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 10 LABORATORIES, INC., MDX LOGISTICS,
 11 INC., CVS HEALTH CORP., COSTCO
 12 WHOLESALE CORP., RITE AID CORP.,
 13 THE KROGER CO., iHERB, INC., BED
 14 BATH & BEYOND INC., VITACOST.COM,
 INC., ALEX FAZELI, and MONROE
 FAZELI

15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA

17 MELISSA RIVAS, on behalf of herself
 18 and all others similarly situated,

19 Plaintiffs,

20 v.

21 PHYSICIAN LABORATORIES, INC.,
 22 an Arizona corporation; MDX
 23 LOGISTICS, a Michigan corporation;
 24 SEBAPHARMA GmbH & CO. KG, a
 25 corporation organized under the laws of
 Germany; CVS HEALTH CORP., a
 26 Delaware corporation; COSTCO
 27 WHOLESALE CORPORATION, a
 Washington corporation; RITE AID
 28 CORPORATION, a Delaware
 corporation; THE KROGER CO., a

Case No.: 8:18-cv-00729

**DEFENDANT COSTCO
 WHOLESALE CORPORATION’S
 NOTICE OF REMOVAL OF
 CLASS ACTION**

[Removal from the Superior Court of
 the State of California in and for the
 County of Orange, Case No. 30-2018-
 00979214-CU-BC-CXC]

1 Ohio corporation; iHERB, INC., a
2 California corporation; BED BATH &
3 BEYOND; a New York corporation;
4 VITACOST, a Delaware corporation;
5 ALEX FAZELI, an individual;
6 MONROE FAZELI, an individual; and
7 DOES 1 through 100,

Defendants.

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1 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO PLAINTIFF
2 AND HER ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. §§ 1331, 1332,
4 1441, 1446 and 1453, Defendant Costco Wholesale Corporation (“Costco”)
5 removes the above-captioned action from the Superior Court of the State of
6 California for the County of Orange to the United States District Court for the
7 Central District of California on the basis of diversity jurisdiction under the Class
8 Action Fairness Act. In support of its Notice of Removal, Costco states:

9 1. On March 9, 2018, plaintiff Melissa Rivas (“Plaintiff”) filed a
10 Complaint in the Superior Court of the State of California for the County of
11 Orange, captioned *Rivas v. Physician Laboratories, Inc., et al.*, Case No. 30-2018-
12 00979214-CU-BC-CXC.

13 2. On April 3, 2018, Plaintiff served the Summons and Complaint on
14 Costco. Costco’s Notice of Removal is timely filed within 30 days of April 3,
15 2018.

16 3. True and correct copies of the Summons, Complaint, and Notice of
17 Court Order, in addition to all other “process, pleadings, and orders served upon”
18 Costco, *see* 28 U.S.C. § 1446(a), are attached as Exhibits A–S, respectively.

19 4. A copy of this Notice of Removal is being filed with the Clerk of the
20 Superior Court of the State of California for the County of Orange, and is being
21 served on counsel of record under 28 U.S.C. § 1446(d).

22 **Venue**

23 5. Venue is proper under 28 U.S.C. § 1441(a) because this Court is the
24 United States District Court for the district and division embracing the place where
25 the state court case was pending.

26 **Nature of the Removed Action**

27 6. Plaintiff alleges that Costco and the other defendants market and/or
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1 sell skincare products that are manufactured by Defendant Sebapharma GmbH &
2 Co. KG under the brand name “Sebamed” and contain materially false labeling
3 representations relating to pH levels. *See* Complaint ¶¶ 1, 3, 5.

4 7. Plaintiff has asserted six causes of action: (1) violation of the
5 Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §1750 et seq.; (2)
6 negligent misrepresentation; (3) violation of the False Advertising Law (“FAL”),
7 Cal. Bus. & Prof. Code §17500 et seq.; (4) unlawful, fraudulent, and unfair
8 business practices under the Unfair Competition Law (“UCL”), Cal. Bus. & Prof.
9 Code §17200 et seq.; (5) breach of implied warranty; and (6) intentional
10 misrepresentation. *See* Complaint ¶¶ 31–78.

11 8. Plaintiff seeks to litigate her claims on behalf of herself and a putative
12 class: “[A]ll persons who, between 2014 and 2018, purchased Sebamed Products
13 in California that were unlawfully represented, *inter alia*, as ‘*exactly 5.5—precisely*
14 *the pH of healthy skin;’ ‘meticulously formulated to a pH balance of exactly 5.5;’*
15 *‘essential in maintaining your skin’s natural hydrolipid barrier against*
16 *environmental stress;’* and related fraudulent misrepresentations.” Complaint ¶ 26.

17 9. Plaintiff alleges that the putative class consists of “thousands of
18 individuals.” Complaint ¶ 27.

19 10. Plaintiff has demanded relief that includes, but is not limited to, an
20 order requiring Defendants to disgorge all moneys, revenues, and profits obtained
21 by means of any wrongful act or practice and to restore all funds acquired by
22 means of any act or practice declared by the Court to be unlawful, unfair,
23 fraudulent, untrue or misleading, or a violation of the CLRA, FAL or UCL.
24 Plaintiff also seeks to recover an award of attorneys’ fees and costs. *Id.*, Prayer for
25 Relief ¶¶ 5, 7, 8.

26 11. As demonstrated below, this Court has jurisdiction over Plaintiff’s
27 action, and it is properly removed to this Court.

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1 place more than \$5 million into controversy.¹

2 16. Second, Plaintiff seeks restitution on behalf of all putative class
3 members, alleging that they “have suffered economic harm by losing money as a
4 result of purchasing the Sebamed Products.” Complaint ¶ 50. Plaintiff also seeks
5 an order requiring Defendants to “disgorge or return all monies, revenues, and
6 profits obtained by means of any wrongful act or practice.” Complaint, Prayer for
7 Relief ¶¶ 5, 7.

8 17. Plaintiff alleges that Defendant Physician Laboratories, Inc. “markets,
9 sells, and distributes Sebamed Products” in California. Complaint ¶ 13. It is
10 Physician Laboratories, Inc.’s regular practice to maintain, in the ordinary course
11 of its business, records of sales of its various products to distributors, retailers, and
12 consumers where applicable. Fazeli Dec. ¶ 2.

13 18. Physician Laboratories, Inc.’s business records reflect that, from
14 March 9, 2014 to March 9, 2018, Physician Laboratories’ sales of Sebamed
15 products to customers at Costco Wholesale Corporation’s California stores alone
16 exceeded \$6 million.² Fazeli Dec. ¶ 3. Plaintiff seeks disgorgement of these
17 revenues, which represent just a fraction of the total sales made by the various
18 defendants within the putative class period. *See* Complaint ¶ 50, Prayer for Relief
19 ¶¶ 5, 7.

20 19. Third, Plaintiff seeks attorneys’ fees. Complaint 16. Attorneys’ fees
21 are counted in determining the amount in controversy for the purposes of
22 determining removal jurisdiction. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150,
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24
25 ¹ Nothing herein shall be construed as an admission by Defendants that Plaintiff
26 and the class are entitled to any relief requested.

27 ² Defendant considers the exact amount of revenue generated to be confidential.
28 As this is a public filing, Defendant is using conservative round numbers. If the
Court has a question regarding Defendant’s filing, Defendant is willing to
submit precise numbers under seal.

1 1156 (9th Cir. 1998); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th
2 Cir. 2007).

3 20. In the Ninth Circuit, a common estimate of attorneys' fees in a class
4 action is 25% of compensatory damages. *Molnar v. 1-800-Flowers.com, Inc.*,
5 2009 WL 481618, at *5 (C.D. Cal. Feb. 23, 2009) (citing *Staton v. Boeing Co.*, 327
6 F.3d 938, 967 (9th Cir. 2003)). Calculating attorneys' fees as 25% of the
7 restitution Plaintiff seeks with regard to Physician Laboratories, Inc.'s sales at
8 Costco stores alone yields \$1.5 million in fees. But the amount of attorneys' fees
9 put in controversy by Plaintiff's allegations significantly exceeds this figure, as
10 Plaintiff alleges that numerous other defendants also sold products that contained
11 false labeling. *See, e.g.*, Complaint ¶¶ 17–21. Indeed, calculating attorney's fees
12 as 25% of \$50 million—Plaintiff's damages estimate—yields \$12.5 million in fees.

13 21. Plaintiff also seeks both prohibitory and mandatory injunctive relief:
14 (a) “an order enjoining Defendants from misbranding Sebamed Products,” (b) “an
15 order compelling Defendants to conduct a corrective advertising campaign to
16 inform the public that Sebamed Products are not ‘meticulously formulated to a pH
17 balance of exactly 5.5,’” and (c) an order compelling Defendants to destroy all
18 misleading and deceptive advertising materials and profits. Complaint 15–16.
19 “The cost of . . . the injunction against defendant must be included when
20 determining the amount in controversy.” *Lyon v. W.W. Grainger Inc.*, 2010 WL
21 1753194, at *2 (N.D. Cal. Apr. 29, 2010) (citing *In re Ford Motor Co.*, 264 F.3d
22 952, 959 (9th Cir. 2001)).

23 22. Including the cost of injunctive relief to Defendants raises the amount
24 in controversy even higher. The value of an injunction in this case includes the
25 cost of revising labels, pulling challenged products from California shelves, and
26 destroying old packaging. *See Arens v. Popcorn, Indiana, LLC*, 2014 WL
27 2737412, at *2 (N.D. Cal. June 16, 2014). And it includes the cost to Defendants
28 of either developing new labels and advertising for Sebamed products or changing

1 the product formulation and reproducing the products. In addition, to ensure that
2 Defendants comply with an injunction requiring them to cease using certain claims
3 in California, Defendants would have to change their product labeling nationwide.
4 Otherwise, distributors or other third parties could sell allegedly misbranded
5 Products in California. And the cost of conducting a corrective advertising
6 campaign also must be counted when establishing the amount in controversy. *See*
7 *Tompkins v. Basic Research LLC*, 2008 WL 1808316, at *5 (E.D. Cal. Apr. 22,
8 2008) (finding amount in controversy exceeded \$5 million through valuation of
9 injunction, buy back of products currently on shelves, and corrective advertising).

10 23. Taken together, the amount in controversy in this action far exceeds
11 \$5 million.

12 **Minimal Diversity of Citizenship**

13 24. CAFA's second requirement, that any one member of the proposed
14 class be a citizen of a state different from any defendant, 28 U.S.C. § 1332(d)(2), is
15 also met here.

16 25. Plaintiff alleges that she was a resident of Orange County, California,
17 at the time of her purchases of Sebamed Products during the relevant class period.
18 Complaint ¶ 10; *see also Dist. of Columbia v. Murphy*, 314 U.S. 441, 455 (1941)
19 (while residence is not the equivalent of citizenship, residence is properly taken as
20 domicile "until facts are adduced to the contrary").

21 26. Several of the defendants are citizens of states other than California.
22 For example:

23 (a) Plaintiff alleges that Defendant Sebapharma GmbH & Co. KG
24 is a "corporation organized under the laws of Germany." Complaint ¶ 15.

25 (b) Plaintiff alleges that Defendant Costco is a "corporation
26 organized and existing under the laws of the State of Washington." Complaint
27 ¶ 16.

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1 (c) Plaintiff alleges that Defendant Rite Aid is a “corporation
2 organized and existing under the laws of the State of Delaware.” Complaint ¶ 17.

3 (d) Plaintiff alleges that Defendant Bed Bath & Beyond is a
4 “corporation organized and existing under the laws of the State of Washington.”
5 Complaint ¶ 20.

6 (e) Plaintiff alleges that Defendant Vitacost is a “corporation
7 organized and existing under the laws of the State of New York.” Complaint ¶ 20.

8 27. Plaintiff brings this putative class action on behalf of “all persons
9 who, between 2014 and 2018, purchased Sebamed Products in California that were
10 unlawfully represented, inter alia, as ‘exactly 5.5 – precisely the pH of healthy
11 skin;’ ‘meticulously formulated to a pH balance of exactly 5.5;’ ‘essential in
12 maintaining your skin’s natural hydrolipid barrier against environmental stress;’
13 and related fraudulent misrepresentations.” Complaint, ¶ 26.

14 28. Accordingly, there is minimal diversity between at least one defendant
15 (e.g., Costco, a citizen of Washington; Rite Aid, a citizen of Delaware; Bed Bath &
16 Beyond, a citizen of Washington; and Vitacost, a citizen of New York) and the
17 named and unnamed members of the putative class (by definition, located in
18 California and most certainly not all citizens of Washington, Delaware, or New
19 York). *See* 28 U.S.C. § 1332(d)(2)(A).

20 **Proposed Class Size**

21 29. CAFA’s third requirement, that the proposed class contain at least 100
22 members, 28 U.S.C. § 1332(d)(5), is met here as well. Plaintiff alleges that the
23 putative class consists of “thousands of individuals.” Complaint ¶ 27. Plaintiff
24 thus alleges a potential class with at least 100 members.

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Conclusion

30. For all the foregoing reasons, this action is properly removed to this Court under CAFA.

Respectfully submitted,

Dated: April 27, 2018

WILLENKEN WILSON LOH &
DELGADO LLP

By: /s/William A. Delgado
William A. Delgado

Attorneys for Defendants PHYSICIAN
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BATH & BEYOND INC.,
VITACOST.COM, INC., ALEX
FAZELI, and MONROE FAZELI