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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SARA M. BARKER, individually and on behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
THRIVE CAUSEMETICS, INC., a Delaware corporation; and KARISSA BODNAR, an individual,)
)
Defendants.)

Case No. 2:18-cv-01470

NOTICE OF REMOVAL

TO: The Honorable Judges of the United States District Court for the Western District of Washington at Seattle

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendants Thrive Causemetics, Inc. and Karissa Bodnar (“Defendants”) remove to this Court the above-styled class action, pending as Case No. 18-2-21685-1 SEA in the Superior Court for King County (the “Action”). As grounds for removal, Defendants state as follows:

BACKGROUND

1. On August 30, 2018, Plaintiff Sara M. Barker (“Plaintiff”) filed a Class Action Complaint for Damages and Injunctive Relief (the “Complaint”) against the Defendants in King County Superior Court. A true and correct copy of the Complaint is attached hereto.

2. In general, Plaintiff alleges that Defendants promote their cosmetics products by stating that they will donate a cosmetic product to a woman in need for each product purchased.

1 See Complaint at ¶¶ 5.5-5.6. Plaintiff alleges that Defendants do not make the donations that
2 they claimed they would make.¹ *Id.* at ¶ 5.8. Plaintiff seeks to hold Defendant Karissa Bodnar
3 (“Ms. Bodnar”) directly liable for the alleged misconduct of Defendant Thrive Causemetics, Inc.
4 (“Thrive”). *See generally* Complaint.

5 3. Plaintiff alleges causes of action for violation of the Washington Consumer
6 Protection Act (the “CPA”), RCW 19.86 *et seq.*, relating to the Defendants’ allegedly unfair
7 practices and allegedly deceptive acts. Complaint at ¶¶ 6.1-7.5. Plaintiff seeks compensatory,
8 exemplary and treble damages, as well as an injunction, attorneys’ fees, costs, expenses and
9 interest as allowed by law. *Id.* at Prayer for Relief.

10 4. Upon information and belief, Plaintiff is a resident and citizen of the state of
11 Washington. *Id.* at ¶ 3.1.

12 5. Thrive is a corporation incorporated in the state of Delaware with its principle
13 place of business in the state of California. *See* Declaration of Ned Menninger (“Menninger
14 Decl.”) at ¶ 2, Exs. A and B. Thrive does not have an office or any place of business in the state
15 of Washington. *Id.* at ¶ 2.

16 6. Ms. Bodnar is the Chief Executive Officer and owner of Thrive, and she is a
17 resident and citizen of the state of California. Declaration of Karissa Bodnar (“Bodnar Decl.”)
18 at ¶ 2.

19 **PROCEDURAL REQUIREMENTS**

20 7. Defendants’ counsel received the Complaint and summonses for each of the
21 Defendants on Friday, September 7, 2018, via email. Declaration of Erin M. Wilson (“Wilson
22 Decl.”) at ¶ 2, Ex. A. Defendants’ counsel accepted service of process for the Defendants on
23 Monday, September 10, 2018. *Id.* at ¶ 3. This Notice of Removal is timely in that it is being
24 filed within thirty (30) days of Defendants’ receipt of service of process of the summonses and
25 the Complaint on September 7, 2018. *See* 28 U.S.C. § 1446(b).

26 8. Defendants have not filed any pleadings in the Action, other than a Notice of

27 ¹ Defendants adamantly deny Plaintiff’s allegations in their entirety.
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1 Appearance.

2 9. Plaintiff's alleged claims have arisen in Snohomish County, Washington.
3 Menninger Decl. at ¶ 5. Accordingly, venue is proper in the Western District of Washington at
4 Seattle. *See* Local Civil Rule 3(e).

5 CAFA DIVERSITY JURISDICTION

6 10. Congress passed the Class Action Fairness Act ("CAFA") "primarily to curb
7 perceived abuses of the class action device." *United Steel, Paper & Forestry, Rubber, Mfg.,*
8 *Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d
9 1087, 1090 (9th Cir. 2010). "To achieve its purposes, CAFA provides expanded original diversity
10 jurisdiction...." *Id.* at 1090-91. Under CAFA, there is no presumption against removal. *Dart*
11 *Cherokee Basin Operating Co., LLC v. Owens*, --- U.S. ---, 135 S.Ct. 547, 554, 190 L.Ed.2d 495
12 (2014).

13 11. Pursuant to CAFA, district courts "shall have original jurisdiction of any civil
14 action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of
15 interests and costs, and is a class action in which ... any member of a class of plaintiffs is a citizen
16 of a State different from any defendant" 28 U.S.C. § 1332(d)(2)(A). For purposes of
17 determining whether the amount in controversy requirement is met, "claims of the individual
18 class members shall be aggregated to determine whether the matter in controversy exceeds the
19 sum or value of \$5,000,000, exclusive of interests and costs." 28 U.S.C. § 1332(d)(6).

20 12. Although Defendants deny that Plaintiff will ever be able to satisfy the standards
21 for class certification, the Action satisfies CAFA's jurisdictional requirements. To begin, the
22 Action satisfies the minimum diversity required by CAFA. This is a class action in which at least
23 one member of the class is a citizen of a state different from at least one of the Defendants, the
24 number of putative class members exceeds 100, and the amount in controversy exceeds
25 \$5,000,000. 28 U.S.C. § 1332(d)(2), (d)(5)(B); *Fritsch v. Swift Transportation Co. of Arizona,*
26 *LLC*, 899 F.3d 785, 788 (9th Cir. 2018).

27 13. The Action satisfies CAFA's class action requirement. A lawsuit is a class action

1 if it is filed “under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule
2 of judicial procedure authorizing an action to be brought by 1 or more representative persons as
3 a class action.” 28 U.S.C. § 1332(d)(1)(B). The instant Action is brought under Rule 23 of the
4 Washington State Rules of Civil Procedure, which is a direct analogue to Rule 23 of the Federal
5 Rules of Civil Procedure. Complaint at ¶¶ 4.1-4.7. Plaintiff also seeks to act in a representative
6 capacity on behalf of a class. *Id.* at Prayer for Relief (B) (seeking to “Appoint Plaintiff as
7 representative of the Class.”).

8 14. Additionally, minimal diversity is satisfied. CAFA’s diversity requirement is
9 satisfied so long as any member of a putative class is a citizen of a state different from any
10 defendant. Here, Plaintiff alleges that she is a citizen of Washington. *Id.* ¶ 3.1. By contrast,
11 Thrive is a citizen of California and Delaware and Ms. Bodnar is a citizen of California.
12 Accordingly, at least one member of the proposed class is a citizen of a state different than
13 Defendant Thrive and Defendant Ms. Bodnar.

14 15. The proposed class exceeds 100 members. The Complaint includes a definition
15 of the putative class as follows:

16 All citizens of the State of Washington who, between August 30, 2014 and the
17 date of final disposition of this action (the “Class Period”), purchased one or more
products from Thrive Causemetics, Inc.

18 Complaint at ¶ 4.1. Plaintiff alleges hundreds of Washington citizens have purchased products
19 from Thrive during the Class Period. *Id.* at ¶ 4.2; *see also* Menninger Decl. at ¶ 3 (confirming
20 that greater than 100 individuals with Washington shipping and billing addresses purchased a
21 Thrive product since the beginning of the alleged class period on August 30, 2014).

22 16. The amount in controversy is satisfied. “The amount in controversy is simply an
23 estimate of the total amount in dispute, not a prospective assessment of defendant’s liability” or
24 a concession of liability. *Lewis v. Verizon Communications, Inc.*, 627 F.3d 395, 400 (9th Cir.
25 2010). Without conceding that Defendants are liable to Plaintiff or any putative class member
26 for any amount whatsoever, in light of the allegations in the Complaint, CAFA’s amount in
27 controversy requirement is satisfied because the aggregate claims of the putative class members

1 exceed \$5,000,000. 28 U.S.C. § 1332(d)(6). Although Plaintiff’s Complaint does not allege a
2 total aggregate sum or value for all claims asserted by Plaintiff on behalf of herself and all
3 putative class members, Defendants’ belief that the matter in controversy exceeds the sum or
4 value of \$5,000,000 is based on the following:

5 a. Between August 30, 2014 (the date that begins Plaintiff’s alleged Class
6 Period), and September 24, 2018, Thrive sold \$2,751,383.86 in products to residents with
7 shipping addresses in Washington and \$2,761,909.63 in products to residents with billing
8 addresses in Washington. These figures do not include the amount of any sale that was later
9 returned by the customer. Menninger Decl. at ¶ 4.

10 b. Plaintiff alleges that she purchased Thrive products through Thrive’s
11 website in 2017. Complaint at ¶ 3.1. She purchased \$49.64 worth of Thrive products. Menninger
12 Decl. at ¶ 5. Plaintiff contends that she would not have purchased Thrive products had she known
13 that Thrive allegedly did not make the donations it claimed to have made.² Complaint at ¶ 5.8.

14 c. Plaintiff also contends that Defendants’ alleged violations of the CPA
15 caused Plaintiff and all other similarly situated members of the putative class damages that should
16 be trebled, along with costs of suit and attorneys’ fees. Complaint at Prayer for Relief. The CPA
17 permits a treble damages award of up to \$25,000 to Plaintiff, as well as all represented class
18 members, who suffer actual damages. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 345-
19 46, 54 P.3d 665 (2002); RCW 19.86.090.

20 d. While Defendants vehemently deny that they violated the CPA, and they
21 specifically deny the claims made by Plaintiff will satisfy the requirements of Rule 23 or that the
22 Plaintiff or any putative class member is entitled to recover monetary or statutory damages in
23 any amount, based on Plaintiff’s allegation that she would not have purchased the Thrive products
24 she purchased and that she and the class members are entitled to compensatory and treble
25 damages, Defendants have a good faith basis to believe that the amount in controversy exceeds
26

27 ² The evidence in this case will show that Plaintiff’s allegations are completely false and that
Defendants donated as much product as they sold to women in need.

1 CAFA’s \$5,000,000 requirement. *See* Menninger Decl. at ¶ 4; *Fritsch*, 899 F.3d at 793; *Korn v.*
2 *Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008) (“Where a statutory
3 maximum is specified, courts may consider the maximum statutory penalty available in
4 determining whether the jurisdictional amount in controversy is met.”). When the amount that
5 Thrive sold to individuals with either shipping or billing addresses in Washington is trebled, the
6 amount in controversy exceeds the minimum amount in controversy of \$5,000,000 required by
7 CAFA. (\$2,751,383.86 in sales to Washington shipping addresses x 3 = **\$8,254,151.58**;
8 \$2,761,909.63 in sales to Washington billing addresses x 3 = **\$8,285,728.89**). Additionally, the
9 Court may consider Plaintiff’s attorneys’ fees, including anticipated future attorneys’ fees, in the
10 amount in controversy. *Fritsch*, 899 F.3d at 793-94 (the amount in controversy includes
11 “attorneys’ fees awarded under fee-shifting statutes or contract”, including future attorneys’
12 fees.).

13 **NO CAFA EXCEPTIONS APPLY**

14 Although Defendants deny that it is their burden to show that CAFA’s exceptions to
15 jurisdiction apply, none do.

16 The “home-state” exceptions set forth in 28 U.S.C. § 1332(d)(4)(A) & (B) do not apply.
17 Section 1332(d)(4)(A) applies where two-thirds of the members of the proposed class share
18 citizenship with at least one defendant (a) “from whom significant relief is sought,” (b) “whose
19 alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class,”
20 and (c) “*who is a citizen of the State in which the action was originally filed.*” (emphasis added).
21 Here, neither of the Defendants are citizens of Washington, and therefore CAFA’s exception set
22 forth in Section 1332(d)(4)(A) does not apply. Menninger Decl. at ¶ 2 and Exs. A and B; Bodnar
23 Decl. at ¶ 2.

24 Section 1332(d)(4)(B) applies where two-thirds of the members of the proposed class and
25 all of the “primary defendants” are citizens of the forum state. 28 U.S.C. § 1332(d)(4)(B). Again,
26 neither of the Defendants in this case are citizens of Washington, and therefore Section
27

1 1332(d)(4)(B) likewise does not apply. Menninger Decl. at ¶ 2 and Exs. A and B; Bodnar Decl.
2 at ¶ 2.

3 Therefore, Defendants give notice that the Action has been removed from King County
4 Superior Court to this Court.

5 DATED: October 5, 2018

6 LANE POWELL PC

7
8 By s/ John S. Devlin
9 John S. Devlin III, WSBA No. 23988

10 By s/ Erin M. Wilson
Erin M. Wilson, WSBA No. 42454

11 By s/ Taylor Washburn
12 Taylor Washburn, WSBA No. 51524

13 1420 Fifth Avenue, Suite 4200
14 P.O. Box 91302
15 Seattle, WA 98111-9402
16 Telephone: 206.223.7000
17 Facsimile: 206.223.7107
18 devlinj@lanepowell.com
19 wilsonem@lanepowell.com
20 washburnt@lanepowell.com

21 *Attorneys for Defendants*

CERTIFICATE OF SERVICE

I certify that, on the date indicated below, I caused the foregoing document to be presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to all attorneys and parties of record.

In addition, I certify that I mailed the foregoing document via United States Postal Service to the following people:

Elizabeth A. Hanley, WSBA # 38233
Reed Longyear Malnati & Ahrens, PLLC
801 Second Ave., Ste. 1415
Seattle, WA 98104
Tel. (206) 624-6271
Fax (206) 624-6672
Email: ehanley@reedlongyearlaw.com
Attorneys for Plaintiff

Toby J. Marshall, WSBA #32726
Eric R. Nusser, WSBA # 51513
Terrell Marshall Law Group PLLC
936 North 34th Street, Suite 300
Seattle, WA 98103
Tel. (206) 816-6603
Fax (206) 319-5450
Email: tmarshall@terrellmarshall.com
Email: eric@terrellmarshall.com
Attorneys for Plaintiff

I affirm under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my personal knowledge.

SIGNED October 5, 2018, at Seattle, Washington.

s/ Peter Elton
Peter Elton
Legal Assistant