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10 Attorneys for Defendant
BED BATH & BEYOND INC.
11 *admission *pro hac vice* to be sought

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA
14

15 ROBERT TURNIER, individually and
16 on behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 BED BATH & BEYOND INC., a New
20 York corporation,

21 Defendant.

Case No. '20CV0288 L MSB

**DEFENDANT BED BATH &
BEYOND INC.'S NOTICE OF
REMOVAL TO FEDERAL
COURT**

[San Diego Cty. Super. Ct., Case No.
37-2020-00002499-CU-BT-CTL]

Complaint Filed: January 15, 2020

1 00002499-CU-BT-CTL. *See* Compl. (attached as part of Exhibit A).

2 4. Accordingly, this action was commenced after February 18, 2005.

3 **B. Minimal Diversity**

4 5. CAFA requires only minimal diversity, i.e., that “any member of a class
5 of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. §
6 1332(d)(2)(A); *see also Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020, 1021
7 (9th Cir. 2007) (“[U]nder CAFA, complete diversity is not required; ‘minimal
8 diversity’ suffices.”).

9 6. Defendant is a citizen of New York because it was organized under the
10 laws of New York. *See* Compl. ¶ 3 (“defendant ... is a New York corporation”).

11 7. Defendant is also a citizen of New Jersey because its principal place of
12 business—i.e., its corporate headquarters—is located in Union, New Jersey. *See*
13 *Hertz Corp. v. Friend, Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010) (“[W]e
14 conclude that the phrase ‘principal place of business’ refers to the place where the
15 corporation’s high level officers direct, control, and coordinate the corporation’s
16 activities,” which will “typically be found at a corporation’s headquarters.”).

17 8. Plaintiff alleges that he is a resident of California. *See* Compl. ¶ 2
18 (“Plaintiff . . . is an individual residing in San Diego County, California.”).

19 9. Plaintiff brings this putative class action on behalf of “[a]ll individuals
20 in California who . . . were enrolled . . . in the BEYOND+ membership program.”
21 *Id.* ¶ 23.

22 10. At least one of those people is surely domiciled in, and thus a citizen of,
23 California. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989)
24 (discussing residence and domicile).

25 11. Accordingly, there is at least minimal diversity between the defendant
26 (a citizen of New York and New Jersey) and the named and unnamed members of
27 the putative class (all residents of California). *See* 28 U.S.C. § 1332(d)(2)(A).

28

1 **C. Numerosity**

2 12. CAFA does not apply to class actions “in which . . . the number of
3 members of all proposed plaintiff classes in the aggregate is less than 100.” 28 U.S.C.
4 § 1332(d)(5)(B).

5 13. Plaintiff defines the putative class as “[a]ll individuals in California
6 who, within the applicable limitations period, were enrolled . . . in the BEYOND+
7 membership program.” Compl. ¶ 23

8 14. Plaintiff alleges that the putative class is “so numerous that joinder of
9 all Class Members would be impracticable.” *Id.* ¶ 26.

10 15. In the four years before the filing of this action, substantially more than
11 100 persons enrolled in Defendant’s BEYOND+ membership program and provided
12 California addresses in connection with their enrollment.

13 16. Accordingly, there are more than 100 putative class members. *See* 28
14 U.S.C. § 1332(d)(5)(B).

15 **D. Amount in Controversy**

16 17. CAFA requires that “the matter in controversy exceeds the sum or value
17 of \$5,000,000, exclusive of interest and costs...” 28 U.S.C. § 1332(d)(2).

18 18. “[T]o determine whether the matter in controversy exceeds the sum or
19 value of \$5,000,000,” the “claims of the individual class members shall be
20 aggregated.” *Id.* § 1332(d)(6).

21 19. Plaintiff has asserted four claims: (1) “Violation of the California
22 Automatic Renewal Law,” Bus. & Prof. Code § 17600 et seq.; (2) violation of
23 California’s Consumers Legal Remedies Act (“CLRA”), Civ. Code § 1750 et seq.;
24 (3) violation of California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code §
25 17200 et seq.; and (4) unjust enrichment. *See* Compl. ¶¶ 30–52. Plaintiff has also
26 requested attorneys’ fees and costs. *Id.*, Prayer for Relief ¶¶ 4, 8–9.

27 20. Plaintiff seeks an award of restitution in connection with his first cause
28 of action under the Automatic Renewal Law, *id.*, Prayer for Relief ¶ 1, his third cause

1 of action under the UCL, *id.*, Prayer for Relief ¶ 5, and his fourth cause of action for
 2 unjust enrichment. *Id.*, Prayer for Relief ¶ 7.

3 21. Specifically, Plaintiff claims that he and every member of the putative
 4 class “are entitled to restitution of all amounts that Defendants charged . . . for
 5 BEYOND+ membership during the four years preceding the filing of this Complaint
 6 and continuing until Defendants’ statutory violations cease.” *Id.* ¶ 33; *see also, e.g.,*
 7 *id.* ¶ 48 (seeking restitution of “all amounts paid to Defendants for BEYOND+
 8 membership in the four years preceding the filing of this Complaint and continuing
 9 until Defendants’ acts of unfair competition cease.”); *id.* ¶ 51 (claiming that
 10 “Defendants have received money from Plaintiff and Class members in connection
 11 with Defendants’ conduct in violation of California law. . . . Defendants should be
 12 ordered to restore said funds to Plaintiff and the Class members.”).

13 22. Since the BEYOND+ membership program first began, the annual
 14 membership fee has been at least \$29. *See, e.g.,* Compl. ¶¶ 11–12.

15 23. In the four years before the filing of this action, BEYOND+ members
 16 with California addresses paid more than \$5,000,000 in annual membership fees.²
 17 Thus, the aggregate value of Plaintiff’s request for restitution exceeds \$5,000,000.

18 24. This amount in controversy would also increase to the extent Plaintiff is
 19 able to recover restitution for alleged monetary harm occurring after the date of filing
 20 this Notice of Removal. *See id.* ¶ 33 (claiming Plaintiff and putative class members
 21 “are entitled to restitution of all amounts . . . charged to [their] credit cards, debit
 22 cards, or third-party payment accounts for BEYOND+ membership during the four
 23 years preceding the filing of this Complaint *and continuing until Defendants’*
 24 *statutory violations cease.*”) (emphasis added); *id.* ¶ 48 (same); *see also, e.g., Lao v.*

25
 26 ² Defendant disputes that Plaintiff or anyone else could recover the fee for the
 27 initial term of the BEYOND+ membership (as opposed to the fee for a renewal term).
 28 Defendant reserves the right to argue that any claim for restitution would necessarily
 be limited to fees for renewal terms. For present purposes, however, all membership
 fees are in controversy. *See supra.*

1 *Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1050 (C.D. Cal. 2006) (including
2 “future damages” in amount in controversy because class period continued from date
3 of filing to date of certification).

4 25. Plaintiff also seek an award of attorneys’ fees and costs, including for
5 the alleged violation of the California’s CLRA. Compl., Prayer for Relief ¶¶ 4, 8–9.
6 Awards of attorneys’ fees and costs may be included in the amount in controversy.
7 *See, e.g., Guglielmo v. McKee Foods Corp.*, 506 F.3d 696, 698 (9th Cir. 2007); *Galt*
8 *G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998) (“[W]here an underlying
9 statute authorizes an award of attorneys’ fees, either with mandatory or discretionary
10 language, such fees may be included in the amount in controversy.”). A fee award
11 in a certified class action can often amount to twenty-five percent (25%) of a class’
12 recovery, which could increase the amount in controversy by 25% or, put another
13 way, to 125% of the class’ claimed recovery. *See, e.g., Jasso v. Money Mart Exp.,*
14 *Inc.*, No. 11-5500, 2012 WL 699465, at *7 (N.D. Cal. Mar. 1, 2012) (stating that fee
15 award of 25% of class recovery was “not unreasonable”).

16 26. Plaintiff also seeks injunctive relief, the costs of which could be
17 substantial. *See* Compl. ¶ 34 (seeking “an injunction enjoining Defendants from
18 making membership program offers and/or posting charges to a credit card, debit
19 card, or third party payment account without first complying with California law”
20 and reserving the right to seek “other prohibitory or mandatory aspects of injunctive
21 relief”); *id.* ¶ 40 (seeking “an injunction prohibiting Defendants from continuing
22 their unlawful practices in violation of the [CLRA]”); *id.* ¶ 49 (seeking “an
23 injunction enjoining Defendants from committing acts of unfair competition”).

24 27. Although Defendant denies that it has any liability to Plaintiff or anyone
25 else, and denies that the putative class could be properly certified for class treatment,
26 the aggregate amount that has been placed “in controversy” by the Complaint—i.e.,
27 the aggregate value of all damages and fees sought and the costs of complying with
28 all equitable relief sought—exceeds \$5,000,000. *See* 28 U.S.C. § 1332(d)(6) (“In

1 any class action, the claims of the individual class members shall be aggregated to
2 determine whether the matter in controversy exceeds the sum or value of \$5,000,000,
3 exclusive of interest and costs.”).

4 28. Because this is a putative class action that was commenced after
5 February 18, 2005 in which there is minimal diversity, more than 100 putative class
6 members, and more than \$5,000,000 in the aggregate in controversy, this Court has
7 original subject matter jurisdiction. *See* 28 U.S.C. § 1332(d)(2)(A).

8 29. Because this action states a basis for original subject matter jurisdiction
9 under 28 U.S.C. § 1332, it is removable pursuant to 28 U.S.C. § 1441(a).

10 **II.**

11 **PROCEDURAL STATEMENT**

12 **A. Timeliness**

13 30. Pursuant to 28 U.S.C. 1446(b) and Federal Rule of Civil Procedure 6,
14 this Notice of Removal has been timely filed within thirty (30) days of service
15 because Plaintiff purported to serve the Complaint on Defendant on January 17, 2020.

16 **B. Defendants**

17 31. Pursuant to 28 U.S.C. § 1453(b), a putative class action may be removed
18 “without regard to whether any defendant is a citizen of the State in which the action
19 is brought.” Even so, Defendant is not a citizen of California.

20 **C. Consent**

21 32. Pursuant to 28 U.S.C. § 1453(b), it is not necessary to obtain the consent
22 of all Defendants in order to remove a putative class action. Nevertheless, consent is
23 not relevant here because there is only one named Defendant.

24 **D. Venue**

25 33. Pursuant to 28 U.S.C. § 1441(a), removal to the United States District
26 Court for the Southern District of California is proper because this District embraces
27 the Superior Court of California, San Diego County, where this action is now
28 pending. *See* 28 U.S.C. § 84(a).

1 **E. Attachments**

2 34. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of Plaintiff's
3 Complaint and all other process, pleadings and orders that Plaintiff purportedly
4 served on Defendant as of the date of this Notice of Removal are attached collectively
5 as Exhibit A.

6 **F. Evidence**

7 35. Pursuant to 28 U.S.C. § 1446(a), it is sufficient to provide a "short and
8 plain" allegation of the jurisdictional facts and it is not necessary to attach evidence
9 establishing those allegations. *See Dart Cherokee Basin Operating Co. v. Owens*,
10 574 U.S. 81, 84 (2014) ("A statement 'short and plain' need not contain evidentiary
11 submissions.").

12 **G. Notices**

13 36. Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly file a copy
14 of this Notice of Removal in the Superior Court of California, San Diego County and
15 give written notice of the removal of this action to counsel for Plaintiff.

16 **H. Defenses**

17 37. By removing this action to this Court, Defendant does not concede that
18 it has any liability, let alone liability of greater than \$5,000,000, to the members of
19 the putative class. *See, e.g., Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446,
20 449 (7th Cir. 2005) ("[The defendant] did not have to confess liability in order to
21 show that the controversy exceeds the threshold"). Rather, "[t]he amount in
22 controversy is simply an estimate of the total amount in dispute, not a prospective
23 assessment of defendant's liability." *Lewis v. Verizon Comm'ns, Inc.*, 627 F.3d 395,
24 400 (9th Cir. 2010) (citing cases); *see also, e.g., Pretka v. Kolter City Plaza II, Inc.*,
25 608 F.3d 744, 751 (11th Cir. 2010) ("[T]he plaintiffs' likelihood of success on the
26 merits is largely irrelevant to the court's jurisdiction because the pertinent question
27 is what is *in controversy* in the case, not how much the plaintiffs are ultimately likely
28 to recover.") (emphasis in original) (quotations omitted); *Heejin Lim v. Helio, LLC*,

1 No. 11-9183, 2012 WL 359304, at *3 (C.D. Cal. Feb. 2, 2012) (“Defendants
2 effectively would be required to concede liability were the Court to require a stronger
3 showing”); *Bryan v. Wal-Mart Stores, Inc.*, No. 08-5221, 2009 WL 440485, at
4 *3 (N.D. Cal. Feb. 23, 2009) (same); *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp.
5 2d 1199, 1204–05 (E.D. Cal. 2008) (finding that defendant need not “research, state,
6 and prove the plaintiff’s claims” in order to remove action) (quotations omitted);
7 *Helm v. Alderwoods Grp., Inc.*, No. 08-1184, 2008 WL 2002511, at *5 (N.D. Cal.
8 May 7, 2008) (“[D]efendants cannot be expected to try the case themselves for
9 purposes of establishing jurisdiction, and then admit to the opposing party and to the
10 Court that a certain number of ... violations did indeed occur.”); *Rippee v. Boston*
11 *Mkt. Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005) (focus is on what is “in
12 controversy,” not what defendant “would owe”); *Muniz v. Pilot Travel Ctrs. LLC*,
13 No. 07-0325, 2007 WL 1302504, at *2 (E.D. Cal. May 1, 2007) (defendant need not
14 “prove the plaintiff’s claims for damages” and assuming 100% violation rate when
15 calculating amount in controversy).

16 38. By removing this action to this Court, Defendant does not waive any
17 defenses, objections or motions available to them under state or federal law.
18 Defendant expressly reserves the right to move for judgment in favor of Defendant
19 pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, and to strike or
20 oppose the certification of a class pursuant to Federal Rule of Civil Procedure 23.

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WHEREFORE, Defendant respectfully removes this action from the Superior Court of California, San Diego County, to this Court pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453.

Dated: February 14, 2020

FAEGRE DRINKER BIDDLE &
REATH LLP

By: /s/ Matthew J. Adler

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BED BATH & BEYOND INC.
*admission *pro hac vice* to be sought