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6 Attorneys for Defendant
Consumer Reports, Inc.
7

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 NINO KOLLER and MICHELLE
12 BROWN, individually and on behalf of all
others similarly situated,

13 Plaintiffs,

14 vs.

15 CONSUMER REPORTS, INC., a New
16 York nonprofit corporation; and DOES 1-
50, inclusive,

17 Defendants.
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Case No. '20CV0660 JLS KSC

San Diego County Superior Court Case
No. 37-2020-00011819-CU-BT-CTL

**DEFENDANT'S NOTICE OF
REMOVAL OF ACTION UNDER 28
U.S.C. §§ 1332(d)(2), 1441(a), 1446**

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
2 SOUTHERN DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that Defendant CONSUMER REPORTS, INC.
4 (“Consumer Reports” or “Defendant”) removes this action from the Superior Court of
5 the State of California, County of San Diego, to the United States District Court for the
6 Southern District of California pursuant to 28 U.S.C. §§ 1332(d)(2), 1441(a), and 1446.

7 **LIMITED PURPOSE**

8 1. The filing of this Notice does not, in any way, waive any right, privilege,
9 immunity, or defense Consumer Reports may have under any applicable law relating to
10 the claims asserted in this matter. By filing this Notice, Consumer Reports does not
11 concede that Plaintiffs Nino Koller (“Koller”) or Michelle Brown’s (“Brown”)
12 (collectively, “Plaintiffs”) or the putative class’ claims have merit. Specifically, by filing
13 this Notice, Consumer Reports does not concede that any “automatic subscription”
14 programs referred to herein constitute an “automatic renewal” or “continuous service”
15 offer pursuant to Business and Professions Code §§ 17600, *et seq.*

16 **BACKGROUND**

17 2. Koller alleges that in October 2018 he downloaded a Consumer Reports
18 application on his iPhone and submitted an order for a one-year subscription to *Consumer*
19 *Reports* for \$55.00. Declaration of Robert A. Cocchia (“Cocchia Dec.”) at ¶ 2, Exhibit
20 (“Ex.”) A, Complaint (“Compl.”) at ¶ 16. Koller alleges he agreed to the order and
21 submitted his credit card information to complete the purchase. *Id.* Koller alleges that
22 upon submission of the order for a one-year subscription to *Consumer Reports*, Consumer
23 Reports enrolled him into an automatic subscription program without his knowledge or
24 consent. *Id.* at ¶ 19. Pursuant to that program, Koller alleges that in or about October
25 2019, Consumer Reports posted an additional charge to Koller’s credit card in the amount
26 of \$59.00 without Koller’s authorization. *Id.* at ¶ 18.

27 3. Brown alleges that in March 2017 she responded to an offer from Defendant
28 to receive ten months of *Consumer Reports* at a cost of \$20.00. *Id.* at ¶ 20. Brown alleges

1 she accepted the offer and provided Defendant with her credit card information in order
2 to complete the purchase. *Id.* Brown alleges that upon submission of the order for ten
3 months of *Consumer Reports*, she also was enrolled into an automatic subscription
4 renewal program without her knowledge or consent. *Id.* at ¶ 21. Brown alleges that in
5 July 2017, July 2018, and July 2019, she was charged an additional \$26.00 as part of the
6 alleged automatic subscription program. *Id.* at ¶ 22. Brown alleges she discovered the
7 renewal in or about December 2019, at which point Brown called to cancel her
8 subscription and Defendant refunded her \$16.00. *Id.* at ¶ 23.

9 4. Plaintiffs filed a class action Complaint against Consumer Reports on March
10 2, 2020 in the Superior Court of the State of California, County of San Diego
11 (“Complaint”), entitled *Koller v. Consumer Reports, Inc.*, Case Number 37-2020-
12 00011819-CU-BT-CTL (“State Court Action”). Cocchia Dec. at ¶ 2, Ex. A, Compl.

13 5. Plaintiffs claim Consumer Reports violated California law by enrolling them
14 and putative class members in an automatic subscription program without adequate
15 notice and consent. Plaintiffs assert four causes of action against Consumer Reports on a
16 putative class basis: (1) violation of the California Automatic Renewal Law, Cal. Bus. &
17 Prof. Code §§ 17600, *et seq.* (“ARL”) (Cocchia Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 1, 35-
18 39); (2) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §§
19 1750, *et seq.* (“CLRA”) (*id.* at ¶¶ 1, 40-45); (3) violation of the California Unfair
20 Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”) (*id.* at ¶¶ 1, 46-54);
21 and (4) for unjust enrichment (*id.* at ¶¶ 55-57).

22 6. Plaintiffs define the putative class as “[a]ll individuals in California who,
23 within the applicable limitations period, were enrolled by [Consumer Reports] in an
24 automatic renewal or continuous service program[.]” Cocchia Dec. at ¶ 2, Ex. A, Compl.
25 at ¶ 28. For the purposes of this Notice, the applicable statute of limitations is four years
26 from the date of filing the Complaint - i.e., March 2, 2016 to the present. Cocchia Dec.
27 at ¶ 2, Ex. A, Compl. at ¶ 38 (alleging a four year statute of limitations); Cal. Code Civ.
28 Proc. § 338(a) (action upon a liability created by statute is three years); Cal. Bus. & Prof.

1 Code § 17208 (statute of limitations for claims brought under the UCL is four years).
2 Plaintiffs seek the return of all initial and automatic subscription fees and charges,
3 injunctive relief, and an award of attorneys’ fees. Cocchia Dec. at ¶ 2, Ex. A, Compl. at
4 ¶¶ 38, 45, 53, 56, Prayer.

5 **TIMELINESS OF REMOVAL**

6 7. 28 U.S.C. § 1446(b)(1) generally requires that a notice of removal be filed
7 within 30 days after the receipt by the defendant of a copy of the original pleading setting
8 forth the claim for relief upon which such action is based. Plaintiffs served the Complaint
9 on Consumer Reports, via Corporate Creations Network Inc., on March 5, 2020. Cocchia
10 Dec. at ¶ 5, Ex. D. The deadline to file a notice of removal is therefore April 6, 2020, and
11 this Notice is timely.

12 **VENUE**

13 8. Venue is proper in this Court because Plaintiffs filed this matter in the
14 Superior Court of the State of California, County of San Diego, which lies within the
15 Southern District of California. *See* 28 U.S.C. §§ 84(d), 1441(a). Venue is also
16 appropriate because Plaintiffs allege they reside in San Diego County and that the
17 “complained of conduct” occurred in San Diego County. 28 U.S.C. § 1391(b)(2);
18 Cocchia Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 2-3, 6.

19 **JURISDICTION**

20 9. The State Court Action is a civil action over which this Court has original
21 jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2)
22 (“CAFA”). CAFA provides “original jurisdiction” to this Court to hear a putative class
23 action if the class has more than 100 members, the parties are minimally diverse, and the
24 matter in controversy “exceeds the sum value of \$5,000,000.” 28 U.S.C. §§ 1332(d)(2),
25 (d)(5). A class action that meets CAFA standards may be removed to federal court.
26 28 U.S.C. § 1441(a).

27 10. Congress intended CAFA jurisdiction to be “interpreted expansively.” *Jose*
28 *L. Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). Thus,

1 unlike other removal cases, “no antiremoval presumption attends cases involving
2 CAFA.” *Dart Cherokee Basin Operating Co., LLC v. Brandon W. Owens*, 574 U.S. 81,
3 89 (2014). The burden of establishing removal jurisdiction is on the removing party.
4 *Washington State, et al. v. Chimel Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011).

5 11. As set forth below, the State Court Action is a civil action that may be
6 removed pursuant to CAFA because: (1) the putative class has more than 100 putative
7 class members; (2) minimal diversity exists between Plaintiffs and Consumer Reports;
8 and (3) the amount in controversy exceeds \$5,000,000 exclusive of interest and cost. 28
9 U.S.C. §§ 1332(d)(2), (d)(5); *John Bryant v. NCR Corp.*, 284 F. Supp. 3d 1147, 1149
10 (S.D. Cal. 2018).

11 PUTATIVE CLASS SIZE

12 12. Plaintiffs define the putative class as “[a]ll individuals in California who,
13 within the applicable limitations period, were enrolled by [Consumer Reports] in an
14 automatic renewal or continuous service program.” Cocchia Dec. at ¶ 2, Ex. A, Compl.
15 at ¶ 28. The applicable statute of limitations for the purpose of this Notice is March 2,
16 2016 to the present. Cocchia Dec. at ¶ 2, Ex. A, Compl. at ¶ 38 (alleging a four year
17 statute of limitations); Cal. Code Civ. Proc. § 338(a) (action upon a liability created by
18 statute is three years); Cal. Bus. & Prof. Code § 17208 (statute of limitations for claims
19 brought under the UCL is four years).

20 13. Based on a review of Consumer Reports’ records, the total number of
21 putative class members in California who were enrolled by Consumer Reports in an
22 alleged “automatic renewal or continuous service program” for Consumer Reports’ print
23 and digital publications during the relevant time period is over 296,000, well beyond the
24 100 class member threshold. Declaration of Chaim E. Cohen (“Cohen Dec.”) at ¶ 6.

25 DIVERSITY OF CITIZENSHIP

26 14. Minimal diversity under CAFA means that “any member of a class of
27 plaintiffs is a citizen of a State different from any defendant[.]” 28 U.S.C. § 1332(d)(2).
28 “A party’s allegation of minimal diversity may be based on ‘information and belief.’”

1 and “[t]he pleading ‘need not contain evidentiary submissions.’” *David Ehrman v. Cox*
2 *Comms.*, 932 F.3d 1223, 1227 (9th Cir. 2019) (quoting *Carolina Cas. Ins. Co. v. Team*
3 *Equip., Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014)). Moreover, “[t]he pleading ‘need not

4 contain evidentiary submissions.’” *Id.* (quoting *Dart Cherokee*, 574 U.S. at 84).

5 Plaintiffs’ Citizenship

6 15. Plaintiffs are the only named plaintiffs in the Complaint. Both allege they
7 are individuals residing in San Diego County. Cocchia Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 2-
8 3. Upon information and belief, they are both also domiciled in California. Cohen Dec.
9 at ¶ 4.

10 16. A natural person’s state of citizenship is determined by his or her state of
11 domicile. *Susan Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). A
12 person’s domicile is his or her permanent home, “where [he or] she resides with the
13 intention to remain or to which [he or] she intends to return.” *Id.* Although the Ninth
14 Circuit has yet to formally adopt the so-called “residence presumption” (see *Jose*
15 *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 887 (9th Cir. 2013); see also *Jes*
16 *Solar Co. Ltd. v. Ton Soo Chung*, 725 F. App’x 467, 469 (9th Cir. Feb. 12, 2018)),
17 numerous courts treat a party’s residence as *prima facie* evidence of his or her domicile.
18 See, e.g., *J. C. Anderson v. James S. Watts*, 138 U.S. 694, 705-06 (1891); *State Farm*
19 *Mut. Auto Ins. Co. v. Teddy Ray Dyer*, 19 F.3d 514, 520 (10th Cir. 1994); *Toni Hollinger*
20 *v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571 (5th Cir. 2011); *Zoroastrian Ctr. & Darb-*
21 *E-Mehr of Metro. Wash., D.C. v. Rustam Guiv Co.*, 822 F.3d 739, 750 n.6 (4th Cir. 2016).

22 17. Plaintiffs allege they are residents of California (Cocchia Dec. at ¶ 2, Ex. A,
23 Compl. at ¶¶ 2-3), and Consumer Reports alleges upon information and belief they are
24 domiciled in California (Cohen Dec. at ¶ 4). Based on the residence presumption,
25 Plaintiffs are citizens of California for the purposes of this Notice.

26 Consumer Reports’ Citizenship

27 18. Consumer Reports, Inc. is the named defendant in this suit. Consumer
28 Reports, Inc. is a domestic not-for-profit corporation. Accordingly, the citizenship of

1 Consumer Reports will be analyzed from a corporate perspective.

2 19. The citizenship analysis turns on the “principal place of business” test for
3 corporations. For a corporation, the phrase “principal place of business” refers to the
4 place where its “officers direct, control, and coordinate” the entity’s activities. *Hertz*
5 *Corp. v. Melinda Friend*, 559 U.S. 77, 92 (2010). In practice, this is “normally. . . the
6 place where the [entity] maintains its headquarters – provided that the headquarters is the
7 actual center of direction, control, and coordination, i.e., the ‘nerve center,’ and not
8 simply an office where the [entity] holds its board meetings. . . .” *Id.* at 79.

9 20. Applying the “principal place of business” test to Consumer Reports, Inc.,
10 the named defendant, Consumer Reports, Inc. is incorporated in New York and
11 headquartered in Yonkers, New York, where Consumer Reports’ officers direct, control,
12 and coordinate the company’s activities. Cohen Dec. at ¶ 3. Thus, Consumer Reports,
13 Inc. is a citizen of New York and is minimally diverse from Plaintiffs, who are citizens
14 of California.

15 21. Accordingly, there is minimal diversity between Plaintiffs and Consumer
16 Reports.

17 AMOUNT IN CONTROVERSY

18 22. A “removing defendant need only include a plausible allegation that the
19 amount in controversy exceeds the jurisdictional threshold [under CAFA], and the
20 defendant’s amount in controversy should be accepted if not contested by the plaintiff or
21 questioned by the court.” *Bryant*, 284 F. Supp. 3d at 1149. Under this standard, Consumer
22 Reports need only establish that the “potential damages could exceed the jurisdictional
23 amount.” *P. Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1239 (9th Cir. 2014) (internal
24 quotations and citations omitted). This “burden is not daunting and only requires that the
25 defendant provide evidence establishing that it is *more likely than not* that the amount in
26 controversy exceeds [\$5 million].” *Rita Varsam v. Lab. Corp. of Am.*, 2015 WL 4199287,
27 at *2 (S.D. Cal. July 13, 2015) (internal quotations and citations omitted, emphasis in
28 original). Claims regarding the amount in controversy under a preponderance of the

1 evidence standard should be “tested by consideration of real evidence and the reality of
2 what is at stake in the litigation, using reasonable assumptions underlying the defendant’s
3 theory of damages exposure.” *Ibarra*, 775 F.3d at 1198.

4 23. Although Plaintiffs do not specify how much they seek in restitution (see
5 Cocchia Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 38, 53, Prayer), the evidence demonstrates that
6 it is more likely than not that the amount in controversy relating to restitution will exceed
7 the \$5,000,000 jurisdictional threshold.

8 24. Plaintiffs allege a putative class of all individuals in California who,
9 between March 2, 2016 and the present, were enrolled in an “automatic renewal or
10 continuous service program” by Consumer Reports. Cocchia Dec. at ¶ 2, Ex. A, Compl.
11 at ¶ 28. Based on a review of subscriber records, the total number of putative class
12 members under this definition is over 296,000. Cohen Dec. at ¶¶ 5-6.

13 25. Plaintiffs seek an order returning all money paid to Consumer Reports by
14 putative class members during the relevant time period, including the original
15 subscription fee and any automatic renewal charges. *See* Cocchia Dec. at ¶ 2, Ex. A,
16 Compl. at ¶ 19 (“If Koller had known that Defendants were going to enroll him in an
17 automatically renewing subscription program, Koller would not have submitted the order
18 for *Consumer Reports* and would not have paid any money to Defendants”), Compl. at
19 ¶ 24 (“If Brown had known that Defendants were going to enroll her in an automatically
20 renewing magazine subscription program, Brown would not have submitted the order for
21 *Consumer Reports* and would not have paid any money to Defendants”), Compl. at ¶ 37
22 (“Plaintiffs have suffered injury in fact and lost money as a result of Defendants” alleged
23 violations of the ARL), Compl. at ¶ 38 (“Plaintiffs and Class members are entitled to
24 restitution of all amounts that Defendants charged to Plaintiffs’ and Class members’
25 credit cards, debit cards, or third-party payment accounts during the four years preceding
26 the filing of this Complaint and continuing until Defendants’ statutory violations cease”),
27 Compl. at ¶ 52 (“Plaintiffs have suffered injury in fact and lost money as a result of
28 Defendants’ acts of unfair competition”), Compl. at ¶ 53 (“Plaintiffs and the Class

1 members are entitled to an order: (1) requiring Defendants to make restitution to Plaintiffs
2 and Class members”), Compl. at ¶ 56 (“Defendants should be ordered to restore said
3 funds to Plaintiffs and the class members”), Prayer (seeking restitution).

4 26. The total amount paid during the relevant time period for initial subscription
5 fees and subsequent renewal subscriptions was over \$24,000,000.00, well exceeding the
6 \$5,000,000 jurisdictional threshold. Cohen Dec. at ¶¶ 5-6.

7 27. Based on the foregoing, the amount in controversy will more likely than not
8 exceed the \$5,000,000 jurisdictional threshold based on Plaintiffs’ request for restitution
9 alone.

10 **COMPLIANCE WITH 28 U.S.C. § 1446**

11 28. No previous application has been made for the relief requested herein.

12 29. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and
13 orders served on Consumer Reports are attached with this Notice. Cocchia Dec. at ¶¶ 2-
14 6, Exs. A-E.

15 30. Pursuant to 28 U.S.C. § 1446(d), Defendant will serve on Plaintiffs and
16 will file with the Clerk of the Superior Court for the County of San Diego a written
17 “Notice to the Clerk of the San Diego Superior Court and Plaintiffs of Filing of Notice
18 of Removal of Civil Action to Federal Court,” attaching a copy of this Notice of
19 Removal and all supporting papers.

20
21 DATED: April 6, 2020

DENTONS US LLP

22
23 By: s/Robert A. Cocchia
24 ROBERT A. COCCHIA

25 Attorneys for Defendant
26 CONSUMER REPORTS, INC.
E-mail: robert.cocchia@dentons.com

27 114491677

CIVIL COVER SHEET

JS 44 (Rev. 09/19)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Nino Koller and Michelle Brown

(b) County of Residence of First Listed Plaintiff San Diego, California (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

James T. Hannink, State Bar No. 131747
Zach P. Dostart, State Bar No. 255071
Dostart Hannink & Coveney LLP, 4180 La Jolla Village Drive, Suite 530, La Jolla, CA 92037 Telephone: (858) 623-4200

DEFENDANTS

Consumer Reports, Inc.

County of Residence of First Listed Defendant New York (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Robert A. Cocchia, State Bar No. 172315
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20CV0660 JLS KSC

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC 1332(d)(2), 1441(a), 1446
Brief description of cause:
Class Action Fairness Act 28 USC 1332(d)(2)

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 0.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE April 6, 2020 SIGNATURE OF ATTORNEY OF RECORD s/Robert A. Cocchia

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE

