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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12

13 SONYA VALENZUELA, individually
14 and behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 BJ'S WHOLESALE CLUB, INC., a
18 Delaware corporation; and DOES 1
through 25, inclusive,

19 Defendants.
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Case No. 2:22-cv-6378

**DEFENDANT BJ'S WHOLESALE
CLUB, INC.'S NOTICE OF
REMOVAL OF ACTION (CAFA
JURISDICTION)**

Removed from Superior Court of the State
of California for the County of Los
Angeles

State Case No.: 22STCV25022

Complaint Filed: August 3, 2022

NOTICE OF REMOVAL

1 **TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR**
2 **THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION:**

3 **PLEASE TAKE NOTICE** that Defendant BJ’s Wholesale Club, Inc. (“BJ’s”),
4 pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, as amended by the Class Action Fairness
5 Act of 2005, Pub. L. No. 109-2, 118 Stat. 4 (“CAFA”), hereby invokes this Court’s
6 jurisdiction and removes the above-captioned case, pending in the Superior Court of the
7 State of California, for the County of Los Angeles (the “State Court”), Case No.
8 22STCV25022, and all claims and causes of action alleged therein, to the United States
9 District Court for the Central District of California, Western Division. The grounds for
10 removal are as follows:

11 **I. STATE COURT ACTION**

12 Plaintiff Sonya Valenzuela (“Plaintiff”) commenced this action on or about August
13 3, 2022, by filing a Complaint (the “Complaint”) entitled “*Sonya Valenzuela, individually*
14 *and on behalf of all others similarly situated v. BJ’s Wholesale Club, Inc., et al.*,” in the
15 State Court. The Complaint alleges one count for violations of the California Invasion of
16 Privacy Act, Cal. Penal Code § 631 (“CIPA”). A true and correct copy of the Complaint
17 is attached hereto as Exhibit 1.

18 Plaintiff served BJ’s with the Complaint on August 8, 2022. (Swanholt Decl., ¶ 3.)

19 Plaintiff brings this action “individually and on behalf of all others similarly
20 situated” and as a members of a purported class, defined as follows:

21 **All persons within California, who (1) within one year of the filing of this**
22 **Complaint visited Defendant’s website, and (2) whose electronic**
23 **communications were caused to be intercepted, recorded, monitored,**
24 **and/or shared by Defendant without prior consent.**

25 (Ex. 1, ¶ 19.)

26 No motion currently is pending in the State Court. (Swanholt Decl., ¶ 4.)

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1 **II. TIMELINESS**

2 Because BJ’s was served with the Complaint on August 8, 2022, BJ’s deadline to
3 file a notice of removal is September 7, 2022. Accordingly, this Notice is timely.
4 *See* 28 U.S.C. § 1446(b).

5 **III. VENUE**

6 Pursuant to 28 U.S.C. § 1441(a), venue for removal lies in the United States District
7 Court for the Central District of California, because Plaintiff originally filed the Complaint
8 within this district. State Court actions from Los Angeles County are in the first instance
9 removed to the Western Division.

10 **IV. NOTICE**

11 Concurrently with this filing, and pursuant to 28 U.S.C. § 1446(d), BJ’s (a) is filing
12 with the Clerk of the State Court a Notice of Removal to Federal Court, together with this
13 Notice and supporting documents, and (b) is serving copies of the Notice of Removal to
14 Federal Court, together with this Notice of Removal, on Plaintiff. (Swanholt Decl., ¶¶ 5-
15 6.)

16 True and correct copies of all process, pleadings, and orders served on BJ’s in the
17 action pending in the State Court are attached hereto as Exhibits 1-7.

18 **V. REMOVAL IS PROPER UNDER CAFA**

19 This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d),
20 as amended by CAFA, because the matter in controversy as alleged in the Complaint
21 exceeds the sum or value of \$5,000,000, exclusive of interests and costs, and the case is a
22 class action in which (i) at least one member of the alleged class of plaintiffs is a citizen of
23 a state different from at least one defendant, and (ii) the proposed class includes at least
24 100 members. 28 U.S.C. §1332(d)(2)(A) and (C); 18 U.S.C. § 1332(d)(5). (*See* Ex. 1.)

25 **A. THE COMPLAINT ASSERTS A CLASS ACTION**

26 A removable class action includes “any civil action filed under Rule 23 of the
27 Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure
28 authorizing an action to be brought under one or more representative persons as a class

1 action.” 28 U.S.C. § 1332(d)(1)(B). Plaintiff alleges her claim as a class claim pursuant
2 to California Code of Civil Procedure section 382. (Ex. 1, ¶¶ 19-24.) This provision of
3 the California Code of Civil Procedure establishes requirements similar to those of Federal
4 Rule of Civil Procedure 23(a), including, among other things, criteria regarding numerosity
5 of class members, commonality of questions of law and fact, typicality of class claims and
6 defenses, predominance of common questions, and adequacy of protection of the interests
7 of the class by the class representatives. Therefore, the Complaint purports to allege a
8 removable class action pursuant to 28 U.S.C. § 1332(d).

9 **B. THE CITIZENSHIP OF THE PARTIES IS MINIMALLY**
10 **DIVERSE**

11 The parties to a class action need only be minimally diverse, such that the citizenship
12 of only one member of the putative class must be diverse from the citizenship of only one
13 defendant. 28 U.S.C. § 1332(d)(2)(A).

14 Plaintiff brought this action in the County of Los Angeles, California, and asserts
15 that she is an adult resident of the state of California. (Ex. 1, ¶ 7.) On that basis, BJ’s is
16 informed and believes that Plaintiff is now, and was at the time the action was commenced,
17 a citizen of the State of California within the meaning of 28 U.S.C. § 1332(d)(2).

18 BJ’s is a Delaware corporation with its principal place of business and headquarters
19 in Marlborough, Massachusetts. (Swanholt Decl., ¶ 7.) Accordingly, for purposes of
20 determining diversity of citizenship, BJ’s is a citizen of Delaware and Massachusetts. 28
21 U.S.C. § 1332(c)(1) (for purposes of diversity of citizenship, a corporation is a citizen of
22 every state or foreign country in which it is incorporated and has its principal place of
23 business).

24 Therefore, the citizenship of Plaintiff is different from that of BJ’s, and the requisite
25 diversity exists.

26 **C. THE PROPOSED CLASS CONTAINS AT LEAST 100**
27 **MEMBERS**

28 As stated above, the purported class, as alleged by Plaintiff in Paragraph 19 of the

1 Complaint, includes all persons within California who, within one year of filing of the
2 Complaint, visited BJ's website and whose electronic communications were intercepted,
3 recorded, monitored, and/or shared by BJ's without prior consent. (Ex. 1, ¶ 19.)

4 Plaintiff further alleges that while she does not know the number of Class Members,
5 she believes the number to be "in the tens of thousands, if not more." (*Id.*, ¶ 20.) The
6 proposed class thus meets the jurisdictional threshold of at least 100 members pursuant to
7 28 U.S.C. § 1332(d)(5).

8 **D. THE AMOUNT IN CONTROVERSY EXCEEDS \$5,000,000**

9 To meet the amount in controversy requirement for removal of a class action under
10 28 U.S.C. § 1332(d)(2), BJ's need only set forth a plausible allegation indicating that the
11 amount in controversy exceeds \$5,000,000. *Dart Cherokee Basin Operating Co., LLC v.*
12 *Owens*, 574 U.S. 81, 135 S. Ct. 547, 551, 554 (2014) ("[as] supplied by the removal statute
13 itself [a] statement 'short and plain' need not contain evidentiary submissions"; "a
14 defendant's notice of removal need include only a plausible allegation that the amount in
15 controversy exceeds the jurisdictional threshold"); *Letuligasenoa v. Int'l Paper Co.*, Case
16 No. 5:13-CV-05272-EJD, 2014 WL 2115246, at *3 (N.D. Cal. May 20, 2014) (when the
17 complaint is silent as to the amount in controversy, the court must analyze the scope of the
18 allegations in the complaint to determine if the amount in controversy threshold is
19 satisfied).

20 Plaintiff does not allege a specific amount in controversy in the Complaint, and BJ's
21 vigorously disputes the allegations of wrongdoing and the claim that it is liable for any of
22 the damages alleged. However, for the purpose of removal to this Court, the amount in
23 controversy exceeds \$5,000,000, based on Plaintiff's claims.

24 In essence, Plaintiff seeks statutory damages in the amount of \$2,500 *per violation*,
25 along with injunctive relief, punitive damages, and attorneys' fees. (Ex. 1, ¶ 31 and Prayer
26 for Relief.) As explained below, based on Plaintiff's allegations, these demands add up to
27 a purported damages amount in excess of the requisite threshold.

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1 **1. ESTIMATE OF ALLEGED STATUTORY DAMAGES**

2 Plaintiff alleges that each Class Member is entitled to statutory damages in the
3 amount of at least \$2,500.00 per violation. (Ex. 1, ¶ 31.) As noted above, Plaintiff expects
4 the number of class members to be in the “tens of thousands, if not more.” (*Id.*, ¶ 20.)
5 Thus, statutory damages may total in excess of \$5,000,000 before punitive damages or
6 attorneys’ fees are added to the total.

7 **2. PUNITIVE DAMAGES**

8 Plaintiff seeks an unspecified amount in punitive damages from BJ’s as part of her
9 cause of action. (Ex. 1, Prayer for Relief.) “In general, claims for punitive damages are
10 considered in determining the amount in controversy, as long as punitive damages are
11 available under the applicable law.” *Molnar v. 1-800-Flowers.com, Inc.*, No. CV 08-0542
12 CAS (JCx), 2009 WL 481618, at *5 (C.D. Cal. Feb. 23, 2009). Under California state law,
13 punitive damages may be available for a plaintiff who is able to show by clear and
14 convincing evidence oppression, fraud, or malice on the part of the defendant. Cal. Civ.
15 Code § 3294(a).

16 **3. ATTORNEYS’ FEES**

17 Plaintiff’s demand for class-wide attorneys’ fees is properly included in the amount
18 in controversy calculation for class action removal purposes under 28 U.S.C. § 1332(d)(2).
19 *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 1000 (9th Cir. 2007) (overruled on
20 other grounds) (attorneys’ fees are properly considered for the amount in controversy when
21 they are authorized by the underlying statute); *see also Gibson v. Chrysler Corp.*, 261 F.3d
22 927, 942 (9th Cir. 2001) (attorneys’ fees are considered on a class-wide basis as opposed
23 to solely named plaintiffs). Courts estimating the amount of attorneys’ fees in alleged class
24 actions for purposes of removal have found a 25 percent estimate to be reasonable. *See*,
25 *e.g., Cortez v. United Nat. Foods, Inc.*, No. 18-CV-04603-BLF, 2019 WL 955001, at * 7
26 (N.D. Cal. Feb. 27, 2019); *Ramos v. Schenker, Inc.*, No. 5:18-CV-01551-JLS-KK, 2018
27 WL 5779978, at *3 (C.D. Cal. Nov. 1, 2018) (“In this Court’s experience, when including
28 attorneys’ fees within the amount-in-controversy for jurisdictional purposes, courts in this

1 circuit consistently use the 25% benchmark rate”); *Garnett v. ADT LLC*, 74 F. Supp. 3d
2 1332, 1338 (E.D. Cal. 2015) (“The court must nonetheless do its best to estimate attorneys’
3 fees, and in light of these cases, the court finds that defendant’s fee estimation of 25 percent
4 of recovery is a reasonable one”).

5 In sum, based on the foregoing, it is a plausible conclusion from Plaintiff’s
6 allegations that she seeks statutory damages in excess of \$5,000,000 – without considering
7 the demand for punitive damages or attorneys’ fees that might increase that amount – and
8 that, therefore, the amount in controversy described in the Complaint not only meets but
9 far exceeds the jurisdictional threshold for the removal of a class action to this Court under
10 CAFA. See 28 U.S.C. § 1332(d); *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 401 (9th
11 Cir. 2010) (“once the proponent of federal jurisdiction has explained plausibly how the
12 stakes exceed the \$5 million . . . then the case belongs in federal court unless it is legally
13 impossible for the plaintiff to recover that much”) (quoting *Spivey v. Vertrue, Inc.*, 528
14 F.3d 982, 986 (7th Cir. 2008)).

15 VI. CONCLUSION

16 As set forth above, this Court has original jurisdiction over the action under CAFA
17 and pursuant to 28 U.S.C. § 1332(d), and the entire action therefore may be removed to
18 this Court pursuant to 28 U.S.C. § 1441.

19 WHEREFORE, BJ’s prays that this action be removed from the Superior Court for
20 the State of California, County of Los Angeles, to the United States District Court for the
21 Central District of California, and for such further relief as may be just and proper.

22 This Notice of Removal is filed subject to and with full reservation of rights
23 including but not limited to defenses and objections to venue, improper service of process,
24 and personal jurisdiction. No admission of fact, law or liability is intended by this Notice
25 of Removal, and all defenses, motions, and pleas are expressly reserved.

1 DATED: September 7, 2022

FOLEY & LARDNER LLP
Erik K. Swanholt
Dyana K. Mardon

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5 /s/ Erik K. Swanholt
6 Erik K. Swanholt
7 Attorneys for Defendant BJ'S
8 WHOLESALE CLUB, INC.
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PROOF OF SERVICE Electronic Filing

I HEREBY CERTIFY that on September 7, 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the Electronic Service List for this case.

/s/ Erik K. Swanholt
Erik K. Swanholt

EXHIBIT 1

Electronically FILED by Superior Court of California, County of Los Angeles on 08/03/2022 01:13 PM Sherri R. Carter, Executive Officer/Clerk of Court, by G. Carini, Deputy Clerk

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8
 9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 10 **FOR THE COUNTY OF LOS ANGELES**
 11

12 SONYA VALENZUELA, individually and on
13 behalf of all others similarly situated,

14 Plaintiff,

15 v.

16 BJ'S WHOLESALE CLUB, INC., a Delaware
17 corporation; and DOES 1 through 25, inclusive,

18 Defendants.

Case No. **22STCV25022**

**CLASS ACTION COMPLAINT FOR
VIOLATION OF PENAL CODE § 631**

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1 **INTRODUCTION**

2 1. Plaintiff Sonya Valenzuela (“Plaintiff”) brings this action individually and on behalf of
3 all other Californians similarly situated against Defendant for its illegal wiretapping of electronic
4 communications with Defendant’s website www.bjs.com (the “Website”).

5 2. Unbeknownst to visitors to the Website, Defendant has secretly deployed “keystroke
6 monitoring” software that Defendant uses to surreptitiously intercept, monitor, and record the
7 communications (including keystrokes and mouse clicks) of all visitors to its Website. Defendant
8 neither informs visitors nor seeks their express or implied consent prior to this wiretapping.

9 3. Defendant has violated and continues to violate the California Invasion of Privacy Act
10 (“CIPA”), California Penal Code § 631, entitling Plaintiff and Class Members to relief pursuant
11 thereto.

12 **JURISDICTION AND VENUE**

13 4. This Court has jurisdiction over all causes of action asserted herein.

14 5. Venue is proper in this Court because Defendant knowingly engages in activities
15 directed at consumers in this County and engaged in the wrongful conduct alleged herein against
16 residents of this County.

17 6. Any out-of-state participants can be brought before this Court pursuant to California’s
18 “long-arm” jurisdictional statute.

19 **PARTIES**

20 7. Plaintiff Sonya Valenzuela is an adult resident of California.

21 8. Defendant is a Delaware corporation. Defendant does business and affects commerce
22 within the state of California and with California residents.

23 9. The above-named Defendants, and their subsidiaries and agents, are collectively
24 referred to as “Defendants.” The true names and capacities of the Defendants sued herein as DOE
25 DEFENDANTS 1 through 25, inclusive, are currently unknown to Plaintiff, who therefore sues such
26 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally
27 responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
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1 Complaint to reflect the true names and capacities of the DOE Defendants when such identities
2 become known.

3 10. Plaintiff is informed and believes that at all relevant times, every Defendant was acting
4 as an agent and/or employee of each of the other Defendants and was acting within the course and
5 scope of said agency and/or employment with the full knowledge and consent of each of the other
6 Defendants.

7 11. Plaintiff is informed and believe that each of the acts and/or omissions complained of
8 herein was made known to, and ratified by, each of the other Defendants.

9 **FACTUAL ALLEGATIONS**

10 12. Without warning visitors or seeking their consent, Defendant has secretly deployed
11 wiretapping software on its Website. This software allows Defendant to surreptitiously record every
12 aspect of a visitor’s interaction with the Website, including keystrokes, mouse clicks, data entry and
13 other electronic communications.

14 13. Defendant’s actions amount to the digital equivalent of both looking over a consumer’s
15 shoulder and eavesdropping on a consumer’s conversation. Defendant’s conduct is not only illegal, it
16 is offensive: indeed, a recent study conducted by the Electronic Privacy Information Center, a
17 respected thought leader regarding digital privacy, found that: (1) nearly 9 in 10 adults are “very
18 concerned” about data privacy; and (2) 75% of adults are unaware of the true extent to which
19 companies gather, store, and exploit their personal data. See <https://archive.epic.org/privacy/survey/>
20 (last downloaded July 2022).

21 14. Within the past year, Plaintiff visited Defendant’s Website. Plaintiff communicated
22 with someone Plaintiff believed was a customer service representative. In reality, Defendant’s
23 Website utilizes a sophisticated “chatbot” that convincingly impersonates an actual human while
24 encouraging consumers to share their personal information. At the same time, the Defendant
25 simultaneously records and stores the entire conversation using secretly embedded wiretapping
26 technology.

- 1 c. Whether Plaintiff and Class Members are entitled to statutory damages pursuant to Cal.
- 2 Penal Code § 631(a);
- 3 d. Whether Plaintiff and Class Members are entitled to punitive damages pursuant to Cal.
- 4 Civil Code § 3294; and
- 5 e. Whether Plaintiff and Class Members are entitled to injunctive relief.

6 22. TYPICALITY: As a person who visited Defendant’s Website and had her electronic
7 communications recorded, intercepted and monitored, Plaintiff is asserting claims that are typical to
8 the Class.

9 23. ADEQUACY: Plaintiff will fairly and adequately protect the interests of the members
10 of The Class. Plaintiff has retained attorneys experienced in the class action litigation. All individuals
11 with interests that are actually or potentially adverse to or in conflict with the class or whose inclusion
12 would otherwise be improper are excluded.

13 24. SUPERIORITY: A class action is superior to other available methods of adjudication
14 because individual litigation of the claims of all Class Members is impracticable and inefficient. Even
15 if every Class Member could afford individual litigation, the court system could not. It would be
16 unduly burdensome to the courts in which individual litigation of numerous cases would proceed.

17 **CAUSE OF ACTION**

18 **Violations of the California Invasion of Privacy Act**

19 **Cal. Penal Code § 631**

20 25. Section 631(a) of California’s Penal Code prohibits and imposes liability upon any
21 entity that “by means of any machine, instrument, contrivance, or in any other manner,” (1)
22 “intentionally taps, or makes any unauthorized connection, whether physically, electrically,
23 acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument,
24 including the wire, line, cable, or instrument of any internal telephonic communication system,” or (2)
25 “willfully and without the consent of all parties to the communication, or in any unauthorized manner,
26 reads, or attempts to read, or to learn the contents or meaning of any message, report, or
27 communication while the same is in transit or passing over any wire, line, or cable, or is being sent
28 from, or received at any place within this state” or (3) “uses, or attempts to use, in any manner, or for

1 any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with,
2 employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any
3 of the acts or things mentioned above in this section”.

4 26. Section 631 of the California Penal Code applies to internet communications and thus
5 applies to Plaintiff’s and the Class’s electronic communications with Defendant’s Website. (“Though
6 written in terms of wiretapping, Section 631(a) applies to Internet communications. It
7 makes liable anyone who ‘reads, or attempts to read, or to learn the contents’ of a communication
8 ‘without the consent of all parties to the communication.’ Cal. Penal Code § 631(a).” *Javier v.*
9 *Assurance IQ, LLC*, 21-16351, 2022 WL 1744107, at *1 (9th Cir. May 31, 2022).

10 27. The software employed by Defendant on its Website to record Plaintiff’s and the
11 Class’s electronic communications qualifies as a “machine, instrument, contrivance, or ... other
12 manner” used to engage in the prohibited conduct alleged herein.

13 28. At all relevant times, Defendant intentionally caused the internet communication
14 between Plaintiff and Class Members with Defendant’s website to be tapped and recorded.

15 29. At all relevant times, Defendant willfully, and without the consent of all parties to the
16 communication, caused to be intercepted, read or attempted to be read, logged, and stored, the contents
17 of electronic communications of Plaintiff and Class Members with its Website, while the electronic
18 communications were in transit over any wire, line or cable, or were being sent from or received at any
19 place within California.

20 30. Plaintiff and Class Members did not consent to any of Defendant’s actions in
21 implementing wiretaps on its Website, nor did Plaintiff or Class Members consent to Defendant’s
22 intentional access, interception, recording, monitoring, reading, learning and collection of Plaintiff and
23 Class Members’ electronic communications with the Website.

24 31. Defendant’s conduct constitutes numerous independent and discreet violations of Cal.
25 Penal Code § 631(a), entitling Plaintiff and Class Members to injunctive relief and statutory damages
26 of at least \$2,500.00 per violation.


27 **PRAYER FOR RELIEF**

28 WHEREFORE, Plaintiff prays for the following relief against Defendant:

- 1 1. An order certifying the Class, naming Plaintiff as the representative of the Class and
- 2 Plaintiff's attorneys as Class counsel;
- 3 2. An order declaring Defendant's conduct violates CIPA;
- 4 3. An order of judgment in favor of Plaintiff and the Class and against Defendant on the
- 5 cause of action asserted herein;
- 6 4. An order enjoining Defendant's conduct as alleged herein and any other injunctive
- 7 relief that the Court finds proper;
- 8 5. Statutory damages to Plaintiff and the Class pursuant to Cal. Penal Code § 631(a);
- 9 6. Punitive damages to Plaintiff and the Class pursuant to Cal. Civil Code § 3294;
- 10 7. Prejudgment interest;
- 11 8. Reasonable attorneys' fees and costs incurred in this action pursuant to Cal. Code Civ.
- 12 Proc. § 1021.5; and
- 13 9. All other relief that would be just and proper as a matter of law or equity, as determined
- 14 by the Court.

15 Dated: August 3, 2022

PACIFIC TRIAL ATTORNEYS, APC

16
17 By: 
18 Scott J. Ferrell
Attorneys for Plaintiff

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [California Consumer Sues BJ's, Kroger, AIG, Aflac Over Alleged Website Monitoring](#)
