

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA**

DANIEL GARCIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:21-cv-457
	)	
WALGREEN CO., and WALGREEN	)	Electronically Filed
EASTERN CO., INC.	)	
	)	
Defendants.	)	

**DEFENDANTS WALGREEN CO. AND WALGREEN EASTERN CO., INC.’S  
NOTICE OF REMOVAL**

Defendants Walgreen Co. and Walgreen Eastern Co., Inc. (“Defendants”), by and through its undersigned counsel and pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, hereby remove this action from the Court of Common Pleas of Allegheny County, Pennsylvania to the United States District Court for the Western District of Pennsylvania. In support thereof, Defendants state as follows:

**INTRODUCTION**

1. Plaintiff Daniel Garcia filed this putative class action in the Court of Common Pleas of Allegheny County, Pennsylvania on or about March 9, 2021. The complaint (the “Complaint”), its accompanying exhibits, and a docket sheet from the Court of Common Pleas action is attached to this notice as part of Exhibit A. *See* Exhibit A.

2. Defendants accepted service of the Complaint on March 22, 2021. This Notice of Removal is filed within 30 days of service: it is both timely and properly filed by Defendants. *See* 28 U.S.C. §§ 1446, 1453.

3. Plaintiff alleges that he resides in this Commonwealth and, upon information and belief, is a citizen of this Commonwealth. Compl. ¶ 6.

4. Walgreen Co. is a Delaware corporation. Walgreen Eastern Co., Inc. is a New York Corporation. Both Defendants are headquartered in Deerfield, Illinois. Walgreen Co. is a thus citizen of Delaware and Illinois, and Walgreen Eastern Co. is a citizen of New York and Illinois, for purposes of diversity jurisdiction under 28 U.S.C. § 1332.

5. Removal of this action is appropriate under 28 U.S.C. § 1332(d) because the parties are completely diverse, the putative class size exceeds 100, and the amount in controversy exceeds \$5,000,000.

#### **THE ALLEGATIONS IN THE COMPLAINT**

6. Plaintiff's Complaint alleges Defendants violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") by charging sales tax on face masks. Compl. ¶¶ 34-38.

7. Garcia alleges that he purchased a face mask from Defendants on October 22, 2020. *Id.* ¶ 14.

8. Garcia alleges that Defendants violated Sections 201-1 of UTPCPL in connection with that transaction. *Id.* ¶¶ 34-38.

9. Garcia seeks to represent a class of "all persons who purchased a protective face mask or face covering from Defendants at a retail store in Pennsylvania, or from Defendants over the internet and arranged for delivery into Pennsylvania, and who were charged an amount purporting to represent sales tax on that purchase since March 6, 2020." *Id.* ¶ 25.

10. Garcia alleges that he lost money or property as result of Defendants' violations and therefore, pursuant to the UTPCPL, he and the putative class are entitled to a minimum of one

hundred dollars (\$100) per violation under 73 P.S. 201-9.2, as well as reasonable costs and attorney fees and such additional relief the Court deems necessary and proper. *Id.* ¶ 38.

### **JURISDICTIONAL STATEMENT**

11. The Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005) grants federal courts diversity jurisdiction over putative class actions that were commenced on or after its effective date of February 18, 2005, and that have minimal diversity, 100 or more class members, and an aggregate amount in controversy over \$5,000,000. *See* 28 U.S.C. §§ 1332 note; 1332(d)(2)(A), 1332(d)(5)(B), 1332(d)(6). This action satisfies each of these requirements.

#### **A. Commencement**

12. As set forth above, Garcia commenced this action on or about March 9, 2021, after CAFA’s effective date. *See* Compl. Accordingly, CAFA applies to this action. *See* 28 U.S.C. § 1332 note.

#### **B. Minimal Diversity of Citizenship**

13. CAFA requires only minimal diversity, *i.e.*, that “any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A).

14. Walgreen Co. is a citizen of Delaware and Illinois for purposes of 28 U.S.C. § 1332(c)(1). Walgreen Eastern Co., Inc. is a citizen of New York and Illinois for purposes of 8 U.S.C. § 1332(c)(1).

15. The Complaint alleges that plaintiff is a natural person who resides in Pennsylvania. Compl. ¶ 1. In addition, the alleged putative class consists of individuals who purchased face masks in, or for delivery into, Pennsylvania. *Id.* ¶ 25. Defendants allege, upon information and belief, that Plaintiff is, and numerous members of the alleged putative class are, domiciled in Pennsylvania. Therefore, they are citizens of Pennsylvania. *See Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 752 (W.D. Pa. 2015) (“Citizenship of natural persons is

synonymous with domicile, and the domicile of an individual is his true, fixed and permanent home and place of habitation”) (internal quotation marks and citations omitted).

16. Because Garcia and members of the alleged putative class are citizens of a state different from each Defendant, minimal diversity exists. 28 U.S.C. § 1332(d)(2)(A); *Papurello*, 144 F. Supp. 3d at 755 (“CAFA requires minimal diversity—i.e., a showing that any class member and any defendant are citizens of different states”) (internal quotation marks and citations omitted).

### **C. Numerosity**

17. CAFA requires that “the number of members of *all proposed plaintiff classes in the aggregate*” be at least 100. 28 U.S.C. § 1332(d)(5)(B) (emphasis added). The alleged putative class satisfies this requirement.

18. The Complaint alleges that “the members of class [sic] is so numerous that joinder of all class members is impracticable.” Compl. ¶ 27.

19. The Complaint further alleges that “there are almost 13,000,000 citizens residing within the Commonwealth of Pennsylvania as of July 1, 2019,” and each citizens is subject to Governor Wolf’s face-mask order, “there are likely *hundreds, thousands, or more* members of each aforementioned class.” *Id.* (emphasis added).

20. Furthermore, based on Defendants’ business records, Defendants can confirm that the alleged putative class exceeds 100 individuals.

21. Accordingly, CAFA’s numerosity requirement is satisfied. *See* 28 U.S.C. § 1332(d)(5)(B).

### **D. Amount in Controversy**

22. CAFA requires that “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.” *Id.* § 1332(d)(2). It further provides that “to

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

23. Although Defendants deny that they have any liability to Garcia or the alleged putative class in this action<sup>1</sup> and deny that any class could be properly certified under Federal Rule of Civil Procedure 23, the aggregate amount of relief sought by the alleged putative class exceeds \$5,000,000, exclusive of interest and costs. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 84 (2014) (“When the plaintiff’s complaint does not state the amount in controversy, the defendant’s notice of removal may do so” (citing 28 U.S.C. § 1446(c)(2)(A))).

24. Garcia and the alleged putative class seek a minimum of statutory damages of \$100 for each alleged violation of the UTPCPL. Compl. ¶ 44.

25. Defendants’ business records indicate that more than 50,000 sales of face masks or face coverings are encompassed by the claims of the alleged putative class. Accordingly, the alleged statutory damages sought by the putative class, taken together, exceed \$5,000,000 (50,001 sales x \$100 per sale = \$5,000,100).

26. In addition, Garcia, on behalf of himself and the alleged putative class, seeks “reasonable costs and attorney fees and such additional relief the Court deems necessary and proper.” *Id.* ¶ 186. Attorneys’ fees are included in determining the amount in controversy for purposes of CAFA jurisdiction. *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 227 (3d Cir. 2019).

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<sup>1</sup> By removing this action to this Court, Defendants do not concede that they are liable for any amount, let alone an amount greater than \$5,000,000, to the members of the alleged putative class. *See, e.g., Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (“[The defendant] did not have to confess liability in order to show that the controversy exceeds the threshold.”); *see also Margulis v. Resort Rental, LLC*, No. 08-1719, 2008 U.S. Dist. LEXIS 115287, at \*13 (D.N.J. June 30, 2008) (same). Instead, “[t]he amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant’s liability.” *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010) (citing cases).

27. “A median recovery range for attorney’s fees is approximately 30 percent.” *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 357 n.1 (3d Cir. 2015). Thus, the inclusion of attorneys’ fees would elevate the amount in controversy even further above the threshold CAFA jurisdictional requirement.

28. Because this is a putative class action that was commenced after February 18, 2005, in which there is minimal diversity, at least 100 putative class members, and more than \$5,000,000 in the aggregate in controversy, this Court has original subject matter jurisdiction under 28 U.S.C. § 1332, and the action is removable under 28 U.S.C. § 1441(a).

### **PROCEDURAL STATEMENT**

29. Pursuant to 28 U.S.C. § 1446(a), copies of the Complaint and any other process, pleadings, and orders that Plaintiff purportedly served on Defendants as of the date of the Notice of Removal are attached collectively as Exhibit A.

30. Pursuant to 28 U.S.C. § 1446(a), it is sufficient to provide a “short and plain” allegation of jurisdiction, and it is not necessary to attach evidence establishing those allegations. *See Dart Cherokee Basin Operating Co.*, 574 U.S. at 84 (“A statement ‘short and plain’ need not contain evidentiary submissions.”); *Judon v. Travelers Prop. Cas. Co. of Am.*, 773 F.3d 495, 500 n.2 (3d Cir. 2014) (“[A] defendant’s notice of removal then serves the same function as the complaint would in a suit filed in federal court.” (internal quotation marks and citations omitted)).

31. Pursuant to 28 U.S.C. § 1446(b) and Federal Rule of Civil Procedure 6, the original Notice of Removal was timely filed within 30 days of service because Defendants accepted service on March 22, 2020. *See, e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

32. Pursuant to 28 U.S.C. § 1441(a), removal to the United States District Court for the Western District of Pennsylvania is proper because it embraces the Court of Common Pleas of

Allegheny County, Pennsylvania, where this action was pending before it was removed. *See* 28 U.S.C. § 118(c).

33. Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly file a copy of this Notice of Removal in the Court of Common Pleas of Allegheny County, Pennsylvania, and will give Plaintiff written notice of its filing.

34. By removing the action to this Court, Defendants do not waive any defenses that are available to them under state or federal law. Defendants expressly reserve all threshold defenses to this action and its right, for example, to move to compel arbitration, to dismiss or for the entry of judgment pursuant to Federal Rules of Civil Procedure 12 and 56, and/or to strike or oppose the certification of any putative class pursuant to Federal Rule of Civil Procedure 23.

WHEREFORE, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendants respectfully remove this action from the Court of Common Pleas of Allegheny County, Pennsylvania, to the United States District Court for the Western District of Pennsylvania.

Date: April 9, 2021

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,  
PENNSYLVANIA**

DANIEL GARCIA, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

WALGREEN CO., and WALGREEN  
EASTERN CO., INC.,

Defendants.

CIVIL DIVISION

No.

CLASS ACTION

**CLASS ACTION COMPLAINT**

Filed on behalf of Plaintiff:  
Daniel Garcia

Counsel of record for Plaintiff:

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*Other Attorneys On Signature*

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,  
PENNSYLVANIA**

DANIEL GARCIA, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

WALGREEN CO., and WALGREEN  
EASTERN CO., INC.,

Defendants.

CIVIL DIVISION

No.

CLASS ACTION

**CLASS ACTION COMPLAINT**

Plaintiff Daniel Garcia (“Plaintiff” or “Garcia”), individually and on behalf of all others similarly situated, brings this action against Defendants Walgreen Co. and Walgreen Eastern Co., Inc. (“Defendants” or “Walgreens”), and alleges as follows:

**NATURE OF THE ACTION**

1. This action seeks statutory damages, attorneys’ fees, and costs against Defendants for violations of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 Pa. Stat. § 201-1, *et seq.*

**JURISDICTION AND VENUE**

2. The Court has subject matter jurisdiction under 42 Pa. C.S. § 931.
3. The Court has personal jurisdiction over Defendants under 42 Pa. C.S. § 5301.
4. Venue is proper under Pa. R. Civ. P. 2179 because Defendants regularly conduct business in this County, this is the County where the cause of action arose, and/or this is the County where the transactions or occurrences took place out of which the cause of action arose.

5. Principles of comity and the Tax Injunction Act, U.S.C. § 1341, require the state courts of the Commonwealth of Pennsylvania to address matters involving state tax laws and regulations. *See Farneth v. Wal-Mart Stores, Inc.*, No. 13-1062, 2013 WL 6859013 (W.D. Pa. Dec. 30, 2013).

### **PARTIES**

6. Garcia is a natural person over the age of eighteen. He resides in Allegheny County, Pennsylvania.

7. Walgreen Co. is an Illinois corporation headquartered in Deerfield, Illinois.

8. Walgreen Eastern Co., Inc. is a New York corporation headquartered in Deerfield, Illinois.

9. Defendants operate brick-and-mortar and online retail stores under the brand name Walgreens.

10. Defendants own, operate, or manage at least 200 brick-and-mortar retail locations in Pennsylvania.

### **FACTUAL ALLEGATIONS**

11. Retailers cannot charge or collect sales tax on protective face masks or face coverings because they are nontaxable.<sup>1</sup>

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<sup>1</sup> Ex. 1, Governor Tom Wolf, *Proclamation of Disaster Emergency* (Mar. 6, 2020 and extended on June 3, 2020, Aug. 31, 2020, Nov. 24, 2020, and Feb. 19, 2021). Ex. 2, Pennsylvania Dept. of Revenue, *Masks and Ventilators* (Apr. 23, 2020) (“Protective face masks that are sold at retail are exempt from Pennsylvania sales tax during the emergency disaster declaration issued on March 6, 2020 by Governor Wolf.”); Ex. 3, Pennsylvania Dept. of Revenue, *Masks and Ventilators* (updated Oct. 30, 2020) (“Are masks and ventilators subject to PA sales tax? No, face masks (cloth and disposable) are exempt from Pennsylvania sales tax.”); and Ex. 4, Pennsylvania Dept. of Revenue, *Sales and Tax Bulletin 2021-01* (Jan. 20, 2021) (“In response to consumer demand for medical masks outpacing supply and leading consumers to use non-medical masks and face coverings for medical purposes, namely to prevent and control the

12. At all relevant times, Defendants sold protective face masks and charged tax on these purchases.

13. Defendants knew or should have known that it was impermissible to charge or collect sales tax on protective face masks.

14. Garcia bought a protective face mask from Defendants at a retail store located at 1701 William Flynn Hwy, Glenshaw, PA 15116, on October 22, 2020.

15. Defendants advertised the mask Garcia purchased as costing \$8.99.

16. Yet Defendants charged, and Garcia paid, \$9.62 for the mask.

17. The extra \$0.63 equals 7% of the mask's advertised price.

18. Garcia did not discover the extra \$0.63 charge until reviewing his receipt.<sup>2</sup>

19. The receipt identified the extra \$0.63 charge as sales tax.

20. Defendants operate, control, maintain, and are otherwise responsible for the POS systems in their brick-and-mortar locations and online stores.

21. Defendants' POS systems regularly charge and collect sales tax on protective face masks sold at Defendants' brick-and-mortar locations in Pennsylvania and online to persons in Pennsylvania.

22. By charging and collecting sales tax on protective face masks, Defendants denied Garcia and the Class the money and the benefit of the use and retention of money they otherwise would have had, benefited from, or held.

23. Garcia and the Class suffered harm as a result of Defendants' conduct.

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spread of COVID-19, the department responded with a statement that any non-medical cloth or disposable mask purchased for use as a means of protection against the virus was not subject to sales or use tax.”).

<sup>2</sup> Ex. 5, Walgreens Receipt.

**CLASS ACTION ALLEGATIONS**

24. Garcia brings this action individually and on behalf of all others similarly situated under Rules 1702, 1708, and 1709 of the Pennsylvania Rules of Civil Procedure.

25. Garcia seeks to certify the following Class: “All persons who purchased a protective face mask or face covering from Defendants at a retail store in Pennsylvania, or from Defendants over the internet and arranged for delivery of the protective face mask into Pennsylvania, and who were charged an amount purporting to represent sales tax on that purchase since March 6, 2020.”

26. Garcia reserves the right to expand, narrow, or otherwise modify the Class as the litigation continues and discovery proceeds.

27. Pa. R. Civ. P. 1702(1), 1708(a)(2): The Class is so numerous that joinder of its Class Members is impracticable. The United States Census Bureau estimates there are 12,801,989 individuals residing in Pennsylvania as of July 1, 2019.<sup>3</sup> All of these individuals have been ordered to wear protective face masks or face coverings to prevent the spread of COVID-19 since at least April 15, 2020.<sup>4</sup> Given Pennsylvania’s population, orders requiring Pennsylvania residents to wear protective face masks in public, and the size of Defendants’ businesses, which operate brick-and-mortar retail locations in Pennsylvania and online stores that sell protective face masks or face coverings into Pennsylvania, there likely are hundreds or thousands of Members of the Class. Since each of the claims of the Class Members is substantially identical, and the Class Members request

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<sup>3</sup> U.S. Census Bureau, *QuickFacts Pennsylvania*, available at <https://www.census.gov/quickfacts/PA> (last accessed Mar. 4, 2021).

<sup>4</sup> Ex. 6, Pennsylvania Dept. of Health, *Order of the Secretary of the Pennsylvania Dept. of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-person Operations*, p. 5 (April 15, 2020); Ex. 7, Pennsylvania Dept. of Health, *Order of Pennsylvania Dept. of Health Requiring Universal Face Coverings*, Section 2 (July 1, 2020).

substantially similar relief, centralizing the Class Members' claims in a single proceeding likely is the most manageable litigation method available.

28. Pa. R. Civ. P. 1702(2), 1708(a)(1): Garcia and each Member of the Class share numerous common questions of law and fact that will drive the resolution of the litigation and predominate over any individual issues. For example, there is a single common answer to the question of whether Defendants violated the UTPCPL by charging Class Members 7% or more than the advertised price for protective face masks. The answer to this question is the same for Garcia and each Member of the Class, and Garcia and each Member of the Class require the same proof to answer this question. This question, and other common questions of law and fact, predominate over any individual issues.

29. Pa. R. Civ. P. 1702(3): Garcia's claims are typical of the claims of each Member of the Class because the claims are based on the same legal theories and arise from the same conduct.

30. Pa. R. Civ. P. 1702(4), 1709: Garcia is an adequate representative of each Member of the Class because the interests of Garcia and each Member of the Class align. Garcia will fairly, adequately, and vigorously represent and protect the interests of each Member of the Class and has no interest antagonistic to any Member of the Class. Garcia retained counsel who are competent and experienced in the prosecution of class action litigation generally and UTPCPL litigation specifically. Garcia has or can acquire adequate financial resources to assure that the interests of each Member of the Class will not be harmed.

31. Pa. R. Civ. P. 1708(a)(3), (6), (7): Given the complexity and nature of the issues presented and the relief requested, the expense and time necessary to obtain such relief, and the anticipated recovery and relief that Garcia and each Member of the Class may obtain, the class action mechanism is by far the preferred and most efficient litigation mechanism to adjudicate the

claims of Garcia and each Member of the Class. Additionally, requiring Garcia and each Member of the Class to file individual actions would impose a crushing burden on the court system. Class treatment presents far fewer management difficulties and provides benefits of a single adjudication and economies of scale.

32. Pa. R. Civ. P. 1708(a)(4): Based on the knowledge of Garcia and undersigned counsel, there are no similar cases currently pending against Defendants. However, there are similar actions pending in this court against other parties. *See Garcia v. American Eagle Outfitters, Inc., et al.*, GD-20-11057.

33. Pa. R. Civ. P. 1708(a)(5): This forum is appropriate for this litigation, as Defendants regularly conduct business in this County and all or part of the claims arose in this County.

**COUNT I**  
**Violation of the Unfair Trade Practices and Consumer Protection Law**  
**73 Pa. Stat. § 201-1, et seq.**

34. This claim is brought individually and on behalf of the Class.

35. Garcia and Defendants are persons, the protective face masks are goods purchased for personal, family, and/or household use, and Defendants' conduct described herein is trade or commerce under the UTPCPL. 73 Pa. Stat. § 201-2(2)-(3), 201-9.2.

36. Defendants' conduct described herein constitutes unfair methods of competition and unfair or deceptive acts or practices under the UTPCPL because: i) Defendants represented that goods have characteristics they do not have; ii) Defendants advertised goods with intent not to sell them as advertised; and iii) Defendants engaged in fraudulent or deceptive conduct which created a likelihood of confusion or misunderstanding. 73 P.S. § 201-2(4)(v), (ix), (xxi).

37. Defendants' use of unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce violates 73 P.S. § 201-3.

38. Garcia and the Class Members lost money or property as a result of Defendants' violations and therefore are entitled to one hundred dollars (\$100) per violation under 73 P.S. 201-9.2, as well as reasonable costs and attorneys' fees and such additional relief the Court deems necessary and proper.

**JURY TRIAL DEMANDED**

Garcia requests a jury trial on all claims so triable.

**PRAYER FOR RELIEF**

WHEREFORE, Garcia prays for the following relief:

- a. An order certifying the proposed Class, appointing Garcia as representative of the proposed Class, and appointing undersigned counsel as counsel for the proposed Class;
- b. An order awarding one hundred dollars (\$100.00) per violation of the UTPCPL, and not a refund of the overcharges that Defendants misrepresented as sales tax;
- c. An order awarding attorneys' fees and costs; and
- d. An order awarding all other relief that is just, equitable and appropriate.

Respectfully Submitted,

Dated: March 9, 2021

*/s/ Kevin W. Tucker*

\_\_\_\_\_  
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