

1 GREENBERG TRAURIG, LLP
2 ROBERT J. HERRINGTON (SBN 234417)
3 HerringtonR@gtlaw.com
4 SARAH G. HARTMAN (SBN 281751)
5 HartmanS@gtlaw.com
6 1840 Century Park East, Suite 1900
7 Los Angeles, CA 90067-2121
8 Tel: 310-586-7700; Fax: 310-586-7800

9 Attorneys for Defendant Wal-Mart Stores, Inc.

10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 Mojdeh Omidi, individually and on behalf
15 of all others similarly situated,

16 Plaintiffs,

17 vs.

18 Wal-Mart Stores, Inc., a Delaware
19 corporation,

20 Defendant.

CASE NO. '14CV0857 JM NLS

CLASS ACTION

Miscellaneous Action (Statutory Action
Under California Law)

**NOTICE OF REMOVAL OF
DEFENDANT WAL-MART STORES,
INC. PURSUANT TO 28 U.S.C.
SECTION 1332(d)(2)**

Complaint Filed: November 5, 2013

1 **NOTICE OF REMOVAL OF DEFENDANT WAL-MART STORES, INC.:**

2 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

3 PLEASE TAKE NOTICE THAT pursuant to the Class Action Fairness Act
4 (“CAFA”), 28 U.S.C. §§ 1332, 1441 and 1446, Defendant Wal-Mart Stores, Inc.
5 (“Wal-Mart”), hereby removes the above-captioned putative class action from the
6 Superior Court of California, County of San Diego, to the United States District Court for
7 the Southern District of California. Wal-Mart denies the allegations and damages
8 claimed in the Complaint, and files this Notice without waiving any defenses, exceptions,
9 or obligations that may exist in its favor. Wal-Mart further files this Notice without
10 conceding, and specifically reserving, its right to contest, the suitability of this lawsuit for
11 certification as a class action.

12 **I. RELEVANT PROCEDURAL HISTORY**

13 1. On November 5, 2013, Plaintiff Mojdeh Omidi (“Plaintiff”), individually
14 and on behalf of others similarly situated, filed a Class Action Complaint against Wal-
15 Mart Stores, Inc. (“Wal-Mart”), captioned *Mojdeh Omidi v. Wal-Mart, Inc.*, Case No. 37-
16 2013-00074230-CU-MC-CTL, in the Superior Court of California, County of San Diego
17 (“State Court Action”). Plaintiff served Wal-Mart with the State Court Action Summons
18 and Complaint on December 17, 2013.

19 2. On January 31, 2014, Wal-Mart answered by denying all of the material
20 allegations in the Complaint and asserting a number of affirmative defenses.

21 3. Pursuant to 28 U.S.C. § 1446(a), attached to this Notice as **Exhibit A** are
22 true and correct copies of all process, pleadings and orders served upon Wal-Mart in the
23 State Court Action (except the Answer), and attached to this Notice as **Exhibit B** is the
24 Answer to the Complaint in the State Court Action.

25 4. Defendant Wal-Mart is the only named defendant in the State Court Action.
26 The defendants designated as DOES 1 through 100 are fictitious defendants, are not
27 parties to the action, have not been named or served, and are properly disregarded for the
28

1 purpose of this removal. 28 U.S.C. §1441(a); *McCabe v. Gen. Foods, Inc.*, 811 F.2d
2 1336, 1339 (9th Cir. 1987).

3 **II. ALLEGATIONS OF THE COMPLAINT**

4 5. In the Complaint, Plaintiff defines the class “to include all individuals who,
5 within four years preceding the filing of the complaint, purchased eye examinations
6 and/or eyewear at a Wal-Mart store after examination by an optometrist affiliated with
7 the Wal-Mart store.” (Ex. A, Complaint (“Comp.”) ¶ 12.) Plaintiff alleges that Wal-
8 Mart offers customers “eye examinations and prescription eyewear in a single retail
9 location, in violation” of California law. (*Id.* ¶ 1.1.) Plaintiff also alleges that Wal-Mart
10 “issue[d] false and misleading advertisements” in violation of California law. (*Id.* ¶ 1.3.)
11 Moreover, Plaintiff alleges that Wal-Mart “disseminat[ed] patient/customers’ confidential
12 medical information” in violation of California law. (*Id.* ¶ 1.4.)

13 6. The Complaint asserts claims for (1) violation of California’s Unfair
14 Competition Law (“UCL”), Business & Professions Code § 17200 *et seq.*; (2) violation
15 of California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code § 1750,
16 *et seq.*; and (3) violation of the Confidentiality of Medical Information Act (“CMIA”),
17 California Civil Code § 56, *et seq.* (*Id.* ¶¶ 31-51.)

18 7. The Complaint seeks compensatory damages, statutory damages, restitution,
19 attorneys’ fees, costs, punitive damage, pre-judgment interest, and injunctive relief. (*Id.*
20 at 12, Prayer for Relief.)

21 8. Wal-Mart denies any liability to Plaintiff or to the class she seeks to
22 represent, and denies that Plaintiff or the putative class members are entitled to recover
23 the damages, restitution and other relief requested in the Complaint. Defendant also
24 submits that this action does not satisfy the requirements for class certification under Fed.
25 R. Civ. P. 23.

26 **III. SERVICE ON THE STATE COURT**

27 9. Pursuant to 28 U.S.C. § 1446(d), contemporaneously with the filing of this
28 Notice of Removal in the United States District Court for the Southern District of

1 California, written notice will be served upon counsel for Plaintiff, and filed with the
2 Clerk of the California Supreme Court of the County of San Diego.

3 **IV. VENUE**

4 10. The Superior Court of California, County of San Diego, is located within the
5 Southern District of California. 28 U.S.C. §§ 84(d). Therefore, venue is proper in this
6 Court pursuant to 28 U.S.C. § 1441(a).

7 **V. TIMELINESS**

8 11. This removal is timely. Here, the face of the Complaint does not allege all
9 elements needed for CAFA jurisdiction (including the amount in controversy), and
10 Plaintiff has not served some other “paper” that concedes all required elements. For
11 example, no amount in controversy is stated.

12 12. As the Ninth Circuit recently held, CAFA removal is timely at any time so
13 long as (1) the face of the complaint does not plainly allege all elements needed for
14 diversity jurisdiction under CAFA (including the amount in controversy), and (2)
15 plaintiff has not served some other “paper” that concedes all elements needed for
16 diversity jurisdiction. *See Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1125-
17 26 (9th Cir. 2013) (a removing defendant may remove “on the basis of its own
18 information, provided that it has not run afoul of either of the thirty-day deadlines” set
19 forth in 28 U.S.C. § 1446(b)(1) and (b)(3); “a defendant’s subjective knowledge cannot
20 convert a non-removable action into a removable one such that the thirty-day time limit
21 of § 1446(b)(1) or (b)(3) begins to run against the defendant”).

22 13. Therefore, this removal is timely under CAFA.

23 **VI. ORIGINAL JURISDICTION UNDER THE CAFA**

24 14. This Court has jurisdiction over this action under CAFA, 28 U.S.C. §
25 1332(d). CAFA extends federal court jurisdiction over a class action when: (1) “the
26 matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and
27 costs,” (2) “any member of a class of plaintiffs is a citizen of a State different from any
28 defendant;” and (3) the putative class is comprised of at least 100 members. 28 U.S.C. §

1 1332. This action satisfies each requirement. Therefore, this Court has jurisdiction over
2 this action pursuant to CAFA.

3 15. This case meets the removal requirements in 28 U.S.C. § 1441(a), because it
4 is a civil class action where (1) the proposed class contains at least 100 members; (2) the
5 defendant is not a state, state official or other governmental entity; (3) the total amount in
6 controversy exceeds \$5,000,000; and (4) there is diversity between at least one class
7 member and the defendant. *See* 28 U.S.C. § 1332(d).

8 16. This action satisfies CAFA’s definition of a class action, which is “any
9 civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State
10 statute . . . authorizing an action to be brought by one or more representative persons as a
11 class action.” 28 U.S.C. § 1332(d)(1)(B); 28 U.S.C. 1453(a), (b).

12 **A. The Proposed Class Contains At Least 100 Members.**

13 17. Plaintiff brings this action on her own behalf, and on behalf of a class of
14 similarly situated individuals. (**Ex. A**, Comp. at ¶ 12.) Plaintiff seeks to represent “all
15 individuals who, within four years preceding the filing of this complaint, purchased eye
16 examinations and/or eyewear at a Wal-Mart store after examination by an optometrist
17 affiliated with the Wal-Mart store.” (*Id.*)

18 18. During the four years prior to the filing of this Complaint, more than 100
19 customers purchased eyewear at a Wal-Mart store based on a prescription from an
20 optometrist at the Wal-Mart store. (**Ex. C**, Decl. of Julianna Mae Bobby-King ¶ 5.)

21 **B. Defendant Is Not A State, State Official Or Other Government Entity.**

22 19. Wal-Mart is not a state, state official or other governmental entity.

23 **C. The Amount in Controversy Exceeds \$5,000,000.**

24 20. As an initial matter, Wal-Mart in no way concedes that it has any liability to
25 Plaintiff or to the putative class, and denies that Plaintiff or the putative class members
26 are entitled to recover the compensatory damages, statutory damages, restitution,
27 injunctive relief, punitive damages, attorneys’ fees, or any other requested relief in the
28 Complaint.

1 21. That said, the amount in controversy “is what amount is put ‘in controversy’
2 by the plaintiffs’ complaint, not what a defendant will actually owe.” *Korn v. Polo Ralph*
3 *Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008) (quoting *Rippee v. Boston*
4 *Market Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005)). When measuring the amount
5 in controversy, “a court must ‘assume that the allegations of the complaint are true and
6 assume and that a jury will return a verdict for the plaintiff on all claims made in the
7 complaint.’” *Campbell v. Vitran Exp., Inc.*, 471 F. App’x 646, 648 (9th Cir. 2012) (citing
8 *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.
9 D. Cal. 2002)). Further, defenses that a defendant may assert are not considered in
10 assessing the amount placed in controversy. *See Lara v. Trimac Transp. Servs. (W.) Inc.*,
11 CV 10-4280-GHK JCX, 2010 WL 3119366, at *3 (C.D. Cal. Aug. 6, 2010) (“affirmative
12 defenses, counterclaims, and potential offsets may not be invoked to demonstrate the
13 amount-in-controversy is actually less than the jurisdictional minimum.”).

14 22. Pursuant to 28 U.S.C. § 1332(d)(6), “[i]n any class action, the claims of the
15 individuals class members shall be aggregated to determine whether the matter in
16 controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.”

17 23. Here, Plaintiff seeks compensatory damages, statutory damages, restitution,
18 disgorgement, punitive damages, injunctive relief and attorneys’ fees and costs. (**Ex. A**,
19 Comp. at 12, Prayer for Relief.) The amount in controversy here exceeds \$5,000,000 for
20 purposes of removal.

21 24. Plaintiff’s Complaint does not plead a specific amount of damages. Instead,
22 the Complaint alleges only that “the damages sought by the Class are well in excess of
23 th[e] Court’s jurisdictional threshold of \$25,000.” (**Ex. A**, Comp. ¶ 10.)

24 25. Where, as here, “it is unclear or ambiguous from the face of a state-court
25 complaint whether the requisite amount in controversy is pled . . . [w]e apply a
26 preponderance of the evidence standard” to determine whether the amount in controversy
27 exceeds the statutory minimum. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699
28 (9th Cir. 2007) (citing *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir.

1 1996)). This standard requires the defendant to prove that it is “more likely than not”
2 that the amount in controversy exceeds that amount. *Id.* Under this burden, “a removing
3 defendant is not obligated to ‘research, state, and prove the plaintiff’s claims for
4 damages.’” *Korn*, 536 F. Supp. 2d at 1204-05 (internal citation omitted). This standard
5 applies to cases removed under CAFA. *See Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d
6 395, 397 (9th Cir. 2010).

7 26. A court may consider facts in the removal petition and may “require parties
8 to submit summary-judgment-type evidence relevant to the amount in controversy at the
9 time of removal.” *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005) (internal
10 citation omitted).

11 27. The amount in controversy with respect to statutory damages under the
12 CMIA exceeds \$5,000,000. In her Complaint, Plaintiff alleges that Wal-Mart violated
13 the CMIA because “[d]uring eye examinations at Defendant’s retail locations, Wal-
14 Mart’s optometrists obtain medical information from patients . . . then provide[] that
15 medical information to Wal-Mart retail employees . . . for marketing and/or sales
16 purposes, not for medical reasons.” (**Ex. A**, Comp. ¶ 48.) Plaintiff alleges that, as a
17 result of the allegedly unauthorized disclosure of medical information, she and each
18 member of the class are entitled to \$1,000 in nominal damages for each release of
19 medical information, in addition to actual damages, under the CMIA. *See* Cal. Civ. Code
20 § 56.36(b)(1) (authorizing nominal damages of \$1000 for a violation of the CMIA); (**Ex.**
21 **A**, Comp. ¶ 51.)

22 28. During just one of the four years at issue in this case, from November 5,
23 2010 to November 5, 2011, there were more than 6,000 instances where eye examination
24 information was allegedly disclosed by an optometrist at the same store location for
25 purposes of filling eyewear prescriptions. (**Ex. C**, Bobby-King Decl. ¶ 4.) Thus,
26 multiplying these at least 6,000 instances by the \$1,000 per violation in nominal damages
27 available under the CMIA, the amount in controversy totals at least \$6,000,000, thus
28 satisfying CAFA’s amount-in-controversy requirement.

1 29. The additional categories of relief that Plaintiff seeks further enlarge the
2 amount in controversy well beyond CAFA’s \$5 million minimum:

- 3 a. Plaintiff also alleges that she and each class member are entitled to
4 actual damages under the CMIA and the CLRA because they
5 allegedly paid above-market prices for eyewear. (*See, e.g., Ex. A,*
6 *Comp. ¶¶ 29, 45.1, Prayer for Relief.*)
- 7 b. Plaintiff’s claim for restitution is also properly considered in
8 determining the amount in controversy. *See Guglielmino, 506 F.3d at*
9 *700.*
- 10 c. Plaintiff also seeks an award of attorney’s fees under the CMIA (**Ex.**
11 **A, Comp., Prayer for Relief, ¶ 5**). This amount is also properly
12 included in the amount in controversy calculation. (*Id.*) *See*
13 *Guglielmino, 506 F.3d at 700* (“Section 1332(a)’s amount-in-
14 controversy requirement excludes only ‘interest and costs’ and
15 therefore includes attorneys’ fees.”).
- 16 d. In addition, Plaintiff seeks punitive damages (*Id.* ¶ 45.4; Prayer for
17 Relief, ¶ 7), which also should be included in calculating the amount
18 in controversy. *See Guglielmino, 506 F.3d at 700* (including punitive
19 damages in amount in controversy calculation).

20 30. Thus, the amount that Plaintiff has placed in controversy substantially
21 exceeds the \$5 million threshold.

22 **D. Diversity of Citizenship**

23 31. CAFA’s diversity requirement is satisfied when there is “minimal diversity”
24 in that at least one named plaintiff is a citizen of a state different from any defendant. 28
25 U.S.C. § 1332(d)(2)(A).

26 32. Plaintiff Omidy resides in and is a citizen of the State of California. (**Ex. A,**
27 **Comp. ¶ 4.**)

1 33. For diversity purposes, a corporation “shall be deemed a citizen of any State
2 by which it has been incorporated and of the State where it has its principal place of
3 business.” 28 U.S.C. § 1332(c)(1). Wal-Mart is incorporated in the State of Delaware.
4 (Ex. C, Bobby-King Decl., ¶ 2.)

5 34. The Ninth Circuit uses a hybrid approach to determine where a corporation’s
6 principal place of business is located.” *Piazza v. EMPI, Inc.*, Case No. 1:07-CV-00954-
7 OWWGSA, 2008 WL 590494, *11 (E.D. Cal. Feb. 29, 2008). “Where a majority of a
8 corporation’s business activity takes place in one state, that state is the corporation’s
9 principal place of business, even if the corporate headquarters are located in a different
10 state. The ‘nerve center’ test should be used only when no state contains a substantial
11 predominance of the corporation’s business activities.” *Industrial Tectonics, Inc. v. Aero*
12 *Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990).

13 35. Under either test, Wal-Mart’s principal place of business is in Arkansas, as
14 its corporate headquarters are located in Arkansas and its administrative and executive
15 functions are performed at those headquarters. (Ex. C, Bobby-King Decl., ¶ 2); *see also*
16 *Richey v. Wal-Mart Stores, Inc.*, 390 F. App’x 375, 378 (5th Cir. 2010) (finding complete
17 diversity where at time of removal, Plaintiff was a citizen of Texas and Walmart is
18 incorporated in Delaware, with its principal place of business in Arkansas); *Menard v.*
19 *Hewlett Packard, Co.*, CIV.A. 12-3570, 2012 WL 2938010 (E.D. Pa. July 19, 2012)
20 (holding complete diversity exists and noting that Plaintiffs are citizens of Pennsylvania,
21 HP is a citizen of Delaware and California, and Walmart is a citizen of Arkansas and
22 Delaware); *Freeman v. Wal-Mart Stores, Inc.*, 11-CV-3816 DMC JAD, 2012 WL 893085
23 (D. N.J. Mar. 13, 2012) (“It is undisputed that the parties to this suit are of diverse
24 citizenship. Plaintiff is a citizen of New Jersey while Walmart Stores, Inc. is a
25 corporation organized and existing under the laws of Delaware with its principal place of
26 business in Bentonville, Arkansas.”).

27 36. Thus, because at least one Plaintiff is a citizen of California and Wal-Mart is
28 a citizen of Delaware and Arkansas, CAFA’s minimal diversity requirement is met.

1 37. As Wal-Mart has shown in this Notice of Removal and supporting
2 documents, this lawsuit meets CAFA's requirements.

3 WHEREFORE, this Action is hereby removed to this Court from the Superior
4 Court of California, County of San Diego.

5 DATED: April 9, 2014

GREENBERG TRAURIG, LLP
ROBERT J. HERRINGTON
SARAH G. HARTMAN

6
7
8 By: /s/ ROBERT J. HERRINGTON
9 ROBERT J. HERRINGTON
10 Attorneys for Defendant Wal-Mart Stores, Inc.
11 E-mail: HerringtonR@gtlaw.com
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28