

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

CHRISTINE GREEN and JORDAN PITLER, )  
on behalf of themselves and all others similarly )  
situated, )

Plaintiffs, )

v. )

ALCON LABORATORIES, INC.; ALCON )  
RESEARCH, LTD.; ALLERGAN, INC.; )  
ALLERGAN USA, INC.; AND ALLERGAN )  
SALES, LLC, )

Defendants. )

Case No. 4:18-cv-00796

JURY TRIAL DEMANDED

**NOTICE OF REMOVAL**

Defendants Allergan, Inc., Allergan USA, Inc., Allergan Sales, LLC, Alcon Laboratories, Inc., and Alcon Research, Ltd. (collectively, “Defendants”) file this notice of removal of this action from the Circuit Court of the County of St. Louis, Missouri, to the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to 28 U.S.C. §§ 1332(d) and 1441.

**I. INTRODUCTION**

1. Plaintiffs Christine Green and Jordan Pitler allege that Defendants have violated the Missouri Merchandising Practices Act (“MMPA”) by manufacturing and selling prescription eye drops for the treatment of glaucoma and other eye conditions (collectively, the “Products”) in containers that dispense drops that are larger than medically necessary, resulting in alleged waste of a portion of each drop.

2. The Petition (“Complaint” or “Compl.”) was filed in the Circuit Court of the County of St. Louis on or about April 17, 2018.

3. Plaintiff Christine Green is a citizen of Missouri. (*See* Compl. ¶ 18.)

4. Plaintiff Jordan Pitler is a citizen of Missouri. (*See* Compl. ¶ 19.)

5. At the time this lawsuit was filed and at all times since, Defendant Allergan, Inc. was and is a corporation organized under the laws of the State of Delaware with its principal place of business in Parsippany, New Jersey.<sup>1</sup> Therefore, at the time this action was filed and at all times since, Allergan, Inc. was a citizen of Delaware and New Jersey. 28 U.S.C. § 1332(c)(1).

6. At the time this lawsuit was filed and at all times since, Defendant Allergan USA, Inc. was and is a corporation organized under the laws of the State of Delaware with its principal place of business in Parsippany, New Jersey. Therefore, at the time this action was filed and at all times since, Allergan USA, Inc. was a citizen of Delaware and New Jersey. 28 U.S.C. § 1332(c)(1).

7. At the time this lawsuit was filed and at all times since, Defendant Allergan Sales, LLC was and is a limited liability company whose sole member is Allergan, Inc. Defendant Allergan, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in Parsippany, New Jersey. Thus, Allergan Sales, LLC's citizenship is the same as Allergan, Inc.'s citizenship, and Allergan Sales, LLC is a citizen of Delaware and New Jersey. *See GMAC Commercial Credit v. Dillard Dept. Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004) (holding that an LLC's citizenship "is that of its members for diversity jurisdiction purposes").

8. At the time this lawsuit was filed and at all times since, Defendant Alcon Laboratories, Inc. was and is a corporation organized under the laws of the State of Delaware with its principal place of business in Fort Worth, Texas. (Compl. ¶ 20.) Therefore, at the time this action was filed and at all times since, Alcon Laboratories, Inc. was a citizen of Delaware and Texas. 28 U.S.C. § 1332(c)(1).

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<sup>1</sup> The Complaint erroneously alleges that the principal place of business for each of the Allergan defendants is in Irvine, California. (Compl. ¶ 23.) Although that is incorrect, in either event, Plaintiffs do not allege that any Defendant shares Plaintiffs' Missouri citizenship.

9. At the time this lawsuit was filed and at all times since, Defendant Alcon Research, Ltd. was and is a corporation organized under the laws of the State of Delaware with its principal place of business in Fort Worth, Texas. (Compl. ¶ 20.) Therefore, at the time this action was filed and at all times since, Alcon Research, Ltd. was a citizen of Delaware and Texas. 28 U.S.C. § 1332(c)(1).

10. Plaintiff Green seeks an unspecified amount of actual and punitive damages, declaratory and injunctive relief, attorneys' fees, interest, and costs for herself and on behalf of a proposed class of "[a]ll persons and entities who paid all or part of the purchase price of prescription eye drops manufactured and sold by Alcon in multi-dose dispensers and purchased within the State of Missouri within the period of the applicable statute of limitations prior to the filing of this lawsuit and up to the date of certification." (Compl. ¶ 158, Prayer for Relief.)

11. Plaintiff Pitler seeks an unspecified amount of actual and punitive damages, declaratory and injunctive relief, attorneys' fees, interest, and costs for himself and on behalf of a proposed class of "[a]ll persons and entities who paid all or part of the purchase price of prescription eye drops manufactured and sold by Allergan in multi-dose dispensers and purchased within the State of Missouri within the period of the applicable statute of limitations prior to the filing of this lawsuit and up to the date of certification." (Compl. ¶ 159, Prayer for Relief.)

12. This case may be removed pursuant to 28 U.S.C. § 1332(d) as it is a proposed class action in which the putative class consists of at least 100 members, there is minimal diversity, and the amount in controversy exceeds \$5,000,000, exclusive of interest and costs.

## **II. VENUE**

13. Venue is proper in this Court under 28 U.S.C. § 1441(a) because the removed action was filed in the Circuit Court of the County of St. Louis, Missouri, a court encompassed by the Eastern District of Missouri, Eastern Division.

### III. REMOVAL PURSUANT TO CLASS ACTION FAIRNESS ACT OF 2005

14. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d). Under the Class Action Fairness Act (“CAFA”), federal district courts have original jurisdiction when: (1) the putative class consists of at least 100 members; (2) the citizenship of at least one proposed class member is different from that of any defendant; and (3) the aggregated amount in controversy exceeds \$5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d).

#### A. There Are More Than 100 Putative Class Members

15. Plaintiffs purport to represent classes of “[a]ll persons and entities who paid all or part of the purchase price of prescription eye drops manufactured and sold by Alcon [and Allergan] in multi-dose dispensers and purchased within the State of Missouri within the period of the applicable statute of limitations prior to the filing of this lawsuit and up to the date of certification.” (Compl. ¶¶ 158-59.)

16. Plaintiff’s Complaint identifies seven multi-dose prescription eye drop products manufactured and sold by the Alcon defendants during the putative class period, and five multi-dose prescription eye drop products manufactured and sold by the Allergan defendants during the putative class period. (*Id.* ¶¶ 22, 24.) Plaintiffs allege that “[m]illions of Americans” take these medications. (*Id.* ¶ 2.)

17. More than 100 persons and entities have paid all or part of the purchase price of multi-dose prescription eye drop products manufactured and sold by Alcon and Allergan and purchased in Missouri during the five years<sup>2</sup> preceding the filing of this lawsuit. Accordingly, there are more than 100 putative class members.

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<sup>2</sup> Plaintiffs’ MMPA claims are subject to a five-year statute of limitations. *Huffman v. Credit Union of Texas*, 758 F.3d 963, 968 (8th Cir. 2014).

**B. Minimal Diversity Exists Between the Parties**

18. Plaintiffs are citizens of Missouri. (*See* Compl. ¶¶ 18-19.) None of the Defendants is a citizen of Missouri. (*See supra* ¶¶ 5-9.) Therefore, diversity of citizenship exists. 28 U.S.C. § 1332(d)(2)(A).

**C. The Amount in Controversy Exceeds \$5 Million in the Aggregate**

19. Under 28 U.S.C. § 1332(d)(2), an action is removable under CAFA when “the matter in controversy exceeds the sum or value of \$5,000,000 ...” 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).

20. When, as here, the complaint fails to allege a specific amount in damages sought, “[t]he jurisdictional fact ... is not whether the damages *are* greater than the requisite amount, but whether a fact finder *might* legally conclude that they are ...” *Kopp v. Kopp*, 280 F.3d 883, 885 (8th Cir. 2002) (emphasis added). For purposes of removal, Defendants need only to make a “plausible allegation” that the amount in controversy exceeds \$5 million. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). Once a defendant makes such a showing, “the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.” *Raskas v. Johnson & Johnson*, 719 F.3d 884, 888 (8th Cir. 2013) (quotation omitted).

21. Assuming the truth of the allegations in the Complaint, there is more than \$5 million in controversy, as required for removal by 28 U.S.C. § 1332(d)(2).<sup>3</sup>

22. Plaintiffs purport to represent “[a]ll persons and entities who paid all or part of the

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<sup>3</sup> By alleging here that Plaintiffs might legally recover a judgment exceeding the jurisdictional amount in controversy, Defendants neither confess any liability nor admit the appropriate amount of damages if found liable for any part of Plaintiffs’ claims. Defendants are only stating what the stakes of the litigation could be. *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 945 (8th Cir. 2012) (“The removing party need not confess liability in order to show that the controversy exceeds the threshold.”).

purchase price of prescription eye drops manufactured and sold by Alcon [and Allergan] in multi-dose dispensers and purchased within the State of Missouri within the period of the applicable statute of limitations prior to the filing of this lawsuit and up to the date of certification.” (Compl. ¶¶ 158-59.)

23. Plaintiffs allege that prescription eye drops “constitute a multi-billion dollar industry in the United States.” (*Id.* ¶ 2). Plaintiffs further allege that the amount of their loss, and the amount of the loss to each class member, “can be measured by the amounts they paid for that portion of topical prescription ophthalmic medication in multi-use bottles manufactured and sold by Alcon [and Allergan] that exceeded a drop of 16  $\mu\text{L}$  [microliters].” (*Id.* ¶¶ 199, 205.) Plaintiffs also allege that commercial eyedroppers “typically deliver between 25.1 and 56.4  $\mu\text{L}$ ; with an average drop volume of 39  $\mu\text{L}$ ” (*id.* ¶ 65), indicating a purported “loss” of more than half of each drop. Plaintiffs do not allege the specific amount in damages sought, but these allegations, taken as true for purposes of determining diversity jurisdiction under CAFA, plausibly indicate an amount in controversy exceeding \$5 million.

24. The Allergan products at issue include Lumigan®, Alphagan®<sup>4</sup>, Alphagan P®, Combigan®, and Betagan®. (*Id.* ¶ 24.) Retail sales of these products in Missouri have exceeded \$10 million annually throughout the proposed class period.

25. The Alcon products at issue include Travatan®, Travatan Z®, Azopt®, Betoptic®, Betoptic S®, Simbrinza®, and Iopidine®. (*Id.* ¶ 22.) Annual prescriptions of these products in Missouri total approximately 55,000 prescriptions per year, meaning there are approximately 275,000 prescriptions at issue during the proposed class period. Retail prices of the Alcon products at issue range from approximately \$25 to approximately \$315 per bottle. *See*

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<sup>4</sup> Alphagan® has been discontinued.

<http://www.goodrx.com> (last accessed May 24, 2018).

26. In addition to actual damages, Plaintiffs seek punitive damages, injunctive relief, and attorneys' fees (*see* Prayer for Relief), all of which are included for purposes of determining the amount in controversy. *See Raskas*, 719 F.3d at 887-88; *Burns v. Massachusetts Mut. Life Ins. Co.*, 820 F.2d 246, 248 (8th Cir. 1987). Plaintiffs may recover punitive damages of “[f]ive times the net amount of the judgment,” Mo. Rev. Stat. § 510.265, and the judgment also includes the attorneys' fee award. *Raskas*, 719 F.3d at 887.

27. As a result of the sales of the Products over the past five years, and the possibility of substantial awards for attorneys' fees, injunctive relief, and punitive damages, the total amount in controversy exceeds \$5 million.

#### **IV. DEFENDANTS HAVE COMPLIED WITH ALL PREREQUISITES FOR REMOVAL**

28. Pursuant to 28 U.S.C. § 1446(a) and Local Rule 81-2.03, attached hereto and marked as **Exhibit A** is a true and correct copy of all process, pleadings, orders, and other documents on file in the state court.

29. Pursuant to 28 U.S.C. § 1446(d), promptly upon filing of this Notice of Removal, copies thereof will be sent to Plaintiffs' counsel and filed with the Clerk of the Court in the state court action. In compliance with Local Rule 81-2.03, Defendants will also file proof of filing the Notice of Removal with the Clerk of the Court in the state court action and proof of service on all adverse parties.

30. Defendants reserve the right to amend or supplement this Notice of Removal, and reserve all rights and defenses, including those available under Federal Rule of Civil Procedure 12.

31. This Notice of Removal is timely as Defendants were served with a summons and

copy of the Complaint on or about April 25, 2018.<sup>5</sup>

WHEREFORE, Defendants Allergan, Inc., Allergan USA, Inc., Allergan Sales, LLC, Alcon Laboratories, Inc., and Alcon Research, Ltd. give notice of the removal of this action from the Circuit Court of the County of St. Louis, Missouri, to the United States District Court for the Eastern District of Missouri, Eastern Division.

Dated: May 25, 2018

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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<sup>5</sup> Allergan, Inc. was served on April 27, 2018.

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By: /s/ Gregory E. Ostfeld (w/consent)

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2018, the foregoing document was served upon the following via the Court's electronic filing system and/or electronic mail:

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