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

VINCE RANALLI, on behalf of himself and all others similarly situated,

Plaintiff,

v.

AMAZON.COM, LLC; ZAZZLE INC.; ARENA MERCHANDISING BY AND THROUGH AMAZON.COM, LLC; ETSY.COM, LLC; BRAVE NEW LOOK; and OUTDOOR RESEARCH,

Defendants.

2:21-CV-00088-RJC

ELECTRONICALLY FILED

JURY TRIAL DEMANDED

OUTDOOR RESEARCH'S BRIEF IN SUPPORT OF RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

AND NOW, comes Outdoor Research, by and through its undersigned counsel, Marshall Dennehey, and specifically Gregory P. Graham, Esq., and files this Brief in Support of its Rule 12(b)(6) Motion to Dismiss Plaintiff's Complaint..

I. BACKGROUND AND FACTS

This class action suit arises from the alleged internet purchases of face masks or protective face coverings from each of the Defendants. (*See Generally,* Plaintiff's Complaint). Plaintiff Vince Ranalli ("Ranalli") alleges that each of the Defendants improperly charged and collected sales tax on protective face masks or coverings. (Complaint, ¶¶ 11-19). Specifically, Ranalli alleges the protective face masks and coverings were exempt from Pennsylvania sales tax under 72 P.S. § 7204 after they were reclassified as everyday wear/clothing due to the COVID-19 pandemic by the Pennsylvania Department of Revenue. (Complaint, ¶¶ 11-19). Ranalli asserts claims against the following Defendants: Amazon.com, LLC; Zazzle Inc.; Arena Merchandising by and through Amazon.com, LLC; Etsy.com, LLC; Brave New Look; and Outdoor Research. (Complaint, ¶¶ 2-7). In addition to individual counts raised against each Defendant, Ranalli

brings class claims on behalf of similarly situated purchasers against each Defendant in separately defined classes. (Complaint, ¶ 21).

Ranalli's Complaint is premised on the allegation that all Defendants improperly charged him, and other similarly situated individuals, sales tax as part of purchases of face masks or coverings during the COVID-19 pandemic. (Complaint, ¶¶ 11-19). Ranalli alleges that face masks or coverings became exempt from Pennsylvania sales tax as of March 6, 2020, the date of Governor Wolf's Proclamation of Disaster Emergency regarding the COVID-19 pandemic. (Complaint, p. 3 at n. 1). Additionally, Ranalli relies on an uncited, undated quote that he attributes to the Pennsylvania Department of Revenue indicating "[p]rotective face masks that are sold at retail are exempt from Pennsylvania sales tax during the emergency declaration issued on March 6, 2020 by Governor Wolf." (Complaint, p. 3 at n. 1).

Ranalli then cites to an October 30, 2020 website posting made by the Pennsylvania Department of Revenue on the "Find Answers" portion of its website. (Complaint, p. 3 at n. 2). In response to a posted question asking whether masks and ventilators are subject to PA sales tax, the Department of Revenue answered with the following:

> No, face masks (cloth and disposable) are exempt from Pennsylvania sales tax. Prior to the COVID-19 pandemic, masks sold at retail were typically subject to Pennsylvania sales tax. However, masks (both cloth and disposable) could now be considered everyday wear/clothing, as they are part of the normal attire. Generally speaking, clothing is not subject to Pennsylvania sales tax. Check the Retailer's Information Guide (REV-717) for a list of exceptions.

(Pennsylvania Department of Revenue, Masks and Ventilators - Find Answers, Pennsylvania Department of Revenue, October 30, 2020, https://revenue-pa.custhelp.com/app/answers/detail/a_id/3748/~/masks-and-ventilators).

Nowhere in the Pennsylvania Department of Revenue's answer to the question does the Department of Revenue express an intention that the espoused position was to have retroactive effect back to the March 6, 2020 date upon which Governor Wolf first declared a disaster emergency. (*Id.*). Similarly, nowhere in the referenced Retailer's Information Guide (REV-717)

does it state that the answer to the question was to have retroactive effect. (*Id.*). Ranalli cites to no other statement, public notice, or decision that would indicate that the Department of Revenue intended for the interpretation set forth in the October 30, 2020 answer to apply to any day prior to October 30. (*See Generally*, Complaint).

Ranalli's Claims Against Outdoor Research

Ranalli brings the following Counts against Outdoor Research: Count VII – Violations of the UTPCPL solely against Outdoor Research as an individual Defendant; Count VIII – Violations of the PFCEUA and UTPCPL on behalf of Plaintiff and similarly situated classes against all Defendants; Count IX – Misappropriation/Conversion on behalf of Plaintiff and similarly situated classes against all Defendants; and Count X – Unjust Enrichment on behalf of Plaintiff and similarly situated classes against all Defendants. (Complaint, Counts VII, VIII, IX, and X). Ranalli also sets forth a claim for a permanent injunction in Count XI, asking the Court to order all Defendants to cease and desist the unlawful charging of sales tax. (Complaint, Count XI). In pursuit of his class action claims against Outdoor Research, Plaintiff proposes the following class definition:

> The Outdoor Research Class consists of all individuals who purchased a protective face mask or face covering from Outdoor Research, over the internet on or after March 6, 2020, arranged for delivery into Pennsylvania and who were charged an amount or fee represented to be sales tax on that purchase.

(Complaint, ¶21, Subpart f).

Ranalli's specific claims against Outdoor Research stem from his alleged purchase of a protective face mask that was advertised for $20.00. (Complaint, ¶ 106). Ranalli alleges he was charged $2.03 in sales tax and paid a total of $22.03 for the mask. (Complaint, ¶¶ 107-108). Other than the description of the amount Ranalli was charged and paid, found in Paragraphs 106-108 of his Complaint, Ranalli does not include any other factual allegation describing Outdoor Research's alleged conduct. (*See Generally*, Complaint). While Ranalli sets forth legal

conclusions as to Outdoor Research's alleged actions, Ranalli's Complaint does not include any factual allegations whatsoever as to any representation made by Outdoor Research or what Ranalli's understanding of such a representation was at the time of purchase. (*See Generally*, Complaint). Further, Ranalli's Complaint does not include any citations to any website, advertising, or public facing media produced by Outdoor Research. (*See Generally*, Complaint).

II. STANDARD OF REVIEW

A. Motion to Dismiss Standard

In considering a Motion under Fed. R. Civ. P. 12(b)(6), the United States Supreme Court both clarified and partially reformulated federal notice pleading principles in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Although the language "showing that the pleader is entitled to relief" in Fed. R. Civ. P. 8(a) (2) was often neglected, the *Twombly* Court held that this language is significant and must be followed:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations [citations omitted], ***a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do***, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, ***courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level***, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("***The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action***") . . .

Twombly, 550 U.S. at 555 (emphasis added).

As further elaborated in a subsequent Supreme Court decision, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in order to withstand a Rule 12(b)(6) motion to dismiss, a complaint must set forth facts showing that a claim is "plausible":

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. [*Twombly*, 550 U.S.] at 556. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . ***But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct***, the complaint has alleged -- but it has not "show[n]" -- "that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a) (2).

Iqbal, 556 U.S. at 679 (emphasis added).

In *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), the Third Circuit centered on the heightened emphasis in *Iqbal* that a plaintiff's conclusory or "bare bones" allegations will no longer survive a motion to dismiss. In a later decision, the Third Circuit provided a two-step analysis to be applied to motions to dismiss for failure to state a claim, "instructing that all civil complaints must contain 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (*citing Iqbal*, 556 U.S. at 678). As explained by *Fowler*:

> Therefore, after *Iqbal*, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. ***First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions.*** Id. ***Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief."*** 129 S. Ct. at 1950. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

Id., 578 F.3d at 210-11 (emphases added).

The Third Circuit has further held that "in reviewing a Rule 12(b)(6) motion, it is well-established that a court should consider only the allegations of the complaint, matters of public record, and documents that form the basis of the claim." *Welch v. Bank of America*, 2014 U.S. Dist. LEXIS 17214 (W.D. Pa. 2014), *quoting M & M Stone Co. v. Pennsylvania*, 388 Fed. App'x

156, 160-161 (3d Cir. 2010); *see also McBride v. Warden of Alleg. Cnty. Jail*, 577 Fed. App'x 98, 99 (3d Cir. 2014). Documents which "form the basis for a claim" are those "integral to or explicitly relied upon in the complaint," thereby serving as a factual underpinning for plaintiff's theory of recovery. *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

III. ARGUMENT

A. Plaintiff's Case Must Be Stayed as the Pennsylvania Department of Revenue Has Primary Jurisdiction Over Claims Made Under the Tax Code.

This Honorable Court must stay this matter as primary jurisdiction over Plaintiff's claims relating to the assessment and collection of sales tax rests with the Commonwealth's Department of Revenue. Ranalli centers his allegations against Outdoor Revenue on alleged violations of the Pennsylvania Tax Code. However, Ranalli disregards the Pennsylvania Tax Code by filing this lawsuit at this juncture. Pertinent to Ranalli's allegations are questions as to the intended effect of the Department of Revenue's posted answer to a website question, whether the Department believes that individuals who were assessed a sales tax while purchasing face masks or protective coverings are owed a refund, and upon which date were entities no longer allowed to assess and collect a previously-acceptable sales tax. Ranalli has failed to follow the administrative process for seeking a remedy under the Code set forth in other sections of the same statute. Pennsylvania law requires that he do so before this Court exercise jurisdiction over his claims.

In a factually analogous matter, the Pennsylvania Superior Court in *Stoloff v. The Neiman Marcus Grp., Inc.*, 24 A.3d 366 (Pa. Super. 2011), remanded the case to the trial court and directed that the action be stayed so that the class members could exhaust their administrative remedies and seek refunds from the Department of Revenue. The plaintiff in *Stoloff*, a Pennsylvania resident, filed a class action complaint following an online purchase of a "black jersey dress" in which she alleged she was improperly charged a 6% sales tax pursuant to the

Pennsylvania Tax Code. *Stoloff*, 24 A. 3d at 367-68. As in this matter, Stoloff's class action complaint alleged Counts of unjust enrichment, violation of the consumer protection law, and conversion, in addition to seeking injunctive relief. *Id.* Moreover, *Stoloff* involves a similar factual claim as that brought by Ranalli and many of the same provisions under the Pennsylvania Tax Code.[1] After the trial court dismissed the complaint for lack of subject-matter jurisdiction following preliminary objections, Stoloff appealed to the Superior Court. *Id.* While the Superior Court reversed on the basis that dismissal for lack of subject-matter jurisdiction was improper, in doing so it held that "any dispute involving the payment of sales tax must first be resolved by the Pennsylvania Department of Revenue..." *Id.* at 367.

On appeal, the Superior Court emphasized that although the trial court improperly dismissed the suit for lack of subject matter jurisdiction because Stoloff had failed to exhaust her administrative remedies, primary jurisdiction over disputes involving the payment of sales tax rested with the Department or Revenue. *Id.* at 370-372. Specifically, the *Stoloff* Court stated "...the doctrine of primary jurisdiction holds that where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made a determination." *Id.* at 371 (internal citations omitted). The Superior Court distinctly analyzed the statutory framework for the assessment, collection, and refund of improperly assessed sales taxes. *Id.* at 371-374. Ultimately, the Superior Court interpreted Sections 7225[2] and 7252[3] to mean that the sales tax collected by an entity, whether properly or

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[1] The *Stoloff* Court identified sections (1) 7202(a) - Imposition of tax; (2) 7204(26) - Exclusions from tax; (3) 7225 - Tax held in trust from the Commonwealth; (4) 7237 - Collection of tax; (5) 7252 – Refunds; and (6) 7253 - Refund petition as the implicated sections of the Pennsylvania Tax Code. *Id.* at 369-370. In the present matter, Ranalli alleges Defendants are liable due to their failure to comply with Section 7204(4) and 7204(18). (Complaint, ¶¶ 11-19).

[2] § 7225. Tax held in trust for the Commonwealth
All taxes collected by any person from purchasers in accordance with this article and all taxes collected by any person from purchasers under color of this article which have not been properly refunded by such person to the purchaser shall constitute a trust fund for the Commonwealth, and such trust shall be enforceable against such person, his representatives and any person (other than a purchaser to whom a refund has been made properly) receiving any part of such fund without consideration, or knowing that the taxpayer is committing a breach of trust:

improperly imposed, becomes the property of the Commonwealth at the time of the sale as the funds must be held in a trust for the Commonwealth. *Id.* at 373. The Superior Court determined that the Commonwealth is in the best position to determine if a sales tax was properly assessed as it customarily handles such claims. *Id.* (*citing Maryland Cas. Co. v. Odyssey Contracting Corp.* 894 A.2d 750 (Pa. Super. 2006). Finally, the *Stoloff* Court identified that Pa. Tax Code Section 7273 mandates that a refund of a tax improperly collected cannot be authorized unless a petition for refund has been filed with the Department of Revenue. *Id.*

As the *Stoloff* decision makes clear, Ranalli's claims are subject to a statutory framework that requires this Court to stay this case and refer the tax-refund issues to the Department of Revenue. As indicated in *Stoloff*, any sales tax collected by Outdoor Research effectively became government property, irrespective of whether the sales tax was properly imposed. Logically, the *Stoloff* decision recognizes that staying a court case to allow for resolution of some disputed issues by the administrative agency charged with regulating the subject matter of the dispute is preferable to courts simply moving forward with the exercise of jurisdiction over the claim. *Id.* at 371. The Department of Revenue will be able to provide Ranalli with a refund via a petition filed under Section 7273. The Department of Revenue will also be able to determine whether an answer posted to an online web question constitutes a formal position on the imposition of sales tax for face coverings, and what date this clarification (if any) was due to take effect. To the extent Ranalli alleges Outdoor Research improperly charged sales tax for his purchase of the face mask, the proper remedy is for Ranalli to seek a refund from the Department of Revenue, the

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Provided, however, That (sic) any person receiving payment of a lawful obligation of the taxpayer from such fund shall be presumed to have received the same in good faith and without any knowledge of the breach of trust. Any person, other than a taxpayer, against whom the department makes any claim under this section shall have the same right to petition and appeal as is given taxpayers by any provisions of this part.

[3] § 7252. Refunds

The department shall, pursuant to the provisions of Article XXVII,1 refund all taxes, interest and penalties paid to the Commonwealth under the provisions of this article and to which the Commonwealth is not rightfully entitled…

administrative agency charged with collecting and refunding sales tax, which has primary jurisdiction over such claim.

B. Plaintiff's Claims Must be Dismissed via Application of the Voluntary Payment Doctrine.

Ranalli was aware of, and voluntarily paid, the sales tax that is now the basis of his individual and class UTPCPL, PFCEUA, conversion, and unjust enrichment claims. His claims are therefore barred entirely via application of the voluntary payment doctrine.

The voluntary payment doctrine is based on the common law doctrine "one who voluntarily pays money with full knowledge of the facts, without any fraud having been practiced upon him, cannot recover it back." *Ochiuto v. Prudential Ins. Co.,* 52 A.2d 228, 230 (Pa. 1947). In Pennsylvania, "[w]here, under a mistake of law, one voluntarily and without fraud or duress pays money to another with full knowledge of the facts, the money paid cannot be recovered." *Acme Markets, Inc. v. Valley View Shopping Ctr., Inc.,* 493 A.2d 736, 737 (Pa. Super. Ct. 1985). "A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of the facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." *Id.*

The rule has been recognized and applied by the Third Circuit. *See In re: Resorts Int'l, Inc.,* 181 F.3d 505, 511-12 (3d Cir. 1999) (payments made voluntarily were not recoverable under New Jersey law). For example, in *Corporate Aviation Concepts, Inc. v. Multi-Service Aviation Corp.,* No. 03-3020, 2005 WL 1693931 (E.D. Pa. July 19, 2005), plaintiff's unjust enrichment claim was dismissed under Rule 12(b)(6) because the claim was barred by the voluntary payment doctrine. Specifically, the court determined that the plaintiff "had an adequate legal remedy at the time it paid off [the challenged] lien claims because it could have filed a lawsuit similar to the instant action seeking a declaratory judgment that the lien claims at issue

were invalid." *Id.* at *5. The plaintiff's failure to challenge through litigation the subject liens before paying them precluded it from subsequently filing suit for return of its payments. *Id.*

In *Acme Markets,* the Pennsylvania Superior Court held that the plaintiff, a tenant of a shopping center, could not recover payments it had made to its landlord for maintenance of the parking lot. The plaintiff contended it had made the payments because it mistakenly believed it had a continuing contractual obligation to maintain the lot, when, in actuality, its lease required maintenance contributions only during an initial term. The court observed that "[i]f this interpretation was erroneous, the mistake was one of law. Payments made pursuant to a mistake of law cannot be recovered." *Id.* 493 A.2d 736 at 738.

The Pennsylvania Supreme Court has repeatedly held that the voluntary payment doctrine bars recovery of erroneous or mistakenly made tax payments unless specifically authorized by statute. *See, e.g., Universal Film Exchs., Inc. v. Bd. of Fin. & Revenue,* 185 A.2d 542, 544-45 (Pa. 1962) ("If payment of taxes is voluntary, even though the taxing statute is later held unconstitutional, the money paid cannot be recovered in the absence of statutory authorization."). "At common law a voluntary payment of taxes, erroneously made, could not, in the absence of a statute, be recovered." *In re Royal McBee Corp. Tax Case,* 143 A.2d 393, 395 (Pa. 1958). To that end, the Pennsylvania General Assembly established the statutory refund procedure as a means to recover taxes voluntarily paid. *See 72* P.S. § 7252; *id. §* 7253(a) ("[T]he refund or credit of tax . . . shall be made only where the person who has actually paid the tax files a petition for refund with the department."). It is critical to again note that Ranalli elected not to be made whole via pursuit of the statutory framework which would – should his disputed assertions be accepted – refund him for the sales tax he was charged by Outdoor Research.

Ranalli may avoid dismissal via the doctrine only by alleging that he paid the sales tax "without full knowledge of the facts, or because of the other party's fraud, or under some type of

duress." *Williams,* 2013 U.S. Dist. LEXIS 38897, at *8. Here, aside from the legal conclusions which Ranalli presents, Ranalli's factual allegations demonstrate that Outdoor Research disclosed all relevant facts, including the purchase price of the face masks and the amount of sales tax collected. "Under the voluntary payment defense, 'one who has voluntarily paid money with full knowledge, ***or means of knowledge of all the facts***, without any fraud having been practiced upon him . . . cannot recover it back by reason of the payment having been made under a mistake or error as to the applicable rules of law.'" *Liss,* 983 A.2d at 661 (emphasis added) (citation omitted). Ranalli cannot avoid the consequence of his voluntary payment of the tax by claiming that the tax was improper. Even if Ranalli's allegations that the tax assessment was improper are proven true, something Outdoor Research disputes, a tax payment made with knowledge of the facts is voluntary even if there was a mistake of law. *See Kirk,* 620 F. Supp. at 460 ("[M]oney voluntarily paid on a mistake of law cannot be recovered on the ground that the party supposed he was bound in law to pay it when in truth he was not."). Where, as here, "one voluntarily and without duress or fraud pays money to another with full knowledge of the facts, the money paid cannot be recovered." *Id.* at 461.

The analysis of the voluntary payment doctrine's application to Ranalli's claims is informed by a reminder of the facts upon which Ranalli brings his claims against Outdoor Research and all Defendants. Ranalli alleges that Pennsylvania was subject to an emergency order from March 6, 2020 onwards due to the COVID pandemic. On October 30, 2020 the Department of Revenue posted an online answer to a user-submitted question stating that, because masks and protective face coverings could be considered everyday wear due to the pandemic, they should be exempt from sales tax. Ranalli further alleges that he purchased masks or face coverings from the Defendants and paid sales tax as part of each transaction. He does not provide specific details of each purchase other than the price and sales tax paid. Other than legal

conclusions, he provides no factual allegations whatsoever of statements made, advertisements read, or representations conveyed by Outdoor Research or the Defendants. Put simply, all the facts that form the basis of Ranalli's claims in his Complaint - and that are subject to Outdoor Research's Motion to Dismiss - were known to Ranalli and Outdoor Research at the time he chose to pay the sales tax. As Pennsylvania law is clear that the voluntary payment doctrine bars the recovery of erroneously – but voluntarily made – tax payments, all of Ranalli's claims must be dismissed.

C. If Plaintiff's Case is Not Stayed or Dismissed, Any Individual or Class Claim Must be Limited in Time to Transactions Taking Place on or After October 30, 2020.

In the event this Court does not stay stay Ranalli's claim, then it must dismiss all claims based upon any transaction taking place prior to October 30, 2020. In Pennsylvania, there is a strong presumption against retroactive application of statutes. 1 Pa.C.S. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly."). Despite this, Ranalli seeks to hold Outdoor Research and all Defendants liable for conduct beginning on March 6, 2020 despite the Department of Revenue statement upon which he relies not being made until October 30, 2020.

Pennsylvania courts are consistent with their presumption against retroactivity. The intent that a statute act retrospectively must be "so clear as to preclude all question as to the intention of the legislature." *R & P Services, Inc. v. Com., Dept. of Revenue*, 541 A.2d 432, 434 (Pa. Cmwlth. 1988). The presumption against retroactivity has been applied to the regulations of administrative agencies such as the Department of Revenue. *See, Jenkins v. Unemployment Compensation Board of Review*, 56 A.2d 686 (Pa. Super. 1948). Administrative agencies may only adopt retroactive regulations "so long as they do not destroy vested rights, impair

contractual obligations or violate the principles of due process of law and ex post facto laws." *Ashbourne School v. Department of Education*, 403 A.2d 161 (Pa. Cmwlth. 1979).

In *Mack Trucks, Inc. v. Commonwealth of Pennsylvania*, the Commonwealth Court of Pennsylvania upheld the presumption against the retroactive application of a tax assessment provision relating to the commercial operations of an engine producing company. *Mack Trucks, Inc. v. Commonwealth*, 629 A.2d 179, 180-81 (Pa. Cmwlth. 1993). Mack Trucks appealed from the Commonwealth Court's order affirming the orders of the Board of Finance and Revenue assessments of sales and use taxes on Mack Trucks' business. *Mack Trucks*, 629 A.2d at 179-180. Mack Trucks argued that an amendment to the Tax Code, which was enacted after the assessment period, should have been applied retroactively to include the remanufacture of new engines from old components. *Id.* at 180. Mack Trucks argued that the amendment was a clarification of the existing tax exclusion. *Id.* The *Mack Trucks* Court noted that this argument implied that the clarification made the application of the particular exclusion provision retroactive. *Id.* at 180. Declining to follow this interpretation, the *Mack Trucks* Court reiterated that statutes are not retroactive unless clearly and manifestly intended to be so by the General Assembly. 1 Pa.C.S. § 1926; *Bureau of Employment Security v. Pennsylvania Engineering Corporation*, 421 A.2d 521, 523 (Pa. Cmwlth. 1980).

Here, there is absolutely no basis to interpret the Department of Revenues response to an online question was to have any retroactive effect whatsoever. Ranalli's Complaint fails to cite to any notice, publication, declaration, decision, or statute set forth by the Department of Revenue, a judicial body, or the General Assembly which would support any claim that the October 30, 2020 online post was intended to have retroactive effect. Rather, Ranalli relies on an uncited, undated quote that he attributes to the Pennsylvania Department of Revenue indicating "[p]rotective face masks that are sold at retail are exempt from Pennsylvania sales tax during the

emergency declaration issued on March 6, 2020 by Governor Wolf." (Complaint, ¶ 11, n. 1). Even taking this undated, uncited quotation as true, it does not explicitly or unequivocally state the sales tax exempt was to be retroactively applied as of March 6, 2020.

Additionally, Ranalli relies on an October 30, 2020 informal online response of the Department of Revenue to a user-generated question regarding the applicability of sales tax to face masks and ventilators. As an initial matter, the nature of an informal online post to a user-generated question cautions against any retroactive effect. Moreover, there is no reference in the October 30, 2020 online post to a start date, nor reference to Governor Wolf's emergency declarations. Accordingly, it would be impossible to tell which date the Department intended the online posting to refer back to. This is particularly problematic as finding that the online post was intended to have retroactive effect would clearly "destroy vested rights, impair contractual obligations or violate the principles of due process of law and ex post facto laws" as cautioned against by Pennsylvania courts. It would do so with absolutely no guidance as to the date by which the rights and obligations of individuals would be impacted.

There is an inherent flaw in Ranalli's claim that the October 30, 2020 informal response of the Department of Revenue indicates an intent for its retroactive effect. Clearly, without direction from the Department of Revenue to the contrary, merchants were previously legally required to collect sales tax on face masks and coverings by the Commonwealth. Regardless, Ranalli asserts the Department of Revenue's October 30, 2020 online response retroactively places liability for the improper imposition of sales tax on the very merchants the Department required to collect such sales taxes in the first place. Ranalli makes claims for individual liability, as well as defines his proposed classes against the Defendants, upon an assumption that an informal online post would have retroactive effect. There is no allegation in the Complaint or indirectly referenced by the Complaint to support such a conclusion and to provide Ranalli's

claims with that assumption contradicts Pennsylvania law. As such, Ranalli's claims for any conduct made prior to October 30, 2020 must be dismissed and his proposed class definitions must be limited in time.

D. Plaintiff Fails to State a Claim Under the UTPCPL.

Ranalli cannot establish the essential elements of his claims under the UTPCPL. At the outset, the UTPCPL applies only to "trade or commerce" within the meaning of the statute. *See* 73 P.S. § 201-3(a). The UTPCPL cannot apply to the statutorily-required collection of sales tax and therefore Ranalli's claims under the UTPCPL fail as a threshold issue. Next, Ranalli cannot establish an ascertainable loss as a result of Outdoor Research's allegedly unfair or deceptive conduct as he is entitled to a full refund from the Department of Revenue, a relief he chose not to pursue through no action on Outdoor Research's part. *See Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 226 (3d Cir. 2008). Finally, Ranalli's Complaint is wholly devoid of facts as to the circumstances surrounding the transaction between Ranalli and Outdoor Research. Ranalli's Complaint merely contains three statements relating to the amount of money charged by Outdoor Research and nothing else. Ranalli must allege facts, under Federal pleadings standards, that "the defendant was engaged in unfair methods of competition and unfair or deceptive acts or practices." *See Fazio v. Guardian Life Ins. Co. of Am.*, 62 A.3d 396, 409 (Pa. Super. Ct. 2012) (internal quotation marks and citation omitted). A cursory review of Ranalli's Complaint demonstrates the extent to which he has failed to do so. As such, his UTPCPL claim against Outdoor Research fails as a matter of law and must be dismissed.

1. The Assessment of Sales Tax Is Not "Trade or Commerce" and Therefore Is Outside the Scope of the UTPCPL.

Ranalli's claims under the UTPCPL fail as the act does not cover the assessment and collection of taxes pursuant to the statutory framework which he alleges is the basis for Outdoor Research's liability. The UTPCPL applies only to "unfair or deceptive acts or practices ***in the***

conduct of any trade or commerce." 73 P.S. § 201-3(a) (emphasis added); *Fazio,* 62 A.3d at 410 (explaining plaintiffs must "establish a consumer transaction in order to fall under the auspices of the UTPCPL"); *see also Dameshek v. Encompass Ins. Co. of Am.,* No. 11-0018, 2012 U.S. Dist. LEXIS 87570, at *24 (M.D. Pa. June 25, 2012); *Gywnedd Club Condo. Ass 'n v. Dahlquist,* 208 A.3d 213 (Pa. Commw Ct. 2019). "Trade or commerce" is defined as commercial activity for profit. *See Meyer v. Cmty. Coll. of Beaver Cty.,* 93 A.3d 806, 816 (Pa. 2014) (Castille, C.J., concurring). Where, as here, a retailer is acting as a mere agent of the Commonwealth and "carrying out a public duty, it is not engaged in the conduct of a trade or commerce." *Meyer,* 93 A.3d at 816 (internal quotation marks and citation omitted); *see also 220 W. Rittenhouse Square Condo. Ass 'n v. Stolker,* No. 2254, 2012 Phila. Ct. Com. Pl. LEXIS 142, at *10 (May 16, 2012) ("[T]here can be no sale of services to constitute . . . being engaged in 'trade or commerce' when [the] performance of services is statutorily required.").

A retailer collects sales tax as an agent of the Commonwealth because it is statutorily required to do so. 72 P.S. § 7237(b)(1) ("Every person maintaining a place of business in this Commonwealth and selling or leasing tangible personal property or services . . . the sale or use of which is subject to tax shall collect the tax from the purchaser or lessee at the time of making the sale or lease, and shall remit the tax to the department"); *see also Aldine Apartments, Inc. v. Commonwealth, Dep't of Revenue,* 379 A.2d 333, 336 (Pa. Commw Ct. 1977) (holding that the utility companies that were alleged to have improperly collected sales tax were *"merely collecting agents* and, legally, [could] play no role in the refund of these taxes" (emphasis added)). Retailers briefly hold the tax in trust and promptly remit it to the Commonwealth. 72 P.S. § 7225 ("All taxes collected . . . shall constitute a trust fund for the Commonwealth."); *id. §* 7217(a)(2)—(4) (requiring monthly remittance). Thus, the collection of sales tax is not considered trade or commerce under the UTPCPL.

The Supreme Judicial Court of Massachusetts provides persuasive guidance in a 2009 ruling that the collection of sales tax is not commercial activity – therefore falling outside the scope of - a substantively similar consumer protection statute. In *Feeney v. Dell,* the plaintiffs brought a class action against a retailer-defendant for allegedly violating the Massachusetts consumer protection law by charging sales tax on optional service contracts when no sales tax was due. 908 N.E.2d 753, 757 (Mass. 2009). The Supreme Judicial Court of Massachusetts dismissed the plaintiffs' claims because the "collection of such tax was not motivated by 'business or personal reasons' but was pursuant to legislative mandate" and was not "commercial" activity according to the statute. *Id.* at 770-71 ("Where a party's actions are motivated by legislative mandate, not business or personal reasons, this court has repeatedly held that [the consumer protection law] does not apply.") (internal quotation marks and citations omitted). Just as with Ranalli's UTPCPL claim, the plaintiffs in *Feeney* sought to expand the consumer protection statute to an act which was outside its scope. Ranalli's UTPCPL claim must similarly be dismissed.

2. Ranalli Has Not Suffered Any Ascertainable Loss.

Ranalli's UTPCPL claims also fail because he has not suffered an ascertainable loss, let alone any loss caused by any act committed by Outdoor Research. *See Corsale,* 412 F. Supp. 3d at 566 ("[T]he UTPCPL requires that a plaintiff show that he has suffered an 'ascertainable loss of money or property, real or personal.' (quoting 73 P.S. § 201-9.2(a))). Even if Ranalli's allegations are true, he would be entitled to a refund from the Department for the reasons described *supra* and would thus be made whole by following the statutory refund procedures set forth in the Tax Code. *See* 72 P.S. §§ 7252-53; *see, Lilian v. Commonwealth,* 354 A.2d 250, 252 (Pa. 1976) (explaining the statutory process that "provide[s] for the refunding of improperly assessed or paid sales taxes, and set[s] forth the procedure whereby such refunds may be obtained"). Ranalli has chosen not to

seek the refund of what he claims was an incorrectly assessed sales tax; he is not entitled to merely rely on this voluntary, manufactured "loss" to support his claims for penalties under the UTPCPL and, for this reason, his UTPCPL claims must also be dismissed. *See Singh v. Wal-Mart Stores, Inc.*, No. 98-1613, 1999 U.S. Dist. LEXIS 8531, *26-27 (E.D. Pa. June 10, 1999) (holding that plaintiff did not suffer an ascertainable economic loss under the UTPCPL where he declined a full refund); *see also Homer v. Nationwide Mut. Ins. Co.*, No. 15-1184, 2016 U.S. Dist. LEXIS 114548, at *33 (W.D. Pa. Aug. 26, 2016) ("Because [plaintiff] has not pled justified reliance or ascertainable loss, his UTPCPL claim will be dismissed."), *aff'd*, 722 F. App'x 200 (3d Cir. 2018). Ranalli would not need to bring this lawsuit against Outdoor Research if he followed the statutory framework for obtaining a refund. The loss that he now bases his UTPCPL claims upon is one of his own making and his claims under the UTPCPL must be dismissed.

3. Ranalli's Complaint Is Devoid of Facts Sufficient to Plead a Cause of Action Under the UTPCPL.

Even if this Court decides that the assessment and collection of sales tax is within the ambit of the UTPCPL and that Ranalli has suffered an ascertainable loss of Outdoor Research's making, it must dismiss his UTPCPL claims as his Complaint wholly fails to provide any factual allegations upon which to base a claim. Other than identifying himself and Outdoor Research in Paragraphs 1 and 7 of his Complaint, Ranalli only includes the following three factual averments as to the purchase of the face mask from Outdoor Research: 1) Outdoor Research advertised price for a protective face mask was $20.00; 2) Vince Ranalli was charged and paid $22.03; and Outdoor Research unlawfully charged Vince Ranalli $2.03 in sales tax. (Complaint, ¶¶ 106-108). In the entirety of the Complaint, there are no other factual averments whatsoever plead in support of any of Ranalli's claims. (*See,* Complaint). Ranalli asserts legal conclusions, and alleges that Outdoor Research violated the UTPCPL, the PFCEUA, and committed conversion and unjust enrichment but he does not aver any facts upon which to base these assertions. (*See*, Complaint).

Ranalli's Complaint does not include any factual allegations whatsoever as to any representation made by Outdoor Research or what Ranalli's understanding of such a representation was at the time of purchase. (*See Generally*, Complaint). Further, Ranalli's Complaint does not include any citations to any website, advertising, or public facing media produced by Outdoor Research. (*See Generally*, Complaint).

Ranalli alleges that Outdoor Research violated three subsections of the UTPCPL: 201-(4)(v), (ix), and (xxi). (Complaint, ¶ 54). Subsections (v) and (ix) "apply only to claims of false advertising" and require the plaintiff to show that "(1) a defendant's representation is false; (2) it actually deceives or has a tendency to deceive; and (3) the representation is likely to make a difference in the purchasing decision." *Seldon v. Home Loan Servs.*, 647 F. Supp. 2d 451, 466 (E.D. Pa. 2009) (internal citations omitted). Similarly, under Subsection (xxi), the catch-all provision, Ranalli must show that Outdoor Research committed "a deceptive act that is likely to deceive a consumer acting reasonably under similar circumstances." *Kerr,* 2018 U.S. Dist. LEXIS 189502, at *14. Even if the collection of sales tax were trade or commerce under the UTPCPL, which it is not, Ranalli has simply failed to allege ***any facts whatsoever*** to support his allegations that Outdoor Research engaged in fraudulent, deceptive, or unfair conduct. *See* 73 P.S. § 201-3(a) (addressing "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"); *Kerr,* 2018 U.S. Dist. LEXIS 189502, at *15-16 (dismissing UTPCPL claim where the plaintiff "generally alleged elements under the UTPCPL without specific facts that would support the same").

Outdoor Research recognizes the impact of the recent *Gregg v. Ameriprise Fin., Inc.* decision on UTPCPL claims in Pennsylvania. As the Pennsylvania Supreme Court noted less than a month ago, under Subsection xxi's catch-all provision "deceptive conduct during a consumer transaction that creates a likelihood of confusion or misunderstanding and upon which

the consumer relies to his or her financial detriment does not depend on the actor's state of mind." *Gregg v. Ameriprise Fin., Inc.*, 2021 WL 607486, at *9 (Pa. Feb. 17, 2021). However, regardless of the impact the *Gregg* decision will have on UTPCPL claims moving forward, it ***does nothing to change pleading requirements*** under the Federal Rules of Civil Procedure. As discussed *supra*, the Third Circuit provided a two-step analysis to be applied to motions to dismiss for failure to state a claim, "instructing that all civil complaints must contain 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Fowler*, 578 F.3d at 210. Under *Fowler*, the factual and legal elements of a claim should be separated and the legal conclusions may be disregarded. *Id.* at 210-11. The District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. This claim for relief must be shown with facts. *Id.*

Here, the Court cannot consider Ranalli's factual averments in support of his UTPCPL claims to be sufficient to have plead a claim. Ranalli does not plead any facts as to as to when the purchase was made, how the purchase was made, whether the purchase was via Outdoor Research's website, a Outdoor Research application, or a Outdoor Research-affiliated third party website. He similarly fails to cite to any advertisement, any product literature, or even the name or model identifier of the mask in question. He simply states that the mask was listed at $20.00 and he paid $22.03. This is the sum total of factual allegations in the entirety of his Complaint. There is nothing in the Complaint that describes any conduct whatsoever that could be considered advertising under UTPCPL Subsections (v) and (ix). Nor is there any fact in the Complaint that describes any conduct whatsoever that could even be analyzed to be "deceptive conduct" which created a "likelihood of confusion or misunderstanding" under the new Pennsylvania decision governing Subsection xxi. Ranalli's UTPCPL claims must be dismissed.

E. Plaintiff Fails to State a Claim Under the PFCEUA.

This Court should dismiss Plaintiff's PFCEUA claim because a sales tax is not a "debt" and the Plaintiff has failed to state a cause of action under the UTPCPL, the mechanism by which a cause of action under the PFCEUA must be brought. The PFCEUA prohibits unfair or deceptive acts or practices in the collection of debt. 73 P.S. ¶ 2270.2. A "debt" is defined as "[a]n actual or alleged past due obligation, claim, demand, note or other similar liability of a consumer. . ." 73 P.S. § 2270.3. The PFCEUA applies only to prohibit certain collections activities on obligations that are in default. 73 Pa. C.S. § 2270.4(5) (a "creditor may not use any false, deceptive or misleading representation or means in connection with the collection of any debt"). The PFCEUA enforcement provision states that "[i]f a debt collector[4] or creditor[5] engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of the [UTPCPL]." 73 P.S. ¶ 2270.5(a). As such, the PFCEUA does not provide individuals with a private right of action; rather, individuals must use the remedial provisions of the UTPCPL to obtain relief. *Mellish v. CACH, LLC*, 2020 WL 1472405, at *5 (W.D. Pa. 2020) (*citing Kaymark v. Bank of Am., N.A.* 783 F.3d 168, 182 (3d Cir. 2015) *overruled in part on other grounds by Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019); *see also Hall v. Equifax Information Services, LLC*, 204 F. Supp. 3d 807, 810 (E.D. Pa. 2016) (citing *Benner v. Bank of America, N.A.*, 917 F. Supp. 2d 338, 359 (E.D. 2013). Accordingly, a plaintiff must be able to state a claim under the UTPCPL to plead a cause of action under the PFCEUA. *Prukala v. Chase Bank, N.A.*, 2020 WL 5351042, at *3 (M.D. Pa. 2020) (*citing Kaymark, supra* and *Baldwin v. Monterery Fin. Servs., Inc.*, 2017 WL 4767696, at *6 (M.D. Pa. 2017).

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[4] A "debt collector" is defined as "[a] person not a creditor conducting business within this Commonwealth, acting on behalf of a creditor, engaging or aiding directly or indirectly in collecting a debt owed or alleged to be owed a creditor or assignee of a creditor."

[5] A "creditor" is defined as "[a] person, including agents, servants or employee conducting business under the name of a creditor and within this Commonwealth, to whom a debt is owed or alleged to be owed." 73 P.S. § 2270.3

Ranalli's claims under the PFCEUA fail as a matter of law. As a threshold matter, the collection of a sales tax at the point of sale cannot be considered a "debt" as defined by the statute because it is not a past due obligation. Consumers are not previously obligated to pay sales tax prior to the purchase of an item. Additionally, Outdoor Research cannot be considered a "creditor" or "debt collector" because it is not in the business of collecting "debts" on behalf of the Commonwealth. Outdoor Research is in the business of selling merchandise. It only acts to assess and collect sales tax to fulfill its statutory obligations as discussed *supra.* Finally, Ranalli's claims under the PFCEUA also fail as he has not stated a legitimate claim under the UTPCPL. The PFCEUA does not provide for a private cause of action and therefore fails as a result of the inapplicability of the UTPCPL to the assessment of sales tax, Ranalli's failure to plead an ascertainable loss, and Ranalli's Complaint's failure to plead facts in support of a UTPCPL claim.

F. Plaintiff Fails to State Common Law Claims for Conversion & Unjust Enrichment.

1. Plaintiff Fails to State a Common Law Claim for Conversion.

Ranalli fails to set forth a legally cognizable claim for conversion as he consented to the transaction for the face masks and Outdoor Research was required to impose the sales tax by the Commonwealth. The classic definition of conversion, a common law tort under Pennsylvania law, is "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 659 n. 3 (Pa. Super. Ct. 2000). Money is considered chattel and may be the subject of conversion, but only when the plaintiff had a property interest in the money at the time of the alleged conversion. *Kia v. Imaging Sciences Int'l,* 735 F. Supp. 2d 256, 270 (E.D. Pa. 2010); *see also Shonberger v. Oswell*, 530 A.2d 112 (Pa. Super. 1987). However, the voluntary payment of fees prohibits and defeats a claim of

conversion. In *Lawn v. Enhanced Serv. Billing, Inc.*, the Eastern District dismissed a plaintiff's conversion claim on the grounds the plaintiff willing turned over payment to a vendor even in the face of allegations the plaintiff consented to the payment on fraudulent and misleading behavior on the part of the defendants. *Lawn*, 2010 WL 2773377, at *3. Moreover, the Eastern District held that "[e]ven though Plaintiff may have lacked complete knowledge of to whom the money was ultimately going, the fact that the money was parted with willingly prevents Defendant's actions from being classified as conversion." *Id.*

Additionally, a claim of conversion cannot be sustained in the face of lawful justification on the part of the asserted tortfeasor. *See Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp.*, 855 A.2d 818, 827 (Pa. 2004), *cert. denied*, 544 U.S. 978 (2005). Whether a defendant has acted without lawful justification is an element of a prima facie case of conversion, on which a plaintiff bears the burden of proof. When the defendant has lawfully come into possession of the personal property, the plaintiff's demand for the return of the personal property is an essential element of a conversion claim. *See Norriton East Realty Corp. v. Central-Penn Nat'l Bank*, 254 A.2d 637, 639 (Pa. 1969). Furthermore, a demand and refusal is an essential element of conversion. *PTSI v. Haley*, 71 A.3d 304, 314 (Pa. Super Ct. 2013).

Here, akin to the Plaintiff in *Lawn*, Ranalli voluntarily consented to the payment of sales tax when he purchased the face covering. That Ranalli alleges his consent was due to fraudulent or misleading behavior by Outdoor Research (an allegation specifically denied) does not negate the fact he willingly parted ways with his $2.03. Moreover, Ranalli's conversion claim fails as the sales tax at issue became Commonwealth property once the taxes were collected by Outdoor Research. *Stoloff*, 24 A.3d at 373. In *Stoloff*, the Superior Court of Pennsylvania dismissed Stoloff's argument that Section 7225 stood for the proposition that "private parties have a duty to refund improperly collected taxes". *Id.* at 327. Rather, as indicated above, the Superior Court

interpreted Section 7225 to mean that entities that collected taxes must hold such taxes in a trust fund for the Commonwealth. *Id.* As such, once a consumer pays a sales tax, whether properly or improperly imposed, the sales tax effectively becomes the property of the Commonwealth. *Id.* at 373. Accordingly, Outdoor Research never became in possession of Ranalli's sales tax. Lastly, Ranalli chose to file this lawsuit rather seek a refund of his alleged improperly assessed sales tax from the Department of Revenue, the entity that is in possession of the disputed funds. Accordingly, Ranalli wholly fails to assert cognizable claim for conversion against Outdoor Research.

2. Plaintiff Fails to State a Common Law Claim for Unjust Enrichment.

Ranallis claim for unjust enrichment fails as Outdoor Research did not retain the disputed sales tax. Unjust enrichment claims have historically been invoked following unconsummated or void contracts. *Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 936 (3d Cir. 1999) (*citing Zvonik v. Zvonik,* 435 A.2d 1236, 1239-40 (Pa. Super. Ct. 1981)). Under such circumstances, the law implies a quasi-contract, requiring that the defendant compensate the plaintiff for the value of the benefit conferred. *Sevast v. Kakouras*, 915 A.2d 1147, 1153 n.7 (Pa. 2007) ("An action based on unjust enrichment is an action which sounds in quasi-contract or contract implied in law.") (citation omitted). In other words, the defendant makes restitution to the plaintiff *in quantum meruit*. *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 998 (3d Cir.1987); *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001) (citations omitted). In *Lawn v. Enhanced Serv. Billing, Inc.*, the Eastern District denied to extend the unjust enrichment doctrine to any and all tort claims with allegations of the "unjust" taking of another chattels. *Lawn*, 2010 WL 2773377, at *6. Moreover, the court noted that there was no contract between plaintiff and defendants and no benefit was conferred to defendants stemming from any void or unconsummated contract. *Id.*

Here, no benefit was ever conferred to Outdoor Research when Ranalli paid $2.03 in sales tax. Again, it is vital to note the sales tax at issue became Commonwealth property once the taxes were collected by Outdoor Research. *Stoloff, supra.* Moreover, there are no allegations, nor can there be, that Outdoor Research retained the sales tax that it is legally required to hold in a trust for the Commonwealth. Lastly, there is no allegation that Ranalli did not receive the product he purchased from Outdoor Research. Accordingly, Ranalli has failed to set forth any facts which could suggest a claim for unjust enrichment.

G. Plaintiff's Claim for Injunctive Relief is Moot as Outdoor Research No Longer Assesses Sales Tax on Masks or Protective Face Coverings Sold in Pennsylvania.

Ranalli's final claim is one for injunctive relief. In Count XI of Ranalli's Complaint, he seeks an injunctive ruling enjoining all Defendants from continuing to assess and collect sales tax on masks and face coverings. This Count is moot as Outdoor Research no longer assesses or collects sales taxes on these products. Accordingly, Count XI of Ranalli's Complaint must be dismissed.

IV. CONCLUSION

For the foregoing reasons, Outdoor Research respectfully requests that this Court dismiss Plaintiff's case with prejudice, or, in the alternative, stay Plaintiff's case in accordance with the arguments set forth herein and in the Proposed Order of Court accompanying Outdoor Research's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March 2021 I electronically filed the foregoing **BRIEF IN SUPPORT OF RULE 12(b)(6) MOTION TO DISMISS** with the Clerk of Courts using the CM/ECF system which will send notification of such filing to all counsel of record. This document was filed electronically and is available for viewing and downloading from the ECF system.

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