

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 27 WAP 2023

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

Appellant,

v.

**AMERICAN EAGLE OUTFITTERS, INC., CARTER'S INC.,
CHICO'S FAS, INC., EXPRESS, INC., GABRIEL
BROTHERS, INC., GENESCO INC., HOT TOPIC, INC.,
J. CREW GROUP, INC., KOHL'S CORPORATION,
TAPESTRY, INC., THE GAP, INC., VERA BRADLEY,
INC.**

Appellees.

***AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION IN
SUPPORT OF APPELLEES**

**Appeal from the Superior Court's March 14, 2023 Order at 1320 WDA 2021,
reversing the July 14, 2021 Order of the Court of Common Pleas of Allegheny
County at No. GD-20-011057**

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I. STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

The Council On State Taxation (“COST”) is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. Today, COST’s membership has approximately 500 major multistate corporations involved in interstate and international business. COST’s objective is preserving and promoting equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST members employ a substantial number of citizens in the Commonwealth, provide goods and services to a broad consumer base in the Commonwealth, and conduct significant business operations within the Commonwealth. COST has participated as *amicus curiae* in many significant federal and state tax cases since its formation, including in Pennsylvania courts considering important state and local tax issues, such as *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth of Pennsylvania*, 171 A.3d 682 (Pa. 2017).

COST has a strong interest in ensuring that state sales tax systems are balanced, fair, and effective. Sales tax administrative systems that are unfair and inefficient make compliance for a seller and a purchaser more difficult. Ultimately, a burdensome and unfair system negatively impacts tax compliance and hinders economic competitiveness. COST members, who sell goods and services into the

Commonwealth, are concerned with the potential negative ramifications of this case and the undue burdens it will impose on them as sales tax collectors on behalf of the Commonwealth.

In this case, the Appellant utilizes a private action lawsuit under the State's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), rather than following the Commonwealth's established statutory sales tax refund procedures with the Department of Revenue ("Department"). This deviation from the statutory procedure places significant and excessive risks and liabilities on a seller in a manner that is inconsistent with a seller's statutorily required role as a sales tax collector in the Commonwealth. Allowing such private UTPCPL actions as used by the Appellant in this case undermines the integrity of both the Commonwealth's sales tax system and the Department. In the long term, allowing such private UTPCPL actions could harm the Commonwealth's sales tax revenue base.

To maintain the integrity of the established statutory sales tax refund procedures and prevent undue strain on both sellers and the Commonwealth, COST respectfully requests permission to file this *amicus* brief.

No person other than *amicus curiae*, its members, or their counsel authored this brief in whole or in part and none of the parties or their counsel, nor any other person or entity other than *amicus curiae* or their counsel, paid in whole or in part for the preparation of this *amicus* brief. Pa. R.A.P. 531(b)(2).

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

Amicus curiae accepts and incorporates Appellant’s statement of scope and standard of review.

III. STATEMENT OF THE QUESTION INVOLVED

Amicus curiae accepts and incorporates Appellees’ counterstatement of the question presented.

IV. STATEMENT OF THE CASE

Amicus curiae accepts and incorporates Appellees’ counterstatement of the case.

V. ARGUMENT

Although the Appellant argues that an alleged sales tax overcollection occurs “in the conduct of any trade or commerce” as contemplated by the UTPCPL, sales tax collection is a government function that lies outside the UTPCPL’s purview. 73 P.S. §§ 201-2(3); 201-3. Instead, a seller who collects sales tax serves as a statutorily required trustee of the Commonwealth, with the Department exercising “the powers and perform[ing] the duties heretofore . . . in the settlement of taxes, and the collection of taxes, license fees, and other moneys due the Commonwealth.” 72 P.S. § 201. Allowing private UTPCPL actions to

proceed in alleged sales tax overcollection cases, especially as raised by the Appellant in this case, inappropriately punishes a seller in its role solely as a collection agent for the Commonwealth. Moreover, the Commonwealth already provides an adequate remedy to purchasers to address situations when a sales tax has been over collected.

The private UTPCPL action also has harmful ramifications to the Commonwealth because it undermines the sales tax system, including stripping the Department of its tax administrative authority, and reduces Commonwealth resources that are diverted to address and litigate tax claims related to underlying class actions.

Further, allowing private actions potentially reduces Commonwealth revenue by increasing the risk in collecting tax because, when Department guidance is unclear on the thousands of products retailers sell, it places retailers in the untenable position of choosing between charging sales tax and being met with a UTPCPL claim, or not charging sales tax and having the Department audit and assess sales tax (plus interest and penalty). From a policy perspective, neither of these outcomes are consistent with what the UTPCPL was intended to accomplish.

1. **A Seller Should Not be Punished Under the UTPCPL as a Statutorily Required Tax Collector for the Commonwealth.**

a. **Liability Cannot be Established Under the UTPCPL Because Sales Tax Collection is a Government Function with a Seller Serving as a Statutorily Required Tax Collector for the Commonwealth.**

A seller serves as a statutorily required tax collector (trustee) for the Commonwealth. *See Lisowski v. Walmart Stores, Inc.*, 552 F. Supp. 3d 519, 529 (W.D. Pa. 2021), *aff'd*, 2022 WL 2763698 (3d Cir. 2022) (a seller collecting tax “was the Commonwealth’s tax collector, not a merchant engaged in commerce”). Pennsylvania sales tax is imposed on each separate retail sale and a purchaser is required to pay the tax to the seller. 72 P.S. § 7202(a). That seller is then obligated to remit that sales tax collected from the purchaser to the Commonwealth. 72 P.S. §§ 7202(a); 7237(a).

Sales tax is separate from the purchase price and a seller is prohibited from advertising the sales tax and purchase together as one price. 61 Pa. Code §§ 31.2(3); -(4). “A vendor may neither advertise nor otherwise state that the tax or any part thereof will be absorbed by the vendor or not be charged.” 61 Pa. Code § 31.2(3). An example provides that “an article selling for 99¢ may not be advertised at ‘\$1.05’ or ‘\$1.05 including tax’ but shall be advertised at ‘99¢ plus tax,’ ‘99¢ plus 6¢ tax’ or ‘99¢.’” 61 Pa. Code § 31.2(4). This ensures clarity and transparency for purchasers, prevents misleading pricing practices, and creates

uniformity and compliance among sellers on how sales taxes and purchase prices are displayed.

A seller’s responsibilities as a statutory tax collection agent (trustee)—collecting and remitting sales tax to (and on behalf of) the Commonwealth—are clear and distinguished from it making a sale. 72 P.S. § 7237(b)(1). As such, a seller is required to collect sales tax from a purchaser and all sales taxes collected “constitute a trust fund for the Commonwealth, and such trust shall be enforceable” against the seller. 72 P.S. § 7225. “[R]etailers wear a different hat when collecting taxes from the one they wear when they market and sell their products.” *Lisowski*, 552 F. Supp. 3d at 529. “[O]nce a purchaser pays the seller a tax, whether properly or improperly imposed, that tax effectively becomes Commonwealth property.” *Stoloff v. Nieman Marcus Grp., Inc.*, 24 A.3d 366, 373 (Pa. Sup. 2011). As a “trust tax,” the sales tax never becomes the seller’s property; it is the Commonwealth’s property held in “trust” by the seller until the seller remits the sales tax to the Commonwealth. Thus, a seller derives no profit and has no profit motive for collecting sales tax from purchasers. The seller’s duty to remit such taxes to the Commonwealth is mandatory. “The collection of sales tax is divorced from private profit.” *McLean v. Big Lots, Inc.*, 542 F. Supp. 3d 343, 350 (W.D. Pa. 2021) (Horan, J.) (“A retailer’s conduct in collecting taxes is not for purposes of profit, private gain, or greed.”).

The Superior Court aptly notes this proposition, looking at this Court’s decision in *Meyer v. Community College of Beaver County*, 93 A.3d 806 (Pa. 2014) as guidance. *Garcia v. Am. Eagle Outfitters, Inc.*, 293 A.3d 252 (Pa. Sup. 2023). A seller, “carrying out [] a public duty, in this case the collection of sales tax, is not trade or commerce within the meaning of the UTPCPL.” *Id.* at 260. Rather, it is “carrying out a public duty...in the conduct of government.” *Id.* (citing *Meyer*, 293 A.3d at 816 (Castille, C.J., concurring)). Collecting and remitting sales tax is merely fulfilling a seller’s public duty to the Commonwealth as a statutorily mandated collection agent.

b. Allowing Private UTPCPL Actions in Alleged Violations of Sales Tax Law Is Disproportionately Burdensome to a Seller.

In a private UTPCPL action, such as the present case, the damages are onerous. They can result in a third-party plaintiff being awarded: (1) the actual damages; (2) three times the actual damages sustained (treble damages); or (3) \$100 per transaction, whichever is greater; plus (4) attorney fees. 73 P.S. § 201-9.2(a).

This creates a significant dilemma for a seller where there are no favorable or “right” options. There is no way for a seller to escape a negative outcome. In this case, the Appellees sold cloth masks at the height of the COVID-19 pandemic. They appropriately asked the Department whether these masks were taxable. The Department responded that “cloth masks are subject to Pa sales tax.” R. 230a;

R. 233a. The Appellees collected sales tax on these masks, dutifully following the Department's instructions.

If the Appellees did not follow the Department's instructions and did not collect sales tax from their purchasers, the Commonwealth could collect the tax due from the Appellees, along with penalty (5 percent for each month) and interest. 72 P.S. § 7202(a); 61 Pa. Code §§ 21.8; 31.2(5). The financial risk imposed on sellers was great, particularly as the sellers pivoted to offering a new product for sale (cloth masks) during a time of newfound uncertainty and challenges stemming from the COVID-19 pandemic. Yet, if the Appellees follow the Department's instructions and collect sales tax from their purchasers, under the Appellant's reasoning, they are subject to private UTPCPL actions, incurring the cost of lengthy and protracted litigation and the risk of extremely high penalties of at least \$100 per transaction.

For a seller, weighing the costs of either alternative, it is a lose-lose situation. Allowing UTPCPL actions in these circumstances punishes a seller for tax issues that lack clarity and undermines the seller's ability to rely on the Department's guidance. This punishes a seller for simply doing business in the Commonwealth and creates a poor business climate, the cost of which is ultimately borne by purchasers (in passed on charges to cover such risk). Moreover, a seller may sell thousands of products in its store and the products offered may change

daily. The Appellant’s position places a hefty administrative burden on the seller to seek—and the Department to issue—formal guidance related to every single retail item. This does not further the goals of the Commonwealth’s sales tax system or the UTPCPL, which is intended to police “deceptive conduct which creates a likelihood of confusion or of misunderstanding[,]” not police taxability determinations. 73 P.S. § 201-2(4)(xxi).

With this threat of huge financial risk, a seller is forced to potentially:

- (1) increase the costs of products sold in the Commonwealth to cover the costs of potential UTPCPL actions and the penalties associated with these actions;
- (2) stop doing business in the Commonwealth because the risks and associated costs are too high in connection with products without clear taxability; or
- (3) take an audit risk and not collect, which burdens a seller with a potential audit liability (*i.e.*, tax, interest, and penalties), and the inability to collect any assessed tax from its purchasers. Regardless of the underlying merits of a UTPCPL action, the risk of the large penalties alone (*e.g.*, \$100 per transaction or treble damages) is too costly for a seller.

These problems are particularly burdensome and harmful for small businesses due to the punitive nature of the penalties. A small business typically operates with limited financial resources and has less capacity to manage challenging business environments. The threat of a single UTPCPL action is a

sufficient economic shock to shut down a small business that has limited resilience to absorb such a burden. Facing increased difficulties doing business in the Commonwealth associated with UTPCPL actions (*e.g.*, financial constraints, increased regulatory compliance, and increased administrative costs and operational challenges), a small business is more likely to stop doing business in the Commonwealth.

Ultimately, none of these options are reasonable paths for a seller who is statutorily mandated to collect the Commonwealth's sales tax. If the Commonwealth's policy is to prioritize the growth and sustainability of businesses, then it is inconsistent to permit UTPCPL actions for sales tax collection matters. All businesses are important to and directly correlated with the Commonwealth's well-being and economic prosperity.

2. **Allowing Private UTPCPL Actions in Alleged Violations of Sales Tax Law Ultimately Harms the Commonwealth.**

a. **Private UTPCPL Actions Weaken the Department's Powers and Duties Administering the Commonwealth's Sales Tax System.**

Sales tax laws are inherently complex and subject to different interpretations, especially in Pennsylvania with its complex provisions of what constitutes exempt clothing or a medical supply. The Department is conferred broad powers to administer the Commonwealth's sales tax system. This ensures that tax laws are applied uniformly and ensures fairness and compliance. The

Department, not private litigants, should be given full authority to initiate examinations, issue assessments, provide refunds, and otherwise enforce the tax laws it administers.¹

Allowing the Appellant to move forward with a UTPCPL action undermines the Department and the integrity of the Commonwealth's sales tax system.²

UTPCPL actions are an attempt to circumvent the Commonwealth's disallowance of class action lawsuits for sales tax matters. *Stranahan v. Cnty. of Mercer*, 697 A.2d 1049 (Pa. Commw. Ct. 1997); *see also, Aronson v. City of Pittsburgh*, 510 A.2d 871 (Pa. Commw. Ct. 1986); *Lilian v. Commonwealth*, 354 A.2d 250 (Pa. 1976). To administer sales tax laws consistently and equitably, a single agency must control the enforcement of those laws. *Id.* The Commonwealth has designated that responsibility to the Department, not private litigants seeking monetary gain during the COVID-19 pandemic. Moving the Appellant's claims forward

¹ See COST, *False Claims Acts Should Exclude State & Local Taxes*, <https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-fca-policy-statement-final.pdf> (last visited on Mar. 11, 2024) (COST's formal policy position adopted by its Board of Directors states that "[t]ax agencies should be the sole entities that administer and enforce state and local tax laws").

² See Karl Frieden, Fred Nicely, Priya Nair, COST, *The Best and Worst of State Sales Tax Systems* (Dec. 2022), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/270677_cost_salestaxbk_2022_final.pdf (Pennsylvania was given a "C" grade and received a demerit for potentially allowing UTPCPL actions on sales tax collection disputes).

intervenes with the Department's administration, interpretation, and enforcement of the Commonwealth's sales tax laws. UTPCPL actions usurp the Department's authority and create uncertainty and inequity among sellers. This is evident in the instant action in which the Appellant targets only large retailers and fashion design companies with thousands of transactions dealing with the disputed cloth masks.

b. Private UTPCPL Actions Create a Negative Business Climate That May Lead to Revenue Loss for the Commonwealth.

The additional burdens and risks associated with expanding the UTPCPL to apply to alleged improper collections of sales tax inherently create a negative business climate with serious implications for the stability of the Commonwealth's sales tax revenue base.

The damages of a UTPCPL action are punitive for sellers, and the risk of these actions increase the cost of doing business in the State. A reduction in economic activity and business investment contributes to lower tax collections.

Another factor that may lower tax collections is a seller choosing to not collect sales tax instead of running the risk of collecting sales tax and facing higher costs and penalties from a private UTPCPL action on certain products with unclear taxability at the time of sale. Undercollected sales tax can lead to revenue loss for the Commonwealth because all transactions that take place in the Commonwealth are not reviewed and audited by the Department. This strain on the

Commonwealth's budget also limits its resources to contribute to social welfare expenditures, making it more difficult to improve the Commonwealth's prosperity.

c. Private UTPCPL Actions are a Misuse of the Commonwealth's Resources and Revenue.

Although these private UTPCPL actions are between private litigants, these actions drain the Commonwealth's resources and revenue as well. These class actions are dependent on determining whether there is an improper sales tax collection. It hinges on whether the transaction at issue is subject to sales tax in the Commonwealth. Separate proceedings involving the State Attorney General and the Department have been necessary to make such taxability determinations. This takes away resources and revenue from the Commonwealth to litigate these issues, which are more effectively and efficiently resolved within the Department's oversight of administering the tax laws including issuing regulations, other written guidance, and its audit, assessment, and refund processes.

For example, a private UTPCPL class action was filed in the Philadelphia Court of Common Pleas against BJ's Wholesale Club Inc. ("BJ's") alleging that BJ's over collected sales tax on the full price of certain items purchased in its stores when customers used discount coupons. Complaint, *Myers v. BJ's Wholesale Club, Inc.*, No. 130800546 (Phila. Ct. Com. Pl., filed Aug. 8, 2013); see *Myers v. Commonwealth*, 289 A.3d 915, 918, n. 1 (Pa. 2023). The Plaintiff argued that Pennsylvania law charged sales tax only on the discounted price of these

items. Complaint, *Myers v. BJ's Wholesale Club, Inc.*, No. 130800546 (Phila. Ct. Com. Pl., filed Aug. 8, 2013). The class action against BJ's was stayed while the Plaintiff filed a separate petition to the Department of Revenue Board of Appeals requesting a sales tax refund on the same transactions at issue in the class action. *Myers v. BJ's Wholesale Club, Inc.*, No. 546 August, 2014 Phila. Ct. Com. Pl. LEXIS 680 (Phila. Ct. Com. Pl., filed June 25, 2014). The class action was stayed “until the Pennsylvania Department of Revenue [] had an opportunity to address and rule on the” the taxability of the discounted coupons. *Id.*

After several appeals, this refund claim came before this Court's review. In a 2023 decision, *Myers v. Commonwealth*, 289 A.3d 915 (Pa. 2023), this Court found in favor of the Commonwealth and against the Plaintiff. This Court concluded that coupons used in the purchases made at BJ's were taxable because they did not meet the prescribed requirements in 61 Pa. Code § 33.2(b)(2) for excluding discounts from the sales tax base. Thus, the purchaser was not entitled to a sales tax refund from the Commonwealth on the sales tax associated with the coupons. *Myers*, 289 A.3d at 928. The class action was subsequently discontinued by the Philadelphia Court of Common Pleas because of this Court's taxability determination of the coupons at issue. Order, *Myers v. BJ's Wholesale Club, Inc.*, No. 130800546 (Phila. Ct. Com. Pl., July 25, 2023).

Private UTPCPL actions are ineffective and inefficient uses of the State’s resources. If private UTPCPL class actions were not allowed, the Department could simply issue guidance that could be relied upon by purchasers and sellers, without draining additional State resources to participate in litigation.

3. **The Commonwealth Provides Purchasers with an Adequate Remedy for Sales Tax Overcollection.**

In addition, private UTPCPL actions are unnecessary because the Commonwealth already provides a purchaser with an adequate statutory remedy for any alleged overcollection: a direct refund from the State.

The Department is required to “refund all taxes, interest and penalties paid to the Commonwealth . . . to which the Commonwealth is not rightfully entitled.” 72 P.S. § 7252. This remedy is available to any “taxpayer who has actually paid tax . . . to the Commonwealth or to an agent or licensee of the Commonwealth authorized to collect taxes.” 72 P.S. § 10003.1(a). “[A]n agent or licensee of the Commonwealth authorized to collect taxes” includes a seller who collects sales tax from a purchaser on behalf of the Commonwealth. A purchaser who paid the sales tax “may petition the Department of Revenue for refund or credit of the tax.” *Id.*

Refund requests adhere to a statutory procedure and structure. The refund request must be made to the Department “within three years of actual payment” of the sales tax. *Id.* If the Department does not grant a refund or credit requested by the purchaser, the purchaser may appeal the Department’s decision to the Board of

Finance and Revenue on a petition for refund. 72 P.S. § 10003.1(e). The process is quite easy for a purchaser and requires only completing a “Board of Appeals Petition Form” REV-65, and it can be sent to the Board of Appeals electronically (eliminating the need to pay for postage).³ The Department also has clear guidance on this process.⁴

The Appellant has adequate recourse with the Commonwealth and could have sought a refund from the Department. Moreover, sellers are required to remit collected sales tax to the Department. Thus, it is the Department, not the seller, who holds the allegedly improperly collected tax dollars. Instead of seeking a refund from the party that has the funds and has a statutory refund mechanism to fully compensate the alleged harm, the Appellant chose to pursue a putative and potentially much more lucrative class action. *See Lisowski*, 2022 WL 2763698, 10-11 (finding that the purchaser’s “common law claims are barred by the existence of a statutory refund mechanism that is available to him” regarding the alleged overcollection of sales tax on 5-Hour Energy drink purchases).

³ Pa. Dep’t of Revenue, *Board of Appeals Petition Form*, www.revenue.pa.gov/FormsandPublications/otherforms/Documents/rev-65.pdf (last visited on March 13, 2024).

⁴ Pa. Dep’t of Revenue, *Board of Appeals Online Petition Center*, <https://www.eservices.revenue.pa.gov/FileAnAppeal> (last visited on March 13, 2024).

VI. CONCLUSION

Allowing private UTPCPL actions in alleged violations of sales tax overcollection is unduly burdensome to a seller and inconsistent with a seller's role as a statutorily mandated tax collector for the Commonwealth. Private UTPCPL actions do not align with fundamental policy considerations associated with the Commonwealth's sales tax system or with the Commonwealth's goals to both foster a robust business environment and generate sales tax revenue for the State. This is especially true when the Commonwealth already provides an adequate statutory remedy to address sales tax overcollection through a refund or credit process. For these foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court affirm the Superior Court's decision, rejecting Appellant's UTPCPL action.

Respectfully submitted,

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PUBLIC ACCESS POLICY COMPLIANCE CERTIFICATE

I, Jennifer W. Karpchuk, hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Jennifer W. Karpchuk
Jennifer W. Karpchuk

CERTIFICATION OF COMPLIANCE WITH RULE 531(b)(3)

This Amicus Brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 531(b)(3), because this brief contains 3,731 words.

/s/ Jennifer W. Karpchuk
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Dated: March 26, 2024

PROOF OF SERVICE

I, Jennifer W. Karpchuk, hereby certify that on this 26th day of March 2024, I caused a true and correct copy of the foregoing Amicus Brief to be served electronically via the Court's PACFile filing portal, upon the following:

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IN THE SUPREME COURT OF PENNSYLVANIA

Daniel Garcia, individually and behalf of all others : 27 WAP 2023
similarly situated, Appellant :
:

v.
American Eagle Outfitters, Inc., Carter's Inc., Chico's
FAS, Inc., Express, Inc., Gabriel Brothers, Inc.,
Genesco Inc., Hot Topic, Inc., J. Crew Group, Inc.,
Kohl's Corporation, Tapestry, Inc., The Gap, Inc.,
Vera Bradley, Inc., Appellees

PROOF OF SERVICE

I hereby certify that this 26th day of March, 2024, I have served the attached document(s) to the persons on the date(s)
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

Served: Abramowicz, Kevin J.
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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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/s/ Jennifer Weidler Karpchuk

(Signature of Person Serving)

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