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WARBY PARKER, INC.
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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 ANNETTE CODY, individually, and on
behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 WARBY PARKER, INC.; and DOES 1
through 25, inclusive,

18 Defendants.
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*[Orange County Superior Court Case
No. 30-2022-01273354-CU-MT-CXC]*

**NOTICE OF REMOVAL OF
ACTION TO FEDERAL COURT**

*[Filed concurrently with Civil Case
Cover Sheet; and Notice of Interested
Parties]*

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

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TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, defendant WARBY PARKER, INC. (“Warby Parker”), removes the action filed by Annette Cody (“Plaintiff”) in the Superior Court of the State of California in and for the County of Orange, captioned *Annette Code v. Warby Parker, Inc.*, Case No. 30-2022-01273354-CU-MT-CXC.

JURISDICTION AND VENUE

1. This is a civil action over which this Court has original subject matter jurisdiction under 28 U.S.C. § 1332, and removal is proper under 28 U.S.C. §§ 1441 and 1446, because it is a civil action that satisfies the requirements stated in the Class Action Fairness Act of 2005 (“CAFA”), codified in part at 28 U.S.C. § 1332(d).

2. This Court is in the judicial district and division embracing the place where the state court case was brought and is pending. Specifically, the United States District Court for the Central District of California embraces Orange County, California, which is the location of the state court in which Plaintiff brought this case and where it is pending. Thus, this Court is the proper district court to which this case has been removed. 28 U.S.C. §§ 1441(b) and 1446(a).

THE ACTION AND TIMELINESS OF REMOVAL

3. On August 2, 2022, Plaintiff filed a civil action in the Superior Court of the State of California in and for the County of Orange, entitled *Annette Code v. Warby Parker, Inc.*, Case No. 30-2022-01273354-CU-MT-CXC (the “State Court Action”).

4. On August 8, 2022, Plaintiff served Warby Parker with copies of the Summons, Complaint and related State Court documents. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of the Complaint and all additional process, pleadings, and orders served upon Warby Parker are attached to this Notice of Removal as **Exhibit “A”**.

1 9. Warby Parker’s Citizenship. A corporation is deemed to be a citizen of
2 the state where it is organized and the state where it has its principal place of
3 business. 28 U.S.C. § 1332(d)(10); *see also Davis v. HSBC Bank Nevada, N.A.*, 557
4 F.3d 1026, 1028 (9th Cir. 2009). As alleged in the Complaint, Warby Parker is
5 organized under the laws of the State of Delaware. (Compl. ¶ 8). Warby Parker’s
6 principal place of business is in New York, New York. Thus, for purposes of CAFA,
7 Warby Parker, as a corporation, is a citizen of Delaware and New York.

8 10. Minimal Diversity. CAFA requires only minimal diversity, which
9 exists where “any member of a class of plaintiffs is a citizen of a State different from
10 any defendant.” 28 U.S.C. § 1332(d)(2)(A). Minimal diversity of citizenship is
11 established here, because Plaintiff (who is a member of the putative class) is a citizen
12 of the State of California, and Warby Parker is a citizen of Delaware and New York.
13 28 U.S.C. § 1332(d)(2)(A).

14 11. Size of the Putative Class. Plaintiff seeks to represent a class of “[a]ll
15 persons within California, who (1) within one year of the filing of the Complaint
16 visited [Warby Parker’s] website, and (2) whose electronic communications were
17 caused to be intercepted, recorded, and/or monitored by [Warby Parker] without
18 prior consent.” (Compl. ¶ 19). For purposes of this Removal, Warby Parker has
19 limited the putative class to the period of August 2, 2021 to August 2, 2022. Plaintiff
20 alleges that the size of the putative class, although unclear at this time, is likely to
21 “number in the tens of thousands, if not more.” (Compl., ¶ 20).

22 AMOUNT IN CONTROVERSY UNDER CAFA

23 12. Removal is appropriate when it is more likely than not that the amount
24 in controversy exceeds the jurisdictional requirement, which in CAFA actions is
25 \$5,000,000 in the aggregate. *See, e.g., Cohn v. PetsMart, Inc.*, 281 F.3d 837, 839-
26 40 (9th Cir. 2002).

27 13. Plaintiff’s putative class action alleges that Warby Parker repeatedly
28 violated California Penal Code § 631, known as the California Invasion of Privacy

1 Act (“CIPA”). Plaintiff’s prayer for relief seeks, among other things, injunctive
2 relief, an award of statutory penalties pursuant to § 631(a), punitive damages,
3 prejudgment interest on all damages awarded, attorneys’ fees and costs, and such
4 other and further relief as the Court deems equitable and appropriate. (*See* Compl.,
5 Prayer for Relief).

6 14. Warby Parker denies Plaintiff’s CIPA claim entirely. For purposes of
7 removal, however, and without conceding that Plaintiff or the purported class
8 members are entitled to or could recover damages in any amount, the amount in
9 controversy in this putative class action, in the aggregate, is well in excess of
10 \$5,000,000, exclusive of interest and costs.

11 15. As stated above, Plaintiff alleges that the size of the putative class is
12 likely to “number in the tens of thousands, if not more.” (Compl., ¶ 20). Plaintiff
13 further alleges that each CIPA violation constitutes an “independent and discreet
14 violation” entitling the putative class to statutory penalties of “at least \$5,000.00.”
15 (Compl. ¶ 31). Assuming *arguendo* that Plaintiff is correct regarding the calculation
16 of statutory penalties and class size, the statutory penalties alone could exceed
17 \$5,000,000. *See Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 417 (9th Cir.
18 2018) (“the amount in controversy is not a prospective assessment of a defendant’s
19 liability” but the amount potentially “at stake.”).

20 16. As described above, the class-wide amount in controversy, even
21 exclusive of attorneys’ fees, is conservatively estimated to be well in excess of
22 \$5,000,000.

23 **NOTICE TO PLAINTIFF AND STATE COURT**

24 17. As required by 28 U.S.C. § 1446(d), Warby Parker is providing written
25 notice of the filing of this Notice of Removal to Plaintiff and is filing a copy of this
26 Notice of Removal with the Clerk of the Superior Court of the State of California,
27 in and for the County of Orange.

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1 Respectfully submitted,

2 Dated: September 7, 2022

BAKER & HOSTETLER LLP

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4 By: /s/Bethany G. Lukitsch
Bethany G. Lukitsch, Esq.
Kamran B. Ahmadian, Esq.

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6 *Attorneys for Defendant*
WARBY PARKER, INC.

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PROOF OF SERVICE

I, Arnel C. Glorioso, declare:

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11601 Wilshire Boulevard , Suite 1400, Los Angeles, CA 90025-0509. On September 7, 2022, I served a copy of the within document(s): **NOTICE OF REMOVAL OF ACTION TO FEDERAL COURT**

<input checked="" type="checkbox"/>	VIA U.S. MAIL. By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with this business’s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on September 7, 2022, at Los Angeles, California.

/s/ Arnel C. Glorioso
Arnel C. Glorioso

EXHIBIT A

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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ORANGE**

12 ANNETTE CODY, individually and on behalf of
13 all others similarly situated,

14 Plaintiff,

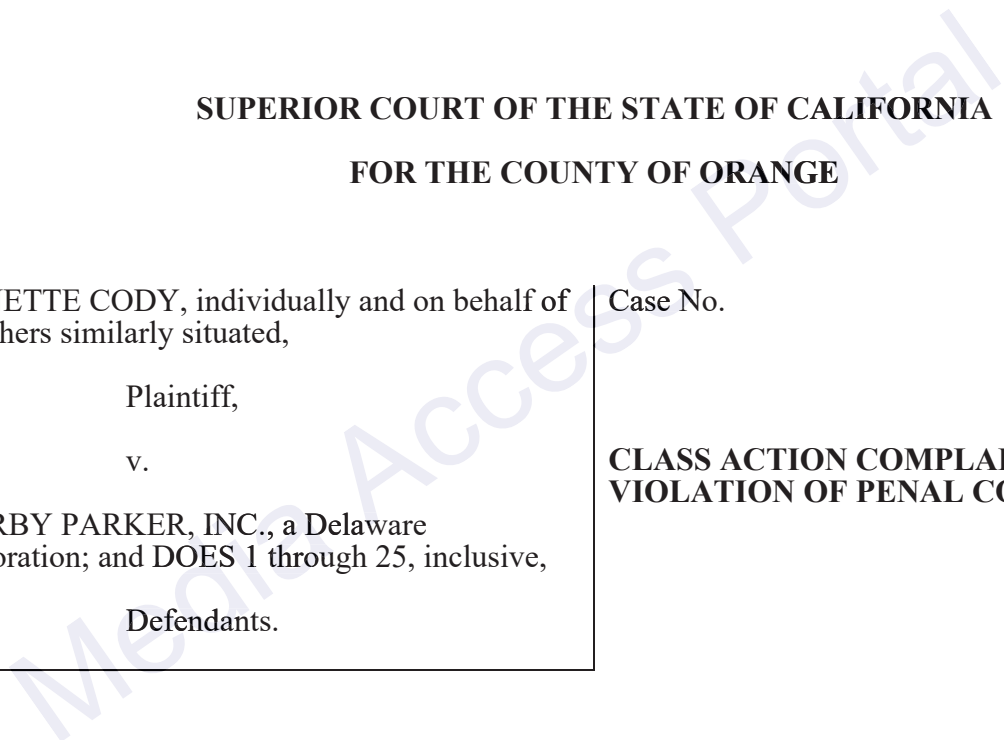
15 v.

16 WARBY PARKER, INC., a Delaware
corporation; and DOES 1 through 25, inclusive,

17 Defendants.
18

Case No.

**CLASS ACTION COMPLAINT FOR
VIOLATION OF PENAL CODE § 631**



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1 **INTRODUCTION**

2 1. Plaintiff Annette Cody (“Plaintiff”) brings this class action on her own behalf and on
3 behalf of all other Californians similarly situated against Defendant for its illegal wiretapping of their
4 electronic communications with Defendant’s website, www.warbyparker.com (the “Website”).

5 2. Unbeknownst to visitors to the Website, Defendant has secretly deployed “keystroke
6 monitoring” software that Defendant uses to surreptitiously intercept, monitor, and record the
7 communications (including keystrokes and mouse clicks) of all visitors to its Website. Defendant
8 neither informs visitors nor seeks their express or implied consent prior to this wiretapping.

9 3. Defendant has violated and continues to violate the California Invasion of Privacy Act
10 (“CIPA”), [California Penal Code](#) § 631, entitling Plaintiff and Class Members to relief pursuant
11 thereto.

12 **JURISDICTION AND VENUE**

13 4. This Court has jurisdiction over all causes of action asserted herein.

14 5. Venue is proper in this Court because Defendant knowingly engages in activities
15 directed at consumers in this County and engaged in the wrongful conduct alleged herein against
16 residents of this County.

17 6. Any out-of-state participants can be brought before this Court pursuant to California’s
18 “long-arm” jurisdictional statute.

19 **PARTIES**

20 7. Plaintiff Annette Cody is an adult resident of Orange County, California.

21 8. Defendant is a Delaware corporation. Defendant affects commerce within the state of
22 California.

23 9. The above-named Defendants, and their subsidiaries and agents, are collectively
24 referred to as “Defendants.” The true names and capacities of the Defendants sued herein as DOE
25 DEFENDANTS 1 through 25, inclusive, are currently unknown to Plaintiff, who therefore sues such
26 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally
27 responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
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1 Complaint to reflect the true names and capacities of the DOE Defendants when such identities
2 become known.

3 10. Plaintiff is informed and believes that at all relevant times, every Defendant was acting
4 as an agent and/or employee of each of the other Defendants and was acting within the course and
5 scope of said agency and/or employment with the full knowledge and consent of each of the other
6 Defendants.

7 11. Plaintiff is informed and believe that each of the acts and/or omissions complained of
8 herein was made known to, and ratified by, each of the other Defendants.

9 **FACTUAL ALLEGATIONS**

10 12. Without warning visitors or seeking their consent, Defendant has secretly deployed
11 wiretapping software on its Website. This software allows Defendant to surreptitiously record every
12 aspect of a visitor's interaction with the Website, including keystrokes, mouse clicks, data entry and
13 other electronic communications.

14 13. Defendant's actions amount to the digital equivalent of both looking over a consumer's
15 shoulder and eavesdropping on a consumer's conversation. Defendant's conduct is not only illegal, it
16 is offensive: indeed, a recent study conducted by the Electronic Privacy Information Center, a
17 respected thought leader regarding digital privacy, found that: (1) nearly 9 in 10 adults are "very
18 concerned" about data privacy; and (2) 75% of adults are unaware of the true extent to which
19 companies gather, store, and exploit their personal data when they visit commercial websites. *See*
20 <https://archive.epic.org/privacy/survey/> (last downloaded July 2022).

21 14. Within the past year, Plaintiff visited Defendant's Website. Plaintiff communicated
22 with a "person" that Plaintiff believed to be a human customer service representative. In reality,
23 Defendant's Website utilizes a sophisticated "chatbot" that convincingly impersonates an actual
24 human that encourages consumers to share personal information. At the same time, the Defendant
25 simultaneously records and stores the entire conversation using secretly embedded wiretapping
26 technology.

1 15. Both the “chatbot” and “replay” technology were created by third party providers who
2 license the technology to Defendant and with whom Defendant routinely shares the contents of the
3 wiretapped communications.

4 16. Defendant did not inform Plaintiff, or any of the Class Members, that Defendant was
5 secretly monitoring, recording, and sharing Plaintiff’s and the Class’s communications.

6 17. Defendant did not seek Plaintiff’s or the Class Members’ consent to monitoring,
7 recording, and sharing the electronic communications with the Website.

8 18. Plaintiff and Class Members did not know at the time of the communications that
9 Defendant was secretly intercepting, monitoring, recording, and sharing the electronic
10 communications.

11 **CLASS ALLEGATIONS**

12 19. Plaintiff brings this action individually and on behalf of all others similarly situated (the
13 “Class”) defined as follows:

14 **All persons within California, who (1) within one year of the filing of this**
15 **Complaint visited Defendant’s website, and (2) whose electronic communications**
16 **were caused to be intercepted, recorded, and/or monitored by Defendant without**
17 **prior consent.**

18 20. **NUMEROSITY**: Plaintiff does not know the number of Class Members but believes
19 the number to be in the tens of thousands, if not more. The exact identities of Class Members may be
20 ascertained by the records maintained by Defendant.

21 21. **COMMONALITY**: Common questions of fact and law exist as to all Class Members,
22 and predominate over any questions affecting only individual members of the Class. Such common
23 legal and factual questions, which do not vary between Class members, and which may be determined
24 without reference to the individual circumstances of any Class Member, include but are not limited to
25 the following:

- 26 a. Whether Defendant caused Plaintiff’s and the Class’s electronic communications with
27 the Website to be recorded, intercepted and/or monitored;
- 28 b. Whether Defendant violated CIPA based thereon;

- 1 c. Whether Plaintiff and Class Members are entitled to statutory damages pursuant to Cal.
2 Penal Code § 631(a);
3 d. Whether Plaintiff and Class Members are entitled to punitive damages pursuant to Cal.
4 Civil Code § 3294; and
5 e. Whether Plaintiff and Class Members are entitled to injunctive relief.

6 22. **TYPICALITY**: As a person who visited Defendant’s Website and had her electronic
7 communications recorded, intercepted and monitored, Plaintiff is asserting claims that are typical to
8 the Class.

9 23. **ADEQUACY**: Plaintiff will fairly and adequately protect the interests of the members
10 of The Class. Plaintiff has retained attorneys experienced in the class action litigation. All individuals
11 with interests that are actually or potentially adverse to or in conflict with the class or whose inclusion
12 would otherwise be improper are excluded.

13 24. **SUPERIORITY**: A class action is superior to other available methods of adjudication
14 because individual litigation of the claims of all Class Members is impracticable and inefficient. Even
15 if every Class Member could afford individual litigation, the court system could not. It would be
16 unduly burdensome to the courts in which individual litigation of numerous cases would proceed.

17 **CAUSE OF ACTION**

18 **Violations of the California Invasion of Privacy Act**

19 **Cal. Penal Code § 631**

20 25. Section 631(a) of California’s Penal Code prohibits and imposes liability upon any
21 entity that “by means of any machine, instrument, contrivance, or in any other manner,” (1)
22 “intentionally taps, or makes any unauthorized connection, whether physically, electrically,
23 acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument,
24 including the wire, line, cable, or instrument of any internal telephonic communication system,” or (2)
25 “willfully and without the consent of all parties to the communication, or in any unauthorized manner,
26 reads, or attempts to read, or to learn the contents or meaning of any message, report, or
27 communication while the same is in transit or passing over any wire, line, or cable, or is being sent
28 from, or received at any place within this state” or (3) “uses, or attempts to use, in any manner, or for

1 any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with,
2 employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any
3 of the acts or things mentioned above in this section”.

4 26. Section 631 of the California Penal Code applies to internet communications and thus
5 applies to Plaintiff’s and the Class’s electronic communications with Defendant’s Website. (“Though
6 written in terms of wiretapping, Section 631(a) applies to Internet communications. It
7 makes liable anyone who ‘reads, or attempts to read, or to learn the contents’ of a communication
8 ‘without the consent of all parties to the communication.’ Cal. Penal Code § 631(a).” *Javier v.*
9 *Assurance IQ, LLC*, 21-16351, 2022 WL 1744107, at *1 (9th Cir. May 31, 2022).

10 27. The software employed by Defendant on its Website to record Plaintiff’s and the
11 Class’s electronic communications qualifies as a “machine, instrument, contrivance, or ... other
12 manner” used to engage in the prohibited conduct alleged herein.

13 28. At all relevant times, Defendant intentionally caused the internet communication
14 between Plaintiff and Class Members with Defendant’s website to be tapped and recorded.

15 29. At all relevant times, Defendant willfully, and without the consent of all parties to the
16 communication, caused to be intercepted, read or attempted to be read, logged, and stored, the contents
17 of electronic communications of Plaintiff and Class Members with its Website, while the electronic
18 communications were in transit over any wire, line or cable, or were being sent from or received at any
19 place within California.

20 30. Plaintiff and Class Members did not consent to any of Defendant’s actions in
21 implementing wiretaps on its Website, nor did Plaintiff or Class Members consent to Defendant’s
22 intentional access, interception, recording, monitoring, reading, learning and collection of Plaintiff and
23 Class Members’ electronic communications with the Website.

24 31. Defendant’s conduct constitutes numerous independent and discreet violations of Cal.
25 Penal Code § 631(a), entitling Plaintiff and Class Members to injunctive relief and statutory penalties
26 of at least \$5,000.00 per violation.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief against Defendant:

1. An order certifying the Class, naming Plaintiff as the representative of the Class and Plaintiff's attorneys as Class counsel;
2. An order declaring Defendant's conduct violates CIPA;
3. An order of judgment in favor of Plaintiff and the Class and against Defendant on the cause of action asserted herein;
4. An order enjoining Defendant's conduct as alleged herein and any other injunctive relief that the Court finds proper;
5. Statutory penalties to Plaintiff and the Class pursuant to Cal. Penal Code § 631(a);
6. Punitive damages to Plaintiff and the Class pursuant to Cal. Civil Code § 3294;
7. Prejudgment interest;
8. Reasonable attorneys' fees and costs incurred in this action pursuant to Cal. Code Civ. Proc. § 1021.5; and
9. All other relief that would be just and proper as a matter of law or equity, as determined by the Court.

Dated: August 2, 2022

PACIFIC TRIAL ATTORNEYS, APC

By: 

Scott. J. Ferrell
Attorneys for Plaintiff

ClassAction.org

This complaint is part of ClassAction.org's searchable [class action lawsuit database](#)
