

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ROBERT LAPOINTE JR., on behalf of himself  
and all other similarly situated employees,

Plaintiff,

- against -

TARGET CORPORATION,

Defendant.

No. 16 Civ. \_\_\_\_\_

**NOTICE OF REMOVAL**

Removed from the Supreme Court of the  
State of New York, County of New York  
(Index No. 162558/2015)

To the Clerk of Court, plaintiff Robert LaPointe, Jr., and plaintiff's counsel of record:

PLEASE TAKE NOTICE THAT defendant Target Corporation ("Target"), through its undersigned counsel, hereby removes this civil action from the Supreme Court of the State of New York, County of New York (the "New York Supreme Court"), where it is now pending, to this Court, based on diversity of citizenship jurisdiction under 28 U.S.C. section 1332 (as amended by the Class Action Fairness Act of 2005 ("CAFA")), 28 U.S.C. sections 1332(d), 1453, and 1711–15), and removal jurisdiction under 28 U.S.C. sections 1441(a) and 1446. In support of its removal, Target alleges as follows:<sup>\*</sup>

**Background**

1. On December 9, 2015, plaintiff Robert LaPointe Jr. commenced a civil action in the New York Supreme Court against Target entitled "*Robert LaPointe Jr., on behalf of himself and all other similarly situated employees v. Target Corporation*", Index No. 162558/2015 (the "Action"). True and correct copies of plaintiff's complaint in the Action (the "Complaint" or

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\* Target expressly reserves all questions other than that of removal for the purpose of further pleadings.

“Cmplt.”) and accompanying summons are attached hereto as Exhibit A. The allegations of the Complaint are incorporated by reference without admitting the truth of any of them.

2. On December 9, 2015, plaintiff delivered a copy of the Complaint to counsel for Target pursuant to New York Civil Practice Law and Rules section 312-a. True and correct copies of the statement of service by mail and acknowledgement of receipt are attached hereto as Exhibit B.

3. On January 8, 2016, Target perfected service of the Complaint when counsel for Target completed the acknowledgement of receipt and delivered one copy to counsel for plaintiff. A true and correct copy of the completed acknowledgment of receipt is attached hereto as Exhibit C.

4. The Complaint asserts two causes of action under the New York Labor Law for (1) alleged nonpayment of overtime wages due to misclassification as exempt from the overtime requirements of the New York Labor Law and (2) alleged failure to provide accurate wage statements. (Cmplt., ¶¶ 23–32.) The relief plaintiff seeks on behalf of himself and the proposed class includes allegedly unpaid wages, interests, attorneys’ fees, costs, statutory penalties, expert fees, and injunctive relief. (*Id.*, ¶¶ 27, 32, Prayer for Relief.)

5. No further proceedings in the State Supreme Court have taken place in the Action.

**The Notice of Removal Is Timely and Venues Lies in This District**

6. This notice of removal is effected properly and timely pursuant to 28 U.S.C. section 1446(b)(1), because it is filed within thirty (30) days of January 8, 2016, the date Target perfected service pursuant to New York Civil Practice Law and Rules section 312-a.

7. As required by 28 U.S.C. section 1446(d), promptly after filing this Notice of Removal, Target will give written notice of the removal to plaintiff, and will file a copy of this Notice of Removal with the Clerk of the New York Supreme Court.

8. Venue of this Action exists in this District pursuant to 28 U.S.C. section 1441(a), because the State Supreme Court is located within the District.

9. If any question arises as to the propriety of the removal of this action, Target requests the opportunity to brief any disputed issues and, if appropriate, to present live testimony and oral argument in support of its positions.

**Removal Is Proper Under Traditional Diversity Jurisdiction (28 U.S.C. § 1332(a))**

10. The Action may be properly removed on the basis of diversity of citizenship jurisdiction, in that it is a civil action between citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(a), 1441.

***The Citizenship of the Parties Is Diverse***

11. Target is informed and believes that plaintiff is now, and was at the time the Action was commenced, a citizen of the State of New York within the meaning of 28 U.S.C. section 1332(a). For diversity purposes, a person is a “citizen” of the state in which he is domiciled. *Palazzo ex rel. Delmage v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000). A person’s domicile is the place he resides with the intention to remain or to which he intends to return. *Id.* In the Complaint, plaintiff alleges that he resides in Saratoga County, New York. (Cmplt., ¶ 3.)

12. Target is now, and was at the time the Action was commenced, a citizen of a state other than the State of New York within the meaning of 28 U.S.C. section 1332(c)(1). Target is now, and was at the time the Action was commenced, a for-profit corporation organized under the laws of the State of Minnesota with its principal place of business in the State of Minnesota.

(Declaration of Michael Brewer in Support of Defendant's Notice of Removal ("Brewer Decl."), ¶¶ 2–3.)

13. Target is the only defendant named in the Action. Accordingly, no named defendant is a citizen of New York, in which state the Action was filed, and there is complete diversity of citizenship between the parties.

***The Amount in Controversy Exceeds \$75,000***

14. Courts may look to documents outside the pleadings—including settlement demands—to determine the amount in controversy where, as here, damages may not be readily ascertained on the face of the complaint. *Yong Qin Luo v. Mikel*, 625 F.3d 772, 775–76 (2d Cir. 2010) (citing *United Food & Commercial Workers Union Local 919, AFL-CIO v. CenterMark Props. Meriden Square Inc.*, 30 F.3d 298, 305 (2d Cir. 1994)). See also *Vermande v. Hyundai Motor Am., Inc.*, 352 F. Supp. 2d 195, 200 (D. Conn. 2004) (“[M]ost courts have held—and this Court agrees—that § 1446(b) is not limited to papers filed in the litigation and that the reference to ‘other paper’ in the statute can include pre-removal correspondence between the parties, including, as here, settlement offers.”) (collecting cases).

15. Target alleges that the amount in controversy for plaintiff's individual claims for allegedly unpaid overtime exceeds the jurisdictional minimum on two separate and distinct grounds.

16. First, Target has calculated an estimate of the amount in controversy for plaintiff's individual claims for allegedly unpaid wages based on certain allegations in the Complaint, coupled with information obtained from Target's corporate records.

17. Paragraph 20 of plaintiff's Complaint sets forth the alleged legal and factual basis for plaintiff's overtime wage claims:

Throughout his employment with Defendant, Plaintiff was required to work approximately forty-eight (48) to fifty-four (54) hours per week as well as being required to attend an hour and one half long meeting once a month and another one hour and one half long meeting once per quarter. Plaintiff would routinely work [sic] through his meal break period. Additionally, Plaintiff regularly had work to do once he returned home that consisted of emailing his supervisors to update them on the team's performance that day. However, Plaintiff never received any overtime pay of time and one-half his regular rate of pay for any hours worked over forty (40) in a week. As such, because of Defendant's misclassification of Plaintiff as an exempt employee, Plaintiff is owed approximately eight (8) to fourteen (14) hours per week of overtime at time and one-half his regular rate of pay.

18. Thus, plaintiff alleges that he is owed overtime wages at a rate of one-and-one-half times his regular rate of compensation for approximately eight (8) to fourteen (14) hours per workweek. (*Id.*)

19. A claim for such overtime wages is governed by a six-year statute of limitations. N.Y. Lab. L. § 198(3).

20. To calculate the overtime wages placed at issue by plaintiff's allegations, Target retrieved personnel data for plaintiff for the period from plaintiff's start date of April 3, 2011, through his termination on May 22, 2015, which included data pertaining to plaintiff's dates of employment and annual rates of compensation. (Brewer Decl., ¶ 4.) These data were accurately created and maintained in the regular course of Target's business and according to its regular practices. (*Id.*)

21. Using this data and the allegations concerning the amount of overtime hours plaintiff worked each week, Target has undertaken to quantify the amount of overtime damages that would be owed to plaintiff assuming his allegations as to failure to pay overtime wages were found to be true. Based on plaintiff's number of weekly pay periods and average hourly wage rates, the amount of overtime damages sought is over \$89,000. (Declaration of Paul F. White, Ph.D., in Support of Defendant's Notice of Removal ("White Decl."), ¶ 10.)

22. These calculations are based on the lowest amount of overtime hours plaintiff alleges he worked each week, and do not account for the statutory penalties to which plaintiff claims he is entitled.

23. Thus, the amount in controversy exceeds the \$75,000 jurisdictional minimum.

24. Second, Target also was able to ascertain the amount in controversy based on plaintiff's pre-filing settlement demand. Prior to filing the Complaint, plaintiff made a settlement demand upon Target for \$90,000.

25. In setting forth this amount in controversy, Target does not admit that it owes plaintiff any form of unpaid wages; that plaintiff is entitled to any statutory civil penalty; that Target is obligated to provide any of the relief plaintiff seeks; or that defendant is liable to plaintiff in any amount. On the contrary, Target alleges that plaintiff received all wages owed and that Target is not liable to plaintiff in any amount or for any relief.

***Traditional Diversity of Citizenship Jurisdiction Exists***

26. As shown above, Target has demonstrated each of the elements required for traditional diversity jurisdiction, and therefore the Action is properly removed to this Court.

**Removal Is Also Proper Under CAFA (28 U.S.C. § 1332(d))**

27. The Action also is properly removed to this Court pursuant to the rules of diversity of citizenship jurisdiction as amended by the Class Action Fairness Act ("CAFA"), 28 U.S.C. sections 1332(d), 1453, and 1711–15.

28. CAFA amended 28 U.S.C. section 1332 to provide that an action is removable to federal court if (a) the action is a class action; (b) any member of the putative class is a citizen of a state different from any defendant; (c) the proposed class members number at least 100; and

(d) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(1)–(6). Each of these requirements is met here.

***The Action Is Brought as a Class Action***

29. CAFA defines a class action as “any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). In the Complaint, plaintiff states that he “brings this action on his own behalf and as a class action pursuant to CPLR Article 9....” (Cmplt., ¶ 5.) The Complaint defines the proposed class and alleges that the requirements for maintaining a class action are satisfied. (*Id.*, ¶¶ 5, 7–15.) Accordingly, this Action is a class action.

***The Citizenship of the Parties Is Minimally Diverse***

30. CAFA requires only minimal diversity, meaning one member of the proposed class must be diverse from one defendant. *See* 28 U.S.C. § 1332(d)(2)(A).

31. As stated above (*see supra* ¶¶ 11–13), Target is now, and was at the time the Action was commenced, a citizen of a state other than the State of New York within the meaning of 28 U.S.C. section 1332(c)(1); it is the only defendant named in this Action; and plaintiff is now, and was at the time the Action was commenced, a citizen of the State of New York within the meaning of 28 U.S.C. section 1332(a).

32. Therefore, Target has demonstrated minimal diversity of citizenship.

***The Proposed Classes Contain at Least 100 Members***

33. Paragraph 5 of the Complaint defines the proposed class as follows:

All current and former Operations Group Leaders (the “Group Leaders”) who worked in any of Defendant’s warehouses located in the State of New York at any time during the Class Period and who (a) were not paid overtime of time and one-

half their regular rate of pay for all hours worked over forty (40) in a week; and/or (b) were not provided accurate wage statements.

34. Plaintiff defines the “Class Period” as “the period commencing six (6) years prior to the filing of this action and continuing until such further date as the practices complained of are discontinued.” (Cmplt., ¶ 1.)

35. Using payroll data that Target accurately created and maintained in the regular course of its business and according to its regular practices, Target generated a list of all Operations Group Leaders who worked in one of Target’s warehouses located in the State of New York since January 1, 2010 (approximately six years prior to the filing of the Complaint). (Brewer Decl., ¶¶ 5–6.) The payroll data indicate that Target employed approximately 209 Operations Group Leaders at its two warehouses in the State of New York since January 1, 2010. (White Decl., ¶ 11.) Accordingly, the proposed class contains approximately 209 individuals.

36. Therefore, Target has demonstrated that the proposed class includes more than 100 individuals.

***The Amount in Controversy Exceeds \$5,000,000***

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

38. A defendant’s notice of removal “need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). Where, as here, the amount in controversy is not readily apparent on the face of the complaint, a court may consider facts in the removal petition to determine the potential damages at issue. *Henry v. Warner Music Grp. Corp.*, No. 13 Civ. 5031(PGG), 2014 WL 1224575, at \*3 (S.D.N.Y. Mar. 24, 2014).

39. Here, the amount in controversy for plaintiff's claim for overtime wages on behalf of the proposed class—just one of the two causes of action asserted in the Complaint—exceeds \$5,000,000, as explained below.

40. In the Complaint, plaintiff alleges that Target failed to pay overtime wages at one-and-one-half his regular rate of pay. Based on these alleged violations, plaintiff, on behalf of himself and the proposed class, seeks to recover compensatory damages, pre- and post-judgment interests, attorneys' fees and costs, expert fees, and "such further relief as this Court deems just and proper." (Cmplt., ¶ 27, Prayer for Relief.)

41. Target has undertaken to quantify the amount of overtime damages that would be owed to the proposed class members if all of plaintiff's class allegations as to failure to pay overtime wages were found to be true. Based on the proposed class members' number of weekly pay periods and average hourly wage rates, the amount of overtime damages sought is over \$5,000,000 even if Target assumes that all proposed class members worked only five hours of overtime each week, substantially less than the eight to fourteen hours that plaintiff alleges he himself worked in overtime. (White Decl., ¶ 9.) This estimate also does not include the statutory penalties to which plaintiff claims proposed class members are entitled.

42. In setting forth this calculation, Target does not admit that it is liable to plaintiff and the proposed class in this amount or any amount. In fact, Target denies that it is liable to plaintiff and the proposed class in any amount.

#### ***CAFA Jurisdiction Exists***

43. As shown above, Target has demonstrated each of the elements required for CAFA jurisdiction, and therefore the Action is properly removed to this Court.

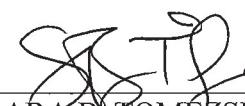
**Conclusion**

44. Based on the foregoing, all requirements under 28 U.S.C. sections 1332, 1441 and 1446 are satisfied and the Action may be removed to this Court on grounds of traditional diversity of citizenship jurisdiction. In addition, all requirements under CAFA are satisfied and the Action may be removed to this Court on grounds of CAFA jurisdiction as well.

Dated: New York, New York  
January 28, 2016

Respectfully submitted,

By:

  
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