IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-03631

GABRIELLA GARITANO, individually and on behalf of all similarly situated persons,

Plaintiff,

v.

CHICK-FIL-A, INC., a Georgia corporation,

Defendant.

DEFENDANT'S NOTICE OF REMOVAL

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

PLEASE TAKE NOTICE THAT, pursuant to the Class Action Fairness Act ("CAFA"), Defendant Chick-fil-A, Inc. ("Defendant" or "CFA, Inc.") respectfully removes the above-captioned action, which was originally filed as Docket No. 2020CV31906 in the District Court, El Paso County, Colorado (the "State Court Action"), to the United States District Court for the District of Colorado. Removal is proper on the following grounds:

I. BACKGROUND

1. On October 25, 2020, Plaintiff Gabriella Garitano ("Garitano") filed the State Court Action. According to the Complaint, a copy of which is attached as Exhibit A, Garitano is a resident of the state of Colorado. (Compl. ¶ 2.)

2. The Complaint names CFA, Inc. as the sole Defendant. CFA, Inc. is a Georgia corporation, and its principal place of business is located at 5200 Buffington Road, Atlanta, Georgia 30349. (*Id.* ¶ 3.)

3. CFA, Inc. is the franchisor of a system of quick-service chicken restaurants located throughout the United States. The thrust of the Complaint is that CFA, Inc. allegedly "employed" Garitano and allegedly failed to provide her with meal and rest breaks required under Colorado law. (*Id.* ¶¶ 7-9.) CFA, Inc., however, never employed Garitano. Rather, Garitano was employed by an independent franchised business owner or owners ("Operators").[1] In fact, of the 54 Chick-fil-A brand restaurant businesses in Colorado, currently, only two are operated by CFA, Inc., while 50 are owned and operated by independent franchised Operators and two are operated by independent food service providers pursuant to license agreements ("Licensees") as part of a separate franchise program. The locations of these Chick-fil-A brand restaurants in Colorado and the identity of the separate corporate entities that independently own and operate the restaurant businesses at these locations are reflected in public records, including on the Colorado Secretary of State's website.

4. Although CFA, Inc. has never been Garitano's employer, Garitano asserts the following causes of action against CFA, Inc.: (i) a violation of the Colorado Wage Claim Act, Colo. Rev. Stat. § 8-4-101 *et seq.*, (ii) a violation of the Colorado Minimum Wage Act, *id.* § 8-6-101 *et seq.*, and (iii) Civil Theft, *id.* § 18-4-405. (Compl. ¶¶ 12-30.)

[1] Pursuant to a franchise agreement, franchisees are solely responsible for the operation of their restaurant businesses, including, but not limited to, the hiring, managing, discipline, treatment, payment and termination of any and all restaurant employees.

5. Similarly, even though only two Chick-fil-A brand restaurant businesses in Colorado are operated by CFA, Inc., Garitano alleges her claims against CFA, Inc. on behalf of a putative class of all persons who worked at any Chick-fil-A brand restaurant business in Colorado. (*Id.* ¶ 10.)

II. JURISDICTION UNDER CAFA

6. This Court has original jurisdiction over this putative class action under CAFA, codified in pertinent part at 28 U.S.C. §§ 1332(d) and 1453(b), because, solely for removal purposes: (i) the number of members of the putative class in the aggregate is at least 100, (ii) the citizenship of at least one proposed class member is diverse from that of at least one defendant (in this case, the only named defendant), and (iii) the purported amount in controversy exceeds $5 million, exclusive of interest and costs.

A. The putative class consists of at least 100 members.

7. CAFA requires that the number of members of all proposed classes in the aggregate be at least 100. 28 U.S.C. § 1332(d)(5)(B).

8. Garitano alleges that the putative class consists of hourly employees who worked at Chick-fil-A restaurants in Colorado within the statute of limitations. (Compl. ¶ 10.) Although CFA, Inc. disputes that it employed Garitano or the hourly employees employed solely by the independent franchised Operators and Licensees operating the majority of Chick-fil-A brand restaurant businesses in Colorado, for removal purposes, CFA, Inc. currently owns and operates two Chick-fil-A restaurant locations in Colorado. At each of these two CFA, Inc.-operated

locations, CFA, Inc. has more than 60 hourly employees.[2] Thus, during the past three years, CFA, Inc. has employed more than 100 employees at these two Colorado locations alone.[3]

9. Based on the number of employees in the two Colorado restaurant locations that CFA, Inc. currently operates and given that there are 52 additional Chick-fil-A brand restaurant businesses in Colorado that are operated by independent franchised Operators and Licensees, assuming *arguendo* for purposes of removal only that Garitano's allegations regarding employment by CFA, Inc. of employees at Chick-fil-A brand restaurants in Colorado were true (which CFA, Inc. denies), there are more than 100 employees alleged by Garitano to be part of the putative class she seeks to represent.

10. Because this putative class consists of at least 100 proposed members, the requirement of 28 U.S.C. § 1332(d)(5)(B) is satisfied.

B. The citizenship of at least one putative class member is different from the citizenship of at least one Defendant.

11. Under CAFA, federal district courts "shall have original jurisdiction of any civil action in which the matter . . . is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant[.]" 28 U.S.C. § 1332(d)(2)(A).

[2] Technically, since January 1, 2020, the hourly Team Members working in the CFA, Inc.-operated restaurants have been employed by COR Restaurant Services, LLC, a wholly owned subsidiary of CFA, Inc. and a Georgia corporation.

[3] Further, assuming *arguendo* for purposes of CAFA removal only that, as alleged in the Complaint, CFA, Inc. were the employer of the hourly employees at other Chick-fil-A brand restaurants in the State of Colorado (which CFA, Inc. denies), and assuming that a class action could be certified based on the facts alleged here (which CFA, Inc. also denies), there are approximately 54 Chick-fil-A brand restaurants operating in Colorado.

12. A corporation is a citizen of "every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business[.]" *Id.* § 1332(c)(1).

13. CFA, Inc. is incorporated in the State of Georgia and has its principal place of business at 5200 Buffington Road, Atlanta, Georgia 30349 (constituting the location of the Company's center of direction, control, and coordination, *i.e.*, its "nerve center"). (*See* Compl. ¶ 3.) Thus, CFA, Inc. is a citizen of Georgia.

14. Garitano is a citizen of the State of Colorado, and she alleges in her Complaint that she was employed by CFA, Inc. in Colorado. (Compl. ¶ 2.)

15. Accordingly, the minimal diversity requirement of 28 U.S.C. § 1332(d)(2)(A) is satisfied because there is diversity of citizenship between Garitano and CFA, Inc.

C. The amount in controversy exceeds $5 million, exclusive of interest and costs.

16. Under CAFA, federal district courts "shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs[.]" 28 U.S.C. § 1332(d)(2).

17. The claims of individual class members are aggregated when determining whether CAFA's $5 million jurisdictional threshold is met. *See id.* § 1332(d)(6).

18. There are 54 Chick-fil-A brand restaurant businesses in Colorado. This information can be verified based upon a review of public documents, including the Colorado Secretary of State's website.

19. Assuming for purposes of CAFA removal only, however, as alleged in the Complaint, that CFA, Inc. could be deemed an "employer" of Garitano and all other hourly

workers in Colorado working at Chick-fil-A brand restaurants (which CFA, Inc. denies), assuming a class action could be certified (which CFA, Inc. denies), and assuming that Garitano and the individuals in the putative class would be entitled to any recovery at all (which CFA, Inc. denies), the allegations in the Complaint, together with a review of publicly available information, indicate that the amount in controversy would exceed $5 million, exclusive of interest and costs.

20. This is based on: (i) the number of Chick-fil-A brand restaurants in Colorado; (ii) the estimated number of hourly employees working at those restaurants during the statutory period who are within the scope of Garitano's putative class, as alleged; (iii) the estimated number of meal and rest breaks available to the putative class members, collectively, under Colorado law; (iv) the Colorado minimum wage; (v) the relevant statutory period; and (vi) the fact that, among other relief requested, Garitano seeks penalties for the violations she alleges (175% of actual damages), seeks recovery for civil theft claims (with treble damages), and seeks attorneys' fees.

21. Assuming the foregoing, for purposes of CAFA removal only, the amount in controversy for the statutory period would exceed $5 million, exclusive of interest and costs.

22. Because the potential amount in controversy exceeds $5 million, exclusive of interest and costs, 28 U.S.C. § 1332(d)(2) has been satisfied.

III. REMOVAL AND RESPONSIVE PLEADING

23. Removal under CAFA is proper because at this time there are more than 100 members in the putative class (*see supra* ¶¶ 7–10), minimal diversity exists (*see supra* ¶¶ 11-15),

and more than $5 million dollars would be in controversy, exclusive of interest and costs (*see supra* ¶¶ 16–22).

24. CFA, Inc. has served a copy of this Notice of Removal, including exhibits, on Garitano, through her counsel, and has filed a copy of this Notice in the State Court Action in accordance with 28 U.S.C. § 1446(d). A copy of the Notice of Filing of Notice of Removal that was filed in the State Court Action is attached as Exhibit B. A copy of the entire case file in the State Court Action is attached as Exhibit C.

25. The Federal Rules of Civil Procedure "apply to a civil action after it is removed from a state court." Fed. R. Civ. P. 81(c)(1). Because CFA, Inc. has not answered or responded to Garitano's Complaint before removal, its answer or response is required to be filed "7 days after [this] notice of removal is filed." *Id.* 81(c)(2).

WHEREFORE, Defendant Chick-fil-A, Inc. respectfully removes the above-captioned action now pending against it in the District Court, El Paso County, Colorado, to the United States District Court for the District of Colorado.

Respectfully submitted this 11th day of December, 2020.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

s/ Michelle B. Muhleisen
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Attorneys for Defendant Chick-fil-A, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2020, I electronically filed the foregoing **DEFENDANT'S NOTICE OF REMOVAL** with the Clerk of Court using the CM/ECF system and served a true and accurate copy of the same upon counsel for Plaintiff by email:

Brian D. Gonzales
BGonzales@ColoradoWageLaw.com

s/ Alison L. Shaw
Alison L. Shaw, Paralegal

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S Tejon St, Colorado Springs, CO 80903 **PLAINTIFF:** GABRIELLA GARITANO, individually and on behalf of all similarly situated persons, **v.** **DEFENDANT:** CHICK-FIL-A, INC., a Georgia corporation	DATE FILED: October 25, 2020 1:19 PM FILING ID: 8584B7D0BB684 CASE NUMBER: 2020CV31906 Δ COURT USE ONLY Δ
Attorneys for Plaintiff: Brian D. Gonzales, Atty. Reg. # 29775 THE LAW OFFICES OF BRIAN D. GONZALES, PLLC 2580 East Harmony Road, Suite 201 Fort Collins, Colorado 80528 Telephone: (970) 214-0562 BGonzales@ColoradoWageLaw.com	Case Number: Ctrm/Div:
CLASS ACTION COMPLAINT	

Plaintiff Gabriella Garitano, by and through undersigned counsel, individually and on behalf of all others similarly situated, files this *Class Action Complaint* against Defendant Chick-Fil-A, Inc., a Georgia corporation. ("Defendant").

STATEMENT OF THE CASE

1. The Colorado Wage Claim Act, §8-4-101, *et seq.* (the "Wage Claim Act") and the Colorado Minimum Wage Act, C.R.S. §8-6-101, *et seq*., as implemented by the Colorado Minimum Wage Order and/or the Colorado Overtime and Minimum Pay Standards Order (the "Minimum Wage Act"), contain various rules regarding employee wages and working hours. Defendant violated these laws by failing to ensure that employees received all required meal and rest breaks during their shifts. This class action seeks to recover damages and backpay to compensate current and former hourly-paid employees of Defendant for these wage violations.

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff, an individual and resident of the State of Colorado, was employed by Defendant.

3. Defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business located at 5200 Buffington Road, Atlanta, Georgia 30349. At all times relevant to this action, Defendant has been located in and has conducted business in the State of Colorado.

4. Venue in this Court is proper pursuant to C.R.C.P. 98 because Defendant may be found in this County.

5. This Court has jurisdiction over the parties and subject matter of this action pursuant to C.R.S. §13-1-124.

FACTUAL BACKGROUND

6. Defendant owns and operates a nationwide chain of fast-food restaurants including numerous Colorado locations. Plaintiff was a food-service worker for Defendant paid at or slightly above the minimum hourly wage.

7. The Minimum Wage Act requires that employees be provided ten-minute rest periods in the middle of each four-hour work period or "major fractions thereof". 7 *Colo. Code Regs.* §5.3. Defendant failed to provide Plaintiff and other non-exempt employees all of their required breaks. Each time Defendant failed to provide a legally-compliant ten-minute rest break, Plaintiff and other non-exempt employees effectively were docked ten-minutes of work time for purposes of calculating their minimum hourly wages. In other words, for each missed rest break, Defendant owes Plaintiff and other non-exempt employees additional straight-time and/or overtime pay for ten-minutes of unpaid work time.

8. In addition to mandatory rest breaks, Colorado employees are "entitled" to an uninterrupted and duty-free thirty-minute meal break whenever a work shift exceeds five hours. 7 *Colo. Code Regs.* §1103-5.1. These breaks must be treated as paid worktime unless the employer satisfies certain strict statutory requirements. Although Defendant could easily have provided such breaks, Plaintiff and other non-exempt employees did not receive all required meal breaks and/or were docked for meal breaks that did not comply with the statutory prerequisites for treating a meal break as uncompensated. Each time Defendant failed to provide a legally-compliant thirty-minute meal break, Plaintiff and other non-exempt employees effectively were docked work time for purposes of calculating their minimum hourly wages. In other words, for each missed meal break, Defendant owes Plaintiff and other non-exempt employees additional straight-time and/or overtime pay for thirty-minutes of unpaid work time.

9. By failing to provide all required meal and rest breaks to its non-exempt employees, Defendant violated the Wage Claim and Minimum Wage Acts. Defendant had no legal justification for its failure to comply and, by failing to properly pay for the break time, shorted employees on their time-worked, minimum wages and compensation. *See, e.g., Lozoya v. AllPhase Landscaping Construction, Inc.*, 2015 WL 1757080, *2 (D.Colo. April 15, 2015). These wages were earned by Defendant's employees, were vested when they completed work without receiving all required pay and are determinable within the meaning of the Wage Claim Act.

CLASS ACTION ALLEGATIONS

10. This is a C.R.C.P. 23 class action on behalf of Plaintiff and a Class for which Plaintiff seeks certification. Pending any modifications necessitated by discovery, Plaintiff preliminarily defines the class as follows:

ALL PERSONS WHO WORKED AS HOURLY EMPLOYEES FOR DEFENDANT IN COLORADO WITHIN THE STATUTE OF LIMITATIONS.

11. This action is properly brought as a class action for the following reasons:

a. The Class is so numerous that joinder of all Class Members is impracticable.

b. Numerous questions of law and fact regarding the liability of Defendant are common to the Class and predominate over any individual issues which may exist.

c. Although the exact amount of damages may vary among Class Members, the damages for the Class Members can be easily calculated by a simple formula. The claims of all Class Members arise from a common nucleus of facts. Liability is based on a systematic course of wrongful conduct by Defendant that caused harm to all Class Members.

d. The claims asserted by Plaintiff are typical of the claims of Class Members and the Class is readily ascertainable from Defendant's records. Plaintiff was subjected to the same rules and policies as all other workers that form the basis of the alleged violation. Defendant applied its policies (or lack thereof) to Plaintiff just as it did with all Class Members.

e. Plaintiff will fairly and adequately protect the interests of Class Members. The interests of Class Members are coincident with, and not antagonistic to, those of Plaintiff. Plaintiff is committed to this action and has no conflict with the class members. Furthermore, Plaintiff is represented by experienced class action counsel.

f. Questions of fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FIRST CLAIM FOR RELIEF
(Violation of the Colorado Wage Claim Act, §8-4-101, *et seq*.)

12. Plaintiff incorporates by reference all of the above paragraphs.

13. At all material times, Defendant has been an "employer" within the meaning of the Colorado Wage Claim Act, §8-4-101, *et seq*.

14. At all material times, Defendant has employed "employees," including Plaintiff and Class Members, within the meaning of the Colorado Wage Claim Act, §8-4-101, *et seq*.

15. Defendant was Plaintiff's "employer" within the meaning of the Colorado Wage Claim Act, §8-4-101, *et seq.*

16. As a result of the foregoing conduct, as alleged, Defendant has failed to pay wages due thereby violating, and continuing to violate, the Wage Claim Act. These violations were committed knowingly, willfully and with reckless disregard of applicable law.

17. As a result, Plaintiff has been damaged in an amount to be determined at trial. Plaintiff hereby demands payment on behalf of Plaintiff and all Class Members in an amount equal to all earned but unpaid straight time and overtime compensation. This demand for payment is continuing and is made on behalf of any current employees of Defendant whose employment terminates at any time in the future. Such payment should be made in care of undersigned counsel at the listed address.

SECOND CLAIM FOR RELIEF
(Violation of the Colorado Minimum Wage Act, §8-6-101, *et seq*.)

18. Plaintiff incorporates by reference all of the above paragraphs.

19. At all relevant times, Defendant has been, and continues to be, an "employer" within the meaning of the Colorado Minimum Wage Act.

20. At all relevant times, Defendant has employed, and continues to employ, "employees", including Plaintiff, within the meaning of the Minimum Wage Act.

21. Plaintiff was an employee of Defendant within the meaning of the Minimum Wage Act.

22. As a result of the foregoing conduct, as alleged, Defendant has violated, and continues to violate, the Minimum Wage Act. These violations were committed knowingly, willfully and with reckless disregard of applicable law.

23. As a result, Plaintiff and Class Members have been damaged in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF
(Civil Theft, C.R.S. §18-4-405)

24. Plaintiff incorporates by reference all of the above paragraphs.

25. At all relevant times, Defendant has been, and continues to be, an "employer" within the meaning of the Colorado Minimum Wage Act.

26. At all relevant times, Defendant has employed, and continues to employ, "employees", including Plaintiff, within the meaning of the Minimum Wage Act.

27. Plaintiff was an employee of Defendant within the meaning of the Minimum Wage Act.

28. Defendant's failure to pay minimum wage under the Minimum Wage Act constitutes theft pursuant to C.R.S. §18-4-401. *See* C.R.S. §8-6-116.

29. As a result, Defendant's failure to pay minimum wage constitutes civil theft pursuant to C.R.S. §18-4-405.

30. As a result, Plaintiff and Class Members have been damaged in an amount to be determined at trial.

JURY DEMAND

31. Plaintiff demands a trial by jury as to all issues so triable.

DOCUMENT PRESERVATION

32. As part of discovery, Plaintiff will be requesting certain documents and information from Defendant. Please note the document preservation instructions attached hereto.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

1. Determining that the action is properly maintained as a class action, certifying Plaintiff as the class representative, and appointing Plaintiff's counsel as counsel for Class Members;

2. Ordering prompt notice of this litigation to all potential Class Members;

3. Awarding Plaintiff and Class Members their compensatory damages, attorneys' fees and litigation expenses as provided by law;

4. Awarding Plaintiff and Class Members their pre-judgment, post-judgment and moratory interest as provided by law;

5. Awarding Plaintiff and Class Members treble damages and/or statutory penalties as provided by law; and

6. Awarding Plaintiff and Class Members such other and further relief as the Court deems just and proper.

Respectfully submitted this 23rd day of October, 2020.

s/Brian D. Gonzales

Brian D. Gonzales
THE LAW OFFICES OF
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Counsel for Plaintiff

EXHIBIT A

DOCUMENT PRESERVATION INSTRUCTIONS

Plaintiff will be requesting electronic and other documentary evidence during discovery in this matter. This evidence will be of critical importance and Plaintiff wants to ensure that the types of documentary and electronic evidence that will be requested during the course of discovery are preserved.

"When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so." Standard 10, *Preservation of Documents, ABA Civil Discovery Standards* (Aug. 2004). This duty "applies to information stored in an electronic medium or format…" *Id.* at Standard 29.

Various kinds of electronic and documentary data will be important in this lawsuit. The information Plaintiff anticipates will be relevant includes, but is not limited to, the following:

- The portions of any database or system maintained or used that contains data relating to the hours of work, breaks and pay of Plaintiff and Class Members;
- Emails and other electronic and hard-copy documents pertaining to Defendant's break policies;
- Emails and other electronic and hard-copy documents pertaining to Defendant's reliance on department of labor authority when promulgating any break policy;
- Emails and other electronic and hard-copy documents pertaining to any audit or investigation performed by the department of labor;
- Emails and other electronic and hard-copy documents pertaining to job duties and pay of Defendant's employees, including Plaintiff;
- Emails sent and received by Plaintiff, Class Members, and their managers/supervisors;
- Emails and other electronic or hard-copy documents pertaining to Defendant's compliance with the Colorado Wage Claim Act and the Colorado Minimum Wage Act; and
- Emails and other electronic or hard-copy documents pertaining to Plaintiff and all other current or former employees.

This data, including all associated metadata, must be preserved. Therefore, Plaintiff requests that Defendant perform offline backups of any databases which contain information of the types identified above. Plaintiff also requests that Defendant perform offline backups of all

current Microsoft Exchange (or other email) databases to external hard drives, preserving their native format. These backups should be done routinely from this point forward.

The laws and rules prohibiting destruction of evidence apply to electronically stored information in the same manner that they apply to other evidence. Therefore, Plaintiff requests that Defendant take every reasonable step to preserve this information until the final resolution of this matter, and discontinue all data destruction activities, including but not limited to, backup tape recycling policies, any automatic email deletion functions, and refrain from disposing of any relevant hardware or data storage. In short, Plaintiff requests that the utmost care be taken in the preservation of all relevant electronic data, including metadata.