

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

LAUREN HOLDEN, *individually and
on behalf of all others similarly
situated,*

Plaintiff,

v.

OLD NAVY, LLC,

Defendant.

Case No. _____

State Court Case No. 16-2021-CA-
000672

Class Action

NOTICE OF REMOVAL OF CIVIL ACTION

PLEASE TAKE NOTICE that Defendant Old Navy, LLC (“Old Navy” or “Defendant”), by and through its counsel, hereby files this notice of removal in the above-captioned action, currently pending in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, as Case No. 16-2021-CA-000672 (the “State Court Action”). This removal is made pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453. For the reasons set forth below, this Court has subject matter jurisdiction.

I. BACKGROUND

1. On or about February 4, 2021, Plaintiff Lauren Holden, individually and on behalf of all others similarly situated, commenced a putative class action against Old Navy by filing a Class Complaint and Demand for Jury Trial (the “Complaint”) in the Circuit Court of the Fourth Judicial Circuit in and for Duval

County, Florida. A true and correct copy of the Complaint is attached hereto as **Exhibit A**.

2. On February 10, 2021, Old Navy was served with the Complaint. A true and correct copy of the Service of Process is attached hereto as **Exhibit B**.

3. True and correct copies of all process, pleadings, and orders in the State Court Action and not previously referenced are attached hereto as **Exhibit C**.

4. The Complaint alleges that Defendant unlawfully intercepted Plaintiff's electronic communications in violation of the Florida Security of Communications Act, Fla. Stat. Ann. § 934.01, *et seq.* ("FSCA"). (Ex. A ¶ 1.)

5. This Notice of Removal is timely under 28 U.S.C. § 1446(b) and Fed.R.Civ.P. 6(a)(1)(C) as it is filed within thirty (30) days after Plaintiff's service of the Complaint upon Old Navy.

6. Nothing in this Notice of Removal shall constitute a waiver of Defendant's right to assert any defense, including motions pursuant to Federal Rule of Civil Procedure 12, as the case progresses.

II. VENUE

7. Venue is proper under 28 U.S.C. § 1441(a) because this Court is the United State District Court for the district and division embracing the location where the State Court Action was pending.

III. JURISDICTION

8. This Court has jurisdiction over this action under the Class Action Fairness Act ("CAFA"), codified under 28 U.S.C. § 1332(d) and § 1453, because: (A)

it meets CAFA’s definition of a class action; (B) the putative class consists of more than 100 members; (C) there is minimal diversity of citizenship; and (D) the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(d).

A. This Action Meets the “Class Action” Definition Under CAFA.

9. The State Court Action is a “class action.” CAFA provides

[T]he term “class action” means 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). CAFA further provides “[t]his subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.” 28 U.S.C. § 1332(d)(8).

10. Plaintiff filed the State Court Action as a putative class action. (*See* Ex. A at 1 (titled “Class Action Complaint”); *id.* ¶ 1 (“This is a class action... . . .”), *id.* ¶¶ 20-29 (section entitled “Class Action Allegations”).) Plaintiff asserts that she seeks to represent a class defined as:

[a]ll persons residing within the State of Florida (1) who visited Defendant’s website and (2) whose electronic communications were intercepted by Defendant or on Defendant’s behalf (3) without their prior consent.

(Ex. A ¶ 20.) The class definition excludes Defendant as well as Defendant’s employees or agents. (*Id.* ¶ 21.) Accordingly, the Complaint clearly qualifies as a “class action” under CAFA.

B. The Putative Class Exceeds 100 Members.

11. Plaintiff concedes that the putative class is “believed to be no less than 100 individuals.” (*Id.* ¶ 22; *see also Exhibit D*, Declaration of Jeffrey Held, ¶ 5.) Accordingly, the proposed class has at least one hundred members in the aggregate. 28 U.S.C. § 1332(d)(5)(b).¹

C. This Action Meets CAFA’s Minimal Diversity Requirement.

12. CAFA applies when “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). “Under CAFA, federal courts . . . have original jurisdiction over class actions in which the amount in controversy exceeds \$5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states).” *McDaniel v. Fifth Third Bank*, No. 14-11615, 2014 U.S. App. LEXIS 10489, *2-*3 (11th Cir. June 5, 2014) (citing *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006)).

13. Plaintiff alleges she is a citizen of Duval County, Florida. (Ex. A ¶ 5.)

14. Old Navy is a limited liability company that maintains its primary place of business in San Francisco, California (*id.* ¶ 6), and is organized under the laws of Delaware. Old Navy is a wholly owned subsidiary of The Gap, Inc. (Ex. D ¶ 3), which is a Delaware corporation with its principal place of business in San Francisco, California. Old Navy is therefore a citizen of Delaware and California for purposes of diversity jurisdiction. See 28 U.S.C. § 1332(c)(1), (d)(10).

¹ Although the putative class alleged by Plaintiff meets the threshold for jurisdictional purposes, Old Navy denies that this action ultimately will prove appropriate for class treatment.

15. Accordingly, because Plaintiff is a citizen of Florida, and Old Navy is a citizen of Delaware and California, CAFA's minimal diversity requirement is satisfied. 28 U.S.C. § 1332(d)(2)(A).

D. This Action Meets CAFA's Amount-in-Controversy Requirement.

16. CAFA creates original jurisdiction for "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). The claims of the individual class members are aggregated to determine whether the amount-in-controversy exceeds \$5,000,000. 28 U.S.C. §1332(d)(6). The amount-in-controversy analysis considers the amount the plaintiff has placed in controversy, not the amount the plaintiff is likely to recover. *McDaniel*, 2014 U.S. App. LEXIS 10489 at *3 ("[T]he plaintiff[s] likelihood of success on the merits is largely irrelevant to the court's jurisdiction because the pertinent question is what is *in controversy* in the case, not how much the plaintiffs are ultimately likely to recover.") (citing *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 751 (11th Cir. 2010) (emphasis in original)).

17. To satisfy this requirement, "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 81 (2014); see also *Anderson v. Wilco Life Ins. Co.*, 943 F.3d 917, 925 (11th Cir. 2019) (same). Nevertheless, Old Navy has submitted a declaration in support of its notice of removal that demonstrates the amount in controversy requirement is satisfied.

(See Ex. D ¶¶ 4–5.) When determining whether the \$5,000,000 threshold has been surpassed, “a court may rely on evidence put forward by the removing defendant, as well as reasonable inferences and deductions drawn from that evidence.” *Anderson*, 943 F.3d at 925 (citing *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014)). Old Navy denies all liability alleged in the Complaint and further denies that class treatment is appropriate for this Action. However, if damages or restitution were awarded on Plaintiff’s claims, the aggregate amount as to the putative class would satisfy the amount-in-controversy requirement.

18. Though Plaintiff has not specified the amount of relief she seeks, the allegations in the Complaint (as well as reasonable inferences and deductions drawn from those allegations) make clear that the amount Plaintiff has placed in controversy is easily above \$5,000,000, exclusive of interests and costs. Indeed, Plaintiff concedes that the proposed class of Florida residents is “numerous and geographically dispersed,” and that “the aggregate damages sustained by the Class are potentially in the millions of dollars” (Ex. A ¶¶ 22, 28.)

19. Specifically, the Complaint seeks declarative and injunctive relief, liquidated damages, punitive statutory damages, and attorney’s fees and costs. (Ex. A ¶¶ 39–41.) The liquidated damages sought by Plaintiff are set forth by the FSCA, which provides for “liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher.” (*Id.* ¶ 39.) The statute of limitations for an FSCA claim is two years. Fla. Stat. Ann. § 934.10(3).

20. Here, Old Navy records show that there were at least 5,000 *sales* made on the Old Navy website to unique persons with billing addresses in Florida during the two years prior to the filing of the Complaint. (Ex. D ¶ 5.) Thus, there necessarily were at least 5,000 Floridian *visitors* to Old Navy's website during the period Plaintiff alleges Old Navy was intercepting website visitor's electronic communications. Since Plaintiff seeks statutory damages of at least \$1,000 per class member, the amount of alleged statutory damages alone exceeds \$5,000,000. Plaintiff's claims for attorney's fees and injunctive relief, including the cost of implementing the requested relief, only further confirm that the amount in controversy requirement is met.

IV. NOTICE

21. As required by 28 U.S.C. § 1446(d), a copy of this notice of removal is being served upon counsel for Plaintiff and a copy is being filed with the Clerk of the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida.

V. CONCLUSION

WHEREFORE, Defendant Old Navy, LLC respectfully requests this Court to assume full jurisdiction over the cause herein, as provided by law, and to issue all necessary orders and process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2021, I electronically filed the foregoing and its attachments with the Clerk of the Court by using the CM/ECF system and sent the foregoing and its attachments via email to the following counsel of record:

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Filing # 120845132 E-Filed 02/04/2021 03:09:23 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.

LAUREN HOLDEN, *individually and on
behalf of all others similarly situated,*

CLASS ACTION

Plaintiff,

vs.

JURY TRIAL DEMANDED

OLD NAVY, LLC,

Defendant.

_____ /

CLASS ACTION COMPLAINT

Plaintiff Lauren Holden brings this class action against Defendant Old Navy, LLC, and alleges as follows upon personal knowledge as to Plaintiff and Plaintiff’s own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by Plaintiff’s attorneys.

NATURE OF THE ACTION

1. This is a class action under the Florida Security of Communications Act, Fla. Stat. Ann. § 934.01, *et seq.* (“FSCA”), arising from Defendant’s unlawful interception of electronic communications. Specifically, this case stems from Defendant’s use of tracking, recording, and/or “session replay” software to intercept Plaintiff’s and the class members’ electronic communications with Defendant’s website, including how they interact with the website, their mouse movements and clicks, information inputted into the website, and/or pages and content viewed on the website.

2. Defendant intercepted the electronic communications at issue without the knowledge or prior consent of Plaintiff and the Class members. Defendant did so for its own

financial gain and in violation of Plaintiff's and the Class members' privacy rights under the FSCA. Such clandestine monitoring and recording of an individual's electronic communications has long been held a violation of the FSCA. *See, e.g., O'Brien v. O'Brien*, 899 So. 2d 1133 (Fla. 5th DCA 2005).

3. Defendant has intercepted the electronic communications involving Plaintiff and the Class members' visits to its website, causing them injuries, including invasion of their privacy and/or exposure of their private information.

4. Through this action, Plaintiff seeks injunctive relief to halt Defendant's unlawful interceptions. Plaintiff also seeks damages authorized by the FSCA on behalf of Plaintiff and the Class members, defined below, and any other available legal or equitable remedies resulting from the actions of Defendant described herein.

PARTIES

5. Plaintiff is, and at all times relevant hereto was, a citizen and resident of Duval County, Florida.

6. Defendant is, and at all times relevant hereto was, a limited liability company that maintains its primary place of business at 2 Folsom Street, San Francisco, California 94105.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.220 and Fla. Stat. § 26.012(2). The matter in controversy exceeds the sum or value of \$30,000 exclusive of interest, costs, and attorney's fees.

8. Defendant is subject to personal jurisdiction in Florida because this suit arises out of and relates to Defendant's contacts with this state. Defendant intercepted electronic communications from and to Florida without the consent of Plaintiff and the Class members.

Plaintiff and the Class members were in Florida when Defendant's unlawful interceptions occurred, and were injured while residing in and physically present in Florida.

9. Venue for this action is proper in this Court because all facts giving rise to this action occurred in this circuit.

FACTS

10. Defendant owns and operates the following website: www.oldnavy.gap.com.

11. Over the past year, Plaintiff visited Defendant's website approximately 5 times.

12. Plaintiff most recently visited Defendant's website on or about November 2020.

13. Plaintiff was in Florida during each visit to Defendant's website.

14. Upon information and belief, during one or more of these visits, Defendant utilized tracking, recording and/or "session replay" software to contemporaneously intercept Plaintiff's use and interaction with the website, including mouse clicks and movements, information inputted by Plaintiff, and/or pages and content viewed by Plaintiff. Defendant also recorded Plaintiff's location during the visits, as well as the time and dates of each visit.

15. Plaintiff never consented to interception of her electronic communications by Defendant or anyone else.

16. At no point in time did Plaintiff provide Defendant, its employees, or agents with consent to intercept Plaintiff's electronic communications.

17. Plaintiff and the putative Class members did not have a reasonable opportunity to discover Defendant's unlawful interceptions because Defendant did not disclose or seek their consent to intercept the communications.

18. Upon information and belief, Defendant similarly intercepted the electronic communications of other individuals located in Florida who visited Defendant's website.

19. Defendant's surreptitious interception Plaintiff's electronic communications caused Plaintiff harm, including invasion of her privacy and/or the exposure of private information.

CLASS ALLEGATIONS

PROPOSED CLASS

20. Plaintiff brings this lawsuit as a class action on behalf of all other similarly situated persons pursuant to Florida Rule of Civil Procedure 1.220(b)(2) and (b)(3). The "Class" that Plaintiff seeks to represent is defined as:

All persons residing within the State of Florida (1) who visited Defendant's website and (2) whose electronic communications were intercepted by Defendant or on Defendant's behalf (3) without their prior consent.

21. Defendant and its employees or agents are excluded from the Class. Plaintiff reserves the right to modify or amend the Class definitions, as appropriate, during the course of this litigation.

NUMEROSITY

22. The Class members are so numerous and geographically dispersed that individual joinder of all Class members is impracticable. The precise number of Class members is unknown to Plaintiff, but may be readily ascertained from Defendant's records and is believed to be no less than 100 individuals. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice

23. The identities of the Class members are unknown at this time and can be ascertained only through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendant's records kept in connection with its unlawful interceptions.

COMMON QUESTIONS OF LAW AND FACT

24. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

- (1) Whether Defendant violated the FSCA;
- (2) Whether Defendant intercepted Plaintiff's and the Class members' electronic communications;
- (3) Whether Defendant disclosed to Plaintiff and the Class Members that it was intercepting their electronic communications;
- (4) Whether Defendant secured prior consent before intercepting Plaintiff's and the Class members' electronic communications;
- (5) Whether Defendant is liable for damages, and the amount of such damages; and
- (6) Whether Defendant should be enjoined from such conduct in the future.

25. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendants routinely intercepts electronic communications without securing prior consent is accurate, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

TYPICALITY

26. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

27. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

SUPERIORITY

28. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are potentially in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote, and, even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

29. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

COUNT I
Violations of the FSCA, Fla. Stat. Ann. § 934.03
(On Behalf of Plaintiff and the Class)

30. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

31. It is a violation of the FSCA to intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any electronic communication. Fla. Stat. Ann. § 934.03(1)(a).

32. Further, it is a violation to intentionally use, or endeavor to use, “the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]” Fla. Stat. Ann. § 934.03(1)(d).

33. The FSCA defines “intercept” as the “acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” Fla. Stat. Ann. § 934.02(3).

34. The FSCA defines “electronic communication” as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce....” Fla. Stat. Ann. § 934.02(12).

35. Defendant violated § 934.03(1)(a) of the FSCA by intercepting Plaintiff’s and the Class members’ electronic communications when they visited Defendant’s website.

36. Defendant intercepted Plaintiff’s and the Class members’ electronic communications without their prior consent.

37. Defendant violated § 934.03(1)(d) of the FSCA by using the unlawfully intercepted electronic communications.

38. Plaintiff and the Class members had an expectation of privacy during their visits to Defendant’s website, which Defendant violated by intercepting their electronic communications with the website.

39. As a result of Defendant's conduct, and pursuant to § 934.10 of the FSCA, Plaintiff and the other members of the putative Class were harmed and are each entitled to "liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher[.]" Fla Stat. Ann. § 934.10(b).

40. Plaintiff is also entitled to "reasonable attorney's fees and other litigation costs reasonably incurred." Fla Stat. Ann. § 934.10(d).

41. Plaintiff and the Class members are also entitled to an injunction.

WHEREFORE, Plaintiff Lauren Holden, on behalf of herself and the other members of the Class, prays for the following relief:

a. A declaration that Defendant's practices described herein violate the Florida Security of Communications Act;

b. An injunction prohibiting Defendant from intercepting the electronic communications of individuals visiting Defendant's website without their knowledge and consent;

c. An award of actual, liquidated damages, and/or punitive statutory damages;

d. Reasonable attorney's fees and costs; and

e. Such further and other relief the Court deems reasonable and just.

JURY DEMAND

Plaintiff and Class Members hereby demand a trial by jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendant take affirmative steps to preserve all records, lists, electronic databases or other itemizations associated with the allegations herein, including all records, lists, electronic databases or other itemizations in the possession of any vendors,

individuals, and/or companies contracted, hired, or directed by Defendant to assist in sending the alleged communications.

Dated: February 4, 2021

Respectfully Submitted,

By: /s/ Andrew J. Shamis
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