

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA**

**DARIN VIARS,
on behalf of himself and all others
similarly situated,**

Plaintiff,

Civil Action No. : 5:18-cv-00041

v.

LOWE'S HOME CENTERS, LLC,

Defendant.

NOTICE OF REMOVAL

Defendant Lowe's Home Centers, LLC ("Lowe's") hereby removes the state court action described below to this Court. In support thereof, Lowe's states as follows:

1. On or about December 4, 2017, Plaintiff Darin Viars ("Plaintiff") filed a putative class action that is currently pending in the Circuit Court of Raleigh County, West Virginia, Civil Action No. 17-C-664-H (the "State Action"). A copy of the Summons and Complaint was served on Lowe's through the Secretary of State's Office on December 14, 2017. Upon information and belief, there have been no other proceedings in the State Action.

2. As explained below, the State Action is one that may be removed to this Court because Lowe's has satisfied the procedural requirements for removal and this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1367 (supplemental jurisdiction), and 28 U.S.C. § 1332 (diversity jurisdiction).

I.
LOWE'S HAS SATISFIED THE
PROCEDURAL REQUIREMENTS FOR REMOVAL

3. Lowe's was served with the Complaint on December 14, 2017. (Declaration of Eric W. Foster ("Foster Decl.") ¶5)(attached as Exhibit A.) Thus, Lowe's Notice of Removal is timely because it is filed within 30 days of the date of service. *See* 28 U.S.C. § 1446(b).

4. Venue lies in the United States District Court for the Southern District of West Virginia because the State Action was filed by Plaintiff and is now pending in this judicial district. *See* 28 U.S.C. § 1446(a) (mandating venue for removal actions).

5. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders served upon Lowe's, including the Complaint, is attached as **Exhibit B** hereto (along with a certified copy of the docket sheet).

6. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon Plaintiff's counsel and a copy is being filed with the Clerk of the Circuit Court of Raleigh County, West Virginia.

II.
REMOVAL IS PROPER BECAUSE THIS COURT
HAS SUBJECT MATTER JURISDICTION

A. This Court Has Original Jurisdiction Over Plaintiff's Claim Brought Under The Fair Labor Standards Act.

7. Federal courts have original subject matter jurisdiction over actions brought under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). 29 U.S.C. § 216(b); *Bruer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 (2003) (holding that district courts "have original jurisdiction over FLSA claims under 28 U.S.C. § 1331"); *Tee v. Brown Reporting Agency, Inc.*, 2013 WL 1331219, at *4 (S.D.W.Va. Apr. 2, 2013) (finding FLSA claims conferred federal question jurisdiction). Here, Plaintiff brings his first claim for relief under the

FLSA. (Compl. ¶¶72-79.) Thus, the State Action is removable pursuant to 28 U.S.C. § 1441(a) because Plaintiff alleges a claim that could have been brought in this Court pursuant to the Court's original jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction).

B. This Court Also Has Jurisdiction Over Plaintiff's Unjust Enrichment Claim.

a. This Court May Exercise Supplemental Jurisdiction Over Plaintiff's Unjust Enrichment Claim.

8. An exercise of supplemental jurisdiction over Plaintiff's unjust enrichment claim pursuant to 28 U.S.C. § 1367 is appropriate. Where, as here, "a case presents a federal question, the court has supplemental jurisdiction over state law claims which are part of the same case or controversy." *Tee*, 2013 WL 1331219, at *4 (internal quotation marks omitted). In *Tee*, the court held that it was proper to exercise supplemental jurisdiction over the plaintiff's remaining state law claims where the plaintiff asserted a FLSA claim and the defendant had removed the case on federal question grounds. *Id.* Here, as in *Tee*, "Plaintiff's claims arise from the same case or controversy because they all stem from" his alleged employment with Lowe's. (Compl. ¶¶72-79 (FLSA claim), ¶¶80-86 (unjust enrichment claim).) An exercise of supplemental jurisdiction is therefore proper.

b. This Court Also Has Jurisdiction Over Plaintiff's Unjust Enrichment Claim Pursuant To The Employee Retirement Income Security Act.

9. This Court also has jurisdiction over Plaintiff's unjust enrichment claim, which seeks the disgorgement of the value of employee benefits, among other things, because it is completely preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"). Pursuant to ERISA, federal jurisdiction lies where a recipient of an "employee welfare benefit plan" seeks to "clarify his rights to future benefits under the terms of the plan." 29 U.S.C. §§ 1002(1), 1132(a)(1)(B) & (e)(1).

10. The United States Supreme Court has recognized that Congress gave ERISA the broadest possible preemptive power under federal law and that such preemption completely displaces the application of state law. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66-67 (1987) (discussing ERISA preemption in the context of removal); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (“the express preemption provisions of ERISA are deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern”) (internal quotation marks omitted).

11. Here, Plaintiff alleges, *inter alia*, that Lowe’s improperly classified him as an independent contractor rather than an employee and, as a result, improperly deprived him of the benefits that are offered to Lowe’s employees. (Compl. ¶¶1, 3-5, 47-48, 54, 59, 82-86.)

12. The retirement, health, and welfare benefit packages that Plaintiff claims he was deprived of are qualified employee pension and/or welfare benefit plans that are governed by ERISA. (Foster Decl. ¶¶4-5.) *See, e.g., Amos v. Blue Cross-Blue Shield of Ala.*, 868 F.2d 430, 431-32 (11th Cir. 1989) (discussing ERISA’s scope in the context of preemption and removal).

13. Accordingly, to recover based on these ERISA-regulated benefits, Plaintiff must prove that he is an “employee” for ERISA purposes, among other things. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). For this reason, Plaintiff’s claimed entitlement to those benefits falls within ERISA’s “deliberately expansive” preemptive reach. *Pilot Life*, 481 U.S. at 45-46.

14. Where, as here, the doctrine of complete preemption applies, state law claims falling within its scope are “necessarily federal in character.” *See Metro.*, 481 U.S. at 67. This means that ERISA’s preemptive effect is to convert state law claims for benefits into claims “arising under federal law for purposes of federal question jurisdiction,” making the instant

action properly removable to federal district court. *See, e.g., Cox v. Gannett Co. Inc.*, 2016 WL 1425525, at *3-4 (S.D. Ind. Apr. 12, 2016) (denying motion to remand where defendant removed action under ERISA preemption principles in case where allegedly misclassified independent contractor brought a claim for unjust enrichment under state law to seek the value of benefits provided to employees); *Clark v. Dale Prop. Serv.*, 2012 WL 851608, at *3 (W.D. Pa. March 13, 2012) (similar).

15. Because Plaintiff's state law claims are preempted under ERISA, this Court has subject matter jurisdiction over Plaintiff's unjust enrichment claim pursuant to 28 U.S.C. § 1331.

C. Diversity Jurisdiction Provides An Independent Basis For Removal.

16. Diversity jurisdiction exists because the requisite diversity of citizenship is present, and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(a) & (c)(1).

a. The Diversity of Citizenship Requirement Is Satisfied.

17. Plaintiff is a citizen of West Virginia. (Compl. ¶13.)

18. Lowe's is a limited liability company that is organized under the laws of North Carolina. (Compl. ¶14; Foster Decl. ¶2.) For removal purposes, the citizenship of a limited liability company is determined by the citizenship of its members. *Cent. W. Virginia Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011); *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 121 (4th Cir. 2004) (noting that "many cases" recognize this principle). Lowe's sole member is Lowe's Companies, Inc. ("LCI"). (Foster Decl. ¶3.)

19. LCI is, and has been at all relevant times, a North Carolina corporation with its principal place of business in North Carolina. (Foster Decl. ¶3.) The phrase "principal place of business" in 28 U.S.C. § 1332(c)(1) refers to the place where a corporation's high-level officers

direct, control, and coordinate the corporation's activities, *i.e.*, its "nerve center," which typically will be found at its corporate headquarters. *Hertz Corp. v. Friend*, 559 U.S. 77, 91-93 (2010). At all relevant times, LCI's corporate headquarters where its high level officers directed, controlled, and coordinated the corporation's activities has been located in North Carolina. (Foster Decl. ¶3.) Accordingly, for removal purposes, Lowe's is, and has been at all relevant times, a citizen of the State of North Carolina, not West Virginia. The requisite diversity of citizenship therefore exists. *See* 28 U.S.C. § 1332(c)(1).

b. The Amount In Controversy Requirement Is Satisfied.

20. To satisfy the amount in controversy requirement, a defendant need establish a plausible, good faith estimate that the amount in controversy exceeds \$75,000. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 551 (2014) ("To assert the amount in controversy adequately in the removal notice . . . it suffice[s] to allege the requisite amount plausibly."); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008) (holding that a removing defendant's allegations that the amount in controversy requirement was met "were sufficient as a matter of law to allege subject matter jurisdiction."). Here, Plaintiff's allegations establish that there is more than \$75,000 at issue, exclusive of interest and costs.

21. Plaintiff alleges that Lowe's deprived him of overtime compensation in violation of the FLSA by willfully misclassifying him as an independent contractor, rather than as an employee. (Compl. ¶¶1, 72-79.) The FLSA requires employers to pay overtime at a rate of one and a half times the employee's regular rate of pay for hours worked in excess of 40 in a workweek. 29 U.S.C. § 207(a)(1). The regular rate of pay cannot be less than the minimum wage, and Plaintiff does not allege that he was paid less than the minimum wage.

22. As Plaintiff alleges that he worked “approximately 70 hours [per] week” to fulfill his contractual obligations to Lowe’s (Compl. ¶45), he necessarily seeks approximately 30 hours of allegedly unpaid overtime per week during the three-year limitations period. 29 U.S.C. § 255(a) (limitations period for willful misclassification). Plaintiff also seeks to recover an amount equal to those wages as liquidated damages. (Compl., Prayer ¶3.)

23. Assuming for purposes of removal that Plaintiff only made the minimum wage,¹ his claim for allegedly unpaid overtime presents in excess of \$46,000 in exposure for the 2.5 year period beginning on January 1, 2015.² (See Compl. ¶¶16, 55.) Given that Plaintiff also seeks an equal amount in liquidated damages (Compl., Prayer ¶3), the amount in controversy exceeds the \$75,000 jurisdictional minimum based on these forms of relief alone.³

24. Plaintiff also seeks other categories of damages, including emotional distress damages, punitive damages, and attorneys’ fees. (See Compl., Prayer.) Plaintiff’s claimed entitlement to such relief makes it all the more plain that the amount in controversy exceeds the jurisdictional minimum.

25. Based on the foregoing, the jurisdictional amount in controversy requirement plainly is met. Accordingly, removal to this Court is proper under diversity of citizenship jurisdiction.

WHEREFORE, Lowe’s hereby removes this State Action from the Circuit Court of Raleigh County, West Virginia, to this Court, pursuant to 28 U.S.C. § 1441.

¹ The minimum wage in West Virginia was \$7.25 per hour in 2014, \$8.00 per hour in 2015, and \$8.75 per hour in 2016 and 2017. See W.Va. Code § 21-5C-2(a)(3) (2014); W.Va. Code § 21-5C-2(a)(4) (2015); W.Va. Code § 21-5C-2(a)(5) (2016 and 2017).

² The calculation is: (\$8/hour) x (30 alleged overtime hours/week) x (130 weeks) x (1.5 overtime multiplier) = \$46,800.

³ The calculation is: (\$46,800 in allegedly unpaid overtime) + (\$46,800 in liquidated damages) = \$93,600.

LOWE'S HOME CENTERS, LLC

By Spilman Thomas & Battle, PLLC

/s/Ellen J. Vance

Eric W. Iskra (WV State Bar # 6611)

Ellen J. Vance (WV State Bar # 8866)

Spilman Thomas & Battle, PLLC

300 Kanawha Boulevard, East (ZIP 25301)

Post Office Box 273

Charleston, WV 25321-0273

O 304.340.3800

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

DARIN VIARS,
on behalf of himself and all others
similarly situated,

Plaintiff,

v.

Civil Action No. : 5:18-cv-00041

LOWE'S HOME CENTERS, LLC,

Defendant.

CERTIFICATE OF SERVICE

I, Ellen J. Vance, counsel for defendant, do hereby certify that the foregoing "Notice of Removal" was electronically filed on this 12th day of January, 2018, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing as follows:

Kristina Thomas Whiteaker
David L. Grubb
The Grubb Law Group
1114 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Plaintiff

/s/ Ellen J. Vance

Ellen J. Vance (WV State Bar # 8866)

CIVIL COVER SHEET

The JS 44 cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM).

I. (a) PLAINTIFF

DARIN VIARS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Kristina T. Whiteaker (WV State Bar #9434)
David L. Grubb (WV State Bar #1498)
The Grubb Law Group
1114 Kanawha Boulevard, East
Charleston, WV 25301
304.345.3356

DEFENDANTS:

LOWE'S HOME CENTERS, LLC

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Eric W. Iskra (WV State Bar #6611)
Ellen J. Vance (WV State Bar #8866)
300 Kanawha Boulevard East, (Zip 25301)
P. O. Box 273
Charleston, WV 25321-0273
304.340.3800
eiskra@spilmanlaw.com
evance@spilmanlaw.com

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1. U.S. Government Plaintiff
2. U.S. Government Defendant
3. Federal Question (U.S. Government Not a Party)
4. Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box For Plaintiff and One Box For Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, PROPERTY RIGHTS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 another district (specify), 6 Multidistrict Litigation, 7 Judge from Magistrate Judgment, Appeal to District

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity).

29 U.S.C. § 201 et seq. and 29 U.S.C. § 1001, et seq.

Brief description of cause:

Class action alleging violation of FLSA and unjust enrichment.

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

In excess of \$75,000

Check YES only if demanded in complaint:

JURY DEMAND: YES

VIII. RELATED CASE(S)

IF ANY (See Instructions):

JUDGE

DOCKET NUMBER

DATE

January 12, 2018

SIGNATURE OF ATTORNEY OF RECORD

/s/Ellen J. Vance

FOR OFFICE USE ONLY

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA**

**DARIN VIARS,
on behalf of himself and all others
similarly situated,**

Plaintiff,

v.

LOWE'S HOME CENTERS, LLC,

Civil Action No. : _____

Defendant.

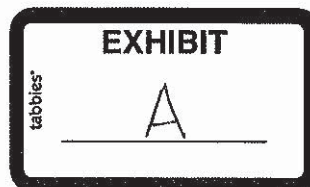
**DECLARATION OF ERIC W. FOSTER
IN SUPPORT OF DEFENDANT LOWE'S HOME CENTERS, LLC'S
NOTICE OF REMOVAL**

I, Eric W. Foster, declare:

1. I serve as the Director, Benefits for Lowe's Companies, Inc. ("LCI"), and I have been employed in this capacity since October, 2016. I have personal knowledge of the facts stated herein, and if called and sworn as a witness, I could and would testify competently thereto. I submit this declaration in support of the Notice of Removal filed by Defendant Lowe's Home Centers, LLC ("Lowe's").

2. Lowe's owns and operates home improvement retail stores in the United States, including in the State of West Virginia. Lowe's is a limited liability company that is organized under the laws of North Carolina.

3. Lowe's sole member is LCI. LCI is, and has been at all relevant times, a North Carolina corporation. LCI's headquarters are located in North Carolina. This is where the corporation's high-level officers direct, control, and coordinate its operations.



4. As Director, Benefits for LCI, I am familiar with the benefits that Lowe's offers to its employees in West Virginia. As part of my duties as Director, Benefits, I have access to, and am familiar with, the company's documents relating to the benefits that Lowe's offers.

5. Lowe's offers numerous retirement, health, and welfare benefit packages to its employees in West Virginia, such as Comprehensive Health Insurance, from which an employee currently can pick between four different plans. These benefits are governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

6. A copy of the Summons and Complaint in the above-captioned action was served on Lowe's through the Secretary of State's Office on December 14, 2017.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 4th day of January, 2018, at Mooresville, North Carolina.

By:



ERIC W. FOSTER

STATE OF WEST VIRGINIA

COUNTY OF RALEIGH SS:

I, PAUL H. FLANAGAN, Clerk of the Circuit Court of Raleigh County do hereby certify that the foregoing is a true and correct copy from the records of my office as the same exists therein.

IN TESTIMONY WHEREOF, I hereunto place my hand and affix the official seal of this Court, at Beckley this the 05 day of January, 20 18.

Paul H Flanagan

Clerk



DARIN VIARS

VS. LOWE'S HOME CENTERS, LLC

LINE DATE ACTION

1	12/04/17	CASE FILED-ISSUED SUMMONS & COMPLAINT/RETURN TO ATTORNEY FOR
2		SERVICE/(VLS) (JED)
3	12/19/17	REC. RETN OF SERVICE BY SEC. OF STATE ON BEHALF OF LOWE'S HOME
4		CENTERS. LLC/ 12 14 2017 (VLS) (CC)

Office of the Secretary of State
Building 1 Suite 157-K
1900 Kanawha Blvd E.
Charleston, WV 25305



Mac Warner
Secretary of State
State of West Virginia
Phone: 304-558-6000
886-767-8683
Visit us online:
www.wvsos.com

Paul H Flanagan
Raleigh County Courthouse
215 Main Street
Beckley, WV 25801-4688

RALEIGH COUNTY
RECEIVED AND FILED

DEC 19 2017 *cc*

PAUL H FLANAGAN
CIRCUIT CLERK *vd*

Control Number: 207388

Defendant: LOWE'S HOME CENTERS, LLC
209 West Washington Street
Charleston, WV 25302 US

Agent: Corporation Service Company

County: Raleigh

Civil Action: 17-C-664-H

Certified Number: 92148901125134100002202221

Service Date: 12/14/2017

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in your name and on your behalf.

Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in your name and on your behalf as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, not to the Secretary of State's office.

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

SUMMONS

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

CIVIL ACTION NO. 17-C-664-H

**Darin Viars, on behalf of himself
and all others similarly situated,**

Plaintiff,

v.

SUMMONS

**Lowe's Home Centers, LLC
Agent: Corporation Service Company
209 West Washington Street
Charleston, WV 25302,**

Defendant.

To the above named Defendant:

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon David L. Grubb and/or Kristina Thomas Whiteaker, Attorneys at Law, Plaintiff's attorney, whose address is 1114 Kanawha Boulevard, East, Charleston, WV 25301, an answer, including any related counterclaim you may have, to the complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred for asserting in another action any claim you may have asserted by counterclaim in the above-styled civil action.

Dated: December 4, 2017

Paul H. Flanagan
Clerk of Court

ACCEPTED FOR
SERVICE OF PROCESS
2017 DEC 14 P 2:10
SECRETARY OF STATE
STATE OF WEST VIRGINIA

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

DARIN VIARS,
on behalf of himself and all others
similarly situated,

Plaintiff,

v.

Civil Action No. 17-C-664-H

LOWE'S HOME CENTERS, LLC,

Defendant.

RALEIGH COUNTY
RECEIVED AND FILED

DEC 04 2017 GP

PAUL H FLANAGAN
CIRCUIT CLERK

COMPLAINT

COMES NOW Plaintiff, by counsel, on behalf of himself and all others similarly situated,

and respectfully represents to the Court as follows:

Preliminary Statement

1. This is an class action by Plaintiff Darin Viars on behalf of himself and all other similarly situated workers "all other installers" who were and/or are misclassified by Lowe's Home Centers, LLC ("Defendant") as independent contractors but who should have been classified as employees of Defendant. In doing so, Defendant has and continues to violate the Fair Labor Standards Act ("FLSA"). Defendant is also unjustly enriched by misclassifying Plaintiff and the Class as it avoids having to provide its installers with benefits offered to other of Defendant's employees including, but not limited to, liability insurance coverage, workers' compensation coverage, and customary payroll withholdings/contributions to fund unemployment insurance, eligibility for Social Security and Medicare, and other associated employee benefits (collectively referred to hereinafter as "employee benefits").

2. Defendant is one of the nation's leading home improvement retailers and operates approximately seventeen stores in West Virginia. Defendant offers installation services for certain categories of products it sells to its customers. These installations are performed by installers with whom Defendant contracts. Plaintiff was such an installer hired by Defendant. Specifically, Plaintiff performed floor installations for Defendant's customers in West Virginia.

3. Defendant misclassified Plaintiff, and all others who were hired by Defendant as installers, as independent contractors. However, Plaintiff and all other installers should have been classified as either part-time or full-time employees of Defendant. Though Plaintiff worked from thirty to seventy hours per week on Defendant's jobs, Defendant did not provide him benefits offered to Defendant's full-time and/or part-time employees, including overtime pay.

4. Defendant further failed to pay for and provide Plaintiff with liability coverage and employee benefits, and required Plaintiff to pay self-employment tax on all income earned from Defendant.

5. Plaintiff is similar to all other installers who perform installations for Defendant as each installer is required to obtain their own liability insurance, receives no employee benefits from Defendant, and pays all of his own self-employment taxes.

6. Plaintiff, and all other members of the Class, should have been classified as employees of Defendant and were misclassified in violation of the FLSA. Pursuant to its contract with Plaintiff, and with all other installers, Defendant had the power to control and direct the performance of the services Plaintiff and any individual working with Plaintiff, and all other Class members, provided on behalf of Defendant, including, among other things: designating customers for which Plaintiff performed installations; requiring the customer to pay Defendant directly for all work performed by Plaintiff and then paying Plaintiff; requiring

Plaintiff and any individual working for Plaintiff to submit to a background check before working on a Defendant's job site; requiring Plaintiff and any individual working for Plaintiff to wear Defendant's branded clothing, thereby holding them out as Defendant's employees; directing Plaintiff to use signage for Defendant's company, and directing the scope of work that Plaintiff could perform for a customer.

7. Moreover, the installation services provided by Plaintiff and the Class for Defendant's customers are within the usual course of Defendant's business.

8. In fact, installation services are integral to Defendant's business and its installation services are advertised widely.

9. Furthermore, Plaintiff, and all other installers, performed installations under the name of Defendant and not that of his or her own business. As such, Defendant misclassified each installer as an independent contractor rather than as an employee.

10. Defendant's contractual agreements and interactions with each installer are similar to its practices with regard to Plaintiff. Because the claims of the Class arise from practices that are common to all Class members, this case is particularly well-suited for class action treatment. Plaintiff and each installer is required to sign an Installer Contract, which is a uniform contract drafted by Defendant. If Plaintiff or any installer fails to sign the Installer Contract, they are not be permitted to receive any work from Defendant.

11. Plaintiff seeks to represent a Class defined as follows:

All persons who performed installation services for customers of Lowe's Home Centers, Inc. in the State of West Virginia who were classified as independent contractors.

Jurisdiction

12. This Court has concurrent jurisdiction over Plaintiff's claims for violation of the FLSA pursuant to 29 U.S.C. §216(b).

Parties

13. Plaintiff is a citizen and resident of Raleigh County, West Virginia.

14. Defendant is a North Carolina limited liability company with its principal place of business in Wilkesboro, North Carolina. Defendant is a wholly-owned subsidiary of Lowe's Companies, Inc. Lowe's Companies, Inc. purports to be the nation's second largest home improvement retailer and conducts its business throughout West Virginia and the United States.

Factual Background

15. Plaintiff began working for Defendant in or around 1999.

16. For the last seventeen years, Plaintiff has regularly provided installation services to Defendant's customers in stores located in Fayetteville, Beckley, Princeton, and Lewisburg, West Virginia.

17. Plaintiff was a Lowe's installer and signed an Installer Contract. Plaintiff was required to comply with each of the terms and conditions described herein with regard to the performance of his services as an installer for Defendant.

18. During his service with Lowe's and pursuant to the installer contract, Lowe's has had the power to control and direct the performance of Plaintiff's installations.

19. Upon information and belief, Defendant enters into a standard and uniform contract with each installer that installs products for Defendant's customers.

20. As part of its agreement with installer, Lowe's also sets forth a series of standards and policies governing the performance of the work by the installers.

21. These standards provide specific instructions regarding how installers are to perform or carry out their installation services, including expectations as to when an installer is required to complete a particular installation.

22. Pursuant to the policies and practices, Defendant requires installers to agree that they will perform installation work within the scope of the work outlined by the installation contract and Lowe's installation program.

23. The standards and policies mandate that all leads and prospects for additional business resulting from or in any way connected to any Lowe's related work, are the property of Lowe's and must be referred to Lowe's.

24. Plaintiff was required to, and did, refer all leads to Defendant and was not allowed to bid work even if it was outside of the scope of work Defendant provided.

25. The terms of all the contracts to perform installation services were determined by Lowe's.

26. Defendant's policies contain specific provisions regarding the installers' job site conduct and specifically provide that installers act as representatives of Lowe's.

27. For instance, Lowe's requires all installers to wear shirts and hats which clearly bear its logo.

28. In this regard, Plaintiff, and all who worked with him on Defendant's installations, was required to wear a Lowe's hat and shirt.

29. Lowe's requires installers to promote Lowe's installation services to customers at all times.

30. Moreover, installers are required to deliver Lowe's "Leave Behind" brochure[s] to the customer at the end of the installation.

31. Further, Plaintiff and other installers are required to place Lowe's yard signs at job sites.

32. Upon information and belief, Lowe's requires that all installers follow Lowe's procedures and practices with regard to installation, including preparing estimates, bids, contracts, scheduling, timing, hours worked, materials, and completion.

33. Upon information and belief, installers are not permitted to perform any changes to a job, without involving Lowe's.

34. Defendant's employees periodically visit installation sites to determine whether, among other things, installers wear the required Defendant's apparel, prominently display Defendant's yard sign, and determine whether the customer was satisfied with the installation.

35. Defendant's employees regularly inspected Plaintiff's work and scored his craftsmanship.

36. Plaintiff was threatened with termination if his scores fell below a certain level.

37. Defendant's customers paid Defendant directly for any installations performed by Plaintiff, and Defendant paid Plaintiff for the installation of flooring for Defendant's customers.

38. Plaintiff was paid by the job pursuant to a schedule of flat rates set by Defendant.

39. Defendant provided Plaintiff with a Form 1099 for all income he received from Defendant.

40. All of Defendant's installers were required to follow the same rules as applied to Plaintiff as each installer executes a substantially identical Installer Contract.

A. INSTALLATION SERVICES ARE WITHIN THE USUAL COURSE OF DEFENDANT'S BUSINESS

41. On its website located at www.lowes.com, Defendant advertises its installation services.

42. Defendant offers installations for several types of goods, including appliances, kitchens and bath remodels, flooring, garage doors, window treatments, lighting, roofing, outdoors, and insulation.

43. Providing its customers with the ability to hire Defendant to install products, requiring the customers to pay Defendant for the installations and for Defendant to "guarantee and warranty" all installations performed establishes that installation services are part of the usual course of Defendant's business.

44. Lowe's advertises on its website that it is a licensed contractor in the state of West Virginia and provides its state contractor's license number.

B. PLAINTIFF WAS NOT CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, PROFESSION OR BUSINESS

45. For all of the years he performed installation services for Defendant, installations for Defendant's customers constituted almost all of Plaintiff's work. Because of the need for him to devote approximately 70 hours of week to fulfilling his duties and responsibilities owed to Defendant under the terms of the Installer's Contract, *to wit*, being available at Defendant "beck and call" any time of day or night, Plaintiff could not develop and maintain a book of business independent of Defendant. Hence, installations for Defendant's customers were Plaintiff's main source of income.

46. Plaintiff was economically dependent on Defendant.

47. By improperly misclassifying Plaintiff, Defendant violated West Virginia's workers' compensation laws, wage laws, and unemployment compensation laws.

48. Defendant also failed to provide Plaintiff with any of the benefits specified under these laws including such benefits.

49. Plaintiff performed installations for approximately four of Defendant's stores and regularly fulfilled work orders as directed by Defendant.

50. Plaintiff was not free to refuse Defendant's jobs so that he could pursue other non-Lowe's business.

51. While performing Defendant's installations, Plaintiff was not permitted to give a Defendant's customer his personal business card and was not permitted to give his personal business card to anyone who approached him while he was working on a Defendant's job.

52. Though potential customers approached Plaintiff while he was on Defendant's jobs and asked him to perform work for them, he was required to refer such jobs to Defendant even though he could have taken those jobs himself.

53. Plaintiff was not allowed to accept such a job even if the product to be installed or job to be performed was outside of the scope of services provided by Defendant.

54. Plaintiff was not an independent contractor but, in fact, was an employee of Defendant. Plaintiff did not receive any of the employee benefits customarily offered to all of Defendant's employees and was compelled to pay his own self-employment taxes, including all employer paid Federal Insurance Contributions Act ("FICA") taxes. Defendant did not reimburse Plaintiff for expenses incurred on a Defendant's job unless the particular job required Plaintiff to purchase a product that Defendant did not carry in its stores. As a result, Defendant

unfairly profited from its relationship with Plaintiff by avoiding costs and expenses that Defendant forced Plaintiff to bear.

55. Plaintiff was recently terminated from further work for Defendant.

CLASS ACTION ALLEGATIONS

56. Defendant requires Plaintiff and the members of the Class to enter into the Installer Contract which results in their misclassification and otherwise does not accurately reflect their true and actual relationship with Defendant.

57. Pursuant to the Installer Contract: Lowe's possesses the power to control and direct the performance of the services of its installers; Lowe's knows that installation services are within the usual course of its business as it advertises these services to its customers; and Lowe's admits that installations form a continuing and growing part of Lowe's business.

58. Defendant knowingly caused Plaintiff and the Class to enter into agreements which resulted in their misclassification.

59. Because of the misclassification, all individuals who install products for Defendant are denied the right to seek unemployment compensation if they are terminated from installing products for Defendant and all are denied benefits in accordance with state law.

60. Plaintiff brings this action on behalf of himself and on behalf of a Class of similarly situated persons.

61. The Class consists of:

All persons who performed installation services for customers of Lowe's Home Centers, Inc. in the State of West Virginia who were classified as independent contractors.

62. Plaintiff's claims are typical of the claims of the Class. Plaintiff is a member of the Class he seeks to represent. Members of the Class are ascertainable from Defendant's records and the Class is sufficiently numerous.

63. Plaintiff will fairly and adequately represent the members of the Class and has no interests that are antagonistic to the claims of the Class. Plaintiff's interests in this action are antagonistic to those of Defendant, and he will vigorously pursue the claims of the Class.

64. The representative Plaintiff has retained competent counsel who are experienced in class action and employment litigation, and who have successfully represented classes in other complex class actions.

65. Common questions of law and fact impact the rights of each member of the Class and a common remedy by way of permissible damages and/or injunctive relief is sought for the Class.

66. There are numerous and substantial questions of law and fact common to all members of the Class which will predominate over any individual issues.

67. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Trial of Plaintiff's and the Class members' claims is easily manageable.

68. The persons in the Class are so numerous that disposition of their claims in this case and as part of a single class action lawsuit, rather than numerous individual lawsuits, will benefit the parties and greatly reduce the aggregate judicial resources that would be spent.

69. Plaintiff knows of no difficulty that will be encountered in the management of this litigation, which would preclude its maintenance as a class action.

70. Defendant has acted on grounds generally applicable to the entire Class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the Class as a whole. Prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant.

71. Without a class action, Defendant will likely retain the benefit of its wrongdoing and will continue its course of action, which will result in further damages to Plaintiff and the Class.

First Claim

[Violation of FLSA]

[Failure to Pay Overtime Wages]

72. Plaintiff realleges and incorporates herein the allegations contained in the preceding paragraphs.

73. Plaintiff brings this claim on behalf of himself and other installers similarly situated pursuant to 29 U.S.C. § 216(b).

74. Defendant suffered or permitted Plaintiff and other similarly situated installers to work.

75. Defendant was the employer of Plaintiff and other installers within the meaning of the FLSA.

76. Defendant was required by the §7 FLSA to pay Plaintiff and other installers similarly situated time and a half their regular rate of pay for hours exceeding forty hours in a work week.

77. Defendant failed to pay Plaintiff and other installers similarly situated overtime wages in violation of 29 U.S.C. § 207 of the FLSA.

78. Defendant's violation of the FLSA was willful.

79. As a result of Defendant's misclassification and failure to pay overtime wages, Plaintiff and others similarly situated have suffered injury.

Second Claim

[Unjust Enrichment]

80. Plaintiff realleges and incorporates by reference the allegations contained in the preceding paragraphs of this complaint, as though fully set forth herein.

81. Plaintiff and all installers are required to enter into the Installer Contract or Defendant will not assign them any installation work. The Installer Contract is a take it or leave it agreement and Plaintiff and the installers have no ability to modify or change any of the standard terms in the Installer Contract.

82. By misclassifying Plaintiff and the Class as independent contractors rather than as employees, Defendant has knowingly forced Plaintiff and the Class to bear the costs incident to its business.

83. Defendant was unjustly enriched by the amount of taxes, business costs, and expenses passed on to Plaintiff and the Class.

84. Defendant benefitted financially from the misclassification of Plaintiff and the Class as independent contractors, and as a result, Plaintiff and the Class suffered damages.

85. It would be inequitable for Defendant to be permitted to retain the benefit it received from its wrongful misclassification of Plaintiff and the Class as independent contractors.

86. Defendant should be compelled to disgorge to Plaintiff and the Class all amounts it received as a result of its wrongful and inequitable practices.

PRAYER

WHEREFORE, Plaintiff respectively prays for the following relief:

1. That the Court enter a declaratory judgment, pursuant to 29 *U.S.C.* §201 *et seq.*, declaring the acts of Defendant to be in violation of the FLSA;
2. That the Court enter a permanent injunction against Defendant ordering it to cease and desist from engaging in the unlawful acts described hereinabove;
3. That Defendant be assessed an additional civil penalty in an amount equal to the unpaid overtime as liquidated damages;
4. That Plaintiff be awarded compensatory damages for his unpaid overtime in an amount to be determined at trial;
5. That each member of the putative class, be awarded compensatory damages for their unpaid overtime in an amount to be determined at trial;
6. That Plaintiff be awarded additional damages, in an amount to be determined at trial, that fairly and reasonably compensates him for emotional and mental distress, aggravation, humiliation, embarrassment, anxiety, annoyance and inconvenience suffered as a result of Defendant's unlawful acts;

7. That each member of the putative class be awarded additional damages, in an amount to be determined at trial, that fairly and reasonably compensates him or her for emotional and mental distress, aggravation, humiliation, embarrassment, anxiety, annoyance and inconvenience suffered as a result of the Defendant's unlawful acts;

8. That Plaintiff be awarded punitive damages against Defendant, in an amount to be determined at trial, for the willful, wanton and/or reckless disregard for his legal rights;

9. That each member of the putative class be awarded punitive damages against Defendant, in an amount to be determined at trial, for the willful, wanton and/or reckless disregard for their legal rights;

10. That Plaintiff be awarded his costs and a reasonable attorney's fee, pursuant to 29 U.S.C. §216(b), the common law, and the general authority of this Court;

11. That each member of the putative class be awarded his or her costs, including a reasonable attorneys' fee, pursuant to 29 U.S.C. §216(b), the common law, and the general authority of this Court;

12. That Plaintiff, and each member of the putative class, be awarded any and all additional compensatory damages, in an amount to be determined at trial;

13. That Plaintiff, and each member of the putative class, be awarded prejudgment and postjudgment interest on any and all of the foregoing damages; and

14. That Plaintiff, and each member of the putative class, be awarded such further and general relief as this Court may deem appropriate.

PLAINTIFF DEMANDS A JURY TRIAL OF ALL ISSUES SO TRIABLE.

DARIN VIARS,
on behalf of himself and all others
similarly situated,
Plaintiff
By Counsel



Kristina Thomas Whiteaker (State Bar No. 9434)

David L. Grubb (State Bar No. 1498)

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit Claims Lowe's Must Install New Pay Policies](#)
