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\*\*E-Filed 3/19/2009\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

MIGUEL COREN, individually and on behalf of a  
class of similarly situated individuals,

Plaintiff,

v.

MOBILE ENTERTAINMENT, INC. a Delaware  
Corporation; LAVALIFE, INC. A Delaware  
Corporation; VERISIGN, INC. A Delaware  
corporation

Case Number C 08-05264 JF (PVT)

**ORDER<sup>1</sup> GRANTING MOTION  
FOR REMAND**

[Re: Docket No. 9]

Plaintiff Coren (“Coren”) moves to remand the instant action to the Santa Clara Superior Court. The Court has read the moving papers and has considered the oral arguments presented at the hearing. For the reasons set forth below, the motion will be granted.

**I. BACKGROUND**

On October 16, 2008, Coren filed a putative class action complaint (“Compliant”) in the Santa Clara Superior Court against Defendants Mobile Entertainment, Inc.(“MEI”), Lavalife, Inc.(“Lavalife”), and Verisign, Inc.

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<sup>1</sup>This disposition is not designated for publication in the official reports.

1 Coren claims that Defendants MEI and Lavalife (collectively “Defendants”) are “mobile  
2 content providers” that create and distribute, among other things, music ringtones, wallpapers,  
3 games and news. Compl. ¶¶ 2-3. Coren further claims that when a consumer purchases content  
4 from a mobile content provider, the content provider forwards the consumer’s cell phone number  
5 along with the amount to be charged to a billing aggregator such as Defendant Verisign, Inc.  
6 Compl. at ¶ 12. The aggregator, in turn, instructs the relevant cellular carrier to add the charge to  
7 the bill associated with that cell phone. Compl. at ¶ 12. Coren alleges, *inter alia*, that Defendants  
8 committed fraud by charging consumers for unwanted and unauthorized mobile content services.  
9 Compl. at ¶¶ 52-77. Coren seeks recovery for economic, monetary, actual, consequential and  
10 compensatory damages, exemplary damages, attorneys’ fees and, pre- and post-judgment interest,  
11 as well as injunctive relief. Compl. at 15-16. The Complaint does not state the amount of the  
12 requested recovery.

13 On November 20, 2008, Defendants removed the case to this Court. In their notice of  
14 removal, Defendants alleged that this Court has original jurisdiction over this action under the  
15 Class Action Fairness Act of 2005 (“CAFA”). On December 22, 2008, Coren filed the instant  
16 motion to remand.

## 17 II. LEGAL STANDARDS

18 Pursuant to 28 U.S.C. § 1441(a), often referred to as “the removal statute,” a defendant  
19 may remove an action to federal court if the plaintiff could have filed the action in federal court  
20 initially. 28 U.S.C. § 1441(a); *see also Ethridge v. Harbor House Restaurant*, 861 F.2d 1389,  
21 1393 (9th Cir.1988). The removal statute is strictly construed against removal. *Id.* The matter  
22 therefore should be remanded if there is any doubt as to the existence of federal jurisdiction.  
23 *Gaus v. Miles, Inc.*, 980 F.2d 564, 565 (9th Cir. 1992).

24 Under CAFA, “[t]he district courts shall have original jurisdiction of any civil action in  
25 which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest  
26 and cost, and is a class action [with minimal diversity].” 28 U.S.C. § 1332(d)(2). “[U]nder §  
27 1332(d)(6), the claims of class members are aggregated to determine whether the amount in  
28 controversy exceeds \$5,000,000.” *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 684

1 (9th Cir. 2006). When it is unclear or ambiguous from the face of a state-court complaint  
2 whether the requisite amount in controversy is pled, the removing defendant must establish by a  
3 preponderance of the evidence that the amount in controversy exceeds \$5 million. *Guglielmino v.*  
4 *McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007).

### 5 III. ANALYSIS

#### 6 A. Compensatory Damages

7 Defendants argue that the amount in controversy should include MEI's revenue for the  
8 entire period in which it engaged in mobile content distribution.<sup>2</sup> During that period, MEI sold  
9 ringtones subscriptions to approximately 248,500 new customers, earning approximately  
10 \$9,500,000 in revenue. Duke Decl. ¶ 4. Defendants cite *Spivey v. Vertrue, Inc.*, 528 F.3d 982  
11 (7th Cir. 2008) in support of their argument. In *Spivey*, the complaint alleged that Spivey's credit  
12 card was charged without authorization and that Vertrue's practices were common to all class  
13 members. *Id.* at 985. The complaint also alleged that making unauthorized charges was a  
14 standard practice at Vertrue. *Id.* The court held that the allegations put into controversy the  
15 propriety of all of Vertrue's charges. *Id.* at 985-86. Defendants argue that the Complaint puts  
16 their revenue in controversy because the it alleges that Defendants "routinely process charges for  
17 mobile content that have not been authorized by the charged party" and "have for years been  
18 systematically, repeatedly and without authorization, billing their customers for purchase of  
19 products and services no agreed to by those customers." Compl. ¶¶ 17, 19. Defendants argue  
20 because the allegation essentially is aimed at MEI's standard content delivery and billing system,  
21 it follows that as in *Spivey*, the entire revenue should be included in the amount in controversy.  
22 However, the Court concludes that Defendants characterize the Complaint too broadly. The  
23 Complaint alleges only that the Defendants' billing process increases the likelihood of false  
24 charges to the consumers. *See* Compl. ¶ 16. Moreover, the Complaint defines the class to  
25 include only "wireless telephone subscribers who suffered losses or damages as a result of MEI  
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27 <sup>2</sup>MEI claims that it engaged in the text message business with ringtones for eighteen  
28 months, from July 2006 through December 2007. Duke Decl. ¶ 6.

1 billing for mobile content products and services not authorized by subscriber.” Comp. ¶ 42. The  
2 claim thus includes only *unauthorized charges*, not *all revenues* from *all customers*.

3 B. Punitive Damages

4 Defendants argue that punitive damages should be included when determining the amount  
5 in controversy. While Defendants are correct as to the applicable legal principle, their argument  
6 is not dispositive in the instant dispute. An award of punitive damages necessarily is related to  
7 the amount of compensatory damages awarded. As discussed above, the amount of  
8 compensatory damages to which the class may be entitled is too speculative to be determined.  
9 Adding punitive damages to the equation only increases the speculation.

10 C. Attorneys’ Fees

11 The parties agree that attorneys’ fees should be included in the amount in controversy, but  
12 they disagree as to the proper estimation of the potential fees in this case. Coren contends that  
13 “the proper estimate of attorneys’ fees is the amount of fees incurred up until the time of  
14 removal.” Pl. Mot. at 9:4-5. Defendants argue that attorneys’ fees should be “the amount  
15 [Coren] reasonably could recover if all of the facts are proven true and the law supports  
16 [Coren’s] claims as alleged.” Def. Mot. at 11:19-21. Because Defendants cannot meet their  
17 burden even if the amount in controversy were to include all of Coren’s attorneys’ fees, the Court  
18 need not address this question. Moreover, even assuming that a reasonable estimation of  
19 potential damages could be reached at this time, Defendants do not offer any showing as to how  
20 the attorneys’ fees based on such damages would be calculated.<sup>3</sup>

21 **III. ORDER**

22 For the reasons discussed above, IT IS HEREBY ORDERED that the motion for remand  
23 is GRANTED.

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27 <sup>3</sup>Defendants’ moving papers suggest that the attorneys’ fees could be as high as twenty-  
28 five percent of the damages. Def. Mot. at 11:23. However, Defendants do not explain how they  
arrived at that percentage.

1 **IT IS SO ORDERED.**

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3 DATED: 3/19/09

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PREMY FOCEI  
United States District Judge

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