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 RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 N.D. CALIFORNIA
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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA

9PST

17 MARY MCKINNEY, Individually and on
 18 behalf of All others Similarly Situated,

Plaintiff,

v.

20 GOOGLE INC., a Delaware Corporation;
 21 HTC CORP., a Delaware Corporation; and T-
 22 MOBILE USA, INC., a Delaware
 Corporation,

Defendants.

Case No. **CV 10-01177** **PVT**
**DEFENDANTS GOOGLE INC. AND T-
 MOBILE USA, INC.'S NOTICE OF
 REMOVAL**

1 **TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE**
2 **NORTHERN DISTRICT OF CALIFORNIA:**

3
4 **PLEASE TAKE NOTICE** that pursuant to 28 U.S.C. §§ 1331, 1332, 1446 and 1453
5 Defendants Google Inc. and T-Mobile USA, Inc. hereby remove the action entitled *Mary*
6 *McKinney v. Google, Inc., HTC Corp., and T-Mobile USA, Inc.*, Santa Clara Superior Court Case
7 No. 1-10-CV0162678, to this Court on the following grounds:

8
9 **I. THE COMPLAINT**

10 1. On January 29, 2009, a purported class action complaint was filed in the Superior
11 Court of the State of California, County of Santa Clara, entitled *Mary McKinney v. Google, Inc.,*
12 *HTC Corp., and T-Mobile USA, Inc.*, Case No. 1-10-CV0162678. Pursuant to 28 U.S.C. §
13 1446(a), a copy of the Complaint is submitted herewith. *See* Declaration of Steven K. Taylor In
14 Support of Defendants Google Inc. and T-Mobile, USA, Inc.'s Notice of Removal ("Taylor
15 Decl."), Exh. A. True and correct copies of all other process, pleadings, and orders filed and
16 served in the state court action are submitted herewith. *See* Taylor Decl., Exh. B.

17 2. The Complaint alleges that Defendants Google Inc., T-Mobile USA, Inc., and
18 HTC Corporation violated a host of state and federal laws by manufacturing and marketing a
19 phone and selling it in combination with T-Mobile's monthly service plan—referred to in the
20 Complaint as the "Google Phone"—that did not "maintain connectivity to T-Mobile's 3G
21 wireless network" and by failing to provide adequate "customer support to assist . . . customers
22 in resolving this defect." Compl. ¶ 1. Plaintiff's Counsel filed this complaint twenty-four days
23 after the Google Phone was released for sale on January 5, 2010. *See* Compl. ¶ 15.

24 3. The Complaint alleges violations of the federal Magnuson-Moss Warranty Act¹,
25 California's Unfair Competition² and False Advertising Laws³, California's Consumer Legal

26
27 ¹ 15 U.S.C. §§ 2301, *et seq.*

28 ² Cal Bus. & Prof. Code §§ 17200, *et seq.*

³ Cal. Bus. & Prof. Code §§ 17500, *et seq.*

1 Remedies Act,⁴ California's Song Beverly Consumer Warranty Act,⁵ as well as five separate
2 common law rights—negligence, negligent misrepresentation, fraud, breach of warranty, and
3 unjust enrichment.

4 4. Plaintiff has styled the Complaint as a "Class Action Complaint" and seeks to
5 represent and have certified a class of "All consumers within the United States who purchased
6 the Google Phone in combination with T-Mobile's monthly service plan for access to its 3G
7 wireless network at any time between January 5, 2010 and the present." Compl. ¶ 32.

8 5. Beyond a class certification order, Plaintiff prays for the following relief: (1) an
9 order requiring disgorgement of Defendants' "ill-gotten gains by requiring the payment of
10 restitution to Plaintiff and members of the Class"; (2) an injunction requiring Defendants to
11 undertake an "informational campaign to inform members of the general public as to the
12 wrongfulness of Defendants' practices"; (3) an injunction barring Defendants from pursuing the
13 policies, acts, and practices complained of; (4) a declaratory judgment stating that Defendants
14 may not pursue the policies, acts, and practices complained of; (5) attorneys' fees; (6) costs; (7)
15 pre-and post-judgment interest; and (8) "other relief as the Court may deem necessary." See
16 Compl. Prayer For Relief.

17 6. Plaintiff served Google and T-Mobile with the Complaint and a summons from
18 the state court on February 18, 2010. Copies of the summons to each party are attached hereto as
19 Taylor Declaration Exhibit B.⁶ This Notice of Removal is timely filed pursuant to 28 U.S.C. §
20 1446(b).

21 7. Copies of this Notice of Removal are being duly served upon Plaintiff's counsel
22 and filed with the Clerk of the Superior Court of California, County of Santa Clara, pursuant to
23 28 U.S.C. § 1446(d).

24
25
26 ⁴ Cal. Civ. Code §§ 1750, *et seq.*

27 ⁵ Cal. Civ. Code § 1790, *et seq.*

28 ⁶ CAFA provides for removal of a class action "without the consent of all defendants." See 28
U.S.C. § 1453(b). Defendants Google and T-Mobile jointly seek removal.

1 **II. JURISDICTION IS PROPER UNDER THE CLASS ACTION FAIRNESS ACT**

2 8. This Court has original jurisdiction over this civil action pursuant to the
3 provisions set forth in the Class Action Fairness Act of 2005, 28 U.S.C. §§1332 and 1453
4 (“CAFA”).

5 9. As set forth more fully below, this case is appropriately removed pursuant to 28
6 U.S.C. §§ 1441 and 1332 because (1) this is a “civil action filed under ... [a] State statute
7 ...authorizing an action to be brought by one or more representative persons as a class action”;
8 (2) the number of members of the proposed plaintiff class is not less than 100; (3) the matter in
9 controversy as alleged exceeds the sum or value of \$5,000,000, exclusive of interests and costs;
10 (4) at least one member of the class of plaintiffs is a citizen of a State different from one
11 Defendant; and (5) the Notice of Removal is timely filed. *See also Wang v. Asset Acceptance*
12 *LLC*, No. 09-4797, 2010 WL 308800, at *1 (N.D. Cal. Jan. 27, 2010) (reciting requirements for
13 CAFA removal).

14 **A. Plaintiff Brings a “Class Action” Consisting of Over 100 Members**

15 10. CAFA permits removal of “class actions,” a term defined as “any civil action filed
16 under ...[a] State statute...authorizing an action to be brought by 1 or more representative
17 persons as a class action.” *See* 28 U.S.C. §§ 1332(d)(1)(B). Plaintiff’s “Class Action
18 Complaint” meets CAFA’s definition because Plaintiff expressly purports to bring this action
19 “on behalf of herself and [a] Class of individuals.” Compl. ¶ 32. The Complaint constitutes a
20 “class action” because it is filed under two California statutes that specifically authorize class
21 actions—Section 382 of the California Code of Civil Procedure and 1781 of the California Civil
22 Code. *See* Compl. ¶ 32 (“Pursuant to California Code of Civil Procedure § 382 and California
23 Civil Code 1781, Plaintiff brings this action on behalf of herself and the following Class of
24 individuals....”).

25 11. CAFA allows removal of any class action where the “number of members of all
26 proposed plaintiff classes” is greater than or equal to 100. *See* 28 U.S.C. § 1332(d)(5)(B). The
27 proposed class that Plaintiff seeks to represent exceeds 100 members. Plaintiff seeks to represent
28 a class of individuals throughout the United States. Compl. ¶ 32. And although Plaintiff does

1 not allege the number of purported class members, she alleges that in the first *week* alone after
2 the phone's release, "[a]n estimated 20,000 Google Phones were sold." *See* Compl. ¶ 15.
3 Plaintiff further alleges that the putative class is "so numerous that joinder of all members would
4 be impractical. Compl. ¶ 34.

5 **B. Diversity Exists**

6 12. Diversity under 28 U.S.C. § 1332(d)(2)(A) exists if at least one class member is
7 diverse from at least one defendant.

8 13. Google is incorporated in Delaware with its principal place of business in
9 California, and is therefore a citizen of Delaware and California. *See* Compl. ¶ 3. T-Mobile is
10 incorporated in Delaware with its principal place of business in Washington State, and is
11 therefore a citizen of Delaware and Washington. *See* Compl. ¶ 5. *See also Hertz v. Friend*, 130
12 S. Ct. 1181, 2010 U.S. LEXIS 1897, at *36 (U.S. Feb. 23, 2010).

13 14. Plaintiff is a citizen of the state of Pennsylvania. *See* Compl. ¶ 2.

14 15. The purported plaintiff class is a nationwide class of "all consumers *within the*
15 *United States* who purchased the Google Phone in combination with T-Mobile's monthly service
16 plan for access to its 3G wireless network at any time between January 5, 2010 and the present."
17 Compl. ¶ 32 (emphasis added). Plaintiff further alleges that the Google Phone was "released
18 throughout the United States" which indicates that the putative class is geographically diverse,
19 hailing from throughout the United States. Compl. ¶ 15; *see also* ¶ 3. Accordingly, the putative
20 class includes other members, in addition to Plaintiff, who are citizens of neither Delaware nor
21 California.

22 16. Because at least one member of the putative class is a citizen of a State different
23 from at least one Defendant, this action meets the diversity requirement of 28 U.S.C. §
24 1332(d)(2).

25 **C. Amount in Controversy Exceeds \$5,000,000**

26 17. To remove an action to federal court under CAFA, the "matter in controversy
27 must exceed the sum or value of \$5,000,000, in the aggregate, exclusive of interest and costs."
28 *See* 28 U.S.C. § 1332(d). The allegations in the Complaint demonstrate that the amount in

1 controversy as a result of the claims of the putative class exceeds the sum or value of \$5,000,000.

2 18. The Complaint seeks all “money” gained by Defendants through the alleged
3 wrongful conduct. *See* Compl. ¶¶ 50, 60, 65. More specifically, Plaintiff in her Complaint seeks
4 “disgorgement of Defendants’ ill-gotten gains by requiring the payment of restitution to Plaintiff
5 and members of the Class.” Prayer For Relief ¶ 6. The Complaint identifies these “ill-gotten
6 gains” as, *inter alia*, “money” Defendants “acquired ...from Class Plaintiffs” “though their acts
7 of unfair competition.” Compl. ¶ 50. Plaintiff requests “this Court disgorge and restore such
8 money to them...” *Id.* Plaintiff further alleges that she and the putative class members suffered
9 “damages, harm and economic loss” as a proximate result of Defendants’ alleged wrongdoing
10 and incurred fees, charges, and other expenses for which Defendants are liable. *See* Compl. ¶¶
11 65, 89, 80, 82, 87, 88, 97, and 105.

12 19. Plaintiff alleges that in the first *week* of sales, an estimated 20,000 Google Phones
13 were sold. Compl. ¶ 15. Plaintiff further alleges that each phone was sold for at least \$179 and
14 all phones sold with a T-Mobile service plan required a two-year contract with monthly service
15 charges “which may be upwards of \$100 per month.” *See* Compl. ¶ 19. Based on these
16 allegations, Plaintiff’s Complaint asserts amounts in controversy in excess of \$3.5 million for
17 sales of the Google Phone and upwards of \$2 million for monthly service charges for only *one*
18 *week of sales*. Indeed, according to the Complaint, the revenues and profits attributable to the
19 sale of handsets, phone service plans, and associated fees amounted to “millions of dollars.” *See*
20 Compl. ¶ 108.

21 20. The Nexus One phone has been on sale for eleven weeks as of the date of this
22 removal notice, and Plaintiff’s putative class is not restricted by date. Based on the allegations of
23 the Complaint, the amount in controversy based on the phone sales and service charges alone
24 will be substantially greater than the amounts specifically alleged in the Complaint, and is
25 increasing daily.

26 21. The Complaint additionally challenges Defendants “policies, acts and practices
27 complained of herein” Compl. ¶ 23, Prayer For Relief ¶ 2. These policies include the
28 application of alleged termination and cancellation fees applicable to customers who buy a

1 Google Phone and enter into a two-year contract for service with T-Mobile but seek to cancel
2 service before the end of the contract term. Compl. ¶ 23. Plaintiff alleges that customers are
3 “liable not only for the termination fee to T-Mobile, but also must pay Google the difference
4 between the full price of the Google Phone and the subsidized price, which may be upwards of
5 \$350.” See Compl. ¶ 23. By seeking to enjoin collection of those fees, the Complaint places in
6 controversy Google’s and T-Mobile’s contractual rights to collect these fees, which based on the
7 total amount of phones the Complaint alleges were sold in *one week*, let alone the eleven weeks
8 that have passed, is substantial. Compl. ¶ 23, Prayer For Relief ¶ 2.

9 22. Plaintiff requests a constructive trust “consisting of the benefit conferred upon
10 Defendants in the form of the excess revenues and profits” derived from the sale of Google
11 Phones and accompanying services. Compl. ¶ 110. Plaintiff alleges that Defendants revenues
12 have amounted to “millions of dollars.” Compl. ¶ 48, 58, and 108. The value of a constructive
13 trust is considered when determining the amount in controversy. See *Rosen v. Chrysler Corp.*,
14 205 F.3d 918, 922 (6th Cir. 2000); *ACS Recovery Services, Inc. v. Kaplan*, Case No. 09-01304,
15 2010 WL 144816, at *2, *4 (N.D. Cal. Jan. 11, 2010).

16 23. Plaintiff’s request for injunctive relief also seeks to compel Defendants to
17 “undertake an informational campaign to inform members of the general public as to the
18 wrongfulness of Defendants’ practices.” Prayer For Relief ¶ 4. The costs of complying with an
19 order for injunctive relief are considered in determining whether the jurisdictional amount in
20 controversy requirement is satisfied. See *Rippee v. Boston Market*, 408 F. Supp. 2d 982, 984
21 (S.D. Cal. 2005). Given Plaintiff’s demand that the informational campaign be directed at the
22 general public, any informational campaign will have to be launched nationwide, and the costs of
23 any such campaign will be substantial.

24 24. Plaintiff further requests, as contained in the CLRA Notice referenced in
25 paragraph 65 of the Complaint, changes to Defendants’ advertising, a recall of all Google
26 Phones, and restitution, which relief would amount to significant expenditures for Defendants.

27 25. Finally, Plaintiff requests payment of attorneys’ fees. See Compl. ¶ 65; *Rippee*,
28 408 F.Supp. 2d at 984; *Tompkins v. Basic Research LL*, No. 08-244, 2008 WL 1808316,

1 *4 (E.D. Cal. Apr. 22, 2008) (estimate of attorneys fees awarded in UCL, FAL, and CLRA
2 claims should be included in amount in controversy calculation under CAFA).

3 26. Although Defendants deny the allegations of the Complaint, and further deny that
4 they have any liability to Plaintiff or the putative class or that the putative class has suffered any
5 cognizable injury or damages, or that the Complaint states any claim, the Complaint satisfies the
6 jurisdictional amount-in-controversy requirement under CAFA. The nature and extent of
7 Plaintiff's claims, along with the magnitude of Plaintiff's demands for disgorgement, restitution,
8 constructive trust, damages, injunctive relief, and attorney's fees constitutes an alleged amount in
9 controversy in excess of \$5,000,000, exclusive of interests and costs.

10 27. None of the removal exceptions contained in 28 U.S.C. §§ 1332(d) and 1453(d)
11 are present in this action.

12 **D. Removal Is Timely**

13 28. Google and T-Mobile were served with the Summons and Complaint on February
14 18, 2010. Under CAFA any defendant may unilaterally remove an action to federal district
15 court. *See* 28 U.S.C. § 1453(b). This action therefore may be removed by Google or T-Mobile
16 on or before March 22, 2010, 30 days from the date either was served. *See* 28 U.S.C. § 1446(b).

17
18 **III. JURISDICTION IS PROPER UNDER THE MAGNUSON-MOSS WARRANTY
19 ACT**

20 29. Federal courts have original jurisdiction over actions arising under the "laws...of
21 the United States." 28 U.S.C. § 1331.

22 30. Plaintiff seeks relief under the federal Magnuson-Moss Warranty Act, 15 U.S.C.
23 §2310, *et seq.* Federal courts have original jurisdiction over claims brought under the
24 Magnuson-Moss Warranty Act, 15 U.S.C. §2310, *et seq.*, when CAFA provides an independent
25 grounds for removal. *See Chavis v. Fidelity Warranty Services, Inc.*, 415 F. Supp.2d 620, 622-
26 624 (D.S.C. 2006); *Wolph v. Acer America Corp.*, No. C09-01314, 2009 WL 2969467, at *3
27 (N.D. Cal. Sept. 14, 2009); *Brothers v. Hewlett-Packard*, No. C06-02254, 2007 WL 485979, at
28 *8 (N.D. Cal. Feb. 12, 2007).

1 31. Because CAFA vests this Court with original jurisdiction over the Complaint, this
2 Court also has original jurisdiction over the Complaint under 28 U.S.C. § 1331 and 15 U.S.C. §
3 2310.

4 **IV. VENUE AND INTRA-DISTRICT ASSIGNMENT**

5 32. Because the Complaint was filed and is currently pending in the Superior Court
6 of California for the County of Santa Clara, this District is the proper venue for this action upon
7 removal pursuant to 28 U.S.C. § 1441(a), and the San Jose Division is the proper intra-District
8 assignment for this action upon removal pursuant to Civil L.R. 3-2(e)

9 **V. NON-WAIVER OF DEFENSES**

10 Defendants expressly reserve all of their defenses. Defendants deny the allegations of the
11 Complaint, and further deny that they have any liability to Plaintiff or the putative class or that
12 the putative class has suffered any cognizable injury or damages, or that the Complaint states any
13 claim. *See, e.g., Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 691 (S.D. Ohio 2006) (“the fact that
14 Defendant removed the case does not mean that Defendant concedes that Plaintiff has adequately
15 alleged appropriate damages”).

16 **VI. DEMAND FOR JURY TRIAL**

17 Defendants hereby demand trial by jury on all issues so triable.

18
19 Dated: March 22, 2010

KEKER & VAN NEST LLP

20
21 By: 

22 Steven K. Taylor
23 Attorney for Defendant
GOOGLE INC.

24 Dated: March 22, 2010

DAVIS WRIGHT TREMAINE LLP

25
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