

1 RODGER R. COLE (CSB NO. 178865)
 rcole@fenwick.com
 2 MOLLY R. MELCHER (CSB NO. 272950)
 mmelcher@fenwick.com
 3 FENWICK & WEST LLP
 Silicon Valley Center
 4 801 California Street
 Mountain View, CA 94041
 5 Telephone: (650) 988-8500
 Facsimile: (650) 938-5200

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
N.D. CALIFORNIA

6 TYLER G. NEWBY (CSB NO. 205790) **E-FILING**
 tnewby@fenwick.com
 7 JENNIFER J. JOHNSON (CSB NO. 252897)
 jjjohnson@fenwick.com
 8 FENWICK & WEST LLP
 555 California Street, 12th Floor
 9 San Francisco, CA 94104
 Telephone: (415) 875-2300
 10 Facsimile: (415) 281-1350
 11 Attorneys for Defendant
 12 CARRIER IQ, INC.

ADR

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

Fenwick & West LLP
Attorneys At Law
Mountain View

16 RODNEY SHIVELY, individually and on behalf of others similarly situated,
 17
 18 Plaintiff,
 19
 20 v.
 21 CARRIER IQ, INC.; GOOGLE INC.; and
 DOES 1-50,
 22 Defendants.

CV 12-00290

HRL

NOTICE OF REMOVAL OF CIVIL ACTION PURSUANT TO 28 U.S.C. §§ 1331, 1441, 1446

Removed from the Superior Court of the State of California, Santa Clara County, Case No. 111 CV 214522

NOTICE OF REMOVAL

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

26 **PLEASE TAKE NOTICE** that, pursuant to 28 U.S.C. §§ 1331, 1441, and 1446,
 27 Defendant Carrier IQ, Inc. ("Carrier IQ") hereby removes the above-titled action from the
 28 Superior Court of the State of California, County of Santa Clara, to the United States District

NOTICE OF REMOVAL OF CIVIL ACTION

1 Court for the Northern District of California, San Jose Division. In support of its Notice of
2 Removal, Carrier IQ states and represents as follows:¹

3 **BACKGROUND**

4 1. On December 7, 2011, Plaintiff Rodney Shively, individually and on behalf of
5 others similarly situated ("Plaintiff") filed a class action entitled *Shively v. Carrier IQ, Inc.,*
6 *Google, Inc., and Does 1-50* ("State Court Action"), in the Superior Court of the State of
7 California, County of Santa Clara.

8 2. On December 20, 2011, Carrier IQ was served with a copy of the Complaint and
9 the Amended Summons. True and complete copies of these documents are attached as **Exhibit**
10 **A**. This Notice of Removal is timely filed as it is within thirty (30) days of receipt by Carrier IQ,
11 through service or otherwise, of a copy of the pleading setting forth the claims for relief upon
12 which the action is based. *See* 28 U.S.C. § 1446(b); *Murphy Bros. Inc. v. Michetti Pipe Stringing,*
13 *Inc.*, 526 U.S. 344, 347-48 (1999).

14 3. Since December 1, 2011, Carrier IQ is aware of 58 federal class actions that have
15 been filed in 22 districts naming Carrier IQ and various cell phone manufacturers as defendants
16 and alleging virtually identical claims of violations of the Federal Wiretap Act, 18 U.S.C. § 2510,
17 *et seq.* *See* Declaration of Tyler Newby in Support of Defendant Carrier IQ, Inc.'s Notice of
18 Removal of Civil Action ("Newby Decl.") ¶ 2. At least 17 of those cases also assert causes of
19 action under California Penal Code § 631, nearly identical to Plaintiff's third cause of action in
20 this case. On December 2, 2011, an MDL action was initiated when the Plaintiffs in *Pipkin v.*
21 *Carrier IQ, Inc., et al.* (Case No. 5:11cv05802, N.D. Cal.) moved for transfer and consolidation
22 of all related actions to the Northern District of California (MDL No. 2330, Dkt. # 1). Newby
23 Decl. ¶ 3. The deadline to file responses to the motion for transfer was December 27, 2011, and

24 ¹ Carrier IQ expressly preserves all Rule 12(h) objections, including without limitation any
25 objections they may have as to improper service, jurisdiction, venue or any other defenses or
26 objections to this action. Carrier IQ further intends no admission of fact, law, or liability by this
27 Notice, and reserves all defenses, motions and arguments. By way of setting forth the bases for
28 removal in this Notice, Carrier IQ in no way concedes the truth of the allegations in the
Complaint. Nor does Carrier IQ concede that the alleged causes of action are amenable to class
treatment or that Plaintiff or any proposed class member is entitled to any recovery; to the
contrary, Carrier IQ does and will dispute the claims in their entirety.

1 the MDL panel will likely hear and take under submission whether the 55 related cases should be
2 consolidated and transferred at its hearing on March 29, 2012. Newby Decl. ¶¶ 4, 5.

3 JURISDICTION

4 4. Pursuant to Civil Local Rule 3-5(a), removal to this Court is proper because the
5 Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.
6 Section 1331 grants district courts “original jurisdiction of all civil actions arising under the
7 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Plaintiff’s third cause of
8 action, although pled a violation of California Penal Code Sections 631, 637.2, arises under the
9 Federal Wiretap Act, 18 U.S.C. § 2510, *et seq.*, and, thus, its Complaint is one which may be
10 removed to this Court by Carrier IQ pursuant to the provisions of 28 U.S.C. § 1441(a).

11 5. Plaintiff alleges that California Penal Code Sections 631 and 637.2 are the bases
12 for its third cause of action. Complaint at 9:25-10:41. Plaintiff alleges that: “[D]efendants,
13 without the willful consent of Plaintiff and Class members, made an unauthorized connection to
14 Plaintiff’s and the putative Class members’ devices over the Internet” and “attempted to use and
15 did use and communicate, and did aid, agree and conspire to use, the information wrongfully
16 obtained.” Complaint 10:2-11.

17 6. Courts in both the Northern and Central Districts of California have held that
18 Federal Wiretap Act, as amended by the ECPA in 1986, comprehensively regulates privacy
19 claims concerning electronic communications. *See* 18 U.S.C. §§ 2510-2522. Federal law
20 completely preempts state law in this area, including California Penal Code Sections 631, *et seq.*
21 *See In re Google Street View Electronic Comms. Lit.*, 794 F.Supp.2d 1067, 1084-85 (N.D. Cal.
22 2011), (Ware, C.J.) (finding that the ECPA was intended to comprehensively regulate the
23 interception of electronic communications such that the scheme leaves no room in which states
24 may further regulate); *Bunnell v. Motion Picture Association of America*, 567 F. Supp. 2d 1148,
25 1154-55 (C.D. Cal. 2007) (finding plaintiff’s California Penal Code §§ 631, *et seq.*, wiretap claim
26 preempted by “field preemption” and stating “it is apparent to this Court ‘that Congress ‘left no
27 room’ for supplementary state regulation” (citation omitted)); *but see Valentine v. NebuAd, Inc.*,
28 C08-05113 TEH, 2011 WL 1296111 (N.D. Cal. Apr. 4, 2011) (finding no express or field

1 preemption and citing *People v. Conklin*, 12 Cal. 3d 259, 273 (1974) (finding no intent by
2 Congress to occupy the field involving interception of communications) and *Kearney v. Salomon*
3 *Smith Barney, Inc.*, 39 Cal. 4th 95, 106 (2006) (finding no basis for concluding that the Wiretap
4 Act preempts CA privacy law)).

5 7. In areas where federal law completely preempts state law, even if the claims are
6 purportedly based on state law, the claims are considered to have arisen under federal law. See
7 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd. of State of Cal.*
8 *v. Constr. Laborers Vacation Trust for S. California*, 463 U.S. 1, 24 (1983)). The Federal
9 Wiretap Act, as amended by the ECPA, completely preempts Plaintiff's state cause of action and,
10 thus, its third cause of action arises under federal law. Accordingly, this action is subject to
11 removal on the ground that it could have been brought, originally, in this Court. 28 U.S.C.
12 §§ 1331, 1441(b).

13 8. For all other claims alleged by Plaintiff, this Court has supplemental jurisdiction
14 pursuant to Section 1367 or removal jurisdiction pursuant to Section 1441(c), which provides that
15 "[w]henver a separate and independent claim or cause of action within the jurisdiction conferred
16 by section 1331 of this title is joined by one or more otherwise non-removable claims or causes of
17 action, the entire case may be removed" 28 U.S.C. § 1441(c); see also 28 U.S.C. § 1367.

18 9. Removal on the basis of federal question jurisdiction requires the consent of all
19 defendants who have been properly served. *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir.
20 2011); *Martinez v. Am.'s Wholesale Lender*, C 09-05630 WHA, 2010 WL 653187 (N.D. Cal. Feb.
21 22, 2010) (stating that the rule that all defendants must join the removal petition applies only to
22 those defendants properly served and joined in the action (citing *Emrich v. Touche Ross Co.*, 846
23 F.2d 1190, 1193, n.1 (9th Cir. 1988))). However, consent to removal is not needed from
24 defendants who have not yet been served. *Destfino*, 630 F.2d at 957. On information and belief,
25 Google, Inc., the only other named defendant in this action has not yet been served (Newby Decl.
26 ¶ 6) and, thus, their joinder or consent to this Notice of Removal is not required under 28 U.S.C.
27 § 1446(a).

28 10. On information and belief, none of the alleged "Doe" defendants have been named

1 or served.

2 11. Carrier IQ has complied with all conditions precedent to removal.

3 **ASSIGNMENT**

4 12. Pursuant to Civil Local Rule 3-5(b), assignment of this action to the San Jose
5 Division of this Court is proper because, under Civil Local Rule 3-2(e), this action arises in the
6 county of Santa Clara: (a) Plaintiff originally filed this action in Santa Clara County Superior
7 Court; (b) Carrier IQ's headquarters and principal place of business is located in the city of
8 Mountain View, California, in Santa Clara County; (c) Google, Inc.'s headquarters and principal
9 place of business are located in the city of Mountain View, California, in Santa Clara County; and
10 (d) a substantial part of the events or omissions which give rise to the claim occurred in Santa
11 Clara County.

12 13. Promptly upon filing this Notice of Removal with this Court, Carrier IQ will
13 provide written notice to Plaintiff (through its counsel) and to the clerk of the Superior Court of
14 the State of California, County of Santa Clara, as required under 28 U.S.C. § 1446(d). A copy of
15 that notice is attached as **Exhibit B**.

16 WHEREFORE, this action is properly removed to this Court pursuant to 28 U.S.C.
17 §§ 1331, 1441, and 1446.

18
19 Dated: January 18, 2012

FENWICK & WEST LLP

20
21 By: Tyler G. Newby / mrm
Tyler G. Newby

22 *Attorneys for Defendant CARRIER IQ, INC.*
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