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9 ASUSTEK COMPUTER, INC.

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

13 EDWARD BREKHUS, an individual, on
14 behalf of himself, the general public, and those
similarly situated,

15 Plaintiff,

16 v.

17 ASUS COMPUTER INTERNATIONAL;
18 ASUSTEK COMPUTER INC.,

19 Defendants.

CASE NO.

[San Francisco County Superior Court Case No.
CGC-18-571553]

**DEFENDANTS ASUS COMPUTER
INTERNATIONAL AND ASUSTEK
COMPUTER INC.'S NOTICE OF
REMOVAL OF CIVIL ACTION UNDER
28 U.S.C. SECTION 1332(D) (CLASS
ACTION FAIRNESS ACT)**

20 **NOTICE OF REMOVAL**

21 TO THE CLERK OF THE ABOVE-ENTITLED COURT, THE PARTIES, AND ALL
22 ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§ 1332(d), 1367, 1441(a), 1446,
24 and 1453, Defendants ASUS Computer International (“ACI”) and ASUSTeK Computer Inc.
25 (“ASUSTeK”) (collectively, “ASUS”) hereby remove to this Court the state court action
26 described below, pending as case number CGC-18-571553 in the Superior Court of California,
27 San Francisco County (“State Court Action”). The following statement is submitted pursuant to
28 28 U.S.C. § 1446(a):

1 **I. FACTUAL BACKGROUND**

2 1. On or about November 26, 2018, Plaintiff Edward Brekhus (“Plaintiff”) filed a
3 class action complaint (“Complaint”) and thereby commenced the State Court Action against ACI
4 in the Superior Court of the State of California for San Francisco County, entitled *Edward*
5 *Brekhus v. ASUS Computer International, et al.* ACI was served with the Complaint on
6 November 28, 2018.

7 2. In the Complaint, Plaintiff purported to represent a class of only California
8 residents who “purchased a Purported USB 3.0 Laptop between November 21, 2014 and the
9 present.” **Exhibit A** (Complaint), ¶ 40.

10 3. On or about April 26, 2019, Plaintiff filed a first amended class action complaint
11 (“FAC”) in the State Court Action against ACI and ASUSTeK. **Exhibit B** (FAC). Plaintiff
12 served the FAC on April 26, 2019. As required by 28 U.S.C. § 1446(a), a copy of the docket and
13 all process, pleadings, and orders served upon ACI with respect to the State Court Action are
14 attached hereto as **Exhibits A, B and C**.

15 4. The allegations of the FAC, attached hereto as **Exhibit B**, are incorporated by
16 reference as though set forth fully herein without admitting to any of them.¹

17 5. Plaintiff alleges that he purchased an ASUS laptop computer that misrepresented
18 that the laptop’s USB 3.0 port is capable of transferring data at a “SuperSpeed” rate of 5Gbit/s,
19 and that the USB 3.0 port is ten (10) times faster than USB 2.0 ports. **Exhibit B** (FAC), ¶¶ 1-3,
20 60.

21 6. Based on these basic facts, the FAC alleges seven causes of action: (1) fraud,
22 deceit and/or misrepresentation; (2) Violation of the Consumer Legal Remedies Act (California
23 Civil Code §§ 1750, *et seq.*); (3) False Advertising (California Business and Professions Code §§
24 17500, *et seq.*); (4) negligent misrepresentation; (5) Unfair, Unlawful and Deceptive Trade
25 Practices (Business and Professions Code §§ 17200, *et seq.*); (6) breach of express warranty; and
26

27 ¹ This Notice of Removal is based on the allegations of the FAC, as is required for purposes of
28 analyzing removability. ASUS believes that the allegations are without merit, and will dispute
them at an appropriate time.

1 (7) Violation of the Song-Beverly Consumer Warranty Act (Civil Code §§ 1790, *et seq.*). *See*
2 *generally* **Exhibit B** (FAC), ¶¶ 60-139.

3 7. The FAC, which amended the class definition in the Complaint to include all
4 residents in the United States who “purchased a Purported USB 3.0 Laptop,” is styled as a
5 nationwide class action complaint pursuant to California Code of Civil Procedure section 382, the
6 state statute authorizing an action to be brought by one or more representative persons as a class
7 action. **Exhibit B** (FAC), ¶ 48. The FAC also expands the size of the class greatly, from over
8 1,000 people to over 500,000 people. *Id.*, ¶ 50.

9 8. The FAC also adds an allegation that the amount in controversy exceeds
10 \$5,000,000. **Exhibit B** (FAC), ¶ 17.

11 9. Plaintiff alleges that he is a resident of San Francisco, California. **Exhibit B**
12 (FAC), ¶ 4.

13 10. ACI is a California corporation, with its principal place of business in Fremont,
14 California. **Exhibit B** (FAC), ¶ 5.

15 11. ASUSTeK is a Taiwanese corporation with its headquarters in Taiwan. **Exhibit B**
16 (FAC), ¶ 6.

17 12. Aside from the documents contained within **Exhibits A, B** and **C**, ASUS has not
18 been served with any other process, pleadings, or orders in the State Court Action.

19 13. Aside from a Case Management Conference scheduled for June 5, 2019, there are
20 no other upcoming proceedings scheduled in the State Court Action.

21 **II. GROUNDS FOR FEDERAL JURISDICTION AND REMOVAL**

22 14. A defendant may remove any civil action that is brought in a state court over
23 which the United States district courts have original jurisdiction. *See* 28 U.S.C. § 1441(a).

24 15. Pursuant to 28 U.S.C. section 1332, as amended by the Class Action Fairness Act
25 (“CAFA”), original federal jurisdiction extends over putative class actions commenced after
26 February 18, 2005—the effective date of CAFA—where: (1) the proposed class consists of more
27 than 100 members in the aggregate; (2) any member of the proposed class is a citizen of a state
28 different from any defendant (*i.e.*, where minimal diversity exists); and (3) the amount in

1 controversy is \$5 million or more, aggregating all claims, and exclusive of interests and costs.
2 *See* 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(B), 1332(d)(6).

3 16. While there are a number of exceptions to this rule of original jurisdiction
4 contained in 28 U.S.C. section 1332(d)(3)-(5), (9), none of those exceptions are applicable here.

5 17. CAFA applies to the State Court Action because the State Court Action was
6 commenced on or around November 28, 2018, after CAFA's February 18, 2005 effective date.
7 *See* Notes to 28 U.S.C. §§ 1332, 1453 ("The Amendments made by this Act shall apply to any
8 civil action commenced on or after the date of enactment by this Act [February 18, 2005]"), citing
9 Pub. L. 109-2, §9, 119 Stat. 14. In addition, the State Court Action is a "class action" within the
10 meaning of CAFA because it is a "civil action filed under" California Code of Civil Procedure
11 section 382 (**Exhibit B** (FAC), ¶ 48), which is a "rule of judicial procedure authorizing an action
12 to be brought by 1 or more representative persons as a class action." *See* 28 U.S.C. §
13 1332(d)(1)(B) ("the term 'class action' means any civil action filed under rule 23 of the Federal
14 Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action
15 to be brought by 1 or more representative persons as a class action"); *see also* 28 U.S.C. §
16 1453(a) (stating that as it applies to removal of class actions, the term "'class action' ... shall
17 have the meaning[] ... under section 1332(d)(1)"). Based on the facts as alleged, there is no
18 question that there are more than 100 members of the putative class, that minimal diversity
19 between the class and ASUS exists and that the \$5,000,000 jurisdictional minimum is satisfied
20 such that removal of the State Court Action to this Court is proper.

21 **A. Class Numerosity**

22 18. Plaintiff alleges a class consisting of "all persons . . . who, while residing in the
23 United States, purchased a Purported USB 3.0 Laptop between November 21, 2014 and the
24 present." **Exhibit B** (FAC), ¶ 48. Plaintiff further alleges that the size of the proposed class "is
25 well in excess of 500,000 people." **Exhibit B** (FAC), ¶ 50. Accordingly, based on the allegations
26 of the FAC, the putative class as defined in the FAC consists of more than 100 members and
27 CAFA's numerosity requirement is satisfied.

28

1 **B. Minimal Diversity**

2 19. In addition, CAFA's requirement for minimal diversity, set forth in 28 U.S.C.
3 sections 1332(d)(2) and (d)(7), must be present. CAFA requires only that at least one named
4 plaintiff or putative class member be diverse from at least one of the named defendants based
5 upon the citizenship of the defendants. 28 U.S.C. §§ 1332 (d)(1)(D); 1332(d)(2)(A). Plaintiff
6 purports to represent a nationwide class which thus includes class members residing in all fifty
7 states. CAFA's minimal diversity requirement is satisfied because Plaintiff alleges that he and
8 ACI are California residents, that ASUSTeK is a resident of Taiwan, and that the putative class
9 members are residents of all fifty states. **Exhibit B** (FAC), ¶¶ 4-6, 48. Accordingly, ACI and
10 ASUSTeK are citizens of a state (or country) that is different from at least one member of the
11 putative class. *See Swearingen v. Yucatan Foods, L.P.*, 24 F. Supp. 3d 889, 895 (N.D. Cal. 2014),
12 *on reconsideration*, 59 F. Supp. 3d 961 (N.D. Cal. 2014) (finding minimal diversity requirement
13 satisfied because claims were asserted on behalf of a "proposed class of consumers throughout
14 the United States").

15 **C. Amount in Controversy**

16 20. The ultimate inquiry is what amount is put "in controversy" by the complaint, not
17 what a defendant will actually owe. *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 400 (9th
18 Cir. 2010) (holding that the amount in controversy is "simply an estimate of the total amount in
19 dispute, not a prospective assessment of defendant's liability" or "proof of the amount the
20 plaintiff will recover."); *Ray v. Wells Fargo Bank, N.A.*, No. CV 11-1477 AHM (JCx), 2011 WL
21 1790123, at *5 (C.D. Cal. May 9, 2011) (citing *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp.
22 2d 1199, 1204-05 (E.D. Cal. 2008)); *see also Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117
23 (9th Cir. 2004) ("The parties need not predict the trier of fact's eventual award with one hundred
24 percent accuracy."). "No antiremoval presumption attends cases invoking CAFA' because
25 'Congress enacted [CAFA] to facilitate adjudication of certain class actions in federal court.'" *Adams v. Toys 'R' Us - Delaware, Inc.*, No. 14-CV-05550-MEJ, 2015 WL 395214, at *2 (N.D.
26 Cal. Jan. 29, 2015) (quoting *Dart Cherokee Basin Operating Co., LLC v. Owens*, --- U.S. ---, 135
27 S. Ct. 547, 554 (2014)).
28

1 21. “[A] defendant’s notice of removal need only include a plausible allegation that
2 the amount in controversy exceeds the jurisdictional threshold.” *Dart*, 135 S. Ct. at 554 (2014).
3 In measuring the “amount in controversy,” the court assumes that Plaintiff will prevail on each
4 cause of action alleged in the complaint. *See Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413,
5 414-15 (9th Cir. 2018) (“the amount in controversy . . . encompasses all relief a court may grant
6 on that complaint if the plaintiff is victorious”). Evidence of the amount in controversy is
7 required only when the plaintiff contests, or the court questions, the defendant’s allegation.
8 *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). In that circumstance, “[t]he
9 parties may submit evidence outside the complaint, including affidavits or declarations, or other
10 summary-judgment-type evidence relevant to the amount in controversy at the time of removal.”
11 *Ibarra*, 775 F.3d at 1198.

12 22. Based on the allegations of the FAC, CAFA’s amount in controversy requirement
13 is met. Plaintiff expressly alleges that the amount in controversy exceeds \$5,000,000, which
14 includes compensatory damages, punitive damages, statutory damages, and restitution. **Exhibit B**
15 (FAC), ¶ 17.

16 **III. COMPLIANCE WITH REMOVAL STATUTE**

17 23. **Removal to Proper Court.** Assignment to this Court is proper because it is part
18 of the “district and division” embracing the place where the State Court Action was filed –
19 Superior Court, San Francisco County. *See* 28 U.S.C. § 1446(a).

20 24. **Removal is Timely.** The original Complaint was not removable under CAFA,
21 as minimal diversity was lacking. The FAC, which was served on April 26, 2019, was amended
22 to allege a nationwide class, so the requisite minimal diversity is now present. This Notice of
23 Removal is timely under 28 U.S.C. section 1446(b)(3) because it is being filed within thirty (30)
24 days of ASUS’ receipt of “an amended pleading . . . from which is may first be ascertained that
25 the case is one which is or has become removable.”

26 25. **Pleadings and Process.** Pursuant to 28 U.S.C. section 1446(a), attached hereto as
27 **Exhibits A, B and C** is a copy of the docket and all process, pleadings, and orders served on
28 ASUS in the State Court Action.

1 26. **Filing and Service.** Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of
2 Removal is being served upon Plaintiff in the State Court Action and a copy, along with a
3 Notice of Filing of Notice of Removal, is being filed with the Clerk of the Superior Court of
4 California, San Francisco County. A copy of said Notice of Filing of Notice of Removal
5 (without exhibits) is attached hereto as **Exhibit D**.

6 27. **Other Defendants.** There are no other defendants. In any event, consent to
7 removal is not required with respect to removal under CAFA. *See* 28 U.S.C. § 1453(b).

8 28. **Proper Signature.** Counsel for ASUS hereby certifies, pursuant to 28 U.S.C.
9 section 1446(a), that this Notice of Removal is signed pursuant to Rule 11 of the Federal Rules
10 of Civil Procedure.

11 29. Based upon the foregoing, this Court has jurisdiction over this matter pursuant to
12 28 U.S.C. section 1332(d), and the claims may be removed to this Court under 28 U.S.C. section
13 1441(a).

14 **IV. REQUEST FOR ADDITIONAL ARGUMENTS AND EVIDENCE, IF**
15 **NECESSARY**

16 30. In the event that Plaintiff files a request to remand, or the Court considers
17 remand *sua sponte*, ASUS respectfully requests the opportunity to submit additional argument
18 or evidence in support of removal.

19 WHEREFORE, this action should proceed in the United States District Court for the
20 Northern District of California, as an action properly removed thereto.

21 Dated: April 29, 2019

Respectfully submitted,

22
23 By: /s/ Robert B. Bader

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