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7 AT&T MOBILITY LLC; NEW CINGULAR WIRELESS
8 PCS LLC; NEW CINGULAR WIRELESS SERVICES,
9 INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 STEVEN MCARDLE, an individual, on
13 behalf of himself, the general public and
14 those similarly situated,

15 Plaintiff,

16 v.

17 AT&T MOBILITY LLC; NEW
18 CINGULAR WIRELESS PCS LLC;
19 NEW CINGULAR WIRELESS
20 SERVICES, INC., AND DOES 1
21 THROUGH 50,
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Defendants.

FILED

MAR 13 2009

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA



FAXED

CV 09

1117

California State Court Case
No. CGC 09-484884

DEFENDANTS' NOTICE OF
REMOVAL OF ACTION
PURSUANT TO 28 U.S.C. §§ 1332,
1441 AND 1446

(DIVERSITY JURISDICTION—
CLASS ACTION FAIRNESS ACT)

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

2 PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. §§ 1332, 1441 and
3 1446, Defendants AT&T Mobility LLC, New Cingular Wireless PCS LLC, and
4 New Cingular Wireless Services, Inc. (collectively, "ATTM") hereby remove to
5 this Court the state-court action described below.¹

6 **STATEMENT OF JURISDICTION**

7 This is a civil action for which this Court has original jurisdiction under 28
8 U.S.C. § 1332, and is one that may be removed to this Court by ATTM, pursuant
9 to 28 U.S.C. §§ 1441 and 1332(d)(2)(A) for the reasons below.²

10 **BASES FOR DIVERSITY AND REMOVAL**

11 1. On February 10, 2009, Plaintiff Steven McArdle filed a purported
12 class action in the Superior Court of the State of California for the City and County
13 of San Francisco entitled: STEVEN MCARDLE, an individual, on behalf of
14 himself, the general public and those similarly situated, Plaintiff v. AT&T
15 MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC; NEW CINGULAR
16 WIRELESS SERVICES, INC., AND DOES 1 THROUGH 50, Defendants; Case
17 Number CGC-09-484884.

18 2. ATTM's agent for service of process, Corporation Service Company,
19 ("CSC"), was served with the Summons, Complaint, ADR Packet, Civil Case
20 Cover Sheet, Civil Case Cover Sheet Addendum and Statement of Location, and
21 Notice of Case Assignment on February 11, 2009. Pursuant to 28 U.S.C.
22 § 1446(a), true and correct copies of all process, pleadings, and orders served upon
23 ATTM are attached to this Notice of Removal as Exhibit A.

24
25 ¹ New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.)
26 and New Cingular Wireless PCS, LLC are wholly owned by AT&T Mobility LLC or its wholly-
owned subsidiaries. AT&T Mobility LLC is owned by AT&T Inc., which is the only publicly-
held corporation with a 10% or more ownership interest in AT&T Mobility LLC.

27 ² ATTM's relationships with its customers are governed by service contracts that contain
28 agreements to arbitrate. ATTM hereby reserves its right to compel Plaintiff to arbitrate his
claims in accordance with his arbitration agreement.

1 3. This Notice has been filed timely pursuant to 28 U.S.C. § 1446(b).

2 4. The California Superior Court for the County of San Francisco is
3 located within the Northern District of California. 28 U.S.C. § 84(a). This Notice
4 of Removal is therefore properly filed in this Court pursuant to 28 U.S.C.
5 § 1441(a).

6 5. The Court has jurisdiction over this action pursuant to Section 4 of the
7 Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), which grants
8 district courts original jurisdiction over putative class actions with more than 100
9 class members where the aggregate amount in controversy exceeds \$5 million, and
10 any member of the class of plaintiffs is a citizen of a state different from any
11 defendant. As set forth below, this action satisfies each of the requirements of
12 Section 1332(d)(2) for original jurisdiction under CAFA.

13 6. **Covered Class Action.** This action meets CAFA's definition of a
14 class action, which is "any civil action filed under rule 23 of the Federal Rules of
15 Civil Procedure or similar State statute or rule of judicial procedure." 28 U.S.C.
16 §§ 1332(d)(1)(B), 1435(a) & (b). Plaintiff alleges that this action is brought
17 pursuant to the class mechanism in Section 382 of the California Code of Civil
18 Procedure. See Complaint ¶ 41.

19 7. **Class Action Consisting of More than 100 Members.** The
20 Complaint alleges that the class size is estimated to be "composed of more than
21 1,000 persons." Complaint ¶ 43.

22 8. **Diversity.** Pursuant to 28 U.S.C. § 1332(d)(2)(A), each Plaintiff is a
23 "citizen of a State different from any defendant." Plaintiff alleges he is a resident
24 of San Francisco, California. Complaint ¶ 3. Defendant New Cingular Wireless
25 Services, Inc. is, and was at the time of the filing of this action, a corporation
26 incorporated under the laws of Delaware with its headquarters and principal place
27 of business in Georgia (Complaint ¶ 6). Moreover, Defendant AT&T Mobility
28 LLC is, and was at the time of the filing of this action, a limited liability company

1 organized and existing under the laws of Delaware with its headquarters and
2 principal place of business in Georgia (Complaint ¶ 4). Defendant New Cingular
3 Wireless PCS, LLC is, and was at the time of the filing of this action, a limited
4 liability company organized and existing under the laws of Delaware with its
5 headquarters and principal place of business in Georgia (Complaint ¶ 5).
6 Accordingly, Plaintiff is a citizen of a state (California) different from a defendant
7 (Delaware and Georgia (*see* 28 U.S.C. §§ 1332(c), (d)(10))), thus satisfying the
8 diversity requirements of 28 U.S.C. § 1332(d)(2)(A).

9 **9. Amount in Controversy.** Under CAFA, the claims of the individual
10 class members are aggregated to determine if the amount in controversy exceeds
11 the required “sum or value of \$5,000,000, exclusive of interest and costs.” 28
12 U.S.C. §§ 1332(d)(2), (d)(6); *see also Lowdermilk v. US Bank Nat’l Ass’n*, 479
13 F.3d 994, 1004 (9th Cir. 2007). While ATTM denies the claims alleged in
14 Plaintiff’s Complaint and further denies that Plaintiff, or any putative class
15 member, is entitled to any monetary or injunctive relief, the amount in controversy
16 here satisfies the jurisdictional threshold, as explained below.

17 **10. Amount in Controversy – Compensatory Damages.** The
18 Complaint itself is silent as to the amount of damages sought, but given the size of
19 the putative class and the monetary relief sought, the amount in controversy
20 exceeds \$5 million, exclusive of interest and costs. This action is a putative class
21 action in which Plaintiff McArdle alleges that ATTM “does not . . . adequately
22 inform its customers that there will be, and its affirmative statements mislead
23 customers into thinking there will not be, international roaming charges for
24 incoming calls they do not accept, voicemails they do not retrieve and/or calls they
25 do not place while they are abroad.” Complaint ¶ 24. Plaintiff further alleges, “No
26 where . . . did Defendants disclose to their customers the existence or amount of
27 any additional ‘data transfer’ fees associated with sending text, video or picture
28 messages while abroad.” Complaint ¶ 31. Plaintiff defines the putative class as

1 “[a]ll California residents who, from February 10, 2005 through the present, paid
 2 Defendants for (1) voicemails they did not retrieve, calls they did not answer
 3 and/or calls they did not make while traveling abroad or (2) data transfer fees for
 4 text, picture or video messages they sent while traveling abroad.” Complaint ¶ 41.
 5 Based on these underlying allegations, Plaintiff claims that ATTM violated the
 6 California False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*), the
 7 California Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*), the
 8 California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), and
 9 engaged in fraud, deceit and/or misrepresentation. Complaint ¶¶ 50-91. Plaintiff
 10 demands compensatory and punitive damages, restitution, injunctive relief, and
 11 attorneys’ fees and costs. Complaint pp. 20:25-28, 21:1-23.

12 11. Based on the allegations contained in Plaintiff’s complaint, the
 13 amount in controversy with respect to compensatory damages *alone* exceeds \$5
 14 million. The Complaint alleges that membership of the class is estimated to be
 15 “composed of more than 1,000 persons.” Complaint ¶ 43.

16 12. Approximately 60% (~5,617,756 as of January 2009) of California
 17 postpaid³ subscribers are enabled for international roaming/dialing. Declaration of
 18 Pamela Papner ¶ 5. ATTM is able to estimate conservatively that, between
 19 January 1, 2006 and January 31, 2009, the number of California postpaid
 20 customers who incurred international roaming charges is over 10 million “unique
 21 roamers”—a term of art used by ATTM to count the number of subscribers who
 22 incurred international roaming charges in a given month:⁴

23 ³ “Postpaid” customers have a term service commitment (i.e., one or two year agreement)
 24 and pay monthly bills. They are distinguished from “pre-paid” customers, who do not have a
 term service commitment. Declaration of Pamela Papner ¶ 4.

25 ⁴ ATTM is able to estimate these amounts by compiling national end-of-month totals for
 26 “unique roamers.” Papner Decl., ¶ 6. A “unique roamer” is a U.S. customer who travels
 27 internationally and incurs roaming charges in a particular foreign country in a particular month.
 28 *Id.* Once that person is counted as a “unique roamer,” he or she will not be counted as a “unique
 roamer” again during a particular month unless he or she incurs international roaming charges in
 a different country. *Id.* ATTM is able to determine the ratio (or percentage) of California
 postpaid customers to national postpaid customers for each month. *Id.* Applying that ratio (or
 percentage) to the national “unique roamer” numbers yields the estimate of California “unique
 (cont’d)

Year	Estimated Postpaid California Unique Roamers
2006	2,721,922
2007	3,420,093
2008	3,880,469
Jan. 2009	322,155
TOTAL	10,344,639

Papner Decl., ¶ 5. Because these numbers do not go back to the start of the putative class period (*i.e.*, February 10, 2005) and do not extend to the end of that period (*i.e.*, “the present”), these numbers likely underestimate the number of California customers who traveled internationally and incurred related roaming charges.

13. Although Plaintiff does not specify the amount of compensatory damages and restitution that he or each putative class member seeks, Plaintiff alleges that he was overcharged \$3.87 for telephone calls he did not answer, voicemail he did not receive and/or calls he did not place. Complaint ¶ 36. If the allegedly similarly situated other putative class members incurred similar overcharges, compensatory damages or restitution for this part of the alleged class would be about \$40,033,752.90 (\$3.87 x 10,344,639).

14. Plaintiff further alleges that he was overcharged \$10.04 in undisclosed data transfer fees. Complaint ¶ 37. If the allegedly similarly situated other putative class members incurred similar data-transfer overcharges, compensatory damages or restitution for this part of the alleged class would be about \$103,860,176 (\$10.04 x 10,344,639).

15. Indeed, these figures may underestimate the amount in controversy. For example, according to the Complaint (¶ 39), some putative class members claim to have had \$150 in overcharges. If that figure is used, the amount in

roamers.” *Id.*

1 controversy exceeds \$1.5 billion (\$150 x 10,344,639). In any event, even if each
2 putative class member paid as little as 48 cents in allegedly improper international
3 roaming charges, there would be over \$5 million in controversy, thereby satisfying
4 CAFA.

5 16. In short, while ATTM contends that neither Plaintiff nor putative class
6 members are entitled to any damages, the amount placed in controversy by
7 Plaintiff's complaint clearly exceeds \$5 million.

8 17. **Amount in Controversy – Punitive Damages.** Plaintiff also seeks to
9 recover punitive damages. Complaint p. 21:15-16. In assessing the amount in
10 controversy, courts take punitive damages into account. *See Sanchez v. Wal-Mart*
11 *Stores, Inc.*, 2007 WL 1345706, at *2 (E.D. Cal. May 8, 2007) (citing *Gibson v.*
12 *Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001)). Plaintiff's Complaint does not
13 specify an amount of punitive damages. Nonetheless, for purposes of analyzing
14 the amount in controversy, California courts have upheld punitive-damage awards
15 of three- to four-times compensatory damages. *Wysinger v. Auto. Club of S. Cal.*,
16 69 Cal. Rptr. 3d 1, 13-14 (Ct. App. 2007) (punitive award of less than four times
17 compensatory award falls within range of multipliers commonly used to achieve
18 the goals of punitive damages). Again, while it is ATTM's position that no
19 damages, compensatory or punitive, should or will be awarded in this case, for
20 purposes of analyzing the amount in controversy, the Court should consider
21 Plaintiff's claim for punitive damages.

22 18. **Amount in Controversy – Attorneys' Fees.** Plaintiff also seeks
23 attorneys' fees under the California Legal Remedies Act and California Code of
24 Civil Procedure § 1021.5. Complaint p. 21:19-21. Thus, the Court should also
25 consider Plaintiff's attorneys' fees request in determining whether the amount in
26 controversy exceeds \$5 million. *See Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479
27 F.3d 994, 1000 (9th Cir. 2007) (citing *Gibson*, 261 F.3d at 942-43).

28 19. In accordance with 28 U.S.C. § 1446(d), ATTM is serving Plaintiff

1 with a copy of a Notice to Plaintiff of Filing of Notice of Removal of Action
2 Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. A true and correct copy of that
3 Notice to Plaintiff is attached hereto as Exhibit B and is incorporated by reference.

4 20. Pursuant to 28 U.S.C. § 1446(d), ATTM is also filing in the Superior
5 Court of California for San Francisco County, and has served the same upon
6 Plaintiff, a Notice to Superior Court of Filing of Removal of Action Pursuant to 28
7 U.S.C. §§ 1332, 1441, and 1446. A true and correct copy of that Notice to
8 Superior Court is attached hereto as Exhibit C and incorporated by reference.

9 21. On March 10, 2009, ATTM filed a response to Plaintiff's complaint in
10 state court in accordance with California Code of Civil Procedure § 431.30(d). A
11 true and correct copy of that response is attached hereto as Exhibit D.

12 Dated: March 12, 2009

MAYER BROWN LLP
JOHN NADOLENCO
JOSEPH W. GOODMAN

13
14
15 By: 

16 Attorneys for Defendants
17 AT&T MOBILITY LLC; NEW
18 CINGULAR WIRELESS PCS LLC; and
19 NEW CINGULAR WIRELESS
20 SERVICES, INC.
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