

No. 10-2823

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

U.S.C.A. – 7th Circuit
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In re Erich Specht, an individual and doing
business as Android Data Corporation, and The
Android's Dungeon Incorporated.

Erich Specht, et. al.,

Plaintiffs-Petitioners,

v.

Google, Inc.,

Defendant-Respondent.

Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Illinois

District Court Case No. 09-cv-2572
Honorable Harry D. Leinenweber, Presiding

**AT&T MOBILITY LLC'S RESPONSE TO PETITION FOR
WRIT OF MANDAMUS**

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Appellate Court No: 10-2823

Short Caption: In re Erich Specht, et al.

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AT&T Mobility LLC

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

AT&T Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: David Carpenter

Date: August 20, 2010

Attorney's Printed Name: David W. Carpenter

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐

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Pursuant to the Court's Order of August 6, 2010, AT&T Mobility LLC ("AT&T Mobility" or "AT&T") respectfully responds to the Petition For Mandamus ("Petition").

STATEMENT OF THE CASE

AT&T is not a party to this action. It has no financial interest in its outcome. AT&T emphatically denies that it worked with Google behind the scenes or otherwise to affect any of Judge Leinenweber's rulings in this case. Indeed, the responsible AT&T lawyers did not even know that this lawsuit existed until they received the Court's Order that directed AT&T to file a response to plaintiffs' mandamus Petition.

However, AT&T is pleased to provide the Court with whatever assistance it can. Because the factual allegations in the Petition primarily relate to AT&T, AT&T will express its views on these issues and provide the Court with relevant information. In addition, because AT&T is continuously engaged in federal court litigation, it has a substantial interest in the federal court system and in rules that foster its fair and efficient operation.

The first issue before the Court is whether it was improper for Judge Leinenweber to rule on plaintiffs' motion to file an amended complaint that would have made AT&T and three other wireless carriers co-defendants in this trademark infringement action against Google. There were compelling reasons to deny the motion that had nothing to do with AT&T, and this motion did not affect any interests of AT&T. AT&T has indemnification agreements with both Google and with manufacturers of the few Android-based handsets that AT&T markets. It makes no difference to AT&T whether plaintiffs brings a trademark infringement claim against AT&T in the instant lawsuit or in a separate lawsuit, for that decision has no effect on the costs or obligations that AT&T incurs. Thus, AT&T believes that Judge Leinenweber did not err in concluding that he could rule on the motion to amend and that he would be required to recuse himself only if AT&T were made a party to this action, as it was not.

Second, plaintiffs claim that Judge Leinenweber should be disqualified even though AT&T is not a party to this lawsuit. This claim rests on the allegation that the Judge's rulings in this case can have collateral consequences in separate litigation against AT&T and that the outcome of the separate litigation will affect substantial interests of AT&T. This claim rests on a false factual premise. Under the indemnification agreements, AT&T is entitled to compensation for any losses and costs that it incurs as a result of invalidation of Google's Android trademark, including the "financial and non-financial harms" that plaintiffs claim cannot be covered by an indemnification agreement. Because AT&T is not a party to this lawsuit and because AT&T has been broadly indemnified against any losses that it incurs as a result of claims that it cannot use the Android mark, AT&T does not believe that there are grounds to disqualify Judge Leinenweber. It also believes that the facts of this case reveal how the rule that plaintiffs urge can lead to gamesmanship and results that are unfair and inefficient.

Third, AT&T refutes plaintiffs' inflammatory allegation that AT&T and Google were "working together" behind the scenes "in connection with the Proceedings, specifically for the purpose of keeping [Judge Leinenweber] on the case" and that AT&T did so because it would "benefit" from a "rulings made against Petitioners" by a Judge with "personal and family interests in AT&T." Petition at 8. As explained in the attached declaration of AT&T Inc.'s Senior Executive Vice President and General Counsel and the other AT&T attorneys with responsibility for litigation affecting AT&T Mobility, they did not know anything about this lawsuit until they received this Court's Order of August 6, 2010. Watts/Grambow/Berinhout Decl. at ¶ 2, attached hereto as Attachment A. To the best of their knowledge, no AT&T employees ever talked about this case with Google during this period. In all events, AT&T did *not* enter into any agreements with Google to affect Judge Leinenweber's decisions in this case.

STATEMENT OF FACTS

The facts and documents relevant to AT&T's Response appear in (1) the attached joint declaration of Wayne Watts, Martin Grambow, and Neal Berinhout ("Watts/Grambow/Berinhout Decl."); (2) the attached declaration of Jeffrey Bradley, Director of Marketing, AT&T Mobility ("Bradley Decl."), attached hereto as Attachment B; and (3) the attached declaration of Brian Low, Senior Attorney, AT&T Services, Inc ("Low Decl."), attached hereto as Attachment C. They are summarized here for the Court's convenience.

AT&T is a wireless carrier that provides voice and data communications services. To use AT&T's services, customers must obtain wireless handsets or other wireless devices (collectively "handsets") that are compatible with AT&T's network. Bradley Decl. ¶ 2. AT&T does not manufacture handsets. *Id.* Rather, it contracts with equipment manufacturers to produce handsets that are customized to operate on AT&T's network, and AT&T purchases these handsets and resells them to its customers. *Id.* Because of the variety of customer needs and preferences, AT&T has always offered a wide variety of different handsets made by a number of different manufacturers. AT&T currently offers 77 different handsets, including several different models of the Apple iPhone and RIM Blackberry, as well as various models from Motorola, Samsung, HTC, Nokia, LG, and many other manufacturers. *Id.* at ¶ 3; Wireless from AT&T Cell Phones & Devices, <http://www.wireless.att.com/cell-phone-service/cell-phones/index.jsp> (last visited Aug. 20, 2010).

The underlying issue in this case involves a large and rapidly growing segment of the wireless handset market that is colloquially referred to as "smartphones." In addition to providing voice services, these handsets provide high-speed internet access service and also allow each owner of a smartphone to customize it by purchasing "applications" that are

downloaded from “App” Stores operated by the manufacturer of the phone or developer of the operating system. Bradley Decl. ¶ 4.

While rudimentary smartphones existed prior to 2006, the market was transformed by the introduction of the iPhone, which was developed to run on AT&T’s network in the U.S. and still is only available in the U.S. for use on AT&T’s network. The iPhone is manufactured by Apple, and it runs on an Apple operating system. See Bradley Decl. ¶¶ 5, 7. It offers capabilities that were previously unimaginable, and there was explosive demand for the iPhone when it was introduced in 2007. Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 09-66, FCC 10-81, ¶¶ 136, 138 (FCC rel. May 20, 2010) (“*Fourteenth Report*”). The newer models of the iPhone that were introduced in subsequent years continued to be among the most popular smartphones. See Bradley Decl. at ¶ 5. There have been more than a billion downloads by iPhone users of applications from Apple’s App Store for the iPhone. *Id.*

After the iPhone was introduced, AT&T’s wireless carrier competitors sought to develop smartphones that offer the same or similar capabilities and that will run on these carriers’ networks. Bradley Decl. ¶ 6. They entered into arrangements with various handset manufacturers and other equipment suppliers to develop these handsets. One outgrowth of this effort was the development of smartphones that use Google’s “Android Platform.” *Id.* at ¶ 8. This is an operating system that Google licenses to handset manufacturers to be incorporated into their products, and third parties have been given rights that allow them to develop applications that run on the Google system and to sell those applications through Google’s App store, which is called the “Android Market.” *Id.* The first Android-based handset was introduced in October 2008 and a wide variety of other Android-based handsets are now offered by multiple

manufacturers and are compatible with and marketed by many U.S. wireless service carriers, including Verizon, Sprint, T-Mobile, AT&T, MetroPCS, Leap Wireless, U.S. Cellular and others. *Fourteenth Report*, App. C-5.

Until very recently, AT&T did not offer any Android-based phones. In March 2010, AT&T began offering its first Android-based handsets (manufactured by Motorola, HTC, Samsung, and Sony Ericsson respectively), and AT&T has also agreed to begin to offer an Android-based phone manufactured by Dell. Bradley Decl. ¶ 11. AT&T sells these handsets in addition to numerous non-Android-based handsets, including the iPhone, Blackberry Bold and many others.

Before agreeing to provide these Android-based phones, AT&T entered into agreements with these manufacturers. Low Decl. at ¶ 2. Under these agreements with AT&T, each of the manufacturers of AT&T's Android-based phones agreed, among other things, to indemnify and "hold [AT&T] harmless" for any damages, losses, and costs that AT&T incurs as a result of claims that AT&T's use of the Android name violates the trademark of some third party. Low Decl., Exs 1-5.

Prior to offering Android-based phones, AT&T also entered into a separate agreement with Google in which it independently agreed to hold AT&T harmless for damages, costs, losses, and expenses incurred as a result of claims that AT&T's use of the Android name violates trademarks of third parties. Low Decl., Ex. 6.

When this Court issued its August 6, 2010 Order directing AT&T to respond to the Petition, the responsible AT&T attorneys learned about this lawsuit for the first time. Watts/Grambow/Berinhout Decl. at ¶ 2. They had no prior knowledge of the indemnification commitment that Google made to Judge Leinenweber at the July 27, 2010 hearing. *Id.* at ¶ 3.

Indeed, these lawyers were not aware of any other AT&T employee who had even discussed the possibility of such an agreement with Google. *Id.*

But in light of Google's unilateral undertaking and offer, AT&T saw no reason not to execute an additional indemnification agreement with Google, and this additional agreement was executed on August 20, 2010. Low Decl., Ex. 7. This agreement, too, expressly indemnifies AT&T against all losses and expenses that AT&T incurs by reason of claims that its marketing and provision of Android-based phones infringed trademarks of third parties. Low Decl., Ex. 7. This agreement duplicates rights that AT&T has under its other indemnification agreement with Google and under its agreement with the manufacturers of AT&T's five Android-based handsets.

Accordingly, AT&T has two layers of indemnification rights that each cover all such losses. Broad indemnity commitments have been made both (1) by the manufacturers of AT&T's Android-based handsets (Motorola, HTC, Samsung, Sony Ericsson, and Dell) and (2) by the supplier of the operating system used in these handsets and the owner and operator of the associated App Store (Google).

ARGUMENT

Judge Leinenweber is married to Ms. Lynn Martin, who is a member of the Board of Directors of AT&T Inc., which is the parent of AT&T Mobility. Petition at 1,4. Judge Leinenweber and his wife also own substantial shares of the stock of AT&T Inc. *Id.* For these reasons, Judge Leinenweber told the parties to this action that he would recuse himself if AT&T Mobility were made a party to it. *Id.* The question raised in the Petition is whether Judge Leinenweber was required to disqualify himself from all or certain aspects of this case even though AT&T Mobility has not been made a party and does not have a financial interest in this matter.

I. AT&T DOES NOT HAVE ANY FINANCIAL OR REPUTATIONAL INTEREST IN THE ISSUE RAISED BY PLAINTIFFS' MOTION TO AMEND THE PLEADINGS TO ADD NEW DEFENDANTS.

The first issue raised in the Petition is whether it was improper for Judge Leinenweber to rule upon and deny plaintiffs' motion to file a Third Amended Complaint that would have made AT&T Mobility and three other wireless carriers co-defendants in this trademark infringement action against Google.

A. The Judge Had Independent Grounds For Denying The Motion To Amend That Had Nothing To Do With AT&T.

Preliminarily, there does not appear to be any dispute that Judge Leinenweber had overwhelming and compelling grounds to deny this motion and that these grounds had nothing to do with AT&T. This motion was filed shortly before the scheduled discovery cut-off, and a grant of the motion would have required extending discovery and postponement of the summary judgment motion that Google had stated that it would shortly file.

Nor was there any legitimate explanation for plaintiffs' 11th hour attempt to add AT&T and three other wireless carriers as defendants. The Petition states that plaintiffs had first learned in a July 2010 deposition that AT&T had begun selling Android-based phones in April 2010. Petition at 3. Even if that were true, the motion seeks leave to assert claims against three other wireless carriers (Verizon, T-Mobile, and Sprint), and these carriers had been aggressively marketing and selling large volumes of Android phones since before the Complaint was filed in 2009. *See* Bradley Decl. ¶ 9. Plaintiffs have not even attempted to explain why they waited until the eve of the discovery cut-off to seek to assert claims in this lawsuit against the wireless carriers who were known to be selling Android-based phones before the litigation was filed and throughout the time that it had been pending. The most plausible explanation for this untimely

motion – and the only one that AT&T is able to credit – is that plaintiffs were seeking to seize upon a pretext to delay a ruling on Google’s impending motion for summary judgment.

Plaintiffs complain that in the event they file a separate lawsuit against the wireless carriers, the carriers can invoke collateral estoppel in that separate lawsuit if plaintiffs’ infringement claim against Google is rejected, but plaintiffs will not be able to invoke collateral estoppel against the carriers if plaintiffs’ trademark claim against Google is accepted. Petition at 13. Plaintiffs also complain that it is less efficient, and costlier for them, if they cannot pursue their claims against the wireless carriers in this action and must file a separate lawsuit. Petition at 12. But these are all consequences of *plaintiffs’* decision to exclude the wireless carriers from this action at its onset, and to make only untimely 11th hour attempts to add them as defendants.

Accordingly, Judge Leinenweber’s grounds for denying the motion to amend had nothing to do with AT&T, and there is no plausible basis for suspecting that the grounds were pretextual. The decision rested on the ground that adding *any* wireless carrier defendants – regardless of their identity – to the case at that advanced stage of the litigation would be inconsistent with the schedule that the District Judge had established and would disrupt the orderly administration of the case. There is not even is a colorable basis to suppose that Judge Leinenweber would have granted the motion to amend if the Third Amended Complaint had excluded AT&T and sought to add only Verizon, Sprint, and T-mobile as defendants.

B. The Ruling On The Motion To Amend Did Not Affect Any Financial Or Non-Economic Interest of AT&T.

Because the issue before the Court is whether Judge Leinenweber was required to disqualify himself from ruling on the motion to amend, plaintiffs correctly state that the question under the relevant statutes is whether AT&T (the party with whom Judge Leinenweber has a relationship) had a financial or substantial non-economic interest in the ruling on the motion.

AT&T did not have any financial interest or any reputational or other non-economic interest in the District Court's ruling on the motion to amend. The issue raised by the motion is whether a trademark infringement claim would be asserted against AT&T (and other wireless carriers) in the existing lawsuit against Google or in a separate lawsuit in which AT&T and three other wireless carriers would be the defendants. On the facts of this case, there is no other alternative.¹

In light of AT&T's indemnity agreements, the ruling on this motion does not affect any interests of AT&T. In particular, even before Google made its July 27, 2010 commitment to indemnify each of the four wireless carriers that plaintiffs sought to make co-defendants, AT&T had indemnification agreements both with the manufacturers of its Android-based handsets and with Google. Low Decl., Exs. 1-6. AT&T thus had two "layers" of indemnification rights. In each layer, AT&T is indemnified against any attorney fees, damages, losses, or expenses that it incurs as a result of a claim of trademark infringement. *See id.* Also, Google's July 27, 2010 commitment provided duplicative protections. Low Decl., Ex. 7.

In this context, it simply cannot matter to AT&T if plaintiffs' claim against AT&T is pursued in this action or in a separate action. In either event, AT&T will bear none of the costs of litigation, will pay no damages, and will be compensated for whatever costs and losses it incurs from complying with any injunction. For all these reasons, there is no basis for plaintiffs'

¹ Plaintiffs assert that the District Court's decision could mean that plaintiffs do not pursue claims that otherwise would have been litigated. That is not a plausible alternative in this context. If the motion to amend is denied and plaintiffs prevail in its lawsuit against Google, they will certainly pursue separate claims against the wireless carrier to obtain damages and other relief against them. If the motion to amend is denied and plaintiffs' claims against Google are rejected, it is certainly possible that plaintiffs will not pursue their claim against the wireless carriers. But in that event, plaintiffs will be in the same position that they would have occupied if the motion to amend had been granted and plaintiffs cannot claim that they were harmed by denial of the motion to amend.

repeated assertions that AT&T “benefitted” from Judge Leinenweber’s denial of the motion to amend. Petition at 11-14.

Nor is it at all relevant that plaintiffs also seek an injunction. Even if it were the case that an injunction would be entered and would impose substantial non-economic harms for which AT&T cannot be compensated (as AT&T does not believe it is), AT&T still would have no interest in the motion to amend. That motion merely addresses the proceeding in which any injunction will be entered, and the consequences of an injunction would be the same to AT&T, regardless of whether it is entered in this action or in a separate action.

In short, Judge Leinenweber correctly concluded that the indemnification agreements mooted the motion to disqualify him from ruling on the motion to amend.

II. BECAUSE AT&T IS NOT A PARTY TO THIS LAWSUIT AND HAS BEEN INDEMNIFIED BY GOOGLE AND HANDSET MANUFACTURERS FOR ANY LOSSES, THE RESOLUTION OF THIS LAWSUIT WILL NOT AFFECT AT&T’S FINANCIAL OR OTHER INTERESTS.

The Petition alternatively contends that if Judge Leinenweber’s ruling to deny the motion to amend is not reversed, he still should be disqualified from continuing to preside over this lawsuit. Plaintiffs correctly state that although AT&T is not a party to this case, rulings in this case can have collateral consequences in separate litigation against AT&T: *e.g.*, a decision that Google’s use of the Android name does not infringe plaintiffs’ trademark can be given collateral estoppel effect and preclude plaintiffs from re-litigating the same basic claim against AT&T in the second case. Plaintiffs claim that the possibility of these collateral consequences should require Judge Leinenweber’s disqualification in this case because plaintiffs allege that a judgment of trademark infringement would result in both financial and non-financial harms to AT&T and that Judge Leinenweber’s knowledge of this fact would affect his rulings in this lawsuit.

The short answer to plaintiffs' claim is that it is not reasonably plausible that AT&T will incur any substantial harm as a result of a finding that its use of the Android name infringed plaintiffs' marks. Plaintiffs acknowledge that AT&T will then be indemnified for any damages that it is required to pay.

Plaintiffs' claim thus rests on the ground that it is also seeking injunctive relief, and plaintiffs contend that an injunction will have "financial and non-financial impact" that "could not be addressed by indemnity agreements." Petition at 22. In particular, they assert that AT&T will then have to update software on Android-based phones, remove Android's name from the phones and from whatever applications its customers have downloaded, cancel ongoing advertising campaigns, replace packaging, and remove phones from shelves. *Id.*

These claims are incorrect. As a preliminary matter, even if there could be such injunctive relief here, many of the obligations that plaintiffs have hypothesized could only be imposed on the handset manufacturers or Google. For example, Google would be the only entity in a position to update the applications that customers downloaded from Google's App store.

But to the extent that AT&T incurred any of these obligations under an injunction, the two layers of indemnification agreements each give AT&T a right to recover the costs that it incurs in modifying products to conform to injunctions. The Google and manufacturer agreements all broadly provide that AT&T is to be indemnified and "held harmless" for all damages, losses, expenses and costs incurred as a result of a claim of trademark infringement. *See Low Decl., Exs 1-7.* In the event of a judgment of trademark infringement, AT&T is thus entitled to quantify and recover whatever expenses and losses that have been incurred to comply with an injunction.

The Petition also contains vague hints that compliance with the hypothesized injunctions will result in harm to the carrier's "reputation" and "goodwill." Petition at 10, 18, 21. Any such claims rest on the intuitively implausible proposition that customers will blame AT&T and other carriers for the trivial inconveniences that result to them from the invalidation of a trade name that is used by and associated with Google and that is also stamped on phones that are made by and bear the names of consumer equipment manufacturers. The possible adverse effects on carriers are quite remote and incidental, and because AT&T has only been providing a handful of Android-based phones and only for a few months, it is the carrier that would likely be least affected by any such consumer perceptions. See Bradley Decl. at ¶ 11. But here, too, the complete response to plaintiffs' arguments is that if there is damage to AT&T's "goodwill" as a result of an injunction, AT&T will be entitled to quantify those harms and recover their value under the broad "hold harmless" indemnities.

Against this background, plaintiffs' disqualification theory is ultimately quite absurd. Because of Judge Leinenweber's personal and family relationships with AT&T, plaintiffs contend that he will not impose liabilities on *Google* in an action in which AT&T is not a party. The supposed reason is that a finding that Google is not liable will mean that, under principles of offensive collateral estoppel, trademark infringement liability cannot be imposed on AT&T in a separate lawsuit against it. Plaintiffs contend that Judge Leinenweber would take this action notwithstanding the fact that *Google* would ultimately bear the full amount of whatever damages, expenses, losses, and harm to good will that AT&T would incur as a result a trademark infringement judgment against it. So plaintiffs' theory in this case is that Judge Leinenweber will decline to find *Google* guilty of trademark infringement in order to prevent *Google* from

bearing the costs of a judgment, despite the fact that Judge Leinenweber has no relationship with *Google* and only has a relationship with AT&T.

It is perhaps for this reason that the Petition also advances a separate and quite different theory of disqualification. Here, plaintiffs contend that because Judge Leinenweber's wife is an AT&T director, his concern about her "reputation" will cause him to want to decide this case against Google in a way that would favor AT&T's interests in a second case. Petition at 18. To make this claim, plaintiffs contend that Judge Leinenweber's wife is in a position that is analogous to a lawyer who is representing a client in a big case. Petition at 16, 18. But the two situations are not remotely analogous. Losing a big case inherently causes some damage to a lawyer's reputation. That is why the Sixth Circuit held that a judge should have disqualified himself from three pending cases that were recently reassigned to him when the judge knew that his daughter is the lawyer representing parties to four other cases that present the same legal and factual issue (and that previously were consolidated with the judge's three cases). *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136 (6th Cir. 1990).

By contrast, it will have no conceivable effect on the reputation of Ms. Martin or any other AT&T director if Android phones that are provided by all major wireless carriers are held to infringe plaintiffs' trademark, *especially* when, as here, AT&T has been indemnified against resulting losses by both Google and the handset manufacturers. Rather than damage the reputation of AT&T directors, the hypothesized ruling would be evidence of AT&T's business judgment in insisting on indemnification.

Accordingly, AT&T submits that Judge Leinenweber was correct in holding that he should not be disqualified from deciding the instant trademark infringement case against Google because AT&T is not a party to it and because AT&T is indemnified against any losses that it

will incur if a judgment against Google leads to a separate judgment against AT&T. Plaintiffs' disqualification motion cannot be animated by any legitimate concerns about bias, and AT&T urges the Court to adopt rules that preclude the delays and distractions of these motions where, as here, there is no plausible basis for claiming a conflict of interest. There are costs to removing a District Judge from a case that has reached the stage where summary judgment motions are to be filed, and those costs should not be imposed absent very good reasons that, in AT&T's view, do not exist here. Indeed, there are compelling reasons to believe that plaintiffs' motion is a ploy to gain tactical advantages in a fight against Google and cannot be animated by even misplaced concerns about potential bias.

III. AT&T HAD NO DEALINGS WITH GOOGLE RELATING TO THIS LAWSUIT PRIOR TO THIS COURT'S ORDER.

Finally, AT&T wants to expressly refute plaintiffs' scurrilous suggestions that during the prior proceedings before Judge Leinenweber, AT&T was secretly "working together" with Google "specifically for the purpose of keeping a judge" that has "personal and family interests in AT&T" and that has issued and will issue rulings that "benefit AT&T." Petition at 8. Because of the serious nature of this charge, AT&T is refuting it with a joint declaration of AT&T Inc's Senior Executive Vice President and General Counsel, its Senior Vice President and Assistant General Counsel responsible for AT&T Mobility, and the Associate General Counsel responsible for litigation involving AT&T Mobility.

As their joint declaration explains, they are the AT&T lawyers responsible for cases like this one, and they were not even aware of this case until they received this Court's Order directing AT&T to respond to the mandamus petition. Watts/Grambow/Berinhout Decl. at ¶ 2. AT&T accordingly did not enter into any agreements with Google that relate to this case while it

was pending in the District Court, and to the best of their knowledge, no AT&T employee discussed this case with Google during this period. *Id.* at ¶ 3.

CONCLUSION

AT&T is not a party to this case, and it does not have any financial or significant non-financial interest in the issues that it raises. But AT&T is knowledgeable about many of the facts relevant to this Petition, and AT&T does not believe that there is a legitimate basis for a disqualification motion in this case. AT&T is also concerned that the rule that plaintiffs urge will invite tactical uses of these motions when there is no real conflict of interest. For these reasons, AT&T respectfully submits that the Petition for a Writ Of Mandamus should be denied.

Respectfully submitted,

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ATTACHMENT A

No. 10-2823

**IN THE UNITED STATES COURT OF APPEALS
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Petition for Writ of Mandamus to the United
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District Court Case No. 09-cv-2572

Honorable Harry D. Leinenweber, Presiding

**DECLARATION OF WAYNE WATTS, MARTIN GRAMBOW,
AND NEAL BERINHOUT IN SUPPORT OF AT&T MOBILITY LLC'S RESPONSE TO
PETITION FOR WRIT OF MANDAMUS**

1. Wayne Watts is Senior Executive Vice President and General Counsel of AT&T Inc., which is the parent of AT&T Mobility LLC ("AT&T Mobility") and other subsidiaries (collectively, "AT&T"). Martin Grambow is Senior Vice President and Assistant General Counsel for AT&T Mobility and Consumer Markets. He is the lawyer with primary responsibility for AT&T Mobility, and he reports to Mr. Watts. Neal Berinhout is General Attorney and Associate General Counsel for AT&T Mobility and Consumer Markets. He is directly responsible for all litigation involving AT&T Mobility, and he reports to Mr. Grambow. The three undersigned lawyers have personal knowledge of the facts stated herein.

2. It is Mr. Berinhout's responsibility to be knowledgeable about litigation that affects substantial interests of AT&T Mobility. More generally, each of the three undersigned AT&T attorneys is aware of and generally monitors major litigation involving AT&T Mobility.

Prior to our receipt of the Seventh Circuit's Order of August 6, 2010 that directed AT&T to respond to the Mandamus Petition, none of us had been asked about this trademark infringement action against Google, and, indeed, none of us had known about this lawsuit.


3. Until we gathered information about this case following our receipt of the August 6, 2010 Order, none of us had any knowledge about Google's commitment that it delivered to Judge Leinenweber to indemnify AT&T with respect to claims asserted in this litigation. None of us had any discussion with Google or anyone representing Google about Google's making such a commitment. We are not aware of any other employee at AT&T who had any knowledge about the commitment that Google delivered to Judge Leinenweber prior to our receipt of the August 6, 2010 Order.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Wayne Watts
Senior Executive Vice President
and General Counsel
AT&T Inc.



Martin Grambow
Senior Vice President
and Assistant General Counsel
AT&T Mobility and Consumer Markets
AT&T Services, Inc.



Neal Berinhout
General Attorney
and Associate General Counsel
AT&T Mobility and Consumer Markets
AT&T Services, Inc.

Executed on: August 20, 2010

ATTACHMENT B

No. 10-2823

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

In re Erich Specht, an individual and doing
business as Android Data Corporation, and
The Android's Dungeon Incorporated.

Erich Specht, et. al.,

Plaintiffs-Petitioners,

v.

Google, Inc.,

Defendant-Respondent.

Petition for Writ of Mandamus to the United
States District Court for the Northern District of
Illinois

District Court Case No. 09-cv-2572
Honorable Harry D. Leinenweber, Presiding

**DECLARATION OF JEFF BRADLEY IN SUPPORT OF
AT&T MOBILITY LLC'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

1. My name is Jeff Bradley. I am Senior Vice President - Devices of AT&T Mobility Consumer Markets. I make this declaration to discuss the range of wireless devices that AT&T Mobility provides, to demonstrate that AT&T's Android phones currently represent a very small fraction of AT&T's base of both smartphones customers and overall customers, and to discuss the negligible impact that a ruling invalidating the Android name would have on AT&T.

2. AT&T provides wireless voice and data services over radio spectrum that has been licensed from the Federal Communications Commission ("FCC") and over radio towers and other facilities that AT&T has constructed. To use AT&T's wireless services, customers must have mobile devices, including mobile phones ("handsets" or "phones"), that operate on

these radio frequencies. AT&T does not manufacture wireless handsets. Rather, AT&T purchases handsets from unaffiliated equipment manufacturers and resells these handsets to its customers. AT&T customers may also purchase compatible handsets from third parties and use them on AT&T's network.

3. Because customer needs and tastes differ widely, AT&T offers customers a wide variety of different types of handsets that are made by a number of different handset manufacturers. Currently, AT&T offers customers a choice of 77 handsets offered by numerous different manufacturers. Each handset includes software, which runs on a particular operating system. Each manufacturer selects the operating system that will be used on each handset that it offers.

4. This case involves a particular type of wireless handset that is referred to generically as a "smartphone." In addition to allowing voice service, a smartphone provides high speed Internet access and other data services and allow their owners to customize the phones by purchasing and downloading different "applications" that run on the phone's operating system. These applications are typically sold in Applications (or "App") stores operated by the manufacturers of the handset or by the provider of the operating system.

5. The introduction the iPhone in June 2007 substantially raised the competitive bar for smartphones by introducing innovative technologies and capabilities. In the U.S., the iPhone was developed for use exclusively on the AT&T wireless network. Since 2007, the iPhone has continued to be available only for use on AT&T's network in the U.S., and it has been an enormous success. AT&T activated more than 3.2 million iPhones in the second quarter of 2010 alone. And, according to Apple Inc., worldwide, iPhone customers have downloaded more than a billion applications from Apples App Store.

6. As the FCC has correctly explained, “the 2007 launch of the iPhone and the 2008 launch of the iPhone 3G catalyzed the development of a new type of device in the mobile wireless ecosystem, the smartphone.”¹ Indeed, in response to the successes of the Apple iPhone, AT&T’s rivals worked with other manufacturers and suppliers to try to develop smartphones to compete with the iPhone. AT&T has also continued to work with several manufacturers to develop and bring to market additional innovative smartphones.

7. According to a recent FCC analysis of notable smartphone launches in the past two years, all of these efforts have resulted in new smartphones from many different manufacturers (*e.g.*, HTC, Nokia, Palm, Motorola, RIM (Blackberry), LG, Samsung, Sony/Ericsson, Hewlett Packard) using many different platforms (*e.g.*, iOS (iPhone), Android, Windows Mobile, Symbian, Blackberry, webOS).²

8. Android-based handsets thus represent one of these many types of smartphones. Google licenses the Android operating system to handset manufacturers, which in turn use the Android operating system in handsets they develop to take advantage of its capabilities. These Android-based handsets are often referred to as “Android phones.” In addition, Google allows third party software developers to develop applications that run on this “Android platform,” and Google has an App store, called the Android Market, that sells (and in many cases offers for free) these applications to users of Android phones.

9. T-Mobile was the first to offer an Android-based handset in the U.S. in 2008, and was quickly followed by Sprint, Verizon and many others. Verizon, in particular, has made major marketing investments in the “Droid” moniker, and has released the Droid, Droid 2, and

¹ Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 09-66, FCC 10-81 (FCC rel. May 20, 2010) (“*Fourteenth Report*”).

² See *Fourteenth Report*, App. C-5.

Droid X, all by Motorola, and the Droid Incredible by HTC, for use on its network. Verizon also offers the LG Ally and Motorola Devour, both of which are powered by Android.

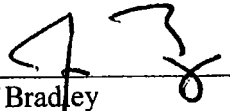
10. AT&T, by contrast, was not an early adopter of Android-based smartphones. AT&T has continued to enjoy great success with the iPhone and the other smartphones it offers that do not use Google's Android Platform (*e.g.* the Blackberry Bold, HTC Tilt 2, Palm Pre, and Samsung Jack).

11. AT&T, however, constantly strives to offer its customers the widest selection of handsets, and given the increasing adoption of Android in the market, AT&T added four Android-based smartphones to its line-up beginning in March 2010 (*i.e.*, Motorola's Backflip, Samsung's Captivate, Sony Ericsson's Xperia, and HTC's Aria). In addition, AT&T has announced that it will begin providing Dell's Android powered handset, the Aero, in August 2010 and intends to add additional Android devices to its portfolio in the second half of the year. While AT&T will likely in the future expand its marketing of Android-based handsets, the subscribers using the four Android-based handsets offered by AT&T today comprise a relatively small percentage of AT&T's smartphone customer base. AT&T today continues to sell a total of 16 non-Android-based smartphones.

12. For these reasons, if a court were to determine that trademark laws prohibit use of the Android name by Google, wireless equipment manufacturers, and wireless carriers, the ruling would not have a material immediate impact on AT&T. Because of its success in providing non-Android-based phones and the fact that it did not begin offering Android-based phones until March 2010, AT&T has not made relatively large investments in advertising and promoting the Android name to date. In addition, as others will explain, AT&T has broad rights to

indemnifications for whatever damages, losses, and costs it incurs as a result of the claims that use of the Android mark is prohibited.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Jeff Bradley
Senior Vice President – Devices
AT&T Mobility Consumer Markets

Executed on: August 20, 2010

ATTACHMENT C

No. 10-2823

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

In re Erich Specht, an individual and doing
business as Android Data Corporation, and
The Android's Dungeon Incorporated.

Erich Specht, et. al.,

Plaintiffs-Petitioners,

v.

Google, Inc.,

Defendant-Respondent.

Petition for Writ of Mandamus to the United
States District Court for the Northern District of
Illinois

District Court Case No. 09-cv-2572

Honorable Harry D. Leinenweber, Presiding

**DECLARATION OF BRIAN LOW IN SUPPORT OF
AT&T MOBILITY LLC'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

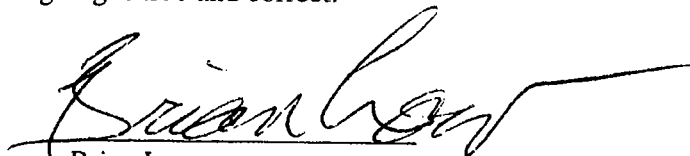
1. My name is Brian Low. My job title is Senior Attorney, AT&T Services, Inc. I have been asked to identify agreements between AT&T and handset manufacturers, and between AT&T and Google, relating to handsets offered by AT&T that rely on the Google's Android operating system ("Android phones"). Based on my search of AT&T's contract databases and my discussions with AT&T's contract managers and responsible attorneys, I declare as follows:

2. AT&T today sells four handsets that use Google's Android operating system, and AT&T has announced that it will be selling a fifth Android phone in the near future. AT&T has purchase agreements with the manufacturers of these handsets. These purchase agreements include indemnification language in favor of AT&T. Attached hereto as Exhibits 1-5 are the relevant excerpts from those agreements.

3. On or about January 5, 2010, AT&T and Google executed an indemnification agreement related to the Android phones offered by AT&T. A copy of the relevant excerpts from this agreement is attached hereto as Exhibit 6.

4. On August 20, 2010, AT&T and Google executed an additional agreement to provide AT&T with indemnification in connection with the Android phones offered by AT&T. A copy of the relevant excerpts from that agreement is attached hereto as Exhibit 7.

I declare under penalty of perjury under the laws of the United States of America that,
based on the information available to me, the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Brian Low", with a long horizontal flourish extending to the right.

Brian Low
Senior Attorney
AT&T Services, Inc

Executed on: August 20, 2010

PROOF OF SERVICE

The undersigned counsel hereby certifies that on August 20, 2010, he caused a copy of the foregoing AT&T Mobility LLC's Response to Petition for Writ of Mandamus to be sent to all persons listed below via Federal Express:

Martin J. Murphy
2811 RFD
Long Grove, IL 60047

P. Andrew Fleming
John F. Shonkwiler
Richard G. Douglass
John B. Harlow, Jr.
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Chicago, IL 60601

and via Federal Express to the chambers of:

The Honorable Harry D. Leinenweber
United States District Court for the
Northern District of Illinois
Everett McKinley Dirksen Building
Room 1946
219 S. Dearborn Street
Chicago, Illinois 60604


David W. Carpenter