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Attorneys for Plaintiffs

7 **IN THE UNITED STATES DISTRICT COURT**  
 8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

9 **ROWENA SILVERA** and )  
 10 **ANDREW SANDERS,** )  
 11 Individually, and on Behalf of all )  
 12 Similarly Situated Persons, )  
 13 Plaintiffs, )  
 14 vs. )  
 15 **CARRIER IQ, INC., SAMSUNG** )  
 16 **ELECTRONICS AMERICA, INC.,** )  
 17 **HTC AMERICA INC.,** )  
 18 **JOHN DOE MANUFACTURERS (1-10),** )  
 19 Defendants. )

Civil No. 3:11-cv-5821-SI

**CLASS ACTION**

**PLAINTIFFS' ROWENA SILVERA AND**  
**ANDREW SANDERS' RESPONSE TO**  
**ADMINISTRATIVE MOTION TO CONSIDER**  
**WHETHER CASES SHOULD BE RELATED**

Additional Cases Subject to Motion:

- Patrick v. Carrier IQ, Inc. et al.*
- Case No. 5:11-cv-05842-PSG
- Kenny v. Carrier IQ, Inc.*
- Case No. 5:11-cv-05774-EJD
- Steiner v. Carrier IQ, Inc.*
- Case No. 5:11-cv-05802-HRL
- Thomas v. Carrier IQ, Inc. et al.*
- Case No. 5:11-cv-05820-HRL
- Pipkin v. Carrier IQ, Inc. et al.*
- Case No. 5:11-cv-05821-EMC
- Padiooa v. Carrier IQ, et al.*
- Case No. 5:11-cv-05975-RMW

1 Plaintiffs, Rowena Silvera and Andrew Sanders, individually and as representatives of a  
2 proposed class of persons who have been spied on by Defendants' use of spyware as alleged in their  
3 complaint, respectfully submit this Response to Administrative Motion to Consider Whether Cases  
4 Should Be Related pursuant to Local Rule 3-12, subdivision (e).

#### 5 **INTRODUCTION**

6 Plaintiffs Silvera and Sanders's (hereinafter "Plaintiffs") action arises out of Defendants'  
7 wrongful conduct with respect to the alleged unauthorized interception of electronic communications in  
8 violation of the Electronic Communications Privacy Act (also known as "ECPA" or the "Wiretap  
9 Act"), 18 U.S.C. §§ 2511, 2512, and the Computer Fraud and Abuse Act (also known as the "CFAA"),  
10 18 U.S.C. §1030.

11 Plaintiffs are informed and believe that 7 cases are pending in the Northern District of  
12 California, as well as over a dozen additional cases pending nationally, concerning Defendants'  
13 conduct. All these cases were filed recently in the period from December 1 through December 7, 2011,  
14 soon after revelation that Defendant Carrier IQ has been intercepting private communications through  
15 their program and software installed on smart phones manufactured by Defendants HTC and Samsung.  
16 On December 2, a motion was filed before the Judicial Panel on Multidistrict Litigation ("JPML") to  
17 transfer all nationally pending federal actions to the Northern District of California for coordination,  
18 which is set to be heard on January 26, 2012 in Miami. So far, one opposition has been filed to that  
19 motion seeking transfer elsewhere. A copy of the JPML Docket Sheet is attached at Exhibit 1.

20 Plaintiffs filed their action on December 2, 2011, and on December 6 the matter was reassigned  
21 to the Honorable Susan Illston. All Defendants have been served with Plaintiffs' complaint through  
22 their agents for service. On December 7, 2011, Plaintiffs filed their motion for a preliminary injunction  
23 against Defendant Carrier IQ to cease collection of private information from mobile smart phone users,  
24 which is set for hearing before Judge Illston on January 13, 2012. Plaintiffs also filed on December 7 a  
25 Request for Expedited Status Conference in order to address the urgent handling of this matter in light  
26 of Defendants' continuing and substantial violations of Federal law at the root of Plaintiffs' preliminary  
27 injunction motion. Plaintiffs' papers are attached at Exhibits 2 and 3, respectively.

1 Plaintiffs believe that the cases pending in the Northern District of California as well as  
2 nationally will be deemed by the JPML to be appropriate for national consolidation, and thus will be  
3 ordered assigned in the Northern District of California or some other district after the January 26, 2012  
4 hearing. Thus, at this time the second prong under LR 3-12 for deeming these matters related – that “it  
5 appears likely” there will be conflicting decisions or undue burden on this Court – is not satisfied  
6 because, of the 7 cases in this district, only Plaintiffs’ case has pending matters that likely will be  
7 resolved before any decision by the JPML to coordinate all matters nationally. If coordination is  
8 granted, the coordination judge appointed by the JPML would make all decisions thereafter regarding  
9 the coordinated cases including the 7 cases that are the subject of this motion. Plaintiffs’ concern is  
10 that if the motion to relate the cases is granted now, before it is necessary or required to do so, they will  
11 suffer further irreparable harm by any delay in the January 13, 2012 hearing on their motion for  
12 preliminary injunction.

13 Thus, Plaintiffs respectfully request that the current motion to deem the 7 Northern District  
14 cases related be denied or held in abeyance at this time, subject to renewal or reconsideration if and  
15 when the JPML denies the motion for coordination now set for January 26, 2012. Alternatively, if the  
16 motion is granted at this time, Plaintiffs request (1) that Judge Illston be designated for the  
17 reassignment so that the current hearing date on the preliminary injunction can remain on calendar and  
18 so she can consider Plaintiffs’ request for an expedited settlement conference; or (2) that if the cases are  
19 reassigned to a judge other than Judge Illston, that the reassignment Judge consider Plaintiffs’  
20 preliminary injunction motion at or about the current date on which it is set, as well as consider  
21 Plaintiffs’ request for an expedited status conference, due to the urgent nature of the continuing  
22 wrongful conduct and resultant harm that is occurring.

### 23 **PROCEDURAL BACKGROUND**

24 The 7 cases filed in the Northern District of California against Carrier IQ from December 1 to  
25 December 7 were all initially assigned to magistrate judges, and the plaintiffs in each of these actions  
26 requested reassignment to an Article III district court judge. So far, plaintiffs believe four cases have  
27 been assigned to Article III judges: Plaintiffs’ case was assigned to Judge Illston on December 6; the  
28 *Kenny* case was assigned to the Honorable Edward J. Davila on December 8, 2011; the *Pipkin* case was

1 reassigned to the Honorable Edward M. Chen on December 8, 2011; and the *Padilla* case was  
2 reassigned to the Honorable Ronald M. Whyte on December 9, 2011.

3 Plaintiffs note that the *Pipkin* case was originally filed in the San Jose Division, and that  
4 Plaintiffs (though filing initially in the San Francisco Division) had requested reassignment to the San  
5 Jose Division (Defendant Carrier IQ is based in Mountain View, Santa Clara County). Those cases,  
6 however, were reassigned to Judges Chen and Illston, respectively, in the San Francisco Division, while  
7 the other two reassigned cases (*Kenny* and *Padilla*) remained in the San Jose Division. Plaintiffs  
8 believe the other 3 cases remain unassigned as of the filing of this Response.

9 On December 7, 2011, Plaintiffs in the *Patrick* case, which was filed on December 5, filed their  
10 Notice of Administrative Motion and Motion to Consider Whether Cases Should Be Related under LR  
11 3-12 with regard to the 7 pending cases. Plaintiffs file this Response pursuant to LR 3-12(e) and LR 7-  
12 11(b).

### 13 **DISCUSSION**

14 Under LR 3-12, “An action is related to another when: (1) The actions concern substantially the  
15 same parties, property, transaction or event; and (2) It appears likely that there will be an unduly  
16 burdensome duplication of labor and expense or conflicting results if the cases are conducted before  
17 different judges.”

18 With regard to the first prong of relatedness, though the 7 pending actions allege in some  
19 instances differing claims (i.e. the *Kenny* case alleges violations of the ECPA and UCL 17200;  
20 Plaintiffs’ case alleges violations of the ECPA and the CFAA; and the *Pipkin* case alleges violations of  
21 the ECPA, CFAA and CPC 631 and 632) and sometimes name different defendants (all name Carrier  
22 IQ but some also name the manufacturer defendants), the cases do have a common party in Carrier IQ  
23 and some common claims. Despite some differences, there is likely a basis for satisfaction of the first  
24 prong of relatedness under LR 3-12(a) given the common conduct of Defendant Carrier IQ.

25 With regard to the second prong of relatedness under LR 3-12(b), Plaintiffs submit that there  
26 likely will not be an unduly burdensome duplication of labor or conflicting results if the motion is  
27 denied at this time. The JPML hearing is set for January 26, 2012, and other than Plaintiffs’ case none  
28 of the 6 other actions have any matter set for decision (or even a hearing or conference) before the

1 JPML hearing or its likely decision on national coordination of these cases. For example, the initial  
2 status conference in the *Kenny* matter is set for March 23, 2012. If the motion before the JPML is  
3 granted, it is likely that the only case in which there will have been any substantive decision or even  
4 hearing will be Plaintiffs' case, and so there is no risk of duplication of labor or conflicting results.  
5 Thus, Plaintiffs assert that the second prong of relatedness is not satisfied at this time. If the  
6 coordination motion is denied by the JPML, then Plaintiffs submit that consideration of this current  
7 motion for related case would be most appropriate at that time for two reasons: (1) The Court can  
8 consider the JPML's reasoning for any finding on relatedness of the cases in that motion; and (2) only  
9 then could there be likelihood of duplication of labor or conflicting decisions in these cases.

10 As a further reason for denying the motion at this time or holding it in abeyance, as mentioned  
11 above Plaintiffs have pending a motion for preliminary injunction pending before Judge Illston that is  
12 currently set for January 13, 2012, as well as a currently pending request for an expedited initial status  
13 conference before such hearing. As reflected in Plaintiffs' moving papers and in their request,  
14 Plaintiffs assert that Defendant Carrier IQ continues to engage in unauthorized and illegal interception  
15 of wireless communications of Plaintiffs and those of many others who are similarly situated. Carrier  
16 IQ's conduct is also of urgent concern to the United States Senate Judiciary Committee, which on  
17 November 30, 2011, wrote to Carrier IQ informing it of the Committee's concern that Carrier IQ's  
18 conduct violates federal privacy laws including the ECPA and the CFAA, and stating "This is  
19 potentially a very serious matter." The Committee's letter poses 11 questions to Carrier IQ, whose  
20 response is due by December 14, 2011. (The letter is Exhibit 1 to Plaintiffs' Motion for Preliminary  
21 Injunction, attached at Exh. 2 hereto.) Plaintiffs, too, recognize the seriousness and urgency of this  
22 matter and that is why they immediately served Defendants with their complaint and filed their motion  
23 for a preliminary injunction. By deferring a decision on relatedness, this will allow Judge Illston to  
24 continue to move forward with the hearing on the motion now set for January 13, 2011.

25 Notwithstanding the above, should the Court grant the motion at this time, Plaintiffs  
26 respectfully request that all matters be reassigned to Judge Illston so that she may continue to hear  
27 Plaintiffs' motion on January 13. Alternatively, if the motion is granted and the matters are assigned to  
28 a different Judge, Plaintiffs respectfully request that such Judge hear Plaintiffs' motion for preliminary

1 junction on the date currently set or very shortly thereafter, and that Plaintiffs' request for an expedited  
2 status conference be considered at this time as well.

3 **CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the administrative motion to  
5 consider the pending cases to be related be denied or held in abeyance at this time, subject to renewal or  
6 reconsideration if and when the JPML denies the motion for coordination now set for January 26, 2012.

7 **SKIKOS, CRAWFORD, SKIKOS & JOSEPH,  
8 LLP**

9 Dated: December 10, 2011

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CERTIFICATE OF SERVICE

I, Mark G. Crawford, certify that I served the above document on counsel for all parties that have appeared in the above-referenced actions via ECF.

/s/ Mark G. Crawford  
Mark G. Crawford

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