

1 MICHAEL J. BETTINGER (SBN 122196)
 IRENE YANG (SBN 245464)
 2 K&L GATES LLP
 4 Embarcadero Center, Suite 1200
 3 San Francisco, California 94111-5994
 Telephone: 415.882.8200
 4 Facsimile: 415.882.8220
 5 mike.bettinger@klgates.com
irene.yang@klgates.com

6 Of Counsel:
 7 MICHAEL J. ABERNATHY
 BRIAN J. ARNOLD
 8 K&L GATES LLP
 70 West Madison Street, Suite 3100
 9 Chicago, Illinois 560602
 Telephone: (312) 372-1121
 10 Facsimile: (312) 827-8000
mike.abernathy@klgates.com
 11 brian.arnold@klgates.com

12 Attorneys for *Amicus Curiae*
 T-MOBILE USA, INC.

13 UNITED STATES DISTRICT COURT
 14
 15 NORTHERN DISTRICT OF CALIFORNIA
 16
 17 SAN JOSE DIVISION

18 APPLE INC., a California corporation,
 19
 Plaintiff,
 20
 vs.
 21 SAMSUNG ELECTRONICS CO., LTD., a
 Korean business entity; SAMSUNG
 22 ELECTRONICS AMERICA, INC., a New
 York corporation; SAMSUNG
 23 TELECOMMUNICATIONS AMERICA,
 24 LLC, a Delaware limited liability company,
 25
 Defendants.
 26

CASE NO. 11-cv-01846-LHK
**BRIEF OF AMICUS CURIAE T-MOBILE
 USA, INC. REGARDING APPLE'S
 MOTION FOR A PRELIMINARY
 INJUNCTION**

Date: October 13, 2011
 Time: 1:30 pm
 Courtroom 8, 4th Floor
 Judge: Hon. Lucy H. Koh

1 *Amicus curiae* T-Mobile USA, Inc. (“T-Mobile”) is a national provider of wireless voice,
2 messaging, and data services capable of reaching over 293 million Americans. T-Mobile’s lineup of
3 handheld devices, particularly its smartphone offerings, includes many Samsung-manufactured
4 devices. T-Mobile respectfully submits this *amicus curiae* brief regarding Apple Inc.’s Motion for a
5 Preliminary Injunction (“P.I. Motion”) to inform the Court of public interest considerations
6 implicated by Apple’s attempt to preliminarily enjoin sales of Samsung’s Galaxy S 4G smartphone
7 and Galaxy Tab 10.1 tablet in the midst of the critical holiday shopping season.¹ The timing of such
8 an injunction on two popular consumer products that will help anchor its 2011 holiday sales would
9 unnecessarily harm T-Mobile and thousands of U.S. consumers.²

10 T-Mobile respects intellectual property rights and believes that owners of intellectual property
11 deserve their day in court. However, “a preliminary injunction is a drastic and extraordinary remedy
12 that is not to be routinely granted.” *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed.
13 Cir. 1993). When considering whether to issue an injunction, courts must “pay particular regard for
14 the public consequences in employing the extraordinary remedy of injunction.” *Weinberger v.*
15 *Romero-Barcelo*, 456 U.S. 305, 312 (1982).

16 A preliminary injunction would unnecessarily harm T-Mobile and its customers. At this late
17 date, T-Mobile could not find comparable replacement products for the 2011 holiday season. T-
18 Mobile has already prepared its sales and marketing campaigns for the 2011 holiday sales season,
19 which prominently feature the Galaxy S 4G and Galaxy Tab 10.1, and ordered holiday inventory of
20 those products. These investments cannot be recouped easily. Moreover, the market is expecting T-
21 Mobile to sell these devices. An injunction could impair T-Mobile’s goodwill with its customers.
22 Consumers who prefer Android-based smartphone and tablet devices and/or who prefer T-Mobile’s
23 network coverage or capabilities would be unable to purchase substitute products with the same

24
25 ¹ As a third-party national wireless carrier, T-Mobile takes no position on Apple’s and Samsung’s
26 respective arguments regarding their likelihood of success on the merits. In addition, because the
27 P.I. Motion is limited to the Galaxy S 4G and Galaxy Tab 10.1 products, T-Mobile has limited its
arguments to these two products and the public interest considerations surrounding a potential
injunction of these products.

28 ² T-Mobile publicly announced today, September 28, 2011, that it will sell the Galaxy Tab 10.1
tablet.

1 features at the same price points. Moreover, current T-Mobile customers who purchase the devices at
2 issue and are under contract with T-Mobile may not be able to obtain replacement devices covered by
3 warranty, for example, if they are enjoined.

4 Since money damages could be readily calculated and the Court has ordered an expedited
5 trial, the public interest weighs decidedly against a preliminary injunction. *See Weinberger*, 456 U.S.
6 at 312 (“[When] an injunction is asked which will adversely affect a public interest . . . the court may
7 in the public interest withhold relief until a final determination of the rights of the parties.”) (internal
8 quotation marks omitted).³

9 **I. T-Mobile and Its Products at Issue**

10 T-Mobile provides wireless voice, messaging, and data services in the U.S. and serves
11 approximately 34 million wireless customers. It offers a range of wireless products and services,
12 including cell phones and smartphones, tablets, mobile hotspots, netbooks, cell phone and data plans,
13 and accessories. Specifically for handsets, T-Mobile offers a variety of additional products and
14 services, such as downloadable games and applications, Internet, e-mail, messaging, music and
15 sounds, handset protection services, voice mail, and wallpapers.⁴ T-Mobile has invested enormous
16 time and resources into building its 4G network, which covers 191 markets and over 200 million
17 people.⁵ T-Mobile also has invested heavily in Samsung handheld devices and considers Samsung to
18 be one of its strategic partners. T-Mobile does not offer products with identical features at the same
19 price point from the same or different manufacturers.

20 **A. The Galaxy S 4G Smartphone**

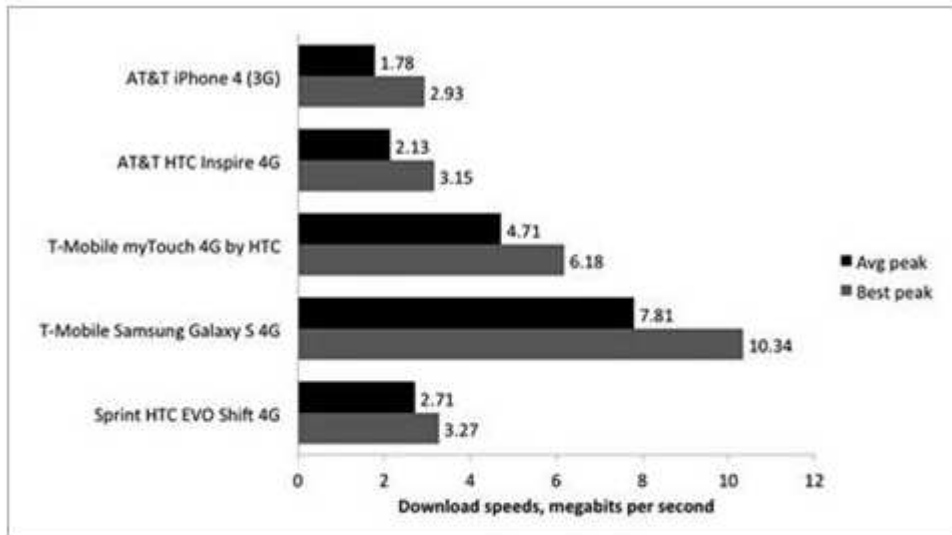
21 The Galaxy S 4G, which runs on the Android platform, is one T-Mobile’s top-five selling
22 devices and one of T-Mobile’s fastest 4G network devices. The Galaxy S 4G was T-Mobile’s “first
23

24 ³ The asserted patents are Design Patent Nos. D618,677 (“D677 patent”), D593,087 (“D087
25 patent”), and D504,889 (“D889 patent”) (collectively “Design Patents”) and U.S. Patent No.
26 7,469,381 (“381 patent”). To the extent applicable, T-Mobile incorporates the arguments of
27 *amicus curie* Cellco Partnership d/b/a Verizon. T-Mobile’s public interest arguments, however,
28 apply to *all* the asserted patents, including the Design Patents.

⁴ See <http://www.t-mobile.com/shop.aspx>.

⁵ See <http://t-mobile-coverage.t-mobile.com/>.

1 smartphone capable of theoretical download speeds of up to 21Mbps.”⁶ It has consistently surpassed
2 other 4G phones in its download speed capacity. A test conducted by MSNBC of the Galaxy S 4G
3 against comparable smartphones offered by T-Mobile and other carriers, for example, showed the
4 Galaxy S 4G to be the speediest of the group:⁷



Wilson Rothman / msnbc.com

14 Results of our smart phone download speed test, showing that the T-Mobile Galaxy S
15 4G really is faster than its sibling, the myTouch 4G, and — at least within our real-world
16 testing enviroment — handily beat other leading 4G phones. It's important to check a
17 phone's performance in your area, preferably before you buy it.

17 B. The Galaxy 10.1 Tab

18 T-Mobile plans to launch the Galaxy Tab 10.1 for the 2011 holiday season. The Galaxy Tab
19 10.1, manufactured by Samsung and based on the Android platform as well, will be T-Mobile's *only*
20 10.1 inch screen tablet. A 10.1 inch screen tablet is very important to T-Mobile's holiday sales
21 strategy, as T-Mobile currently offers only older 7 inch and 8.9 inch screen tablets from non-
22 Samsung manufacturers, the Dell Streak and the T-Mobile G-Slate. If it could not sell this device,
23 customers seeking a larger tablet likely will not shop at T-Mobile.

26 ⁶ Cha, Bonnie, "T-Mobile offers up more Samsung Galaxy S 4G details," CNET, February 1, 2011,
27 <http://reviews.cnet.com/8301-19736_7-20030318-251.html>.

28 ⁷ Rothman, Wilson, "Putting 4G to the speed test," MSNBC.com, February 9, 2011,
<http://www.msnbc.msn.com/id/41485079/ns/technology_and_science-wireless/>.

1 **II. An Injunction During the Holiday Season Would Harm T-Mobile and Its Customers**

2 Like most U.S. retailers, holiday sales are key for T-Mobile’s business.⁸ T-Mobile has been
3 preparing for the holiday season for months.⁹ These efforts have included ordering increased
4 inventory of smartphones and tablets, developing new marketing campaigns for imminent launch,
5 and training additional sales personnel. T-Mobile’s holiday season begins in early November, shortly
6 after the October 13 hearing on Apple’s P.I. Motion, with holiday commercials typically starting the
7 first week of that month.¹⁰

8 Consumers who prefer the Android operating system and Samsung-specific customizations of
9 the Android operating system and/or who prefer T-Mobile’s network coverage or capabilities would
10 be unable to purchase substitute products with the same features at the same price point as offered by
11 the Galaxy S 4G or Galaxy Tab 10.1. Similarly, current T-Mobile customers who purchase the
12 Galaxy S 4G or Galaxy Tab 10.1 may not be able to obtain replacement devices that are covered by
13 warranty or T-Mobile’s Premium Handset Protection, if those devices were enjoined.

14 **A. T-Mobile Has No Adequate Replacement for the Galaxy S 4G**

15 T-Mobile does not currently offer a phone with the same feature set at the same price point as
16 the Galaxy S 4G. If Samsung were enjoined, T-Mobile would have no comparably priced
17 replacement for the Galaxy S 4G during the holiday sales period. As the MSNBC test shows
18 regarding data download speeds, the Galaxy S 4G cannot be readily replaced by just any allegedly
19

20 ⁸ See Virki, Tarmo and Miyoung Kim, “PREVIEW-Smartphones lift Apple, Samsung in Q4 phone
21 bonanza,” Reuters, Jan. 17, 2011, <[http://www.reuters.com/article/2011/01/17/cellphones-
22 idUSLDE70G07C20110117](http://www.reuters.com/article/2011/01/17/cellphones-idUSLDE70G07C20110117)> (“The market for phones tends to jump 10-15 percent in the fourth
quarter from the third quarter, as many consumers buy the latest gadgets for Christmas gifts.”).

23 ⁹ The parties never informed T-Mobile in advance of Apple’s P.I. Motion that the accused devices
24 suddenly might be become unavailable as a result of a preliminary injunction. Consequently, T-
25 Mobile has had no meaningful opportunity to prepare for a potential loss of the accused devices
during the holiday sales season.

26 ¹⁰ See Virki, Tarmo and Miyoung Kim, “PREVIEW-Smartphones lift Apple, Samsung in Q4 phone
27 bonanza,” Reuters, Jan. 17, 2011, <[http://www.reuters.com/article/2011/01/17/cellphones-
28 idUSLDE70G07C20110117](http://www.reuters.com/article/2011/01/17/cellphones-idUSLDE70G07C20110117)> (“The market for phones tends to jump 10-15 percent in the fourth
quarter from the third quarter, as many consumers buy the latest gadgets for Christmas gifts.”);
see also Nelson, Robert, “Verizon begins the holiday season commercials with robotic
snowman,” Nov. 3, 2010, <[http://www.gadgetell.com/technologytell/article/verizon-begins-the-
holiday-season-commercials-with-robotic-snowman-video/](http://www.gadgetell.com/technologytell/article/verizon-begins-the-holiday-season-commercials-with-robotic-snowman-video/)>.

1 comparable smartphone. Moreover, many consumers prefer smartphones running on the Android
2 platform to other mobile operating systems.¹¹

3 Indeed, finding an alternative supplier; developing a comparable product at the same price
4 point; testing proposed substitutes for performance, operation, safety, and network compatibility; and
5 ensuring appropriate supply, among other steps, would take nearly a year. T-Mobile also would lose
6 its investments in the marketing and advertising campaigns that were developed months ago in
7 anticipation of the holiday shopping season. Even if it could find a replacement, T-Mobile would be
8 forced to spend considerable additional money on recalling its marketing campaigns and re-doing its
9 advertising, marketing, and sales staff training to make customers and staff aware of the new product.
10 T-Mobile has already substantially invested in branding the Galaxy S 4G. In the last several months
11 alone, T-Mobile has invested heavily on advertising and promotional materials, including in-store
12 materials, online content, and print marketing. If it were unable to sell that device, T-Mobile would
13 be unable to recoup those expenses.

14 **B. T-Mobile Has No Adequate Replacement for the Galaxy Tab 10.1**

15 T-Mobile likewise would not have time to find an adequate replacement for Galaxy Tab 10.1
16 for the holiday season, harming it and its consumers. It simply has no other replacement tablets ready
17 for release. Its only other tablets have 7 inch and 8.9 inch screens, which are considerably smaller
18 than the 10.1 inch screen of the Galaxy Tab 10.1 and likely to be less desirable to certain consumers
19 as a result. Finding a new supplier, developing a new tablet, and going through the approval process
20 to replace the Galaxy Tab 10.1 would take many months. T-Mobile, like others in the industry, will
21 make a significant amount of tablet sales during the holiday season. If T-Mobile were unable to sell
22 the Galaxy Tab 10.1, it would therefore lose a very large percentage of the projected revenue in the
23 tablet business.

24 Like T-Mobile's investment in the Galaxy S 4G, T-Mobile also has already substantially
25 invested in the release of the Galaxy Tab 10.1. In the last several months, T-Mobile has purchased
26 advertising and promotional materials, including in-store materials, online content, and print

27 ¹¹ See, e.g., Albanesius, Chloe, "Consumers Love Their Samsung, Android Phones, comScore
28 Says," PCMag.com, July 5, 2011, <<http://www.pcmag.com/article2/0,2817,2388107,00.asp>>
(Android had 38.1% of the smartphone market share, while iPhones had 26.6%).

