

## **PUBLIC VERSION**

### **ADDITIONAL VIEWS OF COMMISSIONER PINKERT ON REMEDY AND THE PUBLIC INTEREST**

I concur with my colleagues regarding the remedy that is appropriate in this case. Because my reasoning as to the bearing of the public interest factors on any determination to exclude HTC's smartphone devices differs from theirs, however, I write separately. In particular, I wish to emphasize that the existence of substitutes for the infringing devices does not obviate consideration of the likely impact of exclusion on the range of choices available to consumers.

There are four statutory public interest factors for the Commission to consider in determining whether an exclusion order ought not to issue. The first such factor is public health and welfare.

#### **(A) Public Health and Welfare**

In support of its assertion that an exclusion order would be detrimental to public health and welfare, HTC relies primarily on vague assertions about the benefits of mobile telephony. Although HTC and Google assert that Android smartphones are well suited to certain applications, such as researching medical information, managing home security accounts, and serving the military, there is no evidence that HTC smartphones handle those applications better than other Android smartphones. HTC Br. 177; Google Remedy Br 13. The only unique feature HTC's Android handsets appear to offer is that they use HTC's "Sense User Interface" ("Sense UI"), which is HTC's modification of the Android interface that Google provides handset suppliers.<sup>1</sup> HTC has failed, however, to establish that other handset manufacturers' user interfaces (or the lack thereof, in the case of "Nexus" handsets) cannot be substituted for HTC's. In sum, it appears that substitutes for the infringing devices are available in the smartphone marketplace.

HTC also maintains that it has a greater share of the 4G smartphone market than for smartphones overall. HTC Br. 161. The sales figures cited by HTC, however, appear to be based only on data from early- to mid-2011 and reflect that at one point HTC offered the only LTE (a type of 4G technology) smartphone in the United States. O'Brien Stmt. ¶ 53.

It is essential to understand that an exclusion order in this case would extend only to HTC products, not to products of other Android handset manufacturers such as LG, Motorola, and Samsung. Those handset manufacturers are not respondents in this investigation, and their Android handsets are not the subject of the finding of violation. Thus, contrary to Google's argument that issuance of an exclusion order has the "potential to leave U.S. consumers without access to innovative technologies resulting from the only open and generative mobile computing platform developed and distributed in the U.S. – Android," Google Remedy Br. 9, excluding the

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<sup>1</sup> See Statement of Dr. Vincent E. O'Brien in Support of Respondent HTC's Opening Br. on Commission Review at 27 ¶ 62 (Oct. 6, 2011) (Att. A to HTC Br.) ("O'Brien Stmt.").

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infringing devices would simply not be tantamount to the exclusion of all Android handsets from the United States. It is worth pointing out as well that other smartphone operating systems – including Apple’s and Microsoft’s – are also developed in the United States and that the market appears now to include many non-HTC Android 4G handsets<sup>2</sup> as well 4G handsets using different operating systems. *See* Apple Remedy Reply Br. 12-15; ACT Remedy Br. 18-22.

Notwithstanding that there appear to be substitutes for the infringing devices, I find it appropriate to consider here the likely impact of exclusion on the range of choices available to consumers and how that might bear on economic welfare. In other words, the availability of substitutes does not necessarily mean the consumer’s desire for quality and variety can be satisfied in the absence of the infringing devices. This observation is particularly apposite in a rapidly changing, technologically driven, market like today’s smartphone market. Excluding devices from such a market *could* be significantly detrimental to economic welfare, regardless of whether substitutes are available.

Having said that, I find it extremely difficult on this record to determine the degree to which any narrowing of marketplace choices flowing from exclusion would impact economic welfare, and I find no basis to conclude that a determination to delay exclusion by four months, discussed in detail below, would provide insufficient time for adjustments – by HTC’s carriers and/or HTC itself – necessary to restore a full range of choice to consumers.

### (B) Competitive Conditions in the United States Economy

HTC asserts that the issuance of a limited exclusion order “threatens to upset the precarious nature of competition concerning the sale and use of mobile devices.” HTC Br. 166. HTC further states that the “fragility of that competition may best be seen in the Department of Justice’s recent announced filing to block the proposed merger between AT&T and T-Mobile and its concern about the impact on 4G development.” *Id.*

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<sup>2</sup> I note the following non-exhaustive list of non-HTC 4G Android handsets offered for sale on carriers’ websites and websites of their resellers on November 14, 2011: AT&T (LG Thrill, Motorola Atrix 2, Samsung Focus S, Samsung Galaxy S II, Samsung Infuse, and Sony Ericsson Xperia); Verizon (LG Revolution, Motorola Droid Bionic, Motorola Droid RAZR, Pantech Breakout, Samsung Stratosphere, and Samsung Droid Charge); Sprint (Motorola Photon, Samsung Nexus S, Samsung Conquer, Samsung Epic, and Samsung Galaxy S II); and T-Mobile (LG Doubleplay, LG MyTouch, Samsung Exhibit, Samsung Exhibit II, and Samsung Galaxy S II).

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According to T-Mobile, it is the only national carrier that does not offer the iPhone, and it is particularly vulnerable to the effects of an exclusion order because of its reliance on Android handsets, especially HTC Android handsets. T-Mobile requests that, if an exclusion order is entered, the Commission “allow a four-to-six month transition period . . . so that T-Mobile and the rest of the industry could change to other devices . . . .” T-Mobile Remedy Brief at 2.

I find, after considering all of the evidence demonstrating the importance of the smartphone market as well as T-Mobile’s significant role in it, that it is appropriate to grant T-Mobile’s request. I thus concur in the determination to commence exclusion of articles subject to the Commission’s order on April 19, 2012, in order to provide all carriers time to effect transition to other products.

HTC argues that balanced “against the significant harms to competition in all sectors of the mobile wireless markets that could flow from an exclusion order, Apple’s purported interest in protecting its intellectual property for the asserted patents here is hollow, and highlights the anti-competitive effects of a broad exclusion order.” HTC Br. 172. HTC’s support for this proposition is that the products that Apple identified as practicing three of the four patents in this investigation are Apple computers rather than iPhones. HTC Br. 172-173. The exclusion order here, however, is based on the infringement of the ’647 patent, and it is undisputed that “the iPhone 3GS running Mobile Mail” practices the asserted claims of that patent. ID at 157.

### (C) Production of Like or Directly Competitive Articles in the United States

There is no evidence of domestic production of smartphones. “[T]o HTC’s knowledge no smartphones (including Apple’s iPhones) are produced in the United States; rather they are all manufactured overseas and imported into the United States.” HTC Br. 161. Accordingly, I agree with Apple that issuance of an exclusion order would not result in a deficiency in the production of like or directly competitive articles in the United States. Apple Remedy Reply Br. 19.

### (D) United States Consumers

As I have discussed above, HTC has not demonstrated the unavailability of substitutes for its Android smartphones. Moreover, as I have also discussed above, HTC has not demonstrated that, with a four-month delay in implementation, exclusion would significantly constrict to the detriment of consumers the range of choices available in the smartphone marketplace.

Based on HTC’s representations regarding its refurbishment process, I concur with the Commission’s determination to provide a narrow exemption to the scope of the exclusion order for two years from the date of issuance, which would permit HTC to import refurbished handsets for consumers in need of a same-product replacement or repair under a warranty or service contract.

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Finally, HTC argues that “consumers will likely see an increase in smartphone prices, and a decrease [in] the range of available features. . . . HTC provides a wider selection of smartphones at a wider range of prices, to a wider audience than any other manufacturer. That commitment has assisted carriers like T-Mobile in providing a substantial break on prices in wireless devices and wireless service.” HTC Br. 174-75 (footnotes omitted). HTC’s support for this assertion, however, is based on the price pressure exerted by all Android handsets on iPhone prices, O’Brien Stmt. ¶ 101, not on the specific impact of HTC’s Android smartphones. Indeed, T-Mobile has informed the Commission that four months will be sufficient for it to refill its product offerings with devices from HTC’s competitors at the various price points that HTC’s products presently serve. T-Mobile Remedy Br. 9-10; *see also* Apple Remedy Reply Br. 14-15 (HTC competitors); ACT Remedy Br. 21-22.

## CONCLUSION

In conclusion, I concur with my colleagues as to the nature of the exclusion order that is appropriate in this case.<sup>3</sup> My reasoning with respect to the public interest factors, however, differs from theirs. In particular, I wish to emphasize that the existence of substitutes for the infringing devices does not obviate consideration of the likely impact of exclusion on the range of choices available to consumers in the smartphone marketplace. Such impact may warrant more searching inquiry in other investigations.



James R. Holbein  
Secretary to the Commission

Issued: December 29, 2011

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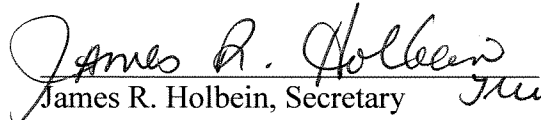
<sup>3</sup> I join in the opinion of the Commission as to issuance of a cease-and-desist order as well as bonding.

**CERTAIN PERSONAL DATA AND MOBILE  
COMMUNICATIONS DEVICES AND RELATED SOFTWARE**

**337-TA-710**

**Certificate of Service**

I, James R. Holbein, hereby certify that the attached **Additional Views of Commissioner Pinkert on Remedy and the Public Interest** has been served by hand upon the Commission Investigative Attorney, Thomas S. Fusco, Esq., and the following parties as indicated, on December 29, 2011.

  
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