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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LHK

APPLE INC., a California corporation,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., a Korean corporation; SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation; and SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited liability company,

Defendants.

CASE NO.

MOTION AND MEMORANDUM IN SUPPORT OF APPLE INC.'S MOTION FOR A PRELIMINARY INJUNCTION

REDACTED PUBLIC VERSION

Hearing:
Date:
Time:
Place:
Judge:

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on [_____] at [_____] a.m. / p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable _____ at the United States District Court for the Northern District of California, 280 South 1st Street, Courtroom __ San Jose, California, Plaintiff Apple Inc. shall and hereby does move the Court for a preliminary injunction prohibiting Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively "Samsung" or "Defendants"), from making, using, offering to sell, or selling within the United States, or importing into the United States, the recently released Galaxy Nexus smartphone. This motion is based on this notice of motion and supporting memorandum of points and authorities; the supporting declarations and exhibits of Dr. Ravin Balakrishnan, Dr. Todd C. Mowry, Dr. Nathaniel Polish, Dr. Karan Singh, Dr. Christopher Vellturo, Arthur Rangel, Steven Sinclair; and such other written or oral argument as may be presented at or before the time this motion is taken under submission by the Court.

Dated: February 8, 2012

GIBSON DUNN & CRUTCHER LLP

By: _____
H. Mark Lyon

Attorneys for Plaintiff Apple Inc.

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PRELIMINARY STATEMENT

A preliminary injunction regarding Samsung's new Galaxy Nexus, which infringes multiple key Apple patents, is essential to prevent immediate and irreparable harm to Apple. While Apple recognizes that this Court recently denied a preliminary injunction motion in another case between the parties (concerning different patents and products), as explained below, absent preliminary relief in this case at this time, sales of Samsung's new infringing device will harm Apple in a manner and to an extent that cannot possibly be calculated, let alone compensated.

As this Court is aware, Apple revolutionized the market in personal computing devices. Apple's iconic mobile devices, including the iPhone and iPad, are now among the most distinctive and successful products in the world. The revolutionary and patented design and user experience of these products are the result of Apple's massive investment in innovation, and have contributed to the extraordinary acclaim and success of these products.

Samsung, in contrast, has systematically copied Apple's innovative technology and products, features and designs, and has deluged markets with infringing devices (at least eighteen new infringing products in just the last eight months), all in an effort to usurp market share from Apple *using Apple's own popular and patented technology*. Apple has been forced to relentlessly pursue Samsung all over the world, including in this Court, regarding products that infringe scores of Apple patents. Yet even while these cases progress—even *after* this Court found Apple likely to succeed on its infringement claims against prior Samsung devices—Samsung continues to launch infringing copycat products with impunity, all with the assumption that courts, *including this Court*, will not stop Samsung before the gain to Samsung, and harm to Apple, is virtually irreversible.

With its latest infringing device—the Galaxy Nexus—Samsung once again blatantly copies Apple's products and infringes Apple's patents. Although for this motion Apple need only demonstrate a likelihood of success, Apple does far more than that, and establishes that the Galaxy Nexus infringes numerous Apple patents, covering key features that contribute to the iPhone's natural, intuitive, and easy-to-use user interface—from how Siri, the iPhone 4S digital personal assistant, searches for information, to the iPhone's iconic slide to unlock screen. These and other

patented features make the iPhone unique, appealing and successful. And that is exactly why they were included in Samsung's new phones.[1]

Sales of the Galaxy Nexus during this litigation will cause irreparable harm to Apple. The smartphone market is at a critical juncture, as the overwhelming majority of consumers move to smartphones, and consumers' long-term preferences and purchases may be determined to a great extent by the operating system on their first smartphone. Thus, as this Court recognized, "the initial decision regarding which product to purchase [is] even more important because the potential customers that Apple loses to Samsung may have long-term effects that are difficult to calculate and may not be recaptured."[2] This is precisely why Samsung copies Apple's products and incorporates Apple's patented features, *i.e.*, in order to lure crucial first-time purchasers away from Apple.

Thus, absent preliminary relief, by the time Apple prevails in this case—and Samsung's infringement is so clear there can be no serious dispute that Apple will prevail—Samsung will have used the Galaxy Nexus, which misappropriates many patented features from the iPhone, to capture market share from Apple that Samsung will be able to retain long into the future. Even worse, as explained below and in the accompanying declarations, the full harm to Apple cannot be calculated, making it impossible for Apple to be compensated by money damages. Samsung understands all this, of course, but has calculated that the benefits it will reap—and the harm Apple will suffer—far exceed any damages Samsung might later have to pay. Even a large damages award is a small price for Samsung to pay to acquire a dominant market share, which Samsung could not otherwise attain without relentlessly imitating Apple's products and infringing Apple's patents.

Samsung's recent launch of the infringing Galaxy Nexus is all the more egregious considering that Samsung did so in the face of this Court's *prior* determination that Samsung's earlier devices

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[1] The Nexus infringes additional Apple patents, including those in the Complaint, but Apple limits this motion to key patents for which infringement is clear in order to facilitate expedited resolution of this motion.

[2] *See* December 12, 2011, Order Denying Apple's Motion for a Preliminary Injunction Case No. 11-cv-01846 ("P.I. Order") (D.I. 452) at 32. The Court denied Apple's motion in part because it found that Apple could not show a nexus between Samsung's infringement of the particular patents at issue in that case and the harm to Apple. *Id.* at 33-34. Although Apple respectfully submits that such a nexus is not required, as explained below, Apple makes a strong showing of such a nexus in this case.

likely infringe certain Apple patents and that sales of such devices would likely cause Apple "to lose market share to Samsung" that "could support a finding of irreparable harm." P.I. Order at 32-33.

As set forth in the Complaint, Apple has filed this suit to put an end to Samsung's serial and brazen infringement. Given the strength of Apple's infringement case and the extent to which sales of Samsung's infringing device will irreparably harm Apple, preliminary relief is clearly appropriate.

FACTUAL BACKGROUND

A. Apple's Groundbreaking and Patented Technology

Before Apple introduced the iPhone in 2007, mobile phones had limited capabilities and difficult, confusing user interfaces. As one technology journalist wrote at the time, "most of these 'smart phones' have had lousy software, confusing user interfaces and clumsy music, video and photo playback." Declaration of Christopher Vellturo ("Vellturo Decl.") Exh. 7 (*Testing Out the iPhone*, June 27, 2007). Another journalist described the web browsers available at the time as "stripped-down" and "claustrophobic." *See id.* Exh. 9 (*The iPhone Matches Most of Its Hype*, June 27, 2007). In short, as Steve Jobs explained, "the problem" with these previous "smartphones" was that "they're not so smart and they're not so easy to use."[3]

Then, in 2007, Apple unveiled the first-generation iPhone, promising that it would "change everything" for mobile phones just as the Macintosh had created a revolution in personal computing two decades earlier. Apple faced tremendous skepticism, however, with many industry commentators predicting that the iPhone was destined to fail.[4] Despite all of these doubts, the iPhone was an astonishing success. Indeed, the iPhone was not just a commercial success; "[it] changed cell phones forever."[5] With its large touchscreen, colorful graphics, advanced browsing capability, and a

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[3] Vellturo Decl. Exh. 6 (*Turning Cell Phones On Their Ear*, Jan. 22, 2007).

[4] *See id.* Exh. 109 (*Perspective: The Apple Phone Flop*, Dec. 7, 2006); *id.* Exh. 110 (*Why the Apple Phone Will Fail, and Fail Badly*, Dec. 23, 2006); *id.* Exh. 111 (*Three Reasons Why the iPhone Won't Be As Mega As Some Think*, Jan. 9, 2007) (predicting that "the iPhone won't see the success that some think it will").

[5] *See id.* Exh. 5 (*Steve Jobs Preparing To Revolutionize the Newspaper Business?*, Sept. 25, 2011). As one commentator wrote, the iPhone "revolutionized the smart-phone industry" and "remains the gold standard by which other smart-phones are judged." *Id.* Exh. 3 (*Looking Back to the First Apple Mac*, Jan. 26, 2009); *see also id.* Exh. 2 (*History Lesson: How the iPhone Changed Smartphones Forever*, June 6, 2011) (noting that the iPhone "totally flipped the mobile industry upside down").

large storage capacity for audio and video files, the iPhone put the equivalent of a personal computer in the pocket of every user. Apple incorporated into the iPhone hundreds of Apple-proprietary features that had never been seen on a phone before—functionality that has become closely associated with Apple and the experience of using Apple products. Subsequent generations of the iPhone have brought even more innovative features to consumers, such as HD video recording, video chat, and, most recently, the remarkable "Siri" personal assistant. *Id.* ¶ 13.[6]

The patents that Apple is asserting here cover a wide array of features and functions that contribute to the success and overall distinctiveness of the Apple products.[7] These patents are directed to such features as the ability to touch a phone number on a web page to dial the number; the innovative search functionality used by Siri; the ability to unlock the phone by simply sliding an image from one location to another on the touchscreen; and Apple's word replacement feature. All of these features contribute to the experience that defines what consumers have come to expect from—and love about—Apple products.[8]

B. Samsung Competes with Apple, and Takes Market Share from Apple, by Copying Its Technology and Infringing on Its Patents

Despite Samsung's prior attempts to make inroads in the smartphone market, Samsung did not have a competitive smartphone on the market when Apple introduced the iPhone in 2007. Samsung's first smartphones, like those of other manufacturers, were unintuitive, difficult to use, and consequently gave Samsung very little position in the market. *Id.* ¶ 23

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Two years after the launch of the iPhone, Samsung released the first Samsung Galaxy phone in 2009. *Id.* ¶ 9. Having been unsuccessful in its efforts to develop a smartphone product, when Samsung launched the Galaxy device, it embarked from the start on a strategy of imitation, not

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[6] *See also id.* Exh. 119 (*Is Siri Steve Jobs' Greatest Legacy?*, Oct. 9, 2011) (suggesting that Siri "could become [] Steve Jobs' greatest legacy" as an innovation that "changes everything. Again.").

[7] Apple has asserted eight patents in this case against the Galaxy Nexus, four of which are the basis for this motion.

[8] Many of these features have been the subject of advertisements and marketing efforts by Apple to educate users on how an iPhone, iPad, or iPod touch works and how fun and easy it is to use. *See* Declaration of Steven Sinclair ("Sinclair Decl.") ¶¶ 3-10.

innovation. Samsung largely copied the iPhone, including the form and functionality that makes the iPhone so distinctive, appealing and successful. A simple comparison between Samsung's earliest phones, the iPhone, and Samsung's later phones illustrates the great extent to which Samsung has attempted to copy Apple's technology:

Samsung did not stop with just copying the design and form of the iPhone—Samsung also misappropriated Apple's application images and icons, and aspects of the unique iPhone user experience, all evidently in order to lure customers desiring the iPhone features and experience into purchasing Samsung products. *See id.* ¶ 67 & n.101. Samsung has flooded markets around the world with multiple different generations of its Galaxy smartphones, all of which closely imitate the iPhone. The Galaxy Nexus at issue here is the latest example.

Through it all, Apple has assiduously sought to stop Samsung from copying the iPhone and infringing Apple's patents

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[9]

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As a result, Apple has been forced to chase Samsung from court to court on four continents in an effort to stop Samsung's clear and deliberate patent infringement. In the United States, for example, Apple filed the earlier patent case currently pending before this Court, as well as a complaint in the ITC regarding Samsung's smartphones that infringe seven Apple patents. Since June 2011, Apple has had to request injunctions in many other countries around the world, including Japan, Germany, Korea, the Netherlands, Australia, and the United Kingdom, all relating to Samsung's devices that closely copy Apple products and infringe Apple patents. All the while, as the courts consider Samsung's infringement, Samsung continues to flood markets with new products that infringe Apple's patents, including most recently the Galaxy Nexus.

Samsung's follower strategy is paying off. Apple and Samsung are now fierce rivals, and, as this Court has found, "compete in the same smartphone market." P.I. Order at 31-32. Samsung's infringement is also coupled with Samsung's advertising, which directly targets Apple and its products. *See* Vellturo Decl. ¶ 67.[11] In October 2010, one industry report noted that Samsung "successfully positioned itself as a major alternative to Apple's iPhone series to telecom operators as well as end customers." *Id.* ¶ 24 & Exh. 30, at 7. Although Samsung introduced its first Galaxy phone long after Apple entered the market, Samsung has rapidly acquired market share at Apple's expense. Indeed, the initial Galaxy, essentially an iPhone clone, served as an important catalyst for

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[11] *See also* Vellturo Decl. Exh. 23 (*Samsung Is Going Right for Apple Fanboys' Jugular with Its Latest Commercial*, Nov. 22, 2011).

Samsung, which previously had only an insignificant position in the smartphone market.

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Id. ¶ 23; *see also id.* Exh. 29, at 18. In the third quarter of 2011, Samsung overtook Apple for the first time as the world's largest seller of smartphones, accounting for 20% of worldwide smartphone shipments, compared to 14.5% for Apple. *Id.* ¶ 22. Another report from October 2011 attributed, at least in part, Apple's decrease in market share "to strong competition from Samsung." *Id.* Exh. 39 (*Updated: Samsung Rules Smartphone Shipments*, Oct. 28, 2011). And, while Apple regained some market share in the last quarter of 2011, Apple no doubt would have gained even more had Samsung's infringing devices not been in the market. *Id.* ¶ 71.

The Galaxy Nexus at issue here is Samsung's first smartphone featuring the new Android platform, known as "Ice Cream Sandwich," and has been characterized as "the most credible competitor to the iPhone so far." *Id.* ¶ 68 & Exh. 101. The Galaxy Nexus launched in the United States on December 15, 2011. Apple promptly conducted an investigation of this phone and brought the current action and accompanying motion

C. The Unique Nature and State of the Smartphone Market

1. The Smartphone Market Is at a Critical Juncture

The smartphone market is in the midst of a critical juncture in which a vast number of consumers will purchase their first smartphone during the course of this litigation. *See id.* ¶¶ 27-37. Smartphones have been available for years, but have only recently started to see widespread adoption in large part due to Apple's breakthrough iPhone. *Id.* There is wide agreement among industry experts that this unique and decisive period in which most consumers will move away from feature phones to smartphones will take place over the next two years, and largely wind down by the time this case ends. *Id.*

Indeed, Dr. Vellturo, a noted economist, has provided an analysis of this industry data, which shows that the period of this litigation will see higher rates of adoption than ever before. *Id.* One analyst, Yankee Group, estimated that while approximately 230 million smartphones were shipped in North America since the inception of the smartphone market in 2003, a total of 311 million will ship

in just 2012-2013. *See id.* Attach. D. In other words, far more U.S. consumers will buy smartphones *over the course of this litigation* than the *combined total* number of consumers who purchased smartphones ever before. Moreover, as Dr. Vellturo explains in detail in his declaration, a large portion of these purchases will be made by first-time adopters. *Id.* ¶¶ 27-37. By the end of 2013, the vast majority of handset customers will have switched to a smartphone. *Id.* ¶ 37. Other industry analysts predict that smartphones will account for 88% of the mobile phone market by 2013. *Id.* ¶ 19. As Dr. Vellturo also explains, Samsung recognizes the importance of these first-time buyers; in recent interviews, Samsung marketing executives have noted that Samsung is specifically targeting first-time smartphone buyers. *Id.* ¶¶ 17, 27 & n.45.[12]

2. Consumers "Stick" with the Platform of Their First Smartphone

Another important characteristic of the smartphone market is key to Samsung's follower strategy in general and to the impact of the Galaxy Nexus in this case. Specifically, a consumer's first purchase of a smartphone exerts substantial influence over subsequent purchases, locking in a preference for the first-chosen platform long into the future.[13] This phenomenon, known as platform "stickiness," renders an initial smartphone purchase critically important. In fact, platform stickiness is what makes all the first-time purchases that Samsung takes from Apple during this pivotal inflection point in the market (*i.e.*, during this litigation) so important and damaging.

Indeed, this Court recognized that brand loyalty in the smartphone market "creates customer retention that potentially has long term implications for downstream purchases." P.I. Order at 32. A wealth of independent industry data supports this conclusion.[14] Every new customer that Samsung

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[12] *See also id.* Exh. 23 (*Samsung Is Going Right for Apple Fanboys' Jugular with Its Latest Commercial*, Nov. 22, 2011) (noting that Samsung is targeting "people entering the smartphone market for the first time."); *id.* Exh. 43 (*Samsung Sees a Bright Future*, Jan. 8, 2011) (Samsung executive explaining that "'[o]ver two-thirds of the U.S. population still has a basic feature phone . . . . There's a huge opportunity there.'").

[13] *See id.* ¶ 46 ("Wireless customers exhibit a high degree of loyalty to the platform they have historically used: a customer who purchases a particular smartphone today is likely to purchase the same brand or platform [*e.g.*, Android] in the future when they replace their smartphone.").

[14] The Nielsen Company reported on stickiness last year, for example, and found that "70% of Android users said they would stick with that platform for their next purchase." *Id.* ¶ 47; *see also id.* Exh. 57. Similarly, a Yankee Group study reveals that 78% of Android users would stick with that platform for future purchases. *Id.* ¶ 47 & Exh. 59. Apple customers show an even stronger loyalty to

lures away from experiencing an iPhone—doing so by selling devices that copy the iPhone—results in the loss to Apple of a long-term loyal customer and repeat sales of iPhone and other iOS devices in the future. There are a number of reasons why the platform of a consumer's first smartphone so strongly affects future purchasing decisions.

First, consumers of Samsung devices become familiar with, and thus attached to, the Android platform, and will, for that reason, be inclined against switching to an iOS device in the future.[15]

Second, there can be fairly significant "switching costs" when changing from one platform to another. Those costs include transferring data, such as contacts, calendars, music files, and other media content, to a new device. *See* Vellturo Decl. ¶ 49. Smartphone users pay for and download digital apps onto their devices, which are typically easy to transfer among devices running the same platform, but *cannot easily be transferred to a different platform.*[16] For example, once a consumer has purchased a range of apps on a Galaxy Nexus device, that consumer is more likely to stick with an Android device going forward rather than switching to the iPhone because these purchased apps will likely not run on an iOS device. Even if iOS versions of those apps were available, the consumer would have to purchase them anew. Thus, customers who have invested in apps and content for their Android device will have a powerful incentive to stick with Android devices rather than switch to an Apple device.

Apple products and the iOS operating system. *See id.* Exh. 57 (*iPhone vs. Android*, June 4, 2010) ("[W]hat sets iPhone and Android apart from the rest of the field of smartphones is operating system loyalty."); *id.* Exh. 58 (*Android Soars, But iPhone Still Most Desired*, Aug. 2, 2010) (reporting iOS loyalty as nearly 90% and Android loyalty running over 70%); *cf.* Declaration of Arthur Rangel ("Rangel Decl."). Exh. 1, at 30; *id.* Exh. 3, at 19.

[15] *See* Vellturo Decl. Exh. 62 (*Loyalty to Smartphone Brand Increases with Greater Use of Digital Content*, Nov. 25, 2011) ("[M]oving from a smartphone that they are familiar with is the biggest challenge to switching devices."); *id.* ¶ 49 & Exh. 52 (*iPhone Users Most Loyal*, Nov. 28, 2011); *cf.* Rangel Decl. Exh. 4, at 17 **REDACTED** ; *id.* Exh. 2, at 41

[16] *See* Vellturo Decl. ¶ 46 (explaining that Android user switching to an iPhone "would have to purchase all new apps because Android apps and iOS apps are incompatible."); *see also id.* ¶ 58 & n.82 & Exh. 85 (*Think Really Different*, Apr. 15, 2010) ("The iPad arrives ready to run virtually all the 150,000 apps that have been created for the iPhone over the past two years."); *cf.* Rangel Decl. Exh. 2, at 82 **REDACTED**

Third, overall customer demand for a given platform, such as Android or iOS, is heavily influenced by what are known as "network effects," which cause the popularity of a platform to increase "as the number of other users on the platform increases." *Id.* ¶ 50. For example, software developers are more willing to write apps for platforms with more users; and, of course, users select platforms that have more apps.[17] The quantity and quality of apps is, in turn, an important factor in purchasing decisions for later customers. *Id.* ¶ 55 & Exh. 82. These network effects not only influence initial purchases, but encourage users to adhere to a platform as it gains in popularity. *Id.* ¶ 56 & Exh. 83.

Thus, as this Court explained, these market dynamics "make[] the initial decision regarding which product to purchase even more important because the potential customers that Apple loses to Samsung may have long-term effects that are difficult to calculate and may not be recaptured." P.I. Order at 32.

ARGUMENT

APPLE IS ENTITLED TO A PRELIMINARY INJUNCTION

As explained below and in the accompanying declarations, a preliminary injunction is necessary in this case at this time because Apple is likely to succeed on the merits and would suffer irreparable harm in the absence of preliminary relief. *AstraZeneca LP v. Apotex Corp.*, 633 F.3d 1042, 1050 (Fed. Cir. 2010) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)).

I. APPLE IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

The patents at issue in this motion relate to some of Apple's fundamental innovations, which have contributed to the popularity and success of the iPhone and other iOS devices. The patents cover functionality closely associated with Apple products—and loved by Apple users—from unlocking the device by sliding an image across the screen, to searching for information with the amazing new Siri personal assistant, to providing word suggestions while typing on an on-screen

[17] *See, e.g.*, Vellturo Decl. ¶ 55 & n.80 & Exh. 72, at 8 (*Mobile Platforms: The Clash of Ecosystems*, Nov. 2011) ("When the number of developers, applications and users on a platform reaches critical mass, the platform begins to grow exponentially. This is because of positive feedback loops or 'network effects' between users and application developers. Applications attract users, which motivates developers to create more applications, which in turn attract more users . . . and so on.").

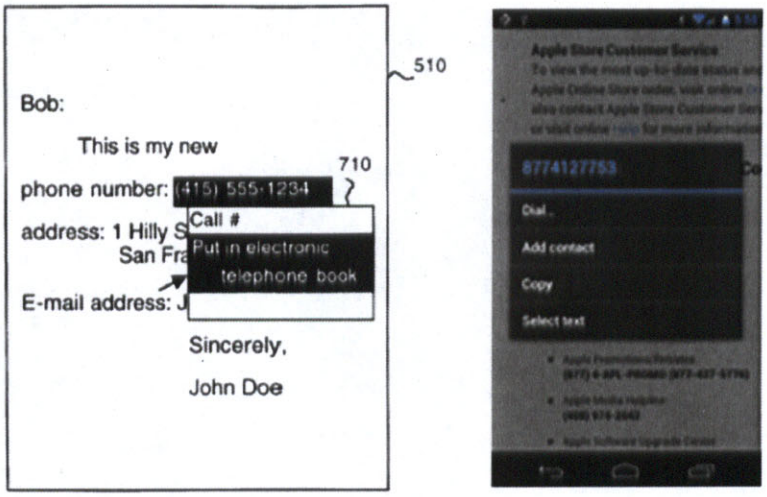
keyboard. Samsung's Galaxy Nexus misappropriates all of these patented features (and others). While Samsung's infringement extends beyond the patents at issue here, these patents illustrate the breadth of Samsung's infringement.

The proof of Samsung's infringement with respect to each of these patents is straightforward and unassailable, and in most instances is confirmed by simple use of the Galaxy Nexus. The patents are also unlikely to be subject to serious validity challenges. These patents have been through rigorous prosecution; indeed, the International Trade Commission has already affirmed the validity of one of these patents.

Of course, for purposes of this motion, Apple need only show that it is substantially likely to prevail on the merits of its claims. Apple does far more than that. In fact, in support of this motion, Apple has submitted thorough expert declarations that establish clearly and conclusively that Samsung's device infringes each of Apple's patents.

A. U.S. Patent No. 5,946,647 (Links for Structures)

In general, the '647 patent is directed to a computer-based system and method for detecting structures, such as phone numbers, post-office addresses, and dates, and performing actions on the detected structures. The '647 patent enables an ease-of-use feature found in Apple's iPhone and iPad devices, on which users have come to depend. Previously, when a user found information such as a telephone number on a web page, the user would have to write down the telephone number, open a phone application, and then manually punch the number into the phone application before being able to call the number. Declaration of Todd Mowry ("Mowry Decl.") ¶¶ 22-24. Instead, an iPhone or iPad user can initiate a call directly from a web page or save information to her contacts by simply touching the



screen at the location of the information on the web page on the screen and then selecting the desired action. *Id.* ¶¶ 22-24, 84-87.

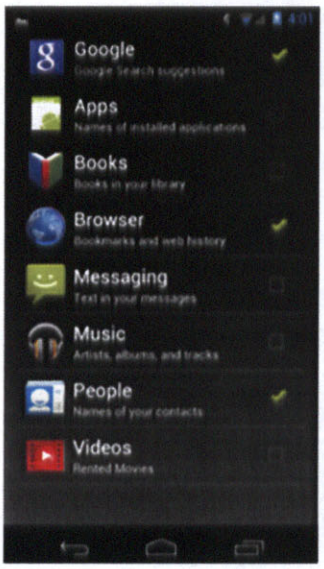
As explained by Dr. Todd Mowry, an expert in computer architecture and object-oriented programming, the Galaxy Nexus phones infringe at least claims 1 and 8 of the '647 patent by enabling a user to perform actions on detected structures, including storing information from a web page in the user's contacts or dialing a telephone number, or sending an email, simply by selecting the information on a web page. *Id.* ¶¶ 3-11, 53-83 & Exhs. 1, 17. This can be seen in the accompanying figure comparing Figure 7 of the '647 patent to a screen capture of the web browser on the Galaxy Nexus where, upon selection of a phone number found in a web page, a user is presented with actions to dial the number or add it as a contact.

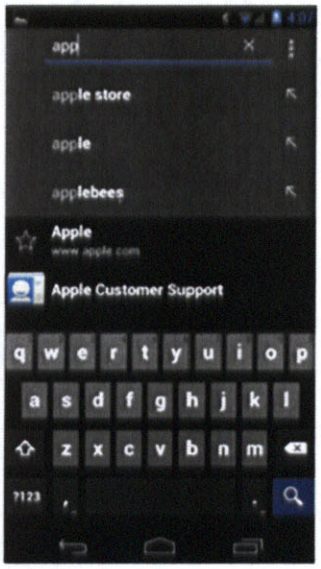
Significantly, a similar analysis was recently conducted by the International Trade Commission, which found that a feature on HTC devices that was identical in all relevant respects to that of the Galaxy Nexus infringed claims 1 and 8 of the '647 patent. *Id.* ¶¶ 53-56. The International Trade Commission also confirmed a finding of the validity of claims 1 and 8 of the '647 patent. *Id.* ¶¶ 88-89 & Exh. 15, at 165-191; *id.* Exh. 16, at 28-29.

B. U.S. Patent No. 8,086,604 (Siri and Unified Search)

The '604 patent enables a key component of Apple's revolutionary Siri computerized personal assistant. Siri, recently released with much fanfare and acclaim on the iPhone 4S, allows a user to ask the iPhone questions and to receive accurate, helpful answers. To do so, Siri must search various resources to find a set of useful information to present to the user. The teachings of the '604 patent allow a user to perform a search request (such as by asking Siri a question) that can search multiple sources of information both on the device (such as the user's contacts) and off the device (such as the worldwide web), all with a single interface. Declaration of Nathaniel Polish ("Polish Decl.") ¶¶ 77-78. While Siri achieves this unified search using a voice request, the invention of the '604 patent is not limited to only voice search. The claims are also directed to a unified text search using text entered in a search box, which is then passed to modules that permit searching both locally on a computer system and to the Internet. *See id.* ¶¶ 38-46. Furthermore, such searches may occur even as the text is being entered into the search box. *Id.*

As explained by Dr. Nathaniel Polish, an expert in artificial intelligence and computer speech, the Galaxy Nexus infringes at least claims 6 and 19 of the '604 patent. *See id.* ¶¶ 3-9, 13, 49-76 & Exhs. 1, 3. This infringement can be seen by using the Quick Search Box on the Galaxy Nexus, in which a single search can be made of multiple information sources both on the phone and through the web using various heuristic modules each employing a different heuristic algorithm. *Id.* ¶¶ 49-76 & Exh. 3. The accompanying figure shows screen captures of the search selection menu from the Galaxy Nexus displaying various heuristic modules and a search for "app" displaying results from the multiple heuristic modules.





In addition to being infringed, claims 6 and 19 of the '604 patent are substantially likely to survive any validity challenges. *See id.* ¶¶ 79-88. The '604 patent was subject to a rigorous prosecution and provides a novel and unprecedented use of heuristic algorithms in connection with information descriptors provided by a user, particularly with respect to conducting a single search of multiple locations. *Id.*

C. U.S. Patent No. 8,046,721 (Image Unlock)

The '721 patent enables a touchscreen device user to "unlock" the device by performing a gesture on an "unlock image," which moves on the screen according to the user's gesture. Declaration of Ravin Balakrishnan ("Balakrishnan Decl.") ¶¶ 47-51. Apple has used this innovation in all iOS devices since the devices were first introduced—users can simply "slide to unlock." *Id.* ¶¶ 102-104; *see also* Sinclair Decl. ¶ 6. Apple has repeatedly highlighted this feature in its advertising, to the point that the "slide to unlock" feature is very well known and associated with the way iPhones, iPads, and iPod touches operate. Sinclair Decl. ¶¶ 6-7. It is a part of the fun, easy-to-use interface that has made iOS devices so popular with customers. *Id.* ¶ 10.

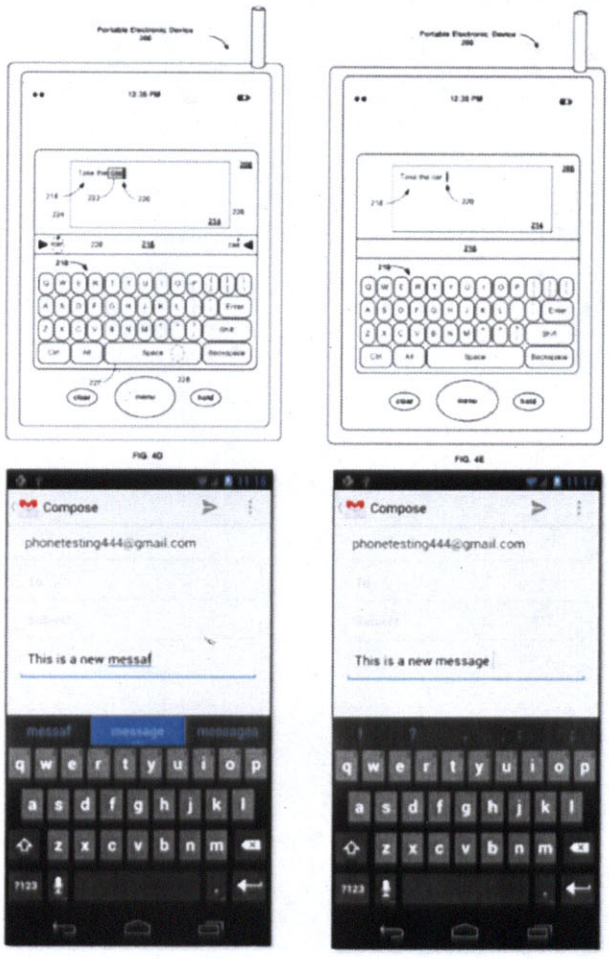
As explained by Dr. Balakrishnan, the Galaxy Nexus infringes at least claims 7, 8, 12, and 15 of the '721 patent. Balakrishnan Decl. ¶¶ 44, 52-96 & Exh. 3. While there are other ways that a touchscreen device can be unlocked, Samsung has chosen to blatantly infringe Apple's patented way of doing so, no doubt because Samsung knows that Apple's solution is more elegant and fun for users. In fact, while there are other methods of unlocking the phone available on the Galaxy Nexus, Samsung selected the "slide to unlock" feature as the default on the Galaxy Nexus. *See id.* The accompanying figure shows Figures 5A and 5C of the '721 patent compared to screen captures of the Galaxy Nexus slide to unlock feature.

In addition, there is a substantial likelihood that the '721 patent will survive any validity challenge. Compared to the prior art, Apple's invention was unique, as it relied on the use of a specified gesture using an image on a touchscreen to unlock the user's phone, saving the user from performing complex key pushes and/or remembering passwords and codes. *See, e.g., id.* ¶¶ 97-101.

D. U.S. Patent No. 8,074,172 (Word Recommendations)

The '172 patent discloses and claims an invention that in part provides for the suggestion of character strings (*e.g.*, words) while characters are being entered into the touchscreen keyboard. Singh Decl. ¶¶ 43-50, 52-54. Upon the detection of a particular gesture or action, the characters that are being entered are replaced with one of the suggested character strings. *Id.* Upon detection of a different gesture or action, the characters being entered are not replaced. *Id.*

Apple has long incorporated this innovation into applications in its iOS devices. *Id.* ¶ 114. The innovation of the '172 patent makes typing information into an iOS device easier and faster by suggesting words that a user is likely intending to type and accepting those as inputs upon selection of the space key or a punctuation mark even before the user completes typing the word. *Id.* ¶¶ 43-50, 52-54, 114. This provides for a faster, easier way for the user to input information. *See id.*



Samsung's Galaxy Nexus infringes at least claims 18, 19, and 27 of the '172 patent. *See id.* ¶¶ 39, 56-113 & Exh. 6. Based simply on operation of the device it is evident that all of the claim limitations are met, and the Galaxy Nexus provides for the suggestion and replacement of character strings in the manner claimed as characters are being entered into the touchscreen keyboard. *Id.* For example, when the text "messaf" is entered, the Galaxy Nexus provides an option to replace the character string with "message" or "messages" by either pressing the space key or pressing one of the character strings directly above the keyboard representing the corrected word or leave it as is by pressing another of the character strings directly above the keyboard representing the misspelled word. *Id.* The accompanying Figure above shows Figures 4D and 4E of the '172 patent compared to screen captures from the Galaxy Nexus.

In addition, there is a substantial likelihood that the '172 patent will survive any validity challenge. The invention of the '172 patent provides a unique, simple method of improving the speed and ease of typing on a touchscreen keyboard that is a significant departure from prior art teachings. *See id.* ¶¶ 48-50, 115-126. Thus, claims 18, 19, and 27 are very likely valid. *Id.* ¶¶ 115-126.

II. APPLE WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION

Absent preliminary relief, Samsung's continued sale of the Galaxy Nexus during the pendency of this case will inflict substantial and irreparable harm on Apple. The Galaxy Nexus incorporates key patented features, and sales of the Galaxy Nexus, especially to first-time smartphone customers, will permanently reduce Apple's market share in the smartphone market. Such loss of market share constitutes irreparable harm as a matter of law and warrants preliminary relief.[18]

Moreover, the harm to Apple would extend far beyond the loss of market share, and would radiate out in a multitude of other ways, impacting other products and aspects of Apple's business, long into the future. Because these harms cannot even be calculated, Apple cannot later fully be compensated by money damages. For these reasons, too, the harm to Apple would be irreparable.

In fact, this Court recently concluded that Samsung's sale of past Galaxy phones would likely cause injury to Apple that would be both difficult to calculate and possibly unrecoverable. *See* P.I. Order at 32-33. These findings, which the Court concluded "could support a finding of irreparable harm," apply here as well. *Id.* Significantly, while the Court ultimately denied Apple's prior motion because Apple had not shown a nexus between the patented features and irreparable harm, Apple does make that showing in this motion.[19]

A. Apple Will Suffer Irreparable Injury in the Form of Long-Term Loss of Market Share Absent a Preliminary Injunction

There is no dispute that the Galaxy Nexus is designed to compete with, *and take sales from*, the iPhone. And it does so by incorporating features that have long been hallmarks of the iPhone. The harm to Apple's market share will be permanent, serious, and irreparable if Samsung continues to sell the Galaxy Nexus.

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[18] Notably, even with preliminary relief, Apple will suffer serious and intractable harm, not capable of full compensation later, from the first sale of the infringing Galaxy Nexus until entry of the preliminary injunction. Every day the Galaxy Nexus is sold, Apple's business suffers, and Samsung secures irreversible gains. Thus, while a preliminary injunction is essential to mitigate the irreparable harm to Apple, it will be insufficient to eliminate all of the harm.

[19] As discussed below, Apple respectfully submits that a showing of nexus is not required under Federal Circuit and Supreme Court precedent, and has appealed this ruling on that basis.

It is well-established that loss of market share to a competitor constitutes irreparable harm. *See Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1151 (Fed. Cir. 2011); *see also 02 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, No. 2011-1054, 2011 WL 5601460, at *8-9 (Fed. Cir. Nov. 18, 2011) (plaintiff had "demonstrated an irreparable injury because it directly competes with [defendant], causing a loss in [plaintiff's] market share"). Indeed, as the Federal Circuit recently explained that a court "commit[s] a clear error of judgment" when it fails to find irreparable harm in the face of "evidence of . . . the parties' direct competition" and "loss in market share and access to potential customers resulting from [the defendant's] introduction of infringing" products. *Robert Bosch*, 659 F.3d at 1151.[20]

It is also "well-established that the 'fact that other infringers may be in the marketplace does not negate irreparable harm.'" *Robert Bosch*, 659 F.3d at 1151 (quoting *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1381 (Fed. Cir. 2005)). Thus, the fact that there may be other infringing Android devices on the market, sold by other infringers not a party to this proceeding, does not negate the harm to Apple caused by the Galaxy Nexus. *See id.* Indeed, while Apple does in fact have other proceedings pending against other infringers, the law is clear that "a patentee need not sue all infringers at once," and "[p]icking off one infringer at a time is not inconsistent with being irreparably harmed." *Id.* (internal quotation marks and citations omitted).

Although "the party seeking an injunction bears the burden of showing lost market share, this showing need not be made with direct evidence." *Id.* at 1154. Rather, Apple need only make "a prima facie showing of lost market share" and is entitled to relief if Samsung proffers insufficient evidence to rebut that showing. *Id.*

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[20] That is particularly true where, as in the present case, loss of market share will be long-term due to the effects of brand loyalty. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor . . . the irreparable injury prong is satisfied." (citation omitted)); *Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("In a competitive industry where consumers are brand-loyal, we believe that loss of market share is a potential harm which cannot be redressed by a legal or an equitable remedy following a trial." (internal quotation marks and citation omitted)).

Here, Apple has made far more than a prima facie showing of harm due to the Galaxy Nexus. Apple has provided a detailed, expert analysis of the smartphone market, demonstrating conclusively that Apple will lose market share to Samsung during the pendency of this case if the Court does not enter a preliminary injunction. *See* Vellturo Decl. ¶ 4.

In fact, consistent with this Court's prior ruling, the record establishes that Samsung's infringing Galaxy Nexus products also will cause long-term erosion of Apple's market share. Apple and Samsung are fierce competitors, and have been at least ever since Samsung introduced its first Galaxy smartphone in 2009. *See id.* ¶¶ 9, 20, 22-26. Samsung is now Apple's largest smartphone competitor worldwide and is rapidly becoming its largest smartphone competitor in the U.S. *Id.* ¶¶ 24-25. Samsung also has launched a pervasive ad campaign designed to capture market share from Apple, focusing much less (if at all) on competing Android devices. *Id.* ¶ 26. And Samsung already has seized critical market share from Apple with its unrelenting infringement and prior copycat products

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Id. ¶ 23 & Exh. 29, at 8, 18.

Just as Samsung was able to capture and increase critical market share with its prior infringing smartphones, Samsung undoubtedly will do so again now with the new infringing Galaxy Nexus, which independent commentators have characterized as "the most credible competitor to the iPhone so far." *Id.* ¶ 68 & Exh. 101. Absent preliminary relief, sales of the Galaxy Nexus will allow Samsung to take yet more market share from Apple *using Apple's patented and popular technology to do so*. Notably, even if Apple's overall market share *increased* while the Galaxy Nexus was sold, lost iPhone sales due to sales of the Galaxy Nexus would result in Apple losing some additional portion of market share that Apple would have enjoyed but for Samsung's infringement.

Moreover, given the unique market dynamics now shaping the smartphone industry, Apple's loss of market share due to the Galaxy Nexus will be long-term and largely irreversible. As explained above, consumers most often "stick" with the operating system on their first smartphone, and thus initial smartphone purchases largely determine subsequent purchases (of smartphones and other devices). *Id.* ¶¶ 46-47. Capturing first-time smartphone users, therefore, is critical for both

Apple and Samsung to obtain and retain market share. And, because the smartphone market is now in a critical juncture in which most consumers will switch to smartphones—and make their all-important initial smartphone purchases—*during this litigation*, the loss of market share due to sales of the Galaxy Nexus before trial alone will be severe and permanent. *Id.* ¶¶ 72-76.

Samsung has built its strategy around these very market dynamics, copying Apple's products (while attacking Apple and its products) in order to lure first-time customers away from Apple, thereby locking them into the Android platform.[21] Samsung knows that any award of damages it might have to pay could not possibly account for the benefit it gains by taking Apple's market share at this critical time, and being able to keep it for the long haul. Apple's permanent loss of market share constitutes irreparable harm precisely because it cannot be calculated or fully compensated.

Indeed, as noted above, this Court recently reached many of these conclusions with respect to other Samsung Galaxy phones. Specifically, this Court found that Apple and Samsung compete "particularly in the market for first-time smartphone buyers," and that the "stickiness" described above "discourages" smartphone "purchasers from switching to other brands, [and] creates customer retention that potentially has long term implications for downstream purchases." P.I. Order at 31-32. The court emphasized that initial smartphone selections are critical to long-term market share, stating that the platform loyalty associated with first-time purchases:

> makes the initial decision regarding which product to purchase even more important because the potential customers that Apple loses to Samsung may have long-term effects *that are difficult to calculate and may not be recaptured.*

Id. at 32 (emphasis added). And, because Apple's market share loss is not only difficult to calculate, but also may not be recoverable, the court concluded that "the evidence presented by both Samsung's and Apple's experts regarding potential lost customers and lost market share, could support a finding of irreparable harm." *Id.* at 33. The same is true here, and warrants temporary relief.

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[21] *See, e.g.*, Vellturo Decl. ¶ 67 & Exh. 23 (*Samsung Is Going Right for Apple Fanboys' Jugular with its Latest Commercial*, Nov. 22, 2011); *id.* Exh. 43 (*Samsung Sees a Bright Future in Smart Phones*, Tablet Computers, Jan. 7, 2011); *id.* Exh. 98 (*Special Report: Can Samsung Change with the Tech Times?*, Jan. 27, 2011) (noting that Samsung's business model is based on being "the first you'll see in the market with a copycat product," and that "[t]he Galaxy S is an imitation iPhone that runs on Google's Android operating system." (internal quotation marks omitted)).

In short, Samsung's sales of the Galaxy Nexus during the pendency of this case will permanently and irreparably injure Apple's market share, necessitating a preliminary injunction.

B. Apple Will Also Suffer Additional Irreparable Injury in Numerous Respects Beyond Loss of Smartphone Market Share

In addition to the long-term loss of market share, sales of the infringing Galaxy Nexus *just during the course of this litigation* would injure Apple in numerous incalculable ways, precluding adequate compensation by money damages. Such an injury would constitute irreparable harm because the harm suffered by Apple "could not be sufficiently compensated by money damages or avoided by a later decision on the merits." *Canon Inc. v. GCC Int'l Ltd.*, 263 F. App'x 57, 62 (Fed. Cir. 2008).

Specifically, given the market dynamics discussed above, harm to Apple would emanate out in many ways beyond initial sales of the Galaxy Nexus, including the following:

1. Galaxy Nexus users will be far *more likely to purchase additional Samsung devices in the future*, even if infringing features are removed, instead of iPhones;

2. Galaxy Nexus users *will purchase other Android phones* in the future (whether infringing or not) made by other manufacturers (such as Motorola or HTC), instead of iPhones;

3. Galaxy Nexus users will be *less likely to purchase other iOS devices*, such as the iPad or iPod touch, and instead will purchase other Android devices (whether made by Samsung or other manufacturers);

4. Galaxy Nexus users will be *less likely to purchase iMacs, MacBooks, and other Apple products* than they would have had they purchased an iPhone;

5. Galaxy Nexus users *will not download untold amounts of digital content* (*e.g.*, apps and music) to Apple devices because they purchased (and will continue to purchase) Android devices instead;

6. Samsung's infringing products such as the Galaxy Nexus will *erode the distinctiveness of, and goodwill associated with, Apple's products*; and

7. Apple's entire iOS ecoystem will suffer given "network effects" in the smartphone market.

Although the impact of these radiating harms is substantial and would be long-lasting, it also would be incalculable, and thus Apple cannot be fully compensated.

Sales Lost Due to Future Samsung Smartphone Sales. Apple would suffer long-term loss of future rounds of Samsung smartphone sales attributable to sales of the Galaxy Nexus. A significant but impossible-to-estimate number of consumers who purchase the infringing Galaxy Nexus instead of iPhones would later purchase new Samsung phones when the time came for them to replace their

current phones. It is impossible to calculate with reasonable certainty the damages suffered by Apple with respect to those second and subsequent rounds of smartphone purchases, even though it is incontrovertible that the loss of those sales to Apple would be caused by Samsung's initial infringement during this litigation. *See* Vellturo Decl. ¶¶ 79-82.

Moreover, the incalculable harm to Apple caused by infringing sales during this case would continue even *after* Apple prevails in this case. With a permanent injunction in place, Samsung would no longer be permitted to sell devices that infringe the patents asserted in this case.[22] Apple, however, would continue to be harmed even by sales of redesigned, allegedly non-infringing Samsung devices. *Id.* ¶ 79. Having used the infringing Galaxy Nexus to "lock in" consumers to the Android platform during the pendency of this case, Samsung would retain those consumers in the future even when it is forced to remove infringing features. The harm to Apple is the same: incalculable lost sales due to the Galaxy Nexus, resulting in irreparable harm that could not be compensated by an award of damages.

Sales Lost Due to Future Android Smartphone Sales by Other Manufacturers. The long-term harm due to Samsung's infringement would not be limited to the lost future iPhone sales displaced by *Samsung* phone sales. Consumers who purchase a Galaxy Nexus now will become accustomed to the Android platform, and will purchase apps and other devices compatible only with the Android platform. These consumers will be much more likely to purchase other Android models later, even if produced by other manufacturers, such as devices produced by HTC and Motorola. *Id.* ¶ 84. Even though this would "cause additional harm to Apple," *id.*, it would be impracticable for a court to identify with reasonable accuracy which sales of future devices by the entire group of Android-phone producers displaced Apple's future potential sales as a result of the initial purchase of a Galaxy Nexus. Moreover, Apple would have difficulty recovering damages from other Android manufacturers to the extent those manufacturers' phones do not infringe, even though some sales

[22] Samsung's recidivist pattern of copying Apple's products and infringing Apple's patents suggests that even with a permanent injunction, Samsung's future devices will infringe additional Apple patents.

would never have been made but for sales of the infringing Galaxy Nexus. Once again, Apple would be indisputably harmed, but the harm would be incalculable.

Lost Sales of Other iOS products, Such As iPad and iPod touch. The irreparable harm from sales of the Galaxy Nexus also would not be limited to lost future smartphone sales, but would extend out to include sales of other Apple iOS products, such as the iPad and iPod touch. Purchasers of the Galaxy Nexus are more likely to purchase additional Android-based devices, now and in the future. *See id.* ¶¶ 87-88. Having grown accustomed to, and purchased apps compatible with, the Android platform, some number of consumers likely will stick with it—and not just for smartphones, but other devices as well, such as tablets. This risk is especially great now that the same version of Android (Ice Cream Sandwich), with its interactive features, will be installed on both smartphones and tablets.

As a result, with sales of the infringing Galaxy Nexus, Apple loses not only market share in the smartphone market, but also an untold number of sales in the broader mobile device market. As this Court previously recognized, Apple customers are extremely loyal, and iPhone users are very likely also to use an iPad or iPod touch, which run on the same iOS operating system, support the same apps, and allow for the same innovative, unique, and exceptional user experience. Features that allow different iOS devices to share data and interact with each other (like iCloud) encourage iPhone users to purchase other iOS products. *See id.* ¶¶ 49, 54, 59 & Exhs. 64-65, 89. Sales of the Galaxy Nexus, rather than the iPhone, eliminate sales of these additional iOS devices that would have been made to iPhone users. *Id.* ¶ 88.[23] Although it is a virtual certainty that there will be lost sales of other Apple products closely related to the iPhone attributable to Galaxy Nexus purchases, the amount of damages cannot be determined with sufficient accuracy. *See id.*

Loss Sales of Other Apple Products, Such As iMacs, MacBooks, and Apple TVs. Apple would also lose an incalculable number of sales of iMacs, MacBooks, and Apple TVs due to sales of the Galaxy Nexus. Users of the iPhone are far more likely to purchase these additional Apple

[23] *See also* Vellturo Decl. ¶¶ 4-5. Those are the same consumers who are most likely to purchase related devices such as tablet computers, and their purchase of an Android-based phone will incentivize them to purchase non-Apple devices (just as their purchase of an iPhone would have incentivized them to purchase other iOS devices).

products.[24] iPhone users quickly develop a deep appreciation of, and loyalty to, Apple products, and this loyalty strongly incentivizes them to purchase other Apple products.[25] Consequently, Samsung's initial act of infringement extends beyond lost sales of iPhones and other mobile devices, and would deprive Apple of some unknowable number of future sales of Apple computers. Vellturo Decl. ¶¶ 91-92.

Lost Sales of Digital Media Tied to Lost Sales of Apple Products. Samsung's infringement would also deprive Apple of revenue that it would have earned through consumer purchases via the iTunes Media and App Store on iOS devices. That lost revenue, too, cannot be fully calculated even though it clearly will be material.

Apple designed the iOS platform to facilitate the easy download of apps and media files from the iTunes store, but those services are not as compatible with Android devices. Revenue derived from these downloads is revenue attributable to the iPhone, iPad, and iPod touch products. Samsung's infringement causes Apple to lose this type of iTunes store revenue because fewer people have iOS devices with which to access those services. It would not be possible to quantify the total lost revenue associated with these lost downloads attributable to Galaxy Nexus purchases. *Id.* ¶ 95. Indeed, the harm would extend not just to lost revenue from apps and other downloads that customers might have purchased during the time they were using their Galaxy Nexus phone, but would also include lost revenue during the time they were using their next devices (which would also likely be Android devices). *Id.* ¶¶ 93-95. Indeed, because the total number of Apple's sales of iOS devices

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[24] *See* Vellturo Decl. ¶ 91 & Exh. 114 (*Apple's Enterprise Halo: Bausch & Lomb Goes iPhone, iPad to Mac Pilots*, Sept. 2, 2011); *id.* Exh. 113 (*Apple Q2 2011: Macs and iPhone Up*, April 20, 2011) ("In fact, we are likely seeing the third-generation of 'halo effect,' where first the iPod, then the iPhone, and now the iPad increase Mac sales by affection"); *id.* Exh. 115 (*Apple Redefines Remote Control—Now, It's Your Cellphone*, Sept. 1, 2010) (noting that only iOS device owners are likely to buy Apple TVs); *id.* Exh. 116 (Apple website) ("With AirPlay, you can wirelessly stream what's on your iPhone, iPad, or iPod touch to your HDTV and speakers via Apple TV. Or mirror your iPad 2 or iPhone 4S screen . . . .").

[25] Moreover, Mr. Wagner, Samsung's economic expert in the earlier case before this Court, admitted that Apple customers have unparalleled brand loyalty. Declaration of Michael Wagner in Opposition to Apple's Motion for a Preliminary Injunction in Case No. 11-cv-01846 ("Wagner Decl.") (D.I. 173) ¶ 73.

lost due to Samsung's infringement would be impossible to predict, the total number of lost downloads would also be impossible to fully calculate. *Id.* ¶ 95.

Harm to Apple Caused by Loss of Goodwill. Samsung's infringement would also erode Apple's goodwill. Such loss of goodwill from infringing sales during the pendency of litigation constitutes irreparable harm. *See, e.g., Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1362 (Fed. Cir. 2008); *AstraZeneca*, 633 F.3d at 1062-63.

Based on its history of pioneering innovations and inventions—culminating with some of the most distinctive, imaginative and popular products in the world—Apple has developed enormous goodwill with consumers, and has devoted immense resources to maintaining that goodwill. Vellturo Decl. ¶ 96. By flooding the market with infringing products, Samsung not only steals market share from Apple, but also erodes Apple's hard-earned goodwill. *See id.* ¶¶ 96-98. Samsung's Galaxy Nexus copies key distinguishing features from the iPhone, diluting the critical distinctiveness of Apple's products and goodwill associated with those products. In fact, while Samsung sells products copying the features that make the iPhone distinct, Samsung has simultaneously embarked on an advertising campaign designed to tarnish Apple and mock its consumers for considering Apple's products distinctive and, for that reason, valuable. *Id.* ¶ 98.

The harm resulting to Apple's goodwill from Samsung's conduct and infringing products is "virtually impossible to quantify, and is thus irreparable." *Id.* ¶ 98.

Harm to Apple's "Ecosystem" Due to Network Effects. The "network effects" discussed above, through which a smartphone platform becomes more attractive to new customers as its base of existing customers grows, mean that infringing sales of the Galaxy Nexus today and over the pendency of this case will make Apple's later generations of products less attractive to consumers, including first-time smartphone purchasers. Those future purchasers will be drawn toward the platform with the most preexisting users, and with the broadest available range of apps.

Indeed, the harm in this case will be particularly acute. Given that the Galaxy Nexus is the flagship phone for the Android platform, as the Galaxy Nexus contributes to the adoption and traction of the Android platform, it will also exacerbate the wide-ranging network effects that, in turn, enhance the appeal of that platform to the detriment of the Apple iOS. As this Court found, such

"network effect[s]" constitute "another form of potential lost sales." P.I. Order at 32. Indeed, the resulting additional lost sales of Apple devices as well as apps and other digital content are all impossible to calculate with reasonable certainty, but will be the inevitable result of Samsung's infringement. Vellturo Decl. ¶¶ 82, 86, 88, 94.

C. While Not Required, There Is a Clear Nexus Between Samsung's Infringement and the Irreparable Harm to Apple

By establishing that sales of the Galaxy Nexus during this litigation will cause irreparable harm, Apple has met its burden. *See Winter v. NRDC*, 557 U.S. at 20 (plaintiff need only establish it "is likely to suffer irreparable harm in the absence of preliminary relief"); *Robert Bosch*, 659 F.3d at 1149.

In the earlier case involving the parties, however, this Court denied Apple's motion for a preliminary injunction in part because it held that Apple was *also* required (but failed) to establish that the patented features are "necessary to, or a core functionality of, the products" at issue, and drive consumers' purchases. P.I. Order at 63-64. Apple respectfully disagrees with that "nexus" requirement, which is the subject of Apple's appeal to the Federal Circuit. *See* Fed. Cir. Appeal No. 2012-1105. As explained in Apple's brief on appeal, well-established precedent of the Supreme Court and the Federal Circuit requires a party seeking a preliminary injunction to show *only* that in the absence of preliminary relief sales of infringing *products* (not the patented *features*) will cause irreparable harm. *See* Apple's Opening Brief at 46-47.

Nor do the cases cited by this Court support a nexus requirement. For example, although this Court cited Justice Kennedy's concurrence in the *eBay* case, Justice Kennedy actually addressed *non-practicing entities* that use patents (sometimes covering trivial features) to extract licensing payments. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396-97 (2006) (Kennedy, J., concurring). Justice Kennedy explained that such non-practicing entities may not be irreparably harmed considering that all they want is money in the first place, and so can be compensated by money damages later:

> For these firms, an injunction . . . can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in

> negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.

Id. Here, of course, Apple sells products embodying its patents, and Samsung is aggressively seeking to steal market share away from Apple by using Apple's patented technology and copying Apple's products.[26] Injunctions also have long been available even in cases where the patented features were far from "core" to the overall accused product. *See, e.g., i4i Lid. P'ship v. Microsoft Corp.*, 598 F.3d 831 (Fed. Cir. 2010) (affirming an injunction in a case involving a little-used XML editing feature embedded in Microsoft Word).[27]

In any event, even if a "nexus" requirement were applied here, Apple would satisfy it. The patents at issue in this motion relate to core functionalities of the Galaxy Nexus and are very likely to drive consumer purchasing decisions. The patents cover important features that enable the "smart" behavior of cutting-edge smartphones that have helped make Apple's products successful. Samsung

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[26] Similarly, the other decisions that this Court relied upon do not require a feature-specific showing of nexus. In *Commonwealth Scientific and Industrial Research Organization v. Buffalo Technology Inc.*, 492 F. Supp. 2d 600 (E.D. Tex. 2007), the plaintiff was a non-practicing entity who could not establish lost sales or market share, and yet the court granted injunctive relief anyway—suggesting at most that nexus can weigh *in favor* of a finding of irreparable harm, not that a lack of nexus *forecloses* a finding of harm. In *Quad/Tech. Inc. v. Q.I. Press Controls B.V.*, 701 F. Supp. 2d 644, 657 (E.D. Pa. 2010), the plaintiff did not practice its patents, and the district court denied relief because it found an "absence of any evidence of lost sales or business" to the plaintiff of its own non-patented products. In *z4Technologies, Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 441 (E.D. Tex. 2006), the harm was calculable and thus not irreparable. And in *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011), there was no harm at all. In its responsive appellate brief, Samsung also cites two post-*eBay* opinions that Samsung claims denied injunctions for lack of nexus. But Samsung is again incorrect. In *Humanscale*, the court found no irreparable harm because the plaintiff "ha[d] not provided evidence showing that it will lose sales" if an injunction were denied—just the opposite of the situation here—and because the patents-in-suit were about to expire anyway, such that "the infringing activity will necessarily end within six weeks." *Humanscale Corp.v. CompX Int'l, Inc.*, 2010 WL 1779963, at *4 (E.D. Va. Apr. 29, 2010). And in *Hynix v. Rambus*, the court did not deny an injunction on nexus grounds, but rather largely because the plaintiff was a non-practicing entity who could not make the showing of lost sales that Apple has made here. *See Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 981-84 (N.D. Cal. 2009) (holding that Rambus "will not lose sales or market share of the different generations of accused memory devices because Rambus does not make or sell such products," and instead could claim only a "slight irreparable harm" in the form of "the loss of a possible design win" for a marginal supplier, such that "the weight of such harm is small").

[27] To the extent an infringer like Samsung truly believes that a patented feature is minor or unimportant, that fact, if anything, may weigh in favor of an injunction, because it suggests the infringer would not suffer undue hardship having to remove it.

knows this, and has incorporated these features into the Galaxy Nexus precisely because they are core functionality and will enable Samsung to gain market share by misappropriating Apple technology.

Unified Search and Siri. Samsung has incorporated the unified search features of the '604 patent into the Galaxy Nexus because Samsung knows that these features have been highly valued by consumers, as demonstrated by the reception of this feature when Apple first introduced it along with the iPhone 4S. With the release of this phone, Apple again revolutionized the interface between human and phone by introducing Siri, a computerized personal assistant. Using the invention of the '604 patent, Siri can exhibit sophisticated, context-sensitive behavior by searching through many different sources of information (*e.g.*, calendar appointments, contacts, and web search results) to provide the particular information sought by an iPhone user. *See* Polish Decl. ¶¶ 13, 77-78 (explaining how Siri incorporates features claimed in the '604 patent).

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Likewise, reviews of the iPhone 4S in the media have confirmed that the Siri feature, enabled by the '604 patent, is an important driver of consumer demand. For example, one review by a popular technical publication states that "Siri is the reason people should buy this phone."[31] Another widely-read review touts Siri as "[t]he standout feature" of the iPhone 4S, and explains that Siri is so

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[28] Rangel Decl. Exh. 3, at 26 *see also* Vellturo Decl. ¶ 44. **REDACTED**

[29] Rangel Decl. Exh. 3, at 27.

[30] *Id.* at 31.

[31] Vellturo Decl. Exh. 50 (*Review: With Siri, iPhone Finds Its Voice*, Oct. 12, 2011).

astonishing that it "has to be tried to be believed."[32] Yet another article calls Siri "the biggest technological leap forward Apple ha[s] ever given us."[33]

Samsung is infringing the '604 patent by using the patented unified search to allow users to search across sources including contacts and the web via a single interface, depriving Apple of its exclusive right to reap the benefit of this invention through Siri. The '604 patent, thus, covers a "core functionality" and will drive consumer demand.

Linking Structures to Actions. The '647 patent covers yet another core portable-device technology that, like the inventions described above, has been key to Apple's success. The '647 patent, entitled "System and Method for Performing an Action of a Structure in Computer-Generated Data," allows devices to recognize certain structures within documents such as web pages, and link those structures to certain user-selectable actions. For example, when a smartphone user comes across a telephone number in a web page, the invention of the '647 patent allows the user to call the number, or add it to the user's contacts database, merely by tapping on the number.

This invention is a "core technology" of Apple's iOS devices, and (as misappropriated by Samsung) also of the Galaxy Nexus, in that it links—both literally and figuratively—the computer side of these devices to the communication side, yielding synergistic performance that would not have been possible on an ordinary phone or computer. *See* Mowry Decl. ¶¶ 21, 84-87 (explaining how iOS devices incorporate features claimed in the '647 patent). In other words, the '647 patent helps put the "smart" in smartphone. Users no longer have to remember a phone number as they come across it, nor write it down nor even dial it into the phone. They can instead simply tap on the number to place a call or save it into memory

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[32] *Id.* Exh. 51 (*The iPhone Finds Its Voice*, Oct. 11, 2011).

[33] *Id.* Exh. 119 (*Is Siri Steve Jobs' Greatest Legacy?*, Oct. 9, 2011).

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The invention of the '647 patent lies right at the intersection of these selling points.

Apple's Touchscreen User Interface. The features claimed in the '172, and '721 patents form part of the critically acclaimed touchscreen user interface at the core of Apple's iOS technology and provide the ease of use and intuitive design that is the hallmark of Apple products. The word-suggestion invention of the '172 patent helps make the iPhone's touchscreen user interface remarkably easy to use, as it allows users to type on the touchscreen quickly (by automatically completing words) and accurately (by correcting misspellings). *Id.* ¶¶ 104-109, 175. Likewise, the "slide to unlock" feature protected by the '721 patent—which allows a user to "unlock" his or her device simply by sliding a finger to drag an image across a portion of the screen—is very well known and associated with the way the iPhone and other iOS devices operate, as evidenced by the fact that Apple has repeatedly highlighted this feature in its advertising. *See* Sinclair Decl. ¶¶ 6-7; Balakrishnan Decl.¶¶ 47, 102-104.

Both of these user-interface inventions are very important to the success of Apple's devices and to Samsung's efforts to misappropriate that success. Indeed, Samsung's choice to infringe these patents—even implementing Apple's iconic "slide to unlock" method as the default unlock method on the Galaxy Nexus—shows a conscious attempt to mimic the iOS interface. Samsung knows that consumers who are choosing a new phone want a fun, easy-to-use touchscreen interface like the one Apple provides,[35] and that these patented features are an integral part of that interface. Thus it is clear that Samsung's continued infringement of the '172 and '721 patents would contribute directly to the irreparable harm that would befall Apple if the Court does not grant injunctive relief now.

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In short, absent preliminary relief, sales of the Galaxy Nexus during this litigation will immediately, seriously, and irreparably harm Apple.

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[34] Rangel Decl. Exh. 1, at REDACTED

[35] *See, e.g.*, Vellturo Decl. ¶¶ 6-7, 42-43, 45.

III. THE BALANCE OF HARDSHIPS STRONGLY FAVORS A PRELIMINARY INJUNCTION

The irreparable harm to Apple's domestic industry absent preliminary relief far outweighs any potential harm to Samsung, which willfully infringes Apple's patents. The balance of hardships, thus, strongly favors entry of a preliminary injunction.

The Federal Circuit has recognized that where a strong showing of irreparable harm and likelihood of success exists, the balance of the hardships favors the patentee. *See, e.g., Celsis In Vitro, Inc. v. CelizDirect, Inc.*, -- F.3d --, 2012 WL 34381, *8 (Fed. Cir. 2012); *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996). Apple is highly likely to succeed in this case, and, absent preliminary relief, will be irreparably and seriously harmed by Samsung's infringement. Indeed, as the Federal Circuit recognized in *Robert Bosch*, Apple suffers "substantial hardship" by having to "compete against its own patented invention." *Robert Bosch*, 659 F.3d at 1156.

In contrast, Samsung will not suffer any legitimate hardship. Any harm to Samsung stems from its own conscious choice to craft its business plan on a strategy of infringement, and thus does not outweigh the harm to Apple. "Simply put, an alleged infringer's loss of market share and customer relationships . . . does not rise to the level necessary to overcome the loss of exclusivity experienced by a patent owner due to infringing conduct." *Pfizer*, 429 F.3d at 1382.[36] The "commercial success" of Samsung's infringing products also is not a legitimate consideration; Samsung "is not entitled to continue infringing simply because it successfully exploited its infringement." *i4i*, 598 F.3d at 863 (citations omitted); *see also Robert Bosch*, 659 F.3d at 1156 ("A party cannot escape an injunction simply because its primary product is an infringing one."). Nor is it relevant that Samsung might have to expend resources to redesign its products to remove the

[36] Although the Court determined that the balance of the hardships favored Samsung in the last case, the reasoning behind that decision does not apply here, because the Court based that determination in part on the Court's finding that Apple did not demonstrate *both* a likelihood of success on the merits *and* irreparable harm for any one of the four patents at issue in that motion. P.I. Order at 37-38, 50, 65. That is not so here because Apple has demonstrated a likelihood of success, irreparable harm, and a strong nexus with respect to all of the asserted patents.

infringing functionality; such expenditures are "irrelevant" because they are "consequences" of Samsung's decision to use Apple's patented technology in the first place. *Id.*

Given "[t]he magnitude of the threatened injury" to Apple and "the strength of the showing of likelihood of success" by Apple, the balance of hardships strongly favors preliminary relief. *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987), *overruled on other grounds Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

IV. THE PUBLIC INTEREST SUPPORTS A PRELIMINARY INJUNCTION

The public interest also would be advanced by, and strongly militates in favor of, a preliminary injunction. In contrast, no public interest considerations weigh against temporary relief.

As discussed above, Apple would suffer myriad harms from Samsung's unfair conduct. The public suffers, too, from Samsung's disregard of Apple's innovation and legal rights. Indeed, Samsung launched its infringing Galaxy Nexus device just two weeks *after* this Court determined that its prior devices likely infringed Apple patents and that Apple was likely to suffer irreparable harm as a result of Samsung's infringement. Samsung's serial infringement and disregard of Apple's rights also does violence to the public's strong interest in promoting innovation and protecting intellectual property rights. The public interest is served by rewarding Apple's innovation, not Samsung's imitation.

Indeed, public policy strongly favors preliminary relief here because Apple has established a likelihood of success on the merits. *See Abbott Labs. v. Andrx Pharm., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006) ("Although the public interest inquiry is not necessarily or always bound to the likelihood of success on the merits, in this case absent any other relevant concerns, we agree with the district court that the public is best served by enforcing patents that are likely valid and infringed."); *see also Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1363 (Fed. Cir. 2008) ("The patent laws promote . . . progress by offering a right of exclusion for a limited period as an incentive to investors to risk the often enormous costs in terms of time, research, and development." (citation omitted)).

Not only will preliminary relief advance the public interest, but there is no "critical public interest that would be injured by the grant of preliminary relief." *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1458 (Fed. Cir. 1988) (footnote omitted). Smartphones are widely available consumer

electronics, and there is no public health or safety issue implicated by an injunction. Moreover, there are many competing devices that could more than adequately satisfy the demand for smartphones, including Apple's own iPhones. *See, e.g., Acumed LLC v. Stryker Inc.*, 551 F.3d 1323, 1331 (Fed. Cir. 2008) (considering existence of non-infringing alternatives in the marketplace). A preliminary injunction against the Galaxy Nexus presents no threat of any kind to any public interest.

CONCLUSION

For the foregoing reasons, Apple respectfully requests that this Court grant Apple's motion for a preliminary injunction.

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