

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

**BARCAN WIRELESS ACCESS
TECHNOLOGIES, L.P.**

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Plaintiff,

Civ. Action No. 2:16-cv-00063-JRG-RSP

v.

JURY DEMANDED

**T-MOBILE US, INC.; AND
T-MOBILE USA, INC.,**

Defendants.

SECOND AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Barkan Wireless Access Technologies, L.P. (“Barkan” or “Plaintiff”) files this second amended complaint for patent infringement against T-Mobile US, Inc. and T-Mobile USA, Inc. (collectively “T-Mobile” or “Defendants”) and states as follows:

THE PARTIES

1. Plaintiff Barkan Wireless Access Technologies, L.P. is a limited partnership organized under the laws of Texas with its principal place of business in Allen, Texas.

2. Defendant T-Mobile US, Inc. (“T-Mobile US”) is a Delaware corporation with its principal place of business in Bellevue, Washington. This Defendant may be served with process through its agent, Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. This Defendant does business in the State of Texas and in the Eastern District of Texas.

3. T-Mobile US was originally incorporated as MetroPCS Communications, Inc. under the laws of the State of Delaware in 2004. The name of Metro PCS was

changed to T-Mobile US on April 30, 2013. On information and belief, MetroPCS is an operating division of T-Mobile US that has a principal place of business at 2250 Lakeside Blvd., Richardson, Texas, 75082.

4. Defendant T-Mobile USA, Inc. (“T-Mobile USA”) is a Delaware corporation with its principal place of business in Bellevue, Washington. This Defendant may be served with process through its agent, Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. T-Mobile US wholly owns T-Mobile USA. On information and belief, Defendant T-Mobile USA, Inc. has research and development facilities at 7668 Warren Parkway, Frisco, Texas 75034.

5. T-Mobile US and T-Mobile USA are collectively referred to herein as “T-Mobile.”

JURISDICTION AND VENUE

6. This is an action for patent infringement arising under the patent laws of the United States, Title 35, United States Code. Jurisdiction as to these claims is conferred on this Court by 35 U.S.C. §§1331 and 1338(a).

7. Venue is proper within this District under 28 U.S.C. §§1391 and 1400(b). On information and belief, T-Mobile has committed acts of infringement in this District, has purposely transacted business in this District, has advertised and solicited business in this District, has committed acts of infringement in this District, and has established minimum contacts within this District.

8. This Court has personal jurisdiction over T-Mobile because, on information and belief, T-Mobile has conducted and does conduct business within this District, has committed acts of infringement in this District, and continues to commit acts

of infringement in this District. On information and belief, T-Mobile generates millions of dollars of revenue in this District. On information and belief, at least thousands of residents within this District use T-Mobile's telecommunications system.

FIRST CLAIM FOR PATENT INFRINGEMENT ('306 PATENT)

9. Barkan incorporates by reference paragraphs 1-8 as if fully set forth herein.

10. On May 26, 2015, United States Patent No. 9,042,306 ("the '306 patent") entitled "Wireless Internet System and Method" was duly and legally issued after full and fair examination. Barkan is the owner of all right, title, and interest in and to the '306 patent by assignment, with full right to bring suit to enforce the patent, including the right to recover for past infringement damages and the right to recover future royalties, damages, and income. The '306 patent is attached hereto as Exhibit A.

11. The '306 patent is valid and enforceable.

12. T-Mobile offers for sale and sells the following mobile telephones that have the capability to connect to the T-Mobile broadband wireless network as well as providing a local area network (LAN) over which other devices may connect to the T-Mobile wireless network: Alcatel One Touch Evolve, Alcatel One Touch Evolve 2, Alcatel One Touch Fierce, Alcatel One Touch Fierce 2, Alcatel Fierce XL with Windows 10, Alcatel One Touch Pop Astro, Apple iPhone 4, Apple iPhone 4S, Apple iPhone 5, Apple iPhone 5c, Apple iPhone 5s, Apple iPhone 6, Apple iPhone 6 Plus, Apple iPhone 6s Plus, Apple iPhone SE, BlackBerry Classic, BlackBerry Curve 9315/9320, Blackberry Priv, BlackBerry Q10, BlackBerry Z10, Coolpad Catalyst, Coolpad Rogue, HTC 10, HTC Amaze 4G,

HTC G2, HTC myTouch 4G Slide, HTC One, HTC One S, HTC Radar, HTC Sensation 4G, HTC Windows Phone 8X, Huawei Comet, Huawei myTouch, Huawei myTouch Q, Huawei Prism / Summit, Huawei Prism II, Kyocera Hydro Life, Kyocera Hydro ZTRM, LG DoublePlay, LG G Flex, LG G2, LG G2x / Optimus 2x, LG G3, LG Leon / Risio, LG myTouch, LG myTouch Q, LG Nexus 4, LG Nexus 5, LG Optimus F3, LG Optimus F3Q, LG Optimus F6, LG Optimus L9 / Optimus 4G, LG Optimus L90, LG Optimus T, LG Stylo 2 Plus, Microsoft Lumia 435, Microsoft Lumia 640, Motorola Cliq 2, Motorola Moto X, Motorola Nexus 6, Nokia Lumia 521 / 520, Nokia Lumia 530, Nokia Lumia 635 / 630, Nokia Lumia 810, Nokia Lumia 925, Samsung Dart, Samsung Exhibit 4G, Samsung Exhibit II 4G / Galaxy Exhibit 4G, Samsung Galaxy Avant, Samsung Galaxy Code Prime, Samsung Galaxy Exhibit, Samsung Galaxy Light, Samsung Galaxy Note, Samsung Galaxy Note 3, Samsung Galaxy Note 4, Samsung Galaxy Note Edge, Samsung Galaxy Note II, Samsung Galaxy S 4, Samsung Galaxy S 4G, Samsung Galaxy S Blaze, Samsung Galaxy S II / SGH-T989, Samsung Galaxy S III, Samsung Galaxy S Relay 4G, Samsung Gravity Smart, Samsung Sidekick 4G, Samsung Vibrant (Galaxy S), Samsung Galaxy S5, Samsung Galaxy S6, Samsung Galaxy S6 Edge, Sony Xperia, ZTE Avid Plus, ZTE Concord / Midnight, ZTE Concord II, ZTE Obsidian, ZTE Z667 / Zinger / Prelude 2 / Flame / Whirl 2, ZTE ZMax, ZTE ZMAX Pro, and all past, present and future cellular phones that offer connectivity to other devices to the T-Mobile network over a local area network provided by the device (the “Accused Phones”).

13. In addition to the Accused Phones, T-Mobile also offers for sale and sells the following tablet devices that have the capability to connect to the T-Mobile broadband wireless network as well as providing a local area network (LAN) over which other devices may connect to the T-Mobile wireless network: Apple iPad Air, Apple iPad Mini with Retina display, Apple iPad Mini 4, Alcatel Onetouch Pop, Samsung Galaxy Tab 4 8.0 and all past, present and future tablets that offer connectivity to other devices to the T-Mobile network over a local area network provided by the device (these and all similar mobile tablets referred to herein as the “Accused Tablets”). The Accused Phones and Accused Tablets are collectively referred to herein as the “Accused Devices.”

14. Whether or not a subscriber may utilize the mobile hotspot or tethering feature of an Accused Device is controlled by T-Mobile.

15. A subscriber who purchases one of the Accused Devices must subscribe to a T-Mobile data plan to use the device to connect to the internet over T-Mobile’s wireless network. In order for an Accused Device to be connected to T-Mobile’s wireless system, the device must have a SIM card provided by T-Mobile that contains information that is associated with a subscriber’s account and which enables the Accused Device to be used on T-Mobile’s wireless network. In fact, a SIM card can be purchased by or reprogrammed for a subscriber to enable a device not purchased through T-Mobile to be used on T-Mobile’s wireless network (any such phone, tablet or other device utilizing a T-Mobile SIM card and providing a LAN for tethering or otherwise connecting other devices, is also included within the definition of “Accused Devices”). The SIM card is the key by which T-Mobile controls which devices may connect to the T-Mobile wireless network. Without T-Mobile’s SIM card, the Accused Device is useless for its intended

purpose of facilitating wireless communications over a wireless network, although certain features such as calculator or camera functionality may still be used. The code, data and/or other information stored on the SIM card that facilitate T-Mobile's control over which devices may be connected to the T-Mobile wireless communications network. The SIM card identifies the subscriber to T-Mobile's network and facilitates T-Mobile in billing the user for the services that the subscriber uses. In addition, in the event the subscriber's service or subscription is terminated, T-Mobile may de-activate the device via the use of the code, data and/or other information stored on the SIM card so that the device cannot connect to the T-Mobile telecommunications network.

16. At least as to the Accused Phones and the Accused Tablets, the data plan typically, without additional fees, only allows the device itself to connect to the T-Mobile wireless network. In order to connect other devices through the LAN provided by one of the Accused Phones or the Accused Tablets, historically, a subscriber has paid an additional fee or subscribed to a more expensive and a higher capacity data plan for the ability to "tether" additional devices through the Accused Phone or Accused Tablet over the LAN provided by same. More recently, "tethering" appears to be included in some T-Mobile data plans, such as "Unlimited tablet or Hotspot data plans," which also refer to "tethering" as a "mobile hotspot." Even when an additional fee is not charged by T-Mobile for tethering and/or mobile hotspot service, the use of tethering and/or mobile hotspot service results in a higher amount of data downloaded by a subscriber which, in turn, results in higher fees to T-Mobile. Telecommunications services offered for sale and sold by T-Mobile in connection with the Accused Devices, including but not limited to the "Tethering" services, the "mobile hotspot" service, and the services sold in

connection with data plans associated with the Accused Base Stations, are referred to herein as the “Accused Services.”

17. Barkan served its P.R. 3-1 and 3-2 disclosures on Defendants on January 17, 2017. Barkan expressly incorporates herein by reference its P.R. 3-1 and 3-2 disclosures, including any corrections or supplements thereto.

18. Barkan filed its Original Complaint against T-Mobile on January 19, 2016. Barkan served each Defendant with a summons and a copy of its Original Complaint on March 21, 2016. On information and belief, Defendants have been aware of the ‘306 patent since at least January 19, 2016.

19. Upon information and belief, T-Mobile has infringed and continues to infringe (literally and/or under the doctrine of equivalents) one or more claims of the ‘306 patent in this judicial district and elsewhere in the United States, by advertising for sale, selling, making, using, and importing computing devices including, without limitation, the Accused Devices, and other computing devices that provide a network access point (i.e., “Hotspot”).

20. Upon information and belief, T-Mobile has also infringed and continues to infringe (literally and/or under the doctrine of equivalents) one or more claims of the ‘306 patent in this judicial district and elsewhere in the United States, by advertising for sale, selling, making, using, and importing systems including, without limitation, systems that provide the Accused Services and other systems that support network access point capability.

21. Further and in the alternative, at least since the date that T-Mobile became aware of the ‘306 Patent, T-Mobile has been and is now actively inducing infringement

of at least claim 1 of the '306 patent in violation of 35 U.S.C. § 271(b) by, with specific intent or willful blindness, actively aiding and abetting others to directly infringe the '306 patent, including without limitation by: (1) performing the steps of the method claims in connection with the Accused Devices and/or Accused Services; (2) using the Accused Devices; (3) combining the Accused Devices and/or Accused Services; and (4) combining the Accused Devices and/or Accused Services with other components, such as third-party hardware, software, or services, to make and use the claimed invention in the United States. Users of the Accused Devices and/or Accused Services, including T-Mobile's customers, directly infringe at least claims 1, 2, 4-10, and 14 of the '306 Patent when they use the Accused Devices in the ordinary, customary, and intended way, including the ways described in T-Mobile's instruction and training documentation, T-Mobile's advertising, and in the ways supported by the T-Mobile Wireless Network. Users of the Accused Services, including T-Mobile's customers, directly infringe at least claims 16-19, 21, 23-31, 34-37, 39, 41-53, 56, 58, 60-63, 65, 67, and 68 of the '306 Patent when they use the Accused Devices and/or Accused Services in the ordinary, customary, and intended way, including the ways described in T-Mobile's instruction and training documentation, T-Mobile's advertising, and in the ways supported by the T-Mobile Wireless Network. T-Mobile's inducements include, without limitation and with specific intent to encourage the infringement, knowingly inducing customers to use the Accused Devices and/or Accused Systems within the United States in the ordinary, customary, and intended way by supplying the Accused Devices and/or Accused Services to consumers within the United States and instructing such customers (for example in instructional material that T-Mobile provides online or otherwise) how to use the

Accused Devices and/or Accused Services in the ordinary, customary, and intended way, with specific intent to cause infringement or with willful blindness to the resulting infringement. Upon information and belief, T-Mobile specifically intended (and intend) that its actions will result in infringement of at least claim 1 of the '306 patent, or subjectively believed (and believes) that its actions will result in infringement of at least claim 1 of the '306 patent but took deliberate actions to avoid learning of those facts, as set forth above. Upon information and belief, T-Mobile knew of the '306 patent and knew of its infringement, including by way of this lawsuit and earlier as described above.

22. Further, at least since the date that T-Mobile became aware of the '306 Patent, T-Mobile's infringement has been and continues to be willful and deliberate, and caused and will continue to cause substantial damage to Barkan. Upon information and belief, T-Mobile deliberately infringed the '306 patent and acted recklessly and in disregard to the '306 patent by (1) by advertising for sale, selling, making, using, and importing computing devices including, without limitation, the Accused Devices, and other computing devices that provide a network access point (i.e., "Hotspot"); (2) advertising for sale, selling, making, using, and importing systems including, without limitation, systems that provide the Accused Services and other systems that support network access point capability; and (3) inducing infringement as described above. Upon information and belief, the risks of infringement were known to T-Mobile and/or were so obvious under the circumstances that the infringement risks should have been known. Upon information and belief, T-Mobile has willfully infringed and/or continues to willfully infringe the '306 patent since at least the date that T-Mobile became aware of the '306 patent. In addition, this objectively-defined risk was known or should have been

known to T-Mobile. Upon information and belief, T-Mobile has willfully infringed and/or continues to willfully infringe the '306 patent. T-Mobile's actions of being made aware of its infringement, not developing any non-infringement theories, not attempting any design change, and not ceasing its infringement constitute egregious behavior beyond typical infringement. T-Mobile has acted despite an objectively high likelihood that its actions constituted infringement of the '306 patent. Barkan reserves the right to amend to assert a claim of pre-filing willful infringement if the evidence obtained in discovery supports such assertion.

23. T-Mobile has been at no time, either expressly or impliedly, licensed under the '306 patent.

24. Barkan is in compliance with 35 U.S.C. § 287.

25. T-Mobile's acts of infringement have caused damage to Barkan. Barkan is entitled to recover from T-Mobile the damages sustained by Barkan as a result of the wrongful acts of T-Mobile in an amount subject to proof at trial.

SECOND CLAIM FOR PATENT INFRINGEMENT ('369 PATENT)

26. Barkan incorporates by reference paragraphs 1-25 as if fully set forth herein.

27. On October 13, 2013, United States Patent No. 8,559,369 ("the '369 patent") entitled "Wireless Internet System and Method" was duly and legally issued after full and fair examination. Barkan is the owner of all right, title, and interest in and to the '369 patent by assignment, with full right to bring suit to enforce the patent, including the right to recover for past infringement damages and the right to recover future royalties, damages, and income. The '369 patent is attached hereto as Exhibit B.

28. The '369 patent is valid and enforceable.

29. Barkan filed its Original Complaint against T-Mobile on January 19, 2016. Barkan served each Defendant with a summons and a copy of its Original Complaint on March 21, 2016. On information and belief, Defendants have been aware of the '369 patent since at least January 19, 2016.

30. Upon information and belief, T-Mobile has infringed and continues to infringe (literally and/or under the doctrine of equivalents) one or more claims of the '369 patent in this judicial district and elsewhere in the United States, by advertising for sale, selling, making, using, and importing computing devices including, without limitation, the Accused Devices, and other computing devices that provide a network access point (i.e., "Hotspot").

31. Further and in the alternative, at least since the date that T-Mobile became aware of the '369 Patent, T-Mobile has been and is now actively inducing infringement of at least claim 1 of the '369 patent in violation of 35 U.S.C. § 271(b) by, with specific intent or willful blindness, actively aiding and abetting others to directly infringe the '369 patent, including without limitation by: (1) using the Accused Devices; (2) combining the Accused Devices and/or Accused Services; and (3) combining the Accused Devices and/or Accused Services with other components, such as third-party hardware, software, or services, to make and use the claimed invention in the United States. Users of the Accused Devices, including T-Mobile's customers, directly infringe at least claims 1-5 and 7 of the '369 Patent when they use the Accused Devices in the ordinary, customary, and intended way, including the ways described in T-Mobile's instruction and training documentation, T-Mobile's advertising, and in the ways supported by the T-Mobile

Wireless Network. T-Mobile's inducements include, without limitation and with specific intent to encourage the infringement, knowingly inducing customers to use the Accused Devices and/or Accused Systems within the United States in the ordinary, customary, and intended way by supplying the Accused Devices and/or Accused Services to consumers within the United States and instructing such customers (for example in instructional material that T-Mobile provides online or otherwise) how to use the Accused Devices and/or Accused Services in the ordinary, customary, and intended way, with specific intent to cause infringement or with willful blindness to the resulting infringement. Upon information and belief, T-Mobile specifically intended (and intend) that its actions will result in infringement of at least claim 1 of the '369 patent, or subjectively believed (and believes) that its actions will result in infringement of at least claim 1 of the '369 patent but took deliberate actions to avoid learning of those facts, as set forth above. Upon information and belief, T-Mobile knew of the '369 patent and knew of its infringement, including by way of this lawsuit and earlier as described above.

32. Further, at least since the date that T-Mobile became aware of the '369 Patent, T-Mobile's infringement has been and continues to be willful and deliberate, and caused and will continue to cause substantial damage to Barkan. Upon information and belief, T-Mobile deliberately infringed the '369 patent and acted recklessly and in disregard to the '369 patent by (1) by advertising for sale, selling, making, using, and importing computing devices including, without limitation, the Accused Devices, and other computing devices that provide a network access point (i.e., "Hotspot"); (2) advertising for sale, selling, making, using, and importing systems including, without limitation, systems that provide the Accused Services and other systems that support

network access point capability; and (3) inducing infringement as described above. Upon information and belief, the risks of infringement were known to T-Mobile and/or were so obvious under the circumstances that the infringement risks should have been known. Upon information and belief, T-Mobile has willfully infringed and/or continues to willfully infringe the '369 patent since at least the date that T-Mobile became aware of the '369 patent. In addition, this objectively-defined risk was known or should have been known to T-Mobile. Upon information and belief, T-Mobile has willfully infringed and/or continues to willfully infringe the '369 patent. T-Mobile's actions of being made aware of its infringement, not developing any non-infringement theories, not attempting any design change, and not ceasing its infringement constitute egregious behavior beyond typical infringement. T-Mobile has acted despite an objectively high likelihood that its actions constituted infringement of the '369 patent. Barkan reserves the right to amend to assert a claim of pre-filing willful infringement if the evidence obtained in discovery supports such assertion.

33. T-Mobile has been at no time, either expressly or impliedly, licensed under the '369 patent.

34. Barkan is in compliance with 35 U.S.C. § 287.

35. T-Mobile's acts of infringement have caused damage to Barkan. Barkan is entitled to recover from T-Mobile the damages sustained by Barkan as a result of the wrongful acts of T-Mobile in an amount subject to proof at trial.

36. Barkan reserves the right to amend to assert a claim of willful infringement if the evidence obtained in discovery supports such assertion.

DEMAND FOR JURY TRIAL

Barkan hereby demands a jury for all issues so triable.

PRAYER

WHEREFORE, Barkan respectfully requests that the Court:

1. Enter judgment that Defendants have infringed the '306 and '369 patents;
2. Award Barkan compensatory damages for Defendants' infringement of the '306 and '369 patents, together with enhanced damages, costs, and pre-and post-judgment interest;
3. A judgment and order awarding enhanced damages, pursuant to 35 U.S.C. § 284, if Defendants' acts of infringement of the '306 and '369 patents are determined to be willful;
4. An award of all costs and reasonable attorney's fees against Defendants, pursuant to 35 U.S.C. §§ 284 and 285, based on its infringement of the '306 and '369 patents; and
5. Award any other relief deemed just and equitable.

DATED: February 21, 2017

Respectfully submitted,

/s/ Robert D. Katz

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ATTORNEYS FOR PLAINTIFF

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a) on the date above. Any other counsel of record will be served by electronic mail.

/s/ Robert D. Katz

Robert D. Katz