

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

NOKIA CORPORATION,

Plaintiff,

v.

APPLE INC.

Defendant.

C.A. No. 09-791 GMS

NOKIA CORPORATION,

Plaintiff,

v.

APPLE INC.

Defendant.

C.A. No. 09-1002 GMS

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**HIGH TECH COMPUTER CORP., A/K/A HTC CORP., HTC (B.V.I.) CORP.,
HTC AMERICA, INC., AND EXEDEA, INC.'S
ANSWERING BRIEF IN OPPOSITION TO APPLE INC. AND NEXT SOFTWARE,
INC.'S MOTION FOR CONSOLIDATION OF THE CAPTIONED CASES**

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Dated: June 21, 2010

APPLE INC., NeXT SOFTWARE, INC.,
f/k/a/ NeXT COMPUTER, INC.,

Plaintiffs,

v.

HIGH TECH COMPUTER CORP., a/k/a HTC
CORP., HTC (B.V.I.) CORP., HTC
AMERICA, INC., EXEDEA, INC.,

Defendants.

C.A. No. 10-166-RK

APPLE, INC.,

Plaintiff,

v.

HIGH TECH COMPUTER CORP., a/k/a HTC
CORP., HTC (B.V.I.) CORP., HTC
AMERICA, INC., and EXEDEA, INC.,

Defendants.

C.A. No. 10-167-RK

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I. NATURE AND STAGE OF PROCEEDINGS

For whatever reason, Apple is dead-set against having its two cases against HTC proceed in the Northern District of California, Apple's home district and the district without question most closely connected to this case. As explained in HTC's pending motion to transfer (D.I. 8 in C.A. 10-166-RK; D.I. 8 in C.A. No. 10-167-RK), the Northern District of California is more convenient for the key non-party and party witnesses and would offer subpoena power over several non-parties, most notably Google, whose revolutionary Android operating system is the target of several of Apple's alleged infringement claims in both cases. The interest of justice also favors transfer to the Northern District of California, where the claimed inventions were allegedly conceived and reduced to practice and where Apple and non-party Google are headquartered. Apple's only point of any substance in opposition to the transfer motion relies on consolidation of the cases—hence Apple, months after it sued HTC, moved to consolidate *the very day* that it opposed HTC's motion to transfer. That timing is no coincidence. The Court should reject Apple's consolidation motion for what it is: a collateral opposition to HTC's transfer motion that Apple cannot meet on the merits.

Arguing for consolidation, Apple overstates the common factors linking the two Apple-HTC cases and the two Nokia-Apple cases—and in the process, takes a completely opposite position from what it argued in opposing consolidation in the ITC. These four cases share a mere *three patents* out of nineteen patents that Apple has asserted against both HTC and Nokia that are not stayed on account of parallel ITC proceedings. *See* Declaration of Karen L. Pascale ("Pascale Decl.") ¶ 2, Ex. 1. As to the ten non-stayed Apple patents asserted against HTC, only *four* of the 69 total inventors are named on those three overlapping patents. Given this minimal commonality, consolidation would in fact *impede* efficiency by subjecting HTC (and Nokia) to an overwhelming volume of irrelevant discovery produced by Apple in a consolidated

proceeding. Apple has thus not carried its burden to show both that common legal or factual questions predominate and that consolidation would streamline the proceedings and promote efficiency. Even if Apple could show that sufficient benefit might result from consolidation, any benefit would be outweighed by the prejudice HTC would suffer from being forced into consolidation where Apple and Nokia are asserting the lion's share of patents against one another. This prejudice would be compounded by the fact that the Court's schedule in the Nokia-Apple litigation is incompatible with the procedural posture of the Apple-HTC cases.

The Court should reject Apple's gambit to avoid transfer and deny Apple's consolidation motion—and also grant HTC's pending transfer motion.

II. SUMMARY OF THE ARGUMENT

1. The four captioned cases do not involve common questions of law or fact sufficient to justify consolidation under Rule 42(a) of the Federal Rules of Civil Procedure. Out of the *44 total patents* at issue in these cases, only eleven patents are relevant to both HTC and Nokia. Moreover, only two of these four cases are active, while the other two are stayed pending parallel ITC investigations. The non-stayed cases share *only three patents in common*. Ignoring this important fact, Apple relies on generalized statements that the non-overlapping patents are somehow related. But Apple has already admitted the opposite in resisting ITC consolidation, and the conclusory statements supporting its about-face are not enough to satisfy Apple's burden to show that consolidation is appropriate.

2. Even were consolidation found to offer some benefit, that benefit would be far outweighed by overcomplication, new delays, increased expense, and unavoidable prejudice to HTC and Nokia. Consolidating stayed cases with non-stayed cases would quickly result in litigation with suits at materially different stages. Consolidation would also force HTC to deal with a large amount of irrelevant discovery and numerous issues unique to Nokia, including an

antitrust claim entirely unrelated to HTC. Consolidation in this District would result in further prejudice because, as set forth in HTC's pending motion to transfer, this District is far less convenient than the Northern District of California for the parties and witnesses.

3. To the extent consolidation would increase judicial economy or convenience, these same benefits can be achieved by the parties themselves through informal coordination.

III. STATEMENT OF FACTS

Apple's claim that it would prove efficient to consolidate the four pending actions is belied by Apple's failure from the time it filed suit against HTC to express any interest in consolidation. Apple filed its patent counterclaims against Nokia on December 11, 2009 and February 24, 2010. Answers and Counterclaims, C.A. No. 09-791-GMS (D.I. 14); C.A. No. 09-1002-GMS (D.I. 12). When it filed its two district-court actions against HTC a week later on March 2, 2010, it neglected to indicate that any of these actions were related as it was obliged to do under District of Delaware Local Rule 3.1(b).¹ See Civil Cover Sheets, C.A. No. 10-166-RK (D.I. 1); C.A. No. 10-167-RK (D.I. 1); Declaration of Karen L. Pascale in Support of Reply Brief [of HTC] in Support of Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404 (D.I. 31 in C.A. No. 10-166-RK; D.I. 32 in 10-167-RK), Ex. 2, 3. Three weeks later, rather than move to consolidate, Apple took the unusual step of writing Chief Judge Sleet and explaining that the four cases "involve *some* of the same technology" and that they should be "identified" as related. Letter to The Honorable Gregory M. Sleet from Richard K. Herrmann dated March 24, 2010 (D.I. 5 in C.A. No. 10-166-RK; D.I. 5 in C.A. No. 10-167-RK) (emphasis added). Only after HTC moved to transfer its cases to the Northern District of California did Apple file its motion for consolidation—on the same day it filed its opposition to the transfer motion.

¹ Local Rule 3.1(b) requires parties to indicate at the time of filing when cases, among other things, involve the same patent or the same trademark, or for other reasons would entail substantial duplication of labor if heard by different judges.

IV. ARGUMENT

Federal Rule of Civil Procedure 42(a) provides in pertinent part that “[w]hen actions involving a common question of law or fact are pending before the court . . . it *may* order all the actions consolidated; and it *may* make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Fed. R. Civ. P. 42(a) (emphasis added). “The mere existence of common issues, however, does not require consolidation.” *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 81 (D.N.J. 1993). Indeed, a “common question of law or fact shared by all of the cases” is merely a threshold requirement. *In re Consolidated Parlodel Litig.*, 250 F.R.D. 441, 444 (D.N.J. 1998). A court should not grant consolidation if it will burden the parties and the court with an “overcomplication of issues.” *Atkinson v. Roth*, 297 F.2d 570, 575 (3d Cir. 1961). Thus, courts contemplating consolidation must “weigh the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice.” *Parlodel*, 250 F.R.D. at 444 (quotation omitted). Here, as the moving party, Apple carries the “burden of persuading the court that consolidation is proper.” *Watkinson v. Great Atlantic & Pacific Tea Co., Inc.*, 585 F. Supp. 879, 883 (E.D.Pa. 1984); *see also Borough of Olyphant v. PPL Corp.*, 153 Fed. Appx. 80, *2 (3d Cir. 2005) (same).

When two cases have different defendants, even a substantial overlap in the asserted patents may not be enough to render consolidation proper. To take one example, in *Powervip, Inc. v. Static Control Components, Inc.*, the court recognized that party-specific issues can erode the benefits of consolidation, even when two cases share four out of five patents. 2009 WL 152106, at *9 (W.D. Mich. 2009) (dismissing the possibility of consolidation when deciding a transfer motion). Here, there are numerous issues of law and fact unique to HTC or Nokia. Apple has not carried its burden of showing the benefits of consolidation on these facts.²

² Apple’s opening brief in support of its motion to consolidate (“Op. Brf.”) cites a handful of patent-infringement suits where courts ordered consolidation, and implies that this situation is

A. Apple fails to demonstrate that common questions of law or fact predominate across the four pending actions.

1. Contrary to Apple's claimed count, at most three patents overlap.

Federal Rule of Civil Procedure 42(a) allows consolidation “when common questions of law or fact *predominate.*” *Vallero v. Burlington Northern R. Co.*, 749 F. Supp. 908, 913 (C.D. Ill. 1990) (emphasis added). Apple’s motion relies heavily on the claim that, of the 27 patents it asserts in these four cases, it has asserted eleven of them against both HTC and Nokia. (Op. Brf. at 4.) But Apple’s patent count is misleading for two reasons. *First*, Apple inappropriately urges consolidation of two actions that Chief Judge Sleet and Judge Kelly have already stayed on account of parallel ITC proceedings. *See* Orders Staying Cases, C.A. No. 09-1002-GMS (D.I. 13); C.A. No. 10-166-RK (D.I. 17). But the extent to which the stayed cases overlap with the non-stayed cases is irrelevant, because the stayed cases cannot be litigated until the related ITC proceedings conclude. Accordingly, consolidating these stayed cases now could not result in any meaningful increase in convenience, as it may be years before those cases become active. Focusing on the non-stayed cases, Apple asserts against HTC and Nokia nineteen total patents, only *three* of which Apple asserts against *both* HTC and Nokia. Pascale Decl., Ex. 1. Thus, the number of overlapping Apple patents is at most three.³

similar. (Op. Brf. at 6) (D.I. 22 in C.A. No. 10-166-RK; D.I. 20 in C.A. No. 10-167-RK). But those cases present facts materially distinct from those here. Those courts consolidated separate cases involving *the same single patent* (*Magnavox Co. v. APF Electronics, Inc.*, 496 F. Supp. 29, 31-32 (N.D. Ill. 1980); *Kohus v. Toys “R” Us, Inc.*, 2006 WL 1476209 (S.D. Ohio May 25, 2006)), *two mirror-image cases* involving the same parties who were each asserting “blocking patents” so similar that neither party could sell its product without infringing the other’s patent (*Rohm and Haas Co. v. Mobile Oil Corp.*, 525 F. Supp. 1298, 1301 (D. Del. 1981)), and alleged infringement of patents *that all claimed the same chemical compound* (*Smithkline Beecham Corp. v. Geneva Pharm., Inc.*, 2001 WL 1249694 (E.D. Pa. Sep. 26, 2001)). In contrast to these situations, Apple has demonstrated a relatively small overlap of only three patents between the non-stayed cases.

³ These three overlapping patents are U.S. Patent Nos. 5,848,105; 7,383,453; and 7,469,381. Pascale Decl., Ex. 1. That number may soon fall to only two patents, as HTC has filed a motion to dismiss the ’453 Patent because its claims were in fact not allowed by the USPTO. *See*

Furthermore, Apple's emphasis on its own patents ignores the ten patents originally asserted by Nokia against Apple in the non-stayed Nokia case.⁴ Pascale Decl., Ex. 1. It would be a case of the scheduling tail wagging the dog for a three-patent overlap to force HTC into a consolidated proceeding in which *sixteen* other non-stayed patents (six asserted by Apple against only Nokia, and ten asserted by Nokia against Apple) have nothing at all to do with HTC.⁵

Even indulging in Apple's assessment of overlap among stayed and non-stayed proceedings reveals no predomination of common questions of law or fact. Counting both stayed and non-stayed cases, the Nokia-Apple litigation began with Nokia asserting seventeen total patents against Apple. Pascale Decl., Ex. 1. Apple *counterclaimed* against Nokia for infringement of a total of eighteen patents. *Id.* Then, in separate suits assigned to a different judge, Apple alleged that HTC infringes a total of twenty patents as well, eleven of which are patents that Apple has also asserted against Nokia. *Id.* If Apple's motion is granted, by Apple's own count the resulting litigation combining stayed and non-stayed cases would involve a total of at least **44 different patents**. HTC and Nokia would share an interest in only eleven of these patents, meaning that three-quarters of the litigation would be a waste of time for one or the other. And if patents in only the non-stayed cases are counted, then the resulting number is that HTC and Nokia would share an interest in only *three* out of a total of 26 non-stayed patents.

Motion to Dismiss Count VIII of Complaint Pursuant to Rule 12(b)(6), C.A. No. 10-167-RK (D.I. 26).

⁴ Furthermore, if and when HTC answers Apple's complaint, it may assert patents against Apple (and not Nokia), further increasing the amount of non-overlapping issues and diminishing any efficiency to be gained by consolidation.

⁵ Additionally, Apple has asserted non-patent antitrust counterclaims against Nokia in the non-stayed Nokia case. Apple Answer and Counterclaims, C.A. No. 09-791 GMS (D.I.14). These counterclaims raise issues entirely unique to the Apple-Nokia dispute, further reducing the commonality among these four cases.

Under either scenario, Apple’s desired result would require the Court needlessly to coordinate activities where one defendant has no involvement most of the time.

2. Apple overstates the witness and technological overlap the four pending actions present.

As with its count of overlapping patents, Apple inflates the number of overlapping inventors by counting patents in the stayed and non-stayed matters. (Op. Brf. at 4.) Of the 69 inventors named in the ten Apple patents asserted against HTC in the non-stayed action, a mere *four* inventors are on the three patents that Apple has also asserted against Nokia in that non-stayed action. Thus, there is little efficiency to be gained by consolidation—as needed, the parties in separate proceedings can always coordinate the scheduling of inventor depositions.

Apple also claims that the patents asserted against only HTC or Nokia are technologically “related” to the three overlapping patents. (Op. Brf. at 4.) But Apple advanced the *exact opposite position* in opposing partial consolidation of overlapping patents in the ITC investigations instigated by Apple against HTC and Nokia. *See* Apple’s Opposition to Consolidation, Pascale Decl. ¶ 3, Ex. 2. In those proceedings:

- Apple admitted that its complaints against HTC and Nokia were “more different than alike.” Pascale Decl., Ex. 2 at 5.
- Apple characterized HTC and Nokia as “two separate infringers that sell completely different infringing products,” *Id.* at 1, and provided a detailed explanation of the issues unique to HTC and Nokia. *Id.* at 6-8.
- Apple represented that the cases against HTC and Nokia would entail “significant amounts of distinct, non-overlapping evidence such as Finnish and Taiwanese testimony from product developers, source code for the accused products, third party testimony and documents from Nokia’s and HTC’s third party vendors, and financial/marketing evidence unique to Nokia and HTC.” *Id.* at 7.

- Ironically, Apple accused HTC of “minimiz[ing] the important differences in the patents asserted in the respective cases and instead rely[ing] on sweeping generalizations about the claimed subject matter,” and pointed out that these patents would require “different sets of experts and witnesses for the sub-specialties within the technology.” *Id.* at 7-8.
- Apple ultimately concluded that consolidating just those two investigations “would create an unmanageable mega-investigation and render it nearly impossible to complete the combined investigation in a timely fashion.” *Id.* at 3.

The ITC partly agreed with Apple, and followed the Staff’s recommendation to consolidate only the five patents that actually overlapped. ITC Order Granting Partial Consolidation, Pascale Decl. ¶ 4, Ex. 3. Here, of course, there is no recourse for partial consolidation.

3. Consolidation would provide limited efficiency and streamlining of issues.

Apple’s motion asks the Court to consolidate stayed cases with non-stayed cases. But that approach would necessarily create scheduling inefficiency and confusion by combining suits moving at different paces. Courts consistently refuse to consolidate cases that are at different stages of litigation.⁶ Here, the ITC proceedings corresponding to the stayed cases have just recently commenced, and the stay may not be lifted for several years, during which the gap between the stayed and non-stayed cases will necessarily increase. Thus, if Apple’s motion were

⁶ For example, in *Rendon v. City of Fresno*, 2006 WL 1582307 (E.D. Cal. June 2, 2006), a court decided not to consolidate three related actions where two actions were filed between seven and ten months prior to the third action. *Id.* at *7. Another district court pointed out that, even if there are “questions of law common to both actions, this does not justify consolidation, particularly where, as here, parties would be prejudiced . . . from the circumstance that the cases are in different phases of pre-trial procedures.” *Schacht v. Javits*, 53 F.R.D. 321, 324-25 (S.D.N.Y. 1971). “[P]roper judicial administration does not recommend consolidation where two actions are at such widely separate stages of preparation.” *Id.*; see also *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 395 (E.D. Wis. 2008) (deciding against consolidation partly because the cases were in “slightly different procedural postures,” which might have caused unnecessary delay).

granted, the Court and the parties would eventually end up with consolidated cases at radically different stages—reason enough on its own *not* to consolidate the stayed and non-stayed cases.

Apple suggests that failure to consolidate could lead to redundant discovery, duplicative depositions and hearings, and inconsistent rulings. Apple is wrong for several reasons. *First*, consolidation actually poses a greater risk of discovery inefficiency. Apple, HTC, and Nokia are large technology companies, and the vast majority of discovery will deal with electronically-stored information produced in electronic form. To the extent materials gathered in one case are relevant to another case, reproduction would require only minimal effort. But if the four pending cases are consolidated, HTC would be forced to wade through gigabytes of undifferentiated documents just to determine whether they were relevant to its case or the Nokia litigation.

Second, to the extent discovery overlaps, the parties will have an incentive to coordinate their efforts so as to minimize cost. Such coordination occurs all the time in complex litigation. As Apple explained in opposing consolidation before the ITC, “there is no reason why depositions of common inventors from overlapping patents cannot be scheduled in a coordinated fashion without combining otherwise wholly disparate cases.” Pascale Decl., Ex. 2.

Third, Apple overstates the potential for inconsistent *Markman* rulings. As discussed above, there are at most three patents that overlap between the non-stayed cases. Even if Apple asserts the same claims of those patents against HTC and Nokia, if one court construes the three patents first, the second court presumably would be guided but not bound by that construction—as happens routinely in cases where a patent has already been litigated before another court. *See, e.g., Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 540 F. Supp. 2d 1233, 1242 (M.D. Fla. 2008) (noting that even where another district court has construed a patent's terms, “the Court has an independent obligation to determine the meaning of the claims, and to render its own independent claim construction”); *American Piledriving Equip., Inc. v. Equipment Corp.*

of Am., 2009 WL 3401726, *7 (W.D. Pa. 2009) (same). In any event, by asserting several patents both against HTC in this Court and against Nokia in the ITC, Apple has guaranteed that they will be construed by different decision-makers regardless of this Court's consolidation ruling. Apple itself agrees that "[j]udges all the time have to deal with issues that may have been ruled on, in one form or another, by another judge." Pascale Decl., Ex. 2 at 13. And that minimal risk is more than offset by the inappropriateness of forcing HTC into a consolidated case in which 33 patents, asserted by Apple and Nokia against only each other, would also be contested. Pascale Decl., Ex. 1.

B. Consolidation would prejudice HTC and non-party witnesses in the extreme.

Even if Apple had carried its burden to show the potential benefits of consolidation in this case (which it has not), the prejudice to HTC would still outweigh these benefits for two reasons.

First, consolidation would disrupt the schedule established in the Nokia-Apple litigation. Contrary to Apple's claim, the non-stayed Nokia case is materially further along than the non-stayed HTC case. In the non-stayed Nokia case, the pleadings have closed and the parties have commenced discovery. Chief Judge Sleet has already issued a scheduling order in that case setting a *Markman* hearing on May 16, 2011, with opening briefing due on March 15, 2011, a fact-discovery cut-off of July 15, 2011, and a trial date of May 21, 2012. *See, e.g.*, April 9, 2010 Minute Order and D.I. 42 in C.A. No. 09-791-GMS. In contrast, HTC has recently moved to dismiss one of the patents Apple has asserted against it and also moved to transfer. C.A. No. 10-167 RK (D.I. 26, 8). HTC has not yet filed its answer and the Court has not yet set a case schedule. Consolidation would result in either rushing the HTC suit through pretrial proceedings or delaying the established Nokia schedule.

Second, the cases against HTC should be transferred for the convenience of non-party witnesses and the interest of justice to the Northern District of California. As explained more fully in the briefs in support of HTC's pending motion to transfer (D.I. 9, 30 in C.A. No. 10-166-RK; D.I. 9, 31 in C.A. No. 10-167-RK), nearly all of the 28 U.S.C. § 1404(a) factors support transfer of the HTC cases to the Northern District of California:

- **The Northern District of California is the most convenient forum for non-party witnesses.**

In support of its Motion to Transfer Venue, HTC has submitted evidence conclusively showing that there are a large number of non-party witnesses located in California, including:

- 54 named inventors of the Apple patents at issue, 30 of whom are not Apple employees;
- the majority of Google personnel responsible for the research, design, development, and marketing of the Android Operating System relevant to several patents;
- the majority of Google personnel responsible for working with HTC to develop certain accused products; and
- Qualcomm, Inc. employees responsible for designing and selling the baseband chips identified in Apple's infringement allegations.

The availability of witnesses is generally considered to be the "most crucial factor" in deciding motions to transfer. *Pennwalt Corp. v. Purex Indus., Inc.*, 659 F. Supp. 287, 291 (D. Del. 1986). In contrast, Apple has failed to identify a single witness in Delaware. *See In re Genentech*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (transfer required where "a substantial number of material witnesses reside within the transferee venue and state" and no witnesses are found in the transferor district).

- **Apple's choice of venue in this District merits no deference.**

Under Delaware law, a plaintiff's choice of forum receives only minimal deference when that plaintiff resists transfer from a district that is neither its "home turf" nor meaningfully connected to the lawsuit. *Virgin Wireless, Inc. v. Virgin Enters., Ltd.*, 201 F. Supp. 2d 294, 300 (D. Del. 2002). In this case, Apple is a California corporation with its principal place of business in California. It cannot dispute that HTC's transfer motion seeks to move this litigation to Apple's "home turf." Further, Apple has been unable to point to a single fact demonstrating a significant connection between the Apple-HTC litigation and this District. Like Apple, HTC is not incorporated in Delaware and has no meaningful connection to this forum.

- **The Northern District of California is the most convenient forum for the parties themselves.**

Despite Apple's protests, venue in the Northern District of California would serve its convenience as well. Apple is based in Cupertino, California and employs a number of potential witnesses there. Similarly, HTC has employee-witnesses in that judicial district as well as in venues more convenient to that district.

- **The interest of justice requires transfer.**

The only response of any substance that Apple has mounted to HTC's motion to transfer is that there is a small overlap with the Nokia cases already pending in this District. Hence Apple's failing to move to consolidate or relate the cases until the very day that its opposition to HTC's motion to transfer came due. Even if that collateral-attack strategy were procedurally sound, it is inconsistent with Supreme Court law. "The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum." *Van Dusen v. Barrack*, 376 U.S. 612, 624 (1964).

V. CONCLUSION

Because consolidation would result in a litigation with 44 total patents, only three of which are going forward and involve the same parties, and would unnecessarily disrupt the schedule and proper venue of those cases, consolidation is improper and Apple's motion should be denied.

June 21, 2010

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CERTIFICATE OF SERVICE

I, Karen L. Pascale, Esquire, hereby certify that on June 21, 2010, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification of such filing to the following counsel of record:

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I further certify that on June 21, 2010, I caused a copy of the foregoing document to be served by e-mail on the above-listed counsel and on the following non-registered participants in the manner indicated:

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