IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NOKIA CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09-791 (GMS)
	)	
APPLE INC.,	)	
	)	
Defendant.	)	

NOKIA CORPORATION'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND COMPLAINT

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Rodger D. Smith II (#3778)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
rsmith@mnat.com

Attorneys for Nokia Corporation and Nokia Inc.

OF COUNSEL:

Patrick J. Flinn
Peter Kontio
John D. Haynes
Mark A. McCarty
Adam J. Biegel
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

July 1, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES AND STATUTES

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 15(a) and D. Del. LR 15.1, Nokia requests that this Court grant Nokia leave to file its First Amended Complaint. Nokia brings this Motion and in advance of the Scheduling Order's August 30, 2010 deadline for amendments to pleadings and at the outset of discovery in this action. Granting Nokia's Motion will promote the interests of justice and will not delay the close of discovery or the trial of this case. Accordingly, Apple will incur no prejudice as a result of Nokia's amendments. Because no substantial reason exists to deny Nokia leave to amend, Nokia's motion to amend should be granted and it should be permitted to file its First Amended Complaint.

NATURE AND STAGE OF THE PROCEEDINGS

On October 22, 2009, Nokia Corporation filed a complaint against Apple Inc. for infringing 10 patents essential to certain wireless communication standards (D.I. 1). On December 11, 2009, Apple filed an answer and counterclaims asserting infringement of 13 patents and six non-patent counts (D.I. 14). On February 19, 2010, Apple amended its answer and counterclaims to drop four patent infringement claims and its claim of unfair competition under California law, add an antitrust claim under Section 2 of the Sherman Act, and add Nokia Inc. (Nokia Corporation's US subsidiary) as a defendant (collectively "Nokia") (D.I. 21). On March 11, 2010, Nokia moved to dismiss all six of Apple's non-patent counterclaims.

On April 30, 2010, the parties submitted a Proposed Scheduling Order (D.I. 42), which was adopted (with one exception) by the Court on May 3, 2010. Under the terms of this Scheduling Order, the deadline for Nokia to amend its Complaint is August 30, 2010. On June 3, 2010, the Court denied Nokia's motion to dismiss. On June 9 and 10, 2010, the parties exchanged interrogatories and requests for the production of documents (D.I. 56 and 57).

Nokia now moves this Court for leave to amend its Complaint to add claims against Apple for (i) infringement of Nokia's implementation patents; (ii) a declaratory judgment that Apple has repudiated any of the benefits of Nokia's F/RAND undertaking; and (iii) alternatively, a declaration that Apple must pay Nokia F/RAND compensation.

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 15(a), Nokia's Motion should be freely granted unless there is an apparent reason for denying Nokia's request, such as undue delay, dilatory motive, or substantial prejudice to Apple. None of these exceptions apply, and thus Nokia should be granted leave to amend its Complaint.

STATEMENT OF FACTS

This lawsuit began as a dispute over Apple's refusal to pay royalties for the use of Nokia's essential patents (D.I. 1). Apple has since transformed this action into a much broader dispute. Apple responded to Nokia's Complaint, which was based on essential patents, by asserting counterclaims for Nokia's alleged infringement of non-essential patents, i.e., patents that have not been declared essential to any relevant standards, and seeking declaratory judgments that all of Nokia's asserted patents are invalid and not infringed (D.I. 21). In addition to seeking to litigate the validity and scope of a mix of 19 patents, Apple asserted non-patent counterclaims against Nokia for breach of contract, promissory estoppel, violation of Section 2 of the Sherman Act, and declarations that Nokia's licensing offers were not FRAND, that Nokia is not entitled to injunctive relief, and that Nokia has engaged in patent misuse (*id.*). As a result, Apple inflated Nokia's 11 Count suit to an action involving 37 Counts (D.I. 1, 21).

Believing that Apple's non-patent counterclaims failed to state a claim (and were designed to divert attention away from free-riding off of Nokia's intellectual property), Nokia

moved to dismiss them (D.I. 25, 26). In the parties' Joint Status Report, Nokia informed Apple and the Court that, although "[t]he granting of Nokia's motion to dismiss would properly focus this case and allow it to be efficiently resolved[,] [i]f the Court denies Nokia's motion to dismiss, Nokia may seek to amend its Complaint to add non-patent claims" (D.I. 33 at 5).

Now that the Court has denied Nokia's motion to dismiss, and the scope of this lawsuit has been transformed by Apple to include (i) non-essential patents (also referred to as "implementation" patents) and (ii) non-patent claims, Nokia seeks leave in the interests of justice to amend its Complaint and assert claims similar in nature to those asserted by Apple. Nokia's Motion is timely under the Court's Scheduling Order, which sets a deadline of August 30, 2010 for the amendment of pleadings (D.I. 42, § 2), and is being filed within weeks of the parties' first exchange of substantive discovery requests (D.I. 56, 57).

ARGUMENT

I. THE COURT SHOULD PERMIT NOKIA TO AMEND ITS COMPLAINT BECAUSE LEAVE TO AMEND SHOULD BE "FREELY GIVEN"

Federal Rule of Civil Procedure 15(a) provides that leave to amend a Complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Rule 15(a) must be interpreted liberally so that claims will be decided on the merits rather than on technicalities. *See Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (courts should use "strong liberality" in considering whether to grant leave to amend); *Dole v. Arco Chemical Co.*, 921 F.2d 484, 486-87 (3d Cir. 1990) (same).

The Supreme Court has cautioned that leave should be freely given unless there is an apparent reason for denying a request, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,

undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Affinion Net Patents, Inc. v. Maritz, Inc.*, C.A. No. 04-360-JJF, 2006 WL 1652677, at *1 (D. Del. June 8, 2006) (granting leave to amend complaint for patent infringement to add claims for false marking and false advertising because there was no undue delay, undue prejudice, or futility). As set forth below, none of these factors are present here, and thus Nokia's Motion for leave to amend its Complaint should be granted.

II. NOKIA SEEKS LEAVE TO AMEND ITS COMPLAINT WITHOUT UNDUE DELAY OR DILATORY MOTIVE

Nokia's Motion is timely and made in good faith. The Court's Scheduling Order gives the parties until August 30, 2010 to amend their pleadings (D.I. 42, § 2). Accordingly, Nokia's Motion cannot be said to have been made after undue delay or with dilatory motive when it was filed within the period prescribed by the Court. *See Trueposition, Inc. v. Allen Telecom, Inc.*, C.A. No. 01-823-GMS, 2002 WL 1558531, at *1-3 (D. Del. July 16, 2002) (granting leave to amend patent infringement complaint to add four new, asserted patents where leave was sought prior to the court's deadline for filing motions to amend).

III. APPLE WILL NOT SUFFER UNDUE PREJUDICE BY THE AMENDMENT

To show undue prejudice, Apple must demonstrate that it will be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence" unless leave to amend is denied. *Bechtel*, 886 F.2d at 652. Apple cannot make such a showing. Because discovery in this action has only just begun, Apple will not be disadvantaged by Nokia's amendments or deprived of the opportunity to prepare and present its case. Indeed, Apple has been aware of Nokia's intention to add at least its non-patent claims for months (*see* D.I. 33 at 5). Moreover,

Nokia's amendment will not delay or postpone deadlines for discovery, motions, or trial. Therefore, Apple will not be prejudiced by Nokia's First Amended Complaint, and Nokia's Motion should be granted. *See Trueposition*, 2002 WL 1558531, at *1-3 (finding no undue prejudice where motion for leave to amend was filed while discovery was in its "earliest stages").

CONCLUSION

For the foregoing reasons, Nokia requests that is Motion for Leave to Amend Complaint be granted.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

Jack B. Blumenfeld (#1014)
Rodger D. Smith II (#3778)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
rsmith@mnat.com

Attorneys for Nokia Corporation and Nokia Inc.

OF COUNSEL:

Patrick J. Flinn
Peter Kontio
John D. Haynes
Mark A. McCarty
Adam J. Biegel
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

July 1, 2010
3652644

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2010, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to:

Richard L. Horwitz, Esquire
David E. Moore, Esquire
POTTER ANDERSON & CORROON LLP

I further certify that I caused to be served copies of the foregoing document on July 1, 2010, upon the following in the manner indicated:

Richard L. Horwitz, Esquire
David E. Moore, Esquire
POTTER ANDERSON & CORROON LLP
Hercules Plaza – 6th Floor
1313 North Market Street
Wilmington, DE 19801

VIA ELECTRONIC MAIL

William F. Lee, Esquire
Mark D. Selwyn, Esquire
WILMERHALE
60 State Street
Boston, MA 02109

VIA ELECTRONIC MAIL

Kenneth H. Bridges, Esquire
Michael T. Pieja, Esquire
WONG, CABELLO, LUTSCH, RUTHERFORD & BRUCCULERI, LLP
540 Cowper Street
Palo Alto, CA 94301

VIA ELECTRONIC MAIL

Jack B. Blumenfeld (#1014)