

EXHIBIT 1

All Patents Asserted in the Four Captioned Cases
Stayed Patents Struckthrough; Non-Stayed Overlapping Patents in Bold

<u>Nokia v. Apple</u>	<u>Apple v. Nokia</u>	<u>Apple v. HTC</u>
	5,315,703	
	5,379,431	
	5,455,599	5,455,599
	5,455,854	
		5,481,721
	5,519,867	5,519,867
	5,555,369	
		5,566,337
	5,634,074	
5,802,465		
	5,848,105	5,848,105
5,862,178		
	5,915,131	5,915,131
	5,920,726	5,920,726
		5,929,852
		5,946,647
5,946,651		
	5,969,705	5,969,705
6,073,036		
	6,189,034 B1	
	6,239,795	
6,262,735		
		6,275,983
	6,343,263	6,343,263
6,359,904		
	6,424,354	6,424,354
6,518,957		
6,694,135		
6,714,091		
6,775,548		
6,834,181		
6,882,727		
6,895,256		
6,924,789		
7,009,940		
7,092,672		
		7,362,331
	7,383,453 B2	7,383,453
7,403,621		
	7,469,381 B2	7,469,381
		7,479,949
		7,633,076
		7,657,849
	RE 39486	RE 39486

EXHIBIT 2

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Before the Honorable Charles E. Bullock
Administrative Law Judge

In the Matter of

**CERTAIN MOBILE
COMMUNICATIONS AND
COMPUTER DEVICES AND
COMPONENTS THEREOF**

Inv. No. 337-TA-704

Before the Honorable Carl C. Charneksi
Administrative Law Judge

In the Matter of

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

Inv. No. 337-TA-710

**CORRECTED COMPLAINANTS APPLE INC. AND NEXT SOFTWARE INC.'S
COMBINED OPPOSITION TO THE STAFF'S, NOKIA'S AND HTC'S MOTIONS FOR
CONSOLIDATION**

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I. INTRODUCTION

Complainants Apple Inc. and Next Software Inc. (collectively, “Apple”) oppose (1) the Investigative Staff’s Motion for Partial Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710 and (2) Respondents Nokia and HTC’s Motions for Full Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710. The Staff and Respondents Nokia and HTC seek unprecedented relief and propose conflicting forms of consolidation that will radically complicate and delay the investigations ordered by the Commission. Apple commenced these investigations against two separate infringers that sell completely different infringing products based on different software platforms. Consolidation will lead to an unmanageable investigation structure and prevent the Commission from meeting its statutory mandate to complete the investigations “at the earliest practicable time.” In short, the consolidation “solutions” proposed by the Staff and Respondents would create more problems than they allegedly solve.

The Staff and Respondents rely on Commission Rule 201.7(a) for authority to consolidate Section 337 investigations, but ignore that this Rule permits consolidation only “in order to *expedite* the performance of [the Commission’s] functions.” It is undisputed that the consolidation options presented by the Staff and Respondents will not expedite these investigations. Nokia and HTC pay lip service to the requirements of efficiency and expediency – contending a fully consolidated case can be completed “without unreasonable delays” – but the facts reveal a more tactical motive.¹ The 704 investigation is scheduled for a hearing beginning October 4, 2010 with a 16-month target date in June 2011, while Judge Charneski just recently set a schedule for the 710 investigation with a March hearing date and a target date in October

¹ Apple recognizes that the Staff does not have any such motive.

2011.² But the consolidation proposed by Respondents, unsurprisingly, will move the date back for both. Consolidating some or all of patent assertions against Nokia into the 710 investigation would extend Nokia's target date by at least four months. And HTC and Nokia would no doubt seek, and the Staff has already indicated its support for, an even longer schedule of a consolidated action, potentially granting Nokia (and HTC) an even greater windfall. There is thus no question that Respondents are attempting to use consolidation to engineer delay, in contravention of Commission Rules.

Although the delay resulting from consolidation would severely prejudice Apple, that is not the only prejudice Apple will suffer. Either full or partial consolidation will result in an unworkably complex investigation with different products based on different software platforms, and witnesses from Respondents from different foreign countries speaking different languages requiring interpretation. The complexity multiplies when one considers that Nokia's accused products are based on at least three different operating systems and HTC's products implicate the Android operating system developed by Google and the Open Handset Alliance.

Respondents and the Staff vaguely point to efficiencies that would allegedly result from consolidation. But the efficiencies of consolidation, even ignoring the inefficiencies of the non-overlapping patents, are grossly overstated. Neither the Staff nor the Respondents have suggested that there are common issues of fact on infringement – there are not. The differences in the products make it likely that Nokia and HTC will advance different non-infringement arguments. Infringement is a fact-intensive analysis and it would not be inconsistent for one set of accused products to infringe and another to not infringe. Likewise, different decisions on invalidity and unenforceability would likely reflect only that respondents often advance or

² This 18 month target is an Initial Determination subject to possible review by the Commission. *See* 19 C.F.R. § 210.51(a).

emphasize different invalidity defenses because they are driven to do so by different positions on infringement. In any event, to the extent efficiencies in discovery can be achieved it should be through coordination among the Staff and private parties, not a cumbersome and prejudicial consolidation. For example, 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. And if HTC feels the need to participate in *Markman* or other proceedings in the 704 investigation to have its views considered on the overlapping patents, Apple will not object.

Perhaps most telling of the perils of consolidation is that the Staff and Respondents cannot even agree on the form of consolidation. On the one hand, Respondents complain that the Staff's partial consolidation proposal would result in an unworkable piecemeal approach to at least one investigation. On the other hand, the Staff rightfully notes that complete consolidation would create an unmanageable mega-investigation and render it nearly impossible to complete the combined investigation in a timely fashion. The admitted flaws in both proposals, pointed out by the parties that are conceptually in favor of consolidation, demonstrate that consolidation of any kind is simply not workable in this circumstance. The investigations are thus best left in the structure the Commission and Chief Judge Luckern put in place.

The International Trade Commission was chartered to protect intellectual property of companies like Apple by preventing the importation of infringing articles into the United States from abroad. When Congress granted the Commission investigative authority, it mandated that these important investigations be completed in the most expeditious manner possible. Apple's products, including those it relies on in these investigations to demonstrate a very significant domestic industry, have achieved acclaim, commercial success, and protection under the U.S.

Patent laws. Like any Complainant, Apple is entitled to an expeditious resolution of the 704 and 710 investigations. The consolidation proposals of the Staff and Respondents will deny Apple that right, and undermine the very tenets upon which the Commission is founded.

Accordingly, Apple respectfully requests denial of the Staff's and Respondents' motions and adherence to the investigation structure determined to be appropriate by the Commission and Chief Judge Luckern.

II. FACTUAL BACKGROUND

A. The Disputes Between Apple and Nokia

Apple and Nokia are involved in a number of lawsuits and investigations involving allegations of patent infringement. Nokia originally sued Apple for alleged infringement of seven patents in October 2009 in the United States District Court for the District of Delaware. Apple answered this complaint and asserted counterclaims of its own, alleging infringement of thirteen patents and also non-patent claims for antitrust violations and related causes of action. These disputes are pending before Chief Judge Sleet.

Nokia subsequently filed a complaint with the Commission, asserting that Apple infringes seven patents, which the Commission instituted as Investigation No. 337-TA-701 and Chief Judge Luckern assigned to Judge Gildea. Apple also filed its own complaint with the Commission, asserting that Nokia infringes nine patents. The Commission issued a Notice of Investigation with respect to Apple's complaint on February 22, 2010, and Chief Judge Luckern assigned Investigation No. 337-TA-704 to Judge Bullock.

The schedules in the various Apple-Nokia disputes in Delaware and the 701 and 704 investigations have been established and the matters are proceeding. In the 701 investigation, Judge Gildea originally set a target date in late May 2011, and has subsequently extended it to August 1, 2011 to allow for a *Markman* Hearing. Nokia is seeking reconsideration of Judge

Gildea's order modifying the schedule, claiming that it will be severely prejudiced by the two-month delay of the hearing and target dates. (Ex. 1, Nokia Motion for Reconsideration.) In the 704 investigation, Judge Bullock has ordered a 16 month target date with an evidentiary hearing currently set to begin on October 4, 2010.

B. The Disputes Between Apple and HTC

Apple filed its complaint with the Commission against HTC Corporation, HTC America, Inc., and Exedea, Inc. on March 2, 2010. On the same day, Apple filed two separate cases against HTC in Delaware. One of the Delaware cases is a mirror-image case asserting the 10 patents against HTC that are also asserted in the Commission complaint. The other case alleges infringement of 10 separate patents, for a total of 20 different patents asserted against HTC. The Commission issued its Notice of Investigation on March 30, 2010 and Chief Judge Luckern assigned Investigation No. 337-TA-710 to Judge Charneski. In the 710 investigation, Judge Charneski has issued an Initial Determination setting an 18 month target date with an evidentiary hearing in March 2011. The Staff and HTC had originally proposed that a 20 month target date would be necessary given the complexity of the investigation and the possibility of consolidation, foreshadowing that they may seek further delay if consolidation is ordered.³ (Ex. 2, Staff's Discovery Statement; Ex. 3, HTC's Discovery Statement.)

C. The 704 and 710 Investigations Are More Different Than Alike.

The 704 and 710 investigations relate to two different complaints filed by Apple against two unrelated companies. As shown above, these investigations are part of broader and unrelated disputes between Apple and Nokia and Apple and HTC. Nokia and HTC are in fact fierce competitors in the marketplace, and agree on little except that they want to achieve delay

³ The Staff's proposed schedule assumes that its proposed consolidation option – moving the five overlapping patents into the 710 investigation – would be adopted. It is unclear whether the Staff or the Respondents might seek an even longer target date than 20 months for a fully-consolidated investigation.

of the investigations of their products' infringement of Apple's patents. In the 701, 704 and 710 investigations there are seven, nine and ten patents asserted respectively. As indicated in the Staff's Motion, the 704 and 710 investigations assert five of the same patents, although different claims may be implicated. On the other hand, there are nine *non*-overlapping patents between the 704 and 710 investigations.

Nokia's accused products are based on three different software platforms – S40, Symbian, and Maemo – that have been developed by Nokia and/or Nokia with its partners. Most of the development work was done in, and thus the potential witnesses come from, Finland or from other European countries (*e.g.* Norway and the UK). Several other important witnesses are in India and elsewhere. The S40 and Symbian operating systems that Nokia installs on its infringing handsets are proprietary Nokia software about which Complainants must seek detailed discovery from Nokia and its legions of software architects and other technical witnesses. Nokia itself is a Finnish company that has no ties whatsoever to HTC and (on information and belief) has not shared its software or other technology with HTC.

HTC's accused products are based on a different software platform, called Android, and have a very different history. In stark contrast to Nokia's proprietary S40 and Symbian operating systems, Android is an open-source software platform that uses a modified version of the Linux kernel. Android was originally developed by Android, Inc. until that company was purchased by Google. Android is now developed by the Open Handset Alliance, a consortium of approximately sixty hardware, software, and technology companies. Notably, Nokia is *not* a member of the Open Handset Alliance, and instead directly competes with the Open Handset Alliance and its members. In addition to the discovery of HTC in Taiwan, HTC has already noted that “much of the technical information regarding the operation of the accused products

resides with third parties.” (Ex. 3, HTC Discovery Statement at 6.) Presumably Apple will be required to take extensive discovery from Google and other third parties, further separating the issues in the 710 investigation from issues in the 704 investigation.

Although some of Apple’s patents apply to both HTC and Nokia products, it cannot be disputed that Android is different from the S40, Symbian and Maemo implementations in Nokia’s accused products. And, given the speed with which the telecommunications market progresses, it is likely that additional Nokia and HTC products will come into the 704 and 710 investigations. Further, the software platforms themselves change – for example, it appears that Nokia is moving to new versions of Symbian and has recently made available its “Qt” cross-platform software development framework, which on information and belief may also be involved in infringing activity, and HTC has moved or is moving to new versions of Android software with possibly further evolution to come in the near future.

It is further beyond dispute that there will be 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 for the remedy phases of the investigations. The investigations are just beginning, and additional differences between them will almost certainly be illuminated with further discovery.

Beyond their silence with the respect to the different product platforms, Respondents disingenuously minimize the important differences in the patents asserted in the respective cases and instead rely on sweeping generalizations about the claimed subject matter. For example, Respondents rely heavily on the fact that many (but not all) of the asserted patents relate to “object oriented software” in some way. This generic description of “object oriented software”

glosses over the differences among the patents that will require different sets of experts and witnesses for the sub-specialties within the technology. As Respondents know, the patents-at-issue in the two investigations involve diverse subjects such as the generation of graphics, camera power management, and booting operations.

III. ARGUMENT

Despite having the burden of justifying consolidation, the Staff and the Respondents both fail to provide any authority for reassigning an investigation in part or in whole from Judge Bullock to Judge Charneski. That is unsurprising as precedent suggests that such a reassignment is not permissible. For example, in *Certain NAND Flash Memory Devices and Products Containing the Same*, Inv. No. 337-TA-553, Order No. 3, 2005 WL 3549542 (Dec. 21, 2005), Judge Harris noted that “no Administrative Law Judge has ever issued a determination to reassign an investigation to another judge for the purpose of consolidation.” (*Id.* at 7.) Judge Harris emphasized that “the Commission has already instituted two distinct investigations, *and assigned them to different Administrative Law Judges.*” *Id.* at 8 (emphasis added). Here too the Staff’s and the Respondents’ invitation to reassign part or all of the 704 case from Judge Bullock to Judge Charneski should be rejected.

A. The Motions To Consolidate Threaten To Create An Unmanageable Investigation That Will Not Be Completed Within The Appropriate Time Limits.

Although the Staff and the Respondents propose different consolidation options, both of their proposals would result in an over-sized investigation that will not meet the statutory mandates and Commission Rules requiring investigations to be completed in an expedited manner. Commission Rule 201.7(a) provides the Commission authority to consolidate investigations only if it “will expedite the performance of [the Commission’s] functions”:

In order to expedite the performance of its functions, the Commission may engage in investigative activities preliminary to and in aid of any authorized investigation, consolidate proceedings before it, and determine the scope and manner of its proceedings.

19 C.F.R. § 201.7(a) (emphasis added). Consolidation leading to *delay*, as opposed to expediting the performance of Commission functions, is not permitted by Commission Rules. See 61 Fed. Reg. 43429, 43432 (Aug. 23, 1996) (“It is expected that the administrative law judge will abide by the intent of Congress and the Commission” in setting expedited target dates); *Certain Personal Watercraft and Components Thereof*, Inv. No. 337-TA-452, Order No. 5, 2001 WL 301292, at *1 (March 27, 2001) (“[T]he public interest favors an expeditious resolution of the investigation.”)

This Commission Rule emphasizing that consolidation should only be granted to “expedite” completion of investigations is consistent with the statutory framework upon which the Commission is founded. Prior to 1994, the Commission’s statutory mandate fixed a 12 month target date for most cases and an 18 month target date for “complicated” cases. 19 U.S.C. § 1337(b)(1) (1988) (amended by Pub. L. 103-465. §§ 261(d)(1)(B)(ii) and 321(a), 108 Stat. 4909 (Dec. 8, 1994). After the fixed time limits were determined to violate GATT principles, Congress amended the ITC’s statutory mandate to require that an investigation be completed “at the earliest practicable time.” 19 U.S.C. § 1337(b)(1). Despite no longer having a hard cap on target dates, Congress nevertheless made clear that it intended to maintain the Commission’s objective of expedited investigations:

Although the fixed deadlines for completion of section 337 investigations have been eliminated, the [Senate Finance] Committee expects that, given its experience in administering the law under the deadlines in current law, the ITC will nonetheless normally complete its investigations in approximately the same amount of time as is currently the practice.

See S. Rep. No. 103-412, at 119 (Nov. 22, 1994).

Consistent with the statutory mandate, Commission Rule 210.51(a) sets a presumptive ceiling on target dates of sixteen months. 19 C.F.R. § 210.51(a). Target dates longer than 16 months can be set by initial determination only and are subject to immediate interlocutory review. Indeed, the Commission has relied upon the preceding Senate Report in vacating ALJ decisions that unreasonably extend target dates, reasoning that “section 337 investigations [should] be conducted as expeditiously as possible and that ***extension of targets beyond 15 months is the exception, not the rule.***” See *Certain Organizer Racks and Products Containing the Same and Certain Sortation Systems, Parts Thereof, And Products Containing the Same*, Inv. Nos. 337-TA-460 and 466, at 2 (Feb. 8, 2002) (emphasis added).

It is undeniable that the consolidation proposals of the Staff and the Respondents would frustrate completion of the 704 and 710 investigations “at the earliest practicable time.” HTC and Nokia should not be permitted to use their infringement of some of the same patents as an invitation to extend these two investigations and meld them into one delayed, mixed investigation involving disparate companies and products. Although careful in their briefs not to discuss the impact that consolidation would have on the schedule of a consolidated case, the Staff and HTC have already acknowledged the delay inherent in their proposal. Given the different schedules that have been adopted, consolidating the 704 investigation with the 710 investigation would delay the investigation of Nokia’s infringement a minimum of 4 months. Because Nokia already has agreed to a case schedule with a 16-month target date for the 704 investigation, it cannot seriously argue that the 704 investigation will be completed “at the earliest practicable time” if even partially consolidated with the 710 investigation.

Even worse, Nokia and HTC wholly fail to specify how much additional time will be necessary to account for their proposed mega-consolidation. They acknowledge that there will

be delay, but contend that any delay will not be “unreasonable.” (*See, e.g.*, Nokia Br. at 12.) But we already know Respondents will seek an unreasonably long target date for a consolidated investigation – they already have. Based on the Staff’s proposed 20 month target date for a ten patent case with five overlapping patents, one can only assume that Nokia and HTC might later argue that a fully consolidated investigation will require an even later (and more unreasonable) target date.

B. The Prejudice To Apple Outweighs Any Benefits of Consolidation.

Apple has invested significant time and money in its patents and commercial products. Apple suffers a continuing and irreparable injury every day that infringing goods are imported by Nokia and HTC. Nokia’s tactically-driven request for a consolidation is clear given the position it has taken in the investigation where it is the Complainant. Specifically, in the 701 investigation, Nokia has vigorously protested Judge Gildea’s proposal to extend the target date by *two months* to allow time for a *Markman* Hearing, arguing that *any* delay prejudices Nokia:

Apple is currently getting a “free-ride” on the billions of dollars that Nokia has invested in research and development to provide the public with the mobile phones it enjoys today. Every day that Apple is allowed to continue its infringing activities is severely prejudicial to Nokia, and Nokia is entitled to an expeditious adjudication.

(Ex. 1, Nokia Motion for Reconsideration at 2.) Nokia cannot credibly argue that a two month extension for Judge Gildea to perform a *Markman* hearing is an impermissible and prejudicial “free-ride” for Apple while also arguing that a far longer extension resulting from an unprecedented consolidation and reassignment to another Judge is not far more prejudicial to Apple.

On the other hand, contrary to Nokia’s and HTC’s arguments, HTC’s alleged prejudice can be minimized or avoided altogether. HTC essentially complains that absent consolidation it will not be able to meaningfully participate in events like inventor depositions in the first

instance, giving Apple a “trial run” at the case. HTC is simply wrong. Close coordination between the Staff, Apple, and Respondents, which is well established in Commission investigations, can avoid and/or cure the majority of HTC’s alleged prejudice. For example, in *Certain Programmable Logic Devices and Products Containing Same*, Order No. 3, 2001 WL 396718 (April 17, 2001), Hynix moved to have its investigation against Toshiba consolidated with an earlier filed Toshiba investigation against Hynix. Despite the fact that there were some similarities between the accused products, Judge Harris denied consolidation. Nevertheless, recognizing that there would be, for example, depositions common to both investigations, Judge Harris directed the Staff and the private parties to coordinate discovery subject to his supervision:

[M]ost of the benefits that [the moving party] seeks by consolidation can be met by other means... There are economies that can be achieved from close coordination of the two cases, as the parties and the Staff have already acknowledged in their briefs.

Id. at *8.⁴ Further, in *Certain Liquid Crystal Display Devices*, Judge Luckern denied a request to consolidate competing investigations instituted by Samsung and Sharp despite the fact that there would be overlapping discovery. *Certain Liquid Crystal Display Devices and Products Containing Same*, Inv. No. 337-TA-631, Order No. 7, 2008 WL 3175268 (May 30, 2008). Instead, Judge Luckern opined that “the possibility of duplicate document production or the possibility of witnesses having to appear for multiple depositions” could be avoided through coordination between the Staff and the private parties. *Id.* at 6 & n.1.

⁴ Similarly, in *Certain NAND Flash Memory Device*, Judge Harris also denied consolidation, reasoning that coordination of discovery would achieve the same benefits as consolidation. *Certain NAND Flash Memory Device*, Order No. 3, at 10, 2005 WL 3549542 (“While the Administrative Law Judge does not find a sufficient basis for determining that ... the investigations should be consolidated, the Administrative Law Judge concurs that there may be opportunities for cooperation and coordination during the discovery phase of the pending investigations.”)

The Staff and the private parties can coordinate in the 704 and 710 investigations to avoid duplication wherever possible. Apple has every desire to handle discovery in the investigations efficiently, and commits to work with the Staff, Nokia or HTC to achieve efficiencies.

Further, HTC and Nokia are wrong that *Certain 3G Mobile Handsets and Components*, Inv. No. 337-TA-613, Order No. 5 (October 24, 2007),⁵ dictates consolidation in this instance. In *3G Handsets*, Administrative Judge Luckern was assigned to both investigations, and therefore the later-sued respondent had a concern about presenting its arguments to Judge Luckern on legal issues such as claim construction in the first instance. *Id.* at 11. Here, the 704 and 710 investigations have different Judges, both of whom will do their job of independently analyzing the facts and law when presented with party arguments. Apple does not agree with HTC's purported concern that Judge Charneski will have "difficulty ... not favorably considering a colleagues' earlier determination". Judges all the time have to deal with issues that may have been ruled on, in one form or another, by another judge.

Moreover, HTC has presented no basis supporting its contention that the issues before the two Judges will necessarily be identical. What will drive the respondents' defenses will be the products at issue, not just the patents. It often is the case that different claim terms are disputed,

⁵ Rather than supporting consolidation here, the 601/613 consolidation presents a cautionary tale arguing against consolidation. In Order No. 5 from Investigation 337-TA-601 and the simultaneously issued Order No. 12 from Investigation 337-TA-613, Judge Luckern consolidated these investigations and set target date of 14 months for Inv. 337-TA-613 and 18 ½ months for Inv. 337-TA-601. Shortly after obtaining consolidation, the respondents in the 613 investigation (ironically including Nokia), moved to terminate or stay the consolidated investigation based on an arbitration defense. *See* 337-TA-613, Order No. 33 at 4 (May 22, 2008). Although that motion was denied, Judge Luckern subsequently found it necessary to suspend the scheduled hearing for the consolidated investigation because of an injunction obtained by Nokia in District Court. *See id.* at 5-6 (citing 337-TA-613 Order No. 31 (April 14, 2008)). Finding "no reason ... to further delay the investigation against Samsung [the respondent in the 601 investigation], the ALJ proceeded to de-consolidate the investigations. *See id.* at 10. Nevertheless, as a result of the delays arising from the suspension of the consolidated hearing, the target date in the 601 investigation was extended to 23 months. *See* 337-TA-601, Order No.14 (May 22, 2008). The target date for the 613 investigation was extended to 27 months. *See* 337-TA-613, Order No. 38 (Oct. 10, 2008). The course of events in the 601/613 investigations illuminate that the "alleged efficiencies" of consolidation are very difficult to predict. *See* 337-TA-601, Order No. 14 at 1.

the constructions of terms differ and different defenses are advanced based on the products at issue. One construction might benefit Nokia but not HTC or vice-versa. One party might favor non-infringement, the other invalidity. The analysis here is far more complex than a declaration that these investigations have overlapping patents.

Despite relying on *3G Handsets*, Nokia and HTC already have shown that they are prepared to coordinate across the two investigations as necessary. Indeed, in moving for full consolidation, Nokia and HTC have not only taken the same position but they filed near verbatim briefs in support of their position. Thus, even if issues common to both investigations are briefed to Judge Bullock in the first instance, HTC has shown that it will be able to provide its input to Nokia. And if HTC desires to participate in *Markman* or other proceedings in the 704 investigation to ensure that its views will be heard by Judge Bullock, Apple will not object.

In short, all of the problems that consolidation allegedly solves can be addressed through coordination, thereby avoiding the drastic consequences of consolidation. The prejudice to Apple resulting from consolidation thus outweighs any alleged prejudice to the Staff or Respondents on the current structure and dictates that consolidation should be denied.

C. The Overlap Between The Factual And Legal Issues Is Not Significant Enough To Justify Consolidation.

The moving parties fail to account for the complexity of a 14 patent case against disparate sets of accused products developed and sold by different foreign companies. In fact, in submissions to Judge Gildea, Nokia has emphasized the “complexity” of the patents asserted by Apple in the 704 investigation, arguing that “most would need extensive education to understand [them.]” (Ex. 1, Nokia Motion for Reconsideration at 4.) HTC similarly has noted that “[t]he complexity of the technology and products-in-issue will require extensive technical discovery,

including extensive third party discovery, and extensive expert analysis.” (Ex. 3, HTC Discovery Statement at 6).

Ignoring these prior representations, Nokia and HTC now attempt to brush over the complexities and admitted differences between the accused products. But the fact is that analysis of those accused products with respect to the “complex” patents-at-issue will require intensive analysis of the software and hardware of the accused products. As noted above, the accused Nokia products are based on at least three different software platforms – S40, Symbian, and Maemo – with additional complications introduced across different phones based on these platforms (including those having an additional software download known as “Qt”). The accused HTC products are based on the Android software platform, introducing the complication of the Android platform, developed by Google and now the Open Handset Alliance.

The potential for confusion at the hearing is yet another reason to reject the consolidation proposals. *See Certain Liquid Crystal Display Devices and Products Containing Same*, Inv. No. 337-TA-631, Order No., 7 2008 WL 3175268 (May 30, 2008), at 4 (“The administrative law judge finds that the various postures of the parties and their relationships could lead to confusion during an evidentiary hearing”); *Certain NAND Flash Memory Devices*, Inv. No. 337-TA-553, Order No. 3, at 8 (“The various postures of the parties and their relationships to the patents and the goods at issue could lead to confusion during the hearing or remedy phase.”). Here, the hearing will inevitably be highly confusing with either partial or full consolidation. Even under the Staff’s partial consolidation proposal, there will be five patents in the partially combined proceeding that are only asserted against HTC. These five patents will at least require fact and expert testimony pertaining to infringement and validity issues -- all of which will be completely irrelevant to Nokia during the evidentiary hearing. The Staff fails to suggest how to avoid the

inevitable confusion that will result where Nokia has no interest for significant portions of the hearing. And as is consistently the case, the Respondents' 14 patent proposal just makes matters worse -- adding another four patents that are asserted against Nokia only and are not implicated in the investigation of HTC. The logical result is to keep these separate investigations separate and not introduce more confusion into investigations that are already complex.

Even if there were complete overlap in the asserted patents and the technology was not complex, consolidated investigations would still result in an unworkable hearing. When considering a request for consolidation, "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *See Certain Liquid Crystal Display Devices and Products Containing the Same*, Inv. No. 337-TA-631, Order No. 7, at 2. . The reality is that the evidentiary hearing will involve witnesses from Finland, Taiwan and potentially other countries. Many of these witnesses may require translators. Hearing the foreign language testimony from one party regarding its implementation of complex technology will be complicated enough. Where the Commission has left the investigations as separate, there is no need to cause further complication by introducing another language at the hearing.⁶ *Cf. Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, Inv. No. 337-TA-604, Order No. 39, 2008 WL 164311 (Jan. 14, 2008) (noting the difficulties associated with witness statements for foreign language witnesses).

IV. CONCLUSION

For reasons discussed above, consolidation in whole or in part should be denied. Most (if not all) of the benefits of consolidation can be achieved through coordination without the

⁶ Finally, Nokia and HTC exaggerate the alleged efficiencies the Commission will enjoy if it only needs to review a single Initial Determination. First, the evidence and argument for the non-overlapping patents should be no different regardless of whether the investigations are consolidated or not. Second, the Commission will need to review different evidence pertaining to infringement of unrelated products whether presented in one Initial Determination or two.

problems resulting from formal consolidation. Full consolidation into a mega-investigation would result in intolerable delay, severe confusion and prejudice. While slightly better than the Respondents' proposed mega-case, the Staff's proposal of partial consolidation would still be unworkable and result in confusion and prejudicial delay. Accordingly, Apple respectfully requests denial of the Respondents' and Staff's motions for consolidation, and for the cases to proceed in their present posture.

Dated: April 22, 2010

Respectfully Submitted,

/s/ Marc Sernel
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CERTIFICATE OF SERVICE

I, Marc Sernel, HEREBY CERTIFY that on this 22nd day of April 2010, I caused a true and correct copy of the foregoing CORRECTED APPLE INC. AND NEXT SOFTWARE INC.'S COMBINED OPPOSITION TO THE STAFF'S, NOKIA'S AND HTC'S MOTION FOR CONSOLIDATION to be served upon the following Persons:

The Honorable Marilyn R. Abbott
Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, D.C. 20436

(via EDIS)

The Honorable Charles E. Bullock-
Administrative Law Judge 337-704
Administrative Law Judge
U.S. International Trade Commission
500 E Street, S.W., Room 317-R
Washington, D.C. 20436

(via hand delivery on 4/22/2010)

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(via hand delivery on 4/22/2010)

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/s/ Marc Sernel

Marc Sernel

EXHIBIT 1

**THE UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

**Before The Honorable E. James Gildea
Administrative Law Judge**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING MOBILE PHONES,
PORTABLE MUSIC PLAYERS, AND
COMPUTERS**

Investigation No. 337-TA-701

**NOKIA'S MOTION FOR RECONSIDERATION
OF THE SCHEDULE SET FORTH IN ORDER NO. 7**

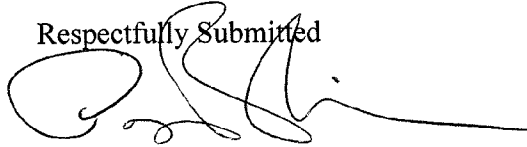
Pursuant to Commission Rule 210.15 and Ground Rule 2, Complainants Nokia Corporation and Nokia Inc. ("Nokia") respectfully move for reconsideration of the procedural schedule set forth in Order No. 7.

As discussed in the attached memorandum, the extension of the target date is highly prejudicial to Nokia, as it permits two more months for Apple to continue to infringe upon Nokia's technology in the marketplace. Nokia believes that a *Markman* hearing can be accommodated within the prior 16 month procedural schedule. Although no party in this investigation advocated in favor of a *Markman* hearing, if the parties had been aware that the ALJ wished to have a *Markman* hearing, the parties could and would have built a *Markman* hearing into the original 16-month schedule, thereby avoiding the prejudice Nokia is experiencing in the marketplace due to Apple's unauthorized use of Nokia's technology.

Pursuant to Ground Rule 2.2, Nokia made a reasonable, good-faith effort to contact and resolve the matter raised in this motion with the other parties two business days before filing the motion. Respondent Apple Inc. indicated that it would oppose the motion. The Staff indicated that it would take a position after reviewing the motion.

Dated: April 13, 2010

Respectfully Submitted



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*Counsel for Complainants Nokia
Corporation and Nokia Inc.*

**THE UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

**Before The Honorable E. James Gildea
Administrative Law Judge**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING MOBILE PHONES,
PORTABLE MUSIC PLAYERS, AND
COMPUTERS**

Investigation No. 337-TA-701

**MEMORANDUM IN SUPPORT OF NOKIA'S MOTION FOR
RECONSIDERATION OF THE SCHEDULE SET FORTH IN ORDER NO. 7**

Nokia Corporation and Nokia Inc. ("Nokia") respectfully ask the ALJ to reconsider the extension of the target date and calendar for this Investigation set forth in Order No. 7. A *Markman* hearing can be accommodated within the prior 16 month procedural schedule. Nokia, which is suffering daily injury from the sales of infringing Apple products imported into the United States, filed its complaint in this matter precisely because Section 337 was designed to offer complainants expeditious relief against unfair methods of competition in the importation of articles into the United States. *See* 19 U.S.C. § 1337; *see also Certain Personal Watercraft and Components Thereof*, Inv. No. 337-TA-452, Order No. 5, 2001 WL 301292 at *1 (Mar. 27, 2001) ("*Personal Watercraft*") ("[T]he public interest favors an expeditious resolution of the investigation."). This investigation can and should be resolved under a 16 month target date.

No party in this investigation advocated in favor of a *Markman* hearing. Had the parties been aware that the ALJ wished to have a *Markman* hearing, the parties could and would have built a *Markman* hearing into the original 16-month schedule. Building a *Markman* hearing into the previous schedule will limit the prejudice Nokia is experiencing in the marketplace due to Apple's use of its infringing technology. Nokia accordingly respectfully requests that the ALJ alter the former schedule to hold the *Markman* hearing within a time frame that allows the target date in this Investigation to remain May 31, 2011.

I. NOKIA IS PREJUDICED BY THE PROCEDURAL SCHEDULE SET FORTH IN ORDER NO. 7.

The procedural schedule set forth in Order No. 7 sets the target date for this investigation at August 1, 2011 – 18 months after the investigation was instituted. Apple's products are taking advantage of decades of investments by Nokia embodied in the patents asserted in this investigation. Apple is currently getting a "free-ride" on the billions of dollars that Nokia has invested in research and development to provide the public with the mobile phones it enjoys today.

Every day that Apple is allowed to continue its infringing activities is severely prejudicial to Nokia, and Nokia is entitled to an expeditious adjudication. *See Personal Watercraft*, Order No. 5, 2001 WL at *1; *Certain Treadmill Joggers, Inc. No. 337-TA-134*, Order No. 5, 1983 WL 207303 at *4 (Jan. 25, 1983). An 18 month procedural schedule, such as the one set in Order No. 7, only prolongs the prejudice to Nokia.

II. A MARKMAN HEARING CAN BE BUILT INTO THE PREVIOUS PROCEDURAL SCHEDULE WITH A TARGET DATE OF MAY 31, 2011.

No party to this Investigation indicated a preference to have a *Markman* hearing, and therefore the parties did not build a *Markman* hearing into the prior schedule. However, they certainly *could* have included a *Markman* hearing into their original proposed procedural schedule. In fact, a *Markman* hearing was built into a 16 month schedule in another Investigation involving both Apple and Nokia. In 337-TA-704, ALJ Bullock set a schedule with a 16 month target date of June 24, 2011. A *Markman* hearing was scheduled even where there was less time between the institution of the Investigation and the evidentiary hearing. Moreover, the 704 investigation involves nine patents and 78 claims, in contrast to the presently pending¹ 54 claims and seven patents in this proceeding.

The 704 Investigation was instituted on February 24, 2010. The evidentiary hearing was set for October 4, 2010, with a *Markman* hearing set for June 14-15, 2010 – a schedule allowing seven months between institution and evidentiary hearing. *See Certain Mobile Communications and Computer Devices and Components Thereof*, Inv. No. 337-TA-704, Order No. 3 (Mar. 22, 2010). In the schedule originally set forth in this Investigation, which was instituted on February 18, 2010, the evidentiary hearing was set for November 5, 2010 – a schedule allowing nearly nine months between institution and evidentiary hearing. *See* Order No. 3 (Mar. 9, 2010).

¹ In many cases, the number of claims ultimately presented at trial is a smaller number than cited at the start of the action, because the process of discovery narrows and focuses the dispute. If helpful in considering Nokia's request to return to a 16 month schedule, Nokia would be willing under the original schedule to reduce the number of claims earlier in the process so as to bring fewer claims to *Markman* and the hearing in this investigation.

In addition to the larger numbers of patents and claims in the 704 Investigation compared to this investigation, the technology in the 704 Investigation is more complex than in this case. The patents in this Investigation are geared towards features we all use and understand, such as a mobile phone touchscreen and iPod clickwheel. Only one of the patents (the 091 Voltage-Controlled Oscillator Patent) requires any detailed presentation of electronic circuitry. The remaining patents relate to user-interface features, such as Click-Wheel Functionality (789 Patent), Symbol Magnification (036 Patent), Touch-Screen Deactivation (975 Patent), and Message Search and Recognition (735 Patent), or to over-all device structure, such as Optimized Camera Architecture (256 Patent) and a Combined Antenna-Speaker (181 Patent).

The patents asserted in the 704 Investigation, in contrast, are geared predominantly toward "software architectures, frameworks and implementations, including various aspects of software used to implement operating systems" – which most would need extensive education to understand. *See* 337-TA-704, Complaint at 5 (Jan. 15, 2010). The 704 Investigation was filed one month later than the 701 Investigation, involves more patents, more claims, has more complex issues than in the 701 Investigation, yet currently has a target date *earlier* than the target date set in Order No. 7 in this Investigation.

If the ALJ prefers to hold a *Markman* hearing, Nokia respectfully requests that the parties be permitted to submit a procedural schedule that includes a *Markman* hearing with the previous target date of May 31, 2011.

If the ALJ restores the prior target date, Nokia is confident that the parties can agree on a date for a *Markman* hearing during that period, just as the parties have a

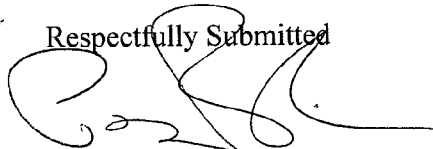
Markman date in the 16-month period of the 704 Investigation. As shown in Exhibit A, even taking into account this ALJ's rescheduling of the 706 investigation, a *Markman* hearing can still be scheduled within the original target date.

CONCLUSION

Nokia is being prejudiced daily by Apple's use of its technology, and is entitled to expeditious resolution of its claims. For the reasons stated above, Nokia respectfully requests that the ALJ reconsider his decision to extend the target date of this Investigation. Nokia respectfully requests that the ALJ allow a procedural schedule including a *Markman* hearing that still maintains a target date of May 31, 2011.

Dated: April 13, 2010

Respectfully Submitted



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*Counsel for Complainants Nokia
Corporation and Nokia Inc.*

EXHIBIT A

Proposed 16-month Procedural Schedule

Event	Date
Parties exchange list of patent claim terms for construction	Apr 28, 2010
File identification of expert witnesses, including their expertise and curriculum vitae	May 3, 2010
Notice of prior art	May 3, 2010
Complainants and Respondents provide Staff with their proposed construction of the disputed claim terms	May 3, 2010
Parties meet and confer (including Staff) in an attempt to reconcile disputed claim terms	By May 5, 2010
Submission of a joint list showing each party's proposed construction of the disputed claim terms - all parties	May 7, 2010
Deadline for initial Markman briefs - Complainants and Respondents	May 14, 2010
Deadline for initial Markman brief - Staff	May 21, 2010
Deadline for Markman response briefs - all parties	May 28, 2010
Markman Hearing	Jun 7, 2010
Deadline for response to contention interrogatories - for party bearing burden of proof	Jul 1, 2010
Anticipated date for Markman ruling	Jul 1, 2010
Fact discovery cut off and completion	Jul 6, 2010
Deadline for remaining contention interrogatory responses	Jul 8, 2010
Exchange of initial expert reports (identify tests/surveys/data)	Jul 9, 2010
Deadline for motions to compel fact discovery	Jul 16, 2010
Exchange of rebuttal expert reports	Jul 23, 2010
File tentative list of witnesses a party will call to testify at the evidentiary hearing, with an identification of each witness' relationship to the party	Jul 23, 2010
Second settlement conference	By Jul 30, 2010
Submission of second settlement conference joint report	Aug 6, 2010
Submission of statements regarding the use of witness statements in lieu of live direct testimony, and statements regarding whether any party intends to offer expert reports into evidence	Aug 9, 2010
Expert discovery cutoff and completion	Aug 9, 2010
Deadline for filing summary determination motions	Aug 16, 2010
Exchange of exhibit lists among the parties	Aug 23, 2010
Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available - Complainants and Respondents	Aug 27, 2010
Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available - Staff	Sep 1, 2010
File objections to direct exhibits (including witness statements)	Sep 3, 2010
File responses to objections to direct exhibits (including witness statements)	Sep 10, 2010
Parties submit and serve rebuttal exhibits (including witness statements), with rebuttal physical and demonstrative exhibits available	Sep 10, 2010
File pre-hearing statements and briefs - Complainants and Respondents	Sep 17, 2010
File objections to rebuttal exhibits (including witness statements)	Sep 17, 2010
Third settlement conference	By Sep 17, 2010
File statement of high priority objections	Sep 22, 2010

EXHIBIT A

Responses to objections to rebuttal exhibits	Sep 22, 2010
Submission of third settlement conference joint report	Sep 24, 2010
File pre-hearing statement and brief - Staff	Sep 24, 2010
File responses to statement of high priority objections	Sep 27, 2010
File requests for receipt of evidence without a witness	Sep 29, 2010
Deadline for motions in limine	Sep 30, 2010
Submission of declarations justifying confidentiality of exhibits	Sep 30, 2010
File responses to motions in limine	Oct 8, 2010
Tutorial on technology	Oct 18, 2010
Pre-hearing conference	Oct 18, 2010
Hearing	Oct 18-29, 2010
File initial post-hearing briefs, proposed findings of fact and conclusions of law, and final exhibit lists	Nov 12, 2010
File reply post-hearing briefs, objections and rebuttals to proposed findings of fact	Nov 23, 2010
Initial Determination	Jan 31, 2011
Target Date	May 31, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, a true and correct copy of the foregoing document was served by the indicated means to the persons at the addresses below:

The Honorable Marilyn R. Abbott
Secretary
U.S. INTERNATIONAL TRADE COMMISSION
500 E Street, S.W., Room 112
Washington, DC 20436

Via Electronic Filing

Administrative Law Judge
The Honorable E. James Gildea
Administrative Law Judge
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Via Hand Delivery
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Staff Attorney
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Dated: April 13, 2010

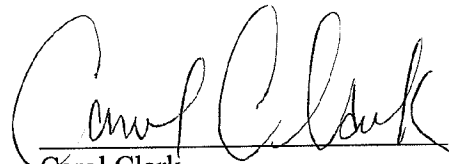

Carol Clark

EXHIBIT 2

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

Before Carl C. Charneski
Administrative Law Judge

In the Matter of

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

Inv. No. 337-TA-710

**COMMISSION INVESTIGATIVE STAFF'S
DISCOVERY STATEMENT**

The Commission Investigative Staff respectfully submits this discovery statement pursuant to Order No. 3 of the Administrative Law Judge issued on April 9, 2010.

I. The Proposed Issues to Be Litigated

A. The Intellectual Property Rights at Issue and Alleged Unfair Acts in the Infringement Thereof

1. Whether the accused personal data and mobile communications devices and related software of Respondents High Tech Computer Corporation, HTC America, Inc. and Exodea, Inc. (collectively "Respondents" or "HTC") infringe one or more of certain claims of the following ten patents: U.S. Patent Nos. 5,481,721 ("the '721 patent"); 5,519,867 ("the '867 patent"); 5,566,337 ("the '337 patent"); 5,929,852 ("the '852 patent"); 5,946,647 ("the '647 patent"); 5,969,705 ("the '705 patent"); 6,275,983 ("the '983 patent"); 6,343,263 ("the '263

patent"); 5,915,131 ("the '131 patent"); and RE39,486 ("the RE '486 patent") (collectively "the Asserted Patents"). Specifically, whether the Respondents infringe:

- (A) claims 1-6 and 19-22 of the '721 patent;
 - (B) claims 1-3, 7, 12 and 32 of the '867 patent;
 - (C) claims 1, 3, 8-10, 12, 18-19 and 23-24 of the '337 patent;
 - (D) claims 1, 3, 4, 6, 7, 9, 10, 15 and 17 of the '131 patent;
 - (E) claims 1-3 and 7-13 of the '852 patent;
 - (F) claim 1 of the '705 patent;
 - (G) claims 1, 3, 7, 8 and 22 of the '983 patent;
 - (H) claims 1-6, 24-25 and 29-30 of the '263 patent;
 - (I) claims 1, 3, 6, 8, 10, 13-16, 19, 20 and 22 of the '647 patent; and
 - (J) claims 1-3, 6, 8-9, 12 and 14-17 of RE39,486 patent.
2. Whether Complainants Apple, Inc. and/or NeXT Software, Inc (collectively, "Apple" or "Complainant"), is the owner or exclusive licensee of the Asserted Patents.
3. Whether the accused personal data and mobile communications devices and related software have been imported, sold for importation, or sold within the United States after importation.

B. Domestic Industry

1. Whether there exists an industry in the United States within the meaning of Section 337 with respect to articles protected by the patent at issue in which there is the following:

3

- (a) significant investment in plant and equipment;
- (b) significant employment of labor or capital; or
- (c) substantial investment in the exploitation of the patent, including engineering, research and development, or licensing.

C. Respondents' Affirmative Defenses

Respondents have not yet filed their responses to the complaint and notice of investigation. The Staff respectfully submits that any appropriate affirmative defenses raised by the Respondents should be litigated in this investigation.

D. Appropriate Remedy and Bond

1. In the event the Commission finds that the Respondents have violated Section 337, what is the appropriate remedy for such a violation.
2. In the event the Commission finds that the Respondents have violated Section 337, what is the appropriate bond to be posted during the Presidential review period.

E. Stipulations

At this time the parties have not entered into any stipulations. The Staff may propose to the other parties during the course of this investigation such stipulations as are appropriate. The Staff will encourage and cooperate with other counsel to narrow and clearly define the issues to be litigated.

II. The Evidence to Be Offered by the Staff

The Staff intends to serve written discovery requests on the private parties to elicit relevant information, including eliciting information concerning an appropriate remedy and bond rate. In particular, the Staff may request additional discovery from the private parties after the

private parties identify the documents, information, and other evidence on which they intend to rely in support of their respective positions. Further, the Staff may notice for deposition and depose all persons identified by the parties as having information relevant to this proceeding, including experts the parties consult or intend to call for testimony at the hearing. The Staff will participate to the fullest extent possible in all depositions noticed by the private parties. In appropriate circumstances, the Staff may seek and serve subpoenas in order to obtain documents or testimony from non-parties. The Staff may rely on evidence obtained through discovery among the parties and from non-parties at the hearing. The Staff may offer other evidence, whether obtained through discovery or otherwise, which will bear on the issues set forth above.

III. Information to Be Sought from Other Parties and Third Persons

The Staff will seek all information and evidence pertaining to the issues outlined in Part I of this discovery statement (including any affirmative defenses raised by the Respondents). The Staff will endeavor to utilize, as much as possible, informal methods of obtaining information and evidence. However, much of the information and evidence may be acquired through formal discovery requests under the Commission's Rules (*i.e.*, deposition, interrogatory, subpoena, or request for admission).

IV. Proposed Schedule For Exchange of Information Without Use of Formal Discovery

The Staff is prepared to meet with the private parties and discuss a schedule for the prompt exchange, without the use of formal discovery methods, of information and evidence already in their possession. However, the Staff is of the view that the majority of the information

and evidence relevant to this investigation will require the use of formal discovery methods such as deposition, interrogatory, subpoena, or request for admission.

V. Information and Evidence that Can be Obtained Only By Deposition, Interrogatory, Subpoena, or Request for Admission

The Staff will seek all information and evidence pertaining to the issues outlined in Part I of this discovery statement (including any affirmative defenses raised by the Respondents). The Staff expects that much of the information and evidence will likely be acquired through formal discovery requests under the Commission's Rules (*i.e.*, deposition, interrogatory, subpoena, or request for admission).

VI. Proposed Procedural Schedule

In view of the Staff's Motion for Partial Consolidation (Motion Dkt. No. 710-01), as well as the number of patents asserted (ten patents with a total of 84 claims asserted) and the range and complexity of the technology, the Staff respectfully submits that a 20-month target date is appropriate, which will allow for at least seven months of fact discovery and additional time for the Judge to issue the ID. The Staff's proposed procedural schedule is attached hereto as Attachment A.

The Staff has conferred with counsel for Apple and HTC regarding the Staff's proposed schedule. The Staff understands that HTC supports the Staff's recommended target date and proposed schedule. Apple does not agree, and alternatively recommends a 15-month target date.

The Staff is of the view that for the reasons stated above, a 15-month target date would be infeasible.

Respectfully submitted,

/s/ Erin D.E. Joffre

Lynn I. Levine, Director

Thomas S. Fusco, Supervisory Attorney

Erin D.E. Joffre, Investigative Attorney

Daniel L. Girdwood, Investigative Attorney

OFFICE OF UNFAIR IMPORT INVESTIGATIONS

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April 22, 2010

ATTACHMENT A

1

PROPOSED PROCEDURAL SCHEDULE

First Settlement Conference on or before	July 16, 2010
Joint report regarding First Settlement Conference	July 21, 2010
Identification of expert witnesses, including their expertise for which they are offered and their curriculum vitae	November 17, 2010
Identification of prior art upon which parties will rely at the hearing	November 17, 2010
Fact discovery request cut-off	November 24, 2010
Identification of a tentative list of witnesses who will testify at the hearing, with a brief description of their relationships to the party	December 3, 2010
Cut off date for any motions to compel fact discovery and related motions	December 10, 2010
Fact Discovery Completion	December 10, 2010
Exchange of initial expert reports on issues upon which the party bears the burden of proof	December 17, 2010
Expert discovery request out-off	January 6, 2011
Exchange of rebuttal expert reports on issues for which the party does not bear the burden of proof	January 7, 2011
Cut off date for any motions to compel expert discovery and related motions	January 21, 2011
Expert Discovery Completion	January 21, 2011
Cut off date for any motion for summary determination	January 27, 2011
Second Settlement Conference on or before	February 5, 2011
Joint report regarding Second Settlement Conference	February 10, 2011
Submission and exchange of direct exhibits of Complainant and Respondents	February 22, 2011
Submission and exchange of direct exhibits of Staff	February 25, 2011
Objections to direct exhibits	March 2, 2011
Submission and exchange of rebuttal exhibits	March 7, 2011
File responses to objections to direct exhibits	March 9, 2011
File Motions in Limine	March 10, 2011

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Pre-hearing statement of Complainant and Respondents	March 8, 2011
Pre-hearing statement of Staff	March 18, 2011
File Objections to rebuttal exhibits	March 14, 2011
Submission of declarations justifying confidentiality of exhibits	March 16, 2011
File responses to Motions in Limine	March 17, 2011
File responses to objections to rebuttal exhibits	March 18, 2011
Pre-hearing Conference	March 24, 2011
Duration of hearing	March 28, 2011 through April 8, 2011
Initial Post-hearing Briefs	April 22, 2011
Reply Post-hearing Briefs	May 6, 2011
Initial Determination Date	August 6, 2011
Target Date for Completion of Investigation	December 6, 2011

**Certain Variable Personal Data and Mobile
Communications Devices and Related Software**

Inv. 337-TA-710

PUBLIC CERTIFICATE OF SERVICE

I, Erin D.E. Joffre, hereby certify that on April 22, 2010 copies of the foregoing **DISCOVERY STATEMENT OF THE COMMISSION INVESTIGATIVE STAFF** were filed with the Secretary and served by hand upon Administrative Law Judge Carl C. Charneski (two copies) and upon the following parties by electronic and by facsimile:

For Complainant Apple, Inc. and NeXT Software, Inc.

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Before the Honorable Charles E. Bullock
Administrative Law Judge

In the Matter of

**CERTAIN MOBILE
COMMUNICATIONS AND
COMPUTER DEVICES AND
COMPONENTS THEREOF**

Inv. No. 337-TA-704

Before the Honorable Carl C. Charneksi
Administrative Law Judge

In the Matter of

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

Inv. No. 337-TA-710

**COMPLAINANTS APPLE INC. AND NEXT SOFTWARE INC.'S
COMBINED OPPOSITION TO THE STAFF'S, NOKIA'S AND HTC'S MOTIONS FOR
CONSOLIDATION**

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I. INTRODUCTION

Complainants Apple Inc. and Next Software Inc. (collectively, “Apple”) oppose (1) the Investigative Staff’s Motion for Partial Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710 and (2) Respondents Nokia and HTC’s Motions for Full Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710. The Staff and Respondents Nokia and HTC seek unprecedented relief and propose conflicting forms of consolidation that will radically complicate and delay the investigations ordered by the Commission. Apple commenced these investigations against two separate infringers that sell completely different infringing products based on different software platforms. Consolidation will lead to an unmanageable investigation structure and prevent the Commission from meeting its statutory mandate to complete the investigations “at the earliest practicable time.” In short, the consolidation “solutions” proposed by the Staff and Respondents would create more problems than they allegedly solve.

The Staff and Respondents rely on Commission Rule 201.7(a) for authority to consolidate Section 337 investigations, but ignore that this Rule permits consolidation only “in order to *expedite* the performance of [the Commission’s] functions.” It is undisputed that the consolidation options presented by the Staff and Respondents will not expedite these investigations. Nokia and HTC pay lip service to the requirements of efficiency and expediency – contending a fully consolidated case can be completed “without unreasonable delays” – but the facts reveal a more tactical motive.¹ The 704 investigation is scheduled for a hearing beginning October 4, 2010 with a 16-month target date in June 2011, while Judge Charneski just recently set a schedule for the 710 investigation with a March hearing date and a target date in October

¹ Apple recognizes that the Staff does not have any such motive.

2011.² But the consolidation proposed by Respondents, unsurprisingly, will move the date back for both. Consolidating some or all of patent assertions against Nokia into the 710 investigation would extend Nokia's target date by at least four months. And HTC and Nokia would no doubt seek, and the Staff has already indicated its support for, an even longer schedule of a consolidated action, potentially granting Nokia (and HTC) an even greater windfall. There is thus no question that Respondents are attempting to use consolidation to engineer delay, in contravention of Commission Rules.

Although the delay resulting from consolidation would severely prejudice Apple, that is not the only prejudice Apple will suffer. Either full or partial consolidation will result in an unworkably complex investigation with different products based on different software platforms, and witnesses from Respondents from different foreign countries speaking different languages requiring interpretation. The complexity multiplies when one considers that Nokia's accused products are based on at least three different operating systems and HTC's products implicate the Android operating system developed by Google and the Open Handset Alliance.

Respondents and the Staff vaguely point to efficiencies that would allegedly result from consolidation. But the efficiencies of consolidation, even ignoring the inefficiencies of the non-overlapping patents, are grossly overstated. Neither the Staff nor the Respondents have suggested that there are common issues of fact on infringement – there are not. The differences in the products make it likely that Nokia and HTC will advance different non-infringement arguments. Infringement is a fact-intensive analysis and it would not be inconsistent for one set of accused products to infringe and another to not infringe. Likewise, different decisions on invalidity and unenforceability would likely reflect only that respondents often advance or

² This 18 month target is an Initial Determination subject to possible review by the Commission. *See* 19 C.F.R. § 210.51(a).

emphasize different invalidity defenses because they are driven to do so by different positions on infringement. In any event, to the extent efficiencies in discovery can be achieved it should be through coordination among the Staff and private parties, not a cumbersome and prejudicial consolidation. For example, 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. And if HTC feels the need to participate in *Markman* or other proceedings in the 704 investigation to have its views considered on the overlapping patents, Apple will not object.

Perhaps most telling of the perils of consolidation is that the Staff and Respondents cannot even agree on the form of consolidation. On the one hand, Respondents complain that the Staff's partial consolidation proposal would result in an unworkable piecemeal approach to at least one investigation. On the other hand, the Staff rightfully notes that complete consolidation would create an unmanageable mega-investigation and render it nearly impossible to complete the combined investigation in a timely fashion. The admitted flaws in both proposals, pointed out by the parties that are conceptually in favor of consolidation, demonstrate that consolidation of any kind is simply not workable in this circumstance. The investigations are thus best left in the structure the Commission and Chief Judge Luckern put in place.

The International Trade Commission was chartered to protect intellectual property of companies like Apple by preventing the importation of infringing articles into the United States from abroad. When Congress granted the Commission investigative authority, it mandated that these important investigations be completed in the most expeditious manner possible. Apple's products, including those it relies on in these investigations to demonstrate a very significant domestic industry, have achieved acclaim, commercial success, and protection under the U.S.

Patent laws. Like any Complainant, Apple is entitled to an expeditious resolution of the 704 and 710 investigations. The consolidation proposals of the Staff and Respondents will deny Apple that right, and undermine the very tenets upon which the Commission is founded.

Accordingly, Apple respectfully requests denial of the Staff's and Respondents' motions and adherence to the investigation structure determined to be appropriate by the Commission and Chief Judge Luckern.

II. FACTUAL BACKGROUND

A. The Disputes Between Apple and Nokia

Apple and Nokia are involved in a number of lawsuits and investigations involving allegations of patent infringement. Nokia originally sued Apple for alleged infringement of seven patents in October 2009 in the United States District Court for the District of Delaware. Apple answered this complaint and asserted counterclaims of its own, alleging infringement of thirteen patents and also non-patent claims for antitrust violations and related causes of action. These disputes are pending before Chief Judge Sleet.

Nokia subsequently filed a complaint with the Commission, asserting that Apple infringes seven patents, which the Commission instituted as Investigation No. 337-TA-701 and Chief Judge Luckern assigned to Judge Gildea. Apple also filed its own complaint with the Commission, asserting that Nokia infringes nine patents. The Commission issued a Notice of Investigation with respect to Apple's complaint on February 22, 2010, and Chief Judge Luckern assigned Investigation No. 337-TA-704 to Judge Bullock.

The schedules in the various Apple-Nokia disputes in Delaware and the 701 and 704 investigations have been established and the matters are proceeding. In the 701 investigation, Judge Gildea originally set a target date in late May 2011, and has subsequently extended it to August 1, 2011 to allow for a *Markman* Hearing. Nokia is seeking reconsideration of Judge

Gildea's order modifying the schedule, claiming that it will be severely prejudiced by the two-month delay of the hearing and target dates. (Ex. 1, Nokia Motion for Reconsideration.) In the 704 investigation, Judge Bullock has ordered a 16 month target date with an evidentiary hearing currently set to begin on October 4, 2010.

B. The Disputes Between Apple and HTC

Apple filed its complaint with the Commission against HTC Corporation, HTC America, Inc., and Exedea, Inc. on March 2, 2010. On the same day, Apple filed two separate cases against HTC in Delaware. One of the Delaware cases is a mirror-image case asserting the 10 patents against HTC that are also asserted in the Commission complaint. The other case alleges infringement of 10 separate patents, for a total of 20 different patents asserted against HTC. The Commission issued its Notice of Investigation on March 30, 2010 and Chief Judge Luckern assigned Investigation No. 337-TA-710 to Judge Charneski. In the 710 investigation, Judge Charneski has issued an Initial Determination setting an 18 month target date with an evidentiary hearing in March 2011. The Staff and HTC had originally proposed that a 20 month target date would be necessary given the complexity of the investigation and the possibility of consolidation, foreshadowing that they may seek further delay if consolidation is ordered.³ (Ex. 2, Staff's Discovery Statement; Ex. 3, HTC's Discovery Statement.)

C. The 704 and 710 Investigations Are More Different Than Alike.

The 704 and 710 investigations relate to two different complaints filed by Apple against two unrelated companies. As shown above, these investigations are part of broader and unrelated disputes between Apple and Nokia and Apple and HTC. Nokia and HTC are in fact fierce competitors in the marketplace, and agree on little except that they want to achieve delay

³ The Staff's proposed schedule assumes that its proposed consolidation option – moving the five overlapping patents into the 710 investigation – would be adopted. It is unclear whether the Staff or the Respondents might seek an even longer target date than 20 months for a fully-consolidated investigation.

of the investigations of their products' infringement of Apple's patents. In the 701, 704 and 710 investigations there are seven, nine and ten patents asserted respectively. As indicated in the Staff's Motion, the 704 and 710 investigations assert five of the same patents, although different claims may be implicated. On the other hand, there are nine *non*-overlapping patents between the 704 and 710 investigations.

Nokia's accused products are based on three different software platforms – S40, Symbian, and Maemo – that have been developed by Nokia and/or Nokia with its partners. Most of the development work was done in, and thus the potential witnesses come from, Finland or from other European countries (*e.g.* Norway and the UK). Several other important witnesses are in India and elsewhere. The S40 and Symbian operating systems that Nokia installs on its infringing handsets are proprietary Nokia software about which Complainants must seek detailed discovery from Nokia and its legions of software architects and other technical witnesses. Nokia itself is a Finnish company that has no ties whatsoever to HTC and (on information and belief) has not shared its software or other technology with HTC.

HTC's accused products are based on a different software platform, called Android, and have a very different history. In stark contrast to Nokia's proprietary S40 and Symbian operating systems, Android is an open-source software platform that uses a modified version of the Linux kernel. Android was originally developed by Android, Inc. until that company was purchased by Google. Android is now developed by the Open Handset Alliance, a consortium of approximately sixty hardware, software, and technology companies. Notably, Nokia is *not* a member of the Open Handset Alliance, and instead directly competes with the Open Handset Alliance and its members. In addition to the discovery of HTC in Taiwan, HTC has already noted that "much of the technical information regarding the operation of the accused products

resides with third parties.” (Ex. 3, HTC Discovery Statement at 6.) Presumably Apple will be required to take extensive discovery from Google and other third parties, further separating the issues in the 710 investigation from issues in the 704 investigation.

Although some of Apple’s patents apply to both HTC and Nokia products, it cannot be disputed that Android is different from the S40, Symbian and Maemo implementations in Nokia’s accused products. And, given the speed with which the telecommunications market progresses, it is likely that additional Nokia and HTC products will come into the 704 and 710 investigations. Further, the software platforms themselves change – for example, it appears that Nokia is moving to new versions of Symbian and has recently made available its “Qt” cross-platform software development framework, which on information and belief may also be involved in infringing activity, and HTC has moved or is moving to new versions of Android software with possibly further evolution to come in the near future.

It is further beyond dispute that there will be 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 for the remedy phases of the investigations. The investigations are just beginning, and additional differences between them will almost certainly be illuminated with further discovery.

Beyond their silence with the respect to the different product platforms, Respondents disingenuously minimize the important differences in the patents asserted in the respective cases and instead rely on sweeping generalizations about the claimed subject matter. For example, Respondents rely heavily on the fact that many (but not all) of the asserted patents relate to “object oriented software” in some way. This generic description of “object oriented software”

glosses over the differences among the patents that will require different sets of experts and witnesses for the sub-specialties within the technology. As Respondents know, the patents-at-issue in the two investigations involve diverse subjects such as the generation of graphics, camera power management, and booting operations.

III. ARGUMENT

Despite having the burden of justifying consolidation, the Staff and the Respondents both fail to provide any authority for reassigning an investigation in part or in whole from Judge Bullock to Judge Charneski. That is unsurprising as precedent suggests that such a reassignment is not permissible. For example, in *Certain NAND Flash Memory Devices and Products Containing the Same*, Inv. No. 337-TA-553, Order No. 3, 2005 WL 3549542 (Dec. 21, 2005), Judge Harris noted that “no Administrative Law Judge has ever issued a determination to reassign an investigation to another judge for the purpose of consolidation.” (*Id.* at 7.) Judge Harris emphasized that “the Commission has already instituted two distinct investigations, *and assigned them to different Administrative Law Judges.*” *Id.* at 8 (emphasis added). Here too the Staff’s and the Respondents’ invitation to reassign part or all of the 704 case from Judge Bullock to Judge Charneski should be rejected.

A. The Motions To Consolidate Threaten To Create An Unmanageable Investigation That Will Not Be Completed Within The Appropriate Time Limits.

Although the Staff and the Respondents propose different consolidation options, both of their proposals would result in an over-sized investigation that will not meet the statutory mandates and Commission Rules requiring investigations to be completed in an expedited manner. Commission Rule 201.7(a) provides the Commission authority to consolidate investigations only if it “will expedite the performance of [the Commission’s] functions”:

In order to expedite the performance of its functions, the Commission may engage in investigative activities preliminary to and in aid of any authorized investigation, consolidate proceedings before it, and determine the scope and manner of its proceedings.

19 C.F.R. § 201.7(a) (emphasis added). Consolidation leading to *delay*, as opposed to expediting the performance of Commission functions, is not permitted by Commission Rules. See 61 Fed. Reg. 43429, 43432 (Aug. 23, 1996) (“It is expected that the administrative law judge will abide by the intent of Congress and the Commission” in setting expedited target dates); *Certain Personal Watercraft and Components Thereof*, Inv. No. 337-TA-452, Order No. 5, 2001 WL 301292, at *1 (March 27, 2001) (“[T]he public interest favors an expeditious resolution of the investigation.”)

This Commission Rule emphasizing that consolidation should only be granted to “expedite” completion of investigations is consistent with the statutory framework upon which the Commission is founded. Prior to 1994, the Commission’s statutory mandate fixed a 12 month target date for most cases and an 18 month target date for “complicated” cases. 19 U.S.C. § 1337(b)(1) (1988) (amended by Pub. L. 103-465. §§ 261(d)(1)(B)(ii) and 321(a), 108 Stat. 4909 (Dec. 8, 1994). After the fixed time limits were determined to violate GATT principles, Congress amended the ITC’s statutory mandate to require that an investigation be completed “at the earliest practicable time.” 19 U.S.C. § 1337(b)(1). Despite no longer having a hard cap on target dates, Congress nevertheless made clear that it intended to maintain the Commission’s objective of expedited investigations:

Although the fixed deadlines for completion of section 337 investigations have been eliminated, the [Senate Finance] Committee expects that, given its experience in administering the law under the deadlines in current law, the ITC will nonetheless normally complete its investigations in approximately the same amount of time as is currently the practice.

See S. Rep. No. 103-412, at 119 (Nov. 22, 1994).

Consistent with the statutory mandate, Commission Rule 210.51(a) sets a presumptive ceiling on target dates of sixteen months. 19 C.F.R. § 210.51(a). Target dates longer than 16 months can be set by initial determination only and are subject to immediate interlocutory review. Indeed, the Commission has relied upon the preceding Senate Report in vacating ALJ decisions that unreasonably extend target dates, reasoning that “section 337 investigations [should] be conducted as expeditiously as possible and that *extension of targets beyond 15 months is the exception, not the rule.*” See *Certain Organizer Racks and Products Containing the Same and Certain Sortation Systems, Parts Thereof, And Products Containing the Same*, Inv. Nos. 337-TA-460 and 466, at 2 (Feb. 8, 2002) (emphasis added).

It is undeniable that the consolidation proposals of the Staff and the Respondents would frustrate completion of the 704 and 710 investigations “at the earliest practicable time.” HTC and Nokia should not be permitted to use their infringement of some of the same patents as an invitation to extend these two investigations and meld them into one delayed, mixed investigation involving disparate companies and products. Although careful in their briefs not to discuss the impact that consolidation would have on the schedule of a consolidated case, the Staff and HTC have already acknowledged the delay inherent in their proposal. Given the different schedules that have been adopted, consolidating the 704 investigation with the 710 investigation would delay the investigation of Nokia’s infringement a minimum of 4 months. Because Nokia already has agreed to a case schedule with a 16-month target date for the 704 investigation, it cannot seriously argue that the 704 investigation will be completed “at the earliest practicable time” if even partially consolidated with the 710 investigation.

Even worse, Nokia and HTC wholly fail to specify how much additional time will be necessary to account for their proposed mega-consolidation. They acknowledge that there will

be delay, but contend that any delay will not be “unreasonable.” (See, e.g., Nokia Br. at 12.) But we already know Respondents will seek an unreasonably long target date for a consolidated investigation – they already have. Based on the Staff’s proposed 20 month target date for a ten patent case with five overlapping patents, one can only assume that Nokia and HTC might later argue that a fully consolidated investigation will require an even later (and more unreasonable) target date.

B. The Prejudice To Apple Outweighs Any Benefits of Consolidation.

Apple has invested significant time and money in its patents and commercial products. Apple suffers a continuing and irreparable injury every day that infringing goods are imported by Nokia and HTC. Nokia’s tactically-driven request for a consolidation is clear given the position it has taken in the investigation where it is the Complainant. Specifically, in the 701 investigation, Nokia has vigorously protested Judge Gildea’s proposal to extend the target date by *two months* to allow time for a *Markman* Hearing, arguing that *any* delay prejudices Nokia:

Apple is currently getting a “free-ride” on the billions of dollars that Nokia has invested in research and development to provide the public with the mobile phones it enjoys today. Every day that Apple is allowed to continue its infringing activities is severely prejudicial to Nokia, and Nokia is entitled to an expeditious adjudication.

(Ex. 1, Nokia Motion for Reconsideration at 2.) Nokia cannot credibly argue that a two month extension for Judge Gildea to perform a *Markman* hearing is an impermissible and prejudicial “free-ride” for Apple while also arguing that a far longer extension resulting from an unprecedented consolidation and reassignment to another Judge is not far more prejudicial to Apple.

On the other hand, contrary to Nokia’s and HTC’s arguments, HTC’s alleged prejudice can be minimized or avoided altogether. HTC essentially complains that absent consolidation it will not be able to meaningfully participate in events like inventor depositions in the first

instance, giving Apple a “trial run” at the case. HTC is simply wrong. Close coordination between the Staff, Apple, and Respondents, which is well established in Commission investigations, can avoid and/or cure the majority of HTC’s alleged prejudice. For example, in *Certain Programmable Logic Devices and Products Containing Same*, Order No. 3, 2001 WL 396718 (April 17, 2001), Hynix moved to have its investigation against Toshiba consolidated with an earlier filed Toshiba investigation against Hynix. Despite the fact that there were some similarities between the accused products, Judge Harris denied consolidation. Nevertheless, recognizing that there would be, for example, depositions common to both investigations, Judge Harris directed the Staff and the private parties to coordinate discovery subject to his supervision:

[M]ost of the benefits that [the moving party] seeks by consolidation can be met by other means... There are economies that can be achieved from close coordination of the two cases, as the parties and the Staff have already acknowledged in their briefs.

Id. at *8.⁴ Further, in *Certain Liquid Crystal Display Devices*, Judge Luckern denied a request to consolidate competing investigations instituted by Samsung and Sharp despite the fact that there would be overlapping discovery. *Certain Liquid Crystal Display Devices and Products Containing Same*, Inv. No. 337-TA-631, Order No. 7, 2008 WL 3175268 (May 30, 2008). Instead, Judge Luckern opined that “the possibility of duplicate document production or the possibility of witnesses having to appear for multiple depositions” could be avoided through coordination between the Staff and the private parties. *Id.* at 6 & n.1.

⁴ Similarly, in *Certain NAND Flash Memory Device*, Judge Harris also denied consolidation, reasoning that coordination of discovery would achieve the same benefits as consolidation. *Certain NAND Flash Memory Device*, Order No. 3, at 10, 2005 WL 3549542 (“While the Administrative Law Judge does not find a sufficient basis for determining that ... the investigations should be consolidated, the Administrative Law Judge concurs that there may be opportunities for cooperation and coordination during the discovery phase of the pending investigations.”)

The Staff and the private parties can coordinate in the 704 and 710 investigations to avoid duplication wherever possible. Apple has every desire to handle discovery in the investigations efficiently, and commits to work with the Staff, Nokia or HTC to achieve efficiencies.

Further, HTC and Nokia are wrong that *Certain 3G Mobile Handsets and Components*, Inv. No. 337-TA-613, Order No. 5 (October 24, 2007),⁵ dictates consolidation in this instance. In *3G Handsets*, Administrative Judge Luckern was assigned to both investigations, and therefore the later-sued respondent had a concern about presenting its arguments to Judge Luckern on legal issues such as claim construction in the first instance. *Id.* at 11. Here, the 704 and 710 investigations have different Judges, both of whom will do their job of independently analyzing the facts and law when presented with party arguments. Apple does not agree with HTC's purported concern that Judge Charneski will have "difficulty ... not favorably considering a colleagues' earlier determination". Judges all the time have to deal with issues that may have been ruled on, in one form or another, by another judge.

Moreover, HTC has presented no basis supporting its contention that the issues before the two Judges will necessarily be identical. What will drive the respondents' defenses will be the products at issue, not just the patents. It often is the case that different claim terms are disputed,

⁵ Rather than supporting consolidation here, the 601/613 consolidation presents a cautionary tale arguing against consolidation. In Order No. 5 from Investigation 337-TA-601 and the simultaneously issued Order No. 12 from Investigation 337-TA-613, Judge Luckern consolidated these investigations and set target date of 14 months for Inv. 337-TA-613 and 18 ½ months for Inv. 337-TA-601. Shortly after obtaining consolidation, the respondents in the 613 investigation (ironically including Nokia), moved to terminate or stay the consolidated investigation based on an arbitration defense. *See* 337-TA-613, Order No. 33 at 4 (May 22, 2008). Although that motion was denied, Judge Luckern subsequently found it necessary to suspend the scheduled hearing for the consolidated investigation because of an injunction obtained by Nokia in District Court. *See id.* at 5-6 (citing 337-TA-613 Order No. 31 (April 14, 2008)). Finding "no reason ... to further delay the investigation against Samsung [the respondent in the 601 investigation], the ALJ proceeded to de-consolidate the investigations. *See id.* at 10. Nevertheless, as a result of the delays arising from the suspension of the consolidated hearing, the target date in the 601 investigation was extended to 23 months. *See* 337-TA-601, Order No.14 (May 22, 2008). The target date for the 613 investigation was extended to 27 months. *See* 337-TA-613, Order No. 38 (Oct. 10, 2008). The course of events in the 601/613 investigations illuminate that the "alleged efficiencies" of consolidation are very difficult to predict. *See* 337-TA-601, Order No. 14 at 1.

the constructions of terms differ and different defenses are advanced based on the products at issue. One construction might benefit Nokia but not HTC or vice-versa. One party might favor non-infringement, the other invalidity. The analysis here is far more complex than a declaration that these investigations have overlapping patents.

Despite relying on *3G Handsets*, Nokia and HTC already have shown that they are prepared to coordinate across the two investigations as necessary. Indeed, in moving for full consolidation, Nokia and HTC have not only taken the same position but they filed near verbatim briefs in support of their position. Thus, even if issues common to both investigations are briefed to Judge Bullock in the first instance, HTC has shown that it will be able to provide its input to Nokia. And if HTC desires to participate in *Markman* or other proceedings in the 704 investigation to ensure that its views will be heard by Judge Bullock, Apple will not object.

In short, all of the problems that consolidation allegedly solves can be addressed through coordination, thereby avoiding the drastic consequences of consolidation. The prejudice to Apple resulting from consolidation thus outweighs any alleged prejudice to the Staff or Respondents on the current structure and dictates that consolidation should be denied.

C. The Overlap Between The Factual And Legal Issues Is Not Significant Enough To Justify Consolidation.

The moving parties fail to account for the complexity of a 14 patent case against disparate sets of accused products developed and sold by different foreign companies. In fact, in submissions to Judge Gildea, Nokia has emphasized the “complexity” of the patents asserted by Apple in the 704 investigation, arguing that “most would need extensive education to understand [them.]” (Ex. 1, Nokia Motion for Reconsideration at 4.) HTC similarly has noted that “[t]he complexity of the technology and products-in-issue will require extensive technical discovery,

including extensive third party discovery, and extensive expert analysis.” (Ex. 3, HTC Discovery Statement at 6).

Ignoring these prior representations, Nokia and HTC now attempt to brush over the complexities and admitted differences between the accused products. But the fact is that analysis of those accused products with respect to the “complex” patents-at-issue will require intensive analysis of the software and hardware of the accused products. As noted above, the accused Nokia products are based on at least three different software platforms – S40, Symbian, and Maemo – with additional complications introduced across different phones based on these platforms (including those having an additional software download known as “Qt”). The accused HTC products are based on the Android software platform, introducing the complication of the Android platform, developed by Google and now the Open Handset Alliance.

The potential for confusion at the hearing is yet another reason to reject the consolidation proposals. *See Certain Liquid Crystal Display Devices and Products Containing Same*, Inv. No. 337-TA-631, Order No., 7 2008 WL 3175268 (May 30, 2008), at 4 (“The administrative law judge finds that the various postures of the parties and their relationships could lead to confusion during an evidentiary hearing”); *Certain NAND Flash Memory Devices*, Inv. No. 337-TA-553, Order No. 3, at 8 (“The various postures of the parties and their relationships to the patents and the goods at issue could lead to confusion during the hearing or remedy phase.”). Here, the hearing will inevitably be highly confusing with either partial or full consolidation. Even under the Staff’s partial consolidation proposal, there will be five patents in the partially combined proceeding that are only asserted against HTC. These five patents will at least require fact and expert testimony pertaining to infringement and validity issues -- all of which will be completely irrelevant to Nokia during the evidentiary hearing. The Staff fails to suggest how to avoid the

inevitable confusion that will result where Nokia has no interest for significant portions of the hearing. And as is consistently the case, the Respondents' 14 patent proposal just makes matters worse -- adding another four patents that are asserted against Nokia only and are not implicated in the investigation of HTC. The logical result is to keep these separate investigations separate and not introduce more confusion into investigations that are already complex.

Even if there were complete overlap in the asserted patents and the technology was not complex, consolidated investigations would still result in an unworkable hearing. When considering a request for consolidation, "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *See Certain Liquid Crystal Display Devices and Products Containing the Same*, Inv. No. 337-TA-631, Order No. 7, at 2. . The reality is that the evidentiary hearing will involve witnesses from Finland, Taiwan and potentially other countries. Many of these witnesses may require translators. Hearing the foreign language testimony from one party regarding its implementation of complex technology will be complicated enough. Where the Commission has left the investigations as separate, there is no need to cause further complication by introducing another language at the hearing.⁶ *Cf. Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, Inv. No. 337-TA-604, Order No. 39, 2008 WL 164311 (Jan. 14, 2008) (noting the difficulties associated with witness statements for foreign language witnesses).

IV. CONCLUSION

For reasons discussed above, consolidation in whole or in part should be denied. Most (if not all) of the benefits of consolidation can be achieved through coordination without the

⁶ Finally, Nokia and HTC exaggerate the alleged efficiencies the Commission will enjoy if it only needs to review a single Initial Determination. First, the evidence and argument for the non-overlapping patents should be no different regardless of whether the investigations are consolidated or not. Second, the Commission will need to review different evidence pertaining to infringement of unrelated products whether presented in one Initial Determination or two.

problems resulting from formal consolidation. Full consolidation into a mega-investigation would result in intolerable delay, severe confusion and prejudice. While slightly better than the Respondents' proposed mega-case, the Staff's proposal of partial consolidation would still be unworkable and result in confusion and prejudicial delay. Accordingly, Apple respectfully requests denial of the Respondents' and Staff's motions for consolidation, and for the cases to proceed in their present posture.

Dated: April 21, 2010

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Marc Sernel, HEREBY CERTIFY that on this 21st day of April 2010, I caused a true and correct copy of the foregoing APPLE INC. AND NEXT SOFTWARE INC.'S COMBINED OPPOSITION TO THE STAFF'S, NOKIA'S AND HTC'S MOTION FOR CONSOLIDATION to be served upon the following Persons:

The Honorable Marilyn R. Abbott
Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, D.C. 20436

(via EDIS)

The Honorable Charles E. Bullock-
Administrative Law Judge 337-704
Administrative Law Judge
U.S. International Trade Commission
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(via hand delivery on 4/21/2010)

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Marc Sernel

EXHIBIT 3

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Administrative Law Judge
Hon. Carl C. Charneski

In the Matter of

CERTAIN PERSONAL DATA AND
MOBILE COMMUNICATIONS
DEVICES AND RELATED
SOFTWARE

Investigation No. 337-TA-710

DISCOVERY STATEMENT OF RESPONDENTS
HTC CORPORATION, HTC AMERICA, INC., AND EXEDEA, INC.

Pursuant to Order No. 3 (April 9, 2010), Respondents HTC Corporation, HTC America, Inc. and Exedeia, Inc. (collectively “Respondents” or “HTC”), hereby submit this Discovery Statement.

I. PROPOSED ISSUES TO BE LITIGATED

Based on the information available at this stage of the Investigation, HTC submits that the following issues will be raised in this litigation:

A. Violation of Section 337

1. Ownership of the Patents-in-Issue and Complainant’s Standing

Whether Apple Inc. and NeXT Software Inc.’s (collectively “Complainant” or “Apple”) are the owners of U.S. Letters Patent Nos. 5,481,721 (“the ’721 patent”); 5,519,867 (“the ’867 patent”); 5,566,337 (“the ’337 patent”); 5,929,852 (“the ’852 patent”); 5,946,647 (“the ’647 patent”); 5,969,705 (“the ’705 patent”); 6,275,983 (“the ’983 patent”); 6,343,263 (“the ’263

patent”); 5,915,131 (“the ’131 patent”); and RE39,486 (“the RE’486 patent”) (collectively “the Asserted Patents”); and whether they have standing to maintain this action..

2. Validity and Enforceability

Whether the asserted claims of the Asserted Patents are (i) invalid for failure to meet the conditions of patentability set forth in Title 35 of the United States Code, including but not limited to Sections 101, 102, 103, and/or 112, and/or (ii) unenforceable.

3. Infringement of Any Valid Asserted Claim

Whether the imported accused products infringe any valid, enforceable asserted claim of the Asserted Patents.

4. Importation

Whether HTC has imported, sold for importation, or sold after importation in the United States any accused products that infringe the Asserted Patents.

5. Domestic Industry

Whether an industry exists in the United States with respect to the Asserted Patents under 19 U.S.C. § 1337(a)(2) and (3).

B. Issues Requiring A Recommendation

In addition to the issues that must be addressed in order to find a violation of Section 337, HTC expects to address the following issues so that the Judge can issue his recommendation as required by Commission Rule 210.42(a)(1)(ii):

1. Remedy

In the event the Commission finds a violation of Section 337 has occurred, HTC will address the appropriate remedy to be imposed.

2. Bond

In the event the Commission finds a violation of Section 337 has occurred, HTC will address (a) whether any bond should be imposed during the Presidential Review period, and (b) if so, the appropriate amount of a bond to be imposed.

C. Stipulations

Currently, the parties have not agreed to any stipulations.

II. DESCRIPTION OF INFORMATION AND EVIDENCE THAT RESPONDENTS INTEND TO SUBMIT TO PROVE THEIR CASE

Due to the early stage of the Investigation, HTC reserves its rights to rely on any relevant and admissible information uncovered prior to the hearing. At present, HTC anticipates that it will rely on, at a minimum, the following types of information:

A. Documents, statements, testimony, and other relevant information, such as charts, expert reports, data, schematics, technical documents, photographs and other information concerning the accused products, demonstrating that the accused products do not infringe the asserted claims of the Asserted Patents, and similar information concerning the Asserted Patents, their prosecution histories, prior art references, and other contemporaneous documents, demonstrating that the asserted claims of the Asserted Patents are invalid and unenforceable.

B. Documents, statements, testimony, and other relevant information demonstrating that HTC does not import, sell for importation, or sell after importation in the United States accused products that infringe the asserted claims of the Asserted Patents.

C. Documents, statements, testimony, and other relevant information demonstrating that a domestic industry as defined by 19 U.S.C. § 1337(a)(3) does not exist in connection with Apple's purported activities.

D. Documents, statements, testimony, and other relevant information demonstrating the appropriate remedy and bond, in the event the Commission finds a violation of section 337.

III. INFORMATION THAT HTC WILL SEEK FROM COMPLAINANT AND THIRD PARTIES

A. Information HTC Will Seek From Apple

1. HTC will seek from Apple information regarding the design, development and manufacture of the alleged domestic industry devices, as well as customer support and technical support for such devices.

2. The nature and operation of the alleged domestic industry devices and the practice of the asserted claims of the Asserted Patents by those devices.

3. Information concerning Apple's purported investments in its alleged domestic industry relating to the Asserted Patents.

4. Information concerning prior art patent and literature searches, opinions, investigations, and studies by or on behalf of the inventors, Apple, NeXT, Taligent and OTLC, or its predecessors concerning: (i) the patent applications that led to the issuance of the Asserted Patents, (ii) validity or enforceability of the Asserted Patents, or (iii) infringement of the Asserted Patents, and (iv) licensing of the asserted patents.

5. Information concerning the bases for Complainants' allegations in the Complaint, including the bases for the allegations of infringement.

6. Information concerning the corporate structure and organization of Complainants and their predecessors.

7. Information concerning prior art to the Asserted Patents, preparation and prosecution of the Asserted Patents and Complainants' interpretation of the asserted claims of the Asserted Patents.

8. Information concerning the identification of persons knowledgeable about, and documents relating to, the foregoing categories of information.

HTC anticipates it will seek additional discovery from Apple in the form of depositions, requests for admission, document requests, and interrogatories. HTC anticipates that it will seek depositions of the Complainants' fact and expert witnesses and those witnesses whose testimony Complainants or the Commission Investigative Attorney intend to present at the hearing.

B. Information From Third Parties

HTC also anticipates that it will need substantial third-party discovery during the course of this investigation. HTC anticipates that its third party discovery will take the form of document subpoenas and depositions. HTC also expects to participate in any third-party document discovery and depositions initiated by Complainants or the Commission Investigative Attorney. Indeed, HTC understands that much of the information Apple will seek regarding alleged infringement of the Asserted Patents by HTC's accused devices is in the possession of third parties.

IV. EXCHANGE OF INFORMATION AND EVIDENCE WITHOUT THE USE OF FORMAL DISCOVERY METHODS

HTC believes that essentially all of the information described in Section III will be obtained through formal discovery, although HTC may use other information gathering techniques in appropriate circumstances.

V. INFORMATION TO BE OBTAINED ONLY BY DEPOSITION, INTERROGATORY, SUBPOENA, OR REQUEST FOR ADMISSIONS

HTC believes that essentially all of the information described in Section III will be obtained through formal discovery.

VI. POSITION AS TO TARGET DATE AND PROPOSED PROCEDURAL SCHEDULE

This investigation involves 85 asserted claims of ten asserted patents and numerous accused devices. Moreover, much of the technical information regarding the operation of the accused devices resides with third parties. Further, Respondents anticipate significant invalidity defenses against the Asserted Patents, involving a significant number of prior art references and prior art commercial products and technologies developed by third parties. The complexity of the technology and products-in-issue will require extensive technical discovery, including extensive third party discovery, and extensive expert analysis. Given the vast number of complex claims and patents-in-issue, HTC does not believe that this Investigation can be completed within a 16 month timeframe. Further, in view of these factors, HTC suggests a trial spanning at least two weeks.

Accordingly, HTC respectfully requests that the Administrative Law Judge issue an Initial Determination setting a 20-month target date, with the target date falling on December 6, 2011, and the initial determination on violation due on August 6, 2011. Respondents note that the Judge may already have an evidentiary hearing scheduled in December of 2010 in 337-TA-685, as well as a final ID due in December in 337-TA-694.¹ Further, it is likely the Judge will be assigned additional investigations based on recently-filed complaints that have not yet been instituted.

HTC's proposed target date attempts to accommodate the Judge's current and expected schedule since the trial in this Investigation could, under Respondents' proposed target date, take

¹ Given the Administrative Law Judge's schedule in December, and the complexity of this Investigation, Respondents submit that this Investigation could not go to an evidentiary hearing prior to December 2010.

place in Mach 2011, leaving the Administrative Law Judge time to prepare an initial determination by August 2011.

HTC proposes the following procedural schedule based on a 20 month target date. The schedule includes dates set forth in Order No. 3 as well as additional proposed dates which HTC believes will assist in the orderly conduct of the Investigation. Respondents have met and conferred with the Staff and Complainant. Respondents understand that Complainants disagree with the 20 month target date, and are providing a procedural schedule based on 15 month target date. Respondents, however, understand that the Staff proposes a 20 month target date.

Accordingly, Respondents provide the below procedural schedule agreed-upon with the Staff:

First Settlement Conference on or before	July 16, 2010
Joint report regarding First Settlement Conference	July 21, 2010
Identification of expert witnesses, including their expertise for which they are offered and their curriculum vitae	November 17, 2010
Identification of prior art upon which parties will rely at the hearing	November 17, 2010
Fact discovery request cut-off	November 24, 2010
Identification of a tentative list of witnesses who will testify at the hearing, with a brief description of their relationships to the party	December 3, 2010
Cut off date for any motions to compel fact discovery and related motions	December 10, 2010
Fact Discovery Completion	December 10, 2010
Exchange of initial expert reports on issues upon which the party bears the burden of proof	December 17, 2010
Expert discovery request cut-off	January 6, 2011
Exchange of rebuttal expert reports on issues for which the party does not bear the burden of proof	January 7, 2011
Cut off date for any motions to compel expert discovery and related motions	January 21, 2011
Expert Discovery Completion	January 21, 2011

Cut off date for any motion for summary determination	January 27, 2011
Second Settlement Conference on or before	February 5, 2011
Joint report regarding Second Settlement Conference	February 10, 2011
Submission and exchange of direct exhibits of Complainant and Respondents	February 22, 2011
Submission and exchange of direct exhibits of Staff	February 25, 2011
Objections to direct exhibits	March 2, 2011
Submission and exchange of rebuttal exhibits	March 7, 2011
File responses to objections to direct exhibits	March 9, 2011
File Motions in Limine	March 10, 2011
Pre-hearing statement of Complainant and Respondents	March 8, 2011
Pre-hearing statement of Staff	March 18, 2011
File Objections to rebuttal exhibits	March 14, 2011
Submission of declarations justifying confidentiality of exhibits	March 16, 2011
File responses to Motions in Limine	March 17, 2011
File responses to objections to rebuttal exhibits	March 18, 2011
Pre-hearing Conference	March 24, 2011
Duration of hearing	March 28, 2011 through April 8, 2011
Initial Post-hearing Briefs	April 22, 2011
Reply Post-hearing Briefs	May 6, 2011
Initial Determination Date	August 6, 2011
Target Date for Completion of Investigation	December 6, 2011

Dated: April 15, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Katherine Pape, hereby certify that on April 15, 2010, copies of the foregoing document were filed and served upon the following parties as indicated:

Ms. Marilyn R. Abbott, Secretary
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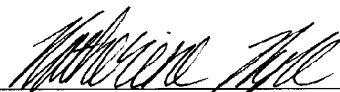

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EXHIBIT 3

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN MOBILE COMMUNICATIONS AND
COMPUTER DEVICES AND COMPONENTS
THEREOF**

Inv. No. 337-TA-704

**ORDER NO. 5: GRANTING THE COMMISSION INVESTIGATIVE STAFF'S MOTION
FOR PARTIAL CONSOLIDATION OF INVESTIGATION NOS. 337-TA-704 AND
337-TA-710 AND DENYING NOKIA'S MOTION FOR FULL CONSOLIDATION**

(April 26, 2010)

On April 13, 2010, the Commission Investigative Staff ("Staff") moved (704-002) for partial consolidation of Investigation No. 337-TA-704, entitled "Certain Mobile Communications And Computer Devices And Components Thereof" and Investigation No. 337-TA-710, entitled "Certain Personal Data And Mobile Communications Devices and Related Software." On April 21, 2010, Complainant Apple Inc. ("Apple") filed a response opposing Staff's motion.¹ On April 23, 2010, Respondents Nokia Corporation and Nokia Inc. (collectively, "Nokia") filed their response. While Nokia's preference is for full consolidation of the two investigations,² Nokia acknowledged that "partial consolidation of the investigation ... is still preferable to the status quo." (Nokia Resp. at 4.)

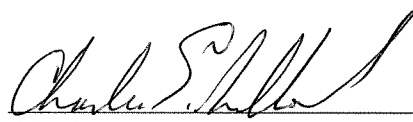
In order to effectuate the transfer of the five overlapping patents, and to the extent the undersigned has the authority, the Staff's motion (704-002) is hereby granted. Concurrent

¹ Apple filed a corrected version of its Opposition on April 22, 2010.

² Consistent with this order, Nokia's Motion For Full Consolidation Of Investigation Nos. 337-TA-704 And 337-TA-710 (704-004) is hereby denied.

herewith, Chief Judge Luckern is reassigning U.S. Patent Nos. 5,519,867; 5,915,131; 5,969,705; 6,343,263; and RE39,486 to Judge Charneski, effective immediately. (See Notice to the Parties, issued Apr. 26, 2010.)

SO ORDERED.

A handwritten signature in black ink, appearing to read "Charles E. Bullock", written over a horizontal line.

Charles E. Bullock
Administrative Law Judge

**IN THE MATTER OF CERTAIN MOBILE COMMUNICATIONS 337-TA-704
AND COMPUTER DEVICES AND COMPONENTS THEREOF**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER NO. 5** has been served upon, **Daniel L. Girdwood, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on April 27, **2010**.

Marilyn R. Abbott
Marilyn R. Abbott, Secretary *JNG*
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**IN THE MATTER OF CERTAIN MOBILE COMMUNICATIONS 337-TA-704
AND COMPUTER DEVICES AND COMPONENTS THEREOF**

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