

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

NOKIA CORPORATION,)	
)	
Plaintiff,)	
v.)	C.A. No. 09-1002 GMS
)	
APPLE INC.,)	
)	
Defendant.)	

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**REPLY BRIEF IN FURTHER SUPPORT OF APPLE AND NEXT SOFTWARE’S
MOTION FOR CONSOLIDATION OF THE CAPTIONED CASES FOR
THE PURPOSE OF COORDINATING PRETRIAL PROCEEDINGS**

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July 1, 2010

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

Plaintiffs,)

v.)

C.A. No. 10-166-RK

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

Defendants.)

APPLE INC.,)

Plaintiff,)

v.)

C.A. No. 10-167-RK

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

Defendants.)

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Note

Unless otherwise indicated, all emphasis has been added, and all internal citations have been omitted.

INTRODUCTION

Five cases involving Apple smartphone patents and technology are pending in this District – two involving HTC before Judge Kelly, two involving Nokia before Judge Sleet, and now a fifth involving HTC, filed June 21, 2010, that has just been assigned to Judge Sleet. HTC and Nokia fail to provide any reason that this Court should not take the routine step of consolidating these related cases for pretrial purposes.

Consolidation of these cases for pretrial purposes before a single judge makes sense for all involved parties. In an effort to dispute this conclusion, HTC and Nokia make dire predictions that consolidation would “impede efficiency,” “increase[] expense,” “unduly complicate these proceedings,” or even “prejudice HTC . . . in the extreme.” (167 Case, D.I. 41 at 1, 2, 10; 791 Case, D.I. 61 at 11.)¹ But in fact, consolidation is the single best way to promote efficiency, reduce expense, streamline proceedings, and avoid prejudice. Consolidation for pretrial purposes would not burden HTC and Nokia with irrelevant issues, as they suggest, but rather would permit a single judge to manage this complex matter in an efficient manner. Common issues could be addressed in a coordinated fashion, and distinct issues could be kept separate. But if these matters are not consolidated, such coordination will be impossible.

In a further attempt to avoid consolidation, both HTC and Nokia reduce the consolidation analysis to a mere numbers game, urging that because more non-overlapping patents exist among the actions than overlapping ones, consolidation should be denied on that basis alone. But the decision to consolidate related patent infringement actions does not turn on a simple tally of common patents. Rather than employ such a formulaic approach, the district court has full

¹ HTC and Nokia each filed identical copies of their respective opposition briefs in both cases in which they are parties, *i.e.*, 166 Case, D.I. 37 and 167 Case, D.I. 41 for HTC, and 791 Case, D.I. 61 and 1002 Case, D.I. 23 for Nokia. For purposes of this reply brief, Apple cites to a representative brief from each docket.

discretion to evaluate a range of factors to determine whether consolidation is the most practical course of action for the parties and the Court. Despite HTC's and Nokia's efforts to minimize the commonality among the four suits, neither can reasonably deny the substantial patent overlap: ten of Apple's twenty-six patents in these litigations are asserted against both parties. The same smartphone technology is at issue in all cases. And twenty-eight individuals are named inventors on patents commonly asserted against HTC and Nokia. HTC and Nokia should not be heard to dispute the significance of this common ground – they recently successfully argued *in favor of consolidation* before the ITC, relying on these very similarities. As their arguments in the ITC confirm, this is exactly the type of case where allowing a single judge to coordinate the issues would be most efficient for the Court and for all involved parties.

HTC and Nokia correctly note that these cases are large, complex patent litigations. But the remedy HTC seeks – transfer of the HTC actions to the Northern District of California – would maximize the burden on the federal judiciary by requiring that two district courts address common issues (*e.g.*, claim construction of ten overlapping patents) that could otherwise be handled by a single court. And while HTC and Nokia concede (as they must) that overlapping discovery should be coordinated, HTC's requested transfer would defeat any opportunity for coordination by placing the cases on different tracks in separate courts on opposite coasts.

ARGUMENT

I. These Cases Should Be Consolidated for Pretrial Proceedings

A. A Single Judge Could Coordinate All Pending Cases for Pretrial Purposes in a Sensible and Efficient Manner

HTC and Nokia argue that consolidation of these four pending cases will result in an overcomplicated, unmanageable “mega” case that will prejudice both of them “to the extreme.” (167 Case, D.I. 41 at 1, 2, 10; 791 Case, D.I. 61 at 11.) HTC even goes as far to take the position

that “consolidation actually poses a greater risk of discovery inefficiency.” (167 Case, D.I. 41 at 9.) But both HTC and Nokia incorrectly assume that this Court is incapable of treating similar issues commonly and, when necessary, different issues separately.

Consolidation of these cases for pretrial coordination is the only means to avoid the disjointed situation that *all* parties fear here. If all cases are consolidated before a single judge for pretrial purposes, that judge will be able to coordinate them in a manner that makes practical sense for all parties: similar issues can be considered together, while dissimilar issues can be addressed separately.² For example, the Court could conduct a unified claim-construction proceeding for the overlapping patents, while holding separate claim-construction proceedings for the patents that are not relevant to all parties. But if the cases remain pending before different judges – particularly if the HTC cases are transferred to California – coordination of common issues would be virtually impossible, and inconsistent rulings could result.

Consolidating the cases will also avoid redundant discovery. Contrary to HTC’s and Nokia’s assertions (791 Case, D.I. 61 at 17-18; 167 Case, D.I. 41 at 1-3, 9), no reason exists to believe that any party would be overwhelmed with irrelevant discovery if the cases were consolidated. *See, e.g., SmithKline Beecham Corp. v. Geneva Pharms., Inc.*, No. 99-CV-2926, 2001 WL 1249694, at *5 (E.D. Pa. Sept. 26, 2001) (rejecting defendant’s argument that consolidation will obligate defendant to attend and review irrelevant discovery). While HTC claims that it would be forced to sift through large volumes of irrelevant documents if the cases were consolidated (167 Case, D.I. 41 at 1-3), such concerns are overblown in light of the

² *See, e.g., Magnavox Co. v. APF Elecs., Inc.*, 496 F. Supp. 29, 33 (N.D. Ill. 1980) (noting that “[c]ommon briefing and hearing schedules can be set which will facilitate the supervision of discovery, and eliminate the need to consider like arguments more than once”); *Cima Labs, Inc. v. Actavis Group HF*, Nos. 07-893, 2007 WL 1672229, at *8 (D.N.J. June 7, 2007) (holding that consolidation of patent cases raised by plaintiff against different defendants will “avoid duplication of efforts by the parties”).

significant overlap in technical issues and witnesses in these actions. If large volumes of documents pertain to an issue that is not relevant to one party or the other, that situation can be addressed by a discovery plan that structures such productions. Moreover, the availability of text-searching and document-indexing tools will allow HTC and Nokia to identify the produced documents that are relevant to their claims and defenses. Similarly, no reason exists for a party to attend a deposition or hearing not relevant to the claims in which that party is involved.

HTC and Nokia have already conceded that pretrial coordination of these cases would be beneficial. For example, in its opposition, HTC references coordinating the inventor depositions as needed. (167 Case, D.I. 41 at 7.) This position is similar to the position that HTC took before the ITC, where it successfully argued *in favor of consolidation*:

- “There is certain to be substantial overlap . . . in the depositions of experts and fact witnesses – particularly of third parties who are expected to possess prior art critical to both respondents’ defenses.” (Ex. 2, HTC ITC Br. at 6.)³
- “[C]onsolidation will reduce these redundancies and will also relieve experts, inventors, and other deponents . . . from the burden of multiple depositions and multiple appearances during separate proceedings.” (*Id.* at 6-7.)

Although HTC concedes that discovery should be coordinated, HTC’s requested remedy would eliminate any opportunity to do so. Transfer of the HTC cases to the Northern District of California would inevitably place those cases on a delayed track in a distant court following a dissimilar schedule. Thus, discovery conducted in the cases pending here would necessarily be duplicated in that second forum. Only pretrial consolidation in this forum offers the discovery coordination that even HTC and Nokia agree should occur.

³ Unless otherwise noted, all exhibits referred to herein are attached to the Declaration of Richard K. Herrmann submitted with Apple’s opening brief. (167 Case, D.I. 21.)

B. The Cases Share Numerous Common Issues of Law and Fact

Both HTC and Nokia suggest there must be a requisite number of overlapping patents for consolidation of the four cases to occur. (791 Case, D.I. 61 at 1, 13-16; 167 Case, D.I. 41 at 1, 4-7.) But Fed. R. Civ. P. 42(a) contains no such requirement. Here, no dispute exists that Apple has asserted the following *ten* patents against both HTC and Nokia in those cases:⁴

5,455,599	5,519,867	5,848,105	5,915,131	5,920,726
5,969,705	6,343,263	6,424,354	7,469,381	RE 39,486

These overlapping patents represent a substantial portion of Apple’s twenty-six patents asserted in the four actions, and all of them involve cellular telephone and smartphone technology. As Nokia told the ITC in urging consolidation, “even the patents that do not overlap share the same technology and the same types of accused products.” (Ex. 1, Nokia ITC Br. at 5.)

These overlapping issues also militate in favor of consolidation. Contrary to HTC’s suggestion, Rule 42(a) does not require that “common questions of law or fact *predominate*” for consolidation. (167 Case, D.I. 41 at 5.) Instead, cases need only “involve *a* common question of law or fact” for a court to exercise its discretion to consolidate them. Fed. R. Civ. P. 42(a); *see also Alexander v. Minner*, No. 07-041-JJF, 2009 WL 1176456, at *6 (D. Del. May 1, 2009).

⁴ At the time it moved for consolidation of these cases, Apple asserted twenty-seven patents, eleven of which overlapped between an HTC and a Nokia case. On June 21, 2010, Apple filed its First Amended Complaint in the 167 Case, in which Apple no longer alleges that HTC infringes two patents that had been asserted in the originally-filed Complaint, including U.S. Patent No. 7,383,453 (“the ‘453 patent”). As a result of this amendment, Apple now asserts a total of twenty-six patents in the four cases, ten of which overlap. Contemporaneously with the filing of Apple’s First Amended Complaint, Apple filed a new action in this District asserting infringement by HTC of the ‘453 patent and three other related patents. (*See* C.A. No. 10-544 (the “544 Case”), D.I. 1.) Apple alleged these four patents are infringed by the same HTC devices that are accused of infringement in the 166 and 167 Cases.

The 791, 1002 and 544 Cases are assigned to Chief Judge Sleet, while the 166 and 167 Cases are assigned to Judge Kelly. Given the common issues of fact and law between these cases, the 544 Case should also be consolidated with the other pending cases for pretrial proceedings. If that were to occur, there would again be eleven overlapping patents.

Emphasizing the individual issues present in each of the actions, HTC and Nokia repeatedly assert that insufficient overlap exists between these four cases to merit consolidation. (791 Case, D.I. 61 at 3, 8-9, 12-15; 167 Case, D.I. 41 at 1-2, 5-6.) In support of their claim, however, they make only vague statements and point to self-serving calculations. When the cases are considered as a whole, it is clear they share many common questions of law and fact:

- The patents asserted in all cases overlap in several technological areas related to smartphone hardware and software, including object-oriented systems, task handling, data processing, and user interface technology⁵
- **Twenty-eight** of the eighty inventors named on Apple’s asserted patents are named on patents asserted in both an HTC case **and** a Nokia case⁶
- Eight of the thirteen prosecuting attorneys or firms identified on the faces of Apple’s asserted patents have prosecuted patents that are asserted in both an HTC case **and** a Nokia case
- As discussed above, ten of Apple’s twenty-six asserted patents are asserted against both HTC and Nokia

The similarities between these cases easily meet the threshold for consolidation required by the Federal Rules and by this Court – even if there were not a single overlapping patent. As both HTC and Nokia represented to the ITC, “the **only unique legal issue** raised in the two investigations may be the respondents’ technical implementation of the [accused] operating software.” (Ex. 1, Nokia ITC Br. at 8; Ex. 2, HTC ITC Br. at 8.) HTC and Nokia thus conceded that all other legal issues in the parallel ITC actions **would** be common to both cases.

Courts in the District of Delaware and in other districts have consolidated cases in similar circumstances, even where **no** overlap in the patents-in-suit existed. For example, in *Abbott*

⁵ For example, at least seven of the asserted patents relate to implementing hardware and software applications in object-oriented systems. (*See, e.g.*, ‘703, ‘599, ‘854, ‘721, ‘867, ‘983, and ‘354 patents). Five of those seven patents have been asserted against Nokia and five have been asserted against HTC, including three overlapping patents.

⁶ Excluding the twenty-four inventors named solely on non-overlapping U.S. Patent No. 7,479,949 (“the ‘949 patent”), twenty-eight of the remaining fifty-six inventors (or 50%) are named inventors on patents asserted in both an HTC case and a Nokia case.

Diabetes Care, this Court consolidated two patent-infringement litigations where the claimed subject matter of the asserted patents was similar, but there were no overlapping patents between the cases. *See Abbott Diabetes Care, Inc. v. DexCom, Inc.*, No. 06-514 GMS, 2007 WL 2892707, at *4 (D. Del. Sept. 30, 2007). The Court found that the non-overlapping patents in the two causes of action were sufficiently similar to be classified as “related” technology, thereby supporting consolidation. *Id.*; *see also Cedars-Sinai Med. Ctr. v. Revlon, Inc.*, 111 F.R.D. 24, 33 (D. Del. 1986) (consolidating two actions covering different, but related, patents because, among other reasons, “much of the prior art will be the same for the two patents, at least with respect to the technological processes at issue”); *Western States Mach. Co. v. S.S. Hepworth Co.*, 37 F. Supp. 377, 378 (E.D.N.Y. 1941). Here, rather than no overlapping patents, there are *ten* patents that overlap in the four cases – and litigating the same ten patents in two different jurisdictions at the same time is a wasteful use of judicial resources.

Similarly, in *3M*, a Magistrate Judge recommended consolidation of two patent infringement suits even where (unlike the present circumstances) there was not a single overlapping patent. *See 3M Co. v. Moldex-Metric, Inc.*, No. 06-4044 (MJD/AJB), 2006 WL 3759758, at *2-3 (D. Minn. Dec. 21, 2006). There, the court determined that “the savings of time and effort resulting from consolidation of these actions outweighs any inconvenience, delay, or expense that it might cause to [plaintiff].” *Id.* at *2. And even though the case schedules were *three years* apart, the court found that any delays could be cured by revising the schedule of the consolidated action. *Id.* Here, the four cases were filed within *five months* of each other, and

only one case has a schedule in place. (791 Case, D.I. 42 and May 3, 2010 Text Order.) And rather than non-overlapping patents, there are *ten* patents that overlap in these four cases.⁷

II. HTC, Nokia, and Any Relevant Third Parties Would Not Be Prejudiced by Consolidation of the District Court Cases

A. The Cases Are in the Early Stages of Litigation

HTC and Nokia claim that the four cases are at very different stages, which would prejudice the parties if the cases were subsequently consolidated. (791 Case, D.I. 61 at 17-18; 167 Case, D.I. 41 at 10.) But the facts demonstrate otherwise. As discussed in detail in Apple's opening brief (167 Case, D.I. 20 at 3-4), all four cases are in their incipient stages.

District courts have previously exercised their discretion to consolidate cases that were at significantly more disparate stages. *See 3M*, 2006 WL 3759758, at *2-3 (holding consolidation of cases filed three years apart was appropriate). Here, the pending cases are closely aligned procedurally, so any scheduling delay would be minimal.⁸ In the 791 Case, although the Court has issued a scheduling order, fact discovery is not scheduled to close until July 15, 2011. In the 167 Case, HTC recently withdrew a motion to dismiss and will file its answer shortly. (167

⁷ In their oppositions, HTC and Nokia cite several decisions where consolidation was denied. (791 Case, D.I. 61 at 12; 167 Case, D.I. 41 at 4, 8.) But these cases are readily distinguishable. *See, e.g., Syngenta Seeds, Inc. v. Monsanto Co.*, No. 02-1331-SLR, 2004 WL 2002208, at *2 (D. Del. Aug. 27, 2004) (denying consolidation because one case was three months away from trial that "could not be rescheduled without undue delay"); *Metallgesellschaft AG v. Foster Wheeler Energy Corp.*, 143 F.R.D. 553, 559 n.9 (D. Del. 1992) (denying consolidation but recognizing that judicial economies can be accomplished when "tandem discovery and/or trials can be scheduled in both cases in order to minimize duplicative efforts and use of resources"); *Vallero v. Burlington N. R.R. Co.*, 749 F. Supp. 908, 913 (C.D. Ill. 1990) (denying consolidation for purposes of trial, but consolidating for discovery because the cases were "closely related and no prejudice would result to any party from such a limited consolidation"); *Schacht v. Javits*, 53 F.R.D. 321, 323 n.1, 324-25 (S.D.N.Y. 1971) (denying consolidation of two actions where the first action was nearly ready for trial and no defendant had filed an Answer in the second action).

⁸ *See Cedars-Sinai Med. Ctr.*, 111 F.R.D. at 34 ("Consolidation . . . is favored also because discovery in the first case is not far advanced" and "[m]ost of the current motions have dealt with such preliminary matters as motions to compel, to dismiss, and for summary judgment.").

Case, D.I. 46.) And the 1002 and 166 Cases are stayed, pending the resolution of the ITC proceedings involving the same patents. Thus, all cases are ripe for consolidation.

B. Apple Has Not Engaged in Forum Shopping by Bringing Suit Here

HTC's suggestion that Apple has engaged in improper forum shopping by bringing suit in Delaware ignores the history of these cases. (167 Case, D.I. 41 at 12.) Apple did not bring suit against HTC in this District to avoid the Northern District of California. This jurisdiction was already the focus of related litigation. In late 2009, Nokia filed two separate actions for patent infringement against Apple in this District (the 791 Case and the 1002 Case). In February 2010, Apple responded to Nokia's allegations in both cases and asserted, among other claims, patent-infringement counterclaims against Nokia.

Contrary to HTC's contention, Apple's motion for consolidation is not an improper "collateral opposition" to HTC's transfer motion. (167 Case, D.I. 41 at 1.) Before HTC even filed its motion to transfer, Apple had already asked this Court to identify the four matters as related cases. (167 Case, D.I. 5.) HTC cannot reasonably dispute that these cases are "related" within the meaning of Delaware Local Rule 3.1(b)(3) in that they "[i]nvolve the same patent."

C. HTC's Transfer Arguments Are Flawed

In its opposition, HTC repeats many of the same arguments made in its pending motion to transfer the 166 and 167 Cases. (167 Case, D.I. 41 at 11-12.) HTC's transfer arguments do not counsel against consolidation of these actions. To the contrary and for the reasons set forth in Apple's opposition to HTC's motion to transfer (167 Case, D.I. 22), HTC's transfer motion should be denied.⁹ See *In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009)

⁹ However, even if this Court denies HTC's motion to transfer, there is still a risk within these cases of inconsistent rulings by different judges within this District. As a result, if the Court does not consolidate these cases for pretrial coordination, all cases should be assigned to a single judge in the interest of consistency and judicial efficiency.

(“the existence of multiple lawsuits involving the same issues is a paramount consideration when determining whether a transfer is in the interest of justice”).

In any event, HTC’s position that the District of Delaware is an inconvenient forum for HTC is not credible. In fact, HTC conducts business throughout the United States and is currently involved in litigations around the country, including in this District. HTC and Nokia are also both involved in the parallel ITC investigations in nearby Washington, D.C. And the fact that HTC does not seek transfer to the District of Washington indicates that HTC is not actually concerned with the proximity to its home base in this country.

HTC’s assertion that non-party witnesses will be prejudiced by consolidation is similarly unsupported. (167 Case, D.I. 41 at 11.) Tellingly, HTC and Nokia fail to identify a *single* potential witness by name who will not be available to testify for a deposition or at trial in this Court. And to the extent non-party witnesses are relevant to multiple cases, it will be less burdensome for those witnesses to respond to discovery requests in a single consolidated proceeding. Depositions of non-party witnesses will also take place in locations most convenient to the witnesses, regardless of where the case is being adjudicated.¹⁰ Thus, HTC cannot meet its burden to demonstrate that this District is an inconvenient forum.

CONCLUSION

For the all foregoing reasons, and those set forth in Apple’s opening brief (167 Case, D.I. 20), Apple respectfully requests that this Court consolidate the 791, 1002, 166 and 167 Cases.

¹⁰ Third-party corporations who may be implicated in these proceedings, such as Google, will also not be prejudiced if asked to participate in these cases. Google is a Delaware corporation with a registered agent for service of process in Wilmington, Delaware. And notably, Google’s Vice President of Engineering, Andrew Rubin, testified at a recent deposition that he was unaware of any Google employee working on the accused Android products who would be unwilling or unable to testify in Delaware if required. (167 Case, D.I. 22 at 14, 17.)

Dated: July 1, 2010

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