

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

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NOKIA CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	C. A. No. 09-791 GMS
)	
APPLE INC.,)	
)	
Defendant.)	
<hr/>)	
NOKIA CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09-1002 GMS
)	
APPLE INC.,)	
)	
Defendant.)	
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**DECLARATION OF RICHARD K. HERRMANN IN SUPPORT OF APPLE INC. AND
NEXT SOFTWARE, INC.'S MOTION FOR CONSOLIDATION OF THE CAPTIONED
CASES FOR THE PURPOSE OF COORDINATING PRETRIAL PROCEEDINGS**

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NeXT Computer, Inc.*

Dated: May 24, 2010

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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.))
<hr/>)
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.))
<hr/>)

I, Richard K. Herrmann, hereby declare that I am an attorney at Morris James LLP, counsel for Apple Inc. in this action, and I am admitted to the United States District Court for the District of Delaware. With sound mind and competence to make this declaration, I have personal knowledge of the facts stated herein. If called as a witness, I could and would testify competently to the following:

1. Attached hereto as Exhibit 1 is a true and correct copy of Nokia’s Motion for Full Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710, filed with the International Trade Commission (“ITC”) on April 15, 2010.

2. Attached hereto as Exhibit 2 is a true and correct copy of HTC Respondents' Motion for Full Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710, filed with the ITC on April 15, 2010.
3. Attached hereto as Exhibit 3 is a complete list of the Apple patents asserted in the four related Apple litigations pending in this District, C.A. Nos. 09-791 GMS, 09-1002 GMS, 10-166 RK, and 10-167 RK.
4. Attached hereto as Exhibit 4 is a true and correct copy of a March 24, 2010 letter from R. Herrmann to the Hon. Gregory Sleet.
5. Attached hereto as Exhibit 5 is a true and correct copy of Nokia's Response to The Commission Investigative Staff's Motion for Partial Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710, filed with the ITC on April 23, 2010.
6. Attached hereto as Exhibit 6 is a true and correct copy of HTC's Reply to Apple's Opposition to the Staff's Motion for Partial Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710, filed with the ITC on April 23, 2010.

Dated: May 24, 2010

/s/ Richard K. Herrmann

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EXHIBIT 1

**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**

Investigation No. 337-TA-704

**NOKIA'S MOTION FOR FULL CONSOLIDATION OF
INVESTIGATION NOS. 337-TA-704 AND 337-TA-710**

Pursuant to 19 C.F.R. §§ 201.7(a) and 210.15, Respondents Nokia Corporation and Nokia Inc. ("Nokia") move for complete consolidation of this Investigation and Investigation No. 337-TA-710. Nokia understands that a similar motion will be filed by the respondents today in the 710 Investigation. On April 13, 2010, the Commission Staff filed a motion for partial consolidation as to only the five overlapping patents at issue in these investigations.

As discussed in the attached memorandum, the Staff and respondents in both investigations are in full agreement that consolidation is needed because of the extensive overlap of legal, factual and procedural issues among the two investigations, including substantial overlap among the parties, technology, asserted patents and claims, claim construction arguments, validity arguments, witnesses, third parties, evidence, domestic industry products and the respondents' defenses. Respondents and the staff differ only in how to best accomplish the consolidation. Respondents believe that only full consolidation solves the problems identified herein and by the Staff, and that full consolidation need not unreasonably delay full resolution of the investigation.

Full consolidation would simplify and reduce duplicative discovery and proceedings, make more efficient use of the Commission's resources, and prevent serious prejudice to respondents in the 710 Investigation from having key issues in the latter investigation substantially determined before being given the opportunity to prepare their defenses and be heard.

The consolidation issue has been raised and discussed with Complainant and the Commission Staff pursuant to Ground Rule 3.2. Nokia has been informed that the Staff is not opposed to full consolidation, but that it will be opposed by Complainant.

Respectfully submitted,



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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**

Investigation No. 337-TA-704

**MEMORANDUM IN SUPPORT OF NOKIA'S MOTION FOR
FULL CONSOLIDATION OF INVESTIGATION NOS. 337-TA-704 AND 337-TA-710**

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I. INTRODUCTION

The Commission Staff and respondents in both the 704 and 710 Investigations are in complete agreement that consolidation is warranted due to the extensive overlap of the legal, factual and procedural issues between this investigation and Investigation No. 337-TA-710, including substantial overlap among the parties, technology, asserted patents and claims, claim construction arguments, validity arguments, witnesses, third parties, evidence, domestic industry products and the respondents' defenses. Moreover, the two investigations were filed by identical counsel for Apple within six weeks of each other.

Respondents file this separate motion because full consolidation is the best solution to simplify and reduce duplicative discovery and proceedings, make more efficient use of the Commission's resources, and prevent serious prejudice to respondents in the 710 Investigation from having key issues in the latter investigation substantially determined before being given the opportunity to prepare their defenses and be heard.

II. BACKGROUND

The Commission instituted Investigation No. 337-TA-704 on February 18, 2010 in response to a complaint filed by Apple Inc. The respondents are Nokia Corporation and Nokia Inc. ("Nokia"). The evidentiary hearing is currently scheduled from October 4-15, 2010, and a sixteen month target date has been set for June 24, 2011.

Two weeks after the Commission instituted Investigation No. 337-TA-704, Apple filed a complaint against HTC Corporation, HTC America, Inc. and Exedea, Inc. ("HTC"), which the Commission instituted as Investigation No. 337-TA-710 on March 31, 2010. Presently, there is no hearing or target date set for Investigation No. 337-TA-710.

The technology at issue in both investigations concerns the operating systems and related software in certain mobile telephone handsets. In Investigation No. 337-TA-704, Apple alleges that Nokia imports handsets that infringe specific claims of nine patents. In Investigation No. 337-TA-710, Apple has alleged that HTC imports handsets that infringe ten patents, including five of the patents asserted against Nokia. As summarized in the chart on page 3 of the Staff's memorandum in support of its motion for partial consolidation, there are five patents asserted against both Nokia and HTC, four patents asserted against Nokia alone, and five patents asserted against HTC alone. Although the patents and claims are numerous, most of them relate to "object-oriented" software governing operation of the accused handsets and should all be addressed together in a single hearing.

III. ADMINISTRATIVE LAW JUDGES HAVE THE AUTHORITY TO CONSOLIDATE INVESTIGATIONS

Authority to consolidate Section 337 investigations is grounded in Commission Rule 201.7(a), which provides "[i]n 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).

Where two investigations are before the same ALJ, the presiding ALJ has routinely relied upon this authority to consolidate separate investigations that involved substantial overlap of technological, factual, legal, and procedural issues. See, e.g., Certain 3G Mobile Handsets and Components, Inv. No. 337-TA-613, Order No. 5 at 9 and n. 10 (Oct. 24, 2007) ("3G Handsets") (discussing ALJ's authority and confirming that consolidation is by order and not by initial determination); Certain Semiconductor Timing Signal Generator Devices, Components Thereof,

and Products Containing Same, Inv. No. 337-TA-465, Order No. 3 (Jan. 22, 2002) ("Signal Devices"); Certain Integrated Repeaters, Switches, Transceivers, and Products Containing Same, ITC Inv. No. 337-TA-435, Order No. 3 (Aug. 24, 2000) ("Integrated Repeaters").

For example, in Integrated Repeaters, the ALJ noted that the Commission has consolidated investigations where there is an overlap in parties and accused products and where there is a relationship between the intellectual property rights at issue in the two investigations. See *id.*, Order No. 3 at 10 (citing Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Inv. Nos. 337-TA-148/169, [citation omitted]; Certain Fluidized Supporting Apparatus and Components Thereof, Inv. Nos. 337-TA-182/188, 225 U.S.P.Q. 1211, 1214 (U.S.I.T.C. 1984) ("Fluidized Supporting Apparatus"); Certain Precision Resistor Chips, Inv. Nos. 337-TA-63/65, Order No. 2 (May 23, 1979)). By consolidating the investigations, even though some differences did exist between the two investigations, the ALJ noted that consolidation would avoid "(1) two concurrent and possibly redundant discovery streams and/or sequential discovery, (2) a second hearing in which many of the same witnesses reiterate, at least in part, testimony that they gave at the first hearing, (3) two sets of trial exhibits, many of which would be entered into evidence in both hearings, (4) two sets of pre- and post-trial submissions, (5) two initial determinations, (6) two reviews by the Commission, and (7) two potential appeals to the Federal Circuit." *Id.*, Order No. 3 at 7.

In 3G Handsets, Chief Judge Luckern consolidated two investigations instituted nearly five months apart due to the similarity in the Complainants' claims and the "significant prejudice" that would be faced by Nokia (the latter respondent) if the claims of the common patents were already construed, evaluated for validity and enforceability and if domestic industry and

affirmative defenses were already assessed a short time before Nokia had the opportunity to present its case. See 3G Handsets, Order No. 5 at 11. Judge Luckern consolidated the investigations even though additional patents were asserted in one of the investigations and consolidation required an extension of the target date in the earlier investigation.¹

On July 3, 2008 the Commission ceded control over the ALJ's dockets to Chief Judge Luckern. Respondents respectfully suggest that the presiding judges, in coordination with Chief Judge Luckern, collectively arrive at a solution wherein the entirety of both investigations is transferred and consolidated before a single ALJ.

IV. FULL CONSOLIDATION IS NEEDED DUE TO THE OVERLAP IN PATENTS, DISCOVERY, AND LEGAL AND FACTUAL ISSUES

As the Staff's motion makes clear, the substantial similarities and relationships between Investigation Nos. 337-TA-704 and 337-TA-710 justify consolidation of at least part of the two investigations into one. Respondents believe that full, rather than partial consolidation, is needed. Indeed, because of the common technological, factual, legal, and procedural issues in the two investigations, full consolidation will simplify the Commission's investigations and make more efficient use of Commission resources, and remove the significant prejudice HTC would face if forced to litigate many issues critical to its case shortly after those same key issues have been litigated and potentially decided by a different ALJ. Full consolidation would achieve these benefits with minimal or no prejudice to Complainant.

A. The Investigations Involve Overlapping Technology and Patents

All of the patents at issue in Investigation Nos. 337-TA-704 and 337-TA-710 allegedly

¹ As discussed below, the Staff's only objection to full consolidation is the potential for a long extension to the target date. See Staff's mot. at n. 3. However, Respondents believe that the fully consolidated investigation can be completed without unreasonable delays.

pertain to mobile telephone handsets' operating software. The five common patents currently asserted in both investigations are asserted against the same aspects of Nokia and HTC's mobile telephones. Indeed, Apple asserts most of the same claims of the five overlapping patents against both Nokia and HTC.

But even the patents that do not overlap share the same technology and the same types of accused products. At least ten of Apple's fourteen asserted patents involve object-oriented technology and related software features. These include the 867, 983, 852, 486, 337, 354, 705, 721, 599 and 431 patents, which are spread across the existing investigations. Many of these patents involve implementing previously-known ideas in an object-oriented programming paradigm, a concept that also existed long before Apple's patents. Even the 705 patent, which does not use the term "object-oriented," involves subject matter related to the 337, 354 and 721 patents.

Some relationships are especially close. For example, the 867 and 983 patents, which involve an interface between an object-oriented application and a procedural operating system, both derive from largely identical specifications filed on the same day. The 852 and 486 patents, involving a system for network components, likewise derive from largely identical specifications filed on the same day. The 337, 354 and 705 patents all relate to software event handling. The 721 and 705 patents both relate to interprocess communication. Each of these subgroups is spread across both Investigations. Even the 599 and 431 patents, which involve graphics and system booting, respectively, share the common thread of object-oriented technology.

The remaining four patents also implicate the accused handsets' operating systems and related software. The 131 patent relates to programming interfaces for input/output services

provided by the operating system. The 263 patent relates to the realtime processing of streams of data sent to and from a handset using a realtime operating system. The 647 patent relates to software involving structures in data. Finally, the 726 patent relates to software and hardware that manages power in a handset's camera.

While it is likely that the respondents' software implementations in their telephone handsets' operating systems differ to some degree, interpretation of that software will involve similar investigation, explanation and testimony. See Integrated Repeaters, Order No. 3 at 10; Fluidized Supporting Apparatus, 225 U.S.P.Q. at 1214.

Given this overlap in subject matter and asserted patent rights, full consolidation of the two investigations will assist the ALJ and OUII attorneys in understanding the technology and patent claims at issue, and, as discussed below, will also eliminate the redundancy and duplication in tutorials, expert reports and testimony, fact witnesses and exhibits that would otherwise occur if the two related investigations remain separated.

B. Full Consolidation Will Avoid Redundant Discovery and Proceedings

Because of the overlapping technology, parties, and patents at issue in the two investigations, the parties' discovery requests and responses will be redundant and unnecessarily burdensome unless the investigations are consolidated. See Integrated Repeaters, Order No. 3 at 3-7. There is certain to be substantial overlap in document production, as well as 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. Full consolidation will reduce these redundancies and will also relieve experts, inventors, and other deponents – as well as the parties' counsel and the OUII attorneys – from the burden of multiple depositions and multiple

appearances during separate proceedings. See id.

Full consolidation before a single ALJ will also avoid the need for a second hearing in the 337-TA-710 Investigation in which many of the same witnesses will parrot the testimony given in the 337-TA-704 Investigation. See id. at 7. A fully consolidated investigation would also reduce the total number of pre- and post-trial submissions regarding the same patents and technologies. See id.

Finally, full consolidation would permit a single ALJ to issue a single final initial determination, which would significantly expedite and simplify the Commission's review proceedings and would conserve overall Commission resources. See id. Having separate ALJs assess the same patents presents substantial risk of inconsistent initial determinations being presented to the Commission for review. Indeed, if the Commission receives a first ID in the 704 Investigation, with awareness that a second ID in the 710 Investigation will issue shortly, it is very possible that the Commission would sua sponte delay review of the former ID until both opinions regarding the patents are before it. This delayed review would effectively consolidate the investigations at the back-end, after all of the duplicative and wasteful effort getting to that point had already taken place.

C. The Legal and Factual Issues in the Current Investigations Substantially Overlap

As five of the asserted patents are common to both investigations – largely at the level of the specific claims asserted against both Nokia and HTC – and since the remaining patents also pertain to the same overall technology, the legal and factual issues involved in the two investigations will be very similar.

For example, legal arguments as to claim construction are likely to be similar in both

investigations. With respect to the five overlapping patents, many of the same claim terms and intrinsic and extrinsic evidence will be in issue in both investigations. Accordingly, the evidence presented in support of claim construction, the prior art references, and other issues arising as the parties present positions on claim construction will overlap extensively in the 337-TA-704 and 337-TA-710 Investigations.

Based upon a review of their responses to the complaint, respondents intend to present similar affirmative defenses, such as defenses concerning patent invalidity, including, for example, arguments pertaining to the obviousness of the asserted patent claims. These efforts will require substantial third party discovery likely targeting the same third parties. Both respondents will also present similar challenges to Apple's alleged domestic industry. In fact, the only unique legal issue raised in the two investigations may be the respondents' technical implementation of the operating software at issue.

D. Full Consolidation Will Make the Greatest Use of Commission Resources

By seeking the institution of separate investigations against Nokia and HTC within a very short timeframe notwithstanding the commonality of the subject matter and asserted patent claims, Apple has already unnecessarily consumed Commission resources. Complete consolidation of the two Apple investigations will eliminate the waste of the parties' and the Commission's time and expense that would otherwise result from redundant discovery, unnecessarily repetitive briefings and duplicative hearings featuring the same exhibits, witnesses, and evidence. See id. at 3-7; see also Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, Comm'n Op. at 30 (1981) (discussing the Commission's preference for avoiding a series of related investigations so as to avoid "burden[ing] the Commission with

redundant investigations"). The Commission and its ALJs are highly burdened at the present time, and should not be asked to entertain redundant litigations simply because Apple filed them a few weeks apart.

V. HTC WILL BE HIGHLY PREJUDICED IF THE INVESTIGATIONS PROCEED SEPARATELY

HTC, named by Apple in the latter investigation, would face significant prejudice if an ALJ were to construe the common patents, assess the patents' validity and enforceability, make findings regarding Apple's alleged domestic industry, and rule on Nokia's affirmative defenses in Investigation No. 337-TA-704 a short time before the hearing in Investigation No. 337-TA-710. While HTC would be legally entitled to proceed on a clean slate in its own investigation, Apple will already have had the benefit of a trial run at the case, and the ALJ may have difficulty in not deferring to or at least favorably considering his colleague's earlier decisions on issues that have been considered in considerable detail in the former investigation without HTC's participation. These problems may be amplified if early initial determinations are granted and reviewed in the 704 Investigation.

In addressing the identical situation now faced by respondents in the 710 Investigation, Chief Judge Luckern held:

The administrative law judge finds that Nokia would face significant prejudice if the undersigned in the 601 investigation were to construe certain claims of the '004, '966 and '579 patents in issue, assess the patents' validity and enforceability, make findings regarding InterDigital's alleged domestic industry as to those patents and rule on certain affirmative defenses as to those patents in which Nokia is not a respondent a short-time before the identical issues were to be heard in the '613 investigation in which Nokia is a respondent.

3G Handsets, Order No. 5 at 11 (emphasis added).

The simple means to cure this prejudice is to consolidate the investigations, allow HTC to participate meaningfully in addressing Apple's allegations the first time, and decide these issues only once.

VI. APPLE WILL NOT BE PREJUDICED BY FULL CONSOLIDATION

Although it may be slow to recognize them, Apple will also realize substantial efficiencies in a consolidated investigation and can only complain about the short delay to the first investigation caused by its own circumvention of the Commission's policy of naming all known respondents in a single investigation by attempting to pursue separate investigations arising under the same subject matter and patent claims. Both Nokia and HTC were importing and selling accused telephone handsets in the United States well before the complaint in the 704 Investigation was filed. Consequently, the minimal delay to the first investigation necessary to bring the consolidated investigations in line was solely a result of the tactical timing chosen by Apple to file the second complaint.

Apple's arguments as to patent validity, claim construction, domestic industry, and infringement will be similar in both investigations. Accordingly, Apple stands to benefit from the same efficiencies that would be achieved by the Commission and by the respondents. For example, Apple will not have to suffer redundant discovery, because Nokia and HTC are likely to seek similar document production from Apple and seek to depose largely the same Apple witnesses and experts. Furthermore, Apple will be spared the burden of reproducing the same trial exhibits, crafting duplicative pre- and post-hearing submissions, and participating in two evidentiary hearings featuring the same witnesses and covering ostensibly the identical factual

and legal issues.

VII. COMPLETE CONSOLIDATION IS PREFERABLE TO PARTIAL CONSOLIDATION

Only complete consolidation fully resolves the problems associated with current state of affairs while maximizing efficiency and conserving the Commission's resources. Given the overlap in technology among all of the asserted patents, partial consolidation as suggested by the Staff carries with it many of the inefficiencies present with the current situation that can be eliminated by complete consolidation. Partial consolidation of the common patents into one of the existing investigations also means that at least one respondent must face two complete investigations on substantially related technology. Partial consolidation means that two ALJs need to become versed in complex object-oriented software technology, from which they will be expected to deliver similar or at least consistent determinations. And partial consolidation means two appearances by the same experts, fact witnesses and third parties at the hearing and in depositions. But full consolidation results in a single Investigation that a single ALJ can manage as he sees fit, without regard to a pending investigation before a different ALJ. Full consolidation prevents the inherent prejudice accruing to the respondent whose investigation proceeds second. Finally, full consolidation means a single final initial determination written by a single ALJ that the Commission can review as a whole.

From the Staff's separate motion, it is apparent that the only issue holding back the Staff's complete endorsement of the full consolidation option is the potential delay to full resolution of the investigations that could inure to management of a consolidated, 14 patent investigation. See Staff's Mot. at n.3 ("The Staff agrees with HTC and Nokia that complete consolidation of the 704 and 710 Investigations would address many of the problems with the current arrangement of

the two investigations, but is concerned that complete consolidation would likely require an exceptionally long target date." Respondents do not believe this concern is warranted. First, any inherent delay from consolidation was caused by Apple's tactical behavior. As noted by Judge Luckern noted in the 613 Investigation, "it is complainants who, through the filing of a complaint in March 2007 and another complaint in August 2007, put identical patents and identical claims in issue in two investigations." 3G Handsets, Order No. 5 at 9. Had Apple started by naming both Nokia and HTC as respondents, delay would not even enter the picture.

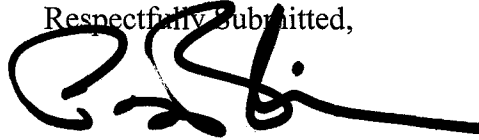
However, respondents believe that, without prejudicing respondents' rights to defend themselves in the consolidated investigation, a consolidated investigation can be managed in an efficient manner that results in resolution of the complete investigation in approximately the same time period as would be required to litigate the investigations separately and without unreasonable delay. Indeed, by eliminating duplication, the whole proceeding should run more smoothly.

VIII. CONCLUSION

Pursuant to 19 C.F.R. §§ 201.7(a) and 210.15, full consolidation of the 337-TA-704 and 337-TA-710 Investigations is appropriate and warranted. There is considerable overlap of legal, factual, technological and procedural issues in both investigations. The parties, technology, patents, claim construction arguments, validity arguments, witnesses, evidence, domestic industry products and the respondents' anticipated defenses in the two investigations are all identical or substantially related. Accordingly, for the reasons stated herein and in the Staff's motion, consolidation of the 337-TA-704 and 337-TA-710 would simplify and expedite the Commission's proceedings, make more efficient use of Commission resources, spare both the

Complainant and Respondents from the time and expense of duplicative discovery, proceedings, and briefings, and eliminate prejudice to HTC from potentially having some key issues in the latter investigation substantially determined before it has the opportunity to prepare its defenses and be heard. Investigation No. 337-704 should therefore be consolidated with Investigation No. 337-TA-710 before a single Administrative Law Judge.

Respectfully Submitted,



Dated: April 15, 2010

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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:

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EXHIBIT 2

**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

**THE HTC RESPONDENTS' MOTION FOR FULL CONSOLIDATION OF
INVESTIGATION NOS. 337-TA-704 AND 337-TA-710 AND RESPONSE TO THE
STAFF'S MOTION FOR PARTIAL CONSOLIDATION, MOTION DOCKET NO. 710-1**

Pursuant to 19 C.F.R. §§ 201.7(a) and 210.15, Respondents HTC Corporation, HTC America, Inc., and Exedea, Inc. (collectively "Respondents" or "HTC") move for complete consolidation of this Investigation and Investigation No. 337-TA-704. HTC understands that a similar motion has been filed by the respondents in the 704 investigation. On April 13, 2010, the Commission Staff filed a motion for partial consolidation as to only the five overlapping patents at issue in these Investigations (Motion Docket No. 710-1). HTC also hereby responds to Motion No. 710-1.

As discussed in the attached memorandum, the Staff and respondents in both Investigations are in full agreement that consolidation is needed because of the extensive overlap of legal, factual and procedural issues among the two Investigations, including substantial overlap among the parties, technology, asserted patents and claims, claim construction arguments, validity arguments, witnesses, third parties, evidence, domestic industry products and the respondents' defenses. Respondents and the staff differ only in how to best accomplish the

consolidation. Respondents believe that only full consolidation solves the problems identified herein and by the Staff, and that full consolidation need not unreasonably delay the Investigation.

Full consolidation would simplify and reduce duplicative discovery and proceedings, make more efficient use of the Commission's resources, and prevent significant prejudice to HTC from having key issues in this Investigation substantially determined in the 704 investigation before being given the opportunity to prepare its defenses and be heard.

The consolidation issue has been raised and discussed with Complainants and the Commission Staff. HTC has been informed that the Staff does not oppose full consolidation, but that it will be opposed by Complainant.

Dated: April 15, 2010

Respectfully submitted,



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**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

**MEMORANDUM IN SUPPORT OF THE HTC RESPONDENTS' MOTION FOR
FULL CONSOLIDATION OF INVESTIGATION NOS. 337-TA-704 AND 337-TA-710
AND RESPONSE TO THE STAFF'S MOTION FOR PARTIAL CONSOLIDATION,
MOTION DOCKET NO. 710-1**

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I. INTRODUCTION

The Commission Staff and respondents in both the 704 and 710 Investigations are in complete agreement that consolidation is warranted due to the extensive overlap of the legal, factual, and procedural issues between this Investigation and Investigation No. 337-TA-704, including substantial overlap among the parties, technology, asserted patents and claims, claim construction arguments, validity arguments, witnesses, third parties, evidence, domestic industry products, and the respondents' defenses. Moreover, the two investigations were filed by identical counsel for Apple within six weeks of each other.

Respondents file this separate motion because full consolidation is the best solution to simplify and reduce duplicative discovery and proceedings, make more efficient use of the Commission's resources, and prevent significant prejudice to the HTC Respondents from having key issues in this Investigation substantially determined before being given the opportunity to prepare their defenses and be heard.

II. BACKGROUND

The Commission instituted Investigation No. 337-TA-704 on February 18, 2010 in response to a complaint filed by Apple Inc. The respondents are Nokia Corporation and Nokia Inc. ("Nokia"). The evidentiary hearing is currently scheduled from October 4-15, 2010, and a sixteen month target date has been set for June 24, 2011.

Two weeks after the Commission instituted Investigation No. 337-TA-704, Apple filed a complaint against HTC Corporation, HTC America, Inc. and Exedea, Inc. ("HTC"), which the Commission instituted as Investigation No. 337-TA-710 on March 31, 2010. Presently, there is no hearing or target date set for Investigation No. 337-TA-710.

The technology at issue in both Investigations concerns the operating systems and related

software in certain mobile telephone handsets. In Investigation No. 337-TA-704, Apple alleges that Nokia imports handsets that infringe specific claims of nine patents. In Investigation No. 337-TA-710, Apple has alleged that HTC imports handsets that infringe ten patents, including five of the patents asserted against Nokia. As summarized in the chart on page 3 of the Staff's memorandum in support of its motion for partial consolidation, Apple has asserted five patents against both Nokia and HTC, four patents against Nokia alone, and five patents against HTC alone. Although the patents and claims are numerous, most of them relate to "object-oriented" software governing operation of the accused handsets and should all be addressed together in a single hearing.

III. ADMINISTRATIVE LAW JUDGES HAVE THE AUTHORITY TO CONSOLIDATE INVESTIGATIONS

Authority to consolidate Section 337 investigations is grounded in Commission Rule 201.7(a), which provides "[i]n 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).

Where two investigations are pending before the same ALJ, the presiding ALJ has routinely relied upon this authority to consolidate separate investigations that involved substantial overlap of technological, factual, legal, and procedural issues. See, e.g., Certain 3G Mobile and Components, Inv. No. 337-TA-613, Order No. 5 at 9 and n. 10 (Oct. 24, 2007) ("3G Handsets") (discussing ALJ's authority and confirming that consolidation is by order and not by initial determination); Certain Semiconductor Timing Signal Generator Devices, Components Thereof, and Products Containing Same, Inv. No. 337-TA-465, Order No. 3 (Jan. 22, 2002)

("Signal Devices"); Certain Integrated Repeaters, Switches, Transceivers, and Products Containing Same, ITC Inv. No. 337-TA-435, Order No. 3 (Aug. 24, 2000) ("Integrated Repeaters").

For example, in Integrated Repeaters, the ALJ noted that the Commission has consolidated investigations where there is an overlap in parties and accused products and where there is a relationship between the intellectual property rights at issue in the two investigations. See id., Order No. 3 at 10 (citing Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Inv. Nos. 337-TA-148/169, [citation omitted]; Certain Fluidized Supporting Apparatus and Components Thereof, Inv. Nos. 337-TA-182/188, 225 U.S.P.Q. 1211, 1214 (U.S.I.T.C. 1984) ("Fluidized Supporting Apparatus"); Certain Precision Resistor Chips, Inv. Nos. 337-TA-63/65, Order No. 2 (May 23, 1979)). By consolidating the investigations, even though some differences did exist between the two investigations, the ALJ noted that consolidation would avoid "(1) two concurrent and possibly redundant discovery streams and/or sequential discovery, (2) a second hearing in which many of the same witnesses reiterate, at least in part, testimony that they gave at the first hearing, (3) two sets of trial exhibits, many of which would be entered into evidence in both hearings, (4) two sets of pre- and post-trial submissions, (5) two initial determinations, (6) two reviews by the Commission, and (7) two potential appeals to the Federal Circuit." Id., Order No. 3 at 7.

In 3G Handsets, Chief Judge Luckern consolidated two investigations instituted nearly five months apart due to the similarity in the Complainants' claims and the "significant prejudice" that would be faced by Nokia (the latter respondent) if the claims of the common patents were already construed, evaluated for validity and enforceability and if domestic industry and affirmative defenses were already assessed a short time before Nokia had the opportunity to

present its case. See 3G Handsets, Order No. 5 at 11. Judge Luckern consolidated the investigations even though additional patents were asserted in one of the investigations and consolidation required an extension of the target date in the earlier investigation.¹

On July 3, 2008 the Commission ceded control over the ALJ's dockets to Chief Judge Luckern. Respondents respectfully suggest that the presiding judges, in coordination with Chief Judge Luckern, collectively arrive at a solution wherein the entirety of both investigations is transferred and consolidated before a single ALJ.

IV. FULL CONSOLIDATION IS NEEDED DUE TO THE OVERLAP IN PATENTS, DISCOVERY, AND LEGAL AND FACTUAL ISSUES

As the Staff's motion makes clear, the substantial similarities and relationships between Investigation Nos. 337-TA-704 and 337-TA-710 justify consolidation of at least part of the two Investigations into one. Respondents believe that full, rather than partial consolidation, is needed. Indeed, because of the common technological, factual, legal, and procedural issues in the two Investigations, full consolidation will simplify the Commission's Investigations and make more efficient use of Commission resources, and remove the significant prejudice HTC would face if forced to litigate many issues critical to its case shortly after those same key issues have been litigated and potentially decided by a different ALJ. Full consolidation would achieve these benefits with minimal or no prejudice to Complainant.

A. The Investigations Involve Overlapping Technology and Patents

All of the patents at issue in Investigation Nos. 337-TA-704 and 337-TA-710 allegedly pertain to mobile telephone handsets' operating software. The five common patents currently

¹ As discussed below, the Staff's only objection to full consolidation is the potential for a long extension to the target date. See Staff's Mot. at n. 3. However, Respondents believe that the fully consolidated investigation can be completed without unreasonable delays.

asserted in both Investigations are asserted against the same aspects of Nokia and HTC's mobile telephones. Indeed, Apple asserts most of the same claims of the five overlapping patents against both Nokia and HTC.

But even the patents that do not overlap share the same technology and the same types of accused products. At least ten of Apple's fourteen asserted patents involve object-oriented technology and related software features. These include the 867, 983, 852, 486, 337, 354, 705, 721, 599 and 431 patents, which are spread across the existing Investigations. Many of these patents involve implementing previously-known ideas in an object-oriented programming paradigm, a concept that also existed long before Apple's patents. Even the 705 patent, which does not use the term "object-oriented," involves subject matter related to the 337, 354 and 721 patents.

Some relationships are especially close. For example, the 867 and 983 patents, which involve an interface between an object-oriented application and a procedural operating system, both derive from largely identical specifications filed on the same day. The 852 and 486 patents, involving a system for network components, likewise derive from largely identical specifications filed on the same day. The 337, 354 and 705 patents all relate to software event handling. The 721 and 705 patents both relate to interprocess communication. Each of these subgroups is spread across both Investigations. Even the 599 and 431 patents, which involve graphics and system booting, respectively, share the common thread of object-oriented technology.

The remaining four patents also implicate the accused handsets' operating systems and related software. The 131 patent relates to programming interfaces for input/output services provided by the operating system. The 263 patent relates to the realtime processing of streams of data sent to and from a handset using a realtime operating system. The 647 patent relates to

software involving structures in data. Finally, the 726 patent relates to software and hardware that manages power in a handset's camera.

While it is likely that the respondents' software implementations in their telephone handsets' operating systems differ to some degree, interpretation of that software will involve similar investigation, explanation and testimony. See Integrated Repeaters, Order No. 3 at 10; Fluidized Supporting Apparatus, 225 U.S.P.Q. at 1214.

Given this overlap in subject matter and asserted patent rights, full consolidation of the two Investigations will assist the ALJ and OUII attorneys in understanding the technology and patent claims at issue, and, as discussed below, will also eliminate the redundancy and duplication in tutorials, expert reports and testimony, fact witnesses and exhibits that would otherwise occur if the two related investigations remain separated.

B. Full Consolidation Will Avoid Redundant Discovery and Proceedings

Because of the overlapping technology, parties, and patents at issue in the two investigations, the parties' discovery requests and responses will be redundant and unnecessarily burdensome unless the investigations are consolidated. See Integrated Repeaters, Order No. 3 at 3-7. There is certain to be substantial overlap in document production, as well as 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. Full consolidation will reduce these redundancies and will also relieve experts, inventors, and other deponents – as well as the parties' counsel and the OUII attorneys – from the burden of multiple depositions and multiple appearances during separate proceedings. See id.

Full consolidation before a single ALJ will also avoid the need for a second hearing in the 337-TA-710 Investigation in which many of the same witnesses will be required to repeat the

testimony given in the 337-TA-704 investigation. See id. at 7. A fully consolidated Investigation would also reduce the total number of pre- and post-trial submissions regarding the same patents and technologies. See id.

Finally, full consolidation would permit a single ALJ to issue a single final initial determination, which would significantly expedite and simplify the Commission's review proceedings and would conserve overall Commission resources. See id. Having separate ALJs assess the same patents presents substantial risk of inconsistent initial determinations being presented to the Commission for review. Indeed, if the Commission receives a first ID in the 704 investigation, with awareness that a second ID in the 710 investigation will issue shortly, it is very possible that the Commission would sua sponte delay review of the former ID until both opinions regarding the patents are before it. This delayed review would effectively consolidate the investigations at the back-end, after all of the duplicative and wasteful effort getting to that point had already taken place.

C. The Legal and Factual Issues in the Current Investigations Substantially Overlap

As five of the asserted patents are common to both Investigations – largely at the level of the specific claims asserted against both Nokia and HTC – and since the remaining patents also pertain to the same overall technology, the legal and factual issues involved in the two investigations will be very similar.

For example, legal arguments as to claim construction are likely to be similar in both Investigations. With respect to the five overlapping patents, many of the same claim terms and intrinsic and extrinsic evidence will be in issue in both investigations. Accordingly, the evidence presented in support of claim construction, the prior art references, and other issues arising as the

parties present positions on claim construction will overlap extensively in the 337-TA-704 and 337-TA-710 Investigations.

Based upon a review of Nokia's response to the 704 Complaint, HTC may present similar affirmative defenses, such as defenses concerning patent invalidity, including, for example, arguments pertaining to the obviousness of the asserted patent claims. These efforts will require substantial third party discovery likely targeting the same third parties. Both respondents will also present similar challenges to Apple's alleged domestic industry. In fact, the only unique legal issue raised in the two Investigations may be the respondents' technical implementation of the operating software at issue.

D. Full Consolidation Will Make the Greatest Use of Commission Resources

By seeking the institution of separate Investigations against Nokia and HTC within a very short timeframe notwithstanding the commonality of the subject matter and asserted patent claims, Apple has already unnecessarily consumed Commission resources. Complete consolidation of the two Apple Investigations will eliminate the waste of the parties' and the Commission's time and expense that would otherwise result from redundant discovery, unnecessarily repetitive briefings and duplicative hearings featuring the same exhibits, witnesses, and evidence. See id. at 3-7; see also Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, Comm'n Op. at 30 (1981) (discussing the Commission's preference for avoiding a series of related investigations so as to avoid "burden[ing] the Commission with redundant investigations"). The Commission and its ALJs are highly burdened at the present time, and should not be asked to entertain redundant litigations simply because Apple filed them a few weeks apart.

V. HTC WILL BE SIGNIFICANTLY PREJUDICED IF THE INVESTIGATIONS PROCEED SEPARATELY

HTC, named by Apple in the later filed 710 Investigation, faces significant prejudice if an ALJ were to construe the common patents, assess the patents' validity and enforceability, make findings regarding Apple's alleged domestic industry, and rule on Nokia's affirmative defenses in Investigation No. 337-TA-704 a short time before the hearing in Investigation No. 337-TA-710, without HTC having any opportunity to be heard. While HTC would be legally entitled to proceed on a clean slate in this Investigation, Apple will already have had the benefit of a trial run at the case, and the ALJ may have difficulty in not deferring to or at least favorably considering his colleague's earlier decisions on issues that have been considered in considerable detail in the 704 Investigation without HTC's participation. These problems may be amplified if early initial determinations are granted and reviewed in the 704 Investigation.

In addressing the identical situation that HTC now faces, Chief Judge Luckern held:

The administrative law judge finds that Nokia would face significant prejudice if the undersigned in the 601 investigation were to construe certain claims of the '004, '966 and '579 patents in issue, assess the patents' validity and enforceability, make findings regarding InterDigital's alleged domestic industry as to those patents and rule on certain affirmative defenses as to those patents in which Nokia is not a respondent a short-time before the identical issues were to be heard in the '613 investigation in which Nokia is a respondent.

3G Handsets, Order No. 5 at 11 (emphasis added).

The simple means to cure this significant prejudice is to consolidate the Investigations, allow HTC to participate meaningfully in addressing Apple's allegations the first time, and decide these common issues only once.

VI. APPLE WILL NOT BE PREJUDICED BY FULL CONSOLIDATION

Although it may be slow to recognize them, Apple will also realize substantial efficiencies in a consolidated investigation and can only complain about the short delay to the first investigation caused by its own circumvention of the Commission's policy of naming all known respondents in a single investigation by attempting to pursue separate investigations arising under the same subject matter and patent claims. Both Nokia and HTC were importing and selling accused telephone handsets in the United States well before the complaint in the 704 investigation was filed. Consequently, the minimal delay to the first investigation necessary to bring the consolidated investigations in line was solely a result of the tactical timing chosen by Apple to file the second complaint.

Apple's arguments as to patent validity, claim construction, domestic industry, and infringement will be similar in both Investigations. Accordingly, Apple stands to benefit from the same efficiencies that would be achieved by the Commission and by the respondents. For example, Apple will not have to suffer redundant discovery, because Nokia and HTC are likely to seek similar document production from Apple and seek to depose largely the same Apple witnesses and experts. Furthermore, Apple will be spared the burden of reproducing the same trial exhibits, crafting duplicative pre- and post-hearing submissions, and participating in two evidentiary hearings featuring the same witnesses and covering ostensibly the identical factual and legal issues.

VII. COMPLETE CONSOLIDATION IS PREFERABLE TO PARTIAL CONSOLIDATION

Only complete consolidation fully resolves the problems associated with current state of affairs while maximizing efficiency and conserving the Commission's resources. Given the

overlap in technology among all of the asserted patents, partial consolidation as suggested by the Staff carries with it many of the inefficiencies present with the current situation that can be eliminated by complete consolidation. Partial consolidation of the common patents into one of the existing investigations also means that at least one respondent must face two complete investigations on substantially related technology. Partial consolidation means that two ALJs need to become versed in complex object-oriented software technology, from which they will be expected to deliver similar or at least consistent determinations. And partial consolidation means two appearances by the same experts, fact witnesses and third parties at the hearing and in depositions. But full consolidation results in a single Investigation means that a single ALJ can manage as he sees fit, without regard to a pending investigation before a different ALJ. Full consolidation prevents the inherent prejudice accruing to the respondent whose investigation proceeds second. Finally, full consolidation means a single final initial determination written by a single ALJ that the Commission can review as a whole.

From the Staff's separate motion, it is apparent that the only issue holding back the Staff's complete endorsement of the full consolidation option is the potential delay to full resolution of the Investigations that could inure to management of a consolidated, 14 patent investigation. See Staff's Mot. at n.3 ("The Staff agrees with HTC and Nokia that complete consolidation of the 704 and 710 investigations would address many of the problems with the current arrangement of the two investigations, but is concerned that complete consolidation would likely require an exceptionally long target date."). Respondents do not believe this concern is warranted. First, any inherent delay from consolidation was caused by Apple's tactical behavior. As noted by Judge Luckern noted in the 613 investigation, "it is complainants who, through the filing of a complaint in March 2007 and another complaint in August 2007, put identical patents and

identical claims in issue in two investigations." 3G Handsets, Order No. 5 at 9. Had Apple started by naming both Nokia and HTC as respondents, delay would not even enter the picture.

However, respondents believe that, without prejudicing respondents' rights to defend themselves in the consolidated Investigation, a consolidated investigation can be managed in an efficient manner that results in resolution of the complete investigation in approximately the same time period as would be required to litigate the investigations separately and without unreasonable delay. Indeed, the Commission has smoothly and effectively run several Investigations involving more than 10 patents. *See, e.g.*, 337-TA-452 (11 patents with a 19 month target date); 337-TA-557 (14 design patents with a 17 month target date); 337-TA-565 (11 patents with a 19 month target date).


VIII. CONCLUSION

Pursuant to 19 C.F.R. §§ 201.7(a) and 210.15, full consolidation of the 337-TA-704 and 337-TA-710 Investigations is appropriate and warranted. There is considerable overlap of legal, factual, technological and procedural issues in both investigations. The parties, technology, patents, claim construction arguments, validity arguments, witnesses, evidence, domestic industry products, and the respondents' anticipated defenses in the two investigations are all identical or substantially related. Accordingly, for the reasons stated herein and in the Staff's motion, consolidation of the 337-TA-704 and 337-TA-710 would simplify and expedite the Commission's proceedings, make more efficient use of Commission resources, spare both the Complainant and Respondents from the time and expense of duplicative discovery, proceedings, and briefings, and eliminate the significant prejudice to HTC from potentially having some key issues in this investigation substantially determined before it has the opportunity to prepare its

defenses and be heard. Investigation No. 337-704 should therefore be consolidated with Investigation No. 337-TA-710 before a single Administrative Law Judge.

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:

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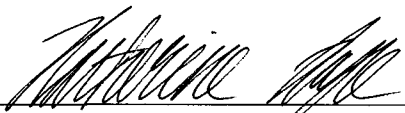

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EXHIBIT 3

Exhibit 3

Asserted Against Nokia		Asserted Against HTC	
C.A. No. 09-791 GMS	C.A. No. 09-1002 GMS and 337-TA-704	C.A. No. 10-166 RK and 337-TA-710	C.A. No. 10-167 RK
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			
5,848,105			5,848,105
	5,915,131	5,915,131	
	5,920,726		5,920,726
		5,929,852	
		5,946,647	
	5,969,705	5,969,705	
6,189,034 B1			
6,239,795			
		6,275,983	
	6,343,263	6,343,263	
	6,424,354		6,424,354
			7,362,331
7,383,453 B2			7,383,453
7,469,381 B2			7,469,381
			7,479,949
			7,633,076
			7,657,849
	RE 39,486	RE 39,486	

EXHIBIT 4

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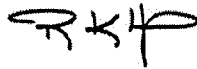
**Re: *Apple Inc., et al. v. High Tech Computer Corp., et al.*, C.A. No. 10-166 RK
Apple Inc. v. High Tech Computer Corp., et al., C.A. No. 10-167 RK**

***Nokia Corporation v. Apple Inc.*, C.A. No. 09-791 GMS
Nokia Corporation v. Apple Inc., C.A. No. 09-1002 GMS**

Your Honor:

We write to you in your capacity as Chief Judge of the District Court of Delaware. Our firm, along with that of Kirkland & Ellis LLP, is currently involved on behalf of the Plaintiffs in the above referenced *Apple v. HTC* matters, C.A. Nos. 10-166 and 10-167 which are presently before Judge Kelly of the Eastern District of Pennsylvania (sitting by designation). Two older matters in this same District – *Nokia v. Apple*, C.A. Nos. 09-791 and 09-1002 – are presently assigned to Your Honor. We write to advise the Court that it has come to our attention that eleven of the twenty patents from the more recent Apple matters against HTC are asserted in the counterclaims for the earlier Nokia matters. These four matters involve some of the same technology and we believe, therefore, that they should be identified as related cases.

Respectfully,



Richard K. Herrmann (I.D. #405)
rherrmann@morrisjames.com

RKH/sch

cc: All Counsel of Record (via email)

Other Documents

1:10-cv-00166-RK Apple Inc. et al v. High Tech Computer Corp. et al
INTRACIRCUIT, PATENT, VACANTJUDGESHIP

U.S. District Court

District of Delaware

Notice of Electronic Filing

The following transaction was entered by Herrmann, Richard on 3/24/2010 at 5:26 PM EDT and filed on 3/24/2010

Case Name: Apple Inc. et al v. High Tech Computer Corp. et al

Case Number: 1:10-cv-00166-RK

Filer:

Document Number: 5

Docket Text:

Letter to The Honorable Gregory M. Sleet from Richard K. Herrmann regarding related actions. (Herrmann, Richard)

Case Name: Apple Inc. v. High Tech Computer Corp. et al

Case Number: 1:10-cv-00167-RK

Filer:

Document Number: 5

Docket Text:

Letter to The Honorable Gregory M. Sleet from Richard K. Herrmann regarding related actions. (Herrmann, Richard)

1:10-cv-00166-RK Notice has been electronically mailed to:

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1:10-cv-00166-RK Notice has been delivered by other means to:

1:10-cv-00167-RK Notice has been electronically mailed to:

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b989ae39ca23827da367952fae76aa6c30e9a73135bc7bcf9b89c7a4edf4]]

EXHIBIT 5

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

**Before The Honorable Charles Bullock
Administrative Law Judge**

In the Matter of

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

Investigation No. 337-TA-704

**NOKIA'S RESPONSE TO THE COMMISSION INVESTIGATIVE
STAFF'S MOTION FOR PARTIAL CONSOLIDATION OF
INVESTIGATION NOS. 337-TA-704 AND 337-TA-710**

Pursuant to 19 C.F.R. § 210.15, Respondents Nokia Corporation and Nokia Inc. ("Nokia") respond to the Commission Investigative Staff's ("Staff") motion for partial consolidation of Investigation Nos. 337-TA-704 and 337-TA-710 (Mot. Dkt. No. 704-002).

Nokia and the Staff are in full agreement that consolidating the 704 and 710 Investigations in some manner is necessary and would eliminate the possibility of inconsistent decisions and promote greater judicial efficiency. The Staff further agrees with Nokia that complete consolidation would address the problems with the current procedural posture of the two investigations (Staff Mot. at 5 n.3). The Staff's sole concern with complete consolidation is that it "would likely require an exceptionally long target date" (*id.*). This concern, however, may have been partially attributable to the fact that at the time the Staff filed its motion, the target date and procedural schedule for the 710 Investigation had not been set.

On April 19 and 20, 2010 Judge Charneski issued Order Nos. 6 and 7 in the 710 investigation, setting an 18-month target date and procedural schedule. *See* 337-TA-710, Order

No. 6 at 2; Order No. 7 (Exs. A and B). Given that the 18-month target date in the 710 Investigation is not "exceptionally long" under Commission standards, Nokia submits that the Staff's concern would be addressed by full consolidation under a similar schedule here.

Consolidation of the two investigations would also alleviate any purported prejudice claimed by Apple. Contrary to Apple's statement that "the consolidation proposed by Respondents, unsurprisingly, will move the date back for both" (Apple Resp. at 2), neither respondent seeks a consolidated target date beyond 18 months.

The lack of prejudice to Apple from consolidation of the two investigations is further illustrated by the positions taken by Apple in the 701 investigation, in which Apple is a respondent. In sharp contrast to Apple's claim that it "suffers a continuing and irreparable injury every day that infringing goods are imported by Nokia and HTC" (Apple Resp. at 11), in the 701 investigation Apple took the position that a complainant cannot suffer significant harm when the accused products do not compete with the domestic industry products (Ex. C, Apple Resp. to Mot. for Reconsideration at 5). Because Apple is relying on its Macintosh computers to satisfy the domestic industry requirement for twelve of the fourteen patents-at-issue in the 704 and 710 investigations, under Apple's reasoning the accused mobile phones should "pose no threat" to Apple's business in the United States (*see id.*).

In the 701 investigation Apple also took the position that a complainant cannot show prejudice when any potential delay is the result of its own actions (*see Ex. C, at 4*). This principle is clearly applicable here. Apple made the strategic choice to file two separate yet largely overlapping investigations. Any purported prejudice resulting from consolidation would be of Apple's own doing. Such self-made harm is insufficient to outweigh the benefits of consolidation.

Even absent consolidation during the investigatory phase, the Commission is unlikely to issue its final determination in this investigation in advance of its determination in the 710 investigation due to the five overlapping patents. Putting the investigations on the same procedural track and before the same ALJ from the start resolves the difficult issues inherent in having the investigations proceed separately – *i.e.*, the substantial overlap in legal, factual and procedural issues, including substantial overlap among the parties, technology, asserted patents and claims, claim construction arguments, validity arguments, witnesses, third parties, evidence, domestic industry products, and the respondents' defenses – which were presented by both the Staff and Nokia in their motions, and that were largely avoided in Apple's response thereto.

In attempting to suggest that consolidation is not appropriate, Apple's response cites to several prior decisions in which consolidation was not granted. None of these decisions, however, involved the assertion of identical patents and claims by the same complainant in both investigations. In fact, *Certain NAND Flash Memory Devices and Products Containing Same*, Inv. No. 337-TA-553, specifically cited by Apple in its response, states:

Although the 552 and 553 investigations may in some respects involve certain same or similar products, neither of the two Hynix patents asserted in this investigation is asserted in the 552 investigation, and none of the three Toshiba patents asserted in the 552 investigation is asserted here. The fact that the 552 and 553 investigations are based on disparate patents weighs heavily against consolidation.

Id., Order No. 3 at 9. It is for this very reason that Chief Judge Luckern in *3G Mobile Handsets* distinguished several investigations, including *Certain Programmable Logic Devices and Products Containing Same*, 337-TA-453, upon which Apple also relies in its response, reasoning that "in all of those investigations identical patent claims were not in issue." *3G Mobile Handsets and Components*, Inv. No. 337-TA-613, Order No. 5 at 9 (Oct. 24, 2007). That the 704 and 710 Investigations involve identical patents and identical claims asserted by the same

complainant weighs heavily in favor of consolidation.

Because a fully consolidated investigation can be completed within 18 months, full consolidation remains a better and more efficient option than the partial consolidation to resolve the difficult issues raised by Apple's deliberate strategy of filing sequential investigations on the same technology and patents. However, partial consolidation of the investigation, by bringing the HTC respondents into the 704 investigation for purposes of the overlapping patents and on an 18 month procedural track – is still preferable to the status quo.

Dated: April 23, 2010

Respectfully Submitted



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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:

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Dated: April 23, 2010



Rosemary Underwood

EXHIBIT 6

**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

**HTC'S REPLY TO APPLE'S OPPOSITION TO THE STAFF'S MOTION FOR
PARTIAL CONSOLIDATION OF INVESTIGATION NOS. 337-TA-704 AND 337-TA-710
(MOTION DOCKET NO. 710-1)**

Pursuant to 19 C.F.R. § 210.15, Respondents HTC Corp., HTC America, Inc. and Exedeia, Inc. (collectively "HTC") submit this Reply to Apple's Opposition to the Staff's Motion for Partial Consolidation of Investigation Nos. 337-TA-704 and 337-TA-710 (Motion Docket No. 710-2).¹

This Reply is necessary because Apple's Opposition trivializes the significant prejudice HTC faces, and improperly suggests that any such prejudice could be simply alleviated by permitting HTC to participate in the upcoming *Markman* hearing in the 704 Investigation scheduled to begin June 14. In opposing partial consolidation Apple also relies on prior decisions that have been specifically rejected in this context. Finally, Apple improperly alleges that HTC is simply seeking to cause delay through consolidation. HTC, however, is seeking to avoid the significant prejudice that would result if the 704 and 710 Investigations are not partially consolidated.

¹ On April 22, 2010, the ALJ issued Order No. 8 denying HTC's Motion for Full Consolidation. Apple continues to oppose partial consolidation.

As HTC discussed in its Motion for Full Consolidation, HTC will suffer significant prejudice if Judge Bullock, in the 704 Investigation, issues his upcoming *Markman* ruling construing the identical claims of identical patents asserted against HTC without HTC ever having had any opportunity to be heard. As Apple readily admits, those claim construction rulings will then drive the parties' infringement and validity contentions. Based on those contentions, Judge Bullock will make rulings regarding the validity of the identical patents asserted against HTC. Thus, absent consolidation, HTC will have had no input on the critical claim construction issues and validity contentions and evidence that will form the basis of Judge Bullock's determinations with respect to the very same patents and claims asserted against HTC.

Apple trivializes this prejudice and improperly suggests it could be alleviated because Apple would not object to HTC's participation in the upcoming *Markman* hearing in the 704 Investigation. Such a suggestion is unworkable and prejudicial to HTC, and has already been rejected by Chief Judge Luckern when faced with the same issue. Indeed, in *3G Mobile Handsets and Components*, 337-TA-613, Respondents argued the significant prejudice they would face if the identical patents and claims asserted against them were construed in a prior Investigation without any opportunity to be heard. Complainant raised the same argument Apple does now in suggesting that any such prejudice could be alleviated by Respondents' participation in the claim construction briefing of the earlier investigation:

Your Honor, there could be-- as long as we're thinking of other possible alternatives, I'm not sure that there is anything to prevent you from allowing Nokia, for example, to present claim-construction arguments around the same time as the prehearing statements are due in the 601 case. If you want to let them file a paper on what their proposed claim construction should be, and give us a chance to respond to it, I don't know that there is anything that prevents you from doing that without consolidating the cases.

Id., Order No. 5 at 11, citing Oral Hearing Tr. at 192.

Chief Judge Luckern specifically rejected this argument, acknowledging that he could not render a claim construction ruling without proper context, including relevant discovery from the respondent in the latter investigation. Thus, he found that consolidation, as opposed to permitting the latter respondent to participate in claim construction briefing, to be the only way to alleviate the significant prejudice on the latter respondent. *Id.* at 12-14.

Likewise, Apple's argument must be similarly rejected. Indeed, there currently is no mechanism by which HTC could participate in the 704 Investigation other than through partial consolidation. Further, HTC has not received any discovery in the 704 Investigation, nor has it provided any discovery in that Investigation. To suggest that HTC could now, suddenly, participate in a *Markman* process where the parties' claim constructions are due in two weeks, briefing on claim construction is due in three weeks, and a hearing is just over a month away is not only impractical but equally prejudicial. As in *3G Mobile Handsets*, the only cure for the significant prejudice HTC will suffer is partial consolidation.

Apple also trivializes the prejudice to HTC by arguing that "Judges all the time have to deal with issues that may have been ruled on, in one form or another, by another Judge." Apple Opposition at 13. But Apple fails to understand that the ALJ's rulings are subject to Commission review. Thus, absent consolidation, HTC may be faced with a situation where the Commission has already made a final determination on patents asserted against HTC, without any opportunity for HTC to be heard. Conversely, the Commission may recognize that the ALJs would be issuing two independent analyses of identical patents and thus delay any final determination in either Investigation in order to reconcile potentially conflicting rulings, perhaps even requiring

remand in at least one of the Investigations—a situation that likely neither the Commission nor the ALJs want to face.

In attempting to suggest that partial consolidation is not appropriate, Apple further cites to several prior decisions in which consolidation was not granted. But Apple ignores the key reason why consolidation was not granted in those investigations, but was granted in *3G Mobile Handsets*, and should be granted here. Specifically, none of the investigations Apple cites involved the assertion of identical patents and claims by the same Complainant in both investigations. It is for this very reason that Chief Judge Luckern in *3G Mobile Handsets* distinguished several investigations, including *Certain Programmable Logic Devices and Products Containing Same*, 337-TA-453, upon which Apple relies in its Opposition, reasoning that “in all of those investigations identical patent claims were not in issue.” *3G Mobile Handsets*, Order No. 5 at 9. Yet each of the cases Apple relies upon in its Opposition do not involve identical patents asserting identical claims in both investigations. In fact, *Certain NAND Flash Memory Devices and Products Containing Same*, Inv. No. 337-TA-553, specifically cited by Apple in its Opposition, states:

Although the 552 and 553 investigations may in some respects involve certain same or similar products, neither of the two Hynix patents asserted in this investigation is asserted in the 552 investigation, and none of the three Toshiba patents asserted in the 552 investigation is asserted here. The fact that the 552 and 553 investigations are based on disparate patents weighs heavily against consolidation.

Id., Order No. 3 at 9 (emphasis added). Likewise, the fact that the 704 and 710 Investigations involve identical patents and identical claims asserted by the same Complainant weighs heavily in favor of consolidation with respect to those identical patents.

Finally, Apple suggests that HTC is merely seeking delay through consolidation. Yet both HTC and the Staff agree that consolidating the 704 and 710 investigations in some manner is necessary and would eliminate the possibility of inconsistent decisions and promote greater judicial efficiency. Curiously, Apple does not accuse the Staff of improperly seeking delay. Rather, Apple claims that partial consolidation would involve inherent delay. Apple Opposition at 10.

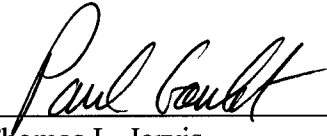
On April 19 and 20, 2010 however, the ALJ, issued Order Nos. 6 and 7 setting an 18-month target date and procedural schedule Order No. 6 at 2; Order No. 7. Given that the ALJ's 18-month target date in this Investigation is not "exceptionally long" under Commission standards, HTC submits that Apple's concerns regarding "inherent delay" have been addressed, and partial consolidation under that schedule is appropriate.

Due to the significant prejudice to HTC, the substantial overlap in legal, factual and procedural issues, including substantial overlap among the parties, technology, asserted patents and claims, claim construction arguments, validity arguments, witnesses, third parties, evidence, domestic industry products and the respondents' defenses, Apple should not expect the Commission to issue its final determination in this investigation in advance of its determination in the 704 investigation, even without partial consolidation. Putting the identical patents in the Investigations on the same procedural track and before the same ALJ from the start resolves the difficult issues inherent in having the Investigations proceed separately that were presented by the Staff in its motion, and that were largely avoided in Apple's response thereto. Because a partially consolidated Investigation can be completed within the 18-month scheduled in this Investigation, partial consolidation is a better and more efficient option to resolve the difficult issues raised by Apple's deliberate strategy of filing sequential investigations on the same

technology and patents.

Dated: April 23, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

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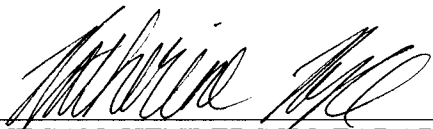
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