

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

MOTOROLA MOBILITY, INC.,	
	Plaintiff,
v.	
APPLE INC.,	
	Defendant.

JURY TRIAL DEMANDED

Consolidated Cases  
Case No. 1:10-cv-23580-RNS  
Case No. 1:12-cv-20271-RNS

APPLE INC.,	
	Counterclaim Plaintiff
v.	
MOTOROLA MOBILITY, INC., HTC CORPORATION, HTC AMERICA, INC., ONE & COMPANY DESIGN, INC., and HTC AMERICA INNOVATION INC.,	
	Counterclaim Defendants.

**REPLY IN SUPPORT OF HTC COUNTERCLAIM DEFENDANTS'  
MOTION TO TRANSFER VENUE**

## I. INTRODUCTION

In its opposition, Apple lauds the benefits of centralizing all litigation related to the asserted patents before a single judge. But its actions belie any commitment to such efficiencies. By asserting the ‘849 patent against HTC in Delaware, and subsequently asserting the ‘849 and the related ‘721 patent in this case, Apple ensured that multiple judges would need to learn the same underlying technologies, issue overlapping Markman rulings, and consider the same invalidity arguments. Apple’s opposition does nothing to refute the substantial overlap between the claims it has asserted against HTC in Delaware and those asserted in this case, including that:

- All or nearly all of the same accused HTC products are at issue in both sets of litigation.
- Eight of the twelve named inventors on the patents asserted against HTC in this action are also named inventors on the patents asserted in Delaware.
- Many of the patents at issue in Delaware relate to graphical user interface technologies, like five of the six patents at issue here. Indeed, six of the patents at issue in Delaware share Primary Classifications—assigned by the PTO to indicate “the main inventive concept” of the invention as a whole—in common with the patents in suit.
- One of the patents asserted against HTC in Delaware targets the same functionality and has the same inventors, specification, figures, and overlapping claim terms as one of the patents asserted against HTC in this action.
- Even for the patents that Apple insists involve technologies other than graphical user interface technologies, there would be overlapping damages evidence and discovery. Given that the accused products are the same, Apple presumably intends to target the same damages base.

In contrast, Apple’s allegations against Motorola and HTC in this action share little in common aside from the mere fact that six of the *twenty-two* patents at issue are asserted against them both. And recent Federal Circuit authority holds that the mere assertion of the same patents against different parties in a single venue does not override all other factors favoring transfer.

Apple’s true motivation for attempting to drag HTC belatedly into its ongoing litigation with Motorola before this Court is clear—it is dissatisfied with Chief Judge Sleet’s determination that the Delaware Actions<sup>1</sup> should be stayed pending resolution of the related, ongoing, and expansive war between Apple and HTC in the ITC. But Apple should not be permitted to impose upon HTC the substantial costs associated with simultaneously defending related lawsuits in venues across the country simply because Apple has become disenchanted with a court it once praised for “its ability to manage [large complex patent infringement] cases.” *See* Decl. of Rebekah Punak in Supp. of Mot. to Transfer (Dkt. 98-1) (“Punak Decl.”), Ex.Q, at 9. Apple’s claims against HTC should be severed and transferred.

## II. ARGUMENT

### A. The first-filed rule applies and requires transfer.

In its opposition, Apple asserts that the first-filed rule applies only where identical claims are asserted in multiple actions. This is not the law. Apple’s sole support for this proposition is a sentence from *Merial Ltd. v. Cipla Ltd.*, Nos. 2011-1471, 2011-1472, 2012 U.S. App. LEXIS 10982 (Fed. Cir. May 31, 2012), in which the court observed that the first-filed rule applies “when multiple lawsuits involving the same claims are filed in different jurisdictions.” *Id.* at \*34. Just because *Merial* involved application of the first-filed rule to cases involving the same patent and two of the same parties (*id.* at \*4, 12-13) does not mean that the rule is limited to those scenarios. *Merial* does not hold—or even suggest—that a lack of complete overlap precludes

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<sup>1</sup> For purposes of this reply brief, the “Delaware Actions” shall refer collectively to *Apple Inc. v. HTC Corp. et al.*, No. 10-CV-00166 (D. Del. March 2, 2010), *Apple Inc. v. HTC Corp. et al.*, No. 10-CV-00167 (D. Del. March 2, 2010), *Apple Inc. v. HTC Corp. et al.*, No. 10-CV-00544 (D. Del. June 21, 2010); *Apple Inc. v. HTC Corp. et al.*, No. 11-CV-00611 (D. Del. July 11, 2011). Yet another HTC-Apple case, *HTC Corp. v. Apple Inc.*, Case No. 1:11-CV-00785-GMS (D. Del. Sept. 7, 2011) (hereafter “*Delaware V*”), is currently proceeding before Judge Sleet in Delaware and is not subject to his stay order.

application of the rule. *Id.* at \*34-36. Given the substantial body of federal case law holding that the first-filed rule applies in circumstances where the claims at issue *are not* identical, it is highly unlikely that the Federal Circuit intended to alter that standard without any analysis or even an acknowledgment that it was doing so. *See Lear Siegler Servs. v. Ensil Int'l Corp.*, No. SA-05-CA-0679-XR, 2005 U.S. Dist. LEXIS 32050, \*6 (W.D. Tex. Sept. 20, 2005) (actions “need not be identical for the first-to-file rule to apply”); *Sony/ATV Music Publ’g, LLC v. KTS Karaoke, Inc.*, No. 3-12-0089, 2012 U.S. Dist. LEXIS 52825, \*3-4 (M.D. Tenn. Apr. 16, 2012) (same); *Supervalu Inc. v. Exec. Dev. Sys.*, No. CV-06-329, 2007 U.S. Dist. LEXIS 3141, \*3 (D. Idaho Jan. 12, 2007) (same).

Nor is it true that the first-filed rule applies only where the result of one action would be dispositive of the result in another action.<sup>2</sup> The sole case that Apple relies on for that proposition, *United States v. 22.58 Acres of Land*, No. 2:08-cv-180, 2010 WL 431254 (M.D. Ala. Feb. 3, 2010), actually holds that “the crucial inquiry is whether the parties and issues substantially overlap.” *Id.* at \*5. And any such requirement would be inconsistent with the Eleventh Circuit’s articulation of the rule in *Manuel v Convergys Corp.*, 430 F.3d 1132 (11th Cir. 2005), in which the court observed: “Where two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule.” *Id.* at 1135.

In reality, numerous courts in the Eleventh Circuit and elsewhere have applied the first-filed rule in circumstances similar to those here, including Judge Ungaro earlier in this action.

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<sup>2</sup> Even if such a requirement did exist, it would be satisfied here. Given the substantial overlap between the ‘721 patent (asserted against HTC in this action) and the ‘849 patent (asserted against HTC in Delaware), many of the same non-infringement and invalidity arguments are likely to be dispositive of both claims. The damages issues for these two patents are also likely to be the same.

*See Motorola v. Apple*, No. 1:10-cv-23580-RNS (hereafter “*Motorola I*”), Dk. 85; *see also Aventis Pharm. Inc. v. Teva Pharm. USA Inc.*, No. 2:06-CV-469, 2007 WL 2823296, \*2 (E.D. Tex. Sept. 27, 2007) (granting accused infringers’ motion to transfer where first-filed action involved same accused products but different patents); *Fujitsu Ltd. v. Nanya Tech. Corp.*, No. C 06-6613CW, 2007 U.S. Dist. LEXIS 13132, \*9 (N.D. Cal. Feb. 9, 2007) (applying first-filed rule where related action involved additional patents and additional causes of action). In denying Apple’s motion to transfer, Judge Ungaro found that the patents at issue in the later-filed Wisconsin actions “involve technologies that have some similarities but . . . also have significant dissimilarities.” *Motorola I*, Dk. 85 at 9-11. He nonetheless applied the first-filed rule and denied transfer, noting that Apple failed to show any “compelling circumstances” sufficient to warrant an exception. *Id.* at 10. Here, the first-filed rule creates a strong presumption in favor of transfer because all of the Delaware Actions were filed before Apple asserted its counterclaims.

**B. Apple ignores the substantial overlap between its claims in this action and in the Delaware Actions.**

Irrespective of the first-filed rule, however, considerations of judicial economy and the interests of fairness strongly favor transfer. Apple spends much of its opposition on a straw man argument that *some* of the patents asserted in the Delaware Actions involve technologies unrelated to the patents at issue here. Given that Apple has asserted twenty-six patents against HTC in Delaware, it is hardly surprising that some of those patents involve some unrelated technologies. The fact remains, however, that many of the technologies at issue do overlap. The ‘849 patent, asserted against HTC in Delaware, shares the same specification, the same figures, the same inventors, and overlapping claim terms in common with the ‘721 patent, asserted against HTC in this action. Many of the other patents asserted in Delaware relate to graphical user interface technologies, like five of the six the patents asserted against HTC here. The same

accused products are at issue in both sets of litigation and thus there will inevitably be overlapping damages issues related to lost profits and sales.<sup>3</sup> And Apple does not dispute that the patents asserted against HTC in this case share Primary Classifications in common with six of the patents asserted in Delaware.

Apple's opposition attempts to downplay the significance of the PTO classifications, but the Patent and Trademark's "Primary Classification" is "indicative of the invention as a whole or the main inventive concept using the claims as a guide." *See* Decl. of Simona Agnolucci in Supp. of HTC's Reply Mot. to Transfer Venue (hereafter "Agnolucci Decl."), Ex. A, § 1.4.5. In addition to the "Primary Classification," at the examiner's discretion a patent may be assigned many more "Secondary Classifications" that relate to "other noninvention information thought to have particularly good search value." *Id.* at § 1.4.6. Apple lists twelve patents in its reply brief that purportedly illustrate the diverse nature of patents assigned to a single PTO classification. Opposition at 9 & n.11. But only *two* of those patents share a "Primary Classification" in common with the patents in suit and both involve methods for entering user input on touch sensitive displays. Agnolucci Decl., Ex. C at 1:1-48, Ex. D at 1:14-68. The remaining patents are merely illustrative of the much broader range of patents that may share a common "Secondary Classification." *Id.*, Ex. B.

**C. Apple cannot avoid transfer by improperly joining HTC in a lawsuit with another party.**

Apple's primary argument against transfer is that six of the twenty-two patents at issue in this case are asserted against both Motorola and HTC. But Apple cannot avoid transfer to a

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<sup>3</sup> To the extent Apple intends to seek damages based on a reasonable royalty analysis, any such analysis inevitably will raise common issues in both this action and the Delaware Actions. HTC does not agree that the proper damages base is its whole-sale revenues.

manifestly more convenient venue simply by improperly joining HTC in a lawsuit in which some of the same patents are at issue. In *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010), the Federal Circuit made clear that the mere fact that a patentee has asserted the same patent against another party in a venue does not preclude transfer. *Id.* at 1382. Rather, the court found that where, as here, many of the asserted patents do not overlap, different products are targeted, and the actions against the alleged infringers are in their infancy, the overlap does not significantly weigh against transfer. *Id.*; see also *In re Verizon Business Network Services Inc.*, 635 F.3d 559, 562 (Fed. Cir. 2011) (“To interpret § 1404(a) to hold that any prior suit involving the same patent can override a compelling showing of transfer would be inconsistent with the policies underlying § 1404(a)”).

Indeed, when the tables were turned, Apple successfully sought to transfer claims asserted against it to another forum, despite the fact that the same patents were being litigated against other parties in the forum in which the suit was filed. In *GPNE Corp. v. Amazon.com, Inc.*, No. 11–00426 SOM–RLP, 2012 WL 1656923 (D. Haw. May 9, 2012), the court granted Apple’s and other defendants’ motions to transfer, explaining:

[P]atent disputes often involve a certain degree of parallel litigation. Patent holders commonly assert infringement claims involving the same patent against different defendants in multiple jurisdictions. Discrepancies can be avoided by application of the doctrine of collateral estoppel and by appealing decisions to the Court of Appeals for the Federal Circuit. In addition, the severed actions, while involving the same patents, may well involve significant noncommon issues. The groups of Defendants in each of the now-severed actions are not related to one another. That is, RIM Defendants are not related to Apple. Each case involves different products. The “related” nature of the cases may, in fact, be attenuated.

*Id.* at \*7-8 (internal citations and quotations omitted). As in *GPNE*, the mere fact that Apple has asserted the same six patents against HTC and Motorola does not mean that those claims raise “precisely the same issues.” Far from it, Apple’s claims against HTC and Motorola involve allegations that different (and competing) parties infringed the patents in suit through the sale of

different accused products that were developed, manufactured, and marketed independently.<sup>4</sup> In contrast, Apple’s claims against HTC in Delaware and in this action involve the same parties, the same accused products, many of the same inventors, a related patent, and related technologies. Indeed, HTC faces the very real prospect of inconsistent judgments if it litigates allegations of infringement of the ‘849 patent in Delaware and the ‘721 patent in Florida.

**D. Apple’s attempt to evade the stay in the Delaware Actions is improper.**

There is no merit to Apple’s argument that the stay in the Delaware Actions militates against transfer. Rather, the opposite is true. Over the past two years, Chief Judge Sleet has overseen the actions between HTC and Apple in Delaware and has coordinated those actions with the parallel proceedings between the parties in the ITC. His order imposing a stay on the Delaware Actions is a reasonable attempt to maximize efficiency and minimize the burden on the courts and parties from duplicative litigation efforts. *See* Punak Decl., Ex. A, 6 n.16 (Dk. 99-1). In characterizing the stay as having been imposed because “it did not make sense to proceed on one part of the case while another part was subject to a mandatory stay,” Apple once again gets its facts wrong. Opposition at 12. Chief Judge Sleet stayed Case No. 1:10-cv-00544—the case in which the ‘849 patent is asserted against HTC—despite the fact that none of the asserted patents were directly implicated in the ITC actions and thus not subject to a mandatory stay. In

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<sup>4</sup> As discussed in HTC’s Motion to Sever briefing, none of the accused HTC products overlap with the accused Motorola products and the accused functionality relates largely to features developed independently by HTC and its contractors. *See* Dkts. 83, 96. Apple’s opposition provides no new evidence to contradict these facts. Rather, Apple’s opposition gets two important facts wrong. First, Apple argues that “volume control pop-up display is not accused in Apple’s complaint” (Opp. at 7 n.10), but Apple’s counterclaims specifically accuse the volume control display (Dkt. 95, ¶ 330). Second, Apple argues that it did not rely on the contributions of an individual named Vladimir Chhtetkine as purported evidence of HTC’s contributions to Android (Opp. at 7 n.10), but if that were the case, then why were the materials submitted to the Court? Rather than simply admit its overzealous search for evidence lead to a search for “htc” that turned up Mr. Chhtetkine submissions to Android, Apple pretends as if the entries from Mr. Chhtetkine were just for context. *See* Dkt. 93-1, Ex. 31; *see also id.* Ex. 38 at 2, 7-10, 12, 13, 15-26. Since Apple concedes these search results are irrelevant, they should be stricken.

his stay order, Judge Sleet relied not on 28 U.S.C. § 1659 but on considerations of “economy and efficiency” given the “overlap in subject matter among the patents at issue.” Punak Decl., Ex. A, 6 n.16 (Dk. 99-1). Apple’s subsequent decision to assert a patent from the same patent family against HTC in another forum, targeting the same functionality in the same accused products, is a transparent attempt to escape the effect of this order.

**E. Transfer will minimize the burdens on the parties and witnesses.**

Apple repeatedly states in its opposition brief that denying transfer will somehow result in witnesses being deposed only once. Opposition at 1, 13. But it is unclear why Apple believes this would be the case. Many of the same witnesses potentially relevant to Apple’s claims against HTC in this action are also relevant, and likely would need to be deposed, in connection with its claims against HTC in Delaware. Most notably, eight of the twelve inventors listed on the patents asserted against HTC in this case are also listed as inventors on the patents asserted against HTC in Delaware. Those inventors will be deposed in connection with the Delaware Actions regardless of whether Apple’s claims against HTC in this action are severed and transferred. In addition, given the close relationship between the ‘849 and ‘721 patents, it is highly likely that every Apple witness with information relevant to the ‘721 patent will also have information relevant to the ‘849 patent. To the extent Apple truly wants to minimize the number of depositions of these witnesses, it should agree to transfer the six overlapping patents against Motorola and HTC to Delaware.

While Apple’s multi-venue litigation strategy makes it likely that its witnesses will need to be deposed multiple times, transfer can ensure that there is no unnecessary duplication in the depositions of at least HTC’s witnesses. If Apple’s claims against HTC are transferred to Delaware, there is no reason to believe that *any* HTC witness would need to be deposed as part of the ongoing proceedings with Motorola in Florida. On the other hand, if Apple’s claims

against HTC proceed in Florida, many if not all of the HTC witnesses knowledgeable about the design, marketing, cost of production, and profitability of the accused products will be subject to multiple depositions. Because many of these witnesses are based in Taiwan, Washington, or California, the burden imposed by such duplicative discovery is substantial.

**F. Apple's choice of forum is entitled to little deference.**

Despite the fact that Apple has little connection to Florida and the operative facts giving rise to its claims did not take place in Florida, it argues that its choice of forum should be given substantial deference. Opposition at 4-6. This argument is wholly inconsistent with the position Apple took earlier in this case when it argued that Motorola's choice of forum should not be given deference because it lacked a significant connection to Florida.<sup>5</sup> Punak Decl. Ex. S at 9-10. It is also inconsistent with the governing case law. *See Cellularvision Tech. & Telecomms., L.P. v. Alltel Corp.*, 508 F. Supp. 2d 1186, 1189 (S.D. Fla. 2007) (“[W]here a plaintiff has chosen a forum that is not its home forum, only minimal deference is required, and it is considerably easier to satisfy the burden of showing that other considerations make transfer proper.”). Apple's reliance on *Omega Patents, LLC v. Lear Corp.*, No. 07-1422, 2009 U.S. Dist. LEXIS 48916 (M.D. Fla. May 27, 2009) is unavailing. In that case, the court deferred to the plaintiff's choice of forum where the products at issue were manufactured in Florida, relevant witnesses resided in Florida, relevant documents were likely to be located in Florida, and the motion to transfer was filed over a year after the action was filed. *Id.* As Apple has acknowledged, none of those circumstances exists here.<sup>6</sup>

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<sup>5</sup> Apple's characterization of Motorola's connections to Florida appears to have been mistaken. *See Motorola I*, Opp. to Mot. to Transfer (Dk. 47), at 4-5.

<sup>6</sup> Apple also argues that its choice of venue should somehow be given greater deference because, in an ITC action, HTC asserted several patents that it had purchased from Google. Opposition at 5. This argument is without citation to legal authority and strains credulity. Apple does not

**G. HTC has consistently sought to litigate Apple’s infringement claims directed at smartphones in a single venue.**

Finally, Apple implies that HTC’s request for transfer is somehow inconsistent with its opposition to Apple’s request to amend its answer to add new counterclaims in one of the pending Delaware actions. This is nonsense. On April 30, 2012, Apple filed a motion to amend its answer in *Delaware V* to assert four new claims of patent infringement against HTC. Agnolucci Decl., Ex. E. HTC opposed the motion, pointing out that it would have been unduly prejudicial to HTC and confusing for a single jury to consider those patents along with the other patents already asserted in that action. Decl. of Lawrence Lien in Supp. of Opp. Mot. to Transfer (Dk. 104-1), Ex. 12. Chief Judge Sleet agreed with HTC and denied Apple’s motion to amend. Agnolucci Decl., Ex. F. HTC did not argue—and Chief Judge Sleet did not rule—that Apple could not assert those patents in Delaware in a separate action. Quite simply, the appropriateness of Delaware as a venue in which to litigate Apple’s patent claims against HTC was not implicated in Apple’s motion to amend or in HTC’s opposition to the motion.

**III. CONCLUSION**

Apple has offered no substantive reason why this case should proceed in Florida given that four related, first-filed actions are currently pending between Apple and HTC in Delaware. The Court should reject Apple’s blatant forum shopping and grant HTC’s motion to transfer.

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argue that there is any connection whatsoever between the patents asserted by HTC in the ITC action and those asserted here. Apple also does not argue that Motorola and HTC have in any way coordinated their actions to have this action venued in Florida. And Apple’s counterclaims contain not one allegation related to any purported conspiracy, coordination, or even connection between HTC and Motorola.

Dated: July 9, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 9, 2012, I electronically filed the foregoing document with the clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the below Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

*/s/ John C. Carey*

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John C. Carey

**SERVICE LIST**

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Case No. 12-cv-20271-Scola/Bandstra  
United States District Court for the Southern District of Florida

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