IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NOKIA CORPORATION,

Plaintiff,

Case No. 10CV249

v.

APPLE INC.,

Defendant.

APPLE INC.,

Counterclaim-Plaintiff,

v.

NOKIA CORPORATION and NOKIA INC.,

Counterclaim-Defendants.

NOKIA CORPORATION'S BRIEF IN OPPOSITION TO APPLE INC.'S MOTION TO TRANSFER VENUE TO THE DISTRICT OF DELAWARE

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INTRODUCTION

On July 28, 2010, Apple filed 7 counterclaims for patent infringement against Nokia in this Court. The very next day, Apple moved to transfer every one of those claims to another court, in the District of Delaware, where Apple could have brought its newly asserted claims in the first place. Why would a party file claims in one court when it prefers to litigate them in another court? The answer here is simple – to manufacture overlap between the parties' cases, manipulate venue, and delay Nokia's case.

Apple has repeatedly attempted to complicate the parties' disputes with unnecessary claims and unwarranted procedural maneuvers. Nokia originally filed suit against Apple in Delaware to seek redress for Apple's use of intellectual property invented and patented by Nokia without payment to Nokia of any royalties for that use. Nokia's original suit in Delaware was based on 10 patents that Nokia has declared essential to one or more wireless communication standards. In response, Apple filed counterclaims in that case for Nokia's alleged infringement of 9 patents that have not been declared essential to any relevant standards, as well as non-patent counterclaims that raise complex and distinct issues relating to antitrust and contract matters. Nokia's second case against Apple in Delaware was filed as a companion suit to a parallel proceeding involving the same patents in the International Trade Commission. Despite agreeing to a stay of the second case pending resolution of Nokia's and Apple's ITC investigations, Apple moved to consolidate the stayed Delaware case with Nokia's original Delaware suit. Apple further sought to consolidate both of Nokia's Delaware cases with two actions Apple had filed in Delaware against an unrelated third-party.

In view of Apple's efforts to inflate and bog down Nokia's original Delaware action, Nokia brought this patent infringement case against its direct competitor (with

respect to certain products) and fellow large, multinational corporation in this Court to achieve resolution quickly and efficiently. True to form, Apple now seeks to delay this case by moving it from Wisconsin – a speedy jurisdiction – to Delaware – a relatively slower jurisdiction – for consolidation with five other cases. Apple claims that a transfer is in the interests of justice due to supposed overlap between this case and the parties' cases in Delaware. The overlap that Apple suggests is irrelevant, however, because it is based exclusively on either the stayed Delaware case or on Apple's improper counterclaims (claims filed in this jurisdiction apparently for the purpose of attempting to manipulate the venue analysis).

In any event, any minimal overlap between this case and the parties' Delaware actions cannot "clearly" outweigh Nokia's interest in resolving this case against its competitor quickly in the forum of its choice, particularly where a trial date in Delaware could be over a year and a half later than can be expected in this case, and where Nokia will be significantly prejudiced by such delay. Apple has not and cannot show that Delaware is clearly more convenient than Wisconsin. Accordingly, this Court should deny Apple's motion.

STATEMENT OF FACTS

I. THE 791 CASE PENDING IN DELAWARE.

The disputes between Nokia and Apple began when Nokia sued Apple in Delaware for refusing to compensate Nokia for Apple's use of Nokia's essential patents – *Nokia Corp. v. Apple Inc.*, No. 09-CV-791 (D. Del. filed Oct. 22, 2009) ("the 791 Case"). The 791 Case is based on Nokia's claims against Apple for infringing 10 patents declared essential to one or more wireless communication standards (Declaration of Coby S. Nixon in Support of Nokia's Opposition (hereinafter "Nixon Decl."), Ex. 1 ¶¶ 1-2). The

10 patents cover a wide range of technologies needed to implement the GSM, UMTS, and IEEE 802.11 standards (*id.* ¶¶ 47-69). Broadly speaking, the 10 patents include (i) wireless data patents that relate to the formation of a virtual channel, transferring data in octet form, polling codes for communication during downlink transfer, accessing the radio network, and reporting signal quality measurements; (ii) speech coding patents that relate to a multiple-stage channel coding scheme, and a postfilter for processing speech signals derived from an excitation code book and adaptive code book of a speech decoder; and (iii) security patents that relate to encryption and integrity algorithms for improved security in parallel transmissions, and ensuring secure communication during a network handover (*id.*). Apple's infringing devices include the Apple iPhone, the Apple iPhone 3G, and the Apple iPhone 3GS (*id.* ¶ 70).

Where applicable, Nokia has undertaken – in accordance with the applicable rules of the applicable standard setting organizations – to grant licenses under each of its 10 essential patents on fair, reasonable, and non-discriminatory ("FRAND") terms and conditions (*id.* ¶ 3). In the 791 Case, Nokia seeks FRAND compensation for Apple's use of Nokia's 10 essential patents, as well as declarations that the patents are infringed by Apple, that Nokia has complied with its FRAND obligations, that Apple has refused to compensate Nokia on FRAND terms, and that Nokia is entitled to an injunction until Apple pays FRAND compensation (*id.* at 29).

Apple responded to Nokia's Complaint in the 791 Case, which was based on essential patents, by asserting counterclaims for Nokia's alleged infringement of 9 non-essential patents, i.e., patents that have not been declared essential to any relevant standards (also commonly referred to as "implementation" patents), and seeking

declaratory judgments that all of Nokia's asserted patents are invalid and not infringed (*id.*, Ex. 2). Apple's 9 patents are generally directed to signal processing techniques, computer application development platforms, user interface management and control, computer interface signal processing, processor voltage manipulation for minimizing static power leakage, and object-oriented call processing and notification systems (*id.*).[1] Apple is accusing of infringement "Nokia products having USB functionality; Carbide.c++, applications developed using Carbide.c++, and phones having applications developed using Carbide.c++; Nokia handsets using the Series 40, S60, Maemo, and/or Symbian platforms; and Nokia handsets having GSM functionality" (*id.*, Ex. 3 at 3).

In addition to seeking to litigate the validity and scope of a mix of 19 patents, Apple asserted non-patent counterclaims against Nokia for breach of contract, promissory estoppel, violation of Section 2 of the Sherman Act, and declarations that Nokia's licensing offers were not FRAND, that Nokia is not entitled to injunctive relief, and that Nokia has engaged in patent misuse (*id.*). As a result, Apple inflated Nokia's 11 Count suit to an action involving 37 Counts (*id.*, Exs. 1 & 2).

Believing that Apple's non-patent counterclaims failed to state a claim (and were designed to divert attention away from free-riding off of Nokia's intellectual property), Nokia moved to dismiss them (*id.*, Ex. 12). On June 3, 2010, the Court denied Nokia's motion to dismiss. On July 1, 2010, after Apple had successfully transformed the scope of the 791 Case to include its non-essential patents and its meritless non-patent claims,

[1] For 5 of Apple's non-essential patents, the United States Patent and Trademark Office has granted Requests for Reexamination, finding that a substantial new question of patentability has been raised by the prior art submitted with the Requests (Nixon Decl., Exs. 4-8). Requests for Reexamination are pending for another 3 of Apple's non-

Nokia sought leave to amend its Complaint to add claims against Apple for infringement of 3 of Nokia's non-essential patents, for a declaratory judgment that Apple has repudiated any of the benefits of Nokia's FRAND undertakings, and, alternatively, for a declaration that Apple must pay Nokia FRAND compensation (*id.*, Ex. 13). Broadly speaking, Nokia's 3 non-essential patents in the 791 Case relate to compensating for DC voltage offsets, establishing communications between Bluetooth devices, and improving the interconnectivity between electronic devices and external devices such as chargers, headsets, or computers (*id.*, Ex. 14 ¶¶ 93-99). Apple's infringing devices include at least the Apple iPhone, the Apple iPhone 3G, Apple iPhone 3GS, the Apple iPhone 4, the Apple iPad, the Apple iPod Touch, the Apple MacBook, the Apple MacBook Pro, and the Apple MacBook Air (*id.* ¶ 188).

Under the terms of the Scheduling Order in the 791 Case, the parties' have until August 30, 2010 to amend their pleadings (*id.*, Ex. 15). The case will not proceed to trial on the patent infringement issues until May 2012 (*id.*).

II. THE 1002 CASE STAYED IN DELAWARE.

On December 29, 2009, Nokia filed a complaint against Apple in the ITC for infringing 7 implementation patents that cover key features used by Apple in its electronic devices – *In re Certain Mobile Communications and Computer Devices*, Inv. No. 337-TA-701 (U.S.I.T.C. filed Dec. 29, 2009) (the "701 Investigation") (*id.*, Ex. 16). On the same day, Nokia filed a complaint against Apple in the District of Delaware, as a parallel proceeding to the 701 Investigation, for infringing the same 7 implementation patents – *Nokia Corp. v. Apple Inc.*, No. 09-CV-1002 (D. Del. filed Dec. 29, 2009) (the

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essential patents (*id.*, Exs. 9-11). Decisions on the remaining three Requests are expected by September 3, 2010 (*id.*).

"1002 Case") (*id.*, Ex. 17). On January 15, 2010, Apple filed a complaint against Nokia Corporation and Nokia Inc. in the ITC, asserting infringement of 9 patents – *In re Certain Mobile Communications and Computer Devices*, Inv. No. 337-TA-701 (filed Jan. 15, 2010) (the "704 Investigation") (*id.*, Ex. 18).

As Apple has explained, "it is a common practice for parties to initiate simultaneous actions in the I.T.C. and a federal district court" because the ITC cannot award damages (Dkt. 13 at 4 n.2). Such a district court action is subject to an automatic stay provision under 28 U.S.C. § 1659(a) pending resolution of the parallel ITC Investigation. Accordingly, on February 12, 2010, Nokia and Apple (i) submitted a Stipulation that Apple would file counterclaims in the 1002 Case to allege Nokia's infringement of the 9 patents asserted in the 704 Investigation and (ii) requested that the Court stay all proceedings in the 1002 Case pending resolution of the 701 Investigation and the 704 Investigation (Nixon Decl., Ex. 19). On March 3, 2010, the Court granted the parties' Stipulation and stayed the 1002 Case (*id.*, Ex. 20).

III. APPLE'S ATTEMPT AT CONSOLIDATION IN DELAWARE.

On May 24, 2010, Apple sought to further complicate matters by filing a motion to consolidate the 791 Case with the parties' stayed 1002 Case and two unrelated Delaware actions brought by Apple against HTC, one of which is stayed (*id.*, Ex. 21). Since then, Apple has filed a third case against HTC, and stated that it intends to add this new case to its pending motion to consolidate (Dkt. 13 at 6 n.4). These five proceedings in Delaware presently include a total of 49 patents (20 Nokia patents currently asserted only against Apple and 29 Apple patents currently asserted against one or more of Nokia and HTC, with potential HTC counterclaims still to come), dozens of accused products from 3 international companies (Nokia, Apple, and HTC), 6 non-patent counterclaims

asserted solely against Nokia, and 2 non-patent claims asserted solely against Apple. The overlap among these cases, which involves only a subset of Apple's patent claims against Nokia and HTC, is greatly outweighed by the individual issues. Because judicial economies would be best served by litigating the actions separately, both Nokia and HTC have opposed consolidation in Delaware (Nixon Decl., Exs. 22 & 23). Apple's motion is pending.

IV. THE PARTIES' FILINGS IN WISCONSIN.

Even before Apple moved for mega-consolidation in Delaware, it became clear to Nokia that Apple was seeking to delay Nokia's original patent infringement action in Delaware by turning it into an unnecessarily complex and unmanageable lawsuit. Consequently, in order to stop Apple's continuing infringing activity, Nokia brought this action against its direct competitor (with respect to certain products), another multinational corporation, in this speedy jurisdiction. According to the most recent statistics, the median time for civil cases to proceed to trial after filing in the District of Delaware is 34 months (*id.*, Ex. 24). In this District, by contrast, the median time to trial is 15 months (*id.*, Ex. 25). Thus, Nokia may receive a trial in this District over a year and a half earlier than it would had it chosen to file this action in Delaware and at least 9 months earlier than the trial set in the 791 Case.

Nokia filed this case against Apple for infringing 5 implementation patents that reflect Nokia's research and development and achievements in the world of mobile communications (Dkt. 1 ¶ 13). In broad terms, Nokia's patents-in-suit relate to a modulator for improving transmission of speech and data, a centralized application interface for obtaining positioning data at a mobile device, and antenna configurations that improve performance and save space in mobile devices (*id.* ¶¶ 13-23). Each of

Nokia's patents-in-suit is still in force, with the earliest patent set to expire in 2018 (Dkt. 1, Ex. C, U.S. Patent No. 6,317,083). Apple's infringing devices include at least the Apple iPhone 3G, Apple iPhone 3GS, and Apple iPad 3G (*id.* ¶ 51).

Apple responded to Nokia's complaint and once again seeks to unduly complicate the issues by asserting counterclaims for Nokia's alleged infringement of 7 implementation patents and seeking declaratory judgments that all of Nokia's asserted patents are invalid and not infringed (Dkt. 10 ¶¶ 38-102). The technology at the center of Apple's asserted patents is appreciably different from, but equally as complicated as, the technology at the center of Nokia's asserted patents. Generally speaking, Apple's asserted patents relate to performing actions on detected structures in computer data, gesture sensitive buttons for graphical user interfaces, receiving and invoking situational location dependent reference information, changing the display environment when a computer system is connected to a new display device, providing a high speed data transfer connection between a computer device and a local memory, adding support for hardware or software components to a computer system, and reducing power consumption in an integrated circuit (*id.* ¶¶ 24-37). Apple is accusing of infringement the Nokia N97, N900, and N8, "Nokia mobile phones running Nokia's Ovi Maps software," and "applications and system software developed using the Nokia Qt Service Framework" (*id.* ¶¶ 39, 49, 20).

Notably, Apple has initiated patent litigation in this forum in the past. Although Apple is a California corporation with its principal place of business in California (Dkt. 13 at 7), Apple (formerly known as "Apple Computer, Inc.") selected the Western District of Wisconsin as its chosen forum in 2006 by filing a patent infringement

complaint involving 7 patents against Creative Labs, Inc., another California corporation – *Apple Computer, Inc. v. Creative Labs, Inc.*, 06-CV-0263 (W.D. Wis. filed May 16, 2006) (Nixon Decl., Ex. 26).

ARGUMENT

28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." When weighing a motion to transfer venue under Section 1404(a), a court must consider the statutory factors – the convenience of the parties and witnesses and the interest of justice – in light of all circumstances of the case. *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986). Apple bears the burden of establishing, by reference to particular circumstances, that the District of Delaware is "clearly more convenient." *Id.* at 219-20.

Apple has failed to meet its burden. Indeed, Apple appears to acknowledge that that the District of Delaware is not "clearly more convenient" by stating that the venue is merely "consistent with" the convenience of the parties and witnesses and the interests of justice (Dkt. 13 at 1). Apple has not shown that the convenience of the parties and witnesses overcomes Nokia's choice of forum and the interest of justice in affording Nokia a quick and efficient resolution in this patent infringement action against its competitor in certain product areas.

V. NOKIA'S CHOICE OF FORUM SHOULD NOT BE DISTURBED.

Although Apple contends that "Nokia's choice of forum deserves no weight in the transfer analysis" (Dkt. 13 at 10), "even when plaintiff is not litigating i[n] his home forum, his choice of forum should not be disturbed unless the transfer factors balance strongly favors defendant." *Illumina, Inc. v. Affymetrix, Inc.*, No. 09-CV-277-BBC, 2009

WL 3062786, at *2 (W.D. Wis. Sept. 21, 2009) (citing *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663-64 (7th Cir. 2003)). As demonstrated below, the balance does not favor transfer, but instead favors keeping this case in this District.

VI. THE INTERESTS OF JUSTICE WEIGH HEAVILY IN FAVOR OF THIS DISTRICT.

A. Denying Transfer Will Allow For Quick And Efficient Resolution Of This Dispute.

"The 'interest of justice' is a separate component of a § 1404(a) transfer analysis, . . . and may be determinative in a particular case, even if the convenience of the parties and witnesses might call for a different result." *Coffey*, 796 F.2d at 220. The "interests of justice" analysis focuses on whether transfer would promote the "efficient administration of the court system," including whether transfer would insure or hinder a speedy trial. *Id.* at 221.

This Court has repeatedly recognized that in suits between competitors docket speed is an appropriate, and often determinative, consideration in a Section 1404(a) analysis. *See, e.g.*, *Wins Equip., LLC v. Rayco Mfg., Inc.*, 668 F. Supp. 2d 1148, 1156 (W.D. Wis. 2009) (denying transfer of patent case between competitors and explaining that "[s]ince speed generally is considered a good thing in federal courts, *See* Fed. R. Civ. P. 1, it would not be in the interests of justice to slow this case down by transferring it to the Northern District of Ohio"); *Illumina*, 2009 WL 3062786, at *1-*6 (denying transfer of patent infringement action between competitors because defendant did not show "that the convenience of the parties and witnesses overcomes the interests of justice in affording plaintiff a speedy resolution"); *Ledalite Architectural Prods. v. Pinnacle Architectural Lighting, Inc.*, No. 08-CV-558-SLC, 2009 WL 54239, at *1, *3 (W.D. Wis. Jan. 7, 2009) (denying transfer because transferee district not shown to be clearly more

convenient, "particularly in light of the fact that plaintiff is a direct competitor that would likely face delay in resolving its patent infringement suit if the case were transferred"); *Sunbeam Prods., Inc. v. Homedics, Inc.*, 587 F. Supp. 2d 1055, 1056-59 (W.D. Wis. 2008) (denying transfer of competitor suit because "the importance of a speedy resolution to protect plaintiff's patent rights outweighs the convenience to defendant of litigating in its home district"); *Procter & Gamble Co. v. McNeil-PPC, Inc.*, No. 08-CV-251-BBC, 2008 WL 3992766, at *1-*2 (W.D. Wis. Aug. 25, 2008) (denying transfer of patent infringement case that centered on "competing products in a dynamic market" and reasoning that "[a]gainst plaintiff's desire for relative speed, defendant's showing of inconvenience is not particularly compelling"); *Fujitsu Ltd. v. Netgear, Inc.*, No. 07-CV-710-BBC, 2008 WL 2540602, at *3 (W.D. Wis. Apr. 4, 2008) (denying transfer of patent case involving competitors and explaining that "there is nothing improper with choosing to litigate in a forum that offers the possibility of a speedier trial so long as venue is proper there. In fact, the interest of justice is served by litigating a suit 'where the litigants are more likely to receive a speedy trial.'") (quoting *Coffey*, 796 F.2d at 221); *Ricoh Co. v. Asustek Computer Inc.*, No. 06-C-0462-BBC, 2007 WL 5514734, at *2 (W.D. Wis. Jan. 8, 2007) (denying transfer of competitor suit and explaining that "[f]or parties holding patents that diminish in value as they age, speed is an important consideration."); *Milwaukee Elec. Tool Corp. v. Black & Decker (N.A.), Inc.*, 392 F. Supp. 2d 1062, 1065 (W.D. Wis. 2005) (denying transfer of patent action between competitors and noting that "the relative speed with which an action may be resolved is an important consideration when selecting a venue ") (citing *Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71, 73 (1963)).

This Court has also recognized that in a patent infringement case between competitors that "centers on competing products in a dynamic market, the factor of speed takes on more importance than it might in another kind of case." *Illumina*, 2009 WL 3062786, at * 5. *See also Milwaukee Elec.*, 392 F. Supp. 2d at 1065 (explaining that "the relative speed with which an action may be resolved is particularly important in a patent infringement action 'where rights are time sensitive and delay can often erode the value of the patent monopoly.'")

Here, given the parties and the relevant market, the interests of justice are strongly served by the possibility of an earlier trial in this District. Nokia and Apple are direct competitors in certain product areas (Dkt. 1 ¶ 9). Apple's unauthorized use of Nokia's patents-in-suit allows Apple to charge less for its products because it does not have to recover the development costs of Nokia's technology. This allows Apple to obtain market share that it would otherwise not be able to obtain were its products to bear those costs. Because Nokia's patents-in-suit have not expired, Apple continues to infringe the patents each day, making it increasingly difficult for Nokia to recover the market share Apple has improperly obtained. As a result, it is extremely important to Nokia that this dispute be resolved as quickly and efficiently as possible.

Denying transfer of this case to Delaware would save significant time and allow for earlier adjudication of Nokia's patent infringement claims. Based on the most recent federal statistics, Nokia may receive a trial in this District within 15 months of filing its complaint (Nixon Decl., Ex. 25), that is, by August 2011. If this case is transferred to Delaware, however, Nokia could expect to wait another 34 months, until at least May 2013, to receive a trial (*id.*, Ex. 24). This would amount to a delay of over a year and a

half from the expected trial in Wisconsin. Even if this case was consolidated with the pending 791 Case (as Apple suggests but which, as explained below, is not likely), Nokia would not receive a trial until May 2012 (*id.*, Ex. 15), presuming the trial date is not extended due to the addition of 12 new patents. Such a trial would thus take place, at earliest, at least 9 months later than the expected trial in this district.

Because the delay in resolving this dispute would substantially affect the value of Nokia's patents and be highly prejudicial to Nokia's rights, the interests of justice weigh heavily in favor of denying transfer.

B. Any Minimal Overlap Between This Case And The Parties' Delaware Actions Is Insufficient To Weigh In Favor Of Transfer Or Consolidation.

Apple contends that transfer of this case would facilitate consolidation with the 791 Case and the 1002 Case between Nokia and Apple in Delaware, as well as the two cases between Apple and HTC in Delaware (Dkt. 13 at 12). As an initial matter, the judicial economies that Apple contends would result from a transfer are purely speculative. Apple's motion relies on a presumption that if transferred, this action will be consolidated with the other Delaware actions or at least assigned to the same judge (Dkt. 13 at 12-15). Because there is no guarantee that these things will happen, transferring this action on Apple's proffered basis could end up being all for nothing. Given the delay and resulting prejudice to Nokia that would result from a transfer, Apple's motion should not be granted on mere contingencies. *See Nercon Eng'g & Mfg. Co. v. Garvey Corp.*, No. 05-C-1339, 2006 WL 1207846, at *2 (E.D. Wis. May 1, 2006) (denying motion to transfer patent action because motion "assume[d] the occurrence of a contingency over which th[e] court ha[d] no control," namely, that the transferee court would deem the

action "related" to a prior case involving the patents-in-suit and assign the action to the particular judge having expertise with the patents.)

Even so, while it is generally desirable to try related patent cases together, this action is not sufficiently related to any of the Delaware cases to make consolidation likely or appropriate, and for the reasons given below, Apple has not met its burden of demonstrating that this action should be transferred on that basis.

First, Apple makes no meaningful attempt to argue that this case is sufficiently related to Apple's three cases against HTC, such that the litigations should be conducted in a single forum. Instead, Apple relies on the conclusory assertion that there are "significant overlaps" among the cases and the *incorrect* assertion that three of the Apple patents in this suit have been asserted against HTC in Delaware (Dkt. 13 at 6).[2] Such assertions are insufficient to meet Apple's burden to justify transfer. *See Research in Motion Ltd. v. Visto Corp.*, 457 F. Supp. 2d 708, 714 (N.D. Tex. 2006) (denying transfer where moving parties failed to meet their burden to demonstrate that the patents at issue were sufficiently related to the patents being litigated in the transferee district).

Second, Apple mistakenly relies on supposed overlap between this case and the parties' 1002 Case to support transfer (Dkt. 13 at 1). The 1002 Case, however, is stayed pending resolution of the parties' parallel ITC proceedings (Nixon Decl., Ex. 20). Because the 1002 Case cannot be litigated until the parallel ITC investigations conclude,

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[2] Of the patents Apple has asserted against Nokia in Wisconsin, only U.S. Patent Nos. 5,946,647 and 7,380,116 have been asserted against HTC in Delaware. The 647 Patent was asserted in Civil Action No. 10-CV-166 (a case that is now stayed) and the 116 Patent was asserted in Civil Action No. 10-CV-544 (Nixon Decl., Ex. 27 ¶¶ 72-79 & Ex. 28 ¶¶ 42-49). Because Apple has asserted 20 additional patents against HTC in Delaware (*see id.*, Exs. 27-29), any overlap with those cases is minimal and insufficient to justify transfer or consolidation.

this case, if transferred, would either (i) proceed on a different track from the 1002 Case, thereby rendering moot any judicial efficiencies that could be gained from transfer or (ii) be consolidated with the 1002 Case and stayed, thereby further delaying resolution of this dispute and causing Nokia extreme prejudice. Thus, the extent to which this case overlaps with the stayed 1002 Case is irrelevant for purposes of a transfer analysis.[3] As such, Apple's arguments regarding overlap in patent allegations concerning antennas and modulators should not be considered because they rely exclusively on patents asserted in the 1002 Case (*see* Dkt. 13 at 5).

Third, Apple inappropriately relies on alleged overlap involving the counterclaim patents it has asserted in Wisconsin. Because the Scheduling Order in the 791 Case gives the parties until August 30, 2010 to amend their pleadings, Apple could have amended its counterclaims in the 791 Case to assert its 7 counterclaim patents in Delaware rather than in Wisconsin. Instead, Apple filed its 7 patent counterclaims in Wisconsin then moved to transfer those claims to Delaware the very next day. Such behavior is a blatant attempt to manufacture overlap between this case and the cases in Delaware.[4] Out of fairness, Apple's arguments regarding overlap in patent allegations concerning user interfaces, device interfaces, and object oriented operating systems should all be rejected as improper because they rely exclusively on patents Apple could have asserted in the

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[3] Because nearly all of the Apple patents asserted in the 791 Case are subject to reexamination or pending reexamination requests, there is a chance that Apple's patent claims in the 791 Case will be stayed pending proceedings at the USPTO. In that event, any overlap between the Wisconsin case and Apple's patents in the 791 Case would also be irrelevant.

[4] Apple's conduct also directly contradicts the stated basis for Apple's motion – judicial efficiency. What could be more inefficient than requiring a court to expend its resources deciding whether claims should be transferred to the court where they could have been brought in the first place?

transferee district (Dkt. 13 at 5).[5] *See Phx. Solutions, Inc. v. Sony Elecs., Inc.*, No. C 07-02112-MHP, 2007 WL 4357602, at *4 (N.D. Cal. Dec. 11, 2007) (denying motion to transfer third-party claim where movant could have filed the claim in the transferee district, but instead chose to bring the claim in California).[6]

Fourth, the "common issues" Apple identifies are founded on an oversimplification of the technology and products at issue and are too minimal to risk judicial inefficiencies if litigated in separate districts. "[I]f the overlap between cases is small then the risk of duplicative judicial work and inconsistent claim constructions is also small." *J2 Global Commc'ns, Inc. v. Protus IP Solutions, Inc.*, No. 6:08-CV-211, 2008 WL 5378010, at *5-6 (E.D. Tex. Dec. 23, 2008) (finding that transfer was not necessary to preserve judicial economy where pending litigation in transferee district involved additional defendants and only one of the four patents in the cases at hand).

Notably, there is no direct overlap of patents in the parties' Wisconsin and Delaware actions. Apple has asserted different patents against Nokia in Wisconsin than it has asserted against Nokia in Delaware. Nokia is likewise asserting different patents in

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[5] Although Nokia filed patent infringement counterclaims prior to moving to transfer in *Qualcomm Inc. v. Nokia Corp.*, No. 07-CV-187 (W.D. Wis. June 25, 2007) (Nixon Decl., Ex. 30), Nokia did not rely on its counterclaim patents to show any overlap between the Wisconsin case and the parties' pending litigation in the transferee district (*see id.*, Ex. 31).

[6] Although Nokia does not believe a transfer of any claims is warranted, if the Court is inclined to transfer Apple's patent infringement counterclaims based on any overlap between Apple's counterclaim patents in Wisconsin and patents asserted in Delaware, Nokia would not oppose if the Court were to sever Apple's patent infringement counterclaims under Federal Rule of Civil Procedure 21 and transfer only those counterclaims to Delaware, thereby leaving Nokia's claims in this district. *See Mediatek, Inc. v. Sanyo Elec. Co.*, No. 6:05-CV-323, 2006 WL 463871, at *3 (E.D. Tex. Feb. 17, 2006) (denying defendants' motion to transfer entire case but granting plaintiff's motion to sever and transfer defendant's patent infringement counterclaims to transferee district for consolidation with suit involving other of defendant's patents).

Wisconsin than it has asserted in Delaware. Further, none of the parties' patents in Wisconsin are formally related to any of the parties' patents in Delaware; they do not share the same specification with, or claim priority to, any the patents asserted in Delaware. Consequently, the claim construction disputes, prior art, and validity arguments in Wisconsin and Delaware will completely differ.

Moreover, in contrast to the implementation patents asserted in Wisconsin, 10 of the patents at issue in the 791 Case are essential patents. Nokia's assertion of essential patents in Delaware raises issues concerning the technology incorporated into the GSM, UMTS, and IEEE 802.11 standards, whether Apple's accused products comply with those standards, and the amount of FRAND compensation owed to Nokia by Apple that do not have to be addressed in Wisconsin.

Despite such major differences, Apple characterizes this case as related to the cases in Delaware because they all involve technology used in certain mobile communications devices and have some specific accused products in common. But the intricacies of the individual patents demonstrate that reliance on such generalizations is not appropriate for purposes of deciding transfer. *See Research in Motion*, 457 F. Supp. 2d at 714 ("Merely because the patents pertain to wireless transmission of email and other data does not, of course, show that they are so related that the litigation should be conducted in a single forum."); *cf. Teva Pharm. Indus. Ltd. v. Astrazeneca Pharms. LP*, No. 08-4786, 2009 WL 2616816, at *6 (E.D. Pa. Aug. 24, 2009) ("[W]ere two other cases with a similar degree of circumstantial overlap to arise in a context less esoteric than pharmaceutical patents and organic chemistry, impartial observers would be unlikely to consider them related.")

Take, for example, Nokia's U.S. Patent No. 6,373,345 ("the 345 Patent"), asserted in Wisconsin, and Nokia's U.S. Patent No. 6,359,904 ("the 904 Patent"), asserted in the 791 Case in Delaware, both of which relate to the transmission of wireless communications. Nokia's 345 Patent, entitled "Modulator Structure for a Transmitter and Mobile Station," relates to modulators for use in wireless transmitters (Nixon Decl., Ex. 32). The purpose of radio communications is to transmit intelligent information. A steady signal of constant power and constant frequency is detectable as a radio transmission, but does not carry any intelligence. Such a steady signal is called a carrier signal. To carry intelligence, some property of the carrier signal, such as its frequency or amplitude, must be modified so that the information to be transmitted is carried in the changes. The process of modifying the carrier wave to carry information is known as modulation, and the sub-system that performs the modification is called a modulator. Modulators are fairly complex electronic circuits that have important characteristics, such as a signal-to-noise ratio, which is the ratio of the transmit signal to the background noise. Transmissions with a high signal-to-noise ratio are more likely to be received, offering a better experience to users. The 345 Patent relates to a modulator that provides a high signal-to-noise ratio while reducing the number of filters needed to do so (*id.*).

Nokia's 904 Patent, entitled "Data Transfer in a Mobile Telephone Network," relates to the handling of data in layers for transmission over a network (*id.*, Ex. 33). In many communication systems, data is handled hierarchically on different layers. For instance, when using an Internet-related application on a mobile device, data passes through various layers from the application layer to the lowest layer where it must be in a form suitable for transmission. Each layer serves a purpose and at at least one layer, the

data undergoes a process called coding that can adds bits to the data that are used by the receiver to correct for errors in transmission. Different coding methods are available, and the format of the data may differ depending on which coding method is used. The 904 Patent relates to a method of handling the data to be coded that simplifies the flow of data through the different layers (*id.*).

Apple contends that there is overlap between the patents in Wisconsin and the patents in Delaware because they involve the manner in which some mobile devices "transmit and receive user information over the air" (Dkt. 13 at 5). It is true that Nokia's 345 Patent in Wisconsin and its 904 Patent in Delaware both relate to how certain mobile devices transmit user information over the air. But as demonstrated above, they are actually very different patents. The technology at the center of the 345 Patent will involve specific concepts such as signal properties, noise designation and calculation, modulation, and modulator circuitry including filters and transistors. The technology at the center of the 904 Patent will involve equally complicated but different concepts such as protocol stacks, packet framing, channel coding, and digital control. Moreover, because Nokia's 904 Patent has been declared essential to the GSM, UMTS, and IEEE 802.11 standards, an understanding of the 904 Patent will involve such topics as standardization processes, the policies of relevant standards setting organizations, the role of working groups, the definition of essential technology, and the meaning of FRAND licensing terms that are not relevant to an understanding of the 345 Patent.

Nokia (and Apple) will likely use different witnesses and different experts to testify about and explain these patents. While some of the same Apple products may be accused of infringement, different processes and components will be at issue for each

patent. The scope of prior art relevant for each patent is not likely to overlap. None of the same claim terms should need to be construed for both patents. In brief, just because these patents both relate to the transmission of wireless communications does not mean that they are so related that they should be litigated in the same forum. They are not so related and any general technological overlap is insufficient to justify transfer.

Fifth, the cases cited by Apple from this District regarding the interest of justice prong are not analogous to this situation. In *Lineage Power*, the Court rejected plaintiff's claim that quick resolution was critical to its rights because the plaintiff was accusing products that had been on the market for almost a decade and had delayed serving its complaint on the defendants until prodded by the Court. *Lineage Power Corp. v. Synqor, Inc.*, No. 08-CV-397, 2009 WL 90346, at *6 (W.D. Wis. Jan. 13, 2009).[7] Upon dismissing plaintiff's claimed need for speed, the Court found that the interests of justice favored transfer for consolidation in the transferee district. Here, by contrast, Apple is a relative newcomer to the relevant market and Nokia has not delayed in enforcing its rights against its new competitor. Nokia's need for prompt resolution should not be discounted and weighs heavily in favor of keeping this case in this District.

In *Encyclopedia Britannica*, the Court gave less weight to plaintiff's interest in a speedy trial because plaintiff did not compete with the defendants and could be readily compensated by a reasonable royalty. *Encyclopedia Britannica, Inc. v. Magellan Navigation, Inc.*, 512 F. Supp. 2d 1169, 1176 (W.D. Wis. 2007). Further, the Court

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[7] This Court similarly granted transfer in *Broadcom Corp. v. Microtune, Inc.* because the transferee district court had twice found the plaintiff to be dilatory and plaintiff's "late-found concern with obtaining a speedy resolution" was insufficient to prevent transfer. *Broadcom Corp. v. Microtune, Inc.*, No. 03-C-676-S, 2004 WL 503942, at *4 (W.D. Wis. Mar. 9, 2004).

found that transfer would conserve judicial resources because the pending cases in the transferee district involved the exact same patents. *Id.* at 1176-77. Here, Nokia and Apple are direct competitors with respect to certain products and there are no overlapping patents.

In *Broadcom*, the Court granted transfer for consolidation with related, previously consolidated cases where the transferee court was already familiar with the technology behind the patents at issue. *Broadcom Corp. v. Agere Sys., Inc.*, No. 04-CV-066-C, 2004 WL 1176168, at *2 (W.D. Wis. May 20, 2004). Here, the cases are not related and the litigation in Delaware is in its early stages, so Judge Sleet has not yet had an opportunity to become familiar with the technology behind any of the patents-in-suit.

In light of all the circumstances of this case, Apple has not shown that the overlap between this case and the parties' Delaware cases is significant enough to outweigh the interest of justice in affording Nokia a speedy resolution against Apple. *See K.W. Muth Co. v. Gentex Corp.*, No. 06-C-0378-C, 2006 WL 2772828, at *5 (W.D. Wis. Sept. 22, 2006) (denying motion to transfer and finding that the interests of justice favored the plaintiff, even though another suit between the same parties was pending in the transferee district, because other suit involved different patents and the case could be tried more quickly in the Western District of Wisconsin than in the transferee district).

VII. THE CONVENIENCE FACTORS CANNOT OVERCOME THE INTEREST OF JUSTICE IN RETAINING THE LITIGATION IN THIS DISTRICT.

A. The Convenience Of The Parties Does Not Weigh In Favor Of Transfer.

Apple tries to make much of the fact that Nokia previously stated that Wisconsin was an inconvenient forum (Dkt. 13 at 8). Such statements do not, however, help Apple

meet its burden to show that the District of Delaware is "clearly more convenient" than the Western District of Wisconsin. Nokia Corporation is based in Finland. Thus, it should come as no surprise that litigating in Wisconsin (or for that matter elsewhere in the United States) may be less than convenient. Nokia's current choice to litigate in Wisconsin shows that it is willing to tolerate any inconveniences of litigating here to obtain quick and efficient resolution of this dispute. *See Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, No. 09-cv-1-BBC, 2009 WL 1615528, at *4 (W.D. Wis. June 9, 2009) ("[I]f plaintiff chose to file suit in Wisconsin, it is willing to overlook any inconvenience associated with litigating in this forum").

Indeed, Apple has made the same sacrifices when it saw fit. In 2006, Apple filed suit in the Western District of Wisconsin to assert 7 patents against a fellow-California company (Nixon Decl., Ex. 26). Presumably, Apple filed suit in this District to obtain the benefits of a speedy resolution, because, as it now asserts, Apple has no meaningful relationship with the Western District of Wisconsin (Dkt. 13 at 7). Thus, Apple has in the recent past viewed this District as a convenient forum to litigate, and should not be heard to complaint now that it is inconvenient. *See ICOS Vision Sys. Corp. v. Scanner Techs. Corp.*, No. 05 Civ. 6322(DC), 2006 WL 838990, at *6 (S.D.N.Y. Mar. 29, 2006) ("The Court is hard-pressed to believe that Scanner, after having chosen this forum for its own lawsuit against ICOS, is now suddenly so inconvenienced that the interests of justice require that the case be transferred. The motion to transfer is denied.")

Moreover, Apple has found this district convenient for filing its infringement counterclaims in this case. If litigating in this district were more inconvenient than litigating in Delaware, Apple would not have filed its infringement counterclaims in this

Court and taken the risk that they would not be transferred. Instead, Apple would have chosen to litigate the infringement and validity of its 7 implementation patents (a major case in and of itself, by any standards) in its preferred forum.[8]

In sum, Apple cannot show that the District of Delaware is the "clearly more convenient" forum for the parties.[9]

B. The Convenience Of The Witnesses Does Not Weigh In Favor Of Transfer.

Apple fails to name a single witness for whom Delaware would be more convenient, and merely hints at unspecified witnesses that may be required in Delaware and Wisconsin (Dkt. 13 at 11). Apple cannot rely on witnesses it does not identify. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989) (explaining that it is the movant's burden to identify witnesses and make at least a generalized statement of their testimony). When considering the convenience of witnesses factor, it is the location of third-party witnesses that may be important, not the location of witnesses who are within the control of a party and presumably will appear voluntarily. *Adams v. Newell Rubbermaid Inc.*, No. 07-C-313-S, 2007 WL 5613420, at *3 (W.D. Wis. Aug. 21, 2007). Here, third-party suppliers such as Infineon

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[8] Again, while Nokia does not believe a transfer of any claims is justified, should the Court deem it appropriate to transfer Apple's patent infringement counterclaims to Delaware for reasons of convenience or overlap, Nokia would not oppose the Court severing and only transferring such counterclaims.

[9] Apple's reliance on the Federal Circuit's recent venue decisions regarding the convenience factors is misplaced. *See* Dkt. 13 at 9 (citing *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); and *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009)). In each of those cases, the Federal Circuit applied Fifth Circuit law and, as a result, did not consider docket speed as a relevant factor in the transfer analysis. *See Lineage Power*, 2009 WL 90346, at *5 (explaining that the

Technologies, a German corporation with U.S. headquarters in California, and Broadcom, a California corporation, are potential witnesses likely to have relevant evidence. Because these witnesses are located across the United States, not in Delaware or Wisconsin, no one district or the other would be clearly more convenient for them.

Moreover, there is every reason to believe that all pertinent witnesses can be deposed prior to trial without having to travel to Wisconsin. As this Court has noted, "in patent actions, depositions are customary and are satisfactory as a substitute for technical issues." *Semiconductor Energy Lab.*, 2009 WL 1615528, at *4 (citations omitted). Even if "defendants may prefer the in-court testimony of its witnesses, they fail to provide reasons why they cannot obtain deposition testimony in this patent suit." *Id.* Under the circumstances of this suit, the convenience to witnesses factor favors neither side in the transfer analysis.

CONCLUSION

Because Apple has failed to show that the District of Delaware is the clearly more convenient forum and will best promote the interests of justice in this case, Apple's motion to transfer must be denied.

Seventh Circuit, unlike the Fifth Circuit, allows the court to deny transfer based on likely delays in the transferee district).

Respectfully submitted, July 20, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2010 I caused true and correct copies of Nokia Corporation's Brief in Opposition to Apple Inc.'s Motion to Transfer Venue to the District of Delaware to be served on all counsel of record by the ECF Notification System.

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