

Exhibit 22

Nokia's Answering Brief in Opposition to Apple's Motion for Consolidation  
dated June 21, 2010.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

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

---

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

**NOKIA CORPORATION'S AND NOKIA INC.'S ANSWERING BRIEF  
IN OPPOSITION TO APPLE INC.'S MOTION FOR CONSOLIDATION**

MORRIS, NICHOLS, ARSHT & TUNNELL LLP  
Jack B. Blumenfeld (#1014)  
Rodger D. Smith II (#3778)  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899  
(302) 658-9200  
jblumenfeld@mnat.com  
rsmith@mnat.com

*Attorneys for Nokia Corporation and  
Nokia Inc.*

OF COUNSEL:

Patrick J. Flinn  
Peter Kontio  
John D. Haynes  
Mark A. McCarty  
Adam J. Biegel  
ALSTON & BIRD LLP  
One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424  
(404) 881-7000

June 21, 2010

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
THE NATURE AND STAGE OF THE PROCEEDINGS.....	1
SUMMARY OF NOKIA’S ARGUMENT.....	3
STATEMENT OF FACTS .....	4
I.    THE 791 CASE PENDING BEFORE JUDGE SLEET .....	4
II.   THE 1002 CASE STAYED BY JUDGE SLEET.....	6
III.  THE 166 CASE STAYED BY JUDGE KELLY. ....	7
IV.   THE 167 CASE PENDING BEFORE JUDGE KELLY.....	8
V.    THE OVERLAP AMONG THE 971, 1002, 166, AND 167 CASES IS MINIMAL.....	8
VI.   THE ALJ’S PARTIAL CONSOLIDATION OF THE 704 AND 710 ITC INVESTIGATIONS.....	9
ARGUMENT.....	11
I.    CONSOLIDATION IS NOT APPROPRIATE BECAUSE IT WOULD UNDULY COMPLICATE THESE PROCEEDINGS. ....	11
II.   CONSOLIDATION IS NOT APPROPRIATE BECAUSE THERE ARE NOT SUFFICIENT COMMON ISSUES OF FACT OR LAW. ....	13
III.  NEITHER THE PARTIAL CONSOLIDATION OF THE 704 AND 710 INVESTIGATIONS AT THE ITC, NOR NOKIA’S ARGUMENTS IN FAVOR OF FULL CONSOLIDATION AT THE ITC, SUPPORT THE CONSOLIDATION APPLE NOW SEEKS. ....	16
IV.   THE PREJUDICE TO NOKIA AND HTC OUTWEIGHS ANY BENEFITS OF CONSOLIDATION. ....	17
CONCLUSION.....	18

TABLE OF AUTHORITIES

Page(s)

**CASES**

*Kohus v. Toys "R" Us, Inc.*,  
No. C-1-05-517, 2006 WL 1476209 (S.D. Ohio May 25, 2006).....13

*Magnavox Co. v. APF Elecs., Inc.*,  
496 F. Supp. 29 (N.D. Ill. 1980).....13

*Metallgesellschaft AG v. Foster Wheeler Energy Corp.*,  
143 F.R.D. 553 (D. Del. 1992) ..... 11-12

*Rohm & Haas Co. v. Mobil Oil Corp.*,  
525 F. Supp. 1298 (D. Del. 1981).....13

*Rosales v. United States*,  
447 F. Supp. 3d 213 (D.D.C. 2007).....14

*Smithkline Beecham Corp. v. Geneva Pharms., Inc.*,  
No. 99-CV-2926, 2001 WL 1249694 (E.D. Pa. Sept. 26, 2001) .....13

*Syngenta Seeds, Inc. v. Monsanto Co.*,  
No. 02-1331-SLR, 2004 WL 2002208 (D. Del. Aug. 27, 2004) ..... 11-12

*United States v. Dentsply Int'l, Inc.*,  
190 F.R.D. 140 (D. Del. 1999) .....11

*Waste Distillation Tech., Inc. v. Pan Am. Res., Inc.*,  
775 F. Supp. 759 (D. Del. 1991).....13, 17

## INTRODUCTION

The disputes between Nokia and Apple began when Nokia sued Apple in this Court for refusing to compensate Nokia for Apple's use of 10 patents declared essential to one or more wireless communication standards. Apple's motion for consolidation is the latest in a series of attempts to divert attention away from its free-riding off of Nokia's intellectual property and transform Nokia's original patent infringement action into an unnecessarily complex and unmanageable lawsuit.

Despite previously opposing a consolidation at the International Trade Commission that would have involved only 14 Apple patents as being "unworkably complex," Apple now proposes to create a proceeding involving a total of at least 44 patents (17 Nokia patents currently asserted only against Apple, and 27 Apple patents asserted against one or more of Nokia and HTC, with potential HTC counterclaims still to come) as well as at least 6 non-patent counterclaims. The consolidation Apple proposes would unduly complicate the already complex factual and legal issues. Further, Apple overstates the amount of overlap among the cases by failing to acknowledge nearly half of the parties' asserted claims. When the cases are considered in their entirety, it is clear that the individual issues predominate and consolidation would be inappropriate.

## THE NATURE AND STAGE OF THE PROCEEDINGS

**The 791 Case.** On October 22, 2009, Nokia Corporation filed a complaint against Apple for infringing 10 patents essential to certain wireless communication standards (C.A. No. 09-791-GMS) (the "791 Case") (791 Case D.I. 1). On December 11, 2009, Apple filed an answer and counterclaims asserting infringement of 13 patents and six non-patent counts (791 Case D.I. 14). On February 19, 2010, Apple amended its answer and counterclaims to drop

four patent infringement claims and its claim of unfair competition under California law, add an antitrust claim under Section 2 of the Sherman Act, and add Nokia Inc. (Nokia Corporation's US subsidiary) as a defendant (collectively "Nokia") (791 Case D.I. 21). On April 9, 2010, the Court held a Scheduling Conference with counsel. On April 30, 2010, the parties submitted a Proposed Scheduling Order (791 Case D.I. 42), which was adopted (with one exception) by the Court on May 3, 2010. On June 9 and 10, 2010, the parties exchanged interrogatories and requests for the production of documents (791 Case D.I. 56 and 57).

**The 1002 Case.** On December 29, 2009, Nokia Corporation filed a complaint against Apple in the ITC for infringing 7 implementation patents that cover key features used by Apple in its electronic devices (the "701 Investigation"). On the same day, Nokia Corporation filed a complaint against Apple in this Court, as a parallel proceeding to the 701 Investigation, for infringing the same 7 implementation patents (C.A. No. 09-1002-GMS) (the "1002 Case") (1002 Case D.I. 1). On January 15, 2010, Apple filed a complaint against Nokia Corporation and Nokia Inc. in the ITC, asserting infringement of 9 patents (the "704 Investigation"), four of which Apple had previously asserted in its counterclaims in the 791 Case. On February 12, 2010, Nokia Corporation and Apple (i) submitted a Stipulation that Apple would file counterclaims in the 1002 Case to allege Nokia Corporation's and Nokia Inc.'s infringement of the 9 patents asserted in the 704 Investigation (including the 4 overlapping patents after dismissing those counterclaims from the 791 Case) and (ii) requested that the Court stay all proceedings in the 1002 Case pending resolution of the 701 Investigation and the 704 Investigation (1002 Case D.I. 11). On March 3, 2010, the Court granted the parties' Stipulation and stayed the 1002 Case (1002 Case D.I. 13).

## SUMMARY OF NOKIA'S ARGUMENT

1. Consolidation is not appropriate in this situation because it would unduly complicate these already complex proceedings. The 791 Case alone presently involves 10 Nokia patents declared essential to the GSM, UMTS, and IEEE 802.11 Standards, 9 Apple patents not declared essential to any relevant standards, and 6 non-patent counterclaims that raise complex antitrust and contractual issues. Consolidating the 791 Case with any of the other actions at issue would unduly complicate the proceedings and cause undue confusion for the parties and the Court. Apple's proposal to consolidate the 791 Case with all 3 of the other actions, two of which are stayed and two of which involve a third international competitor and its various accused products, is simply unworkable and directly contradicts Apple's prior positions on the inefficiency of consolidation at the ITC.

2. Consolidation is not appropriate when considering the entire scope of the cases because there are not sufficient common issues of law or fact. Apple's description of the factual and legal overlap among the cases fails to acknowledge nearly half of the parties' asserted claims. Apple does not mention the 17 patents currently asserted by Nokia against Apple, but not against HTC, nor the 6 non-patent counterclaims currently asserted by Apple against Nokia, but not against HTC, that are unique to their particular cases. Viewing the actions as a whole, there is no substantial overlap of issues. Instead, the individual issues predominate, thus rendering consolidation inappropriate and unnecessary in this situation.

3. Neither the ALJ's decision to consolidate as to 5 overlapping Apple patents in the ITC, nor Nokia's arguments in support of consolidation in the ITC, support the consolidation Apple now seeks. Nokia and HTC sought to fully consolidate two ITC investigations involving a total of 14 Apple patents, wherein 5 Apple patents overlapped and

were asserted against both Nokia and HTC. Such a consolidation would have been remarkably less complex than the at least 44-patent and 6 non-patent counterclaim proceeding that Apple now proposes. Further, the ALJ's conservative decision to deny Nokia's and HTC's motions and order only partial consolidation as to the 5 overlapping patents counsels *against* the mega-consolidation Apple now seeks here.

4. The prejudice to Nokia and HTC from having to attend to additional and extended discovery outweighs any benefit that may result from consolidation.

### **STATEMENT OF FACTS**

#### **I. THE 791 CASE PENDING BEFORE JUDGE SLEET.**

The lawsuits between Nokia and Apple began when Nokia filed the 791 Case against Apple. The 791 Case is based on Nokia's claims against Apple for infringing 10 patents declared essential to one or more wireless communication standards (791 Case D.I. 1). The 10 patents cover a wide range of technologies needed to implement the GSM, UMTS, and IEEE 802.11 standards. 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. Apple's infringing devices include the Apple iPhone, the Apple iPhone 3G, and the Apple iPhone 3GS (*id.*). 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.*).

The 791 Case also includes Apple's counterclaims for Nokia's alleged infringement of 9 patents that have not been declared essential to any relevant standards (791 Case D.I. 21). 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. 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" (D.I. 23 at 3).

In addition, Apple has 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 (791 Case D.I. 21). Because the Court has denied Nokia's motion to dismiss these counterclaims (D.I. 55), Nokia may seek to amend its complaint to add non-patent counterclaims in this case as well (D.I. 23 at 7).

In the parties' Joint Status Report, Apple acknowledged that the parties' claims in the 791 Case raise numerous, disparate issues. Apple described its contract counterclaim as depending on the existence of a contract and on evidence concerning whether license terms demanded by Nokia were unfair, unreasonable and/or discriminatory (D.I. 23 at 9). "On the

other hand,” Apple explained, “the patent infringement claims involve complex validity and infringement questions with respect to ten Nokia patents, nine Apple patents, dozens of products, and a wide range of technology” (*id.*). Finally, Apple acknowledged that “[t]he antitrust claims involve complex and distinct issues such as market definition and power, the timing of Nokia’s patent applications and disclosure thereof, Nokia’s promotion of its technologies to the [Standards Setting Organizations], and what would have happened to the standards had Nokia timely disclosed its IPR and the falsity of its FRAND commitments” (*id.*).

Apple did not mention at the Scheduling Conference, when the Court was considering how to schedule the already complex 791 Case, the 166 Case and the 167 Case against HTC or that it had plans to seek consolidation.

## **II. THE 1002 CASE STAYED BY JUDGE SLEET.**

Nokia filed the 1002 Case against Apple for infringing 7 implementation patents (1002 Case D.I. 1), all of which are asserted in the parallel 701 ITC Investigation. The 7 patents generally relate to programmable voltage controlled oscillators, antenna and speaker assemblies, cameras, touch screens, electronic messaging, and user interfaces. Apple’s infringing products include the Apple iPhone 3G and the Apple iPhone 3GS, as well as other Apple electronic devices such as the iPod Touch, iPod Nano, iPod Classic, iMac, Mac Pro, Mac Mini, MacBook, MacBook Pro, and MacBook Air (*id.*).

The 1002 Case also includes Apple’s counterclaims for Nokia’s alleged infringement of 9 patents (1002 Case D.I. 12), all of which are asserted in one of the parallel 704 and 710 ITC Investigations. In broad terms, Apple’s patents relate to boot frameworks, software architectures, application programming interfaces, power management techniques, and object-oriented graphics architectures, notification systems, and programs. Apple has accused of

infringement (i) Nokia products that include the S60 software platform, such as the Nokia N97 mini, N97, N95, N86, N85, N79, 5800 XpressMusic, 5800 Navigation Edition, E75, E72, E71x, E71, E66, E63; (ii) Nokia products that include the S40 software platform, such as the Nokia 7610 Supernova, 3600 Slide, and 2760; and (iii) the Nokia N900 (1002 Case D.I. 12).

The 1002 Case has been stayed pending resolution of the corresponding ITC Investigations (1002 Case D.I. 11).

### **III. THE 166 CASE STAYED BY JUDGE KELLY.**

On March 2, 2010, in an action unrelated to Apple's disputes with Nokia, Apple and NeXT Software, Inc. filed a complaint in the ITC against High Tech Computer Corp., HTC America, Inc., and Exedeia, Inc. (collectively, HTC) alleging infringement of 10 patents (the 710 Investigation). On the same day, Apple and NeXT Software, Inc. filed a corresponding complaint against HTC (adding HTC (B.V.I.) Corp.) in this Court alleging infringement of the same 10 patents (C.A. 10-166-RK) (the "166 Case") (166 Case D.I. 1). Five of the Apple patents are the same as patents asserted against Nokia in the stayed 1002 Case. The other five Apple patents generally relate to object-oriented operating systems, message passing and event distribution in object-oriented systems, network component systems, and performing actions on a structure in computer-generated data. Apple is accusing of infringement HTC cellular phones and smartphones that include the Android Operating System (*id.*). Apple did not designate the 166 Case as related to either of the 791 or 1002 Cases brought against it by Nokia in this Court (166 Case D.I. 1-6, Civil Cover Sheet).

On April 9, 2010, HTC filed a motion to transfer the 166 Case to the United States District Court for the Northern District of California (166 Case D.I. 8), which was opposed by Apple Inc. and NeXT Software, Inc. on May 24, 2010 (166 Case D.I. 22). On April

26, 2010, Judge Kelly stayed the 166 Case pending resolution of the 710 Investigation (166 Case D.I. 17).

#### **IV. THE 167 CASE PENDING BEFORE JUDGE KELLY.**

On March 2, 2010, Apple filed a complaint against HTC alleging infringement of another 10 patents (C.A. No. 10-167-RK) (the “167 Case”) (167 Case D.I. 1). Three of the Apple patents are the same as patents asserted against Nokia in the stayed 1002 Case and three of the Apple patents are the same as patents asserted against Nokia in the pending 791 Case. The other four patents generally relate to translating user interface objects, determining commands in a touch screen device, unlocking a device by performing gestures, and sensing of user activity in a device. Apple is accusing of infringement HTC cellular phones and smartphones that include the Android Operating System (*id.*). Again, Apple did not designate the 167 Case as related to either of the 791 or 1002 Cases brought against it by Nokia in this Court (167 Case D.I. 1-1, Civil Cover Sheet).

On April 9, 2010, HTC moved to transfer the 167 Case to the United States District Court for the Northern District of California (167 Case D.I. 8). HTC’s motion was opposed by Apple Inc. and NeXT Software, Inc. on May 24, 2010 (167 Case D.I. 22).

#### **V. THE OVERLAP AMONG THE 971, 1002, 166, AND 167 CASES IS MINIMAL.**

The four proceedings at issue include a total of at least 44 patents (17 Nokia patents currently asserted only against Apple and 27 Apple patents currently asserted against one or more of Nokia and HTC), dozens of accused products from 3 international competitors (Nokia, Apple, and HTC) and 6 non-patent counterclaims currently asserted solely against Nokia. The overlap among the cases, which involves only a subset of Apple’s patent claims against Nokia and HTC, is greatly outweighed by the individual issues.

For example, Nokia's patent claims against Apple in the 791 Case, Nokia's patent claims against Apple in the 1002 Case, Apple's non-patent counterclaims against Nokia in the 791 Case, and Nokia's contemplated non-patent claims against Apple in the 791 Case are unique to those cases. Thus, there are at least 23 claims that have absolutely no overlap among the proceedings. Apple notes that it has asserted 11 of its 27 patents against both Nokia and HTC (a less than 50% overlap just on Apple's patent claims alone), but fails to acknowledge nearly half of the parties' asserted claims.

## **VI. THE ALJ'S PARTIAL CONSOLIDATION OF THE 704 AND 710 ITC INVESTIGATIONS.**

On April 15, 2010, Nokia and HTC moved for complete consolidation of the 704 Investigation and the 710 Investigation in the ITC (Declaration of Jack B. Blumenfeld ("Blumenfeld Dec.") Exs. 1 & 2). The 704 Investigation involved 9 Apple patents asserted against Nokia (*id.*, Ex. 3 at 3). The 710 Investigation involved 10 Apple patents asserted against HTC (*id.*). Neither Investigation involved any Nokia patents or any non-patent counterclaims. Five of Apple's patents overlapped between the Investigations and were asserted against both Nokia and HTC (*id.*). All 14 of Apple's patents, including the non-overlapping patents, concerned the operating software in handsets, and most of Apple's asserted patents related specifically to object-oriented technology (*id.*, Ex. 1 at 4-6). In view of this overlap in subject matter, Nokia and HTC argued that full consolidation of the investigations would assist the ALJ and Commission Staff in understanding the technology and patent claims at issue, and eliminate the redundancy and duplication in tutorials, expert reports and testimony, fact witnesses and exhibits that would otherwise occur (*id.*, Exs. 1 and 2).

The Commission Staff believed that partial, rather than full, consolidation was needed (*id.*, Ex. 3). Specifically, the Staff moved to consolidate the 704 and 710 Investigations

as to only the 5 overlapping patents. The Staff argued that such partial consolidation would eliminate the need to adjudicate overlapping domestic industry, claim construction, and validity issues in both investigations, but declined to support full consolidation due to concerns that it would likely require an exceptionally long time to resolve the parties' disputes (*id.*, Ex. 3 at 5 & n.3).

Apple vigorously opposed both partial and full consolidation (*id.*, Ex. 4). It argued that “the differences among the patents . . . will require different sets of experts and witnesses for the sub-specialties within the technology” and that “the patents-at issue in the two investigations involve diverse subjects such as the generation of graphics, camera power management, and booting operations” (*id.*, Ex. 4 at 8). Apple contended that “[e]ither full or partial consolidation will result in an unworkably complex investigation with different products based on different software platforms, and witnesses from [Nokia and HTC] from different foreign countries speaking different languages requiring interpretation” (*id.*, Ex. 4 at 2). Apple pleaded that “the efficiencies of consolidation, even ignoring the inefficiencies of the nonoverlapping patents, are grossly overstated” (*id.*, Ex. 4 at 2). “The logical result,” according to Apple, was “to keep these separate investigations separate and not introduce more confusion into investigations that are already complex” (*id.*, Ex. 4 at 16).

On April 26, 2010, the ALJ denied Nokia's motion for full consolidation and granted the Staff's motion for partial consolidation as to only the 5 overlapping patents (*id.*, Ex. 5). As a result, the 710 Investigation retained the 10 Apple patents already asserted and added claims against Nokia as to the 5 overlapping patents. The 704 Investigation is continuing solely against Nokia with the remaining 4 patents.

## ARGUMENT

### **I. CONSOLIDATION IS NOT APPROPRIATE BECAUSE IT WOULD UNDULY COMPLICATE THESE PROCEEDINGS.**

Decisions “to consolidate cases [are] at the discretion of the district court, but often courts balance considerations of efficiency, expense and fairness.” *Syngenta Seeds, Inc. v. Monsanto Co.*, No. 02-1331-SLR, 2004 WL 2002208, at \*1 (D. Del. Aug. 27, 2004) (citing *United States v. Dentsply Int’l, Inc.*, 190 F.R.D. 140, 142-43 (D. Del. 1999)). Motions to consolidate patent infringement actions that, like those at issue here, involved multiple patentees and multiple accused infringers have been denied because consolidation would “unduly complicate” the factual and legal issues. *Metallgesellschaft AG v. Foster Wheeler Energy Corp.*, 143 F.R.D. 553 (D. Del. 1992).

*Metallgesellschaft* involved an attempt to consolidate two actions, the first having been filed by Metallgesellschaft AG (MG) against Foster Wheeler Energy Corp. and its related companies (FWEC) for infringement of two patents relating to systems for burning coal to produce steam (*id.* at 554-55). FWEC later filed a separate action against (i) MG and its related companies and (ii) third parties Combustion Engineering Inc. and its successor ABB Combustion Engineering Systems, Inc. for infringement of two patents directed to the same technology (*id.* at 556 & n.4). FWEC eventually moved to consolidate the two actions (*id.*).

Although the two cases “involve[d] common issues of fact and law, supported or refuted by some overlapping evidence,” the Court denied FWEC’s motion for consolidation (*id.* at 558). Judge Robinson concluded that “joint adjudication of MG’s patent claims and FWEC’s patent claims would unduly complicate the intrinsically complex factual and legal issues at bar” (*id.* at 559). Because “judicial economies can be accomplished without litigating all of the

disputes between these parties in one action,” she held that consolidation of the cases was neither necessary nor appropriate (*id.*).<sup>1</sup>

Here, there is no doubt that consolidation would “unduly complicate” the complex factual and legal issues, and that judicial economies would best be served by litigating the actions separately. The 791 Case alone involves 10 essential Nokia patents covering a wide range of technologies needed to implement the GSM, UMTS, and IEEE 802.11 Standards; 9 Apple patents not declared essential to any relevant standard that relate to equally complicated but different technology; a number of accused products having various functionalities, software applications, software platforms, and operating systems; and 6 non-patent counterclaims that raise, according to Apple, “complex and distinct issues” (791 Case D.I. 23 at 9) involving market definition and power, the timing and disclosure of Nokia’s patent applications, and standards-setting activities. Consolidating the 791 Case with any one of the other 3 actions at issue would unduly complicate matters. Consolidating the 791 Case with all 3 actions, as Apple proposes, would simply be unworkable.

Such consolidated proceedings would comprise a total of at least 44 highly complex patents and dozens of accused handsets and other electronic devices from 3 international competitors. In Apple’s words, “consolidation will result in an unworkably complex [proceeding] with different products based on different software platforms, and witnesses from [Nokia and HTC] from different foreign countries speaking different languages requiring interpretation” (Blumenfeld Dec., Ex. 4 at 2). If it was “logical” to Apple in the ITC

---

<sup>1</sup> See also *Syngenta Seeds*, 2004 WL 2002208, at \*2 (denying motion to consolidate two “highly complex” patent infringement actions because consolidation “would be more burdensome than beneficial”).



“to keep these separate investigations separate and not introduce more confusion into investigations that are already complex” (*id.*, Ex. 4 at 16), where full consolidation would involve only 14 Apple patents, then Apple’s current proposal in this Court to consolidate actions involving 44 Apple and Nokia patents clearly defies that logic.

Moreover, Apple’s reliance on *Rohm & Haas Co. v. Mobil Oil Corp.*, 525 F. Supp. 1298 (D. Del. 1981), is misplaced. In *Rohm & Haas*, the court consolidated a declaratory judgment action involving one patent and an infringement action involving five patents where all of the patents overlapped between the two parties and all of the patents were directed to the same type of herbicide compound (*id.* at 1309-10). Such a consolidated 6-patent proceeding, with complete overlap and only two parties, would be considerably less complex and include much more substantial overlap in issues than the 44-patent proceeding, with minimal overlap and 3 international parties, that Apple now proposes.<sup>2</sup>

## **II. CONSOLIDATION IS NOT APPROPRIATE BECAUSE THERE ARE NOT SUFFICIENT COMMON ISSUES OF FACT OR LAW.**

“The mere existence of common issues, a prerequisite to consolidation, does not require consolidation.” *Waste Distillation Tech., Inc. v. Pan Am. Res., Inc.*, 775 F. Supp. 759, 761 (D. Del. 1991) (citing *Rohm & Haas Co.*, 525 F. Supp. at 1309). In its motion, Apple

---

<sup>2</sup> The other consolidations cited by Apple involved a single patentee asserting related patents against multiple defendants. See *Kohus v. Toys "R" Us, Inc.*, No. C-1-05-517, 2006 WL 1476209 (S.D. Ohio May 25, 2006) (granting the patentee’s unopposed motion to consolidate two actions involving a single patent asserted against multiple defendants); *Smithkline Beecham Corp. v. Geneva Pharms., Inc.*, No. 99-CV-2926, 2001 WL 1249694 (E.D. Pa. Sept. 26, 2001) (consolidating patentee’s cases involving eight patents covering the same type of compound; although one defendant had asserted non-patent counterclaims, that defendant, among others, did not oppose consolidation for pretrial discovery purposes as ordered by the court); *Magnavox Co. v. APF Elecs., Inc.*, 496 F. Supp. 29 (N.D. Ill. 1980) (consolidating patentee’s actions involving two patents asserted against multiple defendants). As such, those consolidated proceedings involved much less complexity and much more overlap in issues than the proceeding Apple seeks.

contends that these four cases involve “numerous common issues of law and fact that militate in favor of consolidation” (791 Case D.I. 48 at 7). Yet when Apple filed its actions against HTC, it failed to designate either of Nokia’s suits against Apple as a related case (166 Case D.I. 1-6; 167 Case D.I. 1-1). *See Rosales v. United States*, 447 F. Supp. 3d 213, 217 (D.D.C. 2007) (noting that the plaintiffs “tacitly conceded that [two purportedly related cases] are not related by failing to file a related-case notice”). Apple notes that it has asserted 11 of its 27 total patents against both Nokia and ITC (791 Case D.I. 48 at 4). Apple completely fails to acknowledge, however, that Nokia has asserted 10 patents in the 791 Case and 7 patents in the 1002 Case against Apple. Apple also fails to mention that it has asserted 6 non-patent counterclaims against Nokia in the 791 Case. When the full scope of these cases is considered, it is clear that there is no substantial overlap of issues, thus rendering consolidation inappropriate.

For instance, there is no overlap between Nokia’s infringement claims in the 791 Case and any claims in the 1002, 166 or 167 Cases. Nokia’s claims in the 791 Case involve 10 patents declared essential to one or more wireless communication standards. These claims raise 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 are unique to the 791 Case.

Further, there is no overlap between Nokia’s infringement claims in the 1002 Case and any claims in the 791, 166 or 167 Cases. These claims arise out of Apple’s infringement of 7 Nokia implementation patents through Apple’s manufacturing and sales of various mobile communications devices, portable digital media players, and personal computers. Nokia’s implementation patents are not essential to any relevant wireless communications standards and, therefore, do not implicate the contractual licensing obligations and standards-

setting activities that will be at issue in the 791 Case. Because Nokia has not asserted its implementation patents against HTC, there is also no overlap with the 166 or 167 Cases.

There is also no overlap between Apple's 6 non-patent counterclaims in the 791 Case and any claims in the 1002, 166, or 167 Cases. Indeed, Apple has acknowledged that "[t]he antitrust claims involve complex and distinct issues such as market definition and power, the timing of Nokia's patent applications and disclosure thereof, Nokia's promotion of its technologies to the [Standards Setting Organizations], and what would have happened to the standards had Nokia timely disclosed its IPR and the falsity of its FRAND commitments" (D.I. 23 at 9).

Finally, Apple's current arguments as to the overlap between its claims against Nokia in the 1002 Case and its claims against HTC in the 166 Case, and the benefits of consolidating those claims, directly contradict the arguments Apple previously made in opposition to Nokia's and HTC's motion to consolidate the 704 and 710 ITC Investigations, which involve the same Apple patents. To illustrate, Apple now contends that "the 791, 1002, 166, and 167 Cases involve numerous common issues of law and fact that militate in favor of consolidation" (791 Case D.I. 48 at 7). Previously, however, Apple argued that "The Overlap Between The Factual And Legal Issues [in the 704 and 710 Investigations] Is Not Significant Enough To Justify Consolidation" (Blumenfeld Dec., Ex. 4 at 14). In addition, whereas Apple now claims that "the four pending cases include patent-infringement allegations brought by Apple against a common pair of defendants, based on an overlapping set of Apple patents and similar sets of accused products (smart phones)" (791 Case D.I. 48 at 3), Apple previously characterized its disputes as being "against two separate infringers that sell completely different infringing products based on different software platforms" (Blumenfeld Dec., Ex. 4 at 1).

In sum, the factual and legal overlap among the cases is greatly outweighed by the individual issues, thus rendering consolidation inappropriate.

**III. NEITHER THE PARTIAL CONSOLIDATION OF THE 704 AND 710 INVESTIGATIONS AT THE ITC, NOR NOKIA'S ARGUMENTS IN FAVOR OF FULL CONSOLIDATION AT THE ITC, SUPPORT THE CONSOLIDATION APPLE NOW SEEKS.**

In support of its motion, Apple states in a heading that “Nokia and HTC Successfully Moved to Consolidate the Parallel 704 and 710 Investigations at the ITC” (791 Case D.I. 48 at 6). The ALJ, however, *denied* Nokia’s and HTC’s motions to fully consolidate the Investigations. Instead of consolidating as to all 14 of Apple’s asserted patents, the ALJ granted the Staff’s motion for partial consolidation and consolidated as to only the 5 overlapping patents asserted against both Nokia and HTC (Blumenfeld Dec., Ex. 5). The ALJ’s decision to limit consolidation to 5 patents certainly does not support Apple’s current motion to consolidate as to all 44 patents and Apple’s 6 non-patent counterclaims that are involved in the four Delaware cases.

Apple also contends that “[h]aving argued for full consolidation of Apple’s cases in the ITC, HTC and Nokia cannot credibly contend that the cases pending before two judges in this District should not be consolidated for efficient case management and to eliminate duplicative activity and potential inconsistencies” (791 Case D.I. 48 at 2). The consolidation Nokia and HTC sought in the ITC, however, is vastly different, in several significant respects, from the consolidation Apple now seeks.

First, the patents in the ITC investigations included only a subset of the patents Apple is asserting in this Court. Specifically, the ITC Investigations did not include any of the 9 patents Apple is currently asserting in its counterclaims against Nokia in the 791 Case nor any of the 10 patents Apple is currently asserting against HTC in the 167 Case. Second, the ITC

investigations did not include any Nokia patents. Apple now seeks a consolidation that includes the 10 essential patents Nokia is currently asserting against Apple, but not HTC, in the 791 Case as well as the 7 patents Nokia is currently asserting against Apple, but not HTC, in the 1002 Case. Third, the ITC investigations did not involve any issues relating to essential patents, the comparison of accused products with any wireless communications standards, or FRAND compensation, all of which have been raised in the 791 Case. Fourth, the ITC investigations did not include any non-patent counterclaims. Apple now seeks a consolidation that includes its counterclaims for alleged antitrust and breach of contract. Fifth, the ITC investigations included a significant, common issue of law and fact not present in the Delaware cases, namely, whether a domestic industry exists for Apple's asserted patents.

These differences demonstrate that Apple's proposed consolidation is enormously more complex than the consolidation Nokia sought in the ITC and would include a host of additional, non-overlapping issues. As a result, Nokia's arguments for consolidation at the ITC but against consolidation here are completely consistent, and Apple's protestations to the contrary should be rejected.

#### **IV. THE PREJUDICE TO NOKIA AND HTC OUTWEIGHS ANY BENEFITS OF CONSOLIDATION.**

"The savings of time and effort gained through consolidation must be balanced against the inconvenience, delay or expense that might result from simultaneous disposition of the separate actions." *Waste Distillation Tech.*, 775 F. Supp. at 761. Given that all claims in the 1002 and 166 Cases are stayed pending resolution of the 704 and 710 Investigation, it is unclear what benefits, if any, would result from consolidating these cases. The claims in the 1002 and 166 Cases will already proceed on a different track than the claims in the 791 and 167 Cases. Nevertheless, the different questions of law and fact among the four cases will produce prejudice

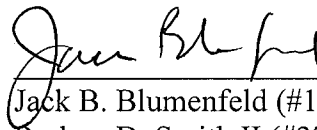
and confusion if the cases are consolidated. Specifically, consolidating all the disparate issues will result in inefficient and extended discovery, promote confusion for the parties and the Court, and unnecessarily increase the length and complexity of each proceeding.

For example, if all four cases are consolidated, Nokia and HTC may feel obligated to attend to significantly more discovery than they otherwise would, on the rare chance that something of relevance might take place. Attending to such discovery will distract and interfere with Nokia's and HTC's ability to litigate the cases and will likely result in unduly extended discovery proceedings.

### CONCLUSION

For the foregoing reasons, Apple's Motion for Consolidation should be denied.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP



---

Jack B. Blumenfeld (#1014)  
Rodger D. Smith II (#3778)  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899  
(302) 658-9200  
jblumenfeld@mnat.com  
rsmith@mnat.com

*Attorneys for Nokia Corporation and  
Nokia Inc.*

OF COUNSEL:

Patrick J. Flinn  
Peter Kontio  
John D. Haynes  
Mark A. McCarty  
Adam J. Biegel  
ALSTON & BIRD LLP  
One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424  
(404) 881-7000

June 21, 2010  
3624623

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2010, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to:

Richard L. Horwitz, Esquire  
David E. Moore, Esquire  
POTTER ANDERSON & CORROON LLP

I further certify that I caused to be served copies of the foregoing document on June 21, 2010, upon the following in the manner indicated:

Richard L. Horwitz, Esquire  
David E. Moore, Esquire  
POTTER ANDERSON & CORROON LLP  
Hercules Plaza – 6<sup>th</sup> Floor  
1313 North Market Street  
Wilmington, DE 19801

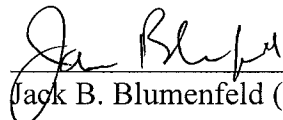
*VIA ELECTRONIC MAIL*

William F. Lee, Esquire  
Mark D. Selwyn, Esquire  
WILMERHALE  
60 State Street  
Boston, MA 02109

*VIA ELECTRONIC MAIL*

Kenneth H. Bridges, Esquire  
Michael T. Pieja, Esquire  
WONG, CABELLO, LUTSCH, RUTHERFORD  
& BRUCCULERI, LLP  
540 Cowper Street  
Palo Alto, CA 94301

*VIA ELECTRONIC MAIL*

  
\_\_\_\_\_  
Jack B. Blumenfeld (#1014)