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

NOKIA CORPORATION, Plaintiff, v. APPLE INC., Defendant.	)	Civil Action No. 10-CV-249 **JURY TRIAL DEMANDED**

APPLE INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER VENUE TO THE DISTRICT OF DELAWARE PURSUANT TO 28 U.S.C. § 1404(a)

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Nokia's opposition to Apple's motion to transfer rests on a single argument—that time-to-trial is purportedly eighteen months shorter in Wisconsin than in Delaware. This argument is not only insufficient as a matter of law to defeat Apple's motion to transfer, but also is simply wrong. In fact, this case would likely reach trial, at best, three to six months ahead of the already scheduled trial in Delaware.

This small difference in potential trial times is not enough to outweigh the strong interests in favor of transferring this case to Delaware. Nokia does not dispute that its claims in this Court arise out of the same larger dispute between the parties. Nor can Nokia dispute that it made the choice to litigate this larger dispute in Delaware, by asserting ***seventeen*** patents against Apple in that forum. Indeed, since filing this action in Wisconsin, Nokia has attempted to add three more patents to its case against Apple in Delaware. Transferring this case to Delaware accordingly will promote the interests of justice by permitting consolidation of the related cases that make up this larger dispute, ensuring judicial efficiency and minimizing the risk of inconsistent rulings.

Nokia claims that Apple has attempted to "manufacture" overlap and "manipulate" venue through its counterclaims. (Nokia Corporation's Brief in Opposition to Apple Inc.'s Motion To Transfer Venue to the District of Delaware ("Opp'n Br.") at 1.) Apple's arguments, however, are not dependent on its counterclaims. The Wisconsin and Delaware cases involve the same parties, the same products, and many of the same technologies, ***even excluding Apple's counterclaims*** in this case. The two cases accordingly will involve overlapping discovery and multiple overlapping issues. Moreover, as Nokia itself argued in moving to transfer Qualcomm's case against it out of this district, there is no inconsistency between moving to transfer a case to a more convenient forum, and filing permissive counterclaims.

Nokia's suggestion that Apple has engaged in "procedural maneuvers" rings particularly hollow given its own actions in this case. If Nokia wanted a quick resolution of its claims, it could have filed this case in 2008, when Apple introduced the accused iPhone 3G. Instead, Nokia brought this action in Wisconsin only after it became clear that the Delaware court might not structure the trial of the parties' larger dispute as Nokia was advocating. Nokia should not be permitted to shop for a new forum when the Delaware case does not go its way. Instead, the Court should transfer this case to Delaware, consistent with the Seventh Circuit's admonition that "related litigation should be transferred to a forum where consolidation is feasible." *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986).

ARGUMENT

I. Nokia Is Wrong To Suggest that Transfer Would Result in a "Delay of Over a Year and a Half."

Nokia's only argument for maintaining this case in Wisconsin is that transferring this case to Delaware would result in a delay of "over a year and a half" from the expected trial in Wisconsin. (Opp'n Br. at 2, 7, 12-13.) This argument ignores two critical facts.

First, the time-to-trial statistics Nokia cites account for ***all*** cases filed in the two districts, regardless of the complexity of the issues. (*See* Exs. 24-25 to Declaration of Coby S. Nixon in Support of Nokia's Opposition) ("Nixon Decl.").) A far more appropriate baseline for estimating the trial schedule for this case is ***actual*** scheduling orders entered in ***patent*** cases. The typical practice of courts in this district is to schedule trials in patent cases approximately

sixteen months after the preliminary pretrial conference.[1] The Preliminary Pretrial Conference in the present case is scheduled for August 3, 2010. If the Court were to follow its typical practice, the likely trial date would be—at the earliest—December 2011.

Moreover, this case warrants a longer schedule than is typical. The case already involves twelve patents, and Nokia has indicated that it may amend its complaint to assert "two or three" additional patents—for a total of at least ***fifteen patents***.[2] (*See*, Joint Preliminary Pretrial Conference Statement, July 29, 2010, at 5, 6, 8, Docket No. 23.) Apple accordingly has requested a trial date in February 2012 (two additional months).

Second, Nokia's reliance on time-to-trial statistics is further misplaced because—as Nokia concedes—the Delaware case that Nokia originally filed, and with which Apple would move to consolidate the present case if it is transferred, already has a scheduled trial for ***May 21, 2012***. (*See* Ex. 15 to Nixon Decl., at 6.) Accordingly, even if the Court were to follow the typical practice of scheduling the trial sixteen months after the August 3, 2010 preliminary pretrial conference, the trial of this case would take place in approximately December 2011, just six months before the May 2012 Delaware trial. If the Court were instead to adopt Apple's

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[1] *See, e.g.*, *e2Interactive, Inc. v. Blackhawk Network, Inc.*, No. 09-CV-629-SLC, Docket No. 66 (W.D. Wis. June 18, 2010) (Amended Scheduling Order indicating that status conference was held June 17, 2010, and scheduling trial for December 5, 2011); *Grice Eng'g, Inc. v. JG Innovations, Inc.*, No. 09-CV-632-WMC, Docket No. 20 (W.D. Wis. Jan. 8, 2010) (Preliminary Pretrial Conference Order indicating that preliminary pretrial conference was held January 7, 2010, and scheduling trial for April 11, 2011); *Illumina, Inc. v. Affymetrix, Inc.*, No. 09-CV-277-BBC, Docket No. 57, and No. 09-CV-665-BBC, Docket No. 12 (W.D. Wis. Dec. 10, 2009) (Preliminary Pretrial Conference Order indicating that preliminary pretrial conference was held December 10, 2009, and scheduling trial scheduled for March 14, 2011); *Renaissance Learning, Inc. v. Qomo Hitevision, LLC*, No. 09-CV-763-WMC, Docket No. 17 (W.D. Wis. Feb. 8, 2010) (Preliminary Pretrial Conference Order indicating that preliminary pretrial conference was held February 3, 2010, and scheduling trial for May 2, 2011).

[2] In contrast, the *e2Interactive*, *Grice Engineering*, and *Renaissance Learning* cases cited above each involve just ***one*** asserted patent, and the *Illumina* case involves just two.

proposed schedule, setting the trial for February 2012, the trial dates would be only three months apart. Either way, Nokia's argument that granting the motion to transfer would result in "a delay of over a year and a half" is wrong.

II. The Benefits of Transferring the Case to Delaware Far Exceed the Small Potential Difference in Trial Times.

The benefits of transferring this case to Delaware far exceed the small potential difference in time-to-trial. The Delaware and Wisconsin cases involve the same parties and the same accused products. Notwithstanding Nokia's contentions to the contrary, the cases also involve multiple overlapping technologies. Transferring this case to Delaware accordingly will promote judicial efficiency, and minimize the risk of inconsistent rulings.

A. The Seventh Circuit Has Confirmed that Related Litigation Should Be Transferred to a Forum Where Consolidation Is Feasible.

The Federal Circuit has emphasized the importance of careful application of venue principles in patent cases, in order to prevent forum shopping.[3] Nokia's arguments against transfer ignore the Seventh Circuit's clear holdings that "related litigation ***should be transferred to a forum where consolidation is feasible***." *Coffey*, 796 F.2d at 221 (emphasis added); *see also AXA Corporate Solutions v. Underwriters Reinsurance Corp.*, 347 F.3d 272, 277 (7th Cir. 2003)

[3] As noted in Apple's opening brief, the Federal Circuit has issued a series of recent writs of mandamus, transferring patent cases from forums with no meaningful connection to the parties or their claims. *See, e.g.*, *In re Zimmer Holdings, Inc.*, No. 2010-M938, 2010 WL 2553580, at *2-4 (Fed. Cir. June 24, 2010); *In re Nintendo Co.*, 589 F.3d 1194, 1198-1200 (Fed. Cir. 2009); *In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1336-38 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338, 1348 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320-21 (Fed. Cir. 2008).

(transfer statute exists "for the total or partial consolidation of related cases from different districts"). [4]

Consistent with this principle, courts in this district have routinely transferred related litigation when consolidation is feasible in another district. *See, e.g., Rudich v. Metro Goldwyn Mayer Studio, Inc.*, No. 08-CV-389-BBC, 2008 WL 4691837, at *1 (W.D. Wis. Oct. 22, 2008) (transferring case that "involve[d] different claims and parties," because consolidation of the two cases in the transferee court seems likely).[5]

Importantly, these transfers should and do occur ***whether or not there is any guarantee of consolidation***. *See id.* at *6 (acknowledging that even if cases are not consolidated, the case should be transferred to district where related litigation is pending).[6] Nokia's argument that transfer is not appropriate because there is "no guarantee" of consolidation (Opp'n Br. at 13) is

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[4] The Federal Circuit applies the law of the regional circuit—here, the Seventh Circuit—in deciding mandamus petitions when a motion to transfer is denied. *See, e.g., In re TS Tech*, 551 F.3d at 1319.

[5] *See also, e.g., United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. 1:09-CV-1068-WTL-TAB, 2010 U.S. Dist. LEXIS 52349, at *5 (S.D. Ind. May 27, 2010) ("The general rule is that 'related litigation should be transferred to a forum where consolidation is feasible,' for the basic reason that it is far more efficient overall for a single judge to become familiar with the common legal issues and how the law is applied than for several judges to do so." (quoting *Coffey*, 796 F.2d at 221)); *Jaramillo v. DineEquity, Inc.*, 664 F. Supp. 2d 908, 916 (N.D. Ill. 2009) (remarking that it is "wasteful and duplicative to have two different courts familiarize themselves with the controversy"); *HFC Commercial Realty, Inc. v. Levine*, No. 90-CV-2921, 1990 WL 186082, at *5 (N.D. Ill. Nov. 9, 1990) ("Perhaps one of the most important elements involved in a consideration of where a dispute will be most efficiently resolved is the existence of a related action in federal court.").

[6] *See also Symbol Techs., Inc. v. Intermec Techs. Corp.*, No. 05-CV-256-C, 2005 WL 1657091, at *3 (W.D. Wis. July 14, 2005) ("Although the Delaware court will be free to consolidate the cases or not, a transfer of the case to that court [would] allow consolidation if the court should deem it appropriate."); *Tuna Processors, Inc. v. Hawaii Int'l Seafood, Inc.*, 408 F. Supp. 2d 358, 363 (E.D. Mich. 2005) ("[A]t the very least, transferring this action [ ] would allow a judge in [the transferee court] to determine whether it should be consolidated with any related actions there.").

therefore without merit. In this case, even if the cases were not consolidated after transfer, they would be pending between the same parties, in the same district, before the same judge. (*See* Nos. 09-CV-791-GMS, 09-CV-1002-GMS, 10-CV-166-GMS, 10-CV-167-GMS, and 10-CV-544-GMS (all pending before Judge Sleet).)

B. Time-to-Trial Alone Is Not a Legally Sufficient Basis to Prevent Transfer.

Even if the difference in potential trial times in Wisconsin and Delaware were substantial—which it is not—courts in this district have consistently held that "***docket speed alone is not sufficient to defeat a motion to transfer*** when other factors establish that another forum is clearly more convenient." *Amtran Tech. Co. v. Funai Elec. Co.*, No. 08-CV-740-BBC, 2009 WL 2341555, at *5 (W.D. Wis. July 29, 2009) (Crabb, J.) (citing *Leggett & Platt, Inc. v. Lozier, Inc.*, No. 04-CV-0932-C, 2005 WL 1168360, at *2 (W.D. Wis. May 17, 2005)) (emphasis added); *see also, e.g.*, *Naschem Co. v. Blackswamp Trading Co.*, No. 08-CV-730-SLC, 2009 WL 1307865, at *4 (W.D. Wis. May 8, 2009) ("[E]ven if I assumed a speedier resolution in this district, speed is only one factor to consider."); *AU Optronics Corp. v. LG Philips LCD Co.*, No. 07-C-137-S, 2007 WL 5613513, at *3 (W.D. Wis. May 30, 2007) ("While the parties would likely receive a speedy trial in this district, the advantages of consolidation outweigh the impact of slightly greater delay" where related action pending in transferee forum.).[7] The Federal Circuit has likewise cautioned against placing undue reliance on time-to-trial. *See In re Genentech*, 566 F.3d at 1347 (commenting that speed of transferee court is "speculative" and "should not alone outweigh all of those other factors").

[7] *See also Snyder v. Revlon, Inc.*, No. 06-CV-394-C, 2007 WL 791865, at *6 (W.D. Wis. Mar. 12, 2007) (remarking that "the relative speed with which an action may be resolved" is "not the only consideration") (citing *Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71, 73 (1963)); *Trafficast, Inc. v. Pritchard*, No. 05-C-557-S, 2005 WL 3002267, at *3 (W.D. Wis. Nov. 7, 2005) ("[T]he relative speed factor is not in and of itself dispositive of the matter.").

Nokia cites eight cases in support of its time-to-trial argument. (*See* Opp'n Br. at 10-11.) But Nokia fails to mention that none of these cases involved a related case—or ***any*** other case between the parties—pending in the transferee jurisdiction. Rather, in every one of these cases, time-to-trial was just ***one*** factor in the larger "interest of justice" analysis. In this case, in contrast, any minor difference in time-to-trial is insufficient to defeat Apple's motion to transfer, in view of the other transfer factors—most critically, the related litigation pending in Delaware.

C. Transfer to Delaware Would Promote Efficiency by Permitting Related Litigation To Proceed in the Same District.

Nokia cannot and does not dispute that this case involves the same parties, many of the same third parties, and the same accused products as the related Delaware litigation. These substantial overlaps are sufficient to justify transfer to Delaware. *See Matsushita Elec. Indus. Co. v. Siliconix Inc.*, No. 05-CV-732-S, 2006 WL 517628, at *5 (W.D. Wis. Mar. 2, 2006) (granting transfer of patent case to district where other patent infringement litigation involving similar technology, but different patents, was pending in the transferee forum; "the efficient administration of the court system is best served by transferring this action to . . . a district already familiar with the technology and the parties involved in the dispute.").

Nokia claims that Apple has "manufactured" the specific technological overlaps identified in its motion, and that Nokia's patents "are actually very different patents" with different "technology at the center." (Opp'n Br. at 19.) But the sole example that Nokia cites—the '345 patent that Nokia has asserted in this case, and the '904 patent that it has asserted in Delaware—is a strawman, set up to illustrate differences between two patents ***that Apple has never claimed are similar***. Apple's opening brief actually cited the Nokia '345 and ***'091*** patents as involving overlapping technologies, because the modulator that Nokia has accused of infringing the '345 patent in Wisconsin, and the voltage control oscillator that it has accused of

infringing the ’091 patent in Delaware, are both embedded on the ***same microchip*** in Apple’s products (a chip manufactured by third-party Infineon Technologies). (Apple Inc.’s Motion To Transfer Venue to the District of Delaware at 5.) Moreover, since filing its claims here, Nokia has attempted to add ***another*** patent to the Delaware case—the ’772 patent—accusing yet another related component manufactured by this same third party.

Nokia’s opposition to transfer to Delaware ignores not only the inconvenience to Infineon (which is likely to be subpoenaed in both cases), but also to other third party manufacturers—including Foxconn Electronics and Samsung Electronics—whose parts are relevant to the parties’ other accusations, and which are therefore likely to be subpoenaed in both cases. Nokia’s only response is that because “no one district or the other would be clearly more convenient” for these third-party suppliers, they should be made to appear in ***both*** Delaware and Wisconsin. (Opp’n Br. at 24.) This argument is nonsensical, and completely disregards the efficiencies of having these third-party manufacturers subpoenaed only once, in a single, consolidated action.

Nokia also ignores the other technological overlaps that Apple identified in its opening brief—including, for example, that three of the five patents that Nokia has asserted in this case (the ’431, ’894, and ’083 patents), and one of the patents that it has asserted in Delaware (the ’181 patent), relate to antennas. Because the accused Apple products are the same, Nokia apparently intends to accuse the very same Apple antennas of infringement in both cases. Transferring this case to Delaware would promote judicial efficiency by ensuring that only one judge will need learn this antenna technology, to address related discovery disputes, to construe overlapping claim terms (including, for example, “planar” antennas), and to address the host of other issues that are likely to arise at trial relating to these patents (including for example,

motions *in limine* and jury instructions). *See, e.g.*, *Lineage Power Corp. v. Synqor, Inc.*, No. 08-CV-397-SLC, 2009 WL 90346, at *6 (W.D. Wis. Jan. 13, 2009) (transferring case to district where related litigation is pending "because the court in Marshall is already obliged to learn power converter technology, that court incurs only a small marginal cost to use that knowledge to preside simultaneously over a third case between the same principals over the same technology"); *see also Zoltar Satellite Sys., Inc. v. LG Elec. Mobile Commc'ns Co.*, 402 F. Supp. 2d 731, 735 (E.D. Tex. 2005) ("In cases that involve a highly technical subject matter, such as patent litigation, judicial economy may favor transfer to a court that is already familiar with the issues involved in the case.").[8]

D. Transfer to Delaware Would Promote the Interests of Justice by Minimizing the Risk of Inconsistent Legal Determinations.

Because the same parties, the same accused products, and many of the same technologies are in issue in both cases, there is a significant risk of inconsistent legal rulings absent transfer. Nokia claims that the "common issues" that Apple has identified are based on an "oversimplification" of the issues. (Opp'n Br. at 16.) The mere fact that the cases involve the same parties and same accused products, however, makes it highly likely that both will involve similar disputes about issues such as protective orders, motions to compel and quash discovery, third-party discovery, motions *in limine*, evidentiary disputes, and jury instructions. The overlapping technologies in the case are also likely to raise similar legal issues including, as discussed above, similar claim construction issues.

[8] Nokia likewise ignores that the same prosecuting attorneys prosecuted ***four*** of the patents in this case and several of the patents in the Delaware case, suggesting at minimum that the technology is closely related. Moreover, since the prosecuting attorneys are likely witnesses, transferring this case to Delaware would spare them the need for multiple separate depositions on Nokia patents involving related technology.

Moreover, litigating this case in Wisconsin creates a risk of inconsistent rulings not only with respect to the claims between Nokia and Apple, but also with respect to Apple's related claims against HTC. As Nokia admits, two of the ***very same patents*** at issue in this case—U.S. Patent Nos. 5,946,647 and 7,380,116—are in suit in Apple's case against HTC, also pending before Judge Sleet in Delaware. (Opp'n Br. at 14.) The risk of inconsistent claim constructions for these patents is yet another reason that transfer is appropriate. *See AU Optronics*, 2007 WL 5613513, at *2 ("The interest of justice clearly disfavors the duplication and waste which is resulting from the simultaneous prosecution of mirror image patent suits in different federal courts. 'To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to wastefulness of time, energy and money that § 1404(a) was designed to prevent.'" (quoting *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990))).

III. Nokia Does Not Dispute that This Case Has No Connection to Wisconsin.

Nokia has not identified any meaningful connection that either the parties or their claims have to this district—because there is none. Rather, in an effort to manufacture some connection between Apple and this district, Nokia identifies a single case that Apple's predecessor corporation—Apple Computer, Inc.—filed here more than four years ago against an unrelated party. Nokia wrongly argues, relying solely on a decision from the Southern District of New York, *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), that Apple's prior filing in this district requires the denial of Apple's transfer motion. (Opp'n Br. at 22.)

The *ICOS* case does not say what Nokia claims. *ICOS* held merely that a defendant should not be able to obtain transfer on the basis that a forum is inconvenient, when it had

recently filed a case against the ***same plaintiff***, in the same forum, asserting similar patents. *See ICOS*, 2006 WL 838990, at *6 (expressing skepticism of a defendant's claim of inconvenience, when the defendant had previously "brought suit in this very Court against this very plaintiff for infringement of patents on devices similar to those at issue here, and litigated that case to trial on the merits."). Moreover, the only related action was that prior case; the defendant was not trying to transfer the case to a forum where a related case was pending. *See id.* at *1, *6. Apple has never argued that this district is the appropriate venue for resolution of its dispute with Nokia, and Apple has never sued Nokia in this district. Instead, the only similar litigation between these parties is pending in Delaware.

Apple's prior, unrelated litigation against an unrelated party in no way diminishes the merits of Apple's motion to transfer. Rather, as Judge Shabaz recognized in *Gemini IP Tech., LLC v. Hewlett-Packard Co.*, when considering a transfer motion, the convenience of the parties must be evaluated on the merits for each individual case, regardless of previous litigation in the forum. *See Gemini IP Tech., LLC v. Hewlett-Packard Co.*, No. 07-C-205-S, 2007 WL 2050983, at *1–*2 (W.D. Wis. July 16, 2007) (granting accused infringers' motion to transfer notwithstanding argument that defendants had previously litigated in the forum, because "[e]ach case must be judged on its own practicalities" and "[a] corporation does not forfeit its right to

claim greater convenience in another forum because it is large or because it has litigated here in the past.").[9]

IV. Apple's Counterclaims Are Not Inconsistent With Its Motion To Transfer.

Nokia focuses, in particular, on Apple's counterclaims in this case, arguing that these counterclaims require denial of Apple's motion to transfer. (Opp'n Br. at 15.) Nokia's focus on Apple's counterclaims, however, flatly contradicts the arguments that it made in attempting to transfer Qualcomm's claims against it out of this district. As Nokia argued to this Court, there is no inconsistency between moving to transfer a case to more convenient forum, and filing counterclaims:

> Next, Qualcomm argues that by filing permissive counterclaims in this Court, Nokia has acted inconsistently with its position that the Southern District of California is a more convenient forum. But Nokia obviously chose this forum to present its counterclaims because that's where Qualcomm filed its case. Nokia is entitled to present to the jury in this case evidence that Qualcomm is using Nokia's patents. Injecting such issues into the case did nothing to waive Nokia's right to have the entire case--claim and counterclaims--in a forum more convenient for everyone.

(Ex. 1 to Declaration of Mark Selwyn ("Selwyn Decl.") in Support of Apple's Motion to Transfer Venue, Nokia Reply In Support of Motion to Transfer at 6 (internal citation omitted).)

[9] *See also Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995, 1002 n.5 (E.D. Tex. 2009) ("[G]iven the fact specific nature of venue transfer analysis, it is unlikely that Microsoft's prior litigation in this district would be highly relevant to the analysis in this case."); *Prism Tech., LLC v. VeriSign, Inc.*, No. 8:08-CV-195, No. 8:08-CV-196, 2008 WL 5111044, at *5 (D. Neb. Dec. 2, 2008) ("'Each case must be judged on its own practicalities. A corporation does not forfeit its right to claim greater convenience in another forum because it is large or because it has litigated here in the past.'" (quoting *Gemini IP Tech.*, 2007 WL 2050983, at *2)); *O'Shea v. Int'l Brotherhood of Teamsters, Local Union No. 639*, No. Civ.A. 04-0207(RBW), 2005 WL 486143, at *4 n.3 (D.D.C. Mar. 2, 2005) (stating that a prior case involving the same parties was "a separate and unrelated matter and therefore the fact that the prior case was litigated in this Court has no bearing on where this case should be litigated.").

As discussed in detail above, the Wisconsin and Delaware cases are part of the same dispute, and have substantial overlaps, even ignoring Apple's counterclaims. Both cases involve the same parties, and the same accused products. Both cases also involve substantial overlapping technologies. It is Nokia's claims—not Apple's counterclaims—that create the technological overlap between the modulator (at issue in this case) and the voltage control oscillator (at issue in Delaware). It is Nokia's claims—not Apple's counterclaims—that implicate the same third parties, including Infineon, in both cases. And it is Nokia's claims—not Apple's counterclaims—that implicate the same Apple antennas in both cases.[10]

V. Nokia Misstates the Law on Plaintiff's Choice of Forum.

Nokia asserts that its choice of forum should not be disturbed, even though Nokia has admitted it does not have "*any* connection to this district." (Ex. 1 to Selwyn Decl., Nokia Reply In Support of Motion to Transfer at 1.) But Nokia ignores the clear precedent of this district to the contrary, including Judge Crabb's decisions in *Uniroyal* and *Rudich*, both of which make clear that ***a foreign plaintiff's choice of forum deserves no weight when it is not "litigating in its home forum."*** *See Uniroyal Engineered Prods., LLC v. Omnova Solutions Inc.*, No. 08-CV-586-SLC, 2009 WL 736700, at *3 (W.D. Wis. Mar. 19, 2009) ("In theory, a plaintiff's choice of forum does deserve deference, but ***only when a plaintiff is litigating in his home forum***." (emphasis added)); *Rudich*, 2008 WL 4691837, at *4 ("The general rule that a plaintiff's choice of forum deserves deference applies ***only when a plaintiff is litigating in his home forum***."

[10] Nokia's argument that Apple could have brought its counterclaims in the Delaware case applies equally to Nokia's original patent claims in this district. As Nokia points out in its opposition brief (in reference to Apple's counterclaims), the scheduling order in the Delaware case permits the parties to move to amend their pleadings through August 30, 2010. (Opp'n Br. at 15.)

(emphasis added)); *see also, e.g.*, *Kraft Foods Holdings, Inc. v. Proctor & Gamble Co.*, No. 07-CV-613-JCS, 2008 WL 4559703, at *3 (W.D. Wis. Jan. 24, 2008) ("[T]he Western District of Wisconsin is not P&G's home forum which means that P&G's choice of forum receives no special deference."). These cases are consistent with Seventh Circuit law, which holds that a plaintiff's forum selection "has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff." *Chicago, Rock Island & Pac. R.R. Co. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955).[11]

Nokia's choice of forum is also entitled to no weight for the further reason that it is seeking to avoid Delaware—the forum where it originally chose to litigate its larger dispute with Apple. *See, e.g.*, *DataTreasury Corp. v. First Data Corp.*, 243 F. Supp. 2d 591, 594 (N.D. Tex. 2003) (remarking that plaintiff's choice of forum "becomes less significant where, as here, the plaintiff originally filed suit in another district."); *General Elec. Co. v. R. Squared Scan Sys., Inc.*, No. 89-C-8604, 1990 WL 7186, at *4 (N.D. Ill. Jan. 12, 1990) (because GE filed in the new forum only after it encountered setbacks in the first forum, "[i]t appears to us more likely than

[11] Nokia likewise ignores case law—including Judge Adelman's decision in *Lineage Power*—holding that a plaintiff's choice of forum deserves no weight when the "case has no discernable connection to this district" or to the state of Wisconsin. *Lineage Power*, 2009 WL 90346, at *5; *see also Bruce Lee Enters., LLC v. Ecko. Complex, LLC*, No. 1:09-CV-0398, 2010 WL 989909, at *3 (S.D. Ind. Mar. 16, 2010) ("When a plaintiff's choice of forum has little connection to the event or events underlying its claims, its choice of forum is entitled to little deference."); *D&G Inc. v. Supervalu, Inc.*, No. 08-CV-761-SLC, 2009 WL 1110412, at *4 (W.D. Wis. Apr. 24, 2009) (where district is not plaintiff's home forum, "[p]laintiffs' choice to litigate in a forum in which certain events occurred deserves no special deference when it is undisputed that these events took place, regardless whether the events are 'material' to the lawsuit." (citing *Chicago, Rock Island & Pac. R.R. Co.*, 220 F.2d at 304)); *Rudich*, 2008 WL 4691837, at *4 (describing *Chicago, Rock Island & Pac. R.R. Co.*, 220 F.2d at 304, as stating that "plaintiff's choice of forum given less deference if few operative facts occurred in that forum"); *Snyder*, 2007 WL 791865, at *8 ("[C]ourts have held that when plaintiff's chosen forum bears only a tangential relation to the events at issue in the lawsuit, a plaintiff's choice has weight equal to other factors and will not receive deference").

not that GE is attempting to judge shop in the present case by filing suit in Illinois instead of filing a new suit in North Carolina. While that fact in and of itself does not justify a transfer of this case, it does wipe out GE's claim that we should defer to its choice of forum.").

VI. Nokia Should Not Be Allowed to Forum Shop To Avoid the Delaware Judge and Scheduling Order.

As Nokia has admitted in its opposition, Nokia's initial litigation strategy was to attempt to structure the Delaware case as a one-sided case involving only Nokia's own patent infringement claims. Apple responded—appropriately—with counterclaims for breach of Nokia's FRAND contract and for antitrust violations, as well as for infringement of its own patents. Nokia moved to dismiss Apple's contract and antitrust claims, purportedly because they would "divert attention" from Nokia's infringement claims. (*See* Opp'n Br. at 4.) While its motion to dismiss was pending, Nokia also moved to bifurcate and stay Apple's counterclaims, so that its patent infringement case could proceed ahead of Apple's counterclaims. (Ex. 9 to Selwyn Decl., *Nokia Corp. v. Apple, Inc.*, No. 09-CV-791-GMS, Docket No. 27 (D. Del. Mar. 18, 2010).)

Judge Sleet has since denied Nokia's motion to dismiss Apple's contract and antitrust counterclaims. (*See* Opp'n Br. at 4).) Moreover, during the parties' June 3, 2010 conference with Judge Sleet, he also indicated that he is considering structuring the trial so that Apple's FRAND contract counterclaims are tried first, in the first five days of a twenty-seven day trial, followed by the parties' patent claims. (Ex. 9 to Selwyn Decl., *Nokia Corp. v. Apple, Inc.*, No. 09-CV-791-GMS, Docket No. 55 (D. Del. Mar. 18, 2010).)

Nokia's filing in this district—in the face of Apple's strong arguments that its counterclaims are well-founded, and should be tried first—is textbook forum shopping. Nokia

knew that it could time its filing in this district so that this patent case would likely be tried ahead of Apple's earlier-filed counterclaims. This Court should not condone Nokia's procedural maneuvering, simply because of Nokia's concerns about time-to-trial. As Judge Crocker succinctly stated in *Lineage Power Corp.*, 2009 WL 90346, at *7, a case involving very similar facts, "[i]f [plaintiff] Lineage was so concerned about a delay . . . between a trial date in Madison and what it expects to receive from the court in Marshall, then Lineage should have filed its first lawsuit here, period." *See also Encyclopaedia Britannica, Inc. v. Magellan Navigation, Inc.*, 512 F. Supp. 2d 1169, 1177 (W.D. Wis. 2007) ("Transfer would stop plaintiff's forum shopping. By its own admission plaintiff believes the Texas cases have stalled . . . . To allow plaintiff to start anew in a different district would permit a type of forum shopping that would consume an unnecessary amount of judicial resources.").

Indeed, Nokia's own actions in this case belie its claim that it requires a quick resolution of its claims to stop the purportedly infringing activities of a "direct competitor." (Opp'n Br. at 1-2.) Nokia filed its Delaware case in October 2009, but waited another ***seven months***—until May 2010—to file this lawsuit. *See Lineage Power*, 2009 WL 90346, at *6 (granting motion to transfer and noting that plaintiff's purported concern for a quick resolution of its patent claims was belied by its delay in filing suit); *see also Broadcom, Corp. v. Microtune, Inc.*, No. 03-C-676-S, 2004 WL 503942, at *4 (W.D. Wis. Mar. 9, 2004) (granting motion to transfer and noting that "[t]he history of litigation between the parties calls plaintiff's stated concern with obtaining a speedy resolution into doubt."). If Nokia truly wanted a quick resolution of its claims, it could have filed this case in 2008, when Apple introduced the accused iPhone 3G. *See Lineage Power*, 2009 WL 90346, at *6 (noting that plaintiff's filing suit after "tolerating years of alleged infringement" was fact weighing in favor of transfer).

VII. Conclusion

For the foregoing reasons, and for the reasons set forth in Apple's opening memorandum, Apple respectfully requests that the Court transfer this case to the United States District Court of Delaware, to facilitate consolidation of this case with the related litigation pending in that court.

Dated: July 30, 2010

GODFREY & KAHN, S.C.

By: *s/ Bryan J. Cahill*

James Donald Peterson (# 1022819)
Bryan J. Cahill (#1055439)
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Tel: (608) 257-3911
Fax: (608) 257-0609
jpeterson@gklaw.com
bcahill@gklaw.com

Attorneys for Defendant Apple Inc.

OF COUNSEL:

WILMER CUTLER PICKERING
HALE AND DORR LLP

William F. Lee
Cynthia D. Vreeland
Dominica E. Massa
60 State Street, Boston, MA 02109
Tel. (617) 526-6000

Keith Slenkovich
950 Page Mill Road
Palo Alto, CA 94304
Tel. (650) 858-6000

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2010, I caused these documents to be electronically filed with the Clerk of Court using the ECF system, which will make these documents available to all counsel of record for viewing and downloading from the ECF system.

- APPLE INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER VENUE TO THE DISTRICT OF DELAWARE PURSUANT TO 28 U.S.C. § 1404(a)

s/ Bryan J. Cahill
Bryan J. Cahill

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