

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NOKIA CORPORATION, NOKIA INC.,)	
INTELLISYNC CORPORATION, and)	
NAVTEQ NORTH AMERICA, LLC,)	
)	
Plaintiffs,)	C.A. No. 12-550-LPS
)	
v.)	JURY TRIAL DEMANDED
)	
HTC CORPORATION, HTC AMERICA,)	REDACTED -
INC., and EXEDEA INC.,)	PUBLIC VERSION
)	
Defendants.)	

NOKIA CORPORATION and NOKIA INC.,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. 12-551-LPS
)	
HTC CORPORATION, HTC AMERICA,)	JURY TRIAL DEMANDED
INC., and EXEDEA INC.,)	
)	REDACTED -
Defendants.)	PUBLIC VERSION
)	

**HTC DEFENDANTS' REPLY BRIEF IN SUPPORT OF
THEIR CONSOLIDATED MOTION TO STAY**

Of Counsel:

MCDERMOTT, WILL & EMERY LLP
Terrance P. McMahon
Yar R. Chaikovsky
S. Michael Song
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
(650) 815-7400

Blair M. Jacobs
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

YOUNG CONAWAY STARGATT
& TAYLOR
Adam W. Poff (No. 3990)
James L. Higgins (No. 5021)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600
apoff@ycst.com
jhiggins@ycst.com

*Attorneys for HTC Corporation and
HTC America, Inc.*

David M. Beckwith
Daniel R. Foster
Christopher D. Bright
4 Park Plaza, Suite 1700
Irvine, CA 92614-2559
(949) 851-0633

August 20, 2012

Redacted Version: August 21, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION AND SUMMARY OF ARGUMENT1

ARGUMENT.....6

 I. Proceeding With the -549, -550, and -551 Actions Together After the ITC
 Proceeding Will Simplify the Issues and Promote Judicial Economy.....6

 A. This Litigation Will Not Be Unduly Delayed and Need Not Proceed
 in Parallel.8

 B. The Material Facts of *Apple, Inc. v. HTC Corp.* Similarly Justify a
 Stay Here.....9

 C. Nokia’s Separate Action Against ViewSonic Does Not Justify Denial
 of a Stay of the Actions Against HTC.10

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
<i>Apple, Inc. v. HTC Corp.</i> , Case No. 1:1-cv-00167-GMS, D.I. 97 (D. Del. Dec. 22, 2011)	5, 9, 10
<i>Mems Tech. Berhad v. ITC</i> , 2011 U.S. App. LEXIS 11350 (Fed. Cir. 2011)	6
<i>SanDisk Corp. v. Phison Elecs. Corp.</i> , 538 F. Supp. 2d 1060 (W.D. Wis. 2008)	7

INTRODUCTION AND SUMMARY OF ARGUMENT

HTC respectfully submits this reply in support of its motion asking the Court to exercise its discretion to stay two cases, 1:12-cv-00550 and 1:12-cv-00551. One related case in this Court, 1:12-cv-00549, was mandatorily stayed because it involves the same nine patents that are asserted by Nokia in a parallel ITC action against HTC. Nokia does not dispute the material matters that demonstrate that the ITC/-549 actions involve overlapping patent infringement issues with the -550 and -551 actions. These overlapping issues between the ITC and the -549 action mandated a stay of the -549 action. They similarly justify a stay of the -550 and -551 actions. HTC promptly filed this motion to stay the -550 and -551 actions in this Court pending the lifting of the stay of the -549 action. Nokia has opposed.

A stay of the -550 and -551 actions pending the lifting of the stay of the -549 action is the only way to avoid duplication and potential inconsistencies between these actions. If the -550 and -551 action proceed now, then when the stay of the -549 action is lifted, there will be duplicative discovery of legal and factual issues that will have to take place in the -549 action. In contrast, if the -550 and -551 actions are stayed and tied to the schedule of -549 action, then there will be no duplicative discovery or potential inconsistencies between them because they can all proceed together after the stay of the -549 action is lifted. Nokia acknowledges that the test for whether a discretionary stay should be entered requires balancing the relative hardships on the parties and determining “whether a stay will simplify issues and promote judicial economy.” The -549 case is stayed because it may avoid the need to re-litigate the same issues the ITC is addressing. For the reasons the -549 case is stayed, the -550 and -551 actions should be stayed: they will benefit from both the ITC action and later proceeding together with the -549 action.

Getting beyond Nokia’s rhetoric, Nokia’s opposition does not dispute the material

matters that justify a stay of the -550 and -551 actions. Nokia does not dispute that “[a]t least more than 83% (10 out of 12) of the products accused in the ITC/-549 actions are also accused in either the -550 or -551 actions ...” Nokia does not dispute that the percentage of products Nokia ultimately attempts to accuse in the ITC/-549 actions that are also accused in either the -550 or -551 actions is likely to be higher than 83% since Nokia is likely to attempt to include more of HTC’s phones with Android and Windows operating systems. [REDACTED]

[REDACTED] Nokia does not dispute that “the remaining accused products have common technical characteristics, such as operating systems, type of chips ...”

Nokia does not dispute that “There are over 580 claim terms shared between the ITC/-549 patents and the patents in either the -550 or the -551 actions.” Nokia does not dispute that there are dozens and dozens of claim terms shared between the ITC/-549 patents and the patents in the -550 and -551 actions. Nokia fails to explain how proceeding in parallel in the ITC and this Court on all of these overlapping claim terms and accused products would avoid the inefficiencies and inconsistencies of duplicating efforts in construing the claim terms and comparing them to the common accused product features in the ITC and this Court.

Nokia also does not dispute the material facts that establish that Nokia will suffer no substantial harm from a stay. Nokia does not dispute that “All of the asserted patents in the -550 and -551 actions issued several years ago and, in many cases, more than a decade ago. [REDACTED]

[REDACTED], and yet Nokia waited until May 2012 to file the -550 and -551 actions.” Nokia’s own delay in pursuing HTC on these patents demonstrates that Nokia will suffer no substantial hardship by a stay of the -550 and -551 actions. As reflected by Nokia’s own delay, Nokia can still pursue the damages it seeks in this Court following a stay.

Finally, Nokia does not dispute that the denial of a stay would substantially harm HTC and third parties. HTC is already defending itself in the ITC on nine patents, and other parties, including Qualcomm and Google, for example, are already facing significant discovery in the ITC on the overlapping accused products. Duplicative discovery and inconsistent results from proceeding in parallel would subject HTC and these other parties to substantial harm.

HTC replies to Nokia's arguments against a stay:

1. Nokia argues: "in essence, HTC argues that Nokia-or any other company-cannot proceed with patent infringement assertions against HTC in a United States district court if there is any pending patent litigation by that company against HTC in the ITC-no matter how unrelated the asserted patents may be." *Opp.* at 1. This is not HTC's argument at all. Rather, the undisputed facts on the overlapping subject matter in this case justify the stay. The more than 83% overlap in accused products and the hundreds of overlapping claim terms will require numerous comparisons of these common claim terms to numerous common accused product features. By entering a stay just like it has for the -549 action, this Court will benefit from the ITC's comparisons while avoiding the inconsistencies of proceeding in parallel.

2. Nokia further argues: "the patents in the 1:12-cv-00550 and 1:12-cv-00551 actions against HTC bear no relationship to the patents in the ITC action. The patents in the ITC have different specifications than the patents before this Court. They have different inventors. And they have different claims." *Opp.* at 1. It is misleading for Nokia to say that the patents in the actions which are the subject of this motion "bear no relationship to the patents in the ITC action." It is undisputed by Nokia that there are hundreds of overlapping claim terms, and each patent in the -550 and -551 actions before this Court shares numerous claim terms with the

patents in the ITC/-549 actions.¹ Nokia does not dispute the common patent subject matter categories or common patent classifications and common references cited. *Motion Ex. F.*

3. Nokia tries to deflect from this overlapping subject matter, arguing: “these subject matters are broad enough to encompass the basic functionality of any mobile device. They do not demonstrate similarity among the patents.” *Opp.* at 2. But there is specific – not merely general – overlap in subject matter, including as reflected in the numerous common claim terms and common subject matter. Among these, Nokia ignores overlapping technical claim terms like “calendar,” “events,” “application,” “database,” “attenuating,” “separated,” and “link.”

4. Nokia argues that “every mobile device has all of those components in some form or another-and HTC does not contend otherwise.” *Opp.* at 2. But every one of the common claim terms – as construed – will have to be compared to the common accused product features. There is also a need for consistency in construing overlapping claim terms which may not otherwise be defined by the specifications, which is most likely if all actions are stayed.

5. Nokia argues: “To the extent there is overlap between discovery in the ITC investigation and in the district court, that overlapping discovery can be coordinated so that both party and third-party witnesses are not burdened with multiple depositions.” *Opp.* at 2. Nokia’s argument is the result of wishful thinking. The ITC action and the -550 and -551 actions are unlikely to be coordinated in parallel and will certainly have different schedules, as will the -549 action. A stay is the only way to minimize duplication and inconsistencies. A stay would result in the benefit of being able to consider ITC discovery and rulings in proceedings in this Court later on the same or similar issues, including dispositive issues.

6. Nokia’s argument for alleged harm due to a stay rings hollow. Nokia argues that

¹ Also, there is at least one common inventor and common prosecution firm here. *Motion Ex. F.*

it “will be harmed by staying the current actions before this Court. With a final initial determination from the ITC not expected until the end of 2013, and the likelihood of appeals following that final initial determination ...” *Opp.* at 2. It was Nokia’s strategic decision not to bring all patents in the ITC to seek exclusion orders on all patents. The lack of harm to Nokia in awaiting a stay is demonstrated by Nokia’s substantial delay in bringing these lawsuits.

7. Nokia bemoans a “loss of documents and memories” during a stay and argues that “[i]f this action is stayed and lies dormant for the several years it may take to litigate the action before the ITC through a final determination and appeal to the Federal Circuit, witnesses’ memories of key facts are likely to fade and documents of third parties may be lost or destroyed.” *Opp.* at 3, 4. This concern is misplaced. Nokia is already seeking sweeping discovery in the ITC investigation on the more than 83% of overlapping accused products and is likely to seek to expand the scope of accused products in the ITC action, which undisputedly would increase the overlap. Noticeably, Nokia does not dispute that there will be numerous common fact and expert witnesses in the ITC/-549 actions and the -550 and -551 actions.

8. Nokia’s arguments about the applicable case law are also misplaced. Nokia argues that “HTC cites no case in which a court has stayed claims relating to patents entirely different from those before the ITC.” *Opp.* at 4. But the patents are not “entirely different.” They are being applied to an overwhelming percentage of common accused products (more than 83%) and involve an overwhelming number of common claim terms (hundreds). The case law cited by HTC, including the *Apple v. HTC* case before this Court, involved similar overlap in accused products and overlapping claim terms. The courts in these cases stayed cases where there was a substantial overlap in accused products and claim terms, just as here. In contrast, the cases cited by Nokia do not involve the substantial overlap present here, and are thus inapposite.

ARGUMENT

I. PROCEEDING WITH THE -549, -550, AND -551 ACTIONS TOGETHER AFTER THE ITC PROCEEDINGS WILL SIMPLIFY THE ISSUES AND PROMOTE JUDICIAL ECONOMY.

In its motion, HTC showed that there will be a substantial overlap in discovery, factual, and legal issues between the ITC/-549 actions and the -550 and -551 actions, which favors a stay of all of the Delaware actions to simplify the issues for discovery and trial. It is not in the interests of judicial economy or consistency to proceed with the -550 and -551 actions now on substantially the same discovery and legal and factual issues that will arise later in the -549 action once the stay is lifted in that case. Rather than proceeding piecemeal, by having all of these Delaware actions proceed later at the same time (which will be soon due to the speed of the ITC), the Delaware cases can be streamlined together later.

Nokia's arguments in opposition fail. Nokia argues: "no evidence exists that common claim terms will be at issue in the two proceedings, nor is there any reason to believe that terms construed in one patent will or should be construed the same in another patent." *Opp.* at 8. On the contrary, there are hundreds of common claim terms necessarily at issue either by virtue of claim construction, comparison to the overwhelmingly overlapping accused product features, or both. Moreover, there is good reason to believe that the same claim terms should be construed consistently among the patents, unless the specifications define them otherwise. *See Mem's Tech. Berhad v. ITC*, 2011 U.S. App. LEXIS 11350, at *28 (Fed. Cir. 2011). Nokia argues that "The patents in the -550 and -551 actions claim different inventions from the claims in the ITC." *Opp.* at 9. As would be expected for any patent, each patent claims its own alleged inventions. But the patents are "similar" enough to extensively use hundreds of common claim terms.

Nokia next argues that "this Court is not bound by any claim construction rulings by the ITC, and thus delaying until after the ITC investigation is complete will not prevent

inconsistencies...” *Opp.* at 8. Such rulings can undoubtedly assist this Court and the parties on issues relating to the common claim terms. Indeed, this is one of the policy reasons that mandated a stay of the -549 action pending the outcome of the ITC proceeding. According to Nokia, “even claim terms that are common across patents and that require construction likely will require different constructions consistent with the unique specifications of each patent.” *Opp.* at 8-9. Tellingly, Nokia fails to identify even a single example of different constructions.

Nokia argues “Nor will this Court benefit from any determination by the ITC of the parties’ positions with respect to infringement, validity, or unenforceability of the patents-in-suit—those issues are not before the ITC.” *Opp.* at 11. There are numerous common comparisons to the overlap in accused product features that the ITC will make in deciding the issue of infringement. Just like for the -549 action, this Court will benefit from the ITC’s determinations, possibly leading to prompt disposition of the -550/-551 actions. Contrary to Nokia’s suggestion, a “perfect[] overlap” in accused products is not required for a stay. *Opp.* at 9. If Nokia has its way, there will likely be more than the current at least 83% overlap in accused products, given Nokia’s statements in its ITC complaint that it will likely seek to accuse more products in the ITC (likely to result even more overlap), which Nokia does not deny in its opposition. This overlap justifies a stay just as it did in other cases. *See, e.g., SanDisk Corp. v. Phison Elecs. Corp.*, 538 F. Supp. 2d 1060, 1067 (W.D. Wis. 2008).

Turning common sense on its head, Nokia argues: “It would be more efficient to have the discovery process run parallel rather than separate.” *Opp.* at 11. A parallel process is guaranteed to lead to inefficiencies. The parties will be asking for the same or similar discovery in the ITC/-549 actions and the -550 and -551 actions. Discovery is unlikely to be coordinated between these two different venues with their different rules and known different discovery

schedules. Inconsistencies in discovery would unduly burden all involved. A stay is the better alternative. Policy mandated that the -549 action be stayed, and for these reasons, the -550 and -551 actions should also be stayed so that these Delaware actions all proceed together.

A. THIS LITIGATION WILL NOT BE UNDULY DELAYED AND NEED NOT PROCEED IN PARALLEL.

In its motion, HTC argued that a stay will not unduly prejudice or present a clear tactical disadvantage to the non-moving party Nokia. Nokia's opposition fails to set forth any substantial harm to Nokia from a stay. Nokia argues that "the prejudice to Nokia of delaying this action, which seeks damages for infringement, is substantial." *Opp.* at 12. Nokia will not be harmed by a delay in seeking damages in this Court. Any damages existing now will still exist after a stay. Notwithstanding Nokia's rhetoric about its "goodwill and reputation as an innovator" and "market share" (*Opp.* at 4), [REDACTED]

[REDACTED]

[REDACTED]

Attempting to explain its curious decision to bring half of the 18 patents asserted in the ITC/-549 actions and the other half in the -550 and -551 actions, Nokia argues that it was not forum shopping. Nokia argues: "The elements of proof in each venue are different as well. For example, the ITC requires proof of a domestic industry, while no such requirement exists at the district court. 19 C.F.R. § 210.12(a)(6)(i). Thus, choosing between the ITC and district-court litigation-or using both-is not a form of forum shopping." *Opp.* at 13. But it was forum shopping by Nokia to seek two bites at the apple against HTC in two different forums on overwhelmingly overlapping accused products and patents with hundreds of common claim terms. Nokia's explanation that the proof issues are different defies common sense. Nokia has not, as of yet, abandoned any claim for lost profits as a measure of damages in this Court, which

would have overlap in elements of proof with domestic industry in the ITC. Even if Nokia only seeks a reasonable royalty as a measure of damages, this measure would include underlying facts that are common to domestic industry in the ITC, like licensing and Nokia's alleged use of the patents. Just like Apple did in the *Apple* case, the simple reality here is that Nokia engaged in forum shopping by choosing to assert some patents in the ITC to seek an exclusion order, and separate patents in the district court seeking damages in this Court thereafter, while all of the asserted patents in all of the Nokia filings undeniably could have been asserted in the ITC.²

B. THE MATERIAL FACTS OF *APPLE, INC. V. HTC CORP.* SIMILARLY JUSTIFY A STAY HERE.

HTC's motion relied in part on the discretionary stay entered in the *Apple v. HTC* case. Nokia's opposition addresses this case, but fails to justify a different outcome. Nokia argues: "the facts in the Apple case bear virtually no resemblance to the facts here ... multiple inventors overlapped ... two of the patents shared a common provisional application ... Apple itself argued in opposition to transfer that 'the 544 Case shares numerous common issues of law and fact ...'" Notwithstanding its efforts, Nokia cannot distinguish the *Apple* case in any material way. In *Apple*, there was an overlap on two inventors and there was an overlap in a provisional application between two patents. But these are not the factors that primarily drove a stay in the *Apple* case. Rather, the Court in the *Apple* case focused on the overlap in accused products. *Apple*, Case 1:10-cv-00167-GMS, D.I. 97, at 5 ("though different patents are involved in the 10-cv-167, 10-cv-544, and 11-cv-611 actions, Apple's actions allege infringement in connection by the same products and the same parties"). The Court in the *Apple* case also focused on the overlap in technical subject matter. *Id.* at 4, 6 (although the "patents at issue do not share common specifications or arise from the same patent families", "[the] actions before the court

² Nokia makes the false assertion that there has been a suggestion that "the only legitimate forum for speedy resolution of patents disputes is the ITC." *Opp.* at 12.

are sufficiently similar in subject matter and evidence overlap”).

A stay here is at least as appropriate as in the *Apple* case given the overlap here. *See id.* at 4, n.8 (“the patents at issue in the two actions share at least one claim term, which would need to be construed consistently”). Although “Apple conceded that the 10-cv-544 case ‘shares numerous common issues of law and fact’ with the other cases pending in the district” (*id.* at 4 n.9), Apple merely conceded what Nokia truthfully cannot deny here: there are numerous common issues of law (*e.g.*, claim construction for common claim terms) and fact (*e.g.*, common accused product features and how they compare to the common claim terms). Apple also recognized the benefits of “having a single court consider these cases at the same time” (*id.*), the same kinds of benefits of efficiency and consistency from staying the -550 and -551 actions and proceeding with them later with the -549 action after the stay of the -549 action is lifted.

C. NOKIA’S SEPARATE ACTION AGAINST VIEWSONIC DOES NOT JUSTIFY DENIAL OF A STAY OF THE ACTIONS AGAINST HTC.

Nokia argues against a stay based on the *ViewSonic* case in this Court. *Opp.* at 15. Regardless of the outcome on ViewSonic’s motion to stay, a stay of the cases here is separately justified because of the significant overlap of hundreds of common claim terms and the more than 83% of accused HTC products which are common to both the ITC/-549 actions and the -550/-551 actions. The -549 action against HTC is already stayed. The -550 and -551 actions against HTC should also be stayed and proceed together later with the -549 action.

* * *

Because the relative hardships overwhelmingly fall on HTC and third parties and a stay will simplify issues and promote judicial economy, HTC respectfully requests that the Court stay these -550 and -551 actions until the ongoing ITC matter has concluded and the -549 action has been removed from its mandatory stay.

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

/s/ Adam W. Poff

Adam W. Poff (No. 3990)
James L. Higgins (No. 5021)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600
apoff@ycst.com
jhiggins@ycst.com

*Attorneys for HTC Corporation and
HTC America, Inc.*

OF COUNSEL:

Terrence P. McMahon
Yar R. Chaikovsky
S. Michael Song
MCDERMOTT, WILL & EMERY LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
(650) 815-7400

Blair M. Jacobs
MCDERMOTT, WILL & EMERY LLP
600 13th Street, N.W.
Washington, DC 20005-3096
(202) 756-8000

David M. Beckwith
Daniel R. Foster
Christopher D. Bright
MCDERMOTT WILL & EMERY LLP
4 Park Plaza, Suite 1700
Irvine, CA 92614-2559
(949) 851-0633

DATED: August 20, 2012

CERTIFICATE OF SERVICE

I, Adam W. Poff, Esquire, hereby certify that on August 21, 2012, I caused to be electronically filed a copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

Joseph J. Farnan, Jr., Esquire
Brian E. Farnan, Esquire
Michael J. Farnan, Esquire
Farnan, LLP
919 N. Market Street
Wilmington, DE 19801
farnan@farnanlaw.com
bfarnan@farnanlaw.com
mfarnan@farnanlaw.com

Attorneys for Plaintiffs

I further certify that on August 21, 2012, I caused a copy of the foregoing document to be served by e-mail on the above-listed counsel and on the following:

John M. Desmarais, Esquire
Alan S. Kellman, Esquire
Jason Berrebi, Esquire
Desmarais LLP
230 Park Avenue
New York, NY 10169
jdesmarais@desmaraisllp.com
akellman@desmaraisllp.com
jberrebi@desmaraisllp.com

Attorneys for Plaintiffs

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ Adam W. Poff

Adam W. Poff (No. 3990)
James L. Higgins (No. 5021)
Rodney Square
1000 North King Street
Wilmington, DE 19801
apoff@ycst.com
jhiggins@ycst.com

Attorney for Defendants