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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN JOSE DIVISION**

14
 15 FEDERAL TRADE COMMISSION,
 Plaintiff

17 v.

18
 19 QUALCOMM INCORPORATED, a Delaware
 Corporation,
 20 Defendant.

Case No. 5:17-cv-00220-LHK-NMC

**FEDERAL TRADE COMMISSION'S
 OPPOSITION TO QUALCOMM'S
 MOTION TO DISMISS**

**REDACTED PUBLIC VERSION OF
 DOCUMENT SOUGHT TO BE SEALED**

Date: June 15, 2017
 Time: 1:30 p.m.
 Courtroom: 8, 4th Floor
 Judge: Hon. Lucy H. Koh

Issue to Be Decided

Whether the complaint states a claim under the Federal Trade Commission Act for monopolization, agreements in restraint of trade, and unfair methods of competition by alleging that Qualcomm uses its monopoly power over modem chips to coerce a range of exclusionary terms of dealing with customers, and refuses to license standard-essential patents to competitors in violation of its commitments to license on fair, reasonable, and non-discriminatory terms.¹

¹ Acting Chairman Maureen K. Ohlhausen dissented from the filing of the complaint in this case, www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf, and she has not changed her views.

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1 **I. INTRODUCTION**

2 Antitrust law prohibits a monopolist from conditioning the supply of its product on
 3 customers' agreement to pay a "tax" when they use rivals' products. Qualcomm, a monopoly
 4 supplier of modem chips, maintains a "no license-no chips" policy under which it conditions
 5 supply of its chips on its customers' agreement to pay such a tax. The key question is whether
 6 Qualcomm can shield its conduct from antitrust scrutiny by labeling this tax—which customers
 7 pay to protect their supply of Qualcomm's *chips*—as royalties on Qualcomm's FRAND-
 8 encumbered standard-essential *patents*. It cannot. Antitrust law eschews such formal labels and
 9 instead examines market realities.

10 Qualcomm is entitled to negotiate royalties that reflect the value of its patents (*i.e.*, the
 11 royalties that Qualcomm would negotiate in the shadow of an infringement suit), including on
 12 rivals' chips that practice those patents. But Qualcomm's no license-no chips policy forces
 13 customers to negotiate in the shadow of Qualcomm's threat to withhold chips. Qualcomm's
 14 policy distorts license negotiations, leading customers to accept elevated patent royalties they
 15 otherwise would refuse. In some cases, Qualcomm further distorts license negotiations by paying
 16 customers to accept elevated royalties.

17 Qualcomm's executives recognize that its no license-no chips policy enables "[REDACTED]
 18 [REDACTED]." (¶¶ 96, 98.)² Consistent with that
 19 recognition, Qualcomm collects far more in royalties than other licensors in the industry with
 20 comparable patent portfolios—[REDACTED].
 21 (¶ 60.) Thus the royalties Qualcomm collects include not only a legitimate royalty, but also an
 22 increment reflecting Qualcomm's monopoly power over modem chips. This increment is a tax,
 23 and hiding it in a license agreement does not reduce its anticompetitive effects or insulate it from
 24 antitrust scrutiny.

25
 26
 27
 28 ² Citations in the form ¶ __ refer to the Federal Trade Commission's Complaint for Equitable Relief, ECF No. 1, and those in the form Br. __ refer to Defendant Qualcomm Incorporated's Motion to Dismiss, ECF No. 69.

1 Qualcomm argues that these royalties cannot be exclusionary because they apply to both
2 Qualcomm's and competitors' modem chips. But even uniformly elevated royalties affect
3 Qualcomm (the tax collector) and its competitors (the indirect taxpayers) very differently. The
4 tax harms actual and potential competitors: it diminishes their ability and incentive to enter,
5 expand, invest, and innovate. For Qualcomm, the tax is a source of revenues and profits, part of
6 the all-in price of its modem chips. If Qualcomm used its monopoly power to raise the price of
7 *only* its own chips, it would promote substitution by OEMs and entry, expansion, investment,
8 and innovation by rivals. By using its monopoly power to elevate royalties that also apply to its
9 rivals' products, Qualcomm evades these market constraints and harms competition.

10 Qualcomm attempts to recast the allegations that it harmed competition through its
11 coercive tax as a type of price squeeze claim that the Supreme Court foreclosed in *Pacific Bell*
12 *Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009). But *linkLine* simply holds
13 that a vertically integrated firm need not consider its rivals' margins when setting its own prices.
14 Contrary to Qualcomm's argument, *linkLine* does not hold that all conduct that reduces a rival's
15 margins is *per se* lawful if the monopolist's own price remains above cost. Many anticompetitive
16 practices that do not involve below-cost pricing—ranging from tying to exclusive dealing to
17 sham litigation—may exclude rivals by reducing their margins. Taxing the use of rivals'
18 products may likewise reduce rivals' margins and thereby exclude, but *linkLine* does not address,
19 much less condone, such conduct.

20 Even with its anticompetitive tax in place, [REDACTED]
21 [REDACTED]
22 [REDACTED]. (¶ 127). To stave off
23 that threat, Qualcomm imposed exclusive dealing terms on Apple that foreclosed the most
24 effective means of competing in the market for premium LTE modem chips, and successfully
25 excluded competitors for five years.

26 Qualcomm's motion invents a requirement that plaintiffs allege substantial foreclosure
27 quantitatively rather than qualitatively, and attempts to isolate the effects of its exclusive dealing
28 from the effects of the tax. But case law establishes that exclusion from critical customers can

1 constitute substantial foreclosure, a numeric-foreclosure percentage is not a pleading
2 requirement, and the effects of each element of an anticompetitive scheme must be viewed
3 together.

4 The market reflects the effects of Qualcomm's anticompetitive scheme. Qualcomm's
5 modem chip monopoly has remained intact, competitors have exited, and the remaining
6 competitors are unable to constrain the high all-in prices of Qualcomm's modem chips. The
7 complaint plausibly alleges facts showing how Qualcomm has achieved these results through
8 anticompetitive practices. Qualcomm's motion to dismiss should be denied.

9 II. BACKGROUND

10 Qualcomm is a monopoly supplier of baseband processors (also known as "modem
11 chips"), which allow handsets to communicate with cellular network equipment using industry
12 standards like CDMA and LTE. (¶¶ 17-21.) Qualcomm's worldwide share of CDMA and
13 premium LTE modem chip sales exceeded 80% from at least 2006 (CDMA) and 2012 (premium
14 LTE) through 2015. (¶¶ 31, 33, 36, 44, 46.) Handset manufacturers (known as "OEMs") depend
15 on Qualcomm's modem chips to reach customers on CDMA networks (like Verizon and Sprint),
16 and to produce flagship handsets. (¶¶ 32-47, 80.)

17 Qualcomm also owns patents it has declared essential to industry standards, and licenses
18 these standard-essential patents ("SEPs") to OEMs. (¶¶ 54-58.) Including patented technology in
19 a standard eliminates alternative technologies and creates the risk that a participant might "hold
20 up" standard users by demanding royalties that reflect the cost of abandoning the standard, and
21 not its patents. (¶ 49.) To guard against hold-up, standard-setting organizations require
22 participants to commit to license SEPs on fair, reasonable, and non-discriminatory ("FRAND")
23 terms. (¶¶ 49-50, 53.)

24 Qualcomm uses its dominant position in the CDMA and premium LTE chip markets to
25 distort license negotiations and secure elevated non-FRAND royalties. Ordinarily, SEP royalties
26 are negotiated "in the shadow of the law," with reference to the parties' expectations about the
27 probable outcome of infringement litigation. (¶¶ 70-73.) Because Qualcomm conditions access to
28 its chips on acceptance of a SEP license, however, OEMs do not negotiate in the shadow of the

1 law. Instead, they pay elevated royalties to avoid the substantial business costs of a supply
2 disruption. (¶¶ 61, 80, 86.) Accordingly, even though OEMs regard Qualcomm’s royalties as
3 non-FRAND, Qualcomm’s royalties go unchallenged and unremedied. (¶¶ 76, 86.) Qualcomm
4 further insulates its licensing terms from challenge by occasionally offering “[REDACTED]”
5 conditioned on OEMs’ acceptance of the royalties and other terms that Qualcomm demands.
6 (¶¶ 102-04.)

7 Qualcomm’s conduct has raised its royalties above FRAND levels, so that the royalties
8 incorporate an additional increment (or “tax”) reflecting Qualcomm’s chip monopoly power.

9 (¶¶ 86-87.) [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED].” (¶¶ 97-98.) In 2015, [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]. (¶ 100.) [REDACTED], Qualcomm garners
18 much larger royalties than other SEP licensors with comparable portfolios— [REDACTED]
19 [REDACTED]
20 [REDACTED]. (¶¶ 56, 58, 60.)

21 OEMs might escape the tax by purchasing licensed chips from other suppliers, because
22 competing manufacturers do not require a supply of Qualcomm chips and thus could negotiate
23 licenses based on the value of Qualcomm’s patents rather than on its chip monopoly power.
24 (¶ 114.) But Qualcomm refuses to license its competitors. (¶ 112.) Though Qualcomm’s
25 voluntary FRAND commitments require it to license its SEPs to its modem chip competitors,
26 Qualcomm has refused to do so when competitors have requested licenses. (¶¶ 107, 108, 112.)

27 Finally, Qualcomm has excluded competitors by cutting off a critical sales opportunity—
28 Apple. Apple is a particularly important customer because of its leading position in the premium

1 handset market. Apple provides its suppliers with high-volume, high-margin purchases; critical
2 engineering engagement; technical validation; field testing; and reputational benefits. (¶ 129.)

3 [REDACTED]
4 [REDACTED]. (¶ 127.)

5 In 2011 and 2013, when Apple sought to reduce its royalties, Qualcomm agreed to pay billions in
6 incentives conditioned on Apple's exclusive use of Qualcomm chips in its new devices, an
7 exclusivity that prevailed for Apple products launched from October 2011 until September 2016.
8 (¶¶ 122-26.)

9 The market reflects Qualcomm's anticompetitive practices. By taxing competitors' chips,
10 Qualcomm reduces existing and potential competitors' ability and incentive to enter, expand, and
11 innovate. (¶¶ 137-38, 141.) Several former competitors of Qualcomm sold off or shuttered their
12 businesses. (¶ 139.) And by relaxing competitive constraints, Qualcomm is able to maintain
13 supra-competitive all-in chip prices, harming consumers. (¶¶ 137, 144.)

14 III. LEGAL STANDARD

15 To survive a motion to dismiss, a complaint "does not need detailed factual allegations,"
16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but "must contain sufficient factual
17 matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Lacey v.*
18 *Maricopa Cnty*, 693 F.3d 896, 911 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677
19 (2009)). A court must accept "all factual allegations in the complaint as true and constru[e] them
20 in the light most favorable to the nonmoving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669
21 F.3d 1005, 1014 (9th Cir. 2012).

22 IV. QUALCOMM MISSTATES THE COMPLAINT'S ALLEGATIONS.

23 Qualcomm acknowledges that the complaint's factual allegations must be accepted as
24 true and interpreted in the light most favorable to the FTC, but repeatedly denies the existence of
25 well pleaded facts. For example, Qualcomm argues that the complaint never alleges that the no
26 license-no chips policy elevated royalties to above-FRAND rates. (Br. 9.) In fact, the complaint
27 is replete with such allegations. The complaint alleges that Qualcomm's policy forces OEMs to
28 accept royalties reflecting OEMs' need to maintain chip supply rather than the value of

1 Qualcomm’s patents, (¶¶ 4, 86, 143); that the policy has “elevated” royalties above the FRAND
2 levels Qualcomm and OEMs would otherwise negotiate (¶¶ 3.a, 4, 6, 7, 143); [REDACTED]
3 [REDACTED]
4 (¶¶ 96, 98); and that [REDACTED]
5 [REDACTED] (¶ 100). The complaint
6 alleges that, as a result of Qualcomm’s practices, Qualcomm collects royalties “[REDACTED]
7 [REDACTED]
8 [REDACTED]. (¶ 60.) Rather than address these
9 allegations, Qualcomm simply pretends they do not exist.

10 Instead of confronting the complaint, Qualcomm improperly relies upon its own
11 assertions of “facts” outside the complaint. For example, Qualcomm states that it invented
12 technologies “fundamental to today’s cellular communications,” that these technologies are
13 practiced by handsets rather than modem chips, that Qualcomm owns many non-SEPs that are
14 practiced by handsets, and that Qualcomm does not assert patents against competitors. (Br. 4-5.)
15 These facts are not alleged in the complaint, and in some cases are obviously false—for example,
16 Qualcomm asserted SEPs against a since-exited competitor, Broadcom, for years.³

17 Qualcomm also relies on its own factual assertions to justify its no license-no chips
18 policy, arguing that its policy is necessary to avoid facilitating infringement of its SEPs. (Br. 6,
19 8, 24.) But under the doctrine of patent exhaustion, Qualcomm’s modem chip customers do not
20 infringe Qualcomm’s patents by using those chips as a matter of law. (¶ 66.) Qualcomm’s
21 insistence on a separate license to use Qualcomm-supplied components is unique in the industry.
22 (¶¶ 65-67.) In fact, paragraph 143 of the complaint specifically alleges that Qualcomm could
23 obtain a fair return on its investment by enforcing its patent rights without its no license-no chips
24 policy, and yet Qualcomm cites that same paragraph for the opposite proposition. (Br. 24.) And
25 even if Qualcomm believes it has a legitimate business justification for its conduct, that is a
26 question of fact not susceptible to resolution at the pleading stage. *See United Food & Comm’l*
27

28 ³ See Complaint for Patent Infringement, *Qualcomm Inc. v. Broadcom Corp.*, 05-cv-1392-B-
BLM (S.D. Cal. July 11, 2005) (asserting cellular SEPs against a competitor).

1 *Workers Local 1776 v. Teikoku Pharma USA Inc.*, 74 F. Supp. 3d 1052, 1067 & n.16 (N.D. Cal.
2 2014) (collecting cases).

3 Many of the supposed “contradictions” Qualcomm identifies in its brief flow from
4 Qualcomm’s reimagining of the complaint and not from the complaint’s factual allegations. For
5 example, Qualcomm argues that because it has “historically” charged a 5% royalty rate—without
6 variation over time, across markets, or based on customers’ use of Qualcomm chips—that rate
7 must not reflect monopoly power over chips. (Br. 10.) But the complaint does not allege (1) any
8 period in which Qualcomm lacked monopoly power, (2) that Qualcomm’s CDMA and premium-
9 LTE chip-supply threats are only used to elevate royalties on SEPs for those standards, or
10 (3) that there are any significant OEMs that do not purchase Qualcomm chips. Instead, the
11 complaint alleges that Qualcomm has long held monopoly power (¶¶ 31, 33, 44), that Qualcomm
12 uses CDMA and premium LTE modem chip monopoly power to coerce royalties applicable to
13 all modem chips (¶ 144), and that all OEMs serving major networks depend on Qualcomm’s
14 chips to a significant extent (¶¶ 32, 37, 38, 47). Moreover, Qualcomm assumes that if its rate was
15 ever FRAND, it must remain FRAND today because it has not changed. But the complaint
16 alleges that “handsets today offer a number of features” not offered by older handsets, and
17 “many of Qualcomm’s patents related to CDMA technology have expired.” (¶ 77.) Thus, a 5%
18 royalty on a 2006 phone is not economically equivalent to a 5% royalty on a 2017 smartphone.

19 Qualcomm’s repeated attempts to ignore, revise, and supplement the complaint’s
20 allegations to fit into its own view of the world cannot provide an appropriate basis for dismissal.
21 *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (reversing dismissal of
22 claims where the district court’s decision was “rooted in defendants’ factual assertions”). The
23 allegations actually set forth in the complaint state a plausible claim for relief, and Qualcomm’s
24 motion to dismiss should be denied.

25 **V. THE COMPLAINT STATES A CLAIM OF MONOPOLIZATION.**

26 The elements of a violation of Section 5 of the FTC Act for monopolization are “(1) the
27 possession of monopoly power in the relevant market and (2) the willful acquisition or
28 maintenance of that power as distinguished from growth or development as a consequence of a

1 superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384
 2 U.S. 563, 570-71 (1966).⁴ Willful maintenance of monopoly power requires anticompetitive
 3 conduct, which is “behavior that tends to impair the opportunities of rivals and either does not
 4 further competition on the merits or does so in an unnecessarily restrictive way.” *Free FreeHand*
 5 *Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1180 (N.D. Cal. 2012) (quoting *Cascade Health*
 6 *Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)); *see also United States v. Microsoft*
 7 *Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001) (en banc) (willful maintenance of monopoly power
 8 occurs when a monopolist’s conduct “through something other than competition on the merits,
 9 has the effect of significantly reducing usage of rivals’ products and hence protecting its own ...
 10 monopoly”). Although courts have developed tests for a number of frequently litigated fact
 11 patterns, a complaint need not fall into a preexisting category to state a claim. *See Caribbean*
 12 *Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998)
 13 (“‘Anticompetitive conduct’ can come in too many different forms, and is too dependent upon
 14 context, for any court or commentator ever to have enumerated all the varieties.”).

15 **A. The Complaint Plausibly Alleges Anticompetitive Practices.**

16 The complaint alleges that Qualcomm engaged in a series of anticompetitive practices
 17 that together exclude competition in the relevant markets.⁵ Qualcomm treats these allegations as
 18 stating two separate claims—a tax on rivals, and an exclusive dealing claim. But the alleged
 19 conduct must be considered as a whole. *See Free Freehand*, 852 F. Supp. 2d at 1180 (“[I]t is not
 20 proper to focus on specific individual acts of an accused monopolist while refusing to consider
 21 their overall combined effect.” (internal quotation marks omitted)). Qualcomm’s tax, secured
 22 through threats of supply disruptions and promises of payments, diminishes the ability and
 23 incentive of competitors to enter, expand, invest, and innovate. Its refusal to license competitors
 24 in violation of its FRAND commitments helps maintain the tax. And its exclusive dealing with
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26 _____
 27 ⁴ Section 5 of the Federal Trade Commission Act prohibits “[u]nfair methods of competition in
 28 or affecting commerce.” 15 U.S.C. § 45(a)(1). Unfair methods of competition include, among
 others, practices that violate the Sherman Act. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).

⁵ The complaint alleges two relevant markets in which Qualcomm has monopoly power, both of
 which are worldwide: CDMA modem chips and premium LTE modem chips. (¶¶ 131-35.)
 Qualcomm does not challenge these allegations.

1 Apple deprived its potential competitors access to a critical strategic customer whose business
2 and technical cooperation [REDACTED] might strengthen rivals. Each of these practices
3 forecloses competition on the merits, and together they have successfully maintained
4 Qualcomm's monopoly power.

5 ***I. Qualcomm's No License-No Chips Policy Raises Rivals' Costs.***

6 **a. Qualcomm Imposed an Anticompetitive Tax on Rivals' Chips.**

7 Under Section 2 of the Sherman Act, using monopoly power to raise rivals' costs of
8 securing customers or critical inputs qualifies as anticompetitive conduct. *See Forsyth v.*
9 *Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (citing Krattenmaker & Salop,
10 *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J.
11 209, 235-62 (1986)). A monopolist that raises the price of *its own* products stimulates
12 substitution by customers and "encourage[s] entry and expansion of rivals"—which tends to
13 erode the monopolist's market power. AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 720a (online
14 ed., updated Sept. 2016); *id.* ¶ 634a. A monopolist that raises the cost of *its rivals'* products
15 stimulates none of these activities. Having used its market power to raise its rivals' costs, a
16 monopolist can then raise prices to consumers while keeping rivals at bay. *See Krattenmaker &*
17 *Salop, supra*, at 246-47.

18 A monopolist may raise its rivals' costs by inducing customers or suppliers not to deal
19 with rivals at all, or to do so only on unfavorable terms. *See, e.g., Lorain Journal Co. v. United*
20 *States*, 342 U.S. 143, 152-53 (1951) (newspaper refused to carry advertisements from customers
21 that also sought to advertise on a local radio station); *McWane, Inc. v. FTC*, 783 F.3d 814, 832
22 (11th Cir. 2015) (exclusive dealing arrangements can harm competition by raising rivals' costs
23 (citing Krattenmaker & Salop, *supra*)).

24 One kind of unfavorable term that a monopolist may impose is a penalty or "tax" that the
25 monopolist's competitors or its customers must pay to the monopolist when they transact with
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1 one another.⁶ *See, e.g., United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 456-58 (1922)
2 (condemning collection of “royalties” on customers’ use of rivals’ machines); *Zenith Radio*
3 *Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 139-40 (1969) (patentee commits patent misuse
4 and may violate the Sherman Act by “using [its patent] monopoly to coerce an agreement to pay
5 a percentage royalty on [non-infringing] merchandise”); *Glen Mfg. v. Perfect Fit Indus.*, 299 F.
6 Supp. 278, 282 (S.D.N.Y. 1969) (license requiring “royalties on all toilet tank covers
7 manufactured or sold by [the licensee,] whether or not [they infringe]” was “in open conflict with
8 both the antitrust and patent laws”), *vacated and remanded*, 420 F.2d 319, 321 (2d Cir. 1970)
9 (remanding for explicit findings on conditioning), *judgment reinstated*, 324 F. Supp. 1133
10 (S.D.N.Y. 1971) (making such findings).

11 In *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244 (D. Utah 1999), for example, the
12 plaintiff challenged Microsoft’s “per processor” licenses, which required computer OEMs to pay
13 Microsoft a royalty on each computer that they sold, even when the OEMs installed only a rival
14 operating system. *See id.* at 1249-50. The district court denied Microsoft’s motion for summary
15 judgment, because Microsoft’s licenses, which raised OEMs’ costs of dealing with rival
16 operating-system vendors, had “the practical effect of exclusivity.” *Id.* at 1250. In its own
17 complaint challenging the same Microsoft licenses, the U.S. Department of Justice similarly
18 alleged that the per-processor royalties acted as “a penalty, or tax” that deterred OEMs from
19 licensing and promoting operating systems developed by Microsoft’s rivals; diminished those
20 rivals’ ability to compete; and raised the cost of personal computers to consumers.

21 Complaint ¶¶ 21, 22, 36-37, *United States v. Microsoft Corp.*, No. 94-cv-1564 (D.D.C. July 15,
22 1994); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1452 & 1462 (D.C. Cir. 1995) (approving
23 consent decree that prohibited Microsoft from entering into per-processor licenses).

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⁶ Whether the tax is paid by a monopolist’s rivals or by its customers makes no difference from
either a legal or economic perspective. *See* MANKIW, PRINCIPLES OF MICROECONOMICS 125, 156
(7th ed. 2014) (“When a tax is levied on buyers, the demand curve shifts downward by the size
of the tax; when it is levied on sellers, the supply curve shifts upward by that amount. In either
case, when the tax is enacted, the price paid by buyers rises, and the price received by sellers
falls.”).

1 The Sherman Act reaches not only naked exercises of market power to raise rivals' costs,
2 but also concealed efforts. In particular, firms cannot shield anticompetitive taxes from antitrust
3 scrutiny by camouflaging them as compensation for complementary services. In such cases,
4 courts look past labels to examine the process through which the payments at issue were set: Did
5 the payments arise from a negotiation over the value of the services? Or did the monopolist use
6 its market power to elevate payments due on rivals' sales?

7 For example, both the Fourth and Seventh Circuits condemned an agreement between a
8 contractor association and a union that required *any* contractor hiring union employees—even a
9 contractor that did not belong to the association—to contribute 1% of its gross payroll to an
10 association-controlled fund. *See Nat'l Elec. Contractors Ass'n v. Nat'l Constructors Ass'n*, 678
11 F.2d 492 (4th Cir. 1982); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d
12 358 (7th Cir. 1987).⁷ The defendant association argued that the contributions simply
13 compensated the fund for bargaining and administrative services that it supplied, but both the
14 Fourth and Seventh Circuits rejected the argument and held that the contributions unlawfully
15 enabled the association to “raise[] its rivals' costs, and thereby raise[] the market price to its own
16 advantage.” *Premier*, 814 F.2d at 368 (citing *Krattenmaker & Salop, supra*); *see also Nat'l*, 678
17 F.2d at 496-97 & 501. Writing for the Seventh Circuit, Judge Easterbrook explained that the
18 process by which the association and union set contribution levels featured no mechanism that
19 would align the price of the services with their value: “If the value of the services the Fund
20 provides to firms that do not belong to the Association is .01% of their payroll, the collection of a
21 1% fee produces a supra-competitive profit of 0.99%, and no market force ... will induce the
22 Association to reduce it.” *Premier*, 814 F.2d at 369.

23 Monopolists may similarly seek to disguise restrictions they impose on their rivals'
24 dealings with suppliers or customers by virtue of their market power as exercises of their related
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27 ⁷ Although *Premier* condemned the defendant's conduct under Section 1 of the Sherman Act, the
28 court concluded that the conduct anticompetitively excluded the defendants' rivals, and the Ninth
Circuit has relied on the Seventh Circuit's opinion in formulating Section 2 standards. *See Forsyth*, 114 F.3d at 1478 (citing *Premier*, 814 F.2d at 368, for proposition that “raising rivals' costs” is a category of exclusionary conduct).

1 patent rights. In *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949), the court
2 concluded that the defendant, “the only manufacturer of a full line of lamp bases,” unlawfully
3 maintained its monopoly by supplying bases only to lamp manufacturers that “sign[ed] letters in
4 which they waived any right to a defense against an infringement suit which might be based on
5 their use of purchased lamp parts or materials” from other suppliers. *Id.* at 801-02. The defendant
6 was entitled to “bring[] patent-infringement suits to protect its inventions.” *Id.* at 817. But it
7 could not use its market power in lamp bases to impose exclusive-dealing arrangements on lamp
8 manufacturers and shield those arrangements from antitrust scrutiny by disguising them as
9 exercises of its lawful patent rights. *Id.* at 801-03.

10 Read together, these cases establish that using market power to tax rivals’ sales is
11 exclusionary, *see United Shoe*, 258 U.S. at 456-58; *Caldera*, 87 F. Supp. 2d at 1250, and that
12 such taxes remain exclusionary even when disguised as compensation for complementary
13 services, *see Premier*, 814 F.2d at 368-69.

14 Qualcomm’s conduct falls squarely within these parameters. Qualcomm uses its
15 monopoly power in modem chips to induce customers to transact with rival chipmakers on
16 disadvantageous terms—terms that require OEMs to pay a tax to Qualcomm when they purchase
17 chips from Qualcomm’s rivals. (¶ 86.) Although Qualcomm labels these payments patent
18 royalties, the manner in which Qualcomm negotiates these payments with OEMs belies that
19 label. Manufacturers accede to these royalties not because they reflect the value of Qualcomm’s
20 patents, but because Qualcomm’s no license-no chips policy places them in an untenable
21 position: they can either accede to Qualcomm’s demands or lose access to Qualcomm’s chips.
22 (¶¶ 37, 47, 61, 76-83.)

23 **b. Even a “Chip-Neutral” Tax Harms Competition.**

24 Qualcomm argues that its conduct cannot harm competition so long as Qualcomm forces
25 OEMs to pay the same elevated royalties to Qualcomm whether they use Qualcomm’s or a
26 rival’s chips. (Br. 11.) When firms with market power dictate the terms on which their customers
27 or input suppliers may deal with their rivals, however, those terms may harm competition even
28 when the same terms apply to the firms’ own dealings. *See United Mine Workers of Am. v.*

1 *Pennington*, 381 U.S. 657, 665-66 (1965) (large coal operators unlawfully conspired with a
2 union “to eliminate competitors from the industry” by imposing “the same wages” on the coal
3 operators and their smaller rivals). This is because even facially neutral terms may prove “more
4 costly to one set of [firms] than another.” *Id.* at 668.

5 That principle applies with special force when the ostensibly “neutral” terms set a price to
6 be paid *to the defendant itself*. In *Premier*, for example, the association required both its
7 members and rival contractors to make the same contributions to an association-controlled fund.
8 814 F.2d at 359. The Seventh Circuit held that these contributions nonetheless helped association
9 members “eliminate a source of competition” because the contributions affected members and
10 their rivals in very different ways. *Id.* at 368. For rivals, the contributions represented an
11 “increase[d] ... cost[] of doing business.” *Id.* For members, by contrast, they represented “higher
12 profits ... both because there [was] more in the Fund, for the Association’s use, and because the
13 reduction in competition enabled the members to capture more of the market.” *Id.*

14 Here, too, even a facially neutral tax harms competition because it affects Qualcomm (the
15 tax collector) and Qualcomm’s rivals (the indirect taxpayers) in fundamentally different ways.
16 For rivals, the tax represents a true economic cost—a penalty that OEMs must pay *Qualcomm*
17 each time they use *the rival’s* chips. The tax depresses OEMs’ demand for rivals’ chips and
18 diminishes rivals’ abilities and incentives to invest and innovate. (¶ 138.) For Qualcomm, by
19 contrast, the tax represents revenue—a component of the all-in price that OEMs pay *Qualcomm*.

20 In arguing that facially “neutral” taxes are exempt from antitrust scrutiny, Qualcomm
21 suggests that a monopolist may use its market power to increase its rivals’ costs, so long as it
22 pairs those cost increases with price increases of its own. This suggestion turns the Sherman Act
23 on its head. A monopolist raises its rivals’ costs to maintain or enhance its market power (*i.e.*, its
24 power over price). *See Krattenmaker & Salop, supra*, at 241-43. The monopolist may exercise the
25 incremental market power it so acquires by raising its own price. *Id.* at 225.⁸ For this reason,
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27 ⁸ *Accord* Tom et al., *Raising Rivals’ Costs: the Problem of Remedies*, 12 GEO. MASON L. REV.
28 389, 390 (2003) (“[A] monopolist may adopt an anticompetitive strategy, not to drive its
competitors out of the market entirely, but instead to make that competitor’s production or
distribution more costly, thereby creating a price umbrella under which the strategizing firm can
raise its prices.”).

1 courts addressing exclusive dealing and other practices that raise rivals' costs regard a
2 concomitant increase in the monopolist's prices as evidence of successful monopolization, not as
3 a ground for a dismissal. *See, e.g., McWane*, 783 F.3d at 832; *United States v. Dentsply Int'l,*
4 *Inc.*, 399 F.3d 181, 185-86 (3d Cir. 2005) (defendant unlawfully maintained its monopoly
5 through conduct that created "a high price umbrella," allowing "aggressive price increases,"
6 though competitors remained).

7 **c. *linkLine* Is Inapplicable.**

8 Contrary to Qualcomm's assertion, *linkLine* furnishes no ground for dismissal. *linkLine*
9 holds that the antitrust laws do not oblige a vertically integrated firm to price its wholesale
10 product sufficiently low and its retail product sufficiently high to afford its unintegrated retail
11 rivals a "'fair' or 'adequate' margin." *linkLine*, 555 U.S. at 448-49. But the FTC has not based its
12 claims on any such obligation. Qualcomm is free to negotiate whatever royalties prospective
13 licensees are willing to pay to avoid an infringement suit. In the case of Qualcomm's FRAND-
14 encumbered SEPs, licensees' willingness to pay will reflect the likelihood that the asserted SEPs
15 would be found valid and infringed and, if so, the FRAND royalties that a court would likely
16 award.⁹ Qualcomm is also free to charge low (though not predatory) prices for its modem chips.
17 *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). What
18 Qualcomm may *not* do is use its monopoly power in modem chips to induce customers to pay it
19 a tax on the use of rivals' chips, and then shield that tax from antitrust scrutiny by labeling it a
20 patent royalty.

21 *Premier* is instructive. The electrical contractors' association there was free to charge
22 whatever price the market would bear for its upstream bargaining and administrative services.
23 The association's members were also free to charge competitive prices for their downstream
24 electrical contracting services. What the contractors could not do, and what led both the Fourth
25 and Seventh Circuits to condemn their conduct, was to use their market power for downstream
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28 ⁹ *See generally Transcore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1275
(Fed. Cir. 2009) (a patent license conveys nothing other than "freedom from suit"); *Ericsson,*
Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1227-30 (Fed. Cir. 2014) (discussing calculation of
reasonable royalties as damages for infringement of FRAND-encumbered SEPs).

1 electrical contracting services to impose higher labor costs on their rivals. *See Premier*, 814 F.2d
2 at 368; *Nat'l*, 678 F.2d at 501. While the association characterized the fee it imposed as fair
3 compensation for its services, the Seventh Circuit rejected that label, instead examining the
4 manner in which the fee was established. *See Premier*, 814 F.2d at 369.

5 Qualcomm advocates an expansive reading of *linkLine*, arguing that *linkLine* creates a
6 rule of *per se* legality for any conduct that diminishes rivals' margins, so long as the
7 monopolist's own prices remain above cost. (Br. 12-13.) But many exclusionary practices—
8 ranging from tying to exclusive dealing to sham litigation—operate in this manner. To read
9 *linkLine* in this fashion would mean that the Supreme Court, *sub silentio*, overruled nearly a
10 century of its own Sherman Act precedent. *See Church & Dwight Co. v. Mayer Labs., Inc.*, No.
11 C-10-4429, 2011 WL 1225912, at *10 (N.D. Cal. July 2, 2014) (observing that “the means of
12 illicit exclusion that fall under the ambit of the Sherman Act are ‘myriad,’” and that “[c]ourts
13 have long recognized many forms of exclusionary conduct that do not involve below-cost
14 pricing” (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398,
15 414 (2004), and collecting cases)). Such a reading is implausible; in *ZF Meritor, LLC v. Eaton*
16 *Corp.*, 696 F.3d 254, 278 (3d Cir. 2012), for example, the Third Circuit explained: “Although the
17 Supreme Court has created a safe harbor for above-cost discounting, it has not established a *per*
18 *se* rule of non-liability under the antitrust laws for *all* contractual practices that involve above-
19 cost pricing.” *Id.* at 278. The court cautioned that “such an unduly simplistic and mechanical rule
20 ... would place a significant portion of anticompetitive conduct outside the reach of the antitrust
21 laws without adequate justification.” *Id.*; *accord Church & Dwight*, 2011 WL 1225912, at *10.¹⁰

22 **d. The Complaint Alleges Above-FRAND Royalties.**

23 Finally, Qualcomm contends that the complaint should be dismissed because it fails
24 adequately to allege that the royalties that Qualcomm has charged are above the FRAND
25 royalties that Qualcomm could negotiate absent the alleged anticompetitive conduct.
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¹⁰ In addition, *linkLine* applies only “when the defendant is under no antitrust obligation to sell its inputs to [its rivals].” 555 U.S. at 442. Qualcomm is under such a duty. *See infra* § V.A.3.

1 As discussed in Section IV, above, the complaint does allege that Qualcomm charges
 2 above-FRAND royalties, including with reference to [REDACTED]. (¶¶ 86,
 3 96-101.) Qualcomm cites no precedent supporting the notion that the FTC’s complaint, to
 4 survive a motion to dismiss, must not only quantify the amount of Qualcomm’s anticompetitive
 5 overcharge, but quantify it with greater precision than [REDACTED].¹¹

6 In any event, antitrust law does not regulate market *outcomes* but protects the competitive
 7 *process*. See, e.g., *Microsoft*, 253 F.3d at 58. To increase its royalties, Qualcomm threatened
 8 supply disruption to block access to judicial review of its patents’ value, thus taxing the use of its
 9 rivals’ products. Those allegations more than suffice to show that Qualcomm’s conduct
 10 “reasonably appears capable of making a significant contribution to maintaining monopoly
 11 power.” *Id.* at 79 (quotation marks and emendations omitted); see also *FTC v. Actavis, Inc.*, 133
 12 S. Ct. 2223, 2236-37 (2013) (anticompetitive nature of payment to avoid the risk of competition
 13 may be assessed without analysis of applicable patent claims).

14 **2. *Qualcomm’s Payments in Exchange for Elevated Royalties Facilitate Its***
 15 ***Taxation of Competitors’ Products.***

16 Beyond threatening all OEMs with the “stick” of a supply disruption, Qualcomm offered
 17 some OEMs the “carrot” of funds conditioned on their acceptance of inflated royalties that raise
 18 rivals’ costs. (¶¶ 102-06.) Qualcomm attacks the complaint’s allegations respecting these funds
 19 on three grounds, all without merit.

20 First, Qualcomm argues that its payments show that it lacked the power to coerce OEMs
 21 into accepting anticompetitive license terms. (Br. 11, 14.) But the notion that using both carrots
 22 and sticks together undermines a finding of monopoly power or anticompetitive conduct runs
 23 counter to both economic logic and legal precedent. See *ZF Meritor*, 696 F.3d at 277 (defendant
 24 used combination of rebates and supply threats to induce OEMs to accept long-term agreements
 25 that disadvantaged rivals); *Dentsply*, 399 F.3d at 185 (defendant used combination of rebates and
 26 supply threats to induce OEMs to accept exclusivity); *United States v. Microsoft Corp.*, 84 F.

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 28 ¹¹ Indeed, such precision is not even required of private plaintiffs seeking treble damages. See, e.g., *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985).

1 Supp. 2d 9, 59-62 (D.D.C. 1999) (Microsoft induced OEMs to comply with restrictions that
2 disadvantaged rival web-browser developers by “threaten[ing] to terminate the Windows license
3 of any [noncompliant] OEM” and by offering certain OEMs “discounts off the royalty price of
4 Windows”), *aff’d in relevant part*, 253 F.3d 34.

5 Second, Qualcomm describes its payments as “[REDACTED]” and
6 contends that *Brooke Group*’s price-cost test precludes the Court from concluding that these
7 funds are exclusionary. (Br. 13.) Qualcomm’s description of the funds as “[REDACTED]”
8 contradicts the complaint, which alleges that Qualcomm “conditioned [the funds] on the OEM’s
9 acceptance of Qualcomm’s preferred [license] terms.” (¶ 102.) As such, the price-cost test does
10 not apply. *See ZF Meritor*, 696 F.3d at 278; *Church & Dwight*, 2011 WL 1225912, at *10.

11 Third, Qualcomm argues that the court cannot evaluate the competitive harm of its
12 payments because the complaint does not specify “how many [REDACTED] Qualcomm has
13 provided or what portion of the alleged relevant markets is affected thereby.” (Br. 14.) But
14 Qualcomm has taxed rivals principally through its no license-no chips policy, which applies to
15 *all* OEMs. (¶ 32, 37-38, 47, 86-87.) The payments help Qualcomm impose and maintain the tax;
16 specific allegations about the number and scope of Qualcomm’s [REDACTED]
17 are not necessary to plausibly allege that Qualcomm’s tax is exclusionary.

18 ***3. Qualcomm’s Refusal to License Competitors on FRAND Terms Is*** 19 ***Anticompetitive.***

20 While antitrust law generally does not impose an obligation to deal with one’s rivals,
21 there are exceptions to that rule. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,
22 472 U.S. 585, 601, 608-11 (1985) (termination of a voluntary course of dealing violated duty to
23 deal). In *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), the Third Circuit
24 recognized that voluntary FRAND commitments can create an antitrust duty to deal. *Id.* at 316-
25 17. The court observed that standard setting has “historically been subject to antitrust scrutiny,”
26 *id.* at 308 (collecting cases), and is permissible only when “‘meaningful safeguards’ ... ‘prevent
27 the standard-setting process from being biased by members with economic interests in stifling
28 product competition,’” *id.* at 310 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486

1 U.S. 492, 501 (1988)). The court found that FRAND commitments are an important safeguard
2 that SSOs have implemented to prevent “owners of [patents], through the exercise of their rights,
3 to exert undue control over the implementation of industry-wide standards.” *Broadcom*, 501 F.3d
4 at 304. The court stressed that Qualcomm “voluntarily agreed to license [its] technology on
5 FRAND terms” as part of a competitive effort to “market its ... technology for inclusion in an
6 industry-wide standard.” *Id.* at 316 (emphasis added). The voluntary nature of Qualcomm’s
7 commitments, the Third Circuit found, sharply distinguished Qualcomm’s circumstances from
8 those of *Trinko*, where the defendant “would not have marketed the allegedly withheld service
9 absent a statutory duty to do so.” *Broadcom*, 501 F.3d at 316. Here, as in *Broadcom*,
10 Qualcomm’s voluntary commitment to license its SEPs to rivals, and its subsequent breach of
11 that commitment, support the inference that Qualcomm’s conduct is exclusionary.

12 Qualcomm argues that “a FRAND violation is not enough to make out an antitrust claim
13 without also alleging that the purported violation caused actual harm to competition.” (Br. 15
14 (citing *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008)).) But here, the complaint does allege
15 such harm. Were Qualcomm to license its SEPs to its rivals, those licenses would undermine
16 Qualcomm’s scheme to use above-FRAND SEP royalties as a vehicle to tax rivals’ sales. Rivals
17 do not depend on Qualcomm’s modem chips, and thus could negotiate with reference to
18 Qualcomm’s likely infringement remedies instead of a threatened supply disruption. If
19 Qualcomm licensed its rivals, OEMs could purchase licensed chips free of Qualcomm’s tax.
20 (¶¶ 113-14.)

21 In denying the allegations of competitive harm, Qualcomm isolates its refusal to license
22 rival chipmakers from the remainder of its conduct. (Br. 15.) But courts “consider all of an
23 alleged monopolist’s related conduct in the aggregate,” *Tele Atlas N.V. v. Navteq Corp.*, No. C-
24 05-01673, 2008 WL 4911230, at *1 (N.D. Cal. Nov. 13, 2008), and even a refusal to deal that
25 might be “legally protected” in other circumstances may be anticompetitive when undertaken as
26 “part of a restrictive course of conduct incompatible with antitrust objectives.” *Flinkote Co. v.*
27 *Lysfjord*, 246 F.2d 368, 377 (9th Cir. 1957); *cf. Lorain Journal*, 342 U.S. at 152-53
28 (“surrounding circumstances are important” when assessing a monopolist’s refusal to deal);

1 *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 458, 463 & n.8 (1992)
2 (condemning policy under which Kodak (1) conditioned the sale of parts on consumers'
3 purchase of Kodak's service, and (2) refused to sell parts to competing service providers, without
4 considering whether Kodak's refusal, viewed in isolation, would constitute an antitrust
5 violation). Qualcomm's refusal to license reinforces the competitive harm created by its tax.

6 Qualcomm also argues that, if Qualcomm's FRAND commitments required it to license
7 its SEPs to rival chipmakers, rivals already would have enforced that requirement in court.
8 (Br. 16.) That argument fails because it requires drawing inferences in Qualcomm's favor. Other
9 chipmakers may not wish to sue Qualcomm for a number of reasons, including fear of
10 countersuit for infringement, escalation, litigation fees, disrupted relationships with OEMs, and
11 hope that a public-enforcement solution may emerge. In any event, the availability of a private
12 right of action for breach of contract supplies no basis for dismissing a government antitrust suit
13 challenging that activity. *See generally Mulvey v. Samuel Goldwyn Prod'ns*, 433 F.2d 1073 (9th
14 Cir. 1970) ("Successful maintenance of an antitrust suit does not depend upon the availability or
15 nonavailability of a common-law remedy for that wrong.").

16 **4. *Qualcomm's Exclusive Dealing Contracts with Apple Harmed*** 17 ***Competition.***

18 The complaint alleges that Qualcomm entered a *de facto* exclusive dealing arrangement
19 with Apple, with the intent and effect of augmenting the substantial barriers to entry and
20 expansion already erected by Qualcomm's no license-no chips policy. In an exclusive-dealing
21 arrangement, a buyer promises its supplier not to purchase from competing suppliers. "[T]he law
22 is clear that an express exclusivity requirement is not necessary because *de facto* exclusive
23 dealing may be unlawful." *ZF Meritor*, 696 F.3d at 282. Exclusive dealing arrangements are
24 unlawful when they "tend to substantially foreclose competition in the relevant ... market."
25 *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (1961). Substantial foreclosure can be
26 alleged quantitatively (through the percentage of the market foreclosed) or qualitatively (by
27 citing other market factors, such as the strategic importance of foreclosed customers). *See, e.g.*,
28 *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 452 & n.12 (4th Cir. 2011)

1 (exclusive dealing adequately alleged based on strategic importance of foreclosed customers).
 2 Moreover, exclusive dealing “that otherwise might comply with antitrust law may be
 3 impermissibly exclusionary when practiced by a monopolist.” *Dentsply*, 399 F.3d at 187.

4 Under these standards, the complaint states a claim for exclusive dealing. Qualcomm
 5 offered billions of dollars in incentive payments to induce Apple’s exclusive use of Qualcomm
 6 chips—a *de facto* exclusive dealing arrangement. (¶¶ 122-26.)¹² And Qualcomm’s exclusive
 7 dealing with Apple was intended to, and did, “foreclose[] a substantial share of the market for
 8 premium LTE baseband processors,” given Apple’s position in the market. (¶¶ 127, 129-30.)¹³

9 [REDACTED]
 10 [REDACTED]. (¶ 127.) *See, e.g., Kolon*, 637 F.3d at 452 & n.12 (substantial foreclosure properly
 11 alleged where exclusive dealing arrangements “severely limited ... competition for the most
 12 important customers in categories needed to gain a foothold for effective competition”).

13 Qualcomm argues that, to state a claim, the complaint must allege the specific percentage
 14 of the market that was foreclosed. (Br. 19.) But substantial foreclosure is not simply a numerical
 15 test, and there is no minimum percentage of the market that must be foreclosed to find a violation
 16 of Section 2. *See Kolon*, 637 F.3d at 452 & n.12 (reversing dismissal of an exclusive dealing
 17 complaint that did not allege a numeric foreclosure percentage); ABA SECTION OF ANTITRUST
 18 LAW, ANTITRUST LAW DEVELOPMENTS 215 (7th ed. 2012) (“Since *Tampa Electric*, courts have
 19 steadily moved away from a strict focus on foreclosure percentage to a more nuanced analysis of
 20 whether the arrangement threatens to create or enhance market power and therefore lead to an
 21 anticompetitive outcome.”). The cases cited by Qualcomm teach that the “percentage share of
 22 the relevant market foreclosed” is “not the exclusive or primary factor” in assessing substantial
 23 foreclosure. *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-CV-05847, 2013 WL

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 25
 26 ¹² Qualcomm argues that *de facto* exclusive dealing was not alleged, citing *Allied Orthopedic*
 27 *Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991 (9th Cir. 2010). (Br. 18.) *Allied*
 28 *Orthopedic Appliances* was decided at summary judgment, and held that the plaintiff there had
 not offered proof that the discounts at issue were exclusive in effect. 592 F.3d at 994. The
 complaint, by contrast, alleges that Qualcomm’s conditional rebates successfully imposed
 exclusivity. (¶ 126.)

¹³ *See, e.g., Microsoft*, 253 F.3d at 59 (“[T]he intent behind the conduct of a monopolist ... helps
 us understand the likely effect of the monopolist’s conduct.”).

1 5694452, at *11 (N.D. Cal. Oct. 18, 2013). Instead, substantial foreclosure depends on a number
2 of factors, including the “probable immediate and future effects” on competition. *Tampa Elec.*,
3 365 U.S. at 329; *see also McWane*, 783 F.3d at 835 (foreclosure is a “proxy for anticompetitive
4 harm,” and is therefore “one of several factors we now examine in determining whether the
5 conduct harmed competition”).

6 Neither of the decisions on which Qualcomm principally relies holds that a complaint
7 must allege substantial foreclosure numerically. The complaint in *Rheumatology* was dismissed
8 because it lacked allegations about any of the salient features of the market, “or how competition
9 ha[d] been harmed.” *Rheumatology*, 2013 WL 5694452, at *11. Indeed, when later assessing an
10 amended complaint, the court expressly stated that no individual item on its list of salient market
11 features was a prerequisite: “plaintiffs do not need to provide *all* of this information to state a
12 claim.” *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-CV-05847, 2014 WL
13 524076, at *10 (N.D. Cal. Feb. 6, 2014).

14 Similarly, in *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019 (N.D. Cal. 2015), the court
15 dismissed the complaint because there was a mismatch between the foreclosure alleged (a subset
16 of Android smartphone-based internet searches) and the antitrust markets allegedly affected (all
17 mobile internet searches and all internet searches). *Id.* at 1031-32. *Feitelson* simply holds that a
18 plaintiff who chooses to allege substantial foreclosure by identifying a specific foreclosure
19 percentage must do so coherently. Neither *Rheumatology* nor *Feitelson* holds that a plaintiff
20 cannot plead substantial foreclosure by addressing qualitative factors from *Tampa Electric*.

21 In addition, Qualcomm’s exclusive dealing with Apple is part of a broader scheme to
22 restrict competition, which must be considered as a whole. *See Microsoft*, 253 F.3d at 72
23 (exclusive deals with one minor distribution channel anticompetitive because combined with
24 other conduct that foreclosed two major distribution channels); *Universal Hosp. Servs., Inc. v.*
25 *Hill-Rom Holdings, Inc.*, No. SA-15-CA-32, 2015 WL 6994438, at *6 (W.D. Tex. Oct. 15, 2015)
26 (rejecting argument “that the anticompetitive effect of each [practice] must be considered
27 separately” for a scheme involving both exclusive dealing and other conduct (citing *Cont’l Ore*
28 *Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962))). Here, Qualcomm directly

1 traded one exclusionary term (reducing Apple’s tax) for another (exclusive dealing),
 2 underscoring the close relationship between those terms. (¶¶ 119, 121.)

3 Qualcomm next argues that the complaint had to identify by name a company with the
 4 relevant technological capabilities that was excluded from the market. (Br. 20.) Qualcomm cites
 5 nothing in support of this proposition, and for good reason—the requirement does not exist. *See*
 6 *generally Tele Atlas N.V. v. Navteq Corp.*, 397 F. Supp. 2d 1184, 1190 (N.D. Cal. 2005)
 7 (sustaining complaint that did not identify foreclosed customers but “explain[ed] how [the]
 8 alleged scheme operate[d]”); *Suture Exp., Inc. v. Cardinal Health 200, LLC*, 963 F. Supp. 2d
 9 1212, 1228 (D. Kan. 2013) (refusing to dismiss exclusive dealing claims “[a]lthough no names
 10 [of foreclosed customers were] alleged” because it was reasonable to infer that the defendant’s
 11 discount programs caused harm). As the complaint makes clear, Apple wanted to “develop[] and
 12 work[] with additional suppliers” (¶ 125(a)), but “[REDACTED]
 13 [REDACTED],” (¶ 127). The most reasonable
 14 inference from [REDACTED] is that such
 15 competitors existed and the contracts excluded them as [REDACTED].

16 Finally, Qualcomm argues that because Intel began supplying Apple with chips in
 17 October 2016, its agreements with Apple were not exclusive in effect. (Br. 20-21.) But the
 18 complaint alleges that the billions of dollars in incentive payments Qualcomm made pursuant to
 19 the agreements induced exclusivity and foreclosed access to Apple and its developmental
 20 benefits for nascent suppliers for a period of five years, ending in September 2016. (¶¶ 126, 130.)
 21 Qualcomm does not argue that five years of exclusive dealing is insufficient to state a claim. *See*,
 22 *e.g., Dentsply*, 399 F.3d at 191 (delaying competitive entry or growth harms competition);
 23 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1802c (online ed., updated Sept. 2016).

24 **B. The Complaint Plausibly Alleges Anticompetitive Effects.**

25 When seeking equitable relief, the FTC need merely allege that ““anticompetitive
 26 consequences are a naturally-to-be-expected outcome of the challenged conduct.”” *McWane*, 783
 27 F.3d at 837 (quoting 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 657a2, at 162 (3d ed. 2008)).
 28 Here, the complaint alleges not only that Qualcomm’s conduct has anticompetitive tendencies,

1 but also that it has produced anticompetitive effects. Qualcomm's conduct has raised all-in prices
2 of modem chips and reduced output (¶¶ 137-38), forced competitors out of the market (¶ 139),
3 and reduced incentives to innovate (¶ 141).

4 Qualcomm ignores the applicable legal standard and instead argues that, to state a claim,
5 the complaint must identify specific sales lost by competitors (Br. 2), identify specific
6 competitors excluded (Br. 20), and allege that Qualcomm's refusal to license excluded *all*
7 potential competitors (Br. 15-16). That is not the law. The complaint need not identify specific
8 business transactions and name the competitors that would have won them absent Qualcomm's
9 conduct; it need only allege that Qualcomm's conduct tended to exclude competition on the
10 merits and that Qualcomm successfully maintained its monopoly. *See, e.g., Microsoft*, 253 F.3d
11 at 79 ("To some degree, 'the defendant is made to suffer the uncertain consequences of its own
12 undesirable conduct.'" (quoting 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78
13 (1996))). The complaint makes such allegations. (¶¶ 138-39.)

14 **VI. THE COMPLAINT STATES A CLAIM OF RESTRAINT OF TRADE.**

15 To establish liability under Section 1 of the Sherman Act, a plaintiff must prove (1) the
16 existence of an agreement, and (2) that the agreement was an unreasonable restraint of trade. *Am.*
17 *Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996). Qualcomm's licenses to
18 customers, agreements to pay ██████████, and exclusive deals with Apple are agreements that
19 unreasonably restrain trade. The competitive harm from Qualcomm's conduct, addressed above,
20 is sufficient to establish that these agreements are unreasonable.

21 Qualcomm argues that its no license-no chips policy involves a refusal to sell, and thus
22 no concerted action. (Br. 21.) But the complaint alleges that Qualcomm threatens to cut off chip
23 supply to compel OEMs to agree to anticompetitive terms. (¶¶ 84-86.) Executed licenses
24 containing coerced terms are agreements for purposes of Section 1. *See, e.g., ZF Meritor*, 696
25 F.3d at 262, 276 (contracts containing anticompetitive terms that defendant "essentially forced"
26 OEMs to accept constituted agreements for purposes of Section 1).

1 **VII. THE COMPLAINT STATES A CLAIM OF UNFAIR METHODS OF**
2 **COMPETITION.**

3 Section 5 of the FTC Act prohibits “[u]nfair methods of competition in or affecting
4 commerce.” 15 U.S.C. § 45(a)(1). Section 5 declares unlawful not only practices that violate the
5 Sherman Act, but also those that “conflict with [the Sherman Act’s] basic policies.” *FTC v.*
6 *Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *see also Liu v. Amerco*, 677 F.3d 489, 494 (1st Cir.
7 2012) (invitation to collude is an unfair method of competition); FTC, Statement of Enforcement
8 Principles Regarding “Unfair Methods of Competition” Under Section 5 of the Federal Trade
9 Commission Act, 80 Fed. Reg. 57,056 (Sept. 21, 2015) (Section 5 reaches “acts or practices that
10 are anticompetitive but may not fall within the scope of the Sherman or Clayton Act.”).
11 Qualcomm’s course of conduct—including its leverage of chipset supply to obtain above-
12 FRAND royalties, refusal to license its FRAND-encumbered SEPs to its competitors, and its
13 exclusive dealing arrangement with a critical customer—conflicts with these policies.

14 Although conduct judged unlawful under Section 5 need not violate the Sherman Act or
15 other laws, such conduct should ordinarily be “collusive, coercive, predatory or exclusionary in
16 character,” or possess other “indicia of oppressiveness.” *E.I. du Pont de Nemours & Co. v. FTC*,
17 729 F.2d 128, 138-40 (2d Cir. 1984). The conduct alleged here satisfies these criteria: a
18 dominant firm forcing its customers to deal with rivals on unfavorable terms is coercive and
19 exclusionary under Section 5. *See, e.g., FTC v. Texaco, Inc.*, 393 U.S. 223, 228-30 (1968) (oil
20 company violated Section 5 by using its “dominant economic power” to limit the extent to which
21 gas stations could market nonsponsored brands of tires, batteries, and accessories); *Atl. Ref. Co.*
22 *v. FTC*, 381 U.S. 357, 368-71 (1965) (same).

23 The complaint sufficiently alleges coercive and exclusionary conduct and an
24 economically sound theory of competitive injury. The standalone Section 5 claim should
25 therefore be sustained.

26 **VIII. CONCLUSION**

27 Qualcomm uses its monopoly power to make OEMs pay a royalty overcharge—a tax—
28 when buying modem chips from its competitors. Qualcomm further hampers those competitors

1 by denying them the licenses it promised would be available on FRAND terms during standard-
2 setting. And Qualcomm foreclosed its competitors from selling to a uniquely important
3 customer, Apple, for half a decade using exclusive contracts. Separately, those allegations
4 present a forceful antitrust case. Together, they easily surpass the plausibility threshold at the
5 pleading stage. The Court should deny Qualcomm’s motion to dismiss.

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Respectfully submitted,

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