No. 19-16122

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-cv-00220-LHK
Hon. Lucy H. Koh

[CORRECTED] OPPOSITION OF THE FEDERAL TRADE COMMISSION TO MOTION FOR PARTIAL STAY PENDING APPEAL

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Following a lengthy trial on the merits and a thorough review of the evidence, the district court concluded that Qualcomm engaged in a multi-year course of anticompetitive conduct, harming competition, market participants, and consumers. Qualcomm's motion for a partial stay of the district court's remedial order fails on all fronts and should be denied.

On the merits, Qualcomm falls far short of meeting its burden to show a likelihood of success on appeal. The district court's finding of antitrust liability does not hinge, as Qualcomm suggests, on a standalone duty to deal with competitors. Rather, the core anticompetitive conduct here is Qualcomm's leveraging of its chip monopoly to secure from its customers inflated license royalties that do not reflect the value of Qualcomm's patents. Those inflated royalties raise Qualcomm's rivals' costs, hobbling competition. The court's decision is solidly supported by the factual record and grounded in well-established precedent of the Supreme Court, this Court, and other circuits.

Qualcomm has not shown that it will suffer irreparable harm absent a stay. Qualcomm's argument, at bottom, is that the injunction entered below will cause it to lose revenues. But the order permits Qualcomm to secure every dollar to which it is entitled: market-based prices for its chips, and royalties that reflect the value of its patents. In contrast, a stay would allow Qualcomm to perpetuate its anticompetitive practices, creating roadblocks to competition that will impede innovation at this critical moment for 5G investment and harm consumers well into the future.

The three amici supporting Qualcomm fail to address Qualcomm's adjudicated conduct or its consequences and misapprehend the order. The district did not rule, as amici seem to believe, that high prices violate the antitrust laws, nor did it require Qualcomm's patent royalty revenue to be anything less than the patent system provides. And the court certainly did not order Qualcomm to curtail its R&D investments or nullify its contracts. The appropriately tailored injunction that Qualcomm actually faces allows it to sell its chips for market-based prices and to license its patents based on rights granted under the patent laws, creating an equitable solution for Qualcomm's years of anticompetitive practices.

BACKGROUND

Qualcomm is the dominant supplier of modem chips, semiconductor devices that manage cellular communications in mobile products. Handset manufacturers (known as "OEMs") depend on Qualcomm for modem-chip supply. Qualcomm also holds patents that it has declared essential to widely adopted cellular standards. In exchange for having its patented technologies included in these standards, Qualcomm voluntarily committed to standard-setting organizations ("SSOs") to make licenses to its standard-essential patents ("SEPs") available to all applicants on fair, reasonable, and non-discriminatory ("FRAND") terms. A6-10, A34, A42, A222.[1]

In January 2017, the FTC sued Qualcomm under Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair methods of competition," including practices that violate the Sherman Act. *See FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948). The FTC alleged that Qualcomm unlawfully used its monopoly power in two modem-chip markets to impose anticompetitive licensing and supply terms on OEMs, thereby excluding competitors. The FTC sought a permanent injunction that would require Qualcomm to cease its anticompetitive conduct.

After a four-week trial addressing both liability and remedy, the district court held that Qualcomm's challenged practices violated both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2,[2] and thus were unfair methods of competition under Section 5 of the FTC Act. A216-17. The court first determined that Qualcomm has monopoly power in two relevant markets: the worldwide markets for CDMA modem chips and premium LTE modem chips—a fact that Qualcomm does not contest here. A26-42. Applying the "rule of reason,"

[1] "A[#]" refers to Qualcomm's Appendix to its stay motion. Citations herein to "SA[#]" refer to the FTC's Supplemental Appendix.

[2] Section 1 of the Sherman Act prohibits "[e]very contract, combination … or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Section 2 makes it unlawful for a firm to "monopolize" a relevant market. 15 U.S.C. § 2.

A42, the court determined that Qualcomm's actions harmed competition in these markets. Based on a wide range of evidence—including in particular Qualcomm's own documents and statements, A13-15—the court found that Qualcomm has abused its chip monopoly power to distort license negotiations with OEMs, secure higher royalties than it could obtain based solely on the value of its patents, and weaken its competitors.

The court detailed the various anticompetitive tactics that Qualcomm employed to maintain its chip monopoly. In a practice that is "unique within Qualcomm and unique in the industry,"[3] Qualcomm refuses to sell modem chips to OEMs unless they first agree to a separate patent license—Qualcomm's "no license, no chips" policy. A45. (By contrast, in markets such as Wi-Fi where it lacks monopoly power, Qualcomm does not require OEMs to sign a separate license as a condition for supply but instead sells components "exhaustively"— *i.e.*, free from downstream patent claims. A89.) Qualcomm has threatened to cut off chip supply to coerce OEMs to sign license agreements on its preferred terms. A45-115 (detailing Qualcomm's anticompetitive acts against 16 OEMs). Because OEMs cannot risk losing Qualcomm's chips, the no license, no chips policy

[3] *See, e.g.*, SA043-45 (Intel testimony that Qualcomm is the only component supplier not to include intellectual property in the price of a component); SA049-50 (Apple testimony that Qualcomm is the only supplier to condition component sale on the existence of an IP license).

enables Qualcomm to secure "unreasonably high" royalty rates that "are set by its monopoly chip market share rather than the value of its patents."[4] A46, A158. OEMs must pay these elevated royalties to Qualcomm even when they use a rival supplier's chips. As a result, Qualcomm's no license, no chips policy "impose[s] an artificial and anticompetitive surcharge on the price of rivals' modem chips."A46. Qualcomm thus has "raised its rivals' costs, and thereby raised the market price to its own advantage." A186 (quoting *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987)).

The district court found that Qualcomm has further sustained its elevated royalties by refusing to license its SEPs to competing chipmakers—in violation of its commitments to certain cellular standard-setting organizations to make licenses to its SEPs available to *all applicants*, including rivals, on FRAND terms. A125-27; *see* SA001-26. The court found that Qualcomm refused to license rivals to impede competition. A139-41. Qualcomm recognized that if it licensed its SEPs to rival chipmakers (against whom it could not leverage its chip market power), it would lose its ability to extract above-FRAND royalties from OEMs. A129-30. And Qualcomm's own documents state that denying SEP licenses to competitors

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[4] In some cases, Qualcomm also made cash payments to licensees to further inflate the royalty rate. A45-46.

would "reduce [their] customer base and ability to invest in future products," further entrenching Qualcomm's chip monopoly power. A139-40.

Finally, the district found that Qualcomm excluded competitors by entering into exclusive supply arrangements with Apple, a particularly important customer. Through these agreements, Qualcomm "shrunk rivals' sales and foreclosed its rivals from the positive network effects of working with Apple," A142, enabling Qualcomm to maintain its chip monopoly power.

The court concluded that, taken together, Qualcomm's practices "strangled competition" in the relevant chip markets "and harmed rivals, OEMs, and end consumers in the process" A216. Although Qualcomm offered supposedly procompetitive justifications for its practices, the court found that these justifications were "pretextual" and contradicted by Qualcomm's own documents. A133, A157, A165-66, A191.

Because the trial addressed both liability and remedy,[5] the court determined the appropriate remedy for Qualcomm's violations. Finding that Qualcomm's

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[5] *See* SA040 (November 2017 ruling on bifurcation); SA036 (order that "[t]he January 2019 trial will address both liability and remedy"). DOJ's statement of interest ("SOI") erroneously claims otherwise. SOI 10. Its citation to *Microsoft* is also off point. There, the trial court did not provide notice that remedy would be addressed at the liability proceeding and refused to take evidence relating to the remedy. *United States v. Microsoft Corp.*, 253 F.3d 34, 98-101 (D.C. Cir. 2001) (en banc). The cited *Microsoft* decision explains that "a trial on liability [] does not

anticompetitive practices are ongoing and, in any event, likely to recur, A219-25, the court entered an injunction. Qualcomm's stay motion challenges two of the injunction's provisions: (1) a requirement that Qualcomm refrain from implementing its no license, no chips policy and "negotiate or renegotiate license terms with customers" free from the threat of lack of access to modem-chip supply, A228;[6] and (2) a requirement that Qualcomm "make exhaustive SEP licenses available to modem-chip suppliers" on FRAND terms, A230.

On July 3, 2019, the district court denied a stay of these provisions.

ARGUMENT

To justify a stay, Qualcomm bears the burden to show that: (1) it is likely to succeed on the merits of its appeal; (2) it will be irreparably injured absent a stay; (3) issuance of a stay will not substantially injure other parties interested in the proceeding; and (4) the public interest favors a stay. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). The third and fourth factors may be considered together where, as here, the government is the opposing party. *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). In particular, Qualcomm must meet the "bedrock requirement" of showing "that irreparable harm is *probable*," and a stay

substitute for a relief-specific evidentiary hearing *unless the matter of relief was part of the trial on liability*," as was the case here. *Id*. at 101 (emphasis added).

[6] Contrary to some expressed concerns, this does not require Qualcomm to renegotiate any existing licenses unless licensees request that it do so.

"must be denied" if it fails to carry that burden. *Id.* at 965, 968 (emphasis added). Because, as shown below, Qualcomm cannot demonstrate that the "balance of hardships tips sharply in [its] favor," it must also establish "a strong likelihood of success" on the merits. *Id.* at 970. Qualcomm fails to meet its burden on any of those factors.

A. Qualcomm Has Not Established A Likelihood Of Success On The Merits

1. The District Court Correctly Held That Qualcomm's No License, No Chips Policy Is Anticompetitive

Qualcomm claims that the district court erred in holding that Qualcomm's no license, no chips policy harms competition. Mot. 18. This claim fails for several reasons. To begin, Qualcomm mischaracterizes the court's analysis (as does the DOJ). The court did not fault Qualcomm simply for "[c]harging high prices." SOI 4; *see* Mot. 18. Instead, the decision condemns a scheme whereby Qualcomm employs its monopoly power over chips to coerce OEMs to accept inflated royalties that do not reflect the value of Qualcomm's patents and that operate as a tax on Qualcomm's rivals. A45-46. This arrangement falls squarely within the category of conduct that "harm[s] the competitive *process*." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (emphasis original); A185-87 (discussing cases in which courts have condemned substantially similar misconduct).

The evidence at trial strongly supports the district court's assessment of Qualcomm's no license, no chips practices—including its finding that Qualcomm's scheme imposes an "artificial and anticompetitive surcharge" on rivals' modem chips. A46. Qualcomm's own documents recognize that its chip monopoly—not the value of its patents—sustains its royalty rates. A158-62. Qualcomm executives explained that "[h]igh modem share drives … royalty rate," SA101, and thus repeatedly advised that a separation of Qualcomm's patent-licensing division (QTL) from its chip business (QCT) would "hurt QTL's leverage to negotiate … licensing deals." SA120.[7] OEM witnesses testified that Qualcomm's chip-supply threats preclude litigation over Qualcomm's royalty rates. A179-81.[8] The FTC's licensing expert testified that Qualcomm's chip supply threats enable Qualcomm to command a "disproportionately high royalty rate," SA052, by removing the prospect of patent litigation if the parties cannot reach agreement, SA052-54.

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[7] *See also* SA105 ("Without chip business, more licensees/potential licensees might fight QTL license demands."); SA109 (Qualcomm needs to keep OEMs "reliant on [QCT] for continued supply" to protect QTL from royalty attacks); SA-086 ("Separation could weaken [QTL] in rate negotiations with major customers.").

[8] *See, e.g.*, SA059-60 (Lenovo testimony); SA061 (BlackBerry testimony). Qualcomm has thus cut off OEM's access to both contract remedies for Qualcomm's breach of its FRAND commitments, and patent law remedies that might have constrained Qualcomm's licensing demands to its patents' value.

Furthermore, ample evidence demonstrates that Qualcomm's no license, no chips policy harms not only OEMs (and final consumers who buy mobile devices) but also the competitiveness of rival chipmakers. The FTC's economic evidence demonstrated that Qualcomm's royalty surcharge raises rivals' costs of selling chips. As a result, the surcharge reduces rivals' sales and margins and weakens them as competitors. The surcharge, by contrast, does not raise Qualcomm's costs because Qualcomm collects the surcharge.[9] A184-86. Qualcomm's no license, no chips policy excludes competitors by deterring OEMs' purchases of rivals' chips. *See* SA064 (Wistron testimony that Qualcomm's surcharge deterred OEM's purchase of MediaTek's chips).

Qualcomm argues that its licensing practices cannot raise its rivals' costs because OEMs, not chip suppliers, pay Qualcomm's surcharge. Mot. 19. As a matter of basic economics, however, it does not matter which party pays the surcharge in the first instance; the impact is the same: "'the price paid by buyers rises, and the price received by sellers falls.'" A186 (quoting 1 N. Gregory Mankiw, PRINCIPLES OF MICROECONOMICS 156 (7th ed. 2014)); *see also United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 456-58 (1922) (condemning

[9] *See also* SA047 (Intel witness testified that "there is this chip price, and on top of that there's this royalty price. For them, Qualcomm, it doesn't really matter because both monies are the all-in price and go to them …, which then undercuts me as the competitor.").

defendant's use of monopoly power over machinery to collect "royalt[ies]" on customers' use of rivals' machinery).

Because this case concerns Qualcomm's threatened withholding of monopolized modem chips to raise the costs of rival chip suppliers, *linkLine* and *Doe*, the precedents on which Qualcomm relies (Mot. 20-21), are inapposite. *See Pac. Bell Tel. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009); *John Doe 1 v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009). The findings of coercion and conditioning that are central to the district court's decision here were absent in *linkLine* and *Doe*, in which the defendants set prices for their wholesale and retail offerings independently of one another. *See Doe*, 571 F.3d at 935 (Abbott "raise[d] the price of [its wholesale product] while selling its own [retail product] at too low a price"). Whereas the court in this case found that Qualcomm's royalties reflect its modem-chip monopoly power, not the value of its patents (A214), the plaintiffs in *linkLine and Doe* did not claim that the prices the defendant set for wholesale offerings reflected anything other than the value of those offerings.

To the extent Qualcomm contends that *linkLine* creates a rule of *per se* legality for *any* conduct that diminishes rivals' margins so long as the monopolist's own prices remain above cost, that contention is insupportable. Many exclusionary practices—ranging from tying to exclusive dealing to sham litigation—harm competition by reducing rivals' margins. To read *linkLine* in this expansive fashion would mean that the Supreme Court, *sub silentio*, overruled nearly a century of its Sherman Act precedent. Courts have declined to read *linkLine* as creating "such an unduly simplistic and mechanical rule" because it "would place a significant portion of anticompetitive conduct outside the reach of the antitrust laws without adequate justification." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 278 (3d Cir. 2012).

2. The District Court Properly Held That Qualcomm's Refusal To License SEPs To Competitors In Violation Of Its SSO Commitments Is Anticompetitive

Qualcomm is also unlikely to succeed in overturning the district court's conclusion that Qualcomm acted anticompetitively in reneging on its commitments to make SEP licenses available to rival modem-chip suppliers. The district court correctly found that Qualcomm's actions harmed competition by supporting Qualcomm's no license, no chips policy at the OEM level, raising its rivals' costs, and thereby maintaining its modem-chip monopoly. A115-17, A139-41; *see* SA090 (Qualcomm document stating that its reasons for denying SEP licenses to a rival include "destroy[ing the rival's] margin and profit" and "[t]ak[ing] away the $$ that [the rival] can invest" in future generations of cellular technology).

Cellular-communications standards are the product of industry-wide collaborative efforts to which numerous firms, Qualcomm among them, have made contributions. A166-67. In exchange for having its intellectual property included in cellular standards and to thereby expand the reach of its chip and licensing businesses, Qualcomm made licensing commitments to expand the reach of its chip and licensing businesses. SA056-57 (Qualcomm testimony).[10] The design of the licensing commitments prevent any one firm from doing what Qualcomm has done: impairing competition in standard-compliant products. *See Microsoft Corp. v. Motorola Inc.*, 795 F.3d 1024, 1030-31, 1041 (9th Cir. 2015). Here, Qualcomm's breach of its commitments was not "just" a breach of contract. It was a mechanism by which Qualcomm effectuated its scheme to raise rivals' costs by binding OEMs to its no license, no chips policy.[11]

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[10] The voluntary character of Qualcomm's commitments distinguishes this case from *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, in which the defendant would not have dealt with rivals absent "statutory compulsion." 540 U.S. 398, 409 (2004). DOJ questions whether Qualcomm "truly volunteered to license chip makers." SOI 5-6. But the record shows Qualcomm not only voluntarily agreed to the terms for participation in the SSOs, it sought to enforce against others the obligations it now disclaims. SA022-23 (order granting FT partial summary judgment); SA071 (declaration of Qualcomm's founder that FRAND commitments to an SSO at issue here required another SEP holder to license to Qualcomm "any patents whose use would be required for compliance with [the applicable standard]"); SA066-67 (testimony of founder that products compliant with the standard included modem chips).

[11] *Cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988) (SSO members violated Sherman Act by subverting SSO rules to exclude competing products from industry standard); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571-72 (1982) (SSO member's misuse of SSO processes to exclude competitor violated antitrust law); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 315-16 (3d Cir. 2007) (allegations that Qualcomm falsely assured SSOs it would license SEPs on FRAND terms sufficient ground for

Qualcomm's refusal to license rivals eliminated a means of escaping its anticompetitive conduct: one way OEMs could avoid Qualcomm's anticompetitive strategy of withholding chips to extract a royalty surcharge would be to obtain Qualcomm-licensed chips from other chipmakers. Those chipmakers would not be vulnerable to Qualcomm's chip supply leverage and would thus be in position to negotiate reasonable royalty rates in the shadow of patent law and Qualcomm's FRAND commitments. In fact, Qualcomm recognized that if it licensed its SEPs to rival chipmakers, it would lose its ability to extract inflated royalties from OEMs. A130.

Finally, Qualcomm argues that any refusal to deal must entail profit sacrifice to be deemed anticompetitive, Mot. 16-17, and that because the court found Qualcomm's actions were "lucrative," the court's analysis fails. But Qualcomm misconstrues the law. While a monopolist's willingness to forsake short-term profits may be evidence of an anticompetitive end, *see Trinko*, 540 U.S. at 409, the lucrative nature of a firm's actions do not immunize the actions from antitrust scrutiny and ultimately liability. *See McWane, Inc. v. FTC*, 783 F.3d 814, 841

monopolization claim). *See generally Trinko*, 540 U.S. at 410 n.3 (exclusion of competitors from a collaboration "presents greater anticompetitive concerns" and is more "amenable to a remedy" than one firm's refusal to share a proprietary asset).

(11th Cir. 2015) (profitability is "'not an unlawful end, but neither is it a procompetitive justification'" (quoting *Microsoft*, 251 F.3d at 71)).

B. Qualcomm Fails To Show Irreparable Injury

Qualcomm fails to show irreparable injury from near-term enforcement of the two challenged provisions of the district court's order. The first requires Qualcomm to negotiate license terms without threatening to disrupt a customer's chip supply or conditioning the supply of modem chips on a customer's patent license status. A228. Qualcomm asserts that this requirement will cause it to lose licensing revenues from contracts it negotiated under its no license, no chips policy. Mot. 24-25. But the district court's order permits Qualcomm to negotiate and collect all the revenues to which it is entitled, namely, (i) chip prices that reflect the market-based value of its modem chips, and (ii) royalties that "reflect the fair value of Qualcomm's patents." A228-30.

Qualcomm's claim that it will be harmed by selling chips to unlicensed customers (Mot. 25-26) is meritless. Like any other supplier of smartphone components, Qualcomm can price its modem chips to reflect the value of its patents substantially embodied in those chips. *See* A45, A47, A57, A63, A70, A78, A84, A114, A164–65 (finding that Qualcomm's no license, no chips policy is unique within the industry); *see also* A89, A114, A163–65 (finding that

Qualcomm's modem policy is also unique within Qualcomm, as it sells other components exhaustively).[12]

Neither Qualcomm's motion nor its supporting declarations adequately explain how an order that expressly allows Qualcomm to collect "fair value" for its patents can deprive Qualcomm of reasonable patent royalties. *Cf. Qualcomm Inc. v. Compal Elecs., Inc.*, 283 F. Supp. 3d 905, 918–19 (S.D. Cal. 2017) (rejecting Qualcomm's contention that defendants' alleged breach of their license agreements would "cause irreparable harm by emboldening other licensees to improperly seek to breach or renegotiate their license agreements" and dismissing assertions contained in the supporting declaration of Alex Rogers as "remarkably general and speculative"). If a customer balks at paying "fair value," Qualcomm is free to seek damages for breach of contract or patent infringement. *See generally Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014) (affirming denial of a preliminary injunction because "Motorola's FRAND commitments … strongly suggest that money damages are adequate to fully compensate Motorola for any

[12] In the district court, Qualcomm argued that it cannot adjust its modem-chip pricing because competitors' chip prices do not include the value of Qualcomm's patents, as competitors do not pay license fees to Qualcomm. This argument is, at best, ironic given that chipmakers have requested licenses, whereas Qualcomm is desperately seeking to avoid the district court's order that Qualcomm license its chip competitors. As to any patents that are not substantially embodied in modem chips, *i.e.*, that would not be exhausted by their sale, Qualcomm can, like any other patent holder, negotiate licenses covering these patents.

infringement"), *overruled on other grounds by Williamson v. Citrix Online*, *LLC*, 792 F.3d 1339 (Fed. Cir. 2015).[13]

Nor is a stay justified by Qualcomm's claim (Mot. 26) that OEMs have cited the district court's decision in recent license negotiations. That putative harm flows not from the court's injunction, but instead from the authority of the court's findings that Qualcomm's royalties are higher than they would be absent its exercise of monopoly chip leverage. A stay will not undo those findings.[14]

Qualcomm's claims of irreparable harm also depend critically on its speculation that OEMs will insist on, and Qualcomm will accept, new license agreements that will "remain in place for years." Mot. 25. This claim is unsubstantiated and contrary to the trial evidence demonstrating that Qualcomm has negotiated (i) short-term or "interim" licenses and (ii) contractual provisions that would mitigate or eliminate any long-term adverse consequences to

[13] For this reason, the unsubstantiated concerns expressed in the DOJ filing about Qualcomm's financial ability to engage in R&D are misplaced. SOI 11-13. Nothing in the remedy requires any catastrophic financial impact to Qualcomm, and nothing in the record substantiates any such assertion. Indeed, the record shows that Qualcomm spends more on stock buybacks and dividends than it does on R&D. *See* SA110-12 (Qualcomm 2017 10-K showing, for the period 2015-2017, Qualcomm R&D of $16.2 billion versus combined stock buybacks and dividends of $25.63 billion).

[14] Amicus curiae Ericsson's concern about "uncertainty" arising from this case is similarly misplaced. The uncertainty arises from this appeal, not from the injunction itself, and certainly doesn't affect Qualcomm's ability to provide 5G chips.

Qualcomm of a license agreement concluded during the pendency of its appeal. *See, e.g.*, A55 (describing "[t]emporary" and "interim" license agreements); SA073, ¶ 6 (LGE declaration, describing "interim license agreement"); SA130 (amendment to license agreement, providing each party the "right to terminate this Agreement for convenience at any time, by providing at least thirty (30) days' prior written notice").

Qualcomm's claims of irreparable harm stemming from the second challenged provision—requiring Qualcomm to make SEP licenses available to modem-chip competitors on fair and reasonable terms—are conclusory and contradicted by the factual findings below. Qualcomm argues that licensing competitors is unprecedented and will force inefficiencies in the form of "patent exhaustion issues" upon Qualcomm. Mot. 23-24. But the district court considered these assertions and concluded, based the evidence introduced at trial, that (i) "Qualcomm has previously licensed its modem-chip SEPs to rivals and received modem-chip-level (as opposed to handset-level) licenses to other patent holders' SEPs," A128; (ii) "[o]ther modem chip suppliers grant chip-level licenses to their modem chip SEPs," A129; and (iii) Qualcomm's asserted efficiency justifications are "self-serving and pretextual" and based on testimony that is "not credible," A133.[15]

The cases Qualcomm relies upon for the proposition that "major disruption of a business" justifies a stay (Mot. 24) are readily distinguishable. As already noted, the order does not prevent Qualcomm from collecting market-based prices for its modem chips and reasonable royalties for its patents—the major revenue streams it has been collecting for years. This is wholly distinct from *NCAA v. Regents of Univ. of Okla.*, 463 U.S. 1311, 1313 (1983), where "the entire 1983 [intercollegiate football] season" was "at risk," or *American Trucking Associations v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (citations omitted), where this Court concluded that the injunction's provisions were "likely unconstitutional" and "constitutional violations cannot be adequately remedied through damages."[16]

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[15] Similarly, DOJ's assertion that the court erred in ordering Qualcomm to abide by its FRAND commitments, SOI 9, is groundless. The two Supreme Court decisions on which DOJ relies did not address FRAND commitments or suggest that reneging on such commitments is immune from antitrust scrutiny. Numerous cases recognize that abusing intellectual property can support antitrust liability. *See, e.g.*, *Microsoft*, 253 F.3d at 63.

[16] Other cases cited by Qualcomm similarly involved far different circumstances. *See San Diego Comic Convention v. Dan Farr Prods*., No. 18-56221 (9th Cir.), ECF Doc. 11 at ii, 3 (Oct. 10, 2018); ECF Doc. 16 at 6 (Oct. 10, 2018) (stay of damages award that defendant alleged would have bankrupted corporate defendants and cost individual defendants their homes; plaintiff had agreed to

Finally, this Court has expedited this appeal. This substantially reduces any impact on Qualcomm from compliance with the antitrust laws as ordered by the district court.

C. The Public Interest Weighs Against A Stay Pending Appeal

Any demonstrated harm to the adjudged law violator must be weighed against harm to competition, vulnerable market participants, and the public. As the district court's extensive findings on anticompetitive effects establish, Qualcomm's antitrust violations—including ongoing conduct resulting in royalty overcharges—have "strangled competition in the CDMA and premium LTE modem chip markets for years." A216. Because the Order allows customers to renegotiate their existing licenses with Qualcomm, a stay could leave some customers paying "unreasonably high royalty rates" that "harm[] rivals, OEMs, and consumers." A229.

The public interest in immediate relief is not limited to the ability to renegotiate Qualcomm's existing licenses. There is ample evidence that Qualcomm is continuing its unlawful practices, and absent an injunction is "likely to replicate

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temporary stay); *O'Bannon v. NCAA*, Nos. 14-16601 & 14-17068 (9th Cir. July 31, 2015), ECF Doc. 111 (stay granted by merits panel four months after oral argument and two months before this Court vacated part of district court's injunction); *Cal. Pharmacists Ass'n v Maxwell-Jolly*, 563 F.3d 847, 850-53 (9th Cir. 2009) (district court and this Court agreed that plaintiff hospitals likely to succeed on merits and no possibility to later remedy certain harm where reduced revenues came from sovereign state government).

its market dominance" in 5G chip supply. A218–27.[17] For example, the district court found that Qualcomm's 2018 license agreement with Samsung was influenced by Qualcomm's leading position in 5G chip supply. A225. The district court also found that Qualcomm used its chip-supply leverage to extinguish Samsung's antitrust claims against Qualcomm. A62-63. A stay would permit Qualcomm to impose anticompetitive terms on new licensees and on other OEMs whose licenses expire during the stay. *See* SA077-83 (LGE amicus brief detailing impact from stay on Qualcomm negotiations with LG Electronics); A239 (Han Decl.) (describing upcoming license negotiations with major customers, and conceding that a stay would "clearly affect the course of [those] negotiations").

Qualcomm's claim that a stay would not harm competition because the cellular industry is "vibrant" and "dynamic" (Mot. 27-28) is at odds with the district court's factual findings that Qualcomm's monopolistic practices have reduced competition, contributed to the exit of several competitors, and hobbled those that remain. A203-09. Qualcomm errs, moreover, in assuming that federal policy favoring competition applies only in declining or stagnant markets. To the contrary, vibrant and dynamic industries may fall prey to anticompetitive conduct, *see, e.g.*, *Microsoft*, 253 F.3d 34 (personal computer operating systems); Plea

[17] Again, the DOJ is mistaken in suggesting that the trial did not consider evidence about 5G. SOI 11.

Agreement, *United States v. Hynix Semiconductor Inc.*, No. 05-CR-249-PJH (N.D. Cal. May 11, 2005), ECF Doc. 11 (memory chips). The policy judgment underlying the antitrust laws is that an industry will be *more* innovative and efficient if freed from anticompetitive constraints. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

Finally, Qualcomm (joined by the DOJ) argues that its continuing technological leadership is vital to national security and "could be harmed" by the injunction. Mot. 28; SOI 12. Qualcomm relies on a letter from the Treasury Department blocking the 2018 attempted acquisition of Qualcomm by a company headquartered overseas. As reasons for blocking the transaction, the letter cites classified national security concerns, the potential acquirer's "relationships with third-party foreign entities," and the likelihood that the acquirer would alter Qualcomm's "business model." A252-253. The letter does not speak to the Qualcomm practices enjoined by the district court, but asserts only that unspecified changes to Qualcomm's business model, would likely reduce its R&D expenditures. *Id*. Nothing in the letter, nor in the two new declarations of executive branch officials attached to the SOI, suggests that the injunction will impact Qualcomm's ability to invest in R&D or otherwise implicate national security concerns. As noted above, Qualcomm remains free under the injunction to pursue both its chip and licensing businesses and to collect royalties that "reflect the fair value of Qualcomm's patents." A229-30.[18]

If Qualcomm and the DOJ contend that any antitrust remedy that diminishes Qualcomm's corporate profits constitutes an impermissible threat to national security, that argument is misplaced. Congress determined, in enacting the Sherman Act, that competition furthers the public interest.[19] *See United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992) ("[P]assage of the statute is itself an implied finding by Congress that violations will harm the public."); *Prof'l Eng'rs*, 435 U.S. at 695 (Sherman Act's legislative preference for competition "precludes inquiry into the question whether competition is good or bad").

[18] The only case Qualcomm cites as an instance of national security trumping other equitable considerations is readily distinguishable on this point. In *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), unlike here, the nexus between the injunction and resulting harm to national security was clearly established. The district court had directly enjoined certain naval exercises, and officers of the U.S. Navy detailed in concrete terms how the injunction would hinder military training efforts, "leaving strike groups more vulnerable to enemy submarines." *Id.* at 23-25.

[19] *See* Remarks of Dep. Ass't Att'y Gen. Roger Alford, 2019 China Competition Policy Forum (May 7, 2019), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-2019-china-competition (criticizing those who would use antitrust law to pursue broad "public interest" goals such as "supporting national champions" or "enhancing national security"; instead, antitrust enforcement should be guided by the "focused consumer welfare standard").

Moreover, the apparent assertion by DOJ and its supporting declarants that Qualcomm should be shielded from *any* financial consequences for violating the antitrust laws—as opposed to identifying specific national security concerns with specific provisions of the remedy—is, in essence, an assertion that Qualcomm should be immune from antitrust scrutiny. But antitrust immunity can only be conferred through the processes established by Congress. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940) ("Congress had specified the precise manner and method of securing immunity. . . . Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers."). If legitimate national security objectives require subsidizing Qualcomm, and taxing Qualcomm's rivals and United States consumers to do so, there are proper political channels for pursuing those objectives. Interference in the judicial resolution of an action to enforce the antitrust laws is not one of them.

CONCLUSION

The Court should deny Qualcomm's motion for a partial stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Circuit Rules 27-1(d) and 32-3(2), in that it contains 5600 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 27-1(1)(d).

July 18, 2018 /s/ Michele Arington