

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

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In the Matter of)
)
Broadcom Limited,)
a limited company, and)
	Docket No. C-4622)
)
Brocade Communications Systems, Inc.)
a corporation.)
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DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Broadcom Limited (hereinafter referred to as “Broadcom”) of Respondent Brocade Communications Systems, Inc. (hereinafter referred to as “Brocade”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement

and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Broadcom Limited is a limited company organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with a principal place of business located at 1320 Ridder Park Drive, San Jose, CA 95131.
2. Respondent Brocade Communications Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 130 Holger Way San Jose, CA 95134.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Broadcom,” means Broadcom Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Broadcom, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, “Broadcom,” also includes Brocade.
- B. “Brocade” means Brocade Communications System, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Brocade, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Brocade shall be included with Broadcom.
- C. “Respondents” means Broadcom and Brocade, individually and collectively.
- D. “Cisco” means Cisco Systems, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its executive office and principal place of business located at 170 West Tasman Drive, San Jose, CA 95134.
- E. “Commission” means the Federal Trade Commission.

- F. “Acquisition” means the proposed acquisition of Respondent Brocade by Respondent Broadcom as contemplated by and described in the Acquisition Agreement.
- G. “Acquisition Agreement” means the Agreement and Plan of Merger between Broadcom and Brocade, dated November 2, 2016, and any amendments, exhibits, or schedules attached thereto.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “ASIC” means application specific integrated circuit.
- J. “Authorized Individual(s)” means (1) all officers and employees having pricing, sales and marketing, or research and development authority for the Firewall Entity; and (2) employees within the Firewall Entity responsible for providing Fibre Channel ASIC-Related Functions for Cisco. Authorized Individuals shall include, but not be limited to, as of the date the Agreement Containing Consent Order is executed, the names, functions, or positions described in Confidential Appendix A to this Order. All changes to Authorized Individuals shall be in accordance with the procedures described in Paragraph III.C. of this Order.
- K. “Confidentiality Agreements” means the confidentiality and non-disclosure provisions contained in the agreements in place between Broadcom and/or its affiliated undertakings and Cisco, with respect to Cisco FC ASICs. These agreements are attached as Confidential Appendix B.
- L. “Confidential Business Information” means any information relating to Fibre Channel ASICs or Fibre Channel Switches. The term “Confidential Business Information” includes, but is not limited to:
1. all information that is a trade secret under applicable trade secret or other law;
 2. all information regarding product specifications, including those referenced in product schedules; data; know-how; formulae; compositions; processes; register-transfer level (“RTL”); netlists; designs, sketches, photographs, graphs, drawings, and blue prints; creative materials samples; inventions and ideas; past, current and planned research and development; current and planned manufacturing or distribution methods; product and technology roadmaps and processes; customer lists; current and anticipated customer requirements; personnel; forecasts, product release dates, including pre-release products; time to market information; price lists; market studies; business plans; software, whether embedded or bundled with products, and computer software and database technologies; and systems, structures, and architectures;

3. all information concerning bid proposals and all related documents, data, and materials, including initial bid terms, final bid terms, and documents that support cost structures underlying the bids;
4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based in whole or in part, upon any of the information described above;

Provided, however, that Confidential Business Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Business Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

- M. “Fibre Channel ASIC” means an ASIC used in a Fibre Channel Switch. For the avoidance of doubt, “Fibre Channel ASIC” does not include common components (or “blocks”) Broadcom uses across ASIC programs generally (i.e., blocks that are not developed solely for the purpose of implementing a Fibre Channel ASIC design).
- N. “Fibre Channel ASIC-Related Functions” means the activities of providing access to IP Libraries, design oversight, and manufacturing capabilities to create a Fibre Channel ASIC, including, but not limited to, working on the physical design, timing, overall chip definition and floor plans, packing, and product bring up, responding to requests for information and requests for quotes, engineering, and product sales and marketing. For avoidance of doubt, “Fibre Channel ASIC-Related Functions” does not include the activities of developing or implementing common components (or “blocks”) Broadcom uses across ASIC programs generally (i.e., blocks that are not developed solely for the purpose of implementing a Fibre Channel ASIC design).
- O. “Fibre Channel Switch” means a fibre channel protocol networking device designed for use in a storage area network, including modular directors and fixed switches.
- P. “Firewall Entity” means Respondents’ business group responsible for the development, production, sale, and marketing of Fibre Channel ASIC for Cisco (“Cisco FC ASIC Group”).
- Q. “IP Library(ies)” means any intellectual property library used by the Cisco FC ASIC Group for the purpose of producing Fibre Channel ASICs.
- R. “Monitor” means any Person appointed pursuant to Paragraph IV. of this Order.

- S. “Monitor Agreement” means any agreement entered into by Respondents and a Monitor pursuant to Paragraph IV. of this Order.
- T. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondents.

II.

IT IS FURTHER ORDERED that:

- A. The Confidentiality Agreements shall be incorporated by reference into this Order and made a part hereof.
- B. Respondents shall comply with the Confidentiality Agreements, and any breach by Respondents of any of the Confidentiality Agreements shall constitute a failure to comply with this Order. If any term of the Confidentiality Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.
- C. The Confidentiality Agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, and nothing in this Order shall be construed to reduce any obligations of Respondents under the Confidentiality Agreements.
- D. Respondents shall not modify the terms of the Confidentiality Agreements without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

III.

IT IS FURTHER ORDERED that:

- A. Respondents shall establish a Firewall Entity that meets the following conditions:
 - 1. The Firewall Entity shall maintain facilities in a physically separate building from the group responsible for the development, production, sale, and marketing of Fibre Channel ASICs or Fibre Channel Switches for Respondents’ Brocade business group. The Firewall Entity’s facilities shall include a room with restricted security access to protect Cisco proprietary hardware; *provided, however,* that if a separate building is not available, the Firewall Entity and the separate room for Cisco proprietary hardware must be located in a separate and secure section of Respondents’ building;

2. Only Authorized Individuals shall have access to the Firewall Entity facilities; *provided, however*, that access to the Firewall Entity by personnel whose regular duties require such access (e.g., IT services, secretarial, janitorial, security personnel) shall not violate this provision so long as those personnel do not also have responsibility for the development, production, sale, or marketing of Fibre Channel ASICs or Fibre Channel Switches for Respondents' Brocade business unit; and
3. Respondents shall provide the Firewall Entity with an information technology ("IT") system with security protocols assuring access only by Authorized Individuals.

B. Respondents shall require from each Authorized Individual:

1. No later than twenty (20) days after Respondents execute the Agreement Containing Consent Order, a signed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that employees that report to him or her will comply with its terms;
2. No later than ten (10) days after becoming an Authorized Individual by replacing, pursuant to Paragraph III.D., someone specifically identified in Appendix A, a signed non-disclosure agreement and statement in the same form and substance as that required by Paragraph III.B.1.; and
3. That any Authorized Individual who accessed Cisco Confidential Business Information that leaves his or her position in the Firewall Entity shall not, for twelve (12) months, work in the development, production, sale, or marketing of Fibre Channel ASICs for Respondents' Brocade business unit or in the development, production, sales, and marketing of Fibre Channel Switches; *provided, however*, that this provision shall not prohibit Broadcom's Senior Vice President and General Manager of the ASIC Product Division or its corporate officers with contemporaneous responsibility for supervising the development, production, sale, and marketing of other Broadcom ASICs from performing their duties, subject to their obligations under Paragraphs III.D. and III.E.

C. Respondents shall change Authorized Individuals only pursuant to the following procedures:

1. Respondents shall replace individuals who report (directly or indirectly) to the people, functions, or positions specifically identified in Confidential Appendix A only in accordance with the usual and customary business practices of Respondents;

2. Respondents shall replace any of the people specifically identified in Confidential Appendix A or re-organizing functions, or positions specifically identified in Confidential Appendix A only in accordance with the usual and customary business practices of Respondents, and only after notification to the Monitor;
 3. Respondents shall not add new functions or positions that are not specifically identified in Confidential Appendix A without providing prior notification to the Monitor and staff of the Federal Trade Commission in accordance with the following:
 - a. The staff shall have ten (10) days from notification to consider the proposed change; and
 - b. If the staff does not object to the change with ten (10) days of its notification, Respondents shall be permitted to make the change.
- D. Respondents shall use Cisco Confidential Business Information only in furtherance of the design, manufacturing, and sale of Fibre Channel ASICs to Cisco.
- E. Respondents shall: (1) take all actions as are necessary and appropriate to prevent access to, or the disclosure or use of Cisco Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such Cisco Confidential Business Information pursuant to the terms of this Order; and (2) with the advice and assistance of the Monitor, develop and implement procedures and requirements with respect to such Confidential Business Information to ensure compliance with the requirements of this Order.
- F. No later than twenty (20) days after the Acquisition Date, Respondents shall submit to the Commission and to the Monitor a copy of written procedures and guidelines that will be instituted by Respondents pursuant to Paragraph III. of this Order.

IV.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission accepts the Agreement Containing Consent Order, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by Paragraphs II. and III. of this Order.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed Monitor within ten (10)

days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

- C. No later than one (1) week after the Monitor is appointed by the Commission, Respondents shall enter into the Monitor Agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order. If Respondents enter into the Monitor Agreement and that agreement is approved by the Commission prior to the Acquisition Date, the Monitor Agreement shall become effective no later than the Acquisition Date. Respondents shall transfer to and confer upon the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his or her duties and responsibilities in a manner consistent with the purposes of the Orders.
- D. The Monitor shall serve for a period of five (5) years after the Acquisition Date; *provided, however,* (a) the Commission may extend or modify this period, and direct that the Monitor be reinstated, as may be necessary to accomplish the purposes of this Order, and (b) the Commission may shorten this period upon a determination that Respondents no longer have access to Cisco Confidential Business Information (e.g., if Cisco ceases developing Fibre Channel ASICs with Respondent Broadcom).
- E. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission or Commission staff, including, but not limited to:
 - a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order; and
 - b. Assuring that Confidential Business Information is not obtained, disclosed, or used by Respondents, except as permitted by this Order.
 - 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - 3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order.
 - 4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and

such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph IV. the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph IV.D.5. of this Order.
7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order.
8. The Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order:
 - a. Within thirty (30) days from the date the Monitor is appointed pursuant to this Paragraph;
 - b. Every six (6) months from the date this Order is entered for two (2) years from the date this Order is entered; and
 - c. annually thereafter for the duration of the Monitor's appointment, or as otherwise requested by the Commission.

9. Respondents may require the Monitor and each of the Monitor's consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.
- H. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.
- I. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

V.

IT IS FURTHER ORDERED that:

- A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondents shall submit to the Commission and the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:
 1. Within thirty (30) days after the date this Order is issued;
 2. One (1) year from the date this Order is issued and annually thereafter until this Order terminates; and
 3. At such other times as the Commission may request.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondents;
- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, with respect to any matter contained in this Order, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents related to compliance with the Consent Agreement and/or this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 17, 2027.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: August 17, 2017

CONFIDENTIAL APPENDIX A

[Redacted from the Public Record Version, But Incorporated By Reference]

CONFIDENTIAL APPENDIX B

[Redacted from the Public Record Version, But Incorporated By Reference]