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)

BRIEF OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND VACATUR

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INTEREST OF THE UNITED STATES

The United States enforces federal antitrust law and has a strong interest in its correct application in order to protect competition and innovation for the benefit of consumers. Here, at least three aspects of the district court's decision threaten to disserve the purposes of antitrust law and, in imposing an overly broad remedy, to harm national security.

First, the court erred in ruling that Qualcomm's licensing practices were anticompetitive based on Qualcomm's "unreasonable" rates, purported "anticompetitive conduct" against customers, and alleged violation of patent law because none of these practices establish the requisite element of harm to competition, notwithstanding the court's repeated (mis)use of the word "anticompetitive". Second, the court improperly inferred that Qualcomm's refusal to license its standard-essential patents to chip-supplier rivals was anticompetitive when that licensing strategy maximized its profits independent of any potential effect on competition. Third, after finding liability, the court erred in imposing an expansive compulsory licensing remedy—without holding a separate hearing on remedy—that applies beyond the markets at issue at trial and has the potential to negatively impact innovation in 5G technologies and compromise national security.

Accordingly, the United States offers this brief, pursuant to Federal Rule of Appellate Procedure 29(a)(2), to address fundamental errors in the district court's analysis that require vacatur of its liability determination and remedy. The United States does not address all aspects of the court's decision or the parties' arguments.

STATEMENT OF THE CASE

Qualcomm sells modem chips, which enable cellular communications using cellular devices (e.g., phones and tablets) to original equipment manufacturers of those devices (OEMs). Additionally, it licenses a portfolio of patents, which includes patents that are essential to various cellular-phone technology standards (i.e., the patent would be infringed by the implementation of the standard without a license) (SEPs). To comply with the intellectual-property policies of several standard-setting organizations (SSOs) that adopt next-generation technologies for future standards based on consensus, Qualcomm agreed to license its SEPs on fair, reasonable, and non-discriminatory (FRAND) terms. 1ER251-1ER253.

As the Committee on Foreign Investment in the United States ("CFIUS") recognized, Qualcomm "is a global leader in the development and commercialization of foundational technologies and products used in mobile devices," and is "the current leading company in 5G technology development and standard setting." Dkt. 9-2 at A252. Last year, CFIUS blocked a proposed takeover of Qualcomm because, among other things, it could have resulted in the company "reducing long-term investment, such as R&D[,]" and thus imperil national security. *Id.* The Departments of Defense and Energy have stated that a significant reduction in Qualcomm's technological competitiveness or influence in standard setting could seriously harm U.S. national security. 2ER316-2ER317, 2ER321-2ER322.[1]

The FTC brought suit against Qualcomm, alleging that Qualcomm's practices harmed competition in two markets for modem chips: CDMA chips (related to 2G and 3G) and Premium LTE chips (related to 4G). 1ER23. Following a bench trial, the court concluded that

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[1] The Court may take judicial notice of the Departments' positions. *See In re Icenhower*, 755 F.3d 1130, 1142 (9th Cir. 2014) (court may take judicial notice of court filings and other matters of public record).

Qualcomm's practices, "[i]n combination," violate Sections 1 and 2 of the Sherman Act, and thus violate Section 5 of the FTC Act. 1ER216.

The court rejected the United States' request that it hold a remedy hearing in order to avoid undue collateral harm to competition and innovation. Instead, the court entered a sweeping injunction that, *inter alia*, requires Qualcomm to re-negotiate its licenses with OEMs worldwide and to license all chip-supplier rivals on FRAND terms. 1ER227-1ER231. This Court stayed (in part) the injunction, concluding that Qualcomm "has shown, at minimum, the presence of serious questions on the merits," noting that the Departments of Defense and Energy raised national-security concerns, and observing that the United States stated that the injunction risks harming rather than benefitting consumers. 2ER278, 2ER280.

SUMMARY OF ARGUMENT

The district court committed fundamental errors of antitrust law that permeate its decision and require vacatur. The court concluded that Qualcomm's licensing practices, "[i]n combination," violate the Sherman Act, 1ER216, but its analyses of two practices reflect basic misunderstandings of antitrust law. First, it condemned Qualcomm's "no license, no chips" practice without sufficiently identifying the requisite harm to competition. It discussed at length Qualcomm's "unreasonably high" royalties, identified harm to Qualcomm's OEM customers and to individual competitors, and reasoned that Qualcomm acted "inconsistent[ly]" with patent law. 1ER158-1ER183. Accurate or not, however, these conclusions do not substitute for a required showing of "harm … to the competitive process, *i.e.*, to competition itself." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). Second, it misapplied governing law in determining that Qualcomm violated the Sherman Act by electing to license OEMs rather than chip-supplier rivals, mischaracterizing as "anticompetitive malice" the sort of profit-maximizing behavior the Supreme Court explained is "what attracts 'business acumen' in the first place." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Because the court's decision hinges on faulty analysis, this Court should vacate the liability determination.[2]

[2] The court based its liability determination on the "combination" of Qualcomm's practices, 1ER216, and therefore, error in its analysis of even a single practice requires vacatur of the determination.

Finally, the court imposed a sweeping remedy without a hearing and adequate explanation. The injunction improperly polices Qualcomm's conduct across the globe and extends beyond markets in which the FTC alleged harm. A hearing was necessary here to consider whether, given its scope, the remedy risks dampening competition and innovation in other markets or harming national security. Had the court conducted a separate hearing on remedy after finding liability—as requested by the United States—it could have considered these issues. Having refused to do so, and having failed to justify the breadth of its remedy, the court's injunction should be vacated.

ARGUMENT

I. The Court Erred in Analyzing Qualcomm's No License, No Chips Practice

The touchstone of antitrust analysis is whether the challenged conduct harms competition. Thus, if a practice "raises the price secured by a seller" or otherwise harms customers, "but does so without harming competition, it is beyond the antitrust laws' reach." *Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008). Relatedly, the antitrust laws protect "*competition*, not *competitors*," and do not shelter individual firms from "vigorous competition." *Cargill, Inc. v. Monofort of Colo., Inc.*, 479 U.S.

104, 115-16 (1979) (citation omitted). The district court lost sight of these basic principles in condemning Qualcomm's no license, no chips practice and related conduct. It marched through vast amounts of largely redundant evidence documenting Qualcomm's consistent practices toward over fifteen different OEM customers—particularly Qualcomm's practice of not providing chips to OEMs that practiced its technology without a license—concluding that they yield "unreasonably high royalty rates" and (mis)labeling them "anticompetitive" from time to time without explanation. 1ER46.

In telling contrast to the seventy pages spent chronicling harm to OEMs, 1ER45-1ER115, harm to competition from Qualcomm's practice received a scant three pages of discussion. 1ER184-1ER187. That analysis rested solely on testimony from a non-expert, a customer dissatisfied with Qualcomm's "onerous royalty." 1ER185. Because customer harm cannot substitute for harm to competition, and because the court's analysis of competition was lacking, the decision should not stand.

A. The district court erroneously sanctioned Qualcomm under the Sherman Act for charging high royalties, injury merely to customers, and violating patent law

The district court erred in analyzing Qualcomm's no license, no chips practice. Its flawed reasoning obscured a simple explanation for Qualcomm's conduct: the practice of not selling chips to OEMs that do not take a license to Qualcomm's patent portfolio—which contains numerous SEPs that would be infringed by an unlicensed device sale—appears to be aimed at protecting the value of Qualcomm's patents. The majority of its analysis focused on how Qualcomm's practices result in high prices; how they harm customer OEMs; and whether they comply with patent law. Notwithstanding the court's misbranding of these consequences as "anticompetitive," none establish the requisite harm to competition.

1. The court erroneously reasoned that Qualcomm's practice was anticompetitive because it allowed Qualcomm to charge OEMs purportedly high prices. "Simply possessing monopoly power and charging monopoly prices does not violate § 2. . . ." *Pac. Bell Tel. Co. v. Linkline Commc'ns*, Inc., 555 U.S. 438, 447-48 (2009). The Sherman Act does not regulate prices or business practices generally, instead

proscribing conduct that harms *the competitive process* (which, in turn, harms consumers, e.g., through above-competitive prices or reduced innovation). *See United States v. Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc). Premising liability on "unreasonably high" prices, as the court did here—instead of harm to competition—can radically undermine important incentives to innovate. "The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407.

2. The court next erroneously stated that Qualcomm engaged in "anticompetitive acts against OEMs," 1ER45, misapplying antitrust law. Qualcomm does not compete with OEMs—it has vertical relationships with them, supplying them with chips and intellectual property. Hence, the effect of its conduct on OEMs does not establish harm to the horizontal competition among Qualcomm and chip-supplier rivals. That Qualcomm's practices, including its purported high prices, may harm OEMs (e.g., by making them pay more or go unlicensed) does not alone make them "anticompetitive."

Discon illustrates this cornerstone of antitrust law. In that case, a telecommunications service provider, which held a lawful monopoly, switched to a higher-priced provider of removal services. The losing lower-cost provider branded the switch "anticompetitive" because the winner's higher prices were passed on to consumers. *See* 525 U.S. at 131-32. The Court accepted the possibility that "[defendant's] behavior hurt consumers by raising telephone service rates," but explained that such "consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is lawfully in the hands of a monopolist." *Id.* at 136. The plaintiff, the Court explained, must show that consumer harm flows from "harm … to the competitive process, *i.e.*, to competition itself." *Id.* at 135. As in *Discon*, customer harm ("unreasonably high" royalties charged to OEMs) alone is not harm to competition.

3. The court's conclusion that Qualcomm's pricing "is inconsistent" with patent law, even if it were correct, does not supply that element either. 1ER173. Proving that high prices that harm customers result from acts that violate other (non-antitrust) bodies of law does not establish that those acts are anticompetitive.

Discon again is instructive. There, the plaintiff alleged that the switch of providers was a scheme to defraud regulators and charge higher prices. 525 U.S. at 132. The Court, however, cautioned against applying antitrust law to a business decision that, though not made for competitive reasons, is "part of a regulatory fraud"; that "would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases." *Id.* at 136-37. The Court stressed that "other laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws, provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.'" *Id.* at 137 (citation omitted).

Here, and contrary to *Discon*, the court concluded that Qualcomm's practice of setting its royalty as a percentage of the OEM's end-device price rather than as a percentage of the lower chip-component price was "inconsistent with Federal Circuit law on the patent rule of apportionment," and resulted in "unreasonable" royalties. 1ER173. That is not harm to the competitive process.

Further, the court misapplied patent law. Apportionment is a rule courts use in calculating patent-infringement damages under 35 U.S.C. § 284, and it does not constrain a patentee's right to ask for a different royalty base (or higher royalties). *See Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1583 (Fed. Cir. 1983) ("a reasonable royalty . . . is merely the floor below which damages shall not fall").[3] Nor does a FRAND commitment necessarily bar the use of a handset as a royalty base. Mem. at 14, *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 6:18-CV-00243 (E.D. Tex. May 23, 2019) (ECF 538) (holding that licensing of 4G SEPs directly to OEMs, based on the price of the entire device, was consistent with FRAND commitments). These errors are especially significant when Qualcomm's licensing strategy is not uncommon in the industry, as the court acknowledged. 1ER131. Finally, that the court based antitrust liability on conduct arguably allowed by patent law creates unnecessary tension between antitrust and patent law, which "share the common

[3] Moreover, under Section 284, "there may be more than one reliable method for estimating a reasonable royalty," and calculating royalties based on the end device can be appropriate. *See Commonwealth Scientific and Indus. Research Organisation v. Cisco Systems, Inc.*, 809 F.3d 1295, 1302-03 (Fed. Cir. 2015) ("[A] rule … which would require all damages models to begin with the smallest salable patent-practicing unit—is untenable.") (citation omitted).

purpose of promoting innovation and enhancing consumer welfare." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 1 (Jan. 12, 2017) [hereinafter, IP Guidelines].

In sum, the court focused on three supposed problems—high prices, harm to OEM customers, and patent-law violations—that do not necessarily show competitive harm here. As the next subsection will show, its brief analysis does not fill in that gap.

B. The district court's threadbare analysis does not establish competitive harm

The district court's fleeting discussion, 1ER184-1ER187, of harm to competition from Qualcomm's no license, no chips practice is legally insufficient and does not redress its focus on prices, harm to OEM customers, and patent law.

The court's legal analysis is incomplete at best. The court offers little more than the declaration that, by charging "unreasonably high royalty rates anytime an OEM sells a handset," Qualcomm "imposes an artificial surcharge on all sales of its rivals' modem chips" and thus "increases the effective price of rivals' modem chips, reduces rivals' margins, and results in exclusivity." 1ER184. As discussed above, high prices alone do not establish harm to competition. Moreover, although pricing practices can in some circumstances be a mechanism through which competition is harmed, courts in analyzing them should be careful to "show a measured concern to leave unhampered pricing practices that might benefit consumers, absent the clearest showing that an injury to the competitive process will result." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 902 (9th Cir. 2008). Binding precedents of the Supreme Court and Ninth Circuit, therefore, have established clear rules for proving certain price-based antitrust claims. Nevertheless, the court condemned Qualcomm's practice without elucidating competitive harm and without engaging these binding precedents.

One potential way companies can harm competition through prices they charge is predatory pricing. The court did not determine Qualcomm engaged in predatory pricing because, *inter alia*, it did not find Qualcomm priced its chips or SEPs below cost—a necessary element of that claim. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

Instead, the court's theory of harm was that Qualcomm imposes a "surcharge" on chip-supplier rivals. 1ER184. There are two potential ways to view this theory, but neither is legally satisfactory. First, it is possible that the court reasoned that what it viewed as the simultaneously "high" prices for the patent portfolio and "low" prices for the chips constituted a means to squeeze the margins of Qualcomm's rivals. *See id.* Viewed in this light, however, Qualcomm's conduct resembles the pricing practice that the Supreme Court upheld as permissible in *linkLine*. There, the defendant allegedly "'squeeze[d]' the profit margins of its competitors" by lowering the price of a product that competed with the competitor's product while simultaneously raising the price of a complementary product they did not sell. 555 U.S. at 448. As did the *linkLine* plaintiff, the court apparently believed that Qualcomm "must leave [its rivals] a 'fair' or 'adequate' margin." *Id.* Thus, it treated the FTC's theory as "the functional equivalent of the price squeeze" the Court addressed in *linkLine*. *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 935 (9th Cir. 2009).

The Supreme Court made clear, however, that a "price squeeze" is not an independent basis for antitrust liability. It concluded that there is no "independent competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level." *linkLine*, 555 U.S. at 455. Similar to the facts of *linkLine*, here there is no antitrust duty to price reasonably in the licensing market, *see infra* Section II, and no evidence of predatory pricing in the chip market that created harm to competition. "Two wrong claims do not make one that is right."[4] *linkLine*, 555 U.S. at 457.[5]

A second way to read the court's analysis of Qualcomm's pricing of its chips and patent portfolio is that, according to the court, the chip-incentive fund payments operated as a discount on Qualcomm's "unreasonably high" royalty rates for customers who chose to purchase Qualcomm's chips and thereby reduce the "effective price" of Qualcomm's chips. 1ER45, 1ER187-1ER191. That reading does not salvage the

[4] *See also* Lindsey Edwards, Douglas H. Ginsburg, & Joshua D. Wright, *Section 2 Mangled: FTC v. Qualcomm on the Duty to Deal, Price Squeezes, and Exclusive Dealing*, George Mason Univ. Law & Econ. Research Paper Series 19-21, at 19, ssrn.com/abstract=3433564 (arguing that the court's holding "is manifestly inconsistent with the teaching of the Supreme Court in *linkLine*").

[5] *See also* Dissenting Statement of Commissioner Maureen K. Ohlhausen *In the Matter of Qualcomm, Inc.*, No. 141-0199, January 17, 2017 ("Although the complaint frames its price-squeeze claim as a 'tax', it overlooks the fact that reasonable royalties are not an exclusionary tax, even if paid by competitors. And it includes no allegation of below cost pricing (presumably of chipsets) by Qualcomm. . . .").

court's analysis. Because under this reading the chip-incentive funds would be a form of bundled discount—a discount if the OEM purchases both a license and chips from Qualcomm—the court's failure to apply the framework this Court adopted in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d at 903, would be another error. As this Court explained, "the exclusionary conduct element of a claim arising under [Section 2] … cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs." *Id*. The court made no such findings in this case.

Rather than grapple with these precedents, the court relies especially on *Caldera Inc. v. Microsoft Corp*., 87 F. Supp. 2d 1244, 1250 (D. Utah 1999), in concluding Qualcomm's patent royalties increased the "all in" cost of rival's chips. 1ER186-1ER187. In *Caldera*, however, "[t]he effect of [a per-processor licensing] arrangement was that an OEM who chose to install [a competing system] would pay two royalties on the same machine." 87 F. Supp. 2d at 1250.[6] Thus, the per-processor arrangement could serve as a disincentive for OEMs to purchase or invest in competing

[6] The per-processor agreements required OEMs to pay Microsoft a royalty on every machine they shipped regardless of whether it contained a Microsoft operating system. *Id*. at 1249-50.

systems. Here, by contrast, OEMs pay for use of Qualcomm's SEPs that are essential to every cellular device produced, regardless of which supplier's chip is used.

* * *

In sum, the court's ruling—premised on little more than a view that Qualcomm's royalty rates were "unreasonably high," 1ER184—runs afoul of the Supreme Court's explanation in *linkLine* that uncertainty would arise from a liability rule based on an assessment of whether prices were "fair" or "reasonable." *linkLine*, 555 U.S. at 454. Bereft of a legally sufficient theory of competitive harm, there are no existing grounds on which this Court could affirm the district court's condemnation of Qualcomm's no license, no chips practice. *See, e.g.*, *Ace Novelty Co., Inc. v. Gooding Amusement Co., Inc.*, 664 F.2d 761, 763 (9th Cir. 1981).

II. The District Court Abandoned Precedent in Concluding that Qualcomm Violated the Sherman Act by Refusing to Deal with Rivals

The district court wrongly applied Supreme Court and Ninth Circuit precedent in concluding that Qualcomm violated the Sherman Act by refusing to license its SEPs to chip-supplier rivals. The long-standing general rule in antitrust is that a business, even a monopolist, is "free[] to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Antitrust courts rarely impose liability for a refusal to deal with rivals because compelling monopolists to "share the source of their advantage" with rivals "may lessen the incentive" of all market participants to "invest in [] economically beneficial facilities." *Trinko*, 540 U.S. at 408-09. Further, "enforced sharing" among market participants can position courts as ill-suited regulators, setting terms of dealing, and inadvertently facilitate collusion, "the supreme evil of antitrust." *Id*. at 408.

Accordingly, the Supreme Court and this Court "have been very cautious," *id*., in making exceptions to the rule that businesses have "discretion as to parties with whom [they] will deal," *Colgate*, 250 U.S. at 307; *see also MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131 (9th Cir. 2004). The Supreme Court made an exception in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, in which the defendant ski-lift operator violated Section 2 by terminating a cooperatively operated lift ticket with a competitor. This termination suggested that the defendant "was willing to sacrifice short-run benefits and consumer goodwill" to exclude "its smaller rival." 472 U.S. 585, 610-11.

The Supreme Court later clarified that *Aspen Skiing* is "at or near the outer boundary of Section 2 liability". *Trinko*, 540 U.S. at 409. In *MetroNet*, this Court distilled this guidance into three requirements for a monopolization claim based on a unilateral refusal to deal: 1) "unilateral termination of a voluntary and profitable" arrangement; 2) a refusal to deal that would be considered irrational, but for anticompetitive malice; and 3) an administrable remedy that does not require a court to "delineate the defendant's sharing obligations." 383 F.3d at 1133-134. The court misapplied these requirements in condemning under *Aspen Skiing* Qualcomm's refusal to deal with chip-supplier rivals.[7]

[7] Although the Ninth Circuit has not expressly so held, *cf. Image Tech. Servs. Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), it is doubtful whether antitrust law condemns a unilateral refusal to license a patent in light of the "exclusive Right" conferred by a statutory patent grant. U.S. Const. art. I, sec. 8; *see, e.g.*, *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000) ("In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws").

A. The district court erred in concluding that Qualcomm unilaterally terminated a voluntary and profitable course of dealing

Qualcomm's transition from component-based to device-based royalties was not a "termination of a voluntary and profitable" agreement, as required by *MetroNet*. *Id*. at 1133.

1. The court's conclusion that Qualcomm terminated a "profitable course of dealing" defies law as well as economics. 1ER138-1ER139. It is undisputed that device-based royalties were significantly more profitable than component-based ones. *See, e.g.*, 1ER131 (Qualcomm stopped licensing rivals because "it was far more lucrative to license only OEMs"); *see also* 1ER126-1ER132, 1ER195. Qualcomm chose a licensing strategy that would allow it to obtain the greatest return on its patents in light of the Supreme Court's interpretation of patent-exhaustion doctrine. *See Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008); 3ER587:7-3ER579:5. Indeed, as Ericsson's and Nokia's practices show, and as the court even recognized, *see e.g.,* 1ER125-1ER126, 1ER131-1ER135, 1ER193-1ER194, licensing at the device level is vastly more profitable than licensing chip suppliers, even before accounting for what competitive effect, if any, that practice has on chip suppliers.

As this Court has explained, termination of a profitable agreement in favor of a more profitable one "sheds no light" on whether the decision was motivated by rational business judgment or by anticompetitive ends. *MetroNet*, 383 F.3d at 1132 (citing *Trinko*, 540 U.S. at 408). Qualcomm's decision to collect royalties from OEMs rather than chip suppliers presents the same scenario: opting for a more profitable arrangement (regardless of effect on competition) over a less profitable one does not subject a monopolist to antitrust liability.

2. The district court's analysis of the "voluntary" requirement of *MetroNet* also was error. Tellingly, Qualcomm never offered exhaustive licenses to its rivals. 1ER116, 1ER119, 1ER121, 3ER586:8-15, 4ER817:13-15. To rectify this deficiency, the court wrongly appealed to Qualcomm's decision to commit to SSO licensing policies as part of its participation in this industry, which the court interpreted as obligating Qualcomm to provide its rivals such licenses exhaustively. *See* 1ER138. This reasoning turns the concept of voluntariness on its head. In this very case, Qualcomm has vigorously argued that the relevant SSO intellectual property policies do not require it to license rivals; it is the court's ruling to the contrary that established such a requirement.

1ER259. Thus, it is difficult to conclude that Qualcomm voluntarily embraced dealing with rivals through these SSO policies when it believed it had no contractual obligation to do so. [8]

Even if the court were correct in its interpretation of Qualcomm's FRAND obligations, those commitments were not "voluntary" in the meaning of *Aspen Skiing*. In *Aspen Skiing*, the defendant previously had offered a joint lift ticket with the rival plaintiff for consumers to ski both its and the plaintiff's mountains, a voluntary business decision the defendant later reversed. Qualcomm's decision to comply with SSO policies requiring FRAND commitments seems more comparable to the non-voluntary course of dealing in *Trinko*, where the defendant was required to accept statutory forced-sharing requirements as a condition of being an incumbent local telephone provider. At a minimum, the court's ruling expands the concept of voluntariness past *Aspen Skiing*,

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[8] Although the Third Circuit in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 316, 316 (3d Cir. 2007), stated in dicta that Broadcom adequately alleged that a FRAND commitment was voluntary, the facts of that case are materially different. Broadcom alleged that Qualcomm agreed to license on FRAND terms and then broke that promise by demanding non-FRAND terms, whereas here Qualcomm disputes that its FRAND obligations require the licensing of chip-supplier rivals in the first place, and thus it cannot be said to have volunteered to do so through those commitments.

which lies "at or near the outer boundary of Section 2 liability." *Trinko*, 540 U.S. at 409.

B. Licensing OEMs was independently rational and supports no inference of anticompetitive malice

The district court's analysis of the second requirement of a refusal-to-deal claim under *MetroNet* also is flawed. The *Trinko* Court explained that the *Aspen Skiing*-defendant's unwillingness to deal with plaintiff "*even if compensated at retail price* revealed a distinctly anticompetitive bent." 540 U.S. at 409. Because the defendant inexplicably eschewed guaranteed profit with no apparent benefit, the Court concluded that it sacrificed "short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Aspen Skiing*, 472 U.S. at 594, 608.

The court here erroneously inferred anticompetitive malice from Qualcomm's "'willingness to sacrifice short-term benefits'—like profitable licenses from chip-supplier rivals—'in order to obtain higher profits in the long run from the exclusion of competition.'" 1ER142 (quoting *MetroNet*, 383 F.3d at 113). As discussed in Section II.A above, Qualcomm's decision to license devices rather than components was undisputedly more profitable in the short run (regardless of competitive effect), and driven by the ordinary desire to maximize profits. *See, e.g.*, 1ER121, 1ER126-1ER127, 1ER130-1ER134, 1ER195. Indeed, Qualcomm's licensing strategy has been adopted by other companies that do not sell chips and thus have little incentive to harm chip competition. 1ER132 (SEP-licensors Ericsson and Nokia charge royalties on devices rather than components because it is more profitable). Moreover, far from finding that Qualcomm sought to foreclose rivals' access to an input (a typical aspect of a refusal-to-deal claim), the court recognized that Qualcomm allowed rivals the use of its patented technology, free of royalty. 1ER115. Finally, the lag in time between Qualcomm's prior, limited course of dealing with rivals in the 1990s, 1ER128, 1ER138-1ER139, and the alleged refusals to deal years later, 1ER115-1ER125, also undermines any inference of anticompetitive malice or that the change in Qualcomm's practices harmed competition. Ginsburg et al., *supra* note 4, at 16. In short, no finding by the court suggests that Qualcomm's decision to license in a profit-maximizing way was a scheme calculated to cause "losses to drive rivals from the market or to discipline them," as necessary under *Aspen Skiing*. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.). That is fatal to the refusal to deal claim.

The court's inference of anticompetitive malice from a company's efforts to maximize profits runs contrary to the principles of a free-market economy. 1ER140-1ER142, 1ER170. Antitrust law does not proscribe profit maximization, even for monopolists: "charging monopoly prices[] is … an important element of the free-market system." *Trinko*, 540 U.S. at 407. In any event, the predominant focus of antitrust analysis is "upon the effect of that conduct, not upon the intent behind it." *Microsoft*, 253 F.3d at 59. Mistaking legitimate business goals for anticompetitive ones can be "especially costly" because it risks "chill[ing] the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

C. The remedy would require the court to regulate licensing

The district court further erred in applying the third requirement of a refusal-to-deal claim under *MetroNet*, which reflects "concern about the administrability of a judicial remedy." 383 F.3d at 1133. Where courts "can simply order the defendant to deal with its competitors on the same terms that it already deals with others," this concern is mitigated.

Id. Such circumstances are not present here. One of the court's compulsory licensing provisions requires Qualcomm to begin a licensing practice it has virtually no history of employing, and presents significant administrative challenges.

Among other requirements, the court ordered Qualcomm to make "exhaustive SEP licenses available to modem-chip suppliers on [FRAND] terms." 1ER230. In requiring Qualcomm to submit to "arbitral or judicial dispute resolution" to determine such terms, the court anticipates the need for indefinite judicial oversight. While Qualcomm in the past made some agreements with rivals for the use of its technology, there is no evidence that any of these were exhaustive licenses that could provide a baseline. In addition, multi-level licensing poses administrative challenges, 3ER586:25-ER587:2, which counsel against a court order requiring it.

* * *

The district court ventured beyond "the outer boundary of Section 2 liability," *Trinko*, 540 U.S. at 409, when it concluded that Qualcomm acted anticompetitively by refusing to license chip-supplier rivals, notwithstanding its finding that licensing to OEMs maximized short-term profits. Its analysis runs headlong into *Trinko* and *MetroNet* and therefore should be vacated.[9]

III. The Court Should Vacate the District Court's Boundless Injunction and Remand for a Hearing

The district court abused its discretion by issuing a boundless remedy without providing an adequate explanation. Its injunction governs Qualcomm's actions in markets beyond those addressed in this case, and is unlimited in geographic scope and duration. The court, however, did not explain why such a broad remedy was appropriate. Moreover, it did not consider whether, because of its breadth, the remedy unintentionally could harm competition and innovation in other markets or pose a risk to national security. These shortcomings may stem from the court's refusal to hold a hearing on the remedy, notwithstanding the United States' request, that could have probed these issues. Accordingly, even if the Court affirms the liability ruling, it should vacate the injunction and remand for further proceedings on remedy.

[9] *See supra* note 2.

A. The district court failed to justify its overly broad injunction

"Antitrust relief should unfetter a market from anticompetitive conduct and pry open to competition a market that has been closed by defendants' illegal restraints." *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972) (citation omitted). Although an antitrust remedy may go "beyond a simple proscription against the precise conduct previously pursued," *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 698 (1978), a court must be guided by "three dominant influences": (1) "[t]he duty of giving complete and efficacious effect to the prohibitions of the statute"; (2) "the accomplishing of this result with as little injury as possible to the interest of the general public"; and (3) "a proper regard for the vast interests of private property," *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327-28 (1961) (citation omitted).

Accordingly, although a court must choose a remedy that is effective in protecting competition, a remedy must not cause undue harm to other public and private interests. *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 150-51 (D.D.C. 1982) ("When choosing between effective remedies, a court should impose the relief which impinges least upon other public policies.").

The injunction here distinctly crosses these lines. It reaches far beyond the markets where the court found harm—CDMA modem chips and Premium LTE modem chips. In fact, the court intended to reach beyond the markets where the FTC alleged an antitrust violation, declaring with negligible fact-finding "a sufficient likelihood" of competitive harm in the 5G modem chip market. 1ER229, 1ER231.

Additionally, the court applied the remedy globally without even attempting to reconcile this relief with the actions of foreign jurisdictions, despite acknowledging them in detail. 1ER11-1ER13. Department of Justice and FTC policy is to "seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation § 5.1.5 (Jan. 13, 2017), https://www.justice.gov/atr/internationalguidelines/download.

The court failed to justify the breadth of its remedy. It made conclusory statements about harm in the provision of 5G and WCDMA chips, 1ER227, 1ER229, 1ER231, even though these markets were not the subject of the trial. The court did not even define them as proper antitrust markets, much less assess competition therein, and thus lacked a basis for a prediction of competitive harm. *Cf. In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 533-34 (4th Cir. 2003) (questioning injunction directed at "an emerging and as yet undefined collateral market" rather than the market at issue). Further, the court did not explain adequately why a global remedy was needed. *See, e.g.*, Organisation for Economic Co-operation and Development, Roundtable on the Extraterritorial Reach of Competition Remedies—Note by the United States 4 (Dec. 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)41/en/pdf (the Antitrust Division's and the FTC's "general practice is to seek an effective remedy that is restricted to the United States").

Most problematically, the court failed to analyze whether such overbreadth could have harmed important public interests. *See E.I. du Pont*, 366 U.S. at 328 (solving the competitive problem must be accomplished "with as little injury as possible to the interest of the general public"). The court ignored altogether the possibility that the remedy could impair competition in other markets, e.g., by limiting Qualcomm's ability to invest in R&D and standard-setting or by changing longstanding and efficient licensing practices. *Cf.* William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 Conn. L. Rev. 1285, 1310 (1999) (a court should "identify possible side effects from implementing the contemplated remedy").

Additionally, the court also failed to consider the remedy's potential impact on national security, a public interest of "the highest order."[10] *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (citation omitted). Qualcomm is a leading company in the development of 5G technology and in related standard setting, and the Executive Branch has stated that diminishment of Qualcomm's competitiveness in 5G innovation and standard-setting could harm U.S. national security. 2ER316-2ER317, 2ER321-2ER322, Dkt. 9-2 at A252. Accordingly, the court should have considered whether the remedy would impair unduly

[10] The United States has not argued, as the FTC suggests, that "Qualcomm should be shielded from *any* financial consequences for violating the antitrust laws." 2ER309 (emphasis in original). Rather, the United States argued that a stay was warranted because immediate implementation of the remedy—which stems from the district court's faulty liability analysis, and likely was overbroad in any event—potentially could have immediate and lasting negative consequences for national security. 2ER340-2ER341.

Qualcomm's ability to invest in R&D, to engage in standard-setting activities, or to supply the military and other national security actors.

The appropriate tailoring of a remedy is vital in a case, like this one, involving monopolization related to the exercise of intellectual property rights. Success that a monopolist "may achieve through the process of invention and innovation is necessarily tolerated by the antitrust laws." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998 (9th Cir. 2010) (internal quotations omitted). "Implementing a [Section 2] remedy that is too broad runs the risk of distorting markets, impairing competition, and prohibiting perfectly legal and efficient conduct."[11] Thomas O. Barnett, *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, 76 Antitrust L.J. 31, 36 (2009); *see also* IP Guidelines § 3.1, n.26 (licensing remedies should be tailored to the competitive harm).

[11] Crafting an appropriate remedy can be more straightforward in other antitrust contexts. For example, in a typical challenge to an unconsummated merger, an injunction prohibiting the merger will preserve the status quo. Moreover, in general, "[t]he proper remedy for a section 1 violation based on an agreement to restrain trade is to set the offending agreement aside." *Authenticom, Inc. v. CDK Glob., LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017).

Here, the court gave no indication that it considered whether a remedy of this scope would, perversely, disserve the purposes of antitrust law by impairing competition and innovation. 1ER228 (considering only the remedy's "feasibility"). Thus, while "all doubts as to remedy are to be resolved in [the government's] favor," *E.I. du Pont*, 366 U.S. at 334, the absence of an adequate explanation for this injunction warrants its vacatur, *see, e.g.*, *Microsoft*, 253 F.3d at 103 (vacating decree because the district court "failed to provide an adequate explanation for the relief it ordered").

B. The district court abused its discretion in failing to hold a hearing on remedy

These faults underscore that the district court abused its discretion in refusing to hold an evidentiary hearing. In antitrust trials, as in other civil cases, "[a] party has a right to judicial resolution of disputed fact not just as to the liability phase, but also as to appropriate relief." *Microsoft*, 253 F.3d at 101. "[A] trial on liability . . . does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability." *Id.*

As the United States explained in a Statement of Interest filed in the district court, a hearing was necessary because of the prospect that an overly broad remedy could reduce competition and innovation in markets for 5G technology and downstream applications relying on that technology. 2ER340. The court, though, deemed a hearing unnecessary because "the matter of relief was part of the trial on liability," and there were no "acute factual disagreements." 1ER228 (quoting *Microsoft*, 253 F.3d at 101).

This explanation does not withstand scrutiny. Qualcomm vigorously disputed that its licensing practices threatened competition in 5G markets, and the court refused to entertain evidence Qualcomm offered on the point. *See, e.g.*, 1ER235, 1ER239. As discussed *supra* Section III.A, the court lacked an adequate foundation for its conclusion that there is "a sufficient likelihood" of competitive harm in as yet undefined 5G markets. Moreover, the court's insistence that "the parties presented considerable testimony, evidence, and argument on the feasibility of requiring Qualcomm to license its SEPs to rival modem chip suppliers," 1ER228, missed entirely the issue raised by the United States, i.e., whether an overbroad injunction might harm competition and innovation. Because there is "a bona fide disagreement concerning substantive items of relief which could be resolved only by trial," the injunction "must be vacated." *Microsoft*, 253 F.3d at 101.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's liability determination, which rests on misunderstandings of basic antitrust law, and its remedy, which lacks adequate justification and threatens harm to competition, innovation, and national security.

Respectfully submitted.

August 30, 2019

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