

No. 19-16122

IN THE
**United States Court of Appeals
for the Ninth Circuit**

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED, A DELAWARE CORPORATION,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF CALIFORNIA
HON. LUCY H. KOH, JUDGE, CASE NO. 5:17-CV-00220

**BRIEF OF *AMICUS CURIAE* ACT | THE APP ASSOCIATION
IN OPPOSITION TO
QUALCOMM'S MOTION FOR PARTIAL STAY PENDING APPEAL**

Amanda Tessar
PERKINS COIE LLP
1900 Sixteenth St, #1400
Denver, CO 80202-5255
Telephone: (303) 291.2357
Facsimile: (303) 291-2457
ATessar@Perkinscoie.com

Sarah E. Fowler
PERKINS COIE LLP
3150 Porter Dr.
Palo Alto, CA 94304
Telephone: (650) 838-4300
Facsimile: (650) 838-4350
SFowler@Perkinscoie.com

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I. RULE 29 STATEMENT OF INTEREST

Amicus curiae ACT | The App Association (the “Association”) respectfully offers its perspective on Appellant’s Motion for Partial Stay of Injunction Pending Appeal (“Motion”). The Association represents more than 5,000 small technology development companies that create leading software and hardware solutions. The ecosystem the Association represents is valued at approximately \$1.3 trillion and provides 5.7 million American jobs. The Association is the leading global representative for the small-business innovator community on law and policy for standard-essential patents (SEPs).

II. INTRODUCTION

Appellant’s request for a stay is based on premises proven false before the district court. Appellant claims that compliance with the district court’s Order (Dkt. 1491) would “fundamentally change the way it has done business for decades” in ways that “conflict with settled industry practice.” Motion, at 1-3. Neither of these claims withstands scrutiny. Nor is there any risk of imminent harm to either Appellant or national interests if the injunction is not stayed during this expedited appeal. To the contrary, domestic rollout of and investment in 5G networks will be severely harmed if the motion to stay is granted, and, as the ITC held, there is “a real and palpable likelihood the National Security interests will be

jeopardized” by Appellant’s conduct.¹

The district court’s 233-page Order meticulously documents the practices held to be illegal, as well as how those practices have harmed competition in the telecommunication market, successfully removing a series of domestic rivals (*i.e.*, alternative sources of supply). The district court expressly addressed the potential harm to competition in 5G markets if Appellant’s illegal conduct were permitted to continue during the market’s imminent transition from 4G/LTE to 5G. In particular, the Order notes that the practices that are the focus of Appellant’s Motion were viewed by Appellant as integral to its anticompetitive efforts to dominate emerging 5G markets. Order, at 200-201.

The injunction requires only that Appellant abide by promises and practices that it had long advocated to both investors and the U.S. courts, and that other successful companies have followed for decades. On the other hand, the requested stay would cause severe harm to the Association’s industry, the wireless ecosystem, and the public interest.

¹ *In re Certain Mobile Electronic Devices*, Inv. No. 337-TA-1065, Initial Determination at 195; *see also* J. Kattan, *The Qualcomm Case and U.S. National Security*, at 6-8, at https://actonline.org/wp-content/uploads/The-Qualcomm-Case-and-National-Security_Final.pdf.

III. ARGUMENT

a. **FRAND EXISTS TO SHIELD AGAINST IP ABUSES—AS QUALCOMM’S HISTORICAL STATEMENTS AND PRACTICES CONFIRM**

1. *FRAND’s Critical Role During the Transition to 5G*

It should be no surprise to anyone, much less Appellant, that a FRAND promise – a promise to license on “fair” and “non-discriminatory” terms – imposes an obligation to offer a license to companies throughout the supply chain. For example, the key industry organization for development of cellular standards prominently notes on its website that FRAND “require[s] IPR holders to make licences available to *all third parties*.”²

Ensuring appropriate FRAND behaviors is critical as the industry implements next-generation 5G networks and devices—something that is happening right now:

According to recent ... estimates, some 25-30 billion devices in the home and workplace will be equipped with sensors, processors and embedded software.... *For proper market functioning as the connected economy develops, it will be critical to all market actors that FRAND licensing practices are followed and that abusive assertions are prevented.*³

If SEP abuses are permitted to distort competition at this critical juncture, even for a matter of months, market distortions will persist for many years to come.

² <https://www.3gpp.org/contact/3gpp-faqs#L5>.

³ *Core Principles and Approaches for Licensing of SEPs*, CEN-CENELEC CWA 95000, at <https://sistemaproprietaintellettuale.it/pdf/WS-SEP2-CWA95000-final-draft.pdf>.

2. *The Association's Views on FRAND Are Mainstream*

The Association's view on these issues, like the district court's decision, is entirely mainstream and consistent with applicable caselaw. For example, we joined 50+ industry leaders and 70+ governmental and academic thought leaders in voicing our support for FRAND practices and U.S. legal precedent to the DOJ,⁴ the FTC,⁵ the Department of Commerce, and the USPTO.⁶ We recently co-sponsored a workshop bringing together 50+ companies to document core principles for SEP-licensing, particularly for 5G.⁷ The companies and associations that have joined us in efforts to curtail SEP abuses represent *over \$100B annually in R&D spending across a range of industries, own hundreds of thousands of patents (including SEPs), employ 50 million+ Americans, and contribute trillions of dollars to*

⁴ Multi-Association Letter to AAG Delrahim, at <http://www.ccianet.org/wp-content/uploads/2018/05/Multi-Assn-DOJ-White-Paper-053018.pdf>; Industry Letter to AAG Delrahim, at <http://www.ccianet.org/wp-content/uploads/2018/01/Industry-Letter-to-DOJ-AAG.pdf>; Letter to AAG Delrahim Regarding Speeches on Patents and Holdup, at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/DOJ-patent-holdup-letter.pdf>.

⁵ Comments to FTC, at <https://www.ftc.gov/policy/public-comments/2018/08/20/comment-ftc-2018-0055-d-0031>.

⁶ Comments to Department of Commerce and USPTO, at <http://actonline.org/wp-content/uploads/Multi-Stakeholder-Letter-re-DOJ-USPTO-Policy-Statement-042219.pdf>.

⁷ *Supra*, n.3.

*annual U.S. GDP.*⁸

3. *Until Recently, Appellant Shared the Association's Views*

In its Motion, Appellant rails against industry practices (such as chip-level licensing) that are not particularly controversial and that even Appellant itself previously championed. For example, Appellant's current President (then VP) has proclaimed: "*Saying [Qualcomm] refuse[s] to license competitors is like saying McDonald's refuses to sell hamburgers [...] It's nuts. It's crazy.*"⁹

Similarly, Appellant has repeatedly argued that FRAND promises *require* licenses to chipmakers (indeed, to any party seeking a license), despite its recent refusals to do so itself.¹⁰ *Appellant even sued a rival chipmaker for breach of FRAND based on the rival's refusal to license Appellant.*¹¹ In the face of these

⁸ *Supra*, n.6. Appellant points to statements by AAG Delrahim as suggesting the district court "relied on a theory" that was flawed. Motion at 1-2. But Appellant never explains how any such "theory" conflicts with Mr. Delrahim's policy statements. Even if it did, Mr. Delrahim expressly desires to *change* Supreme Court precedent, whereas the district court and this Court are required to apply *existing* law. Notably, AG Barr, in sworn testimony to the FTC, has also voiced views and "theories" contrary to Mr. Delrahim's aspirational policy positions. *See supra*, n.6, at n.4.

⁹ Gittlesohn, J., *Battle of Tech Heavyweights*, Orange County (Cal.) Reg. 1 2007 WLNR 30244838 (5/1/07).

¹⁰ *E.g.*, Qualcomm's Counterclaims, No. 05-3350 (D.N.J. Feb. 29, 2008), at ¶¶ 25, 56, 61, 77 ("Qualcomm ... offers licenses on fair, reasonable and non-discriminatory terms *to any interested company*."; "Qualcomm has repeatedly offered [a competitor] license terms for Qualcomm's UMTS patents that comply with FRAND and are at least as favorable as the terms Qualcomm has offered to other chipset licensees.").

¹¹ No. SACV05-0467-JVS (C.D. Cal. Jan. 20, 2009), ECF No. 1606.

judicial admissions, Appellant’s claims that the district court’s order was novel or contrary to historical practices ring hollow.

b. THE HARM TO THE MARKET FROM STAYING SUBSTANTIALLY OUTWEIGHS THE DUBIOUS ALLEGATIONS OF HARM TO ONE COMPETITOR

1. The Order Protects Existing 4G/LTE and Emerging 5G Markets at a Critical Transition

The Order carefully considered the likely effects on 5G markets if the enjoined conduct were permitted to continue. For example, the Court concluded that “[b]y harming rivals’ standing with industry participants, Qualcomm suppresses rivals’ ability to generate additional business, develop new products, and win the race to market. Instead, Qualcomm wins these opportunities, which further entrenches Qualcomm’s monopoly chip power.” Order at 202. The Court noted that Appellant seeks to “replicate its market dominance during the transition to 5G, the next generation of modem chips.” *Id.* at 221. And the Court explained that its remedies were designed to protect against the extension of monopolistic behaviors into 5G markets. *Id.* at 228.

The Association agrees that entrenchment of monopoly power, and the market distortions that SEP abuse engenders, threaten to irreparably harm the marketplace at this critical stage of 5G deployment.

2. Appellant’s Allegations of Harm Are Substantially Overstated

Appellant’s allegations about potential harm to its individual business absent

a stay do not withstand scrutiny.

Appellant argues, for example, that a stay is required to promote U.S. leadership “in the development of the worldwide standards.” Motion, at 4. But this argument does not make sense. While Appellant is undoubtedly an important player in telecommunications development, the suggestion that Appellant is the only company (much less the only U.S. company) situated to develop and promote future cellular technologies is, at best, overstatement. 5G development is and has been exceedingly collaborative, with hundreds of American and foreign companies working together. Cellular development will continue (and will continue to include Appellant) absent a stay.

Moreover, like the DOJ’s assertions of harm to U.S. interests (discussed below), none of Appellant’s assertions about future innovation are tied to the alleged need for a stay. Nothing in the Court’s Order restricts Appellant from selling its 5G devices for a fair price, licensing its 5G patents on FRAND terms, or using the proceeds from those fair market transactions to fund ongoing development. Appellant’s premise that compliance with the Order would prevent Appellant’s participation in the 5G marketplace – and continuing sales of 5G chips – is simply false.

Appellant argues that the Order will require it to enter into license agreements that “will remain in place for years.” Motion, at 25. But the Order

requires no such thing. Appellant could avoid such self-styled (and overblown)¹² harms by structuring any new agreements to terminate if the Order is overturned (or, for existing licensees, to revert to current licensing terms). In this way, Appellant may comply with the Order while ensuring that its business relationships can return to the *status quo ante* if the Order is altered on appeal.

Similarly, nothing in the Order precludes Appellant from pricing its chips at fair prices during the appeal, *including compensation for its patent rights*. While exhaustion may apply to those sales during appeal, it is unclear why Appellant would suffer harm when it has been fully compensated for its products and patent rights.

Appellant's suggestion that it will suffer harm if it must parse through its patent portfolio to determine which patents must be licensed at the component-level and which must be licensed at the OEM-level is similarly false. Motion, at 7. The Order requires no such thing, either explicitly or implicitly. First, cellular standards are implemented at the chip level,¹³ and the Order addresses those

¹² The district court found that Appellant (and other SEP holders, like Ericsson) regularly and repeatedly negotiated exhaustive cross-licenses with component makers until more recently changing their licensing practices. Order at 128-130. Requiring Appellant to revert to this practice during appeal is hardly compelling evidence of irreparable harm.

¹³ *E.g.*, *GPNE Corp. v. Apple, Inc.*, No. 12-CV- 02885-LHK, 2014 WL 1494247, at *13 (N.D. Cal. Apr. 16, 2014) (holding “as a matter of law that in this case [involving 3G and 4G alleged SEPs], the baseband processor is the proper smallest salable patent-practicing unit”).

patents that Appellant has declared essential to cellular standards. Second, regardless of whether Appellant's patents are drafted at a system or network-level, Appellant can exhaustively license rival chipmakers for its entire SEP portfolio. This is demonstrated, for example, by the exhaustive cross-licenses to Appellant's own chip business. Order, at 127-128. It never has been the law that only *directly infringing* devices may become licensed; an exhaustive license to any system or network-level SEPs in Appellant's portfolio would protect rival chipmakers from claims of both direct infringement (*i.e.*, by themselves) and indirect infringement (*i.e.*, by their customers).

In short, under the Order, Appellant retains the right and ability to obtain FRAND compensation for its inventions, to price its chips fairly (including the value of its patents), and to enter agreements addressing any possibility that the Order might be overturned.

3. *A Stay Would Harm U.S. Interests*

The late-filed DOJ brief advocates policies contrary to applicable precedent and mainstream responses to SEP abuse, and is devoid of any factual support for its assertions of harm to national security. The DOJ asserts, without support, that requiring Appellant to sell chips at fair prices (including compensation for the value of patents, as permitted by the Order) or to license rivals in return for FRAND compensation (also as permitted by the Order) would undermine national

interests in 5G development and standard setting.

But 5G standards have already been published.¹⁴ And, while development is always ongoing, there is *no* factual or causal link in the record or that can be established to show that Appellant’s cellular development innovation will cease if it is permitted “only” fair (rather than unfair monopoly) compensation for its chips and patents during this appeal. As the DOJ itself readily admits, Appellant remains a leading chip supplier, with heavy incentives to continue development.

More importantly, the DOJ provides no basis—nor is there any in the record, in Appellant’s motion, nor in Ericsson’s brief—to conclude that there would be any impact on the sale of 5G cellular chips during the pendency of this appeal if the injunction is not stayed. On the contrary, the evidence shows that Appellant will continue to sell, and customers will continue to buy and use, its chips while this appeal follows its course.¹⁵

In short, it does not appear that the public interest is negatively impacted at all by application of the injunction during the 6-9 months of this appeal, much less that any negative effects outweigh the public interest in fair competition during the transition to 5G. Contrary to Appellant and the DOJ’s suggestion, and as held by

¹⁴ <https://www.3gpp.org/release-15>.

¹⁵ Ordinarily, and inconsistently with the DOJ’s position here, the government avoids sole-supplier situations. *E.g.*, 2 CFR §200.320.

one court in assessing Appellant’s arguments, long-term innovation (including American innovation) is impeded, not promoted, by allowing Appellant to continue its monopolistic practices during this appeal.¹⁶

c. THE VIEWS PRESENTED BY THE OTHER PRO-STAY AMICI ALSO DO NOT DEMONSTRATE HARM ABSENT A STAY

The two other amici briefs in support of Appellant’s position do not provide support for a stay. As noted in the Order, Ericsson recently began *copying* Appellant’s licensing model. Order at 130-132 (rejecting “Ericsson’s self-serving and made-for-litigation justifications for refusing to license modem chip suppliers” as inconsistent with Ericsson’s prior statements). In other words, Ericsson’s motivation is to protect its dubious licensing practices. Ericsson also neglects to mention that it previously filed complaints *against Appellant* asserting antitrust violations *based on Appellant’s refusal to license competing chipmakers*. Dkt. 893, at 13. Ericsson likewise omits that it has exhaustively licensed its own cellular SEPs to Appellant for Appellant’s chipsets. Order, at 128.

Former Judge Michel’s brief addresses the importance of strong IP rights. The Association, as an organization representing patent owners and innovators, likewise supports a strong IP system. But Judge Michel suggests an unbalanced approach that fails to protect against abusive behaviors and relies on false

¹⁶ *Supra*, n.1.

premises, rather than the record here. For example, Judge Michel appears to accept Appellant’s incorrect statements, contrary to the findings in the Order, that “all major licensors of cellular patents license their patents not to rival chipmakers but to original equipment manufacturers.” Michel Amicus, at 7. Additionally, the scholarship relied on by Judge Michel comes from authors heavily sponsored by Appellant. *E.g.*, *Qualcomm v. Apple*, ITC 337-TA-1065 (Sept. 28, 2018) (“From [Mr. Sidak’s] financial relationship with Qualcomm[,] bias may be presumed, and ... it would be an abuse of my discretion to give any material credibility to this witness or his findings.”). In denying the problem of SEP hold-up and rejecting the obligation to license SEPs to chip makers, Judge Michel also appears to reject 9th Circuit precedent. *Microsoft v. Motorola*, 795 F.3d 1024, 1031 (9th Cir. 2015) (an “SEP holder cannot refuse a license to a manufacturer who commits to paying the RAND rate”).

IV. CONCLUSION

The Court’s Order protects fair competition at a crucial time. The harm to the marketplace and consumers associated with SEP abuse far outweighs any potential harm to one competitor. Appellant has not made a compelling case to justify a stay of the Order.

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