No. 19-16122

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 U.S. District Court
for the Northern District of California
The Honorable Lucy H. Koh (No. 5:17-cv-00220-LHK)

MOTION FOR PARTIAL STAY OF INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Qualcomm Incorporated ("Qualcomm") states that it has no parent corporation and that no publicly held corporation owns 10% or more of Qualcomm's stock.

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Defendant-Appellant Qualcomm Incorporated ("Qualcomm") respectfully moves for a partial stay pending appeal of the injunction entered by the District Court. *See* A1 (in the Appendix submitted herewith).[1]

INTRODUCTION

The District Court has entered an injunction requiring the nation's leading innovator of cellular technology to fundamentally change the way it has done business for decades—a period in which the industry has flourished, competition has increased, prices have declined, and innovation has accelerated. The District Court relied on a theory that the head of the Department of Justice's Antitrust Division has described as a "misuse of the antitrust laws" that "threatens to undermine innovation."[2] A sitting Commissioner of Plaintiff-Appellee Federal Trade

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[1] Pursuant to Circuit Rule 27-1(2), Appellant states that Appellee opposes any stay of the District Court's injunction. Pursuant to Federal Rule of Appellate Procedure 8(2), Appellant states that it sought a stay (in whole or in part) in the District Court. The District Court summarily denied that relief. *See* A236.

[2] Makan Delrahim, Assistant Att'y Gen., Remarks at the Organisation for Economic Co-Operation and Development in Paris: "Don't Stop Thinking About Tomorrow": Promoting Innovation by

Commission ("FTC") has condemned the District Court's ruling as "both bad law and bad policy."[3] As those unprecedented, stark criticisms from the Government's own senior antitrust leadership reflect, the District Court's injunction and the ruling on which it rests contravene settled precedent.

This Court has repeatedly found that a stay is warranted when—as here—an injunction imposes changes on a party's business practices and commercial arrangements that cannot be undone by this Court's later reversal of the district court's judgment. There is no basis to depart from that settled, sound practice.

The design of the relevant provisions of the injunction is to change the very structure of Qualcomm's business and to irreversibly reduce Qualcomm's licensing revenue. It requires Qualcomm to renegotiate numerous long-term license agreements with its customers. Further, and

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Ensuring Market-Based Application of Antitrust to Intellectual Property (June 6, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-co.

In all quotations, internal citations, punctuation, and footnotes are omitted, and emphasis is added.

[3] Christine Wilson, *A Court's Dangerous Antitrust Overreach*, Wall St. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055.

in conflict with settled industry practice, it compels Qualcomm to provide exhaustive patent licenses directly to other modem chip suppliers. It thus disrupts the long-standing practice of licensing only the makers of cell phones that incorporate those chips, thereby creating substantial inefficiencies, forcing upon Qualcomm potential patent exhaustion issues and severely undermining Qualcomm's ability to fully protect and recover the value of its patent portfolio.[4]

Critically for purposes of this Motion, the harm done by the District Court's order *cannot be undone* if this Court reverses the District Court's judgment—even on an expedited basis. Qualcomm will be unable to revert back to its current license agreements, undo this web of new agreements, reverse any exhaustion of its patent rights, or recover all the revenue lost or transaction costs incurred in the interim. Indeed, unless stayed, the injunction will significantly impair an American company

[4] "Exhaustion" is the principle that the authorized sale of a product precludes any later assertion that the product infringes patent claims substantially embodied within the product. *See Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625, 638 (2008). Thus, if a patentee grants an "exhaustive" license, it may not allege that the licensed product, or any downstream product incorporating the licensed product, infringes the licensed patent claims that the licensed product substantially embodies.

that is the worldwide leader in the development of cellular technologies, at a critical moment in the development of the worldwide standards for next-generation 5G cellular systems, thereby forfeiting the lead to foreign interests.

Strikingly, the District Court entered the injunction without separate remedial proceedings, notwithstanding the Department of Justice's request for such a hearing and express warning that the entry of an injunction could cause "harm to competition and consumers." A255. Further, the federal government's Committee on Foreign Investment in the United States previously found that undermining Qualcomm's business model would harm its ability to invest in core research and development (such as 5G technologies), raising national security concerns. *See infra* at 28.

Qualcomm has separately moved, with the FTC's consent, for an expedited appeal. But expedition is no substitute for a stay. Expedited review alone does not protect Qualcomm from the irreversible disruptions to its ongoing operations and business model that would come from the immediate implementation of the injunction's structural requirements. Already, Qualcomm's counterparties are seeking to renegotiate contracts in order to exploit the District Court's injunction. If this Court does not grant a stay, Qualcomm will be forced to negotiate under the cloud of an injunction requiring it to accept terms to which it would not otherwise agree. That may occur well before this Court could reasonably be expected to decide the case, even on an expedited basis.

STATEMENT OF THE CASE

This case involves the licensing of cellular technology, and the manufacture and sale of cellular modem chips for use in mobile devices such as cell phones. As relevant here, there are three kinds of cellular-related businesses:

(1) innovators, which develop and patent cellular technologies;

(2) companies that make the modem chips that allow mobile devices to communicate with cellular networks; and

(3) original equipment manufacturers (OEMs)—such as Samsung and Apple—which incorporate those chips and other patented technologies into mobile devices.

Qualcomm operates in the first two fields.

As to the first, Qualcomm was created by a group of engineers and communications professors to develop cellular technology. Since its founding, the company has invested more than 57 *billion* dollars in cellular research and development. Qualcomm has invented many fundamental cellular technologies spanning multiple generations and touching all aspects of cellular systems. The company holds approximately 140,000 domestic and foreign patents and pending patent applications. A264. Indeed, all mobile phones sold by OEMs embody an array of Qualcomm's patents. *See* A269, A274-A275.

Thousands of those are "standard essential patents" (SEPs) that are necessarily infringed by any cell phone that practices a particular cellular technical standard—such as the now-prevalent 4G LTE standard. (If a chip or other component in a phone infringes an SEP, then the phone containing the chip infringes that SEP as well.) As an SEP-holder, Qualcomm voluntarily contributed its technology to the relevant standard-development organizations and agreed to license its SEPs for certain purposes on fair, reasonable and non-discriminatory (FRAND) terms.

All the major licensors of cellular patents—including Qualcomm—license their patents to OEMs, not to modem chipmakers. A280, A285, A287-A289, A293, A295-A296. Qualcomm has entered into hundreds of long-term, arm's-length licensing agreements with OEMs covering all of the OEMs' phones; some were negotiated over the course of years. *See* A299.

This settled industry practice is efficient. It reflects the fact that OEMs inevitably need patent licenses because assembled phones practice *both* patents that are infringed by modem chips *and* patents that are infringed only by the complete device. It would be very costly and complicated to assess and agree in advance on which patents would be practiced by which components or combinations of components or by the entire phone. Therefore, it is far more efficient to issue a comprehensive license to an OEM, rather than separately licensing both the OEM and each of its relevant component suppliers, such as modem chipmakers. *See* A293-A294, A304-A306, A311.

Several years after its founding and after establishing its patent licensing program, Qualcomm began selling modem chips. Qualcomm's chip products drive new innovations, features and capabilities into cell phones. But the cellular industry evolves rapidly every year. No chipmaker can sit on its laurels and hold its share of sales, because the technology constantly evolves. Qualcomm's foresight, engineering prowess, innovations and R&D investments have repeatedly made it first to market in successive generations of cellular chipsets and across successive cellular standards. *See* A316, A319-A320, A325.

Qualcomm has always priced its OEM patent licenses separately from the chips it sells to OEMs. As discussed, Qualcomm began as a technology development company, and chose early on to license this technology widely. Ever since the company began selling chips as well, its practice has been not to sell chips to OEMs that had not first licensed the company's SEPs. This practice ensured that buying chips from Qualcomm did not become a path for OEMs to avoid paying for their fair share of the value of Qualcomm's intellectual property, particularly the innovations that Qualcomm regularly contributes to the cellular standards on which the industry is based. Qualcomm's prices for the chips it sells to OEMs do not include the value of the patented technologies reflected in those chips because that value has already been recovered in the OEM patent license. *See* A330-A331.

Qualcomm does nothing to block competing modem chipmakers from accessing and incorporating any of Qualcomm's SEPs in their products. Rival chipmakers enjoy this access—and sell modem chips in competition with Qualcomm—without having to pay *any* royalties to Qualcomm. *See* A293-A294, A336, A339-A340.

2. Based on the vote of only two Commissioners, and over a rare dissent (A343), the FTC filed this suit. The FTC challenges certain of Qualcomm's licensing practices on the ground that they unlawfully maintain Qualcomm's monopoly in two chip markets.

The District Court (Koh, J.) agreed with the FTC that Qualcomm holds monopoly power in those markets. A34-A35, A42. Even if that were correct, monopoly power gained and maintained through skill and foresight is not unlawful. Indeed, "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Verizon Comms, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *see also Pac. Bell Telephone v. linkLine Comms, Inc.*, 555 U.S. 438, 454 (2009) ("[A]ntitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices."). The Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to *destroy competition itself*." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). The FTC was therefore required to prove under the "rule of reason" that "the challenged restraint has a substantial anticompetitive effect that harms consumers" and that any "procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

As relevant here, the District Court held that two of Qualcomm's licensing practices maintain its monopoly in the two markets by unlawfully injuring competition among chipmakers. *First*, finding that Qualcomm had an "antitrust duty to deal," the District Court held that Qualcomm acts anticompetitively by not granting exhaustive licenses to other modem chip suppliers. A125-A126. The District Court rooted this duty in a finding that by licensing only OEMs, Qualcomm had sacrificed certain short-term profits, in the form of licensing revenue from rival chipmakers. By that, the Court merely meant that Qualcomm could make *some* profit if it licensed other chip suppliers. A125. But the District Court affirmatively (and repeatedly) found that SEP owners, including Qualcomm, make *more* profit (in both the short and long term) through the settled practice of collecting royalties by licensing only OEMs instead. *E.g.*, A120, A125-A126, A129-A133, A194.

Second, the District Court held that Qualcomm acts anticompetitively by using its OEM licenses to depress its rivals' revenues from their chip sales—and thereby reduce the rivals' margins and ability to compete. A184. The District Court described a multi-step mechanism. Qualcomm supposedly uses its monopoly power over modem chips to "leverage" OEMs into paying an "excessive" royalty amount for Qualcomm's licenses. That royalty applies to all of the OEMs' phones—including phones that contain modem chips made by Qualcomm's rivals. The District Court characterized the "excessive" portion of the royalty as a "surcharge" on the rivals' chips (or what the FTC called a "tax"). The District Court then opined that OEMs perceive the "all in" cost of a *rival*'s chip as the cost of that chip, plus *Qualcomm*'s alleged royalty "surcharge." On that view, the supposed surcharge depresses the prices that the rivals can charge OEMs for their chips, and thus reduces the rivals' margins. Those lower margins, in turn, supposedly inhibit the rivals' ability to invest in new cellular technologies, and ultimately compete. *See* A195-A196.

Rejecting the request of the Department of Justice, *see supra* at 4 the District Court refused to hold separate proceedings on the appropriate remedy. Instead, it entered a sweeping injunction. Qualcomm seeks a stay pending appeal of two provisions:

(1) "Qualcomm must make exhaustive SEP licenses available to modem-chip suppliers"; and

(2) "Qualcomm must not condition the supply of modem chips on a customer's patent license status," and in that respect must "negotiate or renegotiate license terms with customers."

A228-A230.

The District Court's injunction also did three other things: (1) required Qualcomm to negotiate licenses "in good faith", A228[5] (2) barred Qualcomm from entering into actual or *de facto* "exclusive dealing" arrangements with its OEM customers, A230-A231; and (3) barred Qualcomm from interfering with a customer's ability to communicate with a government agency, A232. The District Court then imposed "compliance and monitoring procedures." A233-A234.

[5] A single provision of the injunction both (1) prohibits Qualcomm from conditioning chip sales on an OEM's licensing status, and in turn (2) requires that Qualcomm negotiate new licenses "in good faith under conditions free from the threat of lack of access to or discriminatory provision of modem chip supply or associated technical support or access to software." A228. In the event this Court grants Qualcomm its requested stay of the first provision, Qualcomm necessarily would not have to negotiate new licenses in conformity with the second provision. Nevertheless, if the requested stay is granted, Qualcomm recognizes an obligation to negotiate with licensees in good faith.

Qualcomm disagrees with those aspects of the Court's ruling, which will be addressed in its brief on appeal. But because Qualcomm does not seek to stay those pending appeal, we do not discuss them further in this Motion.[6]

ARGUMENT

In an action brought by the Government, this Court will grant a stay pending appeal if: (1) the appeal has a "fair prospect of success"; (2) there is a fair probability that the appellant will otherwise be irreparably harmed; and (3) the public interest favors a stay. *See Leiva-Perez v. Holder*, 640 F.3d 962, 970-71 (9th Cir. 2011) (per curiam) (applying *Nken v. Holder*, 556 U.S. 418 (2009)). Under that standard, the District Court's injunction should be stayed in part.

[6] Qualcomm's brief on appeal will also address other aspects of the District Court's ruling. For example, the Court held, as a contractual matter, that some of Qualcomm's FRAND obligations require it to license rival chipmakers. A135-A136. No other court has adopted that interpretation of these FRAND obligations, which is moreover contrary to the settled practice followed by all the major cellular SEP holders and mobile standards bodies. *See* A288-A289, A293-A294, A296, A347-A348, A353-A355.

I. QUALCOMM'S APPEAL RAISES SERIOUS LEGAL QUESTIONS ON WHICH IT HAS A FAIR PROSPECT OF SUCCESS.

To secure a stay pending appeal, Qualcomm need not prove that it is "more likely than not" to prevail. *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). It need only demonstrate that its appeal raises "serious legal questions" or has a "fair prospect of success." *Leiva-Perez*, 640 F.3d at 971. That standard is easily satisfied here.

A. There Is A Serious Legal Question Whether Qualcomm Has An Antitrust Duty To Deal With Its Chip Rivals.

The District Court's decision imposed on Qualcomm an antitrust duty to deal with its chip rivals. That ruling is based on a significant misreading of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and related precedents. The Supreme Court has recognized the bedrock principle that a business—including a monopolist—is generally entitled to determine with whom it will do business and in what manner. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine*, 555 U.S. at 448. Exceptions are "rare" and "limited." *Id.*

A monopolist specifically has no duty to deal with its rivals, unless its refusal to do so is *solely* motivated by an attempt to harm competition. Even the District Court nominally recognized that rule. A136 ("However, in *Aspen Skiing*, there was sufficient evidence to show that the defendant had refused to deal with the plaintiff *only* because of the defendant's anticompetitive intent to maintain its monopoly."). That rigorous standard may be satisfied when the monopolist sacrifices its own short-term profits solely in order to damage its rivals and eliminate competition. Conversely, it *cannot* be satisfied if the allegedly anticompetitive conduct is short-run profit-maximizing behavior. A137 ("The *Aspen Skiing* defendant's 'unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.'") (quoting *Trinko*, 540 U.S. at 409).

The District Court's fundamental error was its conclusion that Qualcomm acted anticompetitively merely because it could have made *some* money by licensing its rivals. In fact, a monopolist's change in its course of dealing can be anticompetitive only to the extent the change involves consciously making *less* money. The monopolist sacrifices its short-term profits for its long-term gain in eliminating competitors. As this Court held in *Aerotec International, Inc. v. Honeywell International, Inc.*, 836 F.3d 1171, 1183-84 (9th Cir. 2016), "there is *only* a duty not to refrain from dealing where the *only* conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run *from the exclusion of competition*.'" *Accord Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.). *See generally Trinko*, 540 U.S. at 409 ("*Aspen Skiing* is at or near the outer boundary of §2 liability.").[7]

A dispositive fact in this case is therefore that—as the District Court affirmatively found—Qualcomm recognized that its practice of licensing OEMs alone is more profitable than it would be to license both OEMs and chipmakers instead. A126. Put another way, Qualcomm did not forego but rather *maximized* its short-run profits in choosing to give exhaustive licenses only to OEMs.

Indeed, the District Court's findings to that effect could not be more clear, emphatic or detailed: "**Qualcomm Now Refuses to License**

[7] *See also* Christine Wilson, *A Court's Dangerous Antitrust Overreach*, Wall St. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055.

Rivals Because it is More Lucrative to License Only OEMs." A129 (section heading) (emphasis in original); *see also, e.g.*, A120 ("Qualcomm could not agree to patent exhaustion [by licensing chip rivals] because doing so would reduce [Qualcomm's] licensing revenues, which comprised 'a very substantial portion of the company's revenue and profit.'"); A125-A126, A128, A130-A131, A194 (same). The District Court further found that other, *non*-monopolist, licensors do the exact same thing for the exact same reason—demonstrating that this is profit-maximizing behavior, with or without market power and with or without any alleged purpose to create or maintain a monopoly. *See* A131 ("[O]ther SEP licensors like Nokia and Ericsson [which do not sell modem chips] have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly."). Qualcomm itself applies the same licensing practices, and receives the same royalties, in markets that it is not alleged to have monopolized. *See* A360-A361, A366.

There is accordingly, at the very least, a serious legal question regarding the District Court's imposition on Qualcomm of an antitrust duty to deal.

B. There Are Serious Legal Questions Regarding The District Court's "Surcharge" Theory.

The District Court separately erred both in asserting that Qualcomm prices its licenses in a way that reduces its chip rivals' margins, and also in holding that such conduct (if it occurred) is anticompetitive.

The District Court did not assert that Qualcomm acted anticompetitively merely by requiring OEMs to secure patent licenses covering all their phones, including phones that contain chips made by Qualcomm's rivals. To the contrary, that licensing practice is indisputably appropriate. All phones practice Qualcomm's patented technologies, regardless of which supplier's cellular modem chips they contain. *See* A305.

Instead, the District Court's theory is that the royalties Qualcomm charges to OEMs impose an unreasonable "surcharge" on rivals' chips—even though Qualcomm charges OEMs the same royalties on a phone using a rival's chip as it does on a phone using a Qualcomm chip. To get there, the District Court opined that OEMs conceive of an "all in" price of *rivals'* chips that includes an excessive "surcharge" from *Qualcomm*'s royalties. As a consequence, rivals are supposedly unable to charge OEMs as much as they otherwise could, their margins are diminished, and they are unable to invest and compete with Qualcomm. *See* A184, A195.

The District Court erred because it inexplicably treated the royalties that Qualcomm charges to OEMs as taxes that "'raised its rivals' costs.'" A186. Qualcomm's chip supplier rivals do not pay those royalties; the OEMs do. There is, moreover, no reason that OEMs would regard the royalties they pay *Qualcomm* as attributable to the prices the OEMs pay for *rivals'* chips—any more than they are attributable to the price the OEMs pay for other components such as batteries or screens.

Further, if anything, Qualcomm has lowered, rather than raised, its rivals' costs. Qualcomm charges its rivals nothing for their use of its SEPs; they bear no royalty costs *at all*. *See supra* at 8-9. Conversely, it is the chip-level licenses contemplated by the District Court's injunction that would cause chip competitors to bear the cost of royalties.

But the District Court erred as a matter of law even if this case is conceived as one in which Qualcomm's royalties actually "squeeze" its rivals' margins. Specifically, if Qualcomm's royalties prevent rival chip makers from charging higher prices for their chips—for example, because they are constrained by the competitive prices that Qualcomm charges for its own chips, as the FTC alleged (Compl. at ¶ 94 (Dkt. 1); A371-372)—the Supreme Court's decision in *linkLine* holds that such conduct does not violate the antitrust laws.

In *linkLine*, the defendant sold a product (DSL internet service) and also held a monopoly on an input necessary for that product (the wiring to customers' households). The plaintiff—a competing DSL provider—asserted that the defendant had both raised the cost for access to the wiring and also lowered its price for DSL service. The plaintiff sued under the Sherman Act, alleging that the defendant had engaged in an anticompetitive "margin squeeze." *linkLine*, 555 U.S. at 442. The root of the plaintiff's margin-squeeze allegation was that "defendants must leave them a 'fair' or 'adequate' margin" in which to make profit. *Id.* at 449. The Supreme Court held that "no such claim may be brought." *Id.* at 442.

The Court reasoned that each element of the alleged "squeeze"—the higher price for the input and the lower price for the retail product—must be considered separately. The plaintiff's objection to the input price failed, because the defendant had no antitrust duty to deal with the plaintiff. *Id.* at 450. The plaintiff's objection to the low retail price likewise failed, because the plaintiff had not alleged that the price was anticompetitive under the standards governing such a claim—*i.e.*, that the defendant had engaged in 'predatory pricing." *Id.* at 451. Accordingly, the plaintiff's claim failed as a matter of law. *Id.*

This Court faithfully applied *linkLine* in *John Doe 1 v. Abbott Laboratories*, 571 F.3d 930, 931 (9th Cir. 2009), holding that a defendant does not unlawfully leverage a monopoly by reducing its rivals' margins, "absent an antitrust refusal to deal (or some other exclusionary practice) in the monopoly market or below-cost pricing in the second market." In that case, the defendant both (1) held a monopoly on a product available at wholesale (a patented drug), and (2) competed in the market for a different product (that drug combined with another). The defendant raised the patented drug's wholesale cost, thereby reducing its rivals' margins and making it uneconomical for them to sell the drug combination. This Court held that, "[h]owever labeled," that "conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *linkLine*." *Id.* at 935.

linkLine and *John Doe I* preclude the District Court's holding here that Qualcomm's license prices are anticompetitive because they squeeze its rivals' margins. As discussed *supra*, Qualcomm does not have an antitrust duty to license its competitors. Further, the FTC did not allege, and the District Court did not find, that Qualcomm's chip prices were predatory. Here, as in *John Doe 1*, the antitrust theory is necessarily that the defendant "put[] the squeeze on competing producers . . . that depend on" the defendant's patented product. *Id*. Absent a duty to deal or "below cost pricing," the claim fails as a matter of law, "however labeled." *Id.*

At the very least, there are serious legal questions regarding the District Court's holding that Qualcomm acted anticompetitively by supposedly reducing its rivals' margins.

II. ABSENT A STAY, QUALCOMM WILL BE IRREPARABLY HARMED.

The party seeking a stay of an injunction pending appeal must demonstrate a probability that it will otherwise suffer irreparable harm. *Lair*, 697 F.3d at 1214-15. That standard is easily met with respect to the two provisions of the District Court's injunction at issue here.

This Court has repeatedly granted a stay pending appeal in similar circumstances.[8] There is no basis to depart from that practice here.

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[8] *See, e.g.*, Order, *San Diego Comic Convention v. Dan Farr Prods.*, No. 18-56221 (9th Cir. Oct. 16, 2018), Dkt. 17 (stay of injunction

First, the Order targets the heart of Qualcomm's business structure—its relationships with *both* rival chipmakers and OEM customers—imposing a fundamental change in the way Qualcomm has always operated since its founding. A377-A382. For example, the injunction requires Qualcomm to license component suppliers exhaustively—something Qualcomm has never done,[9] that none of the major cellular SEP licensors do outside of cross-licenses, and that would

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requiring deregistering internet domains); Order, *Chamber of Commerce v. City of Seattle*, No. 17-35640 (9th Cir. Sept. 8, 2017), Dkt. 24 (stay of order requiring businesses to enter into new collective bargaining agreements); Order, *O'Bannon v. NCAA*, Nos. 14-16601 & 14-17068 (9th Cir. July 31, 2015), Dkt. 111 (stay of injunction allowing colleges to make payments to student athletes); *Cal. Pharmacists Ass'n v Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009) (stay of Medi-Cal reimbursement rate reductions where lost revenue could not later be recouped); *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (finding irreparable harm where district court's order would "disrupt and change the whole nature of [movant's] business").

[9] Qualcomm did previously have some agreements with rival chipmakers, but those were explicitly non-exhaustive—*i.e.*, they did not interfere with Qualcomm's right to require that OEMs using the rivals' chips secure a license. *See* A386-A387. Indeed, for that reason, the FTC itself maintained that the agreements were not licenses at all. FTC's Proposed Findings of Fact and Conclusions of Law at ¶¶ 254-255 (Dkt. 966).

Qualcomm's unwillingness to grant exhaustive licenses to other chip suppliers is no obstacle to their ability to compete. Qualcomm does not assert its SEPs against chip suppliers, because it recoups its patent rights from OEMs at the device level instead.

force upon Qualcomm patent exhaustion issues that would undermine its existing handset-level licensing program. Because "major disruption of a business can be as harmful as its termination and thereby constitute irreparable injury," *Mahroom v. Best W. Int'l, Inc.*, 2009 WL 248262, at *3 (N.D. Cal. Feb. 2, 2009), these restructuring effects constitute irreparable harm justifying a stay, *Am. Trucking Ass'ns*, 559 F.3d at 1058 (finding irreparable harm where order would "disrupt and change the whole nature of [movant's] business in ways that most likely cannot be compensated").

Second, the injunction specifically requires Qualcomm to "negotiate or renegotiate license terms with [OEM] customers"—a mandate that the Order acknowledges "does not merely proscribe future Qualcomm conduct, and will require Qualcomm to renegotiate many [existing] licenses." A228-A230. The court-ordered renegotiations will deny Qualcomm the benefit of the existing deals it struck with OEMs, many of which reflect months or even years of hard-fought negotiations. When existing contracts will be disrupted pending appeal, a stay is warranted. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 463 U.S. 1311, 1313-14

(1983) (staying, pending appeal, antitrust injunction that would void network contracts to broadcast college football games).

Third, and relatedly, the injunction seeks to reduce the royalties that Qualcomm receives from OEMs, but if this Court reverses the District Court's judgment, Qualcomm will not be able to recover any revenues it loses in the interim, or the further revenues it later loses under agreements made while the appeal was pending. Those revenues come from third-party customers, which are not parties to the judgment and thus will maintain that they are under no obligation to provide reimbursement.

Even if this Court eventually reverses, future licensing negotiations will be influenced heavily by less-favorable royalty terms set in the interim under the cloud of the injunction. Further, once a license agreement is concluded, other OEMs will demand that their own licensing deals match the more advantageous terms granted to the new licensees. All those license agreements will remain in place for years.

Fourth, the injunction specifically compels Qualcomm to sell chips to OEMs that do not have a license to Qualcomm's patents. If this Court reverses the Order, Qualcomm could not undo any exhaustion claims caused by such sales—*i.e.*, claims that Qualcomm's sale of the chips foreclose Qualcomm from asserting any patents substantially embodied by the chips. Because Qualcomm sells its chips at prices that do not include the value of its cellular SEPs, this would extinguish Qualcomm's right to obtain licensing revenue for those patents.

Importantly, merely expediting this appeal is no substitute for a stay. As reflected in the attached sworn Declaration of John Han, *see* A238, and confirmed by the sworn Declarations that Qualcomm submitted in the District Court, *see* A241 & A246, the irreparable harms that the injunction imposes on Qualcomm will occur before this Court can dispose of this case, even on an expedited basis. Several important Qualcomm license agreements expire before the end of 2019, and negotiations over license renewals and extensions have already been disrupted by the District Court's injunction. A238-A239. At least two licensees already have raised the District Court's ruling to challenge the licensing terms (and specifically the royalty rates) proposed by Qualcomm and to claim that they are incompatible with Qualcomm's FRAND obligations. A239. Others have indicated that they intend to raise the issue in the event this Court denies a stay of the relevant provisions of the injunction. A239. One licensee now relies on the order to justify a preexisting breach of its current license agreement. A239, A243. At least one OEM has stated that Qualcomm must license a chip rival, in order to permit the OEM to buy the rival's chips with Qualcomm's patents exhausted, while seriously considering ceasing paying royalties to Qualcomm under its current agreement. A238.

III. THE PUBLIC INTEREST FAVORS GRANTING A STAY.

In a case brought by the Government, the only remaining inquiry is whether the public interest favors a stay. *See Leiva-Perez*, 640 F.3d at 970 (no separate inquiry is made into the government's interests). In addition, where the stay relates to broad injunctive relief in an important segment of the economy, there inevitably is a substantial overlap between the Court's view of the merits of the case and the public interest. Here, for the reasons discussed in Part I, there are deep legal flaws with the District Court's relevant liability findings. The public interest accordingly favors a stay.

The vibrant, robust nature of the cellular industry specifically counsels in favor of a stay and refutes the FTC's contrary view that it is essential that injunctive relief take effect immediately.

The particular practices that are the subject of this stay application have been in place for decades, during which time the industry has been "dynamic," products have "improve[d] significantly," and Qualcomm has produced "admirable" innovations. A392, A397, A401. The FTC's own expert testified that competition in the allegedly monopolized modem chip markets has grown in recent years; the FTC offered no evidence suggesting this trend would change if the injunction is stayed pending appeal. *See* A405-A406; *see also* A411-A413, A417-A419.

By contrast, allowing the injunction to take effect pending appeal threatens serious public harms. The Department of Justice specifically cautioned the District Court that an injunction in this case "may cause harm to competition and consumers." A255. It stressed that "the obligations courts impose often have far-reaching effects and can reshape entire industries." *Id.*

In addition to its effect on the cellular industry generally, the Government has recognized that Qualcomm's technological leadership is vital to the "national security of the United States," which could be harmed as a result of a change to Qualcomm's business model. A252-A253; *cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23-26 (2008) (national security concerns may outweigh other equitable considerations). The District Court should not be allowed to compel the restructuring of this industry and thereby harm innovation on the basis of erroneous applications of antitrust law before this Court has had an opportunity for review. A stay thus would advance, rather than impair, the public interest.

CONCLUSION

This Court should grant a partial stay of the District Court's injunction.

July 8, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 5,593 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 27-1(1)(d).

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July 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 8, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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