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)

REPLY IN SUPPORT OF MOTION FOR PARTIAL STAY OF INJUNCTION PENDING APPEAL

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INTRODUCTION

Qualcomm showed in its opening brief that the District Court's injunction rested on flawed antitrust theories that raise serious legal questions on appeal. Mot. 1-2. Qualcomm further demonstrated that it would suffer irreparable harm if forced to negotiate a web of new license agreements with OEMs and chipmakers, especially under the cloud of the District Court's unsupported finding that Qualcomm's royalty rates are "unreasonably high." Mot. 23-27. The United States has now stated that the District Court's "unprecedented" injunction "threatens competition, innovation, and national security," and urged that it be stayed pending plenary review by this Court. U.S. Br. 1. Officers of two federal Departments—the Department of Energy and the Department of Defense—have warned that the injunction could irreparably damage our national security if not stayed. This Court has granted stays in situations far less dire, and less infused with public interest concerns, where mandated changes to a party's business practices could not be undone following reversal on appeal. Mot. 2, 22-23 n.8.

A core point that the FTC concedes in its opposition easily justifies a stay.[1] Qualcomm's opening brief established that the District Court's conclusion that Qualcomm had an antitrust duty to offer exhaustive SEP licenses to other chip suppliers was contrary to law. Mot. 14-17. The FTC does not even attempt to defend the District Court's conclusion that an antitrust duty to deal exists.

But there is more. The FTC also denies that the District Court faulted Qualcomm "simply for '[c]harging high prices,'" Opp. 8. But the core of the FTC's case, and the basis for the District Court's injunction, is the flawed theory that Qualcomm's royalty rates are too high and those high royalty rates operate as an anticompetitive "surcharge." The District Court's injunction is designed to alter a business model that the District Court believed to be too lucrative, by lowering royalty rates for the use of Qualcomm's technologies. The FTC gives the game away with its repeated references to Qualcomm's supposedly "inflated royalties." Opp. 1, 8, 14.

[1] The FTC claims that Qualcomm must show that it is "likely to succeed on the merits of the appeal." Opp. 7. That is incorrect. *See* Mot. 14. But as detailed below, Qualcomm readily clears the higher bar of showing a likelihood of success.

Qualcomm also debunked the FTC's tortured theory that Qualcomm's royalties function as a "surcharge" that squeezes the margins of chipmaker competitors as inconsistent with settled law on the viability of antitrust liability for price squeezes. Mot. 18-22. That theory rests on allegations of leveraging Qualcomm's chip power, yet Qualcomm has charged the same fair and reasonable royalty rates since before it even had a chip business, obtained the same royalty rates when Qualcomm did not allegedly have chip monopolies, and as Qualcomm's patent portfolio has grown. At the same time, innovation has flourished in the cellular industry, output has risen and prices have fallen. None of this was disputed at trial.

The FTC's opposition likewise falls short with respect to irreparable harm. The FTC's core argument is that Qualcomm will not be harmed because it would still be able to obtain what *the FTC* views as a reasonable return on the value of its intellectual property; in other words, it argues that Qualcomm will not suffer harm because the District Court was correct to order changes to Qualcomm's business. That is a non-sequitur; the harm the stay is intended to mitigate is the harm Qualcomm would suffer while the appeal is pending if the District Court

was *wrong*. And in any event, more is at stake than lost royalties; it is undisputed that the injunction forces Qualcomm to enter into new agreements that would work a radical shift in the status quo.

As for the public interest, the brief submitted by the United States and its accompanying declarations should be dispositive, considering the severity of the public harms they establish. No purported harm to rival chipmakers can outweigh these public harms. Indeed, because Qualcomm seeks to license OEMs who make cellphones, chipmakers have access to Qualcomm's technology for free. Mot. 8-9. Rival chipmakers will hardly suffer from enjoying continued free access to Qualcomm's technologies during the pendency of this appeal. Finally, the FTC's assertion that nothing in the submissions of the United States "suggests that the injunction will . . . implicate national security concerns," Opp. 22-23, ignores what that brief and accompanying declarations say. Qualcomm's motion for a partial stay should be granted.

ARGUMENT

I. QUALCOMM HAS RAISED SERIOUS LEGAL QUESTIONS.

A central pillar of the District Court's liability finding was its holding that Qualcomm has an antitrust duty to deal with its rivals. A142; *see also* A193 ("Refusing to license rivals not only blocks rivals, but also preserves Qualcomm's ability to demand unreasonably high royalty rates from OEMs."). In its opposition, the FTC declines to defend that holding.[2] In a telling concession at the very outset of its brief, the FTC looks to sidestep rather than embrace that ruling, arguing that "the district court's finding of antitrust liability does not hinge" on an antitrust duty to deal. Opp. 1. And when discussing Qualcomm's supposed breach of its obligation to deal with rivals, the FTC claims that it is "not 'just' a breach of contract," Opp. 13, but cannot bring itself to say that it is a breach of an antitrust duty to deal. But if Qualcomm has

[2] Indeed, in its opposition the FTC never cites either *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), or *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004), which formed the basis for the District Court's flawed finding of an antitrust duty to deal. A135-42. In an apparent disagreement with the FTC's concession, MediaTek cites those cases in its *amicus* brief. However, its claimed prior course of dealing, MediaTek Br. 6-7, elides the fact that Qualcomm never licensed SEPs exhaustively at the chip level. *See infra* n.5.

no antitrust duty to deal with rival chipmakers, there is no basis for an injunction under the antitrust laws requiring Qualcomm to offer them exhaustive licenses. And as the United States explained, because the District Court based its injunction on the supposed effect of Qualcomm's actions "in combination," the removal of one of the legs of the stool means that the injunction cannot stand. U.S. Br. 3-4.

If there is a contractual duty to deal, then chip suppliers already have a remedy: they can assert their purported contractual right to a license. The FTC contends that "chipmakers would not be vulnerable to Qualcomm's chip supply leverage and would thus be in position to negotiate reasonable royalty rates in the shadow of patent law and Qualcomm's FRAND commitments." Opp. 14. On this theory, no antitrust injunction forcing Qualcomm to exhaustively license chipmakers is needed. Rival chipmakers have always been, and remain, perfectly capable of seeking to enforce any purported contractual obligation to a license through litigation.

Confronted with Qualcomm's showing that a "price squeeze" claim is not cognizable under antitrust law without a duty to deal or below-cost pricing, Mot. 19-20 (citing *Pac. Bell Tel. Co. v. linkLine Comms., Inc.*, 555

U.S. 438 (2009)), the FTC unsuccessfully attempts to recast its allegations regarding the alleged "surcharge" on OEMs. Like the District Court, the FTC does not mention its economic expert, who testified that "rivals are having their margins squeezed" by Qualcomm. A371-72. But the FTC does acknowledge that its theory of harm rests on the notion that "the surcharge reduces rivals' . . . margins." Opp. 10. The FTC cannot avoid *linkLine* by omitting the word "squeeze." "[C]onduct that is the functional equivalent of [a] price squeeze" is not actionable under *linkLine*, regardless how it is labeled. *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 935 (9th Cir. 2009). The FTC claims that *linkLine* and *John Doe 1* differ because the plaintiffs there allegedly did not claim that "the prices the defendant set for wholesale offerings reflected anything other than the value of those offerings." Opp. 11. Wrong. In *linkLine*, the plaintiffs alleged that the defendant had "abused [its] power in the wholesale market." 555 U.S. at 450. In *John Doe 1*, the plaintiffs alleged that "Abbott [was] using its monopoly position in the booster market to raise the price of" the drug. 571 F.3d at 935. These allegations are functionally indistinguishable from what the FTC claims Qualcomm has done here. Just as in those two cases, the lack of an antitrust duty to

deal and of any allegations of predatory pricing dooms the FTC's claim. The FTC's other response is a strawman; Qualcomm is not contending "that *linkLine* creates a rule of *per se* legality for *any* conduct that diminishes rivals' margins so long as the monopolist's own prices remain above cost." Opp. 11. Qualcomm's position is that squeeze claims of the sort expressly rejected in *linkLine* and *John Doe 1* cannot succeed. That is especially true here, where the District Court failed to "articulate associated harm to competition" resulting from Qualcomm's royalties. U.S. Br. 4.[3]

II. QUALCOMM HAS SHOWN IRREPARABLE HARM ABSENT A STAY.

The FTC's arguments for why Qualcomm would not suffer irreparable harm absent a stay are all based on the underlying assumption that the District Court was correct to find that Qualcomm charges "unreasonably high" royalties, such that severely reduced

[3] The FTC claims that Qualcomm does not use the challenged licensing practices "in markets . . . where it lacks monopoly power," Opp. 4, seeking to imply that those practices must lead ineluctably to exclusion of modem chip rivals. That is false; it is undisputed that Qualcomm licenses its cellular SEPs and sells its chips in precisely the same way in markets for WCDMA and non-premium LTE chips, FA2 ("FA" refers to the Further Appendix filed concurrently with this brief), where it has never been alleged, much less shown, to have market power.

royalties would still give it "every dollar to which it is entitled." Opp. 1; *see also id.* 15, 19, 23. But the question isn't whether Qualcomm would be irreparably harmed from having the injunction remain in effect during the pendency of the appeal if the District Court's ruling were *correct*; it is what the effect of leaving the injunction in place would be if the District Court were *wrong*. If the FTC's liability theories prove deficient, so too should its contention of unreasonably high royalties, and the FTC does not dispute that forcing Qualcomm to replace its existing agreements with new long-term agreements would cause irreparable harm if Qualcomm cannot return to the former agreements after a reversal on appeal.[4] Instead, it speculates that because Qualcomm has at times entered into short-term license agreements in the past, it could do so again here. Opp. 17-18. But those prior interim license agreements generally sought to preserve the status quo while seeking common ground on the terms of a future license. By contrast, the District Court's injunction is designed to call into question a broad swath of Qualcomm's

[4] Contrary to the FTC's contention, Opp. 20, expedition does not solve the problem. Once Qualcomm has been forced to sign new agreements and change its business model, a reversal of the District Court's order comes too late to avoid the harm regardless whether it comes six months or two years after those agreements go into force.

existing agreements, and to give Qualcomm's counterparties leverage to seek a significant reduction in royalty rates. *See* Michel Br. 9-10 (noting that the FTC brought the action "to devalue patents"). These contemplated interim agreements therefore would not be calculated to maintain the status quo, but instead to work a sharp change from the parties' prior dealings. There is no reason to expect that a counterparty would agree to a contract permitting Qualcomm to return to its prior royalty rates and terms if the injunction is ultimately reversed on appeal. Even if they were willing to entertain such an agreement, it would come only at a steep price to Qualcomm with respect to other terms of the agreement.

The FTC further suggests that Qualcomm can't avoid all harm inflicted by the District Court's order because a stay would still permit Qualcomm's counterparties to take advantage of the District Court's erroneous findings on the reasonableness of Qualcomm's royalty rates. Opp. 17. However, counterparties may shy away from attempting to use those findings as a ceiling on royalty rates once this Court has found that serious legal questions exist with respect to the underlying ruling. And in any event, mitigation of harm is a legitimate ground for a stay, and a

stay would prevent mandatory renegotiations conducted under the District Court's flawed findings of "unreasonably high" royalties, which would irreversibly change the status quo.

In opposing a stay of the requirement that Qualcomm exhaustively license other chipmakers to its cellular SEPs, the FTC misstates the record. The FTC claims that the evidence introduced at trial showed that "Qualcomm has previously licensed its modem-chip SEPs to rivals," and therefore Qualcomm would suffer no harm if forced to do so by the injunction. Opp. 18. But it is undisputed that Qualcomm's prior agreements with other chipmakers were not the exhaustive licenses the District Court's injunction requires Qualcomm to offer.[5] Indeed, the *FTC itself* said in its pretrial findings of fact that those prior agreements "were not licenses to Qualcomm's cellular SEPs." FA5. And, notably, although it claims that some chipmakers have licensed rival chip suppliers, Opp. 18, the FTC does not dispute that the major cellular SEP licensors do not

[5] *Amicus* ACT, which represents the interests of companies that would like to pay less for Qualcomm's intellectual property, doubles down on this falsehood, claiming that Qualcomm "regularly and repeatedly negotiated exhaustive cross-licenses with component makers." ACT Br. 8 n.12. Neither the cited pages of the District Court's opinion, nor anything else in the record, supports that claim.

exhaustively license chip suppliers. Nor does the FTC claim that Qualcomm would be able to enter into "temporary" exhaustive licenses with chipmakers that would become null and void in the event of a reversal; once such agreements came into force, Qualcomm would be stuck with the intractable issues of exhaustion and multi-level licensing they would entail. A247-48.

III. THE PUBLIC INTEREST FAVORS A STAY.

The FTC does little more than argue that the District Court's (erroneous) finding of liability standing alone shows that the public interest would be disserved by not forcing Qualcomm to change its decades-old business model during the pendency of this appeal. Opp. 20. There is no need to spill much ink rebutting that circular contention. The FTC attacks a strawman when it suggests that Qualcomm or the United States argues that "any antitrust remedy that diminishes Qualcomm's corporate profits constitutes an impermissible threat to national security." Opp. 23. The point is that a remedy that may harm national security should not be imposed until this Court has satisfied itself that the underlying decision is sound. This is not seeking "antitrust immunity," Opp. 24; it is attempting to avoid harm to the public interest

before the judgment has been subjected to appellate scrutiny. The United States explains well why the flawed remedy ordered in this case "risks harming rather than benefitting consumers," and that the "rare circumstances" present here could lead to harm to the national security of the United States. U.S. Br. 11-13.

The FTC further claims that there is a "public interest in immediate relief" because of the impending rollout of 5G technology. Opp. 20.[6] The FTC asserts the 5G transition means that Qualcomm must be enjoined from employing its decades-old business model with respect to chips sold in a 5G market that did not exist at the time of trial and was never defined by the District Court or the FTC. The FTC's flimsy evidence of Qualcomm's abuse of 5G chip power is worth quoting: the District Court stated that "[i]f Qualcomm has a lead on 5G chips, as Qualcomm states it does, then Samsung had little option but to sign Qualcomm's 5G license agreement to ensure access to Qualcomm's chip supply." A225. No citation to evidence accompanies this assertion. And it is implausible, because Samsung has announced that it expects to produce its own

[6] While MediaTek echoes this alleged urgency, MediaTek Br. 12-13, it offers no facts supporting its rhetoric.

competing 5G chips, FA8-9, and its representatives testified that no threats regarding chip supply were made during negotiations, FA11-14. The cellular industry has been robust, as the FTC's own expert conceded at trial, and will remain so after a partial stay is entered pending plenary review of the District Court's order.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, this Court should grant a partial stay of the District Court's injunction.

July 25, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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July 25, 2019

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