FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, *Plaintiff-Appellee*, v. QUALCOMM INCORPORATED, A Delaware corporation, *Defendant-Appellant*, SAMSUNG ELECTRONICS COMPANY, LTD.; SAMSUNG SEMICONDUCTOR INC.; INTEL CORPORATION; ERICSSON, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; MEDIATEK INC.; APPLE INC., *Intervenors*, NOKIA TECHNOLOGIES OY; INTERDIGITAL, INC.; LENOVO (UNITED STATES), INC.; MOTOROLA MOBILITY LLC, *Intervenors.*	No. 19-16122 D.C. No. 5:17-cv-00220-LHK OPINION

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Argued and Submitted February 13, 2020
San Francisco, California

Filed August 11, 2020

Before: Johnnie B. Rawlinson and Consuelo M. Callahan, Circuit Judges, and Stephen J. Murphy, III,[*] District Judge.

Opinion by Judge Callahan

SUMMARY[**]

Antitrust

The panel vacated the district court's judgment, and reversed the district court's permanent, worldwide injunction prohibiting several of Qualcomm Incorporated's core business practices.

The Federal Trade Commission ("FTC") contended that Qualcomm violated the Sherman Act, 15 U.S.C. §§ 1, 2, by unreasonably restraining trade in, and unlawfully monopolizing, the code division multiple access ("CDMA") and premium long-term evolution ("LTE") cellular modern chip markets.

[*] The Honorable Stephen J. Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Qualcomm has made significant contributions to the technological innovations underlying modern cellular systems, including CDMA and LTE cellular standards. Qualcomm protects and profits from its innovations through patents, which it licenses to original equipment manufacturers ("OEM"). Qualcomm's patents include cellular standard essential patents ("SEPs"), non-cellular SEPS, and non-SEPs. Because SEP holders could prevent industry participants from implementing a standard by selectively refusing to license, international standard-setting organizations require patent holders to commit to license their SEPs on fair, reasonable, and nondiscriminatory ("FRAND") terms before their patents are incorporated into standards.

The panel framed the issues to focus on the impact, if any, of Qualcomm's practices in the area of effective competition: the markets for CDMA and premium LTE modern chips.

The panel began by examining the district court's conclusion that Qualcomm had an antitrust duty to license its SEPs to its direct competitors in the modern chip markets pursuant to the exception outlined in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The panel held that none of the required elements for the *Aspen Skiing* exception were present, and the district court erred in holding that Qualcomm was under an antitrust duty to license rival chip manufacturers. The panel held that Qualcomm's OEM-level licensing policy, however novel, was not an anticompetitive violation of the Sherman Act.

The panel rejected the FTC's contention that even though Qualcomm was not subject to an antitrust duty to deal under *Aspen Skiing*, Qualcomm nevertheless engaged in anticompetitive conduct in violation of § 2 of the Sherman

Act. The panel held that the FTC did not satisfactorily explain how Qualcomm's alleged breach of its contractual commitment *itself* impaired the opportunities of rivals. Because the FTC did not meet its initial burden under the rule of reason framework, the panel was less critical of Qualcomm's procompetitive justifications for its OEM-level licensing policy—which, in any case, appeared to be reasonable and consistent with current industry practice. The panel concluded that to the extent Qualcomm breached any of its FRAND commitments, the remedy for such a breach was in contract or tort law.

The panel next addressed the district court's primary theory of anticompetitive harm: Qualcomm's imposition of an "anticompetitive surcharge" on rival chip suppliers via its licensing royalty rates. The panel held that Qualcomm's patent-licensing royalties and "no license, no chips" policy did not impose an anticompetitive surcharge on rivals' modem chip sales. Instead, these aspects of Qualcomm's business model were "chip-supplier neutral" and did not undermine competition in the relevant markers. The panel held further that Qualcomm's 2011 and 2013 agreements with Apple have not had the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market. Also, because these agreements were terminated years ago by Apple itself, there was nothing to be enjoined.

COUNSEL

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