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September 28, 2020

VIA ELECTRONIC FILING

Molly C. Dwyer
Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

Re: *Stromberg et al. v. Qualcomm*, No. 19-15159
Plaintiffs-Appellees' Response to the Court's August 17, 2020 Order (ECF No. 202)

Dear Ms. Dwyer:

Pursuant to the Court's August 17, 2020 Order (ECF No. 202) directing the parties to submit letter briefs addressing the effect, if any, of the panel decision in *FTC v. Qualcomm* (the "FTC decision") on this case, Plaintiffs-Appellees ("plaintiffs") respectfully submit this letter brief. In short, the FTC decision has no direct effect on this Rule 23(f) interlocutory appeal.

If and when it becomes final, the FTC decision would only reinforce the propriety of class certification in this case. The FTC decision addressed common questions and cited common evidence.

Nothing in that decision suggests that individualized issues would predominate.

Qualcomm does not contend otherwise. Instead, the overwhelming majority of Qualcomm's brief is devoted to arguing that plaintiffs' claims—including purely state-law claims not addressed in the FTC decision—will fail on the merits. Such merits inquiries, independent of the criteria set forth in Rule 23, are irrelevant to the question of class certification and outside the scope of this Court's Rule 23(f) review.

The impact, if any, of the FTC decision on plaintiffs' claims requires further development before this Court weighs in. The FTC decision is not final. Last week, on September 25, 2020, the FTC filed a petition for rehearing en banc. Case No. 19-16122, ECF No. 256. And even before the FTC filed its PFREB, the FTC decision had already received significant scrutiny within the legal community.[1] The FTC

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[1] Herbert Hovenkamp, *FRAND and Antitrust* (Aug. 24, 2020), CORNELL LAW REVIEW (2020). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420925 (last accessed Sept. 28, 2020); Thomas F. Cotter, *Two Errors in the Ninth*

decision may very well be modified and thus it would be premature to infer anything now about its impact on plaintiffs' Sherman Act claims, setting aside the separate state law claims that plaintiffs maintain. Even then, determining the impact of the FTC decision—as is, or as modified on rehearing—requires closely parsing the factual record in this case and examining any material differences between the two actions. The district court is best suited to engage in that inquiry, particularly since the full factual record is not before this Court given the more circumscribed nature of the 23(f) proceedings.[2]

Furthermore, plaintiffs' claims for monetary relief in this case arise under California's Cartwright Act and Unfair Competition Law

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Circuit's Qualcomm *Opinion*, 2020 PATENTLY-O PATENT LAW JOURNAL 1 (2020), *available at* https://patentlyo.com/media/2020/09/Cotter-Two-Errors-in-the-Ninth-Circuits-Qualcomm-Opinion-FINAL.pdf (last accessed Sept. 28, 2020); Jorge L. Contreras, *"No License, No Problem" – Is Qualcomm's Ninth Circuit Antitrust Victory a Patent Exhaustion Defeat?*, Patently-O (Sep. 1, 2020), *available* at https://patentlyo.com/patent/2020/09/qualcomms-antitrust-exhaustion.html (last accessed Sep. 28, 2020).

[2] Plaintiffs' factual record includes, among other documents, plaintiffs' experts' opening and rebuttal merits reports, testimony from more than ninety Qualcomm and OEM witnesses, and hundreds of exhibits.

("UCL"). The Cartwright Act differs in meaningful respects from the Sherman Act and decisions concerning the Sherman Act are, at most, instructive and not controlling. The California Supreme Court's decision in *In re Cipro Cases I & II*, 61 Cal.4th 116, 160 (2015)—a case involving a "reverse payment settlement" of patent litigation—demonstrates that California courts would not apply the FTC decision's outlier rulings concerning the intersection of patent and antitrust law. Plaintiffs also allege claims under the UCL, which is even broader than the Cartwright Act.

Whether and to what extent the FTC decision limits the reach of California's Cartwright Act claims concerning anticompetitive conduct touching on FRAND obligations are important questions concerning California law. Those questions require careful, reasoned analysis. Any doubt about the answer to those questions should be resolved by certifying them to the California Supreme Court, not by simply assuming that California courts would reflexively and summarily apply the FTC decision, as Qualcomm's brief suggests. *See* Def's Ltr. Br. at 8-10.

Qualcomm invites this Court to convert this Rule 23(f) appeal concerning the procedural question of class certification into a trial on the substantive merits in the first instance—one in which the claims are prejudged to be "futile" even before plaintiffs present their evidence to the district court and without careful consideration of the distinctions between state and federal law.

The Court should decline Qualcomm's invitation to flout basic principles of appellate review. To the extent the FTC decision has any effect at all on this Rule 23(f) appeal, it is only to confirm that common issues predominate over individual ones.

I. **The FTC Decision Confirms that Class Certification under Rule 23 is Appropriate.**

Nothing in the FTC decision suggests this case is not suitable for class treatment. To the contrary, the FTC decision confirms and does not undermine the conclusion that common issues predominate under Rule 23(b)(3). As the Supreme Court has made clear: "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013) (emphasis in original). Thus, the fact that the FTC decision made findings in favor of Qualcomm on the merits is not a reason to deny class certification.

Instead, the Supreme Court has held the propriety of class certification under Rule 23(b)(3) hinges on "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original). Here, all of the evidence and liability questions addressed in the FTC decision were common to the class.

Qualcomm does not argue otherwise. Instead, it raises a series of disguised merits arguments, none of which address the relevant inquiry or show that class treatment is inappropriate.

A. Defendant Is Wrong on the Facts and the Law Regarding Plaintiffs' Damages Model.

Qualcomm first contends that, based on the FTC decision, plaintiffs' "damages model" fails to satisfy the requirements of

Comcast Corp. v. Behrend, 569 U.S. 27, 36 (2013). Def's Ltr. Br. at 14. As an initial matter, Qualcomm's challenge to plaintiffs' damages model is a new argument that was neither raised below nor on appeal. Regardless, Qualcomm is mistaken on the law and the facts.

In *Comcast*, the problem was a mismatch between the plaintiffs' damages model and "liability case." *Comcast*, 569 U.S. at 35 (holding that "any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effects of the violation") (internal citations and quotations omitted). There, the antitrust model was based on an aggregation of "four theories of antitrust impact," "assumed the validity of all four theories," and "did not attribute damages to any one particular theory of anticompetitive impact." *Id.* at 36-37. The district court held that only one of the four theories of antitrust impact was even "capable of classwide proof and rejected the rest." *Id.* at 31. On appeal, the Court reversed class certification because plaintiffs' model "failed" to measure damages based on "the only theory of injury remaining in the case." *Id.* at 32.

Here, by contrast, plaintiffs quantify damages based on only a *single* theory of anticompetitive impact and their damages model is tailored to that theory. Plaintiffs allege that Qualcomm's anticompetitive "No License, No Chips" tie coerced OEMs into paying supra-FRAND royalties and thus higher "all-in" prices for modem chips.[3] 4SER0562-82 (Elhauge Decl. ¶¶ 40-82). While plaintiffs also allege that Qualcomm's refusal to license competing chipset manufacturers and exclusive dealing contracts were unlawful, the result was to "increase[] the degree of monopoly power that Qualcomm enjoyed over chipsets" and thus "exacerbate" its ability to enforce the NLNC tie. 4SER0576 (Elhauge Decl. ¶ 72).

Plaintiffs' patent licensing expert, Mr. Lasinski, calculates (1) the "but-for" FRAND royalty rate for Qualcomm's patents; (2) the "as-is" effective royalty rate for Qualcomm's patents; and (3) the "delta" in cost between the two. The detailed schedules attached to Mr. Lasinski's

[3] In Part III.A & B, plaintiffs refute Qualcomm's argument that these theories under California's Cartwright Act and Unfair Competition Law ("UCL") fail on the merits in light of the FTC decision.

class certification expert report break out these calculations separately for each handset OEM and cellular standard, and do so by quarter. *See* 5SER0902-0907.

Qualcomm contends, without any record citation, that "Plaintiffs' model rests on the assumption that any deviation from their expert's proclaimed 'FRAND rate' for licenses to Qualcomm's patents represents an anticompetitive overcharge." Def's Ltr. Br. at 14. Not so. Mr. Lasinski's expert report explains that Qualcomm did not merely "deviate" from a FRAND rate but blew past it in multiples. 5SER0712-19, 5SER0725-34. And Professor Elhauge's report opines that Qualcomm's ability to extract such supra-FRAND royalties is explained by its "No License, No Chips" tie. 4SER0562-82. Plaintiffs' argument thus will rise or fall on the merits in "one stroke" and will not devolve into individualized inquiries. *Dukes*, 564 U.S. at 350. This new appellate argument by Qualcomm deserves no weight.

B. The Choice-of-Law Analysis is Not Affected by the FTC Decision.

Citing the Department of Justice's ("DOJ") amicus brief, Qualcomm argues that if plaintiffs' state law claims survive—notwithstanding the FTC decision—applying California law nationally would improperly "allow[] California to set antitrust policy for the entire nation." Def's Ltr. Br. at 16 (quoting ECF No. 18 at 16). Tellingly, the DOJ itself concedes the FTC decision has no impact on the choice-of-law question presented here. ECF No. 208 at 2.

The Ninth Circuit has already ruled that California's Cartwright Act may be constitutionally applied nationwide. *AT&T Mobility LLC v. AU Optronics Corp*., 707 F.3d 1106, 1113-14 (9th Cir. 2013). Indeed, "[a] state court is rarely forbidden by the Constitution to apply its own state's laws, especially where, as here, the case is predicated upon violations of a state's law that allegedly occurred within that state." *Id.* at 1113 (internal citation and quotation marks omitted).

To the extent Qualcomm suggests that federal antitrust law preempts application of California's Cartwright Act to a nationwide class, this Dormant Commerce Clause argument (raised for the first time in Qualcomm's letter) has also been squarely rejected on multiple occasions. "States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only to 'supplement, not displace, state antitrust remedies.'" *In re Cipro Cases I & II*, 61 Cal. 4th at 160 (quoting *California v. ARC Am. Corp*., 490 U.S. 93, 102 (1989)). The "Supreme Court has made clear that neither the Sherman Act nor the Commerce Clause preempts state antitrust laws." *Knevelbaard Dairies v. Kraft Foods, Inc*., 232 F.3d 979, 993 (9th Cir. 2000). As a result, this Court has rejected the argument that "where an industry is primarily engaged in interstate commerce and would benefit from national uniformity of antitrust law," the Cartwright Act is preempted. *Redwood Theatres, Inc. v. Festival Enters., Inc*., 908 F.2d 477, 480 (9th Cir. 1990).

Nothing in the Constitution prevents applying the Cartwright Act to the nationwide class certified in this case. Rather, the only question is whether a California court would do so under its own choice-of-law principles. As the DOJ correctly observes, the FTC decision does not address that question. ECF No. 208 at 2.

C. <u>Qualcomm's Miscellaneous Merits Arguments All Fail.</u>

Qualcomm also restates its argument that certain Apple purchasers were uninjured and contends that plaintiffs are not entitled to injunctive relief. Def's Ltr. Br. at 14-15. Both arguments are merits arguments that fail to undermine the propriety of class certification.

The mere possibility that claims of certain Apple purchasers may fail—either because they purchased after 2016 or in light of the FTC decision—does not defeat class certification. *See Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1136-37 (9th Cir. 2016) (holding that denying certification based on the "inevitabl[e]" inclusion of "some individuals who have suffered no harm" is only warranted if there were "large numbers of class members who were never *exposed* to the challenged conduct"). The arguments Qualcomm raises concerning the merits of Apple purchasers' claims do not hinge on individualized issues but rather are arguments that apply broadly to a class or, if necessary, a readily identifiable subclass of Apple purchasers. *See, e.g.*, Rubenstein, 3 Newberg on Class Actions § 7:30 (5th ed.) ("subclassing 'may be undertaken at any time.'") (citations omitted). The claims of any members of the subclass will rise or fall together and thus individualized issues will not predominate.

Qualcomm also continues to ignore the evidence that plaintiffs presented on this point in their answering brief, namely that (1) Apple's chipset prices were elevated after 2016, according to Professor Elhauge; (2) Apple was forced to continue factoring in Qualcomm's royalty into its chipset pricing decisions well after 2016; and (3) Apple indeed paid billions of dollars to Qualcomm in royalties to settle their litigation in April 2019. *See* ECF No. 85 (Plaintiffs' Answering Br. at 40-43).

Similarly, Qualcomm contends that plaintiffs are no longer entitled to injunctive relief on the merits following the FTC decision. Def's Ltr. Br. at 16-17. This is a merits-based argument rather than a reason to deny class certification. *See Amgen*, 568 U.S. at 459. Qualcomm's position only confirms that plaintiffs' claim for injunctive relief can be decided in "one stroke." *Dukes*, 564 U.S. at 350. And, for the reasons discussed below, plaintiffs' claims survive on the merits.

II. **The FTC Decision's Impact, if any, on the Outcome of Plaintiffs' Claims Is Beyond the Scope of this Rule 23(f) Appeal.**

The first three-quarters of Qualcomm's brief is devoted to arguing why plaintiffs' will not prevail on the merits of their claims. Whether plaintiffs' claims will ultimately succeed is both irrelevant to the question of whether the class should be certified under Rule 23 and outside the scope of this Court's jurisdiction on a Rule 23(f) appeal.

As "elsewhere," this Court "police[s] the bounds" of its "jurisdiction vigorously" on a Rule 23(f) appeal:

> As the exception to the final judgment rule created by Rule 23(f) applies *only* to class certification decisions, merits inquiries unrelated to certification exceed our limited Rule 23(f) jurisdiction, as well as the needs of Rule 23(a)-(b).

Stockwell v. City & Cty. of San Francisco, 749 F.3d 1107, 1113 (9th Cir. 2014) (emphasis in original). This court therefore declines to consider "merits arguments" that are "beyond the scope" of Rule 23(f) appellate review. *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 822 n.8 (9th Cir. 2019).

Whether plaintiffs "could actually prevail on the merits of their claims" in light of the FTC decision is not before the Court on this appeal, nor is it a "proper inquiry" in determining the propriety of class certification under Rule 23. *See Stockwell*, 749 F.3d at 1112 (citation omitted). Regardless, as discussed below, Qualcomm's merits arguments are mistaken.

III. Merits Questions Should Be Certified to the California Supreme Court or Addressed by the District Court.

Qualcomm argues the FTC decision necessarily has *stare decisis* effect as to all of plaintiffs' claims, rendering them "futile." Def's Ltr. Br. at 4-5, 17. To the extent this Court has questions concerning the merits of plaintiffs' claims following the FTC decision, those questions are more appropriately (1) deferred to the district court to address on remand with respect to plaintiffs' Sherman Act claim, and (2) certified to the California Supreme Court with respect to plaintiffs' state-law claims.

Qualcomm relies on *Lierboe v. State Farm Mutual Automobile Insurance Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003) for the proposition that this case should be remanded with instructions to dismiss plaintiffs' state-law claims. As an initial matter, the plaintiff in that case lacked standing, whereas Qualcomm's argument, at best, is that plaintiffs' claims will ultimately fail on the merits. The two have entirely different implications for purposes of class certification.

Importantly, the *Lierboe* court deferred to the state court's interpretation of the key legal question—whether plaintiffs had a viable state-law claim—which it certified to the Montana Supreme Court. *Id.* at 1021. Only after the Montana Supreme Court decided the plaintiff "had no stacking claim from the outset of her litigation," this Court vacated the decision certifying the class. *Id.* at 1023 n.6.[4] To the extent

[4] Qualcomm also relies on *Mays v. Wal-Mart Stores, Inc.*, 804 F. App'x 641, 644 (9th Cir. 2020), an inapposite case where the named plaintiffs sued over a legal technicality and where the court concluded that plaintiffs had "fail[ed] to satisfy Article III's injury-in-fact requirement." Here, plaintiffs purchased relevant cellular devices during the relevant time period and allege that they paid higher quality-adjusted prices as a result. There is no serious question that they have Article III standing—a question that is distinct from whether their

Lierboe has any application here, it counsels in favor of permitting the California Supreme Court to determine the viability of plaintiffs' state-law claims.

Interpreting the application, if any, of a Sherman Act ruling to the California Cartwright Act has "significant implications" for California's antitrust and unfair competition laws warranting decision by the state's highest court. *See Mineral Cty. v. Walker River Irrigation Dist.*, 900 F.3d 1027, 1034 (9th Cir. 2018). That is particularly true here when state law precedent conflicts with the currently articulated principles of law in the FTC decision.

A. <u>The FTC Decision Does Not Preclude Plaintiffs' Claims under the Cartwright Act.</u>

Plaintiffs assert claims under California's Cartwright Act, the outcome of which is not dictated by the FTC decision—whatever it may finally be—under the federal Sherman Act. Nor is this fact affected by

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statutory causes of action will succeed on the merits. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (explaining the distinction between Article III standing and merits inquiries).

Qualcomm's challenge to the application of California law to a nationwide class. Although Qualcomm challenges the application of California law to residents in non-repealer states, it offers no argument why California law should not apply to residents in repealer states. *See* ECF No. 12 (Qualcomm's Opening Br.) at 69.

California's Cartwright Act is "broader in range and deeper in reach than the Sherman Act." *In re Cipro Cases I & II*, 61 Cal. 4th at 160 (quotation marks and citation omitted). The Cartwright Act also "reaches beyond the Sherman Act to threats to competition in their incipiency." *AT&T Mobility*, 707 F.3d at 1110 (quoting *Cianci v. Superior Ct.*, 40 Cal. 3d 903, 918 (1985)). As a result, "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th Century." *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1195 (2013).

Even when the U.S. Supreme Court rules on a "Sherman Act case, its conclusions would not dictate how the Cartwright Act must be read." *In re Cipro Cases I & II*, 61 Cal. 4th at 142. This Court has therefore held that it is improper to dismiss a "Cartwright Act claim" on the grounds that "the interpretation of California's antitrust statute was coextensive with the Sherman Act," as "[t]his is no longer the law in California." *Samsung Elecs. Co., Ltd. v. Panasonic Corp.*, 747 F.3d 1199, 1205 n.4 (9th Cir. 2014).

The California Supreme Court is the "final arbiter of what is state law." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). And there are several reasons to doubt that the California Supreme Court would apply the FTC decision to bar plaintiffs' Cartwright Act and UCL claims.

First, while the FTC decision held that Qualcomm's breach of its FRAND commitments is only actionable in "contract and patent law," the California Supreme Court would hold otherwise. *Compare* slip op. at 56 ("To the extent Qualcomm has breached any of its FRAND commitments, … the remedy for such a breach lies in contract and patent law," not antitrust law."), *with In re Cipro Cases I & II*, 61 Cal. 4th at 145 ("The abuse of patent rights may *also* run afoul of antitrust law." (internal quotation marks and citation omitted)). Instead, the California Supreme Court would apply the antitrust principles announced in *Cipro* to Qualcomm's "No License, No Chips" tie and refusal to license competitors. *See* 61 Cal. 4th at 145.

The California Supreme Court has expressly rejected the argument that the Cartwright Act is limited by the "scope of the patent test," which "insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid." *Id*. Instead, the California Supreme Court held that the "method of analysis" used to "assess[] anticompetitive harm" from restraints related to patent rights "is not materially different from that applied in any other garden-variety antitrust case." *Id.* at 150.

In reaching this conclusion, the court was concerned that "insufficient scrutiny" of potentially anticompetitive restraints related to patents would have "the potential to hamper innovation by allowing weak patents to offer the exact same exclusionary potential and monopoly possibilities as strong ones . . . ." *Id.* at 155. Therefore, the court held that an "agreement to exchange consideration for elimination of any portion of the period of competition that would have been expected had a patent been litigated is a violation of the Cartwright Act." *Id.* at 150.

That scenario is closely analogous to Qualcomm's conduct here. Qualcomm used its chipset monopoly to coerce OEMs into paying supra-FRAND royalties and *forgoing* their rights to litigate whether (1) Qualcomm's patents are valid, infringed, exhausted and (2) Qualcomm's licenses complied with its FRAND obligations. *See, e.g.*, Case No. 19-16122, ECF No. 75-1, 1ER66-67, 1ER174, 1ER179-80.[5]

When challenged about its royalty rate or licensing practices, Qualcomm used its monopoly in CDMA and LTE modem chipsets to cut off the chip supply of nearly every significant OEM and contract manufacturer. Case No. 19-16122, ECF No. 75-1, 76, 1ER0045-1ER0115, 6ER1210-11, 6ER1215 (LG); 6ER1224-26 (Samsung); 6ER1238-40, 6ER1245 (Blackberry); 6ER1274 (Wistron); 6ER1275 (Pegatron); 6ER1245 (Lenovo); 6ER1346 (Motorola); 2SER0326-28.

[5] The FTC decision does not dispute any of these findings by the district court.

Qualcomm refused to provide OEMs with patent claim charts (Case No. 19-16122, ECF No. 75-1, 1ER46, 1ER69, 1ER75, 1ER109, 1ER162-63), and enforced gag clauses that required OEMs to forfeit the right to challenge Qualcomm's patents or license terms through litigation (Case No. 19-16122, ECF No. 75-1, 1ER62-63, 1ER97). Chipset competitors, including Intel and MediaTek, also testified at trial about how Qualcomm's conduct impeded their ability to enter the chipset market and compete. *See, e.g.*, Case No. 19-16122, ECF No. 75-1, 1ER115-17, 1ER120-121, 1ER151-152.

The California Supreme Court would likely conclude that Qualcomm's "No License, No Chips" tie, which resulted in higher royalties than "would have been expected had [Qualcomm's] patent[s] been litigated[,] is a violation of the Cartwright Act." *In re Cipro Cases I & II*, 61 Cal. 4th at 150. There is no reason to believe the California Supreme Court would apply the FTC decision against the weight of contrary authority.[6]

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[6] *See, e.g.*, *Fed. Trade Comm'n v. Actavis, Inc.*, 570 U.S. 136, 148-49 (2013) (where plaintiff alleges "improper use of a patent monopoly,"

Second, the California Supreme Court would not disregard the evidence of harm to competition that the FTC decision deemed irrelevant. A central question at issue in both the FTC's case and this one is whether the licensing terms that Qualcomm imposed on OEMs through its "No License, No Chips" policy harmed competition and maintained Qualcomm's monopolies in the markets for CDMA and Premium LTE chipsets. The FTC decision, however, assumes away this

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the court should consider "traditional antitrust factors such as likely anticompetitive effects"); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 479 n.29 (1992) ("The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" (citation omitted)); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (holding deceptive promise to license on FRAND terms can be "actionable anticompetitive conduct"); *In re Indep. Servs. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000) ("Intellectual property rights do not confer a privilege to violate the antitrust laws."); *Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 429 (4th Cir. 1986) ("When antitrust law is applied to a specific patent-related practice that apparently threatens competition in areas other than those protected by the exclusive grant, it is necessary for a court to weigh the potential anticompetitive effects of the practice against the risk that application of the antitrust laws will frustrate the purpose of the patent laws.").

central question, holding that any such conduct necessarily occurred outside of the chipset markets and is irrelevant as a matter of law:

> [A] substantial portion of the district court's ruling considered alleged economic harms to OEMs—who are Qualcomm's customers, not its competitors—resulting in ***higher prices to consumers***. ***These harms, even if real, are not "anticompetitive" in the antitrust sense***—at least not directly—because they do not involve restrains on trade or exclusionary conduct in the "area of effective competition."

Slip op. at 30 (emphasis added).

Based on this reasoning, the decision simply disregards over 70 pages of the district court's detailed findings of fact explaining *how* Qualcomm's licensing terms prevented OEMs from using rival chipset suppliers and generally resulted in "exclusivity and near-exclusivity" for Qualcomm in the chipset markets to the detriment of its rivals. 1ER114-15. And although it deems it relevant, the FTC decision also disregards testimony from chipset competitors who testified at trial as to the anticompetitive effect of Qualcomm's conduct. *See, e.g.*, Case No. 19-16122, ECF No. 75-1, 1ER115-17, 1ER120-121, 1ER151-152. The California Supreme Court would not do so. To the contrary, California courts hold that increased prices to consumers—which the FTC decision rejects as irrelevant—constitute direct evidence of harm to competition.

The Cartwright Act's "principal goal is the preservation of consumer welfare." *In re Cipro Cases I & II*, 61 Cal. 4th at 136; *see also, e.g.*, *Feldman v. Sacramento Bd. of Realtors, Inc.*, 119 Cal. App. 3d 739, 748 (1981) (holding "the purpose of antitrust laws is primarily to protect the consuming public by healthy competition, and only secondarily to protect the individual competitor"). Thus, California courts recognize that "proof of actual detrimental effects on competition, such as . . . ***increased prices***" constitutes "***direct evidence*** of anticompetitive effects . . . ." *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, --- Cal. Rptr. 3d ---, 2020 WL 5229369, at *20 (Cal. Ct. App. Sept. 2, 2020) (quotation marks and citation omitted) (emphasis added).[7] Proof of anticompetitive effects under the

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[7] The U.S. Supreme Court has reached the same conclusion. *See Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (holding "proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market"

Cartwright Act in fact ***requires*** demonstrating "harm to competition in a manner that negatively affects '***the consuming public***.'" *Id.* (quoting *Feldman*, 119 Cal. App. 3d at 748) (emphasis added).

Because the California Supreme Court would consider increased prices to OEMs as evidence of harm to competition—or at least, would not disregard such evidence as irrelevant—the outcome of plaintiffs' Cartwright Act claims does not depend on the FTC findings concerning the lack of harm to competition.

Third, upon considering such evidence, there is no reason to conclude that the California Supreme Court would reject a theory of anticompetitive harm premised on "raising rivals' costs"—as the FTC decision implicitly did. The FTC decision concluded that because "Qualcomm's *customers*, not its *competitors*" paid the supra-FRAND royalty surcharge, any resulting harm necessarily "had no direct impact on competition" in the "markets for CDMA and premium LTE modem

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constitutes "[d]irect evidence of anticompetitive effects"). The FTC decision thus represents a departure from Supreme Court precedent that the California Supreme Court would not follow.

chips." Slip op. at 44 (emphasis in original). Along similar lines, the FTC decision held that because the supra-FRAND royalty applied to every handset regardless which chipset was used, it was necessarily "chip-supplier neutral." Slip op. at 36, 56.

But a long line of other cases recognize that a monopolist may harm competition by raising its rivals' costs, including by (1) imposing those costs on customers rather than directly on competitors and (2) imposing fees that appear to be facially neutral but whose economic effect discriminates against rivals. The California Supreme Court would follow such cases.

For instance, in *United States v. Microsoft*, 253 F.3d 34, 61-62 (D.C. Cir. 2001) (en banc) (per curiam), Microsoft imposed license restrictions on its Windows customers that had the practical effect of "imposing significant costs upon the OEMs" if they attempted to install a rival browser in addition to Internet Explorer. More specifically, Microsoft's license restrictions on removing the Internet Explorer icon would (1) cause "novice computer users" to be confused by the appearance of two browser icons and (2) thereby increase the frequency of expensive support calls. *Id.* The court recognized that even though such costs were imposed on Microsoft's customers, Microsoft's license restrictions "prevent[ed] many OEMs from pre-installing a rival browser," "protect[] Microsoft's monopoly from the competition that middleware might otherwise present," and were thus "anticompetitive." *Id.*

In another example, the Seventh Circuit condemned a union's imposition of a 1 percent fee on members and non-members alike under a raising rivals' costs theory, even though such a fee could be described as facially "supplier neutral." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 368 (7th Cir. 1987) (Easterbrook, J.). There, an electrical contractors' trade association enlisted a union to collect a 1% fee from members and nonmembers "when the nonmembers began underbidding members…." *Id.* While such a fee facially applied to all electrical contractors, its economic effect was not "supplier neutral" at all. For the associations' rivals, the fee represented an "increase" in the "costs of doing business." *Id.* For the association itself, the fee represented "higher profits" collected for its fund and decreased competition from non-members whose costs had risen. *Id.* Similarly, here, Qualcomm's supra-FRAND royalty increases its rivals' costs, while Qualcomm itself pockets the money.[8]

Other examples of cases finding harm to competition based on a raising rivals' cost theory abound, including at least one decision from this Court. *See, e.g.*, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (citing with approval T. Krattenmaker & S. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209, 235-62 (1986)), *partially overruled on*

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[8] The FTC decision's conclusion that Qualcomm's royalties were "chip-supplier neutral" also ignores the district court's findings that Qualcomm offered to defray high royalty rates through "rebates," "incentive funds," or royalty discounts in exchange for chipset exclusivity (or near exclusivity) with nearly every major OEM. *Compare* slip op. at 36, 56; *with* Case No. 19-16122, ECF No. 75-1, 1ER44-115. The FTC decision expressly disregarded such findings because they appeared in a section of the district court's opinion addressing increased prices to OEMs. *See* slip op. at 44. But, as discussed above, the California Supreme Court would not disregard such evidence as irrelevant.

other grounds in Lacey v. Maricopa Cty., 693 F.3d 896, 925 (9th Cir. 2012).[9]

The FTC decision did not even mention this line of cases—though invoked directly by the district court. *See* Case No. 19-16122, ECF No. 75-1, 1ER185-86 (discussing *Premier*, 814 F.2d at 368). But there is no reason to believe the California Supreme Court would reject the "raising rivals' costs" theory of anticompetitive harm. It does not appear that the California Supreme Court has expressly considered whether a "raising rivals' costs" theory of anticompetitive harm is actionable under the Cartwright Act. However, it recently cited the *Microsoft* decision with approval in an analogous case concerning

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[9] *See also, e.g.*, *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 832 (11th Cir. 2015) (holding conduct harms competition when it "allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 277 (3d Cir. 2012) (holding defendant liable where it "block[ed] customer access to [rivals'] products" and ensured rivals "would be unable to build enough market share to pose any threat to [defendant's] monopoly"); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof. Pubs., Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (same).

anticompetitive restraints related to patents. *In re Cipro Cases I & II*, 61 Cal. 4th at 150 (citing *Microsoft*, 253 F.3d at 79).

Fourth, the California Supreme Court would not impose the *linkLine* "margin squeeze" framework on plaintiffs' Cartwright Act claim, as Qualcomm suggests. *See* Def's Ltr. Br. at 9-10 (citing *Pacific Bell Telephone Co. v. linkLine Comm's*, 555 U.S. 438, 451-52, 457 (2009)). In *linkLine*, a vertically-integrated defendant "squeezed" its rivals' "profit margins by setting a high wholesale price for DSL transport and a low retail price for DSL Internet service." *linkLine*, 555 U.S. at 443. The case therefore involved (1) a defendant that merely engaged in the unilateral setting of its own prices, without more and (2) an alleged exclusionary mechanism premised on retail prices being "too low."

Plaintiffs' case does not allege that Qualcomm merely set the price of its own products "too low." Instead, plaintiffs allege that Qualcomm engaged in coercive tying and exclusive dealing that distorted the market, raised its rivals' costs and ultimately *increased* the total cost for OEMs and the quality-adjusted prices charged to consumers. *See* 3SER0350-398, 4SER0562-81. Plaintiffs also developed expert evidence below from Professor Einer Elhauge that Qualcomm's chipset prices were not dependent on its licensing royalty rates.[10] 4SER0576-81.

Given such facts, there is no reason to believe the California Supreme Court would foreclose plaintiffs' Cartwright Act claim based on *linkLine.* Apart from the FTC decision, plaintiffs are not aware of a single other case in which *linkLine*'s price-cost test for predatory pricing was held to apply to conduct that resulted in higher, not lower prices. Other courts have rejected such arguments. *See ZF Meritor*, 696 F.3d at 277-81; *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). The California Supreme Court would do likewise.

Fifth, the California Supreme Court would take a different approach to evaluating the extent to which Qualcomm's exclusive dealing with Apple foreclosed competition. The FTC decision

[10] Of course, plaintiffs' merits expert reports are not part of the record on this Rule 23(f) appeal. Should the Court request it, plaintiffs can supplement the record with such reports.

considered the Apple exclusive dealing claim in isolation, rather than against the backdrop of Qualcomm's *other* exclusive deals with virtually every major OEM. *See* slip op. at 51-55. In the 70-pages of fact finding that the FTC decision ignored as irrelevant, the district court described Qualcomm's exclusive deals with Samsung, LGE, Motorola, Huawei, Blackberry, and Lenovo. The FTC decision did not mention a single one of these exclusive deals, considering the Apple exclusive deal in a vacuum. *See* slip op. at 51-55. The California Supreme Court, however, would consider Qualcomm's exclusive dealing contracts in the aggregate to determine whether competition was sufficiently foreclosed to give rise to a claim.

For instance, in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App. 4th 309, 335-37 (2003), the court held that there were triable issues as to an exclusive dealing claim under the Cartwright Act where (1) "written exclusive dealing contracts with tour operators alone foreclosed as much as 20 percent of the wholesale market"; and (2) there was evidence that defendants had "*actually* foreclosed as much as *two-thirds* of the wholesale ticket market through a combination of these written exclusive dealing contracts and exclusive dealing arrangements implied through its other unlawful practices (illegal tie-ins and unfair pricing discrimination)." (emphasis in original). There is no reason to believe that the California Supreme Court would (1) disregard the exclusive dealing contracts with various other OEMs as irrelevant, as the FTC decision did, or (2) consider the Apple exclusive dealing claim in isolation.[11]

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[11] Qualcomm argues that "single firm monopolization" is not cognizable under California's Cartwright Act. Def's Ltr. Br. at 9 n.1. The district court rejected this argument in denying Qualcomm's motion to dismiss, a decision that is not subject to review on this Rule 23(f) appeal. Case No. 5:17-md-02773-LHK, ECF No. 175 (Order granting in part and denying in part motion to dismiss), at 31-36. In any event, plaintiffs do not allege unilateral monopolization. Instead, they allege that Qualcomm carried out its monopolization arrangements with other companies, including through exclusive dealing and tying agreements, both of which *are* actionable. *See Suburban Mobile Homes, Inc. v. AMFAC Cmtys.*, 101 Cal. App. 3d 532, 542 (1980) (tying); *Fisherman's Wharf Bay Cruise Corp.*, 114 Cal. App. 4th at 336 (exclusive dealing); *see also* 4SER0550-623 (Elhauge Report).

B. <u>The FTC Decision Does Not Preclude Plaintiffs' Claims under the UCL.</u>

In addition to their Cartwright Act claims, plaintiffs also assert an independent claim under the California Unfair Competition Law ("UCL"). *See* Complaint, ECF No. 490, ¶¶ 207-08 ("Qualcomm's conduct was also deceptive because it induced SSOs to use its technology on the promise that Qualcomm would comply with FRAND. But after SSOs selected Qualcomm's technology for their standards, Qualcomm refused to comply with its FRAND commitments.").

The UCL prohibits "any unlawful, unfair, or fraudulent business act or unfair, deceptive, untrue or misleading adverting . . . ." Cal. Bus. & Prof. Code § 17200. Its reach is even broader in scope than the Cartwright Act, thereby "enabl[ing] judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's intervention would contrive.'" *See Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, 269 F. Supp. 2d 1213, 1227 (C.D. Cal. 2003) (quoting *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935)); *see also Aryeh*, 55 Cal.

4th at 1195 ("though the Cartwright Act and the UCL each address aspects of unfair business competition, they have markedly different origins and scopes"); *see also id.* at 1196 ("the UCL is a chameleon. The UCL affords relief from unlawful, unfair, or fraudulent acts . . .").

Plaintiffs' UCL claim survives this appeal even if a court ultimately concludes that plaintiffs cannot prove a violation of the Sherman Act or the Cartwright Act. *See Korea Kumho Petrochemical v. Flexsys Am. L.P.*, No. C07-01057 MJJ, 2008 WL 686834, at *9 (N.D. Cal. Mar. 11, 2008) ("An act need not violate the antitrust laws to be actionable by a competitor as unfair . . ." (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999))); *Metro-Goldwyn-Mayer Studios Inc.*, 269 F. Supp. 2d at 1227 (opining that the UCL "arguably brings within its radius conduct that might otherwise fall outside the strict confines of antitrust law").

The FTC decision did not opine on any of the factual predicates that plaintiffs would need to show in order to prove their UCL claim. The FTC decision expressly did not consider whether Qualcomm breached its contractual commitments to license-standard setting organizations ("SSOs"). *See* slip op. at 20 ("Because our reversal does not depend on the district court's grant of partial summary judgment with respect to Qualcomm's contractual commitments to license its SEPs to rival chip suppliers, we vacate that order as moot without reaching its merits."); *see also id.* at 36 ("Even if the district court is correct that Qualcomm is contractually obligated via its SSO commitments to license rival chip suppliers—a conclusion we need not and do not reach—the FTC still does not satisfactorily explain how Qualcomm's alleged breach of its contractual commitment *itself* impairs the opportunity for rivals.").

Nor did it opine on whether Qualcomm's royalty rates were unreasonable or whether Qualcomm was in breach of its FRAND commitments. Slip op. at 44 n.20 ("Because our holding does not depend on the 'reasonableness' of a licensor's royalties, a determination that sounds in patent law and not antitrust law, we need not decide whether the method the district court used to assess reasonableness in this case was erroneous."); *see also* slip op. at 41, 49.

These facts are left for plaintiffs to litigate when this case returns to district court.

The Third Circuit's opinion in *Broadcom Corp. v. Qualcomm Inc.* confirms the plaintiffs have a viable UCL claim against Qualcomm for breached commitments to SSOs. 501 F.3d 297, 314 (3d Cir. 2007). There, the court concluded that plaintiffs pleaded sufficient facts to state a plausible claim that Qualcomm deceptively induced SSOs to adopt its patents into its standards by making promises to offer its SEPs to all comers on FRAND terms, only to later refuse to deal with rival chipmakers and demand non-FRAND royalties. *Id.* at 314; *see also id.* at 308-14 (discussing risks to competition from standard-setting context).

The "intentional deception" at issue in *Broadcom* is the same as it is here: Qualcomm's promise to license at a FRAND rate and its later refusal to do so. *See id.* at 313 (considering whether Qualcomm "deceived relevant [standards-determining organizations] into adopting the UMTS standard by committing to license its WCDMA technology on FRAND terms and, later, after lock-in occurred, demanding non-

FRAND royalties”). And other courts have deemed similar conduct actionable. *See, e.g.*, *Research in Motion Ltd. v. Motorola Inc.*, 644 F. Supp. 2d 788, 796 (N.D. Tex. 2008) (“It follows that when an entity side-steps these safeguards in an effort to return the standard to its natural anti-competitive state, anti-competitive effects are inevitable.”). Plaintiffs should have an opportunity to pursue this UCL claim through a complete presentation of evidence to the district court.

How (if at all) a final decision in the FTC action on Sherman Act claims applies to Cartwright Act and UCL claims related to alleged anticompetitive abuse of patent rights are policy questions of great importance. These questions go to the heart of California’s ability to prevent the many technology companies that operate within its borders from engaging in anticompetitive and unfair business practices.

To the extent the Court considers these questions at all, plaintiffs submit they should be certified to the California Supreme Court.

C. **The District Court Should Have an Opportunity to Address the Merits of Plaintiffs' Sherman Act Claims in the First Instance.**

Even with respect to plaintiffs' Sherman Act claim for injunctive relief, Qualcomm's *stare decisis* arguments are best addressed by the district court. There is no reason why the district court should be stripped of its authority to decide in the first instance whether plaintiffs may present this evidence at a trial on their own claims, especially given the posture of a Rule 23(f) appeal, which means this Court does not have before it the full record of plaintiffs' claims.

Private antitrust plaintiffs are not bound by a prior action brought by the federal government. *See Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961), *superseded on other grounds by* Fed. R. Civ. P. 24(a)(2) ("We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation…."). And plaintiffs are not in privity with the FTC. Thus, there is no argument that plaintiffs' claims are subject to claim or issue preclusion.

In considering whether an earlier decision has *stare decisis* effect, a court must consider "not only the rule announced, but also the facts giving rise to the dispute…." *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1253 (9th Cir. 2020) (quotation marks and citation omitted). "Antitrust decisions are particularly fact-bound." *Id.* "'Continuing contracts in restraint of trade,' are 'typically subject to continuing reexamination,' and 'even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.'" *Id.* (quoting Areeda & Hovenkamp, Antitrust Law ¶ 1205c3 (4th ed. 2018)). Where there "may be factual differences between the current case" and the prior case, the court "must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Id.* (quotation marks and citation omitted).

The impact of the FTC decision if at all on plaintiffs' Sherman Act claims requires close analysis of the factual record and the claims at issue—a quintessential trial court function. This Court does not have the full factual record before it. The limited, appellate record on this Rule 23(f) appeal does not include all of the evidence that plaintiffs developed in the course of fact and expert discovery, including merits-based expert reports that (1) differed materially from the expert reports at issue in the FTC case and (2) post-dated the district court's class certification order. Qualcomm itself has admitted that plaintiffs' claims differed from those at issue in the FTC's case including an explicit allegation regarding tying. *See* Case No. 19-16122, ECF No. 80, at 41 (acknowledging that the FTC "never made" a tying claim).

The primary case upon which Qualcomm relies, *In re American Express Anti-Steering Rules Antitrust Litigation*, 361 F. Supp. 3d 324 (E.D.N.Y. 2019), actually supports plaintiffs' position that any question regarding the applicability of the FTC decision's Sherman Act holding to this case should be reverted to the district court. After the Supreme Court opined on the merits of the government's prosecution in *Ohio v. American Express*, the proceedings continued before the district court, which granted the private plaintiffs leave to file an amended complaint and reopened fact discovery. 361 F. Supp. 3d at 333. At summary judgment, Amex sought partial summary judgment on three of the private plaintiffs' four market definitions, and the private plaintiffs prepared for trial on the other market definition. *Id.* at 335, 347. In *Amex*, the private plaintiffs' case did not have the state-law component that this case has; there, the *Amex* private plaintiffs asserted only Sherman Act violations like the government in the parallel case.

This Court should not step into the role of a trial court and decide the merits of plaintiffs' claims in the first instance. Plaintiffs have not presented their merits evidence to the district court at trial and even if they had, that full record is not before this Court.

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On this interlocutory Rule 23(f) appeal where this Court's jurisdiction is limited, the Court should decide the only question before it: whether the district court abused its discretion in certifying the class. The district court should decide in the first instance and with the benefit of additional discovery, if necessary, what, if any, effect the FTC decision has on plaintiffs' claims. To the extent that the Court has questions about the impact of the FTC decision on plaintiffs'

Cartwright Act and UCL claims, the appropriate course would be to certify those questions to the California Supreme Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kalpana Srinivasan
Kalpana Srinivasan