UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	)	
CERTAIN MOBILE ELECTRONIC DEVICES AND RADIO FREQUENCY AND PROCESSING COMPONENTS THEREOF	)	**Investigation No. 337-TA-1065**

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE ON THE PUBLIC INTEREST ISSUES

The American Antitrust Institute ("AAI") submits these comments pursuant to 19 CFR § 210.50(a)(4) and the Commission's Request for Statements on the Public Interest dated October 22, 2018. AAI is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. *See* Mission and History, Am. Antitrust Inst., https://www.antitrustinstitute.org/about-us/. AAI has a longstanding interest in ensuring a proper balance between intellectual property rights and competition in order to advance innovation and consumer welfare.

AAI agrees with Judge Pender's Initial Determination and Recommended Determination ("RD") that public-interest considerations strongly militate against the Commission issuing an exclusion order or cease-and-desist order against Apple should the Commission uphold the judge's determination that Apple violated § 337 of the Tariff Act by importing iPhones that infringe one claim of one of Qualcomm's patents in dispute.[1]

[1] Judge Pender found no infringement with respect to four other claims asserted in connection with two other patents. Qualcomm originally alleged violations as to more than 85 claims involving six patents, but

Judge Pender aptly recognized that "the circumstances here are unique and the risk of harm to the public interest is tangible." RD 194. The unique circumstances are that Qualcomm does not seek to exclude all of Apple's infringing products, just those that do not use a Qualcomm baseband chipset. The tangible harm to the public interest is that this will enable Qualcomm to secure a monopoly in a market that is very important to the economy, which the Federal Trade Commission separately is seeking to undo. *See* Compl., *FTC v. Qualcomm Inc.*, No. 17-CV-00220-LHK (N.D. Cal. Jan. 17, 2017) ("FTC Compl."); Order Denying Motion to Dismiss, *FTC v. Qualcomm, Inc.*, No. 17-CV-00220-LHK, 2017 WL 2774406 (N.D. Cal. June 26, 2017) ("Koh Order"). Judge Pender's findings leave no doubt that an exclusion order, by causing Intel's exit, would solidify Qualcomm's monopoly in the premium baseband chip market. RD 190-91. And such an order would thereby preempt any effective relief in the FTC's monopolization case, the trial of which is scheduled to begin in less than two months.[2]

Qualcomm is not seeking to use the § 337 process to protect its intellectual property from infringement. As Judge Pender noted, Qualcomm "has an adequate remedy at law for any patent infringement," and it is pursuing that remedy against Apple in federal district court. RD 159, 194. If Qualcomm prevails there, it will be entitled to damages on *all* of Apple's infringing devices. But one thing it will not be able to do is to forgive some of those damages (say, on

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Qualcomm sought and obtained termination of the investigation into all but five claims involving three patents. RD 1-3.

[2] Judge Koh recently granted partial summary judgment to the FTC on an important issue in the case. *See* Order Granting FTC's Motion for Partial Summary Judgment, *FTC v. Qualcomm, Inc.*, No. 17-CV-00220-LHK, 2018 U.S. Dist. LEXIS 190051 (N.D. Cal. Nov. 6, 2018) (holding that FRAND rules of standard-setting organizations required Qualcomm to license its standard essential patents to rivals, like Intel). At the very least, the Commission should consult with the FTC before considering an exclusion order. *See* 19 U.S.C. § 1337 (b)(2) (the Commission "shall consult with, and seek advice and information from" the FTC, among other departments and agencies). And if the Commission decides to issue an exclusion order, any such order should be stayed pending the outcome of the FTC's case. *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1975) (antitrust court should have opportunity to consider whether antitrust remedy may override power of regulatory agency, if there is a conflict).

iPhones that use Qualcomm chips) in exchange for Apple's future exclusive use of Qualcomm chips; such an exclusive-dealing arrangement enabling Qualcomm to monopolize the premium baseband chip market would violate Section 2 of the Sherman Act, as the FTC is alleging with respect to Qualcomm's prior exclusive-dealing arrangement with Apple. *See* FTC Compl. ¶¶ 116-30; Koh Order, 2017 WL 2774406, at *6-*7, *23-*25. But that is exactly what Qualcomm seeks from an exclusion order here. Qualcomm would use the § 337 process to exclude the only other supplier of premium baseband chipsets, Intel, from the market—without asserting infringement by Intel[3]—by having this Commission issue an exclusion order that essentially forces Apple to purchase baseband chipsets exclusively from Qualcomm.[4]

It is true that efforts by Qualcomm to obtain an exclusion order that would enable it to monopolize the market presumably are immune from antitrust liability under the *Noerr-Pennington* doctrine.[5] However, that does not mean that the Commission should permit its own process to be abused to enable Qualcomm to monopolize the market. *Cf.* 3 *Restatement (Second) of Torts* § 682 (1977) (abuse of process to use a legal process "primarily to accomplish a purpose for which it is not designed"). On the contrary, the public-interest factors, particularly the "effect

[3] Indeed, most of the infringement claims on which Judge Pender ruled involved a patent (the '936 patent) that relates to Apple's graphics processing unit (GPU), which has nothing to do with baseband processors.

[4] While an exclusion order is in place Apple theoretically could redesign its iPhones to avoid infringement and then renew its purchases from Intel, thereby preserving supply competition. However, Judge Pender apparently found that the elimination of Apple as a purchaser during the time it would take for a redesign would still cause Intel's exit. RD 174 & n.45, 196 (partially redacted). Moreover, even if an exclusion order were stayed pending a reasonable time for redesign, the cost of redesign and the exception for iPhones using Qualcomm chips would still give Qualcomm unwarranted leverage to pressure Apple to stop doing business with Intel. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring) ("When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, . . . an injunction may not serve the public interest . . . ."); Fed. Trade Commission, *The Evolving IP Marketplace* 225-27 (March 2011) (explaining how injunction in component-based industry may facilitate patent holdup and lead to excessive compensation for patentee and harm to innovation).

[5] *But see Puerto Rico Tel. Co. v. San Juan Cable LLC*, 874 F.3d 767, 773 (1st Cir. 2017) (Barron, J., concurring) (series of petitions may satisfy "sham" exception even if not every claim is baseless).

on competitive conditions in the United States economy" and on "United States consumers," suggest that an exclusion order that creates or preserves a monopoly should be denied, even if it is not being used for an ulterior purpose. *See* S. Rep. No. 93-1298 (1974), 1974 U.S.C.C.A.N. 7186, 7330 ("The Committee believes that the public health and welfare and the assurance of competitive conditions in the United States must be the overriding considerations in the administration of this statute. . . . [An] exclusion order should not be issued . . . particularly . . . in cases where there is any evidence of . . . monopolistic practices in the domestic industry."); *see also* 19 U.S.C. § 1337(a)(1)(A)(iii) (Tariff Act is violated by unfair method of competition in the importation of articles, where the effect is to "restrain or monopolize trade or commerce in the United States").

Judge Pender's findings regarding the likely impact of Qualcomm's monopolization of the "the premium baseband chipset market" are well grounded. RD at 190. The market definition is consistent with the FTC's complaint, *see* FTC Compl. ¶¶ 38-47, 131-135, and the expert and other testimony Judge Pender found to be credible, *see* RD 128-130, 190-91, 195. And his conclusion that Qualcomm's monopolization of the market would result in higher chipset prices, *id.* at 195, is consistent with the evidence offered by Apple, *see id.* at 147-48, 178, and basic economic and antitrust principles. Moreover, higher chipset prices can be expected to be passed on to consumers. *See In re: Qualcomm Antitrust Litig.*, No. 17-MD-02773-LHK, 2018 WL 4680214, at *19, *29 (N.D. Cal. Sep. 27, 2018) (plaintiffs' expert calculated that 87% of Qualcomm's monopoly overcharge to OEMs was passed on to consumers).

Judge Pender's conclusion that a Qualcomm monopoly would reduce quality and innovation, *see* RD 195, is also well supported by the record, economic theory, and the premise of the antitrust laws. As Judge Hand famously observed, "Many people believe that possession

of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."[6] Indeed, the harm to innovation here is particularly acute because, as Judge Pender found, it is likely to affect 5G chipsets and innovation in 5G more generally. RD 148-54, 195; *see also* FTC Compl. ¶¶ 140-41 (Qualcomm monopoly would adversely affect innovation because "[c]ompetition often drives firms to innovate in next-generation technologies and products. Competing firms often approach research and development efforts differently, increasing the likelihood of successful innovation.").

In sum, "the public interest[, which] must be paramount in the administration of this statute," S. Rep. No. 93-1298 (1974), *supra*, at 7326, plainly lies in denying an exclusion order here and remitting Qualcomm to its patent remedies in federal court.

Respectfully submitted,

s/ Richard M. Brunell

Richard M. Brunell
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640

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[6] *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945). Modern economic theory and empirical evidence do not support the "Schumpeterian hypothesis" that monopoly is more conducive to innovation than competitive markets. *See, e.g.,* Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?* in *The Rate and Direction of Inventive Activity Revisited* 361 (Josh Lerner & Scott Stern eds., 2012), *available at* https://www.nber.org/chapters/c12360.pdf; Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust L.J. 575, 583-87 (2007); F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 637 (3d ed. 1990).