No. 19-16122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-cv-00220-LHK
Hon. Lucy H. Koh

PETITION OF THE FEDERAL TRADE COMMISSION FOR REHEARING

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INTRODUCTION AND RULE 35(b) STATEMENT

This case has widely been recognized as ñenormously importantò to the future of antitrust law.[1] The practical stakes are just as high: The panelôs decision blesses the continued stifling of competition in multi-billion-dollar markets for cellular-communications chips on which much of the digital economy depends. After an 11-day trial, Judge Koh found that Qualcomm has ñstrangled competitionò in those markets for more than a decade, maintaining its undisputed monopoly by driving out most rival chipmakers and ñhobbl[ling]ò the few that remain. 1ER207, 216.

The linchpin of Qualcommôs scheme is a classic exclusionary practice: Qualcomm uses its chip monopoly to force cellphone makers (called ñOEMsò in this litigation) to pay up to $20 per phone to Qualcomm when they buy chips from rival manufacturers. Qualcomm calls those payments ñpatent royalties.ò But Judge Koh found that Qualcomm extracts them not through its patents, but by threatening to cut off OEMsô supply of chips if they refuse to pay. Judge Koh thus found that Qualcommôs so-called royalties are principally and in substance an ñartificial surchargeò equivalent to a naked tax on its rivalsô chip sales, *not* payments for patent rights. 1ER46, 184.

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[1] *E.g.*, Esther DôAmico, *US v. EU Approach to Monopolies Debated in Senate Hearing*, PaRR, Dec. 20, 2018 (quoting Professor William Kovacic).

The panel did not overturn any of Judge Kohôs factual findings. It also acknowledged that a monopolist acts anticompetitively if it requires customers to pay a tax when they buy from its rivals, a proposition so economically and legally uncontroversial that even Qualcomm embraced it. OP45-46. Yet the panel still held, as a matter of law, that Judge Kohôs findings do not establish ña cogent theory of anticompetitive harm.ò OP41. That decision warrants rehearing *en banc* because it conflicts with Supreme Court precedent on three questions of exceptional importance to the Nationôs antitrust laws.

First, the panel held that Qualcommôs surcharge is shielded from antitrust scrutiny because Qualcomm labels it a ñpatent royalty.ò Any claim predicated on those payments, the panel declared, ñsounds in patent law, not antitrust law,ò OP49 ð despite Judge Kohôs undisturbed finding that the payments principally reflect Qualcommôs chip monopoly, not its patents. That holding flouts the Supreme Courtôs instruction that courts must apply the antitrust laws based on economic substance, not formal labels. *E.g.*, *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1523 (2019). It also contradicts the Courtôs repeated holdings that patent-related agreements are not exempt from antitrust scrutiny. *See*

rivals ð ñby definitionò cannot harm competition. OP49-50. But the Supreme Court has long held otherwise. *See, e.g.*, *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 456-58 (1922). With good reason: Even a facially neut

34 (D.C. Cir. 2001), and ñexactly the opposite of antitrust law.ò[3] The panel opinion tears the fabric of antitrust law; rehearing *en banc* is necessary to correct the harm.

BACKGROUND

I. DISTRICT COURT FINDINGS AND DECISION

Qualcomm makes modem chips and sells them to cellphone OEMs like Apple and Samsung. It has long had monopolies in the markets for two key types of chips: ñCDMAò chips, which OEMs need to make phones that work on networks like Verizonôs, and ñpremium LTEò chips, which OEMs need to make any high-end phone. OP12; 1ER25-42. After hearing testimony from nearly 50 witnesses and reviewing more than 250 exhibits, Judge Koh issued a 233-page decision finding that Qualcomm has preserved those monopolies through anticompetitive practices that violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. ÄÄ 1-2. 1ER2-234.

Judge Koh found that Qualcomm excluded its competitors primarily by using its monopoly to require OEMs to pay an ñartificial surchargeò on *all* chips, including chips bought from Qualcommôs rivals. 1ER184-85. That is a long-

[3] Ben Remaly, *Ninth Circuit Provides Qualcomm Resounding Reversal*, GLOBAL COMPETITION REV., Aug. 12, 2020, https://tinyurl.com/yxp476l9 (quoting Professors A. Douglas Melamed and Mark Lemley); *see* Timothy B. Lee, *Appeals Court Ruling for Qualcomm ña Victory of Theory over Facts,ò* ARS TECHNICA, Aug. 14, 2020, https://tinyurl.com/y3kyce9d (quoting other criticism from antitrust scholars).

recognized anticompetitive practice. Nearly a century ago, the Supreme Court held that a monopolist unlawfully excluded competition when it conditioned leases of its shoemaking machines on customersô agreement to pay ñroyaltiesò on all shoes, including those made on rivalsô machines. *United Shoe*, 258 U.S. at 456-58. More

value of its patents.ò 1ER158. The evidence supporting that factual finding was overwhelming. To take just a few examples:

> In contemporaneous documents, Qualcomm itself ñrepeatedly admitted that Qualcommôs monopoly chip market share ð not the value of Qualcommôs patents ð sustains Qualcommôs royalty rates.ò 1ER158. For example, a senior Qualcomm executive stressed: ñWhere we have low chip share we are seeing challenges with compliance and maintaining the royalty rate é SO ITôS CRITICAL THAT WE MAINTAIN HIGH MODEM SHARE TO SUSTAIN LICENSING.ò 1ER161.
>
> Unlike other patent holders, Qualcomm refuses to provide OEMs with even rudimentary information about its patents, relying instead on chip-supply threats. 1ER162-63.
>
> Those same threats preclude OEMs from litigating or arbitrating ñQualcommôs royalty ratesò or ñwhether Qualcomualco ¾ ﹷ ¾ m e ﹷ

often equal or exceed the price an OEM would pay for a rival chip. 1ER176-77, 183; *see, e.g.*, 5SER1100.

Judge Koh further found that Qualcommôs surcharge distorts competition. It raises rivalsô effective prices, ñprevent[ing] rivals from underbidding Qualcommò and suppressing demand for rivalsô chips. 1ER186. As a result, ñ[r]ivals see lower sales volumes and lower margins,ò and ñcompetition decreases.ò *Id.*

Finally, Judge Koh entered an injunction because ñQualcommôs un

Judge Koh faithfully applied that teaching. She found, as a factual matter, that the bulk of Qualcommôs so-called patent royalties are attributable not to its patents, but to its chip monopoly. 1ER158. Critically, the issue is not that Qualcommôs royalties exceed the ñintrinsic valueò of its patents. OP43. High patent royalties, by themselves, are not an antitrust concern. Instead, as Judge Koh recognized, the problem is that Qualcommôs ñroyaltiesò conceal a chip-driven surcharge that is the economic equivalent of the fees in *United Shoe* and *Caldera*. 1ER46, 158-62, 184-87. Just like those fees, the surcharge is extracted through monopoly power and penalizes purchases of competing products.

The panel acknowledged that a ñnaked taxò like the ones condemned in *United Shoe* and *Caldera* is anticompetitive. OP45 (discussing *Caldera*). It could scarcely have done otherwise: Even Qualcomm acknowledged that such a tax is ñblatantly exclusionary.ò Reply 28; *see* Br. 66. But the panel declared that because Qualcomm has concealed its surcharge in a ñpatent royalty,ò the

Courtôs specific instruction that the antitrust laws do not permit a patent holder, ñunder the guise of his patent,ò to ñsecure protection from competition which the patent law unaided by restrictive agreements does not afford.ò

As an initial matter, the panel relied on an erroneous premise. The panel assumed that an OEM pays the same surcharge ñwhether an OEM buys Qualcommôs chips or a rivalôs chips.ò OP50. But Judge Koh specifically found that the same Qualcomm license agreements that impose a surcharge on all chips often include rebates and other incentives that accrue only ñon OEMsô purchases of [Qualcomm] chips.ò 1ER45. Those payments ñlower [OEMsô] effective royalty ratesò ð and thus the surcharge ð ñon Qualcomm chips only.ò 1ER52. And Judge Koh found, based on specific OEM testimony, that this facially discriminatory surcharge ñcontributed to [OEMs] shifting [their] modem chip purchases from [rivals] to [Qualcomm].ò 1ER81. The panel did not explain why a *facially discriminatory* surcharge should be immune from antitrust scrutiny.

More fundamentally, the sweeping immunity the panel conferred on facially neutral surcharges contradicts both precedent and sound economics. The Supreme Court has long recognized that facially neutral terms may prove ñmore costly to one set of [firms] than another,ò *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 665-66, 668 (1965), and that a monopolist can restrain competition and violate the antitrust laws through a facially neutral charge. That is exactly what United Shoe did when leasing its shoemaking machines: Rather than charging lessees .75Â per shoe made on a United Shoe machine and imposing a ñnakedò fee of .50Â every time they used a *rivalôs* machine (which would have been overtly

discriminatory), it required lessees to pay a fee of .50Â on *all* shoes (regardless of the machine used), and an additional .25Â per shoe made using United Shoe machines. *United States v. United Shoe Mach. Co.*, 234 F. 127, 134 (E.D. Mo. 1916). Like Qualcommôs surcharge, the .50Â fee was ñneutral,ò but the Supreme Court saw through the facial neutrality and condemned the fee as exclusionary. *See* 258 U.S. at 456-58. In so doing, the Court vindicated the core antitrust principle that defendants cannot transform unlawful conduct ñinto something innocuous just by changing the way they keep their books.ò *Freeman v. San Diego Assôn of Realtors*, 322 F.3d 1133, 1146 (9th Cir. 2003).

Economics teaches the same lesson. As Judge Koh explained, a facially neutral fee *paid to a monopolist* affects the monopolist and its rivals in fundamentally different ways. On rivalsô sales, the fee operates as a tax, raising the cost of their products, reducing their sales and margins, and thus suppressing competition. 1ER185-86; *see Premier*, 814 F.2d at 368. On the monopolistôs sales, by contrast, the fee is simply a component of the monopolistôs effective price. *Premier*, 814 F.2d at 368. As such, a rational monopolist will manipulate its nominal price to ensure the fee does not increase its effective price beyond the profit-maximizing point.

Suppose, for example, that a chip monopolist forced its customers to accept agreements that imposed a $10 fee *only* on their purchases of rivalsô chips and

thereby enabled the monopolist to charge a profit-maximizing (monopoly) price of $25 for its own chips. Revising the agreements to make the $10 fee applicable to *all* chip purchases would make no economic difference: The monopolist would reduce its nominal chip price by $10 to ensure that the true price of its chips (inclusive of the $10 fee) remained $25. (Charging more would reduce its profits.) Both the apparent ñreductionò in the monopolistôs price and the apparent ñneutralityò of its fee would be illusory. Customers would still pay $25 for the monopolistôs chips, only now in the form of a $15 nominal chip price plus a $10 fee. And the fee would still burden the monopolistôs rivals, while leaving the monopolist unaffected. *See* 1SER36-39 (testimony of FTCôs economic expert).

Another way to see the anticompetitive effect of a ñneutralò surcharge is to ask what would happen if it disappeared. If Qualcomm could no longer impose a surcharge on its rivalsô sales, but maintained the same real price (nominal price plus surcharge) on its own chips, OEMs would have a strong incentive to buy chips from Qualcommôs (now cheaper) rivals. As Qualcomm itself recognized, it would then be forced to ñlower its price é to meet the competition,ò engaging in ñgarden-variety price competition that the law encourages.ò Reply 43.

A practice that allows a monopolist to insulate itself from such competition is anticompetitive. By holding otherwise ð and by shielding, as a matter of law, *any*

facially neutral restraint ð the panel again departed from precedent and provided a roadmap for subversion of the antitrust laws.

III. THE PANEL DISREGARDED PRECEDENT BY HOLDING THAT HARMS TO QUALCOMMôS CUSTOMERS ARE ñBEYOND THE SCOPE OF ANTITRUST LAWò AND DEMANDING A SHOWING OF ñDIRECTò HARM TO COMPETITORS

Finally, the panel seriously erred by dismissing Judge Kohôs findings about the harm to OEMs ð including higher prices that are passed on to retail

e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The panel thus had things exactly backward.

Of course, the antitrust laws are concerned with high prices or other consumer harms only when they result from anticompetitive conduct, not ordinary market forces. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998). But the panel applied a novel standard for competitive harm, apparently demanding a showing that Qualcommôs practices had a ñdirectò impact on competitors, unmediated through other market participants. OP30-31; *see* OP41, 44, 49.

That erroneous standard ignores that many well-recognized antitrust violations ð like exclusive dealing and tying ð harm competition through their impact on customers or suppliers at another level of isco

surcharge harm competition by punishing customers who deal with Qualcommôs competitors. As the *Microsoft* court put it, the ñanticompetitive effectò flows from ñpreventing OEMs from taking actions that could increase rivalsô share.ò 253 F.3d at 62.

In minimizing the significance of consumer harm ð and in appearing to

CONCLUSION

For the foregoing reasons, the Court should grant rehearing *en banc*.

September 25, 2020

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ADDENDUM A
PANEL DECISION

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 courtôs judgment, and reversed the district courtôs permanent, worldwide injunction prohibiting several of Qualcomm Incorporatedôs core business practices.

The Federal Trade Commission (ñFTCò) contended that Qualcomm violated the Sherman Act, 15 U.S.C. ÄÄ 1, 2, by unreasonably restraining trade in, and unlawfully monopolizing, the code division multiple access (ñCDMAò) and premium long-term evolution (ñLTEò) 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.

Act. The panel held that the FTC did not satisfactorily explain how Qualcommôs 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 Qualcommôs procompetitive justifications for its OEM-level licensing policy ð which, in any case, appeared to be reasonable and c

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OPINION

CALLAHAN, Circuit Judge:

This case asks us to draw the line between *anti*competitive behavior, which is illegal under federal antitrust law, and *hyper*competitive behavior, which is not. The Federal Trade Commission (ñFTCò) contends that Qualcomm Incorporated (ñQualcommò) violated the Sherman Act, 15 U.S.C. ÄÄ 1, 2, by unreasonably restraining trade in, and unlawfully monopolizing, the code division multiple access (ñCDMAò) and premium long-term evolution (ñLTEò) cellular modem chip markets. After a ten-day bench trial, the district court agreed and ordered a permanent, worldwide injunction prohibiting several of Qualcommôs core business practices. We granted Qualcommôs request for a stay of the district courtôs injunction pending appeal. *FTC v. Qualcomm Inc.*, 935 F.3d 752 (9th Cir. 2019). At that time, we characterized the district courtôs order and injunction as either ña trailblazing application of the antitrust lawsò or ñan improper excursion beyond the outer limits of the Sherman Act.ò *Id.* at 757. We now hold that the district court went beyond the scope of the Sherman Act, and we reverse.

I

A

Founded in 1985, Qualcomm dubs itself ñthe worldôs leading cellular technology company.ò Over the past several decades, the company has made significant contributions to the technological innovations underlying modern cellular systems, including third-generation (ñ3Gò) CDMA and fourth-generation (ñ4Gò) LTE cellular standards ð the standards practiced in most modern cellphones and

ñsmartphones.ò Qualcomm protects and profits from its technological innovations through its patents, which it licenses to original equipment manufacturers (ñOEMsò) whose products (usually cellphones, but also smart cars and other products with cellular applications) practice one or more of Qualcommôs patented technologies.

Qualcommôs patents include cellular standard essential patents (ñSEPsò), non-cellular SEPs, and non-SEPs. Cellular SEPs are patents on technologies that international standard-setting organizations (ñSSOsò) choose to include in technical standards practiced by each new generation of cellular technology. SSOs ð also referred to as standards development organizations (ñSDOsò) ð are global collaborations of industry participants that ñestablish technical specifications to ensure that products from different manufacturers are compatible with each other.ò *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 875 (9th

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sales price. This practice is not unique to Qualcomm. As the district court found, ñ[f]ollowing Qualcommôs lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly.ò[5] *Id.* at 754ï55. OEM-level licensing allows these companies to obtain the maximum value for their patented technologies while avoiding the problem of patent exhaustion, whereby ñthe initial authorized [or licensed] sale of a patented item terminates all patent rights to that item.ò *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008); *see also Adams v. Burke*, 84 U.S. 453, 457 (1873) (when a patented item is ñonce lawfully made and sold, there is no restriction on [its] *use* to be implied for the benefit of the patentee or his assignees or licenseesò). Due to patent exhaustion, if Qualcomm licensed its SEPs further ñupstreamò in the manufacturing process to competing chip suppliers, then its patent rights would be exhausted when these rivals sold their products to OEMs. OEMs would then have little incentive to pay Qualcomm for patent licenses, as they could instead

[5] According to Nokia and other companies, OEM-level licensing is now the industry norm. *See* Br. of Amicus Curiae Nokia Technologies Oy at 4 (ñRequiring component-level licensing contravenes industry norms, leads to the ATIS and TIA IPR Policies being inconsistent with [other SSO policies], and could have unintended consequences for other SEP holders and the industry at large.ò); Br. of Amicus Curiae Dolby Laboratories, Inc. at 16 (ñThe consistent experience of Dolby, a licensor to thousands of licenses under SEPs, is that FRAND licensing of SEPs takes place at the end-product level.ò); *see also* Br. of Amici Curiae Continental Automotive Systems, Inc. and D Q ' F ﻙ ﻱ
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become ñdownstreamò recipients of the already exhausted patents embodied in these rivalsô products.[6]

Because rival chip manufacturers practice many of Qualcommôs SEPs by necessity, Qualcomm offers these companies what it terms ñCDMA ASIC Agreements,ò wherein Qualcomm promises not to assert its patents in exchange for the company promising not to sell its chips to unlicensed OEMs.[7] These agreements, which essentially function as patent-infringement indemnifications, include reporting requirements that allow Qualcomm to know the details of its rivalsô chip supply agreements with various

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Over the past several decades, as Qualcommôs licensing and modem chip businesses thrived and the company gained more and more market share, its OEM customers and rival chipmakers grew frustrated with the companyôs business practices. The targets of these complaints included Qualcommôs practice of licensing exclusively at the OEM level and refusing to license rival chipmakers, its licensing royalty rates, its ñno license, no chipsò policy, and Qualcommôs sometimes aggressive defense of these policies and practices. Qualcommôs customers occasionally attempted to ñdisciplineò its pricing through arbitration claims, negotiations, threatening to change chip suppliers, and litigation. These maneuvers generally resulted in settlements and renegotiated licensing and chip-supply agreements with Qualcomm, even as OEMs continued to look elsewhere for less expensive modem chip options.

Qualcommôs competitors in the modem chip markets contend that Qualcommôs business practices, in particular its refusal to license them, have hampered or slowed their ability to develop and retain OEM customer bases, limited their growth, delayed or prevented their entry into the market, and in some cases forced them out of the market entirely. These competitors contend that this result is not just anticompetitive, but a violation of Qualcommôs contractual commitments to two cellular SSOs ð the Telecommunications Industry Association (ñTIAò) and Alliance for Telecommunications Industry Solutions (ñATISò) ð to license its SEPs ñto all applicantsò on FRAND terms.[9] Qualcomm argues that it has no antitrust duty to deal

[9] Under the TIA contract, Qualcomm agreed to make its SEPs ñavailable to all applicants under terms and conditions that are

decided to terminate these agreements and source its modem chips from Intel for its 2016 model iPhone.

D

In January 2017, the FTC sued Qualcomm for equitable relief, alleging that Qualcommôs interrelated policies and practices excluded competitors and harmed competition in the modem chip markets, in violation Ä 5(a) of the FTC Act, 15 U.S.C. Ä 45(a), and ÄÄ 1 and 2 of the Sherman Act, 15 U.S.C. ÄÄ 1, 2. After a ten-day bench trial, the district court concluded that ñQualcommôs licensing practices are an unreasonable restraint of trade under Ä 1 of the Sherman Act and exclusionary conduct under Ä 2 of the Sherman Act.ò[11] *Qualcomm*, 411 F. Supp. 3d at 812 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58ï59 (D.C. Cir. 2001)). The district court ordered a permanent, worldwide injunction prohibiting Qualcommôs core business practices. *Id.* at 820ï 24.

The district courtôs decision consists of essentially five mixed findings of fact and law: (1) Qualcommôs ñno license, no chipsò policy amounts to ñanticompetitive conduct against OEMsò and an ñanticompetitive practice[] in patent license negotiationsò; (2) Qualcommôs refusal to license rival chipmakers violates both its FRAND commitments and

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percentage of the per-unit marketing funds, as well as the incentive funds. *Id.*

[11] Because the district court concluded that Qualcomm violated the Sherman Act and thereby violated the FTC Act ð which prohibits ñ[u]nfair methods of competition,ò including Sherman Act violations ð it did not address whether Qualcommôs conduct co m M

Microsoft, 253 F.3d at 58). Accordingly, the district court held that the FTC met its burden under the Sherman Act of proving ñmarket power plus some evidence that the challenged restraint harms competition.ò *Id.* at 804 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)). Furthermore, the district court held that it could ñinferò a causal connection between Qualcommôs conduct and anticompetitive harm because that conduct ñóreasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.ôò *Id.* at 804ï05 (alterations in original) (quoting *Microsoft*

II

Antitrust law, like patent law, is ñaimed at encouraging innovation, industry and competition.ò *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (citing *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876ï77 (Fed. Cir. 1985)). ñDespite the opportunities for conflict . . . a central goal of both patent and antitrust law is the promotion of the public benefit through a competitive economy.ò *Intôl Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 427 (4th Cir. 1986); *see also Am. Express*, 138 S. Ct. at 2290 (ñ[I]t is ó[t]he promotion of interbrand competition,ô after all, that óis . . . the primary purpose of the antitrust laws.ôò (some alterations in original) (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007))). Indeed, the Federal Circuit, which frequently examines cases at the intersection of patent and antitrust law, has commented that ñ[t]he patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.ò *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) (citing *Loctite Corp.*, 781 F.2d at 866ï67).

Among the antitrust laws, the Sherman Act, 15 U.S.C. ÄÄ 1, 2, is particularly ñimportant to the preservation of economic freedom and our free-enterprise system.ò *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Enacted in 1890, when the emergence of trusts and monopolies with the power to suppress competition and

> aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). In pursuit of these goals, the Sherman Act protects ñthe freedom guaranteed each and every business . . . to compete ð to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.ò *Topco Assocs.*, 405 U.S. at 610.

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Section 1 of the Sherman Act prohibits ñ[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.ò 15 U.S. = ȳ ᵠ ᴀ ᵠ ᴰ e ð tu ϒ σ t þ ᵐ ᵠ M

trade.ò *Aerotec Intôl, Inc. v. Honeywell Intôl, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016) (emphasis added) (citing *Am. Needle, Inc. v. Natôl Football League*, 560 U.S. 183, 189ï90 (2010)).

ñRestraints that are not unreasonable *per se* are judged under the órule of reason.ôò *Am. Express*, 138 S. Ct. at 2283 (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). ñThe rule of reason requires courts to conduct a fact-specific assessment of ómarket power and market structure . . . to assess the [restraint]ôs *actual* effectô on competition.ò *Id.* (alterations in original) (emphasis added) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)); *see also In re Natôl Football Leagueôs Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1150 (9th Cir. 2019) (ñUnder this rule, we examine óthe facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,ô to determine the effect on competition in the relevant product market.ò (quoting *Natôl Socôy of Profôl Engôrs v. United States*, 435 U.S. 679, 692 (1978))). ñThe goal is to ódistinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumerôs best interest.ôò *Am. Express*, 138 S. Ct. at 2284 (alteration in original) (quoting *Leegin Creative Leather Prods.*, 551 U.S. at 886).

In *Am. Express*, for example, the Supreme Court held that the plaintiffs failed to meet their burden to show that antisteering provisions in American Expressôs merchant agreements ð which prohibit merchants from encouraging customers at the point of sale to use other credit cards, like Visa, with lower transaction fees ð have anticompetitive effects that harm consumers. *Id.* at 2280, 2289ï90. Instead, Amexôs unique business model and the antisteering

provisions it relies on have *increased* competition in the credit card transaction market by forcing rivals like Visa and Mastercard to adapt and innovate, which has ultimately benefited consumers by ñincreas[ing] the quality and quantity of credit-card transactions.ò *Id.* at 2290. In other

ñó(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.ôò *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th Cir. 2010) (ñ*Allied Orthopedic*ò)). ñThe mere possession of monopoly power, and the concomitant charging of monopoly prices, is not [itself] unlawful; [instead,] it is an important element of the free-market system.ò *Verizon Commcôns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (ñ*Trinko*ò). ñThe opportunity to charge monopoly prices ð at least for a short period ð is what attracts óbusiness acumenô in the first place; it induces risk taking that produces innovation and economic growth.ò *Id.*

ñTo safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful [under Ä 2] unless it is accompanied by an element of anticompetitive *conduct*.ò *Id.* Accordingly, plaintiffs are required to prove ñanticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market.ò *Allied Orthopedic*, 592 F.3d at 1000 (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545ï46 (9th Cir. 1983)); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 570ï71 (1966) (distinguishing ñwillful acquisitionò of monopoly power from ñdevelopment as a consequence of a superior product, business acumen, or historic accidentò). ñ[T]o be condemned as exclusionary, a monopolistôs act must have an óanticompetitive effectôò ð that is, it ñmust harm the competitive *process* and thereby harm consumers.ò *Microsoft*, 253 F.3d at 58. ñIn contrast, harm to one or more *competitors* will not suffice.ò *Id.*; *see also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (noting that the

Likewise, ñif a plaintiff successfully establishes a *prima facie* case under Ä 2 by demonstrating anticompetitive effect, then the monopolist may proffer a ópro competitive justificationô for its conduct.ò *Microsoft*, 253 F.3d at 59 (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992)). ñIf the monopolist asserts a procompetitive justification ð a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal ð then the burden shifts back to the plaintiff to rebut that claim.ò *Id.*

Here, the district court correctly defined the relevant markets as ñthe market for CDMA modem chips and the market for premium LTE modem chips.ò *Qualcomm*, 411 F. Supp. 3d at 683. Nevertheless, its analysis of Qualcommôs business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a substantial portion of the district courtôs ruling considered alleged economic harms to OEMs ð who are Qualcommôs *customers*, not its competitors ð resulting in higher prices to consumers. These harms, even if real, are not ñanticompetitiveò in the antitrust sense ð at least not *directly* ð because they do not involve restraints on trade or exclusionary conduct in ñthe area of effective competition.ò *Am. Express*, 138 S. Ct. at 2285.

The district courtôs consideration of anticompetitive impacts outside of the relevant markets is reflected in the way it framed and organized the issues. For example, the first, major portion of the district courtôs rule of reason analysis (ñAnticompetitive Conduct Against OEMs and Resulting Harmò) provides a detailed account of Qualcommôs ñanticompetitive acts against OEMsò via the companyôs ñno license, no chipsò policy. *Qualcomm*, 411 F. Supp. 3d at 697ï744. Yet when the district court set forth its primary theory of anticompetitive harm ð that Qualcommôs licensing royalty rates ñimpose a surcharge on rivalsô modem chips,ò thereby inhibiting free and fair competition in the relevant markets ð it did so only in passing. *Id.* at 790ï92.

Moreover, throughout its analysis, the district court failed to distinguish between Qualcommôs *licensing* practices (which primarily impacted OEMs) and its practices relating to *modem chip sales* (the relevant antitrust market). This was, no doubt, intentional: the district court

characterized Qualcommôs various business practices as ñinterrelatedò and mutually reinforcing, and it described their anticompetitive effects as ñcompoundingò and ñcycl[ical].ò *Id.* at 797ï98. But even if Qualcommôs practices are interrelated, actual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of antitrust law.

III

Accordingly, we reframe the issues to focus on the impact, if any, of Qualcommôs practices in the area of effective competition: the markets for CDMA and premium LTE modem chips. Thus, we begin by examining the district courtôs conclusion that Qualcomm has an antitrust duty to license its SEPs to its direct competitors in the modem chip markets. We then consider Qualcommôs royalty rates, its ñno license, no chipsò policy, and its agreements with Apple in 2011 and 2013 to supply all or a substantial portion of the modem chips Apple used for its pre-2016 model iPhones.

Throughout our analysis, we review for clear error the district courtôs findings of fact and we review de novo its conclusions of law and any mixed questions of law and fact. *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011).

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ñAs the Supreme Court has repeatedly emphasized, there is óno duty to deal under the terms and conditions preferred by [ḍ b titrt][a ʻ
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business, freely to exercise his own independent discretion as to parties with whom he will deal.ôò *Trinko*, 540 U.S. at 408 (alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see linkLine*, 555 U.S. at 448 (ñAs 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.ò (citing *Colgate*, 250 U.S. at 307)). This is because the antitrust laws, including the Sherman Act, ñwere enacted for ótheprotection of *competition*, not *competitors*.ôò *Brunswick Corp. v. Pueblo BowlïOïMat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis added) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Or, as we recently put it, in a bit more colorful terms: ñCompetitors are not required to engage in a lovefest.ò *Aerotec Intôl*, 836 F.3d at 1184.

The one, limited exception to this general rule that there is no antitrust duty to deal comes under the Supreme Courtôs decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). There, the Court held that a company engages in prohibited, anticompetitive conduct when (1) it ñunilateral[ly] terminat[es] . . . a voluntary and profitable course of dealing,ò *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004); (2) ñthe only conceivable rationale or purpose is óto sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition,ôò *Aerotec Intôl*, 836 F.3d at 1184 (quoting *MetroNet Servs.*, 383 F.3d at 1132); and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers, *see MetroNet Servs.*, 383 F.3d at 1132ï33. The Supreme Court later characterized the *Aspen Skiing* exception as ñat or near the outer boundary of Ä 2 liability.ò *Trinko*, 540 U.S. at 409.

The district courtôs conclusion that Qualcommôs refusal to provide exhaustive SEP licenses to rival chip suppliers meets the *Aspen Skiing* exception ignores critical differences between Qualcommôs business practices and the conduct at

Qualcomm first gained monopoly power in the modem chip market in 2006 until now, it ever had a practice of providing exhaustive licenses at the modem chip level rather than the OEM level.

Second, Qualcommôs rationale for ñswitchingò to OEM-level licensing was not ñto sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition,ò the second element of the *Aspen Skiing* exception. *Aerotec Intôl*, 836 F.3d at 1184 (internal quotation marks and citation omitted). Instead, Qualcomm responded to the change in patent-exhaustion law by choosing the path that was ñfar more lucrative,ò both in the short term *and* the long term, regardless of any impacts on competition. *Qualcomm*, 411 F. Supp. 3d at 753. The district court itself acknowledged that this was Qualcommôs purpose, observing: ñFollowing Qualcommôs lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly.ò *Id.* at 754ï55. Because Qualcommôs purpose was greater profits in both the short and long terms, the second required element of the *Aspen Skiing* exception is not present in this case.[15]

[15] Throughout its analysis, the district court conflated the desire to maximize profits with an intent to ñdestroy competition itself.ò *Spectrum Sports*, 506 U.S. at 458. As noted *supra*, the goal of antitrust law is not to force businesses to forego profits or even ñ[t]he opportunity to charge monopoly prices,ò which is ñwhat attracts óbusiness acumenô in the first place.ò *Trinko*, 540 U.S. at 407. Here, Qualcommôs desire to maximize profits both in the short-term *and* the long-term und es

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Finally, unlike in *Aspen Skiing*, the district court found no evidence that Qualcomm singles out any specific chip supplier for anticompetitive treatment in its SEP-licensing. In *Aspen Skiing*

OEM-level licensing policy, however novel, is not an anticompetitive violation of the Sherman Act.

B

Conceding error in the district courtôs conclusion that Qualcomm is subject to an antitrust duty to deal under *Aspen Skiing*, the FTC contends that this court may nevertheless hold that Qualcomm engaged in anticompetitive conduct in violation of Ä 2. This is so, the FTC urges, because (1) ñQualcomm entered into a voluntary contractual commitment to deal with its rivals as part of the SSO process, which is itself a derogation from normal market competition,ò and (2) Qualcommôs breach of this contractual commitment ñsatisfies traditional Section 2 standards [in that] it ótends to impair the opportunities of rivals and . . . does not further competition on the merits.ôò Appelleeôs Br. at 69, 77 (quoting *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)). We disagree.

Even if the district court is correct that Qualcomm is contractually obligated via its SSO commitments to license rival chip suppliers ð a conclusion we need not and do not reach[16] ð the FTC still does not satisfactorily explain how Qualcommôs alleged breach of this contractual commitment *itself* impairs the opportunities of rivals. It argues the breach ñfacilitat[es] Qualcommôs collection of a surcharge from rivalsô customers.ò Appelleeôs Br. at 77. But this refers to a distinct business practice, licensing royalties, and alleged harm to OEMs, not rival chipmakers. In any case, Qualcommôs royalties are ñchip-supplier neutralò because Qualcomm collects them from *all* OEMs that license its patents, not just ñrivalsô customers.ò The FTC argues that

[16] *See supra* notes 12 and 13.

Qualcommôs breach directly impacts rivals by ñotherwise deterring [their] entry and investment.ò *Id.* But this ignores that Qualcommôs ñCDMA ASIC Agreementsò functionally act as de facto licenses (ñno license, no problemò) by allowing competitors to practice Qualcommôs SEPs (royalty-free) before selling their chips to downstream OEMs. Furthermore, in order to make out a Ä 2 violation,

to an examination of Qualcommôs procompetitive justifications, failing to recognize that the burden does not shift to Qualcomm to provide such justifications unless and until the FTC meets its initial burden of proving anticompetitive harm. Because the FTC has not met its

chips. Instead, it is undisputed that Qualcommôs current royalty rates ð which the district court found ñunreasonably highò (a finding discussed in greater detail in the next section of our opinion) ð are based on the patent portfolio chosen by the OEM customer regardless of where the OEM sources its chips. Furthermore, competing chip suppliers are permitted to practice Qualcommôs SEPs freely without paying any

Judge Michel notes that ñ[w]hile antitrust policy has its place as a policy lever to enhance market competition, the rules of contract and patent law are better equipped to handle commercial disputes between the worldôs most sophisticated companies about FRAND agreements.ò *Id.* at 24. Echoing this sentiment, a former FTC Commissioner, Joshua Wright, argues that ñthe antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law,ò and that ñimposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard-setting bodies and to commercialize innovation.ò Wright, *supra* note 1, at 808ï09.

In short, we are not persuaded by the FTCôs argremed þ D l ⊓ C ʻ b א ʻ 8 8

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> when an OEM uses one of Qualcommôs rivalôs chips. Thus, the ñall-inò price of any modem chip sold by one of Qualcommôs rivals effectively includes two components: (1) the nominal chip price; and (2) Qualcommôs royalty surcharge.

Qualcomm, 411 F. Supp. 3d at 791. This central component of the district courtôs ruling is premised on the district courtôs findings that Qualcommôs royalty rates are (1) ñunreasonably highò because they are improperly based on Qualcommôs monopoly chip market share and handset price instead of the ñfair value of Qualcommôs patents,ò and (2) anticompetitive because they raise costs to OEMs, who pass the extra costs along to consumers and are forced to invest less in other handset features. *Id.* at 773ï90, 795, 820ï21. The FTC agrees with this aspect of the district courtôs ruling, pointing out that its ñreasonablenessò determination regarding Qualcommôs royalty rates is a factual finding subject to clear error review and arguing that this finding ñwas supported by overwhelming evidence.ò Appelleeôs Br. at 44 (citing *Faulkner v. Gibbs*, 199 F.2d 635, 639 (9th Cir. 1952)).

We hold that the district courtôs ñanticompetitive surchargeò theory fails to state a cogent theory of anticompetitive harm. Instead, it is premised on a misunderstanding of Federal Circuit law pertaining to the calculation of patent damages, it incorrectly conflates antitrust liability and patent law liability, and it improperly considers ñanticompetitive harms to OEMsò that fall outside the relevant antitrust markets. Furthermore, even if we were to accept the district courtôs conclusion that Qualcommôs royalty rates are unreasonable, we conclude that the district

substantive element of patent damages law); *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1327ï28 (Fed. Cir. 2014) (same); *LaserDynamics*, 694 F.3d at 68 (same). As this case involved a bench trial, the potential for jury confusion was absent.

Moreover, the Federal Circuit rejected the premise of the district courtôs determination: that the SSPPU concept is *required* when calculating patent damages. *See Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303 (Fed. Cir. 2015) (ñThe rule Cisco advances ð which would require all damages models to begin with the [SSPPU] ð is untenable [and] conflicts with our prior approvals of a methodology that values the asserted patent based on comparable licenses.ò) (citations omitted). The Federal Circuit has also observed that ñó[s]ophisticated parties routinely enter into license agreements that base the value of the patented inventions as a percentage of the commercial productsô sales price,ô and thus ó[t]here is nothing inherently wrong with using the market value of the entire product.ôò *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1349 (Fed. Cir.

harms customers, ñbut does so without harming competition, it is beyond the antitrust lawsô reachò); *accord NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (no Sherman Act violation where ñconsumer injury naturally flowed not so

amounted to anticompetitive conduct in violation of Ä 2. *Id.* at 1250ï51.

Qualcommôs licensing royalties are qualitatively different from the per-unit operating-system royalties at issue in *Caldera*

ñmargin squeezeò was rejected as a basis for antitrust liability in *linkLine*. 555 U.S. at 451ï52, 457. There, multiple digital subscriber line (ñDSLò) high-speed internet service providers complained that AT&T was selling them access to AT&Tôs must-have telephone lines and facilities at inflated wholesale rates and then shifting those increased profits to charge ultra-low rates for DSL services at retail, effectively squeezing these DSL competitors out of the market. *Id.* at 442ï44. The Court rejected the plaintiffsô assertion of anticompetitive harm, holding that AT&T was under no antitrust duty to deal with its competitors on the wholesale level, and that the plaintiffs failed to introduce evidence of predatory pricing (that is, charging below cost) at the retail level.[22] *Id.* at 450ï51.

Here, not only did the FTC offer no evidence that Qualcomm engaged in predatory pricing, the district courtôs entire antitrust analysis is premised on the opposite proposition: that Qualcomm ñcharge[s] monopoly prices on modem chips.ò *Qualcomm*, 411 F. Supp. 3d at 800. Indeed, the district court faulted Qualcomm for lowering its prices only when other companies introduced CDMA modem chips to the market to effectively compete. *Id.* at 688ï89. We

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Qualcomm ñshift[s] part of its chip revenues into its royalty rates, overcharging on the patent royalty, while undercharging for chips . . . [which] destroys the normal competitive process in the chip marketò).

[22] The Court explained in *linkLine* that ñto prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) óthe prices complained of are below an appropriate measure of its rivalôs costsô; and (2) there is a ódangerous probabilityô that the defendant will be able to recoup its óinvestmentô in below-cost prices.ò 555 U.S. at 451 (quoting *Brooke Grp. Ltd.*, 509 U.S. at 222ï24); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (ñLow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.ò).

example of this is Appleôs 2014 decision to switch to Intel as its main chip supplier, demonstrating that Qualcommôs ñno license, no chipsò policy did not foreclose competition in the modem chip markets.

According to the FTC, the problem with ñno license, no

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However, we do not agree that these agreements had the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market, or that injunctive relief is warranted.

During the relevant time period (2011–2015), the record suggests that the only serious competition Qualcomm faced with respect to the Apple contracts was from Intel, a company from whom Apple had considered purchasing modem chips prior to signing the 2013 agreement with Qualcomm. The district court made no finding that any other specific competitor or potential competitor was affected by either of Qualcommôs agreements with Apple, and it is undisputed that Intel won Appleôs business *the very next year*, in 2014, when Appleôs engineering team unanimously recommended that the company s

not have the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market.

Furthermore, ñ[a]s a general rule, ó[p]ast wrongs are not enough for the grant of an injunctionô; [instead,] an injunction will only issue if the wrongs are ongoing or likely to recur.ò *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (quoting *Enricoôs, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir. 1984)); *see also* 15 U.S.C. Ä 53(b) (providing that the FTC ñmayò seek an injunction in federal district court only when the defendant ñis violating, or is

v. JBM Envelope Co., 876 F.3d 1112, 1122 (8th Cir. 2017). Our job is not to condone or punish Qualcomm for its success, but rather to assess whether the FTC has met its burden under the rule of reason to show that Qualcommôs practices have crossed the line to ñconduct which unfairly tends to destroy competition itself.ò *Spectrum Sports*, 506 U.S. at 458. We conclude that the FTC has not met its burden.

First, Qualcommôs practice of licensing its SEPs exclusively at the OEM level does not amount to anticompetitive conduct in violation of Ä 2, as Qualcomm is under no antitrust duty to license rival chip suppliers. To the extent Qualcomm has breached any of its FRAND commitments, a conclusion we need not and do not reach, the remedy for such a breach lies in contract and patent law. *Second*, Qualcommôs patent-licensing royalties and ñno license, no chipsò policy do not impose an anticompetitive surcharge on rivalsô modem chip sales. Instead, these aspects of Qualcommôs business model are ñchip-supplier neutralò and do not undermine competition in the relevant antitrust markets. *Third*, Qualcommôs 2011 and 2013