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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Nathanael M. Cousins, Judge

FEDERAL TRADE COMMISSION, Plaintiff, VS. QUALCOMM INCORPORATED, A DELAWARE CORPORATION, Defendant.	)	**NO. C 17-00220 LHK (NC)**

San Francisco, California
Wednesday, August 9, 2017

TRANSCRIPT OF OFFICIAL ELECTRONIC SOUND RECORDING OF PROCEEDINGS

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Transcribed By: Lydia Zinn, CSR No. 9223, Official Reporter

Wednesday - August 9, 2017 **3:08 p.m.**

THE CLERK: Calling Civil 17-0220, Federal Trade Commission versus Qualcomm Incorporated.

MR. VAN NEST: Good afternoon, Your Honor. Bob Van Nest, of Keker Van Nest and Peters, for Qualcomm. I'm here with my colleague, Alexander Dryer.

THE COURT: Good afternoon.

MR. VAN NEST: And we also have Carol Lam and Mark Snyder here from Qualcomm.

THE COURT: Thanks for being here. Good afternoon.

MS. MILICI: Good afternoon, Your Honor. Jennifer Milici, for the Federal Trade Commission. And I'm joined by Wes Carson, from the Federal Trade Commission.

THE COURT: Good afternoon. Thank you both. Thanks for being here. You can stand up, Mr. Van Nest. We'll kind of have a little back-and-forth on the issues.

MR. VAN NEST: Perfect.

THE COURT: We are making a recording of today's hearing. And there is no transcript that's being made automatically, but either party or both may request one, and we will create one. For that reason, we'll try to restate who's speaking, to make for a good transcript.

Any objection to my ruling on the discovery issues will, of course, go next door to Judge Koh, the trial judge in the case, and must be filed within 14 days of my Order on the

discovery issues.

MR. VAN NEST: Understood, Your Honor.

THE COURT: So that's the scene.

Have there been any further discussions and limiting of the issues, or agreements, or partial agreements, or a changing of the issues between the time of your brief and today?

MR. VAN NEST: I don't believe so, Your Honor, unfortunately.

THE COURT: All right. And let me tell you my thoughts. Having read the papers and the law, and having had some firsthand experience with international antitrust investigations in my past, there are two issues presented.

One is the challenge to the so-called "Dual Submissions"; those that were collected outside the United States, and then came to the FTC and are in the possession, custody, or control -- or all of the above -- of the FTC now. And Qualcomm seeks production of those.

And a principal issue there is comity; not "comedy" -- we need more comedy -- but "comity," with a "t," as to whether the objections raised by the foreign antitrust enforcer should be honored here in this country, and should be a bar to production to Qualcomm in this case.

My instinct on that issue is that I don't see case authority that applies in this circumstance, where the materials are already in the United States, and are already in

the possession of the FTC. There is authority where the materials are outside the United States, and are being sought by a party. That seems to me to be factually distinct from what we're talking about here.

And then, secondly, I'm not overwhelmed by the degree of the objections raised by the foreign antitrust authorities, as far as the privilege or statutory basis that would say these materials can't be produced. I get that they have a preference that these things not be shared here, but as to a strength of saying the FTC should not or may not provide them here -- I don't really see it. It's more than a preference.

So I want the FTC to address the -- sort of the seriousness and degree of the concerns raised by the foreign investigators, because if it's not -- if it's just a suggestion, and not something stronger, then I don't think that carries as much comity weight here in this country. So that's the issue number one. And I'll hear argument from both parties in a moment as to what to do on that score.

And then there's the second issue, which is the assertion of an informant's privilege. And that gets raised in various contexts; both in a criminal context -- and this is not a criminal proceeding, but there's an investigative proceeding here.

And the parties cited to a previous case that I worked on as a Judge -- the *Seafood Peddler* case -- in a different

procedural context, where the Department of Labor asserted an informant's privilege there. And so there is such a privilege. It's a qualified privilege.

And what I'm going to seek more information from the parties on here is how this discussion fits in with the bigger case-management issues in the case; and that is if the FTC is asserting, as it is, an informant's privilege for these documents and for these witnesses, what's going to happen going forward? Are you going to be disclosing that later? Are you going to be agreeing not to use this information at trial or in the case in some way? How are you going to carve out that information from the case, if that's what you're proposing?

Even in a criminal case, which this is not, oftentimes informants are protected at the early stages of the case; but as the case gets closer to trial or at trial, there is an obligation for the prosecution to -- even for someone who might have their life threatened, they still are turned over at or before trial.

And so oftentimes in cases there's just a case-management process of, *All right. If we're not going to disclose it now, maybe down the road it gets disclosed.* And there might be also some substantive way to provide the information, without disclosing all that perhaps in a narrative form.

So I'm interested in both parties' ideas about the case-management ways to provide this; or if the FTC is going to

take the view that this privilege is so strong and inviolate, that you'll never have to disclose it and never should be asked about it, I'll want to hear what your plan is for how that's going to play out if the case goes to trial some day, because my tentative view here is that I think that there are -- I recognize there's a privilege, but that there might be disclosure somehow, some way. The question is when, and what level of detail to allow Qualcomm to investigate and to ask questions in discovery about what's been disclosed to the FTC; but recognizing that these informants have some interest in what's going on, and may have even a basis to at least defer learning of them. So those are my tentative views.

Let's start with the Dual Submissions issue. And if I can hear from the FTC first as to the strength of the objections, and why I should honor that here.

MS. MILICI: Sure. Thank you, Your Honor. On the Foreign Submissions we submitted with our -- with the Letter Brief that -- the letters from both Directorate General for Competition of the European Commission, and the KFTC. And both of those letters expressed the sovereign interest of foreign governments in the nondisclosure of these materials. And those letters stated the position that disclosure to Qualcomm, who is the target of their ongoing investigations, would impede effective law enforcement in those countries, and have an effect on international cooperation.

So in the *Aerospatiale* case, the Supreme Court directed American courts to exercise special vigilance to demonstrate respect for any sovereign interest expressed by a foreign state.

And in this case we have two foreign states who have expressed sovereign interest. And to accord those due respect, courts generally apply the balancing test from *Aerospatiale*. And I think that the factors from that test weigh very heavily against disclosure.

THE COURT: And in applying that balancing test, how should the Court evaluate sort of the strength of the interest expressed? Is it just sufficient to have the other sovereigns say, *We're interested, and want you to not disclose it*; or should the Court -- should I be doing some deeper analysis into the statutory basis for sort of where that interest comes from?

MS. MILICI: Well, I think, Your Honor, that if there are questions for the Court about what the position is of the foreign governments, or what that position is based on, that probably the appropriate thing to do would be to ask for briefing from -- from those agencies. I believe that the KFTC's letter expressed or the EC's letter expressly offered to do that. These were preliminary letters sent to the FTC. Obviously, if the Court has more questions, they would be better positioned to answer those.

THE COURT: And are you in a good position to

communicate to them that request?

MS. MILICI: I believe we can.

THE COURT: All right. Mr. Van Nest, let me hear from you on the comity issue.

MR. VAN NEST: Your Honor, I think we see it pretty much the way you sized it up. This isn't a traditional comity case. I don't think the comity rules even apply.

These are documents that were provided by their authors to the FTC. We're not seeking discovery from foreign authorities. We're not seeking any foreign documents. It's irrelevant to us that these documents were submitted to someone else.

They were submitted to the FTC. They've had the benefit of them to guide their investigation, structure their Complaint, evaluate the facts. And all we're seeking is a level playing field.

I agree with you completely that these are very soft lobs from these authorities. They could have intervened here. They know the schedule. They're in touch with the FTC. They chose not to do that.

We've got a lot of work to do. Judge Koh has us on a very tight time schedule. I think Your Honor's aware of that.

So I don't think the comity rules even apply here. Even if they did, though, their interests haven't really been identified.

Our interest is very clear that these are important,

operative witnesses in the investigation. These statements may or may not be inconsistent with each other. They may be have exculpatory material. We would need them to confront the witnesses. I just think this is sort of a no-brainer, in that this claim is not well made. The privilege is not well stated.

THE COURT: And speak to that; to what you'll do if the information, should you get it -- of course, you're having to speculate a little bit about what might be in there, but as far as the timing of when you've got depositions coming. And I'm thinking here about the remedy, and when things should occur.

MR. VAN NEST: We need these right away. I mean, discovery is under way right now. We have a very tight calendar, where discovery closes early next year. Depositions will begin soon, as soon as summer's over. We have subpoenas out. Some of those subpoenas will take a little time to be responded to. We're already feeling behind. And, as we all know, it's not likely Judge Koh's going to move the trial date, which is January 4th, 2019. There's just a lot to do.

THE COURT: I will go stronger than that, and say she will not move the trial date; but yes, you're being generous.

MR. VAN NEST: There we go. Being polite.

But there's no reason to delay these.

And I think our request is that we get them ASAP. They're in the possession of the FTC. Again, they were provided by the

authors to the FTC. We didn't go to the foreign authorities. They really don't have a dog in this fight.

In the case of the Korean authority, their investigation's done. Right? That one's on appeal.

In the case of the EC, there are some parts of the investigation may be still open; but most of that's closed up, too.

So I really would urge the Court, if you see it our way, to get this done promptly, and have these things turned over so we can conduct further discovery if necessary, pursue further witnesses if necessary, pursue further subpoenas if necessary, because the clock is running, and it's not a long clock.

THE COURT: All right. Thank you.

Let's turn to the informant-privilege issue. So what's the plan? If I uphold your informant privilege now, do you have in mind disclosing something later, or is this going to be through trial? What's your thought?

MS. MILICI: Let me start by explaining a little bit about what's being withheld under the privilege. And what's being withheld are communications with third parties that identify them as informants. The bulk of these materials are e-mails scheduling appointments and scheduling telephone calls.

There's a small subset of documents that are white papers, or presentations. These are not akin to the kind of witness statements that are in the Department of Labor cases. These

are not, you know, factual recitations. So their use as impeachment at trial, I think, is fundamentally different than in some of these other cases with the case-management issues that you mention.

That said, I think that we could revisit this as trial gets closer, and once witnesses have been identified, and, you know, we have some sense of what discovery has been obtained from these third parties.

And we are happy to submit these documents and the other documents withheld as Foreign Submissions for *in camera* review at any time.

THE COURT: So if you have a -- theoretically. I'm not compelling you to identify a particular informant or witness, but if you theoretically have a witness at trial who's going to testify about what Qualcomm did, and they wrote a white paper, or they made a submission, they had a meeting, they had some communication -- e-mails with the FTC -- when is that -- you know, and you're asserting there may not be something exculpatory. I do not know. I haven't seen it. Are you suggesting you will turn over a white paper from that witness before trial; and if so, when? What's your thought on that?

MS. MILICI: Again, I think the thought is that the discussion is somewhat premature; that we don't know who the witnesses are, so we don't know what the content of the

relevant white papers, if there are any relevant white papers, is, and if they would be related at all to potential testimony.

But you know, we would certainly be willing to participate in a process further down the road, once we know what the discovery has been from third parties, and we know who the witnesses are going to be; that the Court can view these documents, and you can make a call.

THE COURT: And at this point in time, you've identified in your Rule 26 -- have you made witness disclosures, at all? I know it's asserted by Qualcomm that there's been already some disclosure of who these -- quote, unquote -- "informants" are, so it's not a big deal to compel more. What have you disclosed so far? And I'm trying to get a better understanding of what remains to be disclosed, as far as your actual witnesses.

MS. MILICI: Sure. We've disclosed our Rule 26 disclosures; a list of entities that are likely to have knowledge about the facts.

We separately disclosed a list of the third parties that submitted documents during the FTC's investigation.

As the case law cited in the brief sets forth, there is a difference in the law between who's a submitter, or who submits a witness statement, and who's an informant.

We only withhold those documents that identify which of those third parties is an informant. If that company also

submitted documents, then we produced all of those documents. If they sat for investigational hearing, we've produced that transcript.

So -- so it's -- the materials being withheld are only the things that identify them as informants, which is different from identifying them as a submitter, or a person with knowledge.

THE COURT: Mm-hm. All right. Mr. Van Nest.

MR. VAN NEST: Your Honor, I was frankly shocked to hear an informant's privilege invoked here, for a couple of reasons.

We have a letter from the FTC, which Your Honor has seen. It lists all of the folks from whom these documents were received. They're all major, multinational, multibillion-dollar corporations. Most of them have self-identified.

For example, in the Korean investigation, NVIDIA, LG, and Huawei -- they've all filed publicly adverse documents expressing their view that Qualcomm did something wrong, and identifying themselves as people that initiated the investigation. Okay?

In the appeal from KFTC, Apple, Samsung, Huawei MediaTek -- they've all intervened and filed adverse pleadings.

Apple has sued us in forums all over the world.

Nvidia has sued us in forums all over the world.

Samsung has filed amicus briefs in this case.

Intel has filed amicus briefs in this case.

A lot of these folks have self-identified.

And every single one of them and every single one on this list I have is a major, multinational corporation. We all know that this informant's privilege is for individuals; generally, confidential informants. All of the cases that they've cited, including Your Honor's case in *Seafood Peddler*, up from San Rafael, that's either employees of a company who blew the whistle, or it's individual confidential informants in drug or gambling investigations.

It wasn't even contemplated -- I don't believe -- that this privilege would apply in an investigation like this, where these folks are publicly campaigning against Qualcomm, and they're all multinational, multibillion-dollar companies.

THE COURT: Are there any cases that limit the informant's privilege to individuals, and not to companies?

MR. VAN NEST: Well, the cases that I've seen, save one, are all individuals.

In other words, if you want to talk about *Roviaro* -- *Roviaro*, the Supreme Court case -- that's a drug case. It's a confidential informant.

Reyes. Confidential informant. Drug case.

Tsannos. Informant in a gambling case.

Hodgson. Employees in a Fair Labor Standards Act case.

Seafood Peddler, same thing.

Martin, same thing.

There's one case, the *Pools* case, where they don't identify whether the so-called "informants" are individuals, or companies; big companies. There's just simply no identification, because that was a civil case here in the U.S. where the FTC intervened, and the statement of the case is very thin. So I haven't seen it.

If -- if the concern is somehow retaliation, or some such thing, we can make these available to outside counsel only.

I mean, I have frankly never been in a situation where this stuff of this nature was handled in this way, or where a privilege was asserted.

Certainly, Your Honor, with respect to the folks I identified that self-identified themselves and are openly adverse publicly campaigning, there's no question there that the privilege doesn't apply, because their identities are known.

So those -- I think there's no question they have to be turned over, and should be turned over, you know, right away. I think that's true for everything on here. This list of 16 or 18 you've got as well as I do, Your Honor -- it's confidential to the clients, so I'm not going to mention the names; but you can peruse this. And you can tell me if there's any little guys on here. I don't think so. And so I think they should be

turned over, too.

If they're really, really concerned about retaliation, then we can limit, you know, who gets access; but again, I really don't want to push this down the road. They've made their Rule 26 disclosures, and we have, too.

Judge Koh has told us, *I'm not moving the schedule. If you guys have to subpoena people* -- and we're subpoenaing people all over the world -- *you've got to do it now. And if you're going to do follow-up discovery, I don't want to hear crying later about the deadline*.

And so, again, they're the ones -- the FTC -- that asked for a short schedule. They pushed for a short schedule. They asked that the schedule be as fast as possible. And, okay, that's what we're stuck with; but then please don't kick the can down the road, as they like to do, and keep us from this stuff. We ought to have it, and we ought to have it as soon as possible.

THE COURT: All right. Thanks.

MR. VAN NEST: Thank you.

THE COURT: Can you address whether the informant privilege should have some special rule for corporate entities?

MS. MILICI: Absolutely. The informant privilege belongs to the Government. And it allows the Government to withhold the identities of those -- furnish information about possible law violations.

The purpose of the privilege is the for the furtherance of protection of the public interest. In law enforcement, that policy applies no matter who the informant is. There's no policy reason to separate individuals from corporations. The interest here is if the -- if these disclosures are allowed, will this chill future communications from industry participants, which, as the declaration we submitted shows, is key information that we rely on for our law-enforcement function? So there's no reason in the policy or the law for treating companies any differently.

And then I'd just also like to respond to this argument that somehow, Qualcomm nose who the informants are. Qualcomm does not know who the informants are. Qualcomm is making guesses about who the informants are. And Qualcomm is arguing that the informant's privilege shouldn't apply any time it knows that -- that there are third parties who are adverse to it; but knowing a third party is adverse to you is not the same thing as knowing which of those third parties is an informant.

And the case law is clear that the informant's privilege is only waived when the defendant knows the identity of the informant as an informant; not that they know that this party thinks that they're violating the law. That's not the test.

The test is: Do they know who the informants are?

And they have not met that test.

THE COURT: And I understand the abstract concern

about law enforcement.

What's the particularized harm here that would be caused, or there's a threat to be caused to the informants?

Other cases -- in a drug case there's an articulable -- a risk that a person's going to be killed, or they're going to disappear. We don't have that sort of assertion in this case. But the informant standard does not necessarily regard that level of concern; but give me your best argument as to what the harm would be if these informants were disclosed either now, or soon.

MS. MILICI: Absolutely. First, I'd like to say that the -- that the case law says that the Government can assert the privilege as a right, and does not need to make a threshold showing that retaliation is likely. So I don't think that that's part of the analysis.

That said, as set forth in the Declaration, this case concerns allegations that Qualcomm is a monopolist supplier; that it controls essential inputs both in technology, and in components; and that it has threatened customers in the past with supply disruptions.

I think in those circumstance, it's not unreasonable for an informant to fear that if their identity was known, that the monopolist who they're complaining about might retaliate against them.

And I would also say that in the case law -- and this

is -- you can see this in the Department of Labor cases that we cited -- the privilege isn't limited to informants who might suffer some, you know, large retaliation. It covers subtle retaliation. It covers social ostracism in cases.

So I think that asking, you know, *What is the big, terrible thing that Qualcomm could do?* is a little bit of the wrong question.

Could Qualcomm retaliate or make life more difficult for these informants?

I think the answer to that is yes. And it's not unreasonable for them to fear that.

THE COURT: And what about the timing? So it's been asserted that Judge Koh has a tight schedule, and that she will not be likely to grant extensions. And I agree that that is unlikely to occur -- her granting an extension. And I'm unlikely to recommend any extension of discovery in the case.

So given that, and the need to have a process in discovery where there's follow-up by both parties on what information you learn, how can I address the concern asserted by Qualcomm that if they don't do this now, then later if they get it, they're going to miss out on an opportunity to follow up on what they do learn from informants?

MS. MILICI: Well, I -- I want to make a couple of points --

THE COURT: Mm-hm.

MS. MILICI: -- to this argument that there's a timing concern here. First of all, we have been offering to meet and confer about a date to exchange privilege logs since -- oh, since discovery started. And they have not engaged in that conversation. So this representation here that there's some timing concern is, I think, not borne out by actions that -- otherwise.

In addition, you know, as we've set forth in the brief, Qualcomm has access to all of the information that it needs to mount a defense. We've produced 370,000 ordinary-course business documents that we received from third parties. We've produced investigational hearing transcripts. They've subpoenaed, you know, more than 40 companies, including every company on that list.

So the idea that they're going to discover something and not have time to subpoena them is, I think, false.

THE COURT: Now, what about the notion of using a Protective Order as a protection for the informant companies and their employees who have disclosed things, restricting the use of that information, which is a lesser protection than barring any discovery, but is some protection, nonetheless? Why wouldn't that be a sufficient protection for them?

MS. MILICI: I think this was addressed in the Seventh Circuit's *Dole* case. A Protective Order just isn't a substitute for nondisclosure for privileged information. And,

you know, I think that for the reasons stated there, that a Protective Order -- it isn't sufficient.

In addition, when this was raised by Qualcomm during meet-and-confers, we said we would be open to discussing modifications to the Protective Order, but to make that possible -- and never received a response.

But I think the Protective Order, as written, would not give sufficient information -- protection to informants, because it does allow in-house counsel to access the materials. And frankly, you know, the case law says that the informant's well-being shouldn't be placed in the hands of third-party counsel who they don't know and don't trust. So I think that there would have to be some limitation to the outside counsel that -- that were allowed to see this; but again, I think that the proper thing is to not produce them, at all.

THE COURT: And what is the status of the privilege reference -- you've referenced that there's been privilege-log negotiations and more conferring. And it's -- of course, everyone's favorite task is to create privilege logs. Are there internal deadlines set for when that's going to occur? Can I help to move that process forward?

MS. MILICI: No. At this -- at this point, we haven't been able to get Qualcomm to commit to when it's going to finish its document production or produce a privilege log. We've been in discussions about that. We're hoping to have

that -- either an agreement or just submit to Judge Koh at the next status conference.

At this point, the FTC is still working through documents, and is -- and hasn't identified all of the privileged documents yet. But we put on a schedule if we were to agree to one --

THE COURT: And the documents that you're seeking to cloak under the informant's privilege -- are those all set forth on a privilege log, or just -- at this moment, just by category here in the Letter Brief?

MS. MILICI: They're just by category now.

I mean, we could produce a privilege log, but we have not. Like I said, we haven't gone through all of the documents yet, so we have -- we probably haven't identified them all yet.

THE COURT: All right. Thank you.

Mr. Van Nest, anything you want to follow up on?

MR. VAN NEST: I would like to respond to a number of things here, Your Honor.

First of all, I think, based on what I know of these documents, they are not only important, but may be critical. These are the arguments that folks have put forward to the FTC. They are the basis in fact for drafting the Complaint, the discovery they took, the investigation they conducted. So to say that they're not a big deal is absolutely wrong. They're critical. And there's nothing else that replaces them. These are, as they put it, the "white papers"; the Advocacy

Documents.

Obviously, as Your Honor knows, in cross-examining some of these folks and conducting further discovery, this is the critical thing: What did they tell the FTC? What did they argue? What are the facts they presented in support of that? Those are critical, number one.

Number two, it's not my point that the law doesn't allow an application of this to a company -- this privilege. My point is that where you're talking about large multinational companies, the concern about retaliation or disclosure is far, far reduced. We all know that. The classic cases are cases where individuals are at risk. So I'm not arguing you could never apply it to a company, but what I am arguing is: This is not such an occasion.

And, as Your Honor notes, a limitation that made these available to outside counsel, which Your Honor could order, is more than enough protection. It's what Your Honor did in the case when Intel was in here, arguing that they didn't want inside Qualcomm folks looking at it. You said, *Okay. Fine. Limit it to the outside lawyers.*

My firm and my co-counsel are pretty well known in this District and in the country. I don't think they really have a concern about us retaliating against anybody. And most of these people -- most of the people on this list are people that Qualcomm has accused of not dealing with, at all. I'm not sure

how you retaliate against another chipmaker. The argument there: You won't deal with them. Okay. I'm not sure what form of retaliation they're worried about. So I think this is trumped up. I think this is a delay tactic.

THE COURT: Is that a capital "T," or lower case?

MR. VAN NEST: Ah. Ha, ha, ha. Well put, Your Honor.

THE COURT: No, no, no.

MR. VAN NEST: We'll keep that lower case.

But I would again urge the Court: Delay is not a good answer.

And I didn't hear them say they're not going to rely on this stuff. I didn't hear them say it's not going to be relevant. We all know that at some point, this stuff is all going to have to come out. And the sooner it does, the better, in terms of keeping this case on track.

Thank you, Your Honor.

THE COURT: Thank you.

MS. MILICI: Your Honor, if I could respond just briefly. We are not going to rely on any of these materials. We have said that in the briefings to the Court. We've said that in multiple letters to Qualcomm. We have no intention of relying on anything we withhold for any purpose.

THE COURT: So what does that mean? So what would be the test of that at trial; that you didn't rely upon some white

paper you got from one of these informants?

MS. MILICI: Well, we're not going to introduce them into evidence. We're not going to use them to cross-examine anyone.

You know, the case that Qualcomm cited was a *Sysco* case, where there were declarations from third parties that were attached to a motion.

That is certainly not how we intend to use these. And this speculation that somehow we relied on these for our allegations is speculation.

Our case is based on the allegations in our Complaint, which do not rely on the white papers, or -- or any of the withheld materials. There we have provided -- we've produced documents from which you could discern the factual basis for our claims. And, you know, the Qualcomm has -- has many avenues in which to -- to discover the relevant facts in this case.

THE COURT: All right. You invited me to do an *in camera* review of some of these materials. And I'm not particularly enthusiastic about the idea, but when it comes to asserting a privilege, one really does need a privilege log to really thoroughly review the quality of the assertions, and also to get a better sense of the volume and some of the details of what's being withheld that sort of look at every document, itself; but again, I'm not seeking to compel

disclosure of something here in open court. But what kind of volume are we talking about? You don't have a log yet, detailing this.

MS. MILICI: Sure.

THE COURT: So are we talking about a million documents? 10,000 documents? A thousand documents? A hundred?

MS. MILICI: Oh.

THE COURT: What's the magnitude of -- if I said, *Give me a privilege log for what's being withheld on the informant's privilege*, how long would that privilege log be?

MS. MILICI: For the informant's privilege, we've currently identified 273 documents, of which -- 50 to 60 of them are substantive. And the remainder are the kind of e-mails I mentioned of, you know, scheduling meetings, or scheduling phone calls, or transmitting substantive materials. But it's a small --

THE COURT: All right. Thanks very much to you both for your arguments.

Here's what I'm going to order. I'm going to give one more week to the FTC to provide any further declarations from the foreign authorities. Of course, you've already presented me with some. I'm not persuaded based on what I've seen so far that I should bar discovery of what's come to the FTC from the foreign authorities; but in the interest of giving full

opportunity, and because you asked for more briefing -- and if they want to, you know, submit it directly to the Court, that's fine with me, or if they want to give it to you, and have you file it, same difference. But I want to give them one more week to give me their best arguments factually as to the reasons that I should withhold production of something produced to them then on the FTC.

Within that same time period, I want to have a privilege log from the FTC, detailing the documents that have been withheld under the informant's privilege. So the -- enough information that I can make a determination as to whether the privilege is properly made, or not. The who, the when, the what description, without revealing the actual privileged information. And that should be provided to Qualcomm, as well.

From there, I may decide that I want to look at the actual documents to get a better or some of the actual documents, to get -- you know, more granular information about what's in there.

My feeling right now is that I -- if I were in Qualcomm's position, I would be wanting to see those materials. Maybe it's just instinctual that if somebody does not want to give it, it must be important; but white papers can be significant in cross-examination, and might be a source of other discovery that will lead to other things. So I want to learn a little more, and give you a chance to establish the informant

privilege with some more specificity.

I won't set a further hearing now. I may want to have a further hearing after I look at those. So those will be due both one week from today, August the 16th, to be filed and provided to Qualcomm.

And I'll issue a ruling after that, or I'll schedule a further hearing to discuss what I've received.

Thanks very much.

MR. VAN NEST: Thank you, Your Honor.

THE COURT: Yes.

MS. MILICI: Your Honor, can I ask one clarifying question?

THE COURT: Yeah.

MS. MILICI: For the privilege log we're going to produce in a week, do you want just the documents that are being withheld under the informant's privilege on that, or do you want --

THE COURT: Yes, just the ones covered by the informant's privilege; the set of roughly 273 you identified would be sufficient. Thanks very much.

MR. VAN NEST: Thank you, Your Honor.

THE COURT: Have a good afternoon.

(At 3:44 p.m. the proceedings were adjourned.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U. S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

Lydia Zinn

August 16, 2017

Signature of Transcriber Date