PAGES 1 - 19

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE NATHANAEL COUSINS

FEDERAL TRADE COMMISSION, PLAINTIFF, VS. QUALCOMM INCORPORATED, A DELAWARE CORPORATION, DEFENDANT.	)	NO. 17-CV-00220-LHK-NMC SAN JOSE, CALIFORNIA WEDNESDAY JUNE 28, 2017

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 1:12 P.M. - 1:36 P.M.

APPEARANCES:

FOR INTERESTED PARTY
WILMER CUTLER PICKERING HALE AND DORR
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BOSTON, MA 02109
BY: JOSEPH J. MUELLER, ESQUIRE

FOR DEFENDANT
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TRANSCRIBED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR
RETIRED OFFICIAL COURT REPORTER, USDC

WEDNESDAY, JUNE 28, 2017 1:12 P.M.

(TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

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PROCEEDINGS

THE CLERK: CALLING CIVIL 17-0220, FEDERAL TRADE COMMISSION VERSUS QUALCOMM, INCORPORATED.

THE COURT: ALL RIGHT. COME ON UP. DON'T BE SHY.

MR. MUELLER: GOOD AFTERNOON, YOUR HONOR. JOE MUELLER ON BEHALF OF INTEL, AND WITH ME IS SHELLY WEBB, ASSOCIATE GENERAL COUNSEL AT INTEL.

THE COURT: GOOD AFTERNOON. WELCOME BOTH.

MS. PELES: GOOD AFTERNOON, YOUR HONOR. NICOLE PELES FROM CRAVATH ON BEHALF OF QUALCOMM. WITH ME IS GARY BORNSTEIN, ALSO FROM CRAVATH.

THE COURT: GREAT. WELCOME BOTH.

WE'RE HERE ON DISCOVERY WITH INTEL HAVING PRESENTED AT DOCKET 110 ITS MOTION FOR A PROTECTIVE ORDER AND, CONVENIENTLY FOR THE COURT, AND THANK YOU FOR THAT CONVENIENCE, WE'VE GOT ATTACHED TO IT EXHIBIT A, WHICH IS INTEL'S PROPOSAL THAT IS NOT AGREED TO BY QUALCOMM, AND EXHIBIT B, WHICH IS A LESS STRENUOUS PROTECTIVE ORDER FROM INTEL'S PERSPECTIVE THAT, AS I UNDERSTAND IT, IS AGREED BY ALL THE PARTIES, AND FTC, OF COURSE, IS NOT PRESENT IN THE COURTROOM, AT LEAST NOT ON THE

RECORD, BUT THEY HAVE AN INTEREST IN HOW THE PROTECTIVE ORDER GETS RESOLVED. AS I UNDERSTAND IT, THEY'VE AGREED TO THE VERSION IN B.

MR. MUELLER: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND THE PRINCIPAL DISPUTE IS AS TO THE USE OF HIGHLY CONFIDENTIAL MATERIAL AND THE ACCESS OF QUALCOMM'S IN-HOUSE COUNSEL TO THOSE MATERIALS, AND THE PROCEDURE THROUGH WHICH THOSE ATTORNEYS MAY OR MAY NOT ACCESS THE HIGHLY CONFIDENTIAL MATERIAL.

IS THAT FRAMING PROPERLY THE DISPUTE?

MR. MUELLER: THAT'S CORRECT, YOUR HONOR. THAT'S THE PRINCIPAL DISPUTE. THERE ARE SOME SMALLER DISPUTES, BUT THAT IS THE CORE DISPUTE.

THE COURT: VERY WELL. AND JUST TO REMIND BOTH PARTIES, ON THE DISCOVERY REFERRAL IN THIS CASE AND THE RELATED CASES HEREIN THE MDL -- AND EITHER PARTY OR BOTH PARTIES, IF I REALLY MESS IT UP, CAN APPEAL TO JUDGE KOH WITHIN 14 DAYS OF ANY RULING ON THE PROTECTIVE ORDER.

WITHOUT NEEDING MUCH EXPLANATION, THE STANDARD FOR PROTECTIVE ORDER IS GOOD CAUSE. THERE IS NO DISPUTE AS TO WHETHER THERE'S GOOD CAUSE FOR A PROTECTIVE ORDER. THE QUESTION IS WHAT ARE THE APPROPRIATE PARAMETERS OF THE PROTECTIVE ORDER IN THIS CIRCUMSTANCE.

I'M INTENDING TO GRANT ONE OF THE PROTECTIVE ORDERS, THE QUESTION IS WHICH ONE SHOULD I CHOOSE. AND, OF COURSE, I

COULD MELD THEM TOGETHER AND TAKE SOME PARTS OF EACH AND FASHION SOMETHING IN BETWEEN AS WELL, BUT I'M STARTING FROM HAVING EXHIBIT A AND EXHIBIT B AS THE TWO PROPOSALS BEFORE ME.

I WOULD APPRECIATE -- THIS, I BELIEVE, IS OUR FIRST HEARING IN THIS CASE -- GETTING A LITTLE BIT OF CONTEXT FROM EACH PARTY, NOT THE CLOSING ARGUMENTS AT TRIAL, THAT'S NOT WHAT WE'RE DOING TODAY, BUT AS TO WHY THIS MATTERS TO EACH PARTY, BOTH FROM QUALCOMM'S PERSPECTIVE, THE ROLE THAT THE IN-HOUSE COUNSEL PLAY IN THIS LITIGATION AND PLAY OUTSIDE THIS LITIGATION, SO HOW IT WOULD IMPACT QUALCOMM IF I GRANTED THE EXHIBIT A VERSION PROPOSED BY INTEL?

AND THEN, CONVERSELY, FROM INTEL, I KNOW WE ARE TALKING ABOUT HIGHLY CONFIDENTIAL INFORMATION, BUT JUST HOW IMPORTANT THIS IS AND SORT OF WHY IT MAKES A DIFFERENCE TO INTEL THAT QUALCOMM'S IN-HOUSE COUNSEL ACCESS OR DON'T ACCESS MATERIAL AND SORT OF WHY THAT MATTERS FROM INTEL'S PERSPECTIVE, BECAUSE THAT IS THE MOST SIGNIFICANT DIFFERENCE BETWEEN THE TWO.

AND FOR THOSE IN THE AUDIENCE, THE KEY QUESTION IS WHOSE BURDEN WILL IT BE LATER ON TO ESTABLISH SOME VARIANCE FROM THESE GROUND RULES, AND THERE ARE VARIOUS APPLICATIONS OF THAT, INCLUDING HOW IT'S ACCESSED, HOW IT'S PRESENTED DURING THE CASE, HOW IT'S PRESENTED AT TRIAL, BUT THE STARTING POINT IS WHO GETS TO SEE IT.

SO WHY DON'T I START, MR. MUELLER, WITH THE INTEL

SIDE, SINCE YOU'RE THE MOVING PARTY HERE, TO GIVE ME SOME MORE CONTEXT AS TO WHY THIS MATTERS FROM INTEL, AND THEN I'LL GET QUALCOMM'S PERSPECTIVE ON WHY IT MATTERS TO THEM.

MR. MUELLER: CERTAINLY, YOUR HONOR. SO I'LL GIVE YOU A BRIEF OVERVIEW OF THE CASE AND HOW THAT LINKS UP WITH THE PARTICULAR ISSUE.

THE COURT: I JUST FRESHLY READ JUDGE KOH'S RULING ON THE MOTION TO DISMISS, WHICH IS AS USUAL VERY THOROUGH AND HAS A LOT OF CONTEXT FOR THE CLAIMS IN THE CASE AND THE PARTIES. SO I DON'T THINK I NEED MUCH ON THAT. BUT IF YOU CAN JUMP FROM THERE INTO WHY THIS MATTERS.

MR. MUELLER: ABSOLUTELY. SO AS YOUR HONOR KNOWS FROM THE DECISION, THERE'S THREE TYPES OF CONDUCT THAT JUDGE KOH EXAMINED AS BASIS FOR THE CLAIMS BROUGHT BY THE FEDERAL TRADE COMMISSION AGAINST QUALCOMM. FIRST, WHAT THE FEDERAL TRADE COMMISSION DESCRIBES AS QUALCOMM'S NO LICENSE, NO CHIPS POLICY; SECOND, THE REFUSAL TO LICENSE STANDARD ESSENTIAL PATENTS TO CHIP COMPETITORS; AND, THIRD A SERIES OF CONTRACTS THAT THE FTC HAS ARGUED ARE EXCLUSIONARY THAT WHERE ARE NEGOTIATED BETWEEN QUALCOMM AND APPLE.

NOW, THE MARKET AT ISSUE OR ONE OF THE MARKETS AT ISSUE IS BASEBAND PROCESSOR CHIPS FOR PREMIUM LTE PRODUCTS, AND THE ONLY QUALCOMM COMPETITOR FOR THAT PARTICULAR MARKET IS INTEL. INTEL IS NOT A PARTY TO THE CASE, BUT THE IMPACT OF THE CONDUCT THAT THE FEDERAL TRADE COMMISSION HAS ASSERTED AS

ANTI-COMPETITIVE IMPACTS QUALCOMM, IMPACTS INTEL AS THE SOLE COMPETITOR TO QUALCOMM FOR PREMIUM LTE CHIPS. AND JUDGE KOH GOES THROUGH INTEL AND ITS RELATIVE RELATIONSHIP TO QUALCOMM AND THE IMPACT OF THE CONDUCT AT ISSUE ON COMPETITORS LIKE INTEL.

SO THE PARTICULAR CONCERNS THAT INTEL HAS IN THIS CASE DERIVE ENTIRELY FROM THE NATURE OF THE CLAIMS IN THE CASE. THERE ARE THESE THREE SETS OF CONDUCT: NO LICENSE, NO CHIPS; REFUSAL TO ENTER INTO STANDARD ESSENTIAL PATENT LICENSES WITH COMPETITORS; AND THE EXCLUSIONARY AGREEMENTS BETWEEN APPLE AND QUALCOMM.

EACH OF THOSE THREE SETS OF CONDUCT INVOLVE LAWYERS. THE FIRST ONE WOULD INVOLVE AT A BARE MINIMUM LICENSING ATTORNEYS, AS WELL AS ATTORNEYS WHO MIGHT BE INVOLVED IN SALES AGREEMENTS OR CONFERRING WITH FOLKS WHO ARE SELLING QUALCOMM CHIPS, BUT THERE'S LEGAL CONDUCT THAT'S INTERTWINED IN THAT FIRST SET OF CONDUCT, NECESSARILY.

SO, TOO, WITH THE SECOND SET, REFUSAL TO DEAL ON STANDARD ESSENTIAL PATENTS. AGAIN, AT A BARE MINIMUM, LICENSING ATTORNEYS WOULD BE INVOLVED IN THAT REFUSAL TO DEAL.

AND THE THIRD PIECE OF CONDUCT ALSO WOULD INVOLVE LAWYERS; THAT IS, THE AGREEMENTS BETWEEN QUALCOMM AND APPLE WHICH WERE DRAFTED, SURELY, WITH THE ASSISTANCE OF LAWYERS.

AND THE POINT IS FOR EACH OF THE THREE TYPES OF CONDUCT THAT ARE AT ISSUE IN THIS CASE THAT HAVE BEEN THE

TARGET OF THE FEDERAL TRADE COMMISSION'S COMPLAINT, LAWYERS' CONDUCT IS INVOLVED. THE QUALCOMM IN-HOUSE LEGAL DEPARTMENT'S CONDUCT IS INVOLVED TO THE DETRIMENT OF THE COMPETITORS IN THE MARKET, INCLUDING INTEL.

SO WE HAVE CONDUCT INVOLVING LAWYERS THAT'S HARMING CHIP COMPETITORS, AND THERE'S ONLY ONE CHIP COMPETITOR IN THE PREMIUM LTE MARKET, INTEL. AND SO THIS CASE, WE BELIEVE PRESENTS A UNIQUE INTERTWINEMENT OF IN-HOUSE LEGAL CONDUCT AND THE PARTICULAR WRONGS AT ISSUE AND THE PARTICULAR HARM TO MY CLIENT, NONPARTY, INTEL.

I WOULD DISTINGUISH THIS FACT PATTERN FROM CASES LIKE A PATENT CASE, FOR EXAMPLE, WHERE THE ALLEGED INFRINGEMENT IS ACTIONS THAT ARE CONDUCTED BY ENGINEERS ON A MANUFACTURING LINE OR IN A LABORATORY, TRADE SECRET THEFT. AGAIN, THAT COULD BE BY TECHNICAL FOLKS WHO ARE NOT WORKING WITH A LEGAL DEPARTMENT.

IN THOSE CIRCUMSTANCES, YOU COULD ENVISION DISCLOSURE OF HIGHLY CONFIDENTIAL TECHNICAL MATERIAL TO IN-HOUSE LAWYERS IN A WAY THAT WOULDN'T JEOPARDIZE THE UNDERLYING OR -- NOT IMPLICATE THE UNDERLYING HARM AT ISSUE, BECAUSE THERE'S A DIVISION BETWEEN THE IN-HOUSE LEGAL FOLKS AND THE CONDUCT BEING TARGETED IN THE CASE; ENGINEERS ON THE ONE HAND, IN-HOUSE LEGAL FOLKS ON THE OTHER.

HERE IT'S ONE IN THE SAME. THE CONDUCT AT ISSUE IS INTERTWINED WITH THE ACTIONS OF QUALCOMM'S IN-HOUSE LEGAL DEPARTMENT. SO THIS IS NOT A CASE WHERE THEY CAN BE SEGREGATED

APART AND WHERE THE LAWYERS IN THE IN-HOUSE GROUP ARE REMOVED FROM THE CONDUCT AT ISSUE IN THIS CASE. IT'S BOUND UP TOGETHER. THAT PRESENTS SPECIAL CONCERNS TO INTEL, BECAUSE IF INTEL'S HIGHLY CONFIDENTIAL MATERIAL RELEVANT TO THE CLAIMS IN THIS CASE, CLAIMS WHICH IMPLICATE THE CONDUCT OF QUALCOMM'S IN-HOUSE FOLKS, WERE GIVEN TO QUALCOMM'S IN-HOUSE FOLKS, IT PRESENTS EXACTLY THE RISK OF THE PARTY WHO'S ACCUSED OF BEING ENGAGED IN WRONGDOING MISUSING THAT INFORMATION.

I WANT TO UNDERSCORE HERE, WE'RE NOT SAYING THIS WILL BE DONE WITH ILL INTENT. THERE COULD BE ALL THE BEST INTENTIONS AND WALLS SET UP AND ALL THE REST. BUT IF INFORMATION ABOUT INTEL'S LICENSES FOR PATENTS OR SALES PRACTICES OR STRATEGIC PLANNING WERE GIVEN TO QUALCOMM IN-HOUSE LEGAL DEPARTMENT PERSONNEL, THERE IS A REAL RISK THAT AT SOME POINT THOSE PERSONNEL COULD BE INVOLVED IN THE TYPES OF CONDUCT THAT IS SQUARELY AT ISSUE IN THE FEDERAL TRADE COMMISSION'S COMPLAINT. AND THAT'S THE CONCERN OF INTEL.

AS WE SAID IN OUR BRIEFING, YOUR HONOR, IF THERE WERE A SHOWING OF TRUE EXIGENT NEED FOR IN-HOUSE PERSONNEL TO HAVE ACCESS TO INTEL'S HIGHLY CONFIDENTIAL INFORMATION, QUALCOMM COULD APPROACH THE COURT AT THAT TIME AND MAKE A SHOWING TO THAT EFFECT. WE DON'T THINK THAT'S GOING TO HAPPEN FOR TWO REASONS. ONE, THE QUALCOMM IN-HOUSE PERSONNEL WOULD HAVE, EVEN UNDER OUR PROPOSAL, ACCESS TO CONFIDENTIAL INTEL INFORMATION. THERE'S TWO TIERS. THERE'S CONFIDENTIAL AND HIGHLY

CONFIDENTIAL. WE ARE NOT DISPUTING THE PROTECTIVE ORDER'S TREATMENT WITH RESPECT TO CONFIDENTIAL INFORMATION, AND THAT CAN BE GIVEN TO A DESIGNATED TO A GROUP OF QUALCOMM IN-HOUSE PERSONNEL.

THE COURT: SORRY TO INTERRUPT. WHAT'S YOUR ESTIMATE OF THE VOLUME OF HIGHLY-CONFIDENTIAL INFORMATION, EITHER IN PERCENTAGE OR SOME OTHER BASIS?

MR. MUELLER: I WOULD SAY ON A PERCENTAGE BASIS, THERE WOULD BE A FAIRLY HIGH PERCENTAGE OF THE MATERIAL THAT'S GOING TO BE REQUESTED BY QUALCOMM AND HAS BEEN REQUESTED IN A SUBPOENA THAT WE'VE RECEIVED SINCE WE FIRST FILED OUR BRIEF, AS WELL AS MATERIAL THAT WAS GIVEN TO THE FEDERAL TRADE COMMISSION BEFORE THIS LITIGATION, WHICH WE UNDERSTAND QUALCOMM HAS REQUESTED FROM THE FEDERAL TRADE COMMISSION.

SO ON A PERCENTAGE BASIS, I'D SAY IT WOULD BE A DECENTLY HIGH AMOUNT. I CAN'T GIVE YOU AN EXACT VOLUME ESTIMATE. BUT THERE WOULD BE SOME INFORMATION THAT WOULD BE NON-HIGHLY CONFIDENTIAL, AND THE IN-HOUSE FOLKS WOULD HAVE THAT.

WITH RESPECT TO THE HIGHLY CONFIDENTIAL INFORMATION, OF COURSE, THEY HAVE HIGHLY EXPERIENCED COUNSEL WHO WILL BE ABLE TO REVIEW ALL OF IT AND WHO HAVE THE ABILITY TO ADVISE THEIR CLIENTS, AS I THINK ALL OF US ARE ACCUSTOMED TO DOING IN MANY, MANY CASES, ABOUT THE IMPORT OF WHAT THEY'VE SEEN AND GIVE THEM THEIR BEST JUDGMENT BASED ON THE INFORMATION THEY

HAVE WHICH WOULD BE COMPLETE AND ABSOLUTE.

SO, REALLY, THE QUESTION IS, IS THERE A NEED FOR QUALCOMM'S IN-HOUSE COUNSEL TO HAVE ACCESS TO THE HIGHLY CONFIDENTIAL INFORMATION, AND, MOREOVER, UNDER *BROWN BAG*, IN THE *BROWN BAG* BALANCING FRAMEWORK, ARE UNDUE RISKS BEING PLACED ON INTEL BY VIRTUE OF SUCH A DISCLOSURE. AND WE WOULD SAY AT LEAST AS DEFAULT IN THIS CASE THE ANSWER IS UNDUE RISK AND BURDEN TO INTEL OUTWEIGHS ANY INCREMENTAL BENEFIT THAT QUALCOMM COULD RECEIVE FROM HAVING IN-HOUSE COUNSEL HAVE ACCESS TO THIS HIGHLY CONFIDENTIAL INFORMATION. AND, AGAIN, WE THINK IT'S REALLY A FUNCTION OF THE PARTICULAR CLAIMS IN THIS CASE.

WHAT WE THOUGHT WAS NOTABLE ABOUT THE COURSE OF THE BRIEFING, YOUR HONOR, IS THAT WE FOCUSED IN OUR OPENING BRIEF ON THE CLAIMS IN THIS CASE, THE SAME CLAIMS JUDGE KOH DEALT WITH TWO DAYS AGO. THE OPPOSITION BRIEF FOCUSED ON THE MODEL PROTECTIVE ORDER IN THE ABSTRACT.

AND, RESPECTFULLY, THAT'S NOT THE ISSUE. THE ISSUE IS THE PARTICULAR CLAIMS AT ISSUE IN THIS CASE AND THE UNIQUE WAY IN WHICH THOSE CLAIMS IMPLICATE THE WORK OF QUALCOMM'S IN-HOUSE COUNSEL. AND INTEL AS A DIRECT COMPETITOR AND A NON-PARTY FACES RISK FROM DISCLOSING ITS HIGHLY CONFIDENTIAL INFORMATION TO THE VERY DEPARTMENT WHOSE CONDUCT IS AT ISSUE IN THIS CASE.

THE LAST POINT I MAKE, YOUR HONOR, IS, AGAIN, WE'RE SAYING THIS WITH ALL DUE RESPECT TO QUALCOMM AND ITS COUNSEL.

WE ASSUME THEY ARE GOING TO TRY TO SET UP SOME SAFEGUARDS, BUT PEOPLE MOVE IN DEPARTMENTS OVER TIME, AS THE CASES RECOGNIZE, AS *BROWN BAG*, FOR EXAMPLE, RECOGNIZES; COMPARTMENTALIZING INFORMATION IS DIFFICULT. AND IN A CASE WHERE THE COURSE OF CONDUCT AT ISSUE IS THE WORK OF THIS DEPARTMENT IN EACH OF THE THREE CATEGORIES AT ISSUE, WE THINK THAT THE RISK THAT FOLKS WILL MIGRATE FROM A POSITION TO ONE WHICH MIGHT INVOLVE ONE OR MORE OF THOSE THREE SETS OF CONDUCT IS TOO GREAT A RISK FOR ITS DIRECT COMPETITOR TO BEAR.

JUST ONE FINAL, FINAL POINT.

THE COURT: I ALREADY GAVE YOU A FINAL, BUT I'LL GIVE YOU ONE MORE FINAL.

MR. MUELLER: SURE. I APOLOGIZE.

THE FINAL, FINAL POINT IS THE COMPETITOR DECISION-MAKING BAR, YOUR HONOR, IN THE CURRENT PROTECTIVE ORDER IS ONE YEAR FROM RECEIPT OF THE INFORMATION, NOT ONE YEAR AFTER THE CASE IS OVER, ONE YEAR AFTER RECEIPT OF THE INFORMATION. AND IT PLACES A BURDEN ON INTEL TO ESTABLISH THAT THE INFORMATION SHOULD NOT BE DISCLOSED AND HOW -- QUALCOMM IN-HOUSE COUNSEL.

SO WHAT WE'RE FACED WITH IS A CIRCUMSTANCE WHERE FOLKS IN THE IN-HOUSE DEPARTMENT AT QUALCOMM WOULD RECEIVE THIS INFORMATION UNLESS WE MET A BURDEN OF SHOWING THEY SHOULDN'T RECEIVE IT, AND THEN ONE YEAR AFTER IT, THEY COULD MOVE INTO A POSITION OF COMPETITIVE DECISION MAKING UNDER THE CURRENT

PROTECTIVE ORDER.

AND THAT'S SIMPLY TOO GREAT A RISK, WE WOULD ARGUE, YOUR HONOR, TO ITS DIRECT COMPETITOR IN THE UNIQUE CIRCUMSTANCES OF THIS CASE.

THE COURT: THANK YOU VERY MUCH.

MS. PELES: A COUPLE OF POINTS IN RESPONSE.

FIRST, QUALCOMM DISAGREES THAT THERE'S A MARKET FOR PREMIUM LTE CHIPS AND ALSO WOULD DISAGREE THAT INTEL IS THE ONLY COMPETITOR, EVEN IF THERE IS SUCH A MARKET. I THINK WE CAN PUT THAT ISSUE ASIDE FOR NOW.

MOST CRITICALLY, INTEL'S ARGUMENT INCORRECTLY ASSUMES THAT ALL OF QUALCOMM'S IN-HOUSE ATTORNEYS HAVE INVOLVEMENT IN THE LICENSING AND SALES PRACTICES THAT ARE AT ISSUE AND ALLEGATIONS IN THE COMPLAINT, AND THAT'S SIMPLY NOT THE CASE.

THERE ARE LAWYERS THAT ARE HOUSED IN THE BUSINESS UNITS AT QUALCOMM THAT DO HAVE RESPONSIBILITY FOR DRAFTING AND NEGOTIATING THOSE AGREEMENTS. THERE IS ALSO A CORPORATE LEGAL DEPARTMENT AT QUALCOMM THAT HAS IN-HOUSE LAWYERS WHOSE PRIMARY BUSINESS RESPONSIBILITIES INCLUDE MANAGING LITIGATIONS LIKE THIS ONE, AND THOSE LAWYERS DO NOT HAVE BUSINESS RESPONSIBILITIES FOR NEGOTIATING THE TYPES OF AGREEMENTS THAT WOULD BE AT ISSUE HERE.

THE LAWYERS WITH BUSINESS RESPONSIBILITIES FOR LICENSING AND CHIP SALES NEGOTIATIONS AND AGREEMENTS WOULD BE BARRED UNDER THE PROTECTIVE ORDER AS CURRENTLY DRAFTED AND

INCLUDING THE EXHIBIT B OF PROVISIONS, WHICH BAR LAWYERS WITH COMPETITIVE DECISION MAKING FROM HAVING DISCLOSURE FOR HIGHLY CONFIDENTIAL INFORMATION.

MOST IMPORTANTLY, THIS IS A DISTINCTION THAT THE SECTION 7.4 PROCESS, WHICH HAS BEEN APPROVED BY THIS COURT, ALLOWS THE COURT TO MAKE AT THE APPROPRIATE TIME WHEN QUALCOMM WOULD MAKE A MOTION UNDER SECTION 7.4 TO DISCLOSE PARTICULAR DOCUMENTS TO PARTICULAR IN-HOUSE LAWYERS, AND AT THAT TIME THE COURT COULD MAKE A DETERMINATION BASED ON A FULLY-INFORMED FACTUAL RECORD AS TO WHETHER IT THINKS THE RISKS TO INTEL OUTWEIGH THE NEED FOR DISCLOSURE. AND SO WE WOULD SUBMIT THAT.

AT THIS POINT WE DON'T HAVE A FULLY-INFORMED FACTUAL RECORD TO MAKE THAT DETERMINATION AND HAVING A CATEGORICAL BAR AT THIS EARLY STAGE IS NOT WARRANTED AND THAT THE PROTECTIVE ORDER WITH THE SECTION 7.4 MECHANISM ADEQUATELY PROTECTS INTEL'S INTERESTS.

THE COURT: LET ME ASK THIS: FROM QUALCOMM'S PERSPECTIVE, WHAT IS THE NEED FOR IN-HOUSE COUNSEL TO ACCESS INFORMATION KNOWING WHAT WE KNOW RIGHT NOW? TELL ME WHAT WOULD BE LOST IF I GRANTED INTEL'S REQUEST.

MS. PELES: CERTAINLY. YOU KNOW, IT'S HARD TO PREDICT ALL OF THE CIRCUMSTANCES THAT COULD ARISE THAT WOULD REQUIRE IN-HOUSE COUNSEL TO HAVE ACCESS TO INTEL'S HIGHLY CONFIDENTIAL INFORMATION, BUT SOME EXAMPLES THAT WE CAN, YOU KNOW, THINK OF TODAY IS, YOU KNOW, QUALCOMM'S IN-HOUSE LAWYERS

HAVE TECHNICAL EXPERTISE. THEY'VE BEEN DOING THIS WORK AND HAVE BEEN INVOLVED WITH QUALCOMM FOR A LONG TIME.

SO TO THE EXTENT THAT WE WANTED THEIR INTERPRETATION OF WHAT CERTAIN DOCUMENTS MEAN, WE WOULD LIKE TO BE ABLE TO AT LEAST SEEK PERMISSION FROM INTEL AND THEN THE COURT IN ORDER TO BE ABLE TO MAKE THAT DISCLOSURE.

THERE COULD BE DOCUMENTS THAT ARE CRITICALLY IMPORTANT TO THE STRATEGIC DECISIONS THE LITIGATION WILL TAKE GOING FORWARD, WHOSE DEPOSITION TO TAKE, WHAT LINE OF QUESTIONING WE MIGHT WANT TO DO, WHETHER WE WANT TO MOVE FOR SUMMARY JUDGMENT ON A PARTICULAR GROUND, AND WITHOUT HAVING THE ABILITY TO DISCLOSE THE FACTUAL BASES ON WHICH WE'RE MAKING THOSE DECISIONS IT WOULD BE, YOU KNOW, PROHIBITIVELY DIFFICULT FOR QUALCOMM'S IN-HOUSE COUNSEL WHO HAVE LITIGATION MANAGEMENT RESPONSIBILITIES TO ACTUALLY EXERCISE THOSE RESPONSIBILITIES.

THE COURT: AND YOU MENTIONED THAT THERE ARE DIFFERENT DEPARTMENTS WITHIN IN-HOUSE WITH DIFFERENT RESPONSIBILITIES; THEY'RE NOT ALL DOING THE SAME THINGS, SOME MIGHT HAVE OVERLAP BETWEEN LICENSING AND LITIGATION, SOME MIGHT NOT. CAN YOU SPECIFY PARTICULAR PERSONS WITHIN THE IN-HOUSE WHO WE COULD CARVE OUT FROM INTEL'S PROPOSAL TO SAY THIS PERSON OR THESE CERTAIN PEOPLE DON'T HAVE THAT OVERLAPPING CONCERN AND DO HAVE A NEED TO ACCESS THE HIGHLY CONFIDENTIAL INFORMATION, SO THEY SHOULD BE PERMITTED TO ACCESS THIS HIGHLY CONFIDENTIAL INFORMATION?

MS. PELES: WE CERTAINLY COULD DO THAT. I DON'T HAVE A LIST SITTING HERE WITH ME TODAY. CERTAINLY, THE FIVE PEOPLE THAT ARE LISTED IN EXHIBIT B TO THE PROTECTIVE ORDER NOW AS IN-HOUSE COUNSEL WHO CAN ACCESS CONFIDENTIAL INFORMATION WOULD BE ON THAT LIST. THERE WOULD LIKELY BE OTHERS. AND, YOU KNOW, IF THE COURT WOULD LIKE IT, WE'D BE HAPPY TO SUBMIT SUCH A LIST.

THE COURT: ALL RIGHT. ANYTHING ELSE THAT YOU THINK I SHOULD CONSIDER IN RULING ON THE MOTION?

MS. PELES: I GUESS ONE OTHER POINT I WOULD MAKE IS THAT, YOU KNOW, INTEL'S COUNSEL MADE THE POINT THAT THE BURDEN WOULD BE ON INTEL TO PROVE THAT DISCLOSURES SHOULD NOT BE MADE, BUT THE -- THAT IS A BURDEN OF PERSUASION THAT IS FOUND IN THE MODEL PROTECTIVE ORDER, BUT THERE IS SIGNIFICANT BURDEN THAT QUALCOMM WOULD HAVE TO UNDERTAKE IN ORDER TO INITIATE THE 7.4 PROCESS, AND INCLUDING PROVIDING DETAILED INFORMATION TO BOTH INTEL AND THE COURT ABOUT THE LAWYERS THAT IT WOULD SEEK TO MAKE DISCLOSURE TO, AS WELL AS THE PARTICULAR DOCUMENTS AT ISSUE.

IT WOULD ALSO, IF INTEL WERE NOT TO CONSENT, QUALCOMM WOULD BE THE ONE MAKING THE MOTION TO A COURT DESCRIBING WITH REASONABLE PARTICULARITY WHY IT FEELS DISCLOSURE IS NECESSARY, AS WELL AS, YOU KNOW, WHAT TYPES OF PROTECTIONS ARE PUT IN PLACE TO GUARD THE RISK OF DISCLOSURE OF INTEL'S HIGHLY CONFIDENTIAL INFORMATION.

THE COURT: ALL RIGHT. MR. MUELLER -- THANK YOU. THERE'S ONE OTHER ISSUE I WANTED TO ADDRESS. THAT'S PARAGRAPH 15 OF THE EXHIBIT A PROPOSAL, AND THAT CONCERNS THE USE OF DESIGNATED MATERIAL AT TRIAL OR HEARING, SOMETHING THAT WAS ADDRESSED IN THE BRIEFS.

MY CONCERN IS THIS PARAGRAPH CONCERNS A TRIAL IN FRONT OF ANOTHER JUDGE, AND THAT'S JUDGE KOH, AND SHE MAY HAVE SOME CONCERNS ABOUT THE TYING OF HER HANDS AS TO HOW THINGS WILL BE USED AT TRIAL, AND SHE MIGHT FIND THIS TO BE OVERLY STRUCTURED IN PREVENTING HER ORDERLY PRESENTATION OF EVIDENCE AT TRIAL OR HEARING.

I'M CONCERNED BY THAT, BUT I DON'T KNOW HOW SHE'LL RESPOND. SO I WILL PUT AS A CAVEAT, IF I WERE TO GRANT THIS PARAGRAPH, SHE MIGHT DISAGREE WHEN YOU ACTUALLY GET TO A HEARING OR TRIAL AND MIGHT IMPOSE SOMETHING DIFFERENT. JUST BUYER BEWARE, EVEN IF I GRANT THAT REQUEST, IT DOES NOT PREVENT JUDGE KOH FROM VARYING THE RULE AT HEARING OR TRIAL AND REQUIRING SOMETHING DIFFERENT.

MR. MUELLER: UNDERSTOOD, YOUR HONOR. MAY I BRIEFLY RESPOND?

THE COURT: VERY BRIEFLY.

MR. MUELLER: JUST VERY BRIEFLY, YOUR HONOR.

TWO POINTS. FIRST, THAT WITH RESPECT TO THE NEED FOR QUALCOMM IN-HOUSE COUNSEL TO USE THE INFORMATION, TO THE EXTENT THAT THE QUALCOMM IN-HOUSE COUNSEL HAVE PARTICULAR SUBJECT

MATTER EXPERTISE THAT WOULD LEND ITSELF TO AN ANALYSIS OF THE MATERIALS PRODUCED BY INTEL, THAT'S EXACTLY OUR CONCERN, THAT THEY WOULD HAVE THAT EXPERTISE AND THAT PRESENTS THE RISK WE'RE CONCERNED ABOUT. IF THEY DON'T HAVE THAT PARTICULAR EXPERTISE, THERE'S LESS NEED SHOW IT TO THEM.

AND (INDISCERNIBLE) WE'VE ALL DEALT WITH SITUATIONS IN WHICH WE DON'T HAVE THE ABILITY TO SHOW THESE TYPES OF MATERIALS TO IN-HOUSE COUNSEL, AND WE'VE ALL FOUND WAYS TO NONETHELESS ADVISE OUR CLIENTS WITH RESPECT TO SUMMARY JUDGMENT AND LINES OF QUESTIONING AT DEPOSITIONS AND THE LIKE.

SECOND POINT, YOUR HONOR, IS WITH RESPECT TO THE EXISTING PROTECTIVE ORDER, THE BURDEN, THE ULTIMATE BURDEN UNDER PARAGRAPH 7.4 WOULD BE ON INTEL TO SHOW THAT DISCLOSURE TO DESIGNATED HOUSE COUNSEL WOULD RISK HARM THAT WOULD OUTWEIGH THE RECEIVING PARTY'S NEED TO DISCLOSE, AND THAT'S THE BURDEN WE'RE CONCERNED ABOUT. WE DON'T THINK THAT BURDEN SHOULD FALL ON A NON-PARTY DIRECT COMPETITOR WHO THE FTC IS BEING HARMED BY THE VERY CONDUCT AT ISSUE IN THE CASE.

FINALLY, THAT'S AMPLIFIED BY THE COMPETITIVE DECISION-MAKING BAR, WHICH, AS I MENTIONED, IS ONLY ONE YEAR FROM RECEIPT, MEANING A QUALCOMM IN-HOUSE LAWYER COULD RECEIVE THE INFORMATION TODAY, ONE YEAR FROM NOW MOVE INTO A DIFFERENT POSITION THAT INVOLVES COMPETITIVE DECISION MAKING, INCLUDING IN THE THREE SETS OF CONDUCT BEING CHALLENGED BY THE FTC AND THAT, AGAIN, MAGNIFIES OUR CONCERN.

LAST THING, YOUR HONOR, IS UNDER OUR PROPOSAL THEY COULD APPROACH YOUR HONOR AND SAY: WE HAVE DISCRETE INFORMATION THAT WE NEED TO SHOW IN-HOUSE COUNSEL. WE SAID THAT IN OUR BRIEF. IF THAT CIRCUMSTANCE ARISES, WE COULD BE BACK IN FRONT OF YOUR HONOR, BUT WE BELIEVE ON THE FACTS OF THE CASE, THE CLAIMS IN THE CASE, THE PRESUMPTIVE APPROACH SHOULD BE NO DISCLOSURE OF INTEL HIGHLY CONFIDENTIAL INFORMATION.

THE COURT: THANKS VERY MUCH. HERE'S MY RULING FOR THE MOTION ON PROTECTIVE ORDER.

I'M GRANTING INTEL'S REQUEST FOR PROTECTIVE ORDER AND WILL ENTER THE FORM IN EXHIBIT A ATTACHED AS 110-2 IN THE DOCKET. THE REASONS ARE I FIND THERE'S GOOD CAUSE FOR THAT.

IN PARTICULAR, IT'S THE CIRCUMSTANCES OF THIS CASE WITH THE CHARGES IN THIS CASE AND THE PROCEDURAL POSTURE OF THIS CASE. SO I'M NOT SUGGESTING THAT THE COURT'S STANDARD PROTECTIVE ORDER SHOULD BE MODIFIED IN A WAY THAT EVERY CASE WILL HAVE THIS SHIFTING OF BURDEN, BUT IN THIS CIRCUMSTANCE WITH THE ALLEGATIONS AGAINST QUALCOMM AND THE PROFFERED ROLE OF COUNSEL IN THE COMPANY, AND GIVEN THE TYPE OF INFORMATION THAT HAS ALREADY BEEN PRODUCED TO THE FTC AND IS SUBJECT TO SUBPOENA TO QUALCOMM, I AGREE WITH INTEL'S PRESENTATION THAT THE RISK OUTWEIGHS THE BENEFIT BASED ON THE RECORD BEFORE ME.

BUT IN SO RULING, IF THERE'S A PARTICULAR -- IN THE FUTURE, IF THERE'S A PARTICULAR IN-HOUSE ATTORNEY OR PARTICULAR SET OF IN-HOUSE ATTORNEYS WHO CAN DEMONSTRATE WITH MORE

PARTICULARITY DOWN THE ROAD THAT THERE'S A PIECE OF INFORMATION THAT THEY DO NEED TO ACCESS AND CAN EXPLAIN WHY, HAPPY TO COME BACK TO HAVE A FURTHER DISCUSSION ABOUT THAT. THAT WILL BE LESS ABSTRACT. IT MIGHT BE IN CONNECTION WITH A PARTICULAR MOTION OR A PARTICULAR HEARING OR A PARTICULAR PIECE OF EVIDENCE, AND THEN WE CAN GRAPPLE WITH WHETHER THAT PARTICULAR SET OF INFORMATION SHOULD BE SHARED WITH THOSE INDIVIDUALS.

HERE WE'RE SETTING A TEMPLATE FOR WHAT'S GOING TO TAKE PLACE OVER THE COURSE OF THE CASE, AND I THINK THE APPROPRIATE AND PROTECTIVE TEMPLATE, RESPECTING THAT INTEL IS A THIRD PARTY HERE, IS THE FORM THAT THEY HAVE SUGGESTED TO THE COURT IN EXHIBIT A.

SO I'M GOING TO ENTER THAT EXHIBIT, KNOWING THERE MIGHT BE CONTINUED NEED FOR FURTHER CONFERRING AND MODIFICATION DOWN THE ROAD DEPENDING ON WHAT PARTICULAR CIRCUMSTANCES COME UP IN THE CASE.

THAT'S THE COURT'S ORDER. THANK YOU VERY MUCH.

MR. MUELLER: THANK YOU, YOUR HONOR.

MS. PELES: THANK YOU, YOUR HONOR.

THE COURT: HAVE A GOOD DAY.

(PROCEEDINGS ADJOURNED AT 1:36 P.M.)

CERTIFICATE OF TRANSCRIBER

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.



JOAN MARIE COLUMBINI

JULY 28, 2017