

EXHIBIT A

2008-1348, -1381, -1382

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

QUALCOMM INCORPORATED,
Plaintiff-Appellant,

and

JAMES R. BATCHELDER, CHRISTIAN E. MAMMEN,
and KEVIN K. LEUNG,
Sanctioned Parties-Appellants,

and

LEE PATCH,
Sanctioned Party-Appellant,

v.

BROADCOM CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of California in Case No. 05-CV-1958, Senior Judge Rudi M. Brewster.

**BROADCOM CORPORATION'S
EMERGENCY MOTION TO DISMISS APPEAL OF
QUALCOMM INCORPORATED**

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Dated: June 2, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Qualcomm Incorporated v. Broadcom Corporation

Appeal Nos. 2008-1348, -1381, -1382

CERTIFICATE OF INTEREST

Counsel for Appellee **Broadcom Corporation** certifies the following:

1. The full name of every party or amicus represented by WilmerHale is:

Broadcom Corporation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by WilmerHale is:

Broadcom Corporation

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by WilmerHale are:

N/A

4. There is no such corporation as listed in paragraph 3.

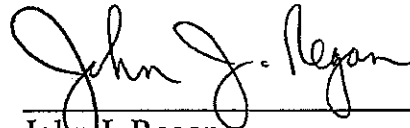
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by WilmerHale before the trial court or agency, or expected to appear in this court, are:

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I. INTRODUCTION

Broadcom Corporation (“Broadcom”) files this emergency motion seeking to dismiss the instant appeal, in which plaintiff-appellant, Qualcomm Incorporated (“Qualcomm”), impermissibly challenges a district court’s interlocutory order. Qualcomm’s appeal should be dismissed for lack of jurisdiction. The order from which Qualcomm appeals merely remanded the case to the magistrate judge for furthering proceedings. As such, it is not a final decision from which an appeal may be filed.

Broadcom further respectfully requests that the Court expedite the briefing schedule associated with its emergency motion to dismiss to require any opposition by Qualcomm to be filed by June 9, 2008, and to further require any reply by Broadcom to be filed by June 11, 2008. As described more fully herein, the remand proceedings before the magistrate court are well underway. Qualcomm’s appeal is nothing more than an improper attempt to delay these proceedings, and should be denied.

II. BACKGROUND

A. The Underlying Jury Trial

This appeal arises from ongoing sanctions proceedings, following the revelation that Qualcomm concealed tens of thousands of highly relevant,

discoverable documents during its patent infringement suit against Broadcom.¹ (See Ex. B [Sanctions Order] at 1.) These documents were highly relevant to Broadcom's defense that Qualcomm had waived its right to assert the two patents-in-suit. (*Id.* at 3.) During the pretrial, trial, and post-trial proceedings in the underlying action, Qualcomm steadfastly made false representations regarding the waiver issue—statements expressly contradicted by the thousands of pages of documents improperly withheld by Qualcomm. (*Id.* at 16-18.)

When Qualcomm's concealment was finally exposed on the last day of testimony during trial, Broadcom moved for sanctions. (*Id.* at 1.) The trial judge

¹ In the underlying proceeding, Qualcomm accused Broadcom of infringing U.S. Patent Nos. 5,452,104 and 5,576,767, each of which Qualcomm claimed was essential to practice the H.264 standard used in certain Broadcom products. In response to Qualcomm's allegations, Broadcom asserted several defenses, including that Qualcomm had waived its right to assert its purportedly essential intellectual property rights by virtue of its deceptive and misleading conduct before the Joint Video Team ("JVT"), the standards-setting working group responsible for the development of the H.264 standard. (See Ex. B [Sanctions Order] at 3.) Throughout the pre-trial and trial proceedings, Qualcomm falsely denied having participated in the JVT during the development of the H.264 standard. (See *id.* at 7.)

Following a three-week trial, at which Qualcomm's misrepresentations were exposed, the jury found that Broadcom had not infringed either of Qualcomm's patents. The jury also made an advisory finding that Qualcomm had waived its rights to assert the patents-in-suit by virtue of its standards misconduct. (See *id.* at 10.) Thereafter, the District Court held a further hearing regarding the waiver defense, and affirmed the jury's advisory verdict of waiver. (See *id.* at 11.)

referred the sanctions motion to a magistrate judge, pursuant to 28 U.S.C. § 636(b).
(*Id.*)

B. The District Court's Show Cause Order

During the course of the sanctions proceeding, the magistrate judge issued an order to show cause why nineteen of Qualcomm's outside attorneys should not be sanctioned for their role in Qualcomm's concealment of the discoverable documents. (*See* Ex. A. [Remand Order] at 1.) In responding to the order, the outside attorneys sought permission to disclose attorney-client privileged information pursuant to a common law self-defense exception. (*Id.*) Qualcomm did not oppose the motion, provided that the hearing could be sealed with Broadcom excluded. (*Id.* at 4.) The magistrate denied the motion. (*Id.* at 1.)

C. The Magistrate's Order Recommending Sanctions

On January 7, 2008, the magistrate judge issued an Order Granting in Part and Denying in Part Defendant's Motion for Sanctions and Sanctioning Qualcomm, Incorporated and Individual Lawyers. (*See* Ex. B [Sanctions Order].) In its Order, the Magistrate Court awarded Broadcom all of its attorneys' fees and costs incurred in the underlying proceeding, which totaled approximately \$8.5 million dollars. (*Id.* at 36.) The Magistrate Court also referred six of Qualcomm's former outside attorneys to the California State Bar for investigation. (*Id.* at 37.) Finally, the Magistrate Court ordered the six former outside attorneys and five

current Qualcomm in-house attorneys to participate in a comprehensive Case Review and Enforcement of Discovery Obligations (“CREDO”) program designed to identify the cause of the discovery failures that occurred in the underlying proceeding and to develop a protocol that would prevent such failures in future litigation. (*Id.* at 38.)

The six sanctioned outside attorneys filed timely objections to the magistrate’s order, objecting to, among other things, the fact that they were denied the opportunity to submit privileged information in the course of their defense. (*See* Ex. A [Remand Order] at 2, 4.) In contrast, Qualcomm chose to accept the sanctions imposed on it and did not file any objections to the magistrate’s order, thus waiving any objections to the magistrate’s sanctions order.² (*Id.* at 2.) Qualcomm also chose not to respond to the objections of its outside counsel. Instead, on January 31, 2008, Qualcomm paid Broadcom the \$8,568,633.24 in attorneys’ fees and costs that the magistrate judge had ordered as part of her sanctions ruling. (*See* Ex. G [Ltr. from Counsel to Qualcomm to J. Brewster].)

In addition to paying Broadcom’s attorneys’ fees, Qualcomm continued to participate in the ongoing CREDO protocol ordered by the magistrate judge.

² Because Qualcomm did not file objections to the magistrate judge’s order underlying the district court’s order from which Qualcomm now appeals, Qualcomm has waived any right to appeal the district court’s adjudication of that order. Broadcom reserves its rights to raise all such arguments at the appropriate time in this Court and in the district court.

Throughout the spring of 2008, Qualcomm and its former outside counsel met several times to discuss the formulation of the CREDO protocol. (*See* Ex. F [Hr'g. Tr. (Mar. 20, 2008)] at 3-4.) On March 19, 2008, Qualcomm provided a first draft of the CREDO protocol to the Court and Broadcom for review and comment. (*See id.*)

D. The District Court's Remand Order

On March 5, 2008, following consideration of the outside attorneys' objection, the district court issued the order contested in this appeal. (*See* Ex. A [Remand Order].) In that order, the district judge held that the objecting attorneys should have been allowed to introduce privileged information pursuant to the self-defense exception. (*Id.* at 5.) The district court vacated the portion of the magistrate judge's order imposing sanctions on the objecting attorneys and remanded the case to the magistrate for further proceedings. (*Id.* at 5-6.) The March 5 Order also noted that because "Qualcomm did not file objections to the [magistrate's] Order, . . . the Order is final as to it." (*Id.* at 2.)

E. The Ongoing Remand Proceedings

On March 20, 2008, Qualcomm, Broadcom, and the six former outside Qualcomm attorneys appeared before the magistrate to discuss further proceedings following the March 5, 2008 remand order. (*See* Ex. F [Hr'g Tr. (Mar. 20, 2008)].) During that status conference, the magistrate ruled that, although the CREDO

process was vacated as to the six former outside Qualcomm attorneys, Qualcomm must continue and complete the CREDO process. (*Id.* at 21.)

The magistrate further held that, in light of certain factual disagreements between Qualcomm and its former outside attorneys as to who bore responsibility for the discovery violations, an evidentiary hearing would be necessary. (*Id.* at 22.) The magistrate ruled that, consistent with the remand order, Broadcom could fully participate in such proceedings. (*Id.* at 42.) Thereafter, following two additional status conferences, Broadcom, the former outside Qualcomm attorneys, and Qualcomm served written discovery and motions practice then ensued.

F. Qualcomm's Premature Notice of Appeal

On May 5, 2008, although it had failed to earlier object to the magistrate's order, and despite significant ongoing proceedings before the Magistrate, Qualcomm filed a notice of appeal in this Court. (*See* Ex. C [Notice of Appeal].) In its docketing statement, Qualcomm specifically and solely relied on 28 U.S.C. § 1295 as grounds for its appeal. (*See* Ex. E [Docketing Statement] at 1.) Qualcomm filed its notice of appeal despite the fact that the district court had not entered final judgment pursuant to Federal Rule of Civil Procedure 54(b), or designated the issues posed in the March 5 order as worthy of immediate appeal pursuant to 28 U.S.C. § 1292(b).

On May 29, 2008, citing a lack of jurisdiction in light of the appeal, the magistrate judge issued an order *sua sponte* staying the remanded proceedings, which had been ongoing, pending the appeal's outcome. (See Ex. D. [Order to Stay].)

III. ARGUMENT

Qualcomm's appeal should be dismissed for lack of jurisdiction because it improperly seeks review of an interlocutory district court order remanding for further proceedings—i.e., a non-final order.

A. The Court Lacks Jurisdiction to Adjudicate This Appeal Because Qualcomm Is Appealing A Non-Final Order.

Qualcomm's premature and improper appeal threatens to short-circuit the related lower court proceedings that have yet to be resolved. However, this Court's jurisdiction is limited to fully-resolved cases, a limitation that exists for the very purpose of preventing parties from making this sort of end-run around lower court proceedings. Accordingly, Qualcomm's appeal should be dismissed for want of jurisdiction.³

Subject to certain limited exceptions, none of which are relevant here, this Court only has jurisdiction to hear appeals from patent cases in which the order appealed is a "final decision." 28 U.S.C. § 1295(a)(1). A final decision is one that

³ This Court applies its own law in determining the scope of its jurisdiction. *Nystrom v. TREX Co.*, 339 F.3d 1347, 1349-1350 (Fed. Cir. 2003).

“ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Intern. Elec. Tech. Corp. v. Hughes Aircraft*, 476 F.3d 1329, 1330 (Fed. Cir. 2007) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). It is not enough for the order to be final as to some subset of the issues; a final decision must resolve “*all claims for all parties.*” *Syntax Pharm. Intern., Ltd. v. K-Line Pharm., Ltd.*, 905 F.2d 1525, 1526 (Fed Cir. 1990) (emphasis added). This finality requirement is jurisdictional; Qualcomm’s inability to satisfy it precludes appellate review. *See Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1362 (Fed. Cir. 2003).

The district court’s March 5 Order “*Remanding in Part*” explicitly contemplates further proceedings, and is therefore not a final decision. *See Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1371 n.1 (Fed. Cir. 2007) (noting that “remand orders are typically not appealable”); *see also Giraldes v. Prebula*, No. 06-15690, 2008 WL 1961017 (9th Cir. May 6, 2008) (unpublished); *Scott v. Bazzle*, 212 Fed. Appx. 185 (4th Cir. 2007) (unpublished).⁴

Nor can Qualcomm claim that it has an immediate right of appeal because the March 5 Order states that it is “final” as to Qualcomm. (*See* Ex. A [Remand Order] at 3. A “final” order is one that “leaves nothing for the court to do but

⁴ These cases applied the finality requirement in the context of 28 U.S.C. § 1291. That statute “mirrors” section 1295. *See Nystrom*, 339 F.3d at 1350.

execute the judgment.” *Intern. Elec. Tech. Corp.*, 476 F.3d at 1330. Here, much remains to be done at the district court. Qualcomm, Broadcom, and the objecting attorneys were in the midst of discovery when Qualcomm’s notice of appeal halted the proceedings.⁵ Qualcomm has issued document requests to each of the six the objecting attorneys, has subpoenaed documents from their former outside counsel, Day Casebeer Madrid & Batchelder LLP, and has received five sets of document requests from Broadcom and the objecting attorneys. The objecting attorneys have filed three motions to compel against Qualcomm, and Qualcomm itself filed a motion for a protective order, all of which are pending before the magistrate court. Qualcomm’s actions – all of which were taken subsequent to the remand order – belie any contention that even it believes the order from which it appealed left “nothing . . . to do.”

In addition, the court-ordered CREDO process arising out of these sanctions proceedings is still underway. On April 11, 2008, Qualcomm submitted its most current draft of the CREDO protocol, which is subject to comment by the magistrate court and Broadcom. The final CREDO protocol will necessarily be informed by the ongoing sanctions proceedings before the magistrate court.

⁵ Any suggestion that Qualcomm’s appeal is somehow independent from the matters remanded to the magistrate judge is belied by Qualcomm’s docketing statement, which expressly states a desire to disrupt those proceedings. (*See* Ex. E [Docketing Statement].)

Nor is the order final as to Broadcom, a party to the case. To avoid “the harassment and cost of a succession of separate appeals from various rulings to which a litigation may give rise,” parties cannot appeal as their individual claims are finalized, but must wait until *all claims for all parties* have been resolved. *Pause Tech. LLC v. TiVO Inc.*, 401 F.3d 1290, 1293 (Fed. Cir. 2005) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). The district court’s remand order explicitly provided that Broadcom would have full rights to participate in the remand proceedings. (*See* Ex. A [Remand Order] at 3.) Consistent with that ruling, Broadcom has been participating by serving document requests and deposition notices on Qualcomm, and by filing a motion to compel against Qualcomm, which remains pending. The court has also ordered that Broadcom be permitted to participate in the CREDO process. (*See* Ex. B [Sanctions Order] at 40 n.21.) Broadcom has been participating in that process, which, as discussed above, is still underway.

In addition, even Qualcomm does not contend that its appeal fits into any of the narrow categories of cases in which this Court has jurisdiction to hear appeals from orders that are not final. (*See* Ex. E [Docketing Statement]); *see also Nystrom*, 339 F.3d at 1350. Specifically:

- the March 5 Order does not concern an injunction, *see* 28 U.S.C. § 1292(a)(1), (c)(1);

- the remaining proceedings involve much more than a final accounting, *see* 28 U.S.C. § 1292(c)(2); and
- the district court has not entered final judgment as to Qualcomm or certified its objections for immediate appeal, *see* Fed. R. Civ. P. 54(b); 28 U.S.C. § 1292(b), (c)(1), § 1295(a)(1).

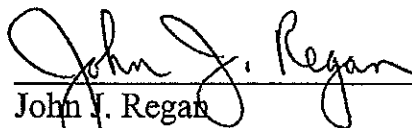
Finally, because all of the issues encompassed by the March 5 Order can be adequately addressed in an appeal following the district court proceedings, Qualcomm's is not the extraordinary case in which the collateral order doctrine could provide jurisdiction to review an interlocutory order. *See, e.g. Quantum Corp. v. Tandom Corp.*, 940 F.2d 642, 644 (1991).

The March 5 Order was not final. Qualcomm's appeal is premature, and this Court does not have jurisdiction to hear it.

IV. CONCLUSION

For the foregoing reasons, Broadcom respectfully requests that this Court dismiss Qualcomm's appeal. Broadcom further respectfully requests that this Court expedite the briefing schedule associated with Broadcom's emergency motion to dismiss to require any opposition by Qualcomm to be filed by June 9, 2008, and to further require any reply by Broadcom to be filed by June 11, 2008.

Respectfully submitted,



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