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BROADCOM CORPORATION

15 UNITED STATES DISTRICT COURT
16 SOUTHERN DISTRICT OF CALIFORNIA
17

18 QUALCOMM INCORPORATED,
19 Plaintiff,
20 v.
21 BROADCOM CORPORATION,
Defendant.
22

Case No. 05 CV 01958 B (BLM)

**BROADCOM CORPORATION'S
OPPOSITION TO QUALCOMM INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
QUALCOMM INC.'S MOTION REGARDING
REMAND PROCEEDINGS**

Date: April 30, 2008
Time: 10:00 a.m.
Judge: Hon. Barbara L. Major

24 AND RELATED COUNTERCLAIMS
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1 **I. INTRODUCTION**

2 Qualcomm Incorporated's ("Qualcomm") Motion¹ to "clarify" the scope of Judge
 3 Brewster's March 5, 2008 Order Remanding In Part Order of Magistrate Court Re Motion for
 4 Sanctions Dated 1/07/08 ("Remand Order") is entirely without merit. Rather, Qualcomm's
 5 Motion is nothing more than an attempt to conceal the full scope of its discovery misconduct in
 6 *Qualcomm Inc. v. Broadcom Corp.*, Civil Action No. 05-1958, by excluding Broadcom
 7 Corporation ("Broadcom") from the Remand Proceedings.

8 Qualcomm's Motion, and its efforts to exclude Broadcom from the Remand Proceedings
 9 are improper for, at least, four reasons. **First**, as is clear from the Remand Order, the information
 10 concerning Qualcomm's discovery misconduct is not privileged. **Second**, Qualcomm seeks to
 11 use its Motion to impermissibly limit the scope of discovery in the Remand Proceedings. **Third**,
 12 Broadcom's participation in the Remand Proceedings is proper and consistent with both this
 13 Court's and Judge Brewster's orders. **Fourth**, as a result of its ongoing litigation with
 14 Qualcomm, Broadcom has a vested interest in fully participating in the Remand Proceedings and
 15 ensuring that Qualcomm finally complies with its discovery obligations.

16 **II. ARGUMENT**

17 **A. Information Concerning Qualcomm's Discovery Misconduct Is Not**
 18 **Privileged.**

19 In its Motion, Qualcomm repeatedly requests that the Court protect or limit from
 20 disclosure to Broadcom the allegedly "privileged information" that is "necessary for the
 21 Responding Attorneys to respond to the OSC." (Qualcomm Mot. at 1, 2, and 4.) Qualcomm
 22 claims that permitting Broadcom access to such information will "provide an unfair advantage to
 23 Broadcom in other litigations" and cause "serious" damage to "Qualcomm's interests." (*Id.*)

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 27 ¹ As used herein, "Motion" refers to Qualcomm's Memorandum Of Points And Authorities
 28 In Support Of Qualcomm Incorporated's Motion Regarding Remand Proceedings, filed on April
 2, 2008, Docket No. 763-2.

1 Qualcomm's assertions are without merit, and contrary to Judge Brewster's clear ruling in his
2 Remand Order.

3 In deciding in the Remand Order that the self-defense exception applies to the attorney-
4 client privilege, Judge Brewster specifically stated that:

5 The exception applying, the communications and conduct relevant
6 to the topic area of records (electronic or other) discovery
7 pertaining to the JVT and its parents, its ad-hoc committees, and
8 any other topic regarding the standards setting process for video
9 compression technology *is not privileged information*. *Weil v.*
Investment/Indicator, Research & Mgmt., Inc., 674 F.2d 18, 24 (9th
Cir. 1981).

10 (emphasis added) (Mar. 5, 2008 Remand Order at 6.) The information that Broadcom has
11 requested in its discovery requests to Qualcomm is consistent with Judge Brewster's ruling. (See
12 Saxton Decl., Ex. A, Broadcom Corporation's Third Set of Requests for Production to Qualcomm
13 Inc., Nos. 116-125).² Accordingly, there is no basis for Qualcomm's assertion that "the
14 substantive issues or facts that were the subject of the underlying lawsuit," and "privileged
15 communications concerning the standards-setting process itself unrelated to the selection of
16 document custodians or document collection," (Qualcomm Mot. at 3) are beyond the scope of
17 these Remand Proceedings and its related discovery.

18 Moreover, given Judge Brewster's ruling regarding the self-defense exception, this
19 information is not, as Qualcomm improperly suggests, privileged. *GPA Inc. v. Liggett Group,*
20 *Inc.*, No. 94 CIV. 5735 AGS, 95 CIV 2652 AGS, 1996 WL 389288, at *3 (S.D.N.Y. July 10,
21 1996) (where the application of the self-defense exception "flows from an attack by the client on
22 the attorney, it is appropriately viewed as a waiver of the privilege by the client").³ Qualcomm
23

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25 ² As used herein, "Saxton Decl." refers to the Declaration of Kate Saxton in Support of
26 Broadcom Corporation's Opposition To Qualcomm Inc.'s Memorandum of Points And
Authorities In Support Of Qualcomm Inc.'s Motion Regarding Remand Proceedings.

27 ³ Qualcomm's reliance on *In re National Mortgage Equity Corporation Mortgage Pool*
28 *Certificates Securities Litig.*, 120 F.R.D. 687 (C.D. Cal. 1988) is misplaced. In *In re National*
Mortgage, the court did not, as Qualcomm suggests, prohibit the opposing party from accessing

(footnote continued on next page)

1 cannot, therefore, shield this information from discovery, no matter how much Qualcomm might
2 wish to do so.

3 **B. Qualcomm’s Efforts To Limit Discovery In These Proceedings Are Improper.**

4 In its August 6, 2007 Order on Remedy for Finding of Waiver, the District Court
5 concluded that Qualcomm had engaged in, at least, the following “widespread and undeniable
6 misconduct . . . during discovery, pre-trial-motion practice, trial, and post-trial proceedings” (*Id.*
7 at 23):

- 8 • Improperly withholding tens of thousands pages of relevant and responsive
9 documents concerning Qualcomm’s participation in the JVT and development of
10 the H.264 standard, including documents related to Qualcomm’s attendance at
11 JVT meetings, Qualcomm’s submission of proposals to the JVT regarding the
12 development of the H.264 standard, Qualcomm’s own potentially essential IPR to
13 the developing H.264 standard, and its disclosure obligations regarding such IPR.
14 (*Id.* at 3.)
- 15 • Improperly responding to Broadcom’s interrogatories concerning Qualcomm’s
16 participation in the JVT and the development of the H.264 standard with more
17 than two pages of objections evidencing “stonewalling denial and diversions of
18 [Broadcom’s] requests for evidence.” (*Id.* 33-36.)
- 19 • Proffering false and misleading Rule 30(b)(6) and individual deposition testimony
20 through certain of its employees regarding Qualcomm’s participation in the JVT
21 and development of the H.264 standard. (*Id.* at 25-32.)
- 22 • Submitting false and misleading testimony and argument to the Court regarding
23 Qualcomm’s participation in the JVT and development of the H.264 standard
24 through certain of its employees and hired witnesses. (*Id.* at 39-45.)

25 Further, in its January 7, 2008 Order Granting In Part And Denying In Part Defendant’s
26 Motion for Sanctions and Sanctioning Qualcomm Incorporated And Individual Attorneys, this
27 Court identified similar instances of Qualcomm’s discovery misconduct, noting that there was
28 “clear and convincing evidence that Qualcomm intentionally engaged in conduct designed to

(footnote continued from previous page)

the purportedly privileged materials. Rather, the Court excluded those third parties that had “at least tentatively, settled with the Bank of America.” (*Id.* at 691-692.)

1 prevent Broadcom from learning that Qualcomm had participated in the JVT during the period
2 when the H.264 standard was being developed.” (*Id.* at 13.)

3 Nonetheless, despite having been found by clear and convincing evidence to have engaged
4 in “aggravated litigation abuse” regarding the above-referenced conduct, Qualcomm inexplicably
5 requests that discovery in these Remand Proceedings (both as to Broadcom and the Responding
6 Attorneys) be restricted only to “communications between Qualcomm and the Responding
7 Attorneys concerning the selection of custodians and the collection of documents for production
8 during the discovery phase of this case.” (Qualcomm Mot. at 2.)⁴ Qualcomm’s efforts to narrow
9 the scope of discovery in these Remand Proceedings are improper, given the breadth of
10 Qualcomm’s discovery misconduct in the underlying proceeding. To determine the precise cause
11 of Qualcomm’s discovery failures, Broadcom and the Responding Attorneys must be permitted to
12 seek discovery regarding the entire scope of Qualcomm’s misconduct throughout discovery,
13 pretrial motion practice, and trial, and not just the limited issue of its document collection and
14 production during discovery, as Qualcomm suggests. The scope of discovery should match the
15 scope of Qualcomm’s violations of the discovery rules and the Court’s pretrial orders.

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19 ⁴ In its Memorandum, Qualcomm requests that the Court preclude the Responding
20 Attorneys and Broadcom from seeking discovery regarding “the standards-setting process itself
21 unrelated to the selection of document custodians or document collection.” (Qualcomm Mot. at
22 3.) Although Broadcom has not at this time sought such discovery, Broadcom does not agree that
such information is outside the scope of these Remand Proceedings.

23 In the underlying case, Qualcomm took certain positions regarding the nature of its
24 involvement with the JVT and H.264 standard, which were ultimately contradicted by
25 Qualcomm’s belated production of relevant and discoverable documents. Substantive
26 information regarding Qualcomm’s standards-setting conduct is directly relevant to the discovery
27 failures that occurred in the underlying proceeding. Therefore, such information is properly
28 within the scope of discovery for these Remand Proceedings. Indeed, Judge Brewster recognized
that in his Remand Order, stating that “discovery pertaining to the JVT and its parents, its ad-hoc
committees, and ***any other topic regarding the standards-setting process for video compression
technology*** is not privileged information,” and is properly within the scope of information the
Responding Attorneys can use to defend themselves in these Remand Proceedings. (March 5,
2008 Remand Order at 5-6 (emphasis added).)

1 **C. Qualcomm's Efforts To Exclude Broadcom From These Proceedings Are**
2 **Improper.**

3 Although Qualcomm's motion purportedly seeks to "clarify" certain aspects of the Court's
4 Remand Order, its central purpose is to prevent Broadcom's legitimate participation in these
5 Remand Proceedings.⁵ While Qualcomm devotes a significant portion of its motion to
6 exaggerating the consequences of Broadcom's participation in these Remand Proceedings, it fails
7 entirely to acknowledge that both this Court and Judge Brewster -- each of whom specifically
8 held that the Responding Attorneys could use attorney-client privileged information in defending
9 themselves -- have already considered the impact of Broadcom's participation and access in these
10 Remand Proceedings, and both have determined that such participation and access is appropriate.

11 In his Remand Order, Judge Brewster stated that the Responding Attorneys could "defend
12 the OSC as to their conduct by any and all procedures permitted by the Magistrate Court,
13 including but not limited to, declarations, depositions and testimony of objectors as well as any
14 other percipient witness." (March. 5, 2008 Order at 3.) Significantly, Judge Brewster specifically
15 held that "Broadcom has standing to fully participate." (*Id.*) Thereafter, Judge Brewster stated
16 that the Responding Attorneys "shall not be prevented from defending their conduct by the
17 attorney-client privilege of Qualcomm." (*Id.*) In reaching such conclusions, Judge Brewster
18 necessarily considered that if Broadcom chose to participate, it would be privy to certain
19 information over which Qualcomm had previously claimed privilege. With this in mind, Judge
20 _____

21 ⁵ Further to its efforts to exclude Broadcom from these Remand Proceedings, Qualcomm
22 requests that any of its purportedly privileged information disclosed in these Remand Proceedings
23 be "reviewed in camera and kept under seal." (Qualcomm Mot. at 2.) By contrast, when
24 Qualcomm filed the declarations of Qualcomm employees Raveendran, Irvine, Ludwin, and
25 Glathe (Docket Nos. 681, 683, 684, and 688) and its Supplemental Brief in Opposition Re:
26 Broadcom's Motion for Sanctions (Docket No. 706), which severely criticized the actions and
27 decisions of the Responding Attorneys during discovery in this Proceeding, it filed those
28 declarations and brief publicly. Having previously taken full advantage of the public forum when
 it suited its purposes, Qualcomm cannot now credibly claim that such information should only be
 "reviewed *in camera* and kept under seal." (Qualcomm Mot. at 2.) The public interest, and the
 judicial presumption of open proceedings outweigh any embarrassment to Qualcomm from what
 may be disclosed about its conduct during discovery. *Castellano v. Young & Rubicam, Inc.*, No.
 97 Civ. 5464 SHS HBP, 1999 WL 714063, at *1 (S.D.N.Y. Sept. 18, 1999) ("There is a public
 interest in open judicial proceedings.")

1 Brewster determined that Broadcom should be permitted to “*fully participate*” in these Remand
2 Proceedings. (*Id.*) (emphasis added.)

3 During the March 20, 2008 status conference, this Court also recognized Broadcom’s
4 right to fully participate in these Remand Proceedings. In response to Qualcomm’s assertion that
5 Broadcom would seek to misuse these proceedings to gain a litigation advantage over Qualcomm,
6 this Court stated:

7 Broadcom’s participating for two reasons. Right off the top of my
8 head, the first is Judge Brewster in his order said they’re
9 participating. The second part is the Court is not the – the entity that
10 should be conducting any sort of examination to verify that the
11 accuracy of the facts are coming out as opposed to, as Mr. Zeldin
12 stated, at some sort of collusive statement. That’s the role
Broadcom can provide by making sure that the relevant people are
deposed and that the questions that the Court would want asked are,
in fact, asked.

13 (March 20, 2008 Tr. at 42.) Thereafter, the Court stated that its tentative ruling, “based upon
14 Judge Brewster’s ruling,” is that “the privilege has been waived” and that any submissions
15 associated with these Remand Proceedings need not be filed under seal. (*Id.* at 53.)

16 Thus, this Court considered that by permitting Broadcom to participate, Broadcom would
17 have access to certain purportedly privileged information from Qualcomm. In doing so, the Court
18 determined that Broadcom’s full participation and access were appropriate. For all of its rhetoric,
19 Qualcomm has neither offered a legitimate explanation why Broadcom should not be permitted to
20 fully participate in these Remand Proceedings, nor carried its burden to show why the Orders of
21 both this Court and Judge Brewster should be vacated.

22 **D. Broadcom Has A Legitimate Interest In Participating In These Remand**
23 **Proceedings.**

24 As this Court is aware, Broadcom and Qualcomm remain actively involved in other
25 litigation, including an enforcement proceedings before the United States International Trade
26 Commission (the “Commission”) regarding Qualcomm’s alleged violation of the Commission’s
27 June 7, 2007 Order to Cease and Desist, as well as a case before the United States District Court
28 for the District of New Jersey (the “New Jersey Action”) regarding certain allegations that

1 Qualcomm has acted in unfair and anti-competitive ways regarding its licensing practices, and in
2 its conduct before certain national and international standard setting organizations. (*See* Saxton
3 Decl., Ex. B (337-TA-543 Enforcement Complaint (exhibits excluded); Ex. C (Civil Action No.
4 05-3350 Second Amended Complaint).)

5 Discovery is on-going in each of these actions. Despite the proceedings before this Court,
6 Broadcom continues to have serious concerns regarding Qualcomm's compliance with its
7 discovery obligations. In the case before the Commission, Qualcomm produced more than
8 2,000,000 pages of responsive documents (or 86% of its total production) *after* the parties had
9 concluded their first round of depositions, and then refused to provide any further deposition
10 witness regarding its late-produced documents.

11 In the New Jersey Action, in response to certain discovery requests served by Broadcom,
12 Qualcomm initially identified 120 custodians with potentially relevant and responsive documents.
13 (*See* Saxton Decl., Ex. D, February 22, 2008 letter from Mr. Barbur to Mr. Selwyn.) Qualcomm
14 informed Broadcom that, although it initially believed these 120 custodians had information
15 responsive to Broadcom's discovery requests, it believed the number of custodians was too large,
16 and demanded that Broadcom narrow or limit the number of Qualcomm custodians whose records
17 must be searched. (*Id.*) Although Broadcom attempted to address Qualcomm's concerns through
18 the meet and confer process, Qualcomm steadfastly refused to search the initial 120 custodians,
19 demanding instead that Broadcom agree to limit the number of responsive custodians. (*See*
20 Saxton Decl., Ex. E, February 22, 2008 letter from Ms. Saxton to Mr. Barbur; Ex. F, March 7,
21 2008 letter from Mr. Barbur to Mr. Selwyn.) This issue is currently the subject of motion practice
22 before Magistrate Judge Hughes in the District of New Jersey. The parties are scheduled to
23 appear before Magistrate Judge Hughes on April 25, 2008 regarding this (and other) issues.

24 Thus, despite the Court's Order imposing significant sanctions against Qualcomm for its
25 discovery misconduct in this case, Qualcomm's gamesmanship regarding its discovery
26 obligations continues unabated. Qualcomm's conduct in these other litigations strongly suggests
27 that, absent an evidentiary hearing that includes Broadcom's full participation and access,
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1 Qualcomm will continue to fail to comply with its discovery obligations. Broadcom therefore has
2 a real and significant interest in full participation in these Remand Proceedings.

3 **III. CONCLUSION**

4 For the foregoing reasons, Broadcom respectfully requests that the Court deny
5 Qualcomm's request for an order restricting the scope and manner of the proceedings on remand.

6 Dated: April 16, 2008

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