No. 18-80135

UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

IN RE QUALCOMM ANTITRUST LITIGATION

Petition for Review of Order Granting Certification of Class
from the United States District Court for the Northern
District of California, Docket No. 17-md-02773-LHK,
The Honorable Lucy H. Koh, District Judge

ANSWERING BRIEF IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f)

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INTRODUCTION

In ruling on Plaintiffs' motion for class certification, Judge Koh considered 102 pages of briefing by the parties and an extensive evidentiary record, including over 1,800 pages of reports submitted by five experts. Her carefully-reasoned, 66-page Order certifying the Class demonstrates her thorough mastery of the parties' arguments and the evidence in the record. Judge Koh found that Plaintiffs presented "copious common evidence" that Qualcomm, a California corporation acting from its California headquarters, unlawfully acquired and maintained a monopoly in CDMA and premium LTE modem chipsets and used that monopoly power to illegally extract above-FRAND royalties from every cell phone manufacturer on every cell phone sold in the United States since at least 2011.[1] Order 23. Qualcomm's conduct included:

- No-License-No-Chips Tying Policy: Implementing an industry-wide "no-license-no-chips" policy in which Qualcomm unlawfully tied its CDMA and premium LTE modem chipsets to a demand that every cell phone manufacturer pay supra-FRAND royalties on every device they made, regardless of whether they contain a Qualcomm chipset;

- Refusal to License Competitors: Refusing to license its Standard Essential Patents ("SEPs") to competing modem chip manufacturers, despite its FRAND commitment to do so; and

- Exclusive Dealing with Apple: Coercing Apple into "exclusive dealing contracts" that excluded Qualcomm's rival Intel and caused "substantial foreclosure" in the relevant markets.

[1] Qualcomm complains that Judge Koh did not hear oral argument on the motion for class certification, but many motions (both below as well as in this Court) are decided on the papers. Particularly given the depth of the briefing below, it is not surprising that Judge Koh felt capable of preparing her 66-page Order without the need for additional minutes of oral elaboration by counsel.

Id.; SER 27-42 (¶¶ 65-113). Finding that common issues predominate, Judge Koh certified a nationwide class of cell phone purchasers seeking both injunctive and monetary relief from Qualcomm's anticompetitive conduct.

Qualcomm does not contend that Judge Koh's order creates a "death-knell situation" that will force it to settle rather than defend itself at trial before appealing under the traditional final judgment rule. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959, 962 (9th Cir. 2005) (articulating these standards for discretionary appellate review of class certification orders under Rule 23(f)). Nor could it do so—the damages model outlined in Judge Koh's ruling is a fraction of Qualcomm's $35 billion on-hand cash and cash equivalents (not to mention its other assets).[2] Qualcomm has spent years litigating the legality of the very conduct at issue in this litigation around-the-globe, been fined billions of dollars by foreign antitrust regulators, and spent over $400 million in litigation costs this year alone.[3] Qualcomm undoubtedly has the ability to vigorously defend this action on the merits and appeal from any eventual adverse judgment.

Qualcomm instead argues that Judge Koh's decision to certify the class was (1) "manifestly erroneous" or (2) "presents an unsettled and fundamental question of law" that is "likely to evade end-of-the-case review." Pet. 25 (quoting *Chamberlan*, 402 F.3d at 959). Both grounds for discretionary review lack merit.

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[2] *See* Qualcomm, Inc. Form 10-Q (June 24, 2018) at 3, *available at* http://investor.qualcomm.com/secfiling.cfm?filingID=1728949-18-75&CIK=804328.

[3] *Id.* at 23-25 (discussing regulatory actions and fines), 34 (discussing litigation costs). *See also* SER 15-16 (¶ 14).

The "manifest error" standard requires Qualcomm to show that the class certification decision is "virtually certain to be reversed on appeal from the final judgment." *Chamberlan*, 402 F.3d at 962. Qualcomm does not come close to showing that Judge Koh erred at all, let alone "manifestly erred," in certifying the class. Qualcomm conceded below that Rule 23(a)'s requirements were satisfied. Order at 18. And Qualcomm's petition never disputes Judge Koh's conclusion that common issues predominate with respect to proving (1) Qualcomm's antitrust violations, and (2) the amount of Qualcomm's unlawful, above-FRAND royalty overcharge. Nor does Qualcomm challenge Judge Koh's decision to certify a nationwide, injunctive relief class under the Clayton Act pursuant to Rule 23(b)(2). Instead, Qualcomm claims "manifest error" in (1) Judge Koh's choice-of-law analysis and (2) her conclusion that one of Plaintiffs' experts, Dr. Kenneth Flamm, presented an economic model capable of demonstrating antitrust impact and damages on a classwide basis. Qualcomm is mistaken on both counts.

The first claimed "manifest error"—that Judge Koh erred in holding that all members of the nationwide class could state claims under California law—was entirely correct and not an error at all. *See infra* Part I.B. But even if it was, Qualcomm concedes that the only effect would be to limit the damages class to residents of the states that (like California) have adopted legislation allowing indirect purchasers to sue.[4] While this approach would reduce damages if accepted,

[4] Qualcomm concedes that California law can be applied to the residents of these so-called *Illinois Brick*-repealer states. Thus, accepting Qualcomm's choice-of-law argument would limit the Class to residents of these states, not overturn class certification in its entirety.

it is an issue easily remedied upon appeal from final judgment and therefore does not warrant interlocutory review.

Moreover, precedent is clear (and Qualcomm concedes) that California's antitrust laws constitutionally may be applied nationwide. *See AT&T Mobility, LLC v. AU Optronics, Corp.*, 707 F.3d 1106, 1114 (9th Cir. 2013). Qualcomm argues only that California courts would not elect to do so under California's own choice-of-law rules, but instead would permit Qualcomm, a California company, to harm consumers so long as they reside in the states that follow *Illinois Brick*. But as Judge Koh correctly noted, the California Court of Appeal has held on facts like those presented here—namely, a case where a California company engaged in wrongful conduct in California, which harmed both California and out-of-state residents—that California law would be applied to both in-state and out-of-state consumers. Order at 53 (citing *Clothesrigger, Inc. v. GTE Corp.*, 236 Cal. Rptr. 605 (Ct. App. 1987) (certifying nationwide class under California law)). No California court has ever held to the contrary, which demonstrates why Qualcomm's claim of "manifest error" is without merit.

The parties extensively briefed the choice-of-law question at the motion to dismiss stage and Judge Koh carefully considered the arguments that Qualcomm made based on this Court's *Mazza* decision.[5] SER 107-113. At the class certification stage, Qualcomm failed to present any new argument on the choice of law question, instead relying on its motion to dismiss arguments. SER 6-7. Judge

[5] The Court considered 62 pages of briefing in connection with Qualcomm's motion to dismiss, Dkts. 110, 129, 153.

Koh summarized her reasons for rejecting Qualcomm's argument and explained again why this Court's decision in *Mazza* did not compel a different result on the facts of this case.[6] Order at 51-57. Even if it were assumed that Judge Koh erred—and she did not—any such error could hardly be characterized as "manifest" given ample precedent supporting her decision. Nor would this purported error in any event evade ultimate appellate review. Permitting a discretionary interlocutory appeal on this choice-of-law issue is simply unwarranted.

Qualcomm's second claimed "manifest error" is that Judge Koh rejected Qualcomm's challenges to one of Plaintiffs' expert's opinions concerning "pass through" of damages. Judge Koh's decision was, again, based upon a careful and well-reasoned analysis of the presentations by both sides on this issue and is amply supported by the extensive record evidence. This sort of fact-intensive analysis based on the particular evidence in this case does not give rise to a question of general importance to class action jurisprudence, which is why this Court has rejected similar petitions in the past.[7]

Qualcomm's contention that this case presents an "unsettled and fundamental issue of law relating to class actions" that is "likely to evade end-of-the-case review" is also mistaken. Pet. 25. Qualcomm's argument is little more

[6] Judge Koh also considered the other district court decisions cited by Qualcomm on this issue and found them unpersuasive. Order at 56, n.4. In none of the cases was the sole defendant a California resident.

[7] *See In re Optical Disk Drive Antitrust Litig.*, No. 16-80026, Dkt. No. 3-1 (9th Cir. March 3, 2016) (petition raising similar challenges to "pass through" model concerning focal point pricing, discounts, and rebates); *id.* at Dkt. No. 6 (9th Cir. June 10, 2016) (denying petition).

than a recycling of the same meritless predominance contentions that Judge Koh correctly rejected. Order at 59. Qualcomm emphasizes the size of the class and speculates about potential problems with providing notice. But courts have repeatedly certified classes numbering in the millions. And Plaintiffs' counsel consulted with notice experts who advised that it is feasible to provide notice in this case using methods approved in prior cases of comparable size.

Finally, even if Qualcomm were correct about the presence of a purported manifest error involving an unsettled issue of law (and it is not), it fails to explain why the issue would escape final review. Every one of the purported errors Qualcomm complains of will either be mooted by subsequent events or reflected in a final judgment that Qualcomm is fully capable of appealing under the traditional final judgment rule. And if ever a defendant had the resources to litigate a class action through trial and appeal if it so chooses, it is Qualcomm. Qualcomm's request that this Court exercise its discretion to authorize interlocutory review of Judge Koh's Order granting class certification should be denied.

ARGUMENT

I. Qualcomm Fails to Justify Rule 23(f) Review on Choice-of-Law.

A. Qualcomm's Argument Would Merely Reduce the Class Size.

Qualcomm fails to establish that Rule 23(f) review concerning choice-of-law is warranted. Qualcomm does not dispute that California law applies to consumers in *Illinois Brick* repealer states. Qualcomm's position is merely that the class size should be reduced by excluding consumers from non-repealer states—an issue that may be addressed, if necessary, through end-of-the-case review. *Chamberlan,* 402

F.3d at 960. Not surprisingly, this Court has denied Rule 23(f) review in a similar case in which the defendant challenged the nationwide application of California's Cartwright Act. *See Pecover v. Electronic Arts Inc*., No. 11-80001, Dkt. 1-3 (9th Cir. Jan. 4, 2011) (Rule 23(f) petition); *id.* at Dkt. 3 (Jan. 14, 2011), Dkt. 9 (Mar. 17, 2011) (denying petition).

By contrast, in *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 585 (9th Cir. 2012), this Court granted Rule 23(f) review because there were "material differences between California law and the consumer protection laws of the 43 other jurisdictions" related to a variety of legal requirements, including "scienter," "reliance," and available "remedies." *Id.* at 590-91. Thus, "variances in state law overwhelm[ed] common issues and preclude[d] predominance for a single nationwide class." *Id.* at 596. Not so here: Qualcomm concedes that choice-of-law concerns are no impediment to certifying a class of consumers in repealer states. Rule 23(f) review is not warranted merely to chip away at the size of the class by excluding consumers in non-repealer states.

B. Judge Koh's Choice-of-Law Ruling Is Not Manifestly Erroneous.

Moreover, Qualcomm fails to demonstrate that Judge Koh's decision to apply California law to non-repealer-state consumers' claims is "manifestly erroneous."

Qualcomm has never disputed that applying California law nationwide comports with due process under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Qualcomm therefore concedes, as it must, that (1) the only remaining question is whether "California's choice-of-law rules" support the nationwide

application of California law, and that (2) "the burden" is on "defendant to demonstrate that non-California law should apply to class claims." Pet. 8.

Qualcomm, as a California resident, fails to satisfy that burden. All of Qualcomm's relevant anticompetitive conduct occurred in California—not in any non-repealer state. Thus, California's interests would be more impaired if California law did not apply. California has, in fact, so held, repeatedly applying its own consumer protection laws beyond its borders to nonresident consumers. Federal courts must do the same. *See also Mazza*, 666 F.3d at 589-90 (holding federal courts "must look to the forum state's choice of law rules to determine the controlling substantive law," and that the "burden" is on the defendant to show "that foreign law, rather than California law, should apply to class claims").

Qualcomm erroneously construes *Mazza* as barring California law from applying to ***any*** nationwide consumer class of any kind. Pet. 8 (citing *Mazza*, 666 F.3d at 594). To the contrary, *Mazza* supports Judge Koh's conclusion that California has the "predominant interest" in regulating Qualcomm's anticompetitive "conduct that occurs within its borders . . . ." *Mazza*, 666 F.3d at 592 (quoting *McCann v. Foster Wheeler, LLC*, 48 Cal.4th 68, 97 (2010)).

1. Qualcomm Concedes California's Significant Interest in Regulating Antitrust Violations within Its Territory.

California's "statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California." *Northwest Mortg., Inc. v. Superior Ct.*, 72 Cal. App. 4th 214, 224 (1999). Judge Koh correctly noted that the "California Supreme Court has held that the 'primary concern' of the

Cartwright Act is 'the elimination of restraints of trade and impairments of the free market.'" Order 54 (quoting *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 783 (2010)). As Judge Koh recognized, the "mechanism of enforcing that commitment and deterring anticompetitive behavior is to allow private rights of action for treble damages." *Id.* (citing *Clayworth*, 49 Cal.4th at 783). *See also In re Cipro Cases I & II*, 61 Cal.4th 116, 136 (2015).

As a result, Judge Koh held that "California has an interest in allowing this suit to proceed to address Qualcomm's unlawful business activities in California and deter such anticompetitive conduct perpetuated by a resident California corporation." Order at 54. Judge Koh's conclusions are amply supported by California law and the facts alleged in Plaintiffs' well-pleaded Complaint demonstrating that:

- Qualcomm, Apple, and Intel are headquartered in California;
- Qualcomm executed its anticompetitive practices primarily in California;
- Qualcomm made anticompetitive licensing demands of Apple during in-person meetings at Qualcomm's California headquarters;
- Qualcomm filed suit against Apple and Apple's contract manufacturers in California; and
- Qualcomm's relevant contracts with its modem chip customers contain California choice-of-law provisions.

SER 58-59 (¶ 166).

Qualcomm does not dispute Judge Koh's conclusions that (1) California has a significant state interest in fully deterring resident corporations from carrying out

anticompetitive schemes within its borders and (2) this interest would be most fully served by permitting a nationwide class to seek damages from Qualcomm under California law. Pet. 15-16. Instead, Qualcomm argues that this interest is trumped by that of foreign states in which Qualcomm neither resides nor conducted relevant business with class members. But Qualcomm ignores the fact that *California courts* would not so constrain application of California law pursuant to California's own internal choice-of-law principles.

2. Qualcomm Fails to Identify any Foreign State's Interest in Regulating Qualcomm's Antitrust Violations in California.

Qualcomm contends that non-repealer states are interested in striking a "balance more strongly in favor of fostering a business climate attractive to foreign businesses," a policy judgment that must be respected by applying "the law of the state where the consumer purchased the cellphone." Pet. 12. But while the California Supreme Court has recognized foreign states' "legitimate interest in attracting out-of-state companies to do business within the state," it has ***rejected*** Qualcomm's argument that this interest creates a one-way ratchet that invariably mandates applying the law of a foreign state in which a plaintiff has experienced an injury. *McCann*, 48 Cal. 4th at 91-92.

To the contrary, California law holds that this interest is protected by applying a jurisdiction's internal law to "***conduct that occurs within its borders***." *Id.* at 98 (emphasis added). For example, the court recognized in *McCann* that the "allocation of 'lawmaking influence' result[ed] in the subordination of California's interest to the interest of Oklahoma" in that case, in which the defendant exposed

the plaintiff to asbestos in Oklahoma. *Id.* at 101. However, the *McCann* court simultaneously recognized that "in other instances in which a defendant is responsible for exposing persons to the risks associated with asbestos or another toxic substance through its conduct *in California*, this general principle would allocate to *California* the predominant interest in regulating the conduct." *Id.* at 101 (emphasis in original).

That is precisely the case here. Qualcomm is headquartered and carried out its anticompetitive activities in California. Qualcomm is not alleged to have directly conducted any relevant business with out-of-state plaintiffs. Instead, those plaintiffs purchased their cell phones from *other businesses*—such as Verizon, AT&T, Best Buy, and Apple—that are not parties to this case. SER 17-18 (¶¶ 20-26). In similar circumstances, California courts have not hesitated to apply California law to a nationwide class.

In *Diamond Multimedia Sys., Inc. v. Super. Ct.*, 19 Cal.4th 1036, 1064 (1999), the California Supreme Court held that California's Blue Sky securities laws could apply to a nationwide class given California's "compelling interest in preserving a business climate free of fraud and deceptive practices" and the "importance of extending state-created remedies to out-of-state parties harmed by wrongful conduct occurring in California."

In *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164, 1187-88 (2015)—which was decided after *Mazza*—the California Court of Appeal reversed denial of certification of a nationwide class of consumers who bought notebook computers from Hewlett-Packard, a California company, because "the alleged

injuries occurred in California where HP conducted the repairs" and not foreign states where plaintiffs resided.[8]

In *Wershba v. Apple Comp., Inc.*, 91 Cal. App. 4th 230, 243 (2001), the California Court of Appeal affirmed the application of California law to nationwide settlement class over a choice-of-law objection because "even though transactions may have occurred outside California, the representations upon which the causes of action rested . . . necessarily emanated from California" at Apple's headquarters.

And in *Clothesrigger, Inc.*, 191 Cal. App.3d at 615—on which Judge Koh relied—the California Court of Appeal reversed denial of certification of a nationwide class under California's UCL where "the fraudulent misrepresentations and unfair business practices forming the basis of the claim of each member of the proposed nationwide class emanated from California."[9]

Qualcomm attacks Judge Koh's conclusion that "applying other states' laws to bar recovery here would paradoxically disadvantage the other states' own citizens for injuries caused by a California defendant's unlawful activities that took place primarily in California." Order at 55. But in the absence of any compelling foreign state interest in regulating Qualcomm's conduct within its borders, Judge Koh correctly noted that "California's more favorable laws may properly apply to

[8] *Vestar Development II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) ("[W]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.").

[9] In the instant case, Plaintiffs have also asserted claims under California's UCL.

benefit nonresident plaintiffs." *Id.* (quoting *Clothesrigger, Inc.*, 191 Cal. App. 3d at 616). Nor does Qualcomm identify any California cases holding that foreign states have an interest in preventing their citizens from recovering for injuries caused by California corporations acting in California.

3. Qualcomm, Not Judge Koh, Misreads *Mazza*.

Nevertheless, Qualcomm baldly asserts, without actually quoting from the decision, that "*Mazza* holds that, in a nationwide consumer class action filed in California, each class member's claim is governed by the law of the state of purchase." Pet. 8 (citing *Mazza*, 666 F.3d at 594). In other words, Qualcomm apparently argues that in ***any*** nationwide consumer class action of any kind, California courts would ***never*** apply California law to purchases that occurred out-of-state no matter the residence of the defendant or where the defendant's wrongful conduct occurred. Qualcomm's breathtakingly broad reading of *Mazza* has no support in that decision, other decisions within the Ninth Circuit, or California law.

Mazza did not come close to barring the nationwide application of California law in any consumer class action. To the contrary, *Mazza* applied long-standing California law to the particular "facts and circumstances of this case . . . ." *Mazza*, 666 F.3d at 594. The court in *Mazza* explained that under California law, a foreign "jurisdiction ordinarily has 'the predominant interest' in regulating ***conduct that occurs within its borders***" so that it may (1) calibrate "liability for companies ***conducting business within its territory***" and (2) assure "commercial entities ***operating within its territory***" that such limitations on liability will be observed. 666 F.3d at 592 (quoting *McCann*, 48 Cal.4th at 91, 97 (citation omitted))

Mazza applied those principles to the specific facts before it—facts that differ dramatically from this case. In *Mazza*, the plaintiffs sought to certify a "nationwide class of all consumers who purchased or leased Acura RLs," alleging they were misled by a "product brochure" and marketing videos that were distributed or shown in "Acura dealerships" across the country. *Id.* at 585-86. In other words, the *Mazza* plaintiffs sought to impose liability under California law against a foreign defendant for its ***interactions with plaintiffs that occurred in other states***.

But here, Qualcomm is headquartered in and carried out its anticompetitive conduct in California. Plaintiffs are seeking to impose liability under California law against a California defendant for its conduct in California. Plaintiffs did not interact directly with Qualcomm at all in California or elsewhere, but instead purchased cell phones indirectly from ***other businesses*** that are not parties to this lawsuit. Unlike in *Mazza*, these out-of-state businesses are not Qualcomm dealerships, and Plaintiffs are not attempting to impose liability on them under California law.

Qualcomm cites a series of other decisions from the Northern District of California declining to apply California's antitrust laws nationwide. Pet. 13. But, as Judge Koh noted, those cases are distinguishable because they were brought against multiple defendants residing in foreign countries or other states in addition to California defendants whose anticompetitive conduct took place inside and outside of California. Order at 56, n.4 (discussing cases). Moreover, Qualcomm ignores other decisions from the Northern District, before and after *Mazza*,

applying California law to nationwide classes where the only defendant is a California corporation whose relevant conduct occurred in California. *See, e.g.*, *Colman v. Theranos, Inc.*, 325 F.R.D. 629, 649-50 (N.D. Cal. 2018) (applying California's Blue Sky securities laws nationwide); *Pecover v. Electronic Arts Inc.*, No. C 08-2820 VRW, 2010 WL 8742757, at *17 (N.D. Cal. Dec. 21, 2010) (applying California's Cartwright Act nationwide).

Qualcomm contends that California courts would mechanically apply the "law of the place of the wrong" and find that Qualcomm's wrongful conduct occurred when Plaintiffs purchased cell phones in the stream of commerce from other businesses in other states. But the California Supreme Court long ago "renounced the prior rule, adhered to by courts for many years, that in tort actions the law of the place of the wrong was the applicable law in a California forum regardless of the issues before the court," instead adopting the governmental interest approach discussed above. *Hurtado v. Superior Ct.*, 11 Cal. 3d 574, 580 (1974).[10]

The dispositive question is whether a California court would apply California law on a nationwide basis on facts like those presented here. It would. Judge Koh's decision is not error, let alone a manifest one. Moreover, even if erroneous, it would not justify an interlocutory appeal, as any such error could be

[10] In any event, the "place of the wrong" with respect to Qualcomm's anticompetitive conduct is California. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 10-05625 SI, 2013 WL 6327490, at *5 (N.D. Cal. Dec. 3, 2013) (holding the "last event" necessary to make defendants liable occurred when they engaged in a price-fixing conspiracy in California, notwithstanding that Circuit City placed purchase orders in Virginia).

easily remedied if and when an adverse final judgment was entered that granted damages to residents of the non-repealer states. That alleged error in no way justifies interlocutory review.

II. Qualcomm Fails to Justify Rule 23(f) Review on Antitrust Impact.

Qualcomm next attacks Judge Koh's conclusion that common issues predominate with respect to antitrust impact. But as Judge Koh recognized, Qualcomm's complaints are all merits questions that do not defeat class certification. Order at 51. *See also Edwards v. First American Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) ("A court, when asked to certify a class, is merely to decide a suitable method of adjudicating the case and should not turn class certification into a mini-trial on the merits."). And none of Qualcomm's scattershot attacks demonstrate that Judge Koh abused her discretion by "relying upon an improper factor, omitting consideration of a factor entitled to substantial weight, or making a clear error of judgment . . . ." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017) (holding decision granting class certification is reviewed for "abuse of discretion" and entitled to "noticeably more deference" than a denial of class certification).

A. Qualcomm's Mistaken Merits Attacks on Dr. Flamm's Analysis Do Not Defeat Class Certification.

Qualcomm contends Judge Koh manifestly erred in concluding common issues predominate as to antitrust impact because Dr. Flamm's hedonic regression analysis supposedly failed to consider carriers' and retailers' pricing strategies, including focal-point pricing, rebates, discounts, and promotions. Pet. 17-22.

Qualcomm overlooks the fact that Judge Koh did not rely upon Dr. Flamm's hedonic regression analysis in isolation, but also took into account:

> (1) California's legal ***presumption*** of classwide impact "in cases where consumers have purchased products in an anticompetitive market," Order at 30 (citing cases);
>
> (2) the "economic consensus, confirmed by theoretical and empirical research, that industry-wide taxes—like Qualcomm's here—are passed through to end purchasers as higher prices," *id.* at 31; and
>
> (3) "documentary and testimonial evidence" including "***Qualcomm's own internal analysis***" and testimony from "Qualcomm and other participants in the cellular industry" demonstrating that "Qualcomm's royalty would be an added component to the price of the phone," *id.* at 33-34.

Qualcomm's petition does not challenge Judge Koh's conclusion that classwide impact is demonstrated by these three factors—all of which are separate and apart from Dr. Flamm's hedonic regression model.

And Qualcomm's attacks on Dr. Flamm's hedonic regression model are all merits-based critiques that are capable of resolution on a class-wide basis using common evidence about common retail pricing strategies and their effects. Judge Koh recognized as much, *id.* at 51, and Qualcomm does nothing to rebut that conclusion. This Court has declined to grant Rule 23(f) review in similar circumstances. The district court in *In re Optical Disk Drive Antitrust Litig. ("ODD")*, No. 3:10-MD-2143 RS, 2016 WL 467444, at *10 (N.D. Cal. Feb. 8, 2016), granted indirect purchaser plaintiffs' renewed class certification motion, notwithstanding defendants' similar arguments regarding focal point pricing, pass-through, discounts, bundles, and rebates, noting that "the crucial point is that whether the IPPs theory is right or wrong, it is something that can be decided on a

classwide basis." *Id.* at *11. Defendants in *ODD* filed a Rule 23(f) petition on these very issues, which this Court summarily denied. *See supra* n.7. Notably, despite having granted class certification, the district court in *ODD* subsequently granted defendants' motion for summary judgment. *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-MD-2143 RS, 2017 WL 6503743 (N.D. Cal. Dec. 18, 2017). Likewise, here, Qualcomm's merits arguments may carry the day (or not)—but they present no basis on which to find that individualized issues predominate or interlocutory review is warranted.

In any event, contrary to Qualcomm's assertions, Dr. Flamm's hedonic regression analysis accounted for focal-point pricing, rebates, bundles, and discounts and nevertheless found classwide "pass through" rates of over 87%. Order 45-48. In addition to reviewing voluminous expert reports from both sides, Judge Koh carefully considered each of Qualcomm's arguments on these points and rejected them in a detailed and well-reasoned Order that cited supporting evidence and case law. *Id.* Qualcomm fails to demonstrate that Judge Koh made a "clear error of judgment" in doing so. *Just Film, Inc.*, 847 F.3d at 1115.

B. Qualcomm's Mistaken Merits Arguments Concerning Post-2016 Apple Customers Do Not Defeat Class Certification.

Qualcomm next contends that because Apple began withholding royalty payments to Qualcomm after 2016, subsequent Apple customers were not injured. Once again, this is a merits question that turns on common evidence and fails to demonstrate that individualized issues will predominate. If Qualcomm prevails on its argument, Judge Koh may perhaps create a subclass of such post-2016 Apple

purchasers and grant summary judgment in Qualcomm's favor as to that subclass. *See, e.g.*, Rubenstein, 3 NEWBERG ON CLASS ACTIONS § 7:30 (5th ed.) ("[S]ubclassing may be undertaken at any time. Courts will generally consider subclassing when the need arises."). But that does not present a reason to deny class certification as a whole or to grant Rule 23(f) review. In any event, Judge Koh explains persuasively why Qualcomm's argument is mistaken—as (1) "Apple's internal documents show that Apple considered Qualcomm's royalty when pricing and designing iPhones to be sold in 2017" and (2) "Qualcomm continues to charge royalties and has initiated ongoing litigation efforts to collect those royalties." Order at 50.

III. Qualcomm Fails to Justify Rule 23(f) Review on Manageability.

Finally, Qualcomm suggests that this case is "inherently unmanageable, unfair, and inferior to alternative forms of adjudication" because it may include hundreds of millions of class members. Pet. 26. But courts have certified numerous class actions of comparable size. *See, e.g, In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 939 n.4 (9th Cir. 2011) (class with over 100 million purchases); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("nationwide class with millions of class members residing in fifty states"). The fact that Qualcomm's anticompetitive conduct was so sweeping that it affected nearly every cell phone consumer in the United States is exactly what makes a class action the appropriate vehicle for adjudicating consumer claims.

Qualcomm relies heavily on an off-point, out-of-circuit case from the 1980s to suggest that any case including millions of class members is necessarily

unmanageable. Pet. 27 (citing *Abrams v. Interco Inc.*, 719 F.2d 23, 30–31 (2d Cir. 1983)). But in that case—which involved a price-fixing conspiracy concerning men's, women's, and children's footwear and apparel—the court held that a class could not be certified absent "some pattern of conduct on Interco's part which was reasonably consistent, affecting all or most of the dealers referred to in the complaint." *Abrams*, 719 F.2d at 29 (quotation marks and citation omitted). Here, Judge Koh made this very finding—that "Plaintiffs have presented copious common evidence to prove that Qualcomm engaged in three uniform practices—namely, (1) Qualcomm's 'no-license-no-chips' policy, (2) Qualcomm's refusal to license cellular SEPs to competing modem chip manufacturers, and (3) Qualcomm's exclusive dealing with Apple." Order 23. Qualcomm's petition does not mention, let alone challenge, this conclusion.

Qualcomm is also wrong to suggest that Plaintiffs did not consider the issue of class notice. Plaintiffs confirmed with multiple claims administrators that they would be able to reach at least 70% of the class members via publication notice, SER 3-4 (¶¶ 14-15), an approach utilized in numerous cases and that comports with due process.[11] As confirmed by claims administrators, the electronic tools available for class notice today far exceed those available in the 1980s.

Finally, there is simply no support for Qualcomm's contention that its complaints about the size of the class will evade end-of-the-case review.

[11] *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827, Dkt. 4424 (N.D. Cal. Dec. 23, 2011); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, No. 07-cv-5944, Dkt. 3861 at 25 (N.D. Cal. May 29, 2015).

Qualcomm has not indicated that it "lacks the resources to defend this case to a conclusion and appeal if necessary or that doing so would 'run the risk of ruinous liability.'" *Chamberlan*, 402 F.3d at 960 (quoting Advisory Committee Notes to Rule 23(f) (1998)). Nor could it do so. The exemplary damages model outlined in Judge Koh's order of $4.84 billion is a fraction of the $35 billion in cash and cash equivalents that Qualcomm had on-hand as of June 2018. *See supra* n.2. Because the district court's class certification decision does not force Qualcomm to "throw in the towel," granting interlocutory review is unwarranted.[12] *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (2d Cir. 2000).

CONCLUSION

Judge Koh correctly held in a carefully-considered and comprehensive order that common issues predominate. Qualcomm can raise its defenses on summary judgment, at trial and, if necessary, on appeal. Any objections Qualcomm may have to Judge Koh's trial-management techniques may be heard after—and if—a final judgment has been entered against it. Qualcomm will not be bludgeoned into a settlement of a meritless claim or an erroneous certification order unless an

[12] Qualcomm takes Judge Koh's comments at an earlier conference out-of-context. Judge Koh said she would be "shocked if this case goes to trial" given that she has "only heard of two or three [class actions] in the last eight years in the Northern District of California" that have been tried. SER 71 at 46:16-21. While it is undoubtedly true that class actions often settle, as do most cases, if ever there were a defendant capable of litigating a case to judgment and through appeal it is Qualcomm. If Judge Koh's prediction of a settlement proves accurate, it will be because Qualcomm agrees to settle—not because settlement is necessary for Qualcomm to survive.

interlocutory appeal is immediately heard. The circumstances of this case do not justify Rule 23(f) review.

Dated: October 24, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and Federal Rule of Appellate Procedure 27(d), I certify that the attached answering brief is proportionately spaced in Times New Roman, has a typeface of 14 points, was created in Word format, and is 5,559 words. This brief therefore complies with the word limitation established by Ninth Circuit Rule 5-2(b)-(c), which sets a 20-page limit on petitions for permission to appeal (excluding the accompanying documents required by Rule 5(b)(1)(E), in conjunction with Ninth Circuit Rule 32-3(2), which allows the filing of a proportionally spaced brief "in which the word count divided by 280 does not exceed the designated page limit."

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 24, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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