



REGISTERED AT THE COMPETITION
APPEAL TRIBUNAL
UNDER NUMBER: 19769
DATE: 19/01/2023

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1382/7/7/21

BETWEEN:

CONSUMERS' ASSOCIATION

Class Representative

- v -

QUALCOMM INCORPORATED

Defendant

ORDER

UPON the Defendant's application dated 5 January 2023 to strike out the second sentence of paragraph 4 of the Class Representative's Reply ("**Strike Out Application**")

AND UPON the Class Representative's application dated 6 January 2023 ("**the Class Representative's Application**") for various case management directions

AND UPON an amended Request for Information served by the Class Representative on 9 January 2023 (the "**Amended RFI**")

AND UPON the parties agreeing: (a) that the Defendant's preliminary disclosure (set out at paragraphs 8 to 10 below) ("**Preliminary Disclosure**") may be designated as Confidential Information within the meaning of the Tribunal's order dated 9 December 2021 (as amended by the Tribunal's order made by consent on 3 October 2022) (the "**Confidentiality Ring Order**"); and (b) that it will be sufficient for the purposes of paragraph 3.1.1 of the Confidentiality Ring Order for the Defendant to state that disclosure is made into the confidentiality ring because it is Preliminary Disclosure

AND UPON the parties having engaged in further correspondence following the service of their respective applications

AND UPON consideration of the parties' written submissions and hearing counsel for both parties at a case management conference ("CMC") on 13 January 2023

AND UPON the Tribunal reserving judgment on the Strike Out Application

AND UPON the Tribunal requesting that parties provide, by the next CMC, written submissions on the following: (i) the reasons as a matter of UK (and/or European law), Qualcomm's "non-assert" agreements with rival chipset manufacturers do not give rise to the exhaustion of Qualcomm's relevant patent rights; (ii) if it is contended that a "non-assert" agreement does not constitute a licence, the reasons for that contention; (iii) in light of the answers to (i) and (ii) above, the basis upon which a royalty is sought by Qualcomm from the customers of such rival chipset manufacturers; and (iv) whether it is accepted that the UK (and/or European law) is the applicable law for the purposes of the above analysis and if not what is said to be the applicable law.

AND HAVING REGARD TO the Tribunal's powers under the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**")

IT IS ORDERED THAT:

Pleadings

1. The Class Representative has permission to re-amend its Amended Collective Proceedings Claim Form in the form enclosed with the Class Representative's Application. The Re-Amended Collective Proceedings Claim Form shall be filed and served by 20 January 2023.
2. The Defendant has permission to file and serve an Amended Defence (including the agreed draft amendments in the form provided to the Class Representative on 6 December 2022) by 17 February 2023.
3. The Defendant will respond to the further requests in the Amended RFI by 6 March 2023.

4. By 6 March 2023, the Defendant shall file and serve its response to the schedule of factual allegations enclosed with the Class Representative's Application, verified by a statement of truth.
5. The Class Representative has permission to file and serve an Amended Reply, if so advised, by 17 March 2023.
6. The response provided by the Defendant pursuant to paragraph 3 of this Order shall be treated as a further pleading (and permission for that pleading pursuant to Rule 37 of the Tribunal Rules is granted).

Disclosure

7. By no later than 24 February 2023, the Defendant shall give specific disclosure of the following documents to the Class Representative to the extent that they are within the Defendant's control:
 - (a) A copy of all documents quoted from or cited in Sections 9 (Market Definition) and 10 (Dominance) of the confidential version of the Decision of the European Commission dated 24 January 2018 in Case AT.40220 - *Qualcomm (Exclusivity Payments)* (the "**European Commission Decision**").
 - (b) Copies of all publicly available admitted exhibits in Case No. 17-CV-00220-LHK, *Federal Trade Commission v Qualcomm Incorporated* (the "**FTC Proceedings**").
 - (c) Copies of all publicly available trial transcripts from the FTC Proceedings.
 - (d) Copies of all publicly available depositions and expert reports from the FTC Proceedings and Case Nos. 17-MD-02773-LHK and 3:17-MD-02773-JSC, *In re: Qualcomm Antitrust Litigation* (the "**US Class Action Proceedings**").
 - (e) Copies of:
 - (i) the Defendant's and the FTC's expert reports in the FTC Proceedings;
 - (ii) the Defendant's own depositions in the FTC Proceedings; and

- (iii) in respect of the US Class Action Proceedings, the versions of the expert reports of (i) Dr Kenneth Flamm, (ii) Mr Michael Lasinski and (iii) Professor Einer Elhauge referred to in paragraph 8(d)(iii) of Qualcomm’s solicitors’ second letter of 9 January 2023.

 - (f) Unredacted Korean language versions of:
 - (i) the decision of the Korea Fair Trade Commission (“**KFTC**”), No. 2017-0-25, *In re Alleged Abuse of Market Dominance of Qualcomm Incorporated*, dated 20 January 2017 (the “**KFTC Decision**”); and
 - (ii) the decision of the Seoul High Court ruling on the Defendant’s appeal from the KFTC Decision, dated 4 December 2019 (the “**Seoul High Court Decision**”).

 - (g) Copies of all exhibits and documents referred to in the KFTC Decision.

 - (h) Copies of all exhibits and documents referred to in the Seoul High Court Decision.

 - (i) In relation to the settlement reached between the Defendant and the Taiwanese Fair Trade Commission (“**TFTC**”), Decision No. 106094, Kung Ch’u Tzu, dated 20 October 2017, confidential (i.e. unredacted) copies of:
 - (i) all of the Defendant’s submissions to the TFTC and all accompanying exhibits to those submissions; and
 - (ii) any other evidence submitted by the Defendant to the TFTC.

 - (j) The four expert reports from the FTC Proceedings referred to in paragraph 8(d)(ii) of Qualcomm’s solicitors’ second letter of 9 January 2023.
8. For the avoidance of doubt, and save as otherwise specified, the disclosure referred to at paragraph 7 above shall be of the English language versions of the documents specified therein where such versions are available.

9. The Defendant shall use all reasonable endeavours to give specific disclosure by 24 February 2023 of all chipset supply agreements between the Defendant and Foxconn, Wistron, Compal and ASUSTeK / Pegatron which were produced by the Defendant in relation to the FTC Proceedings and/or the US Class Action Proceedings, and/or the regulatory investigations by the KFTC and the TFTC (and subsequent court proceedings, where relevant).
10. The disclosure referred to in paragraphs 7 and 9 above may in the first instance be designated as Confidential Information within the meaning of the Confidentiality Ring Order, save that for the purposes of this disclosure paragraph 3.2 of the Confidentiality Ring Order shall not apply.
11. Further as to the disclosure referred to in paragraph 7(a) above:
 - (a) By 4pm on 27 January 2023, the Defendant shall write to all third parties whose documents fall to be disclosed pursuant to paragraph 7(a) above (the “**Relevant Third Parties**”) insofar as practicable, copying the Class Representative and inviting the Relevant Third Parties to copy the Class Representative into any response, providing them with copies of this Order and the Confidentiality Ring Order, and giving notice to the Relevant Third Parties that:
 - (i) the Defendant has been ordered to disclose by 24 February 2023 a copy of all documents within the Defendant’s control that are quoted from or cited in Sections 9 (Market Definition) and 10 (Dominance) of the confidential version of the European Commission Decision;
 - (ii) if any of the Relevant Third Parties have concerns that this Order and/or the Confidentiality Ring Order does not provide adequate protection for their Confidential Information (within the meaning of paragraph 1.1.1 of the Confidentiality Ring Order, *mutatis mutandis*) then following the giving of at least 5 working days’ notice to the Class Representative and the Defendant setting out their concerns, they may make an application to the Tribunal in accordance with paragraph 12 of this Order.

12. Any of the Relevant Third Parties may apply to the Tribunal to vary (to the extent necessary) this Order and/or the Confidentiality Ring Order with a view to protecting their Confidential Information. Such application(s) will be:
 - (a) filed with the Tribunal Registry by 4pm on 17 February 2023;
 - (b) served at the same time on the Class Representative and the Defendant;
 - (c) accompanied by a reasoned explanation of the application to vary (to the extent necessary) this Order or the Confidentiality Ring Order together with any evidence relied on; and
 - (d) at the applicant's risk as to costs if the application is unsuccessful .

13. By 6 April 2023, the Defendant shall file and serve:
 - (a) A disclosure report (as defined in Rule 60(1)(b) of the Tribunal Rules); and
 - (b) A completed Electronic Documents Questionnaire (in the form of the questionnaire in the Schedule to Practice Direction 31B of the Civil Procedure Rules 1998).

Further Directions

14. A further case management conference (“CMC3”) shall be listed for the first available date from 13 June 2023 with a provisional time estimate of 2 days, to determine:
 - (a) Any outstanding issues in relation to disclosure;
 - (b) The timetable to trial (including in respect of disclosure and factual and expert witness evidence); and
 - (c) Any other issues arising.

15. Any applications which any party wishes to have determined at CMC3 shall be filed and served by no later than 10 calendar days before the date of CMC3.

Permission to appeal

16. The Defendant's application for permission to appeal in respect of the order at paragraph 7(a) above is refused.

Costs

17. Each of the parties shall receive their costs of and occasioned by the other party's amendments to its pleadings (as provided for in paragraphs 1 and 2 above).
18. Subject to paragraph 17 above, costs in the case (including the costs of the Strike-Out Application).

Other

19. There shall be liberty to apply.

The Hon Mrs Justice Bacon
Chair of the Competition Appeal Tribunal

Made: 13 January 2023
Drawn: 19 January 2023