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PLEASE SUBMIT QUESTIONS\* TO

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*\*ANSWERED AT THE END OF THE CALL*

# FTC V. QUALCOMM – KEY TAKEAWAYS

- Reasonable prospect for a stay
- Reasonable prospect for reversal
- Settlement effort is complicated but not impossible
- Timing of appeal process is critical as 2020 election nears
- DOJ Solicitor General could be major Qualcomm advantage

# KEY OUTCOME FACTORS

## NINTH CIRCUIT PANEL COMPOSITION

- Current active judges:



**16**

Democratic appointees vs.

**11**



GOP appointees

- President Trump has added six judges to the court (one awaits Senate confirmation)
- Timing of appeal process bumps against 2020 election, affecting Supreme Court review prospects

# DISTRICT COURT OPINION AND ORDER

- Qualcomm has monopoly power in the modem chip market.
- Qualcomm's "no license, no chips" policy effectively imposes an anti-competitive surcharge on OEM use of rival chips.
- Qualcomm's refusal to license cellular SEPs to rival chipmakers impairs or forecloses competitive entry.
- Qualcomm's exclusive supply deals with Apple undermined competition in the modem chip market.
- Qualcomm's anti-competitive practices collectively "create insurmountable and artificial barriers for Qualcomm's rivals."

# JUDGE KOH'S REMEDIES (INJUNCTIVE RELIEF)

- Chip supply cannot be conditioned on customer's licensing status
- Renegotiate licensing deals without threats to chip supply
- Sell SEP modem chips to rivals on FRAND terms subject to arbitration
- No exclusive dealing arrangements for modem chip supply
- Cannot hamper customer complaints to the FTC
- Monitoring reports to the FTC for seven years



# NEXT STEPS IN THE PROCESS

- Stay Request (District Court/Ninth Circuit)
  - Irreparable Harm
  - “Fair prospect for success” on appeal
- Expedited Appeal in the Ninth Circuit (Perhaps a year for decision)
- Potential Supreme Court appeal





# ISSUES ON APPEAL

- Quantification of antitrust harm
- Lawful monopoly pricing or exclusionary conduct?
- Antitrust duty to deal with rival chipmakers?
- Contractual intent on summary judgment
- Scope of the FRAND obligation
- Exclusive dealing and purchaser incentive payments

# JUSTICE DEPARTMENT POSITION

- Fundamental disagreement with FTC case theory
- Administration concerns about 5G economic and national security
  - CFIUS blocked Broadcom's attempted acquisition of Qualcomm
- Can file statement of interest in any court
- Support stay and expedited appeal?



# NINTH CIRCUIT APPEAL TIMING

- If expedited, arguments possible by early 2020
- Panel composition announced about a month before argument
- Decision possible by summer of 2020
- Petition for *en banc* rehearing possible, but probably not advisable if Qualcomm loses before initial appellate court panel

# SUPREME COURT APPEAL

- Justice Department (Solicitor General) typically controls government position in the Supreme Court
- FTC has independent Supreme Court appeal right if DOJ disagrees
  - FTC vote to file certiorari petition?
- DOJ assumes amicus role in opposition to FTC?
- Ninth Circuit appeal duration could affect Supreme Court review



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