

1 SHARTSIS FRIESE LLP
JOEL ZELDIN (Bar #51874)
2 FRANK A. CIALONE (Bar #172816)
One Maritime Plaza, Eighteenth Floor
3 San Francisco, CA 94111
Telephone: (415) 421-6500
4 Facsimile: (415) 421-2922
Email: jzeldin@sflaw.com; fcialone@sflaw.com

5 Attorneys for Non-Parties
6 JAMES R. BATCHELDER, CHRISTIAN E.
MAMMEN and KEVIN K. LEUNG

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

E-Filed

11 QUALCOMM INCORPORATED,

12 Plaintiff,

13 v.

14 BROADCOM CORPORATION,

15 Defendant.

Case No. 05CV1958-B (BLM)

**OBJECTIONS OF RESPONDING
ATTORNEYS BATCHELDER, MAMMEN
AND LEUNG TO SANCTIONS ORDER OF
MAGISTRATE JUDGE AND REQUEST
FOR RECONSIDERATION BY DISTRICT
COURT**

16 AND RELATED COUNTERCLAIMS.

17
18 Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b),
19 responding attorneys James R. Batchelder, Christian E. Mammen and Kevin K. Leung (the
20 "Responding Attorneys") hereby respectfully object to the Magistrate Judge's Order Granting In
21 Part And Denying In Part Defendant's Motion For Sanctions And Sanctioning Qualcomm,
22 Incorporated And Individual Lawyers dated January 7, 2008 (the "Sanctions Order") and request
23 reconsideration by the District Court of the Sanctions Order based upon the objections discussed
24 below.

25 The Responding Attorneys acknowledge and appreciate that the Magistrate Judge has
26 spent considerable time and effort in preparing her Sanctions Order in this difficult case. They
27 also recognize that the case involves complex issues, many of which the Court is unable to
28 address fully due to the limited record before it. In particular, due to Qualcomm's invocation of

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1 the attorney-client privilege, the Responding Attorneys have been unable to provide exculpatory
2 evidence that directly bears on the issues addressed in the Sanctions Order.

3 Pursuant to Rule 72(a) and 28 U.S.C. § 636(b), the Responding Attorneys object to, and
4 seek reconsideration of, the Sanctions Order as follows:

5 1. The Magistrate Judge lacked jurisdiction to issue the August 13, 2007 Order To
6 Show Cause Why Sanctions Should Not Be Imposed (the "OSC") (D.N. 599) *sua sponte* or
7 otherwise against the Responding Attorneys in connection with the District Court's referral to the
8 Magistrate Judge of Broadcom's sanctions motion against Qualcomm. The Magistrate Judge
9 lacked jurisdiction under the District Court's referral of the sanctions motion against Qualcomm,
10 under Rule 72 of the Federal Rules of Civil Procedure, S.D. Cal. Local Rule 72.1(b), 28 U.S.C.
11 § 636, or otherwise to impose sanctions against the Responding Attorneys.

12 2. The OSC violated the Responding Attorneys' due process rights in that it failed to
13 provide notice as to the provision(s) of law under which the Court was considering sanctioning
14 the Responding Attorneys. *See* discussion of notice requirements in Individual Day Casebeer
15 Attorneys' Response To August 13, 2007 Order To Show Cause (the "Attorneys' Brief in
16 Response to OSC") (D.N. 673) at page 22, incorporated herein by reference.

17 3. The OSC and Sanctions Order further violated the Responding Attorneys' due
18 process rights because the OSC described the Court's inquiry as being whether the Responding
19 Attorneys violated "discovery and/or scheduling orders" – orders that cannot properly be the basis
20 for the levied sanctions because, as the Sanctions Order acknowledges, no such orders have been
21 identified as having been violated.

22 4. The OSC and Sanctions Order further violated the Responding Attorneys' due
23 process rights because, although the OSC described the Court's inquiry as being whether the
24 Responding Attorneys violated "discovery and/or scheduling orders," the Sanctions Order is
25 predicated upon other alleged misconduct by the Responding Attorneys. This mismatch between
26 the notice in the OSC and the Sanctions Order violates the Responding Attorneys' due process
27 rights. *See* Attorneys' Brief in Response to OSC at page 22, incorporated herein by reference.

28 5. The September 28, 2007 Order Denying Motion For An Order Determining That

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1 The Federal Common Law Self-Defense Exception To Disclosing Privileged And/Or
 2 Confidential Information Applies (the "Self-Defense Order") (D.N. 669) was contrary to law. *In*
 3 *re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 120 F.R.D. 687 (C.D. Cal
 4 1988); *Application of Friend*, 411 F. Supp 776 (S.D.N.Y. 1975). As a result, the Responding
 5 Attorneys were prevented from introducing exculpatory evidence, and their due process rights
 6 were violated. The Self-Defense Order also was contrary to law in failing to dissolve the OSC as
 7 to the Responding Attorneys after the Court found that the self-defense exception did not apply.
 8 *See generally* Individual Day Casebeer Attorneys' Conditional Joinder in Heller Attorneys'
 9 Motion re Self-Defense Exception to the Attorney-Client Privilege (D.N. 635-637) and
 10 Attorneys' Brief in Response to OSC at pp. 16-21, incorporated herein by reference.

11 6. Several of the Responding Attorneys proffered supplemental declarations
 12 containing privileged communications, first at the September 28, 2007 hearing on application of
 13 the self-defense exception to the attorney-client privilege and again at the October 12, 2007
 14 hearing on the OSC. *See, e.g.*, Transcript of October 12, 2007 Hearing (the "Transcript of OSC
 15 Hearing") (D.N. 712) at 9:10-17; 23:16-20; 28:12-15; 93:2-8. The Court acted contrary to law in
 16 not authorizing the submission of these supplemental declarations, which contained privileged
 17 communications between Qualcomm and the Responding Attorneys.

18 7. The handicap the Self-Defense Order imposed upon the Responding Attorneys
 19 was exacerbated when, on October 3, 2007, four Qualcomm employees submitted declarations
 20 that the Sanctions Order characterizes as "self-serving and misleading." (D.N. 681, 683, 684,
 21 688); *see* Sanctions Order at page 25, footnote 7. The Responding Attorneys objected to these
 22 declarations on due process grounds on October 5, 2007. (D.N. 704). In response to the
 23 Responding Attorneys' objection, which was reiterated at the October 12, 2007 hearing, the Court
 24 indicated that it would consider disregarding the four Qualcomm declarations in connection with
 25 its analysis whether to sanction Responding Attorneys, and ultimately took the matter under
 26 submission. Transcript of OSC Hearing at 28:21-23; 42:11-14; 46:18-23. The Sanctions Order
 27 states a commitment not to consider the four Qualcomm declarations in evaluating the conduct of
 28 the Responding Attorneys. Sanctions Order at page 24, footnote 7. Despite this commitment, the

1 Sanctions Order refers to and/or quotes these same four Qualcomm declarations at least 12 times,
2 including statements by Qualcomm declarant Glathe which falsely allocate certain responsibilities
3 to outside counsel and blame outside counsel for the discovery failures. Sanctions Order at page
4 21, footnote 6. After discrediting these statements by Glathe and committing not to consider
5 them, the Sanctions Order nevertheless seems to accept them as true, when in fact they, like much
6 of the rest of the four Qualcomm declarations, are (as the Court found) "self-serving and
7 misleading." *See, e.g.*, offer of proof in Transcript of OSC Hearing at 13:18-14:22.

8 8. Moreover, even if the Court had stricken and never referred to the Qualcomm
9 Declarations, the Responding Attorneys' due process rights were nevertheless violated by the
10 imposition of sanctions because Qualcomm's assertion of the attorney-client privilege prevented
11 the Responding Attorneys from presenting exculpatory evidence, because the self-defense
12 exception motion was denied (*see* D.N. 634, 635, 637, 669), and because the Court did not find
13 that submission of the employee declarations by Qualcomm waived the attorney-client privilege.
14 *See* Transcript of OSC Hearing at 6:5-9:17. *See, e.g., McDermott Will & Emery v. Superior*
15 *Court*, 83 Cal. App. 4th 378, 385 (2000); *Solin v. O'Melveny & Myers*, 89 Cal. App. 4th 451, 466
16 (2001); *see also* discussion of due process issues and authorities in Attorneys' Brief in Response
17 to OSC at pages 16-20, incorporated herein by reference.

18 9. Without the introduction of this privileged information, the record is necessarily
19 incomplete as to the following: the Responding Attorneys' knowledge; what Qualcomm told the
20 Responding Attorneys about its involvement or lack of involvement in the JVT; what Qualcomm
21 told the Responding Attorneys about what inquiries had been made by Qualcomm concerning the
22 collection of information and documents; what inquiries the Responding Attorneys made of
23 Qualcomm concerning the collection of information and documents, and Qualcomm's responses
24 to any such inquiries; how any such previous communications between Qualcomm and the
25 Responding Attorneys informed and/or influenced subsequent decisions, including decisions to
26 make certain statements, take certain positions, and make (or not make) additional inquiries; what
27 was either represented or done by Qualcomm to cause the Responding Attorneys to believe that
28 they had made a reasonable inquiry and/or search and that Qualcomm had made or would make a

1 reasonable inquiry and/or search; the Responding Attorneys' intentions, insofar as such intentions
2 were informed by privileged communications; and the reasonableness of any of the Responding
3 Attorneys' beliefs or conclusions, insofar as such beliefs or conclusions were informed by
4 privileged communications. Because the attorney-client privilege prevents Responding Attorneys
5 from having an opportunity to be fully heard on those subjects, any conclusions drawn by the
6 Court as to any of those subjects is a violation of the Responding Attorneys' due process rights,
7 and therefore contrary to law. Further, such conclusions as are set forth in the Sanctions Order on
8 these subjects are clearly erroneous.

9 10. More specifically, the Responding Attorneys' substantive due process rights have
10 been violated by the imposition of sanctions because Responding Attorneys were prevented by
11 Qualcomm's assertion of the attorney-client privilege from submitting evidence that would show
12 that they acted reasonably (and without recklessness, improper purpose, or intentional bad faith)
13 in reliance on representations and assurances given to them by Qualcomm. In particular, they
14 have been deprived of an opportunity to present "the totality of the circumstances" (*see* Sanctions
15 Order at page 14) by introducing evidence showing (a) what inquiries they made to Qualcomm,
16 (b) what responses were given by Qualcomm, (c) who made the responses, (d) what alternative
17 search methods Qualcomm said it would use to locate the documents, (e) whether similar search
18 methods had been used successfully in the past by Qualcomm, (f) the extent of Qualcomm's
19 representations concerning its use of and/or reliance on centralized sources for certain categories
20 of documents, including standards-related documents, and (g) why, based upon their
21 communications with Qualcomm employees, the Responding Attorneys believed they had
22 conducted a reasonable inquiry. *See, e.g.*, Transcript of OSC Hearing at 11:11-12:3; 14:12-15:8;
23 23:2-20; 41:17-21; 93:20-94:7; 126:19-127:2.

24 11. As the Sanctions Order notes at page 14, "[W]hat is reasonable is a matter for the
25 court to decide on the totality of the circumstances," citing the Advisory Committee Notes. The
26 Responding Attorneys have been deprived of due process because they have not had an
27 opportunity to introduce evidence "on the totality of the circumstances." The reasonableness of
28 the attorneys' efforts cannot be judged by hindsight or the mere failure to produce information or

1 documents that were available to the client; and the attorney is entitled to rely on assertions by the
2 client and communications with other counsel as long as reliance is appropriate under the
3 circumstances. See discussion of Rule 26(g) in Attorneys' Brief in Response to OSC at 27-28,
4 incorporated herein by reference.

5 12. The Sanctions Order is clearly erroneous and contrary to law in that it refers to and
6 relies upon the Order on Remedy for Finding of Waiver (the "Waiver Order") as a basis for
7 sanctioning the Responding Attorneys despite the facts that they are not parties to the case and
8 they did not have an opportunity to present evidence and arguments on their own behalf in those
9 proceedings. See Attorneys' Brief in Response to OSC at p.21, incorporated herein by reference.

10 13. The Sanctions Order is contrary to law and violates the Responding Attorneys' due
11 process rights because it does not identify which statutes or legal doctrines are being relied upon
12 as a basis to sanction which attorneys. The Sanctions Order also is contrary to law and violates
13 the Responding Attorneys' due process rights because it does not identify and/or correctly apply
14 any established statute or legal doctrine that authorizes the imposed sanctions.

15 14. The Sanctions Order appears to conclude that Rule 37 does not support sanctions
16 against the Responding Attorneys in the present case; however, to the extent the Sanctions Order
17 purports to impose sanctions on the Responding Attorneys under Rule 37, it is contrary to law.
18 As the Sanctions Order points out, Rule 37(a) applies only if a motion to compel has been filed,
19 and Rule 37(b) authorizes sanctions only if a party fails to comply with a discovery order, neither
20 of which occurred here. Similarly, under Rule 37(c), liability can be imposed only on a party, not
21 on an attorney, for failure to comply with discovery obligations. See Attorneys' Brief in
22 Response to OSC at pp. 22-26, incorporated herein by reference.

23 15. To the extent the Sanctions Order purports to impose sanctions on the Responding
24 Attorneys under Rule 26(g), those sanctions are clearly erroneous and contrary to law. As the
25 Sanctions Order notes at page 26, footnote 9, "Rule 26(g) only imposes liability upon the attorney
26 who signed the discovery request or response." The Sanctions Order goes on to state that, "Under
27 a strict interpretation of these rules, the only attorney who would be responsible for the discovery
28 failures is Kevin Leung because he signed the false discovery responses." It is therefore contrary

1 to law to impose Rule 26(g) sanctions on any Responding Attorney who did not sign a discovery
2 request or response. *See* Attorneys' Brief in Response to OSC at pp. 26-29, incorporated herein
3 by reference.

4 16. It is also contrary to law to impose sanctions on Responding Attorney Leung under
5 Rule 26(g) because the signing attorney does not certify the truthfulness of the client's factual
6 responses to a discovery request; the signing attorney represents only that he has made a
7 reasonable effort to assure that the client has provided all the responsive information and
8 documents.

9 17. To the extent the Sanctions Order imposes sanctions pursuant to Rule 11, it is
10 contrary to law and deprives the Responding Attorneys of due process because the OSC stated
11 that "The court is limited in its review and analysis of the debacle that occurred in this litigation
12 because Judge Brewster only referred the discovery violation to this court," and described the
13 Court's inquiry as being whether the Responding Attorneys violated "discovery and/or scheduling
14 orders." As the Sanctions Order acknowledges in footnote 5 on page 18, "Rule 11 does 'not
15 apply to disclosures and discovery requests, responses, objections, and motions.'" *See* Attorneys'
16 Brief in Response to OSC at pp. 34-35, incorporated herein by reference.

17 18. To the extent the Sanctions Order imposes liability pursuant to the Court's
18 inherent power, it is clearly erroneous, contrary to law and violative of due process. As noted
19 above, the OSC did not give adequate notice that the Court was considering sanctions under its
20 inherent power or the precise basis for its proposed exercise of those extraordinary powers.
21 Similarly, in contrast with the Court's references at the OSC Hearing to Rule 26(g) and Rule 37
22 as possible bases for sanctions against the Responding Attorneys, inherent power as a basis for
23 sanctions was not mentioned during the OSC Hearing. For each of the Responding Attorneys, the
24 Sanctions Order also does not contain the findings needed to support inherent power sanctions.
25 In any event, any such findings would be clearly erroneous, contrary to law and violative of due
26 process. Moreover, to the extent the sanctions imposed, including referral to the State Bar and
27 possible payments to Broadcom for its attorneys' fees under the CREDO procedures, are
28

1 “serious” or “punitive,”¹ they require a higher level of due process. See Attorneys’ Brief in
2 Response to OSC at pp. 29-33, incorporated herein by reference.

3 19. To the extent the Sanctions Order purports to have imposed sanctions pursuant to
4 the Court’s inherent power using the formulation set forth in *Fink v. Gomez*, 239 F.3d 989 at 993-
5 994 (9th Cir. 2001) (“an attorney’s reckless misstatements of law and fact, when coupled with an
6 improper purpose ... are sanctionable under the court’s inherent power”) which is cited in
7 footnote 9 at page 26 of the Sanctions Order, due process precludes any finding that the
8 Responding Attorneys’ conduct and/or statements were reckless, and also precludes any finding
9 that the Responding Attorneys had an improper purpose. Due to Qualcomm’s invocation of the
10 attorney-client privilege, the Court candidly acknowledges that it “does not have access to all of
11 the information necessary to reach an informed decision regarding the actual knowledge of the
12 attorneys.” Sanctions Order at page 25, footnote 8. Determinations of both recklessness and
13 improper purpose depend on an informed assessment of the attorneys’ knowledge, which the
14 Court was unable to make. To the extent any such findings were made they are clearly erroneous
15 and violative of due process.

16 20. Ultimately, the Court acknowledges, in footnote 9 on page 26 of the Sanctions
17 Order, that the discovery rules do not adequately address the Responding Attorneys’ purported
18 misconduct in this case. This acknowledgement confirms (i) that the Court lacked authority to
19 enter the Sanctions Order and (ii) that no rule or standard provided the Responding Attorneys
20 with advance notice of what conduct could result in sanctions before they undertook the conduct
21 that is the subject of the Sanctions Order. If the federal rules authorizing imposition of sanctions
22 for discovery abuse do not address the Responding Attorneys’ conduct in this case, the OSC was
23 contrary to law and violative of due process in not advising the Responding Attorneys in advance
24 as to the precise standard that would be applied in evaluating their conduct. Instead, the OSC
25 incorrectly stated that the focus of the inquiry was whether the Responding Attorneys “violated

26 ¹ The OSC, at page 2, recognized that referral to the California State Bar for possible
27 sanctions is itself a sanction. (“[T]his Court is inclined to consider the imposition of any and all
28 appropriate sanctions on Qualcomm’s attorneys, including but not limited to ... referral to the
California State Bar for appropriate investigation and possible sanctions”

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1 this Court's discovery and/or scheduling orders," which were not cited by the Sanctions Order as
2 a basis for imposing sanctions. Further, announcement and application of new rules or new
3 interpretations of old rules violates the prohibition against *ex post facto* application of law.

4 21. Similarly, the Sanction Order's reliance on the proposed legal principle that "the
5 federal rules impose a duty of good faith and reasonable inquiry on all attorneys involved in
6 litigation who rely on discovery responses executed by another attorney" (Sanctions Order, at
7 page 26 footnote 9) is contrary to law and violates the prohibition against *ex post facto*
8 application of law when used as a basis for imposing sanctions of any type. The Sanction Order's
9 reliance on this proposed legal standard also appears to be a basis for cited findings, and thereby
10 infuses those findings with legal error. Moreover, the Responding Attorneys' due process rights
11 were violated because Qualcomm's invocation of the attorney-client privilege prevented any
12 analysis of the reasonableness of any Responding Attorney's inquiries; by definition, such
13 inquiries comprise the very communications the Responding Attorneys are prevented from
14 disclosing, and the reasonableness of any such inquiries can be assessed only by revealing
15 privileged communications.

16 22. To the extent the Sanctions Order engages in hindsight analysis and/or denies
17 Responding Attorneys the entitlement to rely on their client's representations or co-counsel's
18 statements made after what they believed to be a reasonable investigation and analysis, it is
19 clearly erroneous and contrary to law.

20 23. The Sanctions Order is contrary to law in that it exceeds the Magistrate Judge's
21 jurisdiction and violates the Responding Attorneys' due process rights by exceeding the scope of
22 the discovery issue referred to the Magistrate Judge by the District Court. Footnote 5 on page 18
23 of the Sanctions Order acknowledges that "The court is limited in its review and analysis of the
24 debacle that occurred in this litigation because Judge Brewster only referred the discovery
25 violation to this court." Despite stating that the District Court did not refer to the Magistrate
26 Judge any issue concerning sanctions with respect to incorrect statements allegedly made to the
27 trial judge or in pleadings, and despite acknowledging the limits of the Magistrate Judge's review,
28 analysis, and conclusions, the Sanctions Order nevertheless reviews and evaluates non-discovery

1 matters outside of the scope of the referral to the Magistrate Judge. Sanctions Order at pages 29-
2 31.

3 24. The Magistrate Judge used incorrect and inconsistent standards of review, and
4 failed to make the necessary findings needed to support sanctions under those standards of
5 review. See Attorneys' Brief in Response to OSC at pp. 22-35, incorporated herein by reference.
6 The Sanctions Order poses the question, "[W]hat, if any, role did Qualcomm's retained lawyers
7 play in withholding the documents?" To answer that question, the Sanctions Order includes an
8 incomplete list of four possible scenarios, eliminates three, and concludes that "some variation"
9 of the fourth is "likely." Sanctions Order at pages 24-26. The first two scenarios are variants on
10 the proposition that Qualcomm intentionally hid the documents, and the Responding Attorneys
11 failed to uncover or suspect the documents' existence. The Sanctions Order rejects both of these
12 scenarios out of hand, solely on the basis of "the impressive education and extensive experience"
13 of the Responding Attorneys. This conclusory statement does not meet the applicable standard of
14 proof. The Sanctions Order properly declines to adopt the third scenario (*i.e.* knowing complicity
15 by Qualcomm's attorneys) because of the due process limitations imposed by the attorney-client
16 privilege. Thus, by apparent process of elimination, the Sanctions Order determines that the
17 fourth scenario is "likely." This speculative reasoning and fact-finding is contrary to law and
18 falls short of the applicable standard of proof. Furthermore, this analysis violates the Responding
19 Attorneys' due process rights because Qualcomm's assertion of the attorney-client privilege, and
20 the Magistrate Judge's denial of the self-defense exception to the attorney-client privilege and its
21 failure to find a waiver of the attorney-client privilege through Qualcomm's submission of
22 declarations from four Qualcomm employees, have prevented the Responding Attorneys from
23 telling their full story. As an example, the Sanctions Order criticizes Qualcomm's attorneys for
24 purportedly accepting Qualcomm's "unsubstantiated answers" regarding the adequacy of the
25 document search. Sanctions Order at page 26. Because the Responding Attorneys have been
26 unable to reveal the content of their communications with Qualcomm, it is clearly erroneous and
27 contrary to law to describe Qualcomm's statements as "unsubstantiated" or to infer that the
28 Responding Attorneys' inquiry was unreasonable, in part because the Responding Attorneys were

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1 not permitted to provide the context of their conduct and decisions by introducing evidence of
2 their communications with their former client Qualcomm.

3 25. In stating that “It is inconceivable that these talented, well educated and
4 experienced lawyers failed to discover through their interactions with Qualcomm any facts or
5 issues that caused (or should have caused) them to question the sufficiency of Qualcomm’s
6 document search and production” (Sanctions Order at pages 24-25), the Court has engaged in a
7 speculative and clearly erroneous analysis which violates due process and applies an incorrect
8 standard of proof. The Responding Attorneys have been unable to present to the Court the
9 substance of “their interactions with Qualcomm.” Likewise, the Sanctions Order discusses
10 “warning flags” and what the Responding Attorneys knew or should have suspected regarding the
11 adequacy of Qualcomm’s search. These conclusions are directed to an incorrect standard of
12 proof, and in any event could be proper only if reached after the Responding Attorneys have had
13 a full and fair opportunity to present evidence on what they asked, what they were told, who told
14 them, and what they were told was actually done by Qualcomm to search for documents, all of
15 which Qualcomm’s assertion of the attorney-client privilege has prevented the Responding
16 Attorneys from introducing into the record. As stated in the Sanctions Order, at page 25, footnote
17 8, “[T]he fact remains that the court does not have access to all of the information necessary to
18 reach an informed decision regarding the actual knowledge of the attorneys.” Although the
19 Sanctions Order recognizes this deficiency in the record as a bar that prevents awarding sanctions
20 under one of the Court’s four scenarios, the due process concerns also preclude the award of
21 sanctions under any of the other three scenarios as well.

22 26. The statement at page 27 of the Sanctions Order that “Attorneys Leung, Mammen
23 and Batchelder are responsible for the initial discovery failure because they handled or supervised
24 Qualcomm’s discovery responses and production of documents” is clearly erroneous and contrary
25 to law. Among other things, it does not state the proper legal standard. Nor did Batchelder
26 participate in “the initial discovery failure” or in any of the pretrial discovery investigations,
27 discovery responses or production of documents referenced in the Sanctions Order. Batchelder
28 Dec., ¶ 19.

1 27. The statement in footnote 10 in paragraph 27 of the Sanctions Order that, if
2 Responding Attorney Leung was unable to get Qualcomm to conduct the type of search he
3 deemed necessary, he should have obtained the assistance of supervising or senior attorneys, is
4 clearly erroneous and a denial of due process. Responding Attorney Leung was a mid-level
5 associate who did seek and obtain the assistance of a more senior attorney.

6 28. The procedural context in which the issue of Responding Attorney Leung's inquiry
7 to Qualcomm arose, including the Court's clearly erroneous conclusion that he did not consult
8 with any more senior supervising attorney, violates the procedural due process rights of the
9 Responding Attorneys. Certain of the Responding Attorneys submitted declarations that noted
10 where their ability to provide relevant exculpatory evidence supporting the reasonableness of
11 their inquiry was limited by Qualcomm's assertion of the attorney-client privilege. At pages 27-
12 28 of the Attorneys' Brief in Response to OSC, the Responding Attorneys summarized that, "In
13 this area, perhaps more than any other, the Responding Attorneys face the constraints of privilege
14 and the dangers of hindsight." After the Responding Attorneys had completed their written
15 submissions to the Court in response to the OSC, Qualcomm submitted four employee
16 declarations and then a brief blaming the Responding Attorneys for the discovery failures. The
17 Responding Attorneys filed their Objection of Individual Day Casebeer Attorneys to Qualcomm's
18 Declarations on Due Process Grounds. Thereafter, at the OSC hearing on October 12, 2007,
19 counsel for the Responding Attorneys argued that Qualcomm waived its attorney client privilege
20 by submitting the four declarations, and that the filing of the four declarations violated the
21 Responding Attorneys' due process rights because Qualcomm was simultaneously criticizing the
22 Responding Attorneys and asserting the attorney-client privilege to muzzle them from disproving
23 the critical statements. In response to a specific statement in the Irvine Declaration that her
24 computer had not been searched, counsel for the Responding Attorneys tried to illustrate the due
25 process problems by making an offer of proof that Responding Attorney Leung did make a
26 reasonable inquiry concerning document collection, including collection from 30(b)(6) witnesses
27 (Transcript of OSC Hearing at 11:11-12:3; *see also* Sanctions Order at page 27, footnote 10).
28 Counsel made a further offer of proof concerning document collection procedures from

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1 Qualcomm (which the Sanctions Order does not mention). Transcript of OSC Hearing at 14:23-
2 15:5; 93:20-94:7; 126:19-127:2. It is contrary to law, clearly erroneous, and a denial of
3 procedural due process for the Court to state, as it has, that it will not consider the Qualcomm
4 declarations in evaluating the Responding Attorneys' conduct because those declarations are
5 "self-serving and misleading" (Sanctions Order at page 24, footnote 7), but to nevertheless extract
6 a part of the offer of proof submitted to the Court to counter those Qualcomm declarations in
7 order to make a finding that Responding Attorney Leung should have but did not consult with
8 more senior supervising lawyers – and never provide an opportunity for Leung to refute that
9 incorrect finding.

10 29. The findings at pages 28-29 of the Sanctions Order are clearly erroneous in that
11 they apply the wrong standard of proof, and apply a "knew or should have known" standard of
12 conduct. The imposition of sanctions without giving the Responding Attorneys an opportunity to
13 reveal exculpatory attorney-client communications on what they knew or should have known is
14 contrary to law and a violation of due process. The Court's findings are also clearly erroneous
15 and contrary to law in that Responding Attorney Batchelder cannot be sanctioned for delegating
16 responsibility to other lawyers on the Qualcomm trial team as to whether to produce the
17 documents found on Raveendran's computer. Moreover, the OSC provided no notice to
18 Responding Attorneys that the manner in which various supervisory responsibilities were
19 assigned to team members would be an issue under consideration for sanctions. The Court's
20 findings are also clearly erroneous and contrary to law in that Responding Attorney Mammen had
21 a legitimate and good faith basis, based in part on privileged communications, for concluding that
22 the 21 emails found on Raveendran's computer were not required to be produced. Responding
23 Attorney Mammen has acknowledged, in hindsight, that the 21 emails ultimately should have
24 been produced.² Further, it is clearly erroneous and contrary to law to find, with the benefit of
25 hindsight, that the discovery of these emails, which were from a JVT subcommittee but which
26 Raveendran testified were unsolicited and unread, and which did not relate to H.264 standard

27 ² These findings do not appear to apply to Responding Attorney Leung, since he was on paternity
28 leave and did not make the decision whether to produce the 21 emails.

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1 setting, nonetheless should have led these attorneys to (1) realize that Qualcomm had participated
2 in the JVT during the formation of H.264, and (2) conduct a “comprehensive document search” in
3 the middle of trial. The Sanctions Order’s characterization of the subsequent correspondence and
4 production is also clearly erroneous.

5 30. The materiality findings in the Sanctions Order are incorrectly based on, and based
6 on an incorrect reading of, *Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1102-05 (Fed. Cir.
7 2003), regarding the circumstances giving rise to a duty to disclose intellectual property to a
8 standards body.

9 31. Additionally, the finding on page 28 of the Sanctions Order that “the totality of the
10 circumstances” establishes that the Responding Attorneys did not make a reasonable inquiry
11 violates due process because Qualcomm’s assertion of the attorney-client privilege has prevented
12 the Responding Attorneys from introducing evidence that would actually show the “totality of the
13 circumstances.”

14 32. Likewise, to the extent sanctions are based upon the statement in footnote 13 on
15 page 31 of the Sanctions Order that several declarations state or imply that senior lawyers failed
16 to review or comment on pleadings prepared by junior lawyers and sent to them prior to filing,
17 the finding is clearly erroneous, contrary to law, and outside the scope of the referral to the
18 Magistrate Judge, and the Sanctions Order violates the due process rights of the Responding
19 Attorneys. The OSC provided no notice to the Responding Attorneys that this was an issue under
20 consideration for sanctions, or that they needed to make a record of which pleadings they
21 reviewed or commented on and why.

22 33. It is clearly erroneous, contrary to law, and outside the scope of the referral to the
23 Magistrate Judge to hold that the Responding Attorneys engaged in sanctionable conduct by
24 relying on the existing evidentiary record at trial.

25 34. It is clearly erroneous, contrary to law, and outside the scope of the referral to the
26 Magistrate Judge to impose sanctions upon an attorney for arguing to a Court or jury about what
27 the facts in evidence are, or about what those facts in evidence prove or fail to prove.

28 35. The Sanctions Order is contrary to law and violates the Responding Attorney’s due

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1 process rights because it does not contain adequate individual findings and individual analyses as
2 to each of the Responding Attorneys' conduct and culpability to support the sanctions imposed,
3 notwithstanding that the sanctions imposed are individual in nature.

4 36. The Responding Attorneys were not provided notice that the Court was
5 considering requiring them to participate in the Case Review and Enforcement of Discovery
6 Obligations (CREDO) program; and that lack of notice violated the Responding Attorneys' due
7 process rights. The Court's order that the Responding Attorneys participate in CREDO also
8 constitutes a mandatory injunction, and thus exceeds the Magistrate Judge's authority under 28
9 U.S.C. § 636(b). Neither the Responding Attorneys nor their counsel were familiar with CREDO
10 until they read the Sanctions Order, and they have not been able to locate any information
11 regarding the CREDO procedures through an internet search or other inquiries. It appears that the
12 CREDO proceedings will require the Responding Attorneys to reveal many of the same attorney-
13 client communications that they were unable to reveal in their own defense. The process also
14 seems to require self-criticism by the Responding Attorneys and/or criticism of their former client
15 Qualcomm in the presence of that former client and its adversary Broadcom, as well as in a report
16 that presumably will be available to the public. Compelling such statements, which could be
17 deemed admissions, violated due process. Moreover, the attorney-client relationship between
18 Qualcomm and the Responding Attorneys has been terminated. Qualcomm has retained
19 successor counsel who are in a better position to devise discovery protocols to guide Qualcomm's
20 discovery in the future and to report to the Court on those protocols.

21 37. The Responding Attorneys reserve the right to adopt and incorporate by reference
22 any other applicable objections filed by other attorneys in response to the Sanctions Order.
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DATED: January 22, 2008

SHARTSIS FRIESE LLP

By: /s/ Joel Zeldin
JOEL ZELDIN

Attorneys for Non-Parties
JAMES R. BATCHELDER, CHRISTIAN E.
MAMMEN and KEVIN K. LEUNG

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

PROOF OF SERVICE

I, Cristina Pelayo, declare:

I am a citizen of the United States and employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, Eighteenth Floor, San Francisco, California 94111. I am over the age of eighteen years and am not a party to the within-entitled action.

On January 22, 2008, at Shartsis Friese LLP located at the above-referenced address, I served on the interested parties in said cause the attached **OBJECTIONS OF RESPONDING ATTORNEYS BATCHELDER, MAMMEN AND LEUNG TO SANCTIONS ORDER OF MAGISTRATE JUDGE AND REQUEST FOR RECONSIDERATION BY DISTRICT COURT**

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid in accordance with the firm's practice, of which I am familiar, of collection and processing correspondence for mailing on the same day to the person(s) at the address(es) set forth below:

by consigning the document(s) listed above to Federal Express for guaranteed delivery on the next business day to the person(s) at the address(es) set forth below:

by personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:

by facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error to facsimile number(s) set forth below:

by transmitting via e-filing the document(s) listed above to the Case Management/Electronic filing system, such document(s) will be served to the addressee(s) set forth below:

William Boggs, Esq.
DLA Piper
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: (619) 699-2758
Fax: (619) 699-2701
Email: William.boggs@dlapiper.com

Kate Saxton, Esq.
WilmerHale
60 State Street
Boston, MA 02109
Phone: (617) 526-6253
Fax: (617) 526-5000
Email: kate.saxton@wilmerhale.com

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

1 William Lee, Esq.
WilmerHale
2 60 State Street
Boston, MA 02109
3 Phone: (617) 526-6253
4 Fax: (617) 526-5000
5 Email: William.lee@wilmerhale.com

Mr. Robert S. Brewer, Jr., Esq.
McKenna Long & Aldridge LLP
Symphony Towers
750 B Street, Suite 3300
San Diego, CA 92101-8105
Phone: (619) 595-5408
Fax: (619) 619-595-5450
Email: rbrewer@mckennalong.com

6 David J. Noonan, Esq.
Kirby Noonan Lance & Hoge LLP
7 600 West Broadway, Suite 1100
San Diego, CA 92101-3387
8 Phone: (619) 231-8666
9 Fax: (619) 231-9593
10 Email: dnoonan@knlh.com

Robert F Semmer, Esq.
Coughlan, Semmer & Lipman
501 W. Broadway, Suite 400
San Diego, CA 92101
Phone: (619) 232-0800
Fax: (619) 232-0107
Email: rsemmer@cslaw.com

11 Mr. H. Sinclair Kerr, Jr., Esq.
Kerr & Wagstaffe LLP
100 Spear Street, Suite 1800
San Francisco, CA 94105
12 Phone: (415) 371-8500
13 Phone: (415) 300-6700
14 Fax: (415) 371-0500
15 Email: kerr@kerrwagstaffe.com

Merri A. Baldwin, Esq.
Chapman, Popik & White LLP
650 California Street, 19th Floor
San Francisco, CA 94108
Phone: (415) 277-9012
Fax: (415) 352-3030
Email: mbaldwin@chapop.com

16 Richard J. Prendergast, Esq.
Richard J. Prendergast, Ltd.
111 West Washington Street, Suite 1100
Chicago, IL 60602
17 Phone: (312) 641-0079
18 Fax: (312) 641-3562
19 Email: rprendergast@rjpltd.com

James McNeil, Esq.
McKenna Long & Aldridge LLP
Symphony Towers
750 B Street, Suite 3300
San Diego, CA 92101-8105
Phone: (619) 595-5408
Email: jmcneill@mckennalong.com

20 Geoffrey Howard, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111
21 Phone: (415) 393-2845
22 Fax: (415) 262-9212
23 Email: geoff.howard@bingham.com

Douglas M. Butz, Esq.
Butz Dunn & DeSantis
101 West Broadway, Suite 1700
San Diego, CA 92101
24 Phone: (619) 233-4777
25 Fax: (619) 231-0341
26 Email: dmbutz@butzdunn.com

27 I declare under penalty of perjury that the foregoing is true and correct.

28 Executed on January 22, 2008, in San Francisco, California.

/s/ Cristina Pelayo

Cristina Pelayo

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