

1 WILLIAM S. BOGGS (Bar No. 053013)
BRIAN A. FOSTER (Bar No. 110413)
2 TIMOTHY BLACKFORD (Bar No. 190900)
CHRISTOPHER J. BEAL (Bar No. 216579)
3 **DLA PIPER US LLP**
401 B Street, Suite 1700
4 San Diego, CA 92101-4297
Tel: (619) 699-2700
5 Fax: (619) 699-2701

6 Attorneys for Plaintiff and Counterdefendant
QUALCOMM INCORPORATED

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 QUALCOMM INCORPORATED,
11 Plaintiff,
12 v.
13 BROADCOM CORPORATION,
14 Defendant.

05 CV 1958 B (BLM)

**QUALCOMM INCORPORATED'S
NOTICE OF MOTION AND MOTION
REGARDING REMAND PROCEEDINGS**

15 BROADCOM CORPORATION,
16 Counterclaimant,
17 v.
18 QUALCOMM INCORPORATED,
19 Counterdefendant.
20

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

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PLEASE TAKE NOTICE that on Wednesday, April 30, 2008 at 10:00 a.m., or as soon thereafter as counsel may be heard, Qualcomm Incorporated ("Qualcomm") will and hereby does move the Court for an order that clarifies the scope of disclosure of attorney-client privileged material that will be permitted in further proceedings and the manner in which discovery proceedings will be conducted.

The motion is based upon this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities filed concurrently herewith, and such other matters as the Court deems proper.

Dated: April 2, 2008

Respectfully Submitted,

DLA PIPER US LLP

By /s/ William S. Boggs

WILLIAM S. BOGGS

BRIAN A. FOSTER

TIMOTHY S. BLACKFORD

CHRISTOPHER J. BEAL

Attorneys for Plaintiff and Counterdefendant

QUALCOMM INCORPORATED

william.boggs@dlapiper.com

1 WILLIAM S. BOGGS (Bar No. 053013)
BRIAN A. FOSTER (Bar No. 110413)
2 TIMOTHY S. BLACKFORD (Bar No. 190900)
CHRISTOPHER J. BEAL (Bar No. 216579)
3 DLA PIPER US LLP
401 B Street, Suite 1700
4 San Diego, CA 92101-4297
Tel: 619.699.2700
5 Fax: 619.699.2701

6 Attorneys for Plaintiff and Counterdefendant
QUALCOMM INCORPORATED

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 QUALCOMM INCORPORATED,
11 Plaintiff,
12 v.
13 BROADCOM CORPORATION,
14 Defendant.

CV NO. 05 CV 1958 B (BLM)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
QUALCOMM INCORPORATED'S
MOTION REGARDING REMAND
PROCEEDINGS**

15
16 BROADCOM CORPORATION,
17 Counterclaimant,
18 v.
19 QUALCOMM INCORPORATED,
20 Counterdefendant.

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

1 **I. PRELIMINARY STATEMENT**

2 At the March 20, 2008 status hearing, this Court stated its “tentative” view based upon
3 Judge Brewster’s March 5, 2008 Order Remanding in Part Order of Magistrate Court re Motion
4 for Sanctions Dated 1/07/08 (“Remand Order”) that Qualcomm had waived its attorney-client
5 privilege with respect to proceedings related to the Court’s August 13, 2007 Order to Show Cause
6 (“OSC”) as to the six remaining Responding Attorneys. (Miscellaneous Hearing Transcript
7 (“Tr.”) 53:12-16, March 20, 2008.) The Court indicated that it was inclined to permit the
8 Responding Attorneys to file Qualcomm privileged material publicly, and to allow Broadcom to
9 notice Qualcomm employee depositions in which Broadcom would presumably seek to elicit
10 Qualcomm attorney-client privileged information. (*Id.* at 42:22-24, 53:12-16.) This Court also
11 requested that Qualcomm decide the nature and extent of its involvement in the remand
12 proceedings. (*See, e.g., id.* at 53:8-12.)

13 The Court’s Remand Order and the views shared in the status hearing raise the specter of
14 damage to Qualcomm’s interests, particularly in light of Qualcomm’s other, ongoing litigation
15 with Broadcom. Qualcomm is now confronted with the serious possibility that Broadcom, its
16 adversary in numerous other litigations, will obtain access to Qualcomm’s privileged information
17 in circumstances where Broadcom has no need for such access and where such access may well
18 provide an unfair advantage to Broadcom in the other litigations.

19 Qualcomm believes the Remand Order was intended to narrowly limit the scope of any
20 privileged material disclosed and used in further proceedings relating to sanctions against the
21 Responding Attorneys. Qualcomm further believes the Remand Order does not require that
22 Broadcom be provided with access to Qualcomm’s privileged information.

23 Accordingly, Qualcomm respectfully requests that the Court clarify the scope of
24 disclosure of attorney-client privileged material that will be permitted in further proceedings and
25 the manner in which discovery proceedings will be conducted. In particular, Qualcomm believes
26 the Court’s clarifying order should:

27 1. Limit the disclosure of Qualcomm’s privileged information to that which is
28 necessary for the Responding Attorneys to respond to the OSC—that is, communications between

1 Qualcomm and the Responding Attorneys concerning the selection of custodians and the
2 collection of documents for production during the discovery phase of this case;

3 2. Limit the disclosure of Qualcomm’s privileged information to the Court, the
4 Responding Attorneys, and to Qualcomm;

5 3. Make clear that Broadcom’s participation in further OSC proceedings will not
6 include access to Qualcomm’s privileged material, or presence during the exhibition or discussion
7 of such material;

8 4. Require that any portion of the record containing or reflecting Qualcomm’s
9 privileged information be reviewed *in camera* and kept under seal; and

10 5. Make clear that these proceedings will not be a waiver of Qualcomm’s privilege.¹

11 In order to make an informed decision regarding the nature and extent of its involvement
12 in future proceedings—and whether to pursue other options, such as appellate review and/or a
13 stay of proceedings—Qualcomm requires an order from this Court interpreting Judge Brewster’s
14 Remand Order and establishing how the Court intends to conduct further proceedings. Without
15 further clarification, Qualcomm faces the real risk that its privileged information will be revealed
16 in a way that causes irreparable injury.²

17 **II. THE COURT SHOULD ISSUE AN ORDER REGARDING THE EXTENT TO**
18 **WHICH ATTORNEY-CLIENT PRIVILEGED INFORMATION MAY BE USED**
19 **IN DISCOVERY OR FURTHER PROCEEDINGS**

20 In his Remand Order, Judge Brewster held that “[t]he objectors shall not be prevented
21 from defending their conduct by the attorney-client privilege of Qualcomm and its employees and
22 representatives because of the application of the self-defense exception to the attorney-client
23 privilege of Qualcomm”. (Remand Order 3:8-11.) Under the self-defense exception to the
24 attorney-client privilege, disclosure of privileged information must be limited to those materials
25 that are “reasonably necessary” to “vindicate innocence”. *In re Nat’l Mortgage Equity Corp.*
Mortgage Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988).

26 //

27 ¹ In seeking clarification, Qualcomm does not waive its right to challenge the terms of any such order upon review.

28 ² Establishing these parameters at this time may have the additional benefit of minimizing the need to seek judicial
guidance and review in the middle of any discovery process.

1 Accordingly, the scope of any disclosure should be no broader than necessary for the
2 Responding Attorneys to conduct their defense in the OSC proceeding. The appropriate scope of
3 disclosure of privileged materials “reasonably necessary” for the Responding Attorneys to
4 “vindicate innocence” would be (i) communications between Qualcomm and the Responding
5 Attorneys, (ii) relating to the selection of custodians and the collection of documents for review
6 and production on the subjects identified by Judge Brewster at the end of his Order, (iii) during
7 the discovery phase of this case.

8 Thus, the Court should make clear that any discovery and disclosure of privileged
9 information in practice must relate specifically to the Responding Attorneys’ performance of their
10 discovery responsibilities, and not to the substantive issues or facts that were the subject of the
11 underlying lawsuit. For example, privileged communications between Qualcomm and the
12 Responding Attorneys regarding the identification of custodians of documents concerning the
13 standards-setting process would be disclosable, but any privileged communications concerning
14 the standards-setting process itself unrelated to the selection of document custodians or document
15 collection would not be disclosable. The latter information would not be “reasonably necessary”
16 to “vindicate innocence” or “provide significant assistance to [the attorneys’] defense” regarding
17 their performance of discovery responsibilities, and therefore need not be disclosed. *See Nat’l*
18 *Mortgage*, 120 F.R.D. at 692.

19 **III. THE DISCLOSURE OF PRIVILEGED MATERIAL SHOULD BE LIMITED TO** 20 **THE INTERESTED PARTIES**

21 Although this Court’s tentative reading of Judge Brewster’s Remand Order is that
22 Qualcomm’s privilege has been waived (Tr. 33:18-22, 53:12-16), the Remand Order is not
23 definitive on this point. Indeed, the word “waiver” does not appear anywhere in the Remand
24 Order. The Order appears to focus on the self-defense exception to attorney-client privilege, and
25 other courts have permitted disclosure of attorney-client privileged information under the self-
26 defense exception without finding that the privilege has been waived. *See, e.g., Nat’l Mortgage*,
27 120 F.R.D. at 692. While the self-defense exception permits the Responding Attorneys to use
28 privileged information to defend themselves against the OSC, it is not necessary for the Court to

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1 find that a waiver of Qualcomm's privilege has occurred in order to allow limited disclosure of
2 privileged material for the purposes of such defense.

3 Other courts that have allowed for the disclosure of privileged material have reviewed the
4 disclosed materials *in camera* and maintained them under seal, even after determining that the
5 self-defense exception to privilege applies. *See id.* ("Court made an *in camera* review of the self
6 defense material" and entered order that materials be maintained "in confidence" by counsel for
7 interested parties); *see also First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel,*
8 *Dixon & Co.*, 110 F.R.D. 557, 567 (S.D.N.Y. 1986) (court directed disclosing party to submit
9 materials for *in camera* review). Qualcomm believes that *in camera* review here of any
10 privileged material that may potentially be disclosed and limiting the parties to which disclosure
11 may be made will allow the Court to make all determinations necessary to this proceeding.

12 Qualcomm also submits that it would be manifestly inappropriate and unnecessary to
13 permit Broadcom to have access to any of Qualcomm's privileged information. *First*, permitting
14 Broadcom to have access to privileged information would intolerably risk waiver of Qualcomm's
15 privilege—particularly taking into account that Broadcom remains Qualcomm's litigation
16 adversary in other matters and, indeed, has brought proceedings in New Jersey federal court
17 involving the exact same issues (including alleged discovery abuses) presented in this case.
18 *Second*, Broadcom never sought sanctions against the Responding Attorneys and has repeatedly
19 disclaimed any interest in the outcome of the OSC proceedings as to the Responding Attorneys.³
20 Thus, Broadcom's only role here would be to attempt to gain a litigation advantage against
21 Qualcomm in *other* litigation. *Third*, the due process concerns underlying the Remand Order can
22 be fully addressed by permitting the Responding Attorneys alone to submit privileged
23 information to the Court *in camera*. Only the Responding Attorneys—not Broadcom—are in a
24 position to decide in the first instance what information is "likely to provide significant assistance
25 to [the attorneys'] defense". Under these circumstances, there is no need, and it would not be
26 appropriate to employ Broadcom as a sort of "special prosecutor" in this remand proceeding. *Cf.*

27 ³ As recently as the March 20, 2008 status conference, Broadcom reminded the Court that "Broadcom brought its
28 sanctions motion against Qualcomm, not against the outside attorneys," and reconfirmed that "we [Broadcom] really
don't have a position in this. . .". (Tr. 19:1-3, 5-6.)

1 *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).⁴

2 Accordingly, the Court should not hold that the Remand Order finds or effects a waiver of
3 Qualcomm’s attorney-client privilege. However, in the event the Court construes the Remand
4 Order to find or effectuate a waiver, the Court should specify the scope of any such waiver. In
5 addition, the Court should specifically delineate Broadcom’s role with respect to the remand
6 proceedings, and clarify that Broadcom should not have access to Qualcomm’s privileged
7 material.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Qualcomm respectfully requests an order from this Court
10 setting forth the scope and manner of proceedings on remand.

11 Dated: April 2, 2008

12 DLA PIPER US LLP

13
14 By /s/ William S. Boggs

15 WILLIAM S. BOGGS

16 william.boggs@dlapiper.com

17 Attorneys for Plaintiff and Counterdefendant

18 QUALCOMM INCORPORATED

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27 ⁴ The Remand Order provides that Broadcom “has standing to fully participate” but does not define the term “fully
28 participate”. (Remand Order at 3:3.) Permitting Broadcom to participate in all aspects of the remand proceedings
not involving Qualcomm’s privileged information satisfies this directive.

1 WILLIAM S. BOGGS (Bar No. 053013)
BRIAN A. FOSTER (Bar No. 110413)
2 TIMOTHY S. BLACKFORD (Bar No. 190900)
CHRISTOPHER J. BEAL (Bar No. 215679)
3 **DLA PIPER US LLP**
401 B Street, Suite 1700
4 San Diego, CA 92101-4297
Telephone: (619) 699-2700
5

6 Attorneys for Plaintiff and Counterdefendant
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7

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PROOF OF SERVICE

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper US LLP, 401 B Street, Suite 1700, San Diego, California 92101-4297. On April 2, 2008, I served the within documents:

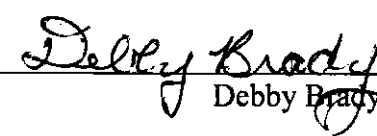
- 1. **Qualcomm Incorporated' Notice of Motion and Motion Regarding Remand Proceedings;**
- 2. **Memorandum of Points and Authorities in Support of Qualcomm Incorporated' Motion Regarding Remand Proceedings**

- by transmitting via e-filing the document(s) listed above to the Case Management/Electronic Case filing system, such document(s) will be served to the addressee(s) specified in Exhibit A hereto.
- by transmitting via facsimile the document(s) listed above to the fax number(s) specified in Exhibit B below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, and deposited with UPS Overnight at San Diego, California to the addressee(s) specified in Exhibit B hereto.
- by personally delivering the document(s) listed above to the person(s) via Central Attorney Service at the address(es) set forth in Exhibit B.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the Bar of or permitted to practice before this Court at whose direction the service was made.

Executed on April 2, 2008, at San Diego, California.



Debby Brady

EXHIBIT A

PARTIES TO BE SERVED ELECTRONICALLY

- 1 • **John Allcock**
2 john.allcock@dlapiper.com lisa.watts@dlapiper.com
- 3 • **Robert S Brewer, Jr**
4 rbrewer@mckennalong.com mmontoya@mckennalong.com
- 5 • **Will L Crossley**
6 will.crossley@wilmerhale.com crystal.williams@wilmerhale.com
- 7 • **Vinita Ferrera**
8 vinita.ferrera@wilmerhale.com elizabeth.geller@wilmerhale.com
- 9 • **Geoffrey M Howard**
10 geoff.howard@bingham.com rosaleen.doran@bingham.com
- 11 • **Alicia Hunt**
12 alicia.hunt@wilmerhale.com
- 13 • **Lawrence M Jarvis**
14 lj Jarvis@mhmlaw.com cdoss@mhmlaw.com
- 15 • **Randall Evan Kay**
16 randy.kay@dlapiper.com irene.folk@dlapiper.com
- 17 • **Jean Dudek Kuelper**
18 jkuelper@mhmlaw.com info@mhmlaw.com
- 19 • **William F Lee**
20 william.lee@wilmerhale.com
- 21 • **James Sullivan McNeill**
22 jm McNeill@mckennalong.com lvaldez@mckennalong.com
- 23 • **Juliana Maria Mirabilio**
24 juliana.mirabilio@wilmerhale.com teresa.shirley@wilmerhale.com
- 25 • **Stephen M Muller**
26 stephen.muller@wilmerhale.com nancy.clark@wilmerhale.com
- 27 • **Allen C Nunnally**
28 allen.nunnally@wilmerhale.com diane.coffin@wilmerhale.com
- **John J Regan**
 John.Regan@wilmerhale.com
- **Kathryn Bridget Riley**
 kathryn.riley@dlapiper.com ginny.gomez@dlapiper.com;robyn.allison@dlapiper.com;
 catherine.orth@dlapiper.com;carmen.ferrera@dlapiper.com

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24
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28

- **Kate Saxton**
kate.saxton@wilmerhale.com jennifer.doig@wilmerhale.com
- **Gregory C Schodde**
gschodde@mhmlaw.com hmack@mhmlaw.com
- **Mark D Selwyn**
mark.selwyn@wilmerhale.com rebecca.mcnew@wilmerhale.com
- **Donald R Steinberg**
don.steinberg@wilmerhale.com gerri.bellavia@wilmerhale.com
- **Wayne L Stoner**
wayne.stoner@wilmerhale.com valerie.mcnamara@wilmerhale.com
- **Maria K Vento**
maria.vento@wilmerhale.com patricia.shore@wilmerhale.com
- **David J Noonan**
dnoonan@knlh.com,rromero@knlh.com
- **Jill E Randall**
jrandall@knlh.com,rromero@knlh.com
- **Douglas M Butz**
dmbutz@butzdunn.com,bmaccarthy@butzdunn.com
- **Merri A Baldwin**
mbaldwin@chapop.com,scoppedge@chapop.com
- **Kerr & Wagstaffe LLP**
sawyer@kerrwagstaffe.com
- **James M Wagstaffe**
wagstaffe@kerrwagstaffe.com,milla@kerrwagstaffe.com
- **Joel Zeldin**
jzeldin@sflaw.com,cpelayo@sflaw.com,calendar@sflaw.com
- **Richard J. Prendergast**
rprendergast@rjpltd.com,jharms@rjpltd.com,rlavko@rjpltd.com
- **Frank A Cialone**
fcialone@sflaw.com,lrodrigues@sflaw.com