

# **EXHIBIT A**

2008-1348, -1381, -1382

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUALCOMM INCORPORATED,  
*Plaintiff-Appellant,*  
and

JAMES R. BATCHELDER, CHRISTIAN E. MAMMEN,  
and KEVIN K. LEUNG  
*Sanctioned Parties-Appellants,*

and

LEE PATCH,  
*Sanctioned Party-Appellant,*

v.

BROADCOM CORPORATION,  
*Defendant-Appellee.*

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APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN CASE NO. 05-CV-1958,  
SENIOR JUDGE RUDI M. BREWSTER.

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**QUALCOMM INCORPORATED'S RESPONSE TO BROADCOM CORPORATION'S  
EMERGENCY MOTION TO DISMISS APPEAL OF QUALCOMM INCORPORATED**

Evan R. Chesler  
Elizabeth L. Grayer  
CRAVATH, SWAINE & MOORE LLP  
825 Eighth Avenue  
New York, NY 10019-7475  
Telephone: (212) 474-1000  
Facsimile: (212) 474-3700

William S. Boggs  
Brian A. Foster  
DLA PIPER US LLP  
401 B Street, Suite 1700  
San Diego, CA 92101-4297  
Telephone: (619) 699-2700  
Facsimile: (619) 699-2701

Dated: June 12, 2008

*Attorneys for Plaintiff-Appellant*  
**QUALCOMM INCORPORATED**

Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RECEIVED

QUALCOMM Incorporated (Plaintiff-Appellant) V. Broadcom Corporation (Defendant-Appellee)

MAY 27 2008

No. 2008-1348

United States Court of Appeals  
For The Federal Circuit

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

QUALCOMM Incorporated certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

QUALCOMM Incorporated.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

QUALCOMM Incorporated.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

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THE FEDERAL CIRCUIT

MAY 27 2008

None.

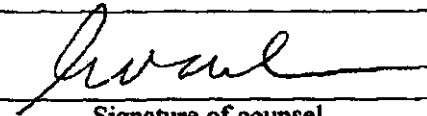
JAN HORBALY  
CLERK

4.  There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Please see attached list.

5/23/08  
Date

  
Signature of counsel  
Evan R. Chesler  
Printed name of counsel

12

Continued from Number 5, above:

Cravath, Swaine & Moore LLP: Evan R. Chesler, Elizabeth L. Grayer, Peter T. Barbur

DLA Piper US LLP: William S. Boggs, Brian A. Foster, Timothy S. Blackford,  
Christopher J. Beal, Stanley J. Panikowski III

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## I. INTRODUCTION

Qualcomm Incorporated (“Qualcomm”) hereby responds to Broadcom Corporation’s (“Broadcom”) Emergency Motion to Dismiss Appeal of Qualcomm Incorporated (“Broadcom’s Motion to Dismiss”) for lack of jurisdiction. Contrary to Broadcom’s suggestion that this appeal is an effort by Qualcomm to make an “end-run around lower court proceedings”, Qualcomm merely seeks to maintain its right to review of the lower court’s Order Remanding in Part Order of Magistrate Court re Motion for Sanctions Dated 1/07/08 (“Remand Order”) amidst procedural and precedential ambiguity.

The unusual procedural evolution of this case left Qualcomm with a choice of filing a timely Notice of Appeal to avoid the possibility of a waiver of critical appellate rights, or potentially foregoing the procedural and jurisdictional deadline for filing such a Notice. Qualcomm believes that there is a legitimate ground for treating the District Court’s Remand Order as a final order, from which Qualcomm was obligated to appeal or waive its right to do so. Specifically, the Remand Order may be appealable either as a final order under 28 U.S.C. §1295(a)(1) or under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Because Qualcomm could not risk a waiver of the right to appeal, Qualcomm filed a timely Notice. Qualcomm neither engaged in, nor intended, any gamesmanship. In any event, nothing supports Broadcom’s charge that Qualcomm filed its Notice to delay proceedings below. Indeed, Qualcomm fully participated in ongoing proceedings in the lower court and did

not seek to stay remand proceedings pending resolution of the appeal.<sup>1</sup> Qualcomm welcomes this Court's resolution of uncertainty as to its jurisdiction over this matter.<sup>2</sup>

## II. FACTS<sup>3</sup>

At the conclusion of the original patent infringement suit brought by Qualcomm against Broadcom, Broadcom moved for sanctions against Qualcomm for certain discovery failures in the case. (Broadcom's Mem. in Supp. of its Mot. for Sanctions, Ex. B, at 14.) Broadcom did not move for sanctions against any of Qualcomm's outside counsel. (*Id.*) Sanctions proceedings subsequently commenced under the supervision of Magistrate Judge Major, pursuant to 28 U.S.C. § 636(b). During the course of the sanctions proceedings, Magistrate Judge Major initiated further proceedings against Qualcomm's individual outside attorneys, ordering them to show cause why they should not be sanctioned for the discovery failures. (*See* Remand Order, Ex. C, at 2.) Following discovery, Judge Major issued an Order Granting in Part and Denying in Part Defendant's Motion for Sanctions and Sanctioning Qualcomm, Incorporated and the Individual Lawyers (the "Sanctions Order"). (Ex. D.) The

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<sup>1</sup> On May 29, 2008 Judge Major *sua sponte* issued an Order Vacating Dates and Declining to Rule on Motions Pending Outcome of Appeal. (Ex. A.)

<sup>2</sup> The Court's decision as to the motion should also apply to the consolidated cross-appeals filed by Responding Attorneys James R. Batchelder, Christian E. Mammen and Kevin K. Leung and Responding Attorney Lee Patch, who have stated that their cross-appeals were filed to protect their ability to challenge a portion of the Remand Order in the event that Qualcomm's appeal moves forward. (*See* Responding Attorneys-Appellees/Cross-Appellants James R. Batchelder, Christian E. Mammen, and Kevin K. Leung's Non-Opposition to Broadcom Corp.'s Emergency Mot. to Dismiss Appeal of Qualcomm Inc.; *see also* June 3, 2008 Letter from Adrian J. Sawyer to Clerk of Court.)

<sup>3</sup> Qualcomm disagrees with various factual assertions in Broadcom's Motion to Dismiss, but does not address those disagreements here because they are not relevant to the jurisdictional question.

Sanctions Order set forth specific sanctions for Qualcomm and outside attorneys Adam Bier, Lee Patch, Stanley Young, James Batchelder, Christian Mammen and Kevin Leung (collectively, the "Responding Attorneys") for the discovery failures. (*Id.* at 18, 26, 34-41.)

Qualcomm neither objected to the sanctions imposed by Judge Major nor appealed them to the trial court. (*See* Remand Order, Ex. C, at 2.) The Responding Attorneys, however, filed timely objections to the magistrate's order, objecting to the denial of an opportunity to submit privileged materials as part of their defenses, amongst other things. (*Id.*) On March 5, 2008, District Court Judge Brewster issued the Remand Order vacating the portion of the Sanctions Order applying to the Responding Attorneys and providing for further proceedings regarding the question of sanctions as to the Responding Attorneys alone. (*Id.* at 2-3.) The Remand Order stated that the self-defense exception to Qualcomm's attorney-client privilege would apply in any further proceedings. (*Id.* at 6.) The Remand Order also stated that Qualcomm does not bear "any exposure to further sanctions of Qualcomm or any of its employees because of the finality of the order as to it, which in fact is nearly fully satisfied".<sup>4</sup> (*Id.* at 2.) The Remand Order further provided that although Broadcom had no pending claims against

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<sup>4</sup> Prior to the District Court's issuance of the Remand Order, Qualcomm fully paid the monetary portion of the Sanctions Order, in the amount of \$8,568,633.24 in attorneys' fees to Broadcom. (*See* Ex. G of Broadcom's Motion to Dismiss.) Qualcomm is still engaged in the Case Review and Enforcement of Discovery Obligations ("CREDO") program ordered by the lower court as part of the Sanctions Order. (*See* Sanctions Order, Ex. D, at 38-41.)



either Qualcomm or the Responding Attorneys, it would have “standing to fully participate” in further proceedings. (*Id.* at 3.)<sup>5</sup>

Qualcomm was uncertain as to how the Remand Order would be applied and sought clarification of the Remand Order before the Magistrate Judge on April 2, 2008 in its Motion Regarding Remand Proceedings (“Motion Regarding Remand”). (Ex. E, at 1-2.) At the same time, Qualcomm moved to extend the deadline for filing the notice of appeal to the full extent allowable in an effort better to understand the application of the Remand Order as to Qualcomm. (Qualcomm’s *Ex-Parte* Application Extending Time to File Notice of Appeal of March 5, 2008 Order, Ex. F.) That extension was granted by Judge Brewster on April 2, 2008. (Order Granting Qualcomm Incorporated’s Unopposed *Ex-Parte* Application Extending Time to File Notice of Appeal of March 5, 2008 Remand Order, Ex. G.) On April 23, 2008, the Magistrate Judge denied Qualcomm’s Motion Regarding Remand as premature. (Order Denying Without Prejudice Qualcomm Incorporated’s Motion Regarding Remand Proceedings, Ex. H, at 2.)<sup>6</sup> On May 5, 2008, the last date to file an appeal, Qualcomm filed its Notice of Appeal. (Ex. I.)

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<sup>5</sup> Qualcomm believes Broadcom lacks standing to participate, and is not an appropriate participant, in the proceedings relating to outside counsel. That said, that issue does not need to be addressed at this time because the issue raised by Broadcom in its Motion to Dismiss goes to the fundamental question of this Court’s jurisdiction over this appeal. Qualcomm reserves the right to raise this standing issue in connection with any consideration of the merits of this appeal or in the district court as appropriate.

<sup>6</sup> Thus, there currently remains uncertainty as to the specific contours of any further proceedings with respect to the sanctions issues relating to the Responding Attorneys. Once the specifics of any such proceedings become clear, Qualcomm may seek review of those determinations either on appeal or through a writ of mandamus as appropriate.

### III. ARGUMENT

The Remand Order can be deemed a final order as to Qualcomm because there are no further sanctions proceedings to be conducted concerning Qualcomm. Moreover, Qualcomm's adversary in the case, Broadcom, sought sanctions only against Qualcomm and that issue has been finally resolved. On the other hand, this case is still pending in the District Court and further proceedings with regard to Qualcomm's former counsel have yet to be completed. Moreover, as noted above, aspects of Qualcomm's implementation of the Sanctions Order have not yet been completed.

Qualcomm does not contest Broadcom's assertion that non-final orders are generally unappealable. (Broadcom's Motion to Dismiss at 7.) Generally, as Broadcom notes, for an order to be considered final, it must resolve "all claims for all parties". (*Id.* at 8, citing *Syntex Pharm. Int'l, Ltd. v. K-Line Pharm., Ltd.*, 905 F.2d 1525, 1526 (Fed. Cir. 1990).) Here, the Remand Order altered the magistrate's finding only as to the Responding Attorneys and Judge Brewster expressly stated that the Sanctions Order was "final as to" Qualcomm, which lodged no objections to the order. (Remand Order, Ex. C, at 2, 3.) The Remand Order also left no outstanding claims asserted by Broadcom. The only issues that remain in the lower court are whether sanctions should be imposed against the Responding Attorneys for records discovery failures during the course of the case and remaining implementation of the sanctions imposed under the Sanctions Order. (*Id.* at 2-3.)

Appellate jurisdiction is arguably also appropriate under the collateral order doctrine. To determine whether a non-final order may be reviewed under this doctrine, courts employ the three point analysis in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Under *Cohen*, the order in question must (1) conclusively

determine the disputed question; (2) resolve an important issue that is completely separate from the merits of the dispute; and (3) be effectively unreviewable on appeal from a final judgment. *In re Ford Motor Co.*, 110 F.3d 954, 958 (3d Cir. 1997). Because a court's application of the *Cohen* factors is highly fact-specific, Qualcomm felt constrained to file its Notice of Appeal to preserve review given the possibility that the collateral order doctrine might apply.<sup>7</sup>

Qualcomm acknowledges that it is unclear whether this Court has jurisdiction over this appeal. But given the unusual posture of the proceedings, Qualcomm was compelled to appeal to this Court or face the possible grave consequence of forever losing an opportunity for such review. *See Ayers v. Peake*, No. 2008-7053, 2008 WL 1757812, at \*1 (Fed. Cir. Apr. 7, 2008) (timely filing of notice of appeal is a jurisdictional requirement). In this context, Qualcomm requests that the Court make a determination as to whether it has jurisdiction to review the Remand Order at this time.

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<sup>7</sup> While this Court in *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991) held in that case that the district court's rulings concerning the attorney-client privilege were effectively reviewable on appeal from a final judgment, and therefore did not satisfy the third requirement of the *Cohen* test, the fact-specific nature of applying the *Cohen* test and the conflicting authority in other circuits regarding the scope of the doctrine compelled Qualcomm to appeal the Remand Order in order to avoid the possibility of losing an opportunity for review should the collateral order doctrine apply here. *See In re Vioxx Products Liab. Litig.*, No. 06-30378, 2006 WL 1726675, at \*1 n.1 (5th Cir. May 26, 2006) (discussing circuit split regarding the doctrine's applicability to rulings on the attorney-client privilege.)

Because the Remand Order at this time is neither conclusive as to the scope of privileged materials that Qualcomm will ultimately be required to produce and further, because disclosure has not yet been compelled, Qualcomm believes the Remand Order at this time does not present the required urgency needed to justify an exceptional finding of jurisdiction under the collateral order doctrine. However, should Qualcomm be ordered to produce specific documents, Qualcomm reserves the right to argue that such circumstances may be grounds for such a finding under the collateral order doctrine.

Depending on the Court's resolution of that issue, Qualcomm will either proceed with briefing the appeal or will proceed below, reserving the opportunity to challenge any decision when a "final order" is issued or through mandamus review as necessary at a later time.

**IV. CONCLUSION**

Qualcomm respectfully requests that this Court make a determination as to whether the Court has jurisdiction on appeal of the Remand Order at this time.

Respectfully submitted,

By 

EVAN R. CHESLER  
ELIZABETH L. GRAYER  
CRAVATH, SWAINE & MOORE LLP  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019  
Telephone: (212) 474-1000  
Facsimile: (212) 474-3700

WILLIAM S. BOGGS  
BRIAN A. FOSTER  
DLA PIPER US LLP  
401 B Street, Suite 1700  
San Diego, CA 92101-4297  
Telephone: (619) 699-2700  
Facsimile: (619) 699-2701

*Attorneys for Plaintiff-Appellant  
QUALCOMM INCORPORATED*

Dated: June 12, 2008

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

**QUALCOMM INCORPORATED V. BROADCOM CORPORATION**

Docket No. 2008-1348

**CERTIFICATE OF SERVICE**

I, KEITH KAPLAN, hereby certifies as follows:

On the 12th day of June, 2008, I caused the annexed Qualcomm Incorporated's

Response to Broadcom Corporation's Emergency Motion to Dismiss Appeal of

Qualcomm Incorporated ("Response") to be served upon:

Joel Zeldin, Esq.  
Frank A. Cialone, Esq.  
Shartsis Friese LLP  
One Maritime Plaza  
Eighteenth Floor  
San Francisco, CA 94111  
Tel: (415) 421-6500  
Fax: (415) 421-2922  
jzeldin@sflaw.com;  
fcialone@sflaw.com

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

Kate Saxton, Esq.  
William Lee, Esq.  
WilmerHale  
60 State Street  
Boston, MA 02109  
Tel: (617) 526-6000  
Fax: (617) 526-5000  
kate.saxton@wilmerhale.com;  
William.lee@wilmerhale.com

H. Sinclair Kerr, Jr., Esq.  
Kerr & Wagstaffe LLP  
100 Spear Street  
Suite 1800  
San Francisco, CA 94105  
Tel: (415) 371-8500  
Fax: (415) 371-0500  
kerr@kerrwagstaffe.com

David J. Noonan, Esq.  
Kirby Noonan Lance & Hoge LLP  
Diamond View Tower  
350 Tenth Avenue, Suite 1300  
San Diego, CA 92101  
Tel: (619) 231-8666  
Fax: (619) 231-9593  
dnoonan@knlh.com

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

Robert S. Brewer, Jr., Esq.  
James S. McNeill, Esq.  
McKenna Long & Aldridge LLP  
Symphony Towers  
750 B Street  
Suite 3300  
San Diego, CA 92101-8105  
Tel: (619) 595-5400  
Fax: (619) 595-5450  
rbrewer@mckennalong.com;  
jmcneill@mckennalong.com

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

W. Thomas McGough, Esq.  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886  
Tel: (412) 288-3131  
Fax: (412) 288-3063  
wmcgough@reedsmith.com

via facsimile transmission on this date to the facsimile numbers listed above, and by personally delivering true copies thereof, in securely enclosed prepaid and properly addressed wrappers directed to said attorneys at the address indicated beneath their names, to an agent of Federal Express, an overnight delivery service, for next business day delivery to said attorneys. In addition, I personally delivered the original and three true copies of the Response, in a securely enclosed prepaid and properly addressed wrapper directed to the Clerk of the Court, to an agent of Federal Express, an overnight delivery service, for next business day delivery to the Clerk of the Court.

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

Executed on June 12th, 2008.

  
\_\_\_\_\_  
Keith Kaplan