

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
QUALCOMM INCORPORATED,
Defendant.

Case No. 17-CV-00220-LHK
**ORDER DENYING MOTION TO
DISMISS (REDACTED)**
Re: Dkt. No. 69

Plaintiff Federal Trade Commission (“FTC”) sues Defendant Qualcomm Incorporated (“Qualcomm”) for violation of § 5 of the Federal Trade Commission Act (“FTCA”), 15 U.S.C. § 45. See ECF No. 1. Before the Court is Qualcomm’s motion to dismiss. ECF No. 69. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court hereby DENIES Qualcomm’s motion to dismiss.

I. BACKGROUND
A. Factual Background

This case requires understanding the complicated interaction between cellular communications standards, standard essential patents (“SEPs”), and the market for baseband

1 processors, or “modem chips.”¹ The Court begins by discussing cellular communications
2 standards and modem chips generally. Then, the Court discusses Qualcomm’s cellular
3 communications SEPs and Qualcomm’s participation in the markets for modem chips. Finally,
4 the Court discusses FTC’s allegations that Qualcomm has used its SEPs and its modem chips
5 monopoly to harm competition in certain modem chips markets.

6 **1. Cellular Technology and the Baseband Processor Industry Generally**

7 **i. Cellphone Networks**

8 Cellular communications depend on widely distributed networks that implement cellular
9 communications standards. ECF No. 1 (“Compl.”), ¶ 18. Network operators, including Verizon,
10 AT&T, T-Mobile, and Sprint, “build networks that comply with these standardized protocols.” Id.

11 Cellular communications standards have evolved over four “generations.” Id. ¶ 19. First-
12 generation cellular communications standards were developed in the 1980s. These standards
13 support analog transmissions of voice calls. Id. ¶ 19a.

14 Second-generation (“2G”) cellular communications were developed in the early 1990s. Id.
15 ¶ 19b. 2G cellular communications standards support digital transmissions of voice calls. Id. The
16 leading 2G standards are the Global System for Mobile communications standard (“GSM”) and
17 second generation Code Division Multiple Access standard (“2G-CDMA”). Id. In the United
18 States today, AT&T and T-Mobile operate “legacy” GSM networks. By contrast, Verizon and
19 Sprint operate “legacy” 2G-CDMA networks. Id.

20 In the late 1990s and early 2000s, third-generation (“3G”) cellular communications
21 standards were developed. Id. ¶ 19c. The leading 3G standards are the Universal Mobile
22 Telecommunications system (“UMTS”) and third-generation CDMA (“3G-CDMA”) standards.
23 Id. Network operators that deployed 2G GSM networks, such as AT&T and T-Mobile,
24

25 ¹ The Complaint and the parties’ motions refer to baseband processors as “processors,” “chips,”
26 “modem chips,” and “chipsets.” Qualcomm states in its motion that “these terms are not in fact
27 interchangeable,” but Qualcomm uses the term “modem chips” in its motion. See Mot. at 5 n.6.
28 For simplicity and consistency, the Court will refer to baseband processors throughout this Order
as “modem chips” or “chips.”

1 transitioned to 3G UMTS networks. By contrast, network operators that deployed 2G-CDMA
2 networks, such as Verizon and Sprint, transitioned to 3G-CDMA networks. Id.

3 In late 2009 and early 2010, fourth-generation (“4G”) cellular communications standards
4 were developed. Id. ¶ 19d. These standards support substantially higher data-transmission speeds
5 than 3G standards. Id. The leading 4G standard is Long-Term Evolution (“LTE”). Id. Most
6 major network operators worldwide have deployed LTE. Id.

7 **ii. Standard Essential Patents**

8 Cellular communications standards, such as CDMA and LTE standards, are adopted by
9 standards setting organizations (“SSOs”). Id. ¶ 48. SSOs that adopt cellular telecommunications
10 standards include the European Telecommunication Standards Institute (“ETSI”), the
11 Telecommunications Industry Association (“TIA”), and the Alliance for Telecommunications
12 Industry Solutions (“ATIS”). Id. ¶ 52.

13 In setting a cellular communications standard, SSOs often include technology in the
14 cellular communications standard that is patented. Patents that cover technology that is
15 incorporated into a standard are known as “standard essential patents” (“SEPs”). Id. ¶ 42.

16 Importantly, before incorporating a technology into a standard, SSOs “often require patent
17 holders to disclose their patents and commit to license [SEPs] on fair, reasonable, and non-
18 discriminatory (“FRAND”) terms.” Id. “Absent such requirements, a patent holder might be able
19 to parlay the standardization of its technology into a monopoly in standard-compliant products.”
20 Id. ETSI, TIA, and ATIS require each party that participates in the standard setting process “to
21 commit to license its SEPs to firms that implement the standard on FRAND terms.” Id. ¶ 53.

22 “Most SSOs neither prescribe FRAND license terms nor offer a centralized dispute-
23 resolution mechanism in the event that a patent holder and standard implementer cannot agree on
24 [FRAND] terms.” Id. ¶ 51. Instead, “most SSOs rely on the outcome of bilateral negotiations
25 between the parties, with resort to remedies available from courts in the event of disagreement.”
26 Id.

27 **iii. Baseband Processors**

28

1 In order to communicate with a cellular communications network, a cellphone handset
2 (“handset”) must contain a semiconductor device known as a baseband processor, or “modem
3 chip.” Id. ¶ 20. More specifically, in order to communicate with a particular cellphone network,
4 the handset must contain a modem chip that complies with the cellular communications standards
5 that the particular cellphone network supports. Id. ¶ 21. For example, a handset that contains a
6 modem chip that complies only with UMTS standards cannot communicate with a cellular
7 network that uses 3G-CDMA standards. Id. “Multi-mode” modem chips can comply with more
8 than one cellular communications standard. Id. ¶ 22.

9 In order to be used on a network that deploys LTE—the leading 4G standard used by
10 major cellular network operators—the handset must ordinarily contain a modem chip that
11 complies with LTE standards in addition to earlier 2G and 3G standards. Id. ¶ 23. This is for two
12 reasons. First, because “LTE network infrastructure generally supports data, rather than voice,
13 traffic,” a handset must contain a modem chip that complies with 2G and 3G standards in order to
14 transmit voice calls. Id. Further, “because the process of upgrading and replacing network
15 infrastructure takes years, a [modem chip] must comply with 2G and 3G standards to
16 communicate with the network in areas where the operator has not yet replaced or upgraded
17 infrastructure equipment.” Id.

18 Accordingly, in order to deploy LTE standards, a handset requires a multi-mode modem
19 chip that complies with “legacy 2G and 3G standards.” Id. ¶ 24. For example, an LTE phone for
20 use on Verizon’s network would need to contain a multi-mode modem chip that complies with
21 LTE standards in addition to 2G-CDMA and 3G-CDMA. Id. A handset that contains a multi-
22 mode modem chip that complies with GSM, UMTS, and LTE standards, but not CDMA
23 standards, could not be used on Verizon’s network. Id.

24 **iv. Cellular Handset Tiers and Smartphones**

25 Cellular handsets are produced by original equipment manufacturers (“OEMs”) such as
26 Apple and Samsung. Id. ¶ 25. Since the late 2000s, handsets with advanced computing capability,
27 known as smartphones, have emerged as alternatives to simple feature phones that support only

1 voice and text-message capability. *Id.* In addition to voice and text-message capability,
2 smartphones include additional features such as “cameras, high-resolution touch-screen displays,
3 powerful applications and graphic processors, and enhanced memory and storage.” *Id.* ¶ 26.
4 Smartphones generally offer consumers connectivity over cellular networks and Wi-Fi networks.
5 *Id.*

6 Competition in the manufacturing and sale of handsets has developed over time into
7 “tiers”: premium, mid, and low. *Id.* ¶ 27. “Premium”-tier smartphones include brands such as
8 Apple’s iPhone and Samsung’s Galaxy-S. *Id.* Premium smartphones are of particular importance
9 to OEMs because they “tend to have higher prices and margins than lower-tier products and are
10 important for branding.” *Id.* ¶ 28.

11 Among the cellular communications standards discussed above, “LTE functionality is
12 particularly important for modern smartphones.” *Id.* ¶ 30. As discussed above, LTE allows for
13 the transmission of large volumes of data, which has grown increasingly more important than
14 cellular voice traffic. *Id.*

15 **2. Qualcomm’s Participation in the Modem Chip Market**

16 Qualcomm is the leading supplier of modem chips worldwide. *Id.* ¶ 31. In particular,
17 Qualcomm is dominant in the supply of two types of modem chips: (1) modem chips that comply
18 with CDMA standards (“CDMA modem chips”); and (2) modem chips for use in premium tier
19 handsets, which comply with advanced LTE standards (“premium LTE modem chips”).

20 **i. CDMA Chips**

21 First, Qualcomm has been particularly dominant in the supply of CDMA modem chips. *Id.*
22 ¶ 32. As set forth above, major carriers such as Verizon and Sprint have deployed CDMA
23 networks. *Id.* Accordingly, for OEMs, “leaving CDMA-compatible handsets out of their product
24 lines has not been a realistic option.” *Id.* OEMs that wish to manufacture handsets to operate on
25 CDMA networks such as Verizon and Sprint must use modem chips that comply with CDMA
26 standards.

27 Qualcomm is the dominant supplier of CDMA modem chips. From at least 2006 through
28

1 September 2015, Qualcomm’s worldwide share of CDMA modem chips exceeded 80%. Id. ¶ 33.

2 Qualcomm faces “limited competition for the supply of CDMA” modem chips. Id. ¶ 34.
3 In the past ten years, “the only supplier of CDMA [modem chips] other than Qualcomm has been
4 Via Technologies,” a Taiwanese company. Id. However, Via Technologies has focused its sales
5 on the lower-tier handset market, rather than the premium market. Id. This is partly because Via
6 Technologies has not offered multi-mode modem chips “that combine CDMA functionality with
7 either UMTS or LTE functionality.” Id. In 2015, Intel Corporation (“Intel”) acquired Via
8 Technology’s CDMA modem chip business. Id. However, “Intel has not yet commercialized a
9 [modem chip] product that integrates” Via Technology’s CDMA technology with “Intel’s own
10 multi-mode [modem chip] technologies.” Id.

11 Another Taiwanese company, MediaTek Inc. (“MediaTek”), licensed technology from Via
12 Technologies in late 2013 and began to offer CDMA modem chips in 2015. Id. ¶ 35. However,
13 MediaTek has not offered multi-mode CDMA modem chips that are “suitable for use in flagship
14 handsets.” Id. Overall, MediaTek’s sale of CDMA modem processors has been small. Id.

15 **ii. Premium LTE Modem Chips**

16 As discussed above, most cellular network operators have deployed LTE networks. Id. ¶
17 38. This includes major U.S. cellular network operators such as Verizon, AT&T, T-Mobile, and
18 Sprint. Id.

19 LTE functionality has continually advanced since the first LTE network was introduced in
20 2010. Id. ¶ 39. These advances have allowed for progressively faster data speeds. Id.
21 Accordingly, “[a]s LTE technology has progressed, [modem chip] manufacturers have had to add
22 features to keep up.” Id. ¶ 40. For premium tier handsets, OEMs typically require modem chips
23 with “advanced LTE functionality” that support advanced data download and upload speeds, in
24 addition to other functions. Id. ¶¶ 40–41. For an OEM designing and manufacturing a premium
25 tier handset, a modem chip that only supports earlier LTE technology is not a substitute for a
26 modem chip that supports advanced LTE standards. Id. Accordingly, just as OEMs produce
27 handsets in “tiers,” competition among LTE modem chip manufacturers also occurs in tiers. Id. ¶

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Qualcomm has consistently been the dominant supplier of premium LTE modem chips. Id. ¶ 44. From at least 2012 through September 2015, Qualcomm’s annual worldwide share of premium LTE modem chip sales has exceeded 80%. Id.

Qualcomm faces limited competition in the premium LTE modem chip market. Id. ¶ 45. Although other modem chip manufacturers offer modem chips that support LTE functionality, they offer limited competition in premium LTE functionality. Id. For example, MediaTek has not supplied premium LTE modem chips for premium-tier handsets, and MediaTek “has lagged behind Qualcomm in LTE [modem chip] sales.” Id. Intel has “achieved modest success in premium LTE [modem chips] only recently, when [Intel] began to supply a portion of Apple’s [modem chip] requirements for the iPhone 7.” Id. Samsung and Huawei self-supply some premium LTE modem chips for use in Samsung and Huawei headsets, respectively, “but this has not provided Qualcomm with meaningful competition in the merchant market.” Id. ¶

3. Qualcomm’s Cellular Communications SEPs

In addition to supplying modem chips to OEMs, Qualcomm also has several patents that have been declared essential to cellular communications standards. Id. ¶¶ 53–55.

Qualcomm has participated in the cellular standard setting process through SSOs such as ETSI, TTA, and ATIS. See ¶ 54. Specifically, “Qualcomm was a leading developer and proponent of 2G-CDMA standards.” Id. Qualcomm has “a correspondingly high share of all patents declared essential to 2G-CDMA standards.” Id. Qualcomm also participated in 3G standard setting, though to a less significant degree. Id. ¶ 55. Qualcomm’s “share of all patents declared essential to 3G-UMTS and 3G-CDMA standards is smaller than its share of 2G-CDMA SEPs.” Id. Qualcomm’s share of SEPs in LTE standards “is much lower” than Qualcomm’s share of CDMA SEPs. Id. ¶ 56. Qualcomm’s share of LTE SEPs “is roughly equal to the shares of other industry participants.” Id. “One study of declared LTE SEPs found that Qualcomm had a 13% share of ‘highly novel’ essential LTE patents, compared to 19% for Nokia and 12% for each of Ericsson and Samsung.” Id.

1 “Qualcomm has committed to ETSI, TIA, ATIS, and other SSOs that it will license its
2 cellular SEPs” on FRAND terms. *Id.* ¶ 57. “Qualcomm’s FRAND commitments require
3 [Qualcomm] to license its [modem chip] competitors to make and sell [modem chips] using
4 Qualcomm’s SEPs.” *Id.* ¶ 108. In practice, however, Qualcomm licenses its SEPs to OEMs, but
5 Qualcomm “refuses” to license its SEPs to competing modem chip manufacturers. *Id.* ¶¶ 58, 112.

6 In licensing its SEPs to OEMs, Qualcomm collects a royalty rate of approximately 5% of
7 the value of the net selling price of the handset. *Id.* ¶ 58. For example, if an OEM sells a handset
8 that is priced at \$600, Qualcomm will collect a \$30 royalty for each sale. According to the FTC,
9 “[a]mong SEP holders, Qualcomm garners an outsized share of licensing revenues paid by
10 OEMs,” and “OEMs pay Qualcomm far more in royalties than [OEMs] pay other SEP licensors,
11 even those with comparable portfolios of cellular SEPs.” *Id.* ¶ 60. Indeed, an analysis conducted
12 by Qualcomm in 2015 showed that revenues from Qualcomm’s licensing program were
13 “equivalent in size to the sum of [redacted] companies with a form of technology licensing,” including
14 [redacted].” *Id.*

15 **4. Qualcomm’s Alleged Anticompetitive Conduct**

16 FTC alleges that Qualcomm uses its dominance in the supply of CDMA and premium LTE
17 modem chips to skew SEP licensing negotiations toward outcomes that benefit Qualcomm and
18 harm Qualcomm’s modem chip competitors. *Id.* ¶ 63. FTC alleges that Qualcomm does this
19 through a course of conduct that includes three primary practices: (i) a “no license-no chips”
20 policy; (ii) Qualcomm’s refusal to license its SEPs to competing modem chip manufacturers; (iii)
21 Qualcomm’s exclusive dealing arrangements with Apple.

22 **i. “No License-No Chips”**

23 As discussed above, “Qualcomm’s FRAND commitments require [Qualcomm] to license
24 its [modem chip] competitors to make and sell [modem chips] using Qualcomm’s SEPs.” *Id.* ¶
25 108. Nonetheless, Qualcomm refuses to license its SEPs to competing modem chip
26 manufacturers. Thus, competing modem chip manufacturers cannot sell to OEMs modem chips
27 “that convey the right to Qualcomm’s cellular SEPs.” *Id.* ¶ 113. Instead, Qualcomm licenses its

1 SEPs to only OEMs who make and sell handsets. *Id.* ¶¶ 58, 112. In licensing its SEPs to OEMs,
2 FTC alleges that “Qualcomm conditions OEMs’ access to [Qualcomm’s] [modem chips] on
3 OEMs’ acceptance of a license to Qualcomm’s cellular SEPs on Qualcomm’s preferred terms.”
4 *Id.* ¶ 61. FTC calls this practice Qualcomm’s “no license-no chips” policy. *Id.*

5 Through Qualcomm’s modem chip supply agreements with OEMs, OEMs agree that (i)
6 Qualcomm’s modem chip supply agreements “convey no rights to intellectual property;” (ii) “that
7 OEMs may use Qualcomm [modem chips] only in accordance with a separate patent license
8 agreement with Qualcomm”; and (iii) “that Qualcomm may terminate supply [of modem chips] if
9 the OEM defaults on its [patent] license agreement.” *Id.* ¶ 62. Essentially, unless OEMs agree to
10 take out a separate SEP licensing agreement with Qualcomm on Qualcomm’s preferred terms, that
11 covers all of the handsets that the OEM sells, Qualcomm will not supply the OEM with any
12 Qualcomm modem chips. *Id.*

13 FTC alleges that Qualcomm’s conduct is unique among modem chip suppliers and
14 suppliers of other cellular-equipment components. *Id.* ¶ 64. “Other component suppliers rely on
15 component sales, rather than separate patent licenses, to convey to their OEM customers the
16 intellectual property rights that those customers need in order to use or resell the components they
17 have purchased.” *Id.* ¶ 65. “When a supplier sells a component, such as a [modem chip], to an
18 OEM, that sale, under the doctrine of patent exhaustion, ordinarily terminates any right of the
19 supplier under patent law to control any further use or sale of the component.” *Id.* ¶ 66. “Thus,
20 when one of Qualcomm’s competitors sells a [modem chip] to an OEM, the OEM can use or resell
21 the processor without obtaining a separate patent license from the competing modem chip
22 supplier,” “just as a consumer buying a smartphone does not have to obtain a separate patent
23 license from the seller of the smartphone” to use the smartphone without infringing the patents
24 that are practiced by that smartphone. *Id.* ¶ 67.

25 Among the hundreds of suppliers from which OEMs purchase handset components,
26 “Qualcomm is unique in requiring an OEM, as a condition of sale, to secure a separate patent
27 license requiring royalty payments for handsets that use a competitor’s components.” *Id.* ¶ 68.

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1 In addition to setting Qualcomm apart from other component suppliers, FTC alleges that
2 Qualcomm’s “no license-no chips” policy is also unique among other licensors of SEPs. Id. ¶ 69.
3 “Ordinarily, if a SEP holder and a potential licensee can neither agree on license terms nor agree
4 to submit those terms to binding arbitration, the SEP holder initiates a patent-infringement suit in
5 which a court resolves issues of patent validity and infringement and, if the court deems a patent
6 valid and infringed, determines and awards reasonable royalties.” Id. ¶ 70. “In some instances, a
7 potential licensee may seek a declaratory judgment addressing the same issues.” Id. The fact that
8 a potential licensee can “secure a FRAND determination from a court affects SEP-license
9 negotiations.” Id. ¶ 72. “[T]he parties’ expectations about the probable outcome of litigation
10 determine the negotiated [FRAND] royalty terms. In this sense, bargaining over royalties and
11 other licensing terms occurs ‘in the shadow of the law.’” Id. ¶ 73.

12 However, this process does not happen with regards to negotiations of the royalty rates of
13 Qualcomm’s FRAND-encumbered SEPs. Although OEMs consider Qualcomm’s “royalties as
14 non-FRAND, and absent Qualcomm’s ‘no license-no chips’ policy, OEMs would have the ability
15 and incentive to challenge Qualcomm’s royalty demands in court,” FTC alleges that OEMs do not
16 challenge Qualcomm’s royalty terms because of Qualcomm’s “no license-no chips” policy. Id. ¶
17 76. Specifically, “[a]s a result of Qualcomm’s [no license-no chips] policy, the costs that an OEM
18 must incur to challenge Qualcomm’s royalties are not simply attorney’s fees and other litigation
19 costs,” but also “loss of access to Qualcomm [modem chips].” Id. ¶ 79. Losing access to
20 Qualcomm’s modem chips would be a substantial loss to OEMs given Qualcomm’s dominant
21 position “in the supply of CDMA and premium LTE [modem chips].” Id. ¶ 80. “[A]n OEM
22 unable to purchase such [modem chips] from Qualcomm would be severely hampered in efforts to
23 design and sell critically important premium-tier [handsets] and [handsets] for use on CDMA
24 networks.” Id.

25 Thus, “[t]o maintain access to Qualcomm’s [modem chips], OEMs have accepted royalty
26 and other license terms that they would not otherwise accept.” Id. ¶ 86. Specifically, OEMs pay
27 Qualcomm royalties that “do not reflect OEMs’ assessments of patent royalties that a court or

1 neutral arbiter would deem reasonable, including in light of Qualcomm’s FRAND commitments.”
2 *Id.* “Instead, the royalties that OEMs pay [Qualcomm for Qualcomm’s SEPs] also reflect
3 Qualcomm’s dominant position in [modem chips], and include an added increment that OEMs pay
4 Qualcomm to avoid disruption of [modem chip] supply.” *Id.*

5 FTC calls this “added increment”—the incremental above-FRAND royalty that OEMs pay
6 Qualcomm—a “tax.” *Id.* ¶¶ 86–87. This “tax” raises an OEMs cost of purchasing any *modem*
7 *chip* because OEMs consider the “all-in” cost of a modem chip as consisting of two components:
8 (i) “the nominal price of the” modem chip itself, and (ii) “any patent royalties that the OEM must
9 pay to use that [modem chip] in a handset.” *Id.* ¶ 88. Qualcomm’s “tax” raises the latter
10 component—the patent royalties to use the modem chip in the handset—for every modem chip
11 that an OEM buys, including the modem chips made by Qualcomm’s competitors. *Id.* FTC
12 alleges that “[t]he royalties that OEMs pay Qualcomm on handsets that contain competitors’
13 [modem chips] are [REDACTED]
14 [REDACTED]” *Id.* ¶ 92. FTC alleges that this has reduced competitors’ margins, and “limited
15 competitors’ abilities to invest and innovate in next-generation technologies.” *Id.* ¶ 93. Moreover,
16 “Qualcomm has also limited competitors’ ability to discipline the all-in prices that Qualcomm
17 charges for [modem chips].” *Id.* ¶ 94.

18 FTC alleges that “Qualcomm executives recognize that [Qualcomm’s] ‘no license-no
19 chips’ policy requires OEMs to accept higher royalties than OEMs would otherwise accept.” *Id.* ¶
20 96. In a June 2015 internal presentation, the presentation “proposed that Qualcomm form a ‘5G
21 Consortium’ with major infrastructure-equipment manufacturers” wherein members of the
22 consortium would not sell a product “to a carrier who is not licensed by the Consortium.” *Id.* ¶ 97.
23 “The internal presentation proposed that the consortium ‘pursue licensing on a non-FRAND basis
24 for SEPs’” because conditioning carrier access to equipment on the acceptance of a separate patent
25 license “would ‘Convinc[e] Carriers to Pay.’” *Id.* ¶ 98. This internal presentation “noted that
26 Qualcomm ‘employs this strategy today.’” *Id.* Qualcomm also pursued in 2015 an intensive
27 review of “whether to divide Qualcomm’s [modem chip] and licensing divisions into separate
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1 companies.” *Id.* ¶ 99. [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Accordingly, Qualcomm did
8 not divide up the company. *Id.* ¶ 101.

9 In addition, FTC alleges that “[o]n some occasions, Qualcomm has induced certain OEMs
10 to accept its preferred license terms using *both* the ‘stick’ of threatened [modem chip] supply
11 disruption and the ‘carrot’ of funds conditioned on the OEM’s acceptance of Qualcomm’s
12 preferred [SEP licensing] terms.” *Id.* ¶ 102 (emphasis added). “These funds” have, in some cases,
13 “accrued based on OEMs’ purchase of Qualcomm’s [modem chips].” *Id.* ¶ 103. This helps
14 “Qualcomm ‘close the gap’ with OEMs that resist license terms that [the OEMs] regard as unfair,”
15 and it helps Qualcomm “to maintain high royalties on handsets that use competitors’ [modem
16 chips].” *Id.* ¶ 104. Indeed, “[i]mplicitly acknowledging that these funds have allowed its
17 licensing division (QTL) to induce certain OEMs to accept higher royalty rates, Qualcomm has
18 [REDACTED] even though these funds accrue based on OEMs’
19 purchase of Qualcomm modem chips. *Id.* ¶¶ 103–05.

20 **ii. Qualcomm’s Refusal to License its SEPs to Chip Competitors**

21 As discussed briefly above, FTC alleges that Qualcomm refuses to license its FRAND-
22 encumbered SEPs to competing modem chip manufacturers. Rather, Qualcomm licenses its SEPs
23 only to OEMs who manufacture handsets. *Id.* ¶ 107. This, according to FTC, is in violation of
24 Qualcomm’s FRAND commitments, which “require [Qualcomm] to license to competitors to
25 make and sell [modem chips] using Qualcomm SEPs.” *Id.* ¶ 108. Although “[s]everal of
26 Qualcomm’s former and current competitors, including Intel, MediaTek, and Samsung, have
27 sought SEP licenses from Qualcomm,” Qualcomm has “refused to grant a SEP license” to its

1 modem chip competitors. Id. ¶ 112.

2 According to FTC, if Qualcomm licensed its modem chip competitors—as opposed to only
3 OEMs—Qualcomm would not be able to use the threat of a disruption in supply of its modem
4 chips to induce OEMs to agree to Qualcomm’s preferred royalty terms. Id. ¶ 114. This is
5 because, unlike OEMs who depend on Qualcomm for modem chip supply, competing modem chip
6 manufacturers do not need modem chips from Qualcomm. Id. Thus, if Qualcomm licensed its
7 SEPs to competing modem chip manufacturers, “the royalties that would emerge from
8 [Qualcomm’s licensing] negotiations [with competing modem chip manufacturers] would reflect
9 the royalties that a court would deem reasonable.” Id. According to FTC, “Qualcomm’s refusal to
10 license competing manufacturers of [modem chips], in contravention of its FRAND commitments,
11 contributes to [Qualcomm’s] ability to tax its competitors’ [modem chip] sales,” and thus maintain
12 Qualcomm’s modem chip monopoly. Id. ¶ 115.

13 **iii. Qualcomm’s Exclusive Deals with Apple**

14 In addition to Qualcomm’s “no license-no chips” policy and Qualcomm’s refusal to license
15 its SEPs to its competitors, FTC further alleges that Qualcomm has entered exclusive deals with
16 Apple. Id. ¶ 116.

17 “Apple is a particularly important OEM from the perspective of a nascent [modem chip]
18 supplier.” Id. ¶ 129. Specifically, “Apple sells large volumes of premium handsets that require
19 premium LTE” modem chips which “command higher prices” than lower-tier modem chips. Id.
20 Moreover, Apple provides additional benefits to chip suppliers because modem chip suppliers for
21 Apple learn from Apple’s engineer teams, “can field-test its [modem chips] through global
22 launches,” and “obtain[] a reputational halo effect from selling to Apple” which helps a modem
23 chip manufacturer win sales with other OEMs. Id.

24 FTC alleges that Apple has entered into de facto exclusive agreements with Qualcomm to
25 use only Qualcomm’s modem chips in Apple’s flagship products. Id. ¶¶ 124–25. Specifically,
26 although “Apple, like other OEMs, regards Qualcomm’s license terms . . . as inconsistent with
27 Qualcomm’s FRAND commitments,” Id. ¶ 118, “Apple has negotiated with Qualcomm in an

1 effort to reduce the royalty burden.” Id. ¶ 119. Apple entered into agreements with Qualcomm in
2 2007, 2011, and 2013.

3 In 2007, “Qualcomm agreed to rebate to Apple royalties that Qualcomm received” from
4 Apple that were “in excess of a specified per-handset cap.” Id. ¶ 120. “Qualcomm’s payment
5 obligations [to Apple] were conditioned upon, among other things, Apple not selling or licensing a
6 handset implementing” a prospective fourth-generation standard that was opposed by Qualcomm
7 but championed by Intel, its competitor. Id.

8 In 2011, Qualcomm entered into an agreement with Apple through which “Qualcomm
9 agreed to make substantial incentive payments [to Apple] from 2011 through 2016, explicitly
10 conditioned upon Apple using Qualcomm [modem chips] exclusively in all new iPhone and iPad
11 models.” Id. ¶ 122. “If, during this period, Apple launched a new handset with a non-Qualcomm
12 [modem chip], [Apple] would forfeit all future payments and, depending on when a handset
13 launched, could be required to refund past payments.” Id.

14 In 2013, Qualcomm entered into an agreement with Apple that “modified and extended the
15 exclusivity arrangement set forth in the companies’ 2011 agreement.” Id. ¶ 123. Specifically,
16 under the 2013 agreement, “Qualcomm agreed to rebate to Apple royalties” that Qualcomm
17 collected “in excess of a modified per-hand set cap.” Id. Qualcomm’s agreement to do this was
18 subject to a new condition: “that Apple neither initiate nor induce others to initiate litigation
19 claiming that Qualcomm had failed to offer a license on FRAND terms.” Id. Further, “Qualcomm
20 also agreed to make substantial incentive payments in 2013, 2014, 2015, and 2016, explicitly
21 conditioned on Apple sourcing [modem chips] for new iPad and iPhone models exclusively from
22 Qualcomm.” Id. If, during this period, Apple launched a new handset with a non-Qualcomm
23 modem chip, Apple would forfeit all future incentive payments and could be required to refund
24 past incentive payments. Id.

25 “In all, Qualcomm’s 2011 and 2013 agreements with Apple provided for billions of dollars
26 in conditional rebates from Qualcomm to Apple for [modem chip] sales from 2011 to 2016,”
27 which “effectively penalized Apple’s use of any [modem chip] supplied by Qualcomm’s

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1 competitors.” Id. ¶ 124.

2 According to FTC, “Qualcomm’s 2011 and 2013 agreements with Apple were, and were
3 intended by Qualcomm to be, de facto exclusive deals that were as effective as express purchase
4 requirements that effectively foreclosed Qualcomm’s competitors from gaining [modem chip]
5 business at Apple.” Id. ¶ 125. Although Apple had “an interest in developing and working with
6 additional suppliers of [modem chips],” the “large penalties that Apple would face” from
7 Qualcomm if it chose to source chips from another supplier “prevented Apple from using
8 alternative suppliers” during the effective exclusivity period under the agreements. Id.; see also
9 id. ¶ 125c (alleging penalties are sufficiently large that they effectively prevent other modem chip
10 manufacturers from competing with Qualcomm to gain business from Apple).

11 As a result of Qualcomm’s exclusive dealing arrangements with Apple, Apple sourced
12 modem chips exclusively from Qualcomm for all iPad and iPhone products that Apple launched
13 from October 2011 until September 2016. Id. ¶ 126. “Qualcomm’s exclusive agreements with
14 Apple prevented Qualcomm’s competitors from attaining” the benefits that come from supplying
15 modem chips to Apple. “These [exclusive] agreements also foreclosed a substantial share of the
16 market for premium LTE [modem chips]” and “significantly impeded the development of other
17 [modem chip] suppliers into effective competitors to Qualcomm.” Id. ¶ 131.

18 **B. Procedural History**

19 FTC sued Qualcomm in this Court on January 17, 2017, and alleged that Qualcomm’s
20 course of conduct violated § 5 of the FTCA. ECF No. 1.

21 On April 3, 2017, Qualcomm moved to dismiss the Complaint. ECF No. 69 (“Mot.”). On
22 May 12, 2017, FTC opposed Qualcomm’s motion. ECF No. 85 (“Opp.”).

23 Also on May 12, 2017, ACT|The App Association, Samsung Electronics Co., Ltd., Intel
24 Corporation, and the American Antitrust Institute, each filed motions for leave to file amicus
25 curiae briefs in support of FTC’s opposition. See ECF Nos. 90–95. On May 15, 2017, the Court
26 granted the motions for leave to file amicus curiae briefs. ECF No. 95.

27 On June 2, 2017, Qualcomm filed its reply. ECF No. 120 (“Reply”).

28

1 **II. LEGAL STANDARD**

2 **A. Motion to Dismiss Under Rule 12(b)(6)**

3 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an
4 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*
5 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
7 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a
8 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
9 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted).

10 For purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations
11 in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving
12 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

13 However, a court need not accept as true allegations contradicted by judicially noticeable facts,
14 *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and a “court may look beyond the
15 plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6) motion into
16 one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 (9th Cir. 2011). Mere “conclusory
17 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”
18 *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

19 **B. Leave to Amend**

20 If the Court concludes that a motion to dismiss should be granted, it must then decide
21 whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave
22 to amend “shall be freely given when justice so requires,” bearing in mind “the underlying purpose
23 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
24 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted).
25 Nonetheless, a district court may deny leave to amend a complaint due to “undue delay, bad faith
26 or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments
27 previously allowed, undue prejudice to the opposing party by virtue of allowance of the

1 amendment, [and] futility of amendment.” See *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d
2 522, 532 (9th Cir. 2008).

3 **III. DISCUSSION**

4 The FTC brings its complaint against Qualcomm under § 5 of the FTCA, which prohibits
5 “[u]nfair methods of competition in or affecting commerce.” 15 U.S.C. § 45(a).

6 “[U]nfair methods of competition” under the FTCA includes “violations of the Sherman
7 Act.” *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 693–94 (1948). In addition, the FTC
8 under § 5 may “bar incipient violations of [the Sherman Act], and conduct which, although not a
9 violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit.” *E.I.*
10 *du Pont de Nemours & Co. v. Fed. Trade Comm’n*, 729 F.2d 128, 136–37 (2d Cir. 1984) (internal
11 citations omitted); see also *Fed. Trade Comm’n v. Brown Shoe Co.*, 384 U.S. 316, 321 (“This
12 broad power of the [FTC] is particularly well established with regard to trade practices which
13 conflict with the basic policies of the Sherman and Clayton Acts even though such practices may
14 not actually violate these laws.”). “The standard of ‘unfairness’ under the FTCA is, by necessity,
15 an elusive one,” and the precise contours of the FTC’s authority under § 5 are not clearly defined.
16 *Fed. Trade Comm’n v. Indiana Fed. of Dentists*, 476 U.S. 447, 454 (1986). However, the FTC’s
17 authority to proscribe “unfair methods of competition” under § 5 is not unbounded. See *E.I. du*
18 *Pont de Nemours & Co.*, 729 F.2d at 137 (“When a business practice is challenged by the [FTC],
19 even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive,
20 predatory or exclusionary in character, standards for determining whether it is ‘unfair’ within the
21 meaning of § 5 must be formulated to discriminate between normally acceptable business behavior
22 and conduct that is unreasonable or unacceptable.”).

23 Here, FTC alleges that Qualcomm’s conduct violates § 5 of the FTCA because
24 Qualcomm’s conduct violates both § 1 and § 2 of the Sherman Act. Compl. ¶ 147. FTC also
25 alleges that, even if Qualcomm’s conduct does not violate either § 1 or § 2 of the Sherman Act,
26 Qualcomm’s conduct nonetheless “constitute[s] unfair methods of competition in violation of [§
27 5] of the FTCA.” *Id.*

28

1 For the reasons discussed below, the Court agrees with FTC that FTC has adequately
 2 alleged that Qualcomm’s conduct violates § 1 and § 2 of the Sherman Act, and thus FTC has
 3 adequately stated a claim under § 5 of the FTCA. Accordingly, the Court need not decide whether
 4 FTC has stated a claim for violation of § 5 that is independent of a Sherman Act violation. The
 5 Court first discusses the elements of an antitrust claim under § 1 and § 2 of the Sherman Act. The
 6 Court then addresses Qualcomm’s alleged anticompetitive conduct.

7 **A. Sections 1 and 2 of the Sherman Act**

8 “Section 2 of the Sherman Act makes it unlawful for a firm to ‘monopolize.’” United
 9 States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001). “The offense of monopolization has
 10 two elements: ‘(1) the possession of monopoly power in the relevant market’; and (2) ‘the willful
 11 acquisition or maintenance of that power’ through exclusionary conduct ‘as distinguished from
 12 growth or development as a consequence of a superior product, business acumen, or historic
 13 accident.’” Id. (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)); see also
 14 *McWane v. Fed. Trade Comm’n*, 783 F.3d 814, 828 (11th Cir. 2015) (applying these two elements
 15 in a case brought under § 5 of the FTCA). As the D.C. Circuit has explained, “to be condemned
 16 as exclusionary, a monopolist’s act must have an ‘anticompetitive effect,’” which means that the
 17 conduct “must harm the competitive process and thereby harm consumers.” Microsoft, 253 F.3d
 18 at 58. “The [Sherman Act] directs itself not against conduct which is competitive, even severely
 19 so, but against conduct which unfairly tends to destroy competition itself.” *Spectrum Sports, Inc.*
 20 *v. McQuillan*, 506 U.S. 447, 458 (1993).

21 “Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits [e]very contract, combination . . .
 22 or conspiracy, in restraint of trade or commerce among the several States.” *Allied Orthopedic*
 23 *Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010). “Unlike Section
 24 2 claims, Section 1 restraint of trade claims need not establish the threshold showing of monopoly
 25 control over a relevant market.” *Amarel v. Connell*, 102 F.3d 1494, 1552 (9th Cir. 1996). “To
 26 show a violation of § 1, a plaintiff ‘must establish a contract, conspiracy or combination intended
 27 to restrain competition and which actually has an anticompetitive effect.’” Id. at 1551.

1 For purposes of the instant motion to dismiss, the § 1 and § 2 analysis are substantially
2 identical.² See Reply at 16 (“FTC acknowledges that the same theories underlie its claims under
3 both Section 1 and Section 2 of the Sherman Act”); see also Compl. ¶ 147. Qualcomm does not
4 contest that FTC has adequately alleged that Qualcomm has “monopoly power” in the markets for
5 CDMA and premium-LTE modem chips. See generally Mot. Rather, Qualcomm primarily
6 contests only whether, under either § 1 or § 2 of the Sherman Act, FTC has adequately alleged that
7 Qualcomm’s conduct is anticompetitive, meaning that it “harm[s] the competitive process and
8 thereby harm[s] consumers.” *Microsoft*, 253 F.3d at 58.

9 FTC claims that Qualcomm has engaged in an anticompetitive course of conduct
10 consisting of three primary anticompetitive practices. First, FTC alleges that Qualcomm has
11 harmed competition through Qualcomm’s “no license-no chips” policy with OEMs. Compl. ¶¶
12 61–106. Second, FTC contends that Qualcomm has harmed competition by refusing to license its
13 FRAND-encumbered SEPs to its rival chip manufacturers. *Id.* ¶¶107–15. Third, FTC alleges that
14 Qualcomm has harmed competition by entering into de facto exclusive dealing arrangements with
15 Apple. *Id.* ¶¶ 116–30.³ The Court discusses each of these three practices in turn.

16 **B. Qualcomm’s “No License-No Chips” Policy**

17 First, FTC asserts that Qualcomm has a “no license-no chips” policy that harms
18 competition in the CDMA and premium-LTE modem chips market (hereinafter, for simplicity,

19 _____
20 ² Qualcomm argues briefly in its motion to dismiss that FTC cannot state a § 1 claim because FTC
21 does not allege a “contract, conspiracy, or combination.” Mot. at 21. In its opposition FTC states
22 that the relevant agreements for purposes of its § 1 theories are Qualcomm’s exclusive dealing
23 arrangements with Apple, licensing terms with OEMs, and agreements to pay strategic funds.
24 Opp. at 23. Thus, FTC has adequately alleged a “contract, conspiracy, or combination” sufficient
25 for its § 1 theories. Qualcomm does not contest this in its Reply. See Reply at 16. Because the
26 parties appear to agree on this issue, the Court need not discuss this element further for purposes
27 of the instant motion to dismiss.

28 ³ Qualcomm analyzes FTC’s allegations of incentive payments as a separate anticompetitive
practice. See Mot. at 13–14. However, given the structure of the Complaint, the Court
understands FTC’s allegations of incentive payments to be only a component of Qualcomm’s “no
license-no chips” policy, rather than an independent business practice that FTC alleges is
anticompetitive apart from Qualcomm’s “no license-no chips” scheme. Compare Compl. ¶¶ 102–
06 (discussing Qualcomm’s incentive payments under the same heading as Qualcomm’s “no
license-no chips” policy), with *id.* ¶¶107–15; 116–20 (discussing Qualcomm’s refusal to license its
competitors and exclusive deals with Apple under separate headings).

1 “modem chips market”). Opp. at 16. Understanding Qualcomm’s “no license-no chips” policy,
2 and why FTC alleges that this policy is anticompetitive, involves understanding several
3 interrelated practices of Qualcomm. Accordingly, the Court first recounts FTC’s allegations
4 regarding Qualcomm’s “no license-no chips” policy. The Court then addresses Qualcomm’s
5 arguments for why FTC has failed to allege that this policy is anticompetitive.

6 **1. No License, No Chips**

7 As stated above, Qualcomm owns cellular communications patents that have been declared
8 essential to certain cellular communications standards, including CDMA. Compl. ¶¶ 56–57. In
9 exchange for having its patents declared essential to cellular communications standards,
10 Qualcomm committed to SSOs that Qualcomm would license its SEPs on FRAND terms. Id. ¶
11 57. As FTC alleges, “[b]y making a FRAND commitment, [Qualcomm] accept[ed] the benefits of
12 participating in standards development and of seeking incorporation of its patented technologies
13 into a standard, but agree[d] in exchange not to exercise any market power resulting from its
14 patents’ incorporation into that standard.” Id. ¶ 50. However, as discussed further below, FTC
15 alleges that Qualcomm has violated its FRAND commitments. Id. ¶¶ 59, 76–77. Specifically,
16 FTC contends that Qualcomm has used its monopoly power in the modem chips market to distort
17 SEP licensing negotiations, which has in turn harmed competition in the modem chips market and
18 helped Qualcomm maintain its modem chips monopoly. See id. ¶¶ 37, 86–87.

19 An important component of Qualcomm’s course of conduct, FTC alleges, is that
20 Qualcomm “has consistently refused to license its cellular [SEPs] to its competitors” that compete
21 with Qualcomm in the modem chips market to sell modem chips to OEMs, who manufacture
22 handsets. Id. ¶ 3; see also id. ¶¶ 58–59, 108. Qualcomm refuses to license its competitors even
23 though “Qualcomm’s FRAND commitments require [Qualcomm] to license its competitors.” Id.
24 ¶ 108. “Because Qualcomm refuses to license [its] FRAND-encumbered SEPs to its competitors,
25 these competitors cannot offer OEMs [modem chips] that convey the rights to Qualcomm’s
26 cellular SEPs.” Id. ¶ 113.

27 As discussed further in Section III.C. *infra*, FTC contends that Qualcomm’s refusal to

1 license its SEPs to its modem chips competitors is an independent Sherman Act violation because
2 Qualcomm has an antitrust duty to deal with its modem chips competitors. See Opp. at 17–19.
3 For purposes of the instant discussion, FTC contends that Qualcomm’s refusal to license its
4 competitors is an important step in Qualcomm’s “no license-no chips” policy. Specifically,
5 because Qualcomm violates FRAND and refuses to license its SEPs to its modem chips
6 competitors, Qualcomm instead licenses its SEPs only to OEMs who make and sell handsets. Id. ¶
7 58. This difference in licensing is important because, unlike Qualcomm’s modem chips
8 competitors, OEMs depend on Qualcomm for modem chips supply. See id. ¶¶ 79–81 , 114.
9 Indeed, even if an OEM currently buys modem chips from Qualcomm’s competitors, an OEM
10 must necessarily buy at least some modem chips from Qualcomm because Qualcomm owns
11 approximately 80% of the market for CDMA modem chips and approximately 80% of the market
12 for premium-LTE modem chips. Id. ¶¶ 33, 44. Access to CDMA and premium-LTE modem
13 chips is particularly important for OEMs, and thus access to Qualcomm modem chips is essential
14 for OEMs to successfully make and sell handsets. Id. ¶¶ 33, 44.

15 FTC alleges that Qualcomm takes advantage of OEMs’ need to obtain both modem chips
16 and SEP licenses from Qualcomm. Specifically, FTC alleges that Qualcomm refuses to sell an
17 OEM any Qualcomm modem chips unless the OEM agrees to Qualcomm’s preferred SEP
18 licensing terms. Id. ¶ 61. FTC calls this practice Qualcomm’s “no license-no chips” policy. Id.
19 FTC alleges that Qualcomm’s threat to withhold modem chips causes OEMs to accede to royalty
20 rates that are above-FRAND and “disproportionately high relative to the value contributed by
21 [Qualcomm’s] patented inventions.” Id. ¶ 77. For example, under Qualcomm’s licensing terms,
22 Qualcomm collects a royalty that is a percentage of the handset’s total price. Id. If two handsets
23 both have the same cellular connection features, but one handset costs \$300 more because it has
24 more memory storage, Qualcomm will collect a higher royalty on the more expensive handset
25 even though Qualcomm’s SEPs did not contribute to the handset’s higher price. In addition,
26 “Qualcomm has required OEMs to grant Qualcomm cross-licenses,” often “with pass-through
27 rights to other OEMs,” but Qualcomm “has failed to adjust its royalty rate to account for the value

1 of OEMs’ cross-licensed patents.” Id. FTC alleges that OEMs do not pursue litigation against
2 Qualcomm over these royalty terms because the cost to OEMs of losing access to Qualcomm’s
3 modem chips during the course of litigation is too high. Id. ¶¶ 78–81.

4 In addition, FTC alleges that Qualcomm on occasion uses “both the ‘stick’ of threatened
5 supply disruption and the ‘carrot’ of funds conditioned on the OEM’s acceptance of Qualcomm’s
6 preferred terms.” Id. ¶ 102. In effect, Qualcomm pays OEMs to accept Qualcomm’s preferred
7 licensing terms in order to “close the gap” in some licensing negotiations. Id. ¶¶ 102–06. These
8 payments “have in some cases accrued based on OEMs’ purchase of Qualcomm’s [modem
9 chips].” Id. ¶ 103. These payments help Qualcomm maintain its “no license-no chips” policy—
10 and the above-FRAND royalties that result—across all of Qualcomm’s licensing agreements with
11 OEMs. Id.

12 According to FTC, the above-FRAND royalties that Qualcomm extracts from OEMs
13 through Qualcomm’s “no license-no chips” policy affects the markets for modem chips and harms
14 competition in the modem chips market. Understanding why this is so requires, again, viewing
15 the entire course of Qualcomm’s conduct. As set forth above, Qualcomm violates FRAND and
16 refuses to license its SEPs to competing modem chips manufacturers. Id. ¶ 108. As a result,
17 Qualcomm’s “competitors cannot offer OEMs [modem chips] that convey the rights to
18 Qualcomm’s cellular SEPs.” Id. ¶ 113. If Qualcomm did license its SEPs to competing modem
19 chips manufacturers, those modem chips manufacturers could sell licensed modem chips to OEMs
20 and, under the doctrine of patent exhaustion, the OEM would obtain the right to use the patents
21 practiced by those modem chips without having to pay Qualcomm a royalty on the sale of those
22 modem chips.⁴ See id. Instead, because Qualcomm refuses to license its modem chips
23 competitors and licenses its SEPs only to OEMs who make and sell handsets, Qualcomm collects
24 a royalty on all handsets sold by an OEM, regardless of whose components are in the handset. Id.

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⁴ To the extent Qualcomm argues that OEMs would still need a license from Qualcomm for Qualcomm patents that are not exhausted by a competitors’ sale of modem chips, see Mot. at 17 n.14, neither the Complaint nor the motion discusses such patents.

1 ¶ 68. In addition, as set forth above, because OEMs are, unlike Qualcomm’s modem chips
2 competitors, vulnerable to Qualcomm’s threat to withhold modem chips, Qualcomm induces
3 OEMs to pay above-FRAND royalties on every handset sold by the OEM. In sum, under
4 Qualcomm’s licensing terms, Qualcomm collects an above-FRAND royalty on every handset that
5 is sold by an OEM, even if that handset contains modem chips made by a Qualcomm competitor.
6 See id. ¶¶ 61–68.

7 This above-FRAND royalty that Qualcomm collects on every handset affects the market
8 for modem chips because OEMs consider the “all-in” price for a modem chip as consisting of two
9 components: “(i) the nominal price of the [modem chip]; and (ii) any patent royalties that the
10 OEM must pay to use that [modem chip] in a handset.” Id. ¶ 88. By extracting above-FRAND
11 royalty payments from OEMs on every handset sold by OEMs, FTC alleges that Qualcomm has in
12 effect raised the second component of the “all-in” price for a modem chip—the patent royalties
13 that must be paid to use the modem chip—for every modem chip that the OEM buys, even if that
14 modem chip is made by Qualcomm’s competitor. Id. ¶¶ 88–95.

15 More specifically, FTC alleges, Qualcomm has raised the second component of the “all-in”
16 price of a modem chip by an “added increment” that does not reflect the value of Qualcomm’s
17 FRAND-encumbered SEPs, but rather reflects Qualcomm’s modem chips monopoly. Id. As FTC
18 alleges, the SEP royalty payments that OEMs pay Qualcomm under Qualcomm’s preferred royalty
19 terms “include an added increment that OEMs pay Qualcomm to avoid disruption of [Qualcomm’s
20 modem chips] supply.” Id. ¶ 86.

21 FTC labels this added above-FRAND increment a “tax” that Qualcomm collects from
22 OEMs on every modem chip sale. Id. ¶ 87. However, an equally apt descriptor for this added
23 above-FRAND increment is a “surcharge” that Qualcomm charges OEMs on every modem chip
24 sale. Importantly, as discussed above, FTC alleges that this added surcharge does not reflect the
25 value of Qualcomm’s SEPs. Id. ¶ 86. Rather, OEMs pay this surcharge to Qualcomm only “to
26 avoid disruption of [Qualcomm’s modem chips] supply.” Id. In effect, FTC contends that
27 Qualcomm’s “no license-no chips” policy means that the “all-in” price of any modem chip now

1 consists of (i) the nominal price of the modem chip itself, which the OEM must pay the modem
2 chips manufacturer; (ii) a FRAND royalty, which the OEM must pay to Qualcomm to practice
3 Qualcomm’s SEPs; and (iii) an added surcharge, which the OEM must pay to Qualcomm in order
4 to ensure continued access to Qualcomm’s modem chips supply. See id. ¶¶ 83, 86, 87.

5 According to FTC, the surcharge that Qualcomm imposes on the sales of its rivals’ modem
6 chips is anticompetitive because it “reduces demand for competitors’ processors,” “reduce[s]
7 competitors’ sales and margins, and diminishe[s] competitors’ ability and incentive of competitors
8 to invest and innovate.” Id. ¶¶ 87, 138. FTC further alleges that, as a result of Qualcomm’s
9 conduct, “[s]everal former competitors of Qualcomm have sold off or shuttered their [modem
10 chips] business.” Id. ¶ 139. Moreover, FTC contends, Qualcomm’s conduct has “raise[d] handset
11 prices paid by consumers.” Id. ¶ 87.

12 Qualcomm contends, however, that the Complaint does not plausibly allege that
13 Qualcomm’s “no license-no chips” policy is anticompetitive. First, Qualcomm argues, FTC has
14 failed to state a claim because the Complaint does not actually allege that Qualcomm’s royalties
15 are above FRAND. Mot. at 9–11. Second, and more fundamentally, Qualcomm contends that,
16 even assuming Qualcomm charges an above-FRAND royalty, FTC has failed to adequately allege
17 that Qualcomm’s “no license-no chips” policy harms the competitive process for modem chips.
18 Id. at 11–17. The Court addresses both of Qualcomm’s argument below.

19 **2. FTC Has Adequately Alleged Above FRAND Royalties**

20 First, Qualcomm contends that FTC has failed to state a claim because a fundamental
21 component of FTC’s “no license-no chips” theory—that Qualcomm extracts from OEMs an
22 above-FRAND royalty—is not adequately alleged in the Complaint. Mot. at 9. Specifically,
23 Qualcomm contends that the Complaint “does not plead any facts purporting to show what
24 Qualcomm’s royalties should be or by how much they are purportedly ‘elevated,’” and that the
25 Complaint does not allege that “Qualcomm’s royalty rates are actually unreasonable or above a
26 FRAND level.” Id. Moreover, Qualcomm asserts, FTC’s allegations of above-FRAND royalties
27 are contradicted by FTC’s allegation that Qualcomm’s royalty rate has stayed the same at 5%.

1 Finally, Qualcomm contends that FTC’s allegations that Qualcomm offers some OEMs incentive
2 payments to accept Qualcomm’s preferred licensing terms contradicts FTC’s allegations that
3 Qualcomm uses the threat of withholding the supply of modem chips to induce OEMs to pay
4 above-FRAND royalties. *Id.* at 10.

5 For the reasons discussed below, taking the allegations in the Complaint as true and
6 “draw[ing] all reasonable inferences in favor of” FTC—as the Court must on a motion to dismiss,
7 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000) (internal quotation
8 marks omitted)—the Court agrees with FTC that FTC has adequately alleged that Qualcomm’s
9 royalties are above FRAND.

10 **a. The Complaint Adequately Alleges that Qualcomm’s Royalties are**
11 **Above FRAND**

12 Contrary to Qualcomm’s argument, the Complaint adequately pleads facts that “show what
13 Qualcomm’s royalties should be,” and that Qualcomm’s current royalties are above FRAND.
14 *Mot.* at 9. As FTC explains in its Complaint, Qualcomm voluntarily participated in certain
15 standards setting processes and, in exchange for having its patents incorporated into cellular
16 communications standards, committed to SSOs that it would license its SEPs on FRAND terms.
17 See *Compl.* ¶¶ 48–53. FTC’s Complaint explains that “[m]ost SSOs neither prescribe FRAND
18 license terms nor offer a centralized dispute-resolution mechanism,” but rather “rely on the
19 outcome of bilateral negotiations between the parties, with resort to remedies available from courts
20 in the event of disagreement.” *Id.* ¶ 51. Thus, parties negotiating royalty rates bargain “in the
21 shadow of the law,” and resort to remedies in court if those negotiations break down. *Id.* ¶¶ 70–
22 73. FTC alleges that “[b]ilateral negotiations conducted in the shadow of judicial determination of
23 FRAND terms are therefore essential to the efficacy of the FRAND commitment.” *Id.* ¶ 51.
24 Through bilateral negotiations conducted “in the shadow of the law,” or a lawsuit itself, a FRAND
25 royalty rate is determined. See *id.* ¶¶ 51, 69–75.

26 However, FTC alleges that, because of Qualcomm’s “no license-no chips” policy, these
27 two processes for determining a reasonable royalty rate are functionally foreclosed to OEMs.

1 Id. ¶¶ 69–75. Critically, FTC alleges that because Qualcomm threatens to cut off an OEM’s supply
2 of chips if an OEM does not agree to Qualcomm’s licensing demands, OEMs are effectively
3 denied the opportunity to challenge Qualcomm’s royalty terms in court. Id. ¶ 79. This is because
4 “an OEM unable to purchase [modem chips] from Qualcomm” would, during the length of the
5 litigation, be unable to sell “critically important premium-tier phones and phones for use on
6 CDMA networks.” Id. ¶ 80. Thus, “[a]s a result of Qualcomm’s policy, the costs that an OEM
7 must incur to challenge Qualcomm’s royalties are not simply attorney’s fees and other litigation
8 costs, but also include loss of access to Qualcomm’s [modem chips].” Id. ¶ 79.

9 Relatedly, because Qualcomm’s “no license-no chips” policy prevents OEMs from
10 resorting to a neutral arbiter to determine a reasonable royalty rate, an OEMs’ bilateral licensing
11 negotiations with Qualcomm do not occur “in the shadow of the law,” and thus do not adequately
12 reflect a reasonable FRAND royalty rate. Id. ¶¶ 70–73. Moreover, FTC alleges that although a
13 reasonable royalty rate for Qualcomm’s SEPs could be determined from Qualcomm’s licensing
14 negotiations with competing chip manufacturers, who “do not depend on Qualcomm for [modem
15 chips] supply,” Qualcomm refuses to license competing modem chip manufacturers. Id. ¶ 114. In
16 effect, FTC alleges, a non-distorted metric for determining a FRAND royalty rate—a rate
17 determined either through bilateral negotiations “in the shadow of the law,” or a rate determined
18 through litigation itself—currently does not exist because of Qualcomm’s conduct. See ¶¶ 73, 75
19 78.

20 Significantly, FTC alleges that if these metrics were available to OEMs, Qualcomm’s
21 current royalty rates would not be the rates reached. Specifically, FTC alleges that “the royalties
22 that OEMs pay Qualcomm . . . do not reflect OEMs’ assessments of patent royalties that a court or
23 neutral arbiter would deem reasonable,” but rather “include an added increment that OEMs pay
24 Qualcomm to avoid disruption of [modem chip] supply.” Id. ¶ 86. FTC alleges that, if given the
25 opportunity, “OEMs could challenge Qualcomm’s royalty demands [before a court] on several
26 grounds.” See id. ¶¶ 77, 86. For example, OEMs would argue that “Qualcomm’s royalties are
27 disproportionately high relative to the value contributed by [Qualcomm’s] patented inventions,”

1 and that they are often “several times higher than the royalties of other SEP licensors that have
2 made similar contributions.” *Id.* ¶ 77. Further, OEMs would argue that Qualcomm has incorrectly
3 “continued to calculate royalties as a percentage of the handset’s price, even though handsets
4 today offer a number of features” that are unrelated to cellular connectivity. *Id.*

5 In addition, the Complaint contains numerous other allegations that, considered with the
6 allegations discussed above, adequately allege that Qualcomm’s royalties are above-FRAND. For
7 example, FTC alleges that Qualcomm’s royalties are “significantly higher than those of other
8 licensors of cellular SEPs,” *id.* ¶ 58, and that Qualcomm’s royalties are “equivalent in size to the
9 sum of [redacted] companies with a form of technology licensing,” including “[redacted]
10 [redacted],” *id.* ¶ 60. This is so despite the fact that
11 Qualcomm’s “share of patents declared essential to LTE standards is much lower than its share of
12 CDMA SEPs and is roughly equal to the shares of other industry participants.” *Id.* ¶ 56. Indeed,
13 “[o]ne study of declared LTE SEPs found that Qualcomm had a 13% share of ‘highly novel’
14 essential LTE patents, compared to 19% for Nokia and 12% for each of Ericsson and Samsung.”
15 *Id.* Further, the Complaint describes Qualcomm’s royalties as “elevated” in several places, and
16 FTC further alleges that “[a]bsent Qualcomm’s unlawful conduct, Qualcomm’s patent licenses
17 would include fair, reasonable, and non-discriminatory terms, and would not include elevated
18 royalties.” *See id.* ¶¶ 3, 7, 143. Finally, FTC also alleges that Qualcomm recognizes that its
19 licensing practices “require[] OEMs to accept higher royalties than OEMs would otherwise
20 accept,” including “licensing on a non-FRAND basis for SEPs.” *Id.* ¶¶ 96–98. In sum, reading
21 the FTC’s allegations as a whole, the Court finds that the Complaint plausibly alleges that
22 Qualcomm’s royalty rates are above FRAND.

23 Qualcomm contends that FTC’s allegations of above-FRAND royalties are nonetheless
24 contradicted by the fact that the Complaint also alleges that Qualcomm has historically collected a
25 royalty rate of 5%, and that this rate has not changed over time. Mot. at. 10. However, FTC’s
26 allegation that Qualcomm has continued to collect the *same* 5% royalty on the total value of a
27 handset *supports*, rather than contradicts, the FTC’s allegations that Qualcomm’s royalty is above

1 FRAND. As the Complaint explains, early handsets were primarily used only to transmit voice
2 calls. *See id.* ¶¶ 19, 25. Accordingly, Qualcomm’s cellular communications SEPs contributed
3 significantly to the functionality and value of a 2006 handset. *See id.* By contrast, handsets today
4 contain numerous features that are unrelated to cellular network connectivity, such as cameras,
5 Wi-Fi access, and data storage. *Id.* ¶ 26. “Many consumers today use their smartphone as their
6 principal camera, for example.” *Id.* Thus, Qualcomm’s SEPs contribute far less to the value of a
7 2017 phone as they contributed to the value of a 2006 phone. *See id.* ¶ 77. Nonetheless,
8 Qualcomm continues to collect a 5% royalty from the *total* value of the handset today for
9 Qualcomm’s cellular communications SEPs, just as Qualcomm did a decade ago.

10 In addition, FTC alleges that Qualcomm has continued to earn the same 5% royalty on the
11 sale of a handset despite the fact that Qualcomm’s SEP portfolio has declined throughout
12 cellphone standard generations. Qualcomm “held a correspondingly high share of all patents
13 declared essential to 2G-CDMA standards,” *id.* ¶ 54, but Qualcomm’s “share of patents declared
14 essential to LTE standards is much lower than its share of CDMA SEPs and is roughly equal to
15 the shares of other industry participants” such as Nokia, Ericsson, and Samsung. *Id.* ¶ 56.
16 Nonetheless, as discussed above, “revenues from Qualcomm’s licensing program are ‘equivalent
17 in size to the sum of [redacted] companies with a form of technology licensing,” despite Qualcomm’s
18 increasingly diminished role. *See id.* ¶ 60. In short, that Qualcomm collects the *same* 5% royalty
19 on the total value of a 2017 smartphone as Qualcomm collected on the total value of a 2006
20 phone, despite the fact that both handset technology and Qualcomm’s SEP portfolio has changed
21 dramatically over the past decade,⁵ supports FTC’s allegations that Qualcomm’s SEP royalty rates
22 are above FRAND.⁶

23
24 _____
25 ⁵ In addition, FTC alleges that Qualcomm’s 5% royalty rate does not vary across OEMs, and thus
26 does not account for the values of the different OEMs’ patent cross licenses to Qualcomm.
27 Compl. ¶ 77.

28 ⁶ Similarly, it is inconsequential that Qualcomm’s 5% royalty rate does not vary depending on the
modem chip at issue and whether Qualcomm has market power over that particular modem chip.
See Mot. at 10. FTC alleges that Qualcomm has used its monopoly in CDMA and premium-LTE
modem chips to collect an above-FRAND royalty on *all* modem chips. *See Compl.* ¶144.

1 In sum, taking the Complaint’s allegations as true and making reasonable inferences in
2 FTC’s favor, the Complaint adequately alleges that Qualcomm’s royalty rates are above FRAND.

3 **b. FTC’s Allegations of Incentive Funds do not Contradict FTC’s**
4 **Allegations of Above-FRAND Royalties**

5 Qualcomm also contends that FTC’s allegations that Qualcomm offers some OEMs the
6 “carrot” of incentive funds renders implausible FTC’s allegations that Qualcomm uses the threat
7 of withheld chip supply to coerce OEMs to accept above-FRAND royalties. Mot. at 10.

8 According to Qualcomm, if FTC alleges that OEMs agree to above-FRAND royalties and do not
9 challenge Qualcomm’s licensing terms only because the OEMs fear that Qualcomm will disrupt
10 their chip supply, it cannot also be true that some OEMs “do push back against Qualcomm’s
11 desired royalty terms,” which necessitates that Qualcomm pay these OEMs to accept elevated
12 royalties. Id. at 10–11.

13 Again however, Qualcomm’s argument requires drawing inferences in favor of Qualcomm,
14 as opposed to FTC. FTC alleges that Qualcomm, on certain occasions, “use[s] both the ‘stick’ of
15 threatened supply disruption and the ‘carrot’ of funds conditioned on the OEM’s acceptance of
16 Qualcomm’s preferred terms.” Id. ¶ 102 (emphasis added). In effect, FTC alleges, if Qualcomm’s
17 initial threat of withholding chips does not get OEMs to accept the full terms that Qualcomm
18 desires on all occasions, Qualcomm “close[s] the gap” by offering the OEMs “strategic funds” that
19 accrue “based on OEMs’ purchase of Qualcomm’s [chips].” Id. ¶ 103–04. Significantly, FTC
20 alleges that these “strategic funds” are thus a way for Qualcomm to continue and maintain its “no
21 license-no chips” policy consistently across all OEMs. Id. ¶ 104. As FTC contends, that
22 Qualcomm has the power to offer “carrots” on some occasions does not contradict FTC’s central
23 allegation, which is that Qualcomm primarily uses the “stick” of threatened modem chips supply
24 disruption to induce OEMs to agree to Qualcomm’s above-FRAND licensing terms. See id. ¶ 105;
25 see also ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282–83 (3d Cir. 2012) (finding
26 anticompetitive conduct where a dominant supplier both threatened OEMs that it would back out
27 of supply agreements if the OEMs did not meet market share targets, and offered the OEMs

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rebates for meeting the market share targets). Taking FTC’s allegations as true, Qualcomm’s incentive payments do not contradict the other allegations in the Complaint.

To summarize, the Complaint plausibly alleges that Qualcomm, through its “no license-no chips” policy, induces OEMs to pay Qualcomm above-FRAND royalties for Qualcomm’s SEPs. Accordingly, the Court next turns to Qualcomm’s argument that, even assuming Qualcomm charges an above-FRAND royalty, FTC has nonetheless failed to allege that Qualcomm’s conduct has harmed the competitive process in the market for modem chips.

3. FTC Has Adequately Alleged that Qualcomm’s “No License-No Chip” Policy Harms the Competitive Process

Next, the Court addresses Qualcomm’s argument that, even assuming that Qualcomm collects an above-FRAND royalty, FTC has failed to state a claim under either § 1 or § 2 of the Sherman Act, and thus § 5 of the FTCA, because FTC has failed to adequately allege that Qualcomm’s “no license-no chips” policy is anticompetitive. As discussed above, in order to state a Sherman Act claim, FTC must adequately allege that Qualcomm’s “no license-no chips” policy has “harm[ed] the competitive process and thereby harm[ed] consumers.” *Microsoft*, 253 F.3d at 58. As the Ninth Circuit has explained, “[a]nticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.” *Cascade Health Solus. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n. 32 (1985)).

Qualcomm makes two primary arguments for why FTC has failed to allege that Qualcomm’s “no license-no chips” policy is anticompetitive. First, Qualcomm contends that FTC has alleged only that Qualcomm has raised all modem chip prices equally across the board. According to Qualcomm, an across-the-board price increase cannot cause OEMs to favor Qualcomm’s modem chips over those of Qualcomm’s competitors. See Mot. at 11. Second, Qualcomm contends that FTC’s argument is, at most, a “price squeeze” theory that is foreclosed by the United States Supreme Court’s opinion in *Pacific Bell Telephone Co. v. linkLine*

1 Communications, Inc., 555 U.S. 438, 449 (2009). The Court addresses each of Qualcomm’s
2 arguments below.

3 **a. FTC Has Adequately Alleged That Qualcomm’s “No License-No
4 Chips” Policy Harms Competition**

5 First, Qualcomm contends that FTC has failed to allege that Qualcomm’s “no license-no
6 chips” policy is anticompetitive because FTC fails to explain how Qualcomm’s “no license-no
7 chips” policy harms competition in the modem chips market. See Mot. at 11. Specifically,
8 Qualcomm contends that, if the “all-in” price for a modem chip is (i) the price of the modem chip,
9 and (ii) any royalties that must be paid for any SEPs that are practiced through use of the modem
10 chip, then FTC’s allegations show only that Qualcomm has raised the latter component in equal
11 measure across all modem chips sales. Mot. at 11. Accordingly, Qualcomm contends, if
12 Qualcomm has raised all modem chips prices equally, Qualcomm’s conduct cannot harm
13 competition for modem chips sales. Id.

14 However, Qualcomm’s argument requires accepting Qualcomm’s own labels for its
15 conduct—labels that FTC alleges do not reflect reality—and it requires drawing inferences in
16 Qualcomm’s favor, which the Court may not do on a motion to dismiss. See *Knevelbaard Dairies*,
17 232 F.3d at 984. In addition, Qualcomm’s argument requires examining each of Qualcomm’s
18 practices independently, as opposed to considering their interactions and combined effect. As the
19 Ninth Circuit has stated, however, “it is not ‘proper to focus on specific individual acts of an
20 accused monopolist while refusing to consider their overall combined effect.’” *Free FreeHand*
21 *Corp. v. Adobe Sys., Inc.*, 852 F. Supp. 2d 1171, 1180 (N.D. Cal. Feb. 10, 2012) (quoting *City of*
22 *Anaheim v. S. Cal. Edison Co.*, 955 F. 2d 1373, 1376, 1378 (9th Cir. 1992)). For the reasons
23 discussed below, taking FTC’s allegations as true and considering the interactions between
24 Qualcomm’s practices and their combined effect, the Court finds that FTC has adequately alleged
25 that Qualcomm’s “no license-no chips” policy has harmed competition in the modem chips market
26 in violation of the Sherman Act, and thus in violation of § 5 of the FTCA.

27 According to the Complaint, Qualcomm uses the threat of withheld modem chips supply to
28 induce OEMs to enter into SEP licensing agreements with Qualcomm that require the OEMs to

1 pay above-FRAND royalties for Qualcomm’s FRAND-encumbered SEPs. See Compl. ¶¶ 83, 86.
2 As FTC alleges, the royalty that OEMs pay to Qualcomm includes not only a FRAND royalty, but
3 also an “added increment” that OEMs pay to Qualcomm “[t]o maintain access to Qualcomm’s
4 [modem chips].” Id. ¶ 86. Significantly, although this surcharge—or, in FTC’s words, “tax”—is
5 labeled as part of the royalty payment that OEMs pay to Qualcomm for Qualcomm’s SEPs, FTC
6 alleges that this surcharge does not reflect the fair value of Qualcomm’s SEPs. Id. ¶¶ 4, 86.
7 Rather, the surcharge is paid by OEMs “[t]o maintain access to Qualcomm’s [modem chips].” Id.
8 ¶ 86.

9 Of course, if Qualcomm merely added a surcharge to its own “all-in” modem chips price,
10 competitors would underbid Qualcomm in the market for modem chips. See id. ¶ 88–90.
11 Qualcomm’s modem chips surcharge works because Qualcomm also “rais[es] OEMs’ all-in costs
12 of using competitors’” modem chips by the same amount. See id. Specifically, as set forth above,
13 although Qualcomm’s voluntary FRAND commitments require Qualcomm to license its SEPs to
14 competing modem chips manufacturers, Qualcomm refuses to license its modem chips
15 competitors. Id. ¶ 59. As a result, Qualcomm’s modem chips rivals cannot sell OEMs licensed
16 modem chips that convey the rights to Qualcomm’s SEPs. Id. ¶ 114. Instead, Qualcomm licenses
17 only OEMs who make and sell handsets, and these licensing agreements cover all of the handsets
18 that the OEM sells, regardless of which company manufactured the components in that handset.
19 Id. ¶¶ 64–68. In this way, Qualcomm collects its surcharge—the incremental above-FRAND
20 royalty that OEMs pay to Qualcomm to ensure continued access to Qualcomm modem chips—on
21 all handset sales. Id.

22 Thus, by violating its FRAND obligations twice over—by not licensing its competitors and
23 by threatening to withhold its chips to induce OEMs to pay an above-FRAND royalty rate—
24 Qualcomm raises the “all-in” modem chip price that OEMs pay on all modem chips. FTC alleges
25 that this “weakens the competitive constraint on Qualcomm’s own all-in [modem chips] price,”
26 which allows Qualcomm to charge OEMs its modem chips surcharge without spurring substitution
27 in the modem chips market. Id. ¶¶ 89–90. Accordingly, FTC alleges, Qualcomm gives itself a

1 competitive advantage in the market for modem chips—a competitive advantage that is unrelated
2 to Qualcomm’s “superior product, business acumen, or historic accident.” Grinnell, 384 U.S. at
3 571.

4 Significantly, although Qualcomm nominally imposes the same surcharge on all modem
5 chips sales, Qualcomm’s surcharge does not affect Qualcomm and its competitors equally. For
6 Qualcomm, as discussed above, Qualcomm’s surcharge is a means for Qualcomm to functionally
7 extract a higher price for Qualcomm’s own modem chips without being underbid in the modem
8 chips market by competing modem chips manufacturers. See Compl. ¶¶ 86, 85–95. The revenue
9 from Qualcomm’s surcharge comes back to Qualcomm as a form of profit, and it maintains
10 Qualcomm’s modem chips monopoly. Moreover, Qualcomm can offer OEMs incentive payments
11 that provide OEMs discounts from Qualcomm’s above-FRAND royalties if an OEM uses
12 Qualcomm’s modem chips as opposed to the modem chips of Qualcomm’s competitors. *Id.* ¶ 103.
13 Qualcomm’s competitors, by contrast, cannot offer OEMs such incentive payments, and
14 Qualcomm’s surcharge works to reduce competitors’ modem chips sales and margins, which
15 prevents these competitors from effectively competing with Qualcomm. See *id.* ¶ 106. In effect,
16 FTC alleges, Qualcomm’s surcharge “artificially stunt[s]” its competitors’ ability to effectively
17 grow and challenge Qualcomm on the merits, in violation of the Sherman Act. *McWane*, 783 F.3d
18 at 824, 839–40; see also *United States v. Dentsply Intern., Inc.*, 399 F.3d 181, 191 (3d Cir. 2005)
19 (finding monopolist’s actions anticompetitive where the monopolist’s conduct “help[ed] keep
20 sales of competing [products] below the critical level necessary for any rival to pose a real threat
21 to [the defendant’s] market share”).

22 The Seventh Circuit’s decision in *Premier Electrical Construction Company v. National*
23 *Electrical Contractors Association*, 814 F.2d 358 (7th Cir. 1987), demonstrates how a monopolist
24 can use an across-the-board price increase to impose artificial constraints that disproportionately
25 harm the monopolist’s competitors. In *Premier*, an association of electrical employers known as
26 the National Electrical Contractors Association (“the Association”) established a fund with an
27 electrical workers’ union (“the Union”). *Id.* at 359. Members of the Association contributed 1%

1 of their gross payroll into the Fund to offset the cost of collective bargaining and administrative
2 services. *Id.* at 359–60. However, because electrical employers who were not members of the
3 Association were “free of the 1% contribution,” these electrical employers “had lower costs of
4 doing business” and could charge lower prices. *Id.* at 368. Electrical employers who were not
5 members of the Association thus began to underbid the Association’s members for electrical
6 contracting work. *Id.* To prevent being underbid, the Association “enlisted the Union” to collect
7 the 1% fee from non-Association electrical employers as well. *Id.* In this way, the Association
8 “leveled” the playing field, but in doing so gave itself an advantage. “The result was higher prices
9 to purchasers of electrical work and higher profits for members of the Association—both because
10 there is more in the Fund, for the Association’s use, and because the reduction in competition
11 enabled the members to capture more of the market.” *Id.* at 368.

12 Although the Association in Premier charged the 1% fee directly to its rivals—whereas
13 Qualcomm’s surcharge raises the price an OEM must pay for Qualcomm’s rivals’ modem chips—
14 the result is substantially the same. Qualcomm functionally charges OEMs more to access
15 Qualcomm’s own modem chips by threatening to withhold its modem chips supply from OEMs
16 unless they agree to Qualcomm’s preferred SEP licensing terms. Compl. ¶ 86. Qualcomm
17 ensures that it can charge this price while not being underbid by competitors—and thus maintain
18 its modem chips monopoly—by also requiring OEMs to pay the same amount of money to
19 Qualcomm even if those OEMs use modem chips from a competing modem chips manufacturer.
20 *Id.* To Qualcomm, the surcharge represents “higher profits,” both because the surcharge brings
21 additional revenue to Qualcomm, and “because the reduction in competition enable[s]” Qualcomm
22 “to capture more of the [modem chips] market.” Premier, 814 F.2d at 368. To Qualcomm’s
23 modem chips competitors, however, the surcharge represents an additional component of the “all-
24 in” price that an OEM must pay for use of the rivals’ modem chips. Compl. ¶ 87. Thus,
25 Qualcomm’s surcharge represents an additional burden on the rival chipmaker that “diminishes
26 OEMs’ demand for those” modem chips and reduces competitors’ sales. *Id.* ¶¶ 87, 89. It also
27 “reduces the ability and incentive of competitors to invest and innovate.” *Id.* ¶ 87.

1 Taking these factual allegations as true, FTC has adequately alleged that Qualcomm has
2 engaged in “behavior that tends to impair the opportunities of rivals and either does not further
3 competition on the merits or does so in an unnecessarily restrictive way.” *Cascade*, 515 F.3d 883,
4 894 (9th Cir. 2008); see *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 2011 WL 4948567, at *6 (N.D.
5 Cal. Oct. 18, 2011) (finding plaintiff had plausibly alleged harm to competition where the plaintiff
6 alleged that the defendant’s conduct “result[ed] in increased prices and decreased quality and
7 innovation”). Although Qualcomm insists that its licensing practices are justified, see *Mot.* at 8,
8 “the existence of valid business reasons in antitrust cases is generally a question of fact not
9 appropriate for resolution at the motion to dismiss stage,” *Tucker v. Apple Comp., Inc.*, 493 F.
10 Supp. 2d 1090, 1001 (N.D. Cal. 2006). In sum, at this stage of the litigation, FTC has alleged
11 facts sufficient to support a plausible theory of harm to competition. The Court thus turns to
12 whether FTC’s claim is nonetheless foreclosed by the United States Supreme Court’s decision in
13 *linkLine*, 555 U.S. 438.

14 **b. linkLine Does Not Foreclose FTC’s Claim**

15 Qualcomm contends that, even assuming that its “no license-no chips” policy affects
16 Qualcomm’s modem chips rivals differently than it affects Qualcomm, FTC has nonetheless still
17 failed to state a claim because FTC has alleged, at most, a “price squeeze” theory that is foreclosed
18 by the United States Supreme Court’s decision in *linkLine*. However, as discussed further below,
19 FTC’s theory is not foreclosed by *linkLine* because FTC has alleged that Qualcomm has an
20 antitrust duty to deal with its competitors, and because Qualcomm’s conduct is distinguishable
21 from the conduct at issue in *linkLine*. The Court first discusses the *linkLine* decision, and then
22 addresses Qualcomm’s argument.

23 In *linkLine*, AT&T “own[ed] much of the infrastructure and facilities needed to provide
24 DSL [internet] service in California.” *Id.* at 442. Accordingly, competing DSL providers needed
25 to gain access to AT&T’s facilities in order to provide DSL services to their own customers. *Id.*
26 AT&T provided DSL transport service to its competitors at the wholesale level, and AT&T also
27 provided DSL internet service directly to consumers at the retail level. *Id.* at 443. AT&T’s

1 competitors sued AT&T under the Sherman Act, and alleged a “price squeeze” theory. *Id.* at 443–
2 44. As the United States Supreme Court explained, a “price squeeze” theory “requires the
3 defendant to be operating in two markets, a wholesale (“upstream”) market and a retail
4 (“downstream”) market.” *Id.* at 449. “A firm with market power in the upstream market can
5 squeeze its downstream competitors by raising the wholesale price of inputs while cutting its own
6 retail prices.” *Id.* “This will raise competitors’ costs (because they will have to pay more for their
7 inputs) and lower [competitors’] revenues (because they will have to match the dominant firm’s
8 low retail price).” *Id.* The United States Supreme Court in *linkLine* considered “whether a
9 plaintiff can state a price-squeeze claim when the defendant has no obligation under the antitrust
10 laws to deal with the plaintiff at wholesale.” *Id.* The United States Supreme Court concluded that
11 the plaintiff could not. *Id.*

12 The United States Supreme Court held that AT&T did not have an antitrust duty to deal
13 with its rivals at the wholesale DSL transport level. *Id.* at 450. Thus, AT&T had “no obligation to
14 deal under terms and conditions favorable to its competitors” and “was not required to offer [its
15 DSL transport service] at the wholesale prices the plaintiffs would have preferred.” *Id.* at 450–51.
16 Moreover, the United States Supreme Court explained, AT&T’s DSL internet prices at the retail
17 level were lawful because they were not predatory. *Id.* at 451. Because AT&T’s actions at the
18 wholesale level were lawful, and because AT&T’s prices at the retail level were lawful, the United
19 States Supreme Court explained that the combination of these two lawful actions did not violate
20 the Sherman Act. *Id.* at 452. In sum, the United States Supreme Court held that it was not
21 anticompetitive for AT&T to “squeeze” its competitors’ margins by charging a high price to its
22 competitors for inputs while maintaining above-cost pricing for AT&T’s competitive retail
23 product. *Id.* at 452.

24 Qualcomm argues that the FTC’s allegations of Qualcomm’s “no license-no chips” policy
25 are, at bottom, a “price squeeze” theory. According to Qualcomm, FTC is functionally arguing
26 that Qualcomm is charging “too much” for its royalties and “too little” for its modem chips,
27 thereby “squeezing” its modem chip rivals’ margins. However, for several reasons, *linkLine* does

1 not apply to FTC’s claim.

2 First, the United States Supreme Court’s holding in *linkLine* was explicitly premised on the
3 fact that AT&T had “no duty to deal” with its competitors at wholesale. *linkLine*, 555 U.S. at 449.
4 Here, as discussed in detail in Section III.C. *infra*, FTC has adequately alleged that Qualcomm
5 does have an antitrust duty to license its SEPs to rival modem chips manufacturers. FTC alleges
6 that if Qualcomm licensed its SEPs to competing chips manufacturers, Qualcomm would not be
7 able to charge “too much” for its SEPs, either to OEMs or to its modem chips competitors, and
8 thus Qualcomm’s entire course of anticompetitive conduct would collapse. Compl. ¶ 113–15.
9 Accordingly, Qualcomm’s antitrust duty to deal with competing chips manufacturers, discussed in
10 full in Section III.C below, distinguishes FTC’s claim from *linkLine*, and *linkLine* does not apply.
11 See *Safeway Inc. v. Abbott Labs.*, 2010 WL 147988, at *4 (N.D. Cal. Jan. 12, 2010)
12 (distinguishing *linkLine* and allowing case to go forward because the plaintiff adequately alleged
13 that the defendant had an antitrust duty to deal with its competitors).

14 Second, the United States Supreme Court in *linkLine* held that AT&T’s lawful prices at the
15 wholesale level and AT&T’s lawful prices at the retail level did not become unlawful merely
16 because the two prices, which were separate and distinct from one another, worked to “squeeze”
17 the margins of AT&T’s competitors when considered in relation to one another. *Id.* at 452. As
18 courts have recognized, *linkLine* did not address allegations of an “overarching anticompetitive
19 scheme.” *Universal Hosp. Servs., Inc. v. Hill-Rom Holdings, Inc.*, 2015 WL 6994438, at *6 (W.D.
20 Tex. Oct. 15, 2015) (distinguishing *linkLine* and holding that *linkLine* does not require courts to
21 consider the components of an alleged anticompetitive scheme “in the disjunctive”). Here,
22 Qualcomm’s SEP licensing prices and Qualcomm’s modem chips prices are not separate and
23 distinct from one another, as AT&T’s wholesale prices and retail prices were in *linkLine*. Rather,
24 FTC alleges that Qualcomm’s SEP licensing practices and Qualcomm’s modem chips practices
25 are inextricably intertwined with one another, and that both of these practices are central
26 components of Qualcomm’s overall anticompetitive “no license-no chips” policy. See Compl. ¶¶
27 86–106. *linkLine* did not address this type of inextricably intertwined conduct and overarching

1 anticompetitive policy, and thus linkLine does not foreclose FTC’s “no license-no chips” claim.

2 **4. Summary**

3 In sum, the Court finds that FTC has adequately alleged that Qualcomm’s “no license-no
4 chips” policy results in OEMs paying Qualcomm an above-FRAND royalty for Qualcomm’s
5 SEPs, and that Qualcomm’s “no license-no chips” policy harms the competition in the market for
6 modem chips. Accordingly, FTC has plausibly alleged that Qualcomm’s “no license-no chips”
7 policy is anticompetitive conduct in violation of either § 1 or § 2 of the Sherman Act, and thus in
8 violation of § 5 of the FTCA. The Court next turns to consider whether Qualcomm’s refusal to
9 license its rivals constitutes independent anticompetitive conduct that violates the antitrust laws.

10 **C. Qualcomm’s Refusal to License its Competitors**

11 Next, FTC alleges that Qualcomm’s refusal to license its SEPs to its competing modem
12 chips manufacturers violates an antitrust duty to deal because Qualcomm’s FRAND obligations
13 and larger anticompetitive course of conduct create an antitrust duty to deal with Qualcomm’s
14 competitors. Compl. ¶ 107; Opp. at 17–19. Qualcomm argues, however, that it has no antitrust
15 duty to assist its rivals, even assuming that its FRAND obligations require Qualcomm to license
16 its SEPs to its rivals. Mot. at 15.

17 For the reasons discussed below, the Court agrees with FTC that, under the circumstances
18 presented here, FTC has adequately alleged that Qualcomm’s refusal to license its SEPs to
19 competing modem chips manufacturers and Qualcomm’s larger course of anticompetitive conduct
20 constitute a violation of an antitrust duty to deal, and thus a violation of § 2 of the Sherman Act
21 and, by extension, § 5 of the FTCA. The Court first discusses the antitrust duty to deal doctrine,
22 and then the Court addresses FTC’s allegations.

23 **a. Antitrust Duty to Deal**

24 The United States Supreme Court has explained that, in general, “there is no duty to aid
25 competitors.” *Verizon Comm’s, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004).
26 Nonetheless, “[u]nder certain circumstances, a refusal to cooperate with rivals can constitute
27 anticompetitive conduct and violate § 2.” *Id.*

1 One such circumstance is the circumstance recognized in *Aspen Skiing Co. v. Aspen*
2 *Highlands Skiing Corp.*, 472 U.S. 585 (1985). In *Aspen Skiing*, the defendant owned three of the
3 four ski resorts in Aspen, Colorado, and the plaintiff owned the fourth resort. *Id.* at 585. The
4 defendant and the plaintiff had, for many years, offered skiers a joint “all-Aspen ticket” that gave
5 skiers admission to all four resorts. *Id.* at 589–90. Revenues from the joint ticket were divided
6 according to the relative percentage of skiers that visited each mountain with the joint ticket. *Id.* at
7 589. Believing that it could get greater revenues without the joint ski pass, the defendant offered
8 the plaintiff “an offer that [the plaintiff] could not accept.” *Id.* at 592. Essentially, the defendant
9 would only agree to continue the joint ticket if the plaintiff agreed to a fixed percentage of revenue
10 that was below the revenue that the plaintiff had historically received under the joint ticket. *Id.*
11 Significantly, after the plaintiff refused the defendant’s offer and the joint ticket was discontinued,
12 the defendant also refused to sell the plaintiff any lift tickets to the defendant’s ski resorts, even
13 though the plaintiff offered to pay the defendant retail price for the tickets. *Id.* at 593.

14 The United States Supreme Court found that the defendant in *Aspen Skiing* violated an
15 antitrust duty to deal with its competitor. The United States Supreme Court explained the general
16 rule that, “[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct
17 does not restrict the long recognized right of a” business to “exercise [its] own independent
18 discretion as to the parties with whom [it] will deal.” *Id.* at 602. However, in *Aspen Skiing*, the
19 United States Supreme Court found that there was sufficient evidence to show that the defendant
20 had refused to deal with the plaintiff only because of the defendant’s anticompetitive intent to
21 maintain its monopoly. Specifically, as the United States Supreme Court later explained in
22 *Trinko*, the *Aspen Skiing* Court “found significance in the defendant’s decision to cease
23 participation in a cooperative venture.” *Trinko*, 540 U.S. at 409. The *Aspen Skiing* defendant’s
24 “unilateral termination of a voluntary (and thus presumably profitable) course of dealing
25 suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” *Id.*
26 Moreover, “the defendant’s unwillingness to renew the [joint] ticket even if compensated at retail
27 price revealed a distinctly anticompetitive bent.” *Id.* In those circumstances, the defendant’s

1 refusal to deal with the plaintiff was a violation of the Sherman Act.

2 By contrast, the United States Supreme Court in *Trinko* held that Verizon did not have an
3 antitrust duty to deal with its competitors. There, the Telecommunications Act of 1996 imposed
4 on Verizon an obligation to share its telephone network with its rivals. *Id.* at 402. However,
5 Verizon did not process its rivals' requests "in a timely manner, or not at all." *Id.* at 404–05.
6 Verizon's rivals sued Verizon and alleged that Verizon's refusal to deal was part of an
7 anticompetitive scheme to harm its rivals and maintain Verizon's monopoly. *Id.* However, the
8 United States Supreme Court in *Trinko* held that the plaintiffs had failed to show that Verizon's
9 conduct fell within *Aspen Skiing*'s exception to the general no-duty-to-deal rule. *Id.* at 408–09.
10 Specifically, the *Trinko* Court stated that the plaintiff's complaint "d[id] not allege that Verizon
11 voluntarily engaged in a course of dealing with its rivals," or that Verizon would have ever have
12 dealt with its rivals absent the Telecommunications Act's requirements. *Id.* at 409. Moreover, the
13 *Trinko* Court found further significance in the fact that, unlike the lift tickets at issue in *Aspen*
14 *Skiing*, the services that Verizon was refusing to offer its competitors in *Trinko* were services that
15 were "not otherwise marketed or available to the public." *Id.* at 410. In sum, the *Trinko* Court
16 "conclude[d] that Verizon's alleged insufficient assistance to the provision of service to rivals is
17 not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.*

18 In *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131 (9th Cir. 2004), the Ninth
19 Circuit analyzed *Trinko* and *Aspen Skiing* and concluded that the United States Supreme Court
20 considered three facts "significant for creating antitrust liability" in *Aspen Skiing* that were not
21 present in *Trinko*. First, the *Aspen Skiing* defendant's "unilateral termination of a voluntary and
22 profitable course of dealing." *Id.* at 1132. Second, the *Aspen Skiing* defendant's refusal to deal
23 even if compensated at retail price, which suggested that the defendant's conduct was
24 anticompetitive. *Id.* at 1132. Third, the fact that the *Aspen Skiing* defendant refused to provide its
25 competitor a product that was "already sold in a retail market to other customers." *Id.* at 1113.
26 The Ninth Circuit explained that this third fact related to the United States Supreme Court's
27 "concern about the administrability of a judicial remedy. *Id.* Because the product at issue was

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1 sold at retail, the court could “simply order the defendant to deal with its competitors on the same
2 terms that it already deals with others in the existing retail market.” *Id.* at 1133. By contrast, in
3 *Trinko*, Verizon’s services were not available to the public, and thus if a duty to deal was
4 recognized, the court would have to act as a “central planner” and establish the terms of dealing.
5 *Id.*

6 Thus, the Supreme Court’s decisions in *Aspen Skiing* and *Trinko*, together with the Ninth
7 Circuit’s decision in *MetroNet*, instruct that a plaintiff alleges an antitrust duty to deal where the
8 plaintiff alleges “[a] decision to alter a [voluntary] course of dealing together with evidence of
9 anticompetitive malice,” and where the recognition of an antitrust duty to deal will not present
10 significant judicial administrability concerns. *SmithKline Beecham Corp. v. Abbott Labs.*, 2014
11 WL 6664226, at *4 (N.D. Cal. Nov. 24, 2014); *Safeway Inc. v. Abbott Labs.*, 2010 WL 147988, at
12 *6 (N.D. Cal. Jan. 12, 2010) (“Taken together, *Aspen Skiing* and [*Trinko*] demonstrate that
13 liability under § 2 can arise when a defendant voluntarily alters a course of dealing and
14 ‘anticompetitive malice’ motivates the defendant’s conduct.”). Accordingly, the Court thus turns
15 to consider whether FTC has adequately alleged that Qualcomm has a duty to deal within the
16 meaning of *Aspen Skiing*, *Trinko*, and *MetroNet*.

17 **b. FTC has Adequately Alleged that Qualcomm had an Antitrust Duty to**
18 **License its FRAND-Encumbered SEPs to its Competitors**

19 FTC contends that Qualcomm’s refusal to license its competitors is a violation of an
20 antitrust duty to deal because Qualcomm voluntarily agreed to license its SEPs in accordance with
21 FRAND, and Qualcomm’s later refusal to license its competitors is an alteration of that voluntary
22 course of dealing. *Opp.* at 17–19. According to FTC, Qualcomm’s decision to not license its
23 competitors is motivated by anticompetitive malice because Qualcomm’s refusal to license its
24 SEPs to competing chips manufacturers is a necessary step in Qualcomm’s “no license-no chips”
25 policy, which allows Qualcomm to maintain its modem chips monopoly, as discussed above. See
26 *id.*; *Compl.* ¶¶ 107–15. Based on the below analysis of the Ninth Circuit’s three *MetroNet* facts,
27 the Court agrees with FTC that, accepting FTC’s allegations as true, FTC has adequately alleged

1 that Qualcomm has a duty to license its SEPs to its modem chips competitors.

2 **i. Voluntary and Profitable Course of Dealing**

3 First, the Court considers whether FTC has alleged that Qualcomm altered a “voluntary
4 and profitable course of dealing.” *MetroNet Servs. Corp.*, 383 F.3d at 1132. Significantly, FTC
5 alleges that Qualcomm voluntarily “participated in cellular standard setting processes” through
6 cellular SSOs such as ETSI, TIA, and ATIS. *Compl.* ¶ 54. These SSOs “require each party that
7 participates in the standards-development process to commit to license its SEPs . . . on FRAND
8 terms.” *Id.* ¶ 50. According to FTC, “Qualcomm’s FRAND commitments require [Qualcomm]
9 to license its competitors to make and sell [modem chips] using Qualcomm’s SEPs.” *Id.* ¶ 108.
10 Moreover, FTC alleges, Qualcomm recognizes that its FRAND commitments require it to license
11 its modem chips rivals. *Id.* ¶ 109. FTC alleges that, despite voluntarily participating in the
12 standard setting process, and despite voluntarily “commit[ing] to ETSI, TIA, ATIS, and other
13 SSOs that it will license its cellular SEPs covering 2G, 3G, and 4G technologies on FRAND
14 terms”—including to its modem chips competitors—Qualcomm has violated its FRAND
15 commitments by refusing to license its modem chips competitors. *Id.* ¶¶ 57–58, 108. Indeed, FTC
16 alleges, Qualcomm’s rivals “have sought SEP licenses from Qualcomm,” but Qualcomm has
17 refused. *Id.* ¶ 112. Thus, FTC has alleged that Qualcomm engaged in a voluntary course of
18 dealing with its rivals by participating in the standard setting process and committing to SSOs that
19 it would license its SEPs to its modem chips competitors, but that Qualcomm altered this
20 voluntary course of dealing by refusing to license its modem chips rivals once its patents were
21 incorporated into cellular communications standards. *See id.* ¶¶ 107–12.

22 In addition to alleging that Qualcomm altered a voluntary course of dealing with its rivals,
23 FTC also alleges that Qualcomm’s voluntary FRAND commitments were “profitable” for
24 Qualcomm. *See MetroNet Servs. Corp.*, 383 F.3d at 1132. Indeed, as FTC alleges, FRAND
25 commitments are intended to ensure that the patent holder receives fair compensation for its
26 intellectual property, while also ensuring that the patent holder does not “exercise any market
27 power resulting from its patents’ incorporation into that standard.” *Compl.* ¶ 50. FTC alleges

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1 that Qualcomm could “obtain fair compensation for its intellectual property” by complying with
2 its FRAND obligations. *Id.* ¶ 112.

3 Nonetheless, Qualcomm argues that its conduct is distinguishable from Aspen Skiing
4 because FTC does not allege that Qualcomm ever actually licensed its rivals in the past. Reply at
5 11. However, Qualcomm’s voluntary participation in the standards setting process, and
6 Qualcomm’s voluntary commitment to license its SEPs on FRAND terms pursuant to the
7 standards setting process, are the type of voluntary actions that can support an antitrust duty to
8 deal. Significantly, the Third Circuit recognized this in *Broadcom v. Qualcomm, Inc.*, 501 F.3d
9 297, 304 (3d Cir. 2007). There, Broadcom “alleged that Qualcomm ignored its FRAND
10 commitments to [SSOs] by demanding discriminatorily higher (i.e., non-FRAND) royalties from
11 competitors and customers using chipsets not manufactured by Qualcomm.” *Id.* According to
12 Broadcom, Qualcomm’s conduct was part of Qualcomm’s effort to obtain a monopoly in the
13 UMTS chip market. *Id.*

14 The Third Circuit in *Broadcom* stated that, assuming that Broadcom had alleged a refusal-
15 to-deal claim in its Complaint, the Third Circuit would have found that Broadcom adequately
16 stated a refusal-to-deal claim. *Id.* at 316. Specifically, the Third Circuit explained that
17 Broadcom’s Complaint alleged that Qualcomm had “actively marketed its [patents] for inclusion
18 in an industry-wide standard,” and that Qualcomm had “voluntarily agreed to license that
19 technology on FRAND terms.” *Id.* at 316. According to the Third Circuit, Qualcomm’s voluntary
20 participation in the standard setting process, and Qualcomm’s voluntary commitment to FRAND,
21 constituted a voluntary course of conduct that distinguished Qualcomm’s conduct from Verizon’s
22 conduct in *Trinko*, where the complaint “did not allege that [Verizon] engaged in a voluntary course
23 of dealing with its rivals, or would have done so absent statutory compulsion.” *Id.*

24 Here, FTC alleges, just as the Complaint alleged in *Broadcom*, that Qualcomm actively
25 marketed its patents for inclusion into cellular communications standards, and that Qualcomm
26 “voluntarily agreed to license” its SEPs on FRAND terms. *Id.* at 316; see Compl. ¶¶ 107–15.
27 Accordingly, as the Third Circuit found, FTC’s allegations that Qualcomm voluntarily participated

1 in the standards setting process and voluntarily committed to license its SEPs to its modem chips
2 competitors are sufficient to allege that Qualcomm altered a voluntary and profitable course of
3 dealing. *Id.*; see Compl. ¶¶ 107–15. Thus, the first MetroNet fact supports finding an antitrust
4 duty to deal.

5 **ii. Anticompetitive Malice**

6 Second, FTC has alleged sufficient facts to show that Qualcomm’s refusal to deal with its
7 rivals, in violation of its FRAND commitment, was motivated by “anticompetitive malice.”
8 *SmithKline Beecham Corp.*, 2014 WL 6664226, at *4. As set forth above, FTC alleges that, like
9 the defendant in *Aspen Skiing*, Qualcomm has not licensed its SEPs to its modem chips rivals,
10 even though Qualcomm “could obtain fair compensation for its intellectual property” by licensing
11 its SEPs in accordance with FRAND. Compl. ¶¶ 50, 143. FTC alleges that Qualcomm refuses to
12 license its rivals, and instead licenses only OEMs, because this practice, in part, enables
13 Qualcomm to enact its “no license-no chips” policy and harm its competitors’ sales. *Id.* ¶ 114
14 (“Qualcomm’s ability to tax its competitors’ sales via patent license terms with OEMs would be
15 limited if [Qualcomm] licensed cellular SEPs to its competitors.”). “Qualcomm’s competitors,
16 unlike [Qualcomm’s] OEM customers, do not depend on Qualcomm for [modem chips] supply.”
17 *Id.* “As a result, Qualcomm could not use a threatened disruption of [modem chips] supply to
18 skew SEP-licensing negotiations with its competitors, and the royalties that would emerge from
19 those negotiations would reflect the royalties that a court would deem reasonable.” *Id.*

20 Moreover, if Qualcomm licensed its SEPs to its competitors, those competitors could
21 “offer OEMs [modem chips] that convey the rights to Qualcomm’s cellular SEPs,” and Qualcomm
22 could not be able to collect a royalty on handsets that contain its competitors’ components. *Id.* ¶
23 113; see also *id.* ¶¶ 64–68. Indeed, FTC alleges that Qualcomm recognizes that by licensing its
24 SEPs only to OEMs, and not its modem chips competitors, Qualcomm is able to use its modem
25 chips monopoly to “pursue licensing on a non-FRAND basis for SEPs.” *Id.* ¶ 96–100. As
26 discussed in detail above, Qualcomm’s ability to collect above-FRAND royalties not only on the
27 sales of its own modem chips, but also on the sale of its competitors’ modem chips, allows

1 Qualcomm to impose a surcharge on its competitors’ modem chips sales which “reduces demand
2 for competitors’ [modem chips], and reduces the ability and incentive of competitors to invest and
3 innovate.” Id. ¶87.

4 In sum, FTC alleges, Qualcomm’s refusal to license its SEPs to its modem chips
5 competitors is an essential component in Qualcomm’s larger “no license-no chips” anticompetitive
6 policy. Id. ¶ 114–15. FTC’s allegations are sufficient, at this stage of the proceedings, to allege
7 that Qualcomm’s refusal to deal is motivated by “anticompetitive malice.” *SmithKline Beecham*
8 *Corp.*, 2014 WL 6664226, at *4. Thus, the second MetroNet fact supports finding an antitrust
9 duty to deal.

10 **iii. Judicial Administrability and Other Factors**

11 Third, the “concern[s] about the administrability of a judicial remedy” that were present in
12 *Trinko* are not present here. *MetroNet*, 383 F.3d at 1133 (citing *Trinko*, 549 U.S. at 409). As the
13 Ninth Circuit in *MetroNet* explained, the *Trinko* Court found it significant that *Aspen Skiing*
14 involved the defendant’s refusal to provide a competitor “products that were already sold in a
15 retail market to other customers.” Id. In *Trinko*, by contrast, Verizon’s “services allegedly
16 withheld [were] not otherwise marketed or available to the public.” *Trinko*, 540 U.S. at 410.
17 Accordingly, the United States Supreme Court in *Trinko* was concerned that imposing on Verizon
18 an antitrust duty to deal would require “antitrust courts to act as central planners, identifying the
19 proper price, quantity, and other terms of dealing—a role for which they are ill suited.” Id. at 408.
20 Here, by contrast, the relevant “terms of dealing” for Qualcomm are Qualcomm’s FRAND
21 commitments. Id.; see Compl. ¶ 108. FTC’s Complaint contains numerous allegations regarding
22 how FRAND rates are determined, and that courts play an important role in determining
23 reasonable FRAND royalty rates. Compl. ¶¶ 69–83 (describing lawsuits wherein the court
24 determined a FRAND royalty rate). Accordingly, recognizing a duty to deal in this case would
25 not require courts to play a larger role in setting the terms of dealing than the role that courts
26 already play in determining appropriate royalties in patent cases. Id. Thus, the third MetroNet
27 fact supports finding an antitrust duty to deal.

1 Finally, the Court notes that an additional concern expressed by the United States Supreme
2 Court in *Trinko* is not present here. The United States Supreme Court in *Trinko* recognized that
3 Verizon’s conduct was already subject to an “extensive regulatory framework that created
4 oversight function and remedies that the antitrust laws were unsuited to augment.” *Broadcom*,
5 501 F.3d at 316–17 (citing *Trinko*, 540 U.S. at 410–15). By contrast, as the Third Circuit
6 recognized in *Broadcom*, “[n]o such regulatory framework exists” with regards to FRAND
7 commitments and SSOs, which are private organizations. *Id.* Thus, for this additional reason,
8 FTC has adequately alleged that Qualcomm has a duty to license its SEPs to its modem chips
9 competitors, and that Qualcomm’s refusal to license its SEPs to its modem chips competitors is
10 anticompetitive.

11 **c. Summary**

12 In sum, applying the three *MetroNet* facts and considering the Supreme Court’s decisions
13 in *Aspen Skiing* and *Trinko*, the Court finds that FTC has adequately alleged that, under the
14 circumstances presented here, Qualcomm violated a duty to deal in refusing to license its FRAND-
15 encumbered SEPs to its modem chips competitors. Thus, FTC has adequately alleged that
16 Qualcomm’s refusal to license its SEPs to its modem chips competitors is independent
17 anticompetitive conduct that violates § 2 of the Sherman Act, and thus violates § 5 of the FTCA.
18 The Court considers whether Qualcomm’s exclusive dealing arrangements with Apple constitute
19 independent anticompetitive conduct in violation of the antitrust laws.

20 **D. Qualcomm’s Exclusive Dealing Arrangements with Apple**

21 Finally, FTC alleges that Qualcomm’s exclusive dealing arrangements with Apple
22 foreclosed competition in the market for premium LTE chips.⁷ “Exclusive dealing is a theory
23 under both § 1 and § 2 of the Sherman Act.” *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1029–
24 30 (N.D. Cal. Feb. 20, 2015). An exclusive dealing arrangement “is an ‘agreement between a
25 vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor.’”

26 _____
27 ⁷ The Complaint does not allege, and FTC does not argue, that these deals have foreclosed
28 competition in the market for CDMA chips. See Compl. ¶ 130.

1 and forecloses competition.” *Aerotec Int’l v. Honeywell Int’l, Inc.*, 836 F.3d 1171, 1180 (9th Cir.
2 2016) (quoting *Allied Orthopedic Appliances Inc.*, 592 F.3d at 996 & n.1). “In certain limited
3 situations, discounts and rebates conditioned on a promise of exclusivity or on purchase of a
4 specified quantity or market share of the seller’s goods or services may be understood as ‘de facto’
5 exclusive dealing contracts because they coerce buyers into purchasing a substantial amount of
6 their needs from the seller.” *Id.* at 1182; see also *Pro Search Plus, LLC v. VFM Leonardo, Inc.*,
7 2013 WL 6229141, at *5 (C.D. Cal. Dec. 2, 2013) (“[D]e facto exclusive dealing claims are
8 cognizable under the antitrust laws.” (quoting *ZF Meritor*, 695 F.3d at 270)).

9 “[W]hether bringing claims under § 1 or § 2, a plaintiff [] must plead facts that support a
10 plausible inference that the exclusive dealing arrangement forecloses a substantial share of the
11 relevant market.” *Eastman v. Quest Diagnostics Inc.*, 2015 WL 7566805, at *11 (N.D. Cal. Nov.
12 25, 2015). However, some courts have recognized that the “definition of ‘substantial share’
13 varies” under § 1 and § 2. *Id.* Exclusive dealing “violates §1 only if its effect is to ‘foreclose
14 competition in a substantial share of the line of commerce effected,’” which has typically “been
15 quantified as foreclosure of 40% to 50% of the relevant market.” *Feitelson*, 80 F. Supp. 3d at
16 1030. By contrast, “a monopolist’s use of exclusive contracts, in certain circumstances, may give
17 rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share
18 usually required in order to establish a § 1 violation.” *Microsoft*, 253 F.3d at 70.

19 Qualcomm asserts that FTC has failed to allege that its exclusive dealing arrangements
20 with Apple violate the Sherman Act because FTC has failed to allege that Qualcomm’s exclusive
21 dealing arrangements with Apple have foreclosed a substantial share of the market for premium
22 LTE modem chips, either under § 2 or § 1. *Mot.* at 18–21. Specifically, Qualcomm argues that
23 (1) FTC fails to allege a specific percentage of the market that was foreclosed; (2) FTC fails to
24 “identify any competitor that was purportedly excluded from the alleged market”; (3) FTC
25 “acknowledges that Intel began supplying premium LTE modem chips to Apple” while the
26 agreements were in effect, which refutes FTC’s allegations that sales to Apple were foreclosed.
27 See *id.* However, for the reasons discussed below, the Court agrees with FTC that the Complaint

1 alleges sufficient facts to withstand a motion to dismiss.

2 First, Qualcomm argues that FTC has failed to allege substantial foreclosure because FTC
3 has failed to allege a specific percentage of the market that is foreclosed, and because FTC fails to
4 allege what percentage of the OEM market Apple occupied. Mot. at 19. However, courts have
5 recognized that, at the motion to dismiss stage, a plaintiff is not necessarily required to allege a
6 specific percentage of foreclosure. See *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637
7 F.3d 435, 452 n. 12 (4th Cir. 2011) (“While Kolon did not allege a specific percentage of market
8 foreclosure in its Counterclaim, it would be problematic to reject its Counterclaim, with its
9 extensive factual allegations, solely on the basis at the pre-discovery, motion-to-dismiss stage.”).
10 Here, although FTC has not alleged a specific percentage of the market, FTC has alleged sufficient
11 facts that plausibly suggest that Qualcomm’s exclusive dealing arrangements with Apple
12 “significantly limited” “the opportunities for other [chip manufacturers] to enter into or remain in
13 [the] market” for premium LTE chips, as required to state an exclusive dealing claim. *Microsoft*,
14 253 F.3d at 69 (internal quotation marks omitted). Specifically, FTC alleges that Apple
15 manufactures and sells “large volumes” of premium-tier handsets, including the iPhone, and that
16 Apple is a “particularly important” OEM for modem chips suppliers. See Compl. ¶ 129. FTC
17 further explains that Apple also provides modem chips manufacturers with significant learning
18 opportunities and reputational benefits. See *id.* (describing the reputational “halo effect” of
19 working with Apple).

20 Moreover, FTC alleges that “Qualcomm recognized that any competitor that won business
21 at Apple would become stronger and better positioned to win future designs at Apple and other
22 OEMs,” and that Qualcomm intended its agreements with Apple to prevent its competitors from
23 working with Apple and achieving these benefits. *Id.* ¶ 127. Indeed, the Complaint states that
24 Qualcomm’s exclusive dealing arrangements with Apple did, in fact, “significantly impede[] the
25 development of other [modem chip] suppliers into effective competitors to Qualcomm,” and that
26 Qualcomm’s agreements with Apple “foreclosed a substantial share of the market for premium
27 LTE” modem chips. *Id.* ¶ 130. These allegations are sufficient, at the motion to dismiss stage, to

1 allege substantial foreclosure in the market for premium LTE modem chips and thus are sufficient
2 to state a claim under either § 1 or § 2 of the Sherman Act. See *Blue Sky Color of Imagination,*
3 *LLC v. MeadWestvaco Corp.*, 2010 WL 4366849, at *4 (C.D. Cal. Sept. 23, 2010) (finding
4 allegations sufficient where the complaint alleged that “Mead entered into an exclusive dealing
5 contract with the intent and effect of excluding all rivals from certain office superstores”); see also
6 *ProSearch Plus, LLC*, 2013 WL 6229141, at *7 (finding it “premature,” on a motion to dismiss,
7 “to determine whether the agreements do in fact leave open alternative channels of distribution”
8 such that they foreclosed a substantial share of the market).

9 Second, Qualcomm argues that FTC has failed to state a claim because FTC “does not
10 identify any competitor that was purportedly excluded from the alleged market.” Mot. at 20.
11 However, the Complaint alleges that “Apple had at all relevant times an interest in developing and
12 working with additional suppliers of [chips],” but that Qualcomm’s agreements “prevented Apple
13 from using alternative [chips] suppliers during the effective exclusivity period under these
14 agreements.” Id. ¶ 125. These allegations are sufficient to plausibly allege that competitors were
15 excluded from the alleged market by Qualcomm’s agreements with Apple. Although FTC has not
16 identified by name any specific competitor that was excluded by Qualcomm’s agreements with
17 Apple, the case law does not suggest that this degree of specificity is required at the motion to
18 dismiss stage. Indeed, courts have denied motions to dismiss exclusive dealing claims even where
19 the complaint did not allege all of the parties to the exclusive deal, so long as the complaint
20 “explain[ed] how [the defendant’s] alleged scheme operate[d]” and provided facts beyond “mere
21 legal conclusions.” See, e.g., *Tele Atlas N.V. v. Navteq Corp.*, 397 F. Supp. 2d 1184, 1190 (N.D.
22 Cal. Nov. 2, 2005) (collecting cases). FTC’s complaint provides sufficient factual allegations,
23 beyond “mere legal conclusions,” to plausibly allege that Qualcomm’s dealing arrangements with
24 Apple excluded competitors. Id.; see Compl. ¶¶ 124–30.

25 Third, Qualcomm argues that the Complaint alleges that Intel did begin to supply Apple
26 with chips, and that this negates the Complaint’s allegations that Qualcomm’s agreements with
27 Apple foreclosed all competitor sales to Apple. Mot. at 20. However, the Complaint alleges that

1 Qualcomm’s agreements with Apple resulted in de facto exclusion “from October 2011 until
2 September 2016.” Compl. ¶ 126. The Complaint alleges only that Intel “began to supply a
3 portion of Apple’s baseband processor requirements for the iPhone 7,”⁸ see Compl. ¶ 45, which
4 Qualcomm acknowledges occurred in October 2016. See Mot. at 20–21. Thus, for purposes of
5 the instant motion to dismiss, Intel’s supply of chips to Apple does not negate FTC’s allegations
6 that Qualcomm’s arrangements with Apple foreclosed competition from October 2011 until
7 September 2016.

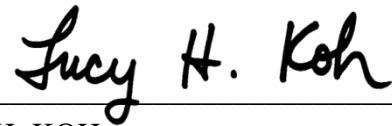
8 In sum, FTC has adequately alleged that Qualcomm entered into de facto exclusive dealing
9 arrangements with Apple from October 2011 until September 2016, and that these de facto
10 exclusive dealing arrangements foreclosed a substantial share of the market for premium LTE
11 modem chips. Accordingly, FTC has adequately alleged that Qualcomm’s exclusive dealing
12 arrangements with Apple violated the Sherman Act, and thus violated § 5 of the FTCA.

13 **IV. CONCLUSION**

14 For the foregoing reasons, Qualcomm’s motion to dismiss is DENIED.

15 **IT IS SO ORDERED.**

16
17 Dated: June 26, 2017



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19 _____
LUCY H. KOH
United States District Judge

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24 _____
25 ⁸ As Intel explains in its amicus brief, Qualcomm ignores “why Intel finally was able to supply
26 Apple after all of these years.” ECF No. 92-1 (“Intel Br.”), at 21. According to Intel, the most
27 plausible explanation is that Qualcomm was deterred from its exclusive dealing practices because
28 Qualcomm has faced or is facing investigations, and in some instances fines, from the Korea Fair
Trade Commission, Japan Fair Trade Commission, China’s National Development and Reform
Commission, and the European Commission, in addition to the Taiwan Fair Trade Commission.
See Intel Br. at 5, 21.