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18

19   **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

20   **SAN DIEGO COUNTY, NORTH COUNTY DIVISION**

21

22 QUALCOMM INCORPORATED,   **CASE NO.**   37-2017-00041389-CU-BC-NC

23   Plaintiff,   **COMPLAINT FOR BREACH OF CONTRACT**

24   v.   **[DEMAND FOR A JURY TRIAL]**

25 APPLE INC. and DOES 1 through 25,
   inclusive,

26
                  Defendants.

27

28

NAI-1503164488v1

Plaintiff Qualcomm Incorporated ("Qualcomm"), by its undersigned attorneys, alleges, with knowledge with respect to its own acts and on information and belief as to other matters, as follows:

NATURE OF THE ACTION

1.   This action arises from Apple Inc.'s ("Apple") breach of a Master Software Agreement For Limited Use entered into between Apple and Qualcomm on September 20, 2010, as amended ("MSA" or "Agreement").

2.   Qualcomm is one of the world's leading technology companies and a pioneer in the mobile phone industry. Its inventions form the very core of mobile communications and enable modern consumer experiences on mobile devices and cellular networks.

3.   Since its founding in 1985, Qualcomm has been designing, developing, and improving mobile communication devices, systems, networks, and products. It has invented technologies that transform how the world communicates. Qualcomm developed fundamental technologies at the heart of 2G, 3G, and 4G cellular communications, is leading the industry to 5G cellular communications, and has developed numerous innovative features used in virtually every modern cell phone.

4.   Apple is the world's most profitable seller of mobile devices, and has enormous commercial leverage over its suppliers, including Qualcomm. Apple manufactures and markets phones, including phones that utilize Qualcomm's baseband modem chips, which process received voice and data information and prepare the same for transmission.

5.   During negotiations with Qualcomm, Apple exercised its commercial leverage and demanded unprecedented access to Qualcomm's very valuable and highly confidential software, including source code. Pursuant to the MSA, Qualcomm has provided Apple with a limited license that grants restricted access to large portions of that Qualcomm software and source code because Apple said that it needed this access to customize the code for Apple's own devices. Upon information and belief, Apple has failed to comply with the restrictions on access and use that Qualcomm required in exchange for Apple's unprecedented access to software and source code.

COMPLAINT FOR BREACH OF CONTRACT

6.   Apple agreed, as a condition of Qualcomm providing the above-described software to Apple under the MSA, to take a number of steps to maintain the confidentiality and security of Qualcomm's software. The MSA provides Qualcomm broad audit and inspection rights in order to provide Qualcomm the ability, among other things, to confirm that Apple has at all times complied with its obligation to handle such software per the terms of the MSA including the obligation that such software "shall only be stored, viewed, and used by Authorized Engineers on Restricted Computers in Authorized Locations[.]" For example, only Apple engineers who have a need to access certain source code and have signed a written agreement to abide by the terms of the MSA can have access to such source code. Similarly, the MSA obligates Apple to maintain information as to which Apple engineers are accessing such software and what actions the engineers take with that access. Furthermore, Apple's engineers with access to certain of Qualcomm's software may only do so through specific designated computers that restrict access to such software only to those authorized engineers. And those computers storing such Qualcomm software may only be housed in specific designated locations.

7.   The MSA also contains restrictions on Apple engineers working on certain non-Qualcomm baseband modem chipsets and related software solutions during (and after) the time period those Apple engineers have access to certain Qualcomm software. One of the primary purposes of the confidentiality and use restrictions of the MSA (and the concomitant compliance audit rights) is to prevent Apple (and any Qualcomm competitor working with Apple) from unlawfully and inappropriately using Qualcomm's software.

8.   Several years after the MSA was first executed by Apple and Qualcomm, Apple began to work with Intel to design and develop a baseband modem chipset solution for Apple's iPhone. Beginning in 2017, Apple began selling iPhones using a competitive baseband modem and associated software designed by Apple and/or Intel in competition with Qualcomm's baseband modem and software.

9.   The restrictions in the MSA are designed to maintain the confidentiality of Qualcomm's source code and related proprietary information. Upon information and belief, Apple has violated the confidentiality and restricted use provisions of the MSA. For example, in July

2017, Apple requested that Qualcomm provide details about how Qualcomm's implementation of a particular interprocessor communication was designed to meet a certain wireless carrier's requirements. Qualcomm's proprietary implementation of this communication protocol is not dictated by any standard and it contains Qualcomm's highly confidential trade secrets. Apple, however, included in the "CC'd Persons" distribution list for this request an engineer from Intel (a competitive vendor) and an Apple engineer working with that competitive vendor. In a separate incident, Qualcomm received correspondence indicating that rather than preventing information regarding Qualcomm's proprietary implementations from being shared with Apple engineers working with competitive vendors, Apple appears to have merely redacted the code name that Apple uses for Qualcomm on that correspondence. As another example, an Apple engineer working on a competitive vendor's product asked an Apple engineer working on Qualcomm's product to request assistance from Qualcomm relating to a downlink decoding summary for carrier aggregation.

10. The MSA provides Qualcomm the right to, at least once per year and in Qualcomm's sole discretion, audit Apple to ensure Apple's compliance with its obligations under the MSA. On February 28, 2017, Qualcomm requested an audit under the MSA. To date, despite Qualcomm's repeated requests, Apple has refused to permit Qualcomm to audit Apple's compliance with the provisions of the MSA. Qualcomm seeks specific performance of Apple's obligations under the MSA to provide sufficient information to Qualcomm to confirm that Apple has at all times complied with its obligations related to Qualcomm's software. Qualcomm also seeks compensation for Apple's breach of the MSA and its failure to adhere to the use restrictions placed on the Qualcomm code by the MSA.

PARTIES

11. Qualcomm is a Delaware corporation with its principal place of business at 5775 Morehouse Drive, San Diego, California. Since 1989, when Qualcomm publicly introduced Code Division Multiple Access ("CDMA") as a commercially successful digital cellular communications standard, Qualcomm has been recognized as an industry leader and innovator in the field of mobile devices and cellular communications. Qualcomm is a world leader in the sale of chips, chipsets,

1 and associated software for mobile phones and other wireless devices. It also derives revenues and

2 profits from licensing its intellectual property.

3   12.   Apple is a corporation organized and existing under the laws of the State of

4 California, with its principal place of business at 1 Infinite Loop, Cupertino, California. Apple

5 maintains a retail store within the venue for the North County Division of San Diego Superior Court

6 at 1923 Calle Barcelona, Carlsbad, California 92009. Apple designs, manufactures, and sells

7 throughout the world a wide range of products, including mobile devices that incorporate

8 Qualcomm's software.

9   13.   The true names and capacities of Defendant Does 1 through 25, whether individual,

10 corporate, associate, or otherwise, are unknown to Qualcomm. Therefore, Qualcomm sues the Doe

11 Defendants under fictitious names pursuant to California Code of Civil Procedure section 474.

12 When Qualcomm learns their true names and capacities, it will seek permission from this Court to

13 amend this Complaint to insert the true name and capacity of each fictitiously named Defendant.

14 Qualcomm alleges that each fictitiously named Defendant is legally responsible in some manner

15 for the occurrences alleged in this Complaint, and that each Defendant directly and proximately

16 caused Qualcomm's damages.

17   **JURISDICTION AND VENUE**

18   14.   This Court has jurisdiction over the subject matter of this action pursuant to Cal.

19 Civ. Proc. Code § 410.10.

20   15.   This Court has personal jurisdiction over Apple because it is organized and exists

21 under the laws of California.

22   16.   Venue is proper in San Diego County pursuant to Cal. Civ. Proc. Code § 395 because

23 the MSA was entered into and negotiated, in part, in this County. Moreover, the MSA in a section

24 titled "JURISDICTION AND VENUE" provides that claims for breach of the MSA "shall be

25 adjudicated only by a court of competent jurisdiction in either the county of San Diego or the county

26 of Santa Clara, State of California, and each Party hereby consents to the personal jurisdiction of

27 such courts for that purpose." MSA, § 11.

28

STATEMENT OF FACTS

The MSA

17.   The MSA was executed by the parties on September 20, 2010 and remains in effect today. The MSA governs Apple's use of Qualcomm's software (including software in source code form) pursuant to a limited software license granted to Apple by Qualcomm.

18.   The Qualcomm software licensed pursuant to the terms and conditions of the MSA may be used by Apple in connection with the development of Apple Products containing Qualcomm chipsets and may be provided by Apple in binary form only to third parties who are "Authorized Purchasers" of Qualcomm chipsets who in turn have their own valid software agreements with Qualcomm for use and distribution of Qualcomm's code. Such Authorized Purchasers may ultimately incorporate the Qualcomm code provided to it by Apple into Apple Products (those that include Qualcomm chipsets) manufactured by the Authorized Purchaser for Apple and subsequently sold to Apple.

19.   The MSA refers to one category of software licensed under the MSA as "Restricted Software." "Restricted Software" refers to software delivered to Apple in source code format and identified in a "Software Addendum" as Restricted Software. MSA, § 1. Qualcomm and Apple entered into Software Addenda for each model of Qualcomm ASIC for which Qualcomm provides software to Apple. *Id*.

20.   The MSA requires that Apple take several measures to maintain the security and confidentiality of certain Qualcomm software. For instance, MSA § 3.1(iv) requires that Apple use the same security infrastructure to protect compiled copies of Qualcomm's software that Apple uses for its own iOS software when it distributes software to its customers. As another example, MSA § 3.3(a) requires that certain software be stored, viewed, and used only on "Restricted Computers" in "Authorized Locations," as those terms are defined in MSA § 3.3. MSA § 3.3(d) requires that Apple "maintain a list of the names of the Authorized Engineers who have accessed [certain] Software, the purpose for such access and any actions taken as a result of such access." MSA § 3.5.1 sets forth the requirements for storing and accessing the software, while MSA § 3.5.2 requires that Apple maintain and review certain information, such as password logs showing access

to the software. Upon information and belief, Apple has failed to comply with the use and access restrictions set forth in the MSA, including but not limited to SECTION 3 (referenced above) and Section 10 (*RESTRICTIONS ON DISCLOSURE AND USE*).

21. MSA § 3.5.4 provides a mechanism for Qualcomm to audit Apple's compliance with these and other provisions. Specifically, it provides that "QUALCOMM shall have the right to inspect LICENSEE's and LICENSEE's Affiliates' facilities, network connectivity and practices, upon reasonable advanced notice and not more than one time per year. . . to verify LICENSEE's compliance with these obligations [e.g., those of MSA § 3.5] and the obligations set forth in Section 3.1 (iv) and Section 3.3 (Additional Limitations on Restricted Software) above." Qualcomm's contractual discretionary right to audit Apple at least once per year does not require any reason or justification.

Apple's Breach Of The MSA

22. On February 28, 2017 Qualcomm requested an audit pursuant to the MSA, stating that it would commence the audit beginning on March 20, 2017. Apple responded, claiming that three weeks' notice was not "reasonable," and refusing to let the audit proceed on that date. Apple also admitted that it had not maintained the list of Authorized Engineers who had accessed the software, the purpose for such access and any actions taken as a result of such access, which Apple was required to maintain under MSA § 3.3(d).

23. In subsequent correspondence, Apple provided some information requested by Qualcomm, such as what Apple claimed to be a list of Authorized Engineers pursuant to MSA § 3.3(d) and certain transactional records from Apple repositories hosting certain Qualcomm software. The information provided by Apple was incomplete and insufficient for Qualcomm to audit Apple's compliance or lack thereof with its obligations under the MSA, including but not limited to the requirement that certain software "shall only be stored, viewed, and used by Authorized Engineers on Restricted Computers in Authorized Locations[.]" MSA 3.3(a). Apple has failed to provide additional information in response to Qualcomm's follow-up requests for information that would allow Qualcomm to meaningfully exercise its audit rights.

24.   In other respects, Apple flatly refused to permit Qualcomm to proceed with the audit. For example, Qualcomm requested to inspect "Restricted Computers, Approved Machines, and Authorized Locations." Apple refused to permit this inspection, stating that doing so would be "unworkable." Similarly, Qualcomm sought to audit Apple's compliance with the MSA with respect to "additional debug messages and log packets" added by Apple pursuant to MSA § 3.3(b), but Apple has refused to permit that inspection.

25.   Subsequent to Apple's refusal to permit audit and inspection under the MSA, Qualcomm became aware of a posting regarding Intel Corp. layoffs that appears to have been posted by a former modem design engineer, and which contains several statements of concern that on August 14, 2017 Qualcomm specifically requested Apple investigate. The post references a CNBC article reporting on the ITC action filed by Qualcomm against Apple and goes on to say: "We were told to ignore intellectual property rights when designing the modem. There was even a conspiracy to copy Qualcomm's technology by hints from Apple about the 'reference device'." This statement appears to be made by an Intel engineer working on the Apple (Intel branded) modem.

26.   Qualcomm requested in writing that Apple investigate whether and to what extent any engineers working on the Intel branded modem for use in the Apple iPhone were provided Qualcomm intellectual property and/or confidential information in any form. Qualcomm also requested that Apple investigate whether and to what extent Qualcomm's modem hardware or software was ever referred to by Apple as the "reference device", or other similar descriptions in the context of modem design.

27.   On August 24, 2017, Apple responded to Qualcomm's request by refusing to conduct any investigation. Apple specifically responded as follows: "Apple does not plan to conduct an investigation []."

FIRST CAUSE OF ACTION

(BREACH OF CONTRACT)

28.   Qualcomm repeats and re-alleges the allegations of all of the above paragraphs as if fully set forth herein.

29. The MSA is a written, valid, enforceable, and binding agreement, supported by adequate consideration, for the grant of a limited software license from Qualcomm to Apple. The MSA was in effect at all relevant times, from September 20, 2010 through the present.

30. Qualcomm has performed all of its obligations under the MSA.

31. By its actions set forth herein, Apple breached its duties under the MSA. Those breaches include, without limitation, Apple's refusal to permit Qualcomm to exercise its audit rights under MSA § 3.5.4 and Apple's violation of the restrictions on disclosure and use under Sections 3 and 10 of the MSA.

32. As the direct and proximate result of Apple's conduct, Qualcomm has suffered significant damages in an amount to be proven at trial. Qualcomm is entitled to recover damages flowing from Apple's breach of the MSA, and any other remedy available under law.

33. Qualcomm is also entitled to specific performance under the MSA, permitting Qualcomm to proceed with the audit to which it is entitled pursuant to MSA § 3.5.4.

34. The language of the MSA is sufficiently definite for this Court to enforce. Moreover, the specific performance requested by Qualcomm mirrors Apple's existing obligations under the MSA.

35. Absent specific performance, Qualcomm will suffer substantial, irreparable, and incalculable injury for which monetary damages will not provide adequate compensation. Without enforcement of its audit rights, Qualcomm will be unable to monitor whether the confidentiality and security of its software has been maintained by Apple in compliance with the MSA. Qualcomm's audit rights under the MSA constitute a critical safeguard without which Qualcomm would not have shared its highly confidential source code with Apple.

36. Indeed, in the MSA, Apple acknowledged that "any breach or threatened breach of this Agreement relating to any Source Code provided hereunder would cause QUALCOMM . . . irreparable harm for which money damages alone will not be an appropriate or sufficient remedy." MSA § 3.4. Apple agreed that Qualcomm would be entitled to injunctive or equitable relief to remedy any such breach, in addition to all other remedies. *Id.*

37. The MSA provides that the prevailing party in a proceeding to enforce the provisions of the MSA shall be entitled to recover reasonable attorneys' fees. Qualcomm is therefore entitled to recover its reasonable attorneys' fees incurred in connection with this lawsuit. MSA § 11.

PRAYER FOR RELIEF

WHEREFORE, Qualcomm respectfully requests that the Court enter judgment as follows:

(a) Declaring that Apple has breached the MSA;

(b) Awarding damages in an amount to be proven at trial;

(c) Ordering an award of reasonable attorneys' fees to Qualcomm;

(d) Awarding expenses, costs, and disbursements in this action, including prejudgment interest;

(e) Ordering specific performance;

(f) Injunctive or equitable relief; and

(g) Awarding such other and further relief as the Court deems just and proper.

Dated: October 31, 2017

By: *Randall E Kay*
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