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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

11  
12 FEDERAL TRADE COMMISSION,  
Plaintiff

13  
14 v.

15  
16 QUALCOMM INCORPORATED, a Delaware  
Corporation,  
17 Defendant.

Case No. 5:17-cv-00220-LHK

**FEDERAL TRADE COMMISSION'S  
OBJECTIONS TO MATERIALS FILED  
WITH QUALCOMM'S REPLY IN  
SUPPORT OF ITS MOTION FOR STAY  
PENDING APPEAL**

Courtroom: 8, 4th Floor  
Judge: Hon. Lucy H. Koh

1 Pursuant to Local Rule 7-3(d), the FTC objects to materials that Qualcomm filed with its  
2 reply in support of its motion for a stay pending appeal and new arguments raised for the first  
3 time on reply. Specifically, the FTC objects to Exhibits C, D, E, and F to the Declaration of M.  
4 Brent Byars in Support of Qualcomm’s Reply. (ECF Nos. 1506-5, 1506-6, 1506-7, and 1506-8.)  
5 The Court should disregard Exhibits C, D, and E because they are offered in support of an  
6 argument raised for the first time in Qualcomm’s reply. *See* Reply, ECF No. 1506, at 8 (“The  
7 irreparable harm is exacerbated by the prospect of inconsistencies between the Order and foreign  
8 regulators.”). Qualcomm did not make this argument in its opening motion, and the argument  
9 does not respond to any point advanced by the FTC or any amici. The Court should not consider  
10 it. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.2007) (“The district court need not consider  
11 arguments raised for the first time in a reply brief.”); *Oak Point Partners, Inc. v. Lessing*, No. 11-  
12 CV-03328-LHK, 2012 WL 4121109, at \*4 (N.D. Cal. Sept. 18, 2012) (Koh, J.) (same).  
13 Moreover, these documents were not introduced at trial and are not part of the record in this case.

14 In addition, the Court should disregard and strike Exhibit F to the Byars Declaration as  
15 unfair and prejudicial. *See Tech. & Intellectual Prop. Strategies Grp. PC v. Insperity, Inc.*, No.  
16 12-cv-3163 LHK, 2012 WL 6001098, at \*14 n.6 (N.D. Cal. Nov. 29, 2012) (striking attachments  
17 to reply brief). Exhibit F is Qualcomm’s opening statement slide presentation in *In re Qualcomm*  
18 *Litigation*, No. 3:17-cv-0108-GPC-MDD (S.D. Cal.). Qualcomm’s reply brief cites to a single  
19 slide that Qualcomm asserts is an excerpt from an internal Apple document. (Reply, ECF No.  
20 1506, at 7 n.4.)<sup>1</sup> Qualcomm did not introduce any such document at trial in this case. Had  
21 Qualcomm sought to introduce a document with the content excerpted in the slide, the document  
22 would have been the subject of high priority objection procedures mandated by the Court and  
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24 <sup>1</sup> The excerpts cited in footnote 4 also do not respond to any new argument raised by the FTC or  
25 amici. Indeed, the footnote quoting purported excerpts of an undated and unadmitted document  
26 does not even support the argument in the text of Qualcomm’s reply brief. Moreover, the  
27 footnote improperly asserts that the cited document is an “internal Apple document listing  
28 strategies”—without any support for the proposition that the document lists Apple strategies and  
without authentication of the document.

1 testimony by an Apple witness. Had the document survived a high priority objection, an Apple  
2 witness may have testified to, among other things, the document’s context and purpose and the  
3 meaning of the cited language. Any such testimony would then have been part of the record on  
4 appeal in this case. Qualcomm’s attempt to introduce excerpts from a document that it obtained  
5 in pre-trial discovery via a post-trial stay reply circumvents procedures intended to test the  
6 relevance and reliability of proffered evidence, and thus is unfair and prejudicial to the FTC.

7 Beyond this single slide, submission of Qualcomm’s Southern District slide presentation  
8 as a whole is improper, unfair, and prejudicial. The slides contain excerpts from and counsel’s  
9 summaries of other materials that Qualcomm had prior to trial and yet chose not to offer as  
10 evidence in this case. The slides were not subject to the meet and confer and high-priority  
11 objection procedures mandated by this Court before opening (and closing) slides were presented  
12 in this case. As a non-party in the Southern District case, the FTC had no opportunity to confer  
13 about, object to, or respond to the slides that Qualcomm now tries to insert into the record in this  
14 case.

15 The FTC respectfully requests that the Court (i) disregard Exhibits C, D, E, and F to the  
16 Byars Declaration and Qualcomm’s argument that the Court’s order is inconsistent with foreign  
17 regulators’ requirements; and (ii) strike Exhibit F to the Byars Declaration.

18 Respectfully submitted,

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20 Dated: June 20, 2019

/s/ Jennifer Milici  
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