IN THE SUPREME COURT OF THE STATE OF DELAWARE

MELBOURNE MUNICIPAL FIREFIGHTERS' PENSION TRUST FUND, derivatively on behalf of QUALCOMM, INCORPORATED, Appellant, Plaintiff-Below, v. PAUL E. JACOBS, STEVEN M. MOLLENKOPF, BARBARA T. ALEXANDER, DONALD G. CRUICKSHANK, RAYMOND V. DITTAMORE, SUSAN HOCKFIELD, THOMAS W. HORTON, SHERRY LANSING, HARISH MANWANI, DUANE A. NELLES, CLARK T. RANDT, JR., FRANCISCO ROS, JONATHAN J. RUBINSTEIN, GENERAL BRENT SCOWCROFT, and MARC I. STERN, Appellee, Defendants-Below, -and- QUALCOMM, INC., Appellee, Nominal Defendant-Below.	PUBLIC VERSION FILED ON: January 23, 2017 No. 444, 2016 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 10872-VCMR

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

To pursue a *Caremark* claim derivatively, a stockholder plaintiff must plead particularized facts that lead to a reasonable inference that (i) the board of directors "had knowledge of certain 'red flags' indicating corporate misconduct"; (ii) the board of directors "acted in bad faith by consciously disregarding its duty to address that misconduct," such as by "simply fail[ing] to investigate"; and (iii) there exists a "subsequent complained-of corporate trauma" that is "sufficiently similar to the misconduct implied by the 'red flags' such that the board's bad faith, conscious inaction proximately caused that trauma." (Op. at 20-21 (internal quotations omitted), *cited in* Ans. Br. at 20.) The decision below was confined to the second element, but Defendants raise all three elements in their answering brief.

Defendants' lead argument, not adopted below, is that the $891 million Broadcom Settlement, the $208 million KFTC Decision, and the JFTC Order were not red flags for the Board that Qualcomm's global patent licensing practices violated antitrust law. Defendants ask this Court to adopt a rule of Delaware corporate law that fiduciaries may ignore findings of systemic illegality and massive charges if those findings and charges arise from a "settlement and pending regulatory proceedings." (Ans. Br. at 2.) No case cited by Defendants stands for that proposition, and allowing fiduciaries to ignore findings of illegality would undermine the premise of *Caremark* that fiduciaries must gather such information.

The three red flags in 2009 were themselves severe corporate traumas that should have shaken Qualcomm's fiduciaries to the core about the legality of Qualcomm's business model. Yet, Plaintiff's Section 220 inspection revealed that Qualcomm's Board undertook no such investigation. Instead, the directors merely signed 10-Ks stating that Qualcomm deemed the governmental findings meritless, and approved a public relations action plan. There is no support for the Vice Chancellor's ruling on a motion to dismiss that the only inference is that the Board "concluded that Qualcomm's business practices were legal[.]" (Op. at 35.) A reasonable inference that can be drawn from the Board's lack of investigation is that the Defendants were determined to preserve Qualcomm's business model without regard for its legality. Put differently, it can reasonably be inferred that the Defendants consciously disregarded red flags of systemic illegality, as in *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011) ("*Massey*"), and *Louisiana Municipal Police Employees' Retirement System v. Pyott*, 46 A.3d 313 (Del. Ch. 2012) ("*Pyott*"), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

Defendants improperly challenge the element of proximate causation in a footnote. (Ans. Br. at 24 n.9, 43.)[1] Defendants' argument withstands no scrutiny because a straight line connects Broadcom's antitrust claims, the findings of violations of anti-monopoly laws in South Korea and Japan, Qualcomm's maintenance of its licensing practices, and the subsequent $975 million fine for violations of China's anti-monopoly law.

Additionally, we note that Defendants incorrectly contend that Plaintiff's appeal is limited to seeking reversal of the dismissal of Count I, which asserts a *Caremark* claim against fifteen present or former Qualcomm directors. (Compl. ¶¶ 14-29, 247-52.) Plaintiff also seeks reversal of the dismissal of Count II, which asserts a *Caremark* claim against three present or former Qualcomm senior officers (*id.* ¶¶ 33-34, 253-57). (Ans. Br. at 13 n.5, 15.) The Vice Chancellor made no holding and cited no law differentiating between the two Counts. (Op. at 35-36.) Plaintiff argued in the opening brief that demand was futile, without distinguishing between Counts I and II. (Op. Br. at 25.) Defendants acknowledge in their answering brief that the test for demand futility is whether "the Complaint's

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[1] Del. Supr. Ct. R. 14(d) ("Footnotes shall not be used for argument ordinarily included in the body of a brief[.]"); *see also id.* R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

underlying claims pose a serious threat to a majority of the Board." (Ans. Br. at 18.) A board disabled from asserting *Caremark* claims against directors is also disabled from asserting *Caremark* claims against officers, especially since two of the three officer defendants are also director defendants. (Compl. ¶¶ 33-34.)

Finally, we note that Defendants make no distinct argument under Court of Chancery Rule 12(b)(6) as opposed to Rule 23.1. (*See* Ans. Br. at 42 ("for all the reasons set forth above").)

ARGUMENT

I. THE BROADCOM SETTLEMENT, KFTC DECISION, AND JFTC ORDER WERE RED FLAGS THAT QUALCOMM'S BUSINESS MODEL VIOLATED ANTITRUST LAW

Defendants argue "as a matter of law" that the Broadcom Settlement, KFTC Decision, and JFTC Order are not red flags of corporate misconduct. (Ans. Br. at 20.) Defendants are wrong, as a matter of law.

As to the Broadcom Settlement, the parties agree that the most pertinent legal authority is *White v. Panic*, 783 A.2d 543 (Del. 2001), in which this Court discussed whether the factual allegations about challenged corporate settlements of eight sexual harassment suits against CEO Milan Panic were sufficient to support an inference "that the board knew (or proceeded in face of an unjustifiable risk) that Panic had engaged in misconduct." 783 A.2d at 553. The outcome turned on the sparseness of the factual allegations respecting the underlying litigation:

> In the present case, the plaintiff has not pleaded facts indicating that the challenged settlements were anything other than routine business decisions in the interest of the corporation. For example, ***the complaint provides no basis to infer the board's assessment of the merits of the suits. The complaint does not allege the amounts involved in the settlements*** or the amount of damages claimed in the suits. ***Indeed, the complaint does not even specify the precise conduct alleged in the various suits against ICN and Panic.*** Absent particularized allegations on these points, we find too tenuous any inference based on the board's approval of eight settlements that the

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> board knew that Panic had actually engaged in misconduct. We also note that ***the alleged settlements***, in which neither Panic nor ICN admitted wrongdoing, ***are consistent with a desire to be rid of strike suits*** and to avoid the cost of protracted litigation….
>
> … the particularized allegations in the complaint do not adequately support the plaintiff's theory that the board knew (or proceeded in face of an unjustifiable risk) that Panic had engaged in misconduct but refused to take action to protect ICN from liability for that misconduct….

Id. at 553 (emphasis added).

Here, the complaint and the public record incorporated in it by reference contain abundant particularized allegations about the Broadcom Settlement and the surrounding circumstances that permit an inference that Broadcom's antitrust claims called into serious question the legality of Qualcomm's business model:

- In 2007, the Third Circuit ruled that "Broadcom has stated claims for monopolization and attempted monopolization under § 2 of the Sherman Act" and announced a rule of antitrust liability directly applicable to Qualcomm's business model (*i.e.*, "insistence on non-FRAND licensing terms"). (Op. Br. at 7-9);
- Broadcom had submitted formal complaints to the Competition Directorate of the European Commission and the

KFTC alleging violations of antitrust law, which complaints were withdrawn as part of the Broadcom Settlement. (A307-08; Op. Br. at 9, 14);

- Two months prior to the Broadcom Settlement, the KFTC issued a Case Examiner's Report setting forth its findings with respect to the Company's violation of antitrust law through its integration of multimedia solutions into its chipsets, rebates and discounts provided to its chipset customers, and certain licensing practices. (A58 ¶ 91; A307; Op. Br. at 9);
- Qualcomm agreed to pay Broadcom $891 million as part of the Broadcom Settlement, and subsequently explained in public filings why Broadcom's patent infringement claims against Qualcomm were meritless, while saying nothing about the merits of Broadcom's antitrust claims. (A319; Op. Br. at 14);
- Two months after the Broadcom Settlement, the KFTC announced that Qualcomm was fined the equivalent of $208 million – by far the largest fine in KFTC history – "for

abusing its dominant position by charging discriminatory royalties and offering conditional rebates," and for requiring payment of royalties for invalid and expired patents, and was subjected to a corrective order. (A57 ¶ 90; A331-35);

- Qualcomm recorded a $230 million charge at the time of the announcement of the KFTC Decision, which meant that Qualcomm deemed it probable that its intended future appeal of the KFTC Decision would fail.[2] (A312; Op. Br. at 34); and
- The KFTC Decision was supported by a 188-page opinion that was subsequently affirmed on appeal by the Seoul High Court. (A430; Op. Br. at 11, 18-19).

Unadjudicated litigation claims can be red flags. In *McCall v. Scott*, 239 F.3d 808 (6th Cir. 2001), the Sixth Circuit upheld a *Caremark* claim based on intentional or reckless disregard of red flags, which included "allegations brought

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[2] Defendants dispute this interpretation of the $230 million charge without offering contrary accounting authority. (Ans. Br. at 39-40.) If Qualcomm deemed it probable that it would prevail in its appeal of the KFTC Decision, then it would not have accrued the loss before it paid the fine and, after it paid the fine, it would have disclosed a gain contingency for its anticipated recoupment of the payment. Jonathan Schiff et al., *Accounting for Contingencies: Disclosure of Future Business Risks*, Mgmt. Acctg. Q., Spring 2012, at 2.

against Columbia in a *qui tam* action." *Id.* at 820. The Sixth Circuit reasoned that the district court had "misapprehended the significance of the lawsuit," because even though the *qui tam* action had been dismissed as of the operative date for assessing demand futility, "it clearly presented claims of improper physician inducements and illegal billing practices," and, as a *qui tam* action, it "implicated federal review of the claims and possible federal intervention." *Id.* at 822. *See also In re Intuitive Surgical S'holder Deriv. Litig.*, 146 F. Supp. 3d 1106, 1117 (N.D. Cal. 2015) ("95 products liability lawsuits" constitute a red flag); *In re Pfizer Inc. S'holder Deriv. Litig.*, 722 F. Supp. 2d 453, 460 (S.D.N.Y. 2010) (red flags included "the Neurontin and Genotropin settlements" and "the allegations of the *qui tam* lawsuits").

By parity of reasoning, Broadcom's domestic antitrust action and foreign antitrust complaints were themselves red flags. Those actions resulted in the Third Circuit's articulation of antitrust claims that Broadcom settled for $891 million and findings of violations of law and the imposition of a $208 million fine by the KFTC. Those consequences are certainly red flags.

The cases cited by Defendants from other jurisdictions about settlements articulate no different rule of law. They turn on the facts. *See In re Johnson &*

Johnson Deriv. Litig., 865 F. Supp. 2d 545, 570 (D.N.J. 2011) ("[I]t is not clear whether the settlement itself suggested to the Board that DePuy had engaged in illegal behavior."); *Marvin H. Maurras Revocable Trust v. Bronfman*, 2013 WL 5348357, at *6 (N.D. Ill. Sept. 24, 2013) (settlements of Fair Debt Collection Practices Act lawsuits mean that "Defendants knew about possible prior violations and were on notice of the possibility of present or future violations; that does not make it reasonable to infer that Defendants had actual knowledge of ongoing violations, much less that they encouraged or condoned such violations."). The $891 million Broadcom Settlement, and the near-contemporaneous and related $208 million KFTC Decision, plus the near-contemporaneous JFTC Order, all put the fiduciaries of Qualcomm on notice that Qualcomm's global licensing practices were vulnerable to being found illegal by antitrust authorities in multiple other jurisdictions.

Defendants ask this Court to adopt a rule of law that "[p]ending legal proceedings, including governmental investigations," cannot be red flags because they "do not establish that a company engaged in misconduct." (Ans. Br. at 23.) By Defendants' logic, there can be no antitrust red flag in South Korea unless and until Qualcomm loses its appeal in the Korea Supreme Court. (*Id.*) Defendants ask this Court to allow them to ignore governmental findings of illegality, even though the KFTC Decision was by far the largest fine in the KFTC's history, it was followed by a 188-page opinion containing "the most thorough [market-impact analysis] that any competition enforcement agency has provided in FRAND cases," and the Seoul High Court "affirmed the KFTC's finding of facts almost in their entirety." (Op. Br. at 11, 18 (internal quotations omitted).) The JFTC Order was a finding of illegality coupled with an injunction. (Op. Br. at 11.)

Defendants' proposed rule of law contradicts the logic of *Caremark*, which was animated by Organizational Sentencing Guidelines adopted in 1991 that "offer[ed] powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996). If no legal proceeding short of a final adjudication by a nation's highest court can be deemed a red flag, then corporate officials are incentivized to permit flouting of the law for years on end, and to forestall the date of a final adjudication.

Defendants' proposed rule of law also disregards cases in which regulatory actions have been deemed red flags. *See Rosenbloom v. Pyott*, 765 F.3d 1137, 1153 (9th Cir. 2014) ("repeated FDA warnings"); *Westmoreland County Employee Retirement System v. Parkinson*, 727 F.3d 719, 723 (7th Cir. 2013) ("Throughout 2009, the FDA repeatedly informed Baxter that its 'timeline for complying with the Consent Decree was unsatisfactory.'"); *In re Abbott Labs. Deriv. S'holders Litig.*, 325 F.3d 795, 800 (7th Cir. 2003) ("the FDA district directors sent the fourth and final certified Warning Letter"); *Intuitive Surgical*, 146 F. Supp. 3d at 1118 ("repeated FDA warnings about off-label marketing and failure to comply with reporting regulations"); *Pfizer*, 722 F. Supp. 2d at 460 ("a large number of FDA violation notices and warning letters"); *Pyott*, 46 A.3d at 320 ("the FDA sent a letter to Allergan concerning off-label marketing during a presentation by an Allergan-sponsored speaker"); *Massey*, 2011 WL 2176479, at *20 ("the MSHA has alleged that serious safety violations and an attitude of law-flouting has continued at other Massey facilities"). Directors cannot turn a blind eye to all regulatory enforcement measures prior to the exhaustion of final appeals.

Defendants' cases do not articulate a rule that "pending" proceedings cannot be red flags. They turn on the insufficiency of particularized factual allegations in the absence of fines or findings. *See In re Chemed Corp., S'holder Deriv. Litig.*, 2015 WL 9460118, at *18 (D. Del. Dec. 23, 2015) ("multiple regulatory inquiries”), *report and recommendation adopted sub nom. KBC Asset Mgmt. NV v. McNamara*, 2016 WL 2758256 (D. Del. May 12, 2016); *La. Mun. Police Emps.' Ret. Sys. v. Hesse*, 962 F. Supp. 2d 576, 588 (S.D.N.Y. 2013) (“warnings from the New York Tax Department employees” that are not alleged to have been received by the defendants); *In re Intel Corp. Deriv. Litig.*, 621 F. Supp. 2d 165, 169 (D. Del. 2009) (ongoing antitrust investigations that yielded no fines or findings as of date of filing of complaint); *In re ITT Deriv. Litig.*, 653 F. Supp. 2d 453, 462 (S.D.N.Y. 2009) (initiation of criminal investigation); *Johnson & Johnson*, 865 F. Supp. 2d at 566 (subpoena). None of these cases are factually analogous to the KFTC Decision or the JFTC Order.

II. THE BOARD FAILED TO RESPOND IN GOOD FAITH TO THE RED FLAGS

As discussed in the opening brief (Op. Br. at 25-29), fiduciaries of a Delaware corporation "must act in good faith to ensure that the corporation tries to comply with its legal duties." *Massey*, 2011 WL 2176479, at *21. As further discussed in the opening brief (Op. Br. at 29-36), a reasonable inference to be drawn from the Complaint is that Qualcomm's directors chose to maintain the Company's profitable business model without regard for red flags signalling its illegality. To summarize:

> The Complaint does not plead any Board investigation into Qualcomm's licensing practices, any voluntary modification of those licensing practices, or any legal advice about antitrust law received by the Board. The Complaint pleads that the Section 220 documents did not evidence any efforts or actions taken by the Board to address violations of foreign antitrust law. (A48 ¶72.) A reasonable inference to be drawn from the record is that the Board used litigation appeals, litigation defense, public relations advocacy, and a willingness, when necessary, to spend billions of dollars on paying fines and settlements, as means to preserve Qualcomm's profitable business model for as long as possible, without regard for its legality under antitrust law.

(Op. Br. at 35.)

Much of Defendants' argument about the second element of a *Caremark* claim is derivative of Defendants' lead argument, rebutted in Argument I above, that there are no red flags of illegality. According to Defendants, Plaintiff has failed "to plead particularized facts to support a reasonable inference that Qualcomm violated international competition laws and that the Directors knew Qualcomm was doing so" (Ans. Br. at 28-29), "there is no reasonable basis on which to infer that the Board knew the Company was engaging in misconduct" (*id.* at 30), and "the only reasonable inference" to be drawn from the Complaint is that "the Board believed the Company was complying with competition law," (*id.* at 37).

Defendants cite no case in which a plaintiff sufficiently alleged that red flags were known to the board, but a *Caremark* claim was nonetheless dismissed for failure to plead that the Board responded in bad faith to the red flags. Similarly, Defendants cite no case supporting the Vice Chancellor's suggestion that red flags must rise to a certain "severity" to "implicate an immediate duty to alter a company's culture and business practices." (Op. at 34.)

Defendants attempt to distinguish *Pyott* and *Massey* and cite cases that distinguish them. (Ans. Br. at 31-32.) In each of those cases, plaintiffs failed to adequately allege red flags known to the board. *See Reiter v. Fairbank*, 2016 WL 6081823, at *13 (Del. Ch. Oct. 18, 2016) ("[T]he core factual allegations of the

Complaint do not amount to red flags of illegal conduct.");[3] *South v. Baker*, 62 A.3d 1, 18 (Del. Ch. 2012) ("three mining accidents in a year does not support a reasonable inference of board involvement … particularly where the incidents appear unrelated"); *In re Capital One Deriv. S'holder Litig.*, 979 F. Supp. 2d 682, 701 (E.D. Va. 2013) (plaintiffs failed to plead "*particularized* facts showing that defendant directors *actually* knew of the wrongdoing"); *Kococinski v. Collins*, 935 F. Supp. 909, 922 (D. Minn. 2013) (plaintiff "provided no evidence of what the outside directors actually discussed and considered"); *Gulbrandsen v. Stumpf*, 2013 WL 1942158, at *5 (N.D. Cal. May 9, 2013) (failure to plead "that any director knew or should have known about the alleged scheme"); *Holt v. Golden*, 880 F. Supp. 2d 199, 204 (D. Mass. 2012) ("[T]he complaint alleged, in essence, that the company enjoyed an increase in international sales and then had an employee indicted for FCPA violations.").

Pyott cannot be distinguished on the ground that off-label marketing is "unquestionably illegal." (Ans. Br. at 29.) At the pleading stage, the plaintiffs in *Pyott* were entitled to the "reasonable inference" that Allergan's board knew that

[3] *Reiter* is further distinguishable because "Capital One's management made efforts to cope with tightening regulations and more aggressive [anti-money laundering] enforcement actions[.]" 2016 WL 6081823, at *14.

Allergan personnel were turning a blind-eye to illegal off-label marketing but "nevertheless decided to continue Allergan's existing business practices in pursuit of greater sales." 46 A.3d at 355. As discussed in Argument I above, Defendants' awareness of the findings, penalties, and payments associated with the Broadcom Settlement, KFTC Decision, and JFTC Order permit the reasonable inference that the Board knew that Qualcomm's licensing practices violated applicable antitrust law.

To distinguish *Pyott*, Defendants contend that Qualcomm's Board "was advised that the Company licensing practices were legal." (Ans. Br. at 29 n.11.) This contention is unsupported by any reference to pled legal advice. Defendants refer instead to Board presentations that Defendants describe as advice that the findings and fines against Qualcomm were the product of "competitor-fueled attacks directed at Qualcomm because it is a foreign company." (Ans. Br. at 34.) Qualcomm's pose as a victim of foreign governments is not the equivalent of advice that the Company was complying with foreign (or domestic) antitrust law. The critical Board presentation of June 28, 2010 refers to "aggressive efforts worldwide [including in the United States] to increase regulation of IP or create new rules / laws that devalue IP." (Op. Br. at 16-17.) Those "new rules / laws" logically encompass the Third Circuit's 2007 ruling in the Broadcom litigation that "insistence on non-FRAND licensing terms" can be an antitrust violation. (Op. Br. at 7-9.) The board presentation does not state or assume that Qualcomm is fully compliant with new antitrust rules and laws.

Defendants try to distinguish *Massey* by arguing that Qualcomm never flouted the law or expressed disagreement with or contempt for the law. (Ans. Br. at 30-31, 36-37.) Yet, Qualcomm's approach was to not accept the application of antitrust law to the licensing of intellectual property, to pursue appeals that delay final adjudication for years, to settle strategically, to maintain challenged business practices except when and where enjoined from doing so, to proclaim that adverse foreign rulings were politically motivated and without merit (until 2012, when Qualcomm changed the tone of its public disclosures), to adopt a public relations action plan, and to refer dismissively in early 2012 to new regulations in China adopted "under guise of anti-monopoly law." (Op. Br. at 8-19.)

Defendants argue that it was "the Board's prerogative" to decide how to navigate legal risk. (Ans. Br. at 32.) Invocation of that prerogative has no place on a motion to dismiss in the face of pleaded red flags, such as the Broadcom Settlement, KFTC Decision, and the JFTC Order, and the absence of any pleaded facts of any investigation by Qualcomm's fiduciaries of the legal risks the Company faced. Defendants cannot rely on a case decided at the summary judgment phase, in which the court cited declarations and deposition testimony of the outside directors about how they "diligently followed up on the red flags … but concluded based on substantial evidence that the factual allegations were simply false." *In re Life Partners Holdings, Inc. S'holder Deriv. Litig.*, 2015 WL 8523103, at *16 (W.D. Tex. Nov. 9, 2015). There is no record here that the Board concluded that it was legal to maintain the same licensing practices in China that had led to legal liability, massive fines, and/or a massive settlement payment in the United States, South Korea, and Japan.

Similarly, Qualcomm's Board cannot avail themselves of the business judgment rule. (Ans. Br. at 35-36.) As Defendants note, the business judgment rule has no application to knowing violations of law (*id.* at 36 n.14), and Plaintiff has pled particularized facts that give rise to a reasonable inference that the Board chose to pursue profit by maintaining licensing practices that violate anti-monopoly law. "Particularly at the pleadings stage, a court can draw the inference of wrongful conduct when supported by particularized allegations of fact." *Pyott*, 46 A.3d at 357.

Defendants insist that the "the only reasonable inference that can be drawn from the relevant internal documents and SEC filings is that the Board believed the Company was complying with competition law." (Ans. Br. at 37.) Defendants cite 10-K disclosures in 2006, 2007, and 2008 (before the Broadcom Settlement or the KFTC Decision) as support for the Board's supposed understanding in late 2009 (after all three red flags were all unfurled) that Broadcom's antitrust claims were "without merit." (Ans. Br. at 7, 37-38.) An alternative reasonable inference is that Qualcomm's fiduciaries mechanically signed off on regurgitated and dismissive 10-K disclosures about antitrust risk without investigating or analyzing the Broadcom Settlement, the KFTC Decision, and the JFTC Order. (*See* Op. Br. at 12-13.) The 2009 10-K discusses the Broadcom Settlement without mentioning or commenting upon Broadcom's antitrust claims, and the Vice Chancellor erred in stating that the 2009 10-K "characterized the Broadcom Action as 'without merit.'" (Op. at 7, 28.)

Defendants contend that no factual allegations cast doubt on the good faith of the Board in endorsing 10-K disclosures in 2009, 2010, and 2011 stating that the KFTC and JFTC proceedings were "without merit." (Ans. Br. at 39-40; A308; A419; A423.) The Court can consider the following:

- Plaintiff's Section 220 inspection revealed no evidence of actions undertaken by the Board (other than public relations and lobbying initiatives) to address the findings of the KFTC and JFTC that Qualcomm violated South Korean and Japanese competition law (A48 ¶ 72), and Defendants point to no legal analysis prepared for the Board.
- Qualcomm paid Broadcom $891 million to settle Broadcom's antitrust claims. (A307-08; A318-19; Op. Br. at 13-14);
- The KFTC's $208 million fine was by far the largest fine in KFTC history, was supported by a 188-page opinion, and Qualcomm recorded a $230 million charge the calendar year before Qualcomm paid the fine. (A57 ¶ 90; A331-35; Op. Br. at 10-11, 15.);
- In 2012 and 2013, Qualcomm no longer described the KFTC and JFTC proceedings as without merit. (A427-28; A430-31.)

Qualcomm's public dismissiveness toward findings of illegal business practices, coupled with a lack of internal deliberation, support a reasonable inference that

Qualcomm's fiduciaries knowingly disregarded findings of violations of antitrust law as a cost of doing business.

III. THE NDRC'S IMPOSITION OF A $975 MILLION FINE AND RECTIFICATION PLAN WAS PROXIMATELY CAUSED BY THE BOARD'S FAILURE TO RESPOND IN GOOD FAITH TO THE RED FLAGS IN THE UNITED STATES, SOUTH KOREA, AND JAPAN

Defendants argue in a footnote that the Broadcom Settlement, KFTC Decision, and JFTC Order raise no issue about the Defendants' duty to act in good faith to ensure Qualcomm's compliance with China's anti-monopoly law. (Ans. Br. at 24 n.9.) According to Defendants, there is no proximate cause between the Defendants' conscious inaction in the face of antitrust red flags in the United States, South Korea, and Japan and the corporate trauma suffered by Qualcomm in China.

The only cases cited by Defendants involved highly attenuated allegations that were not deemed to constitute red flags. *See South v. Baker*, 62 A.3d 1, 11, 17 (Del. Ch. 2012) ("The complaint does not allege any connection between the closure of the Silver Shaft [in 2012], the December 2011 rock burst, the November 2011 accident at the #4 Shaft, or the April 2011 incident…. [T]he complaint nowhere alleges anything that the directors were told about the incidents, what the Board's response was, or even that the incidents were connected in any way."); *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *13 (Del. Ch. Jan. 11, 2010) (rejecting argument that "because bribery may have occurred in the past (Dow paid a fine to the SEC in January 2007), by different members of management, in a different country (India), and for a different transaction (pesticide registrations), the board should have suspected similar conduct by different members of management"). These two cases bear no resemblance to Qualcomm's global business practices and global antitrust challenges.

Those global business practices and antitrust challenges are discussed in the opening brief. (Op. Br. at 5-24.) The NDRC found that Qualcomm abused its dominant position in the wireless standard-essential patent ("SEP") licensing market by:

1. unjustified bundling of the licensed patent portfolio, which included charging royalties for expired wireless SEPs and for non-wireless SEPs; and
2. demanding licensees to provide reverse patent licensing free of charge.

(Op. Br. at 21.) Item 1 was central to the KFTC Decision, and item 2 was central to the Broadcom litigation, the KFTC Decision, and the JFTC Order. (Op. Br. at 8-11.) The NDRC also found that Qualcomm unreasonably conditioned the sale of baseband chips on purchasers signing a patent licensing agreement, which was similar to the antitrust claims sustained by the Third Circuit in the Broadcom litigation and to the findings in the KFTC Decision about unreasonably leveraging patent licensing with the sale of chips. (Op. Br. at 8-10, 21.) The commonality of the proceedings and findings is recognized. *See* Harry First, *Exploitative Abuses of Intellectual Property Rights* 7-8, 15-16, 19-20, 21-23, 30-32 (NYU Center for L. Econ. and Org. Paper No. 16-26, Draft Mar. 6, 2016) (discussing the Broadcom litigation, the KFTC Decision, the JFTC Order, and the NDRC penalty decision). They all illustrate how "antitrust law is being used today to control the ability of intellectual property rights holders to exploit their licensees through excessively high prices or the imposition of particular non-price terms." *Id.* at 32-33.

In July 2010, Qualcomm's board presentation recognized the commonality of regulatory investigations "in Europe, China, India, Japan, Korea and U.S." reflecting "aggressive efforts worldwide to increase regulation of IP or create new rules / laws that devalue IP." (A340.) Qualcomm's fiduciaries treated these "new rules / laws" that had already cost Qualcomm $1.1 billion in the United States and South Korea as requiring an action plan of lobbying, academic advocacy, public relations, and brand management – not legal compliance. Without investigation or legal analysis, Qualcomm's fiduciaries maintained the challenged licensing practices, only to face a further $975 million fine in China. Their culpable inaction proximately caused that damage to Qualcomm.

CONCLUSION

For all the foregoing reasons, and those set forth in the opening brief, Appellant Plaintiff-Below Melbourne respectfully requests reversal of the decision of the Court of Chancery.

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