



February 6, 2014

The Honorable William J. Baer  
Assistant Attorney General  
Antitrust Division, Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

***Re: Rockstar Bidco's Acquisition of Patent Portfolio of Nortel Networks and Microsoft and Nokia's Patent Arrangement with Mosaid***

Dear General Baer,

The American Antitrust Institute<sup>1</sup> (AAI) writes to urge you to reopen investigations into two large patent portfolio transactions that have taken place in recent years. In 2012, Rockstar Bidco (Bidco) – comprising Apple, Microsoft, Blackberry, and other important players in the wireless market – acquired a portfolio of more than 6,000 patents and patent applications from the bankrupt Nortel Networks (Nortel). Nokia, which is now owned by Microsoft, transferred 2,000 patents to Mosaid, a patent assertion entity (PAE), in 2011. Mosaid agreed to share its licensing revenues with Microsoft and Nokia. Evidence suggests that both patent portfolios are being used to hamper competition in the wireless platform market. The costs of anticompetitive uses of patents are large. While it would be premature to attribute this revenue stream entirely, or even mostly, to anticompetitive conduct, Microsoft's licensing earnings illustrate the potential stakes for consumers. The company is estimated to have collected nearly \$2 billion in patent royalties from Android users in 2013.<sup>2</sup> The harm to long-run innovation, though harder to quantify, is likely to be substantial, as well.

In 2011, the AAI submitted a letter to the Department of Justice (DOJ), expressing concerns that Bidco was acquiring the Nortel portfolio to attack the Android system and subvert competition

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<sup>1</sup> The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The AAI has received donations from a number of companies in the high technology industry, including both Google and Microsoft. For more information, see [www.antitrustinstitute.org](http://www.antitrustinstitute.org).

<sup>2</sup> Jay Yarow, *Microsoft Is Making an Astonishing \$2 Billion per Year from Android Patent Royalties*, BUS. INSIDER, Nov. 6, 2013, available at <http://www.businessinsider.com/microsoft-earns-2-billion-per-year-from-android-patent-royalties-2013-11>. The revenue stream from Android royalties is thought to be much more profitable to Microsoft than its Windows Phone business. See Liam Tung, *Microsoft Is Making \$2bn a Year on Android Licensing – Five Times More Than Windows Phone*, ZDNET, Nov. 7, 2013, available at <http://www.zdnet.com/microsoft-is-making-2bn-a-year-on-android-licensing-five-times-more-than-windows-phone-7000022936/>.

in the wireless platform market. The concerted action of Android’s leading competitors raised serious competitive concerns. The AAI noted that if “unaccompanied by meaningful commitments to reasonable license terms,”<sup>3</sup> the transaction “creates substantial risk of exclusionary patent holdup conduct that can subvert open standards initiatives and thereby suppress competition and innovation opportunities throughout the mobile devices space.”<sup>4</sup> Also, Bidco’s \$4.5 billion bid – versus Google’s initial bid of \$900 million – seemed facially problematic. This wide disparity in opening bids raised the question, “How could shared ownership of the Nortel portfolio be worth so much more to the Rockstar group than sole ownership of it would be worth to Google?”<sup>5</sup>

Developments over the past two years appear to have vindicated our fears about this transaction. Since the DOJ closed its investigation into the transaction in February 2012, Bidco has transferred a bulk of the portfolio to Rockstar Consortium (Consortium), a PAE.<sup>6</sup> Consortium is funded by members of Bidco but appears to have operational independence.<sup>7</sup> Troublingly, Consortium’s CEO has renounced licensing promises made by predecessors,<sup>8</sup> including the pledges that Bidco members had given to DOJ to license “standard essential patents” (SEPs) on “reasonable and non-discriminatory” terms.<sup>9</sup> In October 2013, Consortium filed patent infringement suits against Google and manufacturers of Android handsets, including Huawei, LG, and Samsung, claiming that they infringed seven of its patents.<sup>10</sup> In December, Google filed a counterclaim for declaratory action asking the court to rule that none of the seven patents were infringed.<sup>11</sup> In its complaint, Google stated that Consortium’s “litigation campaign has placed a cloud on Google’s Android platform.”<sup>12</sup>

Bidco members’ joint acquisition of the Nortel portfolio does appear to have been motivated by a desire to unleash a patent enforcement campaign against Android – the leading platform in the wireless market and rival to Bidco members. By transferring a large fraction of the patent portfolio to Consortium, Bidco members can wage war on Android at a lower cost. Because it does not face the threat of counterclaims and has no source of revenue except for its patents, Consortium has an incentive to enforce its portfolio aggressively. At the same time, by outsourcing patent enforcement responsibilities to Consortium, Bidco members can escape any licensing commitments they had made and reduce the threat of counterclaims by Google and manufacturers

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<sup>3</sup> Letter from Albert Foer, American Antitrust Institute, to Christine A. Varney, Assistant Att’y Gen. for Dep’t of Justice Antitrust Div. at 2 (July 6, 2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

<sup>6</sup> Robert McMillan, *How Apple and Microsoft Armed 4,000 Patent Warheads*, WIRED, May 5, 2012, available at <http://www.wired.com/wiredenterprise/2012/05/rockstar/>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Press Release, U.S. Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigation of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), available at <http://www.justice.gov/opa/pr/2012/February/12-at-210.html>.

<sup>10</sup> Complaint, Rockstar Consortium US LP v. Google Inc., Case No. 13-893 (E.D. Tex. Oct. 31, 2013).

<sup>11</sup> Complaint, Google Inc. v. Rockstar Consortium US LP, Case No. 13-5933 (N.D. Cal. Dec. 23, 2013).

<sup>12</sup> *Id.* at 2.

of Android devices. The acquisition of the Nortel portfolio by Bidco and subsequent “privateering” arrangement with Consortium may violate Section 7 of the Clayton Act<sup>13</sup> and Section 1 of the Sherman Act,<sup>14</sup> respectively.

The Microsoft/Nokia/Mosaid transaction may have also resulted in anticompetitive effects.<sup>15</sup> In 2011, Nokia transferred 2,000 patents to Mosaid, which agreed to split the licensing revenues three ways with Microsoft and Nokia.<sup>16</sup> Like the Rockstar arrangement, Microsoft and Nokia may have delegated enforcement to a PAE so that earlier licensing promises could be evaded and the patents could be used offensively at a lower risk to their own operations. Mosaid’s CEO boasted that his company’s portfolio includes more than 1,200 standard essential patents,<sup>17</sup> and pledged to “go[] after some global revenues of some very large companies.”<sup>18</sup> In March 2012, an affiliate of Mosaid filed a patent infringement complaint against Apple, claiming that the iPad and iPhone infringe Mosaid-owned SEPs.<sup>19</sup> Patent infringement actions over SEPs can be a violation of Section 2 of the Sherman Act.<sup>20</sup> In addition, Google has complained to the European Commission, alleging that Mosaid “is renegeing on a commitment that Nokia made in a 2005 regulatory filing when the company pledged not to enforce patents against software [like Android] relying on the Linux Kernel.”<sup>21</sup>

We call on the DOJ to reopen investigations into both patent transactions. Competing wireless platforms, like participants in all markets, should be required to succeed on the merits of their products and services, not through abusive and collusive legal tactics. Failure to challenge anticompetitive uses of patent portfolios could harm innovation in the wireless industry. And it would only embolden other parties to use exclusionary methods to gain a competitive advantage.

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<sup>13</sup> Fiona M. Scott Morton, Deputy Assistant Att’y Gen. for Economic Analysis, Antitrust Div., U.S. Dep’t of Justice, Patent Portfolio Acquisitions: An Economic Analysis 3-4, Presented at Fifth Annual Searle Conference on Antitrust Economics and Competition Policy (Sep. 21, 2012), *available at* <http://www.justice.gov/atr/public/speeches/288072.pdf>.

<sup>14</sup> *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963).

<sup>15</sup> Microsoft recently completed its purchase of Nokia’s mobile unit. *See* Mary Jo Foley, *U.S. Department of Justice Gives Microsoft-Nokia Deal the OK*, ZDNET, Dec. 2, 2013, *available at* <http://www.zdnet.com/u-s-department-of-justice-gives-microsoft-nokia-deal-the-ok-7000023839/>.

<sup>16</sup> Diana ben-Aaron, *Nokia Transfers Part of Patent Portfolio to Canada’s Mosaid*, BLOOMBERG, Sep. 1, 2011, *available at* <http://www.bloomberg.com/news/2011-09-01/mosaid-acquires-portfolio-of-nokia-patents-for-undisclosed-sum.html>.

<sup>17</sup> *Id.*

<sup>18</sup> Jameson Berkow, *Mosaid Acquires 2,000 Nokia Patents*, FIN. POST, Sep. 1, 2011, *available at* <http://business.financialpost.com/2011/09/01/mosaid-arms-for-wireless-patent-war-acquires-2000-nokia-patents>.

<sup>19</sup> Steven Musil, *Apple Sued by Company in Patent Deal with Microsoft*, CNET, March 5, 2012, *available at* [http://news.cnet.com/8301-1023\\_3-57391184-93/apple-sued-by-company-in-patent-deal-with-microsoft/](http://news.cnet.com/8301-1023_3-57391184-93/apple-sued-by-company-in-patent-deal-with-microsoft/).

<sup>20</sup> *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007).

<sup>21</sup> Michael Liedtke, *Google Files Patent Claim against Microsoft, Nokia*, ASSOC. PRESS, May 31, 2012, *available at* <http://news.yahoo.com/google-files-patent-claim-against-microsoft-nokia-215403355--finance.html>.

We would be pleased to discuss these matters further with you.

Respectfully,

A handwritten signature in black ink that reads "Albert A. Foer". The signature is written in a cursive, flowing style.

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