



February 6, 2014

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20850

Re: Enforcement Actions against Abusive Patent Assertion Entities

Dear Chairwoman Ramirez,

The American Antitrust Institute¹ applauds the Federal Trade Commission's draft complaint against MPHJ Technology Investments, LLC (MPHJ), a patent assertion entity (PAE).² The New York Attorney General's recent settlement with MPHJ offers a model for PAE conduct restrictions – a set of standards and associated remedies on which the FTC can build. Abusive PAE conduct remains a widespread problem and inflicts serious economic harm on both users and manufacturers of technology products.³ Even as the FTC studies the larger phenomenon of PAEs and Congress considers appropriate legislative action, the FTC should continue to use its consumer protection – and antitrust – authority to attack harmful PAE conduct.

The New York Attorney General's settlement with MPHJ announced last month is likely to deter PAE “mass attacks” against users of patented technology.⁴ Before MPHJ can commence enforcement activities in the future, it must engage in good faith due diligence to determine whether the target of a demand letter has likely infringed its intellectual property. If MPHJ files a complaint for patent infringement, it must include material information about the technology at issue and the alleged infringement, identify the owner of the asserted patent(s), and explain the factual basis for the proposed licensing fee. These binding obligations discourage MPHJ from launching indiscriminate mass attacks and issuing enforcement threats that lead to the extraction of large licensing fees from technology end-users, who are typically untutored in patent law. With its

¹ 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. For more information, see www.antitrustinstitute.org.

² Complaint, FTC v. MPHJ Technology Investments, LLC, Case No. 14-11 (W.D. Tex. Jan. 13, 2014).

³ See, e.g., *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 2013 U.S. Dist. LEXIS 177836 (E.D. Va. 2013); *In re Innovatio IP Ventures, LLC Patent Litigation*, 921 F. Supp. 2d. 903 (N.D. Ill. 2013); Dan Levine, *Google, Samsung, Huawei Sued over Nortel Patents*, REUTERS, Oct. 31, 2013.

⁴ Assurance of Discontinuance, Assurance No. 14-015, In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of MPHJ Technology Investments, LLC (Jan. 14, 2014).

potential to curtail abusive PAE activity in large measure, the New York Attorney General's settlement with MPHJ is conceptually sound and should serve as a template for FTC enforcement actions and remedies.

While the FTC studies the larger universe of PAEs using its Section 6(b) authority and Congress considers bills to remedy damaging PAE activity,⁵ the agency should follow the recent comments of Commissioner Brill and continue to "act expeditiously to take whatever enforcement actions are warranted to stop inappropriate abuse."⁶ As the contemplated action against MPHJ shows, the FTC already has the statutory authority to address deceptive practices. We urge in particular that the Commission use its broad unfair practices authority to attack a wide array of harmful PAE practices.

The FTC should challenge PAE activities that violate either part of Section 5 of the FTC Act. PAEs that enforce standard essential patents (SEPs) in an anticompetitive manner should be subject to enforcement action. In 2008, the FTC required Negotiated Data Solutions, a PAE, to honor a pre-existing licensing commitment on SEPs in the Ethernet standard.⁷ The FTC should also act against PAEs that acquire patents from one or more operating companies and undertake enforcement campaigns against rivals of the operating company. This "privateering" conduct may violate Section 1 of the Sherman Act and Section 7 of the Clayton Act.⁸ In light of its statutory mission to protect consumers, the FTC should not hesitate to use its broad mandate and challenge harmful PAE conduct.

We commend your ongoing focus on misuses of the patent system and encourage you to remain vigilant and aggressive in tackling abusive PAE behavior. We would be pleased to discuss this topic further with you.

Respectfully,



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⁵ Fed. Trade Comm'n, Notice and Request for Public Comment, 78 Fed. Reg. 61,352 (Oct. 3, 2013); H.R. 3309, 113th Cong. (2013).

⁶ Julie Brill, Commissioner, Fed. Trade Comm'n, Patent Litigation Reform: Who Are You Calling a Troll?, Introductory Remarks at International CES CEA Innovation Policy Summit 6 (Jan. 8, 2014).

⁷ Negotiated Data Solutions LLC, FTC Docket C-4234, 2008 FTC LEXIS 119 (Sept. 22, 2008).

⁸ United States v. Singer Manufacturing Co., 374 U.S. 174 (1963); 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>.



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The Honorable Eric Schneiderman