United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

Re: *In the Matter of Robert Bosch GmbH, File No. 121-0081, Docket No. C-4377*

Thank you for your comments regarding the proposed Consent Order accepted by the Federal Trade Commission for public comment in the above-captioned matter. The proposed Consent Order is designed to remedy the anticompetitive effects resulting from Bosch's acquisition of SPX Service Solutions U.S. LLC ("SPX Service Solutions") from SPX Corporation ("SPX"). It also is designed to remedy anticompetitive conduct by SPX in violation of Section 5 of the FTC Act.

The Commission received nine public comments, including yours, during the public comment period expressing a variety of viewpoints on the proposed Consent Order. Some of the comments were supportive of the proposed Consent Order, others expressed concerns. This letter addresses the primary concerns submitted to the Commission, as well as statements received from other commenters.

Some commenters suggested that the Commission's actions in this case are outside of our Section 5 authority and lack a limiting principle. We disagree. As reflected in the Commission Statement accompanying this matter, this action is well within our Section 5 authority. The plain language of Section 5, the relevant legislative history, and the long line of Supreme Court cases all affirm that Section 5 extends beyond the Sherman Act.[1] Moreover, the Commission's action occurs in the standard-setting context, long an area of enforcement and concern for the Commission due to the significant impact of standard setting activity on innovation and competition.

Some commenters expressed concern that the Commission's proposed Consent Order limiting Bosch's ability to seek injunctive relief in patent litigation involving certain standard essential patents ("SEPs") may implicate the *Noerr-Pennington* doctrine ("*Noerr*") and its protection of the First Amendment right to petition for redress of grievances. As noted in the Commission Statement for *In the Matter of Google Inc.*, we do not believe that imposing Section 5 liability where a SEP holder violates its commitment to license its SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms offends the First Amendment.[2]

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[1] *In the Matter of the Robert Bosch GmbH*, FTC File No. 121-0081, Statement of the Federal Trade Commission (November 26, 2012) *available at* http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf.

[2] *See In the Matter of Google Inc.*, FTC File No. 121-0120, Statement of the Federal Trade Commission (January 3, 2013), *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.

Here, Bosch's predecessor, SPX, made a commitment to the standard setting organization, SAE International ("SAE"), to license its SEPs on FRAND terms. The Commission had reason to believe that in doing so, SPX willingly gave up its right to seek injunctive relief against a willing licensee. SPX nonetheless sought injunctions against implementers of the SAE standard that incorporated SPX's patented technology. In these circumstances, imposing Section 5 liability "simply requires those making promises to keep them. . ."[3]and does not offend the First Amendment or the *Noerr* doctrine.[4]

Some commenters expressed concern that prohibiting injunctions through a Section 5 consent order could undermine the role of federal courts and the International Trade Commission (ITC). We disagree. The statutory role the Federal courts and the ITC play in patent disputes does not preclude the Commission from exercising its independent authority under Section 5 of the FTC Act, nor does the Commission's action undermine the separate authority of these other institutions.[5] When, as here, private contractual and patent disputes have a significant bearing on the competitive dynamics of the marketplace, it is appropriate for the Commission to intervene. Indeed, the competitive implications of the standard setting process led the Commission to use its authority here – as it has for nearly 20 years – to safeguard the integrity of the process. When implementers cannot rely on a standard-essential patent holder's commitment to license on FRAND terms, this can create market uncertainty and result in economic harm to consumers. The Commission was created to address harm to consumers and the competitive process – the behavior at issue in this matter -- and this enforcement action falls squarely within our statutory authority.

Some commenters suggested that Bosch lacked adequate incentive to negotiate in its own interests regarding the standard-essential patents because the company wanted to settle the matter with the FTC and complete its acquisition of SPX. The Commission has no reason to believe that Bosch lacked the incentive and means to fully represent its own interests in this matter. Although not a litigated matter, Bosch and SPX were represented by competent counsel throughout the FTC's investigation and negotiations leading to the proposed Consent Order. During extensive negotiations with FTC staff, Bosch and SPX, armed with full knowledge of SPX's pre-acquisition conduct, evaluated the Commission's concerns and applicable law, and determined that entering into the Proposed Order at that time was in their best interests.

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[3] *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991).

[4] *See supra* note 2 at 5 n. 15 (citing *Powertech Technology, Inc. v. Tessera*, Inc., 872 F. Supp. 2d 924, 931-32, (N.D. Cal. 2012) (holding that when the patent holder had contracted away its rights to bring claims before the United States International Trade Commission, a challenge to a breach of that commitment was not barred by Noerr)),

[5] *See* Prepared Statement of the Federal Trade Commission, United States Senate Committee on the Judiciary, "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard Essential Patents," July 11, 2012, *available at* http://www.ftc.gov/os/testimony/120711standardpatents.pdf.

Some commenters expressed concern that the risk of hold-up actually is not a factor in patent licensing negotiations. We disagree. The Commission has ample justification for taking action where it has reason to believe that conduct will facilitate patent hold up in the standard-setting context. The threat of an injunction or exclusion order distorts the bargaining dynamic between the owner of a standard-essential patent and a potential licensee in a way that undermines the procompetitive goals of the FRAND agreement. As the Commission noted in its recent statement to the ITC, "[T]he threat of an exclusion order may allow the holder of a [F]RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives, which could raise prices to consumers while undermining the standard setting process."[6]

Some commenters expressed concern that providing royalty-free licenses to industry participants other than Mahle, the buyer of the divested Bosch ACRRR assets, went beyond what is appropriate to settle this case. The Commission considered this issue in the course of resolving the case, but determined this remedy to be appropriate, and continues to believe that it is appropriate, due to the particular facts of the case. Specifically, prior to the merger, Bosch and two other competitors were defendants in a patent infringement lawsuit brought by SPX involving potentially standard-essential patents. As a result of the merger, Bosch acquired the SPX patents. As part of the divestiture, Bosch chose to license the SPX patents to the buyer of its ACRRR business, Mahle, on a royalty free basis. Without a similar license to the other co-defendants and other market participants, a license solely to Mahle risked creating an inappropriate distortion of the pre-merger market and thus a remedy that would have been inequitable in application. Accordingly, the Commission required, and Bosch agreed, to license other market participants on the same terms that it agreed to license Mahle.

Some commenters raised concerns that the patents to be licensed have not been litigated and found to be standard-essential. This is true, but provides no reason to modify the consent. Bosch elected to resolve the investigation in this area by agreeing to royalty-free licenses before it would have been necessary for the Commission to assess the essentiality and/or validity of any of the patents at issue. Accordingly, the proposed Consent Order does not address infringement or validity of the patents-at-issue.

Finally, some commenters expressed concern that documents and other information supporting the Commission's basis for the proposed Consent Order have not been made public. The Commission is not at liberty to publicly divulge or discuss in great detail most of the

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[6] Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment\ Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA- 752, *available at* http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf, at 3-4.

information it gathers during a non-public investigations, because the information is confidential and competitively sensitive. The Commission conducted its non-public review of the proposed transaction pursuant to its authority under Section 7 of the Clayton Act, 15 U.S.C § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. As is its typical process, during the course of its investigation, the Commission reviewed public and non-public information from the merging parties and third parties to reach its conclusions. By statute, such information is not subject to public disclosure.[7]

One comment, however, suggested that our description of SAE's rules regarding patent licensing was inaccurate. Because SAE's rules are public, the Commission is at liberty to provide more detail on this point. The Commission refers interested readers to Rule 1.14.1 of the Governance Policy of SAE's Technical Standards Board. This Rule expressly require members who disclose patents that may be essential to a given standard to commit to license those patents on a royalty free or FRAND basis.[8]

After careful review of the comments, the FTC has determined that the public interest would best be served by issuing the Decision and Order in final form without modification. A copy of the final Decision and Order is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

It helps the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate your interest in this matter.

By direction of the Commission, Commissioner Ohlhausen dissenting and Commissioner Wright not participating.

Donald S. Clark
Secretary

[7] Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), provides that information which is obtained by the Commission pursuant to subpoena, or voluntarily in lieu of subpoena, in any investigation to determine whether any person may have violated any provision of the laws administered by the Commission, is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. See also 16 C.F.R. § 4.10(a)(2).
[8] SAE International, Technical Standards Board Governance Policy, § 1.14.1, *available at* http://www.sae.org/standardsdev/tsb/tsbpolicy.pdf.