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December 16, 2013

BY ONLINE SUBMISSION AND FIRST-CLASS UNITED STATES MAIL

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: **Comment by State Attorneys General on FTC's Proposed Information Requests to Patent Assertion Entities**
PAE Reports: Paperwork Comment; Project No. P131203

Dear Secretary Clark:

As state Attorneys General committed to preventing our constituent consumers, small businesses, and nonprofits from being victims of baseless patent infringement harassment, we are pleased to offer the following comment in support of FTC's proposed information requests to Patent Assertion Entities ("PAEs").

PAEs, commonly known as "patent trolls," are a growing consumer protection problem in the United States. Generally, PAEs acquire patents solely for the purpose of using them as weapons to obtain financial gains from entities they claim to have infringed the patent. Lacking any intention to develop the underlying technology, improve upon it, or bring it to market, PAEs typically seek only to extract costly licensing fees and/or pretrial settlements from alleged infringers.

Through the issuance of numerous demand letters to their targets (often consumers, nonprofits, and small businesses having little, if anything, to do with the underlying patent), PAEs commonly demand license fees or settlements accompanied by the threat of costly litigation if the target does not "pay up." These consumers, nonprofits, and small businesses usually possess little knowledge of patent law and are intimidated by the demand letters. Given the high costs of patent litigation, even when targets have reason to doubt the validity of the patent or the claim of infringement, they often pay a licensing fee rather than face the prospect of a potentially bankrupting court fight. This has become a kind of silent extortion.

Lately, Congress and the federal government have demonstrated renewed interest in controlling abusive patent practices. Additionally, state Attorneys General have initiated innovative efforts to use existing unfair and

deceptive trade practices laws to attack PAEs' demand letter campaigns. The increased attention these efforts have garnered is encouraging, but for true and lasting success to be realized, regulators need substantially more information about PAEs, their business models, owners, and practices.

Toward that end, and given our critical role as enforcers of state consumer protection laws, we applaud the FTC's recently announced information-gathering proposal. We believe the scope of the request is appropriately comprehensive and will create a valuable enforcement resource for both federal and state authorities to better understand PAEs' function and techniques.

We offer the following specific responses to the issues presented by the FTC at 78 FR 61357:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility.

The FTC's stated mission is, in part, "To prevent business practices that are anticompetitive or deceptive or unfair to consumers…" We firmly believe that efforts by FTC to examine the problem of patent enforcement abuse, which undoubtedly presents risks of antitrust and unfair and deceptive trade practice violations, are entirely consistent with the FTC's function and purpose. Given the value that increased knowledge would have in pursuing efforts to prevent violations of antitrust and unfair and deceptive practice laws, we believe the merits of the proposed information request are beyond question.

Moreover, this information would have significant, practical utility. Given its breadth and scope, the request should yield a trove of information relevant to PAEs' practices, methods, and beliefs regarding the veracity (or lack thereof) of infringement claims, and the number and types of their target entities. Not only will the public collection of such information greatly assist the FTC in fulfilling its consumer protection mission, it will be valuable to state Attorneys General, who are charged with similar obligations.

(2) The accuracy of the FTC's estimate of the burden of the proposed collection of information.

We believe the FTC has estimated the burden of the proposed collection of information with a reasonable degree of accuracy.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

We believe the language of the information request itself is of sufficient clarity that it requires little, if any, revision. We suggest that the FTC share, to the extent permitted by law, the entirety of the response to the information request with state Attorneys General. The value of the collected information is such that it should be possessed by both federal and state consumer protection enforcement authorities.

We would recommend the following additions to the information request, as we believe that this additional information will improve the FTC's ability to understand the activities of PAEs:

Under request F.1 (Patent Assertion Information, Demand Information):

(g) the process by which you identified Person(s) to which the Demand was sent.

We also suggest that the FTC inquire about the role of legal counsel. Not unlike the area of unfair debt collection practices, attorneys may play a central role in patent assertion schemes. We propose the addition of a new section (H) relating to use of counsel. Some additional requests may include:

1. Do you use outside counsel or in-house counsel as part of your business.
2. If you use outside counsel, state the name of the firm employed in relation to each Demand.
3. Describe the role of counsel in:
    a. Identifying Persons to whom you will send Demands;
    b. Sending Demands; and
    c. Advising on your overall business strategy.
4. Financial interest of counsel:
    a. Does counsel have any ownership interest in your business;
    b. If you use outside counsel, describe the compensation arrangement with counsel (contingency fee; fees per license; straight hourly billable, etc.)

(h) whether the Demand threatened that the Firm would initiate Litigation against the recipient of the Demand in the event that the recipient failed to purchase a license.

Our only additional recommendation would be to increase the number of PAEs, Manufacturing Firms, and Other Firms to which the information request will be submitted. Given the extent of the problem of patent enforcement abuse, collecting as much information as possible—and from as many entities as possible—should be a priority. The marginal effort involved in expanding the number of recipients would likely be minimal, but the marginal value yielded great.

(4) Ways to minimize the burden of collecting information.

We believe the burden of collecting the proposed information is minimal, and there are no additional steps that could provide the same quality and utility of information with less burden. While the scope of the information request is appropriately comprehensive, the burden of the request is not unreasonable.

In conclusion, we again commend the FTC on taking this valuable step to gather additional information regarding PAEs. We believe the collection of such information will greatly assist enforcement efforts against PAEs where they are found to violate antitrust and unfair and deceptive trade practices laws. We look forward to the results of the FTC's endeavor.

Sincerely,

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Nebraska Attorney General

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