File No. 121-0120

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

FEDERAL TRADE COMMISSION

Concerning

IN THE MATTER OF MOTOROLA MOBILITY LLC and GOOGLE INC.; REQUESTS FOR COMMENTS ON PROPOSED CONSENT AGREEMENT

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<u>Submitted Electronically</u>
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex D)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: In the Matter of Motorola Mobility LLC and Google Inc.; Request for Comments on Proposed Consent Agreement File No. 121-0120; 78 Fed. Reg. 2398 (January 11, 2013)

Dear Commissioners:

The Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the Federal Trade Commission (FTC) in connection with the FTC's proposed Consent Agreement with Motorola Mobility, LLC and Google Inc. WLF is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF promotes free-market policies through litigation, administrative proceedings, publications, and advocacy before state and federal government agencies, including the FTC.

The proposed Consent Agreement arises in connection with litigation initiated by Motorola (and continued by Google following Google's June 2012 purchase of Motorola) in which Motorola sought injunctions and exclusion orders against competitors who allegedly were infringing patents held by Motorola. The patents in question have been designated as standard essential patents (SEPs) for cellular, video codec, and wireless LAN standards. The FTC's Complaint alleges that Motorola and Google, by seeking injunctive relief and exclusion orders, engaged in unfair methods of competition and unfair acts or practices, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Under the proposed Agreement, Motorola and Google do not admit that they violated the FTC Act, but they have agreed to a Consent Order that would significantly restrict the forms of relief they are entitled to seek in patent infringement proceedings.

WLF expresses no views regarding factual allegations contained in the FTC's Complaint. WLF lacks any detailed knowledge regarding patent infringement litigation initiated by Motorola and thus is not in a position to take issue with the FTC's factual allegations. Moreover, WLF sees no basis for challenging the wisdom of the patent dispute resolution procedures set forth in the Consent Order. Those procedures appear reasonably well designed to reduce the level of patent litigation by encouraging parties to settle their disagreements regarding the appropriate size of patent royalties.

But WLF strenuously objects to the FTC's exercise of its Section 5 authority with total disregard for the *Noerr-Pennington* doctrine, a Supreme Court doctrine designed to protect the First Amendment rights of businesses (including monopolists) to petition the government for relief without regard to whether the requested relief would restrain trade. The conduct alleged here (seeking injunctive relief in court proceedings and seeking exclusion orders in proceedings before the International Trade Commission) fits squarely within the four corners of the *Noerr-Pennington* doctrine. Accordingly, the conduct is not subject to sanction under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. The Statements of the various Commissioners do not explicitly set forth their views on whether the Commission's Section 5 authority is similarly constrained by the *Noerr-Pennington* doctrine. The answer to that question is reasonably clear:

the doctrine does, indeed, limit the reach of Section 5 because it is based on principles set forth in the First Amendment, a constitutional provision that is binding on the Commission.

Several Commissioners suggest that Motorola and Google may have waived their First Amendment rights. Yet they fail to point to any evidence to support that claim. The contractual commitments made by Motorola to standard-setting organizations (SSOs) are silent regarding the relief that may be sought in patent infringement litigation; more importantly, they say absolutely nothing about the First Amendment. Case law is clear that constitutional rights are not deemed waived unless the alleged waiver is set forth explicitly. Motorola and Google promised to offer licenses for their SEPs on FRAND ("fair, reasonable, and non-discriminatory") terms, but that promise says nothing about the nature of litigation they would initiate against companies that practice the SEPS without a license. The FTC alleges that they failed to offer licenses on FRAND terms to several willing licensees; if so, they breached a contractual commitment. But any such breach is separate and apart from the efforts of Motorola and Google to petition the federal courts, efforts that are protected by the First Amendment.

If, as the FTC believes, the FRAND commitment bars Motorola and Google from obtaining injunctive relief against alleged infringers, then one can expect federal courts and the International Trade Commission to arrive at the same conclusion after reviewing the same contractual material. Indeed, the evidence indicates that federal courts are quite reluctant to grant injunctive relief to SEP holders that have made FRAND commitments. Accordingly, there is little reason for the FTC to run roughshod over First Amendment rights in order to achieve a result that almost surely would have been achieved in any event. Moreover, the danger (perceived by the FTC) that an injunction demand might cause defendants to sign settlement agreements calling for unreasonably high royalties (and then pass those costs on to consumers) becomes a factor of diminishing importance as their awareness increases that courts are highly unlikely to grant requested injunctive relief.

I. *Interests of the Washington Legal Foundation*

The Washington Legal Foundation is a public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly appears before federal and State courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government. WLF has frequently appeared as *amicus curiae* in the federal courts to address the proper scope of the antitrust laws. *See, e.g., Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 127 (2007). In particular, WLF filed briefs in several of the principal federal court cases that have addressed the antitrust implications of patent litigation settlements under which the defendant agrees to delay plans to market a generic version of a prescription drug. *See, e.g., In re K-Dur Antitrust Litigation*, 686 F.3d 197 (3d Cir. 2012), *petitions for cert. pending*, Nos. 12-245 & 12-265 (filed Aug. 2012); *Schering-Plough Corp. v. FTC,* 402 F.3d 1056 (11th Cir. 2005), *cert denied,* 548 U.S. 919 (2006); *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294 (11th Cir. 2003). WLF is scheduled to file a merits brief in the U.S. Supreme Court next week on that same issue, in *FTC v. Actavis*, No. 12-416. WLF also filed a brief with the FTC in *Schering-Plough* when that case was before the Commission.

WLF is filing these comments due to its interest in promoting patent rights, including the rights of patentees to petition the federal courts in an effort to protect their patents. WLF has no direct interest in this matter and has not discussed its comments with any of the parties. WLF takes no position regarding any of the factual allegations in either the Complaint or the Statement of the Commission, other than the allegation that Motorola and Google took actions that constituted a waiver of their First Amendment rights.

II. FTC's Statutory Authority

Federal law authorizes the FTC to prevent businesses and individuals (with certain limited exceptions) from "using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). The FTC "shall have no authority" to declare an act or practice unfair unless it is "likely to cause substantial injury to consumers," *and* the injury "is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). It is empowered to issue cease-and-desist orders, ordering individuals and entities not to engage in acts or practices it determines to be in violation of the FTC Act. 15 U.S.C. § 45(b).

As an agency of the United States, the FTC is subject to limitations imposed by the First Amendment of the U.S. Constitution, which explicitly protects the right of the people "to petition the Government for a redress of grievances."

III. The Sherman Act and the Noerr-Pennington Doctrine

The Sherman Act prohibits contracts, combinations, or conspiracies "in restraint of trade," 15 U.S.C. § 1, and monopolizing or attempting to monopolize "any part of the trade or commerce among the several States." 15 U.S.C. § 2. In a series of cases dating back more than half a century, the Supreme Court has made clear, however, that the Sherman Act does not restrict the rights of people to associate together to persuade the government to adopt new laws, even if the laws would have the effect of restraining trade or promoting a monopoly. *See, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657 (1965). The petitioners' motivation in urging government action is deemed irrelevant; "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670. The law established by those cases is generally referred to as the *Noerr-Pennington* doctrine.

The Court reasoned that in light of the Government's "power to act in [its] representative capacity," and "to take actions . . . that operate to restrain trade," the Sherman Act should not be deemed to punish "political activity" through which "the people . . . freely inform the government of their wishes." *Noerr*, 365 U.S. at 529. Noting that the First Amendment protects the right of the people to petition the Government, the Court said that it would not "impute to Congress an intent to invade" First Amendment rights when adopting the Sherman Act. *Id.* at 530. Although *Noerr* and *Pennington* involved petitions submitted to legislative and administrative bodies, the Court later clarified that the *Noerr-Pennington* doctrine also applies to the filing of lawsuits. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508

(1972). The Court has repeatedly made clear that the doctrine is firmly grounded in First Amendment doctrine: "[I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the Government for a redress of grievances,' U.S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge." *City of Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365, 379 (1991). *See also Prof. Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56 (1993).

IV. The *Noerr-Pennington Doctrine* Is Fully Applicable to the FTC

The Statement of the Commission in this matter does not state explicitly whether the Commission deems the *Noerr-Pennington* doctrine to be applicable to FTC proceedings. It is true, of course, that the *Noerr-Pennington* doctrine arose in the context of litigation under the Sherman Act, not under Section 5 of the FTC Act. WLF recognizes that the Commission on occasion takes the position that its Section 5 antitrust enforcement powers extend beyond the confines of the Sherman Act. Case law is nonetheless reasonably clear that the *Noerr-Pennington* doctrine is fully applicable to Section 5 proceedings and constrains the Commission's authority to sanction companies based on the lawsuits they file.

Although the Supreme Court has usually discussed the *Noerr-Pennington* doctrine in the context of Sherman Act claims, in none of those cases did the Court indicate that its analysis was unique to the Sherman Act context and inapplicable to other antitrust claims. *See, e.g., Pennington*, 381 U.S. at 370 (stating that "[j]oint efforts to influence public officials do not violate *the antitrust laws* even though intended to eliminate competition") (emphasis added). In at least once instance, the Court discussed the doctrine's applicability in the context of an FTC lawsuit filed under Section 5 of the FTC Act. *See, FTC v. Superior Court Trial Lawyers Ass'n*, 483 U.S. 411 (1990). Although the Court concluded in that case that the defendants' allegedly unfair acts or practices were not immunized from antitrust scrutiny by *Noerr-Pennington*, it gave no indication that it deemed the doctrine inapplicable to Section 5 claims. *Id.* at 424-25.

More importantly, the doctrine's First Amendment foundation is powerful evidence that the FTC is not entitled to exempt itself from the doctrine. As explained above, the Supreme Court recognized the doctrine in light of the First Amendment's grant of a right to petition the government "for a redress of grievances." Filing Section 5 enforcement actions against companies because they file non-sham federal court lawsuits would interfere with the right to petition for a redress of grievances just as assuredly as actions filed under the Sherman Act. Although Congress delegated broad enforcement powers to the Commission when it adopted the FTC Act, the Supreme Court has been loathe to "impute to Congress an intent to invade the First Amendment right to petition" when adopting the antitrust laws. *Professional Real Estate Investors*, 508 U.S. at 1926. As an arm of the federal government, the FTC is fully bound by First Amendment restrictions; accordingly, it has no authority to exempt itself from those restrictions by deeming the *Noerr-Pennington* doctrine inapplicable to Section 5 enforcement actions.

V. Motorola and Google Have Not Waived Their First Amendment Rights

Commissioner Maureen K. Ohlhausen dissented from the FTC's action in this matter, in part "because the *Noerr-Pennington* doctrine precludes Section 5 liability for conduct grounded in the legitimate pursuit of an injunction or any threats incidental to it." Dissenting Statement of

Commissioner Maureen K. Ohlhausen at 1. In response, the Commission stated:

> We are not persuaded by Commissioner Ohlhausen's argument that the conduct alleged in the Commission's complaint implicates the First Amendment and the *Noerr-Pennington* doctrine. As noted above, we have reason to believe that [Motorola] willingly gave up its right to seek an injunction when it made the FRAND commitments at issue in this case. We do not believe that imposing Section 5 liability where a SEP holder violates its FRAND commitment offends the First Amendment because doing so in such circumstances "simply requires those making promises to keep them."

Statement of the Federal Trade Commission, *In the Matter of Google, Inc.* (Jan. 3, 2013) at 4-5 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991).[1]

WLF notes that the Commission is hedging its bets here; it does not commit itself to an assertion that Motorola and Google waived their rights to seek injunctive relief, only that "we have reason to believe" that a waiver took place. WLF can understand the Commission's desire to use equivocating language, because there is not a shred of evidence that any rights were waived, and the Commission has pointed to none. The Commission states that Motorola and Google promised to offer licenses on FRAND terms to willing licensees. It asserts that they breached that contractual commitment by failing to offer licenses on FRAND terms to Apple and Microsoft, whom the FTC asserts were willing licensees. WLF is not fully familiar with the record and thus takes no position regarding those assertions. But a promise to offer licenses on FRAND terms *is not the issue*. Rather, the issue is whether Motorola or Google ever promised not to seek injunctive relief. The FTC has produced no evidence of such a promise. Indeed, the

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[1] The Commission's phrase, "[a]s noted above," apparently refers to Footnote 7 of its Statement. The footnote states, "A number of courts have recognized the tension between Google's FRAND commitments and seeking injunctive relief." Statement at 2 n.7.

Consent Agreement acknowledges that there exist certain circumstances under which it would be appropriate for Motorola and Google to seek injunctive relief against alleged infringers of its SEPs, so even the FTC acknowledges that they made no contractual commitment never to seek injunctive relief.

The Commission apparently takes the position that one can *infer* that Motorola and Google waived their litigation rights from the fact of their FRAND commitment. Any such inference cuts against well established principals of constitutional law. As noted above, the First Amendment protects the right to petition the government for redress of grievances, including the right to file non-sham litigation. The Supreme Court has held repeatedly that constitutional rights are not deemed waived unless the alleged waiver is set forth explicitly. *See, e.g., College Savings Bk. v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("Courts indulge every reasonable presumption against waiver of fundamental constitutional rights"); *Carnley v. Cochran*, 369 U.S. 506, 514 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In the absence of any language in Motorola's contractual undertakings that references the First Amendment, or even that references the right to seek injunctive relief, any suggestion that Motorola and Google knowingly waived their constitutional rights to petition the government borders on the frivolous.

Of course, the fact that Motorola and Google have a constitutional right to *seek* injunctive relief says nothing about whether they are entitled to obtain such relief. The Supreme Court has made clear that injunctive relief is never granted as a matter of course to prevailing plaintiffs in patent infringement litigation. Instead, the Court has held that normal rules of equity practice apply “with equal force” to patent infringement lawsuits and that the prevailing plaintiffs in such suits must satisfy the rigorous “four-factor test before a court may grant [injunctive] relief.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The facts underlying the patent infringement litigation filed by Motorola – in particular, its agreement to license its SEPs on FRAND terms – might well cause a court to conclude that Motorola could not meet the four-factor test and thus is not entitled to injunctive relief. After all, a company that makes a FRAND commitment might well have difficulty demonstrating that an award of damages (in the form of a retroactive licensing fee) could not adequately compensate it for its injuries (one of the showings required under the four-factor test). But a finding that Motorola and Google are not *entitled* to injunctive relief is a far cry from a finding that they have waived their constitutional rights to petition the courts for such relief.

None of the cases cited by the Commission support its position. Its citation to *Cohen v. Cowles Media Co.* is particularly inapt. That decision had nothing to do with waiver of constitutional rights. It held merely that newspapers are subject to generally applicable contract laws and could be sued for damages arising for breach of a contract. *Cohen*, 501 U.S. at 670-71. Similarly, if Motorola or Google breached a contract by filing an infringement lawsuit seeking injunctive relief, they too are subject to a suit for damages incurred by any intended beneficiary of the contract. But that issue is irrelevant to the issue here: whether they have knowingly waived their *Noerr-Pennington* immunity from antitrust claims arising from their exercise of their First Amendment petitioning rights.

Similarly unavailing are the two decisions cited in Footnote 7 of the Statement of the

Commission. *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012), involved a lawsuit filed by Microsoft for the purpose of preventing enforcement of a German court's injunction that barred Microsoft from using one of Motorola's SEPs. The suit made no claim that Motorola had waived any constitutional rights; rather, it asserted merely that the RAND commitment that Motorola had made to an SSO precluded it from obtaining injunctive relief. The Ninth Circuit did not discuss waiver of constitutional rights, and did not even decide whether the German injunction against Microsoft was unwarranted. Rather, it merely affirmed the district court's grant of a *preliminary* injunction against enforcement of the German injunction, based in part on the following rationale:

> We conclude that the district court did not abuse its discretion in determining that Microsoft's contract based claims, including its claim that the RAND commitment precludes injunctive relief, would, if decided in favor of Microsoft, determine the propriety of the enforcement by Motorola of the injunctive relief obtained in Germany.

696 F.3d at 885. The Ninth Circuit could not have been clearer that it viewed the issue as one that turned on whether Motorola could establish the prerequisites for obtaining a permanent injunction against the use of its SEPs, not whether it had waived its constitutional rights.[2]

The other cited decision – *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901 (N.D. Ill. 2012) (Posner, J., sitting by designation) – cuts strongly *against* the Commission's position. In

[2] The Ninth Circuit confined to a single sentence (the one cited in the Commission's Statement) any discussion of whether Motorola might have made a contractual commitment not to seek injunctive relief. In that sentence, the court raised the possibility (without deciding) that such a commitment could "arguably" be "implicit" in Motorola's RAND commitment to the SSO. 696 F.3d at 884. Other than that passing observation, the court focused solely on the appropriateness of injunctive relief, not on the appropriateness of seeking such relief.

that decision, Judge Posner dismissed the claims for injunctive relief filed against one another by Apple and Motorola in connection with their long-running patent disputes. In dismissing Motorola's claims for injunctive relief with respect to its SEPs, Judge Posner's analysis mirrored precisely the analysis described above by WLF, not the waiver-of-rights analysis espoused by the Commission. *Id.* at 913-15. The language cited by the Commission (at Footnote 7 of its Statement) makes our point precisely. According to Judge Posner, what is "implicit" in Motorola's FRAND commitment is an "acknowledg[ment] that a royalty is adequate compensation for a license to use that patent," 869 F. Supp. 2d at 914, not (as the Commission would have it) a waiver of the constitutional right to petition the government.[3]

In sum, there is no evidentiary support for the Commission's assertion that Motorola and Google have waived their First Amendment rights to petition the government to enjoin other companies from using their SEPs. In the absence of a waiver, the Commission is acting in excess of its Section 5 powers in bringing an enforcement action based on the decisions of

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[3] Judge Posner relied on Motorola's acknowledgment of the adequacy of a royalty (as compensation for its injuries) as the basis for dismissing Motorola's claim for injunctive relief. He explained:

> [T]he Supreme Court has held that the standard for deciding whether to grant [injunctive] relief in patent cases is the normal equity standard. And that means, with immaterial exceptions, that the alternative of monetary relief must be inadequate. A FRAND royalty would provide all the relief to which Motorola would be entitled if its proved infringement of the '898 patent, and thus it is not entitled to an injunction.

Id. 915 (citations omitted). At no point did Judge Posner suggest that Motorola had made a contractual commitment not to seek injunctive relief in lawsuits for infringement of its SEPs, let alone a commitment to waive its constitutional rights to petition the government for such relief.

Motorola and Google to pursue injunctive relief claims in the federal courts. Accordingly, WLF urges the FTC to withdraw its Complaint and not to enter into the proposed Consent Agreement.

WLF nonetheless agrees with the FTC that there has been far too much litigation over the licensing of SEPs, and that such litigation could adversely affect competition. Accordingly, WLF has no objection to FTC efforts to propose standard procedures for resolving licensing disputes. The mandatory arbitration procedures set forth in the Consent Agreement strike WLF as a step in the right direction. Perhaps the FTC can work with SSOs to encourage them, before designating any SEPs, to require the SEP holders to commit to such procedures.

VI. The Relief Ordered by the Commission Is Particularly Inappropriate Because the Problems Identified by the Commission Appear to Be Self-Correcting

If, as the FTC believes, the FRAND commitment bars Motorola and Google from obtaining injunctive relief against alleged infringers, then one can expect federal courts and the International Trade Commission to arrive at the same conclusion after reviewing the same contractual material. Indeed, the evidence indicates that federal courts are quite reluctant to grant injunctive relief to SEP holders that have made FRAND commitments.

Perhaps the best example is Judge Posner's decision, cited above, from June 2012. *Apple Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901 (N.D. Ill. 2012). Judge Posner explained at length why SEP holders are unlikely to be able to establish the irreparable harm necessary to obtain injunctive relief. *Id.* at 913-915. An increasing awareness among defendants that courts are highly unlikely to grant injunctive relief will make them increasingly less likely to sign settlement agreements calling fo unreasonably high royalties. It is the FTC's fear of such "holdup" settlements (which may result in unreasonably high prices being passed along to consumers) that the FTC has cited in support of its recent intervention into SEP patent litigation. But the FTC to date has cited no evidence of any actual consumer injury. Moreover, now that defendants' fears of injunctions has diminished considerably, the likelihood of future consumer injury is rapidly diminishing.

In WLF's view, the real problem is that the value of SEP licenses has been notoriously difficult to quantify. Not surprisingly, SEP holders tend to believe that their patents are extremely value (separate and apart from the increased value caused by the patents being designated as the industry standards by SSOs), while competitors who have few realistic alternatives to continuing to use the patents tend to have quite different appraisals of the patents' value. The wide divergence of opinion regarding what constitutes a reasonable SEP royalty has inevitably led to very high levels of litigation.

By bringing enforcement actions against SEP holders, the FTC appears to be taking the side of defendants in these royalty lawsuits. WLF questions whether that is an appropriate position for the FTC to be taking. Making patent enforcement more difficult for SEP holders will likely lead to a decrease in royalty payments and may even lead to a decrease in consumer prices. But it should not be the role of the FTC to fight against enforcement of patent rights. The patent system was adopted for the purpose of encouraging increased research and development expenditures – in the hope that such expenditures will lead to the development of new and useful products. WLF respectfully suggests that the FTC lacks the technical expertise to know when royalty being demanded by SEP holders are unreasonable and when it is the users of the SEPs who are being unreasonable in refusing royalty demands.

WLF encourages the FTC to devote its energies in this area to finding ways to encourage low-cost methods of settling royalty disputes. All can agree that the current high level of litigation creates inefficiencies. WLF applauds the FTC's encouragement of mandatory arbitration regimes. WLF also applauds the FTC's conclusion that if a user seeks a determination of a fair royalty, it must provide the SEP holder with a commitment to abide by the court's (or arbitrator's) determination regarding what constitutes a fair royalty.

Finally, WLF urges the FTC to trust the ability of courts and the International Trade Commission to reach appropriate resolution of SEP royalty disputes. They too have been assigned a role in resolving such disputes. WLF deems it inappropriate for the FTC to issue decisions whose effect is to make it the sole arbiter of those disputes.

CONCLUSION

WLF respectfully requests that the FTC withdraw its complaint and not enter into the proposed Consent Agreement. It further requests that the Commission: (1) explicitly acknowledge that its Section 5 enforcement authority is subject to the *Noerr-Pennington* doctrine; and (2) announce that it will not take enforcement action against a SEP holder for petitioning the courts for injunctive relief, in the absence of evidence that the SEP holder has explicitly waived its constitutional rights to engage in such activity.

Sincerely,

/s/ Richard A. Samp
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/s/ Cory L. Andrews
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