COMMENTS OF THE NATIONAL RESTAURANT ASSOCIATION TO THE FEDERAL TRADE COMMISSION

on

Paperwork Comment; Project No. P131203
PROPOSED 6(b) STUDY OF PATENT ASSERTION ENTITIES

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Donald Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Public Comments on PAE Reports: Paperwork Comment; Project No. P131203 for National Restaurant Association

Dear Secretary Clark,

We respectfully submit the following public comments to the Federal Trade Commission on behalf of the National Restaurant Association ("NRA") for the request for comments on Paperwork Comment; Project No. P131203, also known as the proposed 6(b) study on patent assertion entities.

The National Restaurant Association is the leading business association for the restaurant industry, which comprises 980,000 restaurant and foodservice outlets and a workforce of more than 13 million employees. In partnership with its state restaurant associations (SRA), NRA represents and advocate for foodservice industry interests with state, local and national policymakers. NRA provides tools and systems that help members of all sizes get significantly better operating results. And NRA offers substantial networking, education and research resources to its membership base.

NRA applauds the FTC's decision to conduct a 6(b) study regarding the impact of patent assertion entities ("PAE") on competition and the economy. NRA represents thousands of restaurateurs, many of which lack the in-house legal expertise and resources to battle intellectual property disputes and patent litigation. Restaurants are in highly competitive markets in which our members' resources are dedicated to providing the best goods and services to the consumer at the lowest cost. PAEs have increasingly targeted restaurateurs and retailers because they recognize how vulnerable they are to abusive litigation. PAEs who target restaurateurs often obtain early settlements despite valid and supportable defenses restaurants could have asserted with adequate resources.

The demands and litigation brought by PAEs harm the retail markets and ultimately consumers. They drain necessary time, resources, and money from these retailers and ultimately those costs translate to higher costs for consumers. In some instances, avoiding PAEs also causes restaurateurs to cease or limit product offerings. As egregious as the monetary costs are, these demands also stifle the ability of retailers to utilize and consider new forms of technology consumers' demand and deserve.[1] Ultimately, the conduct of PAEs harms everyone in the form of higher prices and less innovation.

The impact on innovation and small business is critical. Suppliers of new services who are threatened by these types of dubious litigation cannot shed the shadow of doubt cast upon their enterprise. This stifles the growth of enterprises that are trying to gain a foothold in the industry, and pushes the conservative (or fearful) retailer to only do business with those vendors who can display immunity because they have settled with the PAEs, often at a high cost. And in the worst case, retailers may completely abandon the adoption of new technology because of the threat of PAE litigation. All of this results in the stifling of profitability, ingenuity, and growth, three things that we desperately need in an economy that is straining to grow.

The lack of transparent information on patent assertion activities has been a barrier to market actions to stop these abusive practices. PAEs commonly hide behind a multitude of shell companies, require covenants not to sue in exchange for disclosure of the subject patent, and force non-disclosure agreements on their licensees. This creates a deficit of publicly available information that PAEs leverage to charge high licensing fees. Studies, including the recent study by the Government Accountability Office[2], often have to rely on proprietary data and limited reliable data exists on patent assertion outside of the court system. Market participants do not have widespread access to low cost sources of information that could help defend them from improper assertions. The FTC's proposed 6(b) study will generate reliable data from which to aid market actions, assist in the implementation of currently proposed legislation, fashion appropriate future reforms, and establish a framework for further information gathering and analysis that will be vital to stop abusive PAE behaviors.

NRA writes to answer questions "(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;" and "(3) ways to enhance the quality, utility, and clarity of the information to be collected" of the FTC's request for comment. The attached comments are structured as follows:

- Section I highlights how abusive patent assertions by PAEs pose a significant threat to competition and properly-functioning markets. End-users such as retailers have traditionally played almost no role in patent law and patent litigation. However, there has been a marked, increased trend of PAEs targeting end-users for quick and relatively small pay-outs coerced due to the end users lack of experience, lack of visibility into technologies developed or manufactured by others, and the high costs of litigation. PAEs

[1] *See, e.g.*, Restaurant Payments: Rapid Changes and Investments Underway, National Restaurant Association, *available at* http://www.restaurant.org/downloads/pdfs/advocacy/restaurant_payments

[2] Government Accountability Office, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality (Aug. 2013), http://www.gao.gov/assets/660/657103.pdf

seem to be targeting small retailers in particular. These PAEs send demand letters that are often vague and are based on outdated and broadly asserted – often times grossly overstated - patents. It is also becoming more common for PAEs to send infringement demands that do not even disclose the patent until the retailer signs a covenant not to sue the PAE. These demands seem to be tied more to the potential costs of information gathering and litigation than the merits of the underlying patent infringement claim. This litigation is costly and time-consuming and end users often have little choice but to settle. PAEs prey on retailers' cost-benefit analyses.

- Section II discusses how the lack of publicly available information on PAE activities impairs research, creates challenges for those crafting policy reforms, and harms market participants. Studies of PAEs often rely on proprietary data that are non-random and non-generalizable. There are also no reliable data sources for PAE activities outside the court system. The lack of public information on PAE activities prevents researchers from estimating the total harm of such activity, slows government actions, and increases the information costs for market participants hit with patent infringement claims.
- Section III states that the proposed collection of information will have practical utility and is necessary for the proper performance of the functions of the FTC. When Congress created the FTC almost a century ago, it was given the responsibility and power to conduct studies and issue reports to better inform businesses, Congress, Courts and regulators about the impact of practices that could threaten competition and harm consumers. The FTC's proposed 6(b) study will bring to light information which remains difficult to collect through public sources. This information will prove vital for Congress and other agencies working to create and implement reforms that will prevent abusive patent assertions. The proposed 6(b) study will collect data that is important for the protection of end users and will allow the government to comprehensively address abusive patent assertions across all sectors of the economy.
- Section IV provides suggestions to enhance the utility of the information to be collected. The FTC's proposed 6(b) study will be conducted alongside many reform efforts by Congress and other agencies. Therefore, the study must be timely to be useful. The study should be designed to be iterative with data collection and analysis broken up into interim reports rather than delayed until a final report can be issued. The FTC should prioritize the most important data for reform efforts and end user protection. The FTC should also use the data to guide the FTC's own actions in promoting competition and consumer welfare as soon as the data becomes available.

We applaud the FTC efforts to address the PAE issue. The abusive litigation by PAEs is causing significant harm in retail markets that ultimately harms consumers. The FTC's proposed 6(b) study on patent assertion entities will be an important step in addressing these harms.

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Respectfully Submitted,

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I. Conduct by Patent Assertion Entities is a Significant Threat to Competition and Properly-Functioning Markets

A. Patent Assertion Entities Disrupt the IP Infrastructure and Harm Competition by Skewing Incentives Towards Litigation

PAEs' entire business model depends on successfully asserting patent claims relating to products and services that are already available in the marketplace through demand letters or litigation. PAEs do not manufacture, produce, collaborate, or facilitate the introduction of new products or services to the market in any way. Unscrupulous PAEs exploit endemic flaws in the patent and litigation system to deploy patents as a tax on innovation. These flaws begin with the United States Patent and Trademark Office ("USPTO"), which grants too many patents with opaque, non-specific, and often obvious claims that purport to cover entire business models or abstract concepts.[3] This deluge of poor quality patents renders the notice function of patents inconsequential, and leads to a secondary patent market that is oversaturated and unregulated. The patent litigation framework leaves it far too easy for a holder of any patent to bring a lawsuit against entire industries, regardless of the strength of their patent or merits of their claim. The PAE faces little or no costs to litigation since it does not produce any products or offer any services, but market participants have enormous information costs in producing product and/or service information during discovery, researching the patents validity, determining the scope of the patent, and discovering whether their products and/or services actually infringe. These costs encourage quick and easy, yet very large settlements regardless of the chances of a successful defense.

Finally, it is often virtually impossible to determine the holder of a specific patent, and even more difficult to ascertain whether there are other real parties in interest ("RPI"). Patents are bought, sold, assigned, transferred, and pooled at a staggering pace, leaving putative defendants incapable of even identifying the party in interest with whom they should negotiate. PAEs combine these systemic flaws with an endless supply of patents and an untraceable network of shell corporations to create a perpetual motion machine of patent extortion.

It is important to distinguish PAE activity from traditional patent licensing. The purchase of a license from a patent holder should be analogous to the purchase of any other input in the supply chain. A manufacturing company will be able to identify a needed technology, and through a patent search will be able to identify the patent holder for that given technology or, in the case of substitute technologies, the patent holders. The manufacturing company then can reach out to the patent holders and negotiate a license at a price which is related to the benefit derived from the use of such patented technology, or determine if there is a method for working around the patented technology. The manufacturing company may even have a right to a license under existing agreements, or participation in standard setting organizations or patent pools. In any

[3] For an in-depth discussion on the patent quality problem, *see* John R. Allison, Mark A. Lemley, & Joshua Walker Patent Quality and Settlement Among Repeat Patent Litigants, 99 GEORGETOWN LAW J. 677 (2010); Peter Menell, It's Time to Make Software Patents More Clear, WIRED, Feb. 7, 2013, *available at* http://www.wired.com/opinion/2013/02/its-time-to-make-vague-software-patents-more-clear/.

scenario, there are several commonalities among licensees including 1) opportunity to identify the patent holder through public information; 2) ex ante choice to obtain a license before committing to a certain technology; and 3) opportunities for either counterclaims or future business decisions if they feel they are unfairly being targeted with patent litigation. The PAE evades all of these commonalities that make the patent system function for competing manufacturing entities.

PAEs harm the innovation infrastructure. Nearly all companies, in order to address PAE litigation, find themselves straying from their preferred business model, as they feel the need to stockpile money for outside counsel, hire additional in-house counsel, and/or forego new technology to avoid future litigation. These attempts by firms to protect themselves are impeded by high information costs or a complete lack of information that increases expenses and lowers the opportunities for government agencies to protect against abusive PAE practices that rise to the level of extortion.[4]

Restaurants, retailers and other end users are particularly vulnerable to the predatory conduct of PAEs. Most merchants are not well-versed in the complex world of patent litigation. As entities that deal with millions of consumers and have large sales they appear to be particularly attractive targets in the eyes of PAEs. Colleen Chien recently published an article in which she concluded that PAEs now target more non-tech companies than tech companies.[5]

B. Harm from PAEs Extends Well Beyond High-Tech Industries and Harms End-Users Such as Retailers

In his presentation at the PAE hearing Carl Shapiro explained that "PAEs appear to target small companies more than practicing entities" and "PAEs typically initiate litigation after [the] target has incorporated the patented technology in its products."[6] This is only part of the story. The truth is that PAEs are not only targeting smaller companies, but are also targeting companies far removed from the traditional patent litigation ecosystem such as retailers, restaurants, and non-technical Internet-based services.[7]

Here is one example. In testimony before the House Energy & Commerce Committee Subcommittee on Oversight and Investigations, General Counsel Justin Bragiel of Texas Hotel & Lodging Association stated that within the last year over 100 hotels in Texas have been subjected

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[4] These more abusive PAE activities were the subject of hearings in both the House and Senate. *Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities: Hearing Before Sen. Comm. on Commerce, Science, & Transportation*, 113th Cong. 1 (2013) *available at* http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=8d56ac21-3494-451e-85ad-6ff36888a167; *The Impact of Patent Assertion Entities on Innovation and the Economy: Hearing Before H. Comm. on Energy & Commerce*, 113th Cong. 1 (2013) *available at* http://energycommerce.house.gov/hearing/impact-patent-assertion-entities-innovation-and-economy

[5] Colleen Chien, Patent Trolls by the Numbers, Patently O, March 14, 2013, *available at* http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html.

[6] Professor and former Deputy Assistant Attorney General for Economics Carl Shapiro, Patent Assertion Entities: Effective Monetizers, Tax on Innovation, or Both?, presentation to the PAE Workshop, *available at* http://www.ftc.gov/opp/workshops/pae/docs/cshapiro.pdf.

[7] *See, e.g.*, Personal Audio, LLC v. Ace Broadcasting Network, LLC, Civil Action No. 2:13-cv-00014, Eastern District of Texas.

to patent lawsuits simply for providing WiFi to hotel guests.[8] "The complaint is accompanied by a simple demand: pay the PAE $5,000, or risk going to trial."[9] This is despite the fact that a court recently found that 23 patents covering WiFi technology owned by a PAE were only entitled to a licensing fee of 9.56 cents per unit.[10] In order to provide the WiFi access guests demand, Texas hotels have had to choose between settling or paying hundreds of thousands to defend a lawsuit. It is not feasible for hotel owners to verify whether a device manufacturer has licensed all the necessary patents or identify which products will subject them to lawsuits.

WiFi demand is equally important in many restaurant concepts, where the business feels they cannot walk away from the customer offering. However, since WiFi is not the core business product provided by most of those companies, it is very difficult to make the case to spend millions of dollars wrapped up in litigation. Several restaurateurs have been targeted by WiFi PAEs, causing some to even walk away from offering the technology to their patrons.

The effect of PAE conduct on retailers is threefold. First, as explained above, litigation and unwarranted cease and desist letters drive up costs for these businesses. These costs include not only the cost of litigation and settlement, but also the time and effort by the retailer's staff. Second, this litigation threatens to drive up costs for the legitimate provider of products or services that are subject to the infringement claim. For instance, many retailers have been sued for providing WiFi in their stores, which they usually do with a valid license from a WiFi manufacturer. In exchange, the manufacturer traditionally offers indemnification against patent infringement lawsuits. Having to fight a PAE for every customer threatens to make providing this indemnification either cripplingly expensive or completely impossible. In fact, a recent article highlights that PAE practices cost advertising agencies over $10M per year because of indemnification agreements in their contracts.[11] Finally, PAE tactics disincentivize future investment in technology, meaning that today's innovators will not have as robust a customer base as they should. Consumers benefit from continued investment in new technologies and new services, and offering these services allows firms in industries such as retail to compete in ways beyond traditional price and marketing.

C. First-Hand Accounts from NRA Members

Here are a few observations from NRA members facing patent assertions:

- White Castle is a family owned fast-food chain that employs 10,000 team members in 406 restaurants across 12 states. White Castle's entire approach to marketing has changed as a result of threatening PAE demands. Rather than pay fees to patent trolls, or spend

[8] Testimony of Justin Bragiel before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and investigations, The Impact of Patent Assertion Entities on Innovation and the Economy, Nov. 14, 2013, *available at* http://docs.house.gov/meetings/IF/IF02/20131114/101483/HHRG-113-IF02-Wstate-BragielJ-20131114.pdf

[9] Id.

[10] In re Innovatio IP Ventures, LLC, Case No. 1:11-cv-09308, Doc. # 975, Memorandum Opinion, Findings, Conclusions and Order (N.D. Ill. filed Oct. 3, 2013) *available at* http://essentialpatentblog.com/wp-content/uploads/2013/10/2013.10.03-975_Public-Version-of-Memorandum-Opinion-and-Order.pdf

[11] Nancy Hill, Patent Trolls Are a Big Headache for Ad Agencies, Too, Ad Age Digital, March 14, 2013, *available at* http://adage.com/article/digital/threat-patent-troll-litigation-looms-large-agencies/240313/.

significant resources to hire outside patent counsel, we have refrained from utilizing the alleged infringed activities. The unfortunate byproduct is that our use of QR codes and hyperlinks will be limited in the future despite the value those basic technologies can bring to our customers. Creative website designs will be passed up. And, we may make the strategic decision to cease using digital menu boards despite the potential business efficiencies they create for our operators and customers by allowing us to provide real-time up-to-date information about our latest products, promotions, and offering.

- Culver's is a privately owned and operated fast casual restaurant with over 475 locations. In the past two years Culver's has received several technology related demands from PAEs. None of the patents which the PAEs claim are being infringed upon directly relate to the products or services provided by our restaurants, nor do they directly generate any revenue for our company. The demands are not in the nature of a cease and desist so as to protect intellectual property rights, but instead in the form of a demand for money with the threat that if a license is not purchased the PAE will force our company into expensive patent litigation. The PAEs never present an opportunity to cure or provide the recipient of the demand with a clear indication of how it may work-around the claimed patented technology. The demands are always mass produced and go out to tens if not hundreds of companies at a time. The demands have all been for roughly $250,000 to $500,000 because the amount demanded has nothing to do with the benefit derived from the use of the technology or its market value had a license been sold in advance of the use of such technology, but instead the amount of the demand is set at a level that will be viewed as a discount from what the anticipated costs will be in the event that the matter is litigated. As a result of these demands, Culver's is reluctant to proceed with any new technology in the marketing and operations of its restaurants. Furthermore, due to the lack of insurance available in this area and concerns that vendors that provide products or services that could possibly be the subject of a PAE demand, Culver's has been forced into only doing business with very large companies when it does use technology, which other companies are doing as well, in the hope that the large vendors might have the wherewithal to stand-up to a PAE, whereas a smaller company will not. Eventually, this will have the effect of forcing smaller technology providers out of business.
- Cosi is an American restaurant chain that has over 100 restaurants in 16 states and the District of Columbia. Cosi has seen an increase in the number of technology-related demands from PAEs in the past couple of years, both in the form of demands for money with a threat of litigation and in the form of complaints being filed without prior notice. These demands are usually very vague and general, making it difficult to assess our exposure. We are then asked to enter into confidentiality agreements in order to obtain more details thereby limiting our ability to interact with other respondents. As a small public company, these demands from PAEs put us at a significant disadvantage in the marketplace. We have limited financial and people resources to pay or defend against these claims so we are forced to only partner with larger technology partners who can defend against these PAE claims. This limits our ability to find cost effective technology solutions in this competitive marketplace. Additionally, we are seeing a trend of technology vendors moving away from providing indemnification and defense of these types of patent infringement claims. Due to the increasing risk of these PAE demands, Cosi has been reluctant to pursue new technology strategies in its marketing and operations platforms. Even partnering with larger companies who can defend us against

these patent infringement claims will ultimately become increasingly challenging as we know the litigation risks and costs will be incorporated into vendor pricing to clients, such as Cosi, who in turn will have no choice but to pass those costs onto consumers in the way of price increases.

II. There is a Significant Lack of Publically Available Information on Patent Assertion Entity Activities

A. Scholars and Research Institutions Have Limited Resources to Demonstrate the Extent of the Harm

It has been difficult to assemble a complete profile of PAEs because of the lack of public information and the sophistication of PAE efforts to keep their practices hidden. Public studies have to rely on proprietary data, surveys of companies targeted with infringement suits, and public information from court dockets. These studies are weakened by their limitations and often rely on nonrandom and nongeneralizable data that is imperfect for statistical analysis. Even the Government Accountability Office's (GAO) study had to rely on proprietary data obtained from RPX and Lex Machina.[12] The GAO also could not find "reliable data on patent assertion outside of the court system."[13] Data of PAE activities outside of the courthouse is crucial because most patent assertion claims take place through demand letters and are settled before ever reaching court.[14]

Notwithstanding this difficulty, several important pieces of research have begun to uncover the details of the business model and the impact on the economy. For instance, the PricewaterhouseCoopers, 2011 Patent Litigation Study shows that PAEs are successful in just 23% of litigation, and even less successful in certain industries including business/consumer services, software, and telecommunications.[15] Sarah Jeruss, Robin Feldman, & Joshua Walker build on this research in The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation,[16] in which they detail the meteoric rise in the propensity of PAE lawsuits, and show that the most litigious companies are in fact PAEs. James Bessen and Michael J. Meurer discuss the macroeconomic financial implications of PAE lawsuits in The Direct Costs from NPE Disputes,[17] where they conclude that PAE litigation has cost the country over $29 billion.

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[12] Government Accountability Office, Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality 49-50 (Aug. 2013), http://www.gao.gov/assets/660/657103.pdf

[13] Id. at 49.

[14] *See,e.g.* Testimony of Professor Robin Feldman before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and investigations, The Impact of Patent Assertion Entities on Innovation and the Economy, Nov. 14, 2013, *available at* http://docs.house.gov/meetings/IF/IF02/20131114/101483/HHRG-113-IF02-Wstate-FeldmanR-20131114.pdf

[15] Chris Barry, Ted Martens, Larry Ranallo & Chel Tanger, 2011 Patent Litigation Study: Patent litigation trends as the "America Invents Act" becomes law, 2011 by PricewaterhouseCoopers, LLP, *available at* http://www.pwc.com/us/en/forensic-services/publications/2011-patent-litigation-study.jhtml.

[16] Jeruss, Sara, Feldman, Robin & Walker, Joshua H.., The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation 11 DUKE LAW & TECH. REV. 357, 2012, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158455.

[17] Bessen, James E. and Meurer, Michael J., The Direct Costs from NPE Disputes (June 28, 2012), Boston Univ. School of Law, Law and Economics Research Paper No. 12-34, *available at* http://ssrn.com/abstract=2091210 or http://dx.doi.org/10.2139/ssrn.2091210.

Professor Colleen Chien of the University of Santa Clara has several studies out in which she highlights the impact of PAEs on startups and small tech companies, and in which she explains how the mechanisms of the patent system have led to the current PAE situation. In From Arms Race to Marketplace[18] Professor Chien describes the evolution of the current patent ecosystem, including the transition from defensive patenting to offensive patent assertion by high-technology companies, the birth of intermediaries in the patent arbitrage system, and the origin of asymmetric patent warfare. Then in Startups and Patent Trolls[19] she evaluates the precise impact PAEs have on the innovation economy, particularly in Silicon Valley and the high-technology community. This research looks at a comprehensive database of patent litigation and features interviews from 223 high-tech startups regarding their experiences with patent infringement lawsuits, demand letters, and licensing relationships with patent aggregators.

These studies point to a significant emerging problem in patent assertion activities and Congress is responding appropriately with legislation. Governmental agencies, including the FTC, will need reliable data to implement whatever legislation is ultimately passed. These agencies also need reliable data to assist in any actions taken under their current powers. This data can be produced by the FTC through its special powers to investigate.

B. PAEs Take Advantage of the Lack of Public Information to Harm Market Participants

Abusive PAE practices rely primarily on a lack of information. The process often starts when vague demand letters are sent out to numerous companies that often do not have a clear indication of what patent is infringed, what product is infringing, which claims are alleged to cover the product, and who even owns the patent. Companies who receive a demand letter do not know who else has received the demand letters. When litigation is filed the defendant company often does not know what the boundaries of the patent are or whether they are already covered by a license from an upstream manufacturer. Companies that settle are often forced to sign non-disclosure agreements that prevent other companies faced with lawsuits to discover useful information. End users face an even greater information deficit because they often have no experience with the patent system and may not even know a patent attorney.

Abusive PAEs generate huge informational costs that coerce companies to settle rather than determine if their claims have merit. The American Intellectual Property Law Association estimates that the cost of litigation ranges from $350,000 to $3,000,000 to reach the end of discovery and from $650,000 to $5,000,000 to fully complete litigation.[20] The costs of a patent trial are already high when the plaintiff's claims have merit and the plaintiff pursues its case in

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[18] Colleen Chien, From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System, 62 HASTINGS LAW J. 297 (2010), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1119&context=facpubs.

[19] Colleen Chien, Startups and Patent Trolls, (September 28, 2012), Santa Clara Univ. Legal Studies Research Paper No. 09-12, *available at* SSRN: http://ssrn.com/abstract=2146251 or http://dx.doi.org/10.2139/ssrn.2146251.

[20] Comments of American Intellectual Property Law Association to the United States Patent and Trademark Office, Request for Comments on a Patent Small Claims Proceeding in the United States, April 30, 2013, *available at* http://www.uspto.gov/ip/global/patents/comments/aipla_comment_letter_on_small_patent_claims_4-30-2013.pdf

good faith. An unscrupulous PAE can increase these substantial costs, especially in the beginning stages of negotiation or a lawsuit, in order to make settling a more sound business decision regardless of the merits of the infringement allegation. For example, when FindTheBest.com was delivered a demand letter by Lumen View Technologies it arrived with a notice of a lawsuit that limited their response to 21 days.[21] Neither the demand letter nor the complaint explained which claim of Lumen View's patent infringed, which of FindTheBest's technologies was infringing, or how it infringed.[22] FindTheBest was left with the informational burden to answer these questions to determine whether they were infringing and also whether the patent was valid within a short time frame and with no inside counsel. Lumen View also made clear that they would make mounting a defense as expensive as possible.[23] The information costs of simply determining whether a patent is valid and infringed is often greater than the settlements offered by many PAEs. FindTheBest chose to fight and has already incurred $160,000 in costs since the case was filed in May of this year – over 3 times Lumen View's settlement offer of $50,000.[24]

The proposed 6(b) study will provide the necessary framework and data to establish and/or implement reforms and policies to ease these informational burdens that allow bad faith patent assertions. The proposed study will not only uncover vital information that will help stop abusive patent assertions but the very act of collecting and analyzing large volumes of industry data will help develop efficient and low cost methods of information gathering that could be used in some of the proposed reforms.[25]

III. The Proposed 6(b) Study Will Provide the Information Necessary to Properly Analyze the Problem

When Congress created the FTC almost a century ago, it gave it unique powers to conduct studies and issue reports to better inform businesses, Congress, courts and regulators about the nature of certain competitive practices. Unlike other agencies, the FTC has the power to use subpoenas to secure information from companies to conduct studies.[26] As the FTC Office of General Counsel explains, "Section 6(b) [of the FTC Act] empowers the Commission to require the filing of 'annual or special * * * [sic] reports or answers in writing to specific questions' for the purpose of obtaining information about 'the organization, business, conduct, practices,

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[21] Testimony of Director of Operations for FindTheBest.com Danny Seigle before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and investigations, The Impact of Patent Assertion Entities on Innovation and the Economy, Nov. 14, 2013, *available at* http://docs.house.gov/meetings/IF/IF02/20131114/101483/HHRG-113-IF02-Wstate-SeigleD-20131114.pdf

[22] Id.

[23] Id.

[24] Id.

[25] An example of a reform with an information gathering component is a proposed demand letter registry under consideration by the Senate Commerce, Science, & Transportation Committee. *See* Statements made by Senator Claire McCaskill et al during the Senate Commerce, Science, & Transportation Committee Hearing on Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities, *available at* http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=8d56ac21-3494-451e-85ad-6ff36888a167&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a

[26] The FTC most recently exercised this power to initiate a study into the business practices of the data broker industry. *See* http://www.ftc.gov/opa/2012/12/databrokers.shtm.

management, and relation to other corporations, partnerships, and individuals.'"[27] Congress gave the FTC this power 98 years ago because it hoped the FTC would serve as a key investigator to illuminate potentially anticompetitive practices. The question of PAEs is the perfect situation to exercise this authority.

A. The Questions Asked by the 6(b) Study Will Uncover the Information Important for End-Users

The 6(b) study as proposed is comprehensive and will provide information vital to end-users suffering from abusive PAE practices. The patent information request (Section C) will reveal real party in interest information to discover how shell companies are used and whether their use has a negative impact. The Patent Acquisition request (Section E) will give an indication on the quality of patents entering PAE markets and whether the patents asserted were created to cover the technologies later sued as infringing.[28] The Patent Assertion request (Section F) will demonstrate whether PAEs adequately research their claims before sending demand letters or filing complaints and whether demands and complaints are pursued in good faith. These sections are the most likely to uncover unfair and deceptive patent assertion practices that are subject to § 5 of the FTC Act.

The FTC should closely examine the demand letters obtained in F(1)(d) of the proposed information request for deceptive behavior barred by § 5 of the FTC Act. Examples of deceptive behavior include not identifying which patents or claims are allegedly infringed, alleging infringement based on a patent that is not actually infringed, or alleging infringement on a product that is already covered under a license by an upstream manufacturer or distributor. Deceptive demand letters are used to obtain settlements based on false or misleading information. The FTC should use this demand letter information to file charges against any PAE found to have sent deceptive demand letters in violation of § 5.

B. The Questions Asked Will Provide the Information Necessary to Inform Governmental Efforts to Stop Abusive Patent Assertion

The FTC's 6(b) power is an important and potent tool, and historically has been used as a launching point to draft legislation curbing industry abuse. A 6(b) study led to the Packers and Stockyards Act of 1921[29] and, more recently, to the Medicare Modernization Act of 2003.[30]

Both the House and the Senate are conducting hearings to examine abusive patent behaviors and many bills have been introduced to combat these behaviors.[31] One of these bills, The Innovation

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[27] Federal Trade Commission Office of the General Counsel, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, *available at* http://www.ftc.gov/ogc/brfovrvw.shtm.

[28] For example, if a patent was acquired from a failed business and that patent was later asserted against companies in a completely unrelated industry with unrelated technologies it would be a strong indication of abusive patent assertions.

[29] 7 U.S.C. §§ 181-229b.

[30] Public Law 108-173-DEC. 9, 2003.

[31] There are currently 10 bills before Congress that deal with abusive patent assertions. *See* Matt Levy, Patent Progress' Guide to Patent Reform Litigation, PATENT PROGRESS, Nov. 19, 2013, *available at* http://www.patentprogress.org/2013/11/19/patent-progresss-guide-to-patent-reform-legislation/

Act, passed in the House of Representatives on Dec. 5.[32] The proposed 6(b) study will provide much needed information to implement any legislation that is passed and shape future reforms as long as the study is designed to be iterative and timely. The FTC's proposed 6(b) study will not only unveil the business practices and negotiating techniques of PAEs, but will determine – once and for all – whether PAEs do in fact provide an efficient market function as many of them contend.[33] This information is instrumental for government efforts to enact reforms targeted at preventing patent system abuses without punishing good actors.

Much of the concern over PAEs in these comments focuses on the lack of transparency into patent trolls' businesses, and the real parties of interest in these PAE demands. This very lack of transparency is at the root of many abusive PAE practices. The FTC's 6(b) study will remedy this lack of information with an independent, unbiased study.

IV. The 6(b) Study Should be Designed to be Iterative and the Data Uncovered Should be Used by the FTC as it Becomes Available

For the study to be useful it must be completed in time to be a part of the necessary debate on patent reform. This debate is happening now because many Americans need action now. Small businesses are getting hit with bogus demand letters and patent claims now because it is cheaper to settle than litigate. Every day that goes by, without new laws in place, puts our restaurant and foodservice members, along with all other merchants, at greater risk of being victimized by patent trolls. Unfortunately, FTC 6(b) studies can often get bogged down. A recent study of authorized generic drugs took over 5 years to complete.[34] The shelf life for the types of end-user technologies that are being challenged is exceptionally short. Many of the technologies in question may be obsolete in less than even 2 years.

The FTC should design the study so that there are logical, timely checkpoints when information can be disseminated to the public. It is vital that there is a constant flow of accurate information informing the debate. The FTC should share the information they learn in many forms and without delay – through speeches, Congressional testimony and advocacy to regulators.

A. The FTC Should Issue Regular Reports and Advise Congress as Data Becomes Available

The FTC's proposed 6(b) study will be conducted alongside legislative reform efforts by Congress and will produce information that will undoubtedly be helpful for enacting legislation. The information gathered by the FTC's proposed 6(b) study will also benefit other agencies as they consider policy reforms to reduce opportunities for abusive patent assertions. Any delay in the issuance of information will create a difficult choice for Congress and other agencies working to prepare comprehensive and thoughtful reforms. They will either have to delay these

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[32] Joe Mullin, *House votes 325-91 to pass Innovation Act, first anti-patent-troll bill*, ARS TECHNICA (Dec. 5, 2013, 3:50 PM), http://arstechnica.com/tech-policy/2013/12/house-votes-325-91-to-pass-innovation-act-first-anti-patent-troll-bill/

[33] For a discussion of possible PAE efficiencies, *see* Timothy Simcoe, Patent Assertion Entities: Potential Efficiencies, presentation at the FTC/DOJ PAE Workshop, *available at* http://www.ftc.gov/opp/workshops/pae/docs/tsimcoe.pdf.

[34] Authorized Generic Drug Study: FTC Project No. P062105

reforms knowing that more economic harm will be suffered, or finalize reforms without the benefit of the FTC's collected data. Therefore, the FTC should not delay the dissemination of collected and analyzed information until a final report can be prepared. Instead, the FTC should issue regular reports as the information and analysis is completed. The FTC needs to carefully design this 6(b) study so that it provides necessary information as it is needed by Congress, governmental agencies, and the public.

B. The FTC Should Prioritize the Collection of Data Most Pertinent to Ongoing Harms

The order in which data is collected and analyzed should not be arbitrary but based on need. The FTC should work closely with Congress as well as affected market participants to determine the most important information that needs to be delivered as soon as possible. Then the FTC can design a study that occurs in steps with a report on each topic delivered on time to be useful to Congressional reform efforts.

The information most vital to end-users and victims of abusive patent assertions is information related to demand letters and patent assertion. Specifically, the information most helpful to examine the abuses experienced by end users are demand letter information and information about the process by which a PAE researches a potential licensee before making a demand or filing a complaint.[35]

C. The Study Should Guide the FTC's Actions in Promoting Competition and Consumer Welfare

The data the FTC collects is not only vital to the public, but also to guiding the FTC's own actions. This requires regular dissemination of information not only externally, but internally as well. The FTC should use the study data when filing amicus briefs, comments, testifying before Congress, or any other activity it regularly engages in to promote its core functions. The FTC should also initiate investigations as it uncovers abusive practices that violate consumer protection and competition laws. The FTC already has the power to take actions against abusive patent trolls. The 6(b) study reports should be drafted to serve as a tool for the agency when taking action against this type of deceptive and unfair trade practice.

The proposed 6(b) study will provide information on consumer protection and competition in the patent exchange and assertion industry. These areas are core to the FTC's purpose and the study data should not be wasted but utilized as results are produced. It is the FTC's duty to protect competition and end users, who are consumers of technologies targeted by patent trolls.

Conclusion

The proposed FTC 6(b) study is an important tool in providing necessary information about PAE industry practices that cannot be discovered through public sources. The FTC study will fill a research gap in information and help Congressional and other agency efforts to address patent abuse without harming legitimate patent transfers and assertions. The study will also help guide

[35] These requests are found in sections F(1) and F(5) of the proposed 6(b) study questions.

FTC action and investigations into deceptive and unfair practices to protect end users, including small businesses, retailers, and consumers. The study is of particular importance to end users because they are increasingly targeted by abusive PAE assertions. These end users are ill-equipped to deal with patent demands and are coerced into quick settlements for amounts lower than the price of litigation. Abusive PAEs prey on the lack of information and the expense of litigation. The FTC's proposed 6(b) study will lay the groundwork for corrective measures that will put an end to these abuses.

We appreciate the opportunity to provide comments on the FTC's proposed 6(b) study process, and we look forward to working with the FTC to provide any additional information that will be helpful to the realization of significant patent troll reforms.