The Federal Circuit Bar Association

BENCH & BAR

PRESIDENT
Jeanne E. Davidson, Esquire
United States Department of Justice

PRESIDENT-ELECT
Edgar Haug, Esquire
Frommer Lawrence & Haug LLP

TREASURER
Nicholas Groombridge, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison LLP

SECRETARY
Deborah Miron, Esquire

BOARD OF DIRECTORS
Meredith (Mimi) Addy, Esquire
Steptoe & Johnson LLP

Jeff Bove, Esquire
Novak Druce Connolly Bove + Quigg LLP

Eric Cohen, Esquire
Katten Muchin Rosenman LLP

William Colwell, Esquire
Northrop Grumman Corporation

Chris Cotropia, Esquire
Richmond Law School

Patrick J. Coyne, Esquire
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

Andy Culbert, Esquire
Microsoft Corporation

Robert Deberardine, Esquire
Sanofi

Michael Esch, Esquire
Wilmer Cutler Pickering Hale & Dorr LLP

Daniel Graham, Esquire
Wiley Rein LLP

Martin Hockey, Esquire
United States Department of Justice

Robert Huffman, Esquire
Akin Gump Strauss Hauer & Feld LLP

Michelle Lee, Esquire

Sonal Mehta, Esquire
Weil, Gotshal & Manges LLP

David Ralston, Esquire
Foley & Lardner LLP

Neal Reynolds, Esquire United States International Trade Commission

Emily Tait, Esquire
Honigman Miller Schwartz and Cohn LLP

Jamie Underwood, Esquire
Alston & Bird LLP

Kristin Yohannan, Esquire
Cadwalader Wickersham & Taft LLP

EX OFFICIO
Daniel E. O'Toole, Circuit Executive
United States Court of Appeals for the Federal Circuit

FOUNDING EXECUTIVE DIRECTOR
George E. Hutchinson, Esquire

EXECUTIVE DIRECTOR
James E. Brookshire, Esquire

DELEGATE TO ABA
Laura Masurowsky, Esquire
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

Federal Trade Commission
Office of the Secretary
Constitution Center
400 Seventh St., SW
Room 5610
Washington, DC 20024

(By Courier)

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
NOV 26 2014
SECRETARY

Dear Sir or Madame:

Re: In the Matter of MPHJ Technology Investments, LLC, et al., File No. 142 3003

We write on behalf of the Federal Circuit Bar Association with respect to the invitation for comments on the proposed Agreement Containing Consent Order in File No. 142 3003. Our national Association represents the legal community on matters relating to patent quality, enforcement, and adjudication. These comments are submitted on behalf of only our private litigation and corporate practitioner members; Government members have not participated in the preparation or submission of this letter.

Abusive behavior, whether by so-called "patent trolls" or anyone else, is unacceptable. It unfairly burdens America's most successful economic engine—innovation and the patent system which supports it. Abusive behavior places inappropriate burdens on innocent actors whose commerce is critical to the success of the American economy. The "Agreement Containing Consent Order" proposed In the Matter of MPHJ Technology Investments, LLC, et al, File No. 142 3003, draws upon the definition of "commerce" in Section 4 of the FTC Act for the purpose of avoiding deceptive trade practices under Section 5(a) of the Act. It constitutes an effective method to curb and to preclude abuse. That one of an abuser's weapons might be the threat of litigation does not alter the essential character of the behavior as a deceptive trade practice. The proposed Agreement demonstrates that the FTC Act can be an effective tool to forestall exploitative behavior. We strongly support this approach.

We recognize that the mix of tools to address deceptive trade practices varies with the situation. The definition of "Patent Assertion Communication" appears to the Association to strike an appropriate balance. The definition focuses on representations which "expressly or implicitly" assert infringement, an obligation to obtain a license, or the possibility of a compensation obligation. In turn, Section IA of the order prohibits false or unsubstantiated patent pricing; Section IB, false or unsubstantiated representations concerning licensing, sales, settlement, or litigation; Section IC, misrepresentations of the existence of a lawsuit; and, Section ID, representations concerning the initiation of lawsuits absent a decision to do so and the possession of competent and reliable evidence substantiating the likelihood of litigation. This structure–pricing, licensing (sales, settlement, or litigation), and representations on the existence or threat of litigation–places effective restraints on the asserted deceptive behavior. It does so, using the existing authority of the FTC Act, requiring no legislative amendment.

Thank you for the opportunity to provide these comments. If we can provide additional information on this or any other issue, please contact us.

Sincerely yours,

James E. Brookshire
Executive Director

1620 I Street NW, Suite 801 Washington, DC 20006 (202) 466-3923 www.fedcirbar.org