No. 18-1367

IN THE
United States Court of Appeals for the Federal Circuit

INTELLECTUAL VENTURES I LLC; INTELLECTUAL VENTURES II LLC,
Plaintiffs-Appellees,

INVENTION INVESTMENT FUND II, LLC; INTELLECTUAL VENTURES MANAGEMENT, LLC; INVENTION INVESTMENT FUND I, L.P.,
Third-Party Defendants-Appellees,

v.

CAPITAL ONE FINANCIAL CORPORATION *et al.*,
Defendants/Third-Party Plaintiffs-Appellants.

On Appeal from the
United States District Court for the District of Maryland
No. 8:14-cv-111 (Hon. Paul W. Grimm)

BRIEF FOR THE UNITED STATES OF AMERICA AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY (CORRECTED)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASE 2

A. Legal Background 3

B. Factual And Procedural Background 7

SUMMARY OF ARGUMENT 10

ARGUMENT 11

Enforcement Of Patents Through Litigation Does Not Protect The Acquisition Of Those Patents From Antitrust Challenge 11

CONCLUSION 21

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES:

Abbott Labs. v. Brennan,
952 F.2d 1346 (Fed. Cir. 1991) 5

Abbott Labs. v. Teva Pharm. USA, Inc.,
432 F. Supp. 2d 408 (D. Del. 2006) 16

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988) 4, 12

Amphastar Pharm. Inc. v. Momenta Pharm., Inc.,
850 F.3d 52 (1st Cir. 2017) 13, 21

Atari Games Corp. v. Nintendo of Am., Inc.,
897 F.2d 1572 (Fed. Cir. 1990) 4

Cal. Motor Transp. Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 3, 4, 12

Coastal States Mktg., Inc. v. Hunt,
694 F.2d 1358 (5th Cir. 1983) 13

Columbia v. Omni Outdoor Advert., Inc.,
499 U.S. 365 (1991) 3, 14, 15

Cont'l Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 3

Cybor Corp. v. FAS Techs., Inc.,
138 F.3d 1448 (Fed. Cir. 1998) 6

Dawson Chem. Co. v. Rohm & Haas Co.,
448 U.S. 176 (1980) 5

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 1, 3, 12

TABLE OF AUTHORITIES—Continued

Page(s)

Eastman Kodak Co. v. Goodyear Tire & Rubber Co.,
114 F.3d 1547 (Fed. Cir. 1997) 6, 18

ERBE Elektromedizin GmbH v. Canady Tech. LLC,
629 F.3d 1278 (Fed. Cir. 2010) 12

FTC v. Procter & Gamble Co.,
386 U.S. 568 (1967) 16

FTC v. Univ. Health, Inc.,
938 F.2d 1206 (11th Cir. 1991) 19

Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.,
362 F.3d 1367 (Fed. Cir. 2004) 12

Ill. Tool Works Inc. v. Indep. Ink, Inc.,
547 U.S. 28 (2006) 5

In re Indep. Serv. Orgs. Antitrust Litig.,
203 F.3d 1322 (Fed. Cir. 2000) 5

Intellectual Ventures I LLC v. Capital One Bank (USA),
792 F.3d 1363 (Fed. Cir. 2015) 7, 8

Intellectual Ventures I LLC v. Capital One Fin. Corp.,
850 F.3d 1332 (Fed. Cir. 2017) 7

Intellectual Ventures I LLC v. Capital One Fin. Corp.,
No. 13-740, 2013 WL 6682981 (E.D. Va. Dec. 18, 2013)................. 8

Kobe, Inc. v. Dempsey Pump Co.,
198 F.2d 416 (10th Cir. 1952) 6

Pharm. Research & Mfrs. of Am. v. FTC,
790 F.3d 198 (2015) 18

Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.,
508 U.S. 49 (1993) 4, 11

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Page(s)

PrimeTime 24 Joint Venture v. Nat'l Broad. Co.,
219 F.3d 92 (2d Cir. 2000) 15, 16

Teva Pharm. USA, Inc. v. Sandoz, Inc.,
789 F.3d 1335 (Fed. Cir. 2015) 6

United Mine Workers v. Pennington,
381 U.S. 657 (1965) 1, 3, 12, 13

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 5

STATUTES:

15 U.S.C.:

§ 2 .... 2, 3, 5, 6, 7, 8, 17, 20
§ 18 .... 2, 3, 6, 7, 8, 16, 17, 18, 20
§ 18a(a) 18
§ 25 19
§ 53(b) 19

35 U.S.C.:

§ 154(a)(1) 5

RULES:

Fed. R. App. P. 29(a) 1

GOVERNMENT MATERIALS:

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No. C-4060 (Fed. Trade Comm'n Oct. 2, 2012),
https://www.ftc.gov/sites/default/files/documents/cases/2002/
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Page(s)

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Herbert J. Hovenkamp, *Prophylactic Merger Policy*, Univ. of Penn. Inst. for Law & Econ. Research Paper No. 18-3 (Jan. 6, 2018), https://ssrn.com/abstract=3090650 .... 6, 17, 19, 20

STATEMENT OF INTEREST

This case concerns the scope of the *Noerr-Pennington* doctrine, which protects attempts to influence the passage or enforcement of laws, including through litigation, from antitrust liability. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Here, a company defending against a patent-infringement lawsuit asserted antitrust counterclaims against the plaintiff. The district court dismissed the antitrust counterclaims based, in part, on its determination that the challenged conduct included patent-litigation activity that was protected by the *Noerr-Pennington* doctrine.

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the government) enforce the federal antitrust laws and have a strong interest in the substantive and procedural aspects of those laws. The government files this brief, pursuant to Fed. R. App. P. 29(a), to address the district court's statement that, "even if the . . . litigation allegations could be excised from [the antitrust claimant's] pleadings," *Noerr-Pennington* would protect the patent holder from liability—including for its patent

acquisitions—because litigation was "one component of [the] larger scheme" of allegedly anticompetitive conduct. Mem. Op. 23 (D. Ct. Dkt. No. 686) (Op.). That language incorrectly suggests that the presence of protected litigation activity shields non-petitioning conduct (e.g., asset acquisitions) from antitrust liability. Accordingly, if the Court reaches the *Noerr-Pennington* issue, it should clarify that *Noerr-Pennington* does not protect anticompetitive patent acquisitions from antitrust liability, regardless of whether the patent acquirer engages in protected litigation activity. The government expresses no view on any other grounds on which the Court may decide the case.

STATEMENT OF THE ISSUE

Whether, under the *Noerr-Pennington* doctrine, a non-sham patent-infringement lawsuit shields an anticompetitive patent acquisition from antitrust scrutiny under Section 2 of the Sherman Act, 15 U.S.C. § 2, or Section 7 of the Clayton Act, *id.* § 18.

STATEMENT OF THE CASE

On December 1, 2017, the U.S. District Court for the District of Maryland granted summary judgment to five related entities (collectively Intellectual Ventures), the counter-defendants to Capital

One's antitrust counterclaims alleging that Intellectual Ventures violated Section 2 of the Sherman Act and Section 7 of the Clayton Act. Capital One appeals that decision.

A. Legal Background

This case involves the *Noerr-Pennington* doctrine, which protects petitions to the government for redress. The doctrine provides "that no violation of the [antitrust laws] can be predicated upon mere attempts to influence the passage or enforcement of laws." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *accord United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). And the doctrine "extends to all departments of the Government," thus protecting "[t]he right of access to the courts." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

Noerr-Pennington does not, however, protect "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962). Nor does it protect persons who "use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Columbia v. Omni Outdoor Advert., Inc.*, 499

U.S. 365, 380 (1991) (emphases in original). In the litigation context, this limitation is called the "sham litigation" exception and withdraws *Noerr-Pennington* protection from "private action that is not genuinely aimed at procuring favorable government action." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (1993) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)); *see Cal. Motor Transp. Co.*, 404 U.S. at 513 ("a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused").

Here, the *Noerr-Pennington* issue arises in the context of antitrust claims brought against an entity that was suing to enforce its portfolio of acquired patents. As this Court has observed, antitrust law and patent law are "complementary, as both are aimed at encouraging innovation, industry and competition." *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990). The patent system "provide[s] incentives for innovation and its dissemination and commercialization by establishing enforceable property rights," while "antitrust laws promote innovation and consumer welfare by

prohibiting certain actions that may harm competition." Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 1.0 (2017) (*Antitrust-IP Guidelines*).

A valid patent confers the right to exclude others from practicing the invention claimed in the patent. 35 U.S.C. § 154(a)(1); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980). Courts often refer to this right to exclude as the "patent monopoly," but the right to exclude others does not—in and of itself—create a monopoly in the antitrust sense. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006) ("[A] patent does not necessarily confer market power upon the patentee."); *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991) (same); *Antitrust-IP Guidelines* § 2.2 (same). Moreover, "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (en banc) (per curiam) (quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000)).

The antitrust laws at issue in this case are Section 2 of the Sherman Act, which makes it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several

States," 15 U.S.C. § 2, and Section 7 of the Clayton Act, which prohibits the acquisition of assets when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," *id.* § 18. Both could apply to anticompetitive patent acquisitions. For example, a patent holder violates Section 2 when it attempts to monopolize an industry by acquiring "every important patent" to that industry. *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 422-24 (10th Cir. 1952). And Clayton Act "section 7 may prohibit an acquisition, such as the acquisition of some patent licenses, if 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'" *Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1557 (Fed. Cir. 1997) (citation omitted);[1] *accord* Herbert J. Hovenkamp, *Prophylactic Merger Policy* 21 & n.93, Univ. of Penn. Inst. for Law & Econ. Research Paper No. 18-3 (Jan. 6, 2018) (citing cases).

[1] *Eastman Kodak* was abrogated for several years, on other grounds, by *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448, 1454-55 (Fed. Cir. 1998) (en banc). But *Cybor* itself was subsequently abrogated, as explained by *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1339-40 (Fed. Cir. 2015).

B. Factual And Procedural Background

Intellectual Ventures purchases patents and aggregates them into portfolios that it seeks to license to businesses. Intellectual Ventures sought to license Capital One to use its portfolio of thousands of financial-services patents. After the parties failed to agree on a license, Intellectual Ventures sued Capital One for patent infringement, first in the Eastern District of Virginia in 2013 (on five patents) and then in the District of Maryland in 2014 (on five different patents). Capital One asserted antitrust counterclaims in both actions, alleging that Intellectual Ventures violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize a market for financial-services patents (defined as Intellectual Ventures' portfolio) and that Intellectual Ventures' acquisition of these patents violated Section 7 of the Clayton Act.

All claims of infringement of the financial-services patents Intellectual Ventures asserted in these cases have been withdrawn or rejected because the patents were invalid or unenforceable. *See Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332 (Fed. Cir. 2017) (affirming District of Maryland decisions); *Intellectual*

Ventures I LLC v. Capital One Bank (USA), 792 F.3d 1363 (Fed. Cir. 2015) (affirming Eastern District of Virginia decision). The litigation on Capital One's antitrust counterclaims, however, continued in the District of Maryland.[2]

In the decision under review, the district court granted summary judgment on those counterclaims in favor of Intellectual Ventures. Op. 1-2, 52. The court held that Capital One's antitrust claims were barred by the *Noerr-Pennington* doctrine. Op. 20-39.[3] It understood Capital One's Section 2 and Section 7 claims to rest on allegations that Intellectual Ventures acquired market or monopoly power through patent aggregation, concealment, and litigation, which enabled it to demand from potential licensees (like Capital One) take-it-or-leave-it,

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[2] Capital One's antitrust counterclaims in the Eastern District of Virginia were dismissed for failure to state a claim. *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, No. 1:13-cv-740, 2013 WL 6682981, at *5-8 (E.D. Va. Dec. 18, 2013). Capital One cross-appealed that dismissal, but later moved to dismiss its cross-appeal, which this Court did. *Intellectual Ventures I LLC*, 792 F.3d at 1365 n.1.

[3] The district court's summary-judgment decision was also based on an alternative and independent ground: the judgment in the Eastern District of Virginia collaterally estopped Capital One from relitigating its antitrust claims in the District of Maryland. Op. 39-52. The government expresses no opinion on that portion of the court's decision.

supracompetitive royalties to license its patent portfolio. *See* Op. 21-22. In the court's view, Intellectual Ventures' litigation activity was "an integral component of Intellectual Ventures' alleged strategy underlying all of Capital One's claims," Op. 22, and so placed all of the challenged conduct squarely within the protections of the *Noerr-Pennington* doctrine.

The district court rejected Capital One's contention that *Noerr-Pennington* does not extend to "litigation conduct [that] is part of a broader monopolistic scheme." Op. 21. And it concluded that, "even if the sham litigation allegations could be excised from its pleadings," *Noerr-Pennington* still applied because the litigation was "one component of a larger scheme" of anticompetitive conduct. Op. 23. The court then considered whether Capital One had established that Intellectual Ventures' patent-enforcement litigation was "sham litigation" and therefore not protected from antitrust liability by the *Noerr-Pennington* doctrine. It held that Capital One had not, and further, that no other exception to the *Noerr-Pennington* doctrine applied. Op. 24-39.

SUMMARY OF ARGUMENT

The *Noerr-Pennington* doctrine protects legitimate petitioning activity, including patent-infringement litigation, from antitrust scrutiny. It applies even when the petitioning activity is part of an overall course of anticompetitive conduct. The petitioning activity (and conduct incidental to it) remains protected.

But *Noerr-Pennington* does not protect non-petitioning conduct that is not incidental to petitioning, even if both are part of the same course of conduct. The district court's opinion, however, could be read to suggest that Capital One's antitrust claims could not survive because, subsequent to the challenged acquisition, Intellectual Ventures filed patent-infringement litigation that Capital One alleged was "one component of [the] larger scheme" of anticompetitive conduct. Op. 23. That suggestion is incorrect. An acquiring entity is not protected from the antitrust laws just because it may subsequently exercise its unlawfully obtained market power through litigation.

Accordingly, if the Court reaches the *Noerr-Pennington* issue, it should clarify that the *Noerr-Pennington* doctrine does not protect

anticompetitive patent acquisitions from antitrust liability regardless of whether the patent acquirer engages in protected litigation activity.

ARGUMENT

ENFORCEMENT OF PATENTS THROUGH LITIGATION DOES NOT PROTECT THE ACQUISITION OF THOSE PATENTS FROM ANTITRUST CHALLENGE

The district court's *Noerr-Pennington* analysis employed overly broad language when it said that, "even if the . . . litigation allegations could be excised from [Capital One's] pleadings," *Noerr-Pennington* would protect Intellectual Ventures from antitrust liability—even for its non-petitioning activity—because litigation was "one component of [the] larger scheme." Op. 23. In this way, the court suggested, incorrectly, that the mere presence of protected petitioning activity in an overall course of anticompetitive conduct shields non-petitioning aspects of that course of conduct from antitrust liability.[4]

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[4] The government expresses no view on the district court's sham-litigation-exception analysis, Op. 25-39, other than to note that the court misread *Professional Real Estate Investors*, 508 U.S. at 60-61, to mean that the subjective prong of the sham-litigation exception can be satisfied only if the antitrust defendant sues a competitor. Op. 38. This Court has not focused exclusively on the marketplace relationship between the plaintiff and the defendant, but instead has said that *Professional Real Estate Investors*' subjective prong addresses whether

1. Under the *Noerr-Pennington* doctrine, a person or entity may, "without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *see United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). Legitimate petitioning activity, even if "intended to eliminate competition," "is not illegal, either standing alone or as part of a broader scheme itself violative of the [antitrust laws]." *Pennington*, 381 U.S. at 670.

Noerr-Pennington protection extends only to petitioning activity itself and to restraints that are "'incidental' to a valid effort to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Noerr*, 365 U.S. at 143). Incidental restraints include those that are "reasonably and normally

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the antitrust defendant filed a baseless suit out of "a desire to impose anticompetitive harm from the judicial process rather than obtain judicial relief." *ERBE Elektromedizin GmbH v. Canady Tech. LLC*, 629 F.3d 1278, 1291 (Fed. Cir. 2010).

attendant upon effective" petitioning. *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.*, 362 F.3d 1367, 1376 (Fed. Cir. 2004) (quoting *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983)).

At the same time, although protected litigation activity cannot itself be the antitrust violation, that activity may be used to show other things, such as intent. *See Pennington*, 381 U.S. at 670 n.3. Or, once the antitrust violation is established on other grounds, the costs of defending against litigation can be incorporated in an award of damages. *See Amphastar Pharm. Inc. v. Momenta Pharm., Inc.*, 850 F.3d 52, 57-58 (1st Cir. 2017); 1 Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 11.04[F], at 11-83 (3d ed. 2018).

2. The district court rightly held there is no "overall scheme" exception to *Noerr-Pennington* that withdraws protection from petitioning activity simply because it is part of a larger course of anticompetitive conduct. *See* Op. 21-24; *Pennington*, 381 U.S. at 670. The district court also appeared to recognize that, to assess whether IV's conduct violated the antitrust laws, it should disregard Capital One's allegations of protected litigation activity. *See* Op. 23.

But then the court used overbroad language to suggest that "even if the . . . litigation allegations could be excised from [Capital One's] pleadings," *Noerr-Pennington* would still apply to the non-petitioning aspects of the alleged unlawful anticompetitive scheme because litigation was "one component of [that] larger scheme." Op. 23. This suggestion cannot be reconciled with *Pennington*, which specifically acknowledged that protected petitioning activity may be part of a larger anticompetitive, and hence unlawful, course of conduct. *See* 381 U.S. at 670. In such circumstance, the Court distinguished between the petitioning activity that was "not illegal" and the "broader scheme"—of which the petitioning activity was a "part"—that was "itself violative of the Sherman Act." *Id.* In other words, the non-petitioning aspects of an anticompetitive course of conduct may be sufficient to establish a violation of the antitrust laws, even though the petitioning activity itself remains protected. *See id.*

Other Sherman Act cases confirm that conduct that falls outside protected petitioning may violate the antitrust laws. In *Columbia v. Omni Outdoor Advertising*, for example, the Supreme Court considered whether an antitrust claimant could challenge an alleged

anticompetitive course of conduct that included activity protected by *Noerr-Pennington*. 499 U.S. 365, 384 (1991). The fact that the conduct included protected activity did "not entirely resolve the dispute" because there were "other activities . . . at issue"—namely, "private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract." *Id.* The Court therefore remanded for a determination whether "the evidence was sufficient to sustain a verdict on the basis of these other actions alone." *Id.*

The Second Circuit reached a similar conclusion in a Sherman Act case in which a satellite operator alleged that network broadcasters "engaged in a concerted refusal to negotiate copyright licenses" with it. *PrimeTime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 98 (2d Cir. 2000). The Second Circuit rejected the broadcasters' argument that their subsequent filing of copyright-infringement lawsuits protected them from antitrust liability for their alleged preexisting agreement not to deal with the satellite operator. *Id.* at 102-03. The court distinguished the agreement from the lawsuits, stating that "copyright holders may not agree to limit their individual freedom of action in licensing future rights to such an infringer before, during, or after the

lawsuit." *Id.* at 103. "Such an agreement would, absent litigation, violate the Sherman Act, and cannot be immunized by the existence of a common lawsuit." *Id.* (citation omitted). Thus, "an unlawful agreement, or an unlawful overall scheme, do[es] not become lawful because [it] may be enforced by immunized litigation." *Abbott Labs. v. Teva Pharm. USA, Inc.*, 432 F. Supp. 2d 408, 429 (D. Del. 2006) (citations omitted).

The district court's decision raises particularly stark concerns in the context of Section 7. A Section 7 violation exists at, or before, the point of "acquisition," 15 U.S.C. § 18, and "there is . . . no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play," *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). "The core question" to determine whether the acquisition violates Section 7 is whether it "may substantially lessen competition, and necessarily requires a prediction of the [acquisition's] impact on competition, present and future." *Id.* This inquiry focuses on the probable effect of the acquisition. *See id.* The particular mechanism the acquiring party might then use to wield its unlawfully obtained power cannot undo that violation. *See id.*

The acquiring entity's subsequent decision to assert its property rights through litigation does not change the nature of the transaction or its susceptibility to antitrust enforcement. Consider this hypothetical: ABC Medical Company manufactures and leases x-ray machines. ABC buys out its main competitor, and so acquires monopoly power that enables it to raise its prices to supracompetitive levels. It could charge the higher rates when renewing leases with existing customers and when negotiating leases with new customers. Of course, if existing customers refused the higher prices, ABC could sue to repossess its machines. But that prospect does not change the fact that ABC's acquisition of its competitor was unlawful, both because it created a monopoly in violation of Section 2, 15 U.S.C. § 2, and because the effect of the acquisition was "substantially to lessen competition, or to tend to create a monopoly," in violation of Section 7, *id.* § 18.

Patent acquisitions are no different. A patent acquirer has the right to enforce its newly acquired patents, but the patent laws do "not permit the creation of monopoly by means of [patent] transfer rather than invention." Herbert J. Hovenkamp, *Prophylactic Merger Policy* 23, Univ. of Penn. Inst. for Law & Econ. Research Paper No. 18-3 (Jan. 6,

2018); *see Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1557 (Fed. Cir. 1997) (recognizing that Section 7 applies to acquisitions of patent rights). The patent acquisition is what "may substantially lessen competition"—not any potential subsequent enforcement action. 15 U.S.C. § 18.

DOJ and FTC routinely analyze patent acquisitions under the antitrust laws. *See Antitrust-IP Guidelines* § 5.7 & Ex. 10. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 facilitates this analysis by requiring persons intending to acquire assets at or above a threshold value to provide notice of the transaction to the government, and wait a designated period before consummating the acquisition, to allow for government investigation of the likely competitive effects of the transaction. 15 U.S.C. § 18a(a). This notification and review process can apply to the acquisition of patents and patent rights, such as licenses. *See Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 201-02, 208 (2015) (upholding Hart-Scott-Rodino Act rule requiring notification of exclusive licenses to pharmaceutical patents that grant all commercial rights). And whether through this review process or under their general enforcement authority, DOJ and FTC have the

ability to prevent the anticompetitive transfer of patents before they are asserted against others. *See* 15 U.S.C. § 25 (government has duty to "institute proceedings in equity to prevent and restrain" Clayton Act violations); *id.* § 53(b) (similar); *cf., e.g.*, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225-26 (11th Cir. 1991) (directing district court to issue preliminary injunction against consummation of asset acquisition); DOJ Closing Statement (Feb. 13, 2012) (explaining decision to close investigation into acquisitions of patent portfolios by Google, Apple, and Microsoft). Antitrust enforcers similarly have the ability to challenge patent acquisitions after the acquirer has begun asserting the patents against others because the unlawful conduct remains the anticompetitive acquisition; the subsequent assertion of the acquired patents through infringement litigation is simply a lawful tool used to reap the rewards from unlawful conduct. *See, e.g.*, Decision & Order, *In re Biovail Corp.*, No. C-4060 (FTC Oct. 2, 2012) (ordering divestiture of illegally acquired exclusive patent license); *see generally* Hovenkamp, *Prophylactic Merger Policy*, *supra*, at 19-24 (explaining Clayton Act limitations on patent acquisitions).

Thus, enforcement of Section 7, whether before or after the patent owner has alleged infringement of its patented invention, does not run afoul of *Noerr-Pennington* protection. Such enforcement challenges the legality of the antecedent acquisition, not any subsequent petitioning activity. *See* FTC, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine: An FTC Staff Report* 21 n.87 (2006).

3. Interpreting *Noerr-Pennington* to protect a patent acquisition from antitrust liability simply because it is followed by protected petitioning activity, however, would significantly hinder both private and government enforcement of Sherman Act Section 2 and Clayton Act Section 7. *See* Hovenkamp, *Prophylactic Merger Policy*, *supra*, at 23 ("[i]f taken seriously the district court's holding would effectively prohibit application of § 7 of the Clayton Act to virtually any acquisition of rights in intellectual property"). An acquiring entity need only file a lawsuit asserting its patent rights (or perhaps only threaten to file a lawsuit) to avoid any antitrust challenge to its anticompetitive acquisition of patent rights. Such an expansion of *Noerr-Pennington* finds no justification in the need to protect petitioning activity. "The mere existence of a lawsuit does not retroactively immunize prior anti-

competitive conduct." *Amphastar*, 850 F.3d at 57. Likewise, *Noerr-Pennington* does not protect anticompetitive patent acquisitions from antitrust liability simply because the patent holder subsequently engages in protected litigation activity.

CONCLUSION

If the Court reaches the *Noerr-Pennington* issue, it should clarify that the *Noerr-Pennington* doctrine does not protect anticompetitive patent acquisitions from antitrust liability.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32(a), because this Brief contains 3,856 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(b).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in New Century Schoolbook, 14-point font, using Microsoft Office Word 2013.

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CERTIFICATE OF SERVICE

I certify that on May 11, 2018, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties.

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