Testimony of

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Before the

Subcommittee on Intellectual Property, Competition and the Internet

of the

House Committee on the Judiciary

Room 2141, Rayburn House Office Building

February 17, 2012

"Litigation as a Predatory Practice"

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Good morning, Chairman Goodlatte, Ranking Members Watt and Conyers, and members of the Subcommittee. I am Doug Richards, and I am managing partner of the New York office of the law firm of Cohen Milstein Sellers & Toll. My legal practice focuses mainly on antitrust claims, largely including antitrust claims arising from unfounded patent litigation. I have been asked to testify today to share my perspectives concerning the scope of immunity that one should have from antitrust liability stemming from use of litigation as a predatory practice. My perspectives on that question stem from my experience in having represented plaintiffs in several antitrust cases during the last ten years that asserted claims of sham litigation, arising mainly from defective patents. I am testifying on my own behalf, and the opinions expressed are my own.

Thank you for giving me the opportunity to testify about current legal standards governing antitrust liability stemming from sham litigation. It is important that the law governing Noerr-Pennington immunity strike a correct balance between the need to reward invention by allowing intellectual property owners to obtain and protect their intellectual property through litigation, on one hand, and the need to preserve competition in the face of unfounded intellectual property claims, on the other. These antitrust issues often arise when a patent-holder sues a company alleging patent

infringement, such as when a brand name pharmaceutical company sues a generic drug company for infringing its patents, and wins or settles the case. Purchasers of the drug at issue then sometimes bring an antitrust suit against the brand name pharmaceutical company claiming that the patent litigation was sham litigation because the patent was invalid due to fraud on the part of the patent-holder in obtaining the patent.

I believe that the law is currently out of balance, and effectively immunizes unfounded litigation to too great a degree from challenge under antitrust law. In several key respects, legal hurdles that an antitrust plaintiff must clear in order to pursue antitrust claims based on predatory litigation have been set too high by the courts. The result is that dominant corporations are often not held duly accountable when they bring unfounded intellectual property claims for the purpose of excluding competitors from the marketplace. In resolving the tension between goals of antitrust and of intellectual property, the courts have stacked the deck in favor of intellectual property rights, even when they are legally unfounded, and to the detriment of the public's right to protect itself under antitrust law against unjustified monopoly prices.

Under the *Professional Real Estate Investors* case,[1] the core requirement for antitrust liability arising from a claim of sham litigation is

that the claim must be both objectively and subjectively baseless. Even from the outset of the analysis in actual cases, this dichotomy between "objective" baselessness and "subjective" baselessness is often unclear. Suppose, for example -- as is often true in these cases -- that the antitrust plaintiff has uncovered evidence that a patent holder actually conducted its own tests, prior to obtaining a patent, that showed in one way or another that the patent should not be granted. Does that evidence go to objective baselessness, subjective baselessness, or both? If those tests were not part of the published literature, defendants often argue that they are irrelevant to "objective" baselessness because all they show is what the defendant knew subjectively, and not what some sort of objective "reasonable person" would know. But shouldn't a test of baselessness address what the defendant actually knew? There is no sensible reason to divorce the objective reasonableness inquiry from facts actually known at the time by the antitrust defendant, if the goal is to deter groundless claims. In actual cases, to focus on what was actually known by a defendant often provides a richer and more reliable guide to what someone in the position of the antitrust defendant should have known, than to limit one's focus in the first instance only to what some purely hypothetical, "reasonable" person would have known in some hypothetical context. Even if "objective" baselessness is required,

therefore, what the defendant actually knew should be one of the most reliable guides to whether a case was baseless in light of known facts.

Nevertheless, the Court in the *Professional Real Estate* case wrote that "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."[2] One can reasonably argue that this statement relates only to evidence of the defendants' subjective “motivation,” and not to the defendant's subjective knowledge of facts. However, the Federal Circuit has not recognized that distinction, holding instead that facts that only the defendant itself was aware of prior to filing suit cannot properly be considered in making the objective reasonableness inquiry.[3] In cases where the antitrust defendant clearly knew facts that made the patent invalid, confusion about the fuzzy distinction between “objective” and “subjective” baselessness can cause courts to turn a blind eye to the clearest and most compelling evidence that a case had no reasonable basis at all.

That is not the only way in which current case law encourages courts to turn a blind eye to critical facts. The Federal Circuit stated a year ago that "[t]he existence of objective baselessness is to be determined based on the record ultimately made in the infringement proceedings."[4] Defendants since that time have argued that under that precedent, even if an antitrust plaintiff

has clear evidence that facts that were not available to the patent challenger in an underlying patent case show that the patent was invalid or unenforceable, the plaintiff is precluded from relying on those facts to establish "objective baselessness." It is difficult to see what legitimate purpose such a rule could serve, to the extent that the purpose of sham litigation legal standards is to distinguish between patent cases that are unfounded and cases that are not.

Not only have some courts turned a blind eye in both of these ways to telling evidence of baselessness, but they also have placed the high burden on antitrust plaintiffs of proving both objective and subjective baselessness by "clear and convincing evidence." The usual rule would be that absent any statutory provision for a heightened standard of proof, the applicable standard of proof is a preponderance of the evidence.[5] However, the Federal Circuit has clearly indicated that a requirement of "clear and convincing evidence" applies to both objective and subjective baselessness.[6] The combined effect of the Federal Circuit's potential exclusion of multiple categories of evidence from consideration in connection with "objective baselessness," and then its also having applied the heightened "clear and convincing" standard of proof to objective baselessness, is often to cause sham litigation cases either to fail altogether, or to settle on terms that reflect

only a fraction of the plaintiffs' actual losses, even when the plaintiff has clear evidence showing that a patent case was fundamentally unfounded, and was brought to maintain high prices rather than to vindicate any legitimate patent.

Not only have courts raised unfounded obstacles to sham litigation claims by excluding key evidence from consideration, and by adopting extraordinary standards of proof, but they also have denied standing to the most important categories of plaintiffs to sue based on enforcement of fraudulently procured patents. The traditional rule in antitrust law has long been that overcharged purchasers are the persons whose standing to assert antitrust claims is clearest, and that the standing of competitors to bring antitrust claims is more limited. Nevertheless, when the asserted basis for patent invalidity is that the antitrust defendant procured its patent through fraud on the patent office -- *i.e.*, when the antitrust liability in question rests on the Supreme Court's longstanding precedent in the *Walker Process* case[7] -- some courts have turned the conventional rule of antitrust standing on its head, holding that overcharged purchasers lack standing to pursue an antitrust claim.[8] Government antitrust authorities have uniformly argued against this rule, including the Department of Justice even in the recent Republican administration, as well as nearly all state Attorneys General.[9]

Academic commentary on point has similarly criticized this limitation on antitrust standing.[10] Nonetheless, whether overcharged purchasers have standing to bring an antitrust claim based on fraud on the patent office under *Walker Process* remains a highly controversial issue. In this way as well, case law in recent years has made it increasingly difficult for the purchasing public to hold defendants accountable, under United States antitrust law, for causing higher prices to the public by bringing groundless patent infringement litigation for the purpose of injuring competition and unfairly excluding competitors from the market. In the field of prescription drugs alone, this has enabled brand name drug manufacturers to extract hundreds of millions if not billions of dollars from seniors based on defective patents, for which the brand name drug manufacturers would otherwise have been held duly accountable in antitrust litigation.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

END NOTES

[1] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc*., 508 U.S. 49 (1993).

[2] 508 U.S. at 60.

[3] *iLOR, LLC v. Google, Inc*., 631 F.3d 1372, 1378 (Fed. Cir. 2011).

[4] *iLOR*, 631 F.3d at 1378.

[5] *Grogan v. Garner*, 498 U.S. 279 (1991).

[6] *Wedgetail Ltd. v. Huddleston Deluxe, Inc*., 576 F.3d 1302, 1304-06 (Fed. Cir. 2009). The Supreme Court would likely agree with this conclusion, in view of its recent holding that "clear and convincing evidence" is necessary to establish infringement. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S.Ct. 2238 (2011).

[7] *Walker Process Equ't, Inc. v. Ford Machinery & Chem. Corp*., 382 U.S. 172 (1965).

[8] *In re Remeron Antitrust Litig*., 335 F. Supp. 2d 522 (D.N.J. 2004); *The Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010); *but cf. In re DDAVP Direct Purchaser Antitrust Litig*., 585 F.3d 677 (2d Cir. 2009); *Molecular Diagnostics Labs. v. Hoffmann-LaRoche Inc*., 402 F. Supp. 2d 276 (D.D.C. 2005).

[9] Brief for the United States and Federal Trade Commission as Amici, Curiae Supporting Plaintiffs-Appellants, *In re DDAVP Direct Purchaser Antitrust Litig*., No. 06-5525-cv (2d Cir.); Brief for the States of [40 States, the District of Columbia and Puerto Rico] Supporting Plaintiffs-Appellants and Reversal; *In re DDAVP Direct Purchasers Antitrust Litig*., No. 06-5525-cv (2d Cir.).

[10] H. Hovenkamp, M. Lemley, M. Janis and C. Leslie, *IP and Antitrust* § 11.4b at 11-51-52 (2010 Supp.) (*Remeron* "mistakenly applies the antitrust rules for competitor standing to cases involving consumer standing").