

## Consent Order Settles FTC Complaint Against Patent Assertion Entity

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On Nov. 6, 2014, the Federal Trade Commission announced that it has brought an enforcement action against a patent assertion entity seeking to license its patent rights for the first time in its history.<sup>1</sup> MPHJ Technology Investments, LLC, and Farney Daniels L.P., the law firm representing it, have agreed to settle a complaint brought by the FTC that they made deceptive representations in threat letters purporting to enforce MPHJ's patent rights.

According to the FTC's administrative complaint,<sup>2</sup> in September 2012, MPHJ purchased four patents directed to networked scanning systems whereby computer systems are capable of transmitting electronic images, graphics and/or documents over a network from a scanner or copier to external devices, files, and applications. Then, between September 2012 and June 2013, MPHJ, via a network of subsidiaries, began a multi-stage campaign to extract patent licenses from thousands of small businesses through a series of threat or demand letters, alleging that the recipients were likely infringing on its patents by using common office equipment. At later stages in the campaign, the letters were sent on Farney Daniels letterhead and signed by Farney Daniels attorneys. MPHJ's and Farney Daniels' letters contained various representations that the FTC alleged were false and misleading. For instance, according to the complaint, despite sending over 9,000 letters in the first stage of its campaign representing that "many companies" had taken a license to MPHJ's patents, in reality, MPHJ sent its first 7,366 letters without having sold a single license, and by February 2013, only two small businesses contacted by MPHJ had opted to license its patents. In the last stage of MPHJ's campaign, Farney Daniels' attorneys represented that "litigation [would] ensue" against companies that did not respond within two weeks from the date of the threat letter, while in reality, MPHJ and its attorneys "were not prepared to initiate and did not intend to initiate such legal action imminently." According to the FTC, these representations constituted deceptive acts or practices in violation of Section 5 of the FTC Act.

In a consent order settling the FTC's complaint,<sup>3</sup> MPHJ and Farney Daniels agreed to refrain from making misleading, unsubstantiated representations about the existence or price of any licenses to MPHJ's patents, the results of any licensing, settlement, or litigation activities, or that MPHJ has

initiated a lawsuit or will imminently initiate a lawsuit if a license is not taken. The consent order also imposes certain recordkeeping and reporting requirements on MPHJ and Farney Daniels with respect to future demand letters. MPHJ's principal, Jay Mac Rust, was named individually as well as in his capacity as an officer of MPHJ, in both the complaint and consent order. The FTC voted unanimously to accept the proposed order, which will be published in the Federal Register for public comment. If made final, the consent order will carry the force of law with respect to future actions and could impose a civil penalty of up to \$16,000 for each violation.

The FTC's enforcement action is the latest in a line of legal proceedings brought by and against MPHJ. The State of Vermont has brought suit against MPHJ for violation of Vermont consumer protection laws; that litigation is proceeding in state court despite MPHJ's attempts to remove the case to Federal court.<sup>4</sup> And, in Minnesota, MPHJ entered into a settlement agreement requiring it to give the attorney general's office 60 days' notice and obtain its consent before sending demand letters to Minnesota businesses.<sup>5</sup> However, in Nebraska, the state's attorney general was preliminarily enjoined from enforcing a cease-and-desist letter directed to Farney Daniels, demanding that it refrain from initiating new patent infringement efforts;<sup>6</sup> that injunction is now on appeal.

MPHJ has maintained that its letters were not misleading and protected by the First Amendment, and that lawsuits were not filed because its patents were the subject of challenges at the U.S. Patent and Trademark Office. And, of course, FTC action with respect to lawsuits that were threatened but never instituted does not necessarily foreshadow any similar action with respect to even facially meritless lawsuits that have been actually filed. So while consumer and business advocates may herald the FTC's willingness to bring enforcement actions in the most egregious of circumstances, it remains to be seen whether the MPHJ settlement and the threat of future enforcement will seriously impact the litigation and licensing activities of most patent assertion entities.

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1 Press Release, Fed. Trade Comm'n, FTC Settlement Bars Patent Assertion Entity From Using Deceptive Tactics (Nov. 6, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.

2 <http://www.ftc.gov/system/files/documents/cases/141106mphjcmpt.pdf> (Nov. 6, 2014).

3 <http://www.ftc.gov/system/files/documents/cases/141106mphjagree.pdf> (Nov. 6, 2014).

4 See *Vermont v. MPHJ Tech. Investments, LLC*, 763 F.3d 1350 (Fed. Cir. Aug. 11, 2014).

5 See Press Release, Office of Minnesota Attorney General, Attorney General Lori Swanson Announces First-in-the-Nation Order to Stop Delaware Company from "Patent Trolling" in Minnesota (Aug. 20, 2013), archival copy available at [http://www.law.berkeley.edu/files/Panel\\_17b\\_Documents.pdf](http://www.law.berkeley.edu/files/Panel_17b_Documents.pdf).

6 See *Activision TV, Inc. v. Pinnacle Bancorp., Inc.*, 2014 WL 197808 (D. Neb. Jan. 14, 2014).

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