

JANET T. MILLS  
ATTORNEY GENERAL



TEL: (207) 626-8800  
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES  
84 HARLOW ST. 2ND FLOOR  
BANGOR, MAINE 04401  
TEL: (207) 941-3070  
FAX: (207) 941-3075

415 CONGRESS ST., STE. 301  
PORTLAND, MAINE 04101  
TEL: (207) 822-0260  
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1  
CARIBOU, MAINE 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

February 4, 2014

Honorable Linda Valentino, Chair  
Honorable Charles Priest, Chair  
Joint Standing Committee on the Judiciary  
2 State House Station  
Augusta, Maine 04333

Re: LD 1660, *An Act Regarding Bad Faith Assertions of Patent Infringement*

Dear Senator Valentino and Representative Priest:

In recent months the term "patent troll" has entered the lexicon of attorneys, policy makers and some small businesses in Maine and around the nation. The term relates to the assertion of a patent of a product or process with the goal of an out of court financial settlement on the part of the entity making the patent assertion. Rather than inform the producer of the software or machine that a patent infringement occurred, they seek out the end user of the technology. Typically, the patent troll informs a small business that they are infringing upon a patent and demands payment and threatens costly litigation in federal court. Many small businesses receiving these letters settle so they can move on and avoid the prospect of an extensive court battle. For their part, those sending the letters assert that they hold legitimate patents and are only seeking to uphold their rights under the law.

Patent law is a legal field almost exclusively occupied by the federal government, which is a source of frustration for state attorneys general who receive complaints from citizens who receive a letter from a patent assertion entity. My Office is working with the National Association of Attorneys General to urge the Federal Trade Commission to crack down on illegitimate patent assertions. I have attached our most recent letter for your information. I also joined an amicus brief to the US Supreme Court in the case of *Octane Fitness, LLC v. Icon Health & Fitness* which argues that when a defendant prevails in a patent assertion case, they should be awarded attorney's fees. This proposal would make it easier to fight patent trolls.

The bill before you, LD 1660, *an Act Regarding Bad Faith Assertions of Patent Infringement*, is based on a Vermont statute. Vermont has been actively pursuing patent trolls under that state's unfair trade practices act. The patent assertion entities are claiming that the Vermont Attorney General's actions

under the UTPA is preempted by federal patent law. So, with or without a specific statute aimed at patent trolling, folks against whom this bill is aimed will likely raise this same defense.

I remain very concerned about Maine businesses being targeted by broad patent infringement claims. I urge businesses and individuals who receive such demand letters to contact us and we will follow up, and I certainly welcome Sen. Haskell's interest in this matter.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Janet T. Mills".

Janet T. Mills  
Attorney General



National Association  
of Attorneys General

PRESIDENT

J.B. Van Hollen

*Wisconsin Attorney General*

PRESIDENT-ELECT

Jim Hood

*Mississippi Attorney General*

VICE PRESIDENT

Marty Jackley

*South Dakota Attorney General*

IMMEDIATE PAST PRESIDENT

Douglas Gansler

*Maryland Attorney General*

EXECUTIVE DIRECTOR

James McPherson

December 16, 2013

**BY ONLINE SUBMISSION AND FIRST-CLASS UNITED STATES  
MAIL**

Mr. Donald S. Clark, Secretary  
Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex J)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

**Re: Comment by State Attorneys General on FTC's Proposed  
Information Requests to Patent Assertion Entities  
PAE Reports: Paperwork Comment; Project No. P131203**

Dear Secretary Clark:

As state Attorneys General committed to preventing our constituent consumers, small businesses, and nonprofits from being victims of baseless patent infringement harassment, we are pleased to offer the following comment in support of FTC's proposed information requests to Patent Assertion Entities ("PAEs").

PAEs, commonly known as "patent trolls," are a growing consumer protection problem in the United States. Generally, PAEs acquire patents solely for the purpose of using them as weapons to obtain financial gains from entities they claim to have infringed the patent. Lacking any intention to develop the underlying technology, improve upon it, or bring it to market, PAEs typically seek only to extract costly licensing fees and/or pretrial settlements from alleged infringers.

Through the issuance of numerous demand letters to their targets (often consumers, nonprofits, and small businesses having little, if anything, to do with the underlying patent), PAEs commonly demand license fees or settlements accompanied by the threat of costly litigation if the target does not "pay up." These consumers, nonprofits, and small businesses usually possess little knowledge of patent law and are intimidated by the demand letters. Given the high costs of patent litigation, even when targets have reason to doubt the validity of the patent or the claim of infringement, they often pay a licensing fee rather than face the prospect of a potentially bankrupting court fight. This has become a kind of silent extortion.

Lately, Congress and the federal government have demonstrated renewed interest in controlling abusive patent practices. Additionally, state Attorneys General have initiated innovative efforts to use existing unfair and

2030 M Street, NW  
Eighth Floor  
Washington, DC 20036  
Phone: (202) 326-6000  
<http://www.naag.org/>

deceptive trade practices laws to attack PAEs' demand letter campaigns. The increased attention these efforts have garnered is encouraging, but for true and lasting success to be realized, regulators need substantially more information about PAEs, their business models, owners, and practices.

Toward that end, and given our critical role as enforcers of state consumer protection laws, we applaud the FTC's recently announced information-gathering proposal. We believe the scope of the request is appropriately comprehensive and will create a valuable enforcement resource for both federal and state authorities to better understand PAEs' function and techniques.

We offer the following specific responses to the issues presented by the FTC at 78 FR 61357:

- (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.*

The FTC's stated mission is, in part, "To prevent business practices that are anticompetitive or deceptive or unfair to consumers..." We firmly believe that efforts by FTC to examine the problem of patent enforcement abuse, which undoubtedly presents risks of antitrust and unfair and deceptive trade practice violations, are entirely consistent with the FTC's function and purpose. Given the value that increased knowledge would have in pursuing efforts to prevent violations of antitrust and unfair and deceptive practice laws, we believe the merits of the proposed information request are beyond question.

Moreover, this information would have significant, practical utility. Given its breadth and scope, the request should yield a trove of information relevant to PAEs' practices, methods, and beliefs regarding the veracity (or lack thereof) of infringement claims, and the number and types of their target entities. Not only will the public collection of such information greatly assist the FTC in fulfilling its consumer protection mission, it will be valuable to state Attorneys General, who are charged with similar obligations.

- (2) *The accuracy of the FTC's estimate of the burden of the proposed collection of information.*

We believe the FTC has estimated the burden of the proposed collection of information with a reasonable degree of accuracy.

- (3) *Ways to enhance the quality, utility, and clarity of the information to be collected.*

We believe the language of the information request itself is of sufficient clarity that it requires little, if any, revision. We suggest that the FTC share, to the extent permitted by law, the entirety of the response to the information request with state Attorneys General. The value of the collected information is such that it should be possessed by both federal and state consumer protection enforcement authorities.

We would recommend the following additions to the information request, as we believe that this additional information will improve the FTC's ability to understand the activities of PAEs:

Under request F.1 (Patent Assertion Information, Demand Information):

(g) the process by which you identified Person(s) to which the Demand was sent.

We also suggest that the FTC inquire about the role of legal counsel. Not unlike the area of unfair debt collection practices, attorneys may play a central role in patent assertion schemes. We propose the addition of a new section (H) relating to use of counsel. Some additional requests may include:

1. Do you use outside counsel or in-house counsel as part of your business.
2. If you use outside counsel, state the name of the firm employed in relation to each Demand.
3. Describe the role of counsel in:
  - a. Identifying Persons to whom you will send Demands;
  - b. Sending Demands; and
  - c. Advising on your overall business strategy.
4. Financial interest of counsel:
  - a. Does counsel have any ownership interest in your business;
  - b. If you use outside counsel, describe the compensation arrangement with counsel (contingency fee; fees per license; straight hourly billable, etc.)

(h) whether the Demand threatened that the Firm would initiate Litigation against the recipient of the Demand in the event that the recipient failed to purchase a license.

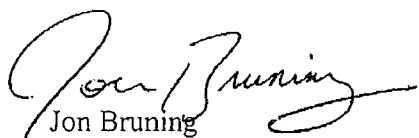
Our only additional recommendation would be to increase the number of PAEs, Manufacturing Firms, and Other Firms to which the information request will be submitted. Given the extent of the problem of patent enforcement abuse, collecting as much information as possible—and from as many entities as possible—should be a priority. The marginal effort involved in expanding the number of recipients would likely be minimal, but the marginal value yielded great.

*(4) Ways to minimize the burden of collecting information.*

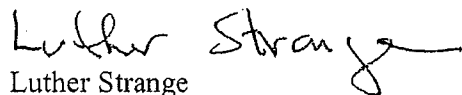
We believe the burden of collecting the proposed information is minimal, and there are no additional steps that could provide the same quality and utility of information with less burden. While the scope of the information request is appropriately comprehensive, the burden of the request is not unreasonable.

In conclusion, we again commend the FTC on taking this valuable step to gather additional information regarding PAEs. We believe the collection of such information will greatly assist enforcement efforts against PAEs where they are found to violate antitrust and unfair and deceptive trade practices laws. We look forward to the results of the FTC's endeavor.

Sincerely,



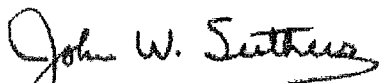
Jon Bruning  
Nebraska Attorney General



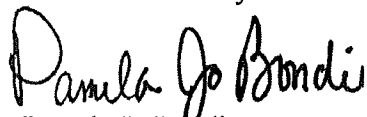
Luther Strange  
Alabama Attorney General



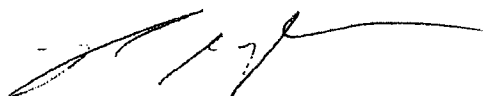
Tom Horne  
Arizona Attorney General



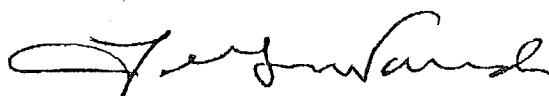
John Suthers  
Colorado Attorney General



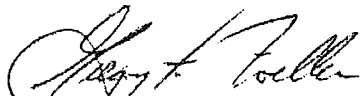
Pamela Jo Bondi  
Florida Attorney General



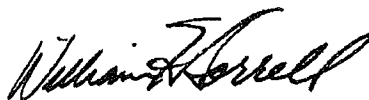
Lenny Rapadas  
Guam Attorney General



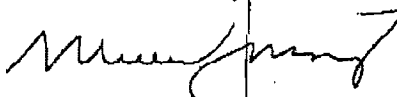
Lawrence Wasden  
Idaho Attorney General



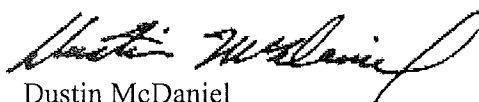
Gregory Zoeller  
Indiana Attorney General



William H. Sorrell  
Vermont Attorney General



Michael Geraghty  
Alaska Attorney General



Dustin McDaniel  
Arkansas Attorney General



George Jepsen  
Connecticut Attorney General



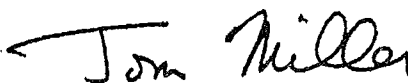
Samuel S. Olens  
Georgia Attorney General



David Louie  
Hawaii Attorney General



Lisa Madigan  
Illinois Attorney General



Tom Miller  
Iowa Attorney General

Derek Schmidt  
Kansas Attorney General

James "Buddy" Caldwell  
Louisiana Attorney General

Janet Mills  
Maine Attorney General

Douglas F. Gansler  
Maryland Attorney General

Martha Coakley  
Massachusetts Attorney General

Bill Schuette  
Michigan Attorney General

Lori Swanson  
Minnesota Attorney General

Jim Hood  
Mississippi Attorney General

Chris Koster  
Missouri Attorney General

Tim Fox  
Montana Attorney General

Catherine Cortez Masto  
Nevada Attorney General

Joseph Foster  
New Hampshire Attorney General

Gary King  
New Mexico Attorney General


Eric T. Schneiderman  
New York Attorney General

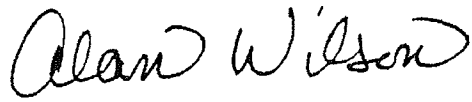
Roy Cooper  
North Carolina Attorney General

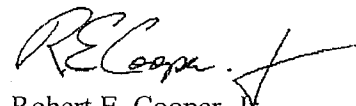
Wayne Stenehjem  
North Dakota Attorney General

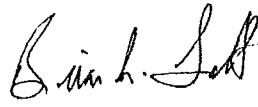
Mike DeWine  
Ohio Attorney General

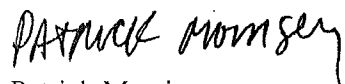
Ellen F. Rosenblum  
Oregon Attorney General

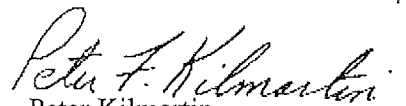
  
Kathleen Kane  
Pennsylvania Attorney General

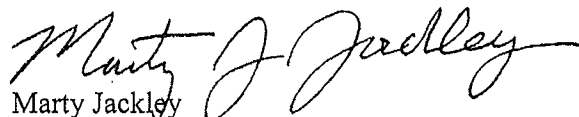
  
Alan Wilson  
South Carolina Attorney General


  
Robert E. Cooper, Jr.  
Tennessee Attorney General

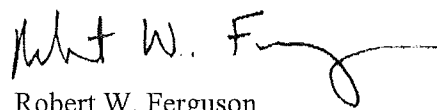
  
Brian Tarbet  
Acting Utah Attorney General

  
Patrick Morrissey  
West Virginia Attorney General

  
Peter Kilmartin  
Rhode Island Attorney General

  
Marty Jackley  
South Dakota Attorney General

  
Greg Abbott  
Texas Attorney General

  
Robert W. Ferguson  
Washington Attorney General