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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REALTEK SEMICONDUCTOR CORP.,

Plaintiff,

v.

MEDIATEK, INC., et al.,
Defendants.

No. 23-cv-02774-PCP

STATEMENT OF INTEREST OF THE UNITED STATES

Date: Nov. 14, 2024
Time: 10:00 AM

The Honorable P. Casey Pitts
Courtroom: 4th Floor, Courtroom 8

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The Antitrust Division of the Department of Justice enforces the federal antitrust laws, including Sections 1 and 2 of the Sherman Act, and has a strong interest in their correct application.

The United States has a significant interest in preventing anticompetitive conduct, including exclusionary conduct by powerful firms that raises their rivals' costs and thereby further increases their market power. Such conduct can foreclose rivals from access to critical inputs or customers, harming competition as the weakened rivals pose less of a competitive constraint to the powerful firm imposing those costs. This type of exclusionary conduct can be achieved through the unilateral actions of a dominant firm or by the dominant firm enlisting the help of a third party to weaken its rivals.

The United States also has a significant interest in ensuring that exceptions from the antitrust laws, such as the *Noerr-Pennington* doctrine, are not broadened beyond their appropriate scope. "Federal antitrust law is a central safeguard for the Nation's free market structures" that ensures "the preservation of economic freedom and our free-enterprise system." *N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015). To ensure they can effectively serve this critical role, "exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 126 (1982); *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 945 (2d Cir. 1987), *aff'd,* 486 U.S. 492 (1988). The United States has therefore filed briefs addressing the appropriately limited scope of the *Noerr-Pennington* doctrine. *See, e.g.*, *Intellectual Ventures v. Capital One*, No. 18-1367

(Fed. Cir., May 11, 2018), ECF No. 41; *United States v. LSL Biotechnologies*, No. 02-16472 (9th Cir., Nov. 21, 2002) (Reply Brief of the United States).

The United States files this Statement of Interest to underscore the anticompetitive potential and the unprecedented nature—for *Noerr-Pennington* purposes—of the litigation bounty agreement described in the First Amended Complaint (FAC). Courts reviewing the underlying patent claims have already expressed alarm upon seeing the bounty provision, stating it is "improper" and "should be discouraged as a matter of public policy," FAC ¶¶ 23, 141-42; Sealed Omnibus Order and Memorandum Opinion, *Future Link Systems, LLC, v. Realtek Semiconductor*, Case Nos. 6:21-cv-00363-ADA; 6:21-cv-01353-ADA at 16 (Oct. 10, 2022) (unsealed by this Court at ECF 95 and subsequently filed at ECF 102-5); expressing that it creates an "improper motive" to file suit such that it "warrants sanctions," *id* at 17, and that "[i]t is difficult to imagine how it could possibly be lawful or enforceable" and "would seem to warrant an action [. . .] for unfair competition." Order No. 11 at 3, *In re Certain Integrated Circuit Products and Devices Containing the Same*, ITC Inv. No. 337-TA-1295 (Apr. 12, 2022). The *Noerr-Pennington* doctrine does not, at this stage of the litigation, exempt that agreement from antitrust scrutiny. The United States takes no position on the ultimate merits of this case or on the accuracy of the plaintiff's allegations.

I. BACKGROUND

On June 6, 2023, Realtek sued MediaTek, IPValue, and Future Link, alleging, *inter alia*, antitrust violations under Sections 1 and 2 of the Sherman Act. Realtek alleges that its competitor, MediaTek, has a dominant share—in excess of 70%—of the relevant market for television chips. FAC ¶¶ 69, 72, 88-89, 244. IPValue and its subsidiary, Future Link, are allegedly Patent Assertion Entities ("PAEs") whose businesses are directed at acquiring large

numbers of patents and using patent litigation to generate licensing fees or litigation settlements. *Id*. ¶ 2.

Realtek's theory centers on allegations that MediaTek had entered into one or more bounty provisions inducing IPValue and Future Link to seek licenses against, or file lawsuits targeting, various competitors in television chips. Compl. ¶¶ 6-11, 270, 281. For example, a May 2019 patent license agreement with IPValue and Future Link included the following "bounty provision":

> In addition to the above 3 payments, [MediaTek] shall pay an additional $1.0 million U.S. dollars on 15 February 2022 if [Future Link], prior to 01 January 2022, ***either executes a patent license agreement with or institutes litigation against one or more of the following companies***: (a) Realtek Semiconductor Corporation, or (b) Amlogic.

FAC ¶ 39 (emphasis added). MediaTek allegedly offered these bounties to harm Realtek and Amlogic (another TV chip competitor) by encouraging the PAE defendants to impose licensing costs on them or to file baseless lawsuits. MediaTek did not own or hold any other interest in the patents involved, nor did it stand to receive any portion of the royalties that would be generated if Realtek took a license or the PAEs prevailed in litigation. *See* FAC ¶ 9.

Realtek alleges that, subsequent to the bounty agreement, the PAEs filed six baseless patent infringement suits: four against Realtek and two against Amlogic. FAC ¶¶ 23, 102-103, 119, 122-163, 273. Realtek further alleges that, as part of its anticompetitive scheme, MediaTek improperly interfered with Realtek's customer relationships. For example, while the lawsuits from the PAEs were pending, MediaTek made disparaging statements to Realtek's customers implying that Realtek's chips would be unavailable for incorporati333on into Realtek's customers' products. *See* FAC ¶ 10-12. According to the complaint, these communications led Realtek to lose business, FAC ¶ 13—contributing to MediaTek's monopoly by allowing

MediaTek to charge artificially higher prices and by forcing MediaTek's rivals to spend more on litigation costs. *See, e.g.*, FAC ¶¶ 304, 314.

On May 3, 2024, the district court granted the defendants' motion to dismiss without prejudice, holding that the *Noerr-Pennington* doctrine barred the entirety of plaintiff's claims, because the entire allegedly anticompetitive course of conduct is incidental to protected petitioning activity. MTD Order, ECF 95. Realtek amended its complaint on July 15, 2024, again alleging an anticompetitive scheme involving the same bounty provision. ECF 129 (Public Version of FAC). Defendants filed the pending motion to dismiss on August 19, 2024. ECF 138, 140.

II. ARGUMENT

Realtek's complaint centers on bounty provisions imposed by a dominant firm targeted to weaken rivals by imposing licensing or litigation costs on them—all in violation of Sections 1 and 2 of the Sherman Act. The complaint therefore alleges an agreement with an already-powerful firm that poses a significant threat to competition. Absent an exemption, such provisions would be condemned if they have anticompetitive or exclusionary tendencies, and the FAC alleges likely anticompetitive effects sufficient to demonstrate a prima facie case for purposes of a motion to dismiss. *See Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (*Amex*); *United States v. Microsoft Corp.*, 254 F.3d 34, 58 (D.C. Cir. 2001) (en banc).

Defendants' argument that the *Noerr-Pennington* doctrine protects the bounty agreement from antitrust scrutiny asks this court to heighten the standards at the motion-to-dismiss stage, where courts "rarely award *Noerr-Pennington* immunity . . . because well-pleaded allegations of sham litigation must be accepted as true." *Perez v. DirecTV Grp. Holdings, LLC*, No. 816CV01440JLSDFM, 2019 WL 6362471, at *8 (C.D. Cal. July 23, 2019) (internal quotation

marks omitted); *In re Outlaw Lab'y, LP Litig.*, 2019 WL 1205004, at *5 (S.D. Cal. Mar. 14, 2019) (similar). The complaint sufficiently alleges that the PAEs' serial patent lawsuits are a sham. If true, the bounty agreement has no *Noerr* protections. Even if the patent cases are not sham, however, the bounty agreement is not petitioning or incidental to petitioning. Unlike a litigation funding agreement, the patent holder could obtain the bounty without filing or threatening to file litigation—and the First Amendment petitioning right can be vindicated even absent the agreement. At minimum, Realtek's allegations are sufficient for discovery. Defendants' arguments also seek to apply the *Noerr-Pennington* doctrine in novel circumstances—even though exemptions from the antitrust laws should be construed narrowly, counseling hesitation before applying them on a motion to dismiss. If defendants' arguments are accepted, *Noerr-Pennington* would be improperly applied to protect well-pleaded serial sham petitioning activity from discovery and exempt anticompetitive activity unrelated to petitioning. A ruling in defendants' favor would improperly expand *Noerr-Pennington* to protect run-of-the mill anticompetitive activity.

A. The Bounty Provision Is Subject to Antitrust Scrutiny for its Allegedly Anticompetitive and Exclusionary Effects

The Sherman Act prohibits monopolization and agreements unreasonably in restraint of trade. 15 U.S.C. §§ 1, 2. It serves as "a central safeguard for the Nation's free market structures . . . as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *N.C. Dental*, 574 U.S. at 502. The Sherman Act therefore "declare[s] a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *Id.*

Analysis of the conduct alleged in the FAC turns on its potential for exclusionary or anticompetitive effect and, if the plaintiff's prima facie case is established, any procompetitive benefits that offset the harm it threatens to competition. *Amex*, 585 U.S. at 541-42 (describing, in Section 1 conspiracy case, the burden-shifting framework that applies in cases involving the rule of reason); *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 983-94 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024) (same); *Microsoft Corp.*, 254 F.3d at 58-60 (similar, in Section 2 monopolization and attempted monopolization case).

The complaint plausibly pleads exclusionary, anticompetitive effects. Realtek alleges that, through the bounty provision and other conduct, MediaTek's conduct caused Realtek to spend "significant amounts" on legal fees using funds that could "otherwise have been spent on innovation," FAC ¶ 26; and led Realtek to "los[e] bids with customers" due both to the "fear, uncertainty, and disinformation from the fraudulent lawsuits," and to MediaTek's false and misleading communications with these customers. *Id.* ¶¶ 26, 270. This, in turn, led to higher prices for TV chips and Smart TVs, as well as reduced innovation in the relevant markets, *id.* ¶¶ 26, 41, 272, harming competition and consumers. These allegations fall squarely into the kinds of conduct courts have found anticompetitive. *See Microsoft*, 253 F.3d at 60 (conduct can be anticompetitive if it "keep[s] rival[s] . . . from gaining the critical mass of users necessary" to pose a competitive threat); *N. Am. Soccer League v. U.S. Soccer Fed'n*, 883 F.3d 32, 43 (2018) (citation omitted) (same where it creates "significant barriers to entry").

Indeed, a bounty provision like the one alleged—rewarding a third party for imposing costs on a competitor—poses significant anticompetitive risks, as it can be used to raise a rival's costs, whether by imposing licensing fees or litigation costs the rival may not otherwise incur. A firm employing this strategy may enjoy an anticompetitive reduction in competition because its

rival will pose a weaker competitive constraint as it passes on the increased costs through higher prices (rather than undercutting the dominant firm on price). This allows the dominant firm to enjoy greater profits or an increased market share. The end result is to prevent competitive entry, expansion, or lower pricing. Accordingly, theories tied to raising the rivals' costs have often formed the basis of Sherman Act claims. *E.g.*, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (appliance store conspired with its suppliers to sell inputs to its competitor, if at all, at higher prices and unfavorable terms, thereby "handicapp[ing] its ability to compete"); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (destruction of in-store displays harmed competition by causing higher prices, in part because of significant investments in display repair and replacement).

The anticompetitive consequences of bounty provisions imposed by rivals has the potential to be stark. A ruling that a bounty provision—one where the PAE is paid regardless of recovery in litigation—is immune from antitrust scrutiny, as defendants have advocated, would likely increase the risk of these anticompetitive harms by leading to more bounty agreements.

Defendants wrongly suggest that a bounty provision cannot be anticompetitive where "such provisions encourage a level playing field between competitors," ECF 140 (FutureLink MTD) at 18; *see also* ECF 138 (MediaTek MTD) at 12. But agreements to impose uniform costs on one's rivals often are subject to antitrust scrutiny under the Sherman Act. For example, a most-favored-nation clause, under which a buyer requires the seller to give that buyer the lowest price (i.e., no other buyer can get a lower price), can violate the antitrust laws if they raise costs for the buyers' competitors, thus impeding entry and harming competition. *E.g.*, *Biddle v. Walt Disney Co.*, 2024 WL 3171860 (N.D. Cal. Jun. 25, 2024); *Frame-Wilson v. Amazon.com, Inc.*, 664 F.Supp.3d 1198 (W.D. Wash. 2023).

Further, the alleged bounty provision does not affect MediaTek and Realtek equally—it imposes costs on Realtek (and Amlogic) not tied to the size of the costs borne by MediaTek. *Cf. United States v. Blue Cross Blue Shield of Michigan*, 809 F. Supp. 2d 665, 674 (E.D. Mich. 2011) (holding unlawful contracts between insurers and hospitals that required rival insurers to pay *greater* reimbursement rates than it needed to, because such contracts impeded entry and reduced competition by raising costs on actual and potential rivals). The filing of litigation by the PAE defendants should therefore be considered in light of the evident structure of the bounty agreement—ensuring that Realtek could not compete with MediaTek without suffering from upward cost pressure.

The allegations in the FAC thus provide substantial ground for inquiry under the Sherman Act. Moreover, they paint a picture of an anticompetitive exclusionary tactic that, if exempted from the coverage of the antitrust laws, could create a powerful tool for dominant firms seeking to harm competition. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist").

B. Defendants Seek to Apply the Noerr-Pennington Exemption in Unprecedented Circumstances

Unless *Noerr-Pennington* exempts MediaTek's conduct, the complaint should survive a motion to dismiss. The gravamen of defendants' motion to dismiss is its argument that, whatever the anticompetitive effects of MediaTek's conduct may be, *Noerr-Pennington* exempts it all from antitrust scrutiny. But, in so arguing, defendants ask this Court to heighten the pleading standard at the motion-to-dismiss stage. The conduct alleged is also distinguishable from prior *Noerr-Pennington* cases, and "exemptions from the antitrust laws must be construed

narrowly." *Union Labor Life Insurance,* 458 U.S. at 126; *Allied Tube*, 817 F.2d at 945 (2d Cir. 1987).

1. *Noerr-Pennington* does not protect an alleged sham series of petitioning activity from discovery.

Noerr-Pennington protects legitimate 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). But *Noerr-Pennington* does not protect against "sham" petitions—i.e., situations where "persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991). Under Ninth Circuit precedent, the sham exception applies in three circumstances: (1) the lawsuit is "objectively baseless and the defendant's motive in bringing it was unlawful"; where (2) the conduct "involves a series" of suits "brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose"; or (3) if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Kaiser Found. Health Plan, Inc. v. Abbott Lab'ys, Inc.*, 552 F.3d 1033, 1045 (9th Cir. 2009). Whether "something is a genuine effort to influence government action, or a mere sham is a question of fact." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982). Courts thus "'rarely award *Noerr-Pennington* immunity at the motion to dismiss stage,' because well-pleaded allegations of sham litigation must be accepted as true." *Perez*, 2019 WL 6362471, at *8.

Focusing solely on the litigation-initiating aspect of the bounty provision, *but see infra* § II.B.2 (noting that the bounty provision includes non-petition activity, as it can harm competition even without litigation), Realtek has sufficiently pleaded allegations falling into the second

circumstance in *Abbott*—i.e., that the series of lawsuits pursued by the PAE defendants falls within the sham exception of *Noerr*. Realtek's complaint plausibly alleges that the bounty provision induced the defendants to bring a series of lawsuits "pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 810–11 (9th Cir. 1994).[1] In particular, Realtek alleges that defendants, pursuant to the bounty provision, commenced six meritless lawsuits—four against RealTek and two against Amlogic—in the span of two years, FAC ¶¶ 122-63, and that the series of litigation is being used precisely to raise rivals' costs. *Id*. ¶¶ 15-16. When challenged by RealTek, the underlying patent claims were found invalid or withdrawn. FAC ¶¶ 21, 129, 282. Under the legal standard set out in *USS-POSCO* for serial litigation—which does not require a showing of objective baselessness—the complaint plausibly pleads that the PAEs' legal filings were made "not out of genuine interest in redressing grievances," but as "part of a pattern or practice . . . essentially for purposes of harassment," *USS-POSCO*, 31 F.3d at 810-11 (relying on *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) to describe the standard for evaluating whether a series of lawsuits meets the sham exception).[2] As Realtek alleges, the litigation directly interfered with its ability to do business and imposed significant costs. FAC ¶¶ 172-73 (describing Damocles sword that denied Realtek the ability to "clear its name" with

[1] In addition to alleging an actionable series of litigation, Realtek alleges that each of the lawsuits is also objectively baseless and that the defendants' motive in bringing it was unlawful, *see* MTD Opp. at 9-13; this Statement of Interest does not take a position on this argument.

[2] In previously declining to apply the sham exception, this Court pointed to the agreement's provision for payment upon the filing of only a single lawsuit. MTD Order at 11. But, while the specific bounty provision at issue related only to a single suit, the FAC plausibly alleges that there were multiple agreements to file suits in multiple jurisdictions. FAC ¶ 119.

customers and in the semiconductor industry); *id*. ¶¶ 196-96 (describing holdup practice of PAEs). The bounty provision further supports the allegations that the series of litigation the PAEs initiated was a sham, because the provision is facially indifferent to the merits of the legal proceedings and without regard to whether any filings are further pursued (i.e., litigated to judgment). In short, Realtek's allegations sufficiently establish that the PAEs brought their lawsuits "pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id*. at 810-11; *Abbott Labs*, 552 F.3d at 1045.

2. A bounty agreement that raises rivals' costs is not protected petitioning activity.

As described above, because the series of lawsuits the PAEs brought are adequately alleged as a sham, the lawsuits can have no protection under *Noerr*. But even if the *lawsuits* addressed in the complaint were petitioning activity protected by *Noerr-Pennington*, the bounty provision itself is not petitioning. *Noerr-Pennington*, therefore, should not apply to insulate defendants' bounty provision.

Conduct is protected under *Noerr-Pennington* only to the extent that antitrust scrutiny "could impair the right of access to the courts protected by the first amendment." *Sosa v. DIRECTV, Inc*., 437 F.3d 923, 936 (9th Cir. 2006). Here, however, the PAEs *could* have sued Realtek—and may have had incentive to do so, depending upon the strength of their potential case—without the bounty provision at all. FAC ¶ 2 (alleging it was PAE defendants' business model to sue). That is, the PAEs had an incentive to bring the infringement suits independent of the bounty provision to vindicate the full value of their patent rights. But the PAEs, whose business model is to vigorously enforce their patent rights, allegedly did not make a claim or even threaten to sue Realtek prior to the bounty agreement—supporting an inference that the PAEs sued only because of the bounty. The incremental incentive of the bounty provision is

thus not needed to vindicate legitimate petitioning rights, but instead reflects MediaTek's desire to impose anticompetitive costs on its rival. *See supra* § II.A. Because the petitioning activity could occur without the bounty provision (and yet it did not), the agreement is not necessary or incidental to legitimate petitioning activity; it is entirely severable. Accordingly, subjecting the bounty provision to antitrust review would not impair "the right of access to the courts."

Moreover, on its face, MediaTek pays the bounty if the PAE files suit *or* obtains a license, so the bounty provision does not require PAEs to initiate a lawsuit at all—i.e., it is possible for the PAEs to receive the contractually offered $1 million even without ever pursuing litigation, in a way that risks anticompetitive harm. That is, the bounty agreement at issue focused on *licensing*, with litigation as an alternative means of imposing costs on rivals. MediaTek agreed to pay $1 million to FutureLink if FutureLink did one of two things: "*either* executes a patent license agreement with *or* institutes litigation against" Realtek or Amlogic. FAC ¶ 39 (emphasis added). Under the first option—negotiating a license for which the rival would pay some fee—FutureLink would be rewarded for imposing costs on a rival without initiating litigation. Accordingly, the agreement was structured so as to reward FutureLink for raising the costs of MediaTek's rival (Realtek or Amlogic), with or without litigation. Accordingly, should the case proceed to trial, a jury could find that the defendants' scheme was agnostic as to whether PAE defendants would impose costs via litigation or a negotiated patent license agreement—reinforcing that the provision can be read as divorced from legitimate protected petitioning activity. And under the *Noerr-Pennington* doctrine, an antitrust claim may proceed if non-petitioning conduct is sufficient to establish a *prima facie* case of anticompetitive harm. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991). That principle applies here, and so the bounty provision is not protected by *Noerr-Pennington*.

Indeed, *Noerr* protects "associating together in an attempt to persuade the legislature or the executive [or the judiciary] to take particular action with respect to a law that would produce a restraint or monopoly." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) (quoting *Noerr*, 365 U.S. at 136). But, because the bounty agreement at issue does not necessarily require the initiation of a lawsuit, there is no vindication of the First Amendment on which the *Noerr-Pennington* doctrine is based—further reinforcing that the exemption does not apply. *See White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (*Noerr-Pennington* is "based on and implements the First Amendment right to petition").

Nor can it be argued that *Noerr* would apply to the first option under the bounty provision (to impose a license rather than litigate) because no rival would agree to pay for a license absent the potential for litigation. The mere possibility of litigation cannot be sufficient to trigger *Noerr*. It is always the case that vertical contracts imposing restraints are negotiated in the shadow of potential contract- and property-law litigation. For example, the contract provision ("most-favored-nation"-plus) in *United States v. Blue Cross Blue Shield of Michigan* harmed competition by requiring rival insurance companies to pay higher rates to hospitals than Blue Cross did. But a reason those rivals had an incentive to *pay* those higher rates to the hospitals was to avoid breach-of-contract litigation, as those higher rates were memorialized in contracts with the hospitals. *See* 809 F. Supp. 2d 665. That did not make the vertical contracts *Noerr* protected. Indeed, virtually any time a party uses market power to raise a rival's costs through vertical contracts, that market power is supported by state-backed property rights (in real and intellectual property) and the potential for litigation to enforce those rights.

It is further clear that the *Noerr-Pennington* doctrine does not apply in analogous contexts involving intellectual property. Patent acquisitions are unquestionably subject to

antitrust scrutiny. Thus, when a firm acquires a patent portfolio that includes patents needed by a rival, the acquisition is treated as a vertical acquisition subject to scrutiny under Section 7 of the Clayton Act to the extent that the acquisition may give the acquiring firm the power to foreclose, hold up, or raise the costs of its rivals and thus wall off competition it may otherwise face. *See SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1205 (2d Cir. 1981) ("Patent acquisitions are not immune from the antitrust laws."); *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 844 n.36 (S.D.N.Y. 1988) (citing *SCM* for the proposition that "Patent acquisitions are within the scope of the antitrust laws."). A monopolist's bounty agreement with a patent holder is like a vertical acquisition of a patent, except that with the bounty agreement the monopolist merely *rents*, rather than *acquires*, the patent's exclusionary power. It would thus be perverse if the bounty agreement would be exempt from antitrust scrutiny, but the acquisition would not, even though the bounty agreement may present fewer opportunities for procompetitive benefits.

In any case, *MediaTek*—which does not own the patents—certainly has no petitioning right as to the *PAEs*' intellectual property. MediaTek cannot simply enlist another company with ownership of the intellectual property to claim that *MediaTek* now has legitimate petitioning rights protected under *Noerr-Pennington*. To permit otherwise would be to create a perverse incentive: One where a monopolist can simply use its monopoly profits to effectively lease another's potential *Noerr-Pennington* exemption—thereby insulating its exclusionary conduct from challenge when it never had a First Amendment right to begin with.

In an effort to claim that bounty provisions are protected petitioning activity, MediaTek characterizes them as litigation "funding" agreements. But, based on the allegations, a fact finder could easily conclude that the alleged bounty agreement is different from a traditional

litigation "funding" agreement. Rather than providing for litigation *fees*, the provision provides a *reward* for licensing or for initiating a lawsuit. For example, Realtek alleges that the PAEs did not make a claim or demand against it for the patents prior to the bounty agreement. *See* FAC ¶¶ 17, 95. The alleged bounty agreement does not provide any money upfront—suggesting that the funding is not required for the PAEs to pursue their rights. Similarly, the PAEs receive the compensation without regard to the outcome of the proceedings or the license obtained. One would expect a litigation funding agreement developed with regard to the merits of the litigation to involve some limit on funding tied to expenses, and some compensation for the funder based on the outcome. But because MediaTek had no patent ownership interest at stake (and enforcing the patents would be contrary to its interests but for the effect on rivals), these common characteristics of legitimate litigation funding are not present. The allegations are thus different from those in *Liberty Lake Investments v. Magnuson*, 12 F.3d 155 (9th Cir. 1993), where the costs of litigation were in fact borne via the agreement. *Id*. at 156 (proceedings were "were prompted and paid for" by a competitor).

3. *Liberty Lake* is inapposite.

In arguing that MediaTek's "litigation funding" is exempt under *Noerr-Pennington*, MediaTek primarily relies on *Liberty Lake*, 12 F.3d 155)—but *Liberty Lake* does not exempt the alleged bounty provision from antitrust scrutiny. There, Liberty Lake accused a competitor of hiring third parties to mount a frivolous environmental challenge to Liberty Lake's plan to develop a regional shopping center. The plaintiff, however, primarily argued that the two proceedings at issue (an appeal to the board of county commissioners and a lawsuit in Washington state court) met the requirements of the sham exception—but did not raise whether the *agreement to fund the proceedings* was not petitioning activity that was *Noerr*-protected in

the first place. *Liberty Lake* should not therefore be read to stand for the principle that a competitor is exempt under *Noerr-Pennington* any time it writes a check that encourages litigation against a rival.

In any event, even focusing on the litigation (rather than the bounty provision) here, *Liberty Lake* is inapt. The reasoning in *Liberty Lake* focused on the objective baselessness of the proceedings under *Professional Real Estate Investors* (*PREI)*, which is not the appropriate test under the facts of this case. That is, the *Liberty Lake* court considered itself "precluded from examining" the motivation for litigation funding by the requirement that the litigation be "objectively baseless." *Id.* at 159 (citing *Professional Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc*., 508 U.S. 49, 59–60 (1993)).

In contrast, here, the complaint sufficiently alleges the sham exception based on the *series* of cases. The complaint therefore raises the precise allegations that were absent in *Liberty Lake*. Whether the sham exception applies to serial litigation does not depend on objective baselessness and is evaluated under a different standard. As the Ninth Circuit has explained, *PREI* did not overrule *California Motor Transport*'s inquiry into whether serial litigation was motivated by a desire to harass a defendant with the costs of litigation. Rather, "we reconcile these cases by reading them as applying to different situations," with the *California Motor Transport* focus approach applicable "where the defendant is accused of bringing a whole series of legal proceedings." *USS-POSCO*, 31 F.3d at 810–11. Here, the complaint alleges both a series of lawsuits, incentivized by the bounty provision, and significant reason to believe they were "brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id*. at 811. The PAEs allegedly brought six baseless

infringement suits against MediaTek's rivals. FAC ¶¶ 23, 102-103, 119, 122-163, 273. These lawsuits, as described *supra* § II.B.1, are plausibly pleaded as falling into the sham exception.

III. CONCLUSION

For the reasons above, we urge this Court (i) to hold that bounty provisions such as the one at issue should be scrutinized as a way to raise rivals' costs; and (ii) to avoid applying the *Noerr-Pennington* doctrine to protect the alleged anticompetitive bounty provision from antitrust scrutiny.

Respectfully Submitted,

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Dated: October 4, 2024

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CERTIFICATE OF SERVICE

I certify that on October 4, 2024, 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 for all parties.

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