Separate Statement of Commissioner Thomas Rosch Regarding

simply a breach of a commitment to license SEPs on FRAND terms. (Compl. ¶ 1, 25-27.) In other words, the concept of "patent hold up" has nothing to do with Google's conduct. It is a construct that applies as a matter of theory.

Second, while the majority correctly asserts that the proposed Complaint in this matter alleges that Google's practices in seeking an injunction "constitute unfair methods of competition and unfair acts or practices, in violation of Section 5" of the FTC Act, the lion's share of the Commission's Statement, as well as the Complaint, is devoted to analysis of Google's conduct as a "standard alone" unfair method of competition claim under Section 5. (Commission Statement at 1-3.) I would have given equal prominence to the unfair acts and practices claim.

"Unfair acts or practices" claims based on alleged breaches of contract have repeatedly been made by the Commission. Orkin Exterminating Co., 108 F.T.C. 263 (1986), aff'd, Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988); Negotiated Data Solutions LLC (N-Data), 73 Fed. Reg. 5,846 (FTC 2008) (aid to public comment); see also C&D Electronics, Inc., 109 F.T.C. 72 (1987).

Moreover, the Commission has brought a number of consumer protection cases involving petitioning activity. See, e.g., Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976) (upholding the Commission's finding that the filing of lawsuits in distant locations was an unfair act); J.C. Penny Co., 109 F.T.C. 54 (1987) (consent decree resolving similar concerns). Nor was neither raised nor held to apply in these cases.

There is reason to believe that seeking injunction on a SEP would be a breach of contract actionable as an unfair act or practice.[3] More specifically, when there is a SEP, a FRAND commitment is given by the owner of the SEP in exchange for inclusion of the SEP in the standard, and seeking an injunction instead of a case if there is infringement of the SEP is a breach of that FRAND commitment.

That conclusion is not contrary to the Supreme Court's decision in eBay, Inc. v. MercExchange LLC, 547 U.S. 388 (2006). To be sure, a majority of the Supreme Court declined to rule in that case that injunctions were never permitted as a matter of law. Id. at 393-94. But a SEP was not involved in that case.

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that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?"

[3] As I have stated in the past, injunctive relief should be prohibited only when the potential licensee is a "willing licensee" under FRAND terms. See also Commission Statement at 1-2. That is not what the consent decree provides, nor is it the relief I would agree to. The only exception to this is when a federal court or some other neutral arbitrator has defined those terms. Cf. Opinion of the Commission on Remedy at 8-9, Evanston Northwestern Healthcare Corp., Docket No. 9315 (Apr. 28, 2008) (requiring disputes to be resolved through final offer arbitration, sometimes referred to as "baseball arbitration"). In the event that a licensee refuses to comply with a federal court order or another neutral arbitrator's order defining those terms, I think it is appropriate to enforce the court's order against the licensee. (Compl. ¶ 16.)

The lack of any allegations in the Complaint of injury to consumers to date does not undercut the "unfair acts or practices" claim. (Compl. ¶¶ 4, 30-33). Both Section 5(n) of the FTC Act and our Unfairness Policy Statement treat as an "unfair act or practice" any practice that not only actually harms consumers but also any practice that is "likely" to do so. 15 U.S.C. § 45(n); Int'l Harvester Co

well as the language of Section 2 itself. Absent those limiting principles, which are not identified in the Complaint, I think Section 5 is not properly circumscribed.

To be sure, the potential anticompetitive harm that is threatened when injunctive relief is sought for alleged infringement of an SEP may be especially pernicious: a false FRAND commitment not only may cripple competition for inclusion in the standard (so-called "ex ante competition"); it may also cripple competition among those using the standard (so-called "ex post" competition). *See Broadcom Corp. v. Qualcom, Inc.*, 501 F.3d 297 (3d Cir. 2007). This may be a limiting principle. But the Complaint does not allege that standalone Section 5 actions are limited to especially pernicious practices, let alone the practices at issue here.

Beyond that, the Commission, with its expertise in identifying deception, brings something to the analysis that others cannot. As Commissioner and former Chairman Bill Kovacic observed, the FTC is a better competition agency because of its consumer protection mission.[6] The fact that the Commission has a comparative advantage in identifying deception might also be a second "limiting principle." But the Complaint does not allege that either.

The Complaint does allege that Google has monopoly power. (Compl. ¶ 21.) But the Complaint does not allege monopoly power as a limitation on the Commission's use of a standalone Section 5 unfair methods of competition claim. *See* Concurring and Dissenting Statement of Commissioner Rosch, *Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009), available at http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf. This might be understandable if Google faced treble damages liability in a private action under Section 5 as long as there was any chance that Google would face an unlimited standalone Section 5 unfair competition claim. But Section 5 belongs to the Commission and Commission alone, and even the Commission cannot seek treble damages for a standalone Section 5 unfair methods of competition violation.[7]

Fourth, I object to language in the Agreement Containing Consent Order that is tantamount to a denial of liability. Specifically, Google has refused to admit any facts other than jurisdictional facts and has refused to admit that a violation of the law has occurred. (ACCO ¶¶

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[6] *See* William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 J. L. & Pol'y 101, 114 (2007) (observing that "consumer protection laws are important complements to competition policy"); *see also* Opinion of the Commission on Liability, *Rambus Inc.*, FTC Docket No. 9302 (2006), available at http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

[7] *See* Rosch, The Great Doctrinal Debate, *supra* note 5, at 8-10. Commissioner Kovacic

2, 4.) As I have previously explained,[8] the Commission should require respondents either to admit or to "neither admit nor deny" liability in Commission consent decrees, and this change should be reflected in the Commission's Rules of Practice. *See* Rule 2.32, 16 C.F.R. § 2.32.

[8] *See* Dissenting Statement of Commissioner J. Thomas Rosch, In the Matter of Facebook, Inc., File No. 092 3184, Docket No. C-4365 (Aug. 10, 2012), available at http://www.ftc.gov/speeches/rosch/120810facebookstatement.pdf.