IN THE UNITED STATES COURT

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INTRODUCTION

The FTC submits this supplemental *amicus* brief to address defendants' argument, not addressed by the court below, that their settlement agreement is exempt from antitrust scrutiny under the *Noerr-Pennington* doctrine.

The Supreme Court has made clear that the

progeny supports such a result. Accordingly, the FTC urges this court to reject

defendants' Noerr argument.

ARGUMENT

I. DEFENDANTS' SETTLEMENT IS NOT "PETITIONING" ACTIVITY EXEMPT FROM THE ANTITRU.T.446 0 Td (h a)3.6(r)3.6(e)3-0 0 14.04 2A 8Tc 0.005 Tw 11.04 -0 25T0 4 184.32 right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138. Subsequent Supreme Court decisions made clear that the *Noerr* doctrine also applies to petitioning the executive and judicial branches of government. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (advocacy directed at executive officials); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (petitioning activity before courts and administrative agencies).

 Sherman Act, as "competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as the appropriate level for governmental rate making or price supports." *Id.* The Court observed that the challenged conduct—coordination among competitors in the context of a private standard-setting process—was the type of commercial activity that the antitrust laws traditionally scrutinized. *Id.* at 505-06. Such "commercial activity with a political impact," the Court held, did not warrant *Noerr* protection. *Id.* at 507, 509-10. Thus, as the Court explained, the scope of *Noerr* protection depends "on the source, context, and nature of the anticompetitive restraint at issue." *Id.* at 499.

Courts therefore make a distinction between merely urging the government to restrain trade and asking the government to adopt, approve, or enforce a private agreement on marketplace behavior. Government advocacy is protected by *Noerr*; seeking governmental approval of a private agreement is not. *See*, *e.g.*, *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (rejecting defendants' argument that their collective rate proposal was *Noerr*-protected because they sought government approval of those rates; defendants' conduct was "commercial activity with a political impact," rather than "political activity with a commercial impact") Supreme Court reaffirmed this principle in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232 (2013), noting that "this Court's precedents make clear that patent related settlement agreements can sometimes violate the antitrust laws."

In contrast to settlement agreements among private parties, settlements with government parties have been treated as *Noerr*-protected because they involved petitioning to those governmental entities. *See, e.g., A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc.,* 263 F.3d 239, 252 (3d Cir. 2001) (applying *Noerr* protection to agreement settling a lawsuit brought by var, eo8Td 8.3(g d [(va)3.6(r)3.6(TJ -0 dispute.⁴ When parties pursue litigation, courts reach determinations of facts and applicable law via the adversary process. But when courts enter consent judgments, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in the consent decree." *Id.* at 522. "Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Id.*

Consent decrees, the Court explained, "closely resemble contracts." *Id.* at 519. Their "most fundamental characteristic" is that they are *voluntary agreements* negotiated by the parties for their own purposes. *Id.* at 521-22; *id.* at 522 ("the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes") (emphasis in original). Consequently, when parties seek to enforce agreements adopted in consent orders, courts construe terms of the settlement based on the intent of the parties, not of the court. *See, e.g., Fox v. U.S. Dep't of Hous.* & *Urban Dev.*, 680 F.2d 315, 321 (3d Cir. 1982) (examining evidence regarding "the intention of the parties"); *Wicker v. Oregon*, 543 F.3d 1168, 1174 (9th Cir. 2008) (if text of consent decree is ambiguous, court looks at the "contracting parties" intent"); *Segar v. Mukasey*, 508 F.3d 16, 22 (D.C. Cir. 2007) (court will look at "the parties' subjective intent" if a consent decree is ambiguous).

⁴ The question in *Local Number 93* was whether a provision of Title VII that precluded the court from entering an "order" providing certain relief precluded the court from entering a consent decree providing such relief.

Consistent with this understanding of consent decrees, every court to have considered the question has rejected a *Noerr* defense in the context presented here: an antitrust challenge to agreements between a brand-name drug company and a generic competitor settling Hatch-Waxman patent infringement litigation. See In re Androgel Antitrust Litig., No. 1:09-cv-955, 2014 WL 1600331, at *6-9 (N.D. Ga. Apr. 21, 2014); In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 395-98 (D. Mass. 2013); In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 212-13 (E.D.N.Y. 2003) (Cipro). In each case, the drug company defendants argued that they were shielded by the Noerr doctrine because their private agreement was embodied in a consent decree, and therefore judicial action, rather than their private agreement, caused the alleged competitive harm. In rejecting the defendants' arguments, each of these courts noted the limited role played by judges when parties seek to settle private disputes with entry of a consent judgment

In *Androgel*—the proceeding on remand from *Actavis*—the court concluded that the "'source … of the anticompetitive restraint at issue' is the parties' reverse payment agreement itself, not the governmental action." 2014 WL 1600331, at *8 (quoting *crseersh*(*A*)8.2(0.006 3.7(e)3.20 cs e)]*TJ* t31(o6(r)9st720 cs e.7(e)3.5(v)8.3(e)3.6(r)3 providing *Noerr* protection in these circumstances "would largely eviscerate" *Actavis* because subsequent settlements would always include a consent judgment. *Id*.

In *Nexium*, the court recognized that, unlike a litigated decision, "which is aided by an adversarial system that grants a judge the occasion formally to review the merits of the claims asserted," the means by which parties obtain a consent judgment are essentially "the same as those used to enter into private settlement or any private commercial contract." 968 F. Supp. 2d at 396 (internal quotation marks omitted). It observed that the terms of consent decrees "are arrived at through mutual agreement of defendants," in which the judge "played no role other than signing the Consent Judgment." 261 F. Supp. 2d at 212.

II. DEFENDANTS' *NOERR* DEFENSE RESTS ON THE INCORRECT PREMISE THAT THE CHALLENGED RESTRAINT WAS THE RESULT OF GOVERNMENT ACTION.

Defendants do not appear to dispute that private agreements settling litigation warrant no *Noerr* protection. Instead, they argue that *Noerr* applies here because (1) their settlement agreement was contingent on the patent court's entry of the orders they requested; and (2) the consent decree was entered after what the court below deemed to be "strong judicial intervention in the antitrust inquiry." Neither of these features, however, makes the court's order the source of the challenged restraint.

First, defendants' argument that the court's entry of their requested orders is a superseding cause of plaintiffs' injury ignores the voluntary character of consent judgments and a court's limited role when it enters a consent judgment. *See Local No. 93*, 478 U.S. at 523 ("the obligations contained in a consent decree . . . [are] created by agreement of the parties *rather than imposed by the court*") (emphasis added). Even "the choice . . . whether to rely on contractual remedies or to have an agreement entered as a consent decree . . . is itself made voluntarily by the parties." *Id.* Defendants' argument that the court's order is the source of the restraint rests on inapposite cases, principally involving regulatory government action that differs fundamentally from consent judgments.⁵ The only case they cite involving a consent judgment arose in a wholly different context, and its *Noerr* theory was not upheld on appeal.⁶

Indeed, defendants' causation argument is belied by the express terms of both the patent court's order and their own license agreement. The court's order provides that Teva may not sell generic Effexor XR "except as licensed under the License Agreement." JA 1298. The license agreement, in turn, leaves Wyeth and Teva—not the court—in control of the terms of Teva's entry with generic Effexor XR, providing that the parties can modify the agreement upon written

⁵ See A.D. Bedell Wholesale Co., 263 F.3d at 252 (petitioning to state Attorneys General); Armstrong Surgical Ctr. v. Armstrong Cty. Mem'l Hosp., 185 F.3d 154, 156 (3d Cir. 1999) (state department of health denial of certificate of need application); Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 121-22 (3d Cir. 1999) (International Trade Commission decision on anti-dumping petition); Mass. Sch. of Law at Andover v. Am. Bar Ass'n, 107 F.3d 1026, 1036 (3d Cir. 1997) (decision of state acting as sovereign to adopt bar admission requirements); Sessions Tank Liners v. Joor Mfg., 17 F.3d 295, 296, 299 (9th Cir. 1994) (injuries directly resulting from adoption of model fire code by local governments).

⁶ *MedImmune v. Genentech*, No. 03-2567, 2003 WL 25550611 (C.D. Cal. Dec. 23, 2003), held that *Noerr* applied to a settlement accompanied by a consent judgment in a case brought to overturn a Patent and Trademark Office (PTO) decision in a patent interference proceeding. The plaintiffs' theory of harm depended on subsequent action by the PTO (issuance of a new patent) that concededly was the result of petitioning. *See id.* at *5 n.5, *8-10. On appeal, the Federal Circuit affirmed the district court's dismissal of the antitrust claim but found that "it was unnecessary for the district court to have relied on *Noerr-Pennington* immunity." *MedImmune v. Genentech*, 427 F.3d 958, 967 (Fed. Cir. 2005), *rev'd on other grounds*, 549 U.S. 118 (2007).

influence the passage or enforcement of laws" beyond recognition. *Noerr*, 365 U.S. at 135.

CONCLUSION

For the foregoing reasons, the Court should find that defendants' challenged conduct is not exempt from the antitrust laws under the *Noerr-Pennington* doctrine.

Respectfully submitted,

DEBORAH L. FEINSTEIN Director

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Nos. 15-1184, 15-1185, 15-1186, 15-1187, 15-1274, 15-1323, 15-1342

COMBINED CERTIFICATIONS

- 1. This brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 3,374 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.
- 2. I filed the electronic PDF version of this brief with the Court via the CM/ECF system. The docket for this proceeding indicates that all participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.
- 3. The text of the electronic PDF version of this brief is identical to the text of the paper copies being sent to this Court.
- 4. I ran a virus check on the electronic version of this brief using used Symantec Endpoint Protection version 12.1.6318.6100.105, and it detected no virus.
- 5. Because this brief is filed on behalf of an administrative agency of the United States, there is no bar membership requirement.

March 17, 2016

s/ Michele Arington MICHELE ARINGTON