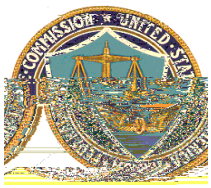

UNITED STATES OF AMERICA
Federal Trade Commission

Small businesses have serious concerns about unchecked SEP licensing abuses that result in cost uncertainty and delays in bringing products and new technology to market. This uncertainty can also scare actual and potential investors away. One start-up called the SEP licensing framework "anarchy."[4] Small firms, unlike large firms, often lack the resources for technical legal advice to counter holdup. They are more likely to cave to supra-FRAND rates out of fear of exclusion, rather than put themselves in legal peril by challenging the high rates. Ultimately, all of this uncertainty and risk has a chilling effect that may push firms out of the market or extinguish good ideas in the cradle.[5] Worse, the threat of exclusion might deter innovation investment in these firms in the first place.[6]

So this is not an issue that is waning. The standard-setting process and the associated licensing of SEPs will only increase in importance to technological advancement. Yet, we

patent(s) in the standard. FRAND commitments reinforce the bargain entered into by the patent holder. When a patent holder makes this voluntary commitment, it does so knowing that it has the potential to gain enormous benefits from the high volume of licensees it will gain by virtue of its technology being included in a widely adopted standard.

Normally, patent holders are absolutely entitled to keep the benefit of their invention to themselves and fully exclude any who want to practice the patent. A patent is literally a government-granted and time-limited right to exclude others from practicing their inventions. We not only allow but value this right to incentivize investment in innovative new products and services. But when patent holders' commitment to voluntarily

I want to take a brief detour to address the "holdout" problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a competition standpoint as holdup, which has the potential to exclude firms from implementing a standard. Holdout, as long as it is unilateral and not done collusively among licensees, fits squarely into the box of problems that have patent law solutions. If a potential licensee has engaged in willful infringement, the patent holder has remedies in patent law, including the potential for enhanced damages.[12] Unilateral holdout does not involve the abuse of market power to stymie consumer choice that holdup does, and therefore does not trigger antitrust concerns in the same way.

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So I want to make clear that I am not on anyone's "side." I am not patent holders or patent licensees. I am on team competition and consumers.

In a perfect world, SDOs could work with their members to implement FRAND policies that provide clear guidance to reduce licensing frictions and eliminate the threat of exclusion against willing licensees. But until we reach that aspirational world, the antitrust agencies serve an important backstop to protect and promote competition. The FTC has long been at the forefront of

Finally, conduct that I find particularly mind boggling is when SEP holders demand licenses for SEPs that they have not even identified, much less provided information needed to allow an implementer to evaluate whether the patents at issue are valid, enforceable, 4 (s)-1l84 (d t) the-6 (mph)2 l(e-6 m(e)6 (n)2 t(a)6 (i(o)2 n)]TJ 0 Tc 0 Tw85 0 Td ( )Tj -0.004 Tc 0.004 Tw [on)-4 (f)- d(t)-6 l(e)-1 ent

bottom of the ocean. The ones with bullet holes in the wings are the ones that made it back. Looking at the data that was available did not provide the whole picture, or even the most important parts of the picture. This story is a helpful reminder of why selection bias can be real when looking at data and that we cannot take absence of data points as evidence of absence of data itself when we are not able to see the entire picture.

Another argument we heard is that because holdup is based on the breach of a contractual FRAND commitment between a patent holder and the SDO, contract law is sufficient for parties to vindicate those contractual rights.