though both companies' products were still in the development stage. ³					
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under the Supreme Court's analysis in *Actavis*.¹² And in September, the Commission brought its first post-*Actavis* lawsuit, charging pharmaceutical companies with filing sham patent litigation suits against potential generic competitors to delay the introduction of lower-priced versions of the blockbuster testosterone replacement drug Androgel. The Commission also charged that those same pharmaceutical companies subsequently entered into an anticompetitive reverse payment agreement in the form of an authorized generic deal on an unrelated drug to delay generic competition with Androgel further.¹³

Patent Assertion Entities

Another area in which the FTC is working to get the balance right between competition policy and IP is the conduct of patent assertion entities (PAEs). PAEs raise a number of significant questions from a competition policy perspective. Proponents of PAEs argue that they foster a valuable secondary market for patents, enabling inventors to capitalize on their ideas and encouraging venture capital firms to fund new projects. On the other hand, critics argue that PAEs divert resources away from manufacturing firms' productive research and development efforts, take advantage of an imbalance in litigation costs between PAEs and defendants, and act as a drag on innovation. Fundamentally, this is a debate about whether PAEs enhance or reduce output.

The Commission believes that it is important to understand how PAEs do business and how they affect innovation and competition. The Commission hosted a workshop with the Department of Justice on the subject of patent assertion entities in 2012, and received approval this summer to use our 6(b) authority – which allows the FTC to compel production of information from market participants – to conduct a study on PAEs. Last year we issued information requests to approximately 25 patent assertion entities in connection with our PAE 6(b) study, as well as to approximately 15 non-practicing entities and manufacturing firms in the wireless chipset sector. The FTC intends to publish a descriptive report that will allow industry participants, policymakers, and academics to gain a better understanding of the PAE business model.

At the same time, the FTC is also using its authority to address the deceptive use of patent demand letters, and other potentially abusive tactics, by PAEs. For example, last year the FTC challenged MPHJ for sending tens of thousands of deceptive demand letters falsely threatening patent suits. MPHJ's letters alleged that the companies were illegally sending emails of scanned documents from a networked copier – something I think most of us have done – without paying a licensing fee to do so. In its letters, MPHJ claimed that "many other

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¹² See Br. of Fed. Trade Comm'n as *Amicus Curiae* in Supp. of Pl.-Appellants, *King Drug Co. of Florence, Inc. v. SmithKlineBeecham Corp.*, No. 14-1243 (3d Cir., filed Apr. 28, 2014), *available at* http://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf.

¹³ See generally Compl., FTC v. AbbVie, Inc., No. 14-CV-5151 (E.D. Pa. filed Sept. 8, 2014), available at http://www.ftc.gov/system/files/documents/cases/140908abbviecmpt1.pdf.

¹⁴ See 15 U.S.C. § 46(b).

businesses" have paid for a license, and that failure to pay would result in legal action. Neither of those claims was true, and the deceptive letters led to FTC action. 15

While I hope that the FTC's 6(b) study will contribute meaningfully to our understanding of the PAE business model, the work on the report should not be seen as an obstacle to Congressional patent reform efforts. For example, the 6(b) study results aren't needed to conclude that greater transparency in demand letters and lawsuits would be helpful. And we should be able to agree, without waiting for the 6(b) study, that it makes sense to protect individual consumers and small businesses from liability for using off-the-shelf products in the intended manner. Congress has indicated a desire to move forward with patent reform efforts. I know that House Judiciary Chairman Bob Goodlatte said earlier this month that he hopes to get patent reform enacted "as quickly as possible." And so, without weighing in on any particular bills, I would just say that I certainly hope that important patent reform is able to move forward while our 6(b) study is ongoing.

Standard Essential Patents

I'll conclude my remarks by noting some encouraging developments regarding standard essential patents (SEPs) – another area at the intersection of IP and antitrust in which the FTC has been actively engaged. Last month the Federal Circuit held in *Ericsson v. D-Link* that any royalty award for infringement of an SEP must be based on the incremental value of the invention, not the value of the standard as a whole or any increased value the patented feature knora[4u weighing

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Conclusion

The task of 21st century competition enforcers is to protect competition and innovation – to make sure that hi-tech markets remain dynamic, fertile grounds for new products and ideas.