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INTRODUCTION

Plaintiff Activision TV, Inc. (“Plaintiff” or “Activision”¹) respectfully submits this Reply Memorandum in support of its Motion under FED. R. CIV. P. 65 for a Preliminary Injunction with respect to Defendants’ Bruning, Cookson, and Lopez (collectively “the Nebraska AG” or “the AG Defendants”). The Nebraska AG has now submitted its Response to Plaintiff’s Motion (“Response”).² Dkt. No. 22. A consideration of that Response, together with the evidence submitted by Plaintiff with its Opening Memorandum and this Reply, demonstrate that the AG Defendants have engaged, and are engaging in disturbing misconduct with respect to Plaintiff and its counsel. That misconduct demands redress, beginning with the grant of Plaintiff’s Motion here.

When the Court considers all the submitted papers, the following will become clear. Activision is a small business that owns patents covering the display technology it builds and sells. It reasonably believes those patents are being infringed by others, including certain companies in Nebraska. Activision retained a nationally recognized law firm, Farney Daniels PC (“Farney Daniels”), to help it address that infringement. Farney Daniels then engaged in ordinary and lawful patent enforcement activity on behalf of Activision, including doing the investigation and due diligence work necessary to identify infringers. This activity included sending letters to certain identified infringers, notifying them of their infringement, and

¹ To make this briefing more conveniently readable, Plaintiff refers to itself as “Activision” rather than “Activision TV.” Defendants make an irrelevant observation (Dkt. No. 22, p. 1, n.1) that Plaintiff is in an unrelated trademark dispute in C.D. Cal. That dispute obviously has nothing to do with what shorthand reference is used in this briefing to refer to Plaintiff.

² The Nebraska AG’s Response included, in one document, both its response to Activision’s Motion for Preliminary Injunction, as well as the Nebraska AG’s Motion to Dismiss under FED. R. CIV. P. 12(1) and 12(b)(6). In this Reply, Activision addresses only those issues relevant to its Motion, and will respond timely at a later date to the AG Defendants’ Motion to Dismiss (should this Court conclude following the hearing on the preliminary injunction motion scheduled for September 19, 2013, that the Court needs any further responsive briefing from Activision with respect to the AG Defendants’ Motion).

extending Activision's offer of a license. It also included conducting pre-suit investigations to satisfy FED. R. CIV. P. 11, and preparing complaints, in conjunction with local counsel, to bring suit for infringement against infringers who declined a license. This activity included working with Kutak Rock, LLP to file the Original Complaint in this case. Such activity is common and lawful, and necessary to enforce a patent owner's rights under the U.S. Constitution and federal patent law.

On July 18, the AG Defendants interjected themselves into this lawful patent enforcement activity by Activision by issuing a Cease and Desist Order directed to law firm Farney Daniels. Dkt. No. 7-11. That Order encompassed the Firm's activities on behalf of Activision. Importantly and shockingly, prior to issuance of this Order, the AG Defendants had never contacted Farney Daniels, never contacted Kutak Rock, LLP, never contacted Activision's prior counsel – Kirkland & Ellis LLP, and never contacted Activision to make any inquiry whatsoever regarding Farney Daniels' efforts on behalf of Activision. Declaration of Bryan Farney Regarding Activision ("Farney Activision Decl."); Dkt. No. 10-3. Indeed, the AG Defendants now, over two months since they issued the Order, admit that their investigation has only just "begun." *See* Dkt. No. 22, *passim*. Thus, one can infer that the AG Defendants issued the Order without conducting any investigation into Farney Daniels' conduct on behalf of Activision at all.

But the AG Defendants did not stop at just sending Farney Daniels a Cease and Desist Order which required them to stop representation of Activision in this suit, as well as other suits in Delaware and Texas. The AG Defendants also used that Order (again, in absence of any investigation) to make repeated and multiple statements to the press, falsely defaming and disparaging both Activision and Farney Daniels. These false statements were so egregious they

garnered national attention, and even gave rise to a profile of Defendant Bruning in the Washington Post (which Plaintiff suggests likely is a rarity for a State Attorney General). *See* Exhibit A-7.

But in picking on a small Florida company trying to seek redress for infringement of its patents, the AG Defendants miscalculated. They did not consider that Activision might fight back. Thus they find themselves now where they did not expect to be, before this Court forced to defend their conduct. And, as the Court will see, now forced to defend their conduct, the AG Defendants have chosen to be untruthful, and tell this Court that the misconduct never occurred.

The AG Defendants, having taken action against Farney Daniels with respect to its representation of Activision without investigation, without due process, and without basis, and having repeatedly issued public statements falsely accusing Farney Daniels of misconduct (*See* Exhibits A-7 – A-20), and falsely characterizing Farney Daniels’ conduct, now elect to respond in Court to argue lack of standing and ripeness by relying upon two key misrepresentations.³ The first of these is to continually and repeatedly insist to this Court that the July 18 Cease and Desist Order was not intended by the AG Defendants to be directed at any activity of Farney Daniels with respect to Activision. The second of these is to continually and repeatedly insist to this Court that Activision is simply concocting the allegation that the AG Defendants intended the Order to interfere with any of Activision’s ongoing activities, including its already-filed

³ The AG Defendants in their Response oddly repeatedly try to justify their conduct on grounds that Farney Daniels has supposedly done something wrong in its representation of a different client, MPHJ Technology Investments, LLC (“MPHJ”). While the AG Defendants’ fail to present evidence of this as well, it also is irrelevant. They cannot justify issuing an order to a law firm representing Activision from further representing Activision on the basis of some ongoing investigation into whether that firm has done anything wrong in connection with another client altogether. To provide the Court at least some evidence responsive to this point, Activision provides herein a second declaration of Mr. Farney relating to MPHJ. *See* Declaration of Bryan Farney Regarding MPHJ (“Farney MPHJ Decl.”).

lawsuits (including the one represented by the Original Complaint here).⁴ Both of the representations made by the AG Defendants are contradicted by the facts, as shown below.

Plaintiff Activision demonstrates first in this Reply that it has both standing, and that the controversy is sufficiently “ripe” that it may maintain this suit, and obtain this preliminary relief. Following demonstration of these two key points, Plaintiff Activision will turn to the other specific considerations relevant to the four-part test for granting injunctive relief and demonstrate that, in light of the AG Defendants’ Response, Plaintiff’s Motion for such relief is warranted and should be granted.

SECTION I: THE NEBRASKA AG MAKES MATERIAL UNTRUTHFUL STATEMENTS RELATED BOTH TO STANDING AND RIPENESS

I. The AG Defendants’ Repeated Statements That Activision Lacks Standing Because Their Cease and Desist Order Did Not Relate To Activision Is Not True

The Court can see from the opening page of the Response that the AG Defendants argue that Plaintiff has no standing in this case because the July 18 Cease and Desist Order purportedly did not relate to any activity of Activision.⁵ Thus for example, on the first page of their

⁴ The AG Defendants’ decision here to attempt to disguise the scope and intent of their Order is carried out to the point of being frivolous. For example, at page 3 of the Response, the AG Defendants tell this Court that in the July 18 Order that “the Attorney General asked Farney Daniels to immediately cease and desist.” Dkt. No. 22, p. 3 (emphasis added). This mischaracterization is exposed when the Court looks to the Order itself, where it can be seen that the AG “demanded,” not “asked” Farney Daniels to cease and desist. Dkt. No. 10-2. Where there is doubt on this score, the Nebraska AG cited to NEB. REV. STAT. §87-303.03, which provides that the AG “may issue a cease and desist order . . . directing such person to cease and desist from such activity.” (emphasis added). Plainly, the AG intended his Order to be a “demand” and not a “request.”

⁵ It is certainly true that the Order was “directed” to Farney Daniels, and not to Activision in the literal sense that it was addressed to Farney Daniels. But it is false, and knowingly false, to assert that the Order was not directed at activity of Farney Daniels being carried out on behalf of Activision, or that Activision was not intended to be affected by the AG Defendants’ Order. Thus, Defendants make much of Mr. Johnson’s declaration that the July 18 Order was directed at the Firm itself, and “not directed at any particular client of the firm.” That statement is true in the sense explained above – the letter was certainly addressed to the Firm, and thus in that sense “directed” at the Firm. But Mr. Johnson was not saying, as is plain from the context of his

Response, they tell the Court that the Order was “unrelated to this litigation.” Dkt. No. 22, p. 1. They tell this Court that the Order “did not mention Plaintiff.” *Id.* They further tell this Court that the Plaintiff made “an incorrect assumption” that the Order “applied to Plaintiff.” *Id.* at 6. This position is summarized succinctly, at page five of Response, where the AG Defendants state: “[G]iven the clearly obvious application of the July 18 letter to Farney Daniels, and *not Plaintiff*, as well as only to *new* efforts, not this preexisting action, Plaintiff’s attempt to create a controversy where one does not exist should be rejected and the entire complaint against State Defendants should be dismissed.” *Id.* at p. 5 (emphasis in original). Such statements are made throughout the Response,⁶ and they are demonstrably false.

The evidence of the falsity of the AG Defendants’ position is overwhelming. It includes at least the following:

1. The Order, when read in context, implicitly refers to Activision.
2. The AG Defendants told the press that the Order expressly related to Activision.
3. The circumstances of the investigation regarding MPHJ demonstrate that the July 18 Order related to Activision and not MPHJ.
4. Mr. Greg Walklin, an attorney in the Nebraska AG’s Office responsible for investigating MPHJ, expressly confirmed to MPHJ’s counsel that the Order was not issued because of activity related to MPHJ.

declaration, that the Order was not “directed” to the Firm regarding the Firm’s activity on behalf of Activision or that it was not intended to impact the Firm’s activity on behalf of Activision. *See* Declaration of M. Brett Johnson (“Johnson Decl.”) at ¶¶ 5-6.

⁶ *See, e.g., id.* at p. 8 (“Plaintiff is simply not the regulated party under the July 18 letter”); *id.* (“Having mischaracterized its way into a controversy of which it was not and is not a part, Plaintiff alleges numerous injuries”); *id.* at p. 9 (“the party with the alleged injury would be Farney Daniels, not Plaintiff”); *id.* at p. 12 (“Until the letter is applied to Plaintiff or State Defendants state an intention to apply the letter to Plaintiff’s future events, Plaintiff’s claims are unripe”); *id.* (“As explained above, the July 18 letter to Farney Daniels is inapplicable to Plaintiff”).

5. Defendant Cookson expressly stated that the Order was issued with full awareness of the “Pinnacle Bank situation” by which he was referring to the Original Complaint in this case.
6. One or more of the AG Defendants located and contacted a Louisiana corporation who had been sued in E.D.Tex. by Activision to inform it that the July 18 Order prevented Activision from serving that suit (at least using Farney Daniels as its counsel). This point was made, and supported with evidence, in Activision’s Opening Memorandum and the AG Defendants did not respond to it.

The evidence conclusively establishing each of these points is provided to the Court below. That evidence will demonstrate that the AG Defendants took one position with respect to whether the Order was issued with respect to Activision activity outside this Court, and then now take an entirely different position within this Court. In making this showing, Activision well demonstrates that it does indeed have standing and that this case is “ripe.”

A. The Cease and Desist Order Itself Demonstrates That It Pertained to Activision

The first evidence to weigh in considering whether the July 18 Order related to Activision activity is the Order itself. With some context, it can be seen that the Order itself was expressly directed at Activision.

There are only two clients of Farney Daniels in which the Nebraska AG has ever expressed interest. One of them is MPHJ Technology Investments, LLC (“MPHJ”). The second is Activision. Indeed, these are the only two Farney Daniels’ clients mentioned in the Response. With this understanding, it is easy to see that the AG Defendant’s assertion to this Court that they did not intend the Order to relate to Activision’s activity is false.

The first relevant point to be observed from the Order is that it is addressed to “Brett Johnson.”⁷ Mr. Johnson is a shareholder in Farney Daniels PC, who represents Activision, but

⁷ Specifically, the Cease and Desist Order and accompanying Civil Investigative Demand was faxed to Farney Daniels by Defendant Lopez. *See* Exhibit A-2. Further, Defendant Lopez signed the Civil Investigative Demand as well as the certificate of service. *Id.* Thus, despite the

who has never represented MPHJ. *See* Johnson Decl. at ¶¶ 3-4. Thus, the claim that the Order had “nothing to do” with Activision would at least seem suspect given that the Order is addressed to an attorney only representing Activision, and not MPHJ.

But more than this, the Order itself contains direct evidence on this point. Dkt. No. 7-11. If the Court will look at the letter comprising the Order, it will see that the Nebraska AG makes it clear it is referring to the issuance by the Firm of letters related to patent infringement (which the letter refers to as “demand letters”). To understand which “demand letters” are being referred to, one need only look at the first sentence of the third paragraph. *Id.* There, the Nebraska AG states: “It is notable that **this** is **not the first time** your firm or an entity on whose behalf your firm ostensibly represents has been the subject of an investigation by this office.” *Id.* (emphasis added).

This sentence, when understood, proves beyond doubt that the July 18 Cease and Desist Order related to Activision TV. Prior to the July 18 letter, the Nebraska AG had contacted the Firm twice regarding MPHJ, but had never contacted the Firm about Activision. Farney MPHJ Decl. at ¶¶ 31, 32. Given that MPHJ was the “first time” referred to in the quoted sentence, it is evident that this time the letter must be referring to an entity other than MPHJ. This could only be Activision.

Were the July 18 letter the only evidence that the AG Defendants intended the Order to relate to Activision TV, it would, standing alone, certainly be sufficient. But, here there is more.

Nebraska AG’s arguments to the contrary, there is obviously a “connection between the alleged injury and conduct that is fairly traceable to Defendant David A. Lopez,” as Mr. Lopez is the person who sent the Cease and Desist Order and Civil Investigative Demand. Dkt. No. 22, p. 11. Therefore, the Nebraska AG’s assertion that Defendant Lopez should be dismissed from this action because “no mention of David Lopez even appears in the letter” is without merit. *Id.*

B. In Stark Contrast to What the AG Defendants Now Tell This Court, the AG Defendants Told the World on July 18 That Their Order Related to Activision

In their haste to try to get this case dismissed for lack of standing by arguing that their Order did not relate to Activision, the AG Defendants overlook their conduct on the day they issued that Order on July 18. Within minutes of when the Nebraska AG faxed the Cease and Desist Order to Farney Daniels, Defendant Bruning gave interviews to local reporters about the action.⁸

In those interviews, Defendant Bruning expressly stated that the Order was issued because of Activision. *Id.* Defendant Bruning even went to the trouble of not only identifying Activision as a target of the Order, but to specifically single them out (falsely) as a patent troll.⁹ *See id.* That it was Defendant Bruning who informed outlets such as the Omaha World Herald that his action related to Activision, and that Activision was a “patent troll” was confirmed by Russell Hubbard, the reporter for the article. *See* Declaration of David L. Gothard (“Gothard Decl.”) at ¶ 3.

C. The Circumstances of the Nebraska AG’s Inquiry Regarding MPHJ Demonstrates That the July 18 Order Pertained To Activision

Even further evidence, if any were needed, that the Nebraska AG Cease and Desist Order pertained to Activision is demonstrated by the circumstances surrounding the letter. As set forth in the accompanying declaration of Mr. Farney, the Nebraska Attorney General’s Office had made inquiries regarding MPHJ prior to July 18. Farney MPHJ Decl., *passim*. The first of these

⁸ *See* Exhibits A-8 and A-9.

⁹ Notably, the press release issued by Defendant Bruning on July 18 asserts that its investigation arose because “Farney Daniels LLP has sent multiple letters to Nebraska businesses on behalf of patent **trolls** threatening lawsuits for infringement.” Exhibit A-2. As MPHJ can only be considered one “troll,” one must conclude that Farney Daniels sent letters on behalf of another “troll” into Nebraska to trigger the investigation. As the Nebraska AG has not named any other “troll” on whose behalf Farney Daniels sent patent infringement letters, the only other alleged “troll” to which Defendant Bruning could be referring to in its press release is Activision.

was in February 2013, when the Office at least initially concluded that it saw nothing worth investigating or taking further action with respect to MPHJ. *Id.* The second inquiry came in the form of a letter sent on June 11, 2013 by Mr. Walklin of the Nebraska Attorney General's Office, to Mr. Farney as counsel for MPHJ. *Id.* Mr. Walklin references this letter in his declaration. Dkt. No. 23-1; Exhibit A-3.

During June and early July, Mr. Farney and Mr. Walklin had several lengthy discussions about MPHJ's licensing activity, in which Mr. Farney explained the lawful basis and unusual circumstances relating to MPHJ's patents and licensing. Farney Activision Decl., *passim*. At that time, Mr. Walklin assured Mr. Farney that the Office had not issued a CID because it did not yet see grounds for a formal investigation. *Id.* at ¶ 57. Mr. Walklin further agreed that should his further review lead him to conclude that additional actions should be taken, he would give Mr. Farney the opportunity to meet in person to attempt to address any concern. *Id.* at ¶ 58. Mr. Walklin then asked Mr. Farney to summarize the points that had been made in the various communications in letter form, and to send it to Mr. Walklin for further consideration. *Id.* at ¶ 59. Mr. Farney timely complied with that request by transmittal of the letter on the evening of Monday, July 15. *See* Exhibit A-4.

As the Court now knows, the AG Defendants (of whom Mr. Walklin is not one) issued their Cease and Desist Order to Farney Daniels on the morning of Thursday, July 18. Dkt. No. 7-11. These circumstances strongly suggest that the AG Defendants are not being truthful when they assert now that the letter related to MPHJ, and not to Activision. While it is only circumstantial evidence, Mr. Walklin admitted that he had not yet had time to review the details in Mr. Farney's letter and reach a conclusion that emergency action was needed with respect to MPHJ in two business days after receipt of the letter. Farney Activision Decl., *passim*. This is

particularly the case, given that Mr. Walklin knew that MPHJ had ceased all licensing activity in Nebraska and had no present intention of resuming that activity. Farney Activision Decl. at ¶ 69. Further, Mr. Walklin consistently conducted himself ethically and professionally, and it appears highly unlikely that he would not have honored his informal agreement with Mr. Farney to first permit an in-person meeting before taking any action with respect to MPHJ. All of these circumstances regarding the status of the MPHJ investigation immediately prior to July 18 further strongly suggest that the Order was issued with respect to Activision, and not MPHJ.

D. Mr. Walklin Directly Stated That the Order Was Not Issued on the Basis of His Investigation of MPHJ

Further evidence that the July 18 Order was not issued because of the Nebraska AG's ongoing inquiry related to MPHJ, but was instead related to Activision's activity, is found in the statements made by Mr. Gregory Walklin to Mr. Farney on July 18. As Mr. Farney explains in his declaration, following receipt of the Order, Mr. Farney contacted Mr. Walklin to express his surprise given his understanding of the prior communications between him and Mr. Walklin regarding the informal inquiry related to MPHJ. Farney Activision Decl., *passim*. Mr. Walklin indicated at that time that he had not yet had a chance to even review Mr. Farney's written response regarding MPHJ sent on July 15, but that he would get to it next week and contact Mr. Farney further if needed. *Id.* at ¶ 74. When asked by Mr. Farney what the Cease and Desist Order was thus about, if not MPHJ, Mr. Walklin indicated it was not issued because of MPHJ.¹⁰ *Id.* at ¶ 76. In fact, he stated he had not even been aware of the possibility of the Order until the previous evening, and suggested that Mr. Farney contact Mr. David Cookson with further inquiries. *Id.* at ¶ 77.

¹⁰ He did suggest the CID might encompass MPHJ.

E. Defendant Cookson Expressly Stated That the July 18 Order Related at Least to the Suit by Activision Against Pinnacle Bank

In response to Mr. Walklin's suggestion, Mr. Farney did call Mr. Cookson, and they spoke in the early afternoon of July 18. *Id.* at ¶ 80. Mr. Farney explained his surprise at receiving the July 18 letter given the seemingly cordial communications Mr. Farney had been having with Mr. Walklin regarding the MPHJ matter. *Id.* at ¶ 81. Mr. Cookson made it clear that the letter was not about the MPHJ matter, though he indicated that matter might be covered by the accompanying CID. *Id.* at ¶ 82. When Mr. Farney indicated that the only other client of which he was aware that had any matters pending in Nebraska was Activision and its suit against Pinnacle Bank, Mr. Cookson responded: "Yes. We are well aware of the Pinnacle Bank situation." *Id.* He thus made it clear that the July 18 letter was related to the Activision matter, even if the accompanying CID might encompass other clients represented by Farney Daniels, including MPHJ.

F. Removing Any Doubt as to Whether the AG Defendants Intended Their Order to Relate to Activision, One or More of Those Defendants Expressly Told CenturyLink That the July 18 Order Related to Activision

If there could be any doubt given all of the evidence presented above that the July 18 Order did in fact relate to Activision despite what the AG Defendants now tell the Court, the conduct of the AG Defendants with respect to a company called CenturyLink, Inc. d/b/a Century Link Communications ("CenturyLink") puts this matter to rest.

Prior to July 18, Activision had brought suit on its patents in the Eastern District of Texas against CenturyLink Corporation, a company incorporated in and headquartered in Louisiana, with operations in Texas and Nebraska. *See* Dkt. Nos. 10-1, 10-3. The suit against CenturyLink was filed on June 5, 2013, approximately one month before Activision TV filed this suit against Pinnacle Bank. *See* Dkt. No. 10-3. After issuance of the Cease and Desist Order, one or more of

the AG Defendants reached out and contacted CenturyLink and informed CenturyLink of the Order, and of the position of the AG Defendants that the Order prevented Activision TV from serving this suit upon CenturyLink. Johnson Decl., ¶ 7. In light of the AG Defendants' representation to this Court that their Order did not relate to Activision, and did not relate to previously filed litigation, the text of the email bears repeating here:

I note that I was somewhat surprised Activision was considering service while the Nebraska Attorney General's Investigation remains ongoing. CenturyLink, as a company that conducts business in Nebraska, was notified by the Nebraska Attorney General's office of the office's investigation and cease & desist order, presumably because the Office believes the CenturyLink action is impacted by this activity. If you could please confirm that you have not effected service at this time, I would greatly appreciate it. (emphasis added).

Plainly, unless disputed, this conduct by the AG Defendants would prove beyond a doubt that they considered their Order to relate to Activision activity. And it has not been disputed. As part of its Opening Memorandum, Activision explained the AG Defendant's conduct related to CenturyLink, and supported it with evidence in the form of a declaration from Mr. Johnson. *See* Dkt. No. 9, *passim*. Despite submitting a 40-page response and a declaration from Mr. Walklin, the AG Defendants provided no response at all to deny that they did in fact engage in this interference with CenturyLink. Given that this uncontroverted evidence demonstrates conclusively that the AG Defendants considered their Order to relate to Activision, Plaintiff submits that it has proven beyond doubt that the statements made to this Court by the AG Defendants in their Response to the contrary are false, and knowingly false. As shown by the AG Defendants' activities regarding CenturyLink, even if the Order were considered prospective in the eyes of the Nebraska AG, the Order still prevents Activision from using the counsel of its choice in Nebraska infringement matters that may be under investigation in the future.

II. The Nebraska AG's Allegation That This Matter Is Not "Ripe" Because It Has Not Yet Had an Adverse Effect On Activision Is Simply Not True As Demonstrated By Their Own Conduct Which Is Not Denied

As noted above, the AG Defendants argued in their Response that this Court lacked subject matter jurisdiction because Activision lacked standing where, according to the AG Defendants, the July 18 Order did not relate to Activision. As proven above, that defense of "lack of standing" was based upon statements by the AG Defendants regarding what they knew and related to others to be the intent and scope of their Order, statements by them that are inconsistent with the overwhelming evidence of what they actually knew and intended.

But the AG Defendants make a second set of untruthful statements in an attempt to argue this Court lacks subject matter jurisdiction. They argue that this matter also is not "ripe" because it was unreasonable of Activision or its counsel Farney Daniels to even consider that the Order might relate to activity associated with already-filed cases such as the Pinnacle Bank case represented by the Original Complaint here. Recall that in the July 18 Order, the AG Defendants "demanded" that Farney Daniels "cease and desist" from "the initiation of any and all new patent infringement enforcement efforts within the State of Nebraska." Dkt. No. 10-2. This would necessarily entail ceasing any efforts on behalf of Activision. In effect, the AG Defendants have taken the position that Activision's suit with this Court that the case is not "ripe" because Farney Daniels could not reasonably have thought that the reference to "new patent infringement enforcement efforts" could relate to carrying out any activity on behalf of Activision with respect to cases, such as this Pinnacle Bank case, that had already been filed prior to the issuance of the Order.

That the AG Defendants would seek dismissal for lack of jurisdiction on the basis of this misrepresentation is, frankly, astonishing. As already explained above, Activision presented evidence that the AG Defendants themselves took the position that their Order prevented Farney

Daniels from seeking admission *pro hac vice* in the Eastern District of Texas to represent Activision in that Court against CenturyLink, a Louisiana corporation, and having CenturyLink served with the Complaint filed in that Court. Dkt. No. 10-3. That CenturyLink suit was filed three weeks' prior to the filing of the Pinnacle Bank suit here. *Id.* As noted, the AG Defendants did not even attempt to deny that they communicated this position to CenturyLink, and made no attempt to dispute the evidence submitted by Activision on this point.

Plainly, outside this Court, the AG Defendants construed the reference in their Order to “initiation of any and all new patent infringement enforcement efforts within the State of Nebraska” so broadly that it prohibited Farney Daniels’ representation in a case filed even *earlier* than the Pinnacle Bank case, and filed in Texas against a Louisiana corporation (whose only connection with Nebraska is that they apparently have some operations in Nebraska). Thus, just as with the untruthful statements they make to support their “lack of standing” argument, the evidence of record also demonstrates the lack of merit in their statements made to support the AG Defendants’ “lack of ripeness” argument.¹¹

¹¹ The AG Defendants’ Response, when considered in light of the evidence explained in this Reply, presents this Court with a rare and serious circumstance. By their Response, the AG Defendants have chosen to make material statements to this Court that are demonstrably untrue. Further, their Response proves the July 18 Order was issued without any investigation related to Activision at all, and that, lacking any lawful basis, the AG Defendants chose deliberately to issue an Order against, and publicly defame and disparage a respected national law firm. *See* Exhibits A-7 – A-20. The Response and the AG’s Defendant’s conduct, Activision respectfully submits, constitutes violations of this Court’s Local Rules (Rule 1.7(b)(2); 1.7(c)(1)(A)); FED. R. CIV. P. 11; and the Nebraska Rules of Professional Conduct (NEB. CT. R. OF PROF. COND. §§ 3-503.1; 3-503.3). Plaintiff makes this point reluctantly and with great care, and with respect for the Office held by the AG Defendants. But the great deference due to their Office, because of its nature and power, should come with a commensurately great response when that Office and position is abused. The AG Defendants, because of their Office, appear to be immune from the laws of defamation that would apply to a private party. But as parties and counsel here, they stand on equal footing with Plaintiff and its counsel and must abide by the same rules.

**SECTION II: ARGUMENT REGARDING THE PRELIMINARY INJUNCTION
MOTION BEFORE THE COURT**

Having addressed above the two separate startling misrepresentations made by the AG Defendants to this Court in their Response, Activision now turns to the specific relief requested by its Motion.

It is important to keep in mind the relief Activision seeks by its Motion, because the AG Defendants seek to confuse that issue in hopes that it may confuse the Court into not granting Activision the relief it seeks. Contrary to the AG Defendants' statements, Activision by its Motion has not sought to prevent the Nebraska AG from investigating anything.¹² While it is apparent from the Response that the Nebraska AG has no legitimate basis to investigate further any activities of Farney Daniels with respect to Activision, that issue is not presented to the Court by this Motion. It is also apparent from the Response that the Nebraska AG has no legitimate basis to further investigate Farney Daniels' activities with respect to MPHJ. But that issue also is not presented to the Court by this Motion.

The only issue presented to this Court is the request for relief from the unlawful Cease and Desist Order issued by the AG Defendants against Farney Daniels on July 18. The Response proves that this Order was issued with respect to Activision without any investigation at all, and with respect to MPHJ with only a minimal incomplete investigation from which the AG Defendants admit they cannot yet identify any activity that violates Nebraska law.

¹² The AG Defendants complain that without a denial of Plaintiff's Motion, they will be left unable to investigate. This is plainly incorrect. Farney Daniels has already fully complied with the July 18 CID, and thus the AG Defendants have the information they requested. Farney Activision Decl., *passim*; Farney MPHJ Decl., *passim*. Further, the Motion sought here seeks only relief from the Cease and Desist Order, not the CID. Had the AG Defendants acted reasonably and professionally, and merely privately issued the Firm a CID related to Activision, as is the usual course of conduct, this suit would not have been necessary.

Had the Nebraska AG issued only a CID to Farney Daniels, even if doing so might have been inappropriate, this case would not be pending before the Court. But that is not what the Nebraska AG chose to do. It chose instead to issue the very public Cease and Desist Order, and it is that Order which is the subject of this Motion.¹³

Activision has submitted sufficient evidence and argument such that it is entitled to preliminary injunctive relief with respect to the Nebraska AG's unlawful Order. As the Court can see from the Response, the parties agree that whether preliminary injunctive relief should be granted here requires consideration by the Court of a four-part test. The parties further agree on the test and that to demonstrate entitlement to preliminary injunctive relief, Activision must demonstrate: (1) the likelihood of success on the merits; (2) the threat of irreparable harm to the movant should the court deny the injunction; (3) the balance between this harm and the harm that granting the injunction will cause to the other litigants; and (4) the public interest. *Vonage Holdings, Corp. v. Neb. PSC*, 543 F. Supp. 2d 1062, 1065 (D. Neb. 2008) citing *Dataphase Sys., Inc. v. C L Sys.*, 640 F.2d 109, 114 (8th Cir. Mo. 1981).

Activision takes up each of these four points in turn and responds to the arguments made with respect to them by the Nebraska AG. Consideration of these points demonstrates overwhelmingly that a preliminary injunction should be issued.

¹³ For what purpose it chose to issue such an Order without having established by any investigation that such an Order was warranted, Plaintiff will leave to the Court's own experience and deduction. Plaintiff notes, however, that the AG Defendants' vigorous publicizing of their issuance of the Order against Farney Daniels, and against Activision, in which they refer to Activision as a "patent troll," led to nationwide publicity for the AG Defendants. *See* Exhibits A-7 – A-20. Whether this has any relevance to the AG's issuance of the unprecedented Order and their conduct, Plaintiff leaves for judgment of this Court.

I. Activision Has Shown that it has a Likelihood of Success on the Merits That Entitles Activision to Its Preliminary Injunction

When one considers the entirety of the Nebraska AG's Response, it is apparent that the most one can say is that the Nebraska AG thinks there might be the possibility that an investigation of Farney Daniels might, sometime in the future, reveal some evidence for which it might be able to bring a state law claim. But, it is also made clear that even this contingent possibility would depend upon the Nebraska AG figuring out some law, and interpretation of the law, that he has not yet identified, that could even apply to this activity. The essence of this is that the Nebraska AG cannot demonstrate a likelihood of success on any state law claim. But the more immediate point is that it is beyond peradventure that the Order issued by the Nebraska AG is currently without lawful basis (regardless of whether the Nebraska AG may, at some later time, come up with some basis). As such, the Order represents a clear violation of §1983 and Activision has established a likelihood of success on its Count III, which alone would justify entry of the preliminary injunctive relief that it seeks.

A. Activision Will Likely Succeed In Showing It Has Standing To Bring This Suit

The AG Defendants have argued as one reason that Activision could not have a likelihood of success is that Activision lacks standing. As explained previously, the AG Defendants claim now that their Order was not intended to relate to Activision activity. Activision has amply illustrated that position is squarely contradicted by their own conduct and statements outside this Court.

The Order was intended to be, and was directed at Farney Daniels' representation of Activision.¹⁴ Activision need only demonstrate that the Order directly and immediately has an

¹⁴ This would be true even if it also related to that Firm's separate and distinct representation of MPHJ. *See* Farney MPHJ Decl., *passim*.

adverse effect upon it to have standing with respect to Count II. Here, as the AG Defendants assert that the letters sent by Activision violated Nebraska law, such a finding undoubtedly has a direct and immediate adverse effect on Activision, because the Order, as it stands, would bar such communications to alleged infringers by Activision now and in the future. Thus there is standing with respect to Count II.

As to Count III, Activision has standing because the Nebraska AG's Order has a direct and immediate adverse effect on Activision's constitutional rights. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that standing requires: a concrete injury that is actual or imminent, casually connected to the conduct, not speculative and the requested relief will redress the injury). That this is the case was demonstrated above. *See* Section I, *supra*.

B. Activision Will Likely Succeed in Showing That Its Suit Is “Ripe”

The only argument that the AG Defendants have asserted regarding “lack of ripeness” is that the Order was not intended to, nor had, any effect on suits that Activision had filed prior to the issuance of the Order, nor on Farney Daniels' representation of Activision in connection with those suits. As demonstrated earlier, the AG Defendants' own conduct in connection with the CenturyLink matter demonstrates the untruthfulness of this statement. Their own conduct demonstrates that they intended their Order to directly affect Farney Daniels' representation of Activision in cases that had already been filed, and took active steps at least in connection with the CenturyLink case to inform the defendant in that case that the Order prevented Activision from even serving the complaint on the defendant. The AG Defendants did not deny that this occurred.

Plainly, Activision will be able to demonstrate that this suit is sufficiently “ripe” that this Court has subject matter jurisdiction. *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (explaining that a determination of ripeness requires evaluation of the issues' fitness for

judicial decision and the hardship of the parties of withholding court consideration). In fact, the AG Defendants admit that this Court has an issue fit for judicial decision if it can show, as it now has, that the Order applies to Activision's existing cases, such as the CenturyLink case. *See* Dkt. No. 22, p. 12 ("In the events Defendants actually applied the letter to one of Plaintiff's alleged contingent future events, this Court would have an issue fit for judicial decision.").

C. Activision Will Likely Succeed On Its State Law Claims

In Count II of its Complaint, Activision seeks a declaration that its patent enforcement activities in Nebraska have not violated any Nebraska state law. In its Opening Memorandum, Activision explained that the patent enforcement activity in Nebraska on its behalf by Farney Daniels had been based upon reasonable investigation, and was accurate and truthful. *See* Dkt. No. 9. Indeed, Activision presented evidence in the form of a declaration of Mr. Johnson, that took each separate portion of the letter sent to Pinnacle Bank and explained and averred that each of the statements in those respective portions were based upon reasonable investigation, were accurate, and truthful. Dkt. No. 10-1.

Activision further explained that neither the sending of its patent enforcement letters, nor the filing of patent infringement suits, could violate Nebraska's unfair competition and deceptive trade practices laws. Dkt. No. 9. One of the reasons that there could be no violation was that these laws do not pertain to patent enforcement efforts, as the State Defendants appear to concede in their Response. A second reason is that the accuracy and reasonableness of the communications related to the patent enforcement efforts were such that they could not be considered "deceptive" or "unfair" within the meaning of those respective laws. But as a third, and more important reason, Activision explained the black letter law established by the Federal Circuit that no Nebraska law could interfere with Activision's patent enforcement efforts unless it could be alleged and proven that Activision's efforts were a "sham." To demonstrate that the

efforts were a “sham,” and not intended to be legitimate patent enforcement activity, the Nebraska AG would have to plead and prove that the communications or the suits were both “objectively baseless” as well as “subjectively baseless.”

Activision need only demonstrate a “likelihood of success” with respect to any of these three reasons, to demonstrate that it has a likelihood of success in demonstrating that its conduct has not violated any Nebraska law.

1. Activision Will Likely Succeed On Count II Because Preemption Applies and the AG Defendants Fail To Present Any Evidence That Activision’s Patent Enforcement Efforts Were A “Sham” (i.e. “Objectively Baseless” and “Subjectively Baseless”)

Activision demonstrated in its Opening Memorandum that the doctrine of preemption would apply to prevent the application of Nebraska state law to Activision’s patent enforcement activities unless the Nebraska AG could prove those activities were a “sham.” Dkt. No. 9. This requires showing that the related correspondence was both “objectively baseless” and “subjectively baseless.” The Federal Circuit in the *Globetrotter* case made this point quite clearly:

Our decision to permit state-law tort liability for only objectively [and subjectively] baseless allegations of infringement rests on both federal preemption and the First Amendment. The federal patent laws preempt state laws that impose tort liability for a patentholder’s good faith conduct in communications asserting infringement of its patent and warning about potential litigation. In addition, the same First Amendment policy reasons that justify the extension of *Noerr* immunity to pre-litigation conduct in the context of federal antitrust law apply equally in the context of state-law tort claims.

* * *

Accordingly, to avoid preemption, bad faith must be alleged and ultimately proven, even if bad faith is not otherwise an element of the tort claim. This preemption is based on the following concept: A patentee that has a good faith belief that its patents are being infringed violates no protected right when it so notifies infringers. Accordingly, a patentee must be allowed to make its rights known to a potential infringer so that the latter can determine whether to cease its

allegedly infringing activities, negotiate a license if one is offered, or decide to run the risk of liability and/or the imposition of an injunction.

Globetrotter Software, Inc. v. Elan Computer Group, Inc., 362 F.3d 1367, 1374, 1377 (Fed. Cir. 2004) (internal quotations and citations omitted).

The Nebraska AG appears to disagree with this point of law, but in doing so confuses the difference between “complete preemption” (also called “field preemption”) and “conflict preemption.” It is well-settled that the federal patent law is not the subject of “complete preemption” in that state law may not ever apply to anything to do with patents. Instead, patent law is the subject of “conflict preemption.” In the case of patents, the Federal Circuit has considered this issue multiple times, and has concluded repeatedly that the *Noerr-Pennington* doctrine applies to the assertion of any state law inhibiting assertion of patent rights, such that state law can only be applied where the assertions are both “objectively baseless” and “subjectively baseless.” As *Globetrotter* explains, one in effect has to read the assertion of any state law claim against patent assertion activity as requiring proof not only of the requirements imposed by the state law itself, but the additional elements of “objective baselessness” and “subjective baselessness” as if those were elements of the state law itself.

In confusing this, the Nebraska AG quotes the Federal Circuit’s decision in *Hunter Douglas, Inc. v. Harmonic Design*, 153 F.3d 1318, 1333 (Fed. Cir. 1998), where the Court said: “there is no reason to believe that the clear and manifest purpose of Congress was for federal law to occupy the field pertaining to state unfair competition law.” *See* Dkt. No. 22, p. 31. The Nebraska AG asserts this quotation stands for the proposition that state unfair competition law is not preempted. *Id.* However, this statement by the Federal Circuit was merely stating the well-established fact that there is no “field” preemption (or “complete” preemption) in patent law. But that is different than saying there is no federal preemption of state law applicable at all to

patents. The *Hunter Douglas* case makes this clear.

The Federal Circuit held that while “there is no field preemption of state unfair competition claims,” it is instead “conflict preemption [that] is a more precise means of determining which state law causes of action are preempted.” *Hunter Douglas*, 153 F.3d at 1333. Other Federal Circuit cases, like *Globetrotter*, have repeatedly made it clear that conflict preemption prevents the assertion of state law claims against patent assertion activity in the absence of evidence of “bad faith” – which, again, requires evidence of “objective baselessness” and “subjective baselessness.” See *Hunter Douglas*, 153 F.3d at 1336 (“federal patent law bars the imposition of liability for publicizing a patent in the marketplace unless the plaintiff can show that the patent holder acted in bad faith.”) (citing numerous cases); *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1352 (Fed. Cir. 1999) (patentee’s statements regarding its patent rights are privileged and not actionable unless made in bad faith); *Matthews Int’l Corp. v. Biosafe Eng’g, LLC*, 695 F.3d 1322 (Fed. Cir. 2012) (affirming district court’s finding that the plaintiff failed to sufficiently plead bad faith necessary to avoid *Noerr-Pennington* immunity, because the plaintiff had only conclusorily pled bad faith). District courts consistently adhere to this rule.¹⁵

¹⁵ *Matthews Int’l, Corp. v. Biosafe Eng’g, LLC*, 2011 U.S. Dist. LEXIS 110010, at *40 (W.D. Pa. Sept. 27, 2011) (“[T]he Court has already explained that it finds that allegations of legal activity coupled with bald assertions of bad faith insufficient to raise even the *plausibility* of bad faith. All that is alleged is the making of accusations of infringement, which activity it is legal for a patentee to undertake.”); *Infection Prevention Techs., LLC v. UVAS, LLC*, 2011 U.S. Dist. LEXIS 105666, at *74 (E.D. Mich. July 25, 2011) (holding the plaintiff had not adequately pled bad faith where, although the plaintiff alleged the defendants made statements regarding accusations of infringement “knowing the statement[s] to be false,” the allegations were still insufficient because the complaint failed to suggest how the defendants knew (or should have known) that their statements were false); *Noble Fiber Techs., LLC v. Argentum Med. LLC*, 2006 U.S. Dist. LEXIS 43357, at *16 (M.D. Pa. June 27, 2006) (allegations were conclusory and insufficient to allege bad faith with the particularity necessary).

The Nebraska AG claims that “[w]ithout coverage under deceptive trade practices laws, there would be no entity that could ensure law firms, or any individual, is not being false, deceptive or misleading in soliciting patent licenses. Ostensibly, under the logic of Plaintiff’s brief, any time a letter that alleged patent infringement whatsoever – say, under circumstances perhaps that were entirely fraudulent, where the patent didn’t even exist – would be exempt from coverage.” Dkt. No. 22, p. 27. However, the Nebraska AG must have overlooked Activision’s extensive briefing in its Opening Memorandum regarding preemption.

To dispose of the Nebraska AG’s first concern, the “entity” that could ensure that law firms or any individual is not being fraudulent in its patent enforcement efforts would be any Federal Court – including the Federal Circuit, as those Courts have subject matter jurisdiction to hear all claims arising under the federal patent laws. *See* U.S. Code Title 35. To dispose of the Nebraska AG’s second concern, those patentees who assert patent rights in “bad faith” are not exempt from state law coverage (including those who knowingly assert invalid patents). *See, e.g., Mirafī, Inc. v. Murphy*, 1991 U.S. App. LEXIS 1636, at *6 (Fed. Cir. Feb. 4, 1991) (explaining that “bad faith infringement litigation, [in knowingly asserting an invalid patent, for example] could violate North Carolina’s Unfair Competition Statute”) (emphasis added). This conclusion stems from the preemption doctrine, which is clear that a patentee’s communications regarding its patent rights are immune from liability for affirmative claims such as the Nebraska AG’s, pursuant to the *Noerr-Pennington* doctrine, unless it is both pled and proven that the communications were made in bad faith, meaning they were both objectively and subjectively baseless. *See* Dkt. No. 9, pp. 17-18.

Contrary to the Nebraska AG’s assertions, the *Noerr-Pennington* doctrine does not “only [apply] to antitrust and unfair competition actions, and not deceptive trade practices claims.” Dkt

No. 22, p. 30. *See, e.g., Globetrotter Software, Inc.*, 362 F.3d at 1374 (“State [tort] law claims . . . can survive federal [patent law] preemption only to the extent that those claims are based on a showing of ‘bad faith’ action in asserting infringement.”); *ClearPlay, Inc. v. Nissim Corp.*, 2011 U.S. Dist. LEXIS 99154, at *8 (S.D. Fla. Sept. 2, 2011) (finding that federal patent law preempted the state-law claim of violation of Florida’s Deceptive and Unfair Trade Practices Act); *DeSena v. Beekley Corp.*, 729 F. Supp. 2d 375, 401 (D. Me. 2010) (finding that bad faith in the publication of the patent must be established to avoid preemption by patent law for a state law claim under the Maine Uniform Deceptive Trade Practices Act); *Alien Tech. Corp. v. Intermec, Inc.*, 2008 U.S. Dist. LEXIS 13095, at *11-13 (D.N.D. Feb. 20, 2008) (citing the Washington Consumer Protection Act and explaining that deceptive conduct falls within Washington’s CPA, and further holding that a finding of bad faith for publicizing a patent in the marketplace is required in order to survive federal preemption).

In summary, the AG Defendants are simply incorrect that the doctrine of “conflict preemption” does not apply to patent law. Further, they are also incorrect that conflict preemption does not apply to the attempted assertion of Nebraska state law here. Finally, the Federal Circuit has made it repeatedly clear that to overcome preemption, the Nebraska AG must have evidence showing any accused patent related communications are “objectively baseless” and “subjectively baseless.” This must be demonstrated by concrete evidence. Mere cursory allegations of “bad faith” are not enough to avoid preemption.¹⁶ Certainly, the Nebraska AG

¹⁶ *See also Viskase Companies, Inc. v. World PAC Intern. AG*, 710 F. Supp. 2d 754, 757 (N.D. Ill. 2010) (“Undoubtedly mindful of its pleading requirements . . . plaintiff recites in the complaint that defendants sent the letters, ‘purposefully and in bad faith,’ in an effort to harm plaintiff’s business by ‘creating the false perception in the marketplace’ that plaintiff’s products infringed the asserted patent. The complaint as a whole, however, does not support these conclusory allegations, which are insufficient to raise plaintiff’s right to relief under this standard ‘above the speculative level.’”); *GMP Techs., LLC v. Zicam, LLC*, 2009 U.S. Dist. LEXIS

here has not demonstrated that it can avoid preemption where it cannot even identify yet any conduct which shows violations Nebraska state law, much less constitutes anything “objectively baseless” or “subjectively baseless” about Activision’s communications.

2. The Nebraska AG Failed to Demonstrate That Any of the Nebraska Laws It Cites Would Apply to the Transmission of Patent Enforcement Letters

In its Opening Memorandum, Activision explained that neither the Nebraska unfair competition law, the deceptive trade practices law, nor the UDTPA law appear by their terms to apply to the conduct at issue here – the transmission of patent infringement related letters to infringers. In its Response, the Nebraska AG fails to demonstrate that either of these laws apply to this activity.

a. The Nebraska AG Failed to Demonstrate That Farney Daniels’ Correspondence On Behalf of Activision Constitutes “Trade or Commerce” Within the Meaning of Nebraska’s Consumer Protection Laws

The Nebraska AG admits that to succeed on its state law claims under Nebraska Consumer Protection laws, it will have to show that the transmission of patent licensing letters is the conduct of “trade or commerce.” Dkt. No. 22, p. 24. Those terms are defined under the Nebraska Consumer Protection Act as “the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska.” NEB. REV. STAT. § 59-1601(2) (emphasis added). The State cites *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984) as being controlling in holding that the Nebraska statutes apparently do not actually limit unfair or deceptive activity to “the sale of assets or services.” Dkt. No. 22, p. 25. In *Demopolis*, the

115523, at *9 (N.D. Ill. Dec. 9, 2009) (“Turning to the Amended Complaint, [plaintiff] repeatedly alleges that [the patentees] took certain actions ‘deliberately and intentionally,’ ‘with intent’ and ‘in bad faith.’ These legal conclusions are not entitled to any weight, and cannot salvage [plaintiff’s] state-law claims. . . if an aggrieved party had only to allege that an infringement warning was erroneous to avoid federal preemption, the bad-faith hurdle would be meaningless.”).

plaintiffs, members of a law firm, represented a defendant in two lawsuits (one for dissolution of a real estate partnership and another for a real estate forfeiture action). The plaintiffs sued the defendant for breach of an express contract to pay for legal services. The defendant counterclaimed for violations under the Washington Consumer Protection Act.

The question on appeal was whether the lawyers could be subject to liability under Washington's CPA. *Demopolis*, 621 P.2d at 53. The court held that "**certain** entrepreneurial aspects of the practice of law may fall within the 'trade or commerce' definition of the CPA." *Id.* at 60 (emphasis added). The court then limited these "certain" entrepreneurial aspects of the legal practice that may be subject to the CPA to the following: "how the price of legal services is determined, billed and collected and the way a law firm obtains, retains, and dismisses clients," because "[t]hese business aspects of the legal profession are legitimate concerns of the public which are properly subject to the CPA." *Id.* at 61. The Nebraska AG agrees that only these aspects of the practice of law were held to be subject to the Washington CPA. Dkt. No. 22, p. 26. Importantly, the court noted that "the actual practice of law" is not a concern of the CPA including "gather[ing] essential facts [presuit]" and "pursu[ing] claims against [the client's] opponents." *Demopolis*, 621 P.2d at 61.

The Nebraska AG claims that the sending of patent inquiry letters by Farney Daniels on Activision's behalf, although a case of "first impression . . . is far more like the 'entrepreneurial' aspect of practicing law than the 'actual practice.'" Dkt. No. 22, p. 26. The sending of these letters on Activision's behalf, however, is undoubtedly not "entrepreneurial" in nature, as evidenced by the *Demopolis* court's holding.¹⁷ Such letters are sent on behalf of Activision, at

¹⁷ Activision notes in passing that the AG Defendants plainly use the term "entrepreneurial law firm" in a pejorative context, but never explain what they mean. Given that Activision's prior

its request, and constitute the active “pursuit of claims against [Activision’s] opponents.”

Further, such letters have nothing to do with “how the price of legal services is determined, billed, and collected” or “the way [Farney Daniels] obtains, retains, and dismisses clients.”

Demopolis, 621 P.2d at 61. Therefore, pursuant to *Demopolis*, the sending of Activision letters by Farney Daniels cannot come within the purview of Nebraska’s CPA laws and cannot be deemed so because Farney Daniels does not engage in “trade or commerce,” under Nebraska’s definition.¹⁸

b. The Activities Undertaken by Farney Daniels On Behalf of Activision Likewise Do Not Come Within Nebraska’s UDTPA Law

The Nebraska AG attempts to argue that the UDTPA might apply to Farney Daniels’ sending of patent notice letters on behalf of Activision if those letters constitute “unconscionable practices.” Dkt. No. 22, p. 27.

However, unconscionability within the meaning of the Nebraska law refers to contract actions, as admitted by the Nebraska AG: “Unconscionability is determined in light of all the surrounding circumstances, including (1) the manner in which the parties *entered into the contract*, (2) whether the parties had a reasonable opportunity to understand *the terms of the contract*, and (3) whether *important terms* were hidden in a maze of fine print.” Dkt. No. 22, p. 27 citing *Parizek v. Roncalli Catholic High Sch.*, 11 Neb. App. 482, 286 (2002) (emphasis added). Thus, the Nebraska statute does not bring such an analysis out of the contract context.

counsel was Kirkland & Ellis, it would be uncertain how the AG Defendants intend the term to be pejorative. But the point seems to be irrelevant here in any event.

¹⁸ This conclusion supports the policy that a Nebraska Attorney General does not have the authority to regulate the practice of law in a particular jurisdiction. That power, of course, is better left to the Nebraska Supreme Court. *See* Dkt. No. 9, p. 21.

3. Even If Nebraska Law Did Apply To Farney Daniels' Conduct On Behalf of Activision, the Nebraska AG Fails To Provide the Court With Any Evidence of Any Violation

Even if the Nebraska AG could have shown that any Nebraska law was even relevant to Farney Daniels' activity on behalf of Activision, it wholly failed to submit any evidence to suggest that that activity posed any possible violation of any law. In addressing this point, the AG Defendants take inconsistent positions. On the one hand, they repeatedly tell the Court that their Order has nothing to do with Activision at all. Certainly if this were true, they would have no evidence of any violation of state law. But the AG Defendants state elsewhere that Farney Daniels' actions on behalf of Activision were somehow "unfair" and "deceptive" under Nebraska's "deceptive trade practices laws." *Compare* Dkt. No. 22, p. 6 (explaining that the July 18 letter "does not apply to Plaintiff") *with* p. 19 ("Plaintiff cannot show that the threatening letters by Farney Daniels are not in violation of the Nebraska Consumer Protection Act"). Thus, despite the fact that the Nebraska AG admits that the Nebraska Consumer Protection laws have yet to define activity that is deemed "deceptive" or "unfair," it still insists that Activision and Farney Daniels violated these laws. Dkt. No. 22, p. 19.

a. Activision's Letters Were Not "Deceptive" Within the Meaning of Nebraska's Unfair Competition Law

In asserting that statements in Activision's letters were deceptive, the Nebraska AG cites the following statements: "the letters warn there are 'serious consequences for infringement,' and '[i]nfringers who continue to infringe in the face of an objectively high risk of infringement of a valid patent can be forced to pay treble (triple) the actual damages, as well as the patent owner's litigation costs, including all attorney's fees.'" *Id.* at p. 20 (citing Activision letters attached to the Amended Complaint).

These statements under no circumstances could be considered “deceptive.” Both, plainly, are objectively true. Surely the Nebraska AG will not deny that the federal patent law provides for “serious consequences for infringement.” Liability for infringement entails both liability for damages and possibly an injunction. 35 U.S.C. §§283 & 284. Further, the Nebraska AG cannot deny that willful infringers can be liable for enhanced damages. 35 U.S.C. §284. Such facts about patent infringement and the consequences for infringement can hardly be considered “deceptive,” as they are plainly true and accurate under federal patent laws.

Further, the Nebraska AG argues that the letters Activision sent might be considered deceptive because they allegedly “demanded” that the recipient contact Farney Daniels and Activision “within three weeks of the date of this letter.” Dkt. No. 22, p. 21. However, by simply reading the letters, the Court can see that there were no such demands. In fact, the letters plainly stated: “Please contact us within three weeks of the date of this letter, so that we may confer with you regarding an appropriate license arrangement.” *See, e.g.*, Dkt. No. 7-4. There were no “demands,” nor stated consequences for not contacting Activision in the time stated.¹⁹ Even if there had been such a demand, the Federal Circuit law is clear that such demands are not only not lawful, they cannot even form the basis of exercising personal jurisdiction over an out-of-state sender. *See, e.g., Sinclair v. StudioCanal S.A.*, 709 F. Supp. 2d 496 (E.D. La. 2010) (threatening infringement suit “within two weeks” if recipient does not respond to demand letter is insufficient to justify exercising personal jurisdiction over the out-of-state patent owner who sent the demand).

¹⁹ The letter to Nanonation asking it to contact Activision “as soon as possible . . . to discuss an appropriate resolution of Nanonation’s past and ongoing infringement” is equally non-demanding and not deceptive. Dkt. No. 7-7.

The Nebraska AG claims that the statements made in these letters “seem like ‘threats to sue.’” Dkt. No. 22, p. 21 (referring generally to Fair Debt Collection Act cases, which of course have no relevance to patent enforcement). The first problem with the Nebraska AG’s argument here is that the Federal Circuit has made it repeatedly clear that a patent owner has a First Amendment right specifically to “threaten suit for infringement.” *See, e.g., Concrete Unlimited, Inc. v. Cementcraft, Inc.*, 776 F.2d 1537, 1539 (Fed. Cir. 1985) (patentee “did only what any patent owner has the right to do to enforce its patent, and that includes threatening alleged infringers with suit”). Thus, even if it were conceded that Activision letters represented “threats to sue,” by law, they could not be unlawful under the federal patent laws with which the state laws may not conflict. Moreover, it appears that most, if not all, of the Nebraska AG’s arguments on this point relate to MPHJ and not Activision. Thus, in addition to being without merit, the arguments have no relevance here. To the extent that the Nebraska AG did intend to assert that Farney Daniels sent letters on behalf of Activision without an attempt to bring follow-up infringement suits, the Original Complaint filed in this case serves to concretely refute such a frivolous contention. Further, Activision submitted Brett Johnson’s declaration demonstrating that each portion of Activision’s letters were accurate and truthful, to which the AG Defendants made no response.

b. Activision’s Letters Were Not “Unfair” Within the Meaning of Nebraska DTPA Law

The only activity the Nebraska AG appears to allege as being potentially unfair relates to activities Farney Daniels undertook in connection with its representation of MPHJ. While it appears that the Nebraska AG’s allegations in this regard lack any legal merit²⁰ or evidentiary

²⁰ The amount of letters sent to alleged infringers is neither relevant nor influential to the analysis. Simply put, a patent holder is legally entitled to notify all infringers of its patent rights – just because there may be more infringers of one patent than another does not mean that a

support, they are not relevant in any event because they do not pertain to Activision. Further, the Nebraska AG admits that “[t]he exact standard here has not, apparently, been defined for the instant case” with respect to unfairness. Dkt. No. 22, p. 22. Of course, this begs the question as to what standard the Nebraska AG applied when it felt the actions by Farney Daniels on behalf of its clients were so egregious that it felt that a Cease and Desist Order’s issuance to halt such activity was necessary.²¹

The Nebraska AG in its Response also alleges that the Farney Daniels’ letters were “coercive,” citing statements in Activision’s letters “regarding imminently filing suit or taking further legal action,” because such were “attempts at coercing businesses to agree to quick licenses.”²² However, nowhere in the Activision letters, as explained *supra*, do the letters state that Activision planned to “imminently file suit” or “take legal action.” Instead, the letters explained the federal patent law regarding the consequences of infringement, including willful

patent holder must only pick a small portion of infringers to enforce its patent rights against. Further, nowhere in the federal law is a patent holder required to sue an alleged infringer after notifying it within a prescribed period of time. In fact, a patent holder is not required to enforce its intellectual property rights against an infringing party at all – either in court or outside of court. Accordingly, the amount of infringers who received letters is simply irrelevant to the protection of a patent holder’s intellectual property. *See Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1359 (Fed. Cir. 1998) (cease and desist letter sent to a potential patent infringer coupled with offers to license are insufficient to establish the personal jurisdiction); *Toro Co. v. Advanced Sensor Tech., Inc.*, 2008 U.S. Dist. LEXIS 49458, at *8 (D. Minn. June 25, 2008) (finding no personal jurisdiction even though the defendant had sent over 300 emails to Minnesota residents, but had no contacts outside of the emails, and holding that “[w]ithout more, even the relatively large amount of communication does not establish specific jurisdiction”); *Digi-Tel Holdings, Inc. v. Proteq Telecomm., Ltd.*, 89 F.3d 519, 521, 523 (8th Cir. 1996) (finding no personal jurisdiction despite evidence of “dozens of letters and faxes and numerous phone calls” between the defendant and the forum state).

²¹ Notably, the Nebraska AG fails to show that Activision’s activities through Farney Daniels violated the *Raad v. Wal-Mart Stores*, 13 F. Supp. 2d 1003 (D. Neb. 1998) standard, which requires proving the practice: “(1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous.” *Id.* at p. 22.

²² Again, notably, the Nebraska AG, to support its assertion that “coercion itself has been held to be an adequate basis for finding a practice unfair,” cites non-binding and non-persuasive authority out of the North Carolina Court of appeals. *Id.* at p. 23.

infringement, and simply asked that the recipient to contact Activision to discuss the matter. *See* Dkt. Nos. 7-3, 7-4, 7-5, 7-6, 7-7. Such letters can hardly be deemed “coercive” or “unfair.”²³ Additionally, threatening to imminently file suit cannot be deemed coercive, as every patent holder United States is afforded the same privilege to threaten suit under the First Amendment. *See Concrete Unlimited*, 776 F.2d 1537.

The Nebraska AG further asserts that such letters were unfair because they “[took] advantage of disparate knowledge, creating an extensive burden on a consumer or entity with an imbalance of knowledge” that received them. Dkt. No. 22, p. 23. Again, setting aside that these assertions lack any legal merit or evidentiary support, they appear to relate to MPHJ, and not to Activision. The Nebraska AG admitted that Pinnacle Bancorp or the businesses targeted by the Plaintiff letters could not reasonably be considered “vulnerable,” even if supposed “vulnerability” were even a relevant consideration under the patent law, which it is not.²⁴ *Id.* at p. 24. Plainly, the Nebraska AG presents no evidence that Farney Daniels’ conduct on behalf of Activision was “unfair.” Further, the Nebraska AG admits that it does not have any information to show that they are. *See id.* at p. 28 (“Because the Attorney General’s investigation is nascent and developing, it is difficult – with the limited information available about Farney Daniels’

²³ Further, contrary to the Nebraska AG’s assertions, the alleged coercion of such letters cannot be “increased” because they were sent by Farney Daniels. Dkt. No. 22, p. 23. Such letters clearly stated they were sent on behalf of Activision, and thus, there was no “increase” in coercive effect. Plainly, Farney Daniels, as Activision’s counsel, is entitled to send patent notice letters on its client’s behalf.

²⁴ Elsewhere, the Nebraska AG makes vague references to it being coercive to send a letter asking a recipient to “pay an undisclosed licensing fee within a short span of time,” or to it being unfair to refer the recipient to a website where the relevant patents may be viewed. Given that a patent owner may initiate licensing discussions without first naming its licensing price, has the right to bring suit at any time, even without notice (subject to Rule 11, of course), and that it cannot be unfair to invite the recipient to read the patent relevant to its infringement, all of these points by the Nebraska AG fail to support any allegation of violation of any state law. *See*, generally, Farney MPHJ Decl.

practices at this time – to conclude that their practices are violating any of these specific statutory prohibitions.”). A contention by the Nebraska AG that it is undertaking an ongoing investigation and may someday come up with some argument for why Activision’s activity was in violation of Nebraska law plainly is insufficient to justify an Order issued to prevent Activision from enforcing its patents while that investigation lingers.²⁵ These circumstances indeed suggest that the AG Defendants struggled to find some argument to justify an otherwise unwarranted position.

c. Activision’s Letters Were Not “Unconscionable” Within the Meaning of the UDTPA

The Nebraska AG asserts that the UDTPA bans “unconscionable” acts or practices, and asserts that this section is applicable to Farney Daniels’ letters because apparently those letters constituted “contract negotiations with Nebraska businesses for patent licenses.” Dkt. No. 22, p. 27. The Nebraska AG, however, in citing to NEB. REV. STAT. § 87-303.01 artfully omitted the entire portion of that section to imply that unconscionability applies here. *See id.* The entirety of that section shows its inapplicability outside of the contract context: “An unconscionable act or practice *by a supplier* in connection with a consumer transaction shall be a violation of the Uniform Deceptive Trade Practices Act.” NEB. REV. STAT. § 87-303.01(1). Here, obviously neither Activision nor Farney Daniels can be considered “suppliers” to a “consumer transaction,” likewise, neither have entered into any “contracts” with any of the businesses who received letters.²⁶ Thus, the unconscionability position as set forth by the Nebraska AG plainly does not

²⁵ The Nebraska AG refers to a suit filed in Vermont against MPHJ, not Farney Daniels. But it never explains any relevance of this to Activision.

²⁶ Importantly, a licensing agreement is not considered a “contract in connection with a consumer transaction,” because there is no sale of goods or services. Rather, such an agreement is considered a settlement regarding the recipient’s infringement, inclusive of a covenant not to sue for such infringement in the future. *See, e.g., Howes v. Howes*, 436 So. 2d 689, 692 (La.App.

apply here. Additionally, as it is clear that patents are not considered “goods or services,” the letters sent here cannot be subject to the purview of NEB. REV. STAT. § 87-302. *See, e.g., Optigen, LLC v. Int’l Genetics, Inc.*, 777 F. Supp. 2d 390, 406 (N.D.N.Y. 2011) (reiterating that “a patent is not a good or service”).

D. Activision Is Likely To Succeed On Its Constitutional Claims Asserted In Count III

In its Opening Memorandum, Activision explained that its Section 1983 action was based upon the fact that the July 18 Cease and Desist Order was issued by the Nebraska AG without due process or lawful basis, and that the order violated Activision’s First Amendment rights to choice of counsel in its patent enforcement activities. Dkt. No. 9, pp. 20-28. If it is established that Activision has a likelihood of proving these points at trial, then Activision must be held to have established a “likelihood of success” with respect to its Section 1983 claim, justifying the entry of the requested preliminary injunction.

In its Response, the Nebraska AG does not suggest that its Cease and Desist Order was issued on the basis of any reasonable prior investigation. Indeed, it insists just the opposite, claiming it has not done sufficient investigation to yet reach any conclusions. Dkt. No. 22, pp. 19-20. That this demonstrates the Order was issued without “due process” is clear. The only points made by the Nebraska AG for why Activision might not have a “likelihood of success” on the merits of its Section 1983 claim are the following: (1) that Activision has no “standing” to bring such a claim because the July 18 Cease and Desist Order was not directed at Activision; (2) that the issue is not “ripe” because the scope of the July 18 Cease and Desist Order does not impact any current activity of Activision, but at most only future unspecified activity; and (3) even if the July 18 Cease and Desist Order were directed at Activision, and had an effect upon

4 Cir. 1983) (noting that a contract for a sale of a patent, is distinguishable to a contract to license its use).

Activision, that the rights of Activision that may be affected by the Order are not rights protected by the U.S. Constitution or federal law for which the Nebraska AG could be considered to have violated under Section 1983. Activision addresses each of these points in the following pages, and demonstrates that each is both wrong and unsupported.

First, that the July 18 Order was directed at Activision has been demonstrated by Activision in Section I, *supra*. It was demonstrated there beyond any real doubt that the statements by the Nebraska AG to this Court that the July 18 letter was not directed at Activision were untruthful.

Second, that the July 18 Order has a current adverse effect on Activision, and that Defendant Bruning intends the Order to have that effect (*see, e.g.*, his conduct explained above with respect to CenturyLink), was demonstrated beyond any real doubt by Activision in Sections I and II, *supra*. Indeed, the Court may question from reading the Response of the Nebraska AG what its purpose was in issuing the Cease and Desist Order at all. According to its response, it was not intended to have any effect on Activision, except to prohibit unspecified future activities of Activision (an admission, therefore, that the Order was on its face intended to be an unlawful “prior restraint” on free speech). The actual purpose appears to have been, based upon published reports, to demonstrate that the Nebraska Attorney General was going to be “tough” on what he considered to be patent trolls, a species of patent owner whom the Nebraska Attorney General has decided to disfavor, even though the U.S. Supreme Court, the Federal Circuit, and multiple district courts, have repeatedly reiterated that patent owners of this type are as fully entitled to exercise their patent rights and to enforce their patents, as any other type of patent owner.^{27,28}

²⁷ Whether or not the Nebraska AG Defendants like the NPE business model, it is clear the U.S. Supreme Court itself has endorsed this business model as lawful, and has made it clear that such patent owners are entitled to enforce their patents. *See eBay, Inc. v. MercExchange, LLC*, 547

The last point the Nebraska AG attempts to make to demonstrate that Activision does not have a likelihood of success is to argue that the effects of the Cease and Desist Order upon Activision will not impact any recognized constitutional rights. This is, simply, insupportable as explained in Activision’s Opening memorandum, and the arguments asserted below.

1. The Nebraska AG Fails to Show That Its Order Does Not Violate Activision’s First Amendment Right to Counsel

The Nebraska AG in its Response does not challenge Activision’s position on the law that it has a First Amendment right to choice of counsel. At best, the Nebraska AG claims that “[i]n no way has Plaintiff been deprived access to the Court or the ability to employ the counsel of its choosing in this or any Court.” Dkt. No. 22, p. 33. Such a claim is simply contradictory to the Nebraska AG’s actions with respect to CenturyLink, as described *supra*. By contacting CenturyLink and informing it that the Nebraska AG’s Cease and Desist Order prevents Farney Daniels from serving Activision’s filed lawsuit against CenturyLink, the Nebraska AG undoubtedly violates Activision’s constitutional right to counsel – in that, in order to serve its

U.S. 388 (2006) (non-practicing entity entitled to monetary relief, if not injunctive relief). District courts that hear large numbers of patent cases recognize this principle, and consistently reject efforts to have non-practicing entities treated differently under the patent laws. *Cradle IP, LLC v. Tex. Instruments, Inc.*, 2013 U.S. Dist. LEXIS 19245 *6 (D. Del. Feb. 13, 2013) (many businesses and academic institutions enforce their patent rights through [non-practicing entities]; such a business strategy is not nefarious. The court declines to treat such non-practicing entities as anything less than holders of constitutionally protected property rights, those rights having been legitimized by the Patent & Trademark Office.); *Advanced Processor Tech, LLC v. Atmel Corp.*, 2013 U.S. Dist. LEXIS 43050 *20 (E.D. Tex. Mar. 26, 2013) (same); *Parallel Networks, LLC v. Netflix, Inc.*, 2008 U.S. Dist. LEXIS 123563 (E.D. Tex. Dec. 23, 2008) (plaintiff’s “status as a non-practicing entity has no bearing on whether it will be prejudiced by a stay because every patentee has equal rights under the law to enforce his patent rights.”); *Tex. Data Co., L.L.C. v. Target Brands, Inc.*, 771 F. Supp. 2d 630 (E.D. Tex. 2011) (“the patent troll label often ascribed to entities created solely to buy patents and then license them or bring patent infringement suits. But these entities own a legitimate property right—the patent—that they are seeking to enforce. The Court is not aware of any rules that apply differently to them.”).

²⁸ Such public statements referring to Activision as a “patent troll,” entirely disprove the Nebraska AG’s assertion in its Response that “Plaintiff proceeds to complain about the term ‘patent troll,’ without citation to evidence the term was ever used by State Defendants to reference Plaintiff itself.” Dkt. No. 22, p. 34.

filed lawsuit in Texas, Activision must retain different counsel. Therefore, Activision is likely to prevail on its First Amendment claim.

2. The Nebraska AG Fails to Show That Its Order Does Not Violate Activision's Fifth Amendment Rights

The Nebraska AG asserts that Activision has “creative[ly] use[d]” the Fifth Amendment to “create an injury.” Dkt. No. 22, p. 34. It further asserts that Activision has not been deprived of its “time-limited asset” (purportedly meaning its intellectual property rights), because Activision “is free to initiate as many patent enforcement efforts as it desires, in whatever Court it wishes.” *Id.* However, as made evident by the CenturyLink matter discussed above, clearly, in the eyes of the Nebraska AG, Activision is not “free to initiate” any actions “in whatever Court it wishes.” Further, even if the Nebraska AG concedes now that it issued an overbroad and unconstitutional Order, Activision has still suffered a taking of its property rights over the last two months – since the Order’s issuance. Accordingly, it is clear that Activision will likely succeed on its Fifth Amendment claim.

3. The Nebraska AG Fails to Show That Its Order Does Not Violate Activision's Rights Under Title 35, U.S. Code and the Supremacy Clause

Contrary to the Nebraska AG’s assertions that Activision in its Opening Memorandum failed to describe how its rights under Title 35 of the U.S. Code have been violated, Activision’s Opening Memorandum, in fact, is replete with abundant support for that assertion. For example, Activision repeatedly asserts that it has constitutional rights under federal patent law (i.e. Title 35 of the U.S. Code), to notify alleged infringers of its patents, and that the exercise of those rights do not violate any Nebraska State laws. *See, e.g.*, Dkt. No. 9, Section I, *passim*. Further, throughout its Memorandum Activision argues that the issuance of the Cease and Desist Order deprives Activision of those rights. *See id, passim*. In fact, that is the premise of this entire

motion. Thus, the Nebraska AG is plainly incorrect in arguing that Activision has failed to describe how its rights under Title 35 have been violated. The same conclusion follows with respect to the Supremacy Clause, as the entirety of the Nebraska AG's actions in issuing and enforcing its Cease and Desist Order violate the Supremacy Clause. Accordingly, Activision can undoubtedly show a likelihood that it will succeed on these claims.

4. Any Regulation By the Nebraska AG of Letters Sent by Activision or by Farney Daniels on its Behalf, Constitutes an Unconstitutional Prior Restraint on Speech as Implicated in an Unconstitutionally Vague Order

As more fully explained in Activision's Opening Memorandum, the Cease and Desist Order issued by the Nebraska AG operates as an unconstitutional prior restraint on speech. Dkt. No. 9, p. 16. This is because the Order prevents Activision (or any other Farney Daniels client for that matter) from sending any communications regarding "new patent enforcement efforts" without a finding that the letters, or statements within the letters, are false, misleading, or deceptive. As fully explained in Activision's Opening Memorandum, the sending of letters to provide notice of, or to assert infringement of patents, is constitutionally protected speech, which the Order operates to unconstitutionally restrain. Tellingly, the Nebraska AG, in its forty pages of briefing, conveniently chose not to respond to Activision's assertions that the Cease and Desist Order operates as an unconstitutional prior restraint on Activision's speech (likely because the Nebraska AG admits that its Order was not only issued unconstitutionally, but operates unconstitutionally as well).²⁹

²⁹ See, e.g., *Weaver v. Bonner*, 309 F.3d 1312, 1323 (11th Cir. 2002) (finding issuance of cease and desist order pursuant to Georgia Judicial Qualifications Committee Rule an impermissible prior restraint where order requested that judicial candidate refrain from engaging in certain speech); *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578, 580 (6th Cir. 1991) (observing that "cease and desist orders are a forbidden prior restraint" and affirming district court's holding that cease and desist enforcement provision of Ohio election statute was unconstitutional); see also *Vance v. Universal Amusement Co.*, 445 U.S. 308, 311, 317 (1980) (holding Texas public

Further, in addition to being a prior restraint on free speech, the Cease and Desist Order is unconstitutionally vague – in that Activision (or any other patent holder), would be unable to proactively monitor its “speech” to ensure its compliance with the Order.³⁰ The entirety of the Order is as follows: “I demand that you immediately cease and desist the initiation of any and all new patent infringement enforcement efforts within the State of Nebraska.” Dkt. No. 10-2. Simply reading the Order presents numerous questions, including what exactly constitutes “new” enforcement efforts; what is meant by “enforcement efforts”; and what does “within the State of Nebraska” include?

The Nebraska AG offers no guidance in its interpretation of its own Order. Apparently, in its Response, the Nebraska AG claims that because Activision had filed this case against Pinnacle, Farney Daniels’ admission *pro hac vice* into this suit is not considered “new” enforcement activity. Dkt. No. 22, p. 9. The Pinnacle suit was filed on July 7, 2013. The CenturyLink case, however, was filed more than a month earlier – on June 5, 2013. As already explained *supra*, the Nebraska AG clearly felt that its’ Order applied to prevent Farney Daniels

nuisance statute an unconstitutional prior restraint where it authorized judges, “on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene” and lacked the requisite procedural safeguards); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971) (vacating order enjoining organization from picketing or distributing any literature in the community after citizen complained about pamphlets the group had previously created criticizing his business practices).

³⁰ See, e.g., *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 970 (9th Cir. 1996) (pronouncing college’s sexual harassment policy unconstitutionally vague as applied and stating: “There are three objections to vague policies in the First Amendment context. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of first amendment freedoms.”); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1183-84 (6th Cir. 1995) (holding university’s harassment policy unconstitutionally vague and identifying two forms of vagueness, both of which were present in the case before the Court: 1) denial of fair notice of the applicable standard of conduct; and 2) unrestricted delegation of power inviting arbitrary, discriminatory and overzealous enforcement).

from serving CenturyLink on behalf of Activision – in a case filed *earlier* than this suit.

Obviously, the Nebraska AG’s contradicting statements and actions do not aid Activision, Farney Daniels, or this Court, in their interpretation regarding the scope of the Cease and Desist Order.

II. The Nebraska AG Has Failed to Rebut Activision’s Assertion that It Will Suffer Irreparable Harm if the Injunction is Not Granted

In its Opening memorandum, Activision set forth all of the benefits it receives from having Farney Daniels represent it in its patent enforcement actions. *See* Dkt. No. 9, pp. 29-30. The only rebuttal to the fact that Activision will suffer irreparable harm if the injunction is not granted offered by the Nebraska AG is that “nothing in the July 18 letter prohibits Farney Daniels” from representing Activision. Dkt. No. 22, p. 36. Any alleged future injury, the Nebraska AG asserts, is merely “speculative” and “is uncertain to occur.” However, as explained *supra*, through its activities with CenturyLink, such future injury has already occurred.

This Court cannot reasonably accept the Nebraska AG’s statements that it will not prevent Activision from retaining Farney Daniels in the future, given the Nebraska AG’s conduct with respect to CenturyLink. Such a finding would render Activision forever at the mercy of the Nebraska AG, awaiting the day that the Nebraska AG “decides” its Order applies to bar Farney Daniels’ activity on behalf of Activision. *See* Dkt. No. 22, p. 12 (“In the event Defendants actually applied the letter to one of Plaintiff’s alleged contingent future events, this Court would have an issue fit for judicial decision. *Until the letter is applied to Plaintiff or State Defendants state an intention to apply the letter to Plaintiff’s future events*, Plaintiff’s claims are unripe.”) (emphasis added). Accordingly, not only is a preliminary injunction necessary to protect Activision here, but a permanent injunction will ultimately be necessary to protect it in the future.

III. The Balance of Harms Weighs in Favor of Granting the Injunction

In its Response, the Nebraska AG relies upon the purported harm Defendants, the State of Nebraska and Nebraska consumers face in the event the Office of the Attorney General is precluded from undertaking efforts to investigate unfair or deceptive acts and practices vastly outweighs any harms potentially suffered by Plaintiff.” Dkt. No. 22, p. 36. However, the Nebraska AG misconstrues the relief sought here. All that is sought is an injunction preventing the enforcement of the Cease and Desist Order issued by the Nebraska AG. The only effect of that injunction would be to restore the status quo as it stood prior to the Nebraska AG’s issuance of the Cease and Desist Order. Further, nothing about the injunction would prevent or prohibit the Nebraska AG from “undertaking efforts to investigate unfair or deceptive acts and practices.” The Nebraska AG is free to do so. In fact, Farney Daniels has complied with the Nebraska AG’s investigation and its Civil Investigative Demand – further evidencing that the relief here would not prevent the Nebraska AG from investigating unfair and deceptive practices. Farney Activision Decl., *passim*; Farney MPHJ Decl., *passim*. All that is requested is that this Court enjoin the enforcement of a Cease and Desist Order that was admittedly issued unconstitutionally, without prior investigation and without due process. The Nebraska AG is otherwise free to pursue any investigative efforts, assuming they are otherwise within its statutory authority.

Further, the “harm” claimed by Activision in not having Farney Daniels represent it in this action and future actions is not “illusory,” as evident by the CenturyLink matter. Dkt. No. 22, p. 36. Additionally, contrary to what the Nebraska AG dubbing the “*actual* scope” of the July 18 Order as being limited to that of Farney Daniels, the Nebraska AG, in complete contradiction, one paragraph of its Response later, states that “the Attorney General’s concerns about the deceptive patent license assertions and solicitations made by Farney Daniels – *both*

those on behalf of Plaintiff and on behalf of MPHJ – granting an injunction would effectively allow Farney Daniels to continue its practices while not actually achieving the end (representation in this suit by Farney Daniels) that Plaintiff seeks.” *Id.* at p. 37 (emphasis added). As it is clear that the Nebraska AG asserts that Farney Daniels has engaged in deceptive practices on behalf of Activision, granting an injunction would not only protect Farney Daniels’ representation of Activision in this case, but it would also protect Activision’s choice of counsel in future cases, such as the CenturyLink case. Such a protection would not prohibit or hinder any legitimate civil investigation.

IV. The Public Interest is Not Served by the Nebraska Attorney General’s Unconstitutional Regulation of Nebraska State Law

As more fully explained in Activision’s Opening Memorandum, the public interest will be served by the issuance of the injunction requested. *See* Dkt. No. 9, pp. 32-33. The public does not have an interest in its Attorney General’s issuance of unconstitutional cease and desist orders. Throughout its response, the Nebraska AG defends its actions as somehow protecting Nebraska companies from receiving baseless coercive letters from the Farney Daniels Firm. But at the same time, the Nebraska AG admits that it cannot at the present time demonstrate that any such letter was “baseless” or “coercive” (all of its public statements to the press notwithstanding) and that its investigation is “nascent” and early. It cannot be in the public interest for an Attorney General to issue an order prohibiting the exercise of free speech protected by the First Amendment where the Attorney General admits he has no present proof of any violation of law, but only speculates that he may find some at a later unspecified date.

There is a strong public interest, indeed a strong national economic interest, in having a strong and viable patent system to incentivize innovation. It certainly does harm to the public interest to have orders issued without basis or investigation preventing the enforcement of U.S.

patents where there has been no demonstration that such enforcement is a bad faith violation of the law.

Further, contrary to the Nebraska AG's assertions, "[g]ranted the injunction" will not "halt[] a duly-elected officer of the state from investigating deceptive trade practices in the state." Dkt. No. 22, p. 37. As explained *supra*, the injunction will not operate to "halt" the Nebraska AG's investigation of deceptive trade practices in the state – it will merely enjoin the enforcement of an unconstitutional cease and desist order. In fact, Activision agrees with the Nebraska AG that "courts [should be] leery of granting injunctions to prevent the executive branch from conducting investigations."³¹ *Id.* at p. 38. However, the injunction here would not prevent such an investigation. Simply put, the public does not have an interest in a Nebraska AG using its position of power and authority to circumvent the U.S. Constitution.

V. Scope of Preliminary Injunction

Given the demonstration in this Reply Memorandum regarding the background, basis, scope, and effect of the July 18 Cease and Desist Order, Plaintiff Activision respectfully suggests that the most appropriate remedy is for the Court simply to vacate that Order in its entirety. Short of that, the Court should, at a minimum, issue a preliminary injunction enjoining the Nebraska AG from seeking any enforcement of, or remedy for violation of, the Cease and Desist Order by Farney Daniels in connection with any activity it undertakes in connection with representing Activision anywhere in the United States, either in sending patent enforcement letters or bringing and litigating suits for infringement..

It should be noted, as explained *supra*, that contrary to the protestations of the Nebraska AG, Activision does not seek by its motion to prevent the Nebraska AG from investigating the

³¹ Activision submits that the Nebraska AG should be similarly "leery" of abusing its power by issuing unwarranted Cease-and-Desist Orders and baseless public accusations without prior investigation.

conduct of the Farney Daniels law firm. Indeed, Farney Daniels has been fully cooperative with the Nebraska Attorney General in response to every inquiry they have made of the firm. *See* Farney Activision Decl., *passim*; Farney MPHJ Decl., *passim*; Exhibit A-4. Finally, the firm has fully and timely complied with the Nebraska AG CID to the firm, even though that CID was issued without any reasonable basis, and was shocking and overbroad in its scope. Farney Activision Decl., *passim*. This motion by Activision does not seek to interfere with the Nebraska AG's investigation, even though it strongly appears that it is unwarranted and deliberate interference with the lawful and proper activities of an out-of-state law firm. Thus, any argument by the Nebraska AG that a preliminary injunction should be denied because it interferes with any investigation they may be conducting is simply wrong, and cannot serve as a basis for denial of the injunction.

CONCLUSION

For the foregoing reasons and for those set forth in Activision's Opening memorandum, Activision respectfully requests that this Court grant the requested preliminary injunction requested by Activision and enjoin Defendants Bruning, Cookson and Lopez.

Dated: September 17, 2013

ACTIVISION, INC., Plaintiff

By: /s/ John P. Passarelli

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served September 17, 2013, with a copy of this document via the Court's CM/ECF system.

/s/ John P. Passarelli
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