



October 2, 2014

Patent Assertion Entity MPHJ Loses its Suit to Stop FTC Investigation

By Richard J. Oparil and Kevin M. Bell

A well-known "patent assertion entity" (PAE), MPHJ Technology Investment LLC, lost its declaratory judgment suit against the Federal Trade Commission (FTC) and its Commissioners based on alleged "threats to bring action against MPHJ." The company claimed the FTC's "unlawful interference and threats" against MPHJ and its counsel directed at stopping or impeding the lawful, proper, and constitutionally protected efforts by MPHJ to identify and seek redress for infringement of its US patents."

MPHJ owns several patents related to document management devices and applications covering, among other things, the ability to scan documents to email. Acting through subsidiaries, MPHJ allegedly sent thousands of demand letters accusing companies of infringing its patents and offering licenses. MPHJ's demand letters sought a royalty of \$900 to \$1,200 per employee. The FTC began investigating the practices of MPHJ and its counsel. In an attempt to resolve the matter, the FTC sent the company a consent judgment and a draft complaint.

MPHJ's January 13, 2014 complaint filed in the Western District of Texas (No. 14-cv-11) alleged that the FTC has not asserted invalidity of the patents, any lack of infringement of the patents, any loss of rights to enforce the company's patents, any lack of need for the company

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to send infringement inquiry letters, or that MPHJ does not have a right to threaten suit against would-be infringers. MPHJ complained that the agency did not have the authority to file the threatened unfair trade practice complaint against the company pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45. MPHJ's suit sought a declaration that its demand letters did not violate Section 5 and that the company had the First Amendment right to send them.

On January 14, 2014, the District Court granted the FTC's motion to dismiss the case. The Court held that it lacked subject matter jurisdiction. The Court found that the FTC's investigation and intent to file a complaint against MPHJ was not a final action, that the matter was not ripe for review and that administrative remedies had not been exhausted. The Court wrote that the issues boiled down to a single question: "May Plaintiff derail the FTC administrative process by bringing this declaratory judgment action?" According to the Court, "[t]he short answer is, 'No.'" There has been no FTC action beyond the investigative stage, other than FTC's attempted settlement. There was, therefore, no imminent threat of prosecution or final agency action. The case was not ripe for review because MPHJ's complaint did not raise pure issues of law and would require the court to engage in fact-finding as to MPHJ's conduct before the FTC investigation was complete. Finally, failure to exhaust administrative remedies "bars district court intervention where Congress has clearly mandated such a requirement.... In this case, the FTC Act clearly requires exhaustion."

MPHJ argued that the finality, ripeness and exhaustion doctrines did not apply because MPHJ's complaint raised a constitutional issue under the First Amendment's right to petition the government for a redress of grievances. The Court rejected the argument because a determination of whether MPHJ's various letters to alleged infringers were proper "would require the Court to usurp the fact-finding responsibility of the FTC." Moreover, even for a constitutional issue, standing, ripeness and exhaustion requirements must still be met. "After investigation, the FTC could well determine that no Section 5 violation has

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occurred, meaning that no further agency action would ensue and no Constitutional issues would arise."

As a result of the ruling, the FTC is free to move forward with its investigation and either file a complaint against MPHJ and its attorneys or settle the dispute.

In January 2014, MPHJ finalized an agreement with New York Attorney General Eric T. Schneiderman in which it did not admit to any wrongdoing, but agreed to follow certain guidelines in future communications with New York businesses. New York's guidelines focus on requiring the PAE to conduct due diligence before accusing any person of infringement and to provide the alleged infringer with certain information.