19-16122

United States Court of Appeals

for the

Ninth Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

– v. –

QUALCOMM INCORPORATED, a Delaware Corporation

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE FAIR STANDARDS ALLIANCE IN SUPPORT OF THE FEDERAL TRADE COMMISSION AND IN SUPPORT OF AFFIRMANCE

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Daniel P. Culley
Jessica A. Hollis

2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

David H. Herrington
Alexandra K. Theobald

One Liberty Plaza
New York, New York 10006
212-225-2000

Attorneys for Fair Standards Alliance

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* certifies the following:

1. The full name of every party or amicus represented by me is:

   Fair Standards Alliance ASBL

2. The party named above in (1) is the real party in interest.

3. The Fair Standards Alliance does not have a parent corporation, and no publicly held corporation owns 10% or more of the Fair Standards Alliance.

4. The names of all law firms and the partners or associates that appeared or are expected to appear for the *Amicus* now represented by me in this Court are:

   Daniel P. Culley, David H. Herrington, Alexandra K. Theobald, and Jessica A. Hollis Cleary Gottlieb Steen & Hamilton LLP.

5. Counsel is not aware of any case pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

Dated: November 29, 2019

By: /s/ Daniel P. Culley

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Daniel P. Culley
Jessica A. Hollis

2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

David H. Herrington
Alexandra K. Theobald

One Liberty Plaza
New York, New York 10006
212-225-2000

Attorneys for the Fair Standards Alliance

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STATEMENT OF INTEREST

Amicus Curiae Fair Standards Alliance ASBL (the "Alliance" or "FSA") is an association of companies both large and small, focused on supporting standardization while preventing abusive licensing practices of Standards Essential Patents ("SEPs") that harm industry and consumers.[1]

FSA members are innovators. They own more than 300,000 patents and patent applications, including SEPs, and develop and market innovative (standards practicing) products. FSA members have extensive experience developing, patenting, and licensing standards-related technologies and SEPs, including on a FRAND basis across a broad range of industries such as telecommunication, automotive, and semiconductor. FSA members spend more than $100 billion annually on R&D and innovation. In aggregate, FSA members employ more than three million people, and generate over a trillion dollars in annual revenues.

The Alliance advocates for policies that promote industry and consumer interests in preventing SEP licensing abuses. To that end, the Alliance has

[1] The Alliance submits this statement of its own accord. The positions and statements in this brief do not necessarily reflect the detailed individual corporate positions of each member. All Parties consented to the filing of this brief. No counsel for any Party to this action has participated in authoring any part of this brief, and no person other than the *Amicus Curiae* or its counsel has contributed money intended to fund the preparation and submission of this brief.

articulated key principles it believes are necessary to license SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms.[2] FRAND commitments accomplish two key goals: (1) implementers can feel secure that they can get licenses on fair and reasonable terms, and (2) SEP holders receive appropriate remuneration for their inventions.

PRELIMINARY STATEMENT

This case addresses whether a SEP owner may obtain and maintain market power by disregarding its own voluntary FRAND commitment to license all-comers, including rivals. The district court correctly held that a FRAND commitment does not include unstated exclusions restricting the availability of licenses for some applicants.

Because the standard setting process involves groups of competitors coming together to select technologies over competing alternatives, it inherently involves anticompetitive risks. The law has long recognized these risks, and requires that standard setting organizations ("SSOs") provide effective safeguards so as to facilitate standardization's procompetitive benefits.

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[2] *See* FSA, *Key Principles*, http://www.fair-standards.org/key-principles/ (last visited Nov. 29, 2019); *see also* FSA, *Core Principles and Approaches for Licensing of Standard Essential Patents* (June 2019), *available at* https://www.cencenelec.eu/news/workshops/Pages/WS-2019-014.aspx; *see generally* FSA, *Publication*s, https://fair-standards.org/publications/ (last visited Nov. 29, 2019).

One tool that SSOs use to prevent abuse of market power and safeguard the procompetitive benefits of standard setting is the FRAND commitment, whereby patent owners claiming ownership of SEPs commit to licensing SEPs on FRAND terms. The SEP owner, in return, obtains the benefits (*e.g.*, increased licensing opportunities) of having its patented technology adopted into a standard.

If the FRAND commitment did not require SEP owners to license all-comers, including rivals, SEP owners would be able to exert unearned market power, including the ability to exclude rivals from the market solely by fiat of specific technologies being chosen for the standard. Understanding the important role that FRAND commitments play in easing the antitrust concerns around the standard setting exercise, and protecting its procompetitive benefits, helps to explain why violations of the FRAND commitment – such as by refusing to license competitors – can, in addition to creating liability for breach of contract, also function to impede competition in violation of the antitrust laws.

Effective antitrust enforcement of the FRAND commitment supports standard setting efforts and innovation by providing industry participants the confidence that they will not, after the fact, be driven from the market by competitors who own SEPs. With confidence that the FRAND commitment will be effectively upheld, stakeholders are more willing to participate in standard setting efforts and invest in follow-on innovations to differentiate their products.

ARGUMENT

A. FRAND COMMITMENTS ARE ESSENTIAL TO MAINTAINING THE PROCOMPETITIVE BENEFITS OF STANDARD SETTING.

Standard setting restricts competition between technologies, but can benefit both consumers and innovators provided that certain proactive measures are taken to protect the market. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (finding that "private standards can have significant procompetitive advantages"). When implemented effectively, standard setting fosters competition among products implementing the standard by creating interoperability—benefiting business, consumers and the economy in general. Users of the standard can also further develop additional technologies incorporating standardized functionality, thereby creating more sophisticated and complex products to serve (and in some cases, to create) myriad downstream markets.

However, courts have long recognized that standard setting "can be rife with opportunities for anticompetitive activity." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). Indeed, inherent in the standard setting process is the ability to confer significant market power on a patent owner by choosing its technology for inclusion in a standard and thereby excluding actual or potential substitutes. *Allied Tube*, 486 U.S. at 507. SSOs typically include, and in this case do include, competitors at various positions along the

value-chain. Before an SSO adopts a standard, technologies compete for inclusion into the standard. Through standard setting, SSO members collaborate to make many choices of one technology or feature over another. When a standard becomes widely adopted in the industry, standard setting increases demand for the selected technology, while eliminating demand for alternative technologies. Standardization thus deprives market participants of the ability to choose competing technologies ("lock-in").

If a patent covers technology incorporated into a standard and is, therefore, essential to the standard, it is called a standard essential patent, or SEP. If compliance with that standard is necessary to participate in the market, then the market is necessarily limited to participants who are able to license the SEP.[3] The collaboration among competitors in the SSO thereby alters the dynamics of the market, such that absent further constraints on SEP licensing terms, a SEP owner can prevent potential rivals from entering the market and demand supra-competitive prices made possible by a lack of competing technologies. Investment in innovation is concentrated in furthering and implementing only the chosen technology because the market is locked-in to that standard.[4] Once a

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[3] *See* Herbert J. Hovenkamp, *FRAND and Antitrust* at 19 (Sept. 2, 2019), https://scholarship.law.upenn.edu/faculty_scholarship/2093.

[4] This is distinguishable from the rights granted by non-essential patents, which remain subject to competition from alternative technologies. For example,

standard is selected, the "value [of a patent] becomes significantly enhanced," *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007), and the selection "creates an opportunity for [SEP holders] to engage in anti-competitive behavior." *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030-31 (9th Cir. 2015). If patent owners were permitted to capitalize on the enhanced market power attributable to standardization itself (rather than the value of patented technology),[5] the pro-competitive benefits of standardization (*e.g.*, increased competition based on the interoperability created by the standard) would be lost. And without these pro-competitive benefits, the (otherwise problematic) activity of competitors coming together to choose and exclude technologies – effectively picking "winners" and "losers" among competing technologies – would lose its foundational justification.

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with standards the opportunity to charge monopoly prices generally would not induce investment or market entry because the standard can erect a barrier to entry for alternative technologies. *Cf. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[5] *See Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1232 (Fed. Cir. 2014) ("As with all patents, the royalty rate for SEPs must be apportioned to the value of the patented invention. When dealing with SEPs, there are two special apportionment issues that arise. First, the patented feature must be apportioned from all of the unpatented features reflected in the standard. Second, *the patentee's royalty must be premised on the value of the patented feature, not any value added by the standard's adoption of the patented technology*. These steps are necessary to ensure that the royalty award is based on the incremental value that the patented invention adds to the product, *not any value added by the standardization of that technology*." (emphasis added) (citations omitted)).

It is precisely because the standard setting process confers market power on a SEP holder that courts have held commitments to license on fair, reasonable and non-discriminatory (FRAND) terms to be a crucial safeguard of the procompetitive benefits of standardization. *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 795-96 (N.D. Tex. 2008) ("FRAND commitments are intended as a 'bulwark' against the unlawful accumulation of monopoly power that antitrust laws are designed to prevent."). Standard setting is thus procompetitive only to the extent that meaningful safeguards are adopted and enforced to protect competition among market participants and to avoid exploitation. *See Allied Tube*, 486 U.S. at 506-07 ("[P]rivate standard setting by associations . . . is permitted . . . only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits . . . .").

B. THE FRAND COMMITMENT INCLUDES A REQUIREMENT TO LICENSE ALL-COMERS, INCLUDING RIVALS.

FRAND commitments are intended to ensure that SEP owners cannot exploit the market power created—not by their own efforts—but by the collaboration of competitors in the SSO. *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (Posner, J.) (FRAND obligation confines the patentee's demands "to the value conferred by the patent itself as distinct from the additional value—the hold-up value—conferred by the patent's being designated as standard-essential."), *rev'd in part on other grounds*, 757 F.3d 1286 (Fed. Cir.

2014). Such safeguards must apply in the upstream technology market related to the SEPs and at every downstream level of the value chain from the smallest component to the final end device. That chain is only as strong as its weakest link.

Unless the FRAND commitment is effective in protecting competition at every level of the value chain, it cannot provide consumers with the procompetitive benefits necessary to justify the anti-competitive risks associated with the standard setting exercise. A lack of competition anywhere along the value chain can unfairly and unreasonably raise prices for consumers. Thus, the FRAND promise is only an effective safeguard when it requires licensing to all willing license applicants, including—and indeed especially—rivals.[6]

Participation in standard setting and making a commitment to license SEPs on FRAND terms is a choice—an entirely voluntary course of conduct by patent

[6] As various courts and regulators – in the U.S. and elsewhere – have recognized, standardization may lead to anticompetitive results where FRAND commitments do not provide *effective* access to licenses on non-discriminatory terms to all users of a standard. *See, e.g.*, Communication from the Commission—Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, 2011 O.J. (C 11), ¶¶ 268, 287. *See also* European Commission Decision of 04/12/2013, ¶ 192, Case No. COMP/M.7047 – MICROSOFT/NOKIA (finding FRAND commitments oblige SEP holders not to discriminate between different licensees); European Commission Decision of 13/02/2013, ¶ 55, Case No. COMP/M.6381 – GOOGLE/MOTOROLA MOBILITY.

owners.[7] Where patent owners participate in selecting a standard incorporating their own technology, they necessarily waive certain otherwise applicable rights to control its use. *See Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir. 2008) (failure to comply with duties imposed by participation in SSO waived right to enforce affected patents). In accordance with this principle, the district court in this case found that the TIA and ATIS IPR policies impose a duty to license all those who wish to receive a license from declarants of essential patents.[8] 1ER273; *see also* 1ER267 (citing TIA IPR policy "a SEP holder promises to license its SEPs to 'all applicants'").

This Court has previously interpreted a similar IPR policy and FRAND commitment and likewise concluded that the policy's "language admits of no limitations as to who or how many applicants could receive a license." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012). Rather, the Court ruled that SEP holders must "offer RAND licenses to all seekers" and "cannot

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[7] To the extent Appellant argues that, unlike in *Aspen Skiing*, it had no prior course of dealing to license SEPs at some levels of the supply chain, Appellant ignores that its FRAND promise to license "all applicants" was even broader and more concrete than a course of dealing. As the district court correctly recognized, here Appellant made a binding contractual commitment to license its SEPs without discriminating among different applicants, including its rivals.

[8] Citations to "1ER__" are to the excerpts of the record that Qualcomm filed on August 23, 2019. *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Aug. 23, 2019), Dkt. Nos. 75-1 and 75-3.

refuse a license to a manufacturer who commits to paying the RAND rate." *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015); *see also Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231 (Fed. Cir. 2014) (requiring SEP holders to grant licenses to "an unrestricted number of applicants").

Interpreting the FRAND commitment as requiring a duty to license rival chipmakers also is consistent with the industry's expectation, shared by the FSA's broad membership, that SEP FRAND declarations include an agreement to deal with anyone who may wish to license the patent at any level in the value chain.[9] Indeed, the role of the FRAND promise in safeguarding the procompetitive benefits of standard setting requires that it be interpreted to impose such a duty.

Any approach that would construe the FRAND commitment to include hidden exclusions restricting licenses for some market participants risks severe anticompetitive harm. For instance, and as the district court has found in this case (1ER46), when a SEP owner is also a participant in the market for essential components implementing the standard, its refusal to license rivals can hamstring those rivals, making them less effective competitors thus creating, enhancing, or

[9] *See* FSA, *Position Paper – SEP Licenses Available to All* (June 24, 2016), https://fair-standards.org/wp-content/uploads/2016/09/160624_FSA_Position_Paper_-_SEP_licenses_available_to_all.pdf.

maintaining market power in the component market. If a SEP holder is not required to license all-comers, it may exclude entirely the very competition FRAND is intended to protect.

C. VIOLATION OF THE FRAND COMMITMENT CAN CONSTITUTE AN ANITRUST VIOLATION.

SEP holders are not immune from well-established principles of antitrust law that a defendant who (1) possesses monopoly power in the relevant market and (2) has acquired, enhanced, or maintained that power by use of anticompetitive conduct "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" has violated Section 2 of the Sherman Act. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Courts have long held that misconduct related to the standard setting process that restrains competition satisfies the requirement of anticompetitive conduct. *See Allied Tube*, 486 U.S. at 509; *Broadcom*, 501 F.3d at 314.

Just as deception in the standard setting process can harm the competitive process by obliterating the procompetitive benefits of standards, *see, e.g.*, *Broadcom*, 501 F.3d at 314, so too can misconduct that includes a SEP owner's subsequent violation of its FRAND promise. When a patent owner disregards its

FRAND commitment by refusing to license its SEPs to rivals, it may unlawfully acquire the ability to exercise market power and undermine the procompetitive benefits of standard setting.[10]

The quintessential goal of the FRAND licensing requirement is to prevent SEP owners from abusing the post-standardization lack of alternative technologies and exercising market power. As time goes on following the standard's adoption, that potential to exercise durable market power only grows given (1) the impossibility implementers face in designing around individual patents that are essential to a standard, (2) prior investments in creating products incorporating the standard, and (3) network effects as others implement the standard as well. Indeed, such market power continues even after a standard is replaced by next-generation technology, as later products still need compatibility with earlier standards (*e.g.*, 5G handsets need to retain the ability to work when only 4G or 3G networks are available – what is known as the "multi-mode" requirement).

The anticompetitive effects can be severe. When SEP owners fail to comply with FRAND commitments and refuse to license some willing licensees

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[10] *See* Herbert J. Hovenkamp, *FRAND and Antitrust* at 20-21 (Sept. 2, 2019), https://scholarship.law.upenn.edu/faculty_scholarship/2093 ("Conditionally refusing to license a FRAND-encumbered patent when the relevant agreement requires licensing is clearly a breach of contract, but it can also be an antitrust violation").

(including rivals) or otherwise raise rivals' costs, they can exclude competing products from the market entirely or significantly impair their competitiveness. For example, modem chipset manufacturers that cannot obtain a license to SEPs are not able to offer the customary indemnities to their customers for third-party patent infringement claims. As a result, competing chip manufacturers are hesitant to enter the market and customers are reluctant to buy those manufacturers' chips. This has delayed, for example, the development of 5G products, including the "internet of things"[11]—which includes connected devices, from self-driving cars to smart refrigerators or connected lightbulbs. Additionally, barriers to implementing FRAND-based 5G connectivity standards have caused customers to expend resources exploring alternative technologies, such as long-range Bluetooth, so as to avoid SEP abuses associated with cellular standards.

The SEP context is distinguishable from the antitrust analysis applied to ordinary inventions because the licensing of essential patents subject to a FRAND commitment implicates fundamentally different issues than licensing of non-essential patents. Before a patent was declared essential, a SEP holder makes a voluntary contractual commitment to license their patents to others. SSOs, their

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[11] *See* Patrick Wingrove, *5G Set to Exacerbate FRAND Problems, Say Top Patent Holders*, Patent Strategy (June 6, 2019), https://patentstrategy.managingip.com/articles/56/5g-set-to-exacerbate-frand-problems-say-top-patent-holders (reporting that lack of clarity on the interpretation of FRAND has led to protracted licensing negotiations).

members, and implementers reasonably rely on such promises when selecting, continuing to develop, and implementing a standard. As discussed above, but for the FRAND commitment not to abuse the market power conferred by collectively selecting one technology over others, the standard setting process would raise significant antitrust concerns.

Thus, case law concerning licensing of SEPs is distinguishable from cases holding that a refusal to share one's technology cannot not constitute an antitrust law violation. *Cf. Trinko*, 540 U.S. 398 (alleged insufficient assistance in accordance with federal regulatory scheme was not an antitrust violation); *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000) (declining to require licensing of patent "so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant"). Unlike *Trinko* and *Independent Service Organizations*, here the Defendant-Appellant made a *voluntary* commitment to an SSO, agreeing to safeguards designed to prevent anticompetitive effects in exchange for having its technology incorporated into the standard. Because compliance with the FRAND safeguard is essential to realizing the benefits of standard setting and avoiding what could otherwise function as an antitrust violation, disregard of the FRAND safeguard properly raises antitrust concerns.

D. ANTITRUST ENFORCEMENT OF THE FRAND COMMITMENT CAN SUPPORT STANDARD SETTING AND INNOVATION.

Unfair, unreasonable, or discriminatory SEP licensing practices pose a significant risk to future standard setting efforts and innovation, create barriers to entry for new market players, threaten to stifle the full potential for economic growth across major industry sectors, and ultimately harm consumer choice. FRAND commitments involve a reasonable tradeoff that benefits all stakeholders; in exchange for accepting constraints on their licensing discretion, SEP holders benefit from the creation of much greater demand within a much shorter time.

Many Alliance members participate heavily in standardization efforts and all are innovators of both standardized and non-standardized technologies. The Alliance sees no merit in arguments that antitrust enforcement in this case will hurt either standard setting efforts or innovation. To the contrary, enforcement of FRAND commitments supports future standard setting efforts by assuring potential market participants that they will not be excluded or driven from the market by competitors who own SEPs. With that reassurance, market participants can contribute to the selection of technologies that they believe will work best, rather than worrying about other members making it difficult for them to compete in the market.

Additionally, enforcement of FRAND commitments through the application of antitrust laws can support innovation throughout industries implementing standards. Although high-tech products can contain hundreds of standards covered by thousands of patents each, manufacturers of products incorporating standards invest heavily in innovation of features that differentiate their products from others. But restrictive licensing practices and associated SEP abuses create uncertainty, raise prices and hurt competition, deterring innovation.

CONCLUSION

For the reasons set forth above, *Amicus* supports the district court's application of Appellant's FRAND obligations to require licensing to all applicants, including rivals. Moreover, *Amicus* sees no merit in arguments that proper enforcement of antitrust laws would somehow harm standardization.

Date: November 29, 2019

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: /s/ Daniel P. Culley

Daniel P. Culley
Jessica A. Hollis

2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

David H. Herrington
Alexandra K. Theobald

One Liberty Plaza
New York, New York 10006
212-225-2000

Attorneys for the Fair Standards Alliance

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2019, I electronically filed the foregoing brief and all attachments with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF filing system.

November 29, 2019

By: /s/ Daniel P. Culley

Daniel P. Culley
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for the Fair Standards Alliance

FEDERAL RULES OF APPELLATE PROCEDURE FORM 6.
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance With Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rule 32-1 because the main body of the brief contains 3,478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 for Windows with Times New Roman font size 14.

Dated: November 29, 2019

By: /s/ Daniel P. Culley

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Daniel P. Culley
Jessica A. Hollis

2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

David H. Herrington
Alexandra K. Theobald

One Liberty Plaza
New York, New York 10006
212-225-2000

Attorneys for the Fair Standards Alliance