Nos. 15-1184, 15-1185, 15-1186, 15-1187, 15-1274, 15-1323, 15-1342

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE EFFEXOR XR ANTITRUST LITIGATION

On Appeal from the United States District Court
for the District of New Jersey
Lead Case No. 3:11-cv-05479-PGS-LHG

SUPPLEMENTAL BRIEF OF AMICUS CURIAE FEDERAL TRADE COMMISSION SUPPORTING PLAINTIFFS-APPELLANTS

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INTRODUCTION

The FTC submits this supplemental *amicus* brief to address defendants' argument, not addressed by the court below, that their settlement agreement is exempt from antitrust scrutiny under the *Noerr-Pennington* doctrine.

The Supreme Court has made clear that the *Noerr* doctrine protects advocacy, not commercial activity. Settlements among private litigants, including patent settlements, have long been treated as commercial activity subject to antitrust scrutiny. Defendants' contention that a consent decree creates a *Noerr* defense ignores what the Supreme Court has called "the most fundamental characteristic" of consent decrees: the source of the court's authority to enter any such judgment is the parties' agreement. Indeed, every court faced with the question raised here has rejected the argument that a consent decree confers *Noerr* protection on an agreement between a brand-name drug company and a generic competitor settling Hatch-Waxman patent litigation.

Defendants' effort to stretch the *Noerr* doctrine is not only wrong on the law, it is also bad policy, with implications well beyond this case. If Defendants were correct, private litigants could shield a wide variety of anticompetitive business arrangements from antitrust law merely by incorporating them into a settlement agreement and obtaining a consent order. Nothing in *Noerr* or its

progeny supports such a result. Accordingly, the FTC urges this court to reject defendants' *Noerr* argument.

ARGUMENT

I. DEFENDANTS' SETTLEMENT IS NOT "PETITIONING" ACTIVITY EXEMPT FROM THE ANTITRUST LAWS UNDER *NOERR*.

A. The *Noerr* Doctrine Protects Advocacy, Not Commercial Activity.

The essence of the *Noerr* doctrine, first articulated in *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), is that parties do not violate the antitrust laws when they merely seek anticompetitive action from the government. *Id*. at 135 ("no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws"). Thus, a publicity campaign conducted by railroads to influence the passage of state laws detrimental to competing trucking companies was not subject to antitrust liability, because "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id*. at 136.

The Court offered two principal reasons for its decision: First, "[i]n a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id*. at 137. The Court explained that the Sherman Act regulates "business activity," not "political activity." *Id*. Second, the Court noted that "[t]he

right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id*. at 138. Subsequent Supreme Court decisions made clear that the *Noerr* doctrine also applies to petitioning the executive and judicial branches of government. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (advocacy directed at executive officials); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (petitioning activity before courts and administrative agencies).

The Supreme Court has also made clear that *Noerr*'s protection for petitioning does not shield commercial activity, even when designed to have a political impact. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), it held *Noerr* protection did not extend to a concerted effort to exclude a competitor's products from an industry association's product standards, notwithstanding that the defendants' objective was to get state and local governments to enact those standards as law. The Court recognized that *Noerr* precludes antitrust liability for restraints that are "incidental to a valid effort to influence government action" or "valid governmental action" resulting from such efforts. *Id.* at 499. But the Court rejected the "absolutist position" that *Noerr* applies to "every concerted effort that is genuinely intended to influence governmental action." *Id*. at 503. Otherwise, the doctrine could swallow the

Sherman Act, as "competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as the appropriate level for governmental rate making or price supports." *Id*. The Court observed that the challenged conduct—coordination among competitors in the context of a private standard-setting process—was the type of commercial activity that the antitrust laws traditionally scrutinized. *Id.* at 505-06. Such "commercial activity with a political impact," the Court held, did not warrant *Noerr* protection. *Id.* at 507, 509-10. Thus, as the Court explained, the scope of *Noerr* protection depends "on the source, context, and nature of the anticompetitive restraint at issue." *Id*. at 499.

Courts therefore make a distinction between merely urging the government to restrain trade and asking the government to adopt, approve, or enforce a private agreement on marketplace behavior. Government advocacy is protected by *Noerr*; seeking governmental approval of a private agreement is not. *See*, *e.g.*, *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (rejecting defendants' argument that their collective rate proposal was *Noerr*-protected because they sought government approval of those rates; defendants' conduct was "commercial activity with a political impact," rather than "political activity with a commercial impact") (quoting *Allied Tube*, 486 U.S. at 507).[1]

[1] *See also Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1446 (9th Cir. 1996) (no *Noerr* protection where utility entered into a market division agreement and then obtained an order from a state agency, noting that

B. Agreements Among Private Parties Settling Litigation Are Private Commercial Agreements, Not Petitioning.

In a private lawsuit, the parties seek government action in the form of a decision by the court on the merits of the suit. Although such a decision may affect competition, the parties' conduct in furtherance of litigation is generally entitled to *Noerr* protection.[2] When parties enter a settlement agreement, however, they voluntarily withdraw their dispute from the court to resolve matters among themselves. Such private agreements are not treated as protected conduct incidental to litigation petitioning. *See Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 818 (D.C. Cir. 2001)*; In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 641 (E.D. Mich. 2000), *aff'd on other grounds*, 332 F.3d 896 (6th Cir. 2003); *In re N.M. Natural Gas Antitrust Litig.*, 1982 U.S. Dist. LEXIS 9452, at *16 (D.N.M. Jan. 26, 1982). Instead, private settlement agreements have long been treated as commercial agreements subject to the antitrust laws.[3] Indeed, the

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"PGE is not being held liable for filing the application" but for "agreeing with PP&L to replace competition with area monopolies"); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987) (agreement between union and trade association to fix prices was not immunized by lawsuit to enforce the agreement).

[2] *Noerr* protection does not extend, however, to "sham" lawsuits. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

[3] *See, e.g., United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (settlement of patent interference claim before the PTO held to violate Sherman Act); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (holding that a dissolution agreement between former law partners settling a state court lawsuit was a horizontal

Supreme Court reaffirmed this principle in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232 (2013), noting that "this Court's precedents make clear that patent related settlement agreements can sometimes violate the antitrust laws."

In contrast to settlement agreements among private parties, settlements with government parties have been treated as *Noerr*-protected because they involved petitioning to those governmental entities. *See, e.g.*, *A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc*., 263 F.3d 239, 252 (3d Cir. 2001) (applying *Noerr* protection to agreement settling a lawsuit brought by various state Attorneys General); *Campbell v. City of Chicago*, 823 F.2d 1182, 1186-87 (7th Cir. 1987) (applying *Noerr* to settlement with city).

C. Consent Judgments Adopting Private Settlements Do Not Confer *Noerr* Protection.

The entry of a consent decree provides no reason to deviate from the principle that a settlement resolving a private dispute is commercial conduct subject to antitrust scrutiny. As the Supreme Court explained in *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), while consent decrees are at some level judicial acts, a court's role in entering a consent judgment differs fundamentally from its role in actually adjudicating a

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agreement to allocate markets among competitors and thus a per se violation of the Sherman Act); *Duplan Corp. v. Deering Milliken, Inc.*, 594 F.2d 979, 981 (4th Cir. 1979) (finding a patent settlement agreement to be the core of a horizontal agreement in violation of the antitrust laws).

dispute.[4] When parties pursue litigation, courts reach determinations of facts and applicable law via the adversary process. But when courts enter consent judgments, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in the consent decree." *Id*. at 522. "Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Id*.

Consent decrees, the Court explained, "closely resemble contracts." *Id*. at 519. Their "most fundamental characteristic" is that they are *voluntary agreements* negotiated by the parties for their own purposes. *Id*. at 521-22; *id*. at 522 ("the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes") (emphasis in original). Consequently, when parties seek to enforce agreements adopted in consent orders, courts construe terms of the settlement based on the intent of the parties, not of the court. *See*, *e.g*., *Fox v. U.S. Dep't of Hous. & Urban Dev.*, 680 F.2d 315, 321 (3d Cir. 1982) (examining evidence regarding "the intention of the parties"); *Wicker v. Oregon*, 543 F.3d 1168, 1174 (9th Cir. 2008) (if text of consent decree is ambiguous, court looks at the "contracting parties' intent"); *Segar v. Mukasey*, 508 F.3d 16, 22 (D.C. Cir. 2007) (court will look at "the parties' subjective intent" if a consent decree is ambiguous).

[4] The question in *Local Number 93* was whether a provision of Title VII that precluded the court from entering an "order" providing certain relief precluded the court from entering a consent decree providing such relief.

Consistent with this understanding of consent decrees, every court to have considered the question has rejected a *Noerr* defense in the context presented here: an antitrust challenge to agreements between a brand-name drug company and a generic competitor settling Hatch-Waxman patent infringement litigation. *See In re Androgel Antitrust Litig.*, No. 1:09-cv-955, 2014 WL 1600331, at *6-9 (N.D. Ga. Apr. 21, 2014); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 395-98 (D. Mass. 2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 212-13 (E.D.N.Y. 2003) (*Cipro*). In each case, the drug company defendants argued that they were shielded by the *Noerr* doctrine because their private agreement was embodied in a consent decree, and therefore judicial action, rather than their private agreement, caused the alleged competitive harm. In rejecting the defendants' arguments, each of these courts noted the limited role played by judges when parties seek to settle private disputes with entry of a consent judgment.

In *Androgel*—the proceeding on remand from *Actavis*—the court concluded that the " 'source … of the anticompetitive restraint at issue' is the parties' reverse payment agreement itself, not the governmental action." 2014 WL 1600331, at *8 (quoting *Allied Tube*, 486 U.S. at 499). The court also explained that *Actavis* demonstrates that such settlements are "*precisely* the type of agreement that should have its validity determined by the antitrust laws." *Id*. at *7. It recognized that

providing *Noerr* protection in these circumstances "would largely eviscerate" *Actavis* because subsequent settlements would always include a consent judgment. *Id*.

In *Nexium*, the court recognized that, unlike a litigated decision, "which is aided by an adversarial system that grants a judge the occasion formally to review the merits of the claims asserted," the means by which parties obtain a consent judgment are essentially "the same as those used to enter into private settlement or any private commercial contract." 968 F. Supp. 2d at 396 (internal quotation marks omitted). It observed that the terms of consent decrees "are arrived at through mutual agreement of the parties," *id*. (quoting *Local No. 93*, 478 U.S. at 519), and that entry of a consent decree "does not, by itself, reflect a court's assent to the substantive terms found therein." *Id*. at 398. The court concluded that the drug companies' settlement through a consent order could not be fairly characterized as *Noerr*-protected petitioning to persuade a government decision-maker. *Id*.

In *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, the court likewise focused on the limited role played by judges in the consent judgment context. It found that the defendants' *Noerr* defense was "easily refuted" because, among other reasons, the challenged agreements were "private agreements between the

defendants," in which the judge "played no role other than signing the Consent Judgment." 261 F. Supp. 2d at 212.

II. DEFENDANTS' *NOERR* DEFENSE RESTS ON THE INCORRECT PREMISE THAT THE CHALLENGED RESTRAINT WAS THE RESULT OF GOVERNMENT ACTION.

Defendants do not appear to dispute that private agreements settling litigation warrant no *Noerr* protection. Instead, they argue that *Noerr* applies here because (1) their settlement agreement was contingent on the patent court's entry of the orders they requested; and (2) the consent decree was entered after what the court below deemed to be "strong judicial intervention in the antitrust inquiry." Neither of these features, however, makes the court's order the source of the challenged restraint.

First, defendants' argument that the court's entry of their requested orders is a superseding cause of plaintiffs' injury ignores the voluntary character of consent judgments and a court's limited role when it enters a consent judgment. *See Local No. 93*, 478 U.S. at 523 ("the obligations contained in a consent decree . . . [are] created by agreement of the parties *rather than imposed by the court*") (emphasis added). Even "the choice . . . whether to rely on contractual remedies or to have an agreement entered as a consent decree . . . is itself made voluntarily by the parties." *Id.* Defendants' argument that the court's order is the source of the restraint rests on inapposite cases, principally involving regulatory government action that differs

fundamentally from consent judgments.[5] The only case they cite involving a consent judgment arose in a wholly different context, and its *Noerr* theory was not upheld on appeal.[6]

Indeed, defendants' causation argument is belied by the express terms of both the patent court's order and their own license agreement. The court's order provides that Teva may not sell generic Effexor XR "except as licensed under the License Agreement." JA 1298. The license agreement, in turn, leaves Wyeth and Teva—not the court—in control of the terms of Teva's entry with generic Effexor XR, providing that the parties can modify the agreement upon written

[5] *See A.D. Bedell Wholesale Co.*, 263 F.3d at 252 (petitioning to state Attorneys General); *Armstrong Surgical Ctr. v. Armstrong Cty. Mem'l Hosp.*, 185 F.3d 154, 156 (3d Cir. 1999) (state department of health denial of certificate of need application); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 121-22 (3d Cir. 1999) (International Trade Commission decision on anti-dumping petition); *Mass. Sch. of Law at Andover v. Am. Bar Ass'n*, 107 F.3d 1026, 1036 (3d Cir. 1997) (decision of state acting as sovereign to adopt bar admission requirements); *Sessions Tank Liners v. Joor Mfg.*, 17 F.3d 295, 296, 299 (9th Cir. 1994) (injuries directly resulting from adoption of model fire code by local governments).

[6] *MedImmune v. Genentech*, No. 03-2567, 2003 WL 25550611 (C.D. Cal. Dec. 23, 2003), held that *Noerr* applied to a settlement accompanied by a consent judgment in a case brought to overturn a Patent and Trademark Office (PTO) decision in a patent interference proceeding. The plaintiffs' theory of harm depended on subsequent action by the PTO (issuance of a new patent) that concededly was the result of petitioning. *See id*. at *5 n.5, *8-10. On appeal, the Federal Circuit affirmed the district court's dismissal of the antitrust claim but found that "it was unnecessary for the district court to have relied on *Noerr-Pennington* immunity." *MedImmune v. Genentech*, 427 F.3d 958, 967 (Fed. Cir. 2005), *rev'd on other grounds*, 549 U.S. 118 (2007).

authorization by each company. JA 1334.[7] Thus, under the court's order, the parties themselves jointly control the challenged restraint. Manifestly, the source of the restraint is the agreement between the defendants, not governmental action.

Second, defendants' contentions that the patent court "scrutinized the proposed terms for antitrust concerns" (Teva Br. at 66) and did not play merely a "ministerial" role (Wyeth Br. at 65), cannot create a *Noerr* defense. To begin with, defendants have failed to demonstrate that the patent court played any role in crafting the terms of the settlement agreement.[8] Nor does the record reflect any "strong judicial intervention" in any antitrust inquiry. All it shows is that the patent court issued a scheduling order giving the FTC an opportunity to submit objections to defendants' proposed settlement (as required by a 2002 FTC consent order with Wyeth). But that order does not indicate the patent court engaged in any assessment of the settlement terms. Indeed, the record reflects that Wyeth told the FTC that the parties did not intend to independently raise antitrust issues with the court. JA 20 (quoting FTC's letter to Wyeth's counsel).[9]

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[7] Section 13.7 of the License Agreement provides that any subsequent changes to the agreement must be "reduced to writing and signed by an authorized officer of each Party." JA 1334.

[8] *See Nexium*, 968 F. Supp. 2d at 398 ("it is not apparent that the New Jersey District Court actually played an independent role in drafting the terms in the consent judgments").

[9] Even further afield is Wyeth's suggestion that its compliance with its obligations under the FTC's consent decree meant the settlement agreement was "permissible"

In any event, the Court should reject the *Noerr* defense regardless of whether the judge's role in entering a consent order is deemed "passive" or "ministerial." As demonstrated above, "the source, context, and nature of the anticompetitive restraint at issue" all weigh against application of *Noerr*. *Allied Tube*, 486 U.S. at 499. In the context of a consent decree, the settling parties' agreement is the source of the restraint. And as exemplified by the *Actavis* decision, such agreements settling Hatch-Waxman patent infringement litigation are the type of agreements that warrant traditional antitrust scrutiny. Such settlements are, in short, "commercial activity with a political impact" not protected by *Noerr*.

If defendants were correct that a judge's signature on a consent decree confers antitrust immunity on private parties' anticompetitive agreements, companies would gain a new and powerful tool to evade the antitrust laws. Litigants would be free to include all manner of anticompetitive agreements in their private settlements and shield those unlawful agreements from antitrust challenge as long as a judge signs a consent judgment. Such a result would place an intolerable burden on district courts to examine and resolve the antitrust implications of every settlement deal—almost always in the absence of an adversary process. It would also stretch *Noerr*'s protection of "mere attempts to

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as a matter of antitrust law. The FTC's letter to Wyeth's counsel made clear that the FTC's decision not to object did not signify that the settlement agreement was lawful. *See* JA 21.

influence the passage or enforcement of laws" beyond recognition. *Noerr*, 365 U.S. at 135.

CONCLUSION

For the foregoing reasons, the Court should find that defendants' challenged conduct is not exempt from the antitrust laws under the *Noerr-Pennington* doctrine.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. This brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 3,374 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

2. I filed the electronic PDF version of this brief with the Court via the CM/ECF system. The docket for this proceeding indicates that all participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

3. The text of the electronic PDF version of this brief is identical to the text of the paper copies being sent to this Court.

4. I ran a virus check on the electronic version of this brief using used Symantec Endpoint Protection version 12.1.6318.6100.105, and it detected no virus.

5. Because this brief is filed on behalf of an administrative agency of the United States, there is no bar membership requirement.

March 17, 2016

s/ Michele Arington
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