

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

NAPCO, INC., )  
 )  
 Plaintiff, )  
 v. ) No. 1:21-cv-00025  
 )  
 LANDMARK TECHNOLOGY A, LLC, )  
 )  
 Defendant. )

***Amicus Curiae* Brief in Support of Plaintiff**

Defendant Landmark Technology A, LLC, has filed a motion to dismiss (ECF No. 18) Count III of the First Amended Complaint filed by Plaintiff NAPCO, Inc., ECF No. 15, which asserts a claim under the North Carolina Abusive Patent Assertions Act (Act), N.C. Gen. Stat. § 75-140, *et seq.* ECF No. 18. *Amici Curiae* are: Acushnet Company; Garmin International, Inc.; North Carolina Chamber Legal Institute; North Carolina Retail Merchants Association; North Carolina Technology Association; Red Hat, Inc.; SAS Institute Inc.; and Symmetry LLC. *Amici* submit this brief to assist the Court as it considers the constitutionality of the Act. *Amici* submit this brief to complement the constitutional defense of the Act by NAPCO and the Attorney General by describing the nature and scope of the problem the Act addresses.

In short, the Act is similar to statutes passed in the last 10 years in most states (32, to be exact) to combat abusive and bad-faith patent infringement

assertions used to extract settlements from *Amici* and others. The North Carolina Legislature (Legislature) properly found that the Act was a narrowly tailored response to abusive and bad-faith patent infringement assertions by non-practicing entities (NPEs).

### **Interest of *Amici Curiae***

Although *Amici* are headquartered across the country, from North Carolina to Massachusetts to Kansas, and represent or operate in diverse industries, from analytical software to golf to GPS technology, they share an interest in a robust, functioning patent system. *Amici* and their members have obtained numerous patents to protect their operating businesses' intellectual property and the millions of dollars that they have invested in research and development (R&D) in their cutting-edge technologies.

Because *Amici* and their members have succeeded as a result of their innovations, they also are familiar with the dark underbelly of the patent system. *Amici* have been on the front lines fighting what they believe to be frivolous patent infringement lawsuits filed by NPEs, also known as patent assertion entities (PAEs) or patent trolls. *Amici* know first-hand that NPEs often assert dubious patents and take advantage of the asymmetrical litigation advantages between non-practicing entities and operating companies to extract settlements unrelated to the merits of the asserted patents. But *Amici* also know well that NPEs often are thinly-

capitalized shell companies and thus judgment proof. Hence, NPEs have little to lose and everything to gain by aggressively asserting non-meritorious patent claims against *Amici* and others, and *Amici* have little to gain from defending even the most egregious cases just to obtain an expensive Pyrrhic victory instead of taking a cost-of-litigation settlement.

Accordingly, to even the playing field, *Amici* supported the adoption of state statutes combatting abusive patent assertions. Indeed, SAS and Red Hat, both headquartered in North Carolina, and the North Carolina organizations joining this brief, were among the many strong supporters urging the Legislature to adopt the Act that is the subject of this motion to dismiss.

Pursuant to LR 7.5(d), *Amici* state that no party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than the *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

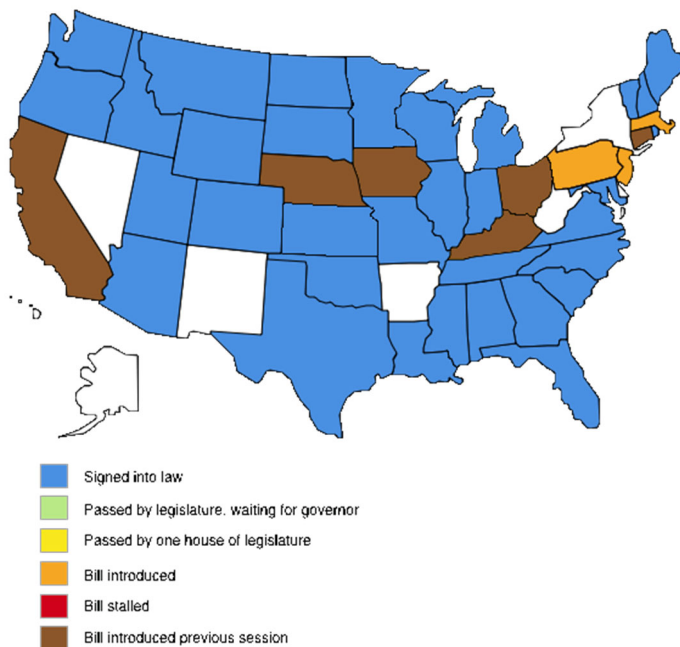
### **Argument**

**Like Many Other States, the North Carolina Legislature Properly Concluded that Non-Practicing Entities Are More Likely to Engage in Abusive Patent Assertions and thus the Act Is an Appropriate and Necessary Response.**

**North Carolina's Act is similar to statutes passed in over 30 states.**

North Carolina is scarcely alone in passing a statute to try to stop abusive and bad-

faith patent assertions. On the contrary, 32 states have passed similar statutes and several other states have considered or are considering similar legislation:



Patent Progress’ Guide to State Patent Legislation (May 1, 2019), *available at* <https://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-state-patent-legislation/>; *see also* Andrew Salomone, *Protecting Wisconsinites from Trolls: The Federal Circuit’s ‘Bad Faith’ Preemption and its Restrictive Effect*, 23 Marq. Intellectual Property L. Rev. 195, 197 n.16 (2019) (collecting statutes). So, the Court’s ruling here may impact state statutes across the country.

**The Legislature’s findings are entitled to deference.** The Legislature made numerous findings concerning the adverse impact of abusive patent assertions on North Carolina citizens and businesses. *See* N.C. Gen. Stat. § 75-141.

In evaluating Defendant’s constitutional challenges, “[a]lthough the legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute.” *Hest Techs., Inc. v. State*, 749 S.E.2d 429, 433 (N.C. 2012) (quotation omitted).

The Legislature found that “[t]he expense of patent litigation, which may cost millions of dollars, can be a significant burden on companies.” N.C. Gen. Stat. § 75-141(a)(4). Additionally, a “business that receives a letter asserting such claims faces the threat of expensive and protracted litigation and may feel that it has no choice but to settle and to pay a licensing fee even if the claim is meritless[,]” which the Legislature found is particularly true for small and medium-sized businesses and non-profits. *Id.* § 75-141(a)(6). Also, “[f]unds used to avoid the threat of bad-faith litigation are no longer available to invest, produce new products, expand, or hire new workers, thereby harming North Carolina’s economy.” *Id.* § 75-141(a)(7). Although costs are available to prevailing defendants, and attorneys’ fee awards are available in patent infringement actions in “exceptional cases,” 35 U.S.C. § 285, such awards “do not serve as a deterrent to abusive patent assertion entities who have limited liability, as these companies may hold no cash or other assets.” N.C. Gen. Stat. § 75-141(a)(9).

The legislative report cited by Defendant itself lays the blame for abusive patent assertions at the feet of NPEs: “people or companies that misuse patents as a business strategy (‘patent trolling’) has jumped by nearly 250%, rising from 29% of infringement suits to 62% of infringement suits in 2 years.” Joint Legislative Economic Development and Global Engagement Oversight Committee, *Report to the 2013-2014 General Assembly of North Carolina*, 38 (2014) (cited in ECF No. 18 at 2 n.2); accord Executive Office of the President, *Patent Assertion and U.S. Innovation*, 1 (2013) (President’s Report).

As demonstrated below, the Legislature not only had a rational basis to find these facts to be true when it considered the Act, but such findings are also supported by a mountain of empirical data and academic research that demonstrate them to be as true now as they were then. Stated differently, although Defendant implies that North Carolina is somehow picking on NPEs by treating them differently from other entities, the evidence supports the conclusion that NPEs are largely responsible for the evils of abusive patent assertions that the Legislature was trying to combat when it passed the Act.

After labelling these entities as “patent trolls,” President Obama described the problem as follows: “The folks that you’re talking about are a classic example; they don’t actually produce anything themselves. They’re just trying to essentially leverage and hijack somebody else’s idea and see if they can extort some money

out of them.” Gene Sperling, *Taking on Patent Trolls to Protect American Innovation* (June 4, 2013) (quoting President Obama’s Fireside Hangout), available at <https://obamawhitehouse.archives.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation>. The North Carolina Legislature adopted a tailored solution to address a terrible situation.

**NPEs are significant contributors to increased expensive patent litigation.** By 2014, when the Legislature was considering the Act, approximately two-thirds of all patent cases were brought by NPEs. See Council of Economic Advisers, *The Patent Litigation Landscape: Recent Research and Developments*, 3 (March 2016). As of 2020, little had changed, with NPE-related litigation representing 2228 of 3738 patent suits filed last year (approximately 61%). See United Patents, *Q1 2021 Patent Dispute Report* (Mar. 31, 2021), available at <https://www.unifiedpatents.com/insights/2021/3/31/q1-2021-patent-dispute-report>; cf. RPX Corp., *Q4 in Review*, 3 (Jan. 13, 2021), available at <http://www.rpxcorp.com/wp-content/uploads/sites/6/2021/02/RPX-Q4-in-Review-January-2021.pdf> (NPE patent litigation increased by 11.8% in 2020).

Based on the first large-sample evidence of NPE litigation, commentators concluded that “the rise in overall IP litigation is entirely driven by NPE lawsuits.” Lauren Cohen, *et al.*, *Patent Trolls: Evidence from Targeted Firms*, 65 *Management Science* 5461, 5464-65 (2019). More ominously, the authors

concluded that NPEs target companies not based on their allegedly infringing activity but rather on their ability to pay, even from parts of their businesses unrelated to the alleged infringement: “NPE IP litigation is unique in its cash-targeting nature in comparison with other forms of litigation and even within the fine space of IP litigation.” *Id.* at 5468; *accord id.* at 5469-70.

It belabors the obvious to state that patent litigation is breathtakingly expensive. This, of course, makes it more likely that companies, particularly small and medium-sized companies, and non-profits, will settle rather than defend themselves. According to the bi-annual survey conducted by the American Intellectual Property Law Association (AIPLA), when there was less than \$1 million at risk, the median costs of patent litigation through trial were \$950,000. *AIPLA, 2019 Report of the Economic Survey*, at 50. When there was up to \$10 million at risk, the median costs were \$2.1 million; when there was up to \$25 million at risk, the median costs were nearly \$4 million; and when there was more than \$25 million at risk, the median costs were \$6.375 million. *Id.* Few companies and non-profits are prepared to pay these amounts, particularly if the patent claims do not concern the core of the business or mission.

Meanwhile, NPEs do not incur the same costs when they assert patent claims against potential defendants. “Often working with lawyers under a contingency agreement, trolls can send hundreds of demand letters asserting infringement at



relatively low cost and then simply pay the lawyer’s fees on whichever assertions are successful.” Grace Heinecke, *Pay the Troll Toll: The Patent Troll Model is Fundamentally at Odds with the Patent System’s Goals of Innovation and Competition*, 84 *Fordham L. Rev.* 1153, 1174 (2015) (footnote omitted); *see also* Federal Trade Commission (FTC), *Patent Assertion Entity Activity*, 52 (2016) (FTC Report) (NPEs frequently employ contingency counsel).

**The burden of NPE litigation falls disproportionately on defendants.** It is not just that patent litigation is expensive and burdensome—it is that these expenses and burdens fall disproportionately on defendants. Given the asymmetry between parties in cases in which plaintiffs are NPEs that have no real businesses and few, if any, employees, and therefore have little discovery to provide, and defendants are operating companies with products and processes, documents and electronically-stored information, and witnesses, these costs are usually borne largely by defendants. *See, e.g., Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011) (finding bad faith, in part, due to NPE’s “ability to impose disproportionate discovery costs” on defendant, which increased “the nuisance value that an accused infringer would be willing to settle for in a patent infringement case”).

In addition to the asymmetric positions of NPEs and defendants vis-à-vis discovery, local patent rules often increase the leverage NPEs have in seeking a

quick settlement. At least 30 district courts in 23 states have adopted local patent rules. *See* Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 Ariz. St. L.J. 63 (2015); *see, e.g.*, LR 101.1, *et seq.* Although such local rules require plaintiffs to make initial infringement contentions early in the case, *see, e.g.*, LR 103.1 (30 days after the initial scheduling conference), NPEs and others allegedly laid this necessary groundwork during their pre-suit investigation. The rub comes from the requirement that defendants serve their initial invalidity contentions and supporting documentation soon afterwards. *See, e.g.*, LR 103.3, 103.4 (45 days after initial infringement contentions).

To prepare invalidity contentions, defendants must conduct a thorough worldwide search of existing patents and patent applications, technical journals, and other written works, as well as global searches for specific pieces of prior art that match the claim language of the asserted patent point-for-point, and they must perform this search on the tight timeline set by the rules, which leaves them with little time to discover and disclose invalidating prior art. *See* La Belle, *supra*, 47 Ariz. St. L.J. at 100. Especially when the NPEs assert that their vague patents broadly cover a wide swath of technology, locating the precise prior art on a short schedule is daunting. *See, e.g.*, ECF No. 15-1 (demand letter) (claiming patent asserted in this case covers “certain special-purpose computer, communication and network technologies relating to Internet searching, e-commerce, electronic bill

pay, business-to-business transactions, multimedia data processing networks and mobile technologies”).

Thus, local patent rules and discovery obligations present “Defendants with a *Hobson’s* choice: spend more than the settlement range on discovery, or settle for what amounts to cost of defense, regardless of whether a Defendant believes it has a legitimate defense.” *Id.* (quoting Judge Davis of the Eastern District of Texas in an NPE case); *see also* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 383 n.230 (2012) (explaining that the “costs of defense [are] being driven by the quick discovery deadlines of the local rules”) (brackets added).

Other guardrails that temper litigation between competitors are also missing when NPEs instead are plaintiffs. “As a non-practicing entity, [the NPE] was generally immune to counterclaims for patent infringement, antitrust, or unfair competition because it did not engage in business activities that would potentially give rise to those claims.” *Eon-Net*, 653 F.3d at 1327 (brackets added); *see also* Heinecke, *supra*, 84 Fordham L. Rev. at 1174 (NPEs need not worry about indirect costs or reputational concerns); Stijepko Tokic, *The Role of Consumers in Deterring Settlement Agreements Based on Invalid Patents: The Case of Non-Practicing Entities*, 2012 Stan. Tech. L. Rev. 2, 8 (2012) (“the NPEs business model allows them to adopt unusually tenacious litigation strategies”) (quotation

omitted). This means that the only real risk NPEs face from filing suit is that they may not prevail on their claims. *See Eon-Net*, 653 F.3d at 1327-28.

**Uncertain claim construction outcomes favor NPEs.** *Amici* and others sued for patent infringement incur early in the case the disproportionate costs necessary to develop their non-infringement and invalidity positions, and to produce all potentially relevant documents, including all electronically-stored information, which, in turn, necessitates significant internal investment and distraction. But, even if they incur such costs and distraction, there is no obvious exit ramp from the litigation other than settlement because infringement and invalidity analysis frequently must await claim construction before being ripe for summary judgment.

“[I]n almost every patent case claim construction is a dispositive issue.” David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 Wm. & Mary L. Rev. 1699, 1708 (2009). This means that defendants usually must incur the cost and distraction of a patent case through discovery and claim construction before they even have the opportunity to prevail on the merits.

Although claim construction may be a dispositive issue, it rarely is a settled issue. At the time the Legislature was considering the Act, studies showed that the

reversal rate by the Federal Circuit on claim construction ranged between 33% and 44%. See Ted L. Field, “*Judicial Hyperactivity*” in *the Federal Circuit: an Empirical Study*, 46 U.S.F. L. Rev. 721, 734-35 & Table 1 (2012). One would think that this reversal rate would have declined somewhat following *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015), in which the Court applied the clear and convincing standard to district courts’ subsidiary factual findings on claim conclusion. Studies, however, have not yet confirmed that hypothesis, and the Federal Circuit’s efforts to “sidestep” *Teva* has led one commentator to opine that it is “probable that the high reversal rates for claim construction in the Federal Circuit will remain constant.” Rainey C. Booth, Jr., *The Only Certainty is Uncertainty: Patent Claim Construction in the United States Court of Appeals for the Federal Circuit*, 21 J. Tech. L. & Pol’y 243, 254 (2017).

Claim construction uncertainty only benefits NPEs. “[P]roblems with claim construction are significant contributors to the uncertainty and breadth of claim scope, which fuel patent assertion entities.” Greg Reilly, *Patent “Trolls” and Claim Construction*, 91 Notre Dame L. Rev. 1045, 1047 (2016); accord Heinecke, *supra*, 84 Fordham L. Rev. at 1177.

Judge Young of the District of Massachusetts put the conundrum facing the litigants and trial courts this way:

In most cases the trial judge, with the “satisfaction that proceeds from the consciousness of duty faithfully performed,” General Robert E.

Lee, Farewell Address to Army of Northern Virginia (Apr. 10, 1865), and a reversal rate among the several circuits ranging from two to fourteen percent, has the added satisfaction of knowing that he has probably resolved the parties' dispute and that they can get on with their business. Not so here.

Here the parties have fought each other to a standstill and any "victory" is pyrrhic. Given the monetary stakes involved and a Federal Circuit reversal rate exceeding forty percent, this Court is no more than a way station—an intermediate irritating event—preliminary to the main bout in the Federal Circuit. Whatever the merits of such a system, it is undeniably slow and extraordinarily expensive. The most this Court can say is, "Good luck and Godspeed."

*Aspex Eyewear, Inc. v. Altair Eyewear, Inc.*, 818 F. Supp. 2d 348, 365 n.8 (D. Mass. 2011).

The reality of modern patent litigation is that *Amici* and others often face the Sisyphean prospect of spending millions of dollars through discovery and trial, with the critical issue of claim construction little better than the flip of a coin on appeal, making a re-trial a real possibility. So long as the NPE prices the settlement at less than the massive certain costs of defense through judgment and appeal, and the uncertain risk of the ultimate, eventual outcome, the hydraulic pressure to settle instead of defending against even a weak patent will continue unabated.

**NPEs assert older, lower quality patents.** The inevitable rejoinder is that these settlements merely reflect acknowledgement of and compensation for valuable intellectual property being asserted by NPEs. On the contrary, "recent large-sample empirical evidence suggests that, on average, entities such as NPEs

buy and litigate lower quality patents.” Lauren Cohen, *et al.*, “*Troll*” Check? *A Proposal for Administrative Review of Patent Litigation*, 97 B.U.L. Rev. 1775, 1796 (2017). This conclusion is reinforced by the fact that non-practicing entities are less successful than others when patent cases are actually litigated. *See* Mark Lemley, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 1117, 1120 (2013). “Operating companies’ success rates in adjudicated cases is more than twice as high as NPEs: operating companies won definitive rulings 30.6% of the time, compared to only 14.4% for NPEs.” John R. Allison, *et al.*, *How Often Do Non-Practicing Entities Win Patent Suits?* 32 Berkeley Tech. L.J. 237, 269 (2017) (footnote omitted). A batting average of less than .150 speaks volumes about the quality of the patents being asserted by NPEs.

Because NPEs are asserting lower quality patents, it is more important that they resolve their cases through settlement than litigation, which, ironically, encourages more aggressive patent assertions. Aggressive patent assertion *threatening* expansive and expensive litigation increases the odds that potential defendants, concerned about the cost and distraction of such potential litigation, will agree to take a cost-of-litigation settlement. *See* Erik Hovenkamp, *Predatory Patent Litigation*, 1-5 (Aug. 5, 2013). Thus, the patents most likely to be asserted, and asserted aggressively, by NPEs are the least likely to survive battle-testing.

Patents asserted by NPEs not only are more likely to be of lower quality, but they also tend to be older and closer to expiration. *See* Lauren Cohen, *supra*, 65 Management Science at 5470. This not only makes them usually less innovative because they represent older technology, but also more likely to be asserted against completely different and newer front-line technologies. Once again, this favors NPEs and increases the likelihood of settlement of even a weak patent claim. *Cf.* Heinecke, *supra*, 84 Fordham L. Rev. at 1174 (“They often use timing tactics by waiting to assert infringement claims until after a potential defendant’s product has been widely commercialized. This allows patent trolls to threaten litigation at a time when the defendant’s cost of changing its product is too high, so the defendant is pressured into settling the claim.”) (footnotes omitted).

U.S. Patent No. 7,010,508 C1 (’508 patent), ECF No. 15-2, which Defendant has asserted against NAPCO, *see* ECF No. 15-1 (demand letter), is a prime example of an old dog being asked to perform new tricks. Issued on March 7, 2006, the application for the patent was filed on April 7, 1995, and it traces its roots via a series of continuations to a patent application filed on *May 24, 1984*. *See id.* Yet Defendant characterizes the invention claimed as “covering certain special-purpose computer, communication and network technologies relating to Internet searching, e-commerce, electronic bill pay, business-to-business transactions, multimedia data processing networks and mobile technologies.” *Id.*



One may search the patent specification in vain for a reference to the Internet or the World Wide Web, neither of which even existed when the original patent application was filed in 1984, finding instead references to “[a]utomatic vending machines and self-service terminals.” ECF No. 15-2, col. 1, lines 37-38. And “[t]he principal object of the invention is to provide an economical means for screening loan applications.” *Id.*, col. 1, lines 47-48. Suffice it to say, Defendant is not just asserting the ’508 patent against loan processors.

**NPE patent assertions harm innovation.** Almost by definition, the NPE business model does not encourage innovation, which, after all, is the objective of the Patent Clause. *See Heinecke, supra*, 84 Fordham L. Rev. at 1182 (“[B]ecause trolls do not create products or use the patents they own in any manner other than extracting license fees and initiating litigation, their business model does not spawn further innovation, one of the primary purposes of patent law.”) (footnote omitted).

Instead, at the time that the Legislature was considering this issue, an academic study concluded that “the estimated direct, accrued costs of NPE patent assertions totaled \$29 billion in 2011.” James Bessen and Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 Cornell L. Rev. 387, 389 (2014) (footnote omitted). In discussing the deleterious effect of NPEs on American innovation, the

President's report relied on these findings and other studies documenting the drain on innovation from NPE lawsuits. *See* President's Report, *supra*, at 9.

Additionally, these academics confirmed the Legislature's express finding that "much of this burden falls on small and medium-sized companies." Bessen and Meurer, *supra*, 99 Cornell L. Rev. at 411 (footnote omitted). As these researchers explained, "the majority of defendants in NPE lawsuits are small and medium-sized companies, and these companies accrue larger costs relative to their size." *Id.* (footnote omitted); *see also* President's Report, *supra*, at 2 ("the majority of PAE suits target small and inventor-driven companies"). Furthermore, "publicly traded NPEs likely cost small and medium-sized firms more money than these NPEs transfer to inventors." Bessen and Meurer, *supra*, 99 Cornell L. Rev. at 411 (footnote omitted).

The available research confirms that NPE patent assertions harm innovation. In 2013, the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy concluded: "A review of the evidence suggests that on balance, such patent assertion entities (PAEs) (also known as 'patent trolls') have had a negative impact on innovation and economic growth." President's Report, *supra*, at 2. One of the busiest judges hearing patent cases, Judge Alsup of the Northern District of California, was blunter: patent cases are "a plague on innovation." William Alsup, *Huge Numbers of Patent Cases:*

*How One District Judge Manages Them*, 18 Chi.-Kent J. Intell. Prop. 111, 124 (2019).

“In all, the evidence ... supports the idea that NPEs have a real and negative impact on innovation of U.S. firms and that within the IP space ... the negative impact on R&D is unique to NPE lawsuits.” Lauren Cohen, *supra*, 65 Management Science at 5477 (ellipses added). This negative impact is not just that this is a massive transfer of billions of dollars to NPEs from operating companies, but rather it is an enormous tax or toll on operating companies’ ability to innovate. “Effectively, what defendants pay in costs as a result of NPE litigation reduces their own R&D budgets.” Bessen and Meurer, *supra*, 99 Cornell L. Rev. at 411. The President’s report extensively quotes the SAS general counsel describing the negative effect on innovation of a single patent troll case that SAS litigated and won:

We spent \$8 million and huge amounts of developer time and executive time etc., for what? This victory does not resolve the other patent troll cases that we face, or will face in the future. This \$8 million and the millions more we are spending on other cases is money SAS no longer has to invest in people, facilities, research, or product development[.]

President’s Report, *supra*, at 7.

“One might argue that the losses to defendants accused of infringement would be offset by gains to the owners of patents. However, very little such transfer of value appears to take place.” *Id.* at 9. On the contrary, it is estimated

that only 5¢ of every \$1.00 obtained by NPEs are returned to the actual inventor. *See* Bessen and Meurer, *supra*, 99 Cornell L. Rev. at 411. In sum, “patent assertion by NPEs constitutes a tax on innovation.” *Id.* at 417. In other words, NPE litigation and settlements drain money from the innovative economy without even transferring more than a small fraction of that money to the original inventors.

**NPEs primarily settle patent assertions rather than litigate them.** Most patent cases brought by non-practicing entities are not litigated, but rather settled. *See* FTC Report, *supra*, at 4 n.6 (FTC study found that two-thirds of NPE lawsuits settle within one year). They not only are settled, but generally for less than the cost-of-litigation. The FTC found, using its subpoena power, that NPEs routinely price patent litigation settlements at less than \$300,000, which not coincidentally is below the lower range of early-stage litigation costs of defending a patent infringement suit. *See id.* at 88–90; *see also id.* (30% of litigation settlements are less than \$50,000). Because 77% of such settlements “fell below a *de facto* benchmark for the nuisance cost of litigation[,]” *i.e.*, less than \$300,000, “[t]his suggests that discovery costs, and not the technological value of the patent, may set the benchmark for settlement value” in such cases. *Id.* at 10.

Consistent with what some academics refer to as the “bottom feeder patent troll” model, NPEs “may bring nuisance value litigation seeking payouts far, far below the cost of defense. Almost all of these nuisance value cases should

rationality settle before a merits ruling.” Allison, *supra*, 32 Berkeley Tech. L.J. at 284 (footnote omitted). It therefore is not surprising that commentators have found that over 90% of the lawsuits filed by NPEs settle before a merits ruling either on summary judgment or at trial. *Id.* at 289.

In short, “an industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.” *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 646 (2015) (quotation omitted). In addition to the costs caused by actual litigation of non-meritorious patent claims, a substantial menace from NPEs comes from aggressive *threats* of possible litigation, *i.e.*, abusive patent assertions. “Conservative estimates place the number of threats in the last year alone at a minimum of 60,000 and more likely at over 100,000.” President’s Report, *supra*, at 6. Indeed, “it is clear that nonlitigated patent assertions are responsible for much of the direct costs imposed by NPEs on operating companies.” Bessen and Meurer, *supra*, 99 Cornell L. Rev. at 406. It is, of course, these aggressive, abusive, bad-faith patent assertions by NPEs in actual litigation or threatened litigation that lie at the heart of the Act passed by the North Carolina Legislature.

**Threatened expensive litigation coupled with cheap settlement offers are indicia of abusive patent assertions.** The Federal Circuit recently reiterated what it considers to be the indicia of an abusive pattern of patent litigation. *See Elec.*

*Comm’n Techs., LLC v. Shopperschoice.com, LLC*, 963 F.3d 1371, 1378 (Fed. Cir. 2020) (vacating order denying award of attorneys’ fees to wrongfully accused infringer); *see also SFA Sys., LLC v. Newegg, Inc.* 793 F.3d 1344, 1350 (Fed. Cir. 2015) (“[A] pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits of one’s claims, is relevant to a district court’s exceptional case determination under § 285.”).

The hallmarks of this abusive pattern are “sending standardized demand letters and filing repeat patent infringement actions to obtain low-value ‘license fees’ and force settlements.” *Shopperschoice.com*, 963 F.3d at 1377 (cleaned up). The record in that case disclosed an NPE filing at least 150 lawsuits, not to mention sending an undisclosed number of demand letters, seeking a five-figure “settlement.” *See id.* The Federal Circuit also noted that it is relevant to consider whether an NPE engages in a pattern of rapid settlement of litigation while actively avoiding litigating merits issues. *See id.* at 1378 (“ECT did not contest True Grit’s assertion that, of the 875 times ECT has asserted the ’261 patent and other patents in the patent family, ECT has never taken a single case to a merits determination.”) (cleaned up).

In theory, a defendant facing a meritless patent claim could defend itself, prevail, and then seek its attorneys’ fees under 35 U.S.C. § 285. In reality, that is

unlikely to happen because most rational defendants are unwilling to spend substantially more than a cost-of-defense settlement to seek such relief under the enhanced “exceptional case” standard of Section 285. *Cf. Eon-Net*, 653 F.3d at 1327 (defendant spent over \$600,000 to litigate a case it could have settled for \$75,000 or less). Furthermore, as discussed below, even if they are willing to pursue the case to the bitter end, NPEs are frequently shell companies with few or no assets, and thus the prevailing defendant is unable to actually recover the attorneys’ fees awarded against the NPE.

**Landmark is a non-practicing entity.** Not to put too fine a point on it, but Defendant Landmark Technology A, LLC, and its apparent affiliate, Landmark Technology, LLC (collectively, Landmark), are non-practicing entities. At this stage, we take as true NAPCO’s assertions that Defendant is an NPE. *See* ECF No. 15, ¶¶ 7, 17-35.

A review of publicly available federal district court dockets discloses that Landmark has engaged in a familiar pattern of litigation. There are three related patents in its family: U.S. Patent No. 5,576,951 (’951 patent), issued on November 19, 1996; 6,289,319 (’319 patent), issued on September 11, 2001; and the ’508 patent, issued on March 7, 2006. This last is the patent asserted against NAPCO. *See* ECF Nos. 15-1 (demand letter), 15-2 (’508 patent). Landmark has asserted one or more of these patents in 128 separately filed lawsuits (excluding declaratory

judgment actions initiated by accused infringers) dating back to 2008, with the latest lawsuit being filed on May 11, 2021. Four suits asserted only the '951 patent; 31 asserted only the '319 patent; 22 asserted only the '508 patent; 48 asserted both the '951 and '508 patents; and 22 asserted all three.

All of them were dismissed without a ruling on the merits in favor of Landmark. None of them was resolved on appeal, at trial, or on summary judgment. None ever reached claim construction. Most were dismissed within six months of filing, and only three remained pending for over a year (one due to Blockbuster's bankruptcy, and another one, Southern Motorcycle Supply, Inc., had a dispositive motion for judgment on the pleadings unresolved for a lengthy period of time while several judges recused themselves). In other words, Landmark has filed its lawsuits more than 100 times and never obtained a judgment on the merits.

In addition to these 100+ lawsuits, Landmark boasts that its patents "have been licensed to over 200 companies across various industries," ECF No. 15-1 at 1, demonstrating that it must have sent similar demand letters to well more than the 127 defendants it sued, and that many more industries are involved than the original objective of the asserted patent, namely, "an economical means for screening loan applications." ECF No. 15-2, col. 1, lines 47-48 ('508 patent).

Finally, Landmark seeks, as a starting offer, a non-exclusive license for \$65,000. *See* ECF No. 15-1 at 2. The multiple indicia of abusive NPE litigation—



the kind discussed by the Federal Circuit in *Shopperschoice.com* and contemplated by the North Carolina Legislature in the Act—are plainly present. *See also* Paul Roberts, “Any business with a web presence is a potential target”: State sues “patent troll” targeting Washington firms, *Seattle Times* (May 13, 2021), available at <https://www.seattletimes.com/business/local-business/a-patent-troll-targeting-small-businesses-is-sued-by-washington-state/> (Washington Attorney General sued Landmark this week under the Washington Patent Troll Protection Act); *see also State v. Landmark Tech. A, LLC*, No. 21-2-06348-5 SEA, Complaint ¶ 1.2 (Wash. Super. Ct., King’s Cty.) (May 11, 2021) (“Landmark’s “business model is bad faith patent assertion. Over a recent 18-month period, {Landmark} issued 1,892 separate patent assertion demand letters to 1,176 different target companies in 48 states.”) (brackets added), available at <https://www.documentcloud.org/documents/20708768-state-of-washington-v-landmark-technology-a-llc>.

**NPEs have few assets and no downside to aggressively pursuing targets.**

By definition, non-practicing entities do not make, use, or sell products, and significantly for present purposes, they typically have few or no other assets than the patents-in-suit. *See* Peggy P. Ni, *Rethinking Finality in the PTAB Age*, 31 *Berkeley Tech. L.J.* 557, 563 (2016). Non-practicing entities tend to be “thinly capitalized. Many had between one and three individual owners, often with no

other employees and no offices outside of their owners' homes.” FTC Report, *supra*, at 47.

Such “businesses” rely on their insubstantiality to pursue the benefits of litigation without facing its costs. *See Eon-Net*, 653 F.3d at 1327. In other words, NPEs “commonly act through shell companies whose only asset is a single patent. All litigation is filed through these shell entities, so when they assert their rights in the patent in question, they leave no assets vulnerable to countersuit.” Ashli Weiss, *An Insight into the Apparel Industry’s Patent Troll Problem*,” 6 *Hastings Sci. & Tech. L.J.* 121, 127-28 (2014); *accord* Ni, *supra*, 31 *Berkeley Tech. L.J.* at 563; *cf.* President’s Report, *supra*, at 2 (expressing concern that NPEs “create shell companies that make it difficult for defendants to know who is suing them”) (cleaned up).

Sophisticated trolls sue using shell companies created for the specific purpose of shielding their investors from liability and scrutiny. Structured correctly, the entity need not be connected to the corporation’s sponsors or its assets. Faced with a sanction or attorney’s fee award against it, the LLC could go bankrupt rather than pay the penalty.

Colleen V. Chien, *Reforming Software Patents*, 50 *Hous. L. Rev.* 325, 382-83 (2012) (footnote omitted). In short, the traditional tools used to stop meritless litigation are powerless when the plaintiffs are non-practicing entities.

\* \* \*

Like most of its sister states, the North Carolina Legislature faced a situation in which non-practicing entities were engaged in abusive and bad-faith patent assertions, using weak and old patents to extort settlements from North Carolina companies and non-profits, thereby harming innovation. The Legislature adopted a narrowly tailored solution to address this specific crisis. As explained by NAPCO and the Attorney General, this solution is both necessary and constitutional.

### **Conclusion**

*Amici Curiae* respectfully request that the Court deny Defendant's motion to dismiss Count III of the First Amended Complaint.

Dated: May 14, 2021

Respectfully submitted,

/s/ Raymond M. Bennett

Raymond M. Bennett

(NC State Bar No. 36341)

Womble Bond Dickinson (US) LLP

555 Fayetteville Street, Suite 1100

Raleigh, North Carolina 27601

(919) 755-2158

[ray.bennett@wbd-us.com](mailto:ray.bennett@wbd-us.com)

Peter J. Brann  
[pbrann@brannlaw.com](mailto:pbrann@brannlaw.com)  
David Swetnam-Burland  
[dsb@brannlaw.com](mailto:dsb@brannlaw.com)  
Eamonn R.C. Hart  
[ehart@brannlaw.com](mailto:ehart@brannlaw.com)  
Brann & Isaacson  
184 Main Street, 4th Floor  
Lewiston, ME 04243-3070  
(207) 786-3566

*Attorneys for Amici Curiae*

### **Certificate of Service**

I certify that on May 20, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Raymond M. Bennett  
Raymond M. Bennett

### **Certificate of Word Count**

I certify that this document contains fewer than 6,250 words according to the word count feature in Microsoft Word and is therefore in compliance with the word limitation set forth in L.R. 7.3(d)(1).

/s/ Raymond M. Bennett  
Raymond M. Bennett