

TABLE OF CONTENTS

INTRODUCTION 1

I. SUMMARY OF RELEVANT LAW..... 5

A. Rule 11 Applies and Warrants Sanctions..... 5

1. Federal Rule 11 Applies To This Case Even Though The Frivolous
 Assertions Of The State’s Claims Occurred In The Complaint
 Filed In Vermont State Court, Because The State Has A
 Continuing Obligation to Monitor Its Case Under Rule 11 6

B. The Court May Also Award Sanctions Under Its Inherent Powers..... 8

C. This Case, And The Conduct Of The State Attorney General, Constitutes
 A Plain Violation Of 28 U.S.C. § 1927 9

II. ARGUMENT..... 12

A. The Vermont Supreme Court In *Foti* Makes It Clear That Any Vermont
 Court Lacks Jurisdiction Over MPHJ’s Patent Licensing Activities Under
 The VCPA..... 12

B. It Is Well-Settled Law That The State Must Ultimately Plead And Prove
 Bad Faith Patent Enforcement In Order To Avoid Preemption..... 16

1. The Central Message Of The Communication Must Be Objectively
 And Subjectively Baseless, And Conclusory Allegations Of Bad
 Faith Are Insufficient To Avoid Preemption..... 18

2. The State’s Intentional Avoidance Of Pleading With Respect To
 Baselessness At This Stage Cannot Avoid The Ultimate Dismissal
 Of Its Case And The Imposition Of Sanctions Here..... 19

III. Proper Remedies For The Violations Of Rule 11, And Section 1927, Include An
 Award Of Fees And Costs And Dismissal Of This Suit..... 22

A. Proper Remedy For The Rule 11 Violation Is Dismissal Of The Suit, And
 An Award Of Fees And Costs At Least Since The Service Of This Motion
 22

B. The Proper Remedy To Be Awarded Under 28 U.S.C. § 1927 Is An
 Award To MPHJ Of Its Expenses, Fees and Costs Incurred As A Result
 Of The Violation Of That Statute By Counsel For The State..... 23

IV. THE ATTORNEY GENERAL'S POSITION AFTER THE 21-DAY RULE 11
REVIEW PERIOD.....24

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

Activision TV, Inc., et al. v. Pinnacle Bancorp, Inc., et al.;
 In the United States District Court for the District of Nebraska; C.A. No. 8:13-cv-00215-JFB-TDT2

Alyeska Pipeline Sew. Co. v. Wilderness Soc’y,
 421 U.S. 240 (1975).....8, 9

Ashcroft v. Iqbal,
 556 U.S. 662 (2009).....18

Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.,
 129 F. Supp. 2d 578 (W.D.N.Y. 2000).....18

Bus. Guides, Inc. v. Chromatic Communs. Enters.,
 498 U.S. 533 (1991).....7, 22

In re C F & I Steel Corp.,
 489 F. Supp. 1302, 1311 n.4 (D. Colo. 1980).....11, 15

Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc.,
 28 F.3d 259 (2d Cir. 1994).....5, 15

Chambers v. NASCO, Inc.,
 501 U.S. 32 (1991).....9

Concrete Unlimited, 776 F.2d at 1539.....16

Dubois v. U.S. Dept of Agric.,
 270 F.3d 77 (1st Cir. 2001).....9

Eastway Constr. Corp. v. City of New York,
 762 F.2d 243 (2d Cir. 1985).....5

Eng’g & Inspec. Servs, LLC v. IntPar, LLC,
 2013 U.S. Dist. LEXIS 146849 (E.D. La. Oct. 10, 2013)1, 24

F.D. Rich Co. v. United States for the Use of Indus. Lumber Co.,
 417 U.S. 116, 129 (1974).....8

Foti Fuels, Inc. v. Kurrle Corp.,
 2013 VT 111 (Vt. 2013) (Exh. A)..... *passim*

Globetrotter Software, Inc. v. Elan Computer Croup, Inc.,
 362 F.3d 1367 (Fed. Cir. 2004)..... *passim*

GP Indus. v. Eran Indus.,
500 F.3d 1369 (Fed. Cir. 2007).....8, 19

Griffen v. City of Oklahoma City,
3 F.3d 336 (10th Cir. 1993)7

Herron v Jupiter Transp. Co.,
858 F2d 332 (6th Cir. 1988)7

Hunter Douglas, Inc. v. Harmonic Design,
153 F.3d 1318 (Fed. Cir. 1998).....16

In re Innovatio IP Ventures, LLC Litigation,
921 F. Supp. 2d 903 (N.D. Ill. 2013)18

Matthews Int’l, Corp. v. Biosafe Eng’g, LLC,
2011 U.S. Dist. LEXIS 110010 (W.D. Pa. Sept. 27, 2011)18

Matthews Int’l Corp. v. Biosafe Eng’g, LLC,
695 F.3d 1322 (Fed. Cir. 2012).....18

McGowan v. Ananas Spa East, LLC,
2009 U.S. Dist. LEXIS 79378 (E.D.N.Y. Sept. 2, 2009)6

Music Center S.N.C. di Luciano Pisoni v. Prestini Musical Instruments Corp.,
874 F. Supp. 543 (E.D.N.Y. 1995)18

Neato, LLC v. Great Gizmos,
2000 U.S. Dist. LEXIS 20684 (D. Conn. Feb. 24, 2000)13

Noble Fiber Techs., LLC v. Argentum Med. LLC,
2006 U.S. Dist. LEXIS 43357 (M.D. Pa. June 27, 2006)19

North American Philips Corp. v. American Vending Sales, Inc.,
35 F.3d 1576, 1579 (Fed. Cir. 1994).....13

O’Brien v. Alexander,
101 F.3d 1479 (2d Cir. 1996).....6, 7

Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,
508 U.S. 49 (1993).....4, 16, 17, 20

Ransmeier v. Mariani,
718 F.3d 64 (2d Cir. 2013).....9

Simpson v. Lear Astronics Corp.,
77 F.3d 1170 (9th Cir. 1996)22

Storey v. Cello Holdings L.L.C.,
347 F.3d 370 (2d Cir. 2003).....5

Teamsters Local No. 579 v. B & M Transit, Inc.,
882 F.2d 274 (7th Cir. 1989)6, 15

United States v. Prince,
1994 U.S. Dist. LEXIS 2962 (E.D.N.Y. Mar. 9, 1994).....11, 15

Virginia Panel Corp. v. MAC Panel Co.,
133 F.3d 860 (Fed. Cir. 1997).....16

Virtue v. Creamery Package Mfg. Co.,
227 U.S. 8 (1913).....16

Zenith Elecs. Corp. v. Exzec, Inc.,
182 F.3d 1340 (Fed. Cir. 1999).....8, 16

Statutes

28 U.S.C. § 1927 *passim*
Vermont Consumer Protection Act..... *passim*

Other Authorities

U.S. Const. amend. I *passim*
FED R. CIV. P. 11 *passim*
Oakley, John B., “A Fresh Look at the Federal Rules in State Court,” 3 NEV. L.J. 354, 3727

INTRODUCTION

MPHJ Technology Investments, LLC (“MPHJ”) respectfully submits this Memorandum in Support of its Motion for Relief pursuant to FED. R. CIV. P. 11, 28 U.S.C. § 1927, and the Court’s inherent authority.

The circumstances of this case, and the circumstances of this Motion, are unusual. As the Court is aware, in the present case, the State of Vermont filed suit in Vermont state court against MPHJ, seeking a judgment that certain of MPHJ’s efforts to enforce its patents in Vermont violated the Vermont Consumer Protection Act (“VCPA”). That suit was removed to this Court, where the Court has before it two motions. One motion is MPHJ’s Motion to Dismiss for Lack of Personal Jurisdiction. In that Motion, MPHJ simply asks this Court to reach the same conclusion on personal jurisdiction as has already been decided by the Eastern District of Louisiana in a case involving the identical patent licensing conduct by MPHJ accused by the State in this case. *See Eng’g & Inspec. Servs, LLC v. IntPar, LLC*, 2013 U.S. Dist. LEXIS 146849 (E.D. La. Oct. 10, 2013). The second pending motion is the State’s Motion to Remand.

MPHJ from the start of this case has maintained that the State’s case is frivolous and brought in bad faith, at least because its conduct accused by the State does not fall within the scope of the VCPA, and separately because its conduct is protected speech under the First Amendment, unless the State pleads and proves that it was objectively baseless and subjectively baseless, two points which the State has consistently adamantly insisted it has not yet pled, and which it is clear the State could not plead without violating FED. R. CIV. P. 11, or the state equivalent.

Two recent decisions by two different courts have now confirmed MPHJ’s positions, and done so in a way that the State can no longer reasonably contend that it has any good faith basis to maintain this suit. The first of these decisions is *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT

111 (Vt. 2013) (Exh. A). That decision was published December 13, 2013. In *Foti*, the Vermont Supreme Court interpreted the scope of the VCPA in a manner that puts it beyond peradventure that the statute cannot be applied against MPHJ's conduct. The State cannot contend in good faith after this decision that there is any set of facts upon which it can prevail in the present case, regardless of whether the issues are ultimately decided by this Court, or by a state court.

The second of the two decisions that have confirmed MPHJ's positions is a decision by the U.S. District Court for the District of Nebraska entered as of January 14, 2014. *See Activision TV, Inc., et al. v. Pinnacle Bancorp, Inc., et al.*; In the United States District Court for the District of Nebraska; C.A. No. 8:13-cv-00215-JFB-TDT [Dkt. 111] (Exh. B¹). In that case, the State of Nebraska, via power invested in the State Attorney General, had issued a Cease and Desist Order against MPHJ's counsel from continuing the patent enforcement efforts of MPHJ in Nebraska, which were identical to the efforts in Vermont. In its decision of January 14, the Nebraska District Court held that MPHJ's conduct had not been shown to be objectively and subjectively baseless, and was protected free speech under the First Amendment. *See* Exhs. B [Dkt. 111] & Exhs. D [Dkt. 41]. The Court then preliminarily enjoined the State Attorney General from any further interference with MPHJ's patent enforcement activity.² It is significant that in the Nebraska case, every single accusation made by the State of Vermont in this case was placed before the Nebraska District Judge for consideration, and in the face of those allegations, the

¹ The Order in Exhibit B makes reference to earlier preliminary injunction orders issued by the Court with respect to a second plaintiff in the same case, and those Orders are included herein for the Court's convenience as Exhibits C [Neb. Dkt. 38] and D [Neb. Dkt. 41].

² The decision was made in the context of the grant in MPHJ's favor of a preliminary injunction enjoining the Nebraska Attorney General from enforcing in any manner the Cease and Desist Order against MPHJ's counsel with respect to MPHJ's licensing activity. However, as part of that Order, the Court also found that a permanent injunction was appropriate, and ordered the parties to agree upon a form of that motion, or to submit summary judgment briefing on the subject.

Court still found that preemption applied and that there was no evidence that MPHJ's patent enforcement efforts were objectively baseless or subjectively baseless.

The holding in Nebraska confirming MPHJ's position that its conduct is constitutionally protected free speech means that the State of Vermont cannot persist in its unlawful interference with the identical speech of MPHJ in Vermont unless the State can show that the protections of the First Amendment somehow do not apply in Vermont in the same manner that they do in Nebraska. The law is clear that the only way the State could contend that MPHJ's conduct was not protected by the First Amendment is if it were to argue that MPHJ's conduct has been both objectively baseless and subjectively baseless.³ But here, the State up until now has expressly chosen to not plead that MPHJ's conduct was objectively baseless, which would require showing the relevant patents are either invalid, or not reasonably suspected of infringement. Moreover, given that the Nebraska District Court has already considered this issue, and given the State's representation to date that it is not making allegations regarding the validity or infringement of the patents, the State cannot make a showing of objective baselessness in any pleading or submission that would still satisfy FED. R. CIV. P. 11, or the state equivalent. Given this position, and given the recent confirmation by the District Court of Nebraska that MPHJ's conduct is otherwise constitutionally protected, there is no set of circumstances upon which the State can prevail in either this Court, or Vermont state court. As such, this case has become a textbook case of sham litigation.⁴

³ See *infra* Section II(B).

⁴ Moreover, it has become a textbook case of the government attempting to interfere with free speech for a reason specifically prohibited to the government – namely, that it happens not to like the particular speech, which in this case, is patent enforcement activity by an entity that acquired the patents and does not engage in business activity related to the patents.

Thus, in this case, we now have a situation where MPHJ's accused conduct has been found by a federal court to be constitutionally protected free speech, and the only way it could be shown to not be protected free speech is by proof of legal and factual points that the State to date has not pled or asserted, and for which it would be frivolous for it to plead or assert.⁵

We further have the situation where the Vermont Supreme Court itself has interpreted the relevant statute in a manner that excludes coverage by that statute of the conduct accused by the State Attorney General in this case.

Finally, it is at least worth noting that we also have the situation where a federal district court has already ruled on identical circumstances involving MPHJ in a different state that there cannot be personal jurisdiction over MPHJ in this case.

Thus, there are three decisions, two of them involving MPHJ and the same exact conduct accused by the State here, each of which independently demonstrate that there is no set of circumstances under which the State can prevail on its case, regardless of whether the case remains in the federal district court or were to be improperly remanded to state court. One would expect that a party in the same position as the State should not be able to persist in maintaining what has become demonstrably sham and frivolous litigation without there being sanctions, remedy and recourse. And, such sanctions, remedy, and recourse are in fact available, and should be awarded in this case to MPHJ on the grounds set forth below.

⁵ It is not insignificant that the State's disavowal of any intention to prove the elements necessary to establish that the First Amendment protections do not apply to this case at this stage of the proceedings, even though such pleading is required at this stage under applicable decisions of the Federal Circuit and of the U.S. Supreme Court, is motivated by the overwhelming desire of the State and its counsel to not have the substantive issues in this case decided by the federal courts. *See, e.g., Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993); *Globetrotter Software, Inc. v. Elan Computer Croup, Inc.*, 362 F.3d 1367, 1374 (Fed. Cir. 2004).

For these reasons, which are presented and discussed in greater detail below, MPHJ respectfully requests that the Court award sanctions against the State and its counsel, including dismissal of the State's case against MPHJ, fees and costs incurred by MPHJ at least from the date on which this motion was served on the State, and such other relief as the Court deems just and proper. As explained below, sanctions and other relief should be awarded to MPHJ under FED. R. CIV. P. 11, 28 U.S.C. § 1927, and under the inherent powers of this Court.

I. SUMMARY OF RELEVANT LAW.

A. Rule 11 Applies and Warrants Sanctions.

Rule 11 of the Federal Rules of Civil Procedure requires that:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, *or later advocating it*—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

FED. R. CIV. P. 11 (emphasis added). Compliance with Rule 11's requirements is evaluated under a standard of objective reasonableness. *Storey v. Cello Holdings L.L.C.*, 347 F.3d 370, 387 (2d Cir. 2003). A showing of subjective bad faith is not required to trigger Rule 11 sanctions, nor does a showing of subjective good faith provide a safe harbor against sanctions. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985).

Rule 11 sanctions are warranted when a party has asserted a legal theory or contention that is either not supported by, or instead is contradicted by, legal authority. *See, e.g., Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259, 264-65 (2d Cir. 1994) (holding that sanctions were appropriate where the attorneys' legal argument clearly misapplied

relevant law to the facts). In addition, and of particular importance in the present case, Rule 11 prohibits a party from “insisting upon a position after it is no longer tenable.” FED. R. CIV. P. 11, Advisory Committee note to 1993 amendments. Rule 11 obligations “are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit.” *See O’Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir. 1996) (quoting Rule 11’s Advisory Committee’s notes). Thus, attorneys “have a continuing obligation to monitor the strength of their clients’ claims and discontinue representing clients who pursue claims that—although not obviously frivolous at the outset—are entirely unsupported or refuted by the evidence.” *McGowan v. Ananas Spa East, LLC*, 2009 U.S. Dist. LEXIS 79378, at *4 (E.D.N.Y. Sept. 2, 2009). Further, a court may sanction a party who deliberately ignores or misstates case law that is unfavorable to its position. *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989).

1. Federal Rule 11 Applies To This Case Even Though The Frivolous Assertions Of The State’s Claims Occurred In The Complaint Filed In Vermont State Court, Because The State Has A Continuing Obligation to Monitor Its Case Under Rule 11.

The State of Vermont may argue that it should not be subjected to sanctions here for two reasons. First, the State may argue that, to the extent its claims are barred by the application of Constitutional law to patent licensing activities, or by the application of Vermont case law to the State’s jurisdiction over such activities, its frivolous assertions of its claims occurred in the complaint filed in Vermont state court prior to the removal, and, thus, Federal Rule 11 does not apply. Second, the State may argue that the motion for remand filed in this Court does not itself advocate the frivolous positions addressed in this motion. Both of these arguments fail as a matter of law for the reasons set forth below.

While it is true that Federal Rule 11 does not apply to filings made prior to a removal, as discussed above, the State and its counsel have an affirmative duty to continue monitoring their case to avoid advocating a position that is baseless. *O'Brien*, 101 F.3d at 1489. Indeed, as the Sixth Circuit has held, when a complaint is filed in state court and is subsequently removed to federal court, Rule 11 applies at the instant federal jurisdiction is invoked over proceedings, since once removed, plaintiff is impressed with continuing responsibility to review and reevaluate his pleadings and, where appropriate, to modify them to conform to the Rule. *Herron v Jupiter Transp. Co.*, 858 F2d 332 (6th Cir. 1988).

Moreover, the case law makes it quite clear that, although this Court may not apply Federal Rule 11 to the State's conduct prior to the removal, the Court may apply the analogous rule in the state court, if one exists. *See Griffen v. City of Oklahoma City*, 3 F.3d 336, 341 (10th Cir. 1993) (recognizing that a federal court may impose sanctions under a state rule of procedure or state statute for conduct that occurred in state court before removal, including the filing of a pleading in state court prior to removal). In fact, Vermont has adopted a rule identical to Federal Rule 11, and has adopted all amendments to the rule. Oakley, John B., "A Fresh Look at the Federal Rules in State Court," 3 NEV. L.J. 354, 372. Thus, although it is not required to do so in order to find the conduct of the State and its counsel sanctionable here, it is quite clear that the Court may look to Vermont's own Rule 11 and find that it compels the same result as Federal Rule 11.

Importantly, both attorneys and clients, or each individually, may be subject to sanctions under Rule 11. *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 549-50 (1991). Here, in advocating for the remand of this case, the State and its counsel have repeatedly certified, both implicitly and explicitly, that the underlying state law claims they assert have

merit. However, such certifications fly directly in the face of the law applicable to those claims. The Vermont Supreme Court decision in *Foti* directly explains that the VCPA does not apply to MPHJ's patent licensing conduct accused of here and thus that the Vermont Attorney General even lacks authority to bring the claim brought against MPHJ. Moreover, the State's unequivocal admission that it has not and will not meet the *Globetrotter* burden⁶ of pleading that MPHJ's conduct was both objectively and subjectively baseless, as required by governing law and reaffirmed by the Nebraska District Court on January 14, 2014, *in itself* renders the underlying claims without merit and makes clear that the State's continued prosecution of its claims through the briefing and arguing of its remand motion is a violation of Federal Rule 11. Further, the State could not plead or make assertions that MPHJ's conduct was objectively baseless, because it would be frivolous and sanctionable to contend that the relevant patents were objectively invalid or objectively not infringed.

B. The Court May Also Award Sanctions Under Its Inherent Powers.

Although it is clear that Rule 11 applies to the State of Vermont's conduct in this case and that the Court can and should award sanctions on that basis, to the extent the Court concludes that some of the conduct falls outside the Rule, the Court may nonetheless award sanctions under its inherent power. *Alyeska Pipeline Sew. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). Although this power is to be used sparingly where, as here, the Rules are "up to the task," the Court may nonetheless award attorneys' fees against a "party [that] has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* (quoting *F.D. Rich Co. v.*

⁶ *Globetrotter Software, Inc.*, 362 F.3d at 1374. See, e.g., *See GP Indus. v. Eran Indus.*, 500 F.3d 1369, 1375 (Fed. Cir. 2007) citing *Globetrotter Software, Inc.*, 362 F.3d at 1377 ("a plaintiff claiming that a patent holder has engaged in wrongful conduct by asserting claims of patent infringement must establish that the claims of infringement were objectively baseless."). See also *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1352 (Fed. Cir. 1999) (explaining that the initiation of patent infringement suits against a plaintiff in bad faith means that the patentee did so "with knowledge that the patents, though lawfully-obtained, were invalid.").

United States for the Use of Indus. Lumber Co., 417 U.S. 116, 129 (1974)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Ransmeier v. Mariani*, 718 F.3d 64, 68 (2d Cir. 2013) (relying on inherent power “vested in courts to manage their own affairs” to award sanctions). Subjective bad faith is not a requirement for the imposition of sanctions in this context. *Dubois v. U.S. Dept of Agric.*, 270 F.3d 77, 80 (1st Cir. 2001).

Here, the State of Vermont concedes that it has failed to plead (and, apparently, has not even investigated) whether the accused conduct by MPHJ was objectively and subjectively baseless, as required for its claim to pass constitutional muster. Further, as noted, the State cannot plausibly make such a claim, and in particular cannot do so in the face of the decision by the Nebraska District Court. It is thus beyond dispute that the sole purpose for the State’s persistence in this lawsuit is for vexatious or oppressive reasons and is being conducted in bad faith. Moreover, even if that were not sufficient to induce the Court to exercise its inherent power and sanction the State, the decision of the Vermont Supreme Court in the *Foti* case makes it clear that MPHJ’s patent enforcement activity that forms the basis of the State’s claims here does not fall under the purview of the VCPA, and thus renders the State’s lawsuit frivolous as a matter of law. To the extent Rule 11 is not “up to the task” of curbing the State’s attempt to recover for alleged violations of a law that does not apply to MPHJ’s conduct, the Court should exercise its inherent power to do so. *See Alyeska Pipeline Sew. Co.*, 421 U.S. at 258-59.

C. This Case, And The Conduct Of The State Attorney General, Constitutes A Plain Violation Of 28 U.S.C. § 1927.

Congress has made it clear that counsel engaging in vexatious litigation, or engaging in conduct that improperly multiplies proceedings, may be required by the Court personally to satisfy the fees and costs incurred by the victim of such conduct. Specifically, Congress has enacted 28 U.S.C. § 1927, which provides as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Here, there can be no doubt that the attorneys for the State have engaged in vexatious conduct with no purpose other than to multiply and extend these proceedings unreasonably and vexatiously. These attorneys have conceded that they will be required to address the preemption issues in this case. Carried with that concession, by necessity, is a concession that they must follow the binding precedent and both plead and prove that the conduct by MPHJ accused here is both objectively and subjectively baseless. Yet, in order to defeat this Court's subject matter jurisdiction, the attorneys for the State have so far failed to plead objective and subjective baselessness, and they have taken the position in this court that they have no intention of ever pleading baselessness as part of their affirmative case, even though such pleading is required by the Federal Circuit in *Globetrotter*.⁷ In short, for the sole purpose of obtaining the remand of this case to state court and thereby guaranteeing the multiplication and delay of proceedings—including greatly increasing the costs associated therewith—the attorneys for the State have cynically pled their case in a manner that guarantees it will ultimately fail as preempted by Federal law. A clearer case for Section 1927 sanctions would be difficult to find. While imposition of Section 1927 sanctions has been held to require evidence of clear bad faith, or willful misconduct, that high standard is without doubt met in these circumstances. This is particularly so where counsel for the State, having been provided this Motion for the full 21

⁷ Further, as noted, particularly in light of the Nebraska District Court decision, and the State's statements taken so far with respect to validity and infringement, neither the State nor its counsel could make an assertion that the relevant patents are objectively invalid or objectively not infringed and remain in compliance with FED. R. CIV. P. 11 or the state equivalent.

days, have chosen not to dismiss this suit, or to pursue withdrawal from further representation of their client in this matter. *See* Section IV, *infra*.

Even if this conduct were not sufficient to warrant sanctions here (and it clearly is), the State's persistence in prosecuting this case in the face of the *Foti* decision unquestionably is. As discussed extensively herein, the Vermont Supreme Court holding in *Foti* takes patent licensing activities undertaken privately with individual infringers outside the scope of Vermont's consumer protection laws. As a result, this action cannot proceed and the State of Vermont's complaint fails for failure to state a claim on which relief can be granted. Nonetheless, the attorneys for the State have persisted in litigating this case and have engaged in aggressive efforts to remand the suit to state court where any reasonable attorney would know that the decision in *Foti* deprives them of a claim. Again, such conduct serves no purpose other than the vexatious multiplication of proceedings and thus falls squarely within the conduct prohibited by Section 1927. Again, on these circumstances as well, the high standard of "clear bad faith" and "willful misconduct" is self-evidently present. This is particularly so given the failure of the counsel involved to take advantage of a 21-day safe harbor period provided by MPHJ, even though it was not required under Section 1927.

The State of Vermont may assert that it has immunity from a cost award under Section 1927. While MPHJ does not concede this point if indeed the State makes such an assertion, it is nevertheless clear that any immunity the State might claim does not apply to its counsel of record in this case. The courts have been clear that there is no sovereign immunity for individual attorneys under Section 1927. *See, e.g., United States v. Prince*, 1994 U.S. Dist. LEXIS 2962 (E.D.N.Y. Mar. 9, 1994) ("[r]ecognizing that sovereign immunity is no obstacle" to the court's imposition of costs on individual prosecutors); *In re C F & I Steel Corp.*, 489 F. Supp. 1302,

1311 n.4 (D. Colo. 1980) (explaining that “although it may be that there is ‘government’ immunity from a cost award, 28 U.S.C. § 1927 doesn’t exclude government lawyers”).

Therefore, individual attorneys prosecuting this case should be sanctioned personally for the unnecessary expenses incurred as the result of their conduct, and have no immunity by virtue of the fact that they represent the State in this case.

In this case, the conduct by the State Attorney General and the counsel of record plainly and explicitly constitutes an effort to multiply the proceedings unreasonably. As such, this Court has the power under Section 1927 to award fees, costs and other expenses against such attorneys, and should do so. This is particularly true in these circumstances, where even though Section 1927 does not require any safe harbor warning similar to that required by Rule 11, MPHJ nevertheless afforded the State’s attorneys that safe harbor and they have chosen not to avail themselves of it and to either dismiss their client’s case, or at least personally to withdraw from their further representation of their client’s case, a case which, on its face, has now been conclusively demonstrated as frivolous and without basis.

II. ARGUMENT.

A. The Vermont Supreme Court In *Foti* Makes It Clear That Any Vermont Court Lacks Jurisdiction Over MPHJ’s Patent Licensing Activities Under The VCPA.

On December 13, 2013, the Vermont Supreme Court decided *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111 (Vt. 2013) (Exh. A), interpreting the Vermont Consumer Protection Act (“the VCPA”). The VCPA is the sole authority relied upon by the State and its counsel in this case. As MPHJ has contended from the outset, and as the *Foti* court has now confirmed, the VCPA is limited exclusively to consumer transactions, and does not apply to patent licensing activity, at least of the type accused in this case. In short, the *Foti* decision makes it clear that

the statute relied upon by the State and its counsel cannot be applied to patent licensing activity, as patent licensing relates to a dispute between two private parties as to existing infringement. and thus is, at its essence, the resolution of a dispute over a civil tort.

Specifically, the Vermont Supreme Court held as follows:

We hold that the “in commerce” requirement narrows the CFA’s application to prohibit only unfair or deceptive acts or practices that occur in the consumer marketplace. To be considered “in commerce,” the transaction must take place “in the context of [an] ongoing business in which the defendant holds himself out to the public.” [citation omitted]. Further, the practice must have a potential harmful effect on the consuming public, and thus constitute a break of a duty owed to consumers in general. *Id.* By contrast, transactions resulting not from “the conduct of any trade or business” but rather from “private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort and property law” remain beyond the purview of the statute. [citation omitted].

Id. at 18-19 (¶ 21).

Given this clear interpretation by the Vermont Supreme Court, it is beyond reasonable dispute that the correspondence by MPHJ to Vermont companies suspected of infringement cannot be subject to the statute. The accused correspondence plainly related to an inquiry as to whether the recipient might be infringing MPHJ’s patent—a civil tort. *See, e.g., Neato, LLC v. Great Gizmos*, 2000 U.S. Dist. LEXIS 20684, at *6 (D. Conn. Feb. 24, 2000) citing *North American Philips Corp. v. American Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994) (explaining that patent infringement is a tort). The correspondence further made it clear that if there was no infringement, MPHJ asked merely to be so informed so that it could cease further inquiry. *See* Dkt. 6-1 (Exhibits A, B & C to the Complaint). It further made it clear that if there was infringement, a resolution of that ongoing civil tort by the recipient was available by entering into a license (a private contract related to principles of intellectual property law between two private parties). *See id.*

Communications by MPHJ, which plainly were individual correspondence between MPHJ and a particular company suspected of infringement, where such communications sought to confirm whether a civil tort was being committed by the recipient, and sought to propose resolution of such a civil tort, simply is not conduct that the *Foti* court considers to be within the scope of the VCPA. The somewhat lengthy discourse of the *Foti* court on this topic is worth repeating here, as it is applicable to plainly demonstrate that the *Foti* court would not consider MPHJ's conduct to be within the scope of the VCPA.

The “in commerce” language, in particular, limits the act’s application to the consumer context. *Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E.2d 748, 752 (Mass. 1974) (holding that act’s purpose is to provide “a more equitable balance in the relationship of consumers to persons conducting business activities”). Similarly, the New Hampshire Consumer Protection Act broadly defines its equivalent of the “in commerce” requirement. N.H. Rev. Stat. Ann. § 358-A:1. Nevertheless, the state’s highest court has determined that the act’s scope “is narrower than its broad language may suggest.” *Ellis v. Candia Trailers & Snow Equip., Inc.*, 164 N.H. 457, 58 A.3d 1164, 1171 (N.H. 2012). In particular, the court has held that “[r]emedies under the Consumer Protection Act are not available where the transaction is strictly private in nature ... [as] the purpose of the Act is to ensure an equitable relationship between consumers and persons engaged in business.” *Hughes v. DiSalvo*, 143 N.H. 576, 729 A.2d 422, 424 (N.H. 1999) (quotations omitted).

* * *

Here, the parties’ transaction does not constitute a transaction “in commerce” for CFA purposes because it did not occur in the consumer marketplace. First, plaintiff held his offer out to defendant only, not to the public at large. *See Zeeman*, 273 S.E.2d at 913-14. Second, the transaction did not involve products, goods or services purchased or sold for general consumption, as those terms are generally understood, but rather the sale of an entire business from one party to another. *See 539 Absecon Blvd., L.L.C. v. Shan Enters. Ltd. P’ship*, 406 N.J. Super. 242, 967 A.2d 845, 868 (N.J. Super. Ct. App. Div. 2009) (declining to expand scope of consumer fraud statute to include sale of ongoing business from one group of owners to another).

Id. at *17-18, *22-23. The Vermont Supreme Court further held that it would be inappropriate to expand the reach of the VCPA to private transactions because existing law amply protects the participants to those transactions:

Broadening the scope of the CFA to encompass transactions that do not occur in the consumer marketplace would not serve the CFA's aim of public protection. In purely private transactions, remedies available through well-established principles of contract, tort, and property law are adequate to redress wrongs. Therefore, granting a remedy that benefits only the buyer in a purely private transaction would create an imbalance arbitrarily favoring one party. Cf. *Lantner*, 373 N.E.2d at 977 (when both parties have equal bargaining power, "arming the 'consumer' [with additional legal remedies] ... does not serve to equalize the positions of buyer and seller. Rather, it serves to give superior rights to only one of the parties, even though as nonprofessionals both stand on an equal footing."). Additionally, expanding the CFA to cover purely private transactions would allow the act to subsume the common law claims traditionally employed to remedy contractual wrongs. See *Winey v. William E. Dailey, Inc.*, 161 Vt. 129, 136, 636 A.2d 744, 749 (1993) (cautioning against "confusing principles of contract with principles of fraud so that the elements of fraud are made out by a mere breach of contract").

Id. at *21-22.

Both a Vermont court and a federal court considering this matter under Vermont state law would necessarily have to reach the same conclusion – that the Vermont Attorney General's Complaint under the VCPA fails to state a claim upon which relief can be granted because the VCPA, as a matter of law, cannot be applied to the conduct accused here. As the State has proceeded to prosecute its claims despite the *Foti* decision, and thus continued to advocate claims that are directly contradicted by legal authority, sanctions are appropriate here under both FED. R. CIV. P. 11 and 28 U.S.C. § 1927. See, e.g., *Caisse Nationale De Credit Agricole-CNCA*, 28 F.3d at 264-65 (holding that sanctions were appropriate where the attorneys' legal argument clearly misapplied relevant law to the facts); *Teamsters Local No. 579*, 882 F.2d at 280 (holding that a court may sanction a party who deliberately ignores case law that is unfavorable to its position); FED R. CIV. P. 11, Advisory Committee note to 1993 amendments (explaining that Rule 11 prohibits a party from "insisting upon a position that is no longer tenable"). See also 28 U.S.C. § 1927; *Prince*, 1994 U.S. Dist. LEXIS 2962; *CF&I Steel Corp.*, 489 at 1311 n.4.

B. It Is Well-Settled Law That The State Must Ultimately Plead And Prove Bad Faith Patent Enforcement In Order To Avoid Preemption.

Assuming, *arguendo*, that the conduct complained of here would even fall within the scope of activity regulated by the VCPA (which, for the reasons explained above, it would not), it is well-settled that communications related to patents are part of the patent owner's rights.⁸ It is clear that MPHJ has a First Amendment right to enforce its patents against alleged infringers, including sending correspondence to alleged infringers, notifying them of MPHJ's patent rights, and offering a license.⁹ It is also clear that the State's claims under the VCPA are preempted by federal law.¹⁰ Finally, it is clear that in order to avoid preemption, the State must both plead and prove objective and subjective baselessness.¹¹ The Federal Circuit has made clear that both of these aspects of baselessness – objective and subjective – must be shown to avoid First Amendment preemption. Any argument by the State that a Vermont state court would ignore the bad faith standard reinforced by the Federal Circuit would be meritless, as it was the United States Supreme Court that set out the objective baselessness standard that has since been

⁸ See *Globetrotter Software, Inc.*, 362 F.3d at 1374 (“A patentee that has a good faith belief that its patents are being infringed violates no protected right when it so notifies infringers.”); see also *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 37-38 (1913) (“Patents would be of little value if infringers of them could not be notified of the consequences of infringement”); *Concrete Unlimited*, 776 F.2d at 1539 (“patent owner has the right to . . . enforce its patent, and that includes threatening alleged infringers with suit”); *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997) (“[A] patentee must be allowed to make its rights known to a potential infringer”).

⁹ See *id.*

¹⁰ See *Zenith Elecs. Corp.*, 182 F.3d at 1352 (patentee's statements regarding its patent rights are conditionally privileged under the patent laws, so that such statements are not actionable unless made in bad faith); *Hunter Douglas, Inc. v. Harmonic Design*, 153 F.3d 1318, 1336 (Fed. Cir. 1998) (citing numerous cases for this proposition). The Federal Circuit has extended *Noerr-Pennington* immunity to all of the types of affirmative claims, including the Vermont State law claims in the State's Complaint. See, e.g., *Globetrotter Software, Inc.*, 362 F.3d at 1376 (state law claims).

¹¹ See *id.*

repeatedly reaffirmed by the Federal Circuit. *See Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60 (“Only if the challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.”). Plainly, any Vermont state court would be required to follow the law of the United States Supreme Court, and, thus, would require the State to prove objective and subjective baselessness to avoid preemption.

Not only are these well-settled principles true for all patent owners, but they have been specifically applied to MPHJ and the conduct complained of here. *See* Exhs. B & C. In fact, the Nebraska District Court very recently issued a preliminary injunction in MPHJ’s favor and against the Nebraska Attorney General because that State’s Attorney General failed to show that MPHJ’s patent enforcement activities, the same activities complained of here, were objectively and subjectively baseless. *See id.* Thus, the letters presented here are perfectly permissible under the relevant law and the State has not,¹² and cannot, plead or prove that the accused correspondence was objectively and subjectively baseless. Without such a showing, the State’s attempt to assert the VCPA is necessarily preempted by the First Amendment, and there is no set of circumstances upon which the State could prevail.

¹² *See, e.g.*, Dkt. 29 at p. 16 (“the State’s complaint does not seek an adjudication of patent validity or infringement”); p. 1 (“MPHJ emphasizes that its letters asserted patent infringement. True.”); *See* Dkt. 9 at p. 1 (“True, the letters sent by MPHJ alleged patent infringement. But the State’s consumer fraud claims have nothing to do with the validity of MPHJ’s patents. Nor does the State’s complaint address whether, in fact, any Vermont businesses are infringing the patents. Even assuming the patents may be valid, and some Vermont businesses may have infringed those patents, the letters sent to Vermont consumers were unfair and deceptive.”); p. 5 (“The State’s complaint does not dispute the validity or scope of MPHJ’s patents, or assert any other claim under federal patent law.”); p. 11 (“The State’s claim has nothing to do with the validity or scope of MPHJ’s patents. Whatever the status of the patents, the letters sent by MPHJ were not a good faith attempt to enforce those patents.”); p. 11 (“None of these theories underlying the State’s claim for relief require the court to evaluate the validity of MPHJ’s patents. Neither the State’s claim nor the legal theories supporting the claim challenge the validity of the patents.”); p. 15 (“None of the State’s allegations require determination by a court that MPHJ’s patents were invalid, or that they were infringed.”).

1. The Central Message Of The Communication Must Be Objectively And Subjectively Baseless, And Conclusory Allegations Of Bad Faith Are Insufficient To Avoid Preemption.

Not only must the State plead and prove that MPHJ's conduct in communicating its patent rights was both objectively and subjectively baseless, but, importantly, the State must plead and prove that the central message of the communication itself was objectively and subjectively baseless. *In re Innovatio IP Ventures, LLC Litigation*, 921 F. Supp. 2d 903 (N.D. Ill. 2013), vividly illustrates that assessing alleged deceptiveness in a patent letter must consider the essential message, and not peripheral statements. Applying essentially the same test as the Vermont Supreme Court uses for the VCPA, the *Innovatio* court found that each accused misrepresentation, even if false, was not central to the essential message of the letter: that the recipient infringed and needed a license. Unless this essential message was baseless, no state law claim could stand. *Id.* at 921. *See also Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578, 593 (W.D.N.Y. 2000) (to invoke the sham exception, the claimed accused misrepresentations must have been significant to the proceeding's ultimate outcome); *Music Center S.N.C. di Luciano Pisoni v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995) (similar).

Not only must the essential message of the communication be pled and proven to be objectively and subjectively baseless, but the Federal Circuit and Supreme Court have made it clear that it is legally insufficient simply to make conclusory allegations or bald assertions that conduct was in "bad faith." Instead, the pleading must identify some communication made by a defendant that was, on its face, objectively baseless. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (conclusory allegations are insufficient and do nothing more than raise "the sheer possibility that a defendant has acted unlawfully"); *Matthews Int'l Corp. v. Biosafe Eng'g, LLC*, 695 F.3d 1322 (Fed. Cir. 2012) (affirming the district court's finding that the plaintiff failed to

sufficiently plead the bad faith element necessary to avoid *Noerr-Pennington* immunity, because the plaintiff had only pled, in a conclusory fashion, that the defendant engaged in bad faith acts); *Matthews Int'l, Corp. v. Biosafe Eng'g, LLC*, 2011 U.S. Dist. LEXIS 110010, at *40 (W.D. Pa. Sept. 27, 2011) (“[T]he Court has already explained that it finds allegations of legal activity coupled with bald assertions of bad faith insufficient to raise even the *plausibility* of bad faith. All that is alleged is the making of accusations of infringement, which activity it is legal for a patentee to undertake.”); *Noble Fiber Techs., LLC v. Argentum Med. LLC*, 2006 U.S. Dist. LEXIS 43357 (M.D. Pa. June 27, 2006) (holding that the plaintiff’s allegations were conclusory and insufficient to allege bad faith with the particularity necessary). Further, in *GP Indus. v. Eran Indus.*, 500 F.3d 1369, 1373 (Fed. Cir. 2007), the Federal Circuit made it clear that the requirements to plead and prove that the accused conduct was “objectively baseless” and “subjectively baseless” were independent requirements, and that each must be pled and proven. The Federal Circuit went on to make clear that proof of objective baselessness requires proof that the asserted patent(s) was objectively invalid, objectively not infringed, or both. *See id.*

2. The State’s Intentional Avoidance Of Pleading With Respect To Baselessness At This Stage Cannot Avoid The Ultimate Dismissal Of Its Case And The Imposition Of Sanctions Here.

Apparently recognizing this deficiency in its case, the State has, in its pleadings to this Court, taken the position that this is not a “patent case,” and the State has attempted to artfully craft its Complaint in a way to specifically avoid pleading that MPHJ enforced its patents in bad faith, or that those patents are invalid or not infringed.¹³ In its briefs, however, the State has admitted that the question of whether MPHJ’s patent enforcement efforts is preempted by federal law will eventually be analyzed in this case. *See* Dkt. 29 at p. 4. Indeed, the State not only

¹³ *See, e.g.*, Dkt. 9 at p. 15 (“While there may be a basis for challenging the validity of the patents and the scope of the patents described in the letters, the State chose not to pursue such theories, so the court should not consider them for the purpose of deciding jurisdiction.”).

admits to this omission, it adamantly relies upon it and does so explicitly for the purpose of attempting to avoid federal question jurisdiction. Thus, it is clear, and all parties agree, that whether this case remains in this Court, or is remanded back to Vermont State Court, there will be an investigation as to whether or not MPHJ's conduct is preempted by federal law. The Nebraska District Court has now found this identical conduct to be protected by the First Amendment, and thus found that application of state law to it is preempted. The State has so far abandoned and avoided asserting the one argument that could in theory be made to overcome this preemption. Further, the State would have no good faith basis to make any allegation of objective baselessness. As a result, the Nebraska decision has made it clear that the State cannot ultimately prevail on this case, regardless of whether the preemption issue were to be decided by this Court, or a state court.

As the State has repeatedly explained in its briefing on its Motion to Remand, it has chosen to plead its Complaint in a way that purposely avoids raising patent issues – including the absence of the required allegations that MPHJ's patent enforcement efforts were objectively and subjectively baseless. As the well-settled law under *Globetrotter* makes clear, including that law reaffirmed by the Nebraska District Court specifically with respect to MPHJ's conduct, in order to survive preemption, a party must plead and prove that the patentee enforced its patents in bad faith. As the State, by its own admission, has purposely avoided pleading bad faith in its Complaint in order to have a Vermont state court, rather than a Federal District Court, hear its case, and it is clear at least in part from the Nebraska District Court decision that no such pleading or proof of baselessness could be made in good faith, whether the State's Motion to Remand is granted or denied is simply irrelevant – as, at the next stage, in either court, the State's case will be dismissed for failure to state a claim. As the *Globetrotter* decision merely

applies the principles of the U.S. Supreme Court decision in *Prof'l Real Estate Investors*, a Vermont state court would be bound by the same standard.

It is clear, pursuant to Rule 11, that even if the filing of the State's Motion to Remand might not be itself considered "frivolous," in its briefing to this Court, the State and its counsel have repeatedly certified that their VCPA claims have merit.¹⁴ It is clear, however, that the only scenario in which the State's claims under the VCPA could have merit and not be preempted by federal law is if MPHJ's activities were undertaken in bad faith – meaning they were both objectively and subjectively baseless. The State, in asserting bad faith, must plead and prove that MPHJ's patent enforcement efforts were both objectively and subjectively baseless. As the State cynically concedes that it has purposely so far avoided pleading bad faith, and it could not in the future make such an allegation in good faith, its case must fail. Thus, the State's continued advocacy of its meritless positions through its briefing and arguments to this Court, including its Motion to Remand, not only needlessly wastes the parties' and this Court's time and resources, but is undoubtedly sanctionable conduct under Rule 11.

Moreover, the position taken by attorneys for the State presents a textbook case of a violation of 28 U.S.C. § 1927. In effect, counsel for the State have pled their case in a manner to avoid interjecting the issues of whether MPHJ's conduct is objectively baseless or subjectively baseless, because to do so would necessarily mean that their Motion to Remand would fail and that they would have to defend their frivolous case in federal court, which they are loath to do. But, by carefully sidestepping the allegations of whether MPHJ's conduct is objectively baseless

¹⁴ Further, even if the particular motion presented by the State does not expressly relate to whether its claims have merit, such a contention is implicit in any filing. Thus, where the suit itself is meritless, a motion for remand that on its face may legitimately present jurisdictional arguments, such a motion implicitly asserts that the underlying suit itself is warranted by existing law. Where such an implicit representation is plainly incorrect, the submission necessarily violates Rule 11.

or subjectively baseless, the counsel for the State has set up a situation where they cannot argue that preemption under the First Amendment does not apply to this case. Making an argument in one court that specifically omits assertion of elements otherwise required to win on the ultimate merits, solely for the purpose of multiplying proceedings on a case to extend to another court, where the positions taken get to that second court then necessarily means that one cannot prevail in that second court, is by definition vexatious multiplication of proceedings. It is exactly the type of conduct for which Congress intended to provide a remedy under 28 U.S.C. § 1927.

III. PROPER REMEDIES FOR THE VIOLATIONS OF RULE 11, AND SECTION 1927, INCLUDE AN AWARD OF FEES AND COSTS AND DISMISSAL OF THIS SUIT.

A. Proper Remedy For The Rule 11 Violation Is Dismissal Of The Suit, And An Award Of Fees And Costs At Least Since The Service Of This Motion.

If the Court agrees with MPHJ that the State violated Rule 11 by filing and advocating its Motion for Remand for an improper purpose, then one aspect of an appropriate sanction is dismissal of the State's suit. *See, e.g., Business Guides, Inc. v. Chromatic Communications Enterprise*, 498 U.S. 533, 543 (1991) and *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1177 (9th Cir. 1996) (permitting a sanction of dismissal for Rule 11 violations). In this case, the State's violation of Rule 11 turns on the baselessness of the State's Complaint as a matter of law, and, therefore, an appropriate sanction in this case is dismissal of the Complaint. Further, the Court should award such additional sanctions as are appropriate under Rule 11(c)(2 & 4). If the State chooses to maintain its untenable position after receipt of this Motion, under Rule 11(c)(2), MPHJ should certainly be entitled to its fees and costs incurred in connection with this Motion and all fees and costs moving forward.

Under Rule 11(c)(4), this Court may impose such additional sanctions as may be appropriate to deter repetition of its conduct. Such sanctions are particularly appropriate here,

where the State has made public statements proclaiming its efforts to get other states to undertake similar improper actions. At a minimum, the sanctions awarded here should include MPHJ's fees and costs incurred at least since the service of upon the State of notice of this Motion. Beyond these remedies, MPHJ requests the Court to enter such other sanctions and remedies as its finds appropriate, including its fees and costs associated with this case since its inception.

B. The Proper Remedy To Be Awarded Under 28 U.S.C. § 1927 Is An Award To MPHJ Of Its Expenses, Fees and Costs Incurred As A Result Of The Violation Of That Statute By Counsel For The State.

By its terms, Section 1927 provides that it is counsel that must be personally liable for vexatiously multiplying proceedings. While the State itself may argue it is immune, the law is clear that individual counsel is not. Counsel for the State, for motivations which have been at least partially identified to this Court in other briefings, have chosen to bring this baseless litigation against MPHJ, an owner of U.S. patent rights granted by the United States Patent Office, who is engaging in the enforcement of those patent rights in a manner that have now been conclusively found to be protected by the First Amendment. It is apparent that counsel for the State took this action either because they, or their client, a state government, disfavors the constitutionally protected speech in which MPHJ has engaged. Such a motivation is inconsistent with the long and honored history of the First Amendment and is not to be condoned. While admittedly unusual to make such an award of fees, the entirety of this case is unusual, and warrants unusual remedy. Only by the grant of such remedy may a court deter future governmental actors from interfering with the constitutional free speech rights of persons similarly situated to MPHJ in the future.

IV. THE ATTORNEY GENERAL'S POSITION AFTER THE 21-DAY RULE 11 REVIEW PERIOD.¹⁵

As noted at the outset, MPHJ recognizes this is an unusual motion. But this is an unusual case. It is a rare circumstance to have a state Attorney General seek so adamantly to violate a party's First Amendment rights, and to persist in doing so in the face of three separate court decisions, two directly involving the same party and facts, each of which make it clear the suit is ultimately meritless. Out of a sense of courtesy and professionalism, during the Rule 11 period, MPHJ's counsel twice consulted with the State's counsel to ascertain whether they had any response. This included sending a letter directly asking whether the Attorney General believed this Motion was based on any misunderstanding, or was incorrect in any position. *See* Exh. E. Making such an inquiry was done by MPHJ's counsel in good faith simply to confirm its belief that this unusual Motion is both proper and warranted.¹⁶

The Attorney General's response to that inquiry was telling. *See* Exh. F. Despite having nearly three weeks to review the Motion, the Attorney General refused to provide any reason as to why MPHJ might be wrong in its reading of the *Foti* case and the inapplicability of the VCPA, wrong about the Nebraska case and the preemption of state law under the First Amendment, or wrong about the *EIS* case and the clear lack of personal jurisdiction over MPHJ in this case. Indeed, the Attorney General refused to provide any reason why any of this Motion is not warranted.

¹⁵ MPHJ notes that this section was added to the version sent to the State's attorneys for review.

¹⁶ The letter also explained and attached an Assurance of Discontinuance that was recently entered into by MPHJ with the Attorney General of the State of New York. *See id.* That AOD confirms New York's recognition that MPHJ has a right to enforce its patents even under state law (that is, even ignoring the decision by the Nebraska District Court reconfirming that state law in this area is preempted).

Instead, the Attorney General used the occasion of MPHJ's reasonable inquiry to contend that the inquiry itself somehow shows that MPHJ believes its Motion lacks merit. Nothing could be further from the truth. And the Attorney General's assertion that MPHJ is using this Motion to test the merits of MPHJ's position, or to intimidate an adversary into withdrawing contentions that are fairly debatable, is simply nonsense, and belied by the correspondence. This Motion is being made precisely because two federal courts, and the Vermont Supreme Court, have made it clear that the Attorney General should not be maintaining this lawsuit.

CONCLUSION

On the basis of the evidence and the law provided above, MPHJ respectfully requests this Court grant its Motion and award MPHJ the sanctions and remedies set forth herein.

Dated: Burlington, Vermont
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/s/ Andrew D. Manitsky

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