August 20, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
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Washington, District of Columbia 20580

Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 8: "The role of intellectual property and competition policy in promoting innovation")

I. Introduction and Statement of Interest

ACT | The App Association (App Association) appreciates the opportunity to submit views to the Federal Trade Commission (FTC) to inform its hearings on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy,[1] specifically regarding "the role of intellectual property and competition policy in promoting innovation."

The App Association represents thousands of small business software application development companies and technology firms that create the software apps used on mobile devices and in enterprise systems around the globe. Today, the ecosystem the App Association represents – which we call the app economy – is valued at approximately $950 billion and is responsible for 4.7 million American jobs. Alongside the world's rapid embrace of mobile technology, our members have been creating innovative solutions that power the internet of things (IoT) across modalities and segments of the economy. The FTC's approach to competition and consumer protection enforcement law, enforcement priorities, and policy directly impacts each of the App Association's members.

In its request for comment, the FTC seeks input on "the role of intellectual property and competition policy in promoting innovation." The App Association, in its response to this question posed by FTC, seeks to address innovation relating to standard-essential patents (SEPs) subject to obligations to license on fair, reasonable, and non-discriminatory (FRAND) terms.

[1] Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century*, Notice of Hearings and Request for Comments, 83 FR 38307 (August 6. 2018).

The App Association is committed to preserving and promoting innovation while developing robust standards and encouraging the creation of a balanced intellectual property system to accelerate the growth of technology markets. App Association members actively participate in the development of technical standards; further, App Association members create (sometimes through contributions that contain patented technologies), use, and sell products that implement those standards. The App Association strongly supports the FTC's (and other key competition regulators) efforts to provide clarity about the SEP licensing ecosystem for all stakeholders. The rise of IoT is poised to expose new markets and verticals to SEP licensing, and we strongly urge the FTC to continue demonstrating leadership to competition regulators in the United States and around the globe by building upon existing, global-consensus guidance on the abuse of FRAND commitments and the effects of their abuse on competition and innovation.

Influenced by the FTC, a variety of market regulators have provided significant guidance regarding SEPs and FRAND licensing commitments. The App Association continues to urge competition authorities to align with and build upon this guidance to support innovation and competition in the global market. Further, leading standard setting organizations (SSOs) like IEEE have, after much effort, successfully revised their intellectual property rights (IPR) policies to clarify technology contributors' FRAND commitments in ways that are consistent with such guidance. The FTC has a central role in addressing the anti-competitive implications of breaches of FRAND commitments that can increase competition by reducing IP abuse, deterring unnecessary and burdensome litigation and supporting ingenuity in the U.S. market.

Specifically, the App Association believes clarifications on the meaning of FRAND commitments are extremely beneficial to SEP holders and standard implementers, as well as the consumers of technology. The negative effects of abusive licensing of SEPs can be particularly harmful to the App Association's members, which include thousands of small and medium-sized enterprises (SMEs) that are both SEP holders and standards implementers. These SMEs, from across the United States, often do not have the resources to deal with larger enterprises holding numerous SEPs. As a result, they must face financially debilitating litigation with no predictable outcome or are forced to accept excessive royalty demands made by the SEP holders. In the worst case, the SME may be forced to change their product or abandon their business plan altogether, if they cannot afford the litigation or the expensive SEP licenses. Patent licensing abuses pose a major threat to any industry that relies on standards in its innovation cycle. We believe the FTC's guidance will be essential to deter these abuses for innovators.

The convergence of computing and communication technologies will continue as a diverse array of industries come together to build the internet of things. IoT's seamless interconnectivity will be made possible by technological standards like Wi-Fi, LTE, and Bluetooth, which bring immense value to consumers by promoting interoperability while enabling healthy competition between innovators.

Unfortunately, a number of FRAND-committed SEP owners are flagrantly abusing their unique opportunity and reneging on their commitment to license in a fair, reasonable, and non-discriminatory manner. These practices threaten healthy competition and jeopardize the potential of nascent markets like IoT.

The patent policies developed by standard development organizations (SDOs) today will impact the way Americans work, live, and play for decades to come. Such policies are important to app developers and emerging industries in the United States and around the globe. This prompted the App Association to launch the All Things FRAND (http://www.allthingsfrand.com/) initiative. We encourage the FTC to utilize All Things FRAND as a resource to better understand how regulators and courts around the world are defining FRAND.

SDOs vary widely based on their membership, the industries they cover, and the procedures for establishing standards.[2] Each SDO will need the ability to tailor its intellectual property policy to its particular requirements and membership. We do not believe governments should prescribe detailed requirements for all SDOs to implement. However, as evidenced by the judicial cases and regulatory guidance posted on www.allthingsfrand.com, basic principles underlie the FRAND commitment to ensure standard-setting is pro-competitive and SEP licensing terms are in fact reasonable, fair, and non-discriminatory. Ideally, an SDO's IPR policy that requires SEP owners to make a FRAND commitment would include all the following principles that prevent patent "hold-up" and anti-competitive conduct:[3]

- **Fair and Reasonable to All** – A holder of a SEP subject to a FRAND commitment must license such SEP on fair, reasonable, and non-discriminatory terms to all companies, organizations, and individuals who implement or wish to implement the standard.
- **Injunctions Available Only in Limited Circumstances** – Injunctions and other exclusionary remedies should not be sought by SEP holders or allowed except in limited circumstances. The implementer or licensee is always entitled to assert claims and defenses.
- **FRAND Promise Extends if Transferred** – If a FRAND-encumbered SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.

[2] U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 33-34, footnote 5 (2007), *available at* https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-propertyrights-promoting-innovation-and-competition-report.s.department-justice-and-federal-tradecommission/p040101promotinginnovationandcompetitionrpt0704.pdf.

[3] "Principles for Standard Essential Patents" About AllThingsFRAND.com (explaining the FRAND commitment requirements.) http://www.allthingsfrand.com/about/about-allthingsfrand.com/

- **No Forced Licensing** – While some licensees may wish to get broader licenses, the patent holder should not require implementers to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed, or a patent that is not essential to the standard.
- **FRAND Royalties** – A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard, which cannot be assessed in a vacuum that ignores the portion in which the SEP is substantially practiced or royalty rates from other SEPs are required to implement the standard.

The App Association calls on the FTC to ensure that its actions regarding SEP licensing continue to align with the above principles.

We also note that several SDO IPR policies require SDO participants to disclose patents or patent applications that are, or may be, essential to a standard under development. Reasonable disclosure policies can help SDO participants evaluate whether technologies being considered for standardization are covered by patents. Disclosure policies should not, however, require participants to search their patent portfolios. These requirements are overly burdensome and expensive, effectively deterring participation in an SDO. In addition, FRAND policies that do not require disclosure, but specify requirements for licensing commitments for contributed technology, can accomplish many, if not all, of the disclosure requirements.

II. The U.S. Government Must Continue to Maintain and Develop Pro-Innovation Approaches to Intellectual Property, Standardization, and Competition Law

We strongly urge the FTC to acknowledge the inherent link between standard setting and competition and innovation, and the role of competition law in ensuring a balanced and fair SEP licensing ecosystem through FRAND commitments having meaning. When SEP-related abuse, such as patent hold-up or refusals to license FRAND-encumbered SEPs, takes place, the impact on innovation throughout the ecosystem can be detrimental.

Working with stakeholders from across key industries, the App Association issued a white paper titled *Standards, Licensing, and Innovation: A Response to DOJ AAG's Comments on Antitrust Law and Standard-Setting*,[4] which we append to this response, fully incorporate into our views, and urge for FTC's thoughtful consideration. This paper explains (1) why patent hold-up is a competition law problem that can harm the economy; (2) why a focus on so-called "upstream innovators" ignores the contributions that others in the value chain make to benefit consumers and advance the American and global economy; (3) why enforcement of voluntary licensing commitments is, by definition, not a form of compulsory licensing; and (4) advocates that U.S. antitrust enforcement and antitrust policy should encourage, not threaten, diversity among standard-setting organizations so they can be responsive to the varied interests of participants in standards development.

The App Association believes that clearer, more coordinated rules for SEP licensing will allow for more informed participation and enable participants to make more knowledgeable decisions about the implementation of the standard. Since 1995, market regulators have taken numerous steps to provide this clarity in the SEP context, and we urge the FTC to ensure alignment with, and build upon, these well-established international norms.

[4] *See Multi-Association White Paper, Standards, Licensing, and Innovation: A Response to DOJ AAG's Comments on Antitrust Law and Standard-Setting* (May 30, 2018), available at https://allthingsfrand.com/standards-licensing-and-innovation-a-response-to-doj-aags-comments-on-antitrust-law-and-standard-setting/

The U.S. government has played a central role in establishing these norms through the following, among other activities:

- In 2011, the FTC issued a report entitled *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, in which the FTC addresses the issue of a reasonable royalty for FRAND-encumbered SEPs and recommends that "[c]ourts should cap the royalty at the incremental value of the patented technology over alternatives available at the time the standard was chosen."[5] The FTC explains that setting the royalty for a FRAND-encumbered SEP "based on the *ex ante* value of the patented technology at the time the standard is chosen is necessary for consumers to benefit from competition among technologies to be incorporated into the standard – competition that the standard setting process itself otherwise displaces." The FTC also addresses the question of the appropriate royalty base in patent cases and recommends that "[c]ourts should identify as the appropriate base that which the parties would have chosen in the hypothetical negotiation as best suited for accurately valuing the invention. This may often be the smallest priceable component containing the invention." According to the FTC, "the practical difficulty of identifying a royalty rate that accurately reflects the invention's contribution to a much larger, complex product counsels toward choosing the smallest priceable component that incorporates the invention."

- The U.S. Department of Justice (DOJ) and FTC issued a report in 2007 entitled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, which discusses various way to minimize patent holdup, including SEP disclosure policies, FRAND undertakings, and *ex ante* disclosure of licensing terms.[6]

- The FTC issued a decision and order in 2013 accompanying its challenge to an injunction sought by Google's Motorola Mobility Division, which sets forth in detail procedures that a declared SEP holder must undertake before it may seek an injunction or other exclusionary relief based on a SEP, and it makes clear that a potential licensee may challenge infringement, validity, and enforcement of a declared SEP before being ordered to pay a royalty.[7]

- In August 2013, the U.S. Trade Representative (USTR), acting on behalf of the President of the United States, overturned a U.S. International Trade Commission ruling that would have issued (i) an exclusion order (similar to an injunction) prohibiting importation of Apple products into the United States that purportedly infringed Samsung SEPs; and (ii) a cease and desist order that would have prevented Apple from engaging in certain activities, such as the sale of these products in the United States.[8] The USTR decision included substantial discussion of the policy reasons for disallowing the exclusion order.

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[5] https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf

- In January 2013, the DOJ and U.S. Patent and Trademark Office issued the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which recognizes the harms of patent hold up and explains that FRAND commitments are designed as a solution to that problem that benefits both standard implementers and SEP holders.[9] The policy statement reasons that FRAND commitments may be incompatible with injunctive relief: "A decision maker could conclude that the holder of a F/RAND-encumbered, standards-essential patent had attempted to use an exclusion order [a form of injunctive relief] to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment—in essence concluding that the patent holder had sought to reclaim some of its enhanced market power over firms that relied on the assurance that F/RAND-encumbered patents included in the standard would be available on reasonable licensing terms under the SDO's policy." However, such relief may be appropriate in some circumstances, "such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND term" or "is not subject to the jurisdiction of a court that could award damages."

- The DOJ issued a detailed response in February 2015 to a "Business Review Letter" request from IEEE seeking guidance on its updated patent policy.[10] The DOJ's response addressed several important aspects of SEP licensing, including injunctive relief, reasonable royalty rates, availability of FRAND licenses to standard implementers at all levels of the production chain, and reciprocal licenses. DOJ found the IEEE revised patent policy discussed earlier to be consistent with U.S. law.

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[6] https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf

[7] https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-consent-agreement-google/motorola/130103brillgooglemotorola-sep-stmt.pdf

[8] https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF

[9] https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf

[10] https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated

- In 2017, the FTC brought an enforcement action in the U.S. District Court for the Northern District of California against Qualcomm, asserting that Qualcomm violated competition law in its mobile phone chip licensing practices.[11] This enforcement action is significant in seeking to provide clarity about what constitutes FRAND behavior. The FTC alleged Qualcomm's behavior was due, in part, to its dominant position in the chip manufacturing market. Qualcomm makes the lion's share of Code Division Multiple Access (CDMA) and premium LTE chips, which are essential components to nearly every cell phone. According to the FTC, Qualcomm either refused licenses or threatened device manufacturers with the withholding of access, to those necessary chips unless licensees agreed to pay exorbitant royalty fees. The FTC described this as an anticompetitive "no license-no chips" policy, which allowed Qualcomm to obtain royalties significantly higher than those suggested within their FRAND obligation. This case continues to be litigated in the U.S. federal court system.

Elsewhere around the globe, FRAND licensing-related guidance in alignment with the U.S. government's established positions includes, but is not limited to, the following:

Canada

In March 2017, the Canadian Bureau finalized revisions to IP enforcement guidelines that define breaches of FRAND commitments as a competition issue for the first time.[12] The IP guidelines note that (i) bundling of SEPs and non-SEPs can cause competitive harm; (ii) there are only limited circumstances under which SEP holders can obtain injunctive relief; (iii) while contract law may be sufficient to resolve contractual breaches of FRAND, competitive effects from some breaches may need to be addressed under competition law; and (iv) the Bureau is not a rate regulator and would likely only find a royalty rate alone (without the accompanying threat/use of injunctive relief) to be a competition problem if the SEP owner had set a maximum rate during standard development and then breached it. The Bureau acknowledges in its guidelines that rapid developments continue in competition enforcement policy, so the Bureau will regularly revisit its guidance in light of relevant developments.

[11] http://bit.ly/2hseOdv.

[12] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04031.html.

China

- On February 9, 2015, China's National Development and Reform Commission ("NDRC") issued an administrative penalty decision against Qualcomm, Inc. The NDRC determined that several aspects of Qualcomm's licensing of telephony SEPs constituted an abuse of a dominant position.[13] The specific practices deemed to be unlawful were (i) charging royalties for expired SEPs, (ii) conditioning SEP licenses on licensees' agreement to take licenses to other Qualcomm patents that were not SEPs ("non-SEPs"), (iii) requiring SEP licensees to grant back royalty-free licenses to their non-SEPs, (iv) imposing a "relatively high royalty" calculated on a device-level royalty base, and (v) requiring baseband chip purchasers to agree to licenses with unreasonable conditions such as the ones listed above and not to challenge Qualcomm's licenses.

- China's State Administration for Industry and Commerce issued a Regulation on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition on April 7, 2015.[14] The regulation prevented SEP holders with a dominant market position from engaging in conduct that eliminates or restricts competition by refusing to license implementers, tying SEPs to non-SEPs, or imposing other unreasonable conditions in violation of the FRAND commitment.

[13] National Development and Reform Commission, [2015] Administrative Penalty Decision No. 1, February 9, 2015, http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

[14] http://bit.ly/2zrGDcX.

European Union

- The European Commission's guidelines regarding horizontal co-operation agreements, published in 2011, discuss the anticompetitive threat of patent "hold-up" in the SSO context and the importance of the effective use of FRAND commitments in combating that threat. [15] "While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market." (Par. 266). This characteristic of standard-setting presents the potential of enabling "companies to behave in anti-competitive ways, for example by 'holding-up' users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees thereby preventing effective access to the standard." (Par. 269). To avoid this anticompetitive outcome, the guidelines stress that SSOs should adopt IPR policies that "require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')." (Par. 285). The Commission points out that "FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees." (Par. 287). In case of a dispute involving a FRAND commitment, "the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR." (Par. 289). Because FRAND commitments are voluntary, however, IPR holders should be permitted "to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard." (Par. 285).

- In the European Commission's market testing in December 2012 of a set of proposed commitments offered by Rambus to license its SEPs on reasonable terms, some respondents expressed the concern that Rambus would seek to "extract royalties based not on the price of the individual chips or controllers, but on the value of the end-product (such as PCs, mobile phones, and other devices integrating dynamic random-access memory), even if the licensed technologies only represent a small percentage of such end-products." In response, the Commission made clear that the "royalty shall be determined on the basis of the price of the individually sold chip and not of the end-product. If they are incorporated into other products, the individual chip price remains determinative."[16]

[15] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement, Par. 285 (Jan. 14, 2011).

[16] http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pdf

- On April 29, 2014, the European Commission issued a decision in which it determined that "Motorola Mobility's seeking and enforcement of an injunction against Apple before a German court on the basis of a smartphone SEP constitutes an abuse of a dominant position prohibited by EU antitrust rules."[17] The Commission explained that FRAND commitments are "designed to ensure effective access to a standard for all market players and to prevent 'hold-up' by a single SEP holder." The Commission determined that seeking an injunction against a willing licensee of a FRAND-encumbered SEP "could risk excluding products from the market" and "lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers." On the same day, the Commission issued a press release on the case that provided further guidance, including the point that (i) the licensee can challenge the validity, essentiality, or infringement of SEPs and still be considered a "willing" licensee; and (ii) the specific rate of a reasonable royalty should be determined by courts or arbitrators.

- On April 29, 2014, the European Commission formally accepted commitments from Samsung to not seek injunctions on FRAND-encumbered SEPs for smartphones and tablets against licensees that agree to an approved licensing framework.[18] This framework gave licensees the choice of having a reasonable royalty rate and other FRAND terms determined by a court or, if both agree, by an arbitrator. The Commission also iterated the same principles that it stated in connection with the Motorola case described above.

[17] http://europa.eu/rapid/press-release_IP-14-490_en.htm\

[18] http://europa.eu/rapid/press-release_IP-14-490_en.htm

Republic of Korea

- In December 2014, the Korean Fair Trade Commission (KFTC) revised its Guidelines on the Unreasonable Exercise of Intellectual Property Rights to address breaches of FRAND commitments as a competition law matter.[19] According to the KFTC, the following licensing practices by SEP holders may be deemed to be abusive:

    - Coercing the licensee to accept a license of a non-SEP as a condition for licensing a SEP;
    - Not disclosing patents applied for or registered to increase the possibility of one's technology being standardized or to avoid prior consultations on license conditions;
    - Unreasonably refusing to license the SEP;
    - Not licensing the SEP on FRAND terms so the patentee can strengthen its monopoly power or exclude competitors in the relevant market;
    - Requesting discriminatory terms for a SEP license, or imposing an unreasonable level of royalties;
    - Imposing licensing conditions that unreasonably restrict the licensee's exercise of related patents held by the licensee;
    - Seeking injunctive relief unless (i) the potential licensee refuses to enter into a license agreement on FRAND terms objectively confirmed in proceedings in a court or an arbitration forum, or (ii) a willing licensee is unable to pay damages due to imminent bankruptcy, etc.; or
    - Unreasonably imposing licensing conditions that require a cross-license of non-SEPs held by the licensee.

  The KFTC also indicated that a FRAND commitment obligates SEP holders to negotiate in good faith with willing licensees, and listed various factors to help the agency make that determination.

[19] http://bit.ly/2jdxbUa.

- In December 2016, the KFTC issued a decision imposing sanctions against Qualcomm Incorporated in the amount of 1.03 trillion Korean Won (approximately $865 million USD) for alleged violations of Korean competition laws.[20] After conducting a comprehensive investigation that spanned for more than a year and issuing its examination report to Qualcomm on November 13, 2015, the KFTC found that Qualcomm, a SEP holder, breached its FRAND commitments when engaging in licensing agreements with certain companies. The Seoul High Court subsequently denied a stay of the Corrective Order.

Although different jurisdictions' guidance varies in detail, they exhibit common licensing principles for FRAND-committed SEPs. In particular, one commonly shared guidance indicates that the following conduct can be a breach of the FRAND commitment, or even an abuse of competition law: (1) refusing to license SEPs to standard implementers; (2) coercing the licensee to accept a license of a non-SEP as a condition for the licensing of a SEP; (3) requesting discriminatory terms for a SEP license; (4) imposing an unreasonable level of royalties or other non-FRAND conditions; (5) seeking or using injunctive relief against willing licensees that are able to pay a reasonable royalty; or (6) imposing licensing conditions that unreasonably restrict the licensee's exercise of related patents it owns. This guidance does not, however, prescribe specific royalty rates for SEPs because of the highly transaction-specific nature of SEP licensing.

In summary, we urge the FTC to provide, through policy and enforcement as appropriate, guidance for standardization activities to help ensure SEP licensing on FRAND terms that prevents and effectively resolves disputes over the meaning of FRAND, and encourages the enforcement of FRAND commitments. With such guidance, private parties and SSOs will still have plenty of room to negotiate the specifics of FRAND licensing terms.

[20] http://bit.ly/2hoADuI.

III. Conclusion

The App Association appreciates the FTC's consideration of our responses to this question and urges FTC to contact the undersigned with any questions or ways that we can assist the FTC moving forward.

Sincerely,

[signature images w name/title]

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