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MARKUP OF H.R. 9, THE INNOVATION ACT

Thursday, June 11, 2015

House of Representatives

Committee on the Judiciary

Washington, D.C.

The committee met, pursuant to call, at 10:12 a.m., in Room 2141, Rayburn Office Building, Hon. Bob Goodlatte [chairman of the committee] presiding.

Present: Representatives Goodlatte, Smith, Chabot, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Marino, Labrador, Farenthold, Collins, DeSantis, Walters, Buck, Ratcliffe, Trott, Bishop, Conyers, Nadler, Lofgren, Jackson Lee, Cohen, Johnson, Pierluisi, Chu, Deutch, Bass, DelBene, Jeffries, Cicilline, and Peters.

Staff present: Shelley Husband, Majority Staff Director; Branden Ritchie, Deputy Majority Staff Director and Chief Counsel; Allison Halataei, Majority Parliamentarian and General Counsel; Vishal Amin, Counsel, Subcommittee on Courts, Intellectual Property, and the Internet; Kelsey Williams, Clerk; Perry Apelbaum, Minority Staff Director; Danielle Brown, Minority Parliamentarian; Jason Everett, Minority Counsel; and Veronica Elgin, Clerk.

Chairman Goodlatte. Good morning. The Judiciary Committee will come to order, and without objection the chair is authorized to declare a recess of the committee at any time.

Pursuant to notice, I now call up H.R. 9 for purposes of markup, and move that the committee report the bill favorably to the House.

The clerk will report the bill.

Ms. Williams. H.R. 9, to amend Title 35, United States Code, and the Leahy-Smith American Invents Act to make improvements and technical corrections and for other purposes.

Chairman Goodlatte. Without objection, the bill is considered as read and open for amendment at any point.

[The bill follows:]

Chairman Goodlatte. I will begin by recognizing myself for an opening statement.

Today we are here to mark up H.R. 9, the Innovation Act. The enactment of this bill is something that I consider central to U.S. competitiveness, job creation, and our Nation's future economic security. During the 112th Congress, we passed the America Invents Act. Many view the AIA as the most comprehensive overhaul of our patent system since the 1836 Patent Act. However, the AIA was in many respects a prospective bill. The problems that the Innovation Act will solve are more immediate and go to the heart of current abusive litigation practices.

This bill builds on our efforts over the past decade. It can be said that this bill is the product of years of work. We have worked with members of both parties, with stakeholders from all areas of our economy, and with the Administration, and the courts. Just about 18 months ago, this committee first marked up the Innovation Act, voting it out of committee overwhelmingly. That bill was the product of multiple discussion drafts and hearings, passing the House last Congress with more votes than the landmark America Invents Act of 2011.

In February, I, along with a large bipartisan group of members, reintroduced the Innovation Act, and today we build on all of our discussions and work over those last 18 months to put forward legislation that takes meaningful steps to address the abusive practices that have damaged our patent system and resulted in significant economic harm to our Nation. I strongly believe that the Innovation Act takes the necessary steps to address abusive patent litigation while protecting legitimate property rights.

Abusive patent litigation is a drag on our economy. Everyone from independent inventors to startups to mid- and large-sized businesses face this constant threat. The tens of billions of dollars spent on settlements and litigation expenses associated with abusive patent suits represent truly wasted capital, wasted capital that could have been used to create new jobs, fund R&D, and create new innovations and technologies that promote the progress of science and useful arts. And that is what innovation is really about it, is it not? If you are able to create something, invent something new and unique, then you should be able to sell your product, grow your business, hire more workers, and live the American Dream.

The Innovation Act puts forward reasonable policies that allow for more transparency and brings fundamental fairness into the patent system and the courts. The Innovation Act is designed to deal with systemic issues surround abusive patent litigation as a whole and includes a number of provisions designed to ameliorate this significant problem.

Within the past couple of years, we have seen an exponential increase in the use of weak or poorly-granted patents against American businesses in the hopes of securing a quick payday. Many of these abusive practices are focused not just on larger companies, but against small and medium-sized businesses as well. These suits target a settlement just under what it would cost for litigation knowing that these businesses will want to avoid costly litigation and probably pay up. The patent system was never intended to be a playground for litigation extortion and frivolous claims.

The Innovation Act contains needed reforms to address the issues that businesses of all sizes and industries face from patent troll type behavior while keeping in mind several key principles, including targeting abusive behavior rather than specific entities, preserving valid patent enforcement tools, preserving patent property rights, promoting invention

by independents and small businesses, and strengthening the overall patent system. Congress, the Federal courts, and the PTO must take the necessary steps to ensure that the patent system lives up to its constitutional underpinnings.

The Innovation Act includes heightened pleading standards and transparency provisions. Requiring parties to do a bit of due diligence up front before filing an infringement suit is just plain common sense. It not only reduces litigation expenses, but saves the courts time and resources. Greater transparency and information makes our patent system stronger.

The Innovation Act also provides for more clarity surrounding initial discovery, case management, fee shifting, joinder, and the common law doctrine of customer stays and protecting IP licenses in bankruptcy. Further, the bill's provisions are designed to work hand in hand with the procedures and practices of the Judicial Conference, including the Rules Enabling Act and the courts, providing them with clear policy guidance while ensuring that we are not predetermining outcomes, and that the final rules and legislation's implementation in the courts will be both deliberative and effective.

Today in this committee, we are taking a pivotal step towards eliminating abuses of our patent system, discouraging frivolous patent litigation, and keeping U.S. patent laws up to date. The Innovation Act will help fuel the engine of American innovation and creativity, help create new jobs, and grow our economy. I look forward to the debate on this bill and the many amendments that have been filed, many of which will further improve the bill.

And it is now my pleasure to recognize our ranking member, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. Conyers. Thank you, Mr. Chairman. Members of the committee, abusive patent litigation is a problem that requires a targeted approach. Unfortunately, H.R. 9, the so-called Innovation Act, is overly broad and could potentially weaken every single patent in America. It is not the solution that we should be supporting.

First, the bill favors big businesses over small inventors and startups. It will make it too difficult and too risky for small inventors to enforce their rights in court, and some of the most harmful provisions include presumptive fee shifting. Small inventors may be afraid to

bring infringement suits because the risk of having to pay the other side's court costs may outweigh the benefits from even winning. Expanded joinder. Universities' research endeavors and venture capital for startups could dry up out of fear that they will be joined in a case and become liable for paying attorney's fees.

Burdensome heightened pleading standards. Plaintiffs will be required to plead facts beyond what is required in other civil cases, which they may not know before conducting discovery. And then there are discovery limitations. Most discovery will be delayed limiting access to information that may be necessary to win an infringement suit.

Now, in the second place, the bill does not address fee diversion and demand letters. The U.S. Patent and Trademark Office is required to turn over all of the user fees it collects to be made available for appropriations. But as we know, the USPTO has lost an estimated $1 billion due to user fees being diverted. Congress must end fee diversion so that USPTO has the resources it needs to improve patent quality and prevent issuing weak quality patents, which bad actors use to bring frivolous litigation. H.R. 9 does not even consider stopping fee diversion.

The next point is that H.R. 9 does not truly address the use of deceptive demand letters, which is widely agreed to be one of the most significant reasons why we are even considering this legislation. Third, many of the problems the bill attempts to solve are already being addressed. For example, the Supreme Court lowered the standard for fee shifting last year, and Federal district courts have awarded fees in far more cases since then.

Next, beginning December 1st, Federal court rules will require a more detailed, but reasonable, pleading standard. Also, Federal district courts are instituting local rules and guidelines to improve case management to limit abusive discovery. The Federal Trade Commission and state attorneys general are working to curtail the use of vague and deceptive demand letters, and the USPTO is working on a variety of measures to increase patent quality and address abusive patent litigation.

Rather than upending the patent litigation system, we should be working with stakeholders to target the roots of the problem. H.R. 9 will have unintended consequences that will harm legitimate patent holders. It will discourage innovation by making it more difficult for small inventors

and startups to protect their patents, and it will not effectively prevent patent litigation.

For all of these reasons, I oppose this bill. And I thank the chair and yield back any time that is remaining.

Chairman Goodlatte. The chair thanks the gentleman and recognizes the gentleman from California, the chairman of the Subcommittee on Courts, Intellectual Property, and the Internet, Mr. Issa, for his opening statement.

Mr. Issa. Thank you, Mr. Chairman. And I want to thank the chairman for his commitment to moving forward today on H.R. 9, the Innovation Act. This process really began with your leadership several years ago, and the committee recognizes the successful bipartisan negotiation that led last year to an overwhelming approval of the base bill before us today.

America is succeeding. America is innovating. And, in fact, what we are dealing with today is not -- not -- any inability or any lack of ability for small inventors to get access to the Patent Office. It is not about the Patent Office complaining that they are not able to collect the fees and reasonably spend them the way they want with no diversion.

What this bill is is a recognition that there are a number of basic opportunists who are using the patent system not, in fact, as part of innovation, but, in fact, as part of an extortion plan, one in which a patent, a patent whether weak or strong, is alleged against a company or person, often without a fundamental understanding or way to understand whether or not you infringe.

Mr. Chairman, as the owner of 37 patents, but long before the 37 patents, there was one, one patent in which I had not yet had $200,000 of revenue. I had not yet become a real company. That innovation is the seed for many of the reforms here today. The fact is, a small inventor does need access to an inexpensive way to have redress if somebody has taken over their intellectual property rights. That is most often and best by getting to the Patent Office whenever possible.

When not, it is about getting to the court and getting to the court at a low cost. But low cost has to be on both sides. In fact, if you allege infringement and the other product mistakenly is not infringing, you are best off getting to that answer quickly.

Mr. Chairman, many of the fine lawyers here today are

very capable lawyers in areas other than intellectual property and patents, so for a moment let me take the liberty of setting up today's markup in this way. The specific pleading required in the Innovation Act is very much like a case where an individual would like to allege that his neighbor has put a fence on his property. The amazing thing is we would never consider claiming that you are two feet onto my property without providing an assessment of where my property line is and a map saying where your fence is. That is the Innovation Act is doing, basic definition of what your property is and where somebody else crosses on to your property.

So, Mr. Chairman, when many people say that, in fact, the requirements for specificity in this Innovation Act somehow is unique, it is not unique. Nobody would ever say you are on my property with no basis other than I think the fence is too close to my side door, and not expect to be held accountable for the cost to their neighbor if they are outright wrong and their pleading is without merit.

So although there are many additional items in my opening statement, I want to make it clear. Mr. Chairman, you have done all the right things to bring us an excellent

bill. There will be changes today. I will regret many of those changes. But here in Congress, and I will also like some, Mr. Chairman, I trust. But here in Congress we deal in the art of the possible. So today we are not just marking up a bill that can pass this committee. We are dealing with the reality of getting a bill to the floor, and getting it approved to the Senate, and making it law.

So, Mr. Chairman, I want to thank you for your leadership. I plan on supporting the manager's amendment, and will make every effort to make sure the bill arrives in a form that it can leave here, go to the floor, and promptly become law. And with that, I thank the chairman and yield back.

Chairman Goodlatte. The chair thanks the gentleman and recognizes the gentleman from New York, Mr. Nadler, the ranking member of the Subcommittee on Courts, Intellectual Property, and the Internet for his opening statement.

Mr. Nadler. Thank you, Mr. Chairman. Mr. Chairman, as an original co-sponsor of the Innovation Act, I am pleased we are moving this legislation forward today. This is a good and balanced bill that I expect to become better after passage of the manager's amendment.

The United States leads the world in innovation and creativity, and it is our strong patent system that helps fuel economic growth by enabling creators to protect and exploit their inventions. But the patent system has been turned on its head in recent years. Instead of serving as a shield for inventors against those who would infringe on their intellectual property rights, it has been used increasingly as a sword by patent trolls who file abusive and frivolous lawsuits against inventors.

Patent trolls use litigation or the threat of litigation as a weapon to extort settlements from innocent defendants. They generally own weak patents and make vague claims that will require expensive and time-consuming discovery on the part of the defendant. Many patent trolls target end users who have no knowledge or control over the alleged infringing product and little ability to mount a defense.

Trolls seek to drive up the cost of litigation and force the defendants to determine that it makes more financial sense to settle even a totally spurious claim early rather than to fully litigate a case and pay the exorbitant legal fees that may come with it. Companies that refuse to give into the patent trolls' demands may be vindicated in court,

but after spending what could be millions of dollars on their case, it is a somewhat hollow victory. As a result, many businesses decide that defending their case is simply not worth it, and they agree to a settlement.

This is what the patent trolls are counting. This is their business model. They do not invent new products to improve our lives. They invent new methods to drive up litigation costs and prey on innocent defendants. Such abusive litigation threatens small and large businesses alike, and it is not just businesses that should be concerned about these lawsuits. Patent trolls harm consumers, too, because every dollar spent fending off frivolous lawsuits is a dollar that cannot be spent on R&D or on improving customer service. We all have a stake in stopping this terrible practice.

I support the Innovation Act because a strong patent system requires that we protect businesses and consumers from the harm caused by abusive litigation. But I am mindful that in addressing the patent troll problem, we must not impose too great a burden on legitimate plaintiffs. A strong patent system also depends on inventors having the ability to protect their creations in court. We must be careful to

ensure that the reforms included in this legislation do not have unintended consequences.

The manager's amendment will make several helpful changes to address some of the concerns we have heard from stakeholders who believe the bill may unduly restrict the rights of inventors. I should note, however, that I remain concerned about the loser pays provision in this bill. People or businesses with legally legitimate disputes should not be punished for trying to protect their interests in court. H.R. 9 attempts to strike a balance that will deter patent trolls from filing frivolous suits while protecting those with reasonable but ultimately unsuccessful claims. This provision is at the outer edge of what I can support, and I hope it can be improved as we continue to work on this legislation.

I was pleased to see that the Patent Act, which passed the Senate Judiciary Committee last week includes a fee shifting provision that while not perfect, moves in the right direction. As we work to reconcile our bill with that of the Senate, we should retain and refine their language even further. On balance, however, this is good legislation that deserves our support.

I want to thank Chairman Goodlatte for crafting the Innovation Act, and I look forward to working with him toward a finished product that will both deter abusive patent litigation and protect the rights of investors. I thank you, and I yield back the balance of my time.

Chairman Goodlatte. The chair thanks the gentleman, and now recognizes himself for purposes of offering an amendment in the nature of a substitute.

The clerk will report the amendment.

Ms. Williams. Amendment in the nature of a substitute to H.R. 9, offered by Mr. Goodlatte of Virginia, strike all after the enacting clause and insert the following.

Chairman Goodlatte. Without objection, the amendment in the nature of a substitute is considered as read.

[The amendment of Chairman Goodlatte follows:]

Chairman Goodlatte. And I will recognize myself to explain the amendment.

The manager's amendment was developed based on discussions with a cross range of industry stakeholders, the input of members from both sides of the aisle, the courts, and the Administration, including the U.S. Patent and Trademark Office. In pleadings, the manager's amendment would require plaintiffs to include all claims necessary to identify each accused instrumentality or, in other words, to provide targeted pleadings that are actually tied to the infringing product or process.

The provision also includes clarifications, clean up, and technical edits to ensure that the provision works effectively, is consistent with the Federal Rules of Civil Procedure, and can be complied with. In the joinder provision we include language to ensure that the provision is targeted to insolvent shell companies and does not include inventors, legitimate startups, banks, and VCs, or those engaged in research in the field.

We have included a venue provision that will restore Congress' intent that patent infringement suits only be brought in judicial districts that have some reasonable

connection to the dispute. Since 1897, Congress has regulated the venue in which patent actions may be brought. These limits protect parties against the burden and inconvenience of litigating patent lawsuits in districts that are remote from any of the underlying events in the case.

In 1990, the U.S. Court of Appeals for the Federal Circuit reinterpreted that statute in a way that robbed it of all effect. The Innovation Act corrects the Federal Circuit's error and restores the congressional purpose of placing some reasonable limits on the venue where a patent action may be brought. This common sense reform is long overdue and entirely consistent with the longstanding congressional policy of placing reasonable limits on venue and patent cases. Later today we will debate an amendment I will offer with Mr. Issa and Mr. Farenthold along with Ms. Lofgren to further strengthen the venue language in the bill.

We also update the customer stay language, which allows a case against a customer to be stayed while the manufacturer litigates the alleged infringement. This stay is available only to those at the end of the supply chain who are selling or using a technology that they acquired from a manufacturer without materially modifying it. We have also updated our

rulemaking recommendations on core document discovery and case management to allow the Judicial Conference to start developing and implementing the rules as part of the Patent Pilot Project.

The manager's amendment also addresses the inter partes review proceedings at the PTO and ensures that the rules governing the program will be fair and afford due process. Additionally, we have addressed the most significant concerns raised by the biopharma industries pertaining to the use of the IPR proceeding to engage in market manipulation, as well as addressing the potential for abuse by parties engaging in extortion of patent owners by seeking payoffs to not file IPR cases.

The bill, however, avoids excessive restrictions on IPR that would prevent the PTO from being able to complete these proceedings within the statutory deadline. This bill, therefore, preserves IPR as a cost-effective alternative to litigation. This legislation also does not include provisions that would require PTO to automatically enter claim amendments in IPR. Such provisions effectively require PTO to issue patent claims that have never undergone substantive examination. This amounts to a registration

system for issuing patent claims. It would not only undo the America Invents Act, but would also repeal the Patent Act of 1836, which first required substantive examination of all patent claims.

The manager's amendment further updates technical provisions concerning doubling patenting, and ensures that USPTO implementation will be efficient. It also includes provisions dealing with USPTO management and work sharing.

The Innovation Act targets abusive patent litigation, protects the patent system, increases transparency, prevents extortion, and provides greater clarity. I urge members to support the amendment, which accommodates input from many members of the committee as well as various stakeholders and improves the bill.

Are there amendments to the amendment? For what purpose does the gentleman from California seek recognition?

Mr. Issa. Mr. Chairman, I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Mr. Conyers. I wanted to --

Chairman Goodlatte. Oh --

Mr. Issa. But I can wait.

Chairman Goodlatte. I have definitely overstepped my bounds here, and I now recognize the ranking member of the committee, the gentleman from Michigan, Mr. Conyers, for his opening remarks regarding the manager's amendment.

Mr. Conyers. Well, thank you, Mr. Chairman. Members of the committee, I oppose the manager's amendment because it does not go far enough to gain my support for the underlying bill. It is as simple as that. Over the past 18 months, the patent landscape has substantially changed in response to efforts by the courts, the U.S. Patent and Trademark Office, and by many others to address abusive patent litigation and exploitation of the patent process.

This committee has held three hearings examining these issues. Other House and Senate committees have also held hearings on this matter, and just last week, a bipartisan group of senators on the Senate Judiciary Committee rejected the language in H.R. 9 and passed a more reasonable, yet far from perfect, solution to the issue. And yet the manager's amendment fails to consider the more balanced approaches others have taken.

First, the amendment did not remove several problematic

provisions in the underlying bill. In particular, these provisions include presumptive fee shifting and higher pleading requirements that are one-sided, overly broad, and, frankly, unnecessary. Witnesses at our hearings described the many problems associated with those and other provisions and suggested improvements. Yet the manager's amendment did not make those needed changes.

For example, the American Intellectual Property Law Association writes that the amendment does not include improvements to the fee shifting provision like language included in the marked-up Senate proposal. The Alliance for U.S. Startups and Inventors for Jobs warns that the manager's amendment will make the pleading and discovery process much more complex, expensive, and risky for startups and small businesses to enforce their patents. The higher education community notes that "The amendment's attempt to limit the overreach of the joinder provision to protect universities is, in fact, ineffective."

Further, the amendment lacks effective provisions to prevent abuse of patent litigation and the patent process. It fails to address fee diversion or include helpful language curtailing demand letters. And it does not effectively deal

with the gaming of the IPR process that is harming biopharmaceutical companies.

And finally, significant members of the patent community have raised concerns or outright oppose the amendment. They include the higher education community, the American Intellectual Property Law Association, the Medical Device Manufacturers Association, the Alliance of U.S. Startups and Inventors for Jobs, the Innovation Alliance, the Institute of Electrical and Electronics Engineers USA, the Small Business Technological Council, and many others. And so, we need to address the issue of abusive patent litigation. We should be able to find common ground and work together in doing so. But I cannot support the manager's amendment without any significant changes.

I thank the chairman, and that concludes my statement.

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. Strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Nadler. Thank you, Mr. Chairman. I rise in support of the manager's amendment. I believe it makes a number of

welcomed improvements to the bill and moves the bill in a positive direction.

Since January, the Subcommittee on Courts, Intellectual Property, and the Internet has held two hearings on patent litigation, and the full committee held a legislative hearing on H.R. 9. Over the course of these hearings we have learned about the challenges businesses and individuals face in confronting patent trolls, and the ways abusive patent litigation stifles innovation. But we have also heard concerns from various stakeholders about the impact this legislation could have on legitimate inventors who wish to protect their rights in court.

This manager's amendment attempts to address some of these concerns and will also bring us closer to reaching agreement with the Senate on final legislation. For example, the manager's amendment makes important clarifications to the bill's joinder provision to ensure that only shell companies are targeted. It provides a more reasonable discovery stay provision, and it helpfully narrows the customer stay exception to protect only true end users and retailers.

In addition, the manager's amendment new section concerning post-grant and inter partes review proceedings at

the PTO will help crack down on abuses of the IPR process while providing additional due protection to patent holders and petitioners. I was also pleased to see the manager's amendment attempt to prevent forum shopping through the next venue section, but I hope we can make some improvements to the language to ensure that that section is effective. While the bill still requires certain additional refinements, these changes will make this legislation better, and they deserve our support.

I should note that I am disappointed this amendment does not address fee shifting in any significant way. I hope that as we consider to consider this legislation we will follow the Senate's lead and strike a better balance on that issue. Notwithstanding that concern, I support the manager's amendment. I believe it is an improvement to the underlying legislation.

I urge my colleagues to support it, and I yield back the balance of my time.

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentleman from California seek recognition now?

Mr. Issa. Now I would like to have an amendment at the

desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Issa of California, with Mr. Goodlatte --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Issa follows:]

Chairman Goodlatte. And the gentleman is recognized on his amendment.

Mr. Issa. Thank you, Mr. Chairman. And I want to thank all the members of the committee that participated, and helped draft, and approve this amendment. They include, but are not limited to, Mr. Farenthold, Mr. Nadler, Ms. Lofgren, Mr. Forbes, Ms. Walters, Ms. Chu, and Ms. DelBene. They and others have been part of recognizing that we truly at the heart of this bill need to have strong language to determine whether or not a case is appropriately in a jurisdiction, yes, in a venue, and if that venue ultimately gets a fair chance to be reconsidered if inappropriate.

To that extent, we have offered strong venue language in this amendment. It has broad support. And I want to just take a moment. I do not often mention a Federal judge, but let us understand that Judge Gilstrap in the Eastern District of Texas has nearly 20 percent of all patent cases that are in our court system. The idea that that many should be concentrated in any one district or any one judge, particularly when it is not a center of innovation, shows that there is a need to get the appropriate venue.

This language is intended to do just that, not to take

away a case that should be anywhere in the country, and many could be in the Eastern District of Texas or in Delaware, but, in fact, to create an opportunity to properly define that one more time in order to stop what we believe to be unreasonable venue shopping that does go on, particularly by trolls.

It is as simple as that. And, again, Mr. Chairman, I would like to thank all the members of the committee that have helped make sure that this language is bipartisan and broadly supported. And I would yield back.

Chairman Goodlatte. For what purpose does the gentleman from Michigan seek recognition?

Mr. Conyers. I thank the chair. To oppose the amendment.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Conyers. Members of the committee, this changing of venue provision is a relatively new addition to the overall package that we have been working on for such a long time. It has not been sufficiently vetted by all stakeholders, nor has this amendment to that new language. The new language appears to unduly restrict the ability of operating companies

to bring suits for patent infringements in home districts.

And so, the amendment makes changes to the venue provision of the manager's amendment, and would add a new section on venue to H.R. 9. The manager's amendment would restrict venue in both patent infringement and declaratory judgment actions by the limitations of current law. The manager's amendment is intended to prevent forum shopping and manufacturing of venue, but many patent stakeholders argue that the bill would unfairly limit access to courts that offer more expeditious and efficient proceedings, and encourage delay tactics by deep pocketed defendants.

The venue language in the manager's amendment could potentially deprive the courts of all discretion to balance convenience factors for choosing venue while also depriving patent plaintiffs their provisional right to choose the forum. And finally, patent stakeholders also argue that rigid venue rules for patent cases will arbitrarily and unfairly disadvantage patent holders, particularly small, innovative firms by potentially forcing them to litigate infringement of the same patent by multiple defendants in many courts across the country.

And so, I urge our members here in Judiciary to

carefully consider the faults that are rampant in the Issa amendment. And I yield back the balance of my time.

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentleman from Texas seek recognition?

Mr. Farenthold. I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Farenthold. Thank you very much, and I would first like to thank the chairman, my fellow co-authors, and staff for working so hard to tighten up the venue provision in this amendment to the amendment in the nature of a substitute.

One of the things I hear most about is how the abuse of the venue system is a huge enabling factor for bad actors in our patent system. Our bipartisan amendment helps to resolve some of these loopholes in the original venue provisions, ensuring that the gamesmanship of venue does not persist after these reforms.

What we are trying to do here in general with this bill is remove the avenues for abuse so our patent system can be stronger and better aligned with its constitutional purpose. I believe in the importance of intellectual property, and I

believe with a few positives tweaks like this amendment, we really can strike the right balance to both improve the perception and function of our intellectual property system, and put a serious dent in some of the abusive practices that are going on.

And I urge my colleagues to support this amendment, and yield back.

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. Strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Nadler. Mr. Chairman, I am pleased to join as a co-sponsor of this amendment to improve the venue provision contained in the manager's amendment by closing certain loopholes in the language. These loopholes cause many patent stakeholders to raise concerns about this provision, even though they support the concept behind it. In particular, they are concerned that the venue provision as drafted in the manager's amendment would still allow patent trolls to game the system. This amendment would tighten the language and

would be more effective in discouraging forum shopping and manufacturing of venue.

As we move this bill to the floor, we should continue to work with all the stakeholders to see if there are ways that the venue language can be further improved and strengthened. There ought to be a logical connection between the forum where a case is litigated and the substance of the case. Many patent trolls engage in forum shopping, however, seeking the most friendly venue for their claims, and we know where that most friendly venue is in one particular district in the United States. An effective venue provision will go a long way toward ending this abusive behavior, and is entirely consistent with the goals of the legislation.

This amendment will strengthen the underlying language of the manager's amendment, and I urge all members to support it. I yield back.

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentlewoman from California seek recognition?

Ms. Lofgren. To strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for 5 minutes.

Ms. Lofgren. I will not take 5 minutes. I do think that the amendment, which I am a co-sponsor, is an improvement as compared to the alternative. I do think it is likely this could have been stronger yet, but I am happy to move forward with this, and I do think we ought to monitor the effect of the amendment. Obviously we have the opportunity to make fine tunings and adjustments as time goes on to see if this actually accomplishes what I think it will.

So with that, I am happy to support it, and I think, you know, this is a difficult area, as the chairman knows. There are competing interests, and we have all worked very hard to try and strike the right balance. But we are going to have to keep looking to see whether we have succeeded. And with that, I yield back.

Chairman Goodlatte. Would the gentlewoman yield?

Ms. Lofgren. I would certainly yield.

Chairman Goodlatte. I thank the gentlewoman for yielding. And as she knows from conversations with me, I share her interest in continuing to enhance the venue provisions. So this is an ongoing process, and we will look at whether there are further possibilities going to the floor. But I think this is a good improvement, and I support

it.

For what purpose does the gentlewoman from Washington seek recognition?

Ms. DelBene. Move to strike the last word.

Chairman Goodlatte. The gentlewoman is recognized.

Ms. DelBene. Thank you, Mr. Chairman. I also support this amendment and one of the co-sponsors of this amendment. I think as we continue to see changes from the original Innovation Act, it is more critical than ever to make sure we address the issue of forum shopping in patent litigation.

A strong venue provision is critical to ensuring that this bill still does what it set out to do, which is to curb abusive patent litigation. And this venue amendment ensures that bad actors cannot set up shell facilities or otherwise skirt the requirement that the venue in which a patent case is heard has some genuine relevance to the dispute at hand.

I agree with my colleagues that this is an important step forward in the bill. I encourage others to support it, and I yield back.

Chairman Goodlatte. The question occurs on the amendment offered by the gentleman from California.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it, and the amendment is agreed to.

Are there further amendments to the amendment?

Mr. Conyers. Mr. Chairman, I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment of the gentleman from Michigan.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Conyers of Michigan, page 80 --

Chairman Goodlatte. Without objection, the amendment is considered as read.

[The amendment of Mr. Conyers follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Conyers. Thank you, Mr. Chairman. Members of the committee, my amendment serves a couple of purposes. First, it will halt the continuing diversion of patent user fees, and, as a result, help address the problem with abusive patent litigation by ensuring poor quality patents are not even issued to begin with. My amendment accomplishes this goal by giving the U.S. Patent and Trademark Office much needed resources to its examiners so that they are better equipped to review and analyze the hundreds of thousands of complex and interrelated patent applications the office receives each year.

The current funding mechanism cannot guard against sequestration as proved in the 2013 moment when nearly $150 million in collected user fees were diverted. And this loss is in addition to the estimated $1 billion in fees diverted over the last two decades. In essence, there is a tax on innovation in this country, and my amendment would repeal it. That is why I, along with my colleagues Sensenbrenner, and Nadler, and Franks, and others, introduced H.R. 1832, the Innovation Protection Act, to ensure that the U.S. Patent and

Trademark Office retains all of the user fees it collects.

As of today, 16 members have co-sponsored this measure, including 11 from this committee. And the supporters of the bill include significant patent stakeholders, such as the American Intellectual Property Law Association, BSA, the Software Alliance, the Coalition for the 21st Century Patent Reform, the Institute of Electrical and Electronics Engineers, USA, the Innovation Alliance, the Intellectual Property Owners Association, the Medical Device Manufacturers Association, and the higher education community. Many of the witnesses at our hearings this year have also endorsed it.

My amendment includes the text of H.R. 1832, and would thereby create a permanent, reliable funding mechanism to protect the USPTO from the unpredictability of the annual appropriations cycle. By eliminating the tax on innovation, this amendment will encourage innovation and ensure that our patent system remains the envy of the world.

Also, my amendment extends for 10 years the USPTO's ability to set its fees. Before 2011, the Office relied on Congress to adjust its fee structure through statutory changes. History has shown, however, that this process does not allow the USPTO to respond promptly to the changes and

challenges that it faced as its workload increased. In the America Invents Act, Congress gave the Office fee setting authority for a limited time from 2011 to 2018, and it protected against burdensome fees by requiring stakeholder involvement before fees could be adjusted. My amendment would simply extend the fee setting authority an additional 10 years to 2028.

Considering that it takes a year or more for the Office to complete its process to alter its fee structure, this extension would help the Office avoid future disruptions. Just last week the Senate Judiciary Committee reported bipartisan patent reform legislation that also extended fee setting authorizes for 7 years.

In closing, I would like to address and respectfully disagree with the various jurisdictional concerns about this amendment that have been raised before, and I expect will unfortunately be repeated again today. First, it is correct that the language could be subject to a Rule 21 point of order on the House floor. However, that does not mean a point of order can or will be raised. If the bill proceeds under the suspension of the rules, all points of order are waived.

Alternatively, if the bill was to proceed subject to a rule, the Rules Committee can typically and frequently does, in fact, waive all points of order. That decision will be made by House leadership, and I would suggest that the individuals in this room can make a very strong case that any point of order should be waived.

In any event, the worst that could happen if a point of order is raised and sustained is that the language could be dropped from the bill. This would not delay consideration of the legislation, and we would be no worse off than we are right now. In addition, there is no point of order against this amendment here in this committee. It is germane to the measure we are considering and well within our jurisdiction.

So accordingly, a yes vote on this common sense amendment is appropriate, and I yield back the balance of my time, and urge support of the amendment. Thank you, Mr. Chairman.

Chairman Goodlatte. The chair thanks the gentleman, but recognizes himself in opposition to the amendment. I must oppose this amendment. While I agree with the policy goals of this amendment, it would have the effect of becoming a poison pill to the bill as we try to move it to the floor.

Adopting this amendment would cause a point of order under House rule 21 to lie against the bill on the House floor. This rule prohibits the committee, other than the Appropriations Committee, from reporting a bill carrying an appropriation. The rule also prohibits a committee other than Ways and Means from reporting a bill containing a tax or tariff.

I fully understand the frustration of the gentleman from Michigan and other members on this panel who are concerned about the fact that the PTO does not enjoy the full use of the fees collected. However, if we are going to address other pressing problems facing the patent system relating to litigation, we must defeat this amendment so that the bill may proceed to the floor of the House unencumbered. I am reliably assured that a member of the Appropriations Committee will raise a point of order, and I am reliably assured that the Rules Committee will not waive that point of order. And, therefore, we cannot accept this amendment.

Mr. Issa. Would the gentleman yield?

Chairman Goodlatte. I would be happy to yield to the gentleman from California.

Mr. Issa. A point of inquiry, Mr. Chairman. Those

points of order would be as to the tax provision and as to the appropriations. But within the jurisdiction of this committee, my understanding is we could take the portion of extending the fee setting capability. That is within our jurisdiction, is it not?

Chairman Goodlatte. It is.

Mr. Issa. Then I might strongly that if later today we could bring back this bill with just the extension of fee setting, it might be much more acceptable to all of us.

Chairman Goodlatte. That is certainly a possibility that could be done.

Mr. Issa. I thank the gentleman.

Mr. Conyers. Would the chairman yield?

Chairman Goodlatte. I would be happy to yield to the gentleman from Michigan.

Mr. Conyers. Thank you. It is the prerogative of this committee to consider patent policy, and we should be dealing with the serious problem of fee diversion in the bill that is before us today, and not be ceding our jurisdiction over the issue out of a fear that appropriators may or may not raise an objection at some later time in the legislative process. Thank you, Mr. Chairman.

Chairman Goodlatte. The point of order lays with the reporting of the bill from the committee. So that is the problem we would face. And if the ranking member is interested in pursuing what the gentleman from California suggested and separately offering the extension of fee setting authority, then that could be something that we could consider. But at this time, I must oppose the amendment offered by the gentleman.

For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. Strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Nadler. Mr. Chairman, I am pleased to support this amendment to ensure that the PTO receives full funding and to extend the PTO's fee setting authority. The language of this amendment is similar to H.R. 1832, the Innovation Protection Act, which I have co-sponsored along with ranking member and several of my colleagues on the committee.

This amendment would ensure that the PTO retains all the user fees it collects while providing for continuing and appropriate congressional oversight. The amendment would

also help provide long-term financial stability of the Patent Office. This amendment is necessary to prevent user fees from being diverted away from important priorities, like improving patent quality.

Many of the problems we are seeking to address in this legislation could be solved if the PTO had the resources it needs to properly review and issue patents. Over the last two decades, Congress has redirected more than $1 billion in user fees to other programs, treating these fee revenues as if they were general appropriations.

The PTO continues to be in need of a more long-term sustainable funding model. During Congress' consideration of the Leahy-Smith America Invents Act, a compromise was struck on the funding issue, which resulted in the establishment of the reserve fund under Section 22. However, as we have seen from recent events, this compromise has been unable to protect PTO's funding in this unpredictable budget climate.

For example, in Fiscal Year 2013, an additional $148 million of user fees were denied to the PTO as a result of sequestration, which had nothing to do with the PTO. This amendment would ensure that the PTO's funding remains secure well into the future.

The amendment would also extend for 10 years the PTO's ability to set its fees. The American Invents Act provided the PTO with fee setting authority between 2011 and 2018, and has proven a success. This amendment would extend this fee setting authority for 10 years to 2028.

This is a good and reasonable amendment. I urge my colleagues to support it. I yield back.

Chairman Goodlatte. For what purpose does the gentlewoman from California seek recognition?

Ms. Lofgren. Mr. Chairman, I very much agree with the fee diversion effort as well as the idea of extending the fees. But I was recalling many years ago when our former colleague, Howard Berman, took the lead on the fee diversion effort to the House floor, and all of us on the committee were united. I really miss Mr. Berman's touch on this so very much. And the Appropriations Committee, both Democrats and Republicans, killed the effort.

And so, I am concerned as you are, Mr. Chairman, that adding this meritorious measure may, in fact, doom the underlying bill. I am mindful that the fees continue into 2018, so the need to extend them, although important is not urgent. And so, I reluctantly reach the same conclusion as

you, Mr. Chairman, that although this is the right thing to do from a policy point of view procedurally, it is too difficult to proceed. And I with great regret reach that conclusion, and I yield back.

Chairman Goodlatte. The chair thanks the gentlewoman, and the question occurs on the amendment offered by the gentleman from Michigan.

All those in favor, respond by saying aye.

Oh, I am sorry.

Ms. Jackson Lee. Mr. Chairman.

Chairman Goodlatte. The vote will suspend. For what purpose does the gentlewoman seek recognition?

Ms. Jackson Lee. Strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for 5 minutes.

Ms. Jackson Lee. Let me take just a moment, and I wanted to make sure this was the gentleman from Michigan's amendment that we have supported over the years. But let me start out by saying that we have always had a very effective bipartisan approach to the questions of innovation and technology on this committee, and I hope and look forward to us continuing to do so, even as we make our way through the

Innovation Act and as it makes its way to the floor that we will be able to join on the very important aspect of this legislation.

But I do believe that Mr. Conyers' amendment responds to some of those who have expressed concern regarding small inventors, universities, as it relates to the fee diversion aspect. And so, I would encourage as we begin this process to understand the basis, as I understand Mr. Conyers' effort is to make sure that those who feel left out of this process are included into this process, and that we do ultimately get to the conclusion where all of those who benefit from the USPTO can do so. And if there is any discomfort, it is for that very fact. Can we get everybody under the same umbrella?

I want to thank the ranking member for offering this amendment, and I believe the amendment should pass, and I believe that a number of amendments that we are going to be offering will not do the damage that may be represented so that small entities and entities that are different from the business aspect can also be included in this process.

So let me thank the gentleman for offering his amendment, and I hope that my colleagues will see this as

contributing to the big tent that this bill should actually represent, not the small tent, but the big tent. With that, I yield back.

Chairman Goodlatte. The question occurs on the amendment offered by the gentleman from Michigan.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the noes have it, and the amendment --

Mr. Conyers. May I have a record vote?

Chairman Goodlatte. A recorded vote is requested, the clerk will call the roll.

Ms. Williams. Mr. Goodlatte?

Chairman Goodlatte. No.

Ms. Williams. Mr. Goodlatte votes no.

Mr. Sensenbrenner?

[No response.]

Ms. Williams. Mr. Smith?

Mr. Smith. No.

Ms. Williams. Mr. Smith votes no.

Mr. Chabot?

[No response.]

Ms. Williams. Mr. Issa?

Mr. Issa. No.

Ms. Williams. Mr. Issa votes no.

Mr. Forbes?

[No response.]

Ms. Williams. Mr. King?

Mr. King. No.

Mr. Williams. Mr. King votes no.

Mr. Franks?

[No response.]

Ms. Williams. Mr. Gohmert?

[No response.]

Ms. Williams. Mr. Jordan?

[No response.]

Ms. Williams. Mr. Poe?

[No response.]

Ms. Williams. Mr. Chaffetz?

Mr. Chaffetz. No.

Ms. Williams. Mr. Chaffetz votes no.

Mr. Marino?

Mr. Marino. No.

Ms. Williams. Mr. Marino votes no.

Mr. Gowdy?

[No response.]

Ms. Williams. Mr. Labrador?

[No response.]

Ms. Williams. Mr. Farenthold?

Mr. Farenthold. No.

Ms. Williams. Mr. Farenthold votes no.

Mr. Collins?

Mr. Collins. No.

Ms. Williams. Mr. Collins votes no.

Mr. DeSantis?

[No response.]

Ms. Williams. Ms. Walters?

Ms. Walters. No.

Ms. Williams. Ms. Walters votes no.

Mr. Buck?

Mr. Buck. No.

Ms. Williams. Mr. Buck votes no.

Mr. Ratcliffe?

Mr. Ratcliffe. No.

Ms. Williams. Mr. Ratcliffe votes no.

Mr. Trott?

Mr. Trott. No.

Ms. Williams. Mr. Trott votes no.

Mr. Bishop?

Mr. Bishop. No.

Ms. Williams. Mr. Bishop votes no.

Mr. Conyers?

Mr. Conyers. Aye.

Ms. Williams. Mr. Conyers votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

Ms. Williams. Mr. Nadler votes aye.

Ms. Lofgren?

Ms. Lofgren. No.

Ms. Williams. Ms. Lofgren votes no.

Ms. Jackson Lee?

Ms. Jackson Lee. Aye.

Ms. Williams. Ms. Jackson Lee votes aye.

Mr. Cohen?

Mr. Cohen. Aye.

Ms. Williams. Mr. Cohen votes aye.

Mr. Johnson?

Mr. Johnson. Aye.

Ms. Williams. Mr. Johnson votes aye.

Mr. Pierluisi?

[No response.]

Ms. Williams. Ms. Chu?

Ms. Chu. Aye.

Ms. Williams. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. Aye.

Ms. Williams. Mr. Deutch votes aye.

Mr. Gutierrez?

[No response.]

Ms. Williams. Ms. Bass?

[No response.]

Ms. Williams. Mr. Richmond?

[No response.]

Ms. Williams. Ms. DelBene?

Ms. DelBene. Aye.

Ms. Williams. Ms. DelBene votes aye.

Mr. Jeffries?

Mr. Jeffries. Aye.

Ms. Williams. Mr. Jeffries votes aye.

Mr. Cicilline?

Mr. Cicilline. Aye.

Ms. Williams. Mr. Cicilline votes aye.

Mr. Peters?

Mr. Peters. Aye.

Ms. Williams. Mr. Peters votes aye.

Chairman Goodlatte. The gentleman from Ohio?

Mr. Chabot. No.

Ms. Williams. Mr. Chabot votes no.

Chairman Goodlatte. The gentleman from Virginia?

Mr. Forbes. No.

Ms. Williams. Mr. Forbes votes no.

Chairman Goodlatte. Has every member voted who wishes to vote?

[No response.]

Chairman Goodlatte. The clerk will report.

Ms. Williams. Mr. Chairman, 11 members voted ayes, 16 members voted no.

Chairman Goodlatte. And the amendment is not agreed to.

For what purpose does the gentleman from Texas seek recognition?

Mr. Smith. Mr. Chairman, I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Smith and Mr. Goodlatte, page 16, line --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Smith and Chairman Goodlatte follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Smith. Thank you, Mr. Chairman. Mr. Chairman, this amendment makes two technical and, I believe, non-controversial changes to the bill. First, the amendment clarifies that certain preliminary motions that trigger a stay of discovery must be made within 90 days following service of the lawsuit. This ensures that the court rules in a timely fashion on motions that might significantly impact the litigation before parties begin the discovery process.

Second, the amendment makes a technical correction to reflect the proper version of the customer stay provision. It reflects the agreement between a defendant, customer, and a manufacturer to stay the lawsuit while the manufacturer litigates that patent claim.

I think both these technical changes are necessary. And, Mr. Chairman, before I conclude and urge my colleagues to support this amendment, let me compliment and thank you publicly for coming up with this piece of legislation. It has not been an easy job I realize. I think you have reached that delicate balance that does as much as you possibly can to satisfy all parties who have an interest in this subject.

And I appreciate your leadership on the patent reform bill, and I appreciate the goals you are trying to accomplish, and certainly you get the deserved support that you have earned.

So I will yield back.

Chairman Goodlatte. The chair thanks the gentleman for his kind words.

Mr. Conyers. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman from Michigan seek recognition?

Mr. Conyers. I would like to take a moment just to thank the gentleman from Texas. I think it is a non-controversial amendment, and I am pleased to support it. I yield back.

Chairman Goodlatte. The chair thanks the gentleman.

The question occurs on the amendment offered by the gentleman from Texas.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it, and the amendment is agreed to.

Mr. Conyers. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman

from Michigan seek recognition?

Mr. Conyers. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. offered by Mr. Conyers of Michigan, page 80, insert after line --

Chairman Goodlatte. Without objection, the amendment is considered as read.

[The amendment of Mr. Conyers follows:]

Chairman Goodlatte. And the gentleman is recognized on his amendment.

Mr. Conyers. Thank you. Unfortunately, the committee rejected my earlier amendment to stop fee diversion from USPTO, and to extend USPTO's fee setting authority. I have drafted now a narrower amendment that does not include the language to protect user fees from being diverted for purposes unrelated to USPTO. Instead, this amendment only includes the fee setting authority from my earlier amendment.

As a brief summary for my colleagues, the America Invents Act in 2011 granted USPTO temporary fee setting authority. That authority expires in 2018. My amendment would extend that authority an additional 10 years until 2028. This is a simple amendment that will help the USPTO set its fee structure so that it will be able to respond to changes in its workload. The Senate Judiciary Committee understood the need to extend the fee setting authority, and included similar language in the bill marked up last week.

I urge my colleagues to support this amendment, and, Mr. Chairman, I yield back the balance of my time.

Chairman Goodlatte. For what purpose does the gentleman from California seek recognition?

Mr. Issa. Mr. Chairman, I would like to speak in support of this amendment. I think it is a good idea. I believe that it strikes the right balance recognizing that some of these other areas that were technically difficult in the earlier amendment can be worked out over time. But the setting of fees and the retaining of funds is critical. This gives the PTO a long period of time in which to calculate their present and future needs, and gradually make changes to meet those.

I think the ranking member's length of time is quite long, but candidly I would rather ask for long and negotiate less if we need to. So I would urge all members to support the amendment.

Chairman Goodlatte. Would the gentleman yield?

Mr. Issa. Of course I would yield.

Chairman Goodlatte. I thank the gentleman for yielding, and I want to compliment the gentleman from Michigan on a fine amendment that I am pleased to support. And we will work together on the other aspects of his concerns about shifting of USPTO funds to other purposes. I completely agree with his purpose, but we will find another way to do it.

So I urge my colleagues to support the amendment, and I yield back to the gentleman from California.

Mr. Issa. And I yield back.

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. Mr. Chairman, I want to support this amendment, too.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Nadler. Thank you, to extend the USPTO's fee setting authority for 10 years. This amendment should be accepted because it would allow the USPTO to consider its fee structure and respond to changes in its workload for an additional 10 years. By setting the fee setting authority, there will be decreased examination times, allowing inventors to bring patent assets to market faster, and it will allow the USPTO to provide better service to the patent community.

This is issue was also included in the Senate bill when the Senate Judiciary Committee held their markup last week. The bill that passed the committee -- the Senate committee, that is -- included language to extend the fee setting authority by 7 years. And I think that whether we extend it

for the 10 years provided in this amendment or the 7 years in the Senate bill, clearly an extension of this authority is warranted.

So I urge my colleagues to support this amendment, and I yield back the balance of my time.

Chairman Goodlatte. For what purpose does the gentlewoman from California seek recognition?

Ms. Lofgren. To strike the last word.

Chairman Goodlatte. The gentlewoman is recognized.

Ms. Lofgren. I just want to thank Mr. Conyers for offering this amendment. It is a smart amendment. And not only does it extend the authority, but it gives the Office an opportunity to do long-range planning and to be creative. So I think it is a really significant thing. I appreciate his amendment, and I look forward to supporting him.

I yield back.

Chairman Goodlatte. The chair thanks the gentlewoman.

And the question occurs on the amendment offered by the gentleman from Michigan.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it. And, in

fact, I think it is unanimous. The amendment is agreed to.

Mr. Conyers. Thank you. Thanks, everybody.

Chairman Goodlatte. For what purpose does the gentleman from California seek recognition?

Mr. Issa. Mr. Chairman, I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Issa of California and Ms. Chu of California.

Chairman Goodlatte. Without objection, the amendment is considered as read.

[The amendment of Mr. Issa and Ms. Chu follows:]

Chairman Goodlatte. And the gentleman from California is recognized for 5 minutes on his amendment.

Mr. Issa. Thank you, Mr. Chairman. This amendment is fairly simple, straightforward, but very necessary. The current expiration of the covered business method review is 2020. Our amendment would allow this successful program to continue through 2026.

When we passed the America Invents Act, we recognized that it was a new program, and we wanted to have a trial period. That trial period, although early on, has proved to be an efficient way to deal with poorly written patents that knew less about what they should have. And when in full light of day additional information is provided to the PTO, vague, overly broad, and abstract patents are reduced or outright eliminated.

Mr. Chairman, many people will have a number of reasons to say not to extend this. There is one reason to extend it. If you have a poor patent, particularly one that, for example, was being granted just today, latches only occurs presumptively after 6 years of a violation that is not enforced. The fact is, Mr. Chairman, that with a 2020 expiration, companies today that know of a potential claim

can simply sit on their rights until the covered business method patent review process expires.

The reason for the extension is simply to make sure that if there is, in fact, a claim, bring it now, be subject to the review. If your patent stands the test, you win. If it does not, then, in fact, you have a poorly written or overly broad patent that should not have been granted.

So, Mr. Chairman, I would like to just quickly go through because there will are people who support it and do not support it. But I think in this case since it primarily deals with financial community patents, I want to note that the Financial Services Roundtable, the Independent Community Bankers of America, the American Insurance Association, the Clearinghouse, Engine Advocacy, and the National Association of Mutual Insurance Companies all support this amendment.

Additionally and most importantly, I want to thank Ms. Chu for working diligently on this amendment, and recognize that through her help we have been able to craft a bipartisan amendment to extend CBM, which we believe is exactly the right thing to do. And with that actually, I would like to yield the remainder of my time to Ms. Chu.

Ms. Chu. Thank you. The entities who abuse our patent

system are not just hitting our high tech industry. They are hitting Main Street businesses all over the country, from coffee shops to restaurants, retail stores to supermarkets, and banks and credit unions. A growing number of contributors to our economy are fending off frivolous patent litigation. These entities often acquire questionable business method patents to assert them against many of these businesses.

The amendment that Mr. Issa and I put forward today would extend the existing Covered Business Method program at the U.S. Patent and Trademark Office by 6 years. This program was put in place to create a cost-effective way to examine the validity of certain method patents. It is intended to solve the problem of low quality financial services business method patents.

The current CBM Program is used by quite a variety of industries, not only the financial companies, but non-financial companies. The users include banks, high tech companies, and internet companies, but also businesses selling coffee, real estate, home and garden supplies. Even the U.S. Post Office has used the program. The program is working as intended, and it is producing savings for the U.S.

economy and avoiding expensive litigation costs.

Without this program, industries that are alleged to have infringed a financial patent would be cut out of the post-grant review process. This leaves the CBM Program as the only post-grant program at PTO that can address low quality financial service patents. And the extension is necessary in order to avoid holders of these patents from asserting them when the program expires, and to maintain an alternative to Federal court for these types of patents.

I urge my colleagues to support this amendment, and I yield back.

Mr. Issa. And reclaiming my time briefly, I want to make sure everyone understands that this is not an automatic procedure. In fact, almost 30 percent of all CBM petitions were denied by the Patent Office. So it is a program that both has worked when appropriate, and has been withheld or denied when, in fact, people tried to misuse the CBM process. And I thank the chairman and yield back.

Chairman Goodlatte. For what purpose does the gentleman from Michigan seek recognition?

Mr. Conyers. I am opposed to the amendment, Mr. Chairman.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Conyers. Thank you. Members of the committee, when the America Invents Act created the transition program for covered business method patents, I said that it would work an injustice on legitimate patent holders. Unfortunately, my view has not changed. I continue to believe that the creation of the CBM Program was a mistake and was a special interest gift.

Unfortunately, USPTO expanded the scope of patents that are subject to the program. This expansion has ensnared small business owners and independent inventors unrelated to the program's original intent. The CBM Program is harming inventors by giving infringers a new tool to drain legitimate patent holders' resources. This amendment seeks to extend this special interest program for 6 more years. Instead, we should be ending the program rather than extending it.

And so, I urge my colleges to carefully consider the problems that I have raised, and I urge opposition to this amendment. And I yield back the balance of my time.

Chairman Goodlatte. For what purpose does the gentleman from Georgia seek recognition?

Mr. Collins. Mr. Chairman, I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Collins. Thank you, Mr. Chairman. I have said from the beginning of this process over the last couple of years that I support the chairman's effort to combat litigation abuse that we have all heard about from companies large and small. But I will not be able to support an extension of the CBM Program.

The fundamental problem with the CBM Program is that it treats property rights differently based on fields of technology. In my view, a property right is a property right. The government should not be deciding that a patent protecting hydraulics should be more secure than a patent protecting the computerized process.

The CBM Program was created as a transitional program as part of the America Invents Act. This is a controversial program that was ultimately only accepted and enacted because of two reasons. First, its limited direction, and second, its intended limited scope.

I was not a member of Congress when this committee

debated AIA, but I understand what it means to strike a deal. Now I recognize that Congress often authorizes pilot programs that if successful should be extended. In fact, I support the extension of the Patent Pilot Program that Mr. Issa offered as part of the manager's amendment. But the CBM provision in AIA was not called a pilot program. It was intended as a test to see if certain inventions should always receive second class status.

The CBM provision was called a transitional program for a reason. The financial services industry faced a unique situation. The courts told the PTO to start issuing patents on business methods relating to financial services in the 1990s. And the PTO started issuing patents that it should not have. Okay. I understand where that is going, but if we extend this program, we are not only saying that we cannot be trusted to stick to the deal this committee struck. We are risking causing real problems for the U.S. economy.

I agree with the comments of the Center for Individual Freedom and other conservative groups that the key to fostering innovation across all areas of technology and sectors of the economy has been the non-discriminatory treatment of all inventions. If our entrepreneurs and those

investing in R&D believe government is going to pick winners and loser among different technologies, we are going to have serious trouble in maintaining our global leadership.

Finally, I am also confused about why we would be considering today the extension of a program that is set to sunset in 2020. Let me repeat that. This program is set to sunset in 2020. I expect that in 2020 I would still oppose the extension for the reasons I have just discussed, but at least if I was here at that time, it would make sense to have the debate. Why are we debating an extension of a transitional program less than halfway through the life of the program? Do we really know today how the CBM Program is going to affect our economy in 5 years? Again, I oppose this amendment.

But, Mr. Chairman, you have done an excellent job trying to balance the interest of all sides of the litigation reform debate, and I appreciate and support your efforts. Let us not let this issue, an issue that does not need to be debated for another 4 or 5 years, risk upending that balance.

Before I close, I want to briefly respond to an argument previously made by supporters of this amendment. Some claim that we must extend the transitional program today another 5

years because there is a possibility that opportunistic trolls will wait to sue on their weak patents until 2020 when the program expires. That seems a little far-fetched to me. First, are we really going to extend a discriminatory program 5 yeas before it expires based on a hypothetical? More importantly, we have no way of knowing what the world of patent litigation will look like in 5 years.

I think we need to give Chairman Goodlatte and other supporters of the Innovation Act some credit, and I am a firm believer that if we pass the chairman's bill, it will make it dramatically more risky for bad actors to assert their weak patents. In other words, because of the fee shifting provision and other provisions, a troll would be foolhardy to assert weak patents whether CBM exists or not. If this is not the case, then what we have we been working on?

Litigation is technology neutral. IPR is technology neutral. Let us focus on strengthening those two avenues to challenge bad patents and allow the discriminatory, controversial transitional program to expire as Congress intended in 5 years, or at the very least let us save the debate for a more appropriate time when we have an opportunity to evaluate the fruits of the chairman's bill.

And with that, I urge my colleagues to preserve congressional intent and oppose this premature amendment. And I yield back.

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. Mr. Chairman, I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Nadler. Mr. Chairman, I am pleased to support this amendment because it would extend the duration of the Covered Business Method Program by 6 years. When we passed the America Invents Act, we recognized that there were certain patents that should never have been granted by the PTO, and that we needed the program to review the validity of these patents at a cheaper and more efficient way than litigation.

The Covered Business Method Program has proven to be a valuable tool for evaluating the validity of this category of patents, and has served as an effective alternative to district court litigation. This bipartisan amendment does not expand the scope of the CBM Program. It would simply extend the successful program for a short period of time so

that it can continue to weed out patents that were improperly granted in the first place.

I urge all members to support the amendment, and I yield back.

Chairman Goodlatte. The chair recognizes himself in support of the amendment. I have always supported this program. I worked hard to see that a program like this was included in the America Invents Act. It has by all accounts been working well, and I have yet to hear any examples of where the program was improperly extended to non-business method patents or where a proceeding has reached the wrong result.

The program is doing what it was designed to do: eliminating overly broad and invalid non-technological business method patents. This simple extension will ensure that the existing program will continue to operate and prevent gamesmanship by those who would attempt to evade its reach since we are now within the 6-year term of latches.

This extension is clearly distinct from previous efforts to expand the definition of the program. Though I have been supportive of including all business method patents within CBM, that is not what this amendment does. It simply extends

the existing program which has been working remarkably well. This amendment ensures that the PTO will be able to continue the work of ensuring strong patent quality and fixing mistakes when they arise.

I strongly support this amendment, and I urge my colleagues to do the same.

Mr. Issa. Would the gentleman yield?

Chairman Goodlatte. I would be happy to yield.

Mr. Issa. I thank the gentleman. I agree with his comments. Earlier when some folks spoke about CBM being unique or in some other way a program that we do not need because we should treat all patents equally, I want to make the point that more than 85,000 business method patents have been issued, and they would for the most part not be available under IPR or PGR. And as a result, if CBM goes away, there would be no way, except costly litigation, to resolve these issues.

When we look at small inventors and small end users, community banks, we have to recognize that one thing that is undeniable about CBM is it is a low-cost way to get a review of the facts that may not have been known at the time of the granting of the patent. And if I could briefly share with

everyone one piece of history, which sometimes can be illustrative.

This committee years before I arrived went from a 17 years from grant to a 20-year from application. At that time, people did not think too much about the fact that there were patents already out there that took less than 3 years to be granted. Neither did I. But shortly before I came to Congress back in the late 90s, I was sued by a company who I had been the vendor of a product to for more than a decade. They had a patent which was nearly 17 years old. They sued me for the very product that I had been selling them, without any mention of the patent, for years. I spent over $2 million proving that the product I sold them clearly did not fall under the patent.

Now, I was meritorious, but one of the odd situations was the patent in suit expired during that period of time because it reached its 17th year since granting. Unfortunately, I continued to have the peril for another 18 months of if I had lost of damages simply because we had retroactively effectively extended their patent. We argued latches. We argued estoppel. And we spent $2 million proving that we absolutely did not fall under a frivolous

claim from a former on a product that he had bought from me without mentioning for a decade.

These are real live small businesses out there. These are real live inventors. I do not take this without real regard to the effect. CBM is a program that is working. We need to keep it available. We need to make sure that there is an efficient administrative way to deal with bad patents.

And I thank the chairman for his support, and I yield back.

Chairman Goodlatte. For what purpose does the gentlewoman from Washington seek recognition?

Ms. DelBene. Move to strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for 5 minutes.

Ms. DelBene. Mr. Chairman, I want to speak in strong opposition to the amendment. The transitional program for covered business method patents was created as part of the America Invents Act, but after extensive negotiations, Congress struck a delicate compromise that was intended to address the unique situation that was facing the financial services industry without affecting areas of technology that are not used in financial products or services.

The program, as its name indicates, was meant to be transitional. It was never a pilot program. And it is not set to expire until 2020, much time from now, much information may be gained. But only 45 or so cases have been decided under the program, and we should not be thinking about extending it until we have more data. And there is plenty of time ahead. In fact, early reports on how the program is working actually say that it is going beyond the scope of what was originally intended, and that is not good.

In its first decision since the CBM Program became operational, the PTO expanded the scope of patents that were subject to CBM. The expansion overstepped PTO's authority, unraveled the compromise that Congress has reached, and put important areas of innovation at risk. So I think it is very premature to even consider expanding a program, a transitional program, to be looking at something that is just going to expire in 2020, and make a decision on that today.

I think this bill is focused on abusive litigation. That should be our focus as we look at what we are doing within the Innovation Act. I encourage my colleagues to oppose this amendment, and I yield back.

Chairman Goodlatte. The question occurs on the

amendments offered by the gentleman from California.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it.

Mr. Collins. Roll call, Mr. Chairman.

Chairman Goodlatte. A roll call vote is requested, and the clerk will call the roll.

Ms. Williams. Mr. Goodlatte?

Chairman Goodlatte. Aye.

Ms. Williams. Mr. Goodlatte votes aye.

Mr. Sensenbrenner?

[No response.]

Ms. Williams. Mr. Smith?

Mr. Smith. Aye.

Ms. Williams. Mr. Smith votes aye.

Mr. Chabot?

Mr. Chabot. Pass.

Ms. Williams. Mr. Issa?

Mr. Issa. Aye.

Ms. Williams. Mr. Issa votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

Ms. Williams. Mr. Forbes votes aye.

Mr. King?

[No response.]

Ms. Williams. Mr. Franks?

Mr. Franks. No.

Ms. Williams. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

Ms. Williams. Mr. Jordan?

[No response.]

Ms. Williams. Mr. Poe?

[No response.]

Ms. Williams. Mr. Chaffetz?

Mr. Chaffetz. No.

Ms. Williams. Mr. Chaffetz votes no.

Mr. Marino?

Mr. Marino. Yes.

Ms. Williams. Mr. Marino votes yes.

Mr. Gowdy?

[No response.]

Ms. Williams. Mr. Labrador?

Mr. Labrador. No.

Ms. Williams. Mr. Labrador votes no.

Mr. Farenthold?

Mr. Farenthold. Yes.

Ms. Williams. Mr. Farenthold votes yes.

Mr. Collins?

Mr. Collins. No.

Ms. Williams. Mr. Collins votes no.

Mr. DeSantis?

Mr. DeSantis. No.

Ms. Williams. Mr. DeSantis votes no.

Ms. Walters?

Ms. Walters. Aye.

Ms. Williams. Ms. Walters votes aye.

Mr. Buck?

Mr. Buck. No.

Ms. Williams. Mr. Buck votes no.

Mr. Ratcliffe?

Mr. Ratcliffe. No.

Ms. Williams. Mr. Ratcliffe votes no.

Mr. Trott?

[No response.]

Ms. Williams. Mr. Bishop?

Mr. Bishop. No.

Ms. Williams. Mr. Bishop votes no.

Mr. Conyers?

Mr. Conyers. No.

Ms. Williams. Mr. Conyers votes no.

Mr. Nadler?

Mr. Nadler. Aye.

Ms. Williams. Mr. Nadler votes aye.

Ms. Lofgren?

Ms. Lofgren. No.

Ms. Williams. Ms. Lofgren votes no.

Ms. Jackson Lee?

Ms. Jackson Lee. No.

Ms. Williams. Ms. Jackson Lee votes no.

Mr. Cohen?

Mr. Cohen. Aye.

Ms. Williams. Mr. Cohen votes aye.

Mr. Johnson?

Mr. Johnson. No.

Ms. Williams. Mr. Johnson votes no.

Mr. Pierluisi?

[No response.]

Ms. Williams. Ms. Chu?

Ms. Chu. Aye.

Ms. Williams. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. No.

Ms. Williams. Mr. Deutch votes no.

Mr. Gutierrez?

[No response.]

Ms. Williams. Ms. Bass?

[No response.]

Ms. Williams. Mr. Richmond?

[No response.]

Ms. Williams. Ms. DelBene?

Ms. DelBene. No.

Ms. Williams. Ms. DelBene votes no.

Mr. Jeffries?

Mr. Jeffries. No.

Ms. Williams. Mr. Jeffries votes no.

Mr. Cicilline?

Mr. Cicilline. Aye.

Ms. Williams. Mr. Cicilline votes aye.

Mr. Peters?

Mr. Peters. Aye.

Ms. Williams. Mr. Peters votes aye.

Chairman Goodlatte. The gentleman from Texas, Mr. Poe?

Mr. Poe. No.

Ms. Williams. Mr. Poe votes no.

Chairman Goodlatte. The gentleman from Iowa?

Mr. King. No.

Ms. Williams. Mr. King votes no.

Chairman Goodlatte. The gentleman from Ohio?

Mr. Chabot. No.

Ms. Williams. Mr. Chabot votes no.

Mr. Gohmert. How am I recorded?

Chairman Goodlatte. The gentleman from Texas, Mr. Gohmert?

Mr. Gohmert. Aye.

Ms. Williams. Mr. Gohmert votes aye.

Chairman Goodlatte. Has every member voted who wishes to vote?

[No response.]

Chairman Goodlatte. The clerk will report.

Ms. Williams. Mr. Chairman, 13 members voted aye, 18 members voted no.

Chairman Goodlatte. And the amendment is not agreed to.

For what purpose does the gentleman from Georgia seek recognition?

Mr. Johnson. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Johnson of Georgia, page 5, strike lines 14 through 22, and insert the following.

Chairman Goodlatte. Without objection, the amendment is considered as read.

[The amendment of Mr. Johnson follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Johnson. Thank you, Mr. Chairman. I have long been a proponent of reforming the patent litigation system to prevent patent trolls from draining innovative companies of their time and resources. Throughout this process of reviewing the Innovation Act, though, I have been deeply concerned about the fee shifting provisions. I was hopeful that the manager's amendment would make significant changes to this section, but it has not. The bill makes every case a fee shifting case. It intimidates and deters legitimate patent holders from asserting their property rights in court because if they lose, they will likely put themselves at severe risk of having to pay the winner's attorney's fees.

My amendment does two things. First, it substitutes the current fee shifting language with the award language from the Senate's Patent Act that requires the prevailing party to file a motion for attorney's fees. Second, it clarifies that motions to shift fees should not be based on de minimis or non-material litigation positions or conduct.

My Republican counterparts argue that H.R. 9 does not create presumptive fee shifting and that it simply clarifies

when fee shifting will or will not occur. Sadly, this is not the case. Currently, the Patent Act states that courts may award attorney's fees in exceptional cases. The Supreme Court clarified what exceptional cases in *Octane Fitness*. H.R. 9 states that the loser "shall award reasonable fees and other expenses" to the winner if it is found that the losing party's conduct was not reasonably justified in law and fact. These are two very different standards.

This amendment provides a layer of protection to the non-prevailing party by requiring the winner to file a motion for attorney's fees, and the burden is on the prevailing party to prove that the case fits the requirements for fees to be awarded. It prevents an automatic assumption that the losing party is a bad actor.

Under the de minimis standard that my amendment would add to H.R. 9, litigation positions with no bearing on the ultimate decision would not be considered as grounds for fee shifting. This will ensure that attorney's fee awards cannot be based upon an allegedly unreasonable litigation position or action that was not material to the outcome or a consideration of the case. Replacing the fee shifting language is a serious issue, and we should compromise if we

are going to pass good legislation.

And with that, Mr. Chairman, I will yield back.

Chairman Goodlatte. The chair recognizes himself in opposition to the amendment. The gentleman's amendment appears to mimic the Senate language. It replaces our standard of reasonable justified in law and fact with a test of objectively reasonable. I do not understand the purpose of this amendment. There is no reason to adopt this approach since there is no substantive difference objectively reasonable and the standard imposed by the EAJA.

In *Pierce v. Underwood*, the Supreme Court held that under the Equal Access to Justice Act, tests employed by our bill, a litigation position, is substantially justified if it is justified to a degree that could satisfy a reasonable person. This is exactly what "objectively reasonable" means. In the Federal circuit just last year in *Aqua Shield v. Inter Pool Cover Team*, the Court held that litigation positions are objectively reasonable if no reasonable litigant could realistically expect them to succeed.

Can someone explain to me the difference between a position that could satisfy a reasonable person and one that a reasonable litigant could realistically expect to succeed?

Does anyone really think there is a difference between these two tests? It is clear that there is not, and there is not a point to this amendment.

Additionally, this amendment includes a carve-out for bad actors. Even under current law, parties can be subject to fee awards for abusive litigation behavior. In this amendment's new subsection (b), even the most outrageous litigation behavior would be immune from any possibility of a fee award so long as it was not material to the consideration or outcome of the litigation. In other words, it does not matter how much abuse and bad faith tactics the party engaged in. As long as they were going to lose anyway, they are immune, and the prevailing party would be unable to recover its attorney's fees.

This is an unacceptable carve-out for bad actors, and it is for this and other reasons I urge my colleagues to oppose this amendment.

Mr. Conyers. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman from Michigan seek recognition?

Mr. Conyers. I rise to support the amendment.

Chairman Goodlatte. The gentleman is recognized for 5

minutes.

Mr. Conyers. Thank you so much. The amendment sets for at a de minimis standard under which litigation positions with no bearing on the ultimate decision would not be considered to be grounds for fee shifting. I commend the gentleman from Georgia because this amendment provides a much more reasonable standard for when fees should be shifted under the bill.

The fee shifting standard in this amendment is not presumptive, but rather requires the prevailing party to motion for attorney's fees. As written, the H.R. 9 standard makes every case a fee shifting case because at the end, the non-prevailing party must go on to defend its litigation position. This amendment language is considerably closer to *Octane Fitness*, the governing standard established by the Supreme Court only last year as the fee shifting only occurs upon motion an the burden is on the prevailing party to prove that the case fits the requirement for fees to be rewarded.

The de minimis amendment strikes a balance to prevent abuse of fee shifting provisions in this bill. Under the de minimis standard, litigation positions with no bearing on the ultimate decision should not be considered as grounds for fee

shifting. This really means attorney fee awards cannot be based on an allegedly unreasonable litigation position or action that was not material to the outcome of the consideration of the case. Without a harmful effect, there can be no fee shifting award.

So it is important to consider that this bill makes every case a fees shifting case. Every judge must decide whether the non-prevailing party's litigation position was reasonably justified in law and fact. The chance for abuse of this broad, permissive section should not be ignored and should be balanced by the committee in a fair and reasonable manner.

And so, therefore, I urge the members of the committee to support this amendment, and I yield back the balance of my time, and thank the chair.

Chairman Goodlatte. The chair thanks the gentleman.

Mr. Cicilline. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman from Rhode Island seek recognition?

Mr. Cicilline. I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Cicilline. Mr. Chairman, I rise in support of this amendment, and I would like to just respond. I know the chairman mentioned that you did not conclude that there was a significant difference in terms of the standard for the granting of attorney's fees. And while that might be the case, I think this amendment does two additional things.

If you look at line 3, it says, "Upon motion of the prevailing party," so it requires a motion to be made by the prevailing party. And it also establishes that the prevailing party shall bear the burden of demonstrating that he is entitled to an award.

So I think what this amendment does is it corrects an error in the underlying bill that simply creates a presumption that attorney's fees are required in every instance, and does not require the prevailing party to move, to make a motion, or then carry the burden.

So I support the Johnson amendment because I think in addition to clarifying the standard, it follows a well-established practice, and really I think the decision of *Octane Fitness* that says the burden for proving that is on the prevailing party, which I think is a very important protection.

I urge my colleagues to support this amendment, and I yield back.

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Jeffries. Thank you, Mr. Chairman. I also rise in support of this amendment. And as the distinguished gentleman from Rhode Island pointed out, I think the key distinction here is the shifting of the burden as well as the requirement of a motion by the prevailing party. And I just want to note that I think this amendment is consistent with the Administration's position as set forth by Michelle Lee, the director of the PTO.

She testified in a hearing on this legislation that she generally supports the approach taken in Section 3(b) of H.R. 9, which would require an award of attorney's fees and expenses to be made to the prevailing party in a patent case upon a motion by that party unless the non-prevailing party's litigation position or conduct was reasonable justified in law and fact.

She agrees with the standard that is in H.R. 9, but she also goes on to point out that the USPTO also believes, however, that the parties seeking a fee award, the prevailing

party, should bear the burden of demonstrating that it is entitled to such an award. I think that is an appropriate adjustment, particularly in light of the developments that have taken place since the last time we put this legislation forward through committee.

And I will be supporting Mr. Johnson's amendment, and I yield back.

Chairman Goodlatte. The question occurs on the amendment --

Ms. Jackson Lee. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentlewoman from Texas seek recognition?

Ms. Jackson Lee. Mr. Chairman, I rise to strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for 5 minutes.

Ms. Jackson Lee. I, too, want to briefly rise to support the gentleman's amendment, and particularly I want to focus on the relaxing of the heightened pleadings, discovery stay, and fee shifting provisions as it relates to the original and joint inventors and original assignees.

The whole idea of some of the challenges and concerns by

many of us dealing with a different component of patent seekers is the burden of litigation cost. And the question of heightened pleadings, more extensive pleadings, and other elements bear on that.

I think it bears on creativity. It bears on what I have always said, that innovation creates jobs. And we want a fair balance between those who feel that they have been infringed upon in terms of their patent versus those who are seeking to create new opportunities, or those who are smaller and seeking opportunities, and are being judged as intruding on an existing patent.

So I support the gentleman's amendment because it recognizes the importance of the litigation aspect being more relaxed to address the questions of smaller inventors, universities, and others. With that, I yield back.

Chairman Goodlatte. For what purpose does the gentleman from Florida seek recognition?

Mr. Deutch. I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Deutch. Thank you, Mr. Chairman. Mr. Chairman, I would also like to offer my support for this amendment. And

I would like to address what you had expressed earlier, some confusion about the language and the difference in language.

I, first of all, would just like to acknowledge that I understand the desire to change the calculus for a bad actor bringing or even threatening to bring a frivolous lawsuit. Businesses across the country, small and large, are victim to these abusive practice, and they are too often based on bogus claims. That is why this debate is so important, and why legislation is necessary. But we have got to understand that even small changes that the Congress makes can have an outsized impact on an individual's basic property right.

As a result of *Octane* and *High Mark*, we have seen a drop in frivolous patent lawsuits, including when company sues another just to saddle them with legal expenses. And that is because the ruling gave judges more discussion in imposing fees on the losers in the most abuse cases. I agree that making these actors pay for bringing baseless suits is the right thing to do, but preserving judicial discretion is vital to that process.

And what the gentleman from Georgia's amendment does is simply establish a clear process for the Court to exercise that discretion. In connection with the civil action, the

amendment reads, "The Court is going to determine whether the position of the non-prevailing party was reasonable after a motion by the prevailing party was made," as opposed to the language in the manager's amendment, which simply says that the court shall award prevailing party reasonable fees, and then has the exceptions.

The gentleman's amendment provides a procedure for this to happen. It makes it easier to understand. It does not automatically shift within some need to come in and try to figure out whether or not it was reasonable because the Court has already ordered pursuant to the manager's amendment to shift it.

This seems like a reasonable amendment. I support it, and I hope my colleagues will as well. And I yield back.

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. Strike the last word, please.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Nadler. Mr. Chairman, I rise in strong support of the Johnson amendment. Although I am a co-sponsor of the Innovation Act, I have been clear since its introduction that

I believe its fee shifting provisions should be significantly improved. The Johnson amendment would do so in three important ways.

First, instead of the presumptive fee shifting contained in the bill, the amendment would require the prevailing party to make a motion for fees. If a non-prevailing party is going to be at risk of having to pay fees, it is only fair that the prevailing party bear the burden of showing that it is entitled to those fees.

The amendment would also set forth a more reasonable standard for when fees will be shifting, requiring that the non-prevailing party's position and conduct be objectively unreasonable in law and fact. It also makes clear that fees will not be awarded where there is undo economic hardship to a named inventor or an institution of higher education. Although it may be appropriate to shift fees to deter abusive conduct, this standard will help ensure parties with a reasonable, even if ultimately unsuccessful, case will not be on the hook for fees. We must not make fee shifting so common that legitimate inventors will be unwilling or unable to press their claims in court for fear of being required to pay the costs of both sides.

Finally, this amendment includes a sensible exception for de minimis conduct that has no bearing on the ultimate decision in the case. Fee shifting should not be an opportunity for gamesmanship. It should be awarded when a party's conduct makes it truly deserving. The Johnson amendment preserves basic fairness for plaintiffs while also providing a deterrent for abusive behavior. It is a significant improvement over the underlying bill, and I urge my colleagues to support it.

Thank you. I yield back the balance of my time.

Chairman Goodlatte. The question occurs on the amendment offered by the gentleman from Georgia.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the noes have it, and the amendment is not agreed to.

Mr. Johnson. I ask for a recorded vote.

Chairman Goodlatte. A recorded vote is requested, and the clerk will call the roll.

Ms. Williams. Mr. Goodlatte?

Chairman Goodlatte. No.

Ms. Williams. Mr. Goodlatte votes no.

Mr. Sensenbrenner?

[No response.].

Ms. Williams. Mr. Smith?

Mr. Smith. No.

Ms. Williams. Mr. Smith votes no.

Mr. Chabot?

Mr. Chabot. No.

Ms. Williams. Mr. Chabot votes no.

Mr. Issa?

Mr. Issa. No.

Ms. Williams. Mr. Issa votes no.

Mr. Forbes?

[No response.]

Ms. Williams. Mr. King?

[No response.]

Mr. Williams. Mr. Franks?

Mr. Franks. No.

Ms. Williams. Mr. Franks votes no.

Mr. Gohmert?

Mr. Gohmert. No.

Ms. Williams. Mr. Gohmert votes no.

Mr. Jordan?

Mr. Jordan. No.

Ms. Williams. Mr. Jordan votes no.

Mr. Poe?

Mr. Poe. No.

Ms. Williams. Mr. Poe votes no.

Mr. Chaffetz?

Mr. Chaffetz. No.

Ms. Williams. Mr. Chaffetz votes no.

Mr. Marino?

Mr. Marino. No.

Ms. Williams. Mr. Marino votes no.

Mr. Gowdy?

[No response.]

Ms. Williams. Mr. Labrador?

Mr. Labrador. No.

Ms. Williams. Mr. Labrador votes no.

Mr. Farenthold?

Mr. Farenthold. No.

Ms. Williams. Mr. Farenthold votes no.

Mr. Collins?

Mr. Collins. No.

Ms. Williams. Mr. Collins votes no.

Mr. DeSantis?

Mr. DeSantis. No.

Ms. Williams. Mr. DeSantis votes no.

Ms. Walters?

Ms. Walters. No.

Ms. Williams. Ms. Walters votes no.

Mr. Buck?

Mr. Buck. No.

Ms. Williams. Mr. Buck votes no.

Mr. Ratcliffe?

Mr. Ratcliffe. No.

Ms. Williams. Mr. Ratcliffe votes no.

Mr. Trott?

Mr. Trott. No.

Ms. Williams. Mr. Trott votes no.

Mr. Bishop?

Mr. Bishop. No.

Ms. Williams. Mr. Bishop votes no.

Mr. Conyers?

Mr. Conyers. Aye.

Ms. Williams. Mr. Conyers votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

Ms. Williams. Mr. Nadler votes aye.

Ms. Lofgren?

Ms. Lofgren. No.

Ms. Williams. Ms. Lofgren votes no.

Ms. Jackson Lee?

Ms. Jackson Lee. Aye.

Ms. Williams. Ms. Jackson Lee votes aye.

Mr. Cohen?

Mr. Cohen. Aye.

Ms. Williams. Mr. Cohen votes aye.

Mr. Johnson?

Mr. Johnson. Aye.

Ms. Williams. Mr. Johnson votes aye.

Mr. Pierluisi?

[No response.]

Ms. Williams. Ms. Chu?

Ms. Chu. Aye.

Ms. Williams. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. Aye.

Ms. Williams. Mr. Deutch votes aye.

Mr. Gutierrez?

[No response.]

Ms. Williams. Ms. Bass?

[No response.]

Ms. Williams. Mr. Richmond?

[No response.]

Ms. Williams. Ms. DelBene?

Ms. DelBene. No.

Ms. Williams. Ms. DelBene votes no.

Mr. Jeffries?

Mr. Jeffries. Aye.

Ms. Williams. Mr. Jeffries votes aye.

Mr. Cicilline?

Mr. Cicilline. Aye.

Ms. Williams. Mr. Cicilline votes aye.

Mr. Peters?

Mr. Peters. Aye.

Ms. Williams. Mr. Peters votes aye.

Ms. Jackson Lee. Mr. Chairman?

Mr. King. No.

Ms. Williams. Mr. King votes no.

Ms. Jackson Lee. How am I recorded?

Ms. Williams. Ms. Jackson Lee votes aye.

Ms. Jackson Lee. Thank you.

Chairman Goodlatte. Has every member voted who wishes to vote?

[No response.]

Chairman Goodlatte. The clerk will report.

Ms. Williams. Mr. Chairman, 10 members voted aye, 22 members voted no.

Chairman Goodlatte. And the amendment is not agreed to.

To inform the members, we are going to take a recess, but we have one amendment we think is noncontroversial. If it is, we will finish it when we come back, but if it is not, we will do it right now, and that is Mr. Marino's amendment. And then we will return and take up Mr. Deutch's amendment. And we will return at 12:45.

Mr. Nadler. Mr. Chairman?

Ms. Lofgren. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. There is a rather important Democratic caucus starting at 12:00. There is no way it is going to be finished by 12:45. We are going to have votes at 1:30.

Democrats will not be able to be back here at 12:45. It is a crucial caucus on the trade agreement. I would suggest that since the votes will be at 1:30, we recess until after the votes.

Chairman Goodlatte. The gentleman is aware of that. We have this congressional baseball game tonight, and I think --

[Laughter.]

Mr. Nadler. Well, with --

Chairman Goodlatte. My side of the aisle would be very appreciative if we continued the markup during that game because one of the members on your side of the aisle --

[Laughter.]

Chairman Goodlatte. So we really do need to move this along. So in light of the gentleman's request, we will recess until 1:00, and try to get something done. And then we will go when the votes occur. You never know when votes are going to occur.

Ms. Lofgren. Mr. Chairman, if I could, I am, as you know, a strong supporter of this effort. But I would really request that we have an opportunity to come back at 1:30. I am happy to work through dinner.

Chairman Goodlatte. But if votes occur at 1:30, we will

not be back here until 2:30.

Ms. Lofgren. I understand, but, you know, we understand that our pitcher is not here right now, and we actually could slip into the baseball game. But this is an essential meeting for the Democrats, and I know that the trade deal is very important to the country.

Chairman Goodlatte. Well, I recognize that, and we will not start unless members are back, but we should aim to start at 1:00, and if we cannot we will not.

Mr. Conyers. Fair enough.

Ms. Jackson Lee. Thank you, Mr. Chairman.

Chairman Goodlatte. All right. Well, let us take the gentleman from Pennsylvania's amendment. The gentleman is recognized for 5 minutes.

The clerk will report his amendment.

Mr. Marino. Thank you, Chairman. This will be the very condensed version. Marino 14. This amendment would require the Judicial Conference of the United States to --

Chairman Goodlatte. Well, let the clerk report the amendment first so we do not get too far ahead of ourselves.

Mr. Marino. Okay.

Ms. Williams. Amendment to the amendment in the nature

of a substitute to H.R. 9, offered by Mr. Marino of Pennsylvania, page 42 --

Chairman Goodlatte. Without objection, the amendment is considered as read.

[The amendment of Mr. Marino follows:]

Chairman Goodlatte. And now the gentleman is recognized.

Mr. Marino. This amendment would require the Judicial Conference of the United States to do a study on discovery rules and outcomes in jurisdictions across the country to better determine if particular discovery rules and in phases better expedite patent proceeding.

I think we all have heard about the unnecessary expense of discovery requests that are often used as an abuse tactic. I would like to know the percentage of jurisdictions that already have core document phase in place, and what percentage of those core documents are able to resolve the case. And when the core documents are not sufficient, what else is needed to resolve the case?

A study will provide us with ample facts on which to figure out if additional legislation is needed to curtail drawn-out discovery in patent legislation. And with that, I yield back.

Chairman Goodlatte. The amendment is a good one, and without objection, the committee will proceed to a vote. We still have a quorum.

So all those in favor of this amendment, respond by

saying aye.

Those opposed, no.

The ayes have it. The gentleman's amendment is passed.

The committee will stand in recess until 1:00 p.m., or as soon thereafter as possible.

[Whereupon, the committee recessed, to reconvene at 1:35 p.m. the same day.]

Chairman Goodlatte. The committee will reconvene. When the committee recessed, we were considering amendments to the manager's amendment to H.R. 9. For what purpose does the gentlewoman from California seek recognition?

Ms. Walters. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Ms. Walters of California. On page 59, insert the following after line 19 and --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Ms. Walters follows:]

Chairman Goodlatte. And the gentlewoman is recognized for 5 minutes on her amendment.

Ms. Walters. Thank you, Mr. Chairman. We can all agree that the biopharmaceutical industry is uniquely situated. This industry, which numbers 2,500 companies, employing over 270,000 people in my home state of California alone, faces a challenging business model in which intellectual property rights play a pivotal role.

On average, it costs $2.6 billion over 10 years to discover and develop a single drug that gains FDA approval. Congress has recognized the significant investment needed to develop these innovative medicines that hold the potential to revolutionize our society's health and well-being.

In enacting the Hatch-Waxman Act in the Biologics Price Competition and Innovation Act, Congress created unique patent dispute resolution procedures. These procedures accommodate the challenges facing the industry and set the proper balance between fostering the continued development of innovative medicines and allowing generics to come to the market.

Unfortunately, the unintended consequences of the recently established inter partes review process threatens to

undermine congressional intent, thus allowing abusive behavior by those seeking to game the IPR system. These consequences will inhibit the industry's ability to undertake the considerable investment in research and development needed to address the medical challenges of the 21st century.

While I support the goals of H.R. 9 overall, I offer this amendment to restore the congressionally-mandated patent dispute resolution procedures by excluding biopharmaceutical patents covering approved drug and biological products from IPR proceedings. This amendment merely recognizes and reestablishes Congress' goal of fostering a balanced governance system that properly reflects the unique circumstances of the biopharmaceutical industry.

While I am prepared to withdraw this amendment, I do so with the understanding that we will continue to work to resolve this issue. I yield back the remainder of my time.

Chairman Goodlatte. The chair thanks the gentlewoman and recognizes himself. These PTO post-grant proceedings were designed to apply to all industries, to all patentable subject matter in all areas of technology. Carving out one industry group or another would be anathema to the program and quite clearly upsets the carefully negotiated language of

the America Invents Act of 2011. These programs allow the experts at the PTO to address patent quality.

Further, this amendment trips many wires. First, our international obligations under TRIPS require us to not discriminate between areas of technology when it comes to patent law. I would be worried that the adoption of an amendment like this would send a strong signal to India, China, Brazil, Russia and others that they should feel free to adopt different legal regimes for pharmaceuticals or other areas of technology. That is absolutely the wrong message to send in the world when it comes to intellectual property.

Second, according to the CBO, this amendment may even draw a fairly significant budget score because it would increase the prices that Medicare and Medicaid pay for drugs. When I talk to my constituents, they frequently express concern about the high cost of prescription drugs. This amendment would not alleviate that problem; it would aggravate the problem. I certainly would have to answer to my constituents as to why I allowed a provision into a bill that makes their medicine more expensive.

The purpose of Hatch-Waxman is to incentivize generics to challenge invalid drug patents and thereby ultimately

provide cheaper access to drugs. This amendment would turn that purpose on its head and make the filing of an Abbreviated New Drug Application, an ANDA, an event that makes it harder to cancel an invalid patent.

When it comes to having the experts at the PTO address the very patents that they reviewed and engage in quality control, it makes little sense to create an exemption that would shield bad patents and make medicine more expensive for every American.

We took strong steps in this bill to address the legitimate concerns raised by stakeholders, including pharmaceutical companies, about the inter partes review proceedings at the PTO. We have heard for months that the number-one concern about IPR was the risk that it could be used to engage in market manipulation or extortion. The bill addresses those concerns and stops such behavior dead in its tracks. Additionally, we have included provisions that will ensure fairness and due process at the PTO.

Nonetheless, I share the gentle lady's concern about that problem and am willing to continue to look at additional ways to make sure that the IPR process is not abused in the way that it has been through market manipulation. So I thank

the gentle lady for withdrawing her amendment and commit to working with her.

For what purpose does the gentleman from Georgia seek recognition?

Mr. Collins. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized.

Mr. Collins. Thank you, Mr. Chairman. Again, thank you for your work on this, but I also wanted to speak in favor, in support of this amendment. I appreciate that my colleague from California is going to withdraw that, but I appreciate her leadership on this issue.

Since the enactment of Hatch-Waxman and the resulting generic drug industry, Congress has continually recognized the uniqueness of patent litigation in the biopharmaceutical industry. I believe as this legislation moves through committee and to the floor, there are additional conversations that need to be had about exempting certain biopharmaceutical patents from the IPR process.

Striking the appropriate balance is not an easy task, and I do not believe it is one that we can solve today, but I do think it should be addressed prior to floor consideration. In my home State of Georgia, the biopharmaceutical sector

directly supports over 10,000 jobs and indirectly supports almost 40,000. This dynamic and growing industry in Georgia is estimated to have $8.2 billion in total economic output from just a few years ago, and that number continues to grow.

I am concerned about moving forward with legislation on the floor that would needlessly create an increased risk and uncertainty to an already lengthy, costly, and uncertain biopharmaceutical R&D enterprise, and I appreciate so much the gentlewoman bringing attention to this issue, and I would like to work with her as this legislation moves through the process.

I believe we can craft an appropriate compromise that preserves the goals of H.R. 9 and the hard work of the chairman and others, but also recognizes and respects the uniqueness of patent litigation in the biopharmaceutical sector and the established processes that have resulted in the balanced approach that we have of protecting incentives for innovation while also creating the regulatory pathways for abbreviated applications for FDA approval.

And with that, Mr. Chairman, I yield back.

Chairman Goodlatte. The chair thanks the gentleman. Does the gentleman seek to speak on this?

Mr. Johnson. I do.

Chairman Goodlatte. The gentleman from Georgia is recognized.

Mr. Johnson. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized.

Mr. Johnson. Thank you, Mr. Chairman. The Walters amendment I am proud to be in support of. It restores Hatch-Waxman and the BPCIA primacy when a treatment has earned FDA approval. Challenges to the patent which supports the treatment should be conducted through the system laid out in Hatch-Waxman and BPCIA.

When an innovator has not only garnered a patent on their invention but also navigated the FDA approval process, it is grossly unfair to take away that property right without clear and convincing evidence that the patent is invalid, as established in Federal court.

This is in response to the fact that patents in the biopharma space are fundamentally different. When pharmaceutical companies have a patent granted by the PTO, they are not able to immediately capitalize on the value of that patent. Instead, they spend an average of 8 to 10 years and potentially billions of dollars to prove that not only is

the patent unique but that the treatment it supports is safe and effective according to the FDA.

This requires a huge investment in clinical trials. The FDA review is designed to be a rigorous process, and less than 12 percent of candidates that enter clinical testing make it to approval.

When the inter partes review process was enacted as part of the America Invents Act, no one argued that the patent review process dictated in Hatch-Waxman and the BPCIA was not working. Indeed, at the time the issue was not raised because the stakeholders believed that the incentives in Hatch-Waxman would make the IPR process superfluous.

So to allow Hatch-Waxman and BPCIA to be undermined would be a travesty. Not only would key incentives for generics to challenge patents be lost, but investment in the expensive, time-consuming, laborious work necessary to discover new drugs and bring them safely to market would be harmed. Both generics and cures are at stake.

Hatch-Waxman and BPCIA allow successful innovative drugs to come to market, but it also allows a vibrant generic drug industry. 88 percent of prescriptions filled in the U.S. are for generics, thus allowing the United States to

simultaneously be the world leader on developing cures.

Hatch-Waxman and BPCIA must be restored, and with that I yield back.

Chairman Goodlatte. The chair thanks the gentleman. The gentlewoman's amendment is withdrawn.

We have a vote on the floor. For what purpose does the gentleman from Pennsylvania seek recognition?

Mr. Marino. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes. We have 3 minutes and 17 seconds remaining on the vote.

Mr. Marino. I will do it in less than 2 minutes. I do agree with the Chairman's assessment of carve-outs. Once we start carve-outs, we have a plethora of carve-outs coming down the road. However, I do agree with my colleagues' assessment of the manipulation, the unintended consequences here. So I do look forward to playing a part in curtailing or eliminating those unintended consequences and that market manipulation.

With that, I yield back.

Chairman Goodlatte. If the gentleman would yield, I extend the commitment to all those who spoke to continue to

work on finding a way forward on this that works. And again, I appreciate the gentlewoman withdrawing her amendment.

The vote on the floor now has two-and-a-half minutes remaining, and still 377 members, including all of us, have not voted. So, the committee will stand in recess. We will reconvene immediately following this series of votes.

[Recess.]

Chairman Goodlatte. The committee will reconvene. When the committee recessed, we were considering amendments to the manager's amendment to H.R. 9. For what purpose does the gentleman from Georgia seek recognition?

Mr. Johnson. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Johnson of Georgia, page 5, strike --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Johnson follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Johnson. Thank you, Mr. Chairman. When talking with stakeholders about this legislation, they often say that the goal of H.R. 9 is to curb abusive patent litigation, and that H.R. 9 is targeted at patent trolls, what they call patent trolls, or non-practicing entities that bring frivolous lawsuits. While that is the story everyone is shopping around, the language of the bill goes much farther than just targeting patent trolls, which are entities that acquire patents just for the purpose of litigating and harassing business owners.

Many plaintiffs, or, excuse me, many plaintiffs forced to file suit to protect their patents are not patent trolls. My amendment would exempt original and joint inventors and original assignees of inventions from heightened pleadings, discovery stay, and fee shifting. An original inventor is the individual or entity that filed the patent at issue.

By adopting this language, we will narrow the scope of H.R. 9. If the intent of this bill is to go after patent trolls, then let us tailor the language to get at patent trolls. This bill treats original inventors the same at

trolls when it comes to imposing new litigation burdens. Does this committee believe that original investors are -- excuse me -- original inventors are trolls? They earned their patents. They invested their time and skill and resources to get the patent. Why are we placing new burdens on their ability to protect the patents that they earned?

Many of these original inventors are individuals or small startup companies who come up with a new idea that literally changes the world. If we exempt original inventors from these new provisions, cases brought by original inventors will continue to be governed by current law. The current law has worked for original inventors, and the courts have taken it upon themselves to refine the law to provide even more guidance.

Let us narrow the scope of H.R. 9 so it goes after the intended bad actors, not America's most creative people. Thank you, and I urge my colleagues to vote with me on this amendment. And I yield back.

Chairman Goodlatte. The chair thanks the gentleman and recognizes himself in opposition to the amendment. The gentleman's amendment would carve out patent applications and their employers from the heightened pleading requirements of

this bill. The tens of thousands of patents acquired by Fortune 100 companies could be asserted without meeting requirements that they explain to someone which product is being accused, and how those products infringe the claims of the patent. Providing this type of basic notice to defendants is common sense, and will make litigation more efficient.

I see no reason why a multi-billion dollar company should be exempted from these requirements if they sue a small business. The amendment also an exemption from fee awards for patent applicants and their employers. Many large companies apply for their own patents or assigned the patents of their employees. This amendment effectively makes these multi-billion dollar companies immune from accountability for unreasonable litigation positions and tactics.

The amendment also includes a similar carve-out from the customer stay provision for patent applicants and their employers. This would deny the protections of the customer stay to mom and pop retailers and consumer end users who are being sued by a major corporation that prosecuted its own patents. There is no justification for this kind of exemption. The carefully crafted customer stay provision

ensures that the litigation burden will borne by the manufacturer of the product rather than the retailer or customer end user.

These manufacturers are in a better position to understand and defend against the claims of infringement. It makes no sense to allow suits against customers and retailers to go forward when the manufacturer has intervened and is willing to defend simply because the corporate plaintiff obtained its patent from it own employees.

It is for these reasons and others that I strongly oppose this amendment, and urge all of my colleagues to do the same.

The question occurs on the amendment offered by the gentleman from Georgia.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the noes have it, and the amendment is not agreed to.

For what purpose does the gentleman from Pennsylvania seek recognition?

Mr. Marino. Mr. Chairman, I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Marino of Pennsylvania, page 52, after --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Marino follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Marino. Mr. Chairman, without objection because we were in a hurry to get over to vote, I would like to add into the last amendment that was passed by voice that I have colleagues that supported, that are co-sponsoring this with me. And that would be Congressman Franks, Congressman Jeffries, and Congressman Deutch.

Chairman Goodlatte. Without objection, it will be so noted.

Mr. Marino. Mr. Chairman, while the entire patent troll practice is appalling to me, I am particularly concerned with demand letters that target small businesses -- the hometown bakery owner, the entrepreneur -- founding a startup who has just five employees, or the franchise owner who has little to no legal department apparatus in place. These demand letters are in all reality thinly-veiled threat letters that use excessive legal jargon and litigation scare tactics to trick recipients into cutting big checks, even if no infringement has occurred.

That said, I am not opposed to general business correspondences to deal with disputes, but my amendment would

target the practice of sending widespread letters with little evidence on any particular recipient. Maybe more well known is the fishing with dynamite approach. I think it is high time we put measures in place to look out for small businesses and crack down on these abusive practices.

Following a proposal from the bill, Congressman Deutch and I co-sponsored with Congressman Jared Polis the Demand Letter Transparency Act. I wanted to offer an amendment to establish a database to provide demand letter recipients with more information. I am proposing a one-year pilot study to be concluded at the United States Patent and Trademark Office in which they would create a searchable database of demand letters, along with information on the sender of such letters. This database would provide transparency to the public and would allow recipients find one another in an effort to join together in defense against the alleged infringement, or simply to be better informed in determining how or if they should respond to the letters.

This is a common sense pilot program that will finally shed some light on the demand letter practice that is happening and hampering innovation and the economy, and bring parity back to our patent system. Since the amendment was

filed, I have had some suggestions from other members, and at this time I will withdraw this amendment based on the fact that there were some good ideas that came out that we can develop this and make sure once the proper language is put in here, we can have a sound piece in this total legislation.

And with that, I yield back.

Chairman Goodlatte. The chair thanks the gentleman for withdrawing his amendment, and we will be happy to work with him moving forward on the issue of concern to him.

For what purpose does the gentleman from Florida, Mr. Deutch, seek recognition?

Mr. Deutch. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Deutch of Florida, page 30, line 21, insert after --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Deutch follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Deutch. Thank you, Mr. Chairman. Mr. Chairman, I offer this amendment to highlight a potential loophole within the customer stay provision of H.R. 9. While I support the principle of protecting end users and retailers from abusive litigation where they are passive users of technology, I am fearful that as it is written, the customer stay could be used by entities far beyond these innocent victims of trolling. Although allegedly directed at end users who purchase products off the shelf, the amended stay provision remains overbroad, and would unfairly shield large infringers from patent litigation, leaving patent owners without a remedy for their damages.

As amended, H.R. 9 could force a patent owner to sue an upstream component manufacturer instead of a sophisticated device maker even if the device maker is the direct infringer of the patent. This could then require a patent owner to pursue an indirect infringement action against the manufacturer of a component before it has had an opportunity to sue the infringing device maker for the direct infringement.

Recent cases in the Supreme Court and the Federal circuit make the task of proving indirect infringement exceedingly difficult. This is in part because we want patent owners to sue the party most responsible for the infringing activity, namely the direct infringer in my example, the device maker. This amendment would clarify that a stay is only appropriate where the manufacturer defending the suit on behalf of the customer is a direct infringer of the patent. It would grant a stay to the covered customer only when the patent owner can proceed against a directly infringing manufacturer. My amendment would ensure the patent owners will not be left without a remedy for infringement because the most culpable infringer gets a stay of litigation.

Mr. Chairman, I am going to withdraw this amendment, but I hope to continue to work with the chairman and other stakeholders to ensure that as we address the abuses targeting innocent users, we do not make it impossible for patent owners to enforce their patents.

Chairman Goodlatte. The chair thanks the gentleman, and would be happy to work with the gentleman moving forward on the gentleman's concern.

Mr. Deutch. Thank you. Since I have some time, I would like to yield to Mr. Peters.

Chairman Goodlatte. The gentleman from California is recognized on his own time for 5 minutes.

Mr. Peters. Thank you. Thank you, Mr. Chairman. I understand the amendment will be withdrawn, but I want to say I very, very much support this concept. If you are a small inventor with a legitimate patent without the means to retain the services of a large experienced law firm to defend your intellectual property, you really will be left without recourse. And the idea is to go after abusive litigation, but to protect those people who need protecting. In this case, you know, we are aiming the gun at the wrong target, and I think Mr. Deutch is on the right track. And I, too, would like to work with you to see if we cannot rectify this.

Thank you, Mr. Chairman. I yield back.

Chairman Goodlatte. The amendment is withdrawn?

Mr. Deutch. It is.

Chairman Goodlatte. The gentleman from Rhode Island, for what purpose do you seek recognition?

Mr. Cicilline. Mr. Chairman, I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Cicilline of Rhode Island, page 5, line 22, insert --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Cicilline follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Cicilline. Thank you, Mr. Chairman. Mr. Chairman and members of the committee, my amendment will exempt universities and their non-profit research foundations from the onerous fee shifting provisions of this legislation when such an award would impose a severe economic hardship on these institutions.

The fee shifting provision in this bill creates a new default rule: presumption that the legal position or conduct of the non-prevailing party is unreasonable. This assumes that those who use patent litigation to protect their intellectual property rights are bad actors. It assumes that because many litigants abuse the system, the entire system must be skewed at the expense of innovators acting in good faith.

While patent trolls do exact a great cost upon the economy, institutions of higher education do not regularly participate in such behavior. Professor James Besson of Boston University School of Law estimates that patent trolls cost the economy $29 billion each year, but that colleges and universities participate in only 1 to 2 percent of these

cases.

My amendment would partially correct the imbalance created by the fee shifting provision, providing an exception for institutions of higher education. Without this exception, universities could be punished for the actions taken by the licensees of their intellectual property regardless of whether or not the institution itself consented to the litigation. Moreover, my amendment recognizes the vital role of these great institutions fostering innovation in their incredible to the public interest.

As the Association of American Universities points out, research at U.S. universities led to 5,200 patents and the formation of 818 new startup companies in 2013 alone. Previously such research allowed us to travel to the stars with the invention of rocket fuel by Robert Hutchings, Goddard at Clark University in Massachusetts. It led to the elimination of rickets, a crippling childhood bone disease with the innovation of vitamin D fortification by Harry Steenbock at the University of Wisconsin. And it allowed us to eradicate polio through the discovery of vaccines by Jonas Salk at the University of Pittsburg. And it led to the development of the computers that rely on today through the

invention of the first large-scale computers at the University of Pennsylvania.

This amendment preserves the ability of colleges and universities to protect their research and will pave the way for even greater discoveries in the future. I urge my colleagues to support this amendment, and I yield back.

Chairman Goodlatte. The chair thanks the gentleman, and recognizes himself in opposition to the amendment. The amendment would alter the carefully negotiated fee shifting language in the bill. The bill provides an example of a special circumstance that would allow a judge to avoid awarding fees. That provision recognizes severe economic hardship to a named inventor.

This is a very specific example. It is the man or woman at the startup or in their garage. This example recognizes the importance of providing a safeguard to the under capitalized, but well intentioned, small inventor. This amendment would turn that positive example on its head by including institutions with multi-billion endowments and university-affiliated patent assertion entities to avoid paying fees if they bring an unreasonable case in fact and law, or engage in abusive litigation tactics.

And I want to stress that because no university acting properly, and I think the gentleman is correct that in the overwhelming majority of cases they do act properly. But no university acting that way should in any way fear the fee shifting provisions in this bill because it is only when they bring a claim that has no reasonable basis in law or fact that would allow them to be subjected to paying attorney's fees.

During her testify before this committee, the PTO director, Michelle Lee, specifically spoke out against such carve-outs, noting that "Any entity that engages in abusive behavior should be held accountable." There is no policy rationale for providing such a specific carve-out to large enterprises in the bill. This would also weaken the bill's fee shifting provisions across the board for all entities. It would require the Federal circuit to maintain two different bodies of case law. These would inevitably bleed into each other over time, and current law would seep into and weaken the standard applied by this bill.

Moreover, one thing we have learned from this process is that carve-outs create an appetite for more carve-outs. This type of provision mocks the real inventors, those who come up

with the ideas and innovations that our country is founded on. And as a result, I must oppose the gentleman's amendment.

The question occurs on the amendment offered by the gentleman from Rhode Island.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the noes have it, and the amendment is not agreed to.

For what purpose does the gentleman from Georgia, Mr. Collins, seek recognition?

Mr. Collins. I have an amendment at the desk, Number 31, Mr. Chairman.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Collins of Georgia, Mr. Deutch, Ms. Lofgren, and Mr. Farenthold, page 15, strike line 7 and all that follows through page 17, line 23 --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Collins, Mr. Deutch, Ms. Lofgren,

and Mr. Farenthold follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Collins. Thank you, Mr. Chairman. I am pleased to offer this amendment with Mr. Deutch, Ms. Lofgren, and also Mr. Farenthold. The goal of our amendment is to fight discovery abuse in patent litigation, again has been a stated goal of how we make this better. This is what we are looking at to do so.

Exploitation of the discovery process is at the heart of abusive practices all too often employed in patent litigation. Discovery is a tool for justice and transparency that can be a dangerous and destructive weapon without proper checks and balances. But even in a case where litigation is clearly frivolous, the cost of discovery for the defendants can reach into the millions. The threat of astronomical discovery costs can be enough to compel companies to settle, even when they believe the claim against them would not stand up in court. And smaller companies have even less choice and recourse against frivolous claims.

Even with the possibility of fee shifting on the back end, the up front costs of discovery are simply too high, so they are forced into settlement payments based on litigation

costs rather than the merits of the case. Unless we curb abusive discovery practices, many companies, both large and small, will continue to be effectively denied access to the court simply because they cannot afford it.

We would be outraged if this situation existed in any other area of the law, and I believe we should be equally outraged that it is occurring in the patent litigation arena today. Every individual and every company regardless of shape or size deserves the right to have their day in court.

Unlike the underlying bill, the manager's amendment only contains a section that stays discovery while a motion to transfer venue is pending. Our amendment restores the strength of H.R. 9 by also allowing a stay of discovery while the motion to dismiss is pending. This restores to the litigation process by preventing companies from being financially exploited through discovery and situations where the claims are meritless and will be thrown out. While a stay based on a venue motion is helpful, it is inadequate. A discovery stay should also apply when the defendant has filed a motion to dismiss the case under Rule 12(b) of the Federal Rules of Civil Procedure.

A patent case may present a dispositive issue, like

patent validity, that can be resolved efficiently through a motion to dismiss. This path benefits innovation by weeding out bad patents without imposing huge costs on productive companies. But that is true only if discovery is stayed while the court considers the motion. Without a stay, some companies will have to settle to avoid discovery costs, even when the validity challenge through a motion to dismiss ought to be available to them. And if they do proceed, the expense of discovery is wasted if the case is dismissed.

A stay based on a motion to dismiss also includes safeguards to protect patent owners. Under the Federal Rules of Civil Procedure, a motion to dismiss must be filed before the time for filing an answer, which is only 21 days after the patent owner files the complaint, sometimes extended another 30. This means that the motions cannot be serially filed and strung out to get multiple overlapping stays, and frivolous motions filed only for the purpose of getting a stay will not be successful in delaying litigation.

Judges can and do quickly reject weak motions to dismiss, sometimes ruling immediately from the bench. It is common practice, too, for a judge to rule on all motions to dismiss quickly. Also it is important to note that the

discovery provision itself in Subsection (c) requires courts to decide motions to dismiss early, and any delay of litigation will be minimal.

I would urge my colleagues to support our amendment to help parties avoid expensive, wasteful discovery that might otherwise be leveraged by those engaging in frivolous litigation practices. And I really want to thank Mr. Deutch, Ms. Lofgren, and Mr. Farenthold for their hard work and leadership on this issue.

And with that, Mr. Chairman, I yield back.

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentleman from Michigan seek recognition?

Mr. Conyers. I think I am going to oppose this amendment unfortunately.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Conyers. Thank you, Mr. Chairman. This amendment would likely lead to more costly litigation and will not help lead to case resolution any quicker. Instead, it could provide more opportunities for bad actors to abuse the discovery process. It does not prevent bad actors from

continuously delaying the resolution of the case by filing motion upon motion to delay proceedings. In fact, it will provide more opportunities for parties to file more motions, and that will only prolong litigation, of course, and increase costs for the opposing party.

We should be taking, I think, a more balanced approach. And for those reasons, I urge my colleagues on the committee to oppose this amendment, and I yield back the balance of my time.

Chairman Goodlatte. The chair thanks the gentleman and recognizes himself. I am willing to accept this amendment while recognizing that as we go to the floor we will need to continue to look at this provision to ensure that the provision works effectively, does not prevent parties from gaining an early understanding of the case, and does not result in undue delays in litigation.

Motions to dismiss are typically denied in patent cases, but under either *Iqbal*, *Twombly*, or the heightened pleading requirements in the Innovation Act, parties in most cases may have an incentive to file motions to dismiss. Though many may be non-frivolous, they will ultimately be denied. Additionally, such non-preliminary discovery stays, such as

motions to dismiss, are rarely case dispositive. They may result in automatic delays while the motion is pending, and we need to make sure this does not simply become a new abusive litigation tactics that would delay cases and add to the burden and expensive of litigation.

This amendment purports to mimic the version in the Senate. This amendment, however, fails to allow interrogatories and other early discovery. I think such protections are important. I am also concerned that it may take judges months or even years to rule on these motions, thereby unduly delaying cases and potentially clogging the courts.

Though I have these documents, I look forward to working all the parties to amendment, and I thank the gentleman from Georgia and the other members offering the amendment for doing so. And I am pleased to work with them as we move toward the floor.

For what purpose does the gentlewoman from California seek recognition?

Ms. Lofgren. Thank you, Mr. Chairman. I speak in favor of the amendment.

Chairman Goodlatte. The gentlewoman is recognized for 5

minutes.

Ms. Lofgren. The limitation of discovery until after claims construction or markman I think is an important cost-cutting measure, and would prevent abusive litigators from using one-sided discovery costs to essentially extort a settlement.

Now, this saves not only discovery costs when there is a settlement before or immediately after markman, it also encourages early resolution of the markman process, which itself encourages earlier settlements, which reduces other non-discovery litigation expenses. Last year, Professor Mark Lemley at Stanford, who is someone I respect a great deal, did a study and found that more than 90 percent of the lawsuits filed in 2008 and 2009 were settled early before the court resolved summary judgment or went to trial.

Now, I understand the Senate has a different approach that I think would have the opposite effect of dragging out trials. And I understand the Senate's position. I do not understand why in the manager's amendment we would have an even weaker stay than the Senate's provision, and so that is why I think this amendment would at least bring us up to par with the Senate's discovery stay provisions, which I think is

actually just the minimum of what we should be doing to reduce costs and prevent discovery extortion.

And I would note further, and I will have an amendment that we can discuss later in this process, in terms of the chairman's point about heightened pleadings, we have also reduced that protection in the manager's amendment and in the bill. So I think this is an important step forward. Without inclusion in this process, I would hard pressed frankly to support the bill. And I understand the chairman's concern. I look forward as always to working with the chairman as this process forward. But I think this is not only an important, but I would say essential change.

And with that, Mr. Chairman, I would yield back.

Chairman Goodlatte. The chair thanks the gentlewoman.

For what purpose does the gentleman from Florida seek recognition?

Mr. Deutch. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Deutch. Thank you, Mr. Chairman. Mr. Chairman, I also want to support this amendment, and I want to thank Mr. Collins for his work on this, and I am happy to join with him

on this improvement to the bill.

I think the language in the underlying bill, however well meaning, does need improvement, and I have another amendment at the desk that actually would substitute the Senate language because I think that that version, by giving the court discretion to allow limited discovery if the court deems it necessary strikes an imminently fair balancing of interests, which was, I think, recognized in the way that that language came out of the Senate. But if the committee is not willing to accept that, I think this is another good option.

Everyone involved in a legitimate patent dispute has an interest in having venues, severance, and other preliminary motions decided early on, and before either side invests in substantial discovery. This will keep from wasting the court's time, and may help deter troll suits that count on drawing out costly discovery in the early phases of a suit.

And I still think there are some timing issues that could be improved. I have some fears that giving a defendant 90 days to file a motion to stay discovery while a reasonable amount of time generally could set up potential conflicts for cases where judges act quickly in issuing a scheduling order.

I am not sure how you balance providing a reasonable window for a defendant to prepare a thoughtful motion here, but I do worry about unintended consequences.

Overall, however, I think this is a significant improvement, and I thank Mr. Collins, Ms. Lofgren, and Mr. Farenthold for their work on it. I urge my colleagues to support it, and I yield back the balance of my time.

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentleman from Texas seek recognition?

Mr. Farenthold. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Farenthold. Thank you very much, and I am happy to hear the chair is willing to accept this amendment and work with us as we move forward. But I do want to take this opportunity to reiterate how I think the inclusion of this is absolutely critical to addressing the problem that we are attempting to solve, and that is abusive practices by patent trolls.

Listen, it is a simple business decision when you are faced with paying a patent $10,000 or spending hundreds of

thousands of dollars just to get through the discovery phase of litigation. I mean, it is an obvious business case, and really does enable patent trolls to move forward. You make a business decision and pay off the extortion. But if we can at least stay this expensive discovery until the most egregious cases are weeded out through motions to dismiss, I think will go a long way towards addressing bad actors.

This language is substantially similar to language I introduced, along with Congressman Jeffries, in the 2013 Patent Litigation and Innovation Act, and puts in place a well understood, well vetted process for weeding out frivolous claims. And I appreciate the committee's willingness to work with us to improve this language, and I urge my colleagues to join us in supporting this amendment, and yield back.

Chairman Goodlatte. For what purpose does the gentleman seek recognition?

Mr. Johnson. I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Johnson. Mama, mama, the patent trolls are coming, the patent trolls are coming.

[Laughter.]

Mr. Johnson. You know, what we are doing with this amendment, Mr. Chairman, is gumming up the works of the patent litigation jurisprudence that we have relied upon in this country, which should have some changes made to get at the patent trolls. They are a real problem, but every plaintiff is not a patent troll.

And so, what this amendment would do is gumming up the works, like I say. It will result in a drawing out of the litigation. It will make it more expensive for plaintiffs to assert their just claims against patent or alleged patent infringers. And so, when you take it along with the chilling effect of the fee shifting and the heightened pleading standards, this just really distorts the playing field so that it is tilted heavily in favor of those accused of patent infringement.

And for that reason, I would be opposed to this amendment, and I would ask my colleagues to support my opposition. And with that, I yield back.

Chairman Goodlatte. The chair thanks the gentleman.

The question occurs on the amendment offered by the gentleman from Georgia, Mr. Collins.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it, and the amendment is agreed to.

For what purpose does the gentleman from California, Mr. Peters, seek recognition?

Mr. Peters. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Peters of California, page 5, strike lines 3 through 5, and insert the following.

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Peters follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Peters. Thank you, Mr. Chairman. Just for the benefit of my colleagues, we have originally put an amendment that had two issues with respect to small businesses. We understand there might be some support from across the aisle for half of it, so we split it into two. And so, I will offer this amendment and then offer the other half at the end.

We have heard a lot about this bill from people across San Diego, and there is a lot of concern that the bill tilts the playing field in an unintended, but significant, way against legitimate innovators, inventors, startups, and small businesses that are creating new inventions and quality jobs in my region. And so, this amendment does not fix every problem I have with the bill, but it does take a step to ensure that small businesses are protected against unfairly high pleading standard when enforcing their own patents and protecting them from abusive litigation.

So this amendment, which, again, is half of what was originally on file, would exempt small entities from the burdensome pleading requirements imposed by the current bill,

which requires that all patent plaintiffs plead highly specific information that no patent owner, much less a small business, can be expected to know at the outset of a case. Small startups are a major engine of innovation in the country, and unlike their larger competitors, many will lack the resources to hire expensive, sophisticated attorneys and engineers to help them investigate and reverse engineer infringing products from the get-go. This amendment would level the playing field so that small businesses do not have to jump through the hoops that are needlessly costly and burdensome and intended for real abusers.

And, Mr. Chairman, with that, I would yield back.

Chairman Goodlatte. The chair thanks the gentleman --

Ms. Jackson Lee. Mr. Chairman?

Mr. Issa. Mr. Chairman? Oh, I am sorry.

Chairman Goodlatte. -- and recognizes himself in opposition to the amendment. This amendment would exempt so-called small business concerns and independent inventors from the bill's heightened pleading requirements. Neither of these terms are defined in the amendment. The Small Business Administration defines a small business as a manufacturer with up to 500 employees. Almost every patent troll in the

country would seem to meet this definition.

The term "independent inventor" simply seems to mean the inventor that filed the patent application. This could be a large company that simply filed its own patent applications and is independent of other entities. This could include large corporations that make billions of dollars and own thousands of patents.

The amendment would exclude patent trolls and many major corporations from the heightened pleadings requirements. Defendants sued by these entities, however, deserve to know which products they are being sued because of, and why the plaintiff thinks those products infringe. For these reasons and many others, I am out. I strongly oppose the amendment.

[Laughter.]

Mr. Issa. Would the gentleman yield?

Chairman Goodlatte. I would be happy to yield to the gentleman form California.

Mr. Issa. I will be brief. I think you said it well, uniquely well, Mr. Chairman. But, again, one of the interesting things is, and the gentleman from California and I agree on most things when it comes to intellectual property protection. But the exemption for so many of these entities,

virtually all of them, would be the equivalent of saying that you are going to allege, because you are a homeowner that your neighbor has built a fence on your property, but you have no obligation to define why you believe it is on your property, what you have done to discover that, and as a result, why that fence is on your line. The requirement in this act is no more specific than that. What is the person's product, and how does it read on your patent claims?

So I certainly hope that the gentleman when he sees this bill become law and he sees it in action will realize that no small entity is required to know more than they know. They are simply required to have a level of due diligence to be able to claim why it is they are suing with sufficient specificity that the defendant can either stop the infringing act or make such changes as are necessary to work around the patent. And that is by definition the sense of innovation that we want to have companies producing products to have, and any good inventor normally builds on patents of the past no different than somebody who is producing a product alleged to infringe.

So I, too, will oppose this amendment, but recognize that my good friend from California means well in so many

things related to intellectual property reform. Thank you, Mr. Chairman. I yield back.

Ms. Jackson Lee. Mr. Chairman?

Chairman Goodlatte. For what purpose does the gentlewoman from Texas seek recognition?

Ms. Jackson Lee. I am sorry. Strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for 5 minutes.

Ms. Jackson Lee. Mr. Chairman, thank you very much. I think when I spoke earlier, I had among other thoughts, and this might have been a clearer thought, which is that we have always worked together in this committee on the issue of innovation and technology because we value it very much, and we value our role as the Judiciary Committee in the oversight of this issue.

I rise to support the gentleman's amendment, and, again, it seemed when the gentleman was speaking, he was offering an olive branch as to how he would proceed going forward. I believe that this amendment has a purpose, and I think the purpose deals with Section 281, and it makes a clear statement that original inventors are not or should not be classified continuously or equal to those that are considered

patent trolls. And that is the term that permeates this legislation, that it thwarts innovation, and many of us know that this concept of patent trolls does exist, and they can create havoc.

But many who we are supporting who have concern about this legislation are not that. I heard my good friend from California, my other good friend on the other side of the aisle, talk about the nebulousness of this. And I would just suggest that whatever happens to this amendment, which I am supporting, that going to the floor, we can refine with a definition so that the protection is still there, carving out the onerous pleading requirements of these small guys who are original inventors and who mean no harm. They are not patent trolls. They are just simply trying to rise above the water rim and not drown.

And I am hoping that we can consider these small businesses. I heard someone define, and they are absolutely right. The SBA has a wide range of definitions of what they consider small businesses. Well, I am prepared -- I am not speaking for Mr. Peters -- to have a definition that is actually defined in the bill so that that those individuals will not suffer from some of these provisions that stifle

their growth and innovation a well.

So I rise to support the Peters amendment, and believe that if not in its present form, that we have enough creativity to get this amendment passed and have the impact that I know Mr. Peters would like it to have. And I thank him for his work.

I yield back.

Chairman Goodlatte. The question occurs on the amendment offered by the gentleman from California, Mr. Peters.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the noes have it, and the amendment is not agreed to.

Does the gentleman from California have another amendment to offer?

Mr. Peters. Mr. Chairman, I have another amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Peters of

California, page 2, strike line 10 and all that follows through page 5, line 5 --

Chairman Goodlatte. Without objection, the amendment will be considered as read.

[The amendment of Mr. Peters follows:]

Chairman Goodlatte. And the gentleman is recognized for 5 minutes on his amendment.

Mr. Peters. Mr. Chairman, this is the second half of the suggestion I made with respect to small businesses, and I will at the end of this seek consent to withdraw it. But it has to do with the consumer stay provision.

My amendment would specify that small businesses and only small businesses are entitled to a mandatory stay of litigation when accused of selling an infringing product, and where a manufacturer is available to step into the litigation. That would ensure that small businesses are protected from litigation when the manufacturer who designs or assembles the infringing product and, thus, profits the most is available to defend the suit.

In my district in San Diego, I heard from the general manager of a local hotel who bought security equipment off the shelf, then was sued for patent infringement for simply using that equipment. And rather than litigate, the hotel decided to settle. This is the kind of case that the customer stay provision is meant to protect against, and my amendment will ensure that businesses and end users who do not sell off the shelf product for a profit cannot be dragged

into a court without the benefit of the customer stay.

And my amendment would also ensure that small businesses will get relief from infringers. At an earlier hearing on this bill, we heard from Brian Pate, one of Mr. Issa's constituents just up the road from my district, who is the founder of the elliptical bicycle company ElliptiGO. Mr. Pate told us that if the customer stay provision becomes law, he would be unable to enforce his patents against the manufacturers he knows are making infringing bicycles overseas or against the American companies who could someday import and sell them. And this amendment would ensure that large companies in the U.S. could not sell infringing products with impunity.

Again, Mr. Chairman, I see this as an unanswered question in the bill as it is currently written, and I hope to work further on this before it gets to the floor. And without objection, I would withdraw the amendment.

Chairman Goodlatte. The chair thanks the gentleman. The amendment is withdrawn.

For what purpose does the gentleman from Utah seek recognition?

Mr. Chaffetz. Mr. Chairman, I have an amendment at the

desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Mr. Chaffetz of Utah, strike Section 9 and re-designate subsequent sections, and amend the table of contents accordingly.

[The amendment of Mr. Chaffetz follows:]

Chairman Goodlatte. The gentleman is recognized for 5 minutes on his amendment.

Mr. Chaffetz. I thank the chairman, and I really do appreciate you bringing up this bill overall. The need to tackle this is very much needed in the marketplace. It will offer relief to a great number of people, provide and streamline the process. It will make it a fair and better process. So I truly do support the underlying bill.

But as you know, Mr. Chairman, there were some adjustments in literally the last 48 hours or so that I think caused a lot of consternation and a lot of problems and challenges that need more time and review. And what my amendment does is it strikes the section containing changes to the post-grant review process and the inter parte review process to allow both review processes to remain as they were originally crafted in the America's Invents Act of 2011.

So we had a standard. It changed in the last 48 hours. What I am suggesting that we could potentially all agree to is going back to as it was originally crafted in the America Invents Act of 2011. I would also note, Mr. Chairman, that this amendment, we have gotten some good support from Micron, Apple, Applied Materials, Dell, SAP Software and Solutions.

I really am committed to crafting a solution to curb litigation abuses while balancing the concerns of all parties involved, and especially in the pharmaceutical and tech industries. Unfortunately, the current language adopted in the manager's amendment makes significant changes to this inter parte review process. Congress established the IPR process as part of the America Invents Act of 2011 to allow the PTO to fix its mistakes in a relatively inexpensive proceeding as an alternative to having courts do it in the litigation that can cost millions. However, virtually all of the proposed changes to IPR would make the proceeding more like litigation, more expensive, more complex. It would not fix the goals that we had originally set out to do.

So the proposed changes to the claims construction standard in IPR proceedings from broadest reasonable interpretation to one of ordinary skill and art would alter unnecessary and significant difference between the court system and the patent office standards for claims and construction. The proposed language for the IPR significantly changes the process. That is the last best opportunity to avoid expensive district court litigation to weed out weak patents that should have never seen the inside

of a courtroom.

More time and input is necessary and appropriate to consider the impact of these changes. For that reason, I would ask members to support this amendment, allow for continued consideration. I would ask you, Mr. Chairman, to work with us on this and have other discussions with stakeholders. Certainly you have some of the biggest companies in the world that are very concerned about this, and I think that would require and necessitate some additional discussion, which would be very valid.

I also want to thank Ms. Lofgren, who we have been working closely with on this. She is very passionate on these issues, and I think we see eye to eye on this amendment, and would urge its adoption.

With that, I yield back.

Ms. Lofgren. Mr. Chairman?

Chairman Goodlatte. The chair recognizes the gentleman from Michigan --

Mr. Conyers. Thank you.

Chairman Goodlatte. -- for his statement for 5 minutes.

Mr. Conyers. Thank you, Mr. Chairman. Members of the committee, this amendment would strike Section 9 from the

bill, a section which includes the changes to the post-grant review and inter parte review program. It also includes the, in my view, ill-advised extension of the patent pilot program, and the codification of the double patenting doctrine.

Now, as we have heard from patent holders in the biopharmaceutical realm, the inter partes review process is being misused to harm the patent portfolio value of these biopharmaceutical companies. And unfortunately, their attempt to address this issue in the manager's amendment does not provide an adequate solution.

Now, in addition, the 21st Century Patent Coalition for Patent Reform has stated that they do not believe the post-grant review and inter partes review provisions in the manager's amendment are sufficient to ensure the fairness of the proceedings for patent owners and patent challengers. And so, for those reasons I urge my colleagues on this committee to support this amendment.

And I yield back the balance --

Chairman Goodlatte. Support or oppose?

Mr. Conyers. To support.

Chairman Goodlatte. Okay. The chair recognizes

himself. I must oppose this amendment. This amendment offers a reformulation of a major section in the bill. That provision, however, is the product of months of discussions with stakeholders and the Patent Office, and good legislative practice prevents us from accepting entirely new language without an opportunity to adequately consider its implications.

This repeals the bill's correction of the scrivener's error in the America Invents Act that mistakenly applied "could have raised estoppel" to post-grant review. All parties to this debate agree that this was a mistake, and applying such a severe estoppel to post-grant review would cripple that proceeding, which is only getting started.

This amendment strikes provisions that would prevent stock market manipulation and the extortion of parties through the abusive of inter parts review. This amendment strikes an important technical correction that is necessary to ensure that assignees who file patent applications will be able to get the benefit of their provisional filing date. This amendment literally cuts the legs out from under such filers.

This amendment would prevent parties in post-grant

proceedings from citing prior art patents as of their filing dates. Under this amendment, such patents would be prior art as of the date they were issued as patents. This makes no sense. Patents and applications have always been prior art against other applications as of the date that they are filed.

This amendment also strikes the Patent Pilot Program in certain district courts created by Mr. Issa. Under this amendment, a trademark examiner's registerable decision could be appealed to different regional courts of appeal, applying materially different bodies of trademark law. In effect, the PTO would have no way of knowing which body of trademark law would govern trademark applications.

This amendment strikes many other provisions that have been the result of years of discussion that have been part of the Innovation Act since it was first introduced nearly 2 years ago, and to which we have never heard any objection or any concerns.

If I might ask the gentleman from Utah to yield, I understand the gentleman's concern about the tweaks to the IPR process that have been included in the manager's amendment in the last, not 48 hours, but in the last several

days. But his amendment goes way, way, way beyond that, and there is no question that the discussion about what is the appropriate handling of IPR is an ongoing discussion.

So if the gentleman would be willing to withdraw this amendment and work with us on that subject --

Ms. Lofgren. Mr. Chairman?

Chairman Goodlatte. And I will be happy to recognize the gentlewoman from California in a moment. I think that would be far more helpful than an amendment that would strike an entire section of the bill that does a whole lot of collateral damage that I do not think the gentleman intended.

Ms. Lofgren. Mr. Chairman?

Chairman Goodlatte. I yield to the gentleman if he wishes?

Mr. Chaffetz. I am prone to do that, and I probably will do that. I would like to hear from the gentlewoman from California first if that is --

Chairman Goodlatte. The gentleman will be recognized again in a moment or someone else will yield to him. In the meantime, for what purpose does the gentlewoman from California wish to be recognized?

Ms. Lofgren. To strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for 5 minutes.

Ms. Lofgren. I understand the chairman's suggestion, and certainly Mr. Chaffetz has taken a lead on the amendment, and he can address the issue of withdrawing the amendment and working on it. I think that has some merit. Certainly the correction of the "could have raised" issue is important, and there are some others.

But I also have some concerns about the drastic changes that are being made to the IPR and PGR process. You know, these are provisions of the underlying act that are actually working, and I think there is a lot of scare language out there. I would like to draw the members' attention to an article written by Colleen Chin, who is an intellectual property law professor at my alma mater, Santa Clara Law School, who really debunks the numbers that have been thrown around.

In fact, it is not a large number of claims that are being invalidated. And even for patents that have run into trouble, it is not all claims, so it is really a small number. And it is also an extremely small number of biopharma. I think there are a lot of scare tactics going on

here. There is a reason why we put these provisions in the prior act, and I remember Howard Berman, who I do not want to keep mentioning Howard, but he did such good work on this provision. And I am sure he is satisfied now that he is in the private sector to see that it is working just as we had hoped it would do.

So I was happy to co-sponsor this measure, and I was sorry we were at the trade discussion and I was not here when Congresswoman Walters introduced and then withdrew her amendment about the carve-out from IPR/PGR for biopharma, essentially those entities that are defined by SU and Hatch-Waxman.

And I think really if you look at that withdrawn amendment along with this amendment, we can see a path forward to resolving this issue to the satisfaction of all sectors of the American economy. I do think that, the PTO has knocked out some ridiculous patents in the IT area. Just in the last couple of weeks a patent on podcasting that would have prevented all podcasting, patents over check imaging, and the like.

So I do think that the state of play right now is a problem. If the chairman is serious, and I hope he is, about

trying to improve the state of play, I would be eager to work with him, and Mr. Chaffetz, and others. But I hope that we will consider wrapping Congresswoman Walters' suggestion into that discussion. And I know the Senate is looking at that, too, because we could have a wrap here for all of the American economy in a way that would work quite well, much better, I think, than the provisions that we have before us.

So I look forward to continuing to --

Mr. Chaffetz. Would the gentlewoman yield --

Ms. Lofgren. I would be delighted to yield to the gentleman from Utah.

Mr. Chaffetz. Thank you, and I do appreciate working with you. You have always been one of the better members to work on all these issues. And I, again, appreciate your expertise on this issue.

Mr. Chairman, I would like to ask unanimous consent to withdraw the amendment. I appreciate your willingness to work with us in a constructive manner, taking into account again some of the largest companies in the world that are very concerned about this provision. But I do think we can come to a plausible solution to help appease all sides and come to something that is workable.

And so, with that, Mr. Chairman, I would ask unanimous consent to withdraw the amendment and work with you as the bill moves forward.

Mr. Peters. Mr. Chairman?

Ms. Lofgren. And I would yield back.

Chairman Goodlatte. The gentlewoman yields back?

Ms. Lofgren. I would be happy to yield.

Chairman Goodlatte. For what purpose does the gentleman from California seek recognition?

Mr. Peters. I move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Peters. And I just want to add my thoughts on this, too, because I, too, was sorry I missed Ms. Walters' amendment about the difficulty that life sciences companies, including many in San Diego, are having with the review process at the Patent and Trademark Office.

I also would express a concern that our innovators are facing a dual standard here, one in court and one in the IPR process, to defend the validity of a patent. And it means by the terms of this act that you could face a patent challenge in court and successfully defend your patent only to turn

around and face a second administrative challenge using a completely different interpretation or a standard of proof in your claim to the intellectual property in question.

So if we are going to allow challenges at both the administrative and judicial level, I think they should be at the very least using the same standard of proof to evaluate validity. And I would, again, support the efforts of all my colleagues to continue work on this, but I wanted to add those thoughts as well.

Chairman Goodlatte. Would the gentleman yield?

Mr. Peters. Yes, sir.

Chairman Goodlatte. I thank the gentleman for yielding. I would say to the gentleman from Utah, and the gentlewoman from California, and the gentleman from California as I already said to the other gentlewoman from California that I understand the concern about this. The language that was added is an effort to try to achieve some balance between these two different perspective about IPR and the impact it has on certain sectors.

So if everybody is willing to continue this discussion, it is a complex one because I do not think everybody is on the same side of it. But we do want to achieve a central way

to utilize IPR in a way that works and does not unfairly put people in a situation where they can be subject to certain unfair treatments in the marketplace and elsewhere.

So with that in mind, the gentleman has requested to withdraw his amendment. The amendment is withdrawn, and thank you.

Ms. Lofgren. Mr. Chairman?

Chairman Goodlatte. Before we go to the gentlewoman from California, I would like to briefly clarify that the amendment we attempted to consider earlier was the Peters 2 amendment, which was withdrawn. The clerk inadvertently reported a different amendment title, but it was the Peters 2 amendment under consideration. And without objection, this correction will be made in the record to make the clerk's reading consistent with the arguments made by the gentleman from California.

For what purpose does the gentlewoman from California --

Ms. Lofgren. I have an amendment at the desk.

Chairman Goodlatte. The clerk will report the amendment.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Ms. Lofgren of

California, page 2, strike line 10 and all that follows through page 5, line 9, and insert the following.

Ms. Lofgren. I would ask unanimous consent that the amendment be considered as read.

Chairman Goodlatte. Without objection, the amendment is considered as read.

[The amendment of Ms. Lofgren follows:]

Chairman Goodlatte. And the gentlewoman is recognized for 5 minutes on her amendment.

Ms. Lofgren. I have some concerns with the changes that are made to the pleading language by the manager's amendment. Now, I supported the pleading language in the original version of this bill as did 325 members of Congress, our colleagues. However, I am concerned that the changes made by the manager's amendment may, in fact, encourage bad actors to play games rather than reducing any real burden on -- and would also bring our pleading standards in line with what is being considered by the Senate.

The original version of the Innovation Act did create a higher pleading standard than required by other civil actions, but I think rightfully so given that patent litigation is probably the most complex form of litigation. But the standard did not ask a plaintiff to disclose any more than they already know when deciding to bring a suit in the first place.

Identification of the patent and all claims infringed, the products which infringe each claim, and what part or element of the infringing product infringes what claim and how. That is just basic. Additionally, as a safety valve,

the pleading standard also allows for more generalized explanations of any of the pleading requirements where the information required is not readily accessible.

Now, given the complexities of patent litigation itself, meeting such pleading standards should really be trivial for any competent attorney capable of representing the plaintiff through the rest of the process. By allowing bad faith plaintiffs to withhold or hide claims that they already believe are being infringed would result in blindsiding defendants with claims that would be difficult to determine whether they cover a given product.

I understand the complexity that comes with negotiating such an important legislation, so I may be willing to withdraw this amendment if we can consider working together, Mr. Chairman, on this issue as we move forward. But I do think it is a mistake to reduce the specificity of the pleading requirements as the manager's amendment does. And I recall a number of years ago, you and I worked together on securities litigation that was abusive. And sometimes I am reminded of that issue which is similar to this one.

Part of the answer was requiring specificity on the pleadings. And if you cannot actually specify how you have

been harmed, then the question is have you been harmed. And so, I would hope, Mr. Chairman, that we might improve upon what is in your manager's amendment. I am not criticizing. I know how hard you have worked on it, but I think improvement could be had.

Chairman Goodlatte. Well, is the gentlewoman --

Ms. Lofgren. I would happy to yield.

Chairman Goodlatte. Is she seeking to withdraw the amendment or proceed with it?

Ms. Lofgren. Well, I would like to understand whether you are interested in working on this further.

Chairman Goodlatte. I am prepared to work with you further on it, provided that you withdraw it.

[Laughter.]

Ms. Lofgren. We may have a deal.

Chairman Goodlatte. And I am willing to entertain improvements to this provision in the bill, but I am hesitant to simply adopt provisions of the Senate bill, some of which do not appear to be properly drafted. And I believe the House legislative counsels do a fine job and draft legislation to a high technical standard. And I do not think it is her criticism of the drafting. I think it is her

criticism of the intent, and I am happy to consider whether there can be a higher standard of what is required in the pleadings, but I cannot commit to it at this point. I will commit to working with you on it.

Ms. Lofgren. Well, with that, Mr. Chairman, I would ask unanimous consent to withdraw this amendment noting that I look forward very much to working with you --

Mr. Chaffetz. Mr. Chairman?

Ms. Lofgren. -- between now, and I would be happy to yield to the gentleman.

Chairman Goodlatte. The gentleman from Utah.

Mr. Chaffetz. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5 minutes.

Mr. Chaffetz. I can see the direction where this is handled, but I just want to simply want to offer a voice here that I think this makes great sense in a very common sense way. It simply requires the complainant to identify each claim that is alleged to be infringed. That is a simple principle that I think we should all be able to agree upon.

The direction, the principle that the gentlewoman from California is taking this is the right one. I would like to

be part of those discussions. I would support this amendment if it were up for a vote, but in the spirit of what we are doing to move forward, I think this is a simple thing that we can do. Diligent parties alleging infringement will not be harmed by this amendment. In most cases, if a party has performed the proper pre-suit investigation, it will know which claims it thinks are infringed. It will have no trouble identifying them. They can always go back and amend something, but this will reasonably limit the scope to what has supposedly been infringed.

And being able to identify that at the beginning creates balance and fairness for both sides. And so, I appreciate her offering this amendment. I would stand in support of it, and yield back.

Mr. Issa. Would the gentlelady further yield?

Ms. Lofgren. I would be happy to yield.

Mr. Issa. Briefly I want to echo the fact that many times patent trolls say, you know, here is our patent, you figure out what is in it, and pay me the amount. So this sensible reform certainly as the chairman said, we would like to have it properly drafted with thought and working. But I also would like to be involved in that, and would very much

support the gentlelady's direction and intention. Thank you.

Ms. Lofgren. Well, reclaiming my time, I would just say with all of this good will and effort to improve the bill, I am very optimistic that we will be successful in improving this measure. And I know the lights are ringing, so I will yield back to the chairman.

Mr. Farenthold. If the gentlelady would yield for like 30 seconds.

Ms. Lofgren. Of course.

Mr. Farenthold. I would like to say I think it is a basic requirement of fairness that you know what you are being sued for. In these broad pleadings of you are infringing our patents, the obvious next question is which one and what part of the patent, and I think that ought to be a minimum requirement of fairness. And I would have supported the amendment, and look forward to working with the chairman as well.

Chairman Goodlatte. The chair thanks the gentleman. And for what purpose does the gentleman from Texas seek recognition?

Mr. Gohmert. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for 5

minutes.

Mr. Gohmert. Thank you, Mr. Chairman. And it has truly been a pleasure to call not only this chairman, but the prior chairman friend, people I deeply respect. And I apologize for having to run back and forth to two different important markups today, so I have missed some of the things that have gone on.

I greatly appreciate the work that has been done in the manager's amendment and has bee said about pleadings. They are critical. And I do not know how many people here have been involved in multi-district litigation on the Federal level as I have, suing, defending at all levels, federal, state. Having been a judge over the biggest plaintiff's case in Texas history, and bringing that to resolution after six judges held it before me, I know something about it.

I would ask if I might included in this process. Also I would be able to vote for the manager's amendment. I still have concern over what former PTO director David Kappos said in testify before this committee when he said we are not tinkering with just any system here. We are reworking the great innovation engine the world has ever known almost instantly after it had just been significantly overhauled by

the America Invents Act of 2011. If there were ever a case where caution is called for, this is it.

I know my friend from California has expressed concerns about so many cases being in the Eastern District of Texas where Texas Instruments started filing there. I think there would be a way to hopefully address that. I mean, in some courts you reassign cases, move them around where it does not work a hardship on the parties to keep it from being overly unfair in one area. I know the venue issue is particularly sensitive to defendants. They should not be drug into places they should have not to go to defend lawsuit. I am sensitive to that.

So, again, I appreciate the chairman's willingness. There are often a lot of chairman that will not consider reworking things after a bill is done as it was last year. But I would hope that we can continue to work on the venue issue, reassignment of cases if possible, and also if I could be included in working on forcing specificity to protect defendants from being unfairly sued.

With that, Mr. Chairman, thank you. I yield back.

Chairman Goodlatte. We will be glad to include you in those discussions.

Ms. Jackson Lee. Mr. Chairman?

Chairman Goodlatte. The chair would advise members that have 11 minutes remaining in this vote. There are two votes as I understand it on the floor. We do need to finish this bill this afternoon. We are not coming back tonight, and we do not want to come back tomorrow. So members would have to return immediately after. The question is how quickly we can deal with the two amendments that Ms. Jackson Lee has.

Ms. Jackson Lee. Well, here I am, and let me say that I started out by saying I know that we can find common ground. And I would like to take my amendments up on en bloc, and I will be extending a question to you to work with me.

Chairman Goodlatte. All right. Let us do it.

Ms. Jackson Lee. Because I know what your position is on the heightened pleadings on the Senate version, but I know that there is an opportunity to find common ground.

Let me begin with amendments 21 and 22, Jackson Lee.

Chairman Goodlatte. The clerk will report the amendments.

Ms. Williams. Amendment to the amendment in the nature of a substitute to H.R. 9, offered by Ms. Jackson Lee --

Ms. Jackson Lee. I ask the amendments be considered as

read, unanimous consent.

Chairman Goodlatte. Without objection, the amendments will be considered as read.

[The amendments of Ms. Jackson Lee follow:]

Chairman Goodlatte. And the gentlewoman is recognized on both of her amendments.

Ms. Jackson Lee. Thank you very much, Mr. Chairman. My Amendment Number 21, exemption from pleading requirements for patent infringement actions, deals with the question of helping promote the useful arts and grow the economy by protecting the rights of inventors to their discoveries as it will help the best of those inventors, the small businesses that create jobs and provide good paying jobs in their community.

As the bill is currently drafted, it would not only stifle innovation for some of these small entities, but it would hamper our economic growth. Those who will suffer the most are small businesses attempting to compete with novel ideas and limited resources. Small businesses seeking to protect their ideas and economic stability must subject themselves to really what is in this phase of the bill a burdensome form of litigation.

My amendment strikes the exemption failing to specify those who shall be excluded form participating in litigation battles, particularly those who will be gravely impacted by simply defending their rights in costly active litigation.

As we all know, patent trolls target those they perceive to be easy targets, namely smaller companies incapable of protecting themselves compared to large companies. And they seek lawyers who want to help them, but their resources are challenged.

The Jackson Lee amendment allows for the exemption of those parties who in good faith, belief, and ability to reasonably demonstrate a test that litigation itself results in the loss of at lest 20 or more full-time manufacturer and research-related jobs, and as well provides for an even playing field for smaller companies.

That is my amendment number one, and just to add from the Small Business Technology Council, it indicated we would like add small businesses to the list of universities and venture capitalists, technology startups, and small inventor entrepreneurs who have concern with the bill as presently structured.

Amendment Number 2 deals, Jackson Lee amendment, improves upon it by replacing the requirement of detail specificity with the fairer and more equitable requirement of reasonable specificity. We should avoid significantly increasing pleading requirements for patent infringement

actions that add costs and impose further burdens on small businesses. To my colleagues, as you can see, I am focused on the concern that I have, and that is the small businesses.

Finally, under the Federal Rules of Civil Procedure, to withstand a motion to dismiss, a complaint need only contain a plausible short, plain statement of the plaintiff's claim showing that the plaintiff is entitled to relief. And in 2012, the U.S. Court of Appeals for the Federal Circuit held *In Re Bill of Lading* that for patent infringement, the complaint need not plead facts establishing that each element of an asserted claim is met, nor even identify which claims it asserts are being infringed.

So as my statement goes on to detail how the local rules have been treated in the Federal district courts, we have the ability I think to be more reasonable as it relates to the entities that I called out, and that is universities, venture capitalists, technology startups, small inventor, entrepreneurs that in essence believe that we can do a better job at this area.

So, Mr. Chairman and to my colleagues, I ask for you to support Jackson Lee Amendment Number 21 and 22, and I ask that we work on this bill before it goes to the floor. With

that, I yield back my time.

Chairman Goodlatte. The chair would inquire of the gentlewoman is she asking to withdraw the amendments. Her second amendment, by the way, is the exact opposite of what some of the other members of the committee are seeking with regard to pleading standards, and we would be happy to include her in those discussions, the omnibus on pleading that are going to ensue after the bill is reported, or does she wish to have a vote on it?

Ms. Jackson Lee. Well --

Chairman Goodlatte. I am opposed to both amendments as they are written, and I cannot support them.

Ms. Jackson Lee. Well, why do I not do this, Mr. Chairman? I have taken them en bloc. Can I ask for a bifurcation of a voice vote on the first one and seek to withdraw the second one to be included in the pleadings discussions that will ensue as we go to the floor?

Chairman Goodlatte. So without objection, Jackson Lee Amendment 181 is withdrawn, and Jackson Lee Amendment 182 dealing with the exemption from pleading requirement for patent infringement actions if the alleged infringement will result in the loss of jobs is seeking a vote.

The question occurs on the amendment offered by the gentlewoman from Texas.

All those in favor, respond by saying aye.

Ms. Jackson Lee. Mr. Chairman, let me just make sure that the vote that you are now taking is the vote on 182. Is that correct?

Chairman Goodlatte. Yes.

Ms. Jackson Lee. All right. Thank you, Mr. Chairman.

Chairman Goodlatte. All those in favor of Jackson Lee 182, respond by saying aye.

Those opposed, no.

Chairman Goodlatte. In the opinion of the chair, the noes have it, and the amendment is not agreed to.

Ms. Jackson Lee. And, Mr. Chairman, I would at this time, seeking to engage in the discussion on pleadings would ask that Jackson Lee Amendment Number 181, and I assume you will convene us or we will have a way of doing that before it gets to the floor.

Chairman Goodlatte. We have several related amendments, and we will have discussions on those to see if we can make changes on the way to the floor.

Ms. Jackson Lee. Thank you. I ask unanimous consent to

withdraw Jackson Lee Amendment Number 181.

Chairman Goodlatte. Jackson Lee Amendment 181 is withdrawn.

Are there any further amendments to H.R. 9?

[No response.]

Chairman Goodlatte. If not, the question is on the amendment in the nature of a substitute to H.R. 9, as amended.

All those in favor will respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it. The amendment is agreed to.

A reporting quorum being present, the question is on the motion to report the bill, H.R. 9, as amended, favorably to the house.

Those in favor will say aye.

Those opposed, no.

The ayes have it.

Mr. Conyers. Can we have a recorded vote?

Chairman Goodlatte. A recorded vote is requested, and the clerk will call the roll.

Ms. Williams. Mr. Goodlatte?

Chairman Goodlatte. Aye.

Ms. Williams. Mr. Goodlatte votes aye.

Mr. Sensenbrenner?

[No response.]

Ms. Williams. Mr. Smith?

Mr. Smith. Aye.

Ms. Williams. Mr. Smith votes aye.

Mr. Chabot?

Mr. Chabot. Aye.

Ms. Williams. Mr. Chabot votes aye.

Mr. Issa?

Mr. Issa. Aye.

Ms. Williams. Mr. Issa votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

Ms. Williams. Mr. Forbes votes aye.

Mr. King?

[No response.]

Ms. Williams. Mr. Franks?

[No response.]

Ms. Williams. Mr. Gohmert?

Mr. Gohmert. No.

Ms. Williams. Mr. Gohmert votes no.

Mr. Jordan?

[No response.]

Ms. Williams. Mr. Poe?

Mr. Poe. Yes.

Ms. Williams. Mr. Poe votes yes.

Mr. Chaffetz?

Mr. Chaffetz. Yes.

Ms. Williams. Mr. Chaffetz votes yes.

Mr. Marino?

Mr. Marino. Yes.

Ms. Williams. Mr. Marino votes yes.

Mr. Gowdy?

[No response.]

Ms. Williams. Mr. Labrador?

[No response.]

Ms. Williams. Mr. Farenthold?

Mr. Farenthold. Aye.

Ms. Williams. Mr. Farenthold votes aye.

Mr. Collins?

Mr. Collins. Aye.

Ms. Williams. Mr. Collins votes aye.

Mr. DeSantis?

Mr. DeSantis. Aye.

Ms. Williams. Mr. DeSantis votes aye.

Ms. Walters?

Ms. Walters. Aye.

Ms. Williams. Ms. Walters votes aye.

Mr. Buck?

[No response.]

Ms. Williams. Mr. Ratcliffe?

Mr. Ratcliffe. Yes.

Ms. Williams. Mr. Ratcliffe votes yes.

Mr. Trott?

Mr. Trott. Yes.

Ms. Williams. Mr. Trott votes yes.

Mr. Bishop?

Mr. Bishop. Yes.

Ms. Williams. Mr. Bishop votes yes.

Mr. Conyers?

Mr. Conyers. No.

Ms. Williams. Mr. Conyers votes no.

Mr. Nadler?

Mr. Nadler. Aye.

Ms. Williams. Mr. Nadler votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

Ms. Williams. Ms. Lofgren votes aye.

Ms. Jackson Lee?

Ms. Jackson Lee. Pass.

Ms. Williams. Mr. Cohen?

[No response.]

Ms. Williams. Mr. Johnson?

Mr. Johnson. No.

Ms. Williams. Mr. Johnson votes no.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

Ms. Williams. Mr. Pierluisi votes aye.

Ms. Chu?

Ms. Chu. Aye.

Ms. Williams. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. No.

Ms. Williams. Mr. Deutch votes no.

Mr. Gutierrez?

[No response.]

Ms. Williams. Ms. Bass?

Ms. Bass. No.

Ms. Williams. Ms. Bass votes no.

Mr. Richmond?

[No response.]

Ms. Williams. Ms. DelBene?

Ms. DelBene. Aye.

Ms. Williams. Ms. DelBene votes aye.

Mr. Jeffries?

Mr. Jeffries. Aye.

Ms. Williams. Mr. Jeffries votes aye.

Mr. Cicilline?

Mr. Cicilline. No.

Ms. Williams. Mr. Cicilline votes no.

Mr. Peters?

Mr. Peters. No.

Ms. Williams. Mr. Peters votes no.

Chairman Goodlatte. The gentleman from Arizona?

Mr. Franks. Aye.

Ms. Williams. Mr. Franks votes aye.

Chairman Goodlatte. The gentleman from Iowa?

Mr. King. Aye.

Ms. Williams. Mr. King votes aye.

Chairman Goodlatte. The gentleman from Tennessee?

Mr. Cohen. Aye.

Ms. Williams. Mr. Cohen votes aye.

Ms. Jackson Lee. Mr. Chairman, how am I recorded?

Chairman Goodlatte. You are not recorded.

Ms. Jackson Lee. No.

Ms. Williams. Ms. Jackson Lee votes no.

Chairman Goodlatte. Has every member voted who wishes to vote?

[No response.]

Chairman Goodlatte. The clerk will report.

Ms. Williams. Mr. Chairman, 24 members voted aye, 8 members voted no.

Chairman Goodlatte. The ayes have it. The bill, as amended, is reported favorably to the House. Members will have 2 days to submit views.

[The information follows:]

Chairman Goodlatte. Without objection, the bill be reported as a single amendment in the nature of a substitute incorporating all adopted amendments, and staff is authorized to make technical and conforming changes.

This concludes our business for today. Thanks to all members for attending. The meeting is adjourned.

[Whereupon, at 4:30 p.m., the committee was adjourned.]