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before the
HOUSE COMMITTEE ON THE JUDICIARY
HEARING ON HOUSE RESOLUTION 9,
THE INNOVATION ACT

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INTRODUCTION

Mr. Chairman, Ranking Member Conyers and members of the Committee. Thank-you for the opportunity to testify today on how the Innovation Act, House Resolution 9, will diminish abuse in the patent system.

I am the Senior Vice President of Intellectual Property for Salesforce.com, Inc. Since our founding sixteen years ago, we have delivered software as a service over the Internet throughout the world. As the world's leading enterprise cloud ecosystem, we permit large and small companies of all sizes to connect with their customers using the latest innovations in cloud, social, mobile and data science technologies. Through our network of data centers throughout the United States, we permit our customers to securely and reliably access their data worldwide. At the same time, our 1-1-1 program provides one percent of our employees' time, one percent of our profit and one percent of our equity for helping non-profits use our technology to serve the needy. As such, we are sensitive to how patent trolls' activities bedevil even non-profits through boilerplate letters and pleadings.¹

To fulfill our customers' needs, intellectual property is key to our business. Our core offerings are updated with new innovations three times per year, year in and year out. This has led to our winning Forbes Magazine's award of the "Most Innovative Company" for each of the last few years. To protect our innovations, we do need to make sure that our copyrights, our trade secrets and our 2000 plus patent assets are adequately protected so we can continue to delight our customers.

At the same time, we recognize that any intellectual property system needs to be balanced. If patent protection is so strong that hundreds of bad actors can make millions or even billions of dollars from asserting dubious patents, innovation will be forestalled. Main Street customers will avoid using our technology to avoid lawsuits. Industry will divert resources from innovation to litigation. Notwithstanding the acknowledgement of these dangers, a growing consensus indicates that patents have become a burden on the economy for both large and small companies.² That is why even the largest patent holders in the United States with tens of thousands of patents support reforms such as the Innovation Act.

¹ See, e.g., Prepared Statement of Jon Bruning, Attorney General State of Nebraska, Demand Letters and Consumer Protection, Hearing before the Senate Subcommittee on Consumer Protection, Product Safety and Insurance, Senate Hearing No. 113-204, November 7, 2013; Complaint ¶ 16 in State of Vermont v. MPHJ Technology Investments LLC, Superior Court, Washington Unit 282-5-13Wncv.

² See, e.g., J. Bessen & M. Meurer, The Mounting Costs of NPE Litigation, 99 Cornell L. Rev. 387 (2014)(estimating that patent litigation costs \$29 billion per year); C. Tucker, The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity MIT Sloan School Working Paper 5095-14 (2014); L. Cohen, U Gurun & S Kominers, Patent Trolls: Evidence from Targeted Firms, Harvard Business School Working Paper 15-002 (2014). In addition, this committee has heard repeated evidence about the tax placed on American business by assertion of dubious patents. See, e.g., House Committee on the Judiciary, Report to Accompany the Innovation Act (HR 3309) at 18-20 Report No. 113-279 (2013).

And today's imbalance permits those who seek to speculate on patent litigation to use the inefficiencies of the litigation system to extract unjustified royalties. Others have testified at length about these problems so I will not elaborate in detail. While this problem once only bedeviled parts of the technology industry, it has spread like a plague so that Main Street merchants including realtors, retailers, hoteliers, restaurateurs and other small businesses have joined ranks with technology companies. All of us find ourselves victimized by sharp practitioners who seek to tax those who use technology to make their businesses more efficient.

Yet this committee has a path forward before it to solutions to many of these problems in the form of the Innovation Act. A virtually identical bill passed the House last Congress with broad bipartisan support. In that Congress, the issue went through multiple hearings and the issues have even been the subject of more hearings this Congress. Numerous changes have already been made from the Innovation Act's original introduction in 2013 and we believe that the bill is the path on which move forward. Therefore, we ask that you move this legislation forward.

I will now comment on the operative sections of the bill.

Section 3

Section 3 addresses many of the problems that bedevil both Main Street and the technology industry in litigation. That section attempts to achieve several goals:

- Bringing patent pleading requirements in line with other areas of the law and thereby eliminating boilerplate pleading
- Making those who finance speculative, unjustified litigation pay attorneys fees
- Sequencing of discovery to reduce costs for all sides in the litigation by having courts identify the scope of the patentees' rights before launching expensive discovery that may be unnecessary
- Directing the Judicial Conference to deal with the asymmetries in patent litigation
- Incentivizing patent trolls to provide detailed support for their demand letters.

Section 281A: Eliminating Boilerplate Pleading to Provide Defendants With Actual Notice Pleading

Section 3 proposes a new section 281A to eliminate boilerplate pleadings. Existing patent litigation pleading practice, severely handicaps defendants, both large and small. Due to a poorly drafted pleading form, all a patent infringement complaint has to set forth is the names of the parties and a statement that the plaintiff owns the patent in suit and that the defendant is infringing. The result is patent trolls use boilerplate pleading practice to hide what they are really claiming, to raise costs for defendants and to leverage dubious patents to extract tens

or hundreds of thousands of dollars for nuisance settlements that when scaled over thousands of defendants becomes tens of millions of dollars.

Faced with a boilerplate pleading, the defendant has no way of knowing which of potentially hundreds of claims in the patent it is allegedly infringing. It will not know which features among thousands of product features in its offerings are alleged to infringe those claims. And until the court forces the plaintiff to identify which patent claims are infringed and why they are infringed, the defendant will have no idea how the plaintiff is construing the claims to read on the accused products. As a result, the defendant upon being served has to place expensive document retention holds on employees relating to products that ultimately will not be in the lawsuit, interview engineers and scientists about products that will ultimately not be in the lawsuit and search for prior art on patent claims that will never be in the lawsuit. This only serves to contribute to the already absurdly high cost of defending a patent litigation.

An example of an entity that uses such boilerplate pleading is Traffic Information LLC, which has apparently been embroiled in forty one cases involving 132 defendants. Typical complaint allegations do not identify any individual claims. Such complaints merely allege that “alone and in conjunction with others, [the defendant] has in the past and continues to infringe and/or induce infringement of the ‘606 patent by . . . using . . . traffic information systems, software, products and/or services (“Accused Products”) that alone or in combination with other devices or products are covered by at least one claim of the ‘606 patent” Thus, the 132 hapless defendants who include computer companies, insurance companies, hotels, coffee shops, pharmacies and banks do not know which claims are infringed. Nor do they know whether their “Accused Products” infringe. They do not know if the infringement is alone or in combination with a third party product. And if a third party product is involved, they do not which third party is involved. Nor do they know which third party’s products are involved so they cannot determine if they have the right to an indemnity. Such clear absence of notice pleading is to my knowledge not tolerated in any other area of the law.

Proposed section 281A would amend the Patent Act to require the type of pleading mandated by the Supreme Court in all other areas of the law under *Iqbal* and *Twombly*.³ It sets out the detail that is required to meet the unique patent law requirements for the Supreme Court’s test. Since each patent claim constitutes a separate invention⁴ and is therefore a separate cause of action,⁵ section 281A requires the identification of each claim being asserted. It also requires the plaintiff to set forth which instrumentalities of the defendants infringe the claims. That will permit defendants to know what is involved in the lawsuit from the start.

³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (affirming the *Twombly* standard for satisfying Federal Rule of Civil Procedure 8(a)(2)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face . . .”).

⁴ *Altoona Publix Theaters, Inc. v. American Tri-Ergon Corp.*, 294 U.S. 477, 487, 55 S.Ct. 455, 459, 79 L.Ed. 1005 (1935).

⁵ *Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 213 U.S. 301, 319 (1909).

Further, section 281A would require the plaintiff to set forth what portions of the accused instrumentalities infringe and how those portions infringe. This is required to meet *Twombly's* and *Iqbal's* requirements that the complaint set forth sufficient facts by which the court can determine if the complaint is plausible. Anything short of this standard would permit plaintiffs to launch into litigation that may cost tens of millions of dollars without having shown they have a plausible claim.

Further, section 281A would for the first time permit defendants who make complex products with billions of lines of computer software or billions of parts such as advanced semiconductors to be able to determine what portion of their offerings are infringed from the complaint. It is a question of due process. None of these requirements is unfair because the plaintiff would have to provide this information anyway to prove its case.⁶

Further, proposed section 281A has the laudatory effect of ensuring that the courthouse door will not be barred to patentees who cannot discern certain evidence from publicly available information. Thus, proposed section 281A would let defendants know why they are being sued, and how the patentee believes the patent is infringed but still permits patentees who cannot discover details about the accused instrumentalities to initiate cases.

These pleading requirements would also have other salutary effects. Defendants would know which features of which offerings are being accused and know what documents they need to retain. They would not search for prior art needlessly for hundreds of claims that will not be asserted. They would not waste valuable engineers and scientists time discussing products that are not actually in the lawsuit.

Also, Main Street customers who are often the target of troll lawsuits would know whether they have an indemnity claim against their technology purveyors. Providers of technology would know whether they owe a duty to defend at the start of the litigation because the complaint would make that readily apparent. Thus, the providers would know whether they should intervene in the lawsuit and not have to turn down claims until after the patentee finally makes its infringement allegations--which could be years later. This benefits both large and small defendants.

A further benefit of the pleading requirements of proposed section 281A is it would make settled law on what is required to be pled in patent cases. Unfortunately, appellate review of the correctness of district court decisions on the adequacy of pleadings is often difficult to obtain. If the district court rules that the complaint meets the standard, appeal is impossible. Any errors in that decision are subsumed subsequently by the district court's decision on the merits.⁷ If the district court erroneously dismisses the complaint, the plaintiff will typically

⁶ *TecSec v. International Business Machines Corp.*, 731 F. 3d 1336, 1342 (Fed. Cir. 2013).

⁷ *Clearone Communications Inc. v. Biamp Systems DSP* 653 F.3d 1163, 1172 (10th Cir. 2011).

replead the case to avoid the dismissal; the rectitude of such decisions is almost impossible to have reviewed. Merely repealing Form 18 as some propose would result in a decade or more of uncertainty as parties struggle to determine what is required under *Iqbal* and *Twombly* with little chance of being able to obtain appellate guidance. This would only create further gamesmanship over venue, a factor that Congress should be seeking to avoid in patent litigation.

For all of these reasons, we believe that the new pleading requirements for patent cases proposed by section 3 would simplify and streamline patent litigation, lower the cost of patent litigation, permit earlier resolution of many issues regarding the scope of discovery, eliminate the wasteful preservation of unneeded evidence and permit the determination of whether an indemnity is owed. It is time that boilerplate pleading that fails to provide any notice is stopped and true notice pleading is required for patent law.

Section 3 Would Require Financiers of Unjustified Patent Cases to Pay for the Harm that they Cause in New Section 285

By proposing a new section 285 governing the award of attorneys fees, Section 3 would finally provide true balance for attorneys fees awards. Unlike other areas of the law, patent law has had a long tradition of permitting courts to award attorneys fees in exceptional cases. However with the rise of patent trolls, which are invariably shell corporations that have few assets, attorneys fees awards for defendants in patent cases have become empty promises. When the defendant prevails and the court finds that the case is truly exceptional, the victorious defendant now has a claim against whatever assets the corporate shell has--but the only asset is typically the patent; yet that sole asset has just been established to either not be infringed or to be invalid. This is truly a pyrrhic victory.

The newly proposed section 285, however, would provide a new joinder process that permits trolls' financiers to be put in harm's way for the first time. Those who want to profit from patent litigation would be joined to the litigation after a defendant prevails and the court determines attorneys fees are appropriate. The financiers of this unjustified litigation could avoid this liability by renouncing their financial interest. They will have notice and an opportunity to determine whether they really want to be at financial risk for those shell entities who cannot pay for their litigation. If they disclaim their interest, they suffer no harm. If they decide to keep their interest and the defendant ultimately establishes that the patentee's position is unjustified, the defendant can be effectively compensated.

The provision also has other safeguards. First, it only applies in cases where the court has jurisdiction and venue over the interested party and where the interested party can be served and where timely notice has been provided. Further, the court could still not make an interested party responsible such as where the controlling interest of the patentee is a university or the inventor of the patent. It also exempts attorneys who are representing patentees on a contingency fee so there should be no concerns about access to justice.

Another way that the proposed new section 285 is balanced is it seeks to tighten the standard for attorneys fees from exceptional cases --which as the Supreme Court noted recently is still very rare. Under proposed section 285, attorneys fees are to be awarded to a prevailing party "unless the court finds that the position and conduct of non prevailing party were reasonably justified." By its nature, the language requires the court if asked to make a finding--something that did not previously exist. And the final measure of the careful balance in section 285 is that the new standard it imposes for awarding attorneys fees applies with equal force to plaintiffs and defendants.

This is an important change in the law because it could forestall a common troll tactic. Many trolls sue dozens of defendants on a broad and ambiguously worded patent and immediately after suit start start settling the case for nominal sums--often in the tens of thousands of dollars. The plaintiff has no desire to go to trial but merely wants to collect from dozens or hundreds of defendants modest sums immediately after having filed boilerplate complaints.⁸ The cumulative payoff can often be dramatic. Some plaintiffs have made tens of millions of dollars on their patents from hundreds of defendants or targets with cases that are unmeritorious. Most defendants find it is much simpler to pay say \$50,000 to settle than to fight the case for \$3 million. If a defendant is stubborn and refuses to settle, the defendant dismisses its case against that one defendant with prejudice, knowing that the court is unlikely to award attorneys fees against it.⁹ However, the new language in proposed section 285 would require the court to make that determination so unscrupulous patentees would know that they and their financiers are at risk for bringing such unmeritorious lawsuits using boilerplate complaints.

Section 299A Would Stage Discovery in Patent Infringement Actions

Section 3 also would add a new section 299A, which provides a fair and balanced method for limiting discovery while the scope of the patent right is litigated. Patent cases often turn on the meaning of ambiguous terms so interpretations are often outcome determinative. Thus in many patent cases, the issue is not what did the defendant's product do or what is the prior art; rather the issue is what is the scope of the patentee's right. The issue is whether that patent right is broad or narrow.

Section 299A would stay most discovery in patent cases until the court determines what the scope of the plaintiff's patent is. That early determination would often lead to a settlement or

⁸ An exemplar of such a case is Eon-Net LP v. Flagstar Bancorp, 653 F. 3d 1314, 1327 (Fed. Cir. 2011)(finding settlements ranging between \$25,000 for sales less than \$3,000,000 to \$75,000 for sales between \$20,000,000 and \$100,000,000 is evidence of bad faith litigation).

⁹ See, e.g., Computer Software Protection, LLC v. Adobe Systems, Inc., No. 12-451SLR (D. DE March 31, 2015)("in a case where settlements were reached with other parties, and the court did not construe the claims, or resolve multiple discovery disputes, or resolve motions to dismiss or for summary judgment, to characterize these circumstances as exceptional is . . . inconsistent with the court's understanding of what justifies the fee-shifting provisions of § 285).

dismissal as parties often stipulate to a judgment for purposes of an appeal based on the trial court's interpretation of the claim.¹⁰ Further, even if the claim interpretation is not dispositive, the question of claim interpretation can also have the beneficial effect of narrowing the scope of both what is prior art and what are the accused instrumentalities. The result would be to remove multiple issues in the case, thereby avoiding wasteful discovery that happens under today's process. Therefore, it makes good sense to determine the scope of the rights early and avoid wasteful discovery before the litigation moves forward.

Nonetheless, section 299A retains valuable protections for the plaintiff. In any case impacted by mandated periods of time such as ANDA litigation under section 281(e), the litigation would be exempted from this provision. If a manifest injustice would result from the stay such as a crucial witness is in poor health or if a competitor is seeking a preliminary injunction, the stay would not apply. Similarly, if the parties were to agree that the stay would not work in their case, the stay would not apply. Thus, the provision retains that important balance to impact the cost of litigation while retaining the rights for patentees who need the most prompt resolution.

Section 3 Incentivizes Clarity in Demand Letters

Subsections 3(e) and 3(f) address the problem confronting thousands of small businesses targeted by a stream of deliberately vague demand letters for immediate payment for patent infringement. When a small business such as a hotel is confronted with a demand letter saying for example that it is infringing a patent on WiFi or a patent on video systems, the small business owner learns the typical cost of counsel advising them is a multiple of the sum in the demand letter. Even for large corporations such as Salesforce, we often receive vague or inaccurate letters regarding patents and our offerings and have to make difficult decisions

¹⁰ See, e.g., *Thorner v. Sony Computer Entertainment America LLC*, 669 F. 3d 1362 (Fed. Cir. 2012); *Typhoon Technologies Touch, Typhoon Touch Technologies, Inc. v. Dell, Inc.*, 659 F. 3d 1376 (Fed. Cir. 2011); *Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F. 3d 1367 (Fed. Cir. 2014); *Starhome GmbH v. AT&T Mobility LLC*, 743 F. 3d 849 (Fed. Cir. 2014); *Ancora Technologies, Inc. v. Apple, Inc.*, 744 F. 3d 732 (Fed. Cir. 2014); *GE Lighting Solutions LLC v. AgiLight, Inc.*, 750 F. 3d 1304 (Fed. Cir. 2014); *Augme Technologies, Inc. v. Yahoo! Inc.*, 755 F. 3d 1326 (Fed. Cir. 2014); *Chicago Bd. v. International Securities Exchange*, 748 F. 3d 1134 (Fed. Cir. 2014).

regarding whether we should spend the tens of thousands of dollars to evaluate the situation or pay the demanded sum, which may only be slightly more than the cost of the opinion of counsel.

First, subsection 3(e) would improve the law by providing that it is the sense of Congress that the courts should take into account whether a given demand letter provides adequate transparency when the court is determining whether to award attorneys fees under section 285. Subsection 3(f) would amend section 284 to prevent unscrupulous patentees from relying on demand letters that fail to discuss with specificity how the instrumentalities being used by the defendant infringe for the purpose of establishing willful infringement. While modest, both of these steps may encourage some improved transparency in demand letters and hopefully may stop practices that almost border on extortion.

Section 4 Patent Ownership Transparency

Section 4 injects transparency into ownership and financial interests in patent litigation for the first time by amending section 290 of the Patent Act. Roughly half of the patent plaintiffs are shell corporations by my estimate. Often, the ownership and financial interests in those entities remains hidden behind a morass of shell corporate filings. After extensive discovery, the defendant may finally know who is behind the litigation but that discovery generally remains a secret from all but the defendants' counsel. For example, Intellectual Ventures is reported to have sold its patent to an entity called Oasis Research and disclaimed responsibility for Oasis' actions; yet, it later came out at trial that IV owned 90% of the proceeds from the litigation.¹¹ But this is one of the rare instances where the defendants fought and the details became public. Normally, this information would have remained secret and trolls and their financiers thrive on that secrecy.

Clearly, there is no reason to permit trolls and their financiers to hide behind a veil of shell entities. Nor should defendants have to pay one dime in discovery to learn who is hiding behind the owner of the patent. Rather, all of this information should be publicly available so potential infringers and the public can know who truly owns the patent and who benefits from the assertions of the patent.

Section 5 Stay Against Customer Suit

Section 5 would provide the laudatory result of staying litigation brought against customers when the manufacturer or the provider of the infringing instrumentality is willing to stand up to the plaintiff suing its customer. This Committee has heard of numerous cases where patentees sue Main Street businesses such as coffee shops, restaurants and hotels for a

¹¹ This American Life, Episode 496, *When Patents Attack, Part 2!*
<http://www.thisamericanlife.org/radio-archives/episode/496/when-patents-attack-part-two?act=2#play> at 49:30.

variety of technology services or for their websites.¹² Even when the manufacturer intervenes, the courts often will not stay the litigation against the customers.

This is simply wrong and needs to stop. Hotels, restaurants, and small shops simply lack the financial and technical wherewithal to withstand such attacks and typically settle quickly. While a doctrine for staying customer suits has evolved after a manufacturer intervenes has evolved, courts are often reluctant to permit the intervention; patentees often find clever ways to avoid intervention through artful pleading or dismissals of cases.¹³ Given that “current case law recognizes an exceptionally narrow set of circumstances under which application of the customer suit exception would . . .” apply, the current case law is adequate to meet the needs of litigation tactics.¹⁴

Section 5 would provide automatic stays to allow manufacturers who have the interest and the technical and financial means to halt lawsuits against their customers; it would allow the dispute to proceed with the truly interested parties who understand the technology and have the funds to fight the lawsuit. Yet, section 5 would strike a proper balance by requiring the manufacturer to intervene promptly: within 120 days of the service of the complaint or other document that first identifies the infringement. It would require the customer to agree to be bound by the litigation between the patentee and the manufacturer. It also would permit the lifting of the stay if the decision involving the manufacturer does not resolve a significant issue in the case or it would unreasonably prejudice another party to the case. Thus, it expands customer stays but protects the interests of patentees too.

Section 6 Would Direct the Judicial Conference to Deal with the Asymmetries of Patent Litigation

Section 6 would direct the Judicial Conference to amend the Rules of Civil Procedure to deal with the asymmetries in patent litigation. These asymmetries are well documented and need not be repeated.¹⁵ By far the largest asymmetry is the cost of discovery since most trolls have few documents and virtually no knowledgeable, non-expert witnesses while their targets

¹² One instance that has gotten substantial press is an entity named Innovatio that has sued dozens of hotels, restaurants and stores for providing WiFi services. Often the lawsuits involve multiple defendants and patents on the details of WiFi systems. See, e.g., *Innovatio IP Ventures, LLC, v. Madison Marriott West et al.* CV 11-cv-644 (WD WI 2012)(suing 12 Wisconsin defendant hotels on 17 patents). See also B. Love & J. Yoon, *Expanding Patent Law’s Customer Suit Exception*, 93 *Boston U. Law Rev.* 1605, 1610 (2013)(documenting a spike in customer lawsuits).

¹³ C. Chien & E. Reines, *Why Technology Customers are Being Sued En Masse for Patent Infringement & What Can Be Done*, Santa Clara University School of Law Legal Studies Research Papers Series Working Paper No. 20-13, 15-16 (August 2013)(documenting techniques by which plaintiffs seek to avoid intervention); see also *Lodsys Group LLC v. Brother International Corp., Inc. et al.*, No. 2:11-cv-00090 (ED TX September 24, 2013)(dismissing Apple’s attempt to intervene as moot when the plaintiff apparently had settled with all of the end users of Apple’s technology in that one lawsuit) .

¹⁴ Love, *supra* note 12, at 1618.

¹⁵ E. Rogers & Y. Jeon, *Inhibiting Patent Troll Litigation: A New Approach for Apply Rule 11*, 12 *Northwestern Jnl of Tech & IP* 291, 302-03 (2014).

may have petabytes of potentially discoverable evidence and tens of thousands of employees who may be deposed.¹⁶

Section 6 directs the Judicial Conference to address these asymmetries by providing new rules for patent cases. It suggests, but does not mandate, that the conference consider cost shifting for non-core discovery; i.e., once the parties produce their documents sufficient for the core of the case, the additional discovery would come at the cost of the party propounding that discovery. These proposals do not bar that discovery; they merely provide for the party desiring non-essential discovery to pay for its cost.

Nor do these proposals impose Congress' will on its co-equal branch. Section 6 merely suggests solutions and leaves it to the Judicial Conference to define what these rule changes to be.¹⁷ Thus, the provision is modest and balanced and does not discriminate between patentees and accused infringers.

Other Issues

While we believe the Innovation Act would improve the patent landscape greatly, we believe that the Committee should consider a few additional issues. First, while the legislation addresses demand letters, it does not penalize the sending of false or misleading demand letters.

Second, the language in section 9 regarding interpreting patent claims in inter partes reviews and post grant reviews raises difficult implementation issues. Claim interpretation in district court cases typically occurs after the parties meet and confer and agree on the meaning of most of the terms in the claims and then jointly brief the court regarding the disputed terms. However, in the AIA proceedings, the petitions must be filed without knowing the patentee's claim interpretation and the trial is initiated by the Board before the patentee can be compelled to state its interpretation. Thus, the only practical solution is the one that the PTO currently uses: the broadest reasonable interpretation of the claims is to be used rather than district court mechanisms that rely on powers and procedures not available to the PTO. And

¹⁶ The Federal Circuit has noted this asymmetry. *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011) and the advantage the asymmetric discovery costs provide plaintiffs in patent litigation:

[Court rules] allow for liberal discovery, and it is not uncommon for an accused infringer to produce millions of pages of documents, collected from central repositories and numerous document custodians. Those discovery costs are generally paid by the producing party increasing the nuisance value that an accused infringer would be willing to settle for in a patent infringement case. (Citations omitted),

¹⁷ This is not to suggest that Congress may not mandate rules for the courts. After all, the Federal Rules of Civil Procedure were mandated by the Rules Enabling Act. Pub.L. 73-415, 48 Stat. 1064 (1934).

frankly, since the AIA proceedings are new and the earliest final decisions are at most one year old, we believe it is premature to even consider changing the statutory language.

Another troubling issue remains with venue and forum shopping. Seventy percent of all NPE patent cases were filed in two districts last year.¹⁸ This places undue burdens on those courts and local customers of manufacturers since the local customers are often joined to the lawsuit to prevent the transfer of the litigation.¹⁹ We believe that there are various modest changes that can be made to reduce forum shopping.

In addition, notwithstanding the plague of patent cases that have hit Main Street, opponents of the Innovation Act are advocating a bill to make patents even stronger. They claim that the new post grant AIA proceedings are run by “patent death squads” and cite to sensational statistics.²⁰ While these these sensationalist charges were debunked quickly, critics of the new procedures persist in repeating their claims. Now after over 600 resolved inter partes petitions, USPTO data shows that opponents of the AIA proceedings claims are false and unjustified. Only 24% of all of the claims challenged in Inter Partes Reviews were determined to be invalid by the Patent Trial and Appeal Board.²¹ Yet these opponents persist in trumpeting false data to foster changes that are impractical and ill-conceived proposals. The evidence is the proceedings are balanced and providing a much cheaper alternative to patent litigation. There simply is no reason to change the rules for these proceedings only one year after the first post grant proceedings have concluded -- particularly when the arguments are based on documented false evidence.

CONCLUSION

While we and many others from Main Street to Silicon Valley support the Innovation Act, it is important to remind those who were not here last Congress that the current Innovation Act already represents numerous compromises. For example, section 9 in our mind unnecessarily amends the inter partes and post grant review processes, which are working well. Also, the Chairman’s original proposal introduced last Congress required cost shifting for non-core discovery as opposed to this bill’s mere suggestion that such cost shifting is an alternative that the Judicial Conference should consider. It also had much tighter language to

¹⁸ RPX Corporation, 2014 NPE Litigation Report at 21 (2015) http://www.rpxcorp.com/wp-content/uploads/2014/12/RPX_Litigation_Report_2014_FNL_03.30.15.pdf; see also R. Brophy, The Ever Increasing Concentration of Patent Cases in Plaintiff-Favored Venues: Can we Avoid Critical Mass? The St. Louis Bar Journal/Winter 12 (2012).

¹⁹ See D. Taylor, Patent Misjoinder 88 NYU Law Rev. 652, 677 & n. 116 (2013)(describing local businesses as pawns in patent venue games).

²⁰ H. Wegner, The PTAB, Success Story and Challenges in the Wake of the Leahy Smith America Invents Act at 4 <http://ipfrontline.com/wp-content/uploads/2015/01/Naples2015PTABInterPartesReview.pdf>.

²¹ USPTO analysis of these proceedings may be found at: http://www.uspto.gov/sites/default/files/documents/inter_partes_review_petitions_terminated_to_date%2001%2015%202015.pdf

ensure that “interested parties” would pay for unjustified litigation and made it far easier for a prevailing party to obtain attorneys fees.

Notwithstanding these changes that we would have preferred not to see, we believe that on balance the Innovation Act represents an avenue to important change in the law and should be moved forward in the same bipartisan manner as happened in the last Congress. We hope that this Committee will pass the Innovation Act shortly.