

Initial Comments of BrainThrob Laboratories, Inc. (Micro/Small Entity) from Erin C. DeSpain (Inventor, Cofounder, CEO) In Response to Request for Comment Regarding the Administrative Conference of the United States (“ACUS”) Small Claims Patent Court Study. (Amended/Corrected in underline)

I. **Personal Introduction**

BrainThrob Laboratories, Inc. is a small technology research and development firm cofounded by Erin C. DeSpain to independently research, develop, prototype, and commercialize useful new inventions in the United States. Erin began as a fully independent individual inventor interested primarily in working on novel approaches and applications of Artificial Intelligence, Computerized Agents, Statistical Learning, and Operations Research/ Decision Science Systems and Technologies in 2010 before these technologies gained much broad interest.

II. **Comments and Concerns Related The Administrative Conference of the United States (“ACUS”) Small Claims Patent Court Study**

a. **Concern of potential economic and professional bias in the composition of the ACUS designed to address professional and economic issues**

There don't appear to be any small-entity or small claim inventor practitioners to represent the voice of practitioners who this patent court seems to be designed to represent. My concern is this process will lend itself towards unfairly biased reasoning in the development of administrative procedures which are aimed to provide remedies for this group of practitioners.

As a further claim of possible bias it is noted that the reCAPTCHA blocked this submission and others from being provided to the ACUS. This has resulted in a significant decline in public comments by interested parties who would otherwise have provided their valuable insights to the committee. For example, this submission, and at least three other colleagues has been rejected by the reCAPTCHA for no apparent reason, even after solving all of the anti-bot puzzles.

b. **Do we need a “small claims” court or a “small entity” court? -- A “small entity” court, please**

There are not really “small claims” so much as “small entities”. For example, in the case of BrainThrob Laboratories and its principal inventor/cofounder, Erin DeSpain, the technology Erin invented may represent potentially billions of dollars of net economic impact; however, as a micro/small entity there is almost no way for BrainThrob to enforce its valid patent claims against a large multinational organization. This represents a huge economic injustice that the marketplace seemingly doesn't remedy (see narrative below) despite the fundamental assertion that a patent represents "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States" ([Title 35 U.S. Code § 154](#)). Consequently, what is needed is a “small entity” court designed to adjudicate matters related to “small entities” (plaintiff or defendant). A “small claims” court, as defined by primarily as “small” economic damages, isn't seemingly useful. What is needed is a court to adjudicate for “small entities”.

c. **The proposed court should address some weaknesses of the PTAB, which isn't apparently a constitutionally valid “court” under Article III. Therefore, we can start by proposing that this new court is an actual Article III court.**

The PTAB apparently has an extraordinarily high invalidation rate of patents that come before it, 84% by one measure representing the totality of patents that don't survive the PTAB "trial-by-fire" tribunal some inventors have claimed is akin to something from the Medieval witch trials, but for patents. The harm of this extremely high invalidity rate creates enormous business and economic uncertainty, especially for small/micro entities, when it comes to patent enforcement. This is further compounded by the fact that most small/micro entities can't afford these lengthy, and complicated proceedings.

The reason making the proposed court an Article III court would help resolve this is that (a) it would ensure that it would resolve some of the "due process" claims that constitutionally challenge the PTAB – which doesn't actually fulfill the Constitution's requirements for due process, (b) it would also resolve some of the evidence standards that create enormously skewed results (84% invalidation rates) by presuming the examiners actually did their jobs and issued the patent correctly. Under PTAB institution it is presumed the patent is invalid, and the lower evidence standards lead to some perverse results (like one PTAB tribunal finding that a patent is valid and another PTAB tribunal finding that the patent is valid. (Come on, that's just objectively stupid – the mood of the judg(es), and phases of the moon shouldn't radically affect the outcome of a case that almost entirely uses the exact same corpus of evidence.)

d. The proposed court should limit motions

If the goal of the court is to limit costs and ridiculous legal procedural motions that increase the burden of the economically disadvantaged party then it should limit the number of activities one party can undertake to economically harm the other party.

e. Injunction should be the default remedy for the court.

When it comes to small/micro entities the surest way to prevent harm to the property owner, and to ensure fair settlement, is to provide an injunction as the default remedy. In almost all cases such injunctions lead to settlement. The goal of having small entities is to provide economic incentives to develop new industry. If existing industry can use its greater resources, distribution, and capacity to predatorially infringe on small/micro entities then soon there won't be any small/micro entities – and there certainly won't be a desire for them to get patents that represent meaningless trophies they can hang on their failed businesses costing multiple hundreds of thousands of dollars per trophy.

Damages assessments are typically one of the most expensive portions of a patent case. By eliminating this unnecessarily expensive procedure it ensures that expensive economic witnesses and testimony aren't needed. This helps to streamline procedures and ensure a conclusion within an accelerated timeframe and smaller budget that is necessary for small/micro entities.

III. Reasons Why Small/Micro Entities Need A Separate Court In Contrast to Legal/Academic Theory

Below is the narrative of BrainThrob Laboratories, alongside how a small-entity patent court would have helped. In 2010-11 Erin DeSpain imagined using artificial computer agents, statistical learning, and neural networks to tackle difficult and long-running search problems such as employment and housing searches. These problems typically consume weeks/months of otherwise productive time and represent a huge drag on the economy generally. After arriving at a suitable novel solution to this problem, Erin faced the typical decision about whether to file to patent this technology (costing potentially hundreds of

thousands of dollars) or to merely develop the and commercialize the solution as a “trade secret”.

Erin says, “I had full faith in the integrity of the US patent system, so I opted to spend the time and money to prioritize obtaining a patent over spending scarce resources on immediately commercializing the technology without patent protection”. Consequently, Erin filed for a patent to have the “exclusive Right” of “making, using, offering for sale, or selling the invention throughout the United States,” believing such a legal right would better facilitate the funding, development, and commercialization of the technology. Erin subsequently filed for a patent in 2012 and received a grant in 2013 under the accelerated examination program for the patent titled, “Asymmetrical Multilateral Decision Support System” (AMDSS).

Subsequent to receiving the patent, Erin sought to commercialize the technology by attempting to raise capital from 2012 – 2015 to commercialize the technology as a business after developing a very early prototype. “In 2012 there was significant interest in partnering and licensing the technology; however, as time marched on and I believe the results of the American Invents Act sunk in, it became very apparent from multiple conversations I had with potential funders that they no longer had much appetite in investing in any business method patents implemented on computing devices unless they already had tremendous market followings. This was pretty universal of the scores of different funders I talked to, and I believe it’s still true today.”

“I received a lot of comments from potential investors like, ‘why didn’t you just get a great domain name and ignore the patent’ and ‘we don’t invest in patents anymore – we only invest in businesses with lots of customers’.” Real life statements like these fundamentally undermined the assumption that investors believe patents are defensible enough to use as the basis for funding a business – in direct contrast to the baseline legal and academic theory that assumes patents (a) are valuable assets and (b) act as sufficient barriers to competition that businesses who own them can then use ownership of patents to raise capital to build ventures.

“I had some very basic acquisition discussions and nobody who ever discussed acquiring the company ever mentioned the patent as an asset. They always asked what my revenue numbers were, and how many customers I had as a baseline for their valuations.”

Some of the failings of the patent system here may be the result of eBay vs. MercExchange in combination with the newly formed PTAB which allows a large company to freely infringe on the patents of a small/micro entity as long as that small/micro entity cannot replace distribution or market power of the infringer. Here is where a default injunction would provide significant value to a small-entity, by allowing it to maintain the “exclusive right to the build, develop, use practice, etc. the invention. Rather than an investor dismissing the as indefensible, it would recognize that strong defenses would make the property a valuable asset, and therefore a worthy investment on the basis on either (a) the ability to develop and commercialize the technology and (b) the ability to require other firms engage to license the technology in order to practice, use, sell it, etc..

Subsequently, Erin attempted to partner with other entities to license the technology. The reception Erin received was unexpected, “I attempted to work with a number of different startup ventures and people who were engaged with Silicon Valley firms. There was some discussion with a few of these companies about how the technology works, but once I explained how it worked and I tried to arrange a licensing discussion they disappeared. Through acquaintances and trade journals I found out they appeared to be trying to implement my technology without a license. This was sadly pretty normal behavior.” Here

again a small entity court, along with a default injunction would protect nascent industries and the businesses that support them while they grow without allowing large companies to prey on them and their technology with almost total impunity.

“In a different context I asked one executive if they were going to license a computerized business method technology from other businesses and they bluntly said, ‘no, we`re just going to build it ourselves and if there is a problem, they can just sue us.’”

Erin says this carries through with other experiences too, “My experience in discussing matters with the former counsels of companies who represented large multinational organizations as defendants against patent infringement is remembered as, ‘If you send them a notice letter, notifying a company that they have infringed, your letter will be entirely ignored – they won`t even respond – and if they do happen to respond they`ll just seek a summary judgement in a far-from-you patent-unfriendly jurisdiction to raise your costs and instantly invalidate your case against them. This is common practice. We used to do it all the time.’”

Experiences and statements like those above, greatly undermine the theory/hypothesis that micro/small entities can work with companies to take their infringement claims seriously and work cheaply and fairly settle patent claims without very expensive and drawn-out legal battles. In this regard a small-entity court could allow for a cheaper, faster venue to adjudicate cases where small entities are plaintiffs or defendants. This would help lower the costs and help preserve these small entities from the serious economic harms that a large firm can cause through endless legal motions and maneuvers.

Lastly, Erin attempted to raise significant funds to enforce the patent. The experience here was, “I attempted to raise funds to enforce the patent claims against (company name removed) with significant possible damages. I engaged one of the top 10 law firms to raise these funds and bring the case forward. Sadly, after almost 2 years of looking at the case under a microscope and ensuring all the claims charts were super solid to bring the suite and presenting it to something like 10 major different funders and we were unable to get the funding we needed. I won`t say too much due to NDAs, but each funder gave different reasons for rejecting funding. None of them rejected funding the case on the merits. Not even one.” This experience fundamentally undermines the basic theory that if a small/micro patent plaintiff has a good case somehow “the marketplace” will provide a solution to fill that gap. This is clearly not the case with BrainThrob Laboratories. Many of the reasons that Erin believes the funders didn`t support his case were due to the incredible uncertainty posed by the PTAB proceedings. 84% invalidation is a VERY hard number to ignore, and to find funding to defend. Consequently, structuring the court as an Article III court, along with the transitional Article III standards of evidence, would rebalance the patent system and give small/micro entities a fair and fighting chance to get justice when the deck isn`t stacked heavily against them.

BrainThrob Laboratories would like to thank the ACUS for its time and consideration in this matter. Erin DeSpain, (inventor) CEO is available for questions and discussion related to these comments.

Sincerely,

Erin DeSpain,
Principal Inventor, Cofounder, CEO BrainThrob Laboratories, Inc.