From: **ACUS Information** nfo@acus.gov
Subject: FW: In t a Comments of US Inventor Inc. In Response to the Request for Comment Regard ng the Adm n strat ve Conference of the Un ted States ("ACUS") Sma C a ms Patent Court Study.
Date: August 29, 2022 at 9:34 AM
To: [redacted]

-----Or g na Message-----
From: D rk Toms n [redacted]
Sent: Fr day, August 26, 2022 9:45 PM
To: ACUS Informat on < nfo@acus.gov>
Subject: In t a Comments of US Inventor Inc. In Response to the Request for Comment Regard ng the Adm n strat ve Conference of the Un ted States ("ACUS") Sma C a ms Patent Court Study.

In t a Comments of US Inventor Inc. In Response to the Request for Comment Regard ng the Adm n strat ve Conference of the Un ted States ("ACUS") Sma C a ms Patent Court Study.

I. Introduct on
US Inventor s non-profit 501 (c) 4. S nce 2013, US Inventor has advocated for strong patent protect on and strong patent r ghts for sma bus nesses and startups, and nventors. W th 80,0000 members nat onw de, we are a trusted organ zat on regard ng advocacy for protect on of the nventor and ts ent ty.
For near y a decade, we have worked w th startups and nventors who have been v ct m zed by the US Patent system. It s our goa to protect these sma startups and ent t es from nfr ngement and corrupt on of the patent system.

II. Background Informat on
To proper y address the ACUS' request for v ews, nformat on, and data on a aspects of a potent a court or proceed ng for sma ent ty patent c a ms and ts mpacts, we must first address the arger prob ems that harm sma ent t es.

Sma Ent t es
Most p oneer ng nvent ons are nvented and patented by sma ent t es, and these nvent ons are most often nfr nged upon and mass ve y commerc a zed by very arge mu t nat ona corporat ons. Th s means that most sma ent t es do not have sma c a ms – they have huge c a ms.
For sma ent t es, the cost and comp ex ty of a patent awsu t s an unsurmountab e barr er to defend ng the r r ghts. The ack of money can cause a sma ent ty to cense a patent that they do not nfr nge just to stop the huge ega fees.
But the s ze of a c a m has no re at onsh p to whether a sma ent ty has m ons of do ars to defend the r patent r ghts.

Fa ed Patent System
eBay v. MercExchange
In 2006, the Supreme Court n eBay v. MercExchange created a pub c nterest test to determ ne f njunct ve re ef shou d be granted. The eBay pub c nterest test requ res the patent ho der to have a product on the market w th the manufactur ng and d str but on power to rep ace the nfr nger.
When a patented nvent on of a sma ent ty s nfr nged by a huge corporat on, the nfr nger's deep pockets, ex st ng eng neer ng, market ng and d str but on capab t es mass ve y commerc a ze the nvent on and take the market eav ng the sma ent ty unab e to compete and out of bus ness.
Once out of bus ness, the sma ent ty cannot surv ve the eBay pub c nterest test because they do not have a product on the market.

Patent Tr a and Appea Board
In 2011, the Amer ca Invents Act created an adm n strat ve tr buna ca ed the Patent Tr a and Appea Board (PTAB). The PTAB cons sts of government awyers ca ed Adm n strat ve Patent Judges (APJ). These judges are hand-p cked to adjud cate patent va d ty rev ews, wh ch are pet t oned by most y arge corporat ons aga nst sma ent t es. APJs work w th n the USPTO to nva date the same patents a persona property r ght that were just ssued by the patent exam ners, who a so work w th n the USPTO.

Patents targeted for nva dat on at the PTAB are those w th s gn ficant commerc a va ue. They are nvented and owned by sma ent t es who n pursu t of the r Amer can dream conce ved t, nvented t, and protected t w th a patent granted by the USPTO, and then attempted to commerc a ze t.

But tt e d d the nventor know, the patent protect on that they worked so hard to obta n, the patent protect on that was ssued by the USPTO, s a so patent protect on that can be eas y dec ared nva d at the USPTO's PTAB for reasons wh ch were (or shou d have been) addressed dur ng patent exam nat on.

The USPTO D rector, who runs both patent exam nat on (creat ng patents) and the PTAB (destroy ng patents) has d ctator a power to both create and destroy the most mportant persona property r ght n the Un ted States.

The PTAB s an adm n strat ve tr buna n the Execut ve branch of government, not an Art c e III court. Yet, they take persona property r ghts w thout a jury and w thout due process of aw.

The vast major ty of the APJs have tt e or no pract ca exper ence n the fie d of the r techn ca undergraduate degree and n many cases, have no exper ence n the techno ogy of the patents they nva date. Yet, they destroy 84% of the patents they rev ew.

The PTAB's 84% des ruc on ra e defies he very purpose of wha he PTAB was mean o so ve. The PTAB was mp emen ed o

The PTAB's 84% dest uct on rate de es the ve y pu pose o what the PTAB was meant to so ve. The PTAB was mp emented to protect sma ent t es and prov de a faster and ess cost y way to reso ve d sputes whether the sma ent ty s the patent ho der or the accused nfr nger.

However, the PTAB has fa ed sma ent t es. PTAB rev ews can add three or more years to t gat on and add at east $500,000 do ars of costs. Because there are no stand ng requ rements, anyone can cha enge a patent even f they w never be the subject of t gat on. There are no m ts to the number of PTAB rev ews that can be fi ed. Many sma ent t es have been overwhe med by dozens of PTAB rev ews fi ed by mu t p e huge corporat ons and the r prox es.

A ce v. CLS Bank
35 USC 101 states "Whoever nvents or d scovers any new and usefu process, mach ne, manufacture, or compos t on of matter, or any new and usefu mprovement thereof, may obta n a patent therefor, subject to the cond t ons and requ rements of th s t t e."

In 2014, the Supreme Court n A ce v. CLS Bank un eashed a demon creat ng an except on to the word "any" ca ed an abstract dea. Th s means that abstract deas are not patent e g b e. But they d d not define what an abstract dea s.

Th s has eft the USPTO and the ower courts grasp ng for a mean ng of abstract dea and n the r strugg e, tr a courts nva date around 67% of patents cha enged as abstract deas, and the USPTO fa s to grant a huge number of patents that shou d be granted.

Summary
Between the PTAB, A ce and eBay, wh ch a d sproport ona y harm sma ent t es over arge corporat ons, patents are a ab ty n the hands of a sma ent ty.

S nce patents are often the on y asset that a sma ent ty can co atera ze to attract nvestment, espec a y at the ear est stages of deve opment, ear y-stage fund ng of startups has m grated from the U.S. to Shenzhen, Ch na. Th s s now a nat ona secur ty cr s s and must be reso ved.

III. Comments n response to so c ted top cs

1. The Focus Shou d be Sma Ent t es, not Sma C a ms.
Patent nfr ngement t gat on s among the most expens ve and comp cated t gat on n the U.S. Teams of awyers, most y work ng for accused nfr ngers, run costs nto the m ons of do ars. Often dozens of mot ons are fi ed that must be answered, and a s ng e case can have severa appea s to the Court of Appea s for the Federa C rcu t (CAFC). Cases can take ten years to fu y reso ve.

Due to the h gh costs, extreme y ong pendency, and the h gh chance that the patents w be nva dated n the PTAB or as an abstract dea, and because njunct ons are no onger ava ab e for most sma ent t es, very few aw firms w take a case on a cont ngent fee bas s. Th s means that sma ent t es need m ons of do ars to defend the r r ghts. Sma ent t es, whether the patent ho der or the accused nfr nger, cannot shou der the financ a burden.

A so, sma ent t es often nvent p oneer ng techno og es. These nvent ons are knocked off by huge corporat ons that mass ve y commerc a ze them and run the sma ent ty out of bus ness. Th s means that many sma ent t es do not have sma c a ms, but they st cannot afford the m ons of do ars to defend the r r ghts.

Therefore, a sma c a ms court s not a pract ca so ut on, and any new process must focus on the s ze of the ent ty rather than the s ze of the c a m.

The nfr nger obby has repeated y pushed a narrat ve the sma ent t es are the target of patent awsu ts. If th s s ndeed the case, then sma ent ty defendants must a so be cons dered n any so ut on.

2. It must be an Art c e III court, not an Adm n strat ve Tr buna As we a have w tnessed through the PTAB's excess ve y h gh nva dat on rates and the r focus on nva dat ng sma ent ty patents on the request of huge mu t nat ona corporat ons, adm n strat ve tr buna s do not work. Th s s because the PTAB v o ates core Const tut ona constructs of due process and separat on of powers. An adm n strat ve tr buna cannot adjud cate patent t gat on cases for the same reasons.

That eaves Art c e III courts. However, as we have found n the CAFC, the concentrat on of adjud cat ve power n a few judges can ead to a dangerous y unba ance court. Over the years, a arge number of ant -patent judges have been put on the CAFC. These judges have repeated y and unfa r y dec ded cases aga nst sma ent t es and for huge mu t nat ona corporat ons. Th s cou d not happen f patent appea s were d str buted across a appea courts.

The CAFC has demonstrated that t w overr de sound judges on venue transferr ng cases to the headquarters of the nfr nger. Th s pract ce w proh b t ve y ra se costs for sma ent t es because they w need to trave , take excess ve t me off work and h re oca counse n courtrooms often thousands of m es away. If a separate Art c e III court s created to hear sma ent ty cases, those sma ent t es not near that court w have the same d sproport onate cost ncrease.

Sma ent t es must be ab e to fi e awsu ts n the courthouse nearest to them.

The so ut on s to create sma ent ty ru es n the Federa Ru es of C v Procedure (FRCP) that Art c e III courts must fo ow upon request by e ther party f that party s a sma ent ty. Th s a ows a sma ent ty to fi e su t n the federa d str ct court most conven ent to the sma ent ty.

3. Sma Ent ty Qua ficat ons
To qua fy as sma ent ty, the nd v dua or bus ness' revenue must be no more than 500MM and 499 emp oyees.

Upon request by e ther party, the sma ent ty FRCP ru es must be fo owed by the Art c e III court.

4. Mot on Pract ce L m ts
Excess ve mot on pract ce s common n patent cases. Large y th s pract ce s ntended to dr ve up costs for the party east ab e to afford the cost ncrease.

Therefore, m t ng the number of mot ons each party can fi e s mportant. L m t ng the number of mot ons forces each party to cons der the mportance of the mot ons so that t fi es on y those mot ons that have a mater a effect on the adjud cat on of the case. Fr vo ous mot ons are avo ded by th s m t.

5. Mot on Pract ce L m ts
PTAB rev ews must be opt ona for sma ent ty patent ho ders. If the PTAB becomes a fa r so ut on, many w accept the PTAB to adjud cate va d ty. If t rema ns as t s now (corrupt) many w not accept a PTAB rev ew.

6. Injunct on s the Defau t Remedy
Injunct ve re ef dr ves sett ements. As a case moves to ts fina tr a date, each party earns the r sks re ated to nfr ngement and va d ty. In near y a cases, when the part es are ant c pat ng an njunct on, a sett ement occurs before tr a . Th s w ncrease the opportun ty of sett ement pr or to tr a thereby e m nat ng the costs of tr a .

Injunct ve re ef br ngs a market va ue for the nfr ngement because damages wou d be negot ated n a free market by w ng buyer and a w ng se er.

In cases where the pract ca fe on the patents do not a ow for njunct ve re ef or n cases where the patent ho der does not request njunct ve re ef, d sgorgement of a profits must be the remedy for past nfr ngement and ru es of thumb shou d be estab shed for ongo ng cens ng fees.

Reestab shment of njunct ve re ef not on y keeps w th the Const tut on's construct on of a patent so e y as an "exc us ve R ght", but t a so e m nates a the costs ncurred by t gat ng damages, wh ch can match or exceed nfr ngement t gat on and are mposs b e for sma ent t es to afford.

US Inventor apprec ates the opportun ty to prov de these comments. We thank ACUS for ts t me and attent on to th s matter. We are ava ab e for add t ona d scuss on and ook forward to ass st ng further.

S ncere y,
D rk Toms n, husband of Inventor