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Discretion to Institute Trials Before the Patent Trial and Appeal Board

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Comment from Robert Wise

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General Comment

Sir/Maam:

I am the president of the Texas Inventors Association, a voluntary association of people with experience in different aspects of the invention and entrepreneurial process. We endeavor to help aspiring inventors and entrepreneurs to navigate the daunting process of creating a product or service and bringing it to market. We believe that this is critical for the American economy. Our association conducts monthly in-person monthly meetings and, during the pandemic, on-line meetings. We also accept emailed questions and provide speakers to local schools and other organizations.

I have been a registered patent attorney (registration number 29,602) since 1977. I worked in the PTO as an examiner for almost 20 years of my 43-year career. I also worked as a corporate patent attorney for a few years, and in private practice for many years. I've seen patent examination from both sides of the fence over more than four decades. More importantly, as a volunteer to the Texas Inventors Association, and also as its president for many years, I've

interacted with thousands of aspiring inventors and patentees. My recommendations are based on all the foregoing experiences.

The PTAB has gone too far in trying to invalidate bad patents. Instead of first allowing bad patents and then spending more money to invalidate the bad patents, it would make much more sense to issue good patents from the beginning. The underlying problem is that examiners mostly do not know how to do their jobs correctly. Patent examiners need better training, better management, and more time to do a good job. I can tell you from personal experience during my years as a patent examiner that the line management of examiners is just awful, and that many examiners have, at best, a tenuous grasp of the concepts of obviousness and adequate disclosure.

The patent examination industry can be likened to the auto industry. U.S. car manufacturers used to make cars with lots of defects and then try to repair the defects in their quality control unit before shipping the cars to the dealers. Of course, not all defects were caught and repaired, and the whole process was ungainly. The reputation for quality of American cars plummeted. Japanese car manufacturers had a better idea make the cars right the first time. They became so good at making the car correctly that they were able to eliminate their quality control unit. When American car manufacturing executives visited Japanese plants, they would ask where is your quality control unit? When told there was none, the American executives simply could not believe that workers could make cars right the first time, and continued for years to believe there was a hidden QC unit in each Japanese manufacturing plant.

This is what the PTO is doing now. Their 10,000 examiners are examining the patent applications poorly and then the PTO tries to repair the defects with the PTAB afterwards. This process helps no one. We should reform the PTO so that examination is done right the first time. Then there will be relatively little need for the PTAB to kill bad patents. Once this is done, then the consideration of whether a patent is valid or not will return to its rightful place in an Article III courtroom where all the normal procedural protections will make litigation of the validity of any patent fair for both parties.

As president of the Texas Inventors Association, I and our associations members ask you to reform the PTO process to (1) substantially improve the original examination process to eliminate almost all bad patents, and (2) to revise the PTAB review process to bring its examination procedures in line with normal examination procedures, such that only a minority of the patent claims reviewed there are held invalid. These two objectives will interact with one another if they are revised properly.

Respectfully submitted,

Robert E. Wise
President, Texas Inventors Association
Registered Patent Attorney