

UNITED *for* PATENT REFORM

Re: USPTO Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board, 80 Fed. Reg. 66502-06.

Dear Under Secretary Iancu:

United for Patent Reform (UFPR) appreciates this opportunity to comment on the U.S. Patent and Trademark Office's ("PTO" or "Office") policy of using "discretionary denials" to limit access to patent validity review under the America Invents Act ("AIA"). UFPR is a broad coalition of diverse American businesses advocating for a patent system that enhances patent quality, advances meaningful innovation, and protects legitimate American businesses from abusive patent litigation. Our members are small and large — they range from Main Street retail shops, REALTORS®, hotels, grocers, convenience stores, and restaurants to national construction companies, automobile manufacturers, and technology businesses. Collectively, our members represent over 80 million U.S. employees, a figure that accounts for nearly two-thirds of private sector jobs in the U.S.

While some of UFPR's members manufacture products and have their own patent portfolios, the vast majority do not. Nevertheless, we are compelled to make our voices heard on patent policy because, over the last two decades, our members have become routine targets of abusive patent infringement lawsuits. We write to you today to explain why reliable access to post-issuance review at the PTO is critical, not only to the integrity and fairness of the patent system, but also to Main Street businesses, and to urge you to abandon policies that arbitrarily limit access to such review.

Abusive Patent Litigation Targets Vulnerable Small and Medium-Sized Businesses

In the public's mind, it is the manufacturer of an accused product who is logically the target of a patent lawsuit. The Patent Act, however, allows an infringement action to be brought against anyone who "uses, offers to sell, or sells" the patented invention.¹ In other words, any small business can be sued for simply using a product that someone else has made, and a retailer can be sued for selling that product. This is so even if the manufacturer is readily identifiable and could have been sued instead. There is no requirement in the Patent Act that the patent owner first sue the entity that made the allegedly-infringing product.

As recently as two decades ago, it was relatively rare for patent owners to sue businesses such as our members, who are end users and retailers of accused products. Targeting such parties was frowned upon when a suit could have been brought more appropriately against the manufacturer. In the intervening years, however, a new type of business model arose. Non-practicing entities ("NPEs"), which buy up patents solely for the purpose of bringing patent litigation, have sued many of our members—businesses such as grocery stores, restaurants, and hotels—for doing things such as offering Wi-Fi Internet access to customers, scanning documents and attaching them to emails, using Quick Response (QR) codes in promotional

¹ 35 U.S.C. § 271(a).

materials, helping people to find jobs over the Internet, or for using a variety of web-based technologies that have become routine in e-commerce.²

In all of these cases, our members were simply using a product that had been sold to them by someone else and were not in the best position to address the claim of patent infringement. Indeed, it is apparent that in many cases our members are targeted *because* they are not in possession of technical information on the accused technology. Litigation finance advisers who work for NPEs openly counsel their clients to “litigate against a smaller defendant first” to address key issues concerning their patents “and gain key favorable rulings,” and only then “attack the big fish with a cleaner path through litigation.”³ Frequently NPEs will sue small businesses while “deliberately exclud[ing]” the manufacturer of the accused product because the manufacturer is “often more patent-litigation sophisticated and thus more difficult to force into cost-of-defense settlements.”⁴ In other words, our members are targeted precisely because they are vulnerable businesses and may lack the resources or technical information to defend themselves. This type of litigation is by its very nature abusive and not tied to the vindication of legitimate patent rights. Combined with the recent discretionary denial policies by the PTO, this targeting is designed to protect invalid patents.

Even a lawsuit that has settled can have a negative impact on our members. NPEs are very familiar with the costs of litigation and the financial resources of small businesses. They know how much they can demand without bankrupting a business while keeping their demands well below the cost of litigation. But a settlement of \$50,000 can be devastating to a small company. Many brick-and-mortar retail and service businesses have low profit margins. Paying to settle or avoid litigation can mean that a business owner is unable to expand, hire new employees, retain current staffing levels, or even pay its salaries. On an individual scale, the abuses inflicted by this litigation are grossly unfair to our members.

Validity Review at the PTO Is Critical to Preventing and Deterring Litigation Abuse

The inequities of patent litigation are compounded by the fact that a large portion of patents asserted in district court are invalid. Studies have found that approximately 40% to 45%

² See <https://www.unitedforpatentreform.com/stopbadpatents>; Brian J. Love and James C. Yoon, *Expanding Patent Law’s Customer Suit Exception*, 93 B.U.L. Rev. 1605, 1610-11 (2013) (citing examples and noting that “small companies—not tech giants—are the predominant targets of NPE lawsuits”); Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C.L. Rev. 1443, 1456-58 (2014) (citing examples and noting that “increasingly, . . . PAEs have been suing end users who are customers of a manufacturer or supplier of the alleged infringing technology”).

³ “Intersection of Litigation Finance and Patent Litigation,” *Litigation Finance Journal*, Sep. 17, 2020, <https://litigationfinancejournal.com/intersection-of-litigation-finance-and-patent-litigation/>.

⁴ Colleen Chien and Edward Reines, *Why Technology Customers Are Being Sued En Masse for Patent Infringement & What Can be Done*, Santa Clara Univ. Legal Studies Research Paper No. 20-13, p. 10 (2013) (quoting a survey response from counsel noting that “the plaintiff purposefully chose not to sue the developer of the technology, who has an incentive to fight and defend its product,” and that NPEs “[sue customers, not suppliers] because they seek easy money from defendants who have no idea how the technology works”); see also Bernstein *supra* note 1, at 1446-57 (“[E]nd users are typically onetime players. They are not in the business of producing and selling the technology. . . . End users would, therefore, prefer to settle or withdraw from use of the technology, rather than pursue litigation.”); see also *id.* at 1450 (“[E]nd users at a significant disadvantage, making them much more likely to settle and avoid litigation even when their claims are meritorious.”).

of all patents that are challenged in court are ultimately determined to be invalid.⁵ In other words, not only are retailers and other Main Street businesses being forced to pay settlements for products that they did not make; in many cases, the asserted patent never should have been issued in the first place.

The low quality of so many asserted patents is why validity review at the PTO is critical to the fairness and integrity of the system. *Inter partes* review (“IPR”), established by the AIA, allows technically-trained and legally-knowledgeable judges to evaluate patents,⁶ at what is typically just a tenth of the cost of civil litigation. Critics of IPR sometimes assert that district court litigation is an adequate substitute for the PTAB, but this is not so for two reasons. First, while PTO review is not cheap, typically costing hundreds of thousands of dollars, district court litigation costs millions—often ten times as much a PTAB trial.⁷ “Access” to validity review in a district court is illusory for many small businesses. They simply cannot afford to pay the legal fees and will be forced to settle the case and pay for an invalid patent if validity review at the PTAB is made unavailable. Second, because PTAB judges have technical degrees and are legally trained in patent law, they are better equipped to consider patent validity than a district court. A PTAB judge’s understanding of the relevant technology helps them to understand the patent, the prior art, and what would have been obvious to a skilled artisan. Indeed, PTAB judges *are* skilled artisans. Who better to evaluate what was taught or suggested by the prior art?

Academic research confirms the benefit of having technically-trained PTAB judges. A review of the results of all patent appeals that were docketed at the Federal Circuit in fiscal years 2015 and 2016 found that “the PTAB is affirmed notably more often than district courts on [patent] validity issues.”⁸ In fact, district courts are almost *two and a half times* more likely to be reversed on appeal when deciding patent validity issues than is the PTAB.⁹ After considering the Federal Circuit case law, it was also found that “the most straightforward conclusion” is that PTAB judges’ technical expertise has “aided decision-making on the thorny scientific questions endemic to patent law.”¹⁰

⁵ See John R. Allison, Mark A. Lemley and David L. Schwartz, *Our Divided Patent System*, 82 U. Chi. L. Rev. 1073, 1099 (2015) (noting that of all patent infringement lawsuits that were filed in 2008 and 2009, “roughly 43.0 percent of patents that went to a final judgment on validity were invalidated”); Mark A. Lemley, *Ignoring Patents*, 2008 Mich. St. L. Rev. 19, 27 n.32 (2008) (noting that “[f]orty-six percent of patents litigated to judgement are invalid”) (citing John R. Alison & Mark A. Lemley, *Empirical Evidence of the Validity of Litigated Patents*, 26 IPLA Q.J. 185, 205 (1998)). These data are consistent with historical trends. See Thomas W. Cole, *Why Most Patents Are Invalid*, 34 Orthotics and Prosthetics 36 (1980) (noting that “about 60 percent of all the patents sued upon in the federal courts are held invalid, and hence unenforceable”).

⁶ The AIA requires that PTAB judges “shall be persons of competent legal knowledge and scientific ability.” 35 U.S.C. § 6(a). And as the PTO notes, the “[j]udges have extensive patent legal experience prior to their appointment on the Board, for example, in private practice, in government practice (*e.g.*, at the Department of Justice or the International Trade Commission), and as in-house counsel in companies. Many also have served as USPTO examiners or judicial law clerks.” See USPTO, *New to PTAB*, <https://go.usa.gov/x7gqr>.

⁷ See “Inter Partes Review: Five Years, Over \$2 Billion Saved,” Patent Progress, Sept. 14, 2017, available at <https://www.patentprogress.org/2017/09/14/inter-partes-review-saves-over-2-billion/>.

⁸ See Matthew G. Sipe, Experts, Generalists, Laypeople—and the Federal Circuit, 32 Harv. J.L. & Tech. 576, 610 (2019) (noting PTAB affirmance rate of 91.2% and district court affirmance rate of 84.9%).

⁹ See *id.* (noting district court reversal rate of 12.1% and PTAB reversal rate of 4.8%). (The few remaining cases were vacatur or remands for further proceedings.)

¹⁰ *Id.* at 627.

PTAB review also improves the quality of issued patents by providing guidance to examiners on particular technologies and claims.¹¹ This guidance helps to ensure that more invalid patents are not issued from the same patent specification. The availability of PTAB review also motivates patent applicants to assist with examination and to seek only high quality patents. The PTO receives on average 1,800 patent applications *every day*.¹² To avoid a backlog and long delays in the issuance of patents, the PTO must limit the time allowed to examiners to search for and consider prior art. When an issued patent is later found to be invalid, it is usually because of prior art that was never considered by the examiner during prosecution.¹³ To improve patent quality, the system must incentivize patent applicants to be forthcoming with examiners and to assist with the identification of relevant prior art. IPR serves this critical role.

The PTO’s “Discretionary Denial” Policies Arbitrarily Limit Access to PTAB Review and Facilitate Litigation Abuse

Over the last two years, the PTO has adopted a series of “discretionary denial” policies that are not based in the statutory requirements of the AIA and effectively make it impossible for many defendants to use PTAB review proceedings. These policies allow decisions solely made by the patent owner, such as where to bring suit or which defendants to sue first, to eliminate the defendant’s access to IPR. In effect, the new policies allow a plaintiff to insulate its patents against validity review at the PTO. After the positive advancements made after the passage of the AIA, these policies have once again made it possible for NPEs to leverage invalid patents and have enabled and encouraged abusive litigation against our members.

The PTO’s *Fintiv*¹⁴ and *NHK Spring*¹⁵ policies bar access to post-grant review if a district court moves a case quickly and schedules a trial to begin before a PTAB proceeding would be completed.¹⁶ This is directly contrary to the structure of the AIA, which expressly provides one year for a defendant to seek PTAB review after it has been sued.¹⁷ Indeed, Congress clearly deliberated over, and even extended, this deadline over the course of its consideration of the AIA. Members recognized that patent owners often assert “multiple patents with large numbers of vague claims” and that it takes time to sort out which claims are relevant.¹⁸ Petitioners also need time to conduct a prior art search and analysis. For these reasons, Congress extended the AIA filing deadline from six months to one year in the final bill out of a recognition that “it is important that the . . . deadline afford defendants a reasonable opportunity”¹⁹ to prepare a proper petition.

¹¹ See generally Michael D. Frakes & Melissa F. Wasserman, *Patent Trial and Appeal Board’s Consistency-Enhancing Function*, 104 Iowa L. Rev. 2417 (2019).

¹² See U.S. Patent Statistics Chart, at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (noting 669,434 total patent applications filed in 2019).

¹³ See John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 232-34 (1998).

¹⁴ *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (March 20, 2020).

¹⁵ *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (Sept. 12, 2018).

¹⁶ *Fintiv* also bars review based on International Trade Commission proceedings involving the patent. See, e.g., *Fitbit, Inc. et al v. Koninklijke Philips N.V.*, IPR2020-00771, 2020 WL 6136596 (Oct. 19, 2020); *Garmin Int’l, Inc. et al v. Koninklijke Philips N.V.*, IPR2020-00754, 2020 WL 6293683 (Oct. 27, 2020).

¹⁷ See 35 U.S.C. § 315(b).

¹⁸ 157 Cong. Rec. S5429 (Sep. 8, 2011) (statement of Sen. Kyl).

¹⁹ *Id.*

NHK and *Fintiv* not only override the clear choices that Congress made in the AIA; in many cases these policies make it impossible for a defendant to employ any PTAB review at all depending on where the patent owner has filed suit. For instance, earlier this year, *Fintiv* was applied to deny an IPR that was sought “less than five months after the service of the complaint and less than two months after receiving the Patent Owner’s infringement contentions.”²⁰ As a dissenting PTAB judge noted in that case:

[t]he Petitioner here did exactly what Congress envisioned in providing for inter partes reviews in the America Invents Act: upon being sued for infringement, and having received notice of the claims it was alleged to infringe, it diligently filed a Petition with the Board, seeking review of the patentability of those claims in the alternative tribunal created by the AIA.²¹

Nevertheless, because the district court scheduled a trial to begin before the PTO validity review would be completed, *Fintiv* blocked access to that review. Subsequently, when the patent owner asserted another patent in the same lawsuit, *Fintiv* again barred review, even though AIA review was requested just *seven weeks* after the patent was asserted.²² As a panel member again noted, *Fintiv* denies a defendant access to validity review based on factors that are completely “outside its control.”²³

In other cases, the Board has effectively acknowledged that *Fintiv* makes it impossible for a defendant to obtain congressionally-authorized review if the patent owner brings suit in a fast-moving district court. In one recent case, the PTAB took note of a defendant’s argument that reliance on “the trial date in a parallel proceeding is unfair because, when sued in fast-moving jurisdictions, the Board’s statutory due date for the final written decision will almost always occur after trial in the parallel proceeding *even if* a petitioner filed its petition on the *same day* it is served in district court.”²⁴ In reply, the Board simply noted that “we are constrained to follow [the Director’s *Fintiv*] guidance, regardless of Petitioner’s argument regarding the practicalities of lawsuits filed in fast-moving jurisdictions.”²⁵ Similarly, in response to complaints that *Fintiv* makes “it *impossible* to attain post-grant relief,” and that it allows “patent owners to game the system through forum shopping and defeat the statutory scheme chosen by Congress,”²⁶ the Board has responded that “we are constrained to follow *Fintiv*.”²⁷

The *Fintiv* and *NHK* policies have also drawn the notice of district courts that have sought to make themselves a magnet for patent litigation. For example, Judge Albright in the

²⁰ *Cisco Sys., Inc. v. Ramot at Tel Aviv U. Ltd.*, IPR2020-00122, 2020 WL 2511246, at *7 (May 15, 2020) (Crumbley, J., dissenting).

²¹ *Id.* at *10.

²² *Cisco Sys., Inc. v. Ramot at Tel Aviv U. Ltd.*, IPR2020-00484, 2020 WL 4820592 (Aug. 18, 2020); *see also id.* at *7 (Crumbley, J., dissenting) (noting that “[t]he Amended Complaint that added the ’866 patent to the district court suit was filed on December 12, 2019, six months after the original complaint was filed. Petitioner filed the instant Petition challenging the claims of the ’866 patent on January 31, 2020, less than seven weeks later.”).

²³ *Id.*

²⁴ *Supercell Oy et al v. GREE, Inc.*, IPR2020-00513, 2020 WL 3455515, at *4 (Jun. 24, 2020).

²⁵ *Id.*

²⁶ *Supercell Oy v. GREE, Inc.*, IPR2020-00215, 2020 WL 3092613, at *5 (Jun. 10, 2020)

²⁷ *Id.* at *7.

Western District of Texas has openly advertised for patent owners to bring suit in his court²⁸ and has made clear that he views himself in competition with the PTAB.²⁹ He has adopted what local patent lawyers refer to as “the Albright Doctrine: that a district court can moot an IPR by moving quickly to trial so that a jury can adjudicate validity rather than the PTAB.”³⁰ As one law professor has noted, “Judge Albright’s aggressive default schedule helps ensure that, in most cases, th[e] [*Fintiv*] factors will cut in favor of denying institution”³¹—the interaction between *Fintiv* and Judge Albright’s rules “essentially eliminates the prospect of PTAB review.”³² Quite simply, “the *Fintiv* factors are a death knell to any IPRs filed for patents in cases assigned to Judge Albright.”³³

The impact of these combined policies has been significant and damaging for our members. Recognizing the opportunity to insulate their patents against validity review, plaintiffs have shifted their lawsuits to West Texas. “Since [Judge Albright] took the bench [in 2018], more than 500 patent cases have been filed in the Waco [Division], more than the division had received in its prior thirty-five years of existence.”³⁴ And “[o]ver 85% of the patent suits brought in the Western District of Texas are brought by NPEs.”³⁵ Patent lawyers have begun openly advising patent owners that “[v]enue selection is a critical component to any patent enforcement strategy” because “the speed of your patent case (i.e. time to trial) and stay statistics will have a direct impact on whether IPRs against your patents will institute in light of the *Fintiv* factors.”³⁶ This confluence of policies “undermines the system Congress set up in the AIA to weed out low

²⁸ Jonas Anderson and Paul R. Gugliuzza, “Federal Judge Seeks Patent Cases,” Temple University Beasley School of Law, Legal Studies Research Paper No. 2020-25, at p. 29 (Sep. 18, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668514.

²⁹ “West Texas Judge Says He Can Move Faster Than PTAB,” Law360, Nov. 27, 2019, available at <https://www.law360.com/articles/1224105/west-texas-judge-says-he-can-move-faster-than-ptab>.

³⁰ “The Strengthening of the ‘Albright Doctrine’ re IPRs at the PTAB, available at <https://www.wacopatentblog.com/waco-patent-blog/the-strengthening-of-the-albright-doctrine-re-iprs-at-the-ptab>; see also Anderson, *supra* n.28, at 38 (“Judge Albright has specifically stated a goal of always beating the PTAB to a validity decision.”).

³¹ Anderson, *supra* n.28, at 46. Judge Albright also refuses to stay cases for PTAB review or any other reason. For example he recently refused to stay a patent lawsuit that had been brought against a grocery store for using a commercial software product, even after the developer of the product had intervened in the litigation to defend the suit. See Anderson, *supra* n.28, at 44-45 (discussing *Motion Offense, LLC v. Sprouts Farmers Mkt., Inc.*, No. 6:19-cv-417 (W.D. Tex. Jan. 26, 2020)).

³² Anderson, *supra* n.28, at 47.

³³ Harper Batts and Chris Ponder, “Vexing PTAB Apple Decision May Overtax West Texas Court” Law360, June 25, 2020, available at https://www.sheppardmullin.com/media/publication/1874_Vexing_PTAB_Apple_Decision_May_Overtax_West_Texas_Court.pdf.

³⁴ Anderson, *supra* n.28, at 29.

³⁵ Anderson, *supra* n.28, at 34.

³⁶ Daniel B. Weinger, Michael C. Newman and Peter J. Cuomo, “Tip #1 for Avoiding IPR Institution: Litigation Venue Selection,” National Law Journal, Oct. 29, 2020; see also *id.* (“Because venue selection is largely within the patent owner’s control, a successful enforcement strategy should factor the likelihood that the chosen venue may assist in avoiding IPR institution.”). (Article available at <https://www.natlawreview.com/article/tip-1-avoiding-ipr-institution-litigation-venue-selection>.)

quality patents,”³⁷ and “provide[s] exactly the tool that [plaintiffs] need to avoid having the Patent Office use its expertise to reexamine a patent.”³⁸

Finally, the PTO’s *Valve Corp.*³⁹ discretionary denial policy also arbitrarily restricts access to validity review in contravention of the statute. The Patent Act provides that if a party is procedurally barred from seeking validity review, that bar will also extend to that party’s real parties in interest (a parent or subsidiary) and to parties in privity (such as successors in interest to property).⁴⁰ This is a fair rule—it prevents multiple bites at the apple while limiting the estoppel effect that a third party’s action will have on a defendant to the actions of parties with whom the defendant has a relationship.

The *Valve Corp.* rule overrides these congressionally mandated policies by extending estoppel effects to actions that are taken by *any* third party. Under this new rule, PTAB review is denied simply because an invalidity defense to a patent has been mounted by another entity who is completely unrelated to the party seeking PTAB review.⁴¹ As one Board Judge has noted, *Valve Corp.* “set[s] up a race to file the first petition. The losers of the race are denied a chance to present their own case to the Board, and must depend on others whose interests may not align fully with theirs.”⁴²

In a very recent case, the Board has even combined *Valve* with *Fintiv* to bar consideration of a request for AIA review because a different defendant was likely to raise an invalidity defense in a different district court.⁴³ The Board relied on the reasoning that “the field [of the patent] is crowded with pertinent prior art, and given the breadth of the claims, the district court [in the other defendant’s case] will be considering and resolving issues very similar to those that would be considered in this proceeding.”⁴⁴ In other words, if a patent owner sues a large number of defendants and asserts broad claims that appear to be invalid under multiple prior art references, *Valve* and *Fintiv* are more likely to require discretionary denial. Such a policy affirmatively encourages abusive litigation and thoroughly undermines the AIA’s purpose to allow PTAB review to serve as a check on patent quality.

Our Conclusions and Recommendations

³⁷ Anderson, *supra* n.28, at 47.

³⁸ “Meet the Western District of Texas-NPEs Certainly Have,” Patent Progress Blog, May 27, 2020, available at <https://www.patentprogress.org/2020/05/27/meet-the-western-district-of-texas-npes-certainly-have/>; *see also* Anderson, *supra* n.28, at 47 (noting that “many of the patents being asserted in West Texas are low quality”).

³⁹ *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00064, -00065, -00085, Paper 10 (May 1, 2019); *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, -00063, -00084, Paper 11 (April 2, 2019).

⁴⁰ 35 U.S.C. § 315(b), (e)(2).

⁴¹ *See, e.g., Ericsson Inc. et al. v. Uniloc 2017, LLC*, IPR2019-01550, 2020 WL 1285387, at *5 (PTAB Mar. 17, 2020) (agreeing that the petitioner “does not have a significant relationship with the other petitioners,” but denying review on the basis of *Valve Corp.*); *United Fire Protection Corp. v. Engineered Corrosion Solutions, LLC*, IPR2018-00991, 2019 WL 5089762, at *4 (PTAB Oct. 10, 2019) (denying institution despite “agree[ing] that the record does not establish a relationship between Petitioner and the Prior Petitioners”).

⁴² *Google LLC v. Uniloc 2017 LLC*, IPR2019-01584, 2020 WL 1488349, at *8 (PTAB Mar. 24, 2020) (dissenting from discretionary denial based on earlier petitions).

⁴³ *See Fitbit, Inc. v. Philips N. Am. LLC*, IPR2020-00828 (Nov. 3, 2020).

⁴⁴ *Id.* at 14.

The PTO's discretionary denial policies have already done serious damage to the patent system. They encourage judicial forum shopping, undermine the quality-enhancing effects of AIA review on patent examination, and contravene the clear statutory commands of Congress. These policies have a direct and negative impact on our members. After several years of declining NPE litigation, the last year saw a substantial increase.⁴⁵ The discretionary denial rules give a plaintiff complete control over whether a defendant has access to PTO validity review, based solely on the venue where the plaintiff chooses to bring suit or the order in which it sues defendants. By allowing a plaintiff to insulate its patent against AIA review, these policies have enabled NPEs to force small and medium-sized businesses into nuisance litigation settlements.

Our members are dismayed that the PTO has adopted these policies. Several of our members were directly involved in the negotiations over the AIA and many of our trade associations strongly supported its passage. A critical component of the new law for our members was reliable and predictable access to PTO validity review. By arbitrarily cutting off access to that review, the discretionary denial policies renege on the deal that was negotiated and signed into law, and leave our members exposed to abusive litigation and nuisance settlements.

Our recommendations are simple. Follow the statute that Congress enacted. Cancel the *NHK Spring*, *Fintiv*, and *Valve Corp.* policies immediately. And when a petitioner shows that a patent is reasonably likely to be invalid and has complied with the statutory requirements, conduct a validity review. By doing so, you will ensure that small businesses are not forced to pay litigation settlements for patents that never should have issued in the first place.

Sincerely,

Stephanie Martz
Co-Chair, United for Patent Reform
Senior Vice President & General Counsel
National Retail Federation

Paul Redifer
Co-Chair, United for Patent Reform
Senior Director Government Affairs
Cisco

⁴⁵ "Q4 in Review: NPE Filings Rebound as Operating Company Litigation Declines," RPX Blog, Jan. 14, 2020, available at <https://www.rpxcorp.com/intelligence/blog/q4-in-review-npe-filings-rebound-as-operating-company-litigation-declines/>.

UNITED for PATENT REFORM

United for Patent Reform is a broad coalition of diverse American businesses, small and large – from national construction companies, automobile manufacturers, and technology businesses to Main Street retail shops, REALTORS®, hotels, grocers, convenience stores, and restaurants – advocating for a patent system that enhances patent quality, advances meaningful innovations and protects legitimate American businesses from abusive patent litigation.

