

September 14, 2009

The Honorable Gary Locke
Secretary
U.S. Department of Commerce
1219 8th Street, NW
Washington, DC 20001

Dear Secretary Locke:

We are writing to share with you our thoughts and concerns regarding patent bills currently before the Congress. While some versions of the legislation have been improved this Congress, additional improvements are in order to ensure that the end product avoids serious unintended consequences.

The two most contentious issues in the patent reform debate relate to patent damages and the expansion of administrative challenges to patent validity through a new post-grant review process and modifications to the existing inter partes examination process. We believe the current Senate legislation resolves the damages issue by instituting the so-called “gatekeeper” language, and we urge you to support that approach. Any effort to go back to previous proposals will, in our view, endanger the entire patent reform effort.

The proposals relating to post-grant review and inter partes reexamination, however, will have serious negative consequences which must be considered. First, these proposals represent a huge risk for the Patent and Trademark Office, which already is under severe strain as indicated in Congress’ emergency approval to use trademark fees for patent functions. Adding new obligations to the agency at this time seems extraordinarily unwise. Almost inherently, the basic patent examination function will suffer, with the result of longer patent pendency and lower patent quality. We do not want that. The health of the PTO is extremely important to us, and we urge you to support no proposal which would undermine its core mission.

Another troubling aspect of the post-grant review and inter partes reexamination proposals is that, as written, they are vulnerable to a high level of abuse. Specifically, the current construct of the proposals will allow infringers to subject valid patents to lengthy and repeat challenges.

These concerns are not hypothetical. Firms like “Patent Assassins” market the *existing* reexamination process as a way to “create uncertainty about a problem patent by tying it up in a long reexamination process” (see www.patentassassins.com). And foreign IP experts have publicly noted the abusive possibilities of the new proposals. For example, writing for a Chinese IP publication, former Chinese intellectual property judge Yongshun Cheng analyzed the House-passed bill from last Congress as:

The newly created post-grant review procedure is alleged to provide an economic and fast way to challenge a patent before litigation becomes necessary. However, the proposed post-grant review procedure would also enable infringers to easily subject legitimate patents to consecutive attacks, creating much expense and uncertainty for the patent holder and those investing in the patent holder’s business. (“The Greatest Changes

in the U.S. Patent System in the Last 50 Years,” *China Intellectual Property News*,
November 7, 2007.)

Clearly, such abuses will be harmful to American innovators who rely on strong patents.

We agree on the goal of reducing the amount and cost of patent litigation. We do not believe, however, that the post-grant and inter partes provisions, as drafted, will achieve this goal. We urge you to push for improvements to these provisions which will limit the ability of infringers to undermine the very system the legislation attempts to strengthen.

Thank you for considering our views in this crucial matter. Strong patent protections are a critical factor to innovation and job creation. We look forward to working with you to ensure that American patent protections remain the strongest in the world.

Sincerely,

Abbott Medical Optics Inc.
Santa Ana, CA

Acclarent, Inc.
Menlo Park, CA

Acorn Cardiovascular, Inc.
St. Paul, MN

Allergan Inc.
Irvine, CA

Applied Medical
Rancho Santa Margarita, CA

ARCH Venture Partners
Austin, TX; Seattle, WA; Chicago, IL

Ardian, Inc.
Palo Alto, CA

Asthmatx, Inc.
Sunnyvale, CA

ATS Medical
Minneapolis, MN

Aware, Inc.
Bedford, MA

Biomerix Corporation
Fremont, CA

Calibra Medical
Seattle, WA and Redwood City, CA

Carticept Medical, Inc.
Alpharetta, GA

Conceptus, Inc.
Mountain View, CA

Corning Incorporated
Corning, NY

Cryptography Research, Inc.
San Francisco, CA

Cummins-Allison
Mt. Prospect, IL

Cyberonics
Houston, TX

Digimarc Corporation
Beaverton, OR

Dolby Laboratories
San Francisco, CA

Dynatronics Corporation
Salt Lake City, UT and Ooltewah, TN

Evalve, Inc.
Menlo Park, CA

Fallbrook Technologies Inc.
San Diego, CA

ForSight
Menlo Park, CA

ForSight VISION4
Menlo Park, CA

Ikaria Holdings, Inc.
Clinton, NJ

Intermolecular
San Jose, CA

Miramar Labs, Inc.
Sunnyvale, CA

Monsanto
St. Louis, MO

NeoTract, Inc.
Pleasanton, CA

Neuro Resource Group, Inc.
Plano, TX

Nims, Inc.
Miami, FL

Optimum Performance Solutions LLC
Tampa, FL

Paracor Medical, Inc
Sunnyvale, CA

Qualcomm Inc.
San Diego, CA

Tessera
San Jose, CA

Elemé Medical Inc.
Merrimack, NH

ExploraMed Development, LLC
Mountain View, CA

The Foundry, LLC
Menlo Park, CA

ForSight VISION3
Menlo Park, CA

GeneEx, Inc.
Hialeah, FL

InterDigital, Inc.
King of Prussia, PA

Medigroup Inc.
Oswego, IL

Mohr Davidow Ventures
Menlo Park, CA

Moximed, Inc.
Mountain View, CA

NeoVista, Inc.
Fremont, CA

NeuroPace, Inc.
Mountain View, CA

Novasys Medical
Newark, CA

OsteoMed
Addison, TX

PolyRemedy, Inc
Mountain View, CA

Streamline
Minneapolis, MN

TherOx
Irvine, CA

Transonic Systems Inc.
Ithaca, NY

U.S. Venture Partners
Menlo Park, CA

The Vertical Group
Summit, NJ and Palo Alto, CA

Viryd Technologies Inc.
San Diego, CA

Urovalve Inc.
Newark, NJ

Venture Investors
Madison, WI

Vibrynt, Inc.
Redwood City, CA