June 12, 2024

The Honorable Darrell E. Issa
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry C. "Hank" Johnson, Jr.
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa and Ranking Member Johnson:

We write to express support for the committee's hearing entitled "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities" and to urge additional transparency and oversight of third-party litigation funding in the U.S. judicial system.

Intellectual property is the bedrock of our national and economic security, with every critical industry relying on a vast network of interrelated technologies and patent property rights. The U.S. Patent and Trademark Office (USPTO) issues over 350,000 patents annually. In recent years, claims in more than 40% of challenged patents have been found to be invalid. The USPTO's Patent Trial and Appeal Board (PTAB), specifically the inter partes review (IPR) process, is an essential check on these threats to U.S. intellectual property. But it's not enough.

From defense to high-tech, energy to health care, non-transparent funding arrangements allow foreign competitors to advance their strategic interests against individuals, companies, and whole industries, weaponizing the judicial system to hurt American businesses. Foreign adversaries' use of litigation funding to anonymously initiate lawsuits against strategically important U.S. industries raises serious national security concerns, particularly due to access to highly confidential business information through abuse of the discovery process. Congress must act to shine a spotlight on these bad actors and meet head-on the new dangers posed by litigation investment entities, reducing waste and delays in our courts while also boosting the U.S. economy.

Third-party litigation funding (TPLF) is an investment strategy where an investor or investment group pays for legal costs in return for a large portion of any settlement or award. Litigation funders exploit the United States judicial system for their own financial gain, often working through networks of shell companies to initiate frivolous lawsuits in an attempt to extort large settlements or awards from their targets.

In 2023, the U.S. TPLF industry had more than $15 billion in assets under management, with funding flowing into patent infringement litigation in particular. In 2021, patent litigation accounted for 19% of all TPLF capital commitments, the largest category of funded matters. TPLF is deeply intertwined with meritless patent infringement litigation initiated by non-practicing entities (NPE), also known as patent trolls.

TPLF results in more lawsuits, longer lawsuits, and costlier lawsuits. Estimates show that 30% of 2022 U.S. patent litigation cases were backed by TPLF, with the majority of funding directed to NPEs. This estimate almost certainly underestimates the scale of investment, as the lack of mandatory TPLF disclosure requirements allows funders to operate in the shadows without defendants, judges, or juries knowing who is pulling the strings on litigation.

The lack of uniform federal court investor-funded litigation disclosure requirements means that individual judges must institute transparency measures in their own courtrooms. This push has been led by District of Delaware Chief Judge Colm Connolly, who has made changes within his district to prevent TPLF abuse.

Led by the suspicion that dozens of patent infringement lawsuits in his district were filed by related shell entities, Judge Connolly issued a standing order in April 2022 requiring all parties appearing in his court to disclose any investor arrangements for litigation expenses. The order requires the disclosure of litigation investors' identities, a description of the nature of their financial interest, and whether each investor's approval is necessary for litigation or settlement decisions.

In response to a petition to the U.S. Court of Appeals for the Federal Circuit requesting reversal of the transparency order, Judge Connolly issued a memorandum providing the legal justification for his order and detailing the apparent abuse he uncovered while enforcing it. Not only is Judge Connolly's order legal, but it should also serve as a model for others to replicate.

Judge Connolly's memorandum makes it clear that:

- Litigation funders are actively recruiting potential plaintiffs, presenting lawsuits as "investments" and a source of "passive income."
- Investor-funded litigation hides who the real parties in interest are and who is making the litigation decisions.
- Lawsuits that appear unrelated can in fact be funded and controlled by the same or connected parties behind the scenes.
- Undisclosed litigation investor arrangements call into question whether counsel act ethically and properly adhere to their rules of professional conduct.
- Investor-funded litigation arrangements may result in fraud perpetrated on the USPTO as well as the courts.

While Judge Connolly's memorandum is a good first step, transparency mandates must be instated across all jurisdictions to be truly effective.

As the Committee proceeds with discussions on patent reform, we ask that you consider commonsense transparency reforms to protect the U.S. intellectual property system from exploitive actors, providing judges, juries, and defendants with the information they need to maintain a fair and balanced judicial system. Thank you for your consideration. We look forward to the opportunity to discuss these matters with you.

Sincerely,

The U.S. Manufacturers Association for Development and Enterprise