

**Written Statement of Kirupa Pushparaj
General Counsel at Step**

Statement for the Hearing “The Patent Trial and Appeal Board After 10 Years: Impact
on Innovation and Small Businesses”

Before the Subcommittee on the Courts, Intellectual Property, and the Internet
June 23, 2022

Chairman Nadler, Ranking Member Jordan, Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, thank you for the invitation to appear before you today and for your concerns on the impact of intellectual property to help small business. I am here to share my background and experiences relating to the Patent Trial and Appeal Board (“PTAB”) its positive impact on innovation and small businesses.

I am the General Counsel at Step, a fintech startup based in Palo Alto, CA. Step’s mission centers is to offer financial literacy and improve the financial future of the next generation. We want to leave the planet better off with our next generation being more financially savvy than those of years past. We offer various financial tools -- including a parent-controlled digital banking platform, a credit card that allows teenagers to safely build positive credit history even before they turn 18, a savings tool, and an investment platform -- to empower and equip teenagers and young adults with the tools and resources they need to be able to safely and securely start building their financial skills and future.

I bring a perspective seeing the intellectual property world from a number of different perspectives. I previously was the head of Intellectual Property and Patent Litigation at Block (formerly known as Square) for over eight years, having seen the company grow from a startup to the global leader it is today in the payments industry. Prior to my career in law, I was an engineer at companies like Intel and Siemens, where I have filed for patents as an engineer and first-hand understand the impact of protecting your innovation. I also teach patent law at Stanford and at University of California, Davis.

At Step, with respect to patents, I play the dual role of protecting the company’s innovation by filing for patents at the US Patent and Trademark Office as well as defending the company against any claims that allege that we infringe others’ patent rights. This is similar to my experience at my prior positions. First off, let me state that I am a big believer in the ability of patents to be able to protect the rights and interests of companies, especially startups. Patents are vital to our ability to protect our innovation, offer us competitive advantage against larger companies, deter abusive litigation, raise capital for growth, establish credence in the technical field, and attract talent.

Patents are impactful and serve the functions of protection and deterrence only when they are of high quality and are reliably valid -- that is, the patents are thoroughly vetted by the patent

office and are legally sound and appropriately cover the claimed inventions. All too often, when startups are faced with patent assertion or litigation emerges, the patents are not valid and we do not infringe them. Which leaves two options for defending ourselves: either establish that the patent is invalid (i.e., it never should have been granted in the first place, for example based on "prior art") or establish that the patent does not read on the allegedly infringing product (or do both). In a typical situation, a defending company has to go through both avenues of defense (invalidity and non-infringement) in parallel in a court of law. The owner of the patent also has similar burdens -- to simultaneously prove infringement and defend against invalidity allegations. Given the complexities in patent litigation, this takes enormous resources and comes at the cost of several million dollars in just legal fees to pursue both issues in parallel.

Because of the PTAB, the vast majority of district courts will stay the litigation at the appropriate time so that resources are not being expended unnecessarily - the patent's validity is a prerequisite to moving forward in the case. If it isn't valid, then the Court nor the parties have to expend resources on infringement, damages and extensive discovery. Often, given that the validity of the patent is a seminal decision, meaning that the patent owner has to prevail on validity before being able to prevail on infringement, we see tremendous amounts of resources (including economic and judicial resources) being wasted in a district court prior to a decision on whether the underlying patent is valid.

The PTAB is the best forum to address and resolve patent validity issues, especially for startups. Patent litigation is extremely expensive and a single lawsuit could potentially be a death knell to a startup based just on the cost it takes to defend in court. Additionally, pending patent litigation matters affect a startup's ability to obtain funding, grow, bring in new talent, and protracted litigation also operates as a drain on the startup's resources given the amount of participation required from every part of the company (engineers, finance team, product developers, management team, etc.). Given that the validity of a patent is an essential and threshold matter to resolve in patent litigation trials, it is efficient, less expensive, and judicious to get this done at the PTAB. The PTAB is an expert body with a council of highly-qualified patent professionals (who are also typically experts in the technical fields of the patents being assessed) who are better equipped than courts to quickly and efficiently decide validity questions, which is the very reason Congress provided for PTAB trials in the AIA. They are tasked with making a final decision of patent validity within a year of taking on a case, which is a much faster pace to potentially have final resolution compared to most district courts where it takes many years before decisions are made. There is also consistent application of law and assessment of invalidity (as opposed to the courts where it varies vastly based on the location, judge, and jury in each case), making it a better and more reliable forum to address invalidity matters.

The PTAB is objectively balanced. It comes down to this -- in most situations, the patent owner and the defending party have to both have the patent's validity determined before there is final resolution on whether the patent is infringed. Both parties benefit from the efficient, less-expensive, quick, and expert resolution on the matter at the PTAB. A resolution on validity

parties to explore settlement, leading to practical conservation of resources (both judicial and economic). Certain allegations that the PTAB is a “death squad” for patents are unfounded. Oftentimes, the patent office does not have visibility, access, or resources to find and fully review all of the relevant prior art at the time of examining a patent application -- but that art is highly relevant to whether a patent is valid or whether technology is in the public domain for all of us to use and build on. When a company is sued for patent litigation years after the patent has been granted, it is in a better position to focus and identify prior art the patent office may have missed. Faced with this new prior art that the party brings before it, the PTAB makes an objective determination of whether the patent is valid or not. First, statistics show that PTAB decisions are indeed balanced -- that a “complete victory” for either side is not skewed in either direction. Second, that a large number of patents brought in front of the PTAB have ultimately proven to be invalid is an indication of the quality of the patents that were examined and the merits of the petitions being reviewed, not a bias or proclivity of the PTAB toward finding invalidity.

The problem of non-practicing entities further exacerbates the issue for startups and makes the PTAB even more indispensable. Non-practicing entities (or NPEs) are companies that purchase or otherwise aggregate patents with the intention of “licensing” them out to operating companies (oftentimes, forcing the companies into taking licenses against threat of litigation), including to startups. I have firsthand seen that most of the patents asserted by such NPEs are invalid, far-fetched, and completely irrelevant to the product they assert the claim against, and asserted with the aim of forcing companies to take out licenses rather than litigate the patents on their merits. Given the steep costs of litigating the patents against NPEs, startups especially are forced to settle and take out relatively inexpensive licenses to avoid litigation even when they are aware that the claims are meritless. In these situations, PTABs have been an effective forum (for startups and large companies alike) to tackle the problem by defusing the threat of these invalid patents at the more efficient and less-expensive PTAB forum. I have noticed that the availability of the PTAB as a forum for addressing patent invalidity has had a direct correlation to the receding number of NPEs and NPE claims a company faces.

That PTABs hurt small inventors is false. In my work with startups, we have reliably used patents to protect our intellectual property. But any patent holder, small or large, has to address the validity of their patents before they are able to prevail in litigating their patent against another party. For the reasons discussed above, the PTAB is a much better and more efficient forum to have that determination made, to the benefit of both the inventor and of the patent holder.

Thank you again for inviting me to testify today about the value of the PTAB to small businesses and startups. I am eager to contribute to your work, to help bring greater clarity to the patent system, improve patent quality, and avoid abuses of the system that hurt innovation. The PTAB has an important role to play in all of that. I appreciate you giving me a voice in the conversation today, and look forward to your questions. Thank you for your time. I look forward to your questions.