

1 [Laughter.]

2 Chairman Grassley. I want to go even further than you.
3 We want to make sure that that does not happen January 5,
4 2017.

5 [Laughter.]

6 Senator Durbin. I understand your concern.

7 Senator Leahy. I am staying out of this one.

8 Senator Whitehouse. I would like to get involved.

9 Chairman Grassley. So just on a gentleman's agreement,
10 keep the questions going when we are voting.

11 Good morning. We are here to discuss the problem of
12 abusive patent practices and the solutions offered by the
13 PATENT Act. Abusive patent litigation is having a serious
14 impact on small companies, innovators, manufacturers, Main
15 Street businesses, high-tech firms, and consumers. The
16 patent troll problem is being felt across every sector of
17 the economy, from small town Iowa to Silicon Valley. It is
18 critical that we enact reforms to prevent this from further
19 stifling the innovation and entrepreneurship that our patent
20 system is designed to protect.

21 The volume of abusive patent litigation has exploded in
22 recent years. By some accounts it is costing the U.S.
23 economy upwards of \$80 billion annually. Bad actors are
24 exploiting the high costs of patent litigation and using
25 deceptive tactics to prey on businesses.

1 Last week, several of us on the Judiciary Committee
2 introduced the bipartisan PATENT Act. Since the process
3 started in the last Congress, we have engaged stakeholders
4 that have been targeted by patent abuse. In addition, we
5 have sought to be responsive to concerns raised by other
6 industries and constituencies. Because of this, we have
7 made significant progress. As I have maintained from day
8 one, patent holders have a very legitimate right to enforce
9 their patents against infringement. Our efforts must strike
10 the right balance.

11 As a result of these efforts, the PATENT Act has
12 received a tremendously positive response. The bill has the
13 support of groups as diverse as hotels, retailers, tech
14 companies, realtors, automakers, broadcasters, homebuilders,
15 and restaurants. Further, other stakeholders such as the
16 associations representing higher education and universities,
17 the Coalition for 21st Century Patent Reform, and the
18 Biotechnology Industry Organization have recognized our
19 commitment to finding effective solutions that do not
20 produce unintended consequences or impinge upon the ability
21 of good-faith actors to enforce patent rights. I ask
22 unanimous consent to put several letters and statements in
23 the record in support of the bill.

24 [The letters follow:]

25

1 Chairman Grassley. The PATENT Act deters abusive
2 litigation through a series of targeted reforms. I would
3 like to state briefly some of the key provisions. The
4 PATENT Act establishes clear uniform pleading standards in
5 patent infringement lawsuits and gives defendants clear
6 notice of the claims against them. It increases
7 transparency of the parties bringing lawsuits.

8 It places standards on demand letters and clarifies
9 that the widespread sending of deceptive demand letters are
10 covered by Section 5 of the FTC Act. The bill also allows
11 manufacturers--rather than end users--to litigate cases in
12 order to protect customers who are targeted for patent
13 infringement just because they buy a product off the shelf.

14 Further, the bill deters frivolous suits and abusive
15 litigation practices by allowing the award of attorney fees
16 if a court determines that the position or conduct of a non-
17 prevailing party was not objectively reasonable. It creates
18 a mechanism for a court to recover fees where an abusive
19 litigant is judgment-proof. Finally, in order to deal with
20 the asymmetries in discovery burdens and litigation costs,
21 the bill requires courts to stay discovery pending the
22 resolution of certain preliminary motions such as dismissal
23 or transfer venue.

24 Because of the wide-ranging positive reactions to the
25 PATENT Act, I am comfortable with where we are on the

1 language contained in the bill. However, I am also aware of
2 concerns about processes at the Patent and Trademark Office
3 that have been recently raised by patent holders. They
4 worry that administrative proceedings created by the America
5 Invents Act--the inter partes review and post-grant review
6 proceedings--are being abused and are stacked against patent
7 holders. Other stakeholders, however, are of the view that
8 these new proceedings have been very effective at weeding
9 out weak patents.

10 So I am committed to looking at these concerns,
11 determining whether they are valid or not, and working with
12 my colleagues, particularly all the cosponsors, to see what
13 can be done to improve this process.

14 We will be hearing from the witnesses on where they
15 stand on these proceedings, so we will be able to evaluate
16 what should and can be done to ensure that they are fair to
17 all parties.

18 As we move forward with this legislation, it is
19 important that we continue the collaborative process that
20 has characterized its creation and best represented by the
21 cooperation of the cosponsors of the bill. Again, I thank
22 my colleagues for their dedication and constructive
23 engagement on this bill.

24 And now it is my friend Senator Leahy's turn.

25 OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.

1 SENATOR FROM THE STATE OF VERMONT

2 Senator Leahy. Thank you, Mr. Chairman.

3 Last week, we had seven bipartisan members of this
4 Committee that came together, and we introduced legislation
5 to address abusive conduct in our patent system. We have
6 been working on this issue for almost 2 years. Senator Lee
7 and I introduced bipartisan legislation in the fall of 2013
8 that has been included in this package. Last Congress,
9 Senators Cornyn and yourself and Senator Hatch and Senator
10 Schumer and Senator Feinstein all had individual bills.
11 Senator Klobuchar had her views. And after long
12 negotiations, we brought people together, and I think we
13 have crafted a strong and fair compromise that will address
14 abusive conduct while preserving the strength of our patent
15 system, and I think legislation is needed.

16 I am home a number of times every month, and we are a
17 small State and everybody knows everybody else. Just
18 walking around the small businesses in Vermont, I hear what
19 they have been threatened with. It is the same every
20 Senator has, how they have been threatened with patent suits
21 simply for using equipment they purchased off-the-shelf.
22 Website owners have faced costly litigation for using basic
23 software in e-commerce. Predatory conduct that takes
24 advantage of the complexity of patent law does not serve the
25 important goal for which our patent system was intended. It

1 was intended to advance science and the useful arts.

2 Writing legislation that involves our patent system
3 requires care and balance. It can be a Rubik's Cube.
4 Congress spent years and years developing what ultimately
5 became the Leahy-Smith America Invents Act of 2011. Now,
6 throughout our negotiations on this patent abuse bill--and I
7 see a number of the people that we have worked with on the
8 Leahy-Smith bill and now worked on this bill--I have
9 emphasized the need to work with manufacturers,
10 universities, and other patent holders to ensure we get the
11 right balance. In fact, a number of those groups have
12 written to this Committee to welcome the changes we made in
13 the Senate bill. The administration has praised this
14 legislation. Yesterday, the New York Times Editorial Board
15 came out in support of the bill.

16 So as the legislation heads to markup, we should
17 continue to work on reasonable amendments--reasonable
18 amendments--to improve the bill. Some have raised concerns
19 about unfair practices that are taking place in the post-
20 grant review proceedings at the Patent and Trademark Office.
21 I think we should look at that. Those proceedings are an
22 important tool to improve patent quality, but if they are
23 being misused, then let us address it. We are already
24 working on those ideas, and I think we will discuss them
25 today.

1 Our patent system is a wonderful thing to have, and bad
2 actors that use abusive practices, they discredit it. It is
3 in no one's interest that they continue. Let us act on
4 behalf of Main Street and the patent system alike.

5 So I welcome the witnesses that are here. Mr.
6 Chairman, I thank you for having this hearing. I think it
7 is extremely important.

8 Chairman Grassley. And I thank you for your
9 cooperation through all the weeks of negotiation on this
10 bill.

11 Senator Leahy. There have been a lot of them.

12 Chairman Grassley. Yes. I am going to call on Senator
13 Klobuchar because we have a Minnesota person here, but
14 remember, this Minnesota person was born in Iowa.

15 [Laughter.]

16 Senator Klobuchar. All right. Let me begin. Mr.
17 Kevin Rhodes was born in Iowa, but there is just a little
18 bit more to his resume, but really maybe I need to say
19 nothing else. He is actually the vice president and the
20 chief intellectual property counsel of 3M Company. Senator
21 Franken and I are very proud of that company, and I think
22 that their work is very--

23 Senator Franken. What do the three M's stand for?

24 Senator Klobuchar. Minnesota Mining and Manufacturing.
25 Thank you. And it is a company that has so many patents

1 that it actually has more patents than it has employees, and
2 it has a lot of employees. So we like to say that it has a
3 patent for every employee. So they care very much about the
4 topic today.

5 Kevin is responsible for managing the global
6 intellectual property assets of 3M Company and its worldwide
7 affiliates. He serves as the chairman of the Steering
8 Committee of the Coalition for 21st Century Patent Reform.
9 He is a member of the Board of Directors of the American
10 Intellectual Property Law Association. He also serves on
11 the Executive Committee of the Association of Corporate
12 Patent Counsel.

13 He has used his expertise as well as the expertise of
14 all of the patent holder companies that are involved in 21st
15 century patent reform to make significant and constructive
16 changes to this bill, and I just want to thank Senator
17 Grassley, Senator Leahy, Senator Cornyn, Senator Schumer,
18 Senator Hatch, and Senator Lee. We have all worked together
19 to make this bill a balance--and we know that people will
20 have different views on it, but a balance of not only going
21 after the patent trolls and the lawsuits, but also making
22 sure that we have made some changes to the bill that allow
23 companies like 3M that have to assert their rights to
24 protect patents to be able to continue to do that.

25 So I want to thank him for his constructive work, and

1 thank you, Mr. Chairman.

2 Chairman Grassley. I am glad to do it.

3 Before I introduce the other people, I want to inform
4 my colleagues from Minnesota that one of the reasons I am
5 voting for Trade Promotion Authority is because the
6 Knoxville plant of 3M exports about 40 percent of their
7 product.

8 Our first witness is Mark Chandler, senior vice
9 president and general counsel, Cisco. Mr. Chandler joined
10 Cisco in 1996 upon acquisition of StrataCom, Inc., where he
11 had been general counsel. Prior to working at StrataCom, he
12 worked as vice president of corporate development and
13 general counsel of Maxtor Corporate, a manufacturer of hard
14 disk drives. In 2010, the National Law Journal named Mr.
15 Chandler one of the 40 Most Influential Lawyers of the
16 Decade. And in 2013, American Lawyer numbered him among the
17 "Top 50 Big Law Innovators of the Last 50 Years." Mr.
18 Chandler holds a bachelor's degree in economics summa cum
19 laude from Harvard College and a juris doctor from Stanford
20 Law School.

21 I am going to pass over for obvious reasons Mr. Rhodes.

22 Third on our panel is Diane Lettelleir, who is senior
23 managing counsel - litigation at J.C. Penney, where she is
24 responsible for all patent litigation matters. Prior to
25 joining J.C. Penney, Ms. Lettelleir was a shareholder at

1 Winstead PC, Dallas, and a member of the Intellectual
2 Property and Commercial Litigation Practice Group. Ms.
3 Lettelleir's litigation experience includes complex patent,
4 copyright, and trademark matters, including patent
5 infringement, patent invalidity, copyright infringement,
6 copyright in violation of technology licensing agreements.
7 She holds a bachelor's degree from Indiana State University
8 magna cum laude and a juris doctorate from Southern
9 Methodist Dedman School of Law.

10 Henry Hadad is senior vice president and deputy general
11 counsel-intellectual property, Bristol-Myers Squibb, where
12 he is responsible for all aspects of patent and trademark
13 procurement, counseling, litigation, and even policy. Mr.
14 Hadad previously held positions as vice president and
15 associate general counsel at Schering-Plough Corporation
16 where he was chief IP counsel until 2009. Immediately prior
17 to joining BMS in 2011, he was associate patent counsel at
18 Johnson & Johnson. He is a member of the Board of Directors
19 of the Intellectual Property Owners Association, American
20 Intellectual Property Law Association Education Foundation.
21 He holds a bachelor of science in biology from Haverford
22 College and a juris doctor cum laude from American
23 University Washington College of Law.

24 Our fifth witness is Julie Samuels who is executive
25 director and president of the board at Engine, a nonprofit

1 focused on technology entrepreneurship and giving startups a
2 seat at the table of policy debates. Ms. Samuels is a
3 frequent commentator on technology and policy issues for
4 national media, particularly the intellectual property
5 space, and she has filed briefs with the Supreme Court and
6 has testified before Congress. Ms. Samuels came to Engine
7 by way of the Electronic Frontier Foundation, where she was
8 senior staff attorney and Mark Cuban Chair to Eliminate
9 Stupid Patents. That is what it says here.

10 [Laughter.]

11 Chairman Grassley. I think I will stop there.

12 [Laughter.]

13 Senator Leahy. Tell us what is really on your mind.

14 Chairman Grassley. We will go left to right here.

15 Start, Mr. Chandler. And then we will wait until everybody

16 has testified before we have questions.

1 STATEMENT OF MARK CHANDLER, SENIOR VICE PRESIDENT
2 AND GENERAL COUNSEL, CISCO SYSTEMS INC.,
3 WASHINGTON, D.C.

4 Mr. Chandler. Mr. Chairman, Ranking Member Leahy, and
5 members of the Committee, at Cisco we have over 25,000
6 engineers who have obtained over 12,000 U.S. patents--

7 Senator Leahy. Is his microphone on?

8 Chairman Grassley. Is your microphone on? Is the red
9 light on?

10 Mr. Chandler. I have a red-green--

11 [Laughter.]

12 Mr. Chandler. There we go. Okay. Thank you. Sorry
13 about that.

14 Senator Leahy. We get things done technically here.

15 [Laughter.]

16 Senator Leahy. With our low-tech machines.

17 Senator Klobuchar. Yes, just a little 3M technology
18 over there.

19 [Laughter.]

20 Mr. Chandler. Chairman Grassley, Ranking Member Leahy,
21 members of the Committee, at Cisco we have over 25,000
22 engineers who have obtained over 12,000 U.S. patents who are
23 working hard to extend and secure the Internet. Our
24 coalition, United for Patent Reform, includes thousands of
25 companies in the automotive, retail, hospitality, and other

1 industries.

2 Mr. Chairman, Ranking Member Leahy, Senators Hatch,
3 Klobuchar, and Lee--and I would like to thank Senator Cornyn
4 and Senator Schumer as well--thank you for introducing the
5 PATENT Act. You are addressing a fundamental systemic
6 imbalance that is simple to illustrate. Last year, over
7 4,400 patent suits were filed, the third highest in history,
8 and almost double the number 10 years ago, with the pace
9 rising this year. Sixty-three percent of those, or about
10 3,000, came from entities who do not make any product but
11 seek only the reward of litigation gamesmanship, compared to
12 only 20 percent of suits 10 years ago, a rate of about 400
13 or 500 a year 10 years ago up to about 3,000 now. An
14 astounding 40 percent of the suits last year were filed in
15 only two judicial districts, where less than 1.5 percent of
16 Americans live.

17 When plaintiffs and defendants pervasively believe,
18 rightly or wrongly, that judicial results depend on where an
19 action is brought, fundamental precepts of legal integrity
20 and consistency of legal application are endangered.

21 Behind these dry statistics, of course, are stories of
22 abuse. In one recent case, a lawyer bought semiconductor
23 patents related to Wi-Fi that were close to expiration and
24 set up a company he cynically called "Innovatio." These
25 standard-essential patents had previously been heavily

1 licensed to other chip companies, so the majority of Wi-Fi
2 devices did not need any new license at all. Innovatio and
3 the Niro law firm sent over 14,000 letters to small
4 businesses ranging from cafes to bakeries to children's
5 health clinics, anyone they thought might use Wi-Fi. They
6 did not tell them that most devices were already licensed
7 but demanded \$2,000 to \$3,000 per location. They did not
8 tell the victims that Cisco had intervened to protect its
9 customers but, rather, told them that equipment
10 manufacturers had not stepped in.

11 They planned to extract \$4 billion from the productive
12 part of the American economy. Before we stopped them, they
13 collected several million. We, with other companies,
14 litigated aggressively, and a judge determined that the
15 patents were, in fact, worth 3.2 cents per chip for the ones
16 that were not licensed already. We got the right result,
17 but we had to pay \$13 million in legal fees to get there.

18 This issue is hard because, while our cause is just--
19 and who comes here to testify without saying that--the
20 concerns of those who do not yet support the PATENT Act are
21 also understandable. Both sides suffer from abuse. Yes, I
22 am outraged by those who game the patent litigation system,
23 forcing Cisco alone to spend a quarter of a billion dollars
24 in the last decade on legal fees for cases that never should
25 have been brought, or who shake down small businesses with

1 misleading demand letters. But I am equally outraged by the
2 activity of hedge funds, often the same people who bring the
3 suits against us, who use the inter partes review system to
4 throw doubt on the legitimacy of innovative companies' hard-
5 won patents in order to short the stocks and make a quick
6 buck.

7 So how do we get to yes? We can fix the problem by
8 ensuring that patents that never should have been granted
9 are invalidated by giving more transparency to the process
10 and by limiting extortion litigation games that artificially
11 raise costs.

12 As to bad patents, while everyone supports patent
13 quality, few raise their hands to have their own bad patents
14 invalidated. But patent rights are not inalienable natural
15 rights endowed by the Creator like life, liberty, and
16 pursuit of happiness. They are a Government-created tool
17 designed, as our Constitution says, for an industrial policy
18 purpose, to promote progress in science and the useful arts.
19 They allow the patent holder to exclude from the market even
20 those who innocently and independently arrive at similar
21 results. For every entrepreneur who is given a monopoly
22 right in order to promote innovation, others are precluded
23 from exercising their God-given talents.

24 I do urge you to directly address, such as through
25 securities laws, the issue of the hedge funds I referred to.

1 But this legitimate issue should not be used to justify
2 unrelated steps making it harder to invalidate bad patents
3 like the misguided STRONG Act proposes to do. The IPR and
4 covered business method programs, while limited in scope,
5 are effective because they provide a consistent mechanism
6 for review.

7 Second, we support transparency efforts reflected in
8 the heightened pleading standards and disclosure of true
9 interests behind litigation, and we support ensuring that
10 those benefiting from patent litigation cannot hide behind
11 shell entities in egregious cases where attorneys' fees are
12 imposed.

13 Third, the PATENT Act helps address procedural abuse.
14 Provisions on pleading, customer stay, and fee shifting are
15 strong steps in the right direction. We would prefer to
16 have an absolute stay of discovery before the Markman
17 ruling, understand the concerns of other industries, but we
18 think tightening the venue rules and the transfer rules and
19 limiting discovery further prior to transfer would
20 ameliorate our concerns.

21 Thank you again for the opportunity to appear today and
22 for your efforts to fix a national problem that each year
23 sucks billions of dollars from the inventive and productive
24 parts of our economy.

25 [The prepared statement of Mr. Chandler follows:]

1 Chairman Grassley. Thank you, Mr. Chandler, for
2 keeping within the time limit.

3 Now Mr. Rhodes.

1 STATEMENT OF KEVIN H. RHODES, VICE PRESIDENT AND
2 CHIEF INTELLECTUAL PROPERTY COUNSEL, 3M COMPANY,
3 ST. PAUL, MINNESOTA, ON BEHALF OF THE COALITION
4 FOR 21ST CENTURY PATENT REFORM

5 Mr. Rhodes. Chairman Grassley, Ranking Member Leahy, m
6 members of the Committee, thank you for the opportunity to
7 testify here this morning, and thank you, Senator Klobuchar,
8 for that very kind introduction this morning.

9 Because of the longstanding importance of the patent
10 system to 3M and other member companies of the Coalition for
11 21st Century Patent Reform, we have been engaged with
12 members of this Committee and your terrific staffs and many
13 other stakeholders for years in discussions of patent law
14 and policy. We bring a balanced perspective to these issues
15 as 3M, like other 21C member companies, has diverse business
16 interests in several industry segments, and we litigate
17 patent disputes as both a plaintiff and as a defendant. We
18 thus support measure reforms to curb the patent litigation
19 abuses that undeniably do exist today, but balanced against
20 the need to ensure that the ability of all patent owners to
21 enforce their rights against infringers is not unduly
22 undermined by unbalanced or overly broad reactions to
23 litigation abuses by some patent owners. That is the
24 elusive balance that we have been seeking in the patent
25 reform legislation that was proposed last year and in this

1 Congress, and we very much appreciate the opportunity to
2 continue this dialogue today.

3 21C congratulates Chairman Grassley, Ranking Member
4 Leahy, and the other cosponsors--Senators Cornyn, Schumer,
5 Hatch, Klobuchar, and Lee--on the introduction of the PATENT
6 Act. We do believe that the bill represents a significant,
7 thoughtful, and constructive contribution to the patent
8 reform effort.

9 As I will be pleased to explain further this morning,
10 we appreciate that the language of the bill reflects a
11 number of welcome compromises on such litigation issues as
12 the way it balances pleadings and early disclosures, the
13 customer stay, the stay of discovery pending early motion
14 practice, calling upon the expertise of the Judicial
15 Conference to develop in-court discovery and case management
16 procedures for patent cases, and fee shifting and making
17 sure that fees are recoverable against parties who ought to
18 be paying them, as well as non-parties.

19 But 21C does not believe that the PATENT ACT is ready
20 to be reported out of this Committee just yet. The job of
21 patent reform is not yet done. In our view, meaningful
22 patent reform legislation must also include provisions to
23 ensure that the so-called AIA review proceedings, the IPR
24 and PGR proceedings that were referenced in Senators
25 Grassley' and Leahy's opening remarks, are balanced and fair

1 to patent challengers and patent owners alike. We ask this
2 Committee to prioritize reforms of these AIA review
3 proceedings equally with litigation reforms.

4 Now, let me be clear: AIA reviews are critical
5 elements in the overall framework of a properly functioning
6 patent system. They serve an essential role in providing
7 faster and less expensive alternatives to litigation to
8 determine the validity of issued patents. That is why we
9 supported their creation in the first place in the Leahy-
10 Smith America Invents Act. But they should be conducted in
11 a manner that is equitable to all participants, not so
12 skewed against patent owners that they invite gamesmanship
13 and abuse, which regrettably is the case today. So I look
14 forward to discussing this morning some common-sense changes
15 to the way AIA reviews are handled that will address the
16 concerns without undermining their effectiveness.

17 It is a Rubik's Cube, as Senator Leahy said this
18 morning. There are a lot of moving parts. But what we
19 would propose is a comprehensive set of reforms that gets at
20 these issues:

21 First, reforming the procedures used when the PTO is
22 considering petitions to institute reviews, to level the
23 playing field in that process.

24 Second, allowing patent owners to have issues raised in
25 review proceedings first considered in reissue or

1 reexamination proceedings where they can amend the claims
2 and BRI is appropriate in that examination, and that would
3 take place prior to IPR or PGR review.

4 And, third, applying the same standards in reviews that
5 do take place then as are applied in court, including claim
6 construction, burden of proof, and presumptions.

7 As Mr. Chandler said just a minute ago, the validity of
8 patents ought not to--or how patents are litigated ought not
9 to depend on the court. The validity of patents ought not
10 to depend on where it is determined either. These are
11 intended to be faster, cheaper alternatives to district
12 court litigation. They ought to apply the same standards
13 and get generally the same results.

14 These reforms will achieve increased fairness, balance,
15 and consistency in adjudications of patent validity in PTO
16 and in the courts. By addressing the questions and
17 uncertainty that now exist concerning these reviews,
18 Congress can reassure the innovation community that our
19 patents can be relied upon to protect and support the
20 investments in research, development, commercialization,
21 technology transfer, and collaboration that are so essential
22 to future innovation.

23 As always, I, 3M, and 21C remain committed to working
24 with members of this Committee, their staffs, and other
25 stakeholders to couple the provisions in the PATENT Act as

1 introduced with provisions to restore balance and fairness
2 in AIA reviews. We look forward to lending our strong
3 support for a bill that addresses both patent litigation and
4 AIA review proceedings in an effective, balanced, and
5 comprehensive fashion.

6 I will be pleased to answer any questions or supply any
7 additional information for the record today. Thank you very
8 much.

9 [The prepared statement of Mr. Rhodes follows:]

1 Chairman Grassley. Thank you, Mr. Rhodes.

2 Now Ms. Lettelleir.

1 STATEMENT OF DIANE K. LETTELLEIR, SENIOR MANAGING
2 COUNSEL-LITIGATION, J.C. PENNEY CORPORATION, INC.,
3 PLANO, TEXAS

4 Ms. Lettelleir. Chairman Grassley, Ranking Member
5 Leahy, and members of the Judiciary Committee, I am Diane
6 Lettelleir, senior managing counsel of litigation for J.C.
7 Penney Corporation. I want to thank you for the opportunity
8 to testify today about the devastating impact of abusive
9 patent litigation on J.C. Penney. It is an honor to present
10 the company's perspective, and I can assure you that our
11 views are shared by many other Main Street businesses around
12 the country, including other retailers, grocers,
13 homebuilders, convenience stores, advertisers, restaurants,
14 realtors, and hoteliers.

15 On behalf of J.C. Penney, I also want to thank the
16 bipartisan sponsors of the PATENT Act for their commitment
17 to tackling this very important issue. This legislation
18 will make great strides towards addressing the abusive
19 patent litigation facing J.C. Penney and other Main Street
20 businesses.

21 On 1902, James Cash Penney opened his first store in
22 Wyoming. Since that humble beginning, J.C. Penney has grown
23 to be one of the Nation's largest retailers. Today J.C.
24 Penney has over 1,000 stores employing approximately 114,000
25 associates across 49 States and Puerto Rico.

1 J.C. Penney's business model is simple, but we use a
2 complex array of technologies to enhance our customers'
3 shopping experience. J.C. Penney, like countless other Main
4 Street businesses, has been ravaged by the exponential
5 growth and aggressiveness of patent troll industries.

6 While abusive patents initially targeted the high-tech
7 industry, they expanded their focus to include Main Street
8 businesses. In fact, in 2012, for the first time, non-
9 practicing entities reportedly sued more Main Street
10 companies than technology companies. The motivation for
11 this strategy is easy to understand. Main Street businesses
12 that only use technology are easy prey because they often
13 lack the technical or legal expertise to fight patent
14 infringement claims. Abusive patentees take advantage of
15 these weaknesses and strategically offer settlements at a
16 level set below the cost of defense. Faced with this
17 calculus, many Main Street businesses have little choice but
18 to pay.

19 J.C. Penney's experience provides a framework for
20 understanding why this legislation is so important to Main
21 Street businesses. J.C. Penney has been a defendant in 30
22 non-practicing entity lawsuits just in the last 6 years. In
23 addition, J.C. Penney received countless threatening demand
24 letters demanding settlements for what we consider to be
25 very weak patents or invalid patents. None of these NPE

1 lawsuits or demand letters relates to items we sell; every
2 claim relates to the technology we use to operate. NPEs
3 frequently seek tens of millions of dollars in damages in
4 these cases.

5 J.C. Penney agrees that innovation and the U.S. patent
6 system are important to the U.S. economy, and J.C. Penney
7 respects the intellectual property rights of others. While
8 patent protection and the right of enforcement are important
9 components of the innovation ecosystem, so, too, is the
10 adoption of innovation. Innovation without the opportunity
11 for commercial adoption does not lead to economic growth or
12 further innovation. The current patent infringement
13 litigation environment is undercutting the opportunity for
14 Main Street businesses to adopt innovation.

15 In parallel to the direct costs of patent infringement
16 allegations, the steady stream of claims has disrupted J.C.
17 Penney's adoption of innovation offered by small businesses.
18 The disruption manifests itself in two ways. First, J.C.
19 Penney knows that by adopting new technology, it becomes a
20 target for abusive patent litigation. Second, the small
21 technology company itself becomes a target by virtue of its
22 efforts to commercialize its innovation. In both instances,
23 J.C. Penney knows that the small company will not have the
24 financial strength to defend itself or J.C. Penney against
25 these threats.

1 This dynamic has caused a shift in how J.C. Penney and
2 many other Main Street businesses approach the adoption of
3 innovation. J.C. Penney's shift away from small companies
4 has not been driven by concerns that the new technology
5 actually infringes any patent. In most cases, the small
6 companies themselves own patents covering the technologies
7 they offered to J.C. Penney. Instead, J.C. Penney's shift
8 away from small technology companies is driven by the cost
9 of defense of patent litigation.

10 J.C. Penney and Main Street businesses fully support
11 the rights inventors and patent holders to market their
12 products and to bring claims to enforce their intellectual
13 property rights. We believe that the thoughtful and
14 balanced patent litigation reforms set forth in the PATENT
15 Act will preserve these rights while curbing abusive patent
16 litigation.

17 Thank you once again, Chairman Grassley, Ranking Member
18 Leahy, and members of the Committee, for holding this
19 critical hearing. We urge this Congress to pass meaningful
20 reform without delay.

21 Thank you.

22 [The prepared statement of Ms. Lettelleir follows:]

1 Chairman Grassley. Thank you, Ms. Lettelleir.

2 Now Mr. Hadad.

1 STATEMENT OF HENRY HADAD, SENIOR VICE PRESIDENT
2 AND DEPUTY GENERAL COUNSEL-INTELLECTUAL PROPERTY,
3 BRISTOL-MYERS SQUIBB, NEW YORK, NEW YORK

4 Mr. Hadad. Chairman Grassley, Ranking Member Leahy,
5 and members of the Committee, thank you for the opportunity
6 to appear on this panel.

7 Bristol-Myers Squibb is a global biopharmaceutical
8 company with over 25,000 employees focused on our mission to
9 discover, develop, and deliver innovative medicines that
10 help millions of patients prevail over serious disease. In
11 2014 alone, BMS spent over \$4.5 billion in research and
12 development. BMS leads the industry with our ground-
13 breaking immuno-oncology therapies and pipeline which
14 harness the body's own immune system to target and detect
15 cancer cells. Given the extraordinary challenges, expense,
16 and time it takes to discover and develop a new drug, BMS
17 depends on strong and predictable IP protection to justify
18 this investment.

19 BMS acknowledges the patent litigation concerns
20 expressed by other members of this panel and appreciates the
21 significant efforts by the bill's sponsors and their staffs
22 to strike a balance between curbing abuses of the patent
23 litigation process and promoting innovation.

24 Provisions around early disclosure of ownership
25 information, Judicial Conference involvement in discovery

1 and case management, and customer stay should improve the
2 litigation process overall. Provisions around fee shifting
3 appropriate focus on objectively unreasonable behavior by a
4 non-prevailing party, while the fee recovery provisions
5 reflect a balanced and improved approach. And the discovery
6 stay and pleadings provisions include important concepts
7 that should reduce potential abuse.

8 Despite this significant progress, however, BMS
9 strongly urges the Committee to strengthen the bill by
10 addressing abusive litigation practices not only in the
11 district courts but also in the context of IPR and PGR
12 proceedings before the USPTO. We commend the USPTO and the
13 PTAB for their efforts in professionally and diligently
14 managing nearly 3,000 IPR filings. Unfortunately, in an
15 effort to timely address the deluge of filings, these
16 proceedings have been implemented in a manner that lacks due
17 process protections and unfairly prejudices patent owners.

18 Recent statistics show that the PTAB grants IPR
19 petitions and finds at least some of the challenged claims
20 invalid over 75 percent of the time. Moreover, 80 percent
21 of the patents challenged in IPRs are also asserted in
22 parallel district court proceedings. Given this data, it is
23 not surprising to see increasing abuse of these proceedings,
24 including IPR petitions filed by hedge funds that are short-
25 selling stock based largely on investor anxiety around these

1 proceedings, by parties primarily seeking to extract a
2 financial settlement from patent holders, and by litigants
3 presenting the same or substantially the same arguments that
4 were presented in Federal court.

5 The same challenges and serial harassment that confront
6 other members of this panel regarding patent assertion
7 entities are mirrored in the abuses of the IPR-PGR system.
8 The stakes are high. If there is a reduced confidence in
9 the patent system, the biopharmaceutical industry will
10 innovate less, invest less, and employ fewer. To that end,
11 there will be fewer ground-breaking therapies for patients.

12 There are three procedural changes that, if enacted
13 together, would more fairly balance these proceedings, aid
14 in their efficient adjudication to the benefit of patent
15 owners and challenges alike, and provide faith and
16 predictability in the patent system.

17 First, in IPR and PGR proceedings, the PTAB apply the
18 same "correct" claim construction standard as district
19 courts rather than the "broadest reasonable" interpretation.

20 Second, the PTAB also should respect the presumption of
21 validity for granted patents and apply the same "clear and
22 convincing" evidentiary standard as applied in district
23 courts for establishing invalidity of the patent. By doing
24 so, this would minimize inconsistent results and duplicative
25 proceedings between the courts and the PTAB and ultimately

1 increase fairness and predictability.

2 The second proposal would be that patent owners should
3 be permitted to make minor amendments to claims during the
4 proceeding and more substantial amendments through the
5 filing of a reissue or reexamination application prior to
6 the institution of any IPR or PGR.

7 And my third and last proposal is that the procedural
8 rules governing IPR and PGR should be revised to ensure
9 fairness and due process for patent owners, including equal
10 opportunity to submit evidence, reducing potential bias by
11 having someone other than the PTAB Merits Panel decide
12 whether to institute the petition, and by permitting live
13 testimony on key issues.

14 I would be pleased to address these proposals in more
15 detail if there are any questions. The PATENT Act, with the
16 suggested modifications to USPTO post-grant proceedings, is
17 a productive step that will curb abusive practices and
18 minimize unintended consequences for legitimate patent
19 owners.

20 I thank you for the opportunity to appear today and
21 look forward to answering any questions you may have. Thank
22 you.

23 [The prepared statement of Mr. Hadad follows:]

1 Chairman Grassley. Before I ask questions, I just got
2 notice from the floor that the 10:30 vote will probably be
3 now around 1:30. If you have got any other information, let
4 me know.

5 I will start, and we are going to have 5-minute rounds-
6 -I screwed up your introduction, so I might as well do that.
7 Go ahead.

8 [Laughter.]

9 Ms. Samuels. No problem.

1 STATEMENT OF JULIE P. SAMUELS, EXECUTIVE DIRECTOR
2 AND PRESIDENT OF THE BOARD, ENGINE, NEW YORK, NEW
3 YORK

4 Ms. Samuels. Chairman Grassley, Ranking Member Leahy,
5 and members of the Committee, I am Julie Samuels, executive
6 director of Engine, an organization started several years
7 ago to help advocate for high-tech, high-growth
8 entrepreneurship. Using policy analysis and economic
9 research, we represent startups nationwide. I am also a
10 recovering patent lawyer. It is an honor to be here today,
11 and I look forward to discussing effective solutions to the
12 patent troll problem, especially because this problem
13 disproportionately harms the community of high-tech, high-
14 growth startups I represent.

15 Today I am going to tell you about what the startup
16 community needs from a functioning patent system--fairness
17 and balance--and why the PATENT Act would help ensure those
18 things.

19 Patent trolls are armed with two weapons: low-quality,
20 impossible-to-understand patents, on the one hand, and the
21 outrageous costs, both in time and money, of patent
22 litigation, on the other. So imagine you are a small
23 startup, cash-strapped and hungry, and you get a patent
24 demand from a company you have never heard of, claiming to
25 own some basic technology. Your choices are: hire a lawyer

1 and spend valuable time and limited resources fighting back,
2 or simply pay the troll to go away, which is why I want to
3 talk today about fairness and balance.

4 Right now we have a system that across the board favors
5 patent holders who want to abuse that system. Those parties
6 have exclusive access to all of the relevant information
7 surrounding the patent, basic things such as who owns it,
8 who else has rights to it, along with the ability to
9 singlehandedly drive up the costs of litigation with motion
10 practice and discovery. It is a system that essentially
11 allows for legalized extortion, and that leaves startups
12 nearly powerless to fight back without great personal risk
13 and expense.

14 Take the experience of Jump Rope, a Chicago startup
15 founded by Peter Braxton. An Air Force veteran and former
16 combat pilot, Peter found himself facing a troll suit less
17 than 1 month after he launched Jump Rope. Peter's lawyers
18 advised him to settle, but he instead decided to fund the
19 litigation himself. Ultimately the court found no
20 infringement and that the plaintiff failed to conduct even
21 due diligence before filing suit, but not before Peter was
22 forced to spend more than \$250,000 on his defense.

23 Or take Life360, an app keeps over 55 million families
24 safe and connected. After raising \$50 million in capital
25 early last year, the company was hit with a troll suit that

1 it decided to fight. In spite of a jury finding the troll's
2 claims meritless, Life360 still had to spend over \$1.5
3 million to defend itself, with no reasonable recourse to
4 recover that money.

5 Many of the startups--and this is incredibly important,
6 I think. Many of the startups who support reform are also
7 patent holders themselves, like Foursquare, which currently
8 faces four troll. This year's legal budget set aside enough
9 money for these cases alone that could otherwise have been
10 enough to hire between six and ten engineers--good jobs that
11 now do not exist.

12 There are countless other companies in our network,
13 too, who invest in the patent system, yet still support
14 strong reform. Many asked that I not use their names
15 because they are afraid of attracting more troll suits.

16 One startup general counsel told me, and I quote, "The
17 system is set up in such a way that it pretty much
18 guarantees that the troll gets paid. It has nothing to do
19 with the patent's claims, but with the litigation fees. We
20 were bombarded with letters, emails, discovery requests, and
21 motions. It was all meaningless paper, but we still had to
22 spend time and money to respond."

23 In each case, startups divert resources from
24 innovating, growing their business, and creating new jobs to
25 fight what are often meritless claims. To make matters

1 worse, the bulk of this money never finds its way back to
2 inventors or R&D departments.

3 For a small startup, even one troll suit can ruin its
4 business, and the mere threat can cause significant
5 disruption. No small business owner should be forced to put
6 her company at risk to defend what she knows is right, which
7 is why we need the kind of comprehensive set of reforms that
8 is the PATENT Act. The PATENT Act would bring much needed
9 transparency to the system through heightened pleading and
10 demand letter reform, giving startups tools to understand
11 the scope of the threat they face, helping them decide how
12 to respond. The bill creates the appropriate incentives for
13 startups facing meritless suits to fight back. By shifting
14 fees and allowing for real recovery and by reforming
15 discovery, the PATENT Act allows parties a fighting chance
16 in court.

17 Right now, a startup worried about its bottom line has
18 almost no choice but to pay a troll to go away. The PATENT
19 Act would dramatically change this calculation and keep the
20 courthouse doors open to everyone. Taken together with the
21 strong post-grant review procedures from the America Invents
22 Act, the PATENT Act represents an important package of
23 incentives that would rebalance and restore faith in a
24 broken system.

25 To be clear, no single reform in the bill can

1 accomplish this task alone. It is only when they are all
2 taken together that we can find the missing balance and
3 fairness.

4 Opponents of reform argue that proposed changes in the
5 law would have the unintended consequence of making it
6 harder to assert valid claims. In fact, nothing in the
7 PATENT Act would hinder an inventor from monetizing,
8 asserting, or enforcing valid patents, or making claims that
9 are substantially justified or objectively reasonable.

10 The freedom to innovate has always been a central part
11 of the American dream. For the sake of our economy and our
12 identity, we must not let innovation become a legal
13 liability. A patent should be valued for what it covers and
14 how it incentivizes innovation, not for its litigation
15 value. The PATENT Act would go a long way to making that
16 the case.

17 Thank you, and I look forward to your questions.

18 [The prepared statement of Ms. Samuels follows:]

1 Chairman Grassley. We will have 5-minute rounds.

2 I am going to start with Mr. Chandler. We have heard
3 concerns that the PATENT Act could have the unintended
4 effect of undermining patent property rights. In your
5 opinion, because Cisco, I have been told, has 12,000
6 patents, are you concerned that this bill would devalue
7 your company's extensive patent portfolio?

8 Mr. Chandler. Not at all. Our portfolio is used to
9 stop others when they are infringing our patents. We also
10 cross-license freely with other companies so that each of us
11 can be empowered by each other's patents when that makes
12 sense for us to do so with other companies.

13 The PATENT Act is a series of changes that will bring
14 litigation fairness, that will allow for removing
15 artificially imposed costs in the system that do not produce
16 useful results.

17 You know, the IPR process has been discussed a little
18 bit this morning, and the IPR process is good for Cisco
19 because it is good for the integrity of the patent system.
20 We recently brought litigation against a company which
21 systematically used our patented technology as well as word-
22 for-word copying of our copyrighted materials. They have
23 asked for IPR review at the Patent Office of our patents in
24 the case.

25 Now, of course, I do not want my patents invalidated,

1 and I believe our patents are strong. If I do not like the
2 result of the IPR, there is an appeal process. But at the
3 end of the day, the patents need to be more than just a
4 blank and unexamined check to bring litigation. It really
5 needs to stand for true innovation. If some of my patents
6 are invalidated after getting a closer look under the rules
7 that exist before I am able to enforce them, so be it. We
8 will have a stronger, more credible patent system as a
9 result, even if I do not like a particular short-run result.

10 So we strongly support the PATENT Act, and we do not
11 buy the need to undermine the ability of the Patent Office
12 to undertake the reviews that were created in the America
13 Invents Act.

14 Chairman Grassley. I would have questions for
15 Chandler, Samuels, and Lettelleir, hopefully a short answer:
16 Do you believe that the PATENT Act is effective in
17 addressing the patent troll problem? And would you in a
18 short way say what you think is the most important reform in
19 the bill? I will start with Chandler.

20 Mr. Chandler. I think the most--the answer is yes, and
21 the most important reform in the bill is the fee-shifting,
22 fee recovery provisions that ensure that people with weak
23 lawsuits and weak patents think twice before bringing them.

24 Chairman Grassley. Ms. Samuels?

25 Ms. Samuels. I would also answer yes to the first--

1 sorry. Sorry about that. Yes, I think it is effective, and
2 I actually have a hard time saying that there is one most
3 effective provision. I think the most effective
4 characteristic of the bill is that it is comprehensive and
5 that, when taken together, we have a package of incentives
6 that can rebalance the system.

7 Chairman Grassley. Ms. Lettelleir?

8 Ms. Lettelleir. I agree with Ms. Samuels. I think
9 that it is a very important piece of legislation and will be
10 a powerful tool for those that are the victims of abusive
11 patent litigation tactics. I feel like the most important
12 attribute of the PATENT Act is the fact that the provisions
13 complement each other, and one provision makes another
14 provision more effective, more meaningful, as it is applied
15 to individual scenarios. So I think the fact that they work
16 together, they complement each other, and they strengthen
17 each other--if you start picking apart one aspect, one
18 provision, it weakens another provision. So it is a very
19 carefully crafted piece of legislation, and we think that
20 has been very well crafted, and we support all the
21 provisions as they work together.

22 Chairman Grassley. A short question for Mr. Rhodes.
23 Do you believe that the PATENT Act's litigation provisions
24 strike the right balance between patent holders and
25 petitioners?

1 Mr. Rhodes. Yes, thank you for the question, Chairman
2 Grassley. Yes, we think a lot of very welcome compromises
3 have been made to the provisions that get it to that balance
4 and really address the concerns that we have heard about on
5 the panel this morning, while still providing balance and
6 for the ability of patent owners to assert their rights
7 against true infringement and to attain effective and prompt
8 and expeditious relief. So we think that the improvements
9 that I mentioned in my opening statement are welcome
10 advances in that regard.

11 Chairman Grassley. I am skipping over a question here
12 because my time is running out. For Ms. Samuels, as you
13 note in your testimony, patent abuse is a problem that
14 disproportionately targets startups and small businesses, so
15 legislation trying to put a stop to these predatory
16 practices is something that companies should welcome.
17 However, at the same time, concerns have been expressed that
18 some of the proposed patent reform bills will negatively
19 impact the ability of these same startups and small
20 businesses to attract investment.

21 Since you are someone that deals with startups on a
22 daily basis, do you believe that the PATENT Act will have an
23 adverse impact on venture capital investment for small
24 companies and startups?

25 Ms. Samuels. Thank you for the question, Chairman

1 Grassley. I absolutely do not think this will have any
2 impact on the venture capital as opposed to startups.

3 Chairman Grassley. Okay. Senator Leahy?

4 Senator Leahy. Thank you, Mr. Chairman.

5 Mr. Rhodes, you are a chief of intellectual property
6 counsel for 3M, but you also wear another hat, the chair of
7 21C. Let me ask you, you have been involved in this. An
8 important part of the PATENT Act was the customer stay
9 provision. Those who are not familiar with that, it allows
10 end users and retailers to stay a lawsuit against them when
11 the manufacturer is available to litigate the case instead.

12 Now, some have criticized this for not focusing on end
13 users. They have said, and I believe incorrectly, that the
14 provision would leave patent owners without redress for
15 infringement by foreign manufacturers outside of the
16 jurisdiction of U.S. courts.

17 Senator Lee and I authored this provision in our
18 original bill last Congress. I hate to think of the number
19 of hours and months we spent reworking it to address those
20 exact concerns. As a patent holder and a manufacturer, can
21 you share your views of the concerns that have been raised?

22 Mr. Rhodes. Yes, thank you for the question, Ranking
23 Member Leahy. I have heard those concerns. I do not share
24 them. I think the customer stay provision is a very
25 carefully crafted compromise among many different

1 stakeholder groups, some of whom are sitting at this table
2 this morning. We are really talking, with respect to
3 customer stay, about a three-part negotiation balancing the
4 interests of the patent holder, the manufacturer, and the
5 customer. And I will assure you that we looked very
6 carefully at the issues that you talked about in reaching
7 those compromises.

8 In particular, with respect to retailers and end users,
9 we did define "covered customer" to only encompass those
10 entities, not entities who either manufacture products or
11 who modify the products in a way that gives rise to the
12 charge of infringement. Those are the parties that should
13 be defending against the infringement charge.

14 As to foreign, if you would like me to answer that
15 question, the stay is only available if the manufacturer is
16 either a party to the case in U.S. court with the covered
17 customer or a party to another case in U.S. Federal district
18 court. And we added that language into the bill to address
19 the exact concern you mentioned, so it is just not possible
20 that a manufacturer beyond the jurisdiction of U.S. courts
21 could--its customer could avail itself of the stay. That is
22 just not possible.

23 Senator Leahy. I assumed that was going to be your
24 answer, but after all the time that Senator Lee and I spent
25 on that, I am glad to have that answer.

1 Mr. Hadad, you raised concerns about abuses of post-
2 grant review programs created by the America Invents Act,
3 and I am troubled by the behavior you described. It is
4 vital, I think we would all agree, that PTO programs remain
5 a strong tool for patents to be reviewed in an efficient
6 setting. So of the reforms you are suggesting, what is most
7 important? And can you assure us that those reforms would
8 not undermine the law as it is now, the America Invents Act?

9 Mr. Hadad. Thank you for the question, Ranking Member
10 Leahy. I think the three proposals I set out are somewhat
11 interconnected, and I think they all serve to make it a
12 fair, more balanced proceeding. I think--

13 Senator Leahy. So you would make them of equal
14 importance?

15 Mr. Hadad. I do, but I would say the first one,
16 though, I think really sets the tone for the rest, which is
17 the standards that the claims are reviewed by, whether it is
18 the claim construction standard that is used in district
19 court, which takes into account the extensive examination
20 record of the patent that took place before the USPTO;
21 whether it is the clear and convincing evidentiary standard
22 for establishing invalidity; or the presumption of validity.

23 What those things do, when you think about it, is make
24 a patent the property right that it is. And when you
25 diminish that, it undermines the strength and, frankly, the

1 predictability of whether that patent right can be invested
2 in in the future.

3 So I think that piece of it, coupled with if the
4 standards were the same, you would actually have decreased
5 duplicative proceedings because then the courts and the
6 USPTO would acknowledge each other's determinations as being
7 of equal weight.

8 Senator Leahy. My time is almost up, and if anybody
9 wants to add anything for the record, either in agreement or
10 disagreement to what Mr. Hadad said, please do so. But I
11 did want to ask Ms. Samuels, you talked about the abusive
12 letters, and, man, I hear that all the time in Vermont. We
13 address it by making clear that it is a deceptive trade
14 practice to send misleading demand letters and the power of
15 the FTC to give civil penalties. Does that make sense? And
16 do you have examples from your own experience why we have
17 got to have Federal legislation here?

18 Ms. Samuels. Thank you for the question, Senator
19 Leahy. I think that definitely makes sense, and I applaud
20 what this bill, this piece of legislation does to address
21 the demand letter problem. The demand letter problem is
22 such a big problem, and we cannot even know the scope
23 because it is all pre-complaint, right? So there is no
24 public record. And I think when you empower the FTC, what
25 you do is you really get at the worst actors, and those are

1 the people who are sending the abusive demand letters. So I
2 think that that is a great step in the right direction.

3 Senator Leahy. Thank you. Thank you very much, Mr.
4 Chairman.

5 Chairman Grassley. Thank you, Senator Leahy.

6 Now Senator Hatch.

7 Senator Hatch. Well, we are happy to have all of you
8 here. This is a really, really important hearing. All of
9 us have worked for a long time to try and get a patent bill
10 that had pretty much great success.

11 But let me ask you this, Ms. Samuels: As you know,
12 especially over the past year, I have been working on a fee
13 recovery provision to ensure that those who defend against
14 abusive patent litigation and are awarded fees will actually
15 get paid for them, and I am pleased that the PATENT Act
16 includes this provision.

17 From the small inventor startup point of view, can you
18 explain how important the recovery provision would be in
19 stopping patent trolls from litigating and dashing?

20 Ms. Samuels. Yes, thank you, Senator Hatch, and thank
21 you so much for making sure that recovery language was in
22 the bill, because as you say, if we are going to have any
23 kind of fee shifting, without an effective way to actually
24 recover those fees, the fee shifting would be meaningless.
25 And we think that fee shifting is a core principle that is

1 so important for small startups and for anyone facing
2 abusive patent litigation, because right now, when you are a
3 startup facing a patent demand, facing a lawsuit, you are
4 looking at years of litigation and potentially millions of
5 dollars in legal fees. That is untenable. And when there
6 is no real expectation that you might see some of that money
7 back, there is no incentive to fight back. And if there is
8 no incentive to fight back, then we are just, you know,
9 emboldening the trolls' continued behavior.

10 So what you are doing is you are giving these tools to
11 these small companies to really push back, and there are
12 really important safeguards in the recovery language. So I
13 am not worried about any abuse. It has to be objectively
14 reasonable, the case that is brought. So I think we are in
15 really good shape with the language as it is.

16 Senator Hatch. Well, thank you.

17 Mr. Chandler, the PATENT Act includes a provision to
18 stay discovery if the defendant files certain motions like a
19 motion to transfer venue. The provision also allows courts
20 to order the exchange of information such as infringement
21 intentions.

22 What type discovery is typically required to create
23 infringement contentions? And with respect to motions to
24 transfer venue, do you think that infringement contentions
25 and any subsequent discovery should be postponed until the

1 case is actually transferred to the appropriate court?

2 Mr. Chandler. Yes, Senator, we do believe that all
3 discovery should be stayed pending the resolution of the
4 transfer motion, and there should be pressure on the judges
5 to rule quickly on the transfer motion. Infringement and
6 invalidity contentions can involve voluminous discovery. In
7 fact, the invalidity contentions could end up implicating
8 the majority of the discovery that would happen in the case.
9 Costs typically can exceed \$1 million to proceed with that
10 discovery. The proposed legislation refers to the district
11 court or local rules in terms of what would be required for
12 discovery, and we see no reason to permit that discovery to
13 proceed pending a transfer motion. The judge should rule
14 quickly on the transfer motion. There should be an
15 interlocutory appeal available on that, and the case should
16 get going as quickly as possible in the appropriate court.

17 Senator Hatch. Well, thank you.

18 Mr. Rhodes, for several months now I have heard a great
19 deal about what many stakeholders argue is an unanticipated
20 abuse of the inter partes review process we established in
21 the America Invents Act. Now, I am committed to working to
22 address any illegitimate instances of what some now refer to
23 as "reverse trolling." I was looking for realistic reforms
24 that address the problem, but also ensure that the IPR
25 process remains an effective option for ridding the system

1 of invalid patents.

2 Do you have any thoughts on what might fit that
3 description?

4 Mr. Rhodes. Yes, thank you very much for the question,
5 Senator Hatch. You know, the patent system is a Rubik's
6 Cube. The patent ecosystem is very complex. We have heard
7 here this morning the proponents for litigation reform
8 saying it is interlocking, you know, multiple provisions are
9 needed. We have heard those concerns. We have worked in
10 good faith and constructively to address them on the
11 litigation side. We think the mirror, the reverse, the
12 converse is true with respect to PGR and IPR reforms in the
13 Patent Office.

14 So I listed to three big buckets in my opening
15 statement, and I think, you know, more fairness in reviewing
16 petitions so both parties can submit the same evidence,
17 different bodies consider it initially within the PTAB, and
18 then at the end of the day, there is an obligation to
19 disclose evidence at the outset. We think the hybrid
20 approach which will make the right to amend real and put BRI
21 in its proper place in the reexamination and reissue of
22 claims, and then the fairness in burdens and presumptions
23 that Mr. Hadad mentioned.

24 So we think just as the litigation reforms that we have
25 listened to and responded to are interlocking, so, too, are

1 our reforms that we are asking for in IPR and PGR
2 interrelated and interlocking.

3 Senator Hatch. Mr. Chairman, my time is up. I will
4 submit the rest of my questions.

5 Chairman Grassley. Yes.

6 [The questions of Senator Hatch follow:]

7 / COMMITTEE INSERT

1 Chairman Grassley. Senator Schumer--well, she came
2 after--yeah, Senator Schumer, and then Senator Durbin.

3 Senator Feinstein. He came after me.

4 Senator Schumer. No. I was here earlier.

5 Chairman Grassley. No. He was here at--

6 Senator Whitehouse. Ladies first.

7 Senator Feinstein. Okay.

8 Senator Schumer. Would you like to go?

9 Senator Feinstein. No.

10 Senator Hatch. So typical of--

11 Senator Schumer. Chauvinism is dead.

12 Chairman Grassley. We are wasting--

13 Senator Klobuchar. Senator Grassley says you are
14 wasting--

15 Chairman Grassley. We are wasting time. Go a head.

16 Senator Schumer. Excuse me. Do you want to go?

17 Senator Feinstein. No. You go.

18 Senator Schumer. Okay. She was busy showing me the
19 terrible thing that ISIS puts out, which people should look
20 at, called "Inspire."

21 Senator Durbin. Another patent troll.

22 Senator Schumer. They could be.

23 Okay. I want to thank Chairman Grassley and Ranking
24 Member Leahy for organizing this hearing and for your
25 leadership and partnership on this issue. I really want to

1 thank Senator Cornyn, whom we have worked closely with on
2 this, as well as Senators Klobuchar, Lee, and Hatch, our
3 cosponsors who have done a great job on this legislation.

4 I am grateful that the Committee has the opportunity to
5 hear today about the incredible strides we have been
6 crafting in coming to a meaningful solution to the scourge
7 of patent trolls without damaging the rights of legitimate
8 patent holders.

9 It is clear, based on what we are hearing today, that
10 this is not yesterday's patent bill. This bill is
11 different, and we are going to get it done. There will be
12 patent legislation along the lines of what we proposed on
13 the President's desk this year. I truly believe that. And
14 I think the panel, which last year, if all of you came,
15 there would have been a much wider disparity. The consensus
16 is growing around this bill, and we thank you for that,
17 particularly our 21C friends who are helping us and being
18 very constructive. So thank you.

19 I want to make sure everyone watching this hearing
20 understands what a breakthrough we have before us. Today's
21 hearing marks the first time Congress is hearing a unified
22 chorus that legislation we have drafted balances the
23 interests of traditional patent holders and businesses that
24 are only on the receiving end of infringement accusations.

25 Have we made everybody happy? Of course not. That is

1 literally impossible in the patent space, as we learned
2 during the debate over the AIA. But I feel confident we
3 have taken tremendous steps towards the goal that my
4 colleagues and I all identified: solve the problem of
5 frivolous, expensive lawsuits without damaging the
6 legitimate claimants. And I am committed to working with
7 those who have opposed previous iterations of reform,
8 especially those in the life science industry, to identify
9 workable solutions to the problems they perceive in the PTO
10 system.

11 But I do want to sound a note of caution. Just as we
12 have said for years that it is important that patent
13 litigation reform not undermine the legitimate rights of
14 patent holders, it is similarly critical that the reforms to
15 the post-grant system not undermine the ability of the PTO
16 to provide cost-effective, efficient alternatives to
17 litigation for the consideration of poor-quality patents.

18 As I have said many times, my lodestars in this debate
19 are the small New York startups. These are the seed corn of
20 New York's economy and similar companies throughout the
21 country of America's economy. These are the companies, the
22 future Googles and the future Facebooks and the future
23 Oracles, that are going to create thousands and thousands of
24 jobs and export so much materials. And they are snuffed out
25 by these parasitic trolls, and we cannot allow that to

1 happen.

2 And so the post-grant proceedings at the PTO are
3 particularly important to those companies who simply do not
4 have the resources to litigate or who benefit from the
5 collective efforts of others who have been hit by the same
6 troll to invalidate bad patents.

7 I will not be able to support any deal on post-grant
8 that does not preserve the viability of the process for
9 these little startups. And I do have to say that, again, we
10 are making good progress here. There are ways we can all
11 come together.

12 So my questions: First, to Ms. Samuels, you represent
13 exactly the kind of startup companies I care about in New
14 York and elsewhere. Do you think that this bill solves
15 their problems? And you can give a short answer?

16 Ms. Samuels. I will be very short. I think, yes, it
17 mostly does. Obviously, there are some things we can
18 discuss, but it is a good compromise bill, and it will allow
19 those companies to do what they do, which is innovate and
20 create jobs, in New York and all across the country.

21 Senator Schumer. And I know Mr. Chandler and Ms.
22 Lettelleir, because Senator Grassley asked the question,
23 feel the same about problems faced by Cisco and J.C. Penney.
24 And it is amazing. One of the reasons we are gaining
25 support is Main Street is being hit by these trolls. A

1 restaurant owner said to me in New York that, "They are
2 going to sue me because they say they patented the spoon."

3 Okay. Now to Mr. Rhodes, last question, to Mr. Rhodes
4 and Mr. Hadad. Both of you represent companies that have
5 had substantial concerns about previous versions of patent
6 reform legislation. Do you feel like the sponsors of this
7 bill have listened to you, been responsive to the concerns
8 you have raised? You may answer any way you choose. Mr.
9 Rhodes?

10 Mr. Rhodes. Yes, I am happy to go first. Thank you,
11 Senator Schumer. We do think we have been listened to. We
12 think many of our concerns have been addressed, and that is
13 why in the context of an overall bill that addresses our
14 additional concerns about IPR and PGR, we would look forward
15 to supporting the bill as a whole moving forward.

16 Senator Schumer. And we have been mindful of your
17 concerns, because you have a lot of expertise in your
18 organization.

19 Mr. Hadad, who represents retailers who have just all
20 of a sudden been right in the cross hairs of these horrible
21 trolls.

22 Mr. Hadad. So I represent Bristol-Myers Squibb, and I
23 agree with--

24 Senator Schumer. Sorry. Represents pharmaceuticals.

25 [Laughter.]

1 Senator Schumer. They retail pharmaceutical drugs.

2 Mr. Hadad. But in the interest of time, I agree with
3 Mr. Rhodes' characterization.

4 Senator Schumer. Right. And J.C. Penney, a retailer,
5 agrees as well. That is who I was referring to.

6 Okay, Mr. Chairman. My time has expired.

7 Chairman Grassley. Senator Lee.

8 Senator Lee. Thank you, Mr. Chairman, and thanks to
9 all of you for your help and for your insight today.

10 I would like to thank all of the other original
11 cosponsors--Senators Leahy, Cornyn, Schumer, Hatch, and
12 Klobuchar--for their work in putting together this really
13 important legislation.

14 In the last Congress, Senator Leahy and I proposed
15 legislation to deal with abusive patent practices directed
16 at small businesses: sending demand letters, extorting
17 money, and filing expensive patent infringement lawsuits
18 filed against retailers and other end users of products
19 instead of against the manufacturers of those products. We
20 are pleased to report that in the PATENT Act, with the
21 support of a bipartisan array of cosponsors, we will finally
22 be able to enact these reforms. And so it has been a
23 pleasure working with this great bipartisan group and with
24 so many people in the industry who have provided such
25 valuable insight.

1 I would like to start with you, Ms. Lettelleir. You
2 said in your testimony that you support a statutory customer
3 stay. I just want to make sure that everyone understands
4 why that is important. J.C. Penney is in the retail sales
5 business. You all do not manufacture technology or design
6 complex software for a living, right? You sell clothing and
7 you sell other merchandise. You do not know anything about
8 the microprocessors in the bar code reader or some other
9 technology that you use in order to get on with your
10 business. And so when you get slapped with a patent
11 infringement lawsuit over some product that you did not
12 design, that you did not manufacture, you are not going to
13 be able to evaluate the merits of that suit. The
14 manufacturer has to do that. Yet, according to your
15 testimony, district courts are currently somewhat reluctant
16 to stay litigation against retailers or against end users,
17 even when the manufacturer is already defending its patent
18 litigation.

19 Can you tell us a little bit more about that and about
20 how you think the customer stay language in this bill will
21 help in the industry?

22 Ms. Lettelleir. Yes, thank you for your question,
23 Senator Lee. We have been called upon to defend various
24 aspects of technology we have acquired from other companies,
25 companies like Cisco, companies like Oracle, intel

1 processors, the whole array of technology that you can
2 imagine we have been called upon to try and defend. And you
3 can imagine when J.C. Penney is sued on the premise that an
4 intel chip that resides in its point-of-sale terminal in its
5 store, that we are at a severe disadvantage in terms of even
6 beginning to defend that technology. We do not have access
7 to the evidence that would even be required to defend that.

8 So a customer stay is very important to us with respect
9 to those particular types of suits. It is not all the suits
10 that we see, but it is a good percentage of them. And I
11 think the customer stay provision is really geared towards
12 getting to the truth. Does the chip infringe? And it
13 addresses the issue of who is the best party to defend that
14 issue, and we feel it is the manufacturer, and we think that
15 the language that has been carefully crafted to balance all
16 the different interests of the different stakeholders is the
17 best way to get to that result. It does not absolve us of
18 liability, but it does shift the burden of proving and
19 addressing the infringement allegations to the manufacturer
20 who actually supplied the technology.

21 Senator Lee. Thank you.

22 Mr. Rhodes, you have been focused, and appropriately
23 so, on ensuring balance in our litigation reform proposals.
24 You have been an honest broker in this process, and I hope
25 you know how much we appreciate that.

1 Are you satisfied that under our proposal eligibility
2 for a customer stay is sufficiently far down the chain of
3 distribution?

4 Mr. Rhodes. Yes, thank you for the question, Senator
5 Lee. I do think that we took careful pains, as I mentioned
6 earlier, in the definition of who a "covered customer" is to
7 limit it to retailers and end users who are reselling
8 products from covered customers who are in a position to
9 defend the case. They have not manufactured, they have not
10 modified the product in a way that gives rise to the charge
11 of infringement. They are well positioned if they have done
12 that to defend based on their modifications.

13 So I think with those protections in place, we are not
14 talking about absolving people of liability. I think that
15 is an important principle on which I agree. But we are
16 talking about, in the first instance at least, having the
17 parties well positioned to defend the case have the first
18 and foremost role in defending it.

19 Senator Lee. Okay. Thank you very much.

20 I see my time has expired. Thank you, Mr. Chairman.

21 Chairman Grassley. Thank you.

22 Now Senator Durbin.

23 Senator Durbin. Thank you, Mr. Chairman.

24 Chairman Grassley. Senator Durbin, and then it will be
25 Senator Perdue. And I am going to go to Agriculture for a

1 few minutes.

2 Senator Durbin. Thank you, Senator. Let me thank the
3 panel.

4 Throughout the morning we have heard the word
5 "balanced" used repeatedly. I thank you for coming here to
6 testify, but it appears that this panel is divided between
7 those who love the bill and those who really love the bill.

8 There are some people who may not be in that category.
9 They include the National Venture Capital Association, which
10 said of this bill, "We think as presently worded it will
11 raise the cost and risk of patent litigation for startups
12 that need to defend their intellectual property against much
13 larger incumbents and will discourage investment in any new
14 company that wants to enter lines of business where patents
15 are important."

16 The U.S. Alliance for Startups and Inventors for Jobs
17 said of this bill, "It will make it far more difficult for
18 small companies to protect and enforce their patented
19 technologies against larger competitors."

20 There is another side to this story which has not been
21 given a chance to speak this morning, and I hope that during
22 the course of considering this bill we can reflect on it.

23 Let me also say to Mr. Chandler from Cisco, I do not
24 think you started with your strongest argument, your strong
25 argument that you spent \$50 million in legal fees defending

1 against these nuisance lawsuits. The revenues of Cisco last
2 year were \$47 billion; \$50 million represents one-tenth of 1
3 percent of your revenues. It is as if a \$1 million
4 corporate making \$20,000 a week had to spent \$20 a week in
5 legal fees. So let me ask you, since both you and Mr.
6 Rhodes represent companies that have patents, how many
7 patent lawsuits did you file to protect your patent lawsuits
8 last year?

9 Mr. Chandler. We filed one lawsuit last year.

10 Senator Durbin. Only one?

11 Mr. Chandler. Only one.

12 Senator Durbin. Mr. Rhodes?

13 Mr. Rhodes. So we filed--over the last 5 years, 60
14 percent of our patent lawsuits have been patent--when we
15 have asserted our patents against others. We currently have
16 a dozen of those suits pending and only three cases that we
17 are defending.

18 Senator Durbin. And this is what it gets down to:
19 Large corporations either filing one or more lawsuits have
20 the resources to play under this new law as proposed,
21 because it takes quite an effort under the proposed law to
22 assert your rights under a patent. You have the requirement
23 of detailed pleadings. You have the reduction of
24 opportunities for discovery. And you have fee shifting, and
25 in a great number of cases at least leads to the possibility

1 of fee shifting, which could discourage the small patent
2 holder.

3 One small business witness said in the Small Business
4 Committee, "If you need to pay \$5 million in order to assert
5 your patent rights, that is not petty cash for me. It is
6 taking my house, my spouse, and my children."

7 So this responsibility that is put into the law makes
8 it much more difficult than it might for Cisco or for 3M.

9 And, Ms. Samuels, the case that you referred to here,
10 the Jump Rope case, where a patent troll called Smart
11 Options sued them, you are aware of the fact that the court
12 awarded fees after finding that Smart Options, the patent
13 troll, failed to perform even minimal due diligence before
14 suing.

15 Ms. Samuels. That is right, Senator Durbin, but then
16 the patent troll came back and sued again under new patents,
17 and they have just recovered a small fraction. What I would
18 like to--

19 Senator Durbin. Do you know what percentage of cases
20 now recover fees for this type of nuisance litigation under
21 patent law?

22 Ms. Samuels. I understand it is still a very, very low
23 percentage, and in certain districts it has not happened at
24 all since the--

25 Senator Durbin. It turns out, according to the Federal

1 Circuit Court Bar Association, defendants have a 50-percent
2 chance of winning these fees. So it is not as if we are
3 dealing with a remote possibility. Under the current law, a
4 50-percent chance of winning these fees.

5 Ms. Samuels. But fees are not granted in 50 percent of
6 patent litigation.

7 Senator Durbin. This is the Federal Circuit Court Bar
8 Association. You are welcome to look at their report.

9 May I ask the panel here, particularly those who are
10 representing the larger corporations, there are exemptions
11 built into this law, exemptions from fee shifting,
12 pleadings, and discovery. One of the exemptions relates to
13 patent infringement lawsuits between generic and brand-name
14 drug companies. In other words, the bill protects this one
15 type of patent litigation from the burdens and risks the
16 bill would impose on all other patent holders.

17 I am not saying that drug patent cases should not be
18 exempt. Maybe they should. But why does the bill draw the
19 line there? Shouldn't we also protect original inventors in
20 the bill? They are not trolls. They earned their patent.
21 What about small businesses and universities? Can you tell
22 me why we have carved out one group in this bill to say that
23 they would be exempt from the more demanding procedural
24 requirements than these other categories? Would anyone like
25 to--

1 Mr. Hadad. Senator Durbin, I will, since I am in the
2 industry. So as you know, with cases under 271(e), or the
3 so-called Hatch-Waxman procedure, these cases have to get
4 done within a 30-month period--that is sort of a statutory
5 mandate--because that is the period where the FDA is stayed
6 from approving any products while a litigation is pending.
7 So anything that would delay the case would somehow maybe
8 derail, I think, the balance of that statute, and that is, I
9 believe, why those exemptions are in there.

10 When it comes to the fee shifting, I have to say I have
11 a bit of mixed feelings about that one myself, because I
12 believe that the standards for behavior in cases should be
13 applied equally in all cases, and so I do not see the need
14 to necessarily differentiate here.

15 Senator Durbin. I may come to a different conclusion
16 as to fee shifting, but I would say that since we are
17 dealing with patent trolls, which, according to the GAO,
18 represent 20 to 25 percent of all the patent litigation,
19 this new proposed law applies to all patent litigation,
20 except for the ones that I mentioned, the expectation that
21 was made.

22 I yield back to whoever is presiding. I think it may
23 be Senator Lee at this point.

24 Senator Lee. [Presiding.] Thank you.

25 Senator Perdue?

1 Senator Perdue. Thank you, Mr. Chairman, and thank
2 you, panelists, this morning for your testimony.

3 You know, in my experience--I have been on both sides
4 of this in my career--the economic boom of the last 70 years
5 is really attributable, in my opinion, to three things: one
6 is innovation; two is our ability to form capital; and,
7 three, the rule of law. Unfortunately, today we face abuses
8 in several of those areas, and I have got a real concern
9 that we find the right balance that does not hinder our
10 ability to form capital.

11 Ms. Samuels, I think you mentioned this earlier,
12 particularly as it relates to the fee shifting part of this
13 bill. Can you give us your views? You are the closest to--
14 I do not know how many rounds you have been through. I am
15 part of a little startup--have been part of a little
16 startup. We went through four rounds, and I know what
17 impact this can have on small companies' abilities to raise
18 capital.

19 I share Senator Durbin's concern about the small
20 player, the young player, getting from that angel stage into
21 the venture capital stage, and then being hit by a
22 fraudulent or problematic lawsuit that is totally frivolous.

23 Ms. Samuels. Thank you for the question, Senator
24 Perdue. As a preliminary matter, the VC community--and
25 particularly the venture capital community that invests in

1 high-tech, high-growth entrepreneurship, that invests in
2 software companies--by and large supports this kind of
3 comprehensive legislation. I can happily provide lots of
4 examples. I have some written down, but I would rather just
5 get to the meat of what is going on here. And I think what
6 we see is that those venture capitalists who are investing
7 in small startups, their interests are so closely aligned
8 with the small startups, of course. It is in their benefit
9 to see those startups succeed.

10 And when a patent troll comes after that company, you
11 run into a lot of problems because a small company, even
12 backed by venture capital, does not have a lot of resources
13 to fight back. That is incredibly problematic.

14 I think, you know, to address some of the things that
15 Senator Durbin said that play into this, there is some
16 concern that this kind of legislation makes it harder to
17 attract investment. I do not think that is true at all.
18 This legislation is a compromise piece of legislation. It
19 is really measured.

20 The kinds of things that this bill wants a company to
21 do before filing suit, like basic due diligence, are the
22 kinds of things anyone should do before they take advantage
23 of the Federal court system in our country.

24 Senator Perdue. Right. Thank you very much.

25 Ms. Samuels. Thank you.

1 Senator Perdue. Ms. Lettelleir, I competed with Penney
2 and I also sold to Penney, but welcome this morning. I just
3 have a question about balance. We have heard that mentioned
4 several times today. But the balance I am concerned about
5 is between, you know, the focus on pleading and the initial
6 disclosure provisions of the bill. Can you speak from your
7 perspective about have we found that balance? Or do you
8 still have concerns?

9 Ms. Lettelleir. I think the bill has done--it presents
10 a very finely crafted compromise position between all the
11 stakeholders, and I think that it achieves what we will need
12 to make meaningful changes to the system. You know, as a
13 target of this type of litigation, we receive just
14 ridiculously broad assertions.

15 For example, I just received one last month that they
16 list a patent number and then beside it they have only the
17 word "e-commerce," and that constitutes my notice of what
18 they are alleging. I do not even know where to start in
19 terms of analyzing the potential risk, whether, in fact, I
20 should seek a license, or if I think that, in fact, we do
21 not actually practice the invention.

22 So I think that the pleading requirements that are set
23 forth will be very helpful, I think the requirements in the
24 demand letters will be very helpful, in terms of moving the
25 ball down the path in a less expensive way for all the

1 parties.

2 Senator Perdue. Thank you.

3 Mr. Rhodes, relating to demand letters, in your written
4 testimony I think you suggested that provisions of the bill
5 on abusive demand letters may encourage a "sue now, talk
6 later" approach. I would like to give you an opportunity to
7 expand on that, because we are really trying to make sure
8 that these provisions will actually--well, basically you are
9 saying that this increases the likelihood of litigation. Is
10 that correct? Is that a correct observation from your
11 testimony?

12 Mr. Rhodes. Thank you, Senator Perdue, and that is the
13 concern. I think the risk is if companies that want to put
14 others on notice of their patent rights confront the current
15 landscape that we are dealing with, with demand letters, the
16 risk may be too high, and we may be incited into a "sue
17 first, talk later" strategy--not because we do not want to
18 get the information out there, but because the risks of
19 doing so under the current regime are too high. And what I
20 mean by that is two problems and two proposed solutions.

21 One is if it is not clear what the rules of the road
22 are with respect to a particular demand letter, you might
23 not know what you should or should not put in the demand
24 letter. And people just want clear rules of the road. We
25 do not have that today because different States have

1 different rules now where they have legislated demand letter
2 provisions. What we would like is national uniformity,
3 consistency. We are asking that the U.S. FTC be allowed to
4 enforce the uniform standard. If they do not, State
5 Attorneys General would be empowered to step in and enforce
6 that uniform standard. But it would be uniform so we would
7 not have to wonder, you know, what we put in a letter in
8 this State or that State.

9 We also think the addition of a bad-faith requirement,
10 as is in the bill proceeding in the House Energy and
11 Commerce Committee, would be helpful to help really
12 distinguish the truly bad-faith assertion letters that we
13 heard about from some of the panelists this morning, from
14 parties legitimately trying to put others on notice of their
15 rights or promote licensing discussions, who may, for
16 whatever reason, make a mistake.

17 Senator Perdue. Thank you.

18 I will now yield to Senator Klobuchar, who I think is
19 next.

20 Senator Klobuchar. Very good. Thank you very much.
21 Thank you to all the witnesses. And, again, I know we have
22 mentioned all of the cosponsors of this bill many times, but
23 I also want to thank Senator Coons for his work. He knows a
24 little bit, having been a counsel in the past, about how
25 important it is to protect the rights of patent holders, as

1 well as in a previous life in the private sector, as well as
2 the work of Senator Durbin. And I know people have some
3 differing views here, but I think this is very important,
4 and I really came around to working with our patent holder
5 companies and making sure that there were provisions in the
6 bill, as Mr. Rhodes has expressed, that make sure that we
7 can differentiate some between legitimate assertions of
8 patents and then the troll situation.

9 I do not know if anyone has brought out this stat, but
10 there were more cases filed by patent trolls in 1 month, in
11 January 2015, than in the entire year of 2004--250 compared
12 to 234, just to give a sense of this changing problem and
13 why we are doing something about it today.

14 And I also believe that we need to look at some of the
15 additional needs with this bill, and I deeply appreciate
16 everyone's willingness to work on this issue.

17 I thought I would start with one of the most poignant
18 examples that I heard when I did a roundtable with 50 patent
19 lawyers in Minnesota. It was a lot of fun. And I heard at
20 the roundtable the story about an infusion pump used to
21 administer critical medicines to patients, including
22 premature babies. And the maker of the pumps has been sued
23 by a patent troll who is claiming that the patent on the--
24 that the infusion pump infringes on a fuel delivery system
25 that is intended for the use in tractor-trailers. And the

1 litigation reforms in the PATENT Act are aimed at stopping,
2 of course, these kinds of abuses.

3 But I have also heard, of course, from small inventors
4 who are concerned about how this legislation might affect
5 them, so I guess I would start with you, Ms. Samuels, and
6 how you balance that, the small inventor's interest and then
7 the effect on so many businesses across the country.

8 Ms. Samuels. Thank you for the question, Senator
9 Klobuchar. For starters, we have in our network of startups
10 people who strongly support this reform and are patent
11 holders themselves, and I think it is because we have
12 crafted the kind of compromise here that I really do not
13 believe puts much of a burden on a small patent holder. I
14 mean, you are talking about, before you file a lawsuit in
15 Federal court, doing certain due diligence. The fee-
16 shifting standard, for instance, that you bring an
17 objectively reasonable case, that is the kind of behavior we
18 want to incentivized, right? And "objectively reasonable
19 case" does not mean you have to win. You can lose and not
20 get your fee shifted, right? You just need to give some
21 thought before you go and sue someone in Federal court.

22 You know, to take a quick step back, I think part of
23 the problem here is there is this knee-jerk reaction in a
24 lot of what we are discussing, where people just assume that
25 a patent is, as someone else said, some kind of God-given

1 right to make money, and it is not. A patent exists to
2 incentivize innovation, the progress of science and useful
3 arts. And that is what we are talking about here.

4 So I actually think, to answer your question, that the
5 balancing act that this bill does both protects small
6 businesses who are targeted by trolls, but it also protects
7 small businesses who have patents and want to assert them.

8 Senator Klobuchar. Okay. Thank you.

9 Mr. Rhodes, as I mentioned in your introduction,
10 innovation has been key to your company. You brought the
11 world the Post-it Note, as we know, and as you point out in
12 your testimony, some stakeholders continue to claim that the
13 customer stay provision is subject to abuse that will harm
14 legitimate patent rights. Do you agree with this concern?

15 Mr. Rhodes. Thank you for the question, Senator
16 Klobuchar. I do not. As I mentioned earlier, I think
17 really the trick there was that delicate three-part
18 negotiation: the patent holder, the covered manufacturer,
19 and the covered customer. And we really focused at the end
20 of the supply chain so that the stay would be available for
21 retailers or end users who really should be in the position
22 of obtaining a stay.

23 Senator Klobuchar. And when you and I talked
24 yesterday, you talked about some of the additional reforms
25 that you thought could be helpful here. Do you want to

1 enumerate those?

2 Mr. Rhodes. Yes, and certainly I mentioned those this
3 morning with the post-grant review procedures and inter
4 partes review procedures in the Patent Office. And I
5 mentioned, you know, three buckets of interlocking reforms
6 that we would like to see added to the bill: at the
7 institution phase, leveling the playing field there; having
8 sort of the hybrid approach where claim amendments could be
9 considered if a patent owner elected to take the patent into
10 a reexamination or reissue proceeding; and then for those
11 claims that are examined--or, I am sorry, are adjudicated
12 under IPR and PGR proceedings, making those consistent with
13 the court.

14 So, you know, I would just like to emphasize that on
15 the litigation pieces we have listened to the concerns of
16 those who have called for changes to litigation practice to
17 address imbalance and unfairness. We would now ask for the
18 same attention and concerns on our side to what we perceive
19 to be imbalance and unfairness to be brought to real
20 solutions on the IPR and PGR front. So thank you.

21 Senator Klobuchar. Thank you very much.

22 Chairman Grassley. [Presiding.] Now we have Senator
23 Tillis.

24 Senator Tillis. Thank you, Mr. Chair.

25 Mr. Hadad, I had a question for you. I have heard from

1 a lot of pharmaceutical companies about maybe one of the
2 unintended consequences of the America Invents Act is some
3 of this economic espionage that is going on with
4 manipulating stock prices. I think you mentioned some of
5 that in your opening testimony.

6 Do you believe in the bill's current form that it
7 adequately address those threats going forward?

8 Mr. Hadad. No, it does not.

9 Senator Tillis. And can you give me some idea of what
10 we could potential look at that would improve our standing
11 in that area?

12 Mr. Hadad. Absolutely. So today I enumerated three
13 proposals modifying the U.S. PTO's post-grant review
14 proceedings which would make them more fair. And what we
15 are asking for is--and I just want to make it clear. BMS
16 and other industry members are on both sides of this issue.
17 Yes, we are patent holders, but we are also defendants at
18 times. And what we are looking for is a proceeding which is
19 fair, which is a faster, cheaper, and analogous proceeding
20 to what is going on in district court, but one that does not
21 arrive at greatly different results every time, which is
22 what we are seeing right here.

23 So the things that you mentioned about hedge funds
24 trying to torpedo patents and take advantage of the stock
25 market anxiety around this are really a symptom of an

1 underlying condition. The underlying condition is these
2 proceedings are at least perceived to be slanted against the
3 patent holder, and they just need to be balanced.

4 And I also just want to follow up, too. We have talked
5 a lot about startups today and concerns of startups around
6 patent assertion entities, but I would also want to point
7 out that there are a lot of startups in the biotech area,
8 and those startups, when bigger companies are looking to do
9 deals with them, they have to have IP protection, meaningful
10 IP protection for that investment and for that drug to be
11 developed. So I do not want that to be lost in the mix as
12 well. Thank you.

13 Senator Tillis. I talked with a pharmaceutical company
14 down in North Carolina, the CEO, and we were talking about,
15 because of this uncertainty, the long-term impact it has on
16 very important business decisions. This particular company
17 is in the middle of getting an Alzheimer's treatment drug
18 ready. It is about 4 years out. They have to start making
19 decisions about manufacturing capability today, billion
20 dollar investments. But with this level of uncertainty, it
21 really changes the matrix for them in terms of making those
22 sorts of capital expenditures, which are delaying good
23 outcomes that the pharmaceutical industry is poised to
24 provide.

25 I do have another question. Mr. Rhodes, this may go to

1 you because you mentioned, I think, a case for preemption.
2 Generally speaking, I do not like the Federal Government
3 preempting States' efforts. But I understand the complexity
4 that comes from having different rules in different
5 jurisdictions.

6 But last year, when I was Speaker of the House, we
7 actually passed a bill that I think actually goes further.
8 It essentially created a cause of action against entities
9 who assert a bad-faith patent infringement and claims or who
10 made bad-faith infringement assertions and demand letters.

11 Do you believe that--it sounds like you would be
12 arguing for a position that this may be preempted. Do you
13 believe that the bill right now preempts that sort of law in
14 North Carolina?

15 Mr. Rhodes. Thank you for the question, Senator
16 Tillis. I do not believe there is a preemption in the bill
17 as introduced, no. And to be clear, you know, what I am
18 seeking, I think what the overwhelming majority of patent
19 holders in this country are seeking, are, as I said, clear
20 rules of the road so there is no ambiguity or confusion as
21 to what we should or should not put in our demand letters.
22 We have no wish to send out false or deceptive demand
23 letters. We just want to know what we can put in the letter
24 in this State or that State. You know, much like we are
25 trying to make sure that we have a level playing field

1 outside the U.S. with our trading partners and their patent
2 laws, within the U.S. we would like that same kind of level
3 playing field and certainty and uniformity.

4 Patent law has always been a creature of Federal
5 statute. I think it is really up to Congress, the Federal
6 courts, and Federal agencies to develop that policy, and
7 there is certainly a role for concurrent enforcement, but I
8 would like that to be a uniform standard for enforcement.

9 Senator Tillis. Ms. Lettelleir, the customer stay
10 provision, the thing that concerns me is the way that that
11 process could be gamed in terms of maybe technologies that
12 have a 24- or 48-month cycle, components of products that
13 may be a brand, and people could game the system to where it
14 would be very difficult for someone who ultimately proves
15 that their patent has been infringed upon actually
16 collecting anything. Do you think there are safeguards in
17 the proposed legislation against that?

18 Ms. Lettelleir. Well, I think that the very fact that
19 the customer stay does not absolve the end user from
20 liability, from the recovery potentially of damages, is the
21 safeguard. It is just the way it mechanically would work.
22 All it really would do would pause the cause of action
23 against the end user while the manufacturer case proceeds on
24 liability questions. And then at the conclusion of that,
25 whatever may remain in terms of issues to be resolved with

1 the end user simply picks back up, and you continue down
2 that path. So I do not see there--it does not really
3 significantly delay or hinder their ability to be made whole
4 if, in fact, there was infringement.

5 Senator Tillis. My question more is once they get to
6 the original offending entity, whether or not there is
7 anything there to help make them be made whole. But my time
8 has expired. We will follow up with questions.

9 Thank you.

10 [The questions of Senator Tillis follows:]

11 / COMMITTEE INSERT

1 Chairman Grassley. Thank you, Senator Tillis.

2 Senator Franken?

3 Senator Franken. Thank you, Mr. Chairman.

4 Mr. Rhodes, I appreciate that you are here to offer
5 3M's perspective, and I know that abusive tactics have
6 harmed 3M, as well as other Minnesota companies. But I also
7 understand that your business relies heavily on the
8 continued strength of the United States patent system, and I
9 remain hopeful that we can support that system with narrowly
10 tailored legislation that targets bad actors while
11 preserving our innovation economy.

12 I know you have been involved in the discussions
13 surrounding the PATENT Act, but you also wrote in your
14 testimony, "...we do not believe that the PATENT Act is
15 ready to be reported out of this Committee just yet..."

16 Can you tell me how your perspective has changed over
17 the last year overall, but also and specifically as it
18 relates to the growing popularity of post-grant review
19 proceedings?

20 Mr. Rhodes. Yes, thank you very much for the question,
21 Senator Franken. I think my perspective over the last year
22 has changed in two respects: one is I am very much
23 appreciative of the work that has been done by the Committee
24 and their staffs to address some of the imbalance and
25 concerns that we had expressed with the bill that--or prior

1 bills that had been introduced. And, you know, I agree this
2 is different and improved in many ways.

3 But I think concurrently with that, the concern has
4 been growing with respect to the IPR and PGR proceedings in
5 the Patent Office. We now have over 3,000 of those filed,
6 we think under procedures that are not fair even beginning
7 at the outset, where the challenger can put in all of its
8 evidence to begin a review; the patent holder really has to
9 respond with one hand tied behind its back and cannot put in
10 testimony to rebut expert testimony put in by the
11 challenger. The same body then decides on that incomplete
12 record that it is more likely than not that one of the
13 claims is invalid. That same body then carries through and
14 is sort of in a position of justifying that initial decision
15 in the final ruling.

16 When you get into the proceedings, the right to amend
17 claims that was codified in the AIA has effectively been
18 negated. The way the rules have been set up, only a very
19 small handful of amendments to claims have ever been
20 granted. So we think taking the amendment process out of
21 perhaps what is not a good mix in the context of IPR and PGR
22 and putting in a new hybrid process where you could have an
23 effective ability to examine amended claims and BRI would
24 make sense is a way to go. And then for those claims that
25 really are adjudicated in IPR and PGR, those are supposed to

1 be faster, more cost-effective alternatives to district
2 court litigation. Let us make them that.

3 You know, again, as was said this morning, we want to
4 have consistent among courts. I think we ought to also have
5 consistency among adjudicatory bodies when they are looking
6 at patent claims. We ought not to have, as in the example I
7 listed in my testimony, 4 years of district court litigation
8 and then all the way up to the Federal circuit, a patent
9 claim is upheld, its validity is upheld, and then you turn
10 around and get an IPR petition that expressly leverages the
11 difference in claim construction between the two to start
12 over from scratch? That is not what--I would submit that is
13 not what Congress intended when it set up these procedures
14 of the AIA.

15 Senator Franken. Well, thank you.

16 Mr. Hadad, in your testimony you focus heavily on
17 statistics that some in the pharmaceutical industry have
18 argued demonstrate a pro-challenger bias in the post-grand
19 review proceedings. What would you say to those on the
20 opposite side who say that these statistics actually reflect
21 the fact that the PTO has all too often issued overly broad
22 patents? In other words, the people on the other side would
23 say that these statistics demonstrate that these proceedings
24 are serving the precise function they were intended to.
25 What would you say to that?

1 Mr. Hadad. Thank you, Senator Franken, for the
2 question.

3 I think when you look at the analogous proceedings in
4 district court, I think no one has thus far, in my mind,
5 criticized the excellent work the district courts have been
6 doing in adjudicating patents in terms of the merits. The
7 procedure has been somewhat onerous, the discovery and the
8 like. But those statistics, from what I understand, are far
9 lower in terms of the overturning of patents, certainly
10 around, I think, 40 percent or so from the last statistics I
11 saw. But yet, when you look at the USPTO, that is about a
12 75-percent rate of invalidation.

13 So I think that delta tells a story that suggests that
14 perhaps if there were level standards, as I mentioned
15 earlier, Senator Franken, they would consider these things
16 in a corresponding way. And I do not think bad patents
17 would survive more reasonable standards any more than they
18 would under these current standards. I think bad patents
19 will go down in either case.

20 Senator Franken. Okay. Well, thank you.

21 Thank you, Mr. Chairman.

22 Chairman Grassley. Senator Coons.

23 Senator Coons. Thank you, Chairman Grassley, for
24 calling this hearing. It is my hope that this will be the
25 first of several hearings on the proposed reforms to the

1 patent system and that we will have an opportunity to hear
2 from as broad a range as possible of the folks who will be
3 affected by the proposed changes, including some of the
4 critical voices not on today's panel, which I think
5 essentially includes small businesses who rely on patent
6 protection for attracting investment, especially in the bio
7 and pharma and materials spaces and the venture capital
8 community that invests in them.

9 While I congratulate my colleagues on their bipartisan
10 effort, this is not a bill that I can support. While it has
11 made progress and is less bad than H.R. 9, currently under
12 consideration in the House, there are still, in my view, two
13 central concerns that I have in reviewing this act.

14 First, the reforms in this bill that will make it
15 harder to enforce patents are not targeted towards trolls
16 but will affect all patent holders. What this will mean in
17 practice is that small investors, small inventors, startup
18 businesses taking the biggest risks will be potentially hit
19 the hardest by the proposed litigation reforms.

20 Second, the bill contains nothing to encourage the
21 innovation that our patent system is designed to support.
22 In particular, there is nothing in this bill to remedy the
23 well-documented abuse of post-grant proceedings, and I
24 greatly appreciate the comments of my colleagues Chairman
25 Grassley and Senator Cornyn who have expressed a desire to

1 incorporate improvements in these areas in markup.

2 Allow me to briefly elaborate on both points, if I
3 might.

4 I am starting with the bill before us today. Our
5 panelists have described some truly egregious conduct by
6 trolls, including companies sending thousands of letters to
7 small businesses or retailers and a company suing based on
8 nearly expired patents. Yet none of those circumstances are
9 limitations actually embedded in the provisions of this
10 bill. Instead, it changes the rules for all patent holders.

11 Now, specifically the provisions in heightened pleading
12 requirements, delayed discovery, enhanced fee shifting do
13 not even attempt to distinguish between patent trolls and
14 the startups and small businesses across America that are
15 potentially creating jobs and making new discoveries and
16 delivering life-saving cures. We can make that distinction,
17 and we must. The patent system is simply too important to
18 make speed the ultimate goal of our efforts rather than
19 accuracy.

20 Several of you have described it as a Rubik's Cube, a
21 complex system where there is a real risk of unintended
22 consequences, and I think, frankly, the point about post-
23 grant review makes that abundantly.

24 Do not just take this from me. I have a letter--and,
25 Mr. Chairman, I would ask permission to enter this into the

1 record--from the National Venture Capital Association, which
2 does--

3 Chairman Grassley. Without objection, so ordered.

4 Senator Coons. Thank you.

5 [The letter follows:]

6 / COMMITTEE INSERT

1 Senator Coons. Which does speak on behalf of all of
2 the venture capital community, that speaks to the
3 significant unintended consequences that we may face, and I
4 quote: "It is important to recognize a patent is only as
5 strong as the owner's ability to enforce it and the
6 awareness of others of that ability. If the bill as written
7 were to pass, NVCA believes both of these parameters would
8 be impaired, making it more difficult to invest in early-
9 stage companies working on life-saving cures or significant
10 breakthroughs."

11 To further understand these views, I encourage any of
12 my colleagues or staff to watch the hearing and associated
13 testimony from the recent Small Business and
14 Entrepreneurship Committee hearing chaired by Senator
15 Vitter. In that hearing, we heard from Rachel King, CEO of
16 a small biotech company developing potentially life-saving
17 treatments for blood cancers. She testified, "If the
18 ability to enforce patents becomes limited due to excessive
19 lawsuit filing requirements or undue delays, third parties
20 would be less likely to invest in or license our technology,
21 and major sources of R&D funding would dry up."

22 We also heard from Robert Schmidt, co-chair of the
23 Small Business Technology Council, who expressed fear that
24 weakening patent laws would only benefit large, dominant
25 firms in maintaining their market power.

1 On the second issue, there is nothing in this bill that
2 helps inventors attract investment to find new cures or
3 disrupt current technologies, and I am pleased to hear Mr.
4 Chandler's testimony in which he acknowledged that recent
5 abuses of post-grant review is outrageous and the expressed
6 concerns by Mr. Rhodes and Mr. Hadad that these need to be
7 addressed. My STRONG Patents Act, which Senator Vitter has
8 joined Senators Durbin and Hirono in cosponsoring, really
9 would address IPR abuse, and I would be interested, if I
10 might, Mr. Chairman, in hearing Mr. Hadad speak to what are
11 the changes in IPR and PGR proceedings that you would like
12 to see incorporated into the bill. Since Mr. Rhodes has
13 already had an opportunity to address that, I would be
14 interested, Mr. Hadad, in how you see the changes needed to
15 really deal with this issue.

16 Mr. Hadad. Thank you, Senator Coons, and thank you for
17 your concerns and considerations of these issues in your
18 STRONG Patent Act.

19 Many of the proposals that I brought up have analogous
20 provisions in the existing text of the STRONG Patent Act.
21 There are refinements, as thinking has continued, to really
22 target this to the abusive conduct and really tailor it in a
23 way that makes sense. As I mentioned, having the equivalent
24 standards as the district court, giving an alternative to
25 amending claims through this reissue or reexamination, and

1 then providing some basic fairness and equity in terms of
2 the type of information you can introduce, those three areas
3 that I said--and I think Mr. Rhodes agrees with--are areas
4 that would be areas of focus going forward, in my mind.

5 Senator Coons. Thank you, Mr. Hadad.

6 Thank you, Mr. Chairman.

7 Chairman Grassley. And now Senator Whitehouse.

8 Senator Whitehouse. Thank you all. Let me begin by
9 thanking the cosponsors and negotiators who worked so hard
10 on this bill. I am at this point in undecided mode. I am
11 waiting to let my Rhode Island universities have a chance to
12 digest the bill a little bit more and to have a better sense
13 from the small business and startup community in Rhode
14 Island weigh in a little bit more with me. And I echo
15 Senator Coons' suggestion that there should be more hearings
16 on this that bring in a wider range of viewpoints.

17 My concern is that among the different conflicts that
18 inhabit this patent space includes the ones we have talked
19 about, like patent holders versus patent infringers or
20 alleged patent infringers; includes the difference between
21 the pharmaceutical companies, which have a huge stake in a
22 particular patent but want to defend it at all costs, and
23 tech companies that may have a product that implicates
24 potentially thousands of patents and that gives them very,
25 very different motivation in this space.

1 But behind all of that, as somebody who used to do a
2 certain amount of litigation, is the conflict of big versus
3 little and the advantage that our litigation system kind of
4 systemically gives to big, particularly through the ability
5 to just crush a small plaintiff with endless discovery, lots
6 of paper blizzard litigation techniques and strategies that
7 basically prevent the small plaintiff company from ever
8 getting to the merits. If you are gigantic incumbent, then
9 you have enormous power to crush potentially disruptive
10 competition by climbing into their space and simply
11 overpowering them in court. And all of the moves that were
12 made in this bill with respect to heightened pleading
13 standards and discovery limits and adding a threat of a
14 potentially game-ending fee-shift award into the equation
15 seem to move in the direction of big versus little.

16 So I am going to need to hear a little bit more from my
17 universities, which tend to represent smaller folks, and
18 from small businesses. But I do think that a lot of
19 progress has been made.

20 I do think it is also going to be important that we
21 have a clear understanding, Mr. Chairman, as we go forward,
22 that if we reach an agreement that is very solid in the
23 Senate, that we have some reassurance that we will not just
24 get rolled in the conference process and end up with a bill
25 that looks like the House bill, which I think is really

1 unacceptable to most of us and would do real wrong as
2 opposed to this, which I think is--you know, we are in the
3 hunt on this bill, and the question is: Have we got it
4 right yet?

5 My basic question, I would like to ask it to each of
6 you. If you want to expand a little bit, please feel free
7 to, but I think it is a yes-or-no question. If you had to
8 sit down and write a definition of what a troll was so that
9 you could tell a troll apart from a legitimate patent
10 holder, would you be able to do that? Mr. Chandler.

11 Mr. Chandler. I have felt for a long time that the
12 issue here is abuse of the litigation process by big and
13 small alike potentially, by active companies and inactive,
14 that certainly there has been a huge increase in the number
15 of suits brought by companies that are basically investment
16 vehicles for buying patents and litigation. But the reforms
17 we are looking at in this legislation should improve the
18 patent system overall.

19 Mr. Chandler. My point is: Can you tell a troll apart
20 from other litigants? Is there a way to define--we use the
21 word a lot. Would you be capable of defining it if you had
22 to?

23 Mr. Chandler. Certainly--well, I do not use the term
24 because I think the problem is systemic.

25 Senator Whitehouse. Okay.

1 Mr. Chandler. I think you have rats running through a
2 maze--

3 Senator Whitehouse. Mr. Rhodes--

4 Mr. Chandler. --because there is food at the end of
5 it.

6 Senator Whitehouse. --would you be able to define the
7 term if you had to?

8 Mr. Rhodes. I do not use the term because I do not
9 think there is any common or understood definition to it
10 that people agree on, certainly that I am aware of, and I
11 think it is important--

12 Senator Whitehouse. Ms. Lettelleir?

13 Mr. Rhodes. --to identify behavior, not people.

14 Ms. Lettelleir. I have to agree with my colleagues on
15 that because I really think it--at one point it might have
16 been more easily defined, say 10 years ago when this
17 movement started. But over time the vortex of behavior has
18 drawn in what previously might not have been--

19 Senator Whitehouse. Two seconds left on my clock. Mr.
20 Hadad?

21 Mr. Hadad. No.

22 Senator Whitehouse. No.

23 Ms. Samuels. I agree. It is trolling behavior, not
24 troll as a party.

25 Senator Whitehouse. Got it. Okay. Thank you very

1 much.

2 I yield back my time, and I guess that puts Senator
3 Cornyn in charge.

4 Senator Cornyn. [Presiding.] Good morning. Thank you
5 for being here today. I was just getting a little update on
6 what has happened. We have a remarkable way of scheduling
7 multiple meetings and hearings at the same time around the
8 Senate.

9 I understand there was some concern about the process
10 leading up to today's hearing, and I just would like to
11 remind all of my colleagues, we got very close to actually
12 bringing a bill from the Senate Judiciary Committee to the
13 floor last year. But Senator Reid, who then was Majority
14 Leader, reportedly told the Chairman of the Judiciary
15 Committee, "Do not bother because I am not going to schedule
16 it for debate and votes." So we were unsuccessful bringing
17 the bill to the floor then, but it has been a 2-year
18 process, as many of you know, because we have consulted with
19 each of you, and we have had intense involvement with
20 stakeholders, an incredibly diverse array of stakeholders.
21 Also, this is the second hearing we have had on this issue
22 this Congress.

23 So I just wanted to say that to remind all of my
24 colleagues that we have worked very hard to get to where we
25 are today, which is not to the finish line, but we are a lot

1 closer. And my thanks to each of you for your contribution
2 to help us get to where we are today. I realize we are not
3 done, but we are much closer.

4 Mr. Chandler, I understand that Senator Durbin has some
5 questions about the fee-shifting provisions. This is
6 something that Senator Schumer and I worked hard to try to
7 get right. As a former State court judge, I had some
8 concerns about the presumptive fee-shifting idea. I have
9 seen a lot of people lose lawsuits that were not frivolous.
10 They just lost. But in cases where there is objective
11 unreasonableness of the position, I think one of the things
12 that is important is to have the fee-shifting mechanism that
13 we have tried to put in this legislation to make sure that
14 it acted as an additional deterrent and did justice to the
15 people who were sued based on a frivolous claim.

16 Could you talk about the importance of fee shifting a
17 little bit more and explain why the Supreme Court's decision
18 in Octane Fitness was not enough?

19 Mr. Chandler. Thank you, Senator Cornyn, and thank you
20 for your sponsorship of the PATENT Act.

21 The Supreme Court decisions are based on a statute that
22 still refers to exceptional cases and have been very
23 spottily applied. In fact, in one district a judge has
24 indicated that he felt it was a suggestion, not mandatory
25 law. The number of fee awards still based on the principle

1 of exceptionality has been very low and we do not think
2 serves as a sufficient disincentive to unmeritorious
3 litigation.

4 We would prefer the presumptive language in the
5 Innovation Act in the House but understand the process of
6 crafting this bill and are comfortable with the way the
7 language is presented in the PATENT Act to address this and
8 to provide the district judges with a uniform national
9 standard, which has not been the result from the Supreme
10 Court decisions last year.

11 Senator Cornyn. I thought it was important to require
12 a hearing and to require evidence be introduced at that
13 hearing and then to have an opportunity for appellate review
14 to keep the district judges doing what Congress intended
15 them to do when it comes to considering this matter.

16 Mr. Rhodes, thank you for your contribution to this
17 effort and working with us. Can you explain why this fee-
18 shifting provision is an improvement over current law in
19 your view?

20 Mr. Rhodes. Yes, thank you for the question, Senator
21 Cornyn. I do believe that the interests of uniformity are
22 important. As Mr. Chandler said, you know, we currently
23 have the Supreme Court opinions. You know, we have long
24 supported more frequent fee shifting in patent cases to
25 drive the right behavior. But the Supreme Court in giving

1 district courts more discretion is still working within the
2 confines of existing Section 285, which is an exceptional
3 case. So the Supreme Court defined that as cases that stand
4 out from others, but, you know, there is still a lot of
5 ambiguity in that.

6 So I would submit that having the protections, the
7 safeguards that you mentioned, as well as making it clear
8 that fees are not automatically shifted--that has been one
9 of our core principles. It really should target bad
10 behavior, not parties, got to go both ways and be premised
11 on, as the bill says, you know, behavior or conduct that is
12 not objectively reasonable. And there is an interest-of-
13 justice exception at the end.

14 So I think there is actual protection as compared to
15 current law that this statute would provide to those who are
16 concerned about more frequent fee shifting.

17 Senator Cornyn. On a different topic, I have heard
18 from life sciences industries and other concerns about inter
19 partes review that was created by the 2011 America Invents
20 Act, and I would like to hear from people on both sides of
21 that discussion here. Mr. Hadad, you have testified your
22 belief that reforms to IPR are necessary, in part because of
23 what you view as a high rate of invalidation of patents
24 after they have been issued, and I can understand the
25 uncertainty that that might create, and particularly if

1 there are different legal standards that apply to litigation
2 as opposed to the IPR process. Could you share your views
3 with us on that?

4 Mr. Hadad. Thank you, Senator Cornyn. Yes, I do
5 believe the IPR proceedings, as they have been implemented--
6 and I think they have been implemented in the best of
7 intentions by the USPTO, but there is a considerable deluge
8 of these IPRs, and they have to be managed. And I think to
9 some degree lost in the mix a little bit have been some of
10 the procedural safeguards to ensure a fair and level playing
11 field between parties.

12 You mentioned the standards, and I had mentioned them
13 earlier. I think what they would do would be to give
14 basically analogous type of decisionmaking to the district
15 courts and the USPTO. We are looking for the USPTO to be a
16 more efficient forum, not to be a different forum in terms
17 of the level of invalidations. And I think what we are
18 seeing is an increased lack of confidence for patent holders
19 in terms of investment when you consider that there is
20 effectively a 75-percent chance that your patent at one
21 point will go down in a USPTO proceeding, at least based on
22 current statistics.

23 Mr. Chandler. Senator, may I address that as well?

24 Senator Cornyn. Certainly.

25 Mr. Chandler. Thank you. I think first we ought to

1 get a grip on the statistics. There are 2.48 million
2 outstanding and in-force patents in the United States.
3 There have been 3,000 petitions for IPR review. The PTO has
4 granted about 1,300 out of those 3,000, and that has
5 resulted in 391 patents having some or all of their claims
6 eliminated.

7 Now, I can understand why that is painful for the
8 people who have that happen. I also understand that they
9 are going to petition Congress for redress.

10 The fundamental issue, though, that we see is things
11 like this hedge fund activity that is initiating IPRs and
12 then trying to short stocks. We ought to address that
13 directly through securities laws, for instance. That is not
14 acceptable behavior, in our view.

15 But the reforms that are being proposed to the IPR
16 process would basically force the Patent Office to use
17 standards that were set for the district court rather than
18 taking a fair look at whether a patent was granted in the
19 first place. And the types of standards that the PTO uses
20 where they use broadest reasonable interpretation to figure
21 out what the scope of a patent should be, where they do not
22 apply a clear and convincing evidence standard that we put
23 in the district courts because they are not the experts the
24 way the Patent Office is. All that does is roll back the
25 ability of the PTO, which was a fundamental part of the

1 process that was implemented in the America Invents Act, to
2 take a fair look, should this patent have been granted in
3 the first place, using the same standards that were used
4 when the patent was looked at in the first place. If a
5 mistake was made, let us fix it. There is no excuse for
6 letting a mistaken patent grant result in a 20-year monopoly
7 that raises costs to customers and keeps other entrepreneurs
8 out of the marketplace.

9 So we think there are targeted reforms that should be
10 implemented, but rolling back the standards the PTO uses is
11 not the right answer.

12 Senator Cornyn. I know there are different views on
13 the panel--

14 Mr. Chandler. There sure are.

15 Senator Cornyn. --and that is the reason for the
16 hearing in the first place so we can flesh this out and we
17 can hopefully make better decisions.

18 Mr. Rhodes?

19 Mr. Rhodes. Yeah, I think that, you know, these states
20 that there are 2 million patents and only 3,000 IPRs have
21 been file so far, that misses the point that this is not a
22 representative sampling of the 2 million patents that are in
23 force.

24 What patents do you think are being challenged right
25 now? The most important ones, the most valuable ones, the

1 ones that are either in litigation or that others would like
2 to be able to practice. So therein lies the problem.

3 There is less confidence than has ever been, and this
4 goes beyond the life sciences sector that we heard from Mr.
5 Hadad. There is less confidence now, when I am talking to
6 business decisionmakers, about whether we can safely put
7 investments in commercializing patented technology and
8 building products based on that technology, can we assure
9 investments by knowing that we have patent rights that can
10 protect them. That is a less certain question than it has
11 ever been. It is because of the uncertainty, the perception
12 of unfairness, the reality of unfairness that I mentioned in
13 several respects this morning, and that directly drives
14 business decisions, and it is beyond the life sciences
15 sector.

16 So we have proposed a series of reforms. You know, we
17 hope that our ask is listened to. The same way those who
18 said there was imbalance in litigation that needed to be
19 addressed, we hope our concerns are listened to as well in
20 terms of the post-issuance proceedings.

21 Senator Cornyn. Ms. Lettelleir, I should have
22 recognized you first since you are a constituent, but
23 welcome to today's hearing. We have heard testimony on the
24 alignment or we should not align the IPR standards with
25 those in district courts. What is your view of that?

1 Ms. Lettelleir. Well, I think the one thing that is
2 very important for the Committee to keep in mind as it
3 considers these requests for changes is that the post-grant
4 review proceedings that were adopted as part of the AIA was
5 part of a carefully structured provision, and if you now go
6 in and try and pick just one element of that or two elements
7 of that, you disrupt the balance of what was accomplished in
8 the AIA.

9 While I have heard the arguments that there is an
10 imbalance between the district court standards and the PTO
11 standards, the reality is that throughout the rules
12 governing IPR and PGR that have been adopted and applied,
13 there are imbalances. So if you just start looking to
14 making one element of those proceedings line up with
15 district courts, then you have changed fundamentally the
16 balance between challengers and patent holders. So we are
17 very concerned of disrupting the balance that was achieved
18 when AIA was accomplished.

19 As challengers of patents before the PTO in the context
20 of these post-grant review proceedings, we are seeing
21 unfairness as to the challenger as well. And there may be a
22 broader discussion that needs to be had down the road, but
23 as part of this, I do not think you can just take one
24 element and disrupt the entire balance that was achieved in
25 the AIA.

1 Senator Cornyn. I have gone over my time for now. I
2 will recognize Senator Blumenthal, who I think is next.

3 Senator Blumenthal. Thanks, Senator Cornyn, and thank
4 you all for being here. Thank you for the excellent
5 testimony. I had to step out to attend one of the numerous
6 conflicting hearings and meetings that we find we have in
7 the Senate.

8 But I am very, very interested in this dilemma. For me
9 it is a dilemma. I have wrestled with it for quite some
10 time. And I recently heard, for example, from a Connecticut
11 Navy veteran names Michael Skelps whose photography company
12 was, in fact, sued by a patent troll. The troll claimed to
13 have patented the idea of taking pictures at a finish line
14 and selling them to racers. I am a runner. I know about
15 these photographs at finish lines. They are done commonly.
16 Michael Skelps was threatened with this lawsuit. In fact,
17 he was sued, and the troll's demand letter contained no
18 information about his supposed patent. It made the case to
19 Mr. Skelps that it would be cheaper to settle than to
20 litigate, and it announced that the troll had already forced
21 nine businesses to settle with much the same kind of claim.

22 Mr. Skelps fought it as hard as he could. He spent
23 \$100,000 and ultimately all three of the troll's patents
24 were invalidated. But he won the battle. He lost the war.
25 I learned last night that Mr. Skelps will file Chapter 13

1 bankruptcy this month, and within 60 days his business will
2 be gone.

3 I have heard from innovators who are afraid what could
4 happen if patent reform goes too far, but I am convinced
5 that there are ways to focus and target legislation to help
6 not only big companies and very well resourced
7 entrepreneurs, but also the Michael Skelapses of the world,
8 of America. He happens to be a veteran who obviously was
9 not going to give up without a fight, and he fought and he
10 won. And ultimately, though, he lost.

11 So I am hopeful that we will have a result here that
12 vindicates the legal rights of people in America generally,
13 both the entrepreneurs and the innovators, the business
14 people, and our veterans. And I want to thank all the
15 bill's sponsors. I am not one of them. I hope that we can
16 improve even more on what has been done already, which leads
17 to the question that I have for you, and I will accept
18 volunteers. Do you think there are parts of the bill that
19 can and should be improved? And what would you do to make
20 it better and--what always troubles me, especially in an
21 area that is so complex and challenging--to avoid unintended
22 consequences?

23 Ms. Samuels. I can answer that. Thank you, Senator
24 Blumenthal, for the question. I think that this bill
25 represents a really good compromise, which means, of course,

1 that I do not think it is perfect. Right? That is the
2 definition of compromise. Some of the things that I wish we
3 saw in there were--I wish that we were dealing with quality,
4 like we talked about last year, 2 years ago, with an
5 expanded covered business method review; that we more
6 directly were talking about improving patent quality, which
7 for people in my industry, in the small startups in the tech
8 space and not unlike the photographer, Mr. Skelps--if I got
9 that correctly.

10 Senator Blumenthal. You did.

11 Ms. Samuels. You know, that is what would really help.
12 That is the core of this problem. Also, actually the
13 discovery provisions have been dialed back some during
14 compromise, and I wish that were not the case, because I was
15 so glad to hear your story and I will be quick just to say
16 that there has been a lot of talk today about small
17 businesses and they hurt on both sides of the equation, and
18 I think that is probably always true. But in this instance,
19 we are so worried about small businesses having access to
20 the courthouse, and that just does not mean plaintiffs, but
21 it really means defendants in these cases, so that you do
22 not have to spend \$100,000, \$200,000, \$1 million to defend
23 yourself, but you can go to court and make your case. So
24 thank you for the question.

25 Senator Blumenthal. Thank you.

1 Mr. Chandler. Thank you, Senator. We would support
2 making sure that the discovery stay in the case of transfer
3 motions, motions to dismiss, motions to sever be more
4 robust. Right now it allows for local rules that could
5 impose a significant amount of discovery while a transfer
6 motion is being considered, and we would hope there would be
7 an interlocutory appeal on the transfer motions as well. As
8 we noted, 40 percent of the patent litigation is now brought
9 in two judicial districts where only 1.5 percent of
10 Americans live. And that imbalance forces people to bring
11 large numbers of witnesses and travel to places that are
12 very, very inconvenient, but cases are brought there for
13 reasons that are obscure to us.

14 Mr. Rhodes. So we would certainly hope that any of the
15 welcome compromises that we mentioned would not be dialed
16 back in the bill. We think that would be a big step
17 backwards.

18 Beyond that, I have mentioned two areas where we think
19 improvement should be had this morning--no surprise to those
20 of you who have been here the whole morning--AIA reviews as
21 well as the demand letter section. And we think, you know,
22 if we could couple changes to those with what is in the bill
23 today, at that point we would be in a position where we
24 could support the overall package.

25 Ms. Lettelleir. And, Senator Blumenthal, from the Main

1 Street perspective, we recognize the balance that has been
2 struck, and we accept that. While we would always hope to
3 have stronger provisions, we accept the balance that has
4 been struck. However, any further erosion of the critical
5 provisions of the PATENT Act would greatly challenge our
6 continued support for the PATENT Act as introduced.

7 Mr. Hadad. And to finish it up, we appreciate the
8 compromises in the current existing bill. We do remain
9 concerned about these post-grant proceedings and believe a
10 comprehensive bill addressing abusive litigation procedures
11 would also include those as well. Thank you.

12 Senator Blumenthal. Thank you. Well, I want to thank
13 you all. As my colleague Senator Schumer remarked at the
14 very beginning, the witnesses that we have before us today
15 reflect a consensus, but it also may be without some of the
16 disagreeing views, some of the other views, which may not be
17 reflected simply because others have not been invited for
18 whatever reason. And I think that this Committee has an
19 obligation to reach out for views that represent the
20 diversity and continue to work to improve it without
21 necessarily disrupting the compromise that has been struck.
22 Even with a compromise, I think there may be room for
23 improvement.

24 Thank you, Mr. Chairman.

25 Senator Cornyn. Thank you, Senator Blumenthal.

1 I agree with Senator Blumenthal, there is always room
2 for improvement. But we--

3 Senator Blumenthal. And I want to thank the Chairman
4 for his role in forging this compromise, along with our
5 colleagues Senator Leahy, Senator Grassley, Senator Schumer,
6 and Senator Klobuchar.

7 Senator Cornyn. Well, as we have learned, even with
8 consensus legislation, which this is not yet, it is still
9 hard to pass legislation in the Senate. So we are going to
10 keep at it. But we are trying to make sure that we do get
11 the views of stakeholders, and we have worked very hard at
12 that, and, again, I will thank you once more for your
13 sharing that with us and working with us in good faith.

14 This to me is the sort of important piece of
15 legislation--maybe it is not important on a global scale,
16 but it is to a lot of people. I have heard from everybody
17 from restaurant owners to hotel/motel owners to operators,
18 to people in the building trades that they are somehow swept
19 up by the patent trolls litigation, and it is just
20 incredibly destructive and unfair.

21 Ms. Samuels, I think you had a great phrase:
22 "defendants access to justice." Sometimes we focus on the
23 plaintiffs' access to justice in a lawsuit but do not give
24 adequate recognition to the defendants' access to justice as
25 well.

1 I might just cover with you--and I apologize if you
2 have talked about this before when I was not able to be here
3 and I was at one of those other conflicting meetings and
4 hearings that Senator Blumenthal alluded to. But how would
5 the pleading rule in this proposal help small businesses?

6 Ms. Samuels. Thank you for the question, Senator
7 Cornyn, and I have to thank you so much for your leadership
8 on this effort.

9 I think the heightened pleading provision is actually
10 one of the most important parts, particularly for startups,
11 for small businesses, for individuals who face threats from
12 patent trolls, because you need to be able to understand the
13 scope of the threat you face before you can make appropriate
14 decisions about how to proceed, and without basic
15 information, you cannot make those decisions.

16 And I think this is especially true when we are talking
17 about a patent system--a patent system that is a system of
18 public notice. That is the point of the patent system, and
19 right now it does not operate like that. When we talk about
20 property, we are talking about metes and bounds. And if you
21 want to grow a company, make some innovation, put something
22 out there, it is literally impossible right now to know the
23 scope of your rights because there is no information out
24 there to help delineate that. And so the heightened
25 pleading requirement would help fix that problem.

1 Senator Cornyn. Mr. Rhodes, you testified to the
2 safeguards and the pleading rule. Would you describe those
3 and perhaps explain those a little more?

4 Mr. Rhodes. Yes, thank you for the question, Senator
5 Cornyn. I think the trick with pleadings is to achieve, as
6 in so many other areas of the bill, the right balance
7 between putting all parties, both plaintiffs and defendants,
8 on fair notice of the claims and the defenses at issue in
9 the case without making the requirements too high or onerous
10 that there is an access-to-justice issue or that the
11 pleading targets do not just become a motion to dismiss--
12 that it does not become a target for motions to dismiss. So
13 I think, you know, that is a balance we are trying to strike
14 here.

15 I was encouraged that some of the initial information
16 that is not required to establish a claim for relief was
17 moved to initial disclosures, so that cannot serve as the
18 basis for a motion to dismiss.

19 There is also an ability to plead matters generally,
20 consistent with the Plaintiff's Rule 11 obligation, but more
21 generally if information is not available to the plaintiff
22 at the time the complaint is file.

23 In addition, there is confirmation within the
24 heightened pleadings requirement of the right to amend
25 pleadings consistent with the standards in Rule 15(a) of the

1 Federal Rules of Civil Procedure. So I think those
2 safeguards are important.

3 Senator Cornyn. If we can turn to the issue of
4 discovery, if I worry about--the two things I worry about
5 the most about our civil justice system is the costs and the
6 delays necessary to resolve disputes. And, of course, not
7 everybody can afford a high-priced lawyer or the discovery
8 costs associated with protracted litigation. And so one of
9 the things we tried to address here is a way to deal with
10 this in an appropriate way. But it is an item of consensus
11 because you have plaintiffs who complain about discovery,
12 and you have defendants who complain about discovery, too.
13 But some, especially those with little to produce, rely upon
14 the high cost of discovery to extract settlements regardless
15 of the merits of the case.

16 Since the introduction of the Patent Abuse Reduction
17 Act 2 years ago, which included a discovery stay, I have
18 heard a lot from both sides about the right way to address
19 discovery costs.

20 Ms. Samuels, would you please tell us how you view the
21 discovery stay in the PATENT Act and its impact on startup
22 companies?

23 Ms. Samuels. Of course, Senator Cornyn. Thank you for
24 the question. You know, I think that a lot of what I said
25 about heightened pleading is also true with regard to the

1 discovery reforms in the early stays. What you are allowing
2 startup small companies without a lot of resources to do is
3 really take the necessary time with the necessary
4 information to understand the scope of what they are facing,
5 to understand as they make these decisions whether they
6 should pay a lawyer and continue to fight, whether they
7 should settle. These are the kinds of things we need to
8 give these folks so that they, like we have talked about,
9 have access to the courthouse.

10 To be honest, while I am glad that the stay is in here,
11 I wish it went farther. I wish it were to Markman. I
12 understand we have a compromise and that is life, so we just
13 think that anything that allows these people to get into the
14 courthouse is a good thing.

15 Senator Cornyn. And, Mr. Rhodes, I think you touched
16 on this, but let me just ask you again. Do you think we
17 have reached a balanced approach on deterring frivolous
18 litigation without unduly burdening patent holders who need
19 to assert their rights when it comes to discovery?

20 Mr. Rhodes. Yeah, I think with respect to the
21 discovery stay, that was a major area of concern for 3M and
22 for 21C. As the original proposal that you referenced was
23 drafted, it would stay discovery pending claim construction,
24 and that is a complex and often protracted procedure that
25 takes place in every case, nearly every patent case before

1 the claims are construed. So we were very concerned, as a
2 company that makes investments based on our patent rights
3 and, unfortunately, sometimes has to enforce those patents
4 to prevent infringement, that staying all discovery in a
5 case pending the claim construction process might delay our
6 ability to get fast, expeditious, and effective relief.

7 And so I think walking that back to preliminary motions
8 does address concerns. The discovery proceeds while motions
9 to transfer, for example, are not ruled upon. So it does
10 address some of that concern about discovery taking place in
11 a court where maybe the case is not even going to proceed,
12 while balancing the risk--against the risk of a protracted
13 delay of that discovery stay as pending claim construction.

14 I do disagree strongly with the pushback that we have
15 heard this morning about the exception for initial
16 disclosures. I think if you look across the country at the
17 patent courts that have done the best job of--at the
18 district courts that have done the best job of managing
19 patent cases, a common denominator that you see are initial
20 disclosure requirements, local patent rules that provide for
21 an early exchange of information that helps narrow the
22 issues in dispute. It helps identify opportunities on
23 issues for early resolution. It helps identify early
24 settlement opportunities. And I think allowing that process
25 to proceed in an orderly fashion, drawing upon the

1 experience and the expertise of the Federal judiciary that
2 has adopted that process is very important, even if we stay
3 more intrusive discovery pending those preliminary motions.

4 Senator Cornyn. Thank you. I know Senator Blumenthal
5 mentioned some concern about people who are not represented
6 at today's hearing. I just wanted to note for the record
7 that at the last hearing one of the universities was
8 engaged, and I am pleased that as a result of the work we
9 have done reaching out to the various university groups, we
10 have welcomed both their input, and I think we were in a
11 pretty much better place as far as their concerns and the
12 compromise that we have reached, which is, as we have all
13 said, is not perfect, but seems to be a consensus--we have
14 reached a consensus, by and large, with some notable
15 exceptions on the IPR and other areas where we need to
16 continue to work.

17 Senator Blumenthal, do you have any other questions you
18 would like to ask?

19 Senator Blumenthal. I do not. Thank you.

20 Senator Cornyn. Okay. Thank you. Well, since we have
21 run out of Senators and questions, thank you for your
22 patience and your time, and thanks for continuing to work
23 with us and get this right. The hearing is adjourned.

24 [Whereupon, at 11:54 a.m., the Committee was
25 adjourned.]

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