



Statement for the Hearing  
“The Impact of Abusive Patent Litigation  
Practices on the American Economy”

Before the United States Senate  
Committee on the Judiciary

Mr. Steven E. Anderson  
Vice President & General Counsel  
Culver Franchising System, Inc.

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Chairman Grassley, Ranking Member Leahy, and members of the Judiciary Committee, I am Steven E. Anderson, Vice President and General Counsel of Culver Franchising System, Inc. I want to thank you for giving me opportunity to testify today about the devastating impact of abusive patent litigation practices on Culver's restaurants. It is an honor to present our company's perspective to you, and I can assure you that our views are shared by other restaurants and retailers throughout our country.

### Culver Franchising System, Inc.

Culver's® is a real American success story. A family business from the very beginning, Culver's opened its first restaurant in Sauk City, Wisconsin, in 1984, highlighting the signature combination of homemade, cooked-to-order Butter Burger® hamburgers with fresh frozen custard that is our hallmark to this day. We have been franchising since 1990, and today we have 538 restaurants serving our customers in 22 states. All but seven of our Culver's restaurants are franchised -- which means they are individually owned and operated. Our company headquarters has 107 employees, and more than 20,000 people are employed at Culver's restaurants. We are experts in delivering great food with warm hospitality to our guests. We are not experts in the fields of technology or patent law. Therefore, we at Culver's, like most restaurants and retailers, are at a real disadvantage in being able to anticipate, plan for, and react to the demands of patent trolls.

### The Problem: It Costs Too Much to Fight

Ten percent of the U.S. workforce is employed by the restaurant industry, the nation's second-largest private-sector employer. Restaurants account for roughly 4% of the nation's GDP with an estimated \$709 billion in annual sales -- and serve 130 million hungry customers each day.<sup>1</sup> Restaurants create meals, and restaurants create jobs, hundreds of thousands of both; we are a powerful force for job-creation and for customer satisfaction in the United States. However, most restaurants are small businesses, like our franchisees, and operate on very thin margins. We simply cannot afford to litigate patent infringement lawsuits, and we lack the technical expertise to evaluate the merits of technology patent claims that are asserted against us. This lack of resources -- both informational and financial -- makes restaurants prime targets for patent trolls. As the National Restaurant Association has previously testified, "Patent trolls often seek to extort settlements, knowing that it will be expensive and time consuming for businesses to fight the baseless claims in court. Patent assertion entities stifle innovation and inhibit the implementation of customer facing technologies at the store or e-commerce level, while draining necessary time and money from businesses."<sup>2</sup>

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<sup>1</sup> National Restaurant Association, 2015 Restaurant Industry Forecast

<sup>2</sup> Testimony of Jamie Richardson, White Castle System, Inc., on behalf of the National Restaurant Association of America, "The Impact of Patent Assertion Entities on Innovation and the Economy," before the

Patent trolls had not set their sights on us until recently, but this recent experience is more than enough to bring me to the Senate today to plead for your intervention. In the past few years, Culver's has been the victim of two demand letters and one lawsuit from patent trolls. Each entity claimed to own the rights to a basic technology used by virtually every restaurant and retail chain: in the case of the lawsuit it was a nutrition calculator on our website, and in the case of the demand letter it was the use of shortened links and time content in text messages. The third instance -- another demand letter -- I cannot discuss today, because as with many such situations, the resolution of the case included a confidentiality agreement that forbids public discussion.

Beginning in 2011, a patent assertion entity sued Culver's and over fifty other restaurants and retailers, such as grocery stores, in the Eastern District of Texas, claiming that we infringed upon the asserted patent by having a calculator on our website that listed the nutritional content of menu items, and then recalculated that information if the customer removed or added a condiment (for example, taking cheese off a burger or adding salad dressing). The "technology" that we were using did nothing more than add to or subtract from nutritional totals as the menu item was customized. This complaint took us completely by surprise, for we had heard nothing from the plaintiff prior to being served with the summons and complaint. After filing the lawsuit the settlement demand was \$350,000 per defendant and stated that even removing the technology from our website, which we immediately did, would have little or no impact on the amount demanded. This is an enormous amount of money for a small business, especially for the use of a technology that does nothing to drive business. These types of settlement demands can be crippling to a small business, but the attorneys' fees required to fight the lawsuit might be ten times as much, so in most cases defendants will choose to settle regardless of the extent of their use or the merits of the patent claim.

We also received a demand letter in 2011 from a troll claiming patent rights to the use of shortened Web links, like the popular bit.ly service, in text messages, and the patent holder also claimed that its patent portfolio covered any text message that included an expression of time (e.g. \$1 off a sundae before 5:00 PM or 2 for 1 onion rings today). Many of the accused text messages are automated or created by third parties, such as text alerts of social media posts, and therefore we had no way of ensuring that they would not be sent. Regardless of legal advice that we received indicating that it is likely that we would not have been found to have infringed upon such patents, we reached a settlement because we simply could not afford to battle the issue in court, which we were told would cost \$2 million to \$4 million in legal fees.

## Effect of Demand Letters on Business

As General Counsel for Culver's there is literally nothing that I dread more than receiving such a patent demand letter. Through my own experiences as well as from talking to countless other in-house counsel, I can tell you exactly how this patent troll system works. The demand letters read like extortion letters. They are customized form letters that are very obscurely drafted, with broad but limited information about the alleged infringement, the company making the claim, the patented technology, and the validity and ownership of the claimed patents. These mass-produced demands may be sent to tens or hundreds of companies at a time. After reviewing the demand, we still have no idea as to the validity of the patent, exactly what the alleged violation might be, and whether or not we are actually infringing upon that patent. But we must secure knowledgeable outside counsel to investigate such demands and the price tag for that legal work is very high and the resulting opinion is never conclusive. These patent assertion entities are quite happy to tell us that we are welcome to test their claims in litigation, knowing that a trial is cost prohibitive, with typical attorneys' fees of well over \$1 million, and too much of a distraction from our business for us to undertake. The trolls strategically offer the alternative of a licensing fee that is a mere \$250,000 to \$500,000. This demand amount has nothing to do with the value of the technology that has supposedly been patented, but is instead offered as a less expensive alternative to litigating. And although we do not know if the patent is valid, let alone whether we are infringing, this form of extortion is very effective -- and in most cases the recipient of this demand letter pays the demand.

Moreover, the money we spend dealing with these demands has to come from somewhere; we have to take it from some other place in our business where it might be productive and profitable, and instead use it to placate trolls. In our case, because such use of technology is related to advertising our business, we are forced to use the money we collect from advertising fees to pay and fight patent assertion entities. This is the same money that we would have otherwise reinvested in promoting our business and driving traffic to our franchisees to help them succeed.

Patent trolls strategically target their demands against the end-user or purchaser of the technology, who has limited knowledge of the technology or patents around it, rather than the producers and sellers of the technology. Again, we have two limits in such situations: information and money. We are vulnerable because the patent assertion entities can get away with providing us far too little information for us to determine whether we think the patent is even valid, and whether we might be infringing upon it. At the same time, we lack the financial resources to gamble on the outcome and go, effectively blind to the real information, into federal court. Furthermore, we cannot insure against such claims, and we cannot rely on technology providers to indemnify us for the costs of these risks. Therefore, we and other restaurants have resorted to avoiding the use of technology whenever possible, or only purchasing from companies large enough to protect us against patent

claims. Other small businesses suffer, for the lack of our purchases and patronage, and they become casualties of these troll attacks. Furthermore, our customers want the latest technology on our websites and in our restaurants. They like to be able to find the nearest Culver's with a few taps on their smartphone, to be able to figure out whether the combo they want to order fits within their diet, and to be able to get text messages about the frozen custard flavor-of-the-day. And we want to provide our customers with the best restaurant experience; we do not make money off such technology, we simply want to satisfy our customers. As we are driven away from the use of such technology by trolls, our guests will also suffer.

The costs imposed by patent assertion entities are high enough that they jeopardize our business model and could force small and mid-sized companies out of business. I have spoken to more than forty in-house counsels from other restaurants and retailers, and they tell me that their businesses and industries are suffering from these demands. In the current patent litigation marketplace, where usually only a Fortune 500 company has the resources to defend itself in court and challenge these likely invalid patents, there is nothing to deter a patent assertion entity from demanding exorbitant licensing fees and no choice for restaurants and retailers but to pay the toll. Under the current state of the law, as soon as the ordinary business receives a demand from a patent assertion entity, it has lost.

### The Solution

Now is the time for Congress to step in, and I know I speak for a multitude of businesses when I say how heartened I am that you are tackling this problem. As I said earlier, when we receive a patent troll demand letter, we have lost. Simply receiving such a letter will cost my company over six figures in attorneys' fees and licensing payments, regardless of the merit behind such a letter. And that is not how our patent system, or our litigation system, ought to work. You can stop, or at least seriously diminish, the abuse of the courts and the patent system, and you can save businesses. I believe you are considering a variety of reforms to curb patent trolls' frivolous behavior, and I urge you to consider every useful change that could increase transparency and shift the economic incentives away from trolls making baseless claims. In particular, we at Culver's believe that increased demand letter transparency would be very effective: if a patent holder is required to relay the simple facts about what its patent is, what its product does, and how we are allegedly infringing, we would all be better off. Additionally, clear and complete pleading standards for cases that do get to court would have a positive effect in the same way that transparent demand letters would as well. But most of all, allowing claims between a patent owner and a manufacturer, which is the company that makes the technology the end users are accused of infringing, to proceed before claims between a patent owner and a manufacturer's end users, like Culvers, which is the consumer of such product, is essential. Manufacturers are better positioned to address such claims, and do not suffer from the same lack of information that my company and others similarly situated do. With these changes, patent

assertion entities might well think better of playing on a somewhat more even field, where companies like mine are no longer at quite such an informational and financial disadvantage.

In closing, let me be clear about another important thing, which is that we fully support the ability of individual inventors and legitimate patent holders to market their products and bring claims to protect their intellectual property. But we believe that appropriate patent litigation reform can promote incentives for innovation and still shutter out the exploitation and abuse that runs rampant in the patent system today.

Thank you, once again, Chairman Grassley, Ranking Member Leahy, and members of this Committee for holding this critical hearing. This is a vital step in shedding light on the growing problem of patent assertion entities and the negative affect they have on business, innovation, and the economy. We urge Congress to pass meaningful reforms, without delay, so Culver's, and others in the restaurant industry, can spend more funds on jobs and services that benefit the American economy, and less on payments to patent trolls.