Congressman Jared Polis: Testimony Before the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade

Hearing on H.R. ___, a bill to enhance federal and state enforcement of fraudulent patent demand letters

Thank you Chairman Terry, Ranking Member Schakowsky and Members of the Subcommittee for allowing me the opportunity to testify on the important topic of patent demand letter reform. I greatly appreciate the attention the Committee has devoted to the issue of abusive patent demand letters.

As an entrepreneur and former venture capital investor, I experienced first-hand the challenges of starting and running small businesses. These challenges are exacerbated by the patent trolls who prey on our core job creators – including many startups in my District- by sending fraudulent patent demand letters. Patent trolls increase the cost of doing business and cause small businesses to shell out millions in legal or settlement fees to address illegitimate claims.

One of the ways to crack down on patent trolls is by requiring demand letter transparency and allowing enforcement against bad actors. Last November, I was pleased to introduce, along with Representatives Tom Marino and Ted Deutch, a bipartisan comprehensive bill that accomplished both of these goals, *The Demand Letter Transparency Act*.

Our bill would require certain patent holders to disclose information relating to the patent in their demand letters and file their letters in a public registry maintained by the PTO that is searchable and accessible. Our bill would prevent trolls from hiding behind anonymous shell companies; empower defendants to take collective action and share information; and alert regulatory authorities and the Patent and Trademark Office about patents that are being frivolously asserted.

But let me be clear: addressing abusive patent demand letters is only part of a much larger issue. Our antiquated patent system was designed to protect machines and contraptions; not apps and clouds. There is much that needs to be done to ensure that the innovations of tomorrow have the same protections as the inventions of yesterday. With Senator Leahy's recent announcement that he is taking the patent bill off the Committee's agenda - I

want to remind the Committee that we can still find common ground to bring our patent system into the 21st century. Further, if the House recognizes the dangers of the patent troll business model and fixes our patent system in a strong, bipartisan manner, it just may send a message to the Senate that the time to act and protect our nation's small business is now.

While I wish the Discussion Draft, took a more comprehensive approach to combating abusive demand letters as *The Demand Letter Transparency Act* does, I certainly understand the limited jurisdiction of this Committee and am encouraged that the Committee is moving forward on this issue. However, I am concerned that in an attempt to address the issue of abusive demand letters, the Committee's proposal may have inadvertently taken us backwards on addressing the troll problem at the pre-litigation stage.

First, I am concerned that the bill may inadvertently limit the FTC's Section 5 authority to target harmful behaviors. The FTC already has enforcement authority to go after certain entities who are engaging in unfair and deceptive practices by sending abusive demand letters – most recently evidenced by their investigation of *MPHJ*.

I commend the Committee for its inclusion of a savings clause in its Discussion Draft - a great improvement over the original draft language. However, I believe that the language may not be sufficient to preserve the FTC's Section 5 authority. I am troubled that by delineating an exhaustive list of unfair or deceptive acts or practices in the bill, the underlying legislation may limit the ability of the FTC to target other harmful behaviors and unforeseen abusive behaviors. To ensure that this legislation does not foreclose the FTC's enforcement authority, I urge the Committee to include a catch-all provision that would allow the FTC to bring actions to address other harmful behaviors that are not expressly listed in the legislation.

Second, I am concerned with the Draft's broad preemption clause – which may inhibit State Attorney Generals from seeking civil penalties against bad actors. Nine states have passed strong laws prohibiting abusive demand letters; many more are in the process of doing so. And forty-two State Attorneys General have expressly stated their desire for federal demand-letter reform and they wanted that with concurrent state authority. Until we can act at the federal level, we must support the action that the states are taking to protect their small businesses. I am thus concerned that this

Discussion Draft may strip state AGs of this important tool to combat bad actors.

Third, I have concerns that the rebuttable presumption language may create a large loophole trolls can climb through. The inclusion of this language may place a large burden on demand letter recipients and the FTC to prove their case.

Finally, I am troubled that the bill's scope is only limited to "systems integrator" "consumers" and "end users." I am hopeful that we can expand the bill's definition to protect all recipients of demands by bad actors.

Thank you again for allowing me to testify today. I greatly appreciate your attention to the issue of addressing patent troll demand letter and look forward to working with you on this legislation.