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Subcommittee on Courts, Intellectual Property, and the Internet

Hearing
Examining the Supreme Court's TC Heartland Decision

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Subcommittee Chairman Issa, Ranking Member Cicilline, and members of the Courts, Intellectual Property & the Internet Subcommittee, 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 *TC Heartland* decision as well as the devastating impact of abusive patent litigation practices on Culver's restaurants. It is an honor to present our company's perspective to you. My testimony on behalf of Culver's today also represents the views of the National Restaurant Association and that of the United for Patent Reform coalition, of which both Culver's and the NRA are members and support its policy priorities.

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 624 restaurants serving our customers in 24 states. All but eight of our Culver's restaurants are franchised -- which means they are individually owned and operated family businesses. Our company headquarters has 124 employees, and more than 24,000 people are employed at Culver's restaurants nationwide. 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.

Culver's is incorporated in and always has been incorporated in the State of Wisconsin. Culver's one and only corporate office is, always has been and will always be located in the State of Wisconsin. Yet Culver's has now been sued twice in the past few years for patent infringement in the Eastern District of Texas. When the *TC Heartland* decision was first announced, I was very encouraged. It appeared, at least from the headlines, that patent infringement actions would have to be filed in the state in which the defendant is incorporated. For too long, businesses across the United States have been dragged to the Eastern District of Texas for patent infringement cases. These suits filed in Texas create yet another financial incentive for restaurants not to fight these oftentimes meritless claims. They create elevated costs to litigate including travel, hiring local counsel, and greater disruption to our business. On

its face, this Supreme Court decision seemed entirely sensible: why should restaurants and other businesses be forced to litigate in a far-flung district and especially one proven to be overly-friendly to patent assertion entities? Finally, I thought, we had received a glimmer of hope in defending against patent trolls.

My hopefulness, however, was unfounded. Upon reading the *TC Heartland* decision I realized the limited impact that it would have on businesses like ours. The patent venue statute still provides that a patent infringement action may be filed in the state of the defendant's resides, which the court found to mean the state of incorporation for a corporate entity like Culver's, **OR** where the defendant is alleged to have committed acts of infringement and has a regular and established place of business. For businesses that operate from bricks and mortar locations in multiple states, such as Culver's and many other restaurants and retail chains, this decision is likely to have no impact.

In April, an attorney practicing in California filed a patent infringement action against Culver's in the Eastern District of Texas. The plaintiff claims to have patents that are directed to nothing more than the abstract idea of sending promotional offers to a mobile device. The claims recite no special programming, computer, hardware, or other physical components. The plaintiff was not the original holder of the patents, but instead a company that acquired the patents sometime after they were granted. And the plaintiff claims to have a principal place of business in the Eastern District of Texas, but when we had someone visit that business in Plano, Texas just last week, they found nothing but a single vacant office space located within a large office building with many other single office spaces. There was no identification of the plaintiff's business on the door or even on the office-building directory. In the middle of a weekday there was not a single employee of plaintiff at that "principal place of business." As far as we can tell, plaintiff's principal place of business is nothing more than an address from which to sue other companies. This is in stark contrast to our business located in Prairie du Sac, Wisconsin (see attachment). Truly unbelievable, but here we are again, being forced to use our time and resources to defend another patent infringement suit over something that we do not feel should have been approved for a patent in the first place, more than 1,000 miles from our home office, in a court that is known to be friendly to patent trolls, with high priced defense attorneys,

instead of using those resources to drive business to our independently owned and operated franchisees' businesses.

Had the *TC Heartland* case applied to us, we could – like most other businesses involved in patent litigation in the Eastern District of Texas are likely doing now – be considering or drafting our motion to dismiss for improper venue. But we are not. Culver's has three locations, all of which are franchised, located in the Eastern District of Texas. I'd like to note that these three restaurants collectively generate less than one-third of one percent of the revenue from Culver's 624 restaurants. And most importantly, these three franchised locations play no role whatsoever in deciding to use specific company marketing tactics – such as sending promotional offers to a mobile device as the asserted patent purportedly requires. These types of marketing decisions are made by us, as the franchisor, in Wisconsin, at our corporate headquarters. Despite this, we find ourselves in the Eastern District of Texas again.

The costs to our company to fight lawsuits in the Eastern District of Texas are significant. 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 we have to 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 customer 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. Restaurants 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 technology from companies large enough that they might be able and willing to protect us against patent claims.

As much as we'd like to use local, innovative start-ups, the risk of patent litigation is just too high. So start-ups companies, often the true innovators, suffer decreased business, and they are likely to become casualties of these troll attacks as well. Furthermore, our customers want the latest technology on our websites and in our restaurants, as do our franchisees. Our guests 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 restrictions, and to be able to get text messages about our 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 and franchisees will also suffer.

With *TC Heartland* as it stands today, it seems likely to me that we will continue to see infringement claims against us as well as other restaurants and brick and mortar businesses in the Eastern District of Texas and other remote venues. While the *TC Heartland* decision may have stymied efforts to target some, it has left open the door for patent trolls to target businesses such as Culver's. Indeed, why wouldn't patent trolls now expand their efforts against us? This is a truly chilling turn of events. To avoid this seemingly inevitable situation, Congress must act swiftly to correct this inequity in terms of venue created by the patent venue statute that was not fixed by the *TC Heartland* decision.

This reform however is just one of many that are needed to bring much needed accountability in our patent system. Over two years ago, in March 2015, I had the chance to testify on the issue of patent reform in front of the U.S. Senate Judiciary Committee. As I prepared for this hearing today, I had an opportunity to review my testimony from then, and I was struck by how many of the problems outlined then still persist in our patent litigation system today. Two years ago, I said Culver's "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 is still very much true. I said, “When we receive a patent troll demand letter, we have lost.” Simply receiving such a letter or summons will cost my company over six figures in attorneys’ fees and licensing payments, regardless of the merit behind such a claim. I’m sure you will agree: this is not how our patent litigation system should work.

Congress can stop, or at least seriously diminish, the abuse of the courts and the patent system, and you can save businesses by doing so. I urge you to revive patent litigation reform efforts to curb patent trolls’ frivolous behavior, and I urge you to consider every useful change that could increase accountability and shift the economic incentives away from trolls making baseless claims.

I do, however, want to address one particular development that has been particularly useful to businesses like mine in fighting patent trolls. A month after I testified at the Senate Judiciary Committee, the U.S. Court of Appeals for the Federal Circuit upheld a Texas federal judge's conclusion that the DietGoal patent was an abstract idea under the U.S. Supreme Court's *Alice* standard. As I’m sure this Committee knows, the U.S. Supreme Court’s unanimous decision in *Alice v. CLS Bank* created a two-step framework to distinguish low-quality patents – for abstract ideas or activities simply done “on a computer” – from high-quality claims.

Culver’s along with dozens of other restaurants and retailers were parties to the DietGoal suit in the Eastern District of Texas. DietGoal also sued numerous restaurants and retailers in other jurisdictions across the country. The plaintiff claimed 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 a condiment). The meal planning “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. Thankfully, due to the *Alice* decision, the District Court for the Southern District of New York entered an Opinion and Order that the DietGoal patent was drawn to patent-ineligible subject matter and was invalid, resulting

in dismissal of the case against Culver's and the other defendants. As I noted earlier, the Order invalidating DietGoal's patent was later affirmed by the Federal Circuit.

But I understand there are efforts brewing to scale back the *Alice* decision legislatively. I strongly urge the Committee to consider all points of view on such efforts and the effects it would have on end-users like Culver's. To lose or limit this very useful tool against the scourge of patent trolls asserting low quality patents would be extremely disappointing and costly for companies like Culver's who would again be forced to settle meritless patent infringement allegations.

In closing, let me be clear about one final and incredibly important observation: Culver's fully supports the ability of individual inventors and legitimate patent holders to market their products and bring claims to protect their intellectual property. This will promote innovation and it is in the spirit of what patents are all about. But we also believe that appropriate patent litigation reform can continue to protect those incentives for innovation while discouraging the exploitation and abuse that runs rampant in the patent system today and which actually stifles innovation.

Thank you, once again, Subcommittee Chairman Issa and Ranking Member Cicilline, and members of this Subcommittee for holding this very important hearing.

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