



April 14, 2015

Rep. Bob Goodlatte (R-VA)
Chairman, House Judiciary Committee
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Rep. John Conyers
Ranking Member, House Judiciary Committee
U.S. House of Representatives
B-351 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman Goodlatte and Ranking Member Conyers,

On behalf of the National Venture Capital Association (NVCA), I am writing to express concerns with H.R. 9 as it is written, because a number of its provisions would affirmatively discourage investments in new technologies and would put the survival of some of our most promising young companies at risk. While NVCA appreciates that the House Judiciary Committee is concerned about abusive patent litigation tactics, H.R. 9 will do little to solve these challenges. Instead, H.R. 9 introduces layers of complexity to the litigation process that will make patent enforcement more cumbersome, more risky and more expensive for all litigants, but will do little to curb litigation abuse that the Supreme Court, the United States Judicial Conference, the Federal Trade Commission and the Inter Partes Review proceedings in the Patent Office have not already addressed. Adding a statute designed simply to make the process of patent enforcement more risky and expensive works only to the advantage of large corporations at the expense of their smaller and more nimble competitors.

NVCA comprises some 400 venture capital firms spread throughout the country. Our members invest tens of billions of dollars annually in a variety of young companies, many of which are heavily reliant on the enforceability of their patents for survival. Legislation that impairs that ability will diminish the incentive to build and invest in new companies. It has been well documented that a disproportionate amount of the economic growth and job creation in the United States over the last several decades has come from the growth of young innovative

companies. Because H.R. 9 will make it harder for small businesses to defend their patents, this legislation will have a chilling effect on innovation and entrepreneurship in America.

The “fee shifting” or “loser-pays” rule in H.R. 9, is exemplary. The Supreme Court last year gave district judges in patent cases the discretion to award attorney fees to the prevailing party in cases where abusive behavior by the other party was evident. The Court made clear that it wanted to see that discretion put to use, and the aftermath has been a significant rise in the number of such fee awards by district judges. H.R. 9, however, is not discretionary. Section 3(b) would mandate fee shifting to the prevailing party irrespective of how abusive and unreasonable the prevailing party might have been during the litigation, unless the losing party could demonstrate affirmatively that all of its arguments during the litigation were reasonable in both law and fact – an almost impossible burden for any losing party to satisfy. Such a lopsided rule would not be fair even where the resources available to the parties were more or less equal, but when a large competitor sues or is sued by a small company, such a rule will significantly tilt the scales of justice towards the side of the larger entity. Consider that the cost for each side of a single patent infringement case that goes all the way to trial can range from \$3 million over \$10 million for more expensive litigation. For large companies, numbers in this range are consistent with the cost of doing business. For small companies, either as plaintiff or as defendant, this cost represents an existential threat to their ability to continue to operate.

Ironically, the loser pay rule will not have much effect on NPEs suing small companies such as retail stores and startups. The vast majority of all patent cases are settled, even where the defendant thinks it can win, because trial outcomes are inherently unpredictable and litigation is both costly and inefficient. By raising the projected cost and the stakes of patent litigation for small businesses as defendants, a loser-pay rule will increase the pressure on the defendant to settle cases – even meritless cases brought by so-called patent trolls. The only companies that truly benefit from an automatic loser-pay rule are the large companies that engage in litigation against small ones.

NVCA is strongly opposed to the provision in H.R. 9 that would make the venture capital investors in a small company liable for paying legal fees in situations where the litigation costs or other forces drove the company into bankruptcy. The corporate structure of American business, because it isolates investors from liability claims if a company goes into bankruptcy, is one of the most fundamental building blocks of an industrial economy. In addition, piercing the corporate veil will have the practical effect of increasing the risk of investing in startups beyond the total amount invested. It makes absolutely no economic sense to pass a bill that actually increases the risk of investing in innovative startups in today’s economy.

H.R. 9 also seeks to dictate a one-size-fits-all approach to the detailed procedures for handling patent cases. Deferring discovery, for example, will usually extend the resolution of a case and thus will work to the advantage of a large company with greater resources in litigation against a smaller competitor. There are far better ways to contain the costs of discovery in litigation that do not disadvantage small companies trying to defend their ideas.

An effective and fair patent system is fundamental to American entrepreneurship. NVCA hopes to work with the committee on our shared goals of targeting abusive patent litigation behavior, which does affect a number of our members. Unfortunately, as currently written, H.R. 9 will do too little to deter NPEs and curtail abusive demand letters, and too much to reduce investment in innovation and entrepreneurship.

Sincerely,

A handwritten signature in cursive script that reads "Bobby Franklin".

Bobby Franklin
President & CEO

Cc: House Judiciary Committee members