



**Committee on the Judiciary  
U.S. House of Representatives**

**Hearing  
“H.R. 3309: Improving the Patent System to Promote  
American Innovation and Competitiveness”**

**Testimony of Krish Gupta  
Senior Vice President and Deputy General Counsel  
EMC Corporation**

**October 29, 2013**



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Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, my name is Krish Gupta, and I am Senior Vice President and Deputy General Counsel for EMC Corporation (EMC). First and foremost, I would like to express EMC's strong support for H.R. 3309, the Innovation Act, ("Innovation Act") introduced by Chairman Goodlatte and a significant and impressive group of bipartisan Members of Congress. The breadth and diversity of members who signed on to the legislation as original cosponsors is indicative of how widely recognized it is that there is a need for additional reform to our patent litigation system. We greatly appreciate the interest that you, both individually and as members of the committee, have taken in this matter.

I am a registered patent attorney with 20 years of experience in patent law. At EMC, I have worldwide responsibility for intellectual property (IP) law and technology licensing matters, including IP policy, patent and trademark prosecution, and IP litigation. I would like to thank you for the opportunity to discuss the importance of patents to EMC, the current state of the patent litigation system, and the urgent need for the reforms enumerated in the Innovation Act. This committee has consistently shown leadership in addressing the problems of the patent system, and today's hearing topic is one that hits close to home for our company and the business community. The Innovation Act is a major step forward toward curbing abusive patent litigation and making it possible for innovators to focus on developing the next new technology, rather than defending lawsuits.

**About EMC**

EMC was founded in Newton, Massachusetts, in 1979. Early on, it developed memory upgrades for minicomputers. By the late 1980s, the company sold advanced storage subsystems for minicomputers and solid-state mainframe storage. In late 1990, EMC introduced Symmetrix Integrated Cached Disk Array, which would become the most popular high-end storage system ever developed.

Since 2003, EMC has invested approximately \$30 billion in research and development, as well as in acquisition of technologies that have revolutionized the world of information technology. These investments have enabled EMC to broaden our product portfolio, enter new market segments and expand our addressable market opportunity. EMC has taken bold steps into software markets in backup, archiving, and recovery management; information security, information protection; data analytics; information intelligence; resource management; network systems management; eDiscovery, governance, risk, and compliance; cloud computing; and server and desktop virtualization; among others. Our 2004 acquisition of VMware, the global leader in virtualization, gives EMC the strongest virtualization portfolio in the IT industry by far.

Today, EMC is a global leader in enterprise scale information storage systems, backup and recovery systems, cloud computing, Big Data and IT backup and security solutions. We serve



the information security market through our security division, RSA. We also have a majority interest in Pivotal, another Silicon Valley-based business that provides the platform for next generation cloud computing and big data applications.

Headquartered in Hopkinton, Massachusetts, with additional concentrations of employees in California, North Carolina, Utah and Washington State, we employ approximately 61,000 people in 86 countries around the world. We rank 133rd on the Fortune 500, based on 2012 revenues of \$21.7 billion.

### **Importance of Patents to EMC**

EMC's position of market leadership is the result of pioneering innovation, hard work, and substantial investment in new technologies. Innovation and intellectual property are our lifeblood, our key to survival, and our future. We have a 34-year track record of anticipating future needs and building and acquiring the technology solutions to solve problems in new and innovative ways.

EMC relies greatly on patent rights to establish and maintain our proprietary rights in our technology and products. Our patent portfolio includes more than 3,600 issued U.S. patents and is regularly recognized as one of the strongest and most impactful in the information technology business. These patents cover EMC's many innovations, including the hardware and software technologies used in our diverse product and service offerings.

### **Patent Litigation is a Serious and Growing Problem**

The last several years have brought a dramatic increase in abusive patent litigation, which has significantly impacted EMC, our customers, and the entire business community. The number of companies sued by patent assertion entities (PAEs) grew more than 400% from 2007 to 2011<sup>1</sup>, and patent litigation costs have grown from \$7 billion in 2005 to \$29 billion in 2011.<sup>2</sup> Abusive patent litigation is a costly and rapidly-growing problem that is stifling American innovation and job creation each and every day.

In 2011, 2,150 unique companies were forced to defend 5,842 lawsuits initiated by PAEs.<sup>3</sup> These lawsuits have had significant impacts on large companies like EMC, but they have done much more profound damage to small- and medium-sized companies that lack the resources to counter these frivolous lawsuits. 55% of defendants accused of infringement by PAEs generate \$10 million or less in annual revenue, and 66% make \$100 million or less.<sup>4</sup> These are small, independent American innovators who are having their growth stifled by abusive patent litigation.

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<sup>1</sup> Government Accountability Office. *Assessing Factors The Affect Patent Infringement Litigation Could Help Improve Patent Quality*. GAO-13-465. August 2013. Print.

<sup>2</sup> James E. Bessen & Michael J. Meurer, Michael J., *The Direct Costs from NPE Disputes* (June 28, 2012). Cornell Law Review, Vol. 99, 2014, Forthcoming ; Boston Univ. School of Law, Law and Economics Research Paper No. 12-34. Available at SSRN: <http://ssrn.com/abstract=2091210> or <http://dx.doi.org/10.2139/ssrn.2091210>

<sup>3</sup> *Id.*

<sup>4</sup> Colleen V. Chien, *Patent Trolls by the Numbers* (March 13, 2013). Santa Clara Univ. Legal Studies Research Paper No. 08-13. Available at SSRN: <http://ssrn.com/abstract=2233041> or <http://dx.doi.org/10.2139/ssrn.2233041>

It is important to clarify who PAEs are. There is an important and legitimate role for patent litigation as a means for inventors to protect their technologies. But we are not talking about those who legitimately seek to protect their inventions. Patent assertion entities are not inventors, innovators, manufacturers, or creators of any kind. They are, as Justice Kennedy described them, firms that “use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”<sup>5</sup>

Many leading, innovative companies like ours are suffering losses due to unfair and abusive patent litigation that undercuts the fundamental objectives of our nation’s patent system. Randall Rader, Chief Judge of the United States Court of Appeals for the Federal Circuit, recently co-authored a New York Times op-ed describing the current state of the patent litigation system:

The onslaught of litigation brought by “patent trolls” — who typically buy up a slew of patents, then sue anyone and everyone who might be using or selling the claimed inventions — has slowed the development of new products, increased costs for businesses and consumers, and clogged our judicial system...

In the meantime, vexatious patent litigation continues to grind through our already crowded courts, costing defendants and taxpayers tens of billions of dollars each year and delaying justice for those who legitimately need a fair hearing of their claims.<sup>6</sup>

These “vexatious” plaintiffs, as Judge Rader calls them, “filed the majority of the 4,700 patent suits last year — many against small companies and start-ups that often can’t afford to fight back.”<sup>7</sup>

In 2012, PAEs initiated 62% of all patent litigation, up from 45% in 2011.<sup>8</sup> What is perhaps even more astounding is that these lawsuits are not limited to technology companies. In fact, PAEs sued more non-tech companies than tech companies in 2012.<sup>9</sup> PAEs are targeting retailers, automotive manufacturers, financial services companies, even funeral homes and bakeries!

Under the current system, with very little effort, expense, or risk, PAEs are able to bring a wave of patent suits against a large number of defendants. Companies have two very expensive options: settle or fight. The merits of the cases are often incidental because the suits impose great expense, internal disruption, and risk long before the merits of the cases are ever addressed. In this situation, most defendants choose to settle for some amount less than the cost of litigation, so the merits are never tried and PAEs move on to the next wave. But when cases are actually

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<sup>5</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring).

<sup>6</sup> Randall R. Rader, Colleen V. Chien, and Dave Hricik. “Make Patent Trolls Pay in Court.” *The New York Times*, June 5, 2013.

<sup>7</sup> *Id.*

<sup>8</sup> Colleen V. Chien, Patent Trolls by the Numbers (March 13, 2013). Santa Clara Univ. Legal Studies Research Paper No. 08-13. Available at SSRN: <http://ssrn.com/abstract=2233041> or <http://dx.doi.org/10.2139/ssrn.2233041>

<sup>9</sup> *Id.*



decided in court, because PAEs so often assert weak patents, PAEs lose 92% of the time, compared to 60% for other plaintiffs.<sup>10</sup>

The above-described business model has proven to be very lucrative, leading to more and more PAE suits are being filed. The situation has become a tax on legitimate business, and channels money away from real innovators.

The legal fees associated with responding to the cases are staggering. It has been reported that the mean total litigation costs are \$1.75 million for small- and medium-sized companies and \$8.79 million for large companies.<sup>11</sup>

Patent assertion entities created \$29 billion in direct costs in 2011 alone. That number does not factor in broader costs, which have been estimated at \$80 billion per year.<sup>12</sup> These broader costs include diversion of personnel and resources away from their normal functions, stock market reaction, and, most importantly, time and money spent fighting lawsuits that could be spent innovating, growing, and creating jobs. It is also important to note that these dollars are not ending up in the hands of small inventors. They are going to lawyers, and to large, publicly-traded PAEs whose profits depend on litigation outcomes.

The Innovation Act will help level the playing field by directly addressing abusive tactics that have been used by patent assertion entities to harass innovators. It will thereby help strengthen our patent system and restore its rightful place as the envy of the world.

### **EMC's Experience**

EMC has substantial experience with lawsuits brought by PAEs. Since 2005, EMC has been sued by patent assertion entities more than thirty times, and has never been found to have infringed. As a matter of principle, EMC does not settle unmeritorious suits. To us, to do so would be tantamount to giving in to extortion. Yet defending against abusive litigation has cost us millions of dollars that could have been invested in growing our workforce or furthering innovation.

Before Congress passed the America Invents Act (“AIA”) in 2011, PAEs usually sued EMC as one of many defendants in a lawsuit accusing disparate products. While the AIA guaranteed

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<sup>10</sup> John R. Allison, *et al.*, *Patent Quality and Settlement Among Recent Patent Litigants*, 99GEO. L.K. 677, 694 (2011); *see also* Brian T. Yeh, Congressional Research Service, R42668, “An Overview of the ‘Patent Trolls’ Debate” 5 (2012).

<sup>11</sup> James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes* (June 28, 2012). Cornell Law Review, Vol. 99, 2014, Forthcoming; Boston Univ. School of Law, Law and Economics Research Paper No. 12-34. Available at SSRN: <http://ssrn.com/abstract=2091210> or <http://dx.doi.org/10.2139/ssrn.2091210>.

<sup>12</sup> James E. Bessen, Jennifer Ford & Michael J. Meurer, *The Private and Social Costs of Patent Trolls, Regulation*, 26 (Winter 2011-2012); Patent Freedom. 2012. “Litigations Over Time,” available at: <https://www.patentfreedom.com/about-npes/litigations/>; Robin Feldman, Thomas Ewing, & Sara Jeruss, *The AIA 500 Expanded: Effects of Patent Monetization Entities*, UC Hastings Research Paper No. 45, 7 (2013) available at SSRN: <http://ssrn.com/abstract=2247195> (patent monetization entities filed 58.7% of the patent lawsuits in 2012).

EMC the right to be heard in its own trial, PAEs still sue scores of companies in waves, and the cases are typically consolidated at least for pretrial purposes. EMC must still spend time, resources, and energy analyzing vague complaints that are directed at vast technology areas, with an EMC product—sometimes seemingly chosen at random—inserted in the complaint. It takes considerable time, expense, and effort to speculate what the plaintiff will argue infringes. And in the process we waste the time of our engineers—the lifeblood of our company—studying technical details of features that ultimately are not at issue in the case.

EMC must still coordinate with joint defense groups often consisting of 30 members or more to try to harmonize codefendants' disparate interests in key areas. In large part due to these coordination issues, EMC spends between \$100,000 and \$150,000 per month in outside legal fees for routine administration of a patent suit. And at the end of the day, notwithstanding the provisions of the AIA, EMC is still denied its own voice on critical issues such as claim construction, ordinarily being required to share briefing and pages with scores of co-defendants.

Once a case heats up with discovery, depositions, expert reports and Markman hearings, the fees are typically in the range from \$150,000 to \$250,000 per month, or higher. Added to this are expenses for outside vendors, experts, searching, etc. that may cost several hundred thousand dollars each. And even after defendants have developed their core technical positions, we face major internal disruption to our businesses; engineers need to be taken away from their normal busy schedules to assist in the defense of the case; and many employees are burdened with searching for documents, preparing financial analysis, and conducting surveys, etc. In short, defendants can easily spend several million dollars in two years and undergo considerable internal disruption, and all of this occurs often without even having a hearing on the merits of the case.

Moreover, the spate of lawsuits overwhelms the courts and impairs EMC's ability to be heard on a timely basis on key issues. In most of its cases, EMC is able to identify core, "silver bullet" reasons why EMC does not infringe, or why the patent is invalid. There is no mechanism to have these arguments heard at an early stage, and so EMC is required to spend millions defending a case that plainly has no merit. Even more problematic is the fact that issues that, even under current law, are supposed to be heard early in the case—such as motions to transfer or motions to dismiss for lack of standing—are being delayed, all because the courts are overwhelmed with the massive number of patent filings.

All of this increases the risks and costs for defendants—unfairly increasing the leverage of PAEs. The only certainty, unfortunately, is that EMC will be required to litigate for years and spend several million dollars if it wishes a resolution on the merits. Under current law, which requires that a case be "extraordinary" before attorneys' fees are awarded, EMC is rarely able to recover its fees spent during those years of litigation. PAEs use this fact to negotiate extortionary settlements, often based on the high cost of litigation. Indeed, some PAEs will negotiate scores of cost-of-litigation settlements with the majority of defendants, then simply dismiss the rest rather than proceeding with litigation. Although this tactic demonstrates the frivolous nature of the lawsuit, defendants rarely have any recourse against these PAEs.

Adding to the lack of certainty is the disparate approaches to discovery taken by judges across the country, abetted by the lack of uniform national patent rules. In a speech to the Eastern District of Texas Judicial Conference, Chief Judge Rader observed that discovery costs in intellectual property cases were almost 62% higher than in other cases.<sup>13</sup> Yet in a case brought by a PAE, these discovery costs are borne almost exclusively by defendants. PAEs typically have few documents and fewer employees. No matter how many discovery requests they are served, they can often simply produce all their documents in a single banker's box. There is a significant incentive for a PAE to try to drown a large company defendant in discovery requests, seeking to force its engineers, its IT department, and its legal staff to unearth tens of thousands of requested documents.

These burdens are unnecessary and unwarranted. In the same talk, Judge Rader observed that, based on one analysis, “.0074% of the documents produced actually made their way onto the trial exhibit list—less than one document in ten thousand.”<sup>14</sup> And “email appears even more rarely as relevant evidence.”<sup>15</sup> Yet despite the irrelevance of most documents produced in discovery, PAEs still use the threat of exorbitant discovery costs to increase the incentives for large companies to settle.

In short, the system as it exists today is highly skewed. PAEs have significant leverage in the form of the ability to increase risk and costs on the part of defendants. But they share no part of the risk, and little part of the costs. They are rarely held accountable for a defendant's attorneys' fees, even when the litigation they filed lacked any reasonable basis. Because they do not make any products or sell any services, they are rarely subject to counterclaims, eliminating a typical equalizer in most patent litigation between competitors. They may be thinly capitalized, rendering them judgment-proof in the event fees are awarded. And the real party in interest—usually a third party with deep pockets who funded the PAE in the first place, and who retains a “back end” in proceeds of the litigation—need not be disclosed, and typically may not be joined in the litigation. All the risk is borne by the defendants, and none of it by the PAEs. The Innovation Act addresses many of these core issues and will ultimately change the system for the better.

### **The Innovation Act**

H.R. 3309, the Innovation Act, makes significant strides to address the most egregious and established abuses of the current patent litigation system. By taking a narrow focus on the problems plaguing the current system, the bill will help reinstate the balance and transparency necessary to ensure that the U.S. remains the most innovative and competitive country in the world. For purposes of my testimony, I would like to focus my attention on the subsections of the bill that are of particular relevance to EMC.

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<sup>13</sup> Chief Judge Randall B. Rader, “The State of Patent Litigation” (E.D. Tex. Judicial Conference, Sept 27, 2011) (available at <http://www.patentlyo.com/files/raderstateofpatentlit.pdf>) at 7.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.*

*Section 3(b).*

Of particular importance to EMC is the fee shifting provision in Section 3(b) of the bill. We believe that this provision embodies the simplest way to discourage the filing of frivolous and abusive suits by imposing financial accountability in the patent system. Under current law, EMC has found that judges almost never award attorneys' fees to the prevailing party. The Innovation Act makes awarding attorney's fees and other expenses the default rule, unless a party is substantially justified in its position.

As I mentioned earlier, PAEs have little to lose when they file meritless lawsuits. PAEs typically cannot be countersued for patent infringement because they do not make or sell any products or services. Also, PAEs do not have major discovery burdens because they have very few documents, and often they could be contained in a single box at a single location. Further, PAEs may have standard forms from previous waves of litigation on the same patent, so offensive discovery is usually very simple.

On the other hand, defendants face daunting expenses, typically on the order of \$150,000 to \$250,000 per month, for a total of \$3 million to \$10 million per patent case. Faced with this situation, it is little wonder that many defendants choose to settle and avoid further costs and disruption. Yet cost-of-litigation settlements only encourage more frivolous suits.

EMC has had more than its share of meritless patent cases filed against it. In one case, EMC was sued by a PAE where there clearly was no infringement. In spite of many protests by EMC, the case dragged on for well over a year and cost EMC more than \$1 million in legal fees. The plaintiff had nothing to lose, so it continued on until it finally concluded that EMC was never going to pay anything. Finally, the plaintiff dismissed the suit, but EMC was unable to collect any fees it had spent.

In another case, a PAE filed suit on a patent that had a restriction providing that if the patent was not co-owned with a second patent, it would not be enforceable. EMC spent several hundred thousand dollars before we determined that the two patents were not co-owned. The plaintiff immediately dismissed the suit, but we were not able to recover our fees and expenses. These are costs that would have been avoided if plaintiff had conducted a basic investigation before filing suit.

Fee shifting is an important step toward reducing frivolous litigation because it raises the stakes for PAEs that would file suits with little or no merit, and without doing extensive pre-filing investigations. If PAEs potentially face the prospect of paying the legal fees incurred by defendants, they would be much less likely to pursue meritless cases.

*Sections 3(c) and 4.*

Sections 3(c) and 4 of the bill, requiring disclosure of the real party in interest and permitting joinder of that party, are also important to EMC because they allow EMC to recover fees, and to file counterclaims, against the entity that is truly behind the lawsuit. PAEs are often shell companies, with another entity providing the financial backing for the case. That entity may

receive a “back end” in proceeds of the litigation. It may retain significant rights in the patent. It may be directing the litigation in the background. It may have granted licenses in the past, or committed to license its patents on reasonable and non-discriminatory terms.

This real party in interest should be required to be a party to the litigation. It should be liable for attorneys’ fees if it permits a meritless case to go forward. And it should be subject to counterclaims in the event the real party in interest is infringing claims of patents owned by the defendant in the litigation. These changes will give companies like EMC more leverage, leveling the playing field and bring more fairness to suits brought by PAEs.

*Subsection 3(a).*

Subsection 3(a) of the bill recognizes the need to strengthen the pleading requirements for patent infringement cases. Under current law, a patentee may file a complaint with sparse allegations that fail to provide any notice as to what products are being accused and precisely how they are alleged to infringe. The result is that PAEs sue scores of defendants without taking the time to study and analyze infringement comprehensively. They cast a broad net with very little if any pre-filing investigation.

Because PAEs do not specify the particular claims of infringement in detail, large companies with scores of products, each with hundreds of features, are left to guess as to what is being accused, and why. Meanwhile, PAEs seek to avoid being pinned down, keeping their infringement allegations vague until the last possible moment. This vagueness allows PAEs to extract cost-of-litigation settlements from defendants who cannot afford, or cannot risk, litigating a case whose core parameters remain in flux until the end.

While current law does not require the disclosure of infringement theories in a plaintiff’s complaint, Rule 11 does require that the plaintiff have conducted due diligence and arrived at a tenable, good-faith theory of infringement before filing suit. The bill’s heightened pleading requirement, therefore, imposes no new burden on diligent plaintiffs; they merely need to disclose the results of their required analysis. But the section will have a real effect on those plaintiffs who are not as diligent, barring them at the outset from filing suit where they have conducted no proper due diligence and ensuring that the plaintiff has in fact conducted an analysis, and that the plaintiff has a real basis for filing suit.

*Subsections 3(d) and 6(a).*

Subsections 3(d) and 6(a) together rationalize discovery in patent cases. Discovery has become a significant weapon in the arsenal of PAEs to try to extort cost-of-litigation settlements in meritless cases. Companies that sell innovative products and services are on uneven footing in litigation with PAEs, who have few documents and fewer employees. The costs of discovery are borne disproportionately by practicing entities such as EMC, and PAEs have little incentive to propound reasonable, targeted discovery requests. Instead, PAEs have an incentive to apply “scorched earth” techniques to force defendants to spend an inordinate amount of time and energy collecting and producing volumes of documents that are ultimately irrelevant to the merits of the case.

Recently, in one case, EMC received scores of broad, vague requests for documents—even though EMC had already produced the core technical documents that would demonstrate that EMC does not infringe. In another case, EMC produced its source code in an effort to prove that it did not infringe. Yet the plaintiff insisted that EMC spend additional time and money to provide an annotated version of its source code to convince the plaintiff of EMC’s position—even though it was the plaintiff, and not EMC, that bore the burden of proving infringement. This sort of experience is typical.

Such discovery requests and responses are wasteful. In patent cases, an early ruling by the judge construing the claims of the asserted patent is often case-dispositive. The plaintiff’s infringement theory may rely on a particular interpretation of a claim term, or a defendant may place significant emphasis on a prior art reference that is only within the scope of the claims under a particular construction. And in any event, before the court construes the claims, it is often difficult to know what the theories of infringement or invalidity will be.

Subsection 3(d), therefore, sensibly limits discovery before the court issues its claim construction ruling to only discovery that bears on claim construction issues. This will help prevent wasted effort by either eliminating the need for discovery entirely (where, for example, the court’s claim construction order effectively resolves the case), or at minimum by focusing the parties on truly relevant discovery, which can only be known after the court has told the parties how the claims will be interpreted.

Subsection 6(a) further ensures that the technical discovery that does take place will be tailored to the issues that actually matter, and that the costs of inefficient “fishing expeditions” will be borne by the party serving the discovery request. In a patent case, very few documents are relevant to the core issues in the case. Such documents are ones that bear on the patentee’s ownership, any prior art known to either party, and technical documents sufficient to show how the accused features work at the level of detail addressed by the claims. Documents beyond this tend to be both irrelevant and expensive to produce. As Judge Rader recognized, this is especially true for emails, whose attenuated relevance is vastly outweighed by the inordinate costs associated with searching for, reviewing, and producing them.<sup>16</sup> By requiring the requesting party to cover the costs of extraneous discovery, section 6(a) will limit the extent to which PAEs can use discovery costs as a bargaining tool in settlement negotiations.

### *Section 5.*

Section 5 of the Act, which provides for a customer suit exception, is important to EMC, both as a manufacturer and as a customer. Product manufacturers are no longer the primary target of PAEs. When the President signed the AIA into law in 2011, we had already begun to see PAEs bringing suits not only against companies such as EMC, but also our customers. However, this seems to have reached a new height over the past year with virtually every economic corner of our country being a potential target for a demand letter or patent suit. These customer lawsuits

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<sup>16</sup> Chief Judge Randall B. Rader, “The State of Patent Litigation” (E.D. Tex. Judicial Conference, Sept 27, 2011) (available at <http://www.patentlyo.com/files/raderstateofpatentlit.pdf>) at 8.



are inefficient for our judiciary, as they increase the number of lawsuits filed exponentially. They are also bad for our economy: (1) they increase PAEs' revenues by allowing them to profit from more cost-of-litigation settlements than they would get if they sued the single manufacturer; (2) they artificially inflate damages by allowing PAEs to point to downstream profits (incorporating customers' added value) rather than the true value of the accused product as recognized by the manufacturer; (3) they impair manufacturers' relationships with their customers, increasing the pressure on the manufacturer to provide a payment that is untethered to the value of the patent, but which may be necessary to preserve business relationships; and (4) they target companies or individuals who do not have a vested interest in or knowledge about the accused technology, and therefore are far more likely to pay a nuisance settlement.

Section 5 of the Innovation Act attempts to ease some of the burden of frivolous patent litigation brought against end users by providing that a manufacturer can intervene on behalf of and stay a case against a customer. EMC applauds this provision. When EMC products are accused of infringement, EMC's customers frequently approach EMC and request indemnification. In instances where EMC provides indemnification, the ability to force the PAE to litigate a single case against EMC, which will resolve the issues in the customer cases, is crucial. Without a strong provision such as this one, EMC could conceivably be required to pay not only its own attorneys' fees defending against frivolous litigation, but also the fees of each of its customers. This is a plainly untenable situation, particularly where a single lawsuit could resolve all the major issues in each of the customer lawsuits.

Likewise, when EMC is a customer and is accused of infringing someone else's product, it makes little sense for EMC to be required to litigate about a product the company is not responsible for and knows little about. The real defendant is the manufacturer, and there is little to be gained—other than unfair leverage for a PAE—to proceeding against EMC.

### **Conclusion**

In conclusion, EMC believes that patent litigation reform is an effort whose time has come. Litigation brought by PAEs is exacting a major toll on EMC and on similarly situated companies. Failure to act on the abuses of the litigation system has resulted in the problem growing worse, with more industries falling prey to the tactics of the PAEs. We believe that this legislation, together with Sen. Cornyn's Patent Abuse Reduction Act (S. 1013), is essential to protecting America's position as the most innovative nation in the world. Both on behalf of EMC and also on behalf of the innovative industries and small businesses that form the economic core of our country, I applaud the Committee for its work on this bill, and I ask that Congress act swiftly to enact this important legislation.