Committee on the Judiciary
U.S. Senate

Hearing
"Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse"

Submitted Testimony of Krish Gupta
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My name is Krish Gupta, and I am Senior Vice President and Deputy General Counsel for EMC Corporation. I would like to thank Chairman Leahy, Ranking Member Grassley, and Members of the Senate Judiciary Committee for taking on the important issue of abusive patent litigation.

Headquartered in Hopkinton, Massachusetts, EMC is a global leader in cloud computing as well as data storage, backup and recovery systems.

EMC has a keen interest in seeing that our patent system is rational, fair, and evenly balanced. We create many innovations and look to the U.S. patent system to protect those innovations and the jobs that result from them. We have more than 3,600 U.S. patents.

Since 2005, EMC has been sued by PAEs over 30 times and has never been found to have infringed. As a matter of principle we don't settle frivolous suits. But defending those suits has cost us millions and has caused great disruption of our business, requiring our employees to shift their attention from designing new products and growing the business to sitting in depositions or going to court. EMC is not alone in this regard.

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.

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."

For EMC, a typical PAE suit involves a shell company, with secret backers, created solely to file suits. The PAE often sues EMC and dozens of companies in separate suits that get consolidated

for pretrial purposes. The complaint is often vague and provides little information about the specific infringement allegations.

When cases are consolidated, we lose some of our due process rights. We are forced to compromise on defense strategies, and incur additional legal fees in coordinating with others. Furthermore, PAEs try to pressure us into settlement by demanding thousands of documents and emails during discovery, most of which are irrelevant to the suit and costly to produce. If we want a decision on the merits, we have to typically wait two years, spend millions, and endure massive business disruption. Meanwhile, the PAE has nothing to lose, with lawyers on contingency and a steady income stream from defendants who have settled along the way. Faced with these choices most defendants cave and are forced to settle, but we don't.

EMC strongly supports patent litigation reform efforts that would effectuate five key goals:

First, PAEs should have something to lose when they file meritless suits. We believe a fee shifting provision along the lines of those included in S. 1013, the Patent Abuse Reduction Act of 2013, introduced by Senator Cornyn (R-TX) and cosponsored by Ranking Member Grassley, or S. 1612, the Patent Litigation Integrity Act, introduced by Senator Hatch (R-UT), will strongly discourage the filing of frivolous suits.

Second, the playing field needs to be leveled by requiring disclosure of the real party in interest and permitting joinder of that party. S. 1720, the Patent Transparency and Improvement Act of 2013, introduced by Senators Leahy (D-VT) and Lee (R-UT), contains strong transparency provisions but we should take this opportunity to ensure that entities with a financial interest in a lawsuit are not able to operate in secrecy. They should be part of the suit, subject to counterclaims, and liable for attorneys' fees for frivolous suits.

Third, there is a need to strengthen the specificity in pleadings for patent infringement cases. Defendants should not have to bear the high cost of discovery, simply to find out some of the most basic facts about the patent in question. We believe that a strong heightened pleading provision along the lines included in S. 1013 will vastly improve the quality of those suits brought in our patent judicial system by ensuring that a plaintiff has in fact conducted pre-suit diligence and has a real basis for filing suit.

Fourth, we need greater certainty in 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. 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 and 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." And "email appears even more rarely as relevant evidence." 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. Injecting greater balance into the discovery process,

which prevents abusive discovery demands in an attempt to drive up the costs, will ensure that smaller businesses have the choice to fight a case rather than settling simply to avoid the greater of two legal cost burdens.

Fifth, we need to protect end user customers by providing explicitly that a manufacturer can intervene on behalf of and stay a case against a customer. PAEs sue customers in order to pressure manufacturers to settle. We applaud the inclusion of such a provision in Senator Leahy and Lee's bill and believe that it is a common sense approach that will curb this particularly egregious tactic.

In conclusion, EMC believes that patent litigation reform must be enacted to restore accountability and balance back into the system to alleviate the unfair burdens that PAEs are able to put on hardworking companies that are the life-blood of our economy. We believe that reform legislation is essential to protecting America's position as the most innovative nation in the world. We stand prepared to help in any way we can to bring a bill to the President's desk in short order.

Thank you.