

**WRITTEN TESTIMONY OF JON BRUNING
ATTORNEY GENERAL OF THE STATE OF NEBRASKA**

**BEFORE THE
UNITED STATES SENATE COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION**

**SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND INSURANCE**

**HEARING ON
DEMAND LETTERS AND CONSUMER PROTECTION:
EXAMINING DECEPTIVE PRACTICES BY PATENT ASSERTION ENTITIES**

NOVEMBER 7, 2013

Good morning, Chairman McCaskill, Ranking Member Heller, and members of the Subcommittee. I am the Attorney General of the State of Nebraska and have served in that capacity since 2003. I appreciate the Subcommittee's interest in addressing the growing problem of patent trolls and am pleased to have the opportunity to share the state enforcement perspective on this issue.

Patent trolls abuse the open nature of our intellectual property system and represent a destructive threat to small businesses, nonprofit organizations, and consumers. They offer little or no innovative value to our economy and undertake their schemes in the shadows, often beyond the view of regulators. The time is ripe for federal and state authorities to work in concert to address this issue and stem the tide of patent trolling nationwide, while protecting the ability of legitimate patent holders to enforce their rights. I am pleased to participate in that effort.

I am charged with the obligation to enforce Nebraska's Consumer Protection and Uniform Deceptive Trade Practices statutes and view this role as one of my top priorities. My office includes a division of attorneys and staff devoted exclusively to combating fraud, unfair, and dishonest trade practices. We pursue these efforts using a broad spectrum of tools, including consumer mediation, multi-state investigations, and full-scale litigation. Because we understand that financial predators are often sophisticated, technically savvy, and adept at creating an air of legitimacy, we take our role as guardian of the public interest in this area very seriously.

Over the past year, we have grown increasingly aware of the threat posed to Nebraska small businesses, nonprofits, and consumers by patent assertion entities, commonly known as "patent trolls." Generally, patent trolls acquire patents solely for the purpose of using them to coerce license fees from legitimate charities or businesses they claim have infringed on the patent. Patent trolls typically lack any intention to develop the underlying technology, improve upon it, or bring it to market. Rather, they seek only to extract costly licensing fees and/or pretrial settlements from alleged "infringers."

Our investigations and research have developed insight into the modus operandi of the prototypical patent troll. First, the patent troll acquires one or a handful of patents relating to a particular technology. The patent troll will then gather a list of targets against which it believes it can assert "infringement." Very little research is likely performed at this stage. The troll simply

assembles a list of a substantial number of targets it believes might be utilizing the patented technology.

Our investigations have revealed little rhyme or reason to the type or size of entity a patent troll will include in its target list. We identified victims ranging from small businesses and nonprofits for whom patent trolls can represent an existential threat to global technology producers and nationwide telecommunications firms for whom patent trolls represent a drain on resources and constant annoyance. The former are often caught off-guard by the notion that they are “infringing” on a patented technology totally unrelated to their organization’s actual work.

The scope of a patent trolling effort can be extraordinary in breadth and scope. A 2013 White House report noted that one patent troll sent eight thousand demand letters to coffee chains, hotels, and retailers seeking compensation for use of Wi-Fi equipment made by several manufacturers that the patent troll alleged to infringe on its patents. One constant has emerged, however: in virtually every case, we found the process began with a “demand letter.”

A patent troll’s demand letter usually includes several components. It typically identifies the patent or patents owned by the troll, usually by number accompanied by a vague or generalized description of the nature of the patent(s), with a conclusory statement that the targeted company is infringing upon the specified patent. The demand letter will often indicate it is necessary for the targeted entity to engage in some type of negotiation to pay the patent troll a license fee and will explain, in very broad terms, why a license is needed. Though the demand letter may indicate the possibility that the targeted entity is, in fact, *not* infringing, this caveat is often at the end, coming well after a series of conclusory and ominous statements that the targeted entity’s use of a particular technology – usually completely unrelated to the entity’s actual business – has infringed on the patent or patents in question.

If the initial demand letter carries the *implicit* threat of litigation, as described above, then subsequent correspondence from the patent troll will often include the *explicit* threat of litigation. Should a targeted entity not respond to the initial demand for license fee negotiations or should such negotiations stall or prove insufficiently profitable for the patent troll, additional letters may include a draft copy of a federal court complaint, complete with the targeted entity’s name in the caption and numbered allegations. Though the inclusion of such a document may appear to some to be the ultimate leverage as the final step toward litigation against the targeted entity,

chosen by the patent troll solely toward the aim of winning a significant patent infringement award specifically from the target, it is often simply a template scare tactic. In reality, the same complaint with virtually the same language may well have been submitted to a number of other targeted entities as a result of their own alleged “infringement.”

One patent troll active in Nebraska is “MPHJ Technologies.” Nationwide, MPHJ has become notorious. MPHJ has asserted it owns the patent for using a basic office scanner to scan a document to email. According to MPHJ and its lawyers, anytime any person has scanned a document to email, that person has infringed on MPHJ’s patent. The potential financial consequences to MPHJ’s targeted victims are significant. MPHJ has demanded a thousand dollars *per employee* from hundreds of organizations around the country. In many instances, such a claim can mean a death threat to a small business or nonprofit incapable of defending itself without incurring substantial legal expenses.

MPHJ’s scheme functions through dozens of shell companies it and its lawyers have created. MPHJ itself owns the patents – ostensibly for scan-to-email technology – but the initial assertion of infringement comes from a veritable alphabet soup of LLCs such as “AccNum,” “GosNel,” or “FolNer.” These shell companies bill themselves as “licensing agents” for the patents owned by MPHJ and are the entities from which demand letters are sent to hundreds of alleged infringers.

One example of MPHJ’s targets in Nebraska was Eldon Steinbrink. Mr. Steinbrink is perhaps the perfect example not only of the absurdity of MPHJ’s campaign but also of how little research MPHJ and its lawyers perform before sending threatening letters scattershot across the country. MPHJ, through its shell company FosNel, somehow decided that Mr. Steinbrink was “infringing” on its scan-to-email patent through his work for Phelps County Emergency Management and sent him a demand letter. *See* Exhibit A (on information and belief, a demand letter virtually identical to the one sent to Mr. Steinbrink), Exhibit B (the second demand letter sent to Mr. Steinbrink), and Exhibit C (the third demand letter sent to Mr. Steinbrink which included a draft lawsuit complaint).

The problem with this scheme was that Mr. Steinbrink *never* worked for Phelps County Emergency Management. He is an elderly gentleman living in a nursing home in Holdrege, Nebraska, and who once served on the Phelps County Board many years ago. It is obvious

MPHJ and its lawyers performed little or absolutely no research prior to threatening Mr. Steinbrink.

Mr. Steinbrink's story is but one of many. Others in Nebraska have included nonprofits, such as Voices of Omaha, a community choir, to small businesses ranging from plumbers to accountants. Very few of MPHJ's Nebraska targets would have had the resources to mount a full defense had MPHJ followed through on its threats and most were forced to find alternative means to resolve the issue. In sum, MPHJ represents patent enforcement abuse at its very worst.

Patent troll demand letters, usually marked by a steady increase in pressure and aggression, are typically designed to ultimately achieve a single aim: the extraction of as big a payment as possible from the targeted entity. Indeed, it is our understanding that most patent trolls do not ordinarily desire their enforcement actions be fully adjudicated – or even subjected to a *preliminary* evaluation – by a federal court. For if such adjudication occurs and the patent or patents are invalidated, efforts against other targeted entities based on the same patents are rendered useless and unprofitable.

Instead, patent trolls generally seek to “price” their license or settlement demands such that the sum obtained will be high enough to make the effort worthwhile but low enough that it can actually be afforded (using the term loosely) by the targeted entity. In other words, it is worth it to simply pay the troll to go away (for a price which reflects not any true market value for the patented technology, but its litigation-induced value) instead of engaging in protracted and costly litigation.

The latter point appears to be one of the main reasons patent trolls have been so successful and, thus, so destructive. To put it simply, most targeted entities have neither the time, resources, nor inclination to engage in a pitched legal battle to defend a patent. This is particularly so when the patent in question is collateral to the entity's actual line of business. The average cost of a full-scale patent defense ranges from \$350,000 to \$3 *million*. Regardless of the exact price, defending a patent can be fairly described as one of the most expensive forms of litigation in existence.

A large entity, such as a software or technology firm (frequent targets of patent trolls), may have the resources to fight those efforts which are facially illegitimate, but it also has the resources to simply make a troll go away through settlement. Indeed, large corporations may employ an intellectual property specialist on staff to manage the large number of challenges it

receives, in addition to one or more outside firms to handle disputes if they are ultimately litigated.

Smaller entities, including nonprofits and firms who cannot afford to hire attorneys well-versed in the intricacies of patent litigation (which, candidly, applies to most attorneys, including seasoned litigators) are often even more eager to limit significant litigation risk and will pay the patent troll a sum to dispose of the case. Indeed, even if a targeted entity *can* hire an experienced patent litigator, prudent risk management strategy still often results in a settlement with the patent troll. This is so because a hired patent attorney will usually foresee the resources and expense which are the hallmarks of successfully defending almost *any* patent infringement enforcement effort and recommend the prompt resolution of the matter. In any event, a smaller entity will have little choice but to so hire a specialized patent attorney because few small organizations have the capacity to employ a patent lawyer on a full-time basis.

The damaging effects of patent trolls are clear. Patent trolls succeed through the issuance of egregious threats which serve to advance no valid legal purpose or the legitimate protection of productive intellectual property but, rather, seek only to extract quick settlements from those otherwise committed to building their businesses and providing positive value to society. The question for policymakers charged with building a legal framework of robust consumer protection is how to stem the destructive tide of patent trolls and give targeted entities some support in what has, thus far, been a rather one-sided fight.

As a preliminary matter, I proceed from the premise that America's intellectual property enforcement system, though in need of significant reform, should remain one which readily enables holders of valid, productive patents to enforce such patents without undue hurdles or unfair obstacles. I firmly believe in the principle that intellectual property is precisely that – *property* – and that legitimate enforcement of the rights which flow from such property should be protected. Patent trolls, however, have abused America's relatively open system that expressly provides for a presumption of validity of patents. To protect the integrity of that system while simultaneously protecting consumers and businesses from patent trolls, therefore, increased consumer protection tools are necessary at both the federal and state level to address this issue.

Several States, including Nebraska, have explored using our existing Consumer Protection and Unfair and Deceptive Trade Practices statutes to combat patent trolls. The theory behind this strategy is simple: if a patent troll sends a demand letter demanding licensing

fees from an alleged “infringer” but in fact lacks a good faith belief in the validity in the underlying patent or its application to the target’s technology, or if the troll threatens litigation categorically lacking any intention of ever filing suit, that may violate *existing* consumer protection laws.

Though we are confident this approach using existing statutes can be highly effective, we are also exploring ways in which we can strengthen existing laws and further tailor their applicability to patent trolls. Such state legislation – which must be done in a manner that does not stray into the clearly pre-empted federal sphere of patent regulation – may include stricter demand letter content requirements, the requirement of a bond posting by the asserting entity, or the inclusion of a sworn affidavit by the asserting entity that the assertion is legitimate and made in good faith. I look forward to continuing my work with my fellow state Attorneys General to develop what could ultimately be termed “model legislation” for this purpose.

Congress must also act to align federal consumer protection activities with state efforts. Though reform of the patent system itself must originate with your colleagues on the Judiciary Committee, the Commerce Committee possesses the jurisdiction to empower federal enforcement authorities to take a hard line against unfair and deceptive demand letter practices. I encourage you to do so.

I am pleased that the federal government has already shown a willingness to address this problem. The FTC has proposed a patent troll information gathering project which is currently in the public comment phase. Vermont Attorney General William Sorrell and I have partnered to co-sponsor a multi-state letter of support for that project. I encourage the Subcommittee to champion that project and use its results as the basis for additional hearings on the workings and methods of patent trolls nationwide.

In the meantime, however, I call upon Congress to utilize its subpoena power to bring the investigation of some of the worst known patent trolls to the national level. I encourage you to bring the most notorious patent trolls – and the lawyers who facilitate their schemes – to account for their alleged abuses of the patent enforcement system and explain how they do business. For too long patent trolls have operated in the shadows with virtual impunity. It is now time for federal and state authorities to bring them into the open.

In conclusion, addressing the problem of patent trolls is achievable and necessary if we are to truly fulfill our consumer protection roles. Frankly, it is one of those rare issues which

commands truly broad consensus on the need for reforms. Entities of all types and sizes – from the very large to the very small – view patent trolls as a threat to their productivity and, sometimes, their existence. Scholars and practitioners from across the intellectual property legal spectrum have voiced the problems posed by these financial predators. Democrats and Republicans alike view patent trolls as a direct threat not only to our constituents but to innovation, overall. In short, few other consumer protection concerns are more deserving of our immediate attention.

Again, I appreciate the Subcommittee’s attention to this issue and for the opportunity to share my views. I look forward to working in partnership with Congress to bring about changes which will enhance our consumer protection tools and put an end to the problem of patent trolls.

* * *



BriPol, LLC

40 East Main Street, #19
Newark DE 19711
866-450-4451
licensing@bripol.org
October 2, 2012



Re: BriPol Patent Licensing Program - File No. 1011583

We are the licensing agent for certain U.S. patents listed below. We have identified your company as one that appears to be using the patented technology, and we are contacting you to initiate discussions regarding your need for a license. In this letter, we explain what the patents cover, how you likely have an infringing system, explain why a license is needed, and provide you the general terms for such a license. We also answer some frequently asked questions, as well as explain how you can determine whether you do have an infringing system that requires a license. We should note that we have written you with the understanding that you are the proper person to contact on behalf of [REDACTED]. If you are not the proper person to handle this matter on behalf of the company, please provide this letter to the proper person, and notify us so that we may update our records and contact them directly in the future.

To turn to the matter at hand, the patents for which we are the licensing agent are listed below. The list includes both issued U.S. patents, as well as a patent application which is expected to issue in the future as an additional U.S. patent.

1. U.S. Pat. No. 7,986,426 ("Distributed Computer Architecture And Process For Document Management");
2. U.S. Pat. No. 7,477,410 ("Disributed Computer Architecture And Process For Virtual Copying");
3. U.S. Pat. No. 6,771,381 ("Distributed Computer Architecture And Process For Virtual Copying");
4. U.S. Pat. No. 6,185,590 ("Process And Architecture For Use On Stand-Alone Machine And In Distributed Computer Architecture For Client Server And/Or Intranet And/Or Internet Operating Environments"); and
5. 13/182,857 filed July 14, 2011 ("Distributed Computer Architecture And Process For Document Management").

You can find and review each of the issued patents listed above at www.google.com/patents.

As you may know, a patent's scope is defined by its claims, and you will see that each of the above-listed patents have different claims. While those differences matter and mean each patent is distinct, the patents listed above do, as a group, generally relate to the same technology field, and cover what at the time was a groundbreaking distributed computer architecture and process for digital document management. An illustrative embodiment of the architecture of the patents is provided in Figure 28, which is reproduced here for your reference.

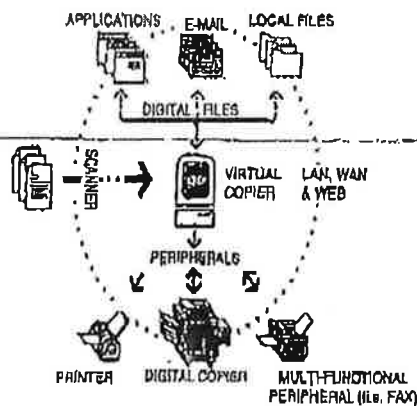


Fig. 28

A good example of an infringing system, and one your company likely uses, is an office local area network ("LAN") which is in communication with a server, employee computers having email software such as Outlook or Lotus, and a third-party scanner (or a multi-function printer with scanning functionality) which permits the scanning of a document directly to employee email address as a pdf attachment. Such a system would be a typical example of what infringes. There are other examples listed further below.

We note here that the scope of the patents is technically defined by the claims, and the language of the claims defines the legal scope of the patents. The more generalized examples provided in this letter are for your convenience and should not be considered exact substitutes for the more detailed claims. As such, you may find it useful to consider, as illustrative examples, claims 1-5 of the '426 Patent. Reviewing those you can see that the patent claims are directed to a system having a digital copier/scanner/multifunction device with an interface to office equipment (or to the web) and related software, for scanning or copying and transmitting images electronically to one or more destinations such as email, applications or other local files. Coverage of this type of system, and of the more generally worded example in the previous paragraph, is further reflected in claims 1, 8 and 15 of the '410 Patent, claims 12 and 15 of the '381 Patent, and claims 9 and 16 of the '590 Patent. Obviously each claim is separately drafted and you should consider the scope of each claim separately.

To assist you in confirming that you need a license, we provide illustrative examples of infringing systems below in the form of a brief set of fact checklists that you can use to determine if your system is one for which you should contact us about a license. If you can answer "YES" to each question under any of the scenarios A through C below, then you should contact us promptly.

A. Internetworking of Scanner/MFP and Email (SMTP, IMAP, POP3)

Yes No

- 1. Does your company use document scanning equipment that is network addressable (*i.e.*, it has an IP address and can communicate on your network);
- 2. Does your company use Microsoft Exchange/Outlook, Lotus Domino/Notes or a comparable system for company email;
- 3. Are at least some of your employees' email addresses loaded into the scanner, so that you can select to whom you wish to send a scanned document by email; or alternatively, can you manually input an employee's email address into the scanner to whom you wish a scanned document to be sent; and
- 4. Can you cause your scanner to transform your paper document to a .pdf file, and have it automatically transmitted to one or more of your employees by email. By automatically, we mean that pressing a "Start" or "Go" button instigates both the copying of the document and the automatic transmission of the document to its intended destination (such as a Microsoft Outlook email inbox).

B. Scanner/MFP and Sharepoint (HTTP and HTTPS)

- 1. Does your company use document scanning equipment that is network addressable (*i.e.*, it has an IP address and can communicate on your network);
- 2. Does your company use Microsoft Sharepoint; and
- 3. Is your scanner equipment configured so that you can scan a document and automatically transmit it to a Sharepoint site address.

C. Scanner/MFP and FTP/SFTP Site

- 1. Does your company use document scanning equipment that is network addressable (*i.e.*, it has an IP address and can communicate on your network);
- 2. Does your company use File Transfer Protocol and/or Secure File Transfer Protocol; and
- 3. Is your scanner equipment configured so that you can scan a document and automatically transmit it to an FTP or SFTP site,

Our research, which includes review of several marketplace trends and surveys, including various IDC reports, Infotrends reports and market share analyses, as well as a recent survey of an IT service company about the internal network environments of its clients, has led us to the conclusion that an overwhelming majority of companies like yours utilize systems that are set up to practice at least one of scenarios A through C above. Indeed, such practices are now standard in many industries. As a common example, our investigation has shown that most businesses have migrated to the usage of corporate email servers running Exchange or Lotus Domino/Notes and have further incorporated digital scanning into their workflows.

As your organization almost certainly uses in its day-to-day operations digital copier/scanner/multifunction equipment which is interfaced to a separate central office computer (an office network), so that digital images may be scanned and transmitted to one or more destinations such as email accounts and other applications, you should enter into a license agreement with us at this time.

If you believe you are in the unusual position of not having a system that can practice any of scenarios A through C outlined above, or otherwise avoids the requirements of the patent claims, please contact us so we may discuss means for confirming that. Upon appropriate confirmation, we would agree you have no need of a license and would not intend to pursue the matter further unless circumstances changed in a way to warrant reopening a reasonable inquiry. The materials we likely would require could include copies of the user manuals for your office copying/scanning equipment, along with the IP addresses and 2012 daily activity logs for each of them, as well as the registry of each of the email servers and file servers used in your company. These would allow us to determine whether we agree with your assessment. Of course, we are willing to treat any information you provide us as confidential and we will sign a non-disclosure agreement to that effect if you so desire. We should note that the examples A through C above are not an exhaustive list of the systems which may infringe, and that it may be determined that your system nevertheless requires a license even if it does not exactly fit one of the more common examples we have provided in this letter. However, when you provide us with the above information, we will be able to make that determination and explain that situation to you, if it exists.

You should know also that we have had a positive response from the business community to our licensing program. As you can imagine, most businesses, upon being informed that they are infringing someone's patent rights, are interested in operating lawfully and taking a license promptly. Many companies have responded to this licensing program in such a manner. Their doing so has allowed us to determine that a fair price for a license negotiated in good faith and without the need for court action is a payment of \$900 per employee. We trust that your organization will agree to conform your behavior to respect our patent rights by negotiating a license rather than continuing to accept the benefits of our patented technology without a license. Assuming this is the case, we are prepared to make this pricing available to you.

As part of our licensing program, we have received certain common inquiries that frequently are asked. In anticipation that you might have some of those same questions, and with an interest in addressing those sooner than later, we wish to provide some additional information as well.

One common question we have been asked is why we are not contacting the manufacturers of the scanning equipment or application software directly. The answer is our patent rights do not claim any scanning equipment, network file systems, FTP or Sharepoint sites, or email systems *alone*. Instead, our patent rights are addressed to end user enterprise systems which use network scanners or MFPs interoperably with other software/systems in order to practice the patented solution. As such, we would not, and do not, expect any manufacturer of a particular piece of equipment or software to accept any responsibility for the infringement created by the overall system, of which their product is only a part. Further, we expect that if you review your own agreements with these manufacturers, you will find that likewise they do not owe you any duty to indemnify you for situations where you combine a piece of equipment or software with other equipment or software to make a larger, more integrated (and useful) system.

Another common question is whether (or why) you have been singled out to receive this letter, as you may believe there are other companies like you that have not been contacted. Our response to that is to assure you that we have an ongoing vigorous licensing program that is being handled as promptly as possible, and that we fully expect to address the companies who are in need of a license. That said, your infringement of the patent rights is not justified by the infringement by others, as we are sure you understand.

We do invite you to consult with a patent attorney regarding this matter. Patents are exclusive property rights granted by law, and there can be serious consequences for infringement. Infringers who continue to infringe in the face of an objectively high risk of infringement of a valid patent can be forced to pay treble (triple) the actual damages, as well as the patent owner's litigation costs including all attorney's fees.

Please let us hear from you within two weeks of the date of this letter, so that we may agree with you upon an appropriate license arrangement if one is needed. You may answer by contacting us by mail, phone, or email at the address provided at the start of this letter. We look forward to hearing from you.

Sincerely,

The Licensing Team

BriPol, LLC

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Austin/Georgetown

January 25, 2013

Mr. Eldon Steinbrink
Phelps County Emergency Mgt
715 5th Ave Ste 22
Holdrege, NE 68949-2254

Savin

Re: FolNer, LLC Patent Licensing

We are writing on behalf of our client, FolNer, LLC ("FolNer"). Several weeks ago, they wrote you a letter regarding their licensing program with respect to certain U.S. patents. The patents related to systems that, among other things, can permit scanning a document and have it automatically sent over a local area network to an email account. These patents included U.S. Pat. Nos. 7,986,426; 7,477,410; 6,771,381; 6,185,590. In their letter, our client described these patents, the technology, and infringement. They then asked you either to respond by entering into discussions to take a license, or, if appropriate, to provide confirmation that your company does not have an infringing system. Having not heard from you, our client reasonably assumes you do have an infringing system and need a license. Accordingly, they have referred the matter to us to determine whether we may be able to work out a license with you, or whether additional steps might be required.

As background, our firm practices nationally and specializes solely in patent litigation and licensing. While our representation of FolNer can involve litigation, it is our client's preference here that we first make all reasonable efforts to reach agreement on a license. To that end, we do need to hear from you within the next two weeks.

We also wish to reiterate the position of our client in its first letter that they have no interest in seeking a license from someone who does not infringe. If your company does not use a system covered by the patents, or does not have a system that would perform any of the Scenarios A through C mentioned in the first letter, then we will discuss with you how your position can be confirmed so that we may discontinue further unnecessary correspondence. In the far more likely scenario that you do need a license, we are prepared to work with you to reach an agreement on reasonable terms.

We do encourage you to retain competent patent counsel to assist you in this matter, if you have not already done so. If you have already retained patent counsel, please forward this letter to them, and have them advise us of their representation (or you may so inform us directly) so that we may direct all future correspondence to them.

You may contact us at 866-658-6707.

Sincerely,

Maeghan Whitehead, Esq.



FARNEY DANIELS PC

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February 20, 2013

Via First Class Mail

Mr. Eldon Steinbrink
Phelps County Emergency Mgt
715 5th Ave Ste 22
Holdrege, NE 68949-2254

Re: FolNer, LLC Patent Licensing

We write with respect to the patent licensing efforts of our client, FolNer, LLC. This is the third letter you have received on this topic. The first letter, sent to you some time ago, provided a detailed explanation of what our client's patents cover, how you likely have an infringing system and therefore require a license, and provided you with the general terms for such a license. We then wrote you several weeks ago, noting that our client had not received a response from you, and had turned the matter over to us in hopes that we would be able to work out a license agreement. Both letters advised you to seek patent counsel for assistance. As you have not contacted us to explain that you do not have an infringing system, we reasonably can only assume that the system you are using is covered by the patents. In that case, you do need a license.

Accordingly, if we do not hear from you within two weeks from the date of this letter, our client will be forced to file a Complaint against you for patent infringement in Federal District Court where it will pursue all of the remedies and royalties to which it is entitled. The Complaint is attached, so that you may review it and show it to your counsel. Please note that we reserve the right to modify the Complaint, including adding additional patents, before we file. While our client would like to avoid litigation, it takes its licensing responsibilities seriously, as well as its responsibilities to protect the interests of all the companies who have already taken the proper step of obtaining a license. As stated in both the first and second letters you received, our client has no interest in seeking a license from someone who does not infringe. To reiterate this point one last time, if your company does not use a system covered by the patents, we urge you to contact us to confirm non-infringement so that we may discontinue our correspondence with you and avoid the unnecessary expense associated with a lawsuit.

In the far more likely scenario that you do need a license, we are prepared to work with you to reach an agreement on reasonable terms, but we must hear from you within two weeks of the date of this letter. Given that litigation will ensue otherwise, we again encourage you to retain competent patent counsel to assist you in this matter. If you have already retained patent counsel, please forward this letter to them and inform us of your choice of counsel so that we may direct all future correspondence to them.

You may contact me at (512) 508-8481.

Sincerely,

Rob Kiddie

**IN THE UNITED STATES DISTRICT COURT
District of Nebraska**

FolNer, LLC

Plaintiff,

v.

Phelps County Emergency Mgt

Defendant.

Civil Action No. _____

JURY TRIAL REQUESTED

COMPLAINT

Plaintiff FolNer, LLC ("FolNer" or "Plaintiff"), by way of Complaint against Defendant Phelps County Emergency Mgt ("Phelps County Emergency Mgt" or "Defendant"), hereby alleges as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement arising under the Patent Laws of the United States, 35 U.S.C. §§ 1, *et seq.*

THE PARTIES

2. Plaintiff FolNer is a limited liability company organized under the laws of Delaware with its principal place of business at 1220 N. Market Street, Suite 806, Wilmington, DE 19801.

3. Defendant Phelps County Emergency Mgt is a business with a principal place of operation at 715 5th Ave Ste 22, Holdrege, NE 68949-2254.

JURISDICTION AND VENUE

4. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1338(a). Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b&c) and 1400(b).

5. This Court has personal jurisdiction over Defendant for at least the following reasons: (i) Phelps County Emergency Mgt has, upon information and belief, knowingly and intentionally committed acts of patent infringement at least in this District and (ii) Phelps County Emergency Mgt regularly does business or solicits business, engages in other persistent courses of conduct, and/or derives substantial revenue from products and/or services provided to individuals in this District.

RELEVANT FACTS

6. This is a case where the Plaintiff owns valuable patent rights through a combination of issued patents and patents pending which cover the Defendant's ability to operate an information technology system within which its employees are able to scan a document into such things as (a) an email attachment, including transmittal of the attachment over a local area network or across the Internet; (b) a digital document file format, transmitted over a local area network or across the Internet, including storage of the document into its network files so that it can be accessed by Defendant's employees through one or more software applications; (c) a digital document, including transmittal of the document to a Sharepoint site or an FTP site. These patent rights are valuable because of the efficiencies they add to the workplace via the fast, reliable transmission of data without the added cost, delay and unreliability of paper-based systems of the prior art.

7. Defendant obtained this technology by integrating hardware, software and other equipment provided by various companies, none of which individually are accused of infringing the Plaintiff's patent rights. However, the Defendant has brought these diverse elements together into a data management system that infringes Plaintiff's patent rights.

8. Plaintiff has previously communicated in writing with Defendant about its patent rights, including setting forth its view that Defendant should take a license to one or more of its

patents. Defendant has not denied the use of the infringing technology, but has thus far been unwilling to share any of its own business information requested by Plaintiff, and has furthermore failed to cease its illegal theft of Plaintiff's patent rights.

9. Upon information and belief, Defendant has created and maintains a system for collecting, storing and accessing information.

10. Upon information and belief, Defendant utilizes a network addressable scanner and or a network addressable multifunction device (each of which is hereby described as an "IP scanner"). The IP scanner is capable of scanning paper into a digital form. Said IP scanner has its own IP address. It is configured so that various employee email addresses may be inputted into it in advance. Said IP scanner also includes a user interface which permits the user to input, *inter alia*, an intended recipient's email address, and then to press a button, which in turn triggers the scanning of paper into a digitally-formatted file that is automatically emailed to the intended recipient's email address. Upon information and belief, such IP scanner is configured to support similar related functionality such as scanning a document into a digital file that it transmitted to a Sharepoint site and/or to an FTP site, where it may be accessed by one or more of Defendant's employees. To be clear, Plaintiff is not alleging or contending that IP scanner equipment alone infringes any patent rights.

11. Upon information and belief, Defendant utilizes within its IT infrastructure an email system. Upon information and belief, Defendant utilizes Microsoft Exchange and Outlook, which runs on at least one server, in order to aid the process of communicating a digital image from an IP scanner to an intended email destination. Again, Plaintiff is not alleging or contending that these Microsoft products (or servers running them) by themselves infringe any patent rights.

12. Upon information and belief, Defendant utilizes an IP scanner capable of scanning paper into a digital form. Said IP scanner includes a user interface which permits the user of the IP scanner to input, *inter alia*, an intended network file destination, and to then press a button, which in turn triggers the scanning of paper into a digitally-formatted file that is automatically transmitted to and stored within the designated network file destination. To be clear, Plaintiff is not alleging or contending that the IP scanner equipment alone infringes any patent rights.

13. Upon information and belief, Defendant utilizes Microsoft Windows in a client server configuration, in order to aid the process of communicating a digital image from a scanner/copier to an intended file destination accessible to a file server. Again, Plaintiff is not alleging or contending that these Microsoft products (or server running Microsoft products) by themselves infringe any patent rights.

COUNT I – INFRINGEMENT OF U.S. PATENT NO. 7,477,410

14. FolNer repeats and re-alleges the allegations of all of the preceding paragraphs as if fully set forth herein.

15. On January 13, 2009, United States Patent No. 7,477,410 (hereinafter referred to as the "'410 Patent"), entitled DISTRIBUTED COMPUTER ARCHITECTURE AND PROCESS FOR VIRTUAL COPYING, was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the '410 Patent is attached as Exhibit A to this Complaint.

16. FolNer is the exclusive licensee for the field pertinent to the Defendant in and to the '410 Patent, with sufficient rights and interest in the '410 Patent as to have standing to

assert all causes of action arising under said patent and the right to any remedies for infringement of it with respect to Phelps County Emergency Mgt.

17. Upon information and belief, Defendant has in the past and continues to directly infringe at least Claim 8 and other claims of the '410 Patent by making and using in this judicial district and elsewhere in the United States, a data management system possessing all of the elements of at least these claims.

18. Upon information and belief, Defendant uses at least one network addressable scanner, digital copier or other multifunction peripheral (collectively, "digital copying devices") capable of creating a digital copy of a physical document (e.g., a paper document).

19. Upon information and belief, Defendant uses one or more central computer(s) or server(s) for sharing access to information (collectively, Defendant's "file server") among desktop computers and/or other computers used by Defendant's employees (collectively, "client computers") and/or mobile devices used by Defendant's employees such as Blackberry® devices and other smartphones.

20. Upon information and belief, Defendant uses one or more central computer(s) or server(s) running corporate electronic email software (collectively, Defendant's "email server").

21. Upon information and belief, Defendant's file server and its email server are each connected to data stored in an electronic storage medium ("Defendant's data storage") such that certain of Defendant's data located in Defendant's data storage is accessible to Defendant's file server and/or email server.

22. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's file server and at least one of the Defendant's digital copying devices.

23. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's file server and at least one of the Defendant's client computers.

24. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's email server and at least one of the Defendant's digital copying devices.

25. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's email server and at least one of the Defendant's client computers.

26. Upon information and belief, Defendant uses software operated on or in conjunction with its file server and/or its email server and/or its data storage to replicate and transmit one or more digital copies of physical documents such as paper documents to one or more servers or client computers.

27. This replication and transmission occurs as a result of a user-command communicated through a graphical user interface (GUI), without any modification of any of Defendant's client computers, and without any modification of Defendant's software source code.

28. As a consequence of the infringement of the '410 Patent by the aforesaid Defendant, Plaintiff is entitled to recovery of past damages in the form of, at a minimum, a reasonable royalty.

29. Defendant's conduct since at least Defendant's receipt of the first communication from Plaintiff to Defendant regarding the '410 Patent also has induced infringement and/or contributed to infringement by others. For this indirect infringement, Plaintiff also is entitled to recover damages in the form of, at a minimum, a reasonable royalty.

30. Moreover, as a consequence of the prior communication of patent rights by Plaintiff to Defendant, combined with Defendant's failure to cease and desist from further infringement in the face of the objective risk of infringement, the infringement is willful, giving rise to Plaintiff's claims for trebling of the damages in this case, as well as to Plaintiff's claims that this is a case where Defendant should reimburse Plaintiff for its attorneys' fees and other costs of litigation pursuant to 35 U.S.C. Section 285.

COUNT II- INFRINGEMENT OF U.S. PATENT NO. 7,986,426

31. FolNer reasserts and incorporates herein by reference the allegations of all preceding paragraphs of this Complaint as if fully set forth herein.

32. On July 26, 2011, U.S. Patent No. 7,986,426 (hereinafter referred to as the "'426 Patent"), entitled DISTRIBUTED COMPUTER ARCHITECTURE AND PROCESS FOR DOCUMENT MANAGEMENT, was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the '426 Patent is attached as Exhibit B to this Complaint.

33. FolNer is the exclusive licensee for the field pertinent to the Defendant in and to the '426 Patent, with sufficient rights and interest in the '426 Patent as to have standing to assert all causes of action arising under said patent and the right to any remedies for infringement of it with respect to Phelps County Emergency Mgt.

34. As a result of the Defendant's scan-to-file and scan-to-email functionality described in the preceding paragraphs, which are incorporated herein in their entirety, the '426 patent is directly infringed by Defendant. The infringement includes infringement of Claim 1.

35. As a consequence of the infringement of the '426 Patent by the aforesaid Defendant, Plaintiff is entitled to recovery of past damages in the form of, at a minimum, a reasonable royalty.

36. Defendant's conduct since at least Defendant's receipt of the first communication from Plaintiff to Defendant regarding the '426 Patent also has induced infringement and/or contributed to infringement by others. For this indirect infringement, Plaintiff also is entitled to recover damages in the form of, at a minimum, a reasonable royalty.

37. Moreover, as a consequence of the prior communication of patent rights by Plaintiff to Defendant, combined with Defendant's failure to cease and desist from further infringement in the face of the objective risk of infringement, the infringement is willful, giving rise to Plaintiff's claims for trebling of the damages in this case, as well as to Plaintiff's claims that this is a case where Defendant should reimburse Plaintiff for its attorneys' fees and other costs of litigation pursuant to 35 U.S.C. Section 285.

JURY DEMAND

38. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, FolNer demands a trial by jury on all issues triable as such.

PRAYER FOR RELIEF

WHEREFORE, FolNer respectfully demands judgment for itself and against Defendant as follows:

- A. An adjudication that Defendant has infringed the '410 Patent;
- B. An adjudication that Defendant has infringed the '426 Patent;
- C. An award of damages to be paid by Defendant adequate to compensate FolNer for its past infringements of the '410 and '426 Patents and any continuing or future

infringement through the date such judgment is entered, including interest, costs, expenses and enhanced damages for any willful infringement as justified under 35 U.S.C. § 284 and an accounting of all infringing acts including, but not limited to, those acts not presented at trial;

D. A declaration that this case is exceptional under 35 U.S.C. § 285, and an award of Plaintiff's reasonable attorneys' fees; and

E. An award to FolNer of such further relief at law or in equity as the Court deems just and proper.

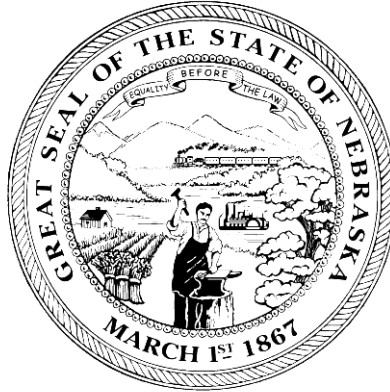
Dated: February 20, 2013

Respectfully,



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ATTORNEYS FOR PLAINTIFF



**SPOKEN TESTIMONY OF JON BRUNING
ATTORNEY GENERAL OF THE STATE OF NEBRASKA**

**BEFORE THE
UNITED STATES SENATE COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION**

**SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND INSURANCE**

**HEARING ON
DEMAND LETTERS AND CONSUMER PROTECTION:
EXAMINING DECEPTIVE PRACTICES BY PATENT ASSERTION ENTITIES**

NOVEMBER 7, 2013

Good morning, Chairman McCaskill, Ranking Member Heller, and members of the Subcommittee. As Nebraska's chief law enforcement officer, I am pleased to have the opportunity to share my perspective on putting an end to patent trolling.

Patent trolls abuse the open nature of our intellectual property system and represent a destructive threat to small businesses, nonprofit organizations, and consumers. They offer little or no innovative value to our economy and undertake their scheme in the shadows, often beyond the view of regulators.

The time is ripe for federal and state authorities to work in concert to address this issue and stem the tide of patent trolling nationwide, while protecting the ability of legitimate patent holders to enforce their rights.

Patent trolls seek only to extract costly licensing fees from alleged "infringers." They lack any intention to develop the underlying technology, improve upon it, or bring it to market. They will send scattershot demand letters which include a vague description of the patent and a demand that the target "pay up." Unfortunately, these targets are often small businesses and nonprofits. Recently, there have been several examples of this in my state.

“MPHJ Technologies” has been an active and notorious patent troll in Nebraska and across the country. MPHJ claims it owns the patent for using a basic scan-to-email technology. According to MPHJ and its lawyers, any person who has scanned a paper document to an email attachment has infringed MPHJ’s patent.

MPHJ demands a thousand dollars *per employee* from hundreds of organizations around the country. For small businesses and nonprofits, this can mean a death threat.

MPHJ’s scheme functions through dozens of shell companies it and its lawyers have created. These shells go by names like “AccNum,” “GosNel,” or “FolNer” and bill themselves as “licensing agents” for MPHJ.

One example of MPHJ’s targets in Nebraska was Eldon Steinbrink. Mr. Steinbrink is perhaps the perfect example not only of the absurdity of MPHJ’s campaign but also of how little research MPHJ and its lawyers perform before sending threatening letters scattershot across the country. MPHJ, through its shell company FosNel, somehow decided that Mr. Steinbrink was “infringing” on its scan-to-email patent through his work for Phelps County Emergency Management and sent him a demand letter. (See Exhibits A, B, and C). But Mr. Steinbrink **never** worked for Phelps County Emergency Management. He is an elderly gentleman living in a

nursing home in Holdrege, Nebraska, and once served on the Phelps County Board many years ago.

Other examples in Nebraska have included nonprofits, such as Voices of Omaha, a community choir, and small businesses ranging from plumbers to accountants. Very few of MPHJ's Nebraska targets would have had the resources to mount a full defense had MPHJ followed through on its threats.

These letters are designed to frighten consumers and small organizations who lack the resources to mount an expensive legal fight. The average cost for such a defense is estimated in the *hundreds of thousands, at minimum*. Accordingly, they often pay to make the patent troll go away. This is a kind of silent extortion.

My office and other state Attorneys General have declared a bipartisan, multistate war on patent trolls. Nebraska and Vermont, in particular, have taken aggressive and innovative steps to use our state consumer protection laws to address deceptive demand letters. We are planning to introduce a bill in our legislature which will further focus on patent abuse. But we need Congress to lead.

This Committee, in particular, has an important role in conducting a national consumer protection investigation. You can bring national attention

to some of America's worst patent trolls and their use of demand letters as weapons of extortion.

I encourage Congress to use its subpoena powers to bring the most egregious patent trolls and the lawyers who enable them to account. Call MPHJ before this Subcommittee to explain why its shell company sent demand letters to people like Eldon Steinbrink of Holdrege, Nebraska. Compel other patent trolls to do the same.

This must be a multi-pronged effort. Congress must reform the patent system. States and the FTC must be empowered to address patent troll demand letter abuses using consumer protection laws. This issue must be given prolonged and meaningful attention. Through such efforts, we can stop the problem of patent trolling in America and protect our consumers, small businesses, and nonprofits who have been victimized.

Again, I thank the Subcommittee for inviting my testimony and I look forward to your questions.

* * *