

From: Brian Buchheit [<mailto:brian.buchheit@patentsondemand.com>]
Sent: Monday, December 22, 2014 1:06 PM
To: Oliver, Justin
Cc: DeLucia, Frank; #AskeladdenIPR; Sean McGhie
Subject: RE: Petition Real Party of Interest Question

Justin,

Thank you for the information. It is helpful.

It did not, however, address issues of the same individuals working for both the Clearing House and for Askeladden. It appears that the below is stating that person X (in his role at Askeladden) made a decision to file the petitions on specific patents, but that the same person X also was a decision maker of the Clearing House, which decided to have Askeladden handle the petitions. If this occurred, your statements would still be true, but there would be a clear suggestion (that crossed the companies' boundaries through concurrent employment of the same key decision makers). It is my understanding that the RPX decision make it clear that the PTAB will look beyond the legal fiction of a company boundary to determine the actual decision makers.

From my research on Askeladden and the Clearing House, the same people seem to be paid a salary by both AskeladdenIPR and the Clearing House. This issue wasn't addressed in your comments below. You also didn't indicate if there are any procedures in place to ensure that Askeladden and the Clearing House operate independently – given the key decision makers (even the entire board of directors) are employed by both companies. **Can I assume for the purpose of informing the PTAB that no protections are in place to prevent this contamination between the two different legal entities, which apparently share board members completely, that share key legal advisors, and that share operating officers? Are these facts correct/incorrect to your knowledge.** Could you please provide me with any evidence that the same people are not making decisions for both companies, just wearing different "hats"? Is there anything in place to prevent the SAME PERSON or SAME GROUP OF PEOPLE from first making a decision to fund and initiate (through PQI or otherwise) an effort by Askeladden on behalf of the Clearing House, and then to make finer grain "official determination" on behalf of Askeladden. In other words, is there anything in place that preserves the "autonomy" of Askeladden's decisions from being anything other than a legal fiction, as the decision makers (concurrently employed by/advising) the Clearing House are the same key decision makers for Askeladden?

With respect to your first point:

First, none of the identified entities is a party that seeks to avoid the preclusive force of a previous judgment by using a nominal party in a subsequent case.

The preclusive force applicable to IPRs applies to the future as well as the past – if my understanding is correct. To my knowledge, the Clearing House represents 20 financial institutions. Are you agreeing that the **future** preclusive force of a judgment by Askeladden applies to the Clearing House? This would mean that if it is found that the Clearing House in reality represented the interest of a number of financial institutions (in this or subsequent decisions), that the preclusive force applied by the present IPRs would also apply to the Clearing House and any entities that are determined to be precluded by nature of the actions of the Clearing House. **The Patent Owners would be satisfied if this is the assertion you are representing applies. If not, please clarify.**

With respect to your second point:

None of the other entities suggested that any patent be the subject of the pending IPRs

Did people employed (including officers and directors) by the Clearing House suggest any of the patents be the subject to the pending IPRs – in the role as Askeladden employees ? Were the decision makers NOT employed concurrently by the Clearing House ? Did any person who is a decision maker of the Clearing House – also make a decision to suggestion of the patents subject to the pending IPRs, while functioning in a differet role as an Askeladden employee ? **Please clarify.**

With respect to your third point:

Third, with respect to The Clearing House Payments Company specifically, in contrast to Apple's position in the RPX case, it has no specific interest in invalidating the patents at issue because it does not engage in any loyalty discount activities

The Clearing House appears to be entirely funded by approximately 20 banks, via paid service fees. These banks are actively seeking patents in the same area (like Apple did) and are actively engaging in loyalty discount activities (parallel to the Apple situation). The Patent Owners believe that the Clearing House is effectively in RPX's position, not in Apple's position. Further, it is believed that Askeladden is effectively the same as the Clearing House, who should have been properly named a RPI. – as the SAME PEOPLE are decision makers for both companies and are CONCURRENTLY EMPLOYED AND PAID by both companies, to the knowledge of the Patent Owners. **Is this true or false ?** In RPX, the PTAB found that the financial connection (Apple was paying for the IPRs, like the service fees paid to the Clearing House by the financial institutions, which were presumably used to fund the IPRs, which presumably was funded routed from the Clearing House to Askaladden or was diverted from the Banks service fees paid to the Clearing House to Askaladden directly, to fund the IPRs). Ultimately, where did the funding to pay for the IPRs come from ? **Did Askaladen independently (independent of the Clearing House/the banks represented by the Clearing House) receive funding (like EFF did in their case, which was found to be the proper real party of interest) ... or is funding used to pay for the IPRs tied to the Clearing House and/or the Banks.**

I believe all of the above pending questions significant to resolving the issue with the RPI issue with the petitions. If you do not believe these are legally relevant issues – I'm interested in hearing why or seeing any authority on that point. If the decision makers are isolated between the Clearing House and Askeladden to ensure decision making autonomy despite the strong overlap of employed personnel, this would be highly relevant information. If there is a separate/autonomous source of funding unrelated to the financial institutions that support the Clearing House and/or Askeladden, this would be extremely useful information to help the PTAB decide any RPI issues.

Please provide any evidence in your possession of the above, so that this can be resolved before the discovery phase (if possible) and so that issues related to discovery that must be decided by the PTAB can be minimized by cooperation.

Very Truly Yours,

- Brian K Buchheit for

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