

United States Patent and Trademark Office

Before the Patent Trial and Appeal Board

RPX CORPORATION,

Petitioner,

v.

APPLICATIONS IN INTERNET TIME, LLC,

Patent Owner.

Case IPR2015-01750

Patent 8,484,111 B2

Case IPR2015-01751

Case IPR2015-01752

Patent 7,356,482 B2

RPX Exhibit 1098

RPX v. AIT

IPR2015-01751

Petitioner's Demonstratives for Oral Hearing

April 25, 2019

III. SALESFORCE IS A REAL PARTY IN INTEREST

The Federal Circuit's two-part test is broad, succinct and easily applied

here:

1. The unnamed party Salesforce is a clear beneficiary that
2. [REDACTED] preexisting, established relationship with the petitioner

RPX.

RPX calls this the "benefits-plus-relationship" test. *See e.g.*, RPX brief

p. 50. RPX has not and cannot overcome the presumption against it and has thus failed to carry its burden of persuasion.

AIT Opposition (Paper 100) at 8

Business Method Review of the AIT patents. *Id.* If RPX succeeds in its efforts here, there can be no argument that Salesforce does not benefit. Even the delay caused by these proceedings, and the subsequent appeal to the Federal Circuit, delays justice for AIT. That alone is and has been a benefit to Salesforce – the only party against whom the AIT patents have been asserted. As the Federal Circuit explained, “the evidence submitted indicates the company’s understanding that the very challenges to validity included in the IPR petitions were challenges Salesforce would like to have made if not time-barred from doing so.” *Id.* at 1355.

RPX does not deny that that Salesforce is a beneficiary in these proceedings. In the deposition of RPX Senior Vice President Chuang, when asked, “Do you believe Salesforce has benefited in any way from the AIT IPRs at any time?” Mr. Chuang responded, “They may have. I don’t know.” Ex. 1095, p. 103, lines 12-15 (Chuang depo.). In the view of RPX Senior Director and IP Counsel Steve Chiang, “benefit is largely a matter of perception... And to the extent that Salesforce is perceiving a benefit, they might be.... I can’t speculate on their perception of a benefit.” Ex. 1094, p. 69, lines 7-8 (Chiang depo.).

Despite the evasive responses from RPX representatives, Salesforce is obtaining very specific benefits from these IPRs. Chiang admitted that Salesforce “may have benefited” from these IPRs because AIT’s lawsuit against Salesforce was stayed while these IPRs are pending. Ex. 1094, p. 70, lines 10-23 (Chiang depo.). Chiang also admitted that invalidation of the AIT patents is “good” for RPX’s clients. Ex. 1094, p. 125, line 20 – p. 126, line 7. Likewise, Chuang admitted that if RPX succeeds here, none of its clients could be sued on the AIT patents. Ex. 1095, p. 101, lines 7-18 (Chuang depo.). Of course, this “goodness” from RPX’s efforts would cover Salesforce, too.

AIT Opposition (Paper 100) at 9

(friends in the same aviation association) with the party to the first action. *Taylor*, 889-91, 901, 904. The Supreme Court explicitly rejected the lower court’s “virtual representation” test as violating due process. *Id.*, 901, 904. *Taylor* makes clear that “identity of interests [*e.g.*, benefit] and some kind of relationship between parties” is **not** sufficient to establish nonparty preclusion. *Id.*, 901; *see* TPG, 48,759 (applying *Taylor* to RPI analysis under § 315(b)), cited approvingly by *AIT*, 1344-45 n.2.

A broad benefits-plus-relationship test would also conflict with *Wi-Fi Remand*. There, the Federal Circuit affirmed the Board’s finding that Broadcom’s customers were not RPIs, even though Broadcom had a contractual relationship with them and “Broadcom’s interests as to the issue of infringement were generally aligned with those of its customers.” *Wi-Fi Remand*, 1341. Like *AIT* did here, *Wi-Fi* “speculated that Broadcom may have been serving the interests of [its customers] when it sought” IPR. *Id.* In rejecting that argument, the Federal Circuit noted that “Broadcom clearly has an interest of its own in challenging” the patent and that “[o]ther than *Wi-Fi*’s conjecture, there is no evidentiary support for *Wi-Fi*’s theory that Broadcom was acting at the behest or on behalf of” its customers. *Id.*

The Board has consistently rejected arguments that *AIT* established a “benefits-plus-relationship” test, correctly noting that the Federal Circuit remanded

A. “Benefits-Plus-Relationship” Is Not the Law

1. AIT Ignores Contrary Authority

AIT did not announce a broad “benefits-plus-relationship” test. *AIT* ignores *RPX*’s contrary authority, including *Wi-Fi Remand* and numerous PTAB cases expressly rejecting the very interpretation *AIT* advances. Brief, 50-52; *see also Hybrigienics v. Forma Therapeutics*, PGR2018-00098, Paper 10, 14-15.

RPX Reply (Paper 101) at 19

WesternGeco LLC v. ION Geophysical Corp., 889 F.3d 1308 (Fed. Cir. 2018) 4, 35
Worlds Inc. v. Bungie, Inc., 903 F.3d 1237 (Fed. Cir. 2018) 6, 7, 32
Zoll Lifecor Corp. v. Philips Elec. N. Am. Corp.,
Case IPR2013-00609 4

AIT Opposition (Paper 100) at iii (Table of Authorities)

Benefits-Plus-Relationship Is Not the Law; AIT Ignores Contrary Authority

Reply (Paper 101) at 19

We agree with Petitioner that Patent Owner is overextending the reasoning of *AIT*. The RPI analysis set out in *AIT* and the common law require more than simply confining the analysis to determining whether a party benefits generally from the filing of this Petition and also has a relationship with the Petitioner. While the court in *AIT* looked to the fact that RPX was a “for-profit company whose clients pay for its portfolio of ‘patent risk solutions,’” it did not end its analysis there. *AIT*, 897 F.3d at 1351. Instead, it proceeded deeper to ascertain the nature of the relationship between Salesforce, RPX and the specific IPRs filed, and the nature of the benefit to Salesforce from RPX’s IPRs. Finding extensive and specific ties between the two parties as they relate to the IPRs, the Federal Circuit was ultimately compelled to vacate the Board’s decision and remand for further proceeding to consider “the full range of relationships under § 315(b) and the common law that could make Salesforce a real party in interest.” *AIT*, 897 F.3d at 1358.

Unified v. Realtime at 14-15 (cited RPX Opening Brief at 52)

Notably, the RPI analysis in *AIT* turned on considerations not present here. *AIT* not only involved finding that RPX was a for-profit company that files IPR petitions to benefit its clients, but also proceeded deeper to find extensive and specific ties between RPX and the unnamed party as they *relate to the particular proceeding*. *AIT*, 897 F.3d at 1351–53. Unlike here, the unnamed party in *AIT* was accused of patent infringement, and had a series of communications with RPX related to the specific infringement action and post-grant filings challenging the asserted patent, as well as paid RPX “a very significant payment shortly before the IPR petitions . . . were filed.” *Id.* at 1341–42. In short, we do not agree with Patent Owner’s analysis that an unnamed party is an RPI if the unnamed party benefits *generally* from the filing of a petition and has a relationship with the petitioner. As in *AIT*, an RPI analysis must proceed deeper to find specific ties between the petitioner and the unnamed party as they *relate to the particular proceeding*.

Google v. Seven Networks at 14-15 (cited RPX Opening Brief at 52)

Petitioner.”). The question is whether Petitioner is *specifically representing* the unnamed party’s interest—“whether [the petitioner] can be said to be *representing that interest* after examining its relationship with [non-party].” *AIT*, 897 F.3d at 1351 (emphasis added). So although Samsung and Verizon may ultimately benefit from this Petition (depending on its outcome), we do not have evidence that Petitioner is representing any particular interest of Samsung or Verizon here.

Unified v. Barkan at 11-12 (cited RPX Opening Brief at 52)

AIT Ignores the Federal Circuit's Instruction That the Board Probe Whether RPX Was Representing Salesforce's Interests

Reply (Paper 101) at 20

tion. The point is not to probe RPX's interest (it does not need any); rather, it is to probe the extent to which Salesforce—as RPX's client—has an interest in and will benefit from RPX's actions, and inquire whether RPX can be said to be representing that interest after examining its relationship with Salesforce. The Board's focus on RPX's motivations to the exclusion of Salesforce's reveals its misunderstanding of controlling legal principles.⁵

AIT, 897 F.3d at 1353

(cited RPX Opening Brief at 52-53, Reply at 21-22)

Petitioner.”). The question is whether Petitioner is *specifically representing the unnamed party's interest*—“whether [the petitioner] can be said to be *representing that interest after examining its relationship with [non-party].*” *AIT*, 897 F.3d at 1351 (emphasis added). So although Samsung and Verizon may ultimately benefit from this Petition (depending on its outcome), we do not have evidence that Petitioner is representing any particular interest of Samsung or Verizon here.

Unified v. Barkan at 11-12 (cited RPX Opening Brief at 52, Reply at 22)

AIT Ignores Authority That Representation Requires Appointment and Agency Requires Control and Assent

Reply (Paper 101) at 27

The Supreme Court listed six categories that create an exception to the common law rule that normally forbids nonparty preclusion in litigation. *Taylor*, 553 U.S. at 893– 895. Under a category relevant here, “a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy.” *Id.* at 895. *Taylor* refers to a proxy as a “representative or agent of a party who is bound by the prior adjudication.” *Id.* at 905. Additional relevant factors include:

- the non-party’s relationship with the petitioner;
- the non-party’s relationship to the petition itself, including the nature and/or degree of involvement in the filing; and
- the nature of the entity filing the petition.

77 Fed. Reg. at 48,760. *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994). The inquiry is not based on isolated facts, but rather must consider the totality of the circumstances. *Id.*

POPR (Paper 21) at 5

IV. SALESFORCE AND RPX ARE IN PRIVITY	35
A. RPX is a Proxy for Salesforce.....	35

AIT Opposition (Paper 100) at 1 (Table of Contents)

Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. See *Chicago, R. I. & P. R. Co. v. Schendel*, 270 U.S. 611, 620, 623 (1926); 18A Wright & Miller §4454, at 433–434. And although our decisions have not addressed the issue directly, it also seems clear that preclusion is appropriate when a non-party later brings suit as an agent for a party who is bound by a judgment. See *id.*, § 4449, at 335.

Taylor at 895 (cited RPX Opening Brief at 53)

We have never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. Because the issue has not been briefed in any detail, we do not discuss the matter elaboratively here. We note, however, that courts should be cautious about finding preclusion on this basis. A mere whiff of “tactical maneuvering” will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent’s conduct of the suit is subject to the control of the party who is bound by the prior adjudication. See 1 Restatement (Second) of Agency § 14, p. 60 (1957) (“A principal has the right to control the conduct of the agent with respect to matters entrusted to him.”).¹³

Taylor at 906 (cited Reply at 23)

proxy, n. (15c) **1.** Someone who is authorized to act as a substitute for another; esp., in corporate law, a person who is authorized to vote another's stock shares. Cf. *absentee voting* under VOTING. **2.** The grant of authority by which a person is so authorized. **3.** The document granting this authority. — Also termed (for sense 3 in Roman law) *procuratorium*.

Black's Law Dictionary (10th ed. 2014) (cited Reply at 25)

We have never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. Because the issue has not been briefed in any detail, we do not discuss the matter elaboratively here. We note, however, that courts should be cautious about finding preclusion on this basis. A mere whiff of “tactical maneuvering” will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication. See 1 Restatement (Second) of Agency § 14, p. 60 (1957) (“A principal has the right to control the conduct of the agent with respect to matters entrusted to him.”).¹³

Taylor at 906 (cited Reply at 25)

The petition for *inter parte* review of U.S. Patent No. 8,484,111 (the '111 patent) fails because, yet again, petitioner RPX Corp. (RPX) comes before the Board as an agent, not a principal. RPX has no interest in the '111 patent or the outcome of this proceeding. Salesforce.com, Inc. (Salesforce) is the only party that has ever been accused of infringing the '111 patent, and apparently the only party with an interest in this proceeding. [REDACTED]

POPR (Paper 21) at 1

RPX admits, "The same Taylor-derived 'proxy' analysis applies to RPI and privity..." RPX brief p. 60. Yet, RPX's arguments err in focusing almost exclusively on its own interests, *Id.*, rather than those of the privity, Salesforce. And as a matter of law, RPX's interests are *irrelevant* to this analysis. As with its RPI argument, in its privity argument RPX relies only on attorney argument. There is no evidence from Salesforce except the clear record of Salesforce [REDACTED] for RPX's services.

AIT Opposition (Paper 100) at 36

RPX has no interest in a review of the AIT patents and RPX has nothing to gain. None. As explained on its website, "RPX Corporation is the leading provider of patent risk solutions, offering defensive buying, acquisition syndication, patent intelligence, insurance services, and advisory services." Ex. 2016. RPX is in the

POPR (Paper 21) at 6

Clearly, because RPX has no interest here and Salesforce is very interested, [REDACTED]
[REDACTED]

POPR (Paper 21) at 13

proxy, n. (15c) 1. Someone who is authorized to act as a substitute for another; esp., in corporate law, a person who is authorized to vote another's stock shares. Cf. *absentee voting* under VOTING. 2. The grant of authority by which a person is so authorized. 3. The document granting this authority. — Also termed (for sense 3 in Roman law) *procuratorium*.

Black's Law Dictionary (10th ed. 2014) (cited Reply at 25)

Likewise, privity may “have little to do with ‘control’ over” this case. *Id.* “Neither absolute control, nor actual control, is a requirement for finding of privity.” *ARRIS Int’l PLC v. Chanbond, LLC*, IPR2018-00570, Paper 25, 8 (PTAB July 20, 2018) (denying institution based on privity under §315(b)).

AIT Opposition (Paper 100) at 5

relevant. Specifically, there is both (a) a legal relationship between Salesforce and RPX, and (b) no evidence that Salesforce could not exercise control over RPX’s IPRs against AIT (“preclusion by consent and estoppel by conduct” such as acquiescence). *CAFC Op.* at 1357. So, the facts here present a far stronger case for preclusion than *Taylor v. Sturgell*.

AIT Opposition (Paper 100) at 30

We have never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. Because the issue has not been briefed in any detail, we do not discuss the matter elaboratively here. We note, however, that courts should be cautious about finding preclusion on this basis. A mere whiff of “tactical maneuvering” will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent’s conduct of the suit is subject to the control of the party who is bound by the prior adjudication. See 1 Restatement (Second) of Agency § 14, p. 60 (1957) (“A principal has the right to control the conduct of the agent with respect to matters entrusted to him.”).¹³

Taylor at 906 (cited Reply at 25)

06. Nor is there evidence supporting WesternGeco's contention that ION used PGS as a proxy. *Id.* The litigation history suggests that PGS filed its IPRs as a defensive measure in response to WesternGeco's lawsuit against PGS, rather than at ION's instruction. When ION tried to join the IPRs, PGS actively opposed the attempted joinder. Even when ION was joined, the PTO gave ION only spectator status. Moreover, ION did not disclose any prior art references to PGS in connection with the IPR proceedings, nor did it pay for PGS's IPRs. The Board reasonably found that ION did not control or direct the IPR petitions.

WesternGeco at 1320 (cited Reply at 25)

[10] We further hold that the Board's decision was supported by substantial evidence. There was essentially no evidence before the Board that any of the D-Link defendants was a real party in interest in the inter partes review proceeding. While Wi-Fi has speculated that Broadcom may have been servicing the interests of the D-Link defendants when it sought inter partes review, Broadcom clearly has an interest of its own in challenging the '215 patent, based on its manufacture of the assertedly infringing chips. Other than Wi-Fi's conjecture, there is no evidentiary support for Wi-Fi's theory that Broadcom was acting at the behest or on behalf of the D-Link defendants.

Wi-Fi Remand at 1340

(cited RPX Opening Brief at 51 with typo as 1341, Reply at 25)

AIT Ignores RPX's Showing That RPX Is Not Representing Salesforce's Interests

Reply (Paper 101) at 23

We have never defined the showing required to establish that a nonparty to a prior adjudication has become a **litigating agent** for a party to the earlier case. Because the issue has not been briefed in any detail, we do not discuss the matter elaboratively here. We note, however, that courts should be **cautious about finding preclusion on this basis**. A mere whiff of “tactical maneuvering” will not suffice; instead, **principles of agency law** are suggestive. They indicate that preclusion is appropriate **only** if the putative agent’s conduct of the suit is subject to the **control** of the party who is bound by the prior adjudication. See 1 Restatement (Second) of Agency § 14, p. 60 (1957) (“A principal has the right to control the conduct of the agent with respect to matters entrusted to him.”).¹³

Taylor at 906 (cited Reply at 23)

1. Representation Requires Appointment - Absent Here

Wright, Miller, & Cooper, Federal Practice & Procedure § 4454 (2d ed. 2018) makes clear that a “representative” “must be established” by “**appointment**.” See also *id.* (“Several important rules limit the extent of preclusion by representation. The most obvious rules are that the representative must have been **appointed** by a valid procedure, . . . and that preclusion does not extend to litigation that carries the representative outside the scope of his authority.”) (“A mere self-appointed volunteer cannot usurp authority to bind anyone else by litigation.”).

Salesforce never **appointed** RPX its representative, and RPX in no sense represents Salesforce or Salesforce’s interests in these IPRs. See §§ II.B, II.D above.

RPX Opening Brief (Paper 98) at 53-54

2. Agency Requires Control and Assent - Both Absent Here

“Agency” “arises when one person (a ‘principal’) **manifests assent** to another person (an ‘agent’) that the agent shall act **on the principal’s behalf** and **subject to the principal’s control**, and the agent **manifests assent or otherwise consents** so to act.” Restatement (Third) Of Agency (“Agency Restatement”) § 1.01 (2006), cited by AIT, 1357; see also *O’Neill v. Dep’t of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (same). *Taylor* admonishes, “[C]ourts should be cautious about finding preclusion on this basis [agency] . . . [P]reclusion is appropriate **only** if the putative agent’s conduct of the suit is subject to the **control** of the party who is bound by the prior adjudication.” *Taylor*, 906.

RPX is not Salesforce’s agent in these IPRs, for two independent reasons:

- (1) neither Salesforce nor RPX **assented** to such an agency relationship, and
- (2) Salesforce has no right to **control** these IPRs or any RPX action related to the AIT Patents. Agency Restatement § 1.01 cmt. c (“A relationship is **not** one of agency within the common-law definition unless the agent **consents** to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to **control** the agent’s acts.”); see *id.* (“[a] principal’s right to control the agent is a constant across relationships of agency”); *id.*, § 1.01 cmt. f (“An **essential element** of agency is the principal’s right to **control** the agent’s actions. . . . A relationship of agency is **not** present unless the person on whose behalf action is taken has the right to **control** the actor.”); see also *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1360 (Fed. Cir. 2016) (same).

RPX Opening Brief (Paper 98) at 54-55

AIT Ignores RPX's Showing That RPX Is Not Representing Salesforce's Interests

Reply (Paper 101) at 23

RPX admits to serving as “an extension of the client’s in-house legal team” that helps “selectively clear” liability for infringement as part of its “patent risk management solutions.” Depending on the nature of the parties’ relationship, an entity can serve as an agent to a principal and file an IPR on the principal’s behalf even without the two formally agreeing that the agent will do so. See Restatement (Third) of Agency, § 1.01 cmt. c (Am. Law Inst. 2006) (“Thus, a person may be an agent although the principal lacks the right to control the full range of the agent’s activities, how the agent uses time, or the agent’s exercise of professional judgment.”).

AIT Opposition (Paper 100) at 37-38

RPX Opening Brief (Paper 98) at 54-55

2. Agency Requires Control and Assent - Both Absent Here

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AIT's Assertion That Salesforce Is a "Clear Beneficiary" of These IPRs Misunderstands What a "Beneficiary" Is

Reply (Paper 101) at 20

[12] Determining whether a non-party is a "real party in interest" demands a flexible approach that takes into account both equitable and practical considerations, with an eye toward determining whether the non-party is a clear beneficiary that has a preexisting, established relationship with the petitioner. Indeed, the Trial Practice Guide, on which the Board relied, suggests that the agency understands the "fact-dependent" nature of this inquiry, explaining that the two questions lying at its heart are whether a non-party "desires review of the patent" and whether a petition has been filed at a nonparty's "behest." Trial Practice Guide, 77 Fed. Reg. at 48,759.

AIT, 897 F.3d at 1351 (cited Reply at 20)

thing of monitionous...
be-hest \bi-'hest, bē-\ n [ME, promise, command, fr. OE *behāes* promise, fr. *behātan* to promise, fr. *be-* + *hātan* to command, promise — more at **HIGHT**] (12c) 1 : an authoritative order : **COMMAND** 2 : an urgent prompting <called at the ~ of my friends>
...
adv or adi IME *behinde*. fr. OE *behindan*, fr. *be-*

Ex. 1018 (cited RPX Opening Brief at 49)

2. AIT Ignores the Federal Circuit's Instruction That the Board Probe Whether RPX Was Representing Salesforce's Interests

AIT's assertion that Salesforce is a "clear beneficiary" of these IPRs misunderstands what a "beneficiary" is. Opposition, 8-13. A "clear beneficiary" (*AIT*, 1351) is not any party that may incidentally benefit, but rather is a party *for whose benefit* the IPRs were filed. See, e.g., Black's Law Dictionary (10th ed. 2014) ("beneficiary" is "[s]omeone who is *designated* to receive the advantages from an action"); Restatement (Third) of Trusts § 48 (2003) ("[A] person who merely benefits incidentally... is *not* a beneficiary.").

Reply (Paper 101) at 20

More than a relationship and a shared interest in the outcome is required to make Salesforce an RPI, as established by *Taylor*, *Wi-Fi Remand*, and numerous post-AIT PTAB cases. Brief, 50-52. Here there is nothing more. Salesforce is not an RPI.

Reply (Paper 101) at 23-24

[10] We further hold that the Board's decision was supported by substantial evidence. There was essentially no evidence before the Board that any of the D-Link defendants was a real party in interest in the inter partes review proceeding. While Wi-Fi has speculated that Broadcom may have been serving the interests of the D-Link defendants when it sought inter partes review, Broadcom clearly has an interest of its own in challenging the '215 patent, based on its manufacture of the assertedly infringing chips. Other than Wi-Fi's conjecture, there is no evidentiary support for Wi-Fi's theory that Broadcom was acting at the behest or on behalf of the D-Link defendants.

Wi-Fi Remand at 1340

(cited RPX Opening Brief at 51 with typo as 1341, Reply at 25)

⁸ The substantive legal relationships justifying preclusion are sometimes collectively referred to as “privity.” See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); 2 Restatement § 62, Comment *a*. The term “privity,” however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. See 18A Wright & Miller § 4449, at 351–353, and n. 33 (collecting cases). To ward off confusion, we avoid using the term “privity” in this opinion.

Taylor at 894 n.8 (cited RPX Opening Brief at 59)

WesternGeco at 1319 (cited RPX Opening Brief at 59)

[8] But, importantly, the reach of privity cannot extend beyond the limits of due process. In *Taylor v. Sturgell*, the Supreme Court observed that a person who was not a party to a suit generally has not had a “full and fair opportunity to litigate” the claims and issues settled in that suit. 553 U.S. at 894, 128 S.Ct. 2161. Because nonparty preclusion risks binding those who have not had a full and fair opportunity to litigate, the Supreme Court has cautioned that there is a general rule against nonparty preclusion, subject to certain exceptions. *Id.* at 892–93, 128 S.Ct. 2161; see *Aspex Eyewear, Inc. v. Zenni Optical, Inc.*, 713 F.3d 1377, 1382 (Fed. Cir. 2013) (“A full and fair opportunity to litigate is the touchstone of any preclusion analysis.”); see also *Cal. Physicians’ Serv.*, 163 Cal. App. 4th at 1522, 78 Cal.Rptr.3d 646 (“Notions of privity have been expanded to the limits of due process.”).

p. 70, line 23 – p. 71, line 2 (Chuang depo.). The most relevant evidence is the existence of the Membership Agreement itself. Ex. 1020. This is the very definition of privity. It cannot be clearer that the parties are in privity.

AIT Opposition (Paper 100) at 37

⁸The substantive legal relationships justifying preclusion are sometimes collectively referred to as “privity.” See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); 2 Restatement §62, Comment a. The term “privity,” however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. See 18A Wright & Miller §4449, at 351–353, and n. 33 (collecting cases). To ward off confusion, we avoid using the term “privity” in this opinion.

Taylor at 894 n.8 (cited Reply at 30)

Under *WesternGeco*, Salesforce's Contractual Relationship with RPX Does Not Establish Privity

Reply (Paper 101) at 31

ION litigation. J.A. 194–95. As a general proposition, we agree with the Board that a common desire among multiple parties to see a patent invalidated, without more, does not establish privity. J.A. 196, 203; see Trial Practice Guide, 77 Fed. Reg. at 48,760.

Setting aside factors concerning control, we also see no reason to overturn the Board's determination that privity did not exist based on any of the other alleged considerations. *WesternGeco* relies on the pre-existing business alliance between ION and PGS before the ION lawsuit commenced, as well as indemnity provisions contained in the purchase agreements for the product accused of infringing *WesternGeco*'s patents. Appellant Supp. Br. 13–19. As explained below, we agree with the Board that these factors are insufficient to make PGS and ION privies within the meaning of the statute.

WesternGeco at 1321

(cited RPX Opening Brief at 62-63, Reply at 32)

of WiFi One's time-bar claim).⁷ But where *WesternGeco* raised additional considerations, such as pre-existing legal relationships, the Board considered those arguments and found them unpersuasive. See, e.g., J.A. 33–38, 193–206.

WesternGeco at 1320

(cited RPX Opening Brief at 62, Reply at 32)

[14] For these reasons, we affirm the Board's conclusion that PGS and ION are not privies within the meaning of § 315(b).⁸ Substantial evidence supports the Board's conclusion that ION's relationship with PGS is not sufficiently close such that the ION proceeding would have given PGS a full and fair opportunity to litigate the validity of the claims of the *WesternGeco* Patents. Accordingly, the petitions are not barred under 35 U.S.C. § 315(b).⁹

WesternGeco at 1322

(cited RPX Opening Brief at 63, Reply at 31)

Under *Wi-Fi Remand*, Salesforce’s Contractual Relationship with RPX Does Not Establish Privity

Reply (Paper 101) at 31

In its motion for additional discovery, Wi-Fi began by noting that the Supreme Court in *Taylor* set forth six factors to consider in determining whether a nonparty to an action is bound by the judgment in the action. Wi-Fi argued that this case was governed by the factors providing for nonparty preclusion based on a pre-existing “substantive legal relationship” with a party to the action and the opportunity to control the litigation. In particular, Wi-Fi

Wi-Fi Remand at 1337 (cited Reply at 32)

On the issue of privity, the Board reasonably concluded that the evidence failed to show that Broadcom had sufficient control over the district court litigation to justify treating Broadcom as a virtual party to that proceeding. In applying the privity requirement of section 315(b), the Board has stated that the inquiry typically requires proof that the party in question had sufficient control over the prior proceeding that it could be bound by the results of that proceeding. *See Aruze*

Wi-Fi Remand at 1340 (cited Reply at 32)

There was no such showing of control in this case. Wi-Fi’s evidence showed that Broadcom’s interests as to the issue of infringement were generally aligned with those of its customers, and that Broadcom had indemnity agreements with at least two of the D-Link defendants. But the evidence did not show that Broadcom had the right to control that litigation or otherwise participated in that litigation to the extent that it should be bound by the results. Nor did any evidence suggest that the D-Link defendants were the real parties in interest in Broadcom’s inter partes review petition.⁴ Section 315(b) thus does not bar Broadcom from petitioning for inter partes review of the ’215 patent. Based on the full record before the Board, we conclude that substantial evidence supports the Board’s decision on the “real party in interest, or privity” issue.

Wi-Fi Remand at 1341 (cited Reply at 32)

The Evidence Establishes Salesforce Is Not an RPI or RPX's Privy

RPX Opening Brief (Paper 98) at 8

RPX's Brief and accompanying evidence established the following facts,

none of which AIT meaningfully disputes:

1. RPX's Business Model

- RPX's core business is defensive patent aggregation by acquisition of patent rights—**this** is how RPX clears liability for members, as it has done in over 1,200 cases. Brief, 8-10, 19-20, 42.
- A typical client's membership agreement and annual fee cover **only** RPX's patent aggregation service, which is the **primary reason** clients join RPX. Brief, 9, 23.
- RPX clients sued by NPEs have seen RPX file a related IPR less than 2% of the time, corroborating that the prospect of an RPX-filed IPR is not a key reason clients join RPX. Brief, 20.

2. RPX/Salesforce Relationship

- Salesforce's membership agreement granted Salesforce licenses to RPX's portfolio of thousands of patents. Brief, 23.
- Salesforce [REDACTED], and Salesforce's annual fee [REDACTED]. Brief, 24-26.
- RPX and Salesforce have no corporate relationship. Brief, 35.
- RPX had no involvement in Salesforce's litigation or CBMs. Brief, 27.

3. RPX's Reasons for Filing These IPRs

- Competitors criticize RPX as "too close to NPEs" and rewarding NPEs by paying for "worthless" patents RPX "didn't have the stomach" to challenge—allegations RPX sought to refute with these IPRs to achieve reputational benefits. Brief, 7, 11, 41.
- RPX also filed these IPRs to establish a credible validity challenge threat for future cases, reinforce RPX's expertise in valuing patent assets, and decrease public questioning of the value of patents and RPX's acquisitions—by invalidating worthless patents. Brief, 37, 42.
- Invalidating the AIT Patents offered significant reputational benefits because their claims are "astonishingly broad" and would likely be asserted in "multiple future lawsuits" against the software industry. Brief, 37-41, 46-47. RPX mapped the patents to [REDACTED] companies AIT might target. Brief, 40.
- RPX repeatedly rebuffed AIT's settlement overtures because RPX was not seeking to extricate Salesforce from litigation. Brief, 10, 29, 42, 47.
- RPX was concerned Salesforce might have **adverse** interests in an RPX-filed IPR, but pursued its own interests without acting on Salesforce's. Brief, 44-47.

Reply (Paper 101) at 7-9

I. RPX'S BUSINESS MODEL

3. RPX's core business model is defensive patent aggregation, which involves acquiring patents and licensing those patents to RPX's members. This is explained, for example, in RPX's 2013 Form 10-K Annual Report: "The core of our solution is defensive patent aggregation, in which we acquire patent assets that are being or may be asserted against our current and prospective clients. We then provide our clients with a license to these patent assets to protect them from potential patent infringement assertions." (Ex. 2008 at 3.) The license rights to the patent assets that RPX has acquired is the primary reason clients become RPX members and pay membership fees to RPX.

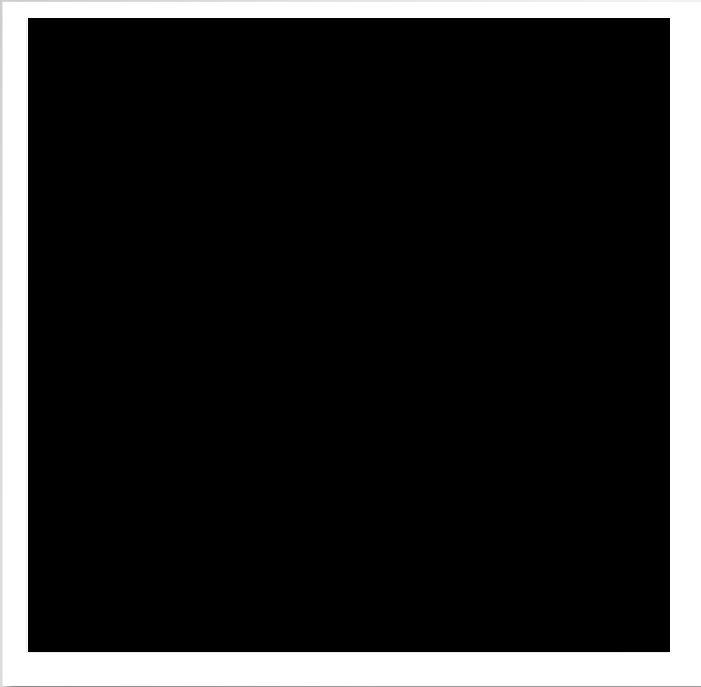
Second Chuang Dec. (Ex. 1073) ¶ 3 (cited Opening Brief at 9)

- First Chuang Dec. (Ex. 1019) ¶ 8
cited Opening Brief at 9
- Second Chuang Dec. (Ex. 1073)
¶¶ 3-9, 29-36
cited Opening Brief at 8-10, 18-23
- Chuang Depo. (Ex. 1095) at 72:19-73:14
cited Opening Brief at 19

31. Contrary to the Federal Circuit opinion's mistaken inference, the prospect of RPX filing an IPR petition in the event that a client is sued by an NPE is not "a key reason clients pay RPX." As discussed above in § I, by far the primary reason clients pay RPX is to obtain the license to RPX's vast portfolio of

Second Chuang Dec. (Ex. 1073) ¶ 31 (cited Opening Brief at 18)

- RPX Form Membership Agreements:
Ex. 1074, Ex. 1075
cited Opening Brief at 9, Reply at 10
- Salesforce membership agreement:
Ex. 1020 ()
cited Opening Brief at 23, Reply at 9-10
- Salesforce Third Amendment: Ex. 1077
() expressly
()
cited Reply at 9-10
- () agreement: Ex. 1079
()
cited Reply at 9-10



RPX Form Membership Agreement (Ex. 1074) at 2
(cited Second Chuang Dec. (Ex. 1073) ¶¶ 5, 21;
Opening Brief at 23; Reply at 10)

Membership Agreement].” (Ex. 1074 at 2.) In a typical year of membership, the Patent License would include various rights (including the right not to be sued for infringement) over thousands of patents. Pursuant to [REDACTED]

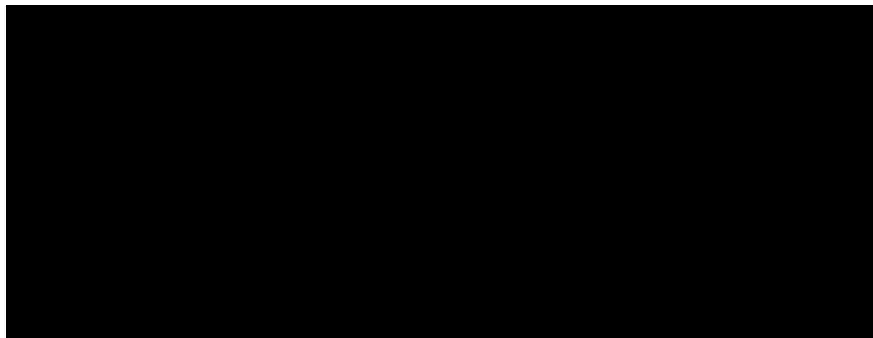
Second Chuang Dec. (Ex. 1073) ¶ 5 (cited Opening Brief at 23)

Salesforce Contracts for RPX's Core Patent Aggregation Service

RPX Opening Brief (Paper 98) at 23



Salesforce membership agreement (Ex. 1020) at 1 (cited Opening Brief at 23)

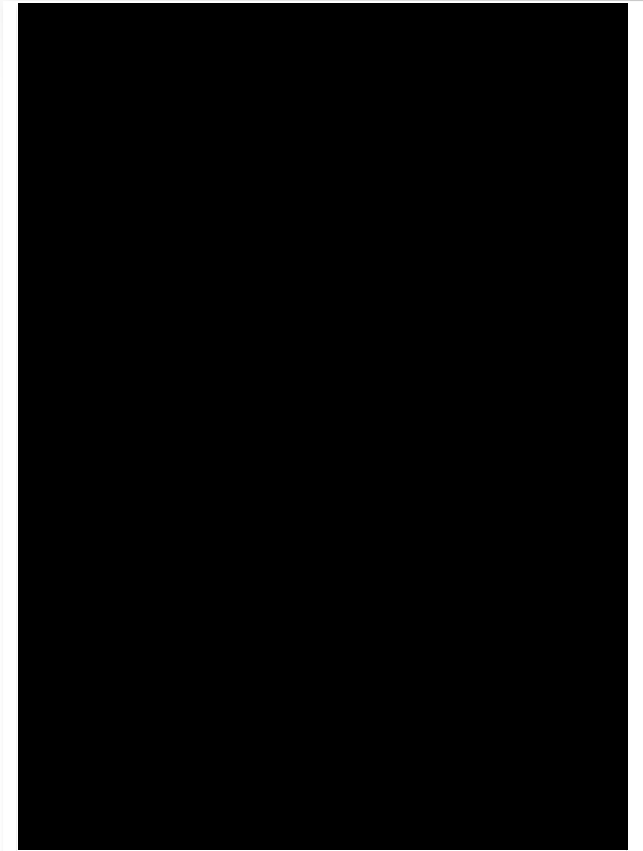


Salesforce membership agreement Third Amendment dated 2017 (Ex. 1077) at 1 (cited Reply at 9)

acquired patent assets. Brief, 23-26. Ex. 1079 alone

(Opposition, 24), and Ex. 1077 (at 1) explicitly

Reply (Paper 101) at 9



Salesforce membership agreement (Ex. 1020) at 2 (cited Second Chuang Dec. (Ex. 1073) ¶¶ 14, 21; Opening Brief at 23; Reply at 9-10)

Defensive Patent Aggregation

The core of our solution is defensive patent aggregation, in which we acquire patent assets that are being or may be asserted against our current and prospective clients. We then provide our clients with a license to these patent assets to protect them from potential patent infringement assertions. We acquire patent assets from multiple parties, including operating companies, individual inventors, NPEs and bankruptcy trustees. We also acquire patent assets in different contexts, including when they are made available for sale or license by their owners or to resolve threatened or pending litigation against our clients or prospective clients.

Ex. 2008 (RPX 2013 10-K) at 3 (cited Opening Brief at 9)

Defensive Acquisitions

RPX's defensive patent acquisition service reduces patent risk for clients by removing the threat posed by potentially problematic patents. To date, we have invested nearly \$2 billion to acquire more than 10,000 patent assets and rights, avoiding more than 3,000 litigations and generating dismissals from more than 800 active litigations. Our clients have saved more than \$2.5 billion in avoided legal and settlement costs from our defensive buying.

Our acquisition activity works in two primary ways: by purchasing patents and patent rights pre-litigation and by acquiring assets as early as possible out of active litigation. Members of our network have access through their membership and syndicated acquisitions to obtain a license to every patent and right we own. Patents and rights to which they are licensed can never be used defensively against them.

RPX also organizes complex and large-scale syndicated acquisitions.

In all acquisitions, we combine our own capital with capital aggregated from our clients' annual fees (syndicated transactions include additional monies contributed by participants in the deal).

Ex. 1019, Attachment B (RPX website, Services tab) (cited Opening Brief at 9)

9. RPX's public materials consistently inform clients and prospects that RPX's core business and the core benefit of RPX membership is defensive patent aggregation. For example, RPX's 2013 Form 10-K Annual Report states, under

Second Chuang Dec. (Ex. 1073) ¶ 9 (cited Opening Brief at 9)

We provide compelling cost savings

RPX's interests are 100% aligned with those of our clients. We work to ensure that each RPX client avoids more in legal costs and settlements each year than they pay RPX in subscription fees. We quantify the cost savings we have delivered collaboratively with the client. Together, we review the RPX acquisitions relevant to the client and determine a specific "avoided cost". The cumulative avoided cost is applied against the client's annual fee to calculate the dollar savings we have delivered for the year. We have been very successful delivering cost savings to the more than 220 members of our network and have had a consistently strong renewal rate each year.

Ex. 2015 (RPX website FAQs) (cited Ex. 1073, Second Chuang Dec., ¶ 36; Opening Brief at 22-23)

Attachment B: RPX website, Services tab.) When poor quality, facially invalid patents are asserted in litigation campaigns by NPEs, it causes the public to question the quality and value of patents in general, and may cause clients and prospective clients to question whether they should pay subscription fees to RPX to license patents, even if those patents have real value. By filing IPRs against facially invalid patents, RPX hopes to decrease the number of plainly invalid patents asserted by NPEs that erode the public perception of the value of patents, and hopes to affirm the value of RPX's core service to its clients and prospective clients.

9. RPX also files IPRs to address the irrational pricing expectations of owners of patents with serious validity issues. Without the credible threat of validity challenges, NPEs may demand unreasonable licensing or settlement fees that are not commensurate with the value of a patent of questionable validity.

RPX's history of filing IPRs may provide leverage in negotiating reasonable prices for acquiring patent rights and removing them from the hands of NPEs. This allows RPX to more efficiently run its business, including the acquisition of rights to assist recruitment of new clients and mitigate its own risk, and saves unnecessary litigation expense for the industry that would otherwise be forced to defend against assertion of such patents.

First Chuang Dec. (Ex. 1019) ¶¶ 8-9 (cited Opening Brief at 11)

23. RPX did not file the AIT IPR petitions for the purpose of extricating Salesforce from its lawsuit with AIT. The validity challenge identification team, of which I was a member, selected the AIT Patents as IPR candidates for the primary purpose of benefitting RPX's reputation and future market pricing for patent acquisitions, by preventing AIT from asserting its facially invalid patents against [REDACTED] other companies that RPX had identified as potential targets given the breadth of AIT's infringement contentions in its lawsuit against Salesforce. (See

Chiang Dec. (Ex. 1090) ¶ 23 (cited Opening Brief at 11)

- First Chuang Dec. (Ex. 1019) ¶¶ 7-13, 34-49
cited Opening Brief at 10-11, 37-42
- Second Chuang Dec. (Ex. 1073) ¶¶ 28, 38
cited Opening Brief at 40, 42
- Chuang Depo. (Ex. 1095) at 97:4-98:12
cited Opening Brief at 37, 42
- Chiang Dec. (Ex. 1090) ¶¶ 20-30
cited Opening Brief at 37-42
- Chiang Depo. (Ex. 1094) at 50:4-21, 67:9-17,
141:4-6, 147:3-148:19
cited Opening Brief at 37-38, 41-42

RPX Files IPRs on Its Own To Benefit RPX's Core Business

RPX Opening Brief (Paper 98) at 10

7 THE WITNESS: So RPX views itself as a -- as a
8 participant in the broader patent market and that its
9 position is, you know, neutral, credible -- a neutral,
10 credible party able to assess the value of patent rights
11 in a way that can bring efficiency to the market.

12 The market has gone through changes over the
13 years, and the perception of patent risk has evolved in a
14 way that, at this time period, we found there were --
15 there was a rising sentiment in certain market sectors in
16 particular -- technology sectors, market sectors -- that
17 patents were mostly invalid or mostly worthless and that
18 their -- you couldn't know the value of a patent unless
19 you knew -- unless you challenged it or could credibly
20 assess it for validity.

21 And a market participant like RPX is -- there
22 were people in the market, potential competitors or
23 commentators, that were suggesting that RPX was not -- was
24 interested in doing deals on patents that were not worth
25 it, not valuable, and that we were too close to NPEs and
1 didn't have the stomach to challenge their assertions with
2 respect to the validity of their assets.

3 And so we viewed filing IPRs as a potential way
4 to improve our reputation amongst some of the companies
5 that were -- that seemed to be holding that view, and
6 that's what I mean by a potential reputational benefit for
7 filing an IPR.

Chuang Depo. (Ex. 1095) at 97-98 (cited Opening Brief at 11)

10. RPX also files IPRs to demonstrate to the industry through RPX's public conduct that RPX does not reward assertions of facially invalid patents and thereby incentivize further assertions. Other organizations, such as Iron Dome and Unified Patents, seek to court companies concerned about not rewarding those who assert invalid patents by representing that they do not acquire patents from NPEs and only address NPE-owned patents by filing validity challenges. By filing IPRs against clearly invalid patents having little or no value, RPX conveys to the industry that RPX uses every available method to reduce patent risk efficiently.

First Chuang Dec. (Ex. 1019) ¶ 10 (cited Opening Brief at 11)

9 Q And so does RPX's reputation impact its ability
10 to attract new members?

11 MR. GIUNTA: Objection. Scope.

12 THE WITNESS: Yes, it does.

13 BY MR. SEREBOFF:

14 Q And does RPX's reputation impact RPX's ability to
15 retain existing members?

16 MR. GIUNTA: Objection. Scope.

17 THE WITNESS: [REDACTED].

Chuang Depo. (Ex. 1095) at 98 (cited Opening Brief at 11)

RPX Files IPRs on Its Own To Benefit RPX's Core Business

RPX Opening Brief (Paper 98) at 10

28. RPX's history with IPRs is replete with examples where there can be no doubt that RPX pursues its own interests and did not file with the intention of extricating an RPX client from a pending infringement lawsuit. For instance:

- IPR2014-00946, IPR2014-00947, IPR2014-00948, and IPR2014-01107 challenged patents owned by ParkerVision that had only been asserted in litigation against a party who was not an RPX member.
- IPR2015-00736 challenged a patent owned by Cedatech Holdings when the only two active defendants had reached settlement agreements in principle with the patent owner at the time RPX filed the IPR petition.
- IPR2016-01235 challenged a patent owned by MD Security Solutions under which none of the defendants sued for infringement were RPX members.
- IPR2018-00304 and IPR2018-00305 challenged a patent owned by Spycurity when no RPX member was an active defendant when RPX filed the IPR petitions.
- IPR2018-01131 and IPR2018-01132 challenged a patent owned by Publishing Technologies when there was no RPX member in the only active litigation when RPX filed the IPR petitions.

8-10, 18-20 *with* Opposition, 12-13, 30. Of the 42 IPR petitions RPX has filed since establishing its Best Practices Guide, half named co-petitioners under joint filing agreements; the other half pursued only RPX's interests. *Compare* Brief, 16; Ex. 1073, ¶¶ 27-30 *with* Opposition, 27. Of the 21 RPX filed alone, ten (nearly half) challenged patents being asserted against *no RPX member*, corroborating that RPX files IPRs for its own interests. Brief, 41.

Reply (Paper 101) at 14

Second Chuang Dec. (Ex. 1073) ¶ 28 (cited Opening Brief at 20, 40-41)

RPX Clears Liability for Members Via Defensive Patent Aggregation

RPX Opening Brief (Paper 98) at 10

31. Contrary to the Federal Circuit opinion's mistaken inference, the prospect of RPX filing an IPR petition in the event that a client is sued by an NPE is not "a key reason clients pay RPX." As discussed above in § I, by far the primary reason clients pay RPX is to obtain the license to RPX's vast portfolio of patent assets, and the prospect of RPX in the future choosing to acquire rights in patents being asserted, or which could potentially be asserted, against the client (or licenses to such patents, with the right to sublicense to the client). To date, RPX has secured dismissals of 1,286 lawsuits against RPX clients, through acquisition of the patent-in-suit or a license with sublicensing rights. *That* is what was being described on RPX's "Why Join" webpage, which the Federal Circuit opinion quotes as saying that RPX can help members "extricate themselves from NPE lawsuits." (897 F.3d at 1351, quoting Ex. 2007.) The very next sentence of that page says, "Our central, trusted position in the market enables us to negotiate with plaintiffs, acquire a license to the litigated patent and selectively clear our clients from the suit," making clear that it is RPX's core service of defensive patent aggregation (not patent validity challenges) that helps members "extricate themselves from NPE lawsuits."

Second Chuang Dec. (Ex. 1073) ¶ 31 (cited Opening Brief at 10)

32. In contrast to the 1,286 lawsuit dismissals RPX has secured through acquisitions, RPX has only ever filed a total of 57 IPR petitions to date, and those 57 petitions challenged patents that were involved, in total, in 85 cases of active litigation against an RPX member at the time the petition was filed. Considering the thousands of NPE lawsuits involving clients that RPX has monitored (to date, 4,748 NPE lawsuits filed against companies that were RPX members at the time of the lawsuit, resulting in 5,946 instances of an RPX member being a named defendant in a lawsuit filed by an NPE), the rate at which clients sued by NPEs have seen RPX file a related IPR is less than two percent. Clearly, the prospect of

Second Chuang Dec. (Ex. 1073) ¶ 32 (cited Opening Brief at 20)

Invalidating the AIT Patents Offered Significant Reputational Benefits

Reply (Paper 101) at 8

41. The AIT Patents were identified as good potential IPR candidates because they met a number of key criteria set forth in the Validity Challenge Process. The patents appeared facially invalid to the patent analyst on the team that specializes in software patents. In addition, they were being asserted in the software industry which, given that it is a frequent target of NPEs asserting facially invalid patents, is particularly sensitive to developing solutions to combat that

First Chuang Dec. (Ex. 1019) ¶ 41 (cited Opening Brief at 38-39)

42. RPX determined that if the AIT Patents are not invalidated, it is highly likely that they will ultimately be broadly asserted against the industry. For example, RPX determined that the technology tags for the asserted AIT Patents have a broad reach - they were mapped to different companies (including RPX clients and prospective clients) as of the date the AIT IPRs were filed. Based on RPX's deep knowledge of NPE litigation strategies, RPX determined that it was also likely that the NPE would seek cost-of-litigation settlements due to the highly suspect validity of the AIT Patents.

First Chuang Dec. (Ex. 1019) ¶ 42 (cited Opening Brief at 40-41)

- First Chuang Dec. (Ex. 1019) ¶¶ 37, 41-43
cited Opening Brief at 39-42
- Chiang Dec. (Ex. 1090) ¶¶ 21-23, 25-26, 28
cited Opening Brief at 38, 40-42

- The AIT Patents: Exs. 1001, 1101
- AIT's Litigation Complaint: Ex. 1093 at 13
cited Opening Brief at 39; Chiang Dec. (Ex. 1090) ¶ 22
- Final Written Decisions: Paper 80
- Examiner's Note: Ex. 1013 at 7-8
cited Opening Brief at 38
- Technology tags mapped to AIT Patents:
Ex. 1024
cited Opening Brief at 40
- Application Developers Alliance and Electronic Frontier Foundation articles on "patent trolls" in software industry:
Ex. 1019 Attachment C
cited Opening Brief at 39
(Ex. 1019 cited with typo as "Ex. 1090")
- Chiang Depo. (Ex. 1094) at 57:6-58:12, 74:16-75:20
cited Opening Brief at 40, 46

Invalidating the AIT Patents Offered Significant Reputational Benefits

Reply (Paper 101) at 8

significant reputational benefits in invalidating the AIT Patents (seventeenth factor), because (a) AIT's behavior appeared characteristic of an NPE (e.g., incorporating what appeared to be a shell corporation in Nevada for what we hypothesized to be a forum shopping tactic; asserting the AIT Patents in a manner that was inconsistent with their specification; etc.); (b) we believed AIT's overly broad patents and likely infringement reads to be textbook examples of why there are so many critics of the U.S. patent system; and (c) we believed AIT's likely infringement reads arguably put in their crosshairs for future lawsuits the entire software industry [REDACTED] which is particularly sensitive to "nuisance" patent infringement assertions by NPEs.

Chiang Dec. (Ex. 1090) ¶ 25 (cited Opening Brief at 38)

RPX's experience with NPEs. The claims of the AIT Patents and the manner in which AIT would need to interpret those claims in order to read on the accused products identified in AIT's infringement Complaint against Salesforce were astonishingly broad and could not possibly be patentable, in the view of RPX's validity challenge identification team. (This was later confirmed when the PTAB found claims of the AIT patents anticipated or obvious over three different grounds based on three different primary prior art references in three different fields.)

Chiang Dec. (Ex. 1090) ¶ 21 (cited Opening Brief at 38)

Examiner Note

If the examiner had not read the application number she never would have realized that these claims went with this specification. The claims are extremely generic and broad there is no mention about regulatory changes or anything that the invention talks about in the first 13 pages of the specification that the invention is trying to solve/ directed at.

Currently the independent claim has 1) "unique aspect" and 2) "user interface element" for a particular application. If you talked to any software developer every project they worked on has at least these two elements and probably 100% of their software projects.

Ex. 1013 at 7-8 (cited Opening Brief at 38; Chiang Dec., Ex. 1090, ¶ 21)

III. CONCLUSION

For the foregoing reasons, we determine that Petitioner has demonstrated, by a preponderance of the evidence, that claims 13–18 are unpatentable under 35 U.S.C. § 102 as anticipated by Popp; claims 13–18 are unpatentable under 35 U.S.C. § 102 as anticipated by Kovacevic; and claims 13–18 are unpatentable under 35 U.S.C. § 103 as obvious in view of Balderrama and Java Complete.

Final Written Decision (Paper 80) at 35

RPX Did Not Represent Salesforce's Interests

RPX Opening Brief (Paper 98) at 47

27. The validity challenge identification team never received any suggestion from anyone outside the team to challenge the AIT Patents' validity to benefit Salesforce. Within the team, any potential ancillary benefit to Salesforce was never discussed by the validity challenge identification team as a positive motivating factor for challenging the AIT Patents' validity, and I did not consider any potential ancillary benefit to Salesforce to be a motivating factor.

Chiang Dec. (Ex. 1090) ¶ 27 (cited Opening Brief at 44)

30. RPX's motivation in filing the AIT IPR petitions was to have AIT's facially invalid claims declared unpatentable by the PTAB, and RPX acted only in RPX's own interests. For example, in adopting its proposed interpretations of the AIT Patents' claim terms, RPX did not concern itself with any noninfringement position(s) that Salesforce may have wished to advance.

Chiang Dec. (Ex. 1090) ¶ 30 (cited Opening Brief at 47)

36. Prior to and at the time the AIT IPR petitions were filed, I and the other members of RPX's validity challenge identification team considered it a significant possibility that Salesforce might react negatively to RPX's filing of the AIT IPR petitions, and that Salesforce might have adverse interests in any IPR filed by RPX. At the time RPX approved the proposed AIT IPRs in March 2015,

Chiang Dec. (Ex. 1090) ¶ 36 (cited Opening Brief at 45)

First Chuang Dec. (Ex. 1019) ¶ 46 (cited Opening Brief at 45)

20. RPX had no communication with Salesforce whatsoever regarding the filing of IPR petitions against the AIT Patents before the AIT IPRs were filed. Salesforce did not request that RPX file the AIT IPRs, was not consulted about the decision by RPX to file the IPRs, and did not communicate with RPX about the searching for or selection of prior art asserted in the AIT IPRs, the selection of counsel for the IPRs, the selection of an expert for the IPRs, or any other aspect of the IPRs. RPX had no obligation (contractual or otherwise) to Salesforce to file the AIT IPRs and Salesforce did not fund the AIT IPRs.

First Chuang Dec. (Ex. 1019) ¶ 20 (cited Opening Brief at 26, 49)

RPX filing an IPR. RPX still does not know what (if any) impact the AIT IPRs may have on RPX's relationship with Salesforce. RPX also considered whether Salesforce might react negatively to the RPX filing. For example, defendants often express concern about validity challenges potentially emboldening a plaintiff if unsuccessful or creating conflicts with their litigation strategy. RPX does not know what (if any) prior art challenges Salesforce may be planning in the litigation. RPX considered the possibility that Salesforce might view the IPR filings negatively due to such concerns. RPX also recognized that

[REDACTED]

RPX Did Not Represent Salesforce's Interests

RPX Opening Brief (Paper 98) at 47

38. If RPX had wanted to help extricate Salesforce from the AIT-Salesforce Litigation, or if Salesforce had wanted RPX to do so, the most straightforward way would have been for RPX to engage AIT in settlement discussions and pursue a potential acquisition of the AIT Patents or sublicensing rights to them, as RPX has successfully done in over 1,200 other cases. Indeed, AIT's counsel made multiple offers to engage in settlement discussion, but RPX consistently refused. See, e.g., Ex. 1082 (AIT counsel's September 8, 2015, first

Second Chuang Dec. (Ex. 1073) ¶ 38, *citing* Exs. 1082-1089 (cited Opening Brief at 47)

24. I also agree with the statements in ii 38 of Exhibit 1073. If RPX's intention had been to help extricate Salesforce from its lawsuit with AIT, RPX would have engaged with AIT's multiple overtures toward settlement, for example to at least explore the potential terms of a license. RPX did not engage with AIT's settlement overtures, because RPX's motivation was to invalidate the AIT Patents for RPX's own business reasons, and not to end Salesforce's lawsuit. Even if Salesforce had settled out of the lawsuit on its own during the pendency of the AIT IPRs, RPX have continued to prosecute the IPRs given that RPX's intention was to invalidate the AIT Patents in RPX's own interests.

Chiang Dec. (Ex. 1090) ¶ 24 (cited Opening Brief at 47)

From: Steve Sereboff <SSereboff@socalip.com>
Sent: Thursday, November 3, 2016 11:11 PM
To: Giunta, Richard F.
Cc: Jonathan Pearce
Subject: Settlement RPX v AIT

Rich, it's normal in disputes for the parties to entertain possible settlement. That hasn't happened here but we still have time. Is it worth floating the option of settlement by our respective clients? /steve/

Ex. 1086
(cited Opening Brief at 47; Second Chuang Dec., Ex. 1073, ¶ 38)

Giunta, Richard F.
Friday, November 4, 2016 12:02 PM
'Steve Sereboff'
'Jonathan Pearce'
RE: Settlement RPX v AIT

Steve,

I think settlement is highly unlikely. I will check with the client and get back to you if they feel differently.

Thanks,
Rich

Ex. 1087 (cited Opening Brief at 47; Second Chuang Dec., Ex. 1073, ¶ 38)

RPX Did Not Represent Salesforce's Interests

RPX Opening Brief (Paper 98) at 52

AIT argued Salesforce was an RPI because RPX was Salesforce's "proxy." *AIT*, 1338, 1342. AIT's "proxy" theory (POPR, 5) derived from *Taylor*'s explanation that "a party bound by a judgment may not... relitigat[e] through a proxy," which could be someone bringing suit "as the designated representative of" the party, or "as an agent for [the] party." *Taylor*, 895. As explained below, a "representative" must be validly appointed; and an "agent" must be subject to the principal's control after manifestations of assent by the agent and principal to have the agent act on the principal's behalf. None of those requirements for RPX to be Salesforce's proxy are remotely present.

RPX Opening Brief (Paper 98) at 53

27. The validity challenge identification team never received any suggestion from anyone outside the team to challenge the AIT Patents' validity to benefit Salesforce. Within the team, any potential ancillary benefit to Salesforce was never discussed by the validity challenge identification team as a positive motivating factor for challenging the AIT Patents' validity, and I did not consider any potential ancillary benefit to Salesforce to be a motivating factor.

Chiang Dec. (Ex. 1090) ¶ 27 (cited Opening Brief at 33, 57)

Salesforce agreements: Exs. 1020-1022, 1076-1079

cited Second Chuang Dec. (Ex. 1073) ¶¶ 12-23;
Opening Brief at 23-26; Reply at 9-10

20. RPX had no communication with Salesforce whatsoever regarding the filing of IPR petitions against the AIT Patents before the AIT IPRs were filed. Salesforce did not request that RPX file the AIT IPRs, was not consulted about the decision by RPX to file the IPRs, and did not communicate with RPX about the searching for or selection of prior art asserted in the AIT IPRs, the selection of counsel for the IPRs, the selection of an expert for the IPRs, or any other aspect of the IPRs. RPX had no obligation (contractual or otherwise) to Salesforce to file the AIT IPRs and Salesforce did not fund the AIT IPRs.

First Chuang Dec. (Ex. 1019) ¶ 20 (cited Opening Brief at 26, 49)

45. Part of the reason RPX established its Validity Challenge Process was to ensure that it was complying with its obligation to name all real parties-in-interest (RPIs) and privies. (Bates No. RPX000074). RPX has no contractual obligation to Salesforce to file an IPR under any circumstances (Bates Range RPX000009-RPX000025) and has no "unwritten" or implicit understanding with Salesforce that RPX will do so.

First Chuang Dec. (Ex. 1019) ¶ 45 (cited Opening Brief at 49)

Salesforce payment records: Exs. 2019, 1081

cited Second Chuang Dec. (Ex. 1073) ¶¶ 17-21;
Opening Brief at 25-26; Reply at 10

Summary of Unmet Legal Requirements To Find Salesforce an RPI or Privy

Proxy: - RPX must have had no interest of its own.

Opening Brief at 53-54 and Reply at 25-26

(collectively citing *WesternGeco* at 1340, *Wi-Fi Remand* at 1320, Black's Law Dictionary definition of "proxy")

- Salesforce must have appointed RPX its litigating agent/representative and controlled these IPRs.

Opening Brief at 53-55 and Reply at 25-26 (collectively citing *Taylor* at 906: "preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication.")

RPI: - RPX must have represented Salesforce's interests.

Opening Brief at 48-53 and Reply at 19-24 (collectively citing *AIT* at 1353, *Wi-Fi Remand* at 1341, *Barkan* at 11)

- Salesforce must have appointed RPX its representative.

Opening Brief at 53-55 and Reply at 25-26 (collectively citing *Taylor* at 906, WM&C § 4454 (representation requires appointment), Restatement (Third) of Agency § 1.01 cmt.c (agency requires principal's assent, agent's consent, and principal's control), *O'Neil* (same), *Pac. Gas* (agency requires principal's control))

- RPX must have filed these IPRs at Salesforce's behest/command.

Opening Brief at 48-50 and Reply at 20-22 (collectively citing *AIT* at 1351, *TPG* at 48,759, *Wi-Fi Remand* at 1351, Ex. 1018 ("behest" means "command"), Black's Law Dictionary ("beneficiary" is "designated"))

Privy: - RPX/Salesforce contractual relationship must have given RPX control of Salesforce's litigation/CBMs. Opening Brief at 61-63 and Reply at 30-33 (collectively citing *Taylor* at 894 n.8, *Wi-Fi Remand* at 1337 and 1340-41, *WesternGeco* at 1319-22)

- Proxy – see above.

Summary of Unmet Legal Requirements To Find Salesforce an RPI or Privy

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47. Given the potential benefits to RPX of filing the AIT IPRs (e.g., ¶¶ 7-12, 41-44 above), RPX determined that those benefits outweighed any potential risks to its relationship with Salesforce. The primary factor driving RPX's decision to file the AIT IPRs was the ability to file a very strong petition against a low quality patent in the software sector before the NPE extracted its price from its first litigation and proceeded to assert the patents more broadly against other targets.

Filing a petition would potentially prevent multiple future lawsuits against clients, prospects, and the industry at large and, as a result, provide significant reputational benefits to RPX. RPX was also fairly confident that it would not waste resources on the preparation of a petition only to have someone else file first, based on the conclusion arrived at by RPX's team that the AIT Patents were not likely to be challenged by any others in the time RPX was preparing its petitions. In RPX's experience, it was relatively rare to identify an opportunity with this same combination of factors.

29. To my knowledge, RPX has never had any authority (express, implied, apparent, or otherwise) to act on Salesforce's behalf (as Salesforce's agent, proxy, attorney-in-fact, or any other way) in challenging the validity of any patent (via IPR or any other type of validity challenge). To my knowledge, no suggestion was ever made to the validity challenge identification team that RPX had any such authority to act on Salesforce's behalf or that RPX should be motivated to file IPRs for Salesforce's benefit. I was involved in overseeing the preparation of the AIT IPR petitions and RPX's prosecution of the AIT IPRs, and RPX never conducted any aspect of the proceeding on Salesforce's behalf and instead pursued only RPX's own interests.

Chiang Dec. (Ex. 1090) ¶ 29 (cited Opening Brief at 57)

Second Chuang Dec. (Ex. 1019) ¶ 47 (cited Opening Brief at 41)

Summary of Unmet Legal Requirements To Find Salesforce an RPI or Privy

RPI:

- RPX must have represented Salesforce's interests.

Opening Brief at 48-53 and Reply at 19-24 (collectively citing *AIT* at 1353, *Wi-Fi Remand* at 1341, *Barkan* at 11)

- Salesforce must have appointed RPX its representative.

Opening Brief at 53-55 and Reply at 25-26 (collectively citing *Taylor* at 906, WM&C § 4454 (representation requires appointment), Restatement (Third) of Agency § 1.01 cmt.c (agency requires principal's assent, agent's consent, and principal's control), *O'Neil* (same), *Pac. Gas* (agency requires principal's control))

- RPX must have filed these IPRs at Salesforce's behest/command.

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20. RPX had no communication with Salesforce whatsoever regarding the filing of IPR petitions against the AIT Patents before the AIT IPRs were filed.

Salesforce did not request that RPX file the AIT IPRs, was not consulted about the decision by RPX to file the IPRs, and did not communicate with RPX about the

searching for or selection of prior art asserted in the AIT IPRs, the selection of counsel for the IPRs, the selection of an expert for the IPRs, or any other aspect of the IPRs. RPX had no obligation (contractual or otherwise) to Salesforce to file the AIT IPRs and Salesforce did not fund the AIT IPRs.

First Chuang Dec. (Ex. 1019) ¶ 20 (cited Opening Brief at 26, 49)

[REDACTED] For these and other reasons, I and the validity challenge identification team recognized potential

[REDACTED] RPX pursued its own interests

in the AIT IPRs and did not act on behalf of Salesforce's interests. For example,

RPX made no effort to ensure consistency between its claim construction positions, prior art interpretations, or other substantive positions in the AIT IPRs and any of Salesforce's substantive positions in the litigation.

Chiang Dec. (Ex. 1090) ¶ 36 (cited Opening Brief at 47)

Summary of Unmet Legal Requirements To Find Salesforce an RPI or Privy

- Privy:** - RPX/Salesforce contractual relationship must have given RPX control of Salesforce's litigation/CBMs. Opening Brief at 61-63 and Reply at 30-33 (collectively citing *Taylor* at 894 n.8, *Wi-Fi Remand* at 1337 and 1340-41, *WesternGeco* at 1319-22)
- Proxy – see above.

37. RPX has had no involvement in the AIT-Salesforce Litigation (*Applications in Internet Time, LLC v. Salesforce.com, Inc.*, No. 3:13-CV-00628, D. Nev.). RPX has had no contact with AIT related to the AIT-Salesforce Litigation, has provided no direction to Salesforce in relation to the AIT-Salesforce Litigation, and has no ability to control Salesforce's actions or positions in the AIT-Salesforce Litigation. I had a telephone call with [REDACTED] of Salesforce on January 7, 2014 (the only call I had with anyone from Salesforce on that day), during which I provided a small amount of information that we at RPX knew about the AIT-Salesforce Litigation, but I did not provide any direction or advice to Salesforce regarding the litigation. RPX knew very little about the AIT-Salesforce Litigation, and to the best of my recollection, the primary information I provided to Salesforce was the information that RPX had had previous encounter with AIT's litigation counsel.

Second Chuang Dec. (Ex. 1073) ¶ 37 (cited Opening Brief at 62)

39. RPX also had no involvement in the covered business method review proceedings (CBMs) that Salesforce filed against the AIT Patents. In relation to those proceedings, RPX had no contact with AIT, provided no direction to Salesforce, and had no ability to control Salesforce's actions or positions.

Second Chuang Dec. (Ex. 1073) ¶ 39 (cited Opening Brief at 62)

RPX has explained the Federal Circuit's two-part test as follows: "Under the panel's decision, it does not matter that a petitioner has its own interest in pursuing IPR; the petitioner is bound by prior litigation brought by a separate entity if it has a relationship with that entity and the entity would 'benefit from' the subsequent action." RPX Pet. for Rehearing at 2. RPX called this test "broad." *Id.* at 2, 8. On these points, the parties agree.

AIT Opposition (Paper 100) at 3

There can be no dispute that Salesforce was and remains a clear beneficiary in these IPRs. One might expect an extensive discussion of this issue in RPX's opening brief. There is none. Instead, RPX argues that the Federal Circuit's "benefits-plus-relationship" test is incorrect. See RPX brief, 50-52. RPX petitioned the Supreme Court for a writ of certiorari to review this issue. However, the Supreme Court denied the petition. *RPX Corp., v. Applications in Internet Time, LLC*, Case No. 18-1075 (Supreme Court, March 18, 2019). Thus, though RPX attempts to argue it is incorrect, the Federal Circuit's beneficiary-plus-relationship test is the only controlling precedent.

AIT Opposition (Paper 100) at 8

QUESTION PRESENTED

Whether 35 U.S.C. § 314(d) bars judicial review of the Patent and Trademark Office's decision to institute inter partes review where a patent holder's challenge to that institution decision is grounded on a timeliness objection under § 315(b).

RPX Petition for Certiorari at i

E. RPX is an Incorporated Association that is Not the RPI, but Rather its Members

As discussed by the Federal Circuit, an incorporated or unincorporated association “is not the appropriate party for bringing suit to assert the personal rights of its members” absent statutory authority to do so. Wright & Miller § 1552. “[T]he association may become the real party in interest by acquiring the rights of its members by a bona-fide assignment.” *Id.* RPX has no real interest in the business of its clients, and certainly has not been assigned any rights to any of the products or services it attempts to protect.

Thus, RPX’s members are appropriately considered the real-parties-in-interest, and these IPRs are time barred by the litigation against RPX-member Salesforce.

AIT Opposition (Paper 100) at 28

§ 1552. Application of the Real Party in Interest Rule—Incorporated and Unincorporated Associations

If an incorporated or unincorporated association has capacity to sue or be sued as provided under Rule 17(b),¹ it is considered the real party in interest for purposes of enforcing any right it has as an entity.² Absent statutory authority, however, an association is not the appropriate party for bringing suit to assert the personal rights of its members.³

Wright & Miller § 1552

Similarly, a related section of a different treatise discusses “preclusion by consent and estoppel by conduct,” beginning with the remark that “[t]he repose and reliance interests generated by a judgment may deserve protection against nonparties for reasons of acquiescence that depart from any of the common ‘privity’ theories of participation, representation, or property.” 18A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4453 (2d ed. 2018) (“Wright, Miller, & Cooper”). The treatise continues by noting that, “[a]lthough acquiescence furnishes the most apt single label for these reasons, several distinctive principles can be identified.” *Id.*

It then provides that:

One, relying on actual consent to be bound, may fairly be treated as an aspect of preclusion by judgment. The others are better viewed as species of apparent authority or estoppel by conduct; the distinctive feature of these theories is that the apparent authority or estoppel arises from conduct that relates to litigation between other persons. Such conduct may include conduct of a nonparty that apparently authorizes a party to represent his interests; acquiescence in a situation that has been created by a prior judgment; and *failure to dispel a party's reasonable belief that the nonparty will honor the judgment in pending litigation.* *Id.* (emphases added).

As explained above, Salesforce has acquiesced in RPX filing and prosecuting these IPRs.

AIT Opposition (Paper 100) at 38-39

The Federal Circuit quoted Wright, Miller & Cooper § 4453 (“WM&C”) for its discussion of *apparent authority*. *AIT*, 1357. As RPX’s Brief (at 55-57, which AIT ignores) establishes, apparent authority does not apply here for many reasons, including that it requires “*expressive conduct* by the principal” manifesting assent to be bound by an agent’s actions. Brief, 56 (quoting Agency Restatement). AIT’s Opposition (at 39) italicizes a *different* category of acquiescence mentioned by WM&C, but the mismatch with the facts here is so extreme, *AIT does not even attempt* to explain how this new theory allegedly applies. The “failure to dispel” theory applies where the entity alleged to have acquiesced (Salesforce, according to AIT) is a *non-party* to some action, and then *later* asserts its *own* claim inconsistent with the judgment in that action. *See* WM&C. If Salesforce were a non-party “acquiescing” to RPX’s IPRs as alleged, this theory could only apply to preclude Salesforce from taking some *later* action in its own name inconsistent with RPX’s IPRs. No such later action is at issue here.

AIT’s theory that RPX is Salesforce’s proxy because Salesforce did not object to these IPRs is nonsensical, finds no support in WM&C, and is refuted by *Wi-Fi Remand* and *WesternGeco*, neither of which found that time-barred litigants must “object” to the IPRs to prevent the petitioner from being found their “proxy.” AIT’s new theory fails.

Reply (Paper 101) at 29-30

After RPX filed the petitions here, Salesforce seems to have sat silently on the sidelines, doing nothing to dispel the apparent view that RPX was acting on behalf of Salesforce. It must be emphasized that the focus here is on *Salesforce*, not RPX. And RPX has produced no evidence to show that Salesforce has *not* acquiesced.

AIT Opposition (Paper 100) at 18

3. The dissent faults the Board for not discussing all of the *Taylor* factors bearing on a finding of privity. But the Board properly focused on the factors that Wi-Fi raised in its argument. While it recognized that a variety of factors can contribute to a finding of privity, it limited its discussion to the arguments made by Wi-Fi.

Wi-Fi Remand at 1338 n.3 (cited Reply at 29)

RPX calls this the “benefits-plus-relationship” test. *See e.g.*, RPX brief p. 50. RPX has not and cannot overcome the presumption against it and has thus failed to carry its burden of persuasion.

AIT Opposition (Paper 100) at 8

[1, 2] We largely concur with the burden framework used in *Atlanta Gas Light*. As explained below, we agree that the IPR petitioner bears the burden of persuasion to demonstrate that its petitions are not time-barred under § 315(b) based on a complaint served on a real party in interest more than a year earlier. We also agree that an IPR petitioner’s initial identification of the real parties in interest should be accepted unless and until disputed by a patent owner. And although we disagree with treating this initial acceptance as a “rebuttable presumption” that formally shifts a burden of production to the patent owner, we agree that a patent owner must produce some evidence to support its argument that a particular third party should be named a real party in interest.

Worlds at 1242 (cited Reply at 29)

AIT's apparent authority argument also fails as a matter of law for two reasons. First, apparent authority only arises if a ***principal's conduct*** toward a third party manifests that the principal has granted power to an agent. Agency Restatement § 2.03 and § 3.03 cmt. b (“an agent’s apparent authority originates with ***expressive conduct by the principal toward a third party*** through which the ***principal*** manifests assent to ***action*** by the agent with legal consequences for the principal”). AIT pointed to no Salesforce conduct toward any third party manifesting that Salesforce granted RPX authority to act as its agent in filing these IPRs. AIT’s citation to ***RPX’s*** public materials misapprehends apparent authority, which requires conduct by the ***principal (not the agent)***. Salesforce’s confidential payments were not “conduct ... toward a third party.” *Id.*

Second, apparent authority requires that the agent inform a third party that the agent’s actions are on behalf of a principal. Agency Restatement § 2.03 cmt. b. RPX’s petitions did just the opposite, and made clear these IPRs are pursued only for RPX’s interests. *See id.* § 2.03 cmts. b and d.

Willful Blindness

While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.⁹ We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. See G. Williams, *Criminal Law* §57, p. 159 (2d ed.

Global-Tech Appliances at 769 (cited RPX Opening Brief at 33)

Third, when RPX made the final decision to file these IPRs, Salesforce had most recently indicated it was *un*interested in RPX doing anything with respect to AIT. *Id.*, ¶¶ 32-35. The evidence establishes RPX did *not* “subjectively believe” Salesforce desired an RPX-filed IPR, as would be required for “willful blindness.” *Id.*; see *AIT*, 1355, citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

Finally, the premise that RPX was working to ascertain whether Salesforce wanted RPX to file an IPR is directly refuted by all the evidence of record. Crediting AIT’s speculation would require ignoring the sworn testimony of two witnesses—Messrs. Chuang and Chiang, both lawyers in good standing—that directly refute it. Mr. Chiang is unequivocal: “RPX never worked in any way to ascertain Salesforce’s desires with respect to RPX challenging the AIT Patents’ validity, and never received any indication of Salesforce desiring RPX to file such a challenge.” Ex. 1090, ¶ 35. RPX was not seeking to, and did not need to, ascertain Salesforce’s desires because RPX made the decision to file these IPRs solely to pursue RPX’s *own* interests, not Salesforce’s. Ex. 1073, ¶ 38; Ex. 1090, ¶¶ 20-30; Ex. 1019, ¶¶ 7-12, 41-44.

RPX Opening Brief (Paper 98) at 33

B. RPX is Merely the Attorney-In-Fact or Agent of Salesforce

As the Federal Circuit explained, Wright & Miller and other authorities provide examples of legal relationships in which a nonparty is or is not a “real party in interest.” “[A]s a general rule, a person who is an attorney-in-fact or an agent solely for the purpose of bringing suit is viewed as a nominal rather than a real party in interest and will be required to litigate in the name of the principal rather than in the agent’s own name.” Wright & Miller § 1553.

AIT Opposition (Paper 100) at 37

Though RPX and Salesforce are separate business entities, ██████ “a legal relationship between them that is defined by mutual legal obligations and commonality of interest,” and is “precisely . . . that which defines privity.” *CAFC Op.* at 1362 (Reyna, J., concurring). Here, Salesforce obviously is benefiting from RPX’s advertised IPR services, and indeed ██████ business relationship in part to gain the benefit of such services.

AIT Opposition (Paper 100) at 35

7. The views of the “special concurrence” in *Envirotech*, contending that the claims on appeal had been properly submitted to the jury and were not reviewed *de novo* on appeal, were not adopted by the majority opinion. 730 F.2d at 763, 221 USPQ at 481 (Baldwin, J., specially concurring). Accordingly, the concurrence’s “spin” on the case is not the position of the court.

Markman v. Westview Instruments, 52 F.3d at 976-77 n.7 (cited Reply at 31)

REYNA, Circuit Judge, dissenting.

In this appeal, the court for the first time defines the legal standard for establishing “privity” under 35 U.S.C. § 315(b). The majority concludes that to establish privity, a petitioner must have had control over the prior district court litigation. This narrow standard will make it difficult for a patentee to successfully assert § 315(b). I believe that control of a prior litigation is but one form of privity. Privity may exist in other forms that do not involve control over the prior litigation, all of which are excluded under the standard adopted by the majority. I respectfully dissent.

Wi-Fi Remand at 1346 (Reyna, J., dissenting)
(cited Reply at 32)

Likewise, privity may “have little to do with ‘control’ over” this case. *Id.* “Neither absolute control, nor actual control, is a requirement for finding of privity.” *ARRIS Int’l PLC v. Chanbond, LLC*, IPR2018-00570, Paper 25, 8 (PTAB July 20, 2018) (denying institution based on privity under §315(b)).

AIT Opposition (Paper 100) at 5

Here, in our analysis, we mainly address the fourth *Taylor* category of nonparty preclusion. For the reasons stated below, the evidence of record establishes sufficiently that Petitioner is in privity with a time-barred district court party because Petitioner had substantial control over the Delaware actions. As such, it is not necessary for us to determine whether privity exists based on other grounds.

Under the fourth *Taylor* category of nonparty preclusion, a nonparty to a prior action is bound by a judgment if that party “‘assume[d] control’ over the litigation in which that judgment was rendered.” *Taylor*, 553 U.S. at 895 (citing *Montana v. United States*, 440 U.S. 147, 154 (1979)). “Courts and commentators agree, however, that there is no ‘bright-line test’ for determining the necessary quantity or degree of participation to qualify as . . . ‘privity’ based on the control concept.” Trial Practice Guide, 77 Fed. Reg. at 48,759 (citing *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994)).

Neither absolute control, nor actual control, is a requirement for finding of privity. Rather, “it should be enough that the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two formal coparties.” Trial Practice Guide, 77 Fed. Reg. at 48,759 (quoting Wright & Miller § 4451); see also *WesternGeco*, 889 F.3d at 1320. “Such relationships between a party and a nonparty are most often found when . . . an indemnitor participates in defending an action brought against its indemnitee.” Wright & Miller § 4451; *Benson & Ford*,

ARRIS at 8 (cited Opposition at 5, Reply at 32-33)

C. AIT's Amorphous Privity Test Is Contrary to Law

AIT argued *Taylor* categories 2 and 5, which apply to different circumstances and justify preclusion for very different reasons. *WesternGeco*, 1319.

For a contractual business relationship, analyzing *Taylor* category 2 requires determining whether the relationship is sufficiently close that the *nonparty to the first action* had the right to control the first action, and therefore had a fair chance to challenge validity and should be precluded from pursuing a second action in its own name. *WesternGeco*, 1319-1321; *Wi-Fi Remand*, 1340.

Conversely, *Taylor* category 5 justifies precluding a nonparty to the first action—even if it had no control thereof—from bringing a second action as a proxy for the party to the first action. The justification for preclusion under *Taylor* category 5 is that the *party* to the first action (not the *nonparty* as in *Taylor* category 2) cannot get a second bite at the apple by having a proxy represent its interests in a second action. *Taylor*, 895.

We reject this argument for three reasons. First, our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party. See, e.g., *Richards*, 517 U. S., at 798–799; *Martin*, 490 U. S., at 761–762. Accordingly, we have endeavored to delineate discrete exceptions that apply in “limited circumstances.” *Id.*, at 762, n. 2. Respondents’ amorphous balancing test is at odds with the constrained approach to nonparty preclusion our decisions advance.

Taylor at 898 (cited RPX Opening Brief at 59, Reply at 34)

Evidence also supports a conclusion that Ventex is serving as a proxy for Seirus and that Seirus was, in effect, funding the *inter partes* reviews, whether wittingly or unwittingly. In making out its privity case, Columbia directs our attention to payments made from Seirus to Ventex from late 2016 to 2018 pursuant to the Exclusive Manufacturing Agreement. *See, e.g.*, Papers 99, 100 at 6–10. Columbia contends that those identified payments indicate that Seirus was funding the IPRs. Ventex, on the other hand, contends that the payments are normal business transactions between Ventex and Seirus and unrelated to the IPRs. *See, e.g.*, Papers 118, 119 at 3–5. The timing, structure, and amounts of the payments suggest a correlation with legal fees incurred by Ventex in connection with the preparation and prosecution of these IPRs by its counsel. For example, a few months prior to the filing of the Petition, the parties entered into their Exclusive Manufacturing Agreement, which included a \$█,000 advance, \$█,000 in surcharges, and ongoing fees above the usual amount Seirus paid for Ventex's materials. *See Ex. 2189, 1–2; Papers 99, 100 at 6–7.* The result was \$█,000 in payments, with a \$█,000 advance coinciding with the first payments to counsel for Ventex for work on the *inter partes* reviews. Papers 99, 100 at 8. An internal Ventex email further links the surcharge fees from Seirus as necessary to cover the attorneys' fees in these *inter partes* reviews. *Id.* at 8–9; Ex. 2200 ¶¶ 44–46; Ex. 1095.

Ventex at 13 (cited Reply at 18)

be representing that interest.” *Id.* Based on our review of the contractual relationship between the parties and the record as a whole, we conclude that Seirus will benefit from Ventex's actions and Ventex represents Seirus's interests in this action.

Ventex at 10 (cited Reply at 19)

Other evidence suggests that the Exclusive Manufacturing Agreement may have been a cover for Seirus to fund the *inter partes* reviews without leaving a paper trail establishing Ventex's awareness that, because Seirus was a real party in interest, a petition for *inter partes* review would be barred under § 315(b). For example, Seirus was allegedly paying a large sum of money compared to its usual cost of obtaining goods (\$█,000) for “exclusivity,” yet the 2013 Supplier Agreement already prevented Ventex from selling to Seirus competitors. Papers 99, 100 at 9–10; Papers 103, 104 at 10 (Ventex acknowledging that the “original exclusivity agreement dates back to 2013”). Ventex broadly asserts that the new exclusivity agreement was perceived to have value to Seirus, but that merely begs the question and does not explain adequately why Seirus would pay such a large sum for rights it appeared to already possess. *See* Papers 103, 104 at 3, 10–11; Papers 118, 119 at 4 (asserting that Seirus wanted to “maintain” exclusivity without explaining why the prior exclusivity was lost or inadequate, or how the scope of exclusivity changed).

Columbia sought discovery from Ventex and Seirus regarding the nature of their agreements and related issues, but Ventex and Seirus produced witnesses largely unable to answer key open questions, either due

Ventex at 13-14 (cited Reply at 18)

Based on the foregoing, we conclude that the preexisting contractual relationships between Seirus and Ventex, and Ventex's role as a proxy for Seirus in these *inter partes* reviews, supports the conclusion that Seirus is in privity with Ventex. Accordingly, Ventex has not met its burden to establish that Seirus is not a privity and that the Petition is not time-barred pursuant to § 315(b).

Ventex at 15 (cited Reply at 18-19)

1. As stated above, the time-bar arguments that AIT made to the Board centered on a theory that Salesforce was a real party in interest, rather than a privity of RPX. The first time it hinted that it believed Salesforce was a privity of RPX was during the oral hearing, where counsel argued that § 315(b) “merely requires that the real party-in-interest or privity be time barred without speaking of control.” J.A. 2024. It then argued in its Notices of Appeal that “the Board lacked authority to proceed in rendering the Final Written Decision because it misconstrued the law of privity and real party in interest.” J.A. 298, 303, 308, 484, 489. Because AIT focused its arguments on whether Salesforce was an unnamed real party in interest and because we vacate the Board’s determination on that score, we need not address in this opinion whether RPX and Salesforce were in privity, and leave this argument for the Board to consider on remand.

AIT, 897 F.3d at 1344 n.1 (cited Opposition at 35 n.8)

During the conference call, the parties questioned whether arguments included in the Patent Owner Preliminary Response, but not expressly included in the Patent Owner Response, could be presented at the oral hearing. We informed the parties that arguments presented at the oral hearing should be within the scope of the arguments presented in the trial papers (i.e., Petition, Patent Owner Response, Petitioner’s Reply, and Patent Owner’s Sur-Reply). At the oral hearing, either party may bring to the panel’s attention that it believes a particular argument presented by the other party is not supported by the trial papers.

Board’s Oct. 2016 Hearing Order (Paper 75) at 3
(cited RPX Opening Brief at 58)

Even if we were to assume that the '491 patent would cover the USP that was the subject of the Servier/Hybrigenics collaboration, Patent Owner's contention that Servier is a real party in interest amounts to little more than an assertion that Servier had a preexisting, established relationship with Petitioner and is a beneficiary of the Petition. This is insufficient to establish that Servier should have been named as a real party in interest. *See Unified Patents, Inc. v. Realtime Adaptive Streaming, LLC*, IPR2018-00883 (PTAB Nov. 27, 2018 (Public Version)) (Paper 36, 14–15) (“We agree with Petitioner that Patent Owner is overextending the reasoning of *AIT* [*Applications in Internet Time*]. The RPI analysis set out in *AIT* and the common law require more than simply confining the analysis to determining whether a party benefits generally from the filing of this Petition and also has a relationship with the Petitioner.”). If the sole requirement for being named a real party in interest were that a party might benefit from the filing of a petition, as suggested by Patent Owner, it would ensnare third parties, such as suppliers and contract research organizations, with no connection to the Petition.

Hybrigenics v. Forma Therapeutics at 14-15 (cited Reply at 19)

[10] We further hold that the Board's decision was supported by substantial evidence. There was essentially no evidence before the Board that any of the D-Link defendants was a real party in interest in the inter partes review proceeding. While Wi-Fi has speculated that Broadcom may have been serving the interests of the D-Link defendants when it sought inter partes review, Broadcom clearly has an interest of its own in challenging the '215 patent, based on its manufacture of the assertedly infringing chips. Other than Wi-Fi's conjecture, there is no evidentiary support for Wi-Fi's theory that Broadcom was acting at the behest or on behalf of the D-Link defendants.

Wi-Fi Remand at 1340

(cited RPX Opening Brief with typo as 1341, Reply at 25)

06. Nor is there evidence supporting WesternGeco's contention that ION used PGS as a proxy. *Id.* The litigation history suggests that PGS filed its IPRs as a defensive measure in response to WesternGeco's lawsuit against PGS, rather than at ION's instruction. When ION tried to join the IPRs, PGS actively opposed the attempted joinder. Even when ION was joined, the PTO gave ION only spectator status. Moreover, ION did not disclose any prior art references to PGS in connection with the IPR proceedings, nor did it pay for PGS's IPRs. The Board reasonably found that ION did not control or direct the IPR petitions.

WesternGeco at 1320 (cited Reply at 25)

Patent Owner also suggests that because they are being sued for infringement of the '284 patent, Verizon and Samsung “have an interest in this proceeding.” Prelim. Resp. 47–48 (citing *AIT*, 897 F.3d at 1353); *see also AIT* at 1351 (stating that an RPI inquiry must look to “whether the non-party is a clear beneficiary” of the filing), 1353 (stating the Board must “probe the extent to which [the unnamed party] has an interest in and will benefit from [the petitioner’s] actions”). All entities have an interest in eliminating or mitigating the risks of a lawsuits pending against them; that does not make all defendants accused of infringing a patent later challenged in a petition for *inter partes* review a real party in interest to the petitioner. Notably, *AIT* did not end its inquiry with the fact that the petition at issue challenged a patent that was being asserted against the non-party. But the “interest” or “benefit” discussed in *AIT* is not so broad as to mean any interest whatsoever. *See Unified Patents, Inc. v. Realtime Adaptive Streaming, LLC*, IPR2018-00883, Paper 29, 14–15 (PTAB 2018) (“The RPI analysis set out in *AIT* and the common law require more than simply confining the analysis to determining whether a party benefits generally from the filing of this Petition and also has a relationship with the Petitioner.”). The question is whether Petitioner is *specifically representing the unnamed party’s interest*—“whether [the petitioner] can be said to be representing that interest after examining its relationship with [non-party].” *AIT*, 897 F.3d at 1351 (emphasis added). So although Samsung and Verizon may ultimately benefit from this Petition (depending on its outcome), we do not have evidence that Petitioner is representing any particular interest of Samsung or Verizon here.

Unified v. Barkan at 11-12 (cited Opening Brief at 52)

3. No Other *Taylor* Exception Applies

None of *Taylor*'s other privity categories apply. RPX and Salesforce have no agreement for either to be bound by the other's action(s) with respect to the AIT Patents (first *Taylor* category). See Ex. 1073, ¶¶ 12-16 (describing all agreements between RPX and Salesforce). RPX's interests were not represented by Salesforce (as a class action, trustee, guardian, or fiduciary) in the AIT-Salesforce Litigation or Salesforce CBMs (third *Taylor* category). *Taylor*, 894; see also § II.B.7 above (explaining "representation" requires valid *appointment*). Neither RPX nor Salesforce has had any right or opportunity to control the other's actions related to the AIT Patents (fourth *Taylor* category). See §§ II.B-D above.

No "special *statutory* scheme" forecloses successive litigations of patent validity by different parties (sixth *Taylor* category). § 315(b) is not such a scheme as it does not foreclose successive litigation by *anyone*, but only "by those who previously have had the opportunity to make such challenges in prior litigation." *WesternGeco*, 1319.

RPX Opening Brief (Paper 98) at 63

Likewise, privity may “have little to do with ‘control’ over” this case. *Id.* “Neither absolute control, nor actual control, is a requirement for finding of privity.” *ARRIS Int’l PLC v. Chanbond, LLC*, IPR2018-00570, Paper 25, 8 (PTAB July 20, 2018) (denying institution based on privity under §315(b)).

The Federal Circuit explained that privity is “closely related” to the RPI analysis and serves “related purposes,” including ensuring that “third parties who have sufficiently close relationships with IPR petitioners” are prevented from benefiting from “belated administrative attacks by related parties via §315(b).” *CAFC Op.* at 1350. Where two business entities, though separate, have “a legal relationship between them that is defined by mutual legal obligations and commonality of interest,” that can be “precisely . . . that which defines privity.” *Id.* at 1362 (Reyna, J., concurring).

AIT Opposition (Paper 100) at 5

Other statements from members of Congress reveal that the terms “real party in interest” and “privity” were included in § 315 to serve two related purposes: (1) to ensure that third parties who have sufficiently close relationships with IPR petitioners would be bound by the outcome of instituted IPRs under § 315(e), the related IPR estoppel provision; and (2) to safeguard patent owners from having to defend their patents against belated administrative attacks by related parties via § 315(b).

AIT, 897 F.3d at 1350