

17-1698, 17-1699, 17-1701

United States Court of Appeals
for the Federal Circuit

APPLICATIONS IN INTERNET TIME, LLC,
Appellant

v.

RPX CORPORATION,
Appellee

**Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Nos.
IPR2015-01750, IPR2015-01751 and IPR2015-01752**

NON-CONFIDENTIAL BRIEF OF APPELLEE RPX CORPORATION

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CERTIFICATE OF INTEREST

Counsel for Appellee RPX Corporation certifies the following:

1. The full name of every party represented by us is:

RPX Corporation

2. The name of the real party in interest represented by us is:

RPX Corporation

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the party represented by me are listed below.

None.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

WOLF, GREENFIELD & SACKS, P.C.: Randy J. Pritzker.

Date: July 19, 2017

/s/ Michael N. Rader

Michael N. Rader

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STATEMENT REGARDING CONFIDENTIAL MATERIAL OMITTED

Pursuant to Federal Circuit Rule 28(d)(1)(A), RPX Corporation submits this brief with certain confidential material on pages 10 and 57-59 omitted from the public filing. The omitted material relates to confidential business information concerning RPX Corporation and its non-public business operations. The omitted material is less than fifteen (15) words (excluding the words exempted by Fed. Cir. R. 28(d)(1)(A)) and was designated as confidential under the protective order in this case.

Dated: July 19, 2017

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STATEMENT OF RELATED CASES

No other appeal from these *inter partes* review proceedings was previously before this or any other appellate court. The Court's decision in this case may affect the following case in which Appellant Applications in Internet Time, LLC ("AIT") has asserted U.S. Patent Nos. 7,356,482 ("the '482 patent") and 8,484,111 ("the '111 patent"): *Applications in Internet Time, LLC v. Salesforce.com, Inc.*, No. 3:13-cv-00628 (D. Nev.). Counsel for RPX Corporation ("RPX") know of no other case pending in this or any other court that may affect or be affected by the Court's decision in this appeal.

INTRODUCTION

The Patent Trial and Appeal Board (“PTAB” or “Board”) correctly found all of the instituted claims of the ’482 and ’111 patents unpatentable.

This appeal turns on construction of a single, related limitation in each claim.¹ AIT argues that the software described in the prior art does not “automatically detect changes that affect an application” under AIT’s construction. AIT does not dispute that, under the plain and ordinary meaning, which the Board adopted, the asserted prior art references do disclose that limitation and render the instituted claims unpatentable. Thus, if the Court affirms the Board’s adoption of “plain and ordinary meaning,” the Court should likewise affirm the Board’s final written decisions.

AIT devotes the bulk of its brief to arguing that (1) RPX lacks standing to participate as an appellee before this Court and (2) RPX’s IPR petitions were untimely because Salesforce.com, Inc. (“Salesforce”), a third party that was time-barred, allegedly should have been named as a real-party-in-interest (RPI).

As to standing, it is AIT, the appellant, that must establish standing to invoke this Court’s jurisdiction. The standing requirement does not apply to RPX as the appellee.

¹ The relevant language differs in each independent claim, but AIT treats all of the language identically. *See infra* pp. 39-44.

As to timeliness (including AIT's RPI challenge), the overwhelming evidence supports the Board's determination that Salesforce is not an RPI. AIT's arguments to the contrary ignore the relevant evidence and, as the Board found, are based on "conjecture without evidentiary support." Appx1400-1401. Moreover, this Court need not reach the merits of AIT's RPI challenge, since the Board's conclusion is not reviewable by this Court under this Court's precedent. *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652, 658-59 (Fed. Cir. 2015) (holding that, under 35 U.S.C. § 314(d), the Federal Circuit lacks jurisdiction to review the Board's decisions concerning the Section 315(b) time bar, including determinations of the real-party-in-interest).

Accordingly, the Board's final written decisions should be affirmed.

STATEMENT OF JURISDICTION

RPX agrees that this Court has jurisdiction over an appeal from a final agency action of the United States Patent and Trademark Office (USPTO) under 28 U.S.C. § 1295(a)(4)(A) and 35 U.S.C. § 141(c). RPX disagrees, however, with AIT's jurisdictional statement in two critical respects.

A. Under Section 314(d), this Court Lacks Jurisdiction to Review the Board's Decision to Initiate an IPR Trial.

AIT contends that this Court has appellate jurisdiction over the Board's finding in all three IPRs that "RPX was not time-barred as a proxy of Salesforce." Opening Brief of Appellant ("Br.") 3. In *Achates*, however, this Court rejected a similar RPI argument and held that "35 U.S.C. § 314(d) prohibits this court from reviewing the Board's determination to initiate IPR proceedings based on its assessment of the time-bar of § 315(b), even if such assessment is reconsidered during the merits phase of proceedings and restated as part of the Board's final written decision." 803 F.3d at 658.² *Achates* is directly on point and forecloses AIT's argument. Unless this Court overturns *Achates en banc*, it remains good law. See *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) ("This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*").

² Internal quotations and citations are omitted unless otherwise noted.

B. RPX, as the Appellee, Is Not Required to Show Standing.

AIT also argues that RPX, the *appellee* here, “does not have standing in this appeal.” Br. 2. AIT contends that “[u]nder Supreme Court precedent, the same standing requirement also applies to a party seeking to appear as an appellee.” Br. 5. To the contrary, the “case or controversy” requirement of Article III applies only to the party invoking the Court’s jurisdiction—and is satisfied here because AIT has standing to appeal the decisions of the PTAB adverse to its interests.

1. The Standing Requirement of Article III Applies to Appellants, Not to Appellees.

As the party invoking this Court’s jurisdiction, AIT—not RPX—bears the burden to establish standing. The Supreme Court has explained that the burden to establish standing is on “[t]he party invoking federal jurisdiction.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). *See also Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1171-72 (Fed. Cir. 2017) (“[A]lthough Article III standing is not necessarily a requirement to appear before an administrative agency, *an appellant* must nevertheless supply the requisite proof of an injury in fact when it seeks review of an agency’s final action in a federal court”).³ Simply put, because RPX is not the party invoking this Court’s jurisdiction, RPX need not establish standing.

³ Emphasis added unless otherwise indicated.

An earlier Supreme Court decision, *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), is also instructive. In *ASARCO*, the underlying litigation was brought in state court, which has no Article III standing requirement. The Supreme Court found that even though the plaintiffs in that suit lacked Article III standing, the ensuing controversy over the propriety of the relief awarded to the plaintiffs by the state court provided federal subject matter jurisdiction because the defendants (i.e., the petitioners before the Supreme Court) did have Article III standing to invoke the authority of a federal court. 490 U.S. at 618. The Court explained:

Although respondents would not have had standing to commence suit in federal court based on the allegations in the complaint, they are not the party attempting to invoke the federal judicial power. Instead it is petitioners, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit. We determine that petitioners have standing to invoke the authority of a federal court and that this dispute now presents a justiciable case or controversy for resolution here.

Id.

Even assuming *arguendo* that RPX lacked Article III standing at the time it filed its IPR petitions, the circumstances would be directly analogous to *ASARCO*. Just as the plaintiffs in *ASARCO* were entitled to defend the decision they won outside the federal courts despite lacking Article III standing, RPX may defend the Board's decision, regardless of whether RPX has Article III standing. *Id.*⁴

⁴ AIT cited *ASARCO* (Br. 9) but failed to address its facts, reasoning or holding.

2. Congress Has Answered Any Prudential Standing Concerns.

After a final written decision by the Board, the statutory scheme devised by Congress gives each of the parties to the IPR—here, RPX and AIT—a statutory right to be a party to the appeal of that decision: “*Any party* to the *inter partes* review shall have the right to be a party to the appeal.” 35 U.S.C. § 319; *see also* 28 U.S.C § 1295(a)(4)(A) (giving the Federal Circuit jurisdiction to hear appeals from the PTAB “at the instance of a party who exercised that party’s right to participate in the applicable proceeding before or appeal to the Board”). The IPR statute thus establishes that RPX is the proper appellee in this case, and that decision by Congress cannot be overridden by prudential or policy concerns. *E.g.*, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (“Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”).⁵

⁵ AIT’s improper conditional motion that this Court should decline to hear from RPX (*see* Br. 10) contradicts the fundamental values underlying the adversary system. To ensure sound judgments based on complete understanding of a case, federal courts routinely accept briefing and argument from parties lacking both prudential standing and Article III standing—including attorneys, independent of any litigant, who are appointed as *amicus curiae* to defend lower-court judgments. *See, e.g.*, *Welch v. United States*, 136 S.Ct. 1257, 1263 (2016). Here, RPX, the prevailing party below, is in the best position to advocate before this Court for affirmance of the Board’s decision.

3. AIT's Cited Authority Is Inapposite.

AIT first cites *Phigenix*, but as AIT admitted, *Phigenix* concluded that the *appellant*—not the appellee—must prove standing. *Phigenix*, 845 F.3d at 1171-72 (“As *the party seeking judicial review*, *Phigenix* bears the burden of establishing that it has standing”; “*an appellant* must ... supply the requisite proof of an injury in fact when it seeks review of an agency’s final action in a federal court”).

AIT also cites *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) for the proposition that, even though *Phigenix* concerns an appellant, the Supreme Court has held that the appellee must also demonstrate standing—but AIT misunderstands *Arizonans*. AIT quotes a long passage from *Arizonans*, including the statement that “[s]tanding to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome.” Br. 8. The phrase “defend on appeal,” however, referred *not* to the idea that those litigants were appellees. Rather, they were third party intervenors who sought to step in as *appellants* (because the original defendants had declined to appeal) to challenge a ruling that the state statute was unconstitutional. 520 U.S. at 56-67. The phrase “defend on appeal” referred to the fact that, as *appellants*, the putative litigants hoped to “defend” the constitutionality of the state statute. AIT appears to have misread the phrase “defend on appeal” as suggesting that the litigants in question were appellees.

Finally, AIT misapplies *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1985). In *Jaimes*, the Sixth Circuit considered whether the plaintiffs had standing not in the appeal proceedings, but rather when they originally filed suit in federal district court to assert claims related to discriminatory housing practices. The court noted that to establish Article III standing, “*the named plaintiffs* must be shown to have ‘standing’.” *Id.* at 1092. The court ultimately held that the plaintiffs had, in the district court below, enjoyed Article III standing to assert some (but not all) of their claims. *Id.* at 1101. Unlike the plaintiffs in *Jaimes*, who needed but lacked Article III standing to invoke federal jurisdiction over certain claims in the first instance in federal district court, RPX indisputably did not need Article III standing to file an IPR petition before the Board. And only AIT, as appellant, needs standing to invoke this Court’s jurisdiction on appeal.⁶

⁶ Although RPX is not required to establish standing here as the appellee, RPX rejects any suggestion that it would be unable to satisfy Article III standing on the present record or otherwise.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are presented for this Court's review:

1. Whether the Board correctly ruled that claims 13-18 of the '111 patent are unpatentable.
2. Whether the Board correctly ruled that claims 1, 3-8, and 10-40 of the '482 patent are unpatentable.
3. Whether, under 35 U.S.C. § 314(d) and *Achates*, this Court lacks jurisdiction to review the Board's determination to initiate an *inter partes* review based on its assessment of the time bar set forth in 35 U.S.C. § 315(b).
4. Whether substantial evidence supports the Board's determination that Salesforce was not a real-party-in-interest.

STATEMENT OF THE CASE

A. The Parties

RPX has multiple lines of business related to mitigating patent risk.

Appx1249-1252. RPX's core line of business is acquiring patent rights to benefit its client base. Appx1225 (¶8). Operating companies that join RPX's network and pay an annual subscription fee gain a license to the patents in RPX's portfolio, allowing those member companies to reduce the risk of being sued for patent infringement by non-practicing entities. Appx1251. Despite owning many patents, RPX has never filed a suit for patent infringement. *Id.*

In a separate and independent line of business, RPX files and prosecutes IPRs against patents of questionable validity. RPX views IPRs as an efficient way to address meritless patent assertions that undermine confidence in the general patent market and to [] industry-wide [] of [] of [] [] patents. Appx1224-1125 (¶¶7-8). Challenging patents of questionable validity with IPRs, however, is not part of RPX's core business. Appx1225 (¶8). RPX files IPRs if, and only if, RPX decides that it is in RPX's own interests to do so. Appx1224-1227 (¶¶7-10, 13).

AIT, the owner of the '111 and '482 patents, is a non-practicing entity that describes itself as a “consulting company with patented technology that enables individuals to develop and deploy business applications through a meta-data driven application platform without being dependent on complex programming” and “has three patents and one pending application, all related by continuation.” Appx017.

B. The '111 and '482 Patents

1. The Specifications and Claims

The '111 and '482 patents are directed to computer software application development, and claim a system with a multi-layered architecture for generating a software application and/or its user interface (UI). Appx704 (33:19-34:8). The shared specifications⁷ describe “the integrated management of information affected by regulatory changes, such as changes in environmental, health and safety laws, and non-regulatory changes.” Appx688 (1:21-24).

According to the specifications, the alleged invention “monitors and evaluates the relevance of information on regulatory and non-regulatory changes that affect operations of the business and/or information management requirements.” Appx691 (8:39-42).

⁷ Because both patents have “substantially identical specifications and drawings,” Br. 12, all specification citations are to the '111 patent unless otherwise noted. *See* Appx673-704 and Appx705-737 for full copies of the '111 and '482 patents, respectively.

The specifications describe embodiments related to applications dealing with environmental, health, and safety regulations. Appx673 (Abstract); Appx688-693 (1:1-11:65); Appx698-702 (22:1-29:3). Some embodiments describe using one or more “intelligent agents” or “change agents” that “cruise the Web” or “continually search on the Web” to identify and report relevant regulatory and non-regulatory changes found on the Web that may affect a user’s business. *See* Appx692 (9:38-42, 10:45-52); Appx695 (16:20-35).

The claims of the ’111 and ’482 patents, however, are not limited to regulatory embodiments, let alone “change agents” or “Web cruising.” The breadth of the claims—and their detachment from the specifications—is underscored by AIT’s assertion of the patents against Salesforce, a company that AIT does not allege in its complaint to offer products or services concerning streamlining regulatory compliance, let alone in the specific ways described in the specifications. Appx976-980 (¶¶12-26).

Claims 13-18 of the ’111 patent are directed to a system with four server portions which correspond to well-known components of the classic prior art “model-view-controller” (MVC) architecture, discussed below. Appx750 (¶20). The other limitations merely recite conventional features of a client-server system. Appx749-750 (¶19). No limitations tie the claims to any particular field of use, let alone regulatory compliance.

The instituted '482 patent claims are directed to systems and methods for dynamically generating an application and/or its UI. Appx736 (33:34, 33:55-56, 34:54); Appx737 (35:4-5). Claim 1, for example, recites a system for providing a dynamically-generated application and includes four layers (first through third layers plus a change management layer) corresponding to components of the classic MVC architecture. Appx750 (¶20). Again, the other limitations recite conventional features of a client-server system, Appx749-750 (¶19), and the claims are not tied to regulatory compliance or any other particular field of use.

2. The Patent Family and Prosecution Histories

The '111 patent is a continuation of U.S. Patent Application No. 12/098,154 (“the parent '154 application”) (abandoned), which was a continuation of the '482 patent, which is a continuation of U.S. Patent No. 6,341,287 (“the '287 patent”). The '287 patent has a single independent claim, which is much narrower than the claims of the '111 and '482 patents, and is closely tied to environmental, health, or safety regulations as described in the specification. Appx956-957 (32:9-34:8). Each of the three continuations was originally filed with an independent claim matching the issued claim from the '287 patent, but was amended to replace that claim with much broader claims with no mention of regulatory compliance. One such broader claim, claim 14 of the parent '154 application, was rejected with the following “Examiner Note” highlighting its overbreadth:

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.

Appx965-966.

Rather than attempt a response, the applicant abandoned the parent ’154 application and filed a continuation, which issued nearly three years later as the ’111 patent. Claim 13 in the ’111 patent is nearly identical to claim 14 that was rejected as overbroad in the parent ’154 application. *See* Appx961-963. The ’111 patent’s prosecution history includes no examiner’s statement of reasons for allowance.

The ’482 patent is a continuation of the ’287 patent. As noted above, the ’287 patent issued with a single claim that is tied to regulatory compliance as described in the specification. Appx956-957 (32:9-34:8). The ’482 patent was filed with far broader claims that do not mention regulatory compliance. *See, e.g.*, Appx735-736 (32:9-34:8). After multiple rejections, the ’482 patent’s claims were allowed based on the “change management layer” that had been added by amendment. Appx2176.

C. The Prior Art

Different software applications often have some components and functionality that differ, but others (e.g., those in the UI) that are similar. *See* Appx744-747 (¶¶12-17). For example, any software application with a UI that enables user interaction via a keyboard and mouse must have components that enable the application to process and interpret user input via those devices.

More than 25 years ago, the model-view-controller (MVC) architecture was developed to facilitate the design of software applications in a way that leverages the commonality among UIs and other aspects of software applications. Appx745 (¶13). MVC separates the pieces of software that create an application into distinct compartmentalized portions, in a way that facilitates code sharing and reuse across applications. Appx745 (¶13); Appx894. A “model” layer of code is application-specific, i.e., unique to a particular application. Appx745 (¶13); Appx895. A “view” layer contains generic UI elements (e.g., buttons, input fields, etc.) that can be shared across applications. Appx745 (¶13); Appx895. Thus, generic UI elements need not be coded separately for every application, and the same model can be implemented with multiple different views to create different presentation styles for the same application. Appx745 (¶13); Appx894-895. A “controller” layer integrates a model and a view to create a specific UI presentation (view) of a particular application (model). Appx745 (¶13); Appx895.

In addition to those three layers, another layer monitors for changes affecting the application (such as input that changes the application's data), and those changes result in a change notification that causes modification of the model and/or the view. Appx746 (¶15); Appx896.

The MVC framework was well-known to those of ordinary skill in the art by the '111 and '482 patents' priority date, and although not explicitly called out, is used in all three primary prior art references: (1) U.S. Patent No. 6,249,291 ("Popp"), Appx814-854; (2) Srdjan Kovacevic, *Flexible, Dynamic User Interfaces for Web-Delivered Training*, in AVI '96 Proceedings of the Workshop on Advanced Visual Interfaces (1996) ("Kovacevic"), Appx855-865; and (3) U.S. Patent No. 5,806,071 ("Balderrama"), Appx866-892. Appx747 (¶17). These prior art references, the scope and content of which are generally not in dispute,⁸ are briefly summarized below for reference.

1. Popp

Popp, filed on September 22, 1995, discloses a multi-layered development architecture for web page applications that incorporates change management. For example, Popp's system can be used to provide a dynamic UI for an internal application that can respond to user input. Appx840 (8:24-26).

⁸ Their prior art status vis à vis the '111 and '482 patents likewise is not in dispute.

Popp's UI is in the form of a Web page that can present corporate data from a database and can receive user input to modify information in the database.

Appx847 (21:7-11). The system maintains separation between the application's data and presentation by defining the presentation via an object tree built from shared components, and by utilizing intermediary objects (context objects) for linking and pushing data from the database into the Web page presentation. *Id.* (21:24-35).

2. Kovacevic

Kovacevic, published in 1996, discloses a system called MUSE (Model-based User interface for SLOOP Environment) for generating UIs for tutoring applications. Appx855 ("One of the critical parts of a tutoring system is its user interface (UI) We have developed a system, MUSE, that applies a model-based technology to address the above requirements."). The MUSE framework separates the application model from the UI presentation details, as in the MVC architecture described above. Appx858. It also incorporates change management for updating the UI when changes affecting the application occur. Appx861.

3. Balderrama

Balderrama, filed on August 21, 1995, discloses a system for generating an automated ordering interface for a sales outlet, using both a template presentation that is generic to a chain of sales outlets and a database of items for sale at a particular sales outlet. Appx882 (1:15-23) (“[T]his invention relates to a new process and system that can combine a complex multi-media template presentation created at, for example, corporate headquarters of a chain of sales outlets, along with information from a database containing items intended for sale at any sales outlet of the chain, and automatically configure a tailor-made presentation for use on a customer-interactive device at the outlet...”), (2:11-16) (“It is a primary object of this invention to provide a process and system to, using both a template presentation created at one location and a database containing items intended for sale at a sales outlet, configure with a computer, electronic information for presentation at an electronic device with which an item (from the outlet), may be ordered.”). The system also includes change management. *Id.* (2:16-21) (“It is also an object of this invention to ... automatically handle modifications to the database or updates to the template presentation, so that they can be included in the presentation at the interactive electronic device on a timely basis.”).

D. Proceedings Before the Board

RPX petitioned for *inter partes* review of claims 13-18 of the '111 patent and claims 1-59 of the '482 patent on August 17, 2015. Appx362. Across three petitions, IPR2015-01750 ('111 patent), IPR2015-01751 ('482 patent claims 1, 7-21, 27-41, 47-59), and IPR2015-01752 ('482 patent claims 2-6, 22-26, 42-46), RPX identified several grounds of invalidity. Appx492; Appx499; Appx542; Appx550-551; Appx608; Appx615-616. RPX submitted testimony from Dr. Mark Crovella, Professor and Chair of the Department of Computer Science at Boston University. Appx740; Appx1958; Appx2180. Dr. Crovella testified that the multi-layered architecture generating an application UI claimed in the '111 and '482 patents was well-known in the prior art, and that the claims were anticipated by and/or obvious in view of the prior art. *See, e.g.*, Appx744-747 (¶¶12-17); Appx753-754 (¶¶26-27); Appx767 (¶¶46-47); Appx779-781 (¶¶64-66); Appx2196-2197 (¶¶29-30); Appx2227 (¶¶99-100); Appx2245-2247 (¶¶145-147); Appx2276 (¶¶211-212); Appx2285 (¶231); Appx2289-2290 (¶245); Appx2294-2295 (¶¶260-262).

On October 4, 2015, AIT moved for discovery related to its contention that Salesforce is an unnamed RPI and therefore that RPX's *inter partes* review petitions were time-barred under 35 U.S.C. § 315(b) because AIT had sued Salesforce more than a year earlier. Appx017; Appx020-021; Appx027.

In response, RPX explained that Salesforce was entirely uninvolved in the IPRs and offered to produce any and all evidence relating to control, ability to control, direction and funding of the IPRs by Salesforce; but explained that no such evidence existed. Appx1054-1055.

The Board granted AIT's motion in part, and ordered RPX to produce discovery concerning (1) any agreements between RPX and Salesforce; (2) communications between RPX and Salesforce, including any relating to these IPRs, the underlying patents and/or the litigation involving them; (3) any funds RPX received to pay for the IPRs; and (4) the reasons why RPX filed the IPRs. Appx1069-1070; Appx970-972. RPX made a fulsome production, including a 21-page declaration from William W. Chuang, RPX's Vice President of Client Relations. Appx1222-1243. Mr. Chuang explained RPX's reasons for filing the AIT IPR petitions—reasons that had nothing to do with Salesforce specifically. Appx1240-1241 (¶47); *see* Appx092; Appx097-098. Mr. Chuang further testified:

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.

Appx1229 (¶20).

The evidence produced by RPX confirms that RPX did not have any contractual obligation to file the IPRs or any unwritten, implicit or covert understanding with Salesforce that it would do so. Appx1239 (¶45).

AIT filed a Preliminary Patent Owner Response (“PPOR”) on November 27, 2015 for IPR2015-01750 and on November 30, 2015 for IPR2015-01751 and IPR2015-01752. Appx363; Appx371; Appx379. In each of its PPORs, AIT advanced two primary arguments.

First, AIT argued that RPX’s petitions should be denied institution under 35 U.S.C. §§ 312(a) and 315(b) because RPX failed to name Salesforce, which AIT alleged was a time-barred RPI. AIT’s PPORs, however, ignored most of the evidence that RPX had produced on RPI, and advanced arguments that were not only unsupported by any evidence of record, but also directly refuted by the evidence that RPX had produced. Further, as discussed below, AIT misused RPX’s confidential information by showing it to unauthorized persons (including the head of a large non-practicing entity that RPX frequently confronts), and was sanctioned for such unauthorized disclosure.

Second, on the merits, AIT argued that the prior art failed to disclose the claimed “change management layer,” “fourth portion,” or “automatically detecting changes” based on AIT’s narrow construction of these terms. Appx1105-1113; Appx1149-1156; Appx1192-1198.

On December 14, 2015, RPX filed a Reply to AIT's PPOR on the RPI issue. Appx364; Appx372; Appx380. RPX explained that the un rebutted evidence shows that RPX filed the IPRs to pursue its own interests, and not at Salesforce's behest, and that Salesforce did not fund the IPRs, nor have any control over, opportunity to control, or involvement in them. Appx099. RPX also noted AIT's disregard of the evidence produced by RPX. Appx092-093.

On December 23, 2015, AIT filed a Sur-Reply on the RPI issue. Appx1366; Appx1372. AIT largely repeated its arguments from its PPORs, ignored the evidence marshalled in RPX's Reply, and attempted to refute the sworn testimony of Mr. Chuang with pure attorney argument. Appx1367-1368.

On February 25, 2016, the Board issued its Decisions on Institution, finding a reasonable likelihood that claims 13-18 of the '111 patent and claims 1, 3-8, and 10-40 of the '482 patent are unpatentable in light of each of the grounds advanced by RPX. The Board declined to institute on '482 patent means-plus-function claims 2, 9, 41, 42, and 47-59 because it was "unable to construe the means-plus-function limitations" of claims 2, 9, 41, 42, and 47-59 due to the specification's failure to "disclose the algorithm for performing the function." Appx1445-1447; Appx1491-1493. The Board also addressed AIT's RPI argument, finding that the evidence did not support AIT's assertion that RPX was a proxy for Salesforce. Appx1395-1403; Appx1436-1444; Appx 1482-1490.

Also on February 25, 2016, the Board issued its Case Management and Scheduling Order which stated that “any arguments for patentability not raised in the [Patent Owner’s] response will be deemed waived.” Appx1525; Appx1529.

Prior to institution, on December 21, 2015, RPX moved for sanctions due to AIT’s repeated breaches of its agreement to comply with the default protective order (PO), which resulted in unauthorized disclosure of RPX confidential information. Appx 1347; Appx1350; Appx1365. In its opposition, AIT did not dispute the disclosure of RPX confidential information to unauthorized individuals, but argued instead that sanctions were unnecessary, and attempted to shift blame to RPX. Appx1376-1377. On May 6, 2016, the Board granted RPX’s motion for sanctions in part. Appx367; Appx1547. The Board found that AIT’s conduct was a breach of the PO and that RPX had been harmed, including “to the extent that it had to expend time and money enforcing clear terms of the Protective Order that AIT should have been following without RPX’s efforts.” Appx1535-1539. The Board determined that, among other sanctions, an award of attorneys’ fees might be appropriate. Appx1546. After additional briefing by RPX and AIT, the Board granted RPX’s motion for attorneys’ fees, which related to work subsequent to AIT’s November 30, 2015 breach and related solely to addressing AIT’s breaches of the protective order. The Board awarded RPX the full amount of its requested fees. Appx1638-1641.

Subsequent to institution, on May 20, 2016, AIT filed a single identical Patent Owner Response (“POR”) in each of the three IPR proceedings, Appx1550, Appx1585, along with supporting declarations from its experts Dr. H. V. Jagadish (Appx1586) and James Flynn (Appx1615).

AIT’s POR argued that the prior art fails to disclose limitations that AIT alleged to be similar in both patents, namely “automatically detect changes that affect the information in the first portion of the server or the information in the second portion of the server” (’111 patent claim 13) and “automatically detect changes that affect an application” (’482 patent). Appx1553-1556; Appx1574; Appx1577; Appx1580. AIT proposed a narrow construction of the simple terms “changes” and “affects,” arguing that “changes” should be limited to changes that “arise from changes external to the application”—and that the “changes” do not simply “affect” an application, but rather “impact how the application program should operate.” Appx1565-1572. AIT offered no other arguments or evidence to rebut RPX’s showing of unpatentability of the instituted claims. In its POR, AIT also offered a seven-sentence assertion that RPX is a proxy for Salesforce. AIT did not, however, offer any substantive evidence or argument on the RPI issue in its POR. Instead, AIT attempted to incorporate by reference the arguments made previously in its PPORs, which the Board had previously rejected in its institution decisions. Appx1560.

On August 12, 2016, RPX filed a separate Reply for each IPR proceeding, along with a Reply Declaration of Dr. Crovella. Appx368; Appx376; Appx384; Appx1957. RPX noted that AIT's sole challenge to the instituted grounds was based on a claim construction that improperly limits the meaning of the straightforward claim terms "changes" and "affects," contradicts AIT's broader claim construction in litigation, and attempts to import limitations into straightforward claim language. Appx1647-1649; Appx1680-1681; Appx1712-13; Appx1957-1968. RPX explained that the Board's institution decisions properly applied the broadest reasonable interpretation (BRI) of these claim terms. Appx1657; Appx1688; Appx1720. RPX and Dr. Crovella also explained that the prior art meets (and thus renders the instituted claims unpatentable under) even AIT's narrow claim construction. Appx1659; Appx1691; Appx1723; Appx1961-1962 (¶7). Finally, RPX noted that AIT provided the Board no reason to reconsider its decision on RPI. Appx1672; Appx1704; Appx1736.

On October 26, 2016, the Board granted the parties' requests for an oral hearing, informed the parties that, *inter alia*, RPX's confidential information should not be discussed during the hearing, and explained 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)." Appx1970-1971.

After the oral hearing, the Board issued its final written decisions on December 28, 2016. As to the core claim construction dispute, which applied to all three final written decisions, the Board concluded that the disputed terms should get their plain and ordinary meaning. The Board rejected AIT's construction, and, with respect to "changes," agreed with RPX that the specifications of the '111 and '482 patents nowhere refer to changes "that arise from changes external to the application"; that the specifications do not limit "changes" in any way; and that there is no disclaimer in the '111 or '482 patents that limits the meaning of "changes" in the manner AIT argued. Appx2102-2103; Appx2141-2143.

The Board then determined that each of the primary references meets the plain and ordinary meaning of the disputed limitations, and that RPX demonstrated by a preponderance of the evidence that the claims were unpatentable under each instituted ground. Appx2105-2125; Appx2144-2173.

Regarding RPI, the Board noted that "[t]o the extent [AIT] is attempting to incorporate arguments made in the Preliminary Response into the Patent Owner Response, such incorporation is improper under our rules. *See* 37 C.F.R. § 42.6(a)(3) ('Arguments must not be incorporated by reference from one document into another document.')." Appx2096.

The Board also concluded that AIT “neither presented any new evidence into the record, beyond the evidence we considered previously in rendering our Institution Decisions, nor cited any legal authority to support its positions set forth above.” *Id.* Based on the complete record before it, the Board was not persuaded that Salesforce should have been identified as an RPI, and saw no reason to change its previous determination that RPX timely and correctly filed all three IPR petitions without naming Salesforce as an RPI. Appx2096-2097.

This appeal followed.

SUMMARY OF THE ARGUMENT

AIT does not contest that, if the disputed claim limitations receive their plain and ordinary meaning per the Board, the instituted claims are unpatentable. Thus, if the Court affirms the Board’s claim construction analysis, it should also affirm the Board’s final written decisions, leading to cancellation of the instituted claims.

AIT treats the disputed limitations together: “automatically detect changes that affect the information in the first portion of the server or the information in the second portion of the server” (’111 patent claim 13) and “automatically detecting changes that affect” an application (’482 patent claims 1, 21). The parties’ dispute largely boils down to the meaning of the simple words “changes” and “affects.” AIT did not argue below, and does not argue here, that any other claim limitations are lacking in the prior art of record. The Board agreed with RPX that the words “changes” and “affects”—and the simple phrases within which they appear—are straightforward, include no specialized terms of art (as AIT and its expert conceded), are not limited by any disclaimer in the specifications or file histories, and should thus be afforded their plain and ordinary meaning under the BRI.

The Board correctly rejected AIT’s argument that the claimed “changes” must “arise from changes *external* to the application program.” Indeed, the specifications describe intelligent agents (i.e., the software that identifies “changes”) that pursue “*internal*” as well as “external Web activities.”

There is some ambiguity as to whether AIT now urges the same construction it proposed below, or a different construction in which the phrase “changes that arise from” is omitted—as both versions appear in AIT’s appeal brief. The latter would be a yet-narrower construction, as it would require the “changes” recited in the claims to be “external to the application program” rather than covering changes that “*arise from* changes external to the application program.”

In proceedings before the Board, AIT likewise used both formulations at various times, but ultimately clarified at the oral hearing that its construction *does* include “changes that arise from,” and that any formulation lacking the phrase “changes that arise from” was simply “shorthand.” If AIT deviates from that confirmation now, and attempts to advance a narrower construction on appeal, this Court should find the argument waived.

In any event, regardless of AIT’s proposal, the Board reached the correct conclusion in applying the plain and ordinary meaning for the reasons noted above and discussed in more detail below. Indeed, under the narrower *Phillips* standard in district court, AIT itself proposed a construction considerably broader than either version of its construction in these proceedings (i.e., “*any type of change* that may have an impact on the user’s business”). *A fortiori*, under the BRI standard, “plain and ordinary meaning” is appropriate. In any event, the claims would still be unpatentable even under either version of AIT’s construction.

AIT devotes the remainder of its brief to re-litigating the Board's conclusion that Salesforce was not an unnamed RPI, and thus RPX did not run afoul of the time bar set forth in 35 U.S.C. § 315(b). Under *Achates*, the Board's decision on that issue is not reviewable. 803 F.3d at 658. Moreover, AIT waived its RPI argument by failing to meaningfully present that argument in its POR. In any event, the Board's conclusion was based on overwhelming, unrebutted evidence produced by RPX showing that Salesforce was not, in fact, an RPI or otherwise in privity with RPX.

The Board's final written decisions should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the Board's claim constructions *de novo* and its underlying factual determinations involving extrinsic evidence for substantial evidence. *Teva Pharms. U.S.A., Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 841-42 (2015).

The Board's factual findings (for example, on the RPI issue) are entitled to deference and should therefore be upheld if supported by substantial evidence. *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). Substantial evidence is more than a "mere scintilla of evidence" but something less than the "weight of the evidence." *In re Kotzab*, 217 F.3d 1365, 1369 (Fed. Cir. 2000). A finding is supported by substantial evidence if a reasonable mind might accept the evidence as adequate support for the finding. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002).

II. THE BOARD CORRECTLY FOUND THAT CLAIMS 13-18 OF THE '111 PATENT AND CLAIMS 1, 3-8, AND 10-40 OF THE '482 PATENT ARE UNPATENTABLE.

A. The Board Correctly Determined that Plain and Ordinary Meaning Applies to Each Disputed Claim Term.

“In construing the claims, the Board applies the broadest reasonable interpretation consistent with the specification.” *Cisco Sys., Inc. v. Cirrex Sys., LLC*, 856 F.3d 997, 1005 (Fed. Cir. 2017). In other words, “[u]nder a broadest reasonable interpretation, words of the claim must be given their plain meaning, unless such meaning is inconsistent with the specification and prosecution history.” *Trivascular, Inc. v. Samuels*, 812 F.3d 1056, 1062 (Fed. Cir. 2016). As AIT concedes, “this Court usually must defer to the Board on ‘reasonableness’ of its claim construction.” Br. 19.

AIT appeals the Board’s construction of three terms from the independent claims: “a change management layer for automatically detecting changes that affect an application” (’482 patent claim 1); “automatically detecting changes that affect a particular application” (’482 patent claim 21); and “the fourth portion of the server being configured to automatically detect changes that affect the information in the first portion of the server or the information in the second portion of the server” (’111 patent claim 13). The Board found that the foregoing claim language is plain on its face, includes no terms of art (as AIT and its expert conceded) and thus requires no formal construction. Appx2102-2103.

As discussed below, the Board further found that the plain and ordinary meaning of the disputed terms is consistent with the specifications. Appx2103. As a result, the Board rejected AIT's narrower constructions of the disputed claim terms. This Court should affirm. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) ("In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.").

AIT does not dispute that the instituted claims are unpatentable over the prior art under the Board's constructions.

1. "changes"

RPX's expert Dr. Crovella explained that "changes" is not and was not a term of art in the patents' time frame, and that the BRI of "changes," according to a person of ordinary skill in the art (POSA), is thus its plain and ordinary meaning. Appx1959-1960 (¶4). While AIT points to several portions of the specifications in its brief to support its argument that the claimed changes should be limited to those external to the application, Br. 36-39, the Board recognized (and AIT ignores here) that the specifications also describe an embodiment in which intelligent agents pursue "internal" as well as "external Web activities." Appx2141; Appx697 (19:66-67). That embodiment directly contradicts AIT's construction.

2. “affect an application”

The claimed changes must “affect an application” (’482 patent, claim 1) or a “particular application” (’482 patent, claim 21), or “affect the information in the first portion of the server or the information in the second portion of the server” (’111 patent, claim 13). Dr. Crovella explained that a POSA would have understood that changes can affect an application without impacting how the application “should” operate (as AIT proposes), and that those types of changes are also included in the plain and ordinary meaning of “changes that affect an application.” For example, a change to the processing resources available to an application could affect the application (e.g., by causing it to run faster or slower) without impacting how the application “should” operate (e.g., without altering any of the steps that the application attempts to perform). Appx1960-1961 (¶5). The Board credited Dr. Crovella’s testimony. Appx2141-2142.

Further, the Board rightly observed that the patents describe changes “throughout as changes that may affect operation of a user’s business, rather than as changes that affect operation of the application program.” Appx2141. Many changes to a business could “affect an application” that it uses without impacting how the application “should operate.” For example, to piggy-back on Dr. Crovella’s example, the business may purchase new hardware which would run an application more quickly but otherwise identically.

B. RPX’s Expert Applied the Correct Claim Construction Standard.

AIT criticizes Dr. Crovella (and, in turn, the Board for considering his testimony) for describing the relevant claim construction standard as the broadest reasonable interpretation “consistent with the specification” rather than “in light of the specification.” Br. 32-33.

The two articulations are equivalent. While 37 C.F.R. § 42.100(b) uses the latter phrase, this Court has repeatedly used the former phrase in appeals from IPR proceedings. *E.g.*, *Genzyme Therapeutic Prods. Ltd. P’ship v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1370 (Fed. Cir. 2016) (“In an *inter partes* review, the Board accords unexpired claims their ***broadest reasonable interpretation consistent with the specification.***”); *Trivascular*, 812 F.3d at 1062 (“Under a broadest reasonable interpretation, words of the claim must be given their plain meaning, ***unless such meaning is inconsistent with the specification*** and prosecution history.”).

The phrases “consistent with the specification” and “in light of the specification” were both historically common ways of describing the USPTO’s claim construction standard. *See, e.g.*, *In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984) (“We affirm the board’s decision to give claims their broadest reasonable interpretation, consistent with the specification, in reexamination proceedings.”); *In re Crish*, 393 F.3d 1253, 1257 (Fed. Cir. 2004) (“[T]he PTO gives claims their broadest reasonable meaning in light of the specification.”).

AIT cites no legislative or judicial authority that the adoption of one phrase, rather than the other, in the Code of Federal Regulations was intended to work a change to the USPTO's practices. Indeed, as noted above, in IPR proceedings governed by 37 C.F.R. § 42.100(b), which uses the former phrase, this Court itself has summarized the appropriate standard using the latter phrase. They are plainly interchangeable. Accordingly, both Dr. Crovella and the Board applied the correct claim construction standard.⁹

In any event, AIT waived this argument by not including it in its Patent Owner Response. *See* Appx1529 (“The patent owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.”)); *In re Nuvasive, Inc.*, 842 F.3d 1376, 1380 (Fed. Cir. 2016) (“[A] party waives an argument that it failed to present to the [PTAB] because it deprives the court of the benefit of the [PTAB]’s informed judgment.”).¹⁰

⁹ AIT’s assertion that Dr. Crovella’s declarations were the *only* “evidence of record” considered by the Board in its claim construction analysis is incorrect. The Board also reviewed the intrinsic evidence and considered—and rejected—the testimony of AIT’s experts. *See, e.g.*, Appx2100-2101; Appx2137-2138.

¹⁰ While AIT attempted to raise a variation of this argument for the first time at the oral hearing, it did so in violation of the Board’s earlier order 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).” Appx1971.

C. The Board Correctly Rejected AIT's Narrow Claim Construction.

1. If AIT Is Attempting to Change Its Construction on Appeal, the New Construction Is Waived.

As noted above, there is ambiguity in AIT's claim construction position on appeal. Below, AIT argued that "changes" means "changes that *arise from* changes external to the application."

In a proper construction, the "change management layer" and the "fourth portion" "detect changes which impact how the application program should operate". The associated "changes" "*arise from* changes external to the application program." Two experts representing both academia and industry agree here on that construction, and the Board should adopt these experts' views.

Appx1555; *see, e.g.*, Appx1570 ("The associated 'changes' '*arise from* changes external to the application program.'"), Appx1572 ("The detected changes clearly '*arise from* changes external to the application.'").

AIT confirmed this construction at the oral hearing. Appx2041 (67:21-24) ("In the context of the '482 patent, these changes detected by the change management layer *arise from* changes external to the application."); Appx2042 (68:1-4) ("So it is not just any change that is external from the -- that *arise from* changes external to the application, but it is detecting changes which impact how the application program should operate."). AIT clarified for the Board that any variation of this construction expressed by AIT without "arise from" was merely a "shorthand" expression of AIT's construction. Appx2040-2042 (66:13-68:4).

Notwithstanding AIT's clarification, the Board recited AIT's construction both with and without the words "changes that arise from" in its final written decisions, ultimately holding that plain and ordinary meaning should prevail. *E.g.*, Appx2138 ("[AIT]'s construction adds an additional requirement to the express language of the claim that any detected changes are 'external to the application program.'"); Appx2142 ("[AIT] further argues that '[t]he meaning of 'automatically detecting' should correspond to that of the 'change management [layer]' and the 'changes' therein should likewise 'arise from changes external to the application.'").

On appeal, AIT refers to its construction both with and without the "changes that arise from" language. *Compare* Br. 40-41 (including "changes that arise from") *with* Br. 36, 43 (omitting "changes that arise from"). Notably, when applying its construction to the prior art, AIT *omits* the phrase "changes that arise from." If AIT intended that approach to be anything other than a "shorthand" (as AIT explained to the Board at the oral hearing), the new construction is waived because AIT advanced a different one below.¹¹ *See, e.g., Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1346 (Fed. Cir. 2001) (waiver "preclude[s] a party from adopting a new claim construction position on appeal");

¹¹ AIT would have an obvious motivation for dropping "changes that arise from" from its construction: its own expert conceded that the automatically detected changes in the prior art "arise from changes external to the application program." *See* Appx1805 (66:5-7); Appx1850 (111:7-10); Appx1871-1873 (132:15-133:7, 134:22-25); Appx1875 (136:5-9).

Conoco, Inc. v. Energy & Env'tl. Int'l, L.C., 460 F.3d 1349, 1358-59 (Fed. Cir. 2006) (“[A] party may not introduce new claim construction arguments on appeal or alter the scope of the claim construction positions it took below.”).

2. AIT’s Construction Improperly Narrows the Meaning of Straightforward Language.

Regardless of which version of AIT’s claim construction proposal one considers, the Board was correct to reject it as unduly narrow and to adopt instead “plain and ordinary meaning.”

a. “changes”

As a threshold matter, AIT invites legal error by proposing identical constructions for differing claim language.

AIT focuses its analysis on the “change management layer” limitation in claim 1 of the ’482 patent, then argues that, in method claim 21 of the ’482 patent, “[t]he meaning of ‘automatically detecting’ should correspond to that of the ‘change management later’ [*sic*] and the ‘changes’ therein should likewise impact how the application program should operate.” Br. 44. Similarly, for ’111 patent claim 13, AIT’s conclusory analysis of the function of the fourth portion of the server is reproduced below:

This limitation, especially the phrase, ‘changes that affect,’ is clearly the same as the ‘changes’ discussed above regarding the change management layer [in the ’482 patent claims]. Thus, the ‘fourth portion,’ as understood by a person of ordinary skill in the art and like the ‘change management layer’ automatically detects changes external to an application program which impact how the application program should operate.

Br. 44-45.¹²

Providing the same formal construction for the phrase in claim 13 of the ’111 patent, which differs from the relevant phrases in the claims of the ’482 patent, runs afoul of basic claim construction principles. *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 747, 752 (Fed. Cir. 2016) (“[T]he general assumption is that different terms have different meanings.”).

The claims all share the phrase “changes that affect.” *See, e.g.*, Br. 30-31. But the claims identify differently *what* the detected changes must affect. The ’482 patent claims require that the changes “affect an application” or “affect a particular application.” Claim 13 of the ’111 patent, however, requires that the changes “affect the information in the first portion of the server or the information in the second portion of the server.”

¹² This argument is taken nearly verbatim from AIT’s POR, with one notable exception. In its POR, consistent with its experts’ testimony, AIT stated that “the ‘fourth portion,’ as understood by a person of ordinary skill in the art and like the ‘change management layer’ automatically detects changes that *‘arise from* changes external to the application.” Appx1573. Before this Court, AIT omitted the phrase “changes that arise from.”

AIT's proposal that the function of "fourth portion" in '111 patent claim 13 be given a formal construction identical to that of the different language in the '482 claims invites legal error. *See PPC*, 815 F.3d at 753 ("Thus, if the term 'surrounded' was used in one claim element and 'resides around' in a second claim element, it is reasonable to view the differing terms as being intended to have a different scope.").

For each disputed claim term, AIT thus asserts that the Court must construe "changes." However, as shown in the table below, which compares the disputed language of claim 1 of the '482 patent with AIT's expert's articulation of AIT's construction before the Board, AIT's "construction" repeats the word "change" without explaining its meaning, instead offering a construction that focuses on the function of the change management layer—adding from thin air the concept of "changes [that] arise from changes external to the application program."¹³ The color coding below shows that AIT's construction adds additional requirements to the express language of "changes" and "affect an application."

¹³ AIT's expert admitted that the word "changes" in the claim is replaced in the construction by "'changes' detected by the change management layer arise from changes external to the application program," as shown with the yellow text in the table below. Appx1833 (94:10-15).

'482 patent, claim 1 (excerpt)	AIT's Construction Before the Board
a change management layer for automatically detecting changes that affect an application	<p data-bbox="727 264 1427 562">“[A] ‘change management layer’ is automatically detecting changes which impact how the application program should operate. In the context of the ‘482 patent, these ‘changes’ detected by the change management layer arise from changes external to the application program.</p> <p data-bbox="727 611 1097 644">Br. 41 (citing Appx184).</p>

The Board correctly concluded that these disputed limitations are plain on their face and require no construction.

The only limitation that the '482 patent claims impose on “changes” is that they “affect an application.” Similarly, the only limitation that the '111 patent claims impose on “changes” is that they “affect the information in the first ... or ... second portion of the server.” Neither the '482 and '111 claims, nor their specifications, refer anywhere to changes “that arise from changes external to the application,” nor to “changes external to the application”; indeed, they do not limit “changes” in any way. The Board correctly determined that the embodiments in the specifications, upon which AIT relies, do not “rise[] to the level of ‘reasonable clarity, deliberateness, and precision’ necessary to provide a special definition for the claim term.” Appx2141. Indeed, “changes” is a common English word with a “readily apparent” and “widely accepted meaning.” *Phillips*, 415 F.3d at 1314.

AIT also wrongly contends that Dr. Crovella “admitted that the only changes detected by the change management layer in the specification are from ‘cruising other websites,’ which are necessarily outside of an application program’s ordinary interaction with a user.” Br. 42. Indeed, in the very quotation relied on by AIT, Dr. Crovella qualified his response “in the context of the specification, which, of course, is different from the claims I analyze to establish the non-patentability,” and he merely pointed out that *one of the embodiments* described in the patents’ common specifications is an intelligent agent that can “cruise the web.” Br. 42-43. As the Board correctly found, the specifications also describe an embodiment in which intelligent agents pursue “*internal*” as well as “external Web activities.” See Appx1722 (citing ’482 patent at 19:66–67).¹⁴

¹⁴ AIT also argues that “detecting user interface interactions” (which the Board considered “changes” within the scope of the fourth layer, “is precisely what the claimed ‘third layer’ does.” Br. 43. The Board correctly observed, however, that its interpretation does not render the third and fourth layers redundant because “the claimed third layer does not recite detecting any changes *per se*, but instead the claim recites that the third layer ‘retrieves the data in the first and second layers in order to generate the functionality and user interface elements of the application.’” Appx2138 (n.13). The Board agreed that the claimed “third layer” and “change management layer” also need not be described as separate components in the prior art to meet the limitations recited in the claim. See, e.g., Appx1463.

Tellingly, under the narrower claim construction standard applicable in district court, AIT argued in its infringement case that “changes” can be “*any type of change* that may have an impact on the user’s business.” Appx1945. Moreover, AIT argued there that “changes” should *not* be limited to “changes to information that is stored outside of the claimed system,” and instead should encompass “changes to information that is *internal* to the system.” Appx1943-1944. In making that argument, AIT relied—just like the Board below—on the ’482 patent’s disclosure at 19:66-67 of intelligent agents that pursue internal activities as “an embodiment where changes are detected within the system.” Appx1944.

The claim construction standard at the PTAB is broader than the standard applied in district court. *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co., Ltd.*, 853 F.3d 1370, 1377 (Fed. Cir. 2017) (“[T]he Board in IPR proceedings operates under a broader claim construction standard than the federal courts.”). AIT improperly offers a narrower construction here under the BRI standard (covering only “external” changes), and a broader construction in district court under the *Phillips* framework (allowing for “internal” as well as “external” changes). Assuming AIT would not proffer an “unreasonable” claim construction in federal court, given its obligations under Fed. R. Civ. P. 11, AIT’s own approach to claim construction in its infringement action strongly reinforces the propriety of the Board’s conclusion below.

b. “affect an application”

AIT asserts that changes that “affect an application” should be limited to changes “which impact how the application program should operate.” *See, e.g.*, Br. 31, 35-36, 40-43; Appx1833 (94:16-20). AIT again seeks to improperly import limitations into the claims, as changes can affect an application without impacting how it “should operate.” Appx1960-1961 (¶5); Appx1802-1803 (63:9-64:22) (AIT’s expert Dr. Jagadish conceding that changing the server on which an application runs can “affect” the application without impacting how it “should operate”).

Indeed, AIT’s own expert declaration reveals that the plain meaning of “affect an application” is narrowed in AIT’s construction, as the declaration concedes that Kovacevic “automatically detect[s] changes ... which affect the application,” Appx1609 (¶70), but asserts that those changes nevertheless do not “impact the application program.” Appx1609-1610 (¶71). Further, AIT’s construction runs counter to the patents’ specifications. As the Board recognized, “the Specification describes the detected changes, more generally, throughout as changes that may affect operation of a user’s business, rather than as changes that affect operation of the application program.” Appx2141 (citing ’482 patent at Abstract, 9:34–38, and 22:33–39).

D. The Prior Art Meets Both Versions of AIT's Construction.

As noted above, AIT did not argue below, and does not argue here, that any of the other claim limitations are lacking in the prior art of record. Thus, even if this Court were to adopt AIT's construction (whether the one advanced below, or even a version omitting the phrase "changes that arise from"), the only issue to decide would be whether the disputed "changes" limitations are satisfied by the prior art at issue in the IPRs. In that scenario, this Court should still affirm the Board's final written decisions of unpatentability because substantial evidence demonstrates that the prior art renders the claims unpatentable even under AIT's construction. *See, e.g.*, Appx1961-1966 (¶¶7-13).

AIT argues here that each of RPX's primary references fails to disclose a "change management layer" that "automatically detects changes external to an application program which impact how the application program should operate," and thus do not anticipate or render obvious the independent instituted claims. *See* Br. 48, 51-52, 55. These arguments, however, misapply AIT's own construction, which does not require detecting changes that *are* external to the application, but rather changes that "*arise from* changes external to the application." Br. 40-41; Appx197-200; Appx184 (¶27).

Substantial evidence confirms that Popp, Kovacevic, and Balderrama¹⁵ all disclose this limitation under AIT's construction including the "changes that arise from" language. *See id.*; Appx1805 (66:5-7); Appx1850 (111:7-10) (AIT's expert conceding that, in fact, user input may arise from changes external to the application); Appx1871-1873 (132:15-133:7, 134:22-25); Appx1875 (136:5-9) (AIT's expert conceding that updates in Balderrama can include "changes" (e.g., price changes) that are automatically detected by detector 82 and impact the presentation 90 (e.g., the menu on a customer terminal)).

Further, even in the absence of the "changes that arise from" language, i.e., under AIT's potential (waived) modified construction, substantial evidence demonstrates that at least Balderrama still discloses the claimed "change management layer." Appx1964-1967 (¶¶12-14).

¹⁵ Regarding Balderrama, AIT also mischaracterizes Dr. Crovella's testimony as "indicat[ing] that Balderrama does not disclose the change management layer." Br. 54. Dr. Crovella said no such thing. Dr. Crovella explained that database updates in Balderrama could be made either by a person or by software. *Id.* This is a different function than the function performed by detector 82 in Balderrama, which automatically detects such updates *after* they are made. Dr. Crovella's testimony did not concede that Balderrama's detector 82 fails to perform the claimed function of the change management layer.

III. THE BOARD'S DETERMINATION TO INITIATE AN *INTER PARTES* REVIEW IS BOTH CORRECT AND UNREVIEWABLE.

A. Under *Achates*, this Court Lacks Jurisdiction to Review the Board's Determination to Initiate an IPR Trial.

AIT asks this Court to overturn the Board's determination to institute the underlying IPR trials. In particular, AIT argues that RPX should be recognized as a proxy for Salesforce, which AIT alleges is a time-barred RPI. Br. 21-30.

According to AIT, in holding that the petitions by RPX were not time-barred (because Salesforce is not an RPI), and in allegedly construing 35 U.S.C. § 315(b) too narrowly, "the Board exceeded the scope of its delegated authority and violated a clear statutory mandate" by granting the petitions for IPR and issuing final decisions on the merits. Br. 18.

As a threshold matter, this Court squarely resolved the question of whether the Board's Section 315(b) determination is appealable in *Achates*, holding that under 35 U.S.C. § 314(d), the Federal Circuit lacked jurisdiction to review the Board's decisions concerning the § 315(b) time bar, which included the Board's determination that none of the codefendants in related litigation were RPIs or privies of petitioner. 803 F.3d at 654, 658-59.

AIT contends, however, that *Achates* permits this Court to "review an error in statutory interpretation which results in the agency exceeded [*sic*] the scope of its delegated authority or violated [*sic*] a clear statutory mandate." Br. 20.

Since *Achates* is directly on point in dealing with the same alleged failure to name an RPI, however, the Board plainly did not “exceed[] the scope of its delegated authority” nor “violate[] a clear statutory mandate.” Br. 18. To the contrary, *Achates* makes clear that “statutory interpretation disputes fall outside this exception for *ultra vires* agency action.” 803 F.3d at 658-59 (“Here, although *Achates* did not raise this argument, the Board’s institution decision does not violate a clear statutory mandate.”).

AIT does not argue that *Achates* was wrongly decided. This Court recently granted rehearing *en banc* in *Wi-Fi One, LLC v. Broadcom Corp.*, Nos. 2015-1944, -1945, -1946 (Fed. Cir. 2017), and ordered supplemental briefing on the question of whether the court should “hold that judicial review is available for a patent owner to challenge the PTO’s determination that the petitioner satisfied the timeliness requirement of 35 U.S.C. § 315(b).” *Wi-Fi One, LLC v. Broadcom Corp.*, 851 F.3d 1241 (Fed. Cir. 2017). Unless and until that question is answered in the affirmative, *Achates* remains good law. *Newell*, 864 F.2d at 765; *see also* Fed. Cir. R. 35(a)(1) (“[O]nly the court *en banc* may overrule a binding precedent.”). *Achates* is directly on point and forecloses AIT’s RPI argument.

B. Even if Reviewable, AIT Has Waived Any Argument that RPX’s Petitions Were Time-Barred.

The Board’s Scheduling Order expressly cautioned AIT that “any arguments for patentability not raised in the response will be deemed waived.” Appx1529.

See also Funai Elec. Co., Ltd. v. Gold Charm, Ltd., IPR2015–01468, 2016 WL 7995297, *22 (P.T.A.B. Dec. 27, 2016) (holding that patent owner waived RPI argument by failing to present argument in its POR, where scheduling order “cautioned that any arguments for patentability not raised in the response will be deemed waived”). In its Patent Owner Response, AIT included just a seven-sentence assertion that RPX is a proxy for RPI Salesforce. Appx1560. Rather than offer any evidence or argument on the RPI issue, AIT instead merely referred back to its PPOR: “*As explained in Patent Owner’s Preliminary Response*, Salesforce is the real party in interest and Petitioner is acting as its proxy.” *Id.* The Board observed in its final written decisions that AIT was improperly attempting incorporation by reference, which is not permitted under the PTAB’s rules. Appx2096; Appx2134-2135. *See also Samsung Elecs. Co., Ltd. v. Black Hills Media, LLC*, IPR2014–00717, IPR2015–00335, 2015 WL 6180946, *13 n.7 (P.T.A.B. Oct. 20, 2015) (in final written decision, declining to consider arguments incorporated by reference from one document into another document as waived).

AIT’s improper incorporation by reference, along with the absence of any evidence or supporting legal authority for its time-bar argument in its POR, amounts to a waiver of that argument. *See Nuvasive*, 842 F.3d at 1380 (“[W]e have held that a party waives an argument that it failed to present to the [PTAB] because it deprives the court of the benefit of the [PTAB]’s informed judgment.”).

Indeed, this Court has found that “if a party fails to raise an argument before the trial court, or presents only a skeletal or undeveloped argument to the trial court, we may deem that argument waived on appeal.” *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1294 n.3 (Fed. Cir. 2015).

Further, for the first time on appeal, AIT argues that the Board “entirely ignored the prohibition against a ‘privy’” in Section 315(b). Br. 11. Since AIT did not raise any separate “privy” argument in its POR, that argument was likewise waived, *Nuvasive*, 842 F.3d at 1380, so there was nothing for the Board to address.

C. The Board Correctly Determined that RPX’s Petitions Were Not Time-Barred.

1. Substantial Evidence Supports the Board’s Finding that Salesforce Is Neither an RPI Nor in Privy with RPX.

If this Court reaches the merits of AIT’s RPI challenge, the evidence here overwhelmingly demonstrates that RPX is the sole RPI. Unlike in *Achates*, 803 F.3d at 653-54, and *Wi-Fi One*, 837 F.3d at 1332, where the Board *denied* the patent owners’ requests for discovery to support their RPI-related arguments, the Board here *granted* AIT such discovery. Appx1069. RPX produced substantial discovery into (1) agreements between RPX and Salesforce; (2) communications between RPX and Salesforce, including relating to these IPRs, the patents and/or the litigation involving them; (3) any funds RPX received to pay for the IPRs; and (4) the reasons why RPX filed the IPRs. Appx1069-1070; Appx970-972.

RPX's VP of Client Relations provided a fulsome explanation of the reasons for RPX's decision to file the IPRs. Appx1240-1241 (¶47); *see also* Appx097-098.

These reasons had nothing to do with Salesforce or the Salesforce litigation.

Appx1240-1241 (¶47). He further testified unequivocally that:

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.

Appx1229 (¶20).

The evidence produced by RPX confirms that RPX did not have any contractual obligation to file the IPRs or any unwritten, implicit or covert understanding with Salesforce that it would do so. Appx1239 (¶45).

After representing to the Board that the evidence RPX produced was "needed" to determine whether Salesforce was an RPI, Appx021, AIT *completely ignores* this evidence on appeal, just as it did before the Board. Indeed, presented with the opportunity to depose Mr. Chuang, AIT declined, leaving his testimony, and all of the other evidence produced by RPX, unrebutted. As such, AIT invites this Court, as it did the Board, to speculate and draw unsupported inferences refuted by the direct evidence RPX produced.

Whether Salesforce is a “real-party-in-interest” or “privy” here is a *highly fact-dependent question*, see Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012). On appeal to this Court, the Board’s findings merit significant deference. Indeed, as the Supreme Court has stressed, Congress adopted the “substantial evidence” standard to ensure “proper respect to the expertise of the administrative tribunal” and to free courts from “the time[-] consuming and difficult task of weighing the evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966); *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1297 (Fed. Cir. 2015) (“As a general matter, we review the Board’s conclusions of law de novo and its findings of fact for substantial evidence.”).

2. The Board Did Not Commit Any Legal Errors in Its RPI Analysis.

As the Board did not commit any legal errors in its RPI analysis, AIT’s arguments to the contrary should be rejected.

First, the Board did not “define[] ‘real party in interest’ incorrectly.” Br. 11. AIT argues provocatively that “[t]he Board’s overly narrow construction of 35 U.S.C. § 315(b) has led to a time bar laundering racket” in which “[t]ime-barred infringers now simply become ‘members’ of RPX and similar organizations.” Br. 18. AIT then goes on to contend that “[t]hese organizations game the system by evading the Board’s unduly narrow definition of ‘real party in interest’ yet take the infringers’ money and pursue IPRs which are in the infringers’ interest.” *Id.*

At least as they pertain to RPX, these allegations are entirely baseless and directly contradicted by the evidence. *See* Appx1240-1241 (¶47 (explaining RPX’s reasons for filing these IPRs); Appx1226-1227 (¶¶12-13)).

AIT nevertheless argues that the Board limited its review of the evidence “sole[ly]” to whether an unnamed party “can control the petition or directly fund it” and “ignored any other evidence.” Br. 24. That is incorrect. The Board acknowledged in its initial determinations that determining “[w]hether an entity that is not named as a participant in a given proceeding constitutes an RPI is a highly fact-dependent question”; “there are ‘multiple factors relevant to the question of whether a non-party may be recognized as’ an RPI”; and “[t]here is no ‘bright line test.’” Appx1396.

Moreover, the Board explained with great clarity that “whether a non-party exercises control over a petitioner’s participation in a proceeding, or whether a non-party is funding the proceeding or directing the proceeding,” are *exemplary* considerations. *Id.*; *see also* Appx1068 (“The inquiry regarding whether Salesforce is an RPI in these proceedings is not limited to ‘control, ability to control, [or] direction of or function of the IPRs by Salesforce’ Whether a party constitutes an RPI to a proceeding is a ‘highly fact-dependent question,’ and ‘whether the non-party exercised or could have exercised control over [the] proceeding’ is merely *one exemplary factor* listed in the Trial Practice Guide.”).

Indeed, the Board then went on to consider—and reject—each of AIT’s assertions in view of persuasive and un rebutted evidence produced by RPX, which established that RPX is the sole RPI in these IPRs. Appx1397-1403.

Second, AIT bizarrely suggests that the Board “ignored” AIT’s “privy” argument. Br. 11. As noted above, however, AIT waived this argument by failing to raise it before the Board. Since AIT did not advance a separate “privy” argument before the Board, there was by definition no such argument for the Board to “ignore.”

Third, AIT’s assertion that “the Board set an improperly high burden of proof for the patent owner on real party in interest, and the Board improperly shifted the burden of proof to the patent owner” is groundless. Br. 22. While AIT’s brief is largely silent as to the alleged “improperly high burden of proof,” counsel for AIT contended at the oral hearing that “[t]he Board in its Institution Decision effectively required direct control of the filing and management of these IPRs to find RPX time-barred by 35 U.S.C. 315(b).” Appx2024 (50:3-7). As noted above, that contention is contradicted by the record. The Board properly considered *all* of the evidence before it—not merely evidence related to alleged control and management of the IPRs. *See* Appx1395-1403. As to the supposed burden of proof “shifting,” the Board stated in its institution decisions: “When a patent owner provides sufficient evidence prior to institution that reasonably brings

into question the accuracy of a petitioner’s identification of RPIs, *the overall burden remains with the petitioner* to establish that it has complied with the statutory requirement to identify all RPIs.” Appx1396-1397. Since the overall burden always remained with RPX, AIT appears to take issue with the Board’s finding that AIT’s “evidence” was insufficient. But, as discussed below, AIT’s “evidence” was wholly insufficient to rebut RPX’s evidence that directly contradicted AIT’s speculative and unsupported allegations.

3. AIT Repeats Factual Mischaracterizations that the Board Properly Rejected.

AIT peddles the same “evidence” on appeal to support its RPI argument as it did below. This “evidence,” however, consists entirely of mischaracterizations of the record, disregard of undisputed facts, and baseless speculation.

First, ignoring the evidence specific to this case (such as Mr. Chuang’s detailed declaration), AIT selectively quotes from portions of RPX’s website and public filings—unrelated to this matter, and, indeed, largely unrelated to the filing of IPRs in general—to allege that: “RPX has stated that its interests are ‘100% aligned’ with those of clients”; “[t]o achieve its goals, RPX has stated that it serves as ‘an extension of the client’s in-house legal team’”; and “RPX represents clients who are accused of patent infringement, acting as their proxy to ‘selectively clear’ liability for infringement as part of RPX’s ‘patent risk management solutions,’ ... including attacking patents that are or will likely be asserted against its clients.”

Br. 24-25. As the Board correctly found, AIT “provides several of these quotations out-of-context and/or mischaracterizes them,” and “[n]owhere in the evidence of record does Patent Owner point to any portion of RPX’s website or public filings that expressly indicates that RPX acts as a proxy for its clients, [].” Appx1397-1398. In fact, AIT now *admits* that the foregoing statements “were not about RPX’s filing of petitions for IPR.” Br. 25.

On their face, these documents show that: RPX’s interests being aligned with those of its clients concerns the cost savings that RPX’s services provide without any mention of filing IPRs (Appx071); serving as an extension of a client’s in-house legal team does not refer to challenging patents, but rather to RPX sharing insight about the patent market with the “client’s in-house legal team to better inform its long-term IP strategy” (Appx028); and “clear[ing]” liability for its clients does not refer to challenging patents, but rather to RPX acquiring “a license to the litigated patent and selectively clear[ing] our clients from the suit” (Appx029). To be sure, RPX also provided declaration testimony that refuted any assertion that RPX is acting as a proxy for Salesforce. *See* Appx1397-1398.

Second, AIT also claims that “[] a written policy explaining how to skirt the Board’s real party in interest rules.” Br. 18-19. Not only is this an outrageous mischaracterization of the cited evidence on its face, but it is also directly contradicted by declaration testimony. Appx1227-1229.¹⁶

Third, AIT further disregards the record by pointing to the Board’s prior decision in *VirnetX*, IPR 2014-00171 (Paper 52), and the related IPRs (collectively “*VirnetX*”), to support its bald assertion that “RPX is in the IPR proxy business.” Br. 27. As the Board below correctly determined, however, *VirnetX* is distinguishable from the present case because in *VirnetX*, *inter alia*, “the Board found that Apple (the alleged unnamed RPI) had both suggested that RPX challenge the specific patents, as well as paid for it to do so,” and that “the petitions included grounds that were ‘substantially identical’ to those in Apple’s time-barred petition.” Appx1399. The Board in *VirnetX* also found that RPX used “Apple’s expert” and “Apple’s law firm” to file a petition with “substantially identical” grounds to Apple’s. *VirnetX* at 6-7. None of those facts are present here, as corroborated by un rebutted evidence. *See, e.g.*, Appx1229 (¶20); Appx2091-2092; Appx2126; Appx2128-2130; Appx2174.

¹⁶ AIT’s limited redaction to this sentence in its brief treads uncomfortably close to violating the protective order, and shows yet another instance of AIT’s careless treatment of RPX’s confidential information.

Finally, the balance of AIT’s “evidence” is innocuous, and AIT’s use thereof to try to support its assertions is pure speculation. AIT argues that “Salesforce is a []” and points to evidence of [] made by []. Br. 25. The insinuation, however, that Salesforce funded the IPRs is, as the Board determined, “based on conjecture without evidentiary support” (Appx1400-1401), and directly refuted by Mr. Chuang’s sworn testimony. Appx1229 (¶20). AIT also implies that RPX discussed these IPRs with Salesforce because the two companies “[] prior to the filing of the petitions.” Br. 25. This suggestion is likewise baseless speculation, and contradicted by Mr. Chuang. *Id.*

AIT also claims that RPX and Salesforce have an “unusually close” relationship because (1) they share a board member; (2) their CEOs, along with more than 30 others, Appx049-063, both belong to an organization, T4A.org; and (3) their offices are close to one another. Br. 25-26. Of course, “[a]n overlapping Board member alone, without evidence of his involvement, is not sufficient to demonstrate an unnamed entity had control over or was involved in an IPR.” Appx1401. *See Butamax Advanced Biofuels LLC v. Gevo, Inc.*, IPR2013-00214, Paper 11 at 4 (PTAB Sept. 30, 2013). In any event, Mr. Chuang testified expressly that the overlapping board member “had no involvement whatsoever in, and had no impact on, RPX’s decision to file the AIT IPRs.” Appx1242-1243 (¶¶50-53).

Further, AIT posits—remarkably—that “it is natural to expect that the CEOs of RPX and Salesforce would use the T4A.org ‘safe space’ and others to find ways to reduce Salesforce’s patent infringement liability,” and that the close proximity of the San Francisco offices of RPX and Salesforce permits “[t]he ease of informal or covert communications between RPX and Salesforce.” Br. 25-26. AIT, however, offers no evidence to support these baseless conspiracy theories.

AIT further proclaims that “[t]he absence of direct evidence of Salesforce’s involvement should not be determinative. Willful blindness has no place in patent law.” Br. 28. AIT states that “RPX dodged the Board’s narrow view simply by avoiding any kind of written record which could be used to show actual control or directed funding.” Br. 29. In fact, RPX did provide a written record—a sworn declaration—to AIT demonstrating that Salesforce did not control or fund the IPRs. The insinuation that RPX discussed the IPRs orally with Salesforce is both baseless and refuted by the evidence of record. Appx1229-1233 (¶¶20-30). AIT’s “willful blindness” argument simply is not understood. Every potentially relevant factor (e.g., funding, control, ability to control, communication, selection of prior art, experts and counsel) confirms unequivocally that Salesforce had nothing whatsoever to do with these IPRs. The only party guilty of “willful blindness” is AIT, which has persisted in arguing that Salesforce is an RPI despite the lack of any supporting evidence and the mountain of evidence to the contrary.

CONCLUSION

For the foregoing reasons, the Board's final written decisions should be affirmed.

Date: July 19, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FED. CIR. R. 28(d) AND FED. R. APP. P. 32(a)**

I, Michael N. Rader, counsel for Appellee, certify that the foregoing brief complies with the length limits set forth in Fed. R. App. P. 32 (a)(5). Specifically, this brief contains 13,195 words (excluding the parts of the motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b)) as determined by the word count feature of the word processing program used to create this brief.

I further certify that the foregoing brief complies with the typeface requirements set forth in Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6). Specifically, this brief has been prepared using a proportionally spaced typeface using Microsoft Word 2010, in 14-point Times New Roman font.

I further certify that the foregoing brief complies with the limitations set forth in Fed. Cir. R. 28(d) and contains 14 words (including numbers) marked as confidential (excluding the words exempted by Fed. Cir. R. 28(d)(1)(A)).

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 19th day of July, 2017, the foregoing NON-CONFIDENTIAL BRIEF OF APPELLEE RPX CORPORATION was electronically filed with the Clerk of the Court using the CM/ECF system, which will issue an electronic notification to counsel of record, and an electronic copy will be served via email upon:

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Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of copies of the Confidential Brief of Appellee RPX Corporation will be hand filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit in accordance with the Federal Circuit Rules. Two copies of the Confidential Brief of Appellee RPX Corporation will also be served upon counsel for the Appellants via UPS Ground Transportation at the address listed above.

Date: July 19, 2017

/s/ Michael N. Rader

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