THE PTAB REVIEW

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AIA Institution Rates Following Supreme Court's *SAS* Decision

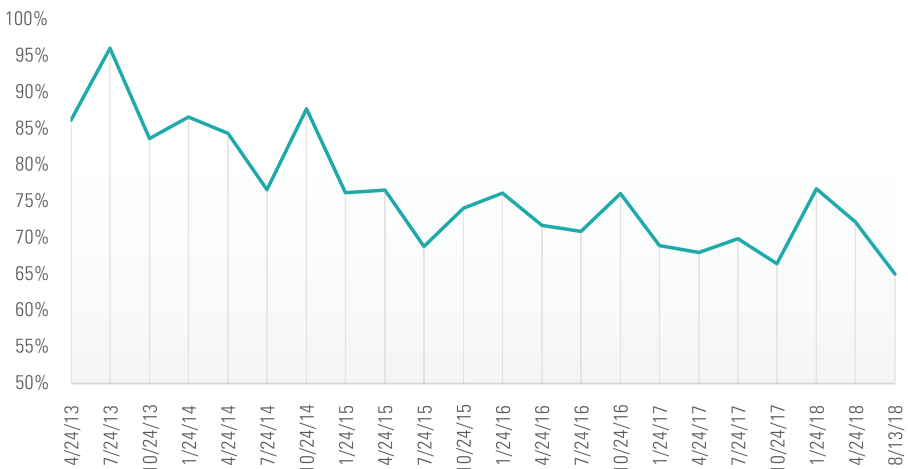
On April 24, 2018, the Supreme Court issued its decision in *SAS Institute v. Iancu*, holding that when the Patent Trial and Appeal Board (PTAB) institutes an America Invents Act (AIA) trial, it must decide the patentability of all claims challenged in the petition. Many observers have hypothesized that this decision may decrease institution rates if the PTAB denies institution of petitions because the PTAB deems a subset of the challenges non-meritorious. Although still too early to know with certainty whether *SAS* will have a significant or lasting impact on institution rates, we reviewed the more than 300 post-*SAS* institution decisions issued through the first half of August to investigate whether there was any apparent change in institution rate as compared to historical averages. Because the number of decisions is still relatively small, this is necessarily a rough and limited measure of the impact of *SAS* on institution rates. This analysis revealed that the PTAB's institution rate has seen a slight decrease from historical averages.

Pre- and Post-*SAS* Institution Rates

	Overall	Excluding Joinder
Pre-*SAS* Institution rate (9/16/2012 to 4/24/2018)	75%	73%
Pre-*SAS* Institution Rate (4/25/2017 to 4/24/2018)	71%	69%
Post-*SAS* Institution Rate (4/25/2018 to 8/13/2018)	65%	62%

From April 25, 2018 to August 13, 2018, the PTAB issued 338 institution decisions, instituting 220 and denying 118, for an institution rate of about 65% (62% excluding joined cases).[1] This represents a decrease from the pre-*SAS* cumulative institution rate of 75% (73% excluding joinders) and from the 71% (69% excluding joinders) institution rate during the full year preceding *SAS*.

However, a 65% institution rate does not represent a significant departure from previous rates, particularly since a less than four-month sample might not be fully representative.



For example, from July 25, 2017 to October 24, 2017, the PTAB had an institution rate of 66%. The observed post-*SAS* decrease is small enough that it might be explained by normal fluctuations in the PTAB's workload. Indeed, as shown below, quarters with high institution rates are frequently followed

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[1] Institution data in this article obtained using Lex Machina.

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Pre- and Post-*SAS* Institution Rates for Technology Centers			
Technology Center	**Date Range**	**Institution Decisions**	**Institution Rate**
Communications (2600)	Pre-*SAS* (4/25/2017 to 4/24/2018)	257	74%
	Post-*SAS* (4/25/2018 to 8/13/2018)	48	67% (↓7%)
Semiconductors, Electrical and Optical Systems and Components (2800)	Pre-*SAS*	203	75%
	Post-*SAS*	75	72% (↓3%)
Computer Networks, Multiplex communication, Video Distribution, and Security (2400)	Pre-*SAS*	172	68%
	Post-*SAS*	39	74% (↑6%)
Transportation, Construction, Electronic Commerce, Agriculture, National Security and License & Review (3600)	Pre-*SAS*	154	81%
	Post-*SAS*	23	83% (↑2%)
Biotechnology and Organic Chemistry (1600)	Pre-*SAS*	152	74%
	Post-*SAS*	52	46% (↓28%)
Mechanical Engineering, Manufacturing, Products (3700)	Pre-*SAS*	149	62%
	Post-*SAS*	38	71% (↑9%)
Computer Architecture, Software, and Information Security (2100)	Pre-*SAS*	141	60%
	Post-*SAS*	24	71% (↑11%)
Chemical and Materials Engineering (1700)	Pre-*SAS*	81	75%
	Post-*SAS*	28	39% (↓36%)

by one or more quarters with lower institution rates. The observed post-*SAS* decrease in institution rates is in line with the ebb and flow of PTAB institution rates.

Much of the post-*SAS* decrease in institution rates observed so far can be attributed to only two technology centers. In particular, Technology Centers 1600 (Biotechnology and Organic Chemistry) and 1700 (Chemical and Materials Engineering) each saw a decrease in institution rate from around 75% to less than 50% after *SAS* was issued. At the same time, the share of institution decisions by the PTAB coming from these two technology centers increased from 17% to 23%. The increased volume in these two centers, and the corresponding decrease in institution rates in these two centers, explains nearly all of the change in institution rates for the PTAB as a whole. The observed decrease in institution rates post-*SAS* thus could reflect the reality of an executive agency managing its limited resources in two increasingly busy technology centers.

Although a firm conclusion about the effect of *SAS* on institution rates must await the collection of additional data over time, the present data provides some food for thought. If *SAS* results in a decrease in institution rates, one would expect to see such a decrease across all technology centers, not concentrated in a few centers as was found in the current sample. A clearer picture may emerge as more data becomes available over time.

Another interesting question will be what impact *SAS* has on institution rates once petitioners become able to adapt to the new reality created by *SAS*. Because it takes six months after a petition is filed to get an institution decision, the present data sample is unlikely to represent long-term post-*SAS* institution trends. As time goes by, petitioners may be expected to more carefully screen the unpatentability grounds they assert to avoid having an entire petition denied because it includes an argument having less merit than the remainder of the petition. If so, institution rates might go up as petitioners adapt to *SAS*. It is also conceivable that the PTAB will become more likely to reject an entire petition based on its view that a subset of the grounds lack merit once petitioners have had a chance to account for SAS when writing petitions. It that case, long term institution rates across technology centers could show a delayed decrease in institution rates beginning in the next few months. Only time will tell.

The Federal Circuit's Battle Over Real Party-in-Interest and Privity Standards in IPRs Is Likely to Spur New Challenges to IPR Institution

Petitioners for *inter partes* review (IPR) of a patent under the AIA are required by statute to identify "all real parties in interest."[2] Who qualifies as a real party-in-interest (RPI) or privy has practical implications stemming from statutory restrictions about who may petition the PTAB. For example, 35 U.S.C. § 315(b) bars institution of an IPR if the petitioner, RPI, or privy of the petitioner was served with a complaint for infringement of the challenged patent more than one year before the petition was filed. As another example, a final written decision on a given claim in an IPR prevents the RPI or a privy of a petitioner from challenging that claim in proceedings before the Patent Office, the ITC, or in district court on any ground the petitioner raised or reasonably could have raised during the IPR. The determination of who is an RPI and a privy of a petitioner can thus be critically important to petitioners and patent owners.

Although the PTAB's Trial Practice Guide emphasizes that RPI and privity determinations require a flexible approach, the Board has often focused its analysis on two questions: (i) control over the IPR proceedings; and (ii) financing of the IPR proceedings. In *Samsung Electronics Co., Ltd. et al. v. Black Hills Media, LLC*[3], for example, a panel of the Board focused on control and funding in determining that one of Samsung's suppliers was not an RPI. The Board rejected the argument that the supplier was an RPI based on an indemnification obligation to its customer Samsung or based on its request to intervene in an ITC investigation involving Samsung's products. The Board recognized that "the issue" to be resolved in making an RPI determination "is whether there is a non-party 'at whose behest the petition has been filed,'" but reasoned that this determination is "a 'highly fact-dependent question,' based on whether the non-party 'exercised or could have exercised control over a party's participation in a proceeding' and the degree to which a non-party funds, directs, and controls the proceeding." The Board concluded the supplier was not shown to be an RPI because neither the indemnification agreement nor the attempt to intervene in the ITC investigation provided "persuasive evidence" that the supplier "is in position to exercise control over Petitioner's involvement in this proceeding." The Board instituted a trial, and the patent owner later cancelled the challenged patent claims and requested adverse judgment.

The Board similarly focused on control in other decisions. In *Broadcom Corp. v. Wi-Fi One, LLC*,[4] the Board denied discovery on the issues of RPI and privity for failure to demonstrate probability of control by the petitioner over the prior litigation. The Board stated, "To be bound [to the outcome of the Texas Litigation], in normal situations, Broadcom must have had control over the Texas Litigation." The Board rejected the argument that an indemnity agreement on its own established privity, finding that "more is required," specifically that "[c]ontrol of the litigation, or some sort of representation, constitutes a 'crucial' factor."[5] The Board concluded that "[p]aying for trial expenses pursuant to indemnity normally does not establish privity or control."[6] The Board rejected the argument that filing an amicus brief or participating in a joint defense group establishes privity.[7]

Although the Board has frequently focused on control when evaluating RPI and privity issues, some Board panels have imputed a one-year bar to a petitioner absent evidence of control. In *RPX Corporation v. VirnetX Inc.*,[8] for example, the Board denied institution because Apple paid RPX $500,000 to file IPR reviews for unspecified "patents of questionable quality" under an agreement providing RPX with "complete control" over its activities. RPX (with Apple's consent) hired the same law firm and expert to prepare its IPR challenge that Apple had previously used to prepare its IPR challenge to the same patents. The Board had found Apple's IPR petitions to be time-barred under § 315(b). The Board concluded that "because RPX is Apple's proxy, the RPX petition is also time-barred." The Board reasoned that "RPX is, at most, a 'nominal plaintiff' with 'no substantial interest' in these IPR challenges apart from those of its client."

Until recently, the Board's exercise of its case-by-case discretion regarding RPI and privity issues has been largely shielded from any external review by Federal Circuit precedent established in *Achates Reference Publishing, Inc. v. Apple Inc.*[9] In January of this year, however, the Federal Circuit reversed course and exposed the Board's RPI and privity determinations to appellate review when a statutory bar is implicated. In an *en banc* decision, the court overruled *Achates* and held that time-bar determinations under § 315(b) (including the underlying RPI/privity determination) are appealable from a final written decision.[10]

[2] 35 U.S.C. § 312(a)(2).
[3] IPR2014-00737, Paper 7 at 3-4 (Nov. 4, 2014).
[4] IPR2013-00601, Paper 23, at 7 (Mar. 6, 2015).
[5] *Id.* at 9.
[6] *Id.* at 11.
[7] *Id.* at 11-12.
[8] IPR2014-00171, Paper 49 at 4-9 (Jun. 5, 2014).
[9] 803 F.3d 652, 658 (Fed. Cir. 2015).
[10] *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364, 1374 (Fed. Cir. 2018) (en banc).

In April 2018, a Federal Circuit panel in that same case affirmed the Board's determination that a manufacturer-customer relationship did not make a manufacturer-petitioner a privy of its time-barred customers nor render the customers RPIs.[11] In an opinion joined by Judge Dyk, Judge Bryson concluded that the Board had not adopted a categorical rule requiring control by the petitioner of the prior litigation to establish privity, but had merely addressed the arguments presented by the patent owner.[12] The court concluded that the Board did "understand that privity and real-party-in-interest status could be established not only by Broadcom's exercise of control over the district court proceedings, but also by the D-Link defendants' exercise of control over the *inter partes* review proceeding."[13] The court noted the Board's conclusion that indemnity payments, minor participation in a trial, and filing an amicus brief are not sufficient to establish privity between a non-party manufacturer of the accused device and the defendant parties, and concluded that the Board did not apply a legally erroneous standard in deciding the RPI or privity issue.[14] It also concluded that "[t]he interpretation of the concepts of privity and real party in interest set forth in the PTO's Office Trial Practice Guide and applied by the Board is consistent with general legal principles."[15]

Judge Reyna dissented, stating that "[t]he majority affirms the Board's decision that the applicable legal standard is whether 'the party in question had sufficient control over the prior proceeding.'"[16] Judge Reyna concluded that there were three independently sufficient bases to conclude that Broadcom was a privy of its customers: (i) based on its indemnity obligations to them; (ii) the possibility it might have controlled the Texas litigation; and (iii) the possibility that the customers were using Broadcom as a proxy to avoid preclusion in the IPR.[17] Judge Reyna concluded that the Board erred by denying discovery into the specific terms of the indemnification agreement, whether Broadcom had paid claims to the defendants for the Texas Litigation, and whether Broadcom exercised control over the Texas Litigation.[18]

A different Federal Circuit panel revisited the RPI/privity question just last month. Like the *Wi-Fi One* panel, the panel in *Applications in Internet Time, LLC v. RPX Corp.*[19] agreed that RPI and privity determination for purposes of the § 315(b) one-year bar are governed by common law principles that demand a case-by-case approach as described in the PTO's Trial Practice Guide. Unlike the *Wi-Fi One* decision, however, the *Applications in Internet Time* decision found that this particular panel of the Board had used an "unduly restrictive test" for making RPI determinations. The court vacated two final written decisions of unpatentability and clearly signaled to the Board, patent owners, and patent challengers that it takes a dim view of efforts to evade the one-year bar.

The *Applications in Internet Time* decision involves the same entity the Board had found to be an RPI in the *RPX Corporation v. VirnetX Inc.*, discussed above. In the later case, RPX had adapted its business model to avoid making its members RPIs. For example, RPX adopted "best practice" prohibitions against discussing validity challenges with its members prior to filing or during pending challenges and a mandate for RPX to maintain complete control of all aspects of pending validity challenges. During pre-institution discovery, Applications in Internet Time (AIT) gained access to evidence that RPX advertised invalidity challenges as one of its services, and that its client had paid RPX "substantial sums as membership fees...including a very significant payment shortly before the IPR petitions at issue here were filed." The Board rejected AIT's RPI argument based on declaration testimony RPX submitted to establish that it had its own reputational interests in bringing the IPRs, that it had no contractual obligation to the client or implicit understanding with the client to file the IPRs, and that it did not communicate with the client on the specific topic of the IPRs. The IPRs were instituted and proceeded to final written decisions, resulting in decisions by the Board that certain challenged claims were unpatentable.

Judge O'Malley delivered the opinion of the court in which Judge Hughes joined the judgment vacating the final written decisions. Judge O'Malley concluded that the Board's decisions had to be vacated because the RPI determination relied on an impermissibly narrow understanding of the common-law meaning of RPI, was not based on consideration of the entirety of the administrative record, and misallocated the burden of proof to the patent owner. She stressed that determining whether a non-party is an RPI "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." She instructed the Board to consider whether the client was an RPI based on an attorney-in-fact or an agency-for-litigation relationship. Judge Reyna filed a concurring opinion explaining that the Board erred in failing to address whether RPX's petitions were barred under the privity provision of § 315(b).

[11] *Wi-Fi One, LLC v. Broadcom Corp.*, 887 F.3d 1329, 1334 (Fed. Cir. 2018).
[12] *Id.* at 1337-38.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1336.
[16] *Id.* at 1346 (Reyna, J., dissenting).
[17] *Id.* at 1349-51.
[18] *Id.* at 1350-51.
[19] App. 2017-1698, 2017-1699, 2017-1701 (Fed. Cir. Jul. 9, 2018).

Although *Wi-Fi One* and *Applications in Internet Time* appear to result in disparate outcomes, these outcomes are reconcilable. One may accept that a petitioner does not become a privy of a prior litigant simply because they each share a common interest in defeating the same patent to avoid a mutual liability. At the same time, one may deem a petitioner that undertakes an IPR challenge for the benefit of a time-barred entity a privy of the time-barred entity even where the petitioner acts essentially as an independent contractor in serving as a proxy instead of acting under the supervision and control of the time-barred party. Aside from situations where the Board perceives an arrangement designed specifically to work around a statutory bar, however, neither the Board's decisions nor the Federal Circuit's decisions in this area provide predictability for RPI or privity determinations. The Board has indicated in a precedential decision that it may permit a petitioner to correct RPI-identification errors where a statutory bar is not implicated.[20] Where a statutory bar is implicated, however, one may expect RPI and privity issues to be hotly contested for the foreseeable future.

The Future of Sovereign Immunization in Patent Board Reviews

Nearly two decades ago, the Supreme Court explained that State sovereign immunity under the Eleventh Amendment insulates States (and arms of the State, like State universities) from patent-infringement suits in federal district courts. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court explained that States are ordinarily immune from federal jurisdiction, and that waiver of immunity would be narrowly construed: mere participation in the patent system as a patent applicant or owner would not constitute waiver.[21] A few years later in a non-patent case, the Court held that State sovereign immunity would also bar federal-agency adjudication if the adjudication were sufficiently court-like.[22]

In 2017, four years after the initiation of post-grant patent reviews at the PTAB, patent owners were looking for protection from a process that some saw as inimical to their patent rights. The University of Florida Research Foundation was one such owner. Perhaps inspired by its State's earlier success in *Florida Prepaid*, the foundation asserted sovereign immunity against challenger Covidien LP in an IPR. When the Board agreed with the foundation,[23] more assertions of immunity followed. State entities were generally successful with their challenges, although if a non-State entity co-owned the patent, the review might continue if the co-owner were held to have a comparable interest and ability to defend the patent.[24] Ultimately, the Board assigned an expanded panel to two related University of Minnesota cases and confirmed that State sovereign immunity protects State entities in Board reviews; however, the panels also held that the State entity waives its immunity at the Board if it sues for infringement in federal district court (as the university had).[25] The question is currently pending at the United States Court of Appeals for the Federal Circuit.[26]

In August 2017, a patent owner (Allergan) facing several IPRs took the unusual step of transferring its patents to the Saint Regis Mohawk Tribe a week before oral argument in the cases. Among the unusual features, the tribe received payment ($13.5 million) to accept the patents and promised to assert its tribal sovereign immunity, but only in PTAB proceedings.[27] The tribe promptly asserted its immunity in the IPRs and requested dismissal of the cases, leading the PTAB to toll the proceedings while it sorted through the issue. The PTAB authorized briefing, including amicus briefing (a first for the PTAB). The principal issues were whether tribal sovereign immunity applies to PTAB reviews, whether the transfer to the tribe was a sham, and whether Allergan retained sufficient rights to proceed without the tribe. In early 2018, the PTAB ruled that tribal sovereign immunity does not apply to PTAB proceedings and that Allergan could continue to represent the patentee interests. The PTAB expressly declined to apply its State immunity precedent to the tribe and also declined to decide the sham-transaction question. The tribe immediately sought review at the Federal Circuit, which heard argument in June and ruled in August. The court held that tribal sovereign immunity does not apply to PTAB reviews because they are more like reviews of the agency's own action than court proceedings, but expressly declined to address any implications for State sovereign immunity.[28] A concurring opinion was less tentative, explaining that sovereign immunity generally did not apply to the PTAB reviews.[29]

[20] *Lumentum Holdings, Inc. et al. v. Capella Photonics, Inc.*, IPR2015-00739, Paper 38 at 3-6 (Mar. 4, 2016) (precedential) ("§ 312(a) sets forth requirements that must be satisfied for the Board to give consideration to a petition, however, a lapse incompliance with those requirements does not deprive the Board of jurisdiction over the proceeding, or preclude the Board from permitting such lapse to be rectified").

[21] 527 U.S. 627, 640 (1999).

[22] *Federal Maritime Commission v. South Carolina Ports Authority*, 535 US 743, 760 (2002).

[23] *Covidien LP v. Univ. of Fla. Research Found.*, IPR2016-01274, Paper 19 (2017).

[24] *Reactive Surfaces Ltd. LLP v. Toyota Motor Corp.*, IPR2016-01914, Paper 36 (2017).

[25] *Ericsson Inc. v. Regents of the University of Minnesota*, IPR2017-01186, Paper 14 (2017) (expanded panel).

[26] *Regents of the University of Minnesota v. Ericsson Inc.*, App. No. 18-1560 (Fed. Cir.).

[27] *Mylan Pharmaceuticals Inc. v. Allergan, Inc.*, IPR2016-01127.

[28] *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals Inc.*, 2018 U.S. App. LEXIS 20276 (Fed. Cir., July 20, 2018).

[29] *Id.* at *15-29.

At present, the question of State sovereign immunity is officially open with the question pending in the University of Minnesota appeals. Moreover, the tribal sovereign immunity may still be subject to rehearing at the Federal Circuit or further review at the Supreme Court. Allergan uses the patents to block competitors from selling a product worth millions each day, so the patent owner can be expected to put off their cancellation as long as possible. Nevertheless, there are several reasons to think that sovereign immunity will not be an option for patent owners in the future.

The Federal Circuit rested its decision on the recent Supreme Court decision in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, in which the Court rejected a constitutional challenge to IPRs, ruling that the proceedings are simply reviews of the agency's own decision to grant a patent and thus are not required to occur in district courts.[30] This reasoning, on which the Federal Circuit relies in *Saint Regis*, should dispose of the issue. Although the Eleventh Amendment presents an additional and unique consideration for State sovereign immunity, and has been extended to federal agencies acting in a judicial capacity already, the *Oil States* rationale that the PTAB is not acting as a court squarely addresses this issue.

Significantly, the U.S. Department of Justice (which often intervenes in cases to support sovereign immunity) intervened in the *Saint Regis* appeal against the tribe. The United States is itself both a sovereign and a patent owner, and has defended its patents in IPRs without resorting to sovereign immunity.[31] There is little reason to suppose the federal government would defend an immunity it does not assert. Indeed, attacks by other sovereigns on a comprehensive federal program from which they (as patent owners) have benefitted are arguably attacks on federal sovereignty, impairing its ability to exercise its own powers.

So far, no foreign sovereign has asserted sovereign immunity before the PTAB. As a general proposition, foreign sovereigns are not immune as far as their commercial activities are concerned.[32] The Federal Circuit has already held that foreign sovereign immunity does not apply in patent declaratory judgment cases.[33] In the wake of the *Saint Regis* decision, it is unlikely that the PTAB would extend immunity to foreign sovereigns in patent cases.

At present, the answers for sovereign immunity in PTAB proceedings are mixed and inconsistent. State patent owners are immune, while tribes are not. Federal and foreign sovereign immunity are untested. The Supreme Court's *Oil States* decision, however, points to an eventual resolution against any use of sovereign immunity in PTAB reviews.

PTAB Designates Three Decisions Informative

On July 10, the PTAB designated as informative three decisions addressing conduct of depositions, motions to seal, and limitations on joinder.

Ariosa Diagnostics v. Isis Innovation Limited, IPR2012-00022, Paper 55

Ariosa concerns guidelines specific for taking a deposition in a foreign language. The Board confirmed that such depositions are governed by 37 C.F.R. § 42.53 and that the guidelines which apply to such depositions in interference proceedings also apply in AIA trials. These guidelines generally provide for each party to obtain the services of an interpreter and send notice to the other party, the mode of interpretation, and the procedure for resolving interpretation disagreements.

Argentum Pharmaceuticals LLC v. Alcon Research, Ltd., IPR2017-01053, Paper 27

Argentum concerns the requirements for showing entitlement to seal confidential materials. The party moving to seal must show good cause for the relief requested. The decision reminds movants that "the default rule is that all papers … are open and available for access by the public" and thus motions to seal are only granted where the movant demonstrates "good cause." Showing good cause requires the movant to demonstrate "(1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4), on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record." *See also* 37 C.F.R. § 42.54.

[30] 584 U.S. _, 138 S. Ct. 1365 (April 24, 2018).
[31] E.g., *International Flavors & Fragrances Inc. v. U.S. Dept. of Agriculture*, IPR2013-00124.
[32] 28 U.S.C. 1602.
[33] *Intel Corp. v. Comm. Scientific & Indus. Research Organisation*, 455 F.3d 1364 (Fed. Cir. 2006).

Colas Solutions Inc. v. Blacklidge Emulsions, Inc., IPR2018-00242, Paper 9

Colas Solutions' motion for joinder was denied because, prior to requesting joinder, it had filed a declaratory judgment action against the patent owner. Section 315 bars institution of *inter partes* review based on civil actions where (a) the petitioner has previously filed a declaratory judgment action, or (b) the petitioner was served with an infringement complaint more than 1 year prior to filing the petition. The PTAB determined that joinder is allowed in the latter situation, but not the former, for the reason that "the time bar of § 315(b), which expressly states that it 'shall not apply to a request for joinder under subsection (c),' the prohibition set forth in § 315(a)(1) makes no reference to requests for joinder." That is, a party that files a declaratory judgment action is barred from *inter partes* review proceedings.

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