

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RØDE MICROPHONES, LLC AND
FREEDMAN ELECTRONICS PTY LTD,
Petitioners

v.

ZAXCOM, INC.,
Patent Owner

IPR025-00231
Patent 7,929,902

**PATENT OWNER'S RESPONSE TO PETITIONER'S REQUEST
FOR DIRECTOR REVIEW UNDER 37 C.F.R. § 42.75 OF PAPER 32**

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Pursuant to the Board's authorization (Ex-3101), Patent owner submits this response to Petitioner's Request for Director Review ("Request") (Paper 34).

Contrary to Petitioners' Request arguments, the Board meticulously weighed the evidence presented in Patent Owner's Motion to Terminate (Paper 15 (unredacted), Paper 16 (redacted)) and Petitioners' Response thereto (Paper 20), and ultimately concluded that "...at the time of institution, Lectrosonics was a privy of Petitioner" and "Petitioner has not met its burden to establish that Lectrosonics is not a privy and that the Petition is not time-barred pursuant to § 315(b)." Paper 33 at 9. Thus, Petitioners mischaracterize the Board's decision as "[c]ontrary to law," (Paper 34 at 1), as the Board's decision was made through a thorough, factual analysis and should not be overturned.

I. LEGAL STANDARD AND BURDEN OF PROOF FOR 35 U.S.C. § 315(B)

35 U.S.C. § 315(b) provides that, "[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent." Furthermore, Petitioner "bears the ultimate burden of persuasion to show that its petition[] [is] not time-barred under § 315(b) based on a complaint served on an alleged real party in interest more than a year earlier." *Worlds Inc. v. Bungie, Inc.*, 903 F.3d 1237, 1242 (Fed. Cir. 2018). *See also RPX Corp. v. Applications in Internet Time*,

LLC, (“AIT”) IPR2015-01750, Paper 128 at 6-7 (PTAB October 2, 2020)

(precedential) (“The same logic requires placing the burden on IPR petitioners to demonstrate that their petitions are not time-barred under § 315(b) based on a complaint served on a real party in interest or a privy more than a year before a petition is filed”). Petitioners have failed to meet this burden.

II. ARGUMENT

Petitioners state “due process concerns” while arguing that the Board improperly analyzed the *Taylor* exclusions in its IPR Termination decision (the “Decision”) (Paper 33 at 3). As explained below, Petitioners’ request to overturn the Decision fails for three independent reasons: Petitioners mischaracterize the Decision as finding Lectrosonics to be a “mere subsidiary”; Petitioners improperly raise new due process arguments without leave from the Director, despite these concerns having already been addressed by Congress, the Supreme Court, and PTAB precedent; and (3) the Board correctly applied the *Taylor* exceptions. For at least these reasons, the Director should deny Petitioners request.

A. The Board’s Fact Analysis Found Lectrosonics’ Status to be More Than a “Mere Subsidiary”

Petitioners claim that “the Board’s decision effectively establishes a *per se* rule that mere status as a subsidiary despite having no influence, role, or definitive interest in the parent-petitioner’s IPR subjects said parent-petitioners to 35 U.S.C.

§ 315(b)'s one year time bar, even when parent-petitioners also had no role in their subsidiary's previous IPR and court proceedings." Paper 34 at 1.

Other than this introductory sentence, Petitioners fail to support this assertion, and the Board's decision leads to no such rule. To the contrary, the Board properly weighed the facts presented by the Parties to find that Lectrosonics does not have a "mere status as a subsidiary," (*Id.*) and has an influence, role, or definitive interest in the present IPR. "Whether a party who is not a named participant in a given proceeding nonetheless constitutes a 'real party-in-interest' or 'privy' to that proceeding is a highly fact-dependent question...[which] will be handled...on a case-by-case basis taking into consideration how courts have viewed the terms 'real-party-in-interest' and 'privy.'" Consolidated Trial Practice Guide ("CTPG") at 12 (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)).

That is, in addition to holding that Lectrosonics was a subsidiary of RØDE (Paper 33 at 8-9)), the Board evaluated the *additional* facts presented by both Parties and found that Lectrosonics was not a "mere subsidiary":

Management was also aligned between Petitioner and Lectrosonics. Three board members of Freedman, two of which are also board members of RØDE, joined the board of Lectrosonics as a result of the acquisition. Ex. 1041 ¶¶ 15–16. One of those individuals, the CEO of Freedman, became Secretary and Treasurer of Lectrosonics. *Id.* ¶ 15. In June 2024, prior to the filing of the Petition and acquisition of

Lectrosonics, a RØDE employee introduced Lectrosonics's EVP to Freedman's CEO, stating that Lectrosonics's EVP had been "asking some questions with regards [to] Zaxcom." Ex. 2030, 3. The email includes an attachment referencing Zaxcom's "patents" and "the Rode vs Zaxcom lawsuit." *Id.* at 4. And in "February/early March, 2025," Lectrosonics provided to Freedman's CEO a claim chart for a related Zaxcom patent that Lectrosonics had previously challenged in a different proceeding before the Board (IPR2018-00972). Ex. 1041, ¶ 19.

Paper 33 at 9. Petitioners failed to refute these facts and did not meet "its burden to establish that Lectrosonics is not a privy." *Id.*

B. Petitioners' Claimed Violation of Their Due Process Rights Is a New Argument Made Without the Director's Permission & It Has Already Been Addressed by Congress, the Supreme Court, and PTAB Precedent

Petitioners claim the "Board impinged on Petitioners' due process rights by terminating the proceedings after failing to properly apply governing legal authority" and that "[d]etermining whether parties are in privity implicates due process concerns." Paper 34 at 1, 3, respectively; *see also id.* at 4-5.

First, this argument should not be considered. Pursuant to 37 C.F.R. § 42.75(c)(3) and the Director Review Webpage, available at <https://www.uspto.gov/patents/ptab/decisions/director-review-process>: "[A]bsent Director authorization [t]he Director **will not consider** new evidence or **new arguments not part of the official record.**" (emphasis added). Petitioners

completely ignore this statutory mandate by raising brand-new due process arguments that are not part of the official record, such arguments encompassing almost two pages of its Request, without obtaining the Director's approval to do so. Thus, Petitioners' due process claim should be disregarded.

Setting aside this threshold issue, Petitioners' due process arguments have already been closely considered by Congress, the Supreme Court, and precedential case law and is now *well settled*. Petitioners' entire Request fails to cite or consider highly-relevant, precedential PTAB case law, namely, *AIT*, Paper 128 (PTAB 2020) (precedential) and its concern for *Patent Owner's* due process rights, which is the focus of 35 U.S.C. ¶ 315(b): "When parties are in privity, under *due process* principles, 'a litigant [is prohibited] from taking a second bite at the apple by relitigating the same case through the persona of another, its privy,' and thus from 'abusing the legal system ... Likewise, 'where privity is shown to exist between a party to a second case and a party who is bound by an earlier judgment, the party to the second case—*who was not a party in the first action*—is also bound by the earlier judgment.'" *Id.* (internal citations omitted) (emphasis added).

When Petitioners assert they didn't receive a "full and fair opportunity to litigate the validity of the patent" (Paper 34 at 3-4) because "[i]t is undisputed that Petitioners were not parties to, and had no role in, Lectrosonics' IPR2018-01129 or court litigation," they argue a position that is entirely contradicted by the plain

language and Congressional intent of 35 U.S.C. § 315(b). If Congress intended this to be a requirement, it would have added such language, which is obviously not present. If the Director and Board were to adopt Petitioners' desired interpretation (i.e., one in which every Petitioner would have had the opportunity to play a role in its Real Party in Interest's ("RPI") or privy's prior IPR and court proceedings) (*see* Paper 34 at 1), the statute would have to be rewritten to remove the terms "real party in interest" and "privy" to ensure that *every* Petitioner had an opportunity to directly relitigate the same patent previously litigated by its RPI or privy. It's clear that Congress would have known that a Petition could have been brought by a privy/RPI prior to the relationship with the Petitioner being established, and they still chose to bar the later Petitioner. It's established that the privy relationship can be created at any time prior to institution. *See Power Integrations, Inc. v. Semiconductor Components Industries, LLC*, 926 F.3d 1306, 1316 (Fed. Cir. 2019) ("[P]rivy relationships arising after an IPR is filed but before institution should be considered in the §315(b) time-bar analysis.") Since IPRs happen regularly after the filing of a complaint, Congress would have known that this statute would bar a later privy/RPI who never had an opportunity to be heard in the earlier IPR. "Congress intended that the term "real party in interest" have its expansive common-law meaning.'" *AIT*, Paper 128 at 7 (PTAB 2020) (internal citations omitted).

The Supreme Court also considered due process issues in its *Taylor* decision, which has become PTAB precedent for evaluating privity. *See id.* at 36-37. *Taylor* carves out the six exceptions to the general rule “against nonparty preclusion,” (i.e., the *Taylor* Exceptions). *Taylor*, 553 U.S. at 880, 893 (2008). That is, *Taylor* is specifically directed towards rules for preclusion of an entity that was not a party to a prior proceeding, (i.e., the nonparty), and it considered the due process limitations thereof in enumerating such exceptions, which exceptions were properly considered and applied by the Board in its Decision. *See Id.* at 891 (“[t]he federal common law of preclusion is, of course, subject to due process limitations”).

The facts of the current case compare to *CommScope, Inc. v. TQ Delta, LLC*, IPR2022-00352, Paper 13 (PTAB Aug. 19, 2022), in which the Board dismissed a petition filed by a parent, CommScope, pursuant to § 315(b) because it found the parent to be in privity with its subsidiary, 2Wire. As in this case, there is no indication that the parent was a party to, or played a role in, the subsidiary’s prior court proceeding, filed 7 years prior to the parent’s lawsuit. This did not deter the Board from finding a privity relationship between the parent and subsidiary.

Petitioners’ quotation to *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1319 (Fed. Cir. 2018) places emphasis on the wrong portions of the quoted excerpt. *See* Paper 34 at 4. As stated by the *WesternGeco* Court, “the privity inquiry ... naturally **focuses on the relationship** between the named IPR Petitioner

and the party in the prior lawsuit.” *WesternGeco*, 889 F.3d at 1319 (Fed. Cir. 2018) (emphasis added). This relationship between Petitioners and Lectrosonics was the focus of the Board’s decision in accordance with the *Taylor* Exceptions laid out by the Supreme Court, which have already been evaluated for due process issues.

Finally, it is important to note that Petitioners created their own time-bar problem, presumably with advice of counsel, in purchasing Lectrosonics and forming a privity relationship therewith, despite knowing of its prior IPR history. Indeed, Petitioners’ recycling of Lectrosonics’ prior arguments underscores this awareness. Thus, Petitioners’ own actions precluded themselves, and they now seek to avoid accountability for their actions under § 315 (b) and PTAB precedent.

B. The Board’s Evaluation of the *Taylor* Exceptions Is Legally Correct

i. *Taylor* Exception 2

Petitioners state that “[t]he Board’s finding of privity relies primarily on the fact that, prior to institution, RØDE acquired the stock of Lectrosonics Inc. and it became a subsidiary” to support its *Taylor* Exception 2’s “pre-existing,

“substantive legal relationship.” Paper 34 at 5 (internal citations omitted).

Petitioners attempt to distance themselves from Lectrosonics by claiming the “Board mistakenly viewed Petitioner’s purchase of Lectrosonics’ stock as a purchase of its assets and obligations and thus conflated the property law principles to which *Taylor* exception 2 is directed...” (Paper 34 at 6-7), and cite a string of

cases to support their claim that mere stock ownership does not create privity and that Petitioners and Lectrosonics are nothing more than “corporate relatives.” Paper 34 at 7. This is misleading, at best. The evidence shows that the relationship between Petitioners and Lectrosonics is not of some distant corporate association, but, in fact, is more akin to a merger.

In its decision, the Board contrasted *WesternGeco*, finding that Petitioners and Lectrosonics were not “distinct and unrelated corporate entities” citing to, *inter alia*, the evidence of its intertwined management structure and its interactions relating to Patent Owner. Paper 32 at 9. Petitioners repeatedly state that they “control their wholly-owned subsidiary.” Paper 34 at 10. And, after said acquisition, the sole three Freedman directors all assumed executive level positions at Lectrosonics. Damien Wilson now serves as the secretary and treasurer of Lectrosonics (Ex-1041, ¶ 15 (redacted)) and holds a seat on its Board of Directors (*Id.*), while founder, Peter Freedman, and Joe Hockey replaced two directors on Lectrosonics’ Board post-acquisition (*Id.*). Further, Freedman, Wilson, and Hockey remain the sole directors of Freedman. (*Id.*, ¶ 16). As a result, there is a 100% overlap between the Directors of Freedman and Lectrosonics.

This 100% overlap between Freedman’s and Lectrosonics’ directors is one of the reasons that corporate form has been ignored. Petitioners are not merely passive shareholders but are actively directing Lectrosonics. *See Gillig v. Nike*,

Inc., 602 F.3d 1354, 1362 (Fed. Cir. 2010) (“control of a party to the litigation through stock ownership or corporate officership is not enough to create privity, **absent a showing that the corporate form has been ignored.**”) (emphasis added). *See also Zerto, Inc. v. EMC Corp.*, IPR2014-01254, Paper 35 at 10 (PTAB Mar. 3, 2015) (The Court found a parent and a subsidiary to be a RPI where both “blur the lines of corporate separation ... [and] operate as a single entity” because the companies were “so intertwined” in control). In this case, the Petitioners bear the burden of proof to show that there is no privity between Petitioners and Lectrosonics, and have failed to show that the corporate form has been adhered to, despite Patent Owner’s showing to the contrary. Accordingly, Petitioners reliance on these cases that emphasize the corporate form is misplaced, as they involve traditional parent-subsidary relationships wherein the parent and subsidiary were actual distant corporate relatives – not run as one entity. Petitioners control Lectrosonics at its highest level and operate it as a merged company, which essentially erases any distinction between the companies.

In short, Petitioners’ attempt to downplay the significance of their acquisition is not persuasive in light of the evidence presented by the Parties. The Board did *not* conclude its finding of privity on corporate status alone, but on a thorough factual analysis of the relationship between Petitioners and Lectrosonics,

consistent with *AIT*, *Taylor*, and *CommScope*. Thus, the Board properly concluded that *Taylor* exception 2 weighed in favor of Patent Owner.

ii. *Taylor* Exception 5

Petitioners' claim that "[t]he Board made no finding that parent-Petitioners are subject to Lectrosonics's control in any way" (Paper 34 at 10) contorts a proper analysis under the CTPG, and it is irrelevant that "Freedman and RODE control their wholly-owned subsidiary" (Paper 34 at 10). The proper CTPG analysis is whether "a non-party exercised or *could have exercised* control over a party's *participation in the proceeding*," not the party itself. CTPG, p. 16 (emphasis added). Either way, Petitioners' assertions are contradicted by the evidence of record, as properly analyzed by the Board. Damien Wilson serves as both the CEO and Director of Freedman and is also Secretary and Director of Lectrosonics (Ex-1041, ¶¶ 15-16). He admits that he has "ultimate management responsibility for and knowledge of this IPR proceeding" (Ex-1041, ¶ 17). He then states "Lectrosonics has had no input, influence, direction, or control over any of the IPRs filed by Petitioners either before or after they were filed." Ex-1041, ¶ 18. This is literally an impossibility considering his simultaneous role in controlling the IPRs and acting as a Director and Secretary of Lectrosonics. These roles in Lectrosonics task him with a fiduciary duty to operate in the best interests of Lectrosonics, and he owes Lectrosonics a duty of care, loyalty, and good

faith/oversight. *See Weinberger v. Uop*, 457 A.2d 701, 710-11 (Del. 1983) (“There is no dilution of this obligation where one holds dual or multiple directorships, as in a parent-subsidary context. ... Thus, individuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations, and in the absence of an independent negotiating structure (see note 7, *supra*), or the directors' total abstention from any participation in the matter, *this duty is to be exercised in light of what is best for both companies*” (emphasis added)). Accordingly, Mr. Wilson is legally bound to consider Lectrosonics in his IPR decision making. Either way, his duties and significant involvement in Lectrosonics, and his intimate knowledge of its business, are not “turned off” when he acts on behalf of Petitioners in IPR decision-making. Also, actual control is not required. It is enough that Lectrosonics could have exercised control over Petitioners’ participation in the IPRs through its Director/Secretary. Petitioners bear the burden of proof and have set forth no evidence regarding how Lectrosonics fails to control the IPRs, in light of Mr. Wilson’s concurrent positions.

Petitioners are relitigating the same issues as the prior Lectrosonics IPRs. Although Petitioners claim that Lectrosonics had no input, it is undisputed that Lectrosonics identified Petitioners’ primary prior art (Strub, Woo, Gleissner, Nagai). *See Lectrosonics v. Zaxcom, Inc.*, IPR2018-01129, Paper 2 at i (PTAB,

June 12, 2018)). Lectrosonics also drafted the original arguments reused by Petitioners and litigated the prior Lectrosonics IPR to which Petitioners repeatedly claim collateral estoppel. *See* Paper 1; *see also Lectrosonics*, IPR2018-01129, Paper 2 (PTAB 2018).

As stated in *AIT*, Paper 128 at 37, “[a]s with our RPI analysis above, the Board ‘evaluate[s] what parties constitute “privies” in a manner consistent with the flexible and equitable considerations established under federal caselaw.’”

“‘Congress included “privies” within the parties subject to the statutory estoppel provisions in an effort to capture “the doctrine’s practical and equitable nature,” in a manner akin to collateral estoppel.’” *Id.* (quoting *Taylor*, 553 U.S.) (internal citations omitted). It would be inequitable to allow Petitioners to litigate the exact same case against Patent Owner for the reasons described above, forcing Patent Owner to incur double the costs, double the time, and the burden of re-defending the ‘902 Patent on the exact same basis. Therefore, the Board correctly determined that Lectrosonics is in privity with Petitioners under *Taylor* exception 5.

iii. Remaining Findings

Petitioners claim that Zaxcom’s argument “that Lectrosonics could add certain features to its products or “potentially” resume sale of its previously accused product is naked speculation.” (Paper 34 at 12). This is unsupported by their accompanying case law. In *Hybrigenics SA v. Forma Therapeutics, Inc.*,

PGR2018-00098, Paper 23 at 19 (PTAB Mar. 19, 2020), it was speculative as to whether the opposing party would “develop” an infringing compound, because no action had been taken on its part other than filing of a patent application. Here, Lectrosonics has already developed, sold, and pulled a product from commerce as set forth in Zaxcom’s Motion to Terminate. *See* Paper 15 at 3-4 (unredacted).

Petitioners’ reliance on *Merck Sharp & Dohme Corp. v. Glaxosmithkline Biologicals SA*, IPR2018-01229, Paper 13 at 12-13 (PTAB Dec. 18, 2018) is equally misplaced. In *Merck*, the Board rejected the patent owner’s theory because it was based on speculation that a non-party might lose the benefit of a license. Here, by contrast, there is nothing speculative about the benefit to Petitioners. If the challenged claims are cancelled, Petitioners and Lectrosonics are positioned to reintroduce already designed and fabricated, infringing products into the market. Zaxcom is a direct competitor to Lectrosonics and Petitioners. The possibility of infringement is therefore more than just “assumptions and speculation.”

The remainder of Petitioners’ arguments relate to explaining away the Board’s interpretation of the evidence in the record, much of such explanation that is clearly not credible. For example, Zaxcom has shown that it was the initial impetus for Lectrosonics coming together with Petitioners. “Patent Owner argues that about six months prior to the filing of the Petition, Lectrosonics contacted RØDE to discuss Zaxcom, and Lectrosonics’s executive vice president (EVP), Karl

Winkler, was immediately introduced to RØDE’s CEO, Damien Wilson. Id. (citing Ex. 2030).” Paper 32 at 5-6. Petitioners response is “the call never even happened.” Paper 34 at 14. Maybe not, but obviously communications did occur because Petitioners now own Lectrosonics. To have the Director believe that the parties never discussed Zaxcom after such an initial inquiry is just not plausible and questions the veracity of Petitioners’ other statements. Petitioners also claim that Zaxcom has not “identified any choate interest of Lectrosonics, let alone any that has had any influence on the instant IPR.” Paper 34 at 13. It is not Zaxcom’s burden to prove privity – it is Petitioners’ burden to prove that privity does not exist. And if such documents existed, they are in the possession of Petitioner. Yet, as properly found by the Board, Petitioners failed to meet this burden.

III. CONCLUSION

The record establishes that Petitioners and Lectrosonics are in privity under well-settled law. Petitioners have not, and cannot, carry their burden to show otherwise. Thus, the Board properly applied the § 315(b) time-bar in terminating the instant IPR, and the Request for Director review should be denied.

Dated: September 11, 2025

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 11, 2025, a complete and entire copy of the foregoing “PATENT OWNER’S RESPONSE TO PETITIONER’S REQUEST FOR DIRECTOR REVIEW” is being served on the petitioners at the electronic addresses shown below per consent.

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