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7  
8 UNITED STATES BANKRUPTCY COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION

11 In re

12 TECHNOLOGY PROPERTIES LIMITED, LLC,  
13 Debtor.

Case No. 13-51589 SLJ

Chapter 11

14  
15 MOTION FOR APPOINTMENT OF  
16 § 1102(a)(2) COMMITTEE AND  
RELATED RELIEF FOR LICENSEE  
17 DEFENDERS

18 Date: February 26, 2014  
19 Time: 2:00 p.m.  
Place: Courtroom 3099  
280 South First Street  
San Jose, California

21  
22 TO DEBTOR AND ITS COUNSEL OF RECORD AND ALL PARTIES IN INTEREST:

23 PLEASE TAKE NOTICE THAT on February 26, 2014, at 2:00 p.m. in the Courtroom of  
24 the Honorable Stephen L. Johnson, located in room 3099 of the above-captioned Court, Fujitsu  
25 Limited (“Fujitsu” or, generally, a “Licensee Defender”) by and through its counsel, will and  
26 hereby does move for: (1) an order appointing a statutory “Licensee Defender Committee” under  
27 11 U.S.C. § 1102(a)(2) and other relief under § 1102; (2) in the alternative, the replacement of the  
28 OCC members pursuant to § 1102(a)(4) with members more sensitive to their fiduciary duties and

FUJITSU’S MOTION FOR APPOINTMENT OF  
§ 1102(a)(2) COMMITTEE

1

1 the need to represent all creditors; and (3) an order mandating the sharing and report of the  
2 requested OCC information pursuant to § 1102(b)(3), including to facilitate coordination and  
3 cooperation among the 175 Licensee Defenders for fair joint defense.

4 Fujitsu will base this Motion on the memorandum of points and authorities filed in  
5 support of this Motion, the notice of motion and exhibits filed in connection herewith, all other  
6 pleadings and matters of record, and such other written or oral argument and other materials as  
7 may be presented before this Court takes the Motion under submission.

8

9 Dated: January 16, 2014

MORRISON & FOERSTER LLP

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By: /s/ G. Larry Engel

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G. Larry Engel  
Kristin A. Hiensch

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*Attorneys for Fujitsu Limited*

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11 TECHNOLOGY PROPERTIES LIMITED, LLC,  
12 Debtor.

Case No. 13-51589 SLJ

Chapter 11

13  
14 MEMORANDUM OF POINTS AND  
15 AUTHORITIES TO MOTION FOR  
16 APPOINTMENT OF § 1102(a)(2)  
COMMITTEE AND RELATED RELIEF  
FOR LICENSEE DEFENDERS

17 Date: February 26, 2014  
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FUJITSU'S P&As TO MOTION FOR  
APPOINTMENT OF § 1102(a)(2)

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1           **I.       INTRODUCTION**

2           Fujitsu Limited, a licensee of the Debtor (“Fujitsu” or, generally, a “Licensee Defender”)  
3 is one of approximately 175 § 1109(b) parties-in-interest that the Debtor has identified as  
4 settlement licensees (collectively the “Licensee Defenders”).<sup>1</sup> Such licensees could collectively  
5 become a super majority of the allowed creditor claims in this case if the Official Unsecured  
6 Creditors Committee (the “OCC”) succeeds with confirmation of its plan of reorganization (the  
7 “OCC Plan”) [Dkt. No. 321]. As set forth in Fujitsu’s Reservation Of Rights And Objection To  
8 Disclosure Statement For Official Committee Of Unsecured Creditors’ Plan Of Reorganization  
9 (the “Fujitsu DS Objection”), the OCC Plan could also provoke massive litigation (and potential  
10 appeals) based on aspects of the OCC Plan that threaten to undermine Licensee Defenders’ rights  
11 and defenses. Despite the potential harm to such parties-in-interest and the potential size of  
12 licensee claims, the majority of the Licensee Defenders have not been properly noticed and,  
13 therefore, are not adequately represented in this Case. Licensees have not been involved in the  
14 OCC plan process or in negotiations with the OCC at all, and most have not even been served  
15 with the key pleadings potentially impacting their rights.

16           Therefore, Fujitsu<sup>2</sup> moves this Court for the appointment of a statutory “Licensee  
17 Defender Committee” under 11 U.S.C. § 1102(a)(2) and for other relief under § 1102, because it  
18 is necessary to assure adequate representation of licensee creditors under these circumstances. In  
19 the alternative, Fujitsu requests a rebalancing of the existing OCC pursuant to 11 U.S.C

20  
21  
22           <sup>1</sup> Debtor’s Disclosure Statement (December 23, 2013) Dkt. 340-1 (“Debtor’s DS”) at 49,  
23 n.10, related to Debtor’s Plan of Reorganization (December 23, 2013) at 5, Dkt. 340 (“Debtor’s  
24 Plan”). Counsel to Fujitsu attempted to identify these 175 Licensee Defenders through public  
25 searches. Such investigation revealed approximately 134 other parties who may have licenses  
26 with the Debtor. The burden should be on the Debtor and the OCC to ensure all 175 parties are  
27 properly alerted to any developments in this case that may impact Licensee Defender rights.

28           <sup>2</sup> As a settlement licensee, Fujitsu is a § 1109(b) party in interest with standing to object to  
the Disclosure Statement. *See Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe  
Insulation Co.)*, 677 F.3d 869, 884 (9th Cir. Cal. 2012) (noting that “party in interest” standard is  
construed broadly and on a case-by-case basis where party has a sufficient stake in the  
proceedings). There are also many other similarly situated target defendants sued or threatened  
by the Debtor, including Licensee Defenders on other unsettled patent disputes.

1 § 1102(a)(4) to assure better communication and protection for the Licensee Defender  
2 constituents.<sup>3</sup>

## 3 II. PRELIMINARY STATEMENT

### 4 A. Overview of Key Parties and Settlement Licenses

5 Fujitsu and the other Licensee Defenders are legitimate operating businesses (most of  
6 whom are manufacturers or distributors of real products) who were sued or threatened with IP-  
7 infringement suits by the Debtor. By contrast, the Debtor and most of the Committee members  
8 are “trolls” or troll affiliates or investors or supporters. A so-called “troll” is the term commonly  
9 used to describe a “nonpracticing” entity that “commercializes” patents. That is, patent trolls  
10 acquire patent rights with the primary goal of coercing ransom payments for settlement “licenses”  
11 by the threat of (1) launching of patent infringement litigation, and (2) leveraging the huge cost  
12 and burden of defending against even exaggerated or meritless troll claims. Trolls and troll  
13 litigation have been the subject of many public policy debates calling for patent reforms to stop or  
14 limit troll abuses. Even the President has added his support for reform.<sup>4</sup> See Exhibits A through  
15 G (documenting the controversial and political nature of troll practices).

16 Fujitsu is informed and believes that all or substantially all of the Licensee Defenders  
17 were targets of such troll claims or litigation and obtained their licenses through related  
18 settlements (as opposed to obtaining licenses through business negotiations in traditional  
19 technology collaborations). That is, the Licensee Defenders have already paid to settle disputed  
20

---

21 <sup>3</sup> Fujitsu, for itself and any party joining in this motion, does not consent to jurisdiction of  
22 the Bankruptcy Court with respect to any patent dispute or any other pending litigation. This  
23 motion shall not be deemed or construed to be a waiver of the rights of Fujitsu under applicable  
24 law or in equity, including but not limited to, the right (i) to have final orders entered only after de  
25 novo review by a district judge in applicable matters, (ii) to trial by jury in any proceeding so  
26 triable in this case or any case, controversy, or proceeding related to this case, (iii) to have the  
27 District Court withdraw the reference in any matter subject to mandatory or discretionary  
28 withdrawal, or (iv) to assert or exercise any other rights, claims, actions, defenses, setoffs or  
recoupments to which Fujitsu is or may be entitled, all of which are expressly reserved.

<sup>4</sup> By failing to be candid about the troll nature of Debtor’s business and the OCC managed  
Reorganized Company’s business, the OCC Disclosure Statement fails to address the real  
feasibility, legal and risk factors that will be at issue in the OCC Plan confirmation battles. See  
Fujitsu DS Objection. Among those risks is that law reforms will make troll litigation less  
threatening and less feasible and, therefore, less profitable.



1 claims of the Debtor, most of which they regarded as meritless or exaggerated, because of the  
2 disproportionately huge cost of defense and burden to fully litigate such claims to judgment on  
3 the merits. Some Licensee Defenders are still litigating with the Debtor on other patent portfolios  
4 outside the Debtor's scope of existing settlements.

5 **B. The OCC Plan Threatens to Undermine Settlement Licenses**

6 The Licensee Defenders are entitled to the benefit of such settlement licenses and the  
7 OCC Plan cannot be used as a mechanism to relitigate previously settled litigation. In light of  
8 certain troubling aspects of the OCC Plan (detailed in the Fujitsu DS Objection) and because such  
9 controversial troll litigation is the primary business of Debtor and the OCC proposed Reorganized  
10 Company, Fujitsu and other Licensee Defenders are very concerned that the OCC Plan threatens  
11 to destroy or impair the settlement license benefits for which the Licensee Defenders have already  
12 paid. *See* Fujitsu DS Objection.

13 The Licensee Defenders are particularly focused on understanding the OCC Plan threats,  
14 some or all of which may be addressed in future adversary proceedings for declaratory or other  
15 relief. Licensee Defenders assert that: (i) settlement licenses must survive, regardless of what  
16 OCC or others attempt to do in order to harm them, because either (A) they are not the kind of  
17 executory contracts that can be rejected (*e.g.*, *In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010),<sup>5</sup>  
18 and are rights and defenses vested beyond harm under the OCC's exaggerated version of  
19 Section 1141, (B) even if they are found to be executory, as would be the result if OCC is  
20 permitted to exaggerate the effect of Section 1141 under its OCC Plan, *Sunbeam*<sup>6</sup> is right, and  
21 *Lubrizol*<sup>7</sup> and *Interstate Bakeries*<sup>8</sup> are wrong,<sup>9</sup> (C) even if those arguments fail, Section 365(n)

22 \_\_\_\_\_  
23 <sup>5</sup> As in *Exide*, Licensee Defenders dispute that their licenses can be rejected under Section  
24 365(n), and, in any event, their contract rights and defenses cannot be rejected or harmed, at least  
25 without creating consequential damage claims for Licensee Defenders. The character of such  
26 settlement licenses is not an appropriate issue to be resolved at plan confirmation, but requires an  
27 adversary proceeding under Bankruptcy Rule 7001, although considering the Patent Act and  
28 Federal IP issues in that and related litigation, it may be more appropriate for withdrawal of  
reference of such disputes pursuant to 28 U.S.C. § 157(d).

<sup>6</sup> *Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012).

<sup>7</sup> *In re Richmond Metal Finishers, Inc.* (“*Lubrizol*”), 756 F.2d 1043, *cert denied*, 475 U.S.  
1057 (1986).

1 still protects Licensee Defenders (despite being entirely ignored in the OCC Plan),<sup>10</sup> and (D) the  
2 objectionable OCC Plan is not confirmable and, if confirmed, will be invalidated, in whole or as  
3 to relevant parts, on appeals, despite OCC mootness arguments.<sup>11</sup>

### 4 C. General Basis for and Benefits of a Licensee Defenders Committee

5 Because the OCC fiduciaries<sup>12</sup> have proposed a plan that harms Licensee Defenders and  
6 has generally shut licensees out of plan-related discussions, it is clear that the OCC does not  
7 adequately represent or reasonably consider licensee rights and defenses—rather, it seems to be at  
8 odds with them. Appointment of a Licensee Defender Committee will enable similarly-situated  
9 licensees with an interest in this case to participate fairly in the process and protect their licenses,  
10 rights and defenses in an efficient manner.

11 The OCC Plan, unless promptly and comprehensively revised to reflect licensee  
12 considerations, will likely trigger litigation by multiple Licensee Defenders. Without

13 \_\_\_\_\_  
14 (Footnote continued from previous page.)

15 <sup>8</sup> *Interstate Bakeries Corp.*, 690 F.3d 1069 (8th Cir. 2012).

16 <sup>9</sup> *Sunbeam* correctly explains why § 365 rejection of an IP license is a breach — not a  
17 termination — and that defenses must survive, because the debtor licensor cannot profit from its  
18 own breach. Contrary precedent springing from the erroneous *Lubrizol* decision and its progeny  
19 are simply incorrect. If the Supreme Court has to resolve that Circuit split, that would be a good  
20 thing for IP licensees, because *Lubrizol* is intellectually indefensible on the merits. Since no other  
21 kind of executory contract is terminated by rejection, there can be no principled basis for treating  
22 IP licenses as terminated by rejection.

23 <sup>10</sup> Licensee Defenders' worst case result is the survival of their licenses under § 365(n),  
24 which would still defeat even the OCC's exaggeration of Section 1141 in the OCC Plan. For a  
25 public policy discussion of the importance of that § 365(n) defense for licenses, *see, e.g., In re*  
26 *Qimonda, AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), defending § 365(n) under 11 U.S.C. § 1506  
27 in Chapter 15. Note that the OCC Disclosure Statement and Plan entirely ignore § 365(n).

28 <sup>11</sup> The OCC and its members apparently intend to attempt to use their OCC Plan as a basis  
for the Reorganized Company to attack the Licensee Defenders' rights, claims and defenses.  
Thus, the Licensee Defenders may as well defend by challenging the standing and rights of the  
Reorganized Company by disputing the OCC Plan, and to the extent that the Plan survives,  
challenging also objectionable features, such as the exculpations of the OCC and its members and  
OCC member Board of the Reorganized Company, who must remain fully accountable  
fiduciaries in a way that cannot ever be exculpated or mooted on appeals.

<sup>12</sup> The OCC owes fiduciary duties to the Licensee Defenders. *See, e.g., In re Cochise*  
*College Park*, 703 F.2d 1339 (9th Cir. 1983), imposing on a trustee a specific fiduciary duty of  
disclosure and fair dealing in favor of each individual contract counterparty, which the trustee  
breached by sandbagging those contract counterparties with improper rejection tactics. *See*  
Fujitsu DS Objection.

1 coordination, such as through a statutory committee, litigation will proceed in a piecemeal  
2 manner. Appointment of a Licensee Defender Committee will enable licensees to cooperate and  
3 participate in the case in a streamlined, cost-effective, and coordinated manner. It will make any  
4 plan-related litigation more efficient by consolidating scores of licensees into a more unified  
5 process.

6 In addition, a Licensee Defender Committee could advance the restructuring of the Debtor  
7 by offering a better plan of reorganization. Unlike the troll Debtor or troll-aligned OCC, a  
8 Licensee Defender Committee could rally sufficient cost-of-defense settlements from licensee  
9 defendants as a way to fund a prompt resolution of the OCC's estimated \$8 million in unsecured  
10 claims. Therefore, in addition to ensuring adequate representation of Licensee Defenders, a  
11 Licensee Defender Committee could facilitate a fair and reasonable competing plan, thereby  
12 avoiding the counterproductive expenses and burdens of litigation provoked by the OCC Plan.

### 13 III. ARGUMENT

#### 14 A. Appointment of a Licensee Defender Committee Is Necessary and 15 Appropriate Here To Ensure Adequate Representation of Licensees

16 While the U.S. Trustee considers whether to appoint a Licensee Defender Committee  
17 under 11 U.S.C. § 1102(a)(1),<sup>13</sup> Fujitsu requests that the Court appoint such a committee pursuant  
18 to Section 1102(a)(2) because that is "necessary to assure adequate representation of creditors"  
19 under these circumstances.<sup>14</sup> Furthermore, in order to reduce discovery expense and to

20 <sup>13</sup> The Court reviews the U.S. Trustee's decision not to appoint an official committee *de*  
21 *novo*. See, e.g., *In re Oneida Ltd.*, 2006 Bankr. LEXIS 780, at \*3 (Bankr. S.D.N.Y. May 4, 2006)  
22 (the Court reviewed U.S. Trustee's decision *de novo*); *Enron*, 279 B.R. at 684 (same), *aff'd*, 2003  
23 U.S. Dist. LEXIS 18149 (S.D.N.Y. Oct. 9, 2003); *In re Texaco, Inc.*, 79 B.R. 560, 566 (Bankr.  
24 S.D.N.Y. 1987) (whether or not request for additional committee is made to the U.S. Trustee,  
25 Court must exercise its own judgment); *McLean*, 70 B.R. at 856-57 (an abuse of discretion  
26 standard does not apply with respect to U.S. Trustee's initial exercise of discretion); see also *In re*  
27 *Value Merchants*, 202 B.R. 280, 284 (E.D. Wis. 1996) (reviewing U.S. Trustee decision *de novo*);  
28 *In re Dow Corning Corp.*, 194 B.R. 121 (Bankr. E.D. Mich. 1996) (court has *de novo* authority to  
alter an existing committee), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997); *In re First*  
*RepublicBank Corp.*, 95 B.R. 58, 59 (Bankr. N.D. Tex. 1998) (applying *de novo* standard of  
review to determine adequacy of representation).

<sup>14</sup> We have just begun the discussions with the U.S. Trustee, but in the interest of time we  
need to proceed on parallel tracks. If we are able to persuade the U.S. Trustee of the merit of our  
request, the motion becomes moot.

1 compensate for inadequate disclosure so far in this case, the Court should order a comprehensive  
2 OCC report to all Licensee Defenders pursuant to §§ 1125 and 1102(b)(3), among other things:  
3 (i) identifying every possible prejudice that the OCC Plan could inflict on any Licensee Defender,  
4 and (ii) explaining how the OCC and its controlled Board intend to exercise their discretion under  
5 the OCC Plan with respect to Licensee Defenders, as well as (iii) identifying each OCC member's  
6 conflicts of interest relative to the Licensee Defenders.<sup>15</sup>

7 A statutory special committee comprised of Licensee Defenders is necessary and  
8 appropriate here. Courts have appointed special committees under § 1102(a)(2) in cases where,  
9 as here, there is a large number of specialized creditors with unique concerns creating adversity  
10 with the main creditors committee. For example: (i) in the Orange County Chapter 9 case,<sup>16</sup>  
11 where there were both (a) a special committee appointed for the investor creditors in the Orange  
12 County Investment Pool, and (b) an official subcommittee for those located outside the County  
13 and beyond insider control and Orange County political conflicts; (ii) in the *Pizza Time Theater*  
14 *Inc.* (Chuck E. Cheese) Chapter 11 case,<sup>17</sup> the franchisee committee was appointed, because (as  
15 here) there were many franchisees with huge potential rejection claims not respected by the

16 <sup>15</sup> In order fairly and cost-effectively to calculate that damage claim exposure from the  
17 OCC Plan, we need either or both (1) OCC compliance with their disclosure obligations under 11  
18 U.S.C. §§ 1125 and 1102(b)(3), including by correcting the flaws described in the Fujitsu DS  
19 Objection, and (2) discovery in one or more of the coming litigations triggered by the OCC,  
20 including in opposition at the long trial expected at the OCC Plan confirmation hearing. What we  
21 need includes:

22 (a) transparency as to the intent and effects of the OCC Plan on all the issues raised in  
23 the Fujitsu DS Objection, plus the better concealed others that are revealed in that required further  
24 disclosure, as well as those later discovered by the other Licensee Defenders who have been  
25 awakened to these covert OCC threats to their core businesses, whether by opposition of Fujitsu  
26 or others, or by the OCC beginning to make the adequate disclosure required by Section 1125 or  
27 1102(b)(3) and by the Committee's fiduciary duties to these Licensee Defenders;

28 (b) data about the other Licensee Defenders previously hidden as "confidential," so  
that they can cost-effectively coordinate their common defense and the potential for them co-  
sponsoring a competing plan of reorganization; and

(c) data about the pending troll litigation, so as to enable the Licensee Defenders and  
their Committee to develop a far superior competing plan of reorganization with those  
defendants.

<sup>16</sup> *In re County of Orange*, No. 8:94-bk-22272-ES (Bankr. C.D. Cal. 1994).

<sup>17</sup> *In re Pizza Time Theatre Inc.* ("Chuck E. Cheese"). No. CV-89-20633-SW (Bankr. N.D. Cal 1984).

1 creditors committee; and (iii) other more common committees for retirees (e.g., Detroit, Kodak,  
2 etc.), for equity holders (see below), for mass tort victims, etc. All those precedents apply here.<sup>18</sup>

3 Whether the appointment of a specific committee is appropriate under section 1102(a)(2)  
4 depends on the facts and circumstances of the case. See *In re Beker Indus. Corp.*, 55 B.R. 945,  
5 948 (Bankr. S.D.N.Y. 1985) (“The statute affords no test of adequate representation, leaving the  
6 bankruptcy Courts with discretion to examine the facts of each case to determine if additional  
7 committees are warranted.”). See also *In re Dow Corning Corp.*, 194 B.R. 121, 141 (Bankr. E.D.  
8 Mich. 1996) (“Most Courts confronted with a motion for the appointment of a separate committee  
9 recognize that there is no bright line test for determining whether an additional committee should  
10 be appointed. Instead, the decision must be made on a case-by-case basis.”), *rev’d on other*  
11 *grounds*, 212 B.R. 258 (E.D. Mich. 1997). In determining whether to appoint a committee under  
12 section 1102(a)(2) of the Bankruptcy Code, “the following non-exclusive factors are the most  
13 pertinent: (a) the nature of the case; (b) identification of the various groups of creditors and their  
14 interests; (c) the composition of the committee; and (d) the ability of the committee to properly  
15 function.” *Dow Corning*, 194 B.R. at 142. As demonstrated herein, the case for appointment of a  
16 Licensee Defender Committee satisfies each of these requirements.

17 Section 1102(a)(2) of the Bankruptcy Code provides that the Court may order the  
18 appointment of a statutory equity committee “if necessary to assure adequate representation of . . .  
19 equity security holders.” 11 U.S.C. § 1102(a)(2). Courts have developed a number of criteria to  
20 consider in determining whether to appoint such a statutory committee: (i) whether the interest  
21 of those constituents are adequately represented absent the appointment of a statutory committee;  
22 (ii) whether there is a likelihood of constituents receiving a distribution; (iii) the timing of the  
23 motion relative to the case; and (iv) whether the administrative costs of the statutory committee

24 \_\_\_\_\_  
25 <sup>18</sup> Those cases apply here because the OCC Plan admits there is value in excess of what it  
26 required to pay all the OCC recognized \$8 million creditors, because their OCC Plan is to restore  
27 the Reorganized Company to the equity holders when those creditors’ allowed claims are paid in  
28 full. Moreover, we address those equity precedents in order to rebut the predicable attempt by the  
OCC to distinguish special creditor precedents on the disputed theory that Licensee Defenders do  
not become creditors until after they are wrongly rejected by the OCC’s Reorganized Company  
after the Effective Date of the OCC Plan.

1 outweigh the benefits of adequate representation. *See, e.g., In re Kalvar Microfilm, Inc.*, 195 B.R.  
2 599, 600 (Bankr. Del. 1996); *In re Williams Commc'ns Group*, 281 BR. 216, 220 (Bankr.  
3 S.D.N.Y. 2002); *In re Johns-Manville Corp.*, 68 B.R. 155, 160 (S.D.N.Y. 1986); *Wang Labs.*,  
4 149 B.R. at 1-2. In addition to other factors, Courts also weigh the size and complexity of the  
5 case. *See, e.g., Beker*, 55 B.R. at 949. As set forth below, each of these factors, when applied to  
6 the instant facts, also strongly supports the appointment of a statutory Licensee Defender  
7 Committee.

8 **1. Licensee Defenders Cannot Rely On Any Other Constituency**  
9 **For Adequate Representation.**

10 Absent a statutory committee, Licensee Defenders clearly lack adequate representation in  
11 this case, because the OCC has not only ignored them and their interests, but has also designed its  
12 OCC Plan in a way that could harm the Licensee Defenders. *See Pilgrim's Pride Corp.*, 407 B.R.  
13 211, 217 n. 17 (Bankr. N.D. Tex. 2009) (“[W]hen it comes to valuation and determination of  
14 future capital structure for plan purposes, their agendas are likely to be very much at odds.”); *In*  
15 *re Saxon Indus.*, 29 B.R. 320, 321 (Bankr. S.D.N.Y. 1983) (stating that “the two committees are  
16 separate and distinct entities with the members of the unsecured creditors and equity creditors  
17 possessing variant priorities and interests with respect to their relationship with the debtor”).

18 Thus, there are no other parties in the case currently working to protect the rights of  
19 Licensee Defenders. Congress clearly noted the importance of safeguarding against this  
20 divergence of interests when it emphasized: “[a]s public investors are likely to be junior or  
21 subordinated creditors or stockholders, it is essential for them to have legislative assurance that  
22 their interests will be protected. Such assurance should not be left to a plan negotiated by a  
23 debtor in distress and senior or institutional creditors who will have their own best interest to look  
24 after.”<sup>19</sup> S. Rep. No. 989, 95th Cong., 2d Sess. 10 (1978). A statutory committee offers such

25 <sup>19</sup> As stated in the legislative history to section 1102, appointment of a statutory  
26 shareholders’ committee offers shareholders necessary protection against “the natural tendency of  
27 a debtor in distress to pacify large creditors, with whom the debtor would expect to do business,  
28 at the expense of small and scattered investors.” S. Rep. No. 989, 95th Cong., 2d Sess. 10 (1978).  
While Congress may not have anticipated this unique situation, the same logic applies. Because  
the OCC works to favor some creditors over others, by delaying when parties in interest like

(Footnote continues on next page.)

1 assurance by facilitating a unified voice against the myriad competing interests. *See In re Finley*  
2 *Kumble*, 85 B.R. 13, 16 (Bankr. S.D.N.Y. 1988) (“The committee structure provided for in  
3 Chapter 11 cases offers substantial benefits to the Court and the Debtor in the form of a  
4 centralized body to be heard and met with.”).

5 **2. The Debtor Has The Capacity To Compensate Licensee**  
6 **Defenders For At Least Some Of The Harm Caused By The**  
7 **OCC Plan**

8 The second element to which Courts look in determining whether to appoint such a  
9 committee is whether that constituency has an economic interest to protect. Despite the OCC  
10 Plan’s apparent effort to deprive the Licensee Defenders of a recovery by wrongful manipulation  
11 of timing for triggering their rejection or other claim damages, the Licensee Defenders clearly  
12 have a right to be paid that is equal to the right of any of the unsecured creditors, whom the OCC  
13 expects to pay in full.

14 **3. A Statutory Committee Appointment Will Not Delay This Case**

15 The appointment of a statutory committee will not delay this case but will instead  
16 facilitate a swifter resolution of this case, since the OCC Plan is not confirmable. The Court  
17 should appoint the committee as a way to facilitate plan negotiations and discussions among  
18 competing stakeholders regarding formulation of a better and less divisive plan of reorganization.  
19 The appointment of a statutory committee will ensure that the 175 Licensee Defenders have a seat  
20 at the negotiating table, rather than limiting their options to litigation against plans and plan  
21 proponents on a piecemeal basis. This is not a case where stakeholders have moved for the  
22 appointment of a statutory committee merely to extract some hold-out value from the Debtor.  
23 Rather, the appointment of a statutory committee is a constructive solution to ensure adequate  
24 representation of an otherwise unrepresented but critical group and to hopefully advance a  
25 consensual plan that satisfies all stakeholders.

26 (Footnote continued from previous page.)

27 Licensee Defenders become creditors under the OCC Plan, such Licensee Defenders need a  
28 committee now that does protect their interests before those interests are lost.





1 plan.<sup>20</sup> Because the OCC estimates only \$8 million in real, net unsecured claims it should not be  
2 difficult for a Licensee Defender Committee to organize a competing plan, even using cost of  
3 defense amounts in settlements. Note, however, that neither the Debtor nor the troll sponsor OCC  
4 could ever itself accomplish that kind of plan designed by the Licensee Defender Committee,  
5 because no legitimate business targeted by trolls would ever want to revive a failing troll so that it  
6 could harass them again in the future.

7 As the Supreme Court has noted, albeit in a different context, parties in interest must be  
8 protected *before plan confirmation* from unfair manipulation by plan proponents. *E.g., Bank of*  
9 *Am. v. 203 North La Salle Street P'ship*, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999)  
10 (equity holders cannot divert the upside opportunity from a secured creditor's deficiency claim by  
11 retaining equity control without a market value test under a plan of reorganization, because there  
12 is value in controlling the debtor's assets.) Just as the "new value" plan in *203 North LaSalle*  
13 could not be manipulated by equity to retain control of the Reorganized Company, such control  
14 should rightfully belong to all of the unsecured creditors. Here, the troll sponsoring OCC  
15 creditors cannot retain control that should belong to the majority of the allowed claim holders:  
16 *i.e.*, Licensee Defender creditors created by their OCC Plan. *See id.*

17 The precedent of *203 North La Salle* is relevant here, because the OCC has created an  
18 even more improper version of a new value plan by the manipulation of OCC control over the  
19 claim and contract assets and the section 365 rejection power. That is, the moment before the  
20 OCC Plan becomes effective, the OCC troll-sponsor creditors would control the case. However,

21 \_\_\_\_\_  
22 <sup>20</sup> So, what kind of a competing Plan would the Licensee Defenders Committee advocate?  
23 One goal would be to pay off the required priority and administrative claims allowed by the  
24 Court, plus the allowed unsecured claims, and cram down the rest at the nothing they deserve  
25 under applicable law, all without disturbing the existing license settlements with the Licensee  
26 Defenders. That would, (a) avoid the nonproductive and unnecessary defensive litigation that the  
27 OCC Plan would otherwise compel from Licensee Defenders, and (b) pay the OCC-favored  
28 creditors their estimated \$8 million in allowed claims and end any need—or excuse—from them  
to manage and continue a troll business through the Reorganized Company. How would that be  
accomplished? By having the Licensee Defender Committee organize and control a *business* (not  
troll) settlement process that (1) expressly assures all Licensee Defenders of perpetual peace and  
the continuing benefit of their bargains under their settlement licenses, and (2) promptly settles all  
the pending or threatened troll litigation on a fair and reasonable basis sufficient to close out this  
case.

1 upon rejection after the OCC Plan Effective Date, the Licensee Defenders could become the  
2 super-majority creditors (*i.e.*, with claims potentially totally many times the claim amounts under  
3 the OCC Plan). Yet, just as with the controlling equity in a new value plan barred in *203 North*  
4 *La Salle*, the OCC is abusing its control to unfairly harm the Licensee Defender creditors that its  
5 OCC Plan is creating after the Effective Date, at which point it could be too late for the Licensee  
6 Defenders to defend themselves effectively. Clearly, the Courts need to fashion rules to stop this  
7 kind of divisive plan from OCC fiduciaries. Therefore, this Court should follow the Supreme  
8 Court's suggestion that *allowing competing plans is one means of addressing the abuse of control*  
9 *by the initial plan proponent*. See *id.*, 119 S.Ct. at 1424.

10 If the chief goal in formulating a plan is to pay the priority administrative and allegedly  
11 allowable \$8 million unsecured claims in this case, neither the Debtor's Plan nor the OCC Plan is  
12 a cost-effective solution. Indeed, both Plans are counterproductive and infeasible, and have the  
13 potential to create larger claims and expenses than could ever be paid. See Fujitsu DS Objection.

14 Clearly, the OCC troll-supporter creditors don't trust the Debtor's management or insiders  
15 to run a continuing troll business or fairly and timely to pay them in full. Thus, the OCC Plan  
16 theory is to replace the Debtor's management with perpetual, unchangeable management by OCC  
17 member troll sponsors with their own agenda (as well as the duplicative/perpetual OCC and their  
18 professionals). See Fujitsu DS Objection. Whenever the net proceeds from the Reorganized  
19 Company's continuing troll litigation business are sufficient to pay off the allowed claims, then,  
20 apparently the insiders can resume control of their troll business. None of this is attractive or  
21 tolerable to Licensee Defenders or, indeed, even feasible. Moreover, the OCC Plan will create  
22 expensive test-case litigation and likely appeals.

23 A Licensee Defender Committee would be better able to resolve or entirely avoid such  
24 litigation by proposing an alternative plan at a sufficient price for a win-win result, properly  
25 paying the allowable claims.<sup>21</sup> In the event that the Court does not allow a Licensee Defender

26 <sup>21</sup> For example, one of many defensive strategies of legitimate businesses resisting the  
27 objectionable conduct of trolls is illustrated by RPX, where the legitimate target defendants use a  
28 "white knight" patent buyer to acquire patents in competition with the trolls for defenses and  
reasonable license fees. See Exhibits D, F and G. The Licensee Defenders Committee idea is not

(Footnote continues on next page.)

1 Committee, Fujitsu requests that the Court promptly schedule a §105(d) status conference to  
2 discuss how best and most cost-effectively to obtain the data needed to fashion an ad-hoc  
3 Committee of like-minded Licensee Defenders to coordinate the coming litigation or a competing  
4 plan. Allowing the Licensee Defenders to have common interest privileged discussions,  
5 especially without debates with plan proponents over the boundary of joint defense versus the  
6 solicitation of opposition to plans, is in the best interests of all stakeholders.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Fujitsu requests the Court to order:

- 9 1. The appointment of a Licensee Defender Committee pursuant to § 1102(a)(2);  
10 2. In the alternative, the replacement of the OCC members pursuant to § 1102(a)(4)  
11 with members more sensitive to their fiduciary duties and the need to represent all creditors;  
12 3. The sharing and report of the requested OCC information pursuant to  
13 § 1102(b)(3)(C), including to facilitate coordination and cooperation among the 175 Licensee  
14 Defenders for fair joint defense; and  
15 4. Such other relief as is just and proper.

16 Dated: January 16, 2014

MORRISON & FOERSTER LLP

18 By: /s/ G. Larry Engel  
19 G. Larry Engel  
20 Kristin A. Hiensch

*Attorneys for Fujitsu Limited*

21  
22  
23  
24 (Footnote continued from previous page.)

25 exactly the same, but the point is to illustrate that target defendants can deal with recognized  
26 “good guys” on a business like basis, whereas litigation is the only typical tool of trolls like the  
27 Debtor or the Reorganized Company. A better plan could offer a quasi-RPX type of solution,  
28 whereby settling legitimate businesses can achieve a fair license defense in a reasonable  
settlement without “feeding the beast” (i.e., paying ransom to the troll, whether as the Debtor or  
the OCC’s imagined Reorganized Company).

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**EXHIBIT A**  
(WALL STREET JOURNAL, November 11, 2012)

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BUSINESS | Updated June 4, 2013, 1:44 p.m. ET

## Obama Takes Aim at Patent-Holding Firms

By JARED A. FAVOLE and BRENT KENDALL

WASHINGTON—The White House announced a set of executive actions and policy recommendations Tuesday aimed at preventing certain patent-holding firms, known as "patent trolls" to their detractors, from abusing the patent system.

The Obama administration's actions are intended to target firms that have forced technology companies, financial institutions and others into costly litigation to protect their products. These patent-holding firms amass portfolios of patents and focus on pursuing licensing fees rather than using the patents to build new products.

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**More**

**Experts Weigh In on President's Plan**

Fact Sheet: White House actions

**Regulators Take Look at Patent Firms' Impact** (11/18/2012)

**Cisco Calls Patent Trolls Racketeers** (11/11/2012)

**Patent Troll Tactics Spread** (7/8/2012)

**When Lawyers Become 'Trolls'** (1/23/2012)

The firms say they are doing nothing wrong, just defending patents that were legally granted by the U.S. Patent and Trademark Office. They say they promote a fair market by protecting smaller inventors.

To help deter questionable patent-infringement lawsuits, the Obama administration is, among other things,

directing the Patent and Trademark Office to issue rules that require the owner of a patent to be clearly identified, the White House said. Businesses are sometimes sued by shell companies and don't always know who actually owns the patent they are being accused of infringing or whether the firm holds other relevant patents.

In addition, President [Barack Obama](#) is asking Congress to pass legislation that would give courts broader discretion to impose sanctions on litigants who file lawsuits deemed abusive by judges.

In all, the Obama administration initiated five executive actions and made seven recommendations to lawmakers. The administration's announcement came in conjunction with the release of a White House report on patent-holding firms. The report cites estimates that companies and individuals paid patent-holding firms \$29 billion in 2011, up sharply in recent years.

1 The president's unilateral moves might make an incremental difference in the patent  
2 system, but the White House will need help from Congress to make more substantial  
3 changes, said Edward Reines, a patent lawyer with Weil, Gotshal & Manges LLP.

4 "The legislative recommendations are the core of this initiative," Mr. Reines said.

5 Congress is already considering proposals that are similar to those made by the  
6 White House. Lawmakers spent many years debating patent legislation before  
7 passing a law in 2011 that overhauled the patent system for the first time in nearly six  
8 decades.

9 House Judiciary Committee Chairman Bob Goodlatte (R, Va.) said that Tuesday's  
10 White House announcement "is a good indicator that momentum is building behind  
11 efforts to enact meaningful legislation to address abusive patent litigation."

12 Tech companies that have faced infringement lawsuits threw support behind the  
13 administration's efforts. The Coalition for Patent Fairness, a trade group whose  
14 members include [Google Inc.](#), [Intel Corp.](#) and [Oracle Corp.](#), said it particularly  
15 supports efforts to impose monetary sanctions on aggressive litigants that file  
16 frivolous lawsuits.

17 Among the administration's other actions, Mr. Obama is directing the Patent Office  
18 to train examiners to scrutinize applications for overly broad patent claims.

19 He is also looking to rein in the growing use of the International Trade Commission  
20 to settle patent disputes. In recent years, patent-holding firms have increasingly filed  
21 infringement claims at the ITC, which has jurisdiction over certain unfair trade  
22 practices and can bar the importation of products that infringe patents. The ITC  
23 process usually moves more quickly than a patent-infringement case in federal court.

24 **Earlier**



25 The White House is set to announce a set of  
26 executive actions aimed at reining in so-called  
27 "patent trolls" amid concerns that the patent firms  
28 are abusing the system. Brent Kendall joins  
MoneyBeat.

The Obama administration would like Congress to change certain ITC legal standards and ensure that the agency has flexibility in hiring its judges. The president is also ordering a review of existing procedures at the ITC.

The president has taken a dim view of certain patent-holding firms. In February, he said some firms "don't actually produce anything themselves. They're just trying to essentially leverage and hijack somebody else's idea to see if they can extort some money out of them."

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The new actions build on other government efforts. The Federal Trade Commission and the Justice Department are examining whether some patent holders are disrupting competition in high-tech markets.

—Ashby Jones contributed to this article.

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**EXHIBIT B**  
**Cisco Calls Patent Trolls Racketeers**  
By Ashby Jones  
(WALL STREET JOURNAL, November 11, 2012)

Cisco Systems Inc. [CSCO +1.37%] has unveiled a new strategy for dealing with so-called patent trolls: accuse them of breaking the law.

The networking-equipment maker has captured the attention of patent experts and lawyers across the country by filing strongly worded legal claims against two companies that buy up patents and seek to make money from them through licensing and litigation.

‘When someone runs a racket, we’re going to make them liable for racketeering,’ says Cisco’s Mark Chandler.

Cisco’s attempt to turn the tables on those companies, more formally known as “non-practicing entities,” comes as Congress and the federal Courts have largely failed to stem a wave of patent lawsuits that has roiled the technology industry.

Cisco’s suit against Chicago-based Innovatio IP Ventures LLC targets a tactic that some NPEs have employed in recent years. Rather than allege that a big technology company has infringed one or more of their patents, Innovatio and other NPEs have gone after the tech company’s customers.

Cisco, which is based in San Jose, Calif., and co-plaintiffs Netgear Inc. NTGR -0.36% and Motorola Solutions Inc., [MSI +0.68%] claim that Innovatio has sent 8,000 “threatening” letters to coffee chains, hotels and other retailers using Wi-Fi equipment that includes the three companies’ technologies.

Innovatio’s tactics, Cisco argues in its lawsuit, are “misleading, fraudulent and unlawful.” It says they effectively amount to an extortion scheme, and therefore violate federal antiracketeering laws.

Separately, Cisco claims that Ottawa-based Mosaid Technologies Inc. violated the same laws by allegedly paying witnesses for testimony and documents in order “to overcome fatal shortcomings” in patent-infringement claims it filed against Cisco in 2011 at the U.S. International Trade Commission.

“When someone runs a racket, we’re going to make them liable for racketeering,” said Mark Chandler, Cisco’s general counsel.

Innovatio said it “categorically” denies Cisco’s allegations. “Cisco’s claims are long on rhetoric and hyperbole and short on the facts and law,” said Matthew McAndrews, a lawyer for Innovatio, in a statement. Mr. McAndrews said Innovatio this week will ask James F. Holderman, the federal judge overseeing the case, to dismiss the claims.

Mosaid said in a statement that Cisco’s claims were “ridiculous,” and accused Cisco of digging up allegations from a case the parties resolved earlier this year in order to raise new claims.

“Cisco is trying to use the racketeering label to create litigation and settlement leverage when its underlying case has no merit. This tactic...will not succeed,” Mosaid said.

Patent experts and lawyers are watching the two cases closely. Rather than lodging their own claims, the strategy Cisco and other companies have typically used against NPEs has been to defend themselves when named as defendants or to pre-emptively ask a judge to declare either that a particular patent is invalid or that no infringement took place.



1 “A win by Cisco isn’t necessarily going to stop the NPE industry in its tracks,” said Ann  
2 Fort, a defense lawyer in Atlanta who isn’t involved in the cases. “But it could halt some of the  
3 tactics used by NPEs, like going after companies’ customers.”

4 Their defenders say NPEs, which buy up troves of patents not to develop products with  
5 them, but to pursue licensing and litigation revenue, spur innovation by allowing inventors—  
6 ranging from university research labs that aren’t interested in developing products to basement  
7 tinkerers—to get paid for their creations. They say the firms also help ensure that well-heeled  
8 tech companies don’t profit unfairly from the work of others.

9 Either way, such firms are increasingly active in the Courts. The proportion of patent  
10 lawsuits filed by NPEs has grown to 40% in 2011 from 22% in 2007, according to Lex Machina,  
11 an intellectual-property litigation, data and analytics company.

12 Some of the more recent suits target technology companies’ customers. Patent experts say  
13 that approach is aimed at extracting dozens or hundreds of smaller settlements from companies  
14 that may lack the legal firepower to fight back.

15 “If Innovatio sues Cisco, Cisco knows how to handle its defense,” said Colleen Chien, a  
16 law professor at Santa Clara University and a patent-law expert. “But if you’re a coffee shop or  
17 hotel and aren’t in the business of making Wi-Fi equipment, you’re more likely going to settle” to  
18 avoid a lawsuit “than you are to fight a big, costly legal battle.”

19 Innovatio argues that its tactics are completely legal: federal law lets a patent holder bring  
20 infringement claims against anyone who makes, sells, or uses a patent without permission.

21 Mr. McAndrews, Innovatio’s lawyer, said the company simply “seeks to grant  
22 licenses...to those entities that derive the most immediate...benefit from infringing” Innovatio’s  
23 patents. Those businesses, said Mr. McAndrews, are the hotels, restaurants and retailers that  
24 “configure and use” the particular Wi-Fi equipment made and sold by Cisco, Motorola and  
25 Netgear. Most of Innovatio’s patents were purchased from or once owned by chip maker  
26 Broadcom Corp. BRCM +0.39%

27 Cisco, on the other hand, claims that many of Innovatio’s demands to the end users of  
28 Cisco’s products have been fraudulent for a variety of reasons. In some instances, Cisco argues,  
the patents Innovatio was asserting had already expired. In others, says Cisco, the products  
already were covered by the licenses that Innovatio was looking to sell.

“They’re well aware that these people don’t owe them any money,” said Cisco’s Mr.  
Chandler, who said he heard from 400 customers that had gotten notices from Innovatio. “This is  
nothing other than a shakedown.”

Innovatio denies making fraudulent licensing requests or filing sham lawsuits.

To win in Court, Cisco must prove not only that Innovatio’s claims were bogus, but that  
Innovatio knew they were bogus, said Daniel Ravicher, a law professor at Cardozo School of Law  
in New York. “That’s hard to do,” he said. “I really don’t think this is a tactic that’s going to get  
very far.”

But others have higher hopes for Cisco’s approach. “Sometimes, lawsuits are about how  
much damage you can threaten in order to change behavior,” said Robin Feldman, a law professor  
at the University of California’s Hastings College of the Law and author of a recent book on  
patents. “At the very least, Cisco might get that. Or it could get a sympathetic judge or jury that  
takes Cisco’s case and runs with it.”

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EXHIBIT C



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## Former Intuit Lawyer Plays Offense Against NPEs

Chelsea Allison

2013-09-20 04:19:46 PM

As the head of IP litigation at Intuit Inc. a few years ago, Kevin Jakel says he was essentially managing a docket of cases brought by non-practicing entities.

"I wanted to find a way to not just pay off patent trolls or buy our way out of the problem," he said. But none of the existing patent-pooling ventures took the approach Jakel had in mind. So last year, he left the Mountain View software company and founded Unified Patents, which is geared toward taking proactive measures designed to ward off NPEs from circling specific sectors.

The first fruits of his labor are ripening now: On Thursday, Unified petitioned the U.S. Patent and Trademark Office for an *inter partes* review of a patent held by Clouding IP since 2004, which covers file synchronization techniques employed by most cloud storage solutions. Jakel said the firm will file others, too.

The IPR is a revamped proceeding borne out of the America Invents Act, which was passed in 2011, and is meant to make it easier to beat back flimsy patent claims. The option doesn't come cheap, however: estimates of IPR costs range from upwards of \$200,000, according to a September 2013 paper, "Patent Assertion and Startup Innovation," by Colleen Chien, associate professor at the Santa Clara University School of Law and new adviser at the White House Office of Science and Technology Policy. Reviews replaced *inter partes* reexaminations, which were similar but more protracted.

As of July, 377 IPR petitions had been registered, according to data compiled by Merchant & Gould, and 11 had been either terminated or dismissed.

Oracle initiated two IPRs against the Clouding IP patent earlier this year, but when the parties settled, the process ended. Before reaching its deal with Oracle, Clouding IP attempted to amend some claims — a step Jakel says concedes invalidity.

All told, Oracle had challenged 13 of Clouding IP's patent claims; Unified added seven more claims to that mix. In taking up where Oracle left off, Unified is even using the same firm, Oblon Spivak, which touts itself as the nation's number one

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filer of post-grant challenges.

RPX Corp., a patent defense industry leader, sees the IPR as but one arrow in the quiver, noted Robert Heath, the firm's senior vice president for corporate development. RPX has not filed IPRs itself, Heath said.

"Unlike buying patents, which will 100 percent reduce the risk, IPRs are not without risk," he said.

Brian Love, assistant professor at the Santa Clara School of Law, said reexaminations have long been a double-edged sword. "Sometimes it limits or outright eliminates patents, but often it actually makes them stronger."

Under the pre-AIA system, just 42 percent reexaminations succeeded in having claims canceled, according to patent office data. Courts will be naturally less inclined to second-guess a patent that has been twice "blessed" by the PTO, Love said.

IPRs are only one element of Unified's strategy. Headquartered in Los Altos, the firm intends to differentiate itself in the NPE defense market through its focus on particular technologies, dubbed micro-pools, which bring together competitors in sectors targeted by NPEs. Clients like NetApp, which advocate for industry solutions to shared problems, favor such an approach.

Michael Sacksteder, chair of the patent litigation group at Fenwick & West, said Unified's segment approach is smart because its clients pay only for the defense of patents in areas they care about. In addition to cloud computing, Unified says it's working on micro-pools in financial services and streaming media.

When it comes to selecting micro-pools of focus, Jakel and Unified COO Shawn Ambwani "follow the trolls."

"We want to affect their investment decisions," Jakel said, "so when they look at cloud storage they say, 'Why would we try to monetize there?'"

That's a key point for Julie Samuels, a staff attorney at the Electronic Frontier Foundation.

"The problem is that for the most part, what patent trolls do is perfectly legal," she said. "Trying to make life harder for them, and trying to make it a less desirable business model so there will be fewer of them," is the best approach.

Unified tracks NPE activity through demand letters and tries to identify patent areas before they become hot. "I use patent analytics in the same ways NPEs do," Jakel said.

RPX also employs an industry-centric approach, Heath said. RPX has more than 150 members and takes in more than \$200 million a year in revenues from companies who subscribe in part to be able to defend themselves with the patent rights RPX has secured. "We have a lot of different micro pools within our macro pool," Heath said.

Moreover, he added, scale is the most important factor in shaping rational behavior, and Unified is a couple orders of magnitude smaller than RPX. He likened the newcomer's entry into the market to David trying to enter Goliath's playground.

Unified is recruiting both large and small companies to join its micro-pools, so they reflect the full ecosystem within a technology focus.

The little guys tend to be easy targets, Jakel notes, and Unified has extended membership to them for free. Unified won't disclose how much bigger players pay to participate.

In some ways, small companies are like canaries in the cave, signaling that NPEs are eyeing a particular technology.

"You're not going to send a demand letter to Google very often," Jakel said. "They can send those demand letters to small companies with relative impunity."

Companies with less than \$10 million in revenue make up more than half of the unique defendants sued by NPEs, according to Chien's study.

Jakel hopes to curb such easy target monetization. And when companies fail, Jakel wants them to sell their patents to

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Unified, rather than keep feeding the NPE cycle.

It also plans to snap up patents in those areas on the secondary market to reduce the number available to NPEs. But Behrooz Shariati, an IP litigator at Womble Carlyle, speculated that might simply jack up the price for patents. Still, Shariati said Unified's approach struck him as good in theory.

"The only place NPEs are really vulnerable is their patents," he said, "so if you're going after their patents, you're blunting the weapon."

Contact the reporter at [callison@alm.com](mailto:callison@alm.com).

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# EXHIBIT D

**Managing Intellectual Property**

**US PATENT FORUM 2014**  
March 25 2014, Washington DC, Willard Intercontinental  
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## PATENT TROLLS FACE HARSH CRITICISM AT SENATE HEARING

0

|

08 November 2013 | David Hatch, Washington DC

There was strong rhetoric at a Thursday US Senate hearing on deceptive practices by patent monetisation firms, with trolls accused of extortion and fraud and "whistleblowers" urged to come forward



Attention whistleblowers at patent monetisation firms that threaten the elderly, non-profits and small businesses: the US Senate wants to talk to you.

Democratic Senator Claire McCaskill, head of a Senate consumer protection subcommittee, promised anonymity on Thursday for employees at patent assertion entities that step forward to privately share trade secrets with the panel as it investigates allegations of abusive litigation

tactics.

"We would welcome a whistleblower that is inside one of these entities," the senator said at a hearing on "deceptive practices" by patent firms. "We are very used to, in my office, protecting whistleblowers."

McCaskill's request came as both chambers of Congress intensify scrutiny of the patent industry, with a steady stream of hearings and bills aimed at dissuading meritless lawsuits and requiring more transparency by litigants.

The main legislative action is in the judiciary committees, with Senate Judiciary Chairman Patrick Leahy, a Democrat, prepping legislation to be paired with a comprehensive measure introduced on October 23 by House Judiciary Chairman Bob Goodlatte, a Republican.

### An FTC registry for demand letters

McCaskill said her subcommittee is targeting the "bottom feeders" and "scam artists" that send hundreds or thousands of "demand" letters to businesses and customers seeking settlement payments for outrageous claims - such as use of common technologies like Wi-Fi and office scanners. Patent holders with legitimate infringement grievances are not a concern, she added.

**Managing Intellectual Property**

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- A big day at the Supreme Court for patent case watchers
- The week in IP - Coynye West, USPTO rejects R-word, Samsung and Apple CEOs to discuss patent dispute
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Feedback

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**December 2013 / January 2014**

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While the subcommittee, part of the influential Senate Commerce Committee, does not have broad jurisdiction over patent issues, McCaskill told reporters that she might pursue a narrowly focused patent bill. Such legislation could require parties that send demand letters to share details about their ownership and allegations with a Federal Trade Commission "registry".

The hearing was notable for the blunt criticism leveled at patent asserters that engage in these sorts of practices. "It's a silent extortion," said Nebraska Attorney General Jon Bruning, who accused firms behind demand letter schemes of using Mafia-like tactics and engaging in "fraud".

He urged lawmakers to use their subpoena powers to haul top executives with the most abusive patent companies before Congress to force them to respond to questions about tactics that include sending demand letters to elderly people who live in nursing homes. The attorney general added that he's exploring whether some patent asserters may have engaged in criminal behavior.

### The victims bear witness

The costs that small- and mid-sized businesses incur when they're broadsided unexpectedly with threats of patent litigation were underscored by Larry Sinewitz, executive VP at BrandsMart USA, who testified on behalf of the National Retail Federation.



The appliance retailer has received six demand letters over the past decade, forcing it to spend \$500,000 on attorney fees and settlements with patent trolls, he said. Most of the claims, Sinewitz added, were frivolous, such as a request that the retailer pay license fees for using widely available technology that processes debit and gift card transactions.

"What do you do? Consult a patent lawyer?" he testified. "BrandsMart does not have in-house patent lawyers, and we did not have a patent lawyer on retainer," he said. Picking up the phone to consult a patent attorney to determine the validity of a claim could cost "tens of thousands of dollars".

Mark Chandler, senior VP, general counsel and chief compliance officer at Cisco, said that his company, which rarely accuses others of violating its extensive patent portfolio, would have no problem complying with an FTC registry.

Also critical of trolls were Jon Potter, president of the App Developers Alliance, which represents creators of apps and coding software, and Julie Samuels, senior staff attorney with the Electronic Frontier Foundation, a non-profit advocacy group that promotes civil liberties. Both groups have teamed together to fight trolls through the court system.

### A lone supporter

The hearing's only supporter of patent assertion firms was Adam Mossoff, a law professor at George Mason University just outside Washington, DC, and co-director of the school's Center for the Protection of Intellectual Property.

While there are bad actors and frivolous lawsuits, it's unclear whether there's evidence of a "systemic" problem that warrants the attention of Congress, he argued. A rush to rewrite patent laws, he warned, could have the unintended effect of harming innovation.

But Mossoff's arguments didn't resonate with McCaskill, who told the professor that after listening to his testimony she was more convinced of the need for a demand letter registry to ensure greater transparency.

Photos (c) Senator Claire McCaskill



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### POLL

Following the US Apple v Samsung trial, do you think juries should play a role in patent cases?

- Yes - juries should decide validity, infringement and damages
- Yes - but juries should not have a role in damages calculation
- No - judges are better placed than juries to decide patent matters

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### SUPPLEMENTS

Mexico IP Focus 2013 10th edition

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**EXHIBIT E**

Start-Up Takes on 'Patent Trolls'

Firm Plans to Defensively Buy Patents and Charge Fixed Membership-License Fees

(Wall Street Journal, November 24, 2008)

By Don Clark

A San Francisco start-up is disclosing details of a new service to address patent risks facing technology companies, and has lined up Cisco Systems Inc. and International Business Machines Corp. as initial members.

The new venture, called RPX Corp., is the latest response to the rise of firms that buy up patents to seek royalties from other companies. Such licensing firms are often called nonpracticing entities-or, more derisively, patent trolls-because they don't make or sell products that use patents.

The patent-licensing firms have figured prominently in costly lawsuits against technology companies. RPX estimates . that those firms have raised more than \$6 billion over the past decade to finance patent purchases.

RPX, in response, plans to become what it calls a "defensive patent aggregator," buying patents to keep them from firms that might use them as the basis of lawsuits or to press for licensing payments. Companies that pay a fixed annual fee receive licenses to the patents purchased by RPX, which pledges never to assert them.

John Amster, RPX's co-chief executive, hopes to attract hundreds and eventually thousands of corporate members. "At thousands of members I think it's a game-changing business," Mr. Amster said.

RPX isn't the only organization trying to aid potential patent defendants. Allied Security Trust, which was formed by a group of large technology companies and disclosed its plans in June, also buys patents to keep them from potential plaintiffs.

But there are differences between the two efforts. RPX hopes to earn a profit and is backed by two venture-capital firms, Kleiner Perkins Caufield and Byers and Charles River Ventures. Its revenue comes from membership fees-\$35,000 to \$4.9 million, depending on a company's operating income but RPX makes the decisions about which patents to buy.

AST, based in Poughkeepsie, N.Y., is a nonprofit entity. Its members put money into an escrow account, and are consulted to see if they want to contribute to the purchase of particular patents, said Daniel McCurdy, the group's chief executive.

AST claims about 15 members and has a goal of 30 to 40. It hasn't disclosed any names, but people familiar with the matter say initial members include Google Inc., Verizon Communications Inc., Hewlett-Packard Co. and Cisco.

Mr. McCurdy said AST and RPX could wind up bidding against each other on patents, but sees them mostly as allies pursuing similar goals. "They are completely complementary," he said.

RPX's Mr. Amster and co-CEO Geoffrey Barker previously worked at Intellectual Ventures LLC, a Seattle firm founded by former Microsoft Corp. executive Nathan Myhrvold. Intellectual Ventures has purchased thousands of patents, and has patented its own inventions. It has recruited big technology companies as investors, but has rankled some of them because it also charges patent-license fees and hasn't ruled out the use of litigation.

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Peter Detkin, Intellectual Ventures' founder and vice chairman, said the field can easily absorb more buyers such as RPX. "There are four or five million active patents, and we hold a very, very small percentage of them," he said.

A spokesman for Cisco, which is based in San Jose, Calif., said RPX's "objective of defensively pooling patents is a sensible approach to the continuing problem of litigation by firms that don't produce products or services!"

An IBM spokesman confirmed the company's participation in the effort, but declined to comment further.

RPX says it has acquired rights to 150 patents and 50 patent applications since it was founded in March, in fields such as mobile technology, Internet search and radio-frequency identification.



EXHIBIT F

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**IP trolling firms make more waves**

Mark LaPedus  
12/31/2010 06:57 PM EST  
11 comments

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SAN JOSE, Calif. - It's been a big year for the IP patent--or so-called patent trolling--firms. Acacia, Intellectual Ventures Management, Interval Licensing, Patriot and others made big headlines in 2010.

**In August, for example**, Interval Licensing LLC, which is backed by Paul Allen, filed a complaint against AOL, Apple, eBay, Facebook, Google, Netflix, Office Depot, OfficeMax, Staples, Yahoo, and YouTube.

The original case was dismissed. The firm did not name the infringing products in the suit. But this week, Interval Licensing re-filed the suit against those companies and listed four infringed patents in the case.

Another firm also made headlines in 2010. Intellectual Ventures Management LLC, a patent holder and administration group founded by Nathan Myhrvold, a former CTO of Microsoft Corp., has recently taken action on multiple fronts alleging patent infringement. In semiconductor industry the firm is pursuing two memory chip makers and three FPGA vendors.

And this week, Acacia Research Corp. said that its subsidiary, DRAM Technologies LLC, entered into a settlement agreement with Etron Technology America Inc. and Taiwan's Etron Technology Inc. covering patents relating to certain DRAM memory chips.

Founded in 1993, Acacia Research and its subsidiaries partner with inventors and patent owners, license the patents to corporate users and share the revenue. In recent times, it has reached patent settlements or licensing agreements with ARM, BMW, Hynix, IBM, NEC, Renesas, Seagate, TI and others.

"We are a leader in licensing patented technologies and have established a proven track record of licensing success with over 920 license agreements executed to date, across 87 of our technology licensing programs," according to a filing by the firm.

**Most Recent Comments**

junko.yoshida @Bert, I can't agree with you more. You wrote: It should be obvious that touch screens are a no-go. First, because the driver needs to concentrate on the screen, to know...

1/14/2014 5:44:32 PM

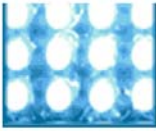
**Opinion**

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Caleb Kraft 5 comments  
I'm excited about the upcoming keynote at EE Live! This keynote speaker in particular has been an inspiration to me for quite some time. I had a few moments to talk to ...  
latest comment betajet According to the links in the article, the OSHW Laptop is copyrighted and licenced...

**Business for Engineers: Black Hat Selling**  
Henry Davis 7 comments  
Just as black hat hackers break into secure networks to destroy data or make the network unusable, black hat selling employs unethical manipulation to goad you into buying ...  
latest comment henry..12 @rrvea75101 Indeed, the whole "subliminal advertising" was a fraud. The original...

**In Praise of Airlines, the 500 Kind**  
Eric Bogatin 0 comments  
"I use airlines every week," said Al Neves, the self-proclaimed SI (signal integrity) Practitioner, at DesignCon 2013. He's also the Chief Technologist with Wild River ...

**All About Batteries, Part 3: Lead-**



"Currently, on a consolidated basis, our operating subsidiaries own or control the rights to over 160 patent portfolios, which include U.S. patents and certain foreign counterparts, covering technologies used in a wide variety of industries."

In August 2010, it formed the Acacia Intellectual Property Fund, L.P., or the Acacia IP Fund. The Acacia IP Fund is authorized to raise up to \$250 million. The Acacia IP Fund will acquire, license and enforce intellectual property consisting primarily of patents, patent rights, and patented technologies.

In October, Acacia Research reported results for the three months ended Sept. 30, 2010. It reported record quarterly revenues of \$63,949,000 during the third quarter of 2010, as compared to \$16,169,000 in the comparable prior year quarter.

Acacia Research reported record quarterly GAAP net income of \$24,675,000, or \$0.70 per diluted share, for the third quarter 2010, as compared to a quarterly net loss of \$3,429,000, or \$.11 per diluted share, for the comparable prior year quarter.

"Revenues increased by \$47.8 million, or 296 percent, due primarily to an increase in the average revenue per executed agreement," according to the firm.

Another firm, Patriot Scientific Corp., was not so lucky. Headquartered in Carlsbad, Calif. Patriot is the co-owner of the Moore Microprocessor Patent Portfolio licensing partnership with The TPL Group.

In October, the firm reported its first fiscal 2011 quarter ended Aug. 31, 2010. For the three month period ended Aug. 31, 2010, the company's revenues were \$0.1 million, with net losses totaling \$2.0 million. The company's net loss of \$2.0 million during the current quarter included losses of \$1.2 million from its equity investment in Phoenix Digital Solutions, the joint venture owned by the company and the privately-held TPL Group.

Patriot Scientific has been in litigation with TPL. In August, Patriot reported that it has withdrawn from discussions aimed at settling its outstanding actions against The Technology Properties Limited Group, LLC (TPL) and Alliacense LLC, the company's joint venture partner in the management of the MMP Portfolio of microprocessor patents, and its licensing division, respectively.

On April 12, 2010, the Company filed suit in the Superior Court of the State of California, County of San Diego against TPL, alleging breach of a \$1 million promissory note obligation for which repayment was due Patriot on Feb. 28, 2010. On April 22, 2010 it filed an action in the Superior Court of the State of California, County of Santa Clara, against TPL and Alliacense which was placed under seal provisionally by the court at the defendants' request.

On August 12, 2010, the Court considered defendants' request to seal the file indefinitely and to compel private arbitration of the dispute and denied both Motions. On August 13, 2010 the Court provisionally allowed some file redactions pursuant to a Motion filed by TPL and will decide the appropriateness of those redactions on Sept. 30, 2010.

The complaint makes several allegations against TPL and Alliacense, including breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, contract interference, constructive fraud, and unjust enrichment, while also seeking declaratory relief over specific contractual disagreements.

The complaint further seeks an accounting of revenues and expenses charged to the PDS joint venture, while also engaging in licensing activities designed to profit TPL at the expense of the



### Acid Batteries

Ivan Cowie 6 comments

As you may recall, a few weeks ago, Max Maxfield roped me into his ongoing robot project. This led to my writing this series of articles on the various battery ...

latest comment Adam-Taylor A great series of blogs, when it comes to specifying a battery what are the cardinal...



BLOG

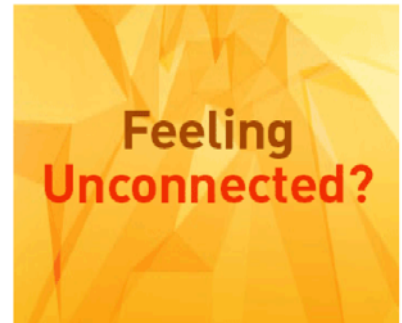
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Ann R. Thryft 1 comments

We've told you about several NASA-sponsored efforts to create new types of robots for exploring planets, moons, and asteroids. Some of them, like the golf-ball-sized ...

latest comment Caleb Kraft this seems like a really cool idea. I'm quite curious how it handles densely packed...

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interests of PDS and Patriot.

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 **re: IP trolling firms make more waves**  
lakehermit 1/4/2011 12:12:58 AM

NO RATINGS  
LOGIN TO RATE

Do you have a vacant room in your place? Since you have problems with individual property rights I'll be right over with some homeless people who want to live in your room for a while. I'm sure you won't mind any more than you mind some patent thief infringing someone's patent. By the way, the problem with the lawyers is the average corporation that would rather pay some lawyers \$1000 per hour than admit they did something wrong and try to make it right.


Reply Post Message Messages List Start a Board

 **re: IP trolling firms make more waves**  
Duane Benson 1/3/2011 10:33:31 PM

NO RATINGS  
LOGIN TO RATE

Nathan, I really struggle with this one. I'm in favor of people being able to make a living off of what they own or have created, but it seems like there is something wrong in there mixed in with the right. In your house analogy, I don't have a problem with people buying houses without intention to live in them, but I have discomfort with the practice of turning loan portfolios into traded securities - especially when poorly used and regulated as happened in the recent past. Due to the complexity of the patent system (as well as the real estate financial system), I find it pretty difficult to articulate my concerns in this area. I do believe that the patent system was designed to encourage invention and advancement. It just seems like there is a good amount of the opposite going on as well.


Reply Post Message Messages List Start a Board

 **re: IP trolling firms make more waves**  
NathanGrossman 1/3/2011 10:12:27 PM

NO RATINGS  
LOGIN TO RATE

Duane, do you have a problem with people buying and selling houses that they have no intention of living in? Do you have a problem with people buying and selling grain that they have intention of eating or using to make food products? Intellectual Property rights are no different from other types of property rights for a reason: For property to be valuable, it must be tradeable on the open market. Otherwise, the creator of that property cannot extract the full value of his/her creation, and the incentive to create things of value suffers. Also, patents often come on the open market when companies go out of business. If others cannot buy and exploit the full value of that intellectual property, then the investors/creditors of the company cannot recoup as much of their investment as possible.

Reply Post Message Messages List Start a Board

 **re: IP trolling firms make more waves**  
Duane Benson 1/3/2011 8:49:31 PM

NO RATINGS  
LOGIN TO RATE

I really don't think the patent system was created to fund people that have no interest in developing technology (or other products). I'm a little mixed on the subject though. If someone invents something, they should be able to profit from that invention whether they can afford to build and market it or not. If these organizations help inventors do that, then I support them in that particular activity. On the other hand, companies

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Top Comments of the Week

-  **Re: Atmosphere of earth - O2 20.946%:**  
Toyota claims that they've reduced the amount of needed platinum to a lot less than before and may eventually be the same as is what's in a...  
tb100 on [Toyota Suddenly ...](#)
-  **Working!:** How about that! You can still get good old GWbasic from here <http://gwbasic.webs.com/download.htm> or here, which has manuals as well <http://www.gw-basic.com/downloads.html> Pretty...  
David Ashton on [Do You Have a Working ...](#)

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EXHIBIT G



GEORGE RIEMANN / CONCEPT BY THE RECORDER