

IN THE
Supreme Court of the United States

REAL ESTATE ALLIANCE LTD,

Petitioner,

v.

MOVE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Move, Inc. (“Move”) is a subsidiary of News Corp. REA Group Limited owns more than 10% of Move’s stock. Respondents National Association of Realtors (“NAR”) and National Association of Home Builders (“NAHB”) each have no parent company or company owning ten percent (10%) or more of its stock. The ultimate parent corporation of Respondents Advanced Access and eNeighborhoods, LLC is Landmark Media Enterprises, LLC. RE/MAX, LLC is a wholly owned subsidiary of RMCO, LLC, which has two parent companies, each of which owns 10% or more of RMCO, LLC’s membership units: RE/MAX Holdings Inc., which is publicly traded, and RIHI, Inc., which is not publicly traded. Respondent California Regional MLS (formerly Orange County ML d/b/a Southern California MLS) has no parent company or company owning 10% or more of its stock. Respondent Pulte Homes, Inc. has no parent company or company owning ten percent (10%) or more of its stock. Respondent The Ryland Group, Inc. merged with Standard Pacific Homes in June 2015 to become CalAtlantic Homes, and CalAtlantic Homes merged with Lennar Corporation in February 2018. Lennar Corporation has no parent company or company owning ten percent (10%) or more of its stock. Respondent Shea Homes Limited Partnership d/b/a Shea Homes has at least four (4) companies that each own ten percent (10%) or more of its stock, including: (a) J. F. Shea, G. P., (b) Orlando Road, LLC, (c) Virginia Road, LLC, and (d) Bay Front Drive, LLC. The ultimate parent corporation of Respondent Taylor Morrison, Inc. is Taylor Morrison Home Corporation. Respondents Norcal Gold, Inc., dba RE/MAX Gold, Inc., Metropolitan Multi-List, Inc., dba

Georgia MLS, Inc., Rapattoni Corp., and Delta Media Group, Inc. have no parent corporations and no publicly held company owns 10% or more of their stock. Respondent MetroList Services, Inc. has no parent corporation. It is 50% owned by California Real Estate Brokers, Inc., 25% owned by Sacramento Association of REALTORS®, 10% owned by Placer County Association of REALTORS®, 5% owned by El Dorado County Association of REALTORS®, 5% owned by Yolo County Association of REALTORS®, and 5% owned by Lodi Association of REALTORS®. Respondent Delaware Valley Real Estate Information Network Inc., dba TREND, merged into TREND MS, LLC, as of December 31, 2016 and is a wholly owned subsidiary of Bright MLS, Inc. No publicly held company owns 10% or more of its stock. Respondent, Birdview.com, Inc., dba Birdview Technologies, has ceased doing business.

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STATEMENT OF THE CASE

Move filed this action against Petitioner Real Estate Alliance Limited (“REAL”) on April 3, 2007, after REAL filed a complaint for patent infringement against a realtor named Diane Sarkisian and thereafter sought to certify a class of defendants composed of certain subscribers to Move’s realtor.com website. In Move’s action against REAL, Move sought a declaratory judgment that REAL’s U.S. Patent No. 5,032,989 (the “’989 Patent”) and its parent, U.S. Patent No. 4,870,576 (the “’576 Patent”), are both invalid and not infringed.

After REAL filed suit against the National Association of Realtors and numerous other defendants, the district court consolidated REAL’s case with Move’s case and thereafter divided the consolidated cases into two phases. In Phase 1, all issues relating to REAL’s allegations of infringement by the Move websites and the validity or enforceability of the ’989 and ’576 Patents would be resolved, whereas Phase 2 was to address REAL’s infringement claims against the remaining defendants (“the Secondary Defendants”) based on their individual (*i.e.*, non-Move) websites.

On July 15, 2016, Move filed a motion for summary judgment that claim 1 of the ’989 Patent (the only claim REAL continued to assert against Move by that date) is directed to patent ineligible subject matter and thus invalid under 35 U.S.C. § 101. In opposition to Move’s motion, REAL argued that under the two-part test set forth in *Alice Corp. Pty. Ltd. v. CLS Bank Int’l.*, 573 U.S. ____, 134 S. Ct. 2347 (2014), claim 1 of the ’989 Patent is directed to patent eligible subject matter because it: (i) is

not directed to an abstract idea under step one of *Alice*; and (ii) adds an inventive concept under step two of *Alice* because the “claimed invention is neither routine nor conventional” (Case No. 17-1463, Dkt. No. 48 at Appx169, Appx175). As to the latter argument, it was REAL’s position that whether a claimed invention is routine or conventional is an issue of fact, but it pointed to only two purported “facts” to show that the facts relevant to this issue were in dispute: (i) the issuance of the ’989 Patent over cited prior art (*id.* at Appx175); and (ii) the assertions in a declaration by REAL’s expert, Dennis Shasha (the “Shasha Declaration”), that it “was considered neither routine nor conventional in the mid-1980s for a computer-displayed map to be able to zoom to display a higher level of detail in the sense of displaying information that wasn’t present at the lower level of detail at all” and “in the mid-1980s, there were no databases of available real estate properties that could be queried geographically to locate available real estate properties” (Pet. App. 97a).

In its order granting summary judgment, the district court specifically addressed REAL’s purported “evidence” and whether it was sufficient to create a disputed issue of fact precluding entry of summary judgment. As to the issuance of the ’989 Patent over the prior art, the district court found this fact to be “of no relevance” as a matter of law given this Court’s explanation that “the fact that a company may be the first to successfully apply an abstract idea within a new technological context does not transform the abstract idea into something tangible and patentable” (Pet. App. 68a). As for the Shasha Declaration, the district court accepted “as true” Dr. Shasha’s statements regarding the zooming and database limitations of claim 1, but found them insufficient to create a disputed issue

of fact. Specifically, the district court found that “a zoom feature on a digital map is a commonsensical way to implement this abstract idea” of “using a series of related maps that provide progressively greater detail . . . on a computer” (Pet. App. 67a). For the database limitation, the district court noted that the claims recited only “creating a database,” not creating a database that could be queried geographically, and found that such creation is simply a “generic function[]” that does not improve “computer functionality” (Pet. App. 63a, 66a). Important to the district court’s decision regarding step two of *Alice* was the specification’s explanation that the “present invention may be implemented in an IBM or compatible personal computer,” which the district court found to support its conclusion that the claims do no more than “provide[] instructions to implement an abstract idea ‘with routine, conventional [computing] activity’” in a manner that does not “improve[] computing capabilities” (Pet. App. 68a).

The district court’s § 101 summary judgment order also concluded that “it appears... that our ruling with respect to the ‘989 Patent may invalidate the ‘576 Patent as well” and directed the parties to submit a Joint Status Report “stating their views on whether the [§ 101 order] effectively resolves this action as to all parties” (Pet App. 89a). In the Joint Status Report, the parties – including REAL and the Secondary Defendants – jointly stated that the district court’s order “in addition to its Order of April 25, 2016 holding that REAL has waived its right to proceed on a theory of divided direct infringement under § 271(a), effectively resolves all issues to this action, including all issues related to REAL’s claims against the Secondary Defendants” and specifically “request[ed] that the [district court] enter Judgment of Non-Infringement and Invalidity

in favor of [the Primary Defendants] and all Secondary Defendants” (Pet. App. 32a). Consistent with that request and referencing the parties’ agreement, the district court entered a Rule 58 judgment of non-infringement and invalidity as to both the ’576 and ’989 Patents (Pet. App. 30a). REAL appealed to the Federal Circuit.

On appeal, the Federal Circuit prefaced its § 101 analysis by noting that “patent eligibility under § 101 is a question of law and may involve underlying questions of fact” (Pet. App. 16a). Concerning the Shasha Declaration, the Federal Circuit noted its “conclusory nature” but “set[] aside” that fact to substantively address whether it created a disputed issue of fact (Pet. App. 20a). The Federal Circuit concluded that it did not in light of the undisputed fact that claim 1 does not provide “any technological advancement” or otherwise “improve[] the functioning of the computer itself,” but focuses only “on the performance of an abstract idea ‘for which computers are invoked merely as a tool’” (Pet. App. 20a, 22a). The Federal Circuit agreed with the district court that while the database limitation may improve the ability to identify available real estate properties, it was not a “technological improvement[]” (Pet. App. 21a-22a). As for the zooming limitation, the Federal Circuit observed that claim 1 recites “nothing more than the result of the zoom” (*i.e.*, more detail shown) but was completely silent as to “how to implement” the zooming function (Pet. App. 20a-21a). As such, it concluded that “the claimed zoom feature is nothing more than an instruction to apply an abstract idea using a computer” and thus insufficient to provide an inventive concept (Pet. App. 24a).

The Federal Circuit also found that: (a) the district court’s § 101 summary judgment order “placed the ‘576 patent’s validity at issue” (Pet. App. 25a); (b) the district court properly relied on the parties’ representations in the December 2016 Joint Status Report to enter a judgment of invalidity as to the ‘576 Patent (Pet. App. 26a); and (c) “REAL conceded the invalidity of the ‘576 patent” (Pet. App. 27a).

REASONS FOR DENYING CERTIORARI

I. There is No Intra-Circuit Split Regarding the Role of Fact Finding in the § 101 Analysis.

REAL’s Petition For A Writ Of Certiorari (“REAL’s Petition”) is founded entirely on the demonstrably false premise that “[t]he proper role of fact-finding with respect to the second part of the *Alice* test is the subject of a split among the judges of the Federal Circuit” (Pet. i). As REAL’s own petition concedes, however, the Federal Circuit fully settled this issue in *Berkheimer v. HP Inc.*, 881 F. 3d 1360 (Fed. Cir. 2018), which it subsequently confirmed one week later in *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F. 3d 1121 (Fed. Cir. 2018). Specifically, in *Berkheimer*, the Federal Circuit held “[w]hether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent **is a factual determination.**” 881 F. 3d at 1369 (emphasis added). In *Aatrix*, the Federal Circuit confirmed that “[w]hether the claim elements or the claimed combination are well-understood, routine, conventional **is a question of fact.**” 882 F.3d at 1128 (emphasis added). *See also Exergen Corp. v. Kaz USA, Inc.*, 725 Fed. App’x. 959, 965 (Fed. Cir. 2018) (reconfirming “whether a claim is directed

to patentable subject matter is a question of law **based on underlying facts**) (emphasis added). These cases establish that the Federal Circuit has already provided a “clear standard” regarding the role of fact finding in connection with the § 101 analysis, and thus there is no need for “this Court to speak with special clarity on the issue” (see Pet. 17-19).

Notwithstanding the clear pronouncements in *Berkheimer*, *Aatrix*, and *Exergen*, REAL asserts that Federal Circuit Judges Reyna, Wallach, and Lourie each hold that “§ 101 is a purely legal question, in which factual considerations should play no part,” evidencing a “lack of uniformity among panels” (Pet. 13). This characterization is wholly without merit, as each of these judges has sat on post-*Aatrix* panels that have unanimously held that the § 101 analysis is based on underlying issues of fact. See, e.g., *BSG Tech LLC v. BuySeasons, Inc.*, 899 F. 3d 1281, 1290 (Fed. Cir. 2018) (Judges Reyna and Wallach both part of majority opinion holding that “whether a claim limitation or combination of limitations is well-understood, routine, and conventional is a factual question”); *Burnett v. Panasonic Corp.*, Case No. 2018-1234, 2018 WL 3434533, at *2 (Fed. Cir. July 16, 2018) (Judge Reyna part of majority opinion noting that “[w]e have held that patent eligibility can be determined at the Rule 12(b)(6) stage, but ‘only when there are no factual allegations that, taken as true, prevent resolving the eligibility question as a matter of law’”) (citations omitted); *SAP America, Inc. v. Investpic, LLC*, 898 F. 3d 1161, 1166 (Fed. Cir. 2018) (Judge Lourie part of majority opinion holding “[e]ligibility under 35 U.S.C. § 101 is a question of law, based on underlying facts”); *Automated Tracking Solutions, LLC v. Coca-Cola Co.*, 723 Fed. App’x. 989, 992 (Fed. Cir.

2018) (Judge Wallach part of majority opinion holding “[p]atent eligibility under § 101 is a question of law that may contain underlying issues of fact”). In short, there is no split amongst Federal Circuit judges necessitating guidance from this Court and thus no basis for the Court to grant REAL’s petition.¹

II. The Decision Below Correctly Applies Settled Law.

Other than erroneously arguing an intra-district split, REAL provides no basis for this Court to grant its Petition. Moreover, even if “higher intervention” were called for regarding the proper role of fact-finding during step two of the § 101 analysis – it is not – this case is not the vehicle for resolution of this issue given that the district and appellate courts correctly applied the law in determining that summary judgment was proper.² Indeed, REAL’s own words make clear that REAL is not

1. As for the Patent Office, REAL’s own petition notes that it has already issued a memorandum to all patent examiners notifying them that the second step of the § 101 analysis is an issue of fact (Pet. 18 citing <https://www.uspto.gov/sites/default/files/documents/memo-berkheimer-20180419.PDF>).

2. REAL argues that guidance from this Court is especially warranted in light of Judge Lourie’s statement in his *Berkheimer* rehearing dissent – which in fact was not a dissent, but a concurrence – that “[r]esolution of patent-eligibility issues requires higher intervention” (Pet. 17). Yet, Judge Lourie made clear that, in referring to “higher intervention,” he was referring to Congress, not the Supreme Court: “I believe the law needs clarification by higher authority, perhaps by Congress” because “[i]ndividual cases, whether heard by this court or the Supreme Court, are imperfect vehicles for enunciating broad principles because they are limited to the facts presented.” *Berkheimer*, 890 F. 3d at 1374.

truly concerned with any inconsistency in the law (Pet. 13) (noting that on “February 8, 2018, one week after its decision in this case, the Federal Circuit **clarified the standard** for determination of whether an invention is well-understood, routine and conventional,” holding “in **a precedential decision** that although eligibility under 35 U.S.C. § 101 is a question of law, an essential component part of that determination is a question of fact . . .”) (emphasis added). Nor is REAL concerned that the law has been misinterpreted – the Federal Circuit applied the very standard REAL now urges. *See* Pet. App. 16a (“patent eligibility under § 101 is a question of law and may involve underlying questions of fact”). Rather, REAL’s true dispute is over the way in which the district and appellate courts applied the appropriate and settled law to the facts of this case (*see* Pet. 14 (“The Federal Circuit’s decisions in *Berkheimer* and *Aatrix* make it clear that this case was wrongly decided.”); Pet. 16 (complaining that both the district and appellate courts “ignored the user interface aspects of the invention, and then wrongly determined under *Alice* step two that the claims lacked an inventive concept . . .”). Such a dispute simply does not present an issue of nationwide importance suitable for this Court’s review, especially given that on the facts of record, and even in light of *Berkheimer*, summary judgment was wholly proper.

A. *Berkheimer* Confirms the Propriety of Granting Summary Judgment Regarding Patent Eligibility.

The Federal Circuit plainly recognized in *Berkheimer* that “not every § 101 determination contains genuine disputes over the underlying facts material to the § 101

inquiry.” *Berkheimer*, 881 F. 3d at 1368. Noting that “[p]atent eligibility has in many cases been resolved on motions to dismiss or summary judgment,” the Federal Circuit confirmed that “[n]othing in this [*Berkheimer*] decision should be viewed as casting doubt on the propriety of those cases.” *Id.* To the contrary, where, as here, “there is no genuine issue of material fact regarding whether the claim element or claimed combination is well understood, routine, conventional to a skilled artisan in the relevant field, this issue can be decided on summary judgment as a matter of law.” *Id.*

B. Entry of Summary Judgment Under § 101 Was Proper.

In affirming the district court, the Federal Circuit analyzed the patent eligibility of claim 1 under the same legal framework later confirmed in *Berkheimer*: “Patent eligibility under § 101 is a question of law and may involve underlying questions of fact” (Pet. App. 16a). Applying this framework, the district and appellate courts both analyzed whether the facts of record prevented entry of summary judgment under § 101. In concluding they did not, both courts relied entirely on undisputed facts.

Specifically with respect to the zooming and database limitations, the courts found the following facts to be undisputed: (i) the limitations of claim 1 did not improve the functioning of the computer (Pet. App. 21a-22a); (ii) the invention could be performed, according to the specification, using a generic “IBM or compatible personal computer system,” *i.e.*, both functions use “only existing computer capabilities” (Pet. App. 24a); and (iii) claim 1 recited only the *result* of the zooming (*i.e.*, greater detail is shown) “instead of focusing on the technical

implementation details of the zooming functionality” (Pet. App. 20a). In light of these undisputed facts, the Federal Circuit agreed with the district court that claim 1 contains nothing more than “an instruction to apply an abstract idea using a computer” (Pet. App. 24a). Because Federal Circuit precedent holds that “[s]teps that do nothing more than spell out what it means to ‘apply it on a computer’ cannot confer patent-eligibility,” *Intellectual Ventures I, LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1370-71 (Fed. Cir. 2015), the district and appellate courts both correctly concluded that Dr. Shasha’s conclusory assertions that the claimed limitations were neither routine nor conventional – assertions the lower court accepted as true – were, as a matter of law, insufficient to create a disputed issue of fact precluding summary judgment.

III. REAL’s Other Arguments Do Not Support the Grant of Certiorari.

A. REAL’s Arguments Regarding Phase 2 and the ’576 Patent are Not “Fairly Included” in the Question Presented.

Although REAL’s Petition presents a single question – whether or not Step Two of the § 101 *Alice* analysis is a question of fact (Pet. i) – the Petition nevertheless includes at least three separate sections on the following unrelated topics: (a) the district court failed to render a “separate judgment” in Phase 2 of the underlying action; (b) the record below does not support invalidation of the ’576 Patent; and (c) REAL did not concede the invalidity of the ’576 Patent (*id.* at 24-28). These arguments are *not* “fairly included” within the scope of the single question presented. Under Sup. Ct. Rule 14.1(a), the Court should not consider these unrelated arguments in deciding

whether to grant certiorari. Moreover, even a cursory review shows them to be meritless.

B. Phase 2 of the Case Was Not a Separate Action.

REAL's effort to characterize Phase 2 of the underlying proceedings as a separate action that requires a "separate" judgment is incorrect. Phase 2 was never a separate action. The district court consolidated two separate cases into a single litigation and then "divid[ed] the litigation into two phases." The Petition (at 8) even characterizes the process in this manner. Indeed, in the December 2016 Joint Status Report, REAL joined in agreeing that all issues related to its claims against the Secondary Defendants were resolved "in this action" (Pet. App. 32a). On appeal, the Federal Circuit correctly ruled that "both phases were part of the same case or 'action'" (Pet. App. 27a).

REAL's reliance on this Court's decision in *Hall v. Hall*, 584 U.S. ____ (2018), is also misplaced (Pet. 24). In *Hall*, two separate actions were consolidated and a single trial held. The lower court granted a new trial as to one of the actions, but judgment was entered, and an appeal filed, as to the second. The issue for the Court was whether there was a right to appeal in the second action before the first action was re-tried. The Court ruled that there was such a right since there were two actions and there had been a final judgment in one of them. The ruling in *Hall* does not require a *separate* judgment for each action where cases are consolidated. In fact, a single judgment can address multiple actions, and thus form a final judgment in multiple actions, particularly when those actions are consolidated (as is the case here). Here, the district court properly entered a judgment resolving

all issues as to *all parties* in the consolidated action. The ruling was proper and resolved both Phase 1 and Phase 2 of the consolidated action.

C. REAL Was Not Denied Due Process With Respect to the '576 Patent.

REAL's contention that it was denied "due process" and that the final judgment entered by the district court as to the '576 Patent "was a complete surprise to the parties" (Pet. 25), is fully belied by that fact that REAL agreed to judgment on the '576 Patent and to judgment in favor of the Secondary Defendants. The judgment was *not* a surprise to any of the defendants and it is objectively unreasonable that REAL would consider the final judgment a surprise. The judgment was entirely consistent with what all parties had conceded and REAL itself agreed to and affirmatively sought – entry of a final judgment.

As the Federal Circuit observed, "the district court issued an order, questioning the validity of the... '576 patent and [soliciting] input from all parties [involved] in Phase 1 and Phase 2 of the litigation" (Pet. App. 25a; 89a). The Federal Circuit further observed that, in response, "all the parties" – including REAL – "indicated that the district court's eligibility and waiver opinions resolved all issues in the case with respect to all parties" (Pet. App. 26a; *see also* Pet. App. 32a).³ The district court relied

3. While REAL contends that "The Record Lacks Any Findings Sufficient to Invalidate the '576 Patent" (Pet. at 24), it ignores its explicit concession that all issues had been resolved and that it sought entry of judgment. The Federal Circuit properly determined that REAL "conceded the invalidity of the '576 patent" (Pet. App. 27a-28a).

on this express representation by REAL and entered “judgment that the ‘576 Patent and the ‘989 Patent are invalid and not infringed” (Pet. App. 26a; 30a). There is no basis for REAL to claim that it was “surprise[d]” by this judgment.

REAL’s clear and unequivocal concession that “all issues had been resolved” came over six months *after* REAL had argued (in an earlier May 2016 Joint Status Report) that resolution of the waiver issue as to the Phase 1 parties should not preclude “full and fair litigation of all available infringement theories as to the Phase 2 counterclaim defendants” (Pet. App. 106a). As evidenced by that May 2016 Joint Status Report, REAL clearly understood how to preserve its claims against the Secondary Defendants in the December 2016 Joint Status Report if it so desired.⁴ It chose, instead, to relinquish its claims.

REAL recognizes that the district court did not enter a Rule 54(b) partial judgment in December 2016 (Pet. 26) despite the entry of such judgments on multiple occasions previously in the case. Indeed, REAL never requested a Rule 54(b) partial judgment in December 2016. Instead, it agreed to – and sought – a final judgment on *all* claims, and as to *all* parties, a Rule 58 judgment.

It does not “strain credulity” (Pet. 26) to accept that REAL conceded the invalidity of the ‘576 Patent. In fact,

4. Indeed, REAL’s admission in the Petition that it reserved the ‘576 Patent’s validity in the May 5, 2016, Joint Status Report (Pet. 25-26) further highlights that REAL gave up the validity issue by submitting entirely different language (with no such reservation) in the December 15, 2016, Joint Status Report.

this concession was the only way REAL could take an immediate appeal. REAL would have been unable to appeal absent agreement that: (1) the decision on the '989 Patent resolved the question of the validity of the '576 Patent; and (2) those decisions (along with the district court's waiver opinions) resolved all claims against all parties. By seeking entry of a Rule 58 final judgment, REAL plainly waived its claims of infringement as to the '576 Patent against the Secondary Defendants and is judicially estopped from pursuing them now.

REAL argues that it did not waive its claims under the '576 Patent because it “did not know” that its express agreement in the December 2016 Joint Status Report would be interpreted as a forfeiture of the '576 Patent as to the Secondary Defendants. This contention is refuted by the clear and unequivocal language of the Joint Status Report itself – a report that REAL signed. The Report states, in part: “after meeting and conferring on the issue, the Parties are all in agreement that the court’s [prior orders effective resolve] all issues to this action, including all issues related to REAL’s claims against the Secondary Defendants” (Pet. App. 32a). There is no reasonable interpretation of this agreement that does not encompass all parties and all issues. REAL’s assertion that the district court had a “defective memory” and that its claims against the Secondary Defendants remained “stayed” (Pet. 27) cannot be squared with REAL’s clear statements to the contrary.⁵

5. REAL’s contentions that it was “to be expected” that the district court would have sought input from the Secondary Defendants about what issues remained in Phase 1 (Pet. 27) and that the stay of Phase 2 was not altered are similarly misplaced. Input from the Secondary Defendants on whether issues remained in Phase 1 was unnecessary. Any issues not resolved in Phase 1 would

In sum, the district court properly entered a final judgment against REAL and in favor of the Primary and Secondary Defendants, and the Federal Circuit committed no errors in affirming this judgment.

CONCLUSION

REAL's Petition should be denied.

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have been available for argument during Phase 2. The only reason to consult the Secondary Defendants concerned Phase 2.

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Network, Inc. (now Trends MS,
LLC), Rapattoni Corp. and
Birdview.com, Inc.*

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and Taylor Morrison, Inc. f/k/a
Taylor Woodrow, Inc.*