UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RADWARE, INC.,
Petitioner

v.

F5 NETWORKS, INC.,
Patent Owner

Case IPR2017-01249
Patent 6,311,278

REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

Radware, Ltd. ("LTD") is not a real party-in-interest ("RPI"). Radware, Inc. ("INC") is solely responsible for directing, controlling, and bearing the costs of these petitions.[1] Patent Owner, F5, relies on the parent/subsidiary relationship to argue LTD is an RPI. However, the Board has repeatedly rejected the argument that a traditional parent/wholly-owned-subsidiary relationship alone renders a parent an RPI (especially when the parent is a foreign entity and the subsidiary is a U.S. entity).[2] Rather, RPI-analysis looks at the "relationship between a party and a proceeding;" *not* to "the relationship between parties." *Daifuku* at 7.

LTD has no relationship to these proceedings. First, apart from its ownership interest in INC, LTD has no independent interest in adjudicating the validity of the '278 Patent because it has not been accused of infringement; nor can it, because it has no operations and no direct sales in the U.S. Ex. 1014 at ¶¶ 2, 6, 7. INC is the only entity that operates in the U.S., the only entity that makes sales in the U.S., and the only entity accused of infringement. *Id*. at ¶ 2. However, in an effort to shore up its argument that LTD is an RPI, F5 has misrepresented the record by arguing LTD filed a declaratory judgment action of invalidity—allegedly estopping both INC and LTD from petitioning the PTAB. Not true. LTD

[1] A. Peles Declaration (Ex. 1013) at ¶ 7; G. Meroz Declaration (Ex. 1014) at ¶8.
[2] *See, e.g.*, *Daifuku Co., Ltd. V. Murata Mach., Ltd.,* IPR2015-01538, Paper 11 (Jan. 19, 2016) ("Daifuku"); *Par Pharm., Inc., v. Horizon Therapeutics, Inc.*, Paper 13 (Nov. 4, 2015) ("Par"); *see also Samsung, et al. v. Gold Charm LTD.*, IPR2015-01416, Paper 12 (Dec. 28, 2015) ("Samsung"); *D-Link, Inc. v. Chrimar Sys., Inc.,* IPR2016-01425, Paper 15 (Jan. 17, 2017) ("D-Link").

joined the litigation as a necessary party so INC, its exclusive licensee, could counter-assert a paten owned by LTD. *Id*. at ¶ 5. LTD did *not* seek declaratory judgment of invalidity—nor could it—given it has no controversy with F5's patents. *Id*. at ¶ 6. Only INC asserted a counterclaim for invalidity. *See id*. at ¶ 7. The District Court presiding over the underlying litigation ruled F5's arguments "frivolous", and held that LTD neither filed nor joined a declaratory judgment action of invalidity against F5; in addition, the Court nearly sanctioned F5's counsel for making arguments F5 "should clearly lose on in the PTAB."[3]

Second, INC and LTD have not blurred corporate lines as F5 contends. The decision to file an IPR, and all decisions related to the preparation and filing of the petitions, were made by INC alone. Ex. 1013 at ¶ 7. INC and LTD are separate companies with separate budgets; they maintain separate business records, and pay separate taxes. *Id*. at ¶ 2; *see Daifuku* at 9.

Third, LTD has not controlled these proceedings. Despite F5's claims to the contrary, the Board has found (1) statements in Annual Reports unavailing (*see Samsung* at 4, *D-Link* at 8); (2) coordinated efforts in unrelated litigation irrelevant (*see Par* at 10); (3) representation by same counsel immaterial (*see Samsung* at 9, *D-Link* at 8); and (4) shared officers and general counsel not determinative when, as here, corporate form has been observed (*see Daifuku* at 9,

[3] F. Marino Declaration (Ex. 1015) at ¶ 4; Ex. 1017, 2:12-15, 8:12-15. Also, under 35 U.S.C. § 315(a)(3), there would still be no estoppel by filing a counterclaim.

Par at 10). Although F5 argues that Mr. Meroz, LTD's GC, signed the POA, in truth, Mr. Meroz holds positions with both companies and, as can be seen in the signature line, executed the POA in his capacity as an INC representative. Ex. 1014 at ¶ 10. F5 also points out Mr. Zisapel, yet identifies no evidence of actual control by Mr. Zisapel over the IPRs. Moreover, INC's identification of third-party LTD witnesses in its litigation disclosures is no more indicative of control than its identification of F5 witnesses. Ex. 1014 at ¶ 11; Ex. 2006 at 2-3; *see Daifuku* at 12 (non-party testimony in earlier action does not show control).

Finally, all the cases F5 cites are factually distinguishable and involved instances where the petitioner intentionally avoided naming a party as an RPI to circumvent estoppel (*see Paramount* and *Zoll*); or where there was substantial evidence of the parent's direct involvement *in the IPR* (*see Atlanta Gas*); or where petitioner failed to respond to the RPI challenge (*see Amazon* and *Aceto*). None of these circumstances are present here. As explained above, LTD would not be estopped from joining this IPR and INC would gain no benefit by arguing LTD is not an RPI; F5 has presented no evidence of LTD's control over the IPR; and, unlike *Amazon* and *Aceto*, INC presented a point-by-point rebuttal. At bottom, F5 relies on the mere corporate relationship between INC and LTD, but fails to show any evidence of LTD's control over these petitions. Consistent with the Board's prior decisions, the Board should find LTD is not an RPI.

Dated: August 30, 2017

Respectfully submitted,

/s/ *Fabio E. Marino*

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