

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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RADWARE, INC.,  
Petitioner,

v.

F5 NETWORKS, INC.,  
Patent Owner.

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Case IPR2017-01249  
Patent 6,311,278 B1

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Before KRISTEN L. DROESCH, DAVID C. McKONE, and  
MATTHEW R. CLEMENTS, *Administrative Patent Judges*.

DROESCH, *Administrative Patent Judge*.

DECISION  
Denying Institution of *Inter Partes* Review  
*37 C.F.R. § 42.108*

## I. INTRODUCTION

### A. Background

Radware, Inc. (“Petitioner”) filed a Petition (Paper 2 (“Pet”)) for *inter partes* review challenging the patentability of claims 1–7, 10–12, 14, 15, and 19–26 of U.S. Patent No. 6,311,278 B1 (Ex. 1001, “the ’278 Patent”). See 35 U.S.C. §§ 311–312. F5 Networks, Inc. (“Patent Owner”) timely filed Preliminary Responses (Paper 7, “Prelim. Resp.”). In its Preliminary Response, Patent Owner argues that Petitioner failed to identify all the real parties in interest. See Prelim Resp. 2–13. With authorization from the Board, Petitioner filed a Reply to Patent Owner’s Preliminary Response (Paper 8, “RPI Reply”) to address the real party-in-interest issue.

Section 312 of title 35 of the United States Code establishes the requirements of a petition for an *inter partes* review. Section 312 states, in relevant part, that a petition “may be considered *only if*— . . . (2) the petition identifies *all* real parties in interest.” 35 U.S.C. § 312(a)(2) (emphases added). Upon considering the record in its entirety, we are not persuaded that Petitioner identified all real parties in interest. Accordingly, we decline to consider the Petition, and, therefore, do not institute *inter partes* review.

### B. Related Matter

The parties indicate the ’278 Patent is asserted in *F5 Networks, Inc. v. Radware, Inc.*, Case No. 16-cv-480-RAJ (W.D. Wash.) (“Washington litigation”) Pet. 1; Paper 4, 2.

### C. Brief Factual Background

In 1998, Petitioner, Radware, Inc., was established as a wholly-owned subsidiary of Radware, Ltd. in the United States to conduct sales and marketing of Radware products. See Ex. 2004, 26, 41, 123; Ex. 2002, 1;

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Ex. 1013 ¶ 2; Ex. 1014 ¶ 2. Petitioner is “a New Jersey corporation engaged in selling, marketing, installing, and servicing network management and data-security devices, and is the only Radware entity operating in the United States.” Ex. 1013 ¶ 3; *see* Ex. 1014 ¶ 2; Ex. 2004, 26, 41.

Radware, Ltd. was organized in 1996, and incorporated under the laws of Israel in 1997. *See* Ex. 2004, 25. It was co-founded by father and son Yehuda Zisapel and Roy Zisapel. *See id.* at 62–63. Radware, Ltd. “is a publically traded Israeli corporation engaged in design, research and development, and manufacturing of network management and data-security devices,” and “sells the Radware products worldwide, other than in the USA and Canada.” Ex. 1013 ¶ 4; Ex. 1014 ¶ 2.

Co-founder Roy Zisapel has served as President, Chief Executive Officer, and Director of Radware, Ltd. since 1996. *See* Ex. 2004, 63. Co-founder Yehuda Zisapel has served as Director of Radware, Ltd. since 1996, and Chairman of the Board of Directors from 1996 through 2006, and again since 2009. *See id.* at 62. Yehuda Zisapel and Roy Zisapel are also Directors of Radware, Inc. *See id.* at 62–63. Gadi Meroz is Vice President and General Counsel of Radware, Ltd. and also in-house counsel of Radware, Inc. *See* Ex. 1014 ¶ 1; Ex. 2004, 1; Paper 1.

As mentioned briefly above, the '278 Patent, along with U.S. Patent Nos. 7,472, 413 and 8,676,955, is the subject of the Washington litigation. *See* Ex. 1002. Fabio E. Marino serves as “Attorney[] for Defendant and Counterclaim Plaintiff Radware, Inc. and Counterclaim Plaintiff Radware, Ltd.” in the Washington litigation. Ex. 2003, 24. Mr. Marino also is lead counsel for Radware, Inc., for the Petition now before us. *See* Ex. 1015 ¶ 1; Pet. 2; Paper 1. Prior to the Washington litigation, Radware, Ltd. and Radware, Inc., were plaintiffs in a patent infringement action against Patent

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Owner F5 Networks, Inc., in *Radware, Ltd. v. F5 Networks, Inc.*, Case No. 5:13-cv-02024 (N.D. Cal.). (“California litigation”). *See* Ex. 2005.

Mr. Marino also serves as “Attorney[] for Plaintiffs RADWARE, LTD. and RADWARE, INC.” in the California litigation. Ex. 2005, 7.

## II. ANALYSIS

We begin our analysis by explaining who has the burden of establishing whether a third party has, or has not, been identified properly as a real party-in-interest in a petition, followed by reviewing principles of law that generally apply to identifying a real party-in-interest in a given proceeding. Finally, we address the parties’ contentions, in the context of the parties’ respective burdens, regarding whether Radware, Ltd. is a real party-in-interest.

### A. *Burdens and Legal Principles*

A petition for *inter partes* review “may be considered *only if*” the petition identifies all real parties in interest. 35 U.S.C. § 312(a)(2) (emphasis added). Accurate identification of all real parties in interest serves the purpose of assuring proper application of the statutory estoppel provisions, and “protect[s] patent owners from harassment via successive petitions by the same or related parties.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) (“Trial Practice Guide”).

The Board generally accepts a petitioner’s identification of real parties-in-interest at the time of petition filing. *See* Changes to Implement *Inter Partes* Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents; Final Rule, 77 Fed. Reg. 48,680, 48,695 (Aug. 14, 2012) (Response to Comment 9). The Trial Practice Guide directs attention to *In re Guan*, Inter Partes Reexamination Proceeding, Control No. 95/001,045, Decision Vacating

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Filing Date (Aug. 25, 2008), which addresses the application of similar principles in the context of *inter partes* reexamination proceedings. 77 Fed. Reg. at 48,759. The Office explained that it “will not look beyond the required statement identifying the real party in interest.” *Guan* at 7. The practice of generally accepting the identification of real party-in-interest serves as a rebuttable presumption benefitting the petitioner. *Zerto, Inc. v. EMC Corp.*, Case IPR2014-01254, Paper 35, slip op. at 6-7 (PTAB March 3, 2015).

Pursuant to the Federal Rules of Evidence, which apply to *inter partes* review, “the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. *But this rule does not shift the burden of persuasion, which remains on the party who had it originally.*” Fed. R. Evid. 301; *see* 37 C.F.R 42.62(a). Accordingly, when a patent owner provides sufficient evidence prior to institution that reasonably brings into question the accuracy of a petitioner’s identification of real parties-in-interest, the overall burden remains with the petitioner to establish that it has complied with the statutory requirement to identify all real parties-in-interest. *Zerto* at 7. The allocation of the burdens of production and persuasion for identification of all real parties in interest appropriately accounts for the fact that a petitioner is far more likely to be in possession of, or have access to, evidence relevant to the issue than is a patent owner. *Id.*

The real party-in-interest is the party that desires review of the patent, and “may be the petitioner itself, and/or it may be the parties at whose behest the petition has been filed.” Trial Practice Guide, 77 Fed. Reg. at 48,759. “Real party-in-interest” has been used by courts “to describe relationships and considerations sufficient to justify applying conventional principles of

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