

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 B1

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;

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

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

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

estoppel and preclusion.” *Id.* “Whether a party who is not a named participant in a given proceeding nonetheless constitutes a ‘real party-in-interest’ . . . to that proceeding is a highly fact-dependent question.”

Id. (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)).

“A common consideration is whether the non-party exercised or could have exercised control over a party’s participation in a proceeding.” Trial Practice Guide, 77 Fed. Reg. at 48,759. The concept of control generally means that “the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two formal parties.”

Id. (citing 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure §§ 4449, 4451 (2d ed. 2011) (“Wright & Miller”)). “[T]here is no ‘bright-line test’ for determining the necessary quantity or degree of participation to qualify as a ‘real party-in-interest’ . . .

based on the control concept.” *Id.* (citing *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); Wright & Miller § 4451). The Trial Practice Guide, however, acknowledges one factual scenario that will generally justify applying the real party-in-interest label, namely, a party that funds and directs and controls an IPR petition or proceeding. *See* Trial Practice Guide, 77 Fed. Reg. at 48,760. Yet, “whether something less than complete funding and control suffices to justify similarly treating the party requires consideration of the pertinent facts.” *Id.* The inquiry into whether a non-party wields substantial control “cannot be based on isolated facts,” but “must consider the totality of the circumstances to determine whether they justify a reasonable inference of a nonparty’s potential or actual involvement as a decision maker.” *Gonzalez*, 27 F.3d at 759. “The non-party’s participation may be overt or covert, and the evidence of it may be direct or circumstantial—so long as the evidence as a whole shows that the nonparty

possessed effective control over a party's conduct . . . as measured from a practical, as opposed to a purely theoretical, standpoint.” *Id.* The Trial Practice Guide emphasizes, “rarely will one fact, standing alone, be determinative of the inquiry.” 77 Fed. Reg. at 48,760.

In evaluating whether a non-party exercised or could have exercised control over a party's participation in the proceeding, we may also consider whether the entities “are so intertwined that it is difficult for both insiders and outsider to determine precisely where one ends and another begins” such that an actual measure of control or opportunity to control the filing of and participation in an IPR might reasonably be expected between entities in such a relationship. *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, Case IPR2013-00453, Paper 88, slip op. at 2–6 (PTAB Jan. 6, 2015); *see Zerto* at 10. In other words, “if a nonparty can influence a petitioner's actions in a proceeding before the Board, to the degree that would be expected from a formal copetitioner, that nonparty should be considered a[] [real party-in-interest] to the proceeding.” *Aruze Gaming Macau, Ltd., v. MGT Gaming, Inc.*, Case IPR2014-01288, Paper 13, slip op. at 12 (PTAB Feb. 20, 2015).

B. Patent Owner Provides Sufficient Evidence That Reasonably Brings Into Question The Accuracy of Petitioner's Identification of All Real Parties-in-Interest

Patent Owner contends that Petitioner is a wholly-owned subsidiary of Radware, Ltd. in the United States, and conducts sales and marketing of Radware, Ltd. products and serves as Radware, Ltd.'s authorized representative and agent in the United States. *See* Prelim. Resp. 3 (quoting Ex. 2004, 26; Ex. 2002). Patent Owner asserts, “[b]y definition, Radware Ltd. can exercise complete control over its subsidiary—including by

influencing Petitioner's actions in this proceeding.” *Id.* at 6–7 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771–72 (1984)). Patent Owner argues, “Radware Ltd. and Petitioner also share common leadership and financial management, further confirming that the parent exercises control over the subsidiary.” *Id.* at 7 (citing Ex. 2004, 63; Ex. 2006, 3); *see also id.* at 4 (arguing Petitioner and Radware, Ltd. have a substantial overlap of leadership and directors). In support of these arguments, Patent Owner contends: (1) Roy Zisapel, the President, CEO, and director of Radware, Ltd. is also a Director of Petitioner (*see id.* at 4, 7 (citing Ex. 2004, 63)); (2) in the Washington litigation, Petitioner identified Radware, Ltd. employees as witnesses with knowledge of Petitioner's advertising, sales, and financial information (*see id.* at 5, 7 (citing Ex. 2006, 3)); (3) Roy Zisapel served as corporate representative for both Petitioner and Radware, Ltd. in the California litigation (*see id.* at 4, 7); (4) Gadi Meroz provided a declaration stating that he is Vice President and General Counsel of Radware, Ltd. and the in-house counsel for Petitioner (*see id.* at 4 (citing Case IPR2017-00653, Ex. 1024 ¶ 1)); *see also* Ex. 1014 ¶ 1 (Gadi Meroz stating same)); and (5) “Mr. Meroz signed Petitioner's Power of Attorney for this Petition in his capacity as ‘Vice President and General Counsel’ of Radware Ltd.” (*id.* at 5 (citing Paper 1)).

Patent Owner argues Petitioner and Radware, Ltd. “have a very close relationship and near-identity of interests.” Prelim. Resp. 7. Patent Owner asserts that, although Radware, Ltd. is not a defendant in the Washington litigation and has not been sued for infringement of the '278 Patent, Radware, Ltd. joined the Washington litigation as a counterclaim-plaintiff to assert one of its patents against Patent Owner. *See id.* at 3 (citing Ex. 2003, 9); *see also* Ex. 1015 ¶ 2 (confirming Radware, Ltd. is a counterclaim

plaintiff asserting infringement of one of Radware, Ltd.’s patents).¹ Patent Owner further contends that Petitioner and Radware, Ltd. have a history of litigating jointly against Patent Owner, identifying the California litigation, now on appeal before the Federal Circuit. Prelim. Resp. 3–4 (citing Ex. 2005); *id.* at 7. Patent Owner argues that Petitioner and Radware, Ltd. are represented by the same outside counsel, Fabio Marino, in the California litigation and Washington litigation. *See id.* at 4 (citing Ex. 2003, 24; Ex. 2005). Patent Owner further asserts Mr. Marino currently represents Petitioner and Radware, Ltd. in the appeal before the Federal Circuit, and represents Petitioner before the Board in these matters, and numerous other petitions filed. *See id.* at 4 (citing Ex. 2005). Patent Owner contends “[a] favorable outcome in this proceeding will directly benefit Radware Ltd.” *Id.* at 8.

In support of its arguments, Patent Owner directs attention to several Board cases. Patent Owner directs attention to *Zoll Lifecor Corp. v. Philips Electronics North America Corp., et al.*, Case IPR2013-00607, and argues that, similar to facts present in *Zoll*, Radware, Ltd. wholly owns Petitioner, filed suit with Petitioner against F5 in the California litigation, voluntarily injected itself into the current Washington litigation, and is represented by the same counsel in those proceedings that is representing Petitioner in the matters before the Board. *See id.* at 8–9 (citing Ex. 2010 (*Zoll*, Case

¹ Patent Owner argues Radware, Ltd. filed a declaratory judgment action challenging the validity of the ’278 Patent. *See* Prelim. Resp. 12. We consider Patent Owner’s argument moot in view of the subsequent clarification at the District Court that Radware, Ltd. was not a party to the counterclaims for declaratory judgement. *See* Ex. 1015 ¶¶ 2–4, Ex. 1016, Ex. 1017.

IPR2013-00607, Paper 13 (PTAB Mar. 20, 2014))). Patent Owner also directs attention to *Aceto Agricultural Chemicals Corp. v. Gowan Co.*, Case IPR2015-01016, and argues that, similar to the facts present in *Aceto*, there is a significant overlap in corporate leadership because key employees such as Roy Zisapel hold high-ranking positions with both Petitioner and Radware, Ltd., and a Radware, Ltd. employee signed the Power of Attorney on Behalf of Petitioner. *See id.* at 9–10 (citing Ex. 2012 (*Aceto*, Case IPR2015-01016, Paper 15 (PTAB Oct. 2, 2015))). Patent Owner argues, “[t]he Board should conclude here, as in *Aceto*, the blurring of corporate boundaries is such that Petitioner was obligated to identify Radware Ltd. as a real party in interest.” *Id.* at 10. Lastly, Patent Owner directs attention to *Paramount Home Entertainment, Inc. v. Nissim Corp.*, Case IPR2014-00961, and argues that, similar to the facts present in *Paramount*, Radware, Ltd. wholly owns Petitioner, Petitioner and Radware, Ltd. have consistently shared counsel, and a common representative, Roy Zisapel, acts and has acted on behalf of both entities. *See id.* at 8 (citing Ex. 2009 (*Paramount*, Case IPR2014-00961, Paper 11 (PTAB Dec. 29, 2014))).

Petitioner counters that Patent Owner’s reliance on the parent/subsidiary relationship between Petitioner and Radware, Ltd. is insufficient because “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).” RPI Reply 1 (citing *Daifuku Co., Ltd. v. Murata Mach., Ltd.*, Case IPR2015-01538, Paper 11 (PTAB Jan. 19, 2016); *Par Pharm., Inc. v. Horizon Therapeutics, Inc.*, (PTAB Nov. 4, 2015) (Paper 13); *Samsung v. Gold Charm LTD.*, Case IPR2015-01416, Paper 12 (PTAB Dec. 28, 2015); *D-Link, Inc. v. Chrimar Sys., Inc.*, Case IPR2016-

01425, Paper 15 (PTAB Jan. 17, 2017)). Petitioner emphasizes that the analysis looks at the relationship between a party and a proceeding, not the relationship between the parties. *See id.* (citing *Daifuku* at 7).

Petitioner further contends that Radware, Ltd. has not controlled these proceedings. RPI Reply 2. Petitioner asserts that, although the General Counsel for Radware, Ltd., Mr. Meroz, signed the Power of Attorney for the Petition before us, Mr. Meroz holds positions with both companies, and executed the Power of Attorney as a representative for Petitioner. *See id.* at 3 (citing Ex. 1014 ¶ 10). Petitioner also argues that Patent Owner “identifies no evidence of actual control by Mr. [Roy] Zisapel over the IPRs,” and “has presented no evidence of [Radware, Ltd.]’s control over the IPR.” *Id.* Petitioner further asserts that its identification of Radware, Ltd.’s witnesses in its litigation disclosures is no more indicative of control than its identification of F5 witnesses. *See id.* (citing Ex. 1014 ¶ 11; Ex. 2006, 2–3; *Daifuku* at 12). In support of its arguments, Petitioner asserts:

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, *Par* at 10).

RPI Reply 2–3. Finally, Petitioner contends,

all the cases cited by [Patent Owner] are factually distinguishable and involved instances where the petitioner intentionally avoided naming a party as an RPI to circumvent estoppel 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.

Upon reviewing the arguments and supporting evidence presented by the parties, we determine that Patent Owner provides sufficient evidence that reasonably brings into question the accuracy of Petitioner's identification of real parties-in-interest. Considering the totality of the circumstances, Patent Owner's evidence indicates that Petitioner and Radware, Ltd. have "blurred the lines of corporate separation such that the parent could control conduct of the *inter partes* review." *Reflectix, Inc. v. Promethean Insulation Tech. LLC*, Case IPR2015-00039, Paper 18, slip op. at 9 (PTAB Apr. 24, 2015).

It is undisputed that Petitioner is a wholly-owned subsidiary of Radware, Ltd. *See* Ex. 1013 ¶ 2; Ex. 1014 ¶ 2. Unlike a holding company-subsidary relationship, where the holding company conducts no independent operations (*see Daifuku* at 8), Radware, Ltd. engages in the design, research and development, manufacturing of network management and data-security devices, and sale thereof outside of the USA, while Petitioner engages in sales, marketing, installing, and servicing of these network management and data-security devices in the United States. *See* Ex. 1013 ¶¶ 3, 4; Ex. 1014 ¶ 2; Ex. 2004, 22, 25, 40, 17. As an initial example of blurring the lines of corporate separation, Petitioner, in the Washington litigation, offered certain Radware, Ltd. employees as potential witnesses having knowledge of Petitioner's advertising and sales of accused products in the United States, and revenue derived therefrom, even though Petitioner is the entity engaged in the sales and marketing in the United States of Radware, Ltd.'s devices. *See* Ex. 2006, 3; *see also* Ex. 2004, 63 (listing Sharon Trachtman as Radware, Ltd.'s Global Marketing Vice President). The significant overlap in corporate leadership between Petitioner and Radware, Ltd. also is indicative of corporate blurring. Most

notably Radware, Ltd.'s co-founder, long-term Chief Executive Officer, President, and Director Roy Zisapel also serves as a Director for Petitioner. *See* Ex. 2004, 63. In addition, Radware, Ltd.'s Form 20-F indicates that co-founder and long-term Chairman of the Board of Directors Yehuda Zisapel also serves as a Director for Petitioner. *See* Ex. 2004, 62. Lastly, Radware, Ltd.'s Vice President and General Counsel, Gadi Meroz, also serves as in-house counsel for Petitioner, and Mr. Meroz signed the Power of Attorney for the Petition before us. *See* Paper 1; Ex. 2004, 1; Ex. 1014 ¶ 1.

Patent Owner and Petitioner have conflicting positions regarding whether Mr. Meroz executed the Power of Attorney for the Petition on behalf of Radware, Ltd. or Petitioner. *See* Prelim. Resp. 4–5; RPI Reply 3. We note that, although the Power of Attorney was signed by Mr. Meroz “on behalf of Petitioner RADWARE, INC.,” it nevertheless lists Mr. Meroz’s title as “Vice President and General Counsel,” which is his position at Radware, Ltd. Paper 1; *see also* Ex. 1014 ¶ 1 (Mr. Meroz identifies himself as “the in-house counsel of Radware, Inc.” and “Vice President and General Counsel of Radware Ltd.”). The incorrect listing of Mr. Meroz’s title on the Power of Attorney suggests some confusion regarding whether Mr. Meroz was acting in his capacity as representative for Petitioner and/or Radware, Ltd. *See Zerto* at 10 (“The evidence of record demonstrates that, because the non-named party and named petitioner are so intertwined it is difficult for both insiders and outsiders to determine precisely where one ends and the other begins, there exists an actual measure of control or opportunity to control that reasonably might be expected between entities in such a relationship.”).

The following additional considerations, together with the aforementioned indicators of corporate blurring, suggest that Radware, Ltd.

has control, or the opportunity to control, the *inter partes* review before us: (1) Petitioner and Radware Ltd's history of litigating together against Patent Owner; and (2) Petitioner and Radware, Ltd.'s shared litigation counsel Fabio Marino, who also serves as Petitioner's lead counsel for the Petition before us. *See Zoll* at 10 (circumstantial evidence showing unified actions by petitioner and the non-named party in multi-state patent war with patent owner considered among several factors indicating non-named party is a real party-in-interest); *but cf. TRW Auto. US LLC, v. Magna Elecs. Inc.*, Case IPR2014-01497, Paper 7, slip op. at 9–10 (PTAB March 19, 2015) (shared litigation counsel and same counsel representing petitioner did not establish parent corporation's ability to control).

We recognize that Patent Owner does not provide direct evidence to support its argument that Roy Zisapel acts and has acted on behalf of both Petitioner and Radware. *See* Prelim. Resp. 4, 7; RPI Reply 3. Petitioner's evidence, however, indicates that Roy Zisapel receives additional compensation for "additional duties and tasks in the United States as manager of our entire on-going North Americas activities," suggesting that Roy Zisapel manages the operations of Petitioner. Ex. 2004, 66. In other words, the evidence indicates that Roy Zisapel, co-founder and long-term Chief Executive Officer, President, and Director of Radware, Ltd., and Director for Petitioner with "additional duties and tasks in the United States as manager of [the] entire on-going North Americas activities," wields a significant degree of effective control over Petitioner. *See Galderma S.A. v. Allergan Industrie, SAS*, Case IPR2014-01422, Paper 14, slip op. at 12 (PTAB March 5, 2015) (Paper 14) (finding the President and CEO of both parent and subsidiary wields a significant degree of effective control over

the *inter partes* review proceeding—whether exercised or not, it is sufficient that he has the power to call the shots (quoting *Gonzales*, 27 F.3d at 758)).

When considering the totality of circumstances and the evidence as a whole, the corporate blurring between Petitioner and Radware, Ltd., the history of litigating together (particularly Radware, Ltd. voluntarily joining the Washington litigation so that Petitioner could assert Radware, Ltd.’s patent against Patent Owner), and the same shared litigation counsel serving as Petitioner’s lead counsel for the *inter partes* review before us, indicate that Radware, Ltd. has the actual measure of control or opportunity to control the *inter partes* review before us that would be reasonably expected between copetitioners.

We are not persuaded by Petitioner’s arguments addressing the determinations by other panels of the Board based on certain facts, and its argument that Patent Owner’s cited cases are factually distinguishable. *See* RPI Reply 1–3. We recognize that other panels of the Board have indicated the following fact patterns, by themselves, were not sufficient to reasonably bring into question the accuracy of petitioner’s identification of all real parties-in-interest: (1) a parent-subsidiary relationship and common outside counsel (*see Samsung* at 4–11, *D-Link* at 6–9); (2) a parent-wholly-owned subsidiary relationship with an overlapping general counsel/chief administrative officer between the two entities (*see Par Pharm.* at 8–10); and (3) a parent holding company-wholly-owned subsidiary relationship with an overlapping corporate officer/general counsel between the two entities (*see Daifuku* at 5–13). None of the cases cited by Petitioner and Patent Owner, however, contain the same or nearly identical underlying facts as the case before us. *See also* Prelim. Resp. 10–12 (discussing distinctions between the underlying facts of each case and the facts before

us). As stated in the Trial Practice Guide, the question of whether a party who is not a named participant in an *inter partes* review constitutes a real party-in-interest is a highly fact-dependent question. 77 Fed. Reg. at 48759. The totality of the circumstances must be considered to “determine whether they justify a reasonable inference of a nonparty’s potential or actual involvement as a decision maker.” *Gonzalez*, 27 F.3d at 759.

We also are not persuaded by Petitioner’s argument that Patent Owner “has presented no evidence of [Radware, Ltd.]’s control over the IPR,” and “identifies no evidence of actual control by Mr. [Roy] Zisapel over the IPRs.” RPI Reply 3. As explained above, Patent Owner bears the burden of production to provide sufficient evidence that reasonably brings into question the accuracy of a petitioner’s identification of real parties-in-interest. *See Zerto* at 7. Contrary to Petitioner’s suggestion, the burden of production does not require presenting evidence of actual control over the proceedings by a non-party. *See Aceto* at 10 (explaining Patent Owner does not bear the burden of proving funding by the non-party). In determining whether a non-party has effective control over a named party’s conduct in a proceeding, it is important to consider that “[t]he non-party’s participation may be overt or covert, and the evidence of it may be direct or circumstantial—so long as the evidence as a whole shows that the nonparty possessed effective control over a party’s conduct . . . as measured from a practical, as opposed to a purely theoretical, standpoint.” *Gonzalez*, 27 F.3d at 759.

For all of the foregoing reasons, we determine that Patent Owner provides sufficient evidence that reasonably brings into question the accuracy of Petitioner’s identification of real parties-in-interest. Having determined that Patent Owner provides sufficient evidence to rebut the

presumption afforded to Petitioner, we next address whether Petitioner meets its burden of persuasion to demonstrate that it identified all real parties in interest, in compliance with 35 U.S.C. § 312.

C. Petitioner Does Not Establish That it Has Complied With the Statutory Requirement to Identify All Real Parties in Interest

Petitioner contends that Radware, Ltd. is not a real party-in-interest because Petitioner is solely responsible for directing, controlling, and bearing the costs of these petitions. RPI Reply 1 (citing Ex. 1013 ¶ 7; Ex. 1014 ¶ 8). Petitioner contends that Radware, Ltd. has no relationship to these proceedings, and, apart from its ownership interest in Petitioner, Radware, 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.” whereas, “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.* (citing Ex. 1014 ¶¶ 2, 6, 7).²

Petitioner argues that Petitioner and Radware, Ltd. have not blurred corporate lines. *See* RPI Reply 2. Petitioner asserts that Radware, Inc., and Radware, Ltd. are separate companies with separate budgets; they maintain separate business records, and pay separate taxes. *See id.* (citing Ex. 1013 ¶ 2; *Daifuku* at 9). Petitioner argues the decision to file an IPR, and all decisions related to the preparation and filing of the petitions, were made by Radware, Inc., alone. *See id.* (citing Ex. 1013 ¶ 7).

² Petitioner addresses Patent Owner’s argument asserting that Radware, Ltd. filed a declaratory judgement action for the ’278 Patent. As explained in the footnote above, we consider Patent Owner’s declaratory judgement argument moot.

We are not persuaded by Petitioner's uncorroborated testimonial evidence that Petitioner is solely responsible for directing, controlling, and bearing the cost of the Petition, and that all decisions related to the preparation and filing of the Petition were made by Petitioner. For example, Petitioner does not provide any explanation to address which ones of Petitioner's Directors and/or employees, such as Roy Zisapel and/or Gadi Meroz, provided input for preparing, directing, controlling, and filing of the Petition. As another example, Petitioner does not provide evidence, such as receipts or statements, to support the testimony that Petitioner bore the costs for filing the Petition. Similarly, Petitioner does not provide evidence to support the testimony that Petitioner and Radware, Ltd. have separate budgets, maintain separate business records, and pay separate taxes. As stated before, Petitioner is far more likely to be in possession of, or have access to, relevant evidence than is a patent owner. *See Zerto* at 7.

We recognize that Petitioner's arguments and testimony bears some similarity to the arguments and testimony presented in *Daifuku*. The inquiry into whether a non-named party constitutes a real party-in-interest, however, is "a highly fact-dependent question." Trial Practice Guide, 77 Fed. Reg. at 48,759. The facts before us are not the same as, or nearly identical to, the facts present in *Daifuku*. For example, in contrast to the facts before us, in *Daifuku*, the parent company merely held ownership of its subsidiaries and conducted no independent operations. *See Daifuku* at 8.

Lastly, Petitioner's arguments focus on actual control, e.g., decisions related to preparation and filing of the Petition, and directing, controlling, and bearing the costs of the Petition. *See RPI Reply* 1–3. Petitioner, however, does not offer any arguments to address whether Radware, Ltd.

has the opportunity to control Petitioner's participation in the *inter partes* review before us.

For all of the foregoing reasons, Petitioner does not persuade us that the Petition complies with the statutory requirement of 35 U.S.C. § 312(a)(2) to identify all real parties-in-interest.

III. CONCLUSION

Having determined that that Patent Owner provides sufficient evidence that reasonably brings into question the accuracy of Petitioner's identification of real parties-in-interest, and determined that Petitioner has not persuaded us that the Petition complies with the statutory requirement of 35 U.S.C. § 312(a)(2) to identify all real parties-in-interest, the Petition is incomplete. Board Rule 42.106(b) provides that "[w]here a party files an incomplete petition, no filing date will be accorded, and the Office will dismiss the petition if the deficiency in the petition is not corrected within one month from the notice of an incomplete petition." There is no dispute that the complaint alleging infringement of the '278 Patent in the Washington litigation was served on Petitioner in April 2016, more than one year ago. *See* Ex. 1003. In the circumstances before us, however, Petitioner did not correct the identification of real party-interest by adding Radware, Ltd. *See* 37 C.F.R. 42.8(a)(3). Accordingly, we decline to consider the Petition, as filed, and, therefore, we do not institute *inter partes* review.

III. ORDER

Accordingly, it is ORDERED that *inter partes* review of U.S. Patent No. 6,311,278 is not instituted based on this Petition.

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