Paper No. __

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BROADCOM CORPORATION

Petitioner

v.

WI-FI ONE, LLC

Patent Owner

Case IPR2013-00602
U.S. Patent No. 6,466,568

PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE UNDER 37 C.F.R. § 42.120

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I. BROADCOM'S PETITION IS NOT BARRED BY 35 U.S.C. § 315(B)

Owner[1] asserts that Broadcom's Petition is barred because Broadcom is a "privy" of the D-Link Defendants, the alleged "real parties-in-interest to this Action." (Response at 8; Paper 20). Owner has raised this identical argument twice, and has failed each time. This Board previously denied Owner's Motion for Additional Discovery regarding privity and real party-in interest issues and the Federal Circuit subsequently denied Owner's Petition for a Writ of Mandamus seeking to overturn this Board's decision. This third attempt relies on exactly the same arguments Owner made to this Board and the Federal Circuit and should be rejected for the same reasons. Owner offers no new reason whatsoever for this Board to reverse its prior decision that Owner's proffered "evidence" and legal authorities fail to amount to anything more than "speculation" or "a mere possibility" that Broadcom is in privity with the D-Link Defendants or that the D-Link Defendants are real parties-in-interest.

A. Broadcom is Not in Privity with the D-Link Defendants

Owner again relies on unsubstantiated allegations of Broadcom's "substantive legal relationship" of indemnity with the D-Link Defendants, "multiple legal actions on behalf of the community of interest," and Broadcom's

[1] After institution, Ericsson transferred the '625 patent to Wi-Fi One, LLC. This Reply refers to the current and prior owners as "Owner".

"attendance" at the Texas trial to support its claim of privity. (*Id.*; Paper 20). Owner's arguments, which rely on the same flawed and speculative "evidence" asserted previously, fail to establish Broadcom as a privy. As the Board correctly held, "indemnity payments and minor participation at trial are not sufficient to establish privity." (Discovery Decision at 7 (*citing Bros, Inc. v. W.E. Grace Mfg. Co.*, 261 F.2d 428, 429 (5th Cir. 1958); Paper 20). Instead, Owner must demonstrate that Broadcom actively controlled the Texas Litigation. (*Id.* at 7-8; Paper 20; *see also Goodman v. Super Mold Corp.*, 103 F.2d 474,482 (9th Cir. 1939) (no privity where there was no evidence manufacturer of accused infringing device "had the right to control the defense of the suit."). Owner cannot, however satisfy this burden, because Broadcom did not control – actively or otherwise – the Texas Litigation. (Exhibit 1021.[2]) Indeed, this Board has already found that "the

[2] The Board should again reject Owner's argument that if Broadcom had the "opportunity to control" the Texas Litigation, this is sufficient to establish it as a privy. First, Owner offers no evidence that Broadcom had any "opportunity" to control the Texas Litigation. Second, mere "opportunity" to control litigation cannot create privity; a party must have actual control of the related litigation. (*Id.* at 9 (citing *Dentsply Intern., Inc. v. Kerr Mfg. Co.*, 42 F.Supp.2d 385, 398 (D. Del. 1999) (no privity where party's role in a prior suit was "limited to observing the proceedings and filing amicus curiae briefs.")); Paper No. 20).

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