

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WEATHERFORD INTERNATIONAL, LLC;
WEATHERFORD/LAMB, INC.;
WEATHERFORD US, LP; and WEATHERFORD
ARTIFICIAL LIFT SYSTEMS, LLC
Petitioners

v.

PACKERS PLUS ENERGY SERVICES INC.,
Patent Owner

Case IPR2016-01509
Patent 7,861,774

**EXCLUSIVE LICENSEE RAPID COMPLETIONS LLC'S
SUR-REPLY IN SUPPORT OF ITS PRELIMINARY RESPONSE**

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In its preliminary response,¹ Respondent challenged the substance of the Petition and it identified three additional reasons for denial of the Petition: (1) Petitioners failed to identify all real parties in interest; (2) the Petition failed to show that this Petition is “meaningfully different” from the other Petitions that have been filed against the claims at issue; and (3) the Petition represents an improper “second bite at the apple.” All of these assertions are based on statutory safeguards designed to ensure the overall fairness of the *inter partes* review procedure. Petitioners’ new evidence submitted in reply only confirms that this is precisely the type of Petition that should be denied as an unfair attempt to game the system.

To be clear, Respondent has never asserted that Baker Hughes and Weatherford entered into a secret contract that required Weatherford to act as a hollow proxy for Baker Hughes or that Baker Hughes secretly paid the filing fee

¹ The Board authorized the filing of this sur-reply during its January 4, 2017 telephonic hearing. It limited the scope of this sur-reply to responding to the common interest agreement and request for admission responses cited in Weatherford’s reply brief. The Board also indicated that it would not issue a written order to this effect and that Respondent should memorialize its ruling in this sur-reply.

for this Petition. None of the Board decisions cited by either party hold that such a showing is necessary to prove that an unnamed party is a real party in interest. Instead, the key inquiry is whether Baker Hughes had the opportunity to exercise the level of control that would be expected of a formal co-party to this proceeding. Indeed. The new evidence submitted by Weatherford fails to rebut the fact that Baker Hughes had just such an opportunity, and that the two parties effectively split the costs of their filings by dividing the asserted grounds between their two sets of follow-on Petitions.

Weatherford does not deny, and none of its new evidence refutes, that: (i) Baker Hughes at least had an opportunity to influence and develop the specific theories asserted in this Petition; (ii) that Baker Hughes sought discovery on Petitioner's behalf related to the theories at issue in this Petition; or (iii) that Baker Hughes and Petitioner developed the Yost theory at issue in this Petition in response to arguments made by Respondent in its preliminary response to Baker Hughes' initial petitions. Accordingly, the Board should find that Baker Hughes had an opportunity to influence the content of this Petition such that it should be considered a real party in interest.

Petitioners attempt to avoid this result by identifying self-serving language contained in a highly redacted "Joint Defense, Common Interest and Confidentiality Agreement." But regardless of this written agreement, it is

undeniable that Baker Hughes and Petitioner have a common interest in seeking invalidity of the claims at issue in this Petition. Whether they characterize their efforts and communications² in furtherance of that common interest as litigation-related or *inter partes* review-related has no impact on the substantive issue of whether Baker Hughes had an opportunity to influence the theories asserted in this Petition. It did, and so the Petition should be denied.

² The Request for Admission responses submitted in Weatherford's reply do not support a finding that Baker Hughes is not a real party in interest. Had Weatherford admitted those requests, i.e. it discussed the relevant issues in the context of *Inter partes* reviews, the Board would have had little choice but to find Baker Hughes to be a real party in interest. The fact that Petitioners denied those requests merely indicates that the parties characterized their substantive discussions as litigation-related rather than *inter partes* review related. Moreover, it is still unclear why Weatherford refused to respond to those requests earlier. While the litigation was stayed before Weatherford could be compelled to provide responses, Weatherford also refused Respondent's request to expedite the deadline for its response or to otherwise provide Respondent with informal responses. Ex. 2037.

If the redacted Common Interest Agreement is relevant at all, it only shows that this Petition is an attempt to obtain an unfair second bite at the apple. This agreement was signed months before Petitioners and Baker Hughes served their initial invalidity contentions. Ex. 2022. At that time, Petitioners and Baker Hughes could have agreed that, because all Defendants were jointly participating in asserting a common invalidity defense in the litigation, they would also jointly file a single *inter partes* review. Instead, they chose to include the provision now before the Board, which is aimed at thwarting the application of § 315(e) estoppel and allowing them to file serial petitions.³ This indicates that Petitioners' and Baker Hughes' decision to file separate IPR Petitions was not based on some legitimate desire for independent control over petitions (e.g. because Petitioners

³ It is unlikely that this provision is actually effective for that purpose. For example, the mere fact that parties agree to not be in privity with respect to a particular proceeding does not dictate whether they are actually in privity. Privity exists between parties regardless of the context in which that privity first arises. *See Gen. Elec. Co. v. Transdata, Inc.*, IPR2014-01559, Paper 23 at 13-14 (PTAB April 15, 2015) (explaining that the fact that two parties are in privity with respect to a lawsuit is enough to establish privity with respect to the statutory bar in 35 U.S.C. § 315(b)).

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