UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,

Petitioner

v.

HEWLETT PACKARD ENTERPRISE COMPANY,

Patent Owner

Case IPR2017-01933

Patent 8,478,799

PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

Petitioner thanks the Board for the opportunity provided in the Order issued February 21, 2018 (Paper 7) to respond to the real party-in-interest allegations made in Patent Owner's Preliminary Response ("POPR," Paper 6).

Petitioner reaffirms that the Petition ("Pet.," Paper 1) correctly named only Cisco Systems, Inc. ("Cisco") as a real party-in-interest. Springpath, Inc. ("Springpath") did not participate in, fund, direct, or control the preparation or filing of the petition, and Cisco and Springpath were not in privity as of the filing date. Patent Owner's allegations are without evidence and without merit.

A. Relevant Facts

Cisco filed its petition in this case ***before*** it agreed to acquire Springpath, ***before*** it announced its intent to do so, and ***before*** it completed that acquisition:

- Aug. 11, 2017: Cisco filed the petition in this case. *See* Paper 1.
- Aug. 19, 2017: Cisco agreed to acquire Springpath. Ex. 1063 at 2.
- Aug. 21, 2017: Cisco announced an intent to acquire Springpath. Ex. 2002.
- Sept. 22, 2017: Cisco acquired Springpath. Ex.1062 at 1; Ex. 1064 at 2-3.

B. The Petition is Complete Because Springpath was Not a Real Party-in-Interest at the Time of Filing

The Board should not deny the Petition because it properly identifies Cisco as the only real party-in-interest at the time of filing. Pet. at 13; *see* POPR at 2; *see also* 35 U.S.C. § 312(a)(2) and 37 C.F.R. § 42.8(b)(1).

The Board's precedent clarifies that whether a party is a real party-in-interest

depends on "the relationship between a party and a *proceeding*" not "the relationship between *parties*." *Aruze Gaming Macau, Ltd. v. MGT Gaming, Inc.*, IPR2014-01288, Paper 13 at 11 (PTAB Feb. 20, 2015). The Office Patent Trial Practice Guide also provides factors for determining whether a party is a real party in interest such as whether a non-party exercises control over a petitioner's participation in a proceeding or whether a non-party is funding or directing the proceeding. 77 Fed. Reg. 48,756, 48,759-60 (Aug. 14, 2012).

Here, there is no evidence to show that Springpath has controlled, funded, or directed this proceeding, had the opportunity to control this proceeding, or was involved in any way in initiating this proceeding. Therefore, Springpath is not a real party-in-interest. *Id.*; *see also Aruze Gaming* at 11-12. Further, there is no evidence to show that Springpath influenced, or sought to influence, Cisco's independent decision to initiate this proceeding. Thus, Springpath is not impermissibly "litigating through a proxy." *Aruze Gaming* at 12.

Patent Owner's argument is empty because there is no supporting evidence. POPR at 6. Patent Owner's arguments, unsupported by evidence, fail to rebut the presumption that Cisco's Petition accurately identifies all real parties-in-interest. *See Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.*, Case IPR2014-00488, Paper 52 at 6-7 (PTAB Mar. 16, 2015).

Patent Owner's cited cases are readily distinguished on the facts. First, in the

Medtronic case, Medtronic filed a petition ***after*** completing the acquisition of Cardiocom. *Medtronic* at 3-4. The evidence also showed that Cardiocom had funded preparation of Medtronic's petitions. *Medtronic* at 14. In stark contrast, Cisco filed the instant Petition ***before*** even announcing its intent to acquire Springpath and a month ***before*** completing the acquisition. There is also no evidence that Springpath funded any activity related to this proceeding. Thus, this case is nothing like the facts of *Medtronic*.

The *RPX v. VirnetX* case is also factually unlike this case. There, the Board found that Apple discussed a proposal with RPX to challenge patents through *inter partes* review and provided $500,000 to fund RPX's efforts. *See* IPR2014-00171, Paper 57 at 4-5 (PTAB July 14, 2014). The Board also found that Apple made available its counsel and expert to RPX. *Id.* at 7. Here, no evidence has been submitted of such interactions between Springpath and Cisco. Cisco filed the Petition for its own reasons, not as a proxy for Springpath.

Accordingly, the Petition properly named only Cisco as the real party-in-interest. Patent Owner's allegation that Cisco's Petition was incomplete is therefore not correct. *See Lumentum v. Capella*, IPR2015-00739, Paper 38 at 6 (Mar. 4, 2016) (precedential). Cisco's Petition was complete when filed.

C. Cisco and Springpath Were Not in Privity at the Time of Filing

Moreover, because Springpath and Cisco were not in privity when Cisco

filed the Petition, denial of Cisco's Petition would unfairly deprive Cisco of a full and fair opportunity to litigate validity of the '799 patent—an opportunity Cisco has not had before. *See Aruze Gaming* at 13.

The Board has repeatedly found that "it is only privity relationships up until the time a petition is filed that matter; any later-acquired privies are irrelevant." *Semiconductor Components Indus. v. Power Integrations, Inc.*, Case IPR2016-00995, Paper 26 at 10 (PTAB Oct. 18, 2017) (*quoting Synopsys, Inc. v. Mentor Graphics Corp.*, Case IPR2012-00042, Paper 60 at 12 (PTAB Feb. 19, 2014)).

In a case where a petitioner filed its petition and (like here) later acquired a third party, the Board held that §315(b) did not bar institution. *See Arris Group, Inc. v. TQ Delta, LLC*, IPR2016-00430, Paper 9 at 6-7 (PTAB July 1, 2016). In *Arris*, the Board considered evidence that the petitioner was in the process of acquiring a third party and had a common defense agreement with the third party, but found that the petitioner had no control over the third party. *Id.*

Here, Cisco filed its Petition before acquiring Springpath. There is no evidence to suggest that as of the petition filing date Cisco had control over, or the legal right to assume control over, Springpath, or vice versa. Indeed, Cisco and Springpath had not even agreed to an acquisition, let alone completed it. Patent Owner's attempt to use Cisco's option to acquire Springpath to imply a privity relationship is unsupported by facts or applicable law. Even an acquisition

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