

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZERTO, INC.,
Petitioner,

v.

EMC CORPORATION,
Patent Owner.

Case IPR2014-01254
Patent 7,603,395 B1

Before KARL D. EASTHOM, MICHAEL R. ZECHER, and
GEORGIANNA W. BRADEN, *Administrative Patent Judges*.

ZECHER, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner, Zerto, Inc., filed a Petition (“Pet.”) requesting an *inter partes* review of claims 1–18 of U.S. Patent No. 7,603,395 B1 (“the ’395 patent,” Ex. 1001). Paper 2. Patent Owner, EMC Corporation (“EMC”), timely filed unredacted and redacted versions of a Preliminary Response (Papers 10 and 11, “Prelim. Resp.”),¹ along with a First Motion to Seal (Paper 9) and default Protect Order set forth in Appendix B of the Office Trial Practice Guide (“Practice Guide”), 77 Fed. Reg. 48,756, 48,756–66 (Aug. 14, 2012).

Shortly after EMC filed its Preliminary Response, we granted-in-part EMC’s Motion for Additional Discovery that was directed to the issue of whether Zerto, Inc.’s parent entity, Zerto, Ltd., should have been identified as a real party-in-interest in the Petition, as required by 35 U.S.C. § 312(a)(2). Paper 15. In our Decision granting-in-part EMC’s Motion for Additional Discovery, we ordered Zerto, Inc. to: (1) produce an inter-company agreement between Zerto, Inc. and Zerto, Ltd.; and (2) if necessary, make the Chief Executive Officer (“CEO”) of Zerto, Inc. and Zerto, Ltd., Mr. Ziv Kedem, available for a deposition that would be confined to the narrowly tailored topics outlined in EMC’s discovery request (Ex. 2002). Paper 15, 10.

In support of its Preliminary Response, EMC filed the inter-company agreement between Zerto, Inc. and Zerto, Ltd. (Ex. 2030), the entire

¹ Citations hereinafter correspond to the redacted version of each paper.

transcript of Ziv Kedem's deposition (Ex. 2029), unredacted and redacted versions of Observations regarding this deposition testimony (Papers 20 and 21), and a Second Motion to Seal (Paper 23). Zerto, Inc. then filed redacted and unredacted versions of a Reply to EMC's Preliminary Response (Papers 26 and 27, "Pet. Reply"), along with a Third Motion to Seal (Paper 24). In its Reply to EMC's Preliminary Response, Zerto, Inc. maintains that it was not required to identify Zerto, Ltd. as a real party-in-interest in the Petition. Pet. Reply 1–7. Finally, EMC filed redacted and unredacted versions of a Sur-Reply (Papers 28 and 29, "PO Sur-Reply"), along with a Fourth Motion to Seal (Paper 30). We have jurisdiction under 35 U.S.C. § 314.

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 persuaded that Zerto, Inc. should have identified Zerto, Ltd. as a real party-in-interest in the Petition, as required by 35 U.S.C. § 312(a)(2). We, therefore, deny the Petition.

A. Related Matters

The parties indicate that the '395 patent was asserted in a district court case captioned *EMC Corp. & EMC Israel Dev. Ctr., Ltd. v. Zerto, Inc.*, No. 12-CV-00956 (D. Del). Pet. 1; Paper 5, 2. The evidence of record indicates that the complaint in this district court case was served on or around August 21, 2013. Ex. 2003. In addition to the Petition in this proceeding, Zerto,

Inc. filed three other Petitions challenging the patentability of a certain subset of claims in the following patents owned by EMC: (1) U.S. Patent No. 7,971,091 B1 (Case IPR2014-01295); (2) U.S. Patent No. 7,647,460 B1 (Case IPR2014-01329); and (3) U.S. Patent No. 6,073,222 (Case IPR2014-01332). Paper 5, 2.

B. Factual Background

In November 2009, Messrs. Ziv and Oded Kedem founded Zerto, Ltd. in Israel to sell disaster recovery software that they had designed and developed. Ex. 2003 ¶¶ 40, 49; Ex. 2004 ¶¶ 40, 49. According to an article published in the Wall Street Journal, Ziv Kedem stated that “[w]e recognized early that the U.S. would be our largest target market, so naturally we wanted to open an office where we had access to both customers as well as top talent for our sales and marketing teams. Boston proved to be the ideal location for our U.S. headquarters.” Ex. 2005, 1. In May of 2011, Zerto, Inc. was founded as a United States entity—located in Boston, Massachusetts—to sell the disaster recovery software designed and developed by Ziv and Oded Kedem. Ex. 2003 ¶¶ 41, 50; Ex. 2004 ¶¶ 41, 50. As such, Zerto, Inc. is a wholly-owned subsidiary of Zerto, Ltd. Ex. 2003 ¶ 44; Ex. 2004 ¶ 44. Ziv Kedem is the CEO of Zerto, Ltd. and President/CEO of Zerto, Inc. Ex. 2003 ¶ 42; Ex. 2004 ¶ 42. Oded Kedem is the Chief Technology Officer (“CTO”) of Zerto, Ltd. and member of the Board of Directors for Zerto, Inc. Ex. 2003 ¶ 43; Ex. 2004 ¶ 43. The members of the Board of Directors for Zerto, Ltd. and Zerto, Inc. are identical. *Compare* Ex. 2006, *with* Ex. 2007.

Although there is a website—<http://www.zerto.com>—and LinkedIn webpage that corroborates this information to some extent, neither the website nor the LinkedIn webpage differentiate clearly between Zerto, Ltd. and Zerto, Inc. According to the “About Us” webpage on the website, “Zerto was found in 2010 by a team of storage industry veterans,” including Ziv and Oded Kedem. Ex. 2009, 1. The LinkedIn webpage indicates that “Zerto is dual-headquartered in Israel and the United States.” Ex. 2010, 1.

The inter-company agreement between Zerto, Ltd. and Zerto, Inc., produced in accordance with our Decision granting-in-part EMC’s Motion for Additional Discovery, includes an indemnification clause. Ex. 2030, 4.

[REDACTED]

[REDACTED]

[REDACTED]

During the deposition of Ziv Kedem, conducted in accordance with our Decision granting-in-part EMC’s Motion for Additional Discovery, counsel for EMC inquired whether “[Zerto,] Inc. ever had a board of directors meeting.” Ex. 2029, 45:3–4. Ziv Kedem testified that he couldn’t “recall a specific [Board of Director’s meeting for Zerto, Inc.]” *Id.* at 45:5–10. Counsel for EMC also inquired who was responsible for paying Foley and Lardner, the law firm representing Zerto, Inc. in this proceeding. *See id.* at 163:20–22; 164:12. Ziv Kedem testified that he didn’t “know who [provided] actual payment,” but that payments generally are resolved by Zerto, Ltd.’s “finance department,” which “oversees the subsidiaries,” including Zerto, Inc. *Id.* at 163:23–164:22. This is consistent with Ziv

Kedem's prior testimony, in which he indicated that the financial reports of Zerto, Ltd. and Zerto, Inc. are consolidated with the financial reports of all the subsidiaries. *See id.* at 159:3–13.

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 real party-in-interest in a petition, followed by principles of law that generally apply to identifying a real party-in-interest in a given proceeding, and then we address the parties' contentions directed to whether Zerto, Inc. should have identified Zerto, Ltd. as a real party-in-interest in the Petition.

A. Burden

In an *inter partes* review, the statutory requirement under 35 U.S.C. § 312(a)(2) that a petition identify all real parties-in-interest is a threshold issue. *See ZOLL Lifecor Corp. v. Philips Elecs. N. Am. Corp.*, Case IPR2013-00606, slip op. at 7–8 (PTAB Mar. 20, 2014) (Paper 13). We generally accept the petitioner's identification of real parties-in-interest at the time of filing the petition. 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). Our practice in this regard, however, acts as a rebuttable

presumption that benefits the petitioner.² When, as here, a patent owner provides sufficient rebuttal evidence that reasonably brings into question the accuracy of a petitioner's identification of real parties-in-interest, the burden remains with the petitioner to establish that it has complied with the statutory requirement to identify all real parties-in-interest. This allocation of the burden for establishing whether a third party has, or has not, been identified properly as a real party-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.

B. Principles of Law

The Practice Guide explains that that “[w]hether 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.” 77 Fed. Reg. at 48,759. The Practice Guide cites *Taylor v. Sturgell*, 553 U.S. 880 (2008), as informing this determination. *Taylor* lists six categories that create an exception to the common law rule that normally forbids non-party preclusion in litigation. *Id.* at 893–95. Under the category relevant here—namely, whether a third party exercises or could exercise control over this proceeding—“[c]ourts and commentators agree . . . that there is no

² With a few exceptions not pertinent in this proceeding, the Federal Rules of Evidence apply to an *inter partes* review. 37 C.F.R. § 42.62(a). “[T]he 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 (emphasis added).

‘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.” 77 Fed. Reg. at 48,759 (citing *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994)).³ A third party’s participation may be overt or covert, and the evidence may be circumstantial, but the evidence, as a whole, must show that the third party possessed effective control from a practical standpoint. *Gonzalez*, 27 F.3d at 759. This inquiry is not based on isolated facts, but rather must consider the totality of the circumstances. *Id.*

C. The Parties’ Contentions

In its Petition, Zerto, Inc. identifies itself as the sole real party-in-interest. Pet. 1. In its Preliminary Response, EMC contends that Zerto, Inc.’s failure to identify Zerto, Ltd. as a real party-in-interest is fatal to the Petition. Prelim. Resp. 1. EMC briefly describes the overlap between Zerto, Inc. and Zerto, Ltd., as well as the relevant aspects of the co-pending district court case (*id.* at 1–3), before presenting the following arguments: (1) Zerto, Ltd. and Zerto, Inc. hold themselves out as a single entity and, therefore, we should deny the Petition because it does not identify Zerto, Ltd. as a real party-in-interest (*id.* at 4–8); (2) Zerto, Inc.’s failure to identify Zerto, Ltd. as a real party-in-interest renders the Petition incomplete, and adding Zerto,

³ Another category discussed in *Taylor* that might be relevant here is a special statutory scheme that forecloses successive attacks by third parties, and otherwise is consistent with due process. *Taylor*, 553 U.S. at 895. Examples of such schemes include bankruptcy and probate proceedings (*id.*), which are similar in some respects with this proceeding because they also consider the public interest.

Ltd. as a real party-in-interest would require according the Petition a new filing date, which, in turn, would fall outside the one-year time bar set forth in 35 U.S.C. § 315(b) (*id.* at 9–10); and (3) dismissal of the Petition is the consequence of the strategic decision made by Zerto, Inc. not to identify Zerto, Ltd. as a real party-in-interest in the Petition (*id.* at 10–11).

In its Reply to EMC’s Preliminary Response, Zerto, Inc. contends that Zerto, Ltd. is not controlling or funding this proceeding. Pet. Reply 1–2 (citing Ex. 2029, 169:5–170:10). Zerto, Inc. argues that, although there is some overlap between Zerto, Ltd. and Zerto, Inc., there is insufficient evidence showing that someone from Zerto, Ltd. is acting for Zerto, Inc. in a legal capacity. *Id.* at 4–5. Zerto, Inc. further argues that it has not demanded that Zerto, Ltd. indemnify Zerto, Inc. with respect to the litigation involving EMC. *Id.* at 6 (citing Ex. 2029, 170:11–20).

In its Sur-Reply, EMC contends that Zerto, Inc. has not met its burden of showing that Zerto, Ltd. should not be identified as a real party-in-interest in the Petition. PO Sur-Reply 1. Instead, EMC argues that, despite exclusive access to the evidence, Zerto, Inc. does not provide sufficient evidence demonstrating that it takes actions independent of Zerto, Ltd. (*id.* at 3), nor does Zerto, Inc. provide documentation showing that it paid for this proceeding—not Zerto, Ltd. (*id.* at 1–2).

D. The Evidence, as a Whole, Shows it is Unclear Whether Zerto, Ltd. and Zerto, Inc. Operate as Separate and Distinct Entities, or Effectively Operate as a Single Entity

Upon reviewing the evidence presented by Zerto, Inc. and EMC, we are not persuaded Zerto, Inc. has met its burden of identifying all real parties-in-interest in the Petition, as required by 35 U.S.C. § 312(a)(2). The evidence of record demonstrates that, because Zerto, Ltd. and Zerto, Inc. 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. In other words, the evidence shows that Zerto, Ltd. and Zerto, Inc. blur the lines of corporate separation, such that, in certain instances, these entities operate as a single entity.

As we explained previously, even though Zerto, Inc. is a wholly-owned subsidiary of Zerto, Ltd. (Ex. 2003 ¶ 44; Ex. 2004 ¶ 44), there is also evidence indicating that these entities hold themselves out as a single entity. Ziv Kedem is the CEO of both Zerto, Ltd. and Zerto, Inc. Ex. 2003 ¶ 42; Ex. 2004 ¶ 42. The members of the Board of Directors for Zerto, Ltd. and Zerto, Inc. are identical, as required by the by-laws of Zerto, Ltd. Compare Ex. 2006, with Ex. 2007; Ex. 2029, 25:5–26:3. The website and LinkedIn webpage that represents both Zerto, Ltd. and Zerto, Inc. does not differentiate between these entities, but instead commonly refers to them as simply “Zerto.” Ex. 2009, 1; Ex. 2010, 1. For instance, the LinkedIn webpage does not indicate that Zerto, Ltd. and Zerto, Inc. are separate and

distinct entities because one is headquartered in Israel and the other is headquartered in Boston, MA, but rather represents that Zerto is a single entity that is dual-headquartered in Israel and the United States. Ex. 2010, 1. Similarly, a Wall Street Journal article quotes Ziv Kedem as stating that “*we* wanted to open an office where *we* had access to both customers as well as top talent for *our* sales and marketing teams. Boston provided the ideal location for *our U.S. headquarters.*” Ex. 2005, 1 (emphases added).

The testimony offered by Ziv Kedem during his deposition does not resolve the uncertainty with respect to whether Zerto, Ltd. and Zerto, Inc. operate as separate and distinct entities, or effectively operate as a single entity. For instance, when probing the differences between Zerto, Ltd. and Zerto, Inc., counsel for EMC inquired whether Zerto Inc. had ever held a Board of Director’s meeting. Ex. 2029, 45:3–4. In response, Ziv Kedem testified that he couldn’t “recall a specific [Board of Director’s meeting for Zerto, Inc.]” *Id.* at 45:5–10. If Zerto, Inc. has never held a Board of Directors meeting, it is unclear then how Zerto, Inc. operates independently of Zerto, Ltd. Without evidence suggesting otherwise, the implication is that the operations of Zerto, Inc. are discussed at the Board of Director meetings for Zerto, Ltd. Regardless whether this is a proper implication to draw from Ziv Kedem’s cited testimony, the lack of clarity concerning the manner in which Zerto, Inc. operates independently of Zerto, Ltd. weighs in favor of concluding that Zerto, Ltd. exercises control, at least in certain instances, over Zerto, Inc.

The inter-company agreement between Zerto, Ltd. and Zerto, Inc. is another factor that weighs in favor of concluding that Zerto, Ltd. exercises sufficient control over Zerto, Inc. Ex. 2030. The indemnification clause

[REDACTED]
[REDACTED]
[REDACTED]. Even though Ziv Kedem testified that Zerto, Inc. has not demanded that Zerto, Ltd. indemnify Zerto, Inc. with respect to this proceeding (Ex. 2029, 170:11–20), other testimony from Ziv Kedem indicates that it is unclear who funded this proceeding.

For instance, when counsel for EMC inquired about who was funding this proceeding, Ziv Kedem testified that he didn't "know who [provided] actual payment," but that payments generally are resolved by Zerto, Ltd.'s "finance department," which "oversees the subsidiaries." Ex. 2029, 163:23–164:22. Ziv Kedem also testified that the financial reports of Zerto, Ltd. and Zerto, Inc. are consolidated with the financial reports of all the subsidiaries. *See id.* at 159:3–13. This cited testimony implies that the finances of both Zerto, Ltd. and Zerto, Inc. are commingled such that the CEO of these entities, Ziv Kedem, chose not to ascertain or demonstrate clearly who is funding this proceeding. Although Zerto, Inc. is in the best position to provide evidence relevant to the issue of funding, it did not produce receipts or statements showing clearly that Zerto, Inc.—not Zerto, Ltd.—paid the filing fees and legal expenses associated with this proceeding.

We recognize that at least one other panel of the Board has held that an indemnification clause, by itself, is not dispositive with respect to

whether the indemnitor exercises or could exercise control over an *inter partes* review proceeding. *See Samsung Elecs., Co., Ltd. v. Black Hills Media, LLC*, Case IPR2014-00737, slip op. at 4 (PTAB Nov. 4, 2014) (Paper 7). To be clear, the isolated fact that Zerto, Ltd. must, [REDACTED], defend Zerto, Inc. [REDACTED] is not, by itself, dispositive in this case. Instead, as instructed by *Gonzalez*, 27 F.3d at 759, we must consider the totality of the circumstances. Given that Zerto, Ltd. and Zerto, Inc. have not maintained well-defined corporate boundaries, and it is unclear who paid the filing fees and legal expenses associated with this proceeding, we are not convinced it matters whether Zerto, Inc. officially invoked the indemnification clause in the inter-company agreement.

We note that Zerto, Inc.'s position that Zerto, Ltd. is not controlling or funding this proceeding is predicated, in part, on testimony elicited from Ziv Kedem by counsel for Zerto, Inc. For instance, when counsel for Zerto, Inc. inquired whether Zerto, Ltd. exercises control over Zerto, Inc. in this proceeding, Ziv Kedem testified that: "I don't—I can't think of a way for [Zerto, Ltd.] to control . . . the IPR[]." Ex. 2029, 169:5–16. When counsel for Zerto, Inc. inquired whether Zerto, Ltd. is funding this proceeding, Ziv Kedem testified that: "No. I think [Zerto, Inc.] is paying for the IPR." *Id.* at 170:6–10. Contrary to Zerto, Inc.'s assertions, Ziv Kedem's testimony does not establish clearly that Zerto, Ltd. is not controlling or funding this proceeding. *See* Pet. Reply 1–2. We view the lack of clarity in this cited testimony as additional evidence of the pervasive nature of the corporate blurring between Zerto, Ltd. and Zerto, Inc.

Finally, Zerto, Inc. suggests that, under these particular circumstances, we should exercise our discretion under 37 C.F.R. § 42.5(b) to suspend the requirements of 37 C.F.R. § 42.106, which establishes the regulatory requirements for according a petition a filing date, to allow Zerto, Inc. to identify Zerto, Ltd. as a real party-in-interest in the Petition without effecting the August 7, 2014, filing date. Pet. Reply 7. At best, Zerto, Inc. has suggested that correction of the Petition is a potential remedy, while simultaneously asserting that Zerto, Ltd. should not be identified as a real party-in-interest in the Petition. Zerto, Inc., therefore, has failed to take the necessary steps to put the merits of this position squarely before us.

When considering the totality of the circumstances, it remains unclear whether Zerto, Ltd. and Zerto, Inc. operate as separate and distinct entities, or effectively operate as a single entity. The inter-company agreement and deposition testimony offered by Ziv Kedem do not resolve this uncertainty. As we explained previously, because EMC provides sufficient rebuttal evidence that reasonably brings into question the accuracy of a Zerto, Inc.'s identification of real parties-in-interest, the burden remains with Zerto, Inc. to establish that it has complied with the statutory requirement to identify all real parties-in-interest. *See supra* Section II(A). Given the uncertainty with respect to whether Zerto, Ltd. and Zerto, Inc. operate as separate and distinct entities, or effectively operate as a single entity, we are not persuaded that Zerto, Inc. has met its burden of identifying all real parties-in-interest in the Petition, as required by 35 U.S.C. § 312(a)(2). To comply with this statutory

requirement, the Petition should have identified Zerto, Ltd. as a real party-in-interest.

E. Other Consideration

The Petition was accorded a filing date of August 7, 2014. Paper 3, 1. At this stage of the proceeding, correction of the Petition to include Zerto, Ltd. as a real party-in-interest would require assignment of a new filing date. 37 C.F.R. § 42.106(b). Granting Zerto, Inc. a new filing date would be futile in this instance because, even if corrected, the earliest filing date that could be accorded to the Petition would fall outside the one-year time bar for pursuing an *inter partes* review set forth in 35 U.S.C. § 315(b).⁴

F. Motions to Seal

On November 14, 2014, EMC filed unredacted and redacted versions of its Patent Owner Response (Papers 10 and 11), along with a First Motion to Seal (Paper 9). The First Motion to Seal seeks to seal certain portions of EMC's Patent Owner Response, as well as Exhibit 2024. Exhibit 2024 includes a settlement agreement executed by EMC, its affiliate EMC Israel Development Center, Ltd. ("EIDC"), and Zerto, Inc. to terminate two prior *inter partes* review proceedings that Zerto, Inc. initiated against patents assigned to EIDC. Those proceedings are Case IPR2013-00456 and Case IPR2013-00457. When terminating both proceedings, we granted the

⁴ As we explained previously, the evidence of record indicates that Zerto, Inc. was served with a complaint alleging infringement of the '395 patent on or around August 21, 2013. Ex. 2003. Therefore, the one-year time period expired on or around August 21, 2014. See 35 U.S.C. § 21(b).

parties' joint request to treat the settlement agreement as business confidential information. IPR2013-00456, Paper 14, 2; IPR2013-00457, Paper 13, 2.

On January 9, 2015, EMC filed unredacted and redacted versions of Observations regarding the deposition testimony of Ziv Kedem (Papers 20 and 21), along with a Second Motion to Seal (Paper 23). The Second Motion to Seal seeks to seal certain portions of EMC's Observations regarding Ziv Kedem's deposition testimony, as well as Exhibits 2029 and 2030. Exhibit 2029 includes the transcript of Ziv Kedem's deposition that was conducted in accordance with our Decision granting-in-part EMC's Motion for Additional Discovery. Exhibit 2030 includes the inter-company agreement between Zerto, Inc. and Zerto, Ltd. that Zerto, Inc. produced in accordance with our Decision granting-in-part EMC's Motion for Additional Discovery.

On January 14, 2015, Zerto, Inc. filed redacted and unredacted versions of a Reply to EMC's Preliminary Response (Papers 26 and 27), along with a Third Motion to Seal (Paper 24). The Third Motion to Seal seeks to seal certain portions of Zerto, Inc.'s Reply to EMC's Preliminary Response. On January 16, 2015, EMC filed redacted and unredacted versions of a Sur-Reply (Papers 28 and 29, "PO Sur-Reply"), along with a Fourth Motion to Seal (Paper 30). The Fourth Motion to Seal seeks to seal certain portions of EMC's Sur-reply.

The record for an *inter partes* review shall be made available to the public, except that a document filed with a motion to seal shall be treated as

sealed until the motion is decided. 35 U.S.C. § 316(a)(1); 37 C.F.R. § 42.14. Our standard for granting a motion to seal is discussed in *Garmin Int'l, Inc. v. Cuozzo Speed Techs., LLC*, Case IPR2012-00001 (PTAB March 14, 2013) (Paper 34). In summary, there is a strong public policy for making all information filed in an *inter partes* review proceeding open to the public. *Id.* at 1–2. The standard for granting a motion to seal is “good cause.” 37 C.F.R. § 42.54. The moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). That includes showing that the information is truly confidential, and that such confidentiality outweighs the strong public interest in having an open record. Given the public’s interest in maintaining a complete and understandable record, there is an expectation that confidential information relied upon in a subsequent decision will be made public. *See Practice Guide*, 77 Fed. Reg. at 48,760–61.

We have reviewed the unredacted versions of EMC’s Patent Owner Response (Paper 10), EMC’s Observations regarding the deposition testimony of Ziv Kedem (Paper 20), Zerto, Inc.’s Reply to EMC’s Preliminary Response (Paper 27), and EMC’s Sur-Reply (Paper 29), as well as the unredacted versions of Exhibits 2024, 2029, and 2030, and we are persuaded that good cause exists to have most, but not all, of these documents remain under seal. With the exception of Exhibits 2029 and 2030, the parties have demonstrated that the redacted portions of these papers and exhibits contain confidential information pertaining to either

Zerto, Inc.'s business or EMC's business, and are tailored narrowly to redact only confidential information.

This decision cites to excerpts from Exhibits 2029 and 2030. With respect to Exhibit 2029, we are not persuaded that the entirety of Ziv Kedem's deposition testimony constitutes confidential information, especially the excerpts we cited in our analysis above. With respect to Exhibit 2030, we only relied upon the indemnification clause in our analysis above. Considering the stated importance and sensitivity of the information included in Exhibit 2030, we are mindful that the public does not have an interest in viewing the confidential information included in this Exhibit that we did not rely upon to reach our decision.

We also recognize that the Second Motion to Seal filed by EMC seeks to seal Exhibits 2029 and 2030, yet the information disclosed therein constitutes confidential information of Zerto, Inc. As such, EMC's interest in maintaining these exhibits under seal is not aligned with its initial request to seal the confidential information disclosed therein, which appears to have been filed as a courtesy to Zerto, Inc., because it does not constitute confidential information of EMC.

In light of the public's interest in maintaining a complete and understandable record, as well as the parties' interest in protecting truly sensitive information that is not necessary to reach our decision, the parties are ordered to file jointly new proposed, redacted versions of Exhibits 2029 and 2030 by February 27, 2015. These newly proposed, redacted versions of Exhibits 2029 and 2030 should only redact information that is truly

confidential, as well as account for the public's interest in understanding how we reached our decision. If further guidance is necessary, the parties may request a conference call with the panel.

In the meantime, this Decision has been filed "For Board and Parties Only." After we receive the parties' new proposed, redacted versions of Exhibits 2029 and 2030, we will determine if the proposed redactions are consistent with the guidance we provided above and, thereafter, issue a subsequent public Decision. If the parties do not file new proposed, redacted versions of Exhibits 2029 and 2030 by February 27, 2015, we will issue a public Decision and unseal both Exhibits in their entirety.

III. ORDER

In consideration of the foregoing, it is
ORDERED that the Petition is DENIED and no trial is instituted;
FURTHER ORDERED that the First Motion to Seal is GRANTED;
FURTHER ORDERED that the Second Motion to Seal is
PROVISIONALLY GRANTED. The redacted versions of Exhibit 2029 and 2030 are expunged. The parties are authorized to file jointly new proposed, redacted versions of Exhibits 2029 and 2030 by February 27, 2015. The new proposed, redacted versions of these Exhibits should be filed as Exhibits 2029 and 2030, respectively, and labeled "new proposed, redacted versions." No other changes to these Exhibits are authorized;

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FURTHER ORDERED that the Third Motion to Seal is GRANTED;
and

FURTHER ORDERED that the Fourth Motion to Seal is GRANTED.

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