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A10 NETWORKS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RADWARE, LTD., an Israeli Company; RADWARE, INC., a New Jersey Corporation,

Plaintiffs, Counterclaim-Defendants

v.

A10 NETWORKS, INC., a California Corporation, et al.,

Defendant, Counterclaim-Plaintiff.

RADWARE, LTD., an Israeli Company; RADWARE, INC., a New Jersey Corporation,

Plaintiffs, Counterclaim-Defendants

v.

F5 NETWORKS, INC., a Washington Corporation, et al.,

Defendant, Counterclaim-Plaintiff.

Case No. 5:13-CV-2021-RMW
Case No. 5:13-CV-2024-RMW

DECLARATION OF ERIC S. SHERBY, ESQ., IN SUPPORT OF MOTION FOR ISSUANCE OF LETTER OF REQUEST

I, Eric S. Sherby, declare as follows:

1. I am an attorney admitted to practice law before the courts of the State of New York, the District of Columbia (inactive status), and the State of Israel. I am also admitted to practice before several American federal courts. I respectfully submit this declaration at the request of the attorneys for A10 Networks, Inc. ("A10"), in support of the Reply to the Opposition to the Special Appearance filed by Smadar Fuks and Dr. Eyal Felstaine (the "SA"). Except to the extent expressly set forth herein, the information in this declaration is based on my personal knowledge.

My Background And Qualifications

2. I have been practicing law since 1988. In 1988 I was admitted to the bar of the State of New York. I litigated in New York until 1993, when I moved to Israel. After completing the statutorily required apprenticeship, I was admitted to the Israeli Bar in 1994. I have practiced law in Israel continuously since 1993 (taking into consideration the above referenced apprenticeship). I speak, read, write, and understand both English and Hebrew. I can and do practice law in both languages. I am a citizen of the United States and of Israel.

3. My specialty is international litigation. In 2004, I founded the law firm Sherby & Co., Advs., in Ramat Gan, Israel. Prior to that, I headed the International Litigation Department of Yigal Arnon & Co., which was one of the largest law firms in Israel.

4. I have litigated in courts throughout Israel, including Israel's Supreme Court.

5. I have submitted numerous declarations (affidavits) to American courts concerning Israeli law and procedure, including in connection with international evidence-taking.

6. I have been appointed several times by Israeli courts to oversee the taking of evidence in Israel in connection with lawsuits pending before American courts.

7. I have also published extensively in Hebrew and in English on a variety of topics concerning Israeli law, including international evidence-taking. In 1998, I authored the chapter on Israel in the *Encyclopedia of International Commercial Litigation* (Kluwer; updated approximately every two years). A list of my publications is available at http://www.sherby.co.il/cgi-bin/Resources.pl.

8. Through my experience in Israeli litigation over the last 21 years, I am very familiar with the Hague Evidence Connection (the "Convention") and how it is implemented in Israel.

9. I have reviewed the SA in detail, as well as the accompanying Declaration of Guy Ruttenberg, and Radware's Joinder to the SA.

10. I have been asked to address the following assertions contained in the SA:

a) **Reliability and Authority of a Questionnaire Response:** the contention that a document found online at http://www.hcch.net/upload/wop/2008israel20.pdf is an authoritative statement by the Israeli Government on the application of the Convention in Israel (SA at 4);

b) **Availability of American-style depositions:** the contention that American-style depositions are "unavailable" in Israel (*id*. at 1); that "Israeli law does not provide for American-style pre-trial depositions" (*id*. at 5); and that an American-style deposition would be "unprecedented and inconsistent with" Israeli practice (*id*.);

c) **Depositions of Unwilling Witnesses:** the contention that the Convention "does not authorize a Letter of Request seeking depositions of unwilling third-parties in Israel" (*id*. at 1); and that "Israel has never implemented any laws to handle" requests under the Convention for a deposition of an unwilling witness (*id*. at 6);

d) **Special Method or Procedure:** the contention that Israel has never received any letter of request that the taking of evidence follow any special method or procedure (*id*. at 6); that "Israel has never implemented any laws to handle such requests" (*id*.); that "there is no basis for Defendants' request to administer an oath for an American-style deposition" (*id*.); and that a Letter of Request must have a list of specific questions rather than deposition topics (*id*.);

e) **Depositions of Non-Party Witnesses:** the contention that "Letters of Request seeking oral testimony in Israel have not been used for non-party witnesses" (*id*. at 6);

f) **Production of Emails:** the contention that "Letters of Request for electronically stored information in Israel is unprecedented" (*id*. at 15);

g) **Interpretation by Israeli Courts of the Letter of Request Pursuant to Chapter 1 of the Convention**: the contention that the Israeli authorities would interpret the Letter of Request as pursuant to Chapter II of the Convention and not Chapter I (*id*. at 4-5);

h) **Appointment of a Private Attorney:** the contention that I may not be appointed as a private lawyer by the Israeli court to oversee the discovery process (*id*. at 16-17).

11. As described below in greater detail, each and every one of these contentions in the SA is baseless.

The So-Called "Israel Questionnaire Response" Is of Virtually No Relevance

12. The SA cites repeatedly to a document (the "Internet Document") available at http://www.hcch.net/upload/wop/2008israel20.pdf, which the SA calls "Israel's Response to Questionnaire of May 2008 relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters." (*Id*. at 4) The SA defines that document as the "Israel Questionnaire Response." (*Id*.) I have reviewed the Internet Document, and I see ***no*** reason to attribute to it ***any*** legal or factual authority.

13. There are a number of obvious deficiencies in the Internet Document:

a) the first four pages of the document appear to be missing;

b) the Internet Document has no title;

c) the document is undated;

d) the document is not signed by anyone.

These multiple deficiencies would probably preclude the Internet Document from being admissible in any American or Israeli court for any purpose at all.

14. The only name of anyone from the Ministry of Justice or the Directorate of Courts that appears in the Internet Document is that of Ayelet Handelman.

15. I had several phone conversations with Ms. Handelman in 2008 and 2009. At that time, she was an employee of the Directorate of Courts, and the context of my being in touch with her was my having been appointed, pursuant to Letters of Request and the Legal Assistance Among States Law (1998, the "Statute"), Section 16, to oversee the taking of evidence (documents and/or depositions) from non-willing Israeli witnesses. To the best of my knowledge and recollection, Ms. Handelman was a law student at the time (2008-2009).

16. In other words, the only name of an "official" that appears in the Internet Document is that of a law student.

17. To the extent that the Internet Document had been intended as an official statement of law by the Israeli government, one would expect that the Minister of Justice would have signed it. The fact that the document is unsigned indicates that it was never intended as an official statement of law by the Israeli government.

18. The Internet Document is not a legal authority in any sense of that term.

19. The Internet Document does not refer directly to Israeli statutes or Israeli case law. The most that could be said for the Internet Document is that it *summarizes* Israeli statutes and/or Israeli case law.

20. To the extent that the Internet Document purports to be a factual source, it is rampant with hearsay concerning a topic on which I have substantial non-hearsay knowledge – namely, that the Directorate of Courts routinely receives Letters of Request from the United States for precisely the kind of evidence that is sought by A10 in this case. My substantial knowledge concerning those issues is based upon my having been appointed, several times, pursuant to Section 16, to oversee the taking of evidence (documents and depositions) of/from non-willing Israeli witnesses. My substantial knowledge concerning those issues is also based upon (a) my having worked closely with the late Professor Paul Baris, who had been appointed (in approximately 2001) pursuant to Section 16 to oversee the deposition of a non-willing Israeli witness in connection with an American case, and (b) my having reviewed Israeli case law (in

cases in which I was not involved) concerning orders issued by Israeli courts pursuant to the Statute to compel unwilling Israeli witnesses to give depositions in Israel in connection with an American case.

21. To the extent that the Internet Document purports to be a factual source, it contains numerous statements that are at odds with how Letters of Request are actually handled in Israel. It is not an accurate summary or statement of Israeli law on many of the topics that it is cited for in the SA.

Letters of Request Under Israeli Law (Generally)

22. The relevant Israeli statute is the Statute.

23. Pursuant to the Convention and the Statute, the Central Authority in Israel for receiving and reviewing Letters of Request is the Minister of Justice. Statute, § 3. The Minister of Justice carries out Letters of Request through the Directorate of Courts.

24. After the Directorate of Courts determines that an incoming Letter of Request complies with the Convention, the Directorate of Courts sends that letter to a Magistrates Court for that court to summon the witness(es).

25. Notwithstanding the above, the Magistrates Court may delegate some of its jurisdiction under the Statute to a private lawyer, as per section 16(b) of the Statute ("Section 16"), which provides:

> If the request for taking evidence concerns a civil matter, the court may, for reasons that [it is to set forth], order that the evidence be taken not before it or a registrar but before one who is licensed as [an Israeli lawyer], and who has worked, continuously or cumulatively, at least five years as a lawyer, of which at least two years in Israel . . . .

26. When a Magistrates Court exercises its delegation power under Section 16, the private lawyer who is appointed pursuant to that section is usually referred to as an "Appointed Lawyer." In my experience, an Appointed Lawyer is almost always one who is very familiar not only with the Israeli legal system but also with that of the state of the requesting court.

27. The role of the Appointed Lawyer differs on a case-by-case basis. As a general matter, the Appointed Lawyer will, at a minimum, be expected to (a) formally summon each

witness to produce documents and/or schedule his/her deposition; (b) coordinate the production of the documents; and (c) coordinate the logistics of scheduling deposition dates between American counsel and the witnesses. These are tasks that the Israeli courts are happy to delegate to private counsel.

28. When written objections are raised by witnesses, the Israeli court will usually require the Appointed Lawyer to formally respond. In most cases, the Appointed Lawyer is required to report to the court as to the progress of obtaining the requested evidence.

Israeli Law Provides for American-Style Depositions of Unwilling Witnesses Pursuant to a Letter of Request

29. Section 8(a) of the Statute provides generally that an incoming Letter of Request is to be carried out in the manner that the same type of action would be carried out in Israel. However, subsections 8(b) and (c) provide as follows:

> (b) No action is to be done in Israel pursuant to a request for legal assistance from another state unless that action is permitted by Israeli law;
>
> (c) The requested action is to be done in the manner that comports with the request of the requesting state, so long as the action is permitted by Israeli law.

In other words, so long as the manner for carrying out a Letter of Requests is permitted by Israeli law, the Israeli court is to carry out the request in that manner. Insofar as a deposition is concerned, because a deposition is not prohibited by Israeli law, if a Letter of Request asks that a deposition take place, then a deposition is the manner in which the request is to be carried out.

30. The conclusion set forth in the preceding paragraph was the holding of the Magistrates Court of Tel Aviv in *Medinol Ltd. v. Boston Scientific Corporation*, H.D. 000123/02 (Aug. 8, 2002).[1] In the *Medinol* case, a Letter of Request had been sent by the United States District Court for the Southern District of New York to the Directorate of Courts in Jerusalem, requesting that two Israeli witnesses – who were non-parties – be deposed. After the two Israeli

[1] The Hebrew letters *Het* and *Dalet* (HD) are the acceptable abbreviation for *Hikur Din*, which is often translated as "inquisition" or "inquiry." *Hikur Din* is the name of the proceeding used by the court system to refer to an incoming Letter of Request.

witnesses were summoned by the Israeli court to testify, they filed objections, arguing primarily that a deposition is a proceeding that does not exist in the Israeli legal system and, therefore, pursuant to section 8(b) of the Statute, the Israeli court does not have the jurisdiction to compel them to be deposed.

31. In ***denying*** that objection, the Israeli court not only relied upon the text of section 8(c) but also upon the Statute's legislative history, from which the court quoted, as follows:

> . . . to the extent that Israeli law so permits, it is best to fulfill the request of the other state in the manner that will enable it [the other state] to use, pursuant to the legal provisions of that state, the material [evidence] that is obtained in Israel. Therefore, even if the specific activity would be carried out differently in a proceeding taking place in Israel, permission is given to do it as [requested] by the other state, **provided that Israeli law does not negate doing so**.

(Paragraph 8; emphasis in original.)

32. The court in the *Medinol* case further noted that the Statute's purpose is to provide as broad legal assistance as possible. (Paragraph 10.) The court concluded that a deposition is among the legal actions that may be carried out in Israel in the context of providing international judicial assistance:

> . . . there is no obstacle or prohibition in carrying out actions that are consistent with the law in the requesting state when the law in Israel **does not prohibit** them. Israeli law regarding pretrial proceedings does not include a deposition. ***On the other hand, the deposition procedure is not forbidden or illegal***. The fact that the legislature found it appropriate to allow, in section 16(b) of the statute, that evidence be taken before a lawyer, as is acceptable in the United States, and which is not acceptable in Israel, is consistent with the conclusion that not only did the legislature not prohibit a deposition to take place in the context of an inquiry, but implicitly permitted it, in a manner that enables providing as complete assistance as possible to the state requesting the inquiry.

(Paragraphs 12-13, some emphasis in original; some emphasis added).

33. The court in *Medinol* considered the ***very same arguments*** that have been asserted in the SA against the carrying out of depositions in Israel, and the *Medinol* court ***rejected*** those arguments. The court held that, even though depositions are not part of Israeli procedure, **a "American-style" deposition may be used, pursuant to a Letter of Request from an American court, to compel unwilling Israeli witnesses to give testimony**.

34. The holding of the Magistrates Court in *Medinol* was affirmed by the District Court of Tel Aviv in Civil Appeal 292/02 (June 17, 2003). The District Court agreed that depositions are not forbidden by Israeli law and that the Magistrates Court has the jurisdiction to summon a non-willing witness to a deposition. (Paragraphs 10 and 13.)

35. The case reached the Israeli Supreme Court in two different motions by Israeli witnesses to stay execution of the orders for them to give deposition testimony. In both of those cases, the Israeli Supreme Court ***declined*** to intervene. (Permission for Civil Appeal 9785/02, Feb. 2, 2003; Permission for Civil Appeal 363/03, May 12, 2003.)

36. Thus, it is ***settled law*** in Israel that, pursuant to a Letter of Request under the Convention emanating from the United States, ***a non-willing Israeli witness may be compelled to give deposition testimony in connection with an American case***.

37. The answer to Question 52 from the Internet Document confirms that a witness might be subject to contempt of court and that a compulsory attendance order may be issued against him.

38. As a matter of practice, the Directorate of Courts routinely approves of requests for depositions of unwilling Israeli witnesses in connection with American cases. The Directorate of Courts does so by transferring incoming Letters of Request to Magistrates Courts, and Magistrates Courts routinely order unwilling Israeli witnesses (within their geographical jurisdiction) to sit for depositions, in Israel, in connection with American cases. In many cases, Magistrates Courts appoint an Appointed Lawyer to summon the witnesses.

39. From the factual description above of the *Medinol* case, it should be clear that the jurisdiction of Israeli courts to order Israeli citizens to sit for an American-style deposition applies to "unwilling" witnesses.

40. In this context, section 18(a) of the Statute provides:

> If a person is summoned by the court for purposes of giving evidence, every obligation that applies to a witness who has been summoned to testify before an Israeli court will apply to him [the person summoned to give evidence] and he will have every right of such a witness.

41. Needless to say, Israeli law provides for compelling unwilling witnesses to testify before Israeli courts. Pursuant to section 18(a) of the Statute, the power to compel unwilling witnesses to testify applies with full force to testimony pursuant to a Letter of Request under the Convention.

Custom Procedures for Taking of Evidence, Including Verbatim Transcripts, Administration of Oaths, and General Deposition Topics, are Allowable

42. Israel (obviously) does not have any "blocking" statute.

43. Even though Israeli (domestic) civil practice does not include depositions, it is common for American-style depositions to take place in Israel in connection with American cases. Without limiting the foregoing, it is common for:

a) depositions to take place in Israel before an American-licensed court reporter;

b) the deposition transcript to be a verbatim transcript, prepared by an American-licensed court reporter; and

c) depositions to be videotaped.

44. Under Israeli civil practice, a witness is not "sworn" to testify truthfully but is "cautioned" that, if s/he fails to testify truthfully, s/he will be subject to statutory penalty -- which can include ***imprisonment***. Thus, as a practical matter, the fact that Israeli witnesses are not "sworn" to tell the truth is a semantic "difference" only. The practice of cautioning a witness is the functional equivalent of swearing the witness in.

45. Whenever I am asked to deal with an Israeli witness in the context of an American deposition, my practice is to give the caution to the witness both in English and in Hebrew. Sometimes one of the American lawyers for a litigant requests that, at the outset of the deposition, I state on the record (and have the witness acknowledge) that the deposition transcript will be

deemed a declaration pursuant to 28 U.S.C. § 1746,[2] and I have complied with that request – as a "belt and suspenders" method of "swearing" the witness in.

46. I have ***never*** encountered a situation in which one or more of the processes described in the preceding paragraph was not acceptable to an American court.

47. In my experience with many Letters of Request under the Hague Evidence Convention, even though item 10 of the *form* of Letter of Request calls for a statement of the subject matter of the examination of the witness, so long as the Letter of Request expressly requests that the American lawyers for the litigants be given the opportunity to examine the witness(es) via an American-style deposition, item 10 is ***not*** in any way an obstacle to compelling an unwilling Israeli witness to set for an American-style deposition.

48. The answer to Question 64 from the Internet Document makes clear that a "specific" (read – special) request is required for non-Israeli lawyers to pose questions. However, if such a request is made, it is clear from that answer that the Israeli court will authorize such questioning.

Non-Party Witnesses May Be Deposed

49. As indicated above, Israeli case law has held that non-party witnesses may be deposed and may be required to produce documents.

50. As a practical matter, (a) the Directorate of Courts routinely receives Letters of Request for discovery from non-parties, (b) the Directorate of Courts routinely processes those Letters of Request by sending them to Magistrates Courts, and (c) Magistrates Courts routinely summon (whether directly or through an Appointed Lawyer) non-party witnesses to produce documents and/or sit for American-style depositions.

[2] This method obviously requires the witness to *sign* the deposition transcript when it is presented to him/her (usually weeks later).

Emails May Be Produced

51. The pretrial (discovery) stage in Israeli civil cases *routinely* includes the production by parties (litigants) of emails, and it includes (as necessary) court orders for documentary production, including of emails.

52. I have been involved in numerous cases in which Letters of Request from the United States included requests for the production of emails.

53. There clearly is no blanket prohibition upon requesting production of emails.

The Directorate of Courts Would Treat the Letter of Request Pursuant to Chapter 1

54. The SA asserts that the proposed Letter of Request is deficient because it is "unclear" whether A10 "seeks to proceed" under Chapter I or Chapter II. (SA at 5)

55. In this context, I note that the draft Letter of Request contains eight (8) separate references to Article 3 of the Convention (two on page 3, one on page 6, two on page 9, and three on page 10) as well as references to Articles 7, 8, 9, 11, and 14. (LOR at 10-12).

56. Articles 3, 7, 8, 9, 11, and 14 are all articles within Chapter I of the Convention.

57. In light of these numerous references to articles within Chapter I of the Convention, I believe that it is "clear" – and would be clear to the Directorate of Courts – that the draft Letter of Request "seeks to proceed" under Chapter I, even though there is also a reference to Chapter II.

The Appointment of a Private Lawyer Is Consistent With the Convention and Appropriate Under Israeli Law

58. Article 9 of the Convention provides that the "judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed." In the case of Israel, as noted above, pursuant to Section 16, the court to which the Directorate of Courts has transmitted the Letter of Request may appoint a private lawyer to oversee the discovery process.

59. I note that, in the answer to the questionnaire cited in the SA (see below), it is observed that oral testimony is "sometimes done before an attorney that [sic] is requested by the foreign authority." (Answer 44.)

60. Thus, even the source cited in the SA confirms that the appointment of a private Israeli lawyer to oversee the discovery process is entirely appropriate under Israeli law.

61. As indicated above, I have been appointed in several cases by Israeli courts to oversee the taking of deposition testimony and/or the production of documents, from unwilling Israeli witnesses, in connection with cases pending before American courts.

62. The table below summarizes those cases:

Case Number in Israel	**Date**	**American Court That Requested Assistance**
228/01 (Tel Aviv, the "First Tel Aviv Case")	2001	Federal Court New York
1008/04 (Haifa, the "First Haifa Case")	2004	State Court New York
51-45/05 (Jerusalem, the "Jerusalem Case")	July 2005	Federal Court California
5557-08-08 (Haifa, the "Second Haifa Case")	Sept. 2008	Federal Court New Jersey
967-12-08 (Haifa, the "Third Haifa Case")	December 2008	State Court California
33307-12-09 (Tel Aviv, the "Second Tel Aviv Case")	January 2010	Federal Court North Carolina

63. Under Israeli law, there is no obstacle to having the Israeli court appoint a lawyer affiliated with one of the foreign (non-Israeli) litigants as the Appointed Lawyer.

64. In each of the Jerusalem Case, the Second Haifa Case, and the Second Tel Aviv Case:

a) the American litigant that wanted me to be appointed by the Israeli court as the Appointed Attorney filed a motion with the American court for that court to sign a Letter of Request; at the time of such filing, that litigant informed the American court of its desire that I be appointed;

b) the adverse litigant(s) had the opportunity (before the American court) to object to such request and/or to suggest a different Israeli lawyer as a candidate to be appointed by the Israeli court as the Appointed Lawyer;

c) the adverse (American) litigant(s) did ***not*** object to my appointment and did ***not*** suggest a different Israeli lawyer as the Appointed Lawyer;

d) when the American court signed the Letter of Request, it was fully aware that my services had been retained by ***one*** side (and one side only), and the American court signed the Letter of Request, asking of the Israeli court that I be appointed (in one case, using language that the evidence be obtained "through" me).

65. In addition, in the Third Haifa Case, even though my name did not appear in the Letter of Request that was signed by the American court, the Directorate of Courts sent a letter to the Magistrates Court, stating that the American court had requested that I be the Appointed Lawyer. Therefore (even though my name was not in the Letter of Request), it was (and remains) my understanding that the American court asked (in some other document) that I be the Appointed Lawyer. As was the case in connection with the cases referred to in preceding paragraph, (a) when the American court signed the Letter of Request, it was fully aware that the litigant that requested the Letter of Request would be the only one paying the fees of the Appointed Lawyer, and (b) the other (American) litigants had the opportunity to suggest their own Israeli lawyer as a candidate to be appointed by the Israeli court as the Appointed Lawyer, but they did ***not*** do so.

66. There is nothing surprising in the fact that Israeli courts sometimes (arguably often) appoint as the Appointed Lawyer an attorney affiliated with a litigant. Israeli courts want to give the maximum assistance possible pursuant to a Letter of Request, and, in this context:

a) the best way to maximize the assistance that could be given is to appoint a private lawyer who has the incentive to carry out the mandate of the Letter of Request;

b) as a practical matter, one of the main tasks of the Appointed Lawyer is to prevent foot-dragging by unwilling witnesses;

c) when an Israeli court appoints a private lawyer as the Appointed Lawyer, the court does not confer upon him/her any "arbitrator-like" powers;

d) without limiting the foregoing, (i) the Israeli court retains jurisdiction to pass upon any action taken by the Appointed Lawyer, and (ii) under section 18(a), any privilege available under Israeli law would be available to an unwilling Israeli witness who would be required to sit for an American-style deposition.

Executed on January 21, 2014 at Ramat Gan, Israel.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct to the best of my knowledge.

By: 
Eric S. Sherby