United States Court of Appeals for the Federal Circuit

NOS. 20-1587, 20-1588, 20-1654

QUALCOMM INCORPORATED
Appellant,

v.

INTEL CORPORATION
Cross-Appellant.

On Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board, *Inter Partes* Review Nos. IPR2018-01152, IPR2018-01153

NO. 20-1664

INTEL CORPORATION
Appellant,

v.

QUALCOMM INCORPORATED
Appellee.

On Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board, *Inter Partes* Review No. IPR2018-01429

NO. 20-1828, 20-1867

INTEL CORPORATION
Appellant,
v.
QUALCOMM INCORPORATED
Cross-Appellant.

On Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board, *Inter Partes* Review Nos. IPR2018-01334, IPR2018-01335, and IPR2018-01336

NOS. 20-2092, 20-2093

INTEL CORPORATION
Appellant,
v.
QUALCOMM INCORPORATED
Appellee.

On Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board, *Inter Partes* Review Nos. IPR2019-0128, IPR2019-00129

APPLE INC.'S COMBINED OPPOSED MOTION FOR RECONSIDERATION AND PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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Attorneys for Apple Inc.

September 10, 2020

CERTIFICATE OF INTEREST
(Nos. 20-1587, 20-1588, 20-1654)

Counsel for Intervenor Apple Inc. ("Apple") certifies the following:

1. Provide the full names of all entities represented by undersigned counsel in this case.

Apple Inc.

2. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

Not applicable

3. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None

4. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None

5. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

Common issues related to jurisdiction and standing are presented, or are expected to be presented, in connection with motions to intervene in the following appeals: *Intel Corp. v. Qualcomm Inc.*, No. 20-1664 (Fed. Cir.); *Intel Corp. v. Qualcomm Inc.*, Nos. 20-1828, -1867 (Fed. Cir.); *Intel Corp. v. Qualcomm Inc.*, No. 20-2092, -2093 (Fed. Cir.); *Intel Corp. v. Qualcomm Inc.*, No. 20-2239 (Fed. Cir.); *Intel Corp. v. Qualcomm Inc.*, No. 20-2240 (Fed. Cir.); and *Intel Corp. v. Qualcomm Inc.*, No. 20-2242 (Fed. Cir.).

In addition, the following appeals involve common issues related to jurisdiction and standing: *Apple Inc. v. Qualcomm Incorporated*, No. 20-1561 (Fed. Cir.); *Apple Inc. v. Qualcomm Incorporated*, No. 20-1642 (Fed. Cir.); *Apple Inc. v. Qualcomm Incorporated*, No. 20-1683 (Fed. Cir.); *Apple Inc. v. Qualcomm Incorporated*, Nos. 20-1763, -1764 (Fed. Cir.); and *Apple Inc. v. Qualcomm Incorporated*, No. 20-1827 (Fed. Cir.).

No other case is known to the undersigned counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

Not Applicable

Dated: September 10, 2020 */s/ Lauren A. Degnan*
Lauren A. Degnan

CERTIFICATE OF INTEREST
(No. 20-1664)

Counsel for Intervenor Apple Inc. ("Apple") certifies the following:

7. Provide the full names of all entities represented by undersigned counsel in this case.

Apple Inc.

8. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

Not applicable

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None

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Not Applicable

Dated: September 10, 2020 */s/ Lauren A. Degnan*
Lauren A. Degnan

CERTIFICATE OF INTEREST
(Nos. 20-1828, 20-1867)

Counsel for Intervenor Apple Inc. ("Apple") certifies the following:

13. Provide the full names of all entities represented by undersigned counsel in this case.

Apple Inc.

14. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

Not applicable

15. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None

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Not Applicable

Dated: September 10, 2020 */s/ Lauren A. Degnan*
Lauren A. Degnan

CERTIFICATE OF INTEREST
(Nos. 20-2092, 20-2093)

Counsel for Intervenor Apple Inc. ("Apple") certifies the following:

19. Provide the full names of all entities represented by undersigned counsel in this case.

Apple Inc.

20. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

Not applicable

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Not Applicable

Dated: September 10, 2020 */s/ Lauren A. Degnan*
Lauren A. Degnan

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe these appeals require an answer to one or more precedent-setting questions of exceptional importance:

1. Must a real party in interest or privy of a petitioner in an *inter partes* review participate in the IPR as a precondition to intervening in an appeal from an IPR proceeding?

2. When a party promptly moves to intervene as soon as it learns that its interests might no longer be protected by the existing parties and the record demonstrates that the existing parties will not be prejudiced by the timing of the motion to intervene, should intervention be denied solely because the request is filed after the 30-day deadline set forth in Federal Rule of Appellate Procedure 15(d)? (Nos. 20-1587, -1588, -1654; 20-1664; and 20-1828, -1867 only.)

Dated: September 10, 2020

/s/ Lauren A. Degnan
Lauren A. Degnan

PRELIMINARY STATEMENT

Apple Inc. ("Apple") respectfully moves for reconsideration under Federal Circuit Rule 27(j) and petitions in the alternative for either panel rehearing or rehearing *en banc* under Federal Circuit Rule 35(d) of the Court's orders denying Apple's motions to intervene in Appeal Nos. 20-1587, -1588, -1654 (consolidated); 20-1664; 20-1828, -1867 (consolidated); and 20-2092, -2093 (consolidated).[1]

The Court's orders overlook or misapprehend at least three important issues of law or fact. First, although the orders fault Apple for not joining or participating the proceedings below, they overlook that Apple had no reason or practical opportunity to participate in the relevant *inter partes* reviews ("IPRs") while they were pending at the Patent Trial and Appeal Board ("Board"). Second, in treating Apple's request for intervention as a purely discretionary issue, the orders wrongly treat Apple's motions as seeking only permissive intervention, even though Apple demonstrated that it satisfies the requirements for intervention as of right. Third, to the extent that the orders in certain cases rest on the timing of Apple's motion, those orders overlook that Apple sought intervention promptly after becoming aware that Qualcomm was challenging the existing party's standing, and that the Court has previously excused compliance with Rule 15(d) where there was no prejudice to any party. The orders' timeliness analysis and their imposition of a rigid requirement that a real party in interest or privy be a party to the underlying

[1] For convenience, Apple will hereafter refer to consolidated appeals with only the number of the lead case.

IPR in order to protect its rights on appeal are inconsistent with the liberal policy governing intervention under the Federal Rules.

These issues impact every IPR proceeding where a non-party is even arguably a real party in interest or privy of a petitioner, and have exceptional importance to the efficient operation of the AIA's *inter partes* review provisions. Under the approach taken by the orders denying intervention in these cases, any potential real party in interest or privy must (1) seek to participate in the IPR and, if the Board denies the party's request to participate in the IPR, (2) immediately move to intervene at the outset of any appeal. Indeed, the party must take these steps months or even years before there is any indication that the existing petitioner(s) could not represent its interests, because otherwise, under these orders, the party will not be permitted to assert its rights later. This illogical approach not only conflicts with established principles governing intervention, it also threatens to significantly undermine the efficiency of *inter partes* review proceedings, forcing third parties to engage in duplicative filings and motions practice solely to protect against a potential change in the parties' positions years later. This Court—either on reconsideration or on rehearing by a motions panel or *en banc*—should therefore grant Apple's requests to intervene in the above-captioned appeals.[2]

[2] The orders denying Apple's motions to intervene are ripe for panel rehearing or rehearing *en banc* because "[d]enial of a motion to intervene is a final judgment and immediately" subject to further review. *See Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1314 (Fed. Cir. 2012) (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987)).

Counsel for Intel stated that Intel does not oppose Apple's motion for reconsideration. Counsel for Qualcomm stated that Qualcomm opposes the motion for reconsideration and will file an opposition brief.

BACKGROUND

These are appeals from IPRs filed by Intel Corporation ("Intel") in response to proceedings brought by Qualcomm alleging that Apple infringed various patents based on, *inter alia*, its use of Intel chips. Intel named Apple a real party in interest in the underlying IPRs, which are now on appeal.

On June 5, 2020, Qualcomm moved to dismiss Intel's appeal in Appeal No. 20-1828 (consolidated) for an alleged lack standing. Qualcomm argued that Intel lacks Article III standing because Apple acquired Intel's relevant business during the IPR. Because Qualcomm's standing argument, if accepted by this Court, would prevent Intel from adequately representing Apple's interests, Apple promptly prepared a motion to intervene, which it filed on June 29, 2020. Anticipating that similar standing issues would be raised in other appeals, on June 30, 2020, Apple also moved for leave to intervene in Appeal Nos. 20-1587 (consolidated) and 20-1664.[3] Although Apple's motions in Nos. 20-1587 (consolidated), 20-1664, and 20-1828 (consolidated) were filed shortly after the 30-day deadline set forth in Federal Rule of Appellate Procedure 15(d), Apple explained that the deadline can and should be excused under the circumstances,

[3] Qualcomm later moved to dismiss only one of those appeals, No. 20-1664, on July 17, 2020.

consistent with this Court's precedent and with courts' ordinary reluctance to deny intervention on timeliness grounds when the existing parties would not be prejudiced. On August 24, 2020, Apple moved to intervene in Appeal No. 20-2092 (consolidated) within the time set forth in Rule 15(d), for the same reasons it sought to intervene in the other appeals.

On August 27, 2020, the Court denied Apple's motions for leave to intervene in Nos. 20-1587 (consolidated), 20-1664, and 20-1828 (consolidated), noting the untimeliness of Apple's motions under Rule 15(d) and its alleged failure to join or participate in the underlying proceedings. On September 4, 2020, the Court denied Apple's motion in No. 20-2092 (consolidated) as well, signaling that Apple's decision not to file its own petitions for IPR at the Board sealed its fate regarding intervention, regardless of the timing of Apple's motions to intervene. Aside from the timeliness of the first three motions, the orders denying Apple's motions did not find that Apple failed to satisfy the traditional criteria for intervention and the orders did not accept Qualcomm's argument that Apple lacked standing.

Apple now requests reconsideration and petitions jointly for panel rehearing and rehearing *en banc* of the Court's orders denying Apple's motions for leave to intervene in Appeal Nos. 20-1587 (consolidated), 20-1664, 20-1828 (consolidated), and 20-2092 (consolidated).

ARGUMENT

I. APPLE'S PARTICIPATION IN THE IPR PROCEEDINGS BELOW SHOULD NOT BE A PREREQUISITE TO ITS PARTICIPATION ON APPEAL

The Court's orders fault Apple for not "attempt[ing] to join or participate in the underlying proceedings in any way." *E.g.*, Order at 2, No. 20-1828 (Fed. Cir. Aug. 27, 2020), ECF No. 46. However, the orders do not meaningfully address that Apple was identified as a real party-in-interest in the proceedings before the Board. Rather, the Court's orders suggest that Apple could not intervene on appeal unless it (1) filed its own IPR petitions and (2) successfully obtained joinder even though the Board's decision on joinder is purely discretionary, *see* 35 U.S.C. § 315(c), thus becoming a party to the proceedings below.[4]

Requiring a real party-in-interest to file its own petition in every IPR proceeding would circumvent the very "purpose of intervention[,which] is to admit, by leave of court, a person ***who is not an original party*** into a proceeding." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994) (emphasis added); *see also* Fed. R. App. P. 15(d); Fed. R. Civ. P. 24. It is well-established that new parties may intervene or otherwise join an action for the first time on appeal. *E.g.*, *United States v. Presidio Invs., Ltd.*, 4 F.3d 805, 808 & n.1 (9th Cir. 1993); *Penthouse Int'l Ltd. v. Playboy Enters.*, 663 F.2d 371, 373 (2d Cir. 1981). Further,

[4] Aside from the possibility of filing a separate IPR and seeking joinder, Board procedures do not permit intervention or participation by non-party real parties in interest. *See generally* 37 C.F.R. § 42; U.S. PAT. & TRADEMARK OFFICE, Trial Practice Guide (July 2019).

the AIA explicitly contemplates that IPR proceedings may involve real parties in interest that are not themselves petitioners. *E.g.*, 35 U.S.C § 312(a)(2). It cannot have been Congress's intent that such real parties in interest (or privies of the petitioner) would have to file their own IPR petitions in every single IPR just to preserve future appellate rights.

The facts of these cases demonstrate why such a requirement is illogical. Until Qualcomm challenged Intel's standing, Intel was undisputedly capable of representing Apple's interests, and Apple therefore had no reason to participate before the Board. Even assuming, *arguendo*, that Apple should have recognized the possibility of a future dispute over Intel's standing when it acquired portions of Intel's business, by then it was too late for Apple to file its own IPR and seek joinder. Under circumstances like these, intervention on appeal is a far more logical and efficient way to protect parties' rights as their business interests shift over the course of a multi-year IPR proceeding and appeal.

The Court's orders also ignore that Apple had no reason to participate before the Board because it was not aware of Qualcomm's challenge to Intel's standing until Qualcomm raised the issue in connection with its first motion to dismiss. After Qualcomm filed its first motion to dismiss on June 5, 2020, Apple acted diligently to prepare its motions for leave to intervene.

The Court's orders rely on *In re Opprecht* and *In re Purdue Pharma, L.P.* to suggest that Apple was required to participate below to intervene on appeal. *See* 868 F.2d 1264, 1265 (Fed. Cir. 1989); Order at 4, No. 18-1285 (Fed. Cir. Apr. 18,

2018), ECF No. 36 (nonprecedential) ("Purdue Order"). But *Opprecht* and *Purdue Pharma* address very different circumstances; they do not stand for a general prohibition against non-parties intervening on appeal. The Court in *Opprecht*, for instance, denied intervention in an *ex parte* reexamination appeal because such proceedings were not intended to have "*inter partes* attributes." 868 F.2d at 1265-66. The same cannot be said for IPRs, which by their name and adversarial nature explicitly contemplate *inter partes* attributes. *Purdue Pharma* addresses intervention by a new party only after the original litigant voluntarily ceased participating in the litigation. *See Purdue Order* at 4. Here, Intel intends to participate in this appeal, and the only barrier to its representing Apple's interest is an alleged standing defect that was not raised until Qualcomm's first motion to dismiss. Indeed, in *Purdue Pharma*, this Court specifically relied on the fact that it was ***not*** a case where the original party was "render[ed] … incapable of continuing the appeals" based on Article III's requirements. *Id.* at 3. It hardly makes sense to extend *Purdue Pharma* to the precise circumstances this Court ***distinguished*** in that case.

Indeed, the categorical rule imposed by the Court's orders appears to render Rule 15(d) essentially a dead letter in the IPR context. After all, if Apple had been a party to the proceedings below, it would have been a party to the appeal without any need to intervene. *See* Fed. Cir. R. 12, Practice Note. Thus, if non-parties to the proceedings below are barred from intervening, Rule 15(d) has no work left to do. Such a requirement cannot be squared with the ordinary rules governing

intervention, under which "the requirements for intervention are to be construed in favor of intervention." *Am. Maritime Transp., Inc. v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989); *see also Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (explaining that courts construe Rule 24 "broadly in favor of proposed intervenors" because "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts" (quotation marks and alteration omitted)); *South Dakota v. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) ("Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.").

"[I]ntervention in the court[s] of appeals is governed by the same standards as in district court[s]." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D. C. Cir. 1997) (citing *Int'l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965)); *see also Purdue Order* at 4. Thus, this Court should not depart from the traditional, liberal approach to intervention by imposing a rule that effectively prohibits all intervention in IPR appeals. *Cf. eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

Although the Court's orders were not designated precedential, they nevertheless send a strong message to real parties in interest or privies of IPR petitioners that they must prepare and file their own IPR petitions simply to preserve future appellate rights. The Court should not send such a message at all, but if it does, then it should be in a precedential decision issued after full briefing

and argument. The Court, therefore, should reconsider or rehear Apple's motions to intervene.

II. APPLE SHOULD HAVE BEEN ALLOWED TO INTERVENE AS A MATTER OF RIGHT

A. THE COURT'S ORDERS ERRED BY INVOKING THE COURT'S DISCRETION WHEN APPLE WAS ENTITLED TO INTERVENE AS A MATTER OF RIGHT

The Court's orders also misapplied the law governing intervention by treating the decision on intervention as purely discretionary even though Apple demonstrated that it meets the requirements for intervention as a matter of right under Rule 24(a)(2). Apple demonstrated in its motions that it has "'an interest relating to the property or transaction that is the subject of'" each appeal. *E.g.*, Opposed Motion of Apple Inc. for Leave To Intervene at 9-10, No. 20-1828 (Fed. Cir. June 29, 2020), ECF Nos. 28-29 (quoting Fed. R. Civ. P. 24(a)(2)). Apple also showed that it is "so situated that disposing of the action[s] may as a practical matter impair or impede the movant's ability to protect its interest" and that, as long as Qualcomm is challenging Intel's standing, Intel cannot adequately represent Apple's interests. Fed. R. Civ. P. 24(a)(2); *see also, e.g.*, Opposed Motion of Apple Inc. for Leave To Intervene at 9-10, No. 20-1587 (Fed. Cir. June 30, 2020), ECF Nos. 25-26. Despite opposing Apple's motions, Qualcomm did not dispute Apple's satisfaction of these requirements, and the Court's orders did not find that these requirements were not met.

Rule 24(a) states that "the court ***must*** permit anyone to intervene" who satisfies these requirements of Rule 24(a)(2). Even though the same standard governs intervention in this Court, *Mass Sch.*, 118 F.3d at 779, the Court's orders, ignore this mandatory language, stating that the Court "declines to exercise its discretion to grant Apple's motion." *E.g.*, Order at 2, No. 20-1828 (Fed. Cir. Aug. 27, 2020), ECF No. 46. That was legal error. *See, e.g.*, 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1913 (3d. ed. 2020) ("In theory intervention under Rule 24(b) is discretionary with the court ***but there is no discretion when intervention is under Rule 24(a)***." (emphasis added)).

To be sure, a motion to intervene under Rule 24(a)(2) must also be timely, and in three appeals (Nos. 20-1587 (consolidated), 20-1664, and 20-1828 (consolidated)) Apple requested that the Court exercise discretion on the narrow issue of Apple's compliance with Rule 15(d)'s timing requirements. The Court's orders' invocation of "discretion," however, was not tied to the issue of timeliness under Rule 15(d). That much is clear because the Court invoked "discretion" in identical terms in denying Apple's motion to intervene in No. 20-2092 (consolidated), where there was no issue of timeliness. Order at 2, No. 20-2092 (Fed. Cir. Sep. 4, 2020), ECF No. 25.

Even as to the earlier appeals, Apple satisfied the traditional test for timeliness under Rule 24(a) by diligently bringing its motion once Apple became

aware that Qualcomm would challenge Intel's standing in one appeal (after not challenging in earlier-filed appeals) and thus called into question Intel's ability to represent Apple's interests. *See, e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) ("A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties."). Further, as discussed in more detail below, Apple's harmless failure to meet Rule 15(d)'s 30-day deadline hardly warranted denying its motions even if the Court's reference to "discretion" could be read as invoking timeliness.

Accordingly, the Court's orders erred by treating Apple's motions solely as requests for permissive intervention and should be reconsidered or reheard.

B. THE COURT'S ORDERS ERRED TO THE EXTENT THAT THEY DENY CERTAIN OF APPLE'S MOTIONS BASED ON A MECHANICAL APPLICATION OF RULE 15(D)

To the extent that the Court's orders as to the three motions Apple filed outside of Federal Rule of Appellate Procedure 15(d)'s 30-day window rest on timeliness, that should not preclude reconsideration or rehearing of Apple's motions.[5]

Rigidly applying Rule 15(d)'s 30-day limit in these circumstances places

[5] As described above, Apple's motion for leave to intervene in Appeal No. 20-2092 (consolidated) was filed within the period set forth in Rule 15(d).

would-be intervenors like Apple in an impossible position. As discussed above, a prospective intervenor cannot invoke Rule 24(a)(2) unless the existing parties do not adequately represent its interests. If Apple had moved to intervene before Qualcomm challenged Intel's standing, then Apple would have had no way to establish that Intel could not adequately represent its interests. The Court's order in Appeal No. 20-1587 (consolidated) confirms as much by relying in part on the fact that Qualcomm failed to move to dismiss in that appeal.[6] Order at 2, No. 20-1587 (Fed. Cir. Aug. 27, 2020), ECF No. 45.

However, even though Federal Circuit Rule 27(f) requires a party to file a motion to dismiss for lack of jurisdiction "as soon as the grounds for the motion are known," Fed. Cir. R. 27(f), Qualcomm waited until June 5, 2020 to challenge Intel's standing in ***any*** of these appeals. That was more than two months after Intel filed the earliest of its appeals, at which point Rule 15(d)'s 30-day period had already lapsed. Barring intervention based on Rule 15(d) under these

[6] That Qualcomm did not move to dismiss in No. 20-1587 (consolidated) is no reason to deny Apple's motion in that appeal. This Court has an independent obligation to satisfy itself that it has subject-matter jurisdiction, including that an appeal presents an Article III case or controversy. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). If this Court agrees with Qualcomm that Intel lacks standing in its other appeals, there is at a minimum a significant risk that the Court would *sua sponte* determine that Intel lacks standing in Appeal No. 20-1587 (consolidated) as well. Accordingly, Qualcomm's challenge to Intel's standing in other appeals also has implications for Intel's ability to represent Apple's interests in No. 20-1587 (consolidated).

circumstances creates two serious problems. First, it encourages gamesmanship and delay in bringing any challenge to an IPR petitioner-appellant's standing. Second, it wrongfully requires prospective intervenors to move to intervene before the need for intervention is ripe. That approach is wrong. "Courts should discourage"—not encourage—"premature intervention that wastes judicial resources." *Sierra Club*, 18 F.3d at 1206.

Thankfully, there is a straightforward solution to this tension between Rule 15(d)'s deadline and grounds for intervention that arise only during the pendency of appellate proceedings. As Apple explained in its motions, Federal Rule of Appellate Procedure 2 allows this Court to suspend the requirements of Rule 15(d) where, as here, a prospective intervenor promptly moved to assert its rights as soon as the grounds for intervention became known. There is also ample precedent for doing so. *E.g.*, *Canadian Tarpoly Co. v. United States Int'l Trade Comm'n*, 649 F.2d 855, 856-57 (C.C.P.A. 1981); *see also Int'l Union of Operating Eng'rs, Local 18 v. Nat'l Labor Relations Bd.*, 837 F.3d 593, 595-96 (6th Cir. 2016).

This approach also harmonizes Rule 15(d) with the timeliness analysis that normally governs motions to intervene, under which "'courts should be extremely reluctant to dismiss [] a request for intervention as untimely'" where "'the would-be intervenor may be seriously harmed if intervention is denied.'" *E.g.*, *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 388–89 (7th Cir. 2019)

(quoting 7C Charles Alan Wright et al., *Federal Practice & Procedure Civil* § 1916 (3d ed. 2018)). It would also properly place the focus of the timeliness analysis on prejudice to the existing parties rather than the mere passage of time:

> The analysis is contextual; absolute measures of timeliness should be ignored. The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained.

Sierra Club, 18 F.3d at 1205 (citations omitted); *see also Roane v. Leonhardt*, 741 F.3d 147, 151-52 (D.C. Cir. 2014) (holding that a timeliness analysis that did not focus on prejudice to the existing parties was an abuse of discretion).

The lack of any prejudice to the existing parties is a key factor here which the Court's relevant orders entirely fail to address. Indeed, the only prejudice even alleged by Qualcomm (the only party opposing Apple's intervention) was that it would have to brief and argue the appeals. Cross-Appellant Qualcomm Incorporated's Opposition to Apple's Motion for Leave To Intervene at 13-14, No. 20-1828 (Fed. Cir. July 17, 2020), ECF Nos. 38-39. That allegation of prejudice was meritless because it had nothing to do with the timing of Apple's motions and because only ***unfair*** prejudice is rightfully considered in assessing timeliness. *See Roane*, 741 F.3d at 151. But in any event, Qualcomm's only alleged prejudice is

moot now that the Court has ordered the parties to address standing in their briefs.[7] That confirms that the existing parties would not be harmed by Apple's request to intervene, whereas Apple would wrongfully be deprived of the opportunity to protect its interests if not permitted to intervene.

Accordingly, the timeliness issue applicable only to Appeal Nos. 20-1587 (consolidated), 20-1664, and 20-1828 (consolidated) should not preclude reconsideration or rehearing of Apple's motions to intervene.

CONCLUSION

Apple respectfully submits that the orders denying its motions to intervene should be reconsidered or reheard either by a panel or by the *en banc* Court.

[7] As stated in its motions for leave to intervene, Apple intends to join Intel in the briefing on the merits of the appeal, rather than submitting separate briefs, mooting any concern that Apple's addition as intervenor would impose an unreasonable, additional burden with respect to briefing.

Dated: September 10, 2020

Respectfully submitted,

/s/ Lauren A. Degnan

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CERTIFICATE OF SERVICE AND FILING

I certify that on September 10, 2020, I electronically filed the foregoing **APPLE INC.'S COMBINED OPPOSED MOTION FOR RECONSIDERATION AND PETITION FOR PANEL REHEARING OR REHEARING EN BANC** of Intervenor Apple Inc. using the Court's CM/ECF filing system. Counsel for appellant and appellee were electronically served by and through the Court's CM/ECF filing system per Fed. R. App. P. 25 and Fed. Cir. R. 25(e).

/s/ Lauren A. Degnan
Lauren A. Degnan

CERTIFICATE OF COMPLIANCE

I certify that this combined motion and petition for rehearing complies with the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(2)(A) and 35(b)(2)(A). The combined motion and petition for rehearing contains 3,708 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2). This motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14 Point.

Dated: September 10, 2020

/s/ Lauren A. Degnan
Lauren A. Degnan

ADDENDUM

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

INTEL CORPORATION,
Appellant

v.

QUALCOMM INCORPORATED,
Appellee

2020-2092, -2093

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2019-00128 and IPR2019-00129.

ON MOTION

O R D E R

Intel Corporation appeals from final written decisions of the Patent Trial and Appeal Board finding that certain claims of Qualcomm Incorporated's patent are not unpatentable. Qualcomm moves to dismiss Intel's appeals for lack of standing. Intel opposes the motion. Qualcomm replies. Apple Inc. moves to intervene in the above-captioned appeals and moves for a protective order and to seal certain portions of its motion to intervene. Qualcomm opposes

Apple's intervention and moves unopposed to file its response under seal.

Regarding Qualcomm's motion to dismiss, the court deems it the better course to deny the motion without prejudice to Qualcomm raising the lack-of-standing argument in its response brief. Regarding Apple's request to intervene, under the circumstances, the court declines to exercise its discretion to grant Apple's motion. *See In re Opprecht*, 868 F.2d 1264, 1265 (Fed. Cir. 1989) ("The appearance during the judicial appeal of a person who took no part whatsoever in the administrative appeal, although limited participation is authorized by statute, who made no contribution to the record before the PTO, and asserts no deficiency therein, is contrary to general principles of intervention."); *In re Purdue Pharma L.P.*, No. 2018-1285, slip op. at 4 (Fed. Cir. Apr. 18, 2018) (order denying intervention on appeal by a real party-in interest to an IPR who "could have joined or participated in the IPR proceedings but made no effort to do so").

The court will grant Apple's motion for a protective order to the extent that access to Apple's confidential motion papers shall be limited to the court and Qualcomm's and Intel's outside counsel only. To the extent that any party believes it needs to exceed the normal redaction requirements in its merits brief, it must submit a motion along with its brief.

Accordingly,

IT IS ORDERED THAT:

(1) The motion to dismiss is denied. The parties are directed to address the standing issues in their briefs.

(2) Apple's motion to intervene is denied without prejudice to Apple seeking leave to participate as *amicus curiae*.

(3) Apple's motion for a protective order is granted to the extent provided herein. Apple's confidential and non-confidential version of its motion to intervene are accepted for filing.

(4) Qualcomm's motion to file under seal is granted, and the confidential and non-confidential versions of its response are accepted for filing.

(5) The briefing stay is lifted. Intel's opening brief is due within 60 days of the date of the filing of the certified list.

FOR THE COURT

September 04, 2020	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

s28

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

QUALCOMM INCORPORATED,
Appellant

v.

INTEL CORPORATION,
Cross-Appellant

2020-1587, -1588, -1654

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2018-01152 and IPR2018-01153.

ON MOTION

O R D E R

Apple Inc. moves for leave to intervene in these appeals and for a protective order. Qualcomm Incorporated opposes intervention. Qualcomm also moves unopposed to file under seal in order to redact similar confidential information in its opposition.

Apple has not shown intervention is warranted here. Apple contends that its interest in this matter would not

be adequately represented by Intel Corporation if the court were to determine that Intel lacked standing. But Qualcomm has not challenged standing in these appeals. Moreover, Apple failed to timely file its motion to intervene and did not attempt to join or participate in the underlying proceedings in any way. *See In re Opprecht*, 868 F.2d 1264, 1265 (Fed. Cir. 1989); *In re Purdue Pharma L.P.*, No. 2018-1285, slip op. at 4 (Fed. Cir. Apr. 18, 2018) (order denying intervention on appeal by a real party-in-interest to an IPR who "could have joined or participated in the IPR proceedings but made no effort to do so").

Accordingly,

IT IS ORDERED THAT:

(1) Apple's motion to intervene is denied without prejudice to Apple moving for leave to file an *amicus* brief.

(2) The parties' motions for a protective order and to file under seal are granted to the extent that access to the confidential versions of the motions papers shall be limited to the court and outside counsel.

FOR THE COURT

August 27, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s28

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

INTEL CORPORATION,
Appellant

v.

QUALCOMM INCORPORATED,
Cross-Appellant

2020-1828, -1867

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2018-01334, IPR2018-01335, and IPR2018-01336.

INTEL CORPORATION,
Appellant

v.

QUALCOMM INCORPORATED,
Appellee

2020-1664

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2018-01429.

ON MOTION

O R D E R

Intel Corporation appeals from final written decisions of the Patent Trial and Appeal Board finding that certain claims of Qualcomm Incorporated's patents are not unpatentable. Qualcomm moves to dismiss Intel's appeals for lack of standing. Intel opposes the motions. Qualcomm replies. Apple Inc. moves to intervene in the above-captioned appeals and moves for a protective order and to seal certain portions of its motions and replies. Qualcomm opposes Apple's intervention and moves unopposed to waive the requirements of Federal Circuit Rule 25.1(d)(1) to exceed the confidential word count in its responses.

Regarding Qualcomm's motions to dismiss, the court deems it the better course to deny the motions without prejudice to Qualcomm raising the lack-of-standing argument in its response briefs. Regarding Apple's request to intervene, Apple failed to timely file its motion to intervene and did not attempt to join or participate in the underlying proceedings in any way. Under such circumstances, the court declines to exercise its discretion to grant Apple's motion. *See In re Opprecht*, 868 F.2d 1264, 1265 (Fed. Cir. 1989) ("The appearance during the judicial appeal of a person who took no part whatsoever in the administrative appeal, although limited participation is authorized by statute, who made no contribution to the record before the PTO, and asserts no deficiency therein, is contrary to general principles of intervention."); *In re Purdue Pharma L.P.*, No. 2018-1285, slip op. at 4 (Fed. Cir. Apr. 18, 2018) (order denying intervention on appeal by a real party-in interest

to an IPR who "could have joined or participated in the IPR proceedings but made no effort to do so").

The court will grant Apple's motion for a protective order to the extent that access to Apple's confidential motions papers shall be limited to the court and Qualcomm's and Intel's outside counsel only. To the extent that any party believes it needs to exceed the normal redaction requirements in its merits brief, it must submit a motion along with its brief.

Accordingly,

IT IS ORDERED THAT:

(1) The motions to dismiss are denied. The parties are directed to address the standing issues in their briefs.

(2) Apple's motions to intervene are denied without prejudice to Apple seeking leave to participate as *amicus curiae*.

(3) Apple's motions for a protective order are granted to the extent provided herein. Apple's confidential and non-confidential versions of its motions and replies are accepted for filing.

(4) Qualcomm's motions to waive Federal Circuit Rule 25.1(d)(1) are granted, and the confidential and non-confidential versions of its responses are accepted for filing.

(5) The briefing stays are lifted. Intel's opening briefs are due within 60 days of the date of this order.

FOR THE COURT

August 27, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s29