

No. 20-1587, -1588, -1654

IN THE
United States Court of Appeals for the Federal Circuit

QUALCOMM INCORPORATED,
Appellant,

v.

INTEL CORPORATION,
Cross-Appellant.

Appeal from the United States Patent and Trademark Office, Patent Trial and
Appeal Board in IPR2018-01152, and IPR 2018-01153

**OPPOSITION TO PETITION FOR
REHEARING OR REHEARING *EN BANC***

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INTRODUCTION

The challenged order is a run-of-the-mill application of settled law and exercise of the panel’s “discretion,” Dkt. 45 at 2, to deny an untimely and irrelevant intervention request. In this Court, “[a] petition for rehearing *en banc* is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.” Fed. Cir. R. 35, Practice Notes. That guidance applies directly here, given the panel’s conclusion that, based on the facts, Apple may not intervene and its attempt to do so was untimely (*months* after the time for submitting intervention requests). Apple is a sophisticated player, well versed in the nuances of *inter partes* review (“IPR”) proceedings, proudly stating it has filed more IPRs than anyone else. Here, Apple decided against filing its own IPR, chose to forgo participating in Intel’s IPR, and admittedly failed to file a timely motion to intervene in this appeal—factual considerations upon which the panel grounded its order here.¹ As such, Apple’s attempt to manufacture sweeping legal questions

¹ Apple filed a single paper that included a motion for reconsideration and a combined petition for panel and *en banc* rehearing. See Dkt. 46, Apple Inc.’s Combined Opposed Mot. for Reconsideration and Petition for Panel Rehearing Or Rehearing En Banc (“Pet.”). Further, Apple filed the same paper in four separate appeals. Qualcomm’s oppositions to reconsideration were similar across the four separate appeals, but they were not identical given the different facts and circumstances of the appeals. Likewise here, Qualcomm’s responses to Apple’s combined petition for panel or *en banc* rehearing are similar but not identical.

detached from the present circumstances cannot justify *en banc* review or panel rehearing.²

As the panel necessarily concluded, no precedential opinion was needed because its order did “not add[] significantly to the body of law.” Fed. Cir. R. 32.1(b). Indeed, even while asserting—wrongly—that the order improperly extended the Court’s precedents, Apple does not question the correctness of any precedential opinion.³ Given that Apple’s sole challenge is to a discretionary, non-precedential order, the petition presents no viable issue for the *en banc* Court to resolve, much less one that comes close to satisfying the standard for rehearing. Apple provides no reason why the non-precedential order at issue justifies such an extraordinary expenditure of this Court’s resources. In fact, Apple fails to identify a single instance in which this Court has *ever* granted rehearing to consider a motions panel’s non-precedential order, whether on intervention or any other issue.

Apple’s petition should be denied.

² Given the panel’s denial of Apple’s motion to reconsider its own decision, *see* Dkt. 59, this opposition focuses principally on Apple’s failure to justify *en banc* review. But for the same reasons, Apple has not satisfied the demanding standard for either panel or *en banc* rehearing.

³ *See* Pet. 7-10 (arguing only that motions panel incorrectly applied precedents on intervention by entities who did not participate before agency); *id.* at 2, 12-16 (contending that motions panel erred by enforcing timeliness requirements “the Court has previously excused”).

BACKGROUND

This is an appeal from an IPR involving two parties: Intel Corporation—the sole petitioner below—and patent owner Qualcomm. The underlying IPR petitions, filed in 2018, challenged certain claims of a Qualcomm patent (the “’558 patent”) and expressly named Apple as a real party in interest. *See* Dkt. 26, Ex. 2, at 2. Apple elected not to file any IPR of its own or seek to join Intel’s petition in any respect.

The Patent Trial and Appeal Board (“Board”) instituted IPR proceedings on January 16, 2019, and consolidated the IPRs into a single proceeding. *Id.*, Ex. 1 at 2-3. On April 16, 2019, Qualcomm and Apple announced an agreement to settle and dismiss with prejudice all worldwide litigation between them, including allegations that Apple products infringed the ’558 patent. *See id.*, Ex. 3; *see also* Order to Dismiss at 1-2, *Qualcomm Inc. v. Apple Inc.*, No. 3:17-cv-1375-DMS-MDD, Dkt. 751 at 1-2 (S.D. Cal. April 23, 2019) (the Court “DISMISSES WITH PREJUDICE this action in its entirety”). Qualcomm and Apple reached a six-year license agreement, including a two-year extension option and a multi-year chipset supply agreement. *See* Dkt. 26, Ex. 3.

On January 15, 2020, the Board issued a final decision finding all claims of the ’558 patent unpatentable. Dkt. 26, Ex. 1.

On March 13, 2020, Qualcomm filed an appeal of the Board’s decision. On March 27, 2020, Intel also filed a notice of appeal, although Intel’s cross-appeal is improper because Intel can only raise alternate grounds for affirmance. *See* Dkt. 14 at 2; Dkt. 19 at 2. To that end, Intel has agreed to act as appellee under an ordinary, three-brief schedule. *See* Dkt. 36, Ex. 1.

On June 30, 2020—*110 days* after Intel filed its notice of appeal—Apple moved for leave to intervene. Dkt. 26.

On August 27, 2020, the motions panel issued a non-precedential order denying Apple’s motion to intervene. The panel cited the untimeliness of Apple’s intervention motion and also Apple’s failure to participate in the IPR, and stated “Apple has not shown intervention is warranted here.” *Id.* at 1. The panel also noted that Qualcomm is not challenging Intel’s standing. *Id.* at 2.

Apple sought reconsideration and panel and *en banc* rehearing. Dkt. 46. The motions panel denied reconsideration. Dkt. 59.

ARGUMENT

I. REHEARING IS NOT WARRANTED BECAUSE THE CHALLENGED DECISION IS A FACT-BOUND, DISCRETIONARY, AND NON-PRECEDENTIAL MOTIONS-PANEL ORDER.

A. The Panel’s Order Involved A Discretionary Application Of Undisputed Legal Principles.

Consistent with Federal Circuit Rules 35 and 40 and the accompanying practice notes, Apple’s intervention request does not warrant rehearing. In its

unpublished order, the motions panel simply applied settled law to the particular facts of this case, exercising its discretion to deny Apple's motion. The panel explained that Apple "did not attempt to join or participate in the underlying proceedings in any way." Dkt. 45 at 2. The Court's citations to *In re Opprecht*, 868 F.2d 1264, 1265 (Fed. Cir. 1989), and *In re Purdue Pharma L.P.*, No. 2018-1285, slip op. at 4 (Fed. Cir. Apr. 18, 2018), fully support that determination. Dkt. 45 at 2. The panel also explained that "Apple failed to timely file its motion to intervene." *Id.* Apple unquestionably could have participated in the IPR or filed its own. It did neither, much less seek to intervene within the time period set forth under Federal Rule of Appellate Procedure 15. *See* Section I.C, *infra*. Instead, Apple waited 110 days after Intel's notice of appeal to seek to intervene. The panel further explained that, whereas Apple based its motion on its fears that Intel may lack Article III standing, *see* Dkt. 45 at 1-2, "Qualcomm has not challenged standing in these appeals." *Id.* at 2. And even accepting Apple's musing that the Court might nonetheless "*sua sponte* determine that Intel lacks standing" in this appeal if Intel lacks standing in the other appeals, Pet. 13 n.6, Apple would have no basis for seeking to intervene for the first time on appeal. As Qualcomm has explained, Apple has known all along the basis for Intel's lack of standing in the other appeals—that Qualcomm had never accused Intel of infringing the patents that are the subject of these appeals, and Apple had more than a year earlier agreed

to the settlement that formed part of the basis for Qualcomm's challenge to Intel's standing in this Court. Dkt. 26, Ex. 3. Yet Apple never sought to participate in the IPR proceedings at any point.

In addition to being plainly correct, the motions panel's discretionary order has little application outside the specific circumstances of this case. Such a narrow, situation-specific complaint does not warrant the full Court's attention. Moreover, even if Apple were correct that the motions panel erred in exercising its discretion (and it is not), a future panel in a different case would be free to depart from the order's non-precedential rationale.

That Apple now seeks to distinguish *Opprecht* and *Purdue*, Pet. 8, rather than argue they were wrongly decided, emphasizes the narrowness of Apple's complaint. Apple acknowledges that neither case "stand[s] for a general prohibition against non-parties intervening on appeal," *id.*, but argues the motions panel departed from them by applying such a prohibition. That is wrong. The motions panel neither created nor applied a sweeping rule that only a party that filed an agency proceeding can ever intervene on appeal. *Cf.* Pet. 6-7. Rather, considering the specific circumstances of this case and Apple's failure to point to any basis for departing from Federal Rule of Appellate Procedure 15, the panel applied its "discretion" to those circumstances and concluded in a non-precedential order that "Apple has not shown that intervention is warranted *here.*" Dkt. 45 at 1.

Nor was the motions panel's exercise of discretion contrary to *Opprecht* or *Purdue*. In *Opprecht*, the Court noted that “[t]he grant or denial of a request to intervene ... is discretionary with the court” and held that on “the facts of the case at bar,” allowing party status to “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.” 868 F.2d at 1265-66. Apple seeks to distinguish *Opprecht* because it involved an “*ex parte* reexamination,” rather than an adversarial proceeding, Pet. 8, but that fact only supports the panel's similar exercise of discretion here. Apple, which concurrently filed numerous other IPR petitions against Qualcomm, had even more opportunity than the movant in *Opprecht* to participate in this adversarial proceeding or file its own. And although Apple seeks to distinguish *Purdue* because the original party there possessed standing to appeal, *id.*, the Court's holding regarding intervention had nothing to do with that fact. *See Purdue*, Slip Op. at 4 Accordingly, nothing in the panel's discretionary order here is contrary to *Opprecht* or *Purdue*.

B. The Mandatory-Intervention Rule For Which Apple Advocates Is Unsupportable, Particularly In The IPR Context.

If anyone is seeking a categorical rule, it is Apple, which insists that any real party-in-interest, or anyone else claiming to be interested in an IPR, may intervene on appeal as “a matter of right,” regardless of circumstances. Pet. 10. Indeed,

although it has not requested *en banc* review on this issue, *see id.* at 1, Apple openly faults the motions panel for invoking any discretion at all. *Id.* at 10, 12.

Apple advocates for this absolute rule based on inapt authority. Incorrectly contending the motions panel committed “legal error” and “misapplied the law,” *id.* at 10-11, Apple asserts it was “[e]ntitled” to have its motion evaluated under “the requirements for intervention as a matter of right under Rule 24(a)(2)” of the Federal Rules of Civil Procedure. *Id.* at 10. But Rule 24 applies to district, not appellate, courts. *See* Fed. R. Civ. P. 1. As Apple’s own cited authority reiterates, the “Federal Rules of Civil Procedure, of course, apply *only* in the federal district courts.” *Int’l United Auto Workers Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (emphasis added). Thus, although certain “policies” underlying certain aspects of Rule 24 “may” apply to appellate intervention, *id.*, the entirety of its express language does not.⁴

Rather, Federal Rule of Appellate Procedure 15, which governs Apple’s request in *this* Court, requires “*leave* to intervene[.]” Fed. R. App. P. 15(d) (emphasis added). “Determining whether to give leave of court requires an exercise of discretion....” *FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 935 (Fed. Cir. 1995) (discussing district courts’ discretion regarding leave to amend). Apple

⁴ Moreover, even mandatory intervention in district court demands a “timely motion,” Fed. R. Civ. P. 24(a), which was absent here.

cites no precedent that “[e]ntitle[s],” Pet. 10, it to deliberately lay in the weeds during the entire IPR and then interject itself on appeal at a time of its own choosing. To the contrary, the statute stating who “shall have the *right* to intervene” in the specific context of IPR appeals, 35 U.S.C. § 143 (emphasis added), refers only to the PTO Director and mentions no other allegedly interested non-parties. There was no misapplication of Rule 15 here.

Apple cites no case establishing that everything in Federal Rule of Civil Procedure 24 is fully incorporated into and directly governs appellate intervention, much less in the specialized context of IPR appeals.⁵ To the contrary, even if Apple’s proposed mandatory-intervention rule could be supported in another context (which it cannot), the unmistakable implication of the AIA’s Section 143—that nobody other than the Director has the “right” to intervene in an IPR appeal—is one of many circumstances that render IPRs different. Apple’s view that it could prosecute an appeal in an IPR appellant’s stead, *see* Pet. 7-8, 16 n.7;

⁵ Every case Apple cites involved an appeal from a district court order denying intervention, thus squarely presenting Federal Rule of Civil Procedure 24 disputes; they did not involve intervention on appeal under Federal Rule of Appellate Procedure 15. *See Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011); *South Dakota v. U.S. Dep’t of Interior*, 317 F.3d 783, 784-85 (8th Cir. 2003); *Massachusetts School of Law at Andover, Inc. v. U.S.*, 118 F.3d 776, 779 (D.C. Cir. 1997); *Sierra Club v. Espy*, 18 F.3d 1202, 1203 (5th Cir. 1994); *Am. Maritime Transp., Inc. v. United States*, 870 F.2d 1559, 1560 (Fed. Cir. 1989).

Dkt. 26 at 4 & n.1, is also inappropriate because the statutes governing this Court's jurisdiction to hear IPR appeals state that only a "party" to the IPR may appeal. *See* 35 U.S.C. § 319; 28 U.S.C. § 1295(a)(4)(A). Moreover, as the motions panel correctly noted, "Qualcomm has not challenged [Intel's] standing in these appeals." Dkt. 45 at 2. Those case-specific and IPR-specific factors make Apple's arguments for intervention uniquely weak, further demonstrating the unsuitability of this case as a vehicle to resolve any broader question regarding mandatory intervention.

Far from justifying any mandatory-intervention rule, Apple's argument is a case-specific complaint that it should be permitted to intervene now because it purportedly "had no reason ... to participate in the relevant [IPRs]" before the Board. Pet. 2, 7. That mundane factual argument cannot justify the extraordinary exercise of *en banc* review. And indeed it is wrong. Apple admits that it "was identified as a real party-in-interest in the proceedings before the Board," and that the IPR "undisputedly" involved "Apple's interests." Pet. 6, 7. By Apple's own terms, it had ample reason to participate in the IPR proceedings by joinder, filing its own IPR, or co-filing with Intel. Having elected (with full knowledge of all relevant facts) not to participate below, Apple made a strategic decision, on the facts of this case, to allow Intel to carry its water. It must now abide by that decision.

Indeed, Apple is uniquely ill-situated to complain about an inability to protect its rights in an IPR. Not only has Apple filed 26 other IPR petitions against Qualcomm—many of which are now on appeal, *see, e.g., supra* at ii—Apple recently boasted to the Supreme Court that “[s]ince 2012, [it] has filed 676 IPR petitions”—“the most of any party” in the world. Br. for Apple as Amicus Curiae at 19, *United States v. Arthrex, Inc.*, No. 19-1434 *et al.* (U.S. filed Dec. 2, 2020)). Apple’s regret at having failed to file yet another IPR cannot justify overriding the statutory and jurisdictional requirements for becoming an appellant or intervenor before this Court, much less adopting Apple’s absolute rule that every party asserting any interest may intervene in every IPR appeal.

C. The Court’s Findings Regarding Timeliness Do Not Warrant *En Banc* Review.

The Court’s order did not “overlook” that “Apple sought intervention promptly ... and that the Court has previously excused compliance with Rule 15(d).” Pet. 2. As noted above, the order expressly addressed this issue, concluding that “Apple failed to timely file its motion to intervene.” Dkt. 45 at 2. While Apple now offers new reasons for ignoring its tardiness, *see* Pet. 13-15, the order fully aligns with Rule 15(d)’s clear direction that an intervention motion “must be filed within 30 days after the petition for review is filed.” Fed. R. App. P. 15(d). Apple admits it failed to do so here and identifies no adequate

justification for “excus[ing] compliance,” Pet. 2—much less one that was before the motions panel when it ruled or that would bear on other cases.

Apple asserts the motions panel should have deemed Apple’s intervention request timely because it “promptly moved to assert its rights as soon as the grounds for intervention became known.” Pet. 14. But this is simply a quibble over the motions panel’s evaluation of the facts of this case, not an issue for *en banc* review.⁶

II. APPLE’S INTERVENTION MOTION FAILS FOR NUMEROUS ALTERNATIVE GROUNDS THAT ARE UNWORTHY OF *EN BANC* REVIEW.

Apple argues the *en banc* Court should resolve (1) whether a party must participate in the IPR as a “precondition” to intervention, and (2) whether appellate intervention is necessarily timely if a party moves “as soon as it learns that its interests might no longer be protected” and existing parties will not be prejudiced. Pet. 1. As explained above, these issues do not warrant further review. But even if they did, Apple’s motion would provide an unsuitable vehicle for addressing them,

⁶ Apple also complains that the order did not address or provide detailed explanations on every issue Apple’s motion raised. *See* Pet. 5-6, 10-11. The Court has no obligation to do so, *see, e.g., U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir. 1997), and that case-specific complaint would not warrant rehearing in any event.

because the denial of intervention was appropriate for numerous additional factual reasons specific to this case.

To begin with, as Apple neglects to mention in its rehearing petition, Apple argued that the “basis” for its original intervention motion was that “Apple can establish Article III standing to invoke this Court’s appellate jurisdiction,” regardless of Intel’s standing. Dkt. 26 at 4; *see id.* at 9 (arguing that “[t]he same facts establishing Apple’s standing ... also demonstrate that it has the interest required to intervene....”). Thus, fully half the motion was devoted to Apple’s attempt to prove its own standing based on the particular facts of this case. *Id.* at 5-9. Apple asserted this argument on its view that Intel may lack standing. Pet. 13 n.6. But as noted, Intel can properly participate in this appeal only as an appellee, and Intel has made clear that it is doing only that. Article III standing is not required for appellees. “With Article III satisfied as to the appellant [patent owner], [the IPR petitioner] is not constitutionally excluded from appearing in court to defend the PTAB decision in its favor.” *See Pers. Audio, LLC v. Elec. Frontier Found.*, 867 F.3d 1246, 1250 (Fed. Cir. 2017). Thus, as the motions panel noted, “Qualcomm has not challenged standing in these appeals.” Dkt. 45 at 2. Because Intel’s standing is not in dispute, Apple’s intervention is entirely unnecessary and improper because Apple admits it seeks to intervene only to save

the appeal and would not file a separate brief or make any arguments of its own.

Pet. 16 n.7.

In any event, dismissal of Intel’s appeals for lack of standing would not provide any basis for rehearing. Apple’s entire purpose in seeking intervention is simply to raise Intel’s arguments if Intel is found to lack standing. *See* Pet. 16 n.7 (“Apple intends to join Intel in the briefing on the merits of the appeal, rather than submitting separate briefs”); Dkt. 40 at 3-4 (arguing that the “alleged standing defect” is “the only barrier to [Intel’s] representing Apple’s interest”). And, as Apple stated in its intervention motion, it could not participate without Intel’s involvement unless it proves it has independent Article III standing. *See, e.g., Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168, 1171-72 (Fed. Cir. 2017). But Apple nowhere argues that the fact-specific question of its standing warrants *en banc* review.

Finally, the *en banc* Court would have to resolve whether non-party Apple even has a right to seek rehearing the first place. Federal Rule of Appellate Procedure 35(b) provides that only “[a] party may petition for a hearing or rehearing en banc,” (emphasis added), and Apple cites no case where a non-party was ever permitted to invoke such review.⁷ This case demonstrates the soundness

⁷ Apple’s contention that denial of intervention is “a final judgment” ripe for *en banc* review, Pet. 3 n.2, rests on inapposite authority involving a *lower court’s* denial of intervention.

of that restriction. In two discretionary orders that created no precedent, the motions panel denied both Apple's intervention motion and its motion for reconsideration of that denial. That is where this matter should end.

CONCLUSION

For the foregoing reasons, rehearing should be denied.

Dated: December 15, 2020

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CERTIFICATE OF INTEREST

Case Nos. 20-1587, -1588, -1654

Qualcomm Incorporated v. Intel Corporation

Filing Party/Entity: Qualcomm Incorporated

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: December 15, 2020

Signature: /s/ I. Sasha Mayergoyz

Name: I. Sasha Mayergoyz

1. Represented Entities (Fed. Cir. R. 47.4(a)(1)) – Provide the full names of all entities represented by undersigned counsel in this case.

Qualcomm Incorporated

2. Real Party in Interest (Fed. Cir. R. 47.4(a)(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.

None

3. Parent Corporations and Stockholders (Fed. Cir. R. 47.4(a)(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. Legal Representatives – 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. Related Cases – 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).

Although the questions are not all identical, for completeness Qualcomm notes that Apple has petitioned for panel rehearing or rehearing *en banc* in the following pending cases:

Intel Corp. v. Qualcomm Inc., No. 20-1664;

Intel Corp. v. Qualcomm Inc., Nos. 20-1828, -1867 (consolidated);

Intel Corp. v. Qualcomm, Inc., Nos. 20-2092, -2093 (consolidated).

6. Organizational Victims and Bankruptcy Crimes – 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

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS**

Case Nos. 2020-1587, -1588, -1654

Qualcomm Incorporated v. Intel Corporation

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because the filing has been prepared using a proportionally-spaced typeface and includes 3,488 words.

Date: December 15, 2020

Signature: /s/ I. Sasha Mayergoyz

Name: I. Sasha Mayergoyz