

No. 20-1664

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IN THE  
**United States Court of Appeals for the Federal Circuit**

INTEL CORPORATION,

Appellant,

v.

QUALCOMM INCORPORATED,

Appellee.

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

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

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December 15, 2020

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## CERTIFICATE OF INTEREST

Case No. 20-1664

*Intel Corporation v. Qualcomm Incorporated*

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/ Jonathan S. Franklin

Name: Jonathan S. Franklin

**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).

Norton Rose Fulbright US LLP: Ross Viguet, Eric Hall, Darren Smith, and Jeremy Albright

**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 the following pending appeals from *inter partes* reviews of Qualcomm patents also present questions regarding Intel’s and/or Apple’s lack of standing: *Apple Inc. v. Qualcomm Incorporated*, No. 20-1561; *Qualcomm Incorporated v. Intel Corporation*, Nos. 20-1587, -1588, -1654 (consolidated); *Apple Inc. v. Qualcomm Incorporated*, No. 20-1642; *Apple Incorporated v. Qualcomm Incorporated*, No. 20-1683, *Apple Inc. v. Qualcomm Incorporated*, Nos. 20-1763, -1764 (consolidated); *Apple Inc. v. Qualcomm Incorporated*, No. 20-1827; *Intel Corporation v. Qualcomm Incorporated*, Nos. 20-1828, -1867 (consolidated); *Intel Corporation v. Qualcomm Incorporated*, 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).

None

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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 deficient filing by a non-party seeking to participate in an appeal over which this Court lacks jurisdiction in the first place. 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. 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—all factual considerations upon which the panel grounded its order.<sup>1</sup> As such, Apple’s

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<sup>1</sup> Apple filed a single paper that included a motion for reconsideration and a combined petition for panel and *en banc* rehearing. *See* Apple Inc.’s Combined Opposed Mot. For Recons. And Pet. For Panel Reh’g Or Reh’g *En Banc* (“Pet.”), Dkt. 46. 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.

attempt to manufacture sweeping legal questions detached from the present circumstances cannot justify *en banc* review or panel rehearing.<sup>2</sup>

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.<sup>3</sup> 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. Moreover, to even reach the questions Apple now attempts to frame, the Court would have to consider—and resolve in Apple’s favor—issues of standing and jurisdiction that not even Apple argues are appropriate for *en banc* review. 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

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<sup>2</sup> 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.

<sup>3</sup> *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”).

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.

### **BACKGROUND**

This is an appeal from an IPR involving two parties: appellant Intel Corporation—the sole petitioner below—and patent owner and appellee Qualcomm. The underlying IPR petition, filed in 2018, challenged certain claims of a Qualcomm patent (the “’043 patent”) and expressly named Apple as a real party in interest. *See* Dkt. 22, Ex. 1, at 3. 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 February 15, 2019. 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 ’043 patent. *See id.*, Ex. 3; *see also* Order Granting Mot. to Dismiss at 1, *Qualcomm Inc. v. Apple Inc.*, No. 3:17-cv-2402-CAB-MDD (S.D. Cal. April 23, 2019), Dkt. 198 (“The parties’ joint motion for dismissal with prejudice is hereby GRANTED” and “all parties are DISMISSED with prejudice”). Qualcomm and Apple reached a six-year license agreement, including a two-year extension option and a multi-year chipset supply agreement. *See* Dkt. 22, Ex. 3.

On January 30, 2020, the Board issued a final decision invalidating certain claims of the '043 patent and allowing amendment of others. Dkt. 22, Ex. 1. On April 8, 2020, Intel filed an appeal of the Board's decision.

On June 30—**83 days** after Intel filed its notice of appeal—Apple moved for leave to intervene. Dkt. 22. Before briefing began, Qualcomm moved to dismiss the appeal due to Intel's lack of standing. *See* Dkt. 31.

On August 27, the motions panel issued a non-precedential order denying Qualcomm's motion without prejudice, effectively deferring the standing question to the merits panel. Dkt. 45. In the same non-precedential order, the Court, citing the untimeliness of Apple's intervention motion and Apple's failure to participate in the IPR, "decline[d] to exercise its discretion to grant Apple's motion." *Id.* at 2. Apple sought reconsideration and panel and *en banc* rehearing. Dkt. 46. The motions panel denied reconsideration. Dkt. 59. While Apple's rehearing petitions were pending, Apple also moved to file an *amicus* brief relitigating again its ability to participate as a party to this appeal. Dkt. 58.

## 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 principally because 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. Apple unquestionably could have participated in the IPR or filed its own. It did neither. And then Apple waited 83 days after Intel’s notice of appeal to seek to intervene solely because it fears that Intel may lack standing, *see* Dkt. 22 at 9, even though Apple knew all along that Qualcomm had never accused Intel of infringing the ’043 patent, 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.

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 had not shown that intervention was warranted *here*. Dkt. 45 at 2.

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.<sup>4</sup>

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 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

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

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.<sup>5</sup> 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 effort to prosecute this appeal in Intel's stead, *see* Pet. 7-8; Dkt. 22 at 3 & 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). Those case-specific and IPR-specific factors make Apple's arguments for intervention uniquely weak, further demonstrating the

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<sup>5</sup> 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); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 778 (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).

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 points to no fact relating to Intel's lack of standing that is any more apparent now than it would have been at some earlier time when Apple could properly have become involved in the IPR. 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." *Id.* at 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. The fact that Intel cannot appeal because it lacks standing gives Apple no right to change its mind and seek to intervene 83 days after the deadline for noticing an appeal.

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. 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. Indeed, Apple did not (and still does not) claim it was unaware of any *fact* relating to Intel's lack of standing, instead arguing that Qualcomm's motion to dismiss in another case alerted it that the Court might lack jurisdiction. *See* Pet. 12-14. But Apple acknowledges that "[t]his Court has an independent obligation to satisfy itself that it has subject-matter jurisdiction" even without a motion to dismiss. *Id.* at 13 n.6. Accordingly, the *facts* relating to Intel's lack of standing—none of which Apple claims not to have known—created a risk of dismissal whether or not a motion was filed. Apple's intervention motion was therefore untimely even under its proposed rule.<sup>6</sup>

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<sup>6</sup> 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.

**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, 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. 22 at 3; *see also 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 had to assert this argument because, unlike a more typical intervenor, it seeks to sustain this appeal without the participation of the actual appellant, Intel. 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. 39 at 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 do so without proving it has independent Article III standing. *See, e.g., Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168, 1171-72 (Fed. Cir. 2017).

In opposing Apple’s motion, Qualcomm argued that it was unnecessary to decide Apple’s standing because intervention was inappropriate for other reasons given the specific facts of this case. *See* Dkt. 34 at 5-13. The motions panel seems to have agreed. But Qualcomm also explained Apple could not establish standing because of many of the same facts that led Qualcomm to challenge Intel’s standing. *Id.* at 13-20. Thus, Apple’s own motion and requested relief underlying its rehearing petition was expressly premised on whether it has standing. *See supra* at 13. A finding that Apple lacks standing would therefore render all its other arguments irrelevant. But Apple nowhere argues that the fact-specific question of its standing warrants *en banc* review.<sup>7</sup>

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<sup>7</sup> To the contrary, when Qualcomm moved to dismiss Apple’s affirmative appeals against Qualcomm for Apple’s lack of standing, the Court denied those motions without prejudice to raising the issue before each merits panel, just as the

Moreover, as Qualcomm also explained in opposing Apple’s intervention, *see* Dkt. 34 at 7-8, Apple’s stated rationale for intervening—that Intel’s lack of standing “would prevent Intel from adequately representing Apple’s interests,” Pet. 4—is self-defeating. It is settled law that intervention cannot resurrect an appeal this Court has no Article III jurisdiction to decide in the first place. *See, e.g., United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914) (intervention “presuppose[s] an action duly brought,” and cannot “cure” a “vice in the original suit”); *Ericsson Inc. v. InterDigital Commc’ns Corp.*, 418 F.3d 1217, 1221 (Fed. Cir. 2005) (noting “well-settled law” requiring “an existing suit within the Court’s jurisdiction” as a prerequisite to intervention (applying Fifth Circuit law)); *Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283 (D.C. Cir. 1993) (“The general rule is that ‘[i]ntervention presupposes the pendency of an action in a court of competent jurisdiction,’” which “is routinely applied to dismiss an intervenor where the court lacks jurisdiction over the original action.”) (quoting Charles A. Wright, *et al.*, *Fed. Practice & Procedure* § 1917, at 457 (2d ed. 1986)); *Simmons v. I.C.C.*, 716 F.2d 40, 46 (D.C. Cir. 1983) (refusing to permit “late-filing party, by appearing as an intervenor in an existing (but jurisdictionally defective) suit instead of filing independently, to perfect an appeal beyond” the deadline for

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Court did with the question of Intel’s standing here. *See* Orders, *Apple v. Qualcomm*, Nos. 20-1683, 20-1763, 20-1827 (Fed. Cir. Aug. 27, 2020).

filing its own notice of appeal). Accordingly, if Intel were found to lack standing, this Court would lack jurisdiction over the underlying appeal, and Apple's intervention would be unnecessary and improper. And if Intel were found to have standing, then Apple's intervention is likewise unnecessary 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; Dkt. 39 at 4. In short, Apple's fear that Intel lacks standing is one of many reasons, wholly apart from the issues on which Apple seeks rehearing en banc, why Apple *cannot* intervene.

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.<sup>8</sup> This case demonstrates the soundness 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.

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<sup>8</sup> 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.

## CONCLUSION

For the foregoing reasons, rehearing should be denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,  
AND TYPE-STYLE REQUIREMENTS**

Case No. 20-1664

*Intel Corporation v. Qualcomm Incorporated*

I certify that the foregoing filing is proportionately spaced in 14-point font and, according to the word processing program in which it was generated, contains 3,879 words excluding parts of the document exempted by Federal Circuit Rule 27(d).

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