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Paper 142
Entered: December 4, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RPX CORPORATION,
Petitioner,

v.

APPLICATIONS IN INTERNET TIME, LLC,
Patent Owner.

IPR2015-01750 (Patent 8,484,111 B2)
IPR2015-01751 (Patent 7,356,482 B2)
IPR2015-01752 (Patent 7,356,482 B2)

Before SCOTT R. BOALICK, *Chief Administrative Patent Judge*, JACQUELINE WRIGHT BONILLA, *Deputy Chief Administrative Patent Judge*, and SCOTT C. WEIDENFELLER, *Vice Chief Administrative Patent Judge.*

BOALICK, *Chief Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)[1]

[1] This decision pertains to Cases IPR2015-01750, IPR2015-01751, and IPR2015-01752, as Petitioner's Requests for Rehearing are substantively the same in each case. Citations are to the paper numbers in Case IPR2015-01750.

I. INTRODUCTION

On October 2, 2020, we issued a Final Decision on Remand after the Board received a decision by the U.S. Court of Appeals for the Federal Circuit in *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018) ("*AIT*") (Paper 110), remanding the case back to the Board. Paper 125, public Paper 128 ("Dec." or "Decision"). In its decision, the Federal Circuit concluded that the Board previously "applied an unduly restrictive test for determining whether a person or entity is a 'real party in interest' within the meaning of § 315(b) and failed to consider the entirety of the evidentiary record in assessing whether § 315(b) barred institution of these IPRs." *AIT*, 897 F.3d. at 1339. Prior to issuing the Final Decision on Remand, a Panel Change Order was issued. Paper 124 ("Order"). As noted in the Order, these IPRs raised important issues for the Board with applicability to future cases, and presented unique scheduling and timing issues in view of *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1370 (2020) and related case law, warranting a panel change to include the most senior administrative patent judges available. Order 2–3.

In the Final Decision on Remand, we determined that Salesforce was a real party in interest (an "RPI") in these proceedings, and the Petitions, therefore, were time-barred under 35 U.S.C. § 315(b). Dec. 35, 40. Based on that determination, we terminated the previously instituted *inter partes* reviews. *Id*. at 40. On October 9, 2020, RPX Corporation ("Petitioner") filed a Request for Rehearing of the Board's Final Decision on Remand. Paper 134 ("Req. Reh'g."). Pursuant to our authorization, Patent Owner filed a Response (Paper 135, "PO Resp."), and Petitioner filed a Reply (Paper 136, "Pet. Reply"). For the reasons discussed below, we deny Petitioner's Request for Rehearing.

II. STANDARD OF REVIEW

As it relates to a request for rehearing of a Board decision, in pertinent part, 37 C.F.R. § 42.71(d) states:

> The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

Thus, a request for rehearing is not an opportunity to present new arguments or evidence or merely to disagree with the panel's assessment of the arguments or weighing of the evidence.

III. ANALYSIS

In the Final Decision on Remand, we determined that Petitioner had not shown, by a preponderance of the evidence, that Salesforce was not an RPI in these proceedings. Dec. 1–2, 6–7, 30–35, 40. As noted above, in light of this determination, we terminated the previously instituted *inter partes* reviews, and denied *inter partes* reviews under 35 U.S.C. § 315(b). *Id*. at 35, 40.

In its Request for Rehearing, Petitioner sets forth two principal arguments. First, Petitioner asserts that the panel change following the remand from the Federal Circuit deprived Petitioner of its due process rights and violated the Administrative Procedure Act (APA). Req. Reh'g. 1–3; *see also* Pet. Reply 1–9. Second, Petitioner asserts that the Board "overlooked and misapprehended key evidence, resulting in factual findings that are simply wrong on critical issues." *Id.* at 3–10. We have reviewed Petitioner's Request for Rehearing, Patent Owner's Response, and Petitioner's Reply, and carefully considered all arguments presented in view of the legal standards and the evidence of record. For the following reasons, we are not persuaded by Petitioner's arguments.

1. Due Process and the APA

a. Due Process

Petitioner argues that it was deprived of due process because "[d]ue process required that these cases be decided by the panel that conducted a pre-hearing conference to explain what issues and evidence *those* judges believed were most critical to address (Ex. 1099), and participated at oral hearing." Req. Reh'g. 1. Petitioner asserts that the unfairness of the panel change is highlighted by an alleged different view of the same evidence taken by the original and current panel. *Id.* at 2–3. Moreover, Petitioner asserts that the panel change is "unprecedented and improper," and was done without any authority authorizing such a change. Pet. Reply 3. In light of these alleged violations, Petitioner requests that either the Decision be vacated and remanded to the original panel, or that the Decision be vacated so the current panel can hold an oral hearing. Req. Reh'g. 3.

Patent Owner disagrees and contends that RPX has failed to establish a protected liberty or property interest at stake in these cases sufficient to afford them due process protections. To the extent RPX can claim due process rights, Patent Owner argues, the Board's procedures have complied with the requirements of procedural due process. PO Resp. 2–7.

As an initial matter, we note there is no question that IPR petitioners are entitled to due process and the protections afforded by the Administrative Procedure Act. Pet. Reply 1 (citing *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016)). We agree with Patent Owner, however, that all requirements of procedural due process have been met here. "The indispensable ingredients of due process are notice and an opportunity to be heard by a disinterested decision-maker." *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080

(Fed. Cir. 2015) (quoting *Abbott Labs. v. Cordis Corp.*, 710 F.3d 1318, 1328 (Fed. Cir. 2013)).

In this case, Petitioner had ample opportunity to brief the issue of RPI. *See* Paper 28, Paper 29 (redacted version); Paper 38, Paper 37 (redacted version); Paper 98, Paper 95 (redacted version); Paper 100, Paper 104 (redacted version); Paper 101, Paper 102 (redacted version). Petitioner also had an opportunity to argue the issue of RPI in two oral hearings. *See* Paper 77, Paper 112, Paper 123 (redacted version). Moreover, in its Request for Rehearing, Petitioner had a chance to identify any matters it believes this panel misapprehended or overlooked in its Final Decision on Remand. Petitioner further had an opportunity to file a Reply to Patent Owner's Response to its Request. Thus, both before and after this panel issued its Final Decision on Remand, Petitioner had notice and an opportunity to be heard on issues relevant to these cases on remand from the Federal Circuit.

Finally, although a change in panel after remand from the Federal Circuit is not common, this panel, like the original panel, decided the merits of each case based on the entirety of the record. Stated another way, either panel would have decided the case after careful consideration of the same evidence. Nor can Petitioner complain that it lacked notice and an opportunity to be heard regarding the panel change – Petitioner received notice of the panel change both before and in the panel decision, and Petitioner's Request for Rehearing and Board-authorized Reply gave it ample opportunity to be heard.

Accordingly, we are not persuaded that the change in panel has prejudiced Petitioner in any way or violated Petitioner's due process rights.

b. APA

Along the same lines, Petitioner further asserts that the Board's decision to exercise discretion and deny institution under § 314(a) violated the APA because Petitioner was given no notice or opportunity to brief the issue of discretionary denial. Req. Reh'g. 15. Petitioner also argues that the changing of the panel in these *inter partes* reviews violates the APA's requirement that the panel that presides at the reception of evidence also decides the case. Pet. Reply. at 5 (citing 5 U.S.C. § 554 (d) ("The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the . . . initial decision required by section 557 of this title, unless he becomes unavailable to the agency."). Neither of these arguments is persuasive.

To begin with, as to the exercise of discretion under § 314(a), the Final Decision on Remand clearly states that such consideration is not necessary to the analysis because the decision terminated *inter partes* reviews based upon the finding that Salesforce is a RPI and the Petitions are time barred under § 315(b). Dec. 38. Nevertheless, we are not persuaded by Petitioner's argument for the additional reason that, as noted by Patent Owner, the factual findings underpinning the analysis under § 314(a) are substantially the same as those relevant to the decision to terminate the IPRs under § 315(b). PO Resp. 7; *see also* Dec. 38–40 (citing *Valve Corporation v. Electronic Scripting Products, Inc.*, IPR2019-00062, Paper 11 (PTAB April 2, 2019) (precedential); *General Plastic Industries Co. v. Canon Kabushiki Kaisha, IPR2016-01357*, Paper 19 at 15–16 (PTAB Sept. 6, 2017) (precedential)).

Specifically, in considering the evidence of record, we found that RPX had not shown, by a preponderance of the evidence, that Salesforce is not an RPI in these proceedings. The factual findings underpinning that RPI analysis are highly

relevant to a determination of whether the relationship between RPX and Salesforce is the type of "significant relationship" contemplated by *Valve* and, thus, would favor denying institution under § 314(a). *See Valve Corp*., Paper 11, at 9–10. The overlap in the § 314(a) and § 315(b) analyses is made particularly clear by Petitioner's failure to explain how its argument may have changed or what additional factors would require further briefing or consideration. *See generally* Req. Reh'g. 15; Pet. Reply 9–10.

In addition, *inter partes* review proceedings typically proceed on a written record, where a panel may "preside at the reception of evidence" at any time, by evaluating the written record, including by reviewing transcripts of oral hearings (where parties generally may not present new evidence and arguments). Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) ("No new evidence or arguments may be presented at the oral argument."); Consolidated Trial Practice Guide at 85–86.[2] The Board panel deciding the case on remand had access to, and reviewed, all briefing and evidence (including deposition transcripts) in the cases, as well as existing transcripts of oral hearings. Thus, the panel here presided "at the reception of evidence," as required under 5 U.S.C. § 554(d). *Cf. New England Coalition v. Nuclear Regulatory Comm'n*, 582 F.2d 87, 100 (1st Cir. 1978) (indicating that a de novo hearing before the substituted fact finder would not be required if "it fairly could be said that a credibility evaluation from hearing and seeing the witnesses testify was unnecessary") (citing *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106, 115 (8th Cir. 1954).

Moreover, *inter partes* review proceedings frequently involve a decision by administrative patent judges who did not preside at the time some or all evidence

[2] Accessible at https://www.uspto.gov/TrialPracticeGuideConsolidated; *see also* 84 Fed. Reg. 64,280 (Nov. 21, 2019).

was entered into the record, e.g., as submitted with a petition for *inter partes* review well before institution. As explained in the USPTO's standard operating procedures relating to judge panel assignments, panel changes may, and often do, occur after an original panel has appeared in a case, including after an oral hearing, for a number of different reasons, such as a later arising conflict or judge unavailability. *See* Patent Trial and Appeal Board Standard Operating Procedure 1 (SOP 1), at 1-3, 13-14 (Rev. 15 Sept. 20, 2018) (SOP 1). The ability to change panels is a necessary part of Board operations as a general matter, and does not violate the APA.

Accordingly, we are not persuaded that any violation of the APA occurred here.

2. Real Party in Interest

a. RPX's Business and its Relationship with Salesforce

Petitioner contends we "misapprehended the evidence and fundamentally misunderstood RPX's business and its relationship with Salesforce." Req. Reh'g. 4–6. Specifically, Petitioner asserts that no evidence supports the Board's findings that "filing IPRs to protect its clients" is an "important component of RPX's core subscription business." Dec. 15, 32. Rather, Petitioner asserts that the testimony of Mr. Chuang shows unequivocally that "RPX only files IPRs for and with clients who separately contract for that service." *Id.* at 4. Petitioner contends that Mr. Chuang's testimony is corroborated by RPX's typical membership agreements, of which Saleforce's is included, which do not include the filing of IPRs. *Id.* at 5 (citing Exs. 1020, 1074-1075); *see also id.* at 6 (citing Exs. 1020–1022, 1073–1079). Further, Petitioner contends that we erroneously found that Mr. Chuang's testimony "conflicts with statements made by RPX in its marketing materials." Req. Reh'g. at 5 (citing Dec. 13-14). Specifically, Petitioner asserts that marketing

materials describing how RPX can "acquire a license to the litigated patent and selectively clear our clients from the suit," corroborate, rather than conflict with, the testimony because they describe the acquiring of licenses to clear clients, not the filing of IPRs. *Id.*

We do not agree that we misapprehended or overlooked the evidence identified by Petitioner in its Opening Brief on remand (Paper 98; public Paper 95) and its Request for Rehearing. The Decision extensively discusses and analyzes the evidence identified by Petitioner. Dec. 11–15. For example, the Decision acknowledges the testimony of Mr. Chuang, the types of membership agreements offered by RPX including the specific type of membership acquired by Salesforce, as well as RPX's marketing materials describing RPX's provided services. *Id.* (citing Ex. 2008, 3, 6, 27; Ex. 1074 § 2; Ex. 1073 ¶¶ 5, 8, 10, 31–32; Ex. 1090 ¶ 32; Ex. 1095, 116:6–117:1; Ex. 2006; Ex. 2015). Moreover, the Decision specifically acknowledges Mr. Chuang's declaration that RPX provides validity challenges on behalf of a client only if that client specifically, explicitly, and separately contracts for such services as well as statements that "the prospect of an RPX-filed IPR in the event a client is sued by an NPE would not reasonably be a 'key reason' for the client to pay membership fees to RPX." *Id.* (citing Ex. 1073 ¶¶ 10, 32).

The Decision also considered other evidence, however, including RPX marketing materials, that describes RPX's stated mission to help "each RPX client avoid[] more in legal costs and settlements each year than they pay RPX in subscription fees," and "help [clients] after a litigation has begun." Dec. 14 (citing Ex. 2007); *see also id.* at 11–15 (discussing Ex. 2008 (RPX's 2013 Annual Report), Ex. 1074 (RPX Form Membership Agreement); Ex. 2006 (RPX's "Client Relations" webpage), Ex. 2007 (RPX's "Why Join" webpage). The Decision

similarly considered RPX's SEC filings describing the close alignment of RPX's interests with those of their clients and that "one of [RPX's] 'strategies' for transforming the patent market is 'the facilitation of challenges to patent validity,' one intent of which is to 'reduce expenses for [its] clients.'" *Id*. at 13–15 (citing Ex. 2008; *AIT*, 897 F.3d at 1351).

The Decision did not, as Petitioner asserts, overlook the fact that RPX's marketing materials and SEC filings do not specifically mention IPRs. Rather, we weighed this evidence describing the alignment of interests between RPX and its clients, as well as RPX's business model, and determined that RPX filed these IPRs to benefit its member Salesforce, regardless of whether the IPRs were filed at Salesforce's explicit request. *Id.* at 14–15. In sum, Petitioner's argument merely reflects a difference of opinion as to how to interpret the evidence or the weight to accord certain evidence, none of which demonstrates that we misapprehended an argument or overlooked evidence.

b. RPX's Filing of IPRs To Benefit Unnamed Clients

Petitioner further contends that we erred in finding that RPX, in addition to serving its own interests, "also files IPRs to protect its clients" because "the evidence suggests that RPX selects patents to challenge, at least in part, to reduce risk to existing clients." Req. Reh'g. 7 (citing Dec. 19). Petitioner disputes the finding that "the vast majority of RPX petitions, forty-seven of fifty-seven, have involved patents asserted against its clients." *Id.* (citing Dec. 16). Petitioner asserts that we overlooked that 10 of RPX's IPRs did not involve a client and that in 21 of 47 IPRs involving patents asserted against RPX clients, RPX named its clients as co-petitioners. Petitioner contends that this evidence corroborates Mr. Chuang's testimony that "while RPX sometimes files IPRs to reduce risks for

client(s), in those circumstances post-*VirnetX* RPX names those clients as petitioners and RPIs." *Id.* (citing Ex. 1073 ¶¶ 27–30).

As above, we are not persuaded by Petitioner's argument. The Decision explicitly acknowledged, and accepted, that RPX has its own interests in filing IPRs against patents it believes are weak, as means to improve RPX's negotiating position. Dec. 16 (citing Ex. 1019 ¶ 9). The Decision also recognized that RPX had filed at least ten IPRs challenging patents that were not actively asserted against any RPX client. *Id.* (citing Ex. 1073 ¶ 28). However, just as above, we weighed this evidence against the additional evidence discussed above indicating that RPX has filed IPRs to benefit its existing clients, as well as further evidence of RPX's history of filing IPRs, to support our finding. *Id.* at 15–17. For example, the Decision observes that RPX has filed forty-seven IPRs challenging patents actively asserted against its clients, and all but one of RPX's fifty-seven IPRs challenged a patent involved in district court litigation. *Id.* at 16. According to Petitioner, in twenty-one of the forty-seven filed IPRs, RPX listed its clients as co-petitioners. Req. Reh'g. 7. However, this necessarily means that in twenty-six cases, RPX filed IPRs without naming its client as co-petitioner. In weighing all of the evidence, we determined RPX filed these IPRs to benefit Salesforce. Dec. 16–17. Again, as above, Petitioner's argument merely reflects a difference of opinion as to how to interpret the evidence or the weight to accord certain evidence.

c. Whether RPX Takes Clients' Interests into Account When Filing IPRs

Petitioner further contends that we misapprehended the evidence in finding that RPX "'takes its clients' interests into account' when deciding to file IPRs where the client is not named." Req. Reh'g. 8–10. Petitioner contends that the Decision improperly relied on the *AIT* decision as evidence although there is no evidence that "a client in suit was a positive factor that favored RPX filing any

post-*VirnetX* IPR on its own." *Id.* Petitioner asserts that the evidence supports the opposite conclusion because "Mr. Chiang was unequivocal that in these IPRs the time-barred party being an RPX client factored against filing." *Id.* at 9 (citing Ex. 1090, ¶ 28).

Petitioner's argument is unpersuasive because it merely restates the arguments that the Decision considered and rejected. Contrary to Petitioner's argument, the Decision makes explicit factual findings, based on the evidentiary record, that a client subject to a lawsuit was a positive factor in determining whether to file an IPR. Notably, RPX's Best Practice Guide explicitly states that in choosing potential patents to challenge on invalidity grounds, the selection team takes into account, among other characteristics, *the number of current and potential RPX clients in suit*." Dec. 18 (citing Ex. 2018) (emphasis added).

Petitioner further argues that the Decision's finding that "RPX's Best Practice Guide intentionally operates . . . to circumvent the Board's RPI case law," is not supported by evidence. Req. Reh'g. 8–9 (citing Dec. 18 (citing Ex. 2018)). Petitioner asserts that Mr. Chiang's testimony establishes that the Best Practice Guide was intended to ensure that RPX would "comply with the law on RPI and accurately name all RPIs in all future petitions." *Id.* at 9.

We are not persuaded. Here, the Decision weighs Mr. Chiang's testimony against further evidence suggesting that RPX created the Best Practice Guide to avoid clients being found to be RPIs by circumventing the Board's case law. *See* Dec. 18–19 (citing Ex. 1018; Ex. 1019 ¶¶ 14, 16, 18; Ex. 2018). For example, the Decision considered that the Best Practice Guide was created shortly "after receiving and studying decisions denying institution in RPX's IPRs against *VirnetX*," where RPX had been found to be an RPI. *Id.* at 18 (citing Ex. 1090 ¶ 16). The Decision further considered that the Best Practice Guide was intended

to ensure that clients were not found to be RPIs while simultaneously implementing a "systematic process for identifying potential IPR candidates and preparing IPRs," that takes into account "the number of current and potential RPX clients in suit." *Id.* at 18–19 (citing Ex. 1019 ¶ 14; Ex. 2018). Again, we are not persuaded that the Decision's finding is unsupported by evidence. Rather, Petitioner's argument merely reflects a difference of opinion as to how to interpret the evidence or the weight to accord certain evidence.

Petitioner further argues that "[t]he Decision relies on the Federal Circuit raising—not answering—a question about whether RPX's SEC filing's reference to facilitating validity challenges could 'imply' that RPX files IPRs for its clients." Req. Reh'g. 10 (citing Dec. 19-20). Petitioner asserts that the testimony of Mr. Chuang explains that the SEC filing's reference to "the facilitation of challenges to patent validity" refers to aiding a client making the client's own validity challenge, not filing an IPR on the client's behalf. *Id*. (citing Ex. 2008, 4).

We are not persuaded. The Decision does not merely rely on the Federal Circuit raising a question, but rather makes a finding of fact by weighing the entirety of the evidence of record. The Decision considers not only Mr. Chuang's testimonial evidence, but the evidence described above relating to the relationship between RPX and Salesforce and RPX business practices. In doing so, the Decision finds that the SEC statement indicates that filing IPR challenges are part of a broad suite of "solutions" and "services" that "reduce expenses for our clients." Dec. 20. Again, Petitioner's argument merely reflects a difference of opinion as to how to interpret the evidence or the weight to accord certain evidence.

d. Whether RPX Was Representing Salesforces's Interests

Petitioner further contends that we erred in finding that RPX was representing Salesforce's interests. Req. Reh'g. 11–14 (citing Dec. 21, 31). First, Petitioner asserts that we misapprehended the services that Salesforce paid RPX to provide and overlooked the evidence demonstrating why Salesforce joined and renewed their membership with RPX, including conditioning its renewal not on RPX doing anything relating to AIT, but instead on a specific licensing transaction detailed in the confidential record. *Id.* at 11–12.

We are not persuaded that we misapprehended or overlooked this evidence. To the contrary, as noted above, the Decision recognizes the types of membership agreements offered by RPX, including the specific type of membership acquired by Salesforce. Dec. 11–15. (citing Ex. 2008, 3, 6, 27; Ex. 1074 § 2; Ex. 1073 ¶¶ 5, 8, 10, 31–32; Ex. 1090 ¶ 32; Ex. 1095, 116:6–117:1). The Decision observed that record evidence describes "575 dismissals for RPX clients in 74 litigations" by RPX "acquir[ing] a license to the litigated patent." *Id.* at 14 (citing Ex. 2007; Ex. 1073 ¶ 31). The Decision also acknowledged that "there is no persuasive evidence that Salesforce paid RPX for filing these specific petitions for *inter partes* review." *Id.* at 25 (citing Ex. 1019 ¶ 20). However, as described above, the Decision weighed this evidence against the evidence demonstrating the significant relationship between Salesforce and RPX, and the strong economic incentives on RPX to represent Salesforce's interests. *Id.* at 25–26.

Petitioner further argues that "[t]he finding that RPX creates the 'appearance' of pursuing its own interests despite Salesforce's interests being 'of paramount importance to RPX' given 'significant economic incentives' (Dec. 35) diminishes RPX's acknowledged interests (Dec. 16) and misapprehends RPX's incentives." Req. Reh'g. 11. Petitioner asserts that the panel "'agree[d]' with the

Federal Circuit that RPX's website might 'imply' RPX files IPRs to serve its client's interests," but did not determine whether the implication of the Court was supported by evidence, and cited no evidence to support that there were "'strong economic incentives on RPX to represent Salesforces' interests' in these IPRs." *Id*. at 11–12 (citing Dec. 25).

We are not persuaded by Petitioner's argument. Contrary to Petitioner's assertions, the Decision does not discount RPX's interests, but rather, acknowledges the interest that RPX may have in filing IPRs. Dec. 16 ("We can accept RPX's representation that filing IPRs against patents it believes are weak improves its negotiating position"). As stated by the Federal Circuit, however, there is not necessarily "only one interested party in each case." *AIT*, 897 F.3d at 1347. Here, the Decision considered further evidence, described above, which supports the finding that there were "strong economic incentives on RPX to represent Salesforces' interests." Dec. 25, 34. The evidence, such as that described above, supports the Federal Circuit's implication that "RPX can and does file IPRs to serve its clients' financial interests." *Id*. at 26 (quoting *AIT*, 897 F.3d at 1351–52) (citing Ex. 2007). In light of these incentives, the Decision found that RPX "help[s] paying members 'extricate themselves from NPE lawsuits.'" Dec. 26. As the Decision noted, extricating a member from a lawsuit could be performed through licensing, or, as in this case, through challenging the validity of the asserted patent. *Id*.

Petitioner further argues that "[t]he Board's finding that communications between RPX and Salesforce about the [Salesforce litigation involving AIT] were 'naturally tied to possible defenses, of which an IPR challenge is one' is facially wrong and unsupported." Req. Reh'g. 13–14 (citing Dec. 30). Petitioner asserts that the evidence establishes that possible defenses were not discussed and thus, no

evidence indicates that RPX's relationship with Salesforce was based on efforts to address the same patents. *Id.* (citing Exs. 1019, 1073, 1090, 1094, 1095).

Petitioner's argument is not persuasive because, as stated in the Decision, "[e]ven if RPX did not directly discuss filing an IPR, the discussions of litigation are naturally tied to possible defenses." Dec. 30. Indeed, the evidence reflects that, prior to the filing of IPR Petitions here, RPX and Salesforce discussed the Salesforce litigation on numerous occasions. Dec. 29–30 (citing Ex. 1019 ¶¶ 22–28; *see, e.g.*, *id*. at ¶ 22 ("in the normal course of RPX's business, . . . RPX communicates with clients about NPE litigations. . . . As a matter of course, RPX shares intelligence and insight regarding new litigations with its clients.")). As noted in the Decision, those discussions of pending litigation by AIT against Salesforce, followed by RPX filing IPR petitions on the same patents involved in that litigation, weighed in favor of finding that Salesforce was an interested party. *Id.* at 30.

e. Finding of Salesforce to be a Beneficiary

Petitioner argues that we erred as a matter of law by overlooking what is legally required for Salesforce to be a "beneficiary." Req. Reh'g. 14. Further, Petitioner further asserts that we overlooked the authority cited by Petitioner that "'behest' means command, and that RPX cannot have acted as Salesforce's representative unless RPX were appointed by Salesforce to so act." *Id.* at 14–15. Petitioner asserts that the evidence, at most, demonstrates that RPX filed as a "mere volunteer to benefit Salesforce." *Id.* at 15. We are not persuaded because Petitioner's argument proposes that we apply a more narrow and rigid analysis of RPI than the one instructed by the Federal Circuit in these cases. As stated by the Federal Circuit, "[d]etermining whether a non-party is a 'real party in interest' demands a flexible approach that takes into account both equitable and practical

considerations, with an eye toward determining whether the non-party is a clear beneficiary that has a preexisting, established relationship with the petitioner." *AIT*, 897 F.3d at 1351*; see also* Dec. 4–5. Applying this flexible approach to the evidence of record, we determined that Salesforce is an RPI in these proceedings.

IV. CONCLUSION

We deny Petitioner's Request for Rehearing because we determine that Petitioner has not met its burden to show that, in the Final Decision on Remand, the panel misapprehended or overlooked any matter.

V. ORDER

It is, therefore,

ORDERED that Petitioner's Request for Rehearing is denied.

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