Filed on behalf of Petitioner by: Paper No. __
Richard F. Giunta, Reg. No. 36,149
Elisabeth H. Hunt, Reg. No. 67,336
Randy J. Pritzker, Reg. No. 35,986
WOLF, GREENFIELD & SACKS, P.C.
600 Atlantic Avenue
Boston, MA 02210
617.646.8000

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
IPR2015-01752
Patent 7,356,482 B2[1]

PETITIONER'S REQUEST FOR REHEARING OF FINAL DECISION ON REMAND TERMINATING INSTITUTION

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[1] This identical paper is being filed in each proceeding in the above heading the Board authorized the parties to use. Paper 116 at 3. Paper and Exhibit numbers used herein are from IPR2015-01750. Emphasis is added unless otherwise indicated and internal quotation marks and citations are omitted.

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TABLE OF AUTHORITIES

CASES

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REGULATIONS

Pursuant to 37 C.F.R. § 42.71(d), RPX requests rehearing of the Board's Decision Terminating Institution (Paper 125, public Paper 128, "Dec.").

I. THE 11TH-HOUR PANEL CHANGE VIOLATED DUE PROCESS

Taking these cases away from the panel that oversaw them from inception—to be decided instead by judges who had them for less than a week and did not participate at the oral hearing—was unprecedented and improper. Respectfully, neither the justification in the panel change order, nor the ***different*** justification in the Decision (Dec., 6), warranted taking these cases away from the original panel of highly experienced and well-respected judges who knew the record and were more than capable of deciding cases that "raise important issues." Paper 124, 2.

Due 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. The only authority RPX has found addressing repaneling a case after oral argument, for different judges to make the fact-finding decision, questions whether that complies with due process. *E.g.*, *Arthrex v. Smith & Nephew*, 941 F.3d 1320, 1332 (Fed. Cir. 2019) ("It is not clear the Director has de-designation authority." "[M]id-case de-designation of an APJ could create a Due Process problem."); *Moles v. Regents of Univ. of California*, 654 P.2d 740, 742-43 (Cal. 1982) ("[T]he law and sound policy lead to one conclusion—a judge who has not participated in [oral argument]

may not be permitted to participate in the final decision and sign the opinion issued by that panel.... oral argument would be an empty right [] if it did not encompass the right to have one's case decided by the justices who heard the argument.").

AIT's theories were based on pure speculation, which RPX was tasked with refuting. RPX disproved AIT's principal speculation that RPX had no interest of its own (Dec., 16, acknowledging RPX's interest) and other speculative arguments such as those based on allegedly "unusual" payments and a board member. *Id*., 21, 28-29. But as the Board noted, RPX was in the "unenviable position of having to prove a negative." Paper 112 (public Paper 123) ("Hearing Tr."), 12. Thus, it was critical for RPX to understand which (if any) of AIT's incorrect speculative arguments about RPX's business and actions might gain traction, so RPX could explain where the record refuted them. RPX raised this point and was assured the Board would voice any concerns at oral hearing. Ex. 1099, 6-7. The parties were instructed to identify at oral hearing the "record evidence that supports those facts that you think best support your position." *Id*., 5. RPX did just that and addressed the few questions the judges raised. AIT did not; it identified no evidence as "best" supporting its position, instead pointing to the "absence of evidence" from Salesforce, leaving the panel "unsatisif[ied]." Hearing Tr., 37-39; *also id*., 61-63.

The new panel's decision views differently the ***same*** evidence the original panel considered, including public documents (RPX's website and SEC filing)

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