

NOTE: This order is nonprecedential.

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

RPX CORPORATION,
Appellant

v.

CHANBOND LLC,
Appellee

2017-2346

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2016-
00234.

ON MOTION

Before REYNA, LINN, and HUGHES, *Circuit Judges*.

LINN, *Circuit Judge*.

ORDER

RPX Corporation appeals the determination of the Patent Trial and Appeal Board (“Board”) that RPX did not show claims 1–31 of ChanBond LLC’s U.S. Patent No. 7,941,822 (“the ’822 patent”) to be unpatentable. Though ChanBond has asserted the ’822 patent in litigation in the

United States District Court for the District of Delaware against others, it has not accused RPX of infringement. ChanBond contends that RPX therefore lacks standing to file this appeal and moves to dismiss. RPX opposes the motion. ChanBond replies. We agree with ChanBond and grant the motion.

I

RPX’s “core business is in acquiring patent rights on the open market and in litigation to achieve peaceful resolution of patent disputes through rationally negotiated transactions.” Appellant’s Opp’n at 1 (“*Opposition*”). In 2013, “RPX created a new business initiative called the ‘Patent Quality Initiative’ . . . in which RPX began challenging weak patents through the [inter partes review (IPR)] process.” *Id.* at 4. In the industry of non-defendant IPR petitioners,¹ RPX seeks to distinguish itself by filing only “high quality IPR challenges” and publicly markets its success based on institution rates and cancellation rates in IPRs. *Id.* at 5. Contending that it typically realizes no direct monetary benefit by virtue of filing IPRs, RPX states that it relies on the enhanced reputational goodwill generated by its successful IPR challenges. *Id.* According to RPX, the Board’s determination regarding the ’822 patent ended RPX’s “record of claim cancellation in every [final written decision].” *Id.* at 7.²

¹ RPX states that its primary competitors in this market are Unified Patents and Askeladden L.L.C.

² RPX claims it “has filed 42 IPR petitions, settled 3 proceedings before institution, achieved institution of trial on 95% of the petitions reaching a decision on institution on the merits, and compelled cancellation of claims in 16 out of 17 proceedings that reached a final written decision.” *Opposition* at 4.

II

“Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy” required by Article III. *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1547 (2016). To meet the constitutional minimum for standing a party must demonstrate that it has suffered an injury in fact that is fairly traceable to the challenged action and that the injury is likely to be redressed by a favorable judicial decision. *Id.* at 1547 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

To establish an injury in fact, a party must show that it suffered an injury that is “both concrete *and* particularized.” *Id.* at 1548 (citation and internal quotation marks omitted). “To constitute a concrete injury, the harm must actually exist or appear imminent.” *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1171 (Fed. Cir. 2017) (citation and quotation omitted). A “concrete and particularized reputational injury” can give rise to standing. *Shukh v. Seagate Tech., LLC*, 803 F.3d 659, 663 (Fed. Cir. 2015) (explaining that in an action to correct inventorship under 35 USC § 256 “if the claimed inventor can show that being named as an inventor on a patent would affect his employment, the alleged reputational injury likely has an economic component sufficient to demonstrate Article III standing”).

In *Phigenix*, this court held that the “summary judgment burden of production applies in cases where an appellant seeks review of a final agency action and its standing comes into doubt.” 845 F.3d at 1172–73 (citation omitted). We also explained that in cases where standing was not an issue before the agency, an appellant could submit additional evidence to the court of appeals by declaration or other evidence. *Id.* at 1173. Such a declaration must set out facts that would be admissible in

evidence and not be merely a conclusion of law. *Id.* at 1174.

III

RPX argues that it has suffered at least three types of injury sufficient to establish standing: injury to its statutory rights; injury to its standing relative to competitors; and injury to its reputation of successfully challenging wrongfully issued patent claims.

RPX contends the Board's decision injures its "statutory right to compel cancellation of claims on unpatentable inventions" and its "right to file multiple IPR petitions on the same patent claims." *Opposition* at 15, 16.

As to a right to compel cancellation of claims on unpatentable inventions, this issue was settled in *Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014). While that case dealt with the statutes governing inter partes reexamination proceedings, the reasoning applies equally to the relevant statutes governing IPR proceedings. *See also Phigenix*, 845 F.3d at 1175–76 (applying the reasoning of *Consumer Watchdog* in concluding that the IPR estoppel provision does not constitute an injury in fact). "The statute at issue here allowed any third party to request [review], and, where granted, allowed the third party to participate." *Consumer Watchdog*, 753 F.3d at 1262. "The statute did not guarantee a particular outcome favorable to the requestor." *Id.* RPX "was permitted to request [review] and participate once the PTO granted its request. That is all the statute requires." *Id.*

The court in *Phigenix* rejected an argument that an appellant suffered an injury sufficient to confer standing based on its right to file multiple petitions on the same patent when the appellant is not engaged in any activity that would give rise to an infringement suit. *See Phigenix*, 845 F.3d at 1175–1176 (holding that the estoppel

provision of 35 U.S.C. § 315(e)(1) did not constitute an injury in fact when the appellant “is not engaged in any activity that would give rise to a possible infringement suit” (internal quotation marks and citation omitted)). It is undisputed that RPX is not engaged in any potentially infringing activity regarding the ’822 patent. Accordingly, RPX’s argument that the Board’s decision injured RPX by impeding its “right to file multiple IPR petitions on the same patent claims,” *Opposition* at 16, must fail.

RPX next argues that the Board’s decision injures RPX’s “standing relative to competitors.” *Opposition* at 17. To the extent RPX is alleging competitor standing as a separate ground for satisfying the Article III standing requirement, its arguments are unavailing. The doctrine of competitor standing “relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff’s competitors.” *Can. Lumber Trade All. v. United States*, 517 F.3d 1319, 1332, 1333 (Fed. Cir. 2008) (a party may establish that it was more likely than not it would be injured by the challenged government distributions to its competitors and empirical evidence was not required). The cases that RPX cites do not support standing in the circumstances of this case. *See Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015) (“[T]he basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact.” (internal quotation marks and citation omitted)); *Sherley v. Sebelius*, 610 F.3d 69, 73–74 (D.C. Cir. 2010) (holding researchers had standing to challenge agency guidelines that they alleged increased competition for government grants). With the evidence submitted, RPX has not demonstrated that the Board’s determination increased or aids the competition in the market of the non-defendant IPR petitioners.

Finally, RPX asserts that the Board's determination injures RPX's reputation of successfully challenging wrongfully issued patent claims. This position is unconvincing, as RPX's documents submitted on appeal do not demonstrate a concrete and particularized reputational injury. RPX relies upon the declaration of William W. Chuang, Senior Vice President of Client Relations at RPX, to argue that the Board's determination "tarnishes RPX's record in IPR proceedings, which injures RPX's standing vis-à-vis its closest competitors," and "inevitably tarnishes RPX's reputation for expertise and success challenging patents in IPR proceedings." *Opposition* at 16–17.

Mr. Chuang concedes that he is "unable to quantify the reputational and economic harm" caused by the Board's decision. Decl. of William W. Chuang at 5. The evidence submitted indicates that customers consider a variety of items when choosing a non-defendant IPR filing entity. See Decl. of Linda Schroeder in Supp. of Appellant RPX Corporation's Opp'n to Mot. to Dismiss, Exh. C at 3–4 (identifying "what sets Unified [Patents] apart" to be the following practices: challenging patents early, challenging anyone, refusing to pay, refusing to incentivize, acting independently as the sole real-party in interest, and educating non-practicing entities to ensure they know that low quality patents will be challenged); *id.* at Exhs. D–J, N, P (including Askeladden website excerpts touting its various IPR filings and announcements of specific successful IPRs). Therefore the Chuang declaration is insufficient evidence that a concrete and particularized harm will occur.

The court concludes that RPX lacks Article III standing to appeal the Board's decision affirming the patentability of claims 1-31 of the '822 patent.

Accordingly,

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IT IS ORDERED THAT:

- (1) The stay of proceedings is lifted.
- (2) The motion to dismiss is granted. The appeal is dismissed.
- (3) Each side shall bear its own costs.

FOR THE COURT

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

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ISSUED AS A MANDATE: January 17, 2018