Client Alert

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PTAB to Consider Motion for "Abuse of Process" Sanctions Against Kyle Bass Hedge Fund IPR Petition

By Cary Miller and Matthew I. Kreeger

In a recent order, the Patent Trial and Appeals Board (PTAB) indicated that it will consider a motion for sanctions based on a claim of "abuse of process" in Inter Partes Review (IPR) proceedings filed by the Coalition for Affordable Drugs, an entity affiliated with a Kyle Bass hedge fund. This motion represents a possible new avenue to challenge Bass's effort to use the IPR procedure to lower the stock prices of targeted pharmaceutical companies.

INTER PARTES REVIEW

IPR is a procedure created by the America Invents Act (AIA) that allows a third party to challenge the patentability of one or more patent claims based on prior art patents or printed publications. IPRs were first made available on September 16, 2012, and apply to any patent issued before, on, or after that date.

COALITION FOR AFFORDABLE DRUGS IPR FILINGS

In the past several months, hedge fund manager Kyle Bass's Coalition for Affordable Drugs ("Coalition") has filed IPR petitions to invalidate patents on drugs owned by Celgene Corporation, Biogen Idec International GmbH, Acorda Therapeutics, Inc., Horizon Pharma, and Shire PLC. Bass's hedge fund shorts the shares of those companies and stands to profit if their stock prices drop.

In an April 14, 2015 Statement to the House of Representatives Committee on the Judiciary opposing changes to the AIA, Mr. Bass stated that his company challenges drug patents "in order to police the abusive patent tactics used by the worst offending drug companies."[1]

Recently, the Coalition filed IPR petitions against patents owned by Celgene. On April 23, 2015, the Coalition filed four IPR petitions in an attempt to invalidate two of Celgene's patents relating to its product THALOMID® (thalidomide). THALOMID® is indicated for the treatment of certain cancers and a complication of leprosy.

THE PTAB ORDER

Celgene requested authorization to file sanction motions to dismiss the four IPR petitions for abuse of process on June 3, 2015. In its email request, Celgene stated that the real parties-in-interest (RPI) who filed the IPR petitions "have stated publicly that they intend to use the IPR process for the purpose of affecting the value of public

[1] *See* http://www.valuewalk.com/wp-content/uploads/2015/04/Hayman-HR-9-Final-4-14-15-Final.pdf, page 3.

companies . . . [which] is not the purpose for which the IPR process was designed."[2] Celgene also stated that one or more of the RPIs "threatened to file IPRs against the challenged patents unless Celgene met their demands" and filed the IPR petitions after "Celgene did not pay."[3]

Two days after holding a telephone conference about Celgene's request, an expanded panel of the PTAB authorized Celgene, the patent owner, to file a motion for sanctions against the Coalition for Affordable Drugs.

The PTAB ordered Celgene to address in its briefing (1) the elements to show an abuse of process under 37 CFR §42.12(a)(6); (2) any evidence of intent that supports or undermines the allegation of abuse of process; and (3) the standard of proof that applies in determining whether sanctions should apply. The motion for sanctions is due on the same dates as the Preliminary Responses, three months after the notice of filing date was awarded. Opposition and reply briefs are due ten days and five days later, respectively. The PTAB emphasized that its order is not a decision on the merits.

The Celgene sanctions motion is the latest attempt by affected companies to persuade the PTAB that the Coalition should be precluded from using the IPR process to further its business model. Previously, Acorda filed a preliminary response in another IPR, arguing that the Coalition's petitions should be denied for failure to name all affected RPIs, and because "allowing hedge funds to use the IPR process to manipulate financial markets is inconsistent with Congressional intent."

PROPOSED AMENDMENTS TO THE IPR PROCESS

Recent proposed amendments to the IPR process under consideration by the House Judiciary Committee appear responsive, at least in part, to the IPR filings by the Coalition. Rep. Bob Goodlatte's June 9, 2015 proposed amendment to the Innovation Act of 2015 precludes institution of IPR petitions unless the petitioner certifies (1) that it does not own a "financial instrument . . . designed to hedge or offset any decrease in market value of an equity security of the patent owner or an affiliate," and (2) that it has not demanded payment from the patent owner or an affiliate in exchange for foregoing filing an IPR unless the petitioner or RPI has been sued for infringement under the patent at issue.[4]

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[2] Appendix to PTAB Order entered June 9, 2015 in Case IPR2015-01092, Case IPR2015-01096, Case IPR2015-01102, and Case IPR2015-01103.

[3] *Id.*

[4] *See* http://judiciary.house.gov/_cache/files/4723a430-8a79-4569-b3c8-68e7d828e2a3/goodla-028-xml---managers-substitute---june-9-2015.pdf, pages 53-54.

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