Paper No. __
Filed: July 28, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS VI LLC
Petitioner,

v.

CELGENE CORPORATION
Patent Owner

Case IPR2015-01092
Patent 6,045,501

PATENT OWNER MOTION FOR SANCTIONS PURSUANT TO 35 U.S.C. § 316(a)(6) AND 37 C.F.R. § 42.12

TABLE OF CONTENTS

Page

I. INTRODUCTION

Inter partes review ("IPR") was designed as an expeditious and less costly alternative to federal district court litigation. It was not designed for the purpose to which it is aimed here—as a tool to affect the stock prices of public companies for financial gain, to the detriment of those companies and the investing public. By their own admission, the real parties in interest ("RPI") filed this and other petitions as part of their strategy to profit from affecting stock prices. Their petitions represent an ongoing abuse of the IPR process that has been and will continue to be an unwarranted burden on the Patent Trial and Appeal Board ("Board"), and on innovators like patent owner Celgene Corporation ("Celgene") and its shareholders. Celgene is confident in the strength of its patents, but should not be required to expend extensive resources defending them in the face of the RPI's abuse of process.

The RPI's abuse of process began in 2014 when they twice threatened to file IPRs against two Celgene patents, including those at issue in IPR2015-01092, -1096, -1102, and -1103. Specifically, RPI and self-described "patent troll" Erich Spangenberg (and his company IPNav, also an RPI) first threatened Celgene with IPRs in January 2014. Then in July 2014, they assisted a third party in its effort to obtain payment from Celgene in exchange for not filing nearly identical IPRs against the same patents. Notably, none of the threats came from anyone with a

legitimate business interest in the targeted patents or the technology that they cover. Instead, the threats were nothing more than an improper use of the IPR process solely for the RPI's financial gain.

When Celgene did not pay, Mr. Spangenberg/IPNav no longer had any financial incentive to file the IPRs, and did not do so at that time. Instead, they teamed up with RPI and hedge fund manager J. Kyle Bass, and together, they concocted a new scheme to profit from affecting companies' stock prices by filing IPRs. The Petition in this matter, which counsel for the RPI admitted is just a "rewrite" of the earlier threatened petitions, is part of that scheme. It is driven entirely by an admitted "profit motive" unrelated to the purpose of the American Invents Act ("AIA"), as set forth in the bill itself and its legislative history, and unrelated to any competitive interest in the validity of the challenged patents. Pursuant to 35 U.S.C. § 316(a) and 37 C.F.R. § 42.12, the Board has the power to and should sanction the RPI by dismissing this Petition as an abuse of process and an improper use of these proceedings.

II. PRIOR THREATS AND RELEVANT FACTS

From 2008 to 2013, Mr. Spangenberg was "very proud to be America's biggest patent troll," using IPNav to sue at least 1,638 companies. Ex. 2032 at 1. IPNav's business model involved sending vague demand letters, implicitly demanding payment. "The implied '*or else!*' ooze[d] from th[e] letter."

Renaissance Learning v. Doe, No. 11-166, 2011 WL 5983299, at *4 (W.D. Wisc. Nov. 29, 2011). The AIA was specifically enacted to curb such abusive tactics.

But the AIA did not deter Mr. Spangenberg and IPNav. Rather, they saw the AIA (and IPRs in particular) as an easier and more profitable opportunity than their normal "troll" business. They began abusing and misusing IPRs by threatening to file petitions with the goal of extracting "settlement" payments. They had no interest in the patents or the life-saving therapies that the patents protect. They simply saw a way to profit by using the IPR process for an improper purpose—coercing businesses into paying demands to avoid costly proceedings.[1]

Mr. Spangenberg, on behalf of IPNav, first threatened Celgene in a January 2014 email to Celgene's attorneys (Ex. 2033) that attached draft IPRs (and supporting expert declarations) against two Celgene patents: (1) the patent at issue in IPR2015-01092, U.S. Patent No. 6,045,501 (the "'501 patent") (Ex. 2034; Ex. 2035); and (2) U.S. Patent No. 6,315,720 (the "'720 patent") (Exs. 2036-2039), at issue in IPR2015-01096, -1102, and -1103. *See also* Ex. 2040. His email was

[1] Under New Jersey law (where Celgene is headquartered), this conduct amounts to extortion. *See* N.J. Stat. § 2C:20-5(g); *State v. Roth*, 289 N.J. Super 152 (1996) (finding extortion where defendant's threat was solely calculated to harm victim, and the only benefit to defendant was payment to make him go away).

cryptic, but its purpose was clear; as in *Renaissance*, "[t]he implied '*or else*' ooze[d] from th[e]" email. *See* Ex. 2033.

Celgene never responded to that threat, but on July 15, 2014, Celgene's attorneys received another email threatening the '501 and '720 patents. *See* Ex. 2041. This email was sent by an attorney allegedly representing the Initiative for Responsibility in Drug Pricing ("IRDP"), but attached nearly the ***same draft petitions and expert declarations*** that Mr. Spangenberg had used to threaten Celgene in January 2014. *Compare* Exs. 2034-2040 *with* Exs. 2042-2048. It is apparent that Mr. Spangenberg/IPNav assisted IRDP.

IRDP's email stated that its "mission is to improve America's access to low cost generic pharmaceuticals." Ex. 2041. Celgene soon learned, however, that the Spangenberg/IPNav-assisted IRDP would readily forego its purported altruistic mission in exchange for cash. Celgene again did not pay, and the threatened petitions were never filed, likely because Mr. Spangenberg realized that there was no profit in filing—the money would come only if Celgene agreed to pay his demands.

In any event, Mr. Spangenberg was not done targeting Celgene for his own profit. Last year, he met Mr. Bass, and shortly thereafter, Mr. Spangenberg and his companies, IPNav and nXnP (also an RPI), became paid consultants to Mr. Bass and several "Hayman" investment companies (all RPI). *See* Ex. 2028 at 3.

Together they formed fifteen shell companies (Coalition for Affordable Drugs I-XV, or "CFAD") for the sole purpose of "filing and publicizing [IPR] patent challenges against pharmaceutical companies while also betting against their shares." *Id.* at 1. Each CFAD entity is a wholly-owned subsidiary of Hayman Credes Master Fund, L.P. ("Credes"), which through a series of other investment firms, is controlled by Mr. Bass. *See, e.g.*, Pet. at 1-2.

Mr. Bass then publicly trumpeted his investment strategy of attacking patents in the pharmaceutical industry in what he termed a "short activist strategy." Ex. 2029 at 1. "Mr. Bass was pitching wealthy individuals and institutions to invest in a dedicated fund that would bet against, or short, the shares of [target] companies . . . and wager on rivals that could benefit." Ex. 2028 at 4. The RPI's plan was to file petitions on "a big-selling drug [to] rattle investors," anticipating that the filing of petitions would cause a change in public companies' stock prices. *See* Ex. 2031 at 2.[2] Indeed, RPI Hayman Capital Management L.P. admitted, in a

[2] For example, the RPI achieved their goal when they filed petitions against Acorda Therapeutics ("Acorda") and Shire LLC ("Shire"). Acorda's value dropped nearly 10% ($150 million) when the RPI filed their first petition, and nearly another 5% when they filed their second petition. *See id.* at 2. Shire's stock price similarly dropped 2.5% upon filing. *See* Ex. 2049 at 2.

June 1, 2015 Securities Exchange Commission ("SEC") filing, that the "primary purpose" of at least two RPI (Credes and Hayman Orange Fund SPC-Portfolio A) is to "generate superior risk-adjusted returns through long or short positions with regard to selected companies, primarily in the pharmaceuticals sector." Ex. 2030 at 5. IPRs were not designed for this purpose, which is nothing more than another nefarious means for achieving the same goal that Mr. Spangenberg and IPNav sought to achieve through previous threats to file IPRs: to line their own pockets at the expense of public pharmaceutical companies and their shareholders.

Attempting to downplay the RPI's true motives, Mr. Bass has claimed publicly that his IPRs are designed to support generic drug entry and lower drug prices for consumers (Ex. 2050 at 2-4)—the same alleged motive set forth by IRDP. Notably, however, all of the RPI, including each CFAD entity, are ***for profit*** organizations that have no competitive interest in the patents that they challenge or the technology that those patents cover. *See* Ex. 2027 at 1-2 (defining "General" entity status as not including non-profit companies).

Put simply, CFAD is a front, and the RPI's purported altruistic motives are pretext; each CFAD entity's sole purpose is to "benefit [Mr. Bass's] investments" by filing IPRs and profiting from resulting changes in stock prices. *See* Ex. 2051 at 1 (Mr. Bass explaining his plan to halve the combined market capitalization of his target companies—$450 billion—to "benefit[] his investments"). Any other

motive would be a breach of Mr. Bass's fiduciary duty to his investors. *See* Ex. 2030 at 18 (Hayman SEC filing noting the funds' "fiduciary duty to clients").

To date, CFAD I-VII have filed a combined sixteen IPRs against ten innovator companies, including Celgene. *See* IPR2015-00720, -817, -988, -990, -1018, -1076, -1086, -1092, -1093, -1096, -1102, -1103, -1136, -1169, -1241, -1344. The remaining eight CFAD entities (*see* Ex. 2026) appear to be lying in wait to similarly abuse the AIA by filing petitions solely to execute the RPI's investment strategy. This is contrary to the AIA's purpose, and the Board should not allow it.

If the Board permits this strategy to continue, it will be inundated with similar petitions, and no public company that relies on patents to protect its innovations will be safe from threats or unnecessary petitions from for-profit organizations misusing IPRs as investment strategies. The Board should exercise its discretion and dismiss the Petition.

III. ARGUMENT

A. <u>This petition is contrary to the AIA and its legislative history</u>

The AIA was conceived and enacted to reduce abusive litigation tactics, with a specific focus on non-practicing entities ("NPEs") or "patent trolls"—companies that "don't produce any products . . . [and] exist for one purpose only, to bring patent cases." 153 Cong. Rec. H10276 (Sept. 7, 2007); *see also, e.g.*, 157 Cong. Rec. S5319 (Sept. 6, 2011) (AIA "will cure some very clear litigation

abuses"). In other words, the AIA was enacted to hinder those "whose sole purpose is not to create but to sue":

> I am talking about patent trolls—those entities . . . whose only innovations occur in the courtroom. . . . This bill is designed to help all inventors and ensure that small businesses will continue to be a fountain for job creation and innovation.

157 Cong. Rec. H4485-86 (June 23, 2011). The AIA therefore introduced "important litigation reforms to rein in abusive lawsuits . . . so that aggressive trial lawyers do not make patent litigation their next gold mine." 153 Cong. Rec. H10276 (Sept. 7, 2007).

As part of its reforms, the AIA introduced post-grant patent challenges, including IPRs. The RPI have taken the position that anyone can file an IPR. *See* Ex. 2050 at 5. But "[t]he post-grant procedure [was] designed to allow parties to challenge a granted patent through a[n] expeditious and less costly ***alternative to litigation***." 153 Cong. Rec. E774 (Apr. 18, 2007) (emphasis added); *see also* 157 Cong. Rec. S5411 (Sept. 8, 2011) (Sen. Hatch explaining that AIA proceedings "will decrease litigation costs"). The AIA did ***not*** introduce IPRs to provide hedge funds (who have no litigable patent claim) with a vehicle to profit from affecting a public company's stock price by taking advantage of the stigma associated with IPRs.

Indeed, as the former General Counsel of the Patent Office explained, "[w]hen we developed [IPRs], we never thought people would use them this way, in an effort to move stock or as an investment vehicle." Ex. 2052 at 2. Here, the RPI are doing just that. Their sole purpose is not to create, or even to compete, but to file IPRs in an effort to move markets and to reap profits from their investments, while harming public companies and the investing public. *See, e.g.*, Ex. 2030 at 5; Ex. 2051 at 1. This is directly contrary to the intent of Congress in enacting the AIA.

B. The Board should dismiss the Petition as a sanction against the RPI for their abuse and improper use of these proceedings

Congress gave the PTO broad authority to prescribe and enforce sanctions against abusive IPRs. *See* 35 U.S.C. § 316(a)(6); *see also In re Cuozzo Speed Techs., LLC.*, 778 F.3d 1271, 1281 (Fed. Cir. 2015) ("§ 316 provides authority to the PTO to conduct rulemaking"). Pursuant to 35 U.S.C. § 316(a)(6) and 37 C.F.R. §§ 42.12(a)(6)-(7), the Board may prescribe and issue sanctions for, among other things, "abuse of process" or "any other improper use of the proceeding." Congress directed the PTO to consider several factors in drafting its regulations, including "the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings." 35 U.S.C. § 316(b).

Here, the Board instructed the parties to address the elements required to establish an abuse of process. Paper 5 at 2. The PTO has not yet defined the elements required to establish "abuse of process" or "improper use of the [IPR] proceeding" pursuant to § 42.12(a)(6)-(7). Courts and another agency have explained, however, that a party abuses a process when it uses it to achieve a goal for which the process was not designed. *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994) (an abuse of process is a "perversion of lawfully initiated process to illegitimate ends"); *In re Applications of High Plains Wireless, L.P.*, 15 F.C.C. Rcd. 4620, 4623 (2000) ("'[A]buse of process' has been defined as 'the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve.'").[3]

---

[3] The Board also instructed the parties to address the standard of proof that applies when deciding a motion for sanctions. The PTO has placed the burden on the moving party (*see* 37 C.F.R. § 42.20(c)), but has not defined a standard of proof. That said, the two standards used in other aspects of IPR proceedings are instructive: (1) "reasonable likelihood" for institution (35 U.S.C. §§ 314(a)); and (2) "preponderance of the evidence" for instituted IPRs (35 U.S.C. § 316(e)). Since Celgene's motion addresses the threshold, gatekeeping issue of whether the RPI's petition is an abuse of process or misuse of the proceedings, the "reasonable

Abuse of process can exist where a party seeks to financially benefit itself by financially harming another, such as filing "patent office pleadings [that] were essentially designed 'to accomplish some end which the process was not intended by law to accomplish'--such as frightening off [the target company's] investors." *Neumann v. Vidal*, 710 F.2d 856, 860 (D.C. Cir. 1983); *see also* 5 FCC Rcd. 3911, 3912 (1990) (petitions filed "for private financial gain" are "abusive" and a disservice to the public interest). Notably, "an abuse of process action can be maintained even where the earlier suit was ostensibly legitimate, so long as the reasons for the suit are found illegitimate." *Neumann*, 710 F.2d at 860.

Celgene submits that the Board should adopt a similar definition for "abuse of process" in this proceeding, and sanction the RPI by dismissing the Petition. *See* 37 C.F.R. § 42.12(b)(8).[4] As Senator Coons recently explained, Mr.

---

likelihood" standard should apply. Even assuming that the Board requires "preponderance of the evidence," Celgene respectfully submits that it has met that burden as well.

[4] Celgene also submits that the showing necessary to prove "[a]ny other improper use of the proceeding" is even broader than "abuse of process," and should be interpreted in light of the proper use of the proceedings as discussed during the

Spangenberg's and Mr. Bass's attack on the pharmaceutical industry is an "abuse" and "misuse of post grant proceedings." Ex. 2053 at 4. In other words, the RPI are using this proceeding for an illegitimate purpose not contemplated by the statute: causing changes in the stock prices of public companies and thereby harming the investing public. Their scheme is no different than Mr. Spangenberg's original plan to financially profit by demanding payment in exchange for not filing the IPRs. The only difference here is the means—the RPI have come up with a new strategy whereby they aim to profit by filing, instead of demanding payment not to file. Either way, the RPI's "sole purpose is not to create but to litigate." 157 Cong. Rec. H4485-86 (June 23, 2011).

The Board further instructed the parties to address any evidence of intent that supports the allegation of abuse of process. Paper 5 at 2. That evidence is discussed in detail above. *See supra* at §§ I-II. To recap, the RPI began intentionally misusing the IPR process when Mr. Spangenberg/IPNav threatened to file IPRs against Celgene's '501 and '720 patents, and later expanded their scheme into a monetary demand through IRDP. Mr. Spangenberg continued his efforts, but changed tactics when he met Mr. Bass, and the RPI now stand to gain far more

---

legislative history. Here, CFAD's actions independently amount to both an abuse of process and an improper use of the proceedings.

by taking financial positions in the stock market and then filing IPRs hoping to move the market. *See, e.g.*, Exs. 2028-2031; Ex. 2049; Ex. 2051; Ex. 2053.

To be clear, the RPI have no competitive interest in invaliding the patents on which they file, whether to operate a business or otherwise compete in the space covered by the patents. Rather, they are motivated by their desire to profit by impacting the stock market. As in *Neumann*, the RPI are filing "patent office pleadings [that are] essentially designed 'to accomplish some end which the process was not intended by law to accomplish'--such as frightening off [the target company's] investors." 710 F.2d 856. This is contrary to the AIA's purpose, and an improper use of IPRs. Likely recognizing this, Mr. Bass has publicly stated that he is filing the IPRs as part of an altruistic mission to get rid of "weak" patents and to lower drug prices for consumers. *See generally* Ex. 2050. This is disingenuous at best.

RPI Hayman Capital Management is a $2 billion investment management firm. Ex. 2028 at 3. Mr. Bass has a fiduciary duty to his investors that must take precedence over any allegedly altruistic purpose. *See* Ex. 2030 at 18. Mr. Bass and the Hayman investment firms had to investigate whether their IPR investment strategies would monetarily benefit their investors before they filed, and have a duty to continue that investigation while prosecuting their IPRs. Mr. Bass is not filing IPRs so that he can market his own competing generic drugs or to allow the

public to use patented technology; he is first and foremost a Chief Investment Officer with a fiduciary duty to make money for his clients. Any alleged altruistic motive is therefore a tactic designed to conceal the RPI's true motive.

Indeed, if altruism meant anything to the RPI, then they would have filed their threatened IPRs in 2014 instead of demanding payment. In truth, however, they care only about profit, and when they realized that there was no money to be made from filing in 2014, they went back to the drawing board and came up with their current strategy to misuse IPRs to affect the stock market. Tellingly, the RPI have only filed IPRs against patents owned by public companies.

In light of their admitted "profit motive" and lack of any legitimate competitive interest in the validity of the challenged patent, the RPI are unlike generic drug companies, who may seek to invalidate patents that would otherwise block their ability to market competing products. The RPI also have nothing in common with nonprofits, especially those that seek to invalidate patents to make technology available to the public. *See generally, e.g.*, *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, No. 12-398, 569 U.S. ____ (2013) (describing nonprofits' efforts to invalidate patents covering BRCA genes so that the public would have unfettered access to breast-cancer screens without fear of an injunction or lawsuit). Rather, the RPI merely seek, as they must, to maximize profits for their investors. Their sole motive is to move stock markets by filing IPRs. Unlike

a hypothetical nonprofit interested in eliminating drug patents as part of an attempt to speed generic entry, the RPI's mission ultimately does not turn on whether patents are upheld or invalidated—instead, they are interested in whether and how stock prices move within the time horizon of the positions they have strategically taken in the market. They are therefore using the proceedings for an illegitimate purpose, and the sanction of dismissal is appropriate.

IV. CONCLUSION

For the foregoing reasons, the Board should sanction Petitioner and the RPI, and dismiss this Petition.

Date: July 28, 2015

Respectfully submitted,

By: /F. Dominic Cerrito (Reg. No. 38,100)/

F. Dominic Cerrito (Reg. No. 38,100)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel: (212) 849-7000
Fax: (212) 849-7100
nickcerrito@quinnemanuel.com

Anthony M. Insogna (Reg. No. 35,203)
JONES DAY
12265 El Camino Real
Suite 200
San Diego, CA 92130
Tel: (858) 314-1200
Fax: (858) 314-1150
aminsogna@jonesday.com

Attorneys for Celgene Corporation

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS VI LLC
Petitioner,

v.

CELGENE CORPORATION
Patent Owner

Case IPR2015-01092
Patent 6,045,501

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certify that PATENT OWNER MOTION FOR SANCTIONS PURSUANT TO 35 U.S.C. § 316(a)(6) AND 37 C.F.R. § 42.12 and accompany exhibits (Exs. 2026-2053) were served on July 28, 2015 by filing these documents through the Patent Review Processing System, as well as e-mailing copies to sarah.spires@skiermontpuckett.com, parvathi.kota@skiermontpuckett.com, and paul.skiermont@skiermontpuckett.com.

Date: July 28, 2015

Respectfully submitted,

By: /F. Dominic Cerrito (Reg. No. 38,100)/

F. Dominic Cerrito (Reg. No. 38,100)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel: (212) 849-7000
Fax: (212) 849-7100
nickcerrito@quinnemanuel.com

Anthony M. Insogna (Reg. No. 35,203)
JONES DAY
12265 El Camino Real
Suite 200
San Diego, CA 92130
Tel: (858) 314-1200
Fax: (858) 314-1150
aminsogna@jonesday.com

Attorneys for Celgene Corporation