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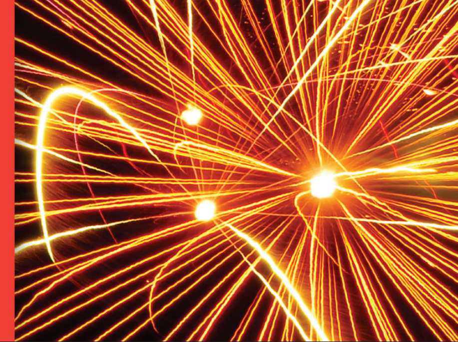
CLIENT ALERT



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Coalition for Affordable Drugs

Since the launch of *Inter Partes* Review ("IPR") in 2012 pursuant to the American Invents Act ("AIA"), the general issues before the Patent Trial and Appeal Board ("PTAB") have been straight forward. First, the PTAB would determine whether there was sufficient basis to institute an IPR proceeding. Second, if sufficient basis was found, then the PTAB determined whether any claims at issue were unpatentable. Recently, the PTAB in the five IPR filings regarding *Coalition for Affordable Drugs VI LLC ("CAD") v. Celgene Corporation* invited both parties in their motions regarding sanctions to delve into whether the IPRs should be dismissed because CAD's intent in filing the IPRs was not in the spirit of the IPR process.

A history lesson would be helpful in understanding the issues before the PTAB. In 2014, Erich Spangenberg and his company IPNav contacted Celgene and indicated they were prepared to file IPRs against two Celgene patents. Mr. Spangenberg and IPNav are well known "patent trolls" that acquire patents and assert them against such companies as Apple Inc. and Exxon Mobil Corp. Celgene was apparently not daunted by Mr. Spangenberg's reputation and did not respond to his message. Mr. Spangenberg did not file the IPRs.

Not easily discouraged, Mr. Spangenberg joined forces with hedge fund manager Kyle Bass, whom had a history of investing in a manner outside the norm. In 2006, Mr. Bass, through his company Hayman Capital, purchased certain financial instruments that essentially were a bet against the housing market boom. By 2007, Mr. Bass had won hundreds of millions of dollars with his bet. In 2007, Mr. Bass sensed weakness in the economies of several European countries, including Greece, and bought insurance against the default of bonds of the governments of those countries. That bet was also profitable. Lately, however, another bet that the value of the stock of General Motors would rise has not been profitable.

The arrangement between Mr. Spangenberg and Mr. Bass has been reported to be as follows. Mr. Spangenberg would identify important patents of a company that had weak validity positions. Mr. Bass would form a dedicated investment fund that would bet against the shares of companies that owned the identified patents and would invest in companies that would benefit from the demise of the patents. In addition, one or more companies would be formed, such as CAD, that would file IPRs against patents identified by Mr. Spangenberg.

In April 2015, CAD filed four IPRs regarding patents owned by Celgene. These patents were the subject of the previous communications made by Mr. Spangenberg and IPNav. In May 2015, CAD filed a fifth IPR regarding a third Celgene patent that had not been the subject of Mr. Spangenberg's prior communications. Celgene has asked the Board to sanction CAD and dismiss the five IPR petitions.

In its motions for sanctions, the latest of which of was filed on August 19, 2015, Celgene argued CAD's IPR petitions represented an ongoing abuse of the IPR process that should be stopped lest the PTAB be inundated with petitioners seeking to line their own pockets at the expense of public companies and their shareholders. Celgene's sanctions argument centered on CAD's use of the IPR process as part of an investment strategy being contrary to the anti-patent troll purpose of the AIA and the less costly litigation alternative the AIA created. Dismissing as mere pretext CAD's claimed altruistic motives for challenging pharmaceutical patents and seemingly villainizing a for profit corporation's interest in making a profit, Celgene likened these IPR petitions to the threatening, innovation stifling patent troll practices the AIA and its post grant patent challenges sought to rein in. Urging the PTAB to define "abuse of process" as a perversion of a lawfully initiated process to illegitimate ends, Celgene requested the PTAB to sanction CAD's illegitimate use of the IPR process to manipulate stock prices of public companies and dismiss the petitions.

In its motions filed on September 2, 2015 opposing the imposition of sanctions, CAD contended Celgene's motions were without merit. Noting that Celgene's motion relied solely on unsupported attorney argument and popular press clips, CAD first turned to the statutory language and pointed out there were no restrictions on whom may file a petition based on business form or motivation to support its position that its IPR petitions were proper. Pointing out Celgene's legislative history citations referred to the Patent Reform Act of 2007 rather than the AIA, CAD argued that its petitions served the public interest by reducing future litigation costs for generic pharmaceutical companies and furthered Congress's goal of vanquishing low quality patents. CAD went on to argue that abuse of process required a showing of both an ulterior motive and an improper act in the use of the process. CAD pointed out that no abuse of the IPR process had occurred, because the IPR petitions had not been instituted and no illegal act or perversion of the judicial process had been identified by Celgene.

CAD further argued its right to bring such IPR petitions was protected by the First Amendment to the U.S. Constitution and the Supreme Court's Noerr-Pennington Doctrine, which protect the rights of citizens to petition the government to redress their grievances. CAD's position was that this protection continued as Celgene failed to establish CAD's IPR petitions were either objectively baseless or were brought with the specific intent to further wrongful conduct through the use of the government's IPR process.

CAD concluded by arguing Celgene's motions for sanctions were premature as the PTAB can only use dismissal as a sanction after an IPR has been instituted by the PTAB. CAD relied on the specific language of 35 U.S.C. § 316 that only gave the Patent and Trademark Office the right to establish standards and procedures regarding IPR proceedings that occur after an IPR is instituted.

As of the date of this alert, no decisions regarding the motions for sanctions had been rendered by the PTAB. In addition, CAD and other related companies have filed at least thirty-two IPR petitions against at least seventeen companies and one public university. While none of these IPRs has yet been instituted by the PTAB, only three of the petitions have been affirmatively denied institution.

Besides the PTAB, CAD, Mr. Spangenberg and Mr. Bass have attracted the attention of Congress, which is now considering legislation that would essentially prevent hedge funds from filing AIA post grant patent challenges. The authors find it amusing that Mr. Bass's and Mr. Spangenberg's business model, based on the filing of IPRs, would be considered these days by the Courts to be but an abstract idea and yet the presence of such an abstract idea formulated by just two individuals has caused patent owners, Congress, and the Patent and Trademark Office to expend much time and expense to address it. It makes the authors wonder if it really is an abstract idea.

Contact Us
If you have any questions or wish to discuss how this decision impacts your business, please contact one of our Brinks Attorneys.