



THINK FORWARD

Coalition for Affordable Drugs Not Sanctioned by the PTAB

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As a follow up on our client alert sent on September 11, 2015, [available here](#), the Patent Trial and Appeal Board (“PTAB”) on September 25, 2015 declined to sanction Coalition for Affordable Drugs (“CAD”), the petitioner of thirty-three *Inter Partes* Review (“IPR”) proceedings challenging the validity of patents owned by various pharmaceutical companies. One of those companies, Celgene Corporation, the owner of three patents challenged by CAD in five IPR proceedings, asked the PTAB to sanction CAD and dismiss the petitions as an abuse of the IPR process based on CAD’s short selling investment scheme.

In a decision common to all five of the pending IPR’s between CAD and Celgene, the PTAB first rejected Celgene’s argument that CAD’s profit motive was an abuse of the IPR process, noting that nearly every IPR has an economic motive. Next, the PTAB held that Congress did not limit IPR’s to only parties having a specific competitive interest in the technology of the challenged patent, therefore the Board did not grant sanctions on this basis. Finally, the PTAB reasoned that the purpose of the America Invents Act (“AIA”) was to streamline the patent system and improve patent quality, and the Board did not find CAD’s petitions to be contrary to that purpose.

It should be noted that the PTAB made its decision despite the fact CAD had previously argued that sanctions were not available until an IPR was instituted. The PTAB’s decision, thus, appears to be a signal that the PTAB believes it has the authority to rule on motions for sanctions regarding conduct performed prior to institution of an IPR.

While the Board’s decision is likely a disappointment for Celgene, CAD seems empowered by the intermediate victory, using it as a rally call for others to join in the fight against pharmaceutical patents. Specifically, after the issuance of the decision, CAD filed its thirty-third IPR against yet another pharmaceutical company, Biogen MA, Inc. Additionally, Erich Spangenberg used his blog to encourage the filing of an IPR against Depomed’s patented painkiller Nucynta, stating that his only interest in the matter was to help lower drug prices. Mr. Spangenberg said that he would not be able to pay for the IPR against Depomed as it would make him an interested party, but he did provide a sixty-three page draft petition for inter partes review to crowdsource strong arguments for the challenge.

Though the PTAB would not sanction CAD and dismiss its IPR petitions, CAD still faces an uphill battle before it succeeds in invalidating the challenged patents. The next hurdle will be getting the PTAB to institute review, which up to this point in time has not occurred in any of CAD’s IPR petitions.

As a matter of interest, CAD is not the only hedge fund seeking to invalidate patents through the use of IPR’s. In March of this year, Ferrum Ferro Capital LLC filed an IPR challenging Allergan Inc.’s patented glaucoma drug, and recently the PTAB declined to institute the proceedings. Rather than pursuing

sanctions at the PTAB, Allergen filed suit in California federal court accusing Ferrum Ferro of extortion and malicious prosecution. It is yet to be seen whether such a strategy will successfully deter hedge funds from filing IPR's.

Contact Us

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