

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACCORD HEALTHCARE, INC., USA
Petitioner

v.

ELI LILLY & COMPANY
Patent Owner

Case IPR2013-00356
Patent 7,772,209

Before MICHAEL J. FITZPATRICK, RAMA G. ELLURU, and
SCOTT E. KAMHOLZ, *Administrative Patent Judges*.

KAMHOLZ, *Administrative Patent Judge*.

DECISION
Denying *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Accord Healthcare, Inc., USA (“Accord”) filed a petition (Paper 4) on June 14, 2013 to institute an *inter partes* review of claims 1-22 of U.S. Patent 7,772,209 (“the ’209 patent”). Accord later filed a corrected petition (Paper 6, “Pet.”). Patent Owner Eli Lilly & Company (“Eli Lilly”) filed a preliminary response (Paper 10, “Prelim. Resp.”). The Board, acting on behalf of the Director, has jurisdiction under 35 U.S.C. § 314.

The ’209 patent is involved in several civil actions for patent infringement, including *Eli Lilly & Co. v. Accord Healthcare, Inc., USA et al.*, 1:12-cv-00086-TWP-DKL (S.D. Ind.) (“the ’086 action”), filed January 20, 2012 and served January 23, 2012, and *Eli Lilly & Co. v. Accord Healthcare, Inc., USA*, 1:13-cv-00335-TWP-DKL (S.D. Ind.) (“the ’335 action”), filed February 28, 2013 and served March 7, 2013. Pet. 1; Prelim. Resp. 5-6.* The ’335 action has been consolidated into the ’086 action. Prelim. Resp. 6-7.

We deny the petition because it is time-barred under 35 U.S.C. § 315(b).

II. ANALYSIS

Eli Lilly served Accord with a complaint alleging infringement of the ’209 patent on at least two occasions: the ’086 action, on January 23, 2012, and the ’355 action, on March 7, 2013. Ex. 2004 (return of service for the ’086 action); Prelim. Resp. 5-6; *see also* Pet. 1. The earlier complaint was served more than one year before Accord filed the present petition; the latter, less than one year.

* The parties disagree as to whether the complaint in the ’355 action was served on February 28, 2013 or March 7, 2013. For purposes of this decision, we accept Eli Lilly’s representation that the complaint was served on March 7, 2013.

Section 315(b) of Title 35 of the United States Code provides:

(b) PATENT OWNER'S ACTION.—An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent. The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).

Accord argues that its petition is timely because it was filed less than one year after the date on which it was served with a complaint in the '355 action. Pet. 2-3. Accord acknowledges service on January 23, 2012 of a complaint in the '086 action, but argues that the two infringement actions concern distinct products and are based on different sets of facts. *Id.* at 3 n.1.

We reject Accord's implicit argument that the one-year period set forth in § 315(b) should not be measured from the date of service of the complaint in the '086 action. The plain language of the statute does not indicate or suggest that the filing of a later lawsuit renders the service of a complaint in an earlier lawsuit a nullity. Moreover, as the legislative history of 35 U.S.C. § 315(b) indicates, Congress intended that *inter partes* reviews should not be used as "tools for harassment" by "repeated litigation and administrative attacks." H.R.Rep. No. 112-98 at 48 (2011). Allowing such attacks "would frustrate the purpose of the section as providing quick and cost effective alternatives to litigation." *Id.*

Accord was "served with a complaint alleging infringement of the patent" on January 23, 2012. Ex. 2004. The petition was filed more than one year after that date and is, therefore, barred. *See Universal Remote Control, Inc. v. Universal Elec., Inc.*, IPR2013-00168, Paper 9 at 4 (PTAB Aug. 26, 2013).

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III. CONCLUSION

The Board denies the petition because it was not filed within the time limit imposed by 35 U.S.C. § 315(b).

IV. ORDER

For the reasons given, it is

ORDERED that the petition challenging the patentability of claims 1-22 of U.S. Patent 7,772,209 is *denied*.

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