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Paper No. 17
Date Entered: September 13, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ANOVA FOOD, LLC.
Petitioner

v.

LEO SANDAU and WILLIAM R. KOWALSKI
Patent Owner

Case IPR2013-00114
Patent 5,972,401

Before SALLY C. MEDLEY, LORA M. GREEN, and
MICHAEL J. FITZPATRICK, *Administrative Patent Judges.*

GREEN, *Administrative Patent Judge.*

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

UNIVERSITY EXHIBIT 2002

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I. BACKGROUND

Anova Food, LLC ("Anova LLC") filed a petition ("Pet.") requesting *inter partes* review of claims 2-66 and 68-75 of U.S. Patent No. 5,972,401 (the "'401 patent"; Ex. 1001) on January 17, 2013. Paper 1. Patent Owner, William R. Kowalski, filed a Preliminary Patent Owner Response on June 17, 2013.[1] Paper 8. We have jurisdiction under 35 U.S.C. §§ 6(b) and 314.

The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which states:

> THRESHOLD. -- The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

For the reasons set forth below, the Board determines that the petition was not filed timely within the statutory period of 35 U.S.C. § 315(a)(1) and, therefore, the petition requesting *inter partes* review is *denied*.

A. *Related Proceedings*

The '401 patent is involved in litigation styled *William R. Kowalski, Hawaii International Seafood, Inc. v. Anova Food, LLC; Anova Food, Inc.; Clearsmoke Technologies, Ltd.*, Case No. CV11-00795 (D. Haw.), filed on March 2, 2012. Pet. 1.

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[1] Patent Owner filed a Reformatted Preliminary Response on June 24, 2013. Paper 10. All further references to the Preliminary Response ("Prelim. Resp.") are to the Reformatted Preliminary Response.

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B. Earlier Proceedings Involving the '401 Patent

Anova Food, Inc. ("Anova Inc."), filed three civil actions challenging the validity of the '401 patent. Prelim. Resp. 1. The three civil actions were *Anova Food, Inc. v. Hawaii Int'l Seafood & Kowalski*, 1:03-CV-0815 (N.D. Ga.), filed March 25, 2003; *Anova Food, Inc. v. Hawaii Int'l Seafood & Kowalski*, 1:03-CV-2325 (N.D. Ga.), filed August 1, 2003; and *Anova Food, Inc. v. Hawaii Int'l Seafood & Kowalski*, 1:04-CV-0775 (N.D. Ga.), filed March 18, 2004. *Id.* According to Patent Owner, all three actions (collectively, "the Anova Inc. actions"), were dismissed, with the last filed action being dismissed with prejudice. *Id.*

II. STANDING

Section 315 of title 35 proscribes the relation of other proceedings or actions to *inter partes* review proceedings. 35 U.S.C. § 315(a)(1) states:

> **Inter partes review barred by civil action.**—An inter partes review may not be instituted if, before the date on which the petition for such review is filed, the petitioner or real party in interest filed a civil action challenging the validity of a claim of the patent.

The language of 37 C.F.R. § 42.101 mirrors the language of the statute, stating:

> A person who is not the owner of a patent may file with the Office a petition to institute an *inter partes* review of the patent unless:
>
> (a) Before the date on which the petition for review is filed, the petitioner or real party-in-interest filed a civil action challenging the validity of a claim of the patent.

Patent Owner asserts that Anova LLC is the same entity as Anova Inc., and thus is barred from bringing an *inter partes* review under 35 U.S.C. § 315(a)(1)

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and 37 C.F.R. § 42.101 because of the filing of the three Anova Inc. actions, and the dismissal with prejudice of the last Anova Inc. action. Prelim. Resp. 1-2.

Petitioner raises two issues in response. The first issue is whether "filed" as used in 35 U.S.C. § 315(a)(1) and 37 C.F.R. § 42.101(a) should be interpreted as requiring "filed and served." If the answer to the first inquiry is "no," the second issue raised by the Petitioner is whether Anova LLC is the same entity as Anova Inc., such that Anova LLC is barred from filing a petition for *inter partes* review of the '401 patent based on the filing by Anova Inc. of the three Anova Inc. actions.

A. *Background*

As to standing to bring the instant *inter partes* proceeding, Anova LLC certified in its petition "that the '401 Patent is available for *inter partes* review and that the Petitioner is not barred or estopped from requesting an *inter partes* review challenging the patent claims on the grounds identified herein." Pet. 3. Anova LLC did not mention the Anova Inc. actions in its petition requesting *inter partes* review of the '401 patent.

In the preliminary response, Patent Owner raised the issue of the Anova Inc. actions, and presented evidence that Anova LLC is the same entity as Anova Inc. Prelim. Resp. 1-9. A phone conference was held on June 20, 2013, between the Board and the parties, in which Anova LLC's standing to request *inter partes* review was discussed. *See* Paper 11. Anova LLC requested permission to file a reply addressing the issue of standing. *Id.* at 4. In that call, the Board authorized Petitioner's request to file a reply ("Pet. Reply;" Paper 13), and also authorized Patent Owner to file a sur-reply ("Sur-reply;" Paper 14). Paper 11 at 5. Thus, Petitioner has had ample opportunity to address the issue of standing under 35 U.S.C. § 315(a)(1).

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B. Whether "filed" as used in 35 U.S.C. § 315(a)(1) should be interpreted as "filed and served."

Anova LLC contends that "'filed' must mean 'filed and served.'" Pet. Reply. 1-2. According to Anova LLC, the purpose of the bar is to prevent harassment of the Patent Owner, and such harassment could not have occurred as none of the Anova Inc. actions was ever served on Patent Owner. *Id.* at 2.

Statutory construction "begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted).

> "Beyond the statute's text, [the 'traditional tools of statutory construction'] include the statute's structure, canons of statutory construction, and legislative history." *Timex V.I. v. United States,* 157 F.3d 879, 882 (Fed.Cir.1998) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n. 9 (1984)). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect" *Chevron,* 467 U.S. at 843 n. 9. . . .

Bull v. U.S., 479 F.3d 1365, 1376 (Fed. Cir. 2007) (parallel citations omitted).

"It is well settled law that the plain and unambiguous meaning of the words used by Congress prevails in the absence of a clearly expressed legislative intent to the contrary." *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526 (Fed. Cir. 1990). When there is no ambiguity in the words of the statute, "we turn to the legislative history to see if Congress meant something other than what it said statutorily." *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426 (Fed. Cir. 1988).

In 35 U.S.C. § 315(a)(1), the statute states that *inter partes* review may not be instituted "if, before the date on which the petition for such review is filed, the

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