UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 01/09/2017

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the appellant in favor of the appellee under Rule 39. The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection. Costs are payable to the party awarded costs. In cases between private parties, payment should be made to counsel for the party awarded costs. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

16-1544 - Phigenix, Inc. v. Immunogen, Inc.
United States Patent and Trademark Office, No. IPR2014-00676

United States Court of Appeals for the Federal Circuit

PHIGENIX, INC.,
Appellant

v.

IMMUNOGEN, INC.,
Appellee

2016-1544

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2014-00676.

Decided: January 9, 2017

GREGORY LAWRENCE PORTER, Andrews Kurth Kenyon LLP, Houston, TX, argued for appellant. Also represented by ROBERT ALAN GUTKIN, PING WANG, MICHAEL YE, Washington, DC.

ELDORA ELLISON, Sterne Kessler Goldstein & Fox, PLLC, Washington, DC, argued for appellee. Also represented by OLGA A. PARTINGTON, PAULINE PELLETIER, BYRON LEROY PICKARD, ERIC K. STEFFE.

Before DYK, WALLACH, and HUGHES, *Circuit Judges*.

WALLACH, *Circuit Judge*.

Appellant Phigenix, Inc. ("Phigenix") sought inter partes review of U.S. Patent No. 8,337,856 ("the '856 patent"), alleging that claims 1–8 ("the Asserted Claims") of the subject patent are unpatentable as obvious over various prior art references. In its final written decision, the U.S. Patent and Trademark Office's ("USPTO") Patent Trial and Appeal Board ("PTAB") found the Asserted Claims nonobvious. *See generally Phigenix, Inc. v. ImmunoGen, Inc.*, No. IPR2014-00676, 2015 WL 6550500 (P.T.A.B. Oct. 27, 2015).

Phigenix appeals. We possess subject matter jurisdiction pursuant to 28 U.S.C. § 1295(a)(4)(A) (2012). Because Phigenix has not offered sufficient proof establishing that it has suffered an injury in fact, it lacks standing to bring suit in federal court. We dismiss.

BACKGROUND

The '856 patent generally relates to "huMab4D5 ANTI-ErbB2 antibody-maytansinoid conjugates." '856 patent, Title. The claimed methods of treatment purport to combat a variety of cancers. *See id.* col. 4 ll. 26–42.

The subject dispute involves three principal parties, each of whom allege to have some relation to the '856 patent. The first party, Appellee ImmunoGen, Inc. ("ImmunoGen"), is the assignee of the '856 patent. ImmunoGen provided the second party, Genentech Inc. ("Genentech"), with a "worldwide exclusive license" to the subject patent, which Genentech uses to produce the drug Kadcyla®™ ("Kadcyla"). *Phigenix, Inc. v. ImmunoGen, Inc.*, No. 2016-1544, Docket No. 23 at Ex. A, ¶ 3 (Fed. Cir. Mar. 4, 2016) (ImmunoGen's Mot. to Dismiss ("ImmunoGen's MTD")); *see id.* at Ex. A, ¶ 2. The third party, Phigenix, describes itself "as a for-profit discovery stage biotechnology, pharmaceutical, and biomedical research company" that focuses "on the use of novel molecular

therapeutics" designed to fight cancer. *Phigenix, Inc. v. ImmunoGen, Inc.*, No. 2016-1544, Docket No. 26 at Ex. 1, ¶ 4 (Fed. Cir. Mar. 14, 2016) (Phigenix's Resp. to ImmunoGen's MTD ("Phigenix's Resp. to MTD")). Phigenix does not manufacture any products, but purportedly "has developed, and is developing, an extensive intellectual property portfolio" that includes U.S. Patent No. 8,080,534 ("the '534 patent"). *Id.* at Ex. 1, ¶ 5; *see id.* at Ex. 1, ¶ 7. Phigenix alleges that the '534 patent covers Genentech's "activities relating to Kadycla[]" and, thus, the subject matter claimed in the '856 patent. *Id.* at Ex. 1, ¶ 7; *see id.* at Ex. 1, ¶¶ 8–9, and Ex. 2, ¶ 14. Phigenix alleges that it "was forced" to bring litigation in various fora when Genentech refused its offer to license the '534 patent. *Id.* at Ex. 1, ¶ 8.

In that vein, and "[t]o further its commercialization efforts with respect to its patent portfolio," Phigenix sought inter partes review of the Asserted Claims of the '856 patent. *Id.* at Ex. 1, ¶ 10. When the PTAB found the Asserted Claims nonobvious, Phigenix sought further review in this court.

DISCUSSION

I. Phigenix Lacks Article III Standing

Before the parties fully briefed the subject appeal, ImmunoGen filed a motion to dismiss, asserting that Phigenix lacked standing to appeal the PTAB's Final Written Decision. *See generally* ImmunoGen's MTD. Phigenix opposed. *See generally* Phigenix's Resp. to MTD. A single judge of this court denied the Motion, "deem[ing] it the better course for the parties to address the standing issue in their briefs." *Phigenix, Inc. v. ImmunoGen, Inc.*, No. 2016-1544 (Fed. Cir. Apr. 20, 2016) (order denying ImmunoGen's MTD).

In its response brief, ImmunoGen argues anew that Phigenix lacks standing, Appellee's Br. 29–37, and Phige-

nix again opposes, Appellant's Br. 24–25 (incorporating the arguments made in Phigenix's Resp. to MTD); Appellant's Reply 3–16. "We have an obligation to assure ourselves of litigants' standing under Article III" of the Constitution, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (internal quotation marks and citation omitted), including when a party appeals from a final agency action, *see Massachusetts v. EPA*, 549 U.S. 497, 505–06, 516–26 (2007). As the party seeking judicial review, Phigenix bears the burden of establishing that it has standing. *See DaimlerChrysler*, 547 U.S. at 342.

A. General Article III Standing Requirements

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy" required by Article III. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (explaining that Article III discusses the powers granted to the Judicial Branch and, inter alia, "confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies'" (quoting U.S. Const. art. III, § 2)). "[T]he irreducible constitutional minimum of standing" consists of "three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). An appellant "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the [appellee], (3) that is likely to be redressed by a favorable judicial decision."[1] *Spokeo*, 136 S. Ct. at 1547 (citations omitted).

---

[1] We recite the standing framework using the designations "appellant" and "appellee," rather than "plaintiff" and "defendant," because we are the court of first instance in an appeal challenging the PTAB's final written decision in an inter parties review. 35 U.S.C. § 141(c) (2012) ("A party to an inter partes review . . . who is dissatisfied with the final written decision of the

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.