

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

SENJU PHARMACEUTICAL CO., LTD.,)
BAUSCH & LOMB, INC., and BAUSCH &)
LOMB PHARMA HOLDINGS CORP.,)

Plaintiffs,)

v.)

METRICS, INC., COASTAL)
PHARMACEUTICALS, INC., MAYNE)
PHARMA GROUP LIMITED, and MAYNE)
PHARMA (USA), INC.,)

Defendants.)

Civil Action No.: 1:14-cv-03962-JBS-KMW

Motion Date: October 3, 2014

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF ITS MOTION FOR ORDER
ENJOINING DEFENDANTS FROM PROSECUTING PARALLEL *INTER PARTES*
REVIEW PROCEEDINGS (D.I. 32)**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	2
A. Plaintiffs Do Not Seek a Preliminary Injunction	2
B. Barring or Enjoining Metrics' IPR Petitions Will Effectuate the Policy Underlying 35 U.S.C. § 315(a)(1)	3
C. Barring or Enjoining Metrics' IPR Petitions Will Avoid Conflict with the Hatch-Waxman Statutory Scheme	4
D. Barring or Enjoining Metrics' IPRs Will Protect this Court's Power to Resolve this Dispute	6
E. Barring or Enjoining Metrics' IPRs Will Avoid Potential Constitutional Problems.....	7
F. Prosecution of Metrics' IPRs Should Be Enjoined Under the First-Filed Rule Even if Metrics Had a Right to File Them	8
G. Plaintiffs Did Not "Ambush" Defendants.....	10
III. CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bristol-Myers Squibb Co. v. Royce Labs., Inc.</i> , 69 F.3d 1130 (Fed. Cir. 1995).....	10
<i>Consumer Watchdog v. Wisconsin Alumni Research Foundation</i> , 753 F.3d 1258 (Fed. Cir. 2014).....	1, 7
<i>Crosley Corp. v. Hazeltine Corp.</i> , 122 F.2d 925 (3d Cir. 1941).....	7, 8, 9
<i>Crosley Corp. v. Westinghouse Elec. & Mfg. Co.</i> , 130 F.2d 474 (3d Cir. 1942).....	9
<i>Dickinson v. Zurko</i> , 527 U.S. 150 (1999).....	7
<i>Eli Lilly & Co. v. Medtronic, Inc.</i> , 496 U.S. 661 (1990).....	10
<i>Fresenius USA, Inc. v. Baxter Int'l, Inc.</i> , 721 F.3d 1330, <i>reh'g denied</i> , 733 F.3d 1369 (Fed. Cir. 2013).....	2, 5, 6, 10
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989).....	8
<i>Katz v. Lear Siegler, Inc.</i> , 909 F.2d 1459 (Fed. Cir. 1990).....	3
<i>Lab. Corp. of Am. Holdings v. Chiron Corp.</i> , 384 F.3d 1326 (Fed. Cir. 2004).....	9
<i>Lindh v. Murphy</i> , 521 U.S. 320 (1997).....	5
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	6
<i>Patlex Corp. v. Mossinghoff</i> , 758 F.2d 594 (Fed. Cir. 1985).....	8
<i>ScentAir Tech., Inc. v. Prolitec, Inc.</i> , IPR2013-00179, Paper 9 (April 16, 2013).....	8, 9, 10

<i>Triangle Conduit & Cable Co. v. Nat'l Elec. Prods. Corp.</i> , 125 F.2d 1008 (3d Cir. 1942).....	9
<i>U.S. v. Moy</i> , 241 U.S. 394 (1916).....	7
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981).....	6
Statutes	
35 U.S.C. § 271(e)(2)(A).....	10
35 U.S.C. § 271(e)(5).....	3
35 U.S.C. § 315(a)(1).....	<i>passim</i>
35 U.S.C. § 315(a)(2).....	2, 4
Other Authority	
<i>Cooper v. Lee</i> , Brief of Plaintiff, D.I. 4, No. 14-cv-672 (E.D.Va. June 5, 2014)	8
H. Rep. No. 112-98 Part 1	5

I. INTRODUCTION

The relief Plaintiffs request is justified either (a) by construing § 315(a)(1) of the IPR provisions, in accordance with its manifest intent, as **barring** resort to IPR by a party that has provoked Hatch-Waxman Act litigation by challenging validity in an ANDA containing a Paragraph IV Certification or (b) by **enjoining** prosecution of the later-filed IPR raising the same issues under the All Writs Act. Both approaches effectuate the manifest intent behind the bar against resort to IPR where a patent challenger has already provoked district court litigation, harmonize the IPR provisions of the AIA with the dispute-resolution procedures of the Hatch-Waxman Act, protect the power of this Court to resolve this dispute, avoid duplication of effort, avoid the risk of inconsistent judgments, avoid serious Constitutional questions regarding use of IPR proceedings in cases like this, and redress a growing misuse of IPR proceedings by threatening to file IPRs in order to extract economic concessions from patent owners.

The thrust of Defendants' opposition is that the AIA as a whole was enacted in full view of the Hatch-Waxman Act, whereby the statutory language should be literally construed to say that what Defendants are trying to do must be legal. But the courts have already found that literal application of some of the IPR provisions would be violative of equally visible legal precedent. *See, e.g., Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014) (statutory provisions allowing appeal by *inter partes* reexamination petitioner inapplicable where petitioner lacks any real case or controversy). And just because something is technically legal does not make it right. All applications of the first-to-file rule involve second-filed actions that the second-filer technically had a legal right to file, but the injunction nonetheless lies to protect the jurisdiction of, and avoid interference with proceedings in, the court where the first action was filed.

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.