Bass Goes Fishing: Trouble Ahead For Pharma, Or For Hedge-Fund Trolls?

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Guest post written by

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Kyle Bass, the manager of the Texas-based Hayman Capital Management hedge fund, has apparently decided to use the new *inter partes* review (IPR) process at the US Patent and Trademark Office (USPTO) to influence stock prices of U.S. biotechnology and pharmaceutical companies. He has launched at least seven new hedge funds for investors to challenge patents on FDA-approved drugs.

The IPR process, recently established by Congress to permit defendants in patent infringement suits to quickly and inexpensively challenge the patents asserted against them, has proved to a potent weapon for patent challengers. In the roughly three years that *inter partes* review has been available, nearly 1,000 patents have been vetted by the USPTO and over 80 percent of them have had claims invalidated. Some in Congress are now questioning whether the IPR rules are perhaps skewed too far in favor of the challengers. But it is safe to say that no one in Congress intended this process to be an opportunity for Wall Street to get into the patent-busting business.

Over the past four months, Bass-directed funds, named the “Coalition for Affordable Drugs” (Series I – VII), have launched at least 16 challenges to patents owned by Acorda Therapeutics, Shire, Jazz Pharmaceuticals, Pharmacyclics, Celgene, Biogen and Pozen. So far the USPTO has not yet issued an institution decision on any of his petitions.

The scheme seems too simple to be true: short the stock of a publicly traded pharmaceutical company, file an IPR with the Patent Trial and Appeal Board (PTAB) that sends the stock price tumbling and then cover your short position by buying the stock at a hefty discount caused by the patent challenge.

But that appears to be exactly what Mr. Bass’s new funds are designed to do. Acorda Therapeutics is a public company with a $1.5 billion market cap that gets most of its revenue from the sale of Ampyra®, an FDA approved treatment for multiple sclerosis. On February 10, 2015, Bass’s first Coalition for Affordable Drugs fund filed its first IPR petition, challenging one of Acorda’s patents on Ampyra®. When news of the challenge broke, Acorda’s stock fell almost 10 percent. The Bass coalition filed another petition against a second Acorda patent on Ampyra® on February 27, 2015 – causing the stock to drop again, this time nearly 5 percent.

In the case of the Ampyra® patents, the Bass fund is arguing that the active compound was already known for MS treatment and, hence, it was obvious to use the same drug, at lower doses for longer periods of time, to treat the same disease. Bass’s fund has also asserted that the claimed pharmacokinetic (sustained release) profile of Ampyra® was described in printed publications (Acorda’s own SEC filings) more than a year before the patent was filed.

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LLC) went after Shire PLC's patent on its Lialda/Mezavant® drug for treatment of ulcerative colitis. Sold under the Lialda or Mezavant trademark in different jurisdictions, the Shire product is a controlled release formulation of mesalamine that generated more than $USD 630M in sales worldwide in 2014. The Series II fund petition asserts that Shire's claims to a sustained release formulation of mesalamine are obvious in light of prior publications.

On the same day, the Bass Coalition II also went after a second Shire patent, this time on the drug Gattex®, an FDA approved treatment for small bowel syndrome that recently had been acquired by Shire through a $5.2 billion purchase of NPS Pharmaceuticals Inc., in February. The Petition against Gattex® asserts that the patent claims are also obvious in light of the prior art. The dual attacks on Lialda® and Gattex® on April 1, 2015 appear to have had a significant short-term effect on Shire's stock – the stock price had dropped over 12 percent by April 3rd.