Paper No. __
Filed: August 20, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS VI LLC
Petitioner,

v.

CELGENE CORPORATION
Patent Owner

Case IPR2015-01103
Patent 6,315,720

PATENT OWNER REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS PURSUANT TO 35 U.S.C. § 316(a)(6) AND 37 C.F.R. § 42.12

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CFAD's focus on standing and the propriety of short selling is an attempt to divert attention from the real issue: whether the manner in which CFAD uses IPRs should be permitted. The answer is "no." The use of IPRs to execute an investment strategy—shorting stocks and then filing IPRs to drive down stock prices—is improper, and an abuse of the IPR process that turns the AIA on its head. This is true regardless of the merits of any petition. Here, *Noerr-Pennington* does not protect CFAD's actions. And despite CFAD's protests, the regulations expressly allow for "dismissal of ***the petition***"; institution of trial is not necessary.

I. CFAD DOES NOT DENY PATENT OWNER'S FACTS[1]

First, CFAD does not deny that the RPI demanded payment in exchange for not filing IPRs in 2014. Instead, CFAD argues that PO presented no evidence, but ignores that Ex. 2033 explains Spangenberg's negotiation tactics. And at least one court has recognized that the "*or else!* oozes" from statements similar to Spangenberg's 2014 email to Celgene. POM at 2-4 & Ex. 2034. Further, CFAD's counsel admitted during the Board call that authorized this motion that payment was discussed. The discussions may be confidential, but at the Board's request, Celgene can supply evidence of the RPI's substantial demand.

Second, CFAD does not deny its use of IPRs to execute its investment strategy. Instead, it argues that "short selling is common, legal and regulated."

[1] PO responds to CFAD's "material facts" in Appendix A. 37 CFR § 42.24(c).

Opp. at 6. Whether short selling is generally proper is irrelevant. CFAD offers no evidence that taking short positions on publicly-traded companies, and then using government petitions (IPRs) to drive down the companies' stock prices, is proper or contemplated by the AIA. PO presented evidence that the PTO "never thought" that IPRs would be used "to move stock or as an investment vehicle." POM at 9.[2]

Third, CFAD does not deny that it: (1) formed for-profit shell companies whose "primary purpose" is to short stocks; (2) has no competitive interest in the challenged patents; and (3) owes its investors a fiduciary duty that puts its investment strategy above any alleged altruistic mission. POM at 5-7.

II. ARGUMENT

The Petition is improper under the AIA and does not serve the public interest. CFAD's arguments to the contrary lack merit. *First*, CFAD incorrectly argues that the AIA's standing provision is fatal to POM. Opp. at 7. POM is not challenging ***who*** CFAD is, but ***how*** it is using IPR proceedings. While anyone can file a petition, the regulations expressly permit dismissal of a petition that is used for an improper purpose or if it is an abuse of process. 37 CFR § 42.12.

Second, CFAD complains about PO's citations to the 2007 PRA legislative history (Opp. at 7-8), but ignores that all of PO's arguments are supported by the

[2] Contrary to CFAD's incorrect assertion, newspapers are "evidence that is self-authenticating." *See* FRE 902(6); 37 CFR § 42.62.

AIA's 2011 legislative history (POM at 7-8). Congress clearly intended to stop non-practicing entities ("NPE"), like CFAD, from using abusive litigation tactics for personal financial gain. *Id.* Congress did not intend to allow those same NPE to turn around and use abusive IPR tactics for personal financial gain. *Id.*

Third, CFAD's caselaw does not support its position. As CFAD emphasizes, the Supreme Court encouraged "**interested persons**," such as "licensees," to challenge patents. Opp. at 9, 1. CFAD has not presented any evidence that it is an "interested person." It cannot. It does not seek to market a competing generic product, and it has not licensed Celgene's patents. Also, its IPRs (even if successful) will not result in generic competition, at least because, as CFAD admits, it has not challenged all of Celgene's Orange Book patents. Opp. at 4. In any event, FDA, not CFAD, controls access to generics, and FDA has not even tentatively approved any generic version of Thalomid®, Revlimid®, or Pomalyst®. Further, there are several interested parties that can challenge Celgene's patents under the AIA. Their petitions would be proper. CFAD's is not.

CFAD is abusing and improperly using the IPR process. CFAD does not challenge that its actions are an abuse of process under *Neumann*. Rather, it argues that "*Neumann* has been abrogated, criticized, and distinguished." Opp. at 10. This is false. *Neumann* remains good law. State and/or federal district courts cannot "abrogate" a circuit court decision, and later decisions from the same court

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