

Filed: September 14, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS II LLC.

Petitioner

v.

NPS PHARMACEUTICALS, INC.

Patent Owner

Cases IPR2015-00990 and IPR2015-01093¹

Patent 7,056,886

**CORRECTED PATENT OWNER'S BRIEF IN RESPONSE TO THE
BOARD'S REQUEST FOR ADDITIONAL BRIEFING PURSUANT TO 37
C.F.R. § 42.20(d)**

¹ Per the Board's Order authorizing this brief (*see, e.g.*, IPR2015-00990, Paper 20, fn 1), the word-for-word identical paper is filed in each proceeding identified in the heading.

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I. INTRODUCTION

This memorandum is submitted pursuant to the Board's September 1, 2015, Order. Paper 20. Respondent requests: (i) dismissal of the "Bass Group" Petitions for abuse of process and improper purpose; and (ii) an award of its attorneys' fees, and an order barring the Bass Group from making any further filings.

Congress sought, through the America Invents Act ("AIA"), to create "a[n] expeditious and less costly alternative to [patent] litigation," 153 Congr. Rec § 774 (Apr. 18, 2007), by eliminating "litigation abuses," 157 Congr. Rec § 5319 (Sept. 6, 2011), particularly those perpetrated by companies "who don't produce any products" and instead exist for the sole purpose of attempting to reap financial gain through no means other than leveraging patent litigation. 153 Congr. Rec. § S5319 (Sept. 6, 2011). While Congress may not have foreseen the Bass Group's specific gambit, it is no less offensive to the AIA's fundamental purpose. If the Petitions are not dismissed with sanctions, the Bass Group (and other copy-cat hedge funds) will further exploit IPRs for illegitimate profiteering. The Petitions subvert IPRs, make the PTO an involuntary party to stock manipulation, and thwart the AIA. They cannot be sustained.

Since January 2015, the Bass Group has manipulated stock markets through IPRs. It has requested nearly 20 IPRs, targeting patents for at least 10 drugs from at least 9 different companies – all publicly traded. Its scheme is as simple as it is

manipulative: establish short positions, file petitions to drop stock prices, make misleading statements in support, and then reap financial gains.

This is a gold-mine for hedge funds: they can control market-moving information (with the illusion of legitimacy through PTO proceedings), cause a drop in share price, and even *control its timing*. The outcome of the IPR proceeding is irrelevant (and the IPR cannot have a proper purpose) because the Bass Group wins profits simply by filing (regardless of merit) and misrepresenting IPRs (and refileing them when they fail). The Bass Group has tried to appear altruistic by pointing to purported ancillary benefits – shortening patent exclusivity, hastening generic entry, and “lower[ing] drug prices for everyone.” Ex. 2022. However, since these statements are materially misleading, they compound the market manipulation.

For example, U.S. Patent No. 7,056,886, challenged here, expires September 18, 2022, and covers formulations and methods of using and manufacturing GATTEX®. However, another Orange Book-listed GATTEX patent, U.S. Patent No. 7,847,061, expires over three years later, and is not challenged. Also, the Petitions do not challenge the ‘886 patent’s manufacturing claims, which will still be enforceable no matter what.² Therefore, contrary to the Bass Group’s public

² The first Petition, filed on April 1, 2015, did not challenge ‘886 claims 1-45.

These were not challenged until three weeks later. The Petitions cannot shorten

statements, the IPRs cannot shorten GATTEX patent exclusivity.³ Nevertheless, the day after the first Petition, the share price of Shire, Patent Owner's parent, fell 2.5% (the equivalent of a \$2 billion loss in enterprise value). Similarly, Acorda's share price fell about 10% after an IPR challenge. *See* Ex. 2019, 2; Ex. 2020, 1. Although that petition was dismissed (IPR2015-00720, Paper 15), the Bass Group later filed additional petitions against the same and other patents. *See* IPR2015-01857, -01858. Serial and repeated IPR petitions benefit short or long term shorting positions. The Bass Group's serial (and repeat) IPR petitions only amplify the market manipulation.

The Bass Group's actions constitute an abuse of process and an improper use of IPRs that strike at the core of the AIA's goals. Its program of harassment, market manipulation, and subversion of PTO proceedings for illicit gains, is a misuse of IPRs; it offends due process and is sanctionable. It is essential that the

GATTEX patent exclusivity, because of other '886 claims and other Orange Book GATTEX patents.

³ Patent term extension ("PTE") applications are pending for the '886 patent and U.S. Patent No. 5,789,379. Possible PTE does not affect the materiality or misleading nature of the Bass Group's statements that the IPRs will shorten patent exclusivity.

Board exercise its powers under 35 U.S.C. § 316(a) and 37 C.F.R. § 42.12. Sanctions, such as dismissal for abuse of process or improper purpose coupled with attorneys' fees and an order prohibiting subsequent filings, will prevent the hijacking of IPRs for manipulative profiteering, will shield patent owners and shareholders from unnecessary harm, and will deter repeated vexatious filings.

II. ARGUMENT

The Board has authority to “impose a sanction against a party for misconduct,” including for “abuse of process” or “any other improper use of the proceeding, including actions that harass.” 37 C.F.R. § 42.12. The PTO has yet to define the precise contours of “abuse of process” and “improper use”, but these concepts are well-understood.⁴ Abuse or improper use of a process or proceeding, occurs when they are used for an ulterior purpose for which they were not designed or intended.

The Bass Group's IPRs, coupled with a deceptive marketing plan to manipulate stock markets, are abuse of process and/or improper use in the sense that they use an agency “process, procedure or rule to achieve a result which that

⁴ “Abuse of process” does not have a special statutory meaning, but, the PTO can say what constitutes “abuse of process” in an agency setting, as did the FCC. *See In re Applications of High Plains Wireless, L.P.*, 15 F.C.C. Rcd 4620, 4623 (2000).

Sanctions for improper purpose also remain appropriate, as discussed herein.

process, procedure or rule was not designed or intended to achieve.” *In re Applications of High Plains Wireless, L.P.*, 15 F.C.C. Rcd 4620, 4623 (2000).⁵ Determining that IPR activities are abusive or improper is within the PTO’s powers. Furthermore, sanctions for “improper purpose” may be a patent owner’s only recourse.

A. The Bass Group’s Market Manipulation and Misrepresentations Are Improper Purposes

The Bass Group has made no secret that the Petitions are part of a “short activist strategy.” *See* IPR2015-00990, Paper 19 at 33. This is short-hand for taking short positions on stock and then using the IPR process and misrepresentations to drive down stock prices. The “beauty” of the “short activist strategy” for investors is that it eliminates significant short-selling market risk. The Bass Group knows that an IPR can cause a stock’s price to fall. It controls the timing of the IPR filing and publicizes a loss of patent exclusivity, thereby controlling the *timing* of the stock drop. Therefore, the IPR petition is simply a

⁵ Also, recognizing the scope of agency due process, as the FCC did, would not be *post hoc* application of a new rule. There is no due process violation against the Bass Group, as argued in *Coalition IV LLC v. Pharmacyclics*. IPR2015-01076, Paper 23 at 12. Sanctioning improper activity is not arbitrary or capricious, and abusive IPRs are not a due process right.

means for market manipulation.

Moreover, the Bass Group has made statements about its IPRs lowering drug prices, hastening generic competition, and shortening drug patent exclusivity (as for GATTEX) that were wrong and misleading, because other patent exclusivity remains in place. Ex. 2021, 2022.

Such misrepresentations to support stock manipulation are improper. The Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and U.S. S.E.C. Rule 10b-5 (17 C.F.R. § 240.10b-5), prohibit any act or omission resulting in manipulation, fraud, or deceit in connection with security trades.⁶ Misrepresentations defraud the entire market and, consequently, affect the stock price. *See Basic v. Levinson*, 485 U.S. 224, 241-42, 244, 247, n. 24 (1988). The Bass Group has materially misrepresented that its IPRs will shorten the GATTEX patent exclusivity and will hasten generics when they actually will not. It did not tell the public material facts – that unchallenged patents and unchallenged ‘886 patent claims would still be enforceable, and that it must win both IPRs to have the ‘886 patent delisted from the Orange Book (so a generic could avoid a paragraph IV certification for this

⁶ Manipulation particularly is intentional conduct, including spreading false or misleading information about a company, designed to deceive investors by controlling or artificially affecting the market for a security. *See* <http://www.sec.gov/answers/tmanipul.htm>.

patent). Bass has commented publicly that IPRs are an essential part of his “short activist strategy”, has solicited investors, and will receive commissions on shorting profits. *See* IPR2015-00990, Paper 19 at 33. It is undeniable that Bass’ material misstatements caused harm – Shire shareholders traded and lost money.

The evidence establishes by a preponderance and reasonable likelihood, and even clearly and convincingly that the Bass Group is using IPRs improperly. It is undeniable. This abuse of IPR proceedings diverts them to an improper purpose and warrants dismissal of the Petitions, attorneys’ fees, and prohibiting further filings.

B. PTAB Issue – Congressional Intent

1. IPRs Were Intended as Expeditious, Cost-Effective Litigation Alternatives, Not Stock Manipulation Tools

Congress recognized that the patent laws needed “to change to accommodate ... the litigation practices in the patent realm.” AIA, H. Rep. No. 112-98 Pat 1 (June 1, 2011), p. 38-40. 112th Cong., 1st Sess. at 38-39. The House focused on “providing a more efficient system for challenging patents” and for “reducing unwarranted litigation costs.” *Id.* at 39-40. A primary AIA purpose was to “limit unnecessary and counterproductive litigation costs.” *Id.* at 40. The PTO stated that “[IPR] proceedings will serve to minimize costs and increase certainty by offering efficient and timely alternatives to litigation as a means of reviewing questions of patent validity.” *Id.* at 87. The Senate concurred. *See* Cong. Record

– Sen. Feb. 28, 2011, p. S952 (“These new procedures would also provide faster, less costly alternatives to civil litigation to challenge patents.”). The House Commission explained that:

H.R. 1249 also includes provisions to ensure that patent litigation benefits those with valid claims, but not those opportunists who seek to abuse the litigation process. Many innovative companies, including those in the technology and other sectors, have been forced to defend against patent infringement lawsuits of questionable legitimacy.

* * * * *

This legislation retains an inter partes re-exam process, which allows innovators to challenge the validity of a patent when they are sued for patent infringement.

AIA Hrg. before Subcomm. on I.P., Comp., and Internet of the Comm. on the Jud. H. Rep. 112th Cong. 1st Sess. on H.R. 1249 (Mar. 30, 2011) S.N. 112-35, p. 2. A former PTO General Counsel subsequently stated “[w]hen we developed [IPRs] we never thought people would use them this way, in an effort to move stock or as an investment vehicle.” IPR2015-01092, Ex. 2052 at 2.

The Petitions offend the AIA’s fundamental purposes. The Bass Group does not otherwise have standing to challenge the GATTEX patents in a litigation. The Bass Group is a collection of hedge funds and their investors. It does not manufacture, use, offer, sell, or import any infringing products and does not induce or contribute to infringement. It is not using the IPRs as a litigation alternative; nor is there a legitimate “patent quality” purpose. It is not using the patent system to create or innovate inventions, either. *See* U.S. Const. art. 1. § 8. Instead, it is

using misrepresentations about IPRs, filed as a pretext, to game the stock market. Congress did not intend IPRs to be instruments of market manipulation and misrepresentation.

2. The Statute Requires the PTO to Ensure that IPRs Are not Used for Improper Purposes or to Harass

The PTO was given expanded authority to enact regulations to ensure IPRs accomplish their intended goals. *See* 111th Cong., 1st Sess. Sen. Rep. 111-18 (May 12, 2009), p. 18 (“[T]he changes are not to be used as tools for harassment or a means to prevent market entry Doing so would frustrate the purpose [of] providing for quick and cost effective alternatives to litigations. Further, such activity would divert resources from the research and development of inventions. As such, the Committee intends for the USPTO to address potential abuses and current inefficiencies under its expanded procedural authority.”); Cal. No. 563 – 110th Cong. 2d Sess., Sen. Rpt. 110-259, at 23 (The PTO must “ensure that regulations forbidding and penalizing harassment are enacted.”); AIA, Hrg. before Subcomm. on I.P., Comp., and Internet of the Comm. on the Jud. H. Rep. 112th Cong. 1st Sess. on H.R. 1249 (March 30, 2011) S.N. 112-35, p. 2.

Accordingly, Congress made it incumbent upon the PTO to carry out the legislative intent through powers granted in the AIA. *See* 35 U.S.C. § 316(a)(4) (“The Director shall prescribe regulations ... establishing and governing inter partes review ...”; 35 U.S.C. § 314(d) (“The determination by the Director

whether to institute an inter partes review under this section shall be final and nonappealable.”). The PTO’s actions should reflect positively on “the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings” 35 U.S.C. § 316(b). The PTO has authority to interpret and apply its own rules to give effect to their underlying purposes. *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1307-08 (Fed. Cir. 2015) (PTAB’s interpretation of IPR regulations is consistent with Congressional intent).

C. A Petitioner Cannot Have Standing if Its Purposes Are Improper

IPR standing is explained by two provisions. First, 35 U.S.C. § 311(a) provides that “... a person who is not the owner of a patent may file with the Office a petition to institute an inter partes review” Section 316(a)(6) then adds the important qualifier that no person may file an IPR petition for improper purposes. Someone who brings an IPR for an improper purpose cannot have standing. 35 U.S.C. § 316(a)(6) (“The Director shall prescribe regulations ... prescribing sanctions for ... any other improper use”). Accordingly, the Bass Group, because it has used IPRs to mislead the public and to manipulate stock, should not have IPR standing. Moreover, the merits (if any) of the IPR are irrelevant, because an improper purpose cannot be cured by arguing a potentially proper one, *i.e.*, any IPR might be said to touch upon patent quality.

Dismissal here would not violate the *Noerr Pennington* doctrine. *See, e.g., Pharmacyclics, Inc.*, IPR2015-01076, Paper 23 at 7. The Bass Group attacked that abuse of process motion by arguing that short selling is not improper *per se*, and, therefore, the *Noerr Pennington* sham exception should not apply. *Id.* at 8-9. While short selling may be lawful, co-opting IPRs and misrepresenting patent exclusivity intentionally to move the market in support of a short sale is not. The exception, therefore, does apply. Furthermore, it is an improper purpose to use IPRs and to make misleading comments about them as a market manipulation tool, whether or not short selling by itself is an acceptable hedge fund activity.

D. Consideration of Business Objectives/Intent

Misrepresentation typically involves intent. Here, Congress instructed the PTO to forbid and penalize harassment. *See* Cal. No. 563 – 110th Cong. 2d Sess., Sen. Rpt. 110-259, p. 23 (“The Director is admonished ... to ensure that regulations forbidding and penalizing harassment are enacted.”); 111th Cong., 1st Sess. Sen. Rpt. 111-18 May 12, 2009, p. 18 (“[T]he changes are not to be used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent. Doing so would frustrate the purpose of the section as providing for quick and cost effective alternatives to litigations.” “[T]he Committee intends for the USPTO to address potential abuses and current inefficiencies under its expanded procedural authority.”)

Harassment is typically an intentional tort. *See, e.g., Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974) (*intentional* infliction of emotional distress). Similarly, criminal harassment typically requires intent. *See, e.g., Code of Virginia 18.2-60.3* (stalking). Since intent is an element of harassment and harassment is an improper purpose, the intent or business objective of the Petitioner should be considered.

The Petitioner's intent or objective should also be considered because, as the PTO noted, "[i]t is important that [these proceedings] be designed to prevent delay and abusive challenges, but still enable valid challenges on meritorious grounds." 112th Cong., 1st Sess. H. Rep. 112-98 Part 1 (June 1, 2011), p. 87; *see also id.* at 48. In order to "prevent [] abusive challenges" and delays caused by repetitive filings and resulting undue docket expansion, the Board should consider extraneous evidence, including a petitioner's business objective or intent in bringing the IPR. Here, the Petitioner has made public statements about its business objectives or intent. The Bass Group aims to manipulate a targeted stock, it files and misrepresents IPRs to do so, and it cloaks its activities with humanitarian camouflage. These abuses should be sanctioned.

E. Social Cost/Benefit of Sanctions v. Merit Consideration

The statute requires the Director to "prescribe regulations ... requiring that the final determination in an inter partes review be issued not later than 1 year after

the date on which the Director notices the institution of a review” 35 U.S.C. § 316(a)(11). Expeditious IPR disposition is essential to the AIA. The sanctions here are a threshold issue that will be more quickly and easily dispositive than time-consuming merit resolution of IPRs that are admittedly pretexts for a move on the stock markets.

Sanctions deter or warn future petitioners who contemplate improper uses, they reform improper behavior, and they educate. For example, district courts use Rule 11 to consider whether a pleading is presented for an improper purpose. *See Jimenez v. Madison Area Tech. Coll.*, 321 F.3d 652, 656 (7th Cir. 2003). The Fourth Circuit elaborated that “[i]f a complaint is not filed to vindicate rights in court, its purpose must be improper.” *In re Kunsler*, 914 F.2d 505, 518 (4th Cir. 1990). If a complaint is filed to vindicate rights in court as well as for some other potentially improper purpose, “[t]he purpose to vindicate rights in court must be central and sincere.” *Id.* “Circumstantial facts surrounding the filing may also be considered as evidence of the signer’s purpose.” *Id.* at 519.

The Rule 11 comments explain: “[t]he word ‘sanctions’ ... stresses a deterrent orientation.” Fed R. Civ. P. 11, Notes of Advisory Comm. on 1983 Amendments. The Rule permits a court “to award expenses, including attorney’s fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation.” *Id.* Furthermore, “deterrence may be ineffective unless the sanction not

only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation.”

Id. These reasons for, and social benefits of, litigation sanctions apply equally to IPRs.

Additionally, parties to PTO proceedings also owe duties of candor and good faith. 37 C.F.R. § 42.11; *Cargill, Inc. v. Canbra Foods, Ltd.*, 476 F.3d 1359, 1368 (Fed. Cir. 2007) (“self-serving manipulation of highly material evidence can hardly be called ‘good faith,’” re analogous Rule 56) (overruled on other grounds). Here, the Bass Group failed to disclose its improper purposes.

Finally, the Board has discretion over which petitions it will grant and can deny petitions that hinder “the ability of the Office to timely complete [IPR] proceedings.” 35 U.S.C. §§ 314(a), 316(b). The Bass Group has no legal right under the IPR statutes. *See Consumer Watchdog v. WARF*, 753 F.3d 1258, 1262 (Fed. Cir. 2014) (Plaintiff had no connection to the challenged patent, so “the Board’s denial . . . did not invade any legal right conferred.”).

III. CONCLUSION

The Petitions should be dismissed, attorneys' fees should be awarded to Patent Owner, and subsequent petition filings should be prohibited for the foregoing reasons.⁷

Respectfully submitted,

Dated September 14, 2015

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⁷Patent Owner certifies that this corrected brief was filed to correct a single typographical error, specifically, the deletion of the word "not" from the fourth sentence on page 11 of "Patent Owner's Brief in Response to the Board's Request for Additional Briefing Pursuant to 37 CFR 42.20(d)" submitted September 10, 2015.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Corrected Patent Owner's Brief In Response to the Board's Request For Additional Briefing Pursuant to 37 C.F.R. § 42.20(D) was served via electronic mail on September 11, 2015 on attorney for Petitioner:

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