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AVENUES FOR ADDRESSING THE EXPLOITATION OF *INTER PARTES* REVIEW PROCESS BY THIRD PARTIES

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An innovative new technique for gaming the financial markets emerged in late 2014 when a hedge fund manager began filing inter partes *review petitions with the United States Patent and Trademark Office against pharmaceutical companies in an attempt to profit from the short selling of pharmaceutical stocks. The pharmaceutical industry deemed this practice an abuse of process and attempted to regulate and deter these tactics by protesting to the Patent Trial and Appeal Board to sanction those who use the strategy and for the Patent and Trademark office to issue a new policy banning the strategy. However, the Board declined to impose sanctions on hedge fund manager Kyle Bass for abuse of process. Options to halt the strategy include Congressional action, agency action, and Judicial Review of the Patent and Trademark Office's ruling. This Recent Development will present means of regulating this activity and ultimately argue that the Patent Trial and Appeal Board made the best decision by leaving the issue for Congressional action.*

I. INTRODUCTION

The United States Patent and Trademark Office ("USPTO") is the federal agency responsible for granting United States patents in accordance with Article I, Section 8, Clause 8, of the U.S. Constitution to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1]

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[1] U.S. CONST. art. 1, § 8, cl. 8; *About Us,* USPTO, http://www.uspto.gov/about-us (last visited Oct. 20 2015).

In 2011, Congress passed the Leahy-Smith America Invents Act ("AIA") and established broad patent reform.[2] One of the reforms was the establishment of the *inter partes* review ("IPR") system for challenging the validity of patents at the USPTO through the Patent Trial and Appeal Board ("PTAB").[3] As part of an investment strategy, the manager of the hedge fund Hayman Capital Management LP, Kyle Bass, targeted pharmaceutical drug patents with IPR petitions primarily as a method to short sell stocks.[4] Bass filed the IPRs using a series of shell companies he created as limited liability companies ("LLC").[5]

The LLCs are named the Coalition for Affordable Drugs ("CFAD") and serve the purpose to invalidate weak pharmaceutical patents so generic pharmaceutical companies can move in and lower drug prices, while also serving his own purpose in enabling him to short sell related stock.[6] Bass and his CFADs have filed more than thirty-two IPR petitions and, regardless of the IPR outcomes, show no sign of slowing down.[7] Bass's actions have

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[2] *See generally* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 341 (2011).

[3] *Id.* For a description of IPR and the PTAB, see *infra*, Part II.

[4] For a description of short selling stocks, see *infra,* Part II.A.

[5] Don Seiffert, *Kyle Bass has lost a battle, but not the war, in his fight with Big Pharma*, BOSTON BUSINESS JOURNAL (Sept. 1, 2015), http://www.bizjournals.com/boston/blog/bioflash/2015/09/kyle-bass-has-lost-a-battle-but-not-the-war-in.html. Bass has announced that his Coalitions are additionally meant to introduce cheaper generics by invalidating weak patents that drive drug prices up; however, he has also commented that motive is "incidental" to his hedge fund managing strategy. *Id.* For a detailed discussion on shorting stock, see *infra*, Part II.B.

[6] Ed Silverstein, *Should hedge funds have standing in IPR?*, INSIDE COUNSEL (July 22, 2015), http://www.insidecounsel.com/2015/07/22/should-hedge-funds-have-standing-in-ipr.

[7] Kristel Schorr et al., *The Road Ahead For Kyle Bass's IPRs*, LAW360 (Aug. 28, 2015), http://www.law360.com/articles/696911/the-road-ahead-for-kyle-bass-s-iprs; Susan Decker*, Bass Vows to Keep Fighting U.S. Drug Patents After Setbacks*, BLOOMBERG BUSINESS (Sept. 03, 2015), http://www.bloomberg.com/news/articles/2015-09-03/bass-vows-to-keep-fighting-u-s-drug-patents-after-setbacks.

caused some pharmaceutical companies to cry abuse,[8] and a few targeted companies have filed for sanctions [9] or argue in preliminary responses that there is an abuse of process.[10] Despite immense success in bringing down stock prices with his first three IPR challenges by just filing the challenge, the market seems to have either adjusted to Bass's tactics or learned about the possible volatility of patents, as his later challenges have not all led to a significant decrease in stock prices of the targeted companies.[11] The PTAB tackled the issue of using the IPR process to short stock head-on in a ruling denying sanctions, stating that "[p]rofit is at the heart of nearly every patent and nearly every *inter partes review*."[12] More recently, the PTAB has instituted review on seven of CFAD's petitions,[13] as well as another hedge fund's petition, giving some credence to the investment strategy.[14] However, the

[8] Schorr et al., *supra* note 7. "Biotechnology Industry Organization's (BIO) president and CEO Jim Greenwood has said, 'Billionaire hedge fund manager Kyle Bass continues to attack biotechnology companies with endless series of IPR . . . challenges to legitimate patents. . . . His abuse of this system highlights the need for reform.'" Ed Silverstein, *Bass wins single victory at PTAB but questions remain who will lose 'war'*, INSIDE COUNSEL (October 2015).

[9] *Id.*

[10] Decker, *supra* note 7, at 3.

[11] *See* J. Gregory Sidak & Jeremy O. Skog, *Attack of The Shorting Bass: Does the Inter Partes Review Process Enable Petitioners to Earn Abnormal Returns?*, 63 UCLA L. Rev. Discourse (forthcoming Nov. 2015).

[12] Ryan Davis, *Hedge Fund Gets PTAB To Eye VirnetX Patents In Apple Case,* LAW360 (Oct. 8, 2015), http://www.law360.com/articles/712078/hedge-fund-gets-ptab-to-eye-virnetx-patents-in-apple-case; Lisa Shuchman, *Kyle Bass Wins a Procedural Victory in Battle Against Big Pharma*, CORPORATE COUNSEL. (Sept. 28, 2015), http://www.corpcounsel.com/id=1202738395997/Kyle-Bass-Wins-a-Procedural-Victory-in-Battle-Against-Big-Pharma?slreturn=20151006134353.

[13] Tasha M. Francis, *Kyle Bass Group Gets PTAB to Review 4 Celgene Patents,* LEXOLOGY (Oct. 28, 2015), http://www.lexology.com/library/detail.aspx?g=f426cc1a-ce41-4347-8640-9e1049f5a6c4.

[14] Matthew Bultman, *Hedge Fund Group Gets Review Of Bowel Disease Drug Patent*, LAW360 (Oct. 8, 2015), http://www.law360.com/articles/712592/ hedge-fund-group-gets-review-of-bowel-disease-drug-patent; Davis, *supra* note 12.

fear is that this investment strategy could spur copycat[15] financiers to adopt his strategy and clog the IPR proceedings with dubious petitions backed by pure financial motivations and stymying innovation by introducing a next-generation IPR troll.[16] This Recent Development argues that the USPTO's policy, revealed in the PTAB's recent ruling, is correct because the PTAB did not act and contravene express statutes, despite the USPTO having the power to address the issue with more force that lies within its Constitutional charge,[17] delegated powers,[18] and status as a "custodian of knowledge." Furthermore, this Recent Development addresses other avenues for dealing with the "next-generation 'IPR troll[s]'",[19] such as Congressional action, Securities and Exchange Commission and USPTO action, and judicial review.

Part II introduces how the current laws and regulations operate, including short sales, IPR petitions, and the motivations for its implementation. Part III discusses Bass's strategy and the exploitation of the IPR process for pecuniary gain. Part IV evaluates whether any intervention is required. Part V addresses methods the USPTO could employ to respond to the exploitation of the IPR system. Part VI concludes that that the USPTO and PTAB were in waiting for Congress to provide guidance and address the issue while deciding the IPR petitions based on the merits of the claims.

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[15] Some other hedge funds and financiers have filed petitions in order to short stock. *See* Michelle Carniaux, *PTAB Crashers: A Look at how they are doing in the PTAB*, LEXOLOGY (Oct. 19, 2015), http://www.lexology.com/library/detail.aspx?g=89b0247b-5614-4819-a0f2-bd3f999e6a4e.

[16] Joseph Allen, *It's Time to Whack 'IPR Trolls'*, IPWATCHDOG (June 22, 2015), http://www.ipwatchdog.com/2015/06/22/its-time-to-whack-ipr-trolls/id=58902/.

[17] "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]" U.S. CONST. art. I, § 8, cl. 8.

[18] *See* 35 U.S.C. § 2(b)(2)(A) (2012).

[19] Schorr et al., *supra* note 7, at 26.

II. SHORT SALES, THE AIA, AND INTER PARTES REVIEW

A. *Short Selling of Stocks*

With the 2008 recession still fresh in mind, the country continues to scrutinize and criticize the activities of Wall Street, including the practice of short selling.[20] Investments in stocks can be split into two categories: long and short.[21] When an investor "goes long," they are betting that the stock will gradually increase in price, and plan to gain from selling at a higher price.[22] Conversely, when they "go short," they are taking the gamble that the stock price will decrease in the near future.[23] In a typical short sale, a seller borrows shares of stock and then sells stock that he or she believes will fall in price. After the stock price has fallen, the short seller then re-purchases the stock at the lower price,[24] and returns the stock to the lender.[25] If the buy-back price is lower than the selling price, the short seller gains a profit, which is the difference between the selling price and the buy-back price, from that transaction. The short selling of stocks was once deemed "the greatest evil that has been permitted or sanctioned by the

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[20] Short selling in the struggling financial industry was widely debated to be a major contributor to the 2008 market crash and subsequent recession, one still fresh in the minds of public. Emilios Avgouleas, *A New Framework for the Global Regulation of Short Sales: Why Prohibition is Inefficient and Disclosure Insufficient*, 15 STAN. J.L. BUS. & FIN. 376, 380 (2010).

[21] *Short Selling: What is Short Selling?*, INVESTOPEDIA, http://www.investopedia.com/university/shortselling/shortselling1.asp (last visited Oct. 31, 2015).

[22] *Id.*

[23] *Id.*

[24] There is no requirement to re-purchase the stock from the buyer. For instance, the short seller can simply purchase the amount of borrowed stock from any seller in the market.

[25] Jonathan R. Macey, *Symposium on the Regulation of Secondary Trading Markets: Program Trading, Volatility, Portfolio Insurance, and the Role of Specialists and Market Makers: Restrictions on Short Sales: an Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash,* 74 CORNELL L. REV. 799, 799-800 (1989). For regulation of short sales, see generally 17 C.F.R. § 242.200 (2015).

Government . . . ." [26] Some conventional investors view short sellers negatively because they are betting on bad news, such as a company's economic struggle. [27] Some also believe that short sellers are heavy contributors to market crashes and recessions, partly because they gain tremendously—while most investors lose financially—when stock prices drop, and because they capitalize on market fear and panic.[28] There are even a few "bad apples" that take the short position on a stock and disseminate unsubstantiated rumors and bad news to drive down stock prices and gain from the artificially low price of the stock.[29]

Despite the negative perception of short sales, "a large number of empirical studies indicate that short selling is an important factor of market efficiency when it comes to pricing of securities and rapid dissemination of unpublished information."[30] However, one persistent concern is the possibility of using short sales "in order to . . . act profitably on inside information."[31] While the fear of market manipulation and threat of insider trading exists, those

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[26] Short Selling of Securities: Hearings on H.R. 4, H.R. 4604, H.R. 4638, H.R. 4639 Before the H. Comm'n on the Judiciary, 72d Cong., 1st Sess., pt. 1, at 7 (1932).

[27] Bridget Yullie, *Short Selling: Ethics and the Role of Short Selling*, INVESTOPEDIA, http://www.investopedia.com/university/shortselling/shortselling4.asp (last visited Oct. 31, 2015).

[28] *Id*.

[29] *Id. See generally* Rick Wayman, *The Short and Distort: Stock Manipulation in a Bear Market,* Investopedia, http://www.investopedia.com/articles/analyst/030102.asp (Last Visited Oct. 31, 2015); David P. McCaffery, *Review of The Policy Debate Over Short Sale Regulation During the Market Crisis,* 73.2 Alb. L. Rev. 483 (2010), http://www.albany.edu/McCaffrey-Short-Sale-Regulation.pdf. In recent news, "Biotech bad boy" Martin Shkreli had also attempted a similar hedge fund strategy as Bass, but instead petitioned Food and Drug Administration to not approve drugs while holding those pharmaceutical companies' stocks in a short position. Ed Silverman, *Biotech exec Martin Shkreli has a history of tough tactics*, BOS. GLOBE (September 26, 2015), https://www.bostonglobe.com/business/2015/09/25/how-martin-shkreli-biotech-pariah-put-cancer-patients-risk/fxjUV8alj28LESmmOF7IbO/story.html.

[30] Avgouleas, *supra* note 20, at 379, 403.

[31] *Id.* at 379.

issues are under the jurisdiction of the Securities and Exchanges Commission ("SEC").[32]

B. *The AIA and IPR*

In 2011, the Leahy-Smith America Invents Act ("AIA") was signed into law by President Obama with broad patent reform in mind. One stated purpose was to "establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counter-productive litigation costs."[33] The AIA changed the United States patent filing system from a first-to-invent system to a first-to-file system mirroring the laws of many other countries, which also reduced litigation costs by reducing interference proceedings.[34] Among other changes, the AIA also created a "toolbox of new or fortified proceedings" to "weed out" suspect or "low quality" patents that should have never been initially issued, which the IPR proceeding is a part of.[35] An IPR allows any person or company to request that the USPTO, through

[32] "[A]ll investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it." *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation.* SEC: WHAT WE DO. http://www.sec.gov/about/whatwedo.shtml.

[33] *See* Press Release, Sen. Patrick Leahy, Senate Begins Debate on Leahy-Smith America Invents Act (Sept. 6, 2011), http://www.leahy.senate.gov/press/senate-begins-debate-on-leahy-smith-america-invents-act.

[34] A patent is available as prior art on the date the patent or patent application was effectively filed, the actual date, or the earliest application date if the patent or patent application is entitled to claim a right of foreign priority or domestic benefit and describes the subject matter. *See* 35 U.S.C. § 100 (2012); America Invents Act (AIA) Frequently Asked Questions, UNITED STATES PATENTED AND TRADE OFFICE, www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/america-invents-act-aia-frequently-asked. Interference proceedings were previously used to determine the priority of inventions, (who invented what first). It was estimated that the proceeding would cost an average of $600,000, which generally only wealthy inventors or corporations could afford. *See* Gene Quinn, *Change? Derviation May Feel a Lot Like Interference Practice*, IPWATCHDOG (Apr. 9, 2012), http://www.ipwatchdog.com/2012/04/09/change-derviation-may-feel-a-lot-like-interference-practice/id=24020/.

[35] Sarah Tran, *Policy Tailors and the Patent Office*, 46 U.C. DAVIS L. REV. 487, 498-99 (Dec. 2012).

the PTAB,[36] review a granted patent to reconsider whether the challenged patent satisfies two conditions for patentability: novelty and non-obviousness.[37] A person who is not the owner of a patent is able to file a petition to institute an IPR of a patent, and if there is a reasonable likelihood that a petitioner can prevail with at least one of the claims in the petition challenged, review will be instituted.[38] If review is instituted, the petitioner has the burden of proof to show by a preponderance of the evidence that a patent claim is invalid.[39] In line with the mission of the AIA to streamline the system, the IPR procedure ensures that the PTAB will aim to contemplate more petitions by requiring the PTAB to reach a decision in instituting review within three months of receiving a patent owner's preliminary response to petition,[40] and reach final decisions of validity in not over one year since the date of

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[36] The Patent Trial and Appeal Board was created by 35 U.S.C. § 6, and it is the judicial arm of the USPTO. The Board's duties consist of:

> (1) on written appeal of an applicant, review adverse decisions of examiners upon applications for patents pursuant to section 134(a); (2) review appeals of reexaminations pursuant to section 134(b); (3) conduct derivation proceedings pursuant to section 135; and (4) conduct *inter partes* reviews and post-grant reviews pursuant to chapters 31 and 32.

35 U.S.C. § 6(b) (2012).

[37] *See* 35 U.S.C. §§ 311–19 (2012). For an invention to be novel, it must not be described in any other patent, printed publication, or widely known; for an invention to be non-obvious, it should display "ingenuity beyond the compass" of a person of ordinary skill in the art, meaning that the differences between the invention and any prior art must not be so trivial that one of ordinary skill in the art could easily see it is already known in whole, or in part from separate references. *See* 35 U.S.C. §§ 102–03 (2012); UNITED STATES PATENT AND TRADEMARK OFFICE, USPTO Inter Partes Review, http://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review (last visited Sept. 26, 2015).

[38] UNITED STATES PATENT AND TRADEMARK OFFICE, Inter Partes Review, http://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review (last visited Sept. 26, 2015).

[39] 35 U.S.C. § 316(e) (2012).

[40] Or if the patent owner chooses not to file a preliminary response, the last date of response eligibility. 35 U.S.C. § 314(b) (2012).

institution of review.[41] IPR is often considerably less expensive than full litigation.[42] One reason IPR can be less expensive and more expedient than patent litigation is because courts often repeatedly grant a stay if there happens to be any pending litigation within the district courts, conserving resources while waiting for the "tech-savvy" PTAB to come to a decision.[43] Adding to the price and speed calculus is the fact that IPR proceedings have a lower standard of proof than at trial for determining a patent claim's validity: a preponderance of the evidence.[44] The reduction

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[41] 35 U.S.C. § 316(a)(11) (2012). As of September 14, 2014, IPR petitions have seen an average 75 petitions per month, compared to 12.5 *Inter Partes Reexamination* ("IPX") petitions per month; IPR decisions are, on average, rendered within 15 months, compared the average 36 months under IPX. *See* Brian J. Love & Shawn Ambwani, *Inter Partes Review: An Early Look at the Numbers*, 81 U. CHI. L. REV. DIALOGUE 93 (2014).

[42] For example, Engellenger estimates IPR proceedings to cost roughly $300,000–500,000, while full litigation could be from $2 million - $6 million. Tom Engellenger, Am. Intellectual Prop. Law Ass'n, Comparison of Federal Court, ITC, and USPTO Proceedings in IP Disputes, slide 31. (Jan. 2014), http://www.aipla.org/committees/committee_pages/IP-Practice-inJapan/Committee%20Documents/2014%20MWI%20Presentations/Tom%20Engellenner%20-%20IP%20Dispute%20Cost%20Comparison.ppt. *See generally* Eric W. Schweibenz et al., *Automatic Stay of Litigation Pending Inter Partes Review?: A Simple Proposal for Solving the Patent Troll Riddle*, 7 ABA SECTION OF INTELLECTUAL PROPERTY: LANDSLIDE 1LAW (2014), http://www.oblon.com/content/uploads/2015/08/ABA_LAND_v007n01__automatic_stay_of_litigation_pending_inter_partes_review_a_simple_proposal_for_solving_the_patent_troll_riddle-authcheckdam.pdf.

[43] Schweibenz et al., *supra* note 42 at 2–3. Courts usually use a three factor test to determine whether a stay in proceedings is appropriate: (1) the stage of the litigation, (2) simplification of the issues in or at trial, and (3) whether a stay will create undue prejudice to the nonmoving party or a clear tactical advantage to the moving party. *See* Telemac Corp. v. Teledigital, Inc., 450 F. Supp. 2d 1107, 1111 (N.D. Cal. 2006). There is a "liberal policy in favor of granting motions to stay proceedings pending the outcome of USPTO reexamination or reissuance proceedings." ASCII Corp. v. STD Entnmen't USA, Inc., 844 F. Supp. 1378, 1381 (N.D. Cal. 1994).

[44] The petitioner has the burden of proving by a preponderance of the evidence that one or more claims of the patent in suit are invalid. At court, there is a presumption of validity of a granted patent against which the alleged

in cost and time make IPR an attractive vehicle for hedge fund managers, such as Bass, that have taken short positions on pharmaceutical stocks and are looking to manipulate share prices for profit.[45]

The USPTO has limited resources. The USPTO's budget, although set by Congress, comes entirely from the fees it collects instead of taxpayer dollars.[46] Because of the constrained budget, manpower is also limited.[47] Compounding the limited resources is the growing popularity of IPRs; IPR petitions have increased from an average of forty-one per month, in fiscal year 2013, to 142 per month in fiscal year 2015.[48]

The hedge fund strategy of CFAD and its copycats is not entirely aligned with the stated goals of the AIA, or the overall goals of the patent system given the resources of the USPTO. The IPR process is susceptible to exploitation because IPR petitions are more enticing than full-blown litigation; any third parties, for instance, financiers, are allowed to challenge patent validity. IPR petitions already comprise 90% of total petitions before the

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infringer then bears the burden of disproving by clear and convincing evidence. Sidak & Skog, *supra* note 11, at 5.

[45] *Id.* at 5–6.

[46] The budget for the US Patent and Trademark Office is set before the office knows know how much is collected in fees. For instance, the fee for IPR petition request for up to 20 claims is $9,000. This goes to the Patent and Trademark Fee Reserve Fund, and can be accessed upon Congressional grant, if the Office has collected more fees than the budget set. Ryan Davis, *Obama Budget Calls For $252M Less For USPTO*, LAW360, (Feb. 2, 2015, 4:39 PM), http://www.law360.com/articles/617421/obama-budget-calls-for-252m-less-for-uspto; *see also Patent Trial and Appeal Fees*, USPTO, http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule (last visited Nov. 23, 2015).

[47] If the budget is set, salaries and the number of examiners are set. In 2014, there were 9,302 patent examiners. U.S. PATENT AND TRADEMARK OFFICE, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT 11 (2014), http://www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf.

[48] UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD STATISTICS 3 (2015), http://www.uspto.gov/sites/default/files/documents/2015-04-30%20PTAB.pdf.

PTAB.[49] CFAD's tactics will undermine the agency's ability to efficiently and effectively deal with patent challenges through IPR because CFAD is consuming the USPTO's resources for purely financial gain without any interest in using a particular technology or in innovation by further development. Other copycats have already adopted his method and have filed IPR petitions while taking the short position, which will further slow down the IPR process and PTAB proceedings.[50] Because the PTAB requires a decision on institution to be within three months of response and any final decision to be within a year of institution, the PTAB might become inundated with these types of IPR petitions if they continuously receive more IPR petitions. The PTAB may also struggle to give full attention to each petition, unless the USPTO massively expands the PTAB. Other concerns motivating the passage of the AIA, such as attempts to curtail short selling, will be discussed in Parts III and IV.[51]

III. COALITION FOR AFFORDABLE DRUGS' STRATEGY

Although certainly not the first to capitalize on market uneasiness,[52] Bass has ingeniously constructed his strategy. Instead of filing IPR petitions under his holding company, Hayman Capital Management, he files his IPR petitions using one of his shell CFADs.[53] 35 U.S.C. § 311(a) has been interpreted to give any person the ability to challenge a patent;[54] this allows an entity such

[49] *Id.* at 2.
[50] Davis, *supra* note 12.
[51] *See infra* Part III and Part IV.
[52] William A. Ackman, a hedge fund manager, is using a similar tactic by undermining market confidence in Herbalife with threats of legal action and lobbying efforts, all the while taking the short position on its stock. Michael S. Schmidt et al., *After Big Bet, Hedge Fund Pulls the Levers of Power*, N.Y. TIMES (Mar. 9, 2014), http://www.nytimes.com/2014/03/10/business/staking-1-billion-that-herbalife-will-fail-then-ackman-lobbying-to-bring-it-down.html?_r=1.
[53] Sidak & Skog, *supra* note 11; his CFADs are registered limited liability companies.
[54] Decision Denying Sanctions Motion, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092 at 3 (P.T.A.B. Sept. 25, 2015).

as a hedge fund to file an IPR petition.[55] Although the actual motivation behind the use of a CFAD instead of his hedge fund company is not entirely clear, Bass contends that his CFADs were formed for a legitimate and altruistic rationale: to challenge "weak patents in an effort to lower drug prices."[56] Instead, the pharmaceutical industry contends that Bass and other hedge fund managers are filing these IPR petitions in order to create market fear about the viability of a pharmaceutical company's patents, which drives down stock prices.[57] They suggest that there is "nothing in this man's history to suggest he has any interest in lowering health-care costs," and point out his partnership with well-known "patent-troll"[58] Erich Spangenberg.[59] Drug company Celgene,[60] one of Bass's targets, filed a motion for sanctions[61] in

[55] "Subject to the provisions of this chapter, a person who is not the owner of a patent may file with the Office a petition to institute an *inter partes* review of the patent." *See* 35 U.S.C. § 311 (2012).

[56] Tasha Francis, *Kyle Bass' IPRs: Are You Next?*, FISH & RICHARDSON (Sept. 8, 2015), http://fishpostgrant.com/alert/kyle-bass-iprs-are-you-next/.

[57] Shuchman, *supra* note 12.

[58] A patent troll is usually someone who has no interest in the technology or industry, but buys weak and dubious patents and then threatens litigation utilizing those patents as a weapon. Their targets are either tolled a licensing fee or settlement fee to avoid costly litigation. David Segal, *Has Patent, Will Sue: An Alert to Corporate America* (July 13, 2013), N.Y. TIMES, http://www.nytimes.com/2013/07/14/business/has-patent-will-sue-an-alert-to-corporate-america.html; Matteo Sabatini, *NPEs vs. Patent Trolls: How to Build a Healthy Innovation Ecosystem*, IPWATCHDOG, (Feb. 4, 2015), http://www.ipwatchdog.com/2015/02/04/npe-patent-trolls-innovation-ecosystem/id=54427/ (Non-practicing entities (NPEs) are patent owners that have no interest in using or developing the patented invention, although not all NPEs are patent trolls.).

[59] Erich Spangenberg has been called "one of the most notorious patent trolls in America" and is infamous within the patent-troll world. Earning over $25 million a year with IPNav, his business mainly centered on trolling patents, which has sued 1,638 companies as of 2013. Segal, *supra* note 58; Joseph Walker & Rob Copeland, *New Hedge Fund Strategy: Dispute the Patent, Short the Stock*, WSJ (April 7, 2015), http://www.wsj.com/articles/hedge-fund-manager-kyle-bass-challenges-jazz-pharmaceuticals-patent-1428417408.

[60] *See About Celgene*, CELGENE CORP., https://www.celgene.com/about/ (last visited Nov. 23, 2015).

the PTAB criticizing Bass for his activities, claiming that his CFADs and his altruistic motives are a "front" and his motives a "pretext" for manipulating stock prices and profiting from shorting their stock.[62] In response to the motion for sanctions from Celgene, CFAD stated its petitions "are part of its investment strategy, and [CFAD] will only succeed by invalidating patents, serving the socially valuable purpose of reducing drug prices artificially priced above the socially optimum level."[63]

A. *Early Failures of Institution*

In late August 2015, the PTAB declined to institute two of Bass's earlier IPR petitions against Acorda Therapeutics and its Multiple Sclerosis ("MS") drug Ampyra.[64] CFAD claimed that two posters presented at meetings qualified as prior art under 35 U.S.C.

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[61] Patent Owner Motion for Sanctions Pursuant to 35 U.S.C. § 316(a)(6) and 37 C.F.R. § 42.12, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092 (P.T.A.B. July 28, 2015); sanctions under 37 C.F.R. § 42.12(a)(6) state that the PTAB may impose a sanction against a party for abuse of process. Section 42.12(b) lists possible sanctions, and the most applicable sanctions are: "[a]n order providing for compensatory expenses, including attorney fees" and "[j]udgment in the trial or dismissal of the petition." 37 C.F.R. § 42.12(b) (2015); "[i]n all [thirteen] cases in which a Patent Owner Preliminary Response has been filed to date, the patent owner has argued that CFAD's petition is an abuse of process or otherwise contrary to the underlying intent of the AIA. In five cases, the patent owner has filed a separate motion for sanctions based on abuse of process, and in at least one other case, the PTAB has authorized the patent owner to file such a motion." Schorr et al., *supra* note 7. The Director of the USPTO has the power to prescribe sanctions for "abuse of discovery, abuse of process, or any other improper use of the proceeding, such as to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding." 35 U.S.C. § 316(a)(6) (2012).

[62] Beth Winegarner, *Celgene Calls Kyle Bass' AIA Review Bids 'Harassment'*, LAW360 (Sept. 11, 2015), https://www.law360.com/articles/701833.

[63] Davis, *supra* note 12.

[64] Decision Denying IPR, Coalition for Affordable Drugs (ADROCA) LLC v. Acorda Therapeutics, Inc., IPR2015-00817 (P.T.A.B. Sept. 25, 2015) [hereinafter Decision Denying IPR, Coalition for Affordable Drugs]; Erin Coe, *Hedge Fund Manager Loses IPR Bids Against Acorda*, LAW360 (Aug. 24, 2015), http://www.law360.com/articles/694762/hedge-fund-manager-loses-ipr-bids-against-acorda.

§ 102(b).[65] The PTAB denied review based on the fact that CFAD failed to establish a reasonable likelihood it would prevail with at least one of their claims within the petition.[66] In early September 2015, the PTAB also declined to institute a review of a third IPR against Biogen MA ("Biogen") and its MS drug Tecfidera.[67] The PTAB stated the reason for denying the IPR was "based on petitioner's failure to establish a likelihood of success as to any challenged claim." [68] The PTAB did not address arguments surrounding an abuse of process investigation through Biogen's motion for additional discovery, going so far as stating in the Biogen case that "additional discovery . . . would be inconsistent with a speedy and inexpensive resolution"[69] based on 37 C.F.R. § 42.1(b).[70]

B. *Validation as an Investment Strategy*

In early October 2015, CFAD and other hedge funds[71] were awarded two significant victories for their use of IPR as an investment strategy. One was the denial of a motion for sanctions in the Celgene case.[72] Celgene filed a motion for sanctions in front of the PTAB that alleged that CFAD's and Bass's investment strategy was an abuse of process.[73] Celgene explained that the USPTO has not adopted any standards for what constitutes an abuse of process for IPRs, but suggested that an abuse of process

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[65] Decision Denying IPR, Coalition for Affordable Drugs, *supra* note 64 at 5.

[66] *Id.* at 2.

[67] Coalition for Affordable Drugs V, LLC v. Biogen MA, Inc., IPR2015-01136 (P.T.A.B. Sept. 2, 2015) [hereinafter Coalition for Affordable Drugs V]; Matthew Bultman, *PTAB Denies Hedge Fund's Bid For Biogen Patent Review*, LAW360 (Sept. 2, 2015), http://www.law360.com/articles/698466/ptab-denies-hedge-fund-s-bid-for-biogen-patent-review.

[68] Coalition for Affordable Drugs V, *supra* note 67 at 16.

[69] *Id.*

[70] *Id.*; 37 C.F.R § 42.1(b) (2015) (stating "[t]his part shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding").

[71] Another hedge fund is Mangrove Partners Masters Fund. *Infra* notes 87–91.

[72] *See generally* Decision Denying Sanctions Motion, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092 (P.T.A.B. Sept. 25, 2015).

[73] *Id.* at 2.

occurs when a party perverts a "lawfully initiated process to illegitimate ends."[74] They argued that allowing CFAD to continue to file IPR petitions would result in an "unwarranted burden" on the PTAB, as well as other innovators.[75] Celgene centered their arguments on three points: (1) the fact that CFAD had no underlying interest whatsoever on the technology contained in the patent, or any interest in the industry targeted; (2) the purposes of the AIA in establishing IPR was to decrease cost and time, and CFAD's activity ran counter to this purpose; and (3) the fact that profit was the ulterior motive behind the IPR petitions.[76] On Celgene's first point, the PTAB determined that Congress chose not to impose a requirement of specific interest in the technology covered by the patent when the PTAB interpreted 35 U.S.C. § 311, and this was consistent with standing principles in front of agencies.[77] With regard to the Celgene's second point, the purpose of the AIA and the newly introduced IPR procedure, the PTAB held that Congress did not only intend for the IPR process to be a less costly alternative, but also to streamline the patent system and improve patent quality. Therefore any meritorious challenge is adequate under the AIA's stated goals.[78] To Celgene's third point, the PTAB chose to not take any position with regards to the profit motive, stating that "[p]rofit was at the heart of nearly every patent

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[74] Patent Owner Motion for Sanctions, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092 (P.T.A.B. July 28, 2015) (citing Heck v. Humphrey, 512 U.S. 477, 486 n.5 (1994)).

[75] Decision Denying Sanctions Motion, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092 (P.T.A.B. Sept. 25, 2015) [hereinafter Coalition for Affordable Drugs VI].

[76] *Id.* at 2–3.

[77] *Id.* at 4 (citing Sierra Club v. E.P.A., 292 F.3d 895, 899 (D.C. Cir. 2002)) (stating that an administrative agency is not subject to Article III of the Constitution of the United States, so a petitioner would have no need to establish standing to participate in proceedings before the agency); *see also* Consumer Watchdog v. Wis. Alumni Res. Found., 753 F.3d 1258, 1261 (Fed. Cir. 2014) (citing Sierra Club).

[78] Coalition for Affordable Drugs VI, *supra* note 75 at 4–5 Celgene did not allege that CFAD filed unmeritorious petitions in their motion for sanctions. *Id.* The PTAB declined to establish explicit elements for abuse of process, but decided that claims with merit are not sanctionable. *Id.*

and nearly every [IPR]."[79] The PTAB went on to grant institution of CFAD's petitions against Celgene's drug patents, but declined to expound on the issue of exploitation.[80]

The other significant win was a successful institution of review stemming from CFAD's IPR petition against Cosmo.[81] Cosmo's preliminary response addressed the CFAD's claims by arguing that they failed to meet the reasonable likelihood standard, but also attacked the CFAD by requesting that the IPR petition be dismissed because the CFAD failed to reveal all real parties in interest ("RPI")[82] pursuant to 35 U.S.C. § 312(a)(2), which states that an IPR petition "may be considered only if . . . the petition identifies all [RPI]."[83] Cosmo began by arguing that the CFAD's

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[79] *Id.* at 3.

[80] *See, e.g.*, Decision, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092, (P.T.A.B. Oct. 27, 2015); Decision, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01096 (P.T.A.B. Oct. 27, 2015); *see also* Francis, *supra* note 13.

[81] Decision, Coalition for Affordable Drugs II LLC v. Cosmo Technologies Ltd., IPR2015-00988 (P.T.A.B. Oct. 7, 2015).

[82] Who constitutes a RPI is a highly fact-dependent question; there is no bright-line test for determining the necessary quantity or degree of participation to qualify as a RPI based on the control concept. *See* Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 759 (1st Cir. 1994); *see also* United States Patent and Trademark Office, *Message from Chief Judge James Donald Smith, Board of Patent Appeals and Interferences: USPTO Discusses Key Aspects of New Administrative Patent Trials*, USPTO (May 21, 2012), http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/message-chief-judge-james-donald-smith-board#heading-2. "Accordingly, the Office has not enumerated particular factors regarding a 'control' theory of [RPI] . . . in the proposed rules. Instead, to resolve a real party in interest or privy dispute that may arise during a proceeding, the Board plans to consider each case on its specific facts." *Id.*

[83] "By neglecting to identify all of the 'wealthy individuals and institutions' invested in Mr. Bass' fund and the myriad entities he has engaged to file such petitions, Petitioner has failed to comply with the explicit requirements of 35 U.S.C. § 312(a)(2)." Patent Owner Prelim. Resp., Coalition for Affordable Drugs II LLC v. Cosmo Technologies Ltd., No. IPR2015-00988 (P.T.A.B. Oct. 7, 2015). *See generally* Krishan Thakker & Eldora L. Ellison, *The Curious Case of RPIs & NPEs in IPRs*, 90 PTCJ 3049 (Aug. 28, 2015). "There are multiple factors relevant to an RPI or privy inquiry, including the 'existence of a

failure to disclose their sister CFADs, parent companies, as well as any investors that sponsor CFAD's actions, is fatal to their petition.[84] Cosmo ended its response by arguing that policy dictates that investors be disclosed as RPI in order to ensure "that IPRs are not used as tools for harassment . . . through repeated litigation and administrative attacks on the validity of a patent, which would divert resources from the research and development of inventions."[85] The PTAB reviewed on the merits in favor of the CFAD, but addressed the issue of RPI by finding that there was insufficient evidence that sister CFADs were required to be listed as RPI, and that investors were also too speculative to be required to be listed for this proceeding.[86]

Also in October, a second hedge fund, Mangrove Partners Master Fund, was granted review for its IPR petition over VirnetX Inc., an Internet security company.[87] In their preliminary response, VirnetX, similar to Cosmo, also attacked the petition by requesting that the PTAB dismiss the petition because Mangrove Fund failed to list all RPIs, including investors.[88] Again, the PTAB ruled that there was insufficient evidence to require Mangrove Fund to do so at that stage of the proceeding.[89] Furthermore, Mangrove Fund was

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financially controlling interest in the Petitioner'; the non- party's 'relationship with the Petitioner'; the nonparty's 'relationship to the petition itself, including the nature and/or degree of involvement in the filing' (i.e., the amount of control and/or funding of the proceeding); and 'the nature of the entity filing the petition.'" *Id.* at 2. The identity of RPIs is important because there a statutory bars that prevent a party from filing an IPR. *See* 35 U.S.C. § 315(b) (2012).

[84] *Coalition for Affordable Drugs II LLC,* IPR2015-00988 at 34–41.

[85] *Id.* at 41 (citing H.R. REP. NO. 112-98, at 48 (2011)) (internal quotations omitted).

[86] Cosmo's attempt to dismiss based on failure to identify all RPIs failed because those sister CFADs and investors have not been shown to be RPIs in this proceeding. *Id.*

[87] Decision, Mangrove Partners Master Fund, Ltd. v. VirnetX, Inc., No. IPR2015-01046 (P.T.A.B. Oct.7, 2015).

[88] Patent Owner's Response, Mangrove Partners Master Fund, Ltd. v. VirnetX, Inc., No. IPR2015-01046 at 2-13 (P.T.A.B. July 24, 2015).

[89] Because the record does not reflect that Mangrove Fund is precluded from modifying the named RPIs to include the ones cited by patent owner, and because Mangrove Fund has not given evidence for whether there are any

not precluded from modifying its RPIs at a later time if necessary.[90] Also like Celgene, VirnetX attempted to argue that the filing of the petition was improper because Mangrove Fund was only interested in manipulating stock prices.[91] VirnetX sought dismissal based on a similar theory of statutory interpretation in its preliminary response, citing language that the Director of the USPTO must consider the effects on the economy, integrity of the system, and efficient and timely administration of IPR in 35 U.S.C. § 316(b).[92] Together with the language in giving the Director power to prescribe sanctions for improper use in 35 U.S.C. § 316(a)(6)[93] as giving the USPTO the authority to sanction and deter this type of investment strategy that exploits the IPR procedure.[94] Again, the PTAB ruled that financial motivation was the heart of many IPRs, and stated, "economic motive for challenging a patent does not itself raise abuse of process issues."[95]

So far, the PTAB has announced that purely financial motivation does not close the door for financiers to file IPR petitions. It also announced that investment strategy is not a sanctionable action with regard to claims of abuse of process. However, the PTAB did not announce a standard for what is, but

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additional RPIs. Decision, Mangrove Partners Master Fund, Ltd. v. VirnetX, Inc., No. IPR2015-01046 at 8 (P.T.A.B. Oct.7, 2015).

[90] *Id.*

[91] Patent Owners Response, Mangrove Partners Master Fund, Ltd. v. VirnetX, Inc., No. IPR2015-01046 at 14 (P.T.A.B. July 24, 2015).

[92] "In prescribing regulations under this section, the Director shall consider the effect of any such regulation 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 instituted under this chapter." 35 U.S.C. § 316(b) (2012).

[93] "Prescribing sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding, such as to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding[.]" 35 U.S.C. § 316(a)(6) (2012).

[94] VirnetX did not allege that Mangrove had filed unmeritorious claims in their IPR petition. Patent Owners Response, Mangrove Partners Master Fund, Ltd., No. IPR2015-01046 at 14.

[95] Decision, Mangrove Partners Master Fund, Ltd. v. VirnetX, Inc., No. IPR2015-01046 at 8 (P.T.A.B. Oct.7, 2015).

merely implied that frivolous claims may succeed in a motion for sanctions.

C. *Goals of the Strategy and Implications of the* Celgene *Decision Not to Sanction*

Bass and other financiers use of IPR petitions to exploit the relatively new AIA is inventive. Although completely invalidating a company's patent could cause a massive drop in that company's share prices, which could presumably be one of Bass's ultimate goals,[96] he has had some success in short selling just based on market fears.[97] With some of his recent petitions, Bass has had less success in causing a drop in stock prices with IPR petitions.[98] In fact, and quite interestingly, some patent owner's stocks spiked after news broke of one of Bass's petitions, casting doubt as to whether other market factors had larger influences than his petitions.[99] However, this type of gamble is not an uncommon occurrence.[100] Either the market has caught on to his tactic and compensated for the volatility of dubious patents and the new IPR proceedings, or it is an overreaction to the initial news that a patent owned by a pharmaceutical company could be lost.[101] However, with his most recent successes, combing through the empirical data

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[96] The theory is that a pharmaceutical company's stock prices will fall after the market learns that an IPR petition that could invalidate one of their patents was filed. Additionally, if Bass and CFAD get an IPR instituted, that could also lead to a drop in stock prices because the chances that the patent may be invalidated increases. Thus, if the patent was actually invalidated, there could theoretically be an enormous drop in stock price because a portion of the pharmaceutical company's business is now open to competition.

[97] Sidak & Skog, *supra* note 11.

[98] *Id.*

[99] *Id.*

[100] *Id.*; *Short Interest*, NASDAQ, http://www.nasdaq.com/quotes/short-interest.aspx (updated daily).

[101] One could argue that Bass and CFAD are bringing awareness to the market that they should value patents differently because there exists the opportunity that some patents are dubious and could be invalidated. Also, the first instance of Bass and CFAD filing an IPR petition might have been such a novel approach that the market did not fully understand implications, and market panic allowed the stock prices to drop. *Infra* note 105-06; *but see infra* note 107.

would be helpful in elucidating how much effect the strategy has had.

At this time, Bass and his copycats have evaded sanctions because he has filed every petition with non-frivolous claims. Preliminary responses arguing abuse of process or improper use of IPRs have failed since the PTAB's October ruling denying Celgene's motion for sanctions.[102] Despite Bass's announcements that he uses the CFADs as part of his investment strategy, the goal of the CFADs to invalidate weak patents for the public good[103] is in line with the stated goals of the AIA, and might provide an extra barrier against claims of improper use and/or abuse of process. Furthermore, the PTAB itself announced that motivation, financial or altruistic, is not a factor when deciding who can file an IPR petition.[104] Moreover, because the PTAB declined to express what actions constitute an abuse of process within the meaning of 35 U.S.C. § 316(a)(6) and 37 C.F.R. § 42.12(a), motions for sanctions based on abuse of process currently must fail. In ruling this way, the PTAB has made it clear that any change with regard to IPR proceedings should come in the form of direction from Congress.

Although this recent development does not delve into all of the variables of the stock market and the finer empirical data, Cosmo's stock price, which was on the rise from around $147 a share to $156 a share in late September to early October of 2015, began to plummet on October 6, and currently stands at just below $144 a share.[105] This price decrease could be in response to the news that review of a Cosmo patent was instituted,[106] and in any case, CFAD would have made a profit based on that news. However, in light of CFAD's and other financier's recent successes, the USPTO and

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[102] *See, e.g.*, Coalition for Affordable Drugs III, LLC v. Jazz Pharmaceuticals, Inc., No. IPR2015-01018 (P.T.A.B. Oct.18, 2015.).

[103] By invalidating weak patents, cheaper generic drugs can enter the marketplace.

[104] *See supra* section III.B.

[105] *Share Price Chart*, COSMO PHARMACEUTICALS, http://www.cosmopharmaceuticals.com (last visited Oct. 20, 2015).

[106] However, it is unknown whether the price decrease is significant; it might align with normal fluctuations in the market during this period.

PTAB may have decided correctly when they interpreted the goals of the AIA in the denial of Celgene's motion for sanctions by placing equal weight between efficiency, cost, and invalidation of dubious patents by IPR. The next line of inquiry deals with whether the USPTO, or other branches of government, should do anything to address this new investment strategy, and what they can do.

IV. POLICY IMPLICATIONS OF INTERVENTION

In determining what measures could be implemented to address the exploitation of the IPR procedure, governing bodies should first address whether or not it is advisable to do so. As described above, some of CFAD's petitions have failed to cause a drop in patent holders' stock prices; some stocks have even spiked after the news of pending petitions broke.[107] Moreover, CFAD has been granted review of Cosmo's drug patent, which might be invalidated to allow cheaper generics to enter the marketplace.[108] Now lies the question of whether or not the USPTO should take further action regarding the exploiting IPRs. If this investment strategy becomes less and less fruitful, fewer copycats will emerge and CFAD itself will most likely cease use of the IPR process, therefore PTAB will not become inundated with challenges motivated by short sale gains. However, some financiers' recent successes in instituting review from their IPR petitions will probably increase the filing of petitions while taking a short position on the patent holder's stock. Bass himself has argued in his opposition to patent owner's motion for sanctions brief that motivations are inconsequential, and argues "[p]oor quality patents enable pharmaceutical companies to maintain artificially high drug prices and reap unjust monopoly profits paid for by consumers and

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[107] Sidak & Skog, *supra* note 11.

[108] Matthew Bultman, *Hedge Fun Group Gets Review of Bowel Disease Drug Patent*, LAW360 (Oct. 8, 2015, 7:03 PM), http://www.law360.com/articles/712592/hedge-fund-group-gets-review-of-bowel-disease-drug-patent.

taxpayers."[109] Bass also argues that invalidating "low quality" patents is one of the express goals of the AIA and IPR process.[110] Thus, Bass is betting that he can invalidate one patent, and views the reward as two-fold, that these tactics will: (1) allow cheaper generics to come in and lower healthcare costs for consumers; and (2) make money for his hedge fund. Is it truly an abusive application of IPR?[111] Since the PTAB explicitly stated that "[p]rofit is at the heart of nearly every patent and nearly every [IPR]."[112] And if the market is adapting to the new AIA and its IPR procedures, as well as the CFAD's strategy, the fear of abuse might be unwarranted.[113] By not taking a position on the investment strategy utilized by CFAD and its copycats, the PTAB might have chosen the preferable course; this path will allow the market to dictate future responses or enable Congress to step in and address the issue. This option least frustrates the purposes of the AIA and the IPR procedures because it still allows any third

[109] Ryan Davis, *PTAB Decision Not to Sanction Bass Shifts Focus to Capitol*, LAW360 (Sept. 29, 2015, 1:29 PM), http://www.law360.com/articles/707985/ptab-decision-not-to-sanction-bass-shifts-focus-to-capitol; Opposition to patent owner's motion for sanctions, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., No. IPR2015-01092 at 2 (P.T.A.B. Aug. 11, 2015).

[110] The PTAB agreed with Bass's arguments, or at least found them more persuasive than Celgene's. *See* Decision denying motion for sanctions, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., No. IPR2015-01092 (P.T.A.B. Sept. 25, 2015); Opposition to patent owner's motion for sanctions, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., No. IPR2015-01092 at 7 (P.T.A.B. Aug. 11, 2015).

[111] On the other side of the argument is that "at the end of the day, a challenge to a possibly invalid patent is in the public's best interest." Decker, *supra* note 7.

[112] Decision denying sanctions, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., No. IPR2015-01092 at 3 (P.T.A.B. Sept. 25, 2015); even a most innocuous third-party could have financial motivation behind an IPR petition, for instance, a non-profit that can use a successful invalidation as a selling point for more donations to their cause; Opposition to Patent Owners Motion for Sanctions, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., No. IPR2015-01092 at 1 (P.T.A.B. Aug. 11, 2015) ("Generic pharmaceutical companies challenge patents to profit from generic sales.").

[113] Ronny Gal, an analyst for Sanford C. Bernstein & Co. stated that "The data accumulated so far, although early, suggests neither the attention, hyperboles, nor the legislative cure is warranted." Decker, *supra* note 7.

party to file petitions to invalidate weak patents,[114] and this route also does not alienate legitimate petitioners and organizations with altruistic motives that might fear sanctions for potential meritorious claims.

However, letting the market adjust might also allow CFAD and other financiers to undermine a mission of the USPTO: to advance American innovation.[115] The USPTO's limited time[116] and manpower is spent navigating less-than-sincere claims filed by these financial-minded[117] third parties with no interest in innovation by developing the technology contained within the patent. There is no guarantee that every petition filed by a third party will reach the merits;[118] which is concerning especially

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[114] *See* Patrick Leahy, *Senate Begins Debate on Leahy-Smith America Invents Act* (2011), http://www.leahy.senate.gov/press/senate-begins-debate-on-leahy-smith-america-invents-act.

[115] The patent system operates by rewarding innovation by "securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *General Information Concerning Patents*, USPTO (Oct. 2014), http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-1 (quoting U.S.CONST. art. 1, § 8).

[116] *See supra*, Part I; As prescribed by § 314(b), these petitions must be addressed within three months after preliminary response. 35 U.S.C. § 314(b) (2012).

[117] By financial-minded, I mean people without a legitimate interest in the technology contained in the patent or industry. Already, some copycat financiers have borrowed CFAD's strategy and filed petitions. Michelle Carniaux, *PTAB Crashers: A Look at How They Are Doing In the PTAB*, LEXOLOGY (Oct. 19, 2015) http://www.lexology.com/library/detail.aspx?g=89b0247b-5614-4819-a0f2-bd3f999e6a4e. One of which, Mangrove Partners Master Fund Ltd., succeeded where Apple did not, and was granted review of a network security patent. Davis, *supra* note 12.

[118] "The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a) (2012). Because the PTAB declined to furnish a rule for when petitions become sanctionable, any petitioner with a semi-meritorious claim is not deterred from filing a petition, and if they are a financially-minded third party, such as a hedge fund that

considering that the PTAB has not established a standard for abuse of process other than implicitly suggesting that frivolous claims might be sanctionable.[119] Therefore, without action, Congress might have created something they sought to destroy by introducing the AIA: a next generation IPR troll.

This next-gen troll could contravene the mission of the USPTO and actually stymie innovation. Any patent owner will need to allocate more funds for legal counsel in anticipation of action from next-gen trolls, which will detract from research and development of innovative technologies. For example, small companies that have become enticing targets will find it harder to afford the representation they need. For those companies, devoting significant resources to defending their patents even in an IPR proceeding could cripple their research efforts. An IPR troll might also act similarly to the patent troll, threatening patent owners with IPR petitions in an effort to negotiate settlements not to file. Furthermore, investing in targeted companies could be chilled if investors realize patents are under imminent threat at the hands of industry outsiders.[120] Because there are currently no clear standards constituting a sanctionable use of IPR procedure, some attorneys believe it is currently open season for trolls to emerge.[121] Despite potential benefits of nonintervention and allowing the market to adjust, intervention may be necessary, if only to prevent the rise of next-gen IPR trolls.

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partakes in short selling, there is no way to police the exploitation that could inundate the PTAB.

[119] *See* Decision, Coalition for Affordable Drugs II, LLC v. Cosmo Technologies Ltd., IPR2015-00988 (P.T.A.B. Oct. 7, 2015) at 5-10; *see, e.g.*, Decision Denying Sanctions Motion, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., IPR2015-01092, (Sept. 25, 2015).

[120] Investors with a stake in the company might be wary of injecting further funds in the company if they are afraid that any person could invalidate patents. Potential investors would be repelled if they knew that the company was being targeted by IPR petitions because it could give the appearance of weak patent rights.

[121] Davis, *supra* note 108.

V. METHODS OF INTERVENTION

Next, this Recent Development considers the various methods by which the IPR process may be altered to address exploitation by outside parties looking to manipulate and cash in on stocks. Four administrative paths are readily available through:[122] (1) the USPTO; (2) the Securities and Exchange Commission ("SEC"); (3) judicial review; and (4) Congressional action.

A. *Administrative Action Through USPTO Regulation*

The USPTO has the power to establish regulations concerning the proceedings at the Office.[123] Additionally, 35 U.S.C. § 316(b), governing conduct of IPR, states that "[i]n prescribing regulations under this section, the Director shall consider the effect of any such regulation 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 instituted under this chapter."[124] Although the PTAB declined to announce new regulations or policy changes to deter short selling investment strategies when it delivered the written decision in the *Celgene* sanctions motion, the PTAB can still implement new regulations and policies should it deem the widespread use of CFAD's investment strategy as exploitative and abusive.[125] Whether the PTAB correctly interpreted the statutes cited in its ruling denying sanctions

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[122] Although neither an extensive nor exhaustive list, these four paths are the most feasible options.

[123] 35 U.S.C. § 2(b)(2)(A) (2012); "[T]he broadest of the Office's rulemaking powers is the power to establish regulations, not inconsistent with law, which . . . shall govern the conduct of proceedings in the Office . . . [b]y this grant of power we understand Congress delegated plenary authority over PTO practice[.]" Stevens v. Tamai, 366 F.3d 1325, 1333 (Fed. Cir. 2004) (internal quotations omitted).

[124] 35 U.S.C. § 316(b) (2012).

[125] The agency can still propose a policy change through rulemaking pursuant to 5 U.S.C. § 551(5) (2012); rules are defined as "[A]n agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (2012).

requires that its interpretation pass the *Chevron* test.[126] In *Chevron*, the Supreme Court elucidated a two-step test for evaluating an agency's statutory interpretation: (1) whether Congress has directly spoken to the precise question at issue, and (2) if the statute is silent or ambiguous with respect to the specific issue, the question for the court to decide is whether the agency's interpretation is based on a *permissible construction* of the statute.[127] The PTAB's interpretation of § 311 meant that any third party could file a petition, especially when compared to business method reviews[128] requiring standing pursuant to AIA § 18(a)(1)(B).[129] The PTAB concluded the AIA "was designed to encourage the filing of meritorious patentability challenges, by any person who is not the patent owner, in an effort to further improve patent quality."[130] Given the statutory language in § 311(a) granting "a person who is not the owner of a patent" the ability to file, PTAB's interpretation likely passes *Chevron*, and any reviewing court would likely defer to the PTAB's interpretations. Even if there was ambiguity, the fact that Congress implemented a standing requirement for covered business methods review but not IPR, points to a permissible construction of why IPR was not intended to have standing requirements.

With USPTO interventions, there are two related inquiries: first, one must ask whether agency action contravenes its statutory

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[126] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[127] *Id.* at 842–43.

[128] Covered business methods patents are defined as a patent having claims: (1) used in the practice, administration, or management of a financial product or service, and (2) that do not claim a "technological invention." 37 C.F.R. § 42.301(a); unlike IPR, they do not cover technological patents, and have an extra standing requirement that the petitioner must be sued or charged with infringement. *Major Differences Between IPR, PGR, and CBM*, USPTO, http://webcache.googleusercontent.com/search?q=cache:jsuVmflOpfYJ:www.uspto.gov/sites/default/files/ip/boards/bpai/aia_trial_comparison_chart.pptx+&cd=3&hl=en&ct=clnk&gl=us (last visited on Oct. 5, 2015).

[129] Decision, Coalition for Affordable Drugs, VI, LLC v. Celgene Corp., IPR2015-01092 at 3–4 (P.T.A.B. Sept 25, 2015).

[130] *Id.* at 4–5 (quoting H.R. Rep. No. 112-98, pt. 1, at 85 (2011).

grant of power; and second, one should examine an agency's possible solutions. The first line of inquiry asks whether Congress delegated the USPTO power to make any of the above proposed regulations. Congress has delegated power to the USPTO to regulate proceedings within the Office.[131] Additionally, pursuant to 35 U.S.C. § 316(a)(4), the Director can prescribe regulations establishing and governing IPR.[132] Lastly, pursuant to 35 U.S.C. § 316(b), the director, in establishing regulations, will take into account the effect on the economy, the integrity of the patent system, and the efficiency of the Office.[133]

Having determined that the USPTO does have the power to intervene, there should be a balancing test weighing the effect on the economy against the interest in maintaining integrity of the patent system. Economic effect is double-edged sword: short selling stocks is a legal and regulated activity,[134] but economic effect must also account for incentivizing technological innovations of the United States by providing robust patent rights. Similarly, while the integrity of the patent system is compromised when financiers can exploit the IPR process in a way not envisioned by Congress when it passed the AIA. At the same time, the integrity of the patent system is bolstered because any party can find and eliminate weak patents. If the issue persists and gains momentum, the PTAB might need to propose regulations to halt the investment strategy, increasing USPTO efficiency in the long run. If the PTAB continues to allow anyone to file petitions, more next-gen IPR trolls will be attracted and likely slow down a very enticing alternative to litigation that the AIA was intended to create.

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[131] *See* 35 U.S.C. § 2(b)(2)(A) (2012); "The Director shall be responsible for providing policy direction . . . for the Office and for the issuance of patents . . . . The Director shall perform these duties in a fair, impartial, and equitable manner." 35 U.S.C. § 3(a)(2)(A) (2012).

[132] 35 U.S.C. § 316(a)(4) (2012).

[133] 35 U.S.C. § 316(b) (2012).

[134] *Key Points About Regulation SHO*, SEC (Apr. 8, 2015), http://www.sec.gov/investor/pubs/regsho.htm.

By declining to impose guidelines for sanctionable abuses of process, the PTAB has effectively thrust the issue back to Congress. As of today, the PTAB has also decided to stress that the motivation to invalidate weak patents is more relevant than an efficient alternative to litigation; whether or not that position changes given the increased usage of IPR remains to be determined. If the USPTO's position changes, the agency can intervene to curtail petitions filed by uninterested third parties.

1. *USPTO Implementation of a Standing Requirement*

CFAD had argued, and the PTAB agreed, that the PTAB cannot currently sanction CFAD's activity because its actions were consistent with § 311(a) and were pursuant to stated goals of the AIA.[135] Here, the USPTO can implement a gatekeeping requirement that only parties with a real interest in the technology underlying the challenged patent can bring IPR petitions. If the AIA implemented IPRs in part to eliminate low quality patents,[136] it follows that the most knowledgeable, and therefore successful, petitioners that can best eliminate those patents come from within the industry the patent resides.[137] Therefore, a check on exploitative petitions could come by instituting a policy that required a demonstrated showing that petitioner's RPIs are from that field, or have at least a minimum rationale for why they are linked to that field.[138] This RPI requirement would ensure the integrity of the

[135] Decision, Coalition for Affordable Drugs, VI, LLC v. Celgene Corp., IPR2015-01092 (P.T.A.B. Sept 25, 2015).

[136] A goal that was stressed by the PTAB in their ruling not to impose sanctions on the CFAD. *See id.*

[137] Given the fact that the majority of the IPR petitions filed by financiers are denied review, there is some sense that those intimately attuned to the underlying science and technology contained in a patent may be better suited to challenge them. *See Chart*, http://interpartesreviewblog.com/wp-content/uploads/2015/10/ChartUpdated2.png.

[138] This may function as a carve-out exception for organization intending to benefit the public by invalidating weak patents, because they would have at least a minimum rationale linking them with the industry. However, it is worth noting that the CFADs were created with that same motive, but the distinction lies with the fact that eventually, the CFAD's RPIs, Bass and Spangenberg, would be directly connected with hedge funds. There exists one interesting loophole: the

patent system in two ways. This system would ensure (1) weak patents are invalidated, and (2) that no party exploits a process within the USPTO for pecuniary gain ancillary to innovation.

2. *Rulemaking that Bars Hedge Funds or Short Sellers from Making IPR Petitions*

Currently, the feelings fostered by the pharmaceutical companies surrounding who can file IPR petitions can be reduced to one argument: one should not be able to use IPR for pecuniary gain through hedge funds, short selling, or other financial instruments.[139] The USPTO may implement a regulation that bars the party filing the IPR petition from operating a hedge fund or operating a strategy for shorting stocks. This proposal seeks to expand the PTAB's discretion by allowing discovery motions during initial stages of examining a petition. The pharmaceutical companies are upset because Bass uses his CFADs to "hide" his true intentions and sources of funds.[140] However, the PTAB has rarely granted motions for discovery in order to explore "hidden" RPIs.[141] By granting more limited motions of discovery, the USPTO could let patent owners uncover if a hedge fund or short seller is a RPI in the petition. This regulation is narrowly tailored to only affect one group of people. However, if the PTAB needed to grant more discovery motions, it might be inconsistent at times with speedy and inexpensive resolution of proceedings pursuant to 37 C.F.R. § 42.1(b).[142] Currently, of all the financiers that have filed IPR petitions, only Bass has filed a petition using a different company than his hedge fund.[143] The USPTO may implement new

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scenario where a hedge fund manager teams up with an industry practitioner to challenge patents.

[139] *See, e.g.*, Julia La Roche, *Kyle Bass eviscerates a drug company's of his short-selling its stock*, BUSINESS INSIDER, FINANCE (Aug. 13, 2015), http://www.businessinsider.com/kyle-bass-response-to-celgene-motion-2015-8.

[140] Thakker & Ellison, *supra* note 83 at 4.

[141] *Id.*

[142] 37 C.F.R. § 42.1(b) (2015) ("This part shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.").

[143] Chart, *supra* note 136.

policies and regulations if it ever finds that the short selling investment strategy becomes too much of a burden on the PTAB.

B. *The Role of the SEC with Regard to CFAD's Investment Strategy*

So far, the SEC has remained curiously silent throughout the proceedings taking place at the intersection of the USPTO and financiers. The SEC may not have the tools it needs to effectively bring any claim against hedge funds and financiers. The two theories that could apply are extremely attenuated and nuanced at best: stock manipulation and insider trading.[144]

The "word 'manipulative' . . . under SEC Rule 10b-5 . . . refers generally to practices that were intended to mislead investors by artificially affecting market activity."[145] A "misrepresentation or omission is material if there is substantial likelihood that [a] reasonable investor would have acted differently if misrepresentation had not been made or truth had been disclosed."[146] Scienter is proven by demonstrating defendant's

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[144] Nuanced and attenuated because neither theory has yet been applied by the SEC in this situation, it is likely to be one of first impression.

[145] *See* Santa Fe Indus., Inc. v Green, 430 U.S. 462 (1977) (holding that in order to prevail on claim of securities fraud, the SEC must establish the following elements: (1) misrepresentation or omission, (2) of material fact, (3) made with scienter).

[146] *See* Armstrong v. Am. Pallet Leasing Inc., 678 F. Supp. 2d 827 (N.D. Iowa 2009). Because reasonable investors would consider facts important in deciding whether to invest in a corporation's stock, misrepresentations and omissions were material within meaning of 15 U.S.C. § 78j and SEC Rule 10b-5 when a corporation's executives make representations to potential purchasers of corporation's outstanding stock involving false quarterly reports distorting true earnings, condition of a major division, antitrust litigation against that division, performance of a new product, and denial of a patent for such product. *See* Alna Capital Assoc. v. Wagner, 532 F. Supp. 591 (S.D. Fla. 1982), aff'd. in part, rev'd. in part on other grounds, 758 F.2d 562 (11th Cir. 1985).

misconduct was knowing or intentional, or had the "intent to deceive, manipulate, or defraud investors."[147]

In its Patent Owner's Brief, NPS Pharmaceuticals argued that Bass and his CFADs were in fact conducting stock manipulation, prohibited by the SEC. NPS argued that the investment strategy is market manipulation because Bass "knows that an IPR can cause a stock's price to fall," and that Bass controls the timing of the stock price falling because he controls the timing of IPR petition filing.[148] NPS also argued that Bass violated SEC Rule 10b-5 when he made misrepresentations about invalidating NPS's patents and inviting cheaper generics into the market, when he cannot be sure of the outcome.[149] On October 23, 2015, the PTAB decided to institute review, while declining to address the issues of manipulation presented by NPS.[150]

Under a traditional theory of insider trading, § 10(b) and SEC Rule 10b-5 "are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information."[151] Moreover, "[t]he misappropriation theory holds that a person commits fraud in connection with a securities transaction when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[152]

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[147] *See* Wechsler v. Steinberg, 733 F.2d 1054 (2d Cir. 1984); "'[S]cienter' is defined as mental state embracing intent to deceive, manipulate, or defraud." SEC v. C. Jones & Co., 312 F. Supp. 2d 1375, 1380 (D. Colo. 2004).

[148] Corrected Patent Owner's Brief at 5, Coalition for Affordable Drugs II, LLC v. NPS Pharm., Inc., IPR2015-00990, (P.T.A.B Sept. 14, 2015).

[149] *Id.* at 6.

[150] *See* Coalition for Affordable Drugs II, LLC v. NPS Pharm., Inc., IPR2015-00990, (P.T.A.B. Oct. 23, 2015).

[151] United States v. O'Hagan, 521 U.S. 642, 651–52 (U.S. 1997).

[152] "The misappropriation theory is thus designed to protect the integrity of the securities markets against abuses by outsiders to a corporation who have access to confidential information that will affect the corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders." *Id.* at 653 (internal quotations omitted).

CFAD's activity likely fails elements of market manipulation based on fraud or misrepresentations because CFAD's IPR petitions are not misrepresentations. CFAD had merit to file each of its IPR petitions; otherwise the pharmaceutical companies would have alleged frivolous claims. Furthermore, because materiality is heavily fact-dependent, a pending legitimate IPR petition is but one fact a jury weighs in determining whether an investor would have purchased stock, and is far too speculative at the stage of deciding whether or not to institute review. The case for insider trading is likely one of first impression because IPR is a new proceeding in patent law. While Bass and other financiers may know they intend to file IPR petitions, current insider trading laws do not contemplate that behavior; instead, they only acknowledge nonpublic information from an inside source.

C. *Judicial Review*

Another way to deter exploitation of the IPR process is waiting for judicial review. Congress delegated the task of interpreting statutes, such as the AIA, to the courts in addition to the USPTO; this has been "evident since 1982, when Congress created a single specialized court, the U.S. Court of Appeals for the Federal Circuit, to hear all appeals in patent cases."[153] However, patent cases can arise and be tried in district courts as well. There are pros and cons with policymaking from judicial review. Because technology and science are highly specialized and technical fields, fact-finding is sometimes complicated with arguments over terminology.[154] Furthermore, a district court may have considerably

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[153] Arti K. Rai, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1238 (2012); *see also* Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1116–20 (2003) (discussing analogies between the patent and antitrust statutes and stating that "the patent statute, as currently structured, contemplates . . . judicial development of patent common law").

[154] The court acknowledged that the specific meaning of words in patent claims might be disputed, and external factual evidence might be needed to explain the meaning of the term. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, *supra* note 152.

less expertise than the USPTO or special committees in Congress.[155] However, a court is not clouded by the politics that Congress or agencies can experience, and therefore can evaluate issues impartially. Courts examine issues one at a time, and judicial opinions are crafted to set policy and offer guidance on those individual issues. A final hurdle for a court-issued policy change is that the Federal Circuit needs the right case to come before it. Currently, there are no actionable claims that companies targeted by CFAD, and other third-party financiers, can bring before a court. The decision by the PTAB to not institute IPR review, such as the one garnered in the *Celgene* case, may not be appealed pursuant to 35 U.S.C. § 314(d).[156] However, pending cases may be directly appealable to the Federal Circuit in the near future. Both CFAD's petition against Cosmo and Mangrove Fund's petition against VirnetX had review instituted by the PTAB.[157] Pursuant to 35 U.S.C. § 318(a), "[i]f an inter partes review is instituted . . . the Patent Trial and Appeal Board shall issue a final written decision . . . ."[158] That final written decision is directly appealable to the Federal Circuit by the party losing the IPR.[159] If either patent owner loses its review, that owner can appeal before the Federal Circuit for clarification of statute, or any other argument the party wishes to put forward. However, there are

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[155] Technical training is not only rare within chambers, but also highly focused on a single area of expertise; one cannot expect a clerk or judge to have a wide range of technical knowledge beyond his or her discipline. *Id.*

[156] "The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." 35 U.S.C. § 314(d) (2012); *see, e.g.*, St. Jude Med., Cardiology Div., Inc. v. Volcano Corp., 749 F.3d 1373 (Fed. Cir. 2014) (holding denial of petition for *inter partes* review was not "final written decision" of Patent Trial and Appeal Board under 35 U.S.C. § 318(a)). It should be noted that these statutes are silent as to whether a motion for sanctions is appealable.

[157] *See* discussion of both cases *supra* Part III.

[158] 35 U.S.C. § 318(a) (2012).

[159] 35 U.S.C. § 319 (2012); 35 U.S.C. § 141(c) (2012) (stating that "[a] party to an *inter partes* review . . . who is dissatisfied with the final written decision of the [PTAB] . . . may appeal the Board's decision *only* to the United States Court of Appeals for the Federal Circuit.") (emphasis added).

no guarantees for the court to provide new regulations or policy change. For instance, if a patent owner wishes to challenge the PTAB interpretation of § 311(a) giving any person the ability to file an IPR petition, the Federal Circuit will likely defer to the PTAB's interpretation of the statute. Furthermore, the Federal Circuit may choose to completely ignore any questions of statutory interpretation or the exploitation of IPR. Instead, it can review just the merits of the claims. But the avenue exists as a way to implement a policy change, especially if the landscape changes dramatically to inundate the PTAB in the time it takes for a case to reach the courts.

D. *Congressional Action*

Congress can enact legislation to reform the patent system and curtail the strategies that Bass and copycats employ to short stock.[160] Because the PTAB's ruling denying Celgene's motion for sanctions and announcing that the PTAB loosely interprets 35 U.S.C. § 311(a) to grant petitions filing rights to any person, and that the PTAB currently takes no position on the motivations of potential IPR petitioners, Congressional action may be the only viable avenue available for reform.[161] Since the start of the 114th Congress, four new bills focused on patent reform have been introduced.[162] Recently, the four bills have been reduced to two,

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[160] *See* U.S. CONST. art. I.

[161] Decision Denying Sanctions Motion, Coalition for Affordable Drugs VI, LLC v. Celgene Corp., No. IPR2015-01092 at 4 (P.T.A.B. Sept 25, 2015). This is viable not because other avenues are closed, but rather because the USPTO seems to have thrust this job to Congress rather than making their own regulation when the PTAB stated that "Congress did not limit *inter partes* reviews to parties having a specific competitive interest in the technology covered by the patents," and the CFAD's petition is "consistent with the proposition that Article III standing is not a requirement to appear before [the PTAB] . . . ." *See id.* "Short of there being legislative action, this activity is going to continue . . . I continue to believe that the only fix for this issue is through an act of Congress[.]" Davis, *supra* note 12 (internal quotations omitted).

[162] The Innovation Act, the Protecting American Talent and Entrepreneurship (PATENT) Act, the TROL Act, and the STRONG Act. Tony Dutra, *Three Areas*

one each in the House of Representatives[163] and Senate.[164] The Senate bill does not address the IPR procedure. The House Bill ("H.R.9"), seemingly in response to Bass and other financiers, takes up the challenge of reforming the IPR procedure head-on. It is proposing to effectively ban financiers from the IPR procedure by seeking to amend parts of § 316(a) of the AIA governing IPRs by introducing the qualifier: "[that petitioner and RPIs] do not own and will not acquire a financial instrument . . . that is designed to hedge or offset any decrease in the market value of an equity security of the patent owner[.]"[165] Both bills seem to be losing support.[166]

One method to amend 35 U.S.C. § 311 is to impose a standing requirement on the IPR procedure that only RPIs with a real competitive interest in the underlying technology contained in the patent be allowed to file petitions.[167] However, that proposal is too far-reaching. Instituting such a drastic change would contravene the AIA's goal of invalidating weak patents that should never have been issued because genuinely altruistic third parties (such as

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of Patent Trolling Behavior, Can Four Bills Become One?, LIFE SCIENCES LAW & INDUSTRY REPORT (May 15, 2015), https://www.bloomberglaw.com/search/results/149c08eefe580308b77677b1629b9efa/document/X3LJ2K7K000000?jcsearch=dk%253Abna%2520a0g5z8q8t7#jcite.

[163] The Innovation Act, H.R. 9, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/9/text.

[164] The PATENT Act, S. 1137, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/1137; *see also* Lisa Patel & Sid Venkatesan, *Patent Reform Tries Again,* TECH CRUNCH (Sept. 13, 2015), http://techcrunch.com/2015/09/13/patent-reform-tries-again/.

[165] The Innovation Act, H.R. 9, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/9/text.

[166] "The House's patent reform bill appears dead in the water for now, partly due to biopharma's demand for a carve out from the *inter partes* review process that Judiciary Chairman Bob Goodlatte rejected." Brett Norman & Sarah Karlin, *As Congress Returns, Patent Reform Hits the Skids* POLITICO (Sept. 8, 2015), http://www.politico.com/tipsheets/prescription-pulse/2015/09/pro-prescriptionpulsesept8-karlin-norman-210101.

[167] Courtenay B. Brinckerhoff, *Stricter Standing for Inter Partes Review?*, PHARMAPATENTS (Apr. 14, 2015), http://www.pharmapatentsblog.com/2015/04/14/stricter-standing-for-inter-partes-review/.

groups for public interest) would be barred from petitioning. The current iteration of H.R.9 seems to deal with IPR petitions by hedge fund managers taking short positions because it narrowly tailors a rule that only bars those that aim to profit off of that activity. However, Congress can also elect to address the issue with by explicit means. They can amend § 316(a)(6) and define a boundary, or task the USPTO to establish a boundary that clearly encompasses what they consider to be a sanctionable abuse of the IPR process. Congress should pursue this path because it gives the USPTO more discretion to determine which parties have crossed that line into abusive tactics instead of declaring a whole group of potential petitioners banned from the IPR procedure. While Congress's slow pace is its pitfall, it is also its virtue. A bill is debated, all angles get covered, experts are consulted, and the resulting legislation is a more wholesome remedy that hopefully functions as expected. This Recent Development proposes that the USPTO and PTAB were correct in the *Celgene* ruling to not impose sanctions. The PTAB was also wise to forgo announcements of any conclusive policy changes regarding investment strategies used by financiers until more data about the effect on the market and the IPR system can be analyzed. Finally, the PTAB's decision in waiting for Congress to provide guidance and address the issue was the best choice because the PTAB remains neutral on a controversial issue of public interest.[168]

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[168] *See, e.g.*, Andrew Pollack, *Drug Goes From $13.50 a Tablet to $750, Overnight*, N.Y. TIMES (Sept. 20, 2015), http://www.nytimes.com/2015/09/21/ business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html?_r=0; Charley Grant, *Why a 2,000% Drug-Price Increase Raises New Questions for Mallinckrodt*, THE WALL STREET JOURNAL (Nov. 17, 2015), http://www.wsj.com/articles/why-a-2-000-drug-price-increase-raises-new-questions-for-mallinckrodt-1447791542;
Priyanka Dayal McCluskey, *As competition wanes, prices for generics skyrocket*, BOS. GLOBE (Nov. 6, 2015), https://www.bostonglobe.com/business/2015/11/06/generic-drug-price-increases-alarm-insurers-providers-and-consumers/H3iA9CSxAUylnCdGjLNKVN/story.html.

VI. CONCLUSION

After investigating Bass's hedge fund strategy and whether or not an abuse of process was really in play, this Recent Development has determined that it is best left to Congress to act to establish guidelines as to what constitutes an abuse of process and what constitutes actions that are sanctionable. Further, after discussing several options for intervention, this Recent Development concludes that the PTAB was wise to follow Congressional motivations in the adoption of the AIA to interpret their statutes. The PTAB effectively declined to establish a position on the exploitative use of IPR in short sales, and is instead waiting for Congressional intervention to address the issue surrounding prevention of the exploitation of the IPR procedure for purely financial gain.

To find the best solution, further research should look at the empirical data resulting from Bass's investment strategy and determine the viability and sustainability of the strategy in describing the potential effects on the USPTO. Notably, much of what lies ahead will be based on pending cases; the majority of Bass's actions are currently before the PTAB, and many other financiers also have petitions pending. Once the PTAB issues more decisions, including some final decisions on patent claim validity, more pieces of this interesting puzzle will be revealed and any adjustment comes from their conclusions.