

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

Case CBM2013-00009
Patent 8,140,358

PATENT OWNER'S REQUEST FOR REHEARING
PURSUANT TO 37 C.F.R. § 42.71

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(d), Patent Owner Progressive Casualty Insurance Co. (“Progressive”) hereby submits this Request for Rehearing of the final written decision (the “Final Decision”) entered February 11, 2014 (Paper 68) by the Patent Trial and Appeal Board (“Board”). Progressive respectfully submits that the Board misapprehended or overlooked the applicable law in entering its decision in CBM2013-00009 cancelling claims 1-20 of U.S. Pat. No. 8,140,358 (“the ’358 Patent”) because: (1) 35 U.S.C. § 325(e)(1) prohibits the Board from allowing CBM2013-00009 to be maintained by Petitioner once the Board issued its Final Decision in CBM2012-00003; and (2) the CBM2013-00009 Final Decision constitutes an improper advisory opinion.

II. FACTUAL BACKGROUND

A. Liberty Filed Two Petitions Challenging The Same ’358 Patent Claims, And The Board Declined To Join The Proceedings

On September 16, 2012, Liberty filed the CBM2012-00003 Petition to institute Covered Business Method Review of all 20 claims in the ’358 Patent. (CBM2012-00003, Paper No. 1.) On November 19, 2012, Liberty filed a second Petition on those same claims. (CBM2013-00009, Paper No. 1.) All the references that Liberty relied on therein had been asserted in CBM2012-00003, except for the article titled “Understanding Radio Determination Satellite Service” (“RDSS article”) describing the Geostar RDSS system. (CBM2013-00009, Ex. 1004.) Liberty was nonetheless

unquestionably aware of Exhibit 1004 when it filed its CBM2012-00003 Petition since the cover declaration authenticating the article was signed September 14, 2012 (two days *prior* to the filing date of the CBM2012-00003 Petition), and it was received by fax the very next day. (CBM2013-00009, Ex. 1004, at 1.) Liberty's CBM2012-00003 Petition had relied on the Geostar RDSS system as a basis for unpatentability, and the Andrews declaration it submitted in support also discussed RDSS. (CBM2012-00003, Paper No. 1, at 55-56; *Id.* Ex. 1025, at ¶ 26.)

The Board itself was well aware of this overlap of references in CBM2012-00003 and CBM2013-00009. It characterized the two proceedings as “involv[ing] the same parties, the same prior art references, and the same patent.” (CBM2013-00009, Paper 16, at 2.) Indeed, even before the Board instituted CBM2013-00009, Liberty “proposed joining [CBM2012-00003] with any covered business method patent review to be instituted on CBM2013-00009[.]” (CBM2012-00003, Paper No. 19, at 2.)

The Board was also aware that the timing of its Final Decisions in CBM2012-00003 and CBM2013-00009 could have substantive implications. On December 2, 2013, Liberty initiated a conference call requesting joinder of these two proceedings. (CBM2013-00009, Paper No. 64.) It requested joinder because it was concerned about the possible application of 35 U.S.C. § 325(e) and 37 C.F.R. § 42.73(d)(1). (*Id.* at 2.) Progressive requested briefing on these issues and argued that “nothing should be created or engineered to avoid whatever consequences that naturally flow from the

Board's issuance of the final written decisions in the two cases[.]” (*Id.*) The Board agreed with Progressive that “nothing unusual should be arranged to avoid a potential issue that hinges on when the Board renders final written decisions in CBM2012-00003 and CBM2013-00009.” (*Id.*) It also ordered that Liberty was “not authorized to file a motion to join” the proceedings or “to seek that a single joint decision be issued for CBM2012-00003 and CBM2013-00009[.]” (*Id.* at 3.) The Board held that “[w]hatever is the consequence of the timing of the decisions, it is.” (*Id.* at 2.)

B. The Board Entered Final Decisions In Both CBM2012-00003 And CBM2013-00009

On February 11, 2014, the Board entered Final Decisions in CBM2012-00003 and CBM2013-00009. The Board upheld claims 1, 19, and 20 and held claims 2-18 of the '358 patent unpatentable in its CBM2012-00003 Final Decision, but then held claims 1-20 of the '358 patent unpatentable in its CBM2013-00009 Final Decision. In each of these decisions, the Board stated that they were being entered “concurrently” with one another. (CBM2012-00003, Paper 78 at 3; CBM2013-00009, Paper 68 at 2.)

On February 19, 2014, Progressive initiated a conference call with the Board requesting that it confirm that the Final Decision in CBM2012-00003 was posted on the PRPS System before the Final Decision in CBM2013-00009. In response to Progressive's request, the Board ruled that “from the Board's perspective, the two final written decisions were entered at the same time, regardless of the actual time of

day each paper was uploaded by the Board's administrative staff into PRPS.”

(CBM2013-00009, Paper No. 69, at 2.)

As discussed at Section IV *infra*, Progressive submits that the Board has misapprehended or overlooked that its decisions are entered at the times they are posted to the PRPS. As such, Progressive is proffering new evidence identifying the times at which its Final Written Decisions were posted to the PRPS in these two cases. Since no such evidence existed until the Board issued the decisions, since the evidence is not otherwise found in the record, and since the Board indicated in Paper 69 at 2 that “it cannot be of help in providing further information in that regard[.]” good cause exists to admit Progressive's evidence indicating the actual times when the Board's Final Decisions were posted and accessible to the public on the PRPS. This evidence regarding the timing of the decisions is set forth in the accompanying Declaration of James L. Wamsley submitted herewith as Exhibit 2036. As indicated therein, the PRPS is the Board's e-filing and case management system. (*See* Ex. 2036, Wamsley Decl. at ¶ 3.) Timestamp metadata associated with the relevant PRPS webpages reveals that the Final Decision in CBM2012-00003 was posted on PRPS at 10:50:25 AM EST on February 11, 2014, while the Final Decision in CBM2013-00009

was posted at 12:04:12 PM EST on February 11, 2014.¹ (*See id.* at ¶¶ 4-6.) Since PRPS is an official public record, the Board should alternatively take judicial notice of these PRPS posting times. *See* Fed. R. Evid. 201. Finally, automated email notifications from PRPS regarding the Final Decisions were received at 10:50 AM EST for CBM2012-00003 and 12:04 PM EST for CBM2013-00009. (Ex. 2036, Wamsley Decl. at ¶ 7 and Attachments C and D, respectively.)

Under Progressive's legal argument herein, this evidence is relevant because it shows that the two Final Decisions were not entered at the same time and that the Final Decision in CBM2012-00003 was entered first. Because the proffered new evidence is relevant and good cause exists for it to be admitted at this time, Progressive respectfully requests its admission by the Board.

III. THIS REQUEST FOR REHEARING IS PROPER

Under the Board's rules, a request for rehearing may be filed where the party challenging the decision can show that the Board misapprehended or overlooked matters in its final written decision. 37 C.F.R. § 42.71(d). Progressive demonstrates herein that the Board misapprehended or overlooked (1) when its final written

¹ A paper titled "Final Written Decision" was posted at 10:56:31 AM EST on the PRPS docket for CBM2013-00009, but was expunged by the Board. (*See* Wamsley Decl. at ¶ 8.)

decisions are “entered,” (2) the application of Section 325(e)(1) to its decisions here, and (3) that it lacks the authority to render advisory opinions on patentability.

A rehearing request should also identify where each matter was previously addressed. *See* 37 C.F.R. § 42.71(d). However, in this case the Board foreclosed Progressive from addressing these matters previously. The matters raised by Progressive in this Request relate to the issues that were discussed in the December 2, 2013 conference call in this case. At that time, Progressive indicated that “nothing should be created or engineered to avoid whatever consequences that naturally flow from the Board’s issuance of the final written decisions in the two cases, and that at the very least, there has to be substantive briefing on the issue.” (Paper 64 at 2.) In its Order following that conference, the Board agreed with Progressive, and ruled that (*Id.*):

nothing unusual should be arranged to avoid a potential issue that hinges on when the Board renders final written decisions in CBM2012-00003 and CBM2013-00009. Whatever is the consequence of the timing of the decisions, it is. The Board should not act in favor of one party or another.

In entering its Final Decisions, the Board did not adhere to this ruling. Rather than accepting “[w]hatever is the consequence of the timing of the decisions,” it stated in its Final Decisions that they were entered concurrently, even though the evidence – obtained from the Board’s own PRPS System – does not substantiate that

conclusion. And while the Board held in Paper 64 that it “should not act in favor of one party or another[,]” its ruling that its Final Decisions were entered at the same time favors the Petitioner in this trial proceeding.

Progressive has met the requirements for a rehearing request and respectfully requests that this Request be granted, for the reasons explained below.

IV. THE BOARD MISAPPREHENDED OR OVERLOOKED THAT POSTING TO PRPS ENTERS A FINAL WRITTEN DECISION

The Board misapprehended or overlooked that entry of a final written decision occurs when it is posted to the PRPS. PRPS is the Board’s case management and electronic filing system, which the Board uses to docket papers in each post-grant review. When an order or decision is posted to the PRPS, it becomes available and an email notification automatically sent to the parties. (*See* Ex. 2036, Wamsley Decl. ¶ 3.)

The Board entered the Final Decisions in CBM2012-00003 and CBM2013-00009 at the times when it posted them to the PRPS. This is confirmed by the automated email notifications the PRPS generated and sent out when the decisions were posted on the PRPS. (*See id.* at ¶ 7, Attachments C and D.)

The Board’s action in posting its decisions to the PRPS is analogous to the entry of a final judgment in a civil action in U.S. District Court. Indeed, the Board’s rules define a “judgment” as a final written decision by the Board. 37 C.F.R. § 42.2. Under the Federal Rules, a civil judgment is “entered” when it is “entered in the civil docket.” Fed. R. Civ. P. 58(c).

The Board stated that its Final Decisions in CBM2012-00003 and CBM2013-00009 were “entered concurrently,” and it repeated that characterization when it denied Progressive any further information as to when decisions were posted to the PRPS. (*See supra* at Section II.B.) However, the Board’s characterization of the decisions as “entered concurrently” does not make it so. A final written decision has not been “entered” when it has not been disclosed by the Board. Moreover, the statute attaches legal significance to entry of a final written decision, since it creates an estoppel that prevents maintaining another proceeding. (*See infra* at Section V.) The substantive rights provided under Section 325(e)(1) should not be made illusory.

There is no evidence to support the Board’s finding that its Final Decisions were “entered concurrently” in CBM2012-00003 and CBM2013-00009. To the contrary, the evidence shows that they were entered in sequence. (*See supra* at Section II.B.) As such, the Board misapprehended or overlooked that its Final Decisions are entered when they are posted to the PRPS and incorrectly found that they were entered concurrently.

V. THE BOARD MISAPPREHENDED OR OVERLOOKED THE APPLICATION OF 35 U.S.C. § 325(e)(1)

The Board misapprehended or overlooked Section 325(e)(1) when – after entering its Final Decision in CBM2012-00003 cancelling claims 2-18 and not cancelling claims 1, 19, and 20 of the ’358 patent – it allowed CBM2013-00009 to be maintained and then entered a Final Decision in that proceeding again adjudicating

the patentability of claims 1-20. As discussed below, the estoppel of Section 325(e)(1) attached as soon as the Board entered its Final Decision in CBM2012-00003, and the Board was then without authority to enter a Final Decision in CBM2013-00009.

A. 35 U.S.C. § 325(e)(1) Prohibited Maintaining This Proceeding Once The Board Entered Its Final Decision In CBM2012-00003

Section 325(e)(1) prohibits a petitioner from maintaining a post-grant review of any claims on a ground that it could have raised in a proceeding in which a final written decision has been entered by the Board:

The petitioner in a post-grant review of a claim in a patent under this chapter that results in a final written decision under section 328(a), or the real party in interest or privy of the petitioner, **may not** request or **maintain a proceeding** before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that post-grant review.

35 U.S.C. § 325(e)(1) (emphasis added); *see also* 37 C.F.R. § 42.73(d)(1); Pub. L. No. 112-29, § 18(a)(1)(A), 125 Stat. 284, 329 (2011).

CBM2013-00009 was “maintained” in violation of the prohibition set forth in Section 325(e)(1) once the Final Decision was entered first in CBM2012-00003, since – as stated by the Board – both petitions addressed “the same prior art references,” and the grounds asserted in CBM2013-00009 unquestionably could have been raised in CBM2012-00003. (*See supra* at Section II.A.) The estoppel in Section 325(e)(1) precludes the Petitioner from continuing a second proceeding, at any stage and in any

manner. Section 325(e) applies here even though briefing and oral argument had been completed and the parties were awaiting the Board's decision. As Justice Holmes explained in a similar context, "[t]o maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927).

In *Smallwood*, Justice Holmes was addressing the question of whether a plaintiff was maintaining a suit while waiting for the Supreme Court to decide whether to grant a writ of certiorari and hear the appeal. *Id.* at 60-61. The plaintiff had brought a suit to restrain the collection of taxes, but after the District Court had ruled and the Court of Appeals had affirmed, Congress changed the law providing that such a suit may not be "maintained." *Id.* In opining that to "maintain a suit" broadly included "continu[ing] on," Justice Holmes explained that the fact that the case was on appeal was of no moment because "[w]hen the root is cut the branches fall." *Id.* at 61-62 (citation omitted). As such, the Supreme Court held that the suit had to be dismissed for lack of jurisdiction. *Id.* The Supreme Court more recently relied on this same construction of "maintain" in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003).

In an unpublished decision, the Federal Circuit addressed the application of the estoppel provision of the previous *inter partes* reexamination statute, 35 U.S.C. § 317(b), and its effect on the Patent Office's ability to maintain a reexamination. *Function Media, L.L.C. v. Kappos*, 108 U.S.P.Q. 2d 1577, 2013 U.S. App. LEXIS 4616 (Fed. Cir. 2013). The patentee had filed a petition to dismiss the reexamination of

certain claims in light of the prohibition on maintaining the reexamination following a “final decision” in a co-pending civil action. 2013 U.S. App. LEXIS 4616, at *5. The Patent Office denied the petition and held that the claims were invalid. *Id.*, at *6-7. The Federal Circuit vacated the Patent Office’s patentability determination, explaining that “[t]here remains no argument for maintaining these claims in the *inter partes* reexamination in light of the clear preclusion It would be improper for us to address the merits of the Board’s findings that claims 52, 63, 90, and 231 of the ’025 patent are not patentable.” *Id.* at 7. That same rationale applies equally here.

B. 35 U.S.C. § 325(e)(1)’s Estoppel Attached As Soon As The Board Entered Its Final Decision In CBM2012-00003

The prohibition on maintaining this proceeding became effective as soon as there was a “final written decision under section 328(a).” 35 U.S.C. § 325(e)(1); *see also* 37 C.F.R. § 42.73(d)(1) (estoppel applies when petitioner “has obtained a final written decision on patentability”). As explained in the Federal Register, the estoppel attaches once the Board enters its decision: “35 U.S.C. § 325(e)(1)[] provide[s] for estoppel in proceedings before the Office where a final written decision was entered[.]” 77 Fed. Reg. 48612, 48625 (Aug. 14, 2012).

The fact that the Board entered the Final Decision in CBM2012-00003 one hour and fourteen minutes before it entered its Final Decision in CBM2013-00009 does not prevent application of the estoppel in Section 325(e)(1). Once the Board has entered a final written decision on one or more patent claims, it cannot enter a

subsequent decision on those same claims at the behest of the same petitioner on grounds it could have asserted in the earlier-filed Petition. Section 325(e)(1) does not distinguish among cases or create an exception from the estoppel based on how long the second proceeding is “maintained” after a final written decision was entered in the first post grant review proceeding. Section 325(e)(1) would apply here whether CBM2013-00009 was maintained for 50 days or 50 seconds following the Board’s CBM2012-00003 Final Decision. Any other interpretation of the statute would make application of the estoppel provision wholly arbitrary, since its application would then depend on the relative timing of the Board’s decisions. Surely Congress did not intend that the substantive estoppel it established in Section 325(e)(1) to depend on the procedural happenstance of how much time elapsed between entry of final decisions. Therefore, the CBM2013-00009 proceeding was “maintained” in violation of Section 325(e)(1) as soon as the Board entered its Final Decision in CBM2012-00003. 35 U.S.C. § 325(e)(1); 37 C.F.R. § 42.73(d)(1).

C. The Board Misapprehended Or Overlooked The Effect Of Section 325(e)(1) On Its Authority To Enter A Final Decision In CBM2013-00009 After All The Claims In The ’358 Patent Were Adjudicated In The Final Decision In CBM2012-00003

As explained above, Section 325(e)(1) estops a petitioner from maintaining another proceeding following the entry of a final written decision on the same patent claims. As a result, the Board lacks authority to maintain a proceeding in which the estoppel has attached. Any other interpretation would nullify the statute.

Where Congress intended for the Board to have authority to decide issues even though the petitioner was no longer an interested party, it set forth that authority expressly in the statute. 35 U.S.C. § 327(a) applies to the situation in which the petitioner and patentee have settled the dispute as to patentability, but the Board has already “decided the merits of the proceeding.” There, the Board has the authority to “proceed to a final written decision” – even though “no petitioner remains in the post-grant review” – and “no estoppel under section 325(e) shall attach to the petitioner.” 35 U.S.C. § 327(a). By contrast, Congress did *not* provide the Board any similar authority to issue a second final written decision once an estoppel attaches under Section 325(e)(1). The statute should not be construed implicitly to provide the Board with authority that Congress granted explicitly only in the settlement context.

Moreover, the legislative history makes clear that Section 325(e)(1) is intended to prevent multiple challenges to a patent. When the House addressed H.R. 1249, which contained almost identical language to what ultimately was enacted in Section 325(e)(1), the legislative record reflected the intent of the legislation to “preclude[] [petitioners] from improperly mounting multiple challenges to a patent” via the post grant review process. H.R. 1249, 112th Cong. (June 1, 2011). It further made clear that “administrative attacks on the validity of a patent” are “not to be used as tools for harassment.” (*Id.*) And, allowing such multiple attacks “would frustrate the purpose” of the legislation as “providing quick and cost effective alternatives to litigation.” (*Id.*)

The Board misapprehended or overlooked the statutory requirements applicable to CBM post-grant reviews and the clear legislative history when it entered a Final Decision on claims 1-20 in CBM2013-00009 after it had entered a final written decision in CBM2012-00003 on those same claims. The Board lacked the authority to enter such a final written decision in CBM2013-00009 under Section 325(e)(1), and it should vacate that decision and dismiss that proceeding.

VI. THE BOARD MISAPPREHENDED OR OVERLOOKED THE PROHIBITION ON ISSUING AN ADVISORY OPINION

The Board misapprehended or overlooked that its Final Decision in CBM2012-00003 affected its ability to render a patentability determination in CBM2013-00009. Since the Board was without authority to enter the Final Decision in CBM2013-00009 (*see supra* at Section V), that decision constitutes a prohibited advisory opinion:

[W]e have **no authority** under the statute (Title 35) or the code of federal regulations (Title 37) **to render advisory opinions** on the patentability of inventions.

Ex parte Talbott, Appeal No. 96-0811, Decision on Appeal, Paper No. 26, at 4-5 (BPAI, Feb. 17, 1999) (emphasis added). Moreover, the Board ruled that claims 2-18 were unpatentable in the CBM2012-00003 Final Decision, so its decision to again cancel them in CBM2013-00009 is, *a fortiori*, an improper advisory opinion because they had already been found unpatentable in CBM2012-00003. *See id.*; *see also Ex parte*

Automotive Techs. Int'l, Appeal No. 2013-008246, Decision on Appeal, at 8 (PTAB, Jan. 15, 2014) (explaining that arguments “relating to cancelled claims [] are moot”).

Congress was presumably aware of the Board’s precedent foreclosing it from issuing advisory opinions. Nowhere in the statute or its legislative history did Congress indicate any intent to abrogate this longstanding doctrine. Nor can the statute be read as authorizing the Board to now issue advisory opinions and rule on moot issues or for the Federal Circuit to take up appeals of such advisory opinions.

The Board was aware that the timing of its Final Decisions could have implications. (CBM2013-00009, Paper No. 64.) The consequence of entering its Final Decision first in CBM2012-00003 was that it deprived the Board of authority to enter the Final Decision in CBM2013-00009, and mooted the question as to patentability of claims 2-18 in CBM2013-00009 because they were cancelled in CBM2012-00003. The Board misapprehended or overlooked the prohibition on issuing advisory opinions and adjudicating moot patentability issues, and its Final Decision in CBM2013-00009 constitutes an impermissible advisory opinion, which it lacked authority to enter and should vacate, and dismiss the proceeding.

VII. CONCLUSION

For all of the above reasons, Progressive respectfully requests that the Board grant its Request for Rehearing, vacate its CBM2013-00009 Final Decision cancelling claims 1-20 of the ’358 patent, and dismiss CBM2013-00009.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing PATENT OWNER'S REQUEST FOR REHEARING PURSUANT TO 37 C.F.R. § 42.71 was served on March 12, 2014 by causing it to be sent by email to counsel for Petitioner at the following email addresses:

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