

2013-1377

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**CONSUMER WATCHDOG,
(formerly known as The Foundation for Taxpayer and Consumer Rights),**

Appellant,

v.

WISCONSIN ALUMNI RESEARCH FOUNDATION,

Appellee.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Reexamination 95/000,154.

BRIEF OF APPELLANT IN RESPONSE TO ORDER

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November 25, 2013

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CERTIFICATE OF INTEREST

Counsel for Appellant Consumer Watchdog certifies the following:

1. The full name of every party or amicus represented by me is:

Consumer Watchdog

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

NONE

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

NONE

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Daniel B. Ravicher, Sabrina Hassan, Public Patent Foundation

Dated: November 25, 2013

/s/ Daniel B. Ravicher
Daniel B. Ravicher

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Consumer Watchdog (“CW”) submits this brief in response to the Court’s Order of November 14, 2013, directing the parties to “submit a brief on the issue of whether Consumer Watchdog has standing to pursue this appeal.” Dkt. 29. In its opening brief, CW stated, “This Court therefore has jurisdiction over this appeal under 35 U.S.C. § 141 and 28 U.S.C. § 1295(a)(4)(A).” *Opening Brief of Appellant*, 1, Dkt. 12 (July 2, 2013). Sections 141 and 315 of the Patent Act expressly give third party requesters of *inter partes* reexamination, such as CW here, the right to appeal to the Court any decision of the Board with which they are dissatisfied. The statutes therefore create a procedural right in such requesters that also provides them the standing to do so. CW thus has standing to pursue this appeal. Under 28 U.S.C. § 1295, the Court has jurisdiction.

I. STATUTES GIVING THIRD-PARTY *INTER PARTES* REEXAMINATION REQUESTERS THE PROCEDURAL RIGHT TO APPEAL ADVERSE PTO DECISIONS ALSO PROVIDE THEM STANDING TO DO SO

Standing is a component of judicial jurisdiction that is meant to maintain a separation of powers within our government. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). When Congress and the President pass express statutes giving the courts power to resolve certain disputes, separation of powers has been respected and the courts should therefore hear such cases. Here, not one, but two express statutes give CW the right to appeal to the Court. They also provide CW standing to do so.

A. A Statutory Procedural Right To Seek Court Review Provides Standing

While the “irreducible constitutional minimum” of standing is injury-in-fact, a causal connection between the complained-of conduct and the injury, and likelihood that the injury will be redressed by a favorable decision, *Lujan*, 504 U.S. at 560-61, “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute,” *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973). Indeed, “Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.” *Warth v. Seldin*, 422 U.S. 490, 514 (1975); *see Lujan*, 504 U.S. at 578.

In *Lujan* the Supreme Court expressly recognized that Congress is empowered to create standing through procedural rights. The Eighth Circuit ruling below *Lujan* had found standing for the plaintiffs who brought suit pursuant to a statute that provided “any person may commence a civil suit” to enjoin a party who allegedly violated the Endangered Species Act of 1973. Its decision rested in part on the theory that the plaintiffs had suffered a “procedural injury.” Justice Scalia supported that theory in the *Lujan* majority opinion, “There is [] much truth to the assertion that 'procedural rights' are special: the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability

and immediacy.” *Lujan*, 504 U.S. 572, n.7.

As further explained by Justice Scalia, the necessary “concrete interest” query looks to whether the party seeking standing is the subject of the challenged government action, or merely just one of hundreds of millions of Americans that could bring such a claim. *Id.* at 561-62 (“When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue.”) Thus, the *Lujan* plaintiff’s use of a statute that provided “any person” could bring a suit was not in itself sufficient to provide concreteness for standing. The person would need to be “an object of the action.” *Id.* at 573.

In concurrence, Justice Kennedy expanded upon the idea that Congress can create standing through legislation, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest a contrary view.” *Id.* at 580. Justice Kennedy’s statement that Congress could “define” an injury sufficient for standing with mere law acknowledges Congress and the President can agree as to what satisfies the “irreducible minimum” necessary for judicial standing.

Thus, while statutes may create a procedural right, and not an injury-in-fact, the

procedural right created by a statute can confer standing for the underlying legal action even where there would otherwise be no standing. Two examples illustrate the point.

First, the Freedom of Information Act (FOIA) confers jurisdiction upon courts to hear cases brought by parties who request documents from government agencies and are dissatisfied with the agency's response. 5 U.S.C. § 552(a)(4)(B). The Supreme Court has described FOIA as a “judicially enforceable public right” (*EPA v. Mink*, 410 U.S. 73, 80 (1973)) and made clear that no injury is required of a person who seeks to enforce that right. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978). Thus, in *Taitz v. Ruemmler* a curious citizen who wished to prove that President Obama was not a natural-born American citizen had standing to challenge the denial of her FOIA request for the President's long-form birth certificate even though there was no injury-in-fact. 2011 U.S. Dist. LEXIS 119452 (D.D.C. Oct. 17, 2011). This holding contrasts with a non-FOIA attempt to obtain the same information in *Berg v. Obama*, where a voter wished to prevent then-candidate Barack Obama from running for President, alleging that Obama was not a natural born citizen as the Constitution required. 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008), *aff'd*, 586 F.3d 234 (3d Cir. 2009). Among the relief Berg sought was an order compelling defendants to produce a copy of Obama's long form birth certificate. *Id.* at 514. The plaintiff lacked standing to bring a challenge under the Natural Born Citizen Clause even though his desire for Obama's birth certificate was precisely the

same as the plaintiff in *Taitz v. Ruemmler*. *Id.* at 519. It was the FOIA statute's express right to seek judicial review of an adverse agency decision that conferred standing in *Taitz* to do so.

For another illustration, in *FEC v. Akins*, a post-*Lujan* Supreme Court decision, voters sued under the Federal Election Campaign Act of 1971 (FECA), complaining that the FEC wrongly classified a certain lobbying group in a way that kept the group's political contributions confidential. 524 U.S. 11, 18 (1998). The plaintiffs wanted to know which candidates had received money from the group and sought judicial review of the FEC determination. The Supreme Court found standing despite the Solicitor General's argument that standing was lacking, stating:

Congress has specifically provided in FECA that 'any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission.' It has added that 'any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition' in district court seeking review of that dismissal.

Id. at 19. In comparison, the taxpayer in *United States v. Richardson*, who sued under the Constitution's Accounts Clause for information about expenditures of the Central Intelligence Agency (CIA) and challenged the constitutionality of the statute that governed CIA accounting and reporting requirements, lacked standing because his want for information did not constitute injury. 418 U.S. 166, 175 (1974). The Supreme Court in *Akins* juxtaposed *Richardson* and pointed out that it was the existence of the express

statute providing a right to seek judicial review of an agency decision that provided standing. 524 U.S. at 22 (“Here, there is no constitutional provision requiring the demonstration of the 'nexus' the Court believed must be shown in *Richardson*[]. Rather, there is a statute . . .”). Thus, the existence of a statute providing the right to seek Court review of an administrative agency's decision provides standing to do so.

B. Two Statutes Expressly Give CW A Procedural Right To Appeal

The first statute applicable here is 35 U.S.C. § 141. While that statute was recently amended, those amendments do not apply to this matter. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), Sec. 7(e)(2). The version of § 141 applicable to this case is the pre-AIA version, which stated in relevant part:

A . . . third-party requester in an *inter partes* reexamination proceeding, who is in any reexamination proceeding dissatisfied with the final decision in an appeal to the Board of Patent Appeals and Interferences under section 134 may appeal the decision only to the United States Court of Appeals for the Federal Circuit.

The second statute applicable here is 35 U.S.C. § 315(b)(1), which similarly provided prior to the AIA:

A third-party requester may appeal under the provisions of section 134, and may appeal under the provisions of sections 141 through 144, with respect to any final decision favorable to the patentability of any original or proposed amended or new claim of the patent.

The pre-AIA version of Section 315 applies to this matter. AIA, Sec. 6(c)(3)(C).

Thus, the Patent Act expressly provides third party requesters of *inter partes*

reexamination, such as CW here, the right to seek appeal of any final decision of the Patent Trial and Appeal Board (formerly known as the Board of Patent Appeals and Interferences) with which they are dissatisfied to the Court. This comports with the entire purpose behind *inter partes* reexamination, as opposed to *ex parte* reexamination, which was to ensure the right of third party requesters to participate throughout all stages of the proceeding, including any and all appeals to the Court. Congress purposefully and knowingly created *inter partes* reexamination as a mechanism by which third parties could challenge the validity of patents at the PTO and appeal any decision of the PTO with which they were “dissatisfied” to the Court. 35 U.S.C. § 141 (applicable version). This combination of the substantive entitlement to an administrative determination and provisions creating subject matter jurisdiction for an appeal to the Court provides CW standing to do so, just as the statute in *Akins* did.

Further, the statute the Court has expressly cited for providing it jurisdiction to hear third party requester appeals of *inter partes* reexamination decisions, 28 U.S.C. § 1295(a)(4)(A), states in relevant part:

The . . . Federal Circuit shall have exclusive jurisdiction—of an appeal from a decision of—the Patent Trial and Appeal Board . . . with respect to a patent . . . reexamination . . . at the instance of a party who exercised that party's right to participate in the applicable proceeding before or appeal to the Board . . .

This statute again expressly states the right of appeal for “a party” who participated in

)(A).”); *Fluor Tec, Corp. v. Kappos*, 499 Fed. Appx. 35, 40 (Fed. Cir. 2012) (“We have jurisdiction pursuant to § 1295(a)(4)(A).”). Quite correctly, the Court has never questioned the standing of third party *inter partes* reexamination requester appellants.¹

Lastly, as is evident from the discussion above, CW's standing to appeal the Board's decision here is not the same standing required to bring suit directly against WARF to challenge the patent's validity, because those two requirements entail vastly different considerations. CW need not argue it has standing to bring a declaratory judgment action against WARF directly, because such standing is not required for this appeal. The reason that standing is different between the two procedural postures is the presence of the statutory scheme for *inter partes* reexamination that confers a concrete

1 Before the creation of *inter partes* reexaminations, the Court faced a similar standing question of whether third party requesters of *ex parte* reexamination had standing to appeal the Board's ultimate decision in the *ex parte* reexamination. The Court held such requesters did not have standing precisely because no statute conferred a right for third parties to participate in any appeal of the reexamination decision of the PTO to the courts. *Boeing Co. v. Commissioner of Patents & Trademarks*, 853 F.2d 878, 881-82 (Fed. Cir. 1988) (finding third-party requester of an *ex parte* reexamination lacked standing due to the fact that the requester “was not entitled *by statute* to seek judicial review of the reexamination because that procedural route is available under [the relevant statutes] only to applicants and patent owners . . .”) (emphasis added); *Syntex (U.S.A.), Inc. v. U.S. Patent & Trademark Office*, 882 F.2d 1570, 1573 (Fed. Cir. 1989) (saying with respect to a third-party *ex parte* reexamination requester's standing, “[t]he question of jurisdiction (subject matter or standing) requires a focus on the legal rights or interests which devolve from *the relevant statute*.”). After the Court stated that a statute granting jurisdiction was exactly what requesters needed for standing to challenge reexamination decisions, Congress created *inter partes* reexaminations and the corresponding right to appeal to the Court decisions of the Board in such proceedings, as CW has done here.

and particularized legal right to file an *inter partes* reexamination upon “any third party requester” and then provides any such “third party requester” the right to appeal an adverse determination to the Court. 35 U.S.C. §§ 311(a), 315, and 141 (the pre-AIA versions applicable here). A declaratory judgment action, because it takes place outside of a concrete and particularized statutory scheme, requires a different basis for standing.

CONCLUSION

For these reasons, CW has standing to pursue this appeal.²

Dated: November 25, 2013

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² If the Court is not convinced that CW has standing to pursue this appeal despite the two statutes providing it that right, the Court may wish to invite the United States to opine on the issue, as a decision that CW does not have standing here could raise a Constitutional question regarding those two statutes. *Stauffer v. Brooks Brothers, Inc.*, 619 F. 3d 1321 (Fed. Cir. 2010) (addressing Constitutional standing challenge to plaintiff who brought *qui tam* action expressly provided for by Patent Act). Further, a decision questioning CW's standing here could also raise Constitutionality issues for other statutes not directly involved, including 35 U.S.C. §§ 319 and 329 and the current version of 35 U.S.C. § 141, which give rights of appeal to the Court to third party requesters of the new *inter partes* review and post grant review processes created by the AIA. In addition, due to the potential far reaching effects of a decision limiting standing of third parties to appeal decisions of the PTO, *amici* may wish to submit briefs to the Court on the issue and should perhaps be provided an opportunity to do so.

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing and served the following counsel, who are registered CM/ECF users, through the Court's CM/ECF filing system:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of the Court's November 14, 2013, Order, because it contains 10 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Open Office 3 in Nimbus Roman 14 point font.

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