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 No. 95/000,154.**

SUPPLEMENTAL COURT-ORDERED BRIEF ON STANDING FOR APPELLEE WISCONSIN ALUMNI RESEARCH FOUNDATION

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONSUMER WATCHDOG v. WISCONSIN ALUMNI RESEARCH
2013-1377

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 26.1 and 47.4, counsel for Appellee Wisconsin Alumni Research Foundation certify the following:

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

Wisconsin Alumni Research Foundation

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 us is:

Not applicable

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

Not applicable

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

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Kara F. Stoll, William B. Raich, Sarah E. Craven

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Kathryn Doyle

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SUMMARY OF THE ARGUMENT

Consumer Watchdog has failed to allege—and cannot on this record show—Article III standing, a jurisdictional requirement to appeal to this Court the Patent and Trademark Office's decision confirming the patentability of WARF's U.S. Patent No. 7,029,913 ("the '913 patent"). To satisfy Article III standing, Watchdog, a nonprofit taxpayer and consumer-rights organization, must establish an injury in fact—i.e., an actual and imminent, concrete and particularized invasion of a legally protected interest—caused by WARF. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But Watchdog does not and has not claimed to make, use, or sell the patented invention; has not and could not be threatened with suit; and has not named another real party in interest, either in this appeal or before the PTO. Watchdog therefore cannot establish standing, and Watchdog's appeal should be dismissed.

I. Consumer Watchdog Must Establish Article III Standing to Pursue this Appeal

A. Standing Is a Jurisdictional Requirement that Must Be Established when Appealing From an Agency to a Federal Court of Appeals

Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." Art. III, § 2; *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Standing is an immutable and non-waivable element of Article III's case-or-controversy requirement. *Defenders of Wildlife*, 504 U.S. at

560; *Pandrol USA, LP v. Airboss Ry., Prods., Inc.*, 320 F.3d 1354, 1367 (Fed. Cir. 2003). And "standing 'must be met by persons seeking appellate review.'" *Hollingsworth*, 133 S. Ct. at 2661; *see also Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) ("We have repeatedly held that an 'actual controversy' must exist . . . through 'all stages' of the litigation.").

Accordingly, although there is no requirement to show Article III standing before an agency, including the USPTO, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012), standing ***must*** be demonstrated on direct appeal from agency action to a federal court of appeals. *See, e.g.*, *Americans for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013) ("[W]hen a federal court of appeals reviews an agency action, Article III standing must be demonstrated 'as it would be if such review were conducted in the first instance by the district court.'"); *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013) ("[P]arties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary judgment in a district court.").

This includes direct appeals to this Court from non-Article III tribunals. *See Yingbin-Nature (Guangdong) Wood Indus. Co. v. ITC*, 535 F.3d 1322, 1334 (Fed. Cir. 2008) (holding that appellant had failed to allege an actual injury caused by the inclusion of certain appealed claims in a general exclusion order); *see also*

Applica Consumer Prods., Inc. v. ITC, 455 Fed. App'x 948 (Fed. Cir. 2010) (non-precedential order) (holding that the patentee did not have standing to appeal the ITC's determination of non-infringement of certain claims when the ITC had held other claims infringed and issued a limited exclusion order).

Because standing is a jurisdictional requirement, a federal court of appeals must first determine that an appellant has standing before considering the merits of any case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

B. The Injury in Fact Requirement for Standing Cannot Be Eliminated by a Statue Providing a Procedural Right to Appeal an Adverse Agency Determination

The irreducible constitutional minimum of standing contains three elements: an "injury in fact," causation, and redressability. *Defenders of Wildlife*, 504 U.S. at 560–61. While Congress has the power to define injuries and chains of causation that a party *may allege* in support of standing, Congress cannot eliminate the requirement that the party seeking review has suffered a concrete and particularized injury. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Accordingly, Watchdog can point to no provision of the Patent Act or any other statute as altering or eliminating the constitutional requirement for an injury

in fact to establish standing. *See Pregis Corp. v. Kappos*, 700 F.3d 1348, 1356–60 (Fed. Cir. 2012) (holding that third-party competitor could not challenge the PTO's decision to issue a patent under the APA based on, *inter alia*, the alternative remedies in the Patent Act).

Watchdog may rely on the Patent Act's codified right to appeal an adverse PTO Board decision directly to the Federal Circuit. 35 U.S.C. § 141 (former) ("A patent owner, or 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 . . . may appeal the decision only to the United States Court of Appeals for the Federal Circuit."); *id.* § 315(2)(b) (former) ("A third-party requester . . . may appeal under the provisions of sections 141 through 144, with respect to any final decision favorable to the patentability . . . of the patent."). Such statutes, however, vest a party with no more than a procedural right. Such rights may relax the redressability and immediacy requirements of standing, but, again, such statutes cannot alter the constitutional requirement for a party to show a concrete and personal injury. *Defenders of Wildlife*, 504 U.S. at 572 n.7.

For example, like 35 U.S.C. § 141, 19 U.S.C. § 1337(c) provides for a direct appeal from the ITC to this Court: "Any person adversely affected by a final determination of the Commission . . . may appeal such determination . . . to the

United States Court of Appeals for the Federal Circuit . . . ." This appeal right does not, however, eliminate the need to show Article III standing, and this Court has held that a party does not have standing to appeal a determination affecting only products for which a final determination to exclude has already been made. *Yingbin-Nature*, 535 F.3d at 1331–34. Similarly, 42 U.S.C. § 7607(b)(1) provides for review of certain actions by the EPA Administrator, either in the Court of Appeals for the District of Columbia or in the appropriate circuit court of appeals. This procedural right does not, however, eliminate the need to establish standing and the requisite injury in fact. *See Massachusetts*, 549 U.S. at 516–18, 521–23.

Statutes that provide initial review in the district courts are the same. For example, 16 U.S.C. § 1540(g)(1) provides for citizen suits in district court to enforce the Endangered Species Act of 1973, but "while the statute purports to confer a right on 'any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter,' it does not of its own force establish that there is an injury in 'any person' by virtue of any 'violation.'" *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J. concurring in part and concurring in judgment)). Finally, the Administrative Procedure Act, 5 U.S.C. § 702, provides judicial review in federal court for "[a] person suffering a legal wrong because of agency action," but that does not eliminate a party's burden of showing an injury in fact, i.e., "that the

party seeking review be himself among the injured." *Sierra Club*, 405 U.S. at 734–735.

As a result, Congressional authorization for an appeal to this Court for third-party challengers in an *inter partes* reexamination, or even the entire Congressional statutory scheme of third-party administrative patent challenges, cannot rewrite or remove the constitutional necessity of Watchdog to show Article III standing (including a concrete and particularized injury) to pursue the current appeal.

II. Consumer Watchdog Cannot Demonstrate Article III Standing on this Record

A. Standing Requires a Concrete and Personal Injury Caused by the Patentee and Redressable by a Favorable Decision

To establish standing, the party invoking federal jurisdiction bears the burden of showing an injury in fact (i.e., an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical) that is caused by the defendant and that is likely redressable by a favorable decision. *See Defenders of Wildlife*, 504 U.S. at 560–61; *see also Hollingsworth*, 133 S. Ct. at 2661. By "particularized," the Supreme Court explained, "we mean that the injury must affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n.1.

Alternatively, Watchdog may seek to allege third-party organizational standing. Under organizational standing, Watchdog must still assert the standing,

including a concrete and particularized injury, of one of its members.[1] *See Summers*, 555 U.S. at 494; *Defenders of Wildlife*, 504 U.S. at 563. Additionally, Watchdog must demonstrate that the interests it seeks to protect are germane to the organization's purpose and that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342–43 (1977).

The Supreme Court has defined injury in fact for a patent challenger such as Watchdog (or its members) in the context of declaratory judgment jurisdiction. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). Jurisdiction turns on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127. Applying the "all the circumstances" test, this Court has held that to establish an injury in fact traceable to the patentee, a patent challenger "must allege both (1) an affirmative act by the patentee related to the enforcement of his patent rights, and (2) meaningful preparation to conduct potentially infringing activity." *Ass'n for Molecular Pathology v. U.S. PTO*, 689 F.3d 1303, 1318 (Fed. Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2107 (2013) (internal citations omitted).

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[1] Watchdog's website (www.consumerwatchdog.org), however, gives no indication that it is a membership organization.

B. Consumer Watchdog Has Not Alleged Any Injury to Itself or to Any Organization Member Caused by WARF

Watchdog has not alleged any concrete and personalized injury, either to itself or to any organization member, traceable to WARF. Specifically, Watchdog has not alleged that WARF has undertaken any affirmative act to enforce the '913 patent against Watchdog or any Watchdog member. Nor has Watchdog alleged that it or any of its members are conducting research on human embryonic stem cells or are willing and able to conduct such research but are precluded from doing so because of WARF. *See id.* In fact, WARF has broadly licensed the technology claimed in the '913 patent, providing licenses at no cost to any interested academic researcher and entering into numerous commercial licenses, Appellee Br. at 18, a fact that Watchdog readily acknowledges, Reply Br. at 16.

Notably, in its opening brief, Watchdog expressly certified that the parties in interest in this case are "NONE," an admission to which it should be held. Appellant Br. at i. Before the PTO, Watchdog identified The Foundation for Taxpayer and Consumer Rights (now Watchdog) as the "real party in interest" under 37 CFR 1.915(b)(8).[2] The only interest Watchdog asserts in challenging WARF's patent is an entirely unsupported "burden on taxpayer-funded research in the State of California where [Watchdog] is located." Appellant Br. at 2. A

[2] Reexamination No. 95/008,154, 07-17-2006 Request for *Inter Partes* Reexamination Transmittal Form.

generalized interest in a perceived problem fails to establish standing. *See Sierra Club*, 405 U.S. at 739 ("[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."); *see also Hollingsworth*, 133 S. Ct. at 2663 ("Article III standing 'is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'").

Having identified Watchdog as the real party in interest before the PTO, Watchdog should not be able to take a different approach on appeal to show standing. But, even if Watchdog attempts to allege an injury to a member, it cannot establish that the interests it seeks to protect in this appeal are germane to the organization's purpose. *See Wash. State*, 432 U.S. at 342–43. Trade unions, for example, have standing to litigate the interests of union members, e.g., the Secretary of Labor's interpretation of the Trade Act's eligibility requirement for laid-off employees, because such interests are germane to the union's purpose in obtaining benefits for its member. *Int'l Union v. Brock*, 477 U.S. 274, 286–88 (1986).

Here, in contrast, the taxpayer and consumer-protection purpose asserted by Watchdog is insufficiently germane to the personal injury that must be alleged to

show standing, an interest of its members (whomever its members may be) in conducting research free of a patent license. This is not an interest identified on Watchdog's website. *See* http://www.consumerwatchdog.org/issues (last viewed Nov. 19, 2013) (listing affordable insurance, patient protection, cheaper energy, fighting corporateering, keeping politicians honest, and online privacy). Nor it is listed as in interest in their litigation agenda. *See* http://www.consumerwatchdog .org /about/in-the-courtroom (last viewed Nov. 19. 2013). Thus, Watchdog cannot assert third-party standing for any injured member, even should one emerge.

Because Watchdog cannot on this record establish a concrete and personal injury to itself or an injury to one of its members germane to its organizational purpose, Watchdog cannot establish Article III standing to appeal the Board's decision upholding the patentability of WARF's '913 patent to this Court. Accordingly Watchdog's appeal should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Watchdog's appeal for lack of Article III standing.

Respectfully submitted,

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November 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, the forgoing was filed via the Court's CM/ECF system. All parties or their counsel who are registered users of the CM/ECF system will receive a notice of this filing from the system. Parties may access this filing through the Court's CM/ECF system.

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