

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION
Petitioner

v.

DESTINATION MATERNITY CORPORATION
Patent Owner

Case IPR2014-00508
Patent No. RE43,563 E

Filed: October 9, 2014

Before LORA M. GREEN, THOMAS L. GIANNETTI,
JENNIFER S. BISK, MICHAEL J. FITZPATRICK, and
MITCHELL G. WEATHERLY, *Administrative Patent Judges*.

**PETITIONER'S MOTION FOR REHEARING
PURSUANT TO 37 C.F.R. § 42.71(d)**

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I. STATEMENT OF RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.71(d), Petitioner, Target Corporation (“Target” or “Petitioner”), hereby requests rehearing and reversal of the Board’s decisions Denying Target’s Motion for Joinder (Paper 18¹) (“Joinder Motion”) and Denying Institution of *Inter Partes* Review (“IPR”) (Paper 20). In particular, because the Board abused its discretion in declining to address the merits of Target’s Joinder Motion—and, consequently, Target’s IPR petition—based on an erroneously narrow interpretation of 35 U.S.C. § 315(c), Target requests that a further expanded panel of seven or more judges of the Board rehear and reverse the Board’s decision and address the merits of Target’s Joinder Motion (which should be granted) and corresponding IPR petition (which should be instituted).

II. ARGUMENT

Target must show that the Board’s decision should be modified, and “must specifically identify all matters [it] believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” 37 C.F.R. § 42.71(d). “An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law” *Lacavera v. Dudas*, 441 F.3d 1380, 1383 (Fed. Cir. 2006) (quotations omitted).

¹ All citations herein to Paper 18 refer to Paper 18 in IPR2014-00508.

“[T]he starting point in every case involving construction of a statute is the language itself.” *U.S. v. Hohri*, 482 U.S. 64, 69 (1987) (quotations omitted).

“Congressional intent is discerned primarily from the statutory text.” *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2186 (2014). “In construing a statute . . . we begin by inspecting its language for plain meaning. If the words are unambiguous, no further inquiry is usually required.” *Medrad, Inc. v. Tyco Healthcare Grp. LP*, 466 F.3d 1047, 1051 (Fed. Cir. 2006) (quotations omitted). Statutory words are given “their ordinary, contemporary, common meaning unless Congress has indicated otherwise.” *Id.* Courts do not “construe the meaning of statutory terms in a vacuum. Rather, [courts] interpret the [statutory] words in their context and with a view to their place in the overall statutory scheme.” *Tyler v. Cain*, 533 U.S. 656, 662 (2001)) (quotations omitted). “In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *Kelly v. Robinson*, 479 U.S. 36, 43-44 (1986) (quotations omitted). Moreover, “[r]emedial legislation . . . should be construed in a manner that effectuates its underlying spirit and purpose.” *Cloer v. Sec’y of Health & Human Servs.*, 675 F.3d 1358, 1362 (Fed. Cir. 2012) (en banc).

A. The AIA Empowers the PTO, Through the Trial Rules, to Implement the AIA’s Broad Remedial Purposes, Which Include Improving Patent Quality and Reducing Litigation Costs

The Leahy-Smith America Invents Act (“AIA”) was implemented to broadly

“update our patent laws,” which had not been “comprehensive[ly] . . . reform[ed] in nearly 60 years.” H.R. REP. NO. 112-98, pt. 1, at 38-39 (2011), *available at* http://www.uspto.gov/aia_implementation/crpt-112hrpt98-pt1.pdf. In short, the AIA “modernize[s]” an aging patent system. *See id.* at 38-40. The overarching purpose of the statutory scheme under the AIA is “to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.” *Id.* at 40; 157 CONG. REC. S1349 (daily ed. Mar. 8, 2011) (statement of Sen. Leahy). Indeed, the AIA was designed, in part, to address “a growing sense,” reflected in various judicial decisions, “that questionable patents are too easily obtained and are too difficult to challenge.” H.R. REP. NO. 112-98, pt. 1, at 39. In an effort “to correct flaws in the [patent] system that have become unbearable, and to accommodate changes in the economy and the litigation practices in the patent realm,” *id.* at 38-39, the AIA was drafted with attention to “improving patent quality and providing a more efficient system for challenging patents that should not have issued,” as well as “reducing unwarranted litigation costs,” *id.* at 39-40. To achieve those goals, “the AIA provides,” among other reforms, “more coordination between district court infringement litigation and [IPR] to reduce duplication of efforts and costs.” *See* 77 Fed. Reg. 48,679, at 48,721 (Aug. 14, 2012) (“Final Rule Notice”). Thus, similar to other laws enacted to improve patent quality, the AIA “is remedial in

nature, based on fundamental principles of equity and fairness, and should be construed liberally,” *see Weiler*, 790 F.2d 1576, 1579 (Fed. Cir. 1986), “in conformance with its purpose, and in a way which avoids harsh and incongruous results,” *see Voris v. Eikel*, 346 U.S. 328, 333 (1953).

The Patent and Trademark Office’s (“PTO”) rules in 37 C.F.R. Part 42, which govern IPR proceedings, are designed to implement the AIA and reflect its purpose by “creat[ing] a timely, cost-effective alternative to litigation” and “ensur[ing] the integrity of the trial procedures.” *See* 77 Fed. Reg. at 48,680. Moreover, the PTO explicitly directed the Board to construe the rules in Part 42 so as “to secure the just, speedy, and inexpensive resolution of every proceeding.” 37 C.F.R. § 42.1(b). Thus, like the AIA itself, the trial rules reflect the PTO’s broad mandate from Congress to efficiently address issues of patent quality—such as, in IPR proceedings, the validity of patent claims in light of prior art, *see id.* § 104(b)(2)—and provide a “cost-effective alternative to litigation.”

B. The Board’s Decision Denying Joinder Should Be Reheard Because the Board Abused Its Discretion by Erroneously Interpreting 35 U.S.C. § 315(c)

In its Joinder Motion, Target cited 35 U.S.C. § 315(c), and argued that “[t]he Board has discretion to join a properly filed IPR petition to a previously instituted IPR proceeding.” (Paper 3, at 7.) Although Target timely filed its Joinder Motion and IPR petition in this proceeding within one month of the Board’s institution of

IPR in IPR2013-00531, *see* 37 C.F.R. § 42.122(b), and although the one-year time-limitation on filing an IPR petition after service of a complaint does “not apply to a request for joinder,” 35 U.S.C. § 315(b); 37 C.F.R. § 42.122(b), the Board found that Target’s joinder motion could not be granted because the corresponding IPR petition was time-barred under 35 U.S.C. § 315(b) on the theory that § 315(c) permits joinder of parties but not an existing petitioner’s new petition filed after § 315(b)’s one-year deadline. (Paper 18, at 3-11.) The Board erred in narrowly interpreting § 315(s) to impose a *per se* prohibition on a party to an existing IPR proceeding joining to that proceeding a second petition filed by that party along with a timely joinder request. The Board abused its discretion, *Lacavera*, 441 F.3d at 1383, and its decision should be reheard and reversed.

1. Target Is “Any Person” Under the Plain Language of § 315(c)

The Board found that Target cannot be “any person” under § 315(c) because the statute “does not refer to the joining of a petition,” but rather “to the joining of a petitioner,” which, according to the Board, Target cannot be, because Target cannot be joined to a proceeding in which it is already a party. (Paper 18, at 3, 5 & n.2.) Section 315(c), however, does not use the word “petitioner,” but rather the broad phrase “any person who properly files a petition under section 311.” 35 U.S.C. § 315(c); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221 (2008) (interpreting the use of “any” as “all-encompassing”). Thus, “any person” under §

315(c) excludes *only* “a person” who *owns* the patent in question. 35 U.S.C. § 311(a). Section 311 does not add any further limitations. Moreover, as is apparent from § 311(a), which refers to “a person” in providing the right to prospectively file an IPR petition, and § 311(b), which refers to “[a] petitioner in an [IPR],” “a person” becomes a “petitioner,” under the statute, only once he or she has filed an IPR petition. Similarly, § 312 refers to a “petitioner” only after referencing, in the past tense, “[a] petition *filed* under section 311.” 35 U.S.C. § 312(a) (emphasis added). The remaining sections of 35 U.S.C. Chapter 31 are not inconsistent.

Thus, as the statutory language makes clear, where Congress referred to a “person” in §§ 311(a) and 315(c), Congress did not intend to limit such “person” to, or equate such “person” with, a “petitioner.” *See Res-Care, Inc. v. U.S.*, 735 F.3d 1384, 1389 (Fed. Cir. 2013) (“A cardinal doctrine of statutory interpretation is the presumption that Congress’s use of different terms within related statutes generally implies that different meanings were intended.” (quotations omitted)); *see also* 35 U.S.C. § 317(b) (separately referring to “a petitioner” and “any person”). Therefore, contrary to the Board’s decision, Target’s status as a petitioner in IPR2013-00531 does not change that Target is “any person” within the plain language § 315(c) for purposes of seeking joinder.² Because the statutory language is clear, Target’s status as a person seeking to “join[] . . . a proceeding in

² Although it is a corporation, Target is a “person.” *See* 1 U.S.C. § 1.

which it is already a party,” (Paper 18, at 3, 5& n.2), is simply irrelevant under § 315(c). *See Medrad*, 466 F.3d at 1051. And there can be no question that no procedural mechanism prevents joinder from occurring under these circumstances, because, as the Board acknowledges, at least five prior decisions of the Board have freely permitted it. (*See* paper 18, at 3 (citing cases).)

2. *The Board Improperly Limits § 315(c)’s Applicability only to the Joining of “Parties”*

It is a “well-settled rule that all parts of a statute, if possible, are to be given effect.” *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981). Thus, “[c]ourts should not render statutes nugatory through construction.” *Id.*; *U.S. v. Tohono O’Odham Nation*, 131 S. Ct. 1723, 1729-30 (2011). Although the plain language of § 315(c) refers to joining “a party” to an instituted IPR proceeding, it does not follow that § 315(c) *prohibits* the joinder of issues raised by such person in its “petition under section 311.” Indeed, by the plain language of the statute, such a prospective “party” need only “properly file[] a petition under section 311 that the Director . . . determines warrants the institution of an [IPR] under section 314.” “By requiring the filing of a proper petition, Congress has made it clear that § 315(c) contemplates the joinder of issues, as well as parties.” (Paper 18, Green, A.P.J., dissenting, at 6.)

As discussed above, § 311(a) prevents only the patent owner from filing such a petition, and § 311(b) limits the bases on which a petitioner may seek IPR.

Section 311 does not reference any other sections of 35 U.S.C. Chapter 31 and imposes no other restrictions on § 315(c). Further, with respect to the petitioner, the only requirement § 314(a) imposes is that, in order to obtain institution of IPR, the petition must “show that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” The remaining provisions of § 314 do not impose any further requirements on the petitioner or, therefore, on the filing “party” under § 315(c). Indeed, § 314 references only § 311, already discussed, and § 313, which pertains to a *patent owner’s* preliminary response to a petition.

There is nothing whatsoever in §§ 311, 313, 314, or 315(c) that limits the permissible content of, or the issues that may be raised in, a petition filed with a request for joinder under § 315(c).³ Further, nowhere does the plain language of those provisions prohibit the review, during an already-instituted IPR proceeding, of new, different, or additional issues raised in a petition filed with a request for joinder under § 315(c). In contrast, the Board’s decision tightly restricts the relief a “time-barred petitioner” may seek to only “join[ing] an existing proceeding and the challenges presented in that proceeding.” (Paper 18, at 10). The Board’s interpretation of § 315(c) renders superfluous the requirement for a properly filed

³ Although Target does not dispute that the new petition should, as a practical matter, relate to the same patent, nothing in § 315(c) requires that.

“petition under section 311.”⁴ The Board’s rationale that “the filing of a petition by a prospective party serves many purposes other than setting forth the challenges to claims in a patent,” (Paper 18, at 5-6), has the proverbial tail wagging the dog—Congress could not have intended that anyone would pay a large fee, \$25,000, *see* 37 C.F.R. § 42.15(a), simply to identify itself, provide certain administrative information to the Board, and subject itself to future estoppel. Moreover, contrary to the Board’s reasoning, its decision does not create a “more complex proceeding” in the case of a “time-barred petitioner” because such a person cannot, according to the Board, present any new challenges. (Paper 18, at 10). Thus, under the Board’s decision, it is entirely *inequitable* to make such a person pay the fee required by § 312(a)(1). One who pays the fee ought to get the full benefit of the IPR process.

⁴ For the same reasons, the Board’s finding that the second sentence of 35 U.S.C. § 315(b)—“[t]he time limitation set forth in the preceding sentence shall not apply to a request for joinder under [§ 315(c)]”—applies only to a *request* for joinder, and not the properly filed petition also required under § 315(c), must be rejected. The Board’s interpretation of § 315(b) further renders superfluous the PTO’s statutory power, under § 316(a)(11), to “adjust the time periods” for issuing “the final determination” in an IPR “in the case of joinder under section 315(c).” The Board wrongly negates the special treatment Congress expressly accorded to joinder in §§ 315(b) and 316(a)(11). *Am. Textile*, 452 U.S. at 513.

The Board’s narrow reading of § 315(c) finds no support in the statutory text and must be rejected. *Am. Textile*, 452 U.S. at 513. Whether the content of a petition filed with a request for joinder under § 315(c) is appropriate to effect joinder is a matter governed not by limitations in the text of § 315(c) or elsewhere but, rather, by “the Director, in his or her discretion.” 35 U.S.C. § 315(c).

Further, the Board’s finding that “the relief described in § 315(c) is something an existing party already has,” (paper 18, at 4-5), is incorrect, at least because it circularly assumes that obtaining “party status” is the sole “relief” that may be sought under § 315(c), when, as shown above, any such “relief” is ancillary, albeit necessary in Target’s case, to the *substantive* relief available under the plain language of the statute—relief on the merits of one or more grounds of unpatentability raised in a petition filed with a request for joinder under § 315(c).

3. *The Board’s Interpretation of § 315(c) Is at Odds with the Remedial Purposes of the AIA*

Despite the plain and unrestricted language of §§ 311, 313, 314, and 315(c), the Board found that § 315(c) does not permit the joinder of new issues raised in a new petition because “the absence from the statute of an express prohibition against joining another petition to an instituted [IPR] does not inform whether the authority to do so has been granted.” (Paper 18, at 4). Yet, although neither § 315(c), nor any other provision in 35 U.S.C. Chapter 31, contains any requirement that different petitions addressing claims in the same patent(s) must also address

the same or even related issues, the Board discerns such a requirement for persons who file joinder requests outside of the one-year time period set forth in the first sentence of 35 U.S.C. § 315(b). (Paper 18, at 10.)

Where Congress has granted an adjudicative body, such as the Board, broad remedial powers by statute, “[t]he absence of an express . . . provision [providing particular relief] should not be read as a prohibition of such relief.” *Shinyei Corp. of Am. v. U.S.*, 355 F.3d 1297, 1312 (Fed. Cir. 2004). Although the Board understandably desires to manage its caseload and the proceedings before it, the express mechanism for doing so in the case of joinder is the Board’s exercise of discretion on a case-by-case basis, *see* 35 U.S.C. § 315(c); Final Rule Notice, 77 Fed. Reg. at 48,707 (“When the Office determines whether to grant a motion for joinder, *the Office will consider the particular facts of each case.*” (emphasis added)), not a *per se* bar that not only conflicts with the plain statutory language, but also ignores the underlying purposes of the AIA.

As discussed above, the AIA effects the broadly remedial purpose of modernizing the patent system, in part by improving patent quality through its IPR provisions. *See supra* Part II.A. In keeping with the AIA’s underlying, remedial purposes, § 315(c) and the other sections of 35 U.S.C. Chapter 31 “should be construed liberally,” *see Weiler*, 790 F.2d at 1579, “in conformance with its purpose, and in a way which avoids harsh and incongruous results,” *see Voris*, 346

U.S. at 333. Indeed, especially in view of the fact that it found no “express prohibition against joining another petition to an instituted [IPR]” in 35 U.S.C. Chapter 31, the Board erred in finding “a prohibition of such relief” based on “[t]he absence of an express . . . provision” providing it. *Shinyei*, 355 F.3d at 1312; *Superior Fireplace Co. v. Majestic Prods. Co.*, 270 F.3d 1358, 1370 (Fed. Cir. 2001) (allowing relief where a statute did “not expressly deal with” such relief but also did “not preclude” it).

4. *Even if Consulting the Legislative History of § 315(c) Were Necessary, It Does Not Contradict Target’s Position*

The Board relies on the Final Committee Report, H.R. REP. NO. 112-98, pt. 1, at 76 (2011), for the proposition that “under §§ 315(c) and 325(c), ‘[t]he Director may allow *other* petitioners to join an inter partes or post-grant review.’” (Paper 18, at 7-9.) But, as discussed above, the text of § 315, properly construed in light of the underlying purposes of the AIA and 35 U.S.C. Chapter 31, is neither so limited nor ambiguous. *See Dept. of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”).

Even if it were appropriate to consult the limited legislative history directed particularly to § 315(c), as opposed to the AIA as a whole, a rule that joinder of the same party or its petition is precluded does not follow from a statement of what the PTO “may” do with respect to “other petitioners.” Indeed, just as the Board found

no “express prohibition against joining another petition to an instituted [IPR]” in 35 U.S.C. Chapter 31, there is no such express prohibition in the legislative history the Board relies on. Accordingly, § 315(c) should be broadly construed for all the reasons discussed above. *See supra* Part II.B.3. Moreover, unlike § 315(c), which expressly refers to making a “person” a “party” to an instituted IPR proceeding, § 325(c) is silent on *who* may have their post-grant review petitions joined. Thus, the statement in the Final Committee Report is at odds with § 325(c) and, as such, its definitive applicability to either section is questionable. *See Milner v. Dept. of Navy*, 131 S. Ct. 1259, 1266 (2011) (“[C]lear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.”).

C. The Board’s Decision Should Be Reheard Because It Departs from the Remedial Purposes of the AIA and the IPR Process

1. The Board’s Decision to Avoid the Merits of Target’s Joinder Motion Is Inconsistent with Its Prior Decisions

Target is unaware of any other decision of the Board in which joinder was denied on the basis of the statutory construction announced in this case. Several prior decisions of the Board have *granted* joinder under circumstances similar to those present here. (*See* paper 18, at 3 (citing cases).) Moreover, since the Board’s decision here, it has issued at least five (5) other decisions on joinder, all of which address joinder *on the merits*. *See Medtronic, Inc. v. Endotach LLC*, IPR2014-

00695, paper 18 (P.T.A.B. Sept. 25, 2014); *Microsoft Corp. v. Enfish, LLC*, IPR2014-00574, paper 13 (P.T.A.B. Sept. 29, 2014); *Fujitsu Semiconductor Ltd. v. Zond, LLC*, IPR2014-00845, paper 14 (P.T.A.B. Oct. 2, 2014); *Samsung Elecs. Co., Ltd. v. Arendi S.A.R.L.*, IPR2014-01142, paper 11 (Oct. 2, 2014); *Samsung Elecs. Co., Ltd. v. Arendi S.A.R.L.*, IPR2014-01144, paper 11 (Oct. 2, 2014). One of those decisions expressly acknowledges the Board’s decision in this case— noting that “a difference of opinion . . . currently exists at the Board”—but declines to follow it. *See Medtronic*, IPR2014-00695, paper 18, at 4 & n.2. Accordingly, the Board’s decision in this case is at odds with all other decisions on joinder and, contrary to the underlying purposes of the AIA, *see supra* Part II.A, and 37 C.F.R. § 42.1(b), unjustly failed to consider the merits of Target’s joinder motion.

2. The Board’s Decision Creates a Roadmap for Gamesmanship in Parallel District Court Litigation

Target’s Joinder Motion sets forth the unique facts of this case, which reveal that a significant prior art reference long known to the patent owner was withheld from Target in the parties’ parallel district court litigation until several weeks after Target’s one-year deadline under 35 U.S.C. § 315(b). (Paper 3, at 1-6.) Under the Board’s decision here, a patent owner in parallel litigation with a petitioner can readily subvert the purposes of the AIA, *see supra* Part II.A, and the IPR process by withholding any significant prior art it may be uniquely aware of, or additional asserted claims, until after the petitioner’s one-year deadline under § 315(b).

Permitting patents of dubious validity to go un- or only partially challenged in such circumstances is wholly at odds with the remedial purposes for which the AIA was enacted and the IPR process created. The Board's decision should be reheard.

III. REQUEST FOR FURTHER EXPANDED PANEL ON REHEARING

In light of the importance of the issues raised in this Motion to the present proceeding, other IPR proceedings, and the IPR process generally, Target respectfully requests that the Chief Judge or a Vice Chief Judge designate a further expanded panel of seven (7) or more judges of the Board to rehear and address the issues raised herein. *See* PTAB Std. Oprt'g Proc. 1, § III (Rev. 13, Feb. 12, 2009).

IV. CONCLUSION

Target respectfully requests that the Board grant the present Motion.⁵

Dated: October 9, 2014

By: /Norman J. Hedges/
Norman J. Hedges (Reg. No. 44,151)

⁵ Target intends to seek the Board's permission to file in related IPR Nos. IPR2013-00530 and -00531 a motion, pursuant to 37 C.F.R. § 42.122(a), seeking to stay those proceedings until the Board resolves this Motion and any follow-on relief the Board may grant as a result of it. Regardless of any stay, however, it is Target's position that those proceedings will remain "institute[d]" and pending proceedings for purposes of 35 U.S.C. § 315 and 37 C.F.R. § 42.122 until such time as all rights to appeal the Board's final written decision(s) in those proceedings either have been waived or exhausted.

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I hereby certify that I caused a true and correct copy of the foregoing Petitioner's Motion for Rehearing Pursuant to 37 C.F.R. § 42.71(d) to be served via e-mail, as a PDF file attachment, on October 9, 2014, on the following:

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