

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

COALITION FOR AFFORDABLE DRUGS II LLC

Petitioner

v.

NPS PHARMACEUTICALS, INC.

Patent Owner

---

Cases IPR2015-00990 and IPR2015-01093<sup>1</sup>

Patent 7,056,886

---

**COMMENTS OF *AMICI CURIAE* J. GREGORY SIDAK  
AND JEREMY O. SKOG IN SUPPORT OF NEITHER PARTY  
IN RESPONSE TO THE BOARD'S REQUEST FOR ADDITIONAL  
BRIEFING PURSUANT TO 37 C.F.R. § 42.20(d)**

---

<sup>1</sup> Consistent with the Board's Order, an identical paper is filed in each proceeding identified in the heading. *See* IPR2015-00990, Paper 20, n.1.

**Table of Contents**

	<b>Page</b>
I. IDENTITY AND INTEREST OF <i>AMICI CURIAE</i> .....	1
II. ARGUMENT .....	2
A. EMPIRICAL ECONOMIC EVIDENCE CONTRADICTS THE CONJECTURE THAT KYLE BASS IS CONTINUALLY PROFITING BY SHORT SELLING THE STOCK OF THE PHARMACEUTICAL COMPANIES THAT OWN THE CHALLENGED PATENTS .....	2
B. THE PTAB SHOULD EXAMINE WHETHER THE ALLEGATION THAT MR. BASS HAS ENGAGED IN SHORT SELLING IS A MISLEADING AND FRIVOLOUS ARGUMENT THAT MAY BE SANCTIONED UNDER 32 C.F.R. § 42.12 .....	4
III. CONCLUSION .....	6

## I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici* are experts and scholars in the economic analysis of patent law:

- **J. Gregory Sidak**, Chairman, Criterion Economics, L.L.C. He has formerly held the Ronald Coase Professorship of Law and Economics at Tilburg University in The Netherlands, the F.K. Weyerhaeuser Chair in Law and Economics at the American Enterprise Institute for Public Policy Research, and academic positions at Yale University and Georgetown University. He is co-editor of the *Journal of Competition Law & Economics*, published by the Oxford University Press. He has published six books and more than 100 articles in scholarly journals and compilations. He has testified on patent damages as a qualified expert economic witness for parties engaged in complex litigation, administrative proceedings, and international commercial arbitration, and he has twice served as Judge Richard A. Posner's court-appointed neutral economic expert on damages in patent litigation pursuant to Federal Rule of Evidence 706.

- **Jeremy O. Skog**, Ph.D., Vice President, Criterion Economics, L.L.C. He is an expert on financial modeling and the analysis of patent damages. He formerly served as an Economist at the U.S. Census Bureau.

Because the Patent Trial and Appeal Board (PTAB) provides limited procedural guidance regarding a filing of this nature, we respectfully submit these comments to assist the Board's evaluation of the public-interest questions on which it has requested additional briefing. We certify that no party or its counsel authored these comments in whole or in part; no party or its counsel contributed money intended to fund the preparation or submission of these comments; and no person other than the *amici* contributed money intended to fund the preparation or submission of these comments.

## **II. ARGUMENT**

### **A. Empirical Economic Evidence Contradicts the Conjecture That Kyle Bass Is Continually Profiting by Short Selling the Stock of the Pharmaceutical Companies That Own the Challenged Patents**

In a scholarly article forthcoming in November 2015 in the *UCLA Law Review Discourse* (the online companion to the *UCLA Law Review*), we analyze empirically the effect of Kyle Bass's 2015 *inter partes* review (IPR) challenges on

the stock prices of the pharmaceutical companies that own the challenged patents.<sup>2</sup> (We attach our forthcoming article and incorporate it here by reference.) On the basis of the observed pattern of stock-price returns after Mr. Bass's filing of an IPR challenge, we find that only the capital market's reactions to Mr. Bass's initial three IPR petitions could have consistently provided him with the opportunity to profit by shorting a stock and quickly closing out his position.

However, as we explain in our forthcoming article, after the initial few IPR challenges, Mr. Bass' subsequent challenges no longer provoked a strong response in the capital market. That muted response means that a trading strategy of short selling based on the expectation of a short-term negative price reaction to an IPR challenge would not have been profitable for Mr. Bass after his initial few challenges. Furthermore, later IPR challenges by Mr. Bass actually produced strong responses in the opposite direction of what the short-selling hypothesis would predict—that is, later challenges produced statistically significant *positive* abnormal returns for the pharmaceutical companies being targeted in the IPR petitions.

---

<sup>2</sup> 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), <https://www.criterioneconomics.com/kyle-bass-inter-partes-reviews-of-patent-validity.html>.

Our empirical economic evidence suggests that a short-selling strategy, if actually employed by Mr. Bass, would not be reliably profitable. That is, if Mr. Bass's strategy was to short the stocks of the pharmaceutical companies that own the challenged patents, such a strategy could be reliably profitable (and thus rational to undertake) only if the challenged company experienced a statistically significant abnormal decline in its stock price after the filing of the IPR challenge. Yet we observe no consistent pattern of negative abnormal returns in the stock prices of the pharmaceutical companies whose patents Mr. Bass has challenged.

Thus, that Mr. Bass continues to file more IPR challenges against other pharmaceutical patents belies the conjecture that he is doing so for the purpose of profiting from a short-selling strategy. Such a strategy would not be expected to be profitable, and it therefore would not be rational business behavior.

**B. The PTAB Should Examine Whether the Allegation That Mr. Bass Has Engaged in Short Selling Is a Misleading and Frivolous Argument That May Be Sanctioned Under 32 C.F.R. § 42.12**

Section 42.12 of the rules of the USPTO provides that the PTAB may sanction a party for “advancing a misleading and frivolous argument” and “misrepresentation of a fact.”<sup>3</sup> That rule is analogous to Rule 11 of the Federal Rules of Civil Procedure, which empowers a court to sanction an attorney whose

---

<sup>3</sup> 37 C.F.R. § 42.12(a)(2)–(3).

“factual contentions [do not] have evidentiary support or . . . will [not] likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>4</sup> The submission of a Rule 11 motion in patent litigation might itself warrant sanctions against the movant under Rule 11 if the allegations presented in the motion are themselves frivolous.<sup>5</sup>

In the case of Mr. Bass’ IPR petitions, patent holders, including NPS Pharmaceuticals, factually contend that he shorted their stocks<sup>6</sup> (which we have been unable to confirm on the basis of information in the public domain). Those patent holders also factually contend that Mr. Bass’s short sales (supposing, for sake of argument, that they did occur) were profitable, such that this pattern of trading on asymmetric information would provide Mr. Bass a plausible economic motivation to “abuse” the IPR process.<sup>7</sup>

---

<sup>4</sup> FED. R. CIV. P. 11(b).

<sup>5</sup> *Syneron Med. v. Viora Ltd.*, No. 2:14-cv-00639, 2014 WL 7140643 (E.D. Tex. Dec. 12, 2014); *Order, OptiGen, LLC v. Animal Genetics, Inc.*, No. 5:10-cv-00940 (N.D.N.Y. July 20, 2011), ECF No. 51.

<sup>6</sup> *See, e.g.*, Corrected Patent Owner’s Brief in Response to the Board’s Request for Additional Briefing Pursuant to 37 C.F.R. § 42.20(d), at 1–2, *Coalition for Affordable Drugs II LLC v. NPS Pharms., Inc.*, IPR No. 2015-00990 (P.T.A.B. Apr. 1, 2015) (“Since January 2015, the Bass Group has manipulated stock markets through IPRs. It has requested nearly 20 IPRs, targeting patents for at least 10 drugs from at least 9 different companies – all *publicly traded*. Its scheme is as simple as it is manipulative: establish short positions, file petitions to drop stock prices, make misleading statements in support, and then reap financial gains.”) (emphasis in original).

<sup>7</sup> *Id.*

Our empirical economic findings call into question whether the factual contentions that Mr. Bass profited from short selling pharmaceutical stocks have any evidentiary support at this time or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. We urge the PTAB to determine whether those factual contentions deserve to be sanctioned under section 42.12.

### **III. CONCLUSION**

For the foregoing reasons, we respectfully submit these comments and the attached article, and we urge the Board to consider the factual basis of the evidence presented therein for the purpose of answering the public-interest questions that the Board has posed.

Dated: September 18, 2015

By: /s/ J. Gregory Sidak  
J. GREGORY SIDAK  
Criterion Economics, LLC  
1717 K Street, N.W. | Suite 900  
Washington, D.C. 20006  
(202) 518-5121 | [jgsidak@criterioneconomics.com](mailto:jgsidak@criterioneconomics.com)

By: /s/ Jeremy O. Skog  
JEREMY O. SKOG  
Criterion Economics, LLC  
1717 K Street, N.W. | Suite 900  
Washington, D.C. 20006  
(202) 518-5124 | [jskog@criterioneconomics.com](mailto:jskog@criterioneconomics.com)