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STRAUSS HAUER & FELD LLP

IP Newsflash



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DISTRICT COURT CASES

Showing of a Substantial Case of Irreparable Harm to Losing Plaintiff Justifies Injunction Against Defendant During Appeal

Following a bench trial, but before the court issued a judgment, the parties stipulated to a preliminary injunction barring the defendants from marketing or selling its generic drug product until the court issued its decision on the merits. The court ultimately issued a judgment of invalidity, and the plaintiff appealed to the Federal Circuit. Nevertheless, the plaintiff moved for an injunction until the appeal is resolved. Judge Catherine C. Blake in the District of Maryland granted this injunction last week pending plaintiff's appeal, on the condition that plaintiff post a \$10 million bond and move to expedite its appeal. The plaintiff claimed that it has a strong likelihood of success on appeal because the district court erred in its application of the law with respect to motivations to combine the prior art and inherency. The court noted that, although it stands by its judgment, it recognizes that this case presents a close call. The plaintiff has not demonstrated a strong likelihood of success on appeal, but plaintiff made a showing of a substantial case. And because the balance of hardships tips strongly in plaintiff's favor as well, the showing of a substantial case is sufficient to award an injunction.

Par Pharmaceutical, Inc. et al v. TWI Pharmaceuticals, Inc., 1-11-cv-02466 (MDD August 12, 2014, Order) (Blake, J.).

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Court Refuses to Apply *Octane Fitness's* "Exceptional" Standard to the Lanham Act

Last week, a district court sitting in Connecticut refused to extend the Supreme Court's recent ruling in *Octane Fitness, LLC v. ICON Health & Fitness*, 134 S. Ct. 1749 (2014), which lowered the standard for awarding attorney's fees under the Patent Act. After the jury returned a verdict finding defendants liable for trademark infringement, false designation of origin, and patent infringement, plaintiff Romag sought attorney's fees under the Patent Act and the Lanham Act. Noting the more flexible standard set forth in *Octane Fitness*, the court awarded attorney's fees under the Patent Act because defendants asserted a borderline frivolous invalidity defense and failed to formally withdraw that defense in a timely manner. Despite the finding that the case was "exceptional" under the Patent Act, the court refused to find that the case was "exceptional" under the Lanham Act. More specifically, after acknowledging that the fee provisions in the Lanham Act and the Patent Act are nearly identical, the court refused to apply *Octane Fitness's* more flexible standard to the Lanham Act because the Supreme Court was only interpreting the Patent Act and not the Lanham Act in *Octane Fitness*. Consequently, notwithstanding the ruling in *Octane Fitness*, a party seeking attorney's fees under the Lanham Act must still prove bad faith, fraud or willfulness.

Romag Fasteners, Inc. v. Fossil, Inc., et al., No. 3:10-cv-01827 (D. Conn. Aug. 14, 2014) (Arterton, J.B.).

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