

November 18, 2015 Meeting

The meeting was called to order on November 18, 2015 by Howard Speight. The following people attended:

Howard Speight, Jason Sander, Shawn Foster, Iona Kaiser, Steven Boyd, Carlyn Burton, Todd Bynum, Andrea Tran, Albert Liou, Lee Eubanks, Keana Taylor, Ted Roe, Priya Prasad, Keith Jaasma

Approval of October minutes: Ted moved to approve. Albert seconded. None opposed. Minutes were approved.

Fall Institute 2017: Howard noted that we signed the contract with Moody Gardens in October for 2017.

Scholarships: Priya stated that we had 12 applicants, many of whom were from UofH. Shawn Foster is an ExxonMobile employee. Shawn stated that he opts not to vote because some of the applicants have a connection to ExxonMobil. Priya Prasad is an ExxonMobil employee. Priya stated that during the nomination process, she did not participate in any deliberations over candidates that had a connection to ExxonMobil.

Howard moved to award scholarships to the 5 students nominated by the scholarship committee: Priscilla Tran of Thurgood Marshall; Adela Pena of STCL; Charles Maule of UofH; Munira Jesani of UofH; and Samie Leigh of UofH. Ted seconded. The motion passed.

Treasurer's Report

Beginning September 30 cash balance was \$323,043.53 with income of \$182,605.57 and expenses of \$113,366.79. The ending cash balance for October 31, 2015 was \$315,187.71.

Carlyn said the Galveston income was \$9,000 over budget; however, we do not yet have all of the expenses. She expects to make more money than budgeted. Keana stated that she would push to get the expenses in faster.

The group conversation contemplated giving future vendors/speakers a deadline by which to submit expenses. We tabled the conversation.

The budget report for FY2015 follows:

Budget Report

FY 2015 (April 2015 - March 2016)

<u>Event</u>	<u>Budgeted Income</u>	<u>Budgeted Expense</u>	<u>Actual Income</u>	<u>Actual Expense</u>
Fall Institute	\$130,000.00	\$100,000.00	\$138,915.00	\$71,162.12
Golf Tournament	\$10,000.00	\$10,000.00	\$7,991.00	\$8,265.27
Judges' Dinner	\$25,000.00	\$30,000.00		\$1,000.00
Monthly Lunches	\$33,000.00	\$40,000.00	\$9,475.00	\$14,722.20
Membership Dues	\$40,000.00		\$34,745.00	
Other Income/Expense				\$5,095.00
Awards & Plaques		\$1,000.00		\$872.65
HIPLA Fellowship		\$6,000.00		\$700.00
Entertainment Committee (Happy Hours)		\$800.00		
Amicus Briefing		\$1,800.00		\$601.67
Merchant Fees		\$11,000.00		\$8,816.45
Miscellaneous Expenses		\$9,000.00		\$1,589.75
Moot Court Expenses		\$2,500.00		\$1,897.42
Science Fair		\$3,000.00		\$2,000.00
Scholarships		\$7,500.00		
Telephone		\$500.00		\$455.18
Meals & Entertainment				
Website Maintenance		\$1,700.00		\$1,609.08
CPA Expenses		\$19,000.00		\$3,100.00
	\$238,000.00	\$243,800.00	\$191,126.00	\$121,886.79

Net Income \$69,239.21

Probono: Albert move to amend his pending motion to: poll the membership and assess the level of interest in pro bono patent preparation and prosecution work. The poll will have seven questions: 1.Are you licensed to practice before the USPTO? [yes, no]; 2. What is your level of interest in taking on a pro bono patent preparation and/or prosecution matter? [not interested, somewhat interested, very interested]; 3. How likely are you to participate in a patent pro bono program if such program does not provide malpractice insurance coverage to its participants? [very unlikely, somewhat unlikely, somewhat likely, very likely] ; 4. How likely are you to participate in a patent pro bono program if such program does provide malpractice insurance coverage to its participants? [very unlikely, somewhat unlikely, somewhat likely, very likely] ; 5. How many patent pro bono representations would you expect to take on per year? [none, 1 to 2, 3 or more] ; 6. Would you be in favor of HIPLA using its funds to acquire malpractice insurance to cover members who participate in the pro bono program? [yes, no, undecided] ; 7. Comment box.

The motion was seconded by Shawn Foster. None opposed. Albert's amended motion passed.

Amicus Briefs : Lee stated that the HIPLA Amicus Committee recommends that HIPLA submit an amicus brief in the Halo v. Pulse and Styker v. Zimmer cases, which have been consolidated for oral argument at the Supreme Court. Committee members Dan Krueger, Mike Hawes, Tom Rooney, Mark Gatschet, and Lee Eubanks discussed the cases, reached consensus that this case merits participation, and provided input leading to the proposal below. According to Lee, Charles Knobloch and Tamsen Valoir also agreed with this proposal.

These cases generally concern the proper standard for awarding enhanced damages for infringement under Section 284. Here are the questions the Court has accepted for consideration:

- Halo question 1: Whether the Federal Circuit erred by applying a rigid, two-part test for enhancing patent infringement damages under 35 U.S.C. § 284, that is the same as the rigid, two-part test this Court rejected last term in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, for imposing attorney fees under the similarly worded 35 U.S.C. § 285.
- Stryker question 1: Has the Federal Circuit improperly abrogated the plain meaning of 35 U.S.C. § 284 by forbidding any award of enhanced damages unless there is a finding of willfulness under a rigid, two-part test, when this Court recently rejected an analogous framework imposed on 35 U.S.C. § 285, the statute providing for attorneys' fee awards in exceptional cases?
- Stryker question 2: Does a district court have discretion under 35 U.S.C. § 284 to award enhanced damages where an infringer intentionally copied a direct competitor's patented invention, knew the invention was covered by multiple patents, and made no attempt to avoid infringing the patents on that invention?

Given the way the Supreme Court has been knocking down Federal Circuit precedent over the last decade or so, and particularly in light of the Court rejecting a similar two-part test for attorney fees under Section 285, the committee members involved in this proposal thought that the Court would likely reject the *Seagate* test for enhanced damages as too rigid (and contrary to Supreme Court precedent dating back to the mid-1800s). But several members were also concerned about balancing the interests of patentees and alleged infringers when it comes to enhanced damages. The compromise position suggested by the committee is to file a brief in support of neither party to emphasize three points:

1. Enhanced damages under Section 284 are punitive and intended to deter and punish bad faith infringers (as opposed to those who infringe in good faith or in ignorance); willfulness is sufficient to show such bad faith, but bad faith is may be proven in other ways (i.e., bad faith and willfulness are not coextensive).
2. The *Seagate* test is too stringent for willfulness, which should be analogous to the intent of indirect infringement as that requirement is described by the Court in *Commil* (requiring knowledge of patent and infringing activity), *Global-Tech* (willful blindness exception to knowledge), etc.
3. Enhancement and any underlying determinations are for the trial court rather than the jury.

Lee has two concerns about this proposal: 1. The *Seagate* test is favorable to alleged infringers, and any movement away from this test will necessarily benefit patent owners at the expense of defendants. Some organizations might stay away from this case for that reason. The committee discussed this issue, but thought it was better here to provide guidance in reaching an equitable solution (that doesn't tip the scales too far against defendants), based on Supreme Court precedent, rather than remaining silent and hoping for the best. 2. Lee has been trying to line up writers for the brief in case we move forward. Some have refused based on client concerns (firms representing both plaintiffs and defendants), and

others have declined for lack of time. Lee suspects he could talk several people into each addressing one of the points above, but I do not yet have volunteers for that.

Lee requests the Board's consideration and vote this week on whether to authorize preparation of a brief along the lines proposed above, subject to finding one or more persons to prepare the brief.

Web Design Update: We continue to have trouble finding web designers.

Upcoming Luncheons

The Holiday lunch is set for December 10th at Reef.

Judges' Dinner: Ted will ask Marily to update our website to announce the judges' dinner.

Motion to adjourn. Keith moved to adjourn. Ted seconded. None opposed. Adjourned.