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THE MYTHOLOGY OF PLUTUS IP: FEDERAL COURT IMPOSES FEES ON PROMINENT "PATENT TROLL"

by
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Plutus is a kindly god who goes everywhere over land and the sea's wide back, and he makes rich the man who finds him and into whose hands he comes, bestowing great wealth upon him.
– Hesiod, *Theogony* 970

Erich Spangenberg, elusive in his managerial role with infamous Plutus IP, LLC, is nevertheless forthright concerning his litigious ambitions. Plutus (literally 'riches from the soil'), the namesake of Mr. Spangenberg's cash management and investment capital hub, is the Greek god of Wealth, credited in mythology with the introduction of property, its acquisition, and safeguarding. Plutus, according to mythology, taught the Greeks to acquire beyond simple necessity; in fact, one was said to 'possess Plutus' in Ancient Greece if one successfully acquired wealth. Befitting its title, Plutus IP has, on net, been financially successful; however, its subsidiary, Taurus IP, LLC, was recently dealt a $3.8 million financial blow for attorneys' fees in *Taurus IP, LLC v. DaimlerChrysler*, 519 F. Supp. 2d 905 (W.D. Wis. 2007). This represents an unprecedented ruling in so-called 'patent troll' litigation.

Mr. Spangenberg owns a hierarchy of LLCs, solely orchestrated to license and enforce patents (called a non-practicing entity or NPE). He often schizophrenically authorizes his decisions as manager of one company to act as manager of another. His companies are ultimately owned by Acclaim Financial Group, LLC, which provided the initial capitalization for Plutus. Plutus, in turn, directly and indirectly owns a host of limited liability companies, including Taurus IP, LLC, Orion IP, LLC, Plutus IP Wisconsin, LLC, Constellation IP, LLC and Caelum IP, LLC. Mr. Spangenberg seems to have a penchant for astronomy – in fact, his limited liability companies are, by and large, named after constellations. For example, according to mythology, Zeus placed 'Orion', a huntsman, in the sky as a constellation. 'Taurus' (Latin for bull) is a constellation of the Zodiac, northwest of Orion. 'Caelum' is a faint minor southern constellation. Additionally, 'Plutus' is, aside from the Greek paragon of wealth, a medium body system with five planets and an asteroid belt. Mr. Spangenberg uses his 'legal constellations' to engage in forum shopping for patent litigation.

On August 25, 2004, Plutus, under the guise of Orion, filed suit against Chrysler in the U.S. District Court for the Eastern District of Texas, alleging that Chrysler's products infringed two of its patents – 5,615,342 and 5,367,627 ('342 & '627). Approximately one year later, Orion filed suit against Mercedes-Benz USA, Inc. in the same court, alleging that it had infringed the same patents. These lawsuits were

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settled in Texas. The settlement agreement included a warranty and representation clause, asserting that Orion had not "*assigned or otherwise transferred to any other Person any rights to any causes of action, damages, or other remedies, or any Orion Patents, claims counterclaims or defenses, relating to the Litigation*." Only five days after filing suit against Chrysler in Texas, Orion had assigned the rights to its '658 patent (i.e. 6,141,658) to Caelum IP, LLC. On February 2006, Constellation acquired the '658 patent when it acquired Caelum. On March 10, 2007, five days after the initial formation of Taurus, Constellation transferred the '658 patent to Taurus. Ten days later, Taurus filed a lawsuit in the U.S. District Court for the Western District of Wisconsin against Chrysler and Mercedes Benz USA, Inc., alleging infringement of the '658 patent. Defendants held that Taurus, Orion, Erich Spangenberg, Constellation IP, LLC and Plutus IP Wisconsin, LLC had breached the prior settlement agreement between defendants and Orion.

Some would simply call Mr. Spangenberg's tactics a "shell game", in which he shuffles patents from one LLC to another to engage in forum shopping for repeated, aggressive litigation against patent infringers. These tactics seem to mimic the ruthlessness of the god of wealth in Aristophanes' *Plutus*, in which the god's opening line is "I'll thrash you." Critics have dubbed such companies "patent trolls", arguing that retention and enforcement of patents without production is unfair and stifles innovation. This view, held by most large corporations, has gained traction in the courts with recent rulings. Others argue that "patent dealers", like Plutus, serve an important role as an intermediary in intellectual property markets, providing liquidity, market clearing, and increased efficiency in patent markets. These benefits, defenders of patent dealers argue, are similar to those achieved by securities dealers in capital markets. The existence of intermediaries may stimulate innovation in a market where poorly-funded inventors are often snubbed by large infringing corporations. Proponents of patent dealers cite poor quality patents and the patent thickets problem (where individuals refrain from using scarce resources because of overlapping ownership) as the real underlying dilemmas of the US patent system. To remedy these problems, some have suggested an open post-grant review of patents, whereby petitioners might appeal against a patent at times of sale and renewal. Despite the current state of the patent system, the recent *Taurus IP v. DaimlerChrysler* decision may offer some hope to corporations plagued with frivolous patent infringement cases.

District Judge Barbara Crabb held that defendants' products did not infringe the '658 patent. The post-trial briefing considered defendants' motion for a permanent injunction (which was summarily denied as overbroad and unnecessary), determined the amount of damages, and resolved defendants' contention that Erich Spangenberg should be held personally responsible. Judge Crabb offered two legal alternatives to a permanent injunction – Rule 11 (which was not employed) and attorneys' fees under 35 U.S.C. § 285. Judge Crabb deemed that Orion IP, LLC could not evade judgment; therefore, she did not pierce the corporate veil to hold Mr. Spangenberg personally liable. Mr. Spangenberg and Orion IP, LLC were, however, enjoined against dissipating the assets of Orion. Defendants' attorneys' fees under 35 U.S.C. § 285 were granted for approximately $1.6 million. Defendants' motion for additional attorneys' fees for Orion's breach of warranty was granted in the amount of $2.2 million.

The debate over patent trolls or dealers (whichever side of the issue one might be on) is far from over, in both the courts and the Congress. The *Taurus* decision does, however, make it clear that spurious patent claims will not always go unanswered. Although the court did not pierce the corporate veil to hold Mr. Spangenberg personally responsible, a nearly $4 million loss on opposing counsel's attorneys' fees may lessen the number of spurious lawsuits filed, at least from Plutus. Judge Crabb's recommended legal remedies, including Rule 11, may be sufficient to combat the most egregious troll-like patent litigation. Though allegedly-infringing companies have been reticent to bring claims to trial for fear of exacerbating their economic losses, the *Taurus* decision reassures corporations that non-practicing entities will foot the bill when bringing forward wholly unsubstantiated patent infringement claims. This decision, though substantial in its own right, hardly cripples Mr. Spangenberg's operations. Only time will tell if Mr. Spangenberg's Plutus IP continues to live up to its cheeky mythological name.

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