

In the Supreme Court of the United States

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Applicant,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

**OPPOSITION TO APPLICATION FOR EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable John G. Roberts, Jr., Chief Justice of the
United States and Circuit Justice for the Federal Circuit

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March 2, 2019

PARTIES TO THE PROCEEDING

Applicant The Trustees of the University of Pennsylvania was the patent owner and respondent before the United State Patent and Trademark Office and was the appellant in the court of appeals.

Respondent Eli Lilly and Company was the petitioner before the United States Patent and Trademark Office and was the appellee in the court of appeals.

RULE 29.6 DISCLOSURE STATEMENT

Eli Lilly and Company is a publicly traded company. It has no parent company, and no publicly traded company owns 10% or more of Eli Lilly and Company's stock.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT:

OPINIONS BELOW

The final written decision of the United States Patent and Trademark Office, Patent Trial and Appeal Board is unreported. *See Eli Lilly and Company v. Trustees of the University of Pennsylvania*, IPR2016-00458, 2017 WL 2992425 (Patent Tr. & App. Bd. July 13, 2017).

The decision of the United States Court of Appeals for the Federal Circuit (Ex. A)¹ is published in the Federal Appendix. *See Trustees of the University of Pennsylvania v. Eli Lilly and Company*, 737 F. App'x 1006 (Fed. Cir. Sept. 17, 2018). The Federal Circuit's order denying Applicant's petition for rehearing (Ex. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2018. Applicant's petition for panel rehearing and rehearing *en banc* was denied on December 12, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REASONS THE APPLICATION FOR EXTENSION OF TIME SHOULD BE DENIED

Applicant The Trustees of the University of Pennsylvania ("Penn") has not shown good cause for its request for a 60 day extension of time to file a petition for a writ of certiorari. "An application to extend the time to file a petition for writ of certiorari is not favored" and may be granted only "for good cause." Sup. Ct. R. 13.5. Penn has not identified any reason why it is unable to timely file its petition, nor has it identified any hardship that would be caused by complying with this Court's deadlines. Instead, as it told the district court two months ago, Penn has simply "not yet decided whether to file a petition for writ of certiorari." *Trustees of the University of Pennsylvania v. Eli Lilly and Company*, No. 2:15-cv-06133-RK, Dkt. 69, at 1 (E.D. Pa. Dec. 21, 2018). Penn recently confirmed that it "is still weighing whether it will file

¹ "Ex." citations are to the Exhibits filed with the Application for Extension of Time to File a Petition for a Writ of Certiorari.

such a cert petition.” *Trustees of the University of Pennsylvania v. Eli Lilly and Company*, No. 2:15-cv-06133-RK, Dkt. 73, at 2 (E.D. Pa. Jan. 23, 2019).

Penn’s indecision is not good cause for an extension. The only reason Penn gives for requesting more time is that two motions pending before the district court “could be essentially dispositive on [its] decision as to whether to file a petition for a writ of *certiorari*.” Application at 2. This is just another way of saying that it still has not decided whether to file, but “all applicants can honestly claim that they would benefit from additional time to prepare a petition for certiorari.” *Penry v. Texas*, 116 S. Ct. 2 (1995) (Scalia, J.) (denying an application for an extension). Likewise, all applicants could benefit from additional time to weigh the merits of filing a petition for writ of certiorari. But if the Court’s admonition that extensions are “not favored” is to have meaning, a mere desire for more time cannot be considered good cause.

Moreover, Penn’s application is part of a larger effort to induce delays in order to gain a strategic advantage in the district court litigation. Penn sued Eli Lilly for allegedly infringing its patent on methods of treating certain types of tumors. Eli Lilly responded by filing a petition for *inter partes* review at the United States Patent and Trademark Office to demonstrate that the patent is invalid. When the Patent Office instituted review, the district court stayed the litigation. *Trustees of the University of Pennsylvania v. Eli Lilly and Company*, No. 2:15-cv-06133-RK, Dkt. 60 (E.D. Pa. July 2, 2016). The Patent Office completed its review and ordered that all of the then-asserted claims be cancelled, based on its finding that Penn’s alleged invention is

obvious. The Federal Circuit has affirmed the decision of the Patent Office, which should have been the end of the district court infringement action.

But in a last-ditch effort to maintain its lawsuit, Penn filed a petition for *ex parte* reexamination in which it has asked the Patent Office to add 188 new claims to the patent. *See Trustees of the University of Pennsylvania v. Eli Lilly and Company*, No. 2:15-cv-06133-RK, Dkt. 63-14, at 4 (E.D. Pa. Nov. 9, 2018). Penn is doing everything it can to keep the district court litigation alive while it tries to convince the Patent Office to issue new claims that it can then assert against Eli Lilly.

At the same time that Penn has asked this Court for more time pending action at the district court, it has asked the district court to keep the case stayed pending this Court's consideration of its (potential) petition for writ of certiorari. *Trustees of the University of Pennsylvania v. Eli Lilly and Company*, No. 2:15-cv-06133-RK, Dkt. 69 (E.D. Pa. Dec. 21, 2018). Penn is thus trying to play this Court and the district court off one another, asking each court to wait until the other one acts. Penn's gamesmanship should not be rewarded.

Penn has had adequate time to consider whether to file a petition for a writ of certiorari. The Federal Circuit issued its judgment on September 17, 2018. Penn filed a petition for rehearing on October 17, 2018, which was denied on December 12, 2018, affording Penn nearly three additional months to consider its decision. All told, more than five months have passed since the Federal Circuit entered judgment. Penn now wants two more. It has not shown good cause for needing seven months to decide whether to seek this Court's review.

CONCLUSION

For the foregoing reasons, Penn's Application for Extension of Time to File a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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