

Filed: June 15, 2015

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 IPR2015-01093¹

Patent 7,056,886

**PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION FOR ADDITIONAL DISCOVERY**

¹ Per the Board's Order authorizing NPS's motion (*see, e.g.*, IPR2015-00990, Paper 8, fn 1), the word-for-word identical paper is filed in each proceeding identified in the heading.

NPS replies to Petitioner's opposition to NPS's request for discovery.

I. NPS's Evidence is not Merely Speculative

Petitioner incorrectly argues that that NPS did not meet *Garmin* factor 1 (*i.e.*, evidence beyond speculation that something favorable to NPS's RPI contention will be uncovered). Even though this Board has held that "[t]he discovery-seeking party only needs to set forth a threshold amount of evidence tending to show that the discovery it seeks factually supports its contention," (*Wavemarket Inc. v. Locationet Systems Ltd.*, IPR2104-00199, Paper 34, 4 (Aug. 11, 2014)), Petitioner wants conclusive evidence and ignores NPS's evidence.

First, Petitioner argues that: "Patent Owner provides *no* evidence that *any* 'Unnamed Funders' have any relationship with *this proceeding*," and only speculative generalities (Paper 11, 8 (original emphasis)); "Patent Owner has not shown that it has any information that ties any unnamed entity or person to control of this proceeding" which Petitioner paradoxically says is essential now because, after discovery, it will be "important to determine whether a non-party exercises, or could have exercised, control over a party's participation in the proceeding" (*id.* at 5); and that "Patent Owner's requests for production (Ex. 2001) request documents regarding the relationships between the parties, not any relationship to this proceeding" (*id.* at 6).² However, NPS followed the actual, not speculative,

² Petitioner's reliance on *Wavemarket* is misplaced. Paper 11, 5. The Board refused

money/control trail which shows that Unnamed RPIs are funding or controlling the Petition and one another through closely held hedge funds – a clear relationship with this proceeding. *See* Paper 9, 5-8; Ex. 2005 “Complete control or funding of the proceeding is not required for a party to be considered an RPI; the exact degree of control or funding that suffices ‘requires consideration of the pertinent facts.’” *Azure Gaming Macau, Ltd. v. MGT Gaming, Inc.*, IPR2014-01288, Paper 13, 11 (Feb. 20, 2015) (quoting 77 Fed. Reg. at 48-9). NPS has shown that the Named and Unnamed RPIs have a common offices and interrelated ownership/management. *See* Paper 9, 5-9. For example, HCMF, Credes Onshore, Credes Offshore, HCP,

discovery there because the only evidence was common counsel, indemnification obligations, and joint defense/common interest agreements. Here, NPS has shown that Unnamed RPIs of are funding, directing, and controlling this proceeding. The *Wavefront* Board also denied discovery as overly broad and burdensome because, unlike here, it was too late (*i.e.*, 3 months after review was instituted). *Wavemarket*, IPR2014-00199, Paper 34, 8. Similarly, *Unified* and *TRW* are not pertinent. Paper 11, 3-4. The *Unified* requests were to establish that Petitioner’s only activity was bringing IPRs (which was irrelevant there) and to determine how the Petitioner spent its money, not from where it came. Here, NPS is seeking discovery of the sources of funding and control. The issue in *TRW* was not discovery; it was whether failure to name RPIs was ultimately proven.

HCOP, HOF, HOM, HCM, HD, JMOMF share the same office. Although Bass and Spangenberg are Named RPIs, others with similar positions in Named and Unnamed RPIs are not. For example, Bass, with Unnamed RPIs Keyes, Kirkpatrick, Morgan, and Sung, direct Named RPIs HCM, HCMF, and HOM and Unnamed RPI HCOP, and Bass, with Unnamed RPIs Lamoy, Knowlton, Kirkpatrick, Lee, Flat Calm Revocable Trust, the Bass Descendants Trusts, and Named RPI HI own or run Named RPI HCM. Additionally, NPS Spangenberg, an nXnP principal and IPNav founder has been instrumental, at least, in soliciting funds from Unnamed RPIs.

Next, Petitioner complains that NPS says “mere financial contribution to a business” justifies discovery. Paper 11, 10. NPS does not suggest a *per se* rule that investors/management must always be RPIs (*see id.* at 8-11) or that corporate distinctions should be disregarded (*see id.* at 7). Here, Named and Unnamed RPIs are related businesses with nearly identical management and identical headquarters. *See* Paper 9, 5-9. It has been publicly admitted that Credes, the Coalition, and HCMF together execute/support a short activist strategy through IPRs. *Id.* at 4. These facts show beyond speculation that the officers and beneficial owners (including funding and controlling limited partners and investors) of Named RPIs are also RPIs.

Petitioner also argues that “Patent Owner’s allegations imply that corporate

distinctions should be disregarded.” Paper 11, 7-8. However, hedge funds, unlike other businesses, are created for precisely targeted purposes, investors’ control and capital commitments are individually negotiated, management is not according to a mandated structure, and the details of this are kept from the public. Here, Unnamed RPIs have intentionally funded a Petition through interrelated hedge funds, the Coalition was formed as a nominal proxy for Unnamed RPIs (including investors) who have an interest in bringing this IPR, the Named and Unnamed RPIs have purposely disregarded corporate distinctions, and all profit handsomely from their collective short activist IPR strategy. *See* Paper 9, 5; Ex. 2005.

Finally, Petitioner alleges that “each of Patent Owner’s arguments focuses on the relationship between parties – an issue of privity – rather than the relationship between an alleged unnamed party to this proceeding.” Paper 11, 6-7. But Petitioner is confusing privity with the RPI inquiry. *See id.* at 5-6. NPS has shown Unnamed RPI relationships to funding, direction, and control of this proceeding. Paper 9, 5-9; Ex. 2005. Unnamed RPIs have intentionally invested in Petition-funding entities and have aided in establishing another entity (*i.e.*, the Coalition), a proxy with no substantial interest apart from those of the Named and Unnamed RPIs. *See Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008); *Azure*, IPR2014-01288, Paper 13, 11. A RPI is a party who desires review of the patent. *Azure*, IPR2014-01288, Paper 13, 100. Clearly, the Unnamed RPIs “desire review

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