

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN PHARMACEUTICALS INC.,
Petitioner,

v.

NISSAN CHEMICAL INDUSTRIES, LTD.,
PATENT OWNER

U.S. Patent No. 5,856,336

Issue Date: January 5, 1999

Title: Quinoline Type Mevalonolactones

Inter Partes Review No. IPR2015-01069

**PATENT OWNER'S REPLY REGARDING
PETITIONER'S FAILURE TO NAME A
REAL PARTY-IN-INTEREST**

The Jenkins Declaration

Petitioner Mylan's Response relies exclusively on the 3+ page unsupported declaration of Thomas W. Jenkins ("Decl.").

Jenkins's declaration is unreliable. He claims: "I either have personal knowledge of the facts stated in this Declaration or believe them to be true based on my experience, review of business records, or information I have otherwise received in the course of my duties." Decl. ¶2 (emphasis added). At his deposition, however, Jenkins testified that he did not look at a single document for purposes of preparing his declaration. Jenkins Transcript ("Tr.") 18:24-20:17, 44:5-21, 109:6-111:7. Jenkins did not even bother to sign the declaration himself. Tr. 12:18-17:22.

Jenkins could not explain how he came to know that MNV was "a non-operational holding company" (Decl. ¶3). The circumstances suggest that he copied the term from the *Par* opinion, and he does not even know what it means. Tr. 56:14-17 ("I'm not a incorporate [sic] lawyer, so I can't tell you what constitutes exactly non-operational versus operational."); *see also id.* 39:19-40:9; 40:24-41:1. He refused to explain why it was that MNV's non-operational status was relevant to whether it should have been named as a real party-in-interest ("RPI"), claiming it was privileged. *Id.* 41:2-43:4. He claimed that MNV lacked the authority to act on IPRs, but could not say why, relying only on what he had

been told by others – i.e., hearsay. *Id.* 118:16-120:3. When asked how MNV came to be identified as an RPI in other IPR proceedings, he refused to answer. *Id.* at 66:16-69:8, 120:4-21.¹

Not only was Jenkins' knowledge limited, it appears that he kept deliberately uninformed (*cf.* 37 C.F.R. § 42.51(b)(1)(iii)). Jenkins did not even look at any of the information or documents available on MNV's website regarding its corporate structure and corporate activities. Tr. 108:20-109:5; 44:5-21. Jenkins did not review MNV's Articles of Association (*id.* 50:4-20), its Corporate Governance principles (*id.* 113:9-114:23), or Leadership pages (*id.* 45:1-17), which speak directly to MNV's business purpose, corporate structure, activities, and personnel. *See* Exs. 2034, 2035, 2045.

MNV

Jenkins claimed that MNV could not control this IPR because MNV has no employees. Tr. 32:25, 83:4-8, 117:7-118:15. In fact, MNV does have employees, not to mention a very highly compensated Board of Directors and Executive

¹ Jenkins and his counsel continually obstructed the deposition process with improper speaking objections and refusals to answer non-privileged questions. Such resistance to discovery relating to the RPI issue is inappropriate. *Cf.* *Reflectix, Inc. v. Promethean Insulation Techn. LLC*, IPR2015-00044, Paper 18 at 16-17 (PTAB Apr. 24, 2015) (duty of candor and good faith in discovery).

Officers. Exs. 2036 p.6; 2049, 2050. One of MNV’s officers, Mark Nance (who also works for Mylan Inc.), is the direct boss of Jenkins’ boss, Jill Ondos. Tr. 33:1-18.

Moreover, Mylan’s corporate lines are blurred. Tr. 83:18-88:25; 94:6-22. This blurring is demonstrated by both internal confusion and by multiple MNV documents that show sharing of many of the same executives. *Id.*; *see Reflectix, IPR2015-00044, Paper 18 at 6-7, 11; Galderma S.A., et al. v. Allergan Industrie, SAS, et al., IPR2014-01422, Paper 14, at 8-12 (PTAB Mar. 5, 2015).*

Mylan argues: “MNV was not involved nor could it have been involved in this proceeding ***because*** *MNV was nothing more than a non-operational, holding company having no capability to control it.*” Br. at 10 (emphasis added). Mylan’s own factual allegations and public filings undermine this argument. First, Mylan’s assertion that a “non-operational holding company” cannot control this proceeding is belied by Mylan’s assertion that MI (which Mylan also says is a non-operational holding company, Decl. ¶ 4) allegedly controls this proceeding. Br. at 4. Second, it is undisputed fact that Mylan identified MNV as an RPI in 15 IPRs since March 2015. Mylan argues that the Board should ignore all of those other IPRs. However, Mylan failed and refused to explain how MNV can be an RPI in those 15 IPRs, but not in this IPR. *See* Tr. 62:15-81:3; *see generally* Ex. 2009. Third, MNV’s Articles of Association specifically authorize it “(a) to participate in,

finance, collaborate and conduct the management of companies, businesses and other enterprises ... and (e) to take any and all actions relating to, in connection with or in furtherance of the foregoing to the fullest extent permitted by applicable law.” Ex. 2035 at § 1.03. Mylan’s position is also directly contrary to MNV’s public statements, which show it to be intricately involved in IPR proceedings (of which Jenkins said he was not aware). *See* Ex.2036, at 19 (especially MNV’s President and Executive Director’s comments regarding one of its IPRs); Ex. 2040, at 4 (MNV’s CEO’s explanation of why it files IPRs).

MNV also has issued numerous press releases announcing its launch of new drug products, and touting its many ANDAs (over 260). *See, e.g.*, Exs. 2042, 2043, 2051. MNV’s investor call discussions tell an even more comprehensive story of MNV’s active business activities. *See, e.g.*, Ex. 2036, at 8-11, 18-19. A more proactive and involved leadership than the MNV officers would be hard to find. In addition, in an effort to avoid being acquired by Teva, MNV argued to the FTC that MNV should be afforded the protections of U.S. law because MNV’s operations are based in Canonsburg, Pennsylvania. *See* Ex. 2052. MNV is thus far more than the empty shell company Mylan claims.

Mylan Cannot Shift Its Burden to Patent Owner

Mylan devotes § III(B) of its brief to arguing that Patent Owner has failed to prove that MNV is an RPI. Br. at 6-9. Mylan misstates the law. The burden of

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