

Filed: June 3, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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COALITION FOR AFFORDABLE DRUGS II LLC.

Petitioner

v.

NPS PHARMACEUTICALS, INC.

Patent Owner

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Cases IPR2015-00990 and IPR2015-01093<sup>1</sup>

Patent 7,056,886

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**PATENT OWNER'S MOTION FOR ADDITIONAL DISCOVERY**

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<sup>1</sup> Per the Board's Order authorizing this 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.

## **I. STATEMENT OF RELIEF REQUESTED**

Patent Owner NPS Pharmaceuticals, Inc. (“NPS”) moves under 37 C.F.R. § 42.51(b)(2)(i) and (ii) in the interests of justice for an order requiring Petitioner to respond to the Request for Production of Documents and Things and Interrogatories attached as Exhibits 2001 and 2002, respectively, and to produce a witness to testify on the topics attached as Exhibit 2003. Discovery is requested to determine all of the real parties-in-interest (“RPis”) in the Petition. This motion was authorized by Order of the Board on June 2, 2015. *See* IPR2015-00990, Paper 8, 3; IPR2015-01093, Paper 7, 3.

## **II. STATEMENT OF REASONS FOR THE RELIEF REQUESTED**

### **A. SUMMARY OF THE ARGUMENT**

Public documents, including publicly available registration statements, Form D’s and Form ADV’s, show that this Petition was brought by the Coalition for Affordable Drugs II LLC (“Petitioner” or “Coalition”) on behalf of numerous natural and non-natural persons who purposely and specifically funded the Petition and will benefit from it. *See generally* Ex. 2004<sup>2</sup>; Ex. 2005<sup>3</sup>. All of these persons

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<sup>2</sup> Ex. 2004 is an overview of the general structure and regulation of hedge funds, which the Board authorized during the May 29, 2015, telephone conference.

must be named as RPIs. However, they are not.

Rather, the Petition names only a select portion of these persons, *i.e.*, the Coalition, Hayman Credes Master Fund L.P. (“Credes”), Hayman Orange Fund SPC – Portfolio A (“HOF”), Hayman Capital Master Fund, L.P. (“HCMF”), Hayman Capital Management, Inc. (“HCM”), Hayman Offshore Management, Inc. (“HOM”), Hayman Investments, L.L.C. (“HI”), nXn Partners, LLC (“nXnP”), IP Navigation Group, LLC (“IPNav”), Kyle Bass (“Bass”), and Erich Spangenberg (“Spangenberg”) (collectively, “Coalition *et al.*”). Pet., 3-4. Furthermore, the Petition states that only HCM, Bass, nXnP, and Spangenberg have authority to direct or control this proceeding and that only HCM, the Coalition, Credes, HOF, and HCMF (collectively, the “Named Funders”) are funding it. *Id.*

The evidence available to NPR shows otherwise. Discovery is, therefore, sought to expand upon and corroborate the public documents that NPS has already carefully examined and to identify particularly these unnamed RPIs.

The Coalition *et al.* include several investment vehicles whose structures, funders, governance, and controlling parties are not publicly disclosed. These

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<sup>3</sup> Ex. 2005 is an illustration derived from public information of relationships among the named RPIs and some of the unnamed RPIs discussed in this motion. (Blue = named RPI; Green = unnamed RPI).

vehicles and undisclosed persons include closely held hedge funds, master funds, feeder funds, pooled investment funds, segregated portfolio companies, and their officers, directors, owners, managers, trustees, and investors. *See generally* Ex. 2004; Ex. 2005. Closely held investment funds operate differently than publicly traded companies. For example, hedge funds are often created for a specific purpose (*e.g.*, the Coalition was created to bring this IPR), and hedge fund investors often can negotiate their individual rights as conditions to their investment. Not all of the investors in a fund are equal; bigger investors often negotiate better terms than others. Furthermore, investment managers, like Bass, create layers of inter-related funds, business entities, and trusts for tax and general liability reasons. However, those reasons cannot insulate these other persons from being listed as RPIs. Here, the spider's web of true RPIs must be unraveled to prevent Petitioner from thwarting the statutory requirement to name them all.

NPS's discovery requests are limited to evidence directly related to the RPI assertions advanced by Petitioner. They (1) are supported by evidence showing beyond speculation that something useful will be uncovered – public information indicates that Petitioner has not identified all RPIs, (2) do not ask for litigation positions or their underlying bases, (3) seek information unavailable without discovery – NPS has exhausted the public information, (4) have easily understandable instructions, and (5) are not overly burdensome to answer – they

IPR2015-00990 and IPR2015-01093

are directed only to the Named Funders and persons that NPS discovered from public documents who are intimately related to them, and they seek information that is essential to every entity, is kept in the regular course of business, and should be readily available. *See Garmin Int'l., Inc. v. Cuozzo Speed Technologies LLC*, IPR2012-00001, Paper 26, 6-7 (PTAB Mar. 5, 2013).

## **B. MATERIAL FACTS**

### **1. The Bass Strategy**

Bass is the principal of HCM, which is an investment manager of over \$2 billion of private funds. Ex. 2006, 4; Ex. 2007, 12. Spangenberg is a patent attorney and a principal at nXnP and founded IPNav, a non-practicing entity. Pet., 4; Ex. 2017, 2; Ex. 2018, 2. Bass and Spangenberg, in cooperation with, on behalf of, and funded by others, are targeting pharmaceutical companies with IPR petitions to bet against their stocks. *See* Ex. 2020, 1; Ex. 2021, 2-4; Ex. 2022, 1. They have established new subsidiaries of Bass's investment businesses as nominal petitioners to carry out a "short activist strategy." *See* Pet., 3; Ex. 2011, 1; Ex. 2012, 1; Ex. 2013, 1; Ex. 2014, 1; Ex. 2015, 1; Ex. 2021, 2-4. Bass has said that "[t]his is a short activist strategy and we hold the hammer." Ex. 2023, 11.

Bass's Coalitions have filed 13 IPR petitions, thus far. The first target, Acorda Therapeutics Inc., saw its stock fall about 10 percent immediately after IPRs were filed in February 2015. *See* Ex. 2019, 2; Ex. 2020, 1.

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