

Filed: July 13, 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 MOTION FOR REHEARING

¹ Per the Board's Order authorizing a motion for additional discovery (*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. INTRODUCTION AND RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.71(d), NPS Pharmaceuticals, Inc. (“NPS”) requests rehearing of the July 2, 2015, Order Granting-in-Part Patent Owner’s Motion for Additional Discovery Regarding Real Party-in-Interest 37 C.F.R. § 42.51(b)(2). *See* Paper 14 (“Order”). Particularly, NPS requests reconsideration/clarification of the term “control” as used in the Order expressly to include “funding” by amending the Order to authorize discovery of “any agreements, in the possession of Petitioner or any designated real party-in-interest, relating to the funding, control or ability to control any aspect of the current proceeding by a party not designated as Petitioner or a real party-in-interest in the Petition. Such agreements include those indicating that any person or party (other than Petitioner or designated real parties-in-interest) provided any funding (i) directly or (ii) indirectly through another funding entity or person, direction to, or had the authority to provide direction to, Petitioner or its counsel in relation to this proceeding, including persons or parties who reviewed, or were given the opportunity to review, papers filed in this proceeding.” *Id.* at 7 (underlining = addition).

This Request is consistent with *Zoll Lifecor Corp. v. Philips Electronics North America Corp.* *See* IPR2013-00609, Paper 15, 10 (PTAB March 20, 2014). Furthermore, it is consistent with the legislative intent in establishing IPR

proceedings. The scope of the amended request is also conservative in light of the non-speculative evidence of record that investors are specifically funding this IPR. Finally, the amended discovery request serves the interests of justice. It is unfair and unjust to reward the Petitioner (*i.e.*, the Coalition) for using a financial shell game to hide the identities of those to whom IPR estoppel should apply. This is also why the request should be met by all designated RPIs. The Board should also consider the Coalition's bad faith in abusing the IPR process.

II. ARGUMENT

The present case is not the typical IPR that was contemplated by Congress in which a potential infringer seeks to invalidate a patent in order to resolve an alleged infringement outside of district court litigation. *See* Order, 4 (“ . . . Congress intended *inter partes* review to be a quick and cost-effective alternative to litigation. *See* H. Rep. No. 112-98, at 45-48 (2011).”). The Coalition could never have commenced a litigation involving the ‘866 patent; it would not have standing. It does not manufacture, use, offer to sell, sell, or import any infringing products or components of any infringing products and does not actively induce anyone else to infringe. It never will. It is not using the IPR as an alternative to litigation, as Congress intended. Rather, the Coalition is admittedly a nominal petitioner for high net worth investors who profit by bringing IPRs and manipulating stocks. Paper 9 (“Motion”), 4. All of these persons are intentionally

and purposefully availing themselves of this IPR proceeding. The way that these investors control this IPR is with their money, which is why it is so necessary to follow the money trail to determine who is “controlling” this IPR, *i.e.*, who all of the real RPIs are. This is also why it is necessary that the term “control” in the Order must be defined to include funding and documents possessed by all named RPIs, not just the Coalition.

NPS believes that the Board overlooked the legal meaning and extent of the term “control” in light of the unusual circumstances of this proceeding. *See* Order at 7; *see also* *Zoll*, IPR2013-00609, Paper 15, 10 (*quoting* Office Patent Trial Practice Guide (“OPTPG”) (“Whether a party who is not a named participant in a given proceeding nonetheless constitutes a ‘real party-in-interest’ . . . to that proceeding is a highly fact-dependent question.”)); 77 Fed. Reg. 48,688, 48,759 (Aug. 14, 2012)). NPS also believes that the Board overlooked the extent to which the Order will be rendered meaningless in the absence of clarifying language that includes “funding.” *See id.* The unamended Order allows the Coalition unilaterally to determine who has “control” (which is the issue in dispute) before producing discovery to NPS. This is untenable, since the Coalition has already incorrectly determined, in its own mind, this issue. The Coalition claims that it has already named those in control – only HCM, Bass, nXnP, and Spangenberg. *See* Pet., 3-4; Paper 11 (“Opposition”), 1. NPS disputes this with evidence tending to

show beyond speculation that something useful, *i.e.*, “favorable in substantive value to a contention of the party moving for discovery,’ not just ‘relevant’ or ‘admissible,’” will be uncovered. *John’s Lone Star Distribution, Inc. v. Thermolife Int’l, LLC*, IPR2014-01201, Paper 29, 4 (PTAB May 13, 2015) (*quoting Garmin, IPR2012-00001*, Paper 26, 7). That is why discovery was ordered in the first place. If the Coalition is permitted to use the “control” criteria (scope and persons) from its Petition for document production, the discovery process becomes self-selective and will inherently exclude documents relating to the unnamed RPIs that NPS has shown beyond speculation will be uncovered.

The Board has stated that “the ‘real party-in-interest’ is the party that *desires review* of the patent.” *Zoll*, IPR2013-00609, Paper 15, 10 (emphasis in original) (*quoting* 77 Fed. Reg. at 48,759). There is no doubt that those who specifically fund an IPR, directly or indirectly, desire review of the patent. Here, these non-party investors’ interests are more than simply aligned with those of the designated RPIs; their interests are identical.

The Board in *Zoll* went even further though and held that “[f]actors for determining actual control or the opportunity to control include the existence of a financially controlling interest in the petitioner” and that “[t]he non-party’s participation may be overt or covert” *Zoll*, IPR2013-00609, Paper 15, 10. NPS has shown beyond speculation that the Coalition was formed specifically to

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