

Filed: September 14, 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

**CORRECTED PATENT OWNER'S BRIEF IN RESPONSE TO THE
BOARD'S REQUEST FOR ADDITIONAL BRIEFING PURSUANT TO 37
C.F.R. § 42.20(d)**

¹ Per the Board's Order authorizing this brief (*see, e.g.*, IPR2015-00990, Paper 20, fn 1), the word-for-word identical paper is filed in each proceeding identified in the heading.

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I. INTRODUCTION

This memorandum is submitted pursuant to the Board's September 1, 2015, Order. Paper 20. Respondent requests: (i) dismissal of the "Bass Group" Petitions for abuse of process and improper purpose; and (ii) an award of its attorneys' fees, and an order barring the Bass Group from making any further filings.

Congress sought, through the America Invents Act ("AIA"), to create "a[n] expeditious and less costly alternative to [patent] litigation," 153 Congr. Rec § 774 (Apr. 18, 2007), by eliminating "litigation abuses," 157 Congr. Rec § 5319 (Sept. 6, 2011), particularly those perpetrated by companies "who don't produce any products" and instead exist for the sole purpose of attempting to reap financial gain through no means other than leveraging patent litigation. 153 Congr. Rec. § S5319 (Sept. 6, 2011). While Congress may not have foreseen the Bass Group's specific gambit, it is no less offensive to the AIA's fundamental purpose. If the Petitions are not dismissed with sanctions, the Bass Group (and other copy-cat hedge funds) will further exploit IPRs for illegitimate profiteering. The Petitions subvert IPRs, make the PTO an involuntary party to stock manipulation, and thwart the AIA. They cannot be sustained.

Since January 2015, the Bass Group has manipulated stock markets through IPRs. It has requested nearly 20 IPRs, targeting patents for at least 10 drugs from at least 9 different companies – all publicly traded. Its scheme is as simple as it is

manipulative: establish short positions, file petitions to drop stock prices, make misleading statements in support, and then reap financial gains.

This is a gold-mine for hedge funds: they can control market-moving information (with the illusion of legitimacy through PTO proceedings), cause a drop in share price, and even *control its timing*. The outcome of the IPR proceeding is irrelevant (and the IPR cannot have a proper purpose) because the Bass Group wins profits simply by filing (regardless of merit) and misrepresenting IPRs (and refileing them when they fail). The Bass Group has tried to appear altruistic by pointing to purported ancillary benefits – shortening patent exclusivity, hastening generic entry, and “lower[ing] drug prices for everyone.” Ex. 2022. However, since these statements are materially misleading, they compound the market manipulation.

For example, U.S. Patent No. 7,056,886, challenged here, expires September 18, 2022, and covers formulations and methods of using and manufacturing GATTEX®. However, another Orange Book-listed GATTEX patent, U.S. Patent No. 7,847,061, expires over three years later, and is not challenged. Also, the Petitions do not challenge the ‘886 patent’s manufacturing claims, which will still be enforceable no matter what.² Therefore, contrary to the Bass Group’s public

² The first Petition, filed on April 1, 2015, did not challenge ‘886 claims 1-45.

These were not challenged until three weeks later. The Petitions cannot shorten

statements, the IPRs cannot shorten GATTEX patent exclusivity.³ Nevertheless, the day after the first Petition, the share price of Shire, Patent Owner's parent, fell 2.5% (the equivalent of a \$2 billion loss in enterprise value). Similarly, Acorda's share price fell about 10% after an IPR challenge. *See* Ex. 2019, 2; Ex. 2020, 1. Although that petition was dismissed (IPR2015-00720, Paper 15), the Bass Group later filed additional petitions against the same and other patents. *See* IPR2015-01857, -01858. Serial and repeated IPR petitions benefit short or long term shorting positions. The Bass Group's serial (and repeat) IPR petitions only amplify the market manipulation.

The Bass Group's actions constitute an abuse of process and an improper use of IPRs that strike at the core of the AIA's goals. Its program of harassment, market manipulation, and subversion of PTO proceedings for illicit gains, is a misuse of IPRs; it offends due process and is sanctionable. It is essential that the

GATTEX patent exclusivity, because of other '886 claims and other Orange Book GATTEX patents.

³ Patent term extension ("PTE") applications are pending for the '886 patent and U.S. Patent No. 5,789,379. Possible PTE does not affect the materiality or misleading nature of the Bass Group's statements that the IPRs will shorten patent exclusivity.

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