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VIA ECF

The Honorable Allison D. Burroughs
United States District Court Judge
John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Boston, MA 02210

Re: ***Teva Pharmaceuticals Int'l GmbH et al. v. Eli Lilly & Co.*,**
Civil Action No. 1:18-cv-12029-ADB

Dear Judge Burroughs:

We write on behalf of Teva to briefly respond to several issues raised in Lilly's recent letter dated April 8, 2019 (Dkt. No. 41), each of which is addressed individually below.

First, Teva did not misstate the holding of *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018) ("*SAS*")—that the Board can only institute as to all claims or none based on its preliminary review of a petition's potential success. Lilly confirms Teva's position by citing decisions where the Board instituted review of either all claims or none at all.[1] In fact, Lilly has not pointed to a single institution decision where the Board failed to follow *SAS* by only instituting review of a subset of the challenged claims.

Second, Lilly mischaracterizes Teva's analysis of the Board's institution decisions in this case. It has never been Teva's position that the Board would not review all challenged claims following institution of the IPRs. Rather, Teva's position is that it is improper to presume the cancellation of every challenged claim based on institution decisions that repeatedly emphasize the preliminary nature of the Board's findings and describe the need for factual issues to be explored during trial. This is aptly illustrated by the excerpt cited in footnote 3 of Lilly's letter, which indicates that a factor in the Board's decision was that Teva had not yet offered specific arguments as to the validity of the many dependent claims at issue.

Third, Lilly is incorrect that a stay would simplify discovery in the event that some of Teva's claims survive the IPR process. As Lilly admits, the subject matter of the various patents-in-suit are "interrelated," meaning that the scope of discovery, and thus the nature of any resulting discovery disputes, would likely remain the same regardless of which claims survive. Further, Lilly's statement

[1] *See, e.g.*, *Apple, Inc. v. Uniloc Luxembourg S.A.*, No. IPR2018-00424, at 54 (P.T.A.B. Aug. 2, 2018); *Deeper, UAB v. Vexilar, Inc.*, No. IPR2018-01310, at 2, 43 (P.T.A.B. Jan. 24, 2019); *Chevron Oronite Co. v. Infineum USA L.P.*, IPR2018-00923, at 10-11.

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that the cancellation of all of Teva's claims is "the most likely outcome" of the IPRs is based on a flawed statistical analysis that conflates the probabilities associated with a *single* IPR outcome with the relevant question here—the aggregate outcome of *nine separate* IPRs.[2]

Fourth, the two unpublished out-of-circuit district court decisions cited in the last paragraph of Lilly's letter are readily distinguishable from the instant case. In *NFC Tech. LLC v. HTC Am. Inc.*, the parties agreed that they were not direct competitors. 2015 WL 1069111, at *3 (E.D. Tex. Mar. 11, 2015).[3] And in *Parsons Xtreme Golf LLC v. Taylor Made Golf Co.*, the district court noted a "liberal policy in favor of granting motions to stay" within the *Ninth Circuit*. 2018 WL 6242280, at *3 (D. Ariz. Nov. 29, 2018). Furthermore, these decisions break no new ground for Lilly's position regarding the merits of a stay.

Finally, Teva disagrees with Lilly that it would be productive to burden the Court with further argument on Lilly's pending motion to stay—an issue that the Parties have exhaustively litigated through four rounds of briefing, one oral hearing, and (now) eight letters to the Court. However, to the extent the Court finds that additional briefing or argument would be beneficial, Teva is happy to comply.

Respectfully submitted,

/s/ Elaine Herrmann Blais

Elaine Herrmann Blais

[2] According to the statistical reference cited in footnote 4 of Lilly's letter, the probability of all claims being cancelled in a given IPR is about 64%, the probability of all claims surviving is about 19%, and the probability of some claims surviving ("mixed outcome") is about 17%. If this is correct, then the probability of every claim being cancelled across nine separate IPRs is (64%)^9 or 18%; or stated differently, the probability of at least one claim surviving all nine IPRs is 82%.

[3] In *NFC Tech.*, Judge Bryson of the Federal Circuit was sitting in the Eastern District of Texas by designation.