

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MALLINCKRODT HOSPITAL PRODUCTS IP )  
LTD., INO THERAPEUTICS LLC and IKARIA, )  
INC. )

C. A. No.: 15-170-GMS

Plaintiffs, )

v. )

PRAXAIR DISTRIBUTION, INC. and )  
PRAXAIR, INC., )

Defendants. )

**PRAXAIR'S OPENING CLAIM CONSTRUCTION BRIEF  
REGARDING U.S. PATENT NO. 8,846,112**

YOUNG CONAWAY STARGATT & TAYLOR, LLP  
Melanie K. Sharp (No. 2501)  
James L. Higgins (No. 5021)  
1000 North King Street  
Wilmington, DE 19801  
(302) 571-6681  
[msharp@ycst.com](mailto:msharp@ycst.com)  
[jhiggins@ycst.com](mailto:jhiggins@ycst.com)

MORGAN, LEWIS & BOCKIUS LLP  
Michael J. Abernathy  
Sanjay K. Murthy  
Maria E. Doukas  
77 West Wacker Drive, Fifth Floor  
Chicago, IL 60601  
(312) 324-1000

K&L GATES LLP  
Christopher E. Hanba  
Benjamin E. Weed  
Margaux L. Nair  
70 West Madison Street, Suite 3100  
Chicago, IL 60602  
(312) 372-1121

*Attorneys for Praxair Distribution, Inc. and Praxair, Inc.*

Dated: March 17, 2016

Mallinckrodt Hosp. Prods. IP Ltd. Exhibit 2034 Praxair Distrib., Inc. et al., v. Mallinckrodt Hosp. Prods. IP Ltd. Case IPR2016-00780
--

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	1
II. OVERVIEW OF THE '112 PATENT.....	2
III. LEGAL STANDARD.....	3
IV. ARGUMENT .....	5
1. “pharmaceutically acceptable”.....	5
a. The Preamble Is Non-Limiting .....	6
b. The Term “Pharmaceutically Acceptable” Should Carry Its Plain And Ordinary Meaning.....	7
c. Plaintiff’s Proposed Construction Improperly Imports Limitations Into The Claims And Is Ambiguous .....	10
V. CONCLUSION.....	11

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Allen Eng'g Corp. v. Bartell Indus.</i> , 299 F.3d 1336 (Fed. Cir. 2002).....	6
<i>ALM Holding Co. v. Akzo Nobel Surface Chem. LLC</i> , C.A. No. 13-1069 (GMS) (D. Del. Nov. 4, 2014) .....	8, 10
<i>Am. Bioscience, Inc. v. Baker Norton Pharm., Inc.</i> , No. CV 00-09589MRP(AJWX), 2001 WL 36170997 (C.D. Cal. Aug. 31, 2001) .....	7
<i>Bell Commc'ns Research, Inc. v. Vitalink Commc'ns Corp.</i> , 55 F.3d 615 (Fed. Cir. 1995).....	6
<i>Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.</i> , 289 F.3d 801 (Fed. Cir. 2002).....	6, 7
<i>Chef Am., Inc. v. Lamb-Weston, Inc.</i> , 358 F.3d 1371 (Fed. Cir. 2004).....	10
<i>Evolutionary Intelligence, LLC v. Sprint Nextel Corp.</i> , No. C-13-03587, 2014 WL 4802426 (N.D. Cal. Sept. 26, 2014) .....	5
<i>Gart v. Logitech</i> , 254 F.3d 1334 (Fed. Cir. 2001).....	3
<i>Intirtool, Ltd. v. Texar Corp.</i> , 369 F.3d 1289 (Fed. Cir. 2004).....	6
<i>LG Philips LCD Co. v. Tatung Co.</i> , 434 F. Supp. 2d 292 (D. Del. 2006).....	4
<i>Markman v. Westview Instruments, Inc.</i> , 52 F.3d 967 (Fed. Cir. 1995).....	3, 5
<i>Merck Sharp &amp; Dohme Corp. v. Xellia Pharm. ApS</i> , No. CV 14-199-RGA, 2015 WL 82386 (D. Del. Jan. 6, 2015) .....	10
<i>Nystrom v. TREX Co., Inc.</i> , 424 F.3d 1136 (Fed. Cir. 2005).....	4

<i>O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.</i> , 521 F.3d 1351 (Fed. Cir. 2008).....	11
<i>Omega Eng'g, Inc. v. Raytek Corp.</i> , 334 F.3d 1314 (Fed. Cir. 2003).....	5
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc).....	3, 4, 5, 11
<i>PSC Computer Products, Inc. v. Foxconn Int'l, Inc.</i> , 355 F.3d 1353 (Fed. Cir. 2004).....	11
<i>Purdue Pharma L.P. v. Endo Pharms. Inc.</i> , 438 F.3d 1123 (Fed. Cir. 2006).....	5
<i>S. Snow Mfg. Co. v. Snowizard Holdings, Inc.</i> , 567 FApp'x 945 (Fed. Cir. 2014) .....	6
<i>Spectrum Pharm., Inc. v. Sandoz Inc.</i> , No. 2:12-CV-000111-GMN, 2013 WL 6865692 (D. Nev. Dec. 31, 2013).....	10
<i>Teleflex, Inc. v. Ficosa N Am. Corp.</i> , 299 F.3d 1313 (Fed. Cir. 2002).....	4, 8
<i>Teva Pharm. USA, Inc. v. Sandoz, Inc.</i> , 135 S. Ct. 831 (2015).....	3
<i>Vitronics Corp. v. Conception, Inc.</i> , 90 F.3d 1576 (Fed. Cir. 1996).....	4
<b>OTHER AUTHORITIES</b>	
Oxford English Dictionary.....	8

## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Although this case involves ten patents, the parties only dispute the meaning of one term: “pharmaceutically acceptable,” found in the preamble of claims 1-11 of U.S. Pat. No. 8,846,112 (“the ’112 patent”). While Mallinckrodt Hospital Products IP Ltd., INO Therapeutics LLC and Ikaria Inc. (collectively “Plaintiffs”) request construction of this straightforward phrase, Defendants Praxair Distribution, Inc. and Praxair, Inc. (collectively, “Defendants”) submit that no construction is necessary.

Not surprisingly, Plaintiff’s request for construction of a clear term like “pharmaceutically acceptable” is motivated by a desire to undercut an unfavorable ruling from the Patent Trial and Appeal Board (the “Board”).<sup>1</sup> In instituting an *Inter Partes* Review proceeding, the Board found that several limitations of the claims of the ’112 patent contain printed matter, without a functional relationship to other claim elements. *See* Ex. A, Institution of *Inter Partes* Review, Paper No. 12 at 9 (July 29, 2015). Therefore, the Board did not give those limitations any patentable weight. *Id.* Plaintiffs now seek a ruling that 1) finds the preamble of claims 1-11 to be limiting; and 2) construes the term “pharmaceutically acceptable,” found in the preamble, to have an unnecessarily narrow meaning. As is apparent from Plaintiff’s briefing in front of the Board, Plaintiff seeks such a ruling in order to bolster its argument that the printed matter claim limitations are *functionally related* to the “pharmaceutically acceptable” preamble such that these limitations should be given patentable weight. *See* Ex. B, Patent Owner’s Response to Petition for *Inter Partes* Review, Paper No. 22 at 23-33 (Nov. 5, 2015).

---

<sup>1</sup> The ’112 patent is currently being reviewed in an *Inter Partes* Review proceeding. *See Praxair Distribution, Inc. v. INO Therapeutics LLC*, IPR2015-00529.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.