UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN PHARMACEUTICALS INC., TEVA PHARMACEUTICALS USA, INC., and AKORN INC., [1]
Petitioners,

v.

SAINT REGIS MOHAWK TRIBE and ALLERGAN, INC.,
Patent Owner.[2]

Case IPR2016-01127 (8,685,930 B2)
Case IPR2016-01128 (8,629,111 B2)
Case IPR2016-01129 (8,642,556 B2)
Case IPR2016-01130 (8,633,162 B2)
Case IPR2016-01131 (8,648,048 B2)
Case IPR2016-01132 (9,248,191 B2)

COMBINED NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT BY SAINT REGIS MOHAWK TRIBE AND ALLERGAN, INC.

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[1] Cases IPR2017-00576 and IPR2017-00594, IPR2017-00578 and IPR2017-00596, IPR2017-00579 and IPR2017-00598, IPR2017-00583 and IPR2017-00599, IPR2017-00585 and IPR2017-00600, and IPR2017-00586 and IPR2017-00601, have respectively been joined with the captioned proceedings (collectively the "Proceedings"). The word-for-word identical paper is filed in each proceeding identified in the caption pursuant to the Board's Scheduling Order (Paper 10).

[2] The caption used in this Notice of Appeal was intended only to comply with the Board's order that the "caption for these proceedings shall reflect both Allergan's and the Tribe's status as 'Patent Owners.'" Saint Regis Mohawk Tribe is the Patent Owner. By using this caption, neither Saint Regis Mohawk Tribe nor Allergan concede that Allergan is a "Patent Owner."

Notice is hereby given, under 35 U.S.C. § 141, 28 U.S.C. § 1295(a)(4)(A) and 37 C.F.R. § 90.2, that Patent Owner St. Regis Mohawk Tribe (the "Tribe") hereby appeals to The United States Court of Appeals for the Federal Circuit from the Patent Trial and Appeal Board's (the "Board") Decision Denying the Tribe's Motion to Dismiss for Lack of Jurisdiction Based on Tribal Sovereign Immunity entered on February 23, 2018 as Paper No. 130 in IPR2016-01127, Paper No. 132 in IPR2016-01128, Paper No. 127 in IPR2016-01129, Paper No. 127 in IPR2016-01130, Paper No. 129 in IPR2016-01131, and Paper No. 127 in IPR2016-01132, and any other orders factually intertwined with the Order denying the Tribe's Motion to Dismiss.

Notice is hereby given, under 35 U.S.C. § 141, 28 U.S.C. § 1295(a)(4)(A) and 37 C.F.R. § 90.2, that Allergan, Inc. ("Allergan") hereby appeals to the United States Court of Appeals for the Federal Circuit from the Board's Order denying Allergan's Motion to Withdraw entered on February 23, 2018 as Paper No. 132 in IPR2016-01127, Paper No. 134 in IPR2016-01128, Paper No. 129 in IPR2016-01129, Paper No. 129 in IPR2016-01130, Paper No. 131 in IPR2016-01131, and Paper No. 129 in IPR2016-01132, and any other orders factually intertwined with the Order denying Allergan's Motion to Withdraw, including but not limited to the Orders appealed by the Tribe. This combined notice is timely filed within 63 days of the Board's decisions. 37 C.F.R. § 90.3(a)(1).

It is undisputed that the Tribe is a federally recognized, sovereign American Indian Tribe that did not waive its sovereign immunity from participation in the Proceedings. EX. 2091 at 4. The Board erred as a matter of law in holding that the Tribe's assertion of its sovereign immunity does not serve as a basis to terminate the Proceedings and that Allergan can adequately represent the Tribe in the Proceedings in the Tribe's absence.

The Board's decisions in the Proceedings are immediately appealable under 28 U.S.C. § 1295(a)(4)(A) via the Collateral Order Doctrine, which applies to agency adjudications rejecting sovereign immunity claims. *See, e.g.*, *Chehazeh v. Attorney Gen. of U.S.*, 666 F.3d 118, 136 (3d Cir. 2012) (collecting cases from nine Courts of Appeals that found the Collateral Order Doctrine applies to judicial review of agency decisions); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1094 (9th Cir. 2007) (holding that denial of tribal immunity is an immediately appealable collateral order); *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999) (holding that the denial of tribal immunity in an agency proceeding is an immediately appealable collateral order); *see In re Board of Regents of Univ. of Texas Sys.*, 435 F. App'x 945, 947-48 (Fed. Cir. 2011) (holding that denial of Eleventh Amendment sovereign immunity allows for immediate appeal under Collateral

Order Doctrine); *Baum Research & Dev. Co. v. Univ. of Massachusetts at Lowell*, 503 F.3d 1367, 1369 (Fed. Cir. 2007) (same).

In accordance with 37 C.F.R. § 90.2(a)(3)(ii), the Tribe anticipates that the issues on appeal may include, but are not limited to, one or more of the following, as well as any underlying findings, determinations, rulings, decisions, opinions, or other related issues:

- Whether the Board erred in denying the Tribe's Motion to Dismiss for Lack of Jurisdiction Based on Tribal Sovereign Immunity.
- Whether the Board erred in finding that *inter partes* review is not the type of "suit" to which an Indian tribe would traditionally enjoy immunity under common law, declining to find the holding in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 754-56 (2002) applies to Tribal sovereigns as it does State university sovereigns.
- Whether the Tribe is entitled to a dismissal of the Proceedings under tribal sovereign immunity because an IPR is adjudicative in nature, Tribes have inherent immunity from suit, and absent express abrogation, there is no indication that Congress intended the Tribe be subject to actions in this forum.

- Whether the Board's conclusion that it is not adjudicating claims and that it has no authority to provide a remedy against the Tribe in the Proceedings means the Board also lacked statutory authority to proclaim the Tribe lacks immunity from participation in the Proceedings.
- Whether the Board erred in concluding that tribal sovereign immunity is a defense that may only be raised by statutory authority, rather than a jurisdictional threshold issue that can be raised at any time in the Proceedings.
- Whether the Board erred in holding that the Tribe may not assert immunity from participation in the Proceedings based on the Board's conclusion that the Proceedings are "federal administrative proceedings" despite the fact that the Proceedings were instituted and prosecuted by private parties and as such, were private actions brought by Petitioners.
- Whether the Board erred in holding that it does not exercise personal jurisdiction over the Tribe as a patent owner.
- Whether the Board erred in finding that the Tribe's assertion of its sovereign immunity does not serve as a basis to terminate these *inter parte* review Proceedings.
- Whether the Board erred in finding that the Tribe is not an indispensible party to the Proceedings.

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