

Paper No. _____
Filed December 1, 2017

**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.

ALLERGAN, INC.,

Patent Owner.

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)

**COMMENTS OF *AMICI CURIAE* DEVA HOLDING A.S. IN RESPONSE
TO THE BOARD'S INVITATION FOR *AMICUS* BRIEFS REGARDING
THE TRIBE'S MOTION TO TERMINATE**

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

Table of Contents

I. IDENTITY OF INTEREST OF *AMICI CURIAE*.....1

II. ARGUMENT3

A. The Tribe’s and Allergan’s actions in related litigation belie their claims in these Board proceedings that Allergan and the Tribe lack identical interests, and Allergan cannot represent the Tribe in its absence.....3

B. The Tribe’s and Allergan’s actions in other related litigation belie their claims that Allergan and the Tribe lack identical interests, and Allergan cannot represent the Tribe in its absence.....5

III. CONCLUSION.....6

CERTIFICATE OF SERVICE.....7

..

I. IDENTITY OF INTEREST OF *AMICI CURIAE*

DEVA Holding A.S. (“DEVA”) is a Turkish company involved in a pending lawsuit in the United States District Court for the Eastern District of Texas filed by Allergan, Inc. (“Allergan”) against DEVA, Civil Action No. 2:16-cv-1447-WCB (“the Pending Litigation”). In this action, Allergan alleges that Deva’s proposed generic version of the Restasis® Product, which is the subject of an Abbreviated New Drug Application filed by DEVA with the United States Food and Drug Administration, will infringe United States Patent Nos. 8,629,111, 8,633,162, 8,642,556, 8,648,048, 8,685,930, and 9,248,191 (“the Patents-in-Suit”). DEVA asserts that the Patents-In-Suit are invalid or not infringed by its ANDA product. The Pending Litigation is in its early stages, with the parties presently engaged in fact discovery and trial set for October 15, 2018. Recently, Allergan and Deva jointly submitted a stipulation to the Court regarding claim construction, without participation of the Saint Regis Mohawk Tribe (“the Tribe”).

Because the Board provides limited procedural guidance regarding a filing of this nature, we respectfully submit these comments to assist the Board’s evaluation of the Tribe’s Motion to Terminate these IPR proceedings. In Paper 96, the Board authorized any interested *amici curiae* to file briefing on the pending Motion to Terminate by December 1, 2017. We certify that no party or its counsel

to the above-captioned Board proceedings authored these comments in whole or in part, no such party or its counsel contributed money intended to fund the preparation or submission of these comments, and no person other than the *amici* contributed money intended to fund the preparation or submission of these comments.

II. ARGUMENT

A. **The Tribe's and Allergan's actions in related litigation belie their claims in these Board proceedings that Allergan and the Tribe lack identical interests, and Allergan cannot represent the Tribe in its absence.**

Actions speak louder than words. In its Corrected Motion to Terminate (Dkt. 81 at 16), the Tribe argues that it is an indispensable party under the Board's identity-of-interest test. Specifically, the Tribe *says* that the Board cannot proceed "in the absence of the Tribe because Allergan and the Tribe do not have identical interests, and Allergan cannot represent the Tribe in its absence." (*Id.*) In support of that argument, the Tribe further says that claim construction positions "might" serve Allergan's interest differently than the Tribe's or that the Tribe might "desire to not risk the validity of the Patents-at-Issue." (*Id.* at 22.) Despite these hollow words, the most recent actions by Allergan and the Tribe in the Pending Litigation against DEVA speak volumes to the contrary.

In the Pending Litigation against DEVA, Allergan acted by filing a letter with the Court on September 8, 2017 stating that "[t]his morning, Allergan assigned its rights in a number of patents, including the patents-in-suit, to the Saint Regis Mohawk Tribe." (Pending Litigation, D.I. 44-1.) Allergan further states that "Allergan does not anticipate that this assignment will have any impact on the litigation or the issues before the Court, other than it expects to join the Tribe as a co-plaintiff in due course." (*Id.*) Here is where Allergan's and the Tribe's

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