

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

MYLAN PHARMACEUTICALS INC., TEVA PHARMACEUTICALS USA,
INC., and AKORN INC.,
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)

**AMICUS CURIAE BRIEF OF THE OGLALA SIOUX TRIBE
IN SUPPORT OF CORRECTED PATENT OWNER'S MOTION
TO DISMISS BASED ON TRIBAL SOVEREIGN IMMUNITY**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii-iv
ARGUMENT	1
I. It Is For Congress Alone To Consider The Policy Arguments Favoring Abrogation Of The Defense Of Tribal Sovereign Immunity In The Area Of Patents	1
II. To Promote Tribal Self-Sufficiency, Tribes Should Be Free To Enter Into New And Innovative Types Of Business Development Contracts, Including Those Requiring Assertion Of Tribal Sovereign Immunity	5
III. Patent-Holding Tribes, Like State Universities, Should Be Allowed To Assert Sovereign Immunity To Bar Patent Challenges.....	9
IV. The Allergan-Saint Regis Mohawk Patent Assignment Is Not A Sham Assignment	14
CONCLUSION.....	15

TABLE OF AUTHORITIES

CASES:

Allergan, Inc. v. Teva Pharmaceuticals USA Inc.,
No. 2:15-cv-1455-WCB (E.D.Tex. Oct. 16, 2017)14

Arizona Dep't of Revenue v. Blaze Constr. Co.,
526 U.S. 32 (1999) 6

*College Savings Bank v. Florida Prepaid Postsecondary
Educ. Expense Bd.*, 527 U.S.666 (1999) 11

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,
523 U.S. 751 (1998)1,3,4

Michigan v. Bay Mills Indian Community,
___ U.S. ___, 134 S.Ct. 2024 (2014)2-3,5,6,7

Oklahoma Tax Comm'n v. Citizen Band Pottawatomie Tribe of Okla.,
498 U.S. 505 (1991) 2,6

Thomas v. Gay,
169 U.S. 264 (1898)7

Seminole Tribe [of Fla. v. Florida],
517 U.S. (1996)10

White Mountain Apache Tribe v. Bracker,
448 U.S. 136, (1980) 9,10,12

ADMINISTRATIVE ORDERS:

Covidien LP v. Univ. of Fla. Research Found. Inc.,
Case IPR2016-1274 (PTAB Jan. 25, 2017) 9,10,12

NeoChord, Inc. v. Univ. of Md., Baltimore,
Case IPR2016-208 (PTAB May 23, 2017)11,12

Reactive Surfaces Ltd., LLP v. Toyota Motor Corp.,
Case IPR2016-1914 (July 13, 2017) 11

CONSTITUTION AND STATUTES:

Eleventh Amendment, U.S. Const.....10,11,13

25 U.S.C. § 2702(1)5

25 U.S.C. § 4301 5,8

Leahy-Smith America Invents Act,
Pub. L. No. 112–29, 125 Stat. 284, 331 (2011)10

OTHER AUTHORITIES:

Struve, *Tribal Immunity and Tribal Courts*,
36 Ariz. St. L.J. 137, (2004).4,6,7

A. Meister, “Casino City's Indian Gaming Industry Report 28”
(2009-2010 ed.)6

C. Quijada, “Patents and Tribal Sovereign Immunity,
BioLawToday.org” (Oct. 23, 2017) (<https://www.law.utah.edu/patents-and-tribal-sovereign-immunity/>) 8,9

G. Ablovsky, “Tribal Sovereign Immunity and Patent Law,”
blog post on Legal Aggregate (Sept. 13, 2017) (emphasis added)
(<https://law.stanford.edu/2017/09/13/tribal-sovereign-immunity-and-patent-law/>).4,6,7

G. Quinn, “Senator McCaskill Introduces Bill to Abrogate Native American Sovereign Immunity,” IPWatchdog Blog (Oct. 5, 2017) (<http://www.ipwatchdog.com/2017/10/05/senator-mccaskill-legislation-abrogate-native-american-sovereign-immunity/id=88975/>).13

K. Thomas, “How to Protect a Drug Patent? Give It to a Native American Tribe,” *New York Times* (Sept. 8, 2017) (<https://www.nytimes.com/2017/09/08/health/allergan-patent-tribe.html>) 8

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.