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.

ST. REGIS MOHAWK TRIBE and ALLERGAN, INC.,
Patent Owners.

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

PETITIONERS' OPPOSITION TO MOTION TO STAY

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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. The word-for-word identical paper is filed in each proceeding identified in the caption pursuant to the Board's Scheduling Order (Paper 10). Paper numbers and exhibits cited in this Opposition refer to those documents filed in IPR2016-01127.

I. Precise Statement of Relief

Movants claim their "Combined Notice of Appeal" (Paper 133) has "divested" the Board's jurisdiction to complete these proceedings and issue final written decisions ("FWDs"). They claim in the alternative to be equitably entitled to a stay pending resolution of their appeal. Movants fail on both counts.

The timing of movants' latest filing (two days before the Board's deadline for submitting hearing conflicts) is reminiscent of the timing of their agreement "transferring" the patents from Allergan to the Tribe last year. That earlier maneuver occurred just one week before the original hearing date, long after the case had been "allowed to proceed to trial" (Paper 134), and well after the close of evidence. Movants repeatedly admitted (even boasted) that the purpose of their agreement was to prevent the Board from issuing FWDs. Movants' appeal is just another exercise in manipulation and delay. The Board should deny the motion based on the determinations it has already made in its decisions on the motions to terminate and withdraw.

II. The Board Has Discretion to Continue

Congress restricted the right to appeal from IPR proceedings to parties "dissatisfied with the *final written decision*" of the Board. 35 U.S.C. § 141(c) (emphasis added); *see also* § 314(d) (no appeal from institution decisions). The collateral order doctrine allows for an appeal before a final judgment is entered for

a "small class" of issues that are separable from the underlying action and effectively unreviewable after the final decision. *See Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *Amgen Inc. v. Hospira, Inc.*, 866 F.3d 1355, 1358-59 (Fed. Cir. 2017).

While *Forsyth*-type collateral order appeals are available under some circumstances, the mere filing of such an appeal does not automatically divest the trial tribunal of jurisdiction. Movants' own cases emphasize that tribunals "are not helpless in the face of manipulation" and may proceed when the appeal is a "sham," "frivolous," "waive[d] or forfeit[ed]," or used "in a manipulative fashion." *Apostol v. Gallion*, 870 F.2d 1335, 1338-39 (7th Cir. 1989); *see also Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 94-96 (1st Cir. 2003) (jurisdiction not lost where collateral order appeal constitutes a transparently frivolous attempt to impede the progress of the case). Courts need only explain why they are proceeding. *Bancpass, Inc. v. Highway Toll Admin., LLC*, 863 F.3d 391, 399 (5th Cir. 2017) ("[a]ll circuits to reach the issue have uniformly…recognize[ed] similar procedures whereby [lower tribunals] may retain jurisdiction despite the filing of an interlocutory appeal"); *Rivera-Torres*, 341 F.3d at 94-96; 15A C. Wright *et al.*, Federal Practice & Proc. Juris. § 3914.10 n. 71 (2d ed.) (collecting additional authorities). EX1169.

A. Allergan's Collateral Order Appeal Is Frivolous

Allergan claims it is entitled to an immediate appeal "via the Collateral Order

Doctrine, which applies to agency adjudications rejecting sovereign immunity claims." Appeal notice at 3. But Allergan is not a sovereign and has no colorable claim to sovereign immunity. The other issues identified by Allergan in the notice of appeal—*i.e.*, the Board's findings regarding patent ownership and denial of Allergan's motion to withdraw, *id.* at 6—do not fall into any recognized exception to normal finality rules, let alone "divest" jurisdiction. *See* 15B C. Wright *et al.*, Federal Practice & Proc. Juris. § 3914.18 (2d ed.) (collecting cases holding that decisions on joinder and substitution are ineligible for collateral order review). EX1170. Indeed, the motion never explains how Allergan's appeal could independently qualify for collateral order review. Paper 134 at 3-7. Allergan's appeal is frivolous and does not affect the Board's ability to proceed.

B. The Tribe's Appeal Does Not Divest the Board's Jurisdiction

This appeal is just the latest example of the movants misusing tribal sovereign immunity as if it were a "monetizable commodity that can be purchased by private entities as part of a scheme to evade their legal responsibilities." *Allergan, Inc. v. Teva Pharm. USA, Inc.*, (E.D. Tex. Oct. 16, 2017). EX1163 at 5. Movants forfeited any claim to collateral order review through their ongoing "sham," "dilatory," and "manipulative" immunity claims. *See* pp. 1-2, *supra*; Paper 86 at 1-2, 10-13; Paper 125 at 1-2.

The Board has already determined that it can proceed without *any* patent

owner. Paper 130, 16-18. The Board determined that an IPR is not a private "suit" for tribal immunity purposes but rather a federal agency's reconsideration of its own prior decision. Paper 130, 11-18. Appeal of these determinations is premature and does not divest the Board's jurisdiction.

Movants' procedural manipulations aside, the Board has also determined that the Tribe is not an indispensable party and that Allergan can sufficiently represent patent owner interests. Paper 130 at 35-40. The collateral order doctrine does not apply to decisions to proceed without an allegedly indispensable party, since such decisions "may be effectively reviewed after final judgment." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1148 (10th Cir. 2011); *see also Alto v. Black,* 738 F.3d 1111, 1130 (9th Cir. 2013); *MasterCard Int'l Inc. v. Visa Int'l Serv. Assoc.*, 471 F.3d 377, 383-84 (2d Cir. 2006) (denial of motion to dismiss for lack of indispensable party "does not fit within the exception created by the collateral order doctrine"). Appeal of these determinations is thus premature—if the Federal Circuit determines the Board cannot reconsider the patents without the Tribe's acquiescence, then the Tribe will have lost nothing because the claims will not be cancelled.

Not *one* of the many decisions cited by Movants holds that a collateral order appeal by one party divests the tribunal of jurisdiction over all other parties and all other issues. To the contrary, one of movants' cases (Paper 134 at 4) acknowledges

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