

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

---

MYLAN PHARMACEUTICALS INC., TEVA PHARMACEUTICALS USA,  
INC., and AKORN INC.,<sup>1</sup>  
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)

---

**BRIEF OF AMICUS CURIAE LUIS ORTIZ AND KERMIT LOPEZ IN  
SUPPORT OF PATENT OWNER'S MOTION TO DISMISS FOR LACK  
OF JURISDICTION BASED ON TRIBAL SOVEREIGN IMMUNITY**

---

<sup>1</sup> 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).

**TABLE OF CONTENTS**

INTEREST OF AMICI ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT..... 3

    I. The Board Must Adhere to Existing Precedent ..... 3

        A. Congressional Policy Supports The Tribe's Sovereign Immunity ..... 4

        B. Indian Nations Rely Upon Tribal Sovereign Immunity ..... 7

        C. Courts Avoid Finding Constructive Waivers of Sovereign  
            Immunity..... 8

    II. The Board Should Not Analyze The Scope of Tribal Sovereign  
        Immunity ..... 9

        A. Congress Circumscribed The Board's Powers ..... 10

        B. Executive Branch Policy Supports The Tribe's Sovereign  
            Immunity..... 12

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### CASES:

<i>Bassett v. Mashantucket Pequot Tribe</i> , 204 F.3d 343 (2d Cir. 2000) .....	8
<i>Caring Hearts Personal Home Servs., Inc. v. Burwell</i> , 824 F.3d 968 (10th Cir. 2016) .....	10
<i>Chevron, U.S.A., Inc. v. NRDC</i> , 467 U.S. 837 (1984).....	11
<i>FDA v. Brown &amp; Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	10
<i>Kiowa Tribe of Okla. v. Manuf’g Techs., Inc.</i> , 523 U.S. 751 (1998).....	5, 6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	13
<i>Mexichem Fluor, Inc. v. EPA</i> , 866 F.3d 451 (D.C. Cir. 2017).....	9
<i>Michigan v. Bay Mills Indian Community</i> , 134 S.Ct. 2024 (2014).....	7, 8, 11
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990).....	4, 6
<i>Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 498 U.S. 505 (1991).....	5
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	13

*Santa Clara Pueblo v. Martinez*,  
436 U.S. 49 (1978)..... 5, 6

*Stark v. Wickard*,  
321 U.S. 288 (1944)..... 9

*State of New York v. Shalala*,  
119 F.3d 175 (2d Cir. 1997) ..... 10

*Three Aff'd Tribes of Fort Berthold Res. v. Wold Eng'g, P.C.*,  
498 U.S. 505 (1991)..... 8

*United States v. USF&G Co.*,  
306 U.S. 506 (1940)..... 7

*Utility Air Regulatory Grp. v. EPA*,  
134 S.Ct. 2427 (2014)..... 4

*Western Minn. Mun. Power Agency v. FERC*,  
806 F.3d 588 (D.C. Cir. 2015)..... 4

*Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*,  
382 F.3d 1324 (Fed. Cir. 2004) ..... 8

**STATUTES:**

5 U.S.C. § 553 ..... 2

25 U.S.C. § 1451 ..... 8

25 U.S.C. § 5301 ..... 8

28 U.S.C. § 1604..... 5

35 U.S.C. § 6..... 3, 11

35 U.S.C. § 102..... 9

35 U.S.C. § 103..... 9

35 U.S.C. § 134 ..... 3

35 U.S.C. § 135 ..... 3

35 U.S.C. § 311 ..... 3, 4, 9

35 U.S.C. § 321 ..... 3

**REGULATIONS:**

Tribal Government-to-Government Consultation Policy,  
81 Fed. Reg. 40,893 (2016) ..... 12

Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) ..... 12

# 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.