

**In the United States Court of Appeals
For the Federal Circuit**

SAINT REGIS MOHAWK TRIBE, ALLERGAN, INC.,
Appellants,

v.

MYLAN PHARMACEUTICALS, INC., TEVA PHARMACEUTICALS USA, INC., AND
AKORN, INC,
Appellees.

Appeals from: Patent and Trademark Office - Patent Trial and Appeal Board
in *Inter Partes* Review Nos. IPR2016-01127, IPR2016-01128, IPR2016-01129, IPR2016-01130,
IPR2016-01131, IPR2016-01132, IPR2017-00576,
IPR2017-00578, IPR2017-00579, IPR2017-00583, IPR2017-00585,
IPR2017-00586, IPR2017-00594, IPR2017-00596, IPR2017-00598,
IPR2017-00599, IPR2017-00600, IPR2017-00601

**PETITION FOR REHEARING *EN BANC* OF APPELLANTS
SAINT REGIS MOHAWK TRIBE AND ALLERGAN, INC.**

Marsha Kostura Schmidt
ATTORNEY AT LAW
14928 Perrywood Drive
Burtonsville, MD 20866
Tel: (301) 949-5176

Jonathan S. Massey
MASSEY & GAIL LLP
1325 G Street, NW, Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511

Michael W. Shore
Alfonso Garcia Chan
Christopher L. Evans
Joseph F. DePumpo
SHORE CHAN DEPUMPO LLP
901 Main Street, Suite 3300
Dallas, TX 75202
Tel: (214) 593-9110

Robert A. Long, Jr.
Jeffrey B. Elikan
Thomas R. Brugato
Alaina M. Whitt
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, D.C. 20001-4956
Tel: (202) 662-5612

*Counsel for Appellant
Saint Regis Mohawk Tribe*

*Counsel for Appellant
Allergan, Inc.*

CERTIFICATE OF INTEREST

Counsel for Appellants certify the following:

| 1. Full Name of Party Represented by me | 2. Name of Real Party in interest represented by me is: | 3. Parent corporations and publicly held companies that own 10% or more of stock in the party |
|---|---|---|
| Saint Regis Mohawk Tribe | N/A | N/A |
| Allergan, Inc. | N/A | Allergan plc |

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

Saint Regis Mohawk Tribe

SHORE CHAN DEPUMPO LLP
Michael W. Shore
Christopher L. Evans
Alfonso Garcia Chan
Joseph F. DePumpo

Marsha Kostura Schmidt
Attorney at Law

Allergan, Inc.

MASSEY & GAIL LLP
Jonathan S. Massey

FISH & RICHARDSON P.C.
Michael J. Kane
Dorothy P. Whelan
Susan Morrison
Robert Oakes

COVINGTON & BURLING LLP
Robert A. Long, Jr.
Jeffrey B. Elikan
Thomas R. Brugato
Alaina M. Whitt

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will affect or be directly affected by this Court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a) (5) and 47.5(b).

Federal Circuit: *Allergan, Inc. v. Teva Pharmaceuticals USA, Inc.*,
No. 2018-1130

Regents of the University of Minnesota v. LSI Corp.,
No. 2018-1559

E.D. Texas: *Allergan, Inc. v. Deva Holding A.S.*, No. 2:16-cv-1447

August 20, 2018

Respectfully submitted,

/s/ Marsha K. Schmidt

Marsha Kostura Schmidt
Counsel for Appellant
Saint Regis Mohawk Tribe

/s/ Jonathan S. Massey

Jonathan S. Massey
Counsel for Appellant
Allergan, Inc.

TABLE OF CONTENTS

| | |
|--|------|
| CERTIFICATE OF INTEREST | i |
| TABLE OF AUTHORITIES | v |
| STATEMENT OF COUNSEL PURSUANT TO RULE 35(B)(2) | viii |
| INTRODUCTION | 1 |
| STATEMENT | 2 |
| ARGUMENT | 7 |
| I. This Case Presents Issues Of Exceptional Importance Warranting <i>En Banc</i> Review..... | 7 |
| II. The Panel Decision Is Contrary To Precedent Of The Supreme Court And This Court..... | 7 |
| A. The Panel Failed To Follow <i>FMC, SAS, Alden, And Vas- Cath.</i> | 7 |
| 1. The Director’s Role In Deciding Whether To Institute An IPR Does Not Eliminate Sovereign Immunity. | 8 |
| 2. The PTAB’s Ability To Issue A Decision Absent The Petitioner And To Intervene On Appeal Does Not Eliminate Sovereign Immunity..... | 13 |
| 3. The Lack Of Complete Identity Between IPRs And Federal Civil Litigation Does Not Eliminate Sovereign Immunity..... | 14 |
| 4. The Contrast Between IPRs And <i>Ex Parte</i> Re- Examinations Supports The Availability Of Sovereign Immunity..... | 16 |
| B. <i>Oil States</i> and <i>Cuozzo</i> Do Not Support the Panel’s Decision. | 17 |
| CONCLUSION..... | 18 |
| ADDENDUM | |
| CERTIFICATE OF COMPLIANCE..... | |

CERTIFICATE OF SERVICE

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.