UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN LABORATORIES LTD.
Petitioner

v.

JANSSEN PHARMACEUTICA NV
Patent Owner

Case IPR2020-00440
Patent 9,439,906

PATENT OWNER'S AUTHORIZED SURREPLY

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1. The *Apple* Factors Favor Denying Mylan's Petition Under § 314(a)

In about two months, District Judge Cecchi will hold a bench trial to consider Teva's obviousness challenges to each and every claim of the 906 Patent. In a related case before Judge Cecchi, Mylan also challenges the validity of the 906 Patent claims. Both challenges rely on the same or similar art that Mylan relies on here. In light of the advanced stages of these two co-pending Hatch-Waxman litigations, and given the substantive flaws in the merits of Mylan's Petition, the Board should deny the Petition under 35 U.S.C. § 314(a).

Apple Factor 1: Mylan's Reply argues that this factor is neutral. That is not correct. Neither co-pending case is stayed, *Teva* is scheduled for trial in September, and Mylan has not indicated it would seek a stay (which would be an unlikely move by a defendant in a Hatch-Waxman case). This factor favors denial. *See Mylan Pharm. Inc. v. Merck Sharp & Dohme Corp.*, IPR2020-00040, Paper 21, at 33 (PTAB May 12, 2020) ("Petitioner and Patent Owner agree that a stay has not been sought and is unlikely, which weighs in favor of denial.").

Apple Factor 2: Mylan's Reply argues that the trial dates of the co-pending litigations favor institution. That, too, is incorrect. Trial in the *Teva* case is imminent (ordered to commence on September 28, 2020). Ex. 2005 ¶ 4; *see Apple Inc. v. Fintiv, Inv.*, IPR2020-00019, Paper 11, at 14 (PTAB Mar. 20, 2020) (precedential) ("*Apple*") (discretionary denial appropriate "[e]ven when a petitioner

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