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UNITED STATES PATENT AND TRADEMARK OFFICE  
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BEFORE THE PATENT TRIAL AND APPEAL BOARD  
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MYLAN PHARMACEUTICALS, INC., TEVA PHARMACEUTICALS  
USA, INC., and AKORN, INC.  
Petitioners,  
v.  
ALLERGAN, INC.  
Patent Owner.

- \_\_\_\_\_  
Case No. IPR2016-01127  
Patent No. 8,685,930 B2  
Case No. IPR2016-01128  
Patent No. 8,629,111 B2  
Case No. IPR2016-01129  
Patent No. 8,642,556 B2  
Case No. IPR2016-01130  
Patent No. 8,648,048  
Case No. IPR2016-01132  
Patent No. 9,248,191

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TELEPHONE CONFERENCE CALL  
September 26, 2017

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A P P E A R A N C E S  
(All appearances telephonically)

PRESIDING:

- MR. SHERIDAN K. SNEDDEN  
Administrative Patent Judge
  
- MS. TINA E. HULSE  
Administrative Patent Judge
  
- MR. CHRISTOPHER G. PAULRAJ  
Administrative Patent Judge

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1 THE COURT: Good afternoon. This is  
2 Judge Snedden.

3 I have on the line with me Judges Hulse  
4 and Paulraj.

5 Mr. Torczon, are you on the line?

6 MR. TORCZON: I am, your Honor.

7 THE COURT: All right.

8 And do we have anyone from the Tribe  
9 present?

10 MR. EVANS: Yes, your Honor, Christopher  
11 Evans and Marcia Schmidt are here representing the  
12 Tribe.

13 THE COURT: Allergan?

14 MS. WHALEN: Dorothy Whelan and Michael  
15 Kane representing Allergan.

16 THE COURT: And who else do we have on  
17 the line?

18 MR. SHORE: Michael Shore is on the line  
19 as well.

20 MR. RIBAR: Travis Ribar representing  
21 Akorn.

22 MR. SPEIER: Gary Speier on behalf of

1 Teva.

2 THE COURT: I understand we have a court  
3 reporter.

4 MR. TORCZON: We do, your Honor.

5 I also believe we have Brandon White,  
6 Shannon Bloodworth, and Charles Curtis of Perkins Coie  
7 for Mylan.

8 THE COURT: Mr. Torczon, you requested  
9 the call, I will let you begin.

10 MR. TORCZON: Thank you very much, your  
11 Honor. Thank you for scheduling this call.

12 Our request falls basically into two  
13 parts. There was originally ordered production we  
14 believe is incomplete, and there is also additional  
15 discovery related to that that we believe we should be  
16 entitled to. It will be limited to discovery  
17 regarding the immunity claim.

18 On the first point the Tribe voluntarily  
19 filed a short form agreement which referred to the  
20 long form agreement. The board ordered the patent  
21 owner and Tribe to produce the long form agreement.

22 The long form agreement itself

1 incorporates additional agreements that are used to  
2 define Allergan's powers and responsibilities.

3 We don't believe the agreement is fully  
4 comprehensible without this. We believe that they are  
5 within the scope of the originally ordered discovery  
6 or production and Allergan should have all of it in  
7 its possession.

8 Allergan disagrees with our position that  
9 it is within the scope of the original discovery, and  
10 the Tribe has indicated that it doesn't have to  
11 produce anything.

12 We would like the board to consider the  
13 issue and immediately order production of those  
14 documents. Failing that we believe that it is  
15 certainly within the scope of any additional  
16 discovery.

17 Along the same lines, it is important to  
18 note that Mylan disagrees that the Tribe has  
19 established that it is the owner--it believes the  
20 assignment is a sham--and Mylan believes that Allergan  
21 has retained all effective rights.

22 The Tribe's residual interest is

1 insufficient for to be a necessary party. So we  
2 believe in support of that we should be able to get  
3 all agreements and understandings between Allergan and  
4 the Tribe regarding patents so that we can determine  
5 who actually owns the rights, holds the rights and  
6 whether the agreements are valid.

7 We would note that any discovery against  
8 nonparty participants does not implicate tribal  
9 sovereign immunity. Even where tribal sovereign  
10 immunity is implicated, the burden is on the Tribe to  
11 establish it is entitled to it in these situations.

12 We note that the federal government,  
13 which is a full-fledged sovereign, regularly has to  
14 provide discovery. We are happy to cite cases on that  
15 point.

16 We note that decision, Finn versus Great  
17 Plains, which we already pointed out to the board,  
18 showed the same concept applies to Tribe. They are  
19 not a full-fledged sovereign, they are domestic  
20 sovereign, and their rights are correspondingly less.

21 Similar concerns to the one the Tribe has  
22 already raised and also has concerns similar to ours,



1 such as control by non-tribal entity, benefits  
2 allocated to a non-tribal entity, action to evade  
3 regulatory review, prejudice no production to the  
4 requester and defined set of fact issues that will  
5 help target the discovery.

6 We note in the foreign sovereign immunity  
7 context, again, full-fledged sovereign, Finn cites to  
8 the Hansen case, which says that such -- that  
9 requester should have ample opportunity to secure and  
10 present evidence on this issue. We believe the Tribe  
11 has expressly waived immunity for the purposes of  
12 contesting immunity, and that would include --  
13 necessarily include discovery on that assertion.

14 The Tribe has already voluntarily  
15 produced one agreement and complied with an order to  
16 produce another agreement.

17 The Tribe and Allergan control all of  
18 material facts here: that has often been considered an  
19 important factor in ordering such discovery. We are  
20 really not asking for anything that is any broader  
21 than what the board would require in the case of the  
22 settlement, which is all agreements and understandings

1 underlying this transaction.

2 The Tribe has the burden of production in  
3 fact. There is the California case Owen versus Miami  
4 Nations. It says that in a context like this where  
5 there is an assertion of immunity and the party -- the  
6 Tribe controls fact or the party asserting immunity  
7 controls the fact, the burden is on them to produce.

8 And, finally, along those lines we note  
9 that there has actually been no representation to date  
10 that all of the agreements between them regarding  
11 these or any other patents, you know, like an umbrella  
12 agreement that would cover any patent agreements  
13 between them, have been produced. And even if we get  
14 a representation to that effect today, it won't be  
15 evidence, it would be a bare representation.

16 A lot of inconsistencies that justify  
17 discovery and jurisdictional issues, the parties --  
18 the Tribe and Allergan having engaged in actions that  
19 are contrary to the agreements. Allergan is supposed  
20 to be responsible for the litigation, yet we have  
21 recently seen the Tribe telling Allergan what it can  
22 and can't do. The license appears to require Allergan to

1 perform statutory functions that are reserved for the  
2 owner.

3 Allergan and the Tribe each say the other  
4 side initiated the agreements, which suggest that  
5 there is some confusion about what actually happened  
6 in what order. The order of the transaction could be  
7 significant here.

8 One of the things is: it is facially  
9 improbable that Allergan would surrender rights to such  
10 valuable patents, patents that are bringing in  
11 millions of dollars a day, without some blanket  
12 understanding or agreement to agree or something like  
13 that in place.

14 The Tribe's webpage when it explains  
15 these agreements to its members has indicated that  
16 additional agreements provide protection in the event  
17 that they lose infringement suit, protections that  
18 aren't readily apparent from the agreements that have  
19 been produced so far.

20 So if we apply the factor here we see  
21 that there is more than a possibility that there is  
22 additional evidence. We see that there is not any

1 possibility that we are seeking underlying litigation  
2 bases, the trial is over. We don't have to worry  
3 about -- I am sorry, there is no other way we can  
4 generate relevant information because necessarily the  
5 information is only in the hands of these parties.

6 As far as easily understandable  
7 instructions, that is something we can commit to  
8 providing.

9 As far as the request not being  
10 burdensome, the Tribe has represented that all  
11 activity in this case has occurred between August and  
12 September. All of these documents should be readily  
13 at hand.

14 Again, we are really not requesting  
15 anything beyond what they would be expected to produce  
16 for a settlement agreement, so it is -- it can't be an  
17 unreasonable request.

18 Specifically what we would be looking for  
19 is all agreements incorporating references to Allergan  
20 license grants, any side agreements, supplemental  
21 agreements, agreements to agree, term sheets,  
22 documents sufficient to show all drafts of the

1 assignment, license agreement, documents sufficient to  
2 show communications between Allergan and the Tribe or  
3 the Tribe's attorneys regarding IPRs or patents  
4 including any marketing material.

5 We also would like any documents showing  
6 good and valuable consideration that the Tribe gave to  
7 Allergan as part of this transaction.

8 We would also request that any --

9 THE COURT: It is your position that  
10 there are agreements that are necessary for you to  
11 establish that Allergan is a party with substantial  
12 interests in these patents?

13 MR. TORCZON: Our position is that we  
14 have received a couple documents that the Tribe and  
15 Allergan have chosen to present here. We never  
16 received any representation that that represents the  
17 sum total of the documents. They're inconsistencies  
18 in the behaviors of the parties and their public  
19 statements compared to what is said in the documents.

20 And, as analysts and others have noted,  
21 it seems very unlikely that Allergan would have given  
22 up such significant rights without some overarching

1 agreement to ensure that it would get the license  
2 back. So --

3 THE COURT: What is the legal position  
4 that you are trying to support with this?

5 MR. TORCZON: I am sorry, yes, okay, so  
6 there are at least a couple of lines that are involved  
7 here.

8 One is the question of whether in fact  
9 the Tribe is the owner.

10 And the other would be whether the --  
11 whether Allergan has retained enough rights and  
12 whether the Tribe has retained enough rights such that  
13 either Allergan can proceed alone or the Tribe is not  
14 a necessary party.

15 So all of these are factors that have  
16 been considered as relevant to sovereign immunity,  
17 several of them have come up indeed in past board  
18 decisions regarding state sovereign immunity, so these  
19 are squarely within the scope of what we would expect  
20 to be able to discover.

21 THE COURT: And it is your position that  
22 you can't make -- it is not possible to make the

1 determination or make the arguments to support that  
2 allegation based on the license and the agreements  
3 that are already of record?

4 MR. TORCZON: Precisely, because we've  
5 only seen the parts of the agreement that the Tribe  
6 and Allergan have chosen to let us see.

7 This comes up regularly in the case law.  
8 For instance, in some of the federal sovereign  
9 immunity cases the agencies have actually presented  
10 documents, there was reason to believe that more was  
11 going on or more should have been going on.

12 THE COURT: Can you walk me through the  
13 license agreement and tell me why, tell me what  
14 language it is and why you believe what is of record  
15 is --

16 MR. TORCZON: So, for instance, I don't  
17 have the agreement open in front of me, but an example  
18 would be that patent term extensions, Allergan is --

19 THE COURT: Hold on a second, I just  
20 noticed that these agreements are --

21 MR. TORCZON: You are right, your Honor,  
22 I am sorry.

1 THE COURT: This is okay, we can submit  
2 this transcript as parties and board only.

3 MR. TORCZON: I believe everybody on the  
4 call is either already of record -- at least on our  
5 side, on the Petitioner's side, I believe everybody is  
6 either of record or has a pending pro hac vice motion,  
7 and I believe everybody on the Petitioner's side has  
8 filed or has signed a protective order.

9 THE COURT: I think it will be useful for  
10 us to do that, if you can file the transcripts of the  
11 parties on board, that will be helpful.

12 MR. TORCZON: And, also we can point out, if you  
13 authorize the motion, we can do this in specific  
14 detail.

15 But just a general example, who controls  
16 the litigation, we are seeing behavior that is  
17 inconsistent with that: patent term extension, the  
18 patent owner's responsibility, we see Allergan doing that. So  
19 it is things like that that suggest there is something  
20 else going on.

21 As I said, the Tribe has indicated to its  
22 constituents that there are agreements in place that



1 protect it in the case that it loses infringement  
2 suit. We are not seeing a basis of that in the  
3 agreement. So there are inconsistencies like that.

4 As I said, it also just logical  
5 conclusion that there must have been a term sheet or  
6 an agreement to agree or something that was in place  
7 before Allergan would take the remarkable step of  
8 signing over rights to the Tribe in the hope that  
9 exclusive license would somehow come off and come back  
10 to them.

11 So there are a lot of reasons to suspect  
12 that there is additional agreements out there. To the  
13 extent there aren't, it is no burden at all to the --

14 THE COURT: There might be other  
15 agreements, we are trying to understand why they might  
16 be useful to this case.

17 I mean, these agreements, I understand,  
18 were entered into for before the Tribe came about, got  
19 involved, so the answer is -- the question is why are  
20 those -- why are those agreements useful for this  
21 particular -- is it a mere allegation or --

22 MR. TORCZON: Those --

1 THE COURT: It sounds like a mere  
2 allegation, more than a mere allegation.

3 MR. TORCZON: Your Honor, in terms of the  
4 long -- in terms of the things that we believe are  
5 already within the scope, in each of those cases those  
6 agreements are used to define Allergan rights and  
7 responsibilities, and so for us to know what it is  
8 that Allergan -- what powers and responsibilities  
9 Allergan has under the agreement and therefore  
10 understand the scope of how much control they have  
11 versus how much control the Tribe has, we need to see  
12 what those agreements are. We are not the ones who  
13 structured the agreement between the Tribe and  
14 Allergan to include these other agreements, but they  
15 are effectively incorporated by reference. And so we  
16 should get those even without additional discovery.

17 THE COURT: Okay, let me ask one  
18 question. I know you might not be -- who is speaking  
19 for Allergan today?

20 MR. SHORE: This is Michael Shore, this  
21 is Michael Shore, and I am only speaking for the  
22 Tribe.

1 THE COURT: I need --

2 MS. WHELAN: Your Honor, this is Dorothy  
3 Whelan, I am speaking for Allergan, and I am here for  
4 the limited purpose of addressing the issue of whether  
5 Allergan complied with the board's September 8th order  
6 to produce the long form assignment.

7 THE COURT: Well, I think this question  
8 is relevant anyway, I have not received your request  
9 for Allergan's counsel to withdraw from this case, and  
10 so the question I have is why do you remain a party to  
11 this case and do you deny that you remain in this case  
12 as a party that has substantial interest in these  
13 patents?

14 MS. WHELAN: Your Honor, actually, we  
15 will -- this is Dorothy Whelan on behalf of Allergan,  
16 we would like to use this call as an opportunity to  
17 seek leave to withdraw from the proceedings because  
18 Allergan is not a patent owner. Allergan is only an  
19 exclusive field of license holder. So we would like  
20 leave to file a motion to withdraw from the  
21 proceedings.

22 THE COURT: Let me just -- I will confirm

1 with my panel and get back to you on the answer for  
2 that, yes, I understand your question.

3 Okay, and so, Mr. Shore --

4 MR. SHORE: Yes?

5 THE COURT: Do you deny that Allergan  
6 remains a party with substantial rights in these  
7 patents?

8 MR. SHORE: Under the statute there is  
9 only two proper parties, the requester and the patent  
10 owner. Allergan doesn't fit into either one of those  
11 slots, so by statute they are not a proper party to  
12 the case.

13 THE COURT: And are there any --  
14 Mr. Shore, are there any agreements between Allergan  
15 and the Tribe relating to -- any other agreements  
16 relating to the challenged patents that are not  
17 already of record?

18 MR. SHORE: No.

19 The only agreements that I am aware of,  
20 the only agreements that I know that exist are the  
21 agreements that are of record in the case.

22 THE COURT: And is Allergan -- under

1 mandatory notice you must identify any real parties of  
2 interest. Is Allergan a real party of interest?

3 MR. SHORE: No, they are not a patent  
4 owner and they are not a requester.

5 MS. WHELAN: We are a real party in  
6 interest.

7 MR. SHORE: I am sorry, you mean someone  
8 who has an interest in the outcome.

9 MS. WHELAN: Well, we are a real party in  
10 interest under the statute, and that is why the  
11 mandatory notices reflect Allergan as a real party in  
12 interest, but we are not the patent owner.

13 THE COURT: Understood, all right.

14 And, Mr. Shore, what about term sheets,  
15 are there any term sheets that have not been  
16 submitted, term sheets that exist that have not been  
17 made of record?

18 MR. SHORE: There is nothing -- there are  
19 no term sheets, there never were any term sheets in  
20 the case.

21 MR. TORCZON: Can I respond to some of the  
22 things?

1 MR. SHORE: Michael Shore on behalf of  
2 St. Regis Mohawk Tribe, simply requesting that before  
3 the panel takes into account what they heard as being  
4 in any way factual or truthfully, it is not.

5 THE COURT: I understand, Mr. Shore. You  
6 get a chance to speak, I had questions. I am going to  
7 let Mr. Torczon finish and then you can respond.

8 MR. SHORE: Okay.

9 THE COURT: Mr. Torczon, are you  
10 finished?

11 MR. TORCZON: I just wanted to point out  
12 that it varies from the proceeding, there has been  
13 suggestion that delay would be appropriate either for  
14 discovery or I believe now in the context of amicus  
15 briefing.

16 I just would like to reiterate that the  
17 petitioners believe that delay only helps Allergan, it  
18 hurts everybody else. Specifically it undermines the  
19 integrity of the system, the patent system.

20 There is uncertainty about whether the  
21 board has power to act, this creates uncertainty for  
22 petitioners. This creates uncertainty for patent

1 owners who are being approached daily by tribes to  
2 know what to do. This actually hurts the board  
3 itself. It has led -- this very proceeding has led to  
4 regular attacks on the integrity of the board.

5 THE COURT: What we are trying to figure  
6 out here is why -- what information, what useful  
7 information do you expect to obtain from additional  
8 discovery.

9 MR. TORCZON: Well --

10 THE COURT: What legal position are you  
11 trying to establish and what evidence is missing.

12 MR. TORCZON: Your Honor, this is Richard  
13 Torczon.

14 Again, if the agreements are shams, that  
15 would go directly to the question of ownership  
16 control, whether the tribes are even a necessary  
17 party, whether they are even an appropriate party to  
18 the proceeding.

19 I understand that your Honors have asked  
20 Mr. Shore just now whether there are other agreements  
21 and he carefully said to the best of his knowledge  
22 there were not. I note that that is attorney

1 argument, not evidence. And, frankly, in a case that  
2 has this much at stake, both in monetary terms and in  
3 terms of the integrity of the system --

4 THE COURT: So you would want to  
5 establish that this agreement is a sham. What do you  
6 need to establish that it is a sham? What evidence do  
7 you need?

8 MR. TORCZON: We believe that it is  
9 almost unbelievable that there aren't additional side  
10 agreements and that those side agreements would tend  
11 to show things like additional license-back provisions  
12 or things to that effect.

13 Until we have had a chance to see all  
14 such agreements or at least establish as a matter of  
15 evidence that no such agreements exist, we are  
16 fighting blindfolded.

17 And the only people that have that  
18 evidence is the Tribe and Allergan, and they have got  
19 a legal obligation to produce it. They have only  
20 produced what we have seen so far.

21 So we need to fully explore this  
22 question, this ample case law for both federal,



1 foreign tribal sovereign immunity claims, that once  
2 you have asserted a claim of sovereign immunity,  
3 discovery to test that claim is perfectly appropriate.

4 MR. SHORE: Your Honor, may I respond?

5 THE COURT: One moment, please.

6 Mr. Shore, you may respond.

7 MR. SHORE: Your Honor, first, there are  
8 no other agreements. Let me be unequivocal as I  
9 possibly can, there are no side agreements, there are  
10 no license-back agreements, there are no expansion of  
11 license rights agreements. There are no give-back  
12 agreements. There are no agreements at all in any  
13 way, shape, form, or fashion that have not already  
14 been produced in the case, none, zero, nada.

15 Number two, the Tribe status as a  
16 sovereign is absolutely established as a matter of  
17 law. The cases that get into such sovereignty,  
18 whether sovereignty attaches, is where you have tribes  
19 or foreign sovereigns or states that set up separate  
20 corporations and give them limited powers to do  
21 limited activity. And you can go in, there has been  
22 discovery in cases where you go in and look at how

1 those corporations were set up, how those corporations  
2 are managed, whether or not those corporations are  
3 backed fully by the state if the judgment is against  
4 them, et cetera.

5 That is not the case here. The Tribe  
6 holds the patents directly. There is no intervening  
7 tribal entity to which you might need to look and see  
8 whether or not that tribal entity has been given the  
9 full color of immunity.

10 All of those cases, including the cases  
11 you cited in the e-mail, have nothing to do with the  
12 situation where the Tribe, the sovereign, the  
13 undisputable sovereign, 100% sovereign Tribe, holds  
14 the asset, in this case the patents.

15 The only issues in this case are whether  
16 or not the Tribe is sovereign, which is undisputed,  
17 and whether or not sovereign immunity attaches to the  
18 PTAB proceedings, which has already been adjudicated  
19 four times in favor of the sovereigns.

20 Those are the only issues, those are the  
21 only issues which the Tribe agreed to participate in  
22 this case, have the case dismissed on sovereign

1 immunity.

2 What they are doing is asking for a  
3 fishing expedition based upon absolutely zero actual  
4 evidence that there is anything -- that there is any  
5 fish in the pond, and the Tribe objects to it, will  
6 not participate in it, and there is absolutely no  
7 reason for it, and he has not articulated any reason  
8 for it.

9 And this is a -- whether or not Allergan  
10 fulfilled some prior order or not, I can tell you that  
11 the agreements he is talking about were not  
12 incorporated by reference into the agreement. They  
13 were simply listed as encumbrances, and simply meaning  
14 that any time a patent owner takes ownership of a  
15 patent they take it subject to prior license  
16 agreements. There is nothing incredible about that.  
17 There is nothing strange about that.

18 THE COURT: Are you able to direct me to  
19 that language? Curious, it would help me if you can  
20 direct me to what is being discussed right now.

21 MR. SHORE: Your Honor, it is on Page 2  
22 of the long form assignment, it is Section 3, it is

1 titled Encumbrances, that is where it talks about the  
2 license agreements that are listed in the schedule.

3 But they are not incorporated by  
4 reference. And, frankly, if anybody has a complaint  
5 about whether or not those agreements have or have not  
6 been followed, the complaint does not belong to Mylan  
7 or Teva or any of the requesters. This complaint  
8 belongs to the other parties to the license agreement.  
9 And we are not going to -- we should not be litigating  
10 those license agreements or at least granting standing  
11 to non-parties of those license agreements to try to  
12 figure out some way to creatively use them to overcome  
13 the obvious case of sovereign immunity.

14 This is a fishing expedition, and it is a  
15 fishing expedition that goes far beyond establishing  
16 whether the Tribe is sovereign, we all know it is, and  
17 whether or not sovereign immunity applies to PTAB  
18 proceedings, which we already know they do.

19 MR. TORCZON: Your Honor, this is Richard  
20 Torczon, may I respond to two of those points?

21 THE COURT: One second, just bear with  
22 me.

1 MR. EVANS: Your Honor, this is Chris  
2 Evans. Would you mind before he has a chance, I would  
3 like to address some of the other issues that he  
4 specifically addressed in the license agreement.

5 He makes allegations that there is  
6 behavior, I guess, that is contrary to the language of  
7 the agreement. I don't know what he is talking about.

8 The license agreement specifically says  
9 in Section 5.1.2 the Tribe has full and exclusive  
10 control over the means and manner which the sovereign  
11 immunity is waived, that is exactly consistent with  
12 how the Tribe is behaving and acting in this  
13 proceeding.

14 I don't know what he's specifically  
15 talking about on the Tribe's website other agreements,  
16 but I will say the license agreement itself contains  
17 indemnification clauses that protect the Tribe in  
18 certain circumstances which seem to be exactly what he  
19 was referring to may have been on the Tribe's website.  
20 There is nothing inconsistent here.

21 And I also would like to point out that  
22 the case he cites, Finn versus Great Plains Lending,

1 LLC, it stands for the proposition that when the  
2 sovereign immunity assertion that perhaps can be  
3 jurisdictional discovery related to the sovereign's  
4 entitlement to immunity, in other words, whether the  
5 sovereign is in fact a sovereign, which is what  
6 Mr. Shore was talking about when you have arms of the  
7 Tribe or arms of a foreign state corporation.

8 That is not the discovery they are  
9 seeking here. Nothing they are seeking is  
10 jurisdictional.

11 As Mr. Shore said, they are fishing for  
12 some other agreements that do not exist to try to gin  
13 up some argument about a sham transaction.

14 MR. EVANS: Your Honor, may I respond?

15 THE COURT: One second.

16 That is Mr. Evans?

17 MR. EVANS: Yes, your Honor.

18 THE COURT: Mr. Evans, can you one more  
19 time direct me to the section in the agreement? I  
20 wasn't able to find it, I just pulled it up.

21 MR. EVANS: It is the sentence of  
22 Section 5.1.2, it starts where the licensor is

1 required to appear --

2 THE COURT: I found that one. The other  
3 one talking about --

4 MR. EVANS: Indemnification?

5 THE COURT: No, the --

6 MR. EVANS: The encumbrances thing?

7 THE COURT: Yes.

8 MR. EVANS: That is part of the long form  
9 agreement, not the license agreement, it is  
10 Exhibit 2086, and on Page 2 and it is the large  
11 Section 3 entitled Encumbrances.

12 THE COURT: I see, okay.

13 Just let me read this, one second.

14 Okay, one more thing before I move on,

15 Mr. Torczon.

16 Ms. Whelan, are you also able to  
17 represent that there is no other agreements?

18 MS. WHELAN: I am not able to make that  
19 representation, your Honor.

20 I would point out that -- though that if  
21 you look at Exhibit 2086, which is the long form  
22 assignment that we produced, if you look at

1 Section 10.10 -- I am sorry, it is the -- sorry, is  
2 the license agreement, sorry. 2087, the license  
3 agreement, if you look at Section 10.10 of  
4 Exhibit 2027, it states that it is a section entitled  
5 Entire Agreement, Amendments, and it says this  
6 agreement, this license agreement represents the  
7 entire agreement and understanding between the  
8 parties.

9 Also, if you --

10 THE COURT: Why are you not in a position  
11 to make a representation, are you just not part of the  
12 conversation?

13 MS. WHELAN: I have not been part of this  
14 conversation.

15 THE COURT: I see, okay.

16 MS. WHELAN: But we were -- the reason we  
17 are actually appearing on this call, other than to ask  
18 for leave to withdraw, is that the board's  
19 September 8th order was directed to patent owner and  
20 Tribe and phrasing at time of the order, even though  
21 Allergan wasn't the patent owner at that time, we  
22 interpreted the order as having been intended to be



1 directed towards the Tribe and Allergan.

2 And what I wanted to make clear was we  
3 were ordered to produce the long form assignments. We  
4 produced the long form assignment, which sets forth  
5 the relationship, the rights between Allergan and the  
6 Tribe.

7 And, you know, I hear Mr. Torczon refer  
8 to originally it was, well, the agreement incorporates  
9 by reference all the settlement agreements. Now I  
10 just heard him say he effectively incorporates them by  
11 reference.

12 Well, the fact is it does neither, it  
13 just lists them. And as encumbrances they existed  
14 prior to this assignment. But they are in no way part  
15 of the assignment, and the extent that he wants them  
16 he is going to have to file a motion for additional  
17 discovery and explaining for the -- why those  
18 settlement agreements between Allergan and third  
19 parties are relevant and why the interest of justice  
20 has to be produced. And I haven't heard that yet.

21 And also, just to note, your Honor, that  
22 those settlement agreements are subject to

1 confidentiality provisions, we would need either  
2 consent, Allergan would need either consent of the  
3 other parties to produce them or an order from the  
4 district court.

5 THE COURT: Mr. Torczon.

6 MR. TORCZON: Several points I would like  
7 to hit.

8 One is we have been told that there are  
9 no agreements, then told that there are settlement  
10 agreements.

11 I think the plain language makes it clear  
12 that they modified --

13 THE COURT: Let me stop you right there.

14 I understood it to mean there are  
15 settlement agreements between Allergan and third  
16 parties, but no other agreements between the Tribe and  
17 Allergan.

18 MR. TORCZON: If that is the case we  
19 would love that in the form of some sort of evidence  
20 that can be tested.

21 I would like to -- if I may continue --  
22 by the plain language those agreements remain the

1 property of Allergan and they modified the terms of  
2 the agreement between the Tribe and Allergan. So  
3 there is really no question that they are part of the  
4 agreement and would inform how much control Allergan  
5 retained.

6 I further note that Mr. Evans pointed out  
7 that these are encumbrances, he characterized as the  
8 typical encumbrances that would come with the transfer  
9 of property. Yet, as we understand it, the entire  
10 immunity assertion is based on the idea that the Tribe  
11 is not subject to previous encumbrances, including  
12 things like the ongoing proceedings here.

13 I think the fact that they are  
14 encumbrances is very material here.

15 I heard Ms. Whelan point out that  
16 Section 10.10 of Exhibit 2087 says it is the entire  
17 agreement. I will note the very last sentence says "No  
18 amendment, modification, or release or discharge of  
19 any term or condition of this agreement shall be  
20 binding on the parties unless in writing and duly  
21 executed by an authorized representative of each  
22 party" and in no way excludes the existence of other

1 agreements. In fact, it expressly authorizes it.

2 Finally, I understand Ms. Whelan to say  
3 proper way to do it is to file a motion. In fact, she  
4 is correct, it is the proper way to test this. But we  
5 should be able to file a motion.

6 Nobody said that this was going to be the  
7 entire motion right now unless the board wants to  
8 order it at this point, but we are perfectly happy and  
9 fully prepared to file a motion to support this  
10 position.

11 And, in fact, assuming that such a motion  
12 is authorized we would plan to file it as quickly as  
13 possible as soon as tomorrow if the board would be  
14 amenable to that.

15 We believe that the incentives to drag  
16 this out are entirely on Allergan's part. We would  
17 suggest that two days after we file our motion they  
18 file their opposition. We understand from the Tribe  
19 that they believe and are absolutely confident that  
20 the case law is on their side so it should be no  
21 problem for them to do that.

22 I will note that although Mr. Evans

1 talked about the Finn case and talked about how it  
2 only -- with entities, the Finn case itself applies to  
3 federal sovereign immunity cases that didn't involve  
4 any intervening entities. So the existence or  
5 nonexistence of intervening entities and arm of the  
6 state analysis in no part -- is no necessary part of  
7 whether discovery is appropriate in sovereign immunity  
8 situations.

9           So we would like to see some expedited  
10 briefing to the extent that the Tribe and Allergan  
11 decline to produce these documents. And we believe  
12 that the pacing of this should be such that we can  
13 complete production and have a chance to analyze and  
14 incorporate them into our opposition without moving  
15 the opposition date. Because, again, delay is the  
16 servant of Allergan, it serves nobody else here.

17           In fact, along those lines, all of the  
18 briefing is going to be completed by October 20.  
19 Allergan has represented that it has -- that it is  
20 ready to argue the merits. Mylan has been ready to  
21 argue the merits for quite some time. The parties  
22 have already exchanged the demonstratives. There is

1 no reason that we can't have a hearing before the end  
2 of October. The board itself has indicated that it  
3 wanted to take up both issues at the hearing. So that  
4 would be an appropriate time to do it.

5 Joinder is not an excuse -- I would like  
6 to make two more points.

7 THE COURT: All subjects here?

8 MR. TORCZON: Your Honor, I am very  
9 concerned about delay here. We have had suggestions  
10 that it is okay because there is joinder involved.  
11 But the joinder did not affect the briefing for this  
12 case at all so the joinder can't possibly be an excuse  
13 of delaying this.

14 The only other thing is good cause, a  
15 finding the chief judge would have to make under  
16 42.100(C). So unless there is a good cause for delay,  
17 we need to get this decided by December 8th, and  
18 without that good cause finding we need the hearing  
19 sooner than later.

20 THE COURT: I understand your position,  
21 Mr. Torczon. One second, hold, please.

22 MR. SHORE: Your Honor, can I respond

1       briefly? This is Mr. Shore.

2                   THE COURT: As long as it is on the  
3       subject of whether or not we are to grant additional  
4       discovery.

5                   MR. SHORE: Yes, it is directly on that  
6       subject.

7                   First, there is no need for additional  
8       discovery no matter what these other agreements say.  
9       And it really does not matter, those agreements were  
10      entered into in some cases years before the ownership  
11      of the patents, once ownership of the patents, the  
12      only issue is whether the Tribe is a sovereign, that  
13      is undisputed, and there is nothing in those  
14      agreements that is going to change the sovereign  
15      status of the Tribe.

16                  Once the sovereign status of the Tribe is  
17      established, it already is undisputed, the only other  
18      question is does the sovereign immunity apply to  
19      proceedings and IPRs, that has already been decided to  
20      take place.

21                  There is no chance that there is going to  
22      be a hearing on the merits and the decision by

1 December 8th because of the way this is set up. If  
2 the board for whatever reason disregards Supreme Court  
3 precedent dating back to 1832 and tries to disregard  
4 the Tribe's sovereign immunity we can appeal under the  
5 collateral order doctrine, which we would, and the case  
6 will be in the appellate courts long after  
7 December 8th.

8 What he is asking for is an unsupportable  
9 fishing expedition into areas that can have nothing to  
10 do with the Tribe's immunity and have nothing to do  
11 with the immunity applies to PTAB proceedings and  
12 IPRs, it is a complete total fishing expedition and  
13 waste of time that should not be granted.

14 THE COURT: Okay, we have conferred, it  
15 appears we aren't going to be able to make a decision  
16 today in the call, we will issue an order with our  
17 decision.

18 Before we go in the event that we do  
19 grant authorization for a motion for additional  
20 discovery, Mr. Shore, would you be okay with to file  
21 opposition?

22 MR. SHORE: No, your Honor, they have



1 obviously been working on their motion for additional  
2 discovery, you know, for days or weeks, and to give us  
3 a 48-hour turn around is completely unreasonable. We  
4 want 15 days, like normal motion practice.

5 I am actually out at Cal Tech today, I  
6 wasn't even sure I was going to be able to take the  
7 call. We are a very busy law firm and we do not have  
8 the ability to drop everything we are doing and be a  
9 slave to what Mylan wants us to do on 48 hours notice.

10 THE COURT: I think I understand your  
11 position.

12 MR. TORCZON: Your Honor, if I may, I  
13 just only want to make two points, very brief ones,  
14 one is, again, delay is the goal --

15 THE COURT: I understand.

16 MR. TORCZON: And the second point is we  
17 were asked to turn around a response when the Tribe  
18 entered within one business day on something they had  
19 months to prepare. We are asking for this two days  
20 after we file our motion. So we have been prompt  
21 and --

22 THE COURT: Mr. Torczon, let me ask you,

1 would you be willing to waive your reply to the  
2 opposition?

3 MR. TORCZON: I guess I would have to see  
4 what the brief -- what the timeline looked like before  
5 I would want to commit to that, your Honor.

6 THE COURT: Okay.

7 Well, in that event we will issue -- if  
8 we go that route we will issue an order with our  
9 decision including our decision on what is appropriate  
10 for a briefing schedule.

11 In the meantime, the parties are to  
12 continue forward with their -- continue forward as if  
13 this authorization for additional discovery will be  
14 denied and to stick with the current briefing schedule  
15 that is in place.

16 MS. WHELAN: Your Honor, this is Dorothy  
17 Whelan.

18 Just to circle back, do we, Allergan,  
19 have permission to file an unopposed motion to  
20 withdraw?

21 THE COURT: Not at this time. After this  
22 briefing schedule, so October 20th, you can renew your

1 request at that time.

2 MS. WHELAN: Thank you.

3 MR. TORCZON: Your Honor, this is Richard  
4 Torczon.

5 Would we also be contingently authorized  
6 to file a motion to dismiss for requested  
7 judgment?

8 THE COURT: I am not sure.

9 What do you --

10 MR. TORCZON: Would we be authorized to  
11 file a request for judgment adverse -- adverse  
12 judgment under the rule?

13 THE COURT: Let me stop everyone right  
14 now. Let's table this conversation for teleconference  
15 to be had after October 20th.

16 MR. TORCZON: Very good, your Honor.

17 THE COURT: Anything else from the  
18 parties?

19 MR. TORCZON: No, your Honor, not from  
20 Mylan.

21 THE COURT: I am just going to repeat  
22 myself just to make sure everyone is clear, but we are

1 going to go forward assuming that this motion for  
2 authorization is going to be denied. Stick to the  
3 current schedule and briefing unless -- and if there  
4 is a -- in our order, if we issue an order which  
5 grants authorization, then whatever is in that order  
6 would dictate in terms of schedule.

7 And I feel like I am missing something,  
8 okay.

9 The transcripts are to be filed under the  
10 parties and board only, and so -- I need all the  
11 discussion regarding these agreements that are also  
12 confidential will remain confidential, and I believe  
13 that is all.

14 MR. SHORE: Your Honor, this is Michael  
15 Shore.

16 I don't know if you want to handle this  
17 now, but this request for amicus briefing, if there  
18 are going to be amicus briefs allowed we probably have  
19 several dozen Indian tribes and Native American  
20 economic development organizations that would also  
21 want to file amicus briefs, so if we are going to  
22 entertain amicus briefs we would like to get that out

1 of the way now.

2 THE COURT: We as the panel have not  
3 discussed that issue at all.

4 I will go ahead and ask the parties is  
5 anyone opposed to filing of amicus briefs?

6 MR. SHORE: The same reason  
7 the Tribe is opposed to amicus briefs, there is  
8 nothing amicus going to say the status of the Tribe as  
9 a sovereign or the fact that sovereigns aren't subject  
10 to IPRs, if amicus briefs are going to be allowed then  
11 obviously there are several Native American  
12 organizations that would want to participate, which  
13 will obviously be going to, again, if they don't want  
14 a delay they shouldn't be asking for amicus briefs,  
15 but if there are going to be amicus briefs they need  
16 to be allowed on both sides to the full extent  
17 interested parties might find it useful.

18 THE COURT: Understood.  
19 We are just not in the position to  
20 discuss that at this date. We will have to -- we will  
21 consider the issue, and we will.

22 MR. TORCZON: Your Honor, this is Richard

1 Torczon.

2 You asked for -- Mylan did not ask -- it  
3 is not our position to ask anybody, we are fully  
4 confident we brief this.

5 Having said that, we would note that just  
6 as 35 U.S.C. 316(b) says that we are going to need to  
7 take into account efficiency, it also says it should take  
8 into account impact on the economy and integrity of  
9 the patent system, so I think any briefing that  
10 contributes to an understanding of the impact on the  
11 economy and the integrity of the patent system is  
12 appropriate, however, not at the expense of drawing  
13 out the schedule.

14 THE COURT: We will table that. I think  
15 once we have some thoughts around that we may ask the  
16 parties for another teleconference to discuss that  
17 issue.

18 One more thing. It is possible that if  
19 you would look at the transcript and there is nothing  
20 confidential in the transcript then it is fine, you  
21 can reconsider filing it as public, as a public  
22 document, but otherwise we will expect you to file as

1 confidential.

2 I think we have an understanding of what  
3 whether take place next, and so if there is nothing  
4 else we will end this call.

5 One more time, Mr. Shore?

6 MR. SHORE: I think that is all from the  
7 St. Regis Mohawk Tribe.

8 THE COURT: Mr. Torczon, anything from  
9 Mylan?

10 MR. TORCZON: Your Honor, this is Richard  
11 Torczon. For some reason I got cut off a minute or  
12 two.

13 The point -- yes, I wanted to say on the  
14 amicus point that 35 U.S.C. 316(b) says the board is  
15 to take into consideration the timeliness of the  
16 proceedings, but it also needs to take into account  
17 the impact on the economy and the integrity of the  
18 patent system.

19 We think any amicus briefing directed to  
20 those points is appropriate, but not to the extent  
21 that it would draw out the schedule. We don't want a  
22 change in the schedule.

1 THE COURT: We already heard that.

2 MR. TORCZON: In which case I don't know  
3 when I cut off. I don't know what else you have asked  
4 after that.

5 THE COURT: I was just going to say that  
6 we will end the call and issue an order.

7 I did mention about the confidentiality  
8 of the transcript after review if the parties consider  
9 it to be non-confidential it is okay to enter it as a  
10 public document, but otherwise expect to see it as a  
11 confidential document, and that was all.

12 We understand that the current briefing  
13 schedule is not going to change unless an order issued  
14 by us makes a change to that, and we will get that  
15 order out as soon as we can. And that is it.

16 Ms. Whelan, anything further from you?

17 MS. WHELAN: No, your Honor, thank you.

18 THE COURT: And with that I will adjourn  
19 the call, thank you.

20 MR. TORCZON: Thank you, your Honor.

21 (WHICH WERE ALL OF THE PROCEEDINGS HAD OR  
22 TAKEN PLACE IN THE ABOVE-ENTITLED MATTER.)



1 STATE OF ILLINOIS )  
2 ) SS.  
3 COUNTY OF DUPAGE )

4 I, STEPHANIE A. BATTAGLIA, do hereby certify  
5 that I reported in shorthand the proceedings had at  
6 the conference call aforesaid, and that the foregoing  
7 is a true, complete, and accurate transcript of the  
8 proceedings at said conference call as appears from my  
9 stenographic notes so taken and transcribed under my  
10 personal direction, this 27th day of September, 2017.

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Certified Shorthand Reporter

CSR No. 084-003337 - Expires May 31, 2019.