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

CASE IPR2016-01127
Patent No. 8.685,930 B2

MYLAN PHARMACEUTICALS, INC.,)
TEVA PHARMACEUTICALS USA,)
INC., and AKORN, INC.,)
Petitioners)
vs.)
ALLERGAN, INC., Patent Owner)

TELEPHONIC HEARING
September 11, 2017

Reported by: Shauna Foreman, CSR

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PROCEEDINGS

THE COURT: Who is on the call representing petitioner?

MR. TORCZON: Thank you, Your Honor. This is Richard Torczon. I am appearing on behalf of Mylan, and with me on the line is I believe Steve Parmelee and Jad Mills and Wendy Devine.

THE COURT: Mr. Torczon, T-O-R-C-Z-O-N? And you will be speaking today on behalf of petitioner?

MR. TORCZON: Yes, Your Honor.

THE COURT: And who do we have on the call for Allergan?

MS. WHELAN: Your Honor, this is Dorothy Whelan, and I'm joined by Michael Kane. We represent Allergan.

THE COURT: And who would be speaking for Allergan?

MS. WHELAN: No one will be speaking for Allergan, but Michael Shore will be speaking on the sovereign immunity issue -- the tribe's issue.

THE COURT: And who is representing the tribe?

MR. SHORE: Michael Shore, S-H-O-R-E, and with me -- in the room with me are Chris Evans

1 and Jessica (inaudible).

2 THE COURT: And I understand that we
3 have a pro hac vice motion and just want to confirm
4 that no one is going -- no one objects to Mr. Shore
5 speaking today on today's conference call.

6 MR. TORCZON: Your Honor, this is
7 Richard Torczon on behalf of Mylan. We have already
8 indicated to -- to the tribe that we do not oppose
9 their pro hac vice entry.

10 THE COURT: Okay. Thank you. Thank
11 you. I hear we have a court reporter. Who --

12 MR. CHAN: Your Honor, this is Alfonso
13 Chan. I'm also on the call on behalf of the tribe.

14 THE COURT: Thank you. And is there
15 anybody else on the call?

16 MR. SPEIER: Your Honor, this is Gary
17 Speier on behalf of Teva.

18 MR. DEWANSIK: Your Honor, this is
19 Mike Dzwonczyk on behalf of Akorn.

20 THE COURT: And anyone else?

21 MS. GRAY: Your Honor, this is Marissa
22 Young-Gray (phonetic) on behalf of Teva.

23 THE COURT: Okay. I'll keep asking
24 until I get a silence. Anybody else?

25 MR. TORCZON: Your Honor, this is

1 Richard Torczon. If counsel are all done, you should
2 be aware that there are actually two court reporters
3 on the call. Each side has requested to have a court
4 reporter present.

5 THE COURT: Okay. Thank you for that
6 information. And if you could, both parties file
7 their -- their transcript following this call.

8 Okay. I think with that, we'll begin.
9 Mr. Shore, would you like to begin?

10 MR. SHORE: Yes, Your Honor. I'm
11 going to take the phone off speaker so that this part
12 of the call will be easier for the court reporters
13 to -- to hear. I want to make sure there's no
14 feedback or anything.

15 Thank you for taking the call today,
16 Your Honor. For the record, my name is Michael
17 Shore. I represent St. Regis Mohawk Tribe. I do not
18 represent Allergan, and I do not speak for Allergan
19 on this call. I only speak behalf of the St. Regis
20 Mohawk Tribe.

21 Patent owner St. Regis Mohawk Tribe,
22 which I'm going to refer to as "the tribe" for the
23 remainder of my discussion today for the purposes of
24 the court reporter, hereby makes a special appearance
25 before this board to protect its sovereignty. No

1 immunity is waived by the tribe's counsel
2 participating in this call or in any briefing that
3 might follow regarding the tribe's assertion of its
4 sovereign immunity.

5 First, the tribe requests that the
6 board immediately enter an order staying all
7 proceedings in all IPRs before the board that might
8 in any way adversely affect the tribe's rights in
9 U.S. Patent Numbers 8,685,930, 8,629,111, 8,624,556,
10 866 -- 633,162, 8,648,048, 9,248,191. And for the
11 purposes of the court reporters, for the remainder of
12 my discussion today the '930 patent, the '111 patent,
13 the '556 patent, the '162 patent, the '048 patent,
14 and the '191 patent will be collectively referred to
15 as the patents-at-issue.

16 The stay -- the stay should remain in
17 place pending resolution of the tribe's sovereign
18 immunity challenge to the board's jurisdiction to
19 proceed with the IPRs.

20 The tribe is a federally-recognized
21 sovereign American Indian tribe. It has acquired all
22 the patents-at-issue. This is established by the
23 Assignment, which is Exhibit 2086 in the court's
24 record and the Updated Mandatory Notice, which was
25 Paper Number 63 in IPR2016-01127.

1 The tribe, as a sovereign government,
2 is not amenable to suit unless it expressly consents
3 or Congress abrogates its immunity. Neither of these
4 exceptions apply here, as will be more fully briefed
5 in the tribe's forthcoming Motion to Dismiss.

6 The stay is required, Your Honor, not
7 discretionary, because "sovereign immunity by nature
8 is jurisdictional," so it must be addressed before
9 the board may proceed to the merits. Sovereign
10 immunity goes to the issue of the court's power to
11 hear the case and, therefore, it must be decided as
12 an antecedent issue to the merits of the case.
13 Absent jurisdiction, the board cannot proceed to the
14 merits. It would frankly be unprecedented for the
15 board to deny the tribe the right to seek a dismissal
16 before conducting the hearing on the merits.

17 The -- every other instance in which a
18 sovereign has applied to the Patent Trial and Appeal
19 Board to seek a dismissal prior to a hearing on the
20 merits has been granted. And we can give you
21 multiple examples of that, and I believe some of them
22 are already in the record as Exhibits 2094 -- or will
23 be in the record as Exhibits 2094, 2095, and 2096
24 when filed.

25 The tribe's sovereign immunity is not

1 merely a liability defense. It's an immunity from
2 suit that would be effectively be lost if IPRs are
3 permitted to go to trial.

4 To respect the tribe's sovereign
5 immunity as required by binding Supreme Court
6 precedent, the court must stay this proceeding
7 pending a final determination of the tribe's
8 assertion of its immunity.

9 Should the board disregard binding
10 precedent and attempt to force the tribe to
11 participate in this process before ruling on the
12 applicability of the its immunity, the tribe has a
13 right to an appellate review.

14 The tribe does not and will not waive
15 its sovereign immunity to the IPRs proceeding against
16 the patents-in-suit.

17 Therefore, if the board allows the
18 September 15, 2017 hearing to proceed, the tribe's
19 immunity would be effectively abrogated in violation
20 of federal law. The better course is to stay the
21 current proceedings, preserve the status quo, and
22 continue the hearing until after the board has had
23 the opportunity to fully consider the tribe's
24 assertion of sovereign immunity and, if the board
25 acts adversely, await a decision on the application

1 of the tribe's immunity at the Federal Circuit, as
2 the tribe would pursue its rights to immediate appeal
3 under the collateral order doctrine.

4 I would also note that the one-year
5 statutory deadline to complete the IPRs, which
6 expires on December 8, 2017, could be extended under
7 37 C.F.R. Section 41.100(c) for either good cause or
8 joinder of new parties. The need to allow the tribe
9 to assert its sovereign immunity clearly qualifies as
10 good cause, and the addition of the tribe as a
11 newly-joined party and the late addition of Teva and
12 Akorn would also support an extension of the
13 deadlines.

14 The tribe requests 15 days to prepare
15 and file its motion to dismiss the IPRs. And
16 understanding that petitioners do not likely have a
17 great deal of experience in briefing Indian sovereign
18 immunity and may need time to line up additional
19 counsel with experience in that area, the tribe is
20 willing to voluntarily provide the petitioners 60
21 days from the day we file our motion to file a
22 response, or more time if they request it. And the
23 tribe would ask -- then ask for 15 days after their
24 filing to file a reply brief.

25 So unless the board has any other

1 questions for me, I believe that I've stated the
2 tribe's position. I understand this call is normally
3 not the place to argue case law, but I have at my
4 disposal citations and cases that back every factual
5 and legal statement I've made. If the board would
6 like a reference to anything now in this call, I can
7 provide it to you.

8 The St. Regis Mohawk Tribe would like
9 to thank you for taking our call today, and I look
10 forward to working with the board to resolving all of
11 these issues before us.

12 THE COURT: Okay. Thank you,
13 Mr. Shore. I think we understand the nature of your
14 request. I'll go ahead and allow Mr. Torczon to
15 respond.

16 MR. TORCZON: Thank you, Your Honor.
17 This is Richard Torczon from Mylan. As an initial
18 matter, I would like to address our objections to the
19 call. The board, in setting the call on Friday, said
20 we could do that today. I would also like to discuss
21 the moving of the hearing date and then, finally,
22 suggest that there's little reason to believe that
23 there would be success on the merits as a further
24 assurance for not moving the -- the date.

25 The objections to the call, there was

1 no meet and confer. This is a concern for several
2 reasons. In this case, particularly at this
3 juncture, we're seeing a lot of push on the -- the
4 petitioners and on the board to act hastily. In this
5 particular case because the -- there was no meet and
6 confer and Mylan at least was unable to determine a
7 timely availability for the call, one of our key
8 attorneys is not available today.

9 This is not the first time Allergan
10 has failed to do a meet and confer in this
11 proceeding. At least once before a reply was
12 authorized under similar circumstances, and we just
13 would like to note our objection to these procedural
14 irregularities. Let me clarify. There was a meet
15 and confer this morning, but I mean a meet and confer
16 before the call was set.

17 The second point of objection is that
18 we were given less than one business day to prepare
19 for this. The tribe has known about this issue since
20 April. They have been telling the media that. And
21 so, there really is no basis for a hurry in this
22 case. They have had plenty of time to consider what
23 they're doing. They've waited until the last
24 possible moment. The only construction that can go
25 with that is intentional prejudice to the petitioner.

1 And, therefore, we ask that you not consider their
2 belatedness a good reason for haste on Mylan's part
3 or on the board's part.

4 We also understand that this call is
5 just about whether you're going to authorize a motion
6 to delay the hearing and authorize a motion to
7 dismiss. Again, we've had so little time to prepare
8 to address the merit, we're really not prepared at
9 this juncture to address the substance of all of
10 those facts.

11 Having gone through the objections, I
12 would like to address the hearing date. As the board
13 knows, it is under a one-year clock to decide this.
14 That means that the decision is going to be due in
15 early December. While opposing counsel has noted
16 that there are bases for extending, this case is not
17 one of those cases that justifies such an extension.
18 The briefing has all been timely. The briefing has
19 all been complete. The only thing that awaits is the
20 hearing and the decision on the merits. Once again,
21 Allergan's decision to delay this until the last
22 possible moment is not good cause for anything.

23 Secondly, the board is supposed to
24 take into account in its proceedings the efficient
25 administration, the office, and the ability of the

1 office to timely complete its proceeding, both of
2 which clearly apply in this circumstance. The same
3 provision of the Statute 316(b) also requires the
4 board to take into account the economy and the
5 integrity of the patent system, both of which are
6 strongly implicated in this case.

7 The motion should not be authorized,
8 the motion to dismiss. But if it is, it should
9 proceeded in parallel, not to the exclusion of
10 consideration of the -- the merits. We have been
11 told that there's no precedent for delay. Quite to
12 the contrary, on the closest authority to this case
13 there is precedent for briefing after when the
14 immunity issue is raised at the very last moment.
15 That's the Neocort versus Maryland decision,
16 IPR2016-002008, Paper 28.

17 We have been told in this proceeding
18 or in this call that the -- that if the board doesn't
19 stay, there's an immediate appeal. We know that
20 that's not true. The first time we heard about this
21 was -- was about an hour ago from opposing counsel
22 during the meet and confer. They cited the
23 collateral order doctrine. Just cursory research
24 into that shows that that doctrine, which is actually
25 Statute 28 U.S.C. 1291, only applies to district

1 court proceedings and it's applied very, very
2 stringently even in those proceedings.

3 There's nothing that they have cited
4 that suggests that it applies in an administrative
5 context. There's nothing to suggest that it
6 overrules the finality doctrine that applies under
7 the APA. And in any case, we know from IPR specific
8 case law that there's no interrogatory appeal.
9 So -- so that's completely a misplaced assumption on
10 opposing counsel's part.

11 There's already been delay in this
12 case. We -- we've already set the hearing back, and
13 that's going to further prejudice the board's ability
14 to get a decision out in a timely fashion. We expect
15 that any motion that gets authorized will require
16 substantial briefing and fact production from both
17 sides.

18 Due to Allergan's last-minute raising
19 of this issue, we would expect to have time
20 commiserate to the month-long preparation they've had
21 to address this issue to fully explore the facts and
22 legal issues involved. Any opposition that would be
23 due from us should await Allergan's -- or rather the
24 tribe's action in the district court. While the
25 tribe is insisting that the board act immediately

1 affecting its -- its immunity in this case, they have
2 told that -- the district court in a letter on Friday
3 that they would make an appearance in due course.

4 This is clearly an effort by them to
5 play the court and the board's jurisdiction off each
6 other because they know that the minute they make an
7 appearance in the district court there will be yet
8 another waiver argument.

9 Mylan shouldn't -- shouldn't have to
10 file any opposition until they have acted in the
11 district court. Anything else would be allowing them
12 to manipulate both the board and the court's
13 jurisdiction.

14 Any delay in considering the merits in
15 this case, prejudices Mylan. Mylan has already
16 expended substantial resources in this case,
17 including since April when a lot of the discovery and
18 briefing has occurred. It's expended substantial
19 resources before Friday when this issue was first
20 raised preparing for the hearing. It also has
21 business interests that -- that have involved
22 substantial investment toward launching a product
23 that now would be delayed.

24 The tribe's media reported royalty for
25 delay works out to about \$41,000 a day. That's just

1 the tribe's fraction of the royalties involved here.
2 So -- so they have a substantial interest in dragging
3 this out as long as possible. We really need to get
4 to the merits. The public deserves that. The
5 integrity of the patent system deserves that.

6 Our delay in making the request waives
7 any equity it has on this. Allergan has controlled
8 the timing. It has timed things to maximum the
9 prejudice of the board of Mylan. There's no
10 prejudice to Allergan. Allergan can appear for the
11 oral argument or not at its discretion. If it does
12 appear, it won't waive its rights any more than it
13 already has. So -- so that argument is specious.

14 If -- if Allergan remains, the tribe
15 can be dismissed and the proceeding can continue
16 without it. There's actually precedent from the
17 board -- again, the most on-point precedent in the
18 case of Reactive Services versus Toyota in which the
19 state entity was dismissed and the proceeding
20 continued with the other interested parties.

21 On the likelihood of -- of their -- of
22 the motion to succeed on the merits, I would like to
23 point out that we haven't cited any authority that's
24 directly on point to this situation. Counsel has
25 just told us that there are a lot of cases out there,

1 but we know for a fact that there's not a single IPR
2 tribal immunity case. They would like us draw
3 analogies to the 11th Amendment. The board is
4 probably very familiar with the 11th Amendment and
5 knows that it does not apply to tribes. If there's
6 any doubt, there's multiple Supreme Court cases that
7 state that.

8 Instead, tribal immunity is a
9 common-law privilege. It doesn't control any
10 Congressionally-mandated scheme. There's ample
11 Supreme Court and Appeals Court authority for that.

12 So -- so they are essentially asking
13 you to use federal common-law to overcome a statutory
14 scheme that Congress has created.

15 There are also plenty -- there's a lot
16 of reasons for concern that -- that this transaction
17 is a sham transaction. In this case, the tribe did
18 not purchase the intellectual property. Instead,
19 they were paid to take it, plus promised a
20 \$15 million a year royalty stream on top of the \$13
21 and a half million that they were paid to take it.

22 There are extensive cases in a lending
23 fraud context where federal courts are permitting
24 extensive briefing and discovery into these kinds of
25 sham transactions, and at least in one case

1 there's -- federal prosecution is being pursued on
2 racketeering charges in these sort of circumstances.

3 So facially this transaction is a
4 sham. There's no reason to believe that it will lead
5 to any success. But in any case, there's an
6 unequivocal waiver here. Mylan expects to have a lot
7 of arguments on merit, but you should have confidence
8 that this motion can't succeed because they have
9 clearly sought out this forum. Mylan did not drag
10 them into this forum. Akorn did not drag them into
11 this forum. Teva did not drag them into the forum,
12 and even the board did not drag them into this forum.
13 Rather, by their own admissions to the press -- the
14 press releases, they have -- the tribe has said that
15 they have sought this out as an opportunity that they
16 are marketing to patentees, that this is basically a
17 protection scheme that they have put forth. They
18 have been looking at this with the advice of counsel.
19 They are marketing it to people. They are
20 specifically targeting the Patent Trial and Appeal
21 Board. They are going to patentees who they think
22 have weak patents and at risk of cancellation, and
23 they are offering this protective service. They are
24 explicit selling immunity.

25 So this is not -- this is totally

1 non-analogous to any of the 11th Amendment cases even
2 if those sorts of cases apply because in all of those
3 cases, the state entity was the pre-existing owner of
4 the intellectual property. In all of those cases, it
5 was the state entity that had been dragged into the
6 proceeding against its will. The tribe here has not
7 been dragged into this proceeding against its will.
8 It has deliberately by its own admission targeted
9 these proceedings for exactly this kind of
10 revenue-generating opportunity.

11 So there's -- there can be no question
12 that there's waiver under these circumstances. If
13 waiver has any meaning in any context, the tribe has
14 waived it.

15 I also point out that there's a
16 statutory waiver under 35 U.S. 8.261. When you
17 accept a patent, you accept it with strings attached.
18 Congress did not create unlimited property. Under
19 261, which is the only one that addresses any kind of
20 property rights under the patent code, Congress
21 actually expressly reserves that any ownership is
22 taken subject to the provisions of the patent code.
23 One of those provisions is amenability to IPRs. So
24 the tribe when went into this with eyes open. They
25 are stuck with it. They have waived it statutorily.

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1 They have waived it equitably.

2 Finally, I would like to point out
3 that the director of the PTO has policy guidance and
4 management supervision duties under 35 U.S.D.
5 3(a)2(a). Sovereignty is clearly a policy issue.
6 Destroying IPRs with sham transactions is a policy
7 pattern. The head of Allergan has said that this is
8 going to open the floodgates. The tribe has said
9 that they already have an unidentified non-pharma
10 tech patent owner who -- who they are extending this
11 protection service to.

12 So this is just the tip of the
13 iceberg. The effects of this would be to -- if
14 granted, if the motion were granted, would be to deny
15 the director of the power to institute. So this is
16 an attack on director power -- we understand that the
17 board has taken a position that you cannot request an
18 expanded panel. However, SOP1 actually in
19 Section 3(c) says that a party can suggest it. And I
20 strongly suggest -- Mylan strongly suggests that if
21 the board decides to authorize this motion that it do
22 so in a manner that allows the director to play the
23 director's policy role and speak on how the
24 director's institution powers would be used in this
25 context.

1 MR. SHORE: Your Honor, this is
2 Michael Shore. If I may quickly respond -- and I
3 apologize. I'm sure that my opponent was speaking
4 with relatively little preparation, so I'll forgive
5 him for his lack of understanding of tribal immunity.
6 But --

7 THE COURT: Mr. Torczon, are you
8 finished?

9 MR. TORCZON: I -- I am, Your Honor.
10 I'm -- I'm willing to -- to hear what Mr. Shore says.
11 I would like an opportunity to respond, though.

12 MR. SHORE: First, tribal sovereignty
13 is broader, not narrower (inaudible), and it is
14 clearly established in the case law that a sovereign
15 immunity does not waive its sovereign immunity
16 through the acts of (inaudible) to a corporation.
17 It's either not entitled sovereign immunity or that
18 it has waived sovereign immunity. There's a whole
19 slew of cases on that.

20 Sovereign -- sovereign immunity
21 attaches as part of the asset. It doesn't matter
22 where the asset is or how the asset is positioned
23 before the acquisition. I think the Seminole case on
24 that came out of Puerto Rico out of the First
25 Circuit, but that case has followed many, many times.

1 But that is not an issue.

2 Second, some of the statements he made
3 were just wrong. This -- this transaction has not
4 been contemplated since April. Allergan and St.
5 Regis Mohawk Tribe did not ever talk to one another
6 until August, and the deal was consummated on Friday.
7 And within two hours of the deal being consummated,
8 paperwork was filed. So this is not just something
9 that anyone is sitting on their hands about at all.

10 There is -- there is no waiver by
11 appearance in district court. And I can kind of
12 speak with authority on this because on behalf of the
13 University of Texas in the Texas Board of Regents
14 versus Texas case I actually won on that issue in the
15 Federal Circuit that if you file in one forum that
16 doesn't mean that you waive as to any other forum.
17 As a matter of fact, the law is you only waive as to
18 the forum where you file compulsory (inaudible). For
19 state sovereign immunity -- actually, tribal
20 sovereign immunity only allows counterclaims for
21 recoupment.

22 So his understanding of tribal law is
23 wrong. His understanding of the facts are wrong.
24 His understanding of the law generally here is wrong.
25 But -- but what it really comes down to, Your Honor,

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1 is I think he has articulated very well that he needs
2 to do a lot of research, the board needs --

3 THE COURT: All right, Mr. Shore. I
4 think I understand your position. Let me ask a
5 couple questions.

6 Ms. Whelan, are you withdrawing from
7 this case?

8 MS. WHELAN: I'm sorry, Your Honor?

9 THE COURT: Are you withdrawing as
10 counsel from this case?

11 MS. WHELAN: No, we are not.

12 THE COURT: So will you be prepared on
13 Friday to attend the hearing?

14 MS. WHELAN: If the hearing proceeds,
15 we will be prepared to attend the hearing.

16 THE COURT: And will you be
17 representing the patent owner?

18 MS. WHELAN: We will only be
19 representing Allergan.

20 THE COURT: And -- but not as patent
21 owner?

22 MS. WHELAN: Correct.

23 THE COURT: Okay. Thank you.

24 MR. TORCZON: Your Honor, this is
25 Richard Torczon. If I may address just that point.

1 Just as a matter of formality, the
2 updated notice on Friday was defective and -- and
3 confusing. It does leave -- leave open the question
4 of who's got a power of attorney for whom and who is
5 speaking from whom -- for whom.

6 The board has a rule in place that
7 does allow for a represent patient by a part owner or
8 somebody with a partial interest in the case that's
9 42.9(b). It sets forth a process for doing that.
10 And just as a matter of formality, I will note that
11 that process has not been observed here.

12 MR. SHORE: Your Honor, I've got
13 another, I think, relatively important point to make.
14 The earlier complaints about conferencing and noted
15 and things like that, the court should be aware that
16 prior to any conference today, Mylan had already sent
17 a letter to the district court judge saying that
18 Mylan will vigorously oppose the transparent delay
19 tactic before the Patent Trial and Appeal Board.
20 They had already done their research. They had
21 already made --

22 THE COURT: Sure. We have our own
23 procedures here, and Mr. Torczon is absolutely
24 correct that before any call to the board the parties
25 are to confer and to at least discuss the issue

1 amongst themselves.

2 MR. SHORE: And we tried. We
3 contacted them on Friday, on Saturday. They refused
4 to conference with us until this morning.

5 MR. TORCZON: Your Honor, if I may,
6 they put in their request before they contacted on us
7 Friday. In fact, I believe the first action was
8 press releases, then they contacted the board, then
9 they contacted us. And at close of business on
10 Friday, they wanted to know whether we could meet and
11 confer in response to your order telling them to do
12 that. We are -- conferred with them less than one
13 business day which is, I think, very good time.

14 THE COURT: Your objection is
15 understood, Mr. Torczon. I -- I have a question for
16 you. Right now I'm trying to decide whether or not
17 we proceed with the hearing but, Mr. Torczon, this
18 latest development obviously changes the situation in
19 this case. So I would ask you, you know -- I think
20 we'll -- we are inclined to go ahead and authorize
21 briefing -- at least briefing on this issue. And if
22 we do so, should we also move the trial -- move the
23 hearing date?

24 MR. TORCZON: Okay. That -- that's an
25 excellent question, Your Honor. Again, let me just

1 state that we don't think you should authorize the
2 motion. But if you do, it's a completely separate
3 issue from whether you move the hearing date.

4 As I pointed out, there's at least one
5 case where the issue was raised very late -- within a
6 few days of the hearing -- and the board in that case
7 proceeded with the hearing and then subsequently
8 authorized briefing, had the briefing, and decided
9 the issue. Now, that was an 11th Amendment case, and
10 they ended up deciding that the 11th Amendment
11 applied in that case on those facts. But there is no
12 reason to stop the briefing at this point if -- just
13 because they have raised an issue.

14 I will point out that while they have
15 suggested I don't understand the fact or the law,
16 it's really important to note that we haven't really
17 been told any of the facts or the law yet. We've
18 been asked to believe them on a whole bunch of things
19 but, again, there is no controlling precedent on
20 point here. So at best this is a very, very open
21 issue that nobody has ever addressed before and
22 nobody has ever resolved before.

23 They have also told you that I don't
24 understand the fact. Well, it's certainly true
25 because all of those facts are under their control

1 and there's going to have to be a good deal of fact
2 production because, among other things, sham
3 transactions have been identified as a key part of
4 the analysis in these cases. So there's going to
5 have to be a lot of fact development before we know
6 the true merits of this case.

7 So because of all that, that would put
8 the hearing out quite a bit of time based on
9 counsel's assurance -- opposing counsel's assurance
10 that he's right on the case law and he's right on the
11 facts. I -- I have no idea what his basis for
12 confidence on those is, but I don't think that that's
13 enough basis for the board to put off the oral
14 argument, particularly at this late date. Precedent
15 doesn't require it. In -- in the most interest of
16 the efficient administration of the office, it's in
17 the best interests of the economy and the integrity
18 of the patent system because, as I said, every day
19 delay profits the tribe 41,000-dollar under their
20 agreement and --

21 MR. SHORE: Not true.

22 MR. TORCZON: I did the math. It's --

23 MR. SHORE: You didn't read the
24 documents. The documents -- there is no --

25 THE COURT: Let me -- let me cut you

1 off there, Mr. Shore. Let me cut you off there,
2 Mr. Shore.

3 Mr. Torczon, how is Mylan
4 prejudiced -- even if you're right, how is Mylan
5 Mylan prejudiced by that fact?

6 MR. TORCZON: Very -- very simply
7 because we've made preparations to -- to enter the
8 market on a strict timetable. As you -- as Your
9 Honor no doubt knows, these SBA regulatory cases
10 depends on tight time tables. People make investment
11 decisions based on those time tables.

12 In this case, the board has a
13 statutory deadline that allows pretty reliable
14 planning. To -- to pull the plug and say, "Well,
15 we're going to think about it for a long time" costs
16 Mylan directly, costs Teva directly, and costs Akorn
17 directly and, frankly, costs the taxpayers who are
18 underwriting direct cost and patients who are
19 directly paying direct costs because, for better or
20 for worse, when a patent is enforced they are a
21 monopoly rep. And, you know, I'm not going to say
22 the patent system is a bad as a result of that, but
23 that's just a fact.

24 And so -- so not Mylan, not just Teva,
25 not just Akorn, but everybody is paying for delay

1 here.

2 THE COURT: I understand.

3 MR. SHORE: Your Honor, I would like
4 to -- I would like to step in for just a moment.

5 THE REPORTER: Who is this, please?

6 MR. SHORE: This is Michael Shore.
7 First of all, they're assuming they are going to win,
8 which is kind of an odd presumption to make before
9 the board has made any decisions. So the idea that
10 they have already decided they are going to win is
11 very odd to me.

12 Second of all, the Neocort case talked
13 about -- was a co-owner case. Mostly -- not a
14 co-owner case. It was a case where the university
15 was a participant throughout the entire process.
16 That's not the case here.

17 THE COURT: Okay. I understand,
18 Mr. Shore. You're very much getting into, you know,
19 legal argument. And I -- and I think what we're
20 trying to do right now is figure out what we should
21 do.

22 MR. SHORE: I agree -- I agree, Your
23 Honor. But the one -- the number one thing I think
24 that the board should understand is that every single
25 case -- Supreme Court, every Court of Appeals case --

1 that the determination of tribal sovereign immunity
2 is an issue which must come before the merit and
3 participating -- forcing the tribe to participate in
4 the hearing on Friday is forcing us to go through a
5 process for which the sovereign immunity exempts us.

6 If sovereign immunity applies -- and
7 it does -- and there are no equitable or fairness
8 considerations on sovereign immunity, any sovereign
9 immunity case where a sovereign has immunity from
10 tort claims or anything else, equity and fairness do
11 not come into play. That's Supreme Court. And I
12 understand he doesn't know the law on this -- we
13 do -- but it is an antecedent issue. We have to
14 decide it first. And there is absolutely no way that
15 this hearing can go forward on Friday supported by
16 any precedent not -- it would be a completely
17 unprecedented thing for the court to do.

18 MR. TORCZON: Your Honor, this is
19 Richard Torczon for Mylan.

20 The license agreement back to Allergan
21 has required Allergan to do all the litigating.
22 Counsel for Allergan has already indicated she's
23 prepared to do that. So there is absolutely no harm
24 to the tribe.

25 The tribe is saying that it's -- it

1 would somehow be harmed because Allergan would be
2 doing its litigating for it, and yet there would be
3 no more impingement on its sovereign immunity than
4 it's already waived away by entering the proceeding.
5 So -- so it doesn't change the immunity analysis to
6 have the hearing to go ahead.

7 MR. SHORE: I apologize, Your Honor.
8 Michael Shore again.

9 What he just said is just not true.
10 It's not true. It's not what the agreement says.
11 And if anything else, I think it's a misunderstanding
12 of the facts and the law. Until the issues can be
13 fully briefed, fully --

14 THE COURT: I think -- I think we
15 understand. What we're trying to figure out here --
16 that is me, myself, and my fellow judges -- is to
17 whether or not we should entertain additional
18 briefing on the issue of sovereign immunity. And I
19 believe that I'm going to need to confer with my
20 panel on that point. So if -- I'm going to ask that
21 the parties hold while we confer.

22 (Recess)

23 THE COURT: Okay. This is Judge
24 Smedder (phonetic). Mr. Shore?

25 MR. SHORE: Yes, sir.

1 THE COURT: And Mr. Torczon?

2 MR. TORCZON: Yes, Your Honor.

3 THE COURT: Okay. I believe we have
4 decided that we will need to brief the issue of
5 sovereign immunity and postpone the hearing. I think
6 the panel would benefit from having the opportunity
7 to address the sovereign immunity issue at oral
8 hearing and, thus, we as a panel are not prepared to
9 answer such questions or will not be prepared to
10 answer such questions by Friday.

11 In that regard, we'll want to set a
12 briefing schedule on the issue of sovereign immunity
13 and set a date for the hearing after that.

14 So, Mr. Shore, it seems that you're
15 ready to go with a brief. We're willing to give you
16 25 pages, and as such -- and in terms of when you
17 might be able to file that, we were hoping that you
18 can do it by next week, maybe the 18th.

19 MR. SHORE: Your Honor, I would ask
20 for four more days simply because I have another case
21 that is hot and heavy in federal court that I need to
22 deal with. I only want four more days. That will
23 get me out of that proceeding. They can -- they can
24 have as much time as they want. Whatever they
25 want -- I understand it's a new issue for them. So

1 whatever they want is fine with us.

2 THE COURT: So you're saying
3 September 22nd?

4 MR. SHORE: Yes, sir.

5 THE COURT: Mr. Torczon, how long
6 would you need?

7 MR. TORCZON: Your Honor, frankly,
8 until we see what evidence they put in and what their
9 arguments are, we can't say. I mean, if they put in
10 declaration testimony, we'll need to take
11 cross-examination of that.

12 As I have said in the sham tribal
13 immunity context, there's usually been expensive
14 discovery to plumb whether it's a sham transaction or
15 not.

16 So until we see what they argue and
17 until we see what they actually make a record, it's
18 hard to say. Again, remember, this issue has only
19 been around since Friday, and facially there are very
20 troubling aspects about this transaction and all of
21 the facts are in Allergan and the tribe's hands. So
22 it's just impossible for us to even know.

23 MR. SHORE: We don't have any
24 objections to them asking for whatever time they
25 want. I think that the more facts they have, I think

1 their minds will be put at ease there's no
2 racketeering here or anything like that going on.
3 And I understand it is a concern, but I think the
4 more he knows, the more his mind will be put at ease
5 this is a legitimate transaction. It's a transaction
6 that goes to the economic development of the tribe.
7 So I have no problem with any time he asks for.

8 THE COURT: So is -- is that going to
9 be true for discovery?

10 MR. SHORE: We're not subject to
11 discovery because that's part of the entire sovereign
12 immunity. We're exempt. But I think when you see
13 our filings, he can make that request. He's not --
14 when he sees our filings, he's not going to have any
15 of these concerns he's worried about.

16 MR. TORCZON: Okay. Your -- Your
17 Honor, in which case I would like to -- to reserve
18 the right if -- if they are going to resist any kind
19 of discovery despite the case law that applies here
20 for dismissal of the motion on that basis.

21 Also, I mean, they haven't asserted a
22 single controlling authority. And so, to the extent
23 that -- that this exercise results in cost to us, I
24 would like to just lay out there that we are going to
25 probably ask to recover those costs.

1 THE COURT: I would say that what you
2 will need to do is at the appropriate time file a
3 request for additional discovery.

4 MR. TORCZON: Okay. There's certainly
5 some automatic discovery, too, if -- if they put in
6 any testimony.

7 THE COURT: So --

8 MR. SHORE: I -- I think the time -- I
9 think Your Honor is right. The time to address that
10 is after our filing on the 22nd and they take a look
11 at it. I can't -- I can't respond to discovery
12 requests I haven't seen, but I think when they see
13 our filing on the 22nd, I think they are -- I don't
14 think they're going to need any, and I don't think
15 that -- but that's an issue for later. And like --
16 as I said, we will give them as much time as they
17 want to -- to go through their research, and we have
18 no problem with that.

19 MR. TORCZON: Well, then, maybe the
20 simplest thing, Your Honor, would be to reconvene
21 after they have filed their motion.

22 THE COURT: I'm going to suggest a
23 date of October 20th.

24 MR. TORCZON: We understand that
25 with -- with the understanding that, again, we're

1 getting a pig in a poke here with virtually no
2 notice.

3 THE COURT: Yeah, I understand. That
4 date, you can submit -- you know, raise your concern
5 again at the appropriate time, but we'll give you --
6 one second. Let me just take a pause. That's
7 actually -- hold, please.

8 (Recess)

9 THE COURT: Okay. This is Judge
10 Smedder returning.

11 Mr. Torczon, I understand your
12 position, but we're going to set an initial briefing
13 schedule. It will begin with the tribe's filing on
14 September 22nd. You'll have a response, 25 pages,
15 due on the 13th. If there is a need for a discussion
16 regarding discovery, then you can call us as soon as
17 possible and schedule a conference and we will hear
18 those concerns at that time.

19 A reply from the tribe then will be
20 due August -- I'm sorry -- October 20th, and the
21 reply is limited to 15 pages.

22 So again, initial filing by the tribe,
23 25 pages, due September 22nd; the response, 25 pages,
24 due October 15th; reply due the 20th of October, and
25 limited to 15 pages. Limited to the issue of

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1 sovereign immunity. I believe I addressed all the
2 issues there.

3 Is there any other concerns,
4 Mr. Torczon?

5 MR. TORCZON: That's it for today,
6 Your Honor.

7 THE COURT: And Mr. Shore?

8 MR. SHORE: No. I just appreciate the
9 lawyers taking this call on such short notice. I
10 understand it's a complicated issue, but we'll get
11 through it efficiently.

12 THE COURT: And just to make clear, as
13 well, the hearing will be postponed and we'll suggest
14 a date at a later time.

15 MR. SHORE: Thank you, Your Honor.
16 May we be excused?

17 THE COURT: Yes, unless there's --
18 well, let me just ask one more time, make sure.

19 Anything further, Mr. Torczon?

20 MR. TORCZON: No. If -- if we have
21 anything further, we'll get back to you after we see
22 their motion.

23 THE COURT: Okay. And I assume,
24 Mr. Shore, you are also finished?

25 MR. SHORE: Yes, sir.

1 THE COURT: All right. Again, I would
2 like to remind the parties to file the transcripts
3 within a day, if possible.

4 MR. SHORE: Madam court reporter,
5 expedite.

6 THE COURT: All right. Thank you very
7 much. And with that, the call is adjourned. Thank
8 you.

9 (Whereupon at 12:55 p.m. the
10 proceedings were adjourned.)
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REPORTER'S CERTIFICATE

TELEPHONIC HEARING

September 11, 2017

I, Shauna Foreman, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the above telephonic proceedings are a true record to the best of my ability;

That the original transcript was delivered to Michael Shore.

That a copy of this certificate was served on all parties and/or the witness shown herein on _____.

I further certify that pursuant to FRCP Rule 30(f)(1), the signature of the deponent:

_____ was requested by the deponent or a party before the completion of the deposition and that the signature is to be before any notary public and returned within 30 days (or _____ days, per agreement of counsel) from date of receipt of the transcript. If returned, the attached Changes and Signature page contains any changes and the reasons therefor;

_____ was not requested by the deponent or a

1 party before the completion of the deposition;

2 I further certify that I am neither counsel for,
3 related to, nor employed by any parties or attorneys
4 in the action in which this testimony is taken, and
5 further that I am not financially or otherwise interested
6 in the outcome of this action.

7 Certified to by me on this the 11th day
8 of September, 2017.

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