

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**  
(Alexandria Division)

TRIANTAFYLLOS TAFAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:07cv846 (JCC/TRJ)
	)	
JON W. DUDAS, et al.	)	
	)	
Defendants.	)	
	)	

CONSOLIDATED WITH

SMITHKLINE BEECHAM	)	
CORPORATION, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:07cv1008 (JCC/TRJ)
	)	
JON W. DUDAS, et al.	)	
	)	
Defendants.	)	
	)	

**MEMORANDUM IN SUPPORT OF *AMICUS CURIAE* ELAN PHARMACEUTICAL  
CORPORATION'S MOTION FOR LEAVE TO FILE ITS BRIEF IN SUPPORT OF  
PLAINTIFFS' ANTICIPATED MOTIONS FOR SUMMARY JUDGMENT**

Elan Pharmaceuticals, Inc., on behalf of itself and its parent and affiliates (herein collectively referred to as "Elan") submits this memorandum in support of its Motion for Leave to file its Brief as *Amicus Curiae* in Support of plaintiffs SmithKline Beecham Corporation, SmithKline Beecham PLC and Glaxo Group Limited's (collectively GSK) and plaintiff Triantafyllos Tafas' anticipated Motions for Summary Judgment. No oral argument on Elan's Motion for Leave is requested.

Elan is a biotechnology company that is focused on discovering, developing, manufacturing and marketing advanced therapies in neurology, autoimmune diseases, and severe pain. Elan wishes to submit its *amicus* Brief addressing certain aspects of plaintiffs' arguments to overturn the U.S. Patent Office's "Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications," 72 Fed. Reg. 46716 (Aug. 21, 2007) (to be codified at 37 C.F.R. pt. 1) (hereinafter "Final Rules"). Elan previously submitted an *amicus* brief during the preliminary injunction stage of these proceedings.

Allowing a non-party to file an *amicus curiae* brief is within the discretion of the Court. *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1284 (N.D. Ga. 2001). The filing of an *amicus* brief should be allowed where the *amicus curiae* can "offer insights not available from the parties" or can provide "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007). Here, while Elan concurs with plaintiffs' assertion that the Final Rules are *ultra vires*, Elan's *amicus* Brief, among other things, will likely expand on plaintiffs' position that the Final Rules improperly shift the burden of examining a patent application from the U.S. Patent and Trademark Office ("PTO") to the applicant. This burden shifting is contrary to law and serves as a basis to overturn the Final Rules.

No oral argument is requested on Elan's Motion for Leave and Elan will file its *amicus* Brief according to the schedule previously set by this Court for the filing of *amicus* briefs. Elan has contacted counsel for plaintiffs GSK and Tafas who consent to the filing of Elan's Brief. Counsel for the Defendants has indicated that the Defendants take no position on the filing of

Elan's Motion for Leave or the filing of Elan's *amicus* Brief. All parties concur that no oral argument is necessary on Elan's Motion for Leave. As Elan's *amicus* Brief will include unique and special information not otherwise available to this Court, the Court should exercise its discretion to allow the filing of Elan's Brief.

Dated: December 6, 2007

Respectfully submitted,

By: \_\_\_\_\_/s/

Scott J. Pivnick (VSB # 48022)

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of December 2007, I electronically filed in Case Nos. 1:07cv1008 and 1:07cv846 (JCC/TRJ) the foregoing “**MEMORANDUM IN SUPPORT OF AMICUS CURIAE ELAN PHARMACEUTICAL CORPORATION’S MOTION FOR LEAVE TO FILE ITS BRIEF IN SUPPORT OF PLAINTIFFS’ ANTICIPATED MOTIONS FOR SUMMARY JUDGMENT**” using the CM/ECF system and that service was thereby accomplished on:

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