

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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FRESENIUS KABI USA LLC,  
Petitioner,

v.

CUBIST PHARMACEUTICALS LLC,  
Patent Owner.

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IPR2015-01566 (Patent No. 8,129,342)  
IPR2015-01570 (Patent No. 8,058,238)  
IPR2015-01571 (Patent No. 8,058,238)<sup>1</sup>

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Before BRIAN P. MURPHY, JON B. TORNQUIST, and  
TINA E. HULSE, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

SCHEDULING ORDER

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<sup>1</sup> This Order will be entered in each case. The parties are not authorized to use this style of caption.

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#### A. INITIAL CONFERENCE CALL

No initial conference call is scheduled for this case. The parties are encouraged to contact the Board to request a call if any issues arise during trial. The parties' attention is directed to the following matters.

##### *1. Motion to Amend*

Patent Owner is reminded that it must confer with the Board before filing a Motion to Amend. 37 C.F.R. § 42.121(a). Patent Owner should contact the Board to request a conference in sufficient time to ensure that the conference is conducted at least two weeks before DUE DATE 1.

Patent Owner and Petitioner are directed to the rules governing Motions to Amend, with particular regard to applicable page limits. 37 C.F.R. §§ 42.24(a)(1), 42.24(b)(3), 42.24(c)(3), 42.121(b).

##### *2. Confidential Information*

The parties must file confidential information using the appropriate availability indicator in PRPS (e.g., "Board and Parties Only"), regardless of whose confidential information it is. It is the responsibility of the party whose confidential information is at issue, not necessarily the proffering party, to file the motion to seal.

A protective order does not take effect until a protective order is filed in the case and is approved by the Board. If a motion to seal is filed by either party, the proposed protective order should be presented as an exhibit to the motion. The parties are urged to operate under the Board's default protective order, should that become necessary. *See* Default Protective Order, Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, App. B (Aug. 14, 2012).

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If the parties choose to propose a protective order deviating from the default protective order, they should submit the proposed protective order jointly. A marked-up comparison of the proposed and default protective orders should be presented as an additional exhibit to the motion to seal, so that differences are highlighted. The parties should contact the Board if they cannot agree on the terms of the proposed protective order.

*a. Redactions*

Redactions should be limited strictly to isolated passages consisting of confidential information. The thrust of the underlying argument or evidence must be discernable from the redacted version.

*b. Confidential Information in Final Written Decisions*

Information subject to a protective order will become public if identified in a final written decision in this proceeding. A motion to expunge the information will not necessarily prevail over the public interest in maintaining a complete and understandable file history. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,761.

## B. DUE DATES

This order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate to different dates for DUE DATES 1 through 5 (earlier or later, but not later than the date set herein for DUE DATE 6). A notice of the stipulation, identifying the changed due dates, must be filed with the Board prior to any filing that depends on the stipulation for timeliness. The parties may not stipulate to an extension of DUE DATES 6 and 7.

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Regardless of whether the parties stipulate to a change of DUE DATE 4, requests for oral argument must be filed no later than the date set forth in this order for DUE DATE 4, for Board planning purposes.

In stipulating to different times, the parties should consider the effect of the stipulation on times to object to evidence (37 C.F.R. § 42.64(b)(1)), to serve supplement evidence (37 C.F.R. § 42.64(b)(2)), to conduct cross-examination (37 C.F.R. § 42.53(d)(2)), and to draft papers depending on the evidence and cross-examination testimony (*see* section C, below).

The parties are reminded that the Testimony Guidelines appended to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,772 (Aug. 14, 2012) (Appendix D), apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

## 1. DUE DATE 1

The patent owner may file—

- a. A response to the petition (37 C.F.R. § 42.120), and
- b. A motion to amend the patent (37 C.F.R. § 42.121).

The patent owner must file any such response or motion to amend by DUE DATE

1. If the patent owner elects not to file anything, the patent owner must arrange a conference call with the parties and the Board. The patent owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.

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## 2. DUE DATE 2

The petitioner must file any reply to the patent owner's response and opposition to any motion to amend by DUE DATE 2.

## 3. DUE DATE 3

The patent owner must file any reply to the petitioner's opposition to patent owner's motion to amend by DUE DATE 3.

## 4. DUE DATE 4

a. Each party must file any motion for an observation on the cross-examination testimony of a reply witness (*see* section D, below) by DUE DATE 4.

b. Each party must file any motion to exclude evidence (37 C.F.R. § 42.64(c)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4.

## 5. DUE DATE 5

a. Each party must file any response to an observation on cross-examination testimony by DUE DATE 5.

b. Each party must file any opposition to a motion to exclude evidence by DUE DATE 5.

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