

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARGENTUM PHARMACEUTICALS LLC
Petitioner,

v.

COSMO TECHNOLOGIES, LIMITED
Patent Owner

Patent No. 9,320,716
Issue Date: April 26, 2016
Title: Controlled Release and Taste Masking
Oral Pharmaceutical Composition

Case No. IPR2018-00080

PETITIONER'S MOTION FOR JOINDER

37 C.F.R. § 42.122(b)

I. A STATEMENT OF THE PRECISE RELIEF REQUESTED

Argentum Pharmaceuticals LLC (“Argentum” or “Petitioner”) submits, concurrently with this motion, a petition for *inter partes* review (“Petition”) of claims 1-29 of U.S. Patent No. 9,320,716 (“the ’716 patent”) (EX1001), assigned to Cosmo Technologies, Ltd. (“Cosmo”). Argentum respectfully requests joinder pursuant to 35 U.S.C. § 315(c) and 37 C.F.R. § 42.122(b) of the concurrently filed Petition with a pending *inter partes* review filed by Mylan Pharmaceuticals, Inc. (“Mylan”), *Mylan Pharmaceuticals, Inc. v. Cosmo Technologies, Ltd.*, IPR2017-01035 (“Mylan IPR”). Joinder is appropriate because it will promote an efficient and consistent resolution of the validity of a single patent and will not prejudice any of the parties to the Mylan IPR. Argentum’s request for joinder is timely because it was filed “no later than one month after the institution date of any *inter partes* review for which joinder is requested.” 37 C.F.R. § 42.122(b).

II. BACKGROUND

On March 9, 2017, Mylan filed a petition for *inter partes* review challenging claims 1-29 of the ’716 patent, which was assigned Case No. IPR2017- 01035. On September 21, 2017, the Board instituted review of claims 1-29 on 5 grounds: (1) claims 1-29 as anticipated under 35 U.S.C. § 102 by U.S. Patent No. 5,681,584; (2) claims 1-29 as obvious under 35 U.S.C. § 103 over U.S. Patent No. 5,681,584; (3) claims 1-7, 9, 11-17, 19, and 21-29 as anticipated under 35 U.S.C. § 102 by U.S.

Patent No. 5,811,388; (4) claims 1-29 as obvious under 35 U.S.C. § 103 over U.S. Patent No. 5,811,388; and (5) claims 8, 10, 18 and 20 as obvious under 35 U.S.C. § 103 over U.S. Patent Nos. 5,681,584 and 5,811,388. IPR2017- 01035, Paper 17.

Today, concurrent with the instant motion for joinder, Argentum filed an IPR petition under Case No. IPR2018-00080, asserting the same grounds of unpatentability against the same patent claims as instituted in the Mylan IPR.

III. ARGUMENT

A. Legal Standard

The Board has authority to join as a party any person who properly files a petition for *inter partes* review to an instituted *inter partes* review. 35 U.S.C. § 315(c). A motion for joinder must be filed within one month of institution of any *inter partes* review for which joinder is requested. 37 C.F.R. § 42.122(b). In deciding whether to grant a motion for joinder, the Board considers several factors including: (1) the reasons why joinder is appropriate; (2) whether the party to be joined has presented any new grounds of unpatentability; (3) what impact, if any, joinder would have on the trial schedule for the existing review; and (4) how briefing and discovery may be simplified. *See, e.g., Hyundai Motor Co. v. Am.Vehicular Sciences LLC*, IPR2014-01543, Paper 11 at 3 (Oct. 24, 2014); *Macronix Int'l Co. v. Spansion*, IPR2014-00898, Paper 15 at 4 (Aug. 13, 2014)

(quoting *Kyocera Corp. v. Softview LLC*, IPR2013-00004, Paper 15 at 4 (April 24, 2013)).

B. The Relevant Factors Weigh in Favor of Joinder

Each of the four factors considered by the Board weighs in favor of joinder.

1. Joinder Is Appropriate

Joinder with IPR2017-01035 is appropriate because the Petition is limited to the same grounds instituted in the IPR2017-01035 petition. It also relies on the same prior art analysis and expert testimony submitted by Mylan. Indeed, the Petition raises grounds identical to those raised in the IPR2017-01035 petition, and does not include any new grounds not raised in that petition.

In order to further simplify the proceeding, Argentum will rely on the same expert as Mylan, Dr. Palmieri, should Mylan permit it. If Mylan allows Argentum to retain the same expert, then Argentum will withdraw its expert declaration of Dr. Derendorf and rely solely on the declaration and testimony of Dr. Palmieri. The Board has previously acknowledged that such concessions on the part of a party seeking to join are sufficient to minimize the impact on the original proceeding. *See SAP America Inc. v. Clouding IP, LLC*, IPR2014-00306, Paper 13 at 4 (May 19, 2014). Further, Dr. Derendorf's declaration submitted in support of the present Petition presents substantively identical testimony to that of Dr.

Palmieri, thus streamlining the issues for trial even if Mylan does not permit Argentum to rely directly on Dr. Palmieri.

Joinder is also appropriate because it will promote the just, speedy, and inexpensive resolution of patentability issues, including the determination of validity of the challenged claims of the '716 patent. For example, a final written decision on the validity of the '716 patent has the potential to minimize issues and potentially resolve any litigation altogether with respect to the '716 patent.

2. No New Grounds Are Presented

The Petition does not present any new ground of unpatentability. As mentioned above, the Petition presents for review only grounds from the petition in the Mylan IPR that have been instituted. The present Petition is based on the same prior art analysis submitted by Mylan, and Dr. Derendorf's testimony in support of these grounds is substantively identical to that of Dr. Palmieri's expert testimony in the Mylan IPR, which further weighs in favor of joinder. *See, e.g., Hyundai*, IPR2014-01543, Paper 11 at 2-4; *Sony Corp. of Am. v. Network-1 Sec. Solutions, Inc.*, IPR2013-00495, Paper 13 at 5-9 (Sep. 16, 2013); *Dell Inc. v. Network-1 Solutions, Inc.*, IPR2013-00385, Paper 17 at 6-10 (Jul. 29, 2013); *Motorola Mobility LLC v. Softview LLC*, IPR2013-00256, Paper 10 at 4-10 (June 20, 2013).

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