

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ARGENTUM PHARMACEUTICALS LLC

Petitioner

v.

COSMO TECHNOLOGIES LIMITED,

Patent Owner

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*Inter Partes* Review No. IPR2018-00080

U.S. Patent No. 9,320,716 B2

**PETITIONER'S REPLY TO  
PATENT OWNER'S OPPOSITION TO  
MOTION FOR JOINDER**

Petitioner Argentum Pharmaceuticals LLC (“Argentum”) submits this reply to Owner Cosmo Technologies Ltd. (“Cosmo”). Argentum seeks to step into the shoes of Mylan Pharmaceuticals Inc. (Mylan), the petitioner in IPR2017-01035.

## **I. THE MOTION FOR JOINDER SHOULD BE GRANTED**

### **A. Previous Decisions Favor Joinder**

Cosmo and Mylan moved to terminate IPR2017-01035 nearly a month after Argentum’s joinder motion was filed. Several decisions involved similar factual scenarios to those of the present case in which (i) the joinder motion was filed before a motion to terminate (based on settlement) was filed in the instituted review, (ii) a petition was filed with a timely joinder motion, (iii) the joinder petition relies on identical grounds as the instituted petition, and (iv) the expert declarations have identical, substantive content. *Qualcomm Inc. v. Bandspeed, Inc.*, IPR2015-00314, Paper 21 (Nov. 16, 2015); *Nintendo of America, Inc. v. Babbage Holdings, LLC*, IPR2015-00568, Paper 12 (Mar. 18, 2015); *AT&T Services, Inc. v. Convergent Media Solutions, LLC*, IPR2017-01237, Paper 10 (May 10, 2017). Joinder was granted in each of these cases. Cosmo cites *Ubisoft, Inc. v. Uniloc USA, Inc.*, IPR2016-00414, Paper 16 at 5 (June 2, 2016) to urge denial of joinder if IPR2017-01035 is terminated. However, *Ubisoft* involved the extenuating circumstance of joinder being pursued in the petitioner’s third attempt at a review proceeding with grounds that were previously denied and could have been brought in one of the

earlier petitions. *Id.* at 5–6.

### **B. Experts Have Submitted Identical Testimony**

Cosmo does not dispute the above-listed facts shared with *Nintendo*, *AT&T*, and *Qualcomm*. Notably, Cosmo does not dispute that Argentum’s expert, Dr. Derendorf, repeats verbatim the declaration testimony of Mylan’s expert, Dr. Palmieri, regarding the ’716 patent, with the exception of the discussion of their backgrounds and qualifications. *See* Ex. 1006, ¶ 1. Before filing its petition, Argentum contacted Mylan regarding retention of Dr. Palmieri. Ex. 1063. Permission was not granted because, as Cosmo now admits (Paper 7 at 2, 4), Cosmo contractually prohibited Mylan from allowing Dr. Palmieri “to assist Argentum or any other Petitioner” from challenging the ’716 patent as a condition of its settlement. Due to Cosmo’s great lengths to “tie up” Dr. Palmieri, Argentum retained its own expert, Dr. Derendorf. The Board should not permit Cosmo to thwart joinder (and reap an unjustified 7-month delay of an IPR final written decision) by using the tactics Cosmo has employed here.

While the lead and joinder petitions in *Qualcomm*, *Nintendo*, and *AT&T* relied on the same experts, the Board has routinely treated declarations as equivalent from different declarants with identical substantive content. *See GEA Process Eng’g v. Steuben Foods*, IPR2014-00041, Paper 24 (Apr. 23, 2014); *Corning Gilbert v. PPC Broadband*, IPR2013-00347, Paper 20 (Jan. 2, 2014). Cosmo does not explain

how any differences in educational and professional backgrounds of Drs. Derendorf and Palmieri would have altered any of Cosmo's arguments in its preliminary response ("POPR") in IPR2017-01035. Nowhere in the POPR did Cosmo base any argument on Dr. Palmieri's qualifications. Dr. Derendorf's credentials are arguably even more distinguished than Dr. Palmieri's because Dr. Derendorf was a full Professor and Chairman of the same Department at the University of Florida where Dr. Palmieri worked in positions below Dr. Derendorf. Cosmo cites to *ZTE Corp. v. Adaptix Inc.*, IPR2015-01184, Paper 10 (July 24, 2015) to assert prejudice from a different expert witness but fails to note that joinder was denied partly because the petitioner's expert in the instituted review had already been deposed and the patent owner response had been filed. *Id.* at 5.

### **C. Trial Schedule**

Cosmo did not depose Mylan's expert, Dr. Palmieri, or file a response in IPR2017-01035. Argentum has already contacted Cosmo to offer Dr. Derendorf for deposition before Due Date 1 in IPR2017-01035 so that the existing trial schedule in IPR2017-01035 will not be disrupted. (Ex. 1064).

As in every IPR involving joinder, the schedule may be changed or maintained depending on the filing of the POPR. If Cosmo takes three months to file its POPR like the Patent Owner in *Qualcomm*, then the scheduling order may be vacated and replaced with adjusted dates as in *Qualcomm*, IPR2015-00314, Paper

22 (Nov. 16, 2015). On the other hand, if Cosmo quickly files a POPR like in *Nintendo* (slightly over a month after filing date accorded), or waives the opportunity to file a POPR as in *AT&T*, then the original schedule may still govern. No matter what Cosmo chooses, it is unlikely that Mylan will remain involved in light of the motion to terminate and thus it is unlikely that Argentum will need to coordinate with Mylan, thereby avoiding disruption. This same scenario contributed to joinder being granted in *Nintendo. Id.* at 5. Cosmos’s reliance on *Sierra Wireless Am., Inc. v. M2M Sols. LLC*, IPR2016-00853, Paper 16 (Sept. 20, 2016) is inapposite due to additional issues, grounds, and prior art impacting the schedule.

The 3-month period for a patent owner to file a POPR is “set by the Director” (35 U.S.C. § 313) and “may be modified by order” (37 C.F.R. § 42.5(c)(1)). Cosmo should not need more than an abbreviated period, such as two weeks, to respond to an identical petition and verbatim copy of an expert declaration. During this time, the motion to terminate IPR2017-01035 should be held in abeyance or granted only with respect to Mylan. Congress authorized a settled review proceeding to be terminated only as to the petitioner under 35 U.S.C. § 317(a), and Congress further envisioned that joinder “will be allowed as of right—if an inter partes review is instituted on the basis of a petition, for example, a party that files an identical petition will be joined to that proceeding.” 157 Cong. Rec. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (emphases added).

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