

Filed: July 1, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MERCK SHARP & DOHME LLC,
Petitioner,

v.

POGONA, LLC,
Patent Owner.

Case No. IPR2026-00374
U.S. Patent No. 11,058,757

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

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I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Patent Owner Pogona, LLC (“Pogona” or “Patent Owner”) respectfully opposes Petitioner Merck Sharp & Dohme LLC’s (“Merck” or “Petitioner”) Motion for Joinder (“Motion” or “Mot.”) and requests that the Board deny joinder of Merck’s petition in IPR2026-00374 to the instituted proceeding in *Pfizer Inc. v. Pogona, LLC*, IPR2026-00189 (the “Pfizer IPR”).

Joinder is unwarranted because the Director has already discretionarily denied institution of Merck’s own petition challenging the same patent (*see Merck Sharp & Dohme LLC v. Pogona, LLC*, IPR2026-00221, Paper 14 (Dir. May 19, 2026) (the “Merck IPR”), and the Board’s own precedent in *Elong Int’l USA Inc. v. Feit Elec. Co.*, IPR2025-00258, Paper 16 (Acting Dir. June 25, 2025) (precedential designation Jan. 9, 2026), forecloses using joinder to revive a petitioner’s independently rejected attempt to challenge a patent. Patent Owner accordingly requests that the Board deny Merck’s Motion in its entirety.

II. STATEMENT OF MATERIAL FACTS

1. Pogona is the owner of U.S. Patent No. 11,058,757 (the “’757 patent”), which is the subject of related litigation between Pogona and Merck in *Pogona, LLC v. Merck Sharp & Dohme LLC*, No. 2:25-cv-15294-BRM-JBC (D.N.J.).

2. On December 23, 2025, Pfizer Inc. (“Pfizer”) filed a petition for *inter partes* review of the ’757 patent. *See* IPR2026-00189, Paper 3.

3. On January 26, 2026, Merck filed its own, separate petition for *inter partes* review of the '757 patent, challenging the same claims (1–19), but relying on different primary prior art references and different grounds than those asserted in the Pfizer IPR. *See* IPR2026-00221, Paper 2.

4. On March 30, 2026, Patent Owner filed a Discretionary Denial Brief in the Merck IPR, arguing, among other things, that settled expectations arising from the '757 patent, the weakness of Merck's unpatentability challenge, and the *Fintiv* factors—including Merck's decision to pursue an independent petition rather than seek joinder with the previously filed Pfizer IPR—favored denial of institution. *See* IPR2026-00221, Paper 8, 9–20; *see also id.*, 20 (explaining that Merck's choice to “file[] its own IPR, rather than join the previously-filed Pfizer IPR” created “concerns of inefficiency and the possibility of conflicting decisions” (quoting *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11, 12 (PTAB Mar. 20, 2020))).

5. On April 29, 2026, Merck opposed Patent Owner's Discretionary Denial Brief, arguing that no proceeding yet existed for Merck to join when it filed its own petition and that any inefficiency from parallel petitions “could be addressed by consolidation or joinder” at a later stage. *See* IPR2026-00221, Paper 13, 15.

6. On May 19, 2026, the Director issued a Notice of Decisions on Institution. Without issuing a separate opinion, the Director denied institution of Merck's petition in the Merck IPR “after review of discretionary and non-merits

considerations,” while referring the Pfizer IPR for further review of the merits and non-discretionary considerations. *See* IPR2026-00221, Paper 14, 1.

7. On May 26, 2026, the Director granted institution of the Pfizer IPR. *See* IPR2026-00189, Paper 16.

8. On June 1, 2026—six days after the Pfizer IPR was instituted, and less than two weeks after Merck’s own petition was denied—Merck filed a new petition, IPR2026-00374, representing that it is “substantively identical to the Pfizer IPR” petition and “relies on the same grounds and expert testimony,” together with the instant Motion seeking joinder. *See* Mot. 3–4.

III. JOINDER IS NOT APPROPRIATE

A. Legal Standard

Under 35 U.S.C. § 315(c), using “his or her discretion,” the Director “may join as a party” to an instituted *inter partes* review any petitioner whose properly filed petition the Director determines warrants institution under 35 U.S.C. § 314. A motion for joinder must be filed no later than one month after the institution date of the proceeding for which joinder is requested. 37 C.F.R. § 42.122(b). In deciding whether to exercise discretion to permit joinder, the Board considers, among other factors, the reasons joinder is appropriate, whether the petition presents new grounds of unpatentability, the impact joinder would have on the existing trial

schedule, and how briefing and discovery may be simplified. *Kyocera Corp. v. Softview LLC*, IPR2013-00004, Paper 15, 3–4 (PTAB Apr. 24, 2013).

Critically, that inquiry does not begin in a vacuum. As the Director made clear in *Elong*, “[t]he Board first determines whether to institute a proceeding before considering a motion for joinder.” *Elong*, IPR2025-00258, Paper 16, 2 (citing 35 U.S.C. § 315(c)). And where, as here, that threshold question has already been answered—because the Director has already discretionarily denied the very petition for which joinder is now sought as a fallback—the joinder inquiry is not a vehicle for revisiting that answer. A petitioner seeking joinder must be able to stand on its own; joinder cannot be used to seat, as a contingent backup, a petitioner the Director has already excluded from the proceeding. *Elong*, IPR2025-00258, Paper 16, 2–3.

B. The Director’s Discretionary Denial of Merck’s Own Petition Forecloses Joinder Under *Elong*

1. *Elong* Controls and Forecloses Joinder Here

This case presents an even more direct application of *Elong*’s rule than *Elong* itself involved. There, the Board had not yet ruled on the joinder petitioner’s own petition when it considered joinder; the petitioner simply could not show, given the advanced stage of the parallel district court litigation, that its petition would independently warrant institution. *Elong*, IPR2025-00258, Paper 16, 2. Here, there is no need to speculate: the Director has already affirmatively ruled that

Merck's own petition challenging the '757 patent does not warrant institution based on the discretionary denial factors. *See* IPR2026-00221, Paper 14. Further, Patent Owner intends to file a substantially similar discretionary denial brief as was filed in the original Merck IPR proceeding initiated by Merck.

Elong's reasoning controls regardless. There, the Board denied joinder even though the petitioner had stipulated that it would not assert the same invalidity positions in the parallel district court litigation, explaining that "if the petitioner in [the instituted proceeding] settles or is otherwise no longer involved in that proceeding, the Office would have to maintain a proceeding that it would not have instituted with respect to the Petitioners here, even if they would have filed their Petition at the same time as the petitioner in [that proceeding]." *Elong*, IPR2025-00258, Paper 16, 3. The same is true here, only more so. Merck proposes to participate only as an "understudy" for so long as Pfizer remains active, and expressly represents that it will "step in for the dismissed petitioner" if Pfizer "ceases to participate" in the Pfizer IPR. Mot. 2, 5–6. That is precisely the contingency *Elong* addressed. If the Board grants joinder and Pfizer later settles, withdraws, or is otherwise terminated from the Pfizer IPR proceeding, the Board will be left maintaining—on Merck's behalf—the very proceeding against the '757 patent that the Director has already determined Merck may not pursue on its own. *Elong* forecloses exactly that result.

Although the Director’s May 19, 2026 denial of Merck’s petition issued without a separate written opinion, the discretionary considerations squarely before the Director at the time were patent- and party-specific, not grounds-specific. Patent Owner’s discretionary denial briefing identified the age of the ’757 patent and Merck’s years-long awareness of it as creating settled expectations, the weakness of Merck’s unpatentability theories, and *Fintiv* factors arising from the parallel district court litigation between Merck and Pogona. *See* IPR2026-00221, Paper 8, 9–20. None of those considerations turns on which prior art references Merck happens to assert in a given petition; they turn on the patent, the parties, and the litigation—none of which has changed between the Merck IPR and the instant Motion. Permitting Merck to achieve through joinder what it could not achieve on its own petition would render the Director’s discretionary determination a nullity any time a denied petitioner is willing to mirror an already-instituted petition’s grounds.

2. Joinder Would Let Merck Achieve Through the Back Door What the Director Already Declined Through the Front

Merck’s present course also reflects a deliberate, sequential litigation strategy rather than a good-faith effort to streamline these proceedings. Patent Owner specifically argued in its discretionary denial briefing that Merck’s decision to file an independent petition, rather than seek joinder with the already-pending Pfizer petition, created “concerns of inefficiency and the possibility of conflicting

decisions.” IPR2026-00221, Paper 8, 20 (quoting *Fintiv*, IPR2020-00019, Paper 11, 12). Merck disagreed, telling the Director that any such inefficiency “could be addressed by consolidation or joinder” down the road and that, in any event, there was no Pfizer proceeding yet instituted for Merck to join. IPR2026-00221, Paper 13, 15.

Merck made a considered choice to pursue its own petition, on its own grounds, rather than wait for the Pfizer IPR to be instituted and seek joinder at that time. That choice failed on the merits of the Director’s discretionary review. Merck cannot now treat joinder as a fallback to be exercised only once its independent attempt has been rejected. A petitioner that hedges in this fashion, by pressing an independent challenge first, and resorting to joinder only after the Director denies it, engages in the same opportunistic, results-driven positioning that the Director has condemned in the discretionary-denial context, and the Board should not permit Merck to obtain through a joinder motion the institution that the Director already declined to grant on Merck’s own petition.

C. Permitting Joinder Would Reward the Serial, Follow-On Petitioning That the Director Has Condemned in *Magnolia*

The Director has repeatedly cautioned that AIA review, including joinder, must not be used as a vehicle for harassment, delay, or repeated attacks on the same patent. Congress was explicit on this point when it created the AIA review program: AIA reviews “should not be used ‘for harassment or a means to prevent

market entry through repeated litigation and administrative attacks.” *Magnolia Med. Techs., Inc. v. Kurin, Inc.*, IPR2026-00097, Paper 17, 2 (Dir. May 14, 2026) (precedential) (quoting H.R. Rep. No. 112-98, at 48 (2011); citing S. Rep. No. 110-259, at 72 (2008)).

Reaffirming that principle in a recent precedential decision, Director Squires explained that “[n]otably, there also have been instances in which AIA reviews have been used for harassment, contrary to Congress’s intent,” and identified as one recurring form of that misuse the filing of “subsequent petitions for review” of a patent “even after [it has] been challenged unsuccessfully in district court, in the ITC, or at the Office.” *Magnolia*, IPR2026-00097, Paper 17, 4.

Merck’s Motion fits that description precisely. Merck already challenged the ’757 patent “at the Office” through its own petition in the Merck IPR, and that challenge was unsuccessful: the Director discretionarily denied institution. *See* IPR2026-00221, Paper 14. Merck now seeks, via joinder, a second, subsequent attempt to obtain the same relief (cancellation of claims 1–19 of the ’757 patent) against the same patent owner, arising from the same dispute. A joinder motion filed days after a petitioner’s own petition challenging the same patent was denied on discretionary grounds is the very type of serial, follow-on attack on patent rights that the Director has sought to curtail. Merck’s own petition was denied. Merck

cannot bootstrap its way into Pfizer’s proceeding to achieve through the back door what the Director already declined to allow through the front.

Granting Merck’s Motion under these circumstances would invite exactly the gamesmanship the Director has disclaimed: a petitioner whose petition is discretionarily denied need only locate an already-instituted petition challenging the same patent, on whatever grounds happen to be pending, and ask to ride along. That approach does not “narrow disputes” or serve AIA review’s purpose as “a quick and cost-effective *alternative* to district court patent litigation”; it simply gives a denied petitioner a second forum in which to relitigate the very discretionary balance the Director has already struck. *Magnolia*, IPR2026-00097, Paper 17, 3–4.

D. The *General Plastic* Factors Warrant Denial of Joinder

Merck separately contends that “the *General Plastic* factors weigh in favor of instituting the present IPR and permitting joinder.” Mot. 7 (citing *General Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, 16 (PTAB Sept. 6, 2017) (precedential as to § II.B.4.i)). Properly applied to the record here, each factor either favors denial or, at minimum, fails to support the relief Merck seeks.

1. Factor 1—Merck Misreads *Code200*’s Rationale

Merck rests its treatment of factor 1 entirely on *Code200*, *UAB v. Bright*

Data Ltd., IPR2022-00862, Paper 18 (Dir. Aug. 23, 2022) (precedential), which held that where a first-filed petition was discretionarily denied or otherwise not evaluated on the merits, factors 1–3 weigh toward denial only if “road-mapping” concerns exist under factor 3 or other concerns exist under factor 2. Mot. 8 (citing *Code200*, IPR2022-00862, Paper 18, 5). But Merck omits why Director Vidal extended that leniency. She did so because allowing the second-filed petitioner an independent opportunity to prove its own petition “best balances the desires to improve patent quality and patent-system efficiency against the potential for abuse of the review process by repeated attacks on patents,” *Code200*, IPR2022-00862, Paper 18, 4–5 (quoting *Intel Corp. v. VLSI Tech. LLC*, IPR2022-00366, Paper 14, 9–10 (PTAB June 8, 2022)), and because doing so lets the Office fulfill its mission of “reviewing the merits of the challenges raised in the petitions, which have not been addressed to date.” *Code200*, IPR2022-00862, Paper 18, 6.

Tellingly, *Code200* involved a contemporaneous motion for joinder, and Director Vidal did not simply grant it because factors 1–3 favored the petitioners. She instead vacated the Board’s institution denial and ordered that “the panel reconsider joinder after reconsidering the institution decisions”—confirming that even under *Code200*’s lenient treatment of factors 1–3, a petition must still independently warrant institution before joinder is reached. *Code200*, IPR2022-00862, Paper 18, 7. Moreover, *Code200* predates the Director’s more recent

discretionary denial guidance, and its lenient treatment of factors 1–3 therefore presupposes that institution turns on the merits alone—it says nothing about, and cannot be read to foreclose, the independent discretionary denial inquiry that now governs. That inquiry must be satisfied first, and the Director has already determined it is not satisfied as to Merck.

Merck seeks the opposite sequence: rather than asking the Board to evaluate whether IPR2026-00374 independently warrants institution, which necessarily involves evaluating discretionary denial issues as to Merck, Merck asks the Board to bypass that inquiry altogether through joinder to a proceeding built entirely on Pfizer’s showing. *Code200* does not support that shortcut; it confirms the same rule *Elong* requires: institution comes first, and joinder second. *See* Section III(A) (quoting *Elong*, IPR2025-00258, Paper 16, 2). Here, the Director has already denied Merck’s prior IPR petition.

2. Factors 2 and 3—The Record Shows the Road-Mapping and Sequential-Strategy Concerns *General Plastic* Targets

Merck argues factors 2 and 3 favor institution because its petition relies on the same prior art as Pfizer’s petition, rather than art “refined based on lessons learned” after Pfizer’s institution. Mot. 8–9. That framing mistakes the source of the road-map. Merck did not need to learn anything from the Board’s reasoning in the Pfizer IPR, because Merck knew of Pfizer’s prior art and theories from the moment Pfizer filed its petition on December 23, 2025—more than a month before

Merck filed its own petition relying on different art. *See* Section II ¶¶ 2–3. Merck thus had Pfizer’s grounds available to it from the outset and chose not to use them, electing instead to pursue an independent theory.

Only after the Director denied that independent petition did Merck activate the Pfizer theory it had known of all along. That sequence is itself a road-map: Merck used the outcome of its own petition’s discretionary denial, together with the known success of Pfizer’s parallel petition, to decide which theory to pursue. Factor 3 is not limited to road-mapping drawn from a patent owner’s substantive arguments; it equally captures a petitioner’s use of the Board’s own institution decisions to calibrate a second attempt. Merck does not dispute that it filed its new petition and this Joinder Motion only after both the Director’s May 19, 2026 denial of Merck’s own petition and the Director’s May 26, 2026 institution of the Pfizer IPR. *See* Section II ¶¶ 6–8; Mot. 3 ¶¶ 4–6. Far from showing the absence of road-mapping, the timeline shows Merck waited for exactly the information factors 2 and 3 are designed to flag, and then acted on it.

3. Factors 4 and 5—Compliance With the Joinder Deadline Is Not an Adequate Explanation for a Second Attempt

Merck conflates timely compliance with 37 C.F.R. § 42.122(b)’s one-month joinder deadline with an adequate explanation for filing successive challenges to the same patent. Mot. 9. They are not the same inquiry. Factors 4 and 5 ask why a petitioner needed more than one attempt to challenge the same claims of the same

patent. Merck’s only answer is that its first attempt failed. That is not an explanation rooted in newly discovered art, a change in the law, or any development between the two filings; it is an admission that the second petition exists as a contingency against the risk that the first would not succeed. A petitioner that keeps an alternative theory in reserve—one it could have asserted from the outset—and deploys that theory only once its chosen theory is rejected, has not explained the delay. It has confirmed the strategic hedge that factors 4 and 5 exist to discourage.

4. Factors 6 and 7—Resource and Schedule Considerations Cut Against Joinder

Merck contends factors 6 and 7 favor joinder because its proposed “understudy” role will not affect the Board’s resources or the statutory one-year deadline. Mot. 9–10. That premise does not hold once the relevant contingency is considered. *See* Section III(B)(1). If Pfizer settles or withdraws, the Board will be required to manage, on Merck’s behalf, the very proceeding the Director has already determined Merck may not maintain on its own—a draw on Board resources that exists even though Merck’s own petition was never independently sustained. That risk, not the schedule on the day joinder is granted, is what factors 6 and 7 require the Board to weigh, and it weighs against joinder here.

Properly applied, the *General Plastic* factors confirm, rather than undermine, the conclusion reached above: Merck cannot use a second petition,

joined to a different petitioner's proceeding, to obtain the merits review the Director already declined to give Merck's own petition.

E. The *Kyocera* Factors Likewise Favor Denial

Merck's treatment of the remaining *Kyocera* factors fares no better.

Kyocera, IPR2013-00004, Paper 15, 4.

No New Grounds (Mot. 5): That Merck's petition merely duplicates Pfizer's grounds confirms only that Merck seeks to ride a theory it did not develop, rather than the independent merits review *Elong* and *Code200* require before joinder. *See* Sections III(A–B), III(D)(1).

No Schedule Impact (Mot. 5–6): Merck's premise that no scheduling order yet exists says nothing about the risk *Elong* identifies—if Pfizer withdraws and Merck “step[s] in for the dismissed petitioner,” Mot. 6, the schedule Merck now promises not to disrupt may have to be revisited entirely.

Briefing and Discovery Simplified (Mot. 6–7): Merck's proposed limitations—consolidated filings, no new arguments or grounds—apply, by Merck's own terms, only “so long as Pfizer remains an active party,” Mot. 6, and thus offer no protection against the one contingency that matters.

No Prejudice to Patent Owner (Mot. 7): Merck's position is simply incorrect as there is concrete prejudice. Joinder would give Merck two bites at the apple: a coordinated challenge to the '757 patent at the Board through Pfizer's instituted

grounds, and a second, estoppel-free challenge in the district court. The Federal Circuit has held that a petitioner who joins an instituted IPR without independently raising its own grounds is “not statutorily estopped under § 315(e) from challenging the asserted claims . . . based on [grounds] which were not raised in the [joined] IPR and which could not have reasonably been raised by [the joining party].” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 981 F.3d 1015, 1027 (Fed. Cir. 2020). Because Merck, as a joined understudy, “could not have raised” any ground beyond Pfizer’s in the joined proceeding, § 315(e) will not estop Merck from asserting its own arguments based on Pfizer’s—or any other invalidity theory—against Pogona in the district court. And unlike its own now-denied petition, where Merck filed a *Sotera* stipulation foreclosing relitigation of grounds raised or reasonably raisable in that IPR, Merck has filed no comparable stipulation here, either in the district court or before the Board with respect to the Pfizer IPR. Joinder would thus hand Merck a second, unconstrained invalidity track while Pogona defends the ’757 patent in two forums against a petitioner the Director has already determined may not pursue its own challenge. That is the prejudice *Kyocera*’s fourth factor exists to prevent.

IV. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests the Board deny Petitioner’s Motion for Joinder.

Dated: July 1, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I hereby certify that on July 1, 2026, a true and correct copy of the foregoing was served via electronic mail upon the attorneys of record for Petitioner at the following addresses:

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