

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

**MERCK SHARP & DOHME LLC'S REPLY IN SUPPORT OF MOTION
FOR JOINDER**

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The Board has already instituted Pfizer, Inc.'s ("Pfizer") petition for *inter partes* review of U.S. Patent No. 11,058,757 (the "'757 patent") after finding Pfizer reasonably likely to prevail on at least one challenged claim. IPR2026-00189, Paper 16 (Dir. May 26, 2026) ("Pfizer IPR"). Merck Sharp & Dohme LLC ("Merck") seeks joinder to avoid parallel litigation initiated by Pogona LLC ("Pogona" or "PO") over the same patent. Absent institution and joinder, Merck will be caused to assert prior art defenses in the early-stage district court litigation in which Pogona has alleged infringement of the '757 patent against Merck.

Pogona's opposition overstates the record and exaggerates the requested relief. Merck's request for joinder is a simple, routine, and unexceptional motion. Consistent with hundreds of granted joinder motions over the Board's history, Merck seeks to join an already instituted IPR proceeding to avoid duplicative proceedings. Merck is not taking a second bite at the invalidity "apple"; Pfizer has already successfully taken that bite, and Merck merely seeks to join it. As such, Merck will participate only as an understudy and will not interrupt the instituted proceeding or the scheduling order.

Under these facts, joinder promotes efficiency without expanding the case and serves the Director's goal of improving patent quality by correcting material examiner error while avoiding parallel proceedings. Pogona's opposition mischaracterizes the related proceedings and misapplies the case law.

I. JOINDER IS NOT FORECLOSED BY THE DIRECTOR'S DISCRETIONARY DENIAL OF MERCK'S PREVIOUS IPR

Pogona does not dispute that Merck's IPR filing and joinder motion are timely, nor does it identify any complexities in granting joinder beyond having to continue should Pfizer settle. Instead, based on *Elong*, Pogona broadly asserts that discretionary denial of Merck's original IPR petition—based on different prior art—categorically forecloses joinder. Opp. at 4–5 (citing IPR2025-00258, Paper 16 (Acting Dir. June 25, 2025)). It does not. Neither *Elong* nor any other Board precedent Pogona cites supports such a finding.

First, *Elong* does not hold that a prior discretionary denial of a different petition categorically forecloses joinder. Instead, in *Elong*, the Acting Director first considered whether the petition would be instituted before considering joinder. Paper 16 at 2. The Acting Director discretionarily denied institution because a parallel district court trial was likely to precede any final written decision, the parties had invested substantially in litigation, and a district court stay was unlikely. *Id.* at 3. None of those facts exist in the district court case here: no discovery has occurred, no schedule is set, no scheduling conference is scheduled, and no meaningful litigation investment has occurred. In fact, the district court has recently ordered Merck to refile its motion to stay the case pending IPR. Ex-1060. And a final written decision on the Pfizer schedule is expected by May 26, 2027, well before any trial

would occur. Ex-1052, -1053.

Second, there is *no* independent basis for discretionary denial. There are no settled expectations because the '757 patent is young; *Fintiv* does not favor denial for the reasons above; and there is no reasonable argument under *General Plastic* because Merck's copycat petition adds no new grounds, evidence, or arguments. Pogona identifies only timing—that this is Merck's second petition— but the first was not denied on the merits and thus could not have enabled “roadmapping.”

The Board should reject Pogona's attempts to convert the Director's summary denial of Merck's earlier petition into a categorical bar to joinder. Pogona acknowledges that the May 19 notice issued “[w]ithout issuing a separate opinion,” and without review of the merits, so neither Pogona nor Merck knows the reason for the discretionary denial. Because there were no settled expectations and neither *Fintiv* nor *General Plastic* support denial, one can surmise that discretionary denial was based on Pfizer's petition, which was filed first, was going to be instituted, and thus it was unnecessary to maintain two proceedings challenging the same patent at the same time. Merck anticipated this potential outcome in addressing Pogona's previous discretionary denial arguments and pointed out that joinder was one possible way to streamline the proceedings. IPR2026-00221, Paper 12 at 15.

II. MERCK HAS NOT ENGAGED IN GAMESMANSHIP

Pogona repeatedly argues that Merck is attempting to pursue a “deliberate,

sequential litigation strategy rather than a good-faith effort to streamline these proceedings.” Opp. at 6–9, 14. The record does not support that accusation. Merck had no knowledge of Pfizer’s petition until after Pfizer filed it on December 23, 2025. Merck independently prepared its own petition and filed on January 26, 2026—before Pfizer’s petition was instituted and therefore before there was any instituted proceeding for Merck to join. Contrary to Pogona’s argument, Merck should not be punished for independently filing its own petition, one month after Pfizer’s, based on different primary prior art and grounds, and mere months after Pogona sued Merck on the ’757 patent in district court. Nor was there any delay by Merck. Merck filed the instant petition and motion for joinder six days after the Board instituted the Pfizer IPR and less than two weeks after the prior Merck petition was discretionarily denied. Again, as Merck previously offered in its prior discretionary denial opposition, Merck now seeks to join the instituted Pfizer IPR on an understudy basis to streamline proceedings, not to harass Pogona or expand the issues. *See* Paper 3 (“Mot.”) at 1; Opp. at 5.

Nor is this case analogous to *Magnolia*. There, the petitioner sought IPR only after a completed jury trial finding the patent not invalid. *Magnolia Med. Techs., Inc. v. Kurin, Inc.*, IPR2026-00097, Paper 17 at 9–10 (Dir. May 14, 2026) (precedential). Here, by contrast, the district court case remains in its earliest procedural phases, and Merck’s prior IPR was discretionarily denied without any merits determination.

There can be no attempt to relitigate because no tribunal has adjudicated the merits of Merck's or Pfizer's IPR grounds. The only "relitigation" that could happen is if Merck is not joined here and is forced to use prior art defenses at trial.

Pogona argues that the prior discretionary determination controls here, but that argument ignores the case-specific nature of the discretionary inquiry. Discretionary denial turns on "the totality of the evidence and arguments the parties have presented." *See, e.g., Elong*, IPR2025-00258, Paper 16 at 2. The record now includes facts that were not present when Merck filed its original petition: Pfizer's petition is instituted, the Board found the grounds reasonably likely to prevail, Merck accepts an understudy role, the Pfizer schedule will control, and a final written decision will precede any trial. Those facts favor joinder under the case-specific discretionary inquiry. *See Elong*, Paper 16 at 2.

Pogona's argument that granting joinder could provide Merck "two bites at the apple" because it would be afforded a "second, estoppel-free challenge in the district court" (Opp. at 14–15) is moot in view of the revised *Sotera* stipulation filed in this case in which Merck agrees that it will not raise in the district court action any grounds it could have raised in either this IPR or its previous IPR. Ex-1051.

III. CONCLUSION

For the foregoing reasons, Merck respectfully requests that the Board institute the instant Petition and grant joinder with the Pfizer IPR.

IPR2026-00374 (Patent 11,058,757)
Petitioner's Reply in Support of Motion for Joinder

Dated: July 29, 2026

Respectfully submitted,

/s/ Ben Haber

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2026, I caused a true and correct copy of the foregoing MERCK SHARP & DOHME LLC'S REPLY IN SUPPORT OF MOTION FOR JOINDER was served in its entirety by filing these documents through the PTAB P-TACTS System, as well as by email, on the counsel of record for the Patent Owner:

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