

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PROPPANT EXPRESS INVESTMENTS, LLC,
PROPPANT EXPRESS SOLUTIONS, LLC,
Petitioner,

v.

OREN TECHNOLOGIES, LLC,
Patent Owner.

Case No. IPR2018-00914
U.S. Patent No. 9,511,929 B2

**BRIEF OF AMICUS CURIAE AMERICAN INTELLECTUAL PROPERTY
LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

I. Interest of Amicus Curiae1

II. Introduction.....1

**III. Joinder May Be Appropriate If It Serves the Just, Speedy, and
Inexpensive Resolution of a Proceeding4**

**IV. The Director Should Exercise His Discretion Under Section 315(c) to
Permit Self-Joinder Only in Limited Circumstances.....7**

V. Conclusion14

Certificate Of Compliance15

Certificate Of Service.....16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Amneal Pharms., LLC v. Endo Pharms. Inc.</i> , Case IPR2014-01365 (PTAB Feb. 4, 2015)	8, 12
<i>Apple Inc. v. Virnetx, Inc.</i> , Case IPR2014-00485 (PTAB Sept. 16, 2014)	11
<i>Aqua Prod., Inc. v. Matal</i> , 872 F.3d 1290 (Fed. Cir. 2017) (<i>en banc</i>)	3
<i>Ariosa Diagnostics v. Isis Innovation Ltd.</i> , Case IPR2012-00022 (PTAB Sept. 2, 2014)	8, 11
<i>Arris Group, Inc. v. Cirrex Sys. LLC</i> , Case IPR2015-00530 (PTAB July 27, 2015)	6, 8, 11, 12
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	2
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	2
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	2
<i>Facebook, Inc. v. Windy City Innovations, LLC</i> , Case IPR2017-00709 (Aug. 1, 2017)	8, 11, 12
<i>General Plastics Ind. Co., Ltd. v. Canon Kabushiki Kaisha</i> , Case IPR2016-01357 (Sep. 6, 2017) (precedential)	12, 13
<i>Hyundai Motor Co. v. Am. Vehicular Scis. LLC</i> , Case IPR2014-01543 (PTAB Oct. 24, 2014)	5
<i>Kisor v. Wilkie</i> , No. 18-15, 2018 WL 6439837 (U.S. Dec. 10, 2018)	3
<i>LG Elecs., Inc. v. Core Wireless Licensing S.A.R.L.</i> , Case IPR2016-00986 (PTAB Aug. 22, 2016)	10

<i>Macronix Int’l Co. v. Spansion LLC</i> , Case IPR2014-00898 (PTAB Aug. 13, 2014)	5
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	3
<i>Medtronic, Inc. v. Endotach LLC</i> , Case IPR2014-00695 (PTAB Sept. 25, 2014)	8
<i>Perez v. Mortg. Bankers Ass’n</i> , 135 S. Ct. 1199 (2015).....	3
<i>Reloaded Games, Inc. v. Parallel Networks LLC.</i> , Case IPR2014-00950 (PTAB Oct. 22, 2014)	12
<i>SkyHawke Techs., LLC v. L&H Concepts, LLC</i> , Case IPR2014-01485 (PTAB Mar. 20, 2015)	6
<i>SL Corp. v. Adaptive Headlamp Techs., Inc.</i> , Case IPR2016-01368 (PTAB Nov. 16, 2016)	5
<i>Target Corp. v. Destination Maternity Corp.</i> , Case IPR2014-00508 (PTAB Feb. 12, 2015)	6, 8, 12
<i>Teva Pharms. USA, Inc. v. Allergan, Inc.</i> , Case IPR2017-00578 (PTAB Mar. 31, 2017)	5
<i>Zhongshan Broad Ocean Motor Co. v. Nidec Motor Corp.</i> , Case IPR2015-00762 (PTAB Oct. 5, 2015)	6, 8, 12
Statutes	
35 U.S.C. § 314(a)	12
35 U.S.C. § 315(b)	3, 4
35 U.S.C. § 315(c)	<i>passim</i>
35 U.S.C. § 316(a)(11).....	5
35 U.S.C. § 325(d)	13
Administrative Procedure Act, 5 U.S.C. § 551 <i>et seq.</i>	3

Other Authorities

37 C.F.R. § 42.1(b)4
37 C.F.R. § 42.101(b)4
37 C.F.R. § 42.122(b)4
157 Cong. Rec. S952 (daily ed. Feb. 28, 2011).....13

I. Interest of Amicus Curiae¹

The American Intellectual Property Law Association (“AIPLA”) is a national bar association of approximately 13,500 members engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.

II. Introduction

AIPLA appreciates the opportunity to present its views to the Patent Trial and Appeal Board in response to the Board’s December 3, 2018, Order for Precedential

¹ This brief was not authored, in whole or in part, or paid for by counsel to a party. AIPLA believes that (1) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to the proceeding in this matter; and (2) no representative of any party to this proceeding participated in the authorship of this brief.

Opinion Panel (“POP”) Review in IPR2018-00914. (Paper No. 24.) At the outset, we note that while the POP Review Order sets forth three questions for briefing, AIPLA is not addressing the first two questions, which appear directed to the statutory construction of 35 U.S.C. § 315(c). Rather, we focus our comments on the third question, assuming that joinder of the same petitioner and joinder of new issues are appropriate under the statute. AIPLA’s silence with respect to the statutory construction issues should not be considered an affirmation that joinder of a petitioner to its own proceeding or the addition of new issues is proper; rather, we choose not to comment on these questions at this time.²

² Current jurisprudence cautions that USPTO statutory interpretation adhere as closely as possible to the express language of the statutory text. Deference to agency interpretations of statutes and regulations has been questioned in Congress and in the Courts. *See* Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. Title II (2017-18) (to repeal deference to agency statutory and regulatory interpretations under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). Specifically, on December 10, 2018, the Supreme Court agreed to consider whether *Auer* deference to an agency’s interpretations of its own

AIPLA takes this opportunity to address the operation of section 315(c) in cases in which a party moves to join its own earlier-filed petition (“self-joinder”) with a later-filed petition that adds new issues, which would otherwise be time-barred under section 315(b). While granting any motion for joinder is a discretionary exercise, in AIPLA’s view, the circumstances in which the Director may exercise his discretion in these types of self-joinder proceedings, if the statute permits such

regulations should be overruled. *Kisor v. Wilkie*, No. 18-15, 2018 WL 6439837, at *1 (U.S. Dec. 10, 2018). As pointed out by the late Justice Scalia, the executive branch encroaches on the judiciary’s prerogative to decide what the law is when it writes substantive rules so broadly that they must fill gaps with interpretive rules that are unchecked by notice and comment. *See Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring). Although Standard Operating Procedure 2, rev. 10, states that “[t]he Director has an interest in creating binding norms for fair and efficient Board proceedings,” we question whether POP Review is an appropriate substitute for notice and comment rulemaking. *See Administrative Procedure Act*, 5 U.S.C. § 551 *et seq.*; *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1328–1332 (Fed. Cir. 2017) (*en banc*) (Moore, J., concurring).

self-joinder, should be the exception, not the rule. In deciding the present POP Review issues, the POP Review panel should exercise caution not to incentivize gamesmanship by petitioners or patent owners.

III. Joinder May Be Appropriate If It Serves the Just, Speedy, and Inexpensive Resolution of a Proceeding

The Director is given discretion to join a person as a party to an instituted *inter partes* review proceeding under 35 U.S.C. § 315(c). Normally, a petition for *inter partes* review is time-barred if it is filed more than one year after the petitioner (or the petitioner's real party-in-interest or privy) is served with a complaint alleging infringement of a patent. *See* 35 U.S.C. § 315(b); 37 C.F.R. § 42.101(b). The one-year time bar, however, does not apply to a petition filed with a motion for joinder. *See* 35 U.S.C. § 315(b); 37 C.F.R. § 42.122(b). In appropriate circumstances, joinder of one *inter partes* review with another *inter partes* review may be appropriate if it secures the just, speedy, and inexpensive resolution of the proceedings. *See* 37 C.F.R. § 42.1(b).

In a typical case, a second petitioner seeks to join, subject to the Director's discretion, a previously instituted *inter partes* review proceeding, even though the second petitioner's petition otherwise would be time-barred. Frequently, the second petition is a "me too" type of petition and the second petitioner makes representations that it will take an understudy role in the already-instituted *inter partes* review proceeding and only take a substantive role if the original petitioner

settles or is terminated from the original proceeding. *See, e.g., SL Corp. v. Adaptive Headlamp Techs., Inc.*, Case IPR2016-01368, slip op. at 8–9 (PTAB Nov. 16, 2016) (Paper 9); *Teva Pharms. USA, Inc. v. Allergan, Inc.*, Case IPR2017-00578, slip op. at 3 (PTAB Mar. 31, 2017) (Paper 9). In this scenario, the second petitioner usually challenges the same claims based on the same grounds as asserted in the already-instituted petition, and relies on the same evidence to support these challenges. *See id.*

When deciding a motion for joinder, the Board (acting under the authority of the Director) usually considers the following factors: (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 Scis. LLC*, Case IPR2014-01543, slip op. at 3 (PTAB Oct. 24, 2014) (Paper 11); *Macronix Int’l Co. v. Spansion LLC*, Case IPR2014-00898, slip op. at 4 (PTAB Aug. 13, 2014) (Paper 15) (citing *Kyocera Corp. v. Softview LLC*, Case IPR2013-00004, slip op. at 4 (PTAB Apr. 24, 2013) (Paper 15)).

One of the more significant factors is the impact joinder would have on the trial schedule for the existing review. While the Director, under 35 U.S.C. § 316(a)(11), “may adjust the time periods [] in the case of joinder under section

315(c),” any adjustments may adversely impact the just and speedy conduct of the trial proceedings, as well as impact the schedule for co-pending district court litigation. Often, the Board (acting at the direction of the Director) may take over six months from the time a second petition is filed to rule on a joinder motion.³ Given that a motion for joinder can be filed up to thirty (30) days after institution of the original petition, the schedule in the original case likely will be very mature by the time a joinder motion is decided. As a result, granting motions for joinder, especially in cases in which new issues are added to the original proceeding, may not leave adequate time for further discovery and briefing prior to the oral hearing. Thus, motions for joinder, by their very nature and timing, raise the potential for due

³ *E.g., Target Corp. v. Destination Maternity Corp.*, Case IPR2014-00508 (PTAB Feb. 12, 2015) (Paper 28) (expanded panel) (195 days from filing to decision on joinder and 335 days to decision on request for rehearing); *SkyHawke Techs., LLC v. L&H Concepts, LLC*, Case IPR2014-01485 (PTAB Mar. 20, 2015) (Paper 13) (190 days from filing to decision on joinder); *Arris Group, Inc. v. Cirrex Sys. LLC*, Case IPR2015-00530 (PTAB July 27, 2015) (Paper 12) (203 days from filing to decision on joinder); *Zhongshan Broad Ocean Motor Co. v. Nidec Motor Corp.*, Case IPR2015-00762 (PTAB Oct. 5, 2015) (Paper 16) (expanded panel) (227 days from filing motion for joinder to decision on request for rehearing).

process concerns. Nonetheless, in circumstances in which due process concerns can be addressed and a just, speedy and inexpensive resolution may be accomplished, as can be the case with “me too” petitions filed by a second petitioner after institution of the original petition, joinder may be appropriate.

IV. The Director Should Exercise His Discretion Under Section 315(c) to Permit Self-Joinder Only in Limited Circumstances

Deciding whether to exercise discretion and grant a motion for joinder is an easier exercise where the parties are unrelated and the second petition is a “me too” petition. However, where the first and second petitioner are the same and the second petition attempts to add additional issues to the original proceeding, the Director’s ability to secure the just, speedy, and inexpensive resolution may be impaired, if joinder is permitted. While “self-joinder” of a second petition adding new issues, if permissible under the statute, may be warranted in certain circumstances, the situations in which the Director should exercise his discretion to allow it should be limited.

In a self-joinder scenario, a petitioner invariably seeks to incorporate additional issues in its second petition. A petitioner has no incentive to file a second identical petition if it is already party to an instituted trial proceeding. In cases of

self-joinder, petitioners commonly assert unpatentability against additional claims,⁴ raise new grounds of unpatentability,⁵ or address deficiencies identified by the Board⁶ in an-already instituted trial. Given the invariable delay in deciding joinder motions and the typically advanced stage of the originally instituted trial, the

⁴ *E.g.*, *Ariosa Diagnostics v. Isis Innovation Ltd.*, Case IPR2012-00022, slip op. at 1–2 (PTAB Sept. 2, 2014) (Paper 166) (adding six claims); *Amneal Pharms., LLC v. Endo Pharms. Inc.*, Case IPR2014-01365, slip op. at 5–6 (PTAB Feb. 4, 2015) (Paper 13) (challenging sixteen additional claims); *Arris Group, Inc.*, Case IPR2015-00530, slip op. at 7 (challenging seven additional claims); *Facebook, Inc. v. Windy City Innovations, LLC*, Case IPR2017-00709, slip op. at 3–4 (Aug. 1, 2017) (Paper 11) (adding five claims).

⁵ *Medtronic, Inc. v. Endotach LLC*, Case IPR2014-00695, slip op. at 5 (PTAB Sept. 25, 2014) (Paper 18); *Target Corp. v. Destination Maternity Corp.*, Case IPR2014-00508, slip op. at 2–3 (PTAB Feb. 12, 2015) (Paper 28) (expanded panel); *Amneal Pharms.*, Case IPR2014-01365, slip op. at 5–6 (Paper 13); *Arris Group, Inc.*, Case IPR2015-00530, slip op. at 7 (Paper 12).

⁶ *Zhongshan Broad Ocean Motor Co., Ltd.*, Case IPR2015-00762, slip op. at 7–8 (Paper 16).

Director should be cautious about granting motions for self-joinder in which new issues are added.

The issues presented by this POP Review arise from tensions between the just, speedy and inexpensive resolution of proceedings, on the one hand, and fairness to all parties involved, on the other. In a typical self-joinder situation, a petitioner, who also is a defendant in co-pending litigation, files a petition for *inter partes* review, and after trial is instituted, the same petitioner files a second petition, which would otherwise be time-barred, and seeks to join the second petition with the instituted trial. The second petition commonly incorporates additional issues—for example, asserting unpatentability against additional claims, raising new grounds of unpatentability, raising alternative claim constructions, or addressing deficiencies identified by the Board in the already instituted trial proceeding.

Assuming section 315(c) allows a petitioner to be joined to a proceeding to which it is already a party, the Director should exercise his discretion under section 315(c) to join that petitioner's otherwise time-barred second petition to the original petition only in limited circumstances. Such circumstances should be the exception, not the rule, and the limited circumstances in which self-joinder is permitted should not encourage gamesmanship—either by petitioners or by patent owners. *Inter partes* review proceedings were intended to be a speedy and inexpensive alternative to district court litigation over challenges involving patentability/validity of issued

patents. In addition, these proceedings were not intended to harass patent owners, *i.e.*, subjecting them to serial challenges, or as a matter of course to allow petitioners to address deficiencies identified in a decision to institute for the earlier-filed petition.

The Director should not permit self-joinder for any issues that could have been addressed in the petitioner's original petition, but which the petitioner chose not to include. Rather, petitioners should be encouraged to include all their challenges to claims in their original petition(s). Petitioners should not be encouraged to lie in wait, test the waters on some claims and grounds, and present remaining challenges in a later-filed petition that would otherwise be time-barred. Nor should petitioners be encouraged to use the reasons for denial of institution in an earlier petition as a roadmap for a new petition with a self-joinder request. *See, e.g., LG Elecs., Inc. v. Core Wireless Licensing S.A.R.L.*, Case IPR2016-00986 (PTAB Aug. 22, 2016) (Paper 12) (denying institution and dismissing motion for joinder where filing is second petition involving same parties, same patent, and same challenged claims, and where second petition attempts to correct errors in first petition).

The limited circumstances warranting grants of motions for self-joinder should involve a triggering event. Self-joinder might be warranted in situations where a patent owner has obstructed a petitioner's ability to incorporate all arguments in the original petition. For example, if a patent owner fails timely to

disclose prior art to the petitioner in co-pending litigation, this may support granting a motion for self-joinder. Another example may involve the situation where a patent owner belatedly asserts new claims or new claim constructions in an underlying litigation.

The Board has considered the following factors when deciding motions for self-joinder:

- The extent of overlap between the issues in the first and second petition, including the claims, prior art, expert testimony, and need for discovery;⁷

⁷ *E.g.*, *Ariosa Diagnostics*, Case IPR2012-00022, slip op. at 21 (PTAB Sept. 2, 2014) (Paper 166); *Apple Inc. v. Virnetx, Inc.*, Case IPR2014-00485, slip op. at 8 (PTAB Sept. 16, 2014) (Paper 18); *Arris Group, Inc.*, Case IPR2015-00530, slip op. at 10 (Paper 12); *Facebook, Inc. v. Windy City Innovations, LLC*, Case IPR2017-00709, slip op. at 7–8 (Aug. 1, 2017) (Paper 11) (additional claims are “substantially similar” to the previously instituted claims, and arguments and evidence will be the same).

- The patent owner’s delay in identifying asserted claims⁸ or relevant prior art⁹ in co-pending district court litigation;
- Whether the petitioner has taken a “second bite of the apple” by waiting until after the institution decision to file the second petition;¹⁰
- The petitioner’s delay when filing the second petition;¹¹ and
- Impact on the existing trial schedule.¹²

These factors overlap substantially with the factors enumerated in the Board’s precedential decision in *General Plastics Ind. Co., Ltd. v. Canon Kabushiki Kaisha*, enumerating factors relating to the Director’s discretion under 35 U.S.C. § 314(a) and 35 U.S.C. § 325(d). Case IPR2016-01357, slip op. at 9–10 (Sep. 6, 2017) (Paper

⁸ *Amneal Pharms., LLC*, Case IPR2014-01365, slip op. at 8–9 (Paper 13) (regarding claims 44 and 47); *Facebook, Inc.*, Case IPR2017-00709, slip op. at 3–4 (Paper 11).

⁹ *Target Corp.*, Case No. IPR2014-00508, slip op. at 2–3 (Paper 28).

¹⁰ *Reloaded Games, Inc. v. Parallel Networks LLC.*, Case IPR2014-00950, slip op. at 4–5 (PTAB Oct. 22, 2014) (Paper 12); *Zhongshan Broad Ocean Motor Co., Ltd.*, Case IPR2015-00762, slip op. at 7 (Paper 16) (petitioner not attempting to cure a deficiency in the merits of the originally filed petition).

¹¹ *Arris Group, Inc.*, Case IPR2015-00530, slip op. at 7 (Paper 12).

¹² *Arris Group, Inc.*, Case IPR2015-00530, slip op. at 10 (Paper 12).

19) (precedential). They also should apply to joinder requests, at least where the follow-on petitioner requests self-joinder.

In establishing *inter partes* review proceedings, Congress noted its intent that the proceedings provide a faster, less costly alternative to district court litigation, *and* provide safeguards to prevent harassment of patent owners from serial challenges:

[T]he bill would improve the current *inter partes* administrative process for challenging the validity of a patent. It would establish an adversarial *inter partes* review, with a higher threshold for initiating a proceeding and procedural safeguards to prevent a challenger from using the process to harass patent owners. It also would include a strengthened estoppel standard to prevent petitioners from raising in a subsequent challenge the same patent issues that were raised or reasonably could have been raised in a prior challenge. The bill would significantly reduce the ability to use post-grant procedures for abusive serial challenges to patents. These new procedures would also provide faster, less costly alternatives to civil litigation to challenge patents.

See 157 Cong. Rec. S952 (daily ed. Feb. 28, 2011) (statement of Sen. Grassley).

Multiple attacks against the same patent reduce certainty, which devalues patents.

The Director should not encourage gamesmanship by permitting petitioners to use prior institution decisions as roadmaps in constructing challenges to patent claims in “follow-on” petitions. In deciding the issues presented for POP Review, the POP Review Panel should be mindful to develop precedent that avoids promoting

gamesmanship, and, rather, promotes the just, speedy and inexpensive resolution of proceedings while providing due process to all parties involved.

V. Conclusion

For the foregoing reasons, to the extent that section 315(c) allows a petitioner to be joined to a proceeding in which it is already a party, the Director should exercise his discretion under section 315(c) to allow joinder of that petitioner's otherwise time-barred second petition to the original petition in only limited circumstances.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the page limit set forth in the Board's December 3, 2018 Order (Paper No. 24), authorizing amicus curiae to file a brief of no more than 15 pages.

I also certify that this brief has been prepared in a proportionally spaced type (Times New Roman, 14-point) using a Microsoft Word word-processing system.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I hereby certify that on this 28th day of December, 2018, I caused to be served a true and correct copy of the foregoing by electronic mail on the following counsel:

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