

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABIOMED, INC., ABIOMED R&D, INC., and
ABIOMED EUROPE GMBH,

Petitioner,

v.

MAQUET CARDIOVASCULAR, LLC,
Patent Owner.

IPR2017-02150 and IPR2017-02151 (Patent 9,327,068 B2)
IPR2017-02152 and IPR2017-02153 (Patent 8,888,728 B2)

Before BART A. GERSTENBLITH, JEREMY M. PLENZLER, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION

Denying Institution of *Inter Partes* Review
35 U.S.C. §§ 314(a) and 325(d); 37 C.F.R. § 42.108
Dismissing Petitioner's Motion for Joinder
35 U.S.C. § 315(c); 37 C.F.R. § 42.122(b)

IPR2017-02150 and IPR2017-02151 (Patent 9,327,068 B2)
IPR2017-02152 and IPR2017-02153 (Patent 8,888,728 B2)

I. INTRODUCTION

A. Background

Abiomed, Inc., Abiomed R&D, Inc., and Abiomed Europe GmbH (collectively, “Petitioner”) filed Petitions to institute an *inter partes* review of various claims (the “challenged claims”) from U.S. Patent No. 9,327,068 B2 (“the ’068 patent”) and U.S. Patent No. 8,888,728 B2 (“the ’728 patent”). IPR2017-02150, Paper 2 (“’2150 Pet.”)¹; IPR2017-02151, Paper 2 (“’2151 Pet.”)²; IPR2017-02152, Paper 2 (“’2152 Pet.”)³; IPR2017-02153, Paper 2 (“’2153 Pet.”)⁴. Petitioner filed Motions for Joinder in each of those proceedings concurrent with the filing of the respective Petitions. IPR2017-02150, Paper 3 (“’2150 Mot.”); IPR2017-02151, Paper 3 (“’2151 Mot.”); IPR2017-02152, Paper 3 (“’2152 Mot.”); IPR2017-02153, Paper 3 (“’2153 Mot.”).

We review the Petitions according to 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted “unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Under 35 U.S.C. §§ 314(a) and 325(d), and 37 C.F.R. § 42.108(a), we have discretion regarding whether to institute trial. Based on the particular circumstances of the proceedings addressed in this Decision, we exercise our discretion to *deny* the petitions in each of IPR2017-02150, -02151, -02152, and -02153. Petitioner’s motions for joinder in each of those proceedings are *dismissed*.

¹ The ’2150 Petition challenges claims 1, 5, 7, and 9 of the ’068 patent.

² The ’2151 Petition challenges claims 10, 13–15 and 20 of the ’068 patent.

³ The ’2152 Petition challenges claims 1 and 6–8 of the ’728 patent.

⁴ The ’2153 Petition challenges claims 10 and 15–17 of the ’728 patent.

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B. Related Proceedings

Petitioner and Patent Owner identify a number of proceedings related to the '068 patent and the '728 patent, including IPR2017-01026, -01027, -01028, and -01029. '2150 Pet. 1–2; '2151 Pet. 1–2; '2152 Pet. 1–2; '2153 Pet. 1–2; '2150 Paper 5, 1–2; '2151 Paper 5, 1–2; '2152 Paper 5, 1–2; '2153 Paper 5, 1–2.

C. Asserted Grounds of Unpatentability and Evidence of Record

Petitioner contends that the challenged claims are unpatentable as set forth below ('2150 Pet. 4–5, 30–94; '2151 Pet. 4, 28–87; '2152 Pet. 4–5, 29–88; '2153 Pet. 4, 28–82).⁵

'068 Patent		
Reference(s)	Basis	Claim(s)
Aboul-Hosn ⁶ and Siess ⁷	§ 103	1 and 5
Aboul-Hosn, Siess, and Sammler ⁸	§ 103	7
Aboul-Hosn, Siess, and Wampler ⁹	§ 103	9
Sammler, Rau ¹⁰ , Aboul-Hosn, and Siess	§ 103	1 and 5
Sammler, Rau, Aboul-Hosn, Siess, and Wampler	§ 103	9
Aboul-Hosn and Sammler	§ 103	10 and 13–15
Aboul-Hosn	§ 102	20

⁵ Exhibit numbers for the asserted references are those used in IPR2017-02150.

⁶ WO 99/02204 A1, pub. Jan. 21, 1999 (Ex. 1004, “Aboul-Hosn”).

⁷ U.S. Pat. No. 5,921,913, iss. July 13, 1999 (Ex. 1005, “Siess”).

⁸ DE 19821307, pub. Oct. 21, 1999 (Ex. 1045, “Sammler”).

⁹ Wampler et al., *Clinical Experience with the Hemopump Left Ventricular Assist Device*, Supported Complex and High Risk Coronary Angioplasty, Ch. 14, 231–49 (Springer 1st ed. 1991) (Ex. 1008, “Wampler”).

¹⁰ WO 97/37696 A1, pub. Oct. 16, 1997 (Ex. 1046, “Rau”).

IPR2017-02150 and IPR2017-02151 (Patent 9,327,068 B2)
IPR2017-02152 and IPR2017-02153 (Patent 8,888,728 B2)

'728 Patent		
References	Basis	Claim(s)
Aboul-Hosn and Siess	§ 103	1 and 7
Aboul-Hosn, Siess, and Sammler	§ 103	6
Aboul-Hosn, Siess, and Wampler	§ 103	8
Sammler, Rau, Aboul-Hosn, and Siess	§ 103	1 and 7
Sammler, Rau, Aboul-Hosn, Siess, and Wampler	§ 103	8
Aboul-Hosn and Sammler	§ 103	10 and 15–17

II. ANALYSIS

A. *Motions for Joinder*

“If the Director institutes an inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director . . . determines warrants the institution of an inter partes review under section 314.” 35 U.S.C. § 315(c). Petitioner’s motions for joinder do not identify an *inter partes* review to join for which trial has been instituted. *See* ’2150 Mot. 1 (seeking to join IPR2017-01028); ’2151 Mot. 1 (seeking to join IPR2017-01029); ’2152 Mot. 1 (seeking to join IPR2017-01026); ’2153 Mot. 1 (seeking to join IPR2017-01027).¹¹

Accordingly, independent of our decision to deny institution, discussed further below, we *dismiss as moot* Petitioner’s Motions for Joinder.

¹¹ The Petitions were denied in each of those proceedings, as were Petitioner’s Requests for Rehearing.

IPR2017-02150 and IPR2017-02151 (Patent 9,327,068 B2)
IPR2017-02152 and IPR2017-02153 (Patent 8,888,728 B2)

B. Challenges

At the outset, we note that Petitioner acknowledges that the IPR2017-02150 “Petition relies on substantially overlapping prior art to challenge the same ’068 patent as in IPR2017-01028” (’2150 Mot. 4), the IPR2017-02151 “Petition relies on substantially overlapping prior art to challenge the same ’068 patent as in IPR2017-01029” (’2151 Mot. 4), the IPR2017-02152 “Petition relies on substantially overlapping prior art to challenge the same ’728 patent as in IPR2017-01026” (’2152 Mot. 4), and the IPR2017-02153 “Petition relies on substantially overlapping prior art to challenge the same ’728 patent as in IPR2017-01027” (’2153 Mot. 4).

1. § 325(d)

Under 35 U.S.C. § 325(d), “the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.” There can be no dispute that Aboul-Hosn, Siess, and Wampler are “the same . . . prior art . . . previously . . . presented to the Office.” Indeed, Petitioner, itself, presented the asserted art in the previously denied Petitions in IPR2017-01026, -01027, -01028, and -01029.¹² Each of the claims

¹² With respect to Sammler, Patent Owner notes that “[t]he Sammler reference that is cited herein is identical to and in the chain of priority of the U.S. Sammler reference cited in the previously denied IPR.” ’2150 Prelim. Resp. 16 (citing IPR2017-01208, Ex. 1018). Exhibit 1018 from IPR2017-01208 is U.S. Pat. No. 6,544,216 B1. We note that patent is listed as a reference cited during prosecution of the application resulting in the ’068 patent, which indicates that patent was cited by the Examiner. Further, as Petitioner acknowledges (*see, e.g.*, ’2150 Pet. 20), Sammler expressly references Rau’s disclosure of an intravascular blood pump system (Ex. 1045, 3).

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