

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

In re

Youtoo Technologies, LLC

Debtor.

Case No. 17-14849-JDL  
Chapter 7

**TWITTER, INC.'S MOTION FOR ORDER (I) HOLDING THAT THE  
AUTOMATIC STAY DOES NOT APPLY PURSUANT TO 11 U.S.C. § 362(b)(4),  
OR ALTERNATIVELY, (II) LIFTING THE AUTOMATIC STAY FOR CAUSE  
UNDER § 362(d)(1) AND WAIVING THE 14-DAY STAY UNDER BANKRUPTCY  
RULE 4001(a)(3), BRIEF IN SUPPORT THEREOF,  
AND NOTICE OF OPPORTUNITY FOR HEARING**

**NOTICE OF OPPORTUNITY FOR HEARING**

**YOUR RIGHTS MAY BE AFFECTED. YOU SHOULD READ THIS DOCUMENT CAREFULLY AND CONSULT YOUR ATTORNEY ABOUT YOUR RIGHTS AND THE EFFECT OF THIS DOCUMENT.** If you do not want the Court to grant the requested relief, or you wish to have your views considered, you must file a written response or objection to the requested relief with the Clerk of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Avenue, Oklahoma City, OK 73102 no later than 14 days from the date of filing of this request for relief. You should also serve a file stamped copy of the response or objection to the undersigned movant's attorney and others who are required to be served and file a certificate of service with the court. If no response or objection is timely filed, the court may grant the requested relief without a hearing or further notice.

**The 14 day period includes the three (3) days allowed for mailing provided for in Bankruptcy Rule 9006(f).**

Twitter, Inc. (“Twitter”), a party-in-interest in the above referenced bankruptcy case, by and through its undersigned counsel, hereby request that the Court enter an order (i) holding that pursuant to Bankruptcy Code § 362(b)(4), the automatic stay under § 362(a) does not apply to *inter partes* review proceedings by the Patent and Trial Appeal Board (the “PTAB” or the “Board”) “of the United States Patent and Trademark Office” (the “USPTO”), or alternatively, (ii) lifting the stay for cause under § 362(d)(1). In support of its request, Twitter represents as follows:

### **INTRODUCTION**

1. Three patents held by Youtoo Technologies, LLC. (“Youtoo”), the chapter 7 debtor in the above-referenced proceeding, are currently the subject of *inter partes* review proceedings (“IPR Proceedings”) in front of the PTAB of the USPTO. The PTAB has instituted the IPR Proceedings based on its determination that Twitter is likely to prevail on the challenges that it has raised to the validity of the challenged patents. The PTAB has been granted the statutory power to determine whether to institute IPR Proceedings, and once instituted, the power to determine the validity of issued patents. The PTAB has been granted this power to protect the public interest in preventing improper patent monopolies, not to vindicate the private rights of the party raising a patent challenge. Because IPR Proceedings are proceedings instituted by the PTAB and intended to protect the public interest, they are exempted from the automatic stay under Bankruptcy Code § 362(b)(4).

2. Further, the PTAB is a specialized tribunal with the power to re-examine its own actions in issuing a patent. Accordingly, given its specialized knowledge and

purpose, it is the best venue for the determination of whether Youtoo's patents were validly issued. Additionally, a determination of the validity of those patents will be necessary before the Trustee will be able to monetize the value of the patents for the bankruptcy estate. The PTAB has already preliminarily determined that there is a reasonable likelihood that Twitter would prevail on its challenges to three of Youtoo's patents. Given their uncertain validity, absent resolution from the PTAB, it will be very difficult to monetize what value, if any, the patents have for creditors of the bankruptcy estate. Therefore, cause exists under § 362(d)(1) to lift the stay, if applicable, to allow proceedings regarding Youtoo's patents to move forward in front of the PTAB.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

### **FACTUAL BACKGROUND**

1. The above-referenced bankruptcy proceeding was filed on November 30, 2017 (the "Petition Date"), and Douglas N. Gould was appointed as the chapter 7 trustee for the Youtoo bankruptcy estate (the "Trustee").

2. On January 31, 2017, Twitter filed two petitions requesting *inter partes* review of U.S. Patent No. 9,083,997 ("'997 Patent"), which were assigned proceeding numbers IPR2017-00829 and IPR2017-00830. The PTAB instituted *inter partes* review proceedings for Twitter's challenges of the '997 Patent on August 11, 2017, based upon the PTAB's finding that there is a reasonable likelihood that Twitter would prevail on its challenges. *See* 35 USC § 314(a).

3. The statute governing *inter partes* review requires that the PTAB issue its final written determination in these proceedings no later than August 11, 2018 (one year from the institution of the proceeding). 35 USC § 316(a)(11). That deadline may be extended no more than six months upon a showing of good cause. *Id.*

4. On March 24, 2017, Twitter filed a petition for *inter partes* review challenging claims of U.S. Patent No. 8,601,506 (“’506 Patent”), and a petition for *inter partes* review challenging claims of U.S. Patent No. 8,464,304<sup>1</sup> (“’304 Patent”), and together with the ’997 Patent, and the ’506 Patent, the “Challenged Patents”), which were assigned proceeding numbers IPR2017-01133 and IPR2017-01131, respectively (collectively with IPR2017-00829 and IPR2017-00830, the “Pending IPR Proceedings”). The PTAB instituted *inter partes* review proceedings for Twitter’s challenges of both the ’506 Patent and the ’304 Patent on October 2, 2017, based upon the PTAB’s finding that there is a reasonable likelihood that Twitter would prevail on its challenges. *See* 35 USC 314(a).

5. As with the IPR Proceeding for the ’997 Patent, the statute governing *inter partes* review requires that the PTAB issue its final written determination in the ’506 Patent and the ’304 Patent proceedings no later than October 2, 2018, and that deadline

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<sup>1</sup> Twitter notes that, on November 10, 2016, in the district court action brought by Youtoo against Twitter alleging infringement of the ’997 Patent, ’304 Patent, and ’506 Patent (Case No. 3:16-cv-00764 (N.D.Tex.)), Judge Godbey issued an Order granting Twitter’s Partial Motion to Dismiss Youtoo’s infringement claims for the ’304 Patent and ’506 Patent, finding that the ’304 Patent and ’506 Patent were invalid under 35 U.S.C. § 101 for claiming patent-ineligible subject matter.

may be extended no more than six months upon a showing of good cause. 35 USC 316(a)(11).

6. On December 7, 2017, the PTAB entered an order in the Pending IPR Proceedings, attached hereto as Exhibit 1, authorizing Youtoo to file a motion to stay the Pending IPR Proceedings as a result of its bankruptcy filing, and authorizing Twitter to respond. The Trustee filed a motion to stay on December 13, 2017, and Twitter responded on December 20, 2017.

7. On December 28, 2017, the PTAB entered an order, attached hereto as Exhibit 2, providing Twitter an opportunity to seek a determination that the automatic stay does not apply or an order granting relief from the automatic stay, and extending Youtoo's deadline to respond to the *inter partes* review petitions to February 5, 2018.

8. On January 19 and February 1, 2018, the PTAB entered two orders, attached hereto as Exhibit 3 and Exhibit 4, requiring, among other things, Youtoo to file a reply in support of its motion for stay no later than February 5, 2018, and extending Youtoo's deadline to respond to the *inter parties* review petitions to February 26, 2018.

9. Youtoo also owns U.S. Patent No. 8,311,382 (“’382 Patent”), U.S. Patent No. 8,413,206 (“’206 Patent”), and U.S. Patent No. 9,319,161 (“’161 Patent,” and together with the ’382 Patent and the ’206 Patent,” the “Additional Patents”). The ’382 Patent is in the same patent family as the ’997 Patent and is directed to similar subject matter as the ’997 Patent, specifically, recording and publishing content on social networking websites. The ’206 Patent and ’161 Patent are directed to methods of enabling viewers to participate in a television program over a communication network.

Twitter believes that each of the Additional Patents may also be subject to validity challenges in IPR Proceedings.

### **BRIEF IN SUPPORT OF RELIEF**

#### **A. IPR Proceedings are Excluded from the Automatic Stay Under 11 U.S.C. § 362(b)(4).**

10. Bankruptcy Code § 362(b)(4) provides in pertinent part that the filing of a petition under the Bankruptcy Code does not operate as a stay of:

[T]he commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . regulatory power, including the enforcement of a judgment other than a money judgment obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . regulatory power."

11 U.S.C. § 362(b)(4).

11. This exception to the bankruptcy automatic stay applies where a proceeding (i) is brought or continued by a governmental unit and (ii) seeks to vindicate the public interest, as opposed to the private rights of a third-party. *See, e.g., I.T.C. v. Jaffe*, 433 B.R. 538, 543 (E.D. Va. 2010). IPR Proceedings satisfy both of the requirements of 11 U.S.C. § 362(b)(4) and are therefore exempt from the automatic stay.

#### **1. IPR Proceedings are proceedings by a governmental unit.**

12. First, an instituted IPR Proceeding is a "continuation of an action...by a governmental unit." 11 U.S.C. § 362(b)(4). The USPTO and the PTAB are unquestionably governmental units created by Congress. *See* 35 U.S.C. §§ 1, 6.<sup>2</sup> An

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<sup>2</sup> The Bankruptcy Code defines a "governmental unit" as:

United States; State; Commonwealth; District; Territory; municipality; foreign state; department, *agency, or instrumentality of the United States* (but not a

IPR Proceeding involves two distinct phases: (i) “the institution phase,” beginning with the filing of an *inter partes* review petition and concluding in the PTAB’s decision on whether to “institute” an IPR Proceeding, and, if instituted, (2) “the merits phase,” beginning after the PTAB’s decision to institute the IPR Proceeding and concluding in the PTAB’s determination of patentability in light of the instituted grounds. *See Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1364-65 (Fed. Cir. 2016); 35 U.S.C. § 314(a). During the institution phase, the PTAB establishes the parameters that will confine the proceeding during the merits phase. *Harmonic Inc.*, 815 F.3d at 1367. The PTAB has the discretion to institute an IPR Proceeding, but is never compelled to do so. *Id.* While private parties can submit an *inter partes* review petition to the PTAB, those private parties do not require constitutional standing and may not even remain in the IPR Proceeding. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016); 11 U.S.C. § 317(a). Rather, the PTAB may continue to conduct an IPR Proceeding even after the petitioning parties have decided to cease participation. *Id.* (citing 35 U.S.C. § 317(a)).

13. The United States District Court for the Eastern District of Virginia considered substantially similar proceedings in front of the International Trade Commission (the “*ITC*”) in *United States International Trade Commission v. Jaffe*, and held that those proceedings are not subject to the bankruptcy automatic stay pursuant to

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United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27) (emphasis added).

11 U.S.C. § 362(b)(4). 433 B.R. at 543. In *Jaffe*, a private party filed a complaint initiating a proceeding before the ITC. *Id.* at 541. However, the filing of the complaint with the ITC resulted only in a “pre-institution proceeding,” where the ITC examined the complaint for sufficiency and performed a preliminary investigation. *Id.* After the ITC’s preliminary investigation, the ITC decided to “institute” the proceeding based on the merits of the complaint. *Id.* The court explained that although the proceeding would continue through an adversarial process after it was instituted, the ITC was the party with the power to continue the proceeding, not the private parties. *Id.* Accordingly, the proceeding was a proceeding “by the ITC” that met the requirements of 11 U.S.C. § 364(b)(4). *Id.* at 543.

14. Here, the PTAB, like the ITC, has the power to institute IPR Proceedings, and the PTAB is the party with the power to continue IPR Proceedings. The PTAB itself has held that *inter partes* review “is an adjudicatory proceeding ***of a federal agency...***” *Ericsson Inc. v. Regents of the Univ. of Minn.*, Case No. IPR2017-01186, slip op. at 4 (Paper No. 14) (PTAB Dec. 19, 2017) (emphasis added), a copy of which is attached hereto as Exhibit 5. The adversarial nature of IPR Proceedings is intended to assist the PTAB’s exercise of its regulatory responsibilities, but does not change the fact that IPR Proceedings are proceedings by the PTAB as a governmental unit.

**2. The primary purpose of an IPR Proceeding is to protect the public welfare, not adjudicate private rights.**

15. IPR Proceedings also meet the second requirement of 11 U.S.C. § 362(b)(4) – they seek to protect the public interest, not adjudicate private disputes. To determine



whether proceedings satisfy this requirement for exclusion from the automatic stay under § 362(b)(4), courts have applied two overlapping and related tests: the pecuniary purpose test and the public policy test. *See, e.g., Halo Wireless, Inc. v. Alenco Commc'ns, Inc. (In re Halo Wireless, Inc.)*, 684 F.3d 581, 588 (5th Cir. 2012); *N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986).

16. The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public welfare. *In re Halo Wireless, Inc.*, 684 F.3d at 588; *Edward Cooper Painting*, 804 F.2d at 942. The primary question in the public policy test is whether the government is effectuating public policy rather than adjudicating private rights. *In re Halo Wireless, Inc.*, 684 F.3d at 588; *Edward Cooper Painting*, 804 F.2d at 942. If the purpose of the law is to effectuate public policy, then the exception to the automatic stay applies. *In re Halo Wireless, Inc.*, 684 F.3d at 588. Alternatively, if the purpose of the law is to protect a pecuniary interest in the debtor's property or primarily to adjudicate private rights, then the exception is inapplicable. *Id.*

17. The application of these tests does not depend upon whether a private party is involved in the prosecution of the action or proceeding. *See In re Halo Wireless*, 684 F.3d at 589; *see also McMullen v. Sevigny (In re McMullen)*, 386 F.3d 320, 328 (1st Cir. 2004) (“[T]he same sound public policy reasons which undergird the [§] 362(b)(4) exception counsel against any rule which might dissuade private parties from providing governmental regulators with information which might require enforcement measures to protect the public from imminent harm.”); *Jaffe*, 433 B.R. at 541-43. While regulatory

proceedings commenced by private parties may have similarities to private litigation, they also promote the public interest by enforcing laws and regulations. *See, e.g., In re Halo Wireless*, 684 F.3d at 589-90. *See also D.M. Barber, Inc. v. Valverde (In re D.M. Barber, Inc.)*, 13 B.R. 962, 963 (Bankr. N.D. Tex. 1981) (“Proceedings before the National Labor Relations Board are commenced by the initiative of aggrieved individual persons and thus have some characteristics of private litigation. However the case law reflects that the proceedings by the PTAB are not to adjudicate private rights but to effectuate public policy.”); *Edward Cooper Painting*, 804 F.2d at 941 (“[T]he NLRB determines which complaints it will act upon in its own name in furthering the policies of the federal labor laws.”).

18. When tested against these criteria, IPR Proceedings are clearly excluded from the reach of the automatic stay under 11 U.S.C. § 362(b)(4). The Supreme Court explained that IPR Proceedings are “less like judicial proceedings and more like a specialized agency proceeding.” *Cuozzo Speed Techs.*, 136 S. Ct. at 2144. The Supreme Court explained that the features of an IPR Proceeding “indicate that the purpose of the proceeding is not quite the same as the purpose of district court litigation.” *Id.* An IPR Proceeding is not a proceeding to judicially determine private rights to monetary or equitable relief. Rather, the primary purpose of an IPR Proceeding is to allow the PTAB to re-examine the agency’s own actions in issuing a patent. *Id.* IPR Proceedings protect the public’s “paramount interest in seeing that patent monopolies are kept within their legitimate scope.” *Id.* (internal citations omitted). The purpose of permitting the Patent Office to correct its errors is to “remedy defective governmental (not private) action, and

if need be to remove patents that should never have been granted.” *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985); *cf. Ericsson*, Case No. IPR2017-01186, slip op. at 3-4 (Bisk, J., concurring) (“*inter partes* review represents no more than the Patent Office’s reconsideration of its initial decision...in the form of a patent grant... *inter partes* review is a circumscribed *in rem* proceeding, in which the Patent Office exercises jurisdiction over the patent challenged, rather than the parties named.”). “A defectively examined and therefore erroneously granted patent must yield to the reasonable Congressional purpose of facilitating the correction of governmental mistakes.” *Patlex*, 758 F.2d at 604. Accordingly, IPR Proceedings meet the second requirement of 11 U.S.C. § 362(b)(4) and are not subject to the bankruptcy automatic stay.

19. This conclusion is supported by other court decisions in connection with similar regulatory proceedings. For example, in *In re Halo Wireless*, various telephone companies filed suits against Halo Wireless, Inc. (“Halo”) with ten state public utility commissions (the “PUCs”). *Id.* at 583. As a result, Halo filed a bankruptcy proceeding. *Id.* The telephone companies sought and received an order from the bankruptcy court that the PUC proceedings were excluded from the bankruptcy automatic stay under 11 U.S.C § 362(b)(4). *Id.* The Fifth Circuit affirmed the bankruptcy court, rejecting Halo’s argument that the actions in the PUCs were private party actions. *Id.* The Fifth Circuit determined that although proceedings in front of the PUCs are commenced by private parties, the continuation of those proceedings by the PUCs is in furtherance of the public policy to make adequate and efficient telecommunications services available to all at just,

fair and reasonable rates. *Id.* at 592-94. Accordingly, the Fifth Circuit concluded that both the pecuniary purpose and public policy tests supported the application of § 362(b)(4). *Id.* at 593-94.

20. Also, in *In re McMullen*, the First Circuit held that a party did not violate the bankruptcy automatic stay by submitting a complaint against the debtor to the Massachusetts Division of Registration for Real Estate Agents based on the debtor's alleged fraudulent retention of a real estate deposit. *In re McMullen*, 386 F.3d at 322-23. The First Circuit found that applicable law empowered the real estate board to suspend, revoke, or refuse to renew a real estate broker license where the broker had improperly refused to account for or remit money in the broker's possession. *Id.* at 325. This power was intended to safeguard the public from the wrongful future conduct of corrupt or incompetent professionals, which fell squarely within the public policy exception of 11 U.S.C. § 362(b)(4). *Id.* The First Circuit recognized that while the creditor filing the complaint with the real estate board might have a pecuniary interest in the recovery of the creditor's claim against the debtor, the real estate board's power was limited to revocation of the debtor's real estate license, and did not adjudicate that private claim. *Id.* at 326-27.

21. Much like the proceedings in both *Halo Wireless* and *McMullen*, IPR Proceedings serve an important public policy function to ensure the proper regulation of patent monopolies. The PTAB should not be, and is not, prevented from performing this important function simply because the Patent Owner has filed bankruptcy.

22. Accordingly, the Court should enter an order confirming that 11 U.S.C. § 362(b)(4) exempts IPR Proceedings from being subject to the stay provisions of § 362(a)

**B. Alternatively, the Court Should Lift the Automatic Stay to Allow the IPR Proceedings to Continue for the Challenged Patents and to Allow Twitter to Request *Inter Partes* Review of the Additional Patents.**

23. As this court has recognized, courts have developed various factor tests to determine whether cause exists to lift the automatic stay. *See Jim's Maint. & Sons, Inc. v. Target Corp. (In re Jim's Maint. & Sons, Inc.)*, Nos. 08-11823-NLJ, Civ-09-438-M, 2010 WL 432251, at \*2 (W.D. Okla. Jan. 28, 2010); *see also Dampier v. Credit Invs., Inc. (In re Dampier)*, BAP No. CO-15-006, 2015 WL 6756446, at \*4 (B.A.P. 10th Nov. 5, 2015); *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984); *In re Pro Football Weekly, Inc.*, 60 B.R. 824, 826 (N.D. Ill. 1986). In this case, the factors identified applied in this district support relief from the automatic stay.

24. First, PTAB is a specialized tribunal established specifically to regulate patent monopolies. *See In re Curtis*, 40 B.R. at 800 (identifying the existence of a specialized tribunal to hear the dispute as a factor favoring relief from the automatic stay).

25. Second, the estate will not benefit from delaying proceedings in front of the PTAB. The PTAB ultimately will have to address the challenges raised in the Pending IPR Proceedings and any challenges to the Additional Patents. Even a determination by another tribunal will not prevent the PTAB from considering patent challenges. *Novartis AG, LTS v. Noven Pharmaceuticals Inc.*, 853 F.3d 1289, 1295 (Fed. Cir. 2017) (noting that, with respect to district court litigation, the “PTAB properly may reach a different

conclusion [on unpatentability] based on the same evidence.”). Twitter does not believe the Trustee can demonstrate any benefit to the bankruptcy estate by delaying the inevitable.

26. Third, the PTAB has already determined that Twitter is reasonably likely to prevail on the merits as the Challenged Patents. Given that there is a reasonable likelihood that the Challenged Patents are invalid, resolution of that issue will be key to determining the value of any assets in the Youtoo estate for its creditors. *See In re Pro Football Weekly, Inc.*, 60 B.R. at 826 (identifying whether the creditor has a probability of prevailing on the merits as a factor supporting relief from the automatic stay).

27. Further, delaying a process that could free other parties from the restrictions of a potentially invalid patent monopoly is significantly more prejudicial than allowing the IPR Proceedings to continue, especially in light of the PTAB’s determination that Twitter is likely to prevail on the merits of its challenges to the Challenged Patents. *Id.* (identifying the balance of hardship caused by maintenance of the stay against hardship caused by the debtor as a factor to consider in determining whether to lift the automatic stay); *In re Curtis*, 40 B.R. at 800 (same as to the “balance of hurt”).

28. Finally, the IPR Proceedings will not result in the allowance of any monetary claim in favor of Twitter or any other party. Instead, lifting the automatic stay will allow the expeditious resolution of patent challenges that ultimately will need to be addressed by the PTAB. *See In re Curtis*, 40 B.R. at 800 (identifying the lack of potential prejudice to other creditors and interest parties as a factor to consider in determining whether to lift the automatic stay).

29. Accordingly, in the event that the Court determines that the automatic stay applies to IPR Proceedings, the Court should lift the automatic stay for cause under Bankruptcy Code § 362(d)(1) to allow the IPR Proceedings to continue as to the Challenged Patents and to allow Twitter, if appropriate, to request *inter partes review* as to the Additional Patents.

**C. The Court Should Waive the Stay Under Federal Rule of Bankruptcy Procedure 4001(a)(3) of Any Order Lifting the Automatic Stay Allowing the IPR Proceedings to Continue.**

30. Waiver of the fourteen day stay set forth in Federal Bankruptcy Rule 4001(a)(3) is justified as to the continuation of the Pending IPR Proceedings. Additional delay of the Pending IPR Proceedings will make it more difficult for the PTAB to fulfill its statutory requirement to issue its final written determination in the Pending IPR Proceedings within one year from the institution of the proceedings. As mentioned above, the continuation of the Pending IPR Proceedings will not prejudice the estate or its creditors.

FOR ALL THE ABOVE STATED REASONS, Twitter requests that the Court enter an order (a)(i) holding that pursuant to Bankruptcy Code § 362(b)(4), the automatic stay under § 362(a) does not apply to IPR Proceedings by the PTAB, or alternatively, (ii) lifting the stay for cause under § 362(d)(1) and waiving the stay under Bankruptcy Rule 4001(a)(3), and (b) granting such other and further relief to which Twitter may be entitled.

DATED: February 2, 2018

Respectfully submitted,

By: /s/ Tami J. Hines

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Paper No. 20  
Entered: December 7, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TWITTER, INC.,  
Petitioner,

v.

YOUTOO TECHNOLOGIES, LLC,  
Patent Owner.

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IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)<sup>1</sup>

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Before SALLY C. MEDLEY, CHARLES J. BOUDREAU, and  
JESSICA C. KAISER, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

ORDER  
Conduct of Proceeding  
37 C.F.R. § 42.5

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<sup>1</sup> This Order will be entered in each case. The parties are not authorized to use this caption style.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

A conference call in these cases took place on December 6, 2017. The parties were represented by their respective counsel. In addition, bankruptcy counsel for Patent Owner as well as a bankruptcy trustee were present on the call. The purpose of the call was to discuss Patent Owner's request for leave to file a motion to stay based on Patent Owner's recent filing for bankruptcy.

During the call, Patent Owner's counsel informed the Board that Patent Owner filed for bankruptcy on November 30, 2017, and that a bankruptcy trustee has been appointed. Patent Owner's counsel contended that the automatic stay under 11 U.S.C. § 362 applies to the above-referenced proceedings. Petitioner's counsel opposed any stay of these proceedings.

Upon consideration of the parties' arguments, Patent Owner is authorized to file a motion to stay no later than December 13, 2017, and Petitioner is authorized to file a response to that motion no later than December 20, 2017. No reply is authorized at this time. In addition, DUE DATE 1 and DUE DATE 2 in the Scheduling Order for each of the above-referenced cases are hereby revised to January 3, 2018, and April 4, 2018, respectively.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

For the foregoing reasons, it is

ORDERED that Patent Owner is authorized to file a motion to stay no later than December 13, 2017, and Petitioner is authorized to file a response to that motion no later than December 20, 2017;

FURTHER ORDERED that DUE DATE 1 in the Scheduling Order for each of the above-referenced cases is hereby revised to January 3, 2018, and DUE DATE 2 in the Scheduling Order for each of the above-referenced cases is hereby revised to April 4, 2018;

FURTHER ORDERED that Patent Owner shall provide the Board with a status report on the bankruptcy proceedings by email on or before December 20, 2017; and

FURTHER ORDERED that no motions are authorized to be filed at this time.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

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Paper No. 23  
Entered: December 28, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TWITTER, INC.,  
Petitioner,

v.

YOUTOO TECHNOLOGIES, LLC,  
Patent Owner.

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IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)<sup>1</sup>

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Before SALLY C. MEDLEY, CHARLES J. BOUDREAU, and  
JESSICA C. KAISER, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

ORDER  
Conduct of Proceeding  
37 C.F.R. § 42.5

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<sup>1</sup> This Order will be entered in each case. The parties are not authorized to use this caption style.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

Pursuant to the authorization in our December 7, 2017, Order (Paper 20),<sup>2</sup> Patent Owner filed a Motion for Stay. Paper 21. Patent Owner filed for Chapter 7 bankruptcy in the Western District of Oklahoma on November 30, 2017, and Patent Owner asserts that an automatic stay pursuant to 11 U.S.C. § 362(a) applies to these proceedings. *Id.* at 3. Petitioner opposes the motion, and asserts that these proceedings are excluded from the automatic stay. Paper 22. There is no indication, however, that Petitioner has sought relief from the automatic stay from the bankruptcy court. On December 20, 2017, Patent Owner also provided a status report on the bankruptcy proceedings, indicating that a bankruptcy trustee has been appointed and that the first meeting of creditors is scheduled for January 2, 2018. Ex. 3002.

Given the parties' dispute as to whether the automatic stay applies to these proceedings, and to provide Petitioner an opportunity to seek relief from the automatic stay (or a determination that it does not apply) by the bankruptcy court, DUE DATE 1 in the Scheduling Order is hereby revised to February 5, 2018. Due dates following DUE DATE 1 will be reset in a future order.

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<sup>2</sup> We refer to the paper and exhibit numbers in IPR2017-00829.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

For the foregoing reasons, it is

ORDERED that DUE DATE 1 in the Scheduling Order for each of the above-referenced cases is hereby revised to February 5, 2018, and due dates following DUE DATE 1 will be reset in a future order; and

FURTHER ORDERED that Patent Owner shall provide the Board with a status report on the bankruptcy proceedings by email on or before January 17, 2018.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

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571-272-7822

Paper No. 24  
Entered: January 19, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TWITTER, INC.,  
Petitioner,

v.

YOUTOO TECHNOLOGIES, LLC,  
Patent Owner.

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IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)<sup>1</sup>

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Before SALLY C. MEDLEY, CHARLES J. BOUDREAU, and  
JESSICA C. KAISER, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

ORDER  
Conduct of Proceeding  
37 C.F.R. § 42.5

---

<sup>1</sup> This Order will be entered in each case. The parties are not authorized to use this caption style.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

On January 17, 2018, Patent Owner provided a status report on Patent Owner's bankruptcy proceedings, indicating that a creditors' meeting took place on January 2, 2018. Ex. 3003.<sup>2</sup> Patent Owner's motion for a stay pursuant to 11 U.S.C. § 362(a) (Paper 20) is pending before the Board. Petitioner opposes the motion, and asserts that these proceedings are excluded from the automatic stay. Paper 22.

Given the parties' dispute as to whether the automatic stay applies to these proceedings, we authorize Patent Owner to file a reply in support of its Motion to Stay. In particular, Patent Owner should address Petitioner's contention that these proceedings are excluded from the automatic stay under 11 U.S.C. § 362(b)(4). *See* Paper 22, 1–9.

For the foregoing reasons, it is

ORDERED that Patent Owner is authorized to file a reply in support of its Motion to Stay no later than February 5, 2018;

FURTHER ORDERED that DUE DATE 1 in the Scheduling Order for each of the above-referenced cases is hereby revised to February 26, 2018, and due dates following DUE DATE 1 will be reset in a future order; and

FURTHER ORDERED that Patent Owner shall provide the Board with a status report on the bankruptcy proceedings by email on or before February 19, 2018.

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<sup>2</sup> We refer to the paper and exhibit numbers in IPR2017-00829.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

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571-272-7822

Paper No. 27  
Entered: February 1, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TWITTER, INC.,  
Petitioner,

v.

YOUTOO TECHNOLOGIES, LLC,  
Patent Owner.

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IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)<sup>1</sup>

---

Before SALLY C. MEDLEY, CHARLES J. BOUDREAU, and  
JESSICA C. KAISER, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

ORDER  
Conduct of Proceeding  
37 C.F.R. § 42.5

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<sup>1</sup> This Order will be entered in each case. The parties are not authorized to use this caption style.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

A conference call in these cases took place on January 31, 2018. The parties were represented by their respective counsel. In addition, the bankruptcy trustee for Patent Owner was present on the call. The purpose of the call was to discuss the status of Patent Owner's bankruptcy and whether any party planned to address with the bankruptcy court the issue of whether the automatic stay under 11 U.S.C. § 362 applies to the above-referenced proceedings.

Prior to the call, the Board requested the parties meet and confer with each other and with the trustee as to whether they would stipulate in the bankruptcy court that the automatic stay does not apply to these proceedings or that the bankruptcy court should grant relief from such a stay. During the call, Patent Owner and the trustee reported that they were not amenable to such a stipulation. The trustee also represented that he agrees with Patent Owner's position in the motion to stay (Paper 21)<sup>2</sup> (i.e., that the automatic stay applies to these proceedings). Petitioner informed the Board that it intends to file a motion in the bankruptcy court seeking a determination that the automatic stay does not apply to these proceedings or seeking relief from such a stay.

Accordingly, it is

ORDERED that Patent Owner shall file a reply in support of its Motion to Stay on the current schedule (no later than February 5, 2018);

FURTHER ORDERED that Patent Owner shall provide the Board with a status report on the bankruptcy proceedings by email on or before

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<sup>2</sup> We refer to the paper numbers in IPR2017-00829.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

February 19, 2018, and every thirty (30) days thereafter until ordered otherwise in these proceedings; and

FURTHER ORDERED that Petitioner shall file as exhibits in these proceedings any filings in the bankruptcy court made by either or both of the parties, the trustee, or any third party and any opinions or orders of the bankruptcy court related to whether the automatic stay applies to these proceedings or whether relief should be granted from such a stay. Petitioner shall make such filings in these proceedings no more than five (5) business days after the item is filed or entered in the bankruptcy court.

IPR2017-00829 (Patent 9,083,997 B2)  
IPR2017-00830 (Patent 9,083,997 B2)  
IPR2017-01131 (Patent 8,464,304 B2)  
IPR2017-01133 (Patent 8,601,506 B2)

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571-272-7822

Paper 14  
Entered: December 19, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ERICSSON INC. and TELFONAKTIEBOLAGET LM ERICSSON,  
Petitioner,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,  
Patent Owner.

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Cases IPR2017-01186 (Patent 8,774,309 B2)  
IPR2017-01197 (Patent 7,251,768 B2)  
IPR2017-01200 (Patent 8,718,185 B2)  
IPR2017-01213 (Patent 8,588,317 B2)  
IPR2017-01214 (Patent RE45,230 E)  
IPR2017-01219 (Patent RE45,230 E)

Before DAVID P. RUSCHKE, *Chief Administrative Patent Judge*,  
SCOTT R. BOALICK, *Deputy Chief Administrative Patent Judge*,  
JACQUELINE WRIGHT BONILLA, SCOTT C. WEIDENFELLER,  
*Vice Chief Administrative Patent Judges*, JENNIFER S. BISK,  
ROBERT J. WEINSCHENK, and CHARLES J. BOUDREAU,  
*Administrative Patent Judges*.

Opinion for the Board filed by *Chief Administrative Patent Judge*  
RUSCHKE.

Opinion Concurring filed by *Administrative Patent Judge* BISK.

ORDER

Denying Patent Owner's Motion to Dismiss  
37 C.F.R. §§ 42.5, 42.71

EXHIBIT

5



IPR2017-01186 (Patent 8,774,309 B2)  
 IPR2017-01197 (Patent 7,251,768 B2)  
 IPR2017-01200 (Patent 8,718,185 B2)  
 IPR2017-01213 (Patent 8,588,317 B2)  
 IPR2017-01214 (Patent RE45,230 E)  
 IPR2017-01219 (Patent RE45,230 E)

## I. INTRODUCTION

Regents of the University of Minnesota (“Patent Owner”) filed a Motion to Dismiss (Paper 8,<sup>1</sup> “Motion” or “Mot.”) the Petition for an *inter partes* review (Paper 1, “Petition” or “Pet.”) in this proceeding. Specifically, Patent Owner contends that it is entitled to avoid this proceeding entirely because it is a sovereign that is immune to our authority under the Eleventh Amendment to the U.S. Constitution. Mot. 1, 2, 15. Ericsson Inc. and Telefonaktiebolaget LM Ericsson (collectively, “Petitioner”) filed an Opposition to the Motion (Paper 10, “Opposition” or “Opp.”), to which Patent Owner filed a Reply in Support of the Motion (Paper 11, “Reply”). For the reasons discussed below, the Motion is *denied*.

## II. PANEL EXPANSION

Our standard operating procedures provide the Chief Judge with discretion to expand a panel to include more than three judges. PTAB SOP 1, 2–5 (§§ II, III) (Rev. 14); *see id.* at 2 (introductory language explaining that the Director has delegated to the Chief Judge the authority to designate panels under 35 U.S.C. § 6); *see also In re Alappat*, 33 F.3d 1526, 1532 (Fed. Cir. 1994) (*abrogated on other grounds by In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008)) (providing that Congress “expressly granted the [Director] the authority to designate expanded Board panels made up of

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<sup>1</sup> IPR2017-01186, IPR2017-01197, IPR2017-01200, IPR2017-01213, IPR2017-01214, and IPR2017-01219 include similar papers and exhibits. Accordingly, all citations are to IPR2017-01186 unless otherwise noted.

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 IPR2017-01200 (Patent 8,718,185 B2)  
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more than three Board members.”). The Chief Judge may consider panel expansions upon a “suggestion” from a judge, panel, or party in a post-issuance review created by the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), such as an *inter partes* review. *Id.* at 3–4; *see also Apple Inc. v. Rensselaer Polytechnic Inst.*, Case IPR2014-00319, slip op. at 2 n.1 (PTAB Dec. 12, 2014) (Paper 20) (expanded panel) (per curiam).

The standard operating procedure sets forth some of the reasons for which the Chief Judge may expand a panel. PTAB SOP 1, 3–4 (§ III.A). For example, an expanded panel may be appropriate when “[t]he proceeding or AIA Review involves an issue of exceptional importance.” *Id.* (§ III.A.1). An expanded panel may also be appropriate when “necessary to secure and maintain uniformity of the Board’s decisions.” *Id.* (§ III.A.2).

In this case, the Chief Judge has considered whether expansion is warranted, and has decided to expand the panel due to the exceptional nature of the issues presented.<sup>2</sup> As we discuss further below, the issues of whether a State can claim Eleventh Amendment immunity and whether such immunity may be waived have been raised in this proceeding. These issues are of an exceptional nature. The Eleventh Amendment immunity issue

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<sup>2</sup> Consistent with the standard operating procedure, the Judges on the merits panel in this case have been designated as part of the expanded panel, and the Chief Judge, Deputy Chief Judge, and Vice Chief Judges Bonilla and Weidenfeller have been added to the panel. PTAB SOP 1, 4 (§ III.E).

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continues to be raised in multiple cases before the Board. We have not had occasion to address the waiver issue before, but it has been raised in multiple cases before the Board. The Chief Judge also has determined that an expanded panel is warranted to ensure uniformity of the Board's decisions involving these issues.

### III. ANALYSIS

Petitioner does not dispute that Patent Owner is a State entity that can claim sovereign immunity under the Eleventh Amendment, at least with respect to this Motion. *See* Mot. 8–11; Opp. 1–2. The parties disagree, though, about whether Eleventh Amendment immunity can be invoked in an *inter partes* review. Mot. 2–8; Opp. 13–15. We agree with Patent Owner that an “IPR is an adjudicatory proceeding of a federal agency from which state entities are immune.” Mot. 7–8 (*citing Covidien LP v. Univ. of Fla. Research Found., Inc.*, Case IPR2016-01274 (PTAB Jan. 25, 2017) (Paper 21) and *NeoChord, Inc. v. Univ. of Md., Balt.*, Case IPR2016-00208 (PTAB May 23, 2017) (Paper 28)). Nevertheless, we determine, for the reasons discussed below, that Patent Owner has waived its Eleventh Amendment immunity by filing an action in federal court alleging infringement of the patent being challenged in this proceeding.

#### A. Patent Owner May Assert Eleventh Amendment Immunity

The Board has previously determined that Eleventh Amendment immunity is available to States as a defense in an *inter partes* review

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proceeding. *Reactive Surfaces Ltd., LLP v. Toyota Motor Corp.*, Case IPR2016-01914 (PTAB July 13, 2017) (Paper 36) (granting in part motion to dismiss and dismissing Regents of the University of Minnesota from an *inter partes* review proceeding); *NeoChord, Inc. v. Univ. of Md., Balt.*, Case IPR2016-00208 (PTAB May 23, 2017) (Paper 28) (granting motion to dismiss and terminating an *inter partes* review); *Covidien LP v. Univ. of Fla. Research Found. Inc.*, Case IPR2016-01274 (PTAB Jan. 25, 2017) (Paper 21) (granting motion to dismiss and dismissing three Petitions requesting an *inter partes* review). We agree.

The Supreme Court has held that the rules and practice of procedure of the Federal Maritime Commission are sufficiently similar to civil litigation for the State of South Carolina to raise Eleventh Amendment immunity as a defense to participation in a proceeding seeking damages and injunctive relief against the South Carolina State Ports Authority. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 757–58, 765–66 (2002) (“*FMC*”). Applying *FMC*, the Federal Circuit has held that Eleventh Amendment immunity is available in interference proceedings before the Board of Patent Appeals and Interferences (the predecessor of the PTAB) because interferences are sufficiently similar in procedure to civil litigation, i.e., they involve adverse parties, examination and cross-examination by deposition of witnesses, production of documentary evidence, findings by an impartial federal adjudicator, and power to implement the decision. *Vas-Cath, Inc. v. Curators of Univ. of Mo.*, 473 F.3d 1376, 1381–82 (Fed.

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Cir. 2007).

Patent Owner asserts that *inter partes* reviews are sufficiently similar in procedure to interferences and other adjudicatory proceedings such that Eleventh Amendment immunity is available as a defense in both types of proceedings. *See* Mot. 3–8. We agree with Patent Owner. In keeping with *Vas-Cath*, we determine that *inter partes* reviews, like interferences, are similar to court proceedings inasmuch as they involve adverse parties, examination of witnesses, cross-examination by deposition, findings by an impartial adjudicator, power to implement the adjudicator’s decision, the ability of the adjudicator to set a time for filing motions and for discovery, and application of the Federal Rules of Evidence. *See generally NeoChord*, slip op. at 6–7 (Paper 28). Patent Owner, therefore, is entitled to rely on its Eleventh Amendment immunity in *inter partes* reviews, as appropriate.<sup>3</sup> That determination, however, does not end our inquiry in this case.

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<sup>3</sup> As the Supreme Court and my concurring colleague correctly note, in many “significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2143 (2016). Indeed, we rely on the differences between court and agency proceedings in reaching our determination that Patent Owner has waived its Eleventh Amendment immunity in this matter. *See infra* at 9–10. We respectfully disagree, nevertheless, that those differences alone provide a sufficient basis to conclude that “Congress had the power to compel States to surrender their sovereign immunity” wholesale in a proceeding that so closely resembles court proceedings. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635 (1999).

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 IPR2017-01214 (Patent RE45,230 E)  
 IPR2017-01219 (Patent RE45,230 E)

*B. Patent Owner Waived its Eleventh Amendment Immunity*

We must now decide whether, and in what circumstances, a State may waive its Eleventh Amendment immunity before us. Previous Board decisions have not involved a State that filed an action in federal court alleging infringement of the same patent being challenged in the petition for an *inter partes* review. Here, Patent Owner has filed such an action, and, accordingly, Petitioner argues that Patent Owner waived its Eleventh Amendment immunity by filing such an action. Opp. 2–13. We agree with Petitioner that the filing of an action in federal court alleging infringement effectively waives Patent Owner’s Eleventh Amendment immunity defense.

A State’s waiver of Eleventh Amendment immunity in one action does not necessarily extend to a separate action, even if the separate action involves the same parties and the same subject matter. *Biomedical Patent Mgmt. Corp. v. Cal., Dep’t of Health Servs.*, 505 F.3d 1328, 1339 (Fed. Cir. 2007) (“*BPMC*”). But there is not “a bright-line rule whereby a State’s waiver of sovereign immunity can never extend to a . . . separate lawsuit.” *Id.* Instead, the rule governing waiver of immunity by litigation conduct rests on the need to avoid unfairness and inconsistency, and to prevent a State from selectively using its immunity to achieve a litigation advantage. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002); *BPMC*, 505 F.3d at 1340.

The facts presented here are similar to those in *Regents of Univ. of New Mexico v. Knight*, 321 F.3d 1111, 1125–26 (Fed. Cir. 2003) (“*Knight*”),



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 IPR2017-01214 (Patent RE45,230 E)  
 IPR2017-01219 (Patent RE45,230 E)

where a State was found to have waived its Eleventh Amendment immunity as to compulsory counterclaims. Specifically, the Federal Circuit explained that “because a state as plaintiff can surely anticipate that a defendant will have to file any compulsory counterclaims or *be forever barred from doing so*, it is not unreasonable to view the state as having consented to such counterclaims.” *Id.* at 1126 (emphasis added). Similarly, a party served with a patent infringement complaint in federal court must request an *inter partes* review of the asserted patent within one year of service of that complaint or *be forever barred from doing so*. See 35 U.S.C. § 315(b). Thus, it is reasonable to view a State that files a patent infringement action as having consented to an *inter partes* review of the asserted patent.<sup>4</sup> See *Knight*, 321 F.3d at 1126. That is particularly true where, as here, the State filed its patent infringement action well after the AIA was enacted. See, e.g., Mot. 2 (indicating that Patent Owner filed suit in November, 2014).

Further, when a State files a patent infringement action in federal court, it is the State’s litigation conduct that triggers the one-year statutory bar for an *inter partes* review. See 35 U.S.C. § 315(b). It would be unfair and inconsistent to allow a State to avail itself of the federal government’s

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<sup>4</sup> We do not conclude that an *inter partes* review is a compulsory counterclaim under Fed. R. Civ. P. 13(a). Rather, we determine that the rationale given in *Knight*, 321 F.3d at 1126, for holding that a State waived its Eleventh Amendment immunity as to a compulsory counterclaim similarly supports determining that Patent Owner waived its Eleventh Amendment immunity as to this proceeding.

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authority by filing a patent infringement action in federal court, but then selectively invoke its sovereign immunity to ensure that a defendant is barred from requesting an *inter partes* review of the asserted patent from a different branch of that same federal government. *See Lapidus*, 535 U.S. at 619–20; *Tegic Commc'ns Corp. v. Bd. of Regents of Univ. of Tex. Sys.*, 458 F.3d 1335, 1341–42 (Fed. Cir. 2006) (emphasizing the need “to look to the substantive charge, not to the procedure for obtaining relief” in order to avoid the “‘seriously unfair results’ [that] could result if a state were permitted to file suit in a federal court and at the same time claim immunity against the defendant’s claims arising from the same conduct” (quoting *Knight*, 321 F.3d at 1125)).

In fact, Patent Owner acknowledged as much in its motion to dismiss in *Reactive Surfaces*. IPR2016-01914, Paper 23, 18–20. In that case, Patent Owner addressed a hypothetical (as of the date of this decision) scenario in which a patent assertion entity (“PAE”) assigned ownership of a patent to a State in order to invoke Eleventh Amendment immunity and avoid an *inter partes* review. *Id.* at 18. Patent Owner acknowledged that the State would have to join any infringement action, and that “[b]y voluntarily invoking federal jurisdiction in the infringement litigation, the [S]tate entity could be deemed to have waived its sovereign immunity to the IPR process, which would deprive the PAE of any litigation advantage it might have hoped for.” *Id.* at 19–20. Patent Owner attempts to distinguish that hypothetical scenario from this case because it involved a State acting together with a PAE. Reply



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4. We fail to see, though, how a State selectively asserting its sovereign immunity to achieve a litigation advantage for itself, rather than a PAE, is less unfair to a defendant.

The crux of Patent Owner's argument in this proceeding is that any waiver of Eleventh Amendment immunity should be limited to the venue where Patent Owner filed its action. Mot. 12–15 (citing *AI23 Sys., Inc. v. Hydro-Quebec*, 626 F.3d 1213, 1219–20 (Fed. Cir. 2010); *Tegic*, 458 F.3d at 1342, 1344–45); Reply 3–4. Although waiver is generally limited in this way in our court system, which is arranged geographically, it is not a bright-line rule. *BPMC*, 505 F.3d at 1339. Indeed, “[a]n animating principle of *Lapides* is that a state should not reap litigation advantages through its selection of a forum and subsequent assertion of sovereign immunity as a defense.” *Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int’l Software, Inc.*, 653 F.3d 448, 466 (7th Cir. 2011). And the authority on which Patent Owner relies does not address waiver with respect to separate proceedings in a single forum created by Congress, such as the post-issuance review proceedings under the AIA.

In any event, the cases cited by Patent Owner are distinguishable. In those cases, a private party was not permitted to assert claims against a State in a different forum from the one in which the State filed its action. *AI23 Sys.*, 626 F.3d at 1219–20; *Tegic*, 458 F.3d at 1342–44. The private party, however, did not suffer any substantial unfairness from that result because the private party could still assert the exact same claims in the forum where

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the State filed its action. *A123 Sys.*, 626 F.3d at 1216 (“A123 had an adequate remedy because UT has waived Eleventh Amendment immunity in the Northern District of Texas.”); *Tegic*, 458 F.3d at 1344 (“It has not been shown . . . that the adjudication of Tegic’s claims of noninfringement and invalidity is not available in the Texas action.”).

In contrast, here, Petitioner cannot seek an *inter partes* review in the district court where Patent Owner filed its patent infringement action. We recognize that Petitioner may be able to assert a defense and/or counterclaim challenging the validity of the asserted patent in the district court where Patent Owner filed its action. But, even though an *inter partes* review has characteristics that are similar to district court litigation, the proceedings are not the same. *See Cuozzo*, 136 S. Ct. at 2143–44. Therefore, allowing Patent Owner to assert its Eleventh Amendment immunity in this proceeding selectively so as to bar Petitioner from obtaining the benefits of an *inter partes* review of the asserted patent would result in substantial unfairness and inconsistency.<sup>5</sup> *See Lapides*, 535 U.S. at 620.

For the foregoing reasons, we determine that Patent Owner has waived its Eleventh Amendment immunity by filing an action in federal court alleging infringement of the patent being challenged in this proceeding.

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<sup>5</sup> Patent Owner filed patent infringement actions against Petitioner’s customers, and then later consented to Petitioner joining those actions as an intervenor. Ex. 1015, 2–3; Ex. 1052, 2–3.

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ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Patent Owner's Motion to Dismiss is *denied*.

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ERICSSON INC. and TELFONAKTIEBOLAGET LM ERICSSON,  
Petitioner,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,  
Patent Owner.

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Cases IPR2017-01186 (Patent 8,774,309 B2)  
IPR2017-01197 (Patent 7,251,768 B2)  
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IPR2017-01219 (Patent RE45,230 E)

Before DAVID P. RUSCHKE, *Chief Administrative Patent Judge*,  
SCOTT R. BOALICK, *Deputy Chief Administrative Patent Judge*,  
JACQUELINE WRIGHT BONILLA, SCOTT C. WEIDENFELLER,  
*Vice Chief Administrative Patent Judges*, JENNIFER S. BISK,  
ROBERT J. WEINSCHENK, and CHARLES J. BOUDREAU,  
*Administrative Patent Judges*.

BISK, *Administrative Patent Judge*, concurring.

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I write separately to express my view that a state university, having availed itself of Patent Office procedures to secure patent rights from the public, may not subsequently invoke sovereign immunity as a shield against reconsideration by the Patent Office in an *inter partes* review proceeding of whether the agency improvidently granted a patent monopoly in the first instance.<sup>1</sup>

Sovereign immunity has been found to attach to administrative proceedings where those actions resemble civil litigation. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753–761 (2002) (“*FMC*”). *Inter partes* review cannot be said, however, to bear the same marks of civil litigation as previously considered administrative matters. Obvious differences exist, for example, between the U.S. Patent and Trademark Office’s review of a patent procured from that agency by a State, and the Federal Maritime Commission’s review of a State’s refusal to berth a cruise ship at port facilities within the sovereign borders of a State that are managed by a State authority. *See FMC*, 535 U.S. at 748–49. The adjudication at issue in *FMC*, after all, implicated a power with unmistakably sovereign characteristics—the ability of a State to control access to its territory.

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<sup>1</sup> I am mindful that resolution of the instant motion requires us to address important constitutional issues that “are unsuited to resolution in administrative hearing procedures,” *Califano v. Sanders*, 430 U.S. 99, 109 (1977), and further highlight that “access to the courts is essential to the decision of such questions.” *Id.*

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Far removed from any question of territorial control, *inter partes* review represents no more than the Patent Office's reconsideration of its initial decision to "take[] from the public rights of immense value, and bestow[] them upon the patentee" in the form of a patent grant. *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888). As the Supreme Court has explained, the "basic purpose[]" of *inter partes* review is "to reexamine an earlier agency decision," and thereby "help[] protect the public's 'paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.'" *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)); *see also MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1293 (Fed. Cir. 2015) (explaining that "patent rights are public rights," and "their validity [is] susceptible to review by an administrative agency."). Allowing a State to secure monopoly rights from the Patent Office, while simultaneously foreclosing Patent Office reappraisal of that decision via *inter partes* review, would thwart "the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

The essential nature of *inter partes* review as a reevaluation by the Patent Office of its decision to grant a patent, rather than as an administrative analog to civil litigation, is evident from the relief available, which differs both in degree and in kind from that afforded in federal district

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court. At its core, *inter partes* review is a circumscribed *in rem* proceeding, in which the Patent Office exercises jurisdiction over the patent challenged, rather than the parties named; “it does not implicate States’ sovereignty to nearly the same degree as other kinds of jurisdiction.” *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006). Such proceedings are authorized solely to address whether the Patent Office should “cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 [of the Patent Act] and only on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b). Once *inter partes* review is commenced, the patent owner may, as a matter of right, “file 1 motion to amend the patent,” 35 U.S.C. § 316(d)—“just what he would do in the examination process.” *Cuozzo*, 136 S. Ct. at 2145 (citing 35 U.S.C. § 316(d) (2012)). No equivalent procedure is available in the federal district courts, which assess the validity only of static patent claims.

The ultimate remedy available from *inter partes* review likewise mirrors the patent examination process more closely than it does federal district court litigation, where a patent monopoly may be enforced through charges of patent infringement. Without resort to the damages or injunctive relief that may be awarded when infringement is proved in federal court, the lone remedy issuable by the Patent Office in an *inter partes* review proceeding is the publication, by the Director, of a certificate canceling, confirming, or amending the challenged claims. 35 U.S.C. § 318(b). In addition, the freedom of the Director to “stay, transfer, consolidat[e],



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terminat[e],” or otherwise determine how either matter should proceed when a patent is concurrently subject to an *inter partes* review and another action in the Office, 35 U.S.C. § 315(d), further differentiates *inter partes* review from civil litigation.

*Inter partes* review does not seek to resolve relationships between parties, or even require that the petitioner have Article III standing to proceed. *See* 35 U.S.C. § 311(a). Indeed, notwithstanding the absence of an existing legal dispute concerning the patent-in-question, so long as a prospective petitioner “is not the owner of [that] patent,” that party is eligible, subject to additional statutory provisions, to file a petition for *inter partes* review. 35 U.S.C. § 311(a). Consistent with this focus on the patent, rather than on the parties, participation by the parties subsequent to institution is not required for an *inter partes* review to go forward. 35 U.S.C. § 317(a) (“If no petitioner remains in the *inter partes* review, the Office may terminate the review or proceed to a final written decision under section 318(a).”). Even in the event of settlement between the parties, the Board remains free to “independently determine any question of jurisdiction, patentability, or Office practice.” 37 C.F.R. § 42.74(a). Similarly, the Patent Office “may intervene in a later judicial proceeding” to defend its cancellation of an improperly granted patent, “even if the private challengers drop out.” *Cuozzo*, 136 S. Ct. at 2144 (emphasis omitted); *see* 35 U.S.C. § 143.



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Indeed, the Supreme Court has emphasized these aspects of *inter partes* review in its recognition that in “significant respects, *inter partes* review is less like a judicial proceeding and more like a specialized agency proceeding.” *Cuozzo*, 136 S. Ct. at 2143; *see also Achates Reference Publ’g, Inc. v. Apple Inc.*, 803 F.3d 652, 657–58 (Fed. Cir. 2015) (holding that procedural limits placed on when certain parties must file for review do not relate to the Board’s ultimate authority to invalidate a patent); 35 U.S.C. § 303(a) (“On his own initiative, and any time, the Director may determine whether a substantial new question of patentability is raised by patents and publications discovered by him or cited under the provisions of section 301 or 302.”).

To my eye, therefore, far from implicating the sovereignty or dignity of the states, *inter partes* review simply provides a streamlined, specialized mechanism by which the Patent Office may reconsider a patent grant and correct any mistake. Accordingly, because *inter partes* review neither “walks, talks, [nor] squawks” like a lawsuit, *FMC*, 535 U.S. at 757 (internal quotation omitted), I conclude that sovereign immunity does not bar the Patent Office from conducting *inter partes* review of a patent owned by a state university. Thus, while I agree with my colleagues that Patent Owner’s Motion to Dismiss should be denied, I reach that conclusion for markedly different reasons.

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Patent 5,859,601

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