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 LIMITED OBJECTION TO MOTION TO SELL PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES COMBINED WITH BRIEF AND WITH NOTICE OF OPPORTUNITY FOR HEARING AND NOTICE OF HEARING AND BRIEF IN SUPPORT

Twitter, Inc. ("Twitter"), a party-in-interest in the above referenced bankruptcy case, by and through its undersigned counsel, respectfully files this limited objection and brief in support (this "**Limited Objection**") to the *Motion to Sell Property Free and Clear of Liens, Claims, and Encumbrances Combined With Brief and With Notice of Opportunity for Hearing and Notice of Hearing* [Dkt. No. 41] (the "**Sale Motion**") filed by Douglas N. Gould, Trustee ("**Trustee**") for YouToo Technologies, LLC, the Chapter 7 debtor ("**Debtor**"). In support of this Limited Objection, Twitter respectfully states as follows:

BACKGROUND

1. The Debtor filed the above-referenced case under Chapter 7 of Title 11 of the United States Code (the "**Bankruptcy Code**") on November 30, 2017 (the "**Petition**

Date"). Thereafter, the Trustee was appointed Chapter 7 trustee for the Debtor's bankruptcy estate.

2. On February 2, 2018, Twitter filed *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 for Opportunity for Hearing* [Dkt. No. 21] (the "**Stay Motion**").

3. As set forth in more detail in the Stay Motion, prior to the Petition Date, Twitter filed several petitions requesting *inter partes* review of (i) U.S. Patent No. 9,083,997, (ii) U.S. Patent No. 8,601,506, and (iii) U.S. Patent No. 8,464,304 (collectively, the "**Challenged Patents**") with the Patent and Trial Appeal Board (the "**PTAB**") of the United States Patent and Trade Mark Office (the "**USPTO**"). The PTAB has "instituted" *inter partes* review proceedings ("**IPR Proceedings**") for Twitter's challenges to the Challenged Patents based on the PTAB's findings that there is a reasonable likelihood that Twitter will prevail on one or more of those challenges in front of the PTAB.[1]

4. A hearing on Twitter's request that the Court determine that IPR Proceedings were excluded from the automatic stay under Bankruptcy Code § 362(b)(4) was held on March 21, 2018. The Court denied the motion, holding that the automatic

[1] While the Trustee states that the "Patents" are the subject of a proceeding pending in front of the PTAB and references proceeding number IPR2017-00829, that is only one of the four pending IPR Proceedings. Certain of the Challenged Patents are also subject to proceeding numbers IPR2017-00830, IPR2017-00113 and IPR2017-001131.

stay does apply to IPR Proceedings. The parties have agreed to continue the hearing as to Twitter's alternative request that the Court lift the automatic stay with respect to the IPR Proceedings.

5. Prior to the Petition Date, the Debtor sued Twitter for patent infringement on the Challenged Patents in the case styled and numbered *Youtoo Technologies LLC v. Twitter, Inc.*, Case No. 3:16-cv-00764-N, in the United States District Court for the Northern District of Texas, Dallas Division (the "**Patent Litigation**"). Twitter moved to dismiss the Debtor's infringement claims on U.S. Patent Nos. 8,464,304 and 8,601,506 on the grounds that the claimed inventions were unpatentable under 35 U.S.C. § 101.[2] The District Court granted the motion to dismiss, holding that U.S. Patent Nos. 8,464,304 and 8,601,506 were invalid, and dismissing the Debtor's claims for infringement of those two patents.[3] Twitter has asserted several defenses concerning U.S. Patent No. 9,083,997 (the "**'997 Patent**"), including failure to mark, invalidity, non-infringement, and the Debtor's lack of standing to assert any claim on the '997 Patent. Twitter has also brought a counterclaim for declaratory judgment that the '997 Patent is invalid.[4]

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[2] *See* Twitter's Partial Motion to Dismiss First and Second Claims of Infringement for Failure to State a Claim Pursuant to 35 U.S.C. §101 (Patent Litigation Docket. No. 28).

[3] *See* Order (Patent Litigation Docket No. 39). The District Court *sua sponta* certified its order invalidating U.S. Patent Nos. 8,464,304 and 8,601,506 for "immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Id.* The Debtor petitioned the Federal Circuit for leave to appeal the court's order, but the appellate court declined to take the appeal. *Youtoo Technologies LLC v. Twitter, Inc.*, No. 17-106, Dkt. No. 12 (Fed. Cir. Dec. 22, 2016).

[4] *See* Twitter's Answer, Affirmative Defenses, and Counterclaim to Plaintiff's Amended Complaint, Case No. 3:16-cv-00764-N (Patent Litigation Docket. No. 87).

6. Further, prior to the Petition Date, Twitter informed the Debtor that Twitter will seek a finding by the District Court that the Patent Litigation is an exceptional case that warrants an award of fees and sanctions to Twitter under 35 U.S.C § 285 based on the failure to dismiss the remaining claims in the Patent Litigation despite overwhelming evidence that the invention claimed by the '997 Patent was unquestionably "in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States." *See* pre-AIA 35 U.S.C. § 102(b). Twitter asserts that each element of the Debtor's asserted claims was practiced, publically used, and commercially sold *at least* four years prior to filing the application that resulted in the '997 Patent. In the event that the Patent Litigation continues with the Buyer (as hereafter defined) or some other party stepping into the shoes of the Debtor in that litigation, Twitter will (a) vigorously defend itself, (b) continue to pursue its affirmative defenses and its counterclaim for declaratory judgment, and (c) seek to recover its attorneys' fees and any other sanctions available under 35 U.S.C. § 285.

7. On March 13, 2018, the Trustee filed the Sale Motion, seeking an order authorizing the sale of the Debtor's interests in certain patents and other assets of the estate to Arundel Ventures, LLC (the "**Buyer**") free and clear of liens, claims and other interests in the patents, other than the perfected security interests of the alleged Secured Creditors' claims. The Challenged Patents are included in the "Patents and Purchased Assets" to be sold to the Buyer.

LIMITED OBJECTION

8. Twitter files this Limited Objection seeking clarification in any "Sale Order" that (a) the challenges raised to the Challenged Patents in the IPR Proceedings, (b) all defenses available to Twitter in the Patent Litigation, including but not limited to defenses related to failure to mark, invalidity, non-infringement, and the Debtor's lack of standing, (c) Twitter's counterclaim for declaratory judgment, and (d) Twitter's claim for fees and sanctions under 35 U.S.C. § 285 for continuation of the Patent Litigation will survive the sale of the Patents and Purchased Assets to the Buyer. Twitter believes the requested relief is appropriate and reasonable in light of the Trustee's request that the Sale Order "specifically state that the same shall be effective upon closing to remove any and all liens, claims and encumbrances from the Purchased Assets other than the Secured Creditors' prior perfected security interests."[5]

9. Specifically, Twitter requests that any Sale order provide that it is without prejudice to: (a) the continuation of the pending IPR Proceedings in front of the PTAB and Twitter's continued participation in those proceedings, (b) Twitter's right to fully defend against any claims or causes of action asserted in the Patent Litigation, which includes asserting Twitter's affirmative defenses and pursuing its declaratory judgment claim, (c) the effect or validity of any prior rulings issues in the Patent Litigation or the

[5] *C.f. Silica Tech, L.L.C. v. J-Fiber, GmbH*, Case No. 06-10293-WGY, 2009 WL 2579432, at *28 (D. Mass. Aug. 19, 2009) ("Prudently, neither party questions the authority of the Massachusetts bankruptcy court to condition the sale of [the debtor's] assets subject to the 'surviving claims' of [a non-debtor patent litigant]."); *Diego, Inc. v. Hsiao-Shih Chang (In re IPDN Corp.)*, 352 B.R. 870, 877 (Bankr. E.D. Mo. 2006) ("[A] sale order cannot be read to affect purported property interests that lay outside the estate.").

IPR Proceedings, and (d) Twitter's right to pursue fees and sanctions under 35 U.S.C. § 285 against the Buyer in the event that the Buyer continues the Patent Litigation.

10. While Twitter believes there is sufficient ambiguity in the Sale Motion to necessitate this objection, Twitter is hopeful that it will be able to reach an agreement with the Trustee and Buyer regarding language sufficient to resolve Twitter's concerns.

11. Further, Twitter objects to the Sale Motion for lack of information in two areas. First, the Sale Motion does not provide sufficient information regarding the Buyer's financial ability to consummate the sale or the anticipated time line to close the sale. A significant delay in the closing of the sale would be prejudicial to Twitter by further delaying the IPR Proceedings and Twitter's ability to pursue final resolution of the Patent Litigation.

12. Second, the Sale Motion does not indicate whether the Buyer has been informed of its continuing obligations to, and has committed to, preserve records related to the Patent Litigation. Those obligations are critical to Twitter's ability to fully pursue appropriate discovery and remedies in the Patent Litigation.

FOR ALL THE ABOVE STATED REASONS, Twitter requests that the Court require modifications to the Sale Order sufficient to address the objections raised in this Limited Objection and grant such other relief as the Court deems just and proper.

DATED: April 3, 2018

Respectfully submitted,

By: *s/ Tami J. Hines*

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