UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.,

Petitioner

- vs. –

YOUTOO TECHNOLOGIES, LLC,

Patent Owner

Case IPR2017-00830
Patent 9,083,997

PETITIONER'S CONSOLIDATED OPPOSITION TO MOTIONS TO WITHDRAW AS LEAD AND BACKUP COUNSEL OF RECORD

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I. Introduction

Petitioner Twitter, Inc. ("Petitioner") opposes Youtoo Technologies, LLC's backup counsel's Motion to Withdraw as Backup Counsel of Record (Paper 14) and Youtoo's lead counsel's Motion to Withdraw (Paper 15) (together, the "Motions") for four reasons. *First*, evidence Petitioner received from third parties indicates that Youtoo may not own the '997 patent. The counsels seeking to withdraw are in a prime position to explain Youtoo's claims of ownership and, if necessary, to identify the true patent owner or additional real parties-in-interest. The counsels should not be discharged from the case until the ownership issue is resolved. *Second*, Youtoo is using its change of counsel as a pretext to seeking delays and modification of the Scheduling Order. Such tactics are improper. *Third*, Youtoo has not filed an updated power of attorney, and the Board should not authorize any dismissal without Youtoo making such arrangements. *Fourth*, the Motions fail to set forth any good cause for withdrawal.

For these four reasons, explained more fully below, the Board should not authorize any of Youtoo's counsel to withdraw under 37 C.F.R. § 42.10(b).

II. The Board Should Deny the Motions for Four Independent Reasons.

A. No Counsel Should be Discharged Until Ownership of the '997 Patent is Resolved.

Backup counsel Stephen L. Levine is a partner in the firm of Carrington, Coleman, Sloman & Blumenthal, LLP ("CCSB"). Mr. Levine and CCSB are also

Youtoo's counsel in the co-pending district court litigation,[1] where serious questions have arisen about whether Youtoo actually owns any rights in the '997 patent. Specifically, evidence Petitioner obtained from third parties in that litigation indicates that in 2014 Youtoo assigned its rights in U.S. Patent Application No. 13/674,768 to a third party, Heartland Bank. Ex. 1023 at 1-2, 6. That patent application subsequently issued as the '997 patent. Ex. 1001 at 1. Youtoo has not disclosed to the Board the assignment to Heartland Bank, or Heartland Bank's potential role as either the true patent owner or a potential real party-in-interest.

While this Opposition is Petitioner's first opportunity to bring the Board's attention to the questions surrounding Youtoo's alleged ownership, the issue has been developing in the district-court proceeding for some time. At Petitioner's request, the district court ordered Youtoo to produce documents concerning the "ownership of the '997 Patent" by June 14, 2017. Ex. 1020 at 3, 5. Youtoo failed to comply with that order, forcing Petitioner to file a motion asking the district court to hold Youtoo and CCSB in contempt and impose significant sanctions against them for their conduct in withholding potentially dispositive evidence. Ex. 1021 at 2. Given their long representation of Youtoo and several related entities, Mr. Levine and CCSB are in a prime position to assist with clarifying the true

[1] *Youtoo Technologies LLC v. Twitter, Inc.*, No. 3:16-cv-764-N (N.D. Tex.).

ownership of the ’997 patent. Similarly, as Youtoo’s lead counsel, Scott McKeown and his former law firm, Oblon, McClelland, Maier & Neustadt,LLP, have presumably been preparing to address the ownership issue in the Patent Owner Response and, therefore, may also be in a position to assist. To the extent that additional discovery may be warranted on this issue, Youtoo’s current counsels are likely to know whether relevant information concerning the ownership of the ’997 patent exists and, if so, its location.

The question of who owns the ’997 patent is fundamental to this proceeding because only the ’997 patent’s owner may act in this proceeding. *See Microsoft Corp. v. Global Techs., Inc.*, Case No. IPR2016-00663, Paper 22 at 11 (PTAB Mar. 21, 2017) (*citing* 37 C.F.R. § 3.54); *see also* 37 C.F.R. § 42.8(b)(1) (requiring a patent owner to identify all real parties-in-interest). Yet at the same time it is obscuring the ownership of the ’997 patent, Youtoo is trying to remove from the picture the counsels who are in the best position to know whether and where relevant ownership information exists. For all of these reasons, the Board should not permit any of Youtoo’s counsels to withdraw before the issue concerning ownership of the ’997 patent is resolved.

B. The Board Should Not Allow Youtoo to Manipulate the Schedule by Changing its Counsels.

Since May 16, 2017, three attorneys with different firms have represented Youtoo. Paper 9 at 2. On October 30, 2017—just two weeks before the Patent

Owner's Response is due—Youtoo's lead counsel (Scott McKeown) and one backup counsel (Stephen L. Levine) sought to withdraw.[2] On the *same day*, Youtoo's only counsel not seeking to withdraw (Spencer Patterson) called Petitioner's lead counsel to request extensions to the Board's Scheduling Order.

Youtoo's intention to use its counsels' withdrawals as a basis to seek delays and modification of the Board's Scheduling Order is apparent from the coordinated actions of all of Youtoo's present counsels of record. But Youtoo's own actions created this situation. Indeed, backup counsel Mr. Levine is not withdrawing because of any infirmity or conflict. As Mr. Levine's motion explains, Youtoo told Mr. Levine to withdraw because it wants "to be represented by different counsel." Paper 14 at 2. Youtoo should not be allowed to manipulate the schedule of this proceeding by dismissing its counsel.

Further, Youtoo's lead counsel Mr. McKeown stated in his October 30 email to the Board that he is "unable to proceed" because he joined a new firm "in August." It is unclear why Youtoo's lead counsel did not update his contact information by filing an updated mandatory notice within 21 days of his change of firms. *See* 37 C.F.R. § 42.8(a)(3). While Mr. McKeown did not inform Petitioner or the Board of these developments until this week, he presumably informed his client Youtoo in a timely fashion. The Motions do not explain why Youtoo did not

[2] Patent Owner's Response is due November 13, 2017. Paper 13 at 6.

arrange for new counsel in August, which suggests that it may have planned for months to use Mr. McKeown's eventual withdrawal as an excuse to delay these proceedings.

Youtoo and all of its counsels have known the due date for the Patent Owner's Response since August 11, when the Board issued its Scheduling Order. Paper 13 at 6. As Mr. McKeown highlights in his motion to withdraw, Youtoo's power of attorney appointed *all* of the patent practitioners at Oblon, McClelland, Maier & Neustadt, LLP to represent it. *See* Paper 15 at 1; Paper 8 at 2. All three firms representing Youtoo had more than enough time to prepare the Response. None should be discharged if it would hinder Youtoo's ability to meet the long-standing deadline.[3]

Moreover, extending Due Date 1 would prejudice Petitioner, and Petitioner opposes any request to modify Due Date 1. Specifically, Youtoo and its present counsels made the strategic decision to waive their opportunity to depose Petitioner's expert. Per the Board's rules, the deposition would have had to occur by November 3, 2017, and Youtoo was required to file a notice of deposition by October 20, 2017. *See* 37 C.F.R. § 42.53(d)(2) (cross-examination to occur "more than a week before the filing date for any paper in which the cross-examination

[3] For the sake of clarity, this argument presumes that Youtoo is entitled to act as Patent Owner in this proceeding.

testimony is expected to be used") & § 42.53(d)(4) (notice of deposition due "at least ten business days before a deposition"). Youtoo made no request to depose Petitioner's expert and, therefore, waived the opportunity. Youtoo should not be permitted to use an eleventh-hour change of counsel as a ruse to reopen the patent owner discovery period. Allowing Youtoo to have a second chance at discovery now would only incentivize other parties appearing before the Board to engage in similar tactics.

As the Board knows, *inter partes* review proceedings are time-sensitive (particularly when, as here, there is co-pending litigation) and are intended to result in a "just, speedy, and inexpensive resolution." 37 C.F.R. § 42.1(b). Youtoo's requests to replace two of its three counsels just days before Due Date 1 is antithetical to those goals, as it prejudices Petitioner, delays this proceeding, and increases in the costs for all parties. The Motions should be denied.

C. Youtoo Has Not Filed the Required Power of Attorney.

If Youtoo's backup and lead counsel wish to simultaneously withdraw, Youtoo must first designate appropriate replacements by filing an updated power of attorney. 37 C.F.R. § 42.10. Youtoo has not done so. Thus, the Board should not grant any of Youtoo's counsel permission to withdraw without Youtoo formalizing its arrangements for substitute counsel and filing an updated power of attorney. *See Masterimage 3D, Inc. v. Reald Inc.*, Case No. IPR2015-00035, Paper

85 at 3-4 (PTAB Jan. 13, 2017) (denying petitioner's counsel's request to file a motion to withdraw because petitioner had not filed a new power of attorney reflecting the change in counsel in accordance with 37 C.F.R. § 42.10(b)).

D. Mr. Levine's Motion Fails to Set Forth Good Cause for Withdrawal.

Mr. Levine and CCSB seek to withdraw under the "good cause" catchall provision of 37 C.F.R. § 11.116(b)(7).[4] Paper 14 at 2. As movant, Mr. Levine and CCSB bear the burden of proof to show that they are entitled to the requested relief. 37 C.F.R. § 42.20(c).

The only "evidence" identified in Mr. Levine and CCSB's one-paragraph motion is the statement that "good cause for Movants' withdrawal exists from Youtoo's instruction to Movants to withdraw, and the desire of Youtoo to be represented by different counsel." Paper 14 at 1-2. The motion does not provide any evidence of Youtoo's "instruction" or "desire," which could presumably come in the form of the power of attorney referenced above. *See* 37 C.F.R. § 42.10(b). Furthermore, if Youtoo desires to be represented by different counsel, then Petitioner would have expected Mr. Levine and CCSB to seek to withdraw pursuant to 37 C.F.R. § 11.116(a)(3), which applies when "[t]he practitioner is

[4] Although Mr. Levine and CCSB's motion cites § 1.116(b)(7), Petitioner assumes they intended to cite § 11.116(b)(7).

discharged" by his or her client. Their decision to instead seek withdrawal under the generic rule reciting "[o]ther good cause for withdrawal" simply heightens the ambiguity of Youtoo's motivation and the need for Youtoo to clearly identify its choice of counsel in a power of attorney.

But because Youtoo has not filed an updated power of attorney—and because Mr. Levine and CCSB have no evidence of their client's instructions or desires—there is no basis for the Board to find that good cause exists for them to withdraw. Thus, their motion should be denied.

III. Conclusion

No counsel should be discharged from this proceeding until the serious question about the ownership of the '997 patent is resolved. And Youtoo's attempt to manipulate the Board's schedule by dismissing its current counsels—while failing to properly appoint its substitute counsel—is improper. Finally, Mr. Levine and CCSB have not shown that good cause exists for the Board to authorize their withdrawal. For each of these independent reasons, the Board should deny the Motions.

Respectfully submitted,

/David L. McCombs/
David L. McCombs
Counsel for Petitioner
Registration No. 32,271
HAYNES AND BOONE, LLP

Dated: November 3, 2017

PETITIONER'S EXHIBIT LIST

November 3, 2017

Ex-1001	U.S. Patent No. 9,083,997 to Harwell *et al.*
Ex-1002	Prosecution File History of U.S. Patent No. 9,083,997
Ex-1003	U.S. Patent No. 8,311,382 to Harwell *et al.*
Ex-1004	Prosecution File History of U.S. Patent No. 8,311,382
Ex-1005	U.S. Patent No. 8,464,304 to Harwell *et al.*
Ex-1006	Prosecution File History of U.S. Patent No. 8,464,304
Ex-1007	Declaration of Dr. Kevin C. Almeroth Under 37 C.F.R. § 1.68
Ex-1008	Curriculum Vitae of Dr. Kevin C. Almeroth
Ex-1009	U.S. Patent Publication No. 2012/0254925 to Nassiri
Ex-1010	Excerpts from "HTML5 Mastery Semantics, Standards, and Styling," by Bradford *et al.*
Ex-1011	1st Declaration of Dr. Ingrid Hsieh-Yee regarding Ex-1010
Ex-1012	Excerpts from WEBSTER'S NEW WORLD COMPUTER DICTIONARY, Tenth Ed. (2003).
Ex-1013	U.S. Patent Publication No. 2010/0180330 to Zhu
Ex-1014	U.S. Patent Publication No. 2008/0209451 to Michels
Ex-1015	Declaration of David Bader regarding Ex-1010
Ex-1016	Affidavit of Christopher Butler, Internet Archive regarding Ex-1010
Ex-1017	Stelter, Brian, "Their Pain is His Gain," The New York Times, August 22, 2010, pages AR15 and AR19.

Ex-1018	2nd Declaration of Dr. Ingrid Hsieh-Yee regarding Ex-1017
Ex-1019	Order (Document 99), *Youtoo Technologies, LLC v. Twitter, Inc.*, Case No. 3:16-CV-0764 (N.D. Tex. July 18, 2017) (Godbey, J).
Ex-1020	Order (Document 95), *Youtoo Technologies, LLC v. Twitter, Inc.*, Case No. 3:16-CV-0764 (N.D. Tex. May 31, 2017) (Godbey, J).
Ex-1021	Motion to Hold Youtoo Technologies, LLC in Contempt and to Issue Sanctions (Document 97), *Youtoo Technologies, LLC v. Twitter, Inc.*, Case No. 3:16-CV-0764 (N.D. Tex. July 11, 2017).
Ex-1022	Intellectual Property Assignment Agreement between Youtoo Technologies, LLC and Heartland Bank (May 14, 2014).

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Twitter, Inc.	§	IPR2017-00830
Petitioner	§	
	§	U.S. Patent No. 9,083,997
	§	
	§	

CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6, that service was made on the counsel of record for Youtoo Technologies, LLC as detailed below.

Date of service	November 3, 2017
Manner of service	Electronic mail to scott.mckeown@ropesgray.com; cpdocketmckeown@oblon.com; spatterson@gchub.com; slevine@ccsb.com; jdepumpo@shorechan.com
Documents served	Consolidated Opposition to Motions to Withdraw Exhibits 1020-1022
Persons served	Scott McKeown Spencer C. Patterson Stephen L. Levine Joseph F. DePumpo

/David L. McCombs/
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