

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TWITTER, INC.,

Petitioner

- vs. -

YOUTOO TECHNOLOGIES, LLC,

Patent Owner

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Case IPR2017-00830

Patent 9,083,997

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION  
FOR STAY

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## **I. Introduction**

Petitioner Twitter, Inc. (“Petitioner”) hereby submits the following opposition to Youtoo Technologies, LLC’s Motion for Stay (Paper 23). This proceeding should not be stayed, because the stay provisions of 11 U.S.C. § 362(a) do not apply to this proceeding. This instituted *inter partes* review is a continuation of an action by the government to enforce the government’s regulatory power, and thus, this proceeding is exempt from stay under the explicit exception of 11 U.S.C. § 362(b)(4). Even if the Board believes a stay is appropriate, Youtoo’s strategic use of its bankruptcy filing as a pretext to seeking yet further delays and modification of the Scheduling Order should not be condoned, and the PTAB should deem Youtoo to have waived its opportunity to file a patent owner response.

As explained more fully below, the Board should not stay this proceeding.

## **II. The Board Should Deny the Motion for Stay.**

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

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).

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). Here, the instant *inter partes* review satisfies both of the requirements of 11 U.S.C. § 362(b)(4) and is therefore exempt from the automatic stay.

**1. IPRs are proceedings by a governmental unit.**

First, an instituted IPR is a “continuation of an action...by a governmental unit.” 11 U.S.C. § 362(b)(4). The United States Patent and Trademark Office (“*USPTO*”) and the Patent Trial and Appeal Board are unquestionably governmental units created by Congress. *See* 35 U.S.C. §§ 1, 6.<sup>1</sup> An IPR involves

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<sup>1</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 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).

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

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 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.

Here, the Board, like the ITC, had the power to institute the IPRs, and the Board is the party with the power to continue the proceedings. The Board itself has held that “IPR 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). The adversarial nature of the IPRs is intended to assist the Board’s exercise of its regulatory responsibilities, but does not change the fact that the IPRs are proceedings by the Board as a governmental unit.

**2. The primary purpose of an *inter partes* review is to protect the public welfare, not adjudicate private rights.**

IPRs 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).

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.*

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 Board 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.”).

When tested against these criteria, IPRs are clearly excluded from the reach of the bankruptcy stay under 11 U.S.C. § 362(b)(4). The Supreme Court explained that IPRs 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 “indicate that the purpose of the proceeding is



not quite the same as the purpose of district court litigation.” *Id.* An IPR is not a proceeding to judicially determine private rights to monetary or equitable relief. Rather, the primary purpose of an IPR is to allow the Board to re-examine the agency’s own actions in issuing a patent. *Id.* IPRs 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.” *Id.* Accordingly, IPRs meet the second requirement of 11 U.S.C. § 362(b)(4) and are not subject to the bankruptcy automatic stay.

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.

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.

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

Thus, because 11 U.S.C. § 362(b)(4) exempts an instituted *inter partes* review from being subject to the stay provisions of § 362(a), the Board should not stay this proceeding.

**B. If the Board Intends to Stay the Proceeding, Youtoo Should Not be Permitted to File a Patent Owner Response**

The Board has now twice granted Youtoo an extension for filing its Patent Owner Response. Paper No. 19, Paper No. 22. And the Board noted in its Order denying counsel's withdrawal that "any future requests for extensions of time by Patent Owner in this proceeding are unlikely to be granted absent a showing of good cause." Paper 20, p. 2.

Because the automatic stay provisions of the bankruptcy code do not apply here (*see* II.A, *infra*), there is no showing of good cause, and Youtoo should not be granted yet another, indefinite, extension of time in this case. Youtoo's bankruptcy filing, like its previous attempts to change counsel, seems to be yet another calculated move to delay this proceeding.

But if the Board still finds it proper to stay this proceeding, Youtoo should be held to have waived its right to file a Patent Owner Response. As Twitter has previously mentioned, since May 16, 2017, three attorneys with different firms have represented Youtoo. Paper 9 at 2. Two weeks before the original Patent Owner Response deadline, Youtoo's lead counsel (Scott McKeown) and one backup counsel (Stephen L. Levine) sought to withdraw, and Youtoo's only counsel not seeking to withdraw (Spencer Patterson) requested a stipulation from Twitter to extend the Board's Scheduling Order. The Board granted Youtoo's extension, but Youtoo counsel's motions to withdraw were since denied by the Board, no stipulation was agreed to, and all original counsel remain in representation of Youtoo.

Youtoo should not have been allowed to manipulate the schedule of this proceeding by attempting to dismiss its counsel, and now, should not be permitted to further manipulate the schedule by strategically filing for bankruptcy.

As Twitter also previously noted, Youtoo's own actions created this

situation. Mr. Levine was not withdrawing because of any infirmity or conflict, rather, only because Youtoo wanted “to be represented by different counsel.” Paper 14 at 2. Further, Youtoo’s lead counsel Mr. McKeown stated in his October 30 email to the Board that he was “unable to proceed” because he joined a new firm “in August,” over two months before notifying the Board or Twitter. But Twitter is unaware of any reason that Mr. McKeown cannot proceed to continue to represent Youtoo: as far as Twitter is aware, Mr. McKeown, and his firm, Ropes and Gray, have no conflict with being adverse to Twitter. Lest there be any doubt, Mr. McKeown was counsel of record since the institution of these proceedings. He chose to move firms in August 2017, and from that point on, either he alone or in combination with his client chose to make no preparations for a Patent Owner Response and likewise chose to only inform the Board of the alleged inability to represent Youtoo days before the Patent Owner Response was due, but months after the alleged conflict had occurred.

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. All three firms representing Youtoo have now had more than enough time to prepare the Response. If those firms have not prepared a Patent Owner Response, they should not be granted further opportunity to do so by way of an indefinite extension of time.

The Board's reliance on Youtoo's gamesmanship to delay the Patent Owner Response deadline, and now, to seek grant of a stay, mandate, at the very least, a finding that Youtoo has waived its opportunity to file a Patent Owner Response. As Twitter stated in its Opposition to Motions to Withdraw, extending Due Date 1 has already prejudiced Petitioner, and Petitioner opposes any request to stay this matter, which would *further prejudice* Twitter.

Thus, to the extent that the Board seeks to impose a stay in this matter, to the detriment of Twitter, Twitter at least asks for the equitable relief that Youtoo be deemed to have waived its right to file a Patent Owner Response. The Board has done more than enough to comply with its statutory duty to "provid[e] for the filing by the patent owner of a response to the petition." 35 U.S.C. § 316(a)(8). Indeed, Youtoo has now had over *four months* in which to file its Patent Owner Response, which is far beyond the typical time allotted for such a response. Office Patent Trial Practice Guide, 77 Fed. Reg. 48759, 48757 (Aug. 14, 2012) ("a Scheduling Order for an IPR or PGR might...provide a three month deadline...for filing a patent owner response...."). Youtoo should not have been permitted to use its eleventh-hour change of counsel as a ruse to obtain a delay in this proceeding, and likewise, Youtoo should not be allowed now to use its eleventh-hour bankruptcy filing as another ruse to maintain its right to file a patent owner response. Allowing Youtoo to game this proceeding to its own benefit, and to

Twitter's detriment, would only incentivize other parties appearing before the Board to engage in similar tactics. Permitting Youtoo's gamesmanship will also only encourage Youtoo to further flout the rules and to disregard the Board's expectations.

As the Board knows, *inter partes* review proceedings are time-sensitive and are intended to result in a "just, speedy, and inexpensive resolution." 37 C.F.R. § 42.1(b). Youtoo's request to stay this case days before Due Date 1 (which had already been extended) is antithetical to those goals, as it prejudices Twitter, delays this proceeding, increases the costs to Twitter, and is fundamentally *unjust* to Twitter. The Motion for Stay should be denied, but in the alternative, Youtoo should be held to have waived its opportunity to file a Patent Owner Response.

### **III. Conclusion**

Because the instant proceeding is continued by the government, and is exempt from the bankruptcy stay provisions of 11 U.S.C. § 362, the Board should deny the Motion for Stay. To the extent the Board believes that the automatic stay does apply, Youtoo's repeated attempts to manipulate the Board's schedule should not be condoned, and the Board should enter an order finding Youtoo to have waived its opportunity to file a patent owner response.

Respectfully submitted,

/David L. McCombs/

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HAYNES AND BOONE, LLP

Dated: December 20, 2017



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* December 20, 2017

*Manner of service* Electronic mail to [scott.mckeown@ropesgray.com](mailto:scott.mckeown@ropesgray.com);  
[cpdocketmckeown@oblon.com](mailto:cpdocketmckeown@oblon.com); [spatterson@gchub.com](mailto:spatterson@gchub.com);  
[slevine@ccsb.com](mailto:slevine@ccsb.com); [jdepumpo@shorechan.com](mailto:jdepumpo@shorechan.com)

*Documents served* Opposition to Motion for Stay

*Persons served* Scott McKeown  
Spencer C. Patterson  
Stephen L. Levine  
Joseph F. DePumpo

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