

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.,

Petitioner

v.

YOUTOO TECHNOLOGIES, LLC,

Patent Owner

Case IPR2017-00830

U.S. Patent No. 9,083,997

PATENT OWNER'S REPLY IN SUPPORT OF MOTION FOR STAY

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I. Introduction

Patent Owner Youtoo Technologies, LLC ("Patent Owner") hereby submits this Reply in support of Patent Owner's Motion for Stay (Paper 23) and in reply to Petitioner's Opposition to the Motion for Stay (Paper 24). This proceeding should be stayed at least pending a decision by the Bankruptcy Court as to whether to an automatic stay applies and whether to lift the stay.

The exception under 11 U.S.C. §362(b)(4) to the automatic stay provisions of 11 U.S.C. §362(a) does not apply to this proceeding because, at its current stage, this proceeding is primarily an adjudication of a dispute between adverse private parties rather than an enforcement of a governmental unit's regulatory power. Moreover, there is a public policy interest in allowing Patent Owner's assets to be defended in the current proceeding for the benefit of its creditors. This interest outweighs Petitioner's desire to eviscerate Patent Owner's patent assets while crippled by bankruptcy and before Patent Owner's creditors have had adequate time to determine how to proceed.

II. The Board Should Allow the Automatic Stay to Remain in Place.

A. The Exception Under 11 U.S.C. § 362(b)(4) to the Automatic Stay Provision Does Not Apply Here.

Section 362(b)(4) of the Bankruptcy Code provides that the filing of a petition does not operate as a stay:

of the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and 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 police or regulatory power.

11 U.S.C. § 362(b)(4). “This exception requires both that: 1) the proceeding be brought by a governmental unit and (2) the proceeding be brought to enforce ... police or regulatory power of the governmental unit.” *In re Edison Mission Energy*, 502 B.R. 830, 835 (Bankr. N.D.Ill. 2013). Here, neither the United States Patent and Trademark Office (“USPTO”) nor the Patent Trial and Appeal Board (“PTAB”) brought the proceeding within the meaning of the law. The proceeding was brought, instead, by Petitioner.

Although there are cases where proceedings initiated by private parties were allowed to proceed under the “police power exception,” those cases involved a governmental unit joining in or commencing its own proceeding. For example, in *In re Halo Wireless Inc.*, 684 F.3d 581 (5th Cir.2012), the court determined that the exception applied based on evidence that the governmental unit becomes a party to the proceeding. *Id.* at 592; *Edison Mission Energy*, 502 B.R. at 836 (distinguishing the situation in *Halo Wireless* where the exception applied from a situation where a governmental unit did not become a party to the proceeding). “Similarly, in *U.S. Int'l Trade Commission v. Jaffe*, 433 B.R. 538 (E.D.Va. 2010), the court held that the automatic stay was not applicable to an action where a private party files a

complaint but the government agency independently chooses to commence an investigation. *Jaffe*, 433 B.R. at 544.” *Edison Mission Energy*, 502 B.R. at 836.

Here, neither the USPTO nor the PTAB have become a party to the proceeding or commenced their own proceeding. Accordingly, the “police power exception” does not apply and the automatic stay should remain in place.

B. This Proceeding Is Primarily a Dispute Between Private Parties.

Even in cases where the proceeding is brought by a governmental unit, the bankruptcy court must determine whether the proceeding is “brought to enforce ... police or regulatory power of the governmental unit.” *Edison Mission Energy*, 502 B.R. at 835. Although proceedings that are authorized by Congress “necessarily effectuate the public policy of the United States,” *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 389 (6th Cir. 2001), the court must determine whether, on balance, the proceeding is in furtherance of public policies or private interests. *Id.* “These inquiries contemplate that the bankruptcy court, after assessing the totality of the circumstances, determine whether the particular regulatory proceeding at issue is designed primarily to protect the public safety and welfare, or represents a governmental attempt to recover from property of the debtor estate, whether on its own claim, or on the nongovernmental debts of private parties. *McMullen v. Sevigny (In re McMullen)*, 386 F.3d 320, 325 (1st Cir. 2004). “[W]hen the action incidentally serves public interests but more substantially

adjudicates private rights, courts should regard the suit as outside the police power exception, particularly when a successful suit would result in a pecuniary advantage to certain private parties vis-a-vis other creditors of the estate, contrary to the Bankruptcy Code's priorities.” *Id.* at 390.

In this case, the present proceeding is primarily an adjudication between private parties, at least at the current stage of the proceedings. The very name of the proceeding, “*Inter Partes* Review,” reveals that the proceeding is *inter partes*, or “between the parties.” Moreover, the statute specifically contemplates that the proceedings are frequently related to, and intertwined with, ongoing litigation between the parties. 35 U.S.C. § 315 (setting forth restrictions relating to *Inter Partes* Reviews and litigation involving related patents). Here, due to the ongoing litigation between the parties on the patents at issue here, the primary impact of the current proceeding, if allowed to proceed, would potentially result in a substantial pecuniary benefit to Petitioner at the expense of Patent Owner's creditors, particularly because a stay of the current proceedings simply maintains the status quo. As such, the proceeding is not primarily to enforce the police or regulatory power of the USPTO or PTAB, and the “police power exception” does not apply.

C. The Policies Behind the Bankruptcy Laws Weigh in Favor of a Stay.

As noted in *Halo Wireless*:

the automatic stay and its exception present two different, and at times competing, policies. On the one hand, the stay aims to protect debtors and creditors during the pendency of a bankruptcy proceeding to ensure that debtors get appropriate relief and that creditors receive payment in a fair and orderly manner.... On the other hand, the exception to the stay helps to ensure that debtors do not use a declaration of bankruptcy to avoid the consequences of their actions that threaten the public interest.

Halo Wireless, 684 F.3d at 588 (citations omitted). Here, the Patent Owner does not have existing funds, as Petitioner is aware from attending the creditors' meeting. Accordingly, the policies behind the automatic stay favor giving the creditors time to get up to speed on the merits and background of the current proceedings and to determine how to proceed to protect the remaining assets of Patent Owner. A stay under these circumstances is entirely consistent with the purpose of the automatic stay provisions under bankruptcy laws, which serves the public interest of protecting assets for the benefit of creditors when an entity files for bankruptcy. Moreover, due to the lack of funds, Patent Owner is not currently in a position to assert the patents in a manner that would otherwise threaten the public interest.

III. Conclusion

Because the exception to the automatic stay provision does not apply and because the Bankruptcy Court is better-positioned to determine proper application of the bankruptcy laws, Patent Owner respectfully requests that the Board grant a

stay pending closing or dismissal of the bankruptcy, or lifting of the stay by the Bankruptcy Court.

Respectfully submitted,

Dated: February 5, 2018

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that I caused to be served on the counsel for Petitioner a true and correct copy of the foregoing "Patent Owner's Reply in Support of Motion for Stay" by electronic means on February 5, 2018 at the following email addresses of record:

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