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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Case IPR2017-01133

U.S. Patent No. 8,601,506

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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 20) and in reply to Petitioner's Opposition to the Motion for Stay (Paper 22). 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

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