

Nos. 2018-1400, -1401, -1402, -1403, -1537, -1540, -1541

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FACEBOOK, INC.,

Appellant,

v.

WINDY CITY INNOVATIONS, LLC,

Cross-Appellant.

Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board, in Nos. IPR2016-01156, IPR2016-01157,
IPR2016-01158, IPR2016-01159, IPR2017-00659, and IPR2017-00709

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The United States submits this brief pursuant to the Court’s order of April 30, 2020, requesting the government’s views “regarding the effect, if any, of the Supreme Court’s decision in [*Thryv, Inc. v. Click-to-Call Technologies, LP*, 140 S. Ct. 1367 (2020)] on [the] decision in this case.” As explained below, *Thryv* makes clear that 35 U.S.C. § 314(d) bars judicial review of the Patent Trial and Appeal Board’s joinder decision in this case. Accordingly, the panel opinion should be vacated, and Windy City’s cross-appeal should be dismissed to the extent it challenges the Board’s joinder decision.

STATEMENT

1. The Leahy-Smith America Invents Act (AIA) created inter partes review (IPR), an adjudicative process through which the U.S. Patent and Trademark Office (USPTO) may reconsider the validity of issued patents. 35 U.S.C. § 311(b). “[A] person who is not the owner of a patent” may petition for IPR. *Id.* § 311(a). The Director of the USPTO may institute an IPR if he determines that “there is a reasonable likelihood that the petitioner would prevail” with respect to at least one challenged patent claim. *Id.* § 314(a). The Director has delegated his institution authority to the Patent Trial and Appeal Board (Board). 37 C.F.R. § 42.4(a). Section 314(d) provides that “[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” 35 U.S.C. § 314(d).

Congress anticipated that petitions for IPR would often be filed by persons alleged to have infringed the patent at issue. The AIA provides that “[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more

than 1 year after the date on which the petitioner [or a related party] ... is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b). The same subsection adds, however, that “[t]he time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).” *Id.* Subsection (c) provides:

(c) Joinder.—If the Director institutes an inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.

Id. § 315(c). The Director has delegated his joinder authority to the Board. *See* 37 C.F.R. §§ 42.4(a), 42.5(a), 42.122(b).

While Congress gave the Director or his delegate authority to institute IPR and consider joinder motions, the AIA provides that the Board shall conduct proceedings in all instituted IPRs. 35 U.S.C. § 316. At the conclusion of proceedings, the Board “issue[s] a final written decision with respect to the patentability” of challenged claims. *Id.* § 318(a). “A party dissatisfied with the final written decision ... may appeal” to this Court. *Id.* § 319.

2. In June 2015, Windy City Innovations, LLC sued Facebook, Inc. alleging infringement of four patents encompassing 830 patent claims. Slip Op. 5. Facebook repeatedly, but unsuccessfully, demanded that Windy City promptly identify the claims it would assert in litigation. *See* Slip Op. 5-6. In June 2016, facing the one-year

time bar under section 315(b), Facebook filed four IPR petitions challenging some, but not all, of the claims of each patent. Slip Op. 6. Several months later, Windy City finally identified the patent claims allegedly infringed by Facebook, which included claims not challenged in Facebook's IPR petitions. Slip Op. 6-7.

In December 2016, the Board instituted IPRs on Facebook's four petitions. Slip Op. 6. Facebook promptly filed two follow-on petitions challenging the additional claims that were identified by Windy City after the filing of the initial petitions, and moved to join those challenges to the existing IPRs. Slip Op. 7. Consistent with its precedential decision in *Proppant Express Investments, LLC v. Oren Technologies, LLC*, No. IPR2018-00914, 2019 WL 1283948 (P.T.A.B. May 20, 2020), the Board granted the joinder motions and instituted review on the follow-on petitions. Appx7399; Appx8172.

After a split final written decision, both parties appealed. This Court held that section 315(c) does not permit the Board to join a person to a proceeding in which it is already a party ("same-party joinder") or permit a joined party to challenge new claims not already at issue in the existing proceeding ("new-issue joinder"). Slip Op. 13-23. Thus, the Court ruled that the Board acted improperly by joining Facebook to IPR proceedings to which it was already a party and considering claims that Facebook had challenged only in its second set of petitions.

The Court was bound at the time by the *en banc* decision in *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018), which held that the Board's time-bar

determinations under section 315(b) are appealable. In view of that decision, Facebook had not argued that the Board's application of the joinder exception to that time bar is nonappealable under section 314(d). Accordingly, the Court's decision did not address its jurisdiction to review the Board's joinder decisions.

3. Facebook petitioned for panel rehearing and rehearing en banc. Facebook argued, *inter alia*, that “[t]he panel’s review of the Board’s institution and joinder decisions raises a serious jurisdictional question” under section 314(d), and noted that the Supreme Court was “currently considering [that provision’s] scope in *Thryv*.” Reh’g Pet. 9-10.

On April 20, 2020, the Supreme Court issued its decision in *Thryv*. The Court held that the Board’s “application of § 315(b)’s time limit ... is closely related to its decision whether to institute inter partes review and is therefore rendered nonappealable by § 314(d).” *Thryv, Inc. v. Click-to-Call Techs.*, 140 S. Ct. 1367, 1370 (2020). Accordingly, the Court remanded *Thryv* “with instructions to dismiss for lack of appellate jurisdiction.” *Id.* at 1377. On April 30, 2020, this Court invited supplemental briefing on the effect of *Thryv* on this case.

ARGUMENT

SECTION 314(D) BARS JUDICIAL REVIEW OF THE BOARD’S JOINDER DECISION IN THIS CASE

1. The AIA provides that the USPTO’s decision “whether to institute an inter partes review” is “final and nonappealable.” 35 U.S.C. § 314(d). That bar on judicial

review applies not only to the determination under section 314(a) whether the petitioner has a reasonable likelihood of prevailing, but also extends at least to any challenge to an institution decision “grounded in ‘statutes related to’ the institution decision.” *Thryv, Inc. v. Click-to-Call Techs.*, 140 S. Ct. 1367, 1375 (2020) (quoting *Cuozz’o Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141 (2016)); *see also Cuozz’o*, 136 S. Ct. at 2141 (section 314(d) bars judicial review “where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office’s decision to initiate inter partes review”); *ESIP Series 2, LLC v. Puzhen Life USA, LLC*, 958 F.3d 1378 (Fed. Cir. 2020) (holding, in light of *Thryv*, that “preclusion of judicial review under § 314(d) ... extend[s] to a Board decision concerning the ‘real parties in interest’ requirement of § 312(a)(2)”).

In *Thryv*, the Supreme Court held that a challenge based on section 315(b)’s time limitation “ranks as an appeal of the agency’s decision ‘to institute an inter partes review’” under Section 314(d). 140 S. Ct. at 1373 (quoting 35 U.S.C. § 314(d)). It explained that “[s]ection 315(b)’s time limitation is integral to, indeed a condition on, institution.” *Id.* Accordingly, the Court explained, “a contention that a petition fails under § 315(b) is a contention that the agency should have refused ‘to institute an inter partes review.’” *Id.* (quoting 35 U.S.C. § 314(d)). Because such a challenge “raises ‘an ordinary dispute about the application of’ an institution-related statute,”

section 314(d) bars judicial review of such a claim. *Id.* (quoting *Cuozzo*, 136 S. Ct. at 2139).

2. Appellate review of the Board’s joinder decision in this case is barred by section 314(d). At least where the Board institutes an inter partes review on a petition that would otherwise be untimely, the Board’s application of section 315(c) is “integral to, indeed a condition on, institution.” *Thryv*, 140 S. Ct. at 1373. And a challenge to the Board’s application of section 315(c) “raises ‘an ordinary dispute about the application of an institution-related statute.’” *Id.* Accordingly, at least in that context, a contention that the Director misapplied section 315(c) is “a contention that the agency should have refused ‘to institute an inter partes review.’” *Id.*

a. The text of section 315(b) confirms that, in this context, the joinder decision is integral to the USPTO’s decision to institute on the joining party’s petition. As noted, the first sentence of section 315(b) creates a limitation on the Director’s authority to “institute[]” proceedings, providing that inter partes review “may not be *instituted* if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner ... is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b) (emphasis added). The next sentence then creates an exception to “[t]he time limitation set forth in the preceding sentence” for “a request for joinder under subsection (c).” *Id.*

Because the time limitation of the first sentence of section 315(b) applies only to “institut[ion]” of IPR, there would be no need for Congress to provide an

exception to that limitation for “joinder under subsection (c)” unless Congress envisioned that joinder would entail institution of inter partes review proceedings. Under a reading of the statute in which joinder is *not* accompanied by institution, “the express exception” of section 315(b) “would be rendered ‘insignificant, if not wholly superfluous.’” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). “It is a cardinal principle of statutory construction that a statute ought ... to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *Id.* (quotation marks omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute[.]” (quotation marks omitted)). The text of section 315(b) thus makes clear that the joinder decision must be accompanied by an institution of proceedings based on the joining party’s petition.

If a party files a motion for joinder and an accompanying IPR petition before the one-year time limit in section 315(b) has passed, the Board’s authority to institute is independent of its joinder authority. If it wished to do so, the Board could grant the petition but deny joinder, and the denial of joinder would not foreclose the IPR. But if joinder is sought after the time limit in section 315(b) has run, as is typically the case, and is the case here, the IPR petition is entirely dependent on the fate of the joinder motion. The petition is exempt from the time limit under section 315(b) only because the moving party seeks to join an existing IPR. If the motion does not satisfy

the statutory requirements for joinder under section 315(c), the Board not only must deny the joinder motion, but must (and does) deny the petition as well.

In this circumstance, a judicial challenge to the joinder decision necessarily operates as a challenge to the USPTO's decision to institute inter partes review, and vacating the joinder decision would have the necessary effect of vacating the institution determination. Here, for example, Windy City purports to appeal the Board's decision to join Facebook to previously instituted proceedings. But the USPTO did not have the authority to institute proceedings on Facebook's second set of petitions without granting joinder, because those petitions were not filed within one year after Facebook was served with an infringement complaint. *See* 35 U.S.C. § 315(b). Thus, if the joinder decision is vacated on appeal, the institution decision must also be vacated.

Vacatur of the institution decision is not only a necessary consequence of a successful appeal, but it is in fact the object of Windy City's appeal. Windy City is not aggrieved by the fact that the Board reviewed Facebook's challenges to Windy City's patents in a single proceeding that joined Facebook's IPRs, and Windy City does not seek an instruction that the IPR proceedings instituted on Facebook's second set of petitions should proceed separately from those instituted on the earlier petitions. Rather, Windy City is aggrieved by the fact that the Board entertained the challenges raised in Facebook's second set of petitions at all, and it challenges the joinder decision in order to obtain de-institution of the proceedings on those petitions.

b. Moreover, there is little question that section 315(c) is a provision that is “‘closely tied to the application and interpretation of statutes related to’ the institution decision.” *Thryv*, 140 S. Ct. at 1373 (quoting *Cuozzok*, 136 S. Ct. at 2141). The USPTO’s joinder authority under section 315(c) rests directly on the institution provisions of the AIA. In order to request joinder, a person must “‘properly’ file ‘a petition under section 311,’ 35 U.S.C. § 315(c)—that is, ‘a petition to institute an inter partes review,’” *id.* § 311(a). The USPTO, in turn, may grant joinder only if it determines that the joinder applicant’s IPR petition “warrants the *institution* of an inter partes review under section 314.” 35 U.S.C. § 315(c) (emphasis added). The granting of any joinder motion therefore necessarily entails an affirmative institution decision. And as noted previously, the fact that the AIA expressly exempts joinder under section 315(c) from section 315(b)’s bar on institution confirms that the statutory scheme contemplates that joinder will be effected by instituting the petition for inter partes review.

In keeping with this statutory scheme, when the Board grants a joinder motion, it orders that inter partes review be instituted on the new petition. In this case, for example, Facebook filed two new, follow-on petitions for IPR in conjunction with its joinder motion, and the Board instituted review on those petitions, thereby creating two new IPRs. *See* Appx774 (instituting a new IPR, granting Facebook’s motion for joinder, and joining the new IPR with the existing IPR). It was the institution decisions that led the Board to review the challenges raised in Facebook’s two new

petitions and render decisions as to the patentability of the claims challenged therein. *See Thryv*, 140 S. Ct. at 1370 (“For inter partes review to proceed, the agency must agree to institute review.”).

Significantly, Congress assigned authority to make the joinder decision under section 315(c) to the Director, whom Congress gave authority to institute IPRs under section 314, not to the Board, which conducts them.

c. In *Thryv*, the Supreme Court held that because “[s]ection 315(b)’s time limitation is integral to, indeed a condition on, institution,” “a contention that a petition fails under [section] 315(b) is a contention that the agency should have refused ‘to institute an inter partes review.’” 140 S. Ct. at 1373. Similarly, in *Cuozz*, the Court held that because a petition must identify “each claim challenged” “with particularity,” 35 U.S.C. § 312(a)(2), a patent holder’s argument that the “petition was not pleaded ‘with particularity’ ... is little more than a challenge to the Patent Office’s” decision to institute proceedings, and review is therefore barred. 136 S. Ct. at 2142. So too here, Windy City’s contention that Facebook’s joinder motions fail under section 315(c) “is a contention that the agency should have refused ‘to institute an inter partes review’” on Facebook’s untimely petitions. *Thryv*, 140 S. Ct. at 1373.

Section 314(d) therefore bars review of Windy City’s challenge to the Board’s joinder determination.¹

3. Applying section 314(d) to bar judicial review of the joinder decision in this case is consistent not only with the statutory provisions that bear directly on that decision, but also with the broader structure of the AIA. This Court has explained that “IPRs proceed in two phases.” *In re Cuozzxo Speed Techs., LLC*, 793 F.3d 1268, 1272 (Fed. Cir. 2015), *aff’d sub nom. Cuozzxo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016). “In the first phase, the [US]PTO determines whether to institute IPR. In the second phase, the Board conducts the IPR proceeding and issues a final decision.” *Id.* Section 314(d) precludes judicial review of the Director’s decisions made at the first phase, while section 319 provides for appeal of Board decisions made at the second phase. *See St. Jude Med., Cardiology Div., Inc. v. Volcano Corp.*, 749 F.3d 1373, 1376 (Fed. Cir. 2014). A decision to join a party to proceedings is part of the first phase—it involves a determination by the Director (or his delegate) that the petitioner is “reasonabl[y] likel[y]” to succeed, the criterion for institution under 35 U.S.C. § 314(a), not a final determination on the merits issued by the Board.

¹ This case does not require the Court to address whether section 314(d) would bar review of a joinder decision when reversal would not have the effect of reversing the USPTO’s institution decision—for example, when the USPTO grants the joinder motion of a party who filed a petition within, rather than after, the one-year time limitation of section 315(b).

At a more general level, the AIA's purpose and design reinforce the conclusion that section 314(d) bars review of the joinder decision in this case. Congress created inter partes review to "giv[e] the [USPTO] significant power to revisit and revise earlier patent grants," *Cuozzoku*, 136 S. Ct. at 2139-2140, with the goal of creating "a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs," H.R. Rep. No. 112-98, at 40 (2011) (House Report). The Supreme Court in *Cuozzoku* "doubt[ed] that Congress would have granted the [USPTO] this authority ... if it had thought that the agency's final decision could be unwound under some minor statutory technicality related to its preliminary decision to institute inter partes review." 136 S. Ct. at 2140.

A judicial order vacating the Board's final decision as to patentability, based on the Court's judgment that the Board had committed legal error on a preliminary question related to the Director's discretion to join parties to existing IPR proceedings, would "unwind the agency's merits decision," "wasting the resources spent resolving patentability." *Thryv*, 140 S. Ct. at 1374. "[I]n lieu of enabling judicial review of patentability," vacatur of the joinder decision would result in "the agency's work ... be[ing] undone and the canceled patent claims resurrected." *Id.* This would run contrary to the purpose of IPR.

Moreover, "because a patent owner would need to appeal" on section 315(c) joinder grounds "only if she could not prevail on patentability," such appeals would operate to save invalid patent claims. *Thryv*, 140 S. Ct. at 1374. When the Board

conducts a review and concludes that a challenged patent claim is invalid, a judicial order setting aside that decision based on section 315(c) or similar procedural grounds can have significant adverse effects on the patent system and patent-reliant industries. The effect of such an order is that, although the USPTO has found the contested patent claim to be invalid and no court has disagreed, the claim remains in effect unless and until it is found invalid again, either by the USPTO (at the behest of a different challenger) or by a court. That result deprives potential infringers and the public of the clarity that a judicial ruling on the merits of the patentability dispute would have brought. And rather than further the AIA's purpose of providing "quick and cost effective alternatives to litigation," House Report at 48, that approach spawns duplicative litigation and enmeshes this Court in a range of additional legal and factual disputes concerning the AIA's restrictions on the Director's institution authority. Applying section 314(d) to bar review of joinder decisions, on the other hand, furthers Congress's efforts to improve patent quality and limit litigation costs by focusing judicial review on the merits of the Board's patentability determinations.

Judicial review of joinder decisions also undermines other statutory goals. Section 315(c) appears in a section of the AIA entitled "Relation to other proceedings or actions." 35 U.S.C. § 315. The restrictions imposed by that section are intended to manage the burden on patent owners and minimize the wasted resources that duplicative judicial and administrative proceedings might entail. *See, e.g., id.* § 315(a)(1) (precluding IPR pursuant to a petition filed by a party that first filed a civil action

challenging the same patent); *id.* § 315(a)(2) (imposing an automatic stay of civil actions that challenge the patent’s validity and are filed on or after the date when the IPR petition is filed); *id.* § 315(b) (imposing a one-year time limitation for a party that has been sued for patent infringement to petition for IPR); *id.* § 315(d) (permitting the USPTO Director to coordinate related administrative proceedings). The joinder provision serves this purpose by ensuring that, when the USPTO institutes an IPR, the Board can consider the invalidity challenges of all interested parties—even those whose petitions would otherwise be time barred under section 315(b). Vacating the Board’s final patentability determination *after* the Board has considered and resolved the patentability arguments of a joined party, based on a court’s determination that proper application of section 315(c) *would have* precluded joinder, and thus institution, does nothing to further the purposes of section 315. *See Thryv*, 140 S. Ct. at 1375 (“Judicial review *after* the agency proceedings cannot undo the burdens already occasioned.”). To the contrary, setting aside the Board’s final patentability determination after an IPR has been completed, on the basis of a preliminary question unrelated to the merits of that decision, will exacerbate rather than reduce the potential burdens associated with patent-related controversies.

To be sure, precluding judicial review of section 315(c) determinations may allow errors in the application of that provision to go uncorrected. But the same thing is true whenever the bar on appealability in section 314(d) is applied. It does not follow that the Board’s patentability determination should be set aside, based on

an asserted procedural error unrelated to Windy City’s entitlement to a patent, after the Board and the parties have expended substantial resources on the proceeding.²

CONCLUSION

For the foregoing reasons, section 314(d) bars Windy City from challenging the Board’s final written decision on the basis of the Board’s joinder decision.

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June 2020

² The USPTO’s interpretation of section 315(c) in this case—permitting Facebook to join its own existing IPR to challenge patent claims that Windy City first asserted after section 315(b) would have barred a standalone IPR petition—comports well with Congress’s goal of making IPR an efficient and viable alternative to litigation and prevents gamesmanship in litigation. While the Court has disagreed with the USPTO’s interpretation and has suggested that the issue is one for Congress (*see* Slip Op. 22), the statutory scheme, as discussed above, limits this Court’s authority to review the issue.

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Joshua M. Koppel

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of April 30, 2020, because its body contains 15 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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