No. 15-446

In the Supreme Court of the United States

CUOZZO SPEED TECHNOLOGIES, LLC,
Petitioner,

–v–

MICHELLE K. LEE, Under Secretary of Commerce for Intellectual Property and Director, United States Patent and Trademark Office,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE TRADING TECHNOLOGIES INTERNATIONAL, INC. IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Trading Technologies International, Inc. ("TT"), founded in 1994, makes trading software and execution solutions for professional traders. TT's software is purchased by premier investment banks, brokers, Futures Commission Merchants, hedge funds, proprietary trading firms, and other trading institutions and is used each day by thousands of traders to access dozens of electronic exchanges around the world. TT employs over 300 people worldwide, mostly at its Chicago headquarters. TT invests heavily in research and development and has obtained patents covering various features of its products. TT relies on its patents to protect its investments in research and development. Therefore, TT has an interest in ensuring a strong U.S. patent system, including clear and efficient post-grant review proceedings before the U.S. Patent & Trademark Office ("USPTO").

Cuozzo Speed Technologies, LLC ("Cuozzo") has petitioned this Court to review the Federal Circuit's

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[1] Pursuant to Supreme Court Rule 37.2(a), notice of *amicus curiae's* intent to file this brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this *amicus curiae* brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

first pronouncement on its inability to review certain aspects of decisions to institute *inter partes* review ("IPR") proceedings as established by Congress in 2011 as part of the America Invents Act ("AIA"). As a patent owner, TT would benefit from a system allowing review of all aspects of decisions to institute post-grant review proceedings as well as review of final decisions on the merits. Nevertheless, because this is not the system that Congress created, TT requests that this Court deny this petition.

SUMMARY OF ARGUMENT

The Court should not grant Cuozzo's Petition with respect to the second question presented because the Federal Circuit properly followed the statute, refusing to reconsider the USPTO Patent Trial and Appeal Board ("PTAB") decision to institute an IPR proceeding on Cuozzo's patent. Cuozzo seeks to appeal a discretionary aspect of the PTAB's decision to institute. In particular, Cuozzo complains that the PTAB instituted on grounds not contained in the petition requesting the IPR proceeding. Under the statute, this decision cannot be appealed. Importantly, Cuozzo is not arguing that its patent falls outside the jurisdiction of the IPR statute. Accordingly, Cuozzo's suggestion of a split at the Federal Circuit is unfounded. The decision cited by Cuozzo is not in conflict because it dealt with an appeal of whether a patent fell within the threshold jurisdictional scope of Section 18 (governing covered business method post-grant reviews), not with

discretionary issues of the sort that Cuozzo seeks to appeal. The Federal Circuit correctly distinguished such threshold jurisdictional issues from discretionary issues because they go to the USPTO's underlying authority to invalidate a patent under the statute. As the decision below follows the statute and as there is no split of authority at the Federal Circuit on this issue, Cuozzo's petition for certiorari in this case should not be granted.

ARGUMENT

I. THE STATUTE DOES NOT PERMIT APPEAL OF THE PARTICULAR TYPE OF INSTITUTION DECISION FOR WHICH CUOZZO SEEKS REVIEW AND THE FEDERAL CIRCUIT HAS NOT RENDERED CONTRADICTORY DECISIONS ON THIS ISSUE

Cuozzo presents two questions for review by this Court. The second question asks this Court to consider whether the Federal Circuit erred in holding that a decision by the PTAB to institute an IPR proceeding is judicially unreviewable.[2] In particular, Cuozzo seeks to appeal the PTAB's exercise of its discretion to institute because Cuozzo claims that the PTAB improperly instituted based on grounds that were not argued in the IPR petition. There is no dispute that the Cuozzo patent is within the jurisdictional reach of the relevant IPR statute.

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[2] TT takes no position with regard to the first question presented in Cuozzo's petition.

Cuozzo merely complains that the standards for institution were not met. However, the statute does not permit such an issue to be appealed. 35 U.S.C. § 314(d) ("*No appeal*. – The determination by the Director whether to institute an *inter partes* review under this section shall be final and nonappealable.").

Petitioner incorrectly suggests that the Federal Circuit's decisions on the issue have been contradictory. To support this argument, Cuozzo cites to the *Versata Dev. Group, Inc. v. SAP Am., Inc.* decision. However, that decision is not inconsistent with the decision reached here. The *Versata* decision was not related to the PTAB's discretion to institute an IPR proceeding for a patent that falls within the jurisdictional reach of the relevant post-grant review statute, and therefore is not relevant to this case.

Versata properly permitted a patent owner to appeal a PTAB decision based on the PTAB acting outside of its statutory "authority to invalidate." Specifically, the *Versata* decision permitted an appeal of the threshold question of whether a patent qualifies as a covered business method ("CBM") under Section 18 of the AIA (creating CBM post-grant reviews for certain patents). The Federal Circuit explained that, because Section 18 post-grant reviews are limited by statute to only CBM patents, the determination whether a patent qualifies as a CBM patent, including whether it falls within the "technological invention" exception to the definition of CBMs under the statute, is available for appellate review. *Versata Dev. Group, Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1319-23 (Fed. Cir. 2015). Such

determinations go beyond the discretionary decision whether to institute a proceeding, and instead go to the PTAB's authority to invalidate in the first place. In other words, the Federal Circuit permitted appeal of a threshold jurisdictional issue because, if the PTAB was wrong on that issue, the PTAB had no authority under the statute to invalidate. In contrast, the issue Cuozzo seeks to appeal relates to the PTAB's discretion in a case where it indisputably had the authority to invalidate. Accordingly, there is no split at the Federal Circuit, and an appropriate line has been drawn as to what aspects of PTAB institution decisions are appealable.

II. THE CONCERNS RAISED BY CUOZZO SHOULD BE ADDRESSED BY CONGRESS AND THE USPTO

Petitioner accompanied its request for Supreme Court review with alarming statistics regarding the new IPR proceedings, including the nearly 85% cancellation rate for some or all claims in patents for which IPR proceedings have been instituted. As a patent owner itself, TT is certainly concerned about these statistics and is sympathetic to Cuozzo's desire to be able to appeal discretionary aspects of the PTAB's institution decisions. However, contrary to threshold jurisdictional-type determinations of the sort at issue in *Versata*, the issue Cuozzo seeks to appeal is the type of determination that Congress made non-appealable. Any change needs to be addressed at the Congressional level. Likewise, changes to how the proceedings operate need to be made by the USPTO and/or Congress.

CONCLUSION

TT urges this Court to not grant Cuozzo's Petition in this case because there has been no inconsistency at the Federal Circuit with regard to its refusing review of the PTAB's institution decisions. The Federal Circuit has correctly distinguished between discretionary institution decisions regarding patents within the jurisdictional scope of the statute and decisions regarding whether the PTAB has authority to invalidate in the first place (such as whether a patent qualifies as a CBM under Section 18). The issue Cuozzo seeks to appeal falls within the former and, therefore, is non-appealable under the statute as it now stands. While Cuozzo may have legitimate complaints about the current law, such issues need to be addressed by Congress.

Respectfully submitted,

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