

2016-1954

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KNOWLES ELECTRONICS LLC,
Appellant

v.

JOSEPH MATAL, Performing the Functions and Duties of the Director of the
United States Patent and Trademark Office,
Intervenor

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Serial No. 95/001,850.

SUPPLEMENTAL BRIEF FOR INTERVENOR

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July 31, 2017

RELEVANT STATUTORY PROVISIONS

35 U.S.C. § 143 (2002): Proceedings on appeal

With respect to an appeal described in section 142 of this title, the Director shall transmit to the United States Court of Appeals for the Federal Circuit a certified list of the documents comprising the record in the Patent and Trademark Office. The court may request that the Director forward the original or certified copies of such documents during pendency of the appeal. In an ex parte case or any reexamination case, the Director shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all of the issues involved in the appeal.

35 U.S.C. § 143 (2012): Proceedings on appeal

With respect to an appeal described in section 142, the Director shall transmit to the United States Court of Appeals for the Federal Circuit a certified list of the documents comprising the record in the Patent and Trademark Office. The court may request that the Director forward the original or certified copies of such documents during pendency of the appeal. In an ex parte case, the Director shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all of the issues raised in the appeal. The Director shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32.

Leahy-Smith America Invents Act, Pub. L. No. 112-29 §7(e), 125 Stat. 284, 315 (2011)

(e) Effective Date.—The amendments made by this section shall take effect upon the expiration of the 1-year period beginning on the date of the enactment of this Act and shall apply to proceedings commenced on or after that effective date, except that—

...

(4) the Director's right under the fourth sentence of section 143 of title 35, United States Code, as amended by subsection (c)(3) of this section, to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board shall be deemed to extend to inter partes reexaminations that are requested under section 311 of such title before the effective date of the amendments made by this section.

TABLE OF CONTENTS

Table of Authorities	ii
Introduction	1
Background	2
Argument.....	3
A. Knowles has established a case or controversy, which ends the Article III standing inquiry	4
B. Even if the government had to show standing, the government, including the USPTO Director, has Article III standing to participate	6
C. The USPTO’s statutory authority allows it to choose whether to intervene and, if so, what position to take.....	13
Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>Allflex USA, Inc. v. Avid Identification Systems, Inc.</i> , 704 F.3d 1362 (Fed. Cir. 2013)	11
<i>Aqua Marine Supply v. AIM Machining, Inc.</i> , 247 F.3d 1216 (Fed. Cir. 2001)	11
<i>ASARCO Inc. v. Kadish</i> , 490 U.S. 605 (1989).....	5, 12
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	12
<i>Becker v. Montgomery</i> , 532 U.S. 757 (2001).....	18
<i>Burse, In re</i> , No. 2016-2675 (Fed. Cir. Apr. 28, 2017)	16
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013).....	4
<i>Consumer Watchdog v. Wisconsin Alumni Research Foundation</i> , 753 F.3d 1258 (Fed. Cir. 2014)	10
<i>Debs, In re</i> , 158 U.S. 564 (1895).....	9
<i>Diamond v. Charles</i> , 476 U.S. 54 (1986).....	5, 6, 10
<i>DiStefano, In re</i> , 562 Fed. App’x 984 (Fed. Cir. June 4, 2014).....	16
<i>Florida Power & Light Co. v. Lorion</i> , 470 U.S. 729 (1985).....	18
<i>Ingalls Shipbuilding, Inc. v. Director, Office of Workers’ Compensation Programs</i> , 519 U.S. 248 (1997).....	8, 9, 13, 16

<i>Lawrence on Behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996).....	18
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	6
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017).....	12
<i>Motorola Mobility LLC, In re</i> , No. 2012-1470 (Fed. Cir. Mar. 5, 2013).....	16
<i>Radiofone, Inc. v. F.C.C.</i> , 759 F.2d 936 (D.C. Cir. 1985).....	7, 8
<i>Roeder v. Islamic Republic of Iran</i> , 333 F.3d 228 (D.C. Cir. 2003).....	4
<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 U.S. 47 (2006).....	4
<i>Shield, In re</i> , No. 2013-1562 (Fed. Cir. Apr. 16, 2014).....	16
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976).....	4
<i>Town of Chester, N.Y. v. Laroe Estates, Inc.</i> , 137 S. Ct. 1645 (2017).....	4, 5, 12
<i>U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership</i> , 513 U.S. 18 (1994).....	7
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950).....	7
<i>Vermont Agency of Natural Resources v. United States ex rel. Stevens</i> , 529 U.S. 765 (2000).....	10
Statutes	
28 U.S.C. § 516.....	15
28 U.S.C. § 517.....	9

28 U.S.C. § 518.....	9
28 U.S.C. § 2403(a)	9
35 U.S.C. § 141(a)	12
35 U.S.C. § 143.....	3, 9, 13, 14, 15
America Invents Act, Pub. L. No. 112-29 § 7(e)(4), 125 Stat. 284, 315 (2011)	14
Regulations	
28 C.F.R. § 0.20(c).....	15
Other Authorities	
Fed. R. App. P. 15(a)(2)(B)	12
Fed. R. App. P. 29(a)(2).....	5
Fed. R. Civ. P. 24(b)(2).....	9
Joseph Matal, <i>Legislative History of the America Invents Act: Part II of II</i> , 21 FED. CIR. B.J. 539, 542 n.25 (2012).....	14
33 Charles Alan Wright et al., <i>Fed. Prac. & Proc. Judicial Review</i> § 8302 (1st ed. 2017)	8

INTRODUCTION

Article III of the Constitution limits the courts to adjudicating cases or controversies. Thus, a party seeking relief from a federal court must show that there is a justiciable case or controversy, which requires a demonstration that the party has a direct and concrete stake in the outcome of the case. The courts do not inquire into the standing of a party that is not seeking separate affirmative relief, such as an intervenor seeking to oppose the plaintiff or appellant. Because the USPTO here has intervened in support of the agency's decision and does not seek affirmative relief of its own, no separate Article III inquiry is necessary.

But even if the USPTO needed Article III standing in its own right—as it would, for example, to seek relief from a decision of this Court in the Supreme Court—that standing requirement would be easily satisfied here. That is because (1) there is a genuine and concrete controversy between the appellant—a patentee whose claims will be canceled—and the USPTO, which is the entity that has made the decision that requires canceling the previously patented claims; and (2) the party seeking to intervene is the government, which has standing to pursue relief on behalf of the public in most situations. As Supreme Court precedents make clear, Article III is no bar to the USPTO's participation in this case, regardless of the procedural posture.

The Director of the USPTO further has explicit statutory authority to intervene in inter partes cases arising from the USPTO. That intervention is at the Director's discretion. And neither the Constitution nor any statute requires the Director to take any particular position when he does intervene. Thus, the Director may decide to what extent to support the decision of the Patent Trial and Appeal Board or whether to support the Board's decision at all.

In this case, the Director has chosen to support the Board's decision and believes that decision should be affirmed.

BACKGROUND

This appeal arises from an inter partes reexamination of U.S. Patent No. 8,018,049 ("the '049 patent"), which is owned by Knowles. The examiner determined that all of the pending claims that were in reexamination were obvious. Knowles appealed to the Board. The reexamination requester, Analog Devices, declined to participate in the appeal to the Board. Appx3; Appx22. The Board affirmed the examiner's determinations.

Knowles appealed to this Court, and Analog Devices again declined to participate, saying so in a letter to the Court. Dkt. No. 2. Upon receiving Analog Devices' letter, the Court sua sponte issued an order, as it regularly does in appeals from inter partes USPTO proceedings in which one party has declined to participate. The Court's order "directed" the USPTO "to inform this court within 14 days from

the date of this order whether it wishes to intervene in this appeal.” Dkt. No. 3 at 1. If the USPTO “elects to participate as intervenor,” the Court’s order gave the agency a deadline to file its brief. *Id.* The USPTO then filed a notice of intervention, explaining that it was “exercis[ing] the right to intervene in this appeal” under 35 U.S.C. § 143. Dkt. No. 11 at 1.

Knowles and the USPTO briefed the appeal, and the Court heard argument. Although no party had raised the USPTO’s authority to participate in the appeal, the Court questioned the USPTO’s counsel about the agency’s standing to be a party to the appeal. Oral Argument at 11:45-13:45. But even after those questions, Knowles on rebuttal still did not assert that the USPTO in any way lacked authority to be there. Oral Argument at 22:32-25:06. After oral argument, the Court issued an order asking the parties to brief the USPTO’s Article III standing. Dkt. No. 61.

ARGUMENT

The Court has asked us to brief (a) whether the USPTO Director must have Article III standing to intervene on the side of the appellee and (b) if so, whether the Director has standing in this appeal. The Court further asks (c) what actions are within the USPTO’s statutory authority to participate as intervenor. We address those questions in turn.

A. Knowles has established a case or controversy, which ends the Article III standing inquiry

“Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). “The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Id.* (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013)). Thus, a plaintiff—or person seeking relief from a federal court—must show “a personal stake in the outcome.” *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

Other parties, such as defendants, appellees, or intervenors who are not seeking affirmative relief, need not have constitutional standing for a case to proceed. “[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (citations omitted). Indeed, it would make little sense to ask whether a defendant or respondent—who normally would prefer not to be in court at all—has “standing” to litigate. Rather, “the standing inquiry is directed at those who invoke the court’s jurisdiction.” *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). As the Supreme Court explained, in a case where the “respondents would not have had standing to commence suit,” the Court nevertheless had jurisdiction over both parties because

the “petitioners ha[d] standing to invoke the authority of a federal court” and the dispute thus presented “a justiciable case or controversy.” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989).

That rule applies to intervenors as well. The Constitution does not require an intervenor separately to demonstrate Article III standing unless it is pursuing “relief that is different from that which is sought by a party with standing.” *Town of Chester*, 137 S. Ct. at 1651; *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (although intervenor had no standing to independently seek review, intervenor would have been allowed to “ride ‘piggyback’ on the [defendant-appellant’s] undoubted standing”). As long as a litigant who has not independently demonstrated standing does not seek to expand the scope of the litigation beyond that justified by a party with standing, Article III’s injury-in-fact requirement is satisfied.¹

Here, Knowles—a patentee that has had its patent claims canceled—has a personal stake in the outcome of its appeal. If Knowles succeeds in convincing this Court that the Board was wrong in its unpatentability decision, that patent can remain

¹ Indeed, the possibility of amicus curiae participation shows the flaw in any claim that a party not seeking affirmative relief could somehow deprive the Court of jurisdiction. An amicus can present written arguments to the Court and can seek leave to participate in an oral argument. No one supposes that the participation of an amicus negates the existence of an Article III case or controversy where one would otherwise exist. Also, notably, on appeal the government is always permitted to “file an amicus-curiae brief without the consent of the parties or leave of court.” Fed. R. App. P. 29(a)(2).

viable; if Knowles does not succeed, the patent claims will be canceled and cannot be enforced. Knowles thus has a concrete, personalized stake in the outcome, and there is no question that the controversy is live and that the remaining requirements of Article III standing are satisfied, *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This appeal therefore presents a justiciable controversy for the Court to decide. Nothing more is required under Article III.

B. Even if the government had to show standing, the government, including the USPTO Director, has Article III standing to participate

The USPTO would have to demonstrate standing if it were to seek further review from an unfavorable decision of this Court. *See Diamond*, 476 U.S. at 61-71. We therefore address the USPTO's standing for the sake of completeness. Knowles's dispute in this case is, in essence, with the USPTO. Although a third party—Analog Devices—initiated the reexamination of the '049 patent by filing a petition, the USPTO is the entity that made the determination that the '049 patent was unpatentable and should not have issued. The fact that a third party initiated the agency action does not change the nature of the dispute: It is the agency's decision that will result in the canceling of Knowles's claims absent judicial relief. Knowles therefore has standing to appeal to this Court, and for the same reasons, the USPTO would have standing to seek relief in the Supreme Court if this Court were to find against the agency.

The fact that Analog Devices has elected not to participate as appellee does not change that conclusion. Presumably, Knowles and Analog Devices settled their dispute, leading Analog Devices to no longer argue its case. But the mootness doctrines that normally govern disposition of an appeal after settlement by the parties in private litigation, *see, e.g., U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21-22 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 37 (1950), do not apply in this context. A settlement normally moots a case because it leaves the court without a live controversy to resolve. In this case, however, the settlement between Knowles and Analog Devices does not moot the controversy between Knowles and the USPTO arising out of the USPTO's administrative decision to cancel the claims in Knowles's patent. Indeed, if the USPTO were to issue a reexamination certificate canceling the '049 patent, there would be no possibility that Knowles could avoid collateral effects of that result in future litigation.

As then-Judge Scalia once explained in a similar context, there is a “fundamental difference between this suit challenging the lawfulness of agency action, and an appeal such as *Munsingwear* from a decision of a lower court”; this appeal considers the propriety of the agency determination of unpatentability. *Radiofone, Inc. v. F.C.C.*, 759 F.2d 936, 940 (D.C. Cir. 1985) (opinion for only Scalia, J.). In such a situation, “it is *not* the matter that was before the agency which

constitutes the Article III case or controversy, but rather the dispute between [Knowles] and the agency concerning the lawfulness of the agency action.” *Id.* Knowles’s dispute with the agency thus remains live, regardless of Analog Devices’ presence in the appeal.

Nor is there anything unusual or suspect under Article III about the government appearing in a court of appeals to defend an administrative decision. Indeed, “[t]he government is almost always a party in an action involving an administrative decision.” 33 Charles Alan Wright et al., *Fed. Prac. & Proc. Judicial Review* § 8302 (1st ed. 2017). The Supreme Court in *Ingalls Shipbuilding, Inc. v. Director, Office of Workers’ Compensation Programs*, 519 U.S. 248, 262-70 (1997), addressed a very similar situation. Under the statutory scheme in *Ingalls*, a worker could bring a claim against his private employer and have the dispute heard ultimately by a Benefits Review Board within the Department of Labor. “[A]ny person adversely affected or aggrieved” by the Benefits Review Board’s decision could appeal to a federal court of appeals. *Id.* at 262. The issue in the case was whether the Director of the Office of Worker’s Compensation Programs, within the Department of Labor, could appear as a respondent. As the Supreme Court held, Article III posed no “impediment to the Director’s appearance as a respondent” in that case. *Id.* at 264. Nor would Article III have posed an impediment when, as

here, “the Director is the sole respondent whose presence is necessary to preserve adversity.” *Id.* at 266-67.

The harder question in *Ingalls* was simply whether the agency Director in that case had authority under the relevant statute to appear. *Id.* at 264. Here, as discussed below, the Director of the USPTO has clear statutory authority to appear, with or without another appellee. But “Article III surely poses no bar to the Director’s participation as a respondent” or, for the same reasons, intervenor in this Court. *Id.*

Even apart from the USPTO’s concrete interest as the party in opposition to the relief Knowles seeks, the government has Article III standing to appear in this Court to advocate for the correct application of the federal patent laws. As the Supreme Court has recognized, “[t]he obligations which [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.” *In re Debs*, 158 U.S. 564, 584 (1895). That sovereign interest explains the undisputed prerogative of the United States to bring criminal and civil enforcement actions in federal court without any requirement to show standing beyond a colorable allegation of a violation of federal law. It is also reflected in the wide array of statutes that provide for participation by the United States or its agencies in litigation affecting the interests of the United States. *See, e.g.*, 28 U.S.C. §§ 517, 518, 2403(a); Fed. R. Civ. P. 24(b)(2); 35 U.S.C. § 143 (discussed *infra*). Where the United States

or a federal agency seeks to intervene as of right, it may rely on the government's unique sovereign interest in ensuring and coordinating the proper enforcement of its laws—just as it could assert the same sovereign interest as a ground for initiating suit or appealing from an adverse judgment. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (explaining that the United States suffers a cognizable “injury to its sovereignty arising from violation of its laws”); *see also Diamond*, 476 U.S. at 64 (“The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic ‘case’ or ‘controversy’ within the meaning of Art[icle] III.”).

All of the factors discussed so far set this case apart from one like *Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014). There, Consumer Watchdog had requested an inter partes reexamination, which the USPTO undertook and decided in favor of the patentee, the Wisconsin Alumni Research Foundation (WARF). Consumer Watchdog—a nongovernmental consumer advocacy group—did not have any concrete stake in the validity of WARF's patent as a competitor or otherwise. *Id.* at 1260. Thus, when Consumer Watchdog appealed, this Court determined that Consumer Watchdog had not suffered an “injury in fact.” *Id.* at 1263. In that case, unlike here, (1) Consumer Watchdog was the party seeking affirmative relief in court, which necessitated the standing analysis in the first place; (2) Consumer Watchdog was not injured in any

concrete way by the unsuccessful USPTO ruling, unlike Knowles in this case (or the USPTO if, for example, this Court reverses the USPTO's decision and the agency needs to seek further review); and (3) Consumer Watchdog was not the government, which has special authority and responsibility to represent the public interest.

Finally, a decision that prevented the USPTO from intervening to defend its own decision in Knowles's appeal would have significant and far-reaching ramifications: Either Knowles would be unable to appeal the Board's decision to cancel the claims of the '049 patent, preventing Knowles from having judicial review of a USPTO decision against it, or Knowles would take an appeal without an adversary to present the opposing side to the Court.

No one suggests that Analog Devices may prevent Knowles from obtaining judicial review of the USPTO's decision to cancel the claims of Knowles's patent by the simple expedient of refusing to participate in the ensuing appeal in this Court. And allowing Knowles to appeal without any adversary, while not strictly contrary to Article III, would put the Court in "the highly unsatisfactory situation" of "a one-party appeal, where there is no adversarial presentation and the court consequently has reduced confidence in any ruling it might enter." *Allflex USA, Inc. v. Avid Identification Systems, Inc.*, 704 F.3d 1362, 1369 (Fed. Cir. 2013); *see also Aqua Marine Supply v. AIM Machining, Inc.*, 247 F.3d 1216, 1220 (Fed. Cir. 2001) (noting that a mootness holding would avoid "allowing the patentee to continue to litigate

validity, unencumbered by an opposing party”); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (explaining that the Court “largely depends” on “concrete adverseness which sharpens the presentation of issues”).

Finding that the USPTO lacks Article III standing to defend decisions of the Board, moreover, would affect far more than merely inter partes cases where one party has dropped out. It would affect the government’s participation in all appeals from ex parte USPTO decisions. *See* 35 U.S.C. § 141(a). The USPTO’s “standing” to defend the agency’s decisions in those circumstances is no different, for constitutional purposes, from its standing to do so here. Nor could such an Article III ruling easily be cabined to questions of patentability: It would presumably affect the government’s standing to appeal a finding that an Act of Congress is unconstitutional, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017), to defend a decision of any administrative agency, *see generally* Fed. R. App. P. 15(a)(2)(B) (agency must be named as respondent in appeal from agency proceeding), or even to bring criminal prosecutions.

In short, the Court inquired whether the agency must have Article III standing to intervene when it is not the one seeking relief. *See* Dkt. No. 61 at 2. The answer to that question is no, as courts do not require a showing of standing from intervenors who are not seeking any relief separate from the plaintiff. *Town of Chester*, 137 S. Ct. at 1651; *ASARCO*, 490 U.S. at 618. And even if the agency had to demonstrate

its standing, that requirement would be easily satisfied here. Knowles's controversy is with the USPTO, giving the government a concrete interest in the outcome of the proceedings here, and in any event the federal government generally has standing to pursue relief on behalf of the public.

C. The USPTO's statutory authority allows it to choose whether to intervene and, if so, what position to take

Because Article III of the Constitution "poses no bar" to the USPTO's participation in an appeal from a USPTO decision, *see Ingalls*, 519 U.S. at 264, we next address the USPTO's statutory authority to intervene and the extent of that authority. By statute, the Director of the USPTO has a right to intervene in every inter partes case arising from the USPTO. And the Director has statutory authority to take any position in those cases.

Before Congress passed the America Invents Act (AIA) in 2011, the Patent Act stated, "In an ex parte case or *any reexamination case*, the Director shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all the issues involved in the appeal." 35 U.S.C. § 143 (2002) (emphasis added). Thus, before the AIA, the USPTO was, by statute, a party to every appeal from an inter partes reexamination. The AIA amended that sentence, removing "any reexamination case" from the category of appeals in which the agency was obligated to appear. 35 U.S.C. § 143 (2012).

Instead, Congress added a sentence addressing the agency's *authority* to intervene, at its discretion, in appeals from inter partes cases, including inter partes reexaminations. The new sentence states, "The Director shall *have the right* to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board . . . in an inter partes or post-grant review under chapter 31 or 32." 35 U.S.C. § 143 (2012). Although that sentence does not specifically mention inter partes reexaminations, which were being phased out by the AIA, Congress explained elsewhere in the Act that "the Director's right under the fourth sentence of section 143"—the sentence just quoted—"to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board shall be deemed to extend to inter partes reexaminations." AIA, Pub. L. No. 112-29 § 7(e)(4), 125 Stat. 284, 315 (2011); *see also* 157 Cong. Rec. S1377 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) ("In the effective-date provision at the end of section [7], various existing [appeal] authorities are extended so that they may continue to apply to inter partes reexaminations commenced under the old system."); *see also* Joseph Matal, *Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 539, 542 n.25 (2012).

Furthermore, the Director's right to intervene in inter partes reexaminations extends to those reexaminations "that are requested . . . before the effective date" of the AIA. Pub. L. No. 112-29 § 7(e)(4), 125 Stat. 284, 315. In other words, the change in the law was made applicable to all inter partes reexaminations that were

requested before the AIA came into effect. Thus, the USPTO's participation in appeals from inter partes reexaminations went from an obligation to a right, even for inter partes reexaminations that were already pending.

The statute thus spells out the situations in which the Director has the right to intervene, which include inter partes reexaminations, inter partes reviews, and other inter partes cases in the USPTO. This Court therefore routinely asks the USPTO if it plans to intervene in inter partes cases, particularly in cases like this one where the Court would otherwise lose the benefit of the adversarial process. The statute also clearly specifies the cases in which the Director is automatically a party—ex parte cases. 35 U.S.C. § 143 (2012).

The statute does not discuss or limit the positions the Director may take in any type of case. In ex parte cases, the statute merely specifies that the Director must “address[] all of the issues raised in the appeal,” 35 U.S.C. § 143 (2012); in inter partes cases, even that requirement does not exist. Although the Director typically intervenes on the side of the appellee, even in that posture, the Director may take any substantive position he likes.²

² Because the USPTO does not have independent litigating authority, the Director seeks and obtains authorization from the Solicitor General before intervening in this Court. *See generally* 28 U.S.C. § 516; 28 C.F.R. § 0.20(c).

Indeed, *Ingalls* directly addresses the Director’s position in these appeals, not as a representative of the Board but as a representative of the agency as a whole. When the Board—the USPTO’s adjudicator—makes a decision, the “order of the agency’s designated adjudicator is in reality an order of the agency itself.” 519 U.S. at 268. The agency “may then be free to designate its enforcer/litigator as its voice before the courts of appeals.” *Id.* The agency’s litigator—in this case the USPTO Solicitor—while appearing on the side of the appellee, “is free to argue on behalf of the petitioner and to challenge the decision of the Board.” *Id.* at 270. Thus, if the Director (or Solicitor) disagrees with the Board’s decision, he need not argue in support of affirmance. This prevents “a ‘lopsided’ scheme whereby the Director can appear only in defense of the [Board’s] decisions.” *Id.* (citations omitted).³

In practice, the USPTO Director typically intervenes in appeals from inter partes cases in only two particular types of situations. Recognizing that the two parties can adequately represent the adverse sides of the dispute if both are present

³ Practically speaking, the Solicitor would not often argue in support of reversal of a Board decision because the agency would likely handle those cases administratively. For example, the Director can ask the Board to reconsider a decision. If the decision has already been appealed and the Director then determines that it is somehow defective, the Solicitor can seek a remand for the Board to reconsider. *See, e.g., In re Bursey*, No. 2016-2675 (Fed. Cir. Apr. 28, 2017) (nonprecedential) (remanding appeal upon Solicitor’s request to allow Board to reconsider); *In re DiStefano*, 562 Fed. App’x 984 (Fed. Cir. June 4, 2014); *In re Shield*, No. 2013-1562 (Fed. Cir. Apr. 16, 2014); *In re Motorola Mobility LLC*, No. 2012-1470 (Fed. Cir. Mar. 5, 2013).

but not when the appellee has dropped out of the case, the Director will often intervene when the appellee has dropped out to preserve the adversarial presentation of the issues and to support the agency's decision. Other than that, the Director often intervenes when the dispute on appeal implicates broader USPTO or government interests. Those interests may involve the validity or interpretation of federal statutes, of the USPTO's procedures, or of USPTO regulations. So, for example, if an appellant argues that a regulation that the Board followed is contrary to the Patent Act, the Director may intervene to support the regulation. Although the Director could choose to intervene, under the statute, in every inter partes case, he instead selects cases in which his participation would be most important to the agency and helpful to the Court.

The Director's presence is not required, however, for the appeal to proceed. As discussed above, the appellant has a justiciable controversy because it stands to lose its patent. The lack of USPTO participation does not moot the appellant's case any more than does the reexamination requester's declining to participate, discussed above.

In the unlikely event that the government were to decline to defend the Board's decision in a case in which no other party was defending it, the Court could simply decide to hear the patentee's appeal without the benefit of an adverse party. Alternatively, the Court could appoint or invite an amicus to defend the Board's

decision. The Supreme Court, for example, often chooses that route when the government confesses error and declines to defend a favorable decision from a lower tribunal. *See, e.g., Becker v. Montgomery*, 532 U.S. 757, 762 n.1 (2001) (“Without any party to defend the Sixth Circuit’s position, we invited [attorney] Stewart A. Baker to brief and argue this case, as *amicus curiae*, in support of the judgment below. His able representation . . . permit[s] us to decide this case[,] satisfied that the relevant issues have been fully aired.” (citations omitted)). Or, if the government confesses error and the Court concludes that, in consequence, there is nothing substantial remaining to be decided, the Court may simply vacate and remand. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 169-73 (1996); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

Regardless, because the USPTO typically intervenes to defend the Board’s decision and tries to avoid situations in which a Board decision that it disagrees with is heard on appeal, the situation rarely arises. Far more common, and preferable, is

a situation like this, in which the USPTO Director chooses to intervene to support the Board's decision.

CONCLUSION

This Court should adjudicate Knowles's appeal, taking into account the positions advanced by both Knowles and the USPTO, and, as discussed in the USPTO's principal brief, it should affirm the Board's decision in this case.

Dated: July 31, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I electronically filed the foregoing SUPPLEMENTAL BRIEF FOR INTERVENOR with the Court's CM/ECF filing system, which constitutes service, pursuant to Fed. R. App. P. 25(c)(2) and Fed. Cir. R. 25(e)(1).

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