

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ASKELOADDEN L.L.C.,
Petitioner,

v.

LIBERTY PEAK VENTURES LLC,
Patent Owner.

Case IPR2023-00422
Patent No. 8,905,301 B2

**ASKELOADDEN'S REPLY TO PATENT OWNER'S RESPONSE FOR
PATENT NO. 8,905,301 B2**

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Patent Trial and Appeal Board
United States Patent and Trademark Office
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EXHIBIT LIST*

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
Ex1001	U.S. Patent No. 7,837,100 B2 to Bonalle et al. (“ <u>the ’100 Patent</u> ”)
Ex1002	U.S. Patent No. 8,905,301 B2 to Bonalle et al. (“ <u>the ’301 Patent</u> ”)
Ex1003	Expert Declaration of Ivan Zatkovich in Support of Petition for <i>Inter Partes</i> Review of Claims 1-17 of U.S. Patent No. 7,837,100 B2 and Claims 1-20 of U.S. Patent No. 8,905,301 B2 (“ <u>Zatkovich Decl.</u> ”)
Ex1004	<i>Curriculum Vitae</i> of Ivan Zatkovich
Ex1005	Prosecution History of the ’100 Patent (U.S. App. No. 11/478,140) (“ <u>the ’140 Application</u> ”)
Ex1006	Prosecution History of the ’301 Patent (U.S. App. No. 12/907,955) (“ <u>the ’955 Application</u> ”)
Ex1007	U.S. Pat. Pub. No. 2007/1098404 A1 to Hirka et al. (“ <u>Hirka ’404</u> ”)
Ex1008	U.S. Pat. Pub. No. 2004/0225604 A1 to Foss et al. (“ <u>Foss</u> ”)
Ex1009	WIPO Pub. No. WO 02/21374 A1 to Hirka et al. (“ <u>Hirka</u> ”)
Ex1010	U.S. Patent No. 6,330,546 B2 to Gopinathan et al. (“ <u>Gopinathan</u> ”)

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
Ex1011	“Financial transaction card originated messages – Interchange message specifications – Part 1: Messages, data elements and code values”, ISO 8583-1, First Edition (published June 15, 2005) (“ <u>ISO Standard 8538-1</u> ”)
Ex1012	Declaration of Glenn J. Perry (“ <u>Perry Decl.</u> ”)
Ex1013	Letter Agreement Between Glenn J. Perry and Askeladden L.L.C. dated May 20, 2020
Ex1014 **	Supplemental Declaration of Ivan Zatkovich in Support of IPR
Ex1015 **	“Available Balance”, <i>Investopedia</i> (Dec. 23, 2008), Archive available at: https://web.archive.org/web/20081223205618/https://www.investopedia.com/terms/a/available-balance.asp (“ <u>Investopedia: Available Balance</u> ”)
Ex1016**	Glenn Gimble, “From the Examiner’s Desk: Unfair and Deceptive Acts and Practices: Recent FDIC Experience”, <i>Supervisory Insights</i> (Winter 2008) (“ <u>Supervisory Insights</u> ”), available at: https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin08/siwinter08-article3.pdf
Ex1017**	“Line of Credit,” <i>Investopedia</i> (April 4, 2005), Archive available at: https://web.archive.org/web/20050404131756/https://www.investopedia.com/terms/l/lineofcredit.asp (“ <u>Investopedia: Credit Line</u> ”)

* Petitioner Askeladden L.L.C. filed simultaneously with the Petition for review of U.S. Patent No. 8,905,301 (Ex1002) (IPR2023-00422), a related Petition for *inter partes* review for), which issued as a child of U.S. Patent No. 7,783,100 (Ex1001) (IPR2023-00421). Since exhibits and subject matter overlap, for the Board's convenience and the parties' convenience, the same exhibits, including a common Declaration of Ivan Zatkovich (Ex1003) and a common Supplemental Declaration for Ivan Zatkovich (Ex1014) and common declaration of Glenn J. Perry (Ex1012), are being submitted in both proceedings.

**** Newly submitted exhibits.** Ex1015, Ex1016, and Ex1017 are used in support of IPR2023-0421.

I. INTRODUCTION

Pursuant to the Scheduling Order (Paper No. 8), Petitioner Askeladden L.L.C. (“Petitioner”)¹ respectfully submits this **Reply to Patent Owner Liberty Peak’s Patent Owner’s Response** (Paper No. 9) with respect to the ’301 Patent (Ex1002) in the above captioned proceeding.

The Petition requested cancellation of Claims 1-20 of the ’301 Patent based on the following grounds:

Ground 1: Claims 1, 3-5, and 7-16 are unpatentable as anticipated by Foss (Ex1008) under 35 U.S.C. §§ 102(a) & 102(e).²

Ground 2: Claim 14 is rendered obvious by Foss in view of the admitted prior art (Ex1005) under 35 U.S.C. §103(a).

Ground 3: Claim 3 is rendered obvious by Foss in view of Gopinathan (Ex1010) under 35 U.S.C. §103(a).

Ground 4: Claims 2, 6, 17-20 are rendered obvious by Foss in view of Hirka (Ex1009) under 35 U.S.C. §103(a).

Claims 1, 7 and 16 are in independent form.

Representative Claim 1 reads as follows:

¹ All defined terms are used in the same sense as in the Petition (Paper No. 1).

² All citations to 35 U.S.C. §§102 and 103 are to pre-AIA versions.

[1PRE] 1. A method comprising:

[1A] receiving, at a computer-based authorization system, a transaction request associated with a debit account, wherein the debit account is associated with a separate account;

[1B] *sending*, using the computer-based authorization system, *an account information request that includes account information of the separate account*;

[1C] receiving, at the computer-based authorization system, status information of the separate account in response to the account information request; and

[1D] authorizing, using the computer-based authorization system, the transaction request based on the status information.

(Ex1002, Claim 1).³

Claim 7 is directed towards a tangible computer-readable medium with computer executable instructions which performs the above method. Element [7B] corresponds verbatim to element [1B]. (Paper 1 at 28-29).

Although the Petition challenges all 20 claims in the '301 Patent, Patent Owner only disputes the Petition with respect to Independent Claim 1 and 7, and Dependent Claims 2-6 and 8-15 (on grounds that claims 1 and 7 are not anticipated). (Paper 9 at 1-2). **Thus, Patent Owner does not offer any challenge to Independent Claims 16 or Dependent Claims 17-20, which should be found invalid in any event.** (See Paper 1 at 48-54, 76-84; Ex1003, ¶¶471-482, 570-612).

³ Emphasis and bracketing added throughout unless otherwise noted.

Patent Owner also argues that Mr. Zatkovich's analysis in his original declaration (Ex1003) is flawed based on a misplaced construction and application of the term "**of**" in claim element [1B] and [7B]. (Paper 9 at 8-12). Specifically, Patent Owner asserts that the term "of" in the context of "account information **of** the separate account" should be construed to mean "**belong to**" and not "**associated with**," and thus the prior art (Foss, Ex1008) purportedly does not teach the limitation of the claim. (Paper 9 at 9-10).

Patent Owner's proposed construction is entirely unsupported, and actually contradicted by the very dictionary relied upon by Patent Owner (American Heritage, Ex2001). The definition relied upon by Patent Owner is based on a double genitive form of "of", which requires the object of the preposition to be in the possessive. (Paper 9 at 6-7). But "separate account" in the limitation "account information **of** the separate account" is not in the possessive, and thus "of" is not being used in the double genitive. The more applicable definitions found in that same dictionary support the interpretation applied in the Petition (Paper 1) and Mr. Zatkovich's original supporting declaration (Ex1003). (See Ex1014, ¶¶669-671). Moreover, even assuming "of" were construed to mean "belongs to" as Patent Owner asserts, Foss (Ex1008) teaches account information (linkage information)

would belong to the account.⁴

For at least these reasons as more fully discussed herein, and the reasons set forth in the Petition (Paper 1), Declaration of Mr. Zatkovich (Ex1003) and the Supplemental Declaration of Mr. Zatkovich (Ex1014), Claims 1-20 should be cancelled.

⁴ While Patent Owner suggests that “[a] petition must be judged as it is written” (Paper 9 at 2), the Federal Circuit has explained that it is proper to “respond to” claim construction arguments first raised after the institution decision by both “explain[ing] why that construction should not be adopted” and by “present[ing] what it believe[s] to be a claim construction that more accurately correspond[s]” to the specification. *See ParkerVision, Inc. v. Vidal*, No. 22-1548, ___ F.4th ___, 2023 U.S. App. LEXIS 33171, *20 (Fed. Cir. Dec. 15, 2023) (upholding Board reliance on construction proposed in reply). Likewise, “[w]here a patent owner in an IPR first proposes a claim construction in a patent owner response, a petitioner must be given the opportunity in its reply to argue and present evidence of anticipation or obviousness under the new construction, at least where it relies on the same embodiments for each invalidity ground as were relied on in the petition.” *Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374, 1384 (Fed. Cir. 2023) (Vacating final written decision where Board improperly “refused to consider [Defendant’s] evidence and argument under [Plaintiff’s proposed] construction”). In other words, this reply complies with the requirement under 37 C.F.R. §42.23(b) that “[a] reply may only respond to arguments raised in the corresponding . . . patent owner response, or decision on institution” by arguing that Patent Owner’s construction is wrong, that another construction is more apt, and that, in any event, the claim limitations are met. *See ParkerVision*, 2023 U.S. App. Lexis at *21; *Axonics*, 75 F. 4th at 1380.

II. ANALYSIS

The crux of Patent Owner's response is based on the contention that, when Claims 1 and 7 of the '301 Patent use the term "of" in the context of "an account information request that includes **account information of the separate account**", it is purportedly being used in the "double generative [sic: genitive]", and thus should be construed to be possessive. (Paper 9 at 6-7 (quoting American Heritage Dictionary, Ex2001)).

Unfortunately for Patent Owner's analysis, "of" as used in the limitation "an account information request that includes account information of the separate account" in Claims 1 and 7 is not being used with a possessive form of "separate account" and thus is not being used in the "double genitive". Rather, it is being used consistent with other definitions (e.g., Definition 7 and 8) set forth in the same dictionary as including "associated with" and "connected to". (Ex2001, Def. Nos. 7 and 8; *see also* Ex1014, Zatkovich Suppl. Decl., ¶¶669-671). Thus, the entire premise of Patent Owner's arguments falls by the way-side in the first instance.

Even putting aside the initial flaws in Patent Owner's interpretation of "account information of the separate account", the next step in Patent Owner's logic is also flawed. In particular, Patent Owner asserts that Foss (Ex1008, the primary reference of the Petition) does not teach "information possessed by the account", but

only teaches sending information **about** or **associated with** the account and that Mr. Zatkovich does not adequately explain otherwise. (Paper 9 at 9-11). The specific information identified by Mr. Zatkovich as the “account information” is, “e.g., an account number or account information using ‘linkage between the credit/overpayment component and the stored value component” (Ex1003, ¶¶385-386, quoting Ex1008, [0017]; *see also* Ex1014, ¶¶672-674). As Mr. Zatkovich confirms, not only is this “linkage information” associated with the overdraft account (Ex1003 ¶387), but it would also be possessed by the overdraft account, in any event. (Ex1014, ¶¶674, 675-677). **Thus, under either construction, Foss would meet this limitation which Patent Owner disputes.**

Patent Owner asserts claims “3-5” and “8-15” are, for the same reasons, not anticipated by Foss, but this argument should be rejected for the reasons discussed. Patent Owner further repeats without analysis the claim limitations in dependent claims 14 (Ground 2), 3 (Ground 3) and 2 and 6 (Ground 4) (Paper 9 at 14-19) and states they are not met without any meaningful discussion. However, as set forth in the Petition (Paper 1) and Mr. Zatkovich’s Declaration (Ex1003, ¶¶ 458-468 (claim 14), ¶¶486-495 (claim 3), ¶¶552-569 (claims 2 and 6)), this is clearly not the case.

Each of these arguments are addressed as follows:

A. Elements [1B] and [7B] Do Not Use the Double Genitive Form of “of” in “account information of the separate account” Limitation

The crux of Patent Owner’s response is based on the contention that, when Claims 1 and 7 of the ‘301 Patent use the term “of” in the context of “an account information request that includes **account information of the separate account**”, it is being used in the double genitive, and thus should be construed to be possessive:

In this context, the word “of” **specifies a possessive relationship** – i.e., the information belongs to the separate account and is not merely associated with it. The American Heritage Dictionary notes that this type of “**double generative**” [sic: genitive] **construction, in which a possessive form appears as the object of the preposition “of,”** has been in use in the English language since the 1300s and serves to eliminate ambiguities that can arise in language. For example, whereas the phrase “Bob’s photograph” could mean either “a photograph of Bob” (i.e., one containing Bob’s image) or “a photograph that is in Bob’s possession,” a “**photograph of Bob’s**” **can only mean one that Bob has in his possession**, regardless of who or what is shown in the image. Ex. 2001. **Using “of” in such a fashion, as it is in claim 1, thus advances the goal of “particularly pointing out and distinctly claiming the subject matter which the inventor [] regards as the invention.”** 35 U.S.C. § 112(b).

Paper 9 at 6-7 (yellow highlighting added).

Thus, Patent Owner cites to the American Heritage Dictionary (Ex2001) to support its construction of the term “of”. In particular, ignoring other definitions for the term “of”, the Patent Owner focuses on the “double genitive” construction, which only applies when the possessive form (such as “ ‘s” or “mine”) is used in conjunction with the preposition “of”. Ex2001.

Unfortunately for Patent Owner’s analysis, the limitation “an account information request that includes account information of the separate account” in Claims 1 and 7 is not using the possessive form of “separate account.” If it were, the claim would read “... account information of the separate account’s.” Therefore, the term “of” in “account information of the separate account” is not being used in the “double genitive”. (*See, e.g.*, Ex1014, ¶670). Thus, since the Claims 1 and 7 do not use a “double genitive” form of “of” as described by the American Heritage Dictionary, Patent Owner's argument fails in the first instance.

B. The More Natural Meaning of the Term “of” in the Context of “account information of the separate account” as Used in Elements [1B] and [7B] Includes “Associated With” and “Connected To”

Moreover, contrary to Patent Owner’s proposed construction, the American Heritage Dictionary confirms that “of” has other applicable meanings, including “Associated with or adhering to” (Ex2001, Def. No. 7) and “Belonging or connected to” (Ex2001, Def. No. 8):

of (ʊv, ɔv; əv when unstressed)

prep.

1. Derived or coming from; originating at or from: *customs of the South*.
2. Caused by; resulting from: *a death of tuberculosis*.
3. Away from; at a distance from: *a mile east of here*.
4. So as to be separated or relieved from: *robbed of one's dignity; cured of distemper*.
5. From the total or group comprising: *give of one's time; two of my friends; most of the cases*.
6. Composed or made from: *a dress of silk*.
7. Associated with or adhering to: *people of your religion*.
8. Belonging or connected to: *the rungs of a ladder*.
9.
 - a. Possessing; having: *a person of honor*.
 - b. On one's part: *very nice of you*.
10. Containing or carrying: *a basket of groceries*.
11. Specified as; named or called: *a depth of ten feet; the Garden of Eden*.
12. Centering on; directed toward: *a love of horses*.
13. Produced by; issuing from: *products of the vine*.
14. Characterized or identified by: *a year of famine*.
15.
 - a. With reference to; about: *think highly of her proposals; will speak of it later*.
 - b. In respect to: *slow of speech*.
16. Set aside for; taken up by: *a day of rest*.
17. Before; until: *five minutes of two*.
18. During or on a specified time: *of recent years*.
19. By: *beloved of the family*.
20. Used to indicate an appositive: *that idiot of a driver*.
21. Archaic On: *"A plague of all cowards, I say" (Shakespeare)*.

(Exhibit 2001, pp. 2-3 of 6 (highlight added)).

In his original declaration, Mr. Zatkovich adopted the plain and ordinary meaning of the claim terms (Ex1003, ¶94). Consistent with definition 7 of the American Heritage Dictionary, Mr. Zatkovich explains that information requests would include information **associated with the separate account (the “overdraft account”)**:

In particular, a POSITA at the time of the July 5, 2005 invention would understand that an account number or other form account identification

using the “linkage between the credit/overpayment component and the stored value component” (Ex1008, [0017]) **would be associated with the overdraft account**, and used to check the available balance of the overdraft account in step 446 of Foss as a simple, easy method to identify what balance was being checked.

(Ex1003, ¶387).

Thus, a natural construction of the phrase “account information of the separate account” encompasses any account information that is “associated with” (def. 7) or “connected to” (def. 8) the separate account. (Ex2001, Def. Nos. 7 and 8; *see also* Ex1014, Zatkovich Suppl. Decl., ¶671). Accordingly, Mr. Zatkovich’s analysis using “associated with” is consistent with the dictionary definition of the term “of” as used in elements [1B] and [7B].

C. Under Either Construction, Foss (Ex1008) Teaches Elements [1B] and [7B]

As explained in the Petition, Foss teaches elements [1B] and [7B], “sending an information request with account information of the separate account”. In Foss, the relevant “information request” is the process associated with “step 446” where “the available overdraft protection balance is checked”. (Paper 1 at 17; Ex1003, ¶¶142, 382-388).

In particular, the Petition explains that the account information of the separate account would include identifying “linkage” information between the debit (“stored value”) and separate (“overdraft”) accounts:

As step 446 of the transaction process 400 shown in Figure 4, Foss discloses sending, using the computer-based authorization system an account information request (e.g., “If overdraft funds are available at step 440, the available overdraft protection balance is checked at step 446”). (Ex1008, [0066]; Ex1003, ¶¶384-385). See, e.g., Ex1008, Fig. 4:

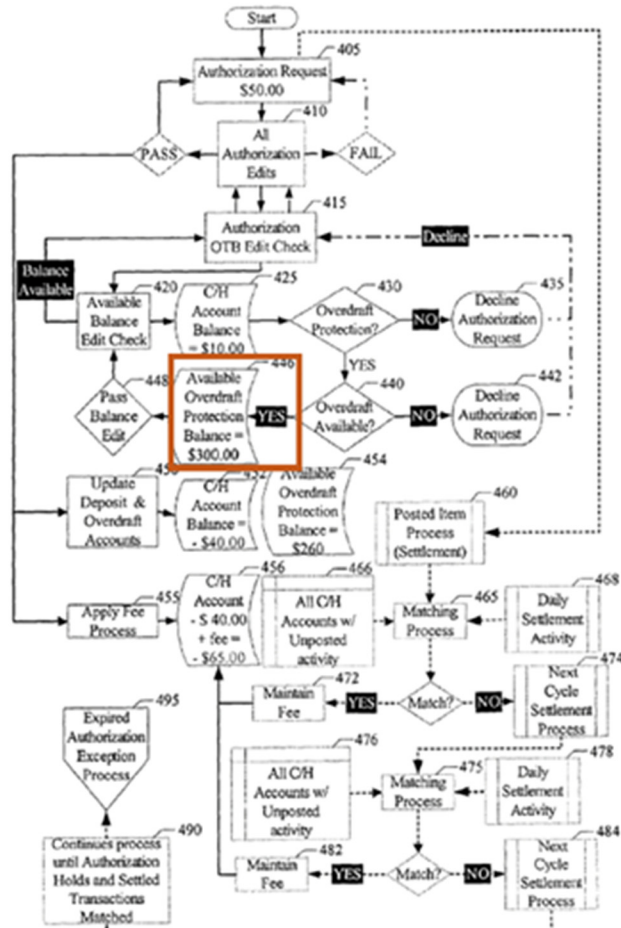


Fig. 4

(Ex1008, Fig. 4).

As Mr. Zatkovich explains, as Ground 1, a POSITA would understand that in order to perform “the available balance is checked at step 446” for the overdraft account, the account information request would necessarily include account information associated with the overdraft account (e.g., **an account number or account identification using the “linkage between the credit/overpayment component and the stored value component”** (Ex1008, [0017])). (Ex1003, ¶¶385- 386).

In particular, as Mr. Zatkovich explains, a POSITA would understand that an account number or other form account identification using the

“linkage between the credit/overpayment component and the stored value component” (Ex1008, [0017]) would be **associated with** the overdraft account, and used to check the available balance of the overdraft account in step 446 of Foss as a simple, easy method to identify what balance was being checked. (Ex1003, ¶387).

(Paper 1 at 28-30).

Further bolstering this conclusion, with respect to dependent Claim 14, the Petition also argued that Foss (Ex1008) teaches that the information request could be made in conjunction with third parties. Such a request would necessarily include account information associated with the overdraft account in order to determine if overdraft was available:

As Mr. Zatkovich explains, a POSITA would understand that, in order to send and receive information to and from the bank managing a funding account, where the credit card issuing system does not communicate directly with the bank managing the funding account, a third-party vendor would have been used. (Ex1003, ¶463). Requests for account information would be sent to the third-party vendors instead of the bank managing the funding account. (Ex1003, ¶463).

(Paper 1 at 46).

Patent Owner asserts that Mr. Zatkovich’s “conclusory” declaration “does not explain what information *about* the account or *associated with* the account is information *of* the account.” (Paper 9 at 10). This is simply incorrect. As discussed,

Mr. Zatkovich explains that account “linkage” information is the information associated with the account that links “credit/overpayment component and the stored value component” (Ex1003, ¶¶386, 387). Mr. Zatkovich reaffirms this point in his supplemental declaration. (Ex1014, ¶674).

Patent Owner also asserts Mr. Zatkovich “does not explain ... *why* they [presumably “about” and “associated with”] should be treated as one in the same.” (Paper 9 at 10). It is hard to fathom what Patent Owner is trying to convey.

In any event, the distinction between association and possession is not significant. The account identifying and linkage information relied upon in the Petition and Mr. Zatkovich’s original declaration, is not only “associated” with the “separate account” but also “belong[s] to” or is “possessed by” the separate account to which it is linked. (Ex1014, ¶¶674, 675-677). Indeed, as Mr. Zatkovich explains, the linkage information in Foss is comparable to the “information stored in another database” taught by the ’301 Patent to link the separate account. (Ex1014, ¶676, quoting Ex1002, 8:52-63; *see also* Ex1014, ¶673, quoting Paper 9 at 4-5).

Thus, Patent Owner’s argument that Foss does not anticipate claims 1 and 7 fails. Similarly, Patent Owner’s argument that claims 3-5 and 8-15 are “not anticipated by Foss for at least the same reasons” likewise fail. (Paper 9 at 13-14).

D. Patent Owner's Arguments with Respect to Dependent Claims 14 (Ground 2), 3 (Ground 3) and 2 and 6 (Ground 4) are Merely Iterative of the Points Raised with Respect to the Independent Claim and Fail to Rebut the Substantial Evidence and Analysis Set Forth in the Petition and Mr. Zatkovich's Supporting Declaration

Patent Owner's arguments with respect to dependent claims 14 (Ground 2), 3 (Ground 3) and 2 and 6 (Ground 4) is that to the extent Foss does not teach "account information of a separate account" as required in Claims 1 and 7, the obviousness arguments do not cure that alleged defect. (Paper 9 at 13-18). However, as detailed above, under either construction of the term "of" (the proper construction as including "connected to" or "associated with", or the improper construction as "belongs to"), Foss teaches the use of "linkage information" which is "account information of the separate account". (*See also* Ex1014, ¶¶673-677).

Thus, Patent Owner's arguments for the dependent claims fails for the same reasons as already discussed.

E. Patent Owner Does Not Challenge Independent Claim 16 or Dependent Claims 17-20, Which Should be Found Invalid

Patent Owner does not offer any challenge to Independent Claims 16 or Dependent Claims 17-20. (Paper 9). For the same reasons as set forth in the Petition (Paper 1 at 48-54, 76-84), and Mr. Zatkovich's original supporting declaration (Ex1003, ¶¶ 469-482, 570-612), each of these claims should be found invalid in any event.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition and supporting declarations of Ivan Zatkovich (Ex1003 and Ex1014), Claims 1-20 of the '301 Patent should be found unpatentable and cancelled by the Board.

Respectfully submitted,

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By: /Charles R. Macedo/
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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. §42.24(d), I hereby certify that the foregoing **ASKELADDEN'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE FOR PATENT NO. 8,905,301 B2** contains 2,953 words, excluding the parts of the reply exempted by 37 C.F.R. §42.24(c), as measured by the word-processing system used to prepare this paper.

Dated: January 3, 2024
New York, New York

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CERTIFICATE OF SERVICE

The undersigned hereby confirms that the foregoing **ASKELADDEN'S
REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE FOR
PATENT NO. 8,905,301 B2** was caused to be served on January 3, 2024 via electronic mail on the following counsel of record for Patent Owner:

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