

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

R-PAC INTERNATIONAL CORPORATION,

Petitioner

v.

ADASA INC.,

Patent Owner.

IPR2024-01416

U.S. Patent No. 9,798,967

PETITIONER'S REQUEST FOR DIRECTOR REVIEW

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EXHIBIT LIST

Exhibit	Reference
1001	U.S. Patent 9,798,967 (“’967 patent”)
1002	Ex Parte Reexamination Certificate for the ’967 patent
1003	File History of Application 15/042,993
1004	File History of 90/014,052 Ex Parte Reexamination
1005	Declaration of Thomas J. Clare in support of petition (“ <i>Clare</i> ”)
1006	Thomas J. Clare curriculum vitae
1007	Claim Construction Order from <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 68)
1008	Adasa Opening Claim Construction Brief from <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 57)
1009	Patrick J. Sweeney II, RFID for Dummies (2005) (“Dummies”)
1010	U.S. Patent 8,373,545 (“Traub”)
1011	EPC Tag Data Standards Version 1.1 Rev.1.24 (April 1, 2004) (“TDS-2004”)
1012	<i>Adasa Inc. v. Avery Dennison Corp.</i> , 55 F.4th 900 (Fed. Cir. 2022)
1013	U.S. Patent No. 5,420,757 (“Eberhardt”)
1014	David L. Brock, White Paper: The Electronic Product Code™ (EPCTM) as a Meta Code, Auto-ID Center, Massachusetts Institute of Technology (June 1, 2003) (“2003 MIT White Paper”)
1015	U.S. Patent 7,201,309 (“Oakes”)
1016	Bill Glover, et al., RFID Essentials (February 28, 2006)
1017	U.S. Patent 7,425,888 (“Powell”)

Exhibit	Reference
1018	U.S. Patent 3,944,976
1019	U.S. Patent 4,580,041
1020	U.S. Patent 5,745,036
1021	U.S. Patent 5,963,134
1022	U.S. Patent 6,025,780
1023	U.S. Patent 3,194,154
1024	Declaration of June Ann Munford
1025	Order on Defendant’s Motion for Judgment as a Matter of Law from <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 612)
1026	Order on Plaintiff’s Motion to Exclude Testimony of Defendant’s Invalidity Expert from <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 489)
1027	Excerpts of the Transcript from the Invalidity Trial in <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 584)
1028	Time to Trial Statistics for the Southern District of New York.
1029	Specification from Application No. 11/465,712
1030	Specification from Provisional Application No. 60/709,713
1031	Specification from Provisional Application No. 60/939,603
1032	Excerpts of the Transcript from the Invalidity Trial in <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 572)
1033	Letter Motion, <i>ADASA Inc. v. R-Pac International LLC</i> , Case No 24-cv-06102 (AKH) (ECF No. 6)
1034	Jury Verdict, <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 577)

Exhibit	Reference
1035	Unopposed Stipulation of Satisfaction of Judgment, <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 619)
1036	Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment of Invalidity and Cross Motion for Partial Summary Judgment of No Invalidity, <i>Adasa Inc. v. Avery Dennison Corp.</i> , 6:17-cv-01685 (Dkt. 130)

I. INTRODUCTION

Pursuant to 37 C.F.R. §42.71(d), Petitioner requests Director Review of the Board’s institution denial (“DI,” Paper 11). The Board abused its discretion by denying authorization for a preliminary reply to address 35 U.S.C. §325(d), and then when it based its Section 325(d) denial on arguments that no party, including Patent Owner (“PO”), had made. The Board also made erroneous findings of fact when it viewed Petitioner’s references in isolation without considering how the Office had previously applied those references or the combination on which Petitioner relied. For these reasons, Petitioner requests the Director vacate the Board’s decision and remand with instructions to (1) authorize a preliminary reply and sur-reply as to Section 325(d) and (2) issue a new institution decision, considering the full record.

II. LEGAL STANDARD

The Director may review and reverse incorrect Board decisions where, as here, those decisions involve an abuse of discretion, erroneous findings of fact, or erroneous conclusions of law. *United States v. Arthrex, Inc.*, 594 U.S. 1, 25 (2021); *see also* Revised Interim Director Review Process §2.B; *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016).

III. BACKGROUND

A. The ’967 Patent (EX-1001)

The ’967 patent generally relates to radio frequency identification (“RFID”) transponders, also referred to as “tags,” and a system “for commissioning RFID

transponders with unique object class instance numbers.” EX-1001, Abstract. Specifically, such tags have memory encoded with data uniquely identifying the item to which the tag is attached, including a space for a serial number. The ’967 patent claims as an invention partitioning that serial number space, such that, the first part of the serial number includes “Most Significant Bits” (MSBs) that can distinguish sets of otherwise identical serial numbers, analogous to how an area code distinguishes the same seven-digit phone number in different areas.

During original prosecution, the pending claims were not rejected based on prior art, and although a portion of RFID for Dummies (“Dummies,” EX-1009) was cited in an IDS, the Examiner never applied it. Petition (“Pet.,” Paper 2), 8. A non-party to this IPR (Avery Dennison, unrelated to Petitioner) filed a reexamination request, and for claim 1, the Examiner applied the combination of US 2007/0040684 to McAllister (“McAllister”) and US 8,373,545 (“Traub,” EX-1010), and, separately, the combination of McAllister and US 7,827,200 to Rowe (“the ’200 patent”). *Id.*, 9-10. The Examiner was not presented with and never applied a combination of the ’200 patent and Traub. McAllister and the ’200 patent have not been filed as exhibits here.

B. Petitioners’ Challenges

One month after being sued in district court and before any answer or other response to the district court complaint was filed, Petitioner filed this Petition

challenging claims 1–20 of the ’967 patent over the combination of Dummies and Traub for claims 1, 6-12, 16, and 20 (Ground 1) and over those references in further combination with EPC Tag Data Standards Version 1.1 Rev.1.24 (“TDS-2004,” EX-1011) for claims 2-5, 13-15, and 17-19 (Ground 2). Petitioner provided the declaration of Thomas J. Clare¹ in support of the Petition. EX-1005.

In the Petition, Petitioner explained why a POSITA would have been motivated to combine the teachings of Dummies and Traub. Pet. 30-34. For claim 1, Petitioner further explained Dummies taught 1[pre]-1[d], and the Dummies-Traub combination taught 1[e] and 1[f]. *Id.*, 34-47. Importantly, for 1[e], Petitioner relied on Dummies for more than just generic components of an RFID system or the well-known EPC data structure.² Instead, Petitioner pointed to Dummies’ recognition of the same problem identified in the ’967 patent: using a centralized issuing authority to assign unique EPCs when multiple lines or locations are encoding tags for the same product (*id.*, 25 (citing Dummies, 239); Patent Owner’s Preliminary Response

¹ The Board’s institution decision sometimes incorrectly refers to this as the Crane Decl. DI, 7, 15.

² Petitioner did rely on such teachings in Dummies for 1[pre]-1[d], and PO has not disputed these limitations were well-known in the prior art, including as taught by Dummies. *See* Pet. 34-37; POPR 42; DI, 15 n.5.

(“POPR,” Paper 9) 10 (citing EX-1001, 2:23-32, 3:27-4:4), and Dummies’ solution to that problem of allocating ranges of serial numbers to each manufacturing facility and partitioning the serial number field into a “facility number, line number and subserial number” (Pet. 25-26 (citing Dummies, 239-40), 38 (citing same)). Although Petitioner contended Dummies alone taught 1[e], Petitioner further combined those teachings with Traub to address a prior district court construction of “being assigned a limited number of [MSBs]” as “includes a limited, predefined sequence of higher order bits at the leading end.” *Id.*, 39-44 (citing EX-1007, 3). Specifically, Traub taught allocating EPC code blocks or pools with business information encoded in the higher order bits at the leading end, and Petitioner explained how this disclosure was the same as PO’s litigation examples of information encoded in the MSBs. *Id.*, 40-42 (citing Traub, 3:40-4:9, Fig. 4B (annotated); EX-1008, 2). Petitioner explained how Traub’s Figure 4B taught partitioning the EPC’s serial number so that the MSBs (in the leading end) stored the location and/or lot number information. *Id.*, 41-42. Petitioner supported its mapping with expert testimony as well as other objective evidence supporting a POSITA’s knowledge. Clare Decl., ¶¶117-24 (citing Powell, 4:29-40).

For 1[f], Petitioner further relied on portions of Traub’s Figure 4B showing the partitioned location/lot number information taught the MSBs and “remaining bits of lesser significance...together comprise the one serial number instance.” Pet. 46-

47 (citing Traub, Fig. 4B (annotated); Dummies, 238-39; Clare Decl. ¶¶129-30).

Because Dummies was cited in an IDS (but not applied) in original prosecution and Traub was applied during reexam, Petitioner addressed Section 325(d) in the Petition. Pet. 69-70. Petitioner explained the Office never previously considered the Dummies-Traub combination, and the examiners had erred by overlooking the specific teachings on which the Petition relied. *Id.*

C. Patent Owner Preliminary Response

In the POPR, PO argued the Board should discretionarily deny institution under Section 325(d). POPR 20-24. Specifically, PO argued relevant portions of Dummies were submitted in an IDS (*id.*, 21 (citing EX-2008, 8-12)), and any additional Dummies' portions cited in the Petition were "directed toward subject matter well known in the RFID industry that is entirely redundant of information within the TDS references, and other art." *Id.* (citing Pet. 23 (Dummies overview); Clare Decl., ¶¶57 (Technology Background), 75 (Dummies overview); EX-2002, 733:8-15 (highly excerpted trial testimony directed to SGTIN-96 encoding generally)). PO then cited a statement in the Petition's motivation to combine explanation ("Dummies, however, does not provide a detailed explanation for how that allocation is done, which leaves the implementation details to the skill and knowledge of the POSITA") before incorrectly asserting the Petition makes only "passing reference" to Dummies in the analysis of 1[e]-1[f]. *Id.*, 21-22.

PO next argued the Office had previously considered the Dummies-Traub combination during reexam. *Id.*, 22. In doing so, PO argued only that Dummies “presents a brief summary of the EPC through reference to and excerpt from disclosure of the TDS” (*id.* (citing EX-1009, 46-47 (“describing EPC format”))) and that such “disclosures do not actually teach the inventive portions of the challenged claims of the ‘967 Patent” [1[e]-1[f]] (*id.*). In other words, for *Advanced Bionics* step one, PO argued (1) Dummies was considered in original prosecution in an IDS, (2) Traub was considered in reexam, and (3) the Dummies-Traub combination was considered in reexam because the reexam examiner had considered Traub in combination with TDS (teaching prior art EPC format). *Id.*, 20-22.

As to *Advanced Bionics* part two, PO acknowledged Petitioner’s argument that the Examiner erred by not discussing Traub’s Figure 4B, but asserted there was no error based on Dummies alone or Dummies in combination with TDS. *Id.*, 23.

D. Cursory Denial of Authorization for Preliminary Reply

Petitioner requested authorization from the Board to file a four-page preliminary reply to address PO’s Section 325(d) arguments in the POPR, and argued good cause because Petitioner could not have anticipated PO’s specific arguments (e.g., that the Dummies-Traub combination had been previously considered by the Office). EX-3001. Had the Board authorized a preliminary reply and sur-reply, that eight total pages of briefing would have been complete on

February 17, 2025, six weeks before the institution decision was due. Instead, a Board paralegal emailed the next day stating: “The panel does not need a conference call to elaborate on this issue and declines to authorize further briefing.” *Id.* That email provided no reasoning for the denial of a preliminary reply.

E. The Board’s Institution Denial

The Board denied institution based on Section 325(d), the same issue for which it denied a preliminary reply, and addressed only disputed claim elements 1[e]-1[f]. DI, 1, 14, 15 n.5.³ Specifically, the Board found Dummies, as applied for 1[e]-1[f], to be cumulative to the ’200 patent, cited in reexam but which neither party cited here. *Id.*, 16-18. Because Traub was considered, the Board found the Dummies-Traub combination did not “present any new disclosure not cumulative to the references considered in reexamination” (*id.*, 19). Thus, the Board concluded the same or substantially the same art or arguments were previously presented to the Office, and *Advanced Bionics* part one was satisfied. *Id.*

As to *Advanced Bionics* part two, the Board found “[t]his is a case where reasonable minds can differ, and the paucity of analysis provided by Petitioner in the

³ The DI incorrectly states “ADASA Inc. (‘Patent Owner’), filed Petitioner’s Preliminary Reply to [POPR],” but then cites the POPR and confirms “[n]o additional briefing [including a preliminary reply] was permitted.” *Id.*, 2 (citing EX-3001).

Petition tips the scales in favor of a discretionary denial.” *Id.*, 28. In particular, the Board faulted Petitioner for not including an in-depth analysis of *Becton, Dickinson* factors (c), (e), and (f) in the Section 325(d) portion of the Petition. *Id.*, 21.

The Board further explained its denial of a preliminary reply, finding Petitioner had failed to show good cause for two reasons: (1) for 1[e] and 1[f], Petitioner argued Dummies’ teachings were within a POSITA’s knowledge and (2) as to Traub, Petitioner had summarized the reexamination history in the Petition and therefore PO’s POPR arguments were not unanticipated. *Id.*, 21-22 n.7.

IV. ARGUMENT

A. The Board Abused Its Discretion By Refusing to Authorize a Preliminary Reply

Under 37 C.F.R. §42.108(c), a petitioner may seek leave to file a preliminary reply to the POPR, and such a request requires a showing of good cause. Here, after meeting and conferring with PO and confirming PO opposed Petitioner’s request for such leave, Petitioner emailed the Board, but complied with the Board’s direction that its email could not “contain substantive argument” or attachments. Paper 3, 3. Petitioner suggested a conference call “if the Board deem[ed] additional detail necessary to determine whether to authorize a preliminary reply.” EX-3001. In a one-sentence email sent the day after the request, the Board paralegal denied both a conference call and authorization for a preliminary reply without explanation. *Id.*

The Board’s denial of authorization here, coupled with its *sua sponte* analysis

discussed below, amounted to an abuse of discretion. The Board deprived Petitioner of a meaningful opportunity to show good cause for a preliminary reply by not allowing anything beyond the email to the Board where substantive argument is not permitted. Paper 3, 3. The Board compounded this abuse of discretion by relying on Section 325(d) analysis not argued by either party. The Board could have allowed the parties an opportunity to be heard through a conference call and subsequent briefing, but instead chose to deny both in a single sentence email. EX-3001.⁴ This amounted to an abuse of discretion that was not cured by the Board's belated reasons months later in its institution denial.

As an initial matter, had the Board provided its reasoning at the time it denied authorization, Petitioner (and even PO) could have asked for a conference call for any needed reconsideration prior to an institution decision. Further, even the Board's belated reasoning was in error. DI, 21-22 n.7. In finding lack of good cause, the Board found as to 1[e] and 1[f], Petitioner argued Dummies' teachings were within the knowledge of a POSITA. *Id.* (citing Clare Decl. ¶¶113-15). But the Board ignored other portions of Mr. Clare's testimony which cited portions of Dummies

⁴ The Board's actions here are contrary to the current policies of the Office, which allow the parties a full opportunity to be heard on discretionary issues. Coke M. Stewart, *Interim Processes for PTAB Workload Mgmt.* (Mar. 26, 2025).

beyond a POSITA's background knowledge. Pet. 38 (citing Dummies, 239; Clare Decl. ¶111). Finally, the Board's finding that all POPR arguments regarding Traub were foreseeable because Petitioner summarized the reexamination history in the Petition (DI, 21-22 n.7) was incorrect. Notably, PO's POPR arguments were different than the Board's reasoning, underscoring that merely having the reexamination history did not make all Section 325(d) arguments foreseeable.

The Board abused its discretion in refusing to authorize a preliminary reply without hearing argument or allowing Petitioner a meaningful opportunity to show good cause. The Director should vacate the Board's institution decision on this basis.

B. The Board Abused Its Discretion By Forging Its Own Path, Not Advanced By Any Party

The Board abused its discretion by finding Dummies cumulative to the '200 patent (considered in reexam) and that such cumulativeness showed the Office had previously considered the Dummies-Traub combination. DI, 16-19. Notably, neither party relied on the '200 patent in addressing Section 325(d). PO argued Dummies had been considered, either by virtue of an excerpt's inclusion on an IDS or as being cumulative of TDS, which taught a well-known EPC code structure. Had the Board authorized a preliminary reply, Petitioner would have explained Dummies was not cumulative of TDS like the 2006 EPC Standard cited in reexam, because it did not disclose anything similar to Dummies' disclosure of "[a] range of serial numbers for each product is allocated to each manufacturing facility." Pet. 38 (citing Clare Decl.

¶111; Dummies, 239–40). The Board apparently agreed because it looked to the '200 patent, not TDS, to find an allegedly cumulative teaching.⁵ DI, 18.

This abuse of discretion also infected the Board's *Advanced Bionics* part two analysis. There, the Board rejected Petitioner's argument that the Office materially erred by not considering the Dummies-Traub combination because "Petitioner has not identified any new disclosure not cumulative to the references considered in reexamination such that any teachings were overlooked, or explained how any such teachings were misapprehended." *Id.*, 20. But it was the Board who *sua sponte* found the '200 patent cumulative to Dummies. Petitioner was never given an opportunity to provide a preliminary reply at all, much less explain why this argument not advanced by PO was erroneous. The Board acknowledged that Petitioner did identify Traub's Figure 4B as teachings that were overlooked by the Examiner. DI, 20. Had Petitioner been afforded an opportunity, it would have explained how the Examiner overlooked the combination in the Petition (which relied on Dummies' teaching of subdivision of serial numbers, not present in the '200 patent, as well as Traub's

⁵ As discussed below, the Board did not point to any teaching in the '200 patent corresponding to Dummies' teaching: "In this way, the serial number is effectively subdivided into a facility number, line number, and subserial number." Dummies, 240 (cited at *e.g.*, Pet. 31).

Figure 4B). Notably, in reexam, the Examiner applied the '200 patent in combination with McAllister and, separately, Traub in combination with McAllister, but never considered the '200 patent and Traub in combination. *See* EX-1004.

The Board abused its discretion in finding Dummies to be cumulative of a reexam reference that was never argued by either party and without providing either party with an opportunity to address this issue. The Director should vacate the Board's institution decision on this basis. Further, as discussed below, the Board choosing this path resulted in material errors, which provide further bases for the Director to vacate the Board's decision.

C. The Board Committed Numerous Material Errors In Its Analysis.

The Board's *sua sponte* Section 325(d) analysis contains at least the following material errors: (1) Dummies is cumulative of the '200 patent applied in reexam, (2) the portion of Traub Figure 4B reproduced by the Examiner in reexam teaches the same concept as relied on by Petitioner's declarant, and (3) the reexam examiner did not err by failing to apply the Dummies-Traub combination.

First, the Board erred in finding Dummies cumulative to the '200 patent. Neither Petitioner nor PO filed the '200 patent as an exhibit here (because neither party presented any arguments based on the '200 patent), and the Board did not do so either. Instead, the Board relied on the Examiner's analysis of the '200 patent. DI, 15-18. In doing so, the Board found Dummies' Figures 2-3 (teaching the well-known

EPC data structure) to be cumulative of the '200 patent's Figure 1. *Id.* The Board also found Dummies' teaching "[a] range of serial numbers for each product is allocated to each manufacturing facility" to be cumulative to the '200 patent's teaching of allocating serial number pools to different manufacturing divisions: "a first division can assign serial numbers in the range of one to a million and a second division can assign serial numbers in a range of three to four million." *Id.*, 18.

This was an erroneous material finding of fact because Petitioner relied on Dummies' teachings beyond just assigning serial numbers into pools. Specifically, Dummies taught subdividing the serial numbers themselves "into a facility number, line number, and subserial number." Pet. 31 (quoting Dummies, 240). The Board overlooked or misapprehended this teaching of Dummies, and pointed to no teaching in the '200 patent corresponding to it. Because the Board ignored this important, non-cumulative teaching, it materially erred in finding Dummies cumulative to the '200 patent. This material error undermines the Board's conclusion as to *Advanced Bionics* part one, and alone is sufficient to warrant the Director vacating the institution decision.

Second, the Board materially erred in finding the portion of Traub Figure 4B the Examiner reproduced teaches the same concept as relied on by Petitioner's declarant. DI, 25-26 n.8 (citing Clare Decl. ¶¶ 118–21). This is clear from a comparison of the Examiner's reproduction of only a portion of that figure (on left)

to the annotated, entire figure in both the Petition and declarant testimony (on right).

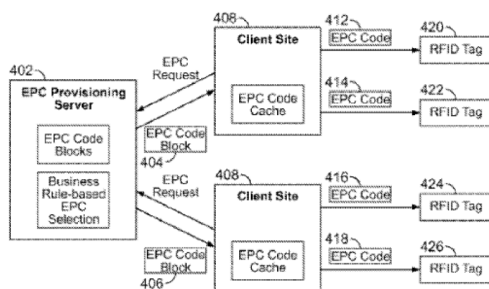


FIG. 4A (545 Patent)

(and portion of FIG. 4B)

header	company	product id	serial number
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header	company	product id	serial number
header	company	product id	loc lot serial #
header	company	product id	loc serial #
header	company	product id	lot serial #

FIG. 4B

Pet. 29, 41, 46; Clare Decl. ¶119.

header	company	product id	serial number
header	company	product id	loc serial #

DI, 24 (citing EX-1004, 69-72).

Pet. 33, 42; Clare Decl. ¶121.

As shown above, the Examiner reproduced and discussed only the portion of Traub Figure 4B showing the unsubdivided serial number. Petitioner, however, based its unpatentability analysis on the portions of Figure 4B which the Examiner did not apply and which show Traub taught subdividing the serial number, including static location and/or lot number portions. The Board overlooked or misapprehended these teachings, which show the Examiner materially erred in not considering them. This error undermines the Board's conclusion as to *Advanced Bionics* part two, and alone is sufficient to warrant the Director vacating the institution decision.

Third, the Board incorrectly found the Examiner did not err by failing to apply the Dummies-Traub combination. For this, the Board said it was "not persuaded that the Examiner erred in not issuing a rejection based on this combination as Petitioner

has not identified any new disclosure not cumulative to the references considered in reexamination such that any teachings were overlooked, or explained how any such teachings were misapprehended.” DI, 20. This was based on the Board’s incorrect determination that Dummies was cumulative to the ’200 patent (discussed above), and on the Board’s failure to realize the Examiner never applied a combination of the ’200 patent and Traub. Petitioner showed in the Petition the Dummies-Traub combination taught all of the limitations of claim 1 (including 1[e] and 1[f]) and explained why a POSITA would have been motivated to combine the references’ teachings. The Board misapprehended or overlooked those combined teachings and the Examiner’s failure to consider them. This error undermines the Board’s conclusion as to *Advanced Bionics* part two, and alone is sufficient to warrant the Director vacating the institution decision.

V. CONCLUSION

The Board shortcut its consideration of Section 325(d) by declining to allow a preliminary reply and sur-reply, *sua sponte* substituting its own analysis for the arguments actually advanced by the parties, and making material and erroneous findings of fact in the process. Petitioner respectfully requests that the Director vacate the Board’s Decision and remand with instructions to authorize a preliminary reply and sur-reply and issue a new institution decision considering the entire record, including that briefing.

Respectfully submitted,

Dated: April 23, 2025

By: / Jessica C. Kaiser /
Jessica C. Kaiser
Reg. No. 58,937
Lead Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on April 23, 2025, a copy of **PETITIONER'S REQUEST FOR DIRECTOR REVIEW** was served upon the below-listed counsel by electronic mail:

Richard A. Wojcio, Jr. - wojcio@fsclaw.com
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Dated: April 23, 2025

By: / Jessica C. Kaiser /
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