

Filed on behalf of: Google LLC

Entered on: November 10, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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GOOGLE LLC,  
Petitioner,

v.

ADVANCED CODING TECHNOLOGIES LLC,  
Patent Owner.

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IPR2025-00998  
Patent 8,090,025

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**PETITIONER'S REQUEST FOR DIRECTOR REVIEW**

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Pursuant to 37 CFR § 42.75, Petitioner Google LLC (“Google”) requests Director Review of the Acting Chief Administrative Patent Judge’s decision (Paper 11, “Decision”) denying institution of Google’s Petition challenging U.S. Patent No. 8,090,025 (“the ’025 patent”). The Decision misapprehended or overlooked multiple material issues of fact and law, and Director Review is needed to correct those errors.

First, the Decision does not comply with Office policy. In denying institution and concluding that the Petition did not meet the statutory threshold of 35 USC § 314(a), the Decision overlooked that the Board had already adjudicated the challenged claims, and overlooked Office policy requiring that the Decision explain why a different conclusion of law was warranted.

Second, the Decision directly conflicts with findings in an earlier Board decision. The Board’s previous institution decision evaluating the ’025 patent found the examiner erred by failing to appreciate the teachings of a reference considered during prosecution. The Decision evaluated the same prosecution history and Google presented the same arguments of examiner error, but the Decision held the precise opposite: Google had allegedly not shown examiner error. The Decision’s finding is arbitrary and capricious and erroneous as a matter of law.

Third, the Decision’s finding that Google did not show why IPR was an appropriate use of Board resources, while applying the non-existent settled expectations of Patent Owner Advanced Coding Technologies, LLC (“ACT”) to

deny review, misapprehended or overlooked Google's multiple contrary arguments, violates the Administrative Procedure Act, and is barred by judicial estoppel.

Director Review and reversal of the Decision are respectfully requested.

### **I. The Decision Violates the Prior Findings Memo**

On September 16, 2025, the then-Acting Director (and current Deputy Director) issued a memorandum titled "PTAB consideration of prior findings of fact and conclusions of law" (hereinafter "Prior Findings Memo"). The Prior Findings Memo set forth a new Office policy when "patent claims being challenged before the Board in an America Invents Act (AIA) trial proceeding ... have already been adjudicated, post-issuance, before the Board." *Id.* In such cases, the Prior Findings Memo imposes two requirements, neither of which was met here.

The Prior Findings Memo first requires: "if the Board reaches an initial or final decision on a finding of fact or conclusion of law that is different than the prior finding or conclusion of the Office ... the Board **shall explain** in the institution ... decision why a different outcome is warranted." *Id.* (emphasis added).<sup>1</sup>

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<sup>1</sup> The Director delegated authority to issue the Decision to the Deputy Director, and the Deputy Director recused herself; thus, the Decision was issued by the Acting Chief Administrative Patent Judge. *See* Decision, 1 n.1. All three are statutory Board members (35 USC § 6(a)), and the "Board institutes the trial on behalf of the

The Decision, issued as a decision on institution under 35 USC § 314(a), fails to comply with this requirement, as its initial decision on multiple conclusions of law and findings of fact differ from prior Office conclusions or findings.

Google's Opposition (Paper 8, "DD Opp.") explained that the same claims of the '025 patent were previously evaluated in IPR2024-00374, where the Board made various conclusions of law in instituting trial. *See, e.g.*, DD Opp. 3-9. Consistent with the Prior Findings Memo, Google's Opposition included "relevant materials submitted by the parties from the other proceeding" including the IPR2024-00374 Petition, Preliminary Response, and Institution Decision. *See* Exs.1060-1061, 1084.

The Decision's explicit and implicit findings contradict the Board's findings of law in IPR2024-00374, and the Decision ignored conclusions of fact established in IPR2024-00374, all without providing **any explanation**. For example:

- The Board previously concluded, "under 35 U.S.C. § 314," institution of *inter partes* review of the '025 patent was warranted. Ex.1061, 30.
  - By contrast, the Decision made the opposite conclusion of law and denied the Petition "under 35 U.S.C. § 314(a)." Decision, 2.
- The Board previously concluded, under § 325(d) and *Advanced Bionics* legal

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Director." 37 CFR 42.4(a). Accordingly, the person issuing the Decision was a Board member, subject to the Prior Findings Memo requirements.

framework, that “the Examiner erred by failing to fully consider Saito-2005 to the extent that its teachings are cumulative to those in Saito.” Ex.1061, 10; *see also* DD Opp., 32 (arguing same).

- By contrast, the Decision made the opposite conclusion of law, finding “Petitioner’s arguments that the Office made a material error during prosecution” as “not persuasive.” Decision, 2.
- The Board previously concluded that claim 1 was likely obvious over the same prior art as in Google’s Petition, after making multiple factual findings regarding the teachings of the prior art. Ex.1061, 24.
  - The Decision does not make any obviousness determination and does not make any factual findings relative to the prior art’s teachings.

Contrary to the Prior Findings Memo’s explicit requirements, the Decision does not “explain ... why a different outcome is warranted” — the Decision **does not mention** the previous Board findings. Director Review is therefore warranted to correct this deficiency and apply the Office’s explicit policy.

The Prior Findings Memo also requires, “when the same or substantially the same evidence and/or arguments that were previously presented to the Office ... are being relied upon in the subsequent AIA trial proceeding” and the later decision reaches a different outcome, “[a] **more detailed explanation** is required from the Board.” Prior Findings Memo. Google’s Petition applies “substantially the same

evidence” as the prior petition in IPR2024-00374: both petitions argue obviousness over teachings in Mualla, Shirani, and Saito, and both petitions rely on expert testimony of Dr. Cliff Reader. Google's Petition and Opposition arguments also were “substantially the same ... arguments” as in the prior proceeding: both argued the claims were obvious, and both argued that the Office erred by not adequately considering the teachings of Saito-2005. The Decision's failure of explanation in reaching a contrary finding, despite reviewing near-identical evidence and arguments, cannot satisfy the “more detailed explanation” requirement. Director Review is therefore warranted to correct this second deficiency in the Decision.

Upon Director Review, the Director should find that the Board's previous findings were correct and supported by the evidence and arguments of record, and the Director should reverse the Decision and institute trial.

## **II. The Decision is Arbitrary and Capricious for Directly Conflicting with the Board's Previous Institution Decision**

Notwithstanding the Decision's failure to comply with the Prior Findings Memo, the Decision's findings regarding Office error are also directly contradictory to the Board's previous Institution Decision, making the Decision legally improper.

The Office must comply with the APA, and any actions, including preliminary actions made that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” cannot be sustained and must be set aside. 5 USC §§ 706, 704. Agency action is an abuse of discretion when it “(1) is clearly unreasonable,

arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact findings; or (4) involves a record that contains no evidence on which the [agency] could rationally base its decision.” *Honeywell Int'l Inc. v. Arkema Inc.*, 939 F.3d 1345, 1348 (Fed. Cir. 2019).

Google's Opposition (DD Opp. 29-38) detailed the numerous Office errors that occurred during prosecution of the '025 patent, including (but not limited to), the Office's error of not appreciating the teachings in Saito-2005 of Poisson's equation (*see* DD Opp. 32). As Google's Opposition discussed, the Board previously found that the Office erred in allowing the '025 patent's claims: “we determine Petitioner has shown that the Examiner erred by failing to fully consider Saito-2005 to the extent that its teachings are cumulative to those in Saito.” Ex.1061, 10.

But without explanation, the Decision ignores this previous finding, instead summarily concluding “Petitioner's arguments that the Office made a material error during prosecution are not persuasive.” Decision, 2. This contrary finding is plainly arbitrary and capricious. *See Robert Bosch, LLC v. Iancu*, 778 Fed. Appx. 871, 874-875 (Fed. Cir. 2019) (finding Board decision “arbitrary and capricious” where two decisions reached “exactly the opposite conclusion in two proceedings on an identical issue” and Office conceded decision could not stand); *see also Vicor Corp. v. SynQor, Inc.*, 869 F.3d 1309, 1322 (Fed. Cir. 2017) (“where a panel ... issues opinions on the same technical issue ... on the same record, and reaches opposite

results without explanation, we think the best course is to vacate and remand these findings for further consideration”) (*citing Local 814, Int'l Bhd. of Teamsters v. N.L.R.B.*, 512 F.2d 564, 567 (D.C. Cir. 1975) (remanding National Labor Relations Board decisions that were “factually similar and ostensibly inconsistent” because the Board “ha[d] not explained its reasons for reaching different results”)).

The Decision's finding that Google's Office error arguments were “not persuasive” stands in direct contrast to the Board's previous findings that Examiner error **did occur**, and in the absence of any explanation for the different result, the Decision cannot stand. The Office's recognition that error occurred during the '025 patent's prosecution warrants review of the '025 patent now so that those errors can be evaluated and corrected. Director Review, reversal, and institution, are warranted.

### **III. The Decision Overlooked the Reasons Google Provided Demonstrating Why This IPR is an Appropriate Use of the Office's Resources**

The Decision found that the '025 patent had been in force for thirteen years, “creating settled expectations for Patent Owner, and Petitioner does not provide any persuasive reasoning why an *inter partes* review is an appropriate use of Board resources.” Decision, 2. But that statement is only plausible if the Acting Chief APJ mistakenly overlooked the numerous reasons that Google provided. Director Review is warranted so that those reasons can be considered and the Decision reversed.

First, following the Process Memorandum's guidance, Google presented multiple compelling, persuasive reasons why IPR of the '025 patent would

appropriately use Board resources, as Factor 1 strongly supported: “Whether the PTAB or another forum has already adjudicated the validity or patentability of the challenged patent claims.” DD Opp. 3-9. As detailed above, and as exhaustively detailed in Google’s Opposition, the Board previously found IPR worthy of the Office’s resources, and this alone should have weighed heavily against denial, contrary to the Decision’s findings. *See also Tesla, Inc. v. Intell. Ventures II LLC*, IPR2025-00217, Paper 9 at 2 (Director June 13, 2025) (referring petition where “the Board previously determined there was a reasonable likelihood that similar claims of an ancestor patent were unpatentable in three separate proceedings with respect to some of the challenged patents in these proceedings.”). The Decision does not address the Board’s previous finding, and accordingly misapprehended or overlooked this factor in finding no persuasive reasoning.

Second, the Decision misapprehends or overlooks Google’s arguments regarding the “complex and diverse litigation proceeding,” which should have weighed against discretionary denial. *Tesla*, IPR2025-00217, Paper 9 at 2. Google presented evidence that the litigation involved six patents in five different families (DD Opp. 24-29): a situation where “the Board is better suited to review” the patents, especially where the Board had already reviewed the ’025 patent, and where Google provided a *Sotera* stipulation to ensure no overlap and no conflicting decisions between the Board and district court. The Decision overlooks the complexity of the

litigation<sup>2</sup>, and does not even mention Google's *Sotera* stipulation or find it to weigh "strongly" against *Fintiv*-based discretionary denial as precedent requires. Accordingly, the Decision misapprehended or overlooked these aspects of Google's argument showing why IPR would be an appropriate use of Board resources.

Although facially, the Decision is "based on the totality of the evidence and arguments the parties have presented," (Decision, 2) its conclusion denying institution cannot be reconciled with these aspects of Google's argument that the Decision does not address. The Decision plainly misapprehended or overlooked these arguments, and Director Review is warranted to correct these errors.

#### **IV. The Decision's Reliance on the Rescission of the June 2022 Memorandum Regarding Sotera Stipulations Violates the APA**

In denying institution, the Decision's reliance, in part, on the Board's expected final written decision due date and the status of the parallel district court litigation (*see* Decision, 2) amounts to an abuse of discretion. The Decision did not properly apply binding Office policies and instead relied on a substantive rule that was adopted without notice-and-comment in violation of the APA. If the Decision had correctly applied binding Office policy, institution would not have been denied.

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<sup>2</sup> After the Decision, ACT withdrew its assertion of the '101 patent; accordingly, the litigation now involves five patents in four different families; regardless, the Board remains better suited to review such a diverse set of patents.

In June 2022, the Director issued the 2022 Guidance that partially cabined discretionary denials, which, by its explicit language, was “binding” on the exercise of the Director’s discretion until it could be superseded by notice-and-comment rulemaking. The 2022 Guidance restricted exercising discretion under *Fintiv* if a petitioner makes a *Sotera* stipulation, because such a stipulation would “avoid[] inconsistent outcomes.” But on February 28, 2025, the Office allegedly “rescinded” the 2022 Guidance (“the Rescission”), and the Office offered no explanation for the dramatic change in the agency’s approach, which came without prior notice.

The Office also de-designated as “binding,” or even persuasive, “any” prior decisions of the Board or decisions on Director review “relying on” the 2022 Guidance. Notably, the Rescission explicitly referred parties to *Fintiv* and *Sotera* “for guidance.” A month later, the then-Chief APJ issued the 2025 Memo regarding the Rescission, underscoring that the effect of *Sotera* stipulations was significantly altered: where they were previously “dispositive,” they were now merely “part of [the] holistic analysis” under the Rescission.

Under “binding” guidance operating before the Rescission, Google had a right for its petition to proceed to a merits institution decision. The 2022 Guidance waived the Director’s discretion to deny petitions on parallel-litigation grounds if the petitioner made a *Sotera* stipulation. Google did so. *See* Ex.1046. The Rescission was improperly issued without notice-and-comment rulemaking, in violation of the

APA; thus, the Acting Chief APJ applying the Rescission to this case in the Decision violated Google's procedural right to a merits institution decision (i.e., for its Petition to not be denied institution based on *Fintiv* when a *Sotera* stipulation is presented) as an APA violation. This violation requires that the Decision be reversed.

The APA requires the Office agencies to promulgate rules through notice and comment (5 USC § 553(b)), and the AIA stated the Director "shall prescribe" regulations governing IPR. 35 USC § 316(a). Agency action must be set aside if the agency failed to follow the APA's rulemaking requirements. *See, e.g., Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) (vacating EPA guidance for failure to follow notice-and-comment). And an agency's pronouncement is a substantive rule, subject to notice-and-comment requirements, if it "effect[s] a change in existing law or policy or ... affect[s] individual rights and obligations." *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affs.*, 464 F.3d 1306, 1317 (Fed. Cir. 2006) (vacating letter to industry for same reason) (citation omitted).

The Rescission was a substantive rule. It effected a change in existing law or policy and affected individual rights and obligations because it rescinded Google's right to avoid *Fintiv*-based denial by making a *Sotera* stipulation. Before the Rescission, *Sotera* stipulations triggered that right under a bright-line rule issued as "binding" agency policy. The Rescission withdrew that right, and the Office acknowledged the withdrawal resulted in a change in law or policy. Moreover, the

Rescission altered the “substantive standards by which the USPTO evaluates” IPR petitions. *See In re Chestek PLLC*, 92 F.4th 1105, 1110 (Fed. Cir. 2024).

Indeed, after the Rescission and after the Decision, **the Office recognized** that notice-and-comment rulemaking is required to create a rule that conditions institution on a petitioner stipulating to withhold grounds of invalidity from a district court proceeding, thereby **conceding** the Rescission required notice-and-comment rulemaking, which did not occur. 90 Fed. Reg. 48335 (Oct. 17, 2025).

Accordingly, the Decision's failure to apply the “binding” 2022 Guidance is erroneous, because the Rescission is invalid in light of the Office's failure to follow notice-and-comment rulemaking procedures. Director Review is required so the Decision can be vacated and reconsidered under the 2022 Guidance.

#### **V. Reliance on Alleged “Settled Expectations” Violates the APA**

The Decision's “settled expectations” reliance is also error, as it is “not in accordance with law” and cannot provide an APA-compliant basis for denying institution. 5 USC §706(2)(A).

**First**, as Google's Opposition argued (DD Opp. 16), in *Celgene Corp. v. Peter*, 931 F.3d 1342 (Fed. Cir. 2019), the Federal Circuit—at the Office's behest—explicitly rejected a patentee's contention that it had an expectation that its pre-AIA patents would not be subject to IPR, a proceeding that did not exist when its patents issued. The *Celgene* patentee knew its patents were subject to potential

reconsideration by the Office, and thus had no reasonable expectations to the contrary. Just as the *Celgene* patentee—as a matter of law—lacked an expectation that its patent would not be subject to IPR, so too did ACT here. The Director's contrary finding is not in accordance with *Celgene*, and such an unlawful finding cannot be the basis for denying institution. 5 USC §706(2)(A).

The Decision's reliance on ACT's alleged "settled expectations" also exceeds the AIA's statutory authority, which explicitly sets forth only one issue-date based limit on when a patent can be challenged in an IPR, which does not apply here. 35 USC §311(c)(1). Congress plainly knew how to limit what patents are subject to IPR based on their issuance date, and Congress's decision to bar IPRs only during the first nine months of a patent's term means that Congress did not intend to impose any other term-based restrictions on IPRs. The Decision's reliance on ACT's (non-existent) "settled expectations" as a basis for denying institution immunizes an entire generation of patents that Congress intended to be subject to IPR; as such, the Decision is not in accordance with the law, improperly exceeds the Office's statutory authority, and is arbitrary and capricious and must be set aside. 5 USC §706(2)(A), (C). Further, the Decision's finding that Google did not provide "persuasive reasoning" why IPR was an appropriate use of Office resources misapprehends or overlooks the numerous reasons in Google's Opposition. *See supra* §III.

**Second**, judicial estoppel principles preclude the Office from applying the

“settled expectations” factor. *See Davis v. Wakelee*, 156 U.S. 680 (1895). The Office successfully convinced the Federal Circuit to find that the *Celgene* patentee had no expectation of IPR immunity despite the challenged patent's age. But the Director's current position, that ACT is entitled to an expectation that its patent will not be reviewed in IPR because of its age, is inconsistent with the opposite position that the Director, on behalf of the Office, advanced through the course of the *Celgene* case.

**Third**, any discretion the Director possesses to deny IPR petitions cannot be exercised in a manner that exceeds statutory authority. 5 USC §706(2)(C); *Halo Electronics, Inc. v. Pulse Electronics*, 579 U.S. 93, 103 (2016). By treating the '025 patent's age as dispositive, the Decision created a *de facto* deadline requiring IPRs to be filed within some ill-defined period early in a patent's life. This Director-crafted deadline is inconsistent with the AIA, and the Decision exceeds statutory authority by relying on the deadline to deny Google's meritorious petition.

As detailed above, Congress knew how to impose issue-date-based deadlines affecting IPRs, and §311(c) is the only such deadline Congress imposed. Congress's decision to impose one issue-date-based deadline means that other issue-date-based deadlines—like the Director's “settled expectations” deadline—were not intended. The AIA indeed permits “anyone [to] file a petition challenging the patentability of an issued patent claim at almost any time.” *In re Cuozzo Speed Techs.*, 579 U.S. 261, 287-88; *see also Samsung Elecs. Am., Inc. v. Prisia Eng'g Corp.*, 948 F.3d 1342,

1346 (Fed. Cir. 2020) (explaining that “[IPRs] can be requested at any time during a patent’s enforceability period, with certain restrictions” including §311(c) and §315(b)). The Decision’s imposition in this proceeding of a new issue-date-based deadline for filing an IPR exceeds statutory authority under the AIA, and violates the APA. The Decision must be reconsidered. 5 USC §706(2)(C).

**Fourth**, and finally, the Decision’s reliance on the age of the ’025 patent to deny institution must also be reconsidered because such reliance is arbitrary and capricious. 5 USC §706(2)(A). Agency action is arbitrary and capricious when “the agency has relied on factors which Congress has not intended it to consider.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Director acted in an arbitrary and capricious manner when the age of the ’025 patent was considered, despite Congress not contemplating such a factor. And, the Decision’s reliance on “settled expectations,” without specifying **what** those settled expectations are related to, is likewise arbitrary and capricious; neither the Decision nor ACT established what ACT possessed “settled expectations” of. The Decision should be reconsidered for this reason too.

Accordingly, as the Decision’s “settled expectations” finding is not in accordance with the law, the Decision denying institution must be reversed.

## **VI. Conclusion**

The Director should review and reverse the Decision for the reasons above.

Dated: November 10, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Pursuant to 37 CFR § 42.6(e), I certify that on this 10th day of November, 2025, a true and correct copy of the foregoing **Petitioner's Request for Director Review** was served by electronic mail on Patent Owner's lead and backup counsel at the following email addresses:

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