

Federal Court



Cour fédérale

Date: 20251112

Docket: T-1651-24

Citation: 2025 FC 1809

Toronto, Ontario, November 12, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

BARRY DUSOME AND WYATT DUSOME

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Barry Dusome and Wyatt Dusome [the Appellants], seek judicial review of a decision dated May 29, 2024 [the Decision] of the Commissioner of Patents [the Commissioner] refusing their application for a patent for a “Method of Playing a Card Game” (Canadian Patent Application Number 2,701,028) [the 028 Application]. The Commissioner refused the 028 Application on the basis that the actual invention claimed did not meet the definition of

“invention” under section 2 of the *Patent Act*, RSC 1985, c P-4 [the *Patent Act*] and claimed excluded subject-matter contrary to subsection 27(8) of the *Patent Act*.

[2] This appeal is directed at aspects of the Commissioner’s approach to determining subject-matter patentability following the Federal Court of Appeal’s decisions in *Amazon.com Inc v Canada (Attorney General)*, 2011 FCA 328 [*Amazon*] and *Canada (Attorney General) v Benjamin Moore & Co*, 2023 FCA 168 [*Benjamin Moore*]. Given that the Supreme Court of Canada is expected to provide guidance on questions of subject-matter patentability in its decision in *Pharmascience Inc. v Janssen Inc., et al.*, 2024 CanLII 88324 (SCC) (albeit in the context of the patentability of methods of medical treatment), I have considered whether I should await the Supreme Court of Canada’s decision which remains under reserve. I have decided not to in light of the Appellants’ submissions at the end of the hearing which emphasized that the Appellants have been prosecuting the 028 Application since 2008 and any possible monopoly that could be granted will be of little value even if they are successful on appeal and re-examination.

[3] For the reasons that follow, I find that the Commissioner’s Decision contains errors of law that warrant this Court’s intervention. The 028 Application shall therefore be remitted back to the Commissioner for re-examination on an expedited basis.

II. Facts

A. *The 028 Application*

[4] The 028 Application was filed under the provisions of the *Patent Cooperation Treaty*, 19 June 1970, 1160 UNTS 232 (as modified 3 October 2001) with an effective filing date in Canada of October 3, 2008. The Appellants' invention relates to a method of playing a wagering poker game either with conventional physical cards or on a computerized system, which is described in the following manner in the 028 Application:

The present invention provides a poker-type game that creates a new “math” and fresh strategies from prior poker games. The present invention also provides a game, which includes an ante system and a betting structure that encourages larger pots. The present invention also provides two or more rounds of play for each dealt hand leading to two or more pots that may be won, and possibly different winners for each pot per dealt hand.

[5] There are 24 claims on file: the method claims 1-21 are directed to a method played with physical cards; and claims 22-24 are directed to a method played on a computerized system.

[6] An examiner [Examiner] of the Canadian Intellectual Property Office [CIPO] issued a Final Action on November 22, 2018, rejecting the 028 Application primarily on the basis that the subject-matter of the claims does not meet the definition of invention found at section 2 of the *Patent Act*. The Appellants submitted arguments and proposed amendments in a response to the Final Action; however, the Examiner maintained that the 028 Application did not comply with the *Patent Act*. In view of the rejection and the Appellants' continued interest in pursuing the

prosecution of the 028 Application, the 028 Application was reviewed by a member of the Patent Appeal Board [PAB] for recommendation as to its disposition.

[7] The PAB review was based on a revised Patent Office practice for evaluating patentable subject-matter, Canadian Intellectual Property Office, *Patentable Subject-Matter under the Patent Act* (November 2020) or PN2020–04 [PN2020-04]. The Appellants were also given the opportunity at the preliminary review stage to address the decision in *Benjamin Moore* which was issued during the course of the PAB review.

[8] On April 12, 2024, the PAB made a recommendation to reject the 028 Application for lack of patentable subject-matter under section 2 of the *Patent Act* and on the basis that the 028 Application claims an abstract theorem contrary to subsection 27(8) of the *Patent Act*. On May 29, 2024, the Commissioner agreed with the PAB's recommendation and refused to grant the 028 Application.

B. *The Decision*

[9] The Commissioner's purposive construction of the claims of the 028 Application begins by defining the person skilled in the art [POSITA] of the 028 Application and identifying the common general knowledge they would have acquired. The Commissioner and the Appellants agreed that the POSITA would include a team of people skilled in gaming, card gaming (specifically, poker) as well as a computer programmer. They also agreed that the POSITA would consider the common general knowledge to include, *inter alia*, the various rules for playing a card game played with a standard deck of 52 cards including rules for dividing an

initial hand into a first hand and a second hand and playing a second poker game with that second hand, as well as rules for placing multiple bets in a card game. The POSITA would also know that gaming techniques could be performed with a specifically programmed computer including a representation of the essential 52 cards.

[10] The Commissioner considered claim 1 of the 028 Application as representative of the claims and concluded that all elements recited in claims 1-24 of the Application are essential, including the computerized elements.

[11] In accordance with *PN2020-04*, the Commissioner then considered whether the actual invention of the 028 Application is directed to patentable subject-matter. The Decision outlines CIPPO's approach to this inquiry as follows:

To be both patentable subject-matter and not be prohibited under subsection 27(8) of the Patent Act, the subject-matter defined by a claim must be limited to or narrower than an actual invention that either has physical existence or manifests a discernible physical effect or change and that relates to the manual or productive arts, meaning those arts involving or concerned with applied and industrial sciences as distinguished in particular from the fine arts or works of art that are inventive only in an artistic or aesthetic sense.

[12] The Commissioner defined the actual invention of the 028 Application as: (i) the rules for a new poker game played with conventional physical playing cards (claim 1); (ii) the same rules for a new poker game to be played using a well-known computerized implementation with a display of images of playing cards (claim 22); and (iii) various method steps for the playing of poker games (claims 2-21).

[13] The Commissioner then considered two questions which the Commissioner considered to lie at “the heart of the subject matter [*sic*] issue with this actual invention.”

[14] First, the Commissioner considered whether a method of playing a game is an “art” among the manual and productive arts. The Commissioner found that the actual invention is not an art as it does not change the character or condition of anything material.

[15] Second, the Commissioner considered whether the actual invention has physicality. The Commissioner found as follows:

In my view, the physical playing cards of claim 1, and their manipulation, while essential elements, are not part of the actual invention. The cards themselves are completely standard. There is no novelty and/or ingenuity in the cards. They do not provide the “something more” to which the Court refers. The printed symbols on them keep track of information of intellectual significance only, and their manipulation only serves to rearrange the display of that information which has only an intellectual meaning. The actual invention of claim 1 is therefore unpatentable subject matter which does not meet the definition of invention at section 2 of the *Patent Act*. The method steps for playing the game constitute only an abstract algorithm and therefore are not patentable according to subsection 27(8) of the *Patent Act*.

[16] As for claims 22-24, the Commissioner found that there is no physical component or discernible physical effect produced by the actual invention rendering the invention abstract and excluded subject-matter.

[17] The Commissioner refused to grant the 028 Application.

III. Issues and Standard of Review

[18] The Appellants have raised the following issues on this application:

- A. Did the Commissioner err in his analysis of the actual invention of the 028 Application?
- B. Did the Commissioner err in his approach to the assessment of patentable art?

[19] According to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 37, where a court is hearing an appeal from an administrative decision, questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, are subject to the standard of correctness in accordance with *Housen v Nikolaisen*, 2002 SCC 33 at paragraph 8 [*Housen*], whereas questions of fact and questions of mixed fact and law where the legal principle is not readily extricable, are subject to a standard of review of palpable and overriding error (*Housen* at paras 10, 19 and 26-37 and *Choueifaty v Canada (Attorney General)*, 2020 FC 837 at para 22 [*Choueifaty*]).

IV. Analysis

A. *Did the Commissioner err in his analysis of the actual invention of the 028 Application?*

[20] The Appellants concede that the Federal Court of Appeal recognized in *Amazon* that determining the “actual invention” is a question that is “relevant and necessary” in assessing patentable subject-matter. However, they argue that the approach taken by the Commissioner is different from the approach endorsed by the Federal Court of Appeal in that the Commissioner's analysis was more akin to an identification of the “substance of the invention” or the “spirit of

the invention,” which approaches have been rejected in Canadian jurisprudence (citing *Free World Trust v Électro Santé Inc*, 2000 SCC 66 at para 46 [*Free World*]). The Appellants insist that the claims purposively construed define the invention against which the Commissioner must assess subject-matter eligibility under section 2 and subsection 27(8) of the *Patent Act* and there can be no “second step” in the analysis.

[21] The Respondent insists that the Commissioner adhered to the guidance given by the Federal Court of Appeal in *Amazon* and *Benjamin Moore* in that the Commissioner purposively construed the claims, and then in assessing patentable subject-matter, determined the actual invention against which it considered whether the 028 Application complied with the definition of invention in section 2 of the *Patent Act* or was excluded under subsection 27(8) of the *Patent Act*.

[22] I agree with the Appellants that the Commissioner committed a number of errors.

(1) The first error: a failure to properly construe the claims

[23] I find that the Commissioner erred in the manner in which he construed representative claim 1 which is not in accordance with *Free World* and *Whirlpool Corp v Camco Inc*, 2000 SCC 67 [*Whirlpool*], or as described in *PN2020-04*. This is an error of law (*Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at paras 39-41). Based on the Commissioner’s error in conducting purposive construction, it necessarily follows that the Commissioner’s identification of the actual invention of the 028 Application, is not grounded in purposive construction as required by *Amazon* (*Amazon* at paras 43-44).

[24] The Decision correctly states the law on purposive construction:

In accordance with *FreeWorldTrust* [sic] and *Whirlpool Corp v Camco Inc*, 2000 SCC 67, purposive construction is performed from the point of view of the skilled person in light of the relevant common general knowledge, considering the whole of the disclosure including the specification and drawings. In addition to interpreting the meaning of the terms of a claim, purposive construction distinguishes the essential elements of the claim from the non-essential elements.

[25] However, the Commissioner does not follow this description of the law as can be seen in the only paragraphs in the Decision dedicated to purposive construction of the claims:

I consider all elements recited in [claim 1] to be essential. The skilled person would understand that there is no use of language indicating that any of the elements are optional or one of a list of alternatives. Similarly, all elements recited in dependent claims 2–21 are essential.

Claims 22–24 recite computerized implementations of the game. Although these claims directly or indirectly depend on claim 1, which recites physical playing cards, I construe these claims, as I did in the Supplementary Preliminary Review letter, as being directed to computerized implementations with only virtual representations of the playing cards. I consider the computerized elements to be essential.

[26] The Commissioner's construction is restricted to a mere conclusion without justification that all of the claim elements in claims 1-24 are essential.

[27] The hallmarks of purposive construction are missing.

[28] First, there is no attempt to isolate and give meaning to descriptive words and phrases employed in the representative claim in order to identify the elements of the invention of the

claim as contemplated by the inventor and which define the subject-matter of the claims. By giving meaning to words and phrases such as “operating wagering poker events/games” and “second buy-in bet,” the Commissioner gives insight into the POSITA’s understanding of the inventor’s intention and where the discovery lies over the common general knowledge.

[29] Second, despite having identified the POSITA and the common general knowledge, missing from the Commissioner’s analysis is any attempt to construe the representative claim through the eyes of the POSITA. The POSITA’s critical lens is required not only in giving meaning to words and phrases used, but in determining whether they present something novel in light of the identified common general knowledge and whether the elements of the representative claim are essential or non-essential (*Whirlpool* at para 53, *Free World* at paras 51, 52).

[30] At the hearing, counsel for the Respondent pointed to the Commissioner’s identification of the POSITA and common general knowledge and suggested that he can be taken to have conducted a proper construction of the claims even if it is not set out in the Decision. I do not consider this to be sufficient. Patent applicants are entitled to understand the basis on which the claims of the patent have been construed by CIPO. This is a matter of transparency and ultimately fairness, given that the examination process is iterative and allows a patentee to amend their claims and provide a response to a final action before a final decision is made.

[31] Finally, reference to the disclosure is missing from the Commissioner’s analysis of the representative claim. In the context of examination, the disclosure takes on heightened importance in achieving the goal of understanding the purpose of the invention, the meaning the

inventor intended the claims to have and the problem that the invention seeks to address (*Benjamin Moore* at para 40 citing *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2011 FC 1323 aff'd 2012 FCA 333 at para 61).

[32] The Commissioner's failure to ground his determination of the actual invention of the 028 Application in a purposive construction of the claims was intentional: the Commissioner stated in the Decision that, "[w]hile there is no second step to purposive construction, the courts have not ruled it impermissible to determine the actual invention as distinct from the essential elements of the construed claims." This is contrary to *Amazon* and is an error of law (*Amazon* at para 47, *Choueifaty* at para 22).

[33] These errors justify remitting the 028 Application back for re-examination. The Commissioner will need to grapple with how the POSITA would read the claims of the 028 Application in light of the disclosure which describes what the Appellants were trying to achieve over what is already known in the art of poker and the benefits that their "wagering poker events/games" seek to achieve for players and the house. The Commissioner should keep an open mind to the possibility that a novel business method may be an essential element of a valid patent claim. Any consideration of the actual invention of the 028 Application must be grounded in this construction.

- (2) The second error: the improper assessment of subject-matter patentability based on the actual invention of the 028 Application

[34] I agree with the Appellants' submission that the Commissioner committed an error of law in conducting his assessment of subject-matter patentability based on what the Commissioner considered to be the actual invention of the 028 Application. This approach was squarely rejected by the Federal Court of Appeal in *Amazon*:

For the questions relating to patentable subject-matter, utility, and the prohibition on granting a patent for a mere scientific principle or theorem (items (a), (c) and (e)), there is no provision corresponding to section 28.2 or 28.3 that provides a specific test. However, I see no reason why the subject of items (a), (c) and (e) should not be the same as the subject of items (b) and (d). For that reason, the subject of questions (a), (c), and (e) is also "the subject-matter defined by the claim".

...

In my view, there is nothing in the cases cited by the Attorney General of Canada that casts any doubt on the proposition that the Commissioner's determination of subject-matter must be based on a purposive construction of the patent claims. Therefore, on the question of analytical framework, I agree with Justice Phelan that in determining subject-matter solely on the basis of the inventive concept, the Commissioner adopted an analysis that is incorrect in law (*Amazon* at paras 41, 47).

[35] Once the Commissioner conducts a proper purposive construction of the claims of the 028 Application, he will need to consider whether the subject-matter defined by the claims meets the definition of "invention" under section 2 or amounts to excluded subject-matter under subsection 27(8) of the *Patent Act*.

- (3) The third error: the improper approach and application of the actual invention question

[36] The Appellants submit that in determining the actual invention, the Commissioner improperly stripped away all of the physical elements of their invention leaving only the new knowledge added to the art of poker, which explains why the Commissioner considered the actual invention to be rules for a game which lack physicality and therefore constitute excluded subject-matter.

[37] The Decision reads in part:

In my view, the physical playing cards of claim 1, and their manipulation, while essential elements, are not part of the actual invention. The cards themselves are completely standard. There is no novelty and/or ingenuity in the cards. They do not provide the “something more” to which the Court refers. The printed symbols on them keep track of information of intellectual significance only, and their manipulation only serves to rearrange the display of that information which has only an intellectual meaning.

...

Claims 22-24 are directed to implementing the new poker game on a computer, rather than with physical playing cards. In my view, the same arguments regarding the physical cards above apply to the computer. While physical and essential, the operation of the computer system is generic in this case. Making use of common general knowledge programming and a computer system is not part of the actual invention of these claims.

[38] The Commissioner did not consider claims 22-24 to be distinguishable from *Schlumberger Canada Ltd v Commissioner of Patents*, [1982] 1 FC 845 (CA) [*Schlumberger*], given that the claimed computer-related steps are well-known functions of generic computer components, nor is the computer improved by the steps. Given the absence of a finding that

there is a physical component or discernible effect produced, the Commissioner found the actual invention to be an abstract algorithm prohibited under subsection 27(8) of the *Patent Act*.

[39] I agree with the Appellants that the Commissioner erred in law in failing to determine where the discovery of the 028 Application lies based on a proper claims construction, and by using an approach that considered that only this new knowledge could constitute the actual invention of the 028 Application.

[40] The problem with the Commissioner's approach is that it will fail to recognize certain types of inventions, including those that claim the discovery of new properties, uses or methods through the combination of a number of essential elements (or non-essential elements) some of which are old (*Shell Oil Co v Commissioner of Patents*, [1982] 2 SCR 536 at 551-552 [*Shell Oil*]). For the discovery of new properties, there is no need for the combination itself to be novel in any sense other than it is necessary to give effect to the discovery (*Benjamin Moore* at para 64).

[41] The Commissioner's approach also fails to pay heed to the warning in *Benjamin Moore* that, in the case of computer implemented inventions, while unpatentable subject-matter cannot be saved by merely programming it into a computer, at the same time the Commissioner is required to "keep an open mind and not hastily conclude that the subject-matter claimed is not patentable simply because it involves the use of conventional computer technology" (*Benjamin Moore* at para 85).

[42] According to the accepted articulation of the *Shell Oil* test, the subject of the patentability assessment (including physicality) is the process or method (expressed as the subject-matter defined by the claim once construed per *Amazon*), not merely the new knowledge:

Accordingly, the definition of the term “art” as provided by the Supreme Court includes a process that:

- (i) is not a disembodied idea but has a method of practical application;
- (ii) is a new and innovative method of applying skill or knowledge; and
- (iii) has a result or effect that is commercially useful

(*Progressive Games, Inc v Canada (Commissioner of Patents)* (1999), 177 FTR 241 (FC) [*Progressive Games*] at para 16).

[43] I appreciate that the Commissioner’s approach is an attempt to give effect to the holding in *Benjamin Moore* that the section 2 invention analysis may include considerations going to what is novel or ingenious about what the inventor claims to have invented as compared to what is already known (*Benjamin Moore* at paras 68-72, 78). However, there is no need to conduct a separate inquiry: the exercise of purposive construction ensures that the question of what constitutes new knowledge is considered in an informed way; and the *Shell Oil* test ensures that that the invention is more than the new knowledge and is instead a practical embodiment of the new knowledge (*Shell Oil* at 549).

[44] Having focused on how *not* to apply the “relevant and necessary question” of the actual invention as part of the assessment of subject-matter patentability, it is worth asking, in what way is it “relevant and necessary” as the Federal Court of Appeal has instructed?

[45] First, determining what in good faith the inventor actually discovered is a question that forms part of purposive construction for the very same reason that the Federal Court of Appeal considered the actual invention question to be helpful. In *Free World* the Supreme Court of Canada explained:

The inventor is addressing others in the same line of work. Words have layers of significance and secondary meanings. A reference to “turf” means something different to racehorse owners than it does to warring business executives. The word “bench” means a physical object to weightlifters but has numerous secondary meanings for members of the legal profession. The courts recognize the pitfalls of language and will do what they can to give the inventor “protection for that which he has actually in good faith invented” ... (*Free World* at para 58 citing *Western Electric Co v Baldwin International Radio of Canada*, [1934] SCR 570 at 574).

[46] Secondly, given the concern with deceptive claims drafting, the actual invention consideration allows the Commissioner to ask “the *Schlumberger* question”:

It is arguable that the patent claims in issue in this case could fail on the same reasoning [as *Schlumberger*], depending upon whether a purposive construction of the claims in issue leads to the conclusion that *Schlumberger* cannot be distinguished because the only inventive aspect of the claimed invention is the algorithm—a mathematical formula—that is programmed into the computer to cause it to take the necessary steps to accomplish a one-click online purchase. On the other hand, it is also arguable that a purposive construction of the claims may lead to the conclusion that *Schlumberger* is distinguishable because a new one-click method of completing an online purchase is not the whole invention but only one of a number of essential elements in a novel combination. In my view, the task of purposive construction of the claims in this case should be undertaken anew by the Commissioner, with a mind open to the possibility that a novel business method may be an essential element of a valid patent claim (*Amazon* at para 63)

[47] In these ways, the question of the actual invention has a role to play in assessing patentability, however, the Commissioner cannot allow this question to supplant the importance of purposive construction upon which a proper assessment is ultimately based.

[48] Based on a purposive construction of the claims of the 028 Application, the Commissioner will need to determine whether the only inventive aspect of claims 1-21 are the rules of a game, and whether the only inventive aspect of claims 22-24 is the algorithm that is programmed into the computer to cause it to take the necessary steps to accomplish the subject-matter defined by the claims (which may or may not be new rules of a game). Alternatively, the Commissioner should consider whether *Schlumberger* is distinguishable because the rules of the game and the use of playing cards and a computer are not the whole invention but only one of a number of essential elements in a novel combination.

B. *Did the Commissioner err in his approach to the assessment of patentable art?*

[49] The Appellants submit that the Commissioner erred in law in his determination that the claims of the 028 Application did not meet the definition of “art” in section 2 of the *Patent Act*.

[50] The Respondent submits that the Commissioner’s finding is in line with Canadian jurisprudence and CIPO’s history of the treatment of such purported inventions.

[51] I agree with the Appellants that the Decision reflects errors of law in the Commissioner’s approach to the assessment of patentable art.

(4) The fourth error: the application of an improper definition of patentable “art”

[52] The Commissioner found that the method of playing a poker game is not an art stating:

...as I wrote in the Supplementary Preliminary Review letter, in my view, the method of playing a poker game is not at [sic] art as defined in *Lawson* as it does not change the character or condition of anything material.

[53] The Commissioner cited two additional reasons for his conclusion: (i) the holding in *Progressive Games* that changes in playing poker do not add to the cumulative wisdom on the subject of games; and (ii) section 17.03.09 of the Manual of Patent Office Practice [MOPOP], which states that a manner of playing a game or sport does not solve a practical problem and is therefore non-statutory.

[54] Each of the Commissioner’s considerations constitutes an error of law (*Choueifaty* at para 22).

[55] *Lawson v Commissioner of Patents* (1970), 62 CPR 101 (CA EXC) at 109-110 is not the correct test for patentable “art”; rather, the definitive definition of “art” is that articulated in *Shell Oil* as expressed in *Progressive Games* (*Amazon* at para 50). Moreover, in *Amazon* the Federal Court of Appeal rejected the Commissioner’s consideration that in order to meet the definition of “art” the invention had to “cause a change in the character or condition of a physical object” (*Amazon* at paras 52-53).

[56] The holding in *Progressive Games* that changes in the method of playing poker do not meet the definition of “art” is not a valid basis for finding that the invention of the 028 Application does not meet the definition of “art” as each case turns on its own facts and those facts must be considered in the context of the state of knowledge at a particular point in time (*Amazon* at paras 53-54 and *Benjamin Moore* at para 84).

[57] The Commissioner’s reliance on section 17.03.09 of MOPOP is also contrary to the clear finding in *Amazon*, that any refusal of a patent application on the basis of non-patentable subject-matter must be grounded in the *Patent Act* (*Amazon* at para 49). As was the case with business method patents in *Amazon*, there is no *per se* prohibition on patenting subject-matter related to the rules of a card game.

[58] Once the claims of the 028 Application are purposively construed, the Commissioner will need to take into account the nature of the discovery claimed and consider whether the subject-matter defined by the claims meets the definition of patentable “art” as defined in *Shell Oil*, which asks whether the claims of the 028 Application add new knowledge to affect a desired result which has commercial value.

V. Conclusion

[59] Based on my analysis, the Commissioner committed legal errors that warrant setting aside the Decision with instructions to the Commissioner to conduct a fresh and expedited examination of the 028 Application based on the Amended Claims, in accordance with these reasons.

[60] There will be no order as to costs.

JUDGMENT in T-1651-24

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed.
2. The decision of the Commissioner of Patents is set aside, and he is directed to consider the 028 Application afresh based on the Amended Proposed Claims submitted by the Appellant and in accordance with these reasons; and
3. No costs are awarded.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1651-24

STYLE OF CAUSE: BARRY DUSOME AND WYATT DUSOME v
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 7, 2025

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: NOVEMBER 12, 2025

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