

In the Matter of the Appeal of:) OTA Case No. 240215361
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SAFETY STEP TD, INC.)
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¹ Appellant claimed a refund of \$10,640 on its amended return, Form 100X, for the 2020 tax year. The claimed refund amount of \$10,640 includes a new tax credit of \$12,062 and additional tax owed of \$1,422. The \$12,062 tax credit is the issue on appeal for the 2020 tax year, and as such is the amount listed on respondent's denial of the claim for refund and included as the amount at issue in appellant's appeal. However, if appellant were to prevail on appeal, the refund allowed would only be the net refund claimed on the Form 100X, i.e., \$10,640.

FACTUAL FINDINGS

1. Appellant was a California corporation in the business of manufacturing sidewalk safety mats. Mr. Menendez was appellant's sole owner, CEO, and president.
2. Appellant timely filed a Form 100, California Corporation Franchise or Income Tax Return (Return), for the 2019 tax year (2019 Return) and for the 2020 tax year (2020 Return).
3. On January 10, 2022, appellant timely filed a Form 100X, California Amended Corporation Franchise or Income Tax Return for the 2019 tax year (Amended 2019 Return) on which appellant affirmatively claimed a 2019 R&D Credit of \$14,254. Also on January 10, 2022, appellant timely filed a Form 100X for the 2020 tax year (Amended 2020 Return) on which appellant affirmatively claimed a 2020 R&D Credit of \$12,062.
4. Respondent opened an audit of appellant's Amended 2019 and 2020 Returns. Appellant provided respondent with a "Research & Development Tax Credit Study" (Study) to support the claimed refund for the R&D Credits. The Study was prepared for appellant by J. Waddell, CPA, with the firm AccountStrong LLC. The Study purports to be "a report used to explain the system of methods regulating the Federal and California R&D tax credits and [appellant's] qualification thereunder," and to determine which efforts qualify for the R&D Credit and which costs can be included.
5. The Study identifies six different projects (each one a Project) for which appellant purportedly paid or incurred expenses that comprise the R&D Credits. The three Projects that comprised the claimed R&D Credit for the 2019 tax year were: a repurposed pressurized roller machine used for applying "peel-and-stick" adhesive applications without air bubbles (Peel and Stick Project); a process for rapid curing time for a proprietary material (Rapid Cure Time Project); and a wet-set product development (Wet-Set Project). The three Projects that comprised the claimed R&D Credit for the 2020 tax year were: a texture-application technique (Texture Technique Project); a bicycle-lane guide strip project (Guide Strip Project); and the development of new pavers (Paver Project).
6. On January 10, 2024, respondent issued appellant a Claim for Refund Denial (Denial). In the Denial, respondent denied appellant's refund claims with respect to the 2019 and 2020 R&D Credits because appellant did not provide the information respondent requested with respect to the claimed 2019 and 2020 R&D Credits, and because

respondent was unable to verify that appellant's work was eligible for the 2019 and 2020 R&D Credits.

7. Appellant submitted several documents on appeal to OTA. For each of the six Projects, appellant provided a one-page document entitled "Project Brief" as well as a two- or three-page outline, photographs, and notes (collectively referred to as the Brief). In each Project Brief, appellant provided a one-page summary with a brief description of each Project, the purpose of each Project, the deliverables, and the result of each Project. Each outline contained a discussion of an initial statement of the problem or objective; a discussion of the relevant machinery or product; a discussion of the testing that may be done and the outcome sought; and an appendix with photographs of work purportedly being performed on a Project.
8. Included with the Brief for a Project for the 2020 tax year was a document from the U.S. Patent and Trademark Office with a mailing date of June 2, 2023, reflecting a provisional patent application by appellant.
9. Appellant timely filed its appeal.

DISCUSSION

The law on appellant's claims for the 2019 and 2020 R&D Credits is identical; therefore, OTA will first discuss the law and then analyze the facts of the 2019 and 2020 tax years separately.

Burden of Proof

Tax credits are a matter of legislative grace. (*Appeal of Pino*, 2020-OTA-375P.) Statutes granting tax credits are to be construed strictly against the taxpayer with any doubts resolved in the government's favor. (*Dicon Fiberoptics, Inc. v. Franchise Tax Board* (2012) 53 Cal.4th 1227, 1235.) A taxpayer has the burden of proving that it is entitled to an R&D tax credit. (*Appeal of Pino*, *supra*.)

Applicable Law - Basic Structure of R&D Credit

California allows a tax credit for amounts paid or incurred for certain research and development conducted in California.² (R&TC, § 23609; *Appeal of First Solar Inc.*, 2023-OTA-532P.) To be eligible for an R&D tax credit under IRC section 41(a)(1), as modified by R&TC section 23609, a taxpayer must prove that it performed qualified research, or paid someone else

² For purposes of the California research credit, "qualified research" only includes research conducted in California. (R&TC, § 23609(c)(2)(A).)

to perform qualified research, during the years at issue and that the expenses it paid or incurred were “qualified research expenses” (QREs). The amount of the taxpayer’s R&D Credit is generally determined based on the amount by which the taxpayer’s qualified research expenses exceed a base amount. (IRC, § 41(a); *Appeal of Pino, supra.*)

Qualified Research

Qualified research is research that satisfies all the following four tests:

1. *IRC Section 174 Test*: expenditures connected with the research must be eligible for treatment as expenses under IRC section 174. (IRC, § 41(d)(1)(A));
2. *Technological in Nature Test*: research must be undertaken for the purpose of discovering information that is technological in nature. (IRC, § 41(d)(1)(B)(i));
3. *Business Component Test*: the taxpayer must intend that the information to be discovered be useful in the development of a new or improved business component of the taxpayer. (IRC, § 41(d)(1)(B)(ii)); and
4. *Process of Experimentation Test*: substantially all the research activities must constitute elements of a process of experimentation for a purpose relating to a new or improved function, performance, reliability, or quality. (IRC, § 41(d)(1)(C), (d)(3).)

The above tests are applied separately to each business component. (IRC, § 41(d)(2)(A).) A “business component” is defined as “any product, process, computer software, technique, formula, or invention” that is to be “held for sale, lease, or license” or “used by the taxpayer in a trade or business of the taxpayer.” (IRC, § 41(d)(2)(B).) It appears that each of appellant’s six Projects constitutes a separate business component.

Section 174 Test

The Section 174 Test requires that expenditures connected with the research activities qualify under IRC section 174, which allows for two alternative methods of accounting for “research or experimental expenditures” that taxpayers would otherwise be required to capitalize. (Treas. Reg. § 1.174-1.) “Research or experimental expenditures” are defined as “expenditures incurred in connection with the taxpayer’s trade or business which represent research and development costs in the experimental or laboratory sense.” (Treas. Reg. § 1.174-2(a)(1).) An activity generally constitutes “research and development” in the “experimental or laboratory sense” if: (1) the information available to the taxpayer does not establish the capability or method for developing or improving a product or process or the appropriate design of a product or process (i.e., an uncertainty exists); and (2) the activity is

intended to discover information that would eliminate that uncertainty. (Treas. Reg. § 1.174-2(a)(1) & (2).)

However, the “ultimate success, failure, sale, or use of the product is not relevant to a determination of eligibility under [IRC] section 174.” (Treas. Reg. § 1.174-2(a)(1).) Moreover, expenses that the taxpayer incurred “merely to determine whether a product is built to satisfy a client’s desired specifications – without any indication that the expenses were incurred to improve or develop the concept of the product – do not qualify.” (*Little Sandy Coal Company Inc. v. Commissioner* (7th Cir. 2023) 62 F.4th 287, 298, affg. T.C. Memo. 2021-15.)

Technological in Nature Test

The Technological in Nature Test requires the research to have been undertaken for the purpose of discovering information that is “technological in nature.” (IRC, § 41(d)(1)(B).) Information is technological in nature if “the process of experimentation used to discover such information fundamentally relies on principles of the physical or biological sciences, engineering, or computer science.” (Treas. Reg. § 1.41-4(a)(4).) The taxpayer must establish how it relied on the science or engineering principles. (*Appeal of Pino, supra*, citing *Siemer Milling Company v. Commissioner*, T.C. Memo. 2019-37.)

Business Component Test

The Business Component Test requires the research to be intended for the purpose of discovering information that is useful in the development of a new or improved business component of the taxpayer. (IRC, § 41(d)(1)(B)(ii).) Any plant process, machinery, or technique for commercial production of a business component shall be treated as a separate business component (and not as part of the business component being produced). (IRC, § 41(d)(2)(C).)

If the requirements of IRC section 41(d) are not met at the level of the discrete business component, the requirements are then applied “at the most significant subset of elements of the product, process, computer software, technique, formula, or invention to be held for sale, lease, or license” (Shrinking-Back Rule). (Treas. Reg. § 1.41-4(b)(2).) The shrinking-back continues “until either a subset of elements of the product that satisfies the requirements is reached, or the most basic element of the product is reached and such element fails to satisfy the test.” (Treas. Reg. § 1.41-4(b)(2).)

Process of Experimentation Test

A process of experimentation is “a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the

appropriate design of that result, is uncertain as of the beginning of the taxpayer's research activities." (Treas. Reg. § 1.41-4(a)(5)(i).) The Process of Experimentation Test requires a process involving the evaluation of more than one alternative that is designed to achieve a result where the way of achieving the result is initially uncertain, and it may require a hypothesis, testing, and analyzing of the hypothesis. (*Union Carbide Corp. and Subsidiaries v. Commissioner*, T.C. Memo. 2009-50 at p. *80 (*Union Carbide*), affd. (2d Cir. 2012) 697 F.3d. 104, citing S. Rept. 99-313, at 694-695 (1986).)

The Process of Experimentation Test has three elements: (A) substantially all of the research activities for each business component (B) must constitute elements of a process of experimentation (C) for a qualified purpose. (IRC, § 41(d)(1)(C), (d)(3).)

A. Substantially All: The "substantially all" element means that 80 percent or more of the taxpayer's research activities, measured on a cost or other consistently applied reasonable basis, for each business component must constitute a process of experimentation for a qualified purpose. (Treas. Reg. § 1.41-4(a)(6).) If a business component fails the Process of Experimentation Test because of the "substantially all" requirement, a court may apply the Shrinking-Back Rule, identified above, until an element that satisfies the test is reached. (*Suder v. Commissioner*, T.C. Memo. 2014-201.)

B. Process of Experimentation: A process of experimentation is "a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the appropriate design of that result, is uncertain as of the beginning of the taxpayer's research activities." (Treas. Reg. § 1.41-4(a)(5)(i).) It "involves: [1] the identification of uncertainty concerning the development or improvement of a business component, [2] the identification of one or more alternatives intended to eliminate that uncertainty, and [3] the identification and the conduct of a process of evaluating the alternatives (through, for example, modeling, simulation, or a systematic trial and error methodology)." (Treas. Reg. § 1.41-4(a)(5)(i).) "Uncertainty concerning the development or improvement of the business component (e.g., its appropriate design) does not establish that all activities undertaken to achieve that new or improved business component constitute a process of experimentation." (Treas. Reg. § 1.41-4(a)(5)(i).)

A process of experimentation "requires the use of the scientific method." (*Union Carbide* T.C. Memo. 2009-50 at p. *81.) A simple trial and error method is not sufficient, but a systematic trial and error methodology can be a process of experimentation. (Treas. Reg. § 1.41-4(a)(5)(i).) However, a systematic trial and error methodology suggests "a methodical plan involving an iterative testing process in which a hypothesis is tested, data analyzed, and

the hypothesis [is] refined and re-tested” (*Appeal of Swat-Fame, Inc.*, 2020-OTA-046P, citing *Union Carbide, supra.*) If only one alternative is tested, the taxpayer should conduct a series of experiments with the alternative in order to constitute a process of experimentation. (*Ibid.*)

C. Qualified Purpose: A purpose is qualified “if it relates to a new or improved function, performance, reliability or quality of the business component.” (Treas. Reg. § 1.41-4(a)(5)(ii).) As previously noted, research relating to style, taste, cosmetic, or seasonal design factors is not for a qualified purpose, and certain types of research are specifically excluded from the definition of qualified research, such as research related to the adaption of an existing business component to a particular customer’s requirement or need, foreign research, research in the social sciences, arts, or humanities, and funded research. (IRC, § 41(d)(3)(B) & (d)(4).) Research relating to style, taste, cosmetic, or seasonal design factors is not for a qualified purpose under the Process of Experimentation Test and is thus not qualified research. (IRC, § 41(d)(3)(B).)

Exclusions from Qualified Research

Certain types of research are specifically excluded from the definition of qualified research, including: research conducted after the beginning of the commercial production of a business component; research related to the adaption of an existing business component to a particular customer’s requirement or need; foreign research; research in the social sciences, arts, or humanities; and funded research. (IRC, § 41(d)(4).)

Issue 1: Whether appellant is entitled to a refund for an R&D Credit for the 2019 tax year.

Appellant claims to have incurred qualified research expenses for three Projects (the Peel and Stick Project, the Rapid Cure Time Project, and the Wet-Set Project) that qualify for the 2019 R&D Credit. Appellant has submitted only the Study and the Brief as support for its claim for the 2019 R&D Credit. Accordingly, OTA’s analysis is limited to the information appellant has presented in the Study and the Brief.

The Study includes a questionnaire completed by appellant for each Project. Each separate questionnaire asks appellant to provide information with respect to seven different questions: to describe the Project; indicate what appellant was trying to achieve; what the new approach was and why appellant thought it would be successful; whether there was a problem that appellant wished to solve; whether any cutting-edge technology was developed; how many employees were involved; and whether appellant used any contract employees such as designers or engineers. Appellant’s responses to the questions are short and provide little

actual substantive detail on each Project. The Study includes a chart that provides an explanation as to how each Project satisfies the four-part test for determining whether the research for each Project is qualified research. The Study also identifies the four employees who worked on the three Projects for the 2019 tax year and provides an estimate as to each employee's percentage of time worked on all three Projects for the 2019 tax year, without providing a breakdown of each employee's percentage of time worked on each Project or the employee's actions taken for each Project.

The Brief is largely comprised of a one-page document identified as a "Project Brief" and a two-page "Project Outline", along with handwritten notes and photographs, for each of the three Projects for the 2019 tax year. The Project Brief briefly states the description, purpose, and deliverables of each Project, with little detail. The Project Outline states the problem statement, the machine or product design and setup, configuration, testing and initial challenges, refinement and optimization, final testing and validation, and conclusions and also contains little detail.

OTA shall consider whether the record establishes that appellant performed qualified research under IRC section 41(d) with respect to each separate Project. OTA shall treat each of the three Projects as a separate business component and shall analyze each Project separately under the four tests. (IRC, § 41(d)(2).)

Peel and Stick Project

The Peel and Stick Project involved modifying (repurposing) a pressurized roller machine for the application of adhesive to slip-resistant safety mats that are ADA compliant, which appellant manufactures. It appears that the Peel and Stick Project presented certain design or engineering challenges, such as the application of the adhesive without capturing air bubbles, preventing the transfer (i.e., dripping) of adhesive onto rollers, and preventing damage to the slip-resistant safety mats by rollers.

However, from the record it cannot be determined what portion, if any, of appellant's work might be viewed as scientific, iterative testing to overcome those challenges. Rather, it appears that appellant's work was the fixing of routine problems that employed a simple trial and error technique, which does not qualify as a process of experimentation under Treasury Regulation section 1.41-4(a)(5)(i). It is not clear how much of appellant's research activities for the Peel and Stick Project were actually spent on activities related to the new or improved function of the mats (or the machinery that applied the adhesive to the mats), whether appellant had any uncertainty or a hypothesis on how to resolve the uncertainty, whether appellant had

any proposed alternatives, or how appellant performed its testing. Thus, OTA cannot determine, based on the record, what portion, if any, of appellant's activities constituted a scientific process of experimentation with respect to the Peel and Stick Project. Accordingly, the research performed on the Peel and Stick Project does not qualify as qualified research.

Rapid Cure Time Project

The Rapid Cure Time Project involved reducing the cure time of appellant's polymer cement using various commercially available rapid-setting agents without compromising the flexibility, thinness, or strength of appellant's slip-resistant safety mats. Appellant identified several problems that the Rapid Cure Time Project aimed to improve, including: (1) excessive drying, (2) reduced flexibility, and (3) increased costs. Appellant provided two pages of undated handwritten notes that purport to reflect the results of testing the various rapid-setting agents in the cement. Appellant also provided numerous pictures of slip-resistant safety mats.

The evidence, however, does not demonstrate that at least 80 percent or more of appellant's research activities with respect to the Rapid Cure Time Project constituted a process of experimentation to overcome design or engineering challenges, which is required by Treasury Regulation section 1.41-4(a)(6), as opposed to the designing or engineering of items where testing was not required. It appears from the evidence that appellant utilized a simple trial and error method to test the various commercially available rapid-setting agents in cement, which does not qualify as a scientific process of experimentation. Accordingly, the research performed on the Rapid Cure Time Project does not qualify as qualified research.

The Wet-Set Project

The Wet-Set Project involved creating a slip-resistant safety mat out of cement based on detailed two- and three-dimensional drawings or models, which could be installed on top of wet cement (i.e., a wet-set application). The Wet-Set Project identified many challenges, including the evaluation of various commercially available materials for cost, durability, and suitability for the Project. The Project also included developing a plan for optimizing the manufacturing process with respect to efficiency, scalability, and reduction of labor. Appellant indicated that its results were unsatisfactory, and it continued the Wet-Set Project indefinitely.

It appears that appellant developed three prototypes for the Wet-Set Project. However, it is not clear what the prototypes were, why the prototypes were unsatisfactory, or what tests were performed on them. While the creation of multiple formulas and the testing of multiple curing methods may have involved certain processes of experimentation, the limited evidence that appellant has provided, such as the various pictures of the wet-set safety mats, along with a

single page of undated handwritten notes, does not demonstrate that at least 80 percent or more of appellant's research activities with respect to the Wet-Set Project constituted a process of experimentation, which is required by Treasury Regulation section 1.41-4(a)(6), or that appellant engaged in testing methodology, which is required by Treasury Regulation section 1.41-4(a)(5)(i). Accordingly, the research performed on the Wet-Set Project does not qualify as qualified research.

Conclusion

Appellant has not demonstrated that substantially all its activities for any of the three Projects for which the R&D Credit was claimed for the 2019 tax year constituted elements of a process of experimentation for a qualified purpose. Accordingly, OTA does not need to discuss whether appellant qualifies under the other tests for qualified research (i.e., the Section 174 Test and the Technological Information Test), or whether any exclusions from qualified research apply. Also, OTA does not need to address whether appellant has provided evidence demonstrating that the "base amount" was calculated accurately. (IRC, § 41(a)(1)(B).) Moreover, OTA does not need to address whether appellant has substantiated the amount of qualified research expenses associated with any Project or business component.

Issue 2: Whether appellant is entitled to a refund for an R&D Credit for the 2020 tax year.

Appellant has submitted only the Study and the Brief as support for its claim for the 2020 R&D Credit. Accordingly, OTA's analysis is limited to the information appellant has presented in the Study and its Brief. Appellant claims to have incurred qualified research expenses for three Projects (the Texture Technique Project, the Guide Strip Project, and the Paver Project) that qualify for the R&D Credit for the 2020 tax year.

The Study includes a questionnaire completed by appellant for each Project. Each separate questionnaire asks appellant to provide information with respect to seven different questions: to describe the Project; indicate what appellant was trying to achieve; what the new approach was and why appellant thought it would be successful; whether there was a problem that appellant wished to solve; whether any cutting-edge technology was developed; how many employees were involved; and whether appellant used any contract employees such as designers or engineers. Appellant's responses to the questions are short and provide little actual substantive detail on each Project.

The Study includes a chart that purportedly provides an explanation as to how each Project satisfies each four-part test for determining whether the research for each Project is qualified research. The Study also identifies the three employees who worked on the three

Projects for the 2020 tax year and provides an estimate as to each employee's percentage of time worked on all three Projects together for the 2020 tax year, without providing a breakdown of each employee's percentage of time worked on each Project or the employee's actions taken for each Project.

The Brief is largely comprised of a one-page document identified as a "Project Brief" and a two-page "Project Outline", along with handwritten notes and photographs, for each of the three Projects for the 2020 tax year. The Project Brief briefly states the description, purpose, and deliverables of each Project, with little detail. The Project Outline states the problem statement, the machine or product design and setup, configuration, testing and initial challenges, refinement and optimization, final testing and validation, and conclusions for each Project but contains little detail.

The Texture Technique Project

The Texture Technique Project involved the replacement of silica sand in appellant's slip-resistant safety mats with a stronger and more durable texturing material. Appellant indicated that its intent was to investigate and analyze alternative texturing materials, and that it would design a testing protocol. However, appellant did not indicate what those alternative texturing materials were or how they were analyzed. Appellant also did not present any evidence regarding any testing protocol, that is, whether and how tests were designed or whether any tests were actually performed. Appellant did not provide any evidence that at least 80 percent of its claimed research activities performed with respect to the Texture Technique Project constituted a process of experimentation, as is required under Treasury Regulation section 1.41-4(a)(6). Thus, appellant cannot satisfy the requirements of the Process of Experimentation Test.

Appellant asserts that the outcome of the Texture Technique Project led to the filing of a patent application with the US. Patent Office. The term "research or experimental expenditures" includes costs of obtaining a patent, such as perfecting a patent application. (Treas. Reg. § 1.174-2(a)(1).) Appellant provides a copy of a letter dated June 14, 2023, from the U.S. Patent Office, which reflects a provisional patent application, which is not the same as a perfected patent application. Moreover, it is not clear that appellant incurred any costs in perfecting a patent application.

Appellant has not indicated what portion of the expenses claimed for the 2020 R&D Credit are allocable to the Texture Technique Project. Accordingly, the research performed on the Texture Technique Project does not qualify as qualified research.

The Guide Strips Project

The Guide Strips Project involved creating guide strips for bicycle paths and street lanes. Appellant identified several features of the Project, including optimizing existing polymer cement formulas and developing new molds. Appellant indicates its intent was to create comprehensive documentation to ensure consistent product quality, and would engage in comprehensive testing of the guide strip panels. In support, appellant provides various pictures of texturized guide strips.

Appellant, however, has not provided evidence demonstrating what portion of its work might be viewed as testing its hypotheses to overcome design engineering challenges, which is required for the Process of Experimentation Test by Treasury Regulation section 1.41-4(a)(5)(i). Appellant did not provide any documentation reflecting product quality or that it engaged in any testing of the guide strip panels. Accordingly, the research performed on the Guide Strips Project does not qualify as qualified research.

The Pavers Project

The Pavers Project involved manufacturing slip-resistant pavers that are ADA compliant. Appellant identified several features of the Pavers Project, including the creation of larger molds and adjustments to the curing process. Appellant indicates that it would manufacture initial prototypes and test the prototypes for performance, durability, and ease of installation.

The creation and incorporation of larger molds, as well as adjustments to appellant's curing process, may have required advanced engineering skills. It is not clear from the evidence whether appellant manufactured any prototypes for this Project or whether appellant actually tested any prototype, as is required under Treasury Regulation section 1.41-4(a)(5)(i). It is also not clear what portion of its research performed constituted a scientific process of experimentation. Based on the record, OTA is unable to find that at least 80 percent of appellant's claimed research activities with respect to the Pavers Project constituted a scientific process of experimentation, which is required by Treasury Regulation section 1.41-4(a)(6). Accordingly, the research performed on the Pavers Project does not qualify as qualified research.

Conclusion

Appellant has not demonstrated that substantially all its activities for any of the three Projects for which it claimed the R&D Credit for the 2020 tax year constituted elements of a process of experimentation for a qualified purpose. Accordingly, OTA need not discuss whether

appellant qualifies under the other tests for qualified research (i.e., the Section 174 Test and the Technological Information Test) or whether any exclusions from qualified research apply. Also, OTA does not need to address whether appellant has provided evidence demonstrating that the base amount was calculated accurately. (IRC, § 41(a)(1)(B).) Moreover, OTA does not need to address whether appellant has substantiated the amount of qualified research expenses associated with any Project or business component.

HOLDINGS

1. Appellant is not entitled to a refund for the R&D Credit claimed for the 2019 tax year.
2. Appellant is not entitled to a refund for the R&D Credit claimed for the 2020 tax year.

DISPOSITION

Respondent's denial of appellant's claims for refund for the 2019 tax year and 2020 tax year are sustained.

Signed by:

L. Katrine Shelton

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L. Katrine Shelton
Administrative Law Judge

We concur:

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Asaf Kletter

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Asaf Kletter
Administrative Law Judge

DocuSigned by:

John O Johnson

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John O. Johnson
Administrative Law Judge

Date Issued: 7/6/2026