

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

VERSATA DEVELOPMENT GROUP, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:13-CV-328
)	(GBL/IDD)
TERESA STANEK REA)	
Acting Director of the)	
United States Patent and Trademark Office,)	
)	
Defendant.)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
BY SAP AMERICA, INC. AND SAP AG

J. Michael Jakes (VSB No. 26,147)
Michael A. Morin (*pro hac vice* pending)
John M. Williamson (*pro hac vice* pending)
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I. INTRODUCTION

This case—an Administrative Procedure Act (“APA”) challenge to a specific agency decision—should be dismissed for lack of subject matter jurisdiction on at least two independent grounds: (1) a statute precludes judicial review and (2) there is no final agency action.

First, Versata invokes the APA to challenge a decision by the Director of the United States Patent and Trademark Office (“PTO”) made on her behalf by the newly-created Patent Trial and Appeal Board (the “Board”). 37 C.F.R. §§ 42.2, 42.4. Specifically, Versata challenges the Board’s *initial decision* to institute a post-grant review proceeding. But under the America Invents Act (“AIA”), Congress expressly precluded judicial review of the exact decision that Versata seeks to challenge: “The determination by the Director whether to institute a post-grant review . . . shall be final and nonappealable.” 35 U.S.C. § 324(e). Simply put, the APA does not apply—and this Court cannot exercise jurisdiction—where, as here, a “statute precludes judicial review.” 5 U.S.C. § 701(a)(1).

Second, the Board’s *initial decision* to institute a post-grant review is not reviewable under the APA because it is not a “final agency action.” 5 U.S.C. § 704. On the contrary, it is the opposite of a “final agency action.” It is the *first* Board decision in what the AIA contemplates will be an expedited string of subsequent decisions—ranging from protective orders, to discovery orders, to evidentiary orders—all culminating in a trial and a “final determination.” 35 U.S.C. § 326. Under statutory mandate, all of this must happen—and the Board must issue its “final written decision”—within one year of the Board’s initial decision to institute a post-grant review. 35 U.S.C. §§ 326, 328. The “final written decision” is then directly appealable to the United States Court of Appeals for the Federal Circuit. 35 U.S.C. §§ 141, 329. So the only “final agency action” here—indeed the only decision that can actually

affect Versata’s legal rights—is the Board’s statutorily mandated “final written decision.”

35 U.S.C. § 328. Because the Board’s *initial decision* to institute a post-grant review is not a “final agency action,” there is no subject matter jurisdiction over Versata’s premature APA challenges to that *initial* decision.

II. BRIEF STATEMENT OF FACTS

A. The AIA and Its New Post-Grant Review Proceeding

On September 16, 2011, Congress enacted sweeping reforms to the Patent Act. Among them was the inception of the transitional post-grant review proceeding—a new administrative procedure to challenge the validity of certain “covered business method” patents. Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112–29, § 18, 125 Stat. 284, 329–31 (2011); *see also* 35 U.S.C. §§ 321–29.¹ “Covered business method” patents are those claiming “a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service” and are not “patents for technological inventions.” AIA § 18. In particular, after the Supreme Court explained in *Bilski v. Kappos* that patents issued during the late 1990’s and early 2000’s may be “too abstract to be patentable,” Congress took action, empowering the PTO to “deal[] with the backwash of invalid business-method patents.” 157 Cong. Rec. S1367 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).

Congress developed the new transitional post-grant review proceeding as “a cheap and speedy alternative to litigation,” 157 Cong. Rec. E1183–84 (daily ed. June 23, 2011) (statement of Rep. Smith), setting forth a comprehensive administrative structure to guarantee quick

¹ The general post-grant review provisions of 35 U.S.C. §§ 321–29 apply to transitional post-grant review proceedings with few exceptions. *See* AIA § 18(a)(1).

resolution from the PTO. For example, after a petitioner files a petition to institute a transitional post-grant review proceeding, the statute allows the patent owner to file a preliminary response to the petition and then requires the Patent Trial and Appeal Board to render a decision on whether to institute a transitional post-grant review proceeding within three months of the preliminary response. 35 U.S.C. §§ 323, 324(c). The Board may institute the proceeding only if it determines “that it is more likely than not that at least 1 of the [challenged claims] is unpatentable.” *Id.* at § 324(a). The decision to institute begins an expedited proceeding that resembles a hybrid between district court litigation and *inter partes* reexamination, including discovery, motions practice, potential claim amendments, and oral argument. *See generally id.* at § 326(a); *see also* 37 C.F.R. §§ 42.1-42.80. The statute ensures that the proceeding moves swiftly—requiring the Board to issue a final written decision within one year of its decision to institute the proceedings. 35 U.S.C. § 326(a)(11).² The final written decision issued by the Board, in contrast to its earlier initial decision to institute the proceeding, is a determination of the patentability of all challenged claims. *Id.* at § 328(a).

Consistent with this compressed one-year timeline between the decision to institute and the final determination, the statute makes the decision to institute “final and nonappealable.” *Id.* at § 324(e). In other words—while the Board is working diligently under statutory mandate to oversee discovery, conduct a trial, and issue a final written decision all within one year—a party may not simultaneously seek judicial review of the Board’s *initial decision* to institute a post-grant review. Instead, Congress provided that a party may seek judicial review of only the Board’s final written decision, and may do so through a direct appeal to the United States Court

² This period may be extended an additional six months, only upon showing of good cause. 35 U.S.C. § 326(a)(11).

of Appeals for the Federal Circuit. *Id.* at § 329. Congress praised these procedural reforms—the compressed one-year timeline and direct appeal of the final written decision to the Federal Circuit—as vast improvements over post-grant review’s notoriously slow-moving predecessor, *inter partes* reexamination. 157 Cong. Rec. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).

B. The Present Transitional Post-Grant Review Proceeding Involving SAP and Versata

On the first day that Congress made the new procedure available, SAP filed a petition to institute a transitional post-grant review proceeding for claims 17 and 26-29 of Versata’s U.S. Patent No. 6,553,350 (“the ’350 patent”).³ In its preliminary response, Versata challenged SAP’s petition on several grounds, including the substantive grounds that Versata seeks to raise before this Court—that the patent claims do not meet the definition of a “covered business method” patent and that 35 U.S.C. § 101 is not a proper grounds for review under section 18 of the AIA. Patent Owner Versata Development Group, Inc.’s Preliminary Response (Paper 29), *SAP America, Inc. v. Versata Development Group, Inc.*, CBM2012-00001, at 31-45, 68-80 (P.T.A.B. Nov. 30, 2012) (attached as Exhibit 4 to Versata’s Complaint). The Board disagreed and instituted the post-grant review proceeding. In doing so, the Board determined that claims 17 and 26-29 were more likely than not invalid as unpatentably abstract under 35 U.S.C. § 101 and anticipated by prior art under 35 U.S.C. § 102. Decision Institution of Covered Business

³ The AIA requires that a petitioner or its privy have been sued for or charged with infringement of the patent being challenged. AIA §18. Versata sued SAP for allegedly infringing certain claims of the ’350 patent in 2007. That case is currently pending before the Federal Circuit, which issued an opinion on May 1, 2013. Both parties have until May 31, 2013 to petition the Federal Circuit for rehearing.

Method Review (Paper 36), *SAP America, Inc. v. Versata Development Group, Inc.*, CBM2012-00001, at 32, 39 (P.T.A.B. Jan. 9, 2013) (attached as Exhibit 5 to Versata’s Complaint).⁴

Consistent with its statutory mandate, the Board has overseen discovery, conducted multiple hearings on pretrial issues, narrowed the substantive issues involved in the post-grant review, and issued numerous case management decisions. All of this culminated in a substantive oral argument and evidentiary hearing that was held on April 17, 2013 (the first of its kind). As such, the Board is positioned to issue its “final written decision”—which is now the only substantive action remaining in the post-grant review. The “final written decision” is expected to issue as early as this month (and in any event no later than the current statutorily-mandated deadline of Jan. 9, 2014).

III. LEGAL STANDARDS

When faced with a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). A motion to dismiss under Fed. R. Civ. P. 12(b)(1) should be granted where the jurisdictional facts are undisputed and the movant is entitled to prevail as a matter of law. *Id.*

In an action against the government, the plaintiff must show that the government waived its sovereign immunity. *Robishaw Eng’g, Inc. v. United States*, 891 F. Supp. 1134, 1142 (E.D. Va. 1995). Although the APA sets forth a limited waiver of sovereign immunity, the law is well settled that this waiver does not apply where a statute precludes judicial review of agency

⁴ During the post-grant review, Versata filed a patent owner’s response challenging SAP’s proposed rejections of the claims at issue but failing to maintain its initial arguments that the claims did not meet the definition of a “covered business method” patent or that 35 U.S.C. § 101 was not a proper grounds for review.

actions. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). And while there is a presumption against such statutory preclusion, that presumption is overcome by showing that “congressional intent to preclude judicial review is ‘fairly discernible in the statutory scheme.’” *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984) (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 157 (1970)). So where a statute expressly precludes judicial review—or where preclusion is evident from the “statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved”—there is no subject matter jurisdiction over an APA challenge to agency action. *Id.* at 345-48, 353 n.4.

Likewise, “[u]nder the APA, a court can review an agency action only when a statute makes the action reviewable or the action was a ‘final agency action for which there is no other adequate remedy.’ If the challenged agency action is not ‘final’ under the APA, a court must dismiss the complaint for lack of subject matter jurisdiction. The party asserting jurisdiction under the APA carries the burden of proving the existence of such jurisdiction by showing that the challenged action constitutes a ‘final agency action.’” *In re: Admin. Subpoena; Walgreen Co. v. U.S. Drug Enforcement Admin.*, No. 1:12-mc-43, 2012 WL 6697080, at *4 (E.D. Va. Dec. 21, 2012) (citations omitted). So if an agency action is not “final” but rather is merely a “threshold determination” to the effect “only that adjudicatory proceedings will commence”—and to be followed by hearings and testimony before administrative law judges, as well as a true final decision for which judicial review is available—then there is no subject matter jurisdiction over an APA challenge to the “threshold determination.” *FTC v. Standard Oil Co.*, 449 U.S. 232, 241-42 (1980).

IV. ARGUMENT

A. The America Invents Act Expressly Precludes Judicial Review

Although the AIA (and its statutory framework for transitional post-grant review of business method patents) is relatively new, the Federal Circuit—affirming this Court—has already recognized that “the fact that Congress [in the AIA] has prescribed detailed new procedures for administrative and judicial review of issued patents reinforces the conclusion that Congress intended to preclude other avenues of judicial review.” *Pregis Corp. v. Kappos*, 700 F.3d 1348, 1358 n.1 (Fed. Cir. 2012) (discussing Congressional intent behind the AIA in dicta when affirming decision of Gerald Bruce Lee, J., finding that the Patent Act, pre-AIA, precludes review of a PTO patentability decision under the APA).

Indeed, the AIA’s “detailed new procedures for administrative and judicial review” involved in this case—namely the transitional post-grant review proceedings—expressly preclude judicial review of the Board’s initial decision to institute:

- “The determination by the Director whether to institute a post-grant review . . . shall be *final and nonappealable*.” 35 U.S.C. § 324(e) (emphasis added).⁵

Rather, under the AIA’s statutory framework, the reviewable decision is the Board’s “final written decision” issued to conclude a proceeding—directly appealable to the Federal Circuit—not the Board’s initial decision to institute a proceeding. 35 U.S.C. § 329.

And again, while the AIA is new, it is nonetheless analogous—for purposes of statutory preclusion—to the (pre-AIA) patent reexamination statutes. There, Congress used the same

⁵ Again, the Board’s initial decision at issue here is a “determination by the Director [of] whether to institute” because the Board makes the “determination” on the Director’s behalf. 37 C.F.R. §§ 42.2, 42.4. Moreover, the express statutory preclusion is reemphasized in the C.F.R. as well: “A decision by the Board on whether to institute a trial is *final and nonappealable*.” 37 C.F.R. § 42.71(c).

express statutory preclusion language—“final and nonappealable”—to protect PTO decisions of whether to *initiate* reexamination under the “substantial new question of patentability” standard:

- “A determination by the Director pursuant to [§ 303(a)] that no substantial question of patentability has been raised will be *final and nonappealable*.” 35 U.S.C. § 303(c) (emphasis added) (*ex parte* reexamination).
- “A determination by the Director under [§ 312(a)] shall be *final and nonappealable*.” 35 U.S.C. § 312(c) (emphasis added) (*inter partes* reexamination).

Courts have consistently understood the “final and nonappealable” language in the Patent Act as expressly precluding APA review. For example, in *Callaway Golf* the court noted in dicta that 35 U.S.C. § 312(c) “*exempts from judicial review* the PTO’s substantive determination that a reexamination application raises ‘a substantial new question of patentability.’” *Callaway Golf Co. v. Kappos*, 802 F. Supp. 2d 678, 685 (E.D. Va. 2011) (emphasis added) (permitting APA challenge to PTO decisions other than the *initial decision* covered by 35 U.S.C. § 312(c)). Likewise in *Heinl*, another opinion addressing APA challenges to PTO reexamination decisions, the court emphasized that the “plain meaning” of 35 U.S.C. § 303(c) “*bars judicial review* of PTO decisions to deny reexamination.” *Heinl v. Godici*, 143 F. Supp. 2d 593, 597 (E.D. Va. 2001) (emphasis added); *see also Patlex Corp. v. Quigg*, 680 F. Supp. 33, 35 (D.D.C. 1988).⁶

⁶ Moreover, in the *ex parte* reexamination context, courts refused to review the PTO’s decisions to *grant* reexaminations—even though the *ex parte* reexamination statute only expressly precluded APA review of decisions to *deny* reexaminations—on the grounds that the PTO’s decisions to *grant* reexaminations are either non-final or are entirely matters of PTO discretion. *Heinl*, 143 F. Supp. 2d at 597; *Patlex*, 680 F. Supp. at 35; *Joy Techs. v. Quigg*, Civ. A. No. 88-3656, 1989 WL 150027, at *2-*3 (D.D.C. July 28, 1989). While the reasoning of these decisions is developed in Section IV(B) below (addressing the *non-final* nature of the Board’s decision to institute a post-grant review), the fact remains that—in the analogous reexamination context—courts have not permitted an APA challenge to the PTO’s *initial* decision (whether that decision was to grant or deny reexamination).

Indeed, as these cases demonstrate, the statutory scheme as well as the express statutory preclusion provisions in the reexamination statutes have served their purpose well. While there have been many administrative and judicial reviews of the PTO's *final decisions* on reexaminations—as contemplated by the reexamination statutes (35 U.S.C. §§ 306, 315)—courts have refrained from entertaining premature APA challenges to the PTO's *initial decisions* on whether to institute reexamination proceedings. *See, e.g., In re Dome Patent, L.P.*, 232 F.3d 905 (Fed. Cir. 2000) (unpublished and non-precedential) (“[A]lthough this court might ultimately review a decision that canceled claims on reexamination, the decision to institute reexamination is not subject to review.”) (citing *Joy Mfg. v. Nat’l Mine Serv. Co.*, 810 F.2d 1127, 1130 (Fed. Cir. 1987)).

Accordingly, it is no surprise that when Congress enacted the AIA's new post-grant review provisions, it carried forward the unequivocal statutory preclusion language from the reexamination statute (“final and nonappealable”)—applying it broadly to the Board's decision of “whether to institute” a post-grant review. 35 U.S.C. § 324(e). And while this straightforward statutory language is alone dispositive, Congressional intent to preclude judicial review is also readily apparent from the structure, objectives, and legislative history of the AIA, as well as from the nature of the decision involved (i.e., the Board's *initial* decision). *Southern Pines Assocs. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (“In determining whether a statute precludes judicial review, we look not only to its language, but also to ‘the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.’”).

The entire purpose of post-grant review—a thorough yet quick and efficient *alternative* to litigating patent validity in federal court—would be wholly eviscerated if parties were

encouraged to multiply proceedings by challenging the Board's *initial decision* to institute a post-grant review in federal court. Indeed, against Congress's statutory mandate that the Board oversee discovery, conduct a trial, and issue a "final written decision" all within one year of institution, it would have made little sense for Congress to have permitted parallel APA challenges to second guess the Board's *initial decision* to institute a post-grant review. This is particularly true where Congress expressly provided for judicial review of the Board's "final written decision"—namely a quick, direct appeal to the Federal Circuit. 35 U.S.C. § 329.

And for the particular type of post-grant review at issue here—a transitional post-grant review for covered business methods (AIA § 18)—the legislative history of the AIA reveals that the Congressional objectives underlying post-grant review are particularly important. For instance, the legislative history indicates that a solution to suspect business method patents was the impetus for the entire patent reform initiative: "A number of patent observers believe the issuance of poor [quality] business-method patents during the late 1990's through the early 2000's led to the patent 'troll' lawsuits that compelled the Committee to launch patent reform projects 6 years ago." H.R. Rep. No. 112-98, at 54 (2011). And post-grant review for covered business methods was characterized as "a relatively cheap alternative to civil litigation for challenging these patents, [one that] will reduce the burden on the courts of dealing with the backwash of invalid business-method patents." 157 Cong. Rec. S1367 (Mar. 8, 2011).

So all of the factors addressed in *Southern Pines*, the AIA's statutory scheme and structure (an expedited proceeding followed by a direct appeal), its objectives (a speedy alternative to federal court litigation), its legislative history (a goal of reducing the burden on courts)—as well as the nature of the administrative decision (an *initial decision*)—demonstrate that statutory preclusion is appropriate here. Based on these factors, along with the AIA's

express statutory language dictating that the Board’s *initial decision* is “final and nonappealable”—language that has long been understood by the courts as dictating statutory preclusion of APA challenges—this Court should dismiss Versata’s APA complaint for lack of subject matter jurisdiction.

B. The Board’s Decision to Institute a Transitional Post-Grant Review Is Not a “Final Agency Action”

Even if Versata’s APA challenge were not statutorily precluded—which it is—Versata’s complaint still fails on jurisdictional grounds because the challenged Board decision is not a “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. “One of the primary reasons for the finality rule in judicial review of administrative action, as codified in 5 U.S.C. § 704, is that the agency is specially suited to deal with the type of case in question, and it would weaken its effectiveness for the courts to abort the administrative procedure before the agency had completed its task.” *Klein v. Commissioner of Patents*, 474 F.2d 821, 825 (4th Cir. 1973). Under governing Supreme Court precedent:

[T]wo conditions must be satisfied for agency action to be “final”: First, the action must mark the “*consummation*” of the agency’s decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.”

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (emphasis added) (citations omitted). Neither of these conditions is met here.

1. The Board’s *Initial Decision* Is Not the Consummation of the PTO’s Decision Making Process

The Board’s *initial decision* to institute a post-grant review is the opposite of the “consummation of the agency’s decision making process.” It is the first decision. Under the statutory framework that first decision is followed by a string of additional decisions culminating

in the Board’s “final written decision.” The “final written decision”—expected shortly in this case—will be the “consummation of the agency’s decision making process.”⁷ Once again, law from the analogous reexamination context is instructive. Specifically, the PTO’s decision to initiate an *ex parte* reexamination—the one initial reexamination decision that is *not* expressly protected by the Patent Act’s “final and nonappealable” provisions—is nonetheless unreviewable because it is not a “final agency action.” *Heinl*, 143 F. Supp. 2d at 597-98. By analogy, the decision to institute a post-grant review, just like the decision to institute a reexamination, is “an intermediate, indeed initial, step in the agency process to resolve the question of the validity of a patent.” *Id.* at 597. It is “merely a ‘determination that adjudicatory proceedings will commence.’” *Id.* at 597 n.9 (quoting *Standard Oil*, 449 U.S. at 241).

Indeed, the Supreme Court’s *Standard Oil* case—the precedent applied in *Heinl*—is also dispositive here. In *Standard Oil*, the plaintiff (Standard Oil Company of California (“Socal”)) filed an APA challenge against the Federal Trade Commission (“FTC”) while the FTC was in the midst of an administrative action against Socal under Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45. *Standard Oil*, 449 U.S. at 490-91. In its APA challenge, Socal contended that—when the FTC filed its administrative complaint against Socal—the FTC did not have a “reason to believe” that Socal violated the FTC Act. *Id.* The Court recognized that the FTC’s complaint “represents a threshold determination that further inquiry is warranted” and that there will be a subsequent hearing with “evidence and testimony before an administrative law judge” as well as a right to appeal an adverse decision of the

⁷ Again, this decision is directly appealable to the Federal Circuit. So to the extent that the Board actually relies on or incorporates any of its actions or reasoning from its initial decision when issuing its “final written decision,” the actions or reasoning are subject to judicial review and can be challenged—assuming the challenges were properly preserved—at the Federal Circuit.

administrative law judge. *Id.* at 493-94. Accordingly, the court determined that the FTC’s administrative complaint against Social—“[s]erving only to initiate the proceedings”—was not a “final agency action” and could not be challenged under the APA. *Id.* at 494, 496. Indeed, the Court emphasized that APA review “is likely to be interference with the proper functioning of the agency and a burden for the courts . . . Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.” *Id.* at 494.

All of these considerations apply equally here. Just as with the FTC’s institution of a proceeding in *Standard Oil*, the Board’s *initial decision* to institute a proceeding merely represents a threshold determination. It was followed by discovery as well as an evidentiary hearing before administrative law judges. And, again just as in *Standard Oil*, Versata will have an opportunity to appeal any adverse decision by the administrative law judges. So there is no reason for the courts to bear a new burden, or to interfere with PTO post-grant review proceedings, before the PTO concludes its administrative proceedings.

2. The Board’s *Initial Decision* Does Not Affect Versata’s Legal Rights

No legal rights have been determined and no legal consequences will flow from the Board’s decision to institute a post-grant review. “The ‘legal rights or consequences’ that make an agency determination ‘final’ under the APA generally have an immediate legal impact on the party in question. They usually require some positive action on the part of the affected party or a concrete and immediately-felt harm.” *Wollman v. Geren*, 603 F. Supp. 2d 879, 885 (E.D. Va. 2009). The only legal right at issue here is the patentability of Versata’s challenged patent claims. Under the statutory framework, however, the Board’s initial decision to institute a post-grant review does not affect the patentability of the challenged claims. Rather, only the “final

written decision” of the Board can affect patentability. 35 U.S.C. § 328. Accordingly, just as the plaintiff in *Wollman*, Versata “complains about an intermediate procedural decision with no effect on the merits of [its] underlying claim. This is not the kind of ‘final agency action’ reviewable by a federal court.” *Wollman*, 603 F. Supp. 2d at 886.

V. CONCLUSION

In Versata’s view, every *initial* Board decision of whether to institute a post-grant review—for every new post-grant review petition filed under the AIA—would be immediately reviewable by this Court. So—again in Versata’s view—while the Board is conducting expedited discovery and trials on the merits under its statutory mandate, and while the Federal Circuit is hearing direct appeals from those trials, this Court is—in parallel—deciding whether the Board properly instituted the post-grant reviews in the first place. This type of needless multiplicity is the exact opposite of what Congress intended with the AIA.

SAP respectfully requests that the Court dismiss this case for lack of jurisdiction for the independent reasons that (1) judicial review of the Board’s decision to institute the challenged post-grant review is a non-reviewable agency action by express statutory preclusion and (2) the decision is not a “final agency action” under the APA.

Respectfully submitted,

/s/ Elizabeth D. Ferrill

J. Michael Jakes (VSB No. 26,147)

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John M. Williamson (*pro hac vice* pending)

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Dated: May 16, 2013

CERTIFICATE OF SERVICE

As ordered by the Court (Dkt. 38), I hereby certify that on the 3rd day of July, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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