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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* NIALL R. LYNAM

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Appeal 2016-003024  
Application 11/623,379<sup>1</sup>  
Technology Center 3700

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Before EDWARD A. BROWN, RICHARD H. MARSCHALL, and  
ANTHONY KNIGHT, *Administrative Patent Judges*.

MARSCHALL, *Administrative Patent Judge*.

DECISION ON APPEAL

Niall R. Lynam (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Appellant is the real party in interest. Appeal Br. 2.

## THE CLAIMED SUBJECT MATTER

Appellant's claimed subject matter "relates to a method of teaching a class of students about innovation and about practices and procedures for intellectual property protection of innovation." Spec. ¶ 1. Claims 1, 17, and 18 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A method of grading students at a learning institution, said method comprising:

establishing a course in innovation and/or intellectual property protection at the learning institution;

registering a plurality of students for the course at the learning institution;

requiring each registered student of the plurality of registered students to assign to an entity designated by the learning institution an intellectual property right that student might otherwise achieve by reason of that student being registered for the course;

appointing an instructor for the course;

establishing a grading scheme for the course;

the instructor awarding a scholastic grade to each registered student completing the course based on the grading scheme;

filing a patent application at a Patent Office based on an idea conceived as a result of establishing the course and as a result of registering the plurality of students for the course being offered at the learning institution, at least one student registered for the course being a named inventor on the application;

basing the scholastic grade awarded to each said at least one named inventor student at least in part on that student's inventive contribution to the patent application filed, wherein the scholastic grade awarded said named inventor student is enhanced by reason of (i) said named inventor student

conceiving, as a result of said course, a concept that is disclosed in the patent application filed, (ii) the filing of the patent application at said Patent Office with said student being a named inventor on the patent application filed and (iii) said named inventor student's inventive contribution to the patent application filed; and

each said at least one named inventor student assigning his or her patent rights under the patent application filed to the entity.

Appeal Br. 62–63 (Claims App.).

## THE REJECTIONS

Appellant seeks review of the following rejections:

1. Claims 1–20 under 35 U.S.C. § 101 because the claimed inventions are drawn to patent-ineligible subject matter.
2. Claims 1–5, 7–16, 18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Kozma<sup>2</sup> and Rutgers.<sup>3</sup>
3. Claims 6, 17, and 19 under 35 U.S.C. § 103(a) as unpatentable over Kozma, Rutgers, and Pressman.<sup>4</sup>

## ANALYSIS

### *I. Section 101 Rejection*

#### *A. Appellant's Procedural Arguments*

In the Final Office Action, in support of the § 101 rejection, the Examiner found that “[a] ‘grade’ is not a concrete or tangible item,” and “there is no transformation of the grade claimed.” Final Act. 4. In the

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<sup>2</sup> John P. Kozma and Thomas Dion, *An Intellectual Property Course for CS Majors*, ACM Crossroads (ACM, Inc. copyright 2000-2001) (“Kozma”).

<sup>3</sup> *Rutgers Policy: Patent Policy for Rutgers, the State University of New Jersey*, Section 50.3.1 (Rutgers, April, 1996 Rev) (“Rutgers”).

<sup>4</sup> David Pressman, *Patent It Yourself* (7<sup>th</sup> ed. NOLO Press) (“Pressman”).

Appeal Brief, Appellant argued that a grade is a concrete and tangible item, and that the Examiner's other findings and reasoning in support of the § 101 rejection lacked adequate support. Appeal Br. 6–30. In the Answer, the Examiner found that “[h]ad the office action been written after July 30, 2015,” the Examiner would have taken into account the most recent Patent Office guidelines for subject matter eligibility rejections.<sup>5</sup> Ans. 4. The Examiner then made a series of findings following the *Alice* two-step framework discussed in more detail below, and maintained the § 101 rejection. *Id.* at 2–8. The Examiner addressed Appellant's argument regarding the claimed “grade” but otherwise largely dismissed Appellant's remaining arguments as repetitive or moot because they addressed the rejection made prior to the most recent guidelines. *Id.* at 13.

In the Reply Brief, Appellant argues that the Examiner's reasoning and findings in the Answer amount to an improper “new ground of rejection.” Reply Br. 2–3. Appellant further contends that the Examiner failed to follow 37 C.F.R. § 41.39 and pertinent provisions of the MPEP, which require the Examiner to set forth a new ground of rejection, and responses to Appellant's arguments, under a separate subheading. *Id.* at 6–7.

Appellant's arguments in this regard are unavailing because they are beyond the scope of our review on appeal. Whether the Examiner's findings and analysis in the Answer should have been designated as a new ground of rejection or not, that would be a matter addressed by petition. Appellant relies on 37 C.F.R. § 41.39, but does not address 37 C.F.R. § 41.40, which states that “[a]ny request to seek review of the primary examiner's failure to

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<sup>5</sup> See *July 2015 Update on Subject Matter Eligibility*, 80 Fed. Reg. 45,429 (July 30, 2015) (“2015 Guidelines”).

designate a rejection as a new ground of rejection in an examiner's answer must be by way of a petition to the Director under § 1.181 of this title filed . . . before the filing of any reply brief. 37 C.F.R. § 41.40(a) (emphasis added). "Failure of appellant to timely file such a petition will constitute a waiver of any arguments that a rejection must be designated as a new ground of rejection." *Id.* The MPEP also emphasizes this requirement, by stating that § 41.40 "sets forth the exclusive procedure for an appellant to request review of the primary examiner's failure to designate a rejection as a new ground of rejection via a petition." MPEP § 1207.03(b). Accordingly, for purposes of this Appeal, we consider the Examiner's findings and conclusions from both the Final Rejection and the Examiner's Answer, and do not consider whether the Examiner failed to identify this rejection as a new ground of rejection.

*B. Legal Framework for § 101 Analysis*

Under 35 U.S.C. § 101, an invention is patent-eligible if it claims a "new and useful process, machine, manufacture, or composition of matter." 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an implicit exception: "[l]aws of nature, natural phenomena, and abstract ideas" are not patentable. *See, e.g., Alice Corp. Pty Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 75–77 (2012), "for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice*, 134 S. Ct. at 2355. The first step in the analysis is to "determine whether the claims at

issue are directed to one of those patent-ineligible concepts.” *Id.* The “directed to” inquiry asks not whether “the claims *involve* a patent-ineligible concept,” but instead whether, “considered in light of the specification, . . . ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (internal citations omitted). With respect to computer-enabled claimed subject matter, it is helpful to determine whether the claims at issue can readily be understood as simply adding conventional computer components to well-known business practices or not. *Id.* at 1338. In that regard, we determine whether the claims “focus on a specific means or method that improves the relevant technology” or are “directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016).

If the claims are directed to a patent-ineligible concept, the second step in the analysis is to consider the elements of the claims “individually and ‘as an ordered combination’” to determine whether there are additional elements that “‘transform the nature of the claim’ into a patent-eligible application.” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 79, 78). In other words, the second step is to “search for an “‘inventive concept’”—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Id.* (brackets in original) (quoting *Mayo*, 566 U.S. at 72–73).

*C. Step One*

Regarding step one, the Examiner found that “the claims are drawn to the abstract idea of *grading*.” Ans. 4. The Examiner found that the limitations in claim 1 “simply describe a process of teaching” and “are akin to a longstanding human organizing activity which was at issue in [*Alice*] and has been identified among non-limiting examples to be an abstract idea.” *Id.* at 5. The Examiner also found that the “limitations can be classified as ‘an abstract idea of itself’ since Applicant’s process can be practiced as an idea standing alone such as an un-instantiated concept, plan or scheme, as well as a mental process (i.e. thinking) that can be performed in the human mind or by a human using a pen and paper.” *Id.* In support of this finding, the Examiner found certain claim limitations resemble “obtaining and comparing intangible data.” *Id.* Finally, the Examiner found that the “limitations can also be classified as ‘certain methods of organizing human activity’ since the Applicant’s process can be practiced as a concept relating to interpersonal activities, such as transactions between people and satisfying legal obligations,” including “creating a contractual relationship.” *Id.* at 6.

As an initial matter, as part of the argument that the Examiner improperly included a new ground of rejection in the Answer, Appellant argues that the Examiner failed to rebut Appellant’s § 101 arguments in the Appeal Brief addressing the Examiner’s findings in the Final Office Action. Reply Br. 3–5. As noted above, we do not reach the issue of whether the Examiner should have issued a new ground of rejection, and we consider all of the Examiner’s findings in the Answer. Because the Examiner effectively supplemented the basis for the rejection in the Answer by following *Alice*’s

two-step framework, *see* Ans. 4–7, we do not view the Examiner’s failure to rebut Appellant’s arguments in the Appeal Brief, which are not directed to the two-step framework, as fatal to the rejection. Instead, we consider the Examiner’s revised rejection as set forth in the Answer based on *Alice*’s two-step framework, and Appellant’s relevant rebuttal to those findings in the Reply Brief. Accordingly, although the Examiner has not withdrawn the original basis for the rejection based on pre-*Alice* case law, any purported flaws in the original basis for the rejection as stated in the Final Office Action do not establish flaws in the two-step *Alice* framework.

Regarding the Examiner’s substantive analysis of step one, Appellant sets forth several arguments in support of its contention that the claimed invention is not directed to an abstract idea. Reply Br. 7–14. First, Appellant lists the claim limitations and argues that “this litany of claim limitations . . . render[s] the invention implementable in a tangible way with observable and verifiable claim elements . . . with a transformation that is expressly recited and is particular.” *Id.* at 8–9 (emphasis added). Appellant also argues that “the claimed invention . . . is not a mental process” as the Examiner found because it requires “tangible, concrete, measureable, observable, verifiable and meaningfully-limited steps involving a transformation.” *Id.* at 9 (emphasis added). Although couched in terms of the Examiner’s abstract idea finding, Appellant’s argument goes to the “machine or transformation test,” which was at issue in the Examiner’s findings in the Final Office Action, but was not used as a basis for finding that the claims are directed to an abstract idea under *Alice*. *Compare* Final Act. 2–4, *with* Ans. 4–7. Moreover, the machine-or-transformation test may provide a “useful clue” in relation to the second step of *Alice*, not the

abstract idea inquiry involved in the first step. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716 (Fed. Cir. 2014). Appellant’s arguments in this regard do not establish error in the Examiner’s finding that the claims are directed to an abstract idea under *Alice*.

In a similar vein, Appellant argues that certain limitations, such as the “grade” and “Virtual Patent Application,” are concrete and tangible items and therefore not abstract. *See Reply Br. 10, 14*. Such arguments largely go to the machine-or-transformation test and/or disputes regarding the Examiner’s findings in the Final Office Action. *See Final Act. 3–4*. Because this issue is not the basis for the Examiner’s finding that the claims are directed to an abstract idea under *Alice*, they do not establish error in the Examiner’s findings in that regard. *See Ans. 4–7*. In addition, even if some claim limitations are “concrete” and “tangible” as argued by Appellant, that does not establish that the claims are not directed to an abstract idea. Claims may include limitations directed to concrete and tangible computer hardware, for example, and still remain directed to abstract ideas. *See Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324 (Fed. Cir. 2016) (holding that claims reciting generic computer components such as an “interface,” “network,” and “database” are directed to an abstract idea).

Appellant also argues that the Examiner erred in finding that the claims can be classified as methods of organizing human activity. *Reply Br. 10–11*. These arguments appear to be based on the “transformation” and “concrete/tangible” arguments already addressed above. *See id.* Appellant’s arguments do not apprise us of error in the Examiner’s finding that the limitations in claim 1 “simply describe a process of teaching” and “are akin

to a longstanding human organizing activity.” Ans. at 5. For similar reasons, we are not persuaded by Appellant’s similar arguments in the context of the Examiner’s finding that a human using a pen and paper could perform the claimed steps. *See* Reply Br. 9. Appellant does not point to anything in the claims or the specification that require anything more than a human using pen and paper to carry out the claimed steps, and we discern no error in the Examiner’s findings in this regard. *See id.*

We have considered Appellant’s additional arguments directed to dependent claims 2–4 as well as claims 6, 17, and 19 (due to the “Virtual Patent Application” limitation). *See* Reply Br. 10–14. Several of those arguments repeat the arguments addressed above. *See id.* (alleging that certain limitations, including “Virtual Patent Application,” are “concrete and tangible”). Appellant also contends that the Examiner failed to address dependent claims 2 and 3 in the Final Office Action, but the Examiner did address claims 2 and 3 in the Final Office Action, and again, more explicitly, in the Answer. *See* Final Act. 2–4; Ans. 6–8. Regarding claim 3, Appellant argues that the claim “is far more than an alleged contractual condition to carry out an abstract idea.” Reply Br. 12. Regarding claim 4, Appellant alleges that the claim’s further requirements are “not an abstract idea—the Examiner’s so contending is fallacy (see, for example, pages 13–16 of the Appeal Brief).” *Id.* at 12–14. Such conclusory, undeveloped arguments do not apprise us of error in the Examiner’s findings, especially when referring back to previous arguments in the Appeal Brief that do not address the Examiner’s findings related to *Alice*’s two-step analysis.

Based on the foregoing, we are not apprised of error in the Examiner’s findings in support of the conclusion that the claims are directed to an

abstract idea.

*D. Step Two*

Regarding step two, the Examiner found that “[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception.” Ans. 6. The Examiner also found that the “claim as a whole clearly could be applied readily to other teaching environments with means for collecting and generating data.” *Id.* Finally, the Examiner found that “these additional claim elements do not provide meaningful limitation(s) to transform the abstract idea into a patent eligible application of the abstract idea such that the claim(s) amounts to significantly more than the abstract idea itself.” *Id.*

With two potential exceptions, Appellant does not advance any specific arguments against the Examiner’s findings regarding step two. *See* Reply Br. 2–14. In the context of Appellant’s “new ground of rejection” argument, in a footnote, Appellant alleges that the Examiner failed to satisfy the *Alice* two-step process, and that the claims, “as discussed through the Appeal Brief, amount to significantly more than a patent upon the purported abstract idea itself.” *Id.* at 4 n.2. Appellant also quotes the Examiner’s finding that the additional claim elements do not “transform the abstract idea into a patent eligible application of the abstract idea such that the claim(s) amounts to significantly more than the abstract idea itself,” but Appellant only takes issue with the “abstract idea” portion of these findings. *Id.* at 10 (“In response, Appellant again traverses that the claims are directed to an abstract idea.”).

We do not view Appellant’s limited references to step two as advancing any specific arguments that could apprise us of error in the

Examiner’s findings regarding step two. Appellant broadly asserts that discussions in “the Appeal Brief” show that the claims amount to “significantly more,” but a broad reference to a 61-page brief does not adequately direct us to the pertinent argument and evidence that may support Appellant’s position. This general principle applies with even more force here, where the Examiner did not make the findings related to *Alice*’s two-step process until after the Appeal Brief was filed. *See Ans.* 4–7.

To the extent that that Appellant’s arguments with respect to step one—such as the argument that certain limitations such as a “grade” and “Virtual Patent Application” are “concrete and tangible”—apply to step two, those arguments do not apprise us of error in the Examiner’s findings regarding step two. Merely identifying certain tangible, concrete physical limitations in the claims does not establish that the claims amount to “significantly more” than an abstract idea or that the claims have been transformed into an inventive concept. *See Mortg. Grader*, 811 F.3d at 1324–25 (holding that limitations reciting generic computer components such as an “interface,” “network,” and “database” “do not satisfy the inventive concept requirement”; “The bare fact that a computer exists in the physical rather than purely conceptual realm is beside the point” (citations omitted)).

Accordingly, to the extent that Appellant did not waive its argument regarding step two, we find the argument insufficient to establish error in the Examiner’s findings regarding step two. Based on the foregoing, we are not persuaded that the Examiner erred in finding that the claims are not directed to an inventive concept or something more than the abstract idea.

Accordingly, we sustain the rejection of claims 1–20 as not directed to statutory subject matter.

## *II. Section 103 Rejections*

### *A. Claims 1–16 and 18–20*

The Examiner rejected claim 1 based on Kozma and Rutgers, relying on Kozma as disclosing steps related to establishing a course, registering students, appointing an instructor, establishing a grading scheme, and preparing a patent application. Final Act. 4–5. The Examiner found that neither Kozma nor Rutgers discloses filing a patent application at a patent office, but determined that it would have been obvious to do so “since the procedural requirements for writing and filing a patent application are unique only to a Patent Office.” *Id.* at 5. The Examiner took official notice “that it is old and well-known that a named inventor student conceiving, as a result of said course, a concept that is disclosed in the patent application filed, since it is a common practice of education to stimulate thought and create an environment conducive for learning and creativity.” *Id.* The Examiner also found that Kozma “fails to teach” requiring students to assign rights to an entity, but that Rutgers discloses “a contractual agreement regarding the patent policy” at Rutgers that requires assigning intellectual property rights to Rutgers. *Id.* at 7; Ans. 15.

Regarding the limitation requiring enhancing a grade based on (i) conceiving, during the course, subject matter disclosed in the application, (ii) the “student being a named inventor,” and (iii) the “named inventor student’s inventive contribution to the patent application filed,” the Examiner found that neither Kozma nor Rutgers disclose the limitation. Ans. 19–20. The Examiner took official notice that

it is old and well-known that (i) named inventors must conceive a concept that is disclosed in the patent application filed and that provides support for at least one claim of the patent application filed; (ii) the filing of the patent application at said Patent Office with a named inventor on the patent application filed and (iii) said named inventor's inventive contribution to the patent application filed, since these are common practices and procedural requirements for filing a patent application.

*Id.* at 20. The Examiner found that Appellant “failed to reasonably traverse” the rejection based on official notice.

Appellant argues, among other things, that the Examiner’s taking of official notice does not articulate how the notice renders obvious the claim elements requiring enhancing a grade based on the three conditions. Appeal Br. 33, 38–41; Reply Br. 15–16. Appellant also argues that the Examiner’s use of official notice in the Answer was improper, because it included reliance on official notice for the first time in several instances, which did not allow Appellant an opportunity to contest the use such notice. Reply Br. 23–25.

We need not reach the propriety of the Examiner’s newly articulated use of official notice in the Answer, because we agree with Appellant that the Examiner has not adequately supported the finding that Kozma or Rutgers, with or without official notice, discloses the “enhanced” grade limitation, or renders the claim obvious. The Examiner acknowledges that neither reference discloses the limitation. Ans. 19–20. Further, the Examiner’s use of official notice does not adequately track the requirements of the claim. *Id.* at 20. The claim requires enhancing a grade based on three conditions—“conceiving . . . a concept that is disclosed” in the application; “being a named inventor on” the application; *and* the “named inventor student’s inventive contribution” to the application. Appeal Br. 62–63

(Claims App.). The Examiner's official notice merely suggests that it is old and well known that named inventor's "must conceive a concept" disclosed, must be named on a filed patent application, and must include the inventor's contribution in the filed application, because these are requirements of filed applications. Ans. 20. These findings related to official notice go to the contents of a filed patent application presuming an inventor and inventive content have been identified; they do not mention much less establish that it is old and well known to enhance a course grade for any of the reasons required by claim 1. Moreover, the Examiner does not make findings on this point going beyond official notice, by articulating why it would have been obvious to enhance a grade based on the claimed criteria, in light of the facts purportedly established by official notice. *Id.*

Based on the foregoing, we do not sustain the rejection of claim 1 based upon Kozma and Rutgers. The Examiner does not address the deficiencies discussed above in the rejection of claims 2–16, which depend from claim 1, or in claims 18 and 19, which contain the same relevant limitations. Appeal Br. 63–68 (Claims App.). Accordingly, we do not sustain the rejection of claims 2–16 and 18–20 for the same reasons as discussed above for claim 1.

*B. Claim 17*

Claim 17 requires a "virtual patent application comprising an application that is substantially similar to an actual patent application that has been at least partially prosecuted at a Patent Office but that has been rendered covert by the instructor . . . and wherein the instructor utilizes art, office actions and responses of said actual patent application in conjunction with said virtual patent application" Appeal Br. 66–67 (Claims App.). The

Examiner found that Pressman discloses the claimed virtual patent application, and determined that it would have been obvious to use Pressman's virtual patent application "within the course of Kozma as modified by Rutgers so as to provide the student with experience in the complete prosecution of a patent application." Final Act. 9; Ans. 25. The Examiner also took official notice "that it is old and well-known to utilize art, office actions and responses of patent applications, since it is part of the procedural process of seeking patent protection" and that Appellant failed to "reasonably traverse the rejection" based on official notice. Ans. 26.

Appellant argues that Pressman fails to disclose the claimed virtual patent application because the Examiner's findings fail to establish that Pressman's application "is substantially similar to an actual patent application that has been at least partially prosecuted at the Patent Office." Appeal Br. 46. According to Appellant, the portions of Pressman relied on by the Examiner "appear to be entirely made-up documents composed for purposes" of Pressman's disclosure, not based on an actual application. *Id.* Appellant also argues that the Examiner improperly relied on official notice because Appellant adequately traversed the rejection. Reply Br. 32.

As above, we need not reach Appellant's arguments regarding official notice or the related claim limitations, because we agree with Appellant that the Examiner did not adequately support the finding that Pressman discloses the claimed virtual patent application. The Examiner asserts that certain pages of Pressman "are substantially similar to applications at least partially prosecuted by a Patent Office," but does not find that that Pressman's application is substantially similar to an "actual" patent application that has been rendered covert, as required by claim 17. *See* Final Act. 9; Ans. 25.

Further, the Examiner's finding that Pressman's application has been rendered "covert" because the application number used by Pressman does not correspond to the actual patent application bearing that number does not cure the deficiency. *See id.* The application number ("07/345678") may have been made up by Pressman, and, not surprisingly, it may not correspond to the application bearing that number at the Patent Office. This fact, however, does not establish that Pressman's application was based on an *actual* application at the Patent Office as required by claim 17. It may be that Pressman's content tracks an actual application on file at the Patent Office in some respects, but the findings before us do not establish adequately that this is the case. Accordingly, we do not sustain the rejection of claim 17 based upon Kozma, Rutgers, and Pressman.

#### DECISION

We affirm the decision of the Examiner to reject claims 1–20 under 35 U.S.C. § 101. We reverse the decision of the Examiner to reject claims 1–20 under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED