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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* SCOTT LYNN,  
DAVID PHILLIPS, and  
BRYCE ANSON

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Appeal 2016-006785<sup>1</sup>  
Application 12/041,518<sup>2</sup>  
Technology Center 3600

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Before HUBERT C. LORIN, JOSEPH A. FISCHETTI, and  
MATTHEW S. MEYERS, *Administrative Patent Judges*

MEYERS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Our decision references Appellants’ Appeal Brief (“Br.,” filed December 16, 2015), the Examiner’s Answer (“Ans.,” mailed April 18, 2016), and Final Office Action (“Final Act.,” mailed April 16, 2015).

<sup>2</sup> Appellants identify “ADKNOWLEDGE INC.” as the real party in interest (Br. 3).

## CLAIMED INVENTION

Appellants' claimed invention "is directed to methods and systems for analyzing consumer clicks (clicks) received from search engines, and managing future traffic by click aggregation" (Spec. ¶ 2).

Claims 1, 12, 23, and 58 are the independent claims on appeal. Claim 1, reproduced below with added bracketed notations, is illustrative of the subject matter on appeal:

1. A computer-implemented method for traffic management over a network comprising:

[a] providing, by a first computer system linked to the network, 1) a system bid corresponding to a current bid of an advertiser associated with the first computer system, the system bid being determined in accordance with a ratio of the advertiser's cost per search engine conversion versus a cost per e-mail conversion times the current bid to set the system bid to a value equal to a cost per e-mail conversion, and 2) a listing corresponding to the system bid, the listing associated with the target web site of the advertiser, to at least one second computer system linked to the network;

[b] directing, by the first computer system, a browsing application of a computer device associated with at least one entity who has activated the provided listing associated with the target web site, the provided listing hosted by the at least one second computer system, to the target web site;

[c] receiving, by the first computer system, data associated with the browsing application of the computer device associated with the at least one entity who has activated the provided listing associated with the target web site;

[d] analyzing, by the first computer system, the received data with respect to at least one parameter associated with the target web site;

[e] determining, by the first computer system, a subsequent system bid based on the analyzed data; and,

[f] providing, by the first computer system, the subsequent system bid corresponding to the provided listing associated with the target web site, to the at least one second computer system.

## REJECTIONS

Claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter (*see* Final Act. 2–5).

Claims 1, 12, 23 and 58 stand rejected under 35 U.S.C. § 112(b) or 35 U.S.C. § 112 (pre-AIA), second paragraph, as being indefinite (*see id.* at 5–6).

Claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Collins (US 2007/0027768 A1, pub. Feb. 1, 2007) in view of Dean (US 2004/0059712 A1, pub. Mar. 25, 2004) (*see id.* at 6–15).

## ANALYSIS

### *Non-statutory subject matter*

*Independent claims 1, 12, 23, and 58, and dependent claims 2–11, 13–22, 24–33, 46, 48, 49, 51, 53, 55, 57, and 59–63*

Appellants argue claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 as a group (*see* Br. 8–12). We select claim 1 as representative. Claims 2–33, 46, 48, 49, 51, 53, 55, and 57–63 fall with independent claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

*Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S.Ct. 2347 (2014) identifies a two-step framework for determining whether claimed subject matter is judicially-excepted from patent eligibility under § 101.

According to *Alice* step one, “[w]e must first determine whether the claims at issue are directed to a patent-ineligible concept,” such as an abstract idea. *Alice*, 134 S.Ct. at 2355.

The “directed to” inquiry []cannot simply ask whether the claims *involve* a patent-ineligible concept, because essentially every routinely patent-eligible claim involving physical products and actions *involves* a law of nature and/or natural phenomenon—after all, they take place in the physical world. *See Mayo*, 132 S.Ct. at 1293 (“For all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.”) Rather, the “directed to” inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether “their character as a whole is directed to excluded subject matter.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015); *see Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1375, 2016 WL 1393573, at \*5 (Fed. Cir. 2016) (inquiring into “the focus of the claimed advance over the prior art”).

*Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). “The ‘abstract idea’ step of the inquiry calls upon us to look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a whole’ is directed to excluded subject matter.” *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (citing *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016).

In rejecting the claims under 35 U.S.C. § 101, the Examiner determined that the claims, considered as a whole, are directed to “the abstract ideas of providing system bids, managing traffic over a network[,] and dynamically serving consumer clicks,” and therefore to “fundamental economic practices [that] employ mathematical relationship[s]/formulas” without additional elements that transform it into a patent-eligible

application of that idea (*see* Final Act. 4, 16; *see also* Ans. 3–10). The Examiner also determined that the claimed steps “could have just as easily been performed by a human operator” (*see id.* at 16).

According to the Examiner, “fundamental economic practices and mathematical relationships/formulas are examples of abstract ideas explicitly referenced in *Alice Corp.*” (Final Act. 16; *see also* Ans. 6). The Examiner further supports this position by citing to *buySafe, Inc. v. Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014) and *Bilski v. Kappos*, 561 U.S. 593 (2010) for disclosing “[a]greements between people or performance of financial transactions” (Ans. 4). Additionally, the Examiner cites to several court cases including *Gottschalk v. Benson*, 409 U.S. 63 (1972) and *In re Abele*, 684 F.2d 902 (CCPA 1982) for disclosing a “[m]athematical relationship or formula” and “[p]erforming mathematical calculations” (Ans. 5).

Appellants argue that “the Office [a]ction makes no reference whatsoever to any of the limitations recited in the claims” (Br. 9 (citing Final Act. 4)). “Thus, [according to Appellants,] ‘generalized arguments that are not directed to the specific language of the challenged claims, are insufficient to show that the claims more likely than not are directed to a patent-ineligible abstract idea’” (Br. 9 (citing *Google Inc. v. SimpleAir Inc.*, CBM 2014-00170, 2015 WL 331089 (PTAB Jan. 22, 2015))). At the outset, we note that *Google* is a non-precedential Board decision denying institution of a covered business method patent review, and, as such, is not binding on

this panel. Nonetheless, we are not persuaded by the analogy Appellants attempt to draw.

In *Google*, the Petitioner advanced arguments that did not align with the language of the claims and, as such, the Board found that Petitioner's arguments did not show that the challenged claims were more likely than not patent-ineligible under 35 U.S.C. § 101. *See, e.g., Google*, 2015 WL 331089, at \*10 ("Petitioner does not explain sufficiently how the challenged claims allegedly relate to the abstract idea of packaging and routing information as part of a subscription service. This is particularly true when none of the challenged claims recite[] a 'subscription service' at all"); *see also id.* (describing flaws in Petition's analogy of the challenged claims to conventional periodical publication delivery). Here, Appellants have not shown there to be a similar deficiency in the Examiner's analysis.

Specifically, the Examiner has pointed to specific claim language in determining that the claims are directed to an abstract idea. In particular, the Examiner refers to "providing a system bid," the "system bid being determined in accordance with a ratio . . . current bid," and "set[ting] the system bid to a value equal to a cost per e-mail conversion," which are all specific limitations set forth in element [a] of claim 1 (*see* Final Act. 4, 16; *see also* Ans. 3–6).

We also find that there is no requirement that examiners must provide evidentiary support in every case before a conclusion can be made that a claim is directed to an abstract idea. *See, e.g.,* para. IV "July 2015 Update: Subject Matter Eligibility" to 2014 Interim Guidance on Subject Matter Eligibility (2014 IEG), 79 Fed. Reg. 74618 (Dec. 16, 2014)

The courts consider the determination of whether a claim is eligible (which involves identifying whether an exception such as an abstract idea is being claimed) to be *a question of law*. Accordingly, courts do not rely on evidence that a claimed concept is a judicial exception, and in most cases resolve the ultimate legal conclusion on eligibility without making any factual findings.

(Emphasis added.) Evidence may be helpful in certain situations where, for instance, facts are in dispute. But it is not always necessary. Based on the above analysis set forth by the Examiner, we are unpersuaded it is necessary in this case.

Instead, we need only look to other decisions where similar concepts were previously found abstract by the courts. *See Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016) (“Instead of a definition [for what an ‘abstract idea’ encompasses], then, the decisional mechanism courts now apply is to examine earlier cases in which a similar or parallel descriptive nature can be seen—what prior cases were about, and which way they were decided.”)

To that end, as noted above, the Examiner finds the claims are directed to “providing system bids, managing traffic over a network[,] and dynamically serving consumer clicks,” and therefore to “fundamental economic practices [that] employ mathematical relationship[s]/formulas” (*see* Final Act. 4, 16; *see also* Ans. 3–6). Broadly, we agree that the Examiner is correct. According to Appellants’ Specification, “the present disclosed subject matter is directed to methods and systems for analyzing consumer clicks (clicks) received from search engines, and managing future traffic by click aggregation” (Spec. ¶ 2). And, taking independent claim 1 as representative, the claimed subject matter is generally directed to “providing

. . . a system bid corresponding to a current bid of an advertiser,” “directing . . . a browsing application . . . to the target web site,” “receiving . . . data associated with the browsing application,” “analyzing . . . the received data,” “determining . . . a subsequent system bid based on the analyzed data,” and “providing . . . the subsequent system bid.”

Therefore, these steps accomplish little more than collecting data, analyzing the data, and then presenting the data based on the analysis, and are similar to the steps that the Federal Circuit determined were patent ineligible in *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016). In *Electric Power*, the method claims at issue were directed to performing real-time performance monitoring of an electric power grid by collecting data from multiple data sources, analyzing the data, and displaying the results. *Elec. Power Grp. LLC*, 830 F.3d at 1351–52. The Federal Circuit held that the claims were directed to an abstract idea, explaining that “[t]he advance they purport to make is a process of gathering and analyzing information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions” (*Id.* at 1354).

Accordingly, we find that independent claim 1 involves nothing more than providing a system bid, directing a computer system to a browsing application to access a target web site, receiving and analyzing browsing data, determining a subsequent bid based on the browsing data, and presenting the subsequent system bid — activities squarely within the realm of abstract ideas. *See, e.g., Elec. Power Grp., LLC*, 830 F.3d at 1353–54 (When “the focus of the asserted claims” is “on collecting information, analyzing it, and displaying certain results of the collection and analysis,”

the claims are directed to an abstract idea.). *See also Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1344–45 (Fed. Cir. 2013) (Claims reciting “generalized software components arranged to implement an abstract concept [of generating insurance-policy-related tasks based on rules to be completed upon the occurrence of an event] on a computer” not patent eligible.).

Appellants argue that claim 1 recites “significantly more” than an abstract idea because it “recites express limitations in a network-linked computer system” (Br. 11). Appellants further argue similar to *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), the instant steps are “necessarily rooted in computer technology” and “solve[] a problem that only arises in the computer technology” (Br. 12). Additionally, according to Appellants, “the ‘core concept’ of [the i]nvention is a ‘technological process,’” so “the claims are correctly directed to eligible subject matter” (*id.*). The Examiner asserts that the additional limitations are “mere instruction[s] to apply the abstract idea,” and “the claims require no more than a generic computer to perform generic computer functions that are well-understood, routine[,] and conventional” (Ans. 6).

We agree with the Examiner and considering each of the claim elements in turn, we find them all to be directed to well-understood, routine, conventional activities previously known to the industry (*see, e.g.*, Spec. ¶¶ 45, 140). And, when viewed as a whole, the computer components (e.g., “first computer system,” “a browsing application,” “second computer system,” and “computer device”) of Appellants’ system add nothing that is not already present when the claim elements are considered separately. Furthermore, other than stating that the claimed limitations are performed in

a network-linked computer system (*i.e.* apply it), the Appellants have not explained why the claims are similar to *DDR* (Br. 11).

Additionally, Appellants' claims do not purport to improve the functioning of the system itself. Nor do they effect an improvement in any other technology or technical field. Instead, claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 amount to nothing significantly more than an instruction to implement the abstract idea of “providing system bids, managing traffic over a network, and dynamically serving consumer clicks[,] and employ[ing] mathematical relationships/formulas” (*see* Final Act. 4, 16; *see also* Ans. 3–6) using generic computer components (*see* Ans. 6; *see also* Spec. ¶¶ 48, 140). This is insufficient to transform an abstract idea into a patent-eligible invention. “[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility.” *Alice*, 134 S. Ct. at 2358.

We acknowledge Appellants' argument that the pending claims “recite[] express limitations in a network-linked computer system[],” (*see* Br. 11), however, Appellants' argument fails to persuade us that this is an improvement beyond using the computer as a tool to carry out the claimed limitations.

According to the Specification, the “[t]he servers, engines and/or components . . . are linked . . . to an endless number of other servers and the like, via the Internet 24” (Spec. ¶ 48). Furthermore, “[t]hese processes . . . can be performed by computers, computer-type devices” (Spec. ¶ 140). The instant claims do not, for example, purport to improve the functioning

of the computer itself or involve a solution necessarily rooted in computer technology to overcome a problem specific to the realm of computer networks, but instead embody the use of generic computer components in a conventional manner to perform an abstract idea, which, as the Court in *DDR Holdings* explained, is not patent eligible. *DDR Holdings*, 773 F.3d at 1256 (“[T]hese claims in substance were directed to nothing more than the performance of an abstract business practice on the Internet or using a conventional computer. Such claims are not patent-eligible.”). Nor do the claims effect an improvement in any other technology or technical field. Instead, the claims at issue amount to nothing significantly more than an instruction to apply the abstract idea of “providing system bids, managing traffic over a network, and dynamically serving consumer clicks [,] and employ[ing] mathematical relationships/formulas” (see Final Act. 4, 16; see also Ans. 3–6), which under our precedents, is not enough to transform an abstract idea into a patent-eligible invention. See *Alice*, 134 S. Ct. at 2360.

Furthermore, unlike the problem in *DDR Holdings*, the instant problem is not “*a problem specifically arising in the realm of computer networks*,” since the claimed steps of “providing . . . a system bid corresponding to a current bid of an advertiser,” “receiving . . . data associated with the browsing application,” “analyzing . . . the received data,” “determining . . . a subsequent system bid based on the analyzed data,” and “providing . . . the subsequent system bid.” can be performed manually by a click aggregator “comparing . . . recorded data” and enabling a web site promoter to “track how many consumers were successfully sent to the relevant web site by the search engine” (Spec. ¶ 4). For example, the click aggregator can mail a paper copy of the report with the analytics to the web

site promoter each month. Therefore, the claims merely recite the performance of some business practice known from the pre-Internet world, namely how well is an advertising campaign performing, along with the requirement to perform it on the Internet. Additionally, we generally agree with the Examiner that the Appellants are merely automating routine activities with the use of generic computing technology (*see* Ans. 6; *see also* Spec. ¶¶ 48, 140). Furthermore, because Appellants have not provided any arguments regarding why these claimed elements are not generic computer components, and the Specification indicates these are generic computer components, we agree with the Examiner that claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 lack additional elements that would render the claims patent-eligible.

In view of the foregoing, we sustain the Examiner’s rejection under 35 U.S.C. § 101 of independent claim 1, and claims 2–33, 46, 48, 49, 51, 53, 55, and 57–63, which fall with independent claim 1.

### *Indefiniteness*

#### *Independent claims 1, 12, 23 and 58*

In rejecting claims 1, 12, 23 and 58 under 35 U.S.C. § 112, second paragraph, the Examiner finds

[t]he claim[s] present[] two conflicting or alternative definitions for what the “system bid” is (i.e., “a ratio of the advertiser’s cost per search engine conversion versus a cost per e-mail conversion times the current bid” vs. “a value equal to a cost per e-mail conversion”) and two conflicting or alternative methods for how the “system bid” is established (i.e., “the system bid being determined” vs. “set the system bid.”).

(Final Act. 5–6; *see also* Ans. 10).

However, we agree with Appellants that the language relied on by the Examiner is taken from the Specification, and “[i]t is fully consistent when Q, for example, is equal to 1” (*see* Br. 13 (citing Spec. ¶ 97)). As recited in limitation [a] of claim 1, the system bid is “determined in accordance with a ratio of the advertiser’s cost per search engine conversion versus a cost per e-mail conversion times the current bid” in order “to set the system bid to a value equal to a cost per e-mail conversion.” The Specification discloses that “[t]he Q value is a ratio of the advertiser’s cost per conversion . . . versus the cost per conversion of another parameter [such as] . . . e-mail conversions,” and the objective may be to get the two costs and therefore Q to be “as close to 1 as possible” (Spec. ¶ 97). The reason for doing so would be to bill the advertiser for the clicks that are high quality and to not bill the advertiser for fraudulent clicks (*id.*).

Therefore, we do not sustain the Examiner’s rejection under 35 U.S.C. § 112, second paragraph, of claims 1, 12, 23, and 58. *See Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.”).

#### *Obviousness*

*Independent claims 1, 12, 23, and 58, and dependent claims 2–11, 13–22, 24–33, 46, 48, 49, 51, 53, 55, 57, and 59–63*

We are persuaded by Appellants’ argument that the Examiner erred in rejecting independent claim 1 under 35 U.S.C. § 103(a) because the combination of Collins and Dean fails to disclose or suggest “the system bid being determined in accordance with a ratio of the advertiser’s cost per

search engine conversion versus a cost per e-mail conversion times the current bid to set the system bid to a value equal to a cost per e-mail conversion,” as recited by limitation [a] of independent claim 1, and similarly recited by independent claims 12, 23, and 58 (*see* Br. 13–14).

The Examiner maintains the rejection is proper, and relies on paragraphs 33, 94, and 102 of Dean, as disclosing the argued subject matter (*see* Final Act. 8–9; *see also* Ans. 12). We cannot agree.

In making this determination, we note that Collins is directed to a system “for optimizing and managing advertising campaigns” (Collins ¶ 9). Collins discloses that advertisers “may bid for position or prominence of their listings in a set of search results” (*id.* ¶ 34). More particularly, Collins discloses “that an advertiser may determine how much they are willing to bid for each listing based on the advertiser’s business objectives and the amount of traffic on the advertised website that the listing generates” using a campaign optimizer component (*id.* ¶¶ 58, 98).

Dean is directed to a system “for allowing advertisers to put targeted, e-mail relevant ads on e-mail, or to serve such ads in association with e-mail” (Dean ¶ 23). Dean discloses

[p]erformance information (e.g., a history of selections or conversions per URL or per domain) may be fed back in the system, so that e-mail clusters that tend to get better performance for particular kinds of ads (e.g., ads belonging to a particular cluster or topic) may be determined. This can be used to re-rank e-mail relevant ads such that the ads served are determined using some function of both e-mail-relevance and performance.

(*Id.* ¶ 94). Dean further discloses that “advertisers can control how their ads are served . . . by allowing the advertiser[s] to opt-in, opt-out, [and] manipulate bidding or budgeting controls, etc.” (*id.* ¶ 102).

After reviewing the cited portions of Dean, we agree with Appellants that there is nothing in the relied upon portions of Dean that discloses or suggests the argued limitation (*see* Br. 13–14). Here, as Appellants point out, although “Dean discloses that advertisers may pay for clicks on content-related-based targeted Web sites and for clicks on content-related-based targeted emails, Dean fails to teach or suggest any ratio that seeks to adjust a bid to a value that is the same for both such advertising mediums” (*Id.*).

In the Response to Arguments section of the Answer, the Examiner takes the position

“the system bid being determined in accordance with a ratio of the advertiser's cost per search engine conversion versus a cost per e-mail conversion times the current bid to set the system bid to a value equal to a cost per e-mail conversion,” does not refer to a positively recited step or act (e.g., “determining the system bid in accordance . . .”, “setting the system bid . . .” etc.) required of the computer system (i.e., “first computer system”) claimed. Furthermore, none of the positively recited steps or acts required of the claimed invention rely on the characteristics of the “system bid” as described in the clause. In other words, the claimed process would occur exactly the same regardless of how the “system bid” is interpreted. The phrase is akin to a “wherein” clauses and/ or “intended use/result” recitations that are not further limiting of the claimed invention.

(Ans. 12). However, we disagree with the Examiner that the secondary determining step is merely such an intended use, and instead find it limiting. For example, limitation [e] in claim 1 recites “determining, by the first computer system, a subsequent system bid based on the analyzed data,” and in order to have a subsequent system bid, logically, a previous system bid needs to be determined as recited in limitation [a] of claim 1. In other words, the first determined bid in limitation [a] of claim 1 is utilized later in the claim to provide “the subsequent system bid” required in limitation [f].

Therefore, contrary to the Examiner's assertion, the determining portion of limitation [a] in claim 1 is not merely an intended result but is actually used to perform the subsequent determination in limitation [e], and thus limiting. Independent claims 12, 23, and 58 include similar limitations.

In view of the foregoing, we do not sustain the Examiner's rejection of independent claims 1, 12, 23, and 58 under 35 U.S.C. § 103(a). For the same reasons, we also do not sustain the Examiner's rejection of dependent claims 2–11, 13–22, 24–33, 46, 48, 49, 51, 53, 55, 57, and 59–63.

#### DECISION

The rejection of claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 under 35 U.S.C. § 101 is affirmed.

The rejection of claims 1, 12, 23 and 58 under 35 U.S.C. § 112(b) or 35 U.S.C. § 112 (pre-AIA), second paragraph, is reversed.

The rejection of claims 1–33, 46, 48, 49, 51, 53, 55, and 57–63 under 35 U.S.C. § 103(a) is reversed.

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