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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* JEFFREY B. WINNER and NICHOLAS GALBREATH

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Appeal 2017-000357  
Application 10/867,844<sup>1</sup>  
Technology Center 3600

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Before HUBERT C. LORIN, NINA L. MEDLOCK, and  
BRADLEY B. BAYAT, *Administrative Patent Judges*.

LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Jeffrey B. Winner and Nicholas Galbreath (“Appellants”) seek our review under 35 U.S.C. § 134 from the rejection of claims 1–6 and 22–27. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

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<sup>1</sup> The Appellants identify Facebook, Inc. as the real party in interest (Appeal Br. 3).

## THE INVENTION

The “invention generally relates to online content management, and more specifically, to a system and method for managing online content delivery based on information from a person’s social network.” (Spec. para. 1).

Claim 1 is representative, and is reproduced below, with bracketed matter and indentation added:

1. A method comprising:

[1] maintaining, in a data store, a social network graph, wherein the social network graph comprises a plurality of nodes, each node corresponding to a respective user, and edge data identifying connections between nodes of the plurality of nodes,

[1a] wherein each connection between two nodes establishes a degree of separation between the two nodes, wherein a first user of the online social network corresponds to a first node of the plurality of nodes;

[2] tracking, using a database of a computer system, online activities of other users with respect to a certain interaction with content of the online social network,

[2a] wherein the other users correspond to nodes that are connected in the social network graph to the first node of the first user by a single degree of separation and wherein each other user shares one more attributes with the first user;

[3] estimating, using the computer system, a probability that the first user will perform the certain interaction with content of the online social network based on the tracked online activities;

[4] selecting, using the computer system, the content to be delivered to the first user based on the estimated probability; and

[5] sending, to a client device of the first user, the selected content for display to the first user, the selected content being operable to perform the certain interaction.

### THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Sterling	US 2002/0055833 A1	May 9, 2002
Hsia	US 2002/0178166 A1	Nov. 28, 2002
Achlioptas	US 2004/0148275 A1	July 29, 2004
Gross	US 2004/0260600 A1	Dec. 23, 2004
Beyda et al. ("Beyda")	US 2005/0165644 A1	July 28, 2005

The following rejections are before us for review:

1. Claims 1–6 and 22–27 are rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.
2. Claims 1–3, 22–24 are rejected under 35 U.S.C. § 103 as being unpatentable over Gross and Achlioptas.
3. Claims 4 and 25 are rejected under 35 U.S.C. § 103 as being unpatentable over Gross, Achlioptas, and Beyda.
4. Claims 5 and 26 are rejected under 35 U.S.C. § 103 as being unpatentable over Gross, Achlioptas, Beyda, and Sterling.
5. Claims 6 and 27 are rejected under 35 U.S.C. § 103 as being unpatentable over Gross, Achlioptas, and Hsia.

### ANALYSIS

*The rejection of claims 1–6 and 22–27 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.*

The Appellants argue these claims as a group. *See* Reply Br. 3–7. We select claim 1 as the representative claim for this group, and the remaining claims 2–6 and 22–27 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

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) (internal quotation marks and citation omitted).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Incorporated*, 566 U.S. 66, 82–84 (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 that analysis is to “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Id.* If the claims are not directed to a patent-ineligible concept, e.g., to an abstract idea, the inquiry ends. Otherwise, the inquiry proceeds to the second step where the elements of the claims are considered “individually and ‘as an ordered combination’” to determine whether the additional elements “‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. 66 at 79, 78).

Applying the framework in *Alice*, and as the first step of that analysis, the Examiner determined that the claims are “directed to the abstract idea of selecting content for members in a social network based on social network connections, closeness of connections, and probability of interaction with the content.” (Ans. 4; *see also* Final Act. 2). According to the Examiner, the invention is “a fundamental economic practice” (Final Act. 3) and “a

mathematical relationship or formula.” (*Id.* at 4). The Examiner also determined that “[e]stimating/predicting user interaction with content to select content for the users relies on the use of mathematical algorithms and probabilistic methods, which is one of the excluded examples of an abstract idea.” (*Id.* at 5). Proceeding to the second step of *Alice*, the Examiner determined that “[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the claims merely amount to the application or instructions to apply the abstract idea.” (*Id.*). The Examiner also determined that the claims “do not effect an improvement to another technology or technical field; [] do not amount to an improvement to the functioning of a computer itself; and [] do not move beyond a general link of the use of an abstract idea to a particular technological environment.” (*Id.* at 6).

The Appellants contend that the Examiner erred and that claim 1 is not directed to an abstract idea. (Appeal Br. 7–8). According to the Appellants, the claims are “directed to tracking online interactions of first-degree connections of a particular user of an online social network, transforming the information about the tracked interactions to select content that the particular user will likely interact with, and sending the interactive content to the user’s client device for display.” (*Id.* at 8). The Appellants further argue that “the Examiner has failed to provide evidence on the record to establish that the claimed invention is an abstract idea.” (*Id.* at 11).

We are not persuaded of error in the Examiner’s rejection.

The “directed to” inquiry in the claims applies a stage-one filter to the 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 also Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (Inquiring into “the focus of the claimed advance over the prior art.”).

Here, claim 1 calls for gathering and storing information, and using the information for selecting relevant content for delivery. Claim 1 recites a method comprising five steps including: (1) maintaining . . . a social network graph, (2) tracking . . . online activities, (3) estimating . . . a probability, (4) selecting . . . content, and (5) sending . . . the selected content for display. Claim 1 also includes two “wherein” clauses that further describe the social network graph and the tracking step.

The court in *Enfish* put the question as being “whether the focus of the claims is on [a] specific asserted improvement in computer capabilities . . . or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Enfish*, 822 F.3d at 1335–1336. The court found that the “plain focus of the claims” there was on “an improvement to computer functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity.” *Id.* at 1336.

“In determining the eligibility of respondents’ claimed process for patent protection under § 101, their claims must be considered as a whole.” *Diamond v. Diehr*, 450 U.S. 175, 188 (1981). The question is whether the claims as a whole “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). In this case, we find that claim 1, as a whole, is focused on targeting

content based on user tracking in a social network. We do not see that claim 1 is focused on an improvement to any technology such as an improved technique for storing data (e.g., social network graph) in a data store or an improved technique for tracking online activities. Here, as in *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372 (Fed. Cir. 2011), all of claim 1’s “method steps can be performed in the human mind, or by a human using a pen and paper.” As in *CyberSource*, the method of claim 1 “can be performed by a human who simply reads records of Internet credit card transactions from a preexisting database.” (*Id.*)

“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)); see also *Enfish*, 822 F.3d at 1335, quoted in *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1241 (Fed. Cir. 2016).

In that regard, the Background section of the Specification discusses the problem, which is that “[s]tatistical models, including those based on collaborative filtering techniques, are, however, imperfect, and more accurate predictors are desired on many fronts.” (Spec. para. 3). According to the Specification, the inventors solved the problem by selecting relevant content for delivery to a member of a social network based on prior online activities of other members of the network, and the closeness of the member’s relationship with the other members of the network. (*Id.* para. 4). In light of the Specification’s description of the problem and solution, the

advance over the prior art by the claimed invention is in selecting relevant content for delivery.

Given the focus of claim 1 as a whole, in light of the Specification, is on data gathering activities<sup>2</sup> in support of selecting relevant content for delivery, the claims are properly characterized as being “directed to” targeting content based on user tracking in a social network. Targeting content based on user tracking in a social network is an abstract idea. *Cf. Morsa v. Facebook, Inc.*, 77 F. Supp. 3d 1007, 1014 (C.D. Cal. 2014), *aff’d*, 622 F. App’x 915 (Fed. Cir. 2015) (claims directed to “targeting advertisements to certain consumers, and using a bidding system to determine when and how advertisements will be displayed” held to be directed to an abstract idea). As noted by the court in *Morsa*, matching consumers with a given product or service “has been practiced as long as markets have been in operation.” *Id.* at 1013 (quoting *Tuxis Technologies, LLC v. Amazon.com, Inc.*, No. CV 13–1771–RGA, 2014 WL 4382446, at \*5 (D. Del. Sept. 3, 2014)); *see also OpenTV, Inc. v. Netflix Inc.*, 76 F.Supp.3d 886, 893, No. 14–CV–01525–RS, at 10, 2014 WL 7185921 (N.D. Cal. December 16, 2014) (“The concept of gathering information about one’s intended market and attempting to customize the information then provided is as old as the saying, ‘know your audience.’”). *Cf. Personalized Media Commc'ns, LLC v. Amazon.com, Inc.*, 161 F.Supp.3d 325, 337 (D. Del.

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<sup>2</sup> *Cf. Elec. Power Grp., LLC*, 830 F.3d at 1353 (When “[t]he 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.)

2015), *aff'd*, 2016 WL 7118532 (Mem) (Fed. Cir. 2016) (“providing personalized recommendations” is an abstract idea).

The Appellants rely on *PNC Bank v. Secure Access, LLC*, CBM2014-00100, 2014 WL 4537440 (PTAB Sept. 9, 2014) to argue that claims that require a transformation of data are not directed to abstract ideas. (Appeal Br. 10).

As a matter of course, what a different panel did in a different situation under a different set of facts has little bearing on how this case should be disposed of.

Still, examining earlier cases can have a role, especially in deciding whether a concept that claims are found to be directed to is an abstract idea. *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.”). In that regard, the patent claims (US 7,631,191 (“’191 patent”)) the *PNC Bank* panel had before them are not comparable to the claims here at issue. The ’191 patent claims involve authenticating a web page. They are comparable to the claims involved in *Bascom Global Internet Services, Inc. v AT&T Mobility LLC*, 827 F.3d 1341 (Fed Cir. 2016) (US 5,987,606). In contrast, the claims here at issue involve targeting content based on user tracking in a social network. More relevant cases are *Morsa v. Facebook, Inc.*, 77 F. Supp. 3d 1007, 1014 (C.D. Cal. 2014), *aff'd*, 622 F. App’x 915 (Fed. Cir. 2015) (*see, e.g.*, US 8,341,020 (claim 1) (“associating . . . criteria with an ad”)) and *Personalized Media Commc’ns, LLC v. Amazon.com, Inc.*,

161 F.Supp.3d 325, 337 (D. Del. 2015), *aff'd*, 2016 WL 7118532 (Mem) (Fed. Cir. 2016) (*see, e.g.*, US 5,887,243 (claim 1) (“generating . . . content in respect to a viewer interest”)).

The Appellants also rely on *PNC Bank* to make the point that the Examiner did not adequately support the rejection with extrinsic evidence. According to the Appellants, in *PNC Bank* “the Patent Trial and Appeal Board found that there was not sufficient evidence that placing ‘a trusted stamp or seal on a document’ was ‘a fundamental economic practice’ or a ‘building block of the modern economy.’” (Appeal Br. 11).

As far as evidentiary support for the determination that the concept to which the claim is directed is an abstract idea, suffice it say that it is not necessary to resort to additional facts and evidence in making the *Alice* step one determination when the claims can adequately be compared to claims declared abstract in past cases. *See Amdocs* at 1294, *supra*.

Although we do not consider *PNC Bank* either controlling or germane, that panel’s consideration of evidence in making a determination under the first step of the *Alice* framework has merit. A similar approach was taken in *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229 (Fed. Cir. 2016). But these cases do not stand for the proposition that Examiners *must* provide evidentiary support in every case before a conclusion can be made that a claim is directed to an abstract idea. There is no such requirement. *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. It is not necessary in this case. We also note that for all the criticism of a lack of evidentiary support, the Appellants have put forward no rebuttal evidence showing that claim 1 is not directed to an abstract idea.

In view of the above, we see no error in the Examiner’s determination that claim 1 is directed to an abstract idea.

We now turn to the second step of the *Alice* framework: “a 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.’” *Alice*, 134 S. Ct. at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1294 (2012)).

Pages 9–10 of the Appeal Brief address the second step of the *Alice* framework. According to the Appellants, independent claims 1 and 22 contain an inventive concept, in particular the “tracking” step. According to the Appellants, the claimed tracking “is patentably distinct from the cited references.” (Appeal Br. 10).

However, a finding of novelty or nonobviousness does not necessarily lead to the conclusion that subject matter is patent-eligible. “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology v. Myriad*

*Genetics, Inc.*, 133 S. Ct. 2107, 2117 (2013). See especially *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1315 (Fed. Cir. 2016):

Indeed, “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of *no relevance* in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diamond v. Diehr*, 450 U.S. 175, 188–89, 101 S. Ct. 1048, 67 L.Ed.2d 155 (1981) (emphasis added); see also *Mayo*, 132 S. Ct. at 1303–04 (rejecting “the Government’s invitation to substitute §§ 102, 103, and 112 inquiries for the better established inquiry under § 101”). Here, the jury’s general finding that Symantec did not prove by clear and convincing evidence that three particular prior art references do not disclose all the limitations of or render obvious the asserted claims does not resolve the question of whether the claims embody an inventive concept at the second step of *Mayo/Alice*.

We also cannot agree with the Appellants’ contention that the claims before us are similar to the claims held eligible in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014). Appeal Br. 7–8. See also Reply Br. 5–6. According to the Appellants, the claims are similar because “the claimed invention is overcoming a problem specifically arising in the context of an online social network.” (*Id.* at 8). In particular, the Appellants point to the steps of “maintaining,” “tracking,” and “sending” recited in claim 1 as support for the proposition that the claims are necessarily rooted in technology. (*Id.*).

In *DDR Holdings*, the Federal Circuit determined that although the patent claims at issue involved conventional computers and the Internet, the claims nevertheless addressed the problem of retaining website visitors who, if adhering to the routine, conventional functioning of the Internet hyperlink protocol, would be transported instantly away from a host’s website after “clicking” on an advertisement and activating a hyperlink. *DDR Holdings*,

773 F.3d at 1257. The court determined that those claims were directed to statutory subject matter because they claim a solution “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *Id.*

No such technological advance is evident in the claimed invention. Unlike the situation in *DDR Holdings*, Appellants do not identify any problem particular to computer networks and/or the Internet that claim 1 allegedly overcomes. Here, the claimed computer components operate precisely in the expected manner of storing data in association with other data, and selecting and sending content via a conventional network. (*See* Spec, para. 20 (“network 400, e.g., the Internet”)). *Cf. buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) (“That a computer receives and sends the information over a network--with no further specification--is not even arguably inventive”). Nothing in the claim, understood in light of the Specification, requires anything more than conventional computer implementation. “The [S]pecification fails to provide any technical details for the tangible components, but instead predominately describes the system and methods in purely functional terms.” *In re TLI Comm. LLC Patent Litig.*, 823 F.3d 607, 612 (Fed. Cir. 2016). For example, with respect to the claimed step of “maintaining, in a data store, a social network graph,” the Appellants’ Specification discloses that a representation of the social network for all the members is stored in a “member database” (Spec. para. 25), and that the social network graph can be stored in the form of “an adjacency list” or “an adjacency matrix or any other graph data structure may be used” (*id.* para. 26). The Specification

does not disclose, for example, a new way of storing a social network graph that improves the functioning of the database itself.

The remaining arguments are unpersuasive as to error in the rejection. We have fully considered the Appellants' arguments. For the foregoing reasons, they are unpersuasive as to error in the rejection of claim 1, and claims 2–6 and 22–27, which fall with claim 1.

The rejection is sustained.

*The rejection of claims 1–3, 22–24 under 35 U.S.C. § 103 as being unpatentable over Gross and Achlioptas.*

Claim 1 requires “[2] tracking, using a database of a computer system, online activities of other users with respect to a certain interaction with content of the online social network, [2a] wherein the other users correspond to nodes that are connected in the social network graph to the first node of the first user by a single degree of separation and wherein each other user shares one more attributes with the first user” (Appeal Br. 22, Claims Appendix) (bracketed matter added). Claim 22 contains similar limitations as claim 1.

The Examiner finds that Gross discloses limitation [2], i.e., “tracking” (Final Act. 8), but not limitation [2a], i.e., “wherein the other users . . . .” (*Id.* at 10). The Examiner relies on Achlioptas to remedy this deficiency. (*Id.* at 11). In particular, the Examiner finds that Achlioptas discloses this limitation in paragraphs 2 and 42 and in Figures 1 and 2. (*Id.* at 11–12; *see also* Ans. 9).

The Appellants argue, *inter alia*, that “*Achlioptas* [does] not disclose anything related to tracking [user’s] interactions with content of an online social network.” (Appeal Br. 16).

We have carefully reviewed these passages and the Examiner's discussion of them. We are unable to discern from these passages what the Examiner has identified as disclosing "wherein the other users correspond to nodes that are connected in the social network graph to the first node of the first user by a single degree of separation and wherein each other user shares one more attributes with the first user" as required by limitation [2a].

Paragraph 2 of Achlioptas discloses that users can share information with each other, such as job information. "For example, a person may be searching for a job and contact his or her friends to determine if they are aware of available positions." (Achlioptas para. 2). We do not see, and the Examiner does not adequately explain, how a user sharing job information with other users is equivalent to tracking online activities of other users that share attributes with a user, as called for in limitation [2a] of claim 1.

Paragraph 42 of Achlioptas discloses that a social network can be embodied as a directed graph with individuals and/or entities represented by vertices (e.g., nodes), and that vertices can be annotated with information (e.g., attributes) about the individual. The mere fact that attributes are stored in the graph is not sufficient to meet the above limitation [2a]. There is no disclosure of tracking a subset of "other users" who "share one more attributes with a first user" as called for in claim 1.

A prima facie case of obviousness has not been made out in the first instance by a preponderance of the evidence. Accordingly, we reverse the rejection of independent claims 1 and 22. For the same reasons, we also do not sustain the rejection of dependent claims 2, 3, 23, and 24. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) ("dependent claims are

nonobvious if the independent claims from which they depend are nonobvious”).

*The rejection of claims 4 and 25 under 35 U.S.C. § 103 as being unpatentable over Gross, Achlioptas, and Beyda.*

*The rejection of claims 5 and 26 under 35 U.S.C. § 103 as being unpatentable over Gross, Achlioptas, Beyda, and Sterling.*

*The rejection of claims 6 and 27 under 35 U.S.C. § 103 as being unpatentable over Gross, Achlioptas, and Hsia.*

As to the rejections of these dependent claims, the Examiner does not rely on the additional references in any way that would cure the deficient finding discussed in the corresponding independent claims above. Therefore, we also do not sustain the rejection of dependent claims 4–6 and 25–27 under 35 U.S.C. § 103(a) because the Examiner relies on the same deficient factual finding.

## CONCLUSIONS

The Appellants have not shown that the Examiner erred in rejecting claims 1–6 and 22–27 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

The Appellants have shown that the Examiner erred in rejecting claims 1–6 and 22–27 under 35 U.S.C. § 103(a).

## DECISION

The decision of the Examiner to reject claims 1–6 and 22–27 is affirmed.

Appeal 2017-000357  
Application 10/867,844

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

AFFIRMED