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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/781,044	02/28/2013	Amy D. Travis	CAM920120098US1_8150-0282	6238

52021 7590 04/26/2018  
Cuenot, Forsythe & Kim, LLC  
20283 State Road 7  
Ste. 300  
Boca Raton, FL 33498

EXAMINER
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LOFTIS, JOHNNA RONEE

ART UNIT	PAPER NUMBER
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3683

NOTIFICATION DATE	DELIVERY MODE
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04/26/2018

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* AMY D. TRAVIS and STEPHEN J. FOLEY

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Appeal 2017-001960<sup>1</sup>  
Application 13/781,044  
Technology Center 3600

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Before ST. JOHN COURTENAY III, LARRY J. HUME, and  
JOYCE CRAIG, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) of the Final Rejection of claims 1–3, 5–11, 13–17, and 19–23, which are all claims pending in the application. Appellants have canceled claims 4, 12, and 18. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM the rejection of claims 1–3, 5–11, 13–17, and 19–23, and enter a new ground of rejection for claims 1–3, 5–11, 13–17, and 19–23 under 35 U.S.C. § 112, second paragraph, pursuant to our authority under 37 C.F.R. § 41.50(b).

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<sup>1</sup> According to Appellants, the real party in interest is IBM Corp. App. Br. 1.

STATEMENT OF THE CASE<sup>2</sup>

*The Invention*

Appellants' disclosed embodiments and claimed invention relate "to tracking and publishing information regarding the quality of one or more aspects of a virtual meeting." Spec. ¶ 1.

*Exemplary Claim*

Claim 1, reproduced below, is representative of the subject matter on appeal (*emphases* added to contested limitations):

1. A method of publishing information regarding the quality of a virtual meeting, the method comprising:
  - collecting one or more performance indicators related to an aspect of the meeting;
  - aggregating the collected performance indicators; and
  - publishing the aggregated performance indicators to an external computing system,wherein
  - collecting one or more performance indicators from one or more meeting attendees includes automatically the one or more performance indicators without input from one or more meeting attendees.*

*Prior Art*

The Examiner relies upon the following prior art as evidence in rejecting the claims on appeal:

Wrench

US 8,817,966 B2

Aug. 26, 2014

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<sup>2</sup> Our decision relies upon Appellants' Appeal Brief ("App. Br.," filed Aug. 8, 2016); Examiner's Answer ("Ans.," mailed Sept. 23, 2016); Reply Brief ("Reply Br.," filed Nov. 18, 2016); Final Office Action ("Final Act.," mailed March 4, 2016); and the original Specification ("Spec.," filed Feb. 28, 2013).

*Rejections on Appeal*

R1. Claims 1–3, 5–11, 13–17, and 19–23 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 6.

R2. Claims 1–3, 5–11, 13–17, 19, and 20 stand rejected under 35 U.S.C. §§ 102(a) and 102(e) as anticipated over Wrench. Final Act. 8.

CLAIM GROUPING

Based on Appellants' arguments (App. Br. 8–17), we decide the appeal of patent-eligible subject matter Rejection R1 of independent claims 1, 8, and 15, and dependent claims 2, 3, 5–7, 9–11, 13, 14, 16, 17, 19, 20, 22, and 23, on the basis of representative claim 1. We address separately argued (App. Br. 16–17) dependent claim 21, *infra*. We decide the appeal of anticipation Rejection R2 of claims 1–3, 5–11, 13–17, 19, and 20 on the basis of representative claim 1.<sup>3</sup>

ISSUES AND ANALYSIS

In reaching this decision, we consider all evidence presented and all arguments actually made by Appellants. We do not consider arguments Appellants could have made but chose not to make in the Briefs, and we deem any such arguments waived. 37 C.F.R. § 41.37(c)(1)(iv).

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<sup>3</sup> "Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately." 37 C.F.R. § 41.37(c)(1)(iv). In addition, when Appellant does not separately argue the patentability of dependent claims, the claims stand or fall with the claims from which they depend. *In re King*, 801 F.2d 1324, 1325 (Fed. Cir. 1986).

We disagree with Appellants' arguments with respect to claims 1–3, 5–11, 13–17, and 19–23 and, unless otherwise noted, we incorporate by reference herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken, and (2) the reasons and rebuttals set forth in the Examiner's Answer in response to Appellants' arguments. In conjunction with our affirmance of Rejections R1 and R2, we enter a new ground of rejection under § 112 for claims 1–3, 5–11, 13–17, and 19–23. We highlight and address specific findings and arguments regarding claim 1 for emphasis as follows.

1. § 101 Rejection R1 of Claims 1–3, 5–11, 13–17, and 19–23

*Issue 1*

Appellants argue (App. Br. 8–17; Reply Br. 2–8) the Examiner's rejection of claim 1 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter is in error. These contentions present us with the following issue:

Did the Examiner err in concluding claim 1 is patent-ineligible by being directed to collecting and organizing data (performance indicators) without providing an improvement to the underlying technology or computer?

*Analysis*

*Alice Framework*

Section 101 provides that anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" may obtain a patent. 35 U.S.C. § 101. The Supreme Court has repeatedly emphasized that patent protection should

not extend to claims that monopolize "the basic tools of scientific and technological work." *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014). Accordingly, laws of nature, natural phenomena, and abstract ideas are not patent-eligible subject matter. *Id.*

The Supreme Court's two-part *Mayo/Alice* framework guides us in distinguishing between patent claims that impermissibly claim the "building blocks of human ingenuity" and those that "integrate the building blocks into something more." *Alice*, 134 S. Ct. at 2354. First, we "determine whether the claims at issue are directed to a patent-ineligible concept." *Id.* at 2355. If so, we "examine the elements of the claim to determine whether it contains an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Id.* at 2357 (quoting *Mayo*, 566 U.S. at 72, 79). While the two steps<sup>4</sup> of the *Alice* framework are related, the "Supreme Court's formulation makes clear that the first-stage filter is a meaningful one, sometimes ending the § 101 inquiry." *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). We note the Supreme Court "has not established a definitive rule to determine what constitutes an 'abstract idea'" for the purposes of step one. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016) (citing *Alice*, 134 S. Ct. at 2357).

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<sup>4</sup> Applying this two-step process to claims challenged under the abstract idea exception, the courts typically refer to step one as the "abstract idea" step and step two as the "inventive concept" step. *Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016).

*Alice Step 1 — Abstract Idea*

Our reviewing court has held claims ineligible as being directed to an abstract idea when they merely collect electronic information, display information, or embody mental processes that could be performed by humans. *Elec. Power Grp.*, 830 F.3d at 1353–54 (collecting cases). At the same time, "all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas." *Mayo*, 566 U.S. at 71. Under this guidance, we must therefore ensure at step one that we articulate what the claims are directed to with enough specificity to ensure the step one inquiry is meaningful. *Alice*, 134 S. Ct. at 2354 ("[W]e tread carefully in construing this exclusionary principle lest it swallow all of patent law.").

Appellants contend, "[n]otwithstanding that the Examiner [sic] characterization of the invention is a gross oversimplification, the Examiner has not identified a precedential or non-precedential decision of the Federal Circuit or Supreme Court that establishes that 'the concept of collecting and organizing data regarding performance would be directed towards an idea of itself.'" App. Br. 10. Appellants further argue:

Contrary to the Examiner's assertion that publishing of data is not "an idea of itself" [r]ather it is an activity that places the information in a tangible form. Additionally, the Examiner's assertion that "the steps can be performed by human using pen and paper" is clearly incorrect. The claims require that performance indicators are collected "from one or more meeting attendees" automatically and "without input from one or more meeting attendees." Such operations cannot be performed "by human using pen and paper."

App. Br. 13.

In addition, Appellants contend:

Contrary to the Examiner's conclusory assertions, the claimed invention cannot be performed by pen and paper. The claimed invention first involves collecting performance indicators related to a virtual meeting (i.e., a meeting involving the use of interconnected computers). In order to collect these performance indicators, one needs to have access to at least one of these interconnected meetings. Additionally, it is not possible to publish the aggregated performance indicators to an external computing system without a manner by which to access the external computing system. A pen and paper alone is incapable of publishing anything to an external computing system. Finally, claim 1 recites that the performance indicators are collected automatically without input from one or more meeting attendees. The term "automatically" necessarily requires the use of a computer. Consequently, the Examiner's conclusory assertions about performing the invention "by pen and paper" is simply wrong.

App. Br. 15.

In response, the Examiner concludes the appealed claims are directed to a judicial exception, i.e., an abstract idea without significantly more because:

[C]ollecting and aggregating performance indicators, as claimed, is similar to the concept in *Classen Immunotherapies, Inc. v. Biogen IDEC*, 659 F.3d 1057 (Fed. Cir. 2011), wherein collecting and comparing known information was found to be abstract. Further, the specification explains that "aggregate" is intended to mean any manipulation of the collected performance indicators including mathematical, statistical or other analysis or operations. As such, the aggregation of the performance indicators is similar to the concept in *Digitech Image Tech., LLC v. Electronics for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014), wherein organizing information through mathematical correlations was found to be an abstract idea.

Ans. 6.

Under the "abstract idea" step we must evaluate "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*, 838 F.3d at 1257 (citation omitted).

Turning to the claimed invention, claim 1 recites "[a] method of publishing information regarding the quality of a virtual meeting." Claim 1 (preamble). Method claim 1's limitations also requires "wherein collecting one or more performance indicators from one or more meeting attendees includes automatically the one or more performance indicators without input from one or more meeting attendees."

Under step one, we agree with the Examiner that the inventions claimed in each of independent claims 1, 8, and 15 are directed to an abstract idea, i.e., collecting known information, e.g., performance indicators. *See* Ans. 6.

As the Specification describes, "[t]he performance indicator can be made with respect to one or more aspects of the virtual meeting. For instance, the performance indicators can be made with respect to any suitable aspect about the virtual meeting itself, the meeting attendees (e.g. the chair(s), the presenter(s), participant(s) and/or attendee(s)), meeting content (e.g., slide, visual, or demonstration), etc." Spec. ¶ 30. We find this type of activity, i.e., collecting performance indicators, for example, includes longstanding conduct that existed well before the advent of computers and the Internet, and could be carried out by a human with pen and paper. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) ("That purely mental processes can be unpatentable, even when

performed by a computer, was precisely the holding of the Supreme Court in *Gottschalk v. Benson.*"<sup>5</sup>

Our reviewing court has previously held other patent claims ineligible for reciting similar abstract concepts. For example, while the Supreme Court has enhanced the § 101 analysis since *CyberSource* in cases like *Mayo* and *Alice*, they continue to "treat[ ] analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category." *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1146–47 (Fed. Cir. 2016) (alteration in original) (quoting *Elec. Power Grp.*, 830 F.3d at 1354).

In this regard, the claims are similar to claims our reviewing court has found patent ineligible in *Elec. Power Grp.*, 830 F.3d at 1353–54 (collecting information and "analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, [are] essentially mental processes within the abstract-idea category").

Regarding Appellants' argument, "[t]he term 'automatically' necessary requires the use of a computer" (App. Br. 15), we disagree because, as our reviewing court guides, merely automating previously manual processing by using computers does not qualify as an eligibility-rejection-defeating improvement. *Credit Acceptance Corp. v. Westlake Servs.*, 859 F.3d 1044 (Fed. Cir. 2017). Therefore, we are not persuaded by this contention.

Based upon the analysis above, and in agreement with the Examiner, we conclude claim 1 involves nothing more than collecting, aggregating, and

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<sup>5</sup> *CyberSource* further guides that "a method that can be performed by human thought alone is merely an abstract idea and is not patent-eligible under § 101." *CyberSource*, 654 F.3d at 1373.

publishing data, without any particular inventive technology — an abstract idea. *See Elec. Power Grp.*, 830 F.3d at 1354. We further refer to *Content Extraction*, where the Federal Circuit has provided additional guidance on the issue of statutory subject matter by holding claims to collecting data, recognizing certain data within the collected data set, and storing that recognized data in memory were directed to an abstract idea and therefore unpatentable under § 101. *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014).

Accordingly, on this record, and under step one of *Alice*, we agree with the Examiner's conclusion the claims are directed to an abstract idea.

*Alice Step 2 —Inventive Concept*

If the claims are directed to a patent-ineligible concept, as we conclude above, we proceed to the "inventive concept" step. For that step we must "look with more specificity at what the claim elements add, in order to determine 'whether they identify an "inventive concept" in the application of the ineligible subject matter' to which the claim is directed." *Affinity Labs*, 838 F.3d at 1258 (quoting *Elec. Power Grp.*, 830 F.3d at 1353).

In applying step two of the *Alice* analysis, our reviewing court guides we must "determine whether the claims do significantly more than simply describe [the] abstract method" and thus transform the abstract idea into patentable subject matter. *Ulramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014). We look to see whether there are any "additional features" in the claims that constitute an "inventive concept," thereby rendering the claims eligible for patenting even if they are directed to an abstract idea. *Alice*, 134 S. Ct. at 2357. Those "additional features" must be

more than "well-understood, routine, conventional activity." *Mayo*, 566 U.S. at 79.

Evaluating representative claim 1 under step 2 of the *Alice* analysis, we agree with the Examiner that it lacks an inventive concept that transforms the abstract idea of collecting data into a patent-eligible application of that abstract idea. *See* Ans. 7–8.<sup>6</sup>

We agree with the Examiner because, as in *Alice*, we find the recitation of collecting performance indicators and then "publishing the aggregated performance indicators to an external computing system" (claim 1), is simply not enough to transform the patent-ineligible abstract idea here into a patent-eligible invention. *See Alice*, 134 S. Ct. at 2357 ("[C]laims, which merely require generic computer implementation, fail to transform [an] abstract idea into a patent-eligible invention.").

Accordingly, based upon the determinations above, on this record, we are not persuaded of error in the Examiner's conclusion that the appealed

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<sup>6</sup> The Examiner

clearly explained that the external computing system is considered a general purpose computer performing routine operations . . . [and] further pointed out that the step of collecting performance indicators *automatically* does not add significantly more. The automation of the steps using a conventional computing system does not add significantly more.

. . . [O]ne could conceivably collect attendee data correlating to performance using a pen and paper, i.e., a user could write down a time when the attendee joins or leaves the meeting, etc. Examiner upholds the stance that the claims could be performed by a human using pen and paper.

Ans. 7–8.

claims are directed to patent-ineligible subject matter. Therefore, we sustain the Examiner's § 101 rejection of independent claim 1, and grouped independent claims 8 and 15, and grouped dependent claims 2, 3, 5–7, 9–11, 13, 14, 16, 17, 19, 20, 22, and 23, not argued separately, and which fall therewith. *See Claim Grouping, supra.*

### Claim 21

We also sustain the Examiner's § 101 rejection of separately argued dependent claim 21<sup>7</sup> because the specific type of data collected, i.e., the specific type of performance indicator collected, or detecting a percentage of time a virtual meeting room is "in focus . . . [on an] access device" do not transform the claim into a non-abstract idea. Merely combining several abstract ideas does not render the combination any less abstract.

*RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1327 (Fed. Cir. 2017) ("Adding one abstract idea (math) to another abstract idea . . . does not render the claim non-abstract."); *see also FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016) (determining the pending claims were directed to a combination of abstract ideas).

Therefore, we sustain the Examiner's § 101 rejection of claim 21.

## 2. § 102 Rejection R2 of Claims 1–3, 5–11, 13–17, 19, and 20

### Issue 2

Appellants argue (App. Br. 17–19; Reply Br. 9–12) the Examiner's rejection of claim 1 under 35 U.S.C. §§ 102(a) and 102(e) as anticipated

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<sup>7</sup> Claim 21 recites, "[t]he method of claim 1, wherein the automatically collecting the performance indicators includes detecting a percentage of time a meeting room of the virtual meeting is in focus on an attendee's access device."

over Wrench is in error. These contentions present us with the following issue:

Did the Examiner err in finding the cited prior art discloses a method of publishing information, comprising "*collecting one or more performance indicators from one or more meeting attendees includes automatically the one or more performance indicators without input from one or more meeting attendees,*" as recited in claim 1 (emphasis added)?

Analysis

Appellants contend:

Determining who was connected to a call or how long a call lasted does not inherently require that this information be collected from a meeting attendee. The Examiner is confusing collecting (or gathering) information about a meeting attendee with the claimed collecting information from a meeting attendee. Consequently, the Examiner still fails to establish that Wrench identically discloses the claimed invention within the meaning of 35 U.S.C. § 102.

App. Br. 18.

The Examiner finds

Appellant tries to distinguish between collecting information about an attendee and collecting information from an attendee, however given the broadest reasonable interpretation of the claim[, the] Examiner upholds the rejection in view of Wrench. The data collected in Wrench with respect to who was connected and when and how they entered and exited is coming *from* the attendee, without input from the attendee as it is based on their connection to the call.

Ans. 10.

Claim terms are to be given their broadest reasonable interpretation, as understood by those of ordinary skill in the art and taking into account

whatever enlightenment may be had from the Specification. *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

We are not persuaded by Appellants' arguments because claim 1 recites collecting information *from* attendees, while also including information *without input from the attendees*. Therefore, under a broad but reasonable interpretation, the disputed limitation, which includes the negative limitation "without input from one or more meeting attendees," reads on Wrench's collection of information. Ans. 10.

Accordingly, Appellants have not provided sufficient evidence or argument to persuade us of any reversible error in the Examiner's reading of the contested limitations on the cited prior art. Therefore, based upon a preponderance of the evidence, on this record, we are not persuaded of error in the Examiner's reliance on the cited prior art to anticipate the disputed limitations of claim 1, nor do we find error in the Examiner's resulting finding of anticipation. Therefore, we sustain the Examiner's anticipation rejection of independent claim 1, and grouped claims 2, 3, 5–11, 13–17, 19, and 20, which fall therewith. *See Claim Grouping, supra*.

#### REPLY BRIEF

To the extent Appellants *may* advance new arguments in the Reply Brief (Reply Br. 2–12) not in response to a shift in the Examiner's position in the Answer, we note arguments raised in a Reply Brief that were not raised in the Appeal Brief or are not responsive to arguments raised in the Examiner's Answer will not be considered except for good cause (*see* 37 C.F.R. § 41.41(b)(2)), which Appellants have not shown.

### NEW GROUND OF REJECTION

Pursuant to our authority under 37 C.F.R. § 41.50(b), we enter a new ground of rejection of claims 1–3, 5–11, 13–17, and 19–23 under 35 U.S.C. § 112(b), as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention.

We conclude the scope of claim 1 is indefinite because the claim first recites "collecting one or more performance indicators from one or more meeting attendees," but then recites "includes automatically the one or more performance indicators without input from one or more meeting attendees." We find these two conditions imposed on the collection of data are mutually exclusive, or at least are ambiguous on their face.<sup>8</sup> If a collection of data is being made from meeting attendees it necessarily includes input from the meeting attendees.

Each of independent claims 1, 8, and 15 is indefinite for the same reason noted above.

Consequently, we enter a new ground of rejection under 35 U.S.C. § 112(b) for indefiniteness for independent claims 1, 8, and 15, and claims 2, 3, 5–7, 9–11, 13, 14, 16, 17, and 19–23, which depend therefrom and inherit the same deficiencies as their respective base claim.

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<sup>8</sup> See *Ex parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008) ("precedential") ("[I]f a claim is amenable to two or more plausible claim constructions, the USPTO is justified in requiring the applicant to more precisely define the metes and bounds of the claimed invention by holding the claim unpatentable under 35 U.S.C. § 112, second paragraph [now § 112(b)], as indefinite.").

## CONCLUSIONS

(1) The Examiner did not err with respect to patent ineligible subject matter Rejection R1 of claims 1–3, 5–11, 13–17, and 19–23 under 35 U.S.C. § 101, and we sustain the rejection.

(2) The Examiner did not err with respect to anticipation Rejection R2 of claims 1–3, 5–11, 13–17, 19, and 20 under 35 U.S.C. §§ 102(a) and 102(e) over the cited prior art of record, and we sustain the rejection.

(3) We enter new ground of rejection under 35 U.S.C. § 112(b) for indefiniteness for independent claims 1, 8, and 15, and claims 2, 3, 5–7, 9–11, 13, 14, 16, 17, and 19–23, which depend therefrom, pursuant to our authority under 37 C.F.R. § 41.50(b).

## DECISION

We affirm the Examiner's decision rejecting claims 1–3, 5–11, 13–17, and 19–23.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). Section 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." Section 41.50(b) also provides:

When the Board enters such a non-final decision, the appellant, within two months from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution

will be remanded to the examiner. The new ground of rejection is binding upon the examiner unless an amendment or new Evidence not previously of Record is made which, in the opinion of the examiner, overcomes the new ground of rejection designated in the decision. Should the examiner reject the claims, appellant may again appeal to the Board pursuant to this subpart.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED  
37 C.F.R. § 41.50(b)