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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AMY STANAR, YVONNE TURNER,
ABIGAIL NORBIN, and AMY WOLFE[1]

Appeal 2017-003370
Application 14/045,768
Technology Center 3600

Before ALLEN R. MacDONALD, JOSEPH P. LENTIVECH, and AARON W. MOORE, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

DECISION ON APPEAL

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[1] This paper is captioned by inventor name according to PTAB convention. The Applicant, Appellant, and real party in interest is Apollo Group, Inc. (*See* App. Br. 3.)

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from a Final Rejection of claims 1, 3, 5–11, 13, and 15–20, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

THE INVENTION

The application is directed to "[a] system and method to prioritize leads for a pool of representatives." (Abstract.) Claim 1, reproduced below, exemplifies the subject matter on appeal:

> 1. A method comprising:
>
> maintaining a queue of a plurality of queue entries, each of which corresponds to a particular lead of a plurality of leads to be contacted about a particular subject;
>
> maintaining, for each queue entry of the plurality of leads, a lead score that reflects how much interest the particular lead has demonstrated in the particular subject;
>
> wherein the plurality of leads include a first lead and a second lead;
>
> wherein the queue includes a first queue entry for the first lead and a second queue entry for the second lead;
>
> wherein a first lead score is maintained for the first lead, and a second lead score is maintained for the second lead;
>
> receiving input indicating performance of a first activity by the first lead;
>
> in response to receiving input indicating performance of the first activity by the first lead, updating the first lead score by a first amount;
>
> wherein the first amount is based, at least in part, on how much interest performance of the first activity demonstrates in the particular subject;

in response to updating the first lead score by the first amount, changing the position of the first queue entry in the queue;

receiving input indicating performance of a second activity by the second lead;

in response to receiving input indicating performance of the second activity by the second lead, updating the second lead score by a second amount;

wherein the second amount is based, at least in part, on how much interest performance of the second activity demonstrates in the particular subject;

wherein the second amount is different than the first amount;

in response to updating the second lead score by the second amount, changing the position of the second queue entry in the queue;

receiving input indicating which stage, in a multi-stage process, each lead of the plurality of leads is currently at;

wherein the position of each queue entry of the plurality of queue entries, within the queue, is based, at least in part, on which stage of the multi-stage process, the corresponding lead is currently at;

wherein each stage in the multi-stage process is associated with a respective priority;

wherein maintaining the queue includes arranging the plurality of entries such that all entries, within the queue, that are associated with a stage that has a given priority:

precede, within the queue, all entries that are associated with stages that have lower priority than the given priority; and

follow, within the queue, all entries that are associated with stages that have higher priority than the given priority;

in response to a request, by a representative, for a lead to contact about the particular subject, performing the steps of:

determining a highest priority queue entry, from the queue, based on the positions of the plurality of queue entries within the queue;

determining a highest priority lead based on the highest priority queue entry; and

returning data that identifies the highest priority lead;

wherein the method is performed by one or more processors.

THE REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Woosley et al.	US 2008/0228544 A1	Sept. 18, 2008
Hood et al.	US 2009/0192918 A1	July 30, 2009
Perna	US 2012/0072264 A1	Mar. 22, 2012
Merwarth et al.	US 8,522,240 B1	Aug. 27, 2013

THE REJECTIONS

1. Claims 1, 3, 5–11, 13, and 15–20 stand rejected under 35 U.S.C. § 101 "because the claimed invention is directed to a judicial exception (i.e., a law of nature, a natural phenomenon, or an abstract idea) without significantly more." (*See* Final Act. 5–6.)

2. Claims 1, 3, 6–8, 10, 11, 13, 16–18, and 20 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Woosley and Hood. (*See* Final Act. 7–17.)

3. Claims 5 and 15 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Woosley, Hood, and Merwarth. (*See* Final Act. 17–19.)

4. Claims 9 and 19 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Woosley, Hood, and Perna. (*See* Final Act. 19–21.)

ANALYSIS

Section 101

By statue, a patentable invention must be a "new and useful process, machine, manufacture, or composition of matter, or [a] new and useful improvement thereof." 35 U.S.C. § 101. The Courts have identified implicit exceptions to patentability—laws of nature, natural phenomena, and abstract ideas, and the Supreme Court in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014), and *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), provided a framework for identifying ineligible claims. The "*Mayo/Alice*" evaluation has two steps: (1) determining if a claim is directed to an ineligible concept, and, if so, (2) determining if one or more claim elements is sufficient make the claim "significantly more" than the ineligible concept itself. *See Alice*, 573 U.S. at 217–18.

The Patent Office recently published new guidance for applying *Mayo/Alice*. *See USPTO's January 7, 2019 Memorandum, 2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50. The Guidance instructs us first to look at whether a claim recites a judicial exception, the broad categories of which are defined by the Guidance as mathematical concepts, certain methods of organizing human activity, and mental processes.[2] *See* 84 Fed. Reg. at 54 (Step 2A, Prong One).

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[2] "Mathematical concepts" includes "mathematical relationships, mathematical formulas or equations, [and] mathematical calculations"; "certain methods of organizing human activity" includes "fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships

If we find a judicial exception, we determine whether it is "integrated into a practical application" in the claim. *See* 84 Fed. Reg. at 54–55 (Step 2A, Prong Two); *see also* MPEP § 2106.05(a)–(c), (e)–(h) (non-exhaustively listing ways in which a practical application may be found). "Practical application" means that the claim includes "a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception." 84 Fed. Reg. at 54. For example, a practical application may exist in an improvement in the functioning of a computer or other technology, a particular machine or manufacture integral to the claim, or transformation or reduction of an article to a different state or thing. *See id.* at 55. However, merely using a computer to perform an abstract idea, adding insignificant extra-solution activity, or only generally linking to a particular technological environment or field are not sufficient for a practical application. *See id.*

If a claim recites a judicial exception not integrated into a practical application, it is directed to an abstract idea. In that case, we further look at whether the claim "adds a specific limitation beyond the judicial exception that is not "well-understood, routine, conventional." *See* 84 Fed. Reg. at 56 (Step 2B); *see also* MPEP § 2106.05(d). In the absence of such an addition, a claim that has reached this stage of the analysis is ineligible.

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or interactions between people (including social activities, teaching, and following rules or instructions)"; "mental processes" includes "concepts performed in the human mind [14] (including an observation, evaluation, judgment, opinion." 84 Fed. Reg. at 52.

Abstract Idea

Claim 1 recites a method that includes "maintaining a queue of a plurality of queue entries" and "maintaining, for each queue entry . . . a lead score that reflects how much interest the particular lead has demonstrated in the particular subject."[3] The claim further recites "receiving input indicating performance of a first activity by [a] first lead" and "in response to receiving input indicating performance . . . , updating the first lead score" by an amount "based, at least in part, on how much interest performance of the first activity demonstrates in [a] particular subject" and "in response to updating the first lead score . . . changing the position of the first queue entry in the queue." The same receiving and updating is then done for a second lead. The method further includes "receiving input indicating which stage, in a multi-stage process, each lead of the plurality of leads is currently at," where "the position of each queue entry . . . is based, at least in part," on the stage, and "wherein each . . . is associated with a respective priority." Maintaining the queue includes "arranging the plurality of entries" by the priorities associated with the stages. Finally, "in response to a request . . . for a lead to contact about the particular subject," the method "determinin[es] a highest priority queue entry . . . based on the positions of the plurality of queue entries," "determin[es] a highest priority lead based on the highest priority queue entry," and "return[s] data that identifies the highest priority lead."

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[3] Following the lead of the Examiner and Appellant, and except as otherwise identified below, we address subject matter eligibility in the context of claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner found the claims "directed to managing a lead queue responsive to updating lead attributes," which the Examiner found to be "a method involving comparing new and stored data and using rules to organize and transmit information, which are ideas of themselves," and that the claims thus were directed to an abstract idea. (Final Act. 5.) According to the Examiner, "[l]imitations directed to maintaining a queue with a plurality of entries and respective attributes (i.e., score, stage, priority), updating the lead attributes, . . . changing the position of leads in the queue, and retrieving particular leads in response to a request all describe the abstractions" and that "[v]iewed individually and in combination, the claims are all substantially directed to the same abstractions." (*Id.*) The Examiner further found that the claimed technique "can be performed entirely manually and at least substantially mentally, while the additional computing elements are recited only as performing routine functions of data transmission, processing, and storage." (*Id.* at 6.)

Consistent with the Examiner's findings, we conclude that the set of limitations we summarized above recite a technique for "managing a lead queue responsive to updating lead attributes." Because this is a method for collecting and sorting ("maintaining," "receiving," "changing the position") information ("leads" and their associated "activities," "scores," and "stages") that could practically be performed mentally, or at least with a pen and a set of index cards, the claim recites a mental process, which is an abstract idea. *See* 84 Fed. Reg. at 52; *cf. Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016) ("[W]ith the exception of generic computer-implemented steps, there is nothing in the claims themselves that foreclose them from being performed by a human,

mentally or with pen and paper."); *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d. 1314, 1324 (Fed. Cir. 2016) (holding that computer-implemented method for "anonymous loan shopping" was an abstract idea because it could be "performed by humans without a computer"); *Versata Dev. Grp. v. SAP Am., Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015) ("Courts have examined claims that required the use of a computer and still found that the underlying, patent-ineligible invention could be performed via pen and paper or in a person's mind.").

We also determine that the limitations summarized above describe a method for identifying a preferred lead (i.e., the best potential customer) from a list of leads (i.e., potential customers) by sorting the list using a particular type of information (the lead's score and process stage priority), and conclude that identifying and managing leads/customers is "marketing or sales activity" and a method for "the management of business relations," both of which fall into the "certain method of organizing human activity" category of abstract ideas. *See* 84 Fed. Reg. at 52; *cf. In re Ferguson*, 558 F.3d 1359, 1364 (Fed Cir. 2009) (holding methods "directed to organizing business or legal relationships in the structuring of a sales force (or marketing company)" to be ineligible).

Appellant argues that "'managing a lead queue responsive to updating attributes' does not reflect the inventor's improvement, which is at least the implementation of [a] priority system based on stages of a multi-stage process (independent Claims 1 and 11) and changing the position of the first queue entry in the queue based, at least in part, on the appointment time and a current time (independent Claims 8 and 18)." (App. Br. 13.) Appellant also argues "[t]he mere fact that a method 'involves comparing new and

stored data, and using rules to organize and transmit information,' says nothing about what the claim is actually about" and that the Examiner "fails to accurately characterize the idea that is the basis for the 101 analysis." (App. Br. 14.) Appellant further argues that "even if the . . . claims were directed to 'managing a lead queue responsive to updating attributes,' . . . 'managing a lead queue responsive to updating attributes' does not even qualify as an 'abstract idea.'" (App. Br. 14.)

Appellant's arguments are not persuasive. This first part of the analysis does not focus on "the inventor's improvement"; instead, we are concerned about the claim "as a whole." *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). There always are different levels of generality that could be used in describing the subject matter to which a claim is directed, ranging from just "a method" to a detailed formulation that includes virtually an entire claim. In this case, we find that the Examiner's summary appropriately captures the idea without being unduly detailed. We also observe that, although adding the multi-stage process or time concepts identified by Appellant would make for a narrower idea, that narrower idea still would be an abstract idea, i.e., managing a lead queue responsive to updating lead attributes based on process state or time.

Appellant additionally argues that "any similarities [the Examiner's abstract idea] may have to a judicially-invalidated claim" are "ancillary and/or superficial" and "no court, has ever stated that 'managing a lead queue responsive to updating attributes' is an abstract idea." (*Id.* at 15.) We again do not agree with Appellant's analysis. The question is not whether a court has addressed claims specific to "managing a lead queue," but, instead, whether courts have found claims involving similar mental processes,

marketing or sales activities, and methods for the management of business relations abstract. They have. *See, e.g.*, 84 Fed. Reg. at 52, n.13.

Because we agree with the Examiner that the claim recites an abstract idea, we proceed to Prong Two of Step 2A to determine if the idea is integrated into a practical application, in which case the claim as a whole would not be directed to merely an abstract idea.

Practical Application

As noted, the "practical application" inquiry looks at whether a claim includes "a meaningful limit on the judicial exception," to ensure that "the claim is more than a drafting effort designed to monopolize the judicial exception." 84 Fed. Reg. at 54. In this case, we have a technique for collecting, updating, and organizing information, where the claim concludes that "the method is performed by one or more processors." The claim thus recites a method that "merely uses a computer as a tool to perform an abstract idea," *id.* at 55, and, therefore, lacks integration into a practical application. We do not find "an improvement in the functioning of a computer or other technology," because the generic processor is used for its ordinary purpose. We do not find "a particular machine or manufacture integral to the claim," because a general purpose processor is not enough. And we do not find "transformation or reduction of an article to a different state or thing," because only intangible data is changed or manipulated.

Because we conclude that claim 1 lacks additional elements that would allow us to find a practical application, we agree with the Examiner that the claim is directed to an abstract idea and move to Step 2B.

Well-Understood, Routine, Conventional

"It is possible that a claim that does not 'integrate' a recited judicial exception is nonetheless patent eligible" as, "[f]or example the claim may recite additional elements that render the claim patent eligible even though a judicial exception is recited in a separate claim element." 84 Fed. Reg. at 56. We need not reconsider the issues addressed in Step 2A, but do weigh whether the claim "[a]dds a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field, which is indicative that an inventive concept may be present." *Id.* at 56.

Claim 1 is directed to an abstract idea of managing a queue of leads in a particular way, using a processor. The claim recites collection and manipulation of specific kinds of data in a specific way that may have been new in the field. Collecting, modifying, and sorting data in general were well known, however, such that any innovation in the claim is limited to using the particular kind of data and sorting it in the particular way, which are part of the abstract idea. We thus conclude that the claims do not include additional elements that evidence an inventive concept imparting patent eligibility. *Cf. Parker v. Flook*, 437 U.S. 584, 585–86 (1978) (holding claims ineligible because "[t]he only difference between the conventional methods . . . and that described in respondent's application rests in . . . the mathematical algorithm or formula").

Appellant argues that "every element, in every rejected claim, that goes beyond 'managing a lead queue responsive to updating attributes' is, by definition, an 'additional element.'" (App. Br. 16.) Appellant then uses bold font to indicate the "additional elements" in the claims. (*See id.* at 17–28.) This is not persuasive. It certainly is true that the lengthy claim

includes more words than "managing a lead queue responsive to updating attributes." The question, however, is not whether there are words beyond those used to characterize the abstract idea, but whether those words evidence something in the claim that pushes it beyond what was well-understood, routine, or conventional. As explained above, we find that they do not. Appellant also specifically focuses on the priority aspects of claim 1 and the time aspects of claim 8. (*Id.* at 28–30.) These concepts, we conclude, are part of the abstract idea and, therefore, do not impart eligibility.

Novelty, Non-Obviousness, and the "Flash of Genius"

Appellant asserts that "any situation in which a claim is held to satisfy the inventiveness standard of 103 and fail the inventiveness standard of 101 is clearly erroneous," and that "it would be a clear violation of both Congressional intent and post-1952 case law to hold that the second prong of the *Mayo* test establishes an inventiveness standard that is not satisfied by an invention that satisfies the inventiveness standard of 35 USC 103." (*Id.* at 31.) Appellant concludes that "[a] Flash of Genius test by any other name is still a Flash of Genius test." *Id.* at 32.

These are not winning arguments. A novel and nonobvious claim directed to an abstract idea is, nonetheless, patent-ineligible. *See Mayo*, 566 U.S. at 90 ("We recognize that, in evaluating the significance of additional steps, the § 101 patent-eligibility inquiry and, say, the § 102 novelty inquiry might sometimes overlap. But that need not always be so. And to shift the patent-eligibility inquiry entirely to these later sections risks creating significantly greater legal uncertainty, while assuming that those sections can do work that they are not equipped to do."); *see also Ass'n for*

Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 591 (2013) ("Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry"). The Section 101 analysis is *not* the flash of genius test under a new name.

Dependent Claims

Appellant argues that "the Office Action appears to assert that all of [the limitations of the dependent claims] are part and parcel with 'managing a lead queue responsive to updating attributes,'" an "assertion . . . made without regard to what the dependent claims actually say," and one that "in many instances . . . is not only wrong, but bizarre." (App. Br. 32.) "For example," according to Appellant, "it is bizarre to assert that 'wherein the first teaching approach and the at least one second teaching approach correspond to different wordings of material used to convey knowledge relating to the specific target-area' (Claim 7) is nothing more than "managing a lead queue responsive to updating attributes." *Id.*

We agree with the Examiner that the limitations of the dependent claims "do not provide additional elements beyond the abstraction itself, but rather recite additional steps of the abstract process that have no explicit ties to technology or any particular technical field" and that "[r]egardless of the specificity of the information gathered and analyzed . . . the limitations of the . . . dependent claims fail to modify the abstract nature of the process." (Ans. 9.)

Appellant's argument regarding claim 7 is not persuasive because we do not find "the first teaching approach" and "the at least one second teaching approach" in the claim. Claim 7 is about providing the first lead to a first representative, removing it from the queue, and providing the second

lead to a second representative. And Appellant does not argue any other dependent claims with particularity.[4]

Eligibility Conclusion

The claims recite an abstract idea, have not been shown to be integrated into a practical application, and do not include additional recitations that make them significantly more than the underlying abstract idea. The Examiner's rejection of claims 1, 3, 5–11, 13, and 15–20 under 35 U.S.C. § 101 is, therefore, sustained.

Section 103

Claims 1, 3, 5–7, 11, 13, and 15–17

Appellant argues that Hood does not teach or suggest "that [stages[5]], current or past, are associated with a priority of any kind" or "that the rank of any lead is based on the current or past [stage] of the lead." (App. Br. 34.) "Therefore," according to Appellant, "Hood certainly cannot teach or suggest 'wherein each stage in the multi-stage process is associated with a respective priority,' or 'wherein maintaining the queue includes arranging the plurality of entries such that all entries, within the queue, that are associated with a stage that has a given priority: precede, within the queue,

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[4] *See* 37 C.F.R. § 41.37(c)(iv) (explaining that, except in the case of inapplicable exceptions, "any arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal"); *Ex parte Belinne*, No. 2009-004693, 2009 WL 2477843, at *4 (BPAI 2009) (informative) (affirming the rejection where "Appellants [did] not present any arguments to explain why the Examiner's explicit fact finding is in error").

[5] The brief uses the term "states." We assume this is referring to the "stages" of the claim.

all entries that are associated with stages that have lower priority than the given priority; and follow, within the queue, all entries that are associated with stages that have higher priority than the given priority,' as expressly recited in Claim 1." *Id.*

The Examiner responds that "Hood explicitly teaches that leads are associated with a current or past state and teaches that a list of leads is dynamically reprioritized based on the respective state of the leads." (Ans. 10, citing Hood ¶¶ 44, 83–85.) The Examiner "additionally notes that limitations directed to 'arranging the plurality of entries such that all entries . . . precede, within the queue, all entries that are associated with stages that have lower priority . . . and follow, within the queue, all entries that are associated with stages that have higher priority' describe the inherent nature of a ranked listing." *Id.*

We agree with Appellant. Hood explains that "[a] lead history represents the context of a lead 175 as it flows through service 100 or from consumer HOA to consumer HOB" and that "[a] lead history can include one or more pieces of information describing various states of the lead." (Hood ¶ 44.) The "[l]ead history information can include . . . current state or past states that a lead has pass through while being worked." (*Id.*) Paragraphs 83–85 of Hood describe "presenting leads," including in "a ranked listing," and that "the rendering of the leads can be updated as leads are worked." *Id.* ¶ 85. Although the Examiner's finding that Hood describes both states and ranking leads is correct, Hood lacks a teaching or suggestion that the ranking is based on the states. We therefore do not sustain the Section 103 rejection of claims 1, 3, 5–7, 11, 13, and 15–17.

Claims 8 and 18

The Examiner found that Hood teaches "changing the position of the first queue entry in the queue based, at least in part, on the appointment time and a current time" in paragraph 55. (Final Act. 16.)

Appellant argues that "Hood fails to disclose . . . 'receiving input indicating an appointment time for the first lead; and changing the position of the first queue entry in the queue based, at least in part, on the appointment time and a current time.'" (App. Br. 35.)

The Examiner responds that "Hood discloses means for mining lead information and returning a ranked listing of leads based on user-specified attributes, and further teaches that the lead attributes as well as lead retrieval policies can include time-based conditions." (Ans. 11, citing Hood ¶ 55, 83–85.) The Examiner states that "[i]t would have been obvious . . . to include in the lead management system of Woosley the ability to rank the leads based on a temporal condition as taught by Hood since the claimed invention is merely a combination of old elements, and in the combination each element would have performed the same function as it did separately, and one of ordinary skill would have recognized that the results of the combination were predictable." (Ans. 11.) According to the Examiner, "[o]ne of ordinary skill would have recognized that using the input appointment time of Woosley to change the position of leads based on a relative or absolute time condition as taught by Hood would have resulted in an improved system that allows for dynamic modification of leads as they are worked as well as identification of lead attributes that have the greatest value." (*Id.*)

We find the Examiner has not established that claims 8 and 18 would have been obvious. Hood describes how "lead consumers" may define "lead polices," which "preferably include one or more rules defining desirable characteristics of leads in [the] database." Hood ¶ 53. "The rules, and as a result polices 260, operate as a function of lead attributes." *Id.* ¶ 54. Hood explains that the policies may "include time based condition[s] with respect to lead attributes," and that, for example," the lead consumer "could define [a policy] to include a rule that requires all leads having zip code attributes in a certain range between the dates of January 2008 and November 2009." Hood ¶ 55. Hood thus describes what amounts to a filter that ensures all leads meet the temporal criteria. But because *all* leads in the set meet the desired characteristics, there would not be a reason to change the position based on that temporal criteria. We accordingly conclude that Hood does not teach or suggest changing the position of queue entries based on time and, therefore, do not sustain the Section 103 rejection of claims 8 and 18.

DECISION

The rejections of claims 1, 3, 5–11, 13, and 15–20 under 35 U.S.C. § 101 are affirmed.

The rejections of claims 1, 3, 5–11, 13, and 15–20 under 35 U.S.C. § 103 are 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[6]

[6] Because we sustain at least one ground of rejection with respect to each claim on appeal, the Examiner's decision rejecting claims 1, 3, 5–11, 13, and 15–20 is affirmed. *See* 37 C.F.R. § 41.50(a)(1).