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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JAMES S. LEITCH, DAN SMITH, and
PETER RITCH¹

Appeal 2017-004420
Application 13/643,886
Technology Center 3600

Before BRADLEY W. BAUMEISTER, KARA L. SZPONDOWSKI, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

BAUMEISTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–6 and 9–22. App. Br. 10–30.² We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ Appellants list Fluor Technologies Corporation as the real party in interest. Appeal Brief filed July 25, 2016 (“App. Br.”) 4.

² Rather than repeat the Examiner's positions and Appellants' arguments in their entirety, we refer to the above-mentioned Appeal Brief, as well as the following documents, for their respective details: the Final Action mailed February 25, 2016 (“Final Act.”); the Examiner's Answer mailed November 17, 2016 (“Ans.”); and the Reply Brief filed January 17, 2017 (“Reply Br.”).

STATEMENT OF THE CASE

Appellants describe the present invention as follows:

Risk management systems and methods for plant [engineering, procurement, construction, commissioning, operations, and maintenance (EPCCOM)] are described. The system comprises a risk management database for storing risk objects, each object representing a real-world risk mitigation factor. A risk recommendation engine is communicatively coupled to the risk management database and is configured to provide recommendations for mitigating and managing risks as a function of efficacy attributes of the risk objects. The efficacy attributes represent the effectiveness of previously implemented and/or simulated risk mitigation strategies. The efficacy attributes are preferably multivariable dependent and are defined by prioritizing and weighing different objectives.

Abstract.

Independent claims 1 and 17, reproduced below with added emphasis, illustrates the claimed invention:

1. A plant engineering, procurement, construction, commissioning, operations, and maintenance (EPCCOM) risk mitigation system, the system comprising:

a risk management database comprising a non-transitory storage medium having stored therein: (i) a plurality of risk objects each having a plurality of risk object attributes, wherein each risk object comprises a digital representation of a real world risk mitigation factor, and (ii) a plurality of EPCCOM activity objects each having a plurality of EPCCOM activity object attributes, wherein each EPCCOM activity object comprises a digital representation of a real-world EPCCOM activity;

wherein the plurality of risk object attributes includes a plurality of multi-variable dependent efficacy attributes that represent prior effectiveness of the associated risk object in achieving an objective;

a risk recommendation engine comprising distributed processors and executable software code communicatively

coupled with the database, wherein the executable software code when executed on the distributed processors causes the distributed processors to perform the following steps:

perform a first mapping of the plurality of risk object attributes to the plurality of EPCCOM activity object attributes;

generate a plurality of risk mitigation recommendations using the first mapping;

perform a second mapping of the plurality of multi-variable dependent efficacy attributes to the plurality of risk mitigation recommendations;

generate a second plurality of risk mitigation recommendations as a function of at least one variable from the plurality of multi-variable dependent efficacy attributes, wherein the second plurality of risk mitigation recommendations are not validated;

a risk engine interface coupled with the risk recommendation engine through which the second plurality of risk mitigation recommendations is communicated to a user; and

an input device communicatively coupled to the risk recommendation engine and *used by the user to validate the second plurality of risk mitigation recommendations.*

17. A plant engineering, procurement, construction, commissioning, operations, and maintenance (EPCCOM) risk mitigation system, the system comprising:

a risk management database comprising a non-transitory storage medium having stored therein: (i) a plurality of risk objects each having a plurality of risk object attributes, wherein each risk object comprises a digital representation of a real world risk mitigation factor, and (ii) a plurality of EPCCOM activity objects each having a plurality of EPCCOM activity object attributes, wherein each EPCCOM activity object comprises a digital representation of a real-world EPCCOM activity;

wherein the plurality of risk object attributes includes a plurality of multi-variable dependent efficacy attributes that

represent prior effectiveness of the associated risk object in achieving an objective;

a risk recommendation engine comprising distributed processors and executable software code communicatively coupled with the database, wherein the executable software code when executed on the distributed processors causes the distributed processors to perform the following steps:

perform a first mapping of the plurality of risk object attributes to the plurality of EPCCOM activity object attributes;

generate a plurality of risk mitigation recommendations using the first mapping;

perform a second mapping of the plurality of multi-variable dependent efficacy attributes to the plurality of risk mitigation recommendations;

generate a second plurality of risk mitigation recommendations as a function of at least one variable from the plurality of multi-variable dependent efficacy attributes, wherein the second plurality of risk mitigation recommendations are not validated;

a risk engine interface coupled with the risk recommendation engine through which the second plurality of risk mitigation recommendations is communicated to a user;

wherein the second plurality of risk mitigation recommendations are implemented in one or more units during construction of the plant.

Claims 1–6 and 9–22 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 14–15.

Claims 1–6, 9–16, and 21 stand rejected under 35 U.S.C. § 112(a) as failing to comply with the written description requirement. Final Act. 15–16.

Claims 17–22 stand rejected under 35 U.S.C. § 112(b) as being indefinite. Final Act. 16–17.

We review the appealed rejections for error based upon the issues identified by Appellants, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

THE 101 REJECTION

Examiner's Determinations

The Examiner determines that claims 1–6 and 9–22 are directed to a patent-ineligible abstract idea. Final Act. 14–15. More specifically, the Examiner determines that the claims are directed to a fundamental economic practice—a series of steps instructing how to generate risk mitigation recommendations. *Id.* at 14. The Examiner additionally determines that “[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception because considered separately and in combination, the generically recited computer elements do not add meaningful limitations to the abstract idea because they would be routine in any computer implementation.” *Id.*

Appellants present multiple arguments (App. Br. 10–26; Reply Br. 3–11), which we address individually below.

Principles of Law

A patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” The Supreme Court has “long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad*

Genetics, Inc., 569 U.S. 576, 589 (2013)). Accordingly, in applying the § 101 exception, the Supreme Court cautioned:

[W]e must distinguish between patents that claim the “buildin[g] block[s]” of human ingenuity and those that integrate the building blocks into something more, thereby “transform[ing]” them into a patent-eligible invention. The former “would risk disproportionately tying up the use of the underlying” ideas, and are therefore ineligible for patent protection. The latter pose no comparable risk of pre-emption, and therefore remain eligible for the monopoly granted under our patent laws.

Alice, 134 S. Ct. at 2354–55 (all brackets in original except first set) (internal citations omitted).

In *Alice*, the Supreme Court has set forth an analytical “framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Id.* at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71–73 (2012)). In the first step of the analysis, we determine whether the claim at issue is “directed to” a judicial exception, such as an abstract idea. *Id.* at 2355. If not, the inquiry ends. *Thales Visionix Inc. v. U.S.*, 850 F.3d 1343, 1346 (Fed. Cir. 2017); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016). If the claim is determined to be directed to an abstract idea, then we consider under step two whether the claim contains an “inventive concept” sufficient to “transform the nature of the claim into a patent-eligible application.” *Alice*, 134 S. Ct. at 2355 (quotations and citation omitted).

In considering whether a claim is directed to an abstract idea under step one, we acknowledge, as did the Supreme Court, that “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. We therefore look to whether the claim focuses on a specific means or method that improves the relevant technology or is instead directed to a result or effect that, itself, is the abstract idea and merely invokes generic processes and machinery. *See Enfish*, 822 F.3d at 1336.

In the second step of the *Alice* analysis, if applicable, we must consider whether the claim contains an element or a combination of elements that is sufficient to transform the nature of the claim into a patent-eligible application. *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 714 (Fed. Cir. 2014); *Alice*, 134 S. Ct. at 2355.

In applying step two of the *Alice* analysis, we must “determine whether the claim[] do[es] significantly more than simply describe [the] abstract method” and thus transform the abstract idea into patentable subject matter. We look to see whether there are any “additional features” in the claim[] that constitute an “inventive concept,” thereby rendering the claim[] eligible for patenting even if [it is] directed to an abstract idea. Those “additional features” must be more than “well-understood, routine, conventional activity.”

Intellectual Ventures I LLC v. Erie Indem. Co., 850 F.3d 1315, 1328 (Fed. Cir. 2017) (citations omitted). A claim that “merely require[s] generic computer implementation[] fail[s] to transform [an] abstract idea into a patent-eligible invention.” *Alice*, 134 S. Ct. at 2357.

Central to our analysis herein is the fundamental principle that the *Alice* framework must be applied to the claims, as properly construed. As our reviewing court has stated, “The § 101 inquiry must focus on the language of the Asserted Claims themselves.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1149 (Fed. Cir. 2016); *see also Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345

(Fed. Cir. 2013) (admonishing that “the important inquiry for a § 101 analysis is to look to the claim”); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1346 (Fed. Cir. 2014) (focusing on “whether the *claims* of the asserted patents fall within the excluded category of abstract ideas”) (emphasis added)).

These principles are based on long-established jurisprudence that “[i]t is the claims [that] define the metes and bounds of the invention entitled to the protection of the patent system.” *In re Warmerdam*, 33 F.3d 1354, 1360 (Fed. Cir. 1994) (citing *Zenith Lab. Inc. v. Bristol–Myers Squibb Co.*, 19 F.3d 1418, 1424 (Fed. Cir. 1994)).

Arguments and Analysis

Appellants assert that in concluding “the generically recited computer elements do not add meaningful limitations to the abstract idea because they would be routine in any computer implementation,” the Examiner erred because the conclusion is not in accordance with the USPTO’s supplemental guidelines. App. Br. 13–14 (citing Final Action 14). Appellants support this assertion with three underlying arguments. *Id.* at 14–15.

Appellants’ first argument is that “the Examiner provides no guidance as to which ‘particular’ claim limitations are routine as required by the supplemental guidelines. The Examiner simply lumps all claim elements together as routine without identifying the ‘particular’ claim limitations [that] are routine.” *Id.* at 14. This argument is unpersuasive. It is reasonably clear the Examiner’s position is that the claimed database, risk recommendation engine, risk engine interface, and input device are the claim elements that the Examiner determines to be well-understood, routine, and conventional computer components.

Appellants next argue that the Examiner fails to explain “which courts have recognized any of Appellants’ claim elements are routine.” App.

Br. 14. Appellants continue,

For example, both Appellants’ claims 1 and 17 recite the risk mitigation engine:

- 1) performs a first mapping of the plurality of risk object attributes to the plurality of EPCCOM activity object attributes;
- 2) generates a plurality of risk mitigation recommendations using the first mapping;
- 3) performs a second mapping of the plurality of multi-variable dependent efficacy attributes to the plurality of risk mitigation recommendations; and
- 4) generates a second plurality of risk mitigation recommendations as a function of at least one variable from the plurality of multi-variable dependent efficacy attributes.

The Examiner has not identified which courts have found performing first mappings and second mappings and generating first and second pluralities of risk mitigation recommendations as well-understood, routine, and conventional.

Id.

This argument is unpersuasive because it improperly conflates the first and second steps of the *Alice* analysis. The question under step two of the *Alice* analysis is not whether the courts have found the steps of mapping, generating, and communicating recommendations to be well understood, routine, and conventional. Those aspects of the steps are directed to the underlying abstract idea. The relevant question for step two is whether the computer components that perform these abstract ideas were well-known, routine and conventional.

Appellants thirdly argue

the Examiner has only alleged that the claimed elements are routine; whereas, the guidelines require a finding that a claim element is well-understood, routine *and* conventional. That is, in addition to finding a claim element is routine, the Examiner must find the claim element is also well-understood and conventional. Not only has the Examiner . . . not presented any evidence or support that Appellants' claims are routine, the Examiner has not set forth any evidence or support that the claim elements are also well-understood and conventional.

Id. at 14–15.

This argument is unpersuasive because we understand the Examiner to be using the term “routine” as shorthand for the full phrase, “well-understood, routine, and conventional.” Furthermore, Appellants cite to no legal authority for the proposition that determining a claim element to be “well-understood, routine, and conventional” requires the Examiner to make three separate showings. To the contrary, the Federal Circuit has explained that whether a claim element is well-understood, routine, and conventional is a single inquiry. *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018) (“The question of whether a claim element or combination of elements is well-understood, routine, and conventional to a skilled artisan in the relevant field is a question of fact.” (emphasis added)). Nor do Appellants proffer any objective definitions or distinctions that supposedly exist among these three terms.

In Section IV.A.3.b) of their Appeal Brief, Appellants argue two reasons why claims 1–6 and 9–16 are patent eligible. App. Br. 15–18. First, Appellants argue that “[c]laim 1’s distributed processors amount to an improvement to the functioning of the claimed system.” *Id.* at 15 (emphasis omitted). Appellants allege that “those skilled in the art would recognize

that reciting distributed processors for operation of the risk recommendation engine in claim 1 amounts to an improvement of the claimed system over a risk recommendation engine [that] operates with a processor (previously claimed).” *Id.* at 16. Appellants argue that “[t]he Examiner provides no evidence that distributed processors do not improve the functioning of a computer.” *Id.*

This argument is unpersuasive. The Examiner cites to paragraph 26 of Appellants’ Specification, *inter alia*, to support the conclusion that using distributed processors, as well as single processors, was well-known, routine, and conventional, and that such use would not constitute a technical improvement within the meaning of *Alice*’s step-two inquiry. Final Act. 6 (“there is no teaching above of an improved distributed database or engines, only contemplation. Therefore Applicant is not inventing or improving distributed computing. Applicant is using existing computing technology.”). The Examiner, therefore, finds Appellants’ claim is limited to performing an abstract idea on distributed processors that are well-understood, routine, and conventional means for processing data.

Paragraph 26 of Appellants’ Specification reads as follows:

[0026] Risk recommendation engine 115 can comprise a central processing unit (CPU) and executable software code, or any other device and/or combination of devices suitable for analyzing and processing digital data on a database. While engine 115 is shown as a single unit in Figure 1, distributed engines are also contemplated.

The Specification’s cursory reference to distributed engines reasonably indicates that at the time of the invention, single processors and distributed processors were art-recognized functionally equivalent well-understood, routine, and conventional means for processing data.

Appellants fail to identify any limitation, other than the distributed processors, that is not merely part of the abstract idea identified by the Examiner. *See generally* App. Br.; Reply Br.

Appellants also argue that that claims 1–6 and 9–16 are patent eligible because “[c]laim 1 recites a transformation of the second plurality of recommendations from a non-validated state to a validated state.” App. Br. 17. Appellants further argue the Board precedent supports Appellants’ position that transformation of data cannot render a claim patent eligible. *Id.* (citing *PNC Bank v. Secure Access*, CBM2014-00100 at 24 (PTAB Sept. 9, 2014)).

Appellants’ arguments are unpersuasive. As a threshold matter, the reasoning set forth in the *PNC Bank* opinion, being non-precedential and unrelated to the present appeal, is not binding on the present Panel. But even more significantly, the facts of *PNC Bank* are not similar to those of the present case.

PNC Bank dealt with using an authenticity key on an authentication host computer to transform “received data” into “formatted data.” *Id.* at 5. In contrast, claim 1 sets forth that the input device is used merely to validate the second plurality of risk mitigation recommendations. Changing the state of the recommendation from not-yet-validated to validated does *not* entail transforming the recommendation, itself, from one form to another form. The claimed validation entails transforming *the characterization* of the recommendation—transforming an intangible property of the recommendation.

In Section IV.A.3.c) of their Appeal Brief, Appellants argue three reasons for why claims 17–22 are patent eligible. App. Br. 18–26.

Appellants first argue that “[c]laim 17 is modeled after a claim found patent eligible in *Diamond v. Diehr*[, 450 U.S. 175 (1981)] and after claims endorsed by the USPTO as patent eligible.” *Id.* at 18 (emphasis omitted).

According to Appellants,

[c]laim 17 improves plant EPCCOM via implementation of the second plurality of risk mitigation recommendations in one or more units during construction of the plant; similar to how the claims in *Diamond v. Diehr* and endorsed by the USPTO improved precision rubber molding by implementing an algorithm during operation of a rubber-molding press. *See July 2015 Update Appendix J: Examples* at pages 14–19 (USPTO July 30, 2015).

App. Br. 18. This argument is unpersuasive.

The present claims are not, in fact, analogous to those of *Diehr*. *Diehr* recited a method of operating a rubber-mold press with the aid of a digital computer that entailed (1) monitoring curing parameters of the press, such as temperature and time, and (2) opening the press automatically upon the occurrence of a designated condition. *See App. Br. 19* (reproducing claim 1 of *Diehr*). Claim 2 of *Diehr* similarly recites a computer readable medium programmed with computer executable instructions for performing the method of claim 1. *See App. Br. 19* (reproducing claim 2 of *Diehr*).

Appellants’ independent claim 17, in contrast, does not recite a method of constructing a plant. Claim 17, instead, recites a system comprising (1) a database, (2) a risk recommendation engine, and (3) a risk engine interface for communicating risk mitigation recommendations to a user. Restated, claim 17 is directed to a system that recommends *a plan for* constructing one or more units of a plant.

For example, the final limitation of claim 17 recites “wherein the second plurality of risk mitigation recommendations are implemented in one

or more units during construction of the plant.” This final recitation is not directed to one of the claimed system’s structural components. The final limitation recites an intended later use of the generated risk recommendations that the risk engine interface communicates to the user.

Appellants next contend that “plant EPCCOM and plant construction are technical fields and should not be analogized with fields like the financial services industry where claims have been previously held patent ineligible.” App. Br. 22; *see generally id.* at 22–24. Appellants further argue that the totality of features in claim 17 improves another technology or technical field, namely, plant EPCCOM.” *Id.* at 24; *see generally id.* at 24–26.

These arguments are unpersuasive because, as we explained, claim 17 does not recite a method of constructing a plant. The claim recites *a system for generating a plan for how to reduce risk* when constructing a plant. Therefore, we agree with the Examiner that the invention is directed toward a business or economic practice. *See* Final Act. 11–13. We also agree with the Examiner that the claimed distributed processors are insufficient to amount to significantly more than the judicial exception. Final Act. 6, 14.

For the foregoing reasons, we sustain the rejection of independent claims 1 and 17 under 35 U.S.C. § 101 for being directed to patent-ineligible subject matter. We likewise sustain the rejection of claims 2–6, 9–16, and 18–22, which Appellants do not argue separately. *See* App. Br. 18, 25, 26.

THE 112(a) REJECTION

Findings and Contentions

The Examiner finds that Appellants' originally filed Specification provides insufficient written description for claim 1's recitation of "distributed processors," as recited in claims 1–6, 9–16, and 21. Final Act. 15–16. According to the Examiner, Appellants' Specification only provides support for distributed database configurations and distributed engines. *Id.* at 16 (citing Spec. ¶¶ 24, 26); Ans. 33. The Examiner clarifies the reasoning further in the Examiner's Answer:

The specification . . . teaches "distributed engines." It is further pointed out that claim 1 has "executable software code when executed on the distributed processors causes the distributed processors to perform the following steps: . . . [,]" which requires software code (singular) on distributed processors (plural) where[as] the specification [sets forth that] "recommendation engine 115 can comprise a central processing unit (CPU) and executable software code . . . [,]" therefore requiring code for at least each processor. Engines therefore comprise at least both code and a processor and is why the claim should be "distributed engines" as taught.

Ans. 34–35.

Appellants note that the Specification's description, as filed, is presumed to be adequate (App. Br. 28) and that the Examiner has the initial burden to establish a reasonable basis to challenge the adequacy of the written description (*id.* at 27). Appellants argue that the Examiner's only basis for maintaining the rejection is the Specification's lack of express disclosure of the term "distributed processors." *Id.* Appellants point out that a Specification need not recite claim language *in haec verba*. *Id.* (citing MPEP 163.02). "Appellants contend 'executable software code' as recited in claim 1 is adequate as encompassing software code coupled with each of

the distributed processes, consistent with the description in paragraphs [0024] and [0026].” Reply Br. 12. Appellants assert that the Examiner therefore has failed to establish the Specification lacks written-description support for “distributed processors.” App. Br. 27.

Analysis

Paragraph 26 of Appellants’ Specification reads as follows with added emphasis:

[0026] Risk recommendation engine 115 can *comprise a central processing unit (CPU) and executable software code, or any other device and/or combination of devices suitable for analyzing and processing digital data on a database. While engine 115 is shown as a single unit in Figure 1, distributed engines are also contemplated.*

This passage indicates that the risk recommendation engine 115 can be comprised of a CPU and software or a combination of other devices. Spec. ¶ 26. The passage expressly states that the engine may be a distributed engine. *Id.* One reasonably may infer that substituting distributed engine for a single engine requires plural processors, each with its own set of software. It would be unclear how else the engine could be distributed. It is unclear to us, then, what additional subject matter claim 1 allegedly encompasses by virtue of reciting distributed processors as opposed to reciting distributed engines. The Examiner does not provide a reasonable

explanation of how an engine comprising distributed processors is broader in scope than a distributed engine.

Accordingly, we do not sustain the rejection of claims 1–6, 9–16, and 21 under 35 U.S.C. § 112(a) for lacking adequate written description.

THE 112(b) REJECTION

Claim 17

Like independent claim 1, independent claim 17 also is directed to an EPCCOM risk mitigation system implemented in a plant during plant EPCCOM. App. Br. 35. Claim 17 also is similar in scope to that of claim 1, the relevant difference being that instead of the final limitation setting forth an input device (*see* claim 1), claim 17 recites “wherein the second plurality of risk mitigation recommendations are implemented in *one or more units* during construction of the plant.” *Id.* at 36 (emphasis added).

Findings and Contentions

The Examiner rejects claims 17–22 as being indefinite for failing to particularly point out and distinctly claim the subject matter that the inventor regards as the invention. Final Act. 16–17. The Examiner’s basis for this rejection is as follows:

Claim 17 has “recommendations are implemented in one or more units during construction of the plant” where implemented in units is indefinite. There is no basis or teaching in the disclosure of implementing recommendations in units[.] [T]herefore[,] units could be something that does not make sense[,] such as inside a unit of a building.

Final Act. 16.

The Examiner further explains, “Appellant above is arguing that one or more units is the portion of the plant being constructed. The term

‘portion’ however is itself a relative term that would render the claim indefinite.” Ans. 37. The Examiner then summarizes, “The Examiner respectfully maintains recommendations in one or more units is indefinite and Appellant’s use of ‘portion[,]’ as argued[,] is also indefinite as a relative term.” *Id.* at 38.

Appellants argue, *inter alia*, “those skilled in the art are informed with reasonable certainty that ‘one or more units’ is the portion of the plant being constructed and in which the second plurality of recommendations are implemented.” App. Br. 30. Appellants further argue that because the meaning of the claim terms is reasonably clear, claims 17–22 are not indefinite. *Id.*

Analysis

To the best that the Examiner’s reasoning can be followed, we understand the Examiner’s position to be that the claims are indefinite because they recite using the invention in constructing at least a portion of the entire plant. We do not understand why this would prevent one of ordinary skill from being on notice as to the metes and bounds of claim protection being sought.

Likewise the fact that the claim recites applying the invention in constructing at least a portion (or “unit”) of the overall plant is a matter of breadth—not ambiguity. The claim reasonably indicates that the invention can be used for constructing either only some portion of the plant or for constructing the entire plant. The breadth of a claim is not to be equated with indefiniteness. *In re Miller*, 441 F.2d 689, 693 (CCPA 1971).

Because the Examiner has not established why one of ordinary skill would fail to be reasonably apprised of the metes and bounds of claim

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protection being sought, we do not sustain the rejection claims 17–22 under 35 U.S.C. § 112(b).

CONCLUSIONS

The Examiner’s decision rejection claims 1–6 and 9–22 under 35 U.S.C. § 101 is sustained.

The Examiner’s decision rejection claims 1–6, 9–16, and 21 under 35 U.S.C. § 112(a) is not sustained.

The Examiner’s decision rejection claims 17–22 under 35 U.S.C. § 112(b) is not sustained.

DECISION

The Examiner’s decision rejecting claims 1–6 and 9–22 is affirmed.

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED