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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEFFREY DAVID FOWLER, HANS WALTER HAESSLIN, MANFRED VOGT, and MICHELLE WEBER

Appeal 2018-003968
Application 10/578,735
Technology Center 1600

Before ULRIKE W. JENKS, JOHN E. SCHNEIDER, and RYAN H. FLAX, *Administrative Patent Judges*.

JENKS, *Administrative Patent Judge.*

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from Examiner's decision to reject claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

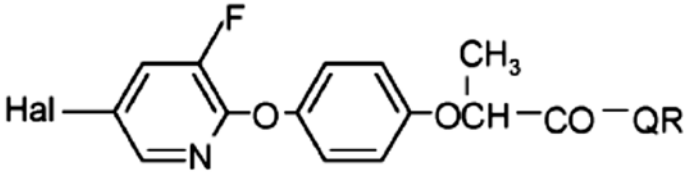
We AFFIRM.

[1] We use the word Appellant to refer to "applicant" as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Syngenta Crop Protection, LLC. Appeal Br. 3.

STATEMENT OF THE CASE

Claims 1–3, 5, 6, 10–12, and 14–25 are on appeal, and can be found in the Claims Appendix of the Appeal Brief. Claim 1, reproduced below, is illustrative of the claimed subject matter:

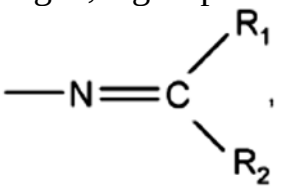
> 1. An emulsifiable concentrate comprising:
>
> a) a herbicidally effective amount of at least one herbicide;
>
> b) an amount, which is effective for antagonism of a herbicide, of at least one safener, wherein the at least one safener includes a quinoline derivative;
>
> c) 30 to 35 % by weight of at least one oil adjuvant, wherein said oil adjuvant comprises an alkyl ester of a vegetable oil selected from the group consisting of a methyl ester of a plant oil chosen from canola oil, olive oil, and sunflower oil;
>
> d) 5 to 70 % by weight of at least one water-immiscible solvent sufficient to keep the herbicide a) and safener in solution in the presence of the adjuvant; and
>
> e) an emulsifying surfactant system in an amount sufficient to form an oil-in-water emulsion when the formulation is added to water;
>
> with the proviso that (i) a) comprises a herbicidally effective amount of at least one compound of formula I



(I)

> wherein Hal is halogen,
> Q is oxygen or sulfur, and
> R is hydrogen, an alkali metal ion, or a quaternary C_1-C_4 - alkylammonium group, a C_1-C_6 - alkyl group which is straight-chain or branched-chain, and which is unsubstituted or substituted by halogen, cyano, C_1-C_4 -alkoxy, C_1-C_4 - alkylcarbonyl, C_1-C_4 -alkoxycarbonyl, carbamoyl or di-C_1-C_4-alkylcarbamoyl, a C_3 -C_6 -cycloalkyl group, a C_3 -C_6 -alkenyl group, which is straight-chain or branched-chain, and is unsubstituted or substituted by halogen, a C_3-C_6 -alkynyl group,

which is straight-chain or branched-chain, and is unsubstituted or substituted by halogen, a group



wherein R1 and R2 separately are each a C_1-C_4-alkyl group, or together form a 4- or 5-membered methylene chain, which can be substituted by C_1-C_4-alkyl; (ii) b) comprises an amount, which is effective for antagonism of a herbicide, of at least one quinoline derivative safener selected from the group consisting of cloquintocet; an alkali metal, alkaline earth metal, sulfonium or ammonium cation of cloquintocet; and cloquintocet-mexyl; or (iii) both (i) and (ii);

wherein a pesticidal composition formed by diluting the emulsifiable concentrate to 1 % concentration in distilled water has a pH in the range of 4.5 to 8.0; and

wherein the emulsifiable concentrate contains less than 2 % water.

Appeal Br. 33–34 (Claims Appendix).

REFERENCES

The prior art relied upon by Examiner is:

Name	Reference	Date
Sixl	US 6,479,432 B1	Nov. 12, 2002
Haesslin	WO 02/067682 A1	Sept. 6, 2002

REJECTIONS

Appellant requests review of the following grounds of rejection made by Examiner:

I. Claims 1–3, 5, 6, 10–12, and 14–25 under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Haesslin.

II. Claims 1–3, 5, 6, 10–12, and 14–25 under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Sixl in view of Haesslin.

I. Obviousness over Haesslin

Examiner finds that Haesslin teaches all elements of the invention but for "the required pH, level of water, and an oil adjuvant in the claimed ranges." Ans. 7. Examiner concludes that "it would have been obvious to have selected various combinations of various disclosed ingredients, such as the composition described by the Examiner above, from within a prior art disclosure, to arrive at compositions 'yielding no more than one would expect from such an arrangement.'" Ans. 9 (citing *KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398,* ("arranges old elements with each performing the same function it had been known to perform and yields no more than one would expect from such an arrangement").

Appellant contends (1) that Haesslin "never guides one skilled in the art to incorporate an emulsifying surfactant system into the organic phase" (Appeal Br. 16); (2) that the combination of the organic and aqueous phase in Haesslin does not result in a concentrate having 2% or less water (*id.*); (3) that removal of water from the concentrate "would change the principle of operation of the teaching of Haesslin" (*id.* at 18); and (4) hindsight (*id.* at 20–21).

The issue is whether the preponderance of evidence of record supports Examiner's conclusion that one of ordinary skill in the art would arrive at an herbicide composition containing clodinafop-propargyl and cloquintocet-mexyl having a water content of less than 2% based on the teaching of Haesslin.

Findings of Fact

FF1. Haesslin teaches the herbicide clodinafop-propargyl. Haesslin 1.

FF2. Haesslin teaches that clodinafop-propargyl is preferably used together with the safener cloquintocet-mexyl. *Id.*

FF3. Haesslin teaches that clodinafop-propargyl and cloquintocet-mexyl are chemically stable if the aqueous emulsion contains a buffer system to maintaining the pH from 4 to 6. *Id.* at 5.

FF4. Haesslin teaches that "commercial products will preferably be formulated as concentrates, the end user will normally employ formulations diluted with water." *Id.* at 12. The general formulation of the herbicidal composition is as follows (recited in percent weight of the total formulation):

Oil phase:

5-25 %	clodinafop-propargyl
1-6%	cloquintocet-mexyl
10-60 %	solvent
1-5%	oil phase stabiliser

Aqueous phase:

0.05-1 %	thickener
3-8%	anti-freeze
1-5 %	surface-active compound and/or dispersing agent
0.1-0.5%	oil phase stabiliser
	remainder water (buffered)

Id. at 12–13.

FF5. Haesslin teaches using solvents that are substantially insoluble in water. *Id.* at 5. Solvents include "[m]ineral oils, fatty acid alkyl esters or rapeseed oil C_1-C_5 alkyl esters, in which case preference is

given to rapeseed oil methyl ester and rapeseed oil ethyl ester." *Id.* at 10, *see also* 14 (Example C1 containing 38% rapeseed oil methyl ester). "Especially preferred solvents are Exxate 700 (mixture of aliphatic acetic acid C_6-C_8 esters, Essa Switzerland), benzyl acetate, isobornyl acetate, benzoic acid methyl ester or Solvesso 200 (high-aromatic-content hydrocarbon mixture, manufacturer: Exxon Chemicals)." *Id.* at 6. Haesslin also teaches using "mixtures of those solvents." *Id.* at 5.

FF6. Haesslin teaches including "[s]urface-active substances and dispersing agents." *Id.* at 11.

Principle of Law

A conclusion of obviousness,

> [R]equires more than a mere showing that the prior art includes separate references covering each separate limitation in a claim under examination. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418, 127 S.Ct. 1727, 167 L.Ed.2d 705 (2007). Rather, obviousness requires the additional showing that a person of ordinary skill at the time of the invention would have selected and combined those prior art elements in the normal course of research and development to yield the claimed invention. *Id*. at 421, 127 S.Ct. 1727.

Unigene Labs., Inc. v. Apotex, Inc., 655 F.3d 1352, 1360 (Fed. Cir. 2011).

Analysis

Haesslin teaches a composition comprising an herbicide and a safener, including the specific combination of clodinafop-propargyl and cloquintocet-mexyl. FF1–FF2. Haesslin also teaches that the combination clodinafop-propargyl and cloquintocet-mexyl is stable in aqueous solution as long as the pH is maintained in a range from 4–6. FF3. This teaching

reasonably suggests adding a pH stabilizer to the formulation in order to maintain the effectiveness of the herbicide. Haesslin teaches an oil and water emulsion by combining the oil phase and aqueous phase. FF4. Haesslin teaches using mixtures of solvents including rapeseed oil methyl ester. FF5. Haesslin also teaches using oil phase stabilizers and surface-active compounds. FF4, FF6.

Examiner recognizes that "Haesslin does not teach a single embodiment comprising the components of claim 1 with the required pH, level of water, and an oil adjuvant in the claimed ranges." Ans. 7. Examiner contends that it is the emulsion of Haesslin "which comprises a surface active compound (aka surfactant), [and] reads on the instant claims." *Id.* at 12. Examiner contends that based on the broad ranges provided in Haesslin that the emulsion can contain water in the range 78.85– >0% water. *Id.* at 7. Because "the emulsion is divided into an oil and an aqueous phase, it is assumed that the latter comprises a positive amount of water (i.e. >0%)," thus, the composition can contain an amount of water that is near zero. *Id.*

Appellant contends that Haesslin's combination of the organic and aqueous phase would not reasonably result in a concentrate having 2% or less water because such a mixture "would change the principle of operation of the teaching of Haesslin." Appeal Br. 17–18. On this record, we find that Appellant has the better position.

Haesslin acknowledges that the clodinafop-propargyl and cloquintocet-mexyl are commercially available as emulsifiable concentrates. *See* Haesslin 1, *see also id.* at 23 (emulsifiable concentrate EC100 known under the trade name CELIO®). Haesslin differs from these prior art herbicidal concentrates because the composition contains an aqueous

emulsion created by combining an oil and water phase. FF4; Haesslin 1 ("It has now been found, surprisingly, that the herbicidal activity of clodinafop-propargyl can be considerably increased when that compound is applied in the form of a particular aqueous emulsion."). "To render a claim obvious, prior art cannot be 'vague' and must collectively, although not explicitly, guide an artisan of ordinary skill towards a particular solution." *Unigene Labs*, 655 at 1361 (citing *Bayer Schering Pharm. AG v. Barr Labs., Inc.*, 575 F.3d 1341, 1347 (Fed.Cir.2009)). As Appellant points out, the lowest concentration of water exemplified in Haesslin's emulsions contains 26% water in the final emulsion. Appeal Br. 17. It is unclear, based on Haesslin, that the reduction in water to near zero in the aqueous component, as suggested by Examiner, would allow for the formation of an emulsion that improves the herbicidal activity of clodinafop-propargyl. Reviewing Haesslin's disclosure (at, e.g., 12–13), although it is not mathematically impossible to achieve a formulation with water amounts approaching 0%, each of Haesslin's specific formulation examples have considerably more water, for example, ~26% to ~60.7%. Haesslin 14–18. Thus, Haesslin alone does not necessarily suggest reducing the amount of water in its formulations to 2% or less. We, therefore, agree with Appellant that the rejection of the claims based on Haesslin alone is not sufficiently supported in the record.

Accordingly, we reverse the rejection relying on Haesslin alone.

II. Obviousness over Sixl and Haesslin

Examiner finds that Sixl teaches an herbicidal concentrate that contains a solvent, a nonionic emulsifier, thickening agents and no water.

Ans. 10. Examiner finds that Sixl teaches solvent mixtures that can include rapeseed oil methyl ester or ethyl acetate. *Id.* at 11. Examiner concludes that when the art teaches ranges that "'overlap or lie inside the ranges in the prior art' a *prima facie* case of obviousness exists." *Id.* (citing *In re Wertheim*, 541 F.2d 257 (CCPA 1976); MPEP 2144.05 (I)). Examiner finds that Sixl teaches the use of pH regulators, but acknowledges that Sixl does not teach a pH range of 5-8. *Id.* Examiner relies on the teaching of Haesslin to include a buffer system with compositions containing clodinafop-propargyl and cloquintocet-mexyl. *Id.* Examiner finds that Haesslin teaches that the combination of clodinafop-propargyl and cloquintocet-mexyl "has been found to be especially stable in aqueous emulsions when comprising a pH buffer system to maintain the pH between 4–6. *Id.* Examiner concludes that based on the combined teachings of Sixl and Haesslin it would have been obvious to include a pH regulator with the "concentrate of Sixl, which can be diluted in water to treat crops." *Id.* at 12.

Appellant contends that there is no reason to seek out the teachings of Haesslin especially since "Sixl is directed to non-aqueous or low water suspension concentrates." Appeal Br. 26. "Appellant[] note[s] that the teaching of Sixl does not disclose, teach or suggest any mixtures of rapeseed oil methyl ester and Solvesso with clodinafop-propargyl and cloquintocet-mexyl, and especially any mixture of rapeseed oil methyl ester (30%) and Solvesso (30%)." *Id.* at 27.

The issue is whether the preponderance of evidence of record supports Examiner's conclusion that the combination of Sixl and Haesslin renders the claimed emulsifiable herbicidal composition obvious.

Findings of Fact

FF7. Sixl teaches suspension concentrates that comprise:

> a) one or more solid herbicidally active compounds from the group of the sulfonylureas in suspended form,
> b) one or more active compounds which are partially or completely dissolved in component c),
> c) an organic solvent or solvent mixture,
> d) one or more nonionic emulsifiers,
> e) optionally one or more ionic emulsifiers,
> f) optionally one or more thickeners or thixotropic agents and *no water or up to 30 percent by weight of water* in dissolved form.

Sixl 2: 55–65 (emphasis added), *see id.* 15:29–67.

FF8. Sixl teaches that component b includes "clodinafop propargyl." *Id.* 7:31–32.

FF9. Sixl teaches the safener cloquintocetl-mexyl (S2-1), "and in particular also (S2-1) in formulations comprising a sulfonylurea and, as further herbicidally active compound, clodinafop-propargyl." *Id.* 10:11–20. The composition can contain 1–5% safener. *Id.* 10: 34.

FF10. Sixl teaches that the organic solvent can be a mixture of non-polar solvents and polar-lipophilic solvents. *See id.* 11: 39. "The total solvent content is, for example, in the range from 5 to 95% by weight, preferably from 10 to 90% by weight, in particular from 40 to 80% by weight." *Id.* 12:51–53.

FF11. Sixl teaches that non-polar solvents include aromatic hydrocarbons derived from benzene, aliphatic hydrocarbons, as well as aromatic mineral oils from the Solvesso® series (Exxon) among others. *See id.* 10:50–63.

FF12. Sixl teaches that polar-lipophilic solvents include among others rapeseed oil, as well "as rapeseed oil fatty acid (C_1-C_8)-alkyl ester, preferably rapeseed oil fatty acid methyl ester (= 'rapeseed oil methyl ester') and rapeseed oil fatty acid ethyl ester (='rapeseed oil ethyl ester'), in particular also those in a mixture with one of the aromatic solvents mentioned." *Id.* 11:24–28.

FF13. Sixl teaches the use of nonionic emulsifiers. "The proportion of emulsifier (component d) is, for example, in the range from 0.5 to 40% by weight, preferably from 0.5 to 20% by weight, in particular from 5 to 15% by weight, based on the weight of the formulation." *Id.* 14:7–10. Nonionic surfactants include "block copolymers of ethylene oxide (EO) and propylene oxide (PO) of different chain lengths" among others. *Id.* 13:37–38.

FF14. Sixl teaches the use of ionic emulsifiers. "The proportion of ionic emulsifier (component e) is, for example, in the range of from 0 to 20% by weight, preferably from 0 to 10% by weight, in particular from 0.1 to 10% by weight, based on the weight of the formulation." *Id.* 14: 38–41.

FF15. Sixl teaches that "water content of up to 2% by weight, in exceptional cases of up to 10% by weight, in the suspension concentrate does not adversely affect stability, or only to a small extent." Sixl 3:38–42. Sixl explains that water content is not detrimental to stability of the active provided it does not lead to a w/o emulsion. *See id.* 3:42–55.

FF16. Sixl teaches the use of pH and viscosity regulators. *Id.* 3:9

FF17. Sixl teaches that concentrate is diluted before application to plants. This can be effected by diluting an effective

> amount of the herbicidal preparation to the use concentration, giving an aqueous suspension, and applying the aqueous suspension to the harmful plants, parts of plants, plant seeds, to the area on which the plants grow or are to be controlled, or to an area of useful plants under cultivation, which are to be protected against harmful plants.

Id. 16: 36–42.

Analysis

Appellant contends that the prior art of record fails to suggest the claimed emulsifiable concentrate. Appeal Br. 29. Examiner counters that Sixl's compositions contain emulsifiers, therefore, the concentrates are reasonably interpreted to be emulsifiable concentrates. Ans. 19. The contention is with the term "emulsifiable."

"[D]uring examination proceedings, claims are given their broadest reasonable interpretation consistent with the specification." *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000). Therefore, we first turn to the Specification to interpret the term "emulsifiable" as recited in in the preamble and the body of the claim. The Specification describes "pesticidal compositions obtainable by diluting the emulsifiable concentrates of the present invention in a suitable amount of water to form an oil-in-water emulsion." Spec. 3:17–19. Thus, all that is required by the term "emulsifiable" is that the concentrate as claimed is *capable* of forming an emulsion when mixed with water, but there is no requirement that the concentrate is stored as an emulsion.

Sixl teaches herbicidal compositions containing active sulfonylureas in conjunction with other active compounds and safeners that are dissolved in a solvent. FF7–FF9. Sixl teaches dissolving the herbicide in an organic

solvent that can include mixtures of non-polar and polar solvents. FF10. Non-polar solvents can include mineral oils from the Solvesso® series (FF11), and polar solvents can include rapeseed oil fatty acid methyl ester. FF12. Sixl teaches the use of nonionic and ionic emulsifiers. FF13–FF14. Sixl further explains that the water content is preferably less than 2% by weight and that during storage water-in-oil emulsions should be avoided. FF15. Sixl also teaches the inclusion of pH regulators. FF16. Sixl describes the production of herbicidal formulations that contain no water or low water during storage but that are diluted before being applied to a plant. FF17.

Examiner finds that Sixl teaches an herbicide concentrate that includes solvent mixtures. Ans. 11. Examiner concludes that based on the "suitable options for each genus" of solvent disclosed in Sixl, that it would be prima facie obvious to arrive at a 50/50 mixture of rapeseed oil methyl ester and Solvesso. Ans. 11 ("a mixture of rapeseed oil methyl ester or ethyl acetate (30%) and Solvesso (30%) would be a prima facie obvious option"); FF11–FF12. Examiner also explains that "Haesslin teaches a similar composition [to Sixl] also useful as an herbicidal composition comprising clodinafop-propargyl and cloquintocet-mexyl wherein the pH is buffered to 4-6, which overlaps with the claimed ranges," which makes Haesslin and Sixl an obvious combination. Ans. 11; *see also supra* FF1–FF6.

Appellant contends that there is no reason to seek out the teachings of Haesslin because Sixl is directed to non-aqueous or low water suspension concentrates, while Haesslin teaches aqueous emulsions. Appeal Br. 26.

We are not persuaded by Appellant's non-analogous art argument. "Two criteria have evolved for determining whether prior art is analogous:

(1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved." *In re Clay*, 966 F.2d 656, 658–59 (Fed. Cir. 1992). Here, both Haesslin and Sixl are directed at formulating herbicidal compositions. FF1–FF17. Thus, we agree with Examiner that the references are reasonably directed to the same field of endeavor even if the references approach the formulation of the same herbicide differently, the product still has the same utility. *See* Ans. 19.

We are also not persuaded by Appellant's argument that Sixl does not teach an herbicide mixture, specifically, a mixture "of rapeseed oil methyl ester (30%) and Solvesso (30%)." *Id.* at 27. "Disclos[ing] a multitude of effective combinations does not render any particular formulation less obvious. This is especially true because the claimed composition is used for the identical purpose taught by the prior art." *Merck & Co. v. Biocraft Laboratories Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989); Ans. 18. Here, Examiner is relying, in-part, on Sixl's teaching that the herbicides can be formulated in a mixture of solvents ranging from 5–95% by weight. Ans. 10; FF10–FF12. We agree with Examiner's position that Sixl's disclosure of a mixture would reasonably encompass a 50/50 mixture of the non-polar and polar solvents. *See* Ans. 11 ("of rapeseed oil methyl ester (30%) and Solvesso (30%)").

In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a prima facie case of obviousness exists. *In re Wertheim*, 541 F.2d 257 (CCPA 1976). Sixl contemplates a solvent range form 5–95%. FF10. Because the Sixl contemplates a mixture of solvents,

we agree with Examiner that it is reasonable to conclude that it would have been obvious for the mixture to be evenly split between the polar and non-polar solvents taught. This would provide a range of 2.5-47.5% for each type of solvent in the mixture. *See* FF10–FF12; Ans. 11 ("a mixture of rapeseed oil methyl ester or ethyl acetate (30%) and Solvesso (30%) would be a prima facie obvious option"). We, therefore, agree with Examiner that the record supports the conclusion that mixtures of solvents containing overlapping ranges renders the presently claimed solvent ranges obvious.

Accordingly, we affirm the rejection of claim 1 under pre-AIA 35 U.S.C. § 103(a) over Sixl and Haesslin. Claims 2, 3, 5, 6, 10, 11, and 14–25 were not separately argued and fall with claim 1. 37 C.F.R. § 41.37 (c)(1)(iv).

With respect to claim 12, Appellant contends that Haesslin generically teaches a pH range of 4–6, but "the overall teaching of Haesslin guides one skilled in the art to utilize a pH of 4.0" and therefore one of ordinary skill would not be directed to higher pH values as recited in claim 12. Appeal Br. 31.

We are not persuaded by Appellant's contention. Sixl teaches the inclusion of pH regulators, but is silent with respect to a particular pH range. FF16; *see* Ans. 18 ("The inclusion of a pH modifier implies that the pH can be varied and Haesslin is applied for its teachings of an ideal pH level for herbicidal concentrates such as the one in Sixl"). Examiner relies on Haesslin for teaching a pH buffer system to maintain the pH between 4–6 when using the herbicide mixture containing clodinafop-propargyl and cloquintocet-mexyl. Ans. 11; FF3. Here, Haesslin describes that the stability of a clodinafop-propargyl and cloquintocet-mexyl in aqueous

emulsion is surprising, but identifies the pH range of 4–6 as suitable for the use with these compositions. Haesslin 5; FF3. Because it was known that clodinafop-propargyl and cloquintocet-mexyl are not stable in aqueous solutions, one of ordinary skill in the art would have been motivated to ensure that a diluted concentrate would be maintained at the stabilizing pH range of 4–6 as taught in Haesslin. *See* FF3. We find that the preponderance of the evidence of record supports Examiner's conclusion that it would have been obvious to include pH stabilizers in Sixl's composition. Because the stabilizing pH range overlaps with the claimed range we agree with Examiners conclusion that the claim is obvious. *See Wertheim*, 541 F.2d 257.

Accordingly, we also affirm the rejection of claim 12.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–3, 5, 6, 10–12, 14–25	103	Haesslin		1–3, 5, 6, 10–12, 14–25
1–3, 5, 6, 10–12, 14–25	103	Sixl, Haesslin	1–3, 5, 6, 10–12, 14–25	
Overall Outcome			1–3, 5, 6, 10–12, 14–25	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED