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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* YAKOV FAITELSON, OHAD KORKUS,  
OPHIR KRETZER-KATZIR, and DAVID BASS<sup>1</sup>

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Appeal 2018-005339  
Application 13/562,711  
Technology Center 2400

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Before JASON V. MORGAN, JAMES B. ARPIN, and  
IRVIN E. BRANCH, *Administrative Patent Judges*.

ARPIN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from a non-final rejection of claims 1–30, all of the claims pending in the application. Non-Final Act. 2; App. Br. 10.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> Appellants indicate the real party-in-interest is Varonis Systems, Inc. App. Br. 2.

<sup>2</sup> In this Decision, we refer to Appellants’ Appeal Brief, filed January 3, 2018 (“App. Br.”); the Non-Final Office Action, mailed August 3, 2017 (“Non-Final Act.”); the Examiner’s Answer, mailed February 23, 2018 (“Ans.”); and the Specification, filed July 31, 2012 (“Spec.”). Rather than repeat the Examiner’s findings and determinations and Appellants’ contentions in their entirety, we refer to these documents.

STATEMENT OF THE CASE

Appellants state that “[t]he present invention relates generally to email distribution list membership governance systems and methods.” Spec. ¶ 5. Claims 1, 7, 11, 17, 21, and 27 are independent. App. Br. 17–23 (Claims App’x). Claims 2–6 depend directly from claim 1, claims 8–10 depend directly from claim 7, claims 12–16 depend directly from claim 11, claims 18–20 depend directly from claim 17, claims 22–26 depend directly from claim 21, and claims 28–30 depend directly from claim 27. *Id.* at 17–24. Claims 1 and 7, reproduced below, are illustrative.

1. A computer-implemented method for controlling email distribution list membership in an enterprise email system hosted on an email server, said method comprising the steps of:

monitoring and collecting continuously updated information regarding access to email distribution lists hosted on said email server by members of said email distribution lists, said access to an email distribution list comprising at least email correspondence of a first member of said distribution list with at least a second member of said distribution list;

ascertaining that a particular member of at least one of said email distribution lists *has not corresponded with* any other member of said at least one of said email distribution lists via email for a predetermined period of time; and

*responsive to said ascertaining, at least one of recommending revoking membership of said particular member to said at least one of said email distribution lists and automatically revoking membership of said particular member to said at least one of said email distribution lists, thereby revoking said permissions of said particular member to correspond with at least one other member of said email distribution list via email communication with said at least one of said email distribution lists.*

*Id.* at 17 (differentiating limitations of claim 1 emphasized).

7. A computer-implemented method for controlling email distribution list membership in an enterprise email system hosted on an email server, said method comprising the steps of:

monitoring and collecting continuously updated information regarding access to email distribution lists hosted on said email server by users of said email system, said access to an email distribution list comprising at least email correspondence of a user of said email system with at least one member of said distribution list;

ascertaining that a particular user of said email system *has regularly corresponded with* at least one other member of at least one of said email distribution lists via email during a predetermined period of time; and

*responsive to said ascertaining, at least one of recommending granting membership to said particular user to said at least one of said email distribution lists and automatically granting membership to said particular user to said at least one of said email distribution lists, said email distribution list membership comprising permissions to correspond with at least one other member of said email distribution list via email communication with said at least one of said email distribution lists.*

*Id.* at 18–19 (differentiating limitations of claim 7 emphasized).

#### REFERENCES AND REJECTIONS

The Examiner relies upon the following prior art in rejecting the pending claims:

Name	Pat./Publ. No.	Issue/Publ. Date	Filing Date
Marcjan et al. ("Marcjan")	US 8,234,374 B2	July 31, 2012; Nov. 10, 2005	Apr. 26, 2004

Horvitz <i>et al.</i> ("Horvitz")	US 7,644,144 B1	Jan. 5, 2010	Dec. 21, 2001
Ahmed <i>et al.</i> ("Ahmed")	US 6,704,772 B1	Mar. 9, 1999	Sept. 20, 1999

Claims 1–30 stand rejected as unpatentable under 35 U.S.C. § 101 as directed to patent ineligible subject matter. App. Br. 10. Claim 1–30 also stand rejected as unpatentable under 35 U.S.C. § 103 as rendered obvious over the combined teachings of Marcjan, Horvitz, and Ahmed. *Id.*

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). Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2017).

## ANALYSIS

### *A. Issues*

1. Does the Examiner err in finding that “the claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception”? Non-Final Act. 4.
2. Does the Examiner err in finding the combined teachings of Marcjan, Horvitz, and Ahmed teach or suggest “ascertaining that a particular member of at least one of said email distribution lists *has not corresponded with any other member of said at least one of said email distribution lists* via email for a predetermined period of time,” as recited in claim 1? *See id.* at 17 (emphasis added); *see also id.* at 18 (Claim App., claim 7: “ascertaining that a particular user of said email system *has regularly corresponded with at least*

*one other member of at least one of said email distribution lists via email during a predetermined period of time” (emphasis added).*

We have reviewed the Examiner’s rejections in light of Appellants’ Appeal Brief arguments that the Examiner has erred.

*B. Patent Ineligible Subject Matter*

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *E.g., Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–218 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is “directed to.” *Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and, thus, patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–220; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–595 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)).

Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 192 (1981)); “tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores” (*id.* at 184 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–268 (1854))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the U.S. Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 176; *id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson* and *Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must 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.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to

monopolize the [abstract idea].” *Id.* (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.* 212.

*1. Subject Matter Eligibility Guidance*

The Office recently published revised guidance on the application of § 101. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 51 (Jan. 7, 2019). Under that guidance, we first look to whether the claim recites:

(1) Step 2A – Prong One: any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human interactions, such as a fundamental economic practice, or mental processes); and

(2) Step 2A – Prong Two: additional elements that integrate the judicial exception into a practical application (*see* MPEP<sup>3</sup> § 2106.05(a)–(c), (e)–(h)).<sup>4</sup>

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

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<sup>3</sup> All Manual of Patent Examining Procedure (MPEP) citations herein are to MPEP Rev. 08.2017, January 2018.

<sup>4</sup> We acknowledge that some of the considerations at Step 2A, Prong Two, properly may be evaluated under Step 2 of *Alice* (Step 2B of the Office guidance). For purposes of maintaining consistent treatment within the Office, we evaluate them under Step 1 of *Alice* (Step 2A of the Office guidance). *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. at 55 n. 25, 27–32.

(3) adds a specific limitation beyond the judicial exception that are not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

*See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. at 56 (“Step 2B: If the Claim Is Directed to a Judicial Exception, Evaluate Whether the Claim Provides an Inventive Concept”).

2. *Examiner’s §101 Rejection – Alice/Mayo Steps 1 and 2*

a. *Guidance Step 2A – Prong One*

Applying step 1 of the *Alice/Mayo* analysis, the Examiner concludes claim 1 is directed to an abstract idea.

*Claims 1, 7, 11, 17, 21 and 27 are directed to the abstract idea of “monitoring and collecting continuously updated information”, “ascertaining”, “response to ascertaining”, and “thereby revoking”.*<sup>5</sup> This describes the collection, identifying (According to Merriam-Webster dictionary, “ascertain” is defined as “to find out or learn with certainty.” An automation of a typical manual server step of identifying users to remove from a communication/buddy/distribution list.), generating and communicating (According to Merriam-Webster dictionary, “thereby” is defined as “by that means” and “connected with or with reference to that.” “Thereby” is an intended result of

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<sup>5</sup> Claims 1, 11, and 21 recite “revoking” membership in an email distribution list, and claims 7, 17, and 27 recite “granting” such membership. App. Br. 17–23 (Claims App’x). Although the Examiner refers only to “revoking,” in view of the Examiner’s listing of each independent claim, we understand the identification of the abstract idea to refer to both “revoking” and “granting” membership.

removing a member from a distribution list and is not a specific improvement or advancement of the claimed invention, see MPEP 2111.04.) that are similar to the generic functions found by the courts to be abstract ideas (e.g., “we have found that ‘merely presenting the results of abstract processes of collecting and analyzing information, without more (such as identifying a particular tool for presentation), is abstract as an ancillary part of such collection and analysis.’” [*Fairwarning IP, LLC vs. Latric Sys., Inc.*, 839 F.3d 1089, 1093 (Fed. Cir. 2016)]). Thus the claims are directed to an abstract idea.

Non-Final Act. 6–7 (emphasis added).

Further, the Examiner finds that these claims describe,

the collection, identifying, generating and communicating that are similar to the generic functions found by the courts to be abstract ideas (e.g., “[T]hough lengthy and numerous, the claims do not go beyond requiring the collection, analysis, and display of available information in a particular field, stating those functions in general terms, without limiting them to technical means for performing the functions that are arguably an advance over conventional computer and network technology” [*Electric Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1351 (Fed. Cir. 2016)]). Thus the claims are directed to an abstract idea.

*Id.* at 7.

Appellants do not dispute the Examiner’s identification of the abstract idea or that the claims are directed to an abstract idea. *See* App. Br. 12–13. Thus, we are persuaded the claims are directed to “[c]ertain methods of organizing human activity . . . *managing personal behavior or relationships or interactions between people* (including social activities, teaching, and following rules or instructions).” 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. at 52 (emphasis added).

*b. Guidance Step 2A – Prong Two*

Applying step 2 of the *Alice/Mayo* analysis, the Examiner concludes:

the “computer implemented,” “email server” and “a computer” recited in the claims do not amount to significantly more than the abstract idea. The examiner states that there is no indication that the combination of the elements/steps improve the functioning of a computer or improve any other technology. Their collective functions merely provide conventional computer implementation.

Ans. 5.

(“With respect to the claim as a whole”); *see* Non-Final Act. 8 (“Taking the claim elements separately”). As the Examiner argues, revoking or granting membership in a distribution list based on a level of participation is not a technological solution to a technological problem, just as removing a past recipient from a Christmas card mailing list, if that person no longer sends cards, or adding a new address, when a card is received from an unexpected sender, is not a technological solution to a technological problem. *See* Ans. 4–5; *see also* *BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018) (As the Federal Circuit has explained, “[i]t has been clear since *Alice* that a claimed invention’s use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention ‘significantly more’ than that ineligible concept.”).

Here, the additional elements recited in the claims and identified by the Examiner do “no more than generally link the use of a judicial exception to a particular technological environment or field of use.” 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. at 55. Specifically, we determine claims 1 and 7 do not recite:

- (i) an improvement to the functioning of a computer;
- (ii) an improvement to another technology or technical field;
- (iii) an application of the abstract idea with, or by use of, a

- particular machine;
- (iv) a transformation or reduction of a particular article to a different state or thing; or
  - (v) other meaningful limitations beyond generally linking the use of the abstract idea to a particular technological environment.

See MPEP §§ 2106.05(a)–(c), (e)–(h). Thus, we are persuaded that the claims are *directed to an abstract idea*, rather than the *integration of an abstract idea into a practical application*.

*c. Guidance Step 2B*

Further applying step 2 of the *Alice/Mayo* analysis, the Examiner further concludes:

Claims 1, 7, 11, 17, 21 and 27, which merely require generic “an email server”, “a non-transitory, tangible computer-readable medium”, “monitoring and collecting continuously updated information”, “ascertaining” and “revoking membership” fail to transform the abstract idea into a patent-eligible invention.

Taking the claim elements separately, these generic computing elements are purely conventional. *The claimed computer elements of a computing device and a server are well-understood, routine, conventional elements previously known to the industry*. In short, the claims do no more than require generic computing elements to perform generic computer functions (e.g., monitoring and collecting of update information regarding access to email distribution/buddy/communication lists, recommending revoking member to the distribution list, and thereby revoking/control permissions of member to an email distribution lists).

Non-Final Act. 8 (emphasis added).

Appellants do not contend that any of these elements is not “well-understood, routine, conventional.” *See* App. Br. 12–13. Rather, the case law shows this “more” of “computers” and “memories” to be the epitome of a well-understood, routine, conventional element/combination previously known in the industry. *Alice*, 134 S. Ct. at 2360 (“[P]etitioner’s . . . media claims add nothing of substance to the underlying abstract idea.”); *Fairwarning*, 839 F.3d at 1096 (“Claims 15–17 . . . add nothing more than similar nominal recitations of basic computer hardware, such as ‘a non-transitory computer-readable medium with computer-executable instructions’ and a microprocessor.”). Moreover, referring to Ahmed, for example, each of these elements was well known in the field of “delivering and organizing electronic messages” at the time of claimed invention. Ahmed, 1:7–13, 7:9–19, Fig. 1; *id.* at 7:19–22 (“Such networking environments are commonplace in offices enterprise-wide computer networks, intranets and the Internet.”). Thus, we are persuaded that considered individually or as an ordered combination, the additional elements recited in claims 1, 7, 11, 17, 21, and 27 do not amount to significantly more than the judicial exception itself.

The Examiner finds that the dependent claims also are directed to an abstract idea and do not positively recite significantly more than the abstract idea. Non-Final Act. 8–9. Consequently, those claims also are determined to be patent ineligible. *Id.* Appellants do not argue any of the dependent claims separately. App. Br. 12–13, 16. Thus, for the reasons set forth above, the dependent claims fall with their base claims.

The Examiner did not err in finding the recited methods and systems patent ineligible, and we sustain the Examiner’s rejection of claims 1–30 under 35 U.S.C. § 101.

*C. Obviousness Over Marcjan, Horvitz, and Ahmed*

With respect to claim 1, the Examiner acknowledges that Horvitz does not expressly teach the limitation at issue, but finds that Horvitz in combination with Marcjan teach this limitation.<sup>6</sup> See Non-Final Act. 11–12; Ans. 5–7. The Examiner notes that Horvitz discloses, “‘if communications with a group member’, ‘drop off’, ‘the group member can be identified as a group member that is to be deleted from the frequently communicated with group’.” Non-Final Act. 11 (citing Horvitz, 2:43–53). As the Examiner notes,

Horvitz [does] not explicitly indicate ascertain whether there was a communication between other members of the distribution list for a predetermined amount of time features, but in an analogous system that solves a similar problem Marcjan teach[es]: . . . (“after monitoring activity of share space users over a designated period of time, it can be determined that a user has not accessed the share space or content during the prescribed time period” [Marcjan,] col 5 lines 49–55).

Non-Final Act. 12.

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<sup>6</sup> See *In re Bush*, 296 F.2d 491, 496 (CCPA 1961) (“where a rejection is predicated on two references each containing pertinent disclosure which has been pointed out to the applicant, we deem it to be of no significance, but merely a matter of exposition, that the rejection is stated to be on A in view of B instead of on B in view of A, or to term one reference primary and the other secondary.”).

The Examiner finds, however, that a person of ordinary skill in the art would have had reason to combine the teachings of Horvitz and Marcjan to achieve the “ascertaining” step, as recited in claim 1. *Id.* at 13–14.

Appellants note that claim 1 recites, “ascertaining that a particular member of an email distribution list has not corresponded **with any other member** of the email distribution list via email for a predetermined period of time.” App. Br. 15. Further Appellants contend, “Marcjan merely discloses determining that a user **has not accessed the share space or content** during the predescribed time period. Marcjan does not teach ascertaining that a user has not communicated **with another user** during a predetermined amount of time.” *Id.* Consequently, Appellants contend that

none of the prior art cited, either alone or in combination, show or suggest the system of the present invention as recited in claim 1 including, inter alia, “ascertaining that a particular member of at least one of said email distribution lists **has not corresponded with any other member of said at least one of said email distribution lists via email for a predetermined period of time**”.

*Id.*

We disagree.

As the Examiner notes, referring to Figure 11, Horvitz discloses *if communications with a group member with whom communications had occurred very frequently (e.g., ten times per day) for the past year drop off to the point where they are no longer considered a frequent communicator (e.g., at least once per day), then the group member can be identified as a group member that is to be deleted from the frequently communicated with group.* Furthermore, if a person updates their calendar to indicate that they will not be attending a meeting with the user, then the person can be *dynamically removed* from the group of people with whom the user will meet. If the determination at

**1060** is YES, then at **1065** the identified group member will be deleted from one or more groups.

Horvitz, 28:47–59 (emphases added); *see* Ans. 5–6; *see also id.* at 12:49–51 (Group inclusion criteria may include “the time since the communicating party last communicated through the system **100**, the time left until [the] deadline with which the communicating party must comply”.); 30:40–42 (Group management functions can include “adding a member, removing a member”). Thus, Horvitz teaches monitoring communication among group members and adding and removing group members based on such monitored communications.

Referring to Figure 9, Marcjan discloses, “[t]he process **900** can involve monitoring at least one of the following: distribution lists, *email activity*, content activity (within a database or share), personnel activity, and database activity at **910**.” Marcjan, 9:60–63 (emphasis added); *see* Ans. 6. Referring to Figures 8 and 9, Marcjan explains that its process may involve monitoring “user interactions” and

data from such monitoring can be collected and analyzed to determine if time period thresholds have been satisfied, for example. Such thresholds can be applicable when determining whether a period of inactivity by a user (*e.g., user has not accessed content or received content or has been removed from contact or distribution list or personnel structure*) or by content (*e.g., content has no indication of activity during a set time period*). *When a particular time threshold or period has been satisfied and the pertinent activity or lack thereof has or has not occurred, then the process **800** can suggest to the owner or creator of the share space or content to adjust the access rights accordingly at **830**.*

Marcjan, 9:45–56 (emphases added); *see* Ans. 6.

As noted above, Appellants do not contest the Examiner’s finding that a person of ordinary skill in the art would have had reason to combine the teachings of Horvitz and Marcjan to achieve the recited methods and systems. *See* App. Br. 13–16. Thus, we are persuaded that the combined teachings of Horvitz and Marcjan teach continuous monitoring of user communications and the adjustment of group membership based on that activity monitored during predetermined time periods, as recited in claims 1 and 7.

Appellants also contend that the applied references fail to teach or suggest *public* distribution lists “that are published as distribution group objects in Active Directory Domain Services.” App. Br. 16. Thus, Appellants contend that “Horvitz does not disclose managing public distribution lists published by an enterprise email system such as the distribution lists of Microsoft Active Directory Domain Services.” *Id.* (emphasis omitted). Nevertheless, as the Examiner correctly notes, the pending claims recite “email distribution lists,” not “public” lists. Ans. 7. We do not incorporate features of the distribution lists of Microsoft Corporation’s Active Directory Domain Services into the pending claims. *Id.*

For the reasons discussed above, Appellants have not shown error in the Examiner’s factual findings and conclusion of obviousness. Accordingly, we sustain the Examiner’s obviousness rejections of independent claims 1, 7, 11, 17, 21, and 27. The dependent claims are not argued separately, and the rejections of those claims are sustained for the same reasons given for independent claims. *See* App. Br. 16.

### CONCLUSIONS

(1) The Examiner has not erred in rejecting claims 1–30 under 35 U.S.C. § 101, as directed to patent-ineligible subject matter.

(2) The Examiner has not erred in rejecting claims 1–30 under 35 U.S.C. § 103, as rendered obvious by the combined teachings of Marcjan, Horvitz, and Ahmed.

(3) Claims 1–30 are not patentable.

### DECISION

We affirm the Examiner’s rejections of claims 1–30.

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