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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JUN ZENG and HAMID REZA MOTAHARI NEZHAD

Appeal 2018-008982
Application 14/354,714
Technology Center 3600

Before BRADLEY W. BAUMEISTER, KARA L. SZPONDOWSKI, and
RUSSELL E. CASS, *Administrative Patent Judges*.

CASS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–3, 5–14, and 16–22 under 35 U.S.C. § 101, which constitute all the pending claims. Appeal Br. 4, 12.² The Examiner's rejections under 35 U.S.C. § 103 have been withdrawn. Ans. 3. Claims 4

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant lists Hewlett-Packard Development Company, LP as the real party in interest. Appeal Brief filed May 24, 2018 (“Appeal Br.”) 2.

² Rather than repeat the Examiner's positions and Appellant's contentions 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 January 8, 2018 (“Final Act.”); the Examiner's Answer mailed July 23, 2018 (“Ans.”); and the Reply Brief filed September 19, 2018 (“Reply Br.”).

and 15 have been cancelled. Appeal Br. 25, 29. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

I. BACKGROUND

The present invention relates to a method of recommending a production plan. Abstr. Appellant's Specification explains that production environments exist in which the fulfillment of new customer orders can involve the use of both pre-existing and newly-developed production plans or templates, such as in the commercial print industry, where many different print products are available through diverse manufacturing processes. Spec. ¶ 1. According to the Specification, in the commercial print industry, production planning is therefore often done by veteran managers having significant experience and extensive knowledge of print products, as well as the machines, tools and outsourcing options available to produce those products. *Id.* ¶¶ 1, 14. However, the Specification explains, print order types are becoming more diverse, and employees are less likely to remain with the same company for long periods of time. *Id.* ¶ 14.

According to the Specification, the invention seeks to improve upon prior methods of production planning by using a self-learning software-based system that automates production planning for any type of incoming order. *Id.* ¶ 16. The system includes a production planning recommender that uses a similarity algorithm to compare an incoming order with a historical order database and calculate a similarity score for the incoming order with respect to each order that has been fulfilled successfully in the past. *Id.* The system generates a list of the most similar historical orders

that have the highest similarity scores, and the system reports this list to the production manager, who can elect to fulfill the incoming order using the highest scored production plan, or another production plan on the list. *Id.* When the production manager approves the production plan of a historical order, that production plan is admitted as the production plan to be released to the factory floor for fulfillment of the incoming order. *Id.* In situations where an incoming order is a new order (for example, has new print production types, unusual customization requirements, etc.) that does not have an ideal match to one of the orders on the list of most similar historical orders, the production planning recommender guides the production manager through a customization process to customize one of the production plans on the list. *Id.* ¶ 17.

Claim 1 is illustrative and is reproduced below with numerals added at the beginning of each limitation, so that it may be referred to more clearly throughout this Opinion:

1. A method of recommending a production plan comprising:

[i] calculating a similarity score between an incoming order and each historical order in a historical order database;

[ii] providing a list of most similar historical orders and corresponding historical production plans ranked according to highest similarity scores;

[iii] receiving an election indicating a historical production plan as a selected production plan;

[iv] admitting the selected historical production plan to fulfill the incoming order; and

[v] customizing the selected production plan before admitting the selected production plan wherein customizing the selected production plan comprises, at least, receiving input

from a user indicating a request to change a step in the selected production plan.

Appeal Br. 25 (Claims Appendix).

II. PRINCIPLES OF LAW RELATING TO PATENT ELIGIBILITY UNDER 35 U.S.C. § 101

A. *Section 101*

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 U.S. 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 Court’s two-step framework, described in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), and *Alice*. *Alice*, 573 U.S. at 217–18 (citing *Mayo*, 566 U.S. at 75–77). In accordance with that framework, we first determine what concept the claim is “directed to.” *See 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 219–20; *Bilski*, 561 U.S. at 611);

mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (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 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 187; *see also 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 (internal 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.* (alterations in original) (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.*

B. USPTO Section 101 Guidance

In January of 2019, the United States Patent and Trademark Office (“USPTO”) published revised guidance on the application of § 101, which was updated in October 2019. USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Guidance”); October 2019 Update: Subject Matter Eligibility, 84 Fed. Reg. 55942 (available at the USPTO’s website) (“October 2019 PEG Update”). Under the 2019 Guidance, we first look to whether the claim recites the following:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activities such as a fundamental economic practice, or mental processes); and
 - (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP §§ 2106.05(a)–(c), (e)–(h)).
- 2019 Guidance, 84 Fed. Reg. at 52–55.

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:

(3) adds a specific limitation beyond the judicial exception that is 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.

2019 Guidance, 84 Fed. Reg. at 56.

III. ANALYSIS

A. *The Examiner’s Rejection and Appellant’s Contentions*

In the Final Office Action, the Examiner rejects claims 1–3, 5–14, and 16–22 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Final Act. 8. The Examiner determines, *inter alia*, that claims 1–3, 5, 6, 9–14, and 16–20 are directed to “selecting and customizing a production plan,” which involves mental processes because “there is nothing in the claimed steps themselves that foreclose them from being performed by a human, mentally or with pen and paper.” *Id.* at 9–10. The Examiner reaches a similar conclusion for claims 7, 8, and 21–22, which the Examiner determines to be directed to “generating a production plan.” *Id.*

The Examiner further determines that the claims either do not recite any physical or system elements (claims 1–3 and 5–8) or recite merely generic computer components that perform generic computer functions (claims 9–14 and 16–22), and therefore do not improve the functioning of a computer or improve any other technology. *Id.* at 11. Thus, the Examiner concludes, the claims do not include additional elements, taken individually

or as an ordered combination, that amount to significantly more than the judicial exception itself. *Id.* at 11–12.

Appellant argues that the claims are not mental processes because they include computer-based limitations to implement the claimed ordering processes over a network, and, therefore, are “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” Appeal Br. 15. Appellant also argues that “the claims add specific limitations other than what is well-understood, routine and conventional in the field, and add unconventional steps that confine the claim to a particular application.” Appeal Br. 13 (internal quotation marks and alteration omitted). In this regard, Appellant argues that the claim includes steps that are “novel and non-obvious,” and that the claims are directed to an improvement to a technology or technical field. *Id.* at 13–14.

B. Analysis under Step 2A, Prong 1, of the 2019 Guidance

Under Step 2A, Prong 1, of the 2019 Guidance, we first must determine whether any judicial exception to patent eligibility is recited in the claim. The 2019 Guidance identifies three judicially excepted groupings: (1) mathematical concepts, (2) certain methods of organizing human activity such as fundamental economic practices and managing interactions between people, and (3) mental processes. 2019 Guidance, 84 Fed. Reg. at 52–53.

Based on existing Supreme Court and Federal Circuit precedent, the 2019 Guidance has identified “mental processes” as including “concepts performed in the human mind (including an observation, evaluation, judgment, opinion).” *Id.* at 53 (footnote omitted). The “mental processes” judicial exception also includes concepts that can be performed by a human with a pen and paper as well as those that can be performed entirely in the

mind. *See* October 2019 PEG Update at 9 (“a claim that encompasses a human performing the step(s) mentally with the aid of a pen and paper recites a mental process”); *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016) (finding claims to be patent ineligible because “with 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”).

Claim 1, as drafted, recites generalized steps for creating a production plan that can be performed in the human mind or by a human using pen and paper without the use of computers or other technological elements. These steps will be discussed in more detail below.

Claim 1, limitation [i], recites the step of “calculating a similarity score between an incoming order and each historical order.” This step can be performed by a human who reviews an incoming order and historical orders and then determines the orders’ similarity according to a variety of metrics using mental calculations or calculations made using pen and paper. For example, a human could take certain key words in the incoming order and count how many of those words appear in each of the historical orders. The human could then determine a “similarity score” for each historical order equal to the number of times the key words appear in that historical order.

Additionally, paragraph 42 of Appellant’s Specification provides an equation for calculating similarity scores of different production plans. Spec. ¶ 42. A human could make use of this equation to calculate similarity scores using pen and paper, particularly where the number of historical orders and attributes over which attribute similarity scores are computed is

small. Appellant does not contend that calculation using this equation is incapable of being performed by a human, much less provide a basis for such a conclusion.

Claim 1, limitation [ii], recites the step of “providing a list of most similar historical orders and corresponding historical production plans ranked according to highest similarity scores.” A human can perform this step by examining the similarity score for each historical production plan and making a list in the mind or on a piece of paper ranking the most similar historical orders and corresponding historical production plans according to highest similarity scores.

Claim 1, limitation [iii], recites “receiving an election indicating a historical production plan as a selected production plan.” That is, limitation [iii] does not recite a step of actually selecting a production plan. Rather, the limitation instead recites a step of receiving an indication of which plan was selected after a non-claimed selection process is completed.

A human can perform this step by receiving an election of a historical production plan as the selected production plan. The election can be received either verbally from another human, or by having another human provide a list of the plans on a piece of paper with one selected using a pen, such as by circling the plan or placing a check box next to it. This step also involves managing interactions between people (the person making the selection and a person receiving the selection). The 2019 Guidance recognizes managing interactions between people as one of the “certain methods of organizing human activity” included within the abstract idea exception. *See* 2019 Guidance, 84 Fed. Reg. at 52.

Claim 1, limitation [iv], recites “admitting the selected historical production plan to fulfill the incoming order.” “Admitting” is a broad term that does not require the use of computers or technology. Therefore, “admitting the selected historical production plan to fulfill the incoming order” can be interpreted to include a human approving the plan. The act of a human approving a plan reasonably can be characterized as a mental judgment performed by the human mind.

Claim 1, limitation [v], recites “customizing the selected production plan before admitting the selected production plan wherein customizing the selected production plan comprises, at least, receiving input from a user indicating a request to change a step in the selected production plan.” We understand the language “receiving input from a user indicating a request to change a step in the selected production plan” to be the only affirmatively recited action of limitation. We understand the language “customizing the selected production plan before admitting the selected production plan” to be merely a recitation of the intended goal or purpose for why the input concerning the change request is received.

The step of receiving input reasonably can be characterized as a method of managing interactions between people. For example, one person receiving information from a second person regarding such a requested change reasonably can be characterized as learning or teaching. The 2019 Guidance recognizes teaching, and more generally managing interactions between people, as one of the certain methods of organizing human activity that constitutes a patent-ineligible abstract idea. 2019 Guidance, 84 Fed. Reg. at 52.

Furthermore, even if the remaining language of limitation [v]—“customizing the selected production plan before admitting the selected production plan”—were interpreted as constituting an affirmative action, such an interpretation would not change our conclusion that limitation [v] recites one or more abstract ideas. A human can carry out a step of customizing a production plan by reviewing a paper version of the selected production plan and using a pen to edit it, such as by crossing out items that are not needed, adding new items, or changing existing items. Under this interpretation, then, limitation [v] reasonably could be characterized as reciting a patent-ineligible mental process.

For these reasons, we determine that claim 1 recites recognized judicial exceptions to patent eligibility. *See* 2019 Guidance, 84 Fed. Reg. at 52–53. Independent claims 7, 9, and 21 include similar limitations, and therefore also recite judicial exceptions to patent eligibility.

C. Analysis under Step 2A, Prong 2, of the 2019 Guidance

Having determined that the claims recite judicial exceptions, we next consider whether the claims recite “additional elements that integrate the [judicial] exception into a practical application.” *See* 2019 Guidance, 84 Fed. Reg. at 54; MPEP §§ 2106.05(a)–(c), (e)–(h). We determine that they do not do so.

Aside from the steps discussed above that can be performed by a human in the mind or with pen and paper or through interactions between people, the only computer or technological limitation that Appellant has included in claim 1 is the use of a “historical order database” for the historical orders. Claims 9 and 21 additionally recite a “non-transitory processor-readable medium storing code representing instructions that when

executed by a processor cause the processor to” carry out the claimed steps. Appeal Br. 27, 31–32 (Claims Appendix). These limitations are generic computer components that perform generic computer functions. For example, the Specification states that “[t]he historical order database . . . can be built based on software components, such as from Lucene, an open source software package,” and shows the “historical order database 330” as generic cylinder in Figure 3. Spec. ¶ 39, Fig. 3. Technical details of the database structure and operation are not provided in the Specification. *See, e.g.*, Spec. ¶ 26–29 (explaining that the system may include “processor-readable media that generally provide storage of computer/processor-readable instructions, data structures, program modules, and other data” including “various application programs or other instructions stored in memory”).

The inclusion of these generic computer components does not take the claims out of the mental process category of abstract ideas. As the 2019 Guidance explains, “[i]f a claim, under its broadest reasonable interpretation, covers performance in the mind but for the recitation of generic computer components, then it is still in the mental processes category unless the claim cannot practically be performed in the mind.” 2019 Guidance, 84 Fed. Reg. at 52 n.14. *See also* October 2019 PEG Update at 8 (“The courts have found claims requiring a generic computer or nominally reciting a generic computer may still recite a mental process even though the claim limitations are not performed entirely in the human mind.”).

Federal Circuit precedent is in accord. *See 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., Inc. 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.”); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375, 1372 (Fed. Cir. 2011) (holding that the incidental use of “computer” or “computer readable medium” does not make a claim otherwise directed to process that “can be performed in the human mind, or by a human using a pen and paper” patent eligible). As discussed above with respect to Step 2A, Prong 1, there is no basis in the claims or Specification to conclude that the claim limitations identified as mental processes cannot practically be performed in the human mind or with pen and paper, or through interactions between people.

Appellant argues that claim 1 is not directed to a mental process because it “recites ‘calculating a similarity score between an incoming order and each historical order in a *historical order database*’ over ‘a corporate network, a home network, or the Internet, as well as one or more local area networks (LANs) and/or wide area networks (WANs) and combinations thereof.’” Appeal Br. 15 (emphasis omitted) (citing claim 1, Spec. ¶ 23).

We disagree. As discussed immediately above, the “historical order database” is claimed and described in the Specification as a generic database and, as such, does not take the claim out of the mental process category. As to the use of a corporate network, home network, the Internet, or one or more LANs or WANs, none of those limitations is recited in claim 1. We agree with the Examiner that it would be improper to read these limitations

from the Specification into the claim, which is especially true here because the Specification in paragraph 24 refers to an alternative embodiment that does not include such networks. Ans. 6 (citing *In re Van Geuns*, 988 F.2d 1181 (Fed. Cir. 1993)); *see also* Spec. ¶ 24 (discussing an alternative production environment in which multiple print factories are managed by a single, centralized production server).

Appellant further argues that claim 1 is “directed to an improvement to another technology or technical field” because it “claim[s] a novel process of customizing an ordering process that determines a historic order that closely matches an incoming order and receiving further input from a user on that customization” and “a user may be allowed to customize a portion rather than an entirety of the plan.” Appeal Br. 14.

This argument is unpersuasive. As the 2019 Guidance explains, an additional element may integrate a judicial exception into a practical application if it “reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field.” 2019 Guidance, 84 Fed. Reg. 55; *see* October 2019 PEG Update at 11. However, the steps that Appellant identifies (customizing an ordering process, determining a historic order that closely matches an incoming order, and receiving input from a user on that customization for all or part of the plan) are not improvements to the functioning of a computer or an improvement to other technology or a technical field. To the contrary, as discussed with respect to Step 2A, Prong 1, above, these steps are mental processes and interactions between people because they do not require technology at all (computer or otherwise) and some of the steps can be performed by a human in the mind or with pen and paper. Therefore, the improvement identified by Appellant

is simply an improvement in the judicial exception itself, which is insufficient to render the judicial exception patent eligible. *See* October 2019 PEG Update at 13 (“it is important to keep in mind that an improvement in the judicial exception itself . . . is not an improvement in technology”); *Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1084, 1093–94 (Fed. Cir. 2019) (determining that a claim that provided a trader with more information to facilitate market trades improved the business process of market trading but did not improve computers or technology).

Consequently, the additional limitations in claim 1 beyond the judicial exception do not serve to integrate the judicial exception into a practical application within the meaning of step 2A, prong 2, of the 2019 Guidance.

D. Analysis under Step 2B

Under Step 2B, we determine whether claim 1 includes additional elements individually or in combination that provide an inventive concept and, therefore, amount to significantly more than the exception itself. *See* 2019 Guidance, 84 Fed. Reg. at 56; *Alice*, 573 U.S. at 221. We agree with the Examiner that claim 1 does not include additional elements that provide any such “inventive concept,” and that claim 1 does not add limitations beyond the judicial exception that are not “well-understood, routine, [or] conventional” in the field. *See* MPEP § 2106.05(d).

As discussed above with respect to Step 2A, Prong 2, the only additional element in claim 1 beyond the abstract idea is the use of a “historical order database” for the historical orders, and claims 9 and 21 additionally recite a “non-transitory processor-readable medium storing code representing instructions that when executed by a processor cause the processor to” carry out the claimed mental process steps. Appeal Br. 27,

31–32 (Claims Appendix). However, as discussed above, these are simply generic computer elements. *See* Spec. ¶ 39, Fig. 3 (stating that “[t]he historical order database . . . can be built based on software components, such as from Lucene, an open source software package” and showing the “historical order database 330” as generic cylinder in Figure 3); *id.* ¶¶ 26–29 (explaining that the system may include “processor-readable media that generally provide storage of computer/processor-readable instructions, data structures, program modules, and other data” including “various application programs or other instructions stored in memory”). As such, we agree with the Examiner that they are well-understood, routine, and conventional and are therefore insufficient to provide an “inventive concept” that amounts to significantly more than the abstract idea itself. *See* Final Act. 11; Ans. 6; *Alice*, 573 U.S. at 223 (“the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention”).

Appellant contends that claim 1 passes Step 2B because the steps of “receiving an election indicating a historical production plan as a selected production plan” and then “customizing the selected production plan before admitting the selected production plan wherein customizing the selected production plan comprises, at least, receiving input from a user indicating a request to change a step in the selected production plan” are not well-understood, routine and conventional in the field. Appeal Br. 13. However, as discussed above with respect to Step 2A, Prong 1, these limitations relate to either (1) mental processes that can be performed by a human in the mind or with pen and paper, and/or (2) certain methods of organizing human activity, and, therefore, these steps relate to the abstract ideas, themselves.

Thus, they are not “additional elements” sufficient to provide an inventive concept that provides “significantly more” than the abstract ideas.

Consequently, we agree with the Examiner that claim 1 is directed to patent-ineligible subject matter. The same is true of independent claim 7 which includes similar limitations as claim 1. We reach the same conclusion as to independent claims 9 and 21, which additionally recite the generic element of a “non-transitory processor-readable medium storing code representing instructions that when executed by a processor cause the processor to” perform the claimed functions. We, therefore, sustain the rejection of independent claims 1, 7, 9, and 21, as well as the rejection of dependent claims 2, 3, 5, 6, 8, 10–14, 16–20, and 22, which are not argued separately.

CONCLUSION

We affirm the Examiner’s rejections of claims 1–3, 5–14, and 16–22 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–3, 5–14, 16–22	101	Eligibility	1–3, 5–14, 16–22	

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)(1).

AFFIRMED