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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO. Includes application details for 15/136,437 and 22222 7590, inventor Rock J. Petit, attorney CMD 245, examiner STCLAIR, ANDREW D, art unit 3753, and notification date 01/22/2020.

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ROCK J. PETIT, MITCHELL J. HEIN,  
and PAUL A. SELLE

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Appeal 2019-005103  
Application 15/136,437  
Technology Center 3700

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Before NATHAN A. ENGELS, ERIC C. JESCHKE, and  
RICHARD H. MARSCHALL, *Administrative Patent Judges*.

JESCHKE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> seeks review, under 35 U.S.C. § 134(a), of the Examiner's decision, as set forth in the Final Office Action dated September 26, 2018, and as further explained in the Advisory Action dated April 8, 2019, rejecting claims 1–11, 20–23, and 30–33. Claims 12–19, 24–29, and 34 have been withdrawn. We have jurisdiction under 35 U.S.C. § 6(b).

*We affirm in part.*

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. CMD Corporation (“Appellant”) is the applicant under 37 C.F.R. § 1.46 and is identified as the real party in interest. Appeal Br. 3.

## BACKGROUND

The disclosed subject matter “relates generally to the art of dispensing gaseous fuels to vehicles.” Spec. ¶ 1. Claims 1, 10, and 20 are independent.

Claim 1 is reproduced below, with emphasis added:

1. A gaseous fuel station for filling vehicle tanks with fuel, comprising:

a plurality of storage vessels, including a first storage vessel at a first pressure, and a second storage vessel at a second pressure, wherein the first pressure is less than or equal to the second pressure;

a plurality of dispensing sub-stations, each dispensing sub-station comprising a dispensing hose, and a control valve;

wherein the plurality of dispensing sub-stations includes a first dispensing sub-station that is in controllable fluid communication with each of the first and second storage vessels such that fluid can flow in a first fluid path from each of the first and second storage vessels through the first dispensing sub-station to a vehicle tank, and wherein the dispensing hose, and the control valve of the first dispensing sub-station are in the first fluid path;

wherein the plurality of dispensing sub-stations further includes a second dispensing sub-station that is in controllable fluid communication with each of the first and second storage vessels such that fluid can flow in a second fluid path from each of the first and second storage vessels through the second dispensing sub-station to a vehicle tank, and wherein the dispensing hose, and the control valve of the second dispensing sub-station are in the second fluid path; and

a controller, connected to *receive feedback indicative of a pressure from each of the first and second dispensing sub-stations* and to provide control signals to the control valves of the first and second dispensing sub-station to implement a desired fill scheme, wherein the controller includes an output on which usage data is communicated to at least one of a station manager and an offsite location.

### REFERENCES

<b>Name</b>	<b>Reference</b>	<b>Date</b>
O'Connor	US 5,400,253	Mar. 21, 1995
Cohen	US 7,028,724 B2	Apr. 18, 2006
Tiberghien	US 8,616,524 B2	Dec. 31, 2013
Mutter	US 2002/0053365 A1	May 9, 2002
Graham	US 2003/0164202 A1	Sept. 4, 2003
Allidieres	US 2009/0151812 A1	June 18, 2009
Uemura	US 2010/0307636 A1	Dec. 9, 2010
Mori	US 2012/0125482 A1	May 24, 2012
Takata	US 2012/0216915 A1	Aug. 30, 2012
Thiessen	US 2015/0083273 A1	Mar. 26, 2015
Sasaki	Japanese Publication No. 2003-172497A (and machine translation)	June 20, 2003

### REJECTIONS

1. Claim 4 stands rejected under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.
2. Claim 4 stands rejected under 35 U.S.C. § 112(b) as failing to particularly point out and distinctly claim the subject matter regarded as the invention.
3. Claims 1, 3, 5, 6, and 9 stand rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Mutter, and O'Connor.
4. Claims 2 and 4 stand rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Mutter, O'Connor, and Thiessen.
5. Claim 7 stands rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Mutter, O'Connor, and Takata.
6. Claim 8 stands rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Mutter, O'Connor, and Tiberghien.

7. Claim 10 stands rejected under 35 U.S.C. § 103 as unpatentable over Allidieres and Cohen.

8. Claim 11 stands rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Cohen, and Uemura.

9. Claims 20 and 23 stand rejected under 35 U.S.C. § 103 as unpatentable over Sasaki, Mori, and O'Connor.

10. Claims 21 and 22 stand rejected under 35 U.S.C. § 103 as unpatentable over Sasaki, Mori, O'Connor, and Thiessen.

11. Claims 1, 32, and 33 stand rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Mori, and O'Connor.

12. Claims 30 and 31 stand rejected under 35 U.S.C. § 103 as unpatentable over Allidieres, Mori, O'Connor, and Graham.

#### DISCUSSION

##### *Rejections 1 and 2 – The rejections of claim 4 under 35 U.S.C. §§ 112(a) and 112(b)*

The Examiner rejected dependent claim 4, finding that its claim language (1) lacks adequate written description support (*see* Final Act. 2–3) and (2) is indefinite (*see id.* at 3–4). In an amendment filed February 26, 2019 (i.e., *after* the Final Office Action on appeal), Appellant proposed revisions to certain language in claim 4 highlighted by the Examiner in these Rejections. *Compare* Amendment, at 3 (dated Feb. 26, 2019), *with* Final Act. 2–4. As acknowledged by Appellant in its Appeal Brief, however, the Examiner *did not* enter the amendment. *See* Appeal Br. 6 (“Claim 4 was amended after the Final Action, and that amendment was not entered.”); Adv. Act. 2.

Appellant does not list these Rejections in the “GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL” and does not present any

arguments addressing these Rejections. *See* Appeal Br. 10–13; *see generally* Reply Br. Under these circumstances, we deem Appellant to have waived any arguments as to these Rejections. *See Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (“When the appellant fails to contest a ground of rejection to the Board, . . . the Board may treat any argument with respect to that ground of rejection as waived”); *see also* 37 C.F.R. § 41.37(c)(1)(iv) (2018) (“The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant. Except as provided for in §§ 41.41, 41.47 and 41.52, any arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal.”).

To the extent Appellant requests the Patent Trial and Appeal Board to direct the Examiner to enter the amendment, we cannot grant the requested relief. The refusal by an examiner to enter an amendment filed after a final rejection is a petitionable matter, not one for appeal. *See In re Berger*, 279 F.3d 975, 984 (Fed. Cir. 2002) (citing *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967) (stating that the predecessor to the PTAB “does not consider the issue of whether the examiner’s refusal to enter the proposed amendment after final rejection constituted an abuse of discretion”)); *see also* 37 C.F.R. § 1.127 (“From the refusal of the primary examiner to admit an amendment, in whole or in part, a petition will lie to the Director under § 1.181.”). For these reasons, we summarily sustain these Rejections.

*Rejection 3 – The rejection of claims 1, 3, 5, 6,  
and 9 under 35 U.S.C. § 103*

For this Rejection, Appellant argues the patentability of independent claim 1 and does not provide separate arguments for claims 3, 5, 6, and 9,

which depend from claim 1. Appeal Br. 12–13; Reply Br. 2–3. Thus, we address claim 1, with claims 3, 5, 6, and 9 standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv). For claim 1, the Examiner relied on a combination of Allidieres, Mutter, and O’Connor for the recited limitations, and the Examiner provided reasons to modify Allidieres based on Mutter and based on O’Connor. *See* Final Act. 4–7.

First, Appellant states that claim 1 requires “that the controller ‘receive feedback indicative of a pressure from each of the first and second dispensing sub-stations’” (as recited in the claim language shown with emphasis above), and argues that “[t]his is not found in the prior art.” Appeal Br. 12. Appellant contends that “[t]he Examiner relied on [Mutter] for this claimed feature,” but, according to Appellant, Mutter instead “teaches to sense the pressure in the tank of the vehicle being filled, not in the dispensing substation.” *Id.* In support, Appellant quotes a passage from Mutter describing sensors 32, 33 as “arranged in the vehicle fuel tank 31.” Mutter ¶ 36, *quoted at* Appeal Br. 12; *see also* Mutter, Fig. 1 (showing sensors 32, 33 inside tank 31).

With this argument, Appellant does not address the rejection as articulated. As clarified in the Answer, the Examiner relied on Allidieres—not Mutter—to satisfy the recited “feedback indicative of a pressure from each of the first and second dispensing sub-stations” in the context of the proposed modified device. Ans. 3. Specifically, in the Final Office Action, the Examiner found that Allidieres teaches that “each sub-station monitors pressure (via pressure sensors 133, 1[43]; figure 1 and paragraph 0035).”

Final Act. 5<sup>2</sup>; Ans. 3 (stating that Allidieres “accounts for a pressure sensor (133, 1[43]) in each sub-station”). As to this claim language, the Examiner clarifies that “[t]he first substation (13) of Allidieres has a first pressure sensor (133), and the second substation (14) of Allidieres has a second pressure sensor (143).” Ans. 3 (discussing Allidieres, Fig. 1).

Second, highlighting a statement in the Final Office Action, Appellant argues that “[t]he Examiner was correct - Allidieres . . . does not teach a controller using pressure sensed from a dispensing sub-station to implement a desired control scheme.” Reply Br. 2 (discussing Final Act. 5). According to Appellant, “[w]hile one prior art publication teaches sensing pressure and another teaches controlling a valve[,] nothing teaches a controller that implements a desired fill scheme and receives pressure feedback from the dispensing substations.” *Id.*

Nonobviousness cannot be established by attacking prior art references individually when the rejection is based on the teachings of a combination of references. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Here, as clarified in the Answer, the Examiner generally relies on Mutter “for the teaching of a controller that controls a valve” and generally relies on Allidieres “for a pressure sensor (133, 1[43]) in each sub-station.” Ans. 3. The Examiner states that “[p]roviding a controller to the system of Allidieres for controlling each substation (13, 14), based on the

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<sup>2</sup> Although the Rejection refers to “pressure sensors 133, 134,” in the Answer, the Examiner clearly references sensors 133 and 143 in Allidieres. *See* Ans. 3 (“The first substation (13) of Allidieres has a first pressure sensor (133), and the second substation (14) of Allidieres has a second pressure sensor (143).”).

teaching of Mutter, accounts for the system of claim 1.” *Id.* Thus, the Examiner relies on *the combination* of Allidieres and Mutter to address the limitation argued by Appellant. By arguing that neither Allidieres nor Mutter *alone* teaches all aspects of the limitation at issue, Appellant does not address the rejection as articulated, in which the Examiner relies on certain *combined* teachings of the prior art. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (“[T]he test [for obviousness] is what the *combined teachings* of the references would have suggested to those of ordinary skill in the art.” (emphasis added)).

Third, Appellant argues that “there is no suggestion in the prior art to have a controller that implements a desired fill scheme and receives pressure feedback from the dispensing substations.” Reply Br. 3. According to Appellant, Allidieres “suggests two reasons for sensing pressure: 1) to pressurize the storage tanks (¶34); and 2) safety venting (¶35)” and Mutter “does not teach pressure sensing at all.” *Id.* at 2–3.

To the extent this argument is distinct from the prior argument, Appellant contends that the prior art lacks an express “suggestion” to combine the aspects of Allidieres and Mutter relied on by the Examiner. An express teaching, suggestion, or motivation, however, is *not* a requirement for an obviousness determination. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418–19 (2007) (holding that when the teaching-suggestion-motivation test is applied as a rigid formula, it is incompatible with Supreme Court precedent). Here, Appellant has not addressed or shown error in the reasoning articulated to modify Allidieres based on Mutter. *See* Final Act. 6.

Moreover, to the extent Appellant asserts error in that the disclosed reasons to sense pressure in Allidieres may not align with the Examiner’s

stated reasoning, we note that “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR*, 550 U.S. at 420. For these reasons, we sustain the rejection of claim 1 under 35 U.S.C. § 103 as unpatentable over *Allidieres*, *Mutter*, and *O’Connor*. Claims 3, 5, 6, and 9 fall with claim 1.

*Rejections 4 through 6 – The rejection of claims  
2, 4, 7, and 8 under 35 U.S.C. § 103*

Claims 2, 4, 7, and 8 depend from claim 1. *See* Appeal Br. 15–16 (Claims App.). Appellant argues that claims 2, 4, 7, and 8 are allowable based on their dependence from claim 1. *See id.* at 12 (arguing that “[c]laim 1 (and thus dependent claims 2–9)” are allowable (emphasis added)).

Appellant does not provide additional arguments for claims 2, 4, 7, and 8.

For the reasons above, we are not apprised of error in the rejection of claim 1 under 35 U.S.C. § 103 as unpatentable over *Allidieres*, *Mutter*, and *O’Connor*. *See supra* Rejection 3. As such, we sustain the rejection of claims 2, 4, 7, and 8 under 35 U.S.C. § 103 as unpatentable over *Allidieres*, *Mutter*, *O’Connor*, and either *Thiessen* (Rejection 4), *Takata* (Rejection 5), or *Tiberghien* (Rejection 6).

*Rejections 7 and 8 – The rejection of claims 10  
and 11 under 35 U.S.C. § 103*

Independent claim 10 requires, among other limitations, “a fitting capable of connecting to the vehicle tank and capable of connecting to at least two dispensing substations, whereby the flow into the tank is from at least two dispensing sub stations.” Appeal Br. 17 (Claims App.). The Examiner relies on *Cohen* for this limitation:

Cohen teaches a fitting (20) capable of connecting to the vehicle tank (column 6, lines 45-47) and capable of connecting to at least two dispensing substations (at 204) (capable of connecting at 204 to two dispensing substations, for example sequentially, by detaching and reattaching at 204), whereby the flow into the tank is from at least two dispensing sub stations (capable of, see figure 4 and MPEP 2114; the system of Cohen is capable of directing flow into the tank from two dispensing sub stations for example sequentially).

Final Act. 12.

Appellant argues that the term “fitting” in the limitation at issue “is explicitly defined in the specification as [‘]the hardware and/or controller used to effectively combine two or more fluid flow paths to fill one vehicle tank.’” Appeal Br. 13 (quoting Spec. ¶ 138). Appellant states that the Examiner found that certain structure in Cohen “is **capable of sequential connection** of first one substation and then a second substation,” but Appellant argues, “this does not teach to combine to [sic – two] or more fluid flow paths as required by the claimed fitting.” *Id.*

We agree with Appellant that the Specification here defines the term “fitting” as “the hardware and/or controller used to effectively combine two or more fluid flow paths to fill one vehicle tank.” Spec. ¶ 138. The Examiner takes the position that “the portion of the specification referred to by the Appellant[] is not sufficiently specific to put the public on notice of a special definition.” Ans. 4 (citing MPEP § 2111.01). We disagree.

When an applicant acts as a lexicographer, definitions for terms must be set out in a specification “with reasonable clarity, deliberateness, and precision.” *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). The Specification here provides a “Glossary,” stating that the “following terms used herein have the meaning set forth below.” Spec. ¶ 127. The next

eighteen paragraphs are an alphabetical list of various terms and what each term “refers to.” Spec. ¶¶ 128–145. The definition of “fitting” relied on by Appellant is in that list. Although the Examiner is correct that “none of the actual claim language uses the term ‘combine’” (Ans. 4), that misses the point. As discussed above, the definition of “fitting” relied on *includes* the word “combine.” Spec. ¶ 138. On this record, the definition of “fitting” is set forth with sufficient “clarity, deliberateness, and precision” to provide public notice. *Paulsen*, 30 F.3d at 1480.

The statements in paragraph 68 of the Specification, highlighted by the Examiner (Ans. 4), do not undermine this finding. The Examiner does not identify (nor are we independently aware of) any instance in which our reviewing courts have allowed such *generalized* language to override a *specific*, express definition of a term. For these reasons, we construe “fitting” in claim 10 in line with the definition provided in paragraph 138 of the Specification. *See* Reply Br. 3 (arguing that “the word ‘fitting’ must be given the definition explicitly provided in the specification”) (citing MPEP § 2111.01 (IV)(A) (“Where an explicit definition is provided by the applicant for a term, that definition will control interpretation of the term as it is used in the claim.”)).

The Examiner has not explained how Cohen satisfies the limitation at issue under the proper construction of “fitting” (discussed above). Instead, the Examiner only asserts that Cohen satisfies the limitation at issue under the Examiner’s own construction of “fitting,” which does not overlap with the proper construction. *See* Final Act. 12 (first full paragraph); Ans. 4–5 (“The coupler shown in figure 3 of Cohen . . . is capable of being connected to two different substations, such as sequentially. . . . Appellant’s

arguments effectively contend that the claim must be interpreted to require a two-into-one coupler which simultaneously dispenses fluid from two inlets through a single outlet, but the claim language is not nearly so specific.”).

For these reasons, we do not sustain the rejection of claim 10, or the rejection of claim 11 (which depends from claim 10) under 35 U.S.C. § 103.

*Rejections 9 and 10 – The rejection of claims  
20–23 under 35 U.S.C. § 103*

The Examiner rejected claims 20 and 23 under 35 U.S.C. § 103 as unpatentable over Sasaki, Mori, and O’Connor, and rejected claims 21 and 22 under 35 U.S.C. § 103 as unpatentable over Sasaki, Mori, O’Connor, and Thiessen. Final Act. 13–17. Appellant does not list these Rejections in the “GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL” and does not present any arguments addressing these Rejections. *See* Appeal Br. 10–13; *see generally* Reply Br. Appellant also does not list claims 20–23 as “on appeal.” Appeal Br. 5. Under these circumstances, we deem Appellant to have waived any arguments as to these Rejections. *See Hyatt*, 551 F.3d at 1314; 37 C.F.R. § 41.37(c)(1)(iv). For these reasons, we summarily sustain these Rejections.

*Rejection 11 – The rejection of claims 1, 32,  
and 33 under 35 U.S.C. § 103*

For this Rejection, Appellant argues the patentability of independent claim 1 and does not provide separate arguments for claims 32 and 33, which depend from claim 1. Appeal Br. 12–13; Reply Br. 2–3. We address claim 1, with claims 32 and 33 standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv). For claim 1, the Examiner relied on a combination of Allidieres, Mori, and O’Connor for the recited limitations,

and the Examiner provided reasons to modify Allidieres based on Mori and based on O'Connor. *See* Final Act. 17–20.

Appellant argues that the Examiner relied on Mori “as teaching the claimed ‘feedback indicative of a pressure from each of the first and second dispensing sub-stations,’” but, according to Appellant, “Mori teaches to control using tank pressure, not dispensing substation pressure.” Appeal Br. 12–13 (discussing aspects of Mori ¶¶ 32, 61).

Like the first argument regarding Rejection 3 (discussed above), this argument does not apprise us of error because Appellant does not address the rejection as articulated. As clarified in the Answer, in the context of this Rejection, the Examiner again relied on Allidieres—not Mori—to satisfy the recited “feedback indicative of a pressure from each of the first and second dispensing sub-stations” in the context of the proposed modified device. Specifically, in the Final Office Action, the Examiner again found that Allidieres teaches that “each sub-station monitors pressure (via pressure sensors 133, 1[43]; figure 1 and paragraph 0035).” Final Act. 18; *id.* (stating that Allidieres “accounts for a pressure sensor (133, 1[43]) in each sub-station”). As to this claim language, the Examiner again clarifies that “[t]he first substation (13) of Allidieres has a first pressure sensor (133), and the second substation (14) of Allidieres has a second pressure sensor (143).” Ans. 3 (discussing Allidieres, Fig. 1); *see also id.* at 4 (relying on the remarks on page 3 to address Rejection 11).

Moreover, to the extent Appellant relies on the arguments in the Reply Brief (characterized as the second and third arguments in the context of Rejection 3) in the context of this Rejection, for reasons similar to those discussed above, we are not apprised of error based on those arguments. For

these reasons, we sustain the rejection of independent claim 1 under 35 U.S.C. § 103 as unpatentable over Allidieres, Mori, and O'Connor. Claims 32 and 33 fall with claim 1.

*Rejection 12 – The rejection of claims  
30 and 31 under 35 U.S.C. § 103*

The Examiner rejected claims 30 and 31 under 35 U.S.C. § 103 as unpatentable over Allidieres, Mori, O'Connor, and Graham. Final Act. 20–21. Appellant does not list this Rejection in the “GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL.” *See* Appeal Br. 10–13; *see generally* Reply Br. Appellant does assert, however, that claims 30 and 31 are allowable based on their dependence from claim 1. *See id.* at 12 (arguing that “[c]laim 1 (*and thus dependent claims . . . 30–33*)” are allowable (emphasis added)). Appellant does not provide additional arguments for claims 30 and 31. For the reasons above, we are not apprised of error in the rejection of claim 1 under 35 U.S.C. § 103 as unpatentable over Allidieres, Mori, and O'Connor. *See supra* Rejection 11. As such, we sustain the rejection of claims 30 and 31 under 35 U.S.C. § 103 as unpatentable over Allidieres, Mori, O'Connor, and Graham.

CONCLUSION

We *affirm in part* the Examiner’s rejection of claims 1–11, 20–23, and 30–33. More specifically, we (1) *affirm* the decision to reject claim 4 under 35 U.S.C. § 112(a), (2) *affirm* the decision to reject claim 4 under 35 U.S.C. § 112(b), (3) *affirm* the decision to reject claims 1–9, 20–23, and 30–33 under 35 U.S.C. § 103, and (4) *reverse* the decision to reject claims 10 and 11 under 35 U.S.C. § 103.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>References/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
4	112(a)	Written Description	4	
4	112(b)	Indefiniteness	4	
1, 3, 5, 6, 9	103	Allidieres, Mutter, O'Connor	1, 3, 5, 6, 9	
2, 4	103	Allidieres, Mutter, O'Connor, Thiessen	2, 4	
7	103	Allidieres, Mutter, O'Connor, Takata	7	
8	103	Allidieres, Mutter, O'Connor, Tiberghien	8	
10	103	Allidieres, Cohen		10
11	103	Allidieres, Cohen, Uemura		11
20, 23	103	Sasaki, Mori, O'Connor	20, 23	
21, 22	103	Sasaki, Mori, O'Connor, Thiessen	21, 22	
1, 32, 33	103	Allidieres, Mori, O'Connor	1, 32, 33	
30, 31	103	Allidieres, Mori, O'Connor, Graham	30, 31	
<b>Overall Outcome</b>			1-9, 20-23, 30-33	10, 11

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-IN-PART