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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GREGORY JOHN CHARLES STOKES and
STEVEN JOHN ANTHONY BARICS

Appeal 2019-006418
Application 12/051,056
Technology Center 1700

Before JEFFREY T. SMITH, BEVERLY A. FRANKLIN, and
MICHAEL G. MCMANUS, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 6, 8, 9, and 17–31. 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 Barokes Pty Ltd. Appeal Br. 1.

CLAIMED SUBJECT MATTER

Claim 1 is illustrative of Appellant's subject matter on appeal and is set forth below:

1. A wine filled two-piece aluminium can comprising wine that has less than 35 ppm of free SO₂, less than 300 ppm of chlorides and less than 800 ppm of sulfates, wherein the can is sealed with an aluminium closure such that there is a pressure within the can sufficient to prevent buckling of the can, wherein the inner surface of the aluminium can is coated with a corrosion resistant coating, wherein the coating comprises an epoxy resin combined with a formaldehyde based cross-linking agent, wherein the quantity of coating within the can comprises at least about 175 mg as computed for a conventional 375 ml can and wherein the wine is non-pasteurized.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Khanna	US 3,960,979	June 1, 1976
Ferrarini et al., <i>Packaging of Wine in Aluminum Cans</i> , OENOLOGY DEPARTMENT OF C.R.V.E GRAPE AND WINE RESEARCH (Bologna University)		
Kojima et al., <i>Corrosion of Aluminum in White Wine</i> , The University of Tokyo (School of Engineering) (1996)		
Ribereau-Gayon et al., <i>Handbook of Enology, Vol. 1, The Microbiology of Wine and Vinifications</i> , Wiley & Sons LTD (hereinafter "Ribereau-Gayon (Vol. 1)")		
Ribereau-Gayon et al., <i>Handbook of Enology, Vol. 2, The Chemistry of Wine Stabilization and Treatments</i> , Wiley & Sons LTD (hereinafter "Ribereau-Gayon (Vol. 2)")		
Leske et al., <i>The Composition of Australian Grape Juice</i>		

REJECTIONS

1. Claims 1, 9, 25–28, and 31 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima, Khanna and Ribereau-Gayon (Vol. 2).

2. Claims 8 and 30 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima, Khanna, Ribereau-Gayon (Vol. 2) as applied to claims 1 and 25 and further in view of Ribereau-Gayon (Vol. 1).

3. Claims 6 and 29 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima, Khanna and Ribereau-Gayon (Vol. 2) as applied to claims 1 and 25 above, and further in view of Leske.

4. Claims 17 and 20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima et al and Ribereau-Gayon (Vol. 2).

5. Claim 18 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima and Ribereau-Gayon (Vol. 2), as applied to claim 17, and further in view of Leske.

6. Claim 19 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima and Ribereau-Gayon (Vol. 2), hereinafter Ribereau-Gayon (Vol. 2) as applied to claim 17 and further in view of Ribereau-Gayon (Vol. 1).

7. Claims 21, 23, and 24 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima and Ribereau-Gayon (Vol. 1).

8. Claim 22 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Ferrarini in view of Kojima and Ribereau-Gayon (Vol. 1) as applied to claim 21, and further in view of Leske.

OPINION

We review the appealed rejections for error based upon the issues Appellant identifies, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”). After considering the argued claims and each of Appellant’s arguments, we are not persuaded of reversible error in the appealed rejections essentially for the reasons provided by the Examiner in the Final Office Action and in the Answer, with the following emphasis, and affirm the decision of the Examiner.

Before reaching the merits of the instant case, we refer to Appellant’s Exhibit A which is a copy of a Board Decision for Appeal No. 2016–005029. Beginning on page 2 of the Appeal Brief, Appellant states that in this Board Decision (Appeal No. 2016–005029), the Board determined that two limitations that were present in the claims of the Application were improperly rejected by the Examiner. Appellant identifies the first claim limitation being the “headspace” in the can of wine, and the second limitation being the non-pasteurized wine. Appeal Br. 2–3. Appellant states that, relying on this determination of the Board of non-obviousness of these two claim limitations, Appellant filed a Request for Continued Examination wherein all claims were amended to contain the precise claim limitations that the Board had previously determined were not supported by the

Examiner's position. The Examiner again rejected all claims of the Application in a non-final and then final Office Action. Appellant states that the current Appeal is from this recent determination of the Examiner in that final Office Action. Appeal Br. 3.

Beginning on page 6 of the Appeal Brief, Appellant argues the subject matter of claim 1 ("wine is non-pasteurized"), claim 17 ("wine is non-pasteurized"), claim 21 (head space within the can having an oxygen content of less than 1% v/v), claim 25 ("wine is non-pasteurized"), dependent claims 8, 19, 23, and 30 (containing a limitation that the head space within the can "comprises 80-90% nitrogen v/v and 2-20% carbon dioxide v/v."). We thus select claim 1 as representative of these claims.²

² On page 8 of the Appeal Brief, Appellant presents Group I (claims 1, 6, 8, 9, 17, 18, 19, 20, and 25). The independent claims from this group (claims 1, 17, and 25) are represented by our consideration of claim 1. We note that Appellant mentions claim 25 on page 34 of the Appeal Brief, but simply recites a limitation of claim 25 pertaining to wine shelf life. As such, Appellant presents no argument sufficient to require us to consider separate patentability of claim 25. 37 C.F.R. § 41.37(c)(iv) ("A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim."); *see also, e.g., In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) ("a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art" is not a substantive argument that requires claims be separately addressed); *In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) ("It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for nonobvious distinctions over the prior art."). The dependent claims in Group I (claims 6, 8, 9, 18, 19, 20) are not argued separately except for the limitation in both claims 8 and 19 involving the head space comprising 80–97% nitrogen v/v and 2-20% carbon dioxide v/v. As mentioned, *supra*, we select claim 8 as representative of these dependent claims. Hence, we consider claims 1 and 8 as representative of Group I. On page 24 of the Appeal Brief, Appellant

We select claim 8 for the limitation that head space within the can “comprises 80-90% nitrogen v/v and 2-20% carbon dioxide v/v.”. We also consider claim 21 (head space within the can having an oxygen content of less than 1% v/v) . 37 C.F.R. § 41.37(c)(1)(iv).

Our determinations with regard to Rejections 1 and 2 are dispositive for Rejections 3, 4, 5, and 6 based upon Appellant’s grouping of the claims and arguments. Our determination with regard to Rejection 7 is dispositive for Rejection 8 based upon Appellant’s grouping of the claims and arguments.

As an initial matter, it is noted that on pages 10–11 of the Appeal Brief, Appellant explains that it is not necessary for Appellant to discuss the disclosures of any of the other applied references since these references were already addressed by the Board in the Decision in Exhibit A. Appellant states that because of the determination of the Board, Appellant has made a decision not to argue distinctions in the disclosures of the remaining references that were cited against patentability of the claims of Claim Grouping I. Rather, Appellant focuses its arguments on the teachings of Ribereau-Gayon Vol. 2, when cited in combination with the other references.

presents Group II (independent claim 21, with dependent claims 22, 23, 24, and 30). We select claim 21 as representative (involving the limitation of oxygen content of less than 1% v/v) of this group. Claim 30 has the same limitation as claim 8 so our consideration of claim 8 is representative of claim 30.

We thus focus on the issue of whether Ribereau-Gayon (Vol. 2) suggests the claimed limitation of “non-pasteurized wine” in making our determination herein regarding Rejection 1.

The Examiner’s findings with regard to Ribereau-Gayon (Vol. 2) are set forth on pages 6–7 of the Answer. Therein, the Examiner finds that Ribereau-Gayon (Vol. 2) discloses the following:

- initially pasteurization was used to protect wines from the microbial spoilage caused by acetic acid and lactic bacteria (page 337);
- in more recent years heating has mainly been used to kill yeast, to stabilize sweet wines containing residual sugar (page 337);
- microbial spoilage can now be avoided by other means, based on careful fermentation management, the use of sulfur dioxide and the reduction of contaminant population by various clarification processes (page 338);
- wine may be pasteurized in the bottle or just before bottling, but other stabilization techniques, especially sulfuring and sterile filtration prior to bottling, are easier to use (page 338).

Ans. 6.

The Examiner states that thus Ribereau-Gayon (Vol. 2) discloses that there are alternative methods of wine stabilization that do not require pasteurization. Ans. 6. The Examiner concludes that therefore it would have been obvious to have employed any well-known method for wine stabilization prior to bottling that does not require pasteurization as suggested by Ribereau-Gayon (Vol. 2). Ans. 6–7.

Appellant argues that Ribereau-Gayon Vol. 2 does not teach the claim limitation of “the wine is non-pasteurized”. Appeal Br. 12. Appellant argues that the Examiner has attempted to change what is actually claimed by Appellant when stating that Ribereau-Gayon (Vol. 2) discloses that there are alternative methods of wine stabilization that do not require

pasteurization. Appeal Br. 12–13. We are unpersuaded by this line of argument. The point being made by the Examiner is that it would have been obvious to have substituted one known stabilization method for wine (pasteurization) for another. A person of ordinary skill in the art would have recognized the interchangeability of the element shown in the prior art for the corresponding element disclosed in the specification based upon the teachings found in Ribereau-Gayon (Vol. 2). *Caterpillar Inc. v. Deere & Co.*, 224 F.3d 1374 (Fed. Cir. 2000); *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1316 (Fed. Cir. 1999); *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus. Inc.*, 145 F.3d 1303, 1309 (Fed. Cir. 1998).

On pages 13–16 of the Appeal Brief, Appellant argues that the Examiner’s interpretation of the teachings of Ribereau-Gayon (Vol. 2) is inconsistent with how one skilled in the art would interpret them. Appellant argues that the methods of stabilizing wines using heat treatment is pasteurization according to Ribereau-Gayon (Vol. 2). Appeal Brief, 13–16. We are unpersuaded by this line of argument. As the Examiner states in response, on page 18 of the Answer, Ribereau-Gayon (Vol. 2) teaches that “other stabilization techniques, especially sulfuring and sterile filtration prior to bottling, are easier to use” (Ribereau-Gayon (Vol. 2), p. 336). The point being made is that there are other known stabilization techniques (other than pasteurization) such as sulfuring and sterile filtration. See also the top of the first column on page 338 of Ribereau-Gayon (Vol. 2) in this regard.

Ribereau-Gayon (Vol. 2) also teaches high temperature bottling in the second column on page 338, which differs from the conditions involved in pasteurization, that is another know stabilization technique.

Hence, the teachings of Ribereau-Gayon (Vol. 2) are not so limited as Appellant believes them to be. Thus, we are unpersuaded of error by this line of argument. *Merck & Co. v. Biocraft Labs., Inc.*, 874, F.2d 804, 807 (Fed. Cir. 1989) (“That the [prior art] patent discloses 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.”); *In re Corkill*, 771 F.2d 1496, 1500 (Fed. Cir. 1985) (affirming obviousness rejection of claims in light of prior art teaching that “hydrated zeolites will work” in detergent formulations, even though “the inventors selected the zeolites of the claims from among ‘thousands’ of compounds”).

On pages 17–20 of the Appeal Brief, Appellant next argues that the Examiner fails to properly prove that the teachings of Ribereau-Gayon (Vol. 2) can be combined with the disclosures of the primary reference (Ferrarini) and that there would have been a reasonable expectation of success. We are unpersuaded by this line of argument. As stated *supra*, a person of ordinary skill in the art would have recognized the interchangeability of the element shown in the prior art for the corresponding element disclosed in the specification. Sufficient proof is found in Ribereau-Gayon (Vol. 2)’s teachings (that there are known equivalents to pasteurization for stabilizing wine as discussed above).

Appellant next argues that Ferrarini requires pasteurization of wine and teaches away from non-pasteurization for the reasons set forth on pages 19–32 of the Appeal Brief. We are unpersuaded by this line of argument. As such, as stated by the Examiner on page 22 of the Answer, substitution of a known equivalent stabilization step for Ferrarini’s pasteurization step is not

a teaching away. In other words, Appellant has not directed us to evidence in Ferrarini that one skilled in the art cannot use an equivalent stabilization step in place of pasteurization. To constitute a teaching away a reference must indicate that a particular feature should not or cannot be used for a particular purpose. *Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1090 (Fed. Cir. 1995).

Appellant next presents arguments for independent claim 21 and dependent claims 8, 9, 30, 22, 23, and 24 on pages 24–38 of the Appeal Brief. These claims pertain to the head space limitation mentioned *supra*. Appellant states that the teachings of Ribereau-Gayon (Vol. 1) are only contested in the Appeal Brief since the Board Decision in Exhibit A addresses the other limitations and references. Appeal Br. 26.

Appellant argues, *inter alia*, that Ribereau-Gayon (Vol. 1) concerns wine in storage containers rather than wine stored in a can. Appeal Br. 28–29. Appellant submits that no person skilled in the art would equate head space requirements for bulk storage of wine with the requirements for wine stored in aluminum cans. Appeal Br. 29.

In response to Appellant's stated arguments, we refer to the Examiner's response made on pages 22–23. Therein, the Examiner relies upon Ribereau-Gayon (Vol. 1) (page 216) for teaching:

--even before the use of antioxidants (sulfur dioxide and ascorbic acid), the first recommendation for protecting wines against the adverse effects of chemical or microbiological contamination was to limit their contact with air;
-- satisfactory results are obtained by storing wine in a partially filled tank with an inert gas, in the total absence of oxygen.³ Wine storage

³ This teaching of absence of oxygen meets the claim limitation of claim 21 of "less than 1% v/v" of oxygen.

using inert gas also permits the carbon dioxide concentration (lowering or increasing) to be adjusted;
--the following gases are authorized for storage: nitrogen, carbon dioxide and argon;

--carbon dioxide used in mixture with nitrogen (for example 15% CO₂+ 85% N₂)⁴ to avoid degassing of certain wines that must maintain a moderate CO₂ concentration (page 216).

Ans. 22.

The Examiner states that hence Ribereau-Gayon (Vol. 1) teaches that the headspace in the container may comprise, for example, 15% CO₂+ 85% N₂, to avoid degassing of certain wines that must maintain a moderate CO₂ concentration. Ans. 23.

The Examiner states that wine is stored in some kind of a container depending on the production stage, and that in order to prepare wine for consumption, wine has to be further stored in a container intended for the final consumption. Ans. 23. It is the Examiner's position that wine stored in a container for storage during production stage versus wine stored in a container for final consumption would benefit in the same way by employing the claimed amounts of carbon dioxide and nitrogen as suggested by Ribereau-Gayon (Vol. 1). Ans. 23. We agree. While Appellant argues 1) that wine stored in bulk containers for relatively short periods of time is not the same as wine stored in an aluminum can which may be stored up to 6 months (Appeal Br. 29), and 2) that no person skilled in the art would equate a head space requirements for the bulk storage of wine for short periods of time with the requirement for wine stored in aluminum cans for sale to the

⁴ This teaching of from 15% CO₂+ 85% N₂ meets the claim limitation of "80–97 nitrogen v/v and 2–20 carbon dioxide v/v".

public (Appeal Br. 29), we are unpersuaded by such argument because Appellant’s arguments are not supported by evidence of record. *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (“[U]nsworn attorney argument . . . is not evidence and cannot rebut . . . other admitted evidence”); *see also Estee Lauder, Inc. v. L’Oréal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997) (an argument made by counsel in a brief does not substitute for evidence lacking in the record.); *see also Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2010) (rejecting a nonobviousness position that was “merely attorney argument lacking evidentiary support).

We turn now to Appellant’s arguments pertaining to secondary considerations presented on pages 30–38 of the Appeal Brief. As to the affidavits already addressed by the Board Decision of Exhibit A, we take the same position for these same affidavits, herein, and adopt the positions taken in the Board Decision of Exhibit A.

As to the three new affidavits mentioned by Appellant on page 31 of the Appeal Brief (Exhibits B, C, and D), these affidavits are addressed below.

Exhibit B is a Declaration by Michelle Buck. Exhibit C is a Declaration by Robin Frank May. Exhibit D is a Declaration by Peter Scudamore-Smith. Appellant discusses these declarations on pages 30–38 of the Appeal Brief. We have carefully reviewed each declaration and the respective arguments made by Appellant.

With regard to the commercial success, Appellants needs to show that the success is linked to the claimed invention and not to some extraneous factor. *See, e.g., In re Huai-Hung Kao*, 639 F.3d 1057, 1069-70 (Fed. Cir.

2011). It is thus helpful to provide a description of what was sold, a description of the relevant market for the product, sales results that should include evidence of market share, and information on advertising within the relevant market. See, e.g., *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1025, 226 USPQ 881 (Fed. Cir. 1985) (Gross sales figures do not show commercial success absent evidence as to market share); *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 227 USPQ 766 (Fed. Cir. 1985) (heavy promotion or advertising, or position as market leader before the introduction of the patented product). Notably absent from the three declarations is information related to sales results, including evidence of market share, and information on advertising within the relevant market.

Also, merely showing that there was commercial success of an article which embodied the invention is not sufficient. *Ex parte Remark*, 15 USPQ2d 1498 (Bd. Pat. App. & Inter. 1990). In the instant case, the testimonials provided by each declarant refer to the quality of the coating and the weight of the coating as being attributable to the success of the product. See Exhibits B, C, and D. Yet, the specific ingredients and amounts of the coating and specific weight of the coating are not mentioned in the declarations, and a nexus is not provided with the claims in this regard. The commercial success must be due to the claimed features, and not due to unclaimed features.

Accordingly, Appellant has not established a sufficient nexus between the merits of the claimed invention and the alleged commercial success.

With regard to the showing of long felt need, a convincing showing of long-felt need includes consideration of the following evidence.

First, the need must have been a persistent one that was recognized by those of ordinary skill in the art. *In re Gershon*, 372 F.2d 535, 539 (CCPA 1967) (“Since the alleged problem in this case was first recognized by appellants, and others apparently have not yet become aware of its existence, it goes without saying that there could not possibly be any evidence of either a long felt need in the . . . art for a solution to a problem of dubious existence or failure of others skilled in the art who unsuccessfully attempted to solve a problem of which they were not aware.”); *Orthopedic Equipment Co., Inc. v. All Orthopedic Appliances, Inc.*, 707 F.2d 1376, 217 USPQ 1281 (Fed. Cir. 1983) (Although the claimed invention achieved the desirable result of reducing inventories, there was no evidence of any prior unsuccessful attempts to do so.).

Second, the long-felt need must not have been satisfied by another before the invention by applicant. *Newell Companies v. Kenney Mfg. Co.*, 864 F.2d 757, 768 (Fed. Cir. 1988) (Although at one time there was a long-felt need for a “do-it-yourself” window shade material which was adjustable without the use of tools, a prior art product fulfilled the need by using a scored plastic material which could be torn. “[O]nce another supplied the key element, there was no long-felt need or, indeed, a problem to be solved”.)

Third, the invention must in fact satisfy the long-felt need. *In re Cavanagh*, 436 F.2d 491 (CCPA 1971). In the instant case, again, as discussed above, each of the three declarations attribute the quality of the coating and the weight of the coating to the success of the wine-in-cans, but the particular ingredients and amounts, and specific weight is not correlated

with what is claimed, and thus a nexus is not provided with the claims in this regard. This “nexus” between the evidence and the claimed invention “is a legally and factually sufficient connection.” *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988). The objective evidence must also be commensurate in scope with the claims. MPEP §716; *Allergan, Inc. v. Apotex Inc.*, 754 F.3d 952, 965 (Fed. Cir. 2014).

Accordingly, Appellant has not established a sufficient nexus between the merits of the claimed invention and the alleged long-felt need.

When, as here, an Appellant presents objective evidence of nonobviousness, the presumption of unpatentability created by the Examiner’s identification of a prima facie case of obviousness dissolves, and all of the evidence must be weighed together to reach a final conclusion regarding the obviousness of the claim in question. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). “[P]atentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument.” *Id.*

Having reconsidered the issue of obviousness anew carefully evaluating and weighing both the evidence relied upon by the Examiner together with the objective evidence of non-obviousness in the form of commercial success, and satisfaction of a long-felt need, provided by the Appellant, on balance, a preponderance of the evidence supports the Examiner’s obviousness determinations.

We thus affirm all of the rejections.

CONCLUSION

We affirm the Examiner’s decision.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 9, 25–28, 31	103	Ferrarini in view of Kojima, Khanna, Ribereau-Gayon	1, 9, 25–28, 31	
8, 30	103	Ferrarini, Kojima, Khanna, Ribereau-Gayon (Vol. 2), Ribereau-Gayon et al (Vol. 1)	8, 30	
6, 29	103	Ferrarini, Kojima, Khanna, Ribereau-Gayon (Vol. 2), Leske	6, 29	
17, 20	103	Ferrarini, Kojima, Ribereau-Gayon (Vol. 2)	17, 20	
18	103	Ferrarini, Kojima, Ribereau-Gayon (Vol. 2), Leske	18	
19	103	Ferrarini, Kojima, Ribereau-Gayon (Vol. 2), Ribereau-Gayon et al (Vol. 1)	19	
21, 23, 24	103	Ferrarini, Kojima, Ribereau-Gayon (Vol. 1)	21, 23, 24	
22	103	Ferrarini, Kojima, Ribereau-Gayon (Vol. 1), Leske	22	
Overall Outcome			1, 6, 8, 9, 17–31	

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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).

AFFIRM