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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* BRIAN DAVID LONG

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Appeal 2016-006532  
Application 12/405,131  
Technology Center 3600

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Before MICHAEL C. ASTORINO, AMEE A. SHAH, and  
MATTHEW S. MEYERS, *Administrative Patent Judges*.

SHAH, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

The Appellant<sup>2</sup> appeals under 35 U.S.C. § 134(a) from the Examiner’s final decision rejecting claims 1, 3–10, and 16, which are all of the pending claims, under 35 U.S.C. § 101 as being directed to non-statutory subject matter. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Throughout this decision, we refer to the Appellant’s Appeal Brief (“Appeal Br.,” filed Nov. 16, 2015), Reply Brief (“Reply Br.,” filed June 20, 2016), and Specification (“Spec.,” filed Mar. 16, 2009), and to the Examiner’s Answer (“Ans.,” mailed Apr. 20, 2016) and Final Office Action (“Final Act.,” mailed Apr. 16, 2015).

<sup>2</sup> According to the Appellant, the real party in interest is the inventor, Brian David Long. Appeal Br. 4.

STATEMENT OF THE CASE

The Appellant's invention "relates to methods ensuring the safety of food products in a food supply chain." Spec. ¶ 1.

Claims 1 and 16 are the independent claims on appeal. Claim 1 (Appeal Br. 18 (Claims App.)) is illustrative of the subject matter on appeal, and is reproduced below:

1. A method comprising:

assigning a unique batch number to a batch of food being processed in a processing facility;

printing the unique batch number as a computer code on a label and attaching the label to the batch of food or directly on packaging containing the batch of food;

obtaining a first sample and a second sample from the batch of food and storing at least the second sample;

after obtaining the first sample and the second sample, shipping the batch of food in association with the unique batch number;

testing the first sample with a safety test to obtain a first test result;

associating the first test result with the unique batch number in a database stored on a computer readable medium;

making the first test result available in association with the unique batch number to a downstream user who receives from the processing facility food from the batch of food in association with the unique batch number;

in response to receipt of a request to verify the first test result upon the first test result indicating an unsafe risk to a final consumer of the food, testing the second sample with the safety test to obtain a second test result, wherein the step of testing the second sample occurs after the step of shipping the batch of food;

making the second test result available in association with the unique batch number to the downstream user; and

in response to the second test result also indicating an unsafe risk to the final consumer, disposing of the batch of food associated with the unique batch number such that the batch of food is no longer usable for consumption.

#### ANALYSIS

The Appellant argues claims 1, 3–10, and 16 as a group. *See* Appeal Br. 6–17. We select claim 1 as the representative claim for this group. Claims 3–10 and 16 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

Under 35 U.S.C. § 101, a patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” The Supreme Court has “long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013)).

The Supreme Court in *Alice* reiterated the two-step framework, set forth previously in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 78–79 (2012), “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 134 S. Ct. at 2355. The first step in that analysis is to “determine whether the claims at issue are *directed to* one of those patent-ineligible concepts.” *Id.* (citing *Mayo*, 566 U.S. at 79) (emphasis added). If so, the second step is to consider the elements of the claims “individually and ‘as an ordered combination’” to determine whether the additional elements “‘transform the

nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 79, 78).

In other words, the second step is to “search for an ‘inventive concept’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Id.* (quoting *Mayo*, 566 U.S. at 72–73). The Court acknowledged in *Mayo*, that “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Mayo*, 566 U.S. at 71. We, therefore, look to whether the claims focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea, and merely invoke generic processes and machinery. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

Under the first step of the *Mayo/Alice* framework, the Examiner determines that claim 1 is directed to the abstract idea of “retaining a sample for future testing down the supply chain in the event a first sample indicates a safety risk.” Final Act. 4. Conversely, the Appellant contends that the claim is directed to “substituting the testing of food products as a sequential step in a food supply chain with increased testing conducted as a parallel step to the food supply chain” to improve and use the “time efficiency of food shipping and processing . . . to facilitate increased and earlier testing.” Appeal Br. 11 (emphasis omitted).

“[T]he ‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether ‘their character as a whole is directed to excluded subject matter.’” *Enfish*, 822 F.3d at 1335. Here, claim 1 recites steps of assigning number data to food, printing the

data, obtaining and testing samples, shipping food, associating and making available test results data, and disposing food in response to test results. *See* Appeal Br. 18 (Claims App.). None of the steps, as claimed, are performed by a specific machine. The Specification provides for “methods ensuring the safety of food products in a food supply chain” (Spec. ¶ 1) and that a “system is needed to provide ongoing proof of quality and absence of pathogens to retailers and further processors in a more efficient and cost-effective manner than prior systems” (*id.* ¶ 3).

In that context, the claim is directed to obtaining, testing, and analyzing testing data of samples to ensure safety of food products.<sup>3</sup> This is similar to claims found to be abstract ideas by our reviewing court. For example, in *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353–54 (Fed. Cir. 2016), the court held that collecting information and “analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, [are] essentially mental processes within the abstract-idea category.” And, in *Vehicle Intelligence & Safety LLC v. Mercedes-Benz USA, LLC*, 635 F. App’x 914, 917 (Fed. Cir. 2015), the court held that testing operators of moving equipment for any kind of impairment is an abstract idea. *See also Cleveland Clinic Found. v. True Health Diagnostics LLC*, 859 F.3d 1352, 1360 (Fed. Cir. 2017) (claims directed to testing bodily samples for a particular enzyme to determine risk of cardiovascular disease were directed to a law of nature). Here, claim 1

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<sup>3</sup> We note that “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). The Board’s “slight revision of its abstract idea analysis does not impact the patentability analysis.” *Id.* at 1241.

involves nothing more than obtaining, testing, associating, and making available testing data of samples to determine whether to dispose unsafe foods, without any implementation details or techniques, technical description, or particular inventive technology — an abstract idea. *See Elec. Power Grp.*, 830 F.3d at 1354. As such, we find unpersuasive the Appellant’s arguments to the contrary. *See* Appeal Br. 10–13; Reply Br. 4–7<sup>4</sup>.

We also find unpersuasive the Appellant’s argument that claim 1 is not directed to an abstract idea because they provide for “a concrete, specific process that includes unconventional steps that result in improved food safety in a [food] supply chain.” Reply Br. 5; *see also* Appeal Br. 15. “[N]ot every claim that recites concrete, tangible components escapes the reach of the abstract-idea inquiry.” *In re TLI Comm’s LLC Pat. Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016). Here, the “concrete” operations pertain to information. “Information as such is an intangible”; obtaining, testing, associating, and making available testing data of samples without more are abstract, and using the data to determine whether to dispose unsafe foods “is abstract as an ancillary part of such collection and analysis.” *Elec. Power Grp.*, 830 F.3d at 1353–54.

We are further not persuaded of Examiner error by the Appellant’s argument that “the method as a whole does not pre-empt others from applying those individual ideas or otherwise engaging in those activities.”

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<sup>4</sup> We note that the pages of the Reply Brief are not numbered. We, therefore, consider the page that contains the title “REPLY BRIEF TO EXAMINER’S ANSWER” page 1, and each page thereafter sequentially numbered with the page containing the signature of Kevan L. Morgan page 11.

Appeal Br. 11; *see also* Reply Br. 7. There is no dispute that the Supreme Court has described “the concern that drives [the exclusion of abstract ideas from patent eligible subject matter] as one of pre-emption.” *Alice Corp.*, 134 S. Ct. at 2354. But characterizing preemption as a driving concern for patent eligibility is not the same as characterizing pre-emption as the sole test for patent eligibility. “The Supreme Court has made clear that the principle of preemption is the basis for the judicial exceptions to patentability” and “[f]or this reason, questions on preemption are inherent in and resolved by the § 101 analysis.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (citing *Alice*, 134 S. Ct. at 2354). “[P]reemption may signal patent ineligible subject matter, [but] the absence of complete preemption does not demonstrate patent eligibility.” *Id.* The aforementioned concept is not sufficiently limiting so as to fall clearly on the side of patent-eligibility.

Under the second step of the *Mayo/Alice* framework, we agree with and find supported the Examiner’s determination that the elements of the claims, individually or as an ordered combination, do not amount to significantly more than that abstract idea. *See* Final Act. 4; Ans. 6–10. We are not persuaded of Examiner error by the Appellant’s arguments that assert the opposite. *See* Appeal Br. 13–16; Reply Br. 8–10.

In response to the Appellant’s argument that the claims contain an inventive concept and are patent-eligible under § 101 because the Examiner indicated that the claims overcome the prior art (Appeal Br. 14), we note that an abstract idea does not transform into an inventive concept just because the prior art does not disclose or suggest it. *See Mayo*, 132 S. Ct. at 1304. “Groundbreaking, innovative, or even brilliant discovery does not by itself



satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology*, 133 S. Ct. at 2117. Indeed, “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981); *see also Mayo*, 132 S. Ct. at 1304 (rejecting “the Government’s invitation to substitute §§ 102, 103, and 112 inquiries for the better established inquiry under § 101”).

We do not agree with the Appellant’s contention that the claim is significantly more than the abstract idea because “the steps in the method claimed by the Appellant adds unconventional steps and specific limitations to what otherwise may be well-understood, routine, and conventional in the field.” Appeal Br. 15. The Specification discusses that, prior to the invention, tests of food samples were conducted and data shared. *See Spec.* ¶ 2. The Specification does not provide for technologically or technically improved ways of assigning number data, printing data, obtaining and testing samples, shipping food, making testing data available, or for disposing food. To the extent any of the steps are performed by a machine, they are performed by generic processing facilities, printers, laboratories, and processors (*see Spec.* ¶¶ 29–32, Fig. 2) that operate in their normal capacities to simply implement the abstract idea. *See Alice*, 134 S. Ct. at 2359. There is no further specification of particular technology for performing the steps. *See Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1263 (Fed. Cir. 2016); *see also Enfish*, 822 F.3d. at 1336 (focusing on whether the claim is “an improvement to [the] computer

functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity”).

We also do not agree with the Appellant’s contention that the method claimed in the present application, when considered as a whole, is significantly more than an abstract idea and provides a technical solution for a technical problem, namely how to ship food as soon as possible while also preserving the ability to conduct multiple tests over time where it otherwise is inconvenient to obtain additional samples after shipping the food.

Appeal Br. 16. The claimed method does not address steps or ways regarding *how* to ship food as soon as possible, i.e., improve “the time efficiency of food shipping” (Reply Br. 10), but rather recites steps for assigning and printing data, obtaining and testing food samples, associating and making test data available, shipping food in a conventional manner (*see, e.g.,* Spec. ¶ 22), determining from the test data whether food is unsafe, and disposing of unsafe food. The problem of unsafe food (*see id.* ¶ 2) is not a technical problem and the claimed solution of testing prior to distribution (*see id.* ¶ 3) to provide for “consumers receiving fresher food” (Reply Br. 10) is not a technical solution.

Finally, to the extent the Appellant argues that the Examiner’s rejection is in error because the Examiner does not follow Office guidelines and/or does not apply the appropriate legal standards (*see* Reply Br. 9–11), we disagree. Here, contrary to the Appellant’s assertion (*see id.* at 10), the Examiner does not rely on the machine-or-transformation test outlined in *Bilski v. Kappos*, 561 U.S. 593 (2010). Rather, the Examiner properly analyzes the claim under the two-part *Mayo/Alice* framework. Specifically, the Examiner determines that the claim is directed to an abstract idea based

on the language of the claim, and provides support in citing to judicial precedents as bases of comparisons. *See* Ans. 3. The Examiner also considers the elements of the claim, separately and as an ordered combination, to determine they are routine, well-understood, and conventional activities previously known in the industry. *See* Final Act. 4; Ans. 7–9; *see also Alice*, 134 S. Ct. at 2359. Thus, the Examiner has set forth the statutory basis of the rejection in a sufficiently articulate and informative manner as to meet the notice requirement of § 132 as to why the claims are patent-ineligible. *See In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011); *see also Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990) (Section 132 “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection”).

Thus, we are not persuaded of Examiner error in rejecting claim 1 under 35 U.S.C. § 101, and we sustain the Examiner’s rejection of claim 1 and of claims 3–10 and 16, which fall with claim 1.

#### DECISION

The Examiner’s rejection of claims 1, 3–10, and 16 under 35 U.S.C. § 101 is AFFIRMED.

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