UNITED STATES PATENT AND TRADEMARK OFFICE

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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 JOHN M. MARYNOWSKI, CATALIN D. VOINESCU,
STEFAN PUSCASU, and THOMAS M. O'DONNELL

_____

Appeal 2016-008508
Application 14/862,839[1]
Technology Center 3600

_____

Before, JOSEPH A. FISCHETTI, MICHAEL R. ZECHER, and
TARA L. HUTCHINGS, *Administrative Patent Judges.*

FISCHETTI, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134(a) of the
Examiner's final rejection of claims 1–36. We have jurisdiction under 35
U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM.

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[1] Appellants identify DCFB LLC as the real party in interest. Appeal Br. 1.

THE INVENTION

Appellants claim an automated trading system for use in an electronic trading exchange network system (Spec. ¶ 1).

Claim 1 reproduced below, is representative of the subject matter on appeal.

> 1. A method of reducing a response time of an automated trading system, comprising:
>
> generating, by an electronic exchange system, information related to a first traded item, said electronic exchange system comprising one or more first backend computers;
>
> transmitting, by the electronic exchange system, the information to an automated trading system, the automated trading system comprising a second remote backend computer solely performing automatic steps of:
>
> receiving the information related to the first traded item from the electronic exchange system;
>
> retrieving trading parameters particular to the first traded item, said trading parameters having been generated and stored in said second remote backend computer, in a searchable format, prior to receiving the information related to the first traded item;
>
> comparing at least a portion of the information related to the first traded item and the trading parameters to determine whether to execute one or more market transactions;
>
> automatically generating a request for the one or more market transactions within 1 millisecond of receiving the information related to the first traded item upon determining to execute the one or more market transactions;
>
> outputting the request for the one or more market transactions to the one or more first backend computers; and
>
> causing the electronic exchange system to execute the

one or more market transactions automatically generated for the
first traded item.

Appeal Br. 13 (Claims Appendix).

THE REJECTION

The following rejection is before us for review.

Claims 1–36 are rejected under 35 U.S.C. § 101. Final Act. 5–6.

ANALYSIS

35 U.S.C. § 101 REJECTION

We will sustain the rejection of claims 1–36 under 35 U.S.C. § 101.

The Supreme Court

set forth a framework for distinguishing patents that claim laws
of nature, natural phenomena, and abstract ideas from those that
claim patent-eligible applications of those concepts. First, . . .
determine whether the claims at issue are directed to one of
those patent-ineligible concepts . . . . If so, we then ask, "[w]hat
else is there in the claims before us?" . . . To answer that
question, . . . consider the elements of each claim both
individually and "as an ordered combination" to determine
whether the additional elements "transform the nature of the
claim" into a patent-eligible application. . . . [The Court]
described step two of this analysis as a 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."

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Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 72–73 (2012)).

To perform this test, we must first determine whether the claims at issue are directed to a patent-ineligible concept.

Although the Court in *Alice* made a direct finding as to what the claims were directed to, we determine that the plain language of the claims and the Specification provide enough information to inform one as to what they are directed to.

The steps in representative claim 1 result in[2]: "causing the electronic exchange system to execute the one or more market transactions automatically generated for the first traded item." App. Br. 13.

The Examiner found that the claims are directed to "a trading system which has been automated by a computer to perform trading activities." (Final Act. 3). More specifically, the Examiner states,

> The reason that the claimed trading system was considered a[] judicial exception (or abstract) was because the claim limitation[s] were clearly directed to *trading-which* is considered a method of organizing human activity which is also a fundamental economic practice of exchange. It should be respectfully noted by the applicant that some methods of organizing human activities can also be a fundamental economic practice. *Trading* is considered herein as a

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[2] Our analysis is made based on considering the claims as a whole, but for purposes of this discussion, we note the result phrase of the independent claim to point to what the claims are directed to.

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> fundamental economic practice similar to the decision of the Supreme Court, in *Bilski*, which described *hedging* as both a method of organizing human activity and a fundamental economic practice.

(*Id.* at 3–4) (emphasis added).

The Specification states:

> In a typical set-up, trading information received from the exchange is processed by general purpose backend computer equipment. The backend computer may, among other things, (1) act as a gateway by communicating market information from the exchange to various types of client equipment, (2) submit, delete, and modify orders and quotes to the exchange from the various client equipment, (3) receive real-time trade confirmations and end-of-day back office reports, and (4) perform risk analysis, position management, and accounting functions.

Spec. ¶ 5. The Specification further states:

> Backend computer 225 may also be equipped with software and/or hardware that facilitates communications with the exchange site. Some exchanges, for example, such as the EUREX (the German and Swiss Derivatives Exchange), recommend installation of a redundant on-site backend computer in the event that the primary communication backend computer 220 fails.

Id. ¶ 47. The Specification then describes,

> In one preferred embodiment, backend computer 225 is dedicated or substantially dedicated to performing automated trading-related functions, as discussed in greater detail below. Backend computer 220, rather than backend computer 225, may be assigned trading-related tasks, such as (1) serving as a gateway to communicate market information from the exchange site 100 to trader stations 230, (2) submitting, deleting, and

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> modifying orders and quotes to exchange site 100 from the trader stations 230, (3) receiving real-time trade confirmations and end-of-day back office reports, and/or (4) performing risk analysis, position management, and accounting functions. In this way, backend computer 225 may perform automated trading functions with limited interruption or delays associated with other tasks the backend computers (such as backend computer 220) may be requested to perform. This increases the response speed for automated trading operations.

Id. ¶ 48.

We further find that the claims simply dedicate trading tasks to surplus equipment, which otherwise would be performed by devices conducting plural tasks so as to increase trading response speed. *See* Spec. ¶ 48. It follows from prior Supreme Court cases, and *Gottschalk v. Benson*, 409 U.S. 63 (1972), in particular, that the claims at issue here are directed to an abstract idea. Trading activities and allocating trading tasks between resources to increase response speeds in trades are fundamental economic principles because according to Appellants, "[t]raders who can quickly identify opportunities and act on them generate the largest profits." Spec. ¶ 3. The patent-ineligible end of the spectrum includes fundamental economic practices, *Alice*, 134 S. Ct. at 2357.

Also, we find the steps of:

    i.   retrieving trading parameters particular to the first traded item, said trading parameters having been generated and stored ... in a searchable format, prior to receiving the information related to the first traded item; [and]

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        ii.   comparing at least a portion of the information related to the

                first traded item and the trading parameters to determine

                whether to execute one or more market transactions,

constitute "analyzing information by steps people go through in their minds,
or by mathematical algorithms, without more, as essentially mental
processes within the abstract-idea category." *Elec. Power Grp., LLC v.
Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016); s*ee also buySAFE, Inc.
v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) (claims directed to
certain arrangements involving contractual relations are directed to abstract
ideas). Thus, allocating trading tasks between resources to maximize trading
response speed is an "abstract idea" beyond the scope of § 101.

      As in *Alice,* we need not labor to delimit the precise contours of the
"abstract ideas" category in this case. It is enough to recognize that there is
no meaningful distinction in the level of abstraction between the concept of
an intermediated settlement, as discussed in *Alice*, and the concept of
allocating trading tasks between resources to maximize trading response
speed, at issue here. Both are squarely within the realm of "abstract ideas"
as the Court has used that term. That the claims do not preempt all forms of
the abstraction or may be limited to trading executions, do not make them
any less abstract. *See OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359,
1362 (Fed. Cir. 2015) (citations omitted) ("And that the claims do not
preempt all price optimization or may be limited to price optimization in the
e-commerce setting do not make them any less abstract.").

Claim 1, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data reception, transmission, and linkage and does not recite an improvement to a particular computer technology. *See, e.g., McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016) (finding claims not abstract because they "focused on a specific asserted improvement in computer animation").

The introduction of a computer into the claims does not alter the analysis at *Alice* step two.

> [T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea "while adding the words 'apply it'" is not enough for patent eligibility. Nor is limiting the use of an abstract idea "'to a particular technological environment.'" Stating an abstract idea while adding the words "apply it with a computer" simply combines those two steps, with the same deficient result. Thus, if a patent's recitation of a computer amounts to a mere instruction to "implemen[t]" an abstract idea "on . . . a computer," that addition cannot impart patent eligibility. This conclusion accords with the preemption concern that undergirds our § 101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of "additional featur[e]" that provides any "practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself."

Alice, 134 S. Ct. at 2358 (alterations in original) (internal citations omitted).

Instead, "the relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea . . . on a generic computer." *Id.* at 2359. They do not.

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Taking the claim elements separately, the function performed by the computer at each step of the process is purely conventional. Using a computer to retrieve, select, and apply decision criteria to data and modify the data as a result amounts to electronic data query and retrieval—one of the most basic functions of a computer. All of these computer functions are well-understood, routine, conventional activities previously known to the trading industry. *See Elec. Power Grp.,* 830 F.3d 1354; *see also In re Katz Interactive Call Processing Patent Litig,* 639 F.3d 1303, 1316 (Fed. Cir. 2011) ("Absent a possible narrower construction of the terms 'processing,' 'receiving,' and 'storing,' . . . those functions can be achieved by any general purpose computer without special programming"). In short, each step does no more than require a generic computer to perform generic computer functions. As to the data operated upon, "even if a process of collecting and analyzing information is 'limited to particular content' or a particular 'source,' that limitation does not make the collection and analysis other than abstract." *SAP Am. Inc. v. InvestPic, LLC,* 890 F.3d 1016, 1022 (Fed. Cir. 2018) (internal citation omitted).

Considered as an ordered combination, the computer components of Appellants' method add nothing that is not already present when the steps are considered separately. The sequence of data reception-analysis-access/display is equally generic and conventional or otherwise held to be abstract. *See Ultramercial, Inc. v. Hulu, LLC,* 772 F.3d 709, 715 (Fed. Cir. 2014) (sequence of receiving, selecting, offering for exchange, display,

allowing access, and receiving payment recited an abstraction), *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1378 (Fed. Cir. 2017) (holding that sequence of data retrieval, analysis, modification, generation, display, and transmission was abstract), *Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (holding sequence of processing, routing, controlling, and monitoring was abstract). The ordering of the steps is, therefore, ordinary and conventional.

The claims do not, for example, purport to improve the functioning of the computer itself. Nor do they effect an improvement in any other technology or technical field. The Specification spells out different generic equipment and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of information access under different scenarios. *See, e.g.,*

> The automated trading system software may run in a text-based environment or a Windows or Windows-like environment. For example, the automated trading system may be run on an operating system, such as VMS, DOS, or LINUX, or in a WINDOWS or similar operating system, which is more user-friendly.

Spec. ¶ 51. In fact, the Specification confirms that the claimed "second remote backend computer" is a known redundant computer tasked with trading operations:

> Backend computer 225 may also be equipped with software and/or hardware that facilitates communications with the exchange site. Some exchanges, for example, such as the EUREX (the German and Swiss Derivatives Exchange),

> recommend installation of a redundant on-site backend computer in the event that the primary communication backend computer 220 fails.

Spec. ¶ 47. Thus, the claims at issue amount to nothing significantly more than instructions to apply the abstract idea of information access using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, 134 S. Ct. at 2360.

We have reviewed all the arguments (Appeal Br. 4–12; Reply Br. 1–5) Appellants have submitted concerning the patent eligibility of the claims before us that stand rejected under 35 U.S.C. § 101. We find that our analysis above substantially covers the substance of all the arguments, which have been made. But, for purposes of completeness, we will address various arguments in order to make individual rebuttals of same.

Appellants argue:

> In this manner, the claimed invention avoids recalculating (or re-determining) decision information, which enables the claimed invention to generate decisions and transaction requests in as little as 1 millisecond (*see* Claim 1 and para. [0022]). This is to be contrasted with conventional systems (that do not comprise the claimed dedicated 'second backend computer' or the 'pre-generated and pre-stored' decision parameters) which take several to many milliseconds to calculate or determine a *single* decision parameter. When considered in the context of tens of millions of transactions in a typical day, the savings provided by the claimed invention is indeed significant and substantial.

Appeal Br. 4–5 (underlining omitted).

We disagree with Appellants. The question here is whether the claims as a whole "focus on a specific means or method that improves the relevant technology" or are "directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery." *McRO,*, 837 F.3d at 1314. In this case, the claims, as a whole, are focused on satisfying certain contingencies for "automatically generating a request for . . . one or more market transactions within 1 millisecond of receiving the information related to the first traded item upon determining to execute the one or more market transactions." We find this limitation to be a result or an affect, and not an improvement in the technology of how a processor, memory, and program works. Appellants' claims merely allocate different computational tasks to known system elements—namely, a second backed computer. *See* Spec. ¶ 47. Thus, we find no improvement in device technology here, but rather only the idea of redirecting workflow to an otherwise redundant, known device.

Appellants argue,

> By introducing the new, uniquely configured and dedicated "second backend computer" component (in conjunction with the other claimed elements), the claimed invention completely removes the automated-trading functions from the backend equipment, leaving the backend equipment solely to perform the general tasks noted above."

Appeal Br. 5(underlining omitted).

We disagree with Appellants. Our review of the Specification reveals that the claimed "second backend computer" is not new to the combination.

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Again, according to the Specification, the "second backend computer" is a known redundancy to the system available for functions "in the event that the primary communication backend computer 220 fails." Spec. ¶ 47. Thus, the elements of the system are well-known and all that remains is a re–designation of tasks on the computers, which, as we found above, is an abstraction. The recitation of a practical application for an abstract idea is not sufficient to transform the abstract idea into a patent-eligible invention. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1371 (Fed. Cir. 2011) ("The Court [in *Parker v. Flook*, 437 U.S. 584 (1978)] rejected the notion that the recitation of a practical application for the calculation could alone make the invention patentable.").

Appellants further argue, "[s]till further, the Appellant's invention includes the innovation of pre-generating and storing, in a searchable format, certain decision-making trading parameters that are used in generating near-real-time transaction decisions and requests in as fast as 1 millisecond." Appeal Br. 5 (underlining omitted).

We disagree with Appellants. First, automation to reduce the burden on the user of what once could have been done with pen and paper, e.g. formatting of data, does not qualify an idea for patent eligibility because it is still a mental process. *See CyberSource*, 654 F.3d at 1375. The subject matter of mental thought, pre-generating and storing of data in a given format, cannot distinguish one mental process from another because an abstraction does not change its essence because of its subject matter and the

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way it is remembered. A claim for a new abstract idea is still an abstract idea. *See Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151. Also, "[a]n abstract idea can generally be described at different levels of abstraction." *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240–1241 (Fed. Cir. 2016). Limiting a process to particular content does not make the collection and analysis other than abstract. *See SAP Am. Inc.*, 890 F.3d at 1022.

As to the argued speed of the "real time decisions," as we found above, this goes to an affect which does not make an otherwise patent ineligible idea eligible.

Appellants argue,

> These (and other) computer problems associated with conventional computer trading systems are overcome by the Appellant's claimed invention which provides a completely new and unique system topography that completely removes many of the burdensome functions from the backend equipment, leaving the backend equipment solely to perform general trading related tasks.

Appeal Br. 7 (underlining omitted).

We disagree with Appellants because "the addition of merely novel or non-routine components to the claimed idea [does not] necessarily turn[] an abstraction into something concrete." *Ultramercial*, 772 F.3d at 715. As we found above, element by element, the topography of the claimed devices is unchanged from known systems — all that is changed is assignment of work to these devices, which is an abstraction.

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Appellants argue,

> Separating functions, particularly with a *remote* second backend computer, is completely unconventional and represents a substantial innovation in this field. Further, the claimed functions performed by the second remote backend computer are initiated only under specified conditions, including selectively activating the electronic exchange system.

Appeal Br. 9.

First, as found above, we have engaged in "ordered combination" findings, which determined the claim steps/elements to be ordinary and conventional. Second, the Examiner correctly cited to precedent in *In re TLI Communications, LLC Patent Litigation*, 823 F.3d 607 (Fed. Cir. 2016) in addressing the analogous, conventional nature of the claims at issue. *See* Answer 5–6. Third, the Examiner found that separating functions to different computers is no more than a generic parallel processing computing concepts (*see* Ans. 5), and neither the claims nor the Specification call for a parallel processing concept different from those available in existing systems. *See SAP America*, 890 F.3d at 1023 ("to the extent that parallel processing is discussed in the [S]pecification, it is characterized as generic parallel processing components"). To the contrary, as discussed above, the Specification provides that the second, backend system is known. *See* Spec. ¶ 47.

To the extent that Appellants argue that the use of a "remote" backend server makes the claims analogous to the claims at issue in *Bascom* (see Reply Br. 4), we disagree with Appellants because the claims in *Bascom*

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Global Internet v. AT&T Mobility LLC, 827 F.3d 1341 (Fed. Cir. 2016) are

distinguishable from those before us here. That is, in *Bascom* the

technology at issue was a

> filtering system [] located on a remote ISP server that associates
> each network account with (1) one or more filtering schemes
> and (2) at least one set of filtering elements from a plurality of
> sets of filtering elements, thereby allowing individual network
> accounts to customize the filtering of Internet traffic associated
> with the account.

Bascom Global Internet 827 F.3d at 1346. In contrast, all that the claims

before us cover is using a known computer for working a different task

without a device improvement. We note too, "remote" is a term of degree

and, neither the claims or the Specification define it to provide a standard for

measuring that degree. *See Seattle Box Company, Inc. v. Industrial Crating

& Packing, Inc.*, 731 F.2d 818, 826 (Fed. Cir. 1984).

Appellants further argue that "[t]he instant claims stand next to

Diehr.[3] As noted above, the automated trading system provides a

mechanism for determining and controlling *when* the electronic exchange

system is activated and what functions it performs." Appeal Br. 9

(underlying omitted).

We disagree with Appellants. In *Diehr*, the Court established

eligibility under § 101 for claims containing mathematical formulas when

the claim "implements or applies that formula in a structure or process

which, when considered as a whole," causes or performs "(e.g., transforming

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[3] *Diamond v. Diehr*, 450 U.S. 175 (1981).

or reducing an article to a different state or thing) . . . ." 450 U.S. at 192–

193. In contrast, we fail to see how executing a trade constitutes

transforming or reducing an article into a different state or thing.

Lastly, Appellants argue that "the Examiner has not met the burden of

establishing a rejection under § 101. The Administrative Procedure Act

mandates the production of evidence by government agencies, such as the

USPTO [United States Patent and Trademark Office]." Appeal Br. 11.

We disagree with Appellants. To the extent Appellants argue that the

Examiner erred in adequately supporting this determination by not providing

evidence, we are unpersuaded. In this regard, there is no requirement that

Examiners must provide evidentiary support in every case before a

conclusion can be made that a claim is directed to an abstract idea. *See, e.g.,*

para. IV "July 2015 Update: Subject Matter Eligibility" to 2014 Interim

Guidance on Subject Matter Eligibility (2014 IEG), 79 Fed. Reg. 74618

(Dec. 16, 2014).[4]

All that is required of the USPTO to meet its *prima facie* burden of

production is that the Examiner set forth the statutory basis of the rejection

and the reference or references relied upon in a sufficiently articulate and

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[4] *See, also,* Manual of Patent Examining Procedure 2106.07(a)(III) (2018)
("The courts consider the determination of whether a claim is eligible (which
involves identifying whether an exception such as an abstract idea is being
claimed) to be a question of law. Thus, the court does not require 'evidence'
that a claimed concept is a judicial exception, and generally decides the legal
conclusion of eligibility without resolving any factual issues." (citations
omitted.))

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informative manner as to meet the notice requirement of 35 U.S.C. § 132.
As the statute itself instructs, the Examiner must "notify the applicant,"
"stating the reasons for such rejection," "together with such information and
references as may be useful in judging the propriety of continuing
prosecution of his application." 35 U.S.C. § 132; *see also In re Jung*, 637
F.3d 1356, 1363 (Fed. Cir. 2011) (declining "to impose a heightened burden
on examiners beyond the notice requirement of § 132). Here, as we found
above, the Examiner has made these findings as required by the statute. *See*
Final Act. 2–6.

Specifically, in rejecting the pending claims under § 101, the
Examiner analyzed the claims using the *Mayo/Alice* two-step framework,
consistent with the guidance set forth in the USPTO's 2014 INTERIM
GUIDANCE ON PATENT SUBJECT MATTER ELIGIBILITY and the JULY 2015
UPDATE: SUBJECT MATTER ELIGIBILITY. *See id.* Specifically, the Examiner
notified Appellants that the claims are broadly directed to

> a trading system which has been automated by a computer to
> perform trading activities. The reason that the claimed trading
> system was considered a[] judicial exception (or abstract) was
> because the claim limitation were clearly directed to *trading-*
> which is considered a method of organizing human activity
> which is also a fundamental economic practice of exchange. It
> should be respectfully noted by the applicant that some methods
> of organizing human activities can also be a fundamental
> economic practice.

(Final Act. 3–4). Turning to step two, the Examiner determined

> [i]t was also submitted that the elements in the applicant's
> claims where insufficient to ensure that the claim as a whole

> amounted to "significantly more" than the judicial exception
> because the electronic exchange system provided for one or
> more computers performing generic computer functions
> previously stated that []generating, storing, receiving
> transmitting and executing instruction, in particular trading
> information which do not provide improvement to the trading
> technology, but apply the abstract idea of trading to computer
> technology that is ubiquitous in the computer industry.

(Final Act. 4). Therefore, we find that the Examiner met the notice requirement of § 132.

For the reasons identified above, we determine there are no deficiencies in the Examiner's *prima facie* case of patent ineligibility of the rejected claims based on the record before us.

CONCLUSION OF LAW

We conclude the Examiner did not err in rejecting claims 1–36 under 35 U.S.C. § 101.

DECISION

The decision of the Examiner to reject claims 1–36 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED.