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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/828,004	03/14/2013	James F. Marshall	12329	8276

53609 7590 09/04/2018
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EXAMINER

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ART UNIT	PAPER NUMBER
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3691

NOTIFICATION DATE	DELIVERY MODE
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09/04/2018

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JAMES F. MARSHALL, JONATHAN J. MARSHALL,
MANUEL ROSADO, SAMUEL J. VANDEN HEUVEL, and
PAUL F. MARTINEZ

Appeal 2016-008528
Application 13/828,004¹
Technology Center 3600

Before JOSEPH A. FISCHETTI, MICHAEL R. ZECHER, and
AMEE A. SHAH, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1–18 and 20–26. Claim 19 has been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM.

¹ Appellants identify Spectrum Investment Advisors, Inc. as the real party in interest. (Appeal Br. 2).

THE INVENTION

Appellants' claims cover a "system of and method for generating investment fund rating scores using a number of factors including criteria related to risk factors, performance, and qualitative factors." Abstract.

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

1. A system for generating relative ratings of mutual funds, comprising:
 - a computer readable investment information database configured to store information including historical performance information for a large plurality of mutual funds of at least two different investment categories;
 - a rating scoring system processor coupled to the investment information database, with the rating scoring system processor configured to:
 - for each mutual fund to be rated, determine whether historical performance information for at least one of at least two different time periods exists;
 - for each mutual fund to be rated having historical performance information for at least one time period, determining, based upon the historical performance information, a relative ranking of the mutual fund to be rated with other mutual funds that are in the same investment category as the mutual fund to be rated for each of a plurality of factors;
 - wherein the plurality of factors includes a performance factor, at least one risk factor, and at least one qualitative factor;
 - and
 - wherein if the mutual fund to be rated has historical performance information for multiple time periods, a separate ranking is determined for at least some of the plurality of factors for each of the multiple time periods;
 - for each of the plurality of factors for each mutual fund to be rated that has separate rankings for each of multiple time periods, applying a time-based weighting to the separate

rankings for such factors and combining the weighted separate rankings for each of such factors into a single ranking for each such factor; and

for each mutual fund to be rated, applying a factor weighting to the rankings for each of the plurality of factors and combining the weighted plurality of factors into a single rating of the mutual fund being rated;

wherein the performance factor is weighted at approximately 30%, the at least one risk factor is weighted at approximately 50%, and the at least one qualitative factor is weighted at approximately 20%.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Barry	US 2006/0136324 A1	June 22, 2006
Giovinazzo	US 2007/0168302 A1	July 19, 2007
Smith	US 2010/0299281 A1	Nov. 25, 2010

Antonio Farina, *Chi-Square Test* Net Industries (2010)
<http://web.archive.org/web/20100218034803> last visited 9/22/2014.

Mean & Standard Deviation Analyzing Investment Returns Valley Vista Enterprises, LLC (2007–2010)
<http://web.archive.org/web/20100207012724/>.

The following rejections are before us for review.

Claims 1–18 and 20–26 are rejected under 35 U.S.C. § 101. Final Act. 2.

Claims 1–10, 12, 15, and 20–26 are rejected under 35 U.S.C. § 103 as being unpatentable over Smith in view of Giovinazzo. Final Act. 9.

Claims 11, 13, and 16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Smith in view of Giovinazzo and further in view of Valley Vista Enterprises, LLC. Final Act. 29–30.

Claims 14 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Smith in view of Giovinazzo and Valley Vista Enterprises, LLC and further in view of Barry. Final Act. 31.

Claim 17 is rejected under 35 U.S.C. § 103(a) as unpatentable over Smith in view of Giovinazzo and further in view of Farina. Final Act. 32.

FINDINGS OF FACT

1. We adopt the Examiner’s findings as set forth on pages 2–33 of the Final Action.

2. Giovinazzo discloses, “The inventors have determined that the combined quantitative and qualitative factors 73 provide a measure of the relative performance, characteristics, behavior and overall appropriateness of a fund for inclusion into the selected qualified retirement plan as an investment option.” ¶ 166

ANALYSIS

35 U.S.C. § 101 REJECTION

We will sustain the rejection of claims 1–18 and 20–26 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.”

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 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.

The steps in representative claim 1 result in²:

for each mutual fund to be rated, applying a factor weighting to the rankings for each of the plurality of factors and combining the weighted plurality of factors into a single rating of the mutual fund being rated;
wherein the performance factor is weighted at approximately 30%, the at least one risk factor is weighted at approximately 50%, and the at least one qualitative factor is weighted at approximately 20%.

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.

The Examiner found that the claims are “directed to system and method for determining single rating of a mutual fund.” (Final Act. 3). The Examiner also found that the activity of the claims “is considered . . . **mathematical formulas/ relationships and/ an idea ‘of itself.’**” *Id.* at 4.

The Specification states:

As is the case with any type of investment, mutual funds involves the risk that investors may lose money, including the investment principal, or fail to earn any return on the investment. Different types of mutual funds have different levels of risk, with mutual funds having a prospectively higher rate of return also having a higher level of risk. Typically, 401 (k) programs and [Individual Retirement Account] investment advisors both present potential mutual fund investments that are arranged by risk, from the lowest risk at one end to the highest risk at the other end.

Spec. ¶ 4. 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. Based on the Examiner’s findings and the Specification, the claims are directed to rating mutual funds based on weighted risk, performance, and at least one qualitative factor, which is a fundamental economic principle because risk management is the bedrock of investing. The patent-ineligible end of the spectrum includes fundamental economic practices, *Alice*, 134 S. Ct. at 2357.

Also, we also agree with the Examiner that many of the steps in representative claim 1, such as, “determining, based upon the historical performance information, a relative ranking of the mutual fund to be rated with other mutual funds,” 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); *see 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 rating mutual funds based on weighted risk, performance, and at least one qualitative factor, 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 rating mutual funds, 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, calculation 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 “implement [t]” an abstract idea “on . . . a computer,” that addition cannot impart patent eligibility. This conclusion accords with the pre-emption 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, 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.

Taking the claim elements individually, 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, computation 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.*, Spec. ¶¶ 20, 32–35, 37, 38 (disclosing how “rate scoring system processor” or “processor 30” performs conventional functions). Thus, the claims at issue amount to nothing significantly more than instructions to apply the abstract idea of information access and computation using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, at 2360.

We have reviewed all the arguments (Appeal Br. 9–12; Reply Br. 9–10) 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 specific contentions in order to make individual rebuttals of same.

Appellants argue, “the system claimed in the present application is more than just an idea, and is not just a generic computer system, but rather a specialized apparatus programmed to carry out a specific task, the steps of which are listed in the claims.” Appeal Br. 10.

We disagree with Appellants. A general purpose computer programmed to perform conventional functions does not amount to an inventive concept such that the claims are significantly more than the abstract idea. *See EON Corp. IP Holdings LLC v. AT & T Mobility LLC*, 785 F.3d 616, 623 (Fed. Cir. 2015). Appellants’ Specification does not support a computer system which is employed to effect the claimed ratings, as anything more than a generic computer. *See, e.g.*, Spec. ¶¶ 20, 32–35, 37, 38 (disclosing how “rate scoring system processor” or “processor 30” performs conventional functions). 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.”). 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).

Appellants further argue,

as disclosed in the present Specification, the claimed system is designed to electronically retrieve onto a computer server the large volumes of financial data which are filtered, analyzed, and processed by elements of the claimed system, according to a unique algorithm, so that the resulting data can be provided electronically, via the network, to the system users.

Appeal Br. 11.

We disagree with Appellants because Appellants are basically arguing the desired effects of automation, and 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.

Appellants’ arguments with respect to claims 23, 24, and 25 (Appeal Br. 12) merely restate limitations appearing in the claims and then go onto contend that these limitations amount to “significantly more than an abstract idea.” *Id.* Given that these limitations for the most part mirror those of claim 1 (claims 24 and 25 are in method format), and Appellants advance no

substantial arguments, we find them unpersuasive for the same reasons set forth above.

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.

35 U.S.C. § 103 REJECTION

Claim 1 is independent. Claims 2–10, 12, 14–16, 20–22, and 26 directly or indirectly depend from claim 1. To the extent Appellants do not separately argue other claims in this group, these remaining claims stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2015). Appellants' arguments against independent claim 1 are based on perceived deficiencies of Smith and Giovinazzo. Appeal Br. 13–16. Inasmuch as Appellants raise the same issues with respect to each of the points in its Brief, we discuss them together, addressing each of Appellants' arguments in turn.

Appellants argue,

in FIG. 8A of Smith, Smith discloses 60% Return and 40% Risk. Appellants submit that the Smith and Giovinazzo references do not disclose, teach or suggest “wherein the performance factor is weighted at approximately 30%, the at least one risk factor is weighted at approximately 50%, and the at least one qualitative factor is weighted at approximately 20%.” Additionally, the illustrated risk and return of FIG. 8A of the Smith reference sum to 100% showing the factors disclosed by Smith are not used in the same manner as the plurality of factors in the claimed invention.

Appeal Br. 16–17 (emphasis omitted).

The Examiner however found,

Smith reference only teaches quantitative factors which includes a performance factor and risk factor (see

Table 1; Fig. 7B; Fig. 8A) and percentage allocation each factor can be adjusted as per user discretion based on degree of influence of each performance factors (see Fig. 8B and 8C: paragraph 0095-0103]). Giovinazzo teaches both quantitative and qualitative factors where Quantitative factor includes performance factors, risk factors and Qualitative factors includes Manager Tenure, Fund Expense; and quantitative score (with risk factor) is allocated 80% incorporating eight factors and qualitative score is allocated 20% incorporating six factors (Giovinazzo et al., paragraph [0149-0165]). The motivation statement is in 103 rejection clearly stated benefit or advantage of combining quantitative and qualitative factors in measuring of relative performance, characteristics, and behavior and overall appropriateness of a fund and selecting the appropriate fund to include in the retirement plan as an investment option (Giovinazzo et al., paragraph [0146 and 0166]).

Answer 13–14.

We disagree with Appellants and agree with the Examiner.

The Examiner found (Final Act. 12) that Giovinazzo explicitly discloses that “[t]he inventors have determined that the combined quantitative and qualitative factors 73 provide a measure of the relative performance, characteristics, behavior and overall appropriateness of a fund for inclusion into the selected qualified retirement plan as an investment option.” FF. 2. Thus, the motivation for combining quantitative and qualitative factors is explicit in Giovinazzo.

Appellants admit “in FIG. 8A of Smith, Smith discloses *60% Return* and *40% Risk*.” (Appeal Br. 16). Thus, there is no dispute that Smith discloses a weighted performance factor and at least one weighted risk factor.

The Examiner finds:

Giovinazzo et al. teach the scoring or rating a fund using plurality of quantitative factors includes a performance factor, at least one risk factor, and *at least one qualitative factor* (Giovinazzo et al., paragraph [0149-0165]; where Quantitative and include performance factors, risk factors and Qualitative factors include Manager Tenure, Fund Expense; and quantitative score (with risk factor) is 80% incorporating eight factors and qualitative score is 20% incorporating six factors).

Final Action 12.

We, thus, find that Giovinazzo discloses that a weighted quantitative factor (80%) and a weighted qualitative factor (20%) can be used to effect scoring a fund. We also find that Smith discloses using a weighted performance factor and at least one weighted risk factor (60% Return and 40% Risk) to effect scoring of a fund.

Thus, we agree with the Examiner and find that one of ordinary skill in the art would have understood that the combination of Smith and Giovinazzo discloses using the claimed weighted, performance factor, at least one risk factor and at least one qualitative factor.

As to the weighting percentages, we further agree with the Examiner that, “allocat[ing] at user discretion based on degree of influence” (Answer 14), would result in evaluation criteria based on design choice. Appellants offer no evidence to the contrary; only arguing that the combination does not result in the percentages recited in the claims. Appeal Br. 16–17. The mere existence of differences between the prior art and the claim does not establish nonobviousness. *Dann v. Johnston*, 425 U.S. 219, 230 (1976). The issue is “whether the difference between the prior art and the subject matter in question ‘is a differen[ce] sufficient to render the claimed subject

matter unobvious to one skilled in the applicable art.” *Id.* at 228 (citation omitted). Here, the percentages required by claim 1 do not render this claim patentable over the asserted prior art because such percentages are merely a matter of a design choice. Indeed, the specification does not explain the significance of these percentages, but rather merely refers to them as examples. *See, e.g.*, Spec. ¶ 65 (stating that “the *example* provided herein weighs the Risk factors at 50% of the total mutual fund rating, the Performance Factor at 30% of the total mutual fund rating, and the Qualitative Factors at 20% of the total mutual fund rating”) (emphasis added).

Claims 2, 24, and 25

Appellants argue,

The block diagram of FIG. 10 in Smith does not mention the periodic downloading of investment information, or the importing of statistical information. Similarly, paragraphs [0117] - [0120] of Smith make no mention of the above-referenced claim limitations. Indeed, the Examiner’s own description, on page 13 of the Final Office Action, of the teachings in paragraphs [0117] - [0120] does not mention the periodic downloading of investment information, or the importing of statistical information.

Appeal Br. 17.

The Examiner found,

Smith et al. teach network system 406 enables communication between the Decision Assistance Platform 402 and client /financial consultant computers which download investment information at any time or period via website providing information required for financial consulting services (Smith et al.: Fig. 1,

Investment Performance Information: paragraph [0059-0069]); Fig. 10 Decision Assistance System Platform (402), Database Structure (402), paragraph [0117-0120]) providing desired set of investment information and its weighing for return and risk of different risk portfolio for 1, 3 and 5 year period and risk scoring including statistical data of **standard deviation** for plurality of mutual funds as shown in Fig. 7A and 7B (see Figs. 8A, 8B, 8C and 9C; paragraph [0112]).

Answer 17.

We disagree with Appellants. Our review of Smith at paragraph 117 reveals that Smith explicitly discloses “a computer of a client, a computer of a financial services consultant, a computer capable of downloading investment performance information, etc[.] is enabled and accessibility of information required for carrying out such financial consulting services functionality” Hence, we find that one of ordinary skill in the art would have understood that the claimed requirement of periodic downloading would be met by “downloading [of] investment performance information” because investment performance is a time-based evaluation.

Claims 11, 13, and 16

Appellants’ arguments to these claims merely contest the *prima facie* case of obviousness based on Smith and Giovinazzo and that the additional reference to Valley Vista Enterprises does not remedy the alleged deficiency. Appeal Br. 18. Appellants’ remaining arguments merely repeat claim limitations without substantive argument. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. *See* 37 C.F.R. § 41.37 (c)(1)(iv) (2017).

Claims 14 and 18

Again, Appellants' arguments to these claims merely contest the *prima facie* case of obviousness based on Smith and Giovinazzo and Valley Vista Enterprises and that the additional reference to Barry does not remedy the alleged deficiency. Appeal Br. 18.

Appellants further argue, "[t]he Examiner has not pointed to any portion of the cited references that disclose, teach, or suggest 'wherein each of the Standard Deviation, Beta, and Up-Less-Down-Capture that is used in the at least one qualitative factor is weighted equally,' as provided by claims 14 and 18." Appeal Br. 20.

We disagree with Appellants. We adopt as our own the Examiner's findings made on pages 31 and 32 of the Final Action in which the Examiner cites to specific portions of both Smith and Giovinazzo at which the claim limitation of claims 14 and 18 are disclosed. Because Appellants' arguments only generally allege the Examiner "has not pointed to any portion," and the record shows otherwise, we find no error in the Examiner's rejection of these claims.

Claim 17

Again, Appellants' arguments to this claim fail because they merely contest the *prima facie* case of obviousness based on Smith and Giovinazzo and that the additional reference to Farina does not remedy the alleged deficiency without further analysis by Appellants. Appeal Br. 20; *see* 37 C.F.R. § 41.37 (c)(1)(iv) (2017).

CONCLUSIONS OF LAW

We conclude the Examiner did not err in rejecting claims 1–18 and 20–26 under 35 U.S.C. § 101.

We conclude the Examiner did not err in rejecting claims 1–18 and 20–26 under 35 U.S.C. § 103.

DECISION

The decision of the Examiner to reject claims 1–18 and 20–26 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