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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOHAN L. OLSSON, DANIEL JENSEN,  
ULF AHLENIUS, and SVEN ALLEBRAND

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Appeal 2017-000354<sup>1</sup>  
Application 14/322,049<sup>2</sup>  
Technology Center 3600

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Before HUBERT C. LORIN, NINA L. MEDLOCK, and  
BRADLEY B. BAYAT, *Administrative Patent Judges*.

MEDLOCK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Our decision references Appellants' Appeal Brief ("App. Br.," filed February 22, 2016) and Reply Brief ("Reply Br.," filed September 28, 2016), and the Examiner's Answer ("Ans.," mailed August 10, 2016) and Final Office Action ("Final Act.," mailed September 23, 2015).

<sup>2</sup> Appellants identify Nasdaq Technology AB as the real party in interest. App. Br. 2.

## CLAIMED INVENTION

Appellants' claimed "invention relates to a method for matching orders in an electronic trading system" (Spec. 1: 10–11).

Claims 1, 5, and 15 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the subject matter on appeal:

1. A method of matching data transaction processing requests on an electronic data transaction processing system, comprising:

transmitting to users, by electronic circuitry over a data communications network, electronic messages regarding a current status of data transaction processing requests stored in a memory of the electronic data transaction processing system including information concerning identities of parties having placed data transaction processing requests stored in the memory, the current status being associated with a queue of data transaction processing requests stored in the memory, each stored data transaction processing request having associated properties and an associated queue number, where a higher queue number indicates a lower data transaction processing priority than a lower queue number;

receiving, by electronic circuitry over a data communications network, an electronic data transaction processing request message selecting one of the data transaction processing requests stored in the memory having a queue number of two or higher over a lower queue number data transaction processing request stored in the memory,

where both the selected data transaction processing request and the lower queue number data transaction processing request have properties matching both the selected data transaction processing request and the lower queue number data transaction processing request; and

matching, by electronic circuitry, the received electronic data transaction processing request message with the selected data transaction processing request,

wherein the lower queue number data transaction processing request remains stored in the memory after the matching.

### REJECTION

Claims 1–20 are rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

### ANALYSIS

Appellants argue claims 1–20 as a group (App. Br. 8–23). We select independent claim 1 as representative. The remaining claims stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Under 35 U.S.C. § 101, an invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. The Supreme Court, however, has long interpreted § 101 to include an implicit exception: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *See, e.g., Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014).

The Supreme Court, in *Alice*, reiterated the two-step framework previously set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (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 Corp.*, 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.* If the claims are not directed to a patent-ineligible concept, e.g., an abstract idea, the inquiry ends. Otherwise, the inquiry proceeds to the second step where

the elements of the claims are considered “individually and ‘as an ordered combination’” to determine whether there are additional elements that “‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 79, 78).

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. Therefore, the Federal Circuit has instructed that claims are to be considered in their entirety to determine “whether their character as a whole is directed to excluded subject matter.” *McRO, Inc. v. Bandai Namco Games Am., Inc.*, 837 F.3d 1299, 1312 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)).

We are not persuaded, as an initial matter, by Appellants’ argument that the Examiner failed to perform “a proper 101 analysis” (App. Br. 10). Appellants charge that the rejection should be withdrawn because the Office Action speaks only in generalities and contains no claim language analysis; Appellants also ostensibly maintain that the rejection cannot be sustained because the Examiner “concludes without any evidence” that the claims “perform generic computer functions that are well-understood, routine and conventional activities previously known to the industry” (*id.*). Neither of these arguments is persuasive.

In rejecting the pending claims under 35 U.S.C. § 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,” 79 Fed. Reg. 74618 (Dec. 16, 2014), in effect at the time the Final Office Action was mailed. Specifically, the

Examiner notified Appellants that “the claims are directed towards electronic order matching” i.e., to an abstract idea; and that the additional elements or combination of elements, other than the abstract idea, does not provide meaningful limitations to transform the abstract idea into a patent-eligible application of the abstract idea such that the claims amount to significantly more than the abstract idea itself (Final Act. 5–6). The Examiner, thus, set forth the statutory basis of the rejection in a sufficiently articulate and informative manner as to meet the notice requirement of 35 U.S.C. § 132. And we find that, in doing so, the Examiner set forth a proper rejection under § 101 such that the burden shifted to Appellants to demonstrate that the claims are patent-eligible. *See In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (holding that the USPTO carries its procedural burden of establishing a prima facie case when its rejection satisfies the requirements of 35 U.S.C. § 132).

Appellants argue that the claims cannot be properly characterized as directed to “electronic order matching” because “the word ‘order’ is not used in claim 1” (App. Br. 11). But, there is no requirement that the Examiner’s formulation of an abstract idea must copy the claim language. Instead, the Federal Circuit has explained that “the ‘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.’” *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (citing *Internet Patents Corp.*, 790 F.3d at 1346).

The Examiner’s determination here that the claims are directed to “electronic order matching” is fully consistent with the Specification. *See Spec. Title (“METHODS OF MATCHING ORDERS ON AN*

ELECTRONIC TRADING SYSTEM AND AN ELECTRONIC TRADING SYSTEM FOR MATCHING ORDERS”); *see also id.* at 1, ll. 10–11 (“The present invention relates to a method for matching orders in an electronic trading system.”); *id.* at 2, ll. 33–34 (“In accordance with the invention[,] a method of matching orders in an electronic trading system is achieved through the steps of receiving an order to trade selecting an order from a queue in an order book. . . and matching the received order with the selected order.”)).

Appellants would seemingly characterize the claims more broadly than the Examiner, i.e., as directed to matching electronic *data transaction processing requests*, rather than merely electronic trading orders (App. Br. 11–12). But, the difference between Appellants’ characterization and Examiner’s relates only to the level of abstraction. An abstract idea can be expressed at various levels of abstraction. *See Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). That the Examiner articulates the abstract idea at a different level of abstraction than do Appellants is an insufficient basis for finding that the claims are not directed to an abstract idea.

As for Appellants’ charge that the rejection cannot be sustained because the Examiner has failed to provide certain evidence, we note that there is no requirement that an examiner provide evidentiary support in every case before a conclusion can be made that a claim is directed to patent-ineligible subject matter. Evidence may be helpful, e.g., where facts are in dispute. But, Appellants have put forth no evidence here that the claim elements or a combination of elements is not well-understood, routine, and conventional. Appellants’ bare assertion that evidence is needed,

without any supporting reasoning, is insufficient to require the Examiner to provide evidentiary support.

We also are not persuaded by Appellants' argument that claim 1 is not directed to an abstract idea because the claim recites "extensive technical details" (App. Br. 12). The mere presence of technical elements in a claim does not preclude a claim from being directed to an abstract idea at least because the Court has instructed that the significance of these elements is determined in step two of the *Mayo/Alice* framework. The claims in *Alice*, for example, were not devoid of technical elements. Yet, those claims are determined to be directed to an abstract idea. *Cf. In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016) ("[N]ot every claim that recites concrete, tangible components escapes the reach of the abstract-idea inquiry.").

It also is significant here, as the Examiner observes (Final Act. 3), that although claim 1 recites that the method steps are performed by "electronic circuitry," these steps all involve acts that can be performed in the human mind, without the use of any machine, or by a human using pen and paper.

Appellants argue that it is "not plausible" for a human to perform the claimed method because a human cannot transmit or receive information "by electronic circuitry over a data communications network" (App. Br. 17). But, Appellants cannot reasonably deny that information, e.g., transaction processing request messages, could be communicated via written correspondence. The storing of information, as called for in claim 1, also could be performed through the use of pen and paper, as could the "matching" of transaction requests.



“[A] method that can be performed by human thought alone is merely an abstract idea and is not patent-eligible under § 101.” *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372–73 (Fed. Cir. 2011); *see also* *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (“[p]henomena of nature . . . , mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.”). Moreover, mental processes remain unpatentable even when automated to reduce the burden on the user of what once could have been done with pen and paper. *CyberSource*, 654 F.3d at 1375 (“That purely mental processes can be unpatentable, even when performed by a computer, was precisely the holding of the Supreme Court in *Gottschalk v. Benson*.”).

Turning to the second step of the *Mayo/Alice* framework, the Examiner found, and we agree, that the claims do not include additional elements or a combination of elements sufficient to transform the abstract idea into patent-eligible subject matter. (Final Act. 3–6; *see also* Ans. 4–6). Appellants argue that claim 1 “does not generically recite ‘one or more sets of processors’ or ‘electronic circuitry’ because the electronic circuitry is specifically configured to perform detailed operations that a generic processor or generic circuitry is not configured to perform” (App. Br. 17). And Appellants charge that the Examiner “wrongly skips over the specific limitations recited in claim 1” (App. Br. 16); “wrongly characterizes the steps as performed by ‘the generically recited one or more sets of processors’” (*id.* at 17); and “makes broad statements about generic processors unconnected to the specific language of each and every claim feature” (*id.* at 18). Yet, we find nothing in the Specification, nor do Appellants point us to anything in the Specification to indicate that the

particular operations recited in claim 1 require any specialized computer hardware or other inventive computer components, invoke any assertedly inventive programming, or that the claimed invention is implemented using other than generic computer components to perform generic computer functions. *See DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256 (Fed. Cir. 2014) (“[A]fter *Alice*, there can remain no doubt: recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible.”). In fact, as the Examiner observes (Ans. 10–11), the Specification explicitly discloses that “essentially any combination of hardware and software” can be used for performing the claimed functions (Spec. 4, ll. 13–15).

Appellants further argue that, as in *DDR Holdings*, claim 1 solves a technical problem in conventional electronic data transaction processing systems, i.e., the inflexibility of matching only the highest priority request messages, and that claim 1 is, therefore, “‘necessarily rooted in’ computer technology,” (App. Br. 14). But, we are not persuaded that matching transaction request messages is a technical problem rather than a business problem. We also are not persuaded that providing the flexibility to permit the selection and matching of lower priority transaction requests is a technical solution, not a commercial solution. Indeed, it is telling in this regard that the Specification discloses that the purpose of matching transactions is to create “trades,” i.e., contractual relationships,<sup>3</sup> and describes the purported flexibility in terms of its effect in allowing a party to

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<sup>3</sup> *See* Spec. 4, ll. 36–37 (“Any matching orders found by the matching unit 109 are formed into a trade and forwarded to a deal capture unit 112 for finalising the trade.”)

enter into a preferred contractual relationship, without the restrictions imposed by priority rules (*see* Spec. 5–6). The only portion of claim 1 that can reasonably be considered “technological” is the generic computer components, e.g., the claimed “electronic circuitry,” used to implement the claimed invention, which is not enough to confer subject matter eligibility. *See Alice Corp.*, 134 S. Ct. at 2358 (“[I]f 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.”) (alterations in original) (internal citations omitted).

Appellants attempt to further analogize claim 1 to the claims held patent-eligible in *DDR Holdings*, arguing that “[t]he claimed technology also overrides the normal matching priority operations where the highest priority transaction requests are automatically matched” and that this is “‘a result that overrides the routine and conventional sequence of events’ in known electronic data transaction processing systems that match electronic data transaction processing request messages” (App. Br. 22 (quoting *DDR Holdings*, 773 F.3d at 1258)). But we find no parallel between claim 1 and the claims at issue in *DDR Holdings*.

In *DDR Holdings*, the Federal Circuit determined that, although the patent claims at issue involved conventional computers and the Internet, the claims addressed the problem of retaining website visitors who, if adhering to the routine, conventional functioning of Internet hyperlink protocol, would be transported instantly away from a host’s website after “clicking” on an advertisement and activating a hyperlink. *DDR Holdings*, 773 F.3d at 1257. The Federal Circuit, thus, held that the claims were directed to patent-eligible subject matter because they claim a solution “necessarily

rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *Id.*

No such technological advance is evident in the present invention. Unlike the situation in *DDR Holdings*, Appellants do not identify any problem particular to computer networks and/or the Internet that claim 1 allegedly overcomes. Instead, claim 1 merely employs generic computer components to perform generic computer functions, i.e., transmitting, receiving, and matching information. For example, the claimed “memory” performs its expected function of storing data. The claimed “data communications network” also performs its expected function, namely transmitting and receiving data (messages), without any asserted improvement to its functionality.<sup>4</sup> *Cf. Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1371 (Fed. Cir. 2015) (“The patent claims here do not address problems unique to the Internet, so *DDR* has no applicability.”). Unlike the improvement to computer functionality in *DDR Holdings*, claim 1 is “directed to nothing more than the performance of an abstract business practice . . . using a conventional computer. Such [a claim is] not patent-eligible.” *See DDR Holdings*, 773 F.3d at 1256.

We also cannot agree that Appellants’ claim 1 is similar to claim 2 of the USPTO’s Example 21 in the “July 2015 Update Appendix 1: Examples”<sup>5</sup>

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<sup>4</sup> *See* Spec. 4, ll. 9–11 (“The communication link 107 may consist of any means or combination of means of creating a signal flow, i.e., communication wires, optic fibres, Internet, Ethernet, LAN, etc.”)

<sup>5</sup> Exemplary claim 2, which appears at pages 2–3 of Appendix 1 of the July 2015 Update (available at <https://www.uspto.gov/sites/default/files/documents/ieg-july-2015-app1.pdf>), reads:

2. A method of distributing stock quotes over a network to a remote subscriber computer, the method comprising:

and, therefore, patent-eligible, because “[t]he extensive limitations in instant claim 1 add more than just linking matching to generic processing circuitry” (App. Br. 18–19).

Exemplary claim 2 was not found patent-eligible merely because it provided “extensive limitations”; nor would that alone have been sufficient for patent-eligibility. *Cf. Mayo*, 566 U.S. at 88–89 (“[O]ur cases have not distinguished among different laws of nature according to whether or not the principles they embody are sufficiently narrow”). Instead, exemplary claim 2 was deemed patent-eligible because it addressed an Internet-centric

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providing a stock viewer application to a subscriber for installation on the remote subscriber computer;

receiving stock quotes at a transmission server sent from a data source over the Internet, the transmission server comprising a microprocessor and a memory that stores the remote subscriber’s preferences for information format, destination address, specified stock price values, and transmission schedule, wherein the microprocessor

filters the received stock quotes by comparing the received stock quotes to the specified stock price values;

generates a stock quote alert from the filtered stock quotes that contains a stock name, stock price and a universal resource locator (URL), which specifies the location of the data source;

formats the stock quote alert into data blocks according to said information format; and

transmits the formatted stock quote alert over a wireless communication channel to a wireless device associated with a subscriber based upon the destination address and transmission schedule,

wherein the alert activates the stock viewer application to cause the stock quote alert to display on the remote subscriber computer and to enable connection via the URL to the data source over the Internet when the wireless device is locally connected to the remote subscriber computer and the remote subscriber computer comes online.

challenge, i.e., alerting a subscriber with time sensitive information when the subscriber's computer is offline. Appellants have not demonstrated that claim 1 addresses any comparable Internet-centric challenge.

Responding to the Examiner's Answer, Appellants charge in their Reply Brief that the Examiner oversimplified the claims as directed to electronic order matching; and Appellants argue that, like the claims in *McRO*, the present claims are directed to a patentable, technological improvement over existing electronic data transaction processing request techniques (Reply Br. 4–8). That argument similarly fails.

In *McRO*, the claim recited “[a] method for automatically animating lip synchronization and facial expression of three-dimensional characters” *McRO*, 837 F.3d at 1307. The court found that the claim required “a combined order of specific rules that renders information into a specific format that is then used and applied to create desired results: a sequence of synchronized, animated characters.” *Id.* at 1315. The court, thus, concluded that the claim, when considered as a whole, was directed to a technological improvement over the existing, manual 3-D animation techniques and used limited rules in a process specifically designed to achieve an improved technological result in conventional industry practice. *Id.* at 1316.

Appellants have not identified any similar improvement attributable to the claimed invention, as recited in claim 1. Appellants assert that “[c]laim 1 uses the particular configured electronic data transaction processing system ‘in a process *specifically* designed to achieve an improved technological result in conventional industry practice’ which in this case is the convention[al] industry practice of matching higher priority requests over lower priority ones” (Reply Br. 7–8). But not all inventions that depart

from some conventional industry practice are patent-eligible. Here, matching transactions without regard to priority may allow the creation of previously unavailable contractual relationships, i.e., it may improve a business process; but it does not achieve “an improved *technological* result,” analogous to the situation in *McRO*.

We also are not persuaded by Appellants’ argument that the Examiner failed to perform a proper analysis under the second step of the *Mayo/Alice* framework (Reply Br. 8–10).

Appellants charge that the Examiner failed to cite any evidence to support the Examiner’s assertion that “[a]ny problems which are addressed do not appear to require a technical, but rather an administrative business solution or a business plan enhanced by common generic hardware” (*id.* at 8 (alteration in original) (quoting Ans. 11)). In fact, the Examiner cited record evidence, namely Appellants’ Specification, to support that assertion (*see, e.g.,* Ans. 11 (“[T]he specification does not contribute any specific computer algorithm or code, but rather merely states that the claimed steps may be performed by the generic modules with the expectation that one of ordinary skill in the art would be capable of implementation without further instruction.”)). Appellants have offered no evidence to the contrary.

Appellants’ attempt to analogize the present claims to those in *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016) also fails (*see* Reply Br. 9). In *Bascom*, the court determined that “an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.” *Bascom*, 827 F.3d at 1350. Specifically, Bascom’s content filter could be “installed

remotely in a single location” and “[this] particular arrangement of elements is a technical improvement over the prior art ways of filtering.” *Id.*

Appellants argue that the present claims “recite ‘a non-conventional and non-generic arrangement of known, conventional pieces,’ and therefore, recite an inventive step” (Reply Br. 9). But, Appellants merely paraphrase the limitations of claim 1 and assert that “[t]hese features [i.e., the “associating” and “matching” features called for in claim 1, for example<sup>6</sup>] are non-conventional and non-generic” (*id.*), without directing us to what is alleged to be the “non-conventional and non-generic arrangement of known, conventional pieces.”

Appellants further argue that “[t]he fact that no prior art is applied against any claims in the Answer is a clear indication that the claims include features that amount to significantly more than merely performing electronic matching using generic computer devices” (Reply Br. 9–10; *see also*, App. Br. 18). A finding of novelty or non-obviousness, however, does not automatically lead to the conclusion that the claimed subject matter is patent-eligible. Although the second step in the *Mayo/Alice* framework is termed a search for an “inventive concept,” the analysis is not an evaluation of novelty or non-obviousness, but rather, a search for “an element or combination of elements that is ‘sufficient to ensure that the patent in

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<sup>6</sup> Claim 1 recites that “each stored data transaction processing request . . . [has] an associated queue number”; “receiving . . . an electronic data transaction processing request message selecting one of the data transaction processing requests . . . having a queue number of two or higher over a lower queue number data transaction processing request”; and “matching . . . the received electronic data transaction processing request message with the selected data transaction processing request.”



practice amounts to significantly more than a patent upon the [ineligible concept] itself.” *Alice Corp.*, 134 S. Ct. at 2355 (alteration in original). “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” *Ass’n. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 591 (2013). A novel and non-obvious claim directed to a purely abstract idea is, nonetheless, patent-ineligible. *See Mayo*, 566 U.S. at 90; *see also Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981) (“The ‘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.”).

Finally, we are not persuaded of Examiner error by Appellants’ argument that “the independent claims do not preempt all approaches that match received electronic data transaction processing request messages.” (Reply Br. 10; *see also* App. Br. 22). 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 preemption 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 Corp.*, 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.*

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We are not persuaded, on the present record, that the Examiner erred in rejecting independent claim 1 under 35 U.S.C. § 101. Therefore, we sustain the Examiner's rejection of independent claim 1. We also sustain the Examiner's rejection of claims 2–20, which fall with claim 1.

#### DECISION

The Examiner's rejection of claims 1–20 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