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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* HOWARD W. LUTNICK, KEVIN M. FOLEY,  
JOSEPH NOVIELLO, and MICHAEL SWEETING

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Appeal 2017-004835<sup>1</sup>  
Application 13/887,486<sup>2</sup>  
Technology Center 3600

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Before MURRIEL E. CRAWFORD, BIBHU R. MOHANTY, and  
MATTHEW S. MEYERS, *Administrative Patent Judges*.

MEYERS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) claims 1–23 and 43–66.<sup>3</sup>  
We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> Our decision references the Appellant’s Appeal Brief (“Appeal Br.,” filed August 12, 2016), Reply Brief (“Reply Br.,” filed February 2, 2017), and the Examiner’s Answer (“Ans.,” mailed June 5, 2017) and Final Office Action (“Final Act.,” mailed May 28, 2015).

<sup>2</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies “BGC Partners, Inc.,” as the real party in interest (Appeal Br. 2).

<sup>3</sup> With respect to claim 67, the Examiner states “[a]n After-Final Amendment cancelling claim 67 is being submitted herewith. (The listing of claims herein reflects the cancellation, though technically the After-Final

We AFFIRM.

### CLAIMED INVENTION

Appellant’s claims relate generally “to electronic trading systems” and more particularly “to order types for use in electronic trading systems” (Spec. ¶ 2).

Claims 1, 10, 19, 43, 52, 61, and 66 are the independent claims on appeal. Claim 1, reproduced below with bracketed notations added, is illustrative of the claimed subject matter:

1. A method of trading items on an electronic trading system comprising a processor, the method comprising:

[a] receiving by the processor over a network a good-until-bettered bid comprising a bid price;

[b] receiving by the processor instructions that specify a good-until-bettered increment value comprising an amount of standard trading increments for the bid;

[c] after maintaining the good-until-bettered bid in the electronic trading system, determining that another bid received by the electronic trading system tops the good-until-bettered bid by the specified amount of standard trading increments; and

[d] responsive to determining that another bid received by the electronic trading system tops the good-until-bettered bid by the specified amount of standard trading increments, canceling by the processor the good-until-bettered bid.

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Amendment has not yet been entered.) No other amendments have been submitted since the Final Office Action dated May 28, 2015” (Ans. 3; *cf.* Appeal Br. 2). For purposes of this appeal, we consider claim 67 to be cancelled.

## REJECTIONS

Claims 1–23 and 43–66 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

Claims 1–23 and 43–66 are rejected under 35 U.S.C. § 103(a) as unpatentable over Fisher (US 5,835,896, iss. Nov. 10, 1998) and Lupien (US 5,689,652, iss. Nov. 18, 1997).

Claims 1–23 and 43–66 are rejected on the ground of non-statutory obviousness-type double patenting over claims 1–18, 24–36, and 41–51 of U.S. Patent No. 8,438,097.

## ANALYSIS

### *Patent-Ineligible Subject Matter*

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. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *E.g.*, *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is “directed to.” *See id.* at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4

in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1853))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson* and *Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula

to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (alterations in original) (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

The PTO recently published revised guidance on the application of § 101. *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Revised Guidance”). Under that guidance, we first look to whether the claim recites:

(1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and

(2) additional elements that integrate the judicial exception into a practical application, i.e., that “apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception.” *See* 2019 Revised Guidance, 84 Fed. Reg. at 53; *see also* MPEP § 2106.05(a)–(c), (e)–(h).

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

(3) adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

*See* 2019 Revised Guidance, 84 Fed. Reg. at 56.

Appellant argues claims 1–23 and 43–66 as a group (*see* Appeal Br. 7; *see also* Reply Br. 3). We select independent claim 1 as representative. Claims 2–23 and 43–66 stand or fall with independent claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

With regard to the first step of the *Mayo/Alice* framework, the Examiner states that the claims broadly recite:

receiving over a network a good-until bettered bid comprising a bid price and after maintaining the good-until-bettered bid in the electronic trading system, determining that another bid received by the electronic trading system tops the good-until-bettered bid by the specified amount of standard trading increments; and responsive to determining that another bid received by the electronic trading system tops the good-until-bettered bid by the specified amount of standard trading increments, canceling by the processor the good-until-bettered bid.

(Final Act. 3–4). After considering the language of the claims, the Examiner determined that the claims recite an abstract idea which the Examiner considers to be “a method of a fundamental economic practice” (*id.* at 6; *see also* Ans. 4–12). .

In response, Appellant first argues that the Examiner’s rejection is improper because the Examiner “merely provides conclusory assertions of these findings, without any supportive evidence or reasoning” (Appeal Br. 7–8; Reply Br. 3–4). We cannot agree.

Under the first prong of step 2A of the 2019 Revised Guidance, we first determine if the claims recite an abstract idea. In this regard, the Specification is titled “SYSTEMS AND METHODS FOR MAINTAINING THE VIABILITY OF A GOOD-UNTIL-BETTERED ORDER TYPE IN ELECTRONIC TRADING SYSTEMS,” and “relates to order types for use in electronic trading systems” (Spec. ¶ 2). The Specification informs us that “[b]ids that are bettered are commonly referred to as ‘topped’ and offers that are bettered are commonly referred to as ‘cut’” (*id.* ¶ 4). The Specification describes that “a bid or offer that is removed from the trading system on occurrence of it being topped or cut may be referred to as a ‘good-until-bettered’ order” (*id.*). In contrast, “a ‘limit’ order that remains listed and available for trading in a trading system until traded or cancelled” (*id.*). According to the Specification, one drawback with limit orders is that participants “are forced to remain constantly aware of their existence” because “[a] limit order may be set to remain good until traded or cancelled for a trading session, multiple trading sessions or any other suitable period” (*id.*).

However, the Specification describes that a good-until-bettered order does not share this drawback because this order type enables participants “to bid or offer for a short time span” (*id.* ¶ 5). Additionally the Specification discloses that “a good-until-bettered order type may become preferable to a limit or other order type, especially in fast moving markets where a

participant's thought processes, or a computer's processing speed, are at a premium" (*id.* ¶ 6). The Specification also informs us of a drawback with the good-until-bettered order type that "occurs when there is a gap in the inside market" (*id.* ¶ 7). During this scenario,

[i]f a first participant is working a "good-until-bettered" bid order in such a situation, a subsequent "topping participant" taking advantage of a gap in the market may knock the first participant's order out of the trading system either unnecessarily, or for the topping participant's trading advantage. This may be contrary to what the first participant intended, and often serves to unnecessarily remove liquidity from the trading system by knocking out good-until-bettered orders, even when the market price of the instrument is not moving away from them.

(*id.* ¶ 7). To address this drawback, the present invention provides "systems and methods for maintaining the viability of a good-until-bettered order in electronic trading systems" (*id.* ¶ 9). More particularly, the present invention discloses that it providing "a new order type" which "is a modification of a conventional good-until-bettered order type" (*id.* ¶ 10).

Taking independent claim 1 as representative, the claimed subject matter recites "[a] method of trading items on an electronic trading system" including steps for "receiving . . . a good-until-bettered bid comprising a bid price," "receiving . . . a good-until-bettered increment value comprising an amount of standard trading increments for the bid," "after maintaining the good-until-bettered bid in the electronic trading system, determining that another bid received by the electronic trading system tops the good-until-bettered bid by the specified amount of standard trading increments," and if the another bid "tops the good-until-bettered bid by the specified amount of standard trading increments, canceling . . . the good-until-bettered bid."

Understood in light of the Specification, we agree with the Examiner that independent claim 1 broadly recites “a method of a fundamental economic practice” (*id.* at 6; *see also* Ans. 4–12). In this regard, exemplary independent claim 1 includes steps for receiving a bid, receiving increments for the bid, and determining if the bid has been topped, which we find akin to placing an order on an electronic trading system. Therefore, when viewed through the lens of the 2019 Revised Guidance, the Examiner’s analysis depicts the claimed subject matter as being directed to ineligible subject matter which may be categorized as one of the ineligible “methods of organizing human activity” that include “fundamental economic principles or practices (including hedging, insurance, mitigating risk)” and “commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations),” and thus an abstract idea. *See* 2019 Revised Guidance, 84 Fed. Reg. at 52.

Having concluded that claim 1 recites a judicial exception, i.e., an abstract idea, we turn to the second prong of step 2A of the 2019 Revised Guidance and determine whether the claims recite a practical application of the recited judicial exception. Here we look to see if, for example, (i) any additional elements of the claims reflects an improvement in the functioning of a computer or to another technological field, (ii) an application of the judicial exception with, or by use of, a particular machine, (iii) a transformation or reduction of a particular article to a different state or thing, or (iv) a use of the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular

technological environment. *See* 2019 Revised Guidance, 84 Fed. Reg. at 55; *See also* MPEP § 2106.05(a)–(c), (e)–(h).

Appellant argues that the present claims are similar to the patent-eligible claims in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), and patent-eligible because the “present claims solve a problem rooted in computer technology to improve functionality of trading systems by automatically canceling orders when certain conditions are met” (Appeal Br. 12). However, we find no indication in the Specification that this purported improvement to the computer, i.e., automatic cancellation of orders, invokes any assertedly inventive programming, requires any specialized computer hardware or other inventive computer components (*cf.* Spec. ¶¶ 26–39), i.e., a particular machine, or that the claimed invention is implemented using other than generic computer components to perform generic computer functions (*see* Ans. 12–14). *See also DDR*, 773 F.3d at 1256 (“[A]fter *Alice*, there can remain no doubt: recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible.”). Instead, we find that the “improvement” to which the Appellant refer is a business improvement rather than an improvement to a technological or technical field (*see OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015) (“[R]elying on a computer to perform routine tasks more quickly or more accurately is insufficient to render a claim patent eligible.”)).

Appellant further argues “that the combination of elements recited in the amended claims perform functions that are not generic computer functions” (Reply Br. 5 (emphases omitted)). However, independent claim 1, unlike the claims found non-abstract in prior cases, uses generic computer

technology to send bid data, receive bid data, and analyze global bid data (see Spec. ¶¶ 26–39), and does not recite an improvement to a particular computer technology. *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (finding claims not abstract because they “focused on a specific asserted improvement in computer animation”). Thus, we do not find anything of record that persuasively attributes any improvement in computer technology and/or functionality to the claimed invention or that otherwise indicates that the claimed invention “appl[ies], rel[ies] on, or us[es] the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception.” See 2019 Revised Guidance, 84 Fed. Reg. at 53.

Appellant also argues that the present claims are not directed to the alleged abstract idea because the Examiner “fails to make any analysis or showing of any kind concerning preemption” (Appeal Br. 11; Reply Br. 6). However, Appellant’s preemption argument does not alter our § 101 analysis. Preemption concerns are fully addressed and made moot where a patent’s claims are deemed to disclose patent ineligible subject matter under the two-part framework described in *Mayo* and *Alice*. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). “While preemption may signal patent ineligible matter, the absence of complete preemption does not demonstrate patent eligibility.” *Id.*

Turning to Step 2B of the 2019 Revised Guidance, we determine whether the additional elements (1) add a specific limitation or combination of limitations that is not well-understood, routine, and conventional activity in the field, which is indicative that an inventive concept may be present or

(2) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception, which is indicative that an inventive concept may not be present. *See* 2019 Revised Guidance, 84 Fed. Reg. at 56.

Addressing the second step of the *Mayo/Alice* framework, the Examiner states:

[t]he claims do not include additional elements that are sufficient to amount to significantly more than the judicial exception because steps for routine data gathering in order for delivering content to consumers do not add a meaningful limitation to the method as they would be routinely used by those of ordinary skill in the art in order to deliver data content.

(Final Act. 4; *see also id.* at 6). The Examiner also notes the “[i]n the instant application, the data processing platform, including a processor is no more than conventional hardware and as such, does not amount to significantly more than the abstract idea” (Ans. 12). More particularly, the Examiner finds that the Specification “requires no more than a generic computing device (server), a client (generic computer) interface, and a network (connected generic computers) to perform generic functions that are well-understood, routine, and conventional activities previously known in the industry” (*id.* at 13–14 (citing Spec. ¶¶ 6, 27, 31)).

We agree with the Examiner that the additional elements taken alone or in combination do not result in anything more than conventional computer implementation. And, considered as an ordered combination, the “electronic trading system comprising a processor” recited by independent claim 1 adds nothing that is not already present when the limitations are considered separately. Viewed as a whole, independent claim 1 simply recites “a method of a fundamental economic practice” (Final Act. 6; *see also* Ans. 4–

12) or more particularly, a series of steps for placing an order on an electronic trading system. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716 (Fed. Cir. 2014) (“[T]he claimed sequence of steps comprises only ‘conventional steps, specified at a high level of generality,’ which is insufficient to supply an ‘inventive concept.’”) (citing *Alice*, 134 S. Ct. at 2357). 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, as discussed above with respect to prong two of step 2A. Instead, independent claim 1 amounts to nothing significantly more than an instruction to apply the abstract idea using “an electronic trading system comprising a processor,” which under our precedents, is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, 134 S. Ct. at 2360.

Appellant’s other arguments, including those directed to now-superseded USPTO guidance, have been considered but are not persuasive of error. (*See* 2019 Revised Guidance, 84 Fed. Reg. at 51 (“Eligibility-related guidance issued prior to the Ninth Edition, R-08.2017, of the MPEP (published Jan. 2018) should not be relied upon.”))).

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, and claims 2–23 and 43–66, which fall with independent claim 1.

#### *Obviousness*

We are persuaded by Appellant’s argument that the Examiner erred in rejecting independent claims 1–23 and 43–66 under 35 U.S.C. § 103(a) because the combination of Fisher and Lupien fails to disclose or suggest

“responsive to determining that another bid received by the electronic trading system tops the good-until-bettered bid by the specified amount of standard trading increments, canceling by the processor the good-until-bettered bid,” as recited by independent claim 1 (*see* Appeal Br. 16–19; *see also* Reply Br. 8–9). Each of independent claims 10, 19, 43, 52, 61, and 66 include a similar limitation, and are argued based on similar argument (*see* Appeal Br. 23–28; *see also* Reply Br. 10–12).

The Examiner maintains the rejection is proper, and cites Lupien, at column 9, lines 30–50, as disclosing the argued limitation (*see* Final Act. 8–9). However, we agree with the Appellant that there is nothing in the cited portion that discloses or suggests the argued limitation.

In making this determination, we agree with the Appellant that “the cited passages of Fisher and Lupien do not disclose or suggest any logical connection between cancelling a good-until-bettered bid/offer/order, on the one hand, and determining that another bid/offer/order is better than the good-until-bettered bid/offer/order by a specified amount of standard trading price increments” (Appeal Br. 16). Although Lupien describes cancelling an order (*see, e.g.*, Lupien, col. 9:41–45), we fail to see, and the Examiner does not adequately explain how Lupien’s ability to cancel or modify an order discloses or suggest “*canceling an order based on (or responsive to) the recited determining action (namely, determining that another bid/offer/order is better than the good-until-bettered bid/offer/order by the specified amount of standard trading price increments)*” (Appeal Br. 17). Instead, the cited portion of Lupien simply discloses that “whenever a new order is entered or an existing order canceled or modified” (Lupien, col. 9:47–50). We also agree with the Appellant that the “Time-in-Force would disclose an order

ceasing to be in force solely as a result of a time expiration, and **not** ‘based on (or responsive to) the act of determining that another bid/offer/order is better than the good-until-bettered bid/offer/order by the specified amount of standard trading price increments’” (Appeal Br. 19).

In the Answer, the Examiner additionally relies upon Lupien, at column 6, lines 56–61, as disclosing the argued limitation (*see* Ans. 18–19). However, we agree with the Appellant that even if the time-in-force feature does cancel an order, the Examiner has not shown that the time-in-force feature “would disclose an order ceasing to be in force solely as a result of a time expiration, and not ‘based on (or responsive to) the act of determining that another bid/offer/order is better than the good-until-bettered bid/offer/order by the specified amount of standard trading price increments’” (Appeal Br. 19 (emphases omitted)). The Examiner does not rely on Fisher to address this deficiency.

In view of the foregoing, we do not sustain the Examiner’s rejection of independent claims 1, 10, 19, 43, 52, 61, and 66, under 35 U.S.C. § 103(a). For the same reasons, we also do not sustain the Examiner’s rejections of claims 2–9, 11–18, 20–23, 44–51, 53–60, and 62–65, which depend therefrom.

#### *Non-statutory Obvious-type Double Patenting*

The Examiner rejected claims 1–23 and 43–66 on the ground of non-statutory obviousness-type double patenting over claims 1–18, 24–36, and 41–51 of U.S. Patent No. 8,438,097 (Final Act. 15–16).

In response, the Appellant argues that “this rejection can be overcome by filing a proper Terminal Disclaimer” and “[a]s the claims of the present application are subject to change during prosecution, Appellants have

Appeal 2017-004835  
Application 13/887,486

requested that these rejections be held in abeyance until the application is otherwise in condition for allowance” (Appeal Br. 29).

Therefore, the double patenting rejection is summarily sustained.

#### DECISION

<b>Claims Rejected</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-23, 43-66	§ 101	1-23, 43-66	
1-23, 43-66	§ 103 Fisher, Lupien	1-23, 43-66	
1-23, 43-66	Obviousness-Type Double Patenting	1-23, 43-66	
<b>Overall Outcome</b>		1-23, 43-66	

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