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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* GLENN D. KIRWIN, MATTHEW CLAUS,  
JOSEPH NOVIELLO, and ANDREW C. GILBERT

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Appeal 2017-006958  
Application 12/789,122<sup>1</sup>  
Technology Center 3600

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Before ANTON W. FETTING, BRUCE T. WIEDER, and  
MATTHEW S. MEYERS, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 37–48 and 66. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> According to Appellants, the real party in interest is BGC Partners, Inc. (Appeal Br. 3.)

CLAIMED SUBJECT MATTER

Appellants' "invention relates to systems and methods for providing a trading interface." (Spec. 1, ll. 10–11.)

Claims 37 and 66 are the independent claims on appeal. Claim 37 is illustrative. It recites:

37. A method, comprising:

- displaying on a display, via a processor of a computing device, a first interface that comprises a first variable associated with trading a financial instrument, in which the first variable comprises a price of the financial instrument;

- receiving, via the processor from a remote device, a selection of the first variable at the first interface, in which the remote device and the processor are in electronic communication over a network;

- in response to the selection of the first variable at the first interface, displaying a second interface on the display, via the processor, in which the second interface is separate from the first interface and in which the second interface comprises:

- a buy button, in which the buy button, when selected causes a buy command to be submitted in order to purchase a financial instrument;

- a sell button, in which the sell button, when selected causes a sell command to be submitted in order to purchase [sic] the financial instrument;

- a price field, in which a price displayed in the price field is adjustable and the price corresponds to a desired bid price for the financial instrument;

- a size field, in which a size displayed in the size field is adjustable and corresponds to a desired bid quantity of the financial instrument;

- a price up button and a price down button, in which the price up button when selected adjusts the desired bid price displayed in the price field and in which the price down button when selected adjusts the desired bid price displayed in the price field;

a size up button and a size down button, in which the size up button when selected adjusts the desired bid quantity displayed in the size field and in which the size down button when selected adjusts the desired bid quantity displayed in the price [sic] field; and

one or more numeric buttons, in which the size field is adjusted to the desired bid quantity of the financial instrument, in response to a selection of at least one numeric button. [sic]

receiving, via the processor from the remote device, a selection of at least one of a buy button and a sell button; and

in response to the selection of the at least one of the buy button and the sell button, transmitting, via the processor, a command to execute a purchase or a sale of the financial instrument.

#### REJECTIONS

Claims 37–48 and 66 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.<sup>2</sup>

Claims 37–48 and 66 are rejected under 35 U.S.C. § 103(a) as unpatentable over Friesen (US 7,212,999 B2, iss. May 1, 2007), Walker (US 6,068,552, iss. May 30, 2000), and Minton (US 6,014,643, iss. Jan. 11, 2000).

Claims 37 and 66 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as “unpatentable over claim 42 of copending Application No. 12/789,006.”<sup>3</sup>

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<sup>2</sup> In view of the discussion of claim 66 (*see* Final Action 6), and that claim 65 has been cancelled (*see* Reply to Office Action, filed June 26, 2014, at 7), we treat reference to claim 65 in the discussion of the rejection under § 101 (*see* Final Action 4), to be a typographical error.

<sup>3</sup> We note that Application No. 12/789,006 issued as US Patent No. 8,060,435 B2 on November 15, 2011.

## ANALYSIS

### The § 101 rejection

Appellants do not separately argue the rejected claims. We select claim 37 as representative. Claims 38–48 and 66 will stand or fall with claim 37. *See* 37 C.F.R. § 41.37(c)(1)(iv).

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. Section 101, however, “contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

*Alice* applies a two-step framework, earlier set out 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*, 573 U.S. at 217.

Under the two-step framework, it must first be determined if “the claims at issue are directed to a patent-ineligible concept.” *Id.* at 218. If the claims are determined to be directed to a patent-ineligible concept, e.g., an abstract idea, then the second step of the framework is applied to determine if “the elements of the claim . . . contain[] an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Id.* at 221 (citing *Mayo*, 566 U.S. at 72–73, 79).

With regard to step one of the *Alice* framework, we apply a “directed to” two prong test to: 1) evaluate whether the claim recites a judicial exception, and 2) if the claim recites a judicial exception, evaluate whether the claim “appl[ies], rel[ies] on, or use[s] 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 Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50, 54 (Jan. 7, 2019) (hereinafter “2019 Guidance”).

Here, the Examiner determines that claim 37

is directed to allowing consumers to shop for and optionally purchase financial-instruments which is considered to be an abstract idea inasmuch as such activity is considered both a fundamental economic practice (concepts relating to economy and commerce such as contracts and business relations) and a method of organizing human activity (concepts relating to inter/intrapersonal activities such as sales and transactions) by providing an opportunity for parties to enter into a specified agreement (see [*buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014)]).

The independent claim(s) recites the steps of displaying, receiving, selecting and transmitting data. This is simply collecting and analyzing information and displaying certain results of the collection and analysis, which is considered by the courts to be an abstract idea (see [*Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016)]).

(Answer 3.)

Appellants disagree and argue that “the Examiner’s characterization of the claims . . . is an improper over-generalization of the claims that fails to take into account what the claims actually recite.” (Reply Br. 3.)

Under step one of the *Alice* framework, we “look at the ‘focus of the claimed advance over the prior art’ to determine if the claim’s ‘character as a

whole’ is directed to excluded subject matter.” *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016)).

The “directed to” inquiry . . . cannot simply ask whether the claims *involve* a patent-ineligible concept, because essentially every routinely patent-eligible claim involving physical products and actions *involves* a law of nature and/or natural phenomenon . . . . Rather, 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.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015).

*Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). In other words, the first step of the *Alice* framework “asks whether the focus of the claims is on the specific asserted improvement in [the relevant technology] or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Id.* at 1335–36; *see also* 2019 Guidance at 54–55.

The Specification provides evidence as to what the claimed invention is directed. In this case, the Specification discloses that the “invention relates to systems and methods for providing a trading interface.” (Spec. 1, ll. 10–11.) Claim 37 provides further evidence. Claim 37 recites “displaying . . . a first interface,” “receiving . . . a selection of the first variable at the first interface,” “in response . . . displaying a second interface,” “the second interface comprises: a buy button,” “a sell button,” “a price field,” “a size field,” “a price up button and a price down button,” “a size up button and a size down button,” “numeric buttons, in which the size field is adjusted,” “receiving . . . a selection of at least one of a buy button

and a sell button,” “and in response to the selection . . . , transmitting . . . a command to execute a purchase or a sale.”

In other words, claim 37 is directed to the abstract idea of certain methods of organizing human activity, i.e., commercial or legal interactions. This is accomplished by displaying, receiving, selecting, and transmitting information. *See Elec. Power Grp.*, 830 F.3d at 1355 (collecting, analyzing and displaying information, even if limited to a specific content, are within the realm of abstract ideas); *see also* 2019 Guidance at 52. Here, this is performed by using a generic processor in a generic computing device. (*See* Spec. 25, ll. 14–32.)

Although we and the Examiner describe, at different levels of abstraction, to what the claims are directed, it is recognized that “[a]n abstract idea can generally be described at different levels of abstraction.” *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). That need not and, in this case does not, “impact the patentability analysis.” *See id.* at 1241.

We do not see how the recitation of a generic processor and computing device, even in conjunction with the recited functions, “ensure[s] ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Alice*, 573 U.S. at 221 (brackets in original) (quoting *Mayo*, 566 U.S. at 77.) Moreover, the limitations of claim 37 do not recite implementation details. “They do not claim a particular way of programming or designing the software to create [the claimed displayed interfaces] that have [the recited] features, but instead merely claim the resulting systems.” *Apple, Inc.*, 842 F.3d at 1241; *see also In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016) (“the

recited physical components merely provide a generic environment in which to carry out the abstract idea”).

Nonetheless, Appellants argue that “[t]he present case uniquely matches the facts of *Trading Technologies International, Inc. v. CQG* [675 F. App’x 1001 (Fed. Cir. 2017)] in which the claims were found patent-eligible.” (Reply Br. 6.) Specifically, Appellants argue that “[a]s with the patents upheld in *TTI*, Applicants’ claimed subject matter is also drawn to a graphical user interface that improves the accuracy of trader transactions, thereby overcoming disadvantages of prior systems.” (*Id.* at 7, citing Spec. 1, l. 15–3, l. 6.) We disagree.

In the claimed method in *CQG*, “bid and asked prices are displayed dynamically along the static display, and the system pairs orders with the static display of prices and prevents order entry at a changed price.” *CQG*, 675 F. App’x at 1003. The court determined that “[t]he claims require a specific, structured graphical user interface paired with a prescribed functionality directly related to the graphical user interface’s structure that is addressed to and resolves a specifically identified problem in the prior state of the art” of graphical user interface devices. *Id.* at 1004.

The portion of Appellants’ Specification cited by Appellants discloses that “[w]hile mouse-based interfaces have existed for years, these interfaces have put traders using them at a disadvantage when competing with full-time keyboard traders.” (Spec. 2, ll. 25–28.) “Thus, it is an object of the invention to provide systems and methods that enable a trader to execute trades quickly, efficiently, and accurately using a pointing device interface.” (*Id.* at 3, ll. 3–6.) But Appellants do not indicate how the limitations in the claims correspond to this object of the invention. Nor do Appellants indicate

how the limitations in the claims provide for “quickly, efficiently, and accurately using a pointing device.” Thus, Appellants have not persuaded us that claim 37 implements this object of the invention. Nor do Appellants’ arguments persuade us that “[t]he present case uniquely matches the facts of [CQG].” (*See* Reply Br. 6.)

However, in a recent case involving a claim in which “the method steps required ‘displaying’ a plurality of bid and offer indicators along a ‘scaled axis of prices,’ ‘receiving market information,’ displaying that information along the axis, and ‘displaying’ information pertaining to a user’s order,” the Federal Circuit determined that “[t]his essentially describes receiving information . . . and displaying that information. ‘[W]e have treated collecting information, including when limited to particular content (which does not change its character as information) as within the realm of abstract ideas.’” *Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1084, 1092 (Fed. Cir. 2019) (quoting *Elec. Power Grp.*, 830 F.3d at 1353). The additional fact that a claim “also recites sending an order by ‘selecting’ and ‘moving’ an order icon” did not change the “determination that the claims are directed to an abstract idea.” *Id.* Indeed, like claim 37 here, the claims in *IBG* merely “recite a purportedly new arrangement of generic information that assists traders in processing information more quickly.” *Id.* at 1093.

In view of the above, we are not persuaded that the Examiner erred in determining that claim 1 is directed to an abstract idea.

Step two of the *Alice* framework has been described “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*, 573 U.S. at 217–18 (citing *Mayo*, 566 U.S. at 72–73).

Appellants argue that “the many recitations of independent claims 37 and 66 include several features that are ‘significantly more’ than the alleged abstract idea.” (Reply Br. 9.) In particular, Appellants argue that

displaying a second interface comprising a plurality of specific buttons and fields in response to a selection of a variable at a first interface, either alone or in combination with one or more other recitations of claim 37 (or 66), is “significantly more” than “allowing consumers to shop for and optionally purchase financial instruments.”

(*Id.*)

We do not find this argument persuasive. Appellants’ argument relies on the ineligible concept itself to establish that the claims recite an inventive concept. But “[i]t has been clear since *Alice* that a claimed invention’s use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention ‘significantly more’ than that ineligible concept.” *BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018).

Appellants further argue “that the combination of elements recited in the amended claims perform functions that are not generic computer functions.” (Reply Br. 10 (emphasis omitted).) But Appellants do not persuasively argue why the claimed steps of displaying, receiving, selecting, and transmitting information are not generic computer functions. To the contrary, receiving, selecting/analyzing, sending, and displaying information are basic computer functions, i.e., they are well-understood, routine, and conventional functions previously known to the industry. *See Elec. Power Grp.*, 830 F.3d at 1356 (The claims “do not include any requirement for

performing the claimed functions of gathering, analyzing, and displaying in real time by use of anything but entirely conventional, generic technology. The claims therefore do not state an arguably inventive concept . . . .”); *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.”). Nor do Appellants point to particular limitations and persuasively argue why those limitations recite “‘significantly more’ than that ineligible concept.” *See BSG Tech LLC*, 899 F.3d at 1290.

Appellants argue that “similar to the claims in [*DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014)], these claims solve a problem rooted in computer technology to improve the functionality of electronic markets that arise from the realm of computer systems and networks.” (Appeal Br. 10.) “[T]he claims override the routine and conventional sequence of events that would have otherwise provided a less efficient interaction with trading intentions. This can lead to inefficiencies in the distribution of capital and the ability to trade quickly.” (*Id.*)

We do not find the argument persuasive. The improvement Appellants argue is an improvement to the abstract idea, i.e., the commercial interaction related to the financial instrument. But “[n]o matter how much of an advance in the finance field the claims recite, the advance lies entirely in the realm of abstract ideas, with no plausibly alleged innovation in the non-abstract application realm.” *SAP America, Inc. v. InvestPIC, LLC*, 898 F.3d 1161, 1163 (Fed. Cir. 2018).

Considered as an ordered combination, the generic computer components of Appellants' method add nothing that is not already present when the steps are considered separately. For example, claim 37 does not, as discussed above, purport to improve the functioning of the computer components themselves. Nor does it effect an improvement in any other technology or technical field. Instead, claim 37 amounts to nothing significantly more than an instruction to apply the abstract idea using generic computer components. That is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, 573 U.S. at 225–26.

Appellants also argue that the Examiner did not make a *prima facie* showing of ineligible subject matter. (Appeal Br. 6–7.) We disagree.

The USPTO carries its procedural burden of establishing a *prima facie* case when its rejection satisfies the requirements of 35 U.S.C. § 132 by notifying the applicant of the reasons for rejection, “together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.” *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (brackets in original, quoting 35 U.S.C. § 132(a)). Particularly in view of Appellants' response to the Examiner's stated reasons for the rejection (*see, e.g.*, Reply Br. 3–10), we do not agree that the Examiner did not notify Appellants of the reasons for the rejection.

In view of the above, we are not persuaded that the Examiner erred in rejecting claim 37 under § 101. Claims 38–48 and 66 fall with claim 37. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 103(a) rejection

Claims 37–41, 44–47, and 66

Appellants argue independent claims 37 and 66 together. Appellants do not separately argue dependent claims 38–41 and 44–47. We select claim 37 as representative. Claims 38–41, 44–47, and 66 will stand or fall with claim 37. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 37 recites “a size up button and a size down button” and “one or more numeric buttons, in which the size field is adjusted to the desired bid quantity . . . in response to a selection of at least one numeric button.”

The Examiner finds that

Friesen does not disclose that the second interface further comprises one or more numeric buttons (more specifically, these buttons are customizable). However, Walker does disclose the use of numeric buttons which allow the adjustment of values (see fig. 4A, 4B, 5, 6). Therefore, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Friesen to include the use of alpha numeric [sic] buttons to allow for the adjustment of values because it is an easy to use method for modifying select parameters (see column 2, lines 34-35 of Walker).

(Final Action 9.)

Appellants argue that “Walker is directed at a gaming device, with cited features . . . for a player to customize payouts” and that “[c]ustomized payouts has nothing to do with adjusting a size field to the ‘desired bid quantity of the financial instrument,’ as recited by the claims. The art is not analogous.” (Appeal Br. 14.) In short, Appellants argue that “Walker is related to a gaming device and Friesen is related to a trading interface. . . . One of ordinary skill in the art would not look to Walker to modify Friesen.”

(*Id.*)

Two criteria have evolved for determining whether prior art is analogous: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.

*In re Clay*, 966 F.2d 656, 658–59 (Fed. Cir. 1992). Even if we agree with Appellants that Walker and Friesen are not from the same field of endeavor, i.e., gaming devices and financial trading, respectively, the problem being addressed by the inventors relates to methods to input data using an electronic screen. Walker discloses methods to input data using an electronic screen. In particular, Walker discloses that up/down buttons or a numeric button may be used interchangeably to input data using an electronic screen. (See Walker, Fig. 4B and 4A; see also *id.* at col. 5, ll. 9–12 & 24–26.)

Similarly, Appellants' Specification indicates that there is no functional or critical difference regarding whether data is input using up/down buttons or a numeric button. (See Spec. 12, ll. 10–13 (“To increase or decrease the size, the trader may either push the size up or size down buttons 232, or delete the size and enter a new size using the [numeric] keypad 202.”))

Therefore, we are not persuaded that Walker is not reasonably pertinent to the particular problem with which the inventors were involved. Thus, we are not persuaded that Walker is nonanalogous art.

Appellants also argue that “including numeric buttons enhances the functionality of the interface. Their inclusion is not merely a ‘design choice,’ as argued by the Examiner.” (Reply Br. 11, citing Answer 16.) But Appellants provide no citation to the record to support this assertion.

Moreover, as discussed above, the Specification indicates that there is no functional or critical difference regarding whether data is input using up/down buttons or a numeric button. (*See* Spec. 12, ll. 10–13 (“To increase or decrease the size, the trader may either push the size up or size down buttons 232, or delete the size and enter a new size using the [numeric] keypad 202.”); *see also In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975) (“Use of such a means . . . in lieu of those used in the references solves no stated problem and would be an obvious matter of design choice within the skill of the art.”).)

Therefore, we do not find Appellants’ argument persuasive of error. Claims 38–41, 44–47, and 66 fall with claim 37. *See* 37 C.F.R. § 41.37(c)(1)(iv).

*Dependent claim 42*

Claim 42 recites: “The method of claim 37, further comprising: automatically populating, by the processor, the size field with a default size of the item.”

The Examiner finds that Friesen discloses this limitation and cites to “‘Quantity’, fig. 3D, 3E and column 8, line 52-67.” (Final Action 12.)

Appellants argue that “[c]learly there is no teaching or suggestion of a default size in [the cited] paragraph. Size or quantity are only mentioned in that they are modifiable.” (Appeal Br. 15.) We do not find this argument persuasive.

Friesen discloses that “a Buy pop-up window **350**, as shown in Fig.3d, is displayed with the bid order information. The Buy pop-up window **350** allows the trader to modify the order information (value, quantity,

expiration, cancel the order or submit the order with the presently displayed information.” (Friesen col. 8, ll. 58–63.) Figure 3d shows “a buy order pop-up window” (*id.* at col. 4, l. 3) already populated with a “Quantity” value of 40 (*id.* Fig. 3d). In other words, the bid order information displayed includes a populated bid size/quantity value that a trader can modify.

Therefore, we do not find Appellants’ argument that “there is no teaching or suggestion of a default size” to be persuasive of error.

*Dependent claim 43*

Claim 43 recites: “The method of claim 42, further comprising: automatically highlighting, by the processor, the default size of the item in the size field.”

The Examiner finds that Friesen discloses this limitation and cites to the disclosure in Friesen that “‘traders [sic] orders are highlighted’, see column 13, lines 10-30.” (Final Action 12.)

Appellants argue that “[c]learly there is no teaching or suggestion of a highlighting a default size. . . . [T]he only element discussed as highlighted are [sic] the orders.” (Appeal Br. 16.)

Column 13, lines 10–30 of Friesen, relied on by the Examiner, refers to Figure 9. Unlike Figure 3d, Figure 9 “illustrates a trading pit view **900** called the pit panel view **900**.” (Friesen, col. 12, ll. 38–39.) “The pit panel **900** displays trader icons **912**, observer icons **904**, and floor broker icons **908**.” (*Id.* at col. 12, ll. 47–48.) “The trader icons **912** are displayed on the pit icon **916**. The pit icon **916** is preferably displayed as a series of concentric polygons, where each polygon represents an activity level or levels. Traders who are more active are placed closer to the center of the pit

icon 916.” (*Id.* at col. 12, ll. 58–62.) “Selecting a trader’s icon 912 will also highlight the trader’s orders on the priority view, value/quantity view, and other views provided in the system that display orders and which can all be displayed concurrently.” (*Id.* at col. 13, ll. 17–20.)

The highlighting referred to in the relied-on portion of Friesen is “highlight[ing of] the trader’s orders” on a variety of system displays. However, the Examiner has not sufficiently explained why this discloses highlighting “the default size of the item in the size field,” as opposed to simply highlighting the trader’s orders. Nor does the Examiner sufficiently explain why, in view of the cited portion of Friesen, it would have been obvious to highlight “the default size of the item in the size field.” In short, the Examiner has not provided sufficient articulated reasoning with rational underpinning to support the conclusion of obviousness of claim 43. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

#### Dependent claim 48

Appellants argue that “[t]he Examiner makes no mention of any of the limitations of claim 48 and provides no prior art analysis of the claims [sic].” (Appeal Br. 16.)

We agree. Nor does the Examiner address this omission in the Answer. Thus, the Examiner has not presented a prima facie case of obviousness for claim 48.

#### The double patenting rejection

Independent “[c]laims 37 and 66 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being

unpatentable over claim 42 of copending Application No. 12/789,006. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims cover identical subject matter.” (Final Action 7.)

Appellants did not argue this rejection in the Appeal Brief. (*See, e.g.*, Appeal Br. 5.) Appellants attempt to argue this rejection for the first time in the Reply Brief. (*See* Reply Br. 12–14.)

Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the examiner’s answer, including any designated new ground of rejection, will not be considered by the Board for purposes of the present appeal, unless good cause is shown.

37 C.F.R. § 41.41(b)(2). Appellants do not show good cause for not raising this rejection in their Appeal Brief. Therefore, we do not consider their argument here.

However, we note that US Patent No. 8,060,425 B2 issued on November 15, 2011, from US Patent Application No. 12/789,006. Claim 42 of the application appears as claim 6 in the issued patent. Therefore, we consider the double patenting rejection to no longer be provisional. We also note that a Post-Grant Review Certificate issued on January 11, 2018, cancelling all claims.

In view of the above, we do not address the Examiner’s statement that “a timely filed terminal disclaimer . . . may be used to overcome” this rejection (Final Action 7), or the appropriateness of such a disclaimer in view of any potential impact on a term or term extension should a patent issue from the present application.

We affirm the double patenting rejection.

DECISION

The Examiner's rejection of claims 37–48 and 66 under 35 U.S.C. § 101 is affirmed.

The Examiner's rejection of claims 37–42, 44–47, and 66 under 35 U.S.C. § 103(a) is affirmed.

The Examiner's rejection of claims 43 and 48 under 35 U.S.C. § 103(a) is reversed.

The Examiner's rejection of claims 37 and 66 on the ground of nonstatutory obviousness-type double patenting 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