UNITED STATES PATENT AND TRADEMARK OFFICE

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte JAMES M. HAYNES III and
ANTHONY W. ULWICK

_____

Appeal 2018-000895
Application 14/553,757
Technology Center 3600

_____

Before JOHN A. JEFFERY, DENISE M. POTHIER, and
JUSTIN BUSCH, *Administrative Patent Judges.*

BUSCH, *Administrative Patent Judge.*

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellants[1] appeal from the

Examiner's decision to reject claims 1, 2, 4, 5, 7–13, 15, and 17–20, which

constitute all the claims pending in this application. We have jurisdiction

under 35 U.S.C. § 6(b). Claims 3, 6, 14, and 16 were cancelled previously.

We affirm and designate our affirmance as a new ground of rejection

within the provisions of 37 C.F.R. § 41.50(b).

_____

[1] Appellants identify the real party in interest as Strategyn Holdings, LLC.
App. Br. 2.

CLAIMED SUBJECT MATTER

Appellants' invention relates to performing commercial venture analysis by establishing an empirically-derived structure and evaluating companies within the structure. *See generally* Abstract.

Claim 1 is representative and reproduced below:

1.   A method comprising:
      providing a value delivery platform data structure to accomplish a first job;
      comparing the value delivery platform data structure with templates of existing value delivery platform data structures;
      modifying parameters of the value delivery platform data structure using at least a first creativity trigger;
      providing a basic business model data structure;
      modifying parameters of the basic business model data structure using at least a second creativity trigger;
      applying features to the value delivery platform data structure to yield at least a first virtual tool that can be used to accomplish the first job, the first virtual tool comprising a first simulated representation of a first process or first device used to accomplish the first job;
      comparing one or more attributes of the first virtual tool to at least one successfully generated tool to accomplish the first job;
      providing an investment decision based on comparing the one or more attributes of the first virtual tool to the at least one virtual competitor tool.

REJECTION

Claims 1, 2, 4, 5, 7–13, 15, and 17–20 stand rejected under 35 U.S.C. § 101 as being directed to ineligible subject matter. Final Act. 8–13.

ANALYSIS

PRINCIPLES OF LAW

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." *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (brackets in original) (citing *Diamond v. Diehr*, 450 U.S. 175, 185 (1981)).

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*. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 217–18 (2014) (citing *Mayo*, 566 U.S. at 75–77). In accordance with that framework, we first determine what concept the claim is "directed to." *See Alice*, 573 U.S. 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, 69 (1972)). Concepts determined to be patent eligible include physical and chemical processes,

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such as "molding rubber products" (*Diehr*, 450 U.S. at 191); "tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores" (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252 (15 How.) 267–68 (1854))); 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 187; *see also id.* at 192 ("We view respondents' claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula."). That said, 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.* (brackets 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.*

In January 2019, the USPTO published revised guidance on the application of § 101. 2019 REVISED PATENT SUBJECT MATTER ELIGIBILITY GUIDANCE, 84 Fed. Reg. 50 (Jan. 7, 2019) ("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 activities such as a fundamental economic practice, or mental processes); and
>
> (2) additional elements that integrate the judicial exception into a practical application (*see* MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) §§ 2106.05(a)–(c), (e)–(h) (9th ed. Rev. 08.2017, Jan. 2018)).

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, and conventional in the field (*see* MPEP § 2106.05(d)); or
>
> (4) simply appends well-understood, routine, and conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See 84 Fed. Reg. 50.

CLAIMS 1, 2, 4, 5, 7, 9–13, 15, 17, 19, AND 20

Claims 1, 2, 4, 5, 7, 9–13, 15, 17, 19, and 20 are argued as group. *See* App. Br. 5–11. We select claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Alice/Mayo Step One

Independent claim 1 recites a method that provides a value delivery platform data structure to accomplish a first job. Features are applied to the value delivery platform data structure to yield a first virtual tool used to accomplish the first job. The first virtual tool comprises a simulated representation of a first process or first device used to accomplish the first job. The first virtual tool's attributes are compared to a successfully generated tool to accomplish the first job. Based on the comparison, an investment decision is provided.

The claim adds that parameters of the value delivery platform data structure are modified using a first creativity trigger, and parameters of a provided basic business model data structure are modified using a second creativity trigger. The value delivery platform data structure also is compared with templates of existing value delivery platform data structures.

As the Specification explains, the claimed invention performs commercial venture analysis by (1) establishing an empirically-derived structure and (2) evaluating companies using analytical techniques within the empirically-derived structure. Spec. ¶ 5. According to the Specification, the claimed invention solves the problems associated with early stage company investments including high inefficiency and dilution over time. *Id.* ¶¶ 2–4.

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The Specification discloses a "value delivery platform data structure" that (1) delivers a product or a service and (2) enables a customer to fulfill a job of interest. *Id.* ¶ 61. Appellants' Figure 6 illustrates value delivery platform data structure 600 composed of parameters. *Id.* ¶¶ 70–79. The Specification discloses a "feature" as being a tangible or intangible piece of information, component, or material that performs a function. *Id.* ¶ 68. Once the feature is applied to the value delivery platform data structure, the resultant value delivery platform data structure yields a "virtual tool"—a process or device that can be used to accomplish a job. *Id.* "[V]irtual tools of competitors can also be created and the differences understood before launching a product." *Id.*

Step 1 of the Guidance

Under the Guidance, we must first determine whether the claims fall within the four statutory categories of patent subject matter identified by 35 U.S.C. § 101. Independent claim 1 recites a series of steps and, therefore, falls within the process category of § 101.

Revised Step 2A, Prong 1 of the Guidance

Despite falling within this statutory category, we must determine whether the claim is directed to a judicial exception, such as an abstract idea. *See Alice*, 573 U.S. at 218. To this end, we must determine whether the claim (1) recites a judicial exception and (2) fails to integrate the exception into a practical application. *See* 84 Fed. Reg. at 54–55. If both elements are

satisfied, the claim is directed to a judicial exception under the first step of the *Alice/Mayo* test, which the Guidance refers to as Step 2A. *See id.*

In the rejection, the Examiner concludes the claims are directed to the abstract idea of "providing an investment decision." Final Act. 9. To determine whether a claim recites an abstract idea, we (1) identify the claim's specific limitations that recite an abstract idea, and (2) determine whether the identified limitations fall within certain subject matter groupings, namely (a) mathematical concepts; (b) certain methods of organizing human activity; or (c) mental processes. *See* 84 Fed. Reg. at 52–54.

Mental processes are concepts performed in the human mind including an observation, evaluation, judgment, or opinion. *Id.* at 52; *see Intellectual Ventures I LLC v. Symantec*, 838 F.3d 1307, 1318 (Fed. Cir. 2016) (citing *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011)); *see also Benson*, 409 U.S. at 67 (indicating "mental processes . . . are not patentable, as they are the basic tools of scientific and technological work."). Unless the claim cannot practically be performed in the mind, the claim is in the mental process category if the claim, under its broadest reasonable interpretation, covers performance in the mind but for the recitation of generic computer components. *See* 84 Fed. Reg. at 52 n.14.

Here, we find claim 1, under its broadest reasonable interpretation, covers performance in the human mind but for the recited "data structure." Notably, a person's mind could provide a value delivery platform to

accomplish a first job as claimed. For example, the person could merely *think* of the value delivery platform, or *recall* such information.

Using this information, the person could then mentally (1) compare the value delivery platform with templates of existing value delivery platforms, (2) modify parameters of the value delivery platform using at least a first creativity trigger (e.g., a person could mentally decide to create a new platform to perform part of the job or break the platform into modules (*see* Spec. 35, Table 9, items 4, 6)), and (3) apply features to the value delivery platform to yield at least a first virtual tool that can be used to accomplish the first job, the first virtual tool comprising a first simulated representation of a first process or first device used to accomplish the first job as claimed. For example, step (1) could be done by the person merely *thinking* or *recalling* templates of existing value delivery platforms, and then *mentally comparing* the value delivery platform with the templates. Step (2) could be done by the person merely *thinking* or *recalling* parameters of the value delivery platform, and then *mentally* using at least a first creativity trigger to modify the parameters. Step (3) could be done by the person merely *thinking* or *recalling* features of the value delivery platform, and then *mentally* applying the features to yield a first virtual tool that comprises a first simulated representation of a first process or first device used to accomplish the first job.

Using the first virtual tool, the person could then mentally compare an attribute of the first virtual tool to at least one successfully generated tool to accomplish the first job. Notably, the person could merely *remember* a successfully generated tool to accomplish the first job and an attribute of the

first virtual tool, and then *mentally* compare the attribute to the successfully generated tool. Once the person *mentally* compares the attribute to the successfully generated tool, the person could *mentally* provide an investment decision based on the comparison.

The person could provide a basic business model by merely *thinking* or *recalling* the basic business model. Using this information, the person could then modify parameters of the basic business model data structure using at least a second creativity trigger. Notably, the person could merely *think* or *recall* parameters of the basic business model, and then *mentally modify* the parameters using at least a second creativity trigger. Moreover, to the extent certain steps are complex and may be difficult to manage in one's mind, these steps also could be performed using pen and paper. *See Symantec*, 838 F.3d at 1318 ("with the exception of generic computer-implemented steps, there is nothing in the claims themselves that foreclose them from being performed by a human, mentally or with pen and paper. *See CyberSource*, 654 F.3d at 1371–72.").

As discussed above, each of these steps is a mental process, such as an observation, evaluation, judgment, or opinion. *See* 84 Fed. Reg. at 52. Thus, the claim recites an abstract idea based on these mental processes.

Revised Step 2A, Prong 2 of the Guidance

Although the claim recites an abstract idea based on these mental processes, we must determine whether the abstract idea is integrated into a practical application, namely whether the claim applies, relies on, or uses the abstract idea in a manner that imposes a meaningful limit on the abstract idea, such that the claim is more than a drafting effort designed to

monopolize the abstract idea. *See* 84 Fed. Reg. at 54–55. To do this, we evaluate the "additional elements individually and in combination to determine whether they integrate the exception into a practical application, using one or more of the considerations laid out by the Supreme Court and the Federal Circuit." *Id.* at 55.

Notably, the *only additional* limitations recited in claim 1 are the data structures. Thus, we evaluate the additional limitations to determine whether the recited data structures (i.e., "a value delivery platform structure" and "a basic business model data structure") integrate the abstract idea into a practical application.

An improvement in the functioning of a computer, or an improvement to other technology or technical field can indicate that the additional elements integrate the exception into a practical application. *See* 84 Fed. Reg. at 55 (citing MPEP § 2106.05(a)). Appellants analogize the claimed invention with *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1258 (Fed. Cir. 2014). App. Br. 8–9, 11; Reply Br. 2–4, 6. According to Appellants, the claimed solution is rooted in computer technologies that allow computer systems to analyze large volumes of market data underlying jobs, outcomes, and investment decisions. App. Br. 11; Reply Br. 6; *see also* App. Br. 10 (asserting "the claims provide a solution with virtual tools for a job."). Appellants contend the claims are rooted in computer technologies because the claimed subject matter would not have been possible—i.e., simulating, with virtual tools, representations of processes or devices to accomplish a first job require digital devices. App. Br. 9; Reply Br. 4. Thus, Appellants argue the claims are "at least as technologically

complex as the system at issue in *DDR Holdings*." App. Br. 9. Appellants also argue the claims improve computer-related technologies because the claims "provide improved computer-aided design (CAD) tools to simulate representations of process/devices used to accomplish a firs[t] job." *Id.* (citing *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016)).

In *DDR*, the court determined that 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*, 773 F.3d at 1257. The court further determined that the claims "specify how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink." *Id.* at 1258. The court, thus, held that the claims may pass the second step 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.* at 1257.

That is not the case here. As previously noted, Appellants' claims recite, in essence, mental processes. Despite Appellants' arguments to the contrary (App. Br. 8–9, 11; Reply Br. 2–4, 6), it would have been possible to *mentally* simulate, with virtual tools, representations of processes or devices used to accomplish a first job mentally. *Cf.* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1996 (adj. def. 2) (3rd ed. 1992) (defining the term "virtual" as "[e]xisting in the mind, especially as a product of the imagination."). In other words, a virtual tool is merely a

product of the imagination that exists in the human mind—not one rooted in computer technology. Moreover, Appellants describe virtual tools as encompassing merely organized information. Specifically, Appellants explain that "[w]hen features are integrated into the value delivery platform, the resultant *data structure* can be referred to as a 'tool.'" Spec. ¶ 68 (emphasis added) (also noting "the tool is virtual"). In other words, the virtual tool can merely be a data structure—i.e., an organizational system or scheme for particular information. Thus, the claimed invention here is not necessarily rooted in computer technology in the sense contemplated by *DDR* where the claimed invention solved a challenge specifically arising in the realm of computer networks.

We likewise disagree with Appellants' reliance on *Enfish*. App. Br. 9, 11; Reply Br. 2–6. In *Enfish*, the Federal Circuit explained that "[t]he Supreme Court has suggested that claims 'purport[ing] to improve the functioning of the computer itself,' or 'improv[ing] an existing technological process' might not succumb to the abstract idea exception." *Enfish*, 822 F.3d at 1335. Appellants' claimed invention does not parallel any improvement to computer functionality itself, such as with *Enfish*'s "self-referential table for a computer database." *Id.* at 1336. *Enfish*'s self-referential table for the computer database is a specific type of data structure designed to improve the way a computer stores and retrieves data in memory. *Id.* at 1339.

But, unlike the claimed invention in *Enfish* that improved how a computer stores and retrieves data in memory, we note that claim 1 is silent regarding a database, let alone any technological aspect of how data is stored

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or accessed in the database. To the extent Appellants contend that the claimed invention uses the "virtual tool" to improve a computer's functionality or efficiency, or otherwise change the way that device functions (*see* App. Br. 9, 11; Reply Br. 2–6), Appellants' claims merely recite, in essence, mental processes. There is no persuasive evidence on this record to substantiate Appellants' contention.

Nor do Appellants explain persuasively how the claimed data structures—the *only additional* limitations recited in claim 1 that we evaluate to determine whether they integrate the abstract idea into a practical application—improve (1) a computer itself, or (2) another technology or technical field. *See* 84 Fed. Reg. at 55 (citing MPEP § 2106.05(a)). Nor do Appellants provide any persuasive explanation of how the claimed "data structure" implements the identified judicial exception with, or uses the judicial exception in conjunction with, a particular machine as set forth in MPEP § 2106.05(b) or a particular transformation as set forth in MPEP § 2106.05(c). *See* 84 Fed. Reg. at 55. Rather, the above-noted "data structure" merely (1) applies the abstract idea on a computer; (2) includes instructions to implement the abstract idea on a computer; or (3) uses the computer as a tool to perform the abstract idea. *See id.* (citing MPEP § 2106.05(f)).

Accordingly, claim 1 does not integrate the judicial exception into a practical application.

Alice/Mayo Step Two

Revised Step 2B of the Guidance

Because the claim does not integrate the judicial exception into a practical application, we determine whether additional elements of the claim, individually or in combination, provide an inventive concept. 84 Fed. Reg. at 56. To this end, we determine whether the additional elements (1) add a specific limitation or combination of limitations that is not well-understood, routine, conventional activity in the field, which is indicative that an inventive concept may be present; or (2) simply append well-understood, routine, and 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. *Id.*

As explained above, the recited data structures are the only *additional* element *beyond* the abstract idea. Thus, to the extent that Appellants contend that (A) applying features to a value delivery platform data structure to yield a first virtual tool used to accomplish a first job, (B) comparing attributes of the first virtual tool to at least one successfully generated tool to accomplish the first job, and (C) providing an investment decision based on the comparison add significantly more to the abstract idea to provide an inventive concept under *Alice/Mayo* step two (*see* App. Br. 10–11), we disagree. These limitations are not additional elements beyond the abstract idea; rather, these elements are part of the abstract idea. *See* 84 Fed. Reg. at 56 (instructing that additionally recited elements should be evaluated in *Alice/Mayo* step two to determine whether they (1) add specific limitation(s) that are not well-understood, routine, and conventional in the field, or

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(2) simply append well-understood, routine, and conventional activities previously known to the industry (citing MPEP § 2106.05(d)).

The recited data structures (i.e., the only additionally recited elements) are well-understood, routine, and conventional generic computing functionality. *Accord* Final Act. 10–11 (finding all *computer*-based functions of claim 1 are well-understood, routine, and conventional activities previously known in the industry). Appellants' arguments (*see* App. Br. 10–11) are, therefore, unpersuasive. Thus, "the claims at issue amount to 'nothing significantly more' than an instruction to apply the abstract idea . . . using some unspecified, generic computer." *Alice*, 573 U.S. at 225–26 (citing *Mayo*, 566 U.S. at 71); *see also* 84 Fed. Reg. at 56.

Therefore, we are not persuaded that the Examiner erred in rejecting claim 1, and claims 2, 4, 5, 7, 9–13, 15, 17, 19, and 20, not argued separately with particularity.

<div align="center">CLAIMS 8 AND 18</div>

Claims 8 and 18 are argued as group. *See* App. Br. 12–16. We select claim 8 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

<div align="center">*Alice/Mayo Step One*</div>

Claim 8 directly depends from independent claim 1, thereby including all the limitations of claim 1. *See* 37 C.F.R. § 1.75. Claim 8 further adds that predicted platform-level parameters and business model parameters are known for the first virtual tool before the first virtual tool is implemented or physically created.

In the rejection, the Examiner concludes that claim 8 is directed to an abstract idea. *See* Final Act. 8, 13; Ans. 20–28. We see no error in this

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finding. Here, we find claim 8, under its broadest reasonable interpretation, covers performance in the human mind apart from the recited data structures. Notably, a person's mind could know predicted platform-level parameters and business model parameters for the first virtual tool before the first virtual tool is implemented or physically created. For example, the person could merely *memorize* predicted platform-level parameters and business model parameters before the person merely *thinks* of the first virtual tool, or merely *recalls* such information.

Thus, contrary to Appellants' contentions (App. Br. 14–15; Reply Br. 7), and as noted above, the claimed invention (1) is not necessarily rooted in computer technology in the sense contemplated by *DDR* where the claimed invention solved a challenge specifically arising in the realm of computer networks, and (2) does not improve a computer's functionality or efficiency or otherwise change the way that device functions in the sense contemplated by *Enfish*. Furthermore, the recited data structures, which are the only *additional* element we evaluate to determine whether it integrates the abstract idea into a practical application, fail to improve a computer itself or another technology or technical field, as noted above (*see* 84 Fed. Reg. at 55 (citing MPEP § 2106.05(a))). The data structures also fail to implement the identified judicial exception with, or use the judicial exception in conjunction with, a particular machine or a particular transformation (*see* 84 Fed. Reg. at 55 (citing MPEP §§ 2106.05(b),(c))). Rather, the above-noted data structures merely (1) apply the abstract idea on a computer; (2) include instructions to implement the abstract idea on a computer; or (3) use the

computer as a tool to perform the abstract idea. *See* 84 Fed. Reg. at 55 (citing MPEP § 2106.05(f)).

We, therefore, agree with the Examiner that claim 8 is directed to an abstract idea.

Alice/Mayo Step Two

Because claim 8 does not integrate the judicial exception into a practical application, we determine whether additional elements of the claim, individually or in combination, provide an inventive concept. *See* Fed. Reg. at 56.

We find unavailing Appellants' contention that the limitations of claim 8 address problems that could not have existed before computer systems were used to analyze markets. *See* App. Br. 15. These limitations, apart from the claimed data structures, are not additional elements beyond the abstract idea, but rather are directed to the abstract idea, as explained above. *See* 84 Fed. Reg. at 56 (citing MPEP § 2106.05(d)). As already noted, the recited data structures is merely well-understood, routine, and conventional generic computing functionality. *Accord* Final Act. 10–11.

Therefore, we are not persuaded that the Examiner erred in rejecting claim 8 and claim 18, not argued separately with particularity.

CONCLUSION

The Examiner did not err in rejecting claims 1, 2, 4, 5, 7–13, 15, and 17–20 under 35 U.S.C. § 101.

DESIGNATION OF NEW GROUND OF REJECTION

Although the overall thrust of our analysis is the same as the Examiner's reasoning, we have provided additional explanations not

provided by the Examiner. Accordingly, in the interests of giving Appellants a full and fair opportunity to respond, we designate our affirmance as a new ground of rejection.

DECISION[2]

We affirm the Examiner's decision to reject claims 1, 2, 4, 5, 7–13, 15, and 17–20, but we designate our affirmance as a new ground of rejection within our authority under 37 C.F.R. § 41.50(b).

Section 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

Section 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of the appeal as to the rejected claims:

> (1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. . . .

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[2] Independent claim 11 recites "a platform innovation engine configured to: . . . apply features to the value delivery platform data structure to yield at least a first virtual tool that can be used to accomplish the first job." Claim 13 directly depends from claim 11 and recites in its entirety: "[t]he system of claim 11, wherein the platform innovation engine applies features to the value delivery platform data structure to yield at least a first virtual tool that can be used to accomplish the first job." The Examiner did not articulate a rejection of claim 13 under 35 U.S.C. § 112, fourth paragraph, and we will not speculate in that regard here in the first instance on appeal. We, therefore, leave this question to the Examiner.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record.

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. § 41.50(f).

<u>AFFIRMED</u>
<u>37 C.F.R. § 41.50(b)</u>