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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MARTINE NIEJADLIK, MICHAEL WILLIAMS, and  
JONATHAN MICHAEL KINGSTON

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Appeal 2018-003177  
Application 12/795,586  
Technology Center 3600

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Before ST. JOHN COURTENAY III, JAMES R. HUGHES, and  
CATHERINE SHAING, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from a final rejection of claims 1–19, which are all the claims pending in this application.<sup>1</sup> Claim 20 is canceled. We have jurisdiction over the pending claims under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> The real party in interest is Boku, Inc. App. Br. 3.

## STATEMENT OF THE CASE

### *Introduction*

Appellants' claimed invention "relate[s] to mobile communications in general and, more particularly but not limited to, mobile communications to facilitate online transactions." Spec. ¶ 2.

### *Exemplary Claim*

1. A computer-implemented method, comprising:

storing, by at least one server computer, information identifying an item and a *seller* of the item, the item to be presented in an *advertisement* to a mobile phone at a phone number;

embedding in the *advertisement* a reference to an interchange to generate a *purchase request* to the interchange computer when the *advertisement* is selected, the *advertisement* further having an indication of the item offered in the *advertisement*;

embedding a phone number of a mobile phone in the *advertisement*;

transmitting, with the server computer, the *advertisement* to the mobile phone at the phone number with the phone number of the mobile phone and the reference embedded in the *advertisement* such that, when the *advertisement* is selected on the mobile phone, the mobile phone transmits the *purchase request* with the phone number of the mobile phone to the interchange due to the reference embedded in the *advertisement* and the interchange receives the phone number of the mobile phone due to the phone number of the mobile phone embedded in the *advertisement*;

receiving, at the interchange, the *purchase request* generated in response to the *advertisement* being selected in the mobile phone, the purchase request including the indication of the item and the phone number of the mobile phone due to the phone number of the mobile phone being embedded in the

*advertisement* and transmission of *purchase request* with the phone number due to selection of the *advertisement*;

*identifying*, by the interchange, the *seller* based on the indication of the item and the information stored by the server computer; and

communicating, by the interchange, with a server of the *seller* to electronically *purchase* the item on behalf of a user of the mobile phone, using the funds associated with the phone number of the mobile phone via the interchange.

Appeal Br. 27–28, “Claims Appendix.” (emphasis added regarding claim terms pertaining to advertising, marketing or sales activities.).

#### *Rejection*<sup>2</sup>

Claims 1–19 are rejected under 35 U.S.C. § 101, as being directed to a judicial exception, without significantly more.

#### ANALYSIS

We have considered all of Appellants’ arguments and any evidence presented. To the extent Appellants have not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

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<sup>2</sup> The Examiner withdrew the rejections under 35 U.S.C. § 103(a) in the Answer (2). Therefore, these rejections are not before us on appeal.

*Principles of Law — 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. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012) (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.” (emphasis omitted)); *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, such as “molding of rubber products” (*Diehr*, 450 U.S. at 193); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores”

(*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. (15 How.) 252, 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 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.*

*Subject Matter Eligibility — 2019 Revised Guidance*

The USPTO recently published revised guidance on the application of 35 U.S.C. § 101. *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Revised Guidance”). *This new guidance is applied in this opinion.* Under the 2019 Revised Guidance, we first look to whether the claim recites:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, mental processes, or certain methods of organizing human activity such as a fundamental economic practice or managing personal behavior or relationships or interactions between people); 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)).<sup>3</sup>

*See* 2019 Revised Guidance, 84 Fed. Reg. at 51–52, 55.

A claim that integrates a judicial exception into a practical application applies, relies on, or uses 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 54. When the judicial exception is so integrated, then the claim is not directed to a judicial exception and is patent eligible under § 101. *Id.*

Only if a claim: (1) recites a judicial exception and (2) does not

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<sup>3</sup> All references to the MPEP are to the Ninth Edition, Revision 08–2017 (rev. Jan. 2018).

integrate that exception into a practical application, do we then evaluate whether the claim provides an inventive concept. *See* 2019 Revised Guidance at 56; *Alice*, 573 U.S. at 217–18.

For example, we 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, and 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.

Because there is no single definition of an “abstract idea” under *Alice* step 1, the PTO has recently synthesized, for purposes of clarity, predictability, and consistency, key concepts identified by the courts as abstract ideas to explain that the “abstract idea” exception includes the following three groupings:

1. Mathematical concepts—mathematical relationships, mathematical formulas or equations, mathematical calculations;
2. Mental processes—concepts performed in the human mind (including an observation, evaluation, judgment, opinion); and
3. Certain methods of organizing human activity—fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions).

*See* 2019 Revised Guidance, 84 Fed. Reg. at 52.

According to the 2019 Revised Guidance, “[c]laims that do not recite [subject] matter that falls within these enumerated groupings of abstract ideas should not be treated as reciting abstract ideas,” except in rare circumstances. Even if the claims recite any one of these three groupings of abstract ideas, these claims are still not “directed to” a judicial exception (abstract idea), and thus are patent eligible, if “the claim as a whole integrates the recited judicial exception into a practical application of that exception.” *See* 2019 Revised Guidance, 84 Fed. Reg. at 53.

For example, limitations that **are** indicative of “integration into a practical application” include:

1. Improvements to the functioning of a computer, or to any other technology or technical field – *see* MPEP § 2106.05(a);
2. Applying the judicial exception with, or by use of, a particular machine – *see* MPEP § 2106.05(b);
3. Effecting a transformation or reduction of a particular article to a different state or thing – *see* MPEP § 2106.05(c); and
4. Applying or using the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment, such that the claim as a whole is more than a drafting effort designed to monopolize the exception – *see* MPEP § 2106.05(e).

In contrast, limitations that are **not** indicative of “integration into a practical application” include:

1. Adding the words “apply it” (or an equivalent) with the judicial exception, or merely include instructions to implement an abstract idea on a computer, or merely uses a computer as a tool to perform an abstract idea – *see* MPEP § 2106.05(f);

2. Adding insignificant extra-solution activity to the judicial exception – *see* MPEP § 2106.05(g); and
3. Generally linking the use of the judicial exception to a particular technological environment or field of use – *see* MPEP 2106.05(h).

*See* 2019 Revised Guidance, 84 Fed. Reg. at 54–55 (“Prong Two”).

*2019 Revised Guidance, Step 2A, Prong One*<sup>4</sup>  
*The Judicial Exception*

Under the 2019 Revised Guidance, we begin our analysis by first considering whether the claims recite any judicial exceptions, including certain groupings of abstract ideas, in particular: (a) mathematical concepts, (b) mental steps, and (c) certain methods of organizing human activities.

Turning to independent claim 1, we observe the word “advertisement” is recited fourteen times. The word “advertisement” is also recited fourteen times in remaining independent claim 19. We have emphasized above (in *italics*) the specific claim terms “advertisement”, “seller”, and “purchase request” in claim 1.

Given the use of these transactional terms, we agree with the Examiner (Final Act. 3) that an abstract idea is recited in claim 1, i.e., a fundamental economic practice, including commercial interactions, further including *advertising*, and related marketing or sales activities, such as *selling* and *purchasing*.

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<sup>4</sup> Throughout this opinion, we give the claim limitations the broadest reasonable interpretation consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

Moreover, we conclude the recited step of identifying (“identifying, by the interchange, the seller based on the indication of the item and the information stored by the server computer”), could be performed alternatively as a mental step. Therefore, we conclude the step of “identifying” also recites an abstract idea.<sup>5</sup> Independent claims 1 and 19.

Because the claims **recite an abstract idea**, we proceed to *Step 2A, Prong Two*.

*2019 Revised Guidance, Step 2A, Prong Two*

*Integration of the Judicial Exception into a Practical Application*

As noted above, we conclude the advertising, selling, and purchasing limitations of claim 1 recite an abstract idea that is a fundamental economic practice. Under MPEP § 2106.05(a) (“Improvements to the Functioning of a Computer or to Any Other Technology or Technical Field”), Appellants contend:

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<sup>5</sup> If a method can be performed by human thought alone, or by a human using pen and paper, it is merely an abstract idea and is not patent eligible under § 101. *CyberSource Corp.*, 654 F.3d at 1372–73; *see also Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1146–47 (Fed. Cir. 2016) (“While the Supreme Court has altered the § 101 analysis since *CyberSource* in cases like *Mayo* and *Alice*, we continue to ‘treat[] analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category.’” (brackets in original) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016)); *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*.”)).

the claims at issue are not directed to an abstract idea within the meaning of *Alice*. Rather, they are directed to a specific **improvement** to the way computers operate, embodied in [the] Customer mobile phone number embedding by a merchant, transmission to a mobile phone, selection on the mobile phone and transmission to an interchange including the phone number.

Appeal Br. 12 (emphasis omitted and added).

However, we conclude Appellants' claims merely rely on generic computer hardware, including generic mobile phones, servers, and networks.

For example, as described in Appellants' Specification:

In one embodiment, advertisements are sent to mobile phones to enable the users of the mobile phones to purchase items via the interchange (101). For example, a merchant can send an advertisement message via wireless technology (e.g., cellular telecommunications, wireless wide area network (WWAN), wireless local area network (WLAN), wireless personal area network (WPAN), Bluetooth) to the mobile phone (117) of the user. For example, the advertisement can be selected and sent to the mobile phone (117), based on the location of the mobile phone (117), when the user approaches the merchant. The user can purchase the item presented on the advertisement via the interchange (101). [00205] In one embodiment, merchants can send out mobile messages to alert users about deals on their sites. If the user simply replies to that message, the interchange (101) can bill the purchase to the mobile phone (117).

Spec. ¶ 204. Additionally, “[i]n one embodiment, merchants can send out mobile messages to alert users about deals on their sites. If the user simply replies to that message, the interchange (101) can bill the purchase to the *mobile phone* (117).” Spec. ¶ 205 (emphasis added).

Therefore, we agree with the Examiner that, without more, “the additional computer elements, which are recited at a high level of generality,

provide conventional computer functions that do not add meaningful limits to practicing the abstract idea.” Final Act. 3.

In support of the contention that the claims on appeal are not directed to an abstract idea, Appellants cite to *McRo, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299 (Fed. Cir. 2016):

An “*improvement* in computer-related technology” is not limited to improvements in the operation of a computer or a computer network per se, but may also be claimed as a set of “rules” (basically mathematical relationships) that improve computer-related technology by allowing computer performance of a function not previously performable by a computer.

App. Br. 19–20 (emphasis added).

However, for the reasons which follow, we do not find persuasive Appellants’ attempt to analogize the claims on appeal to the subject claims considered by the court in *McRO. Id.*

We note the subject claim considered by the *McRO* court concerned a method for automatically animating lip synchronization and facial expressions. *McRO*, 837 F.3d at 1303. The *McRO* court concluded the subject claims did not recite an abstract idea because the computer animation *improved* the prior art through the use of *rules*, rather than artists, to set morph weights and transitions between phonemes. *Id.* at 1308. Thus, the claimed invention in *McRO* allowed for computer performance of animation steps that previously had to be performed by human animators. *Id.* at 1309. The subject claims in *McRO* used “limited *rules* in a process specifically designed to achieve an improved technological result” over “existing, manual 3-D animation techniques.” *Id.* at 1316 (emphasis added).

Here, Appellants' claimed invention does not apply positively recited *rules, per se*. The invention on appeal merely adapts to a technological setting (comprising generic servers and mobile devices) the known concept of using *advertisements* to sell goods that are offered for purchase by a seller. *See* independent claims 1 and 19.

Thus, we agree with the Examiner (Ans. 4) that Appellants' claims merely implement generic technology (e.g., servers and mobile devices) to perform the recited method steps. We emphasize that *McRO* also guides: “[t]he abstract idea exception prevents patenting a *result* where ‘it matters not by what process or machinery the result is accomplished.’” 837 F.3d at 1312 (quoting *O’Reilly v. Morse*, 56 U.S. 62, 113 (1854)) (emphasis added).

*MPEP § 2106.05(b) Particular Machine*

*MPEP § 2106.05(c) Particular Transformation*

Appellants contend, “that the improvement is not defined by reference to ‘physical’ components does not doom the claims. To hold otherwise risks resurrecting a bright-line machine-or-transformation test, *cf. Bilski v. Kappos*, 561 U.S. 593, 604 (2010).” App. Br. 16.

Although Appellants mention the *Bilski* machine-or-transformation test (*id.*), Appellants advance no arguments applying the *Bilski* machine-or-transformation test to any claims on appeal. Nor on this record have Appellants established that the recited “at least one server computer” and “a mobile phone” (independent claims 1 and 19) are “particular” machines under MPEP § 2106.05(b). Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

MPEP § 2106.05(e) “Other Meaningful Limitations.”

As noted above, the Examiner finds: “the additional computer elements, which are recited at a high level of generality, provide conventional computer functions that do not add *meaningful* limits to practicing the abstract idea.” Final Act. 3 (emphasis added).

Appellants advance no arguments in the Appeal Brief pertaining to any specific claim limitations that purportedly provide a *meaningful limitation* beyond generally linking the use of the judicial exception to a particular technological environment. We conclude Appellants’ recited “mobile phone” and “at least one server computer” are merely generic computer components. Appellants’ claim 1 limitations are completely unlike the case in *Diehr*, in which the claim was directed to the use of the Arrhenius equation (an abstract idea or law of nature) for use in an automated process for operating a rubber-molding press. *See* 450 U.S. at 177–78. *See* MPEP § 2106.05(e) “Other Meaningful Limitations.”

We additionally note that several steps of claim 1 merely perform insignificant extra-solution or post-solution activity, such as *storing, embedding, transmitting, receiving, and communicating*. *See* MPEP § 2106.05(g) “Insignificant Extra-Solution Activity.” Thus, under *Step 2A, Prong Two* (MPEP §§ 2106.05(a)–(c) and (e)–(h)), we conclude claims 1–19 **do not integrate the judicial exception into a practical application.** Therefore, we proceed to *Step 2B, The Inventive Concept*.

*The Inventive Concept – Step 2B*

Under the 2019 Revised Guidance, 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 adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); **or**, simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

Under *Step 2B*, we find Appellants’ analogy to *BASCOM*<sup>6</sup> is unavailing. App. Br. 20–21. The Federal Circuit held in *BASCOM* that the claimed Internet content filtering, which featured an implementation “versatile enough that it could be adapted to many different users’ preferences while also installed remotely in a single location,” expressed an inventive concept in “the *non-conventional and non-generic arrangement of known, conventional pieces.*” *BASCOM*, 827 F.3d at 1350 (emphasis added).

Here, Appellants have not shown a non-conventional arrangement regarding the generic (known, conventional) “at least one server computer” and “a mobile phone” (Independent claims 1 and 19). Therefore, it is our view that Appellants’ claims do not involve any improvements to another technology, technical field, or improvements to the functioning of the computer or network, as was seen by the court in *Bascom*.

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<sup>6</sup> *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016).

*Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018)

We note *Berkheimer* was decided by the Federal Circuit on February 8, 2018. The Examiner’s Answer was mailed on October 5, 2017 and Appellants did not file a Reply Brief. On April 19, 2018, the PTO issued the Memorandum titled: “Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (*Berkheimer v. HP, Inc.*)” (hereinafter “*Berkheimer* Memorandum”).<sup>7</sup>

The *Berkheimer* Memorandum provided specific requirements for an Examiner to support with evidence any finding that *claim elements* (or a *combination of elements*) are well-understood, routine, or conventional. In reviewing the prosecution history, we recognize that the Appellants have not yet had an opportunity to advance arguments based upon the change in the law effected by *Berkheimer*. Thus, *Berkheimer* (881 F.3d at 1369) and the USPTO *Berkheimer* Memorandum are intervening authorities.

However, regarding the use of the recited generic “at least one server computer” and “a mobile phone” as recited Appellants’ claims 1–19, the Supreme Court has held “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice*, 573 U.S. 208, 223. Our reviewing court provides additional guidance, including in *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1096 (Fed. Cir. 2016) (“the use of generic computer elements like a microprocessor or user interface do not alone transform an otherwise abstract idea into patent-eligible subject matter”), and *OIP Techs., Inc. v.*

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<sup>7</sup> Available at <https://www.uspto.gov/sites/default/files/documents/memo-berkheimer-20180419.PDF>.

*Amazon.com, Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015) (claims reciting, *inter alia*, sending messages over a network, gathering statistics, using a computerized system to automatically determine an estimated outcome, and *presenting offers to potential customers* found to merely recite “‘well-understood, routine conventional activit[ies]’” by either requiring conventional computer activities or routine data-gathering steps (alteration in original, internal citation omitted)).

Accordingly, on the record before us, we are not persuaded that claims 1–19 add a specific limitation, beyond the judicial exception, that is more than what was “well-understood, routine, and conventional” in the field (*see* MPEP § 2106.05(d)). *See* Final Act. 5 (“The ‘server computer’, ‘interchange’ and ‘mobile phone’ are recited at a high level of generality and are recited as performing generic computer functions routinely used in computer applications.”).

In light of the foregoing, we conclude, under the 2019 Revised Guidance, that each of Appellants’ claims 1–19, considered as a whole, is **directed to a patent-ineligible abstract idea that is not integrated into a practical application and does not include an inventive concept.**

Accordingly, for the reasons discussed above, we sustain the Examiner’s Rejection under 35 U.S.C. § 101 of claims 1–19.<sup>8</sup>

#### CONCLUSION

The Examiner did not err in rejecting claims 1–19, under 35 U.S.C. § 101, as being directed to a judicial exception, without significantly more.

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<sup>8</sup> To the extent the Appellants have not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Appeal 2018-003177  
Application 12/795,586

DECISION

We affirm the Examiner's decision rejecting claims 1–19 under 35 U.S.C. § 101.

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED