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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/932,827	07/01/2013	Howard W. Lutnick	07-2120-C4	1811

63710 7590 05/24/2019
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EXAMINER

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ART UNIT	PAPER NUMBER
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3684

NOTIFICATION DATE	DELIVERY MODE
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05/24/2019

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HOWARD W. LUTNICK

Appeal 2018-003303
Application 13/932,827
Technology Center 3600

Before ELENI MANTIS MERCADER, NORMAN H. BEAMER,
and ADAM J. PYONIN, *Administrative Patent Judges*.

MANTIS MERCADER, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 16–29, which constitute all the pending claims in this application. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ Appellant identifies CFPH, LLC as the real party in interest (App. Br. 3).

THE INVENTION

Appellant's claimed invention is directed to processing of "an indication of an order [that includes] an order for products and/or services from multiple merchants" that is "divided into sub-indications" that each "indicate a portion of the order [] for a particular merchant" (Spec. ¶ 87).

Independent claim 16 reproduced below, is representative of the subject matter on appeal:

16. A method comprising:

populating, by a computing device, a database with merchant information for a set of restaurants, in which the merchant information includes address information, contact information, menu information, and hours of operation;

determine, by the computing device based on the merchant information, a plurality of different restaurants from the set of restaurants that are in a geographical area associated with a user;

presenting, by the computing device to the user, a user interface through which a plurality of restaurant items that are offered for sale by the plurality of different restaurants may be selected by the user, in which each restaurant item of the plurality of restaurant items is associated with a respective price that is the same as a respective walk-in price of the respective restaurant item at a respective restaurant of the plurality of restaurants;

receiving, by the computing device from the user through an electronic communication link, an order that specifies a first set of restaurant items from a first restaurant of the plurality of restaurants and a second set of items from a second restaurant of the plurality of restaurants, and a third set of restaurant items that is available from both the first restaurant and second restaurant, in which a total first price of the first sub-part is a

same price as would be paid by walk-in customers of the first restaurant and total second price of the second sub-part is a same price as would be paid by walk-in customers of the second restaurant;

in response to receiving the order, dividing, by the computing device, the order into subparts, in which a first sub-part includes the first set of restaurant items and the second sub-part includes the second set of restaurant items, and in which the third set is divided between the first sub-part and second sub-part;

in response to receiving the order, forwarding, by the computing device through the electronic communication link, the first sub-part to the first restaurant and the second sub-part to the second restaurant;

in response to receiving the order, facilitating, by the computing device, delivery of the order from the first restaurant and the second restaurant to the user by communicating, through the electronic communication link, delivery information to a mobile computing device of a delivery agent; and

allocating, by the computing device, a first portion of the total first price to the first restaurant, a second portion of the total first price to an operator of the computing device, and allocating a third portion of the total second price to the second restaurant.

App. Br. 11–12 (Claims Appendix).

REJECTION

The Examiner made the following rejections:

Claims 16–29 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to a judicial exception (i.e., a law of nature, a

natural phenomenon, or an abstract idea) without significantly more. Final Act. 2.

ISSUE

The pivotal issue is whether the Examiner erred in finding that the claimed invention to be directed to a judicial exception without significantly more.

ANALYSIS

We adopt the Examiner’s findings in the Answer and Final Office Action and we add the following primarily for emphasis. We note that if Appellant failed to present arguments on a particular rejection, we decline to unilaterally review those uncontested aspects of the rejection. *See Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential); *Hyatt v. Dudas*, 551 F.3d 1307, 1313–14 (Fed. Cir. 2008) (the Board may treat arguments Appellant failed to make for a given ground of rejection as waived).

The Examiner determines claim 16 is patent ineligible under 35 U.S.C. § 101, because the claim “is directed to facilitating creation and processing of an order split amongst multiple physical retailers, which is considered to be an abstract idea inasmuch as such activity is considered a ‘certain method of organizing human activity,’ a ‘fundamental economic practice,’ and ‘an idea of itself’” (Final Act. 5).

The Examiner further finds that “[t]here is nothing in the subject matter [of claim 16] that transforms the abstract idea,” because “[t]he claim’s invocation of a ‘computing device’ as well as ‘an electronic communication link’[] adds no inventive concept” (Final Act. 6; *see also*

Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014)
(describing the two-step framework “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts”).

After the mailing of the Answer and the filing of the Briefs in this case, the USPTO published revised guidance on the application of § 101 (2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (hereinafter “Memorandum”). Under the Memorandum, the Office first looks 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 (*see* 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, does the Office then look to whether the claim:

- (3) adds a specific limitation beyond the judicial exception that are 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 Memorandum.

We are not persuaded the Examiner's rejection is in error. We adopt the Examiner's findings and conclusions as our own, and we add the following primarily for emphasis and clarification with respect to the Memorandum.

Appellant argues that “the Office Action reduces the claims to a gist that ignores most of the limitations including significant and meaningful limitations on which patentability rests” (Reply Br. 6–7) and that

[t]he claims here, as the claims in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016) are directed to an improvement in computerized delivery and referral systems. By arranging computer components and functionality in this manner delivery and referral systems operate more efficiently and quickly.

(Reply Br. 8).

We agree with the Examiner that claim 16 is directed to an abstract idea, and we find that claim 16 recites methods of organizing human activity, including both (1) commercial or legal interactions, and (2) fundamental economic practices. In the claimed method, a “user” places “an order” via a “user interface” presented by a “computing device,” in which the order specifies items from a “plurality of restaurants.” *See* claim 16. The computing device then “allocat[es] . . . a first portion of the total first price to the first restaurant, a second portion of the total first price to an operator of the computing device, and allocat[es] a third portion of the total second price to the second restaurant.”

Thus the claim recites the abstract idea of a “commercial or legal interaction[.]” *See* Memorandum, Section I (Groupings of Abstract Ideas). Through the claimed computing device, the restaurants are making a sale.

The allocation of funds among the first restaurant, the second restaurant, and the operator of the computing device is an interaction that forms the basis of a commercial transaction that legally binds the participants.

Similarly, the claim recites the abstract idea of a “fundamental economic principle[] or practice[]” (*see id.*), because the claimed method represents an intermediary (here, the operator of the computing device) consolidating disparate orders made by customer into a single order, akin to the convenience afforded by “one stop shopping.”² Further, the allocation of funds among the restaurants and the operator of the computing device mimics the traditional “splitting of the tab” that frequently occurs among dining patrons.

We are unpersuaded by Appellant’s argument that “the claims are directed to significantly more than an abstract idea” (App. Br. 8) because

like in *DDR Holdings* [*DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014)], the claims clearly recite improvements to technology that are rooted in networking and computers. Among other things, speed, usability and efficiency are technological improvements addressed by the claims that are rooted in computers and networking

(App. Br. 9). Unlike Appellant’s claimed method, in *DDR Holdings* “the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *DDR Holdings*, 773 F.3d at 1257. The Examiner finds, and we agree, that

² See, for example, “Attention, Retailers! How Convenient Is Your Convenience Strategy?,” MIT Sloan Management Review, April 15, 2000, available at <https://sloanreview.mit.edu/article/attention-retailers-how-convenient-is-your-convenience-strategy/>

Appellant’s disclosure “does not describe the invention as solving any stated problem” (Final Act. 4), and “[u]nlike [*DDR Holdings*], the applicant has not put forth any arguments that a problem created by computer networking exists and is being solved by this invention” (Ans. 6).

Appellant’s related argument that

[s]imilar to the claims in *Bascom* [*Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)], the claims here apply ideas related to computerized and networked delivery and referral services in a more efficient manner creating an invention that improves their performance

(App. Br. 9) is unpersuasive, as the asserted improvement in the “computerized networked delivery and referral services” fails to represent a “technology-based solution” that “improve[s] the performance of the computer system itself. *Bascom*, 827 F.3d at 1351.

Appellant’s claimed method resembles “a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.” *Enfish*, 822 F.3d at 1336. The claimed method does not reconfigure or otherwise alter computer technology but instead uses the tools of computing to facilitate the ordering and delivery of a meal.

Appellant points to nothing in the claim or in the disclosure that indicates (1) a particular computer system architecture or (2) any kind of technological improvement. The disclosure recites an extensive description of the “general purpose computers 101 and / or computing devices” (Spec. ¶ 35) to implement the claimed invention, but all described elements are generic, routine, and conventional. *See* Spec. ¶¶ 35–52 and Fig. 1. We agree with the Examiner that “[t]he claim’s invocation of a ‘computing

device’ as well as ‘an electronic communication link’, adds no inventive concept” (Final Act. 6).

Accordingly, we determine the claims do not integrate the judicial exception into a practical application. *See* Memorandum, Section III(A)(2) (Prong Two: If the Claim Recites a Judicial Exception, Evaluate Whether the Judicial Exception Is Integrated Into a Practical Application). Nor do we find the claim includes a specific limitation or a combination of elements that amounts to significantly more than the judicial exception itself. *See* Memorandum, Section III(B) (Step 2B: If the Claim Is Directed to a Judicial Exception, Evaluate Whether the Claim Provides an Inventive Concept); *see also* *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1359 (Fed. Cir. 2018) (Moore, J., concurring) (“the ‘inventive concept’ cannot be the abstract idea itself”). The claim elements only recite generic computer components that are well-understood, routine, and conventional. *See* Final Act. 12; Spec. ¶¶ 35–52 and Fig. 1; *Alice*, 573 U.S. at 212 (“merely requiring generic computer implementation fails to transform [the] abstract idea into a patent-eligible invention”).

Accordingly, we agree with the Examiner that independent claim 16 is patent in-eligible, as well as independent claims 29 not separately argued, and all claims dependent therefrom. *See* App. Br. 6–10.

CONCLUSION

The Examiner did not err in finding the claimed invention to be directed to a judicial exception without significantly more.

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Application 13/932,827

DECISION

The Examiner's decision rejecting claims 16–29 under 35 U.S.C. § 101 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED