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25 LUBBER STREET  
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EXAMINER
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KUHLMAN, CATHERINE BURK

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* HUPING HU

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Appeal 2018-003398  
Application 13/449,739  
Technology Center 3700

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Before: CHARLES N. GREENHUT, JEFFREY A. STEPHENS, and  
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

GREENHUT, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from a rejection of claims 1–3, 6–8, 12, and 13. We have jurisdiction under 35 U.S.C. § 6(b). Appellant criticizes the Examiner for not proposing amendments to the claims or new claims because Appellant is *pro se*. See App. Br. 24; Reply Br. 9. Because it is a matter of examination practice that does not sufficiently relate to a specific rejection of the claims before us, we lack jurisdiction over the issues

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<sup>1</sup> Related appeals are: 2018-003120 in application 11/670,996; 2018-003401 in application 13/492,830; and 2018-007211 in application 11/944,631.

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of *pro se* treatment. *In re Hengehold*, 440 F.2d 1395 (CCPA 1971); 37 C.F.R. § 1.181; *see* App. Br. 24; Reply. Br 9.

We affirm.

#### CLAIMED SUBJECT MATTER

The claims are directed to an apparatus for producing quantum entanglement and non-local effects of substances. Spec. para. 2. Claim 1, reproduced below, is illustrative of the claimed subject matter:

Claim 1: An apparatus for producing a plurality of quantum entanglements between a first plurality of quantum entities in a chemical substance and a second plurality of quantum entities in a human or animal, a non-local chemical effect of said human or animal on said chemical substance through said plurality of quantum entanglements and/or a non-local biological effect of said chemical substance on said human or animal through said plurality of quantum entanglements which comprises:

- a quantum-entanglement generating source which emits a plurality of quantum-entangling photons or magnetic pulses when said source operates;

- a first container for holding said chemical substance disposed next to said source; and

- said chemical substance in said container;

- such that when said first container is filled with said chemical substance is disposed next to said human or animal, and said source operates, said photons or magnetic pulses interact with said first plurality of quantum entities in said chemical substance and said second plurality of quantum entities in said human or animal generating said plurality of quantum entanglements, said non-local chemical effect through said plurality of quantum entanglements which comprises an effect of said human or animal on a chemical property or process of said chemical substance and/or said biological non-local effect through said plurality of quantum entanglements which comprises an effect of said chemical substance on a biological property or process of said human or animal.

## REJECTIONS

Claims 1–3, 6–8, 12, and 13 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 1–3, 6–8, 12, and 13 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement.

Claims 1–3, 6–8, 12, and 13 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.

Claims 1–3, 6–8, 12, and 13 are rejected because the claimed invention is directed to a judicial exception to 35 U.S.C. § 101.

Claims 1, 6, and 12 are rejected under 35 U.S.C. § 102(b) as being anticipated by Kiontke (US 6,425,851 B1 iss. July 30, 2002).

## OPINION

At issue in this case are the apparatus claims associated with the method discussed in appeal number 2018-003120 (application 11/670,996).  
*Enablement under § 112, first paragraph*

The issues now before us regarding the enablement rejection under 35 U.S.C. § 112, first paragraph, are substantially the same as in 2018-003120. The claims subject to the enablement rejection are argued as a group (App. Br. 11–22), with claim 1 being representative under 37 C.F.R. § 41.37(1)(iv).<sup>2</sup> Paragraphs 9 and 11 of Appellant’s Specification summarize the invention as follows:

[Para 9] For example, using the apparatus and method developed in this invention I have discovered that applying magnetic pulses to a biological system such as the human brain when a substance

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<sup>2</sup> Claims 2 and 3 are cited by Appellant to contest the Examiner’s determination regarding the breadth of claim 1 under *In re Wands*, 858 F.2d 731 (Fed. Cir. 1988). Claims 2 and 3 are not considered separately argued.

such as a general anesthetic was placed in between caused the brain to feel the effect of said anesthetic for several hours after the treatment as if the test subject had actually inhaled the same.

. . . .

[Para 11] Further, I have verified as detailed below that said biological effect was the consequence of quantum entanglement between quantum entities inside the biological system such as the human brain and those of the substance under study induced by the photons of the magnetic pulses, laser light, microwave or flashlight.

The Examiner provided a detailed analysis, citing various evidentiary sources, including, but not limited to, those submitted by Appellant, in considering the *Wands* factors (*see In re Wands*, 858 F.2d 731; MPEP § 2164.01) as they relate to enablement. *See* Final Act. 2–6. We agree with the Examiner’s analysis, which raised reasonable doubts as to the Specification’s compliance with the enablement requirement. Appellant’s arguments (App. Br. 11–21) merely make allegations contrary to those made by the Examiner without any meaningful analysis citing specific examples apprising us as to precisely how the Specification is enabling for the subject matter claimed. Appellant cites, *inter alia*, paragraphs 43 and 45 of the Specification (App. Br. 18), which, along with Figure 1A, are reproduced below to summarize an embodiment of Appellant’s invention:

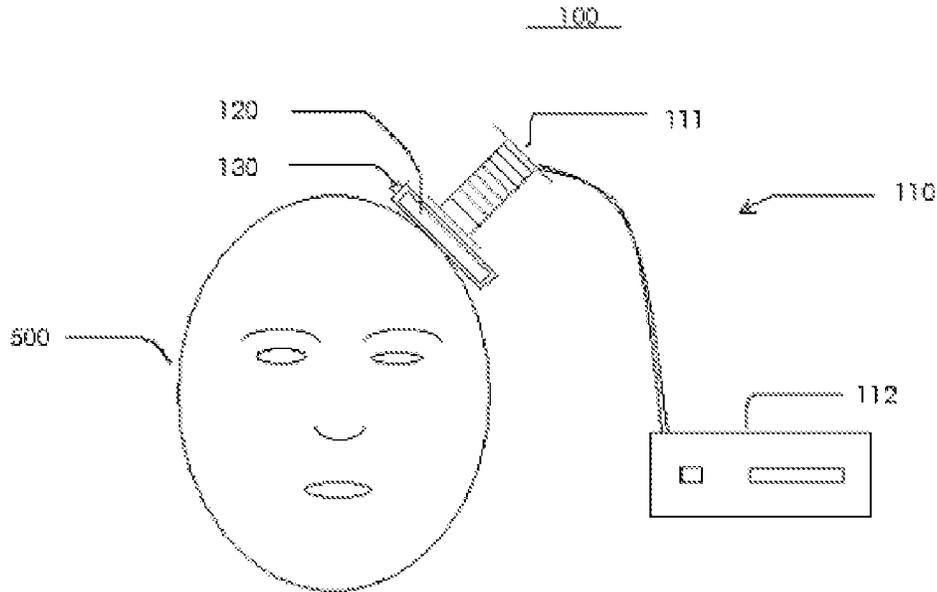


FIG. 1A

[Para 43] In one particular embodiment, the container 130 is a small glassware of the dimensions about 1"x3"x4" with a useful internal volume of about 20ml, and the source 110 is made up of a magnetic coil 111 and an audio system 112 connected to the said magnetic coil. The said small glassware has a cap which is removable so that the container can be filled or emptied. The said magnetic coil is made up of a 75-feet and 26-gauge magnetic wire coated with enamel for insulation and wound on an open-ended plastic tube of the dimensions 3" in length and 1.5" in diameter. The said audio system is a typical consumer electronic product or a combination of several consumer electronic products readily available from a consumer electronics store.

.....

[Para 45] To use the apparatus having this particular embodiment, one disposes the said apparatus 100 adjacent to a responsive target 500 such as a person's brain, and plays music on the audio system 112 with a desired output power and for a

desired length of time whereby the photons generated by the magnetic coil 111 first quantum-entangle with quantum entities inside the substance 120, then travel to the biological system 500 and subsequently entangle with the quantum entities inside the biological system 500 producing non-local effect of the substance 120 on the biological system 500 through quantum entanglement.

We have no doubt that if Appellant's invention is able to use quantum entanglement to administer a general anesthetic to the human brain by directing music toward that brain through a container of that anesthetic it would be groundbreaking and revolutionary. *See* App. Br. 24. However, due to the absence of any known scientific principles explaining how Appellant's invention could possibly operate in this manner, the absence of any cogent explanation in Appellant's Specification regarding the general principals or mechanisms causing this to occur,<sup>3</sup> and the absence of any verifiable test data reasonably attributable to the purported result, the

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<sup>3</sup> That is not to say that Appellant *must*, in all cases, explain the scientific principles governing how a device operates if they are not known. *See In re Anshausser*, 399 F.2d 275, 283 (CCPA 1968) (explaining an applicant "is not legally required to comprehend the scientific principles on which the practical effectiveness of his invention rests"). However, Appellant makes no assertion *here* that the governing principles are unknown. Rather Appellant repeatedly asserts, citing various sources of extrinsic evidence, that the principles would be readily understood by those skilled in the art (App. Br. 18–19, 21) even if they are misunderstood by the Examiner (App. Br. 24; Reply. Br. 11, 14). If the principles governing the operation of Appellant's method were so readily amenable to understanding we see no reason to omit an explanation of them from Appellant's Specification and Appellant's extensive briefing. The cited articles do not fill in these gaps with specific relevance to the subject matter in question presently before us. Furthermore, the fundamental issue is not whether Appellant has explained how the claimed invention works. Rather, the requirements of utility and enablement consider whether Appellant's invention works as claimed.

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Examiner reasonably characterized Appellant's Specification as failing to satisfy the enablement requirement. Despite extensive arguments and voluminous submissions of articles on the subject, we are not apprised of any error in the Examiner's determinations. We find no explanation as to why ordinary and conventional audio produces any meaningful quantum entanglements and, even if it did, why they would have any meaningful effects on the pharmacological interaction between an anesthetic agent and the brain. There is no explanation offered as to why spin or any other quantum property of entangled particles would bring about a pharmacological effect in a subject, particularly one mimicking the known and expected effects a substance causes via its known and typical biochemical pathways. We are also not apprised of any data logically evincing such a pharmacological interaction has actually occurred. We agree with the Examiner that heart rate changes (App. Br. 28–29), even if present, do not amount to such evidence because heart rate changes do not necessarily demonstrate a specific pharmacological interaction. Ans. 4. The various articles cited by Appellant are either generic in nature and discuss only the possibility of quantum entanglements occurring without explaining any reason they would cause the interactions alleged in the present application, from sources regarded as having no scientific value,<sup>4</sup> or both. In light of all this uncertainty, we agree with the Examiner that undue

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<sup>4</sup> See, e.g., IN THE NORWEGIAN REGISTER FOR SCIENTIFIC JOURNALS, SERIES AND PUBLISHERS: JOURNAL OF BIOPHYSICAL CHEMISTRY, available at <https://dbh.nsd.uib.no/publiseringskanaler/KanalTidsskriftInfo.action?id=478691>; NEUROQUANTOLOGY, available at <https://dbh.nsd.uib.no/publiseringskanaler/KanalTidsskriftInfo.action?id=473508>; PROGRESS IN PHYSICS, available at <https://dbh.nsd.uib.no/publiseringskanaler/KanalTidsskriftInfo.action?id=473750>.

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experimentation would be required to practice the invention as claimed.  
Accordingly, we sustain the Examiner's enablement rejection.

*Written Description under § 112, first paragraph*

The claims subject to the written-description rejection are argued as a group (App. Br. 6–11) for which claim 1 is representative under 37 C.F.R. § 41.37(c)(1)(iv).

The purpose of the “written description” requirement is broader than to merely explain how to “make and use”; the applicant must also convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention. The invention is, for purposes of the “written description” inquiry, whatever is now claimed.

*Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563–64 (Fed. Cir. 1991)  
(emphasis omitted).

Some of the Examiner's discussion (Final Act. 3; Ans. 3–5) regarding the written description requirement arguably relates to the operability of the device and may be more suited to the enablement/utility analysis discussed above and in the related appeals. Nevertheless, the Examiner raises a valid point with regard to the written description requirement:

Furthermore, Applicant discloses the source can be anything and states one of ordinary skill will be able to readily determine the appropriate source and operating specifications (see specification paragraph 39). Although some examples are listed, the examples are widely disparate and unrelated and don't provide guidance or limits as to what could or could not be a source. Similarly, Applicant discloses that any substance and container can be used (see specification paragraphs 40-41).

Final Act. 3.

The issue raised by the Examiner concerns the breadth of the recitations related to the source and substance aspects of the claim.

Regarding the source, Appellant's Specification provides:

[Para 51] The said source will be, depending on a particular use, any source, such as a magnetic coil connected to a driving device, laser, microwave oven, flashlight or even a biological system, which is capable of generating quantum-entangling members such as photons, electrons, atoms or molecules when said source operates. The selection and operating specifications of the source will vary according to the use. The person skilled in the art will be able readily to determine the appropriate source and operating specifications of said source, with only routine experimentation, for optimum performance of the specific use intended.

Regarding the substance, Appellant's Specification provides:

[Para 40] The said substance will be, depending on the use, a single substance or a mixture of several substances and has the physical forms of a liquid, gel, powder, solid or gas, or a mixture of these said forms. Again, the selection of the substance or specific mixture of substances and their precise concentrations will vary according to the use. It will, however, from the information herein, be well within the ability of a person of ordinary skill in the art to select the appropriate mixture of substances for the particular use intended by such person, with no more than routine experimentation.

The Specification provides a few examples of suitable sources and substances. However, claim 1 encompasses subject matter wherein anything capable of generating photons or magnetic pulses for causing quantum entanglements, whether known or unknown, described in Appellant's Specification or not, can be the source. Similarly, claim 1 encompasses subject matter wherein any substance, whether known or unknown, described in Appellant's Specification or not, that can have its therapeutic properties administered to a patient via quantum entanglements. In this emerging field of technology, it is relatively clear that Appellant has not

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demonstrated possession of a sufficient number of sources and substances to broadly claim subject matter that covers all possible photon and magnetic sources that may generate quantum entanglements and all possible substances that may have properties conveyed by them. Even if we were to set aside the question of enablement and assume that Appellant has demonstrated possession of a limited number of sources and substances, the scope of the right to exclude that would be granted by claim 1 would far exceed Appellant's contribution to the art—preempting the future before it has arrived:

Patents are not awarded for academic theories, no matter how groundbreaking or necessary to the later patentable inventions of others. “[A] patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion.” Requiring a written description of the invention limits patent protection to those who actually perform the difficult work of “invention”—that is, conceive of the complete and final invention with all its claimed limitations—and disclose the fruits of that effort to the public.

That research hypotheses do not qualify for patent protection possibly results in some loss of incentive . . . . But claims to research plans also impose costs on downstream research, discouraging later invention. The goal is to get the right balance, and the written description doctrine does so by giving the incentive to actual invention and not attempt[s] to preempt the future before it has arrived. As this court has repeatedly stated, the purpose of the written description requirement is to ensure that the scope of the right to exclude, as set forth in the claims, does not overreach the scope of the inventor's contribution to the field of art as described in the patent specification. It is part of the *quid pro quo* of the patent grant and ensures that the public receives a meaningful disclosure in exchange for being excluded from practicing an invention for a period of time.

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*Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F. 3d 1336, 1353–54 (Fed. Cir. 2010) (en banc) (citations and internal quotations omitted).

Accordingly, we sustain the Examiner’s written-description rejection.  
*Indefiniteness under 35 U.S.C. § 112, second paragraph*

The Examiner included two grounds for rejecting the claims under 35 U.S.C. § 112, second paragraph. The first is:

claims 1 and 12 do not specify how the source operates and no specific structure for the apparatus is recited. Since it is unclear what interaction and effect applicant is claiming, what structure defines the apparatus, how the apparatus operates, and how the effect is generated, the metes and bounds of the claim[s] are not clear.

Final Act. 6–7. Appellant correctly argues (App. Br. 23–24) this issue relates to breadth and, without more, not indefiniteness. Accordingly, we do not sustain the § 112-second-paragraph rejection on this particular basis.

The next basis for the Examiner’s rejection under § 112, second paragraph is:

Claim 1 recites “and said chemical substance in said container” in lines 9-10. This language is indefinite because it is unclear whether this is meant to specify the chemical substance in said container as an additional element of the claim or whether this is specifying the container holds the chemical substance in the previous clause.

Final Act. 7. We agree that the phrase in question is ambiguous for the reasons stated by the Examiner. Appellant did not elect to adopt the Examiner’s proposed change (Final Act. 7) to reduce the issues presented for appeal or to contest this particular grounds for rejection under § 112, second paragraph. As this ground for rejection stands uncontroverted, we sustain the Examiner’s rejection of claims 1–3 and 6–8 on this basis. *See In re Berger*, 279 F.3d 975 (Fed. Cir. 2002) (affirming the Board’s affirmance of an

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uncontested rejection, holding that the appellant had waived the right to contest the rejection by not presenting arguments on appeal to the Board); *Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (“[T]he applicant can waive appeal of a ground of rejection.”). The Examiner does not reject independent claim 12 on this basis, so this ground is not applicable to claims 12 and 13.

*Anticipation under § 102(b)*

The claims subject to the anticipation rejection are argued as a group (App. Br. 43) for which claim 1 is representative. It is undisputed that the Examiner found each and every structural element of claim 1 in Kiontke. Final Act. 8–9. To summarize Appellant’s argument:

Kiontke neither teaches/mentions quantum entanglement set forth in the instant Application nor teaches/mentions how to produce quantum entanglement. Further, Kiontke neither teaches/mentions non-local effect nor teaches/mentions or how to produce non-local effect . . . . The entire Kiontke text makes no mention of quantum entanglement, production of quantum entanglement, non-local effect and production of non-local effect.

App. Br. 43.

Appellant’s argument misses the point. Where, as here, the Examiner has shown, citing Appellant’s own Specification as supporting evidence,<sup>5</sup> that the prior art contains the same structure, it is reasonable for the Examiner to conclude that the priorart structure will exhibit the same latent

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<sup>5</sup> See, e.g., *Elan Pharms., Inc. v. Mayo Found.*, 304 F.3d 1221 (Fed. Cir.), Dyk, J., dissenting (distinguishing inherency from hindsight), *vacated at* 314 F.3d 1299 (Fed. Cir. 2002) (en banc).

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properties, which include generating “quantum entanglements” and “non-local [] effects.” *See In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990).

Appellant has not provided any cogent scientific reasoning or evidence to apprise us of error in the Examiner’s determination in this regard. Claims differing from a prior-art process by no more than the recitation of a result do not distinguish those claims over the prior art. *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1376–77 (Fed. Cir. 2001). Even assuming Appellant did discover that non-local effects of a substance could be created in a subject by placing the substance between the subject and a magnetic coil due to quantum entanglements, this discovery, however profound, does not, without more, distinguish over the Kiontke apparatus. Something old does not become patentable by the discovery of a new property or previously unknown principle of operation. *See* MPEP § 2112. Accordingly, we sustain the Examiner’s anticipation rejection.

*Subject matter eligibility under § 101*

The claims subject to this ground of rejection are argued as a group (App. Br. 25–42) with claim 1 being representative.

The structural elements of claim 1 are “a quantum-entanglement generating source,” “a first container,” and, arguably (*see* § 112, second paragraph discussion above), “a chemical substance.” The remainder of the claim describes the purported natural effects flowing from operating the source next to the container which is, in turn, next to a subject.<sup>6</sup> The

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<sup>6</sup> *See* claim 1 (“such that when said first container is filled with said chemical substance is disposed next to said human or animal, and said source operates, said photons or magnetic pulses interact with said first plurality of quantum entities in said chemical substance and said second plurality of quantum entities in said human or animal generating said

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Examiner concludes claim 1 is directed to a natural phenomenon of generating quantum entanglements which, along with their interactions with a subject, are natural results of magnetic pulses or photons, and therefore falls within a judicial exception to subject matter eligible for patenting. Final Act. 7–8; *see, e.g., Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (“Laws of nature, natural phenomena, and abstract ideas” are not patentable.); *see also* MPEP § 2106.04(b). The Examiner considers the source and container limitations and determines they lack the particularity necessary for a machine, transformation, or useful application to bring the claim within the ambit of subject matter that is a patent-eligible practical application. Final Act. 8; *see* MPEP §§ 2106.05(a)–(c). It is undisputed and consistent with Appellant’s own Specification that the componentry relied upon to bring about the purported effects is well-understood, routine, and conventional. *See* Spec. paras. 40, 51, reproduced above, and para. 41;<sup>7</sup> *see also* MPEP § 2106.05(d).

Appellant first argues the Examiner took an alternate position previously in prosecution. App. Br. 26. This has no bearing on the rejection

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plurality of quantum entanglements, said non-local chemical effect through said plurality of quantum entanglements which comprises an effect of said human or animal on a chemical property or process of said chemical substance and/or said biological non-local effect through said plurality of quantum entanglements which comprises an effect of said chemical substance on a biological property or process of said human or animal”).

<sup>7</sup> [Para 41] The container will be any material and form capable of supportive functions such as a simple plastic frame, a glass or plastic bottle, or polymer matrix. The container will be optional if the substance or the mixture of substances will be made into an appropriate solid. Further, the container will be at least partially transparent to quantum-entangling members such as photons generated by the source.

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presently before us. *In re Ruschig*, 379 F. 2d 990, 993 (CCPA 1967) (“There is nothing unusual, certainly, about an examiner changing his viewpoint as to the patentability of claims as the prosecution of a case progresses, and, so long as the rules of Patent Office practice are duly complied with, an applicant has no legal ground for complaint because of such change in view.” (quoting *In re Ellis*, 86 F.2d 412, 414 (CCPA 1936))). Appellant also argues, “the pending claims do include additional elements that are sufficient to amount to significantly more than the judicial exception - One only needs to read the pending claims in the context of the Specification to reach this conclusion.” App. Br. 26. Without any analysis of the specific claim language in question, this argument is of little persuasive value. Arguments must address the Examiner’s action. 37 C.F.R. § 41.37(c)(1)(iv) (“The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant.”). “Filing a Board appeal does not, unto itself, entitle an appellant to *de novo* review of all aspects of a rejection.” *See Ex Parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (citations omitted). “[T]he Board will not, as a general matter, unilaterally review those uncontested aspects of the rejection.” *Id.* at 1075–76 (citations omitted). Appellant also contends the Examiner’s issue relates to breadth. App. Br. 26. Issues of breadth are discussed above with regard to the rejections under the first paragraph of § 112. However, that does not make issues of breadth irrelevant to the eligibility inquiry under § 101 where one must frequently determine whether a limitation is “particular” or “generic.” *See, e.g.*, MPEP § 2106.05.

The PTO recently published revised guidance on the application of § 101. *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Guidance”). Under that guidance, one should

consider whether a claim recites a judicial exception and if so, whether the claim recites additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)) and whether the claim includes a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)).

The remainder of Appellant’s arguments do not appear to have any relevance whatsoever to the various factors that should be considered in a § 101 analysis. App. Br. 27–42; Ans. 9. The Examiner’s analysis, summarized above, is consistent with PTO guidance and stands essentially uncontroverted. Accordingly, we adopt the Examiner’s position<sup>8</sup> and sustain the § 101 rejection on the basis set forth by the Examiner.

#### DECISION

The rejection of claims 1–3, 6–8, 12, and 13 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is affirmed.

The rejection of claims 1–3, 6–8, 12, and 13 under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement is affirmed.

The rejection of claims 1–3 and 6–8 under 35 U.S.C. § 112, second paragraph, as being indefinite is affirmed.

The rejection of claims 12, and 13 under 35 U.S.C. § 112, second paragraph, as being indefinite is reversed.

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<sup>8</sup> *See, e.g., In re Paulsen*, 30 F. 3d 1475, 1478 n. 6 (Fed. Cir. 1994); *accord In re Cree*, 818 F.3d 694, 698 n.2 (Fed. Cir. 2016).

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The rejection of claims 1–3, 6–8, 12, and 13 because the claimed invention is directed to a judicial exception to 35 U.S.C. § 101 is affirmed.

The rejection of claims 1, 6, and 12 under 35 U.S.C. § 102(b) as being anticipated by Kiontke 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<sup>9</sup>

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<sup>9</sup> “The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed.” 37 C.F.R. § 41.50(a).