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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL SWEETING, DINESH KERAI,
NIGEL JOHN RENTON, and ANTHONY PAUL SEETO

Appeal 2019-000449
Application 14/059,000
Technology Center 3600

Before J. JOHN LEE, DANIEL J. GALLIGAN, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

GALLIGAN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34. Claims 3, 5, 10, 12, 17, 18, 20, 21, 26–32, 35, and 36 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.²

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as BGC PARTNERS, INC. Appeal Br. 3.

² Our Decision refers to Appellant's Appeal Brief filed May 11, 2018 (“Appeal Br.”); Appellant's Reply Brief filed October 22, 2018 (“Reply

CLAIMED SUBJECT MATTER

Claims 1, 33, and 34 are independent claims. Claim 1 is reproduced below with bracketed lettering added for discussion purposes:

1. A method for facilitating electronic trading with interfaces of computing devices, the method comprising:

[a] receiving, by at least one processor of a computing device of an electronic trading system, from an interface of a computing device of a particular trader, data representing a trading order for a particular instrument intended for an electronic trading exchange, the trading order having an associated price;

[b] identifying, by the at least one processor of the computing device of the electronic trading system, from a plurality of sets of pre-configured distribution parameters a particular set of distribution parameters for processing the trading order;

[c] responsive to receiving the trading order, automatically generating, by the at least one processor of the computing device of the electronic trading system, data representing a group of distributed trading orders for the instrument distributed over multiple price levels based at least on the trading order price and the identified set of distribution parameters associated with the trading order, each order of the group of distributed trading orders having a respective price that is different from the price of every other order in the group of distributed trading orders, in which each of the group of distributed trading orders comprises a same side as the trading order such that the group of distributed trading orders comprise buy orders if the trading order comprises a buy order and the group of distributed trading orders comprise sell orders if the trading order comprises a sell order;

Br.”); Examiner’s Answer mailed August 23, 2018 (“Ans.”); and Final Office Action mailed December 15, 2017 (“Final Act.”).

[d] calculating, by the at least one processor of the computing device of the electronic trading system, trading order data of the generated group of distributed trading orders which includes (a) a total size of the generated group of trading orders and (b) an average trade price for the total size of the generated group of trading orders;

[e] generating, by the at least one processor of the computing device of the electronic trading system, an electronic signal to communicate, to the interface of the computing device of the particular trader, a single confirmation acknowledgment request message to confirm acknowledgment to proceed to submit, by the computing device of the electronic trading system, the data representing the generated group of distributed trading orders to the interface of the electronic trading exchange for the particular instrument;

[f] in response to receiving an electronic signal representing a confirmation acknowledgement from the interface of the computing device of the particular trader, automatically submitting, by the at least one processor of the computing device of the electronic trading system, an electronic signal to communicate the data representing the generated group of distributed trading orders to an interface of a computing device of the electronic trading exchange for the particular instrument;
and

[g] generating, by the at least one processor of the computing device of the electronic trading system, an electronic signal to communicate to the interface of the computing device of the particular trader (a) a single confirmation message indicating conformation of execution of the generated group of distributed trading orders and (b) data representing the calculated trading order data of the generated group of distributed trading orders.

REFERENCES

The prior art relied upon by the Examiner is:

| Name | Reference | Date |
|-----------|--------------------|---------------|
| Korhammer | US 6,278,982 B1 | Aug. 21, 2001 |
| Lutnick | US 2002/0169703 A1 | Nov. 14, 2002 |

REJECTIONS

Claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 2–8.

Claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 stand rejected under 35 U.S.C. § 103 as being unpatentable over Korhammer and Lutnick. *Id.* at 9–20.

Claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 are rejected for obviousness-type double patenting based on claims 1–39 of U.S. Patent 8,566,213 B2. *Id.* at 20–22.

Our review in this appeal is limited to the above rejections and the issues raised by Appellant. Arguments not made are waived. *See* MPEP § 1205.02; 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.39(a)(1).

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. *See, e.g., Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Court’s two-step framework, described in *Alice* and *Mayo*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim recites. *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.”).

If the claim recites an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, in which “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.*

USPTO Patent Eligibility Guidance

The Office published revised guidance on the application of § 101. *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (hereinafter “Guidance”). Recently, the USPTO published an update to that guidance. *October 2019 Patent Eligibility Guidance Update*,

84 Fed. Reg. 55,942 (hereinafter “Guidance Update”). Under the Guidance and the Guidance Update, in determining whether a claim falls within an excluded category, we first look to whether the claim recites:

(1) Step 2A — Prong One: 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) Step 2A — Prong Two: additional elements that integrate the judicial exception into a practical application (*see* MPEP³ § 2106.05(a)–(c), (e)–(h)).

See Guidance, 84 Fed. Reg. 54–55 (“Revised Step 2A”). 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 (Step 2B):

(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, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See id. at 56 (“*Step 2B: If the Claim Is Directed to a Judicial Exception, Evaluate Whether the Claim Provides an Inventive Concept.*”).

ANALYSIS

35 U.S.C. § 101

Appellant argues all the pending claims as a group (*see* Appeal Br. 9–18, 22), specifically addressing the limitations of claim 1 (*id.* at 11–12).

³ All Manual of Patent Examining Procedure (“MPEP”) citations herein are to MPEP, Rev. 08.2017, January 2018.

Accordingly, we select independent claim 1 as representative of Appellant's § 101 arguments for all claims. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner determines claim 1 is directed to a judicial exception because the claimed subject matter recites an abstract idea. Final Act. 2–5; Ans. 3–5. The Examiner also determines claim 1 does not recite any additional elements that provide significantly more than the recited judicial exception. Final Act. 5–8; Ans. 5–9.

Appellant presents several arguments against the § 101 rejection. The Examiner has provided a full response to Appellant's arguments. *See* Ans. 3–6. We do not find Appellant's arguments persuasive, as discussed in greater detail below.

We analyze the claims under the Guidance and Updated Guidance; we adopt the nomenclature for the steps used in the Guidance.

Step 1

Section 101 provides that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. Independent claims 1, 33, and 34 respectively recite a method, an apparatus, and a non-transitory machine-readable medium. As such, the claims are directed to a statutory class of invention within 35 U.S.C. § 101, i.e., a process, machine, or article of manufacture.

Step 2A Prong 1

Next, we determine whether claim 1, being directed to a statutory class of invention, nonetheless recites a judicial exception. Guidance, 84 Fed. Reg. 51.

The Examiner determines that representative claim 1 recites a judicial exception: an abstract idea. Final Act. 2. In particular, the Examiner determines the claim recites steps for “executing a group of trading orders for multiple prices,” i.e., “distributed trading orders,” which the Examiner characterizes as a fundamental economic practice. Ans. 3, 5; Final Act. 4. The Examiner further determines that “receiving [a] single electronic confirmation for all trades” also recites an abstract idea. *See* Ans. 5.

We agree with the Examiner that claim 1 recites abstract ideas, in particular certain methods of organizing human activity. *See id.* We initially note that we address the computer hardware features recited in the claim, i.e., “electronic trading,” “at least one processor of a computer device of an electronic trading system,” “an interface of the computing device of the particular trader,” and “an interface of a computing device of the electronic trading exchange,” at a later step below. Turning to the remaining language in claim 1, we agree with the Examiner’s determination that the claim recites steps in a fundamental economic practice, namely, “executing a group of trading orders for multiple prices at an electronic trading system.” *Id.* The limitations recited in the claim support the Examiner’s determination. Limitations [a] and [b] identify the specifics of a trading order, i.e., the trading order’s “associated price,” and “distribution parameters for processing the trading order.” The price of a trade and the distribution parameters of the trade, e.g., “price levels” or “a total liquidity

size” (Spec. 15:21–16:8) are pieces of information that are used to execute the trade order. Identifying information relevant to a financial transaction is common to almost any transaction and, so, is a fundamental economic practice. Limitation [c] describes how the information identified in the trade order is then used to generate a “group of distributed trading orders” that are “distributed over multiple price levels.” Trading using multiple orders is a financial market trading strategy. Indeed, the Specification describes that “a series of bids and offers such that in a fast moving market they may trade at different levels in quick succession” address financial market trading concerns, e.g., the “risk of being ‘picked off’ by other better informed traders in the market place.” *Id.* at 4:1–20; *see id.* 3:3. Marketplace trading strategies and concerns are fundamental economic practices. Limitation [d] calculates “trading order data” representing “a total size” of the group of trading orders and “an average trade price” for the group of trading orders. Calculating that information merely provides some cursory analysis and summary information regarding the amount and pricing of the group trade. Calculating size and price information is relevant to almost any trade and, thus, is a fundamental economic practice. Limitations [e] and [f] recite “confirm[ing] acknowledgement to proceed to submit” the group trade order and then subsequently, “submitting” the group of distributed trading orders. Confirming the placement of a trade and then making the trade in response to the confirmation are common interactions to complete a sale in any marketplace, and so, are a fundamental economic practice. Limitation [g] recites a “confirmation message indicating conformation of execution of the generated group of distributed trading orders.” Confirming that a sale has completed is a common interaction in any marketplace and, thus, is part of

the fundamental economic practice. As such, we find no error in the Examiner's determination that the claim recites a fundamental economic practice, namely, steps for "executing a group of trading orders for multiple prices." According to our Guidance, a fundamental economic practice is a "[c]ertain method[] of organizing human activity." Guidance, 84 Fed. Reg. 52. And, according to our Guidance, certain methods of organizing human activity are a category of abstract idea. *Id.*

Additionally, our Guidance Update explains "claims may recite multiple abstract ideas" (Guidance Update at 2), and we also understand that the Examiner determines that "receiving [a] single electronic confirmation for all trades" recites an abstract idea (Ans. 5). We agree with the Examiner that providing a single confirmation, rather than multiple confirmations, is a certain method of organizing human activity. Rather than confirm every single detail in a transaction individually, it is common practice in agreements between humans to confirm all details collectively. For example, the signature at the bottom of a contract confirms and agrees to all the provisions of the contract at once, rather than requiring each individual provision to be separately confirmed, agreed to, and signed. Accordingly, a single confirmation in lieu of multiple confirmations is a certain method of organizing human activity, which, according to our Guidance, is a category of abstract idea. Guidance, 84 Fed. Reg. 52. We, therefore, conclude claim 1 recites an abstract idea, i.e., certain methods of organizing human activity, as provided for in the Guidance and the Guidance Update.

Step 2A, Prong Two

Because claim 1 recites an abstract idea, we now determine whether the claim is directed to the abstract idea itself or whether it is instead directed to some technological implementation or application of, or improvement to, this idea, i.e., integrated into a practical application. *See, e.g., Alice*, 573 U.S. at 223 (discussing *Diamond v. Diehr*, 450 U.S. 175 (1981)). We determine whether the recited judicial exception is integrated into a practical application of that exception by: (a) identifying whether there are any additional elements recited in the claim beyond the judicial exception or exceptions; and (b) evaluating those additional elements individually and in combination to determine whether they integrate the exception into a practical application. 84 Fed. Reg. 54–55. This evaluation requires an additional element or a combination of additional elements in the claim to apply, rely on, or use 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 exception. *See id.*

The Examiner determines that the claim does not recite an “improvement in network performance.” Ans. 11; Final Act. 8.

Appellant argues the “claimed techniques may help improve computer performance by facilitating electronic trading with interfaces of computing devices, which may help control activity over the network and control computer workload including computer resources.” Appeal Br. 12 (emphases omitted). Appellant’s argument is based on the Specification’s description of “problems with current systems,” including the following:

In a fast moving market, a delay of only a few hundred milliseconds by the trading system may result in the denial of a trade confirmation request by the market maker price feed

computer. Network transmission speed may often be a significant factor of the time taken to get a trade or trade request from a trading system to a market maker's system, and when dealing in milliseconds, the geographical domicile of each computer system may create a network delay that is costly to minimize through higher bandwidth or faster computer networking equipment. Thus, any reduction in processing time for trading is advantageous. Often, with multiple trading systems all accessing the same market maker price feed computer, only the fastest trading system or Systems succeed.

Spec. 4:28–5:6. Further, Appellant argues that the “claimed subject matter is also drawn to an improved interface.” Appeal Br. 15 (emphasis omitted).

We are not persuaded that the claim recites an improvement in network or computer performance. First, as Appellant points out (*id.* at 13), the alleged improvement is that “a single notification 250 may be communicated to trader 14 for multiple trades, rather than separate notifications for each trade” and “a single confirmation request/attempt may be communicated” (Spec. 30:27–31:16). But, as discussed above, sending a single confirmation in lieu of multiple confirmations recites an abstract idea, rather than reciting an improvement specific to network or computer functionality.

Moreover, even assuming that sending a single confirmation addresses a technological problem or improves the network or computer performance by reducing network volume in order to save “milliseconds” in network transmission speed (*see* Spec. 4:28–5:6, 30:27–31:16), under its broadest reasonable interpretation, the claim does not realize such an improvement. The Specification states that “a delay of only a few hundred milliseconds by the trading system may result in the denial of a trade confirmation request by the market maker price feed computer.” *Id.* 4:29–

30. That is, the problem described by the Specification is a problem in the speed in which a trade order is confirmed. Claim 1 recites “a single confirmation acknowledgment request message to confirm acknowledgment to proceed to submit” and then “in response to receiving an electronic signal representing a confirmation acknowledgement from the interface of the computing device of the particular trader, automatically submitting” the trade order. Accordingly, the claim requires that, in order for the trade to actually be executed, the trader must first confirm the trade request. Spec. 12:23–24 (“confirmation from the trader 14 before executing the trade”). Notably, that “trader” includes a human. *Id.* at 11:29–31 (“A trading entity 14 (hereinafter referred to as a ‘trader 14’) may include any entity, such as an individual, group of individuals or firm, that engages in trading activity via trading platform 16.”), Figure 1 (trader 14 shown as a human). By incorporating the confirmation of a human into the claimed process, the argued advantage in trading speed may be unrealized because the delay caused by a human responding to a confirmation request negates the “milliseconds” advantage sought by the Specification. *See* Spec. 4:28–5:6. Accordingly, even assuming that increasing trading speed addresses a technical problem or improves the speed of computers or computer networks, the claim does not necessarily solve that problem or improve the speed of the computer and computer network.

Further, Appellant’s reliance on *Core Wireless Licensing S.A.R.L. v. LG Electronics MobileComm U.S.A., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018), is misplaced. Appeal Br. 14–17. Appellant argues that, like *Core Wireless*, the “claimed subject matter is also drawn to an improved interface.” *Id.* at 15. In *Core Wireless*, the claim recited, and the Specification supported,

“improved interfaces” that “allow a user to more quickly access desired data stored in, and functions of applications included in, the electronic devices.” *Core Wireless*, 880 F.3d at 1359. However, as discussed above, the Specification here describes that the improvement is found in replacing “separate multiple notifications” with “a single notification.” Spec. 30:27–31:16. The interface merely presents the single notification, but using a user interface to display a notification is not an improvement to that interface; rather, it describes the information the interface conveys. *Core Wireless*, 880 F.3d. at 1363.

Additionally, none of the remaining indicia of integration listed by the Guidance is present in the claim. For example, the claim does not recite a particular machine and, instead, generically recites “computing devices” and associated “processor[s].” Nor does the claim recite a “[t]ransformation and reduction of an *article* ‘to a different state or thing.’” *Bilski*, 561 U.S. at 604 (emphasis added), *quoted in* MPEP § 2106.05(c). The claim does not transform a physical object or substance. In this way, the claim is unlike the transformations found in some eligible claims. *See, e.g., Diehr*, 450 U.S. at 184 (a process that transforms rubber).

We, therefore, determine claim 1 is not directed to a specific asserted improvement in computer technology or otherwise integrated into a practical application and, thus, is directed to a judicial exception.

Step 2B

Next, we determine whether the claim includes additional elements that provide significantly more than the recited judicial exception, thereby providing an inventive concept. *Alice*, 573 U.S. at 221 (quoting *Mayo*, 566

U.S. at 72–73). To determine whether the claim provides an inventive concept, the additional elements are considered—individually and as an ordered combination—to determine whether they (1) add a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field or (2) simply append well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception. Guidance, 84 Fed. Reg. 56.

The Examiner determines the additional limitations “fail[] to supply an inventive concept that is significantly more than the abstract idea” and recite “computer functions” that are “well-understood, routine, and conventional functions.” Final Act. 5–8.

We agree with the Examiner. The Specification describes that the additional computer hardware elements recited in the claim, i.e., “electronic trading,” “at least one processor of a computer device of an electronic trading system,” “an interface of the computing device of the particular trader,” and “an interface of a computing device of the electronic trading exchange,” are generic computer elements performing generic computer functions. In particular, the Specification describes that the “[t]rading platform 16 may include one or more computers, servers, a management center, a single workstation” and further that the “trading platform 16 may include any suitable hardware, software, personnel, devices, components, elements, or objects.” Spec. 19:27–20:1. Furthermore, the Examiner points out that, individually or as an ordered combination, the functions performed by those additional elements, i.e., “performing repetitive calculations, receiving, processing, and storing data . . . and receiving or transmitting data

over a network,” are recognized as well-understood, routine, and conventional computer functions. Final Act. 6–8.

Appellant’s arguments that the Examiner’s “‘significantly more’ analysis in the Final Action is not consistent with the USPTO guidelines” addressing *Berkheimer v. HP, Inc.* (Reply Br. 2) is untimely and therefore waived. *See* 37 C.F.R. § 41.41(b)(2). The USPTO’s Memorandum outlining Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (*Berkheimer v. HP, Inc.*) (“Berkheimer Memorandum”) issued April 19, 2018, as Appellant acknowledges. Reply Br. 2. Appellant’s Appeal Brief was filed May 11, 2018, weeks after the Berkheimer Memorandum was issued. The Appeal Brief, however, did not discuss the Berkheimer Memorandum. *See* Appeal Brief. 10–18. Even further, the Appeal Brief did not address the second step of the *Alice* inquiry at all, i.e., whether the claim includes additional elements that provide significantly more than the recited judicial exception. *See id.* As such, Appellant has provided no timely argument challenging the Examiner’s determination that any additional elements recited in the claim provide significantly more than the recited judicial exception. We, thus, conclude that claim 1 does not provide an inventive concept because the additional elements recited in claim 1 do not provide significantly more than the recited judicial exception.

Additionally, Appellant argues that “the features of the instant claims, including at least the claimed elements emphasized above, do not preempt all ways of achieving the intended result because the claimed recitations are very specific and do not cover all possible approaches.” Appeal Br. 18 (emphasis omitted). Although “preemption may signal patent ineligible

subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). Where claims are deemed to recite only patent-ineligible subject matter under the *Alice* analysis, as they are here, “preemption concerns are fully addressed and made moot.” *Id.*

Accordingly, claim 1 does not recite patent-eligible subject matter. Because claim 1 is representative of the other claims, we also conclude that claims 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 do not recite patent-eligible subject matter. Therefore, we sustain the rejection of claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter.

35 U.S.C. § 103

Appellant contends the Examiner erred in finding Lutnick teaches

[b] identifying, by the at least one processor of the computing device of the electronic trading system, from a plurality of sets of pre-configured distribution parameters a particular set of distribution parameters for processing the trading order;

[c] responsive to receiving the trading order, automatically generating, by the at least one processor of the computing device of the electronic trading system, data representing a group of distributed trading orders for the instrument distributed over multiple price levels based at least on the trading order price and the identified set of distribution parameters associated with the trading order, each order of the group of distributed trading orders having a respective price that is different from the price of every other order in the group of distributed trading orders, in which each of the group of distributed trading orders comprises a same side as the trading order such that the group of distributed trading orders comprise buy orders if the trading order comprises a buy order and the group of distributed trading orders comprise sell orders if the trading order comprises a sell order;

[f] in response to receiving an electronic signal representing a confirmation acknowledgement from the interface of the computing device of the particular trader, automatically submitting, by the at least one processor of the computing device of the electronic trading system, an electronic signal to communicate the data representing the generated group of distributed trading orders to an interface of a computing device of the electronic trading exchange for the particular instrument,

as recited in claim 1 and similarly recited in claims 33 and 34. Appeal Br. 19–22. All of Appellant’s Appeal Brief arguments discuss alleged shortcomings of Lutnick. *See id.* Specifically, Appellant argues the Examiner “has not shown how Lutnick discloses that a **group of bids (or offers) are generated in response to receiving another buy order (or sell order).**” *Id.* at 21. Appellant further argues Lutnick does not teach that its “‘multiple Bid-Offers’ are ‘**distributed over multiple price levels based at least on . . . the identified set of distribution parameters.**’” *Id.* Still further, Appellant argues that the Examiner “fails to specify **which specific feature of Lutnick** purportedly discloses which specific feature of the claimed recitation.” *Id.*

We are not persuaded. The Examiner finds, and we agree, that Lutnick’s “system controlled parameters” teach “[b] identifying, by the at least one processor of the computing device of the electronic trading system, from a plurality of sets of pre-configured distribution parameters a particular set of distribution parameters for processing the trading order.” Final Act. 12 (citing Lutnick ¶¶ 57, 76, 93, 122, 128); Ans. 15. Further, the Examiner finds that Korhammer teaches

[c] responsive to receiving the trading order, automatically generating, by the at least one processor of the computing device of the electronic trading system, data representing a group of

distributed trading orders for the instrument distributed over multiple price levels based at least on the trading order price and the identified set of distribution parameters associated with the trading order, each order of the group of distributed trading orders having a respective price that is different from the price of every other order in the group of distributed trading orders, in which each of the group of distributed trading orders comprises a same side as the trading order such that the group of distributed trading orders comprise buy orders if the trading order comprises a buy order and the group of distributed trading orders comprise sell orders if the trading order comprises a sell order;
[f] in response to receiving an electronic signal representing a confirmation acknowledgement from the interface of the computing device of the particular trader, automatically submitting, by the at least one processor of the computing device of the electronic trading system, an electronic signal to communicate the data representing the generated group of distributed trading orders to an interface of a computing device of the electronic trading exchange for the particular instrument.

Final Act. 10–11 (citing Korhammer 6:5–20, 7:20–25, 9:10–15, Figs. 3–5, claims 4, 5, 7).

Appellant’s arguments that Lutnick does not teach “a group of bids (or offers) are generated in response to receiving another buy order (or sell order” and that Lutnick’s Bids and Offers are not “distributed over multiple price levels based at least on . . . the identified set of distribution parameters,” i.e., features recited in limitation [c] (Appeal Br. 21), do not address the Examiner’s finding that Korhammer teaches limitation [c] (Final Act. 10–11 (citations omitted)). Similarly, Appellant argues the Examiner fails to specify how Lutnick teaches limitations [c] and [f] (Appeal Br. 21), but the Examiner finds Korhammer teaches limitations [c] and [f] (Final Act. 10–11 (citations omitted)). Accordingly, because the Examiner does not rely on Lutnick to teach limitations [c] and [f], Appellant’s arguments

that Lutnick does not teach limitations [c] and [f] are unpersuasive of Examiner error.

Further, regarding the limitation that the Examiner does rely on Lutnick to teach, i.e., “[b] identifying, by the at least one processor of the computing device of the electronic trading system, from a plurality of sets of pre-configured distribution parameters a particular set of distribution parameters for processing the trading order,” we disagree with Appellant that the Examiner “fails to specify which specific feature of Lutnick purportedly discloses which specific feature of the claimed recitation.” Appeal Br. 21. In the Final Action, in finding that Lutnick teaches the disputed limitation, the Examiner cites relevant portions of Lutnick and highlights Lutnick’s “system controlled parameters.” Final Act. 12. The Examiner further elaborates (Ans. 15) that Lutnick describes that users of its trading system have “permissible trading parameters” (Lutnick ¶ 57). In another example of system controlled parameters, the Examiner highlights that (Ans. 15) Lutnick describes “three levels of Bids and Offers” in which the “number of levels, of Bids and Offers depicted is a system parameter” (Lutnick ¶ 122; *see id.* ¶ 128). Appellant provides no response to the Examiner’s discussion of Lutnick’s “system controlled parameters,” which define permissible trading parameters and the number of levels of Bids and Offers, in its Reply Brief. *See* Reply Br. 5–6.⁴ Accordingly, we are not persuaded the Examiner erred in finding that Lutnick teaches “[b]

⁴ The pagination in Appellant’s Reply Brief appears to include a typographical error. After the first four pages in the Reply Brief, labeled pages 1–4, the pagination labels the actual fifth page as page 2 and the actual sixth page as page 3. We reference the actual pages in the Reply Brief.

identifying, by the at least one processor of the computing device of the electronic trading system, from a plurality of sets of pre-configured distribution parameters a particular set of distribution parameters for processing the trading order.”

Furthermore, Appellant’s argument that “Korhammer fails to disclose the features of the claimed invention” was brought up for the first time in the Reply Brief. Reply Br. 2–3. This argument is untimely and is, therefore, waived. *See* 37 C.F.R. § 41.41(b)(2). Even if we were to entertain this untimely argument, we note that Appellant merely reproduces the preamble and limitations [e]–[g], underlines the entire reproduction except for the phrase “[a] method for,” places almost the entirety of limitation [g] in bold, and states “the cited portions of Korhammer simply describe communication of messages but does not describe the above highlighted features.”

Appellant’s limited discussion amounts to little more than a naked assertion that the prior art does not teach or suggest the disputed claim limitation, which does not persuade us of Examiner error. *See* 37 C.F.R. § 41.37(c)(iv) (“A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.”); *see also In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[T]he Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”).

Accordingly, we are not persuaded the Examiner erred in finding the combination of Korhammer and Lutnick teaches the limitations recited in claim 1 and similarly recited in claims 33 and 34, not separately argued. Appeal Br. 22. Appellant also does not argue separate patentability for

dependent claims 2, 4, 6–9, 11, 13–16, 19, and 22–25, which depend directly or indirectly from claims 1, 33, and 24. *See id.* at 22. Accordingly, for the reasons set forth above, we sustain the Examiner’s decision to reject claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 under 35 U.S.C. § 103.

Double Patenting

Claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 are rejected on the ground of obviousness-type double patenting over claims 1–39 of U.S. Patent 8,566,213 B2 (“the ’213 patent”). Final Act. 20–22. Appellant argues the Examiner “does not compare all of the recitations of any of present claims to any specific claim of [the ’213 patent], nor does [the Examiner] set forth the obviousness analysis required by MPEP § 804(B)(1).” Appeal Br. 24.

We are persuaded. In the Answer, the Examiner reproduces claims 1 and 25 of the present application side-by-side with a reproduction of claim 1 of the ’213 patent. Ans. 17–21. The Examiner’s side-by-side reproduction, however, is just that. *Id.* The Examiner has not provided any discernable correspondence between the reproduced claim limitations of the present application and the ’213 patent. *Id.* Nor has the Examiner explained how claims 1, 25, or any of the other claims in the present application would have been obvious in light of claim 1 the ’213 patent. *Id.* As such, we reverse the Examiner’s obviousness-type double patenting rejection of claims 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, and 34 over claims 1–39 of the ’213 patent.

CONCLUSION

In summary:

| Claims Rejected | 35 U.S.C. § | References/Basis | Affirmed | Reversed |
|--|--------------------|-----------------------------------|--|--|
| 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 | 101 | Eligibility | 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 | |
| 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 | 103 | Korhammer, Lutnick | 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 | |
| 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 | | Obviousness-type Double Patenting | | 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 |
| Overall Outcome | | | 1, 2, 4, 6–9, 11, 13–16, 19, 22–25, 33, 34 | |

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