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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CLAUDE B. BUNICK and CHENGYOU XIAO

Appeal 2019-003054
Application 14/224,991
Technology Center 3600

Before HUBERT C. LORIN, ANTON W. FETTING, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

LORIN, *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 23–42. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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 Guy Carpenter & Company, LLC. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claimed subject matter relates to determining loss data based on industry indices. Claim 23, reproduced below with emphasis added, is illustrative of the claimed subject matter:

23. A method, comprising:

calculating, by a computing device, an element factor for each of a plurality of elements based on a modeled company loss for a plurality of events and a modeled industry loss for the plurality of events;

calculating, by the computing device, a modeled company index loss for each element based on the element factor and the modeled industry loss for each of the corresponding elements for each of the plurality of events;

selecting a section of a total range of expected loss values;

determining a first mean loss for a first event of the plurality of events and a standard deviation of the first mean loss;

identifying a portion of the standard deviation of the first mean loss lying within the section of the total range;

generating a first adjustment for the first event based on the portion of the standard deviation; and

comparing, by the computing device, the modeled company index loss for each element to the modeled company loss for each element for the first event based on the first adjustment, wherein the comparing occurs within the section of the total range to determine a basis risk for the first event.

REJECTION

Claims 23–42 are rejected under 35 U.S.C. § 101 as being directed to judicially-expected subject matter.

OPINION

The Appellant argued these claims as a group. *See* Appeal Br. 4–11. We select claim 23 as the representative claim for this group, and the

remaining claims 24–42 stand or fall with claim 24. 37 C.F.R.
§ 41.37(c)(1)(iv).

Preliminary comment

Previous Office guidance on patent subject matter eligibility has been superseded by the 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019), hereinafter “2019 Revised 101 Guidance.” *Id.* at 51 (“Eligibility–related guidance issued prior to the Ninth Edition, R–08.2017, of the MPEP (published Jan. 2018) should not be relied upon.”). Accordingly, we will not address arguments on the sufficiency of the Examiner’s position relative prior guidance but rather our analysis that follows will comport with the 2019 Revised 101 Guidance. We will address in particular Appellant’s arguments made in the Reply Brief which are raised in the context of the 2019 Revised 101 Guidance.

Introduction

35 U.S.C. § 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.”

In that regard, claim 23 covers a “process” and is thus statutory subject matter for which a patent may be obtained.² This is not in dispute.

² This corresponds to Step 1 of the 2019 Revised 101 Guidance which requires determining whether “the claim is to a statutory category.” *Id.* at 53. *See also* sentence bridging pages 53 and 54 (“consider[] whether the claimed subject matter falls within the four statutory categories of patentable subject matter identified by 35 U.S.C. 101.”).

However, the § 101 provision “contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

In that regard, notwithstanding claim 23 covers statutory subject matter, the Examiner has raised a question of patent eligibility on the ground that claim 23 is directed to an abstract idea.

Alice identifies a two-step framework for determining whether claimed subject matter is directed to an abstract idea. *Id.* at 217.

Alice step one – the “directed to” inquiry

According to *Alice* step one, “[w]e must first determine whether the claims at issue are *directed to* a patent-ineligible concept.” *Id.* at 218 (emphasis added).

The Examiner determined that claim 23 is “directed to the abstract idea(s) of determining company loss.” Final Act. 2.

Appellant argues that the claims are not directed to an abstract idea but rather to an improvement in computer functionality. Appellant mentions “performance of [a] processor” (Appeal Br. 7) and a “software based improvement” (Reply Br. 2) as types of improvements in computer functionality that are obtained by performing the process as claimed.

Accordingly, there is a dispute over whether claim 23 is directed to an abstract idea. Specifically, is claim 23 directed to determining company loss (Final Act. 2) or an improvement in computer functionality as Appellant argues?

*Claim Construction*³

We consider the claim as a whole⁴ giving it the broadest reasonable construction⁵ as one of ordinary skill in the art would have interpreted it in light of the Specification⁶ at the time of filing.

Claim 23 calls for “a computing device,” albeit only to perform the first two “calculating” steps and the last “comparing” step; the other recited steps are not attached to a device and, accordingly, are reasonably broadly construed as covering performing them by any means, including mentally.

The seven recited steps are:

1. “calculating” A “for each of a plurality of elements based on” B “for a plurality of events and” C “for the plurality of events”;

³ “[T]he important inquiry for a § 101 analysis is to look to the claim.” *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed. Cir. 2013). “In *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can.*, 687 F.3d 1266, 1273 (Fed. Cir. 2012), the court observed that ‘claim construction is not an inviolable prerequisite to a validity determination under § 101.’ However, the threshold of § 101 must be crossed; an event often dependent on the scope and meaning of the claims.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1347–48 (Fed. Cir. 2015).

⁴ “In determining the eligibility of respondents’ claimed process for patent protection under § 101, their claims must be considered as a whole.” *Diamond v. Diehr*, 450 U.S. 175, 188 (1981).

⁵ 2019 Revised 101 Guidance, page 52, footnote 14 (“*If a claim, under its broadest reasonable interpretation . . .*”).

⁶ “First, it is always important to look at the actual language of the claims. . . . Second, in considering the roles played by individual limitations, it is important to read the claims ‘in light of the specification.’” *Smart Sys. Innovations, LLC v. Chicago Transit Auth.*, 873 F.3d 1364, 1378 (Fed. Cir. 2017) (J. Linn, dissenting in part and concurring in part), citing *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016), among others.

2. “calculating” D “for each element based on” A “and” E “for each of the corresponding elements for each of the plurality of events”;
3. “selecting” F;
4. “determining” G “for a first event of the plurality of events and” H;
5. “identifying” I;
6. “generating” J “for the first event based on” I; and,
7. “comparing” D “for each element to” K “for each element for the first event based on” J, “wherein the comparing occurs within” F “to determine a basis risk for the first event.”

where,

- A is “an element factor”;
- B is “a modeled company loss”;
- C is “a modeled industry loss”;
- D is “a modeled company index loss”;
- E is “the modeled industry loss”;
- F is “a section of a total range of expected loss values”;
- G is “a first mean loss”;
- H is “a standard deviation of” G;
- I is “a portion of” H “lying within” F;
- J is “a first adjustment”; and,
- K is “the modeled company loss.”

Claim 23 is reasonably broadly construed as a scheme for determining a basis risk for an event.

The Specification states that

[t]he reduction of basis risk is a key goal of those designing ILS [Index-Linked Securities] instruments because the more basis risk is reduced, the more cost effective and appealing ILS instruments are as an alternative to standard reinsurance that reimburses insureds for losses on a basis directly linked to the insured's (or reinsured's) actual losses.

Spec., para. 3. “[A]n advantageous tool would present data

concerning such basis risk to the potential purchaser of these types of securities.” *Id.* at para. 4. The Specification goes on to describe “embodiments . . . related to systems and methods for analyzing risks related to security instruments for hedging risk against catastrophic losses.” *Id.* at para. 25.

Specifically, the exemplary embodiments allow a company (e.g., an insurance company) interested in purchasing such security instruments to visually compare its assumed risk to the index based risk and help determine whether the purchase of the security instrument will aid the company in meeting its hedging goals and also determine the price effectiveness of the security instrument with respect to these hedging goals. Generally, index based security instruments have a lower cost than traditional reinsurance instruments for several reasons, such as the avoidance of moral hazard in making payouts for catastrophic losses and the elimination of operational risk related to an individual insurance company. However, as described above and as will be described in greater detail below, the value offered to the buyer of the index based instruments is subject to inefficiencies because of the existence of basis risk. Thus, the exemplary embodiments address these inefficiencies in the value to the buyer of the index based instruments.

Id.

Given the method as claimed as reasonably broadly construed above and in light of the Specification’s description of the invention as being related to hedging, based on the record before us, we reasonably broadly construe claim 23 as being directed to a scheme for determining a basis risk for an event associated with, e.g., a modeled company loss.

*The Abstract Idea*⁷

Above, where we reproduce claim 23, we identify in italics the limitations we believe recite an abstract idea.⁸ Based on our claim construction analysis (above), we determine that the identified limitations describe a scheme for determining a basis risk for an event associated with, e.g., a modeled company loss. Determining a basis risk is a fundamental business practice. It falls within the enumerated “[c]ertain methods of organizing human activity” as grouping of abstract ideas set forth in the 2019 Revised 101 Guidance.⁹

⁷ This corresponds to Step 2A of the 2019 Revised 101 Guidance. Step 2A determines “whether a claim is ‘directed to’ a judicial exception,” such as an abstract idea. Step 2A is two prong inquiry.

⁸ This corresponds to Prong One (a) of Step 2A of the 2019 Revised 101 Guidance. “To determine whether a claim recites an abstract idea in Prong One, examiners are now to: (a) Identify the specific limitation(s) in the claim under examination (individually or in combination) that the Examiner believes recites an abstract idea.” *Id.* at 54.

⁹ This corresponds to Prong One [“Evaluate Whether the Claim Recites a Judicial Exception”] (b) of Step 2A of the 2019 Revised 101 Guidance. “To determine whether a claim recites an abstract idea in Prong One, examiners are now to: . . . (b) determine whether the identified limitation(s) falls within the subject matter groupings of abstract ideas enumerated in Section 1 of the [2019 Revised 101 Guidance].” *Id.* at 54. This case implicates subject matter grouping “(b)”: “(b) 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).” *Id.* at 52.

*Improvement In the Functioning of a Computer*¹⁰ (Appellant's Argument)

The Examiner's characterization of what the claim is directed to is similar to ours, albeit at a lower level of abstraction. "An abstract idea can generally be described at different levels of abstraction." *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). *Cf. id.* at 1241 (The Board's "slight revision of its abstract idea analysis does not impact the patentability analysis.").

We have reviewed the record and are unpersuaded as to error in our or the Examiner's characterization of what claim 23 is directed to.

A principle argument Appellant makes is that the claimed subject matter is not directed to an abstract idea but rather to an improvement in computer functionality. However, we do not find that the record adequately supports it.

Appellant argues, *inter alia*, that claim 23 provides for an added "an

¹⁰ This corresponds to Prong Two ["If the Claim Recites a Judicial Exception, Evaluate Whether the Judicial Exception Is Integrated Into a Practical Application"] of Step 2A of the 2019 Revised 101 Guidance. "A claim that integrates a judicial exception into a practical application will 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 judicial exception." *Id.* at 54. One consideration, implicated here, that is "indicative that an additional element (or combination of elements) may have integrated the exception into a practical application" (*id.* at 55) is if "[a]n additional element reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field" (*id.* at 55).

improvement to computer technology is realized from the performance of the processor providing a more comprehensive and thorough evaluation functionality in basis risk.” Appeal Br. 7. *See also* Reply Br. 2 (“[T]he claims relate to a software based improvement that may be used in evaluating basis risk associated with index based security instruments.”). The record does not suggest any such realization.

The Specification does not describe the claimed method as providing an improvement to computer technology or a software-based technology. No technical improvement is mentioned. Rather, the Specification discloses only non-technical improvements, such a “[t]he reduction of basis risk is a key goal.” Spec., para. 3. *See also, e.g., id.* at para. 4 (“[F]or insurers to effectively use the hedging potential of these types of security instruments, the insurers must understand this basis risk with respect to their portfolio.”). These improvements may help insurers mitigate risk with respect to their exposure to certain securities but that alone is insufficient to show that there is a technological improvement. Appellant’s technical improvement argument is unpersuasive as to error in the Examiner’s or our characterization of what the claim is directed to because the record evidence fails to adequately support it. The argument alone cannot take the place of evidence in the record. *See generally In re Glass*, 474 F.2d 1015, 1019 (CCPA 1973). *See also In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974); *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); and *In re Schulze*, 346 F.2d 600, 602 (CCPA 1965).

We note Appellant’s citation of *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018). “It is respectfully submitted that the

claims of the present application are similar in scope to the claims of *Finjan* and also relate to a software based improvement that may be used in evaluating basis risk associated with index based security instruments.”

Appeal Br. 5. We disagree.

The question in *Finjan* was “whether this behavior-based virus scan in the '844 patent constitutes an improvement in computer functionality.” *Id.* at 1304. The court found that it did.

The “behavior-based” approach to virus scanning was pioneered by *Finjan* and is disclosed in the '844 patent’s specification. In contrast to traditional “code-matching” systems, which simply look for the presence of known viruses, “behavior-based” scans can analyze a downloadable’s code and determine whether it performs potentially dangerous or unwanted operations—such as renaming or deleting files. Because security profiles communicate the granular information about potentially suspicious code made available by behavior-based scans, they can be used to protect against previously unknown viruses as well as “obfuscated code”—known viruses that have been cosmetically modified to avoid detection by code-matching virus scans.

The security profile approach also enables more flexible and nuanced virus filtering. After an inspector generates a security profile for a downloadable, a user’s computer can determine whether to access that downloadable by reviewing its security profile according to the rules in whatever “security policy” is associated with the user. Administrators can easily tailor access by applying different security policies to different users or types of users. And having the security profile include information about particular potential threats enables administrators to craft security policies with highly granular rules and to alter those security policies in response to evolving threats.

Id. There is nothing disclosed in the instant Specification that is similarly technologically-based. The only improvements we have been able to discern

from reading the Specification are nontechnical. Here, unlike *Finjan*, the evidence weighs in favor of the view that the claim’s focus is on nontechnical improvements, such as helping insurers mitigate risk. *Cf. Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1378, 1384 (Fed. Cir. 2019) (“The claims are focused on providing information to traders in a way that helps them process information more quickly, ’556 patent at 2:26–39, not on improving computers or technology.”).

We have carefully reviewed the claim. Per our previous claim construction analysis, claim 23 is reasonably broadly construed as covering a scheme for determining a basis risk for an event associated with, e.g., a modeled company loss employing a generic computing device. We see no specific asserted improvement in computer capabilities recited in the claim. Nor does the Specification discuss any. Rather than being directed to any specific asserted improvement in computer capabilities, the claim and Specification support the opposite view – that the claimed subject matter is directed to a scheme for determining a basis risk for an event by employing a generic computing device. *See Spec.*, paras. 27, 28, 90, and 91.

The claim provides no additional structural details¹¹ that would distinguish the recited “computing device” from that which was generic and conventional at the time the application was filed. *See, e.g., Spec.*, para. 90 (“Those skilled in the art will understand that the above-described

¹¹ *Cf. Move, Inc. v. Real Estate Alliance Ltd.*, 721 F. App’x 950, 954 (Fed. Cir. 2018) (non-precedential) (“Claim 1 is aspirational in nature and devoid of any implementation details or technical description that would permit us to conclude that the claim as a whole is directed to something other than the abstract idea identified by the district court.”).

exemplary embodiments may be implemented in any suitable software or hardware configuration or combination thereof.”).

With respect to the “calculating,” “selecting,” “determining,” “identifying,” “generating,” and “comparing” steps, the Specification attributes no special meaning to any of these operations, individually or in the combination, as claimed. In our view, consistent with the Specification, these are common computer processing functions that one of ordinary skill in the art at the time of the invention would have known generic computers were capable of performing and would have associated with generic computers. *Cf. OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015):

Beyond the abstract idea of offer-based price optimization, the claims merely recite “well-understood, routine conventional activit[ies],” either by requiring conventional computer activities or routine data-gathering steps. *Alice*, 134 S. Ct. at 2359 (quoting *Mayo*, 132 S.Ct. at 1294) (alterations in original). . . . For example, claim 1 recites “sending a first set of electronic messages over a network to devices,” the devices being “programmed to communicate,” storing test results in a “machine-readable medium,” and “using a computerized system ... to automatically determine” an estimated outcome and setting a price. Just as in *Alice*, “all of these computer functions are ‘well-understood, routine, conventional activit[ies]’ previously known to the industry.” *Alice*, 134 S.Ct. at 2359 (quoting *Mayo*, 132 S.Ct. at 1294) (alterations in original); *see also buySAFE[, Inc. v. Google, Inc.]*, 765 F.3d [1350,] 1355 [(Fed. Cir. 2014)] (“That a computer receives and sends the information over a network—with no further specification—is not even arguably inventive.”).

At best, the “computing device” distinguishes over other generic computers known at the time the application was filed in the *type* of electronic information being processed – that is, for example, a “modeled

company loss.” But that alone is not patentably consequential. This is so because “[c]laim limitations directed to the content of information and lacking a requisite functional relationship are not entitled to patentable weight because such information is not patent eligible subject matter under 35 U.S.C. § 101.” *Praxair Distribution, Inc. v. Mallinckrodt Hosp. Prods. IP Ltd.*, 890 F.3d 1024, 1032 (Fed. Cir. 2018).

Accordingly, within the meaning of the 2019 Revised 101 Guidance, we find there is no integration of the abstract idea into a practical application.

The Reply Brief argues, *inter alia*, that

the characterization of the “business objective” is precisely the practical application that qualifies the claims as reciting patent eligible subject matter ... [T]he claims of the present application are directed to a particular practical application of risk evaluation through additional considerations relating to mean losses and standard deviations relative to a total range to generate an adjustment. Therefore, the claims recite a practical application that is particular for evaluating basis risk.

Reply Br. 3–4. We disagree.

According to the 2019 Revised 101 Guidance, “[a] claim that integrates a judicial exception into a practical application will 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 judicial exception.” 2019 Revised 101 Guidance 54. Setting out a “business objective” for the claimed method does not “apply, rely on, or use” the scheme for determining a basis risk (to which claim 23 is directed to) so as to impose any meaningful limit on it. At most it sets out a field of use (i.e., business) for said scheme. In that regard, the 2019 Revised 101 Guidance indicates that the “courts have . . . identified

examples in which a judicial exception has not been integrated into a practical application” (*id.* at 55) and includes when “an additional element does no more than generally link the use of a judicial exception to a particular technological environment or field of use” (*id.*), which is the case in setting out a “business objective” as Appellant has argued in the Reply Brief.

We have considered Appellant’s other arguments challenging the Examiner’s determination under step one of the *Alice* framework and find them unpersuasive. For the foregoing reasons, the record supports the Examiner’s determination that claim 23 is directed to an abstract idea.

*Alice step two – Does the Claim Provide an Inventive Concept?*¹²

Step two is “a search for an ‘inventive concept’—*i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Alice*, 573 U.S. at 217–18 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 73 (2012)).

In that regard, the Examiner determined that:

The claim(s) do not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additional computer elements, which are recited at a high level of generality, provide conventional

¹² This corresponds to Step 2B of the 2019 Revised 101 Guidance 56 “if a claim has been determined to be directed to a judicial exception under revised Step 2A, examiners should then evaluate the additional elements individually and in combination under Step 2B to determine whether they provide an inventive concept (*i.e.*, whether the additional elements amount to significantly more than the exception itself).”

computer functions that do not add meaningful limitations to practicing the abstract idea.

Final Act. 3. We agree.

We addressed the matter of whether there were any purported specific asserted improvements in computer capabilities in our analysis above under step one of the *Alice* framework. This is consistent with the case law. *See Ancora Techs., Inc. v. HTC Am., Inc.*, 908 F.3d 1343, 1347 (Fed. Cir. 2018) (“We have several times held claims to pass muster under *Alice* step one when sufficiently focused on such improvements.”). Such an argument can also challenge a determination under step two of the *Alice* framework. *See buySAFE*, 765 F.3d at 1354–55. “[R]ecent Federal Circuit jurisprudence has indicated that eligible subject matter can often be identified either at the first or the second step of the *Alice/Mayo* [framework].” 2019 Revised 101 Guidance at 53; *see also id.* n.17.

Be that as it may, we are unpersuaded that claim 23 presents an element or combination of elements indicative of a specific asserted improvement in computer capabilities, thereby rendering the claimed subject matter sufficient to ensure that the patent in practice amounts to significantly more than a patent upon a scheme for determining a basis risk employing a generic “computing device.”

We have reviewed the Specification and, as explained above, we can find no suggestion of any improvements to the system as a result of performing the functions as broadly as they are recited.

We cited the Specification in our earlier discussion. It is intrinsic evidence that the claimed “computing device” as claimed is conventional. In doing so, we have followed “Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision

(*Berkheimer v. HP Inc.*[], 881 F.3d 1360 (Fed. Cir. 2018)],” USPTO Memorandum, Robert W. Bahr, Deputy Commissioner For Patent Examination Policy, April 19, 2018 (the “Berkheimer Memo”).

The court in *Berkheimer* held that “[t]he patent eligibility inquiry may contain underlying issues of fact.” *Berkheimer*, 881 F.3d at 1365 (quoting *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016) (“The § 101 inquiry ‘*may* contain underlying factual issues.”)). But the court also held that “[w]hen there is *no genuine issue of material fact* regarding whether the claim element or claimed combination is well-understood, routine, [and] conventional to a skilled artisan in the relevant field, this issue can be decided on summary judgment as a matter of law.” *Id.* at 1368 (emphasis added). This qualification has been subsequently reiterated.

If there is a genuine dispute of material fact, Rule 56 requires that summary judgment be denied. In *Berkheimer*, there was such a genuine dispute for claims 4–7, but not for claims 1–3 and 9. . . .

. . . .

[I]n accordance with *Alice*, we have repeatedly recognized the absence of a genuine dispute as to eligibility for the many claims that have been defended as involving an inventive concept based merely on the idea of using existing computers or the Internet to carry out conventional processes, with no alteration of computer functionality.

Berkheimer v. HP Inc., 890 F.3d 1369, 1371–73 (Fed. Cir. 2018) (Order, On Petition for rehearing en banc, May 31, 2018); *see also Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1368 (Fed. Cir. 2018) (“A factual allegation or dispute should not automatically take the determination out of the court’s hands; rather, there needs to be justification for why

additional evidence must be considered—the default being a legal determination.”).

Here, the Specification indisputably shows the recited “computing device” individually and in the context as claimed was conventional at the time of filing. *See, e.g.*, Spec., para. 90 (“Those skilled in the art will understand that the above-described exemplary embodiments may be implemented in any suitable software or hardware configuration or combination thereof.”). Accordingly, we are aware of no facts that would persuade us that the claimed “computing device” involves anything other than well-understood, routine, or conventional functionality.

Appellant argues that “the claims effect an improvement to computer technology through improved performance of a processor in evaluating a basis risk using an unconventional approach.” Appeal Br. 8. But, again, we have been unable to find sufficient supporting evidence. Such improvements could indeed transform claimed subject matter that is otherwise directed to an abstract idea into something significantly more. But the difficulty here is that the record insufficiently shows it.

No other persuasive arguments having been presented, we conclude that no error has been committed in the determination under *Alice* step two that claim 23 does not include an element or combination of elements circumscribing the patent-ineligible concept it is directed to so as to transform the concept into an inventive application.

We have considered all of the Appellant’s arguments (including those made in the Reply Brief) and find them unpersuasive.

Accordingly, because we are not persuaded as to error in the determinations that representative claim 23, and claims 24–42 which stand

or fall with claim 23, are directed to an abstract idea and do not present an “inventive concept,” we sustain the Examiner’s conclusion that they are directed to patent-ineligible subject matter for being judicially-excepted from 35 U.S.C. § 101. *Cf. LendingTree, LLC v. Zillow, Inc.*, 656 F. App’x 991, 997 (Fed. Cir. 2016) (“We have considered all of LendingTree’s remaining arguments and have found them unpersuasive. Accordingly, because the asserted claims of the patents in suit are directed to an abstract idea and do not present an ‘inventive concept,’ we hold that they are directed to ineligible subject matter under 35 U.S.C. § 101.”); *see, e.g., OIP Techs.*, 788 F.3d at 1364; *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1098 (Fed. Cir. 2016).

CONCLUSION

The decision of the Examiner to reject claims 23–42 is affirmed.

More specifically:

The rejection of claims 23–42 under 35 U.S.C. § 101 as being directed to judicially-excepted subject matter is affirmed.

DECISION SUMMARY

In summary:

| Claims Rejected | 35 U.S.C. § | Reference(s)/Basis | Affirmed | Reversed |
|------------------------|--------------------|---------------------------|-----------------|-----------------|
| 23–42 | 101 | Eligibility | 23–42 | |

Appeal 2019-003054
Application 14/224,991

TIME PERIOD FOR RESPONSE

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