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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MOSHE KOVARSKY and AYAL BAHARY

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Appeal 2019-004209  
Application 13/603,444  
Technology Center 3600

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Before DONALD E. ADAMS, RICHARD M. LEBOVITZ, and  
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from Examiner's decision to reject claims 1–19, 21–23, and 25–28.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as “AlphaVee Solutions Ltd.” (Appellant’s February 15, 2018 Appeal Brief (Appeal Br.) 2).

<sup>2</sup> See Appeal Br. 3.

## STATEMENT OF THE CASE

Appellant's disclosure "relates to financial data and, more particularly, but not exclusively, to methods and systems of historical and current financial data analysis" (Spec.<sup>3</sup> 1). Appellant's claim 1 is reproduced below:

1. A computer-implemented method of performing testing simulation based on a correlation marked using an interactive display which is presented by a client terminal, the method comprises:

presenting an interactive display on a client terminal by:

receiving said data,

automatically calculating, for each member of a first group of a plurality of publically traded financial instruments, a current growth grade according to combination of a plurality of growth factor scores extracted from said data and a current value grade according to a combination of a plurality of value factor scores extracted from said data,

automatically generating said interactive display with a multidimensional graphic presentation depicting the distribution of a plurality of members of said first group according to their growth and value factor scores, and

forwarding instructions to display said interactive display with said multidimensional graphic presentation as part of an interactive user interface executed on said client terminal,

instructions for automatically identifying a marking of one or more sub-areas on said multidimensional graphic presentation of said interactive display;

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<sup>3</sup> Appellant's September 5, 2012 Specification.

instructions for automatically calculating a correlation between a sub-range of value grades from a value axis, and a sub-range of growth grades from a growth axis, said correlation being selected according to said one or more sub-areas, said one or more sub-areas containing a sub-group of said members of said first group;

instructions for automatically selecting a second group of said publically traded financial instruments according to historical financial data so that each member thereof having growth and value grades which correspond with said value and growth grade sub-ranges in a past period;

instructions for automatically performing at least one back testing simulation to members of said second group according to financial data from said past period; and

instructions for automatically presenting the outcome of said at least one testing simulation on said interactive display.

(Appeal Br. 24–25.)

Ground of rejection before this Panel for review:

Claims 1–19, 21–23, and 25–28 stand rejected under 35 U.S.C. § 101.

#### ISSUE

Does the preponderance of evidence of record support Examiner’s finding that Appellant’s claimed invention is directed to patent ineligible subject matter?

#### 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. The Supreme Court, however, 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 Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *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 is “directed to.” *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1853))); and manufacturing flour (*Gottschalk*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a

mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Gottschalk and Parker*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (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.*

Early in 2019, the PTO published revised guidance on the application of § 101. USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (January 7, 2019) (“Guidance”).<sup>4</sup> In light of comments

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<sup>4</sup> Available at <https://www.govinfo.gov/content/pkg/FR-2019-01-07/pdf/2018-28282.pdf>.

received in response to the Office Guidance, the PTO subsequently issued the *October 2019 Patent Eligibility Guidance Update* (“Update”).<sup>5</sup>

Following the Guidance and October 2019 Update, under Revised Step 2A, we first look to whether the claim recites the following:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and
- (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h)).

*See* Guidance, 84 Fed. Reg. at 54–55. Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look, under Step 2B of the Office Guidance, to whether the claim:

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

*See* Guidance, 84 Fed. Reg. at 51.

## ANALYSIS

Applying the Revised Guidance and Update to the facts on this record, we find that Appellant’s representative claim 1 is directed to patent-ineligible subject matter.

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<sup>5</sup> [https://www.uspto.gov/sites/default/files/documents/peg\\_oct\\_2019\\_update.pdf](https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf).

*Step One: Does Claim 1 fall within a Statutory Category of § 101?*

Appellant’s claim 1 recites a method and, therefore, falls within the statutory categories of 35 U.S.C. § 101.

*Step 2A, Prong One: Does Claim 1 Recite a Judicial Exception?*

The Revised Guidance identifies three judicially-excepted groupings identified by the courts as abstract ideas: (1) mathematical concepts, (2) certain methods of organizing human behavior such as fundamental economic practices, and (3) mental processes. On this record, we agree with Examiner’s finding that Appellant’s claim 1 recites fundamental economic practices and mental processes and, thus, recites an abstract idea (*see* Final Act.<sup>6</sup> 5–6). In this regard, we note that Appellant discloses that “[i]mplementation of the method and/or system of embodiments of the invention can involve performing or completing selected tasks manually, automatically, or a combination thereof” (*see* Spec. 6).

Appellant’s claimed method comprises the step of receiving data (*see* Appeal. Br. 24). The collection, i.e. receipt, of data represents a mental process. In addition, we find that the collection of data as a predicate step to performing additional steps represents insignificant extra-solution activity. *See, e.g., In re Bilski*, 545 F.3d 943, 963 (Fed. Cir. 2008) (en banc), *aff’d sub nom, Bilski v. Kappos*, 561 U.S. 593 (2010); *see also CyberSource v. Retail Decisions*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (data-gathering “step[s] cannot make an otherwise nonstatutory claim statutory.”) (citation omitted)).

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<sup>6</sup> Examiner’s June 30, 2017 Final Office Action.

Appellant discloses that the “[i]mplementation of the method and/or system of embodiments of the invention can involve performing or completing selected tasks manually” (Spec. 6). Thus, we find that Appellant’s collection, manipulation, and display of data involves insignificant extra-solution activity and mental processes. *See, e.g., Intellectual Ventures I LLC v. Capital One Financial Corp.*, 850 F.3d 1332, 1340 (Fed. Cir. 2017) (finding that “an invention directed to collection, manipulation, and display of data was an abstract process”). Therefore, we agree with Examiner’s finding that the steps of manipulating and displaying data, on this record, are abstract ideas (*see* Final Act. 5–6).

The method of Appellant’s claim 1 also requires instructions for automatically:

identifying a marking of one or more sub-areas on said multidimensional graphic presentation of said interactive display;

calculating a correlation between a sub-range of value grades from a value axis, and a sub-range of growth grades from a growth axis, said correlation being selected according to said one or more sub-areas, said one or more sub-areas containing a sub-group of said members of said first group;

selecting a second group of said publically traded financial instruments according to historical financial data so that each member thereof having growth and value grades which correspond with said value and growth grade sub-ranges in a past period;

performing at least one back testing simulation to members of said second group according to financial data from said past period; and

presenting the outcome of said at least one testing simulation on said interactive display.

(Appeal. Br. 25–26.) However, as discussed above, the steps of collecting, manipulating, and display of data on this record involves insignificant extra-solution activity and mental steps.

In addition, the steps of Appellant’s claimed method involve publically traded financial instruments, i.e. fundamental economic practices. Methods of organizing human activity, such as fundamental economic practices, are abstract ideas. *See Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611. Therefore, we agree with Examiner that Appellant’s claim 1 recites a “fundamental economic practice” (Final Act. 6).

For the foregoing reasons, we find that Appellant’s claimed method recites fundamental economic practices and mental processes and, thus, a recites a judicial exception (*see* Final Act. 5–6).

For the foregoing reasons, we are not persuaded by Appellant’s contention that Examiner failed to establish that Appellant’s claimed invention is directed to an abstract idea (Appeal Br. 13).

*Step 2A, Prong Two: Is There Integration into a Practical Application?*

As Examiner explains, Appellant’s Specification and claim “does not describe any improvement to the existing technology or computer itself” and “[t]here is no indication that the combination of elements improve the functioning of a computer or improves any other technology” (Final Act. 7). We agree.

On this record, Appellant’s Specification discloses a method wherein “historical financial data of a plurality of publically traded financial

instruments<sup>7</sup> [is used] to perform back testing simulation based on user selected growth and value grade ranges” (Spec. 9: 24–27). “According to some embodiments of . . . [Appellant’s] invention, a multidimensional graphical presentation of the publically traded stocks, which are optionally filtered, allows the user to mark the correlation in a graphical manner based on the presented data,” wherein “[f]or example, the multidimensional graphical presentation is a two dimensional (2D) grid, where each stock is presented by a graphical indicator, such as [a] dot,” which

are mapped according to their value and growth grades. Stocks with high grades are depicted as dots at the top-right corner of the grid and stocks with low grades are depicted as dots at lower-left corner. Stocks with high growth grades are at the top rows of the grid and stocks with high value grades are at the right column(s). This multidimensional graphical presentation allows mapping a full universe of publically traded stocks onto a 2D grid in a format that enables the user to quickly identify stocks representing the balance of growth grade and value grade that the user is interested in.

(Spec. 14: 11–30.) Appellant further discloses that a “user may graphically mark the correlation between value and growth grade ranges, for example by selecting one or more areas of interest on the multidimensional graphical presentation” (Spec. 15: 17–19; *see generally* Appeal Br. 18–20). Thus, Appellant contends that its “‘interactive display’ . . . provide[s] a specific solution to solve problems of prior graphical user interface (GUI) based devices in the context of computerized trading relating to speed, accuracy and usability” (Appeal Br. 14; *see also id.* at 14–17). We are not persuaded.

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<sup>7</sup> Appellant defines the term “publically traded financial instruments” as “stocks, bonds, market currencies, derivatives, commodities and/or any other publically element which is merchandisable in one or more financial marketplaces” (Spec. 9: 27–30).

Here, as in *Trading Techs.*, Appellant’s “invention makes the *trader* faster and more efficient, not the computer. This is not a technical solution to a technical problem,” but is instead the practice of the fundamental economic practice. *Trading Technologies International, Inc. v. IBG LLC*, 921 F.3d 1084, 1090 (Fed. Cir. 2019); *see id.* at 1089 (Trading Techs. argued that its “inventions addressed technical problems in the way prior art GUI tools were constructed and operated,” addressing problems related to speed, efficiency, usability, intuitiveness, visualization, and efficiency, which the court found “relate to the practice of a financial product, not a technological invention”).

For the foregoing reasons, we are not persuaded by Appellant’s contention that its “claims clearly add functionality to a computer that was previously not available and therefore are not directed to an abstract idea” (Appeal Br. 18). For the same reasons, we are not persuaded by Appellant’s contention that its claimed invention is analogous to that in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016) (*see* Appeal Br. 18). In contrast to Appellant’s claimed invention the claims in *Enfish* were directed to a *self-referential* table (“means for configuring” algorithm) that functions differently than conventional database structures. *Id.* at 1337. This technological improvement provided increased flexibility, faster search times, and smaller memory requirements. *Id.* In contrast, as discussed above, Appellant’s alleged improvement is not to computer technology implementing the trading method, but rather to the manner in which data associated with a fundamental economic practice is displayed, i.e., using a computer to perform conventional computer functions of receiving, processing, and displaying data.

We are not persuaded by Appellant’s contentions regarding *McRO* (see Appeal Br. 20). In contrast to Appellant’s claimed improvement to a fundamental economic practice, in *McRO*, the claims focused on a specific improvement in computer animation. The claimed process in *McRO* used a combined order of specific rules that renders information into a specific format used and applied to create a desired result—a sequence of synchronized, animated characters. *McRO*, 873 F.3d at 1314-15. The claims in *McRO* recited a process of automated lip-synchronization of 3-D characters that resulted from a specific order of rules as a relationship between sub-sequences of phonemes, timing, and weight of visual expression at a particular timing by a morph weight set. *Id.* at 1315. The rules in *McRO* improved the synchronization of 3-D characters on computers. In contrast, as discussed above, although Appellant’s claim 1 may provide an improvement in a fundamental economic practice, unlike *McRO*, Appellants’ alleged improvement is not to computer technology implementing the trading method using rules, but rather to the trading method itself. In other words, Appellant’s alleged improvement is to the manner in which the trade is effected, i.e., using a computer to perform conventional computer functions (the so-called “rules”) of receiving, processing, and displaying data. See *SAP*, 898 F.3d at 1163 (“No matter how much of an advance in the finance field the claims recite, the advance lies entirely in the realm of abstract ideas, with no plausibly alleged innovation in the non-abstract application realm. An advance of that nature is ineligible for patenting.”).

The fact that Appellant’s claims may recite rules that are abstract ideas does not provide an inventive step or integrate those abstract ideas into

a patent-eligible application. *See Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (“a claim for a *new* abstract idea is still an abstract idea.”); *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015) (affirming unpatentability of claims that improved an abstract idea, but not a computer’s performance).

We are not persuaded by Appellant’s contentions regarding *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014) (*see* Appeal Br. 22). The claims in *DDR Holdings* addressed a problem unique to the Internet in a manner that was “not merely the routine or conventional use of the Internet.” *Id.* at 1259. In particular, rather than the expected behavior of simply sending the website visitor to a third-party website, the claimed invention behaved in a manner different than expected by sending a website visitor to a hybrid web page presenting information from a third-party with the look and feel of the host website. *Id.* at 1258–59. In contrast, on this record, Appellant have not identified any unconventional behavior by the recited computer limitations in its claim 1. Similarly, we are not persuaded by Appellant’s contentions regarding *Trading Technologies, Inc. v. CQG, Inc.*, 675 Fed. Appx. 1001 (2017) (unpublished) (*see* Appeal Br. 22). In contrast to Appellant’s claim 1, the claims at issue in *CQG* “require[d] a specific, structured graphical user interface paired with a prescribed functionality directly related to the graphical user interface’s structure that is addressed to and resolves a specifically identified problem in the prior state of the art.” *See CQG*, 675 Fed. Appx. at 1004. Thus, unlike Appellant’s claim 1 on this record, the court in *CQG* agreed with the District Court’s finding “that these patents are directed to improvements in existing graphical user interface devices that have no ‘pre-electronic trading analog,’

and recite more than ‘setting, displaying, and selecting’ data or information that is visible on the [graphical user interface] device” (*id.* (alteration original)).

Thus, we agree with Examiner’s finding that Appellant’s claimed invention fails to integrate the abstract idea into a practical application (*see, e.g.,* Final Act. 7).

*Step 2B: Does Claim 1 Recite Well-Understood, Routine, Conventional Activity?*

Receiving market information is simply routine data gathering, the display of data on a two dimensional grid, and the selection and movement of an icon to identify areas or sub-areas on a display are all well-known, routine, conventional activities. *See Trading Techs.*, 921 F.3d at 1093 (Our reviewing Court agree with the Board’s finding that “receiving market information is simply routine data gathering, and displaying information as indicators along a scaled price axis is well-understood, routine, conventional activity that does not add something significantly more to the abstract idea” and “selecting and moving an icon is well-understood, routine, conventional activity”).

In addition, we recognize that Appellant discloses:

Implementation of the method and/or system of embodiments of the invention can involve performing or completing selected tasks manually, automatically, or a combination thereof. Moreover, according to actual instrumentation and equipment of embodiments of the method and/or system of the invention, several selected tasks could be implemented by hardware, by software or by firmware or by a combination thereof using an operating system.

For example, hardware for performing selected tasks according to embodiments of the invention could be implemented as a chip or a circuit. As software, selected tasks according to embodiments of the invention could be implemented as a plurality of software instructions being executed by a computer using any suitable operating system. In an exemplary embodiment of the invention, one or more tasks according to exemplary embodiments of method and/or system as described herein are performed by a data processor, such as a computing platform for executing a plurality of instructions. Optionally, the data processor includes a volatile memory for storing instructions and/or data and/or a non-volatile storage, for example, a magnetic hard-disk and/or removable media, for storing instructions and/or data. Optionally, a network connection is provided as well. A display and/or a user input device such as a keyboard or mouse are optionally provided as well.

(Spec. 6.)

Therefore, we agree with Examiner's finding that, to the extent that the steps of Appellant's claimed method are performed non-manually, the steps are implemented through the use of a generic computer system (*see* Final Act. 7). *See Alice*, 573 U.S. at 223 (“[M]ere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea while adding the words ‘apply it’ is not enough for patent eligibility.” (citation and internal quotation omitted)); *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed. Cir. 2013) (“Accenture attempts to limit the abstract idea of claim 1 by applying it in a computer environment and within the insurance industry. However, those types of limitations do not ‘narrow, confine, or otherwise tie down the claim.’ . . . [S]imply implementing an abstract concept on a computer, without meaningful limitations to that concept, does not transform a patent-ineligible claim into a patent-eligible

one.” (citation omitted)); *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1363 (Fed. Cir. 2015) (“At best, the claims describe the automation of the fundamental economic concept of offer-based price optimization through . . . generic computer functions.”).

In addition, we note that steps that recite basic data collection and analysis, even when limited to particular content (i.e., publically traded financial instruments), without more, are insufficient to integrate abstract ideas recited in claim 1 into a practical application. *See buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354–55 (Fed. Cir. 2014) (determining claims to creating a contractual relationship with a “transaction performance guaranty” recite a long-familiar commercial transaction that is an abstract idea and reciting generic computer functions of receiving and sending information over a network was insufficient to make the abstract idea patent eligible); *Trading Techs.*, 921 F.3d at 1092–93 (holding that claims to placing an order on displayed market information, even with some particularity, is a fundamental economic practice and that collecting, organizing, and displaying two sets of information on a generic display device does not make the claims patent eligible).

Thus, we find no error in Examiner’s finding that “the additional limitations of a computer with a processor and a tangible, non-transitory memory” are “generic computer components . . . claimed to perform their basic functions of storing, retrieving, processing, and displaying that are well-understood, routine, and conventional activities which amount to no more than implementing the abstract idea with a computerized programmed system” (Final Act. 7). *See, e.g., Credit Acceptance Corp. v. Westlake Services*, 859 F.3d 1044, 1055 (Fed. Cir. 2017) (Mere automation of manual

processes, such as using a generic computer to process an application for financing a purchase); *LendingTree, LLC v. Zillow, Inc.*, 656 Fed. App'x 991, 996–97 (Fed. Cir. 2016) (non-precedential) (speeding up a loan-application process by enabling borrowers to avoid physically going to or calling each lender and filling out a loan application); *see also* MPEP §§ 2106.05(a)(I) (providing examples that the courts have indicated may not be sufficient to show an improvement in computer-functionality) and 2106.05(d)(II) (providing examples that the courts have recognized as well-understood, routine, conventional activity in particular fields).

Moreover, claim limitations describing the excluded subject matter cannot satisfy the second step of the *Alice* analysis. *See SAP*, 898 F.3d at 1163 (“No matter how much of an advance in the finance field the claims recite, the advance lies entirely in the realm of abstract ideas, with no plausibly alleged innovation in the non-abstract application realm. An advance of that nature is ineligible for patenting.”); *Mayo*, 566 U.S. at 72–73 (requiring “a process that focuses upon the use of a natural law also contain *other* elements or a combination of elements, sometimes referred to as an ‘inventive concept,’ sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself” (emphasis added)); *BSG Tech. LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018) (“It has been clear since *Alice* that a claimed invention’s use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention ‘significantly more’ than that ineligible concept.”); *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1374 (Fed. Cir. 2018) (Moore, J., concurring) (“[A]nd *Berkheimer* . . . leave[s] untouched the numerous cases

from [the Federal Circuit] which have held claims ineligible because the only alleged ‘inventive concept’ is the abstract idea.”).

To be complete, we are not persuaded by Appellant’s contentions regarding preemption (Appeal. Br. 15–17). *See Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (Although “preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.”). Nor are we persuaded by Appellant’s contentions regarding “novelty or non-obviousness” (*see* Appeal Br. 21). *See Mayo*, 566 U.S. at 90 (although the § 101 patent-eligibility inquiry and prior art inquiries might sometimes overlap, “to shift the patent-eligibility inquiry entirely to these later sections risks creating significantly greater legal uncertainty, while assuming that those sections can do work that they are not equipped to do.”); *see also Diehr*, 450 U.S. at 188–89 (“[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of *no relevance* in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.”).

#### CONCLUSION

The preponderance of evidence of record supports Examiner’s finding that Appellant’s claimed invention is directed to patent ineligible subject matter. The rejection of claim 1 under 35 U.S.C. § 101 is affirmed. Claims 2–19, 21–23, and 25–28 are not separately argued and fall with claim 1.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-19, 21-23, 25-28	101	Eligibility	1-19, 21-23, 25-28	

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).

AFFIRMED