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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/888,352	05/06/2013	Howard W. Lutnick	12-2322	8631
63710	7590	06/25/2020	EXAMINER	
INNOVATION DIVISION CANTOR FITZGERALD, L.P. 110 EAST 59TH STREET (6TH FLOOR) NEW YORK, NY 10022			KAZIMI, HANI M	
			ART UNIT	PAPER NUMBER
			3691	
			NOTIFICATION DATE	DELIVERY MODE
			06/25/2020	ELECTRONIC

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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* HOWARD W. LUTNICK, SHAWN MATTHEWS,  
PHILIP NORTON, and KEVIN FOLEY

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Appeal 2019-005795  
Application 13/888,352  
Technology Center 3600

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Before JOHN A. JEFFERY, JASON J. CHUNG, and  
BETH Z. SHAW, *Administrative Patent Judges*.

CHUNG, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals the Final Rejection of claims 1–5, 7–12, 17–20, 24, 26, 29, and 31.<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. According to Appellant, CFPH, LLC is the real party in interest. Appeal Br. 3.

<sup>2</sup> Claims 6, 13–16, 21–23, 25, 27, 28, 30, and 32 are cancelled. Appeal Br. 18–20, 22, 23.

## INVENTION

The invention relates to trading and matching buyers and sellers of trading products, e.g., electronically. Spec. ¶ 2. Claim 29 is representative of the invention and is reproduced below:

29. An apparatus, comprising:

at least one processor; and

at least one memory having instructions stored thereon which, when executed by the at least one processor, direct the at least one processor to:

*receive indicia indicating that a first user desires to trade one of (1) a trading product and (2) a type of trading product comprising the trading product;*

*determine that there is no currently active matching contra interest to trade the one of (1) the trading product and (2) the type of trading product in an electronic market place;*

*qualify each of a plurality of users to participate in an auction for the trading product based on at least one of (a) a portfolio of the user, (b) a trade history of the user, (c) an order history of the user, (d) one or more outstanding orders of the user, and (e) trading interest specified by the user, in which the plurality of users comprises the first user, the plurality of users consisting of a subset of users of the electronic marketplace;*

*determine a trading price for the auction for the trading product;*

*cause a display device of the plurality of users to display: indicia identifying the trading product;*

*the price;*

*an auction start time;*

*a bid quantity field for entering a quantity of the trading product offered to purchase; and*

*an offer quantity field for entering a quantity of the trading product offered for sale;*

*start an auction at the price for the plurality of users;*

*prior to an end time of the auction, receive at least one bid to purchase the trading product and at least one offer to sell the trading product, the at least one bid comprising a first-received*

*bid to purchase a first quantity of the trading product, the at least one offer comprising a first-received offer to sell a second quantity of the trading product;*

*match and execute at least a portion of the first quantity of the first-received bid with at least a portion of the second quantity of the first-received offer;*

*in which the first-received bid is from a first bidder and the first-received offer is from a first offeror;*

*in which an identity of the first bidder is not disclosed to the first offeror prior to the auction end time, generating an electronic command transmitted via an electronic communication network to cause to execute a process on a first electronic device of the first offeror to block the identity of the first bidder from being rendered on an output portion of a graphical user interface of the first electronic device of the first offeror; and*

*in which an identity of the first offeror is not disclosed to the first bidder prior to the auction end time, generating an electronic command transmitted via an electronic communication network to cause to execute a process on a first electronic device of the first bidder to block the identity of the first offeror from being rendered on an output portion of a graphical user interface of the first electronic device of the first bidder.*

Appeal Br. 20–22 (Claims Appendix) (emphasis added).

## REJECTION

The Examiner rejects claims 1–5, 7–12, 17–20, 24, 26, 29, and 31 under 35 U.S.C. § 101 as being directed to patent ineligible subject matter. Final Act. 2.

## ANALYSIS

### A. *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 U.S. 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. *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-part 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, 67 (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 waterproof 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 (*Benson*, 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 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 187; *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 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.* (citation omitted) (citing *Benson* and *Flook*); *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.* (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.*

*B. USPTO Section 101 Guidance*

In January 2019, the U.S. Patent and Trademark Office (USPTO) published revised guidance on the application of § 101. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“2019 Revised Guidance”).<sup>3</sup> “All USPTO personnel are, as a matter of internal agency management, expected to follow the guidance.” *Id.* at 51; *see also* Update at 1.

Under the 2019 Revised Guidance and the Update, we first look to whether the claim recites:

- (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes) (“Step 2A, Prong One”); and
- (2) additional elements that integrate the judicial exception into a practical application (*see* MPEP § 2106.05(a)–(c), (e)–(h) (9th ed. Rev. 08.2017, Jan. 2018)) (“Step 2A, Prong Two”).<sup>4</sup>

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<sup>3</sup> In response to received public comments, the Office issued further guidance on October 17, 2019, clarifying the 2019 Revised Guidance. USPTO, *October 2019 Update: Subject Matter Eligibility* (the “Update”) (available at [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)).

<sup>4</sup> This evaluation is performed by (a) identifying whether there are any additional elements recited in the claim beyond the judicial exception, and (b) evaluating those additional elements individually and in combination to determine whether the claim as a whole integrates the exception into a practical application. *See* 2019 Revised Guidance - Section III(A)(2), 84 Fed. Reg. 54–55.

2019 Revised Guidance, 84 Fed. Reg. at 52–55.

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, to whether the claim:

(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.

2019 Revised Guidance, 84 Fed. Reg. at 52–56.

*C. The Examiner’s Rejection and Appellant’s Arguments*

The Examiner concludes that the claims recite an abstract idea, specifically certain methods of organizing human activity. Ans. 7; Final Act. 2 (citing Non-Final Act. 3 mailed March 22, 2018). The Examiner further concludes that the abstract idea is not integrated into a practical application, because the additional elements of processor, network interface, and electronic market place are generic computer components that do not impose meaningful limits on practicing the abstract idea. Ans. 7. The Examiner also determines the present claims do not amount to significantly more than an abstract idea itself because the abstract idea is implemented using additional elements that are well-understood, routine, and conventional. Final Act. 2 (citing Non-Final Act. 5 mailed March 22, 2018 (citing Spec. ¶¶ 79–88)); Ans. 12 (citing *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1321 (Fed. Cir. 2016); *In re TLI Commc’ns LLC Patent Litigation*, 823 F.3d 607, 610 (Fed. Cir. 2016); *OIP*

*Technologies, Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015);  
*buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014).

Appellant argues that the Examiner’s analysis does not consider all claim limitations, which describes various technological improvements to the user interface. Appeal Br. 10–12 (citing *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018); Spec. ¶¶ 194–195). Appellant argues that the Examiner’s analysis is deficient, because it fails to consider whether claimed requirements of the training data are well-understood, routine and conventional and completely ignores the technical advantages discussed in the Specification. Appeal Br. 7 (citing *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); Spec. ¶¶ 194–195). We disagree with Appellant.

*D. Step 2A, Prong 1*

Patent eligibility under 35 U.S.C. § 101 is a question that we resolve pursuant to the 2019 Revised Guidance. The emphasized portions of claim 29,<sup>5</sup> reproduced above (*see supra* at 2–3), recite concepts relating to fundamental economic principles or practices because they require a plurality of users participating in an auction for trading products (*see Priceplay.com, Inc. v. AOL Advert., Inc.*, 83 F. Supp. 3d 577, 580 (D. Del. 2015), *aff’d*, 627 F. App’x 925 (Fed. Cir. 2016) (Rule 36)), and, therefore, fall within the certain methods of organizing human activity category of the USPTO’s Guidance. *See* 2019 Revised Guidance, 84 Fed. Reg. at 52 n.14. Specifically, the italicized steps fall under the umbrella of economic

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<sup>5</sup> Claim 29 is representative, as acknowledged by Appellant. Appeal Br. 10. We, therefore, group claims 1–5, 7–12, 17–20, 24, 26, 29, and 31 as the “present claims.”

practices, including managing transactions or sales activities, because participating in an auction would ordinarily take place in our system of commerce.

We must still determine whether the abstract idea is integrated into a practical application, namely whether the claim applies, relies on, or uses the abstract idea in a manner that imposes a meaningful limit on the abstract idea, such that the claim is more than a drafting effort designed to monopolize the abstract idea. *See* 2019 Revised Guidance, 84 Fed. Reg. at 54–55. We therefore (1) identify whether there are any additional recited elements beyond the abstract idea, and (2) evaluate those elements both individually and collectively to determine whether they integrate the exception into a practical application. *See id.*

Accordingly, we proceed to Prong 2.

#### *E. Step 2A, Prong 2*

Here, the only elements in the claims beyond the abstract idea are “processor,” “electronic marketplace,” “display device,” “electronic communication network,” “first electronic device,” “graphical user interface,”<sup>6</sup> and “memory.”<sup>7</sup> *See* 2019 Revised Guidance, 84 Fed. Reg. at 52. The additional elements of the present claims do not integrate the abstract idea into a practical application because they do not impose any meaningful limits on practicing the abstract idea for the following reasons.

Appellant does not identify persuasively how the Specification sets

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<sup>6</sup> This additional element and the preceding additional elements are recited in claims 1, 29, and 31. *See* Claims App.

<sup>7</sup> This additional element is recited only in claim 29. *See* Claims App.

forth an improvement in technology. Appeal Br. 10–12 (citing *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018); Spec. ¶¶ 194–195). The October 2019 Update addresses how we consider evidence of improvement that is presented to us. The Update states:

*[T]he evaluation of Prong Two requires the use of the considerations (e.g. improving technology, effecting a particular treatment or prophylaxis, implementing with a particular machine, etc.) identified by the Supreme Court and the Federal Circuit, to ensure that the claim as a whole “integrates [the] judicial exception into a practical application [that] 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.*

Update, 11 (emphases added). The Update further states:

During examination, the examiner should analyze the “improvements” consideration by evaluating the specification and the claims to ensure that a technical explanation of the asserted improvement is present in the specification, and that the claim reflects the asserted improvement. Generally, examiners are not expected to make a qualitative judgment on the merits of the asserted improvement. *If the examiner concludes the disclosed invention does not improve technology, the burden shifts to applicant to provide persuasive arguments supported by any necessary evidence to demonstrate that one of ordinary skill in the art would understand that the disclosed invention improves technology.* Any such evidence submitted under 37 C.F.R. § 1.132 must establish what the specification would convey to one of ordinary skill in the art and cannot be used to supplement the specification. For example, in response to a rejection under 35 U.S.C. § 101, an applicant could submit a declaration under § 1.132 providing testimony on how one of ordinary skill in the art would interpret the disclosed invention as improving

technology and the underlying factual basis for that conclusion.

*Id.* at 13 (emphasis added).

Here, the Examiner concludes that the additional elements, when considered individually and as an ordered combination, do not integrate the abstract idea into a practical application because the additional elements are generic computer components that do not impose meaningful limits on practicing the abstract idea. Ans. 7–8. Furthermore, the Examiner concludes, and we agree, that the claims are directed to improvements to an abstract idea (i.e., certain methods of organizing human activity), rather than to improvements to a technology or technological field. *Id.*

Moreover, “a claim for a *new* abstract idea is still an abstract idea.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (emphasis added). “[U]nder the *Mayo/Alice* framework, a claim directed to a newly discovered law of nature (or natural phenomenon or abstract idea) cannot rely on the novelty of that discovery for the inventive concept necessary for patent eligibility . . . .” *Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1376 (Fed. Cir. 2016) (citations omitted).

We also turn our focus to any evidence Appellant cites, as discussed in the Update. Appellant refers us to paragraphs 194 and 195 of the Specification as alleged evidence of an improvement to a technology or technological field. Appeal Br. 10–12 (citing Spec. ¶¶ 194–195). However, paragraphs 194 and 195 of the Specification merely discuss a user interface module for tailoring user preferences pertaining one or more trading products, counterparties, auction preferences, and other preferences (i.e., certain methods of organizing human activity, which is an abstract idea).

Appellant’s citation to *Core Wireless* is unavailing. Appeal Br. 10–12. In *Core Wireless*, the court noted that the invention improved the efficiency of using an electronic device by consolidating “‘a limited list of common functions and commonly accessed stored data,’ which can be accessed directly from the main menu.” *Core Wireless*, 880 F.3d at 1363. Moreover, displaying selected data or functions of interest in the summary window allowed the user to view the most pertinent data or functions “without actually opening the application [window] up.” *Id.* at 1367 (emphasis omitted). Stated differently, the application window is in an un-launched state. *Id.* In addition, the user’s navigation speed through various views and windows is improved because it saves the user from having to navigate to the required application, open the application, and then navigate within that application to enable the data of interest to be seen or a function of interest to be activated. *Id.* Unlike the claims of *Core Wireless*, the present claims do not recite displaying an application summary window that was not only reachable directly from the main menu, but could also display a limited list of selectable functions while the application was in an *un-launched state* or an improvement in the functioning of computers. Nor are we persuaded that the Specification discloses technological advances over the prior art. Appeal Br. 10–12 (citing Spec. ¶¶ 194–195). As discussed above, the claims are directed to an abstract idea, rather than an improvement to the underlying computer technology or to any of the additional elements.

Furthermore, the additional elements in the present claims, namely “processor,” “electronic marketplace,” “display device,” “electronic communication network,” “first electronic device,” “graphical user

interface,” and “memory” do not, either individually or in combination, integrate the abstract idea into a practical application. Appellant’s Specification discloses that these elements encompass generic components, such as processor (Spec. ¶¶ 79, 81, 99), electronic marketplace (Spec. ¶¶ 12, 132, 148), display device (Spec. ¶ 194), electronic communication network (Spec. ¶¶ 88, 91, 148), first electronic device (Spec. ¶ 82), graphical user interface (Spec. ¶¶ 193–194), and memory (Spec. ¶ 86). Merely adding generic computer components to perform abstract ideas does not integrate those ideas into a practical application. *See* 2019 Revised Guidance, 84 Fed. Reg. at 55 (identifying “merely includ[ing] instructions to implement an abstract idea on a computer” as an example of when an abstract idea has not been integrated into a practical application).

Appellant does not make any other arguments pertaining to Step 2A, Prong 2. Because the present claims recite an abstract idea that is not integrated into a practical application, we proceed to Step 2B.

#### *F. Step 2B*

We agree with the Examiner that the additional elements, either individually or in combination, do not amount to an inventive concept. *Ans.* 7–8. An inventive concept “cannot be furnished by the unpatentable law of nature (or natural phenomenon or abstract idea) itself.” *Genetic*, 818 F.3d at 1376; *see also* 2019 Revised Guidance; *Alice*, 573 U.S. at 217 (explaining that, after determining a claim is directed to a judicial exception, “we then ask, ‘[w]hat else is there in the claims before us?’” (alteration in original) (quoting *Mayo*, 566 U.S. at 78)). Instead, an “inventive concept” is furnished by an element or combination of elements that is recited in the claim in addition to the judicial exception and sufficient to ensure the claim

as a whole amounts to significantly more than the judicial exception itself. *Alice*, 573 U.S. at 218–19 (citing *Mayo*, 566 U.S. at 72–73); see *BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018) (explaining that the Supreme Court in *Alice* “only assessed whether the claim limitations other than the invention’s use of the ineligible concept to which it was directed were well-understood, routine and conventional” (emphasis added)).

We agree with the Examiner’s determination that the present claims recite an abstract idea implemented using additional elements that are well-understood, routine, and conventional. Final Act. 2 (citing Non-Final Act. 5 mailed March 22, 2018 (citing Spec. ¶¶ 79–88)); Ans. 12 (citing *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d at 1321; *In re TLI Commc’ns LLC Patent Litigation*, 823 F.3d at 610; *OIP Technologies, Inc. v. Amazon.com, Inc.*, 788 F.3d 1359; *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350. The Specification supports the Examiner’s determination in this regard, because it explains that processor, electronic marketplace, display device, electronic communication network, first electronic device, graphical user interface, and memory are generic computer components. Spec. ¶¶ 12, 79, 81, 82, 86, 88, 91, 99, 132, 148, 193, 194. Appellant’s Specification indicates these additional elements were well-understood, routine, and conventional components because it describes them at a high level of generality and in a manner that indicates that they are sufficiently well-known.

We disagree with Appellant’s argument that the Examiner’s finding that the additional elements are well-understood, routine, and conventional ignores technical advantages discussed in the Specification. Appeal Br. 7

(citing *Berkheimer v. HP Inc.*, 881 F.3d 1360; Spec. ¶¶ 194–195). As discussed *supra*, paragraphs 194 and 195 of the Specification merely discuss a user interface module for tailoring user preferences pertaining one or more trading products, counterparties, auction preferences, and other preferences (i.e., certain methods of organizing human activity, which is an abstract idea).

For at least the above reasons, we conclude, under the 2019 Revised Guidance, that each of the present claims, considered as a whole, is directed to a patent-ineligible abstract idea that is not integrated into a practical application, and does not include an inventive concept. We therefore sustain the Examiner’s rejection of claims 1–5, 7–12, 17–20, 24, 26, 29, and 31 under 35 U.S.C. § 101.

We have only considered those arguments that Appellant actually raised in the Briefs. Arguments Appellant could have made, but chose not to make, in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

#### CONCLUSION

<b>Claim(s) Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1–5, 7–12, 17–20, 24, 26, 29, 31	101	Eligibility	1–5, 7–12, 17–20, 24, 26, 29, 31	

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

Appeal 2019-005795  
Application 13/888,352

AFFIRMED