

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CLS BANK INTERNATIONAL

Plaintiff-Appellee,

and

CLS SERVICES LTD.,

Counterclaim Defendant-Appellee,

ALICE CORPORATION PTY. LTD.,

Defendant-Appellant.

Appeal from the United States District Court for the District of Columbia in
Case No. 11-cv-00977 Judge Rosemary M. Collyer

OPPOSITION OF APPELLANT ALICE CORPORATION PTY. LTD.
FOR REHEARING *EN BANC*

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CERTIFICATE OF INTEREST


Pursuant to Federal Circuit Rule 47.4, undersigned counsel for Defendant-Appellant certifies the following:

1. The full name of every party or amicus represented by me is Alice Corporation Pty. Ltd.
2. The name of the real party in interest represented by me is the same.
3. All parent corporations and any publicly held companies that own 10 percent of more of the stock of the party or amicus curiae represented by me are: National Australia Bank Ltd.

4. The following attorneys appeared for Defendant-Appellant in proceedings in the district court or are expected to appear in this Court:

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September 20, 2012

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INTRODUCTION

There is nothing that warrants *en banc* review of this case. The majority faithfully followed the precedent of the Supreme Court and this Court and correctly held that Alice's claims are eligible for patenting under 35 U.S.C. § 101. Contrary to CLS's suggestion, there is no conflict between the majority's opinion and the decisions in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012), nor is there any inconsistency between the majority's opinion and the other decisions of this Court that CLS cites. Indeed, the majority expressly discussed all of the allegedly conflicting decisions except *Bancorp Services v. Sun Life Assurance Co.*, which this Court decided after this case and expressly held to be consistent with the majority's opinion here. 687 F.3d 1266, 1280–81 (Fed. Cir. 2012). CLS's real complaint is that the claims here were upheld, whereas different claims from different patents were struck down in other cases. But that simply reflects the differences in the claimed inventions. As the majority explained, the legal rule applied in this case is entirely consistent with the rule applied in CLS's other cases. Accordingly, the petition for rehearing *en banc* should be denied.

BACKGROUND

A. The claims at issue are directed to a “computerized trading platform for exchanging obligations” in a particular manner designed to minimize

“settlement risk,” that is, “the risk that only one party’s obligation will be paid, leaving the other party without its principal.” Majority at 2. As the majority recognized, and contrary to CLS’s assertions (Pet. at 4), Alice does not claim the “basic concept of financial intermediation.” Nor does Alice claim the idea of using a computer to exchange obligations. Rather, Alice claims one specific way of executing exchanges using a computer as the intermediary, which is exemplified in the detailed computer implementation of the invention described in the patent specifications. JA251–383. Alice’s claims require a particular configuration of real-world accounts and separate computer-maintained “shadow accounts” that are independent of the real-world accounts, and require a particular series of steps performed by a computer in order to effectuate parties’ exchanges. Majority at 3–6, 23–27. Critically, the computer’s role is not simply to carry out calculations more quickly as CLS suggests (Pet. at 14); rather, the claimed invention is an automated way of executing exchanges that works as intended only when carried out using a computer. JA1013–15.

B. The majority held that Alice’s computer system, method, and computer-readable media claims are patent-eligible. In a comprehensive opinion, the majority discussed at length the precedents of the Supreme Court and this Court regarding subject-matter eligibility under § 101 generally, and as applied to computer-implemented claims in particular. Majority at 11–21. After noting the

general principle that a patent may not claim an abstract idea itself, *id.* at 11–17, the majority expressly recognized that, in the context of computer-implemented inventions, the mere recitation in a claim of the use of a computer is insufficient to make an otherwise abstract idea patent-eligible. *Id.* at 25. The majority proceeded to consider the limitations of Alice’s claims and concluded that Alice has not simply claimed an abstract idea implemented on a computer. Rather, the majority held that Alice’s claims meet the standard announced by this Court post-*Bilski* in *SiRF Technology, Inc. v. International Trade Commission*, 601 F.3d 1319, 1333 (Fed. Cir. 2010): because Alice’s claims “cover the practical application of a business concept in a specific way,” and the computer is “integral” to the claimed invention and “play[s] a significant part in permitting the claimed method to be performed, rather than function[ing] solely as an obvious mechanism for a solution to be achieved more quickly,” Alice’s claims are patent-eligible. *Id.* at 26–27.

ARGUMENT

There is no conflict in precedent regarding how to evaluate the subject-matter eligibility of computer-implemented claims. The majority’s opinion is entirely consistent with both *Bilski* and *Mayo*. It is also consistent with the body of precedent that this Court has developed since *Bilski* on the specific question of how to evaluate the subject-matter eligibility of claims to computer-implemented inventions. The majority’s opinion breaks no new ground; every purportedly novel

rule that CLS identifies was in fact based squarely on this Court’s previous decisions. The majority’s decision that the particular limitations of the claims at issue make the claims patent-eligible is correct and merely involves the application of existing precedent to the facts of this case. The petition for rehearing *en banc* should therefore be denied.

I. The Majority Opinion Is Consistent with the Precedent of the Supreme Court and This Court.

A. A substantial portion of CLS’s petition is devoted to the proposition that the majority flouted the Supreme Court’s decisions in *Bilski* and *Mayo*. To the contrary, the majority discussed those cases at length and correctly applied them to this case. Majority at 11–15, 17, 19–22.

1. Neither *Bilski* nor *Mayo* addressed computer-implemented inventions, and neither addressed the question before the panel, *i.e.*, when a claim to such an invention should be deemed simply to claim an “abstract idea.” In *Bilski*, the claims were to a general business method and were essentially claims to the fundamental economic principle of hedging. 130 S. Ct. at 3231. Contrary to CLS’s assertion, Pet. at 7, 14, the *Bilski* claims were *not* computer-implemented—they did not require the use of any machine, and further had no limitation to a particular way of conducting a hedging transaction. 130 S. Ct. at 3223–24, 3231. *Mayo*, for its part, was about a diagnostic test—based on a “law of nature”—that also did not involve a machine; the issue in *Mayo* was whether the claim’s data-

gathering steps, which the patentee conceded were entirely routine, were sufficient to make the claim a claim to something more than just a law of nature. 132 S. Ct. at 1297–98.

Bilski and *Mayo*'s discussions of the general framework for assessing subject-matter eligibility issues are entirely consistent with the majority's analysis here. As it had held in prior decisions, the Supreme Court explained that while a patentee may not claim an abstract idea itself or claim an abstract idea with a token direction to "apply it," an invention that makes use of such an idea in a particular way—a particular *application* of such an idea—is eligible under § 101. *Id.* at 1293–94 (quoting *Diamond v. Diehr*, 450 U.S. 175, 187 (1981)).

2. CLS extracts from *Bilski* and *Mayo* the generalized notion that § 101 must perform a "screening function" and that the Supreme Court has commanded this Court to apply it "with more vigor." Pet. at 6–8. It is difficult to understand how *Bilski* and *Mayo* can be seen as indications that this Court has been too lenient in evaluating computer-implemented claims. Not only did neither case involve such claims, but *Bilski* affirmed this Court's rejection of the claims at issue, and most decisions of this Court between *Bilski* and *Mayo* involving computer-implemented claims invalidated the claims at issue. *E.g.*, *Dealertrack, Inc. v. Huber*, 674 F.3d 1315 (Fed. Cir. 2012); *Fort Props., Inc. v. Am. Master Lease LLC*, 671 F.3d 1317 (Fed. Cir. 2012); *CyberSource Corp. v. Retail Decisions, Inc.*,

654 F.3d 1366 (Fed. Cir. 2011). Nor does the Supreme Court’s GVR in *Ultramercial, LLC v. Hulu, LLC*, 657 F.3d 1323 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 2431 (2012), indicate dissatisfaction with this Court’s computer-implemented claim jurisprudence. The Supreme Court’s action has no precedential consequence, *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001); rather, because this Court decided *Ultramercial* before the Supreme Court decided *Mayo*, the Supreme Court has merely given this Court an opportunity to consider whether *Mayo* has any impact on the Court’s decision given the particular facts of *Ultramercial*.

In any event, the majority here fully appreciated § 101’s screening function and faithfully applied the precedent of the Supreme Court and this Court. It expressly acknowledged § 101’s role in screening out ineligible claims, meticulously analyzed the relevant precedent, and explained why the claims in this case satisfy § 101. Majority at 11–27. The mere fact that this Court has held that certain computer-implemented claims are sufficiently specific to claim patent-eligible subject matter is not evidence of a lack of “vigor,” nor is it a basis for *en banc* review.

Seeking to create a conflict where none exists, CLS takes out of context the majority’s uncontroversial statement that Sections 102, 103, and 112 “do the substantive work of disqualifying those *patent eligible* inventions that are ‘not worthy of a patent.’” Pet. at 8 (emphasis added). This statement has nothing to do

with whether § 101 performs an important screening function; by its terms, it refers to those inventions that meet § 101's requirements. And it is plainly correct that even if a claim is patent-eligible under § 101, it must still meet the requirements of §§ 102, 103, and 112 to be patentable. Nothing in the majority opinion casts doubt on the importance of § 101 or the screening function that it performs; indeed, the majority specifically stated that “[n]o one section is more important than any other.” Majority at 12.

3. CLS asserts that under the majority's analysis, “virtually every computer-implemented method” will be patent-eligible. Pet. at 2. That is simply incorrect. The majority *expressly recognized* that “[t]he mere implementation on a computer of an otherwise ineligible abstract idea will not render the asserted ‘invention’ patent eligible.” Majority at 17–18. In making that observation, the majority cited prior decisions of this Court—the same decisions on which CLS relies—that struck down computer-implemented claims under § 101. *Id.* It is clear, therefore, that neither the majority in this case nor this Court more generally has immunized computer-implemented inventions from scrutiny under § 101. Conversely, neither the Supreme Court nor this Court has ever suggested that every computer-implemented invention is *ineligible* for patent protection. The question of whether a particular claim is patent-eligible can be determined only by analyzing the actual limitations of that claim.

4. Contrary to the arguments of CLS’s *amici*, the majority did not denigrate the importance of § 101 or create any conflict in precedent when it observed that district courts retain the discretion to consider other validity challenges before § 101 when doing so is most efficient. Majority at 13 (citing *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008)). In doing so, the majority never suggested that § 101 is unimportant or that district courts should not be vigilant in enforcing subject-matter eligibility. In any event, this case is not an appropriate vehicle for *en banc* review of whether a district court has discretion to tackle other validity defenses before § 101, because here the district court *did* address § 101 before any other validity defenses. JA11–12.

B. CLS also faults the majority for two specific holdings: first, that a claim involving a computer is patent-eligible if the computer plays a “significant part” in allowing the claimed invention to be practiced; and second, that a claim should not be held invalid as an abstract idea under § 101 unless its abstractness is “manifestly evident.” Both of these holdings, however, come directly from Circuit precedents that post-date *Bilski* and were undisturbed by *Mayo*.

1. CLS suggests that in upholding Alice’s claims, the majority announced a novel rule focusing on whether the computer plays a “significant part” in Alice’s claimed invention. Pet. at 12–13. To the contrary, this inquiry is precisely the analysis mandated by this Court in *SiRF*, applying *Bilski*, and

reiterated by this Court in numerous subsequent cases. *SiRF*, 601 F.3d at 1333; *see also Dealertrack*, 674 F.3d at 1332; *Fort Props.*, 671 F.3d at 1323; *CyberSource*, 654 F.3d at 1375. This analysis is also entirely consistent with *Mayo*'s requirement that a court inquire into whether the so-called "inventive concept" of a claim adds enough that the claim "amounts to significantly more than a patent upon the [abstract idea] itself." *Mayo*, 132 S. Ct. at 1294, 1297; Majority at 20 n.2.

In *Bilski*, the Supreme Court declined to provide a definitive rule for determining whether a particular claim is simply to an abstract idea. 130 S. Ct. at 3229–30. Instead, it expressly invited this Court's "development of other limiting criteria that further the purposes of the Patent Act and are not inconsistent with its text." *Id.* at 3231. In *SiRF*, this Court developed precisely such a criterion for computer-implemented claims. *SiRF* held that a claim is patent-eligible if the use of a computer plays a "significant part" in permitting the claimed invention to be practiced, "rather than function[ing] solely as an obvious mechanism for permitting a solution to be achieved more quickly." 601 F.3d at 1333. Without citing *SiRF*, CLS argues that meeting this test is "insufficient" for patent eligibility. Pet. at 12. In support, it cites cases in which claims were invalidated despite requiring the use of a computer—most of the time precisely *because* they failed the test articulated in *SiRF*. *Id.* These cases stand only for the proposition—reaffirmed by the majority—that merely reciting a computer is not enough to make a claim patent-

eligible. Majority at 17–18. Here, the majority did not hold that Alice’s claims pass muster merely because they require the use of a computer; rather, it upheld the claims because they are to a particular way of executing exchanges using a computer. *See infra* pp. 13–15.

CLS argues that “[u]nder *Mayo*, the patent claim’s use of the computer must be *inventive*, not just significant, to render eligible an otherwise ineligible abstract idea.” Pet. at 12–13. This is an exercise in semantics; the point that the Supreme Court made in *Mayo* is the same point this Court made in *SiRF* when it held that a claim involving an abstract idea must do more than simply recite the use of a computer to be patent-eligible. 601 F.3d at 1333. CLS’s argument derives from *Mayo*’s statement that a claim embodying a law of nature must incorporate an “‘inventive concept,’ sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself.” 132 S. Ct. at 1294. But that is the same concept that underlies *SiRF*’s holding that a computer must play a significant part in allowing the claimed invention to be practiced in order for the claim to constitute a patent-eligible *application* of an idea, rather than a patent on an abstract idea itself.

Mayo expressly did *not* import the novelty and nonobviousness doctrines of §§ 102 and 103 into § 101. *Mayo*, 132 S. Ct. at 1303–04. Rather, *Mayo* was quoting *Parker v. Flook*, 437 U.S. 584 (1978), which held that including

“conventional” “post-solution activity” is not enough to make an otherwise abstract claim patent-eligible. *Id.* at 590. In *Flook*, the claim was to a mathematical algorithm used to calculate an “alarm limit,” and the “post-solution activity” was “adjustment of [an] alarm limit” after finishing the calculation. *Id.* at 585–86, 590. That adjustment was not a significant part of the claimed process as a whole. *Id.* at 590. Similarly, in *Mayo*, the claim limitation requiring a physician to “determin[e]” levels of a biomarker did not make the claim patent-eligible because it was a concededly routine step needed to gather data to make the correlation between the biomarker and a risk of harm to the patient. *Mayo*, 132 S. Ct. at 1298.

The *SiRF* test applies these concepts to claims involving the use of a computer to perform a particular method. If a claim recites the use of a computer, but uses the computer “solely as an obvious mechanism for permitting a solution to be achieved more quickly,” the use of the computer is insignificant activity akin to the pre-solution activity in *Mayo* or the post-solution activity in *Flook*. *SiRF*, 601 F.3d at 1333. The computer has not added anything ““meaningful””—*i.e.*, any “inventive concept”—to the claim, which remains “substantively directed to nothing more than a fundamental truth or disembodied concept.” Majority at 22, 25 (quoting *SiRF*). If, on the other hand, the computer plays a “significant part” in permitting the claimed invention to be practiced, then the invention “amounts to

significantly more than a patent upon the [abstraction] itself.” *Id.* at 20 n.2 (emphasis omitted) (quoting *Mayo*, 132 S. Ct. at 1294). As the majority held, the “inventive concept” of Alice’s claims is the specific way of effectuating exchanges using a computer that the claims describe and that passes the *SiRF* test; *Mayo* imposes no additional “inventiveness” requirement. *Id.* Indeed, *Bancorp*, which CLS asserts is in conflict with the majority, applied *SiRF* in exactly the same way; because the computer limitations there did not play a “significant part” in the claims, the claims were invalid. *Bancorp*, 687 F.3d at 1278–80.

2. CLS is also wrong to suggest that the majority broke new ground with its statement that a claim’s abstractness must be “manifestly evident” before it can be invalidated on that basis; to the contrary, this statement is drawn directly from this Court’s post-*Bilski* decision in *Research Corp. Technologies v. Microsoft Corp.*, 627 F.3d 859, 868 (Fed. Cir. 2010). Pet. at 2, 8; Majority at 14, 20, 27. In *Research Corporation Technologies*, this Court, applying *Bilski*, held that for a claim to fall within the “abstract idea” exception to patent-eligibility, the “disqualifying characteristic [of abstractness] should exhibit itself so manifestly as to override the broad statutory categories of eligible subject matter.” 627 F.3d at 868. As the *Mayo* Court and the majority here correctly observed, “[a]ny claim can be stripped down, or simplified, removing all of its concrete limitations, until at its core, something that could be characterized as an abstract idea is revealed.”

Majority at 19; *Mayo*, 132 S. Ct. at 1293. The purpose of the “manifestly evident” rule is to reaffirm that claims should be invalidated as “abstract” only when, considering all of their limitations, the claims are actually directed only to an abstract idea; this rule is entirely consistent with *Mayo*. Majority at 19–20; *Mayo*, 132 S. Ct. at 1293–94. Contrary to CLS’s arguments, the majority opinion does nothing to diminish the importance of § 101, and it certainly does not render § 101 a “dead letter.” Pet. at 8.

II. The Majority Correctly Held that Alice’s Claims Are Patent-Eligible.

Applying the principles announced by the Supreme Court and this Court, the majority correctly concluded that Alice’s claims are not drawn simply to the abstract idea of exchanging obligations using a computer, but rather to a specific way of exchanging obligations using a particular configuration of real-world and electronic “shadow” accounts, and a particular series of steps performed by a computer. The computer is “integral” to the claimed invention and “play[s] a significant part in permitting the claimed method to be performed.” Majority at 27 (quoting *SiRF*, 601 F.3d at 1333). As a result, the claims as a whole are patent-eligible, under established precedents, because they “cover the practical application of a business concept in a specific way.” *Id.* at 26.

CLS argues that Alice’s claims are indistinguishable from the claims struck down in *Bilski* and *Bancorp*, and rehearing *en banc* is therefore necessary. Pet. at

14–15. CLS can make this argument only by ignoring express claim limitations and replacing them in its table with ellipses. Pet. at 14–15; *see also* Majority at 23 n.5. When the actual claim limitations are considered, there is no inconsistency in these decisions—their different outcomes are simply the result of differences in the claimed inventions at issue.

As the patentee in *Bilski* expressly conceded, the claims there did not require the use of a machine at all, *see In re Bilski*, 545 F.3d 943, 962 (Fed. Cir. 2008) (en banc), *aff'd*, *Bilski*, 130 S. Ct. at 3231, and thus did not involve a computer playing a “significant part in permitting the claimed method to be performed.” As to *Bancorp*, the claims there were directed to a mathematical method for managing a “stable value protected life insurance policy,” with additional claim limitations that required that a computer perform the calculations. *Bancorp*, 687 F.3d at 1280. Those claims thus failed the test announced in *SiRF*—a result that is entirely consistent with the majority’s reasoning here, as the *Bancorp* panel itself recognized. *Id.* at 1280–81.

The claims in both of these cases contrast sharply with Alice’s claims, which—as both the majority and the *Bancorp* panel correctly recognized—are limited to one “very specific” way of carrying out an exchange using a computer as an intermediary. Majority at 26; *Bancorp*, 687 F.3d at 1280. The computer does not simply perform calculations, but rather is integral to the invention, which “only

work[s] as intended” when carried out on a computer. Majority at 25–27; JA1013–15. Alice’s claims—drawn from a detailed specification—require the maintenance of a particular configuration of real-world and shadow accounts, and the performance of a particular series of steps, in order to effectuate exchanges one specific way. Majority at 23–27. And contrary to CLS’s assertion that any exchange would necessarily involve the use of the claimed “shadow accounts,” Pet. at 14, the majority correctly recognized that “the limitations requiring specific ‘shadow’ records leave broad room for other methods of using intermediaries to help consummate exchanges.” Majority at 27. In short, someone wishing to exchange obligations without using a computer, or with a computer but without using the particular steps and configuration of Alice’s invention, is not foreclosed by anything that Alice has claimed. And because Alice has claimed a particular way of using a computer to effectuate exchanges, its claims are patent-eligible under both the Supreme Court’s and this Court’s precedents.

CONCLUSION

The petition for rehearing *en banc* should be denied.

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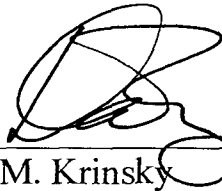
September 20, 2012

CERTIFICATE OF SERVICE

I, David M. Krinsky, counsel for appellant and a member of the Bar of this Court, certify that, on September 20, 2012, the attached Opposition to Petition for Rehearing *En Banc* was hand-delivered to the Clerk, two copies were dispatched by first-class U.S. Mail, and a copy was dispatched by electronic mail to the following:

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I further certify that all parties required to be served have been served.



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September 20, 2012