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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROGER M. SNOW

Appeal 2017-002828
Application 13/631,821
Technology Center 3700

Before JOHN C. KERINS, EDWARD A. BROWN, and
LYNNE H. BROWNE, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Roger M. Snow (Appellant) appeals under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1–16. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

Appellant's invention relates to poker-type casino wagering games.
Spec. ¶ 2.

Claims 1 and 6 are independent. Claim 1 is illustrative and is reproduced below:

1. A method of administering a four-card wagering game, comprising:

receiving an ante wager associable with a player;

providing virtual cards from a deck of cards electronically stored by an at least partially electronic system, comprising:

providing five cards for a dealer hand, the five cards derived from the deck of cards; and

providing five cards for a player hand associable with the player, the five cards for the player hand derived from the deck of cards;

determining a player hand rank of a best four-card player hand from the five cards for the player hand associable with the player;

communicating, to the player, options comprising

a fold option, and

at least one play wager option limited to a maximum multiple of the ante wager, the maximum multiple defined based on a comparison of the player hand rank to a predetermined triple down threshold ranking;

receiving an election selected by the player from the options; and

resolving all wagers.

THE REJECTION ON APPEAL

The Examiner has rejected claims 1–16 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

ANALYSIS

Appellant argues claims 1–16 together. *See* Appeal Br. 10–50; Reply Br. 2–14. We select claim 1 as the illustrative claim, and claims 2–16 stand or fall with claim 1.

The rejection on appeal is based on the Examiner’s position that the claims are directed to patent-ineligible subject matter. In order to assess the propriety of this type of rejection, the Supreme Court has set forth “a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296–97 (2012)). According to the Supreme Court’s framework, it must first be determined whether the claims at issue are directed to one of those concepts (i.e., laws of nature, natural phenomena, and abstract ideas). *Id.* If so, we must secondly “consider the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 132 S. Ct. at 1298, 1297). The Supreme Court characterizes the second step of the analysis as “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.’” *Id.* (alteration in the original) (quoting *Mayo*, 132 S. Ct. at 1294).

The Examiner determines that claim 1 is directed to non-statutory subject matter based on a judicial exception without adding significantly

more to the judicial exception. Final Act. 2; Ans. 2. More specifically, the Examiner determines that claim 1 is directed to an abstract idea involving a set of rules to a card wagering game comprising dealing rules, wagering rules, “determining” rules, and “resolving” rules. Ans. 2.

According to the Examiner, the set of rules recited in claim 1 is similar to the set of rules used to conduct a wagering game, comprising dealing rules, wagering rules, blackjack rules, and payout rules, that was determined to be an abstract idea in *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016). *Id.* The Examiner determines that claim 1 does not include additional elements that are sufficient to amount to significantly more than the judicial exception because the additionally recited elements, which include wagers and virtual playing cards that are electronically stored by an at least partially electronic system, are non-unique and traditional wagering gaming elements. *Id.* at 3–4; *see also* Final Act. 2. As such, the Examiner determines that, considering the additional elements individually and in combination, there is no inventive concept sufficient to transform the claimed subject matter into a patent-eligible application. Ans. 4–5.

Appellant contends that the Examiner fails to identify the supposed abstract idea in a sufficiently clear and specific manner to provide notice and enable Appellant to effectively respond. Appeal Br. 11, 16–17; *see also* Reply Br. 3. Appellant more specifically argues that the Examiner treats the claims at a high level of abstraction untethered to the claim language (Appeal Br. 11); the Examiner does not identify the specific limitation(s) that supposedly recite the abstract idea (*id.* at 16–17); and the Examiner does not consider the basic character of the subject matter (*id.* at 18; *see also* Reply Br. 3). According to Appellant, the Examiner oversimplified the

claimed invention by not considering the Specification, the benefits of the invention, nor other underlying purposes. Appeal Br. 17–20; *see also* Reply Br. 4–5.

We are not persuaded that the Examiner failed in the respects alleged by Appellant, and instead find that the Examiner treated claim 1 and the limitations therein in the same manner as did the Federal Circuit with the claims at issue in the *Smith* decision.

Claim 1 is drawn to “[a] *method* of administering a four-card [poker] *wagering game*” comprising, *inter alia*, the steps of receiving an ante wager associable with a player, providing virtual gaming cards electronically stored by an at least partially electronic system, determining a player hand rank, communicating options to the player, receiving an election of the options by the player, and resolving the wagers. Appeal Br. Appx. 1 (Claims App.) (emphases added). Thus, claim 1 is directed to a method of playing a four-card poker game which is a wagering game—similar to the claims at issue in *Smith*. In *Smith* the claims were directed to a “method of conducting a wagering game” comprising a dealer following a set of dealing rules, wagering rules, blackjack rules, and payout rules. *See Smith*, 815 F.3d at 817–18. The court stated: “On the first step, we conclude that Applicants’ claims, directed to *rules* for conducting a *wagering game*, *compare to other ‘fundamental economic practice[s]’* found abstract by the Supreme Court.” *Id.* at 818 (emphasis added); *see also id.* at 819 (“[W]e conclude that the rejected claims, describing a set of rules for a game, are drawn to an abstract idea.”).

Because claim 1 is drawn to a method of playing a four-card poker comprising dealing rules, wagering rules, “determining” rules, and

“resolving” rules, we agree with the Examiner that claim 1 is directed to an abstract idea, in the form of a fundamental economic practice, that involves wagering and managing a game. This determination fulfills the first step of the *Alice* framework in that we conclude that claim 1 is directed to an abstract idea.

Appellant presents similar arguments with respect to the Examiner’s initial mention of the game of bingo in the Final Action, maintaining additionally that the *Planet Bingo*¹ decision by the Federal Circuit is a nonprecedential decision. Appeal Br. 24–26. Any arguments attempting to factually distinguish the *Planet Bingo* decision are largely rendered moot, in that the Federal Circuit precedential *Smith* decision is seen as being much more closely on point to the issues presented here on appeal.

Appellant, noting that *Alice* characterizes abstract ideas as fundamental practices, building blocks of an industry, and disembodied concepts, further argues that the Examiner does not identify any aspect of the claim as constituting a building block of the gaming industry. *Id.* at 16, 29–32. Appellant additionally contends that the particular, ordered combination of the steps according to the claimed method is not a fundamental practice or a basic tool of the gaming industry. *Id.* at 31–34 (referring to recitations in the claim for providing five cards and a predetermined triple down threshold ranking, among other things). Rather, according to Appellant, the particular recited steps provide a specific implementation of a solution to a problem in the gaming arts. *Id.* at 34–35.

¹ *Planet Bingo, LLC v. VKGS LLC*, 576 F. App’x 1005 (Fed. Cir. 2014).

Appellant’s attempts to distance the subject matter of claim 1 from general characterizations set forth in *Alice* are unavailing, given the existence of Federal Circuit precedent that is very closely on point to the present situation. As noted above, in *Smith*, the court determined that “rules for conducting a wagering game, *compare to other ‘fundamental economic practice[s]’* found abstract by the Supreme Court.” *See Smith*, 815 F.3d at 818 (emphasis added). Thus, we are not apprised of any error in the Examiner’s position.

Appellant contends that the claims are directed to a specific implementation of a solution to a problem in the relevant arts like the claims in *Enfish*,² which were determined to be patent eligible. Appeal Br., *passim*. As an example of this, Appellant points to the Specification as establishing that the game is exciting, uncomplicated, and easy to learn. *Id.* at 22–23, 34–35.

This contention is unpersuasive. In *Enfish*, our reviewing court instructs us that “[s]oftware can make non-abstract improvements to computer technology just as hardware improvements can, and sometimes the improvements can be accomplished through either route.” *Enfish*, 822 F.3d at 1335. Thus, *Enfish* generally stands for the proposition that software may be patent-eligible subject matter if it improves a computer’s functionality. Here, the limitations at issue are not directed to an improvement to a computer’s functionality, and the alleged improvements to the state of the art identified by Appellant are simply additional rules of a card game, held to be abstract ideas in *Smith*, as discussed above.

² *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

Notwithstanding the close alignment of the type of claims here on appeal and the claims at issue in *Smith*, Appellant contends that *Smith* should not be applied in this case. Appeal Br. 12, 14–15, 22, 24, 36. Appellant argues that, in *Smith*, the characterization of rules for playing a wagering game as an abstract idea, is contrary to prior binding precedent from the Supreme Court and is “out of step with” more recent, allegedly controlling other precedent from the Federal Circuit, such as *Enfish*³ and the *TLI Communications*⁴ decisions. *Id.* at 14. Appellant also argues that reliance on *Smith* would improperly ignore the recent *McRO*⁵ decision, which determined that an ordered combination of claimed steps using unconventional rules that relate to sub-sequences of phonemes, timings, and morph weight sets are not directed to an abstract idea. Reply Br. 4–5, 7–10.

However, as noted *supra*, Appellant’s claims are drawn to essentially the same abstract idea, i.e., rules involving wagering and managing card games, as were the claims at issue in *Smith*, which were determined as being directed to an abstract idea of a *fundamental economic practice*. In contrast, Appellant’s claims are *not* similar to the claims in *Enfish*, which relates to

³ Appellant observes that, in *Enfish*, the Federal Circuit noted that fundamental economic and conventional business practices are often abstract ideas whereas a specific implementation of a solution to a problem in the software areas is not an abstract idea. Appeal Br. 14.

⁴ *TLI Commc’ns LLC v. AV Auto., LLC*, 823 F.3d 607 (Fed. Cir. 2016). Appellant observes that, in *TLI Communications*, the Federal Circuit noted that fundamental practices long prevalent in our system constitute abstract ideas. Appeal Br. 14. The claimed invention in *TLI Communications* relates to a method for recording and administering digital images and does *not* relate to a fundamental economic practice. *TLI Commc’ns*, 823 F.3d at 610.

⁵ *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016).

software that was determined to be patent-eligible subject matter because the software was found to improve computer functionality. Although the *McRO*⁶ decision makes mention of the use of “unconventional rules,” in claims determined to be directed to patent-eligible subject matter, it does so in the context of claims requiring an ordered combination of steps in relating sub-sequences of phonemes, timings, and morph weight sets. *McRO*, 837 F.3d at 1308. We decline to extend *McRO*’s reach to purported unconventional rules present in claim 1, in that we find *Smith* to be binding on the facts and issues present in this appeal, in terms of the claimed subject matter being directed to an abstract idea.

Next, moving to step 2 of the *Alice* analysis, we consider the elements of claim 1 both individually and in combination and determine that the claim does not amount to significantly more than a patent upon the abstract idea of a fundamental economic practice that includes wagering and managing games. Appellant contends that claim 1 provides an inventive concept that is significantly more than a mere abstract idea. Appeal Br. 35. In support, Appellant argues that features in claim 1 are unconventional and solution-significant. *Id.* at 37–44; Reply Br. 4–5, 7–12. According to Appellant, while the Examiner considers the use of wagers and a partial electronic system, the Examiner does not consider the additional claim elements that are not physical elements, such as the method acts as recited in the claim. Appeal Br. 11, 37–38; Reply Br. 10–12. As such, Appellant argues that claim 1 recites a particular, ordered combination of method acts that is

⁶ We also note that the claimed invention in *McRO* relates to data processing involving automating an animation method and does *not* relate to a fundamental economic practice. *See McRO*, 837 F.3d at 1307–08, 1314.

unconventional because it is not widely prevalent, well-understood, routine or conventional activities. Appeal Br. 41–44.

Features specific to the dealing rules, wagering rules, poker rank rules, and payout rules either implement the abstract idea or are merely insignificant pre-solution activity or insignificant post-solution activity. *See Parker v. Flook*, 437 U.S. 584, 590 (1978) (“The notion that post-solution activity, no matter how conventional or obvious in itself, can transform an unpatentable principle into a patentable process exalts form over substance.”); *cf Mayo*, 132 S. Ct. at 1298 (“Purely ‘conventional or obvious’ ‘[pre]-solution activity’ is normally not sufficient to transform an unpatentable law of nature into a patent-eligible application of such a law.” (alteration in original)). Like the *Flook* claims, claim 1 does not recite either unconventional physical elements or a functional relationship between an abstract idea and the physical elements.

Appellant’s argument that the particularities concerning the recited dealing rules, wagering rules, poker rank rules, or payout rules are novel or nonobvious and therefore, “unconventional,” is unavailing. *See* Appeal Br. 23. Even assuming that claim 1 is a novel and nonobvious modification, as the Supreme Court has stated, “[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.” *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981). Thus, we are not apprised of error based on this argument.

Appellant argues that the claims do not risk tying up any abstract idea. Appeal Br. 44–48; Reply Br. 13. However, “[w]hile preemption may signal patent ineligible subject matter, the absence of complete preemption does

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not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc., v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015).

For these reasons, we sustain the Examiner’s decision rejecting claim 1, and claims 2–16 which fall therewith, as being directed to non-statutory subject matter.

DECISION

The rejection of claims 1–16 is affirmed.

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