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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/455,742	04/25/2012	Roger M. Snow	3286-10840.1(PA2935.ap.US	9681

66137 7590 04/02/2018
TRASKBRITT, P.C. /Bally Gaming, Inc.
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Salt Lake City, UT 84110

EXAMINER

PIERCE, WILLIAM M

ART UNIT	PAPER NUMBER
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3711

NOTIFICATION DATE	DELIVERY MODE
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04/02/2018

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROGER M. SNOW¹

Appeal 2017-005167
Application 13/455,742
Technology Center 3700

Before LINDA E. HORNER, JOHN C. KERINS, and JAMES P. CALVE,
Administrative Patent Judges.

CALVE, *Administrative Patent Judge.*

DECISION ON APPEAL
STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Final Office Action rejecting claims 12–28. Appeal Br. 6–7. Claims 1–11 are cancelled. *Id.* at 59 (Claims App’x). We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Bally Gaming, Inc. and Scientific Games Corporation are identified as the real parties in interest. *See* Appeal Br. 4.

CLAIMED SUBJECT MATTER

Claim 12, the sole independent claim, is reproduced below.

12. A method for administering a wagering game implemented on an interactive video gaming platform, comprising:

providing an interactive video gaming platform comprising a player bank structure and an adjacent display cabinet, the player bank structure comprising multiple player stations about a first common video display area in a surface of the player bank structure, the display cabinet comprising a second video display, the video gaming platform further comprising at least one processor programmed to execute instructions of the wagering game;

the at least one processor receiving an ante wager instruction input at one player station of the multiple player stations, the ante wager instruction designating an ante wager amount to be resolved based on a comparison of a player hand to a dealer hand;

the at least one processor instructing the first common video display area to display at least one card for the player hand associated with a player associated with the one player station and to display at least one other card for the dealer hand;

the at least one processor instructing the first common video display area to display at least one additional card face down as at least one community card;

after instructing the first common video display area to display the at least one card for the player hand and to display the at least one other card for the dealer hand, the at least one processor receiving an initial election instruction input at the one player station, the initial election instruction selected between initial options provided at the one player station, the initial options consisting of both of:
an initial check instruction, and

a play wager instruction of at least one multiple of the ante wager amount and designated to also be resolved based on the comparison of the player hand to the dealer hand;

the at least one processor instructing the first common video display area to display the at least one community card face up; and

after receiving the initial election instruction and after all cards for the player hand have been displayed, the at least one processor receiving a final election instruction input at the one player station, the final election instruction selected between final options provided at the one player station, the final options comprising both of:

another play wager instruction of a lesser multiple than the at least one multiple of the ante wager amount and designated to also be resolved based on the comparison of the player hand to the dealer hand, and

a fold instruction,

the at least one processor receiving no more than one of the play wager instruction, the another play wager instruction, and any other play wager instruction.

Appeal Br. (Claims App. 1–2).

REJECTIONS

Claims 12–28 are rejected as being directed to patent ineligible subject matter under the judicial exception to 35 U.S.C. § 101.

Claims 12–26 and 28 are rejected under 35 U.S.C. § 103(a) as unpatentable over Scott (US 6,102,402, iss. Aug. 15, 2000) and Perkins (US 6,406,024 B1, iss. June 18, 2002).

Claim 27 is rejected under 35 U.S.C. § 103(a) as unpatentable over Scott, Perkins, and Snow (US 7,628,689 B2, iss. Dec. 8, 2009).

ANALYSIS

Claims 1–28

As Directed To Patent Ineligible Subject Matter

Appellant argues claims 12–28 as a group. Appeal Br. 11–47. We select claim 12 as representative, with claims 13–28 standing or falling with claim 12. 37 C.F.R. § 41.37(c)(1)(iv).

To determine patent-eligibility, we perform a two-step analysis. First, we determine if the claims are directed to a patent-ineligible concept like an abstract idea. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014). If so, we determine if the claims contain an “inventive concept” that transforms the abstract idea into a patent-eligible application. *Id.* at 2357.

Alice Step One: Are the Claims Directed to an Abstract Idea?

Regarding claim 12, the Examiner finds the claim is directed to a new set of rules for playing a card game including antes, checks, wagers, dealing, and reviewing cards. Final Act. 2–6. The Examiner finds these rules are for wagering and card game play instructions and are akin to mental processes, exchanging and resolving financial obligations, basic building blocks of wagering, and contractual obligations found to be abstract ideas in decisions of the Federal Circuit. *Id.* at 7–10, 17–19. The Examiner further finds the rules of play are directed to patent ineligible mental activity, interpersonal interactions, regulating human behavior via rules, and instructing how to conduct business. *Id.* at 13–14. In addition, the Examiner finds that the recital of a processor or other machine is not an integral part of claim 12 and does not impose meaningful limitations on the claim’s scope. *Id.* at 9–11.

The Examiner determines the claims are directed to a wholly generic computer implementation, and the guidance in *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016) and *Planet Bingo, LLC v. VKGS LLC*, 576 F. App'x 1005 (Fed. Cir. 2004) (non-precedential) supports a determination that claim 12 is directed to a patent ineligible method of conducting a card game embodied on a generic game machine with a processor. *See* Ans. 3–6.

We agree with the Examiner that the Federal Circuit's holding in *In re Smith* is controlling and determinative of the issue in this appeal. Ans. 3. *In re Smith* examined patent eligibility of claims to a “method of conducting a wagering game” with a deck of playing cards that a dealer deals according to game rules while accepting and resolving wagers of players. *Smith*, 815 F.3d at 817–18.

Like the claim in *Smith*, claim 12 recites a “method for administering a wagering game implemented on an interactive video gaming platform” according to game rules that involve receiving an ante wager from a player, displaying at least one player, dealer, and community card, receiving a user play election of an initial check (no wager) or a first play wager, revealing a player and community card, receiving a final play election, which may be a fold or a second play wager against the dealer hand, and controlling player wagers. Appeal Br. (Claims App'x 1–2); Final Act. 13; Ans. 3, 8–13.

In re Smith, a precedential decision, held that claims directed to rules for conducting a wagering game are comparable to fundamental economic practices held to be abstract ideas such as a method of exchanging financial obligations in *Alice* and a method of hedging risk in *Bilski v. Kappos*, 561 U.S. 593, 611 (2010). *Smith*, 815 F.3d at 818–19. That the method used physical cards did not make the idea non-abstract. *Smith*, 815 F.3d at 819.

Like the claims in *Smith*, claim 12 recites displaying cards (deal or reveal, Spec. ¶ 36) and exchanging financial obligations to hedge risk via wagers in various amounts, checking (placing no wager), and relying on community cards. The recital of a “method” does not make claim 12 patent eligible. Final Act. 4 (citing *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1374 (Fed. Cir. 2011) (regardless of the statutory category a claim invokes, the underlying invention is considered for patent-eligibility)).

Appellant’s argument that the Examiner has not identified specific limitations or a set of rules for playing a card game and has oversimplified the claims and downplayed the invention’s benefits and character (Appeal Br. 14–19) is not persuasive of error in the Examiner’s findings summarized above. These findings place Appellant on notice of the basis of the rejection and are comparable to those in other cases. *See Smith*, 815 F.3d at 818–19; *Planet Bingo*, 576 F. App’x at 1007–08 (claims directed abstract idea of “methods and systems for ‘managing a game of Bingo’”). Appellant does not identify error in the Examiner’s findings, or any claim features that are not directed to game play rules and wagering, instead arguing the claims recite particular options for checking, folding, and wagering and a particular ordered combination of rules. Appeal Br. 30, *id.* at 14–31; Ans. 3–6.

Appellant’s “present invention relates to wagering games, casino table wagering games, casino table playing card wagering games, and variants of casino table wagering games that use poker ranks in determining outcomes.” Spec. ¶ 2. The claimed “new variant game of Hold ‘Em poker allows for rules of play of one or all of players being allowed to remain in the game with an option of checking or making specific wagering amounts in first play wagers.” *Id.* ¶ 17.

As the Examiner correctly determines, claim 12 is directed to rules for playing and managing a wagering card game. Claim 12 recites game play rules of receiving player wagers (ante wager, first play wager, second play wager), displaying and receiving player options (check, fold, or place play wagers), displaying player, dealer, and community cards, and resolving wagers. Final Act. 2–6; Ans. 8–12; *see* Appeal Br. 35–36.

Appellant’s arguments belie the fact that Appellant is on notice of the bases of the rejection. Appeal Br. 30 (“the claims do not simply recite checking, folding, wagering, etc., but recite specifics as to the particular options provided, when the options are provided, and what limitations define the options.”). The argument that claim 12 recites ordered combinations of steps that are not fundamental practices or building blocks of the gaming industry (*id.* at 29–30) is, likewise, not persuasive as Appellant admits that claim 12 relates to wagering rules for a card game, albeit in a particular, ordered format of options (*id.* at 29). *See* Ans. 5–9. *Smith* held such ordered combinations of wagering rules are an abstract idea. *Smith*, 815 F.3d at 819.

Even if claim 12 recites a new or nonobvious combination of rules for playing a game and wagering, as Appellant asserts is the case, the claim still is directed to rules for a wagering game, which *In re Smith* held to be akin to fundamental economic practices considered abstract by the Supreme Court. *Smith*, 815 F.3d at 818. Appellant recognizes claim 12 is directed to rules for conducting a wagering game. *See* Appeal Br. 29–30 (discussing claimed game play and wagering rules with options of first and second play wagers, checking, folding, and the like as part of the claimed play election events that “may be fundamental practices and building blocks of the gaming industry” but asserting the particular, ordered claimed combination is not).

We are not persuaded the claimed game play and wagering rules are distinguishable from the wagering game rules in *Smith*, which rules were held to be a patent-ineligible abstract idea. *Smith*, 815 F.3d at 819; see *Two-Way Media Ltd. v. Comcast Cable Comm'ns, LLC*, 874 F.3d 1329, 1339–40 (Fed. Cir. 2017) (“Eligibility and novelty are separate inquiries.”). Whether or not claim 12 recites a particular, ordered combination of game play rules and wagering rules, including different options for game play and wagering, does not alter the fact that claim 12 recites game play and wagering rules, which constitute a patent-ineligible abstract idea. *Smith*, 815 F.3d at 819. Reciting a particular, ordered combination of game play and wagering rules and options means that claim 12 is directed to an abstract idea of game and wagering rules versus an inventive technology that performs these abstract idea processes. See *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016). Patent eligibility of an abstract idea does not depend on its alleged novelty or non-obviousness in any case. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1303–04 (2012).

Here, the claimed “interactive video gaming platform” and “at least one processor” do not represent inventive gaming technology and are not used with the game and wagering rules in an unconventional way. They merely provide a known user interface to facilitate game play and process player options and wagers, essentially replicating a live game table. Spec. ¶¶ 65–73, 85–90. Any alleged improvements disclosed in the Specification are not recited in claim 12. Appellant’s arguments indicate that Appellant considers the ordered combination of wagering rules to be patent-eligible. Appeal Br. 6–14 (arguing eligibility based on the combination of method steps versus the gaming platform).

We agree with the Examiner that claim 12 is directed to an abstract idea of “organizing human activity” and managing a game (Final Act. 5) like the method of managing a bingo game in *Planet Bingo*. *Planet Bingo*, 576 F. App’x at 1007–08. The claims in *Planet Bingo* recited “steps of selecting, storing, and retrieving two sets of numbers, assigning a player identifier and a control number, and then comparing a winning set of bingo numbers with a selected set of bingo numbers.” *Id.* Claims directed to managing a game of Bingo are similar to “organizing human activity” held to be an abstract idea in *Alice*. *Id.* at 1008. *See* Appeal Br. 6–14 (game is *unconventional*).

Here, claim 12 recites a method for administering a wagering game that organizes the activities of a dealer (automated) and player similar to the game managed in *Planet Bingo*. Appellant’s argument that *Planet Bingo* treated a method of managing a game of bingo as mental steps (Appeal Br. 5–6) is not persuasive in view of the court’s holding that the method was directed to the abstract idea of organizing human activity. *Planet Bingo*, 576 F. App’x at 1008; Final Act. 13. Claim 12’s game rules also involve mental steps and probabilities performable in the human mind. *CyberSource*, 654 F.3d at 1371–72; Appeal Br. 23 (claims are not *solely* mental steps).

Appellant’s effort to distance the subject matter of claim 12 from the general characterizations set forth in *Alice* are unavailing, given the decision in *Smith*, which is precedent 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). We find *Smith* to be binding on the facts and issues in this appeal, in terms of the claimed subject matter being directed to an abstract idea.

Contrary to Appellant’s arguments (Appeal Br. 25–27), recent Federal Circuit decisions support the Examiner. In *Enfish*, the claims were directed to improvements in computer database technologies through the use of self-referential tables that differed from conventional database structures and provided increased flexibility, faster search times, and less memory needs. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336–37 (Fed. Cir. 2016).

Similarly, in *DDR Holdings*, the claims were “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks” and, thus, did not merely recite an abstract idea. *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). The claims addressed the problem of retaining website visitors who would be transported away from a host’s website after clicking on an advertisement by activating a hyperlink that sends them to an outsource provider’s hybrid web page with the look and feel of the host website and product information from a third party merchant’s website without actually taking the visitor to the third-party merchant’s website. *Id.* at 1257–58.

In *McRO*, the claims improved computer animations through accurate, realistic lip synchronization and facial expressions. *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016).

Here, Appellant asserts claim 12 is *unconventional* because it recites an ordered combination of *game play rules* that is *unconventional*, not because it is directed to improvements in technology for gaming, computers, or networks.² Appeal Br. 5–14. In other words, it recites known abstract wagering and game play rules in an alleged different order than is known.

² Any alleged improvements to the video gaming platform (*see* Spec. ¶¶ 85–90) are not recited in the claims.

A review of Appellant’s own disclosure reveals that the claimed game and wagering rules recited in claim 12 are, in fact, directed to an abstract idea that is not patent eligible. At best, claim 12 combines different abstract ideas. *See Elec. Power*, 830 F.3d at 1354; *Mayo*, 132 S. Ct. at 1303–04.

Appellant discloses that poker games enjoy widespread popularity due to ranking of hands and numerous wagering opportunities, which increase player participation and excitement. Spec. ¶ 3. Appellant also discloses that it is known that variations in wagering schemes can increase excitement by allowing players to compete for additional and larger prizes, and Appellant discloses various such games that do so. *Id.* ¶¶ 4–16. Appellant discloses that many variations of poker-type games have been introduced to increase the excitement and interest in playing table and video poker games. *Id.* ¶ 6. Appellant even describes Texas Hold ‘Em poker game rules as comprising steps similar to those recited in claim 12 of a player receiving hole cards, a dealer dealing community cards face down, and progressive wagering being offered to players as community cards are revealed. *Id.* ¶ 7. It also is known to vary the number of hole cards. *Id.* ¶ 8. Initial ante wagers followed by first and second wagers also are known in the art. *Id.* ¶ 9. It also is known to vary the player wagering and game play options. *Id.* ¶ 10.

Appellant’s asserted advance to wagering and game play rules allow a player to check (i.e., to remain in the game without wagering). *Id.* ¶ 17 (“A new variant game of Hold ‘Em poker allows for rules of play of one or all of players being allowed to remain in the game with an option of checking or making specific wagering amounts in first play wagers [where] ‘checking’ means staying in the game without making an additional wager. However, existing card games already allow players to fold, check, or wager. *Id.* ¶ 11.

Essentially, Appellant alleges that claim 12 recites a new ordered combination of abstract idea game play and wagering *rules*. Even if true, such “novelty” in the claimed game play and wagering rules does not avoid characterization of claim 12 as an abstract idea as discussed above.

Appellant’s position contrasts sharply with Federal Circuit decisions. Decisions that treated claimed subject matter as being patent eligible under step one of *Alice* involved advances in hardware or software as discussed above. Thus, in *McRO*, “the claimed improvement [allows] computers to produce ‘accurate and realistic lip synchronizations and facial expressions in animated characters’ that previously could only be produced by human animators.” *McRO*, 837 F.3d at 1313. The improved software functionality produced lip synchronization and facial expression control of animated characters’ faces (morph targets) when making certain sounds (pronounces a phoneme) such as “ahh.” *See id.* at 1303–09; Ans. 8–9. The claims thereby improved existing *technological* processes. *McRO*, 837 F.3d at 1313.

In *Thales Visionix Inc. v. United States*, 850 F.3d 1343, 1349 (Fed. Cir. 2017), the claims at issue were not directed to an abstract idea because they “specify a particular configuration of inertial sensors and a particular method of using raw data from the sensors in order to more accurately calculate the position and orientation of an object on a moving platform.”

Here, Appellant asserts no comparable improvement to gaming software and/or hardware technology. Any “improvement” resulting from claim 12’s rules of wagering allegedly occurs, if at all, in the minds of the players as increased interest and player excitement. *See Spec.* ¶¶ 3–17. Such mental processes are patent-ineligible abstract ideas. *See Elec. Power*, 830 F.3d at 1354; *CyberSource*, 654 F.3d at 1372; Ans. 14.

Alice Step Two: Do the Claims Contain an “Inventive Concept”?

The Examiner finds claim 12 is directed to software via instructions sent and received by a processor and does not contain an inventive step or improvement for wagering or solving any known problem in the art. Final Act. 15–18. In particular, the Examiner finds that the claimed processor merely instructs how to conduct a game, similar to managing the conduct of a business or human behavior or interpersonal interactions that also involve mental activity of forming judgments, observations, and evaluation. *Id.* at 18. The Examiner interprets claim 12 to recite conventional steps at a high level of generality, and the rules do not solve any known problem or produce real world results besides known payouts and revenue generation. *Id.* at 15, 20–21. The Examiner finds that claim 12’s recital of checking, folding, and placing wagers are not directed to solving any technical problem or to any specific software or algorithm that is part of the invention. Ans. 10–13. The Examiner also finds claim 12 recites different variations of known rules and are “rule-based” without improving the prior art. Final Act. 10–12, 15–17.

The Examiner finds that claimed video gaming platform does not add significantly more to the claimed method because it is a generic electronic game system known and used in the art to play games otherwise played with physical cards and therefore is not necessary to game play. Ans. 13. The Examiner also finds the steps of displaying and resolving wagers are nothing significantly more than instructions to a processor to apply the abstract idea of following the rules of a wagering game. Final Act. 10, 17. The Examiner finds that nothing of record indicates that the claimed rules individually or as an ordered combination solve any known problem in the art or improve upon any of the multitude of other variations of poker that are known. *Id.* at 15.

Appellant argues that claim 12 recites significantly more than a mere abstract idea including an inventive concept to transform any abstract idea into a patent-eligible invention. Appeal Br. 32–33. Appellant argues that “the claims provide an inventive concept of administering a wagering game implemented on an interactive video gaming platform, comprising ‘at least one processor receiving an initial election instruction input at the one player station, the initial election . . . **consisting of both of:** an initial **check** instruction, and a **play wager** instruction.” *Id.* at 35. Appellant cites other wagering rules as evidence of the inventive aspect of the claimed wagering rules. *Id.* at 35–36. Appellant argues the “novel game provides options and opportunities that are not available in conventional games.” *Id.* at 37; *see id.* at 37–39.

Appellant also argues that the claims recite new or original articles that are significantly more than a standard deck of cards in *In re Smith*. *Id.* at 41. Appellant argues that “an interactive video gaming platform” with player bank structure, adjacent display cabinet, and player stations is not a generic, conventional computer but is configured to administer a wagering game involving potentially multiple players and a dealer. *Id.* at 41–43.

If a patent claim recites a computerized method with mere instructions to implement an abstract idea on the computer, the computer cannot impart patent eligibility. *Alice*, 134 S. Ct. at 2358; *Planet Bingo*, 576 F. App’x at 1008. Claim 12 does not recite innovative computer architecture or software to implement the wagering game rules. The *claimed* video gaming platform merely implements the abstract idea of wagering rules using conventional computer technology to perform generic functions. Spec. ¶¶ 2, 31–66, 75–84, Figs. 1–4 (prior art video game platforms), 5 (claimed video platform).

Appellant discloses an “interesting aspect of the present invention” as a wagering rule to allow players to check or raise during play of a Hold “Em style poker game without folding. *Id.* ¶ 63. Appellant also discloses:

The games of the present invention may be implemented as live table games, television or cable game show games, video poker gaming machine platforms, hand-held games for play, multiple player interactive wagering platform games (with kiosk formats, single player screens, community screens, and/or banks of seats for players with a common dealer screen), cell phone games, games downloadable from the internet, parlor games, games executed on personal computers, palm pilots, play stations and the like.

Id. ¶ 65. The claimed video gaming platform merely implements the abstract idea of game play and wagering rules without an inventive step.

Appellant does not purport to have invented gaming platforms or the use of such computer systems and devices to play conventional card games. Appellant discloses a fully automated prior art gaming table having upright display cabinet 2, player bank or station cluster arrangement 3, viewing screen 7 for a virtual dealer image, individual player screens 10 for each player position, and player controls 12, 13. *Id.* ¶¶ 75–76, Figs. 1–3. The prior art video gaming platform includes processor circuitry. *Id.* ¶¶ 77–84, Fig. 4. The claimed interactive video gaming platform and processor are recited at such a high level of generality that they encompass the prior art conventional gaming computer systems and its functionality. They merely “execute instructions of the wagering game.” Players can input wagers and instructions at a player station. The common video display area displays cards dealt to players, a dealer hand, and a community card. Any novelty in their configuration or functionality is not recited in claim 12.

Claim 12 recites rules of a wagering game intended to entice players to play the game. Spec. ¶ 3. Appellant discloses that gaming actions and rules include accepting wagers, dealing cards, selecting cards, and other actions associated with a player or a dealer to include physical and electronic embodiments to implement the abstract game play rules. *Id.* ¶¶ 65–66, 131.

Claim 12 is directed to the abstract idea of *rules* for a wagering game, rather than to specialized computer game play. *See Elec. Power*, 830 F.3d at 1355 (claims do not require inventive types of information, components, methods, or programming; they merely select information for collection, analysis, and display, similar to ordinary mental processes); *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324–25 (Fed. Cir. 2016) (claims reciting generic computer components such as an “interface,” “network,” and “database” and thus do not add an “inventive concept” to an otherwise abstract idea); *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346, 1348–49 (Fed. Cir. 2015) (claims directed to generalized steps to be performed on a computer using conventional computer activity are not patent eligible).

As the Federal Circuit made clear in *Two-Way Media Ltd. v. Comcast Cable Communications*, the improvement must be a technical one. *See Two-Way Media Ltd.*, 874 F.3d at 1338–39 (reciting an abstract idea performed on generic computer and network components that operate according to their ordinary functions does not contain an inventive concept). The specification in that case allegedly described an innovative system architecture, protocols, and signal selections, but the claims did not recite any of those innovations sufficient to elevate the abstract idea to a patent-eligible embodiment. *Id.*

Here, the asserted new combination of wagering rules for a card game can be implemented on a conventional gaming platform or any of a wide variety of gaming formats discussed above. *See* Spec. ¶ 65. The claimed video game platform merely implements the abstract wagering rules.

Claim 12 does not recite a *technological* innovation in computers or in another technological field. *Alice*, 134 S. Ct. at 2359. Appellant argues that the claims recite a combination of wagering rules that is unconventional in the gaming industry. *See* Appeal Br. 32–40. Thus, claim 12 is directed to an alleged new ordered combination of conventional rules (e.g., wager, check, fold, display player options) for conducting a wagering game. Even if true, claim 12 is directed to wagering rules, which is an abstract idea under *Smith*.

Claim 12 does not recite a technical improvement tied to a specific apparatus that solves a technical problem in the gaming arts. *See Two-Way Media*, 874 F.3d at 1338–39. Instead, it automates abstract wagering rules that allow a player an option to check or wager (Spec. ¶¶ 2–19, 31, 65) on a conventional gaming platform. The inventor’s Declarations under 37 C.F.R. § 1.132, dated March 10, 2015 and May 13, 2015, confirm that any novelty is in the wagering rules rather than the game platform or gaming technology used to implement the rules, and these wagering rules make the game more interesting for players, as Appellant asserts (Appeal Br. 35–38). Snow Decl. ¶¶ 4–18 & Exhs. A–E; Supp. Snow Decl. ¶¶ 4–10. His declarations make clear that the “invention” is directed to proprietary rules for *administering* a wagering card game. *See id.* Like the wagering rules in *Smith*, claim 1 is directed to wagering rules and an ordered combination of such rules, which was held to be an abstract idea in *Smith*. *Smith*, 815 F.3d at 819. A new in game tables is not claimed beyond implementing the abstract game rules.

For example, Mr. Snow states the claims “in various combinations” “cover the features of the Ultimate Texas Hold ‘Em[®] game”, which he then describes as involving the dealing accepting a ante and blind wager from a player by receiving wagering chips in a live game in separate betting areas. Snow Decl. ¶¶ 4–5. Mr. Snow then describes other game play and wagering rules of a dealer progressively dealing and revealing player and community cards with rounds of betting in various amounts that pay out according to the wagering rules of the game. *Id.* Mr. Snow describes the design of a new wagering table game for cards as balancing competing interests of various parties that is easy to learn but different enough from existing games while balancing length of play and risk-reward calculations for wagering to be attractive to administrators and players. *Id.* ¶ 6. Changes to the wagering and game play rules may require changes to the physical equipment used to play that wagering game. *Id.* ¶ 7. To differentiate his new wagering game from other hold ’em games, Mr. Snow decided “that the new game would permit players to view *their entire hand* before requiring them to commit to making a play wager or fold” but also “require the permitted amount of the play wager decrease as the quantity of information available to the player increased . . . to enable the administrator to preserve an edge on the game” and players to wager large amounts earlier in the game. *Id.* ¶¶ 10–11.

Mr. Snow then designed the rest of the game by setting ideal amounts for the player wager at each stage and deciding when players can fold and when dealers are disqualified with a “big blind” for players each round. *Id.* ¶ 12. Although the game takes more time to administer a round, which can reduce revenue generated, his game encourages more betting per round so the average revenue per unit of time is higher than other games. *Id.* ¶ 13.

The asserted popularity of the game, according to Mr. Snow, derives from “its incentivizing players to risk large amounts for the play wager early on in a round of game play . . . [where] the house edge on each wager ensures that a sufficient proportion of the wagered amounts is won by the house” . . . [to] compensate for the slower speed, resulting in more than adequate revenue for the administrator.” *Id.* ¶ 14. Popularity among players also derives from allowing players to “tailor the amount wagered during a round of play to their own risk tolerance.” *Id.* ¶ 15. Player enthusiasm has resulted in “a robust community of participants sharing strategies, evaluating the game and attempting to circumvent the house edge” as seen by examples of player conversations at Exhibits A–E of his Declaration. *Id.* ¶ 15. The games wagering and game play features are responsible for its popularity. *Id.* ¶¶ 16–18. Exhibit A describes the various game play, wagering, and scoring rules and tables with various wagering strategies. Many of these rules and payouts are not recited in the present claims, however. This is also apparent from Exhibit B, which describes the game’s popularity as “because the house edge is reasonable, and because of the trips bet pay table.” The reset of Exhibit B discusses various game play rules and strategies with a string of comments from players about their experiences as do Exhibits C–E including player “collusion” of showing cards to fellow players.

In his Supplemental Declaration, Mr. Snow declares that features of the video gaming platform “are essentially the same as those of the game implemented as the live, dealer-administered table game . . . [except] the administrative of the game is at least one processor of the video gaming platform rather than an in-the-flesh dealer” and design considerations are the same for both formats. Supp. Snow Decl. ¶¶ 4–6.

In *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016), an inventive concept existed because a claimed Internet filtering technique improved an existing technological process. *Bascom*, 827 F.3d at 1350–51. In *DDR*, 773 F.3d 1245, the claims were directed to an unconventional use of the Internet to create a composite website. *DDR*, 773 F.3d at 1258–59.

The court in *Smith* stated that a game using a new or original deck of cards might survive *Alice* step two. *Smith*, 815 F.3d at 819; Appeal Br. 41. However, claim 12 does not recite a new or original deck of cards. Claim 12 recites wagering rules implemented on a video gaming platform. The video gaming platform and processor automate the card game rules as generic computers that perform conventional activities of sending, receiving, and displaying data for wagering.³ See *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1370 (Fed. Cir. 2015) (“[M]erely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea.”).

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* stands for the general 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 improvements to a computer’s functionality. They implement alleged improvements to wagering rules of a card game, held to be abstract ideas in *Smith*. They automate those rules where it has been made clear,

³ Spec. ¶¶ 75–84 (prior art video game platform and processors).

Our prior cases have made clear that mere automation of manual processes using generic computers does not constitute a patentable improvement in computer technology. In those cases, “the focus of the claims is not on such an improvement in computers as tools, but on certain independently abstract ideas that use computers as tools.”

Credit Acceptance Corp. v. Westlake Svcs., 859 F.3d 1044, 1055 (Fed. Cir. 2017) (quoting *Elec. Power Grp.*, 830 F.3d at 1354).

The claimed game play and wagering rules implement the abstract idea⁴ or are 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.”); *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) (quoting *Parker*, 437 U.S. at 590)). Like the *Flook* claims, claim 12 recites conventional physical elements or a conventional relationship between the abstract idea and the physical elements.

Even if claim 12 recites an *unconventional* ordered combination of wagering rules, “[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); *Versata Develop. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015) (claims improved abstract idea not a computer’s performance).

⁴ The Examiner considers that the game instructions and display steps are pre or post solution activity to show game indicia. See Final Act. 11, 17.

Whether considered individually or as an ordered combination, the claimed wagering rules lack an inventive concept as in *Smith*. Claim 12 recites wagering and game play rules and activities. Appellant's argument that a new or non-obvious (unconventional) combination of wagering rules makes the claim patent eligible is not the law. *See Elec. Power*, 830 F.3d at 1354; *Mayo*, 132 S. Ct. at 1303–04; *Smith* 815 F.3d at 819.

Appellant's argument that claim 12 does not monopolize fundamental rules of the gaming industry (*see* Appeal Br. 43–47) is resolved by the § 101 analysis. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015); *see also Smart Sys. Innovations, LLC v. Chicago Transit Auth.*, 873 F.3d 1364, 1375 (Fed. Cir. 2017) (same).

Thus, we sustain the rejection of claims 12–28.

Claims 12–28
Rejected Over Scott and Perkins and Snow

Because claims 12–28 are directed to patent-ineligible subject matter, we do not reach the prior art rejections of those claims. *See In re Comiskey*, 554 F.3d 967, 973 (Fed. Cir. 2009) (declining to reach the prior art rejection when claims are barred at the threshold by § 101); *Ex parte Gutta*, 93 USPQ2d 1025, 1036 (BPAI 2009) (precedential) (same).

DECISION

We affirm the rejection of claims 12–28 as directed to patent ineligible subject matter under the judicial exception to 35 U.S.C. § 101.

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).

AFFIRMED