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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROGER M. SNOW¹

Appeal 2017-005321
Application 14/082,835
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 1–4, 6, and 8–10. Appeal Br. 6–7. Claims 11–30 are withdrawn. *Id.* at 6. 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

Appellant discloses the invention as wagering games, casino table wagering games, casino table playing card wagering games, and variants that use poker ranks in determining outcomes. Spec. ¶ 2. The games may be implemented as live table games, television or cable game show games, video poker gaming machine platforms, hand-held games, multiple player interactive wagering platform games, cell phone games, games executed on personal computers, palm pilots, play stations, and the like. *Id.* ¶ 67.

Claim 1, the sole independent claim, is reproduced below.

1. A method of administering a wagering game implemented in physical form on a surface of a gaming table, using a fifty-two card deck of physical playing cards and wagering elements in the form of physical chips, the method comprising:

providing a gaming table defining, on a surface, a player position illustrated to define betting areas, the betting areas comprising an ante wager betting area and only one play wager betting area;
while the ante wager betting area is occupied by at least one chip defining an ante wager, distributing, onto the surface of the gaming table and from the fifty-two card deck of physical playing cards, a number of physical playing cards available for a player hand;
administering a plurality of play election rounds in which a player, associated with the player position, is prohibited from making more than one play wager, the play wager betting area being unoccupied by a chip at the initiation of each play election round of the plurality, administration of each play election round of the plurality of play election rounds comprising:
receiving from the player, associated with the player position, an election selected by the

player from a set of options, the set of options comprising:
in each play election round of the plurality of play election rounds, a play wager corresponding to a value subject to a limit that lowers with each passing play election round of the plurality of play election rounds;
in at least an initial play election round of the plurality of play election rounds, a check option and not a fold option;
and
in only a final play election round of the plurality of play election rounds, the fold option, the play wager not previously received, the final play election round following revelation to the player of all cards available for the player hand, the play wager being a wager on the player hand and against a dealer hand; and

resolving all wagers occupying the betting areas of the player position.

Appeal Br. (Claims App. 1–2).

REJECTIONS

Claims 1–4, 6, and 8–10 are rejected as being directed to patent ineligible subject matter under the judicial exception to 35 U.S.C. § 101.

Claims 1–4, 6, and 8–10 are rejected under 35 U.S.C. § 102(f) because there is evidence to suggest that Appellant invented the claimed subject matter jointly with another individual.

Claims 1–4, 6, and 8–10 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Yoseloff (US 8,590,900 B2, iss. Nov. 26, 2013).

ANALYSIS

Claims 1–4, 6, and 8–10 As Directed To Patent Ineligible Subject Matter

Appellant argues claims 1–4, 6, and 8–10 as a group. Appeal Br. 20–55. We select claim 1 as the representative claim, with claims 2–4, 6, and 8–10 standing or falling with claim 1. 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?

The Examiner determines that claim 1 is directed to an abstract idea of a new set of rules for playing a card game. Final Act. 2–3. In particular, the Examiner finds claim 1 is directed to wagering rules for playing a card game using a gaming table and playing cards that are not essential to game play rules and do not undergo physical transformation. *Id.* at 3–4; Ans. 3–4. The Examiner also finds the game rules involve mental activity like forming a judgment, observation, evaluation, or opinion, interpersonal interactions or relationships, human behavior such as following rules or instructions, and instructions as to how business should be conducted. Final Act. 4–7, 9. The Examiner further finds the claims cover fundamental practices of poker and wagering and recite ordinary building blocks like wagers, checks, and folds that direct how to conduct games and produce interaction between players. *Id.* at 10–12; Ans. 14. The Examiner finds that rules for when a player can place a wager is a fundamental practice of game designs. Final Act. 16–17.

The Examiner finds claim 1 is directed to an abstract idea as was the method of conducting a card game using physical cards in *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016). Ans. 10. The Examiner also cites *Smith* and *Planet Bingo, LLC v. VKGS LLC*, 576 F. App'x 1005 (Fed. Cir. 2004) (non-precedential) as supporting his determination that claim 1 is directed to a patent ineligible method of playing a card game. Ans. 12. Claim 1 recites conventional steps at a high level of generality. *See id.* at 17.

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 the 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 1 recites a “method of administering a wagering game . . . on a surface of a gaming table” using a fifty-two card deck of playing cards and wagering elements (i.e., chips, *see* Spec. ¶ 30; Appeal Br. 8) according to game rules involving making an ante wager by a player, dealing playing cards, administering plural play election rounds and player play elections including an initial election of a play wager or a check option and not a fold option and a final play election round after which all wagers are resolved. Appeal Br. (Claims App. 1–2); Ans. 10, 12.

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 1 recites dealing cards and allowing players and dealers to exchange financial obligations and hedge risk via placing wagers in various amounts and checking (placing no wager). The recital of a “method” does not make claim 1 patent eligible. Final Act. 2; *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); *see* Appeal Br. 52–54.

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. 24–27; Reply Br. 11–12) 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 made in other cases. *See Smith*, 815 F.3d at 818–819; *Planet Bingo, LLC v. VKGS LLC*, 576 F. App’x 1005, 1007–08 (Fed. Cir. 2014) (claims directed abstract idea of “methods and systems for ‘managing a game of Bingo’”) (non-precedential). Notably, Appellant does not identify error in the Examiner’s findings or any claim features that are not directed to game play and wagering, instead arguing that a particular ordered combination of rules is recited. *See* Appeal Br. 29–38.

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 1 is directed to rules for playing and managing a wagering card game. Claim 1 recites game play rules discussed above of receiving a player ante and play wagers, receiving player options (check, fold, or place a play wager), distributing playing cards for a player hand, and resolving wagers. Final Act. 2–7; Ans. 11; Appeal Br. 35 (noting Examiner’s allegations that claims cover known wagering rules).

Appellant’s arguments belie the fact that Appellant is on notice of the bases of the rejection. Appeal Br. 35 (arguing that even if game play rules of folding, checking, and the like are building blocks of the game industry, claim 1 recites a particular, ordered combination that is not a new building block). Appellant’s argument that claim 1 recites an ordered combination of steps that are not fundamental practices or building blocks of the gaming industry (*id.* at 35) is, likewise, unpersuasive as Appellant admits claim 1 is directed to wagering rules for a card game, albeit in a particular, ordered combination (*id.* at 35–36). *See* Ans. 15–16. *Smith* held that such ordered combinations of wagering rules are an abstract idea. *Smith*, 815 F.3d at 819.

Even if claim 1 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 that claim 1 is directed to rules for conducting a wagering game. *See* Appeal Br. 36–37 (reciting claimed steps of play election rounds in which a player is prohibited from making more than one play wager, receiving player election from a set of options including a check and not fold option in an initial play election round and a fold option in the final play election round).

We are not persuaded that 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 1 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 1 recites wagering rules for a card game, 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 1 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 “gaming table” and “fifty-two card deck of physical playing cards” do not represent inventive gaming technology and are not used in an unconventional way. They merely provide a known way to play wagering games with cards. *See Spec.* ¶¶ 6–16 (noting the many variations in poker game playing rules to increase excitement and interest in both table and video versions of poker), 31 (the basis format is the same for table and automated devices). Appellant’s arguments demonstrate that Appellant considers the ordered combination of wagering rules to be patent-eligible. Appeal Br. 35–47 (arguing eligibility based on the ordered method steps versus a gaming table); *see Smith*, 815 F.3d at 819 (standard deck of cards).

We also agree with the Examiner that claim 1 is directed to an abstract idea of “organizing human activities” and managing a game like the bingo game in *Planet Bingo*. Final Act. 5; Ans. 23. 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.” *Planet Bingo*, 576 F. App’x at 1007–08. 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. 48 (game is *unconventional*).

Here, claim 1 recites a method of playing a wagering game that serves to organize the activities of a dealer 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. 30–31) 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. 9. However, claim 1’s game rules also involve mental steps and probabilities that can be performed in the human mind. *CyberSource*, 654 F.3d at 1371–72; Appeal Br. 30–31 (claims are not *solely* mental steps).

Appellant’s attempts to distance the subject matter of claim 1 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. 33–35), 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 the claimed method is *unconventional* because it recites an ordered *combination* of game rules that is *unconventional*, not because it is directed to improvements in technology for gaming, computers, or networks.² Appeal Br. 32–39. In other words, it recites known abstract wagering game rules in an alleged different order than is known in the art.

² Any alleged game table improvement recited in claim 11 (Appeal Br. 50) is not at issue because claim 11 was withdrawn. Appeal Br. (Claims App’x 4).

A review of Appellant’s own disclosure reveals that the claimed game and wagering rules recited in claim 1 are, in fact, directed to an abstract idea that is not patent eligible. At best, claim 1 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 1 of a player receiving cards and exercising play options with wagering options progressing as player cards are revealed and compared the dealer hand to resolve all wagers. *Id.* ¶ 7. Initial ante wagers followed by other player wagers are known in the art. *Id.* ¶ 9. It is known to vary 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 1 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 1 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. 16. 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 technology, playing cards, or gaming tables. Any “improvement” resulting from claim 1’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. 21–22.

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

The Examiner finds claim 1 is directed to conventional industry practice that does not solve a technological problem but instead recites rules that guide actions of players of a wagering game under certain conditions. Final Act. 15–16. The Examiner finds that claim 1 recites conventional steps of wagering, which are fundamental gaming industry practices recited at a high level of generality and not tied to solving any known problem or producing an improvement from any rearrangement of dealing and wagering rules. *Id.* at 17–19. The Examiner finds that reciting a particular ordered combination of wagering and game play rules does not claim significantly more than the abstract idea itself because the claimed rules do not solve a particular technological problem, but instead rely on the impressions and subjective actions of players, which are not a concrete or tangible result; they simply append more conventional steps specified at a high level of generality, which does not supply an inventive concept. Ans. 15–17. The Examiner determines that rearranging game play and wagering rules of a card game does not amount to an improvement, and no evidence has been provided of an improvement or unexpected results here. Final Act. 18–19.

The Examiner determines that the claimed steps analyzed as separate elements are conventional wagering practices offered in poker games with known effects on game strategy. Ans. 17. Minimum or maximum amounts that a player can wager are conventional rules to change a player’s strategy or effect the house percentage. *Id.* The Examiner finds that some wagering rules are characterized by Appellant as opportunities that a player need not pursue. *Id.* at 18. The Examiner finds insufficient evidence that the claimed wagering rules are significantly more than abstract ideas. Final Act. 18–19.

Appellant argues that claim 1 recites significantly more than a mere abstract idea and provides an inventive concept that transforms any abstract idea into a patent-eligible invention. Appeal Br. 38. Appellant argues that the claimed method administers a plurality of play election rounds in which a player is prohibited from making more than one play wager, and a player makes an election from a set of options during plural play election rounds that lowers the wagering limit with each play election round. *Id.* at 42. In addition, Appellant argues that an initial play election round provides a check option that is not a fold option and only a final play election round includes the fold option after all available cards for a player's hand have been distributed. *Id.* at 42–43. Appellant argues that these rules improve the state of the art in the gaming industry as evidenced by a declaration submitted by the inventor. *Id.* at 43–44. Appellant argues that the claimed rules are not an abstract idea and are not fundamental practices or building blocks but instead are unconventional and significant to the solution provided by the claimed method. *Id.* at 45–46.

If a patent claim recites a method with instructions to implement an abstract idea on a device, even a computer, the device cannot impart patent eligibility. *Alice*, 134 S. Ct. at 2358; *Planet Bingo*, 576 F. App'x at 1008. Appellant has not asserted that claim 1 recites an innovative gaming table or playing cards or wagering elements. Claim 1 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, making payouts, dealing cards, selecting cards, and other actions associated with a player or a dealer to include game play on physical or electronic embodiments. *Id.* ¶¶ 31, 84.

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.* ¶ 65. 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. ¶ 67. The claimed game table and playing cards merely implement 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 known devices to play conventional card games with an ordinary deck of playing cards. Figure 9 of Appellant’s disclosure illustrates a betting layout for ULTIMATE TEXAS HOLD ‘EM™ poker games. *Id.* ¶ 62.

Claim 1 does not recite these features, nor does Appellant allege any novelty in the gaming table or playing cards. Claim 1 recites wagering rules for a card game intended to entice players to play the game. Spec. ¶ 3. Appellant discloses gaming actions and rules such as accepting wagers, dealing cards, selecting cards, and other actions associated with a player or a dealer that implement the abstract idea game play and wagering rules. *Id.* ¶¶ 31–62. The game table is not a special configuration. *See Cyberfone Sys., LLC v. CNN Interactive Grp., Inc.*, 558 F. App’x 988, 993 (Fed. Cir. 2014) (non-precedential) (the claimed telephone “is not a specific machine, and adds nothing of significance to the claimed abstract idea.”).

Claim 1 is directed to the abstract idea of *rules* for a wagering game, rather than specialized game play. *See Elec. Power*, 830 F.3d at 1355 (the 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” 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 to generalized steps performed on a computer using conventional computer activity are not patent eligible); *In re TLI Comm’ns LLC Pat. Litig.*, 823 F.3d 607, 613–14 (Fed. Cir. 2016) (mere recitation of concrete, tangible components is insufficient to confer patent eligibility to an otherwise abstract idea and claimed telephone unit and server are normal, generic components operating in conventional ways).

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*, 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). Although the Specification described an innovative system architecture with protocols and signal selections, the claims did not recite the innovations. *Id.* Here, the asserted innovative concept is a new combination of rules for wagering on a card game as implemented in a conventional computer. The gaming table merely implements the abstract wagering rules in conventional ways with positions corresponding to the wagering rules. *See Appeal Br.* 49–50.

As a result, the asserted new combination of wagering rules can be implemented on a wide variety of gaming platforms discussed above. *See* Spec. ¶ 67. The claimed gaming table merely implements these wagering rules. Appeal Br. 8, 48–50; Spec. ¶¶ 62–69; Fig. 9. Any unconventional features were recited in claim 11 (Appeal Br. 50), which is withdrawn.

Claim 1 does not recite a *technological* innovation in gaming or in any other field. *Alice*, 134 S. Ct. at 2359. Instead, claim 1 recites a combination of non-physical game and wagering rules that allegedly are *unconventional*. *See* Appeal Br. 40–46. At best, claim 1 is directed to a new combination of known wagering and game play rules (wagers, a check, a fold, display of player options) for conducting a wagering game. Even if claim 1 recites a new combination of wagering rules for a card game, nonetheless, it is directed to rules for a wagering game, which is an abstract idea under *Smith*.

Claim 1 does not recite any 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. It recites abstract wagering rules (Spec. ¶¶ 4, 30–44). The inventor’s Declaration under 37 C.F.R. § 1.132, dated June 9, 2015, confirms that any novelty is in the wagering rules rather than the game platform or gaming technology that implement the rules, and the rules make the game more interesting for players, as Appellant asserts (Appeal Br. 42–46). Snow Decl. ¶¶ 4–18 & Exhs. A–E. His declaration makes clear the “invention” is the proprietary rules for *administering* a wagering card game. *See id.* Like the wagering rules in *Smith*, claim 1 is directed to individual 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. Any innovation in the gaming platform is not claimed beyond its implementing the 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.

Appellant argues that the claimed table has a layout specific to the game rules, e.g., it has different betting areas. Appeal Br. 49. In other words, the table layout merely implements the abstract wagering and game play rules. Mr. Snow declares that the felt game format incentivized development of customized shufflers (Snow Decl. ¶¶ 24, 26), but these articles are not claimed. The game is offered in electronic formats. *Id.* ¶ 25.

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. 48. However, claim 1 does not recite a new or original deck of cards. Claim 1 recites wagering rules implemented with a standard fifty-two card deck and generic wagering elements on a game table that embodies or implements the abstract wagering rules. *See* Appeal Br. 41 n.13, 50.

Features specific to the dealing rules, wagering rules, player elections, and payout rules either implement the abstract idea³ or are mere 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) (quoting *Parker*, 437 U.S. at 590)). Like the *Flook* claims, claim 1 recites conventional physical elements or a conventional relationship between the abstract idea and the physical elements.

³ The Examiner considers that the game instructions and display steps are extra solution activity to show game indicia. *See* Ans. 22.

Whether considered individually or as an ordered combination, the claimed wagering rules lack an inventive concept as in *Smith*. They recite wagering and game play rules and activities. 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); *Versata Develop. Grp., Inc. v. SAP Am. Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015) (claims improved abstract idea not computer performance). Thus, we are not apprised of error in the Examiner’s determination by this argument.

Appellant’s argument that claim 1 does not monopolize the rules for playing a card game (Appeal Br. 70–73) 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 1–33, 35, 37, and 39.

*Prior Art Rejections of Claims 1–4, 6, and 8–10
Under 35 U.S.C. § 102(f) and 103(a) (Yoseloff)*

Because claims 1–4, 6, and 8–10 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).

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DECISION

We affirm the rejection of claims 1–4, 6, and 8–10 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