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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RONALD J. WOLFF, MICHAEL A. WOLFF,
and STEVEN J. WOLFF

Appeal 2017-008568
Application 13/944,063
Technology Center 3700

Before LINDA E. HORNER, LISA M. GUIJT, and
JEFFREY A. STEPHENS, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks our review under 35 U.S.C. § 134(a) from the Examiner's Final Office Action (Feb. 9, 2016) ("Final Act.") rejecting claims 1–23.² We have jurisdiction under 35 U.S.C. § 6(b).

For the reasons explained below, we are not informed of error in the rejection of claims under 35 U.S.C. § 101. Accordingly, we AFFIRM.

¹ Appellant is the Applicant, HMD Entertainment, LLC, identified by the Appeal Brief as the real party in interest. Appeal Br. 4.

² As explained in note 3, *infra*, we consider the Final Office Action's reference to claims "1–20" to be harmless error.

Claimed Subject Matter

The claimed subject matter relates to a game that may be called “Pokerlette,” which “includes a game table or surface (physical or virtual) on which wagering and steps of the game are carried out using playing cards to implement the game as a combination of poker and roulette.” Spec. ¶ 2. Claims 1, 10, and 16 are independent. Claims 1 and 16 are method claims, while claim 10 is directed to a casino game board for playing the game. Claims 1 and 10, reproduced below, illustrate the claimed subject matter.

1. A method of simulating the play of a poker-type game with betting in a roulette-type fashion while using cards and a game board, comprising:

(a) providing a single deck of playing cards that includes two Joker cards, other than the Joker cards, each remaining card in said deck having indicia of a suit along with a character or number thereon;

(b) providing a wagering area in which wagers may be placed by participants using markers in a roulette-type fashion, wherein the area includes

(1) an inner board comprising, a plurality of spaces representing single card wagers and multiple card wagers that any revealed cards will be the single card or one of a group of multiple cards;

(2) an outer board comprising a plurality of spaces, each of said spaces representing a wager for at least one of a predetermined group of wagers, including a space for wagering that the first three cards revealed will form a winning three-card poker hand, and a space for wagering that all cards revealed will form a winning five-card poker hand;

(c) providing a card presentation region, said presentation region including a plurality of layout spaces located separate from the wagering area; and

(d) the game being played by the following steps,

(1) at least one player commences wagering by selecting a marker representing a desired value for a wager and then placing the marker representing the desired value of said wager in the wagering area,

(2) dispensing at least one packet, the packet including a plurality of cards,

(3) placing the at least one packet on its own layout space,

(4) if more than one packet is dispensed, making a packet selection for use in the game, and discarding any non-selected packets to leave a selected packet,

(5) laying out all cards of the selected packet face-down in order on the layout spaces, and announcing the end of wagering,

(6) successively revealing the first through Nth cards of the selected packet, and

(7) paying all winning wagers, wherein all first card winning wagers are paid.

10. A casino game board for simulating the play of a poker-type card game with betting available in a roulette-type fashion, comprising a wagering area in which wagers may be placed by at least one participant, and wherein said wagering area includes

(1) an inner board comprising, a rectangular layout including 52 playing card spaces in a 13 x 4 rectangular arrangement each representing one of the 52 cards, said spaces being arranged in columns by suit and in rows by card, from Ace to King, and two Joker rectangles each representing one of the two Jokers, where the playing card and Joker rectangles allow for wagering on single cards or groups of two, three or four cards that any of five revealed cards will be the single card or part of a group;

(2) a plurality of rectangular areas for wagering on one or two suits of the designated card regardless of face;

(3) a plurality of areas to allow for wagering on one or two sets of faces of the designated card regardless of suit;

(4) a plurality of areas for wagering that the designated card will be a face card from Ace to Six or either Joker;

(5) an area for wagering that the designated card will be red in color;

(6) an area for wagering that the designated card will be a face card from Eight to King or either Joker;

(7) an area for wagering that the designated card will be black in color;

(8) an area for wagering that the first three cards revealed will form a winning three-card poker hand;

(9) an area for wagering that all five cards revealed will form a winning five card poker hand; and

(10) an area for wagering that a minimum of two Sevens or Jokers, or any combination thereof, will appear among the five cards revealed.

Rejections

I. Claims 1–23 stand rejected under 35 U.S.C. § 101 as directed to non-patent eligible subject matter. Final Act. 2–3.³

³ The Summary on page 1 of the Final Office Action erroneously states that only claims 1–20 are pending and rejected, and the Office Action does not elsewhere explicitly reference claims 21–23, but dependent claims 21–23 were added by an Amendment filed December 18, 2015, prior to the Final Office Action. In this case, we consider the omission of explicit reference to claims 21–23 to be harmless. Appellant states in the Appeal Brief that “as a result of the lack of any objection or rejection being set forth for dependent claims 21 – 23 these claims are currently presumed to be allowable.”

Appeal Br. 9 (footnote omitted). Allowability, however, is not consistent with the Final Office Action’s indication that only claims 1–20 were pending or with the identification of claims 1–23 as “rejected” in the Notice of Panel Decision from Pre-Appeal Brief Review, dated July 13, 2016. Appellant states in a footnote that it reserves the right to supplement the Appeal Brief and to separately argue the merits of claims 21–23 in the event the Examiner asserts that claims 21–23 were rejected. Appeal Br. 10 n.1. In the Reply Brief, Appellant acknowledges that the Examiner’s Answer indicates claims

II. Claims 1–23 stand rejected under pre-AIA 35 U.S.C. § 112, second paragraph, as being indefinite. Final Act. 3–4.⁴

DISCUSSION

Rejection I – 35 U.S.C. § 101

Appellant argues all claims together as a group based primarily on claim 1, but presents some arguments specific to claims 10, 13, and 21–23. *See* Appeal Br. 9–36; Reply Br. 5–9.⁵ For purposes of this decision, we select claim 1 as representative of claims 1–9 and 16–20; select claim 10 as representative of claims 10–12; select claim 13 as representative of claims 13–15, and consider dependent claims 21–23 separately.

Claims 1–9 and 16–20

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. Nonetheless, the Supreme Court has long interpreted § 101 to include implicit exceptions: “Laws of nature, natural phenomena, and abstract ideas

10–23 are rejected on the same basis as other dependent claims. Reply Br. 5 (citing Ans. 7). Appellant provides substantive argument against the rejection of claims 21–23 under 35 U.S.C. § 101. *See* Reply Br. 6–9. In this case, we consider claims 21–23 to be rejected under 35 U.S.C. § 101 on the same basis as the other dependent claims, as clarified in the Answer, and we consider Appellant’s arguments in the Reply Brief challenging the rejection.

⁴ As noted *supra*, note 3, claims 21–23 are also pending, and we consider dependent claims 21–23 to be rejected based on their dependency.

⁵ We do not consider Appellant’s conclusory reference to claim 16 and “several of the dependent claims” at page 19 of the Appeal Brief to constitute separate argument for patentability of these claims. *See* 37 C.F.R. § 41.37(c)(1)(iv).

are not patentable.” *E.g.*, *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (internal quotation omitted).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is “directed to.” *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

In *Diamond v. Diehr*, 450 U.S. 175 (1981), the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” 450 U.S. at 176; *see also id.* at 191 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Gottschalk v. Benson*, 409 U.S. 63 (1972); *Parker v. Flook*, 437 U.S. 584 (1978)). The Court also indicated, however, that “an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.” *Id.* at 187.

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (alterations in original) (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

The PTO recently published revised guidance on the application of § 101. USPTO, *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Revised Guidance”). Under that Revised Guidance, we first look to whether the claim recites:

(1) a judicial exception, i.e., a law of nature, a natural phenomenon, or subject matter within the groupings of abstract ideas enumerated in the Revised Guidance (i.e., mathematical concepts, certain methods of organizing human activity, and mental processes); and

(2) additional elements that integrate the judicial exception into a practical application (*see, e.g.*, MPEP § 2106.05(a)–(c), (e)–(h)).

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then look to whether the claim:

(3) adds a specific limitation beyond the judicial exception that is not “well-understood, routine, conventional” in the field (*see* MPEP § 2106.05(d)); or

(4) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.

See Revised Guidance.

In this case, the Examiner determines claim 1 is “directed to an abstract idea of a game defined by a set of rules, management of a game, and a method of organized human activity.” Final Act. 2. In determining that the claims do not recite significantly more than the abstract idea, the Examiner explains:

Since the judicial exception is not applied with or used with a particular machine (a game board is not considered a machine), the claims must be analyzed as to whether one of ordinary skill in the art would find the activities in the claims to be novel, non-routine, and unconventional. However, the claims are directed to play of a card game, using a conventional deck of playing cards, utilizing a game board with printed indicia (nonfunctional descriptive material). The various indicia on the game board indicate to players where to place wagers and packets of cards. Dealing a number of cards to players and allowing them to hold and discard is also known. Such indicia and boards are seen in well-known games, e.g. craps, Monopoly. Therefore, the limitations in the claim are not found to be significantly more than the abstract idea.

Final Act. 3.

Appellant argues (i) the abstract idea has not been identified by clear articulation, (ii) the allegation of what constitutes an abstract idea in the rejection does not take into consideration the basic character of the subject

matter involved, (iii) the rejection is silent as to how the claims are directed to, rather than merely involving, the alleged abstract idea, and (iv) the alleged abstract idea does not fall within the realm of abstract ideas and the subject matter to which the claims are directed is not within the realm of abstract ideas, in light of precedential court opinions. Appeal Br. 11–24. Appellant also argues the rejected claims recite significantly more than merely an abstract idea because they include additional features that are unconventional and “solution-significant,” recite a particular apparatus tied to the operations, and do not tie up any abstract idea such that others cannot practice it. *Id.* at 24–35.

We begin with prong 1 of step 2A of the Revised Guidance, in which we evaluate whether the claim recites a judicial exception. Claim 1 recites “[a] method of simulating the play of a poker-type game with betting in a roulette-type fashion while using cards and a game board,” and the following steps of the process: (A) providing the items used in playing the game, including (1) “providing a single deck of playing cards that includes” indicia typical of playing cards, (2) “providing a wagering area in which wagers may be placed by participants using markers in a roulette-type fashion,” the wagering area including an inner board and outer board with spaces for different types of wagers, and (3) “providing a card presentation region, said presentation region including a plurality of layout spaces located separate from the wagering area,” and (B) the steps of the game, including (1) “at least one player commences wagering by selecting a marker representing a desired value for a wager and then placing the marker representing the desired value of said wager in the wagering area,” (2) “dispensing at least one packet, the packet including a plurality of cards,”

(3) “placing the at least one packet on its own layout space,” (4) “if more than one packet is dispensed, making a packet selection for use in the game, and discarding any non-selected packets to leave a selected packet,” (5) “laying out all cards of the selected packet face-down in order on the layout spaces, and announcing the end of wagering,” (6) “successively revealing the first through Nth cards of the selected packet, and” (7) “paying all winning wagers, wherein all first card winning wagers are paid.”

The seven steps of the game recited in claim 1 (steps (B)(1) through (B)(7) discussed above) are rules for conducting a wagering game. As in *In re Smith*, 815 F.3d 816, 818 (Fed. Cir. 2016), the claimed rules for conducting a wagering game in this case “compare to other fundamental economic practices found abstract by the Supreme Court” (internal quotation and alteration omitted). *Smith* dealt with a claim that recited nine steps that were described as a variation on the game Blackjack. *Id.* at 817–18. The *Smith* court concluded that “Applicants’ claimed ‘method of conducting a wagering game’ is drawn to an abstract idea much like *Alice*’s method of exchanging financial obligations and *Bilski*’s method of hedging risk.” *Id.* at 819. The seven steps in the wagering game claimed in this case are not distinguishable from *Smith* on this basis. In addition, the steps of the game manage the personal behavior of a person playing the game, or interactions between people where there is a human dealer or multiple players, by providing a set of rules or instructions to be followed. See *In re Marco Guldenaar Holding B.V.*, 911 F.3d 1157, 1160 (Fed. Cir. 2018) (“[W]here the Patent Office further articulates a more refined characterization of the abstract idea (*e.g.*, ‘rules for playing games’), there is no error in also observing that the claimed abstract idea is one type of method of organizing

human activity.”). Accordingly, we conclude claim 1 recites (1) a fundamental economic practice, and (2) managing personal behavior or relationships or interactions between people, which are two of the certain methods of organizing human activity defined in the Revised Guidance, and thus an abstract idea.

Appellant argues the Examiner fails to unambiguously identify the abstract idea recited in the claims. Appeal Br. 11–14. Appellant contends the Examiner’s analysis provides at least three different identifications of the alleged abstract idea and, therefore, does not clearly articulate the abstract idea. *Id.* at 12. The variations in how the Examiner describes the claims, however, is not significant, and essentially relate to the level of detail used in describing the claims as reciting the rules of a game or method of organizing human activity. *See* Final Act. 2–3. The Examiner’s findings are sufficient to put Appellant on notice as to the nature of the abstract idea recited in the claim. We also disagree with Appellant that the Examiner’s description of claim 1 ignores its “basic character.” Appeal Br. 14–17.

Appellant also argues that “even if, *arguendo*, a card game is an abstract idea as alleged by the Examiner, the claims are not directed to the alleged abstract idea.” Appeal Br. 18. In considering whether claim 1 is “directed to” an abstract idea, we move to prong 2 of step 2A of the Revised Guidance, where we evaluate whether the claim recites additional elements that integrate the judicial exception into a practical application.

We conclude that the additional elements recited in claim 1 do not integrate the abstract idea into a practical application. The elements recited in claim 1, in addition to the rules of the game, consist of providing the items used in playing the game (steps (A)(1) through (A)(3) discussed above),

including (1) “providing a single deck of playing cards that includes” indicia typical of playing cards, (2) “providing a wagering area in which wagers may be placed by participants using markers in a roulette-type fashion,” the wagering area including an inner board and outer board with spaces for different types of wagers, and (3) “providing a card presentation region, said presentation region including a plurality of layout spaces located separate from the wagering area.”⁶ The claim as a whole merely describes how to generally “apply” the rules of the game in a wagering game environment. The claimed playing cards, wagering area, and card presentation region are merely invoked as tools to perform the process of playing the game spelled out in the seven rules.

The Examiner determines that the claims recite play of a card game using a conventional deck of playing cards. Final Act. 3. Appellant does not dispute this finding. The recited step of providing a standard deck of playing cards is not sufficient to integrate the abstract idea into a practical application. *See Smith*, 815 F.3d at 819 (holding that shuffling and dealing a standard deck of cards do not transform an abstract idea into a patent-eligible application of the abstract idea).

The Examiner determines that the printed indicia on the game board constitute non-functional descriptive matter. Final Act. 3; Ans. 12. Appellant does not dispute this determination for claim 1. We note that

⁶ Alternatively, considering that the game board and cards recited in claim 1 are dictated by the rules of the game, and merely provide physical representations to facilitate certain aspects of play, the game board and cards are in this sense indistinguishable from the rules and are not additional elements. *See Guldenaar Holding*, 911 F.3d at 1161 (“the abstract idea exception does not turn solely on whether the claimed invention comprises physical versus mental steps”).

claim 1 does not recite any particular printed indicia. The “inner board” and “outer board” of the wagering area comprise a “plurality of spaces” representing certain wagers, but the claim does not specify particular markings for these spaces. Similarly, the “card presentation region” includes a “plurality of layout spaces located separate from the wagering area” but does not specify how such a region is indicated on the board. To the extent markings on the game board are implicit or incorporated from the Specification into the claim, we agree with the Examiner that the printed indicia on the game board constitute non-functional descriptive matter, for the reasons given below.

The Federal Circuit in *Guldenaar Holding* determined that the markings on the applicant’s dice in that case constituted printed matter, and explained that the court “has generally found printed matter to fall outside the scope of § 101.” 911 F.3d at 1161 (citing *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1064 (Fed. Cir. 2010)). The claim in *Guldenaar Holding* recited a method of playing a dice game, including placing wagers on whether certain die faces will appear face up. *Id.* at 1160. The applicant argued as part of step two of *Alice* that “the specifically-claimed dice that have markings on one, two, or three die faces are not conventional and their recitation in the claims amounts to significantly more than the abstract idea.” *Id.* at 1161 (internal quotations and alterations omitted). The court determined that each die’s marking communicates information to participants indicating whether the player has won or lost a wager, similar to markings on a typical die or a deck of cards, and that the claim limitations were thus directed to information. The court also determined that “the printed indicia on each die are not functionally related to the substrate of the

dice” because “the markings on each of [the] dice do not cause the die itself to become a manufacture with new functionality.” *Id.* For that reason, the markings on the dice were not considered to be “something more” than the abstract idea. *See id.*

Similar to *Guldenaar Holding*, the indicia on the game board described in the Specification in this case are not functionally related to the substrate of the game board. The markings in the wagering area communicate the different types of wagers that may be made in the game and indicate which space on the board is to be used by a player to place markers representing a desired value of a wager. *See, e.g.*, Spec. ¶¶ 13–15 (describing a layout of spaces), Fig. 1. Likewise, the markings in the card presentation area indicate a layout of spaces on the game board to be used for dealing cards. *See, e.g., id.* ¶ 47. In essence, the markings are nothing more than labels for different spaces on the board. Although there is a *relationship* between the labels and the board, in that the labels are used to designate how that space on the board is to be used, there is not a *functional relationship* because the label and its position on the board do not depend on one another. Unlike *In re Miller*, 418 F.2d 1392 (CCPA 1969), where indicia on a measuring cup or spoon provided an indication about volume within the receptacle and, thus, had to be placed on a particular receptacle or a particular location on the receptacle, the indications of where to place markers for wagers on the game board described in the Specification in this case can convey that information regardless of where they are placed on the game board. Any indicia on the game board, therefore, are not additional elements that could integrate the abstract idea into a practical application at prong 2, Step 2A of the Revised Guidance, even if the indicia were part of

claim 1. The same is true for the indicia on the playing cards, which are recited in the claim.

In accordance with the Revised Guidance, we also consider under Step 2B whether claim 1 (1) adds a specific limitation beyond the judicial exception that is not well-understood, routine, conventional in the field, or (2) simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception. Here, we determine that claim 1 does not add a specific limitation beyond the abstract idea that is not well-understood, routine, or conventional in the field, for the same reasons that the additional limitations do not integrate the judicial exception into a practical application. The additional elements of providing the items used in playing the game, including (1) “providing a single deck of playing cards that includes” indicia typical of playing cards, (2) “providing a wagering area in which wagers may be placed by participants using markers in a roulette-type fashion,” the wagering area including an inner board and outer board with spaces for different types of wagers, and (3) “providing a card presentation region, said presentation region including a plurality of layout spaces located separate from the wagering area,” merely “apply” the rules of the game in a wagering game environment. The playing cards are conventional, and the setup of the game board (inner and outer wagering areas and card presentation region) is non-functional descriptive matter that is not “something more” than the abstract idea. Even considered as a whole, nothing in the claim adds significantly more to the abstract idea.

Appellant argues the claims provide “a novel technique for the combination of features of games such as poker and roulette” that is not

routine and conventional. Appeal Br. 29. Appellant also contends claim 1 also “require[s] a ‘specific machine’ (i.e., table providing a wagering area for the placement of wager markers, and providing a card presentation region with specific features noted).” *Id.* As discussed above, however, the rules of the game are an ineligible method of organizing human activity, and the objects used to play the game as recited in claim 1 do not add an inventive concept that transforms the abstract idea into patent eligible subject matter.

Appellant also argues the claims do not seek to tie up or monopolize innumerable other non-abstract implementations of card games or wagering games that do not involve the particular operations discussed above. Appeal Br. 32–35. “While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). In addition, as discussed above, the rules of the game recited in claim 1 are a certain method of organizing human activity that falls within the judicial exception to patent eligible subject matter, and the absence of significantly more in the claim results in preemption of that abstract idea.

Accordingly, for the reasons discussed above and by the Examiner, we are not informed of error in the Examiner’s rejection of claim 1 under 35 U.S.C. § 101. For the same reasons, we sustain the rejection of claims 2–9 and 16–20, which are rejected on the same ground and not argued separately.

Claims 10–12

Appellant argues independent claim 10 is not directed to an abstract idea because it “is directed to a particular ‘casino game board for simulating

the play of a poker-type card game with betting' having 'an inner board,' with at least a plurality of defined wagering areas." Appeal Br. 19.

Appellant also argues these features show that claim 10 is tied to a particular apparatus that provides something more than the abstract idea. *Id.* at 32.

Although presented in the context of a game board rather than a process, claim 10 nonetheless presents similar rules as the game recited in claim 1. For example, after describing the layout of the board and spaces arranged in columns and rows for suits and cards of a playing card deck, the claim recites that "the playing card and Joker rectangles allow for wagering on single cards or groups of two, three or four cards that any of five revealed cards will be the single card or part of a group." Similar recitations follow for areas for other types of wagers. Thus, claim 10 is directed to the rules of a card game in the same way that claim 1 is, and the same analysis applies. Although claim 10 provides detail about particular spaces for placing wagers on the game board, any implied indicia on these spaces are non-functional descriptive matter for the reasons discussed above for claim 1. The indicia fall outside of § 101 and do not integrate the rules of the game into a practical application or add significantly more to the abstract idea.

Accordingly, for the reasons discussed above and by the Examiner, we are not informed of error in the Examiner's rejection of claim 10 under 35 U.S.C. § 101. For the same reasons, we sustain the rejection of claims 11 and 12, which are rejected on the same ground and not argued separately.

Claims 13–15

Claim 13 depends from claim 10, and recites "wherein the board is presented on an electronic display as an electronic game with single player or multiplayer settings." Appellant argues claim 13 does not "equate simply

to ‘a game.’” Appeal Br. 19. Claiming the game board as one that is electronically displayed rather than a physical board does not add significantly more to the rules of the game. For the same reasons as claims 1 and 10, we are not informed of error in the Examiner’s rejection of claim 13 under 35 U.S.C. § 101. For the same reasons, we sustain the rejection of claims 14 and 15, which are rejected on the same ground and not argued separately.

Claims 21–23

Claims 20–22 recite:

20. The method according to claim 16, wherein at least the operations of (i) providing a space in which wagers may be placed by participants, (ii) providing a card packet presentation region, and (iii) wagering are illustrated on a digital gaming display, and where a computer performs operations of a dealer including the dispensing of cards and revealing cards, which are also illustrated on the display.

21. The method according to claim 20, where the game board is displayed on an interactive digital gaming table, and where markers representing a wager are represented on the game board as chips in a stack and where the user could select and drag a chip onto the wagering area where the chip is dropped to indicate a wager.

22. The method according to claim 20 wherein the game steps are performed as an interactive online gambling game, wherein a player may play against the dealer individually or with other players via a network, and where the computer is employed to update the digital gaming display, including both audio and video output in response to each player’s actions, and to pay out credits to the players having winning wagers in a hand.

Appellant argues, as with claim 1, that “the Examiner, in oversimplifying the claims so as to ignore specific limitations set forth in

both independent as well as dependent claims such as claims 21 – 23, fails to consider the invention as claimed.” Reply Br. 6–7. Appellant argues the use of a computer in claim 22 or a digital gaming table in claim 21 “results in the invention indeed being more than a card game.” *Id.* at 7. For the same reasons discussed above for claim 13, we do not agree that using a computer or a digital gaming table to play the game in claim 16 adds significantly more to the abstract idea to which the claims are directed.

Claim 23 recites:

23. The method according to claim 1, wherein paying all winning wagers, comprising the following steps executed in order:

after revealing a first card of the selected packet, paying all first card wagers represented by markers in the wagering area;

after revealing a second card and a third card of the selected packet, paying all three-card wagers represented by markers in the wagering area;

after revealing a fourth card and a fifth card of the selected packet, paying all five-card wagers, inner board wagers and any remaining unpaid wagers represented by markers in the wagering area before removing any remaining markers.

As to claim 23, Appellant argues “the order in which winning wagers are paid impacts both the player’s satisfaction as well as the dealer’s efficiency in completing a hand.” Reply Br. 7. Therefore, Appellant contends, “such limitations distinguish over a simple card game as they are directed to the efficient interaction between the dealer and player(s),” and “the method is not simply a conventional card game.” *Id.*

Appellant’s argument as to claim 23 does not inform us of error in the rejection. As is evident from the analysis above for claim 1, the determination that the claims are directed to patent ineligible subject matter

does not rest on any determination that the claims recite a conventional card game. The specific rules of the game, even if novel, “compare to other fundamental economic practices found abstract by the Supreme Court,” *Smith*, 815 F.3d at 818 (internal quotation and alteration omitted), and are not distinguishable from rules for conducting the games in *Smith* and *Guldenaar Holding* based on the analysis presented in those cases.

Accordingly, for the reasons discussed above and by the Examiner, we are not informed of error in the Examiner’s rejection of claims 21–23 under 35 U.S.C. § 101.

Rejection II— 35 U.S.C. § 112, second paragraph

We do not sustain the rejection of claims under 35 U.S.C. § 112, second paragraph, as the rejection does not address the claims as currently amended. The Final Office Action explains that the term “similar to roulette” in claim 1 is a relative term that renders the claim indefinite. Final Act. 4. In a Response After Final Office Action With Proposed Claim Amendments (filed May 1, 2016) (“Amendment After Final”), Appellant proposed to amend claims 1, 10, and 16 to recite betting or wagering “in a roulette-type fashion,” a term used in the Specification, instead of betting or wagering “similar to roulette.” Amendment After Final 2, 4, 6, 10–11; *see, e.g.*, Spec. ¶ 5. The Advisory Action dated May 10, 2016 indicates the Amendment After Final will not be entered, but a second Advisory Action dated June 7, 2016 indicates the amendments will be entered. The second Advisory Action does not, however, address the status of the rejections under 35 U.S.C. § 112, second paragraph.

The Examiner's Answer repeats the rejection of claims under 35 U.S.C. § 112, second paragraph, as being indefinite for reciting the phrase "similar to roulette." Ans. 3–4. This restatement of the rejection is not consistent with the Examiner's agreement in the second Advisory Action to enter the Amendment After Final that altered this language. Thus, we do not sustain the rejection under 35 U.S.C. § 112, second paragraph.

DECISION

We affirm the Examiner's decision to reject claims 1–23 under 35 U.S.C. § 101.

We reverse the rejection of claims 1–23 under 35 U.S.C. § 112, second paragraph.

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

AFFIRMED