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UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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Ex parte AVADIS TEVANIAN JR. and MARK STEVANS
_____

Appeal 2018-001188[1]
Application 11/753,128[2]
Technology Center 3600
_____

Before ANTON W. FETTING, BIBHU R. MOHANTY, and JAMES A.
WORTH, *Administrative Patent Judges*.

WORTH, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final
rejection of claims 33–56, which are all pending claims. We have
jurisdiction under 35 U.S.C. §§ 134 and 6(b).

We AFFIRM.

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[1] Our Decision refers to Appellants' Appeal Brief ("Appeal Br.," filed June
20, 2017) and Reply Brief ("Reply Br.," filed Nov. 14, 2017), and the
Examiner's Final Office Action ("Final Act.," mailed Jan. 20, 2017),
Answer ("Ans.," mailed Sept. 14, 2017).
[2] According to Appellants, the real party in interest for this appeal is "the
John Nicholas and Kristin Gross Trust U/A/D April 13, 2010." Appeal Br.
2.

Statement of the Case

Background

Appellants' application relates to "electronic methods of collecting, facilitating and compiling prediction information from online users concerning the performance or time behavior of items" with "particular applicability to Internet based social networking environments in which members can vote on the anticipated price of a security (or other time varying asset) over defined time periods." Spec. 1:11–15.

This application has previously been before the Board. In a previous decision, the Board affirmed a rejection under 35 U.S.C. § 101 that had been applied to a subset of pending claims, and reversed a prior art rejection that had been applied to all pending claims. Appeal No. 2013–002478, slip op. at 1, 6 (PTAB May 31, 2016).

The Claims

Claims 33, 38, 44, 45, and 46 are the independent claims on appeal. Claim 33, reproduced below, is representative of the subject matter on appeal:

> 33.   A method executing on a computing system for predicting a future performance of assets which are publicly traded in an exchange comprising:
>
>   specifying at least one asset to be subjected to a community based vote;
>
>   wherein said asset is characterized by a time varying price behavior;
>
>   specifying a prediction target date for said asset;
>
>   receiving and counting votes from a population of persons in the community concerning said asset with the computing system;

wherein said votes specify a predicted value for a performance of said asset at said prediction target date;

generating a graphical output region with the computing system within an electronic graphical interface presented to a member which identifies an aggregated prediction performance for said prediction target date based on all members contributing votes for said asset;

generating a prediction rating with the computing system that said asset will achieve said aggregated prediction performance based on an overall accuracy parameter determined by the computing system to be associated with said community.

Appeal Br., Claims App.

The Issues

A. The Examiner rejected claims 33–56 under 35 U.S.C. § 101, as being directed to a judicial exception without significantly more.

Principles of Law

An invention is patent-eligible if it claims a "new and useful process, machine, manufacture, or composition of matter." 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: "[l]aws of nature, natural phenomena, and abstract ideas" are not patentable. *E.g.*, *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014).

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.").

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)).

In *Diehr*, 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." *Diehr*, 450 U.S. at 187; *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."). Nevertheless, 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 *Benson* and *Flook*); *see, e.g.*, *id*. at 187 ("It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.").

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.* (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. *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50 (Jan. 7, 2019) ("Guidance"). Under the Guidance, we first look to whether the claim recites:

> (1) any judicial exceptions, including certain groupings of abstract ideas (i.e., mathematical concepts, certain methods of organizing human activity such as a fundamental economic practice, or mental processes); and

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

If a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, then we consider 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 Guidance.

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Analysis

      Estoppel Arguments

      Appellants argue that the Examiner was collaterally estopped as a matter of issue preclusion from making a rejection under 35 U.S.C. § 101 because the Board previously sustained a rejection under 35 U.S.C. § 101 as to other claims, without entering a new ground of rejection as to these claims. *See* Appeal Br. 6. We disagree. There was no issue preclusion as to claims 33–56 because the issue of patent eligibility was not actually decided as to those claims nor essential to a judgment - - it was not even considered. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303) (2015) (quoting Restatement (Second) of Judgments § 27, p. 250 (1980) ("the general rule is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'"). Further, the Board was under no obligation to enter a new ground of rejection in the previous decision because the rule that delegates authority to the Board to enter new grounds uses permissive language, i.e., "may," rather than mandatory language. *See* 37 C.F.R. § 41.50(b) ("Should the Board have knowledge of any grounds not involved in the appeal for rejecting any pending claim, it may include in its opinion a statement to that effect."). Nor is there res judicata by reason of claim preclusion during patent prosecution prior to issuance. *See BlackLight Power v. Rogan*, 295 F.3d 1269, 1273– 1274 (Fed. Cir. 2002) (quoting *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994) (en banc)) ("the Commissioner has an obligation to refuse to grant a patent if he believes that doing so would be contrary to law.").

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Appellants argue that the Examiner's prior efforts should have included all rejections. *See* Appeal Br. 6–7 (citing 37 C.F.R. § 1.104). Appellants appear to recognize this to be a petitionable matter in footnote 6, which footnote arises in the Appeal Brief immediately after Appellants argue that the Examiner should have made the rejection sooner. *See* Appeal Br. 7. We regard the rules regarding so-called compact prosecution to be subject to the Director's discretion such that this is a petitionable matter that is beyond the Board's jurisdiction on appeal. *See generally In re Berger*, 279 F.3d 975, 984–85 (Fed. Cir. 2002) (citing *In re Hengehold*, 440 F.2d 1395 (CCPA 1971); *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967)); *see also Application of Marriott-Hot Shoppes, Inc.*, 411 F.2d 1025, 1028 (CCPA 1969) (Rich, J.) (acknowledging the Solicitor's argument regarding the "classic" distinction between appealable matters and petitionable matters that applies in both the context of patent and trademark examination).

Claims 33–37

Appellants argue the rejection of claims 33–37 as a group. We select claim 33 as representative such that claims 34–37 stand or fall therewith. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Step 1

Applying Step 1 of the Guidance (which is unchanged from the prior guidance) to the present case, we determine: independent claim 33 recites a "method executing on a computing system," which is a "process" falling within one of the categories enumerated under § 101.

Step 2A, Prong One

The Examiner determines that claim 33 is directed to predicting asset performance using votes, which the Examiner determines to be "an idea of itself" and therefore abstract. Final Act. 9. The Examiner further determines that using categories to organize, store, and transmit information, is an idea of itself. Final Act. 11 (citing July 2015 Update: Interim Eligibility Guidance Quick Reference Sheet, *available at* http://www.uspto.gov/sites/default/files/documents/IEG%20July_2015_Quick_Ref_Sheet.pdf). Appellants argue that the 2015 Guidance has been superseded or amended. Appeal Br. 7 n.6. Nevertheless, Appellants appreciate that "some of the issues presented are petitionable" and that "the fact of the rejection has now been made and is appealable . . . for resolution." *Id.* We, therefore, understand Appellants to be submitting this appeal for resolution under currently existing guidance.

We analyze claim 33 as follows according to the 2019 Guidance. The Guidance instructs us first to determine whether any judicial exception to patent eligibility is recited in the claim. The guidance identifies three judicially-excepted groupings: (1) mathematical concepts, (2) certain methods of organizing human behavior such as fundamental economic practices, and (3) mental processes. We focus here on the second grouping----certain methods of organizing human behavior such as fundamental economic practices.

Claim 33 recites a preamble and steps for "predicting" an "asset price." In particular, the claim recites (1) "A method . . . for predicting a future performance of assets which are publicly traded in an exchange"; (2) "specifying at least one asset . . . "; (3) "wherein said asset is characterized

by a time varying price behavior"; (4) "specifying a prediction target date for said asset"; (5) "receiving and counting votes . . . concerning said asset"; (6) "wherein said votes specify a predicted value . . . said asset"; (7) "generating a graphical output region . . . within an electronic graphical interface . . . which identifies an aggregated prediction performance . . . for said asset"; and (8) "generating a prediction rating . . . based on an overall accuracy parameter." These limitations, under their broadest reasonable interpretation, recite the idea of "predicting an asset price by taking into account multiple predictions, and stating the confidence one has in the prediction."

For example, in the above limitations, the claim recites "predicting a future performance of assets," by specifying an "asset" with "price behavior" and a relevant time to assess the asset, receiving votes ("predicted values") regarding the "asset," generating a graphical output region which identifies an "aggregated prediction performance" for the "asset" and assessing the "accuracy" of the prediction. Predicting an asset price by taking into account multiple predictions for an asset on an exchange, as recited in Appellants' claims, like the claims for intermediated settlement in *Alice*, is "a fundamental economic practice long prevalent in our system of commerce," *Alice*, 573 U.S. at 219 (citations and internal quotation marks omitted). *See also OIP Technologies, Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015) (offer-based price optimization is a fundamental economic concept). We note that the Specification contemplates using the method for predicting the trading of stocks and the exercise of options. *See* Spec. 13:6–7. It is also a fundamental part of economic analysis to state the confidence that one has in the prediction that one makes. We note that the

output is graphical, which we address below under Step 2A, Prong Two below. Nevertheless, under Step 2A, Prong One, we conclude the claims recite the idea of "predicting an asset price by taking into account multiple predictions, and stating the confidence one has in the prediction," which is a fundamental economic practice, which is one of certain methods of organizing human activity, and thus an abstract idea.

We address the remainder of Appellants' arguments under Step 2A, Prong Two, below.

Step 2A, Prong Two

Having determined that the claims recite a judicial exception, our analysis under the Guidance turns now to determining whether there are "additional elements that integrate the judicial exception into a practical application." *See* MPEP § 2106.05(a)–(c), (e)–(h). When a claim recites a judicial exception and fails to integrate the exception into a practical application, the claim is "directed to" the judicial exception. *See* Guidance, 84 Fed. Reg. at 53. A claim may integrate the judicial exception when, for example, it reflects an improvement to a technology or field. *Id.* at 55.

Claim 33 also recites the use of a computer and the step of (7) "generating a graphical output region . . . within an electronic graphical interface . . . which identifies an aggregated prediction performance . . . for said asset." Appellants argue that the claim's use of a graphical interface indicates that the claim is patent eligible subject matter, citing *Ex parte Scott*, Appeal No. 2012-009834, 2015 WL 1093453 (PTAB Mar. 10, 2015) (informative) and *Trading Technologies Int'l, Inc. v. CQG*, Inc., 675 F. App'x 1001 (Fed. Cir. 2017) (non-precedential). Appeal Br. 11, 17–18.

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Appellants argue that the Examiner has ignored how the graphical user interface (GUI) is configured to inform users of key information. *Id.* at 11.

However, the mere presence of a computer and a graphical display do not render subject matter non-abstract. *See Trading Technologies Int'l, Inc. v. IBG LLC*, 921 F.3d 1084, 1093 (Fed. Cir. 2019). In this latter case, the court found that the claims at issue did not improve the functioning of the computer, make it operate more efficiently, or solve any technological problem. *Id.*; *see also* Guidance, 84 Fed. Reg. at 55 (an additional element or combination of elements indicates that an exception has been integrated into a practical application, *inter alia*, where there is an improvement in the functioning of a computer, or an improvement to other technology, or uses a particular machine that is integral to the claim).

The use of a display itself is a basic function of generic computer components. *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Can. (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) (a computer "employed only for its most basic function . . . does not impose meaningful limits on the scope of those claims"); MPEP § 2106.05(f)(2) ("Use of a computer or other machinery in its ordinary capacity for economic or other tasks (e.g., to receive, store, or transmit data) or simply adding a general purpose computer or computer components after the fact to an abstract idea (e.g., a fundamental economic practice or mathematical equation) does not provide significantly more.").

Here, the claim limitation does not recite a particular type of graphical output, and merely indicates that there is a "region" on the display that provides an "output," which is "an aggregated prediction performance." This type of graphical output is generic because it can take any form and is

simply on part of the display. The aggregated prediction performance is
post-solution activity from any mathematical calculations applied that does
not transform an unpatentable process into a patentable process. *See* MPEP
§ 2106.05(g) (citing *Parker v. Flook*, 437 U.S. 584, 590 (1978)); *see also*
Guidance, 83 Fed. Reg. at 55.

Appellants argue that the Examiner erred by referring to more than
one type of abstract idea. Appeal Br. 5, 8–10. To the extent that Appellants
are arguing that the Examiner has changed the nature of the rejection over
time without designating a new ground of rejection, that is a petitionable
matter. To the extent that Appellants are arguing that the Examiner has
reasoned that the claim falls within more than one category of abstract idea,
we determine that the claim falls within the category of fundamental
economic practice, which is one method of organizing certain activity. It is
likely that a person performing the claim would mathematical calculations to
aggregate predictions and to state the confidence in the aggregate prediction,
but doing so would be in furtherance of the fundamental economic practice,
rather than an independent abstract idea.

Appellants argue that the Examiner has provided only limited and
conclusory reasoning based on the existence of a generic computer that is
insufficient under *Enfish* and *BASCOM*. Appeal Br. 15; Reply Br. 8.
Appellants argue that software is more than capable of providing "non-
abstract improvements." Appeal Br. 15 (citing USPTO Memorandum from
Robert Bahr (May 19, 2016)). In *Enfish,* the court held patentable certain
data structures in an innovative logical model for a computer database that
were directed to advances in computing technology. *See Enfish, LLC v.
Microsoft Corp.,* 822 F.3d 1327, 1130, 1338-39 (Fed. Cir. 2016). In

BASCOM, the court determined that there was an ordered combination of conventional components that provided for filtering of internet content based on the location of a filtering component in a network. *BASCOM,* 827 F.3d at 1350. However, claim 33 simply recites "counting" votes to produce an "aggregated" performance prediction. Claim 33 does not provide any specific software routine for performing the claimed counting and aggregation, and therefore does not provide more than mental steps with a directive to apply a computer. This situation falls within the Guidance's example of not being integrated into a practical application, i.e., where a claim "merely includes instructions to implement an abstract idea on a computer, or merely uses a computer as a tool to perform an abstract idea." 84 Fed. Reg. at 55; *see also buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) (generic use of computer).

Appellants also argue that the Federal Circuit decision in *McRO* confirms the importance of preemption as a factor in the patentability analysis and that the Examiner has not shown that claim 33 preempts all methods of "specifying," "receiving," "generating," or "predicting asset performance using votes." Appeal Br. 18. In *McRO*, the court explained that the claimed invention "uses a combined order of specific rules that renders information into a specific format that is then used and applied to create desired results: a sequence of synchronized, animated characters." *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1315 (Fed. Cir. 2016). Here, the generic manner in which the computer and graphical display are used could preempt all, or nearly all, uses of the abstract idea of predicting asset price with a statement of confidence by aggregating votes and displaying the result on a computer.

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Appellants argue that the Examiner incorrectly analogizes the present case to *Digitech* because *Digitech* did not use any physical device. Appeal Br. 15 (citing *Digitech Image Technologies, LLC v. Electronics for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014)). We are unpersuaded. Like *Digitech* which involved a claim that combined multiple data sets into one data set, claim 33 aggregates multiple predictions into a single prediction. Although the Court in *Digitech* observed that the claim in that case was not tied to specific structure or machine (*see id.*, 758 F.3d at 1350), claim 33 in this appeal is not tied to a specific type of hardware. *See* Spec. 16:21 ("Again those skilled in the art will appreciate that the particular hardware is not critical to the operation of the invention").

Appellants argue that the Board has already found a technical inventive concept in its previous Board decision, i.e., an interface which presents to members both an aggregated prediction performance, and a separate prediction by the computing system that such performance will be attained based on determining an overall accuracy parameter for a particular community. Appeal Br. 16. However, the Board was, in context, evaluating the teachings of a specific prior art reference which was the subject of an obviousness rejection, and was not evaluating these claims under § 101, which we evaluate herein.

Step 2B

We next consider whether the claim possesses additional elements that, individually or in combination, provide an inventive concept. Guidance, 84 Fed. Reg. at 56. We evaluate in this step whether a claim merely appends well-understood, routine, and conventional activities, specified at a high level of generality to the judicial exception. *Id.*

The Examiner determines that "**receiving and counting votes from a population of persons in the community concerning said asset with the computer system**" is based on a Delphi (panel based) approach to prediction and is a routine and conventional computer function to receive and tally data; "**wherein said votes specify a predicted value for a performance of said asset at said prediction target date**" also refers to receiving and counting data; and "**generating a graphical output region with the computing system within an electronic graphical interface**. . ." recites the output of the abstract idea; and "**generating a prediction rating . . . based on an overall accuracy parameter . . .**" makes use of a statistical calculation. Final Act. 9–11.

We agree with the Examiner that the type of calculations that one might use to aggregate predictions (even if not claimed) are routine and conventional types of computer functions. *See* Final Act. 10–11. For example, the Specification describes that a vote can be one of 5 predefined indicators: "strongly positive sentiment (double up arrow); positive sentiment (single up arrow); neutral sentiment (disc); negative sentiment (single down arrow); strongly negative sentiment (double down arrow)" or "+10, +5, 0, -5, -10." Spec. 13:24–29, 14:3–5. In other embodiments, voting members are assessed based on their experience and the accuracy of their previous predictions. *See* Spec. 14:20–25; *see also id.* at 15:27–31. The Specification also describes a table showing the highest community wide positive rating. *Id.* at 15:10–11. We agree with the Examiner that such measures for expressing confidence (by voting) are well-understood routine and conventional, and do not transform an abstract idea into patentable subject matter. For example, the Specification indicates that additional

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statistical methods that could be developed by a person of ordinary skill.
See Spec. 12:30–31 ("Additional statistical data could be derived over time
to measure and identify community biases (positive and negative) for
particular securities.").

For the foregoing reasons, we sustain the Examiner's rejection of
claims 33–37 under § 101.

Claim 38

Appellants argue that the Examiner does not take into account
additional limitations in claim 38, i.e., "an aggregated prediction
performance for said prediction target date based on all members
contributing votes for said asset"; "a member prediction performance for
said prediction target date for said asset"; "historical data for a prior price
behavior of said asset"; and "a confidence rating which is based on
evaluating an accuracy parameter of said population of persons in the
community and which rating identifies a likelihood of said future aggregated
performance prediction being achieved." Appeal Br. 19–20.

However, we have already analyzed the substance of these limitations
above, in discussing the Specification's description corresponding to the
limitations of claim 33. As above, we agree with the Examiner that the
statistical analysis for these panel-based voting limitations are well-
understood, routine, and conventional. Therefore, we sustain the Examiner's
rejection under § 101 of claim 38 for similar reasons as claim 33.

Claims 44–46

Independent claims 44–46 recite an "electronic system" or an
"Internet based electronic system," which are articles of "manufacture"

falling within one of the categories enumerated under § 101, with respect to Step 1 of the Guidance.

With respect to the other steps of the Guidance, Appellants argue that the Examiner does not take into account additional limitations in claims 44–46, which provide software routines. Reply Br. 9–10. We have reviewed the language of claims 44–46 and determine that the limitations of claims 44–46 are substantially the same as claims 33 and 38. We note that claim 44 uses the term "item" without using the term "asset," but we determine that predicting the performance of an item is also a fundamental economic principle, whether that item is a service or an asset. We do not discern that claims 44–46 provides routines, and at most provide an instruction to apply a generic computer. Therefore, we sustain the Examiner's rejection under § 101 of claims 44–46 for similar reasons as claims 33 and 38.

Remaining claims

Appellants do not argue for the remaining claims separately from claims 33–38 and 44–46. Therefore, we sustain the Examiner's rejection of the remaining claims under § 101 for similar reasons.

DECISION

The Examiner's decision to reject claims 33–56 is affirmed.

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

AFFIRMED