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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN LABUSZEWSKI, JOHN NYHOFF, DAVID BOBERSKI, MIKE KAMRADT, ROBERTA PAFFARO, EDWARD GOGOL, JOHN WILEY, RICHARD CO, and STEVE YOUNGREN

Appeal 2018-004238
Application 15/079,752
Technology Center 3600

Before BRADLEY W. BAUMEISTER, NABEEL U. KHAN, and MICHAEL M. BARRY, *Administrative Patent Judges*.

KHAN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Pursuant to 37 C.F.R. § 41.52, Appellant[1] filed a Request for Rehearing ("Req. Reh'g"), dated August 28, 2019, seeking reconsideration of our Decision on Appeal mailed July 2, 2019 ("Decision"), in which we affirmed the Examiner's rejection of claims 1–23 under 35 U.S.C. § 101 as directed to patent-ineligible subject matter. We have jurisdiction over the Request for Rehearing under 35 U.S.C. § 6(b).

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[1] Appellant identifies Chicago Mercantile Exchange Inc. as the real party in interest. App. Br. 2.

A request for rehearing must state with particularity the points believed to have been misapprehended or overlooked. Arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs are not permitted in the request for rehearing. *See* 37 C.F.R. § 41.52(a)(1). Also, a request for rehearing is not an opportunity to merely express disagreement with a decision without setting forth points believed to have been misapprehended or overlooked. The proper course for an Applicant dissatisfied with a Board decision is to seek judicial review, not to file a request for rehearing to reargue issues that have already been decided. *See* 35 U.S.C. §§ 141, 145.

In the Request for Rehearing, Appellant argues "that the Board has misapprehended or otherwise overlooked the applicability of Prong Two of the USPTO's Revised Patent Subject Matter Eligibility Guidance, i.e. whether the claim recites additional elements that integrate the judicial exception into a practical application." Req. Reh'g 2. According to Appellant,

> the current claims are integrated into a practical application of enabling a computer implemented margin management system of an electronic trading system to do something it could not do before, indirectly move a pre-defined monetary value among accounts of traders, specifically within the environment of a central counter-party based trading system where, due to the novation by the central counter-party in any transaction, direct movement of value between accounts is not permitted.

Req. Reh'g 3.

Appellant also emphasizes that the claim limitations

> are not operations [that] generally occur when analyzing the risk of a portfolio of derivative products. Instead, as noted above, quite the opposite occurs when analyzing risk, i.e. the market value of the derivatives is first determined and then compared

> with the positions in the trader's accounts, after which appropriate margin is credited or debited therefrom. But here, instead, the value to be credited/debited is first determined, positions suited to cause the margin system to move this predefined value are then created in the respective trader's accounts, and then the margin system is left to operate as it always has by recognizing the gain or loss of the fabricated positions and value and crediting/debiting the value as desired.

Req. Reh'g 5.

We are unpersuaded by Appellant's arguments. In our Decision we reviewed the Examiner's rejection and the Appellant's arguments in light of the USPTO's January 7, 2019 Memorandum, 2019 Revised Patent Subject Matter Eligibility Guidance ("Guidance"). Under step 2A of the Guidance, we first look to whether the claim recites:

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

See Guidance, 84 Fed. Reg. at 52–55.

Only if a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, do we then move to step 2B of the Guidance to determine 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, 84 Fed. Reg. at 56.

Prong One of Step 2A

Under prong one of step 2A of the Guidance, we reviewed claim 1's limitations to determine whether the claim recites an abstract idea. We found that it does. Decision 6–7. For example, claim 1 recites (1) a "method of facilitating a payment between traders based on a first position in a first instrument held by a first trader to which a second trader is a counterparty," (2) "determining . . . the amount of a payment to be made from one of the first or second trader to the other . . . in advance of settlement" based on a first position in an instrument and a fixed percentage of a final settlement value, (3) "assigning . . . a second position to the first trader in a futures contract characterized by a settlement date, a quantity and a price . . . and a third position to the second trader, counter to the second position, in the futures contract, the first and second traders not being identified to each other," (4) "valuing . . . the futures contract at a spot value different from the price of the futures contract," and (5) "modifying [account records associated with the first and second traders] . . . to reflect" a credit or debit from the accounts of the first and second traders depending on the "difference between the value of the second position and the spot value."

Under the broadest reasonable interpretation of claim 1, these limitations recite steps of facilitating payments between traders by assigning the traders positions in a futures contract. The facilitation of payments between traders by way of assigning positions in futures contracts is a fundamental economic practice akin to the concept of intermediated settlement in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 219 (2014) ("[o]n 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"), and the concept of hedging in *Bilski v. Kappos*, 561 U.S. 593, 611 (2010) ("[c]laims 1 and 4 in petitioners' application explain the basic concept of hedging, or protecting against risk"). Under the Guidance, fundamental economic practices fall under the category of certain methods of organizing human activity, which the Guidance recognizes as constituting an abstract idea. *See* Guidance, 84 Fed. Reg. at 52.

Prong 2 of Step 2A

We note that Appellant does not dispute that the claims recite an abstract idea under our prong 1 of step 2A analysis, but rather argues that "the Board has misapprehended or otherwise overlooked the applicability of Prong Two" of the Guidance. Req. Reh'g 2. Under prong 2 of step 2A of the Guidance we determine whether the claim as whole integrates the recited abstract idea into a practical application of the abstract idea. A claim that integrates a judicial exception into a practical application will apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception. To evaluate whether the claims integrate the abstract idea into a practical application, we identify whether there are any additional elements recited beyond the abstract idea, and evaluate those additional elements individually and in combination.

Some exemplary considerations laid out by the Supreme Court and the Federal Circuit indicative that an additional element integrates an abstract idea into a practical application include (i) an improvement in the functioning of a computer or to another technological field, (ii) an application of the judicial exception with, or by use of, a particular machine, (iii) a transformation or reduction of a particular article to a different state or thing, or (iv) a use of the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment. *See* MPEP § 2106.05(a)–(c), (e)–(h).

We have already analyzed, under prong one, the claim limitations individually and found that each recites or relates to a fundamental economic practice of facilitating payments between traders by assigning the traders positions in a futures contract. Before we turn to analyzing the claim limitations as a whole, we review Appellant's Specification.

The Specification explains that "in futures contract clearing, a margin account offsets losses or gains related to the price change of a contract." Spec. ¶ 10. However, "the only way to move money in or out of a margin account is by changing the price of the futures contract." *Id.* According to the Specification, "[c]urrent systems, however, cannot handle related cash flows like coupons, interest on variation margin, or other periodic or occasional payments made by one trader to another while the related position remains open . . . ." *Id.* The Specification explains that in other contexts, such as the over-the-counter ("OTC") market, "any collateral in the prime broker account of a counterparty remains the property of the trader, and thus the trader is entitled to at least one additional margin account cash flow, which is interest on the collateral." *Id.* "Current futures contract clearing systems, [however,] do not support this type of payment requiring separate/external ad hoc payment and accounting mechanisms to manage." *Id.* Thus, the problem that Appellant proposes to resolve is one that is particular to the futures exchange, such as the Chicago Mercantile Exchange, where moving money from accounts is more restricted than in other trading contexts.

Appellant, therefore, proposes "[a] system for moving money between accounts of traders by a central counterparty to facilitate payments, i.e. the movement of funds, there between is disclosed[,] which provides a flexible mechanism [that] supports simpler accounting, new types of derivatives contracts as well as new types of fees." Spec. ¶ 10. This is done by use of a "futures contract, referred to as a 'payer' contract, compris[ing] a 'no-uncertainty' futures contract, i.e. the initial value and settlement value parameters are defined and/or pre-determined and, thereby, the buyer and seller are not exposed to market risk." Spec. ¶ 12. "The disclosed payer contract leverages the mechanisms of the clearing system . . . ." *Id.* "The function of the payer contract is to guarantee, by creating a defined and riskless position value and settlement value, the movement of money from related positions." Spec. ¶ 12. In other words, to move money between the accounts of traders, the invention enters the traders into positions in a futures contract, i.e., the payer contract, and values the contract so that the appropriate amount of money is transferred between accounts. The payer contract operates as an intermediary for indirectly making the payment.

Turning now to the claim limitations a whole, the claim makes clear that it relates to "facilitating a payment between traders based on a first position in a first instrument held by a first trader to which a second trader is a counterparty." First, the amount of the payment is determined. To ensure the payment of this amount from one trader to the other, the claimed invention assigns "a second position to the first trader in a futures contract" and "a third position to the second trader . . . in the futures contract." This futures contract is "spot value[d] different from the price of the futures contract, the spot value being based on the determined payment amount."

Then the accounts of the traders are credited and debited based on the "difference between the value of the second position and the spot value" which corresponds to the payment amount.

The claims correspond with the description of the invention from the Specification summarized above. For example, the "futures contract" referred to in the claim corresponds to the "payer contract" described in the Specification. The payer contract is spot valued appropriately so that the difference between the spot value and the actual value is the amount of payment that needs to be made from one trader to the other. The payer contract is used as an intermediary vehicle for making the payment.

As can be seen, Appellant's invention attempts to resolve a problem related to the clearing procedures of the futures exchange that prevents direct payments between certain accounts. It does so by proposing an intermediary futures contract as the vehicle by which this payment is made. As is evident, the problem being solved and the proposed solution are not technological by nature, nor do they reflect an improvement in the functioning of a computer or to another technological field. The references to the "computer implemented method," the "payment processor," the "settlement processor," and the "margin processor" simply link the fundamental economic practice to a technological environment, but they do not reflect a technological solution or improvement.

Appellant argues "the current claims are integrated into a practical application of enabling a computer implemented margin management system of an electronic trading system to do something it could not do before, indirectly move a pre-defined monetary value among accounts of traders, specifically within the environment of a central counter-party based trading system where, due to the novation by the central counter-party in any transaction, direct movement of value between accounts is not permitted." Req. Reh'g 3.

Appellant provides no evidence, however, that the inability of the margin management system to indirectly move a pre-defined monetary value among accounts of traders is a technological inability or is an inability of the computers upon which the margin management system is implemented. Rather the inability stems from how the system is used and by the rules that it follows. Appellant acknowledges as much, stating that the reason the system could not indirectly move money between accounts of the traders is "due to the novation by the central counter-party in any transaction" under which "direct movement of value between accounts is not permitted." Req. Reh'g 3. According to Appellant's Specification "novation" refers to the clearing procedure "through which the Clearing House becomes buyer to each seller of a futures contract, and seller to each buyer . . . and assumes responsibility for protecting buyers and sellers from financial loss by assuring performance on each contract." Spec. ¶ 3. This description indicates that permission not being granted for the direct movement of value between accounts is a result of the clearing procedure—not a result of the technological capability of the computer system upon which the invention is implemented.

Appellant also argues "the claimed invention operates in a manner [that] upends known computer implemented margin computation processing systems by enabling the system to value the claimed second position based on a previously determined payment amount so as to cause the computer implemented margining system to move that amount, as opposed to normal operation, i.e., where the computer implemented margin system values the position based on a current market value so as to determine a change, e.g. gain or loss, thereto." Req. Reh'g 4.

We are unpersuaded by Appellant's argument. Valuing the second position based on a previously determined payment amount rather than valuing it based on the current market value, is part of the method by which payment is made between the traders through the positions in the futures contract. As such, the improvement here stems from the fundamental economic practice, rather than from technical improvements to a computer or some other technological field.

Appellant analogizes their claims to those in *Ex parte Smith*, Appeal No. 2018-000064 (PTAB Feb. 1, 2019), arguing that "the automated assignment of positions based on a predefined value and subsequent operations to credit/debit that value are just as technological as delaying execution with a timer (Decision, p. 9) and used to improve prior trading systems." Req. Reh'g 6.

This argument is also unpersuasive. First, we note that *Ex parte Smith* is not binding upon this panel. Second, and more importantly, the claims in *Ex parte Smith* are distinct from the claims here. In *Ex parte Smith*, the claim involved a timer that delayed automatic execution of a trade. *Ex parte Smith*, slip op. at 2. The Board found that "the claimed timing mechanisms and the associated temporary restraints on execution of trades provide a specific technological improvement over prior derivatives trading systems." *Ex parte Smith*, slip op. at 9.

The problem being solved was related to "inequitable access to information aris[ing] only in the context of hybrid trading platforms where trades occur both 'in the pits' and electronically." *Id*. at 10. Thus, the claims in *Ex parte Smith* "overcome a problem specifically arising in the realm of computer networks." *Id*. (quoting *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014)). As explained above, the problem being solved by Appellant's claims does not arise in the realm of computer networks, but rather stems from the clearing procedure of the futures exchange. Nor is Appellant's solution, the introduction of an intermediary futures contract, akin to the technical solution of a timer in *Ex parte Smith*.

Accordingly, we find under step 2A of the Guidance that the claims are directed to an abstract idea.

Step 2B of the Guidance

Under step 2B of the Guidance we analyze the claims to determine whether they provide an inventive concept (*i.e.*, whether the additional elements amount to significantly more than the exception itself). Considerations that are evaluated with respect to step 2B include determining whether the claims as a whole add a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field.

Initially, we note Appellant does not present arguments under our analysis of Step 2B. As such we reiterate here, as we did in our Decision, that the claim limitations beyond those that are directed to the above identified abstract idea do not add limitations that are not well-understood, routine, conventional activity in the field. *See* Decision 8–11. The claims include the recitation of a "payment processor," "settlement processor," "margin processor," and "account database stored in a memory coupled with the processor." However, nothing in the claims or Specification indicates that these elements are anything but standard generic computer elements that function in their well understood, routine, and conventional manner.

For example, the Specification describes that "the processor 402 may be part of a *standard personal computer or a workstation*. The processor 402 may be one or more *general processors, digital signal processors, application specific integrated circuits, field programmable gate arrays, servers, networks, digital circuits, analog circuits*, combinations thereof, or other now known or later developed devices for analyzing and processing data." Spec. ¶ 138 (emphasis added). Similarly, the Specification states, "[t]he memory 404 may be an external storage device or database for storing data. Examples include a hard drive, compact disc ('CD'), digital video disc ('DVD'), memory card, memory stick, floppy disc, universal serial bus ('USB') memory device, or any other device operative to store data." Spec. ¶ 139. This description supports the finding that these elements are generic elements that operate in their well-known and standard manner and also do not reflect an improvement to computer technology.

CONCLUSION

Accordingly, we are not persuaded of any basis for modifying the Decision in light of the arguments presented in the Rehearing Request.

DECISION

We deny Appellant's Request with respect to making any changes to our Decision.

DENIED