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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROGER M. SNOW

Appeal 2018-004251
Application 14/462,346
Technology Center 3700

Before MICHAEL L. HOELTER, BRADLEY B. BAYAT, and
FREDERICK C. LANEY, *Administrative Patent Judges*.

LANEY, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner’s decision to reject claims 1–14 and 17–22 under 35 U.S.C. § 101 as directed to non-statutory subject matter. Claims 15, 16, and 23–26 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Bally Gaming, Inc. (D/B/A Bally Technologies, Inc.) and Scientific Games Corporation. Appeal Brief (“Appeal Br.”) 2, filed Sept. 12 2017.

BACKGROUND

Appellant's disclosure relates to "methods of administering wagering games for casinos and other gaming establishments, and related systems and apparatuses." Spec. ¶ 1. The claims more specifically describe methods "of administering wagering games [which] may involve accepting an ante wager and a blind wager from a player." *Id.* Abstract. The administration of a wagering game involves the following steps. *Id.* ¶ 5. "[A]ccepting a mandatory ante wager from a player on a game of five-card stud poker played against a dealer hand" in a first designated area on the gaming table. *Id.* A mandatory blind wager that qualifies as a predetermined winning hand may be accepted from the player by receiving a wager in a second designated area on the gaming table, which is separate and distinct from the first designated area. *Id.* Five randomized physical cards are dealt to the player and to the dealer from a 53-card deck, which includes a standard 52-card deck of playing cards and one joker. *Id.* A play wager may be accepted from the player by receiving a wager in a third designated area of the table. *Id.* The ante and blind wagers remain in play, or the player may fold, which forfeits their respective wager. *Id.* The ante and play wagers may be resolved by comparing the dealer hand to a player hand. *Id.* "A payout on the ante and play wagers may be paid to the player when the player hand outranks the dealer hand and the ante and play wagers may be collected when the dealer hand outranks the player hand." *Id.* "The blind wager may be resolved by comparing the dealer hand to the player hand and comparing the player hand to a set of predetermined winning hands." *Id.* A payout on the blind wager may be paid when the player hand outranks the dealer hand and when the player hand is a predetermined winning hand. *Id.*

“The blind wager may be returned to the player (push) when the player hand outranks the dealer hand and the player hand is not a predetermined winning hand.” *Id.* The blind wager may be collected when the dealer hand outranks the player hand. *Id.*

Claims 1 and 13 are independent, from which the remaining claims depend. Illustrative claim 1 is reproduced below with bracket text, bolding, and italicizing added.

1. A method of administering a wagering game, comprising:
 - [(a)] **accepting** a mandatory ante wager from a player on a game of five-card stud poker played against a dealer hand *by receiving a physical, monetarily valuable wagering element in a first designated area on a surface of a gaming table;*
 - [(b)] **accepting** a mandatory blind wager that a hand dealt to the player will qualify as a predetermined winning hand from the player *by receiving a physical, monetarily valuable wagering element in a second designated area on the surface of the gaming table, the second designated area being separate and distinct from the first designated area;*
 - [(c)] **dealing** *five randomized physical cards to the player and to the dealer hand from a 53-card deck including a standard 52-card deck of playing cards and one joker, the joker and four deuces being designated as wild cards;*
 - [(d)] **accepting** a play wager from the player *by receiving a physical, monetarily valuable wagering element on the surface of the gaming table, responsive to which the ante and blind wagers remain in play by leaving the wagering elements associated with the ante and blind wagers in the first and second designated areas, respectively, or accepting a player election to fold, responsive to which the wagering elements associated with the ante and blind wagers are physically collected;*

- [(e)] **resolving** the ante and play wagers by *comparing the dealer hand to a player hand held by the player;*
- [(f)] **paying** a payout on the ante and play wagers to the player when the player hand outranks the dealer hand by *physically transferring wagering elements to the player and physically collecting the wagering elements associated with the ante and play wagers when the dealer hand outranks the player hand;*
- [(g)] **resolving** the blind wager by *comparing the dealer hand to the player hand and comparing the player hand to a set of predetermined winning hands;* and
- [(h)] **paying** a payout on the blind wager to the player when the player hand outranks the dealer hand and the player hand is a predetermined winning hand by *physically transferring wagering elements to the player, returning the blind wager to the player when the player hand outranks the dealer hand and the player hand is not a predetermined winning hand by physically transferring the wagering element associated with the blind wager to the player, and physically collecting each wagering element associated with the blind wager when the dealer hand outranks the player hand, regardless of whether the player hand is a predetermined winning hand.*

JUDICIAL EXCEPTIONS

The Patent Act defines subject matter eligible for patent protection as “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101. Yet the Supreme Court has “long held” that this provision contains an important implicit exception: “[l]aws of nature, natural phenomena, and abstract ideas are not patentable.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U. S. 576, 589 (2013). These three concerns are “judicially created exceptions to § 101,” or more concisely, “judicial exceptions.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1311 (Fed. Cir. 2016).

Thus, an “abstract idea” is a judicial exception to subject matter (e.g., a method) that would otherwise be deemed patent eligible under 35 U.S.C. § 101.

THE *ALICE* TEST

In *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014), the Supreme Court provided a two-step test to detect when an attempt is being made to patent an abstract idea in isolation. *Id.* at 217–18. In *Alice* step one, a determination is made as to whether the claim at issue is “directed to” an abstract idea. *Id.* at 218. When analyzing a claim under *Alice* step one, attention can be given to whether an abstract idea recited in the claim has been integrated into a practical application “thereby ‘transform[ing]’ them into a patent-eligible invention.” *Id.* at 217 (referencing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 72 (2012)). While a judicial exception (e.g., an abstract idea) cannot be patented, “an *application*” of a judicial exception “to a known structure or process may well be deserving of patent protection.” *Diamond v. Diehr*, 450 U.S. 175, 187 (1981); *see also Bilski v. Kappos*, 561 U.S. 593 (2010).

If the claim at issue is “directed to” an abstract idea, *Alice* step two must be performed. *See Alice*, 573 U.S. at 217–18. In the second step of the *Alice* test, a determination is made as to whether “additional elements” in the claim, both individually and as an ordered combination, contribute “significantly more” than the abstract idea. *Id.* When analyzing a claim under *Alice* step two, attention is given to whether additional elements, and any ordered combination thereof, are “well-understood,” “routine,” or “conventional.” *Id.* at 225.

2019 § 101 GUIDANCE

The 2019 Revised Patent Subject Matter Eligibility Guidance (“2019 § 101 Guidance”) provides us with specific steps for discerning whether a claim passes the *Alice* test for patent eligibility. *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019). These steps are “[i]n accordance with judicial precedent” and consist of a two-pronged Step 2A and a Step 2B. *Id.* at 52.

ANALYSIS

The Examiner determines that the claims are directed to non-statutory subject matter under 35 U.S.C. § 101. Final Act. 2–6.² Appellant argues claims 1–14 and 17–22 as a single group. *See* Appeal Br. 10–16. As a result, we select claim 1 as representative, and the remaining claims stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner determines that independent claim 1 is “directed to” an abstract idea of “game rules” and “managing a game,” which are “similar to the types of ‘methods of organizing human activity’ found abstract by the courts”; and the Examiner determines that additional elements in independent claim 1 do not amount to “significantly more” than this abstract idea. Final Act. 3, 5. Appellant contends claim 1 is not directed to an abstract idea because there are “differences between the claimed method[] and conventional methods of administering five-card stud poker” and, “[e]ven if the claims were directed to an abstract idea, the claims are patent eligible because each is limited to a specific, practical application of the underlying game rules by requiring performance of unconventional actions

² Final Office Action (“Final Act.”), dated Feb. 27, 2017.

in combination with the other required actions and physical implementation.” Appeal Br. 10. For the following reason, we are not persuaded the Examiner reversibly erred.

Step 2A – Prong One

Per the 2019 § 101 Guidance, we begin our analysis with the first prong of Step 2A (“Prong One”) where we determine whether the claim “recites” an abstract idea. 2019 § 101 Guidance, 84 Fed. Reg. at 54. The Guidance “extracts and synthesizes key concepts identified by the courts as abstract ideas,” and these concepts include “[c]ertain methods of organizing human activity,” and, more particularly, “interactions between people,” and, even more particularly, “rules or instructions.” *Id.* at 52.

For example, claims describing “rules” and/or “instructions” for a dealer’s interaction with players during a card game, “are drawn to an abstract idea.” *In re Smith*, 815 F.3d 816, 819 (Fed. Cir. 2016). In *Smith*, the dealer’s rules/instructions for interacting with the players included “accepting” game-related data from the players, “shuffling” a deck of cards, “dealing” cards to the players, “examining” the players’ hands, “resolving” player-versus-dealer standoffs, “expos[ing]” a card to the players, “allowing” to take an additional card or stand pat, “comparing” the value of each player’s hand, and “resolving” the game. *Id.* at 817–818.

Independent claim 1 sets forth a method comprising steps (a)–(h). These steps recite **accepting wagers, dealing cards, resolving wagers, and paying** a payout, which are instructions and rules that a dealer would follow in administering a wagering game. In Appellant’s words, these recitals “require that the wagering game be administered in a specific way (i.e., in player-versus-dealer format, evaluating hands by different standards,

requiring a mandatory side wager on whether a predetermined hand rank will be achieved, and requiring a single play wager).” Appeal Br. 15. Steps (a), (b), and (d) instruct a dealer to accept an ante and various kinds of wagers. Step (c) instructs a dealer to deal five cards. Steps (e) and (g) instruct a dealer to compare the respective cards dealt to resolve the wagers. Finally, steps (f) and (h) instruct a dealer to payout on the ante and the various wagers when the cards dealt to a player satisfy the conditions necessary to resolve a wager in their favor.

Thus, independent claim 1 recites instructions for organizing the activity of a dealer when interacting with players during a wagering game at a gaming table. We agree with the Examiner that these “instructions” and/or “rules” for administering a wagering game constitute a “[c]ertain method[] of organizing human activity” under the Guidance, which is an abstract idea. *See* 2019 § 101 Guidance, 84 Fed. Reg. at 52. Consequently, we proceed to the second prong of Step 2A (“Prong Two”) of the Guidance. *See id.* at 54.

Step 2A – Prong Two

Under Prong Two, we evaluate whether the claim contains additional elements that “integrate” the abstract idea “into a practical application.” (*See* 2019 § 101 Guidance, 84 Fed. Reg. at 52.) 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.” (*Id.* at 54.) The “additional elements” must be “claim features, limitations, and/or steps that are recited in the claim beyond the identified judicial exception.” 2019 § 101 Guidance, 84 Fed. Reg. at 55, n.24.

The 2019 § 101 Guidance requires us to also look at independent claim 1 as a whole in our evaluation of whether the abstract idea has been integrated into a practical application. *See id.* at 54. Even when additional elements are not enough on their own to meaningfully limit an exception, the claimed combination of these additional elements may still provide the practical application. *Id.* Indeed, the Federal Circuit has held that it is possible for “an inventive concept” to reside in “the non-conventional and non-generic arrangement of known, conventional pieces,” such as “a set of generic computer components.” *BASCOM Global Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016).

Here, the only “additional elements” beyond the recited instructions that a dealer follows during a wagering game are a gaming table and playing cards. The instructions, however, do not alter the functional or structural characteristics of those elements. Instead, those elements are merely used by the dealer while performing the recited instructions (i.e., the gaming table with designated areas for wagers provides a surface for the game and the playing cards with symbols are distributed and used to resolve wagers). Thus, under Prong Two of Step 2A, the additional elements in independent claim 1 do not integrate the abstract idea into a practical application, and we proceed to Step 2B.

Step 2B

In Step 2B, we evaluate whether “additional elements recited in the claim[] “provide[s] ‘significantly more’ than the recited judicial exception.” *See* 2019 § 101 Guidance, 84 Fed. Reg. at 56. More particularly, we evaluate whether these additional elements “add[] a specific limitation or combination of limitations that are not well-understood, routine, conventional activity,” or

whether they instead “simply append[] well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception.” *Id.* The additional elements must consist of something other than a conventional arrangement of conventional components to qualify as “significantly more” under the *Alice* test for patent eligibility. *Id.*

The gaming table and playing cards in this case, however, are merely conventional elements used with wagering games. Moreover, those elements are used in a well-understood and routine manner—the table provides a surface for the game and the distributed cards are used to resolve wagers.

Consequently, under Step 2B, the additional elements in independent claim 1 do not provide significantly more than the recited abstract idea (the instructions for a dealer to follow when interacting with players during a wagering game). We therefore agree with the Examiner that independent claim 1 fails the *Alice* test for patent eligibility.

The Appellant’s Arguments

The Appellant argues that “[t]he claimed methods are not directed to abstract ideas because they involve new and useful variations in the administration of five-card, player-versus-dealer stud poker requiring changing the standards by which hands are resolved.” Appeal Br. 11. We disagree because, regardless of the novelty of Appellant’s rules for the wagering game, the fact still remains the claimed method is describing a set of rules for a game, which the Federal Circuit has held qualifies as an abstract idea. *In re Smith*, 815 F.3d at 819. Appellant contends that *Smith* is not controlling in this case because “[t]he applicant in that case relied only

on the presence of physical cards, not on the mechanics of the game and resulting actions to be performed.” Appeal Br. 13. Appellant’s attempt to distinguish *Smith* is unpersuasive, however, because Appellant fails to provide a clear explanation of how its “mechanics of the game” is different than those involved in *Smith*, other than the specific rules of the game recited. Appellant further distinguishes *Smith* because “the actions required by the claims are unconventional and non-routine.” Reply Br. 2. But, separate from the instructions and rules of the game that encompass the abstract idea, Appellant does not adequately explain which actions are “unconventional and non-routine.” It appears Appellant is interpreting *Smith* to narrowly hold that only the specific set of rules at issue in that case are abstract ideas, but Appellant provides no basis for such a narrow reading, and we do not find support for doing so. Otherwise, Appellant’s attempt to rely the uniqueness of the recited rules themselves is misplaced because even a “brilliant” abstract idea “does not by itself satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 591 (2013).

Thus, after careful consideration of the Appellant’s arguments, we still agree with the Examiner that independent claim 1 is directed to a judicial exception without significantly more. As such, we sustain the rejection of claim 1 under § 101, including claims 2–14 and 17–22, which fall with claim 1.

Summary

We sustain the Examiner’s rejection of claims 1–14 and 17–22 under 35 U.S.C. § 101.

CONCLUSION

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-14, 17-22	101	Eligibility	1-14, 17-22	

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