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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/762,795	02/08/2013	Lee Amaitis	13-2380	8661

63710 7590 01/03/2019
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EXAMINER

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ART UNIT	PAPER NUMBER
3716	

NOTIFICATION DATE	DELIVERY MODE
01/03/2019	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LEE AMAITIS and KENNETH L. MILLER

Appeal 2018-004800
Application 13/762,795¹
Technology Center 3700

Before STEFAN STAICOVICI, LEE L. STEPINA, and
ARTHUR M. PESLAK, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Lee Amaitis and Kenneth L. Miller (“Appellants”) appeal under 35 U.S.C. § 134(a) from the Examiner’s decision in the Final Office Action (dated June 15, 2017, hereinafter “Final Act.”) rejecting claims 1, 3–10, and 12–18.² We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM.

¹ CFPH, LLC is the applicant and is identified as the real party in interest in Appellants’ Appeal Brief (filed Oct. 20, 2017, hereinafter “Appeal Br.”). Appeal Br. 3.

² Claims 2 and 11 are cancelled. *See* Appeal Br. 16–17 (Claims App’x.).

INVENTION

Appellants' invention relates to an apparatus and method for accepting wagers in a combined book and pari-mutuel environment. Spec. 1, ll. 18–26. Claims 1, 15, and 17 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. An apparatus comprising:
 - a memory;
 - a network interface to communicate with remote devices over an electronic network;
 - at least one processor to:
 - receive, via the network interface, data indicative of a request for a first wager on an event from a first remote device;
 - generate, in the memory, data indicative of the first wager between the remote device and a gaming operator;
 - in response to receiving the request, identify a proportion of the first wager to place with a pari-mutuel pool of wagers;
 - generate, in the memory, data indicative of a second wager between the gaming operator and the pari-mutuel pool of wagers, the second wager comprising the proportion of the first wager;
 - receive, via the network interface, data indicative of an outcome of the event;
 - resolve the first wager based on the outcome of the event;
- and
 - resolve the second wager with the pool based on the outcome of the event.

REJECTIONS

- I. Claims 1, 3–10, and 12–18 are rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.
- II. Claims 1, 6, 9, 13–15, 17, and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Amour (US 2007/0287533 A1, pub. Dec. 13, 2007, hereinafter

“Amour ’533”) and Aronson et al. (US 2002/0065566 A1, pub. May 30, 2002, hereinafter “Aronson”).

III. Claims 3 and 4 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Amour ’533, Aronson, and Amour (US 7,537,521 B2, iss. May 26, 2009, hereinafter “Amour ’521”).

IV. Claims 5, 7, 8, 10, and 16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Amour ’533, Aronson, and Mindes et al. (US 2007/0293310 A1, pub. Dec. 20, 2007, hereinafter “Mindes”).

V. Claim 12 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Amour ’533, Aronson, and Flaherty et al. (US 2013/0178270 A1, pub. July 11, 2013, hereinafter “Flaherty”).

ANALYSIS

Rejection I

Appellants have not presented arguments for the patentability of claims 3–10 and 12–18 apart from claim 1. *See* Appeal Br. 8–10.³ Therefore, in accordance with 37 C.F.R. § 41.37(c)(1)(iv), we select claim 1 as the representative claim to decide the appeal, with claims 3–10 and 12–18 standing or falling with claim 1.

³ Appellants’ Reply Brief (dated Apr. 4, 2018, hereinafter “Reply Br.”) relies on the arguments discussed in the Appeal Brief with no additional arguments. *See* Reply Br. 2.

Section 101 of the Patent Act defines patent-eligible subject matter: “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. In interpreting this statutory provision, the Supreme Court has held that its broad language is subject to an implicit exception for “laws of nature, natural phenomena, and abstract ideas,” which are not patentable. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014).

The Supreme Court has set forth “a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice*, 134 S. Ct. at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012)). According to the Supreme Court’s framework, we must first determine whether the claims at issue are directed to one of those concepts (i.e., laws of nature, natural phenomena, and abstract ideas). *Id.* If so, we must secondly “consider the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 79, 78). The Supreme Court characterizes the second step of the analysis as “a search for an ‘inventive concept’ — *i.e.*, an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” *Id.* (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73).

Step One

The Examiner determines that the claimed invention is “directed to the abstract idea of wagering.” Final Act. 2. The Examiner states that wagering is “rooted in the same fundamental economic principles as hedging a financial investment and forming a contractual relationship” that have been identified as abstract ideas in cases such as *Bilski v. Kappos*, 561 U.S. 593 (2010) and *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014). Final Act. 2–4. According to the Examiner, the claimed limitations do not amount to significantly more than the abstract idea because they are well-understood, routine, conventional activities that “do not provide meaningful limitations to transform the abstract idea into a patent eligible application of the abstract idea such that the claim(s) amounts to significantly more than the abstract idea itself.” *Id.* at 3 (citing *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014)).

The first prong of the test requires us to determine whether the challenged claims are directed to an abstract idea. To that end, Appellants argue that the claims are patent eligible because the Examiner’s citation to *Bilski* is not “**an appropriate court decision ... reasonably tied to the facts of the [present] case.**” Appeal Br. 9. Appellants contend that whereas the claimed subject matter is directed to wagering, “the representative claim in *Bilski* was drawn to transactions between a commodity provider and commodity consumers. Therefore, **the facts of *Bilski* are not reasonably tied to the facts of the instant case.**” *Id.* Appellants assert that moreover, the claims are patent-eligible consistent with the USPTO eligibility guidelines of Nov. 2, 2016, because the “claims recite a ‘**set of rules ... that improve computer-related technology by**

allowing computer performance of a function not previously performable by a computer.” Appeal Br. 10.

Appellants’ arguments are not persuasive because we agree with the Examiner that the claimed wagering method⁴ is reasonably tied to risk mitigation, as in *Bilski*, because placing a larger portion of riskier bets in the pari-mutuel pool reduces, that is, mitigates, risk. See Examiner’s Answer 3–4 (dated Feb. 8, 2018, hereinafter “Ans.”). For example, Appellants’ Specification describes that “[a] more risky . . . wager may go entirely into the pool and/or have a greater portion put into the pool.” Spec. 7, ll. 9–18; cf. *Bilski* 561 U.S. at 611 (“the basic concept of hedging, or protecting against risk . . . is an unpatentable abstract idea.”); see also *In re Smith*, 815 F.3d 816, 817 (Fed. Cir. 2016) (“On the first step, we conclude that Applicants’ claims, directed to rules for conducting a wagering game, compare to other ‘fundamental economic practices’ found abstract by the Supreme Court.”).

In conclusion, when read as a whole, independent claim 1 is directed to mitigating risk in wagering, and, for the reasons discussed above, constitutes an abstract idea under the first step set forth in *Alice*. *Alice*, 134 S. Ct. at 2355. The question to be settled next is whether claim 1 recites an

⁴ Although we appreciate that independent claims 1 and 15 are drawn to an apparatus, nonetheless, “the basic character of a process claim drawn to an abstract idea is not changed by claiming only its performance by computers, or by claiming the process embodied in program instructions on a computer readable medium.” See *CyberSource*, 654 F.3d at 1375–76 (citing *In re Abele*, 684 F.2d 902 (CCPA 1982)). The introduction of a generic element, such as a processor, into an apparatus claim, such as claims 1 and 15, has been deemed insufficient by the Supreme Court to transform a patent-ineligible claim into one that is patent-eligible. See *Alice*, 134 S. Ct. at 2358.

element, or combination of elements, that is enough to ensure that the claim is directed to significantly more than an abstract idea.

Step Two

As to the second part of the *Alice* eligibility analysis, Appellants' arguments that the claimed invention is an improvement in computer functionality (*see* Appeal Br. 12) are also unpersuasive because the Court in *Alice* made clear that a claim directed to an abstract idea does not move into section 101 eligibility territory by "merely requir[ing] generic computer implementation." *Alice*, 134 S. Ct. at 2357. Whereas the claims at issue might improve wagering (i.e., the abstract idea), Appellants do not provide evidence or persuasive arguments that the generic computer has improved functionality. The test is not whether the claimed "processor" can perform a "new" function, i.e., mitigate risk in wagering. It is whether performing the function allows the claimed "processor" to function better. Here, we agree with the Examiner that the claimed "processor" functions in a conventional manner to receive and resolve a wager. *See* Ans. 5–6; *see also* Spec. 23, ll. 28–24, l. 13.

For the above reasons, the recited elements, considered individually and as an ordered combination, do not constitute an "inventive concept" that transforms independent claim 1 into patent-eligible subject matter. *See Alice*, 134 S. Ct. at 2355. Accordingly, we sustain the rejection of claim 1 under 35 U.S.C. § 101 as directed to patent-ineligible subject matter. Claims 3–10 and 12–18 fall with claim 1.

Rejection II

Appellants have not presented arguments for the patentability of claims 6, 9, 13–15, 17, and 18 apart from claim 1. *See* Appeal Br. 13–14. Therefore, we select claim 1 as the representative claim to decide the appeal of the rejection of these claims, with claims 6, 9, 13–15, 17, and 18 standing or falling with claim 1.

In rejecting independent claim 1, the Examiner finds that Amour '533 discloses most of the recited features including, *inter alia*, generating data indicative of a first wager, and a second wager that is a portion of the first wager, but relies on Aronson to disclose “a wager between a racetrack (*game operator*) and a totalizator (*pari-mutuel pool of wagers*).” Final Act. 7 (citing Aronson, para. 47). The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify Amour '533 to generate data indicative of “a wager between the gaming operator and a pari-mutuel pool of wagers, as taught by Aronson, in order to reduce the risk of a book by generating less risky pari-mutuel wagers to hedge the more risky fixed wagers.” *Id.* (citing Aronson, paras. 3, 4).

Appellants argue that Amour '533 does not allocate a proportion of a first wager into a pari-mutuel pool of wagers, as called for by claim 1, because Amour discloses that non-winning players are allocated entries to a supplementary gaming activity based on the player's supplementary contribution amount. Appeal Br. 11. According to Appellants, allocating entries as in Amour '533 is “based on a contribution amount (i.e., the more contributed the more allocated entries).” *Id.*

We are not persuaded by Appellants' arguments for the following reasons. We agree with the Examiner that because Amour '533 discloses an

entry fee (first wager) that is a “total contribution amount,” the entry fee includes a primary contribution amount and a supplementary contribution amount (second wager). Final Act. 7; *see also* Amour ’533, paras. 52–55. The Examiner is correct that the entry fee in Amour ’533 constitutes a first wager and that the supplementary contribution in Amour ’533 is a proportion of the first wager. *See* Ans. 7. Hence, because Amour ’533 “discloses, ‘allocating to each player identified at step 1002 one or more supplementary entries in a supplementary gaming activity, which, in the present example, is a pari-mutuel gaming activity,’” we agree with the Examiner that Amour ’533 identifies a proportion of the first wager, that is, the supplementary contribution amount, to place with a pari-mutuel pool of wagers. *Id.* As such, the portion that is used for the second wager is used in “pari-mutuel gaming activity.” *See* Amour ’553, para. 272. Moreover, to the extent that Appellants are arguing that “pari-mutuel gaming activity” is not a wager, we note that Amour ’533 defines “pari-mutuel” as synonymous with “mutual betting” (wagering). *Id.*, para. 168.

Appellants also argue that Amour ’533 “does not disclose ‘**a second wager between the gaming operator and the pari-mutuel pool of wagers**’, **the second wager comprising the proportion of the first wager**,” because the pari-mutuel gaming activity in Amour ’533 is “**not a wager between the gaming operator and the pari-mutuel pool of wagers**.” Appeal Br. 11–12. According to Appellants, “*Aronson* does not cure the deficiencies in *Amour* [’533].” *Id.* at 12.

Appellants’ arguments are not persuasive because the Examiner relies on *Aronson*, not Amour ’533 to disclose a wager between a gaming operator and a pari-mutuel pool of wagers. *See* Ans. 7. Specifically, *Aronson*

discloses that “[t]otalisators 30 are the computer systems that may be used to handle pari-mutuel wagers made at the racetracks, made at off-track betting establishments, and made using interactive wagering system 10. Totalisators 30 may place wagers into applicable pari-mutuel wagering pools.” Aronson, para. 47; *see also* Ans. 7. As such, given that Aronson discloses using computer systems to handle pari-mutuel wagers made at the racetracks, Appellants do not persuade us that the Examiner’s finding of “Aronson teach[ing] a wager between a racetrack (*game operator*) and a totalizator (*pari-mutuel pool of wagers*)” is in error. Final Act. 6–7.

In conclusion, for the foregoing reasons, we sustain the rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Amour ’533 and Aronson. Claims 6, 9, 13–15, 17, and 18 fall with claim 1.

Rejections III–V

Appellants’ arguments rely on the arguments discussed *supra*, in the rejection of claim 1, from which claims 3–5, 7, 8, 10, and 12 depend. *See* Appeal Br. 14. Claim 16 depends from independent claim 15, which falls with claim 1. *Id.*

Therefore, for the same reasons as discussed above, we also sustain the rejections under 35 U.S.C. § 103(a) of claims 3 and 4 as unpatentable over Amour ’533, Aronson, and Amour ’521; of claims 5, 7, 8, 10, and 16 as unpatentable over Amour ’533, Aronson, and Mindes; and of claim 12 as unpatentable over Amour ’533, Aronson, and Flaherty.

DECISION

The Examiner's decision to reject claims 1, 3–10, and 12–18 under 35 U.S.C. § 101 as directed to non-statutory subject matter is affirmed.

The Examiner's decision to reject claims 1, 3–10, and 12–18 under 35 U.S.C. § 103(a) 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)(1)(iv).

AFFIRMED