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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/431,742	02/13/2017	Bradley BERMAN	KSG.097.CONT1	7688
111805	7590	03/03/2020	EXAMINER	
King Show Games, INC. 10275 Wayzata Blvd. Suite 300 Minnetonka, MN 55305			HSU, RYAN	
			ART UNIT	PAPER NUMBER
			3715	
			NOTIFICATION DATE	DELIVERY MODE
			03/03/2020	ELECTRONIC

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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* BRADLEY BERMAN

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Appeal 2019-004385  
Application 15/431,742  
Technology Center 3700

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Before STEFAN STAICOVICI, EDWARD A. BROWN, and  
CHARLES N. GREENHUT, *Administrative Patent Judges*.

GREENHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 21–40. *See* Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as King Show Games, Inc. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to a method and apparatus for combining symbols in gaming devices. Claim 21, reproduced below, is illustrative of the claimed subject matter:

21. A gaming device comprising:
  - a video display device including a game portion having a grid of multiple card positions;
  - a memory device configured to store a plurality of virtual cards each having a rank value and a suit type, and to store a credit amount;
  - a wager input device structured to receive physical items associated with a currency value;
  - and a processor operable to:
    - receive a signal from the wager input device indicating receipt of a physical item associated with a currency value;
    - increase the credit amount stored in the memory based on the currency value of the received physical item;
    - receive a wager on a poker game of chance, an amount of the wager deducted from the credit amount stored in the memory;
    - display a first number of the plurality of virtual cards in the card positions of the grid on the video display device, the displayed first number of virtual cards forming a dealt poker hand;
    - determine whether a plurality of the displayed virtual cards meet a combination criterion;
    - combine the plurality of cards meeting the combination criterion when said plurality of cards meet the combination criterion, the plurality of cards being combined in a single card position in the grid;
    - deal one or more replacement cards from the plurality of virtual cards to each card position, respectively, left empty by the combining of the plurality of cards meeting the combination criterion;
    - determine a final poker hand based on the cards shown in the multiple card positions of the grid shown on the video display;
    - evaluate the final poker hand to determine if it is associated with any awards;

and increase the credit amount stored in memory by amounts of any awards determined from the evaluation of the final poker hand.

## REJECTION<sup>2</sup>

Claims 21–40 are rejected under 35 U.S.C. 101 because the claimed invention is directed to a judicial exception (i.e., a law of nature, a natural phenomenon, or an abstract idea) without significantly more. Final Act. 6.

## OPINION

### *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) (internal quotation marks and citation 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*. *See Alice*, 573 U.S. 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.”

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<sup>2</sup> Claims 21–40 were rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–20 of Berman (US 9,569,935 B2; iss. Feb. 14, 2017). Final Act. 4. The Examiner does not appear to have expressly indicated this rejection has been withdrawn but does not include it in the listing of applicable rejections in the February 26, 2019 Answer or the Supplemental Answer of March 12, 2019 (hereinafter “Ans.”). As a terminal disclaimer referencing Berman was filed on February 14, 2018 and approved on February 20, 2018, we consider this rejection to be moot and not before us for review.

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*Id.* 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, 67 (1972)). Concepts determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 191 (1981)); “tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores” (*id.* at 182 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1853))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

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 (internal citation 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.* (alteration in the 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.*

In January of 2019, the PTO published revised guidance on the application of § 101. 2019 REVISED PATENT SUBJECT MATTER ELIGIBILITY GUIDANCE, 84 Fed. Reg. 50 (Jan. 7, 2019) (hereinafter “Memorandum”). Step 2A of that guidance involves determining 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* MANUAL OF PATENT EXAMINING PROCEDURE (“MPEP”) §§ 2106.05(a)–(c), (e)–(h) (9th Ed., Rev. 08.2017, 2018)).

If a claim (1) recites a judicial exception and (2) does not integrate that exception into a practical application, Step 2B of that guidance involved determining 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* Memorandum.

### *Analysis*

#### *Claim Grouping*

The claims are argued as a group for which we select claim 21 as representative under 37 C.F.R. § 41.37(c)(1)(iv).

*Statutory Category*

Claim 21 recites “A gaming device.” A large portion of Appellant’s arguments are devoted to asserting the § 101 inquiry ends there because the claim is directed to a machine or device as opposed to methods held ineligible under § 101. App. Br. 13–16. However, our reviewing court has made clear “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 Corp v. Retail Decisions, Inc.* 654 F.3d 1366, 1375–76 (Fed. Cir. 2011) (citing *In re Abele*, 684 F.2d 902 (CCPA 1982)). Other than the basic componentry recited that can be found in nearly any electronic wagering game device, including a video display, a memory, a wager input device and a processor, claim 21 predominantly recites the *acts* each of those elements, particularly the processor, performs. Particularly in light of its broad and functionally-defined nature, holding claim 21 necessarily passes muster under § 101 simply because it is an apparatus claim would “exalt form over substance.” It is noted that Appellant does not appear to regard this distinction in the styling of the claim preamble as particularly profound, as Appellant relies only on the arguments presented for alleged apparatus claim 21 when arguing claim 37, which is unequivocally directed to a method. App. Br. 12.

*Recitation of Judicial Exception*

The Examiner reasonably determined:

[T]he limitations such as “determine whether a plurality of displayed virtual cards meet a combination criterion” and “determine a final poker hand based on the cards shown in the

multiple card positions of the grid shown on the video display” recite steps which when viewed individually are directed to mental processes. Furthermore, when viewed as a whole, the focus of the claimed invention recite a series of steps directed towards managing a poker wagering game. Therefore when viewed individually and as a whole, the claims recite concepts of a fundamental economic activity which is one of the abstract idea groupings.

Ans. 4.

“The Appellant strongly disagrees that the claimed gaming device includes only steps that may be performed by a human using a pen and paper or merely automated by any generic computer.” App. Br. 16. However, Appellant does not direct our attention to what limitations specifically supposedly fall outside these realms. Mental processes involve the use of *human* observation, evaluation, judgment (e.g., “evaluate” and “determine” steps). *See In re Prater* 415 F. 2d 1393, 1402 n. 22 (CCPA 1969). “[M]ental processes . . . are not patentable, as they are the basic tools of scientific and technological work.” *Gottschalk*, 409 U.S. at 67 (quoted with approval in *Mayo*, 566 U.S. at 71). Receiving wagers, increasing credit, conducting a game according to certain rules and determining changes to the credit based on the outcome under those rules, are fundamental economic practices *See, e.g., In re Smith*, 815 F.3d 816, 818–19 (Fed. Cir. 2016) (describing a new set of rules for conducting a wagering game as a “fundamental economic practice”); MPEP § 2106.04(a)(2).

The incidental use of “video display device,” “memory,” “input device,” or “processor” does not make a claim otherwise directed to process that “can be performed in the human mind, or by a human using a pen and paper” patent eligible. *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375, 1372 (Fed. Cir. 2011).

*Practical Application*

Appellant argues patent eligibility largely by repeating claim language with little supporting analysis. App. Br. 16; Reply. Br. 6. We are not apprised of how the limitations Appellant identifies impose any meaningful limits on the abstract ideas themselves. The absence of any claim recitations indicating specifically how, for example, signals are received, credit is increased, cards are displayed, and criterion satisfaction is determined and evaluated, contrary to Appellant's argument (App. Br. 14), raises serious preemption concerns. Appellant, with these claims would preempt nearly any and all techniques for carrying out these steps without contributing any particular structure or method to the state of the art. This includes both mental techniques and physical, technological ones. Such a monopoly is inconsistent with the basic quid pro quo that is the heart of the patent grant. Thus we agree with the Examiner (Ans. 8–9) that the claimed subject matter is not limited in some meaningful way so as to recite a practical application.

*Well-Understood, Routine, Conventional Activity*

The Examiner, in a Supplemental Examiner's Answer provides the following analysis of the subject matter of claim 21 understood to be routine and conventional:

In accordance with the 2018 Berkheimer Memo, an additional element (or combination of elements) is not well-understood, routine or conventional unless the examiner finds, and expressly supports a rejection in writing with a citation to an express statement in the specification or demonstrates the well-understood, routine, conventional nature of additional elements (see Berkheimer memo, pg. 3 III. A1). A review of the Specification provides the expressed statement that “[a]s is well

known in the art and as used herein, the term “gaming” and “gaming devices” generally involves some form of wagering, and that players make wagers of value, whether actual currency or something else of value” (see Specification, pg. 2: ln 2–5). Furthermore, the Specification demonstrates that “a wager input device structure to receive physical items” is directed to “various mechanisms for entering such vouchers, tokens, credit cards, coins, tickets, etc. are known in the art” (see pg. 7: ln 13–20). The Specification further elaborates that “coin/symbol input mechanisms, card readers, credit card readers, smart card readers, punch card readers, radio frequency identifier (RFID) readers, and other mechanisms may be used to enter wagers[”] (see pg. 7: ln 17–20). It follows that the Examiner request a finding that the additional elements such as “a wager input device” do not add to the recited abstract idea but recites an arrangement that itself does not provide a potential improvement over conventional gaming devices. The remaining additional elements such as a display, a memory, and a processor are general components in any generic computer gaming devices (see pg. 1-2: ln 19–[2]9).

Ans. 5

The Examiner correctly found that the recited use of the generic componentry typically associated with any electronic card gaming machine, both individually and as an ordered combination, relates only to subject matter that is well-understood, routine and conventional. Ans. 5. We do not find within Appellant’s briefing any arguments that inform or apprise us of error in the Examiner’s analysis quoted above. As the Examiner’s analysis is thorough and comprehensive in this regard, we adopt the Examiner’s findings, analysis, and conclusions as those of the Board. *See, e.g., In re Paulsen*, 30 F. 3d 1475, 1478 n. 6 (Fed. Cir. 1994) *accord In re Cree*, 818 F.3d 694, 698 n. 2 (Fed. Cir. 2016).

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*Conclusion*

We have considered all of Appellant's arguments in support of the patent eligibility of claim 21, but find them unpersuasive. Accordingly, we sustain the Examiner's rejection of claims 21–40 under 35 U.S.C. § 101.

CONCLUSION

The Examiner's rejection is AFFIRMED.

DECISION SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
21–40	101	Eligibility	21–40	

TIME PERIOD FOR RESPONSE

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