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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 ANDREW D. STICKEL

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Appeal 2019-007003
Application 15/189,803
Technology Center 3700

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Before DANIEL S. SONG, MICHAEL J. FITZPATRICK, and LISA M. GUIJT, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant, Fantasy Pot Odds, LLC,[1] appeals under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1 and 3–20. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

[1] "Appellant" refers to the applicant as defined in 37 C.F.R. § 1.42. Appellant identifies itself as the sole real party in interest. Appeal Br. 3.

STATEMENT OF THE CASE

The Specification

The Specification "relates in general to fantasy sports, and more particularly to the selection of players for a fantasy team." Spec. ¶2.

The Rejected Claims

Claims 1 and 3–20 are rejected. Final Act. 1. No other claims are pending. *Id.* Claims 1, 18, and 19 are independent. Appeal Br. 13–17. Claim 1 is illustrative and reproduced below.

> 1. A system to calculate discounted projected values of players of a fantasy sports league comprising:
>
> weighted average logic configured to receive two or more seasons of prior value based drafting values associated with athletes of a first player position of a plurality of player position types of the fantasy sports league, wherein the weighted average logic is configured to calculate weighted value based drafting values of players of the first position based, at least in part, on the two or more seasons of prior value based drafting values, and wherein weight values of at least two of the two or more seasons of prior value based drafting values are different;
>
> curved line fit logic configured to fit the weighted value based drafting values to a curved line;
>
> projected value logic configured to calculate new projected values of players of the first position based, at least in part, on the curved line; and
>
> discount projected value logic configured to create discounted projected values of players of the first position by subtracting a constant value from each new projected value, wherein the discounted projected values provide a draft selection guide that is an indication of future performance of the athletes in the first player position relative to athletes of the plurality of player position types

> a draft reporting module configured to generate a draft strategy based, at least in part, on the discounted projected value, wherein the draft reporting module is configured to output the draft strategy to allow a person drafting a fantasy sports team to draft sports athletes based, at least in part, on the draft strategy.

Id. at 13.

The Examiner's Rejection

The Examiner rejected all pending claims under the judicial exception to 35 U.S.C. § 101. Final Act. 2.

DISCUSSION

Patent Eligibility Framework

Section 101 provides that "[w]hoever 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. However, 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." *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014).

In analyzing patent-eligibility questions under the judicial exception to 35 U.S.C. § 101, we "first determine whether the claims at issue are directed to a patent-ineligible concept." *Alice*, 573 U.S. at 218. If the claims are determined to be directed to an ineligible concept, then we "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.* at 217 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc*., 566 U.S. 66, 77 (2012)).

On January 7, 2019, the Director issued *2019 Revised Patent Subject Matter Eligibility Guidance* ("*Revised Guidance*"), which explains how the Director directs that patent-eligibility questions under the judicial exception to 35 U.S.C. § 101 be analyzed. 84 Fed. Reg. 50–57; *see also October 2019 Update: Subject Matter Eligibility* (available at https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf).

Per the *Revised Guidance*, the first step of *Alice* (i.e., Office Step 2A) consists of two prongs. In Prong One, we must determine whether the claim recites a judicial exception, i.e., an abstract idea, a law of nature, or a natural phenomenon. 84 Fed. Reg. at 54 (Section III.A.1.). If it does not, the claim is patent eligible. *Id.* With respect to the abstract idea category of judicial exceptions, an abstract idea must fall within one of the enumerated groupings of abstract ideas in the *Revised Guidance* or be a "tentative abstract idea," with the latter situation predicted to be rare. *Id.* at 51–52 (Section I, enumerating three groupings of abstract ideas), 54 (Section III.A.1., describing Step 2A Prong One), 56–57 (Section III.C., explaining the identification of claims directed to a tentative abstract idea).

If a claim does recite a judicial exception, we proceed to Step 2A Prong Two, in which we determine if the "claim as a whole integrates the recited judicial exception into a practical application of the exception." *Id.* at 54 (Section II.A.2.). If it does, the claim is patent eligible. *Id.*

If a claim recites a judicial exception and fails to integrate it into a practical application, we then proceed to the second step of *Alice* (i.e., Office Step 2B). In that step, we evaluate the additional limitations of the claim,

both individually and as an ordered combination, to determine whether they provide an inventive concept. *Id.* at 56 (Section III.B.). In particular, we look to whether the claim:

- Adds a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field, which is indicative that an inventive concept may be present; or
- simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception, which is indicative that an inventive concept may not be present.

Id.

Analysis

Appellant argues against the rejection of all claims together. Appeal Br. 8–11. We choose claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Revised Guidance Step 2A Prong One

In Prong One of Step 2A, we determine whether claim 1 recites a judicial exception (i.e., a law of nature, natural phenomenon, or abstract idea).

The Examiner determined that claim 1 is "directed to organizing information through mathematical correlations and algorithms, management of a game, and organized human activity." Final Act. 2; *see also id.* at 2–3 (citing *Gottschalk v. Benson*, 409 U.S. 63 (1972) with respect to algorithms) and 3–4 (citing *Planet Bingo, LLC v. VKGS LLC*, 576 F. App'x 1005 (Fed. Cir. 2014) with respect to management of a game and human activity).

Appellant "respectfully disagrees" but does not present arguments rebutting the Examiner's determination that claim 1 recites the identified abstract ideas. Appeal Br. 8. More specifically, the Appeal Brief explicitly concedes that claim 1 recites an algorithm and never discusses the other abstract ideas identified by the Examiner (i.e., "management of a game" and "organized human activity"). *Id.*; *see, e.g.*, Appeal Br. 9 ("Claims 1, 18, and 19 are directed to a new and useful algorithm . . . ."), 11 ("Although the claim recites an abstract idea (an algorithm) . . . .").

On the record presented, we are not apprised of error in the Examiner's determination, under Step 2A Prong One of the *Revised Guidance*, that claim 1 recites an abstract idea, specifically an abstract idea in the mathematical concepts category (i.e., an "algorithm") as set forth in relevant case law and the *Revised Guidance*. *See Bilski v. Kappos*, 561 U.S. 593, 611 (2010) ("The concept of hedging . . . reduced to a mathematical formula . . . is an unpatentable abstract idea."); *Diamond v. Diehr*, 450 U.S. 175, 191 (1981) ("A mathematical formula as such is not accorded the protection of our patent laws . . . .") (citing *Benson*, 409 U.S. 63); 84 Fed. Reg. at 52.

Appellant's claim 1 is not ineligible merely because it recites an algorithm. *Cf. Mayo*, 566 U.S. at 71 ("[A] process is not unpatentable simply because it contains a law of nature or a mathematical algorithm.") (quoting *Diehr*, 450 U.S. at 187). In fact, "an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection." *Id.* (quoting *Diehr*, 450 U.S. at 187).

Appellant cites *Diehr* as support for the purported eligibility of claim 1. Appeal Br. 9. But *Diehr* does not provide such support. As noted

in *Diehr*, "[t]ransformation and reduction of an article 'to a different state or thing' is the clue to the patentability of a process claim that does not include particular machines." *Diehr*, 450 U.S. at 184 (quoting *Benson*, 409 U.S. at 70). In *Diehr*, the requisite transformation was present in that the claims required transformation of "raw, uncured synthetic rubber, into a different state." 450 U.S. at 184.

Appellant has not identified any such transformation with respect to claim 1. Nor do we discern any. Appellant's claim 1 is more like the ineligible subject matter claimed in *Parker v. Flook*, 437 U.S. 584, 585 (1978). There, the claims "provide[d] a new and presumably better method for calculating alarm limit values." *Id.* at 594–95. In holding the claims ineligible, the Supreme Court held that, "if a claim is directed essentially to a method of calculating, using a mathematical formula, even if the solution is for a specific purpose, the claimed method is nonstatutory." *Id.* at 595 (quoting *In re Richman*, 563 F.2d 1026, 1030 (CCPA 1977)).

Revised Guidance Step 2A Prong Two

In Prong Two of Step 2A, we determine whether claim 1 as a whole integrates the recited judicial exceptions (here, abstract ideas) into a practical application of the exception.

One exemplary consideration as to whether a recited abstract idea is integrated into a practical application is whether additional claim language "reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field." 84 Fed. Reg. at 55. Appellant argues that such is the case here. Appeal Br. 9. In particular, Appellant argues that claim 1 is "directed to a new and useful algorithm for analyzing player data to estimate future performance and generate a new and

improved draft strategy" and thus "solve[s] a technical problem (evaluating players to generate a draft strategy)." *Id.* As the Examiner points out, however, Appellant does not show how or why evaluating players to generate a draft strategy is a technical problem or that its algorithm for doing so is an improvement. Ans. 7–8. In particular, the Examiner correctly states:

> [T]he algorithm does not improve the functionality of the computer, technology, or field. Indeed, the computer is only seen as a vehicle for implementing the algorithm, but the algorithm itself is directed to a way of generating a draft strategy for a fantasy sports team. The alleged improvement is not in the functioning of the computer. Furthermore, the technology is not being improved for similar reasons; the computer itself is not of importance to the invention. Finally, the Examiner does not consider a different methodology for drafting a sports team to be an improvement. Without a standardized metric and proven results, the claimed invention can only be seen as an alternative way of drafting a fantasy sports team.

Ans. 7–8. The Examiner has the better position.

Revised Guidance Step 2B

In Prong Two of Step 2B, we evaluate the additional limitations of claim 1, both individually and as an ordered combination, to determine whether they provide an inventive concept.

Relevant to this part of the eligibility analysis, Appellant asserts that "[t]he solution of the problem (analyzing data to generate a draft strategy to determine how to select players) employs generic components combined in an unconventional manner." Appeal Br. 11; *see also id.* ("[T]he 'additional features' are more than well-understood, routine, conventional activity."). Appellant, however, does not elaborate or otherwise support this assertion.

Also relevant to Prong Two of Step 2B, Appellant asserts that *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016) supports a determination that claim 1 is patent eligible. Appeal Br. 10. In that regard, Appellant notes that *Electric Power Group* held claims ineligible for "not requir[ing] an arguably inventive set of components or methods, such as measurement devices or techniques, *that would generate new data*" and for "*not invoke[ing] any assertedly inventive programming*." Appeal Br. 10 (quoting *Electric Power Group*, 830 F.3d at 1355). Seizing on the emphasized language, Appellant argues that claim 1 is "directed to a new technique for analyzing player data that would generate new (and different) data than prior techniques and would thus entail inventive programming." Appeal Br. 10. Appellant's argument overstates *Electric Power Group*. The Court in that case did *not* hold that claims that include the generation of new/different data—here, a draft strategy—necessarily entail inventive programming and are patent eligible. 830 F.3d at 1355.

Appellant also argues that claim 1 does not preempt all uses of the abstract idea. Appeal Br. 11. But Appellant cannot overcome the § 101 rejection by showing a lack of complete preemption. Appellant must show that the rejection is not warranted under the *Mayo*/*Alice* two-step test, which it has not done. *See Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) ("While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility. . . . Where a patent's claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case, preemption concerns are fully addressed and made moot.").

For the foregoing reasons, we affirm the rejection of claim 1 under the judicial exception to § 101, as well as that of claims 3–20, which fall therewith.

SUMMARY

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
1, 3–20	101	Eligibility	1, 3–20	

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