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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* MARCELO AIZENSTEIN FURMAN CALBUCCI and  
MATTHEW ROBERT CARTER

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Appeal 2020-000284  
Application 14/320,067  
Technology Center 3600

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Before BENJAMIN D. M. WOOD, MICHAEL J. FITZPATRICK, and  
ANNETTE R. REIMERS, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant, HIGI SH Holdings, Inc.,<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1, 4, 5, 8, 9, and 11–20. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> “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. 1.

STATEMENT OF THE CASE

*The Specification*

The “disclosure relates to a method and system for rewarding healthy lifestyle activities.” Spec. ¶2.

*The Claims*

Claims 1, 4, 5, 8, 9, and 11–20 are rejected. Final Act. 1–2. No other claims are pending. *Id.*; *see also* Appeal Br. 9–12. Claim 1 is representative and reproduced below.

1. A method of awarding points for healthy lifestyle activities, performed in a computer comprising a memory, which method comprises:

- [a] providing a user an exercise monitor;
- [b] engaging in a physical activity by the user;
- [c] recording the physical activity of the user by the exercise monitor;
- [d] in the computer memory, associating a user with a user identifier and the exercise monitor;
- [e] in the computer memory, associating the user identifier with a reward, wherein the reward requires that the user earn points by engaging in the physical activity to earn the reward;
- [f] by the computer, receiving a report associated with the user identifier and calculating a number of points earned by the user based on the report;
- [g] when the user has earned enough points to earn the reward, making the reward available to the user;
- [h] wherein the report comprises at least one of a user activity report, an exercise monitor report, an event report, and a place report;
- [i] wherein calculating points for the user based on the report comprises adjusting a duration of or number of steps assigned to the physical activity, adjusting a metabolic

equivalent of task value for the physical activity, and calculating the points based on a sigmoidal curve; and

[j] wherein calculating the points based on a sigmoidal curve comprises obtaining the maximum and minimum possible points, subtracting from the maximum possible points the difference between the maximum and minimum possible points for the physical activity multiplied by (the inverse of 0.98 plus (e raised to the power of the product of minus 4 plus ((the product of the measurement of the physical activity minus the minimum measurement of the physical activity required for any points divided by the difference between the maximum and minimum possible points) multiplied by 8.5))).

Appeal Br. 9 (letter labels added).

#### *The Examiner's Rejection*

The Examiner rejected all pending claims as ineligible 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 patent-eligibility questions under the judicial exception to 35 U.S.C. § 101 to 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](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.*

*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).<sup>2</sup>

The Examiner determined that claim 1 recites abstract ideas in both the methods of organizing human activity and mathematical concepts categories set forth in the *Revised Guidance* (84 Fed. Reg. at 52). Final Act. 2–3 (regarding organizing human activity), 4–5 (regarding a mathematical concept).

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<sup>2</sup> Appellant argues against the rejection of all claims together. Appeal Br. 5–7. We choose claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner determined that every limitation of claim 1 recites an abstract idea in the organizing human activity category. *Id.* at 2–3. The Examiner further determined that limitations [i] and [j] recite abstract ideas in the mathematical concepts category. *Id.* at 4–5.

Appellant first argues that “the claimed subject matter involves engaging in physical activity, which cannot be performed in the abstract as the phrase ‘physical activity’ quite literally requires non-abstract performance.” Appeal Br. 5. This argument does not apprise us of error as it is not supported by any legal authority cited by Appellant or known to us. And, as the Examiner points out, the Federal Circuit previously has held claims patent ineligible because they were directed to an abstract idea, even though they included a physical activity. *See* Ans. 4 (citing *In re Brown*, 645 F. App’x 1014 (Fed. Cir. 2016)). Indeed, the representative claim in *Brown* recited:

1. A method of cutting hair comprising;
  - a) defining a head shape as one of balanced, horizontal oblong or vertical oblong by determining the greater distance between a first distance between a fringe point and a low point of the head and a second distance between the low point of the head and the occipital bone;
  - b) designating the head into at least three partial zones;
  - c) identifying at least three hair patterns;
  - d) assigning at least one of said at least three hair patterns to each of the said partial zones to either build weight or remove weight in at least two of said partial zones; and
  - e) using scissors to cut hair according to said assigned hair pattern in each of the said partial zones.

645 F. App’x at 1015. In *Brown*, the PTAB had held the challenged claims ineligible under 35 U.S.C. § 101. *Id.* On appeal, the Federal Circuit

affirmed “[b]ecause the asserted claims cover only abstract ideas coupled with routine and conventional hair-cutting steps.” *Id.* Thus, *Brown* wholly undermines Appellant’s first argument. Appellant does not respond to the Examiner’s reliance on *Brown*. See Reply Br. 2.

Next, Appellant argues that the claimed subject matter does not fall under any of the types of organizing human activity specified in the *Revised Guidance*. Appeal Br. 5–6; see also 84 Fed. Reg. at 52 (“Certain methods of organizing human activity—fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions)”).

The Examiner responds with multiple rebuttals.

First, the Examiner responds that rewarding a user for his or her physical activity (as recited in the claim) is a commercial interaction because “[t]he specification provides as examples of ‘rewards’: ‘merchandise, a membership in a club or organizing, a coupon, discount, or rebate for purchase of merchandise or membership, a donation to a charitable organizing, cash, or the like.’” Ans. 5 (quoting Spec. ¶46). Appellant does not dispute the Examiner’s point and instead merely points out that “all inventions are required to have utility, i.e., value.” Reply Br. 2. Appellant fails to apprise us of error in the Examiner’s determination that claim 1 recites an abstract idea in the methods of organizing human activity grouping, specifically one that is a commercial interaction.

Second, the Examiner explains: “Physical activity is unambiguously a type of personal behavior. Incentivizing specific behavior is unambiguously a form of managing behavior. As such, rewarding users based on their physical activity plainly qualifies as managing personal behavior.” Ans. 6. Appellant replies that “the Examiner ignores the ‘personal’ aspect of this basis as the claimed invention incentivizes (external influence) physical activity” but does not elaborate or explain. Reply Br. 3. As such, Appellant’s Reply Brief, like its Appeal Brief, fails to apprise us of error in the Examiner’s determination that claim 1 recites an abstract idea in the methods of organizing human activity grouping, specifically one that manages personal behavior.

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, indeed multiple abstract ideas, in the methods of organizing human activity and mathematical concepts groupings.

*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 exceptions. In doing so, we first determine “whether there are any additional elements recited in the claim beyond the judicial exception(s).” 84 Fed. Reg. at 54–55. The Examiner determined that the only additional elements of claim 1, beyond those reciting abstract ideas, are “a computer comprising memory” and an “exercise monitor.” Final Act. 3. The Examiner determined that both are “recited at an extremely high level of

generality.” *Id.* As such, neither constitutes a “particular machine” for purposes of the *Revised Guidance*. See 84 Fed. Reg. at 55.

Appellant argues that limitations [b] through [j] of claim 1 integrate the abstract ideas into a practical application. Appeal Br. 6. In making this argument, Appellant characterizes the recitation of “physical activity” as “*particular* conduct,” the “exercise monitor” as “a *specialized* device,” and the “report” as “a *particularized* report.” *Id.* (emphasis added). These re-characterizations of certain claim terms are conclusory and not supported. As such, they lack substance and do not apprise us of error.

Appellant also argues that “the claimed calculations within the claimed subject matter results in a transformation of the user’s physical activity . . . into a reward.” *Id.* at 6–7. This argument appears to invoke footnote 28 of the *Revised Guidance*, which states:

For example, a process that transforms raw, uncured synthetic rubber into precision-molded synthetic rubber products by using a mathematical formula to control operation of the mold. See MPEP 2106.05(c) for more information concerning transformation or reduction of a particular article to a different state or thing, including a discussion of the exemplar provided herein, which is based on [*Diamond v.*] *Diehr*, 450 U.S. [175,] 184 [(1981)].

84 Fed. Reg. at 55 n.28. Neither *Diehr* nor MPEP § 2016.05(c) extends to the purported transformation identified in claim 1. No physical thing is transformed. Stated differently, the physical activity may lead to a reward but it is not *transformed* into a reward.

Appellant also argues that the claimed “invention improves upon the technology of rewarding physical activity by making meaningful and inventive adjustments to the evaluation of physical activity, which is accomplished by the inclusion of additional data points provided in the

report and applying a particularized calculation to derive the points associated with a physical activity.” Appeal Br. 7. This argument appears to invoke the first bullet point listed in the *Revised Guidance* as to whether an additional element may have integrated the exception into a practical application. *See* 84 Fed. Reg. at 55 (“An additional element reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field”). In the Reply Brief, Appellant argues that “[t]he technology at issue deals with how to monitor, evaluate, and incentivize physical activity. Particularly, the present invention results in higher quality physical activity due to improved monitoring, evaluation, and incentivizing hence this technology is improved.” Reply Br. 3. Thus, the purported improvement is “higher quality physical activity.” *Id.* We are not persuaded that Appellant has identified an improvement in any *technology or technical field*.

Additionally, and fatal to all of Appellant’s arguments under Prong Two, is that they are based on claim language reciting abstract ideas and are not based on “any additional elements recited in the claim beyond the judicial exception(s).” 84 Fed. Reg. at 54–55; *see also* Ans. 8 (“Every limitation [argued by Appellant] is identified in the rejection of record as part of the judicial exception. Limitations which are part of the judicial exception are not available as additional elements to integrate that abstract idea into a practical application under Step 2A Prong 2.”).

On the record presented, we are not apprised of error in the Examiner’s determination, under Step 2A, Prong Two of the *Revised Guidance*, that claim 1 fails to integrate any of the recited abstract ideas into a practical application.

*Revised Guidance, Step 2B*

In Prong Two of Step 2B, we evaluate the additional elements of claim 1, both individually and as an ordered combination, to determine whether they provide an inventive concept. Again, the only additional elements are “a computer comprising memory” and an “exercise monitor.” Final Act. 3.

As for the former, the Examiner notes that “implementing an abstract idea on a generic computer does not add significantly more, similar to how the recitation of the computer in the claim in *Alice* amounted to mere instructions to apply the abstract idea of intermediated settlement on a generic computer.” *Id.* at 3–4. As for the latter, the Examiner finds, based on multiple references, that exercise monitors “to record physical activity, and their use with computers was well known prior to the claimed invention's effective filing date.” *Id.* at 4.

Appellant’s sole argument unique to Step 2B<sup>3</sup> is that “the claimed subject matter when viewed as a whole demonstrates that the claimed subject matter is in fact patent eligible.” Appeal Br. 7. This is so, Appellant argues, because “the data contained in the report that is subsequently subjected to calculation demonstrates an inventive concept rendering the claim eligible—even if the same limitations evaluated under Step 2A were disregarded as extra-solution activity.” *Id.* The Examiner responds to this argument by point out that “the report, its data, and the subsequent processing of this data are all considered part of the abstract idea as articulated in the rejection of record.” Ans. 10. The Examiner additionally

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<sup>3</sup> Appellant also argued “Applicant hereby incorporates the above [Step 2A, Prong Two] remarks as they apply to 2B.” Appeal Br. 7.

notes, correctly, that “Appellant does not argue or explain why these limitations are additional elements beyond the identified judicial exception.” *Id.*

Appellant’s Reply Brief does not refute the Examiner’s response. *See* Reply Br. 3. Instead, it merely asserts that “the Examiner, contrary to guidance[,] dissects the claimed invention rather than evaluating the claimed subject matter ‘as a whole.’” *Id.* Appellant’s argument is misplaced. The *Revised Guidance* states that “examiners should . . . evaluate the *additional elements individually and in combination* under Step 2B to determine whether they provide an inventive concept (i.e., whether the additional elements amount to significantly more than the exception itself).” 84 Fed. Reg. at 56. Thus, the Examiner was correct to dissect the claim, identifying abstract ideas and additional elements. And the Examiner was correct, in Step 2B, to consider only the additional elements (here, “a computer comprising memory” and an “exercise monitor”) to determine whether they individually or together provided an inventive concept. The Examiner determined they did not. Appellant has not apprised us of error in that determination.

For the foregoing reasons, we affirm the rejection of claim 1 under the judicial exception to § 101, as well as that of claims 4, 5, 8, 9, and 11–20, which fall therewith.

#### SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 4, 5, 8, 9, 11–20	101	Judicial exception	1, 4, 5, 8, 9, 11–20	

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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