

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTERNATIONAL INTERNET TECHNOLOGIES, LLC and
RED ROCK INVESTMENTS, LLC,
Petitioner,

v.

SWEEPSTAKES PATENT COMPANY, LLC,
Patent Owner.

Case CBM2015-00105
Patent 5,569,082

Before TRENTON A. WARD, STACEY G. WHITE, and
ROBERT A. POLLOCK, *Administrative Patent Judges*.

POLLOCK, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
Covered Business Method Patent Review
35 U.S.C. § 328(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

A. BACKGROUND

International Internet Technologies, LLC (“IIT”) and Red Rock Investments, LLC, f/k/a Gateway Systems, LLC, f/k/a Gateway Gaming, LLC (“Red Rock”) (collectively, “Petitioner”) filed a Petition (Paper 1, “Pet.”) seeking a covered business method patent review of claims 1–17 of U.S. Patent No. 5,569,082 (Ex. 1001, “the ’082 patent”). Sweepstakes Patent Company, LLC (“Sweepstakes” or “Patent Owner”) affirmatively waived any preliminary response. Paper 6. On July 29, 2015, we instituted a covered business method patent review of claims 1–17 of the ’082 patent (Paper 7, “Institution Decision” or “Inst. Dec.”) based upon Petitioner’s assertion that the challenged claims are directed to patent ineligible subject matter under 35 U.S.C. § 101. Inst. Dec. 18.

Subsequent to institution, Sweepstakes filed a Patent Owner Response (Paper 13, “PO Resp.”), and Petitioner filed a corresponding Reply (Paper 20, “Reply”).

Patent Owner filed a Motion to Exclude Evidence (Paper 21) directed to paragraphs 20–31 of the Declaration of Nick Farley (Ex. 1042). In a March 1, 2016 Order, we denied Petitioner’s request to strike or expunge Patent Owner’s Motion to Exclude Evidence, but took no position as to the merits of Patent Owner’s motion. Paper 28. In connection with its Motion to Exclude, Patent Owner submitted Exhibit 2042, the Rebuttal Declaration of Stacy Friedman. Petitioner responded to Patent Owner’s Motion to Exclude Evidence (Paper 32) and requested that Exhibit 2042 be expunged (Paper 26; *see* Paper 28). Petitioner also filed a Motion to Exclude Evidence

(Paper 24), directed to Exhibit 2001, the declaration of Patent Owner's expert, Stacy Friedman. Patent Owner opposed the motion. Paper 30. Petitioner filed a Reply. Paper 31.

A combined oral hearing for this case and CBM2015-00106 was held on March 31, 2016. A transcript of the hearing is included in the record (Paper 35, "Tr.").

We have statutory authority under 35 U.S.C. § 6(c). This Final Written Decision is issued pursuant to 35 U.S.C. § 328(a) and 37 C.F.R. § 42.73.

For the reasons that follow, we determine that Petitioner has shown by a preponderance of the evidence that claims 1–17 of the '082 patent are directed to patent ineligible subject matter under 35 U.S.C. § 101 and, thus, unpatentable.

B. Related Matters

The '802 patent is at issue in a number of district court cases. Paper 4; Paper 5, 1–2; Pet. 5–7. U.S. Patent No. 5,709,603 ("the '603 patent") is a continuation-in-part of the '802 patent.

C. The '802 Patent (Ex. 1001)

The '082 patent is directed to "administering, operating, and playing of a game in which a player acquires a chance to win and the outcome of that chance is displayed in an interesting, fun, and exciting fashion." Ex. 1001, 1:13–16. "The operation and running of these games entails the purchase of a chance to win and then at some point a single and usually quick action displays the outcome of the game." *Id.* at 1:21–24.

According to the Specification, the invention addresses the following failings of traditional lotteries and games of chance, such as conventional “scratch off” lottery tickets:

(a) the low level of excitement that is generated from the display of the game’s outcome; (b) the fact that it takes just a few moments to play the game; (c) insufficient player interaction with the game except for boring scratching of the coating; (d) excessive space that is required to store the different games necessary to stock all of the available printed game cards; (e) tracking and control of the game cards; (f) non-challenging simple games; (g) dirt caused by the scratched coating; (h) the limited number of games because the only variations to the game are the use of different symbols, colors, or placement of the symbols; (i) fraud caused by game card theft and/or tampering; (j) waste caused by the need to print and stock many different game card to keep players interested; (k) restricting access to minors; and (1) allowing for system wide and regional control and monitoring.

Id. at 1:25–51.

In particular, the Specification discloses a “personal computer lottery game” comprising “an interactive lottery/casino type game which allows players to purchase game tickets in the form of data storage media to be used in a personal computer.” *Id.* at Title, 1:5–9. As summarized in column 2, lines 11–23 of the Specification, the invention relates to “a method and system for playing a player interactive lottery type game” wherein:

The player acquires a gaming piece which includes a predetermined code having data indicating whether the player wins or loses the game, the data being unrecognizable to the player, such that the player does not know the outcome of the game prior to play of the game. The code is entered by the player into a processor. The processor presents a game of chance to the player on a display for interactive play by the player, and the

player controls game play by inputting game parameters to the processor. The processor controls the outcome of the game of chance played by the player based upon the code entered by the player. A display provides an indication to the player of a game win or a game loss based upon the code.

Figure 2 of the '082 patent is reproduced below.

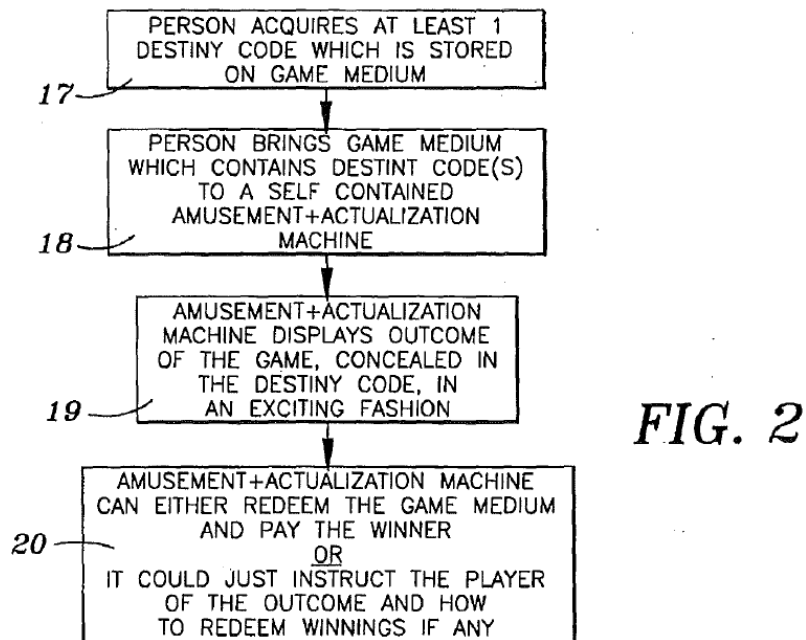


Figure 2 above illustrates the basic components of one embodiment. *See generally id.* at Figs. 2, 3, and 5, 2:34–37, 4:29–5:19, 5:27–57. In Figure 2, block 17, a player “acquires a gaming piece which includes a predetermined code having data indicating whether the player wins or loses the game, the data being unrecognizable to the player, such that the player does not know the outcome of the game prior to play of the game.” *Id.* at 2:11–15. “These codes are called ‘Destiny Codes’ because their primary function is to store the outcome of the game of chance.” *Id.* at 2:59–60. In block 18, “[t]he code is entered by the player into a processor” or “self-contained amusement + actualization machine.” *Id.* at 2:15–16, 5:13–14.

“The processor presents a game of chance to the player on a display for interactive play by the player, and the player controls game play by inputting game parameters to the processor.” *Id.* at 2:16–19. Exemplary games include lottery tickets, hands of cards, and horse races. *Id.* at 3:22–4:21, Fig. 8 (“Play Horses,” “Play 21,” and “Play Lotto”). “The game is purely for player enjoyment, and is used to give the feel of a completely random game of chance.” *Id.* at 3:25–27. In actuality, the computer processor controls the outcome of the game based on the data concealed in the destiny code (*see id.* at 2:67–3:3) and, as shown in block 19 of Figure 2, “provides an indication to the player of a game win or a game loss based upon the code.” *Id.* at 2:19–23; *see id.* at 3:34–37 (“The purpose of the actual game is to display, in a pleasing fashion, the actual prize that is stored in the Destiny Code and to display the game results as though there is a completely random element.”). As shown in block 20 of Figure 2, if the player wins, the “amusement + actualization device” can either pay out the prize directly or provide the player with redemption instructions, e.g., on a game screen display. *See, e.g., id.* at 5:12–17.

D. Illustrative Claims

The ’082 patent includes independent claim 1, from which claims 2–9 depend, and independent claim 10, from which claims 11–17 depend. Claim 1 recites:

1. A method for playing a player lottery game comprising the step of: acquiring by a player a game piece, the gaming piece including a code which includes data indicating whether the player wins or loses the lottery game and an amusement game, the data being unrecognizable to the player, such that the player

does not know whether the player will win or lose the game prior to play of the amusement game;

entering the code by the player into a processor prior to amusement game play;

the processor generating the amusement game on a display for play by the player, the player controlling game play by inputting game parameters to the processor;

the processor controlling whether the player will win or lose the amusement game based upon the code entered by the player; and

providing on a display an indication to the player of the amusement game win or loss based upon the code.

Claims 2–4 specify that the gaming piece includes magnetic, laser optical, or paper media for storing code, respectively. Claims 5 and 6 specify that the amusement game includes a horse race or a card game, respectively.

Independent claim 10 and its dependent claims, claims 11–17, comprise counterpart system claims for a “lottery type game.” See PO Resp. 22, n.7.

II. ANALYSIS

A. Claim Interpretation

According to Petitioner, the ’082 patent expired as of April 6, 2015. Pet. 29. Our review of claims of an expired patent is similar to that of a district court. See *In re Rambus, Inc.*, 694 F.3d 42, 46 (Fed. Cir. 2012). Specifically, claim terms are given their ordinary and customary meaning, as would be understood by a person of ordinary skill in the art, at the time of the invention, in light of the language of the claims, the specification, and

the prosecution history of record. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313–17 (Fed. Cir. 2005) (en banc).

Petitioner urges us to apply this standard to construe the following terms: “game piece” or “gaming piece” and “amusement game.” Pet. 30–36. Patent Owner argues that there is no need to construe “game piece” or “gaming piece,” but that “amusement game” includes “games . . . that are perceived as disclosing winners ‘at random.’” PO Resp. 20. For the purposes of this Final Written Decision, however, we do not need to expressly construe any claim term, as they are not necessary to the § 101 analysis provided below. *See, e.g., Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011) (“[C]laim terms need only be construed ‘to the extent necessary to resolve the controversy.’”) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

B. Standing to Seek Covered Business Method Patent Review

Section 18 of the Leahy-Smith America Invents Act (“AIA”) governs the transitional program for covered business method patent reviews.¹ Section 18(a)(1)(B) of the AIA limits such reviews to persons, or their privies, that have been sued or charged with infringement of a covered business method patent. Petitioner contends that it has been sued for alleged infringement of the ’082 patent and is not estopped from pursuing this action. *See* Pet. 15. Petitioner asserts that at least IIT was sued for infringement of the ’082 patent in related district court cases titled

¹ *See* Section 18(a) of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 329 (2011); 37 C.F.R. § 42.302(a).

Sweepstakes Patent Co. v. Chase Burns, No. 6:14-CV-151-ACC-KRS (M.D. Fla.), and *Sweepstakes Patent Co. v. Chase Burns*, No. 0:14-CV-62351-JEM (S.D. Fla.). Pet. 5. Petitioner asserts that at least Red Rock was sued for infringement of the '082 patent in a related district court case titled *Sweepstakes Patent Co v. Mosley*, Case No. 0:14-cv-62354-DMM (S.D. Fla.). *Id.* at 5–7.² Patent Owner does not dispute Petitioner's allegation. Accordingly, we conclude that Petitioner has met the standing requirement. *See* 37 C.F.R. § 42.302(a).

Under § 18(a)(1)(E) of the AIA, the Board may institute a transitional proceeding only for a patent that is a covered business method patent. A “covered business method patent” is one that “claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service, except that the term does not include patents for technological inventions.” AIA § 18(d)(1); 37 C.F.R. § 42.301(a). To determine whether a patent is eligible for a covered business method patent review, the focus is on the claims. *See* Transitional Program for Covered Business Method Patents—Definitions of Covered Business Method Patent and Technological Invention, 77 Fed. Reg. 48,734, 48,736 (Aug. 14, 2012). A patent need have only one claim directed to a covered business method for all of the patent's claims to be eligible for review. *Id.*

² Petitioner contends that Case No. 6:14-CV-151-ACC-KRS has been dismissed and the appeal of the dismissal order is before the Federal Circuit as Case No. 14-1851. Pet. 6. Petitioner indicates that the remaining two district court cases are pending. *See id.* at 6–7.

1. Whether the Claims Encompass a Financial Product or Service

In promulgating rules for covered business method patent reviews, the Office considered the legislative intent and history of the AIA’s definition of “covered business method patent.” *Id.* at 48,735–36. The legislative history explains that the definition of covered business method patent was drafted to encompass patents “claiming activities that are financial in nature, incidental to a financial activity or complementary to a financial activity.” *Id.* at 48,735 (citing 157 Cong. Rec. S5432 (daily ed. Sept. 8, 2011) (statement of Sen. Schumer)). *See also* 157 Cong. Rec. S5432 (daily ed. Sept. 8, 2011) (statement of Sen. Schumer) (“At its most basic, a financial product is an agreement between two parties stipulating movements of money or other consideration now or in the future.”).

In accord with the legislative history, the United States Court of Appeals for the Federal Circuit construed covered business method patents as encompassing “a wide range of finance-related activities” and “not limited to products and services of only the financial industry, or to patents owned by or directly affecting the activities of financial institutions such as banks and brokerage houses.” *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1325 (Fed. Cir. 2015) (determining that a claim directed to “a method for determining a price of a product offered to a purchasing organization” is subject to covered business method review).

Patent Owner argues that the challenged claims are not directed to a financial product or service because the claims (1) “encompasses a method where no money changes hands at all and as such cannot be properly considered an ‘economic practice’”; (2) require that “whether the player will

win or lose the lottery game and the amusement game to be ‘unrecognizable to the player’, [whereas, i]t is inconceivable that parties will enter into a ‘financial transaction,’ . . . without knowing things such as price and quantity”; (3) lack any indication of *what* the player will win and “merely indicate *if* the player wins or loses”; and (4) “require a processor to control an amusement game based on unrecognizable information from the gaming piece.” PO. Resp. 11–12.

During the oral hearing, counsel for Patent Owner emphasized that the claims were directed to both a lottery and an amusement game. *See, e.g.*, Tr. 35:17–19 (“So the preamble tells you that you are playing a lottery game. No question about it. It is right there. But the rest of the claim talks about an amusement game.”). As we understand Petitioner’s argument, because the claims merely require that the processor controls whether the player will win or lose *the amusement game*, any financial transaction associated with *the lottery game* is too attenuated to qualify as a financial product or service for the purposes of CBM jurisdiction. *See generally* Tr. 30:1–34:6; *id.* at 32:21–24 (“It is too attenuated because it doesn’t tell you how to sell the tickets - - the claims I’m talking about - - how to sell the tickets, how to price the tickets, how to price the rewards or the winnings.”). At the oral hearing, counsel for Patent Owner stated that “the purpose” of playing the claimed game was for “entertainment and financial reward.” *Id.* at 33:8–11. Despite agreeing that one purpose of playing the game was to obtain some sort of financial reward, counsel for Patent Owner argued that this unclaimed motivation was irrelevant to finding a financial product or service. *Id.* at 33:8–34:6, 34:4–5 (“If it is not in the claims, why are we arguing about it?”).

Contrary to Patent Owner's apparent position that any financial transaction associated with the lottery game is too attenuated because the claims merely require that the processor control whether the player will win or lose the amusement game,³ we note that the "gaming piece" common to each independent claim "includes data indicating whether the player wins or loses the lottery game and an amusement game." The claims as a whole, therefore, contemplate determining not only whether a player wins or loses an amusement game, but the "*lottery game*" recited in the claim. See claim 1 (emphasis added); claim 10 (reciting a "lottery type game").

More generally, we do not find Patent Owner's arguments persuasive and agree with Petitioner that the challenged claims encompass financial products or services because they are "directed at lottery games, which the '082 patent describes as financial in nature." Pet. 15–21. The independent claims at issue, for example, recite "a player lottery game" (claim 1) and "[a] lottery type game" (claim 10). We understand a lottery to mean "a *method of raising money* by selling numbered tickets and giving a proportion of the money raised to holders of numbers drawn at random." Ex. 3000 (emphasis added);⁴ see also *id.* ("A contest in which tokens are distributed or sold, the

³ Counsel for Patent Owner admitted that elements of claim 10 outside of the preamble include both the lottery game and an amusement game. See Tr. 36:1–6.

⁴ Lottery. *Collins English Dictionary – Complete and Unabridged*. (2003), available at <http://www.thefreedictionary.com/lottery> (last retrieved July 7, 2015).

winning tokens being secretly predetermined or ultimately selected in a random drawing”).⁵

As correctly noted by Petitioner, “the specification and accompanying figures are replete with descriptions demonstrating that the claimed method of playing a lottery game and the claimed lottery game system contemplate money being paid by the player and a player winning or losing awards, including monetary awards.” Pet. 17 (citing Ex. 1001, 1:10–13, 1:21–24; Ex. 1014 ¶ 21). With respect to claim 1, for example, the ’082 patent Specification discloses that the step of “acquiring by a player a game piece” encompasses a financial transaction wherein a player “purchases a chance to win” from a salesperson or “Automated Destiny Code Machine.” See Ex. 1001, Figs. 4 (“How many tickets do you want to buy?”), 9, 10, 11, 12, 1:5–10, 1:17–20, 2:38–41 (“FIG. 4 illustrates a sales device used to purchase game media”), 4:35–39, 4:41–45 (player wishing to purchase Destiny Codes places money into a bill validator).

Similarly, with respect to Petitioner’s contention that the invention at issue contemplates “a player winning or losing awards, including monetary awards” (Pet. 17), the Specification makes clear that the claimed step of “providing on a display an indication to the player of the amusement game win or loss” encompasses informing a winning player about the value of a monetary payout of the lottery game. See, e.g., *id.* at Figs. 1–3, 5, 7, 9, 10, and 13, 3:47–50 (“If the Destiny Code indicates that player is to win \$25.00,

⁵ Lottery. American Heritage Dictionary of the English Language. (2011), available at <http://www.thefreedictionary.com/lottery> (last retrieved July 7, 2015).

then the system will select and display numbers that match the player's fictitious lottery tickets in a combination that wins the person \$25.00.”), 4:9–19 (system displays poker hands having various payout values depending on Destiny Code, e.g., “1 Pair=\$10.00, 3 Of A Kind=\$15.00, 2 Pair=\$20.00, a Straight=\$50.00, and a Royal Flush=\$100.00”), 6:58–62 (“Program information includes . . . the amount of money that the Destiny Code wins.”), Fig. 12 and 10:17–22 (“If the Destiny Code contains . . . a \$75 winner, the computer can let one lotto ticket win \$75 or 3 lotto tickets win \$25 each, if the player has three lotto tickets.”).

The claims at issue are drawn to methods and systems for computer-assisted playing of lottery games. As read in light of the Specification, discussed above, the instant claims are applicable to—and indeed contemplate—situations wherein players will pay to acquire a game piece and receive a monetary payout when the computer display indicates a winning ticket. They are not, as Patent Owner suggests, generally “pertaining to technology common to many different industries and business environments [having] no particular relationship to financial products or services.” PO Resp. 15 (citing *Salesforce.com, Inc. v. Applications in Internet Time, LLC*, CBM2014-00162 (PTAB Feb. 2, 2015) (Paper 11) (Ex. 2041)). That, as Patent Owner argues, the claims may “encompass a method where no money changes hands at all” (PO. Resp. 11)⁶ does not negate their

⁶ Undermining Patent Owner's argument that the claimed invention is “frequently implemented by amusement arcades such as Chuck E. Cheese's and Dave & Buster[']s. . . . [and, thus,] does not even pertain to business or financial management” (PO Resp. 15–16), Patent Owner's expert, Stacy

character of being “financial in nature, incidental to a financial activity or complementary to a financial activity.” Transitional Program for Covered Business Method Patents—Definitions of Covered Business Method Patent and Technological Invention, 77 Fed. Reg. 48,734, 48,735 (Aug. 14, 2012) (quoting 157 Cong. Rec. S5432 (daily ed. Sept. 8, 2011)); *Google, Inc. v. Simpleair, Inc.*, CBM2014-00170, (PTAB, Jan. 22, 2015) (Paper No. 13) (claim to transmitting data (e.g., lottery results or stock quotes) to remote devices determined to be “used in the practice, administration or management of a financial product or service” (internal quotation marks omitted)).

Accordingly, we are persuaded that a preponderance of the evidence shows that the challenged claims of the ’082 patent encompass methods or corresponding systems “that are financial in nature, incidental to a financial activity, or complementary to a financial activity” and, thus, satisfy the “financial product or service” requirement of Section 18. CBM Rules, 77 Fed. Reg. at 48,735.

2. *Whether the Claims Encompass a Technological Invention*

The definition of a “covered business method patent” in § 18(d)(1) of the AIA excludes patents for “technological inventions.” When determining whether a patent is for a technological invention, we consider “whether the claimed subject matter as a whole recites a technological feature that is novel and unobvious over the prior art; and solves a technical problem using a technical solution.” 37 C.F.R. § 42.301(b).

Friedman, testified that customers of Chuck E. Cheese *purchase* game tokens. Ex. 1030, 17:3–18:1.

The following claim drafting techniques typically do not render a patent a “technological invention”:

- (a) Mere recitation of known technologies, such as computer hardware, communication or computer networks, software, memory, computer-readable storage medium, scanners, display devices or databases, or specialized machines, such as an ATM or point of sale device.
- (b) Reciting the use of known prior art technology to accomplish a process or method, even if that process or method is novel and non-obvious.
- (c) Combining prior art structures to achieve the normal, expected, or predictable result of that combination.

Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,763–64 (Aug. 14, 2012). The Federal Circuit in *Versata* accepted the PTAB’s determination that a computer-implemented method of “determining a price” was not a technological invention under § 18(d)(1) because the method could be practiced “in any type of computer system or programming or processing environment,” without “specific, unconventional software, computer equipment, tools or processing capabilities.” *Versata*, 793 F.3d at 1327 (referencing *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012)).

Petitioner contends that none of the challenged claims are directed to novel or non-obvious technological features or solve a technical problem using a technical solution. Pet. 21–29. In sum, Petitioner argues that the claims recite a generic computer system, or processor, to implement a well-known game of chance and, according to the Specification, address non-technical problems associated with traditional lotteries such as “(a) the low level of excitement that is generated from the display of the game’s outcome; (b) the fact that it takes just a few moments to play the game; [and]

(c) insufficient player interaction.” *See id.*; Ex. 1001, 1:36–40; *see also id.* at 1:25–55.

In its Patent Owner Response, Patent Owner argues that the claims are directed to a technological solution to the technological problem of providing the customer with an illusion of control, or at least randomness, even though the ultimate result of the game is pre-ordained. *See* PO. Resp. 2, 16–19. According to Patent Owner, “[t]he technological problem relates to the use of an amusement game perceived to operate on a random basis, to display an outcome unknown to the player in advance,” such that, “the player **must perceive** the amusement game as operating randomly and even that the player has some control over the outcome.” *Id.* at 16 (internal citations omitted). Patent Owner then defines the technological solution as set forth in the claims to include that, “(a) the gaming piece includes a code . . . indicating whether the player wins or loses the lottery game and an amusement game, the data being unrecognizable to the player . . . and (b) “the processor controlling whether the player will win or lose the amusement game based upon the code entered by the player.” *Id.* at 16–17. More particularly, Patent Owner argues that the technical solution can be defined as follows:

the claim recognizes that the typical amusement game has a random output, and the processor controls the outcome of the apparent random amusement game so that it appears to the player that winning or losing both the lottery and the amusement game are random while, in fact, it is controlled by the processor based on data from the gaming piece unrecognizable to the player and preordained before the player even starts to play the amusement game.

Id. at 17.

We agree with Petitioner that “[t]he idea of giving a player the illusion of control over a game with an independently established outcome is an abstract one that has been used in the gaming industry since well before the priority date of the ‘082 Patent.” Pet. Reply 13, including n.8 (citing Ex. 2005,⁷ 1:5–8; Ex. 1041,⁸ 1:39–44). Patent Owner’s “‘technical solution’ amounts to nothing more than an instruction to use a processor and storage media (a ‘gaming piece’) to control an amusement game. This solution involves only the use of known, conventional components in a conventional fashion to accomplish a process or method in a ‘fun and interesting manner.’” *Id.* at 4 (internal citations omitted).

Whereas, in its Response, Patent Owner argued that the claims encompass a technological invention relating to the illusion of control or randomness (PO Resp. 16–19), during the oral hearing counsel for Patent Owner conceded that this concept is not found in the challenged claims and, “since it is not claimed . . . [Patent Owner doesn’t] believe it is relevant to the issues in front of this Board.” Tr. 38:23–39:23. Nor, admitted counsel for Patent Owner, do the claims require that a player perceive the game to be randomly operated. *Id.* at 39:24–41:15.⁹

Having abandoned its argument that claims encompass a technological invention relating to the illusion of control or randomness,

⁷ Koza et al., US 4,582,324, “Illusion of Skill Game Machine for a Gaming System,” issued Apr. 15, 1986.

⁸ Martti, EP 0498814 B1, “A Game Playing Apparatus,” published May 25, 1994.

⁹ We agree with Patent Owner that the challenged claims require neither an illusion of control nor a perception that the game is randomly operated.

Patent Owner presented an entirely new argument at the oral hearing, arguing that “[t]he technological problem is the random [number] generator at the amusement game. The solution is [a] . . . predetermined code which solves that problem by avoiding . . . multiple successive grand prize winners.” *Id.* at 44:20–5:2. As we understand Patent Owner’s argument, because the processors in electronic gaming systems commonly employ random number generators to generate winning and losing numbers, the potential for randomly generating the same winning number permits the possibility of multiple grand prize winners. *See id.* at 41:16–47:9. In particular,

[t]he problem is one that is rooted in the technology of a processor that generates numbers at random. The problem is that if the code doesn’t override or control the computer, you are going to have multiple winners, or no winners, and that’s not the way a lottery is run.

Id. at 38:11–16; *see* 41:1–6, 16–24. With respect to the claimed invention, however, Patent Owner argued at the oral hearing that “the code on the gaming piece overrides and controls the processor and, as a result, you have a technological problem and a technological solution and it is in the claims.” *Id.* at 42:1–6; *see also* 34:14–23, 44:12–19 (agreeing that “in the prior art systems you would have a random number generation and the technological problem was to figure out how to replace the random element with one that was . . . predetermined”).

Practice before this tribunal expressly forbids raising arguments at oral argument that have not been discussed on the briefs. In particular, our Office Patent Trial Practice Guide states that at this stage of the proceeding, parties may introduce “[n]o new evidence and arguments. A party may rely

upon evidence that has been previously submitted in the proceeding and may only present arguments relied upon in the papers previously submitted. No new evidence or arguments may be presented at the oral argument.” Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768 (Aug. 14, 2012); *see also Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016) (concluding that the Board improperly relied on a key factual assertion made for the first time during the oral hearing of an *inter partes* review proceeding).

At oral argument, Patent Owner argued that the concept of random number generators was raised at page 5 of the PO Response which, by way of background, states that, “[m]ost electronic gaming machines such as slot machine games determine outcomes internally using a random-number generator (RNG), while others receive outcomes remotely over a network and act as electronic pull-tab machines. (Exh. 2001 ¶ 25, page 8).” Tr. 23:8–12; *see also* 47:1–9 (stating that “the experts from both sides have referred to the random number generators, and this is the solution to that problem”). Patent Owner fails to identify where in its Response that it connects the disclosure of an RNG to the use of a predetermined code to avoid multiple winners. We are not persuaded that the cited passage, or any other passage in the Patent Owner’s Response, refers to the same argument presented at the oral hearing. Accordingly, we agree with Petitioner that Patent Owner’s argument should be disregarded as untimely. *See* Tr. 52:11–15.

We also do not find Patent Owner’s argument persuasive on the merits because the claims require neither the use of a random number generator nor the exclusion of multiple grand prize winners. In this respect,

the claims merely require a generic “processor controlling whether the player will win or lose the amusement game based upon the code entered by the player.” *See, e.g.,* Ex. 1001, claim 1.

Patent Owner fails to explain *how* the claim purportedly solves the problem of multiple grand prize winners if the destiny codes are randomly assigned. Although Patent Owner contends that “[t]he problem was that the random number generator of a typical amusement game could have multiple grand prize winners,” it also concedes that the claims do not exclude the possibility that the claimed “destiny codes” are randomly assigned by, for example, a random number generator. Tr. 28:18–29:12, 29:15–23, 41:7–42:12 (agreeing that “the claims don’t exclude the possibility that the destiny codes are randomly assigned by a random number generator”), 43:23–25; 42:20–43:5 (stating that “you can have randomness in assigning the codes. That’s not in the claims”). Given that the challenged claims, thus, encompass the random assignment of winning numbers to destiny codes, the requirement for a predetermined destiny code does not solve the problem of avoiding multiple grand prize winners as Patent Owner contends. *See id.* at 41:16–47:9.

Consistent with this lack of a technical solution, we do not read the Specification as identifying the problem of multiple grand prize winners. Nor was Patent Owner able to identify where the problem articulated at oral hearing is suggested, let alone discussed, in the Specification. Rather, and in contrast to the express list of “[p]roblems . . . inherent in [prior art] gaming systems” set forth in column 1, lines 35–52 of the ’082 patent, counsel for Patent Owner admitted that the Specification “doesn’t expressly talk about the problem [of] the potential for multiple grand prize winners if the random

number generator is allowed to just go on its own” (Tr. 45:3–46:4) and that “the entire scope of the problem may not have been fully appreciated when this application was written” (*id.* at 46:8–11). *See id.* at 46:20–47:9.

For the reasons set forth above, we are persuaded that a preponderance of the evidence shows that challenged claims of the ’082 patent do not “recite[] a technological feature that is novel and unobvious over the prior art[, or] solve[] a technical problem using a technical solution” and, thus, do not encompass a “technological invention” as set forth in Section 18. 37 C.F.R. § 42.301(b).

In view of the foregoing, we determine that the ’082 patent is eligible for covered business method patent review.

C. Asserted Ground of Unpatentability

Petitioner asserts that claims 1–17 are directed to abstract ideas that are not patentable under 35 U.S.C. § 101. Pet. 1–5, 37–53. The Federal Circuit has confirmed that § 101 challenges are permissible under AIA § 18. *Versata*, 793 F.3d at 1330.

1. Overview

“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. Supreme Court precedents, however, provide three specific exceptions to the broad categories of § 101: laws of nature, natural phenomena, and abstract ideas. *Bilski v. Kappos*, 561 U.S. 593, 625 (2010). “The ‘abstract ideas’ category embodies ‘the longstanding rule that ‘[a]n idea of itself is not patentable.’” *Alice Corp.*

Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347, 2355 (2014) (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)).

In *Alice*, the Supreme Court referred to the two-step analysis set forth in *Mayo Collaboration Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012), as providing “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. 2355 (citing *Mayo*, 132 S. Ct. at 1289). Under *Mayo*, “[w]e must first determine whether the claims at issue are directed to a patent-ineligible concept.” *Id.* Next, “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.* (citing *Mayo*, 132 S. Ct. at 1297–98).

Under *Mayo*, to be patentable, a claim must do more than simply state the law of nature or abstract idea and add the words “apply it.” *Mayo*, 132 S. Ct. at 1294; *Benson*, 409 U.S. at 67. For example, “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice*, 134 S. Ct. at 2358. “Thus, if a patent’s recitation of a computer amounts to a mere instruction to ‘implemen[t]’ an abstract idea ‘on . . . a computer,’ that addition cannot impart patent eligibility.” *Id.* (internal citation omitted).

A challenged patent claim, properly construed, must incorporate enough meaningful limitations to ensure that it claims more than just an abstract idea and not just a mere “drafting effort designed to monopolize the [abstract idea].” *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 132 S. Ct. at 1297). “Simply appending conventional steps, specified at a high level of

generality,” is not “*enough*” for patent eligibility. *Id.* (quoting *Mayo*, 132 S. Ct. at 1300). Applying these principles, the Federal Circuit instructs that “determining whether the section 101 exception for abstract ideas applies involves distinguishing between patents that *claim the building blocks of human ingenuity*—and therefore risk broad pre-emption of basic ideas—and patents that integrate those building blocks into something more, enough to transform them into specific patent-eligible inventions.” *Versata*, 793 F.3d at 1332 (Fed. Cir. 2015) (emphasis added); *accord id.* at 1333–34 (“Using organizational and product group hierarchies to determine price is an abstract idea It is a *building block*, a *basic conceptual framework* for organizing information” (emphases added)).

Thus, we analyze the claims of the ’082 patent to determine whether the claims embody a patent-eligible application of an abstract idea or merely the abstract idea itself.

2. *Whether Claims 1–17 Are Directed to an Abstract Idea*

We first “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Alice*, 134 S. Ct. at 2355. In *Alice*, the Supreme Court determined that the claims at issue were “drawn to the concept of intermediated settlement,” i.e., the use of a third party to mitigate settlement risk. *Id.* at 2356. The Supreme Court determined that “[l]ike the risk hedging in *Bilski*, the concept of intermediated settlement is ‘a fundamental economic practice long prevalent in our system of commerce.’” *Id.* With respect to the first step of the “*Mayo* framework,” the Supreme Court concluded in *Alice* that “there is no meaningful distinction between the concept of risk hedging in *Bilski* and the concept of intermediated

settlement” in *Alice* and that “[b]oth are squarely within the realm of ‘abstract ideas’ as we have used that term.” *Alice*, 134 S. Ct. at 2357.

According to the Federal Circuit, patent claims related to “long-familiar commercial transactions” and contractual relationships “of ancient lineage” are directed to abstract ideas as a matter of law. *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354–55 (Fed. Cir. 2014). In *OIP Tech Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015), the Federal Circuit similarly found the “concept of ‘offer based pricing’ similar to other ‘fundamental economic concepts’ found to be abstract ideas.” 788 F.3d at 1362 (citations omitted); *see also Bascom Global Internet v. AT&T Mobility LLC*, No. 2015-1763, 2016 WL 3514158, at *5 (Fed. Cir. June 27, 2016) (finding that “filtering content [on the internet] is an abstract idea because it is a longstanding, well-known method of organizing human behavior, similar to concepts previously found to be abstract”). Pertinent to the lottery-based claims at issue here, the Federal Circuit also has found methods of managing a bingo game and a set of rules for conducting a wagering game of cards drawn to abstract ideas. *Planet Bingo, LLC v. VKGS LLC*, 576 F. App’x, 1005, 1007–08 (Fed. Cir. 2014); *In re Smith*, 815 F.3d 816, 819–20 (Fed. Cir. 2016). With respect to the latter, the Federal Circuit noted with approval the Examiner’s reasoning that a wagering game is “a method of exchanging and resolving financial obligations based on probabilities created during the distribution of the cards.” *Smith*, 815 F.3d at 818–19. The Federal Circuit concluded that “Applicants’ claimed ‘method of conducting a wagering game’ is drawn to an abstract idea much like Alice’s method of exchanging financial obligations and *Bilski*’s method of hedging risk.” *Id.* at 819.

Petitioner asserts that the challenged claims are drawn to the abstract idea of “using an amusing game to reveal the results of a lottery game” using a generic computer system. Pet. 38–41. With respect to claim 1, for example, Petitioner asserts that:

[A] player acquires a “game piece” that includes a code indicating “whether the player wins or loses” a “lottery game,” but the player does not know the outcome until he or she plays an “amusement game.” [’082 patent] at 10:66-11:5. The player enters the code into “a processor,” and the processor “generat[es] an amusement game on a display,” allows the player to input “game parameters,” and controls whether the player will win or lose based upon the code. *Id.* at 11:7–15. Finally, the outcome, or whether the player has won or lost, is “provid[ed] on a display.” *Id.* at 11:16–17.

Id. at 39.

The underlying concept of a lottery is, like the concept of risk hedging in *Bilski* and intermediated settlement in *Alice*, “a fundamental economic practice long prevalent in our system of commerce.” *See Alice*, 134 S. Ct. at 2355 (quoting *Bilski*, 561 U.S. at 611). Petitioner argues persuasively that lotteries were implemented long before the ’082 patent’s priority date. Pet. 3–4. We also note that lotteries have been used for raising money for centuries. As identified in the Institution Decision, for example, Queen Elizabeth chartered a lottery in 1566 to raise funds for harbor repairs. Inst. Dec. 15 (citing Ex. 3001, 3–4;¹⁰ Ex. 3002, 5–6¹¹). Lotteries were also a part of everyday life in the American colonies, as evidenced by numerous

¹⁰ C. L’Estrange Ewen, LOTTERIES AND SWEEPSTAKES (1932).

¹¹ John Ashton, A HISTORY OF ENGLISH LOTTERIES 5–6 (1893) (advertising the sale of 400,000 lots and a top prize of “five thousand poundes sterling”).

advertisements in broadsides and newspapers printed in the first half of the 17th century, and remain prevalent today. *See id.* (citing Ex. 3003;¹² Ex. 3004¹³).

With respect to the concept of revealing lottery results in the format of a game, Petitioner establishes that this practice was also well known prior to the application date of the '082 patent as disclosed, for example, in U.S. Patent Nos. 5,641,167 and 5,037,099, which disclose revealing the results of an instant lottery in the form of an instant bingo game card or game of poker, respectively. Pet. 42, 22–23 (citing Ex. 1003; Ex. 1004); Tr. 13:1–10.

Patent Owner responds by stating that “[t]he fact that the result of lottery tickets can be obtained without the use of computers, *e.g.*, scratch off tickets, does not make the claimed invention an ‘abstract idea.’” PO Resp. 22. Rather, at least in its Patent Owner Response, Patent Owner appeared to argue that the claims are not drawn to an abstract idea because “information unrecognizable to the player **controls** the outcome of the amusement game” such that the player perceives the play “as randomly operated for amusement and enjoyment.” *See id.* at 21–22. Contrary to Patent Owner’s argument, we agree with Petitioner that the “control” limitation is encompassed by the abstract idea because the claims as a whole are directed to the abstract idea

¹² John Samuel Ezel, *FORTUNE’S MERRY WHEEL: THE LOTTERY IN AMERICA* (1960).

¹³ Income and Apportionment of State-Administered Lottery Funds: 2010, *available at* http://www2.census.gov/govs/state/10_methodology.pdf (last retrieved July 10, 2015) (showing that Americans spend in excess of \$53 billion per year on state-sponsored lotteries alone, of which nearly \$33 billion is distributed as prize money).

of using an amusing game to reveal the outcome of a lottery. *See e.g.*, Reply 10. Moreover, as noted above, counsel for Patent Owner clarified at oral argument that the claims do *not* require that a player perceive either the illusion of control, or that the game is operated randomly. *See, e.g.*, Tr. at 38:23–41:15; Reply 9–10.

Patent Owner attempts to buttress the patentability of the challenged claims by arguing that the claims do not preempt the operation of a lottery. PO Resp. 1, 10, 22. We do not find this argument persuasive. *See* Reply 8. Although “assessing the preemptive effect of a claim helps to inform the *Mayo/Alice* two-step analysis, the mere existence of a non-preempted use of an abstract idea does not prove that a claim is drawn to patent-eligible subject matter.” *Vehicle Intelligence & Safety LLC v. Mercedes-Benz USA, LLC*, 635 F. App’x 914, 918 (Fed. Cir. 2015), *cert. denied*, No. 15-1201, 2016 WL 1171121 (U.S. May 31, 2016); *see also Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015), *cert. denied*, No. 15-1182, 2016 WL 1117246 (U.S. June 27, 2016) (“While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.”)

Patent Owner argues that the challenged claims are “entirely different” from the patent ineligible claims in *Planet Bingo* because whether a player wins or loses “is pre-ordained when the player acquires the gaming piece.” PO. Resp. 23. We do not find this argument persuasive as both the instant claims and those found ineligible in *Planet Bingo* relate to the application of computer technology to well-established wagering games. That the instant claims involve a predetermined outcome does not negate the comparison. *See Bancorp Servs. LLC v. Sun Life Assurance Co. of Canada*,

687 F.3d 1266, 1279 (Fed. Cir. 2012) (determining that a claim is not patent-eligible under § 101 when “the computer simply performs more efficiently what could otherwise be accomplished manually”); *see also* Roald Dahl, CHARLIE AND THE CHOCOLATE FACTORY 19–21 (1964. Reprint, Puffin Books, 2004) (winning or losing one of five golden tickets predetermined when customer acquires chocolate bar) (Ex. 3005).

Patent Owner further argues that the challenged claims “are more akin to the claims in *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014)” (PO Resp. 23) because, in the words of Patent Owner’s expert, “the specifically-claimed solution for interpreting the player-unrecognizable Destiny Code and displaying a game outcome is necessarily rooted in the computer technology used to decrypt the code and render the game” (Ex. 2001 ¶ 42). As discussed below, we do not find Patent Owner’s comparison apt. *See also* Reply 17–21.

The *DDR Holdings* patent is directed to retaining website visitors when clicking on an advertisement hyperlink within a host website, where clicking on the hyperlink would conventionally transport a visitor away from the host’s website to a third party website. 773 F.3d at 1257. The Federal Circuit held that the claims of the *DDR Holdings* patent “stand apart because they do not merely recite the performance of some business practice known from the pre-internet world along with the requirement to perform it on the internet. Instead, the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *Id.*; *see also Enfish LLC v. Microsoft Corp.*, No. 2105-1244, 2016 WL 2756255, at *6 (Fed. Cir. May 12, 2016) (finding claims patent eligible under § 101 where “the plain focus of the claims is on

an improvement to computer functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity”); *Bascom Global Internet*, 2016 WL 3514158, at *8 (claims to “the abstract idea of filtering content on the Internet or on generic computer components” patent-eligible under § 101 because they “carve out a specific location for the filtering system (a remote ISP server) and require the filtering system to give users the ability to customize filtering for their individual network accounts”).

We do not view claims 1–17 of the ’082 patent as either necessarily rooted in computer technology or directed to an improvement in computer functionality. There is no recitation in the claims of improved computer technology or advanced programming techniques, and the claimed subject matter does not “improve the functioning of the computer itself,” nor “effect an improvement in any other technology or technical field.” *Alice*, 134 S. Ct. at 2359. The claims merely recite a generic processor that controls the result of an amusing game and, according to the Specification, address non-technical problems associated with traditional lotteries. *See* Ex. 1001, 1:25–51. As such, the challenged claims recite nothing more than the application of an abstract idea on a computer through “well-understood, routine, conventional activity.” *See Mayo*, 132 S. Ct. at 1298.

For the reasons set forth above, we find that the claims 1–17 of the ’082 patent are directed to the abstract idea of using an amusing game to reveal the outcome of a lottery.

3. *Whether Claims 1–17 Are Limited to a Patent-Eligible Application of Using an Amusing Game to Reveal the Outcome of a Lottery*

The second step of the “*Mayo* framework” requires us to determine whether the claims recite 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.’” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 132 S. Ct. at 1294). Thus, “a claim reciting an abstract idea must include additional features to ensure that the claim is more than a drafting effort designed to monopolize an abstract idea.” *Versata*, 793 F.3d at 1332 (citing *Alice*, 134 S. Ct. at 2357). “This requires more than simply stating an abstract idea while adding the words ‘apply it’ or ‘apply it with a computer.’” *Id.* (citing *Alice*, 134 S. Ct. at 2358.)

Petitioner contends that the challenged claims recite “generic and conventional computer hardware . . . to implement the idea of using an ‘amusement game’ to reveal the results of a ‘lottery game,’” and fail to provide any inventive concept separate from the abstract idea itself. Pet. 40–41. Petitioner asserts, *inter alia*, that all of the claim elements and their functions were well-understood and known prior to the filing date of the ’082 patent; that neither the Specification nor the claims describe special purpose computers, algorithms, or programming (*id.* at 45–46); and that the stated purpose of the invention is “to solve the non-technical problem of the ‘administration, operation, and playing’ of a game of chance by displaying the outcome in ‘an interesting, fun, and exciting fashion’” (*id.* at 46 (citing Ex. 1001, 1:13–16, 1:64–66)). Accordingly, Petitioner argues that the challenged claims amount to nothing more than a mere instruction to

implement an abstract concept on a computer and, thus, monopolize the practice of that idea. *Id.* at 42.

Relying on its discussion that the claims encompass a technological invention, Patent Owner argues that the challenged claims also “contain ‘significantly more’ than a patent on the abstract idea itself” (*Versata*, 793 F.3d at 1332 (citing *Alice*, 134 S. Ct. at 2358)):

[A]s previously explained, the claims include steps such as controlling whether the player will win or lose an amusement game based on a pre-ordained outcome unknown to the player so that the player wins or loses a perceived randomly functioning amusement game. This goes far beyond mere generic computer implementation, notwithstanding that a generic computer may be used, because the computer is used in a different way to solve a technological problem.

PO Resp. 23. In section II(B)(2), above, we determined that a preponderance of the evidence shows that claims 1–17 of the ’082 patent do not encompass a “technological invention.” Applying the same reasoning here, Patent Owner’s arguments similarly fail to persuade us that the challenged claims encompass the “significantly more” required under the *Mayo* framework.

In light of the above, we determine that the challenged claims, recite no limitations, individually or as an ordered combination, that transform the challenged claims into a patent-eligible application of the abstract idea of using an amusing game to reveal the outcome of a lottery. For the reasons set forth above, we find that Petitioner has demonstrated by a preponderance of the evidence that claims 1–17 are drawn to unpatentable subject matter under 35 U.S.C. § 101.

III. MOTIONS TO EXCLUDE EVIDENCE

Patent Owner moves to exclude paragraphs 20–31 of the Declaration of Nick Farley (Ex. 1042) as generally lacking expert qualifications (FRE 702), lacking foundation (FRE 703), and lacking relevance (FRE 402). Paper 21, 3. Petitioner moves to exclude Exhibit 2001, as, *inter alia*, failing to comply with the signature requirement of 37 C.F.R. § 1.68, lacking expert qualifications (FRE 702), lacking relevance (FRE 402), and as improperly opining on matters of patent law pursuant to 37 C.F.R. § 42.65(a). Paper 24, 1. Petitioner also requests that we exclude Exhibit 2042, the Rebuttal Declaration of Stacy Friedman, on the grounds that it is an unauthorized rebuttal declaration. Paper 26, 3; *see* Paper 28 (waiving failure to comply with service requirements; permitting response on the merits to Paper 21; and authorizing a second deposition of Stacey Friedman).

Having reviewed the challenged declarations of the parties' experts, we do not find them useful in reaching our decision. As we do not rely on the objected-to materials in this opinion, we dismiss the above motions and objections as moot.

IV. CONCLUSION

We conclude that Petitioner has demonstrated by a preponderance of the evidence that claims 1–17 of the '082 patent are unpatentable under 35 U.S.C. § 101.

V. ORDER

For the reasons given, it is:

ORDERED that claims 1–17 have been shown by a preponderance of the evidence to be unpatentable as drawn to unpatentable subject matter under 35 U.S.C. § 101.

CBM2015-00105

Patent 5,569,082

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