

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BALLY GAMING, INC., DBA BALLY TECHNOLOGIES,
Petitioner,

v.

NEW VISION GAMING & DEVELOPMENT, INC.
Patent Owner.

CBM2018-00005
Patent No. 7,325,806 B1

Before FRANCES L. IPPOLITO, KEVIN W. CHERRY, and
CHRISTOPHER G. PAULRAJ, *Administrative Patent Judges*.

IPPOLITO, *Administrative Patent Judge*.

DECISION

*Denying Request on Rehearing of Final Written Decision Determining that
Challenged Claims are Unpatentable
37 C.F.R. § 42.71(d)*

I. INTRODUCTION

Patent Owner filed a Request for Rehearing (Paper 51, “Reh’g Req.” or “Rehearing Request”) asserting that in the Final Written Decision (Paper 50, “FWD”), the Board “misapprehended or overlooked key portions of the Record.” Reh’g Req. 1. In that Final Written Decision, we determined that claims 1–12 (“instituted claims”) of U.S. Patent No. 7,325,806 B1 (Ex. 1001, “the ’806 patent”) are unpatentable. FWD 3, 66.

Under 37 C.F.R. § 42.71(d), “[t]he burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, opposition, or a reply.”

For the reasons provided below, we deny Patent Owner’s Request for Rehearing.

II. ANALYSIS

A. *Forum Selection Clause*

Patent Owner contends that it is “clear error” for the Board to refuse to enforce the Forum Selection Clause between the parties because the Board’s decision “overlooks key aspects of the Record.” Reh’g Req. 5. Patent Owner asserts that the FWD and the Decision on Institution (Paper 19) never state that the Forum Selection Clause is invalid or does not apply, and that the “sole assertion in the Decision is that the Patent Owner did not enjoin the USPTO to follow the law.” *Id.* at 6. Patent Owner further contends that the text of the Settlement Agreement (Exhibit 2005) is exclusive and requires that only the Nevada courts can resolve the dispute.

Id. (citing Patent Owner’s Preliminary Response (Paper 6, “Prelim. Resp.”) and Patent Owner’s Sur-Reply to the Preliminary Response (Paper 18, “Prelim. Resp. Sur.”)). Additionally, Patent Owner argues that the FWD failed to consider the Supreme Court’s decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and a district court’s decision in *Callaway Golf Co. v. Acushnet Co.*, 523 F. Supp. 2d 388 (D. Del. 2007). Patent Owner also asserts that the Board should have interpreted the Settlement Agreement and, further, “the USPTO should have required that Bally seek permission from the Nevada District Court to proceed in the PTAB against the plain language of the Settlement Agreement, or denied institution outright. Such permission was never sought, and the institution should never have occurred.” Reh’g Req. 8.

To start, we do not agree with Patent Owner that the rehearing request on this particular issue is timely. Patent Owner has argued that “the institution should never have occurred” and that institution should have been denied outright. Reh’g Req. 8. However, our Decision on Institution (Paper 19, “Dec.”) was entered on June 22, 2018. Any request for rehearing of our determinations regarding the forum selection clause in that Decision should have been filed 14 days from the entry of that decision.

37 C.F.R. § 42.71(d)(1). As we noted in the FWD, after institution of the covered business method patent review (“CBM review”), the parties did not present any additional evidence or arguments regarding the forum selection clause issue. FWD 7 (“In the post-institution briefing, neither party has added arguments or evidence to the record regarding this issue.”). Indeed, the Patent Owner’s Response (Paper 27, “PO Resp.”) and Sur-Reply (Paper

42, “Sur.”) and Petitioner’s Reply (Paper 34, “Reply”) did not discuss forum selection. For completeness and clarity of the record, we reiterated our determination in the Decision on Institution that

[b]ased on the preliminary record, we observed that Patent Owner had not identified any controlling authority—such as by statute, rule, or binding precedent—that would require us to deny institution of a covered business method patent review based on contractual estoppel. Dec. 8–11. For example, section 18 of the America Invents Act (AIA) defines a CBM proceeding as following the standards and procedures of post-grant review with the exception of §§ 321(c), 325(b), 325(e)(2), 325(f). With respect to the procedures of post-grant review, we noted that chapter 32 provides requirements for, among other things, the contents of a petition (§ 322), the threshold showing required for institution of a post-grant review (§ 324), and the conduct of the post-grant review (§ 326). *Id.* We did not agree with Patent Owner that any portion of chapter 32, § 18 of the AIA, or authority otherwise, explicitly provides for a contractual estoppel defense. *See id. In the post-institution briefing, neither party has added arguments or evidence to the record regarding this issue.*

FWD 7 (emphasis added). Thus, Patent Owner’s quarrel now is one with the past determinations made in the Decision on Institution for which the deadline for rehearing has long expired. Nonetheless, in the interest of maintaining a complete record, we address Patent Owner’s arguments below.

First, Patent Owner mischaracterizes the FWD as relying on the “sole assertion . . . that the Patent Owner did not enjoin the USPTO to follow the law.” Reh’g Req. 6. The FWD (and the Decision on Institution) provided several reasons for our determination, including, as quoted above, that Patent Owner had not identified any controlling authority that would require us to deny institution of a covered business method patent review based on

contractual estoppel. FWD 7. Further, we determined that “[t]he Board is neither bound by the party’s Agreement, nor do we have independent jurisdiction to resolve any contractual dispute between the parties over the forum selection clause in that Agreement.” *Id.* at 7–8. We additionally addressed *Dodocase VR, Inc. v MerchSource, LLC*, No. 17-cv-07088-EDL, 2018 WL 1475289 (N.D. Cal. Mar. 26, 2018), which the Federal Circuit affirmed in *Dodocase VR, Inc. v. MerchSource, LLC*, 767 F. App’x 930, 935–36 (Fed. Cir. 2019) (non-precedential) (collectively referred to as “*Dodocase*”), on the basis that “unlike the facts and procedural posture of that case, we do not have before us any court order requiring the Petition in this proceeding to be withdrawn.” *Id.* at 7. Thus, we are not persuaded that we overlooked any evidence or argument in the record on this basis.

Second, given the particular circumstances before us, we do not agree with Patent Owner that we are or were required to: (1) interpret the Settlement Agreement (Exhibit 2005); (2) determine the forum selection clause is exclusive and requires that only the Nevada courts can resolve the dispute; (3) order Petitioner to seek permission from the Nevada District Court to proceed in the PTAB against the plain language of the Settlement Agreement; or (4) deny institution. *Reh’g Req.* 6–8. This is because, even assuming as Patent Owner argues (*id.* at 6) that we interpret the *exclusive* forum selection clause as being “far broader and more definitive than the forum selection clause in the *Dodocase*,” the fact remains that the decision in the *Dodocase* is inapposite for the reasons we have explained in our FWD. That is, there, the district court ordered the parties to withdraw the petition filed with the Board. *Ex.* 1027, 24. Those facts are very different

from the ones before us in the instant proceeding where no decision by a federal district court required the parties to withdraw the petition. Even Patent Owner acknowledges that “[c]urrent case law permits District Courts to enforce venue selection clauses against the PTAB through injunction, making it unlikely that the PTAB will have the opportunity to find any claims in the ‘806 patent unpatentable.” Prelim. Resp. Sur. 5 (emphasis added). In this way, Patent Owner agrees that *Dodocase* stands for the proposition that the *district court*, not the Board, may issue an injunction requiring the parties to withdraw the petition. Yet, no district court injunction was at issue here.

More importantly, Patent Owner, again, has not identified any *controlling* authority that requires the Board to deny institution of a CBM review based on contractual estoppel. The FWD explains that

section 18 of the America Invents Act (AIA) defines a CBM proceeding as following the standards and procedures of post-grant review with the exception of §§ 321(c), 325(b), 325(e)(2), 325(f). With respect to the procedures of post-grant review, we noted that chapter 32 provides requirements for, among other things, the contents of a petition (§ 322), the threshold showing required for institution of a post-grant review (§ 324), and the conduct of the post-grant review (§ 326). *Id.* We did not agree with Patent Owner that any portion of chapter 32, § 18 of the AIA, or authority otherwise, explicitly provides for a contractual estoppel defense. *See id.*

FWD 7. None of these statutory provisions expressly grant us the authority to enforce contractual obligations between the parties such as by ordering Petitioner to comply with the forum selection clause (e.g., ordering Petitioner to seek permission from the Nevada district court to file a petition), or awarding damages to either party for breach of contract

disputes. Thus, the parties are not at liberty to seek from us, nor do we have the capacity to grant, relief that is outside the contours of the statutory authority given by Congress for CBM review. *See Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (“An agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress.”).

Additionally, Patent Owner’s reliance on the decisions in *Bremen* and *Callaway* is misplaced. In *Bremen*, the Supreme Court rejected the district court’s ruling that a forum selection clause was unenforceable as a matter of public policy, determined that the lower court had given “far too little weight and effect” to the forum selection clause, upheld the clause, and designated “the London Court of Justice” as the site for all disputes. *Bremen*, 407 U.S. at 8. In doing so, the Supreme Court observed that “[t]he threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, *by specifically enforcing the forum clause.*” *Id.* at 12 (emphasis added). However, as discussed, our CBM review does not seek to resolve contractual disputes or enforce contractual obligations, and is, instead, focused on reviewing the patentability of the challenged claims. *See* 35 U.S.C. § 328(a) (“FINAL WRITTEN DECISION—If a post-grant review is instituted and not dismissed under this chapter, *the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 326(d)*”) (emphasis added); *see also* 35 U.S.C. § 324(a) (“THRESHOLD.—The Director may not authorize a post-grant

review to be instituted unless the Director determines that the information presented in the petition filed under section 321, if such information is not rebutted, would demonstrate that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.”). Thus, we are not persuaded that the *Bremen* decision’s discussion of the district court’s review and enforcement of contractual obligations applies in a CBM review where Patent Owner has not shown that the panel has comparable authority to resolve contract disputes.

Next, although *Callaway* is a non-binding district court decision, we nevertheless observe that the circumstances in *Callaway* support our determination. In *Callaway*, the district court reviewed and decided a breach of contract dispute between the parties. The district court determined Acushnet had breached the contract by seeking an *inter partes* reexamination:

[t]he Agreement expressly provides that “[a]ny dispute arising out of or relating to patents” be resolved by the procedures set forth therein, which are “the sole and exclusive procedure[s] for the resolution of any such dispute.” (D.I. 199, ex. 1 at § 19.1) These procedures included mediation and litigation in this district; reexamination proceedings are not listed as a possible alternative and, therefore, are precluded as possible remedies to any disputes involving the Sullivan patents. (*Id.* at §§ 19.5–19.7) There is no need for the court to determine whether an *inter partes* reexamination is a “legal proceeding,” insofar as defendant breached the Agreement in any event: *If it is a legal proceeding, defendant breached by filing a legal proceeding in the wrong forum; if it is not, defendant breached because the Agreement only allows for legal proceedings.*

Callaway, 523 F. Supp. 2d at 406–407 (emphasis added, footnotes omitted); *see id.* (“[B]ased on the foregoing discussion, *defendant violated the*

Agreement by filing the *inter partes* reexaminations to contest the validity of the Sullivan patents.”) (emphasis added). The district court granted Callaway’s motion for summary judgment of breach of contract. *Id.* at 407. Again, for a CBM review, the Board does not have the authority to enforce a contract (e.g., ordering a party to perform obligations) or to resolve breach of contract disputes (e.g., determining a breach has occurred). Thus, to the extent that Patent Owner seeks this relief, it must obtain that relief from the district court.¹

Finally, we are not persuaded that the Petition should have been denied “outright” as Patent Owner proposes. Reh’g Req. 8. Again, Patent Owner has not identified any authority that provides a contractual estoppel defense in a CBM review. Moreover, Congress has demonstrated that it will provide expressly for equitable defenses if desired and has provided for estoppel based on a party’s previous challenge to the same patent. *See* 35 U.S.C. § 325(e). But Congress did not provide for contractual estoppel as a defense to unpatentability in an AIA proceeding.

B. Covered Business Method Patent Review Standing

Patent Owner asserts that our FWD ignores a precedential decision in *Global Tel*Link Corp. v. Securus Technologies, Inc.*, CBM2014-00166, Paper 17 at 7 (PTAB Feb. 6, 2015). Reh’g Req. 10 (“The Decision ignores the *Global Tel*Link* precedent, cited in the Patent Owners Preliminary Response Sur-Reply at p. 12, and arbitrarily and capriciously finds a charge

¹ By granting institution and proceeding to the FWD, we have not made any determination on whether Petitioner’s actions breach the parties’ Settlement Agreement.

of infringement upon which they instituted this CBM.”).

Initially, we observe that though the decision in *Global Tel*Link* may be instructive, contrary to Patent Owner’s assertion, that decision has not been designated precedential. Moreover, taking into consideration the discussion by the panel in *Global Tel*Link*, we are not persuaded that our determination misapprehended or overlooked any arguments or evidence in the record. For example, the panel there determined that the “Petitioner ha[d] not demonstrated sufficiently that it satisfies the standing requirements to file its Petition under 37 C.F.R. § 42.304(a) and, therefore, den[ied] institution of a covered business method patent review.” *Global Tel*Link Corp*, Paper 17 at 2. In contrast, we discussed at length in the FWD how Petitioner provided sufficient evidence for standing in this proceeding. Specifically, we applied *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) and determined the particular factual circumstances of the parties’ past relationship regarding allegations of infringement, the Settlement Agreement (Ex. 2006), and the parties’ current dispute of the same Agreement in district court (events that had all taken place by the time of the CBM filing) to be sufficient to establish that there was a substantial controversy between the parties sufficient to establish Petitioner’s CBM patent review standing under relevant case law. FWD 8–11; Dec. 11–19; *see* Papers 10, 13, 18. Thus, we do not agree that our FWD “arbitrarily and capriciously” found a charge of infringement.

C. *Abstract Idea*

Patent Owner further argues that the FWD misapplies *Alice* to the facts. Patent Owner asserts first that the FWD’s articulation of the abstract

idea is contrary to the parties' agreement in the record and in the Institution Decision. Specifically, Patent Owner contends that it did not have an opportunity to defend against the Board's change of the abstract idea from "allowing bonus wagers in a wagering game" to "rules for playing a bonus wagering game." Reh'g Req. 10–12.

To Patent Owner's point, the FWD phrased the same abstract idea slightly differently by including "rules for playing" the bonus wager game in the abstract idea. Nonetheless, we are not persuaded that this is clear error or deprived Patent Owner of the opportunity to defend its position. Indeed, Patent Owner does not explain *why* the "rules for playing a bonus wagering game" is substantively different from "allowing bonus wagers in a wagering game," or, more importantly, the basis for Patent Owner's contention that this is a "fundamental change." *See* Reh'g Req. 11.

Indeed, there can be no doubt that from the very start of this proceeding, the issue at the heart of the patent eligibility dispute between the parties is whether the challenged claims recite significantly more than the rules for playing a bonus wagering game (i.e., allowing bonus wagers in a wagering game). For example, in the Decision on Institution, we explained that challenged claim 1 is expressly directed to a "method of playing game with at least one deck of cards" with the steps of placing a bonus wager (step (a)), forming a bonus hand (step (c)), identifying a winner of the bonus wager (step (d)), and paying the winner (step (e)). Ex. 1001, claim 1; Dec. 27. Further, we noted that the Specification describes the mechanics of gameplay by providing

the rules with which the game will be played, including, for example, the base game, the number of player and banker hands,

the number of bonus hands, the cards that are dealt face up, the cards used for the bonus hands, the rank of winning bonus hands, and how winning bonus hands are paid.

Dec. 28 (quoting Ex. 1001, 3:31–37). Thus, we have said from the start and to the end that the challenged claims at issue involve *rules* for gameplay. *Id.*; FWD 22–24.

Further, in our analysis in both the Decision on Institution and FWD, we provided detailed discussions regarding the parties’ respective contentions related to *In re Smith*, 815 F.3d 816, 817–818 (Fed. Cir. 2016). Dec. 28–30; FWD 24–26. We noted that in *Smith*, the Federal Circuit determined that

Applicants’ claims, directed to rules for conducting a wagering game, compare to other “fundamental economic practice[s]” found abstract by the Supreme Court. *See id.* As the Board reasoned here, “[a] wagering game is, effectively, a method of exchanging and resolving financial obligations based on probabilities created during the distribution of the cards.” J.A. 15. In *Alice*, the Supreme Court held that a method of exchanging financial obligations was drawn to an abstract idea. 134 S. Ct. at 2356–57. Likewise, in *Bilski*, the Court determined that a claim to a method of hedging risk was directed to an abstract idea. 561 U.S. at 611, 130 S. Ct. 3218. Here, *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.*

Dec. 29–30 (citing *Smith*, 815 F.3d at 818–819); *see* FWD 24–25 (discussing the same portions of *Smith*). We determined also that the challenged claims in this proceeding were analogous to those at issue in *Smith*, which recited “rules for conducting a wagering game.” FWD 26. Moreover, we observe that even in *Smith*, the Federal Circuit agreed that the “method of conducting a wagering game” implicates the same abstract idea

as “rules for conducting a wagering game.” *Smith*, 815 F.3d at 818–819.

Given the complete record, Patent Owner has not explained persuasively why the challenged claims are not directed to the “rules for playing a bonus wagering game” or “allowing bonus wagers in a wagering game.” In fact, the discussion provided in the FWD would be the same under either articulation of the same abstract idea. Thus, we do not agree that our FWD changed theories in midstream or otherwise deprived Patent Owner of an opportunity to defend itself. *See* Reh’g Req. 11.

D. Federal Circuit Decisions

Patent Owner further argues that it did not have an opportunity to address the Federal Circuit decisions in *BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281 (Fed. Cir. 2018) and *ChargePoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759 (Fed. Cir. 2019) that were cited in the FWD. Reh’g Req. 12. Yet, Patent Owner has not argued that it was not aware of these precedential Federal Circuit decisions, and acknowledges that “*BSG* is just another case referred to in the Revised Guidance as one of numerous decisions [issued by the Federal Circuit] identifying subject matter as abstract or non-abstract in the context of specific cases, and that number is continuously growing.” *Id.*

Further, Patent Owner has not explained persuasively why our FWD may not cite to applicable precedential decisions issued by our reviewing court. *See* Reh’g Req. 14 (“Reliance on *ChargePoint* and *BSG* is clear error and contrary to USPTO policy (and thus a violation of the APA).”). Thus, we are not persuaded of error on this basis. The 2019 Revised Patent Subject Matter Eligibility Guidance (“Guidance”) does not require us to depart from the 101 analysis provided by precedent. Rather, the

“USPTO . . . aims to clarify the analysis” “[i]n accordance with judicial precedent and in an effort to improve consistency and predictability[.]” 84 Fed. Reg. 50, 53 (Jan. 7, 2019).

For rehearing, Patent Owner argues for the first time that the Federal Circuit’s decision in *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019) provides an opposing interpretation of the *BSG* decision. The *Cellspin* decision was issued on June 25, 2019, after our FWD was entered on June 19, 2019. As such, we could not have misapprehended or overlooked case law that had not been issued by the Federal Circuit, or submitted and argued by the parties in this proceeding.

Even considering *Cellspin*, we are not persuaded of any error in the FWD. *Cellspin* quotes *BSG* for the proposition that “[i]f a claim’s only ‘inventive concept’ is the application of an abstract idea using conventional and well-understood techniques, the claim has not been transformed into a patent-eligible application of an abstract idea.” *Cellspin*, 927 F.3d at 1316 (quoting *BSG*, 899 F.3d at 1290–91). In the FWD, we explained that the challenged claims used conventional and well-understood techniques, i.e., rules for playing a game. FWD 39–41 (citing Ex. 1001, 1:27–40, 2:52–67), 40–41. In view of this disclosure, we determine that the ’806 patent expressly acknowledges that any allegedly inventive concepts involving (a) placing a bonus wager; (b) dealing out cards to each player; (c) forming the bonus hand; (d) identifying a winning player; and (e) paying the winning player were merely well-understood, routine, and conventional, steps for playing a card game.

Thus, for the reasons above, we are not persuaded that we have

misapprehended or overlooked evidence based on these arguments.

Additionally, Patent Owner contends that we ignored Patent Owner's argument that *Smith* is not on point and is irrelevant in the *Alice*, Step 2B analysis. Reh'g Req. 16. We disagree with Patent Owner's reading of the FWD. We considered Patent Owner's many arguments regarding *Smith* on pages 28–31 of the FWD. For example, on page 31 of the FWD, we determined that

Patent Owner argues that *Smith* is distinguishable because it is an *ex parte* appeal decision, which is different from an issued patent where the patent examiner determined that the patent application recited allowable patent-eligible subject matter. PO Resp. 19–20; *see* Sur. 8. Patent Owner has not explained why this difference matters for the patent-eligibility inquiry that we must conduct here. *See id.* We decline to speculate on the basis for Patent Owner's position. Rather, we observe that the § 101 inquiry is the same regardless of whether it is addressed in the context of examination, as in *Smith*, or in the context of a contested proceeding over an issued patent, as in the case here. Thus, we are not persuaded that *Smith* is distinguishable merely because our § 101 inquiry arises in a CBM patent review of an issued patent.

FWD 31.

Thus, for the reasons above, we are not persuaded that we have misapprehended or overlooked evidence based on these arguments.

E. Significantly More

Patent Owner further argues that

[t]he claims of the '806 patent add “forming only one bonus hand from at least one of said cards from each of a subset of said plurality of hands.” This element is significantly more than the defined skilled artisan would consider well understood, routine, and conventional in 2004, as supported by the unrefuted evidence

provided by Patent Owner (*see* PO Response at 16-18, PO Sur-Reply p 5-6). The evidence of what is well-understood, routine, and conventional in 2004 is found in the prosecution history of '806 patent, where the Examiner states "closest prior art of reference was Malcolm. His teachings however fail to anticipate or render obvious applicant's invention." The Decision states that bonus hands were well-known at the time of the invention, *but nowhere in the Decision does it state that "forming only one bonus hand from at least one of said cards from each of a subset of said plurality of hands" was well-known.*

Reh'g Req. 15 (emphasis added).

We disagree with Patent Owner's reading of our FWD. First, as discussed above, we explained that the challenged claims use conventional and well-understood techniques, i.e., rules for playing a game. FWD 39–41 (citing Ex. 1001, 1:27–40, 2:52–67); *see id.* at 43 ("[T]he Examiner's reasons for allowance are directed to novelty and nonobviousness, not eligibility. But the fact that the claims may be novel or nonobvious, thereby meeting the patentability requirements of § 102 and § 103, has no bearing on whether the challenged claims are patent-eligible under § 101."). In view of this disclosure, we determine that the '806 patent expressly acknowledges that any allegedly inventive concepts involving (a) placing a bonus wager; (b) dealing out cards to each player; (c) forming the bonus hand; (d) identifying a winning player; and (e) paying the winning player were merely well-understood, routine, and conventional steps for playing a card game.

Further, we explained that "each of the steps of claim 1, including Step C and Step D relied upon by Patent Owner to argue the claims add 'significantly more' than just the abstract idea, are part of the rules of the wagering game using a generic deck of cards." *Id.* at 42 (citing Ex. 1001,

6:60–7:4; 3:1–8). In this way, the challenged claims are similar to those at issue in *Smith* because “[t]he wagering game claimed in *Smith*, reciting rules for a wagering game that use a standard deck of cards, was held to be an abstract idea. *Id.* (citing *Smith*, 815 F.3d at 819). *Id.* The Federal Circuit determined in *Smith* that the “shuffling and dealing a standard deck of cards are ‘purely conventional’ activities” that do render the claims patent eligible. *Smith*, 815 F.3d at 819. As discussed in the FWD, the same rationale applies here where Step C is a conventional activity of gameplay that involves the forming of a bonus hand. For these reasons, we are not persuaded we overlooked or misapprehended evidence or arguments on this basis.

III. CONCLUSION

Based on the foregoing, Patent Owner fails to show that the Final Written Decision overlooks or misapprehends a matter previously addressed by Patent Owner.

IV. ORDER

For the reasons given, it is ORDERED that the Patent Owner’s Rehearing Request is *denied*.

CBM2018-00005
Patent 7,325,806 B1

For PETITIONER:

Gene Lee
PERKINS COIE LLP
lee-ptab@perkinscoie.com

For PATENT OWNER:

Richard Baker
NEW ENGLAND INTELLECTUAL PROPERTY, LLC
rbaker@newenglandip.com

Steven Martin
ALTMAN & MARTIN
smartin@altmartlaw.com