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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* REBECCA JEAN BALOK, LINDA MARIE JAKUBOWSKI,  
VICTOR JOSEPH KUDYBA, BARDIA MADANI,  
MICHALE CAVARETTA, PAUL MARCHETTI,  
KATHLEEN SUE BARNES, and JOHN C. FOREST

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Appeal 2014-004184  
Application 12/138,156  
Technology Center 3600

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Before MURRIEL E. CRAWFORD, NINA L. MEDLOCK, and  
TARA L. HUTCHINGS, *Administrative Patent Judges*.

CRAWFORD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting claims 1–4, 6–9, 11–19 and 21–23. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

Claim 1 is illustrative:

1. A computer-implemented system for receiving a delivery estimated time of arrival (ETA) of an expected vehicle at a customer location, the system comprising:

at least one customer system for receiving the ETA of the expected vehicle at the customer location from at least one tracking tool that is configured to receive historical vehicle order average information which corresponds to known ETAs of one or more delivered vehicles over a predetermined time frame and to generate at least one linear regression model for a first milestone event which corresponds to a vehicle build scheduling event of the expected vehicle in response to the historical vehicle order average information to determine the ETA of the expected vehicle at the customer location.

Appellants appeal the following rejections:

1. Claims 9, 11–19, 21 and 23 under 35 U.S.C. § 101 as directed to non-statutory subject matter.
2. Claims 1, 4, 6, 7, 9 and 13–16 under 35 U.S.C. § 103(a) as unpatentable over Schweickart (US 2006/0085203 A1, pub. Apr. 20, 2006), Barts (US 2002/0082893 A1, pub. June 27, 2002), and Holliday (US 2008/0059274 A1, pub. Mar. 6, 2008).
3. Claims 2, 3, 8, 11, 12, 17–19 and 21–23 under 35 U.S.C. § 103(a) as unpatentable over Schweickart, Barts, Holliday, and Ebert (US 2009/0008450 A1, pub. Jan. 8, 2009).

## ISSUE

Did the Examiner err in rejecting the claims under 35 U.S.C. § 101 because the claims on appeal encompass more than software per se?

Did the Examiner err in rejecting the claims because the linear regression modeling taught in Holliday does not relate to the delivery of

vehicles as is the subject of Schweickart and Barts but rather the prediction of how many people will be in a queue in a supermarket?<sup>1</sup>

## ANALYSIS

### Non-statutory subject matter

The Examiner argues that claims 9, 11–19, 21 and 23 relate to software *per se*. The Appellants argue that the tracking tool could be a database that stores information and as such is not drawn to software alone. (App. Brief 5). However, a database is just an array of data whose scope encompasses software *per se*, especially in view of the Specification which does not specify that the tracking tool is any physical structure. Neither the claims nor Specification narrow the scope to a physical instantiation.

In view of the foregoing, we will affirm this rejection of the Examiner.

### Obviousness

The Appellants argue that the regression modeling disclosed in Holliday does not relate to the vehicle delivery as is the subject of the Schweickart and Barts methods but rather to information pertaining to checkout times in retail outlets. We agree.

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<sup>1</sup> The Appellants also argue that the proposed amendment to the Specification does not introduce new matter as was found by the Examiner. However, the issue of whether the Specification contains new matter under 35 U.S.C. § 132 is petitionable, not appealable. *See In re Rasmussen*, 650 F.2d 1212, 1214-15 (CCPA 1981); MPEP § 706.03(o) and § 1002.02(c); *see also* MPEP § 1201.

Holliday is concerned with optimizing queue management systems in a retail outlet [1]. As part of this optimization, Holliday seeks to predict the number of arrivals in a queue [71, 88]. This prediction takes the average checkout time over the past few minutes to determine the average checkout time over the next (m) minutes, and linear regression is used to calculate the arrival time of people into the queue in the next (m) minutes [87–96]. This linear regression does not relate to the delivery of items as found by the Examiner but rather the *prediction* of how many people will arrive at a queue to optimize staffing levels [100]. This prediction takes into consideration the number of arrivals at the checkouts, the number of people who enter the store and the number of people who leave the store. It is not seen how this teaching applies to the delivery of vehicles which is the subject of the methods of Schweickart and Barts. The Examiner explains that the rationale for modifying the Schweickart/Barts tracking tool so as to be configured to generate a linear regression model is the simple substitution of one element for another (Ans. 4). However, the Examiner does not explain why a person of ordinary skill in the art would be led to make the substitution of a linear regression model designed to predict the number of people arriving at a queue for the mathematical analysis disclosed in Barts. In fact, it is not clear from the Examiner's rationale what system would result from such a substitution.

In view of the foregoing, we will not sustain the Examiner's rejection of claims 1, 4, 6, 7, 9 and 13–16 under 35 U.S.C. § 103.

We will also not sustain the Examiner's rejection of claims 2, 3, 8, 11, 12, 17–19 and 21–23 because the rejection of these claims relies on the rationale used in the above rejection to combine the teachings of

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Schweickart, Barts, and Holliday that we found flawed in our discussion of the preceding rejection.

DECISION

We affirm the Examiner's § 101 rejection.

We reverse the Examiner's § 103 rejections.

AFFIRMED-IN-PART