UNITED STATES PATENT AND TRADEMARK OFFICE

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UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
_____

Ex parte MARIO VILLENA and JOSE VILLENA
_____

Appeal 2015-000414
Application 10/536,692
Technology Center 3600
_____

Before ANTON W. FETTING, NINA L. MEDLOCK and
SHEILA F. McSHANE, *Administrative Patent Judges*.

McSHANE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants seek our review under 35 U.S.C. § 134(a) of a decision of the Examiner to reject claims 133–151 and 155. We have jurisdiction under 35 U.S.C. § 6(b). Appellants' representative appeared for oral argument on April 28, 2015 in this appeal.

We AFFIRM.

BACKGROUND

The invention relates to a system for the creation and maintenance of databases identifying specific real estate properties and their Automated Valuation Method ("AVM") (Specification, hereafter "Spec." ¶¶ 1, 4, 15). Representative claim 133 is reproduced from the Corrected Appeal Brief[1] (Claims App.) as follows, with emphasis added to relevant claim limitations:[2]

> 133. A system for distributing real-estate related information, comprising:
>
> one or more tangible computer-readable mediums that *includes one or more computer-searchable databases* with entries for a plurality of residential properties with each entry including at least: a first field containing an address of a residential property, and a second field containing an *automatic valuation method (AVM) value reflecting a computer-generated value of the residential property* identified by the address of the first field; and
>
> one or more computers configured to:
>
> *repeatedly update each of the AVM values using residential property information so as to enable the one or more databases* so as to repeatedly reflect market changes in the AVM values of the residential properties; and
>
> distribute the AVM values to any one of a plurality of users over a publically-accessible network.

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[1] The Appeal Brief (hereafter "App. Br.") filed on July 29, 2014 contains the majority of issues that Appellants bring in this Appeal. A Corrected Appeal Brief was filed on August 23, 2014 with a corrected Claims Appendix, corrected Summary of Claimed Subject Matter, and an Addendum directed to issues raised for claim 155 only. We will refer to the original Appeal Brief for the majority of the issues discussed herein, and refer to the corrected version for the text of the claims, and claim 155 issues only.

[2] Other claims, or relevant portions of the claims, necessary for an understanding of certain issues are reproduced in the "DISCUSSION" section below.

The Examiner rejected claims 133, 141, 142, and 145 under 35 U.S.C. § 102(b) or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Sklarz.[3] The Examiner rejected claims 134–140, 143, 144, 146–151, and 155 under 35 U.S.C. § 103(a) as unpatentable over Sklarz and Florance.[4] (Non-Final Office Action mailed June 12, 2014, hereafter "Non-Final Act.," 3–19). In the Answer, the Examiner entered a new ground of rejection of all the claims, claims 133–151 and 155, that are the subject of this Appeal under 35 U.S.C. § 101 as directed to non-statutory subject matter. (Answer mailed September 5, 2014, hereafter "Ans." 3). Appellants opted to proceed under 37 C.F.R § 41.41, addressing the new grounds of rejection in the Reply Brief (filed September 29, 2014, hereafter "Reply Br." 5–11).

Pursuant to 37 C.F.R. § 41.37(c)(1), any arguments not included in the Appeal Brief will be deemed waived for purposes of the appeal. We confine our discussion to the issues and arguments raised by Appellants.

DISCUSSION

35 U.S.C. § 101 Rejection

Citing *Alice Corp. v. CLS Bank Int'l,* the Examiner rejected all the claims at issue, finding that they "do not amount to significantly more than an abstract idea. The claim(s) is/are directed to the abstract idea of providing updated AVM values to customers, something that amounts to a method of organizing human activities as well as being a fundamental economic practice." (Ans. 3 (citing *Alice Corp. Pty. Ltd. v. CLS Bank Int'l,* 134 S. Ct. 2347 (2014). More specifically, the Examiner found that the steps

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[3] US Publication 2002/0087389 A1, published July 2, 2002.
[4] US Publication 2004/0030616 A1, published February 12, 2004.

of claim 133 are all routine and conventional, where repeatedly updating AVM values involves mathematical calculation using known algorithms, with the other elements not using more than generic computers and a generic network, where these additional elements do not add significantly more than the abstract idea itself (*id*. at 4). The Examiner also addressed the dependent claims, finding that the additional claimed functions do not transform the abstract idea into a patent eligible invention because the additional functions "are routine and conventional in the computing arts." (*Id*. at 5).

The Appellants responded, contending that when the instant claims are addressed as a whole they are not sufficiently abstract to be patentable, and the claims are "more than 'providing of AVM[] values to customers.'" (Reply Br. 5–9). The Appellants asserted that the claims are not directed towards organizing human activity, fundamental economic practice, ideas in and of themselves, or mathematical relationships or formulas (*id*. at 8–13). The Appellants also argued that the claims provide improvements including "improvements to the functioning of a computer implementing AVMs," by providing reduced latency for providing present market value AVMs (*id.* at 13–16). Further, Appellants asserted that the invention is innovative where there is "no resource" available "for conveniently identifying the best investment properties for sale in a large region" and allows for a Differential Valuation Search to allow quick identification of properties at below market prices (*id*. at 16).

Upon consideration of the evidence on this record in light of the arguments advanced by the Examiner and Appellants, we find that Appellants have not identified reversible error in the Examiner's determination that the claims are directed to non-statutory subject matter.

Accordingly, we sustain the Examiner's rejection for the reasons set forth in
the Answer. We add the following primarily for emphasis. Applying the
first step of the *Alice* analysis, we agree with the Examiner that the claims
are directed to the abstract idea of providing AVMs, a fundamental real
estate practice, which was known in the real estate practice at the time of the
invention. Turning to the second step of the analysis to determine whether
there are additional elements that transform the nature of the claims into a
patent eligible application, we also agree with the Examiner that although
Appellants' claims require a computer and network, these are merely generic
computing elements that perform generic known functions as claimed. *See
Alice*, 134 S. Ct. at 2358 ("[I]f 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.") (Citations omitted). The
evidence in the record does not demonstrate that Appellants' purported
features of decreased latency times, benefits for larger areas, and
identification of prices below market value as compared to other real estate
AVM systems are due to inventive concepts that are significantly more than
what is achieved by implementing an abstract concept to operate faster and
more efficiently on a computer and network.

*35 U.S.C. § 102(b) and 35 U.S.C. § 103(a) Rejections of Claims 133, 141,
142, and 145 Over Sklarz*

The rejections under 35 U.S.C. § 102(b) and 35 U.S.C. § 103(a) over
Sklarz of claims 133, 141, 142, and 145 were argued as a group on common
issues. We select claim 133 as representative.

AVMs and Database. Appellants asserted that the Examiner made
factual errors concerning Sklarz's disclosures and that many of the claim

limitations are not taught by the reference (App. Br.)[5] Appellants contended that Sklarz does not disclose the use of AVMs, database use, storage of valuations, updating a database of AVM values, and that the Examiner failed to provide sufficient motivation to modify Sklarz.

Appellants submitted that "AVM" is a term of art and Sklarz's valuations do not fall within the definition provided as follows:

> "Automated Valuation Model—An automated valuation model (AVM) is a mathematically based computer software program that produces an estimate of market value based on market analysis of location, market conditions, and real estate characteristics from information that was previously and separately collected. The distinguishing feature of an AVM is that it is a market appraisal produced through mathematical modeling. Credibility of an AVM is dependent on the data used and the skills of the modeler producing the AVM."[6]

Appellants also referred to a further characterization of AVMs in National Mortgage Professional Magazine:

> National Mortgage Professional Magazine describes an AVM as "Very fast and economical," but with the weaknesses of "No human inspection or judgment and less certainty."[] While National Mortgage Magazine goes on to state that AVMs "use zero human judgment" but rather "a series of formulas," the IAAO does qualify that human judgment in the form of the "skills of the modeler" is embedded within an AVM.[7]

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[5] The pages of the Appeal Brief are not numbered, so specific citations to it are not possible.

[6] *See*, Exhibit 7 (*Standard on Automated Valuation Models (AVMs)*, International Association of Assessing Officers, 5–8 (2003) (hereinafter "IAAO")).

[7] *See*, National Mortgage Professional Magazine (http://nationaimortgageprofessionai.com/news18232/appraisals-bpos-and-avms), Exhibits 2, 3 (First and Second Declarations of William Kennedy).

Further to this, Appellants contended that rather than disclosing the generation of an AVM as claimed, Sklarz teaches an appraisal that requires human input and is not automated. The appraisal issue aside, Appellants also essentially asserted that the Sklarz's evaluations—which Appellants refer to as Sklarz-evaluations—include human input and, therefore, fall outside of the industry-accepted term of art for AVMs. Appellants alleged that "a user applying direct human judgment uses an 'appraisal engine,' which 'generates an appraisal (i.e., a sales price prediction or valuation) using output from the trend engine, output from the comparable market analysis engine, or a combination of outputs from those engines.' See, paragraph [0248]." Appellants contended, the instant invention, in contrast, does not involve human input short of the initial programming ("'Aren't the comparables going to be pre-programmed into the analysis and doesn't this come from a human being?' The answer is 'no,' Comparables will not be pre-programmed into any machine. What is programmed is the ability of a machine to select comparables."). In further support of their position, Appellants provided a Declaration from Lawrence K. Hixson (hereafter "the Hixson Decl."), which stated that an AVM must be "produced by a computer-modeled system, and not directly by human judgment," where the opinion relied upon the IAAO description and the National Mortgage Professional Magazine reference. Mr. Hixson further opined that Sklarz's "systems and methods require substantial interaction between humans and human judgment" because "Sklarz expressly compares its own valuations with AVMs" and "none of the Sklarz claims incorporates AVMs." (Hixson Decl. 3–4).

Additionally, Appellants alleged that Sklarz references AVMs for "comparison and contrast" purposes only in light of Sklarz's disclosure that its own "trend engine has proven to be significantly more accurate than comparable market analysis, and with existing AVMs, when predicted and closed sales prices are compared." (App. Br. (citing Sklarz ¶ 253)).

Intertwined with this issue are Appellants' assertions concerning the use of a "cache" in Sklarz compared to the claimed use of a "database." Appellants submitted that a cache is not a database and lacks features required by the claim, i.e., a cache cannot be queried or searched, and its storage duration is insufficient to allow the required functionality required by the claims (App. Br.). Mr. Hixson stated that equating a "cache" with a "database" is erroneous because, as described in Sklarz, it does not "add functionality other than speed." (Hixson Decl. 5). Appellants further alleged that Sklarz does not disclose storing AVMs or updating them as claimed. Mr. Hixson stated that his opinion is based on the fact that Sklarz does not mention that it "stores past valuations," that caches clear themselves out after a short time, and even with Sklarz's teaching of a "cache period," it is "inconceivable to a computer science professional in 2003 that a reasonable cache period . . . would extend to as much as an hour." (*Id*. at 4–6 (citing Sklarz ¶ 213)).

The Examiner responded by stating that "*Sklarz discloses the use of AVM values as claimed consistent with the definition argued by the appellant for the term*" (Ans. 12). More specifically, the Examiner found that Sklarz explicitly distinguishes its use of the term "appraisal" from that of a formal human appraisal that is prepared by a certified or licensed appraiser (*id*. at 8 (citing Sklarz ¶ 3)). The Examiner further found that

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Sklarz discloses the generation of a predicted sales price which is the same as an AVM (*id*. at 8–14 (citing Sklarz ¶¶ 7, 14, 15, 18, 223, 248, 250 ("*There are a number of techniques used in* **computerized valuation, also known as automatic valuation models (AVMs),** *for estimating property values,* **which is the same as predicting sales prices when done prospectively**.")))). The Examiner found that "Sklarz discloses that a predicted sales price of a residential property *can be calculated by using software algorithms that are executed by a computing system*," which is "what an AVM is by definition." (*id*. at 11).

As to the claimed database issues, the Examiner found that the cache disclosed in Sklarz can be queried and searched, noting that not only are the queries themselves stored, but also the responses (AVMs and associated property addresses) are stored, where the storage time for the cache can be set by the user for any time period (Non-Final Act. 7–8 (citing Sklarz ¶ 213, Figs. 12, 16); Ans. 17, 29)). Further, the Examiner found that AVM value updating is disclosed in Sklarz, and that Appellants' argument relating to the way that the updating occurs is irrelevant to the system claims (Non-Final Act. 8–10; Ans. 27–29).

Motivation to Modify Sklarz. Appellants asserted that there is no motivation to modify Sklarz as the Examiner suggests, because there is no financial motivation to make the modifications to Sklarz that Examiner suggests, where the modifications would be prohibitively expensive to make and "unjustifiable without some indicia that the suggested changes would be profitable." (App. Br.; Hixson Decl. 6–8). The Examiner responded that there is no requirement that the Examiner should develop financial evidence on the modifications to support an obviousness determination (Ans. 30).

Secondary Considerations. Appellants presented evidence of the secondary indicia of nonobviousness of copying by others and success in the marketplace, based on the success of alleged copier Zillow as well as praise by peers, with June 25, 2007, September 5, 2007, and October 17, 2007 Declarations of William Kennedy submitted (App. Br., Reply Br. 34–38). The Examiner responded that there was no definitive evidence presented that Zillow had copied the claimed invention, and that success by others could not be used to support the alleged success of the instant invention (Ans. 41). The Examiner also stated that there had been no showing of a nexus between the claimed invention and commercial success (*id*.).

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Upon consideration of the evidence on this record in light of the arguments advanced by the Examiner and Appellants, we determine that Appellants have not identified reversible error in the Examiner's determination that the disclosures of Sklarz serve to anticipate and render obvious representative claim 133 pursuant to 35 U.S.C. § 102(b) and 35 U.S.C. § 103(a). We add the following for emphasis.

As an initial matter, we note that the term "AVM" as used in representative claim 133 is limited to being a part of the "second field" of a database where the AVM value has to "reflect" a "computer-generated value of the residential property,"[8] and where there are one or more computers

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[8] We note the use of the AVM term in the claim itself because here, as well as in other arguments, Appellants appear to have veered into comparisons of the details of how their system worked or works in practice, not the invention as claimed. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) ("It is axiomatic that the claims define the invention which an applicant believes is patentable."). The patentability of the claims, and the

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configured to "repeatedly update each of the AVM values using residential property information so as to enable the one or more databases so as to repeatedly reflect market changes." The instant Specification provides minimal description of AVMs (Spec. ¶ 36 ("The exemplary AVM device 230 is based on a combination of heuristic and statistical technologies.")).

We view Appellants' characterization of the definition of AVMs as inaccurate because we see no strict prohibition on any human interaction for AVM determination in Appellants' chosen IOCC definition. The IOCC reference itself discusses providing for "mak[ing][] individual adjustments to the properties for unique features or that are subject to special influences, such as being located at a busy intersection or a premium or obstructed view" to AVM models[9] which would necessarily involve human interaction for this customization. We further view the portion of the National Mortgage Professional Magazine referred to as more limited and distinguishable in context than the Appellants suggest. For instance, this article includes limited bullet points comparing AVMs with traditional appraisals and broker opinions only—where the traditional appraisals and broker appraisals both are understandably noted to require "human judgment." It is not reasonable to rely on selected phrases taken out of context from a trade magazine to support a construction of AVMs which is as limited as Appellants advocate.

Accepting the IOCC definition, we agree with the Examiner's determination that Sklarz's disclosures teach AVMs. Sklarz clearly differentiates a formal appraisal prepared by a certified or licensed appraiser

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relation to the disclosures of the prior art, are evaluated in light of the claims only.

[9] Exhibit 7, IAAO, § 2.3.6, p. 7.

from the automated appraisal or valuation it teaches. Although in some embodiments Sklarz teaches some degree of human interaction in the overall process leading up to an AVM determination, "engines" only are used in the generation of the predicted sales price value. *See* Sklarz ¶ 18. Several of Appellants' arguments are directed to Sklarz's explicit comparison and contrasts to AVMs, where, for instance, the reference states "the trend engine has proven to be significantly more accurate than comparable market analysis, and with existing AVMs, ..." (Sklarz ¶ 253; *see also id*. ¶ 14). We acknowledge that Sklarz uses varying nomenclature, but a fair reading of the reference is that it promotes the use of its improved trending techniques to generate more accurate AVMs. The operative issue is whether Sklarz's predicted sales price value as disclosed is an AVM. There is no ipsissimis verbis test for determining whether a reference discloses a claim element, i.e., identity of terminology is not required, and we concur with the Examiner that the use of AVMs is disclosed by the reference. *In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990). Therefore, Sklarz discloses an automated system to "produce[] an estimate of market value" based on market analysis of a variety of characteristics "from information that was previously and separately collected" with the use of "mathematical modeling." *See, e.g*., Sklarz ¶¶ 14, 15, 18, 248.

Turning to the issue of the cache, as it is disclosed in Sklarz, the cache can be queried and searched, and under a broadest reasonable interpretation as "a memory," we agree with the Examiner that the cache is the equivalent of a database as claimed. We, therefore, concur with the Examiner's finding that Sklarz discloses the use of a computer configured to allow the repeated updating of AVM values using residential property information that enable

databases to reflect market changes of the AVMs. *See, e.g.,* Sklarz ¶¶ 51, 93.

Based on the Examiner's findings, we sustain the anticipation rejection of representative claim 133. We also determine that the Examiner has established prima facie obviousness; we have fully considered the Declarations provided in support of secondary considerations and, weighing all evidence of obviousness against all evidence of non-obviousness, we find the secondary considerations unpersuasive to rebut the prima facie obviousness determination.

35 U.S.C. § 103(a) Rejection Over Sklarz and Florance

Claims 134, 137, and 139. Claim 134, depending from claim 133, contains, in part, the additional limitation of:

> generate a map-like display for a respective geographic region, each map-like display containing at least: (1) respective icons for each of a plurality of residential properties within the respective geographic region, the icons being spatially distributed relative to one another based on the geographic information, and (2) at least one AVM value for one of the plurality of residential properties.

Claim 139 includes the claim limitation "wherein each maplike display is configured such that a user selection of a first property in the map-like display displays a window containing at least an AVM value for the first property," and claim 137 includes the claim limitation "wherein each geographic region is defined based on information received from a user."

Appellants alleged that Sklarz and Florance in combination do not disclose a map with icons/popup and AVM information. More specifically, Appellants contended that the Examiner provided no basis for incorporation

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of Florance's icons into Sklarz's color-coded maps, nor provided for display of AVM information (App. Br.). Appellants also asserted that for claim 137 "the only reason Sklarz allows a user to define a geographic region is to allow a user to generate a list of comparable properties." (*Id*.)

The Examiner's findings include that "*Florance teaches a very desirable manner by which real estate information may be displayed to the user, namely the use of maps with icons as claimed*," where Sklarz "*generally refers to the use of a map for real estate information*." (Ans. 33). The Examiner further found that Florance discloses that with the use of an icon there is also a display of a pop-up information window (*id*. at 32 citing Florance ¶¶ 347, 348, Fig. 58), so Florance's icons in real estate maps and pop-ups are combinable with Sklarz's AVMs, "so that the results of the query can be presented in a more user friendly format to the user." (*Id*. at 33). As to claim 137, the Examiner found that "[t]he use of a user defined map with icons comes from Florance and . . . the AVM is the result of the query in Sklarz," further responding that the Appellants' arguments are akin to individually arguing each reference. (*Id*. at 35).

We find no error with the Examiner's findings and sustain the rejections.

Claims 135, 136, and 140. Claim 135 includes the limitation "wherein the residential properties include substantially all of the residential properties in a user-defined geographic region," and claim 140 includes the limitation "wherein the map-like display includes an AVM value for each of a plurality of residential properties." The Appellants contended that there is no disclosure of "substantially all of the residential properties . . . " in either Sklarz or Florance and that the Examiner's rejection is based upon the lack

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of recitation of any further structure for this clause and therefore the rejection was unsupported. (App. Br.). The Appellants also disputed the Examiner's obviousness rejection of this claim based on the contention that "[t]he Sklarz device produces single valuation having no need to ever be placed in a searchable database," where there would be no motivation to modify Sklarz because this information is private and there is no evidence that such motivation would be profitable. The Appellants disputed the obviousness rejection of claim 136 for the same or analogous reasons. (*Id.*)

In support of the obviousness rejection, the Examiner found that "it would have been obvious to one of ordinary skill in the art at the time the invention was made to have substantially all, or all properties in a given area (including those offered for sale) be stored in the database." (Non-Final Act. 14).

The issue of the disclosure of AVMs has already been addressed, and we do not find the Appellants' additional arguments related to the obviousness issue to be persuasive, therefore we sustain the rejections of claims 135, 136, and 140 on that basis.

Claims 138 and 151. Claim 138 includes the limitation "wherein the one or more computers are configured to provide the display information to a plurality of mobile phones." The Examiner found that "[t]he use of cell phones to receive data via a network is very old and well known in the art and simply replacing the PC of Sklarz with a mobile phone would have been obvious to one of ordinary skill in the art." (Non-Final Act. 14). The Appellants contended that the Examiner's statement that "the mere sending of real estate information to a remote device in the form of a phone as

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opposed to a PC would have been obvious," is conclusory, further stating that

> [t]he examiner fails to discuss the technological limitations of, *inter alia*, cell phones, wireless bandwidth, and Wireless Applications Protocol (WAP) at the time of the invention . . . . Phones at the time of the invention had tiny, low-resolution screens unsuitable for anything other than displaying text at a font of 4 pt. . . . The appropriate issue is whether the most state of the art cellphone in 2003 had the capacity to enable a user to appropriately access the Sklarz device, including select comparable properties using color-coded maps.

(App. Br.).

The Examiner responded to Appellants' argument stating that "the specification makes no mention of any structure to a cell phone that does what is claimed, other than the generic reference to a cell phone (with and without displays)," where "Appellant[s'] specification discloses nothing more than the general idea that the device receiving the valuation data and the map to be displayed, can be a cell phone. The specification does not have any specific discussion as to how this is done by the appellant[s]." (Ans. 36–38). The Examiner further stated that "Appellant[s are] just using known technology at the time of the invention in the form of a generic cell phone" (*id*. at 38).

We do not find Appellants' arguments persuasive; the claim is directed to "computers [that] are configured to provide the display information" and the issues that Appellants raise are beyond the scope of the claim. We, therefore, sustain the rejection of claim 138. Appellants additionally argued the rejection of claim 141 based upon the same arguments as those for claim 138, where we note that the rejection of

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claim 141 was previously affirmed over Sklarz alone, and the additional arguments presented here are not found to be persuasive. The rejection of claim 151 is also sustained; Appellants relied upon the same arguments as claim 141 and, therefore, those of claim 138.

Claim 155. Claim 155 includes the further limitation of "perform[ing] a differential value search (DVS) query on properties offered for sale to identify one or more identified residential properties, a DVS being a difference between a residential property's AVM value and its offer for sale price." Appellants alleged that the prior art references the Examiner relied upon for the rejection do not teach DVSs as claimed, where "Sklarz buy/sell signals are not directed to identifying individual homes, but to generally determining good times to enter or leave particular real estate markets." (Corrected Appeal Brief ("Corr. App. Br.," filed Aug. 23, 2014), Addendum to Sec. IV).

In response, the Examiner found that "[o]ne of ordinary skill in the art would have found it obvious to provide Sklarz with the ability to determine the difference between an AVM value and an offer for sale in an effort to be able to provide a prospective buyer with an indication of how the AVM value and offer price compare to each other." (Non-Final Act. 49 (relying upon Sklarz ¶ 256)). Given Sklarz's disclosure of an embodiment where "the appraisal engine also can be used for the benefit of identifying acceptable properties with lower predicted sales prices," we find no error with the Examiner's findings and sustain the rejection of claim 155.

SUMMARY

The rejections of claims 133–151 and 155 are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

<u>AFFIRMED</u>

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