UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/064,039	10/25/2013	Lawrence C. Lee	PARC-20130571US01	1070

35699   7590   10/24/2018

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EXAMINER
SHELDEN, BION A

ART UNIT	PAPER NUMBER
3681	

NOTIFICATION DATE	DELIVERY MODE
10/24/2018	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte LAWRENCE C. LEE,
OLIVER BRDICZKA,
FRANCISCO E. TORRES,
CHRIS HOLMES,
JAMES D. GLASNAPP,
MICHAEL C. NASH,
and ANDREW J. PERELSON

———

Appeal 2017–001727
Application 14/064,039
Technology Center 3600

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Before ANTON W. FETTING, AMEE A. SHAH, and
MATTHEW S. MEYERS, *Administrative Patent Judges.*

FETTING, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE[1]

Lawrence C. Lee, Oliver Brdiczka, Francisco E. Torres, Chris Holmes,

James D. Glasnapp, Michael C. Nash, and Andrew J. Perelson (Appellants)

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[1] Our decision will make reference to the Appellants' Appeal Brief ("App.
Br.," filed April 22, 2016) and Reply Brief ("Reply Br.," filed November 9,

seek review under 35 U.S.C. § 134(a) of a non–final rejection of claims 1–5, 9–13, 17–21, and 28–32, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

The Appellants invented a way of precise targeting and delivery of local offers from merchants. Specification para. 1.

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below (bracketed matter and some paragraphing added).

> 1. A computer-executable method for delivering an offer to a mobile computing device associated with a potential customer, comprising:
>
> [1] determining, by a processor, a public-transit route
>
>> used by the potential customer associated with the mobile computing device;
>
> [2] obtaining public transit schedule data
>
>> from a public transit agency server for the public-transit route;
>
> [3] determining,
>
>> based on the public transit schedule data received from the public transit agency server,
>
> that there is an upcoming delay in the public-transit route
>
>> during which the potential customer can redeem an offer by a merchant;

2016), and the Examiner's Answer ("Ans.," mailed September 9, 2016), and Non-Final Action ("Non-Final Act.," mailed December 11, 2015).

[4] selecting,

> based on the potential customer's geolocation and upcoming delay,

an offer

> which the potential customer can redeem in the vicinity of his geolocation,

> wherein the offer is valid during the upcoming delay;

[5] sending the selected offer with a message indicating the upcoming delay

> to the potential customer's mobile computing device.

The Examiner relies upon the following prior art:

Greene	US 2009/0222344 A1	Sept. 3, 2009
Agulnek	US 2012/0197690 A1	Aug. 2, 2012
deKozan	US 2014/0156396 A1	June 5, 2014

Claims 1–5, 9–13, 17–21, and 28–32 stand rejected under 35 U.S.C. § 101 as directed to non–statutory subject matter.

Claims 2, 10, and 18 stand rejected under 35 U.S.C. § 112(a) as lacking a supporting written description within the original disclosure.

Claims 4, 12, and 20 stand rejected under 35 U.S.C. § 112(b) as failing to particularly point out and distinctly claim the invention.

Claims 1–5, 9–13, 17–21, and 30–32 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Agulnek and deKozan.

Claims 28 and 29 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Agulnek, deKozan, and Greene.

ISSUES

The issues of eligible subject matter turn primarily on whether the claims recite more than abstract conceptual advice of what a computer is to provide without implementation details.

There are no issues with regard to written description and indefiniteness, as these are uncontested.

The issues of obviousness turn primarily on whether the art describes an upcoming delay rather than an extant delay.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

Agulnek

01. Agulnek is directed to operating a navigation system, and providing advertisements to a mobile device. Agulnek para. 1.

02. Agulnek describes operating a navigation system to provide an advertisement. The method obtains a desired arrival time at a destination and selects the advertisement from an advertisement database. The advertisement includes an incentive to visit a point of interest associated with the advertisement to obtain a product or a service. The method determines a travel time from a current location of the navigation system to the destination including traveling to the point of interest to obtain the product or the

service. The method determines a new arrival time as a current time plus the determined travel time. If the new arrival time is before the desired arrival time, the advertisement is provided. Agulnek para. 5.

03. Agulnek describes determining the travel time to the destination with a visit to the point of interest associated with the advertisement from the current position of the mobile device. To compute the travel time, the advertising program uses data from the geographic database to compute a new route from the current position to the location of the point of interest and from the location of the point of interest to the destination. For the new route, the point of interest associated with the advertisement is now a waypoint between the current location and the destination. Data from the geographic database representing the length and speed limit of the road segments of the new route may be used to determine the travel time. Additionally, real-time traffic information may be used to identify delays along the new route and provide a more accurate estimate of the travel time to the destination including a stop at the point of interest associated with the advertisement. Moreover, historic traffic information may be used to estimate the travel time to the destination. Furthermore, the advertising program obtains the transaction time associated with the incentive of the advertisement from the advertisement database. Agulnek para. 55.

04. Agulnek describes requesting an advertisement with an incentive having a transaction time less than or equal to the spare time. The

request includes the computed spare time and the current position
of the mobile device. The advertising program evaluates the
transaction time data of the advertisement data records to identify
the advertisement and the incentive to include in the advertisement
message that is less than or equal to the spare time. Agulnek
para. 66.

deKozan

05. deKozan is directed to generating a request for an advertisement
based on an identified ridership pattern of a user of a transit
system. deKozan para. 6.

06. deKozan describes fare information, schedule information, delay
update information, and other transit related information being
processed at the computer server and communicated to the various
other machines in the transit system. deKozan para. 54.

ANALYSIS

*Claims 1–5, 9–13, 17–21, and 28–32 rejected under 35 U.S.C. § 101 as
directed to non–statutory subject matter*

Method claim 1 recites determining route data, obtaining schedule data,
determining upcoming delay data, selecting an offer based on location and
delay data, and sending the offer. Thus, claim 1 recites receiving, analyzing,
and transmitting data. None of the limitations recite implementation details
for any of these steps, but instead recite functional results to be achieved by
any and all possible means. Data reception, analysis and modification, and
transmission are all generic, conventional data processing operations to the
point they are themselves concepts awaiting implementation details. The

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sequence of data reception-analysis-transmission is equally generic and conventional. The ordering of the steps is therefore ordinary and conventional. The remaining claims merely describe process parameters, with no implementation details.

The Supreme Court

> set forth 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. First, [] determine whether the claims at issue are directed to one of those patent-ineligible concepts. [] If so, we then ask, "[w]hat else is there in the claims before us?" [] To answer that question, [] 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. [The Court] described step two of this analysis as a search for an "'inventive concept'"—i.e., 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 Corp., Pty. Ltd. v CLS Bank Intl, 134 S.Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012)).

To perform this test, we must first determine whether the claims at issue are directed to a patent-ineligible concept. The Examiner finds the claims are directed to targeted advertising based on public-transit delays. Non-Final Act. 4.

Although the Court in *Alice* made a determination as to what the claims were directed to, we find that this case's claims and the Specification provide enough information to inform one as to what they are directed to.

The preamble to claim 1 recites that it is a method for delivering an offer to a mobile computing device associated with a potential customer. The steps in claim 1 result in sending a selected offer with a message indicating an upcoming delay to a mobile computing device. The Specification at paragraph 1 recites that the invention relates to precise targeting and delivery of local offers from merchants. Thus, all this evidence shows that claim 1 is directed to delivering an offer, i.e. advertising and promotion. This is consistent with the Examiner's finding.

It follows from prior Supreme Court cases, and *Bilski* (*Bilski v Kappos*, 561 U.S. 593 (2010)) in particular, that the claims at issue here are directed to an abstract idea. Like the risk hedging in *Bilski*, the concept of advertising and promotion is a fundamental business practice long prevalent in our system of commerce. The use of advertising and promotion is also a building block of ingenuity in marketing. *See Affinity Labs v Amazon*, 838 F.3d at 1271 (customizing a user interface to have targeted advertising based on user information), and *Personalized Media Commc'ns, LLC v. Amazon.Com, Inc.*, 161 F. Supp. 3d 325, 338 (D. Del. 2015), aff'd sub nom., 671 F. App'x 777 (Fed. Cir. 2016) (providing personalized recommendations). Thus, advertising and promotion, like hedging, is an "abstract idea" beyond the scope of §101. *See Alice Corp. Pty. Ltd.* at 2356.

As in *Alice Corp. Pty. Ltd.*, we need not labor to delimit the precise contours of the "abstract ideas" category in this case. It is enough to recognize that there is no meaningful distinction in the level of abstraction between the concept of risk hedging in *Bilski* and the concept of advertising and promotion at issue here. Both are squarely within the realm of "abstract ideas" as the Court has used that term. *See Alice Corp. Pty. Ltd.* at 2357.

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Further, claims involving data collection, analysis, and display are directed to an abstract idea. *Elec. Power Grp. v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (holding that "collecting information, analyzing it, and displaying certain results of the collection and analysis" are "a familiar class of claims 'directed to' a patent ineligible concept"); *see also In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016). Claim 1, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data retrieval, analysis, and transmission and does not recite an improvement to a particular computer technology. *See, e.g., McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (finding claims not abstract because they "focused on a specific asserted improvement in computer animation"). As such, claim 1 is directed to the abstract idea of receiving, analyzing, and transmitting data.

The remaining claims merely describe process parameters. We conclude that the claims at issue are directed to a patent-ineligible concept.

The introduction of a computer into the claims does not alter the analysis at *Mayo* step two.

> the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea "while adding the words 'apply it'" is not enough for patent eligibility. Nor is limiting the use of an abstract idea "'to a particular technological environment.'" Stating an abstract idea while adding the words "apply it with a computer" simply combines those two steps, with the same deficient result. Thus, if a patent's recitation of a computer amounts to a mere instruction to "implement[t]" an abstract

> idea "on . . . a computer," that addition cannot impart patent
> eligibility. This conclusion accords with the preemption
> concern that undergirds our §101 jurisprudence. Given the
> ubiquity of computers, wholly generic computer
> implementation is not generally the sort of "additional
> feature[e]" that provides any "practical assurance that the
> process is more than a drafting effort designed to monopolize
> the [abstract idea] itself."

Alice Corp. Pty. Ltd., 134 S.Ct. at 2358 (citations omitted).

"[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea [] on a generic computer." *Alice Corp. Pty. Ltd.*, 134 S.Ct. at 2359. They do not.

Taking the elements of claim 1 separately, the function performed by the computer at each step of the process is purely conventional. Using a computer to receive, analyze, and transmit data amounts to electronic data query and retrieval—one of the most basic functions of a computer. All of these computer functions are well-understood, routine, conventional activities previously known to the industry. *See Elec. Power Grp. v. Alstom S.A., supra. Also see In re Katz Interactive Call Processing Patent Litigation*, 639 F.3d 1303, 1316 (Fed. Cir. 2011)("Absent a possible narrower construction of the terms "processing, " "receiving," and "storing," . . . those functions can be achieved by any general purpose computer without special programming"). In short, each step does no more than require a generic computer to perform generic computer functions. As to the data operated upon, "even if a process of collecting and analyzing information is 'limited to particular content' or a particular 'source,' that limitation does not make the collection and analysis other than abstract." *SAP America Inc. v. InvestPic LLC*, 898 F.3d 1161, 1168 (Fed. Cir. 2018)

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Considered as an ordered combination, the computer components of Appellants' method add nothing that is not already present when the steps are considered separately. The sequence of data reception-analysis-transmission is equally generic and conventional or otherwise held to be abstract. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (sequence of receiving, selecting, offering for exchange, display, allowing access, and receiving payment recited an abstraction), *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1378 (Fed. Cir. 2017) (sequence of data retrieval, analysis, modification, generation, display, and transmission), *Two-Way Media Ltd. v. Comcast Cable Communications, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017)(sequence of processing, routing, controlling, and monitoring). The ordering of the steps is therefore ordinary and conventional.

Viewed as a whole, Appellants' method claims simply recite the concept of advertising and promotion as performed by a generic computer. To be sure, the claims recite doing so by advising one to present an ad based on location and upcoming transit delay. But this is no more than abstract conceptual advice on the parameters for such advertising and promotion and the generic computer processes necessary to process those parameters, and do not recite any particular implementation.

The method claims do not, for example, purport to improve the functioning of the computer itself. Nor do they effect an improvement in any other technology or technical field. The Specification spells out different generic equipment and parameters that might be applied using this concept and the particular steps such conventional processing would entail

based on the concept of advertising and promotion under different scenarios.
They do not describe any particular improvement in the manner of computer
functions. Instead, the claims at issue amount to nothing significantly more
than an instruction to apply the abstract idea of advertising and promotion
using some unspecified, generic computer. Under our precedents, that is not
enough to transform an abstract idea into a patent-eligible invention. *See
Alice Corp. Pty. Ltd.* at 2360.

> As to the structural claims, they
>
>> are no different from the method claims in substance. The
>> method claims recite the abstract idea implemented on a generic
>> computer; the system claims recite a handful of generic
>> computer components configured to implement the same idea.
>> This Court has long "warn[ed] ... against" interpreting § 101"in
>> ways that make patent eligibility 'depend simply on the
>> draftsman's art.'"
>
> *Alice Corp. Pty. Ltd.* at 2360.

We are not persuaded by Appellants' argument that the claims are
analogous to those in *Enfish*. Reply Br. 8–10. The claims differ from those
found patent eligible in *Enfish*, where the claims were "specifically
directed to a *self-referential* table for a computer database." 822 F.3d 1327,
1337 (Fed. Cir. 2016). The claims thus were "directed to a specific
improvement to the way computers operate" rather than an abstract idea
implemented on a computer. *Id.* at 1336. Here, by contrast, the claims
are not directed to an improvement in the way computers operate.
Though the claims purport to accelerate and improve the precision of the
process of delivering an ad, our reviewing court has held that speed and
accuracy increases stemming from the ordinary capabilities of a general

purpose computer "do[] not materially alter the patent eligibility of the claimed subject matter." *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can. (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012). Instead, the claims are more analogous to those in *FairWarning* , wherein claims reciting "a few possible rules to analyze audit log data" were found directed to an abstract idea because they asked "the same questions (though perhaps phrased with different words) that humans in analogous situations detecting fraud have asked for decades." 839 F.3d at 1094, 1095. The instant claims ask the same question of when is a good time to send an ad to a customer that has been at the heart of the advertising industry. At bottom, the claims do no more than elicit data matching some criterion to answer this question.

We are not persuaded by Appellants' argument that "the Examiner considers targeted advertising to be a fundamental economic practice but the courts have not." Reply Br. 11–12. The United States District Court, C.D. California, found that "targeted advertising is just such a concept, insofar as matching consumers with a given product or service "has been practiced as long as markets have been in operation." *Morsa v. Facebook*, 77 F. Supp. 3d 1007, 1013 (C.D. Cal. 2014). The Federal Circuit affirmed. *Morsa v. Facebook*, 622 Fed.Appx. 915 (Fed. Cir. 2015). Although non-precedential, this does show that the Federal Circuit considers targeted advertising to be a fundamental practice and idea.

And although Appellants contend that the claims in *Ultramercial*, supra, are not directed to targeted advertising (Reply Br. 12), the *Ultramercial* claims targeted ads to those desiring "access to the media product without charge to the consumer on the precondition that the consumer views the

sponsor message." *Ultramercial*, 772 F3d at 712 (reciting claim 1 of the '545 patent). Beyond that, the instant claims are directed to some specific concept for generating ads absent technological implementation details, and as such is directed to advertising and promotion.

We are not persuaded by Appellants' argument that "claim 1 recites sufficient detail for performing the operations to obtain the result, such as obtaining public transit schedule data and selecting an offer based on geolocation and an upcoming delay." Reply Br. 12. Claim 1 recites sufficient detail only in that it provides general advice on how to determine when to send an ad. The lack of technological implementation details results in an insufficient amount of detail to recite more than instructing a computer to perform the functions recited by any and all possible means. Appellants' examples of obtaining public transit schedule data and selecting an offer based on geolocation and an upcoming delay are no more than the conventional operations of retrieving data and making a decision based on criteria. Aside from how one interprets the data, the operations are the same as looking up someone's schedule and placing a meeting notice where time and place are available. But interpretation of data[2] is in the mind of the beholder and given no patentable weight. *See In re Bernhart*, 417 F.2d 1395, 1399 (CCPA 1969).

We are not persuaded by Appellants' argument that *SmartGene, Inc. v. Advanced Biological Labs., SA*, 555 F. App'x 950, 951, 954 (Fed. Cir. 2014)

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[2] Data per se is an arbitrary string of binary digits dependent on encoding scheme and has no intrinsic meaning unless imposed by some technological limitation.

is inapposite. Reply Br. 12–13. Like *Morsa*, supra, *Smartgene* is a non-precedential decision that nevertheless illustrates subjects the Federal Circuit has found directed to abstract ideas. In holding the *Smartgene* claims as directed to an abstract idea, the Court found

> Claim 1 does no more than call on a "computing device," with basic functionality for comparing stored and input data and rules, to do what doctors do routinely. In three steps, claim 1 defines a "method for guiding the selection of a therapeutic treatment regimen for a patient with a known disease or medical condition." '786 patent, col. 17, lines 49–51. The method (1) "provid[es] patient information to a computing device" having routine input, memory, look-up, comparison, and output capabilities and that (2) "generat[es] ... a ranked listing of available therapeutic treatment regimens" and (3) "generat[es] ... advisory information for one or more therapeutic treatment regimens in said ranked listing."
>
> *Smartgene*, 555 Fed.Appx. at 954–955.

Appellants attempt to distinguish the instant claims by contending

> that claim 1 does not recite comparing new and **stored** information. Instead, claim 1 compares new, dynamic information such as user geolocation with also new, dynamic information such as public transit schedule data and delays associated with the public transit routes. The offers are also new and dynamically changing since the offers have specific validity times. In contrast, the SmartGene system only compares new and stored information such as standard medical conditions found in a textbook reference.

Reply Br. 13.

First, claim 1 does not recite the data as being dynamic. Second, even if the data is dynamic, claim 1 recites only determining a route and location, and schedule delays. Thus, claim 1 recites no more than receiving such data. Data reception is a conventional operation. Whatever data pre-processing

required by any particular characteristics (such as dynamism) of the data are outside the scope of the claims. Finally, the comparison to *Smartgene* is apt, as both the *Smartgene* and instant claims recite data retrieval, analysis, and transmission. Only the mental interpretation of the data and the nature of the analytical criteria differ.

We are not persuaded by Appellants' argument that the claims alter the flow of riders. Reply Br. 14–15. The claims do not recite such, and nothing in the claims would cause such a redirection. Rather, Appellants posit a potential change in a mental travel plan based on the content of the message. Just as sending a message to return home immediately is unworthy of patentable weight, so is an ad that might suggest changing travel plans to take advantage of an offer.

We are not persuaded by Appellants' argument that "analyzing geolocation and an upcoming delay for the user is a technical process that maps the users with merchants, and solves the technical problem of determining which offers from merchants matches up with different scenarios." Reply Br. 16. First, this problem of matching ads with scenarios is a marketing problem present in commerce since the dawn of advertising rather than a technical problem. Second, as the claims recite no implementation details for analyzing geolocation and an upcoming delay, the claims do not solve such analysis, but instead advise one to perform the analysis. To the extent Appellants contend the result of the analysis is a good thing, so is the result of much abstract advice. For example, the highly abstract aphorisms "a stitch in time saves nine" and "an ounce of prevention is worth a pound of cure" form the basis of the preventive maintenance industry.

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We are not persuaded by Appellants' argument that "determining when customers are receptive to receiving and viewing information is a technical process which may constitute significantly more. This process requires analyzing the activities of a user and determining when a user may receive and view the information." *Id.* Again, this is a marketing rather than technical process. Given the data inputs that the claims do not recite implementations for, the remaining portions of the claims may be done mentally or with paper and pencil. Analysis per se is an abstraction of the various algorithms used to perform it, and so is an abstract idea.

Claims 2, 10, and 18 rejected under 35 U.S.C. § 112(a) as lacking a supporting written description within the original disclosure

We summarily affirm this uncontested rejection.

Claims 4, 12, and 20 rejected under 35 U.S.C. § 112(b) as failing to particularly point out and distinctly claim the invention

We summarily affirm this uncontested rejection.

Claims 1–5, 9–13, 17–21, and 30–32 rejected under 35 U.S.C. § 103(a) as unpatentable over Agulnek and deKozan

We are persuaded by Appellants' argument that

> One of ordinary skill in the art would not combine the delays
> identified in Agulnek with performing a transaction during a
> spare time of Agulnek because the delays in Agulnek are
> merely additional time spent driving in traffic to a destination.
> The delays in the Agulnek reference are not free time that a car

> driver can use to redeem an offer. Examiner confuses the delay
> in the Agulnek reference, which is not free time but is time
> stuck driving in traffic as indicated by real-time traffic
> information, with the delay recited in claim 1, which is free
> time because a public transit has not arrived yet.

Reply Br. 19.

In particular, the claim recites an upcoming delay rather than an extant delay as in Agulnek. The Examiner does not make any determinations why the combination of the references would suggest altering the descriptions by substituting an upcoming delay.

Claims 28 and 29 rejected under 35 U.S.C. § 103(a) as unpatentable over Agulnek, deKozan, and Green

These claims depend from claim 1.

CONCLUSIONS OF LAW

The rejection of claims 1–5, 9–13, 17–21, and 28–32 under 35 U.S.C. § 101 as directed to non–statutory subject matter is proper.

The rejection of claims 2, 10, and 18 under 35 U.S.C. § 112(a) as lacking a supporting written description within the original disclosure is proper.

The rejection of claims 4, 12, and 20 under 35 U.S.C. § 112(b) as failing to particularly point out and distinctly claim the invention is proper.

The rejection of claims 1–5, 9–13, 17–21, and 30–32 under 35 U.S.C. § 103(a) as unpatentable over Agulnek and deKozan is improper.

The rejection of claims 28 and 29 under 35 U.S.C. § 103(a) as unpatentable over Agulnek, deKozan, and Green is improper.

DECISION

The rejection of claims 1–5, 9–13, 17–21, and 28–32 is 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED