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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL A. RACUSIN

Appeal 2017-008624
Application 14/466,409
Technology Center 3600

Before JEREMY J. CURCURI, HUNG H. BUI, and MICHAEL J. ENGLE,
Administrative Patent Judges.

BUI, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant seeks our review under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–5, 7, and 9. Claims 6, 8, and 10–11 are cancelled. Claims App. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.¹

¹ Our Decision refers to Appellant’s Appeal Brief (“Br.”) filed January 9, 2017; Examiner’s Answer (“Ans.”) mailed February 20, 2017; Non-Final Office Action (“Non-Final Act.”) mailed April 29, 2016; and original Specification (“Spec.”) filed August 22, 2014.

STATEMENT OF THE CASE

Various systems and methods for purchasing commodities (e.g., gasoline) at a discount using prepaid or credit cards are known. Spec. ¶ 2 (citing CA 2,684,118; KR 2002-00074964; US 7,742,942; US 8,504,465; US 2006/086787; and 2007/0276738). “Due to the variance in the local fees [e.g., taxes and other charges], many discount systems are limited to specific geographical areas.” Spec. ¶ 16 (citing US 6,980,960 and US 8,019,694). However, “[s]uch geographical constraints significantly impede the benefits of such commodity discount system.” Spec. ¶ 17. As such, Appellant proposes “a commodities discount card and a method for selling commodities, such as fuel, that allows a purchaser to purchase a commodity at a discount without any geographical constraints because the invention automatically adjusts the price pursuant to location.” Spec. ¶ 1. In particular, “the discounted retail price of the commodity is based upon the raw commodity price not including any local fees [] that are normally added on.” Abstract. In other words, the discount applies only to the commodity, and not the local taxes and other surcharges. “As such, the discount commodity system [] can be provided without any geographical constraints.” Abstract.

Claims 1 and 7 are independent. Representative claim 1 is reproduced below with disputed limitations in *italics*:

1. A method for operating a Point of Sale (POS) terminal with an all in one, pre-consumption, *anywhere gasoline discount (APAGD) card having a cash value* that enables a prepaid commodity to be dispensed at the POS terminal at a fixed unit commodity discount price *without discounting local taxes and fees* and allows the cost of the units of the discounted commodity to be debited to said APAGD card along with the

undiscounted local taxes and fees applicable to the units of said commodity, the APAGD card having an initial prepaid cash value for enabling a pump to be controlled by the POS terminal up to the current cash value of the prepaid APAGD card, the method comprising the steps of:

(a) enabling at least purchaser's account number data from said APAGD card to be read by said POS terminal;

(b) enabling POS data including at least the location of the POS terminal and the purchaser's account number to be transmitted to a remote server, said server including a database organized by purchaser account number and the current cash value in the purchaser's APAGD account;

(c) *automatically determining the maximum number of units of the discounted commodity that can be pumped at said POS terminal in response to said APAGD card being read at said POS terminal taking into account the local taxes and local charges applicable to each unit of the discounted commodity based upon the location of the POS terminal and the current cash balance of the APAGD card;*

(d) automatically enabling a pump at said POS terminal for said maximum number of units of said commodity determined in step (c) to allow gas to be pumped; and

(e) automatically debiting the current transaction of the commodity and the local taxes and fees from the current cash value of purchaser's APAGD account in a single transaction.

App. Br. 24 (Claims App.).

EXAMINER'S REJECTIONS and REFERENCES

(1) Claims 1–5, 7, and 9 stand rejected under 35 U.S.C. § 101 because the claimed invention is directed to a patent-ineligible “abstract idea” without significantly more. Non-Final Act. 3–9.

(2) Claims 1, 2, 4, 5, 7, and 9 stand rejected under 35 U.S.C. § 103(a) as being obvious over Wanasek (US 2004/0260632 A1;

published Dec. 23, 2004) and Klingle (WO 01/16905 A1; published Mar. 8, 2001).

(3) Claim 3 stands rejected under 35 U.S.C. § 103(a) as being obvious over Wanasek, Klingle, and Fell et al. (US 2008/0313013 A1; published Dec. 18, 2008).

ANALYSIS

Patent-Eligible Subject Matter

To determine whether subject matter is patent-eligible under § 101, the Supreme Court has set forth a two part test “for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice Corp. Pty. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014). The first step in the analysis is to “determine whether the claims at issue are directed to one of those patent-ineligible concepts,” such as an abstract idea. *Id.* If the claims are directed to eligible subject matter, the inquiry ends. *Thales Visionix Inc. v. United States*, 850 F.3d 1343, 1349 (Fed. Cir. 2017); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016).

If the claims are directed to a patent-ineligible concept, the second step in the analysis is to consider the elements of the claims “individually and ‘as an ordered combination’” to determine whether there are additional elements that “‘transform the nature of the claim’ into a patent-eligible application.” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 79, 78). In other words, the second step is to “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.” *Id.* (quoting *Mayo*, 566 U.S. at 72–73). “[W]ell-understood, routine, [and] conventional activit[ies]’ previously known to the industry” are insufficient to transform an abstract idea into patent-eligible subject matter. *Id.* at 2359 (quoting *Mayo*, 566 U.S. at 73).

In rejecting claims 1–5, 7, and 9 under 35 U.S.C. § 101, the Examiner determines these claims are directed to the abstract idea of “automatically pricing the total price of [a] commodity by adding the local taxes and local charges to the price per unit of the commodity” which is considered as “a fundamental economic practice” and includes limitations that are analogous to those claims discussed, for example, in *buySAFE* and *OPI Technologies*. Ans. 8 (quoting *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354 (Fed. Cir. 2014) (holding that “creating a contractual relationship—a ‘transaction performance guaranty’” is an abstract idea); and *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015) (holding that “offer-based price optimization” is an abstract idea)). The Examiner also determines the additional elements in the claims are not sufficient to amount to significantly more than the judicial exception because: (1) the claims recite “mere instructions to implement the idea on a computer” and “generic computer structure that serves to perform generic computer functions [that are] are well-understood, routine, and conventional functions”; and (2) “[t]he claimed invention **does not** ‘improve another technology or technical field,’ ‘improve the functioning of the computer itself,’ [] or ‘add meaningful limitations that amount to more than generally linking the use of the abstract idea to a particular technology environment.’” Non-Final Act. 7–8.

Alice/Mayo—Step 1 (Abstract Idea)

Turning to the first step of the *Alice* inquiry, Appellant argues the claims are not directed to an abstract idea because: (1) “the Examiner has overgeneralized the claims”; (2) the claims are directed to “a POS terminal for dispensing a commodity” that is “not a fundamental economic practice” because these claims “relate to a method for controlling a POS [point-of-sale] terminal” and “a computerized system for processing discounted wholesale gasoline and undiscounted local fees and local taxes at a POS terminal”; and (3) the claims are similar or analogous to the claims in *Diamond v. Diehr*, 450 U.S. 175 (1981) because (i) Appellant’s “claims here, like the claims in *Diehr* above, are directed to operating a machine, namely a pump and are not abstract” and (ii) Appellant’s “claims at issue, like the claims in *Diehr*, improve an existing technological process and are therefore patent eligible.” App. Br. 12–19.

Appellant’s arguments are not persuasive. At the outset, we note Appellant’s reliance on *Diehr* is misplaced because *Diehr* is not the most appropriate authority for this case and does not address claims directed to “a fundamental economic practice” as an abstract idea similar to Appellant’s claims. For example, the Supreme Court in *Diehr* held that a computerized process for curing synthetic rubber into a rubber product — the process including several steps reciting the use of a well-known mathematical formula and a programmable digital computer — is a patent-eligible “process” under 35 U.S.C. § 101.

Diehr’s Figure 1 is representative of U.S. Patent No. 4,344,142 (“*Diehr*’s ’142 patent”) titled “*Direct Digital Control of Rubber Molding Presses*” as reproduced below:

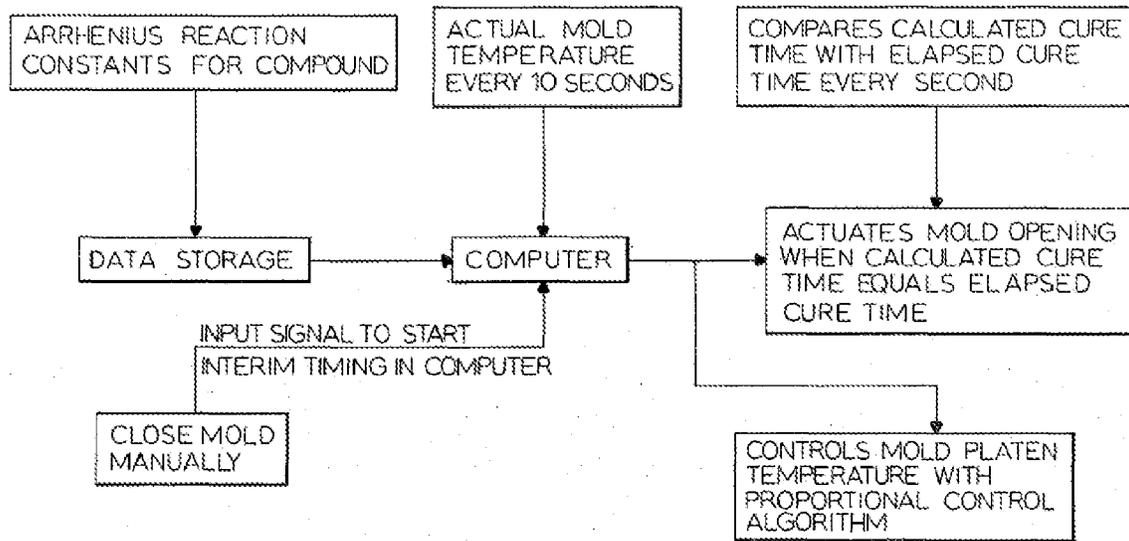


FIG. 1

As shown in *Diehr*'s Figure 1, the process of curing synthetic rubber monitors the temperature of a mold inside a press, and uses a well-known mathematical formula (*i.e.*, the Arrhenius equation) to calculate the required cure time based on the measured temperature and to determine when to open the press and remove the cured, molded rubber, as recited in *Diehr*'s claims. '142 patent, 2:17–37, 3:29–4:5. In other words, *Diehr*'s claim requires a practical application of such a mathematical algorithm, *i.e.*, using a mathematical algorithm in the context of a molding press to transform synthetic rubber into cured rubber products.

The Supreme Court in *Diehr* recognized that (1) mere inclusion of an “abstract idea” in a process does not make the process patent-ineligible, and (2) even if an “abstract idea” (*i.e.*, mathematical algorithm or formula embedded in a process) is unpatentable, the overall claimed process — taken as a whole and resulting in a physical and chemical transformation from synthetic rubber to cured, molded rubber — falls within the scope of patentable subject matter. *See Diehr*, 450 U.S. at 183–89.

In contrast to *Diehr*, Appellant’s claims and Specification are directed to “a method for selling commodities at a discount and a discount commodity system [] that allows a consumer to purchase units of a commodity at a discounted unit price” and that “does not impose any geographical constraints on the purchaser since the discounted unit price will not vary in different locales.” Spec. ¶ 23, Abstract. As acknowledged by Appellant, the claims recite “a computerized system for processing discounted wholesale gasoline and undiscounted local fees and local taxes at a POS terminal.” App. Br. 13.

A more appropriate authority for this case is (1) *Bilski v. Kappos*, 561 U.S. 593 (2010) where the Supreme Court unanimously held that *Bilski*’s method of hedging risk in commodities trading is “a fundamental economic practice long prevalent in our system of commerce” and, as such, is a patent-ineligible “abstract idea”; and (2) *Alice* where the Supreme Court also held that *Alice*’s “process” claims, like *Bilski*’s claims, recite a patent-ineligible “abstract idea” of intermediated settlement risk management — “a fundamental economic practice long prevalent in our system of commerce,” *i.e.*, “a building block of the modern economy.” *Alice*, 134 S. Ct. at 2347, 2359.

Based on Appellant’s claims and Specification, we agree with the Examiner that the claims are directed to an abstract idea of “automatically pricing the total price of [a] commodity [i.e., gasoline at a discount] by adding the local taxes and local charges to the price per unit of the commodity” which is considered as a “fundamental economic practice” similar to the claims in *Bilski* and *Alice*. Such activities are squarely within the realm of abstract ideas. Selling commodities (e.g., wholesale gasoline)

at a discount that does not include (discounted) local taxes and other surcharges to a purchaser is a fundamental business practice prevalent in our system of commerce, like (1) the risk hedging in *Bilski*; (2) the intermediated settlement in *Alice*; (3) verifying credit card transactions in *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011); (4) guaranteeing transactions in *buySAFE*; (5) distributing products over the Internet in *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014); (6) determining a price of a product offered to a purchasing organization in *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306 (Fed. Cir. 2015); and (7) pricing a product for sale in *OIP Technologies*. Selling commodities (e.g., wholesale gasoline) at a discount that does not include (discounted) local taxes and other surcharges to a purchaser is also a building block of a market economy and, like risk hedging and intermediated settlement, is an “abstract idea” beyond the scope of § 101. *See Alice*, 134 S. Ct. at 2356.

Separately, we note Appellant’s claims 1 and 7 do not improve the performance of a computer or solve a problem specific to computers or computer networks. Appellant’s Specification and arguments do not demonstrate the claims “improve the way a computer stores and retrieves data in memory,” as the claims in *Enfish* did via a “self-referential table for a computer database.” *See Enfish*, 822 F.3d at 1336, 1339. Instead, as recognized by the Examiner, “the claimed invention does not provide a technical improvement” or “improve an existing technological process.”
Ans. 11.

Accordingly, we agree with the Examiner that claims 1–5, 7, and 9 are directed to an abstract idea of “automatically pricing the total price of [a] commodity [i.e., gasoline at a discount] by adding the local taxes and local

charges to the price per unit of the commodity” which is considered as a “fundamental economic practice.” Non-Final Act. 3–4.

Alice/Mayo—Step 2 (Inventive Concept)

In the second step of the *Alice* inquiry, Appellant does not argue their claims contain an “inventive concept.” Instead, Appellant simply argues “the claimed system provides **something more** than the fundamental and conventional practices” because “the claims recite operating a pump, analogous to the situation in *Diehr*.” App. Br. 19.

We disagree. As recognized by the Examiner, operating a pump to deliver gasoline after the gasoline is sold at a discount without discounting local taxes and other surcharges is an insignificant post solution activity. Ans. 11. Alternatively, operating such a pump is an attempt to limit the use of the abstract idea “to a particular technological environment,” which has long been held insufficient to save a claim in this context. *See Alice*, 134 S.Ct. at 2358.

According to *Alice*, the second step is to “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*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 72–73). The most relevant Federal Circuit cases re: the question of an “inventive concept” include (1) *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014) and (2) *Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288 (Fed. Cir. 2016). Both involve business-centric inventions that are similar to Appellant’s invention.

For example, the Federal Circuit determined that *DDR*’s claims contain an “inventive concept” under *Alice* step 2 because *DDR*’s claims

(1) do not merely recite “the performance of some business practice known from the pre-Internet world” previously disclosed in *Bilski* and *Alice*, but instead (2) provide a technical solution to a technical problem unique to the Internet, *i.e.*, a “solution . . . necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *DDR*, 773 F.3d at 1257. Likewise, the Federal Circuit also determined that *Amdocs*’ claims contain a sufficient “inventive concept” because like *DDR*, *Amdocs*’ claims “entail[] an unconventional technological solution (enhancing data in a distributed fashion) to a technological problem (massive record flows which previously required massive databases)” and “improve the performance of the system itself.” *Amdocs*, 841 F.3d at 1300, 1302.

In contrast to *DDR* and *Amdocs*, Appellant’s invention does not provide a technical solution to a technical problem unique to the Internet, *i.e.*, a “solution . . . necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *DDR*, 773 F.3d at 1257. Nor does Appellant’s invention entail, like *Amdocs*, any “unconventional technological solution (enhancing data in a distributed fashion) to a technological problem (massive record flows which previously required massive databases)” and “improve the performance of the system itself.” *Amdocs*, 841 F.3d at 1300, 1302. As such, we find no element or combination of elements recited in Appellant’s claims 1 and 7 that contains any “inventive concept” or adds anything “significantly more” to transform the abstract concept into a patent-eligible application. *Alice*, 134 S. Ct. at 2357. Instead, we agree with the Examiner that the additional elements recited in Appellant’s claims 1 and 7 (e.g., a POS terminal, debit card, and

pump) do not transform the abstract idea into a patent eligible invention. As our reviewing court has observed, “after *Alice*, there can remain no doubt: recitation of generic computer limitations does not make an otherwise ineligible claim patent-eligible.” *DDR*, 773 F.3d at 1256 (citing *Alice*, 134 S. Ct. at 2358).

Additional Argument

Appellant argues that the claims “do not pre-empt the use of a POS terminal and the use of a commodity card.” App. Br. 20. However, this argument is not persuasive because, although “preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). “Where a patent’s claims are deemed only to disclose patent ineligible subject matter” under the *Alice/Mayo* framework, “preemption concerns are fully addressed and made moot.” *Id.*

Because Appellant’s claims 1 and 7 are directed to a patent-ineligible abstract concept and do not recite something “significantly more” under the second prong of the *Alice* analysis, we sustain the Examiner’s rejection of claims 1–5, 7, and 9 under 35 U.S.C. § 101.

Obviousness

In support of the § 103 rejection, the Examiner finds the combination of Wanasek and Klingle teaches all limitations of Appellant’s claims 1 and 7. Non-Final Act. 9–15 (citing Wanasek ¶¶ 6–9, 14, 19; Klingle, p. 14).

Appellant disputes the Examiner’s factual findings regarding Wanasek and Klingle. In particular, Appellant presents several arguments against Wanasek and Klingle, including:

- (1) “Wanasek simply does not disclose or suggest that the commodity card disclosed therein can control a POS terminal to dispense a commodity” and Appellant is “unaware of any POS terminals that can be operated with credit type cards based on a ‘currency’ of gallons of gas”;
- (2) neither Wanasek nor Klinge teaches or suggests “a method for processing a commodity discount card having a cash value”;
- (3) “Wanasek does not disclose that his commodity discount card therein requires any determinations of a maximum number of units that can be dispensed and enabling the gas pump for that calculated maximum number”; and
- (4) “[t]he Klinge reference does not disclose a system in which the discount is only applied to the commodity and not the local taxes and local fees.”

App. Br. 5–10. Appellant also argues (1) there is no reason to combine the references; (2) “the references teach away from a combination” because Wanasek’s discount system “requires payment of local taxes and local fees by way of a credit card in a separate transaction” whereas “Klinge teaches the use of a discount system in which the gas and the local fees and taxes are discounted”; and (3) the Examiner “has picked and chosen elements of the references using the claims as a blueprint.” App. Br. 12. Appellant further relies on the Declaration under 37 C.F.R. § 1.132 from the inventor, Michael A. Racusin, filed on October 26, 2015 to explain the differences between the Wanasek and Klinge references and the claimed invention.

Appellant’s arguments are not persuasive. Instead, we find the Examiner has provided a comprehensive response to Appellant’s arguments supported by evidence. Ans. 3–7. As such, we adopt the Examiner’s findings and explanations provided therein. *Id.* For additional emphasis,

we note Appellant cannot show nonobviousness by attacking references individually where the rejection is based on the combination of references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *Id.*

For example, as correctly recognized by the Examiner, Wanasek teaches “a prepaid commodity purchase system in which a user purchases a [] commodity [i.e., gasoline at a discount] using a prepaid commodity [sic] purchase account [via prepaid (debit) card].” Ans. 3 (citing Wanasek ¶ 6, Abstract); *see also* Wanasek ¶¶ 2–3, 9. Similarly, Klingle also teaches the use of a prepaid fuel card in the context of a gas station shown in Figure 1A, where a discount is triggered when the prepaid fuel card is presented at a point-of-sale (POS) terminal and gasoline is delivered via a pump. Ans. 3 (citing Klingle, p. 14, Abstract).

Klingle’s Figure 1A is reproduced below:

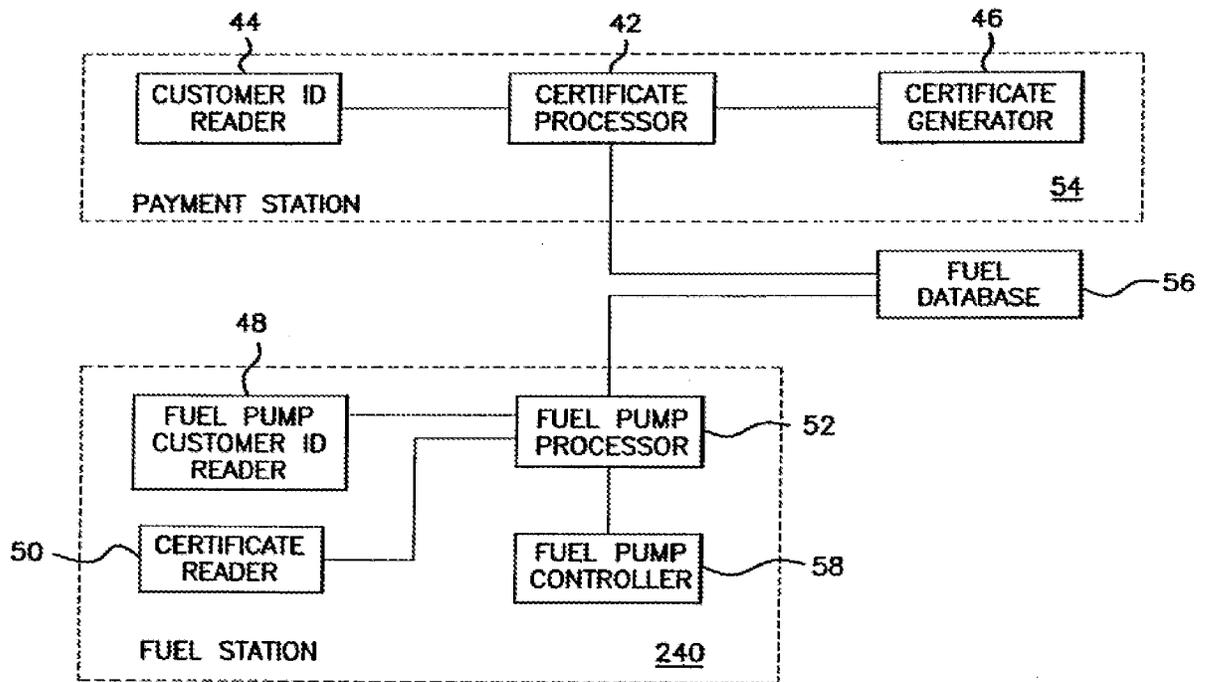


FIG. 1A

Klinge's Figure 1A shows the use of a prepaid card at POS terminal 54 and gas station 240 to receive discounted gasoline.

Contrary to Appellant's arguments, Klinge (not Wanasek) teaches the use of a prepaid commodity card having a cash value in the context of a POS terminal to dispense gasoline, as shown in Figure 1A. Ans. 3 (citing Klinge, p. 14, Abstract). Likewise, Wanasek (not Klinge) teaches "a prepaid commodity purchase system in which a user purchases a [] commodity [i.e., gasoline at a discount] using a prepaid commodity [sic] purchase account [via prepaid (debit) card]." *Id.* (citing Wanasek ¶ 6, Abstract); *also see* Wanasek ¶¶ 2-3, 9. As correctly recognized by the Examiner, Wanasek also teaches that "the discount price is not applied to the [local] taxes and fees" which can vary in various localities. Ans. 7 (citing Wanasek ¶ 19). As such, we agree with the Examiner that "it would have been obvious . . . to modify the fuel card of Wanasek by combining the fuel

card authorization of Klinge, because doing so would prevent a user from pumping more fuel than the prepaid amount” and “[t]he combination would prevent a user from pumping more fuel than the prepaid amount” and “gas fraud.” Non-Final Act. 13–14; Ans. 7. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results” from “the predictable use of prior art elements according to their established functions.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416–17 (2007). Because Klinge provides the natural environment for Wanasek, we are not persuaded that either Wanasek or Klinge teaches away from the combination. Moreover, mere description of an implementation in the prior art that differs from Appellant’s claimed invention, without more, does not show the prior art is “teaching away” from the claimed invention. *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

With respect to Appellant’s “impermissible hindsight” argument, that argument is not persuasive because “the weight of the evidence shows that the proffered combination is merely a predictable use of prior art elements according to their established functions.” *See In re Cree*, 818 F.3d 694, 702, n.3 (Fed. Cir. 2016) (Appellant’s hindsight argument is of no moment where the Examiner provides a sufficient, non-hindsight reason to combine the references).

Lastly, we have considered the Declaration under 37 C.F.R. § 1.132, but found Mr. Racusin’s statements unpersuasive as to the legal question of obviousness. Obviousness is a question of law based on underlying factual findings, *In re Baxter*, 678 F.3d 1357, 1361 (Fed. Cir. 2012), including what a reference teaches, *In re Beattie*, 974 F.2d 1309, 1311 (Fed. Cir. 1992), the

existence of a reason to combine references, *In re Hyon*, 679 F.3d 1363, 1365–66 (Fed. Cir. 2012), and whether the prior art teaches away from the claimed invention, *In re Mouttet*, 686 F.3d 1322, 1330 (Fed. Cir. 2012). Mr. Racusin’s statements are helpful, but are not dispositive to the legal question of obviousness based on the record.

For these reasons, we sustain the Examiner’s rejection of independent claims 1 and 7 and dependent claims 2–5 and 9, argued for their dependency on claim 1.

CONCLUSION

On the record before us, we conclude Appellant has not demonstrated the Examiner erred in rejecting claims 1–5, 7, and 9 under 35 U.S.C. § 101 and § 103.

DECISION

As such, we AFFIRM the Examiner’s Non-Final Rejection of claims 1–5, 7, and 9 under 35 U.S.C. § 101 and § 103.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED