UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EVERY PENNY COUNTS, INC.,
a Delaware corporation,

Plaintiff,

v. CASE NO. 8:11-cv-02826-SDM-TBM

WELLS FARGO BANK, N.A.,
f/k/a Wachovia Bank, N.A.

Defendant.
_____/

PLAINTIFF EVERY PENNY COUNTS, INC.'S NOTICE OF APPEAL

Notice is hereby given that Plaintiff EVERY PENNY COUNTS, INC. ("Plaintiff"), hereby appeals to the United States Court of Appeals for the Federal Circuit from (1) the Claims Construction Order of this Court entered in the above-captioned proceeding on March 18, 2014 (Doc. 96), (2) the Order of this Court entered in the above-captioned proceeding on September 11, 2014, granting Defendant's Motion for Summary Judgment (Doc. 125), (3) the putative Judgment entered September 12, 2014 (Doc. 126), and (4) Order dismissing Counts I-XV of the counterclaim (Doc. 142) which rendered all proceedings in this action at an end and constitutes a final order.

Respectfully submitted this 5th day of June, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 5, 2015, the undersigned filed the foregoing using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EVERY PENNY COUNTS, INC.,

Plaintiff,

v. CASE NO.: 8:11-cv-2826-T-23TBM

WELLS FARGO BANK, N.A.,

Defendant.
_____/

ORDER

Every Penny Counts (EPC) sues (Doc. 16) Wells Fargo for infringing U.S. Patents 7,571,849 and 8,025,217. The patents are quite similar, and each describes – through long sections of identical text – a system of automated saving or automated charitable giving. For example, the dollars and cents amount of a purchase by a bank customer with a credit card is "rounded up" to the next dollar, and the difference between the dollars and cents amount of the purchase and the dollar to which the amount is "rounded up" is withdrawn from the bank account of the bank customer ("the customer account") and deposited into a recipient account ("the provider account") for personal saving or charitable giving. Disputing the meaning of several terms, the parties submit *Markman* briefs. (Docs. 58, 59, 63, 64)

CLAIM CONSTRUCTION

1. '849 Patent – "Rounder Amount"

Wells Fargo defines "rounder amount" as the "amount of excess funds produced through rounding, i.e., produced by applying a rounder function to a

transaction amount and then subtracting the coin amount[1] of the transaction amount from the result." (Doc. 59 at 5-6 (footnote added)) EPC defines "rounder amount" as the "amount of excess payment produced by applying the determinant[2] to the account entry." (Doc. 63 at 3, 9 (footnote added)) "The parties agree that 'rounder amount' is 'excess funds' or 'excess payment,' but [the parties] dispute whether a 'rounder amount' is produced through [only] rounding, as Wells Fargo contends, or whether 'rounder amount' does not [necessarily] involve rounding, as EPC contends." (Doc. 59 at 6; *accord* Doc. 63 at 3)

"[T]he words of a claim are generally given their ordinary and customary meaning." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (internal quotation marks omitted). Wells Fargo argues, convincingly and without objection, that the ordinary and customary meaning of "rounder amount" entails rounding. EPC argues that the patent expands the concept of rounding to include, not just "conventional" rounding, but an additur (i.e., "a fixed dollar amount [that] is added such as $1 or $2") and a percentage of the transaction amount (i.e., "where the amount added is a percentage of the transaction amount"). (Doc. 63 at 4) For example, suppose the transaction amount is $10.20. According to EPC, the invention (1) can round to the next dollar and deposit 80¢ into the provider account,

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[1] The "coin amount" is the cents portion of a transaction amount; e.g., a $14.56 transaction amount has a coin amount of $0.56. '849 patent, col. 13, ll. 6-7 ("The coin amount is the presence of coins in the face amount, i.e. check for $10.14.").

[2] "Determinant" is discussed later in this order.

(2) can deposit a $1.00 additur into the provider account, or (3) can deposit 10% of the transaction amount (i.e., $1.02) into the provider account.

Although "rounder amount," by the plain and ordinary meaning of "rounding," entails rounding, not additurs or percentages, "it is always necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

To expand "rounder amount" beyond rounding, EPC cites the patent's definition of rounder transaction (not the definition of rounder amount). "Rounder transaction" is defined as "the numerical function applied against the face amount or the entry itself, i.e., $1.00, $3.00, *2%, or a specific number $1.50* to create excess funds." '849 patent, col. 13, ll. 2-3 (emphasis added). EPC's argument for the expansion of "rounding" relies entirely on the definition's use of 2% (a percentage) and $1.50 (an additur) as examples of a rounder transaction. In short, EPC's argues that the presence of the examples is inexplicable unless the patent's use of "rounding" is understood to include a percentage of the transaction amount and an additur.

EPC's argument that "rounder amount" implicates additurs is inconsistent with the claims. "It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude." *Phillips*, 415 F.3d at 1312 (internal quotation marks omitted). Each '849-patent claim encompasses a "method for performing a payment transaction, the method

comprising: . . . *generating* a rounder amount *based on the transaction amount* and the determinant . . . ." '849 patent, col. 17, ll. 53-54 (emphasis added). The claims establish that a rounder amount is claimed only if "generat[ed] . . . based on the transaction amount." If an additur were used, the supposed "rounder amount" equals the additur – no need to "generat[e]" the rounder amount exists and the additur is not derived from, dependent on, a function of, or otherwise "based on the transaction amount." (Doc. 58 at 10 (describing the additur as "fixed")) The additur, to which the rounder amount is equal, is not "based on" the transaction amount because the additur and the rounder amount remain constant despite a change in the transaction amount. For example, EPC's *Markman* brief contains a sample additur of $1.00. Despite the sample transaction amount of $1.70, the additur remains $1.00; no change in the transaction amount affects the $1.00. Thus, the claims exclude the use of an additur. *Lacks Indus., Inc. v. McKechnie Vehicle Components USA, Inc.*, 322 F.3d 1335, 1343-44 (Fed. Cir. 2003) (rejecting a party's proposed construction because the "proposed construction is simply not consistent with the language of the claims"); *see also Johnson & Johnston Associates Inc. v. R.E. Serv. Co., Inc.*, 285 F.3d 1046, 1054 (Fed. Cir. 2002) ("[W]hen a patent drafter discloses but declines to claim subject matter, . . . [the drafter] dedicates that unclaimed subject matter to the public.").

In contrast to EPC's argument for claiming an additur, EPC's argument that "rounder amount" includes a percentage of the transaction amount is consistent with

the claims. A rounder amount that is calculated by multiplying a percentage by a transaction amount is "generated" (by the multiplication), and the "generated" rounder amount is "based on the transaction amount" because the product yielded by the multiplication changes with the transaction amount. However, "[t]he plain and ordinary meaning of claim language controls [e.g., 'rounder amount' entails rounding], unless that meaning . . . is overcome by a special definition that appears in the intrinsic record with reasonable clarity and precision. Vagueness and inference cannot overcome an ordinary meaning of a claim term . . . ." *Northern Telecom Ltd. v. Samsung Elecs. Co.*, 215 F.3d 1281, 1295 (Fed. Cir. 2000) (citation omitted).

Although the definition of "rounder transaction" identifies 2% as an example, the patent's expansion of "rounding" is not reasonably clear. The definition of "rounder transaction" and other definitions in the patent are drafted so poorly that the terms are nearly impossible to understand.[3] Worse yet, the patent lacks a definition for many terms that are confusingly similar. For example, although the patents (poorly) define "rounder amount" and "rounder transaction," the patents

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[3] The March 5, 2014, order offers a sample of the '217 patent's staggering number of errors. (Doc. 95 at 7-8) The '849 patent is no different. Clearly, no one – not even the patent examiner – fully read either patent before issuance. Additional errors, which are not discussed in the March 5, 2014, order, are in Figures 9C and columns 14 of the '849 patent and '217 patents. Columns 14 discuss the invention's application to a deposit or interest. However, the text purports to "regard [] deposits or fee income" and, later, a "deposit or interest fee." Simultaneously, the text purports to describe the steps depicted in Figure 9C, but Figure 9C describes the steps for a "debit or withdrawal." All three statements are incorrect; the text and Figure 9C should purport to describe the steps for processing a deposit or interest. The text's error is (presumably) a result of carelessness and confusion. The cause of the figure's error is more difficult to diagnose – perhaps forgetfulness or a combination of laziness and deception. Regardless of the cause, rather than depicting the steps for a deposit or interest, Figure 9C is a slightly-manipulated but functionally identical version of Figure 9B. (Figure 9C has a new title and the steps are re-numbered.)

employ, not only those terms, but "rounder," "rounder number," "rounder percentage," "rounder contribution," "rounding determinant," "rounder instructions," "rounder account contribution," "rounder transaction contribution," "rounder system," "rounder account," "rounder activity," and "total rounder amount," each without an explicit definition. In short, the patent's disconcerting combination of an inadequate or confusing definition for some terms and entire lack of definition for other terms creates an inadequately differentiated mass of similar, specialized terms and easily suffices to defeat the patentee's attempt to counter-intuitively define rounding. *Merck & Co., Inc. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1370 (Fed. Cir. 2005) ("[The patent] fails to redefine [the patent term] . . . in clear enough terms to justify such a counterintuitive definition."); *Abbott Labs. v. Syntron Bioresearch, Inc.*, 334 F.3d 1343, 1354 (Fed. Cir. 2003) ("[T]he patentee's lexicography must, of course, appear with reasonable clarity, deliberateness, and precision before it can affect the claim." (internal quotation marks omitted)); *Northern Telecom Ltd. v. Samsung Elecs. Co.*, 215 F.3d 1281, 1295 (Fed. Cir. 2000) ("Vagueness and inference cannot overcome an ordinary meaning of a claim term . . . .").

However, even after straining to decipher the patent's definitions of "rounder transaction" and "rounder amount," the objective reader finds that the patent's passing mention of a percentage is too inconspicuous and insufficiently declaratory. *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1562 (Fed. Cir. 1991), explains:

> [Patent law] requires that an inventor particularly point out and distinctly claim the subject matter of his invention. It would run

> counter to this statutory provision for an applicant for patent to expressly state throughout his specification and in his claims that his invention includes [a limitation, e.g., rounding,] and then be allowed to avoid that claim limitation in a later infringement suit by pointing to one paragraph in his specification stating an alternative that lacks that limitation, and thus interpret the claim contrary to its plain meaning. Such a result would encourage an applicant to escape examination of a more broadly-claimed invention by filing narrow claims and then, after grant, asserting a broader scope of the claims based on a statement in the specification of an alternative never presented in the claims for examination.

(citations omitted).

Finally, even if the patent's counterintuitive expansion of rounding were sufficiently clear and sufficiently conspicuous, the expansion is incompatible with EPC's construction of "rounder amount." EPC argues that a "rounder amount" can equal a percentage of a transaction amount. Using an example, EPC states that a 10% rounder transaction and a $1.70 transaction amount generate a 17¢ rounder amount because 10% of $1.70 is 17¢, or expressed symbolically, 0.10 × $1.70 = $0.17. (Doc. 58 at 10) Similarly, using EPC's construction of "rounder amount," if the rounder transaction is 10% and the transaction amount is $10.20, the rounder amount is $1.02 because 10% of $10.20 is $1.02, or expressed symbolically, 0.10 × $10.20 = $1.02. However, these examples and EPC's construction of "rounder amount" are incompatible with the patent. The patent defines "[t]he rounder amount" as "the amount of excess funds produced by applying the rounder transaction to the entry minus the coin amount." '849 patent, col. 13, ll. 8-11. The patent defines "[t]he rounder transaction" as "the numerical function applied against

the face amount or the entry itself,[4] i.e., $1.00, $3.00, 2%, or a specific number $1.50 to create excess funds." '849 patent, col. 13, ll. 1-3 (footnote added). Again, suppose that the transaction amount is $10.20 (which gives a coin amount of 20¢) and suppose that the rounder transaction is 10%. Applying the patent's definition, the rounder transaction is $1.02 because 10% of $10.20 is $1.02, or expressed symbolically, 0.10 × $10.20 = $1.02. Applying the patent's definition of "rounder amount" – which is based on the rounder transaction – the rounder amount is the excess funds generated by subtracting 20¢ from the sum of $10.20 and $1.02, or expressed symbolically, ($10.20 + $1.02) – $0.20.[5] This calculation, which results in $11.02, generates 82¢ in excess of $10.20. Accordingly, using the patent's definitions, the rounder amount is 82¢. However, as already discussed, EPC argues that if the rounder transaction is 10% and the transaction amount is $10.20, the rounder amount is $1.02, not 82¢ (because 10% of $10.20 is $1.02, or expressed symbolically, 0.10 × $10.20 = $1.02). Thus, EPC's interpretation of "rounder amount" is incompatible with the patent.

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[4] The "face amount" and the "entry" are identical. *Compare* '849 patent, col. 14, ll. 61-62 ("[T]he rounder amount is added to the face amount to determine the total withdrawal"), *with* '849 patent, col. 16, ll. 57-58 ("[T]he rounder amount is added to the entry amount to determine the total withdrawal.").

[5] The patent's definition of "rounder amount" is "the amount of excess funds produced by applying the rounder transaction to the entry minus the coin amount." The definition is ambiguous because "rounder amount" could mean either "the amount of excess funds produced by applying the rounder transaction to the entry [and subtracting] the coin amount [from the sum]" (e.g., ($10.20 + $1.02) – $0.20) or "the amount of excess funds produced by applying the rounder transaction to [the difference created by] the entry minus the coin amount" (e.g., $10.20 + ($1.02 – $0.20)). This order uses the first definition. However, even if the second definition is used, EPC's interpretation of "rounder amount" remains in conflict with the patent; e.g., ($10.20 + $1.02) – $0.20 = $10.20 + ($1.02 – $0.20) = $11.02.

Recognizing the problem, EPC argues that the patent defines "rounder amount" (broadly) as "the amount of excess payment" and that the broad definition should control because the narrow definition is intended to define "[t]he rounder amount" in only the preferred embodiment, i.e., the "conventional" rounding embodiment. For support, EPC cites a portion of the patent's definitions section. In whole, the section states:

> The face or entry amount means the actual amount of the check/ATM withdrawal or credit/debit card charges prior to any rounder activity.
>
> The rounder transaction is the numerical function applied against the face amount or the entry itself, i.e., $1.00, $3.00, 2%, or a specific number $1.50 to create excess funds. In the preferred embodiment this will be a whole dollar amount such as $1.00, $5.00, $10.00, etc. added to the entry.
>
> The coin amount is the presence of coins in the face amount, i.e. check for $10.14.
>
> The rounder amount is the amount of excess funds produced by applying the rounder transaction to the entry minus the coin amount, i.e. $10.14 using a $1.00 rounder will produce $0.86 as the rounder amount of excess funds.
>
> The total withdrawal will be the rounder amount plus the entry amount which will be debited against the checking account or credit card balance to determine the new account balance.

'849 patent, col. 12, 13, ll. 65-67, 1-15. Citing one sentence in the definition of rounder transaction (not rounder amount), EPC argues that the patent's definition of rounder amount applies to only the preferred embodiment. However, EPC's argument is flawed.

First, by default, if a patentee clearly attempts to define a word and the definition is not explicitly limited to a certain embodiment, the definition applies to each embodiment. For example, *Astrazeneca AB, Aktiebolaget Hassle, KBI-E, Inc. v. Mutual Pharmaceutical Co.*, 384 F.3d 1333, 1340 (Fed. Cir. 2004), adopts a patent's (unusually narrow) definition of "solubilizer" despite the patentee's argument that the definition applies to only the preferred embodiment. *Astrazeneca* states, "We might agree [with the patentee] if the specification stated, for example, '*a solubilizer* suitable for the preparations according to the invention,' but in fact, the specification definitively states '*the solubilizers* suitable for the preparations according to the invention.'" Similarly, the '849 patent definitively states, "*The rounder amount is* the amount of excess funds produced by applying the rounder transaction to the entry minus the coin amount . . . ." '849 patent, col. 13, ll. 8-11 (emphasis added).

Second, EPC is correct that a sentence can qualify portions of the patent by employing words that establish the limitation. The patent effectively demonstrates this technique several times. For example, the patent clearly explains – in a stand-alone paragraph elsewhere in the patent – that subsequent discussion applies when the rounder transaction is $1.00. The paragraph–sentence states, "The following will assume the application of a $1.00 rounder transaction." '849 patent, col. 13, ll. 56-57. Elsewhere, the patent offers another explicit, stand-alone sentence that limits subsequent discussion. '849 patent, col. 13, ll. 56-57 ("The following information will provide clarity for the steps that will be detailed in FIG. 9A-E and

FIG. 10A-E."). In contrast, the sentence cited by EPC states, "In the preferred embodiment this [the rounder transaction] will be a whole dollar amount such as $1.00, $5.00, $10.00, etc. added to the entry." This sentence – which is included in the paragraph defining "rounder transaction" – identifies the preferred embodiment of a rounder transaction. The sentence utterly fails to limit the subsequent definitions to the preferred embodiment.

Third, the sentence's failure to qualify the subsequent definitions is corroborated by the subsequent definitions. No other definition – neither the definition of coin amount nor the definition of total withdrawal – is limited to a certain embodiment. If the "narrow" definition of rounder amount is limited to one embodiment, as EPC argues, the definition is the only definition in a list of five definitions that applies exclusively to one embodiment.

Fourth, in the definition of "rounder transaction," the 2% example appears among the $1.00 and $3.00 examples without any indication that the invention should handle the 2% example differently. *See* '849 patent, col. 13, ll. 1-3 ("The rounder transaction is the numerical function applied against the face amount or the entry itself, i.e., $1.00, $3.00, 2%, or a specific number $1.50 to create excess funds."). Accordingly, the patent cues the reader to process a percentage no differently.

As discussed above, the "narrow" definition of rounder amount contains no indication that the definition is limited to a preferred embodiment, and the patent affirmatively suggests that the definition is broadly applicable. Although this is sufficient to discredit EPC's argument, EPC's argument is further discredited by the inadequacies of the broad "definition."

First, "[t]o act as its own lexicographer, . . . the patentee must 'clearly express an intent' to redefine the term." *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365-66 (Fed. Cir. 2012) (stating further that "*clear lexicography*" is needed and that "a patentee must clearly set forth a definition of the disputed claim term other than its plain and ordinary meaning"); *accord Elekta Instrument S.A. v. O.U.R. Sci. Int'l, Inc.*, 214 F.3d 1302, 1307 (Fed. Cir. 2000) ("Absent express intent to impart a novel meaning, claim terms take on their ordinary meaning."). However, the broad "definition" fails to clearly express an intent to re-define "rounder amount." The broad "definition" is off-handedly written in the middle of a paragraph and is part of a larger sentence. In full, the sentence states, "The amount of excess payment called a rounder amount is then added to the face amount of the draft and the total number is then debited (as in withdrawals or account fees) or added (as in deposits or interest payments) to the account balance." '849 patent, col. 11, ll. 26-32. The patent's mid-paragraph broad "definition," which is part of a larger sentence, fails to express a clear intent to re-define the term. This failure is especially apparent when the "definition" is juxtaposed to the patent's explicit and purposeful definition (i.e., "The

rounder amount is . . . ."). Unlike the broad "definition," the "narrow" definition fully describes rounding[6] and is grouped with other definitions. Also, the broad "definition" fails to "clearly express an intent" to re-define rounder amount because the broad "definition" is compatible with rounding. If a patent broadly describes a term and if that description is compatible with the ordinary and customary meaning of the term, the description fails to re-define the term. For example, suppose a patent describes "watch" as "an object worn on the wrist." Although the "definition" might establish that – for purposes of the patent – a pocket watch is not a "watch," the "definition" fails to expand "watch" to include anything worn around the wrist (such as a bracelet). Despite the presence of the broad "definition," if the patent uses "watch," the term still denotes a timepiece (and not a bracelet). Accordingly, because the '849 patent's broad "definition" of a "rounder amount" is compatible with rounding, the "definition" fails to "clearly express an intent" to re-define rounder amount to include an operation that is not "rounding," understood in the ordinary sense.

Second, the broad "definition" of rounder amount – which is the "amount of excess payment" – fails for lack of precision. *Northern Telecom Ltd. v. Samsung Elecs. Co.*, 215 F.3d 1281, 1295 (Fed. Cir. 2000) ("The plain and ordinary meaning of claim

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[6] EPC argues that "a calculation that 'rounds' $10.00 up to $11.00[] is not [] true ['rounding'] in any conventional definition of the term." This argument is incoherent. "Rounding up" to the nearest whole dollar from $10.00 to $11.00 admittedly might occur less frequently than (say, approximately one in a hundred instances), but is wholly indistinguishable from, "rounding up" from any other amount less than $11.00 but greater than or equal to $10.00.

language controls, unless that meaning . . . is overcome by a special definition that appears in the intrinsic record with reasonable . . . precision."). Even EPC acknowledges that the rounder amount is not any amount of excess payment. Instead, the rounder amount is an excess payment generated by rounding or, perhaps, by adding an additur or a percentage. An excess amount that is calculated by some fourth means is – even according to EPC – not a rounder amount.[7] Thus, the broad "definition" – which applies to any excess amount, no matter how the amount is calculated – lacks the precision required by *Northern Telecom*.

Accordingly, a "rounder amount" is generated through rounding and includes neither an additur nor a percentage of the transaction amount.[8]

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[7] For example, the invention could generate a "rounder amount" by finding the third root of the transaction amount.

[8] Although EPC chose otherwise, EPC could have argued that the example (in the patent) of the invention's application to a deposit demonstrates that the "narrow" definition of rounder amount applies to only the preferred embodiment. For simplicity, the parties' briefs and this order largely ignore the invention's application to a deposit. However, in a strikingly inefficient and error-filled use of words, the specification clarifies that the invention – by "revers[ing] the process" – can apply to a deposit. '849 patent, col. 14, ll. 10-40. In the usual circumstance – when the invention applies to a withdrawal – the rounder amount is added to the transaction amount, the addition of which increases the total withdrawal from the customer account. When the invention processes a deposit, the rounder amount is subtracted from the deposit, the subtraction of which reduces the total amount deposited into the customer account. The patent explains that in the preferred embodiment (1) the coin amount is removed from the check and is deposited into the provider account and (2) the remainder of the deposit is placed into the customer account. Thus, if a customer has a check for $10.14, the provider account receives 14¢ and the customer account receives the remaining $10.00. EPC could have argued that this example shows that the "narrow" definition of rounder amount is not global because the definition is incompatible with the deposit example. However, the argument fails. The definition of rounder amount explains that the rounder transaction is "applied" to the rounder entry and that the coin amount is subtracted from the result. The use of "applied" shows that the invention is not limited to adding the rounder transaction. (But even if the patent said "added," subtraction is achievable by adding a negative number.) In the $10.14 example, the rounder transaction is $0.00 and the coin amount is 14¢. Using the patent's definitions, the rounder transaction ($0.00) is subtracted from the transaction amount ($10.14) and the coin amount (14¢) is

(continued...)

2. '849 Patent – "Determinant"

Wells Fargo states that "determinant" is defined as a "rule to round that is applied to the transaction amount(s) to create an excess payment." (Doc. 59 at 15) EPC states that "determinant" is defined as a "fixed or variable predetermined calculation added to or subtracted from each account entry to create an excess payment." (Doc. 58 at 8)

"Importantly," the parties dispute whether "the form the 'determinant' may take is [] limited." (Doc. 58 at 8) EPC argues that the determinant can denote an additur, a percentage, or conventional rounding. However, the '849-patent claims explain that a rounder amount is "generat[ed] . . . based on the transaction amount and a determinant." *E.g.*, '849 patent, col. 17, ll. 53-54. Because the claims discuss the determinant in the context of only the rounder amount, which excludes an additur and a percentage, the determinant is similarly limited.

Also, Wells Fargo argues that the determinant is a "rule, not a number or result." (Doc. 64 at 15) EPC never explicitly argues that the determinant is a number and implicitly accepts that the determinant is a rule. (Doc. 58 at 10, which lists three putative examples of a determinant: "[r]ound up to the next dollar," "[a]dd 10%," and "[a]dd $1.00," each of which is a rule) Although Wells Fargo acknowledges

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[8] (...continued)
subtracted from the difference. The calculation yields $10.00, and $10.14 exceeds $10.00 by 14¢. In accord with the patent's example, 14¢ is deposited into the provider account and $10.00 is deposited into the customer account. Thus, the "narrow" definition of rounder amount is compatible with the patent's deposit example.

EPC's implicit concession (Doc. 64 at 14 ("EPC's brief recognizes that a determinant is a rule.")), Wells Fargo insists that EPC's use of "calculation" in the proposed definition of "determinant" shows EPC's intent to define the determinant as a number, not a rule. EPC's silence in response to Wells Fargo's insistence is conspicuous.

Notwithstanding Wells Fargo's thrust and EPC's parry, the determinant is a number, not a rule. The specification never defines "determinant" and uses the term outside the claims only twice. The second use clarifies that the determinant is a number[9] – "Under this system the SP . . . instructs the bank or credit card issuer to *add or subtract a determinant* to each transaction . . . ." '849 patent, col. 11, ll. 53-58 (emphasis added). Because the determinant is "add[ed] or subtract[ed]" and because numbers, not rules, are added or subtracted, the determinant is a number, not a rule. Nonetheless, the two are closely related. For example, if the invention rounds up to the next dollar, the determinant is $1.00. (The transaction amount [say, $8.23] plus the determinant [say, $1.00] equals $9.23, minus the coin amount [23¢] equals $9.00, which is $8.23 rounded up to the nearest dollar.) Thus, although a determinant and a rule for rounding are closely related, the two are distinguishable.

[9] The first use fails to clarify whether the determinant is a rule or a number. *See* '849 patent, col. 11, ll. 36-39 ("The system is based on the ability to create excess funds by applying a determinant to the face amount or number of account entries, e.g. checks, ATM withdrawals, credit and debit drafts.").

3. '217 Patent – "Rounding Determinant"

The parties agree that "rounding determinant" – which is used in only the '217 patent – is identical to "determinant."

4. '217 Patent – "Customer Account (Belonging to the Customer)"

EPC defines "customer account" as "an account owned by the customer" and states that "customer account" and "customer account belonging to the customer" are synonymous. Wells Fargo's only criticism is that EPC's construction renders "belonging to the customer" – in the phrase "customer account belonging to the customer" – superfluous. In an attempt to explain what "belonging to the customer" contributes to "customer account," Wells Fargo states – without any justification – that "belonging to the customer" adds that the customer account is "[a]n account from which the transaction amount and the calculated excess are withdrawn." (Doc. 64 at 18) Wells Fargo's statement that this addition "gives full effect to all claim terms" is untenable. "Customer account belonging to the customer" is an account that the customer controls and that contains funds owned by the customer. "Customer account" is a shortened form of "customer account belonging to the customer."

5. '217 Patent – "Provider Account"

The parties agree that a provider account is an account selected to receive excess funds, but Wells Fargo adds that the customer must select the provider account. Wells Fargo's interpretation is incorrect because the interpretation renders

superfluous portions of the specification. *E.g.*, '217 patent, col. 3, ll. 54-57 ("The money is deposited into an 'open' network that will pool and then transfer the once fragmented funds onto [provider accounts] selected by the [subscriber]."); '217 patent, col. 17, ll. 29-31 ("[E]xcess overpayments [are] transferred . . . onto provider accounts selected by said subscriber/subscribers (SP).").

6. '217 Patent – "Rounder"

Wells Fargo's *Markman* briefs conflate "rounder" and "rounder amount" and define the terms identically.[10] (Doc. 64 at 5) Although, to the casual observer, "rounder" and "rounder amount" appear synonymous, the '217 specification confirms that the patent uses the terms differently. "Rounder" first appears in the definition of rounder amount; the patent states, "The rounder amount is the amount of excess funds produced by applying the rounder transaction to the entry minus the coin amount, i.e. $10.14 using a $1.00 rounder will produce $0.86 as the rounder amount of excess funds." '217 patent, col. 13, ll. 15-18.[11] Although the definition of "rounder amount" and the paired example are drafted poorly, the example clarifies that "rounder" and "rounder amount" are distinct – in the example, the rounder is

[10] Wells Fargo's brief addresses primarily whether "rounder" and "rounder amount" are compatible with an additur or a percentage.

[11] Elsewhere, the patents use the same example but with even worse wording. *E.g.*, '849 patent, col. 14, ll. 58-60 ("For example, if the fee was for $10.14 a one dollar rounder add another $0.86 and the net withdrawal would be for $11.00.").

$1.00 and the rounder amount is $0.86. Accordingly, EPC has the better construction – "rounder" is synonymous with "determinant."[12]

CONCLUSION

The disputed terms are construed as follows:

Rounder Amount	The amount of excess funds generated by, first, adding or subtracting the determinant to or from the transaction amount and by, second, subtracting from the sum or the difference the coin amount
Determinant	A number added or subtracted – during the calculation of a rounder amount – to the transaction amount
Rounding Determinant	Determinant
Customer Account (Belonging to the Customer)	An account that the customer controls and that contains funds owned by the customer

[12] Wells Fargo fails to raise two problems with EPC's construction. First, claim 1 of the '217 patent speaks of "calculat[ing] rounders." Although a determinant is not "calculated" in the ordinary sense of "to calculate," no plausible definition of rounder involves a calculation. The use of "calculate" in claim 1 (of the '217 patent) conflicts with the specification's use of "rounder." Accordingly, any construction of "rounder" must either conflict with the common meaning of "calculate" or conflict with the specification. Because the specification's examples are definitive and because – as this order and the March 5, 2013, order demonstrate – the patents are filled with oddities and errors, "rounder" is construed as synonymous with "determinant." *C.f. Northern Telecom Ltd. v. Samsung Elecs. Co.*, 215 F.3d 1281, 1295 (Fed. Cir. 2000) (holding that the specification can "overcome" the plain and ordinary meaning of a claim if "that [ordinary] meaning renders the claim unclear"). Second, because both "rounder" and "rounding determinant" are construed to mean "determinant," "rounder" and "rounding determinant" are construed as synonymous. However, the '217 patent uses each term in the same claim, which usually indicates that the terms are not synonymous. Nonetheless, "this is simply a case where the patentee used different words to express similar concepts, even though it may be confusing drafting practice." *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1120 (Fed. Cir. 2004); *see also Nystrom v. TREX Co., Inc.*, 424 F.3d 1136, 1143 (Fed. Cir. 2005) ("Different terms or phrases in separate claims may be construed to cover the same subject matter where the written description and prosecution history indicate that such a reading of the terms or phrases is proper.").

Provider Account	An account selected to receive excess funds
Rounder	Determinant

ORDERED in Tampa, Florida, on March 18, 2014.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EVERY PENNY COUNTS, INC.,

Plaintiff,

v. CASE NO.: 8:11-cv-2826-T-23TBM

WELLS FARGO BANK, N.A.,

Defendant.
_____/

ORDER

Every Penny Counts (EPC) sues (Doc. 16) Wells Fargo for infringing U.S. Patents 7,571,849 and 8,025,217. A *Markman* order (Doc. 96) construes each patent's claims, but EPC moves (Doc. 108) for reconsideration. Also, challenging each patent's validity, Wells Fargo moves (Doc. 68) for summary judgment under 35 U.S.C. § 101.

BACKGROUND

Described elsewhere in this action (e.g., Docs. 95 and 96), the '849 and '217 patents – using long sections of identical text – claim, respectively, a method of and a system of automated saving or automated charitable giving. The patented inventions are easily illustrated. For example, the dollars and cents amount of a bank customer's credit card purchase is "rounded up" to the next whole dollar. The difference between the dollars and cents amount of the purchase and the next whole

dollar, to which the amount is "rounded up," is withdrawn from the customer's bank account and deposited into a recipient account for personal saving or charitable giving. Conversely, if a participating customer deposits money, the dollars and cents amount of the bank customer's deposit is "rounded down" to the next dollar, and the difference is directed to the recipient account.

A March 18, 2014, *Markman* order (Doc. 96) construes the '849 and '217 patents to claim only the rounding method of contributing to a recipient account. However, in a motion for reconsideration, EPC argues that the patents claim two additional methods of contributing to a recipient account – the additur and percentage methods. Under the additur method, a fixed amount is contributed to the recipient account for each transaction. Under the percentage method, a fixed percentage of each transaction amount is contributed to the recipient account. Because this order grants summary judgment in favor of Wells Fargo and because this order is unaffected by construing the patents in accord with EPC's interpretation, this order assumes (although deciding otherwise) that EPC's patents claim all three methods of contributing to a recipient account – rounding, additurs, and percentages.

However construed, EPC's inventions are a computerized application of a technique known from antiquity in which a small saving on many occasions accumulates into a large saving. By distributing costs and concentrating benefits, a series of nearly unnoticed deductions aggregate to a noticeable accretion.

Because the costs are difficult to detect, the method is sometimes deployed as a scam, much earlier in the form of "coin clipping" in which a minuscule, inconspicuous portion of a coin is furtively clipped from many coins. *See* William Blackstone, *Commentaries on the Laws of England*, Vol. 4, p. 86 (1769) ("[B]etween the reign of Henry the Fourth and Queen Mary, . . . the spirit of inventing new and strange treasons was revived: among which we may reckon the offences of clipping money . . . ."); *see also* Sidney Sherwood, *The History and Theory of Money* 70 (1893), *available at* http://books.google.com/books?id=Q0USAQAAMAAJ&source=gbs_navlinks_s (describing clipping and "sweating," a similar method of debasing a currency).[1] More recently, in the 1983 film *Superman III*, Gus Gorman, played by Richard Pryor, utilizes the coin clipping concept after discovering that each of his co-worker's earnings includes a fraction of a cent. Gorman programs a virus to round each paycheck down to the nearest cent and to deposit the fractional difference into a recipient account.[2]

More than a scam, the technique has long existed as a legitimate practice. For example, governments have collected revenue for millennia through a sales tax or an

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[1] In 1696, the Royal Mint famously hired Sir Isaac Newton to solve the problem of "coin clipping," which he famously solved. *Isaac Newton*, http://www.royalmintmuseum.org.uk/history/people/mint-officials/isaac-newton/ (last visited Sept. 10, 2014).

[2] Similarly, in the 1999 film *Office Space*, three employees of Initech, a fictional company, steal several hundred thousand dollars after discovering that each of Initech's countless business transactions includes a fraction of a cent. The employees program a virus to round each transaction down to the nearest cent and to deposit the fractional difference into a recipient account. The program works but contains a misplaced decimal that rounds each transaction down to the nearest dollar, not the nearest cent – with alarming results.

excise tax, each of which directs either a percentage of a transaction amount or a fixed amount into a recipient account. Similarly, since no later than the Great Depression of the 1930s, employees have created "Christmas Clubs" to save money for Christmas purchases. Throughout the year, an employee with a Christmas Club deducts from each paycheck a small amount, determined by whatever method the employer offers and the employee selects, and deposits the deduction into a recipient account. By the end of the year, the small, manageable, periodic sacrifices amount to a useful saving for purchasing Christmas gifts.

PRECEDENT

Limiting the subject matter of a patent-eligible invention, Section 101 of the Patent Act states, "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." Section 101 excludes from patent protection a law of nature, a natural phenomenon, and an abstract idea. The Supreme Court has decided four recent actions under Section 101 and invalidated all but one claim in the patents considered.[3]

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[3] *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013), the only recent Supreme Court decision decided under Section 101 that upheld a claim, pertains to a natural phenomenon. *Myriad* upholds a claim directed to "synthetically created" DNA but invalidates the claims directed to naturally existing DNA.

In *Bilski v. Kappos*, 561 U.S. 593, 130 S. Ct. 3218 (2010), the patentee's first claim, a method for hedging risk, comprised (1) "initiating a series of financial transactions between providers and consumers of a commodity," (2) "identifying market participants that have a counterrisk for the same commodity," and (3) "initiating a series of transactions between those market participants and the commodity provider to balance the risk position of the first series of consumer transactions." *Alice Corp. Pty. v. CLS Bank International*, 134 S. Ct. 2347, 2356-57 (2014) (summarizing *Bilski*). In Claim 4, the patentee claimed the mathematical formula for the method described in Claim 1, and in the remaining claims the patentee limited the hedging technique in Claim 1 to energy and commodity markets.

Bilski invalidates each claim in the patent as an abstract idea. *Bilski* discusses in detail the law of Section 101 but applies the law only in two paragraphs. *Bilski* invalidates Claims 1 and 4 because the hedging described in the claims is a "basic concept . . . [and] fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance class." 130 S. Ct. at 3231. Thus, upholding Claims 1 or 4 "would effectively grant a monopoly over an abstract idea." 130 S. Ct. at 3231. For the remaining claims, *Bilski* holds that "limiting an abstract idea to one field of use or adding token postsolution components d[oes] not make [a] concept patentable." 130 S. Ct. at 3231. Accordingly, *Bilksi* invalidates the claims as an "attempt to patent the use of the abstract idea of hedging risk in the energy market

and then [to] instruct the use of well-known random analysis techniques to help establish some of the inputs into the equation." 130 S. Ct. at 3231.

Mayo Collaborative Services v. Prometheus Laboratories, Inc., 132 S. Ct. 1289 (2012) – another recent Supreme Court opinion decided under Section 101 – invalidates a patent on calibrating a drug dosage based on a blood reading. The patent instructs a doctor to "(1) measure (somehow) the current level of the relevant metabolite, (2) use particular . . . laws of nature (which the claim sets forth) to calculate the current toxicity/inefficacy limits, and (3) reconsider the drug dosage in light of the law." *Mayo*, 132 S. Ct. at 1299. The natural law discovered by the patentee – a correlation between the concentration of certain metabolites in the blood and the proper dosage of the drug – is, perhaps, abstruse and newly discovered (especially compared to the abstract idea in this action), but *Mayo* holds that the discovery is an unpatentable natural law. Similarly, the application of the natural law – measuring metabolite levels in the blood and "reconsidering" the drug dosage – is unpatentable because the application "add[s] nothing specific to the laws of nature other than what is well-understood, routine, conventional activity, previously engaged in by those in the field." *Mayo*, 132 S. Ct. at 1299.

Alice Corp. Pty. v. CLS Bank International, 134 S. Ct. 2347 (2014) – the Supreme Court's most recent and most applicable decision – invalidates a patent "drawn to the abstract idea of intermediated settlement." The patent contains method and system claims. The "representative" method claim comprises:

> (1) "creating" shadow records for each counterparty to a transaction; (2) "obtaining" start-of-day balances based on the parties' real-world accounts at exchange institutions; (3) "adjusting" the shadow records as transactions are entered, allowing only those transactions for which the parties have sufficient resources; and (4) issuing irrevocable end-of-day instructions to the exchange institutions to carry out the permitted transactions.

Alice, 134 S. Ct. at 2359.

Alice cites *Mayo* and identifies a two-step analysis required under Section 101:

> First, . . . determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so . . . , then ask, "what else is there in the claims . . . ?" 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.

Alice, 134 S. Ct. at 2355.

Applying step one, *Alice* holds that the patent claims an abstract idea that is not "meaningful[ly]" distinguishable from the risk hedging in *Bilski*. Without "labor[ing] to delimit the precise contours of the 'abstract idea' category," *Alice* explains that intermediated settlement is a "building block of the modern economy" and a "fundamental economic practice long prevalent in our system of commerce." 134 S. Ct. at 2356-57.

Applying step two to the method claims, *Alice* states that "the relevant question is whether the claims . . . do more than simply instruct the practitioner to implement the abstract idea of intermediated settlement on a generic computer." 134 S. Ct. at 2359. *Alice* finds that each step of the claimed method is "purely conventional." "In short, each step [of the method claims] does no more than

require a generic computer to perform generic computer functions." *Alice*, 134 S. Ct. at 2359. Also, analyzed "as an ordered combination," the steps of the method "add nothing that is not already present when the steps are considered separately"; instead, the steps of the method "simply recite the concept of intermediated settlement as performed by a generic computer." *Alice*, 134 S. Ct. at 2359. The system claims fail step two for "substantially the same reasons." The system claims recite the unpatentable method implemented by a "generic computer," which is composed of a "handful of generic computer components," including a "data processing system" with a "communications controller" and a "data storage unit." *Alice*,134 S. Ct. at 2360. Accordingly, neither the method claims nor the system claims in *Alice* are patentable.[4]

DISCUSSION

1. Alice*'s Two-Step Analysis*

As a first step, *Alice* instructs the district court to determine whether the concept that each patent is "directed to" or "drawn to" is a patentable concept. 134 S. Ct. at 2355. The '849 and '217 patents are "directed to" or "drawn to" the

[4] *WildTangent, Inc. v. Ultramercial, LLC*, 2014 WL 2921707 (U.S. June 30, 2014), grants a petition for certiorari, vacates the Federal Circuit's opinion, and remands the action "for further consideration in light of *Alice*." *Bancorp Services., L.L.C. v. Sun Life Assurance Co. of Canada (U.S.)*, 2014 WL 2921725 (U.S. June 30, 2014), and *Accenture Global Services., GmbH v. Guidewire Software, Inc.*, 2014 WL 348249 (U.S. June 30, 2014), decline petitions for certiorari. Conspicuously, the Supreme Court vacated the only Federal Circuit opinion, *Ultramercial*, upholding a software patent and declined certiorari over the two actions, *Bancorp* and *Accenture*, that invalidate software patents.

concept of routinely modifying transaction amounts and depositing the designated, incremental differences into a recipient account.[5] Like the intermediated settlement claimed in *Alice* (and th0e risk hedging claimed in *Bilski*), the concept claimed in the '849 and '217 patents is a "basic concept" and a "fundamental economic practice long prevalent in our system of commerce" and, hence, an abstract idea. *Alice*, 134 S. Ct. at 2356. As discussed above, economic actors of every description and every motive – from the scam artist to the frugal wage-earner to the government – have understood and exploited the elemental notion of regularly and frequently capturing a small and inconspicuous quantity and segregating and retaining the captured quantities until the quantities accumulate into a large quantity – a program indebted only and entirely to the fundaments of elemental arithmetic – simple addition.

Because the '849 and '217 patents are "directed to" an abstract idea, step two of *Alice* applies. "At . . . step two, [the district court] must examine the elements of the claim to determine whether it contains an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application," which requires "more than simply stating the abstract idea while adding the words 'apply it.'" *Alice*, 134 S. Ct. at 2357.

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[5] The patents in this action describe an abstract idea that lacks a convenient, catchy moniker, such as *Bilski*'s "risk hedging" or *Alice*'s "intermediated settlement." Perhaps the moniker most precisely identifying the present patent is "salami slicing." *See Larios v. Nike Retail Servs., Inc.*, 2013 WL 4046680 (S.D. Cal. Aug. 9, 2013) (Curiel, J.) (defining "salami slicing" as the method of "remov[ing] something gradually by small amounts at a time").

The '849 patent's "representative" method, *Alice*, 134 S. Ct. at 2359, comprises (1) electronically receiving data, including the transaction amounts,[6] (2) modifying the transaction amounts in accord with a formula, (3) depositing the differences between the modified and unmodified transaction amounts into one or more recipient accounts, and (4) adjusting each account balance accordingly. The function performed by the computer at each step of the method is "purely conventional." *Alice*, 134 S. Ct. at 2358. The first two steps – (1) electronically receiving data (or, in the words of *Alice*, "us[ing] a computer to obtain data") and (2) rounding, or adding a percentage or fixed number – are "well-understood, routine, conventional activities previously known to the industry." *Alice*, 134 S. Ct. at 2359 (internal quotation marks omitted). "The same is true with respect to [steps three and four,] the use of a computer to . . . adjust account balances . . . ." *Alice*, 134 S. Ct. at 2359. Also, by adding "nothing significantly more than an instruction to apply the abstract idea . . . using some unspecified, generic computer,"[7] the four steps of the method are not "'enough' to transform an abstract idea into a patent-eligible invention." *Alice*, 134 S. Ct. at 2360.

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[6] Claim 1 of the '849 patent lists the other data received – "a determinant, apportioning data, payment transaction data comprising a transaction amount, and operating account identifying data that identifies an operating account."

[7] The claims offer no description of the computer, and the specification offers no description beyond the generic, undefined name "clearinghouse central computer" or, sometimes, "central computer."

Like the '849 patent (i.e., the method patent), the '217 patent's invention is not patentable. The '217 patent claims a system that implements – on a generic computer – the '849 patent's method. Like the computer in *Alice*, the computer in the '217 patent contains a "handful of generic components" – specifically, the '217 patent's computer comprises a "data store," an "information processor," and a "communicator." These components, two of which are discussed in *Alice*, are fundamental to every computer. *See Alice*, 134 S. Ct. at 2360 ("Nearly every computer will include a 'communications controller' and 'data storage unit' capable of performing . . . basic calculation, storage, and transmission functions . . . ."). "As a result, none of the hardware recited by the system claims offers a meaningful limitation beyond generally linking the use of the method to a particular technological environment, that is, implementation via computers." *Alice*, 134 S. Ct. at 2360.

In sum, the '849 patent, a method patent, is invalid under Section 101 because the patent claims an abstract idea that is implemented by "well-understood, routine, conventional activities previously known to the industry." *Alice*, 134 S. Ct. at 2359. Similarly, the '217 patent, a system patent, is invalid under Section 101 because the patent merely implements – on a generic, unspecified computer – the '849 patent's (unpatentable) method.

2. Bilski, Mayo, *and Other Precedent*

Although *Alice* controls and shows that the '849 and '217 patents are invalid, *Bilski*, *Mayo*, and other precedent further supports invalidating the '849 and '217 patents. Like the hedging in *Bilski*, modifying each transaction amount and depositing each difference into a single account is a "basic concept . . . [and] fundamental economic practice long prevalent in our system of commerce." Upholding the claims of the '217 and '849 patents "would effectively grant a monopoly over an abstract idea." Also, like the patents in *Bilski* (which contained claims limited to the commodity and energy markets), the '849 and '217 patents are invalid despite the patents' "limiting [the] abstract idea to one field of use" – credit or debit card transactions. 130 S. Ct. at 3231; *accord Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed. Cir. 2013) (invalidating, under Section 101, a patent despite the patent's "attempt[] to limit the abstract concept to a computer implementation and to a specific industry"), *cert. denied*, 2014 WL 348249 (U.S. June 30, 2014).

Section 101 applies to the abstract idea in the '849 and '217 patents even more than Section 101 applies to the invention in *Mayo*. The natural law in *Mayo* – a correlation between the concentration of certain metabolites in the blood and the proper dosage of a drug – is more novel than routinely modifying transaction amounts and depositing the differences into a recipient account. And, like the claims in *Mayo*, the claims in the '849 and '217 patents "d[o] not differ significantly from a

claim that just said 'apply the algorithm.'" *Mayo*, 132 S. Ct. at 1301. In other words, the claims "add nothing specific to [EPC's abstract idea] other than what is well-understood, routine, conventional activity, previously engaged in by those in the field." *Mayo*, 132 S. Ct. at 1299.

CONCLUSION

EPC's motion for reconsideration is **DENIED**. Wells Fargo's motion (Doc. 68) for summary judgment is **GRANTED**. Under Section 101, the '849 and '217 patents are invalid. Because both patents are invalid under Section 101, Wells Fargo's motion (Doc. 106) for reconsideration is **DENIED AS MOOT**. The clerk is directed to enter judgment in favor of Wells Fargo and against EPC, to terminate any pending motion, and to close the case.

ORDERED in Tampa, Florida, on September 11, 2014.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EVERY PENNY COUNTS, INC., a Delaware corporation,

Plaintiff,

v. **Case No: 8:11-cv-2826-T-23TBM**

WELLS FARGO BANK, N.A.,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of Defendant, Wells Fargo Bank, N.A., and against Plaintiff, Every Penny Counts, Inc.

SHERYL L. LOESCH, CLERK

s/D. Saucier, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EVERY PENNY COUNTS, INC.,

Plaintiff,

v. CASE NO. 8:11-cv-2826-T-23TBM

WELLS FARGO BANK, N.A.,

Defendant.
_____/

ORDER

In accord with the parties' joint stipulation (Doc. 141), Counts I–XV of the counterclaim are **DISMISSED WITHOUT PREJUDICE**.

ORDERED in Tampa, Florida, on May 8, 2015.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE