

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TELADOC HEALTH, INC.,
Petitioner,

v.

DATA HEALTH PARTNERS, INC.,
Patent Owner.

Case IPR2024-00616
Patent 11,144,554 B2

SUPPLEMENTAL DECLARATION OF DR. BRYAN BERGERON
IN SUPPORT OF
PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE

TABLE OF CONTENTS

I. INTRODUCTION AND SCOPE OF WORK 1

II. BASIS FOR OPINIONS 2

III. ISSUES CONSIDERED.....2

A. Claim 13.....2

B. Claim 17.....4

C. Motivation to Combine Douglas and Wager 5

D. Claim 10.....7

**E. Petitioner Properly Identified the Combinations in Grounds
4, 6, And 8.....8**

LIST OF DOCUMENTS CONSIDERED

Exhibit	Shorthand	Description	Previously Used
1001	'554 Patent	U.S. Patent No. 11,144,554 B2	X
1002	Douglas	Pub. No. WO 1999/003045 A1	X
1003	Wager	Pub. No. US 2006/0149589 A1	X
1004	Chitiveli	Pub. No. US 2013/0179450 A1	X
1005	Klotsche	J. Klotsche et al., <u>The DETECT adherence score—structure and psychometric exploration of a novel approach to measure adherence to drug and non-drug interventions in primary care</u> , 20 Int. J. Methods Psychiatr. Res. 82 (2011)	X
1006	Klotsche1Archive	Printout of https://web.archive.org/web/20111208022202/http://onlinelibrary.wiley.com:80/journal/10.1002/(ISSN)1557-0657 , evidencing 2011 public availability of Klotsche	X
1007	Klotsche2Archive	Printout of https://web.archive.org/web/20130215121952/http://onlinelibrary.wiley.com:80/doi/10.1002/mpr.v20.2/is-suetoc , evidencing 2011 public availability of Klotsche	X
1008	ArchiveDec	Affidavit of Nathaniel E Frank-White	X
1009	Koh	Hian Chye Koh & Gerald Tan, <u>Data Mining Applications in Healthcare</u> , 19 J. Healthcare Information Management 64 (2005)	X

Exhibit	Shorthand	Description	Previously Used
1010	KohArchive	Printout of https://web.archive.org/web/20050418095732/http://www.himss.org/ASP/publications_jhim_issue.asp?issue=3/30/2005 , evidencing 2005 public availability of Koh	X
1011	Hall-Ellis	Declaration of Sylvia D. Hall-Ellis, Ph.D.	X
1012	Bergeron	Declaration of Bryan Bergeron, M.D.	X
1013	BergeronCV	Curriculum Vitae of Bryan Bergeron, M.D.	X
1014	Microsoft	<u>Microsoft Computer Dictionary</u> (5th ed. 2002)	X
1015	ADAA	Printout of https://web.archive.org/web/20100116093130/https://adaa.org/supportgroups	X
1016	MayoBP	<u>Blood pressure test</u> , Mayo Clinic, https://www.mayoclinic.org/tests-procedures/blood-pressure-test/about/pac-20393098 (last accessed Oct. 28, 2023)	X
1017	MayoC	<u>Cholesterol test</u> , Mayo Clinic, https://www.mayoclinic.org/tests-procedures/cholesterol-test/about/pac-20384601 (last accessed Oct. 28, 2023)	X
1018	NetSuite	Printout of https://web.archive.org/web/20111102042326/https://www.netsuite.co.uk/portal/uk/resource/articles/cloud-computing.shtml	X
1019		Omitted	
1020		Omitted	
1021		Omitted	
1022		Omitted	

Exhibit	Shorthand	Description	Previously Used
1023		Omitted	
1024	Ardehali	Deposition Transcript of Hossein Ardehali, M.D.	

I. INTRODUCTION AND SCOPE OF WORK

1. My name is Bryan Bergeron. I am over the age of twenty-one (21) years, of sound mind, and capable of making the statements set forth in this Supplemental Declaration. I am competent to testify about the matters set forth herein. All the facts and statements contained herein are within my personal knowledge, and they are, in all things, true and correct.

2. I have been retained by Teladoc Health, Inc. (“Teladoc”) to provide my opinions and views on the materials I have reviewed related to U.S. Patent No. 11,144,554 B2 (the “’554 Patent”), and the scientific and technical knowledge regarding that subject matter. I have been asked to consider what a person of ordinary skill in the art (“POSITA”) at the time of the invention (“TOI”) of the ’554 Patent would have understood about the issues I address below. I have been asked to assume by counsel for Teladoc that the TOI was March 15, 2013.

3. I submitted my original declaration in support of the Petition for *Inter Partes* Review of U.S. Patent No. 11,144,554 on February 28, 2024 as Exhibit 1012 (“Original Declaration”).

4. I submit this Supplement Declaration to address certain issues raised in Patent Owner’s Response (Paper 16) and in support of Petitioner’s Reply.

5. My supplemental opinions, set forth below, are guided by my appreciation of how a POSITA would have understood the state of the relevant art,

the teachings of the references I discuss below, and the claims of the '554 Patent at the TOI.

6. My Original Declaration sets forth my education, experience, compensation, legal considerations, and my opinion of the level of ordinary skill in the art of a POSITA. There are no material changes to those portions of my Original Declaration since it was submitted.

II. BASIS FOR OPINIONS

7. My opinions are based on my education, training, and experience, as well as items that I reviewed to prepare my opinions, including the '554 Patent and at least the documents listed in the table at the beginning of this Supplemental Declaration, along with other documents from this proceeding.

III. ISSUES CONSIDERED

8. I was asked to consider certain issues raised in Patent Owner's Response, which I address below. My opinions in this Supplemental Declaration are limited to the issues raised below.

A. Claim 13

9. For claim 13, I understand that PO argues that Petitioner never alleges that relational database 522 of Douglas is "in communication" with server 508. Paper 16 at 32-33. I disagree with PO's position.

10. For Limitation 13[h], the Petition cites to Douglas 24:28-37 (Paper 1 at 47), which makes clear that "[t]he servers 510-516 *have access to* one or more

relational databases 522 (such as SQL) that contain all the health plan data, including information input to the journal and schedule book information.” Douglas at 24:28-30 (emphasis added).

11. A POSITA would have understood that servers 510-516 “hav[ing] access to” the databases 522 means that they operationally interact with the database, such as by reading data from the databases and/or by writing data to the databases, which necessarily encompasses the databases 522 being in communication with the servers 510-516.

12. Additionally, for Limitation 13[a], the Petition makes clear that “network server 508 includes an ‘inner circle server [514],”” and further cites to Douglas FIG. 59, which shows that the network server 508 includes servers 510-516. Paper 1 at 41; Douglas 24:13-19.

13. A POSITA would have understood that, since servers 510-516 are part of server 508, the fact that the database 522 is in communication with servers 510-516, as discussed above, also means that the database is in communication with server 508, as the database is in communication with its constituent components, i.e., servers 510-516.

B. Claim 17

14. For claim 17, I understand that PO alleges that Petitioner merely sets forth conclusory allegations, without citing to any evidence, that a processor within network server 508 of Douglas executes a set of instructions. Paper 16 at 34-35.

15. I disagree with PO's position. The Petition for Limitation 17[a] cites to the discussion of Limitation 13[a], which explains that "Douglas's system is software and therefore a processor executes the system" and cites to Douglas at 25:22-26, which makes clear that the Douglas "system is constructed using the C++ programming language in conjunction with SQL 6.5, Cold Fusion, commercially available from Alaire Company, Visual Basic, commercially available from Microsoft Corporation), and HTML." Paper 1 at 48, 41.

16. A POSITA would have understood these citations to be evidence that the Douglas system processor executes a set of instructions. That is, a POSITA would have understood that a software system constructed using a programming language includes a set of instructions generated by the programming language.

17. A POSITA would have understood that the Douglas system processor executing software, as discussed in the Petition, necessarily involves the processor executing the set of instructions of the software system generated by the programming language.

18. The Petition for claim 17 also cites to Chitiveli at [0044]-[0046] as evidence of a POSITA's general knowledge. Paper 1 at 49.

19. The cited portions of Chitiveli make clear that a software system consists of "programming instructions," that are executed by a processor, as they indicate that a software application is stored in memory, and the programming instructions of which are retrieved by a processor for execution. *See* Chitiveli at [0045] ("CPU 205 retrieves and executes programming instructions stored in the memory 230"), [0046] ("memory 230 includes the content analytics tool 110 . . . [that] provides a software application"). This is further evidence that a processor executes programming instructions.

C. Motivation to Combine Douglas and Wager

20. I understand that PO argues that a POSITA would not have been motivated to combine Douglas and Wager for Grounds 2 and 8. Paper 16 at 36-46.

21. As part of this position, I understand that PO argues that Wager's system is redundant of the assignment process in Douglas. *Id.* at 40. I disagree.

22. It is my opinion that one reason Wager's interface would not have been redundant, in addition to others, is that it would have facilitated reassignments between physicians and clients, when such became necessary.

23. The need for reassignments could arise naturally, without any forced reassignments of the kind suggested by PO.

24. A POSITA would have understood that reassignments could be voluntarily desired or needed by a patient in a number of scenarios.

25. For example, a patient would voluntarily desire a reassignment if the patient determines that he or she does not like an initially assigned provider and would instead like a different provider. A patient may grow to dislike a provider for a number of reasons, such as disliking the provider's perceived effectiveness or personality, or as a byproduct of developing a desire to try the services of a different provider.

26. In another example, a patient voluntarily needs a reassignment when an initially assigned provider retires or leaves the practice, where without such a reassignment the patient would be left without a provider.

27. In yet another example, a patient voluntarily needs a reassignment when a patient's medical condition takes an unexpected turn, and the initially assigned provider is no longer appropriate or sufficient, and instead the patient's condition requires a different provider, such as having a different area of experience or expertise.

28. I understand that PO's expert confirmed that there are instances in which it would be beneficial to switch providers. Ardehali at 113:9-115:4.

29. I further understand that PO also argues that there is no motivation to combine Douglas and Wager because of harm to a patient due to a disruption in the continuity of care. Paper 16 at 40-43. I disagree.

30. In my opinion, the proposed combination of Douglas and Wager does not require forcibly reassigning patients against their will—nowhere in the Petition is this suggested, or any combination proposed that would result in this. Indeed, a POSITA operating the combined Douglas-Wager system would not have used it in this way. Instead, the incorporated interface of Wager provides a way to effectively assign and reassign patients according to the patient's desires and to provide improved care for the patient. Paper 1 at 51-57.

D. Claim 10

31. Regarding claim 10, I understand that PO argues that Douglas does not disclose a framework or logic for triggering an alert for missing data and that this would not have been obvious. Paper 16 at 51.

32. I disagree with PO's position. Douglas's "system periodically correlates the updated patient health information with the program goals to determine the patient's progress and compliance with the program." Paper 1 at 38, 26 *citing* Douglas at 11:26-28. Thus, Douglas discloses its system has the functionality or logic of periodically inspecting and processing the data, which includes the data received from the providers.

33. Additionally, as discussed in the Petition, “Douglas discloses sending an ‘alert’ to a client’s provider should the client’s data indicate a ‘threatening’ situation.” Paper 1 at 38 *citing* to Paper 1 at Section VIII.A.3 (*citing* to Douglas at 11:11-19). Thus, Douglas discloses its system also has the functionality of sending alerts in response to defined situations.

34. Any adaptation of these existing functionalities or logic of the Douglas system to send an alert to the provider in response to determining there is missing data for the client is within the level of skill of a POSITA.

35. Douglas’s system has the functionality and logic to send alerts in response to a condition, and also has the functionality and logic to inspect and process the client data received from the providers. Sending an alert in response to a condition resulting from the inspecting and processing of the client data received from the providers would have been a relatively minor adaptation, within the skill of a POSITA.

36. As discussed in the Petition, a POSITA would have been motivated to do so to ensure completeness of the data to enable detection of threatening or dangerous situations. *Id.*

E. Petitioner Properly Identified the Combinations in Grounds 4, 6, And 8

37. I understand that PO argues that Wager was discussed in Ground 2 in the Petition, but not in Ground 4, except in the heading.

38. According to PO, it is unclear how Wager's visual interface would have been incorporated into the Douglas-Chitiveli combination of Ground 4. Paper 16 at 54-56. I disagree.

39. For both Grounds 3 and 4, Chitiveli is being added to Douglas for implementation using a cloud and client architecture, and the Douglas-Wager System of Ground 2 remains unchanged in Ground 4.

40. I also understand that PO does not dispute that the Douglas-Chitiveli System is sufficiently disclosed for Ground 3.

41. Ground 4 simply takes the Douglas-Wager System of Ground 2 and adds Chitiveli to Douglas in the same way recited for Ground 3.

42. As evident from the discussion of the Douglas-Chitiveli System in the Petition, the implementation of Douglas using a cloud and client architecture of Chitiveli does not change any specific user interface or corresponding functionality of the system, and thus there is no modification of the relied upon aspects of Wager by Chitiveli.

43. By describing the modification of Douglas to include the Wager interface in Ground 2, and by describing the implementation using a cloud and client architecture as in Chitiveli for the Douglas-Chitiveli System in Ground 3, the Petition sufficiently discloses the entire proposed combination of Douglas-Wager-Chitiveli for Ground 4.

44. I further understand that PO argues that Ground 6 is insufficiently disclosed because the Petition fails to mention Wager or how Wager's interface would interact with Klotsche's score, and that Ground 8 is insufficiently disclosed because the Petition fails to mention Wager or how Wager's interface would interact with Koh's data mining. *Id.* at 56-57. I disagree with both of these points.

45. The Petition is simply taking the Douglas-Wager System of Ground 2, and adding Klotsche for Ground 6 and Koh for Ground 8 in the same way that Douglas is modified by Klotsche in Ground 5 and by Koh in Ground 7, respectively.

46. For Ground 6, the Wager assignment interface and the Klotsche score functionality do not interact, and for Ground 8, the Wager assignment interface and the Koh data mining functionality do not interact.

47. Thus, there is no need to repeat the descriptions for the Douglas-Klotsche System of Ground 5 for Ground 6, and the Douglas-Koh System of Ground 7 for Ground 8, particularly since PO does not dispute that Grounds 5 and 7 are sufficiently disclosed.

In signing this Supplemental Declaration, I recognize that the Declaration will be filed as evidence in a contested case before the Patent Trial and Appeal Board of the United States Patent and Trademark Office. I also recognize that I may be subject to cross-examination in the case, and that cross-examination will take place within the United States. If cross-examination is required of me, I will appear for cross-examination within the United States during the time allotted for cross-examination.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Dated:

March 27, 2025

Respectfully submitted,

Bryan Bergeron MD

BRYAN BERGERON, MD