

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

MANTIS COMMUNICATIONS, LLC,

Plaintiff,

v.

**EDIBLE ARRANGEMENTS, LLC and
EDIBLE ARRANGEMENTS
INTERNATIONAL, LLC,**

Defendants.

Case No. 2:17-cv-325

**DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE AND
FOR FAILURE TO STATE A CLAIM**

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Edible Arrangements, LLC and Edible Arrangements International, LLC (collectively, “Edible”)¹ request that the Court dismiss Mantis Communications LLC’s (“Mantis”) complaint pursuant to Rule 12(b)(3) and the Supreme Court’s recent holding in *TC Heartland LLC v. Kraft Foods Groups Brands LLC*, No. 16-341, 2017 WL 2216934 (S.Ct May 22, 2017). In the alternative, Edible requests that the Court dismiss the complaint with prejudice pursuant to 35 U.S.C. § 101 and Rule 12(b)(6) because the asserted patents are directed to the abstract idea of direct mail advertising and do not include additional meaningful limitations amounting to an inventive concept that could render the claims eligible for patenting. Moreover, while Mantis has indicated during the meet-and-confer process that it anticipates amending the complaint to add additional parties, Edible respectfully submits that any such amendment is futile because Mantis cannot cure the venue defects as to the two names parties or § 101 defects surrounding the asserted patents. No reason exists to delay the just and speedy resolution of this case in Edible’s favor.

I. EDIBLE’S RULE 12(B)(3) MOTION TO DISMISS

Edible’s motion to dismiss for improper venue pursuant to Rule 12(b)(3) must be granted because neither prong of the exclusive patent venue statute as recently interpreted by the Supreme Court is met in this case—(1) neither Edible entity was incorporated in the State of Texas, and thus Edible does not reside in this District; and (2) neither Edible entity has a regular and established place of business in this District.

Federal Rule of Civil Procedure 12(b)(3) allows dismissal of an action when venue is “wrong” or “improper.” *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for the W. Dist. of Tex.*,

¹ Note, on April 20, 2017 after the complaint in this case was filed Edible Arrangements filed name changes for the two entities named in the complaint. Edible Arrangements, LLC is now Edible IP, LLC and Edible Arrangements International, LLC is now Edible International, LLC. (Declaration of Anthony DiPippa (attached as Exhibit A) at ¶ 2).

134 S. Ct. 568, 577 (2013). “Upon the filing of a Rule 12(b)(3) motion, the burden of proving proper venue shifts to the Plaintiff.” *Watts v. L-3 Commn’s Corp.*, No. , 2012 WL 4480721, at *1 (E.D. Tex. Sept. 26, 2012) (Gilstrap, J); *Langdon v. CBeyond Commn., LLC*, 282 F.Supp.2d 504, 508 (E.D. Tex. 2004) (Ward, J.).

The exclusive patent venue statute, 28 U.S.C. § 1400b) provides that “[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” The Supreme Court recently clarified the first prong of this statute, holding that for a domestic corporation a defendant is deemed to reside only in their state of incorporation. *TC Heartland*, 2017 WL 2216934, at *3 (“We therefore hold that a domestic corporation ‘reside’ only in its State of incorporation for purposes of the patent venue statute.”). Here, neither Edible entity was incorporated in the State of Texas—but were instead incorporated in Connecticut and Delaware. (*See* Dkt. No. 1 at ¶¶ 31 and 32; *see also* DiPippa Declaration at ¶ 2-3).

The only remaining question is whether either Edible entity has a regular and established place of business in this District. They do not. (DiPippa Declaration at ¶ 5). While there are brick-and-mortar stores selling Edible Arrangements® branded products in this District, all such stores are owned and operated by franchisees of the named defendants. (*Id.* at ¶ 6). All such franchisees are separate legal entities from the named defendants. (*See id.* at ¶¶ 6-15).

Here, the patent venue statute must be strictly construed, as the Supreme Court in the past and again recently has cautioned against given § 1400(b) a “liberal” construction. *See Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961), and *see TC Heartland*, 2017 WL 2216934, at *4 (“In the Court’s view, the patent venue statute was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights”) (quotation omitted). Accordingly,

courts have found that the “regular and established place of business” prong is not satisfied merely through “a defendant's distribution of products through an independent representative or agent in the district, even on an exclusive basis,” such as a franchisee/franchisor relationship. *Stevenson v. Doyle Sailmakers, Inc.*, No. H-86-883, 1988 WL 50721, at (D. Md. Apr. 3, 1988) (finding that defendant did not have a regular and established place of business based on presence of independent retailer/franchisee in District where “the ownership, operation and personnel [between the entities] are and have been entirely separate and distinct,” defendant “pay[s] none of the operating expenses” of the independent entity, the “only sharing arrangements between [the entities] involve . . . technology and its pooled advertising in specialized national media,” the defendant “has similar arrangements with other independent retailers,” the independent retailer only “is required to pay [defendant] a percentage of its sales revenue,” and defendant “has no control over the day-to-day operations” of the independent retailer). Instead, under these circumstances, a “non-resident corporation must itself maintain some physical facility on a relatively permanent basis in the district; it must itself finance or pay for the expenses of the facility.” *Stewart-Warner Corp. v. Hunter Eng’g Co.*, No. 69 C 579, 1969 WL 9613, at *5 (N.D. Ill. Jul. 3, 1969 (gathering cases) (emphasis added); *see also E.H. Sheldon & Co. v. Norbute Corp.*, 228 F. Supp. 245, 247 (E.D. Pa.1964) (“In order that a defendant have a ‘regular and established place of business’ in a district it must have a regular establishment maintained, controlled and paid for by it.”). Here, the two named defendants do not own or operate any establishment in this District, and the presence of independent franchisees in this District cannot be imputed to the named defendants.

Accordingly, Plaintiff cannot carry its burden on either prong of the patent venue statute and dismissal pursuant to Rule 12(b)(3) is appropriate.

II. EDIBLE'S RULE 12(B)(6) MOTION TO DISMISS

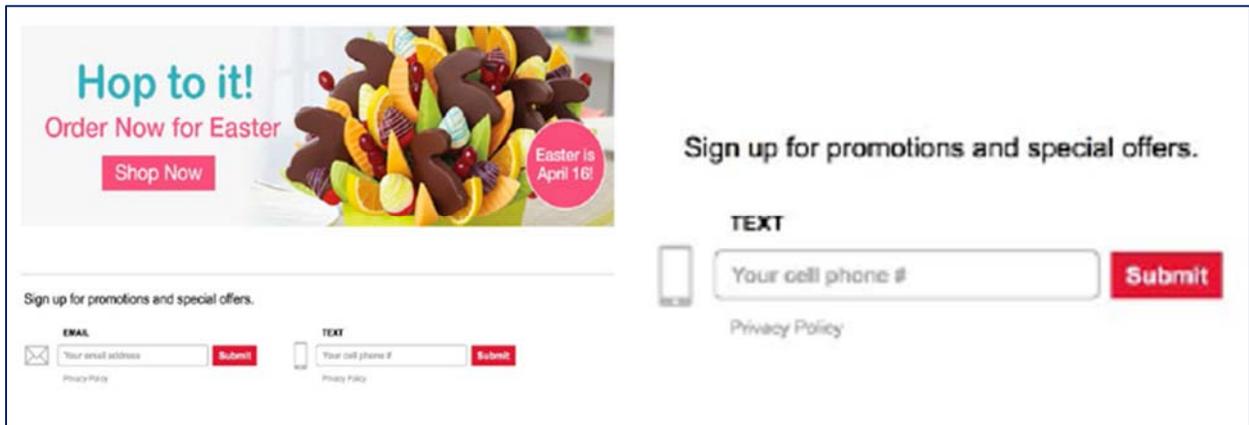
Mantis filed this suit knowing full well that its seven asserted patents are subject to invalidation pursuant to 35 U.S.C. § 101. Accordingly, Mantis spends the first third of its complaint laying out patentee-friendly platitudes after platitudes related to patent-eligibility. (*See* Dkt. No. 1 at ¶¶ 4-29). But Mantis' attempts to salvage patent eligibility fail—especially in light of its infringement contentions against the simple, routine, and human process of direct mail advertising.

Direct mail advertising to businesses—or junk mail to consumers—is an abstract concept. Business have been employing these abstract techniques for ages. In its various forms, the direct mail advertising follows a simple and routine path:

- A customer visits a store selling products that she is interested in.
- The customer either makes a purchase and supplies personal contact information, or otherwise signs-up to receive future promotions and offers.
- The store then sends advertisements in the form of promotions, sales, or coupons directly to the customer.
- When one catches the customer's eye, she visits the store to redeem the offer.

The seven asserted patents are all directed to this abstract process. The patents merely add the idea of performing this process on a computer (here, a mobile computer via text message), which is not a patent eligible transformation according to clear United States Supreme Court and Federal Circuit precedent. The Supreme Court has been clear, “stating an abstract idea while adding the words ‘apply it with a computer’” is not enough for patent eligibility. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347, 2350 (2014). Because the asserted patents do nothing more than state the abstract idea of direct mail advertising while adding the words “apply it with a computer,” they are invalid and should be found so at the pleading stage.

Mantis’ response is previewed in its complaint and cannot salvage the claims. First, Mantis will assuredly point to its claimed “trigger system” as being a technical solution to a technical problem, or as being something that cannot be performed by a human with pencil-and-paper. (*See, e.g.*, Dkt. No. 1 at ¶¶ 6-7 and 19-20). But Mantis’ own infringement allegations defeat this argument. Below is an alleged “trigger system” according to Mantis’ own infringement allegations. (*Id.* at Ex. C-1).



Based on Mantis’ own allegations from which it cannot run, the “trigger system” is nothing more than an entry-box where a customer can give the store their telephone number if they would like to receive future promotions and offers. This exact process has been performed for decades and is still being performed today in brick-and-mortar stores via pencil-and-paper. This is not a technical solution to a technical problem.

In addition, Mantis will assuredly argue that the asserted patents improved computer technology itself. But again Mantis’ own infringement allegations defeat this argument. The same chart from which the picture above was pulled alleges that simple and generic web-servers, web-clients, and mobile devices satisfy the claims. Nowhere do the claims of the asserted patents purport to improve the functioning of such servers, clients, or mobile devices.

Rather, the asserted patents are akin to the patents that this very Court invalidated in *Clear with Computers v. Altec Indus., Inc.*, No. 6:14-cv-79, 2015 WL 993392, at *3 (E.D. Tex. 2014) (Gilstrap, J), which was upheld via Rule 36 affirmance by the Federal Circuit, 636 Fed. Appx. 1015 (2016). There, this Court invalidated claims related to customized sales proposals because they stated an abstract idea that could be performed by humans and merely used generic computer components to do so. *Id.* at *3-4. The claims here suffer the same deficiencies, and even more lack the customization principle found in *Clear with Computers*. Here, the claims do not require any level of customization—rather, each customer that signs up could receive the exact same text promotions and offer from the store.

Because the asserted patents claims nothing more than the abstract idea of direct mail advertising, and add nothing more than the words “apply it on a computer,” the asserted patents are invalid and should be dismissed at the pleading stage.

A. BACKGROUND

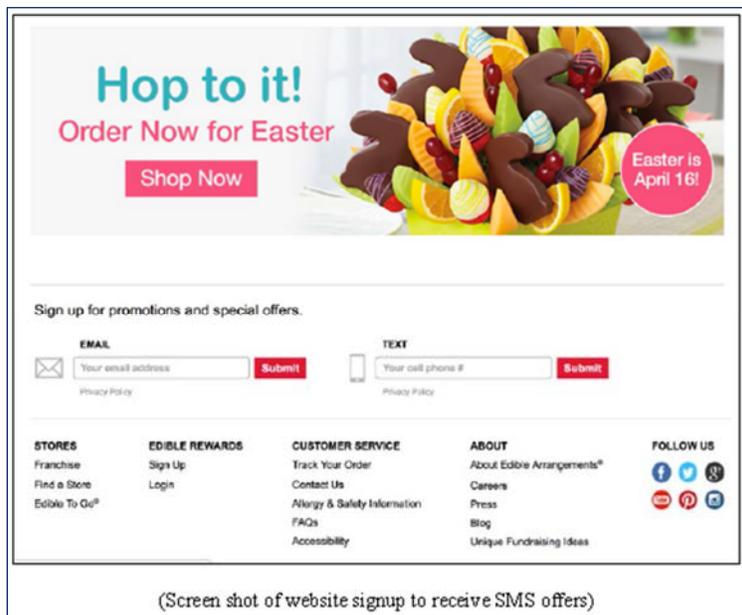
1. Mantis’ Prior Lawsuits

Prior to this suit, Mantis had previously sued five other companies in June 2016 on U.S. Patent Nos. 7,403,788 (“the ’788 Patent”), 7,792,518 (“the ’518 Patent”), 8,131,262 (“the ’262 Patent”), 8,437,784 (“the ’784 Patent”), 8,761,732 (“the ’732 Patent”), 8,938,215 (“the ’215 Patent”), and 9,092,803 (“the ’803 Patent”) (collectively, the “patents-in-suit” or “asserted patents”). *See Mantis Commc’ns, LLC v. Best Buy Co.*, Consolidated Case No. 2:16-cv-661-JRG-RSP (E.D. Tex. 2016). Mantis settled with all five previous defendants early in the case and before Mantis was forced to meaningfully prosecute its case via *Markman* proceedings or substantive motion practice. (*Id.* at Dkt. Nos. 55, 103, 105, 107, and 120). Jo-Ann Stores settled with Mantis in August 2016—a mere two months after the suit was filed. (*Id.* at Dkt. No. 55). The last defendant settled on March 7, 2017—three months before *Markman* and conveniently three days

before Mantis would have to substantively defend the asserted patents against a similar 35 U.S.C. § 101 challenge. (*See id.* at Dkt. Nos. 76, 119, and 120).

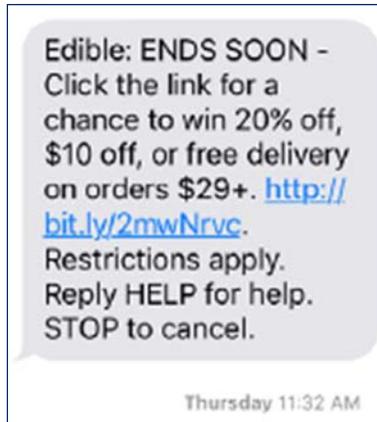
2. Mantis’ Current Lawsuit

The present suit was filed by Mantis in April 2017. (Dkt. No. 1). As it previously did in the earlier round of suits referenced above, Mantis alleged infringement of the same seven asserted patents. (*Id.*) Mantis accuses Edible of infringing the asserted patents through the alleged use of “products or services for targeted content delivery on a mobile device.” (*Id.* at ¶ 37). More specifically, Mantis accuses Edible Arrangement’s system for direct mail advertising to consumers via text message. (*See* Dkt. No. 1, Ex. C-1 (charting accused system against the ’788 Patent)). Mantis claims that the alleged “trigger system” claimed by the asserted patents can be satisfied in one example by an Edible Arrangement’s consumer entering their telephone number on the Edible Arrangement’s website to sign-up for text promotions and special offers:



(*Id.* at 3). In the alternative, the consumer may register to receive promotions during submission of an order—in which the consumer is asked to provide accurate identity information, including a

phone number. (*Id.* at 17). The consumer then receives text messages on their mobile device with Edible promotions or special offers:



(*Id.* at 6). As can be seen, some of these promotions come with an offer to visit the Edible Arrangement’s website or application where the offer can be redeemed.



(Image of receipt containing redemption of SMS offer)

(*Id.* at 24). It is this general process that Mantis accuses of infringement.

The scheduling conference in this matter has not yet been held and, as such, no *Markman* or trial date has been set.

3. The Asserted Patents

The seven asserted patents all share an identical specification, the same five inventors, and the same title: System and Method to Initiate a Mobile Data Communication Using a Trigger System. (Dkt. No. 1 at Exs. A through G). All seven asserted patents concern the same abstract concept of direct mail advertising via text message. Mantis agrees in part with this characterization, as it alleges in the Complaint that the asserted patents claim “system and methods to enable organizations to execute direct marketing techniques and promotions . . . through their mobile communications devices.” (*Id.* at ¶ 5, emphasis added).

All of the claims of the asserted patents relate to this same concept. Indeed, when Mantis devotes the first third of the complaint to preemptive arguments related to patent eligibility or lack thereof, Mantis refers to the asserted patents collectively and makes no attempt to distinguish between the patents or their various claims with respect to their patent eligibility. (*Id.* at ¶¶ 4-29). Moreover, all of the asserted patents relate back to and claim priority to the same provisional patent application dated July 19, 2002. (Dkt. No. 1 at ¶ 5).

B. LEGAL STANDARDS

1. This case should be disposed of at the pleading stage.

To survive a Rule 12(b)(6) motion, a complaint “must provide the plaintiff’s grounds for entitlement to relief—including factual allegations that when assumed to be true raise a right to relief above the speculative level.” *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007) (citations and quotations omitted). In deciding a Rule 12(b)(6) motion, courts consider documents attached to or incorporated into the complaint as well as facts alleged in the complaint. *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017 (5th Cir. 1996). In addition, while a Rule 12 motion is normally confined to the pleadings, the Court may take judicial notice of matters of public record directly relevant to the issue in dispute without converting the motion to one for summary

judgment. *Tech Pharmacy Servs., LLC v. AlixaRX LLC*, Case No. 4:15-cv-766, 2016 WL 4272412, at *2 (Mazzant, J.) (citing *Funk v. Stryker Corp.*, 631 F.3d 777, 780 (5th Cir. 2011)).

Patent subject matter eligibility under § 101 is a question of law particularly suitable for resolution at the pleading stage of a patent litigation matter. *See Content Extraction and Transmission LLC v. Wells Fargo Bank, NA*, 776 F.3d 1343 (Fed. Cir. 2014). “Challenges to patentability under section 101 may be brought based solely on the pleadings, including on a Rule 12(c) motion for judgment on the pleadings.” *Open Text S.A. v. Box, Inc.*, 78 F. Supp. 3d 1043, 1045 (N.D. Cal. 2015); *see also buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1352 (Fed. Cir. 2014) (affirming Rule 12(c) judgment on the pleadings). Indeed, this Court has recognized as much, and has invalidated numerous patents at the Rule 12 stage. *See Clear with Computers.*, 2015 WL 993392, at *3 (recognizing that “a determination of patent validity under § 101 may be made at the pleading stage”), *aff’d* 636 Fed. Appx. 1015 (Fed. Cir. 2016); *Falkon Treasures LLC v. ADIDAS America, Inc.*, No. 2:16-cv-653, 2017 WL 1376447, at *1 (E.D. Tex. Apr. 17, 2017) (Gilstrap, J., adopting report and recommendation of Payne, M.J.).

The focus of a § 101 inquiry, even at the pleading stage, is on the claims. *Dealertrack, Inc. v. Huber*, 582 F.3d 1315, 1334 (Fed. Cir. 2012) (“In considering patent eligibility under § 101, one must focus on the claims.”). Claim construction is not required to conduct a § 101 analysis. *See, e.g., buySAFE, Inc. v. Google Inc.*, 765 F.3d 1350 (Fed. Cir. 2014) (upholding Judge Stark’s grant of defendant’s 12(c) motion). Thus, motions to dismiss and motions for judgment on the pleadings on § 101 grounds—like Edible Arrangement’s motion here—can be and routinely are decided *without* claim construction. *See Alice*, 134 S. Ct. 2347 (finding subject matter ineligible without performing claim construction).

2. The law of 35 U.S.C. § 101

Section 101 of the Patent Act sets forth four categories of patentable subject matter: “any new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. But the Supreme Court specifically recognizes three exceptions to patent eligibility: “laws of nature, physical phenomena, and *abstract ideas*.” *Alice*, 134 S. Ct. at 2354 (quoting *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013)). The patent law does not allow monopolization of these basic “principle[s] of the physical *or social sciences*” because they are the “building blocks of human ingenuity.” *Id.* at 2354, 2359 (emphasis added). Instead, such building blocks should be “free to all men and reserved exclusively to none.” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012) (internal quotations omitted).

Determining whether a patent claim impermissibly claims an abstract idea involves two steps: First, the court determines “whether the claims at issue are directed to a patent-ineligible concept.” *Alice*, 134 S. Ct. at 2355. Second, if the claim contains such an abstract idea, the court evaluates whether there is, apart from the abstract idea, “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.* (internal quotations and citations omitted). The analysis typically begins by comparing the claim at issue to claims with a “similar or parallel descriptive nature” that have been analyzed in previous cases. *Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 841 F.3d 1288, 1295 (Fed. Cir. 2016) (“We begin, then, with an examination of eligible and ineligible claims of a similar nature from past cases.”).

Transformation of an idea into a patent-eligible application requires “more than simply stating the abstract idea while adding the words ‘apply it.’” *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 566 U.S. at 72). In the context of computer-related technology, a claim must be directed to a specific “improvement in computer capabilities” rather than “an ‘abstract idea’ for which

computers are invoked merely as a tool.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016); *see also MacroPoint, LLC v. FourKites, Inc.*, No. 1:15-cv-1002, 2015 WL 6870118, at *6 (N.D. Ohio Nov. 6, 2015), *aff’d* 2016 WL 7156894 (Fed. Cir. Dec. 8, 2016) (“[T]he Court [found] that using a computer to ask for permission before using a locating device [did] not solve a technological problem” and was patent-ineligible abstract idea.). Indeed, if—as here—a claim could be performed in the human mind, or by a human using pencil-and-paper, it is not patent-eligible. *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372 (Fed. Cir. 2011); *see also Planet Bingo, LLC v. VKGS LLC*, 576 Fed. Appx. 1005, 1008 (Fed. Cir. 2014) (“[N]ot only can these steps be carried out in existing computers long in use,’ but they also can be ‘done mentally.’”) (citation omitted).

C. ARGUMENT

This Court, as noted above, has applied the bright-line rules of patent-eligibility established by the Supreme Court and the Federal Circuit to efficiently dismiss patent cases on the pleadings. *See Clear with Computers*, 2015 WL 993392, at *6; *Falkon Treasures*, 2017 WL 1376447, at *1. Mantis’ infringement claims should be similarly dismissed because the asserted patents simply cannot survive the straightforward analysis these cases require. The Court should find similarly here—especially where Mantis’ litigation history in the District follows an oft taken and abusive tactic of filing similar lawsuits against multiple defendants and settling those cases below the cost of litigation while avoiding any substantive challenge to its patents. *See eDekka LLC v. 3balls.com, Inc.*, Case No. 2:15-cv-541, 2015 WL 9225038, at *4 (E.D. Tex. Dec. 17, 2015) (Gilstrap, J.) (finding a case dismissed pursuant to 35 U.S.C. § 101 exceptional where the patentee’s “litigation history in this District—which includes filing strikingly similar lawsuits against over 200 defendants—reflects an aggressive strategy that avoids testing its case on the merits and instead aims for early settlements falling at or below the cost of defense”).

Here, although there are seven patents at issue, the asserted patents as a whole are directed to the same concept and may be treated similarly via a representative claim. Moreover, the asserted patents may be invalidated at the pleading stage because claim construction is not necessary. Indeed, Mantis has already taken the position in preceding litigation that claim construction of the asserted patents is not necessary. With these potential roadblocks easily cleared, the asserted patents are invalid under *Alice* step one because they claim nothing more than the abstract idea of direct mail advertising. This conclusion of invalidity remains untouched in *Alice* step two because the claims add nothing more beyond generic computer components or an equally generic and abstract “trigger system,” which by Mantis’ own admission is tantamount to a consumer telling a store that she would like to receive more information or future deals—a common human interaction that long preceded and is not in any way unique to mobile devices.

1. The claims of the asserted patents are substantially similar and the § 101 analysis may be accomplished using a representative claim.

The use of representative claims as a proxy for a claim-by-claim analysis of eligibility under 35 U.S.C. §101 is a well-accepted practice, and indeed it is often a practical necessity. *See Alice*, 134 S.Ct 2359-60 (finding 208 claims to be patent-ineligible based on analysis of one representative claim); *see also Content Extraction and Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1349 (Fed. Cir. 2014) (finding that for the purpose of a §101 challenge “1) the claims of the asserted patents are substantially similar in that they recite little more than the same abstract idea, and 2) claim 1 of the ’855 patent and claim 1 of the ’416 patent are representative”). This is particularly true where, as here, the asserted patents belong to the same patent family, involve the same technology, and share identical patent specifications.

Here, claim 1 of the ’788 is representative of the claims of the asserted patents for the purposes of this Motion. The claim has been colored in blue to illustrate generic computer

components (such as servers, clients, and applications), and in green to illustrate steps related to the abstract concept of direct mail advertising:

1. A system for enabling targeted content delivery to a mobile device, said mobile device having a device address, said device address having associated therewith at least one unique identifier, said system comprising:

a message application server; and

a trigger system in communication with said message application server, said trigger system comprising:

a trigger client component configured to generate a trigger signal comprising a trigger action, user content request data and said at least one unique identifier; and

a trigger server component in communication with said trigger client component, said trigger server component configured to:

receive said trigger signal, and

send to said message application server said trigger signal for processing by said message application server;

wherein said message application server is configured to:

receive from said trigger system said trigger signal, and in response thereto:

derive said mobile device address from said at least one unique identifier,

generate content based on said user request data, and

send said generated content to said device address of said mobile device;

an offer application component:

an offer entry system in communication with said offer application component, and an offer database in communication with said offer application component for storing said generated content and said user request data, wherein said offer entry system is configured to:

redeem said generated content,

generate content redemption information comprising said redeemed content, and send said content redemption information to said offer application component for storage in said offer database.

All of the claims of the asserted patents contain similar limitations. The only differences are minor—clarifying merely the generic computer components at issue,² the nature of the content sent to the user,³ or the type of unique identifier used.⁴

To illustrate further, Mantis itself addresses the asserted patents as a collective with regard to patent eligibility in its own complaint. (Dkt. No. 1 at ¶¶ 5-29). In its own pleading, Mantis does not attempt to distinguish one claim or set of claims over any other vis-à-vis patent eligibility. To the contrary, Mantis repeatedly characterizes all of the claims as directed to the use of a so-called “trigger system”:

“The claims as a whole are directed to using a trigger system to initiate communications on electronic devices in order to enable targeted content delivery to a mobile device.”

(*Id.* at 19).

Accordingly, claim 1 of the ’788 Patent is representative of all claims, which together as a whole are directed toward the use of the asserted patents’ alleged trigger system. Because the asserted patents claim the abstract concept of direct mail advertising, and because this alleged

² For example, dependent claim 5 of six of the seven asserted patents contains a minor clarification that the client application is a web browser and the server application is a web server. (*See*, claim 5 of the ’788, ’262, ’784, ’732, ’215, and ’803 Patents). Similarly, dependent claim 6 of the same six asserted patents includes the generic limitation that the mobile device include an “input device” (a.k.a. a keyboard). (*See* claim 6 of the ’788, ’262, ’784, ’732, ’215, and ’803 Patents).

³ *See, e.g.*, the ’262 Patent’s minor clarification in claim 1 that the offer include “one or more graphical images.”

⁴ The ’518 Patent merely clarifies that the unique identified may be at least one of “a number, data encoded on a magnetic stripe of a card, a bar code, a Radio Frequency Identification (RFID) tag including data, a client application including unique data, and a biometric identifier unique across a plurality of users.”

trigger system does not add something more to the claims (and is itself abstract), the asserted patents are invalid.

2. Claim construction is not necessary to resolve the asserted patents invalidity under 35 U.S.C. § 101.

Claim construction is not necessary to resolve the § 101 inquiry and this case may be disposed at the pleading stage. Tellingly, Mantis has previously taken the position that none of the claim terms require construction, and should presumably be given their plain and ordinary meaning instead:

Pursuant to L.P.R. 4-1, Mantis does not contend at this time that any claim terms need to be construed by the Court or should be governed by 35 U.S.C. 112(6). Mantis reserves the right to seek or propose constructions for any of the claim terms identified by defendant.

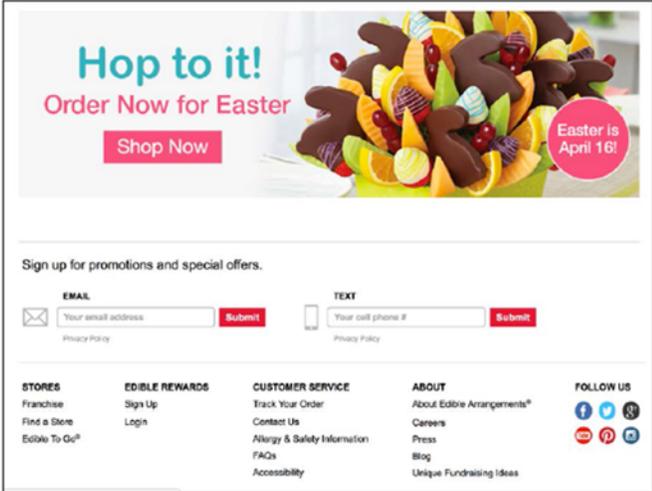
Best regards,

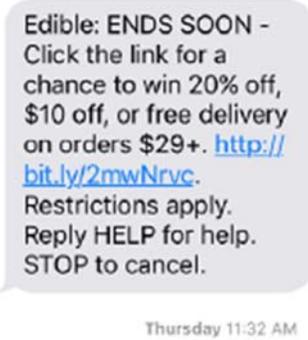
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Mantis Commc'ns, LLC v. Best Buy Co., Consolidated Case No. 2:16-cv-661-JRG-RSP, Dkt. No. 114 at Exhibit 1 (E.D. Tex. Feb. 17, 2017). Mantis made this representation in a case involving the same asserted patents and similar accused products. *See id.*, Dkt. No. 114 at 3 (Mantis “accusing communications sent by or on behalf of Home Depot through Home Depot’s mobile application, e-commerce website, and point-of-sale devices.”).

Moreover, the claim charts provided in the complaint here provide a clear picture of perceived breadth to which Mantis view its claims. At the Rule 12 stage, factual allegations in the pleadings are considered to be true. *Cuvillier*, 503 F.3d at 401. Here, to the extent that Mantis changes course and attempts to procedurally defeat this Motion by raising claim construction

arguments, the Court need only look at Mantis’ own allegations to determine the extraordinary breadth of the asserted claim scope:

’778 Patent, Claim 1 Limitation	Asserted Breadth (Dkt. No. 1, Ex. C-1)
a message application server	<p>“a <u>server component</u> that communicates with the POI”</p> <p>[POI defined as a website, mobile app, and/or point-of-sale system]</p>
a trigger system in communication with said message application server, said trigger system comprising	 <p>(Screen shot of website sign up to receive SMS offers)</p>
a trigger client component configured to generate a trigger signal comprising a trigger action, user content request data and said at least one unique identifier; and	<p>“the trigger client or device is the portion of the trigger system that generates the trigger signal, such as when <u>a user inputs information . . . or signs up for a service</u>”</p> <p>“the trigger action may be . . . <u>a subscription request</u>”</p> <p>“the user content request data includes, e.g., . . . <u>discount available [or] offers applicable</u>”</p> <p>“the unique identifier is <u>a phone number</u>”</p>
a trigger server component in communication with said trigger client component, said trigger server component configured to	<p>“the trigger server is <u>a server component</u> with program code running on the backend, configured to receive and respond to messages from the [website, mobile app, and/or point-of-sale system]”</p>
receive said trigger signal	<p>This limitation is self-explanatory based on the above.</p>

<p>send to said message application server said trigger signal for processing by said message application server</p>	<p>This limitation is self-explanatory based on the above.</p>
<p>wherein said message application server is configured to</p>	<p>This limitation is self-explanatory based on the above.</p>
<p>receive from said trigger system said trigger signal, and in response thereto:</p>	<p>This limitation is self-explanatory based on the above.</p>
<p>derive said mobile device address from said at least one unique identifier,</p>	<p>“the mobile device address or ID is <u>a phone number</u>” “the unique identifier is <u>a phone number</u>”</p>
<p>generate content based on said user request data, and</p>	<p>“generated content or message is, e.g., a message comprising direct or indirect mention of offers and deals, or a message containing customer support and relationship information”</p> 
<p>send said generated content to said device address of said mobile device;</p>	<p>This limitation is self-explanatory based on the above.</p>
<p>an offer application component:</p>	<p>“the offer application component or system is <u>software running in the background</u> of the web client or at the server end, and is configured to <u>facilitate validation, analysis and redemption of offers</u> received on the mobile device of the user”</p>

<p>an offer entry system in communication with said offer application component, and an offer database in communication with said offer application component for storing said generated content and said user request data, wherein said offer entry system is configured to:</p>	<p>“the offer entry system is, e.g., <u>the system used to enter and redeem the offer</u>, which includes the front end for receiving the offer, and the backend for processing the offer”</p> <p>Offers may include:</p> <ul style="list-style-type: none"> • “a promotional code” • “a coupon” • “offer to get rewards points” • “discounted price” • “offer to purchase a particular product” • “obtain coupons” • “visit website” • “obtain relevant details regarding a product” 																					
<p>redeem said generated content,</p>	<p>This limitation is self-explanatory based on the above.</p>																					
<p>generate content redemption information comprising said redeemed content, and send said content redemption information to said offer application component for storage in said offer database.</p>	<p>“redemption information is the information that is generated and stored when the offer is redeemed”</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: fit-content;">  <p>Edible Arrangements - 1522 4740 State Highway 121 Suite 800 The Colony, TX 75056 469-275-4500</p> <p>S1522026603</p> <p>Taken 3/30/17 6:10PM - Dovie</p> <p>Delivery - Fri 3/31/17</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Qty</th> <th style="text-align: left;">Merchandise</th> <th style="text-align: right;">Amount</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Chocolate Dipped Strawberries Box - 12 Count</td> <td style="text-align: right;">0.00</td> </tr> <tr> <td>-1</td> <td>Chocolate Dipped Strawberries Box - 12 Box</td> <td style="text-align: right;">29.00</td> </tr> <tr> <td colspan="2" style="text-align: right;">Sub Total</td> <td style="text-align: right;">29.00</td> </tr> <tr> <td colspan="2" style="text-align: right;">Delivery Charge</td> <td style="text-align: right;">13.99</td> </tr> <tr> <td colspan="2" style="text-align: right;">Discount (Coupon: FYBT4452)</td> <td style="text-align: right;">(10.00)</td> </tr> <tr> <td colspan="2" style="text-align: right;">State Sales Tax</td> <td style="text-align: right;">2.47</td> </tr> </tbody> </table> </div>	Qty	Merchandise	Amount	1	Chocolate Dipped Strawberries Box - 12 Count	0.00	-1	Chocolate Dipped Strawberries Box - 12 Box	29.00	Sub Total		29.00	Delivery Charge		13.99	Discount (Coupon: FYBT4452)		(10.00)	State Sales Tax		2.47
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Thus, based on Mantis’ own allegations the claims cover nothing more than (i) a store selling products, (ii) a customer signing up to receive offers from that store, (iii) the store sending the

customer a coupon, and (iv) the customer buying a product from the store with said coupon. No claim construction is necessary based on Mantis' prior positions and its allegations.

3. *Alice* Step One: The asserted patents are directed to the abstract idea of direct mail advertising.

Step one of the two-part *Alice* test requires that the Court determine whether the claims are directed toward a patent-eligible concept.

Here, the process outlined above—customer signs-up, gets coupon, redeems coupon—is abstract. This process of getting consumer information, sending offers and promotions like coupons to the customer, and letting the customer redeem that coupon at the store is a human activity—one that has been around as long as there have been stores selling products. This is an abstract concept. The asserted patents fail *Alice* step one and are thus presumed invalid.

The asserted patents here are analogous to the '776 and '739 Patents that this Court invalidated in *Clear with Computers v. Altec Industries Inc.*, No. 6:14-cv-79, 2015 WL 993392, at *3 (E.D. Tex. 2014) (Gilstrap, J.). There the patents were “directed to the abstract idea of created a customized sales proposal for a customer.” *Id.* at *4. The '776 Patent recited a “computer-implemented method to (1) present questions to, and receive answers from, a customer regarding products for sale; (2) based on at least one answer, select a picture of the product, a picture of the product environment, and a textual product description; and (3) put the pictures and text into a single visual output as part of a customized proposal for sale.” *Id.* The '739 Patent recited “a computer program product configured to perform the same conceptual steps but also adds that customer information is stored in an ‘active database.’” *Id.* Here, the asserted patents lack even the customization (question-and-answer) feature that the *Clear with Computers* patents touted. Instead, the customer need only indicate that they want more information, be presented with a

coupon or offer, and redeem it. If anything, the alleged “trigger system” is equally abstract to the simple question-and-answer process of *Clear with Computers*:

<i>Clear with Computers</i>	<i>Mantis Communications</i>
Q. Are you interested in a hybrid vehicle or a heavy-duty truck? A. A truck.	Q. Would you like to sign-up to receive promotions and offers from us in the future; if so, please provide your phone number? A. Yes. My phone number is 555-123-4567.

Similarly, just as the Court found in *Clear with Computers* that “the claimed computer elements are functional in nature and could easily be performed by a human,” (*id.*), the claimed computer elements here are equally functional and also can easily be performed by a human:

<i>Clear with Computers</i>	<i>Mantis Communications</i>
1. Salesman presents questions to, and receive answers from, a customer regarding products for sale. 2. Based on one answer, salesman selects a picture of a product, a picture of the product environment, and textual product description. 3. The salesman puts the pictures and text into a single visual output as part of a customized proposal for sale. 4. Customer information is stored in the salesman’s roledex.	1. Customer indicates that they would like to receive more information about products for sale and provides contact information. 2. Salesman sends customer their latest promotions and coupons. 3. Customer goes to store to redeem coupon. 4. Salesman validates coupon and sells customer product at discounted price.

The fact that the steps in *Clear with Computers* were performed on a generic computer while those here are performed on a web server and mobile device is of no moment to *Alice* step one. The asserted patents claim the abstract idea of direct mail advertising—whether it be by promotion, offer, discount, or simple coupon.

4. *Alice* Step Two: The asserted patents do not contain an inventive concept that transforms the abstract idea.

Turning to the second step of the *Alice* test, the Court must consider the remaining elements of the claims, other than the abstract idea, to determine whether they contain an “inventive

concept” sufficient to transform the abstract idea into a patent-eligible application. *Alice*, 134 S. Ct. at 2357. “A claim that recites an abstract idea must include additional features” that “must be more than well-understood, routine, conventional activity.” *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014) (quoting *Mayo*, 132 S.Ct. at 1298 & *Alice*, 134 S.Ct. at 2357). Here, the claims do not contain anything more. They are not transformed, remain abstract, and remain invalid.

Again, similar to this Court’s previous holding in *Clear with Computers*, the asserted patents here simply invoke generic computer components. In *Clear with Computers*, the patentee attempted to rely on technical jargon such as “automatically select[ing],” “dynamically building a template,” “single composite visual output,” “static database,” and “active database” to prove an inventive concept. This Court correctly rejected those arguments, finding that “a general purpose computer with minimal programming can perform functions ‘automatically’ and ‘dynamically,’ and implementation of an abstract idea on such a computer is not an inventive concept.” *Clear with Computers*, 2015 WL 993392, at *4. Here, the concepts of dynamic creation or automatically selecting are not present in the asserted claims. Instead, these claims still require multiple steps of human action—a customer must choose to interact with the sign-up page (the “trigger system”), and the customer must choose to redeem an offer. In addition, just as *Clear with Computers*’ database limitations were found to be “generic computer components used for storing data,” (*id.*), the database of offers referred to in the asserted claims here is equally generic. Beyond the database, neither the “server components” nor the “mobile device” identified in the claims are anything more than web servers or mobile phones—both of which have long been generic.

Next, contrary to Mantis’ protestations, the steps of the asserted claims also do not “improve the functioning *of the computer* itself,” *Alice*, 134 S. Ct. at 2359 (emphasis added),

which could be accomplished for example by disclosing an “improved, particularized method of digital data compression,” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1259 (Fed. Cir. 2014), or by improving “the way a computer stores and retrieves data in memory,” *Enfish*, 822 F.3d at 1339. While Mantis conclusively alleges that “the claims of the patents-in-suit improved upon the functioning of communications interfaces and devices,” (Dkt. No. 1 at ¶ 9), the claims nowhere recite a particularized improvement to the function of the servers, networks, or mobile devices at issue. Instead, as in *Clear with Computers*, “[t]he claims here invoke computer technology only to take advantage of the relative ease by which a computer, rather than a human salesman,” can send text message promotions and coupons to consumers. *Clear with Computers*, 2015 WL 993392, at *4 (citing *SiRF Tech., Inc. v. Int’l Trade Comm’n*, 601 F.3d 1319, 1333 (Fed. Cir. 2010)) (“In order for the addition of a machine to impose a meaningful limit on the scope of a claim, it must play a significant part in permitting the claimed method to be performed, rather than function solely as an obvious mechanism for permitting a solution to be achieved more quickly . . .”).

The claims here also do not “effect an improvement in any other technology or technical field.” *See Alice*, 134 S.Ct. at 2359. These claims, like those in *Clear with Computers*, contain “no inventive algorithms or otherwise creative means for [sending promotional text message] other than an instruction that the basic process be performed using generic computer components.” *Clear with Computers*, 2015 WL 993392, at *5. As this Court has previously recognized, the Federal Circuit held in *Ultramercial* that “the steps of ‘receiving copyrighted media, selecting an ad, offering the media in exchange for watching the selected ad, displaying the ad, allowing the consumer to access the media, and receiving payment from the sponsor of the ad’ using computers and the internet were directed to a patent-ineligible abstract idea.” *Id.* (citing *Ultramercial* 772

F.3d at 715). The Court’s statement in *Clear with Computers* that “[i]f the instant claims can be said to involve complex computer programming, then the claims at issue in *Ultramercial* can be said to require at least the same level programming complexity,” is equally applicable to Mantis’ asserted patents. *See id.* The patents in *Ultramercial*, *Clear with Computers*, and those here all “comprise only ‘conventional steps, specified at a high level of generality, which is insufficient to supply an inventive concept.’” *See id.*

Finally, the asserted patents also do not satisfy the machine-or-transformation test—again despite Mantis’ arguments to the contrary. (*See* Dkt. No. 1 at ¶¶ 16-17). As an initial matter, although this test may be a useful clue in considering the § 101 inquiry, it is “not the sole test for deciding whether an invention is a patent-eligible ‘process.’” *Bilski v. Kappos*, 561 U.S. 593, 604 (2010). As to the machine prong, both the Supreme Court and the Federal Circuit have made clear that the mere use of conventional computer functions as part of a claimed invention does not satisfy the machine-or-transformation test. *Alice*, 134 S. Ct. at 2358 (“the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-ineligible invention”); *Ultramercial*, 772 F.3d at 716 (finding that the machine prong was not meant where the claims were “not tied to any particular novel machine or apparatus, only a general purpose computer.”). Here, as demonstrated above, nothing in the asserted claims distinguish the recited computer components from a general purpose computer. In addition, the asserted independent claims do not “specify how the computer hardware and database are specially programmed to perform the steps in the patent.” *See Dealertrack*, 674 F.3d at 1333. Rather, the recited actions can just as easily be performed by a human. As to the transformation prong, the asserted claims do not transform any particular article into a different state or thing. The “mere manipulation or reorganization of data . . . does not satisfy the transformation prong.” *Cybersource Corp. v. Retail Decisions, Inc.*, 654

F.3d 1366, 1375 (Fed. Cir. 2011). Here, Mantis points to the “generate content” limitation (Dkt. No. 1 at ¶ 16), but as in *Clear with Computers*, the mere assembly of a promotion or offer does not render an abstract idea patent eligible. *See Clear with Computers*, 2015 WL 993392, at *4-5.

Because the method claims of the asserted patents disclose only an abstract idea run on generic computer components, there is no “inventive concept” that could transform the unpatentable, abstract idea into a patent-eligible invention. *Alice*, 134 S. Ct. at 2357. Thus, claims of the asserted patents are patent-ineligible.

D. CONCLUSION

For the foregoing reasons, Edible moves the Court for judgment on the pleadings because all claims of the asserted patents are invalid under § 101 for claiming patent-ineligible abstract ideas.

Dated: May 30, 2017

Respectfully submitted,

By: /s/ Michael A. Bittner

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LLC and Edible Arrangements International,
LLC*

CERTIFICATE OF CONFERENCE

On May 26, 2017, counsel for Mantis and Edible conferred via telephone regarding the subject matter of this motion per the requirements of Local Rule CV-7(h) and Judge Gilstrap's Standing Order. Counsel indicated that Mantis is opposed to this motion.

/s/ Michael A. Bittner
Michael A. Bittner

**CERTIFICATE OF COMPLIANCE WITH
STANDING ORDER ON 35 U.S.C. § 101 MOTION PRACTICE**

- The parties **agree** that prior claim construction is not needed to inform the Court's analysis as to patentability.
- X The parties **disagree** that prior claim construction is not needed to inform the Court's analysis as to patentability.

/s/ Michael A. Bittner
Michael A. Bittner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically in compliance with Local Rule CV-5(a). Therefore, this document was served on all counsel who are deemed to have consented to electronic service pursuant to Local Rule CV-5(a)(3)(A).

/s/ Michael A. Bittner
Michael A. Bittner