

2019-1846

**United States Court of Appeals
for the Federal Circuit**

CONSUMER 2.0, INC., dba Rently,

Plaintiff-Appellant,

– v. –

TENANT TURNER, INC.,

Defendant-Appellee.

*On Appeal from the United States District Court for the
Eastern District of Virginia, Norfolk Division in No.
2:18-cv-00355-RGD-DEM, Judge Robert G. Doumar*

BRIEF FOR DEFENDANT-APPELLEE

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SEPTEMBER 23, 2019

CERTIFICATE OF INTEREST

Counsel for Defendant-Appellee Tenant Turner, Inc. certifies the following:

1. The full name of every party represented by me is:

Tenant Turner, Inc.

2. The name of the Real Party in Interest represented by me is:

Tenant Turner, Inc.

3. All parent corporations and publicly held companies that own 10% or more of stock in the party represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency that are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Laurin H. Mills. Samek, Werther & Mills, LLC.

Laurin H. Mills. LeClairRyan PLLC (at the trial court).

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal are:

None.

Dated: September 23, 2019

/s/Laurin H. Mills
*Attorney for Defendant-Appellee
Tenant Turner, Inc.*

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Defendant-Appellee Tenant Turner, Inc. knows of no other case in this Court, or any other court or agency, that will directly affect or be affected by the Court's decision in this case.

JURISDICTIONAL STATEMENT

This is an appeal from a final order and judgment entered in a patent infringement action on April 4, 2019 pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff-Appellant Consumer 2.0, Inc. d/b/a Rently timely appealed on May 3, 2019 (Fed. R. App. P. 4(a)(1)(A)).

The District Court had jurisdiction under 28 U.S.C. §§ 1331 & 1338(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUES

1. Does Plaintiff-Appellant Consumer 2.0, Inc. d/b/a Rently's abstract "automated entry" patent claim patent-eligible subject matter pursuant to 35 U.S.C. § 101?
2. Can the addition of an insignificant, manual post-solution step transform an abstract claim into patentable subject matter?
3. Can characterizations of claim elements in an amended complaint create fact or claim construction issues when the characterizations are not supported by the claim language or the specification?

INTRODUCTION

The central issue on appeal is whether U.S. Patent No. 9,875,590 B2 (the “’590 Patent”), for “AUTOMATED ENTRY,” claims patent-eligible subject matter under the two-part test set forth in *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208 (2014). The District Court correctly held that the ’590 Patent claims merely an “abstract idea” for making properties available for viewing by prospective purchasers or renters; the abstract idea is implemented on pre-existing generic computing devices and other previously known hardware; and the elements of the asserted claims, alone or in combination, do not add anything inventive to transform the claims into patent-eligible subject matter. The District Court further held that an application claim amendment introduced during prosecution and designed to overcome an initial *Alice* rejection did not add a technological improvement and, thus, did not transform an obviously abstract idea into patentable subject matter.

STATEMENT OF THE CASE

I. Procedural History.

Plaintiff-Appellant, Consumer 2.0, Inc. d/b/a Rently (“Rently”) initiated this case in the United States District Court for the Eastern District of Virginia (Norfolk Division) on July 3, 2018. Appx90-105. On August 7, 2018, Defendant-Appellee,

Tenant Turner, Inc. (“Tenant Turner”) filed a Motion to Dismiss arguing that the ’590 Patent did not claim patent-eligible subject matter. Appx121-152.

On November 1, 2018, the District Court granted Tenant Turner’s Motion to Dismiss without prejudice. Appx1-20. Applying the test for determining patent eligibility set forth in *Alice*, 573 U.S. at 217-18, the Court held that the ’590 Patent claimed merely an abstract idea and that the elements of the claims, considered both individually and as a combination, did not add anything inventive that would transform the claims into patent-eligible subject matter. *See generally Consumer 2.0, Inc. d/b/a Rently v. Tenant Turner, Inc.*, 343 F. Supp. 3d 581 (E.D. Va. 2018) (Appx1-19).

On November 29, 2018, Rently filed a Motion for Leave to File Amended Complaint (Appx398-400, Appx476-508) and a Motion to Alter or Amend Judgment (Appx509-516), along with a Proposed Amended Complaint adding 35 new paragraphs (Appx401-429). Tenant Turner opposed both motions on December 18, 2018. Appx517-531. On April 4, 2019, the District Court denied Rently’s Motion for Leave to File Amended Complaint and its Motion to Alter or Amend Judgment. Appx21-40. Rently timely appealed on May 3, 2019.

II. Facts.

Because this is an appeal in a case where the District Court granted Tenant Turner's Motion to Dismiss, the District Court made no factual findings. The facts set forth below are taken from Rently's Complaint, Proposed Amended Complaint, and various attachments thereto and are assumed to be true only for the purposes of this appeal.

A. The Patent-in-Suit.

The '590 Patent claims a method of providing "automated entry" to properties for sale or rent that allows prospective purchasers or renters to view a property without the in-person presence of a real estate agent. The "Detailed Description" section of the '590 Patent describes a system associated with the claimed method. The "system provides automated entry to a prospective buyer or renter of properties" and "automates the tour registration process," which "eliminates the need to arrange a tour with an agent or landlord" and "eliminates the need for an on-site representative of the property." Appx58 (col. 2, lns. 10-15, hereinafter "col.:lns.").

The '590 Patent then identifies generic hardware devices or software functions that perform the '590 Patent's method:

- (1) a lock box or automated door lock:
- (2) a server;

- (3) an application interface; and
- (4) a generic portable device (such as a cell phone or tablet device).

Appx58, Appx62.

“[A] lockbox or similar locking device is placed at or near a property in order to enable an invited visitor to gain automated and unaccompanied entry into a specific property during a specified period of time.” Appx222. An “application collects information from the visitor’s portable device about the visitor and his planned visit” and “[t]his information is relayed to a server.” Appx222. “The application provides the visitor with an invitation to receive automated entry information (e.g., a valid code).” Appx222.

The application interface retrieves “automated entry information from coordinated server and lockbox database tables.” Appx222. At this stage, a valid code is issued that “correlates with a specific period of time that a specific property may be visited by the invited visitor.” Appx222. The application interface requests “identifying information through the invited visitor’s portable device.” Appx222. The valid code is then “communicated to the invited visitor’s portable device via the application interface from the server.” Appx222-223. “The lockbox or similar locking device” is then able to “be opened to facilitate the automated and unaccompanied entry” by the visitor. Appx223. “The application also tracks in

real-time the identity of and time when a visitor actually visits a property.”

Appx223.

The “automated entry” process is set forth in representative Claim 7, which was the focus of the Motion to Dismiss:

A method for providing automated entry to properties, comprising:

making properties available for viewing to invited visitors;

providing an application interface of an application running on a computing system to a property manager, the property manager being a manager, a listing agent or an owner of the property, the application interface prompting the property manager to enter a visitor name and contact information for a visitor, wherein upon receipt of the visitor name and contact information, the application provides the visitor with an invitation to receive automated entry information including code information that is valid during a specified period of time so that the visitor can enter a property by themselves, the invitation being delivered to the visitor electronically, the invitation being applicable only to the property and the invitation requesting identification from the visitor;

placing a lock box or an automated door lock at or near each property;

upon the application receiving and confirming identification information for the visitor, providing, by the application, automated entry information to the visitor that allows the visitor to enter the property, the automated entry information including code information that is valid during the specified period of time;

upon the visitor providing the code information to the lock box or the automated door lock at the property within the

specified period of time, the lock box or the automated door lock opening to facilitate automated entry to the property;

tracking visitor activities at the properties; and

making information about the properties available within a user interface.

Appx62.

B. The Patent Prosecution History – The Initial *Alice* Rejection and Subsequent Amendment.

Claims of U.S. Patent Application Serial No. 14/260,247 (which issued as the '590 Patent) were initially rejected as “directed to non-statutory subject matter because the claim(s) as a whole, considering all claim elements both individually and in combination, d[id] not amount to significantly more than an abstract idea.” Appx153-156. The patent examiner stated that Claims 1, 6, and 12, were rejected because they were “directed to an abstract idea.” Appx156-157. Then-pending Claim 12 later became representative Claim 7.

In response to the rejection, Rently amended what was then Claim 12, in part, to include the addition of the steps of “placing a lock box or an automated door lock at or near the property” and such device “opening to facilitate automated entry to the property” in response to the “visitor providing the code information to the lock box or the automated door lock at the property within the specified period of time.” Appx169, Appx173-174. Following these amendments, the patent examiner found that “[a]pplicant’s response by virtue of amendment to claims has

overcome the Examiner’s rejection under 35 U.S.C. § 101.” Appx183, Appx186. Thus, by appending the insignificant manual steps of placing the lock box or automated door lock and the visitor providing code information within an abstract process, Rently was able to convince the patent examiner to grant the patent.¹

C. Relevant “Facts” Alleged in a Proposed Amended Complaint.

After the District Court granted Tenant Turner’s Motion to Dismiss, Rently moved to alter or amend the judgment and for leave to file an amended complaint, which contained 35 new paragraphs of largely irrelevant factual allegations, as well as additional exhibits. The crux of the amended factual allegations is that the commercial embodiment of the invention claimed in the ’590 Patent (which differs in many important respects from the claims in the ’590 Patent) has enjoyed commercial success due to its “unconventional” technology and the use of “technology-enabled” lock boxes that can handle up to “100 durational codes” that are valid only for a specified time period. Appellant’s Br. at 14; Appx401-475.²

¹ Rently notes that the ’590 Patent was prosecuted and issued after the Supreme Court handed down its decision in *Alice*. Appellant’s Br. at 25. That rather shocking fact does nothing to aid Rently’s argument.

² Whether the ’590 Patent claims an “unconventional” solution is irrelevant and confuses novelty with patentability. “[A] claim for a *new* abstract idea is still an abstract idea.” *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (emphasis in original).

SUMMARY OF THE ARGUMENT

The '590 Patent is directed at the abstract idea of “automated entry.” The U.S. Patent and Trademark Office (“PTO”) was correct in initially rejecting the '590 Patent as an attempt to patent an “abstract idea.” The PTO erred, however, in granting the patent after a claim was amended to add insignificant and non-inventive manual steps to the recitation of the abstract automated entry method.

The District Court correctly held that the '590 Patent does not claim patent-eligible subject matter and that no facts extrinsic to the subject patent application contained in a Proposed Amended Complaint could somehow transform the abstract claims into patent-eligible subject matter. The District Court’s decision should be affirmed.

STANDARD OF REVIEW

This is an appeal from a grant of a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) where the District Court held that the patent-in-suit did not claim patent-eligible subject matter under § 101 of the Patent Act. The Federal Circuit reviews a district court’s dismissal pursuant to Rule 12(b)(6) under the law of the regional circuit. *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343, 1346 (Fed. Cir. 2014).

This is an appeal from a case decided by the United States District Court for the Eastern District of Virginia (Norfolk Division), which is in the Fourth Circuit.

The Fourth Circuit reviews challenges to a dismissal for failure to state a claim *de novo*. *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002). This Court reviews a district court's patent eligibility determination under § 101 of the Patent Act *de novo*. *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015). While patent eligibility under § 101 is a question that *may* concern issues of fact, *Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1342 (Fed. Cir. 2018), this is a case that was dismissed based on the assumption that the alleged facts were true.

ARGUMENT

The District Court correctly held – twice – that the '590 Patent was directed to an abstract idea, claimed at a high level of generality, and none of the asserted claims contains elements sufficient to transform the abstract nature of the claims into patent-eligible subject matter. No fact alleged in the Proposed Amended Complaint changed that conclusion or created a claim construction issue. The decision below should be affirmed.

I. The *Alice* Two-Step Standard.

The central issue is whether the asserted representative Claim 7 from the '590 Patent is patent eligible under § 101 of the Patent Act, which provides:

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.

35 U.S.C. § 101.

There are three judicially created exceptions to § 101 that are not eligible for patent protection:

- (1) laws of nature;
- (2) natural phenomena; and
- (3) “abstract ideas.”³

Alice, 573 U.S. at 216.

In *Mayo Collaborative Services v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), the Supreme Court enunciated a framework for determining whether a patent claims patent-eligible subject matter. In *Alice*, the Supreme Court reaffirmed and reiterated the *Mayo* framework, which for the purposes of this appeal can be described as follows:

³ The Supreme Court has also used the term “abstract intellectual concept” as a synonym for “abstract idea.” *Gottschalk v. Benson*, 409 U.S. 63, 67-68 (1972) (discussing how claims that are “so abstract and sweeping” cannot be patentable). Neither term has been more precisely defined by either the Supreme Court or this Court. The judicial debate is further enlivened by a disagreement as to whether the abstract idea exception to § 101 should be narrowly or broadly interpreted. The clear teaching of *Alice* is that “abstract idea” should be broadly interpreted so long as the interpretation is “directly tethered” to claim language and the steps of the claim are conventional processes. *Solutran, Inc. v. Elavon, Inc.*, 931 F.3d 1161, 1168 (Fed. Cir. 2019) (also discussing the difficulties associated with determining the correct level of abstraction at which to characterize claims).

Step One: Are the asserted claims directed to a patent-ineligible concept, such as an “abstract idea”? If so, proceed to Step Two.

Step Two: Do the asserted claims describe an “inventive concept” that ensures that the patent claims at issue are “significantly more” than claims upon an ineligible concept?

Mayo, 566 U.S. at 77-79.

II. The ’590 Patent Claims an “Abstract Idea” and Fails Step One of the *Alice* Analysis.

A. Claims Written at a High Level of Generality and Implemented on Generic Computing Devices Using Standard Programming Techniques Are Attempts to Patent Abstract Ideas.

“The Supreme Court has not established a definitive rule to determine what constitutes an ‘abstract idea.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1334 (Fed. Cir. 2016) (citation omitted). In Step One of the *Alice* analysis, a court examines the “focus” of the claim, or its “character [] as a whole,” to determine if the claim is directed to an abstract idea. *Trading Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1378, 1384 (Fed. Cir. 2019). In examining the focus of the claim, however, numerous cases have cautioned that courts must be wary of characterizing claims at “a high level of abstraction and untethered from the language of the claims” lest “the exceptions to § 101 swallow the rule.” *Enfish*, 822 F.3d at 1337; *see also Diamond v. Diehr*, 450 U.S. 175, 189, n.12 (1981); *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016).

The courts have frequently declared “method[s] of organizing human activity” to be abstract. *Alice*, 573 U.S. at 220. Fundamental economic practices that have been long prevalent in commerce are also considered to be abstract ideas. *Id.* at 217-21. In the telecommunications and information processing fields, which are relevant in this case, claims directed to implementing economic practices on generic computers are not patent eligible. *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1285 (Fed. Cir. 2018) (“If a claimed invention only performs an abstract idea on a generic computer, the invention is directed to an abstract idea at step one”). The fact that modern computing systems can perform tasks or operations more rapidly or efficiently does not make an abstract idea patent eligible. *Ultracomercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716-17 (Fed. Cir. 2014) (“Any transformation from the use of computers or the transfer of content between computers is merely what computers do and does not change the analysis.”).⁴

1. Claims Written at a High Level of Abstraction and Purely Functional in Nature Are Too Abstract to Be Patentable.

There is a crucial distinction between claims “characterized” by courts and litigants at a high level of abstraction, and claims that are, as here, written at a very

⁴ By contrast, claims that provide for an improvement in the operation of computers, such as a new memory system or a new type of interface, are patent eligible. *See, e.g., Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017) (improved computer memory system). In this case, there is no serious argument that the ’590 Patent teaches any improvements in the operation of computers. The ’590 Patent is not directed to solving any technical problem.

high level of abstraction. Claims written at a high level of abstraction are not patentable because abstract ideas are the basic tools of science and technology and monopolizing such tools via a patent grant could impede innovation rather than promote it, which would thwart the primary objective of the patent laws. *Alice*, 573 U.S. at 216.

In determining whether a claim is directed to an abstract idea, courts have focused on whether the claim language is purely functional in nature rather than containing the specificity necessary to recite how the claimed function is achieved. This Court has focused on the problem of functional claiming in recent decisions and has treated the term “abstract” as the opposite of “concrete” or “specific,” analyzing whether the claims are sufficiently specific to be directed to a patent-eligible process rather than a patent-ineligible result.

For example, *SAP America, Inc. v. Investpic, LLC*, 898 F.3d 1161, 1167 (Fed. Cir. 2018) examined whether the claim at issue had “the specificity required to transform [it] from one claiming only a result to one claiming a way of achieving it.” To answer that question, this Court looked “to whether the claims in the patent focus on a specific means or method, or [as here] are instead directed to a result or effect that itself is the abstract idea and merely invokes generic processes and machinery.” *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1337 (Fed. Cir. 2017). The critical question in such cases is

“whether the claims are directed to ‘a specific means or method’ for improving technology or whether they are simply directed to an abstract end-result.” *RecogniCorp, LLC v. Nintendo Co.*, 855 F.3d 1322, 1326 (Fed. Cir. 2017) (citation omitted); *see also Interval Licensing*, 896 F.3d at 1345 (holding that a “broad, result-oriented” construction of a term encompassed a patent-ineligible abstract concept rather than a technical improvement because “[i]nstead of claiming a solution for producing that result, the claim in effect encompasses all solutions”).

2. Claim 7 of the ’590 Patent Claims the Abstract Idea of “Automated Entry.”

It would be difficult to characterize the claims in the ’590 Patent at a higher level of abstraction than they are written. The ’590 Patent claims what can only be described as a high-level application programming design for “automated entry” that would not even be protected under copyright law.

High-level design provides a view of the system at an abstract level. It shows how the major pieces of the finished application will fit together and interact with each other.

A high-level design should also specify assumptions about the environment in which the finished application will run. For example, it should describe the hardware and software you will use to develop the application, and the hardware that will eventually run the program.

The high-level design does not focus on the details of how the pieces of the application will work. Those details

can be worked out later during low-level design and implementation.

Rod Stephens, *Beginning Software Engineering*, Ch. 5, *High-Level Design*, <https://www.oreilly.com/library/view/beginning-software-engineering/9781118969175/c05.xhtml> (last accessed September 20, 2019).⁵

The language from relevant Claim 7 in the '590 Patent does nothing more than use generic computing devices and standard programming techniques, described at the highest possible level of generality, to provide “automated entry” to properties listed for sale or rent:

providing an **application interface** of an **application** running on a **computing system** to a property manager, the property manager being a manager, a listing agent or an owner of the property, the **application interface** prompting the property manager to enter a visitor name and contact information for a visitor, wherein upon receipt of the visitor name and contact information, the application provides the visitor with an invitation to receive **automated entry information** including **code**

⁵ The leading test for copyright infringement is set forth in *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992), which was the first appellate decision to describe the “abstraction-filtration-comparison” test for copyright infringement. A high-level application programming design would be filtered out under this test as too abstract to be protectable. *See generally* Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of its Protection*, 85 Tex. L. Rev. 1921, 1962 (2007) (observing that over time, courts came to perceive that *Baker* and section 102(b) required that functional elements of programs, such as processes or systems embodied in them, should be outside of copyright's scope). Copyright law requires only a minimal level of originality to be protectable. It is ironic that the PTO has, over the years, granted software and business method patents that would not get past Step One of a proper copyright infringement analysis, which is supposedly much less stringent.

information that is valid during a specified period of time so that the visitor can enter a property by themselves, the invitation being **delivered to the visitor electronically**, the invitation being applicable only to the property and the invitation requesting identification from the visitor;

Appx62 (10:29-42) (emphasis added).

These limitations merely related to providing an application program interface on a generic computing device that allows for the exchange of information, which is an abstract concept that can be performed on any standard computing device.

Another major portion of the claim is no more concrete:

upon the **application** receiving and confirming **identification information** for the visitor, providing, by the application, **automated entry information** to the visitor that allows the visitor to enter the property, the automated entry information including **code information** that is valid during the specified period of time;

Appx62 (10:45-50) (emphasis added).

The specification section of the '590 Patent states that the claims are implemented via "servers," the Internet, and generic mobile computing platforms such as smart phones and tablets:

An automated entry module 16 is located on a portable device 12. For example, portable device 12 is a **smart phone**, another type of **cellular phone**, a **media player**, a **personal e-mail device**, a **personal data assistant ("PDA")**, a **handheld gaming device**, a **digital camera**, a **computer tablet**, a **laptop computer** or **any other**

type of device that can be transported to a property and that has processing capability sufficient to implement the functionality of automated entry module 16.

Appx58 (2:16-24), Appx41-63 (emphasis added). Thus, “the specification makes clear that the recited physical components merely provide a generic environment in which to carry out the abstract idea” of automated entry. *In re TLI Commc ’ns, LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016).

When evaluating whether a method patent implemented via generic computing systems is abstract, this Court often analyzes whether the focus of the claims is on improving computing capabilities. *See, e.g., Enfish*, 822 F.3d at 1335-36. Here, however, nothing about the highlighted elements set forth above indicates that the claim is directed to any improvement in computer functionality. Rather, as the District Court observed in its first decision, the claim elements “merely coordinate pre-existing and generic computer components [and standard programming techniques] to implement an abstract idea.” *Consumer 2.0*, 343 F. Supp. 3d at 589 (Appx1-19), Appx11-12.

The patent examiner recognized the abstract nature of the ’590 Patent when the claims were initially rejected on that ground. The patent examiner erred, however, when Rently convinced him that adding trivial manual steps to the abstract process could transform the abstract nature of the claims into patentable subject matter. *Solutran*, 931 F.3d at 1168 (“the physicality of the paper checks

being processed and transported is not by itself enough to exempt the claims from being directed to an abstract idea”); *In re Marco Guldenaar Holding B.V.*, 911 F.3d 1157, 1161 (Fed. Cir. 2018) (“the abstract idea exception does not turn solely on whether the claimed invention comprises physical versus mental steps”).

3. Claim 7 Does Not Claim a “Technology-Enabled” Lock box.

Rently argues that the District Court erred when it determined that Claim 7 of the ’590 Patent does not require a “technology-enabled” lock box, as alleged in Rently’s Proposed Amended Complaint. Appellant’s Br. at 22-25. It is true that the District Court, appropriately, “denigrated” the words “technology-enabled” as “magic words” that were added in Rently’s Proposed Amended Complaint. That is because those magic words can be found nowhere in the asserted claim or in the specification. Rently concedes that its thaumaturgical incantation of “technology-enabled” does not appear in the asserted claim or specification, but contends that, “read as a whole and in light of the specification” the claim should be read as claiming such a device. Appellant’s Br. at 22-23.

Rently attempts to rely on the recitation in Claim 7 that “upon the visitor providing the code information to the lock box or automated door lock at the property **within the specified period of time**, the lock box or automated door lock opening to facilitate automated entry to the property.” Appx62 (10:51-55). Specifically, Rently maintains that the code must be time-limited and the lock box

must be configured to recognize that limitation. Appellant's Br. at 22-25.

However, the '590 Patent does not disclose or suggest that any specialized lock box is required beyond generic lock boxes that were available at the time of filing.

More importantly, the '590 Patent does not specify any configuration for the lock box. Instead, the lock box 15 is merely illustrated as a black box. *See* FIGS. 1 and 8 (Appx42, Appx49). The '590 Patent describes the lock box generically and at a high level of generality as set forth below:

For example, a lock box 15 is shown in FIG. 1 representing one of the ways automated entry module 16 allows a user of portable device 12 to access property 14. For example, lock box 15 contains a key that will open a door allowing entry to property 14. To open lock box 15, automated entry module 16 can for example, depending upon various implementations of lock box 15, provide the user with a code to open lock box 15, provide portable device 12 with a signal to open lock box, provide portable device 12 with a pattern to display for optical scanning by lock box 15.

Appx58 (2:51-60).

The '590 Patent fails to provide any structure for the lock box that can be properly read into the limitations of Claim 7. Particularly, what enables the lock box to recognize "time-specific code information" (Appellant's Br. at 23) is not described in the '590 Patent (and, even if it did, the claim would still be written at too high a level of generality to delineate patentable subject matter). Notably, while Rently argues that the lock box must have certain features to practice the

recited claim, it does so without citation to the '590 Patent. Appellant's Br. at 24-25. Thus, Rently's claims that the '590 Patent requires a "technology-enabled" lock box beyond what was available in the prior art are belied by both the claims and the specification. Moreover, the '590 Patent lacks any written descriptive support or an enabling disclosure for such a "technology-enabled" lock box.

Even if Rently's purported functionality for the lock box were read into the claims, that would not alter the analysis. Rently contends that the lock box must be configured to store or access a database of codes along with the specific time those codes are intended to be used. That argument merely incorporates a standard analysis of data, which is a generic computer function. The '590 Patent does not contain any support for a functionally improved lock box or any improvement in computing technology or computer science.

4. No Factual Disputes Impact the Step One Analysis.

In most cases involving an *Alice* challenge, the salient facts should be limited to the patent-in-suit and its prosecution history. Nevertheless, this Court has held that "[w]hether a claim element or combination of elements would have been well-understood, routine, and conventional to a skilled artisan in the relevant field at a particular point in time *may* require weighing evidence, making credibility judgments, and addressing narrow facts that utterly resist generalization." *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d

1354, 1355 (Fed. Cir. 2018) (quotations, citations, and alterations omitted) (emphasis added). This is not one of those cases.

Rently argues that facts set forth in its Proposed Amended Complaint raise factual and claim construction issues that cannot be resolved on a Fed. R. Civ. P. 12(b)(6) motion. Appellant’s Br. at 26-30. As the District Court recognized in its opinion on reconsideration, Rently’s Proposed Amended Complaint, and the arguments it made in support of reconsideration based on the facts alleged in the Proposed Amended Complaint, were mostly rehashes of the arguments that the District Court considered and rejected when it originally dismissed this action. Appx27.

Importantly, the Proposed Amended Complaint and its exhibits added few new relevant facts (despite 35 paragraphs of new allegations). And, the few facts that were new raised no factual disputes or claim construction issues relevant at Step One of an *Alice* analysis.

Nothing in the Proposed Amended Complaint changes the unavoidable fact that there is nothing in the asserted claim or in the specification of the ’590 Patent delineating any inventive feature used in a new or unconventional manner. Rather, the asserted claim and specification merely discuss a concept – described at the highest possible level of generality – for providing “automated entry” to visitors to properties listed for sale or rent. It is an abstract idea implemented via generic

computing equipment using conventional computer operations and well-known lock boxes and automated entry locks. The sloganeering in the Proposed Amended Complaint (Appx223) that the claim elements are a “vast technological improvement” in how a “technology-enabled lockbox” functions is merely Rently’s characterization of the claim language, not new facts.⁶ Advocative spin on unambiguous claim language does not create any legitimate claim construction issues.

At Step One of the *Alice* analysis, the focus is on the claim. *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1344-45 (Fed. Cir. 2013). There is simply nothing in the language of asserted Claim 7 or the patent specification remotely suggesting that the ’590 Patent is directed to any improvement in computer technology or computer science and Rently points to nothing. Thus, nothing in the Proposed Amended Complaint impacts the Step One analysis or the District Court’s holding that the ’590 Patent is directed toward an abstract idea.

⁶ It is ironic that to convince the patent examiner to grant the patent, Rently amended its claim to add the insignificant step of *manually entering* a code into the lock box. So much for the importance of a “technology-enabled” lock box.

B. Appending Conventional and Obvious Manual Steps to Abstract Claims Does Not Transform Abstract Claims into Patentable Subject Matter.

The '590 Patent was granted after Rently appended the steps of placing a lock box at the property and a visitor manually entering a code into a lock box to its abstract process. That was error. It has long been settled that an abstract claim, when combined with conventional and obvious post-solution activity, does not become patentable subject matter. *Parker v. Flook*, 437 U.S. 584, 590 (1978) (observing that to hold otherwise would exalt form over substance); *see also Diamond*, 450 U.S. at 215 n.39 (citing *Flook*); *Fort Props., Inc. v. Am. Master Lease LLC*, 671 F.3d 1317, 1321 (Fed. Cir. 2012). The concept of patentable subject matter under § 101 is not “like a nose of wax which may be turned and twisted in any direction” by a resourceful draftsman. *White v. Dunbar*, 119 U.S. 47, 51 (1886).

Here, to overcome an initial rejection, Rently modified its claim to recite placing a lock box at the property. Such insignificant activity cannot alter an otherwise abstract claim. Further, Rently modified its claim by having a code sent to a visitor’s mobile device and then having the visitor enter the code into the lock box to enter the property. That amendment was the equivalent of wax nose twisting.

This Court has consistently held that operating an existing device from a remote location over a network is a purely abstract idea claimed at far too high a level of generality to be patentable. *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) (generic computer functionality, including “receiv[ing] and send[ing] the information over a network—with no further specification—is not even arguably inventive”). The additional limitation of having the visitor manually enter the code does not improve a computing system’s functionality and does not render the claim any less abstract. *Bilski v. Kappos*, 561 U.S. 593, 610-11 (2010) (“patenting abstract ideas cannot be circumvented by attempting to limit the use of [the idea] to a particular technological environment”) (quotations and citation omitted). Similarly, insignificant post solution activity [, such as manually entering a code into a lock box,] will not transform an unpatentable principle into a patentable process. To hold otherwise would allow a competent draftsman to evade the recognized limitations on the type of subject matter eligible for patent protection.” *Diamond*, 450 U.S. at 191-92. If the teachings of *Alice* can be so easily circumvented, then *Alice* is a dead letter.

III. The Asserted Claims From the ’590 Patent Fail Step Two of the *Alice* Analysis Because They Do Not Describe an “Inventive Concept” That Is “Significantly More” Than Claims Upon an Ineligible Abstract Concept.

The second step of *Alice* is necessary when, as here, the first step determines that the patent is directed to an abstract idea. Step Two of the *Alice* analytical

framework examines whether the asserted claims describe an “inventive concept” that is “significantly more” than claims upon an ineligible concept. *Alice*, 573 U.S. at 217-18.

A. The Claims and Specification Do Not Describe an Inventive Concept That Is Significantly More Than an Abstract Concept.

As shown below, Claim 7 of the ’590 Patent, for “automated entry,” does not contain any sufficiently transformative inventive concept to be patent eligible. Even when viewed as a whole, and with all inferences drawn in favor of Rently, there is no serious argument that Claim 7 (or any other claim in the ’590 Patent) does anything to improve the functioning of a computer or to effect an improvement in any other technological field. All that is claimed is an unpatentable method of organizing human activity claimed at the highest possible coherent level of abstraction. The method is implemented using the most generic and broadly described types of mobile computing platforms and computing environments. This Court has routinely held that such patents fail Step Two of the *Alice* analysis. *See, e.g., TLI Commc’ns*, 823 F.3d at 611-12 (provision of a generic computing environment within which to implement the abstract idea does not make the idea patentable).

The technology described in the ’590 Patent is a standard application of conventional computing techniques implemented on generic devices. Nothing in the ’590 Patent purports to improve the performance of any device, nor does any

claim element describe an inventive programming technique. Such patents fail Step Two of the *Alice* analysis. *See generally Quantum Stream, Inc. v. Charter Commc'ns*, 309 F. Supp. 3d 171 (S.D.N.Y. 2018) (claims related to pairing of secondary advertising content based upon the user's own selection of primary content or upon other data did not contain an "inventive concept"; claims were straightforward, conventional applications of the concept of custom advertising and the selection of advertising content as a function of the selection of primary content or other data, and claims disclosed steps that could have been performed by a human operator or in the human mind).

As in *Solutran*, 931 F.3d at 1169 (method for processing paper checks) and *Ultramercial*, 772 F.3d at 714-15 (method for monetizing and distributing copyrighted content), the '590 Patent merely instructs the practitioner to implement the abstract idea of "automated entry" via routine programming activities described at the highest possible level of generality. "[C]onventional steps, specified at a high level of generality," are insufficient to supply an "inventive concept" and are the kind of claims that this Court has routinely found wanting under Step Two of the *Alice* analysis. *Alice*, 573 U.S. at 222 (quotations and citation omitted); *see also Electric Power Grp., LLC v. Alstom, S.A.*, 830 F.3d 1350, 1354-55 (Fed. Cir. 2016) (real-time performance monitoring of electrical grid not patentable); *Content*

Extraction, 776 F.3d at 1349 (method of extracting data from documents); *OIP Techs.*, 788 F.3d at 1363 (conventional and routine data gathering steps).

In short, under no circumstances can the claims in the '590 Patent survive an *Alice* Step Two analysis.

B. Nothing in the Proposed Amended Complaint Changes the Step Two Analysis.

The second step seeks to determine if there is an inventive concept in the claims. *Mayo*, 566 U.S. at 72-73. Rently argues that its Proposed Amended Complaint outlines a functional improvement of technology-enabled lock boxes that provided an inventive concept over prior conventional lock boxes. As the District Court found, Rently's thirty-five (35) new paragraphs in the Proposed Amended Complaint were merely conclusory and boilerplate. Appx34.

The '590 Patent contains no details regarding any technology-enabled lock box. In fact, Claim 7 recites that a "lock box or an automated door lock" may be used. Appx62 (10:43) (emphasis added). Rently did not invent either. The '590 Patent does not describe any features that could be viewed as an inventive concept over the available lock boxes and automated door locks.

Rently argues, however, that the Proposed Amended Complaint demonstrates a functional improvement that provides an inventive concept. That functional improvement is purportedly the use of dynamic, non-static, durational codes specific to the visitor, the property visited, and the time of the visit.

However, the '590 Patent fails to detail how the supposed "inventive concept" is implemented by the lock box, or how the lock box is improved in any manner. Rently's conclusory allegations regarding the "technology-enabled" features of the lock box fail to provide any inventive concept. The District Court properly decided to ignore Rently's factual assertions that are totally unsupported and contrary to the disclosure of the '590 Patent. Further, there is no disclosure in the '590 Patent that supports incorporating Rently's conclusory allegation into the claim construction for the lock box term. Claim 7 merely provides for the use of a routine, conventional, and well-understood system for providing the abstract concept of automated entry.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Dated: September 23, 2019

Respectfully submitted,

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I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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September 23, 2019

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