

APPEAL NO. 19-1846

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONSUMER 2.0, INC., DBA, RENTLY,

Plaintiff-Appellant,

v.

TENANT TURNER, INC.,

Defendant-Appellee.

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

**PLAINTIFF-APPELLANT CONSUMER 2.0, INC., DBA,
RENTLY'S COMBINED PETITION FOR PANEL
REHEARING AND REHEARING EN BANC**

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CERTIFICATE OF INTEREST

Counsel for Appellant, Consumer 2.0, Inc. certifies the following:

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

Consumer 2.0, Inc. d/b/a Rently

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Consumer 2.0, Inc. d/b/a Rently

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or amicus curiae 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 or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Rowland Braxton Hill, IV

Roman Lifson

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Christian & Barton LLP, 909 E. Main Street, Suite 1200, Richmond VA 23219

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. See Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

Dated: April 8, 2020

/s/ Rudolph A. Telscher, Jr.
Counsel For Plaintiff-Appellant
Consumer 2.0, Inc. d/b/a Rently

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and this Court: *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966), *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014), *Bascom Global Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341, 1347 (Fed. Cir. 2016), *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1124 (Fed. Cir. 2018), *Berkheimer v. HP, Inc.*, 881 F.3d 1360 (Fed. Cir. 2018), *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1317 (Fed. Cir. 2019).

Additionally, I believe this appeal requires an answer to the following precedent-setting question of exceptional importance:

1. Can a court determine at the pleading stage that a claimed method or claim element is unconventional yet not unknown *enough* to be patent-eligible under 35 U.S.C. § 101 by engaging in a quasi-Section 103 analysis of obviousness, and, if so, how much more is required beyond unconventionality, is the determination factual or legal, and how does that determination relate to the Section 103 protections against hindsight bias?

/s/ Rudolph A. Telscher, Jr.
Counsel For Plaintiff-Appellant
Consumer 2.0, Inc. d/b/a Rently

INTRODUCTION

Section 101 and its interpretation by the Courts over the last six years has unquestionably been the most turbulent and impactful legal development in patent law in modern history. While the doctrine against preemptively patenting abstract concepts without the “how to” has been a positive development, *Alice*’s application has also resulted in the invalidation of patents directed to real innovation and has disproportionately hurt individual inventors and start-ups, particularly in the realm of software and IT. See <https://www.ipwatchdog.com/2020/04/02/study-individuals-startups-invalidly-alice/id=120339/>.

Petitioner respectfully submits that the elephant in the room is the interplay between step two of *Alice* and Section 103. In *Alice*, the Supreme Court held that doing an act that has always been done but claiming it be done with “conventional” computer equipment is not patentable. But in *Alice*, the Supreme Court warned that “we tread carefully in construing this exclusionary principle lest it swallow all of patent law. . .” *Id.* at 217. This case exemplifies that concern and dangerously converts the *Alice* step two analysis into a quasi-Section 103 analysis without the protections against hindsight bias provided by secondary considerations of non-obviousness.

Without a doubt, the scope and content of the prior art and the differences between the claimed invention and the prior art are factual inquiries under Section

103 jurisprudence, *see Graham*, 383 U.S. at 17–18, yet this Court is seemingly divided on the degree to which the Section 101 dispute is factual or legal. *See, e.g., Aatrix Software, Inc.*, 882 F.3d at 1128 (J. Reyna concurrence) (“I respectfully disagree with the majority’s broad statements on the role of factual evidence in a § 101 inquiry”). Section 103 examines secondary considerations of non-obviousness because there is a tendency to unfairly judge inventions in the light of what is known today and not what existed at the time of the patent. Again, the conventionality test of *Alice* step 2 seems to lack this same protection.

Here the patented method for automated self-entry (1) had never been done before, and (2) utilized technology (a lockbox able to recognize time-limited codes) that was unconventional. Plaintiff-Appellant Consumer 2.0, doing business as Rently (“Rently”) pled in great detail that the elements in Claim 7 are not “routine, well-understood, or conventional activity,” and asserted a plausible claim construction requiring the use of an unconventional device in an unconventional method. For Section 101, this should have been the end of inquiry at the pleading stage. Rently could have provided additional evidence to the extent necessary to resolve any factual disputes at the appropriate stage of the lawsuit, including evidence that not only the industry at-large, but also Defendant, considered the patented method unconventional. Rently’s pleadings included evidence demonstrating the non-obviousness of its patented method, including skepticism,

industry praise, and commercial success, which would have been taken into consideration on summary judgment or at trial if the *patentability* (as opposed to *patent-eligibility*) was called into question. Yet Rently was not afforded this opportunity. Its unconventional claim was rendered patent-ineligible under Section 101 at the pleading stage based on what appears to have been a quasi-Section 103 analysis regarding whether the unconventional claim was unknown *enough* to convey patent eligibility, and which was analyzed with hindsight that did not exist at the time of filing.

This is not a case of a patentee trying to capture, with broad claim language, that which it did not invent or merely reciting a result without the “how to”. Rather, the invention here is real and specific, and if there is any question as to whether it was obvious, this should have been examined under Section 103 (not Section 101) taking into account secondary considerations of non-obviousness which were abundant here.

Only last week, Rently’s invention was featured on CNBC because of the recent surge in business for its method of automated self-entry using lockboxes with time limited codes during the global COVID-19 pandemic. *See <https://www.cnbc.com/video/2020/03/30/virtual-home-tours-spike.html>*. This is a commercialized invention, in use by thousands of Rently customers in the United States, being copied by competitors after initial industry skepticism, and having

real world benefits particularly now in this time of COVID-19. These are claims that were analyzed and allowed by the examiner post-*Alice*, and this is not a patent that should have been invalidated under Section 101 *at the pleading stage*.

Resolving the question presented here – whether a finding of unconventionality ends the Section 101 inquiry, or whether a court is permitted to conduct a quasi-103 analysis without the protections against hindsight bias, required showing of motivation to combine, and secondary considerations – will permit this Court to provide the clarity that the Section 101 analysis desperately requires. Such clarification should resolve many of the uncertain issues surrounding Section 101, and will do so in a way that avoids calls for Congressional redrafting, which would itself undoubtedly usher in another decade of uncertainty.

ARGUMENT

Under Federal Circuit precedent, in deciding whether a patent survives a Section 101 challenge at the pleading stage, courts must construe claim terms in the light most favorable to the patentee, and must accept all well-pled allegations of unconventionality. *Aatrix*, 882 F.3d at 1125; *Berkheimer*, 881 F.3d at 1370; *MyMail, Ltd. v. ooVoo, LLC*, 934 F.3d 1373, 1380 (Fed. Cir. 2019); *Bascom Glob. Internet Servs., Inc.*, 827 F.3d at 1352; *Cellspin Soft, Inc.*, 927 F.3d at 1317–18 (Fed. Cir. 2019). Rently set forth specific, plausible factual allegations regarding

the unconventional nature of the claimed method, as well as a claim construction encompassing the use of unconventional elements. Yet the district court dismissed Rently's complaint, and its decision was affirmed by a panel of this Court. Given the Federal Circuit's clear mandate requiring the Court to accept Rently's proposed claim construction and factual allegations, the Panel's affirmance indicates that the Federal Circuit conducted some analysis beyond merely determining that claim 7 was unconventional. Rather, the Panel appears to have decided that while unconventional, the claimed technology-enabled lockbox and method of use thereof was not unknown *enough* to convey an inventive concept under Step 2 of *Alice*. This is not only in conflict with this Court's precedent regarding the proper inquiry at Step 2, but also improperly conflates the Section 101 and 103 analyses, and does so in a way that permits obviousness to be considered in a 101 analysis without any protection against hindsight bias, required showings of motivations to combine, or secondary considerations.

A. Rently Alleged a Claim Construction and Plausible Factual Allegations of Unconventionality.

1. Rently asserted that claim 7 must be construed to require the use of a technology-enabled lockbox.

Rently invented and patented a method of automated real estate showing, involving time-limited code lockboxes. Appx41-63. There are undoubtedly many ways to accomplish some form of automated entry to real property for real estate

showings. For example, a prospective renter/buyer could be given a device that they later return like a garage door opener; a real estate agent may have the electronic ability to “buzz” persons into the property in response to a call or text; or the location could have a fingerprint scanner or other bio-metric entry device. Those are *not* the methods of the asserted claims. As recited in the claims of U.S. Patent No. 9,875,590 (“the ’590 patent”), the method of this case involves, among other things, the use of *lockboxes able to recognize time-limited codes* and coordination of those codes with software to facilitate *secure* automated entry.

Specifically, asserted claim 7 of the ’590 patent requires, among other things, (1) an application that “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 the property by themselves”, (2) “upon the visitor providing the code information to the lock box or automated door lock **within the specified period of time**, the lock box or automated door lock opening to facilitate automated entry to the property,” and (3) “providing notification, originating from the lock box or automated door lock, to the property manager when the visitor enters the property.” Appx62, 10:25-58. Stated another way, *when issued*, the code has to be time-limited, the code must be coordinated with a lockbox that is able to recognize and open only in response to the time-limited code. Rently has maintained this construction throughout the entirety of

this lawsuit and explicitly informed both the District Court and this Court of its position. (*See, e.g.*, Appx234-235; Appx405; Appx344; Appx354; Appx365; Dkt 15 at 26-30).

This was not some obscure claim construction divorced from the language of the claim or the description of the specification. Rather, Rently's proposed construction is the only plausible interpretation of the claim itself. While the Panel questioned counsel for Rently about whether a conventional static lockbox would fall within the scope of this claim if a realtor ran out to the property after each showing and manually reset the code, the claim itself makes it clear that such a construction would be unsupportable, as those codes would not be time-limited *at the time they were delivered*. Appx62:10-25-58. Had Rently tried to assert this patent against companies utilizing conventional lockboxes and static codes, under the theory that the realtor could manually alter the codes after each visit, it is almost certain that Rently would have been rebuffed by the Court for asserting an implausible construction.

Since this dispute arose at the pleading stage, the district court was required to adopt Rently's construction of claim 7, or must have resolved the disputes to whatever extent was needed to conduct the § 101 analysis. *See Aatrix*, 882 F.3d at 1125. Since neither the district court nor the Panel provided any discussion

resolving the claim construction dispute this was seemingly overlooked or misapprehended warranting rehearing.

2. Rently put forth plausible assertions that the technology-enabled lockbox was unconventional, as was the overall method claimed.

Rently's Amended Complaint contains numerous plausible assertions that both the overall method and the technology enabled lockboxes used in the method were unconventional at the time the patent application was filed. Appx403-407 at ¶¶ 9, 12-15, 21-22. This pleading is not conclusory in nature. It does not just summarily allege these items were unconventional. Rather, multiple paragraphs of the Amended Complaint describe the conventional way of showing real estate at the time of patent filing and juxtapose this with the improved method of the patent. Appx403-410. Moreover, the Amended Complaint describes the benefits of the use of the "dynamic, non-static durational code" lockboxes in the patented method versus the use of a "generic lockbox" prevalent in conventional in-person showings at the time of the patent. Appx407, Appx409-410 at ¶¶ 21, 25-28 (e.g., "At the time Plaintiff applied for the '590 Patent, the use of lockboxes to gain entry by an agent entering a manually issued static code during an in-person showing was the convention").

Federal Circuit precedent required these plausible allegations to be accepted as true for purposes of deciding the motion to dismiss, absent evidence in the specification to the contrary. *See Aatrix*, 882 F.3d at 1125; *Cellspin*, 927 F.3d at

1317–18. And there is nothing in the specification (or the entirety of the record) to contradict these assertions.

While comments by Defendant prompted questioning at oral argument about the sufficiency of the specification’s disclosure regarding the makeup of the technology-enabled lockbox, Section 101 does not contain a written description requirement. Whether a patent contains an adequate disclosure to enable one of skill in the art to practice the claimed invention is the domain of a Section 112 challenge, which was not brought before this Court (or the district court). And Section 101 should not be transformed into a vehicle to dispose of patent law’s other inquiries, particularly such fact intensive inquiries as Sections 103 and 112, at the pleading stage. Had a motion been brought under Section 112, Rently would be permitted to present expert testimony regarding what one of the skill in the art would be capable of understanding from the disclosure, and the determination would have required a weighing of those facts. Put simply, Defendant’s allegations regarding the sufficiency of the patent’s disclosure are not germane to a Section 101 analysis, and are not evidence of conventionality. Rather, the specification must have had actual statements of conventionality to permit the district court to discount Rently’s well-pled allegations that the technology-enabled lockbox was unconventional. No such statements exist, and therefore the district court was obligated to accept Rently’s pleadings as true. *See Cellspin*, 927 F.3d at 1317–18

(holding that allegations of unconventionality in a complaint can be used to supplement the specification). To the extent misapprehended, this too warrants rehearing.

B. The “inventive concept” requirement of 35 U.S.C. § 101 requires the claimed invention to be unconventional, and does not and should not incorporate a § 103 obviousness test.

Since the district court was obligated to find that claim 7 of the ’590 patent claimed an unconventional method, the Panel’s affirmance indicates that this Court determined that the unconventionality of claim 7 was not on its own sufficient to convey an inventive concept under *Alice*. The Panel seemingly applied a quasi-103 analysis to Step 2, and determined that while unconventional, the claimed invention was not unknown *enough* to be patent-eligible. Such a determination however is in conflict with the United States Supreme Court decisions in *Alice* and *Graham*, and further raises the questions of exactly how much more is required beyond unconventionality, whether such a determination is factual or legal, and how that inquiry relates to the Section 103 obviousness inquiry.

The issue of patent-eligibility under *Alice* has been repeatedly described as a question of law based on underlying questions of fact. *See Aatrix*, 882 F.3d at 1128; *Berkheimer*, 881 F.3d at 1368. And this Court has explained that while there may be overlap between the factual inquiries of Sections 101 and 103, “[w]hether a particular technology is well-understood, routine, and conventional goes beyond

what was simply known in the prior art.” *Berkheimer*, 881 F.3d at 1369. The panel in *Berkheimer* therefore indicated that Step 2 of the *Alice* analysis is not a replacement for 103’s obviousness test. Were that the case, and Step 2 is deemed to include a quasi-obviousness analysis, such a result would greatly expand the scope of Section 101 well beyond that which was intended by the Supreme Court in *Alice*. There, the Supreme Court explained that the “concern that drives” the exclusionary principle of § 101 is “one of pre-emption.” *Alice*, 573 U.S. at 216. The Supreme Court made clear that the purpose of the rule was to “distinguish between patents that claim the building blocks of human ingenuity and those that integrate the building blocks into something more,” not to supplant the remainder of patent law and assess patentability as a whole. *Id.* at 217. The ‘590 patent does not claim the building blocks of human ingenuity; it involves one method, out of many for automated entry, and one that had never been used before.

In contrast, Section 103 is a pro-patent provision in the sense that it forbids invalidating patents through mere hindsight. *Graham*, 383 U.S. at 17–18. It is all too easy to fall into the trap of thinking a solution is straightforward, once one has been exposed to it. As a protection against that inherent human tendency to trivialize past inventions as technology progresses, Section 103 contains requirements aimed at limiting the inquiry to what was known at the time, and to “give light to the circumstances surrounding the origin of the subject matter sought

to be patented.” *Id.* These include an express requirement of showing a clear and convincing motivation to combine, as well as an analysis of the scope and content of the prior art, and the level of ordinary skill in the art. *Id.*; *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Section 103 also requires examination of secondary consideration evidence to make sure real-world factors are considered when making Section 103 determinations, and to assist the trier of fact in putting themselves in the mindset of someone at the time of the invention, without the benefit of hindsight. *See Graham*, 383 U.S. at 17–18. For example, even though an idea might seem simple after the fact, it is nonetheless patentable where there is commercial success tied to the claimed invention, showing that if the claimed combination were obvious, someone would have previously commercialized such a successful product. *See id.* Or, where there is skepticism in the market, it too demonstrates that the claimed solution was not obvious. *See id.* These are all important factual inquiries that are a central part of the 103 analysis, so as to “guard against slipping into use of hindsight” and “resist the temptation to read into the prior art the teachings of the invention in issue.” *Graham*, 383 U.S. at 36.

Those important factual considerations were not implicated in *Alice*, as there was no dispute that the claims covered well-known and fundamental economic practices, with the only new aspect of the claim being to automate the well-known practices on a conventional computer. *Alice*, 573 U.S. at 225. Nor was there any

factual dispute regarding whether the claimed computer (or any component thereof) was conventional and well-known. Thus, the issue could readily be resolved adverse to the patentee as a matter of law. *Id.* Surely however, and particularly given the Supreme Court’s guidance that § 101 not “swallow all of patent law,” the Supreme Court was not suggesting that where a patent owner plausibly disputes whether limitations of the claim were conventional, well-understood, or routine, the Court can nonetheless determine that the unconventional elements were not unknown *enough* to convey an inventive concept under Section 101. Doing so would permit district courts to revoke patent rights based on the alleged state of the art without *any* fact investigation or focus on the pro-patentee requirements of Section 103. The end result being courts could invalidate unconventional claims under Section 101 at the pleading stage simply because the court decided *sua sponte* that the unconventional feature was not unconventional enough – thereby rendering the distinction between 101 and 103 meaningless.

As applied in this case, Section 101 is in direct conflict with Section 103 and *Graham*. Claim 7 of the ’590 patent claims an unconventional method and incorporates the use of an unconventional lockbox. These facts must have been accepted, and under applicable Federal Circuit precedent, this is all that is required to survive a motion to dismiss under § 101. *See Berkheimer*, 881 F.3d at 1367

(“The second step of the *Alice* test is satisfied when the claim limitations involve more than performance of ‘well-understood, routine, and conventional activities previously known to the industry’.”) If the “significantly more” than the abstract idea component to Step 2 is not satisfied by Rently’s plausible allegations of unconventionality, that by definition should move the case beyond the Section 101 phase, and into the realm of Section 103 where Rently is afforded protections against hindsight bias, and where the finder of fact is required to analyze what was known *at the time of the invention*. That must include an analysis of the scope of the art at the time the application for the ’590 patent was filed to determine whether a technology-enabled lockbox existed, and if so, how wide-spread its use was, what industries it was used in, how it compared to the lockbox claimed by claim 7, and whether there was a motivation to combine that (as of yet hypothetical) lockbox with the remaining elements of the claim. No such analysis was conducted by the district court.

In a proper obviousness analysis, the district court also would have been required to weigh the numerous secondary considerations pointing to the non-obviousness of the invention. For example, the Amended Complaint describes how the general concept of automated entry faced “widespread skepticism” in the industry, and the fear that “unscrupulous visitors” would “steal[] refrigerators” absent a sufficiently secure method of automated entry. Appx410 at ¶ 29. It further

describes how the invention overcame these concerns and ultimately received accolades in the industry. Appx411-415 at ¶¶ 35-37, 42-43. The Amended Complaint describes Rently’s commercial success and the praise for its invention (Appx403, Appx406, Appx414-415 at ¶¶ 7, 17, 42-44), success which has been amplified in the current COVID-19 environment. <https://www.cnbc.com/video/2020/03/30/virtual-home-tours-spike.html>. Finally, the Amended Complaint describes how Defendant and others are copying the method that Rently invented and pioneered. Appx416 at ¶ 45-46. These are all relevant considerations pointing away from the obviousness of Rently’s invention, and which would have been considered under a Section 103 analysis. Nonetheless, Rently was not afforded the benefit of these considerations, as the “obviousness” of its claim was essentially determined as an element of *Alice* step two.

Revoking Rently’s patent rights at the pleading stage, without permitting an analysis of these real-world facts is contrary to numerous precedential decisions of both this Court and the Supreme Court. The Panel’s affirmance of the district court’s decision raises multiple important issues of law requiring *en banc* review, including whether unconventionality itself is sufficient to satisfy the inventive concept requirement, whether that determination is one of fact or law, and how that analysis is affected by the protections against hindsight bias of Section 103. This case provides a vehicle for the Federal Circuit to provide guidance distinguishing

“conventional” from “obvious” and requiring that Section 101 be interpreted in accordance with *Alice* and *Graham*. Any investigation into how unknown a claimed unconventional feature may have been should remain solely the province of Section 103, where the patentee is afforded *Graham*’s protections against hindsight bias. Any analysis that improperly conflates the Section 101 and 103 analyses undermines the import of the Supreme Court’s decision in *Graham* requiring the obviousness inquiry be conducted without hindsight bias, and runs contrary to the Supreme Court’s warning in *Alice* that Section 101 not swallow the whole of patent law.

CONCLUSION

For the foregoing reasons, Rently respectfully requests re-hearing or re-hearing *en banc*.

Dated: April 8, 2020

Respectfully submitted,

/s/ Rudolph A. Telscher, Jr

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ADDENDUM

NOTE: This disposition is nonprecedential.

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

CONSUMER 2.0, INC., DBA RENTLY,
Plaintiff-Appellant

v.

TENANT TURNER, INC.,
Defendant-Appellee

2019-1846

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

JUDGMENT

RUDOLPH A. TELSCHER, JR., Husch Blackwell LLP, St. Louis, MO, argued for plaintiff-appellant. Also represented by KARA RENEE FUSSNER; STEPHEN VEGH, Vegh IP Legal, Manhattan Beach, CA.

LAURIN HOWARD MILLS, Samek, Werther & Mills, LLC, Alexandria, VA, argued for defendant-appellee.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (REYNA, CHEN, and HUGHES, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

March 9, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

PROOF OF SERVICE

I hereby certify that on April 8, 2020, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Federal Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Rudolph A. Telscher, Jr.
Counsel for Plaintiff-Appellant
Consumer 2.0, Inc. d/b/a Rently

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS
AND TYPE STYLE REQUIREMENTS**

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) or Federal Rule of Appellate Procedure 40(b) because this petition contains 3,862 words, excluding the parts of the petition exempted by Fed. Cir. R. 35(c)(2).

2. This petition complies with the typeface and type style requirements of Fed. R. App. P. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Date: April 8, 2020

/s/ Rudolph A. Telscher, Jr.
Counsel For Plaintiff-Appellant
Consumer 2.0 d/b/a Rently