

APPENDIX

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APPENDIX A

NOTE: This disposition is nonprecedential.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

2018-1428

[Filed January 15, 2019]

POWER ANALYTICS CORPORATION,)
<i>Plaintiff-Appellant</i>)
)
v.)
)
OPERATION TECHNOLOGY INC, DBA)
ETAP, SCHNEIDER ELECTRIC USA, INC.,)
<i>Defendants-Appellees</i>)
)
OSISOFT, LLC,)
<i>Defendant</i>)

Appeal from the United States District Court for the Central District of California in No. 8:16-cv-01955-JAK-FFM, Judge John A. Kronstadt.

JUDGMENT

ROBERT F. RUYAK, RuyakCherian LLP, Washington, DC, argued for plaintiff-appellant. Also represented by AMADOU KILKENNY DIAW; KORULA T. CHERIAN,

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Berkeley, CA; JERROLD GANZFRIED, Ganzfried Law, Washington, DC.

JOHN D. VANDENBERG, Klarquist Sparkman, LLP, Portland, OR, argued for all defendants-appellees. Defendant-appellee Operation Technology, Inc. also represented by SARAH ELISABETH JELSEMA, SALUMEH R. LOESCH.

REGINALD J. HILL, Jenner & Block LLP, Chicago, IL, for defendant-appellee Schneider Electric USA, Inc. Also represented by BENJAMIN J. BRADFORD, LISA MARIE SCHOEDEL; ADAM G. UNIKOWSKY, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (DYK, WALLACH, and CHEN, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

January 15, 2019

Date

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

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA**

Case No. 8:16-CV-1955-JAK-FFM

[Filed December 21, 2017]

POWER ANALYTICS)
CORPORATION,)
Plaintiff,)
)
v.)
)
OPERATION TECHNOLOGY, INC.)
d/b/a ETAP; OSISOFT, LLC; and)
SCHNEIDER ELECTRIC USA, INC.,)
Defendants.)

**PARTIAL JUDGMENT PURSUANT
TO FED. R. CIV. P. 54(b)**

On October 27, 2016, Plaintiff Power Analytics Corporation (“Power Analytics”) brought this action asserting four causes of action for patent infringement (Counts I-IV) against Defendants Operation Technology Inc. d/b/a ETAP (“ETAP”) and Schneider Electric USA, Inc. (“Schneider”) and 11 non-patent causes of action (Counts V-XV) against ETAP, Schneider, and OSIsoft, LLC. All 15 of these claims

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were also pleaded in the operative Second Amended Complaint.

ETAP and Schneider brought a motion for summary judgment as to Counts I-IV, which was granted on July 11, 2017. Plaintiff's motion for reconsideration of that order was denied on December 7, 2017. Plaintiff alternatively moved for the entry of a partial judgment as to Counts I-IV. In the interests of justice, and in light of the legal and factual distinctions among the matters presented by Counts I-IV and Counts V-XV, Counts I-IV were severed and the request for the entry of partial judgment pursuant to Fed. R. Civ. P. 54(b) was granted.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED as follows:

1. Claims 1-42 of U.S. Patent No. 7,693,608 are invalid pursuant to 35 U.S.C. § 101;
2. Claims 1-23 and 25-26 of U.S. Patent No. 7,729,808 are invalid pursuant to 35 U.S.C. § 101;
3. Claims 1-21 of U.S. Patent No. 7,286,990 are invalid pursuant to 35 U.S.C. § 101;
4. Claims 1-29, 34-37, 39-40, 42-55, and 57 of U.S. Patent 7,840,395 are invalid pursuant to 35 U.S.C. § 101.
5. Judgment is entered in favor of ETAP and Schneider as the Defendants, and against Power Analytics, as the Plaintiff, solely as to Counts I-

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IV of the Second Amended Complaint. Plaintiff shall take nothing as to Counts I-IV.

IT IS SO ORDERED.

Dated: December 21, 2017

/s/ John A. Kronstadt
JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

APPENDIX C

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. SA CV16-01955 JAK (FFMx)

[Filed December 7, 2017]

Date December 7, 2017

Title Power Analytics Corporation v. Operation
Technology, Inc., et al.

CIVIL MINUTES – GENERAL

Present: The Honorable JOHN A. KRONSTADT,
UNITED STATES DISTRICT JUDGE

Andrea Keifer

Deputy Clerk

Attorneys Present

for Plaintiffs:

Not Present

Not Reported

Court Reporter / Recorder

Attorneys Present

for Defendants:

Not Present

Proceedings:

**(IN CHAMBERS) ORDER RE PLAINTIFF'S
MOTION FOR RECONSIDERATION OF
ORDER GRANTING PARTIAL MOTION FOR
SUMMARY JUDGMENT OF INVALIDITY, OR
ALTERNATIVELY FOR AN ORDER TO
SEVER PATENT COUNTS (I-IV) FROM NON-
PATENT COUNTS (V-XV) (DKT. 327)**

I. Introduction

Power Analytics Corporation (“Plaintiff”) brought patent infringement claims against Operation Technology, Inc. d/b/a ETAP and Schneider Electric USA, Inc. (collectively, “Defendants”).¹ On July 13, 2017, an order issued on Defendants’ Motion for Partial Summary Judgment (“MSJ Order” (Dkt. 300)). It granted that motion after determining that all asserted claims of U.S. Patent 7,693,608 (“the ’608 Patent”), U.S. Patent No. 7,729,808 (“the ’808 Patent”), U.S. Patent No. 7,286,990 (“the ’990 Patent”), and U.S. Patent 7,840,395 (“the ’395 Patent”) (collectively, “Asserted Patents”) are invalid pursuant to 35 U.S.C. § 101.

On August 10, 2017, Plaintiff filed a “Motion for Reconsideration of Order Granting Partial Motion for Summary Judgment of Invalidity, or Alternatively for an Order to Sever Patent Counts (I-IV) from Non-Patent Counts (V-XV)” (“Motion” (Dkt. 327)). On August 22, 2017, Plaintiff submitted supplemental authority in support of the Motion, citing *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017). Dkt. 333. On August 28, 2017, Defendants responded to the Motion (Dkt. 334), and on September 8, 2017, Plaintiff filed a Reply (Dkt. 341). A hearing on the Motion was held on October 2, 2017, and the matter was taken under submission. Defendants subsequently submitted supplemental authority in

¹Plaintiff brought certain non-patent claims against OSISoft, LLC. Those claims are not at issue in connection with the matters addressed in this Order.

support of their opposition to the Motion, citing *Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905 (Fed. Cir. 2017). Dkt. 350. Plaintiff then filed a response. Dkt. 352.

For the reasons stated in this Order, and in the MSJ Order, which is incorporated by this reference, the Motion is **DENIED**, and the alternative request to sever the patent claims is **GRANTED**.²

II. Analysis

A. Legal Standards

Fed. R. Civ. P. 59(e) provides that a party may file a “motion to alter or amend a judgment.” Such a motion is appropriate, “(1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.” *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

Local Rule 7-18 provides similar standards:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for

² Defendants’ motions to dismiss the non-patent claims (Dkts. 303, 304) are addressed in a separate order. Dkt. 361.

reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

The Rule also provides that, “[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.” *Id.*

A motion for reconsideration is an “extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted).

B. Application

1. Motion for Reconsideration

Plaintiff advances several arguments in support of the Motion. *First*, that the MSJ Order failed to apply the governing “clear and convincing” standard in evaluating evidence submitted to prove a patent is invalid. Dkt. 327 at 2–3. *Second*, that the MSJ Order included and relied upon an improper, “undisclosed claim construction.” *Id.* at 7–8; 15–16. *Third*, that it failed to evaluate the claims in light of the specifications. *Id.* at 9–13. *Fourth*, that it misapplied the governing law that applies to a patentability analysis under § 101. *Id.* at 13–15; 16–22. *Finally*, that the MSJ Order improperly identified a single claim as representative of the 138 claims at issue. *Id.* at 22–23. These issues are addressed in this sequence.

a) Clear and Convincing Evidence

Plaintiff argues both that the clear and convincing standard was not applied, and that Defendants “did not even attempt” to meet their initial, related burden of establishing the absence of a genuine issue of material fact. Dkt. 327 at 3. Plaintiff acknowledges that questions of patentability under § 101 present legal issues, but relies on *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1339 (Fed. Cir. 2013) *judgment vacated by WildTangent, Inc. v. Ultramercial, LLC*, 134 S. Ct. 2870 (2014), for the proposition that the determination “is rife with underlying factual issues.” *Id.* at 1339.

In general, the party asserting invalidity has the burden of proving the applicable factual elements by clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011). However, as noted, whether a patent is viable under § 101 is ultimately a question of law. *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332, 1338 (Fed. Cir. 2017) (“Patent eligibility under § 101 is an issue of law that [the Federal Circuit] review[s] without deference.”). Here, Plaintiff has not identified what specific questions of material fact were presented by the motion for summary judgment that resulted in error in the MSJ Order. This is significant because Defendants submitted a “Statement of Undisputed Facts,” in support of the motion for summary judgment, stating that “[n]o genuine issue exists regarding any material fact.” Dkt. 162-1. Plaintiff’s Responsive Statement did not identify any disputed material facts. Dkt. 181-14. Therefore, it was not necessary for the MSJ Order to recite the evidentiary standard; the core facts were

undisputed. Plaintiff's failure to identify any disputed, material facts also undermines its claim that the MSJ Order reflects error because Defendants failed to satisfy their initial burden of showing an absence of disputed material facts. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). That Plaintiff disagrees with the MSJ Order, and describes its analysis of legal issues as reflecting "factual errors" does not change the outcome. *See Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 912 (Fed. Cir. 2017) (in reviewing a ruling on a motion to dismiss, claims may be deemed patent-ineligible "based on the intrinsic evidence from the specification without need for 'extraneous fact finding outside the record'").

Moreover, to the extent that Plaintiff relies on facts that were not previously offered in opposition to the motion for summary judgment, it has not explained why, in the exercise of reasonable diligence, these facts could not have been presented in its original opposition to that motion. *See* L.R. 7-18(a). For example, in support of the Motion, Plaintiff proffers the declaration of Dr. Tong. It compares the claims at issue in this action and those addressed in *Electric Power Group*, and addresses whether the Asserted Patents include inventive concepts. *See* Dkt. 327 at 9–15 (citing Dkt. 327-1 ("Tong Decl.")). There is no showing that this analysis could not have been timely submitted. Further, this evidence is unnecessary in light of the intrinsic record, which includes the patent claims, specifications, and prosecution history, that was considered in connection with the motion for summary judgment. *Secured Mail Sols. LLC*, 873 F.3d at 912.

b) Claim Construction and
Characterization

As to an “undisclosed claim construction,” Plaintiff does not argue that the Order construed a particular claim term from the Asserted Patents. Instead, it claims that the analysis of the text of the claims in the Asserted Patents constituted an impermissible claim construction. Dkt. 341 at 3 (citing MSJ Order at 5 (“the claims recite the idea as a function or result, rather than a particular way of performing that function or achieving that result.”)). Plaintiff adds that “[w]hether the claims recite a particular manner of performing any functions recited therein is a claim construction issue that was not before the Court on Defendants’ § 101 motion.” Dkt. 341 at 3–4.

Patentability determinations require a review and analysis of claim language as a matter of law. *See Alice Corp. Pty. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014) (courts must “determine whether the claims at issue are directed to [a] patent-ineligible concept[]”). The MSJ Order concluded that claim construction was not necessary in order to review the claims under § 101. If accepted, Plaintiff’s contrary argument would expand the definition of claim construction to include whenever a claim is reviewed as part of assessing its meaning. If such a rule were adopted, a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would not be viable. This is inconsistent with the present law on that issue. *See, e.g., FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1092 (Fed. Cir. 2016); *Internet Patents Corp. v. Active Network, Inc. et al.*, 790 F.3d 1343, 1345 (Fed. Cir. 2015); *OIP Tech. Inc. v. Amazon.com, Inc.*,

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788 F.3d 1359, 1362 (Fed. Cir. 2015); *Coffelt v. NVIDIA Corp.*, 680 Fed. App'x. 1010, 1011 (Fed. Cir. 2017); *Evolutionary Intelligence LLC v. Sprint Nextel Corp.*, 677 F. App'x 679, 680 (Fed. Cir. 2017).

The “impermissible claim construction” argument is tied to Plaintiff’s assertion that the MSJ Order erred by characterizing the claims at a high level of abstraction. Dkt. 327 at 15. The MSJ Order did not do so. Rather it began the analysis by summarizing the general characterization of the claims by the parties:

- Plaintiff: “compare predicted calculated values generated by the virtual system model against real-time data received from the sensors, updating the virtual system model when the difference exceeds a threshold, to ensure that the virtual system model reflects the system’s real-time operation.” Dkt. 181 at 3.
- Defendants: “the idea of comparing live (real-time) data to predicted data to interpret a monitored system’s health and performance (*e.g.*, identify an alarm condition) and, depending on the level of deviation, to update the prediction model (*e.g.*, by ‘calibration’ or ‘calibration and synchronization.’)” Dkt. 161 at 1.

Dkt. 300 at 5.

Plaintiff does not explain why the MSJ Order reflects error as to the level of abstraction because it considered the parties’ similar characterizations of the claims. It is also revealing that Plaintiff’s newly-

proposed characterization of the claims is substantially similar to what was presented and considered previously. Plaintiff now contends that the patents “permit the real-time monitoring of the entirety of massive electrical systems (including entities that are not connected to sensory devices), in depth analysis of such systems, and the real-time mapping of such systems.” Dkt. 327 at 10. This characterization is not materially different from what the parties presented in connection with the motion for summary judgment, *i.e.*, monitoring, analyzing, and mapping data. *See Elec. Power Grp, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353–54 (Fed. Cir. 2016) (citing several opinions to support the proposition that monitoring and analyzing information are abstract ideas).

For these reasons, Plaintiff’s contention as to improper claim construction is not persuasive.

c) Patent Specification

At the hearing on the Motion, Plaintiff’s counsel characterized the invention as a system that transforms electric power through a distribution process. Thus, the claimed steps of updating the virtual model and filtering the data were identified as ones of particular importance with respect to patentability. Plaintiff’s counsel argues that that these steps are detailed in the specification. For example, the specification includes 15 algorithms and nearly “6 full columns of relevant equations” for reviewing the data. Plaintiff’s counsel argues that this disclosure clearly establishes that the claims are patent-eligible. These positions are also presented in the briefing. *See* Dkt. 327 at 9–13.

Claims must be read in light of the specification. *Philips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). However, this maxim is limited by the rule that limitations from the specification should not read be into the claims. *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed. Cir. 2014) (citing *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 904 (Fed. Cir. 2004)) (“While we read claims in view of the specification, of which they are a part, we do not read limitations from the embodiments in the specification into the claims.”). Here, the claims are stated broadly and concern abstract concepts. Therefore, the disclosure in the specification outlining a specific technological manner in which the abstract concept may be implemented should not be read into the claims. *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed. Cir. 2013) (“the complexity of the implementing software or the level of detail in the specification does not transform a claim reciting only an abstract concept into a patent-eligible system or method.”); *see also Intellectual Ventures I LLC v. Erie Indem. Co.*, No. 2017-1147, 2017 WL 5041460, at *5 n.2 (Fed. Cir. Nov. 3, 2017).

Accordingly, Plaintiff’s argument that the specification supplies the requisite structure, *e.g.*, for comparing real-time and predicted values, or how the claims perform each element, is unpersuasive. The disclosures in the specification cannot transform the claims.

d) Representative Claim

With respect to the argument that the MSJ Order erred in identifying representative claims of the Asserted Patents, Plaintiff cites *Symantec*. There, the Federal Circuit established the standard for determining whether a claim is representative. Plaintiff contends that, under this standard, “Defendants must prove that the purportedly representative claim is ‘substantially similar and linked to the same abstract idea’ to each claims that it is asserted to represent.” Dkt. 327 at 22 (quoting *Intellectual Ventures ILLC v. Symantec Corp.*, 838 F.3d 1307, 1316 n.9 (Fed. Cir. 2016)). Plaintiff argues that the MSJ Order did not apply this standard.³

As an initial matter, Plaintiff seeks to present its challenge to the representative claim analysis as one that presents a question of fact rather than a legal issue. Claim construction and interpretation, are ultimately questions of law. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015) (“[A] judge, in construing a patent claim, is engaged in much the same task as the judge would be in construing other written instruments, such as deeds, contracts, or tariffs.”).

³ Plaintiff refers to its original opposition to the motion for summary Judgment, in which it challenged Defendants’ identification of certain claims as representative. Dkt. 327 at 23. This shows that presenting this basis for the claimed error is not in compliance with the requirement of Local Rule 7-18 that “[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.” Notwithstanding this shortcoming, the merits of the argument are addressed.

Although in some circumstances a claim interpretation may require the consideration of questions of fact, as stated above, in responding to the motion for summary judgment, Plaintiff did not contend that the facts presented by Defendants were in dispute.

The MSJ Order considered Claim 1 of the '608 Patent as representative and then stated:

The other asserted claims vary. However, each recites the idea of evaluating and reacting to prediction deviations along with functionally recited 'engines' and 'components.' Each also refers to ancillary steps such as collecting and evaluating the data and displaying the results of the evaluation. . . . Despite their length and number, the asserted claims focus on gathering information, *e.g.*, real-time and predicted data values, and analyzing and updating a model with that information, *e.g.*, comparing the gathered data and evaluating the prediction deviations to update the model.

Dkt. 300 at 4–5. Although the MSJ Order did not use the phrase “substantially similar and linked to the same abstract idea,” this portion of its analysis reflects the application of that standard. Thus, the MSJ Order analyzed all of the claims and made a reasoned determination that Claim 1 of the '608 Patent was a representative claim under the standards established in *Symantec*. Therefore, the Motion fails on this ground.

e) Application of § 101

Plaintiff next contests the analysis in the MSJ Order of *Diehr*, *Electric Power Group*, and other related cases. When the challenges to specific language in the MSJ Order are viewed in context, they are unpersuasive. For example, the MSJ Order distinguished *Diehr*:

The claims in *Diehr* recited a particular physical transformation of a particular article, *i.e.*, “raw, uncured synthetic rubber, into a different state or thing.” [*Diamond v. Diehr*, 450 U.S. 175, 181, 184 (1981)]; *see Bilski v. Kappos*, 561 U.S. at 604 (“the machine-or-transformation test is a useful and important clue, an investigative tool, for determining” eligibility under § 101). Also, the *Diehr* claims recited an unconventional physical solution to a physical problem in the prior art and used novel physical steps to measure temperature precisely inside the mold. *See Mayo*, 566 U.S. at 80–81. By contrast, the claims in the Asserted Patents focus on the idea of comparing live data to predicted data and updating a prediction model. They are directed to data manipulation rather than a physical transformation of an article.

Dkt. 300 at 7.

Plaintiff contends that this analysis “posits” that “the transformation of a physical article is a prerequisite to patentability under 35 U.S.C. § 101.” Dkt. 327 at 16. That is not a correct interpretation of the MSJ Order. It distinguished *Diehr* based on the

differences in the claims at issue there and in this action, but did not conclude that a physical transformation was a per se requirement for patentability. At the hearing, Plaintiff's counsel argued that the asserted patents are analogous to *Diehr* because they “manage industrial process[es] for distribution of power,” which is similar to those at issue in *Diehr* that were part of the management of the industrial process for curing rubber. This argument overlooks the significance of *Diehr's* application of a specific, technological improvement to a condition that is present throughout a particular industry. The claims at issue in this case are unlike those addressed in *Diehr* and more analogous to those considered in *Flook*. Thus, they simply took abstract data monitoring and analysis concepts and applied them to a particular industry. As the MSJ Order explained, this is insufficient, because simply limiting an invention to a particular field of use, e.g., electrical systems, is insufficient to make the claims patent-eligible. Dkt. 300 at 7; see also *Parker v. Flook*, 437 U.S. 584 (1978).

Plaintiff also relies on *Thales Visionix, Inc. v. United States*, 850 F.3d 1343 (Fed. Cir. 2017) and its application of *Diehr*. *Id.* at 1347. *Thales* included an analysis of claims directed to “systems and methods that use inertial sensors in a non-conventional manner to reduce errors in measuring the relative position and orientation of a moving object on a moving reference frame.” 850 F.3d at 1348–49. However, the general contention that the asserted claims at issue here are also “directed towards results that had not been previously achieved and specific technological improvements,” is an unsubstantiated argument that

by itself is insufficient to show that the MSJ Order is inconsistent with *Thales*.

Plaintiff next argues that, “it is impossible to discern from the Court’s Order why the purported ‘information gathering and analysis’ taught in the ’608 Patent, which only represents a portion of the key invention taught therein, is *the same as* that addressed by the Federal Circuit in *Electric Power Group*.” Dkt. 327 at 14. However, in its discussion of step two of *Alice*, the MSJ Order compared certain claim limitations at issue here to the claims in *Electric Power Group*. As part of that analysis, the MSJ Order explains that “[n]one of these steps differentiates a process from ordinary mental ones.” Dkt. 300 at 7. The MSJ Order then identifies other limitations in the asserted claims and explains why, under the standards and factual settings of *Electric Power Group* and other cases, they fail to add an inventive concept to an abstract idea. Order at 7.

Plaintiff’s attempt to distinguish the claims at issue in *Electric Power Group* and the asserted claims is unpersuasive. At the hearing, Plaintiff’s counsel displayed a highlighted version of Claim 1 of the ’608 Patent and argued that only two limitations of that claim were also among those presented by the claims at issue in *Electric Power Group*. Plaintiff’s counsel emphasized the virtual modeling and filtering requirements of the asserted claims when compared to the claims of *Electric Power Group*. The claims at issue in *Electric Power Group*, however, included many more analogous claim limitations than the two limitations highlighted by Plaintiff’s counsel. For example, Claim 1

of the '608 Patent recites a “decision engine configured to compare the real-time data against the predicted data output to filter out and interpret indicia of electoral system health and performance.” The claims in *Electric Power Group* recite, “deriving a composite indicator of reliability that is an indicator of power grid vulnerability and is derived from a combination of one or more real time measurements or computations of measurements from the data streams.” 830 F.3d at 1352. As *Electric Power Group* concluded, “[m]erely requiring the selection and manipulation of information—to provide a ‘humanly comprehensible’ amount of information useful for users . . .—by itself does not transform the otherwise-abstract processes of information collection and analysis.” *Id.* at 1355.

Plaintiff also argues that the MSJ Order did not sufficiently analyze the claims as a whole under step two of *Alice* and that in some instances, “an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.” Dkt. 327 at 19 (quoting *BASCOM Glob. Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349–50 (Fed. Cir. 2016)). Once again, this argument overlooks the content of the MSJ Order. It is consistent with the step two standards. Thus, it reviewed the asserted claims and evaluated both particular elements as well as the claims as a whole in determining that the asserted claims did not recite an inventive concept sufficient to transform the claims into patentable subject matter. Dkt. 300 at 6–8. Although Plaintiff provides a detailed discussion of *BASCOM*, it does not argue that the claims at issue here are like those in *BASCOM*, which “require an arguably inventive distribution of

functionality within a network.” *See Elec. Power Grp.*, 830 F.3d at 1355–56 (distinguishing *BASCOM*).

* * *

For the foregoing reasons, Plaintiff has not established a basis for error in the MSJ Order. Therefore, the Motion is **DENIED**.

2. Motion to Sever

Because the Motion has been denied, and the parallel motion to dismiss the non-patent claims has been granted without prejudice to the filing of a further amended complaint,⁴ it is appropriate to address Plaintiff’s request to sever the non-patent causes of action and enter a judgment as to those claims. Plaintiff seeks such relief so that it can pursue an appeal of the MSJ Order at this time, rather than after there is a final resolution of the non-patent claims. Dkt. 327 at 23–25.

In support of its request, Plaintiff relies on Fed. R. Civ. P. 21. Rule 21 provides that, “[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.” Defendants respond that Plaintiff’s request is controlled by Fed. R. Civ. P. 54(b). Rule 54(b) provides that a district court may “direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the [C]ourt expressly determines that there is no just reason for delay.” Defendants argue that Rule 54(b) presents a “more demanding” standard

⁴ *See* Dkt. 361.

than the one that applies to determinations under Rule 21, but that “[i]n any event, Plaintiff cannot satisfy the standard articulated by either rule.” Dkt. 334 at 16.

Plaintiff has not shown that Rule 21 applies here. It cites *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000) for the proposition that “[t]he decision to sever is within the Court’s broad discretion.” *Id.* *Coleman*, however, addresses severance under Rule 20(b), which applies to the permissive joinder of parties. *Id.* Plaintiff also cites *Anticancer, Inc. v. Pfizer Inc.*, No. 11CV107 JLS RBB, 2012 WL 1019796, at *1 (S.D. Cal. Mar. 26, 2012). The plaintiff in *Pfizer* filed a first amended complaint in which it presented new causes of action for patent infringement against a new defendant. *Id.* The new defendant moved to sever one of these claims and have the matter addressed in proceedings separate from those that would occur on the same claim as to another defendant. *Id.* The district court denied the motion, after concluding that the movant had not shown a sufficient basis for the exercise of discretion to grant this relief pursuant to Fed. R. Civ. P. 42(b). That rule provides that “[f]or convenience, to avoid prejudice, or to expedite and economize” a district court may “order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.”

Rule 54(b) applies to the request at issue here. Plaintiff seeks to sever the patent claims so that it can appeal from the MSJ Order now, rather than at the conclusion of the proceedings on the remaining claims. Rule 54(b) provides that, “[w]hen an action presents more than one claim for relief, or when multiple parties

are involved, the court may direct entry of a final judgment as to . . . fewer than all claims . . . if the court expressly determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b). To grant such a motion, a district court is to have concluded that the matter on which judgment would be entered “is a decision upon a cognizable claim for relief, and . . . that it is ‘an ultimate disposition of an individual claim entered in the court of a multiple claims action.’” *Curtiss-Wright*, 446 U.S. at 7 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). Evaluating just reason for delay requires a district court to consider “judicial administrative interest as well as the equities involved.” *Id.* at 8. “Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.” *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). The determination whether to grant relief under Rule 54(b) is within the discretion of the district court. *Nat’l Union Fire Ins. Co. v. Ready Pac Foods, Inc.*, No. CV 09-03220 RSWL (MANx), 2011 WL 1790033, at *2 (C.D. Cal. May 9, 2011).

A consideration of the patent and non-patent claims shows that there is little, if any, factual or legal overlap. This is illustrated by the discussion of the non-patent claims in the recent order on the motions to dismiss them. Dkt. 361. Although some evidence as to the operations of certain facilities could be presented as to each set of claims, that is not a sufficient basis to deem them ones that overlap substantially.

Although the entry of a separate judgment could result in more than one appeal in this action, that is not a sufficient basis to deny the requested relief. Given the absence of factual and legal similarity between the two sets of claims, there is modest risk that overlapping appellate issues will be presented should an appeal proceed on the non-patent issues. *Curtiss-Wright*, 446 U.S. at 8. Further, whether such an appeal will be pursued is not something that can be determined at this time; the non-patent issues remain at the pleading stage.

Finally, there is merit to Plaintiff's contention that a prompt appellate review of the patent issues is appropriate. Dkt. 327 at 25. Patents are property rights that have a limited duration. Thus, more of this time will be consumed by an appellate process that must await the conclusion of all proceedings in this matter.

For these reasons, Plaintiff's request for the entry of judgment as to the patent claims is **GRANTED**.

3. Defendant's Request for Attorney's Fees

Defendants seek an award of attorney's fees in connection with the Motion pursuant to 28 U.S.C. § 1927. Dkt. 334 at 22. Section 1927 provides that "[a]ny attorney or other person admitted to conduct cases . . . who so multiplies proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. "The use of the word 'may'—rather than 'shall' or 'must'—confers substantial leeway on the district court when imposing sanctions.

Thus, with § 1927 as with other sanctions provisions, “[d]istrict courts enjoy much discretion in determining whether and how much sanctions are appropriate.” *Haynes v. City & Cty. of San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012) (quoting *Trulis v. Barton*, 107 F.3d 685, 694 (9th Cir. 1995)).

After considering the competing positions of the parties, and based on the record and proceedings in this action, it has not been shown that an award of attorney’s fees is warranted. The issues presented were sufficiently substantive that the standards imposed by 28 U.S.C. § 1927 for such an award have not been met.

III. Conclusion

For the reasons stated above, the Motion for Reconsideration is **DENIED**. The alternative Motion to Sever Patent Counts (I-IV) from Non-Patent Counts (V-XV), which is deemed a motion pursuant to Fed. R. Civ. P. 54(b), is **GRANTED**. On or before December 18, 2017, after meeting and conferring with counsel for Defendants in an effort to reach an agreement as to the form of a proposed judgment, Plaintiff’s counsel shall lodge a proposed judgment. The notice shall indicate whether the form of judgment is agreed upon or whether Defendants will be filing any objections by December 27, 2017.

IT IS SO ORDERED.

_____ : _____
Initials of Preparer ak

APPENDIX D

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. SA CV16-01955 JAK (FFMx)

[Filed July 13, 2017]

Date July 13, 2017

Title Power Analytics Corporation v. Operation
Technology, Inc., et al.

CIVIL MINUTES – GENERAL

Present: The Honorable JOHN A. KRONSTADT,
UNITED STATES DISTRICT JUDGE

Andrea Keifer

Deputy Clerk

Attorneys Present

for Plaintiffs:

Not Present

Not Reported

Court Reporter / Recorder

Attorneys Present

for Defendants:

Not Present

Proceedings:

**(IN CHAMBERS) ORDER RE DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO INVALIDITY (DKT. 161)**

I. Introduction

Power Analytics Corporation (“Plaintiff” or “PAC”) alleges that Operation Technology, Inc. d/b/a ETAP, Osisoft LLC, and Schneider Electric USA, Inc.

(collectively “Defendants”) have infringed U.S. Patent No. 7,693,608 (“the ’608 Patent”), U.S. Patent No. 7,729,808 (“the ’808 Patent”), U.S. Patent No. 7,286,990 (“the ’990 Patent”), and U.S. Patent 7,840,395 (“the ’395 Patent”) (collectively, “Asserted Patents”). On February 28, 2017, Defendants moved for partial summary judgment as to invalidity (“Motion”). Dkt. 161. On May 15, 2017, a hearing on the Motion was held and the matter was taken under submission. Dkt. 236. For the reasons stated in this Order, the Motion is **GRANTED**.

II. Background

The Asserted Patents are in the field of modeling electrical systems. They share portions of a common specification. Each also relates to computer modeling and focuses on computer simulation techniques with real-time system monitoring and prediction of electrical system performance. *See* ’608 Patent at 1:25-29.

The specifications of the Asserted Patents acknowledge that it was already known that models could be used to simulate and predict the performance of monitored electrical systems. ’608 Patent at 1:31-50 (systems models have been used for simulation and “predictive failure analysis”), 8:21-24 (“a variety of conventional virtual model applications can be used for creating a virtual system model, so that a wide variety of systems and system parameters can be modeled.”). These electrical system models are information that can be stored in a database. *Id.* at 8:20-21, Fig. 1 (item 126).

The Asserted Patents purport to introduce the idea of comparing live, *i.e.*, “real-time,” data to predicted data.

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This permits an assessment of the system's health and performance. Depending on the level of deviation that is determined, it may also permit an update to the prediction model. *See, e.g.*, '608 Patent at 1:41-2:2, 2:39-59, 6:48-7:5, 7:24-34, 7:49-60, 8:9-19. According to a preferred embodiment, the real-time data from sensors is collected, processed, and compared to the model's predictors for those sensors. *Id.* at 3:1-3, 6:42-58. Any deviation between live and predicted values is evaluated and potentially acted upon: "[a] divergence between the real-time sensor output values and the predicted values generate either an alarm condition for the values in question and/or a calibration request that is sent to the calibration engine 134." *Id.* at 8:62-65.

An alarm condition communicates the health and performance of the monitored system. *Id.* at 10:31-35. In response to some deviations, a "calibration request" is generated to seek updating of the information in the model: "Once the calibration [request] is generated by the analytics engine 118, the various operating parameters or conditions of model(s) 206 can be updated or adjusted to reflect the actual facility configuration." *Id.* at 8:9-12. Figure 1 of the '608 Patent illustrates an embodiment of the system for predictive analysis of the performance of a monitored system:

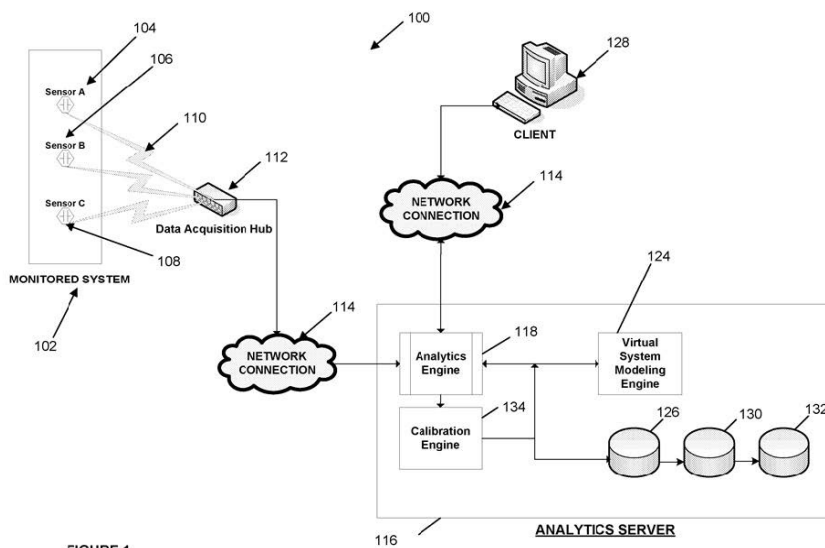


FIGURE 1

III. Analysis

A. Legal Standards

1. Summary Judgment

Summary judgment is appropriate where the record shows that “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

In deciding a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 269. The burden initially falls on the moving party to show an absence of a genuine issue of material fact or to show that the non-moving party will be unable to make a sufficient showing on an essential element of its case for which it has the burden of proof. *Celotex*, 477 U.S. at 322–23. Only if the moving party meets its burden must the non-moving party produce evidence to rebut the moving party’s claim and create a genuine issue of material fact. *Id.* If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

2. Section 101 Analytical Framework

“Section 101 defines the subject matter that may be patented under the Patent Act.” *Bilski v. Kappos*, 561 U.S. 593, 601 (2010). Section 101 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. “Section 101 thus specifies four independent categories of inventions or discoveries that are eligible for patent protection: processes, machines, manufactures, and compositions of matter.” *Bilski*, 561 U.S. at 601.

Although acknowledging that “[i]n choosing such expansive terms . . . Congress plainly contemplated that the patent laws would be given wide scope,” the Supreme Court has identified three exceptions to

Section 101: “laws of nature, physical phenomena, and abstract ideas.” *Diamond v. Chakrabarty*, 447 U.S. 303, 308-09 (1980). Although these exceptions are not required by the statutory text, they are consistent with the idea that certain discoveries “are part of the storehouse of knowledge of all men” and are “free to all men and reserved exclusively to none.” *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948). Consistent with these factors is that “the concern that drives this exclusionary principle [is] one of pre-emption.” *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2354 (2014) (citation omitted). Consequently, the Supreme Court has required that “[i]f there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end.” *Funk Bros.*, 333 U.S. at 130. These principles apply with equal force to product and process claims. *Gottschalk v. Benson*, 409 U.S. 63, 67-68 (1972).

Alice is the most recent statement by the Supreme Court on how these principles are applied. *Alice* expanded on the two-step approach for resolving Section 101 issues first set forth in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 77 (2012). In the first step, a court must “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Alice*, 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 77). If this test is satisfied, then in the second step the court must ask “[w]hat else is there in the claims.” *Id.* This requires consideration of “the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’

into a patent-eligible application.” *Id.* (citing *Mayo*, 566 U.S. at 78–79). In applying this second step, a court must “search for 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.* (citing *Mayo*, 566 U.S. at 72–73).

B. Application

1. Alice Step One – Whether the Asserted Claims are Directed to a Patent-Ineligible Concept

The step-one inquiry determines whether the claims “focus on a specific means or method that improves the relevant technology” or are “directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016). Plaintiff has asserted 138 claims from the four Asserted Patents. Defendants have chosen claim 1 of the ’608 Patent as representative.¹ Claim 1 reads:

¹ Although Plaintiff has not conceded that claim 1 is representative of the remaining claims, it has not shown how the other independent claims differ materially from claim 1. Moreover, although Plaintiff has referred in passing to several of the dependent claims, it presents no substantive arguments as to their separate patentability.

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1. A system for filtering and interpreting real-time sensory data from an electrical system, comprising:

a data acquisition component communicatively connected to a sensor configured to acquire real-time data output from the electrical system;

a power analytics server communicatively connected to the data acquisition components, comprising,

a virtual system modeling engine configured to generate predicted data output for the electrical system utilizing a virtual system model of the electrical system,

an analytics engine configured to monitor the real-time data output and the predicted data output of the electrical system, the analytics engine further configured to initiate a calibration and synchronization operation to update the virtual system model when a difference between the real-time data output and the predicted data output exceeds a threshold, and

a decision engine configured to compare the real-time data output against the predicted data output to filter out and interpret indicia of electrical system health and performance; and

a client terminal communicatively connected to the power analytics server and configured to display the filtered and interpreted indicia.

'608 Patent, claim 1.

The other asserted claims vary. However, each recites the idea of evaluating and reacting to prediction deviations along with functionally recited “engines” and “components.” Each also refers to ancillary steps such as collecting and evaluating the data and displaying the results of the evaluation.

The characterizations of the asserted claims by each side reflect the idea of evaluating and reacting to prediction deviations:

- Plaintiff: “compare predicted calculated values generated by the virtual system model against real-time data received from the sensors, updating the virtual system model when the difference exceeds a threshold, to ensure that the virtual system model reflects the system’s real-time operation.” Dkt. 181 at 3.
- Defendants: “the idea of comparing live (real-time) data to predicted data to interpret a monitored system’s health and performance (*e.g.*, identify an alarm condition) and, depending on the level of deviation, to update the prediction model (*e.g.*, by ‘calibration’ or ‘calibration and synchronization.’)” Dkt. 161 at 1.

Despite their length and number, the asserted claims focus on gathering information, *e.g.*, real-time and predicted data values, and analyzing and updating a model with that information, *e.g.*, comparing the gathered data and evaluating the prediction deviations to update the model. This type of information gathering and analysis has been addressed by the Federal Circuit. It has held that it falls into a class of claims directed to a patent-ineligible concept. *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) (“we have treated collecting information, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas.”).

Further, the claims recite the idea as a function or result, rather than a particular way of performing that function or achieving that result. This is another indicator of abstractness. *Cf. Elec. Power Grp.*, 830 F.3d at 1351 (“The claims, defining a desirable information-based result and not limited to inventive means of achieving the result, fail under § 101.”); *Affinity Labs of Texas, LLC v. Amazon.com, Inc.*, 838 F.3d 1266, 1269 (Fed. Cir. 2016) (“The purely functional nature of the claim confirms that it is directed to an abstract idea, not to a concrete embodiment of that idea.”). For example, claim 1 of the ’608 Patent recites that “an analytics engine” is “configured to initiate a calibration and synchronization operation to update the virtual system model when a difference between the real-time data output and the predicted data output exceeds a threshold.” The language focuses on the result rather than how the operation is achieved. Similarly, claim 1

recites that “a decision engine” is “configured to compare the real-time data output against the predicted data output to filter out and interpret indicia of electrical system health and performance.” Again, it does not specify how the engine is configured. None of the claims recites a particular structure for how to compare the real-time and predicted values, how to pick the threshold values or how to update the virtual model.

Plaintiff argues that the inventions at issue provide a concrete solution to problems that burdened the electrical systems industry for decades, “namely, the inability to accurately analyze, predict and model the operations of an electrical system because the system model was based upon a stale, historical snapshot, taken at a single point in time.” Dkt. 181 at 9-10. Specifically, Plaintiff argues that the Asserted Patents solved the problems in the field in a specific way: “the creation of a virtual system model that is kept up to date through the use of the (1) threshold; (2) calibration and (3) synchronization elements.” *Id.* at 13. Plaintiff further notes that the PTO identified these elements as being especially novel, and determined that the prior art did not suggest or disclose these key elements. (*Id.* at 6, 13-14.)

Plaintiff’s arguments conflate patent eligibility (35 U.S.C. § 101) with anticipation (§ 102) and obviousness (§ 103). Novelty of a claim’s abstract idea does not defeat invalidity under § 101. New abstract ideas are no more valid than old ones: abstract ideas are ineligible for patenting even if they are “novel and useful,” *Parker v. Flook*, 437 U.S. 584, 588, 591 (1978),

and “narrow and specific,” *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 88 (2012). *See also*, *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1151 (Fed. Cir. 2016) (“[A] claim for a *new* abstract idea is still an abstract idea. The search for a § 101 inventive concept is thus distinct from demonstrating § 102 novelty.”) (Emphasis in original). Indeed, Plaintiff acknowledges that “a Section 101 analysis is not the same as a prior art invalidity analysis.” Dkt. 181 at 7.

For claims implemented on a computer, the Federal Circuit has determined that it is “relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed to an abstract idea.” *Enfish LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). Here, the Asserted Patents purport to solve a data problem, *i.e.*, a discrepancy between the real-time and data predicted using a model, not a computer problem. Neither the problem nor the solution is rooted in computer technology. The purported solution offered by the claims to the problem of outdated information is to update the model so that it fits more accurately within the real-world data. There is nothing in the claim to suggest that, once the models have been updated, the computer system will be any more efficient. Instead, like the patents in *Electric Power Group*, the Asserted Patents claim a purported advance in uses for existing computer capabilities, not new or improved computer capabilities. *See Elec. Power Grp.*, 830 F.3d at 1354. “The focus of the claims is not on such an improvement in computers as tools, but on certain independently abstract ideas that use computers as tools.” *Id.*

2. Alice Step Two – Whether the Asserted Claims Included an “Inventive Concept”

As noted, the second inquiry of the *Alice* test is whether the claims found to be directed to an abstract idea contain any inventive concept to transform the abstract idea into a patent-eligible subject matter. *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014). To satisfy this prong, the claims must include additional features that are significantly beyond “well-understood, routine, conventional activity” or a simple “instruction to implement or apply the abstract idea on a computer.” *Id.* (quoting *Mayo*, 566 U.S. at 79.); *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349 (Fed. Cir. 2016).

Routine, conventional, or generic elements or combinations of elements do not satisfy the second step. *Alice*, 134 S. Ct. at 2359 (claim steps requiring “electronic recordkeeping” and “use of a computer to obtain data, adjust account balances, and issue automated instructions” do “no more than require a generic computer to perform generic computer functions.”). Neither does “claiming the improved speed or efficiency inherent with applying the abstract idea on a computer provide a sufficient inventive concept.” *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1367 (Fed. Cir. 2015).

In *Electric Power Group*, the court noted that a field-of-use restriction, “limiting the claims to the particular technological environment of power-grid monitoring,” is insufficient. 830 F.3d at 1354. The same rule applies to collecting and analyzing specific “types of information” from specific types of “information

sources” (including “real time measurements”) because “merely selecting information, by content or source, for collection, analysis, and display does nothing significant to differentiate a process from ordinary mental processes, whose implicit exclusion from § 101 undergirds the information-based category of abstract ideas.” *Id.* at 1355.

As in *Electric Power Group*, the field-of-use restrictions in the asserted claims, which limits them to the technological environment of electrical system monitoring, is insufficient to save them. The result is the same as to the recitation in the claims of the following: (i) various types of information content gathered and used, *e.g.*, “real-time data”, “predicted data,” “virtual system model,” contingency event,” “environmental data,” “real time domain model data”, “real-time system reliability data, and “real time model”; and (ii) various sources of such information, *e.g.*, “sensors,” “data acquisition component,” “virtual system modeling database”. None of these steps differentiates a process from ordinary mental ones.

Similar to the “displaying” steps in the invalidated claims in *Electric Power Group*, many of the asserted claims recite displaying, reporting, or otherwise outputting various results of the analysis and evaluation, *e.g.*, “display” an alarm condition, “forecast an aspect,” generate a “warning message,” report arc-flash-event analyses, generate a “predictive analysis report,” “generate an “operational stability” report, and generate “a report that summarizes the results of the simulation.” Dkt. 161 at 22. However, reporting analysis results, without more, is more appropriately

characterized as an insignificant “post-solution activity” that does not support the invention having an inventive concept. *See Flook*, 437 U.S. at 590.

A few claims recite a “machine learning engine” (’608 claims 16-17; ’395 claims 1, 3), but the patents describe this in functional terms, *e.g.*, ’608 Patent, Fig. 22; 37:35-63, without purporting to add any particular inventive implementation. *Cf. In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 613-15 (Fed. Cir. 2016) (in view of the patent’s “abstract functional descriptions” of the claims’ “telephone unit,” “server,” “image analysis unit,” and “control unit,” they “fail to add an inventive concept sufficient to bring the abstract idea into the realm of patentability.”).

Plaintiff argues that the Asserted Patents are similar to the claims that were at issue in *Diamond v. Diehr* and should be sustained on that basis. Dkt. 181 at 17. In *Diehr*, the patents recited a process of curing synthetic rubber that ensured the product of “molded articles which are properly cured.” *Diamond v. Diehr*, 450 U.S.175, 177 (1980). The claim used a “well-known” mathematical equation, but it applied it in a process designed to solve a technological problem in “conventional industry practice.” *Id.* at 177, 178. The invention in *Diehr* used a “thermocouple” to record constant temperature measurements inside the rubber mold. The measurements were fed into a computer, which repeatedly recalculated the remaining cure time by using the mathematical equation. *Id.* at 178-179. These additional steps “transformed the process into an inventive application of the formula.” *Mayo*, 566 U.S. at 81.

The claims in *Diehr* recited a particular physical transformation of a particular article, *i.e.*, “raw, uncured synthetic rubber, into a different state or thing.” 450 U.S. at 184; *see Bilski v. Kappos*, 561 U.S. at 604 (“the machine-or-transformation test is a useful and important clue, an investigative tool, for determining” eligibility under § 101). Also, the *Diehr* claims recited an unconventional physical solution to a physical problem in the prior art and used novel physical steps to measure temperature precisely inside the mold. *See Mayo*, 566 U.S. at 80–81. By contrast, the claims in the Asserted Patents focus on the idea of comparing live data to predicted data and updating a prediction model. They are directed to data manipulation rather than a physical transformation of an article.

The asserted claims are more like those in *Parker v. Flook*, 437 U.S. 584 (1978). There, the claimed idea was to collect data from a monitored industrial system, and analyze and compare it with other data. Depending on the outcome of that analysis, the claimed idea would update an alarm limit responsible for identifying alarm conditions to users. *Id.* at 596-98. Like the *Flook* claims, the claims here do not recite either unconventional physical elements or a functional relationship between abstract and physical elements. Rather, the “threshold, calibration, and synchronization” elements are abstract, generic steps that describe desired functions or outcomes, but do not, individually or in combination, constitute “inventive concepts.”

For these reasons, none of the claim elements identified by Plaintiff exceeds the abstract idea of evaluating and reacting to prediction deviations. Therefore, the Asserted Patents are ineligible under § 101.

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED.**

IT IS SO ORDERED.

Initials of Preparer ak _____ : _____

APPENDIX E

NOTE: This disposition is nonprecedential.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

2018-1428

[Filed March 21, 2019]

POWER ANALYTICS CORPORATION,)
<i>Plaintiff-Appellant</i>)
)
v.)
)
OPERATION TECHNOLOGY INC, DBA)
ETAP, SCHNEIDER ELECTRIC USA, INC.,)
<i>Defendants-Appellees</i>)
)
OSISOFT, LLC,)
<i>Defendant</i>)

Appeal from the United States District Court for the Central District of California in No. 8:16-cv-01955-JAK-FFM, Judge John A. Kronstadt.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant Power Analytics Corporation filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on March 28, 2019.

FOR THE COURT

March 21, 2019

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court