

No. 20-

IN THE
Supreme Court of the United States

CONSUMER 2.0, INC. D/B/A RENTLY,

Petitioner,

v.

TENANT TURNER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014), this Court laid out the standards for analyzing patent eligibility under 35 U.S.C. § 101, and explained the main concern undergirding the analysis was one of preemption. This Court did not lay out the exact boundaries of the test, but rather had previously instructed the Federal Circuit may expand on the test so long as it was consistent with the statute. The Federal Circuit however routinely skips the preemption analysis, and has imported a quasi-section 103 analysis into Step Two of the test for determining whether the claims recite only “conventional” features or amount to “something more” than a claim on the abstract idea itself.

The questions presented here are:

- 1) Whether preemption is a threshold and defining consideration that the lower courts must consider in determining whether a claimed invention is directed to patent eligible subject matter under Section 101, and
- 2) Whether the courts below have erred in conflating the Step Two conventionality analysis of *Alice* with the factual prior art *patentability* analysis of Section 103, without the evidentiary opportunities and protections against hindsight bias afforded by Section 103 and in conflict with this Court’s precedent in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 29.6 STATEMENT**

The parties to the proceedings include those listed on the cover. Petitioner states that the party, Consumer 2.0, Inc. d/b/a Rently (“Rently”) does not have any parent corporations and no publicly held companies own 10% of more of the stock of the party.

RELATED CASES

Consumer 2.0, Inc. v. Tenant Turner, Inc., No. 2:18-cv-00355-RGD-DEM, U. S. District Court for the Eastern District of Virginia. Judgment entered November 1, 2018.

Consumer 2.0, Inc. v. Tenant Turner, Inc., No. 19-01846, U.S. Court of Appeals for the Federal Circuit. Judgment entered March 9, 2020.

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OPINIONS BELOW

The Rule 36 disposition of the Federal Circuit is reported at 796 F. App'x 752 and reproduced at Pet. App. 1a-2a. The Federal Circuit's decision denying Petitioner's petition for panel rehearing and rehearing en banc is reproduced at Pet. App. 57a-58a. The District Court's decision granting respondent's motion to dismiss is reported at 343 F. Supp. 3d 581 and reproduced at Pet. App. 30a-56a. The District Court's decision denying petitioner's motion for leave to file an amended complaint is reported at 2019 WL 8895213 and reproduced at Pet. App. 3a-29a.

JURISDICTION

The Federal Circuit entered judgment on March 9, 2020. It denied petitioner's timely petition for rehearing on May 8, 2020. On March 19, 2020, this Court extended the time for filing a petition for writ of certiorari to October 5, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

35 U.S.C. § 101. Inventions Patentable

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.

INTRODUCTION AND STATEMENT OF THE CASE

This Court's decision in *Alice* provided a welcome clarification to the law of Section 101 and has undoubtedly been effective in stemming the flood of patents directed to nothing more than age-old ideas applied on a computer. Unfortunately, its misapplication by the lower courts has also resulted in the invalidation of non-preemptive patents directed to real innovation, and has disproportionately hurt individual inventors and start-ups, particularly in the realm of software and IT. Without the protection of patents, these companies have difficulty competing against larger IT and software companies that are infamous for their monopoly-like market power.

In this case, the Federal Circuit invalidated, as ineligible, a patent that revolutionized the real estate showing industry. The idea was so revolutionary that industry criticized it as an unworkable approach to showing real estate. As the patent owner proved the industry wrong, criticism gave way to resounding praise and commercial success, and ultimately, copying. Unlike the hundreds of older patents that were properly cleaned up in the years following *Alice*, this patent was examined by the USPTO *after* guidance on and adapting to the Section 101 analysis in light of *Alice*. Having specifically considered the Section 101 issues, the USPTO allowed the claims, which unquestionably do not preempt any broad ideas or industries. The claims are directed to one particular method of providing safe and secure access to a building for showing real estate, utilizing a technology-enabled lockbox capable of coordinating with a database and responding to unique, time-limited codes only at

the predetermined location and time. This legitimate invention was invalidated at the pleading stage despite concrete factual allegations regarding its unconventional nature, and without any assessment of the potential, or lack thereof, for the claims to broadly preempt any idea or industry. The courts involved here completely ignored the question of preemption, and instead applied a test that conflated the requirements of Sections 101 and 103 – apparently determining at the pleading stage that the invention, although alleged to be unconventional, combined known elements and thus was not worthy of patent protection, mostly in a finger to the wind sort of approach. Yet this is not, and should not, be the analysis under Section 101.

Unlike other petitioners who have come before it, Petitioner here does not seek a complete overhaul or revocation of this Court’s decision in *Alice*. Rather, Petitioner believes this Court was on the right track with *Alice*, but that more guidance is required in order to reign in the lower courts’ misapplication of the rule so legitimate inventions are not mistakenly invalidated. This Court made clear in *Alice* that preemption is the “concern that drives [the] exclusionary principal,” and that patents that “pose no comparable risk of pre-emption . . . remain eligible” for patenting. *Alice*, 573 U.S. at 217. And elsewhere this Court has observed that the issue of patent eligibility is separate from the “familiar issues of novelty and obviousness.” *Parker v. Flook*, 437 U.S. 584, 588 (1978). Section 101 should thus be a mere speedbump on the road to the more complex analysis of patentability, aimed at weeding out patents that broadly preempt by claiming only the abstract concept. As aptly stated by this Court, “we tread carefully in construing this exclusionary principle lest it swallow all of

patent law” because at some level all inventions “embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Alice*, 573 U.S. at 217. Too broad an interpretation of this rule would ultimately “eviscerate patent law” and undermine the balance sought to be struck by the principles underlying § 101. *See Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012).

Since *Alice* and *Bilski* involved patents directed to age-old ideas applied on a general computer, there was no cause for this Court to parse the bounds of patent-eligibility, or define the entirety of the analysis. There was similarly no need to provide guidance as to what constitutes an inventive concept, or what considerations may be taken into account when determining whether a claimed element is “conventional” in Step Two of *Alice* when this issue is debatable. Because there was no cause to address those particular issues, this Court instructed that the Federal Circuit may expand upon the Section 101 analysis and fill in the bounds it did not reach, but with the caveat that any expansion must be consistent with the text of the Patent Act, and of course, this Court’s decisions on the issue. *See Bilski v. Kappos*, 561 U.S. 593 (2010). Yet there can be no doubt that the Federal Circuit’s application of the rule departs drastically from the intent of this Court. The Federal Circuit has, both implicitly and explicitly, conducted the Section 101 analysis in a way that conflicts not only with the underlying import in this Court’s decisions, but also the mandated distinction between Sections 101 and 103, the latter being where true patentable assessment in view of prior art is supposed to occur. In this case and many others like it, the Federal Circuit has completely abandoned the preemption

analysis, finding it inherent in the two-step analysis, and, therefore, acceptable to disregard. But, it is this complete disregard for the core focus of the *Alice* test that has led to the “exception swallowing the rule.” The Federal Circuit has further declared that Step Two is a question of both fact and law, but has done so in a way that conflates the requirements of Sections 101 and 103, and has resulted in courts making an overall assessment of the patentability of an invention under the guise of Section 101, but without grappling with any of the more complicated aspects of Section 103 aimed at avoiding hindsight bias, including consideration of secondary consideration evidence (the fourth element of *Graham v. John Deere*), which were strongly of record below.

Commentary abounds regarding these failures, as well as the disproportionately negative effect the application of *Alice* has had on small businesses. Where, as here, the patent system fails, it fails these small inventors the most. Unlike larger corporations that can rely on market power or a massive portfolio of patents to protect their market-share in the event of an improper invalidation, smaller software and IT companies are dependent on a properly functioning patent system, and an improper invalidation can be devastating to their business. (*See infra* at 18-19.) It is therefore imperative that this Court grant *certiorari* and finish the task it began in *Alice* by clarifying the bounds and requirements of the Section 101 analysis to make clear that where there is no risk of preemption, the exclusionary principals should not apply. Clarification is further needed on the issue of Step Two, and in particular whether Step Two of the *Alice* analysis is a question of law or fact, and if a question of fact, what considerations are permitted. Petitioner asserts that with the proper

clarification of the scope of the Section 101 analysis, the oft-heard calls for congressional overhaul of the statute would become moot, and that Section 101 jurisprudence would finally be in a place to accomplish its purpose of striking a balance between rewarding legitimate invention while avoiding patents that broadly preempt general ideas. Here, the USPTO carefully considered the Section 101/*Alice* issues, allowed the patent claims, and its decision making should not be cast aside with no meaningful analysis at the pleading stage.

I. The Invention

Rently, a small property management technology company located in California, revolutionized the property-showing process by conceiving of and designing a secure method for showing properties through secure self-entry by prospective buyers or renters. In April 2014 Rently sought patent protection for its invention—a system that coordinated a server, several discrete pieces of software, and a technology-enabled lockbox to provide secure self-entry to properties by utilizing unique, time-limited lockbox codes that could be provided to a visitor and which would be capable of operating the technology-enabled lockbox to provide entry only during the predetermined timeframe. Appx41-63. The claims of Rently’s U.S. Patent No. 9,875,590 (the “’590 patent”) did not issue on any broad concept of real estate showing or entry, or even a moderate portion thereof. Nor were they directed to mere use of a computer to automate showing real estate. Rather, the claims of the ’590 patent are directed to one particular, unconventional method of accomplishing secure automated entry. Specifically, claim 7 of the ’590 patent recites:

A method for providing automated entry to properties, comprising:

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

making the property available as an open house 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 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 the 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;

upon the application receiving and confirming identification information from 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 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,

providing notification, originating from the lock box or automated door lock, to the property manager when the visitor enters the property.

Appx62 at 10:25-58.

The claims as originally drafted slightly prior to this Court's decision in *Alice* were broader in scope than those that ultimately issued. After this Court's decision in *Alice* however, and in light of the significant guidance provided by the USPTO to its examiners on the issue of patent eligibility, the office issued its first rejection on October 11, 2016. There, the pending claims were rejected as directed to non-statutory subject matter under § 101, specifically citing *Alice* as support. Appx154-157. In 2016, and in order to overcome this rejection, Rently added specific limitations that, among other things, required the presence of a "lock box" that could provide access for a specific visitor to a specific property through a ***unique durational code valid only for a specified time period***. Appx173-174; Appx176. Unlike conventional lockboxes that utilize a single code at all times unless manually modified, the method now claimed required application to provide the visitor with an invitation that includes "code information ***that is valid during a specified period of time***." *Id.* With the amendments requiring time-specific coded lock boxes, the examiner agreed that "Applicant's response by virtue of amendments to claims has overcome

the Examiner's rejection under 35 U.S.C. § 101." Appx186. The patent issued on January 23, 2018 with claim 7 in the form set forth above.

This patent did not then sit on a shelf only to be pulled out and broadly asserted. Rather, Rently built a business around its patented method. As of the time of the Amended Complaint, and as alleged, Rently had approximately 35,000 "smart" lockboxes in circulation for self-showings across the United States. Appx406, ¶ 17. These lockboxes, coordinated with servers and used for automated entry as described in the '590 patent, can be configured to issue from 9 to 100 unique durational codes per day and Rently can register up to 160,000 or more renters in its automated entry system each month. Appx406, ¶ 17.

Though initially met with skepticism, Rently's innovation ultimately received notice and praise for "chang[ing] the game when it comes to showing rentals." Appx415, ¶ 43; Appx466-470. And this praise and success has become even more pronounced lately, with Rently's invention recently being featured on CNBC because of the surge in business for the embodiment of its patented method during the global COVID-19 pandemic. *See* <https://www.cnbc.com/video/2020/03/30/virtual-home-tours-spike.html>.

II. Procedural Background

After Tenant Turner, Inc. ("Tenant Turner") copied the commercialized embodiment of Rently's invention, Rently filed suit on July 3, 2018 for infringement of claims 7-16 the '590 patent. Appx90-105. In response, Tenant Turner moved to dismiss the asserted claims under 35

U.S.C. § 101. Appx121-152. On November 1, 2018, over Rently's opposition, the district court granted Tenant Turner's motion and dismissed the complaint. Pet. App. 30a-56a. Rently promptly filed a motion for leave to file an Amended Complaint and to alter or amend the judgment. In that Amended Complaint, Rently set forth numerous factual allegations regarding the unconventional nature of the claimed invention as a whole, the unconventional nature of the "technology enabled" lockbox of the claims (i.e., a lockbox capable of recognizing the recited time-limited codes), and the commercial success and industry response to the offered system. Appx398-508; Appx509-516.

The district court analyzed the asserted claims under the two-step framework established in *Alice*, as interpreted by the Federal Circuit. At the first step, the district court found the claims directed to the abstract idea of "provid[ing] automated entry." Pet. App. 48a; Pet. App. 15a-17a. At Step Two, the district court found that the claims merely required the use of "generic computer components," despite the factual allegations to the contrary in Rently's Amended Complaint. Pet. App. 51a; Pet. App. 27a-28a. Rently alleged, and the claims unquestionably require, a lockbox capable of recognizing time limited codes. Despite this and despite Rently's allegation that such "technology enabled" lockboxes were unconventional, the district court found the words "technology enabled" were not in the claims. The district court seemingly failed to understand that a "conventional" lockbox is not what the claims require, and summarily found "lockboxes" conventional. The court did not address the issue of preemption (or lack thereof).

Rently timely appealed the district court's decision. In its briefing to the Federal Circuit, Rently argued, among other things, that the claims were not preemptive, were not abstract, and provided the "something more" required under *Alice*. Fed. Cir. ECF Nos. 15, 20. Rently further argued that the court was obligated to accept its reasonable construction of the claims at the pleading stage, as well as its factual allegations that the claimed method and the use of such a lockbox was not routine, conventional, or well-known. Fed. Cir. ECF No. 15 at 33-37; Fed. Cir. ECF No. 20 at 8-11, 14-19. As Rently explained, those issues could not be decided adverse to Rently at the pleading stage under applicable precedent, which is all that was required to survive Tenant Turner's motion to dismiss. *Id.* Nonetheless, the Federal Circuit affirmed without comment under Rule 36.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts' Refusal to Address the Issue of Preemption is Contrary to This Court's Decision in *Alice*, and Undermines the Purpose of Section 101.

Certiorari is necessary for this Court to clarify the role preemption plays in a Section 101 analysis, and to ensure lower courts are consistently and properly applying the test as set forth. In this case, and many others like it, the Federal Circuit has moved too far from the underlying theme of *Alice*, and has instead begun applying its own brand of Section 101 jurisprudence in a way that completely ignores the issue of preemption, ultimately invalidating not only preemptive patents like those in *Alice* and *Bilski*, but also legitimate, non-preemptive inventions, and at the pleading stage in conflict with the USPTO's consideration

of the same issues and against the backdrop of substantial secondary consideration evidence powerfully showing this invention was revolutionary and patentable. Where there is no risk of broad preemption of an underlying idea, courts must follow this Court's guidance and find the claims eligible for patent protection. *See Alice*, 573 U.S. at 217. The analysis can then proceed under Sections 102, 103, and 112, which is where Congress intended patentability to be assessed.

A. The issue of preemption is central to the Section 101 analysis.

This Court has described Section 101 as an attempt to strike a balance between protecting inventors and avoiding monopolies over the application of general principles. *See Bilski*, 561 U.S. at 606. When laying out the modern test for patent-eligibility in *Alice*, this Court stated the “concern that drives [the] exclusionary principle” is “one of pre-emption.” *Alice*, 573 U.S. at 216. This Court explained the purpose of Section 101 and its new test for eligibility in no uncertain terms – the goal was to distinguish between patents that claim the building blocks of human ingenuity (i.e., abstract ideas) and those that integrate those ideas into something more, because while patents claiming mere abstract ideas would risk disproportionately tying up the use of those ideas, those integrating the ideas into something more “pose no comparable risk of pre-emption.” *Id.* at 217. There, this Court found claims directed to the fundamental economic concept of intermediated settlement, as applied on a computer, ineligible for patent protection. *Id.* at 219, 223-224. Given the ubiquity of computers at the time, such claims would effectively result in a “monopoliz[ation] [of] the abstract idea itself.” *Id.* In

reaching this conclusion, this Court acknowledged that claims that do not “disproportionately t[ie] up the use of the underlying ideas . . . pose no comparable risk of preemption, and therefore remain [patent] eligible.” *Id.* at 217. Thus, the underlying question is whether the claims at issue would effectively monopolize the fundamental idea itself in the modern world, or if they were merely one application of that idea.

This focus on preemption was not new in *Alice* – it is and always has been central to the eligibility analysis. In 1853, this Court explained that principles “in the abstract” cannot be patented purely because they are just a “motive,” of which “no one can claim . . . an exclusive right.” *Le Roy v. Tatham*, 55 U.S. 156, 175 (1852). Such a patent “would prohibit all other persons from making the same thing by **any means whatsoever.**” *Id.* (emphasis added). More than a century later, this Court once again demonstrated the importance of focusing on preemption. There, this Court explained that a claimed method for curing synthetic rubber was patent-eligible under Section 101 because although it employed a well-known mathematical equation, the claims did not “seek to pre-empt the use of that equation,” but instead only foreclosed “the use of that equation in conjunction with all of the other steps in their claimed process.” *Diamond v. Diehr*, 450 U.S. 175, 187 (1981). Next, in *Bilski*, this Court found a patent claiming the old concept of risk hedging as performed by a computer ineligible, because it “would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea.” *Bilski*, 561 U.S. at 612. Once again, preemption was the focus, and avoiding such preemption the goal – nothing more and nothing less.

Although this Court set forth a two-step analysis to aid lower courts in determining whether claims are directed to patent-eligible subject matter, any application of that test must still be consistent with this Court's rulings, and the focus must therefore remain on the issue of preemption and the *practical effects of the claims as would be applied to the real-world market*. See *Bilski*, 561 U.S. at 612; *Mayo*, 566 U.S. at 72–73 (Claims directed to an abstract idea require an inventive concept to “ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself.”); *Gottschalk v. Benson*, 409 U.S. 63, 72 (1972) (The patent, “in practical effect would be a patent on the algorithm itself.”) Where there is no risk of broad preemption, claims must remain *eligible* for patent protection. *Alice*, 573 U.S. at 217.

B. The Federal Circuit has declared it may ignore the issue of preemption.

Contrary to this Court's instructions, the Federal Circuit has utterly failed, in all but the rarest of circumstances, to analyze whether the claims at issue are broadly preemptive. Instead, it has turned the issue into a circular exercise of hand-waiving, where preemption is only addressed after the fact as added justification for patents that already survived its self-created test, or completely brushed aside when it felt the patents simply did not *seem* patentable. As frequently touted in response to a patent holder's argument that their patent is not preemptive, “when a patent's claims disclose patent ineligible subject matter, preemption concerns are fully addressed and made moot.” See *Smart Sys. Innovations, LLC v. Chicago*

Transit Auth., 873 F.3d 1364, 1375 (Fed. Cir. 2017) (internal quotations omitted); *see also Cleveland Clinic Found. v. True Health Diagnostics LLC*, 859 F.3d 1352, 1363 (Fed. Cir. 2017); *Intellectual Ventures I LLC v. Erie Indem. Co.*, 711 F. App'x 1012, 1019 (Fed. Cir. 2017); *Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017); *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1150 (Fed. Cir. 2016). In each instance, the issue of preemption (or lack thereof) was ultimately ignored.

The Federal Circuit's departure from true preemption analysis appears to have begun with its decision in *Ariosa Diagnostics*. *See Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). There, the Federal Circuit acknowledged "the principle of preemption is the basis for the judicial exceptions to patentability," but noted that "questions on preemption are inherent in and resolved by the § 101 analysis." *Id.* In essence, the Federal Circuit determined it could ignore the issue of preemption if it otherwise believed the patent to be undeserving, despite the fact that preemption itself is the core of the analysis and the entire reason for the exclusionary principal. This circular logic undermines the very import of this Court's decisions on the issue. If preemption is the basis for the exclusionary principal and the focus of the analysis, it cannot be brushed aside simply because a court otherwise believes the patent to be undeserving, nor can it *inherently* be resolved by such a determination. Those are determinations that should be made under Section 103 in accord with *Graham v. John Deere* where the protections against hindsight invalidation are present. And if claims that "pose no comparable risk

of pre-emption” are intended to “remain eligible” for patent protection, failing to conduct such an analysis risks broadening the scope of the exclusionary principal well beyond its original intent. *See Alice* at 217. Where preemption concerns are avoided by patent claims that do not simply recite an abstract idea and state “apply it,” the inquiry should, by definition, move beyond Section 101 and proceed to **patentability** portions of the Act.

While ultimately *Ariosa* may have only stood for the unremarkable idea that “the absence of **complete** preemption does not demonstrate patent eligibility” (*id.* at 1379 (emphasis added), it ushered in a willingness to ignore the issue entirely, including for patents with claims that are “narrow,” are limited to “a specific way” of accomplishing the goal, or do not even preempt the alleged idea in that particular field of use. *See Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1320–31 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1098 (Fed. Cir. 2016). Commentators have taken note, with some observing that the Federal Circuit was merely “paying lip service” to the issue of preemption even before it explicitly rejected the analysis in *Ariosa*. Robert Sachs, #Alicestorm: Patent Invalidations and USPTO Practice After Alice, *Bilski Blog* (Jan, 13, 2015, <https://www.bilskiblog.com/2015/01/alicestorm/>). As aptly stated by the author of *Bilski Blog*, “[b]y removing preemption from the analysis, the court can decide for itself what counts as significant, even though there are no facts in the record to support this conclusion. When preemption no longer matters, a court can reach any patent eligibility outcome it desires, even if there is no risk of preemption, let alone the disproportionate level of risk that is the

Supreme Court’s concern.” *Id.* Yet the Federal Circuit is not uniform in its refusal to address preemption, with current justices calling out the remainder of the court over this very issue. Just recently Judge Stoll noted in dissent in *American Axle* that the Federal Circuit “has strayed too far from the preemption concerns that motivate the judicial exception to patent eligibility.” *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 966 F.3d 1347, 1363 (Fed. Cir. 2020) (Stoll, J. dissenting.) There, the Federal Circuit found ineligible claims that, in Judge Stoll’s opinion, as here, are “far removed from the canonical ineligible claim that ‘simply state[s] the law of nature while adding the words ‘apply it.’” *Id.* Judge Moore has similarly indicated that the Federal Circuit no longer seems concerned with the issue of preemption, which “should be the focus.” *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 967 F.3d 1285, 1316 (Fed. Cir. 2020) (Moore, J., dissenting.)

Meanwhile, the USPTO has gotten things right in this regard, and has properly incorporated this Court’s instructions into its procedures for examining patents under Section 101. Consistent with this Court’s focus on the issue of preemption, the USPTO has issued guidance to its examiners explaining that a claim that recites an abstract idea is not “directed to” the abstract idea “if the claim as a whole integrates the recited judicial exception into a practical application of that exception.” October 2019 Update: Subject Matter Eligibility USPTO, https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf at p. 10. While the USPTO has taken this approach as part of the question of whether the claim is “directed to” an abstract idea, it did so in light of considerations from both Step One and Step Two of

the *Alice* analysis. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-01-07/pdf/FR-2019-01-07.pdf> at p. 53.

Thus, unlike the Federal Circuit, the USPTO has recognized that the focus on preemption underlies the entirety of the Section 101 analysis, and that patent claims which may appear to involve an abstract idea are nonetheless eligible when the practical application of those claims would not preempt the entire idea.

C. The asserted claims of the '590 patent are not broadly preemptive.

The Federal Circuit's decision to ignore the issue of preemption is no mere academic failure – it directly resulted in the invalidation of independent claim 7 of Rently's patent, at the pleading stage no less. Unlike *Alice* or *Bilski*, the asserted claims of the '590 patent do not preempt an entire field or idea, nor do they merely take an abstract idea and recite “apply it” on a computer. The district court found the claims directed to the abstract idea of “automated entry,” but they are much narrower. Pet. App. 48a-49a. Although the claims of the original application may have been slightly broader in scope initially, the examiner rejected those claims under Section 101, and ultimately allowed them to issue only after they were amended to specifically require the use of unique time-dependent entry codes and a technology-enabled lockbox capable of responding to those codes to provide entry only during the predetermined period of time (among other things), such that any preemption concerns were alleviated. (*See supra* at 5.) At this point,

USPTO examiners were well versed in the rule, and knew how to properly apply it. They not only had the benefit of this Court's ruling in *Alice* several years prior, but also significant guidance from the USPTO on the issue of patent eligibility in light of *Alice*. See e.g., June 25, 2014 Preliminary Examination Instructions USPTO, https://www.uspto.gov/sites/default/files/patents/announce/alice_pec_25jun2014.pdf; Rules and Regulations, 79 Fed. Reg. 241 (Dec. 16, 2014), <https://www.govinfo.gov/content/pkg/FR-2014-12-16/pdf/2014-29414.pdf>; May 19, 2016 Subject Matter Eligibility Update USPTO, https://www.uspto.gov/sites/default/files/documents/ieg-may-2016_enfish_memo.pdf; July 14, 2016 Subject Matter Eligibility Update USPTO, https://www.uspto.gov/sites/default/files/documents/memo_rlm-sequenom.pdf.

The '590 patent thus did not issue on the broad concept of gaining "automated entry" as the district court held, but instead was properly limited to a non-preemptive discrete method of accomplishing entry to properties by lockbox recognition of unique time, visitor, and property-specific "automated entry information." Finding otherwise would read out critical limitations of claim 7 that require the method to be accomplished through use of "a lock box or an automated door lock" capable of "facilitate[ing] automated entry to the property" upon the "visitor providing the code information to the lock box or automated door lock at the property within the specified period of time." Appx62, '590 patent at 10:43-44, 51-55.

Rather than follow this Court's instructions, the district court ignored the issue of preemption. Instead, it simply held that the claim was directed to the abstract idea of providing automated entry, and that the claims

contained nothing more than the implementation of that idea on generic computer components. Pet. App. 41a-43a. Absent from this analysis was *any* assessment of whether the claims were narrower than the idea itself, or would otherwise preempt the use of that idea. In fact, the term “preempt” or any variation thereof does not appear once in the district court’s decisions. Pet. App. 3a-56a. And the Federal Circuit’s Rule 36 affirmance fared no better, despite one Justice’s acknowledgment during oral argument that there were other methods of accomplishing automated entry, which Petitioner readily admitted were not covered by the claims. <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-1846.MP3>.

Had either court addressed the issue of preemption and analyzed the practical effects of the claims as applied to the real-world market, it would have been compelled to find the asserted claims eligible. The threshold invalidation at the pleading stage under Section 101 was inappropriate and does a complete disservice to the USPTO’s careful analysis of the same issue. There can be no question that the asserted claims do not preempt the entire concept of automated entry. For example, a prospective renter/buyer could be given a device they later return like a garage door opener, or a real estate agent may have the electronic ability to “buzz” persons into the property, among others. Nor do the claims simply recite the idea of automated entry with instructions to accomplish it with a computer. The concerns of *Alice* and *Bilski* simply do not come into play here, and since there is no comparable risk of preemption, claim 7 of Rently’s patent should have been found patent-eligible, yet it was not.

The Federal Circuit's failure to focus on the issue of preemption has resulted in the invalidation of a legitimate, narrow patent, granted by the USPTO after consideration of Section 101 and *Alice*. The courts here did not "tread carefully," and instead permitted Section 101 to "swallow all of patent law." Guidance is desperately needed to solidify the requirement that preemption must be analyzed as part of a Section 101 inquiry, and that where there is no concern of preemption, the exclusionary principal does not apply.

II. The Application of Section 101 Cannot be Permitted to Subsume the Patentability Analysis of Section 103 Without the Mandated Safeguards.

Certiorari is further warranted to clarify the conventionality inquiry of Step Two of *Alice*. Petitioner asserts that Step Two can properly be resolved as a matter of law *only* where the "facts" are of such historical prevalence that they are the type courts routinely accept as a matter of law. This application of Section 101 is consistent with this Court's decisions in *Alice* and *Bilski*, where the patent claims were directed to undeniably old ideas, merely being applied in the modern era on computers, which were ubiquitous and unquestionably well-known. If, however, it becomes necessary for a court to delve deeper into the factual underpinnings of the prior art to determine how common a particular piece of technology or method was, or whether each individual element was known and to what degree, the patent should survive the eligibility test and instead be analyzed under the separate patentability requirements. At a minimum, if such factual inquiries are deemed permissible as part of a Section 101 analysis, the patent holder must be afforded the same

protections against hindsight bias as with Section 103, else Section 101 would be in conflict with this Court's ruling in *Graham*, and subsume the whole of patent law in contravention of this Court's instructions in *Alice*.

In *Bilski*, this Court instructed that the Federal Circuit may expand on its Section 101 analysis and fill in the bounds it did not reach, but did so with the explicit caveat that any expansion must be consistent with the text of the Patent Act. *See Bilski*, 561 U.S. at 613. This is not what has occurred. Instead, the lack of guidance on how to assess the bounds of patent eligibility resulted in the Federal Circuit declaring that Step Two is both a question of law and fact, but in such a vague manner that courts now use the Section 101 search for an inventive concept as a stand-in for Section 103's inventiveness requirement, but without the fact intensive inquiries required therein. Most notably, this conflation of Sections 101 and 103 has removed a patent owner's protections against hindsight bias by permitting courts to determine patentability (under the guise of patent-eligibility), without any assessment of the level of skill of one in the art, the scope and content of the prior art, or secondary considerations of non-obviousness. Here, this issue is not merely academic because the record was replete with secondary consideration evidence that was completely ignored. Clarification of this issue is desperately needed and concrete rules must be set in place so that patent owners can be assured their patents are being evaluated under a consistent set of rules and in a manner which comports with the Patent Act's distinction between patent *eligibility* and *patentability*.

A. This Court did not address the issue in *Alice* or *Bilski*.

This Court explained in *Alice* that a patent survives Step Two if it contains an “inventive concept” sufficient to “transform” the claimed abstract idea into a patent-eligible application of the idea, and that the mere use of a “conventional” computer is not sufficient. *Alice*, 573 U.S. at 221. The concern there, and in *Bilski*, was that patentees were avoiding the exclusionary principal by simply reciting the use of an abstract idea on a computer or other ubiquitous piece of generic technology, and saying “perform it.” Yet neither case was intended to be the demise of all business method and software patents. *See, e.g., Bilski*, 561 U.S. at 607. Instead, those cases appropriately recognized that in the modern era, the use of computers is so ubiquitous that taking an otherwise ineligible concept and saying “apply it with computer” is not enough to convey patent eligibility. *See Alice*, 573 U.S. at 223; *Bilski*, 561 U.S. at 607. There was no complex fact finding required in either case to determine the ideas were age-old concepts, or that computers were entirely ubiquitous. As a result, this Court did not have occasion to parse the bounds of patent eligibility, explain what constitutes an “inventive concept,” or delineate what may be considered when determining whether a claimed element is conventional when not plainly ubiquitous.

Yet it is equally clear that the search for an inventive concept was not intended to be a stand-in for the Section 103 non-obviousness requirement. This phrase was first used in *Flook*, where this Court explained the discovery of a natural phenomenon “cannot support a patent unless there is some other inventive concept in its application.” *Flook*, 437 U.S. at 594. This Court’s discussion of the

issue, however, began by explaining that the issue of patent eligibility “does not involve the familiar issues of novelty and obviousness that routinely arise under §§ 102 and 103 when the validity of a patent is challenged.” *Id.* at 588. And this has been a consistent theme throughout this Court’s Section 101 jurisprudence. *See, e.g., Diamond v. Diehr*, 450 U.S. at 191 (1981) (Although “it may later be determined that the [patented] process is not deserving of patent protection” due to “novelty under § 102 or nonobviousness under § 103. A rejection on either of these grounds does not affect the determination that respondents’ claims recited subject matter which was eligible for patent protection under § 101.”); *Bilski*, 561 U.S. at 624 (Stevens, J., concurring) (Observing that “[g]iven the many moving parts at work in the Patent Act, there is a risk of merely confirming our preconceived notions of what should be patentable or of seeing common attributes that track ‘the familiar issues of novelty and obviousness’ that arise under other sections of the statute but are not relevant to § 101.”) In *Alice*, this Court reiterated the importance of maintaining separation between the issues of patent eligibility and patentability, explaining that courts should “tread carefully” to avoid the application of Section 101 from subsuming other sections of the Patent Act. *Alice*, 573 U.S. at 217. Put another way, the inventive concept inquiry was clearly not intended to be a substantive assessment of the overall patentability of an invention, but merely a speedbump designed to remove from eligibility only those patents that claim a mere idea implemented with thoroughly ubiquitous technology, such as a computer. Once a patent claims more than that, or is narrower in scope than the idea itself, it should survive and proceed to be analyzed under the remaining sections of the Act.

B. The Federal Circuit’s conflation of Sections 101 and 103 is improper.

Although this Court authorized the Federal Circuit to expand upon the Section 101 analysis to fill in gaps that it did not reach, it did so with the caveat that any expansion must be consistent with the Patent Act, and of course, in line with this Court’s rulings on the issue. *See Bilski*, 561 U.S. at 613. That requires, among other things, maintaining Section 101 as a speedbump test aimed at removing only those patents that claim mere ideas or ideas implemented on ubiquitous technology, as well as maintaining the distinction between patent *eligibility* and *patentability*. It was not an invitation, on a judge-by-judge basis, to decide what subject matter is and is not patentable based on mere whim where the patent claims are not directed to the idea itself. The Federal Circuit has expanded the analysis to such a degree that it subsumes the factual analysis of patentability in Section 103, but without any of the requisite protections against hindsight bias. As a result, Section 101 is no longer accomplishing the goal of *Alice* and *Bilski*, but is being used to invalidate legitimate inventions, including patents that have been thoroughly analyzed by the USPTO in light of this Court’s decisions and the related guidance.

Notably, this is not a new phenomenon – the conflation of Section 101 with other sections of the Patent Act has been prevalent for years. For example, in 2015 Judge Newman of the Federal Circuit explained that a “pragmatic analysis of § 101 is facilitated by considerations analogous to those of §§ 102 and 103.” *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1347 (Fed. Cir. 2015). Similarly, Judge Bryson

recently recognized that the majority was improperly conflating the provisions of the Patent Act. There, in his dissent-in-part Judge Bryson criticized the majority's decision that a particular claim was ineligible, stating:

Contrary to the majority's suggestion, patent eligibility under section 101 does not depend on whether the patentee "invented new networking hardware or software." That determination is one of novelty, not abstractness. While the majority may well be correct about the absence of novel features in the claims of the '747 patent . . . the question "whether a particular invention is novel is 'wholly apart from whether the invention falls into a category of statutory subject matter.'"

Bridge & Post, Inc. v. Verizon Commc'ns, Inc., 778 F. App'x 882, 897 (Fed. Cir. 2019).

While the Federal Circuit rarely admits to conflating the test the way it did in the aforementioned cases, the issue has been sufficiently prevalent that numerous commentators have taken note. In 2017, one commentator observed that "[a]lthough the [Supreme] Court may have intended a distinction between inventiveness under Section 101 and Section 103, the lower court cases superseding *Alice* illustrate that the term has caused patent eligibility and obviousness to merge into one analysis." Lewis, Paxton M. (2017) "The Conflation of Patent Eligibility and Obviousness: Alice's Substitution of Section 103," Utah OnLaw: The Utah Law Review Online Supplement: Vol. 2017: No. 1, Article 1, <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1000&context=onlaw> at p. 31.

Numerous others have cited this as a basis for attempting to alter the text of Section 101 itself during congressional testimony. *See, e.g.*, Testimony of Manny Schecter, <https://www.judiciary.senate.gov/imo/media/doc/Schecter%20Testimony.pdf> (“Subject matter eligibility determinations “should not be conflated with the novelty and non-obviousness concerns of sections 102 and 103.”); Testimony of Michael M. Rosen, <https://www.judiciary.senate.gov/imo/media/doc/Rosen%20Testimony1.pdf> (The current application of Section 101 has “led examiners and courts down the primrose path of conflating novelty, obviousness, and eligibility.”); Testimony of Kimberly Chotkowski, <https://www.judiciary.senate.gov/imo/media/doc/Chotkowski%20Testimony.pdf> (“InterDigital believes removing ‘new’ from 35 USC § 101 is an effective and efficient solution for putting an end to the conflation of 35 USC § 101 with 35 USC §§ 102/103.”) Even former Chief Judge of the Federal Circuit Paul Michel has criticized the court for twisting Section 101 from a “threshold eligibility test” into a “remarkably complex” test encompassing everything from novelty, to enablement, and even obviousness. Judge Paul Michel and John Battaglia, *New Enablement-Like Requirements for 101 Eligibility*, IPWatchDog (Aug. 19, 2020), <https://www.ipwatchdog.com/2020/08/19/new-enablement-like-requirements-101-eligibility-aam-v-neapco-takes-case-law-context-far-part/id=124433/>. As explained by Judge Michel, the Federal Circuit expanded the Section 101 analysis to the point that “‘inventive concept’ began to resemble non-obviousness, increasingly merging section 101 with section 103.” Paul R. Michel, *Patent Eligibility from Mayo to American Axle and Beyond*, FedCircuitBlog (Aug. 3, 2020), <https://fedcircuitblog.com/2020/08/03/guest-post-patent-eligibility-from-mayo-to-american-axle-and-beyond/>.

The problem with this conflation is Sections 101 and 103 serve entirely different purposes. In contrast to the speedbump test of Section 101, Section 103 is a pro-patent provision in that it forbids invalidating patents through hindsight. *Graham*, 383 U.S. at 17–18. It is all too easy to view a solution as straightforward, once one has been exposed to it. As a protection against such hindsight, Section 103 contains requirements that limit the inquiry to what was known at the time, 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 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 patentability 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 it. *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. Even the Federal Circuit has *on occasion* recognized the

difference in the scope of these statutes, but that has not avoided its frequent conflation of the two. *See, e.g., Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018).

Technically, conflating these two statutes would not pose such a dire problem if they were fully conflated – i.e., if Section 103 was being applied in an identical manner, just under a different name. Yet despite frequently importing a quasi-obviousness inquiry into Section 101, the Federal Circuit has, in all but the rarest circumstance, failed to also incorporate the pro-patent aspects of that statute. One rare exception is *Data Engine*, where the Federal Circuit incorporated a Section 103 obviousness test into the Section 101 analysis, yet did so in a way that also incorporated secondary indicia of non-obviousness as support for eligibility. There, the Court focused on the “commercial embodiment” of the claimed invention, how it “revolutionized” the industry, the “state of the art at the time of the invention . . . evidencing the significance of the claimed methods,” and the fact that the “invention was applauded by the industry.” *Data Engine Techs. LLC v. Google LLC*, 906 F.3d 999, 1004-1005, 1008 (Fed. Cir. 2018). Certainly, these are the same factors used to avoid hindsight bias in a Section 103 analysis. And ultimately, the Court found that claim patent-eligible. *Id.* at 1011. While Petitioner does not believe such a conflation of Sections 101 and 103 is proper, guidance is needed on this issue to ensure that *if* the Section 101 analysis is deemed to involve a factual inquiry into how well known or routine a claim element was, the requisite secondary indicia are also considered, as they were in *Data Engine*, to “guard against slipping into use of hindsight” when essentially deciding the patentability of an invention. *See Graham*, 383 U.S. at 36.

C. The Courts failed to properly analyze the eligibility of Rently's patent.

Unfortunately for Petitioner, when the Federal Circuit conflated the issues of patent *eligibility* and *patentability* in this case, it did not go as far as in *Data Engine*, and failed to also incorporate Section 103's protections against hindsight bias. Had it either ended the analysis when it became clear that the claimed technology was not ubiquitous (as it should have), or conducted a complete factual analysis including protections against hindsight bias, it would have been compelled to find Rently's patent eligible, as did the USPTO.

Instead, both courts involved appear to have simply determined that the claimed invention did not *feel* inventive enough. Specifically, in finding the asserted claims ineligible, the district court stated the claims merely require "generic computer components," and based its decision on its own understanding of non-automatic lockboxes from decades ago. Appx10; Appx396. Questioning by the Federal Circuit indicated a similar finger-to-the-wind test of patentability overall rather than a focus on eligibility, with one justice injecting a belief that Rently did not invent smart lockboxes. <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-1846.MP3>. But those inquiries are the domain of novelty and obviousness, not patent-eligibility, and certainly could not be decided contrary to Rently at the pleading stage. There was nothing in the record regarding who invented technology-enabled lockboxes capable of responding to unique time limited codes, to what degree they were common or ubiquitous, or even if they existed, what changes were required to make them

work in the claimed invention. Nor was there anything in the record demonstrating that the use of such a lockbox to permit automated entry to a predetermined location at a predetermined time was routine or conventional in the real estate industry. In fact, the record indicated the exact opposite. Rently's Amended Complaint contained numerous plausible factual allegations that this method and the components utilized therein were neither routine, conventional, nor well-known. Indeed, Rently alleged a generic lockbox could not enable "automated entry" into a property because it could not recognize "automated entry information." As a result, it could not perform the very specific filtering function "to facilitate automated entry to the property." Appx409.

Accepting these factual allegations and Rently's proposed construction of the claims, as the courts were obligated, is all that was required for Rently to survive a motion to dismiss. *See Berkheimer*, 881 F.3d 1360; *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019). This, by definition, should have moved the case beyond the speedbump of Section 101, and into the realm of Section 103, where Rently would have been afforded the requisite protections against hindsight bias. No such analysis was conducted by the District Court, however, nor apparently by the Federal Circuit despite allegations describing how the general concept of automated entry faced widespread skepticism in the industry, how the invention overcame these concerns and ultimately received significant commercial success and praise for its unique invention, and as a result, was copied by others in the industry. (*See supra* at 5-6.)

These are all relevant considerations pointing away from Rently's invention being obvious, demonstrating that the claimed invention is significantly more than the alleged abstract idea itself, and which would have been considered under Section 103. If such factual inquiries are indeed part of the Step Two analysis, then they should have been considered, and the decision could not be made contrary to Rently at the pleading stage. And if the question is purely a legal one, then once there was a basic showing that the technology involved was not so ubiquitous that it may be found conventional as a matter of law, the analysis should have moved to the separate issue of patentability under Sections 102 and 103.

III. The Expansion of Section 101 Disproportionately Hurts Small Businesses.

Broadening the scope of Section 101 beyond its original intentions, whether by ignoring the issue of preemption or conflating eligibility with patentability, is not likely to affect all equally. Rather, a study conducted by Stanford law school professors of every District Court and Federal Circuit decision on the issue of patent eligibility from mid-2014 to mid-2019 has shown that Section 101 disproportionately affects solo-inventors and inventor-led businesses, like Rently. The researchers determined that “the entities most likely to lose their patents at this stage are not patent trolls but individual inventors and inventor-started companies.” Mark A. Lemley and Samantha Zyontz, *Does Alice Target Patent Trolls?*, SSRN (Mar. 26, 2020), <https://ssrn.com/abstract=3561252> at p. 2 (“Lemley”). According to the study, patents were invalidated in 57.4% of “product company decisions,” 63.8% of NPE decisions, and 73.4% of “individual inventor

and inventor started company decisions.” Lemley at 35. And the story “gets even worse for individual inventors” when removing cases that merely rejected a Section 101 challenge as premature – individual inventors’ patents survived at less than half the rate of NPE’s and larger corporations – succeeding only 13.8% of the time. Lemley at 35-36. Certainly, some of those patents deserved to be invalidated, but every time a legitimate invention is mistakenly invalidated under Section 101, it is more likely the Rentlys of the country that are harmed. As one industry organization recently observed, the Federal Circuit’s “dysfunction has been especially harmful to small businesses and startups.” Eileen McDermott, Judge Paul Michel to Patent Masters Attendees: It’s Time to Wake Up to Preserve Our Patent System, IPWatchDog (Mar. 16, 2020), <https://www.ipwatchdog.com/2020/03/16/judge-paul-michel-time-wake-preserve-patent-system/id=119874/>.

To make matters worse, small businesses need a properly functioning patent system the most. While most large corporations can afford numerous patents over every aspect of a product or method, and are therefore somewhat protected from an improper invalidation, smaller companies with limited funds may be more likely to seek out just a single patent. When that patent is invalidated, the small company loses its entire protection. Large companies are also more likely to control sufficient market power to protect their business if a patent is mistakenly invalidated. If a company such as Zillow, a dominant player in the online real estate industry, were to lose a patent covering a unique feature of its service, it is unlikely that another company could extract any meaningful number of its customers simply by copying that feature.

Zillow's market share and name recognition are all the protection it needs. In contrast, if a small company such as Rently were to lose a patent over the feature that makes it unique, the Zillows of the world could implement that same feature and in short order steal all of Rently's well-earned goodwill and customer base purely because of the scope of their brand recognition. Studies have also shown that patent invalidation disproportionately affects the future research and innovation of small entities as compared to large corporations. Alberto Galasso and Mark Schankerman, Patent rights and innovation by small and large firms, VOX CEPR Policy Portal (Jan. 7, 2016), <https://voxeu.org/article/patent-rights-and-innovation-small-and-large-firms>. It is therefore unsurprising that trade and policy associations representing large corporations, including Amazon, Facebook, Google, and Microsoft frequently oppose any attempt to clarify or modify the current approach to Section 101. *See, e.g.*, Error 404: Alice And Section 101 Of The Patent Act, Internet Association (May 1, 2017), <https://internetassociation.org/blog/160204034428-error-404-alice-and-section-101-of-the-patent-act/#>; Testimony of Dr. William Jenks, <https://www.judiciary.senate.gov/imo/media/doc/Jenks%20Testimony.pdf>.

When the patent system fails and legitimate rights are revoked, it fails the small businesses that need the system the most, to the benefit of large corporations. It is therefore critical that the Court grant this Petition, complete the work it began with *Alice*, and clarify the bounds of the exclusionary principal of Section 101.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1a

**APPENDIX A — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT, FILED MARCH 9, 2020**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2019-1846

CONSUMER 2.0, INC., DBA RENTLY,

Plaintiff-Appellant,

v.

TENANT TURNER, INC.,

Defendant-Appellee.

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

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.

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Appendix A

ENTERED BY ORDER OF THE COURT

March 9, 2020
Date

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

**APPENDIX B — OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA, NORFOLK
DIVISION, FILED APRIL 4, 2019**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL NO. 2:18cv355

CONSUMER 2.0, INC. D/B/A RENTLY,

Plaintiff,

v.

TENANT TURNER, INC.,

Defendant.

April 4, 2019, Decided
April 4, 2019, Filed

Judge: Robert G. Doumar, Senior United States
District Judge.

OPINION AND ORDER

This matter comes before the Court on a Motion for Leave to File Amended Complaint (“Motion for Leave”) filed by Consumer 2.0, Inc., d/b/a Rently (“Plaintiff”), ECF No. 24, as well as Plaintiff’s Motion to Alter or Amend Judgment, ECF No. 26. The issue before the Court is

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whether Plaintiff should be granted post-judgment leave to file its Proposed Amended Complaint, ECF No. 24-1, Ex. A. If so, the Court must grant Plaintiff's Motion to Alter or Amend, ECF No. 26, and vacate the judgment entered on November 1, 2018. ECF No. 23. For the reasons set forth below, the Court **DENIES** both of Plaintiff's motions. ECF Nos. 24, 26.

I. BACKGROUND**A. PROCEDURAL HISTORY**

On July 3, 2018, Plaintiff filed a Complaint against Tenant Turner, Inc. ("Defendant") alleging patent infringement of the '590 patent, "Automated Entry." ECF No. 1. On August 7, 2018, Defendant filed its Motion to Dismiss along with its Memorandum in Support, to which Plaintiff filed its Response in Opposition ("Resp.") on August 28, 2018. ECF Nos. 12, 13, 16. Defendant filed its Reply to Plaintiff's Opposition on September 4, 2018 ("Reply"). ECF No. 17. The parties appeared before the Court for a hearing on such matter on October 15, 2018. ECF No. 20.

On November 1, 2018, the Court entered an Order granting Defendant's Motion to Dismiss without prejudice, holding that the asserted claims of the '590 patent at issue are invalid because they are directed to an abstract idea and thus ineligible for patent protection under 35 U.S.C. § 101. See Opinion and Order, ECF No. 22. Applying the analysis for determining patent eligibility set forth by the Supreme Court in *Alice Corp. Pty. v. CLS Bank*

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International, 573 U.S. 208, 134 S. Ct. 2347, 2354, 189 L. Ed. 2d 296 (2014), the Court held that the '590 patent is merely an abstract idea; the elements of the claim, considered both individually and as a combination, do not add anything inventive which would transform the claim into a patent-eligible concept; and there were no factual issues precluding the Court from dismissing the matter without prejudice. ECF No. 22 at 6-19.

On November 29, 2018, Plaintiff filed the instant Motion for Leave along with its Memorandum in Support, ECF Nos. 24 & 25, in addition to its Motion to Alter or Amend and Memorandum in Support, ECF Nos. 26 & 27. Attached to its Motion for Leave, Plaintiff filed its Proposed Amended Complaint, which contains thirty-five new paragraphs. *See* Proposed Am. Compl., ECF No. 24-1, Ex. A, ¶¶ 9-44.

On December 12, 2018, Defendant filed its Opposition to Motion for Leave (“Opposition to Motion for Leave”), ECF No. 28, and its Opposition to Motion to Alter or Amend (“Opposition to Motion to Alter or Amend”), ECF No. 29. Plaintiff filed its Reply to Plaintiff’s Opposition to Motion for Leave (“Plaintiff’s Reply”), ECF No. 30, on December 18, 2018. The Court held a hearing on these matters on March 26, 2019. ECF No. 33. These matters are now ripe for adjudication.

B. PATENT-IN-SUIT

As in its initial Complaint, Plaintiff alleges in its Proposed Amended Complaint that Defendant infringes

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claims 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the '590 patent. See Compl., ECF No. ¶¶ 17-35; Proposed Am. Compl., ECF No. 24-1, Ex. A ¶¶ 45-76. According to the '590 patent's description, 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." '590 patent, ECF No. 24-2, Ex. 1 at 19. The patent identifies several entities that perform the patent's method including (1) a lockbox or automated door lock, (2) a server, (3) an application interface, and (4) a portable device. See '590 patent, ECF No. 24-2, Ex. 1.

The process of "automated entry" is set forth in Claim 7 of the patent, which is representative:

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

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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.

'590 patent, ECF No. 24-2, Ex. I at 23. As noted in the Court's prior Order, Claim 7 is the only independent claim asserted in the Complaint. ECF No. 22 at 3. The dependent claims (8-16) build on this basic framework. *Id.*

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The patent-at-issue was initially rejected by the patent examiner 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.” ECF No. 13-1, Ex. 2 at 4. The patent examiner specifically stated that claims 1, 6, and 12, which Plaintiff notes later became representative Claim 7, were rejected because they were “directed to an abstract idea.” *Id.*; Resp., ECF No. 16 at 18. In response to the initial rejection, Claim 12 was amended, 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 code information to the lock box or automated door lock within the specified period of time.” ECF No. 13-3, Ex. 3 at 3. The applicant also argued that these additions consisted of “physical (not abstract) action[s]”. Resp., ECF No. 16 at 19 (citing ECF No. 16-3, Exhibit C at 2). 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.” ECF No. 13-4, Ex. 4 at 4.

II. STANDARD OF REVIEW

The Fourth Circuit has set forth the procedure for reviewing a post judgment motion for leave to amend under Federal Rule of Civil Procedure 15(a), holding that a “district court may not grant the post judgment motion unless the judgment is vacated pursuant to” Federal Rule of Civil Procedure 59(e). *Laber v. Harvey*, 438 F.3d 404, 427

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(4th Cir. 2005). However, “[t]o determine whether vacatur is warranted,” “the court need not concern itself with” the legal standard for Rule 59(e). *Hart v. Hanover County Sch. Bd.*, 495 F. App’x 314, 315 (4th Cir. 2012) (internal quotations omitted). Instead, “a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered — for prejudice, bad faith, or futility.” *Laber*, 438 F.3d at 427.

Therefore, this Court’s considers whether the Motion for Leave to File Amended Complaint should be granted under the same standard as if such motion was made before judgment was entered. Under this standard, the Motion for Leave should be denied if “the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Hart*, 495 F. App’x at 315 (citing Fed. R. Civ. P. 15(a)) (internal quotations omitted).¹

The Court must examine the issue of futility under the lenient standard of Rule 15(a), freely giving leave to amend “when justice so requires.” *AdvanFort Co. v. Intl Registries, Inc.*, No. 1:15-ev-220, 2015 U.S. Dist. LEXIS 90912, 2015 WL 4254988, at *5 (E.D. Va. July 13, 2015). However, as Plaintiff notes, “[a]n amendment is futile if the amended claim would fail to survive a motion to

1. Plaintiff argues that granting the Motion to Amend would not prejudice the Defendant, nor was the Motion to Amend made in bad faith. ECF No. 25 at 2-3. The Court agrees that issues of “prejudice” and “bad faith” are not apparent here. As such, the entirety of the Court’s analysis hinges on whether allowing amendment to the complaint would be futile.

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dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).” ECF No. 25 at 4 (citing *Hall v. Greystar Mgmt. Servs., L.P.*, 637 F. App’x 93, 97 (4th Cir. 2016)); *see also Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995). As such, the Court must apply the same standard of legal sufficiency as is applied under Rule 12(b)(6). Therefore, the Court applies the same analysis here as it did in its Order granting Defendant’s Motion to Dismiss, ECF No. 22, except that the Court will now consider the thirty-five new paragraphs in the Proposed Amended Complaint, ECF No. 24-1.

As noted in this Court’s prior Order, ECF No. 22, the standard for determining whether a complaint is sufficient to survive a 12(b)(6) Motion to Dismiss is as follows:

To survive a motion to dismiss, the facts alleged in the complaint “must be enough to raise a right to relief above a speculative level” and must be sufficient “to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2005). Where the claim is one of patent infringement, there must be “sufficient factual allegations and plausibility of those allegations” to survive a motion to dismiss. *Bel IP LLC v. BoomerangIt Inc.*, No. 2:11cv188, 2011 U.S. Dist. LEXIS 164358, 2011 WL 13228482, at *5 (E.D. Va. Sept 27, 2011). In resolving a Rule 12(b)(6) motion, the court must assume the truth of all facts alleged in the complaint and construe the factual allegations

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in favor of the non-moving party. *Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 222 (4th Cir. 2009). But the court is not bound by the complaint's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

ECF No. 22 at 4. Further, while the Court must “accept all of the allegations contained in a complaint as true, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action - supported by mere conclusory statements - do not suffice.” *Hall*, 637 F. App'x 93 at 97.

III. ARGUMENTS AND PRIOR OPINION

Plaintiff argues that allowing the Proposed Amended Complaint would not be futile, representing that the Proposed Amended Complaint contains allegations that, taken as true and viewed in favor of the Plaintiff, “would directly affect this Court's patentability analysis.” ECF No. 25 at 2, 4. At minimum, Plaintiff argues, these allegations “raise factual disputes underlying the § 101 analysis.” *Id.*

First, Plaintiff argues, as it did at the motion to dismiss stage, that the asserted claims of the '590 patent are not abstract. ECF No. 25 at 5. Second, Plaintiff argues that the newly asserted allegations in the Proposed Amended Complaint “impact whether the terms ‘automated entry,’ ‘automated entry information,’ and/or ‘identification information’ constitute an inventive

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concept, along or in combination with other elements, sufficient to survive an *Alice/Mayo* analysis.” ECF No. 25 at 2, 25. Finally, Plaintiff argues that “the asserted claims refer to a method or system of providing automated entry to properties that is not routine, conventional, or well understood.” ECF No. 25 at 17 (internal quotations omitted).

As Defendant notes, “[t]he Court has already considered — and rejected — the majority of [Plaintiff’s] arguments” in its initial motion to dismiss analysis. ECF No. 28 at 2. Indeed, in comparing Plaintiff’s Memorandum in Support of Motion for Leave to File Amended Complaint, ECF No. 25, with Plaintiff’s Opposition to Defendant’s Motion to Dismiss, ECF No. 16, many of the arguments here are substantially similar, if not identical to those previously asserted by Plaintiff. *Compare* ECF No. 25 at 5-30, *with* ECF No. 16 at 10-28 (both containing the following arguments: the asserted claims are not abstract, the prosecution history mitigates against *Alice*, Claim 7 is rooted in technology, the human mind alone could not perform Claim 7, Claim 7 purports to improve a technological process, the asserted claims describe an inventive concept, this Court’s *Asghari* decision does not control, and factual issues preclude a finding of ineligibility).

This Court rejected these same arguments in its extensive Opinion and Order entered November 1, 2018. ECF No. 22. First, the Court found that the patent was ineligible under step one of the *Alice* test for determining patent eligibility, because the “claims at issue are directed

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to an abstract idea.” ECF No. 22 at 9; *see also Alice*, 134 S. Ct. at 2355-56. Distilled to their essence, “the claims use generic computing devices and techniques to provide automated entry to a property without human interaction.” *Id.* The Court found that “[t]here is nothing in the language of the [] elements” of Claim 7 “indicating that the claims at issue here are directed to any specific improvement in computer functionality or capabilities.” *Id.* at 11. Rather, the claims at issue “merely coordinate pre-existing and generic computer components to implement an abstract idea.” *Id.* at 11-12. They “simply add[] the coordination of these ‘conventional computer components’ to a ‘well-known business practice.’” *Id.* at 10-11 (quoting *Enfish LLC v. Microsoft Corp.*, 822 F.3d 1327, 1338 (Fed. Cir. 2016)).

The Court also found that the second step of the *Alice* test was unsatisfied because “the elements of the claim at issue, both individually and as an ordered combination, do not add anything inventive which would transform the claim into a patent-eligible concept.” *Id.* at 17. The claim limitations did not “involve more than performance of well-understood, routine, [and] conventional activities previously known to the industry.” *Id.* at 14 (quoting *Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1367 (Fed. Cir. 2018)). Further, the claims at issue did not “purport to improve the functionality of a computer or overcome existing technology-based problems.” *Id.* at 15.

Finally, the Court determined that there were no factual questions precluding a finding of patent ineligibility. ECF No. 22 at 17-19. First, the Court found that it was

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“not evident from the ’590 patent specifications that there is any inventive feature used in an unconventional manner[,]” nor was there anything “in the pleadings to fill this gap in the specifications.” ECF No. 22 at 18. “The only alleged unconventional features of Plaintiff’s claims [we]re that the ‘elements set forth in the ’590 patent both individually and in combination represent a novel approach for enabling an invited visitor to self-register and self-access a property’ through the ‘coordination of operation of a server, technology-enabled lock box, application interface, and mobile device.” ECF No. 22 at 19 (citing Resp., ECF No. 16 at 24). The Court found that “this simply restates what we have already determined is an abstract idea and describes the implementation of the abstract idea through conventional computer components.” *Id.* (internal quotations omitted).

Nevertheless, the Court has considered each of Plaintiff’s arguments anew in light of the allegations set forth in the Proposed Amended Complaint containing Plaintiff’s original allegations in addition to thirty-five new paragraphs.

IV. ANALYSIS**A. THE PROPOSED AMENDED COMPLAINT DOES NOT INCLUDE CONCRETE FACTUAL ALLEGATIONS THAT ALTER THE COURT’S ANALYSIS UNDER *ALICE* STEP ONE.**

The claim language of the patent itself must disclose the nature and extent of the patent. Step one of *Alice*

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requires the Court to determine whether the claims of the '590 patent describe a patent-ineligible concept: laws of nature, natural phenomena, or abstract ideas. *Alice*, 134 S. Ct. at 2355. Plaintiff correctly notes that such “inquiry must focus on the language of the asserted claims themselves.” ECF No. 25 at 5 (quoting *Synopsys, Inc. v. Mentor Graphics Corp.*, 839 F.3d 1138, 1149 (Fed. Cir. 2016); see also *Accenture Global Servs. v. Guidewire Software, Inc.*, 728 F.3d 1336, 1345 (Fed. Cir. 2013) (admonishing that “the important inquiry for a § 101 analysis is to look at the claim.”); *Voip-Pal.Com, Inc., v. Apple Inc.*, 375 F. Supp. 3d 1110, 2019 WL 1332762, at *25 (N.D. Cal. 2019) (“*Alice*’s step one inquiry must focus on the claim language.”). Therefore, this Court focuses its analysis on the claim language, as it did at the motion to dismiss stage.

In its Order entered on November 1, 2018, the Court thoroughly analyzed each element of Claim 7 of the '590 patent, individually and as an ordered combination, and found that the patent is directed to an abstract idea. See ECF No. 22 at 6-14. The Court noted that “distilled to its essence,” the '590 patent “use[s] generic computing devices and techniques to provide automated entry to a property without human interaction.” ECF No. 22 at 9. Despite the electronic setting, the Court found that the '590 patent is “‘directed to a common method’ (automation) ‘for solving an old problem’ (the problem of how to provide an invited visitor entry to a property for a specified period of time).” *Id.* at 10 (citing *Asghari-Kamrani v. United Servs. Auto. Ass’n*, No. 2:15cv478, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *4 (E.D. Va. July 5, 2016)).

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Plaintiff's Proposed Amended Complaint does nothing to change the Court's analysis at *Alice* step one. As noted, the majority of Plaintiff's argument in support of its position that the asserted claims of the '590 patent are not abstract are merely restated from Plaintiff's arguments at the original motion to dismiss stage. *Compare* ECF No. 25 at 4-24, *with* ECF No. 16 at 16-26. To the extent Plaintiff asserts additional arguments in its Memorandum in Support of its Motion for Leave to File Amended Complaint, ECF No. 25, such arguments do not change the plain language of Claim 7, which sets forth the '590 patent. Neither do the thirty-five additional paragraphs Plaintiff has inserted into its Proposed Amended Complaint affect step one or Claim 7. *See* Proposed Am. Compl., ECF No. 24-1, Ex. A, ¶¶ 9-44.

For example, Plaintiff supplements its previously asserted argument that the '590 patent is directed to an improvement in a technological process and asserts that the steps of Claim 7 are directed to the improved functioning of a technology-enabled lockbox. ECF No. 25 at 13-18.

Unfortunately for the Plaintiff, such improvements are simply not captured in the language of Claim 7, which must disclose the nature and extent of the patent. As the Court already noted, "[t]here is nothing in the language" of Claim 7 "indicating that the claim at issue here is directed to any specific improvement in computer functionality or capabilities." ECF No. 22 at 11. Instead, the elements of Claim 7 and the '590 patent specifications are "merely directed to the implementation of the abstract

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idea of providing automated entry and making properties available for viewing to invited visitors through generic computer components, such as an ‘application interface,’ a “server,” and “a computing system.” ECF No. 22 at 12-11 (citing ’590 patent, ECF No. 1-1, Ex. 1 at 23). This Court has held that even “very detailed software implementation guidelines in the patent specifications will not save systems claims that only contain[] generalized software components arranged to implement an abstract concept on a computer.” *Va. Innovation Scis., Inc., v. Amazon.com*, 227 F. Supp. 3d 582, 594 (E.D. Va. 2017) (internal quotations omitted). Similarly, “attorney argument in the complaint cannot save the claims because the purported improvements have not been captured in the claim language.” *Voip-Pal.com*, 375 F. Supp. 3d 1110, 2019 WL 1332762, at *25.

The Court incorporates its previous findings in this case that based on the plain language of representative Claim 7 and the specifications of the ’590 patent, the ’590 patent as a whole is directed to the abstract idea of providing automated entry. As such, allowing the Proposed Amended Complaint would be futile insofar as it would not survive a motion to dismiss for patent ineligibility under step one of *Alice*. The Court proceeds to determine whether the allegations in the Proposed Amended Complaint sufficiently “fill the gap,” such that the Proposed Amended Complaint would survive a motion to dismiss under step two of *Alice*.

*Appendix B***B. THE PROPOSED AMENDED COMPLAINT DOES NOT INCLUDE CONCRETE FACTUAL ALLEGATIONS SUFFICIENT TO ALTER THE COURT’S ANALYSIS UNDER ALICE STEP TWO.**

The second step of *Alice* is described as the “search for an ‘inventive concept.’” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 72-73, 132 S. Ct. 1289, 182 L. Ed. 2d 321 (2012)). This step requires the Court to “consider 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” and “ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 72-73, 78-79). This step is only satisfied if “the claim limitations involve more than performance of well-understood, routine, [and] conventional activities previously known to the industry.” *Berkheimer v. HP, Inc.*, 881 F.3d 1360,1367 (Fed. Cir. 2018) (internal quotations omitted).

This Court previously determined that the elements of Claim 7, “both individually and as an ordered combination, do not add anything inventive which would transform the claim into a patent-eligible concept.” ECF No. 22 at 17. It found that “[t]he functions performed at each . . . step[] [are] purely ‘conventional’ and ‘do[] no more than require [] generic computer’ components to perform ‘generic computer functions.’” *Id.* at 16-17 (quoting *Asghari*, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *5). It

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further determined that factual issues did not preclude a finding of patent ineligibility because the alleged unconventional features of the '590 patent “‘simply restate[d] what we have already determined is an abstract idea’ and described the implementation of the abstract idea through conventional computer components.” *Id.* at 19.

Plaintiff’s main argument is that factual questions exist precluding dismissal at the Rule 12 stage under *Alice* step two, Plaintiff cites heavily to *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121 (Fed. Cir. 2018). In *Aatrix*, the “district court denied, without explanation, [plaintiff’s] motion to amend its complaint[,]” which was filed after the court found the claims to be patent-ineligible under *Alice/Mayo*. *Id.* at 1126. The Federal Circuit reversed the district court’s denial of the motion to amend. *Id.* at 1123. The Federal Circuit found that filing of the proposed amended complaint would not have been futile because such amended complaint contained “numerous allegations related to the inventive concepts present in the claimed form file technology[,]” in addition to concrete allegations “that individual elements and the claimed combination are not well-understood, routine, or conventional activity.” *Aatrix*, 882 F.3d at 1127-28. There, the court noted that the amended complaint contained “concrete allegations regarding the claimed combination’s improvement to the functioning of the computer.” *Id.* at 1128. The proposed amended complaint “describe[d] the development of the patented invention, including the problems present in prior art” and specifically alleged “improvements and problems solved by the . . . patented inventions.” *Id.* at 1127-28 (the allegations claimed “that

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the data file [wa]s directed to an improvement in importing data from third-party software applications.”).

As Plaintiff notes, allegations in a complaint may “fill the gap” with facts concerning how the elements or combination of elements set forth in a claim improve upon the prior art and are not routine, conventional or well-understood. ECF No. 25 at 36 (citing *Aatrix*, 882 F.3d at 1128). However, in *TriPlay, Inc. v. WhatsApp, Inc.*, the Court granted a motion to dismiss where it was not evident from the claims and specifications that there was “any inventive feature...used in an unconventional matter” and because the “gap in the specification [wa]s not filled by [Plaintiff’s] pleadings.” No. 13-1703-LPS-CJB, 2018 U.S. Dist. LEXIS 49953, 2018 WL 1479027, at *6, 8-9, 20 (D. Del. Mar. 27, 2018).

Plaintiff argues that the Proposed Amended Complaint sets forth allegations that the claimed combination improved the functionality of a technology-enabled lockbox. Pls. Reply, ECF No. 30 at 7 (citing Proposed Am. Compl., ECF No. 24-1, Ex. A ¶¶ 25-27). Plaintiff also argues that the Proposed Amended Complaint contains concrete allegations that the “claimed combination of a server with a technology-enabled lockbox and a portable device via an application interface was not well-understood, routine, or conventional in the rental and real estate industries at the time Plaintiff filed the ’590 patent.” *Id.* at 3, 7 (citing Proposed Am. Compl., ECF No. 24-1, Ex. A ¶¶ 9, 14-23, 25-28, 34-44).

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The Court is unpersuaded by Plaintiff’s arguments. Although Plaintiff has inserted thirty-five new paragraphs into its Proposed Amended Complaint, many of the new allegations are conclusory and boilerplate. *See, e.g.*, Proposed Am. Compl., ECF No. 24-1, Ex. A ¶ 24 (“ . . . Claim 7 of the ’590 patent inherently performs steps that are specific to the use of computers and a technological process...”); *Id.* at ¶ 27 (“[t]he method of Claim 7 . . . improves both the function of a technology-enabled lockbox as well as the technological process . . .”); *Id.* at ¶ 33 (“Automated entry’ by definition could not itself be conventional, routine, or well understood.”); *Id.* at ¶ 49 (wherein Plaintiff has simply added the magic words “technology-enabled” before the word “lockbox”). Such conclusory and boilerplate allegations are insufficient to alter this Court’s prior analysis. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (“[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations”); *see also Ipa Techs, Inc. v. Amazon.com, Inc.*, 352 F. Supp. 3d 335, 349 (D. Del. 2019) (finding that “[t]he majority of Plaintiff’s new . . . allegations d[id] not alter the *Alice* Step Two analysis” because the court was “not required to treat boilerplate allegations that the claims are directed to new computer functionality and improvements to technological processes as true where those allegations contradict the language of the claims and specification.”).

Accepting as true the Proposed Amended Complaint’s *factual* allegations and construing such allegations in favor of the Plaintiff, the Court finds that such alleged facts are also insufficient to alter the Court’s analysis

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under step two of *Alice* for the reasons stated below. For these reasons, allowing the Proposed Amended Complaint would be futile insofar as it would not survive a motion to dismiss for patent ineligibility under step two of *Alice*.

1. THE PROPOSED AMENDED COMPLAINT DOES NOT SET FORTH CONCRETE FACTUAL ALLEGATIONS THAT THE '590 PATENT IS DIRECTED TO AN IMPROVEMENT IN COMPUTER FUNCTIONALITY OR A TECHNOLOGY-BASED PROBLEM.

Plaintiff argues that here, as in *Aatrix*, “[t]here are . . . concrete allegations regarding the claimed combination’s improvement to the functioning of the computer.” ECF No. 25 at 30-31 (quoting *Aatrix*, 882 F.3d at 1128); *see also* Proposed Am. Compl., ECF No. 24-1, Ex. A ¶ 27 (alleging that Claim 7 “improves both the function of a technology-enabled lockbox as well as the technological process for showing a property to a visitor.”).

In *Aatrix*, the amended complaint alleged that the “invention increased the efficiencies of computers processing tax forms” and “saved storage space both in the users’ computers’ RAM . . . and hard disk.” 882 F.3d at 1127 (internal quotations omitted). The complaint further “allege[d] that the claimed software use[d] less memory, result[ed] in faster processing speed, and reduce[ed] the risk of thrashing which makes the computer process forms more efficiently.” *Id.* Such concrete allegations were sufficient to “suggest that the claimed invention [wa]s directed to an improvement in the computer technology itself and not directed to generic components performing conventional activities.” *Id.*

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Plaintiff also cites to *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC* in support of its argument that the '590 patent is “directed to a specific improvement in how a functionally-improved digital lockbox can selectively ‘filter in’ entry for visitors having unique ‘automated entry information’ while ‘filtering out’ entry to those that don’t.” ECF No. 25 at 14, 25-28 (citing *Bascom*, 827 F.3d 1341 (Fed. Cir. 2016)); *see also* Proposed Am. Compl., ECF No. 24-1, Ex. A ¶ 26 (alleging that automated entry information “associates a request to access a particular property with a particular visitor at a specific time, which is tantamount to being able to ‘filter out’ requests by other visitors”). In *Bascom*, the Court found that the patent-at-issue was “inventive” where the “*the patent describe[d]* how its particular arrangement of elements [wa]s a technical improvement over prior art ways of filtering . . . content.” 827 F.3d at 1350 (emphasis added).

The Court has already distinguished this case from *Bascom*. ECF No. 22 at 14-17. Plaintiff now supplements is previously asserted arguments with boilerplate language asserting that the '590 patent “inherently performs steps that are specific to the use of computers” and “improves both the function of a technology-enabled lockbox as well as the technological process for showing a property to a visitor.” *See* Proposed Am. Compl., ECF No. 24-1, Ex. A ¶¶ 22-27. Plaintiff also now describes the lockbox’s “filtering function.” *Id.* at ¶ 26. To the extent Plaintiff has included new facts such as “the server database can be configured to issue between 9 to 100 unique valid entry codes per day,” the Court has thoroughly analyzed such facts and finds its analysis unchanged. *See* Proposed Am.

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Compl., ECF No. 24-1, Ex. A ¶¶ 22-27. Further, unlike the claim language at issue in *Bascom*, the Court finds nothing in the claim language at issue specific to “filtering.” 827 F.3d at 1345-46. Plaintiff simply alleges magic words that are not captured in the claim language.

Despite the boilerplate allegations set forth in Plaintiff’s Proposed Amended Complaint, the ’590 patent simply “do[es] not purport to improve the functionality of a computer or overcome existing technology-based problems.” ECF No. 22 at 14-17. Unlike the allegations in *Aatrix*, which demonstrated that the claimed invention was “directed to an improvement in the computer technology itself,” the Proposed Amended Complaint here offers nothing of substance to change the Court’s prior analysis that the claim at issue here is not “directed to any specific improvement in computer functionality or capabilities,” but consists instead of the conventional arrangement of generic components. ECF No. 22 at 17; *Aatrix*, 882 F.3d at 1127; *see also Secured Mail Sols., LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 913 (Fed. Cir. 2017) (“a court need not accept as true allegations that contradict . . . the claim and the patent specification”) (internal quotations omitted); *see also Ipa Techs, Inc.*, 352 F. Supp. 3d at 351 (D. Del. 2019) (finding multiple factual allegations insufficient to “infer an inventive concept when the . . . patents themselves make clear that the technology is not inventive.”).

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ii. THE PROPOSED AMENDED COMPLAINT DOES NOT SET FORTH SUFFICIENT CONCRETE FACTUAL ALLEGATIONS THAT THE ELEMENTS OF THE '590 PATENT ARE UNCONVENTIONAL AND NON-ROUTINE.

Plaintiff also argues that the Proposed Amended Complaint “makes numerous allegations and includes evidence about how the claimed combination of steps comprising ‘automated entry’ constitute[s] an improved, unconventional, non-routine process for showing properties.” ECF No. 25 at 20-21. In response, Defendant argues that Plaintiff’s “allegations regarding the use of its commercial product, which are divorced from any claim language, merely indicate that automated entry provided an improvement over traditional practices and fail to show that any of the claim limitations in Claim 7 are anything other than what was well-understood, routine, and conventional.” ECF No. 28 at 7-8. Defendant argues that Plaintiff “provides several paragraphs of allegations that merely reiterate the problem solved, *i.e.*, providing entry to a property without an agent present.” *Id.* at 7 (citing Proposed Am. Compl., ECF No. 24-1, Ex. A ¶¶ 9-13).

The Court agrees with Defendant. Plaintiff certainly includes allegations that the '590 patent's process for automated entry introduced an improvement over the traditional methods for scheduling property viewings in the real estate industry. However, “the relevant inquiry is not whether the claimed invention as a whole is unconventional or non-routine.” *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281,1290 (Fed. Cir. 2018).

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“If a claim’s only ‘inventive concept’ is the application of an abstract idea using conventional and well-understood techniques, the claim has not been transformed into a patent-eligible application of an abstract idea.” *Id.* at 1290-91.

In essence, Plaintiff’s Proposed Amended Complaint alleges that “‘automated entry’ into a property achieved by the integration and coordination of a server with a lockbox and a portable device via an application interface, . . . enabling the remote and automatic issuance of a unique durational code . . . to facilitate entry, was neither conventional, routine, or well understood in any industry, including property management and real estate.” Proposed Am. Compl., ECF No. 24-1, Ex. A ¶28. Like the allegations in Plaintiff’s initial complaint, the new allegations in the Proposed Amended Complaint “simply restate[] what we have already determined is an abstract idea and describe[] the implementation of the abstract idea through conventional computer components.” ECF No. 22 at 19 (quoting *BSG Tech.*, 899 F.3d at 1291) (clarifying that the Court need not consider whether execution of an abstract idea “on a generic computer” is “well-understood, routine, and conventional[,]” but rather, only “whether the claim limitations other than the invention’s use of the ineligible concept to which it was directed [a]re well understood, routine and conventional.”)).

*Appendix B***iii. THE CLAIM LANGUAGE INFORMS THE COURT'S FINDING THAT CLAIM 7 DOES NOT CONTAIN AN INVENTIVE CONCEPT THAT TRANSFORMS THE CLAIM INTO A PATENT-ELIGIBLE CONCEPT.**

Finally, although the Court must accept as true the factual allegations of the Proposed Amended Complaint and such allegations may “fill the gap” in the claim language, the Court’s primary analysis hinges on examination of the claim language of the patent itself. See *Automated Tracking Sols., LLC v. Coca-Cola Co.*, 723 F. App’x 989, 993 (Fed. Cir. 2018) (“Under the second step of the *Alice* analysis, we examine the claim limitations more microscopically to determine whether they contain additional features sufficient to transform the nature of the claim into a patent-eligible application.”) (internal quotations removed); *see also Ipa Techs. v. Amazon*, 352 F. Supp. 3d 335, 350 (D. Del. 2019) (finding that allegations asserting “that the construction of a navigation query results in improvements to computer functionality and technological processes including increased efficiency and speed” were insufficient where “no portion of the claims or specification cited shows how the construction of a navigation query results in increased efficiency or speed in computer functionality.”) (internal quotations omitted).

Examining the claim language itself, the Court finds, as it did at the motion to dismiss stage, that the elements set forth therein, considered both individually and as an ordered combination, consist of generic components “arranged in a conventional manner to execute the undoubtedly conventional functions of identity verification,

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time-sensitive code-generation, remote automated access, information collection and display, and the use of database tables.” ECF No. 22 at 17. “Additionally, [v]iewed as a whole, these method claims simply recite the concept of automated entry to a property ‘as performed by a generic computer’ or computers.” *Id.* at 17 (quoting *Alice*, 134 S. Ct. at 2359). As such, the Court reiterates its finding that the elements of Claim 7, both individually and as an ordered combination, do not add anything inventive which would transform the claim into a patent-eligible concept.

For these reasons, allowing the Proposed Amended Complaint would be futile insofar as it would not survive a motion to dismiss for patent ineligibility under step two of *Alice*.

V. CONCLUSION

For the above reasons, the Court **FINDS** that Plaintiff’s Proposed Amended Complaint, ECF No. 24-1, Ex. A, would not survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). As such, allowing Plaintiff to file the Proposed Amended Complaint would be futile.

Accordingly, the Court **DENIES** Plaintiff’s Motion for Leave to File Amended Complaint, ECF No. 24.

The Court further **DENIES** Plaintiff’s Motion to Alter or Amend Judgment, ECF No. 26.

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The Clerk is **DIRECTED** to forward a copy of this Opinion and Order to all Counsel of Record.

IT IS SO ORDERED.

/s/ Robert G. Doumar
Robert G. Doumar
Senior United District Judge
UNITED STATES DISTRICT JUDGE

Norfolk, VA
April 4th, 2019

**APPENDIX C — OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA, NORFOLK
DIVISION, DATED NOVEMBER 1, 2018**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

CIVIL NO. 2:18cv355

CONSUMER 2.0, INC. d/b/a RENTLY,

Plaintiff,

v.

TENANT TURNER, INC.,

Defendant.

OPINION AND ORDER

This matter comes before the Court on a Motion to Dismiss (“Motion”) filed by Defendant Tenant Turner, Inc. (“Defendant”). ECF No. 12. In such motion, Defendant asks the Court to dismiss the Complaint (“Complaint”) filed by Consumer 2.0, Inc., d/b/a Rently (“Plaintiff”) in its entirety, pursuant to Fed. R. Civ. P. 12(b)(6). ECF Nos. 1, 12. In its Complaint, Plaintiff alleges that Defendant has infringed one or more claims of United States Patent No. 9,875,590, entitled “Automated Entry” (“the ’590 patent”). ECF No. 1 ¶ 9. The issue before the Court is whether the ’590 patent claims patentable subject matter

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under 35 U.S.C. § 101. For the reasons set forth below, the Court **GRANTS** Defendant’s Motion to Dismiss as to the claims asserted in Plaintiff’s Complaint and **DISMISSES** Plaintiff’s Complaint **WITHOUT PREJUDICE**. ECF No. 1.

I. BACKGROUND**A. PROCEDURAL HISTORY**

On July 3, 2018, Plaintiff filed a Complaint against Defendant alleging patent infringement of the ’590 patent, “Automated Entry.” ECF No. 1. On August 7, 2018, Defendant filed the instant Motion to Dismiss along with its Memorandum in Support, to which Plaintiff filed its Response in Opposition (“Resp.”) on August 28, 2018. ECF Nos. 12, 13, 16. Defendant filed its Reply to Plaintiff’s Opposition on September 4, 2018 (“Reply”). ECF No. 17. The parties jointly filed a Motion for Oral Argument on September 6, 2018. ECF No. 18. The parties appeared before the Court for a hearing on this matter on October 15, 2018. ECF No. 20.

B. PATENT-IN-SUIT

Plaintiff alleges that Defendant infringes claims 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the ’590 patent. ECF No. 1 ¶¶ 17 – 35. According to the ’590 patent’s description, 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

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the need for an on-site representative of the property.” ’590 patent, ECF No. 1-1, Ex. 1 at 19. The patent identifies several entities that perform the patent’s method: (1) a lockbox or automated door lock, (2) a server, (3) an application interface, and (4) a portable device.

“[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.” Resp., ECF No. 16 at 8. 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.” *Id.* “The application provides the visitor with an invitation to receive automated entry information (e.g., a valid code).” *Id.* The application interface retrieves “automated entry information from coordinated server and lockbox database tables.” *Id.* 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.” *Id.* The application interface requests “identifying information through the invited visitor’s portable device.” *Id.* The valid code is then “communicated to the invited visitor’s portable device via the application interface from the server.” *Id.* at 8-9. “The lockbox or similar locking device” is then able to “be opened to facilitate the automated and unaccompanied entry” by the visitor. *Id.* at 9. “The application also tracks in real-time the identity of and time when a visitor actually visits a property.” *Id.*

This process is described in Claim 7 of the patent, which is representative:

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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

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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.

'590 patent, ECF No. 1-1, Ex. 1 at 23. Claim 7 is the only independent claim asserted in the Complaint. The dependent claims (8-16) build on this basic framework.

The patent-at-issue was initially rejected by the patent examiner 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.” ECF No. 13-1, Ex. 2 at 4. The patent examiner specifically stated that claims 1, 6, and 12, which Plaintiff notes later became representative Claim 7, were rejected because they were “directed to an abstract idea.” *Id.*; Resp., ECF No. 16 at 18. In response to the initial rejection, Claim 12 was amended, 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

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facilitate automated entry to the property” in response to the “visitor providing code information to the lock box or automated door lock within the specified period of time.” ECF No. 13-3, Ex. 3 at 3. The applicant also argued that these additions consisted of “physical (not abstract) action[s]”. Resp., ECF No. 16 at 19 (citing ECF No. 16-3, Exhibit C at 2). 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.” ECF No. 13-4, Ex. 4 at 4.

II. STANDARD OF REVIEW

A defendant may move to dismiss a complaint under Rule 12(b)(6) on the grounds that it fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). Such a motion should be granted if it appears that the plaintiff is not “entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.” *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988) (internal citation omitted). To survive a motion to dismiss, the facts alleged in the complaint “must be enough to raise a right to relief above a speculative level” and must be sufficient “to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2005). Where the claim is one of patent infringement, there must be “sufficient factual allegations and plausibility of those allegations” to survive a motion to dismiss. *Bel Ip LLC v. Boomerangit Inc.*, No. 2:11cv188, 2011 U.S. Dist. LEXIS 164358, 2011 WL 13228482, at *5 (E.D. Va. Sept. 27, 2011).

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In resolving a Rule 12(b)(6) motion, the court must assume the truth of all facts alleged in the complaint and construe the factual allegations in favor of the non-moving party. *Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 222 (4th Cir. 2009). However, the court is not bound by the complaint's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Furthermore, the court may not consider any matters outside the pleadings, but it may consider written instruments that are attached as exhibits to a pleading, *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013), as these exhibits are "part of the pleading for all purposes." Fed. R. Civ. P. 10(c). The Court may also take judicial notice of items in the public record, *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004), including patent and trademark registrations, *Zinner v. Olenych*, 108 F. Supp. 3d 369, 377 n.2 (E.D. Va. 2015).

"A motion to dismiss for failure to state a claim upon which relief can be granted is not a procedural matter implicating unique issues of patent law, and thus the law of the Federal Circuit is not controlling." *Taltwell, LLC v. Zonet USA Corp.*, No. 3:07cv543, 2007 U.S. Dist. LEXIS 93465, 2007 WL 4562874, at *13 (E.D. Va. Dec. 20, 2007). Although the Fourth Circuit has yet to address the pleading standard for patent claims in light of *Twombly* and *Iqbal*, it is clear that a claim for patent infringement must, at a minimum, set forth "sufficient factual allegations and plausibility of those allegations" to survive a motion to dismiss. *Bel Ip*, No. 2:11cv188, 2011 U.S. Dist. LEXIS 164358, 2011 WL 13228482, at *5 (E.D. Va. Sept. 27, 2011).

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Finally, patentability under section 101 is an issue of law that may be resolved on a Rule 12(b)(6) motion to dismiss. *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343, 1349 (Fed. Cir. 2014). In determining eligibility, a court need not address each claim if the court can identify a representative claim and the “claims are substantially similar and linked to the same abstract idea.” *Id.* at 1348 (internal quotation omitted).

III. ANALYSIS

The issue here is whether the claims at issue are eligible for patent protection. Section 101 of the Patent Act defines the subject matter eligible for patent protection, providing as follows:

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. However, the Supreme Court has “long held that this provision contains an important . . . exception for” three categories that are not eligible for patent protection: “[l]aws of nature, natural phenomena, and abstract ideas.” *Alice Corp. Pty. v. CLS Bank Int’l*, 573 U.S. 208, 134 S. Ct. 2347, 2354, 82 L. Ed. 2d 296, 189 L. Ed. 2d 296 (2014) (internal quotations removed). In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 132 S. Ct. 1289, 182 L. Ed. 2d 321 (2012), the

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Supreme Court “set forth a framework for distinguishing patents that claim” one of these patent-ineligible concepts “from those that claim patent-eligible applications of these concepts.” *Alice*, 134 S. Ct. at 2355. In *Alice*, the Supreme Court reaffirmed this two-step framework. 134 S. Ct. at 2355.

The first step of *Alice* requires a determination by the Court as to “whether the claims at issue are directed to” one of the three patent-ineligible concepts (laws of nature, natural phenomena, or abstract ideas). 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 76-79). If the Court determines that the claims are directed to an abstract idea, it proceeds to the second step, which requires the Court to consider “what else” is in the claims that may that would make them eligible for patent protection. *Id.* (internal quotations removed). To answer this question, the Court must “consider 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.* (quoting *Mayo*, 566 U.S. at 77-79). This second step is described by the Supreme Court as the search for an “‘inventive concept’-*i.e.*, an element or combination of elements that” ensures that the patent claims at issue amount to “significantly more” than claims upon an ineligible concept. *Id.* (quoting *Mayo*, 566 U.S. at 77).

A. ALICE STEP ONE

Step one of *Alice* requires the Court to determine whether the asserted claims of the ’590 patent describe

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a patent-ineligible concept: laws of nature, natural phenomena, or abstract ideas. *Alice*, 134 S. Ct. at 2355.¹ Here, Defendant argues that the patent-at-issue is directed to an abstract idea. ECF No. 13 at 2. As noted in *Alice*, “[t]he abstract ideas category embodies ‘the longstanding rule that [a]n idea of itself is not patentable.’” 134 S. Ct. at 2355 (internal quotations omitted).

“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). Although “[t]here have been somewhat contradictory points of emphasis in the opinions of the Supreme Court and Federal Circuit that address what constitutes an abstract idea,” the Federal Circuit and Fourth Circuit have “looked to some important principles laid down by the Supreme Court in recent cases to decide what is an abstract idea.” *Asghari-Kamrani v. United Servs. Auto. Ass’n*, No. 2:15cv478, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *3 (E.D. Va. July 5, 2016) (internal quotations omitted). For example, in *Alice*, the Court noted that “fundamental economic” and “longstanding commercial practice[s]” are “methods of

1. The Court limits the scope of this ruling to the claims asserted and set forth in Plaintiff’s Complaint. The Court does not have jurisdiction to rule on unasserted claims. See *Fox Group, Inc. v. Cree, Inc.*, 700 F.3d 1300, 1308 (Fed. Cir. 2012) (“There was no case or controversy with respect to the unasserted claims . . . ; therefore the district court did not have jurisdiction over the unasserted claims.”). As Defendant notes, “Claim 7 of the ’590 Patent . . . is the sole asserted independent claim.” ECF No. 13 at 11. Therefore, this Opinion and Order only applies to the asserted claims.

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organizing human activity” that are “within the realm of abstract ideas.” *Alice*, 134 S. Ct. at 2356-57 (finding that claims directed to automating the use of a third party to mitigate settlement risk were abstract) (internal quotations omitted).

Following *Alice*’s guidance, courts have found that claims which are primarily directed at “collecting, analyzing, and displaying data” as well as claims that “classify[] and stor[e] digital images in an organized matter” through the implementation of a server are abstract ideas. See *SmarTEN LLC v. Samsung Electronics Am., Inc.*, 316 F. Supp. 3d 913, 920-22 (E.D. Va. 2018); *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016). Claims encompassing the “idea of sending a request, receiving back a command, and executing a command to operate a device in a known and expected way” have also been found to be abstract. *Chargepoint, Inc. v. Semacconnect, Inc.*, No. MJG-17-3717, 2018 U.S. Dist. LEXIS 49026, 2018 WL 1471685, at *10-11 (D. Md. Mar. 23, 2018). The Federal Circuit also recently determined that a patent “directed to systems for locating, identifying and/or tracking of an object using” radio frequency identification components was “directed to an abstract idea.” *Automated Tracking Sols., LLC v. Coca-Cola Co.*, 723 F. App’x 989, 993 (Fed. Cir. 2018).

Importantly, the Federal Circuit has added a new consideration to the first step of the *Alice* analysis for claims involving computer-related technology. The purpose of this new consideration is to distinguish between claims that “merely recite the performance of some business

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practice known from the pre-Internet world along with the requirement to perform it on the Internet” and claims that are “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014); *see also Enfish*, 822 F.3d at 1335 (demonstrating that the Federal Circuit has begun to ask “whether the claims are directed to an improvement to computer technology versus being directed to an abstract idea, even at the first step of the *Alice* analysis.”). “As Federal Circuit precedent makes clear, a claim is directed to the improvement of a device when it is focused on ‘a specific improvement-[such as] a particular database technique—in how computers c[an] carry out’ a function, rather than on ‘asserted advances in uses to which existing computer capabilities could be put.’” *SmarTEN*, 316 F. Supp. 3d at 922 (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016)).

The claims in *Alice* were directed to a “computerized scheme for mitigating ‘settlement risk’-*i.e.*, the risk that only one party to an agreed-upon financial exchange will satisfy its obligation.” 134 S. Ct. at 2352. The claims provided a solution to this problem, but one which the Court noted was “long prevalent in our” commercial system: “intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.” *Id.* at 2356 (internal quotations removed). The fact that a human third-party intermediary was no longer necessary because a computer performed part of this method was of no consequence to the Court. Instead, the Court highlighted that

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intermediated settlement was a longstanding “method of organizing human activity” as well as a “fundamental economic practice.” *Id.* at 2356-57. As such, the patent claims were merely directed to an abstract idea.

Similarly, in *Asghari*, this Court found that an invention relating “to a system and method . . . for centralized identification and authentication of users and their transactions to increase security in e-commerce” was a patent-ineligible, abstract idea. 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *1. This Court held that “despite the electronic setting and purportedly Internet-specific problem addressed, the patent claims [we]re directed to a common method for solving an old problem.” 2016 U.S. Dist. LEXIS 87065, [WL] at *4. The claims at issue were merely “directed to the abstract idea of using a third party and a random, time-sensitive code to confirm the identity of a participant to a transaction.” *Id.* Critical to the Court’s decision was the fact that “[n]othing about the concept behind the patent claims depends upon their implementation by computers.” *Id.* In fact, “the concept could easily be performed either by hand or, more simply, with technologies much older than computers.” *Id.*

This Court finds that the claims at issue are directed to an abstract idea. Distilled to its essence, the claims use generic computing devices and techniques to provide automated entry to a property without human interaction. As Defendant notes, “[r]eal estate agents have used lockboxes to provide licensed real estate professionals access to properties for decades.” ECF No. 13 at 9. The ’590 patent simply automates that process using generic

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computer components such as a server, technology-enabled lock box/automated door lock, application interface, and mobile device. However, automation of a human, manual process is an abstract idea. *See CalAmp Wireless Networks Corp. v. ORBCOMM, Inc.*, 233 F. Supp. 3d 509, 513 (E.D. Va. 2017) (finding that automation of a process that “humans ha[d] been forever using” had no bearing on the court’s analysis under *Alice*, regardless of the fact that it “had never before been automated”); *Chargepoint*, 2018 U.S. Dist. LEXIS 49026, 2018 WL 1471685, at *7 (“mere automation of a manual process is . . . an abstract idea”). Further, the fact that this process “had never before been automated” is entirely inconsequential. *See CalAmp*, 233 F. Supp. 3d at 513. As such, much like the claims in *Asghari*, “despite the electronic setting . . . , the patent claims are directed to a common method” (automation) “for solving an old problem” (the problem of how to provide an invited visitor entry to a property for a specified period of time). *Asghari*, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *4.

The Court recognizes, however, that there are multiple elements comprising the representative claim, which result in the process of automated entry. Following the Federal Circuit’s warning to avoid analyzing and describing the claims at issue at “a high level of abstraction and untethered from the language of the claims,” the Court has considered each of these elements. *Enfish*, 822 F.3d at 1337. Such consideration, however, results in the same conclusion: the elements are, considered both individually and as a combination, merely directed to abstract ideas.

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Several of the elements are merely directed to the implementation of the abstract idea of providing automated entry and making properties available for viewing to invited visitors through generic computer components, such as an “application interface” and a “server.” ’590 patent, ECF No. 1-1, Ex. 1 at 23. For example, Claim 7 states that:

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

...

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.

Id.

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There is nothing in the language of these elements indicating that the claim at issue here is directed to any specific improvement in computer functionality or capabilities. The Federal Circuit was clear in *Enfish* that the proper question for the Court is “whether the focus of the claims is on the specific asserted improvement in computer capabilities . . . or, instead, on a process that qualifies as an abstract idea for which computers are invoked merely as a tool.” 822 F.3d at 1335-36 (internal quotations omitted). In *Enfish*, the claims at issue were directed to improving a computer’s functionality, as they introduced “an innovative logical model for a computer database,” using a single “self-referential table” to store data. *Id.* at 1331, 1335-36. Plaintiff asserts that “Claim 7 describes an improvement in the coordination and operation of a computer network server with a digital lockbox by coordinating the database tables of the server and digital lockbox to electronically provide automated entry information to an invited visitor that is valid for a specified period of time to facilitate access to a specific property.” Resp., ECF No. 16 at 24. However, this assertion demonstrates that the claims at issue do not provide any improvement in computer functionality or capabilities, but rather, merely coordinate pre-existing and generic computer components to implement an abstract idea. The claims at issue “simply add[]” the coordination of these “conventional computer components” to a “well-known business practice.” *Enfish*, 822 F.3d at 1338 (citing *Alice*, 134 S. Ct. at 2358-60).

Furthermore, Plaintiff’s inclusion of tangible components such as the lockbox and mobile device does

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not prevent this Court from determining that the claims are directed to an abstract idea. *See TLI Commc'ns*, 823 F.3d at 611 (“the specification makes clear that the recited physical components merely provide a generic environment in which to carry out the abstract idea”); *Automated Tracking Solutions, LLC v. Coca-Cola Co.*, 223 F. Supp. 3d 1278, 1289 (N.D. Ga. 2016) (finding that physical components such as a “transponder,” “reader,” and “antenna” simply “provide[d] an environment in which to carry out the abstract idea”), *aff'd*, 723 F. App'x 989 (Fed. Cir. 2018) (internal quotations removed).

Additionally, the element that provides for “upon the visitor providing the code information to the lock box or automated door lock . . . the lock box or automated door lock opening to facilitate automated entry” is directed to an abstract idea. '590 patent, ECF No. 1-1, Ex. 1 at 23. In *Chargepoint*, the court clarified that claims amounting to merely “operating an existing device from a remote location over a network” do not constitute a “technological improvement” and are therefore, not patent-eligible. 2018 U.S. Dist. LEXIS 49026, 2018 WL 1471685, at *11. Further, the fact that “the essence of the invention” at issue was “controlling the . . . process remotely, as opposed to someone physically charging it” played a significant role in the court’s determination that the claim encompassed a practice long prevalent in our system and was therefore, abstract. 2018 U.S. Dist. LEXIS 49026, [WL] at 9-11 (internal quotations removed). *See also CalAmp*, 233 F. Supp. 3d at 513 (noting that automation of a process that “humans ha[d] forever been using” had no bearing on the court’s analysis under *Alice*). Similarly, this element

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of the '590 patent does not constitute a technological improvement, but merely removes the human component of a practice long prevalent in the real estate industry.

The fact that the claim includes an element of “tracking” also does not take the patent-at-issue out of the realm of abstract. *See, e.g., CalAmp*, 233 F. Supp. 3d at 513; *Automated Tracking*, 723 F. App'x at 993. In *CalAmp*, the Court determined that a patent was abstract where, “[d]istilled to its essence,” it claimed a system of “tracking an object by: (1) assessing the current location of the object; (2) obtaining the object’s required location for the corresponding time; (3) determining whether the object is in the required location; and (4) requesting information in response to that determination.” 233 F. Supp. 3d at 512. The tracking component here is certainly no less abstract than the tracking at issue in *CalAmp*. Although the '590 patent contains a “tracking” element, this element is not defined anywhere in the '590 patent. As Plaintiff admitted at the hearing on the instant Motion, the only “tracking” this element provides is to “tell[] the system . . . when a visitor went to a specific property and who that visitor was.” *See* Hearing Transcript, ECF No. 21 at 32; *see also* Resp., ECF No. 16 at 2 (“[t]he application . . . tracks in real-time the identity of and time when a visitor actually visits a property.”). As such, Plaintiff’s inclusion of this element is insufficient to create patent-eligibility.

Finally, the Court finds that the element of “making information about the properties available within a user interface” simply consists of collecting and displaying data, a process which Courts have consistently found to

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be abstract. '590 patent, ECF No. 1-1, Ex. 1 at 23; *see SmarTEN*, 316 F. Supp. 3d at 920-22; *Electric Power*, 830 F.3d at 1353-54.

Furthermore, the mere combination of these abstract processes is insufficient to bring the patent-at-issue out of the realm of the abstract. *Electric Power*, 830 F.3d at 1354 (finding no inventive concept where the claims were “clearly focused on the combination of . . . abstract-idea processes”); *CalAmp*, 233 F. Supp. 3d at 513 (finding that the patent-at-issue was directed to an abstract idea where the claims “focused on a combination of abstract-idea processes”); *Asghari*, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *4 (finding that combining the abstract ideas of “using of a third party intermediary and a random, time-sensitive code to confirm the identity of a participant to a transaction” was insufficient to “remove [] the patent claims from the realm of the abstract”); *VOIT Techs., LLC v. Del-Ton, Inc.*, No. 5:17-CV-259-BO, 2018 U.S. Dist. LEXIS 5130, 2018 WL 385188, at *2 (E.D.N.C. Jan. 10, 2018) (“[T]he patent strings together a description of things that already existed, and calls that series of steps patent-eligible. It is not.”).

For these reasons, the Court finds that the '590 patent as a whole is directed to the abstract idea of provided automated entry.

B. ALICE STEP TWO

Because the Court has determined that the '590 patent is merely an abstract idea, it must proceed to the second

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step of *Alice*. Step two is described as the “search for an ‘inventive concept.’” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 72-73). This step requires the Court to “consider 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” and “ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.” *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 72-73, 78-79). This step is satisfied if “the claim limitations involve more than performance of well-understood, routine, [and] conventional activities previously known to the industry.” *Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1367 (Fed. Cir. 2018) (internal quotations omitted).

Plaintiff asserts that Claim 7 should “pass this test as containing a sufficient inventive concept” because “the coordinated server and lockbox with the application interface on a portable device represents a level of symbiotic operation that never previously existed.” Resp., ECF No. 16 at 22. Plaintiff relies heavily upon *BASCOM Global Internet Services, Inc. v. AT&T Mobility LLC* in support of this position. 827 F.3d 1341 (Fed. Cir. 2016). After affirming the finding that “filtering content on the internet” was an abstract idea, the *BASCOM* court found that “the installation of a filtering tool at a specific location, remote from the end-users, with customizable filter features specific to each end user” was nevertheless an inventive concept. *BASCOM*, 827 F.3d at 1348-50. As part of its analysis, the court noted that “an inventive concept can be found in the non-conventional and non-generic

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arrangement of known, conventional pieces.” *Id.* at 1350. Therefore, the patent’s description of “how its particular arrangement of elements [wa]s a technical improvement over prior art ways of filtering such content” satisfied the court’s search for an inventive concept. *Id.*

The claims in *BASCOM*, however, “address[ed] a problem arising in the realm of computer networks, and provide[d] a solution entirely rooted in computer technology.” 827 F.3d at 1346. Further, the claimed invention represented a “soft-ware-based invention[] that improve[s] the performance of the computer system itself” as well as “an existing technological process.” *Id.* at 1351 (internal quotations omitted). As such, the *BASCOM* court found that the patent-at-issue claimed a “technology-based solution (not an abstract-idea-based solution implemented with generic technical components in a conventional way) to filter content on the Internet that overcomes existing problems with other Internet filtering systems.” *Id.*

The claims at issue here are distinguishable from those in *BASCOM* as they do not purport to improve the functionality of a computer or overcome existing technology-based problems. A comparison with *Asghari* is once again instructive. In *Asghari*, the steps of the representative claim were as follows: “(1) receiving electronically a request for a dynamic code for the user; (2) generating by the Central-Entity a dynamic code; (3) providing the generated dynamic code to the user; (4) receiving electronically by the Central-Entity a request for authenticating the user from a computer associated

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with the External-Entity; and (5) authenticating by the Central-Entity the user and providing the result to the External-Entity.” *Asghari*, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *5 (internal quotations omitted). This Court found that “[t]aken individually, each of these claim elements describe[d] conventional computer functions” and “[c]onsidered as an ordered combination, the claim elements d[id] not add anything inventive to the abstract concept underlying them,” nor did they “purport to improve the functioning of the computer itself.” *Id.* (internal quotations omitted). Instead, they “simply instruct[ed] a generic computer or computers to verify the identity of a participant to a transaction using a randomly generated code.” *Id.*

Similarly, in *CalAmp*, the court found that “the use of a remote database to save storage space on a tracking device [wa]s hardly an unconventional solution.” *CalAmp*, 233 F. Supp. 3d at 515. Although “previous tracking systems had not incorporated this particular arrangement of database records,” “th[e] database structure had been used in other types of systems.” *Id.* The court noted that “[l]ong before the filing of” the patent-at-issue, “computer systems had been configured in such a way to allow remote terminals to access information stored on a centralized database.” *Id.* at 514.

Here, Plaintiff states that the patent-at-issue “contemplates an application providing automated entry . . . by “invitation only” delivered electronically to the portable device of a specific visitor” after “collect[ing] information . . . about the visitor and his planned visit,”

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relaying this information to a server, and providing “the visitor with an invitation to receive automated entry information.” ECF No. 16 at 8. “The lockbox or similar locking device may then be opened to facilitate the automated . . . entry by the invited visitor.” *Id.* at 9. The functions performed at each of these steps is purely “conventional” and “does no more than require [] generic computer” components to perform “generic computer functions.” *Asghari*, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *5 (quoting *Alice*, 134 S. Ct. at 2359). Although it may be true that previous systems had not incorporated this particular combination of generic components, before the filing of the patent-at-issue, computer systems had certainly been configured in such a way to allow a server to coordinate with automated access/entry programs as well as application interfaces on mobile devices. Distilled to their essence, these generic components are arranged in a conventional manner to execute the undoubtedly conventional functions of identity verification, time-sensitive code-generation, remote automated access, information collection and display, and the use of database tables.

Additionally, “[v]iewed as a whole, these method claims simply recite the concept of” automated entry to a property “as performed by a generic computer” or computers. *Alice*, 134 S. Ct. at 2359. As noted, there is nothing in the language of these elements indicating that the claim at issue here is directed to any specific improvement in computer functionality or capabilities. Therefore, the elements simply “do not add anything inventive to the abstract concept underlying them.” *Asghari*, 2016 U.S. Dist. LEXIS 87065, 2016 WL 3670804, at *5.

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For these reasons, the Court finds that the elements of the claim at issue, both individually and as an ordered combination, do not add anything inventive which would transform the claim into a patent-eligible concept.

C. THERE ARE NO FACTUAL QUESTIONS THAT PRECLUDE A FINDING OF PATENT INELIGIBILITY

Plaintiff argues that factual questions at issue in this case preclude a finding of patent ineligibility at the motion to dismiss stage. Resp., ECF No. 16 at 33. The Federal Circuit recently held that “whether a claim element or a combination of elements is well-understood, routine, and conventional to a skilled artisan in the relevant field is a question of fact.” *Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1368-70 (Fed. Cir. 2018). However, the court clarified that “not every § 101 determination contains genuine disputes over the underlying facts material to the § 101 inquiry” and further noted that “[w]hen there is no genuine issue of material fact regarding whether the claim element or claim combination is well-understood, routine, [or] conventional . . . , this issue can be decided . . . as a matter of law.” *Id.* at 1368. In *Automated Tracking*, the Federal Circuit affirmed the district court’s granting of defendant’s motion for judgment on the pleadings where the specification did not “support [Plaintiff’s] contention that there is a factual dispute regarding whether the claims recite routine and conventional...components.” 723 F. App’x at 995-96. *See also TriPlay, Inc. v. WhatsApp Inc.*, No. 13-1703-LPS-CJB, 2018 U.S. Dist. LEXIS 49953, 2018 WL 1479027, at *6, 8-9 (D. Del. Mar. 27, 2018)

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(granting a motion to dismiss where it was not evident from the claims and specifications that there was “any inventive feature...used in an unconventional matter” and because the “gap in the specification [wa]s not filled by [Plaintiff’s] pleadings.”).

In *BSG Tech LLC v. Buyseasons, Inc.*, the Federal Circuit clarified that it is not necessary to consider whether execution of an abstract idea “on a generic computer” is “well-understood, routine, and conventional.” 899 F.3d 1281, 1290-91 (Fed. Cir. 2018). Instead, the proper analysis requires an assessment of whether “the claim limitations other than the invention’s use of the ineligible concept to which it was directed were well-understood, routine, and conventional.” *Id.* at 1290 (citing *Alice*, 134 S. Ct. at 2359-60).

The Court finds that there is no question of fact as to this issue. First, as discussed, the Court finds that it is not evident from the ’590 patent specifications that there is any inventive feature used in an unconventional manner. Further, the Court finds nothing in the pleadings to fill this gap in the specifications. The Complaint alleges that “the ’590 patent eliminated the need existing at the time for an on-site property management or real estate professional to be present in order for an invited visitor to gain physical access to the property” and that “prior to [Plaintiff’s] invention, no other company in the field had reduced to practice the method and system set forth in the ’590 Patent.” ECF No. 1 ¶ 13. The only alleged unconventional features of Plaintiff’s claims are that the “elements set forth in the ’590 Patent both individually

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and in combination represent a novel approach for enabling an invited visitor to self-register and self-access a property” through the “coordination of operation of a server, technology-enabled lock box, application interface, and mobile device.” *Id.*; Resp., ECF No. 16 at 24. However, “this simply restates what we have already determined is an abstract idea” and describes the implementation of the abstract idea through conventional computer components. *BSG Tech*, 899 F.3d at 1291. Accordingly, the Court reiterates its determination that there is no inventive concept and finds that there are no factual issues precluding the Court from dismissing this matter without prejudice.

IV. CONCLUSION

For the above reasons, the Court holds that the asserted claims of the ’590 patent at issue are invalid because they are directed to an abstract idea and thus ineligible for patent protection under 35 U.S.C. § 101. As such, Plaintiff fails to state a claim for relief. Accordingly, the Court **GRANTS** the Motion to Dismiss as to the claims asserted in the Complaint, ECF No. 12, and **DISMISSES** Plaintiff’s Complaint **WITHOUT PREJUDICE**, ECF No. 1.

The Clerk is **DIRECTED** to forward a copy of this Opinion and Order to all Counsel of Record.

IT IS SO ORDERED.

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/s/ ROBERT G. DOUMAR
UNITED STATES DISTRICT JUDGE

Norfolk, VA
November 15, 2018

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**APPENDIX D — DENIAL OF REHEARING OF
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT, FILED MAY 8, 2020**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2019-1846

CONSUMER 2.0, INC., DBA RENTLY,

Plaintiff-Appellant,

v.

TENANT TURNER, INC.,

Defendant-Appellee.

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.

**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.

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ORDER

Appellant Consumer 2.0, Inc. 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 May 15, 2020.

FOR THE COURT

May 8, 2020
Date

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