**APPEAL NO. 19-1846**

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

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

**Appellant,**

**v.**

**TENANT TURNER, INC.,**

**Appellee.**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Appeal from the United States District Court Eastern**

**District of Virginia, Norfolk Division**

**Case No. 2:18-cv-00355-RGD-DEM**

**Judge Robert G. Doumar**

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**OPENING BRIEF FOR APPELLANT**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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# CERTIFICATE OF INTEREST

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

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

Consumer 2.0, Inc. d/b/a Rently

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

Consumer 2.0, Inc. d/b/a Rently

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

None.

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

Rowland Braxton Hill, IV

Roman Lifson

Shannan M. Fitzgerald

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

Dated: /s/

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# STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(a), Appellant, Consumer 2.0, Inc. d/b/a Rently, states that it is not aware of any pending cases that will affect or be affected directly by this Court’s decision.

# Jurisdictional STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

This Court has jurisdiction under 28 U.S.C. § 1295(a)(1). The judgment or order

appealed from is final.

# STATEMENT OF THE ISSUES

Did the district court err as a matter of law by dismissing the case at the pleading stage and denying leave to file the Amended Complaint based on a finding of futility and an erroneous conclusion that the asserted claims, which recite a method of secure entry to a property that employs lockboxes able to recognize unique durational codes, are directed to an abstract idea and unpatentable under 35 U.S.C. § 101.

# STATEMENT OF THE CASE

On July 3, 2018, Consumer 2.0, Inc. d/b/a Rently (“Rently”) filed its Complaint for patent infringement of U.S. Patent No. 9,875,590 (the “’590 patent”) in The United States District Court for the Eastern District of Virginia in Case No. 2:18-cv-003555-RGD-DEM. Appx\_\_\_\_\_\_\_. The ’590 patent is directed to and claims a method employing a combination of software and hardware for secure, automated entry of real property; a technology that Rently pioneered and successfully offers nationwide.

After Tenant Turner, Inc. (“Tenant Turner”) copied Rently’s solution and partnered with one of Rently’s biggest competitors, Rently brought suit alleging infringement of the ’590 patent. On August 7, 2018, Tenant Turner filed a Motion to Dismiss alleging the ’590 patent “does not claim patentable subject matter.” Rently opposed the motion and argued, at a minimum, it should be granted leave to amend the complaint. On November 1, 2018, over Rently’s opposition, the district court granted Tenant Turner’s motion and dismissed the complaint without prejudice finding the asserted claims (independent claim 7 and dependent claims 8-16) abstract and unpatentable under 35 U.S.C. § 101. Appx\_\_\_\_\_\_\_. Rently promptly filed a Motion for Leave to File Amended Complaint and Motion to Alter or Amend Judgment, attaching to this filing a proposed Amended Complaint. On April 4, 2019, the district court denied Rently’s motion on the sole ground that amendment of the complaint would be futile, because, according to the district court, the pleading did not alter the abstract nature of the asserted claims. Final judgment was entered on April 4, 2019, and Rently timely appealed the final judgment to this Court.

# STATEMENT OF FACTS

## A. The Parties

Plaintiff-Appellant Consumer, 2.0, doing business as Rently (“Rently) is a property management technology company located in Los Angeles, California. Amd. Complt ¶ 1. Through innovative software and hardware solutions, it provides property owners and managers with the ability to advertise and show real properties that are for rent or sale. *Id*. at ¶ 7.

Defendant-Appellee Tenant Turner Inc. (“Tenant Turner”) is a Virginia company, that has partnered with third-party management software companies that directly compete with Rently. *Id*. at ¶¶ 34, 38.

## B. Rently’s Multi-Faceted Solution for Secure, Automated Self-Entry

Traditionally, a potential renter or buyer wishing to view a property would contact a listed property manager or agent and that manager or agent would arrange to meet the prospective renter/buyer in-person at the property to facilite the tour. Amd. Complt ¶ 9. This was a cumbersome and inefficient process because it required the agent and visitor to coordinate schedules and both phyically meet at the location. *Id*. at ¶¶ 10-12. On the one hand, the agent would have numerous in-person viewings to schedule, while visitors often sought viewings in the evenings and on weekends when agents were not always available. *Id*. at ¶¶ 10-11. This log-jam delayed or resulted in missed opportunities for sales or rentals. *Id*. at ¶ 12.

Rently revolutionized the property-showing process with its pioneering automated self-showing technology. *Id*. at ¶ 7. Rently conceived of and designed—and in April 2014 sought patent protecution for—a system that coordinated a server, several discrete pieces of software, and a technology-enabled lockbox to provide secure self-entry to properties. (Ex. 1.) As described in U.S. Patent No. 9,875,590 (“the ’590 patent”), an “automated entry module” is provided for use on a portable device, such as a cellular phone or computer tablet. (Ex. 1, 2:17-24.) Properties that are available for rent or sale are listed in a database stored on a server. (*Id*. at 2:32-43.) Through an automated entry module the user is able to search through the property listings and schedule viewings. (*Id*. at 2:44-50.)

To accomplish remotely-facilitated self-showings, the ’590 patent describes, among other ways, placement of a technology-enabled “lock box 15” at the property. (*Id*. at 2:51-60.) To open the lock box and access the key, the automated entry module provides a code or signal that allows the lock box to open. (*Id*. at 2:55-60.) However, the one-time code is only valid for a specified period of time. (*Id*. at 2:54-64.) Hence coordination and integration is required between the module and lock box and between the the server database and the lockbox database that prevents unrestricted access to the property, outside of the permitted time period, by the user.

Other layers of security are also described in the patent. For example, the user must first register through their portable device using an automated entry module. (*Id*. at 4:39-49, 61-65, Fig 7.) Through this process, the automated entry module notifies the server and the server immediately sends a notification to the property manager or owner that includes a name and contact information for the user. (*Id*. at 4:39-49.) The server maintains a database of the users and associated properties which is accessible to managers and owners through an application interface. (*Id*. at 4:46-49.) Moreover, before permitting access to a property the user must be verified and approved. (*Id*. at 5:5-25.) Information about physical location of the user is also collected by the automated entry module. (*Id*. at 5:57 – 6:23.) The combination of these layers allow for screening and increased security. (*Id*. at 6:61-64.)

The ’590 patent did not issue on the broad concept of automated entry, but rather on the specific implementation described above for *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.

(*Id*. at 10:25-58.) Attempts to claim the subject matter more broadly were rebuffed by the examiner. In an Office Action on October 11, 2016, the examiner rejected the claims of the application (including the claim that ultimately issued as claim 7) as directed to non-statutory subject matter under §101, specifically citing *Alice* as support. U.S. Patent Application No. 14/260,247 Prosecution History, Office Action dated October 11, 2016, p 2-3. In order to overcome this rejection, Rently added specific limitations that, among other things, required the presense 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. Appx. \_\_ (U.S. Patent Application No. 14/260,247 Prosecution History, November 18, 2016 Amendment in Response to Office Action at 4-5.) Unlike conventional lockboxes that utilize a single code at all times unless manually modified, the method claimed in the ’590 patent requires the application to provide the visitor with an invitation that includes “code information *that is valid during a specified period of time*.” Claim 7. The amended complaint rightfully refers to the lock boxes capable of being used according to claim 7 as “technology enabled”, as that is what the limitations in combination require. 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. *Id*. at Final Rejection dated February 14, 2017, p. 2. Other amendments overcame obviousness rejections and the patent issued on January 23, 2018 with claim 7 in the form set forth above.

## C. The Industry Recognizes Rently’s Innovation

Unlike as is so often the case in cases finding a patent invalid under *Alice*, Rently is not a non-practicing entity asserting broad claims against technology it did not invent. Under its trade names “Rently” and “Rently Keyless”, it offers products and servcies that practice the claimed invention and enable secure, self-access showing of real estate properties, including through use of “smart” lockboxes developed and offered by Rently. Amd Complt ¶¶ 7, 17, 35. As of the time of the Amended Complaint, and as alleged, Rently had approximately 35,000 lockboxes in circulation for self-showings across the United States. *Id*. at ¶ 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*. *Id*. at ¶ 17.

Rently’s innovation did not go unnoticed. All Property Management, LLC, published an article in February 2014 titled How Will Rently.com Change Your Business? The article described Rently’s self-showing system as “innovative,” and stated that it “represent[s] the next wave of productivity improvements in the rental business,” and offers “unprecedented levels of instant gratification, while making it possible for property managers to scale back even further on the time-sensitive and time-intensive aspects of their jobs…” *See* Amd. Complt. at ¶¶ 42-43, Ex. 9. Similarly, a blog of property managers concluded that Rently’s self-showing services “changed the game when it comes to showing rentals.” *Id*. at ¶ 43, Ex. 10.

## D. Tenant Turner’s Copying of Rently’s Innovation

In March 2018, a property management software company called Buildum, which directly competes with Rently, annouced that it was partnering with the Defendant-Appellee, Tenant Turner, to produce a “Showings Coordinator” for automated showings of properties. Amd. Complt ¶ 34, Ex. 3. Marketing materials attached to the amended complaint tout Tenant Turner’s offerings as allowing “your prospects to self-schedule a showing when it is convenient for them, and if you’re using the optional lockbox feature, your agent doesn’t even need to be present! Once the appointment is made, *a one-time use code is generated for the prospect and programmed to be active during their scheduled window*.” Amd. Complt. at Ex 6 (emphasis added).

Rent Manager, another property management software solution provider also partnered with Tenant Turner to promote “agent-free lockbox showings” where a “one-time-use code is generated for the prospect and programmed to be active during their scheduled window.” *Id*. at ¶ 38 quoting Ex. 6. Tenant Turner’s solution is touted as “taking the process of lead management and scheduling out of your weekly workload by automating and streamlining the entire process for you and your prospects.” *Id*. Tenant Turner’s website, also attached to the Amended Complaint, describes its offering of “Tenant Lead Scheduling Software” for use with “CodeBoxes” and other lockboxes. *Id*. at ¶¶ 45-46, Ex 11. Tenant Turner’s system is more fully described in website pages referenced in the Amended Complaint, and it is this *specific implementation* of automated access offered by Tenant Turner, that the Amended Complaint alleges infringes, directly or indirectly, claims 7-16 of the ’590 patent. *Id*. at ¶¶ 47-71.

 Ironically, an article from Buildum’s own management forum discusses that it was *Rently*, not Tenant Turner, that pioneered the technology. Specifically, Buildum’s article states that “a combination of new software and smart lock technologies have made self-showings safer than ever” but attributes this to Rently, not Tenant Turner as follows:

“Companies like ***Rently*** and ShowMojo offer software that integrates with certain lock boxes. Landlords leave a smart lockbox at each unit that they’re trying to rent. The lockbox is controlled remotely by the service provider, and **the service provider can send a unique access code** to anyone interested in viewing the apartment. . .For instance, anyone interested in touring a property secured by ***Rently*** has to **sign up for an account in advance**. They are required to submit personal information to confirm who they are. Rently then sends a **verification code**, via text message to a user’s cell phone and that code is used to **authenticate the person’s account**. Once authentication is complete, a user specifies when they’d like to see the property.”

*Id*. at ¶ 35 quoting Ex. 5. The code is “unique to that user and will expire after a certain period of time.” *Id*. The system then tracks “who toured the property and when.” *Id*.

That competitors wished to copy the technology is not surprising. The innovative nature of the combination of specific elements described in the ’590 patent was born-out in a survey conducted by Rently. Rently’s survey of a statistically significant number of property management customers revealed that 88.24% found Plaintiff’s self-showing system gave them a competitive advantage; 97.06% found Plaintiff’s self-showing system allowed them to do more showings than did in-person showings; 64.71% found Plaintiff’s self-showing system allowed them to manage more properties than did in-person showings; and 88.24% found Plaintiff’s self-showing technology has **innovated** the property management industry. See *id*. at ¶44.

**E. The District Court’s Mistaken Findings of Unpatentability**

Despite the innovation indicated above, the district court dismissed the complaint at the pleading stage, finding that the asserted claims were unpatentable under 35 U.S.C. § 101. In the decision on Tenant Turner’s motion to dismiss dated November 1, 2018, the district court first identified the abstract idea, stating that “[d]istilled to its essence, the claims use generic computing devices and techniques to provide automated entry to a property without human interaction.” Dkt. 22 at p.9. The district court then touched on other elements of the claims finding that “there is nothing in the language of these elements indicating that the claims at issue here is directed to any specific improvement in computer functionality or capabilities”. Dkt. 22 at p. 11. In step two, the district court concluded that “the functions performed at each of these steps is purely “conventional.” Dkt. 22 at p. 16.

After this ruling, which granted the motion to dismiss *without prejudice*, Rently promptly filed a motion for leave to amend, attaching to the motion a proposed Amended Complaint. This Amended Complaint included 35 new paragraphs describing the existing conventional methods, Rently’s success in the marketplace with its *unconventional* technology which includes lockboxes that can be configured to issue from 9 to 100 unique durational codes per day, and how the ’590 claims this method in a manner that is far from abstract. Amd Complt ¶¶ 9-44, 49. The Amended Complaint clarified that the lockboxes of the ’590 patent are “technology-enabled” lockboxes, in that they have to be able to recognize and respond to automatically-issued unique durational (i.e., time-limited) codes, not just manually-issued “static” codes as with conventional lockboxes. ¶49.

On April 4 the district court denied Rently’s motion based on a conclusion that amendment would be futile.[[1]](#footnote-2) In reaching this conclusion, the district court mistakenly found that the concept of secure automated entry using unconventional time-specific coded lock boxes was not in the claims. April 4 Order at 10-11. The district court stated that “plaintiff has simply added the magic words ‘technology-enabled’ before the word ‘lockbox’”. However, the district court failed to understand that this was a short-hand way of refering to lockboxes capable of being used in the claimed method, i.e., ones that are capable of recognizing time specific codes that can be integrated with software to provide secure and efficient entry to validated persons, at specific times to specific properties. Because of this fundamental misunderstanding of the asserted claims and what they require, along with its flawed analysis under *Alice*, the district court incorrectly found the claims abstract and unpatentable, and that the Amended Complaint would be futile.

# SUMMARY OF ARGUMENT

A common theme in *Alice* cases is broadly-worded claims that a patentee refuses to construe more narrowly lest the accused infringer, who often has a specific-implementation never contemplated by the patentee, would not infringe. That is not the case here. Claim 7 of the ’590 patent, facially and as argued and construed by the patentee below, requires the coordination and integration of a technology-enabled lock box, application server, and visitor’s portable device such that the server is able to provide unique visitor, location, and time dependent “automated entry information” (i.e., time-limited access code information) to the visitor’s portable device. The server and lockbox databases are integrated with time-specific visitation codes that can be recognized by the lock box present at the property. This enables the visitor to be able to open the lock box and securely access the property without the presence of another individual during the pre-determined window of time. *See supra* at Statement of Facts § II, Argument § I.A and Claim 7.

Despite the specificity of the claimed method, and the inherent need for specialty hardware and software components to perform the method, the district court found the method only recited “generic” components and did not provide the “something more” required by *Alice.* This finding was erroneous as a matter of law and failed to accept as true the factual allegations of the patentee. As described in detail below, the lock box contemplated by claim 7 of the ’590 patent is one that can recognize and respond to an automatically-issued unique durational code (“automated entry information”) that facilitates entry for a specific visitor to a specific property during a pre-configured window of time. A conventional or generic lock box would not be able to perform this step of claim 7. Rather than claiming generally the concept of automated entry, the narrowing limitations of claim 7 are for a specific method that facilitates access to a particular property only to an authorized, unaccompanied visitor at a specific time and in a manner which tracks the visit (in terms of who visited, when they visited, and any feedback the visitor may have about the property). As a whole, the system of the ’590 patent improves the efficiency and security of the existing in-person showing system in a way that permitted a paradigm shift in the presentation and showing of properties by the real-estate and property management industries.

Rently, the patentee, alleged and argued this in the court below, but the district court—erroneously at the motion to dismiss stage—simply did not credit the allegations, and did not appreciate the constraints of the claims. Most patents are directed to incremental improvements to technology, yet the district court dismissed the invention because it drew upon known concepts. And the district court’s misunderstanding, overgeneralization, and oversimplification of the asserted claim infected the entirety of its §101 analysis under *Alice* steps one and two.

The district court also misapplied and co-mingled the two-part test of *Alice*, and conflated and confused its invalidity analysis under 35 U.S.C. §101 with that of §103. Concluding, as the district court did, that no “inventive concept” exists based on a finding that prior to the ’590 patent a server *could* have been integrated with an application interface like Rently’s “automated entry” (but actually wasn’t), or a server *could* have been integrated with a portable device and lock box (but actually wasn’t), confuses patent eligibility with obviousness, and does so without any fact finding or the hindsight protections of secondary indicia of non-obviousness. As a result, the actual nature of and inventive concepts described by the limitations of claim 7 were significantly downplayed, if not ignored entirely. The *specificity* of the asserted claims, which were amended during prosecution to *overcome* a Section 101 examiner rejection, is what makes the claims non-preemptive and the specific recitations of software and hardware along with concrete steps is what overcomes Section 101’s patentability hurdle.

The district court further erred in finding that the concept of automated entry using an unconventional, functionally-improved, time-specific coded lock box was not captured by claim 7, and ignored numerous factual issues raised by the specific allegations raised in Plaintiff’s Complaint which it was required to accept as true. As part of this, the district court inferentially adopted a construction of the claim term “lock box” that was adverse to the patentee, despite being obligated to construe all claim terms in the light most favorable to Rently. The district court’s unsubstantiated conclusions regarding the configuration and characteristics of the system elements described in claim 7 were devoid of factual support, and were, *again*, adverse to Rently’s position and contrary to the allegations in the Amended Complaint.

Based on all of the foregoing, the district court erred as a matter of law by dismissing the case at the pleading stage and denying leave to file the Amended Complaint. Rently therefore respectfully requests that this Court reverse and remand for further proceedings.

**STANDARD OF REVIEW**

This Court reviews the grant or denial of motions that are not patent specific pursuant to regional circuit law.
*Content Extraction and Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1346 (Fed. Cir. 2014.);
*Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1124 (Fed. Cir. 2018). The Fourth Circuit reviews the grant of 12(b)(6) motions *de novo*.
*Hart v. Hanover Cty. Sch. Bd.*, 495 F. App’x 314, 315 (4th Cir. 2012). While a district court’s denial of a motion for leave to amend the complaint is typically reviewed for abuse of discretion, where the decision is based on a finding of futility, the Fourth Circuit reviews the decision *de novo.*
*U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 274 (4th Cir. 2014) (“Generally, we review a district court’s denial of a motion for leave to amend for abuse of discretion. But where, as here, the district court denied such a motion on grounds of futility, we employ the same standard that would apply to our review of a motion to dismiss.”) The legal question of whether a claim is valid under § 101 is also reviewed *de novo*.
*BASCOM Global Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341, 1347 (Fed. Cir. 2016). Facts relevant to determining patent eligibility and invalidity must be established by clear and convincing evidence.
*Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1368-69 (Fed. Cir. 2018). Under 35 U.S.C. § 282(a), a “patent shall be presumed valid” and the “burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.”

# ARGUMENT

When the Supreme Court set forth its standard for § 101 patent eligibility in *Mayo* and *Alice*, it provided a wealth of background so that courts could recognize the purpose behind its decision, and thus appropriately apply its limited exclusionary principal. In doing so, the Supreme Court explained that the “concern that drives this exclusionary principle [is] one of pre-emption.”
*Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014). A patent that monopolizes an entire abstract idea or law of nature “might tend to impede innovation more than it would tend to promote it.” *Id*. But, ***an application of such a concept*** “may well be deserving of patent protection.”
*Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012).

Here the preemption concerns that “under gird” the Supreme Court’s *Alice* jurisprudence are not present. Claim 7 of the ’590 patent does not claim every method of entry, or even every method of *automated* entry into real property. It does not claim all uses of lockboxes, all methods of delivering entry credentials, or all methods of validation; much less preempt the showing procedures that are prevalent in the real estate and property management industries. Nor does it preempt even a portion of those uses or fields. Rather, as explained more below, claim 7 is directed at a very particular and narrow method of achieving a secure, automated entry.

The district court’s finding to the contrary, which, as explained below, was based on a fundamental misunderstanding of the inherent requirements of the claim, in fact, runs afoul of the second concern of *Mayo* and *Alice*; namely, “that too broad an interpretation of this exclusionary principle could eviscerate patent law.” *Mayo*, 566 U.S. at 71. “[A]ll inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” *Id*. Patents that do not express the types of preemption concerns underlying the Supreme Court’s decisions in *Alice* and *Mayo* “remain eligible for the monopoly granted under our patent laws.” *Alice*, 573 U.S. at 217. It is noteworthy that the district court never found that claim 7 preempted the entire field for practicing automated entry in any industry.

**I. The District Court Misunderstood The Patented Invention and the Prosecution Leading to the Issuance of the Asserted Claim.**

**A. The District Court Erred In Determining That Claim 7 Does Not Require A Technology-Enabled Lock Box****.**

A fundamental error underlying the district court’s Section 101 analysis was the district court’s finding that the asserted claims do not recite a “technology-enabled” lock box, but instead recite only a “generic” lock box. *See, e.g.,* Dkt. 34 at 16 (“the claim at issue . . . consists instead of the conventional arrangement of ***generic components***”) (emphasis added); Dkt 22 at 12 (stating the claims “merely coordinate pre-existing and***generic computer components***.” (emphasis added). While even conventional, “generic” elements may be patentable when the *arrangement* of those elements is unconventional, *see*
*Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016), the district court’s misunderstanding of the specialized requirements of the recited method permeates the district court’s flawed analysis.

The district court denigrated the words “technology-enabled” as “magic words” added to the Amended Complaint, but supposedly not in the asserted claims of the ’590 patent. Dkt. 34, p. 16. Yet, “technology-enabled” is exactly what the asserted claim, read as a whole and in light of the specification, requires. Though the words “technology-enabled” do not appear in the claims, claim 7, the only asserted independent claim, requires (among other limitations) “providing, by the application, automated entry information to the visitor” that “is valid during a specified period of time,” and a “lock box or automated door lock” that will “open[] to facilitate” entry “to the property” only when the visitor provides the automated entry information to the lockbox “*within the specified period of time*.” Claim 7 inherently requires that the recited “lock box” be able to recognize the time-specific “code information” provided by “the visitor . . . within the specified period of time” in order “to facilitate automated entry to the property”. (’590 patent at 10:25-58.) The unique durational “automated entry information” is delivered to each specific user/visitor in response to an application interface’s receipt of identification information for the visitor. (*Id*. at 224-29, 45-50.) According to the specific phrasing of the claim limitations, the code, as delivered, “*is* valid during the specified period of time.” (*Id*. at 10:49-50) (emphasis added). In other words, the code, when sent, must be time-limited and the lock box must be configured to recognize that time limitation.

A conventional static (non-time limited) code lock box could not be used in this method, because it would not permit the code to be time-limited *at the time it is sent* to the visitor. While it would, of course, be possible (though highly unrealistic) for an agent to physically go to each property and update the entry code of a generic lock box after every visit (the equivalent to changing the locks after each showing to each property by each visitor), that agent would not be performing the claimed method, because at the time the code was provided to the visitor the code was not time-limited, nor could the generic lock box recognize and open in response to time-specific “automated entry information.” The asserted claims, when read in light of the specification, requires the code itself to be preconfigured to be valid only for a predetermined period of time to enable access to a specific property by the visitor. And this, in turn, requires a special kind of lock box, i.e., one that when “plac[ed] . . . at or near [the] property,” either already contains the list of time-specified codes that may be provided to each visitor scheduling a visit to a property (as is the case in Rently’s commercial embodiment), or otherwise can be pre-configured and synchronized with the software providing the automated entry information to facilitate the “self-showing” access to the property. As claimed in the ’590 patent, the lock box must be configured to store or access a database of codes along with the specific time those codes are intended to be used, and must also be configured such that those codes are, in fact, only capable of opening the lock box during that predetermined time period. Furthermore, the codes and time specifications must be synchronized with the information stored in the server for generation and delivery of the automated entry information to each potential visitor to each potential property. In short, the lock box must be a “technology-enabled” lock box that can recognize “automated entry information”, not a generic lock box.

**B. The District Court While, Noting the Prosecution History, Failed to Appreciate its Importance.**

Unlike many of the patents that have been invalidated under *Alice*, the ’590 patent was examined ***after*** *Alice* issued, and after the USPTO examiners were aware of the Supreme Court’s interpretation of patent-eligibility under §101. Because of this claim 12, which matured into claim 7, was specifically amended to include the presence of the “lock box” that could be coordinated to “facilitate” “entry” through a code “within the specified period of time” in order to overcome the examiner’s initial §101 rejection. *See* Facts infra p. \_\_. And the examiner agreed that the amendments brought it in accord with the requirements of §101 as set forth by *Alice*. The district court noted this fact, Dkt 22 at 3-4, but failed to grapple with its implications.

While neither the district court nor this Court is bound by the examiner’s decision, it should “take cognizance of . . . the proceedings before the patent examiner.”
*Garfum.com Corp. v. Reflections by Ruth*, No. CV 14-5919 (JBS/KMW), 2016 WL 7325467, at \*4 (D.N.J. Dec. 16, 2016). Here, the examiner plainly believed that the combination of elements, as amended, recited a specific implementation of hardware and software components that overcame the patentability threshold of Section 101. Both the lock box and the requirement for “specified time period” was part of this amendment, and the combination of elements results in an *un*conventional, non-abstract methodology. There was no basis for finding otherwise at the pleading stage.

**C. At a Minimum Factual and Claim Construction Disputes Should Have Precluded Dismissal At the Pleading Stage.**

Even if the unconventional nature of the combination of hardware and software components of the claimed method was not facially apparent from the claim language, factual and claim construction disputes should have precluded dismissal at the pleading stage. For example, Rently made it clear in its pleadings and filings that the claim term “lock box” does not refer to a generic lock box, but rather a functionally improved technology-enabled lock box. Statements to that effect were reiterated throughout Rently’s many filings. For example:

* “Claim 7 . . . is directed toward specific and concrete improvements to lockbox functionality rather than the mere use of a generic lockbox.” (Dkt. 25 at 13.)
* “Conventional generic lockboxes could not support ‘automated entry.’” (Dkt. 25 at 14.)
* “The elements set forth in Claim 7 of the ’590 Patent . . . represent a vast technological improvement in how a . . . technology-enabled lock box . . . operate[s].” (Dkt. 16 at 9).
* Claim 7 “requires the lock box to be coordinated in time with the server and to maintain and coordinate the code-time database tables.” (Dkt. 16 at 20.)

Despite Rently’s clear assertions as to the meaning of the claim term “lock box” in the method of the asserted claims the district court adopted its own construction—one that was adverse to Rently’s position. The district court was not authorized to make such a determination at the 12(b)(6) stage however. If there is any question as to whether the lock box of claim 7 is properly construed as an improved technology-enabled lock box rather than a generic lock box, the district court was obligated to construe it in the light most favorable to Rently. *See* *MyMail, Ltd. v. ooVoo, LLC, IAC Search & Media, Inc.*, No. 2018-1758, 2019 WL 3850614, at \*5 (Fed. Cir. Aug. 16, 2019) (vacating the district court’s decision that the asserted claims were unpatentable under §101 and holding that “the district court’s failure to address the parties’ claim construction dispute is [an] error under *Aatrix*.”); *Bascom Glob. Internet Servs., Inc.*, 827 F.3d at 1352 (explaining that at the 12(b)(6) stage, claim terms “must be” “construed in favor of [the non-movant].); *Content Extraction & Transmission LLC*, 776 F.3d at 1349 (analyzing the patent eligibility of claims “when construed in a manner most favorable to” patentee.) Yet it did not do so.

This Court recently addressed a similar situation in *MyMail v. ooVoo*. There, the parties’ district court briefing indicated differing constructions of the claim term “toolbar.” *MyMail*, 2019 WL 3850614 at \*4. The district court never addressed the parties’ claim construction dispute, nor did it adopt the patentee’s proposed construction – rather, it simply granted defendant’s 12(c) motion. *Id*. at \*5. The Federal Circuit found that the district court erred and vacated the district court’s finding that the asserted claims were patent ineligible under § 101. *Id*. at \*6. Here, as in *MyMail*, Rently offered a construction of the meaning of the claim term “lock box” which clearly differed from that asserted by defendant. Rather than adopting Rently’s proposed construction or addressing the claim construction dispute itself, as required, the district court simply found that the asserted claims recited a generic lock box. In doing so, the district court ignored applicable Federal Circuit precedent – an error which infected the entirety of its §101 analysis.

Moreover, this was not the only factual or potential claim construction dispute. As set forth in the lower court briefing, potential contested issues included, among other things, (i) whether the ordered combination and integration of a server, lock box, portable device, and application interface to self-show properties was routine or conventional at the time of the ’590 patent application, (ii) whether property managers maintaining the combination of hardware and software necessary to perform the steps of claim 7 to self-show properties was conventional, routine, or well understood at the time of the ’590 patent application; (iii) whether the remote and automatic issuance of “automated entry information” to facilitate entry into a property was conventional, routine, or well understood at the time of the ’590 patent application; (iv) whether to a skilled artisan the steps of claim 7, including but not limited to the claim terms “automated entry information” or “identification information,” solve the problem of automated entry in a sufficiently particular, non-routine, unconventional way, (v) whether the ordered combination of steps in claim 7 results in a functional improvement for automated entry; (vi) whether the steps of claim 7 improve the function of a lockbox; and (vii) whether a generic lockbox could perform the steps of claim 7.  *See* Dkt 25 at p. 30.

At this stage of the litigation, “plausible and specific factual allegations that aspects of the claims are inventive are sufficient” to avoid a finding of ineligibility under §101.
*Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1317 (Fed. Cir. 2019). And where an amended complaint contains such allegations, it cannot be deemed futile. *Aatrix Software, Inc.*, 882 F.3d at 1127. Like *Aatrix,* if the specification does not describe all facts pertaining to how the elements or combination of elements set forth in claim 7 improve upon the prior art and are not routine, conventional, or well-understood to a person of skill in the art, those gaps were filled by the Amended Complaint*.*Aatrix, 882 F.3d at 1128 (“There are concrete allegations in the second amended complaint that individual elements and the claimed combination are not well-understood, routine, or conventional activity. There are also concrete allegations regarding the claimed combination’s improvement to the functioning of the computer.”). Rently alleged plausible and specific factual allegations about the functional improvement of prior lock boxes, problems solved by the patented invention, and the unconventional, non-routine, and not well-understood nature of the ordered integration of hardware and software set forth in claim 7. *See infra* at § II.E. These factual allegations about whether aspects of the asserted claim are inventive more than “filled the gap” under *Aatrix* and should have “preclude[d] dismissal at the pleadings stage under §101.” *See* *Cellspin*, 927 F.3d at 1318.

## II. The District Court Misapplied the Two-Step Analysis of *Mayo*/*Alice*

A patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101. In *Mayo*, the Supreme Court re-affirmed the long-standing implicit rule of § 101 that abstract ideas are not patentable, and set forth a two-step analytical framework to identify patents that, in essence, claim nothing more than abstract ideas.
*Mayo Collaborative Servs. v. Prometheus Labs., Inc*., 132 S.Ct. 1289, 1293 (2012). The court must first “determine whether the claims at issue are directed to a patent-ineligible concept.” *Alice*, 134 S.Ct. at 2355. If so, the court must then “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.” *Alice* (quoting Mayo, 132 S.Ct. at 1298, 1297).

In finding the claims unpatentable, the district court misapplied and co-mingled this two part test. In discussing *step one* in its April 4, 2019 Order, the district court stated, “[i]n 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.” Dkt. 34, p. 9 (emphasis added.). Yet, step one is **not** a review of individual claim elements or even the elements as an ordered combination. *See* supra Section II.A. Those are *step two* considerations. *See* supra Section II.B. Indeed, the district court seemingly applied *the same analysis* in both steps of the inquiry. In discussing *step two* in the April 4, 2019 Order, the district court stated “[t]his 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.” Dkt. 34, p. 12. But this was what the district court said that it did in step one. Having failed to perform the correct analysis in step one, the district court did not follow the law, and this alone, warrants remand. As shown below, however other flaws permeated the analysis.

### A. The District Court Improperly Determined that the Claims of the ’590 Patent are Directed to an Abstract Idea

Under step one of *Mayo*/*Alice*, a trial court must determine whether the claims at issue are directed to one of [the] patent-ineligible concepts,” such as an abstract idea. *Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2355. This step of the analysis is considered a “meaningful one” – a “substantial class of claims” will not be found abstract.
*Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016). The inquiry does not “simply ask whether the claims *involve* a patent-ineligible concept, because essentially every routinely patent-eligible claim involving physical products and actions *involves*” such a concept. *Id*. Rather, step one of the *Alice* test analyzes the claims, “in light of the specification, based on whether their character as a whole is **directed to** excluded subject matter.” *Id*. (emphasis added.)

**1. The district court did not conduct a proper step 1 analysis.**

As indicated above, the district court did not perform a proper step one. In reaching its decision that claim 7 is abstract, the district explained that “[d]istilled to its essence, the claims use generic computing devices and techniques to provide automated entry to a property without human interaction.” (Dkt. 22 at 9); *see also* Dkt 34 at 10 (the claims involve “providing automated entry and making properties available for viewing to invited visitors through generic computer components.” (Dkt. 34 at 10.); *see also* Dkt 22 and 34 at 10 (“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).”

Apart from the incorrectness of the “generic” conclusion, these descriptions of the invention amount to a mere recitation of the preamble of claim 7, which states: “A method for providing automated entry to properties, comprising:” But the essence of a claim is in its limitations. While a preamble may be limiting, it may also be a mere statement of the intended use of the invention, with the bounds of the invention being further defined by the limitations that follow.
*Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 952 (Fed. Cir. 2006). The abstract idea propounded by the district court ignores the limitations beyond the preamble – ***every single one of them***.

The remaining claim limitations narrow the claim to a specific method of providing a secure automated entry so that an authorized, unaccompanied visitor can access a particular property, at a specific time, and in a manner which tracks their visit (who visited, when visited, visitor feedback) while avoiding the security and efficiency concerns inherent to prior methods, rather than the entire concept of automated entry itself. Specifically, claim 7 requires (among other elements) the use of “automated entry information” that “is valid during a specified period of time” and “being applicable only to the property” and a “lock box or automated door lock” that “allows the visitor to enter the property” and will “open[] to facilitate” entry to the property only when the visitor provides the automated entry information to the lockbox “within the specified period of time.” (’590 patent at 10:25-58.) The automated entry information is delivered to the user/visitor in response to an application interface’s receipt of identification information for the visitor. (*Id*. at 224-29, 45-50.) The code that is delivered to the user/visitor’s device is only “valid during the specified period of time.” (*Id*. at 10:49-50). Far from being the result-oriented abstract idea argued by Tenant Turner, claim 7 is rule-based, and claims a specific manner in which to accomplish the underlying goal. Given the numerous restricting limitations the claim is “directed” to a non-abstract, real-life method accomplished with hardware, software, and by leaving a lock box (a tangible thing) at a real property location.

The Federal Circuit has warned that describing the claims at too “high [of a] level of abstraction and untethered from the language of the claims all but ensures that the exceptions to §101 swallow the rule.” *Enfish*, 822 F.3d at 1337. Simply inquiring into whether a claim “involves” a patent-ineligible concept is improper because “essentially every routinely patent-eligible claim involving physical products and actions involves a law of nature and/or natural phenomenon”. *Enfish*, 822 F.3d at 1335. The overgeneralization of claims, if “carried to its extreme, make[s] all inventions unpatentable because all inventions can be reduced to underlying principles of nature.”
*Diamond v. Diehr*, 450 U.S. 175, 189 n. 12, 101 S. Ct. 1048 (1981). Therefore, it is critical that a claim’s key inventive concepts not be oversimplified and an invention’s benefits not be “downplayed.” *Enfish*, 822 F.3d at 1337-38; *see also*
*McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016) (“[C]ourts must be careful to avoid oversimplifying the claims by looking at them generally and failing to take into account for the specific requirements of the claims.” (internal quotations omitted)).

The district court’s overgeneralized characterizations of the claims ignore the limitations of the claim, most notably the portions which the specification and Amended Complaint described as providing a clear benefit over the prior art and solution to the problems created by prior technology.[[2]](#footnote-3) The district court’s characterization of “automation” as being a “common method” would result in the invalidation of virtually ***all*** software patents. Dkt 22 and 34 at 10. Furthermore, framing claim 7 as only solving an “old problem” of “how to provide an invited visitor entry to a property for a specified period of time” completely misunderstands and ignores the scope and purpose of claim 7. Dkt. 22 and 34, at 10. If the district court’s analysis were correct, the problem of how to provide an invited visitor entry to a property for a specified period of time had already been solved by in-person showings. *See also*, Dkt. 25 at 18, fn. 13, 21-22.

In opposing the Motion to Dismiss and seeking leave to file an Amended Complaint, Rently thoroughly explained why the asserted claims of the ’590 patent are *not* directed to an abstract idea. Rently explained that the court should find the claims non-abstract because the steps of claim 7 are rooted in technology, purport to improve on a technical process, purport to improve on a technology-enabled lock box, and are unconventional. *See* Dkt. 25 at 6-24; Dkt. 16 at 10-20. The district court brushed aside each of these arguments, and characterized the new allegations in the Amended Complaint as “conclusory and boilerplate”. Dkt 34 at p. 14. The district court concluded that “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.” The district court’s opinion is completely silent on *how* it reached this conclusion, let alone *why* the “new facts” in the proposed Complaint did not substantively alter the Court’s findings. But as explained above, this was factually incorrect, or, at a minimum, a contested factual and/or claim construction issue. Whether something is conventional or generic is a question of fact, and Rently’s concrete allegations in that regard must be taken as true at the 12(b)(6) stage. *See* *supra* at § II.C.

#### 2. Claim 7 is A Technology-Rooted, Non-Abstract Method.

Had the district court not committed these fundamental errors, it would have been compelled to find the asserted claims of the ’590 patent non-abstract. As explained in its briefing at the district court level, the asserted claims are non-abstract because they describe a real-world method that is rooted in technology, and involves placement of a technology-enabled lock box (a tangible thing) at a real property, going to that real property and opening the lock box, and tracking the visitor. *See* Dkt. 25 at 6-24; Dkt. 16 at 10-20. This is about as far from abstract a method can be.

This Court routinely finds claims rooted in technology or directed at improvements in a technological process or a device to be non-abstract. For example, in *Core Wireless*, this Court found that improvements to a user interface for computing devices were non-abstract.
*Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1363 (Fed. Cir. 2018). This Court explained that since the limitations disclosed a “specific manner of displaying a limited set of information to the user, rather than using conventional user interface methods to display a generic index on a computer,” the claims improved upon prior user interfaces and were therefore non-abstract. *Core Wireless*, 880 F.3d at 1363.

Similarly, in *Ancora Technologies, Inc. v. HTC America Inc.*, this Court held that claims directed at a specific method of improving computer security were non-abstract.
*Ancora Techs., Inc. v. HTC Am., Inc.*, 908 F.3d 1343, 1348–49 (Fed. Cir. 2018), *as amended* (Nov. 20, 2018). There, the claim at issue addressed a technological problem with computers – vulnerability of certain software to hackers. *Id*. The Court explained that improving security could be a non-abstract computer functionality improvement “if done by a specific technique that departs from earlier approaches to solve” the specific problem. *Id*. Since the claimed method “specifically identifie[d] how that functionality improvement is effectuated,” the Court found that it had the “specificity required to transform a claim from one claiming only a result to one claiming a way of achieving it,” and therefore it “passe[d] muster under Alice step one.” *Id*. at 1349.

Here, as in *Core Wireless* and *Ancora*, claim 7 does not merely describe “provid[ing] automated entry to a property without human interaction,” (Dkt. 22 at 9), as the district court described it in one instance. Dkt. 34, pp. 10-11. Rather, the limitations transform the claim in a concrete series of steps that identify how the functional improvement is effectuated. Claim 7 describes the specific manner of permitting such automated entry through a functionally-improved technology-enabled lockbox, the use of time, visitor, and location specific codes, and the issuance of automated entry information to a visitor’s portable device such that the lockbox will only grant entry during the preauthorized time period for that specific visitor, and such that the visitor’s entry may be tracked. *See supra* at § I.A. Like *Core Wireless*, although the idea of using a lockbox to provide entry into a property certainly existed prior to the ’590 patent, claim 7 is directed to a particular manner of improving upon that process. *See*, *Core Wireless*, 880 F.3d at 1362-63. The claim specifically identifies how “that functionality improvement is effectuated” and does so with the “specificity required to transform” it from a claim “claiming only a result to one claiming a way of achieving it.” *See* *Ancora*, 908 F.3d at 1349.

Tenant Turner argued in its Motion to Dismiss that the purpose of *Alice* was to avoid patents that “although frequently dressed up in the argot of invention, simply describe a problem, announce purely functional steps that purport to solve the problem, and recite standard computer operations to perform some of those steps.” Dkt. 13 at 1, citing
*Loyalty Conversion Sys. Corp. v. American Airlines, Inc.*, 66 F. Supp. 3d 829, 845 (E.D. Tex. 2014). According to the Court in *Loyalty* *Conversion*, a limitation is “purely functional” when “neither the limitation nor anything in the specification provides any detail as to how that function is performed.” *Loyalty Conversion*, 66 F. Supp. 3d at 838. Under that analysis, patents such as the ’590 patent are clearly *not* the target of the Supreme Court’s focus in *Alice*, because the limitations of claim 7 do not recite “purely functional steps.” Unlike many patents that are found abstract, claim 7 cannot be performed with the human mind, and is not the kind of activity that § 101 is meant to exclude.

In *SRI International*, this Court found that the asserted claims were non-abstract because they were directed to a specific technique of solving problems and did not require the use of the human mind alone*.*
*SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1303-4 (Fed. Cir. 2019). There, the defendant argued that the claims were abstract, in that they focused on using a computer merely as a tool to accomplish steps that people can go through in their minds. The Federal Circuit disagreed with this argument, finding that the “human mind [was] not equipped” to accomplish the steps of the claims, and that the claims were therefore “not the type of human activity that § 101 is meant to exclude.” *Id*.

Here, claim 7 and the specification of the ’590 patent describe a specific technique of accomplishing *one* secure method of automated entry, and does so in a way that cannot merely be performed by the human mind. The claimed method involves the generation and delivery of visitor, location, and time specific entry codes to a user device and a lockbox placed onsite such that the codes are coordinated and will facilitate entry by the visitor (through operation of the lockbox) only during a pre-arranged period of time. (’590 patent at 10:25-58.) These steps cannot be performed by the human mind alone, as the human mind could not know in real time when or which visitor used which code at any given time unless physically present at a property, and whether that code should be authorized to enter that specific property, particularly given the large amount of time-dependent codes that could be generated. Amended Complaint at ¶ 17. Even if “the goal of the claims is functional,” claims are not abstract where the “clear focus” is “a particular improvement in how” that goal is achieved.
*Uniloc USA, Inc. v. ADP, LLC*, 772 F. App’x 890 (Fed. Cir. 2019).

The clear focus of claim 7 is on the specific manner in which it accomplishes automated entry and improves on technology (a functionally-improved lockbox able to recognize and respond to “automated entry information”) and the technological process (the remote and automatic issuance of “automated entry information”), not simply the goal of automated entry itself. Claim 7 is therefore non-abstract and is patent eligible under §101. *See* *Ancora*, 908 F.3d at 1349; *Core Wireless*, 880 F.3d at 1362-63; *Uniloc*, 772 F. App’x 890; *see also* *McRO, Inc.*, 837 F.3d at 1316 (abstraction is avoided where “the claim uses the limited rules in a process specifically designed to achieve an improved technological result in conventional industry practice.”);
*SRI Int’l, Inc. v. Cisco Sys., Inc.*, No. 2017-2223, 2019 WL 3162421, at \*4 (Fed. Cir. July 12, 2019) (finding the claims non-abstract because the “focus of the claims [was] on the specific asserted improvement” in technology.); *Trading Techs. Int’l, Inc. v. CQG, INC.*, 675 F. App’x at 1004 (agreeing with the district court that the claims were non-abstract because they require a “specific, structured” set of requirements and functionality that is “addressed to and resolves a specifically identified problem in the prior state of the art.”);
*DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257-58 (Fed. Cir. 2014) (finding the asserted claims non-abstract because “the claims at issue here specify how interactions with the Internet are manipulated to yield a desired result,” rather than simply stating the desired result itself.)

When analyzed under the proper Federal Circuit precedent, it is clear that the claims are not abstract, but instead are rooted in technology and directed to specific improvements and solutions to prior technological problems. Since step one is a threshold inquiry, a finding of non-abstraction ends the analysis. *Enfish, LLC.*, 822 F.3d at 1334. It was therefore an error for the district court to dismiss the complaint and to deny Rently’s motion for leave to file an Amended Complaint.

### B. The District Court Erred in Concluding ’590 Patent Does Not Satisfy the Inventive Concept Test of *Alice* Step Two

Under *Alice*, even if the court determines that a particular claim is directed to an abstract idea, the court cannot invalidate the patent under §101 unless it determines that there is no inventive concept. The Court must find that there is no element or combination of elements that is “sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [alleged abstract idea] itself.” *Alice*, 134 S.Ct. at 2355. A patent will satisfy this requirement “when the claim limitations ‘involve more than performance of well-understood, routine, [and] conventional activities previously known to the industry.’” *Berkheimer*, 881 F.3d at 1367 (citation omitted).

The fact that each element of a claim might be “conventional” standing alone will not doom it under step two. Where a well-known technology is used in an unconventional way, it will provide an “inventive concept.” *Bascom Glob. Internet Servs., Inc.*, 827 F.3d at 1349–50. The question of whether “a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact.” *Berkheimer*, 881 F.3d at 1368. “Any fact, such as this one, that is pertinent to the invalidity conclusion must be proven by ***clear and convincing*** evidence.” *Id*. (emphasis added.) And such factual determinations cannot be answered against the patentee on a Motion to Dismiss. *Cellspin Soft, Inc.*, 927 F.3d at 1315.

In analyzing step two of *Alice*, the district court failed both as to its understanding of what the asserted claims require (e.g., a technology-enabled lock box), as well as in its analysis of the ordered combination of elements. The district court asked not whether the arrangement of elements was well-known and conventional, but instead, whether the combination *could[[3]](#footnote-4)* have been done, with known elements. For example, the court stated, “[a]lthough it may be true that previous systems had not incorporated the 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.” Dkt. 22 at p. 17. This analysis conflates and confuses Section 101 with Section 103. *If prior systems did not incorporate the combination, how could it be conventional?* Whether a combination or modification, though never before existing, would have nonetheless been obvious is a separate inquiry distinct from the conventionality concept of Section 101. *See* 35 U.S.C. § 103.

The district court reached unsubstantiated conclusions about the configuration of computer systems and “undoubtedly conventional functions….” that were not supported by any factual evidence, and indeed were contrary to the allegations. Dkt. 22 at p. 17. As discussed above, Rently *at minimum* raised questions of fact as to whether the integration of server and lock box databases with coordinated time-code tables to facilitate entry to property, the use of application interfaces on a user’s portable device to receive “automated entry information from servers”, and the recognition of and response to “automated entry information” by a lockbox was known, expected, and conventional way at the time of the ‘590 Patent. Even if the district court were to disagree, it erred in dismissing the Complaint and in refusing to grant leave to file the Amended Complaint because the questions answered by the district court are questions of fact, which cannot be decided adversely to the Rently on a motion to dismiss. At the motion to dismiss stage “plausible and specific factual allegations that aspects of the claims are inventive are sufficient.” *Cellspin*, 927 F.3d at 1317. Rently more than met this threshold, and the district court’s decision to the contrary was error.

#### 1. Claim 7 is Patent-Eligible Under §101 because it Improved the Functionality of Technology-Enabled Lockboxes

The claimed combination’s improvement to the functioning of a technology-enabled lockbox is an inventive concept sufficient to confer patent eligibility. As discussed in Section I.A., claim 7 is directed toward specific and concrete improvements to lock box functionality. (*See supra* at I.A.). Prior conventional lock boxes could not recognize automated entry information and had to utilize manually issued static codes. Amd. Complt. ¶¶ 26-27, 35. Since the codes were not restricted to the individual, or to a specific time, providing such codes to prospective buyers for self-tours created a risk of visitors using the self-showing for nefarious purposes, such as stealing items from the property. Amd. Complt. ¶ 29. As a result, the sales representative had to be physically present to facilitate safe entry. Amd. Complt. ¶ 27.

 Claim 7’s functional improvement of technology-enabled lockboxes solved this problem and made self-showing much more efficient as well as safer, to such an extent that the industry finally adopted a model where self-showings are now widely recognized by and implemented in the marketplace. Amd. Complt. ¶¶ 35-36, 44. This was completely contrary to the convention. Amd. Complt. ¶¶ 35-36, 44. The use of dynamic, non-static, durational codes specific to the visitor, the property visited, and the time of the visit offers a clear security benefit over the static codes used to open generic lockboxes. Amd. Complt. ¶ 21. By allowing for remote and automated control of who could enter a property, when they could enter it, and the ability to track who in fact entered the property, the invention of claim 7 alleviated security concerns with self-showings inherent to prior lockboxes and thereby enabled self-showings to be utilized, eliminating the need for the presence of an on-site representative. Amd. Complt. ¶¶ 21, 23, 26, 31, 35.

This Court has held that “specific technologic modifications to solve a problem or improve the functioning” of a system, such as claim 7’s improvements to technology-enabled lockboxes, “generally produce patent-eligible subject matter.” *See* *Trading Techs. Int'l, Inc.*, 675 F. App’x at 1004-05. In *Trading Techs.*, this Court found that changes to a graphical user interface which allowed traders to more efficiently place trades using an electronic trading system were sufficiently inventive under step two of *Alice* to confer patent eligibility under §101. *Trading Techs. Int’l, Inc.*, 675 F. App’x at 1004. There, the claimed graphical user interface was an improvement over prior graphical user interfaces that created a timing and coordination problem whereby the stock prices may have changed by the time the trader attempted to place the order. *Id.* at 1003. The Federal Circuit agreed with the district court’s finding that although the claims focused on software, they purported to solve a problem created by the prior technology, rather than merely the concept of a graphical user interface for use with electronic stock trading. *Id*. at 1004-05. The Court explained that abstraction is “overcome when a proposed new application or computer-implemented function is not simply the generalized use of a computer as a tool to conduct a known or obvious process, but instead is an improvement to the capability of the system as a whole.” *Id*. at 1005. Here, as with *Trading Techs.*, the claimed technology-enabled lockbox improves on the functionality of prior lockboxes, and does so in a way that solves the security and coordination problem created by those very same prior lockboxes. When claims are directed to a “specific implementation of a solution to a problem” in technology, as here, such claims are patent-eligible under §101. *See Enfish, LLC*, 822 F.3d at 1339.

The inventiveness of the claimed technology-enabled lock box is further supported by this Court’s reasoning in *Berkheimer*, 881 F.3d at 1369. There, the Court found that methods of archiving data in a manner that reduced redundancy were arguably inventive under §101, even though they were software based. *Berkheimer*, 881 F.3d at 1369. Prior systems for archiving allegedly resulted in multiple instances of redundant document elements, which the patentee argued was solved by the claimed archiving system’s ability to avoid redundancies and thereby increase efficiency. *Id*. Despite defendant’s arguments that “redundancy and efficiency are considerations in any archival system, including paper-based systems,” the Court found that such alleged benefits created a genuine issue of fact as to the inventiveness of the claims. *Id.* at 1370.

Here, as in *Berkheimer*, prior technological solutions to real estate showings created a problem – in this case the problem being one of security and efficiency. Claim 7 of the patent is a direct response, and solution to, those problems. Moreover, as explained in the briefing below, Dkt 25 at 13, 24-25, the recognition of “automated entry information” specific to time, person, property parameters by a lock box is tantamount to the system in claim 7 being able to “filter in” requests for entry by visitors providing correct “automated entry information” and “filter out” requests by visitors who provide incorrect “automated entry information” (e.g., requests by visitors not authorized to visit the property, requests by an authorized visitor to see a different property, or requests by an authorized visitor to see the appropriate property at the wrong time.) The time, person, place parameters captured in the language of claim 7 make it more analogous to cases that have found an inventive concept. *See, e.g., Bascom Glob. Internet Servs., Inc.*, 827 F.3d at 1349–52*.* It is therefore, at a minimum, arguably inventive and sufficient to meet step two of the *Alice* test for purposes of a motion to dismiss.

The district court erred in finding to the contrary. In refusing to permit Rently’s Amended Complaint, the district court merely stated that the “claim at issue is not directed to any specific improvement in computer functionality or capabilities, but consists instead of the conventional arrangement of generic components,” and that “Plaintiff simply alleges magic words that are not captured in the claim language.” (Dkt. 34 at 16). The district court was similarly conclusory in its prior order on the motion to dismiss, simply stating that “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,” and that the claims “do not purport to improve the functionality of a computer or overcome existing technology-based problems.” (Dkt. 22 at 15, 17).

The district court failed to take into account the numerous allegations in the Amended Complaint which demonstrate that the claims do, in fact, improve on the functionality of prior lock boxes, and solve a problem that was created by those very same devices. The Amended Complaint describes the problems created by in person-showings and the use of conventional lockboxes, and presents specific allegations directed to improvements and problems solved by the patented invention and recited by the claims. And as explained above, a functionally-improved lock box is a necessity of the claims. *See supra* at § I.A. The district court was therefore required to accept Rently’s factual allegations as to the inventiveness of the claimed invention as true, and it was an error for the district court to discount such assertions. *See* *Cellspin Soft, Inc.*, 927 F.3d at 1317-19; *Aatrix*, 882 F.2d at 1126-27 (“patentees who adequately allege their claims contain inventive concepts survive a § 101 eligibility analysis under Rule 12(b)(6).”) To the extent there was room to dispute what the claims necessarily required or the functionality of those elements, the district court was obligated to construe the claim terms in the light most favorable to Rently at the 12(b)(6) stage. *See supra* at § I. It did not, and it therefore erred in granting the Motion to Dismiss and in finding that the proposed Amended Complaint would be futile.

#### 2. Claim 7 is Patent-Eligible Under §101 because the Claimed Ordered Integration was not Routine, Well-Understood, or Conventional

Not only did claim 7 and its dependent claims improve upon prior lockbox technology, but the specific ordered integration of the system taught by claim 7 was not well-understood, routine, or conventional. At the time Rently applied for the ’590 Patent, the use of lockboxes responsive to manually issued static code entered by an agent during an in-person showing was the convention. Amd. Complt ¶ 28. But “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, thereby enabling the remote and automatic issuance of a unique durational code (“automated entry information”) to facilitate entry, was neither conventional, routine, nor well understood in any industry. Amd Complt ¶ 25-30. Allowing a person to enter the premises on their own with the type of lockbox code available at the time was seen as dangerous and risky, and faced “widespread skepticism.” Amd Complt at ¶ 29. The type of automated entry permitted by claim 7 was completely unknown. Amd Complt ¶ 28.

Claim 7 of the ’590 patent first introduced the integration of a server, technology-enabled lockbox, and portable devices via an application interface with coordinated server and lockbox databases able to remotely and automatically issue automated entry information that had been reconciled to the availability of a visitor to visit a property and the availability of a property to be visited. *See* Amd. Complt. ¶¶ 29-30. The remote, automatic control of entry into a property could not have been well-understood, routine, or conventional when Rently applied for the ’590 Patent application, because at the time in-person showings were the widely accepted way to show properties. *See* Amd. Complt. ¶¶ 32. This is evidenced through numerous statements from key members of the industry, including Rently’s competitors, ***and even Tenant Turner itself.***

For example, All Property Management, LLC published an article in February 2014 titled How Will Rently.com Change Your Business? The article described Rently’s self-showing system as “innovative,” and stated that it “represent[s] the next wave of productivity improvements in the rental business,” and offers “unprecedented levels of instant gratification, while making it possible for property managers to scale back even further on the time-sensitive and time-intensive aspects of their jobs...” *See* Amd. Complt. ¶¶ 42-43. Tenant Turner’s own CEO, James Barrett admitted in April 2018 that “a couple years ago in particular, people were hesitant to give up control of their tenant leads. . .[but] software is becoming more of a necessity now. . .” Amd Complt ¶ 39. In this same interview, another defendant executive described the recent growth of “self-showing” properties amongst the uses of Tenant Turner’s software solutions. See Amd Complt ¶ 40. Rently’s Amended Complaint is replete with additional facts demonstrating the unconventional nature of its invention, yet the district court summarily discounted those averments.

The non-routine, non-conventional, and not well-understood ordered integration of the system and its components at the time of the ’590 patent constitutes a sufficient inventive concept to survive a §101 challenge under step two of *Alice*. In granting the Motion to Dismiss, and finding that the Amended Complaint would be futile, the district court erred in failing to fully consider these factual allegations and misapplied the applicable case law. “Whether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination.” *Berkheimer*, 881 F.3d at 1369. And the mere fact that something is known does not mean that it was well-understood, routine, and conventional. *See id.*

The district court acknowledged that the Amended Complaint “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.” (Dkt. 34 at 17.) The district court nonetheless dismissed the allegations of inventiveness in the specification and Amended Complaint as insufficient, stating that these allegations simply restate the abstract idea and “describe the implementation of the abstract idea through conventional computer components.” (Dkt. 34 at 18.) The district court failed to consider however that even claims using an environment such as a computer, a mobile phone, etc., may be inventive when they “recite [a] specific, plausibly inventive way of arranging devices and using protocols.” *See* *Cellspin Soft, Inc.*, 927 F.3d at 1319.

This Court’s decision in *Cellspin* is apropos. There, the Federal Circuit addressed the patent-eligibility of claims directed to a method of capturing and uploading digital information, such as a digital image, using a data capture device and a mobile device, linked via short range wireless communication protocols such as Bluetooth. *Id*. at 1310. Although the Court found that the claims were directed at an abstract idea, it held that they nonetheless were at least arguably inventive under §101 because the allegations in the complaint identified several ways in which the application of capturing, transferring, and publishing data was unconventional, and in which the specific ordered combination was inventive. *Id*. at 1316-18. Specifically, the patentee argued that the claim recited an inventive concept because it was unconventional to split the process between two devices, as opposed to having the same device capture as well as upload the data. *Id*. at 1316-17. The patentee further argued that the specific ordered combination of requiring the establishment of a paired connection before the data is transmitted was unconventional. *Id*. at 1317. Essentially, the patentee alleged that although the components were all known, it was not conventional to combine them in the specific manner, or use them in the way the patent claimed.

Despite appellee’s argument that the “limitations relied on by Cellspin amount to nothing more than minor variations in the technological environment in which the abstract ideas are implemented,” the Court found them sufficient to convey patent eligibility under §101 when accepted as true. *Id*. at 1317-19. The Court explained that even if the components were conventional, “implementing a well-known technique with particular devices in a specific combination, like the two-device structure here, can be inventive.” *Id*. at 1318.

Here, as in *Cellspin*, claim 7 recites a specific way of arranging devices that has been alleged to be inventive. Rently has done “more than simply label these techniques as inventive” it has “pointed to evidence suggesting that these techniques [have] not been implemented in a similar way.” *See id*. at 1318. Claim 7 does not merely claim the use of conventional components to permit automated entry. It claims a specific method and arrangement of a server, a portable device, and a lockbox that facilitates automated entry into a property using automated entry information that is specific to visitors, properties, and times, and which information is recognized by the foregoing devices. *See supra* at [\_\_]. This is a specific arrangement that, much like the arrangement of devices in *Cellspin*, was not conventional, routine, or well-understood at the time, and therefore constitutes an inventive concept.

This is further supported by this Court’s analysis in *Bascom Glob. Internet Servs., Inc.*, 827 F.3d 134. There, this Court explained that an “inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.” *Id*. at 1350. Although the claimed technology, a filtering tool used to determine whether a visitor should be permitted access to a website, was made up of conventional components, the Court nonetheless found it inventive. *Id*. at 1345, 1350-51. According to the Court, “filtering content on the Internet was already a known concept,” but “the patent describes how its particular arrangement of elements is a technical improvement over prior art ways of filtering such content.” *Id*. at 1350. Thus, the Court found an inventive concept in the “non-conventional and non-generic arrangement of known, conventional pieces.” *Id.* In reaching this decision, the Court explained that the “inventive concept inquiry requires more than recognizing that each claim element, by itself, was known in the art.” *Id.*

Like *Bascom*, claim 7 of the ’590 Patent claims a technology-based solution to the problems created by prior lockboxes in a way that solves the problems inherent to that prior technology. It does so with a specific combination that was neither routine, well-understood, nor conventional. The specification of the ’590 patent and Amended Complaint describe in detail how the ordered combination of a server and a technology-enabled lockbox improved the technological process of permitting safe and efficient entry into properties by enabling the remote and automatic issuance of automated entry information recognizable by a lockbox at a specific time. Furthermore, the ordered combination of the application interface, server, and portable device enabled the remote issuance and retrieval of automated entry information from the server that is sent to the visitor’s portable device. As discussed at length above, this technological process was neither routine, well understood, generic, nor conventional.

Under the explicit teachings of *Bascom* and *Cellspin*, if in this case it is found that prior systems were not known to integrate a server with a technology-enabled lockbox and a portable device via an application interface in the combinationtaught by claim 7 of the ’590 patent, the Court musthold that claim 7 is directed to an “inventive concept” (even ifthe elements individually are deemed conventional) by virtue of the non-conventional and non-generic arrangement. *See* *Bascom*, 827 F.3d at 1350; *Cellspin*, 927 F.3d at 1319.

Rather than following the teachings of *Bascom* and *Cellspin*, the district court relied on *BSG Tech.* in determining that it did not need to consider whether the specific ordered combination of claim 7 was well-understood, routine, or conventional. (Dkt. 22 at 18.) The court stated that the alleged inventive concept merely restated what it already found to be an abstract idea, and then cited to *BSG’s* decision. (*Id*.) But in *BSG*, the focus was on whether the “claims recite[d] unconventional features,” and the only alleged unconventional feature was the requirement that “users are guided by summary comparison usage information or relevant historical information.”
*BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018). This was found to merely narrow the abstract idea to a specific field. *BSG Tech LLC*, 899 F.3d at 1290-91. In *BSG Tech*, the claims did not recite any improvement in the functionality of a database which “serves in its ‘ordinary capacity’ of storing the resulting information.” This is contrasted by the improved functionality of the lockbox disclosed by claim 7 and the non-generic environment in which automated entry information is recognized by the lockbox to facilitate entry into a property during a specified period of time. Neither the district court nor the Federal Circuit in that case addressed the issue of whether the specific ***arrangement, use, or ordered combination*** of devices was ***well-understood, routine, or conventional***.
*BSG Tech LLC v. AutoZone, Inc.*, No. 2:16-CV-529, 2017 WL 2609066, at \*4–5 (E.D. Tex. Mar. 30, 2017), aff’d sub nom. *BSG Tech LLC.*, 899 F.3d at 1289–91. The Federal Circuit clearly noted that “BSG Tech does not argue that other, non-abstract features of the claimed inventions, alone or in combination, are not well-understood, routine and conventional database structures and activities.” *BSG Tech LLC*, 899 F.3d at 1291. In *BSG*, the only unconventional feature alleged by the patentee was the requirement that users are guided by summary comparison usage information or relative historical usage information, which the Federal Circuit found simply restated the abstract idea. This is in contrast to Plaintiff’s allegations that the ordered combination of an application interface, a portable device, a server and a tech-enabled lockbox, the latter two both having the same code-time specifications in their databases, improved the technological process of showing properties as well as the functionality of the lockbox itself by enabling the remote and automatic issuance of automated entry information to facilitate entry to a specific property at a specific time by a specific visitor. Plaintiff has repeatedly asserted that under *Bascom*, the foregoing ***combination*** taught by claim 7 of the ’590 Patent is directed to an “inventive concept” (*even if* the elements individually are deemed conventional) by virtue of the ***non-conventional and non-generic arrangement of known, conventional pieces***. Bascom, 827 F.3d at 1350. Thus, *BSG* does not support the district court’s decision to ignore the Amended Complaint’s allegations that the specific ordered combination was not well-understood, routine, or conventional. Rently has set forth specific factual allegations in this regard, which must be accepted as true. The district court’s failure to do so was in error, and contrary to applicable precedent. *See e.g.*, *Cellspin*, 927 F.3d at 1316-19.

The district court further erred in determining that claim 7 merely restates the alleged abstract concept. The specific ordered combination of claim 7 permits the use of unique, time, location, and visitor dependent access codes among a lockbox and a user in a coordinated fashion which improves the efficiency of the property showing process as well as its security. This is not merely a restatement of an abstract idea of automated entry, but a specific manner in which automated entry may be accomplished. The Amended Complaint set forth numerous allegations regarding the unconventional, non-routine, and non-well-understood nature of that ordered combination, and the district court was obligated to accept those as true.

The district court’s decision is more akin to the arguments that this Court rejected in *Berkheimer* and *Bascom*. In *Berkheimer*, the Federal Circuit explained that the plaintiff had put forward specific allegations regarding the inventiveness of the claims, and that defendant’s sole evidence in response was a conclusory statement that the claimed features “were known functions at the time” and when combined performed “the exact same functions to yield predictable results.”
*Berkheimer v. HP Inc.*, 890 F.3d 1369, 1371–72 (Fed. Cir. 2018). The Federal Circuit explained that this fails to address the question of “whether the additional limitations were well understood, routine, and conventional.” *Id*.

Similarly, in *Bascom*, this Court rejected the district court’s determination that the elements were well-known in the prior art and that using the claimed components was “well-known to practitioners.” *Bascom Glob. Internet Servs., Inc.*, 827 F.3d at 1347. The Court found that the district court’s analysis “looks similar to an obviousness analysis under 35 U.S.C. § 103, except lacking an explanation of a reason to combine the limitations as claimed.” In rejecting the district court’s finding, the Court held that the “inventive concept inquiry requires more than recognizing that each claim element, by itself, was known in the art,” and that “an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.” *Bascom Glob. Internet Servs., Inc.*, 827 F.3d at 1349–50.

Here the district court conducted a similarly flawed analysis, and completely brushed aside the question of whether the specific ordered combination and additional limitations were well understood, routine, or conventional. Instead, the district courtsimply stated that computer systems were previously configured in a manner that would “allow” the claimed coordination. (Dkt. 22 at 17.) It did not address the issue of whether such coordination was well-understood, routine, or conventional. Rather, it appears to have conducted an obviousness-type analysis, but one lacking any explanation of motivation to combine. But the question of whether something was conventional is entirely different from the question of whether it was known or even possible. *Bascom*, 827 F.3d at 1349–50. In fact, the district court acknowledged that “it may be true that previous systems had not incorporated this particular combination” of components. (Dkt. 22 at 17.) As in *Berkheimer* and *Bascom*, the district court focused on whether it was possible to implement the claimed method, not whether such a method was well-understood, routine, or conventional. The district court therefore erred in granting the Motion to Dismiss and in finding that the proposed Amended Complaint would be futile.

# CONCLUSION

For the foregoing reasons, Rently respectfully requests this Court reverse the

District Court’s erroneous finding that the asserted claims are unpatentable under 35 U.S.C. § 101 and remand the case for further proceedings.

Dated: Respectfully submitted,

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# CERTIFICATE OF COMPLIANCE

 1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a) because this brief contains \_\_\_\_\_\_\_ words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

 2. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. In its order, the district court stated that futility was the *sole* ground on which leave to amend was denied. Appx. \_\_ (April 4 order) at 5. [↑](#footnote-ref-2)
2. The district court’s later analysis of the claim terms individually fails to cure this defect, as that analysis is reserved for step two of
*Alice*. *See* *Trading Techs. Int'l, Inc. v. CQG, INC.*, 675 F. App’x 1001, 1005 (Fed. Cir. 2017); *see supra* at [--]. [↑](#footnote-ref-3)
3. It is noteworthy that at the conclusion of the October 15, 2018 hearing on Tenant Turner’s motion to dismiss, the district court made the following observation: “I am familiar with lockboxes. I am familiar with what they did or didn’t do. I must say that I have some awareness of what those things are and why they are used. I have some familiarity with that. But it’s all based on years ago, 40 years ago probably. So it’s based on the information I learned then**. To a large extent it appears that lockboxes were quite common then, but not anything automatic, I must say that**.” (emphasis added.) Transcript of October 15, 2018 hearing, at 62:11-18. [↑](#footnote-ref-4)