16-1188, -1190, -1191, -1192, -1194, -1195, -1197, -1198, -1199

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

EVOLUTIONARY INTELLIGENCE LLC,

Plaintiff-Appellant,

—v.—

SPRINT NEXTEL CORPORATION, INC., SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS, INC., APPLE INC., FACEBOOK, INC., FOURSQUARE LABS, INC., GROUPON, INC., LIVINGSOCIAL, INC., MILLENNIAL MEDIA, INC., TWITTER, INC., YELP INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. RONALD M. WHYTE, SENIOR JUDGE
CASE NOS. 5:13-CV-03587-RMW, 5:13-CV-04201-RMW, 5:13-CV-04202-RMW, 5:13-CV-04203-RMW, 5:13-CV-04204-RMW, 5:13-CV-04205-RMW, 5:13-CV-04206-RMW, 5:13-CV-04207-RMW, AND 5:13-CV-04513-RMW

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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 us is:

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party represented by us are:

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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 us is:

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party represented by us are:

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

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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 us is:

   Millennial Media LLC (formerly Millennial Media, Inc.)

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party represented by us are:

   Millennial Media LLC is a wholly owned subsidiary of AOL Inc., which is a wholly owned subsidiary of Verizon Communications Inc. Verizon Communications Inc. is a publicly held company. No publicly held corporation owns 10% or more of the stock of Verizon Communications Inc.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this Court:

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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 us is:

   LivingSocial, Inc.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party represented by us are:

   Through its directly or indirectly wholly owned subsidiary Amazon.com NV Investment Holdings, LLC, Amazon.com, Inc. owns over 10% of LivingSocial's stock on a voting basis and over 10% of LivingSocial, Inc.'s stock on a fully diluted basis. Amazon.com is a publically traded corporation.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this Court:

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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 us is:

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party represented by us are:

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

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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 us is:

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Appellees are unaware of any other appeal in or from the same civil action in the lower court that was previously before this or any other appellate court.

Appellees are unaware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

STATEMENT OF JURISDICTION

Pursuant to Fed. Cir. Rule 28(b), Appellees state that they have no areas of disagreement with Appellant with regard to jurisdiction.

STATEMENT OF THE ISSUES

I. Did the District Court properly hold that the claims of U.S. Patent Nos. 7,702,682 and 7,010,536, directed to the computerized management of information in containers in relation to the time of day, a geographic location, or past use of that information, were directed to abstract ideas lacking an inventive concept and therefore patent-ineligible under 35 U.S.C. § 101?

II. Did the District Court properly dismiss and enter judgment on the pleadings pursuant to Rule 12 of Federal Rules of Civil Procedure where the asserted claims were patent-ineligible under Section 101?

STATEMENT OF THE CASE

In 2012, Evolutionary Intelligence LLC ("Evo Intel") sued nine vastly different companies, accusing a diverse array of technologies. In the ensuing four years, Evo Intel has been unable to identify any inventive concept sufficient to transform the nature of the abstract ideas of its claims into patent-eligible subject matter. After full briefing and oral argument, the District Court dismissed Evo Intel's claims.

As the District Court found, Evo Intel's claims are directed toward "age-old forms of information processing such as have previously been employed by libraries, businesses, and other human enterprises" to govern containers in the form of "folders, books, time-cards, ledgers, and so on." Appx0010-11.[1] For as long as people have been collecting and sharing information, they have sought ways to store and organize information in "containers" (books, boxes, and files) and have created rules governing how the containers and their contents can be accessed and used. Rules governing such containers have commonly used both time ("archive on December 31") and place ("reference material—not available for checkout") information. People have long used such rules to manage interactions with and

[1] The District Court issued the same order and judgment in the nine related cases before it. *See* Appx0018-0180. For the Court's convenience, Appellees will refer to the order and judgment issued in *Evolutionary Intelligence, LLC v. Sprint Nextel Corp. et al.*, No. 5:13-cv-04513-RMW (N.D. Cal). *See* Appx0001, Appx0154.

between these information containers. For example, the Dewey Decimal System numbers books to keep biographies from being shelved with fiction; time-stamps on sales data allow the creation of monthly revenue reports; and address information permits assembly of employee records by city of residence. Information containers have also long included data about the container's history. Library books have cards or stamps showing check-out and due dates; files have access logs recording who accessed them and when; and intra-office communications have routing slips reflecting their prior circulation.

As the District Court recognized, the asserted patents seek to preempt these familiar methods of categorizing data. Evo Intel's patents claim nothing more than organizing information into labeled containers and managing them according to certain rules and instructions. The District Court further found that the patents "merely computerize[] this abstract idea, taking advantage of the conventional advantages of computers in terms of efficiency and speed." Appx0011.

Evo Intel's appeal to this Court relies on two primary arguments: (1) that computerizing such age-old methods makes them patent eligible; and (2) that a collection of fundamental computer components operating in a particular, yet expected, manner confers patent eligibility. Both arguments run contrary to well-established case law. Evo Intel adds several secondary arguments based on perceived procedural missteps by the district court judge. But none of these

secondary arguments finds support in the law or facts. Accordingly, Appellees[2] respectfully request that this Court affirm the District Court's decision finding that Evo Intel's patents are patent-ineligible under 35 U.S.C. § 101.

I. Both Patents Relate To Information And Data Management

The patents-in-suit, both titled "System and Method for Creating and Manipulating Information Containers with Dynamic Registers," claim priority to the same provisional application filed in January 1998, and identify the same named inventor, Michael De Angelo. The shared specification describes the patents as providing a "means to create and manipulate information containers." Appx0393 (Patent No. 7,702,682 ("'682 patent") at col. 1:28).[3] The containers store information on networks and physical, published, and "other" media. Appx0394 ('682 patent at col. 3:13-15). The specification refers to the alleged invention in broad and abstract terms:

> [A] system and methods for manufacturing information on, upgrading the utility of, and developing intelligence in, a computer or digital network, local, wide area, public, corporate, or digital-based, supported, or enhanced physical media form or public or published

---

2 "Appellees" are Sprint Nextel Corporation, Inc., Sprint Communications Company, L.P., Sprint Spectrum L.P., Sprint Solutions, Inc. (collectively, "Sprint"), Apple Inc., Facebook, Inc., Foursquare Labs, Inc., Groupon, Inc., LivingSocial, Inc., Millennial Media LLC (formerly Millennial Media, Inc.), Twitter, Inc., and Yelp Inc.

3 Because the patents share a specification, Appellees will refer to the specification for the '682 patent only, for the Court's convenience.

> media, or other by offering the means to create and manipulate information containers with dynamic registers.

Id. at col. 3:10-16.

The claims of Patent No. 7,010,536 ("'536 patent") concern information storage containers that, in addition to the stored information, include other information or instructions governing the use of the container (*i.e.* interaction with other containers, processes, systems, or gateways). In other words, appended to the information containers is information or instructions defining where and when in the "real world" the information stored in those containers is deemed useful or usable. As Evo Intel argued in its opening brief, a practical example of the claims would be a restaurant guide that provides a user with a list or restaurants tailored to the time of day or a user's location, Br. at 3, akin to a mobile Zagat guide.

The '682 patent's claims recite the search of information containers to identify those containing information responsive to a search query. The search considers previous interactions with the container. According to Evo Intel, a search of restaurants could tailor results to restaurants having a certain minimum rating or to eateries the user has considered visiting before. *Id.* Various dependent claims add steps, such as further identifying those containers used to respond to previous, substantially similar queries.

During these lawsuits, Evo Intel has characterized its claims as covering three broad categories: (i) methods of tracking searches ('682 patent); (ii) systems using time-based information containers ('536 patent); and (iii) systems using location-based information containers ('536 patent). Appx2278.

A. U.S. Patent No. 7,702,682

The '682 patent issued on April 20, 2010. Claim 1, Appx0407, shown below with an explanation of each of the recited steps, is representative of the claims:

Claim 1	Step
1. A computer-implemented method comprising:	
receiving a search query;	*receiving search query*
searching, using the computer, first container registers encapsulated and logically defined in a plurality of containers to identify identified containers responsive to the search query, the container registers having defined therein data comprising historical data associated with interactions of the identified containers with other containers from the plurality of containers, wherein searching the first container registers comprises searching the historical data;	*searching historical data*
encapsulating the identified containers in a new container;	*encapsulating search results (i.e., identified information containers) in a new container*
updating second container registers of the identified containers with data associated with interactions of the identified containers with the new container; and	*updating data registers*
providing a list characterizing the identified containers.	*providing a list of search results*

The remaining independent claims recite nearly identical elements as claim 1. *Id.* Claims 19 and 21 merely restate claim 1 as a computer program and searching apparatus, respectively. Appx0408. Claim 23 substitutes "search query templates" for Claim 1's "containers." *Id.* Claim 18 recites "polling" in place of "searching" but further recites that "polling . . . comprises searching." *Id.* Finally, claims 20 and 22 likewise restate claim 18 as a computer program and searching apparatus, respectively. *Id.* The following table summarizes further limitations in the dependent claims, Appx0407-08:

Limitation	**Claims**
Data trees with parent-child relationships	Claim 2
Identification of the historical data being used	Claims 3 and 5
Data storage within containers	Claims 4, 11, 12, and 14
Searching a listing of results (similar to Claim 1)	Claim 6
Listing the title and description of search results	Claim 7
Setting restriction parameters on a search	Claims 8 and 9
Encapsulating the search query in a container	Claim 10
Aggregating register contents	Claim 13
Data management	Claims 15-17

During prosecution of the '682 patent, the examiner rejected the pending claims under § 101. Appx4667-69. In a November 2009 response, the applicant argued that claim 1 was "amended to recite 'computer implemented . . .', and therefore the applicant respectfully submits the Examiner's rejections under

35 U.S.C. § 101 are overcome." Appx4697 (ellipsis in original).[4] The examiner maintained that the claims failed to recite patentable subject matter, and in a December 2009 examiner amendment, the "[e]xaminer suggested some amendments to overcome the 101 rejection (by replacing 'searching, ***using the computer***, first container registers . . .[']))." Appx4713 (emphasis added, ellipsis in original); *see also* Appx4714-17. The only new material added with the December 2009 amendment was that the searching be performed "using the computer." *Compare, e.g.*, Appx4688 (Nov. 2, 2009 claim 1) *with* Appx4714-15 (Dec. 3, 2009 claim 1 as allowed). A notice of allowance issued on December 3, 2009. Appx4709.

B. U.S. Patent No. 7,010,536

The '536 patent issued on March 7, 2006. Claim 1, recited below, is representative of the claims:

> 1. An apparatus for transmitting, receiving and manipulating information on a computer system, the apparatus including a plurality of containers, each container being a logically defined data enclosure and comprising:
>
> an information element having information;
>
> a plurality of registers, the plurality of registers forming part of the container and including

[4] The applicant also amended the claim to recite additional limitations to address § 103 obviousness rejections, but did not argue that these amendments helped overcome the § 101 rejection. Appx4698-4703.

> a first register for storing a unique container identification value,
>
> a second register having a representation designating time and governing interactions of the container with other containers, systems or processes according to utility of information in the information element relative to an external-to-the-apparatus event time,
>
> an active time register for identifying times at which the container will act upon other containers, processes, systems or gateways,
>
> a passive time register for identifying times at which the container can be acted upon by other containers, processes, systems or gateways, and
>
> a neutral time register for identifying times at which the container may inter[a]ct with other containers, processes, systems or gateways; and
>
> a gateway attached to and forming part of the container, the gateway controlling the interaction of the container with other containers, systems or processes.

Appx0359. Claim 2 is essentially identical to claim 1, except it replaces the time-based limitations with location-based limitations. *Id.* Independent claims 15 and 16 are similar to claims 1 and 2, respectively, except they replace the triple active-passive-neutral registers with an acquire register that "control[s] whether the container adds a register from other containers or adds a container from other containers when interacting with them." Appx0360. The following table summarizes further limitations in the dependent claims, Appx0359-60:

Limitation	Claims
Additional registers (container and system history registers; predefined, user-created, and system-defined registers; and an acquire register)	Claims 3-8
Means-plus-function limitations for interactions among components	Claims 9-12
Unspecified and non-enumerated rules inside an "expert" system	Claim 13
The information element contains text, graphic images, video, audio, a digital pattern, a process, a nested container, a bit, natural number, or a system	Claim 14

II. Procedural History

In 2012, Evo Intel sued the nine groups of Appellees in the Eastern District of Texas. Appx0007. Evo Intel accused a wide array of devices and systems: from Facebook's social-networking service, to Groupon's online advertising and marketing platform, to Apple's mobile operating system. *See, e.g.*, Appx0412-13, Appx0516-17, Appx0838-39.

The actions were transferred to the Northern District of California in July 2013. Appx0007. The District Court stayed the actions pending *inter partes* review ("IPR"),[5] and following the PTAB's final written decision, lifted the stay. Appx0211-12.

[5] The Patent Trial and Appeal Board ("PTAB") instituted review of claims of the '536 patent in one petition, but denied review of the other petitions. See Appx0007, Appx2687. In its final written decision, the PTAB found that the petitioners had not demonstrated by a preponderance of the evidence that the reviewed claims were unpatentable over the single asserted prior art reference relied upon in the petition. Appx2894.

Appellees then moved to dismiss and for judgment on the pleadings based on *Alice* and § 101. The Honorable Ronald M. Whyte of the Northern District of California heard oral argument on July 28, 2015. Appx3111. During the hearing, Evo Intel's counsel stated: "when you look at each element of these claims individually, ***you will find elements that when considered by themselves are abstract and not patent-eligible*** . . . ." Appx3138 (emphasis added); *see also* Appx0011 ("The language of the claims describes the use of containers, registers and gateways to perform these steps on a computer. EI [Evo Intel] concedes that the structures recited in the claims are conventional and routine.").

In October 2015, the District Court granted Appellees' motion to dismiss and for judgment on the pleadings in a seventeen-page written decision. Appx0001-17. The District Court found that the patents were directed at the abstract ideas of (i) "searching and processing containerized data" ('682 patent) and (ii) "containerized data storage utilizing rules and instructions" ('536 patent). Appx0016, Appx0017. The District Court stated that "[u]pdating searchable containers of information based on past search results or based on external time or location resembles ***age-old forms of information processing*** such as have previously been employed in libraries, businesses, and other human enterprises with folders, books, time-cards, ledgers, and so on." Appx0010-11 (emphasis added); *see also* Appx0011 ("The '682 patent ***merely computerizes this abstract***

idea, taking advantage of the conventional advantages of computers in terms of efficiency and speed.") (emphasis added); Appx0017 (same, with respect to the '536 patent).

In November 2015, Evo Intel filed its Notice of Appeal.

SUMMARY OF THE ARGUMENT

Evo Intel's patents purport to cover well-known and widely used concepts related to information and data management. Specifically, the '682 patent seeks to claim concepts related to searching data using historical information, while the '536 patent seeks to claim concepts of organizing and managing information in containers based upon rules of time and place. Because Evo Intel's claims are directed to the abstract ideas of searching and processing containerized data and containerized data storage utilizing rules and instructions, and the claims contain no inventive concept, they are ineligible for patent protection under 35 U.S.C. § 101.

On appeal, Evo Intel argues that its claims should survive the *Alice* test, notwithstanding the familiar concepts at the heart of the claims. Although people have long been collecting and organizing information in "containers" (books, boxes, and files) and applied rules to those containers based on time ("archive on December 31") and place ("reference material—not available for checkout"), Evo Intel seeks both to take credit for "open[ing] up a whole new field of dynamic data

processing capabilities," Br. at 4, and to avoid *Alice* and its progeny by relying on computers. Evo Intel's appellate brief makes bold statements about the problems its patents sought to solve, but those statements are not rooted in the disclosures of Evo Intel's specification or the language of Evo Intel's claims.

Evo Intel further argues that remand is appropriate based on a list of perceived procedural missteps by the District Court. Contrary to Evo Intel's arguments, a court (i) may decline to consider conclusory statements of a supposed "expert" that are outside the pleadings; (ii) is under no obligation to *sua sponte* grant leave to amend a dismissed complaint, especially when the amendment would be futile and a complainant never sought leave to amend; and (iii) may support its decision on a Rule 12 motion with common-sense experience and reasonable analogies.

Senior District Judge Ronald M. Whyte in the Northern District of California correctly held that the claims fail to recite patent-eligible subject matter, and Appellees respectfully request that this Court affirm the District Court's decision.

ARGUMENT

I. Standard Of Review

The Federal Circuit applies regional circuit law when reviewing motions to dismiss. *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir.), *cert. denied*, 136 S. Ct. 701 (2015). The Ninth Circuit reviews appeals of a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Id*. The same standard of review applies to a grant of a motion for judgment on the pleadings under Rule 12(c). *Amgen Inc. v. Sandoz Inc.*, 794 F.3d 1347, 1354 (Fed. Cir. 2015). Affirmance of the district court's judgment may occur on any ground supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). On a pleading motion, the complaint must include sufficient "factual content . . . allow[ing] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (A complaint is properly dismissed if it does not contain sufficient factual detail to "state a claim to relief that is plausible on its face."). The denial of leave to amend is within the discretion of the district court and is reviewed for abuse of discretion. *See D-Beam v. Roller Derby Skate Corp.*, 316 F. App'x 966, 969 (Fed. Cir. 2008) (unpublished) (citing *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080,

1087 (9th Cir. 2002)). Patent eligibility under 35 U.S.C. § 101 is an issue of law reviewed *de novo*. *OIP Techs.*, 788 F.3d at 1362.

II. The District Court Correctly Held That The Claims Are Not Patent-Eligible Under *Alice*

Laws of nature, natural phenomena, and abstract ideas are not patentable. *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014). Under *Alice*'s two-part test, courts first determine whether the claims at issue are directed to a patent-ineligible concept, "such as an abstract idea." *In re TLI Commc'ns LLC Patent Litig.*, No. 2015-1372, 2016 WL 2865693, at *2 (Fed. Cir. May 17, 2016); *see also Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 714-15 (Fed. Cir. 2014) (agreeing with district court that "heart" of patent-in-suit was abstract idea), *cert. denied sub nom. Ultramercial, LLC v. WildTangent, Inc.*, 135 S. Ct. 2907 (2015); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (reducing claim elements to "basic concept of data recognition and storage"), *cert. denied*, 136 S. Ct. 119 (2015).

If the patent is "drawn to an abstract idea," courts next ask "whether the remaining elements, either in isolation or combination with the non-patent-ineligible elements, are sufficient to 'transform the nature of the claim' into a patent-eligible application." *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1366-67 (Fed. Cir. 2015) (quoting *Alice*, 134 S. Ct. at 2358). In this second step of the analysis, "there must be an 'inventive concept' to

take the claim into the realm of patent-eligibility." *Intellectual Ventures I*, 792 F.3d at 1367.

A. Step One: Evo Intel's Claims Are Directed at Abstract Ideas

1. Evo Intel's claims directed at processing containerized data based on time, location, or prior search information are abstract ideas.

"The concept of data collection, recognition, and storage is undisputedly well-known. Indeed, humans have always performed these functions." *Content Extraction*, 776 F.3d at 1347; *see also TLI Commc'ns*, 2016 WL 2865693, at *5 (finding the "idea of classifying and storing digital images in an organized manner" abstract). Specifically, this Court has observed that "tailoring" (*i.e.* organizing and presenting) information based on changes in time and place is an abstract concept. *Intellectual Ventures I*, 792 F.3d at 1369-70 ("Providing this minimal tailoring—*e.g.*, ***providing different newspaper inserts based upon the location of the individual—is an abstract idea . . . . Tailoring information based on the time of day of viewing is also an abstract, overly broad concept long-practiced in our society***.") (emphasis added).

Here, the District Court correctly held that the claims directed at "containerized data storage utilizing rules and instructions" (the '536 patent) and "searching and processing containerized data" (the '682 patent) are abstract ideas. Appx0010; Appx0017. For example, the claims of the '682 patent include the

unremarkable steps of "receiving a search query," "searching" registers, placing the identified responsive containers in a new container, "updating" registers, and "providing a list." Appx0407 ('682 patent, claim 1). "This ordered combination of steps recites an abstraction—an idea, having no particular concrete or tangible form." *Ultramercial*, 772 F.3d at 715.

The '536 patent similarly accomplishes nothing more than reciting the age-old idea of storing information in labeled containers with rules and instructions on how the container or contents may be used. The claims of the '536 patent relate to information storage containers that, in addition to the stored information, include other information or instructions governing the use of the container (*i.e.* interaction with other containers, processes, systems, or gateways). Appx0359-60 ('536 claims).

The District Court correctly concluded that "[u]pdating searchable containers of information based on past search results or based on external time or location resembles age-old forms of information processing such as have previously been employed" in various "human enterprises." Appx0010-11. Judge Whyte observed that people have long sought ways to store and organize information in "containers" (books, boxes, and files) and have created familiar rules governing how the containers and their contents can be accessed and used.

For example, the Dewey Decimal System numbers books to keep biographies from being shelved with fiction; time-stamps on sales data allow the creation of monthly revenue reports; and address information permits assembly of employee records by city of residence. In addition, printed restaurant guides (*e.g.*, Zagat guides) organize restaurants by, for example, cuisine, city, and neighborhood. Library books have cards or stamps showing check-out and due dates; files have access logs recording who accessed them and when; and intra-office communications have routing slips reflecting their prior circulation. People have long used rules to manage interactions with and between the types of information containers we are all familiar with, and to which Evo Intel's claims are directed. *Cf. buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354-55 (Fed. Cir. 2014) (claims directed to creating contractual relationship are "beyond question of ancient lineage" and "do not push or even test the boundaries of the Supreme Court precedents under section 101").

2. This Court's opinion in *DDR Holdings* reinforces the District Court's findings.

Evo Intel cites *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), and argues that the District Court "recited the purpose of the Patents at too high a level of generality." Br. at 32; *see also* Br. at 37 (arguing the District Court framed the patents "too broadly"). But the District Court's opinion

recognizes that *DDR* and its progeny support a decision that the Evo Intel patents are not patent-eligible. Appx0012-13.

The *DDR* court reviewed claims addressing a challenge "particular to the Internet." 773 F.3d at 1257. The claimed solution was "necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks." *Id*. The *DDR* court concluded that the claims had no analog outside of the Internet environment, and dealt with a "problem that does not arise in the 'brick and mortar' context." *Id*. at 1258.

The *Intellectual Ventures I* court elaborated further, stating the "patent at issue in *DDR* provided an Internet-based solution to solve a problem ***unique to the Internet***." 792 F.3d at 1371 (emphasis added). The *Intellectual Ventures I* court concluded that where claims did not address "problems unique to the Internet, . . . *DDR* has no applicability." *Id*.

Similarly, in *TLI Communications*, the court declared that *DDR* had no application because the claims at issue did not attempt to solve a challenge particular to the Internet. 2016 WL 2865693, at *4. The claims there, similar to the claims here, were directed to the abstract idea of classifying and storing information in an organized manner. *Id*. at *5.

DDR cannot save Evo Intel's abstract claims. The problem addressed by the challenged claims is not "rooted in" computer technology. The problem arises

anytime information is stored in organized containers—computerized, physical, or otherwise. Containers benefit from instructions that describe when the information in the container is useful and how the data should be used. For instance, library books have cards or stamps showing check-out and due dates; files have access logs recording who accessed them and when; and intra-office communications have routing slips reflecting prior circulation. Managing the use of information containers is not a problem particular to the Internet or rooted in overcoming a problem specifically arising in the realm of computer networks. *See Intellectual Ventures I*, 792 F.3d at 1369 ("tailoring content based on the viewer's location" is "fundamental" and "long prevalent") *see also id.* at 1370 ("Tailoring information based on the time of day of viewing is also an abstract, overly broad concept long-practiced in our society.").

3. Evo Intel's claims describe the routine operation of conventional computer components.

Evo Intel also argues that its claimed invention "improve[s] the function of computers themselves," Br. at 21, and therefore is patent eligible. Evo Intel argues that the "static information model," which Evo Intel contends was common in computing at the time the patent applications were filed, limited data processing. Br. at 35-36. According to Evo Intel, its claimed invention allowed "computers to efficiently process dynamic modifications to data." *Id.* Evo Intel broadly asserts, without support from the patents' specification, that the patents "open up a whole

new field of dynamic data processing capabilities." Br. at 4. According to Evo Intel, "[t]he Patents disclose a novel way for computers to achieve this type of dynamic data processing through specific arrangements of computer-specific components, including information containers, registers, and gateways." Br. at 3.

But Evo Intel acknowledges that its claims employ conventional computer components. Appx3135 ("We agree that the claims just require the general-purpose computer of sufficient processing power."). These elements are so conventional, routine and non-specific that the patentee declared that "those skilled in the art" would readily "recognize that various modifications may be provided." Appx0407 ('682 patent at col. 29:6-7). The conventional components simply manage the use of information based on time, place, or past use of the information. Appx2278 (Evo Intel characterizing the patents as containing "three broad categories of independent claims (methods of tracking searches, time-based information containers, and location-based information containers)"). Thus, Evo Intel's computer-specific components simply perform the abstract idea of managing information on a computer.

Contrary to Evo Intel's assertions, the specification and claims do not teach improving the "computers' ability to process information." Br. at 7. The patents' shared specification refers to the alleged invention as providing a way to create and manipulate information containers. Appx0393 ('682 patent at col. 1:28). The

patents refer to "containers" simply as logically defined data enclosures that can hold as little as "a single digital bit" of information, or expansively, "all defined cyberspace, existing, growing ***and to be discovered***." Appx0397 ('682 patent at col. 9:9-14) (emphasis added). The patents note that "containers" are not even limited to structures on a computer, but may include "physical media, such as a CD-ROM disk." Appx0407 ('682 patent at col. 29:23). The "registers" within the containers, according to Evo Intel's attorney, represent nothing more than a type of conventional computer memory. *See* Appx3122 ("[T]he registers—***which are essentially information that is stored in memory***, your honor . . . .") (emphasis added). "Gateways," according to Evo Intel, provide the "rules to enable the various containers to interact with each other and with other system components." Br. at 3 (citing Appx0346-47 ('536 patent specification at col. 4:54-5:11)). The "physical computing infrastructure may be mainframe, mini, client server, or other with various network and distributed computing designs, including digitally supported or based physical or public media[.]" Appx0407 ('682 patent at col. 29:12-15).

Specifically, the claims in the '536 patent recite familiar gateways and registers that act based on some unspecified "utility" of the "external-to-the-apparatus" time or location. Appx0359 (reciting that the second register "govern[s] interactions of the container . . . according to utility of information in

the information element"). Nothing in the claims or specification describes how this "utility" is determined, or how it is used to control interactions between containers.

Similarly, the claims in the '682 patent recite updating data registers based on "data associated with interactions" of two containers. Appx0407 ('682 patent at col. 29:51-67). The claims, however, do not specify (i) how the registers are updated; (ii) what types of interactions trigger the updating; (iii) what type of data is used to update the registers; or (iv) how updating the "second container registers" can improve searches based on historical data that is stored in "first container registers." *Id.*

"[R]elying on a computer to perform routine tasks more quickly or more accurately is insufficient to render a claim patent eligible." *OIP Techs.*, 788 F.3d at 1363. Put differently, "merely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea." *Intellectual Ventures I*, 792 F.3d at 1370; *see also Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014) (finding process of gathering and combining data not eligible under § 101); *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1335 (Fed. Cir. 2015) ("Examination of the claims—as a whole and in terms of each claim's limitations—reveals that the claims are not directed to improving computer

performance and do not recite any such benefit."), *cert. denied sub nom. Versata Developments Grp., Inc. v. SAP Am., Inc.*, No. 15-1145, 2016 WL 1029054 (June 27, 2016).

As explained by the District Court, Evo Intel's claims—directed at processing containerized data based on "time and location and previous search history," Br. at 2—do not seek to solve a "computing problem, but an ***information organization problem***." Appx0013 (emphasis added). Evo Intel characterizes its patents as helping locate restaurants based on time of day, location, or prior searches, Br. at 8—precisely the type of information "tailoring" that this Court found abstract in *Intellectual Ventures I*. 792 F.3d. at 1370 (holding "advertisement taking into account the time of day and tailoring the information presented to the user based on that information is another 'fundamental . . . practice long prevalent in our system'") (*citing Alice*, 134 S. Ct. at 2356); *id*. at 1369 (recognizing that "tailoring content based on the viewer's location" is well-known). Indeed, the example Evo Intel relies upon for its alleged invention is nothing more than a computerized Zagat guide. Br. at 8 ("[T]he invention enables computers to provide users a dynamically changing list of recommended restaurants that differs depending on the user's location, the day of the week and time of day (*e.g.*, breakfast, brunch, lunch, or dinner), ratings provided by other users, information supplied by the restaurant, and the user's browsing history.").

Thus, such claims to the patentability of "dynamic processing" have been recognized as abstract. *See Intellectual Ventures I*, 792 F.3d. at 1370 ("dynamic presentation of data"); *Cyberfone Sys., LLC v. CNN Interactive Grp., Inc.*, 558 F. App'x 988, 992 (Fed. Cir. 2014) (unpublished) (patent directed to the abstract idea of "using categories to organize, store, and transmit information" ineligible under § 101).

The recent *Enfish* decision does not hold to the contrary. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016). The claims in *Enfish* taught a "self-referential table" that was a "specific type of data structure designed to improve the way a computer stores and retrieves data in memory." *Id*. at 1339. The claims were directed at "a specific implementation of a solution to a problem in the software arts."[6] *Id*. By contrast, Evo Intel's claims are not directed to the type of "specific improvement to computer functionality" found to be eligible in *Enfish*. *Id*. at 1338. Evo Intel's claims describe conventional elements that contemplate routine implementation by existing, generic, general purpose computers. Appx3135 ("We agree that the claims just require the general-purpose computer of sufficient processing power."). Evo Intel's claims go no further, and

[6] *Cf. Rapid Litigation Management v. Cellzdirect, Inc.*, No. 2015-1570, 2016 WL 3606624 (Fed. Cir. July 5, 2016) (finding method claims directed to the new and useful process of manipulating hepatocytes rather than directed to a mere observation of the hepatocytes' natural abilities or to the hepatocytes themselves is patent eligible).

fail to offer any concrete and unique solution, let alone teach a specific data structure designed to improve the way a computer operates.[7]

The Federal Circuit emphasized in *TLI Communications* that *Enfish* does not mean that claims directed to conventional computer components involving conventional computing activity using general purpose computers suffice as improvements directed to the functioning of a computer. *TLI Commc'ns*, 2016 WL 2865693, at *3 ("[T]he claims here are not directed to a specific improvement to computer functionality. Rather, they are directed to the use of conventional or generic technology in a nascent but well-known environment, without any claim that the invention reflects an inventive solution to any problem presented by combining the two."); *id*. at *4 ("The specification fails to provide any technical details for the tangible components, but instead predominately describes the system and methods in purely functional terms.").

At their core, as Judge Whyte observed, Evo Intel's patents encompass nothing more than the long-standing and routine activities of searching, updating, and modifying data on a "'computer network operating in its normal, expected

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[7] Indeed, the patents disclaim any specific improvement to computer functionality analogous to that addressed by this court in *Enfish*, declaring instead that "those skilled in the art" would readily "recognize that various modifications may be provided" without departing from the invention. Appx0407 ('682 patent at col. 29:6-7). The patents stress, for example, that "hardware configurations . . . ***may assume myriad forms*** without altering the essential operation of this invention." *Id.* ('682 patent at col. 29:46-49).

manner' using conventional computers and computer components" based on time, location, and history information. Appx0015 (quoting *DDR Holdings*, 773 F.3d at 1258). Searching for a nearby place to eat, based on time, location, or reviews, does not solve any problem unique to any field of computing and has long been accomplished using printed guides that organize the same information. *See* Appx0013. Evo Intel's claims employ conventional computer capabilities to achieve a purpose unrelated to the functioning of a computer, and the "computer-specific components," Br. at 3, serve "merely as a tool" for the abstract ideas relating to information organization, *Enfish*, 822 F.3d at 1336. As such, they are not patent eligible.[8]

[8] The added limitations found in the dependent claims do not alter this analysis, and Evo Intel has offered no rationale for why these claims are any less abstract. In the '536 patent, adding registers to hold additional data and instructions concerning the information containers does nothing to transform abstract information organization into patent-eligible subject matter. *See* Appx0359-60 (claims 3-8). Reciting "means" for performing routine functions in the '536 patent, such as acting upon containers, Appx0360 (claims 9-10), gathering information, *id.* (claim 11), or reporting information, *id.* (claim 12), add nothing patentable—particularly given that Evo Intel has asserted these limitations amount to no more than the same "containers," "registers," and generic computer components discussed above. Reference in claim 13 of the '536 Patent to an "expert system" fails to transform the abstract idea into one eligible for patenting. Appx0360; *see also Vehicle Intelligence and Safety LLC v. Mercedes-Benz USA, LLC*, 78 F. Supp. 3d 884, 888-91 (N.D. Ill.) ("'expert system' as construed is a generic computer"), *aff'd*, 635 F. App'x 914 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2390 (2016). Similarly, additions in the '682 Patent of common data structures, Appx0407 (claim 2), re-use of prior search results, *id.* (claims 3, 5, and 6), templates, *id.* (claims 4 and 5), providing a title and description of

4. Evo Intel's patents raise serious preemption concerns.

Evo Intel asserts that its patents "open up a whole new field of dynamic data processing capabilities that did not exist previously." Br. at 4. Evo Intel claims credit for transforming "conventional web infrastructure into an application platform with content processing, storage, creation, and dissemination capabilities that were not possible with the static information model." Br. at 9. In doing so, Evo Intel claims generic computer components and concepts (*e.g.*, containers, registers, and gateways) defined in purely functional terms.

Courts have long noted the overbreadth and preemption effects "inherent in open-ended functional claims, . . . which effectively purport to cover any and all means so long as they perform the recited functions." *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1256 n.7 (Fed. Cir. 2008).[9] In addition, a "wholly generic computer implementation," such as that claimed in Evo Intel's patents, "is not generally the sort of 'additional featur[e]'" that would cure the preemption problem or provide "any 'practical assurance that the process is more than a

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results, *id.* (claim 7), employing search parameters, *id.* (claims 8 and 9), storing search results in a container, *id.* (claims 10, 11 and 12), monitoring use of containers and gateways, Appx0407-08 (claims 15, 16, and 17), or aggregating such data, Appx0407 (claims 13 and 14), do not render patentable the abstract idea of searching information based, in part, on its previous use.

[9] "While preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility." *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015).

drafting effort designed to monopolize the [abstract idea] itself.'" *Alice*, 134 S. Ct. at 2358 (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1297 (2012)) (alterations in original). The ability to process data based on time, location, or prior search criteria is a "building block[] of human ingenuity" that should not be improperly tied up. *Alice*, 134 S. Ct. at 2354.

The vague disclosures in the specification contribute to the preemption problem discussed in *Alice*. The shared specification states that a container "***at minimum encapsulates a single digital bit . . . and at maximum all defined cyberspace, existing, growing and to be discovered, including but not limited to all containers, defined and to be defined in cyberspace.***" Appx0397 ('682 patent at col. 9:9-14) (emphasis added). The container registers may be "values alone or contain code" to control interactions. Appx0397 ('682 patent at col. 9:24-26). The containers may also store information on various types of computer and digital networks, as well as on physical, published, and "other" media. Appx0394 ('682 patent at col. 3:13-15). In Evo Intel's view, the patents extend to any container, of any size, and to registers made up of everything from individual values to complex software coding, operating in almost any medium. In fact, Evo Intel's own litigation strategy in suing nine different Defendants and accusing vastly different technologies (*e.g.*, from Groupon's online advertising and marketing platform, Appx0838-39, to Sprint's cellular network, Appx0854-55) illustrates the genuine

preemption risk posed by the way Evo Intel has chosen to read its claims.

While Evo Intel points to the PTAB's denial of several IPR petitions to argue that its patents do not suffer from a real preemption risk, Br. at 52, this argument is unavailing. First and foremost, the PTAB cannot consider § 101 patentability issues during the IPR process. 37 C.F.R. § 42.104. Second, far from "reaffirming the validity of the Patents," Br. at 17, the PTAB only found—without conducting its own analysis—that the petitioners had not addressed certain specific language of the claims. *See, e.g.*, Appx2937 ("We are not persuaded by Petitioner's argument, because it fails to set forth clearly how this disclosure from Theimer describes the claimed 'passive time register.'"); Appx2960 ("Petitioner fails to 'identify how the disclosures of Wachtel relate to the claim or establish all elements of the claim arranged as in the claim.'"). The issue of whether the fifteen references cited in the denied petitions anticipate or make obvious the inventions purportedly claimed by the Evo Intel patents remains open.

B. Step Two: The Claims Lack an Inventive Concept

Evo Intel proffers two basic theories as to why its claims directed at abstract ideas should pass muster under *Alice*. Neither has merit.

1. Adding "computerized" before "containerized data" does not transform these claims into patent-eligible subject matter.

Evo Intel argues that the District Court "failed to recognize" that its "Patents are limited, at minimum, to ***computerized*** containerized data." Br. at 21, 36. Not only did the District Court consider and reject Evo Intel's argument, but the argument is unsupported by relevant case law.

The District Court's decision stated that "[u]pdating searchable containers of information based on past search results or based on external time or location resembles ***age-old forms of information processing*** such as have previously been employed in libraries, businesses, and other human enterprises with folders, books, time-cards, ledgers, and so on." Appx0010-11 (emphasis added). The District Court noted that "[t]he '682 patent ***merely computerizes this abstract idea***, taking advantage of the conventional advantages of computers in terms of efficiency and speed, Appx0011 (emphasis added), and "the claims of the '[68]2 patent merely recite ***routine and conventional computer operations and structures*** as a means of implementing the abstract idea of searching and processing containerized data." Appx0016 (emphasis added).

The District Court correctly applied the controlling law. Reciting an abstract idea such as processing containerized data and adding the words "apply it with a

computer" does not make an abstract idea any less abstract. *Alice*, 134 S. Ct. at 2358.[10]

The prosecution history further supports the District Court's finding. During prosecution of the '682 patent, the examiner twice rejected the claims as unpatentable under § 101. Appx4669, Appx4713; *see supra*, pp. 8-9. It was only on the eve of allowance that the limitation "using the computer" was added to overcome the § 101 rejection. Appx4713-14. While adding the limitation "using the computer" may have been perceived to have been enough for patentability at that time, we now know it was not enough under *Alice* and its progeny. *Alice*, 134 S. Ct. at 2358 ("[T]he mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.").

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[10] *See also id.* at 2359 ("In short, each step does no more than require a generic computer to perform generic computer functions."); *buySAFE*, 765 F.3d at 1355 ("The claims' invocation of computers adds no inventive concept."); *OIP Techs.*, 788 F.3d at 1363 (stating "the computer implementation limitations do little to limit [the claims'] scope"); *Bancorp Servs., LLC v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012) ("[T]he fact that the required calculations could be performed more efficiently via a computer does not materially alter the patent eligibility of the claimed subject matter."); *Intellectual Ventures I*, 792 F.3d at 1367 ("Nor, in addressing the second step of *Alice*, does claiming the improved speed or efficiency inherent with applying the abstract idea on a computer provide a sufficient inventive concept.").

2. Arranging conventional structures in generic ways is not inventive.

Evo Intel also argues that its claims allow for "specific arrangements of particular computer-specific structures operating in a specific way." Br. at 48. The specification, however, states: "hardware configurations, such as the use of RAM or hard drives for storage or lasers for communication ***may assume myriad forms*** without altering the essential operation of this invention." Appx0407 ('682 patent at col. 29:46-49) (emphasis added); *see also* Appx0398 ('682 patent at col. 12:31-35) ("a block diagram of an information container system is shown, listing, without any relationship indicated, some of the possible system components and processes, or sets thereof, that may be encapsulated as elements 01 in an information container 100"); Appx0407 ('682 patent at col. 29:12-15) ("physical computing infrastructure may be mainframe, mini, client server or other with various network and distributed computing designs, including digitally supported or based physical or public media").

Moreover, the amalgamation of ordinary computer components operating, individually and collectively, in a routine and expected manner does not pass the second step of *Alice*. *See Content Extraction*, 776 F.3d at 1348 ("There is no 'inventive concept' in [plaintiff's] use of a generic scanner and computer to perform well-understood, routine, and conventional activities commonly used in [the] industry."). Because generic computers "are the basic tools of modern-day

commercial and social interaction, their use should in general remain 'free to all men and reserved exclusively to none.'" *Ultramercial*, 772 F.3d at 723 (*quoting Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948)); *see also Intellectual Ventures I*, 792 F.3d at 1371 ("Requiring the use of a 'software' 'brain' 'tasked with tailoring information and providing it to the user' provides no additional limitation beyond applying an abstract idea, restricted to the Internet, on a generic computer."); *TLI Commc'ns*, 2016 WL 2865693, at *3.

Evo Intel's patents describe nothing more than familiar arrangements of conventional structures. For example, the claims of the '536 patent relate to information storage "containers" that, in addition to the stored information, include other information or instructions governing the use of the container (*i.e.* interaction with other containers, processes, systems, or gateways). Appx0359-60. Before the District Court, Evo Intel conceded that the patents are comprised of "fundamental structures" such as "containers, registers, and gateways." Appx2800. Referring to generic, well-known components arranged in familiar ways does not suddenly transform Evo Intel's claims into patent-eligible subject matter.

The recent *BASCOM* opinion supports this conclusion. *BASCOM Global Internet Servs., Inc. v. AT&T Mobility LLC*, No. 2015-1763, 2016 WL 3514158 (Fed. Cir. June 27, 2016). In *BASCOM*, the claims "carve[d] out a specific location for the filtering system (a remote ISP server) and require[d] the filtering

system to give users the ability to customize filtering for their individual network accounts." *Id*. at *8. Unlike Evo Intel's abstract claims, the *BASCOM* claims did not "recite the abstract idea of filtering content along with the requirement to perform it on the Internet, or to perform it on a set of generic computer components," which the court held "would not contain an inventive concept." *Id*. at *7. Nor did the claims in *BASCOM* preempt "all ways of filtering content on the Internet; rather, they recite[d] a specific, discrete implementation of the abstract idea of filtering content." *Id*.

Contrary to Evo Intel's attorney's argument, its patent claims fail to "recite a specific, discrete implementation" of processing dynamic data. Instead, Evo Intel's claims recite a conventional and generic arrangement of known, fundamental computer components. *See* Appx0011 ("Each step individually is also conventional and routine, and EI [Evo Intel] does not argue otherwise."). Indeed, the claim elements themselves are nothing more than purely functional descriptions of conventional concepts of data processing. *See, e.g.*, Appx0359 ('536 patent claim 1 at col. 30:19-27) (reciting active, passive, and neutral registers in functional terms "for identifying times at which the container" will act, can be acted upon, or may interact, respectively).

Internet Patents Corporation further supports a finding of ineligibility of Evo Intel's claims. *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343

(Fed. Cir. 2015). There, the claims were directed at the ability to navigate forward and backward in a dynamically generated web page without losing user input data. *Id*. at 1344. Even though the "mechanism for maintaining the state" when navigating through web pages was "stated to be the essential innovation," the patentee's arguments for the inventive concept were rejected because the claims "contain[] no restriction on how the result is accomplished." *Id*. at 1348; *see also Vehicle Intelligence & Safety LLC v. Mercedes-Benz USA, LLC*, 635 F. App'x 914, 919-20 (Fed. Cir. 2015) (unpublished) (no explanation in patent of implementation method).

Here, Evo Intel's vague claims are similarly directed at abstract ideas, which, contrary to Evo Intel's argument, fail to teach "a new way for computers to dynamically and efficiently process certain types of information," Br. at 32, or explain how to "improve the function of computers themselves." *Id.* at 21. Rather, as the District Court found, Evo Intel's claims are directed to the abstract idea itself of dynamically processing data based on time, location, or prior search information. Appx0014-15. The District Court properly examined Evo Intel's specification and claims, and concluded that no inventive concept transforms the nature of the claims into patent-eligible subject matter. *See also Alice*, 134 S. Ct. at 2357; *OIP Techs.*, 788 F.3d at 1364; *TLI Commc'ns*, 2016 WL 2865693, at *5.

III. The District Court Properly Exercised Its Authority

A. The District Court Correctly Excluded the Expert Declaration Submitted Outside of the Pleadings

In opposition to Defendants' motion to dismiss and for judgment on the pleadings, Evo Intel sought to submit an expert declaration. Appx0008 n.5. On appeal, Evo Intel argues that the District Court abused its discretion in declining to consider that declaration.[11] Br. at 25-28 & n.4. But the District Court properly ruled that "such a declaration is not appropriate for the court to consider on a motion to dismiss or motion for judgment on the pleadings." Appx0008 n.5 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (stating on Rule 12(b)(6) motions, court may only consider the complaint, documents incorporated by reference in the complaint, and judicially noticed facts)).[12]

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[11] Contrary to Evo Intel's assertion, conversion of a motion on the pleadings to a motion for summary judgment is at the district court's discretion. *See, e.g.*, Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *see also Swedberg v. Marotzke*, 339 F.3d 1139, 1143-44 (9th Cir. 2003) ("[C]onversion takes place at the discretion of the district court, and only when it affirmatively decides to consider the additional material."); *Jackson v. S. Cal. Gas Co.*, 881 F.2d 638, 642 n.4 (9th Cir. 1989) ("A 'motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleadings happen to be filed with the court . . . .'" (quoting *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 582 (9th Cir. 1983)).

[12] The District Court had ample basis to dismiss Evo Intel's complaint on the pleadings and without construing terms. *See, e.g.*, *OIP Techs.*, 788 F.3d at 1364 (affirming judgment on the pleadings), *buySAFE*, 765 F.3d at 1350

Moreover, the declaration merely parrots assertions made in the specifications and conclusory arguments made by Evo Intel before the District Court concerning limitations of the "static information model." Appx2810-31. The district court did not fail to credit such non-conclusory, factual statements regarding the so-called "static information model," as Evo Intel argues. Br. at 27. The District Court simply disagreed with Evo Intel that these assertions concerning the static information model were relevant or sufficient to overcome the abstract nature of the challenged claims. Appx0013-15.

The District Court also did not err in applying the normal pleading standard. *Compare* Br. at 4 *with* Appx0009. Contrary to Evo Intel's argument, the District Court was not required to ignore the specification and claims and accept as true Evo Intel's proclamations that the patents "improve the functioning of computers themselves." Br. at 4. In fact, Evo Intel does not identify a single pertinent decision supporting its contention that courts must infer that conclusory statements made by counsel (or an expert) about a patent are true, when those statements are not supported by the disclosures of the patent. Br. at 28-31. Evo Intel's overreaching argument is unfounded and should be rejected. *See, e.g.*, *Iqbal*, 556 U.S. at 681 (conclusory allegations "not entitled to be assumed true"); *Sprewell v.*

(same), *Internet Patents*, 790 F.3d at 1349 (affirming motion to dismiss), *Content Extraction*, 776 F.3d at 1351 (same).

Golden State Warriors, 266 F.3d 979, 988 (9th Cir.) ("Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.") *opinion amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001).

B. The District Court Did Not Have to *Sua Sponte* Provide Evo Intel Leave to Amend Its Complaints

Evo Intel—represented by counsel—did not seek leave to amend its complaints when it opposed Appellees § 101 motion. Instead, now on appeal, Evo Intel argues that the District Court should have *sua sponte* granted it leave to amend its complaint. Br. at 53-54. Evo Intel's argument is not supported by the law.

The Ninth Circuit[13] "generally will not remand with instructions to grant leave to amend unless the plaintiff sought leave to amend below." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006); *see also Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1144-45 (9th Cir. 2015), *cert. denied*, 2016 WL 2945289 (May 23, 2016); *Alaska v. United States*, 201 F.3d 1154, 1163-64 (9th Cir. 2000) ("Where a party does not ask the district court for

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[13] Ninth Circuit law governs this issue. *See, e.g.*, *Chicago Bd. Options Exch., Inc. v. Int'l Sec. Exch., LLC*, 677 F.3d 1361, 1374 (Fed. Cir. 2012) (citing *Juicy Whip, Inc. v. Orange Bang, Inc.*, 382 F.3d 1367, 1370 (Fed. Cir. 2004)). A district court's denial of leave to amend is discretionary and reviewed for abuse of discretion. *See D-Beam*, 316 F. App'x at 969 (citing *Zivkovic*, 302 F.3d at 1087).

leave to amend, 'the request [on appeal] to remand with instructions to permit amendment ***comes too late***.'") (brackets in original, emphasis added).

Here, allowing Evo Intel to tack a belated expert declaration onto its complaints would not cure the patent-ineligibility problem with the claims of the patents and, therefore, would be futile. *See, e.g.*, *Shortridge v. Found. Constr. Payroll Serv.*, LLC, No. 14-CV-04850-JCS, 2015 WL 1739256, at *14 (N.D. Cal. Apr. 14, 2015) ("Leave to amend would serve no purpose here because the flaw lies in [the] patent rather than in [the] pleading."), *aff'd* No. 2015-1898, 2016 WL 3742816 (Fed. Cir. July 13, 2016) (unpublished); *see also, e.g.*, *Blue Spike, LLC v. Google Inc.*, No. 14-CV-01650-YGR, 2015 WL 5260506, at *11 (N.D. Cal. Sept. 8, 2015) (granting § 101 challenge and stating that "[i]n light of the rulings herein, the plaintiff's request for leave to amend is denied as futile"); *Gonzalez v. Planned Parenthood*, 759 F.3d 1112, 1116 (9th Cir. 2014) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) ("[F]utile amendments should not be permitted."). The flaw in Evo Intel's complaints was with the ineligibility of the patents themselves and that flaw cannot be cured through the conclusory statements of purported experts.

C. Evo Intel Misunderstands Controlling Authority that Requires a District Court to Draw on Judicial Experience and Common Sense

Notwithstanding its argument that the District Court should have relied upon the expert declaration submitted outside of the pleadings, Evo Intel goes further and argues that the District Court "invented" facts. Br. at 22, 27. Put differently, Evo Intel essentially argues that the District Court could not consider common sense observations and real-world examples in its § 101 analysis. In Evo Intel's view, the District Court would have had to take "judicial notice" of those "facts." Br. at 25-27.

Evo Intel's argument is misplaced and appears to be based on a misunderstanding of the law. Under *Iqbal*, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 556 U.S. at 679. *Alice* likewise instructs courts to determine whether the claims are directed to abstract ideas. *See, e.g.*, *Ultramercial*, 772 F.3d at 714-15 (determining that the "heart" of the patent was an abstract idea); *Content Extraction*, 776 F.3d at 1347 (reducing the claim elements to the "basic concept of data recognition and storage"); *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012) (distilling the claimed process to its "simplest form"). Indeed, in applying *Alice*, this Court has itself drawn upon common sense observations to understand the

ideas and context surrounding the alleged invention. *See, e.g.*, *Intellectual Ventures I*, 792 F.3d at 1369 ("There is no dispute that newspaper inserts had often been tailored based on information known about the customer—for example, a newspaper might advertise based on the customer's location."); *OIP Techs.*, 788 F.3d at 1363 (recognizing that offer-based price optimization is a "fundamental economic concept"); *Content Extraction*, 776 F.3d at 1347 (noting that "banks have, for some time, reviewed checks, recognized relevant data such as the amount, account number, and identity of account holder, and sored that information in their records").

The District Court properly applied the *Alice* test, and determined that the claims were unpatentable. Despite Evo Intel's argument, the District Court was not required to take judicial notice of "age-old" ideas, "libraries," "video rental stores," "barista[s]," "bartender[s]," and "other human enterprises."[14] Br. at 18.

[14] Evo Intel asserts that the court may not take judicial notice of any facts that may be "subject to reasonable dispute." Br. at 23 n.3. But the District Court considered common activities—such as how a library categorizes books or the ways a video rental store highlighted popular videos—and there is no reasonable dispute as to how a library or video rental store operates. Moreover, a court may take judicial notice of facts outside the pleadings *sua sponte*. Fed. R. Evid. 201(c)(1) (the court "may take judicial notice on its own" or "if a party requests it"); *see also Callan v. New York Cmty. Bank*, No. 13-17198, 2016 WL 1128020, at *1 (9th Cir. Mar. 23, 2016) (holding district court did not abuse discretion in *sua sponte* taking judicial notice of documents and citing Fed. R. Evid. 201).

The District Court did not abuse its discretion, and Evo Intel's argument should be rejected.

CONCLUSION

Appellees respectfully request that this Court affirm the decision of the District Court and find that all claims of the patents-in-suit claim patent-ineligible subject matter under 35 U.S.C. § 101.

Dated: July 25, 2016

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on this 25th day of July 2016.

/s/ Nadia Oswald-Hamid
Nadia Oswald-Hamid

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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