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

# United States Court of Appeals for the Federal Circuit

EVOLUTIONARY INTELLIGENCE, LLC,

*Plaintiff-Appellant,*

v.

SPRINT NEXTEL CORPORATION, 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, 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, Hon. Ronald M. Whyte., Senior Judge, Presiding

## PLAINTIFF-APPELLANT'S CORRECTED REPLY BRIEF

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## CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Evolutionary Intelligence, LLC certifies as follows:

1. The full name of Plaintiff-Appellant is Evolutionary Intelligence, LLC. There are no other parties represented by Plaintiff-Appellant's counsel in this appeal.

2. Evolutionary Intelligence, LLC is the real party in interest.

3. The following parent corporation owns at least 10 percent of the stock of Evolutionary Intelligence, LLC: Incandescent, Inc.

4. The names of all law firms and the partners or associates that appeared for Plaintiff-Appellant in the trial court or are expected to appear in this court are: Adam J. Gutride, Seth A. Safier, Todd M. Kennedy, Anthony J. Patek, Marie A. McCrary, and Matthew T. McCrary, all of whom are associated with Gutride Safier LLP.

Respectfully submitted this 9th day of September, 2016.

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## INTRODUCTION

With this Court's recent decisions in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016), and *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, ____ F.3d _____, No. 2015-1763, 2016 WL 3514158 (Fed. Cir. June 27, 2016), there can be no doubt that Evolutionary's patents are eligible under § 101. *Enfish* holds that a software patent is not directed to an abstract idea and thus is eligible under step one of *Alice* when "the plain focus of the claims is on an ***improvement to computer functionality itself***." 822 F.3d at 1336 (emphasis added). Here, the patents' claims focus on providing a novel way of overcoming the limitations of the static information model by enabling computers to efficiently process certain dynamic modifications to data (i.e., those based on external-to-the-apparatus time and space, and previous search history) through the creation and manipulation of information containers with dynamic interactive registers. By providing this novel way of enabling computers to efficiently process certain types of dynamically modified data, including interactions, events, and occurrences in the real world "external-to-the apparatus," Evolutionary's patents are "directed to a specific improvement in the way computers operate," and thus, under *Enfish*, are "not directed to an abstract idea." 822 F.3d at 1336.

Because Evolutionary's claims are eligible under step one of *Alice*, there is no need to proceed to step two. Nevertheless, the patents are also eligible under

step two. In *BASCOM*, this Court explained that where "the specific improvements in the recited computer technology go beyond 'well-understood, routine, conventional activit[ies]'," they supply the necessary inventive concept to "render the invention patent-eligible." 2016 WL 3514158, at *5 (quoting *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2359 (2014)). Evolutionary's patents recite specific improvements in computer technology that go beyond the conventional "static information model." Accordingly, they are eligible under *Alice* step two.

As significant as these new Federal Circuit cases are, Defendants' brief barely mentions them, spending only a paragraph on each that draws meaningless distinctions. Defendants instead spent most of their brief arguing that Evolutionary's patents are directed to abstract ideas because they involve "classifying and storing information in an organized manner"; "storing information in labeled containers"; storing information in "organized containers"; and "managing information on a computer." (Def. Br. at 18, 20-22, 26-28.) But ***none*** of these terms appear in the claim language. By basing their arguments on broad terms of their own making, Defendants attempt to have this Court analyze the Patents at too high a level of abstraction—a tactic this Court specifically rejected in *Enfish*. *See* 822 F.3d at 1337 ("[D]escribing the claims at such a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule.").

Defendants, like the district court, also devote much of their attention to drawing comparisons to purported "age old" methods of "organizing information," including books, boxes, files, the Dewey Decimal System, Zagat restaurant guides, library check out cards, etc. These comparisons are an insult to the complexity of the invention and its "dynamic interactive registers." For example, no printed New York City restaurant guide will dynamically update its contents when taken to San Francisco, nor will any library book exchange or draw paragraphs from another book based upon usage in a library in another part of the world. None of the "age old" systems the Defendants or the district court cited can do what the patents claim. Oversimplifying the invention and downplaying its benefits are additional tactics of which this Court disapproved in *Enfish*. *See* 822 F.3d at 1338. ("[T]he district court oversimplified the self-referential component of the claims and downplayed the invention's benefits").

As it did in *Enfish*, this Court should reject Defendants' oversimplification of the patents. Doing so would accord with the Patent Office's decisions in the ***eight*** *inter partes* review proceedings the Defendants brought against the patents. The Patent Office found that ***none*** of the ***fifteen*** prior art references the Defendants raised could invalidate a ***single*** claim of the patents—the very patents that, according to Defendants, are as simplistic and mundane as "age old" restaurant guides and library check out cards.

Finally, Defendants do not dispute that the district court dismissed Evolutionary's claims by drawing comparisons to facts ***of the court's own creation***. Rather, Defendants attempt to justify the district court's extraordinary departure from the proper standard for evaluating pleading motions by invoking "judicial experience and common sense." But their attempt fails. No case holds that a court can use its "judicial experience" or "common sense" to divine the specific practices of, for example, "video rental stores," "art galleries," or "baristas", and then conclude that those practices resemble the claims of a patent. For these reasons, this Court should reverse the district court's dismissal and remand for further proceedings.

## ARGUMENT

### I. Evolutionary's Patents Are Directed to Improving Computer Functionality, Not to Abstract Ideas.

#### A. *Enfish* Requires Reversal of the District Court's Decision.

This Court's recent decision in *Enfish*, which issued after Evolutionary filed its opening brief, requires reversal of the district court's decision. 822 F.3d at 1336. In *Enfish*, this Court held that a software patent is not directed to an abstract idea under *Alice* step one where "the plain focus of the claims is on an ***improvement to computer functionality itself***, not on economic or other tasks for which a computer is used in its ordinary capacity." *Id.* (emphasis added). This is precisely the argument Evolutionary made in its Opening Brief, though without the benefit of

the *Enfish* decision. (*See* Op Br. at 19 ("Because the specifications state that the inventions enable computers to process containerized data in superior and more efficient ways, Evolutionary is entitled to the reasonable inference that the Patents improve the functioning of computers, and are therefore eligible under section 101.").) *Enfish* controls here.

The *Enfish* patents described a "logical model"[1] of data for a computer database wherein all data entities are contained in a single "self-referential" table, with column definitions provided by rows in that same table. 822 F.3d at 1330. The specification contrasted the invention to the prior art's "relational model" of conventional databases, which stored each data entity in a separate table with relationships among those tables informing the relationships between rows in different tables. *Id.* at 1331-32. The district court held that the *Enfish* patents were not eligible because they were "directed to the abstract idea of 'storing, organizing, and retrieving memory in a logical table' or, more simply, 'the concept of organizing information using tabular formats.'" *Id.* at 1337.

This Court reversed. According to this Court, "[T]he first step in the *Alice* inquiry . . . asks whether the ***focus of the claims*** is on the specific asserted

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[1] "A logical model is a model of data for a computer database explaining how the various elements of information are related to one another." *Enfish*, 822 F.3d at 1330.

improvement in computer capabilities . . . or, instead, on a process that qualifies as an 'abstract idea' for which computers are invoked merely as a tool." *Id.* at 1335-36. (emphasis added). This Court concluded that the *Enfish* claims focused "on an improvement of an existing technology" because the patents' specification taught: (i) "that the self-referential table functions differently than [relational model] database structures [of the prior art]"; (ii) "the relational model … [is] inferior to the claimed invention"; and (iii) "that the claimed invention achieves other benefits over conventional databases, such as increased flexibility [in configuring the database], faster search times, and smaller memory requirements." *Id.* at 1337. Because these factors demonstrated the claims were "directed to a specific implementation of a solution to a problem in the software arts," this Court concluded that "the claims at issue are not directed to an abstract idea." *Id.* at 1339.

Here, the exact same factors demonstrate that the focus of Evolutionary's patents is "on an improvement of an existing technology" not on some "economic or other task" that uses a computer. *Id.* at 1336. Much like the *Enfish* patents, Evolutionary's patents teach: (i) that the claimed invention's dynamic model of computerized data processing functions differently than the prior art "static information model," particularly through the creation and manipulation of information containers with dynamic interactive registers (e.g., Appx0345-46 (1:14-3:14); Appx0359-60 (claims 1-16)); (ii) that the "static information model"

is inferior to the claimed invention, describing with particularity seven drawbacks of the static information model (e.g., Appx 0345 (1:37-2:49), Op. Br. at 5-7); and (iii) that the claimed invention achieves multiple benefits over the prior art static information model, including the ability to efficiently process dynamic modifications to data based on external-to-the-apparatus interactions, events, and occurrences in time and location, and prior search history. (Appx346-47 (3:6-6:15); Appx350 (12:45-58); Appx351 (13:1-67); Appx0359-60 (claims 1-16); Appx2817, 2822-24. ¶¶ 20-21, 33-38). Accordingly, under *Enfish*, the Patents are not directed to abstract ideas. *See also BASCOM*, 2016 WL 3514158, at *5 ("[In *Enfish*,], we found claim language reciting the invention's specific improvements to help our determination in step one of the *Alice* framework that the invention was directed to those specific improvements in computer technology.").

Defendants barely address *Enfish*, discussing it in only one paragraph. In that paragraph, Defendants attempt to distinguish the case in two ways. First, Defendants assert that "Evo Intel's claims are not directed to the type of 'specific improvement to computer functionality' found to be eligible in *Enfish*." (Def. Br. at 26.) But Defendants offer ***no analysis*** regarding this assertion. There is no way to tell from Defendants' brief why Defendants believe that the *Enfish* patents provide a "specific improvement" where Evolutionary's patents do not. Defendants certainly do not explain how overcoming the limitations of the static information

model and enabling computers to process certain types of dynamic modifications to data is not an "improvement to computer functionality."

Moreover, Defendants never address Evolutionary's explanation, set forth in detail in its Opening Brief, of how its invention is a specific improvement to computer functionality. The prior art static information model prevented computers from efficiently processing dynamic changes to information, particularly changes in information based upon occurrences and interactions in external-to-the-apparatus time and space. (Op. Br. at 6, 31.) This limited computers by ensuring that they could not, for example, efficiently provide a user an automatically updating list of restaurant recommendations or nearby gas stations as the user travels, or of book recommendations based on previous search history or usage by other users who have similar preferences or reviews. (Op Br. at 8, 32.) Evolutionary's patents teach one method of achieving this functionality by improving on the static information model—creating and manipulating information containers with dynamic interactive registers. (Op Br. 32-33.) Evolutionary's Patents thus enable computers to efficiently process dynamic modifications to data, which in turn improves computers' future processing efforts. *See* Op. Br., at 7-17; *see also* Appx2825 ¶ 40. New and improved data processing is just as much of an improvement to computer functionality as was the improved data storage and retrieval in *Enfish*, and Defendants cannot explain why it is not so.

Defendants do assert that "[c]ontrary to Evo Intel's assertions, the specification and claims do not teach improving the 'computers' ability to process information,'" arguing that the specification only "***refers*** to the alleged invention as providing a way to create and manipulate information containers." (Def. Br. at 22-23 (emphasis added).). But Defendants' argument misses the mark. The entire section of the specification that Defendants selectively quote describes the invention as "creating and manipulating information containers with ***dynamic interactive registers*** in a computer, media or publishing network, ***in order to manufacture information on, upgrade the utility of, and develop intelligence in, a computer network***." Appx0345 (1:14-20) (emphasis added). As Evolutionary established in its Opening Brief, the dynamic interactive registers described in the claims are what enable computers to efficiently process certain dynamic modifications to data (i.e., those based on external-to-the-apparatus time and space, and previous search history). Op Br. at 7-17. Further, Defendants' assertion is also contradicted by their own briefing, in which they repeatedly acknowledge that the patents are directed to enabling computers to process dynamic modifications to data. (*See* Def. Br. at 37 ("Evo Intel's claims are directed to … ***dynamically processing data*** based on time, location, or prior search information."); 17 ("Evo Intel's claims directed at ***processing*** containerized data based on time, location, or

prior search information . . ."); 36 ("Indeed, the claim elements themselves [describe] … ***data processing***.") (emphases added).)

Defendants' second attempt to distinguish *Enfish* is even weaker. Defendants argue that "Evo Intel's claims describe conventional elements that contemplate routine implementation by existing generic, general purpose computers." (Def. Br. at 26.) But this Court rejected the exact same argument in *Enfish*, specifically holding that "we are not persuaded that the invention's ability to run on a general-purpose computer dooms the claims." 822 F.3d at 1338.

Defendants also use Evolutionary's example of dynamically updating a list of restaurants to claim that the patents describe nothing more than a "computerized Zagat guide" that is focused on achieving a "purpose unrelated to the functioning of a computer" because "[s]earching for a nearby place to eat, based on time, location, or reviews, does not solve any problem unique to any field of computing." (Def. Br. at 25, 28.) But this argument is completely divorced from the language of the claims and specification. The purpose of the patents is not to solve the problem of how to provide users with a list of nearby places to eat (or of book recommendations, etc.). The updating list of restaurants is simply one example of various potential applications of achieving the true purpose of the patents, which is enabling computers to process dynamically modifying data by creating and manipulating information containers with dynamic interactive

registers. Rather than speaking in terms of how to create a "computerized Zagat guide," the specification identifies a "problem in the software arts"—namely the limitations of the static information model. To that end, the claims are "directed to a specific implementation of a solution to" that problem—namely, the creation and manipulation of information containers with dynamic interactive registers. Accordingly, "the claims at issue are not directed to an abstract idea." *Enfish*, 822 F.3d at 1339.[2]

Defendants also attempt to analogize to cases other than *Enfish* to claim that the patents are directed to abstract ideas. But in the *Enfish* decision this Court rejected similar analogies to these exact same cases, acknowledging that the patent claims in those cases were not directed to improving computer functionality. Rather, those claims were more "readily understood as simply adding conventional computer components to ***well-known business practices*.**" *Id.* at 1338 (emphasis added) (citing *Versata Development Group v. SAP America, Inc.*, 793 F.3d 1306 (Fed. Cir. 2015) ("abstract idea of determining a price using organization and product group hierarchies"); *Intellectual Ventures I LLC v. Capital One Bank*

[2] Indeed, in their eight unsuccessful petitions for *inter partes review*, Defendants tried and failed to invalidate the patent with prior art far more sophisticated than a printed Zagat guide, including a computer system capable of processing containerized time and location data while monitoring a railroad. Op. Br. at 56 (citing Appx2884).

*(USA)*, 792 F.3d 1363, 1367–69 (Fed. Cir. 2015) (abstract idea of financial budgeting using a computer); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1354–55 (Fed. Cir. 2014) (claims adding generic computer functionality to the formation of guaranteed contractual relationships); *Ultramercial, Inc. v. Hulu*, LLC, 772 F.3d 709, 714–17 (Fed. Cir. 2014) (claims applying an exchange of advertising for copyrighted content to the Internet); *see also* Def. Br. at 17-21, 24-25 (citing the same cases). In contrast, just as with the patents in *Enfish*, Evolutionary's patents have nothing to do with "well-known business practices," and, in fact, contain no references to any such practices. Rather, they are focused on improving computer functionality by providing a novel way to address the limitations of the static information model.

Defendants also cite *In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607 (Fed. Cir. 2016), but that case is likewise distinguishable. The purpose of the patents in that case was described as "provid[ing] for recording, administration and archiving of digital images simply, fast, and in such a way that the information therefore may be easily tracked." *Id.* at 612. The patent was not addressed to solving any problem with "how to combine a camera with a cellular telephone, how to transmit images via a cellular network, or even how to append classification information to that data." *Id.* Nor was it trying to solve any "problem related to the structure of the server that stores the organized digital images." *Id.*

This, again, is in stark contrast to Evolutionary's patents, which are directed to overcoming the limitations of the static information model of computerized data processing.

### B. Defendants Overgeneralize the Patents and Ignore the Language of the Claims to Argue That the Patents are Directed to Abstract Ideas.

Defendants argue in various forms that Evolutionary's patents are directed to abstract ideas because they involve "classifying and storing information in an organized manner"; "storing information in labeled containers"; storing information in "organized containers" and "managing information on a computer." (Def. Br. at 18, 20-22, 26-28.) These arguments ignore the specific language of the claims and describe the Patents at too high a level of abstraction—tactics that this Court found improper in *Enfish*.

In *Enfish*, the district court held that the patents were directed to the abstract idea of "storing, organizing, and retrieving memory in a logical table," while the defendant claimed that the patents involved the slightly less generalized but still abstract idea of "organizing data into a logical table with identified columns and rows where one or more rows are used to store an index or information defining columns." *Enfish*, 822 F.3d at 1337. This Court rejected both positions, holding that "describing the claims at such a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the

rule." *see also id.* at 1335 ("The [step one] inquiry, therefore, cannot simply ask whether the claims ***involve*** a patent-ineligible concept"); *In re TLI*, 823 F.3d at 611 ("But in determining whether the claims are directed to an abstract idea, we must be careful to avoid oversimplifying the claims."). As this Court recognized, the language of Enfish's claims was "not simply directed to ***any*** form of storing tabular data, but instead [was] specifically directed to a ***self-referential*** table for a computer database." *Enfish*, 822 F.3d at 1337.

Here, the terms Defendants use to paint Evolutionary's Patents as abstract—various forms of "organize," "labels," "classifying information" and "managing information on a computer"—appear ***nowhere*** in the Patents, either in the specification or the claims. Indeed, it is difficult to imagine a generalization of Evolutionary's patents more unsophisticated than Defendant's description of them as focusing on "organizing" or "classifying" information. The patents are far more complex than that.

Just as the *Enfish* patents were specifically directed at creating a self-referential table, Evolutionary's Patents are specifically directed to "creating and manipulating information containers with ***dynamic interactive registers***." As described above and in the Opening Brief, it is the dynamic interactive registers, and the specific arrangements of containers, registers, and gateways described in the claims that enable computers to process dynamic modifications to data.

Defendants' tactic of ignoring the specific language of the claims is not new. The Patent Office repeatedly criticized Defendants for failing to address the specific language of the claims in rejecting their eight petitions for *inter partes review*. (*See* Appx. 2793-95; *see also E.g.*, Appx2995 ("We agree with Patent Owner that the Petition provides insufficient and unpersuasive discussion of the claim limitations …."); Appx2960 ("Petitioner's discussion of Wachtel refers generally to 'searches,' 'client-based information' and 'client-based collections of information' but does not identify specifically what Petitioner regards as the 'first container registers encapsulated and logically defined in a plurality of containers' as recited in claim 1.'"); Appx3018 ("Petitioner does not explain persuasively how any specific one of these alleged containers includes all of the registers recited in claim 1."); Appx3043 ("[T]he Petition does not identify any specific one of the various data structures in Cree and Scully that includes each of the various data elements alleged to constitute the claimed information element, various registers, and the gateway."); *see also* Appx. 2884, 2890-92, 2938, 2988.)

### C. Defendants' Comparisons to Various "Age Old" Ideas Fall Short.

Defendants—like the district court—also compare the Patents to various "age old" methods of "organizing information" such as books, boxes, files, the Dewey Decimal System, Zagat guides, library book check out cards, etc. These comparisons, like Defendants' arguments addressed above, improperly generalize

the Patents to "organizing information." At minimum, none of these age-old, physical systems are relevant because the Patents are directed specifically to improving computers' ability to process containerized data.

Further, these comparisons oversimplify the dynamic interactive registers and downplay the invention's benefits. *See Enfish*, 822 F.3d at 1338. ("[T]he district court oversimplified the self-referential component of the claims and downplayed the invention's benefits"). The Dewey Decimal number on the spine of a book is not a "dynamic interactive register." It does not update the contents of the book when it is moved to the wrong section of the library or exchange or manufacture paragraphs based on events or interactions at diverse unknown times and locations around the world. Similarly, a printed Zagat guide listing New York restaurants by location does not dynamically update its contents when it is taken to San Francisco; it still statically displays the now useless New York restaurant information.

Moreover, Defendants and the district court's positions overlook that Evolutionary's patents are directed to "external-to-the-apparatus" time and space data—data that no "age-old" system could begin to process, let alone process in the very specific way the patents' claims require. For example, no history book sitting on a library shelf in Chicago can automatically update itself based upon a new archaeological discovery in an external location such as Calcutta. Nor can a coffee

barista in Seattle change the recipe of a drink based on the contemporaneous decision of an unknown barista in Boston to improve the drink with a new ingredient.

## II. The Recent *BASCOM* Decision Explains that at Minimum, Evolutionary's Patents Are Eligible Under *Alice* Step Two.

Under *Enfish*, the eligibility of the patents is properly decided under *Alice* step one, and the analysis should cease there. But even if the Court were to evaluate the eligibility of the patents under *Alice* step two, the patents still supply the necessary "inventive concept" to be found eligible.

As this Court recently explained, in some "cases involving computer-related claims, there may be close calls about how to characterize what the claims are directed to." *BASCOM*, 2016 WL 3514158, at *5. "That is, some inventions' basic thrust might more easily be understood as directed to an abstract idea, but under step two of the *Alice* analysis, it might become clear that the specific improvements in the recited computer technology go beyond 'well-understood, routine, conventional activit[ies]' and render the invention patent-eligible." *Id.* (quoting *Alice*, 134 S. Ct. at 2359). "In such cases . . . an analysis of whether there are arguably concrete improvements in the recited computer technology could take place under step two." *Id.*

The *BASCOM* patents were directed to an internet content filtering system. *Id.* at *1. The specification described two prior art filtering systems, one requiring

installation on each local computer in a network, the other being installed on a remote server; each had its benefits and drawbacks. *Id*. *1-2. BASCOM's patent described its invention as "combining the advantages of the then-known filtering tools while avoiding the drawbacks" by installing the filter at the ISP server. *Id.* *2. Because the ISP could associate an individual user (via login) with a specific request to access a website; the patented filter could utilize custom filtering rules based on the user (thereby obtaining the benefits of local installation), while at the same time avoiding user modification and the other excessive installation and maintenance difficulties (thereby also obtaining the benefits of remote installation). *Id.* at *2-3.

This Court held that, although BASCOM's patent presented a "close case" under *Alice* step one, filtering content on the internet was an "abstract idea." *Id.* *8. Nevertheless, this Court concluded that BASCOM's patent supplied an "inventive concept" under *Alice* step two. *Id.* BASCOM's invention was "not claiming the idea of filtering content simply applied to the Internet." *Id.* Rather, the patent claimed "a technology-based solution … to filter content on the Internet that ***overcomes existing problems*** with other Internet filtering systems." *Id.* at *7. (emphasis added). "By taking a prior art filter solution (one-size-fits-all filter at the ISP server) and making it ***more dynamic and efficient*** (providing individualized filtering at the ISP server), the claimed invention represents a 'software-based

invention[ ] that improve[s] the performance of the computer system itself.'" *Id.* (emphasis added). Accordingly, this Court concluded that "an inventive concept can be found in the ordered combination of claim limitations that transform the abstract idea of filtering content into a particular, practical application of that abstract idea." *Id.* at *8.

Similarly, as discussed more thoroughly above, Evolutionary's patents claim a "technology-based solution" to enable computers to process dynamic modifications to data that "overcomes existing problems" with the static information model of computerized data processing. *See BASCOM*, 2016 WL 3514158 at *7-8.

Accordingly, even if this Court were to agree with the district court that the patents are directed to the abstract idea of "searching and processing containerized data," it should still conclude that the ordered combination of the claim limitations supplies an inventive concept. The claims include detailed and specific limitations on how computers must process dynamically modified data through the use of "dynamic interactive registers," including a plurality of containers, registers, and gateways and particular types of these structures (e.g., "active time registers," "passive time registers," "acquire registers," "identified search query templates," etc.); these particular types must also interact in a specific manner. (Appx2817, 2822-2829 ¶¶ 20-21, 33-48.) Thus, just as in *BASCOM*, these limitations recite a

"particular, practical application" of the abstract idea of "searching and processing containerized data," and are patent eligible. *Id.* at *8.

In a single paragraph, Defendants advance two unpersuasive arguments that *BASCOM* supports their position. First, Defendants argue that "the *BASCOM* claims did not 'recite the abstract idea of filtering content along with the requirement to perform it … on a set of generic computer components'" whereas Evolutionary's Patents refer only to "containers, registers, and gateways," which Defendants contend are "generic, well-known components." (Def. Br. at 35, 36.)

The Defendants are simply wrong about *BASCOM*. This Court expressly stated in *BASCOM*: "[w]e agree with the district court that the limitations of the claims, taken individually, recite ***generic computer, network and Internet components, none of which is inventive by itself***. BASCOM does not assert that it invented local computers, ISP servers, networks, network accounts, or filtering." *BASCOM*, 2016 WL 3514158 at *6 (emphasis added). However, this Court went on to hold that "an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces." *Id.* The same is true here. Evolutionary's patents describe detailed and specific arrangements of particular types of containers, registers, and gateways that enable computers to process certain dynamic modifications to data according to external-to-the-apparatus changes in time and location. Appx0359-60 (claims 1-16); Appx2817,

2822-24. ¶¶ 20-21. These arrangements were unconventional and defied the restrictions of the static information model. Appx2824 ¶ 38.

Defendants' second argument with respect to *BASCOM* is that "the claims in *BASCOM* [did not] preempt 'all ways of filtering content on the Internet; rather, they recite[d] a specific, discrete implementation of the abstract idea of filtering content." (Def. Br. at 36.) Yet this, too, is another reason *BASCOM* supports Evolutionary's position. Evolutionary's patents recite a specific and discrete way to process containerized data. The claims describe very particular arrangements of containers, registers, and gateways to overcome the limitations of the static information model. *See BASCOM*, 2016 WL 3514158 at *7 (holding that the claims did not "preempt all ways of filtering content on the Internet . . . [because] the patent describes how its ***particular arrangement of elements*** is a technical improvement over prior art ways of filtering such content.") (emphasis added). For example, a computer system that uses containers without "a first register for storing a unique container identification value" would not infringe ***any*** claims of the '536 patent. Nor would a computer system infringe claim 1 of the '536 patent unless it fulfilled the "active time register," "passive time register," and "neutral time register" limitations, as well as ***all*** of the very specific limitations that the claims ascribe to those registers. "Thus, construed in favor of the nonmovant—[Evolutionary]—the claims are "more than a drafting effort designed to

monopolize the [abstract idea of processing containerized data]." *BASCOM*, 2016 WL 3514158 at *7.

Defendants claim that Evolutionary overcame the examiners rejection of the '682 patent by adding "the limitation 'using the computer'" to the claims, but this is highly misleading. (Def. Br. at 33.) The Defendants fail to mention that the applicant made ***other*** significant amendments to claim 1 that enabled it to overcome the 101 rejection. The full modification, with additions underlined and deletions struck through is as follows:

> 1. A computer-implemented method comprising:
> receiving a search query;
> searching first container registers encapsulated and logically defined in a plurality of containers to identify one or more identified containers responsive to the search query, the container registers having defined therein data comprising historical data associated with interactions of the one or more identified containers with other containers from the one or more plurality of containers, wherein searching the first container registers comprises searching the historical data;
> encapsulating the identified 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
> providing a list characterizing the identified containers.

(Appx2589.)

Finally, the Defendants' repeated assertions that the patents' arrangements of these structures are "familiar," "conventional and generic" (Def. Br. at 35-36), and that the patents preempt the relevant field of technology are contradicted by

the outcomes of the eight separate *Inter Partes Review* petitions Defendants filed. If the patents are really so generic and broad that they preempt the entire field of technology, then why were Defendants unable to convince the Patent Office after a hearing to reject even a single claim of the patents? The answer is simple: the arrangement of structures the patents' claims require is far more complex than Defendants want to admit.

## III. The District Court Erred by Failing to Apply the Correct Rule 12(b)(6) and Rule 12(c) Standards.

### A. The District Court's Reliance on Facts Outside The Pleadings Was Not Authorized By Resort to "Judicial Experience and Common Sense."

Unable to dispute that the district court invented most of the facts upon which it based its order of dismissal (i.e. facts relating to video stores, bartenders, baristas, etc.), Defendants attempt to justify the district court's actions by saying the court was allowed "'to draw upon its judicial experience and common sense'" in ruling on the motion to dismiss. (Def. Br. at 42 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).)

Defendants' argument goes too far. It is one thing for a district court to use its "judicial experience" when evaluating whether a claim is plausible (i.e., is it more than "a sheer possibility that a defendant has acted unlawfully") or refusing to accept as true facts that "common sense" suggests are impossible (e.g. allegations that a person was in San Francisco and London within the same hour on

the same day), which is what *Iqbal* stands for. 556 U.S. at 679. However, it is quite another to give a district court free license to dismiss a complaint based on drawing comparisons to specific facts that the court pulled out of thin air and that Plaintiff never had an opportunity to dispute—what happened here.

The holes in the district court's analysis of the "age old" methods it identified highlights the problems of giving courts such free license. The district court here determined, as a matter of fact, that the Patents "resemble[] age-old forms of information processing" including *inter alia*, library staff recommendation lists, video rental store "customer favorites" shelves, curated art exhibits, and barista and bartender practices, and that the Patents "merely take these age-old ideas and add a computer." Appx0010-11, 0013-14. But the critical, missing element of the court's analysis is ***how*** the patents resemble these age-old methods and ***how*** the patents simply take these methods and "add a computer." For example, assuming, *arguendo*, that a video store "customer favorite" shelf could constitute a "container," how did the district court determine that the shelf has any component resembling an "active time register," a "passive time register," a "neutral time register," and a "gateway" that governs the shelf's interaction with other containers (presumably the interactions would be with other shelves in the store, although this too is unclear). If the district court were correct that a customer

favorite shelf "resembles" the patents, then the court would necessarily have had to make these more detailed comparisons, but they are left completely unstated.

The district court's opinion does not begin to explain how the Patents resemble these "age old" methods because it is devoid of any facts actually explaining the steps that video stores use to update "customer favorite" shelves, or that art galleries use to create curated art exhibits, etc. Those critical facts remain entirely in the Judge's head, whence all of these facts came, effectively denying Evolutionary any opportunity to respond to the comparisons and demonstrate how the patents do not resemble any of the "age old" methods the district court identified.

Defendants argue that the district court could have properly taken judicial notice of the "age old" methods it identified because the 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." (Def. Br. at 43 & n.14.) Of course, as noted above, because the district court did not actually explain the steps of how those businesses operate it is impossible to know whether Evolutionary could reasonably dispute what the district court determined about them. But more importantly, Defendants' argument misses the point. The issue is not how libraries and video stores operate, but whether Evolutionary's patents lack eligibility in light

of how they operate. Evolutionary was entirely deprived of the opportunity to address that issue, and it was not appropriate for judicial notice.

This Court recently stated "we must be mindful of extraneous fact finding outside the record, particularly at the motion to dismiss stage," which is precisely what the Court did here. *In re TLI*, 823 F.3d at 613–14. In *TLI*, this Court was able to determine that those patents claimed functions that were well understood and previously known to the industry, but did so "only look[ing] to the specification," which contained those specific observations. *Id.* at 614. Here, the district court went well-beyond the specification and well-beyond the proper limits of judicially noticeable facts. Doing so was error. *See BASCOM*, 2016 WL 3514158 at *8 ("BASCOM has alleged that an inventive concept can be found in the ordered combination of claim limitations…. We find nothing on this record that refutes those allegations as a matter of law or justifies dismissal under Rule 12(b)(6).").

### B. The District Court Erred by Refusing to Consider Plaintiff's Expert's Testimony.

Defendants argue that the district court was entirely within its discretion to reject Plaintiff's proffered expert declaration while at the same time considering other facts outside the pleadings. (Def. Br. at 38 & n.11.) Defendants are wrong. The only discretion the district court had was ***whether*** it was going to consider any material outside the pleadings. Once the court decided to base its decision on facts outside the pleadings (as discussed above), the court ***automatically*** converted the

motion into one for summary judgment and was ***required*** to consider the opinion of Evolutionary's expert. *See* 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.") (emphasis added); *Garaux v. Pulley*, 739 F.2d 437, 438 (9th Cir. 1984). ("[W]here matters outside the pleadings will be considered in disposition of a Rule 12(b)(6) motion, so as to convert it into one for summary judgment pursuant to Rule 56, the non-moving party must be sufficiently informed or aware of that fact and be afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

Defendants assert that the expert's declaration is "conclusory." (Def. Br. at 39.) What they really mean is that they disagree with the expert's well-reasoned conclusions. The declaration is not conclusory. Rather, it meticulously sets forth the ***reasons*** one of skill in the art would have understood the patents to be "groundbreaking departures" from the prior art static information model. To that end, the declaration ***explains*** how the Asserted Patents offer specific improvements to computer functionality in order to overcome the static information model. (*See* Appx2822-24 ¶¶ 33-38; *e.g. id.* ¶ 34 ("In the invention of the '536 patent, information containers are populated with information elements and time- and space-based dynamic registers, thereby facilitating access to the information at

appropriate times and in relation to pertinent locations, making the information more useful to the user. As users access the information containers, the dynamic registers are updated with information regarding their use, allowing them to evolve without direct human input.").) Evolutionary's expert also offered specific ***evidence*** regarding why the Asserted Patents differ from the "age old" methods upon which Defendants and the district court relied. (Appx2826-29 ¶¶ 43-45; *e.g. id.* ¶ 44 ("I do not believe that any 'age-old method of categorizing data' could possibly perform each of the limitations of any of the Asserted Patents' claims. For example, a book, box, or file organizational system could not perform any claim of the Asserted Patents. As an initial matter, these physical systems were limited to the static information model, which is the very model whose problems the Asserted Patents were designed to address.").)

### C. The District Court Erred by Refusing to Draw Reasonable Inferences in Evolutionary's Favor.

Defendants argue that the district court did not have to infer that Evolutionary's patents "improve the functioning of computers themselves" because that inference is "not supported by the disclosures of the patents." (Def. Br. at 39.) But this is yet another assertion Defendants do not and cannot support. As explained above, the specification specifically discloses that prior art computers were limited by the static information model, and sets forth in detail seven drawbacks of that model. Appx 0345 (1:37-2:49). The district court was required

to accept these allegations as true. *United States v. Corinthian Colleges*, 655 F.3d 984, 991 (9th Cir. 2011). The Patents further teach one method for overcoming those limitations and enable computers to process certain dynamic modifications to data (e.g., Appx346-47 (3:6-6:15); Appx350 (12:45-58); Appx351 (13:1-67); Appx0359-60 (claims 1-16))—additional facts that the district court was required to accept as true. Based on those disclosures in the patents, it is reasonable to infer that the patents improve the functionality of computers by providing one way of addressing the limitations of the prior art static information model. Defendants offer no argument to refute this logic.

### D. The District Court Erred By Not Giving Evolutionary an Opportunity to Amend its Complaint.

Defendants' only argument for why this Court should not grant leave to amend is based on a purported rule from *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006), and *Alaska v. United States*, 201 F.3d 1154, 1163-64 (9th Cir. 2000) that the Court cannot do so absent a request for leave to amend below. However, *Reyn's* and *Alaska* and their progeny are not binding authority on this issue. In *Lopez v. Smith*, an en banc panel of the Ninth Circuit held that "a district court should grant leave to amend ***even if no request to amend the pleading was made***" and then remanded with instructions that the plaintiff be permitted leave to amend. 203 F.3d 1122, 1127, 1130-31 (9th Cir. 2000) (en banc) (emphasis added). In the Ninth Circuit, "an en banc decision of

this court ***cannot be modified by a three judge panel***." *United States v. Tucker*, 716 F.2d 576, 591 (9th Cir. 1983) (emphasis added); *see also Pakootas v. Teck Cominco Metals, LTD.*, ___ F.3d ___, No. 15-35228, 2016 WL 4011196, at *8 (9th Cir. July 27, 2016) ("Neither has intervening en banc or Supreme Court authority cast the reasoning behind *Center for Community Action* or *Carson Harbor* in doubt. In this situation, '[a]n appellate panel simply cannot modify an En banc decision.'") (quoting *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002)). No intervening Supreme Court or en banc panel of the Ninth Circuit has ever called *Lopez* into doubt, and *Lopez* remains good law. *See United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO*, 770 F.3d 834, 845 (9th Cir. 2014) (citing *Lopez* and describing its rule permitting amendment without a request for leave as a "repeated admonition"). Accordingly, this Court is bound by *Lopez*. Evolutionary should therefore be granted the opportunity to amend its complaint to address any factual deficiencies, as set forth in Evolutionary's Opening Brief.

## CONCLUSION

For the foregoing reasons, Evolutionary respectfully requests that this Court reverse the district court's order dismissing its claims and remand the case for further proceedings.

Respectfully submitted this 9th day of September, 2016.

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**PROOF OF SERVICE**

I hereby certify that I electronically filed the Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system on September 14, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Todd Kennedy
Todd Kennedy

## CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(c), I hereby certify that the foregoing brief of Plaintiff-Appellant complies with the word count limitation of Rule 32(a)(7)(B). There are 6,992 words in the brief according to the word count function of Microsoft Word version 15.24, the word processing program used to prepare the brief.

Respectfully submitted this 9th day of September, 2016.

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