

No. 2017-2533

**In the
United States Court of Appeals
for the Federal Circuit**

MANTISSA CORPORATION,

Plaintiff-Appellant,

v.

ONDOT SYSTEMS, INC.; LONE STAR NATIONAL BANK; LONE STAR NATIONAL
BANCSHARES-TEXAS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas, in Case No. 4:15-cv-01133.
The Honorable **Dena Hanovice Palermo**, Magistrate Judge Presiding.

**APPELLANT'S COMBINED PETITION FOR
PANEL AND EN BANC REHEARING**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Mantissa Corporation v. Ondot Systems, Inc., et al.

Case No. 17-2533

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Mantissa Corporation	None	None

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

Novak Druce Connolly Bove Quigg LLP: James Allen Glenn, Jr., Daniel P. Mullarkey, William R. Towns
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RULE 35(b) STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court and this Court: *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); *Ancora Tech., Inc. v. HTC Amer., Inc. et al.*, 908 F.3d 1343 (2018); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016); *McRO v. Bandai Namco Games America*, 837 F.3d 1299, 1316 (Fed. Cir. 2016).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

(1) Is a claimed process using generic computer hardware and software patent eligible under *Alice* Step One if it is “directed to an improvement of an existing technology”, *Enfish*, 822 F.3d at 1337, as distinguished from improving “computer functionality”, *Aatrix*, 890 F.3d at 1357?

(2) Can claimed inventions be proven patent-ineligible under *Alice* Step Two by clear and convincing evidence if the challenger has presented no accepted facts for ineligibility and the patentee has

presented accepted facts for eligibility from: (i) the patent specification, the prosecution history, and the prior art; (ii) the claims; (iii) descriptions of existing technologies; (iv) industry praise of the claimed invention; (v) testimony from two skilled artisans; and (vi) admissions of the challenger?

(3) May a district court assert factual evidence outside the record without giving the patentee notice or opportunity to rebut the evidence, and rely primarily on this evidence for summary judgment of patent ineligibility under *Alice*?

INTRODUCTION

This is not a case where the patentee has taken an age-old banking practice and simply implemented it on a computer. In 2005, the Patents¹ introduced specific methods for proactively preventing fraudulent use of identity over computer transaction networks by giving an identity owner control over conditions for use (not verification) of her identity by a “user” of the identity, such as a bank holding an identity owner’s financial account or hospital holding an identity owner’s health records.

¹ “Patents” refers to U.S. Patent No. 7,779,456 (“456”) and U.S. Patent No. 8,353,027 (“027”).

The specific methods included (i) adding a third-party “service provider” that receives types of conditions-for-use from the user and thereafter receives the specific conditions-for-use from the identity owner, (ii) use of insufficient-identity information (similar to “tokens” in the payment processing industry today) to or at the “service provider”, and (iii) a specific and unconventional order of communications between the four parties involved in the transaction, i.e., the identity owner, the user, the service provider, and a “source”, such as merchant selling goods or doctor seeking health records. The specific methods prevented an imposter from presenting an identity owner’s ordinarily-sufficient identification for a transaction, and fraudulently purchasing goods charged to the identity owner or fraudulently obtaining health records of the identity owner.

The lower court and the appeal panel analogized the specific methods to either (i) a two-party transaction, i.e., an identity owner withdrawing money through a bank teller following the bank’s conditions for verification of identity information or (ii) a three-party transaction where the “service provider” is merely an “intermediary” for mitigating settlement risk between two transacting parties as in *Alice*.

However, these analogies fail because the Claims²: (i) recite or invoke all four parties, each of which is necessary to the transaction and each of which corresponds to a computer, to improve the processing of transactions over conventional computerized transaction networks; (ii) recite “identification information” that is distinct from a “condition” predetermined by the identity owner for a certain use (not verification) of the identity, and (iii) have other distinctions given below.

These concepts and specific implementations in the Claims may appear to be long-standing or conventional business practices, but the record is full of un rebutted evidence that they were not so in 2005. Moreover, these concepts and specific implementations satisfy the standards for eligibility of purported abstract ideas in *Aatrix Software*, *Berkheimer*, *Ancor Tech.*, and *McRO* discussed below.

POINTS OF LAW OVERLOOKED BY THE PANEL

First, claimed inventions implemented using generic computer hardware and software are patent eligible under *Alice* Step One if they improve an existing technology.

² “Claims” refers to claims 1-7 and 11-29 of ’456 and claims 1-3 and 7-29 of ’027”.

Second, claimed inventions cannot be proven patent-ineligible under *Alice* Step Two by clear and convincing evidence if the challenger has presented no accepted facts for ineligibility and the patentee has presented facts for eligibility from: (i) the patent specification, the prosecution history, and the prior art; (ii) the claims; (iii) descriptions of existing technologies; (iv) industry praise of the claimed invention; (v) testimony from two skilled artisans; and (vi) admissions of the challenger.

Third, a court may not assert factual evidence outside the record without giving the patentee notice or opportunity to rebut the evidence, and rely primarily on this evidence for summary judgment of patent ineligibility under *Alice*.

ARGUMENT

I. The Claims Are Patent Eligible Under Alice Step One Because They Claim Processes That, Despite Using Generic Computer Hardware and Software, Improve the Functioning of Conventional Transaction Processing Over Computerized Transaction Networks to Prevent Fraudulent Use of Identity.

Alice step one asks if the claims (i) are “directed to an **improvement of an existing technology...bolstered by the specification’s teachings** that the claimed invention achieves other

benefits over conventional [technology]”, *Enfish*, F.3d at 1337 (emphasis added), or (ii) “achieve an improved technological result in conventional industry practice,” *McRO*, 837 F.3d at 1316.

To those of ordinary skill in the art, the Patents clearly describe the existing technology and a claimed improvement. First, the Patents describe conventional industry practices to prevent fraudulent use of identity over computerized transaction networks. *See, e.g.*, ‘456, 1:26-34 (“[w]ith the increased technical and Internet literacy of our culture,...it has now become necessary [] to protect our most precious identification information from use by an unscrupulous stranger [or] a disgruntled employee”); 1:29-34 (referencing current “ease that identification information can be used to commit fraud against an identity owner”); 1:41-43 (“most common response involves monitoring the use of identity resources and notifying a consumer after detection of an unusual use of the identity”); 1:53-55 (“[c]urrent technology, as disclosed in U.S. Pat. Nos. 6,529,885, 6,811,082, 6,817,521, and 6,332,134 [each directed to transaction processing over computerized networks] highlights a fundamental failing in the current state of the art”).

Second, the Patents describe the means and embodiments for improvement to the conventional industry practices. *See, e.g.*, ‘456, 1:64-67 (“an identity owner has [] means of proactively controlling use of his identity and identification information with a system designed specifically for such control”); 2:2-6 (“embodiments of the invention...giving an individual or other entity increased control over implied or direct use of his identity”).

Third, the Claims capture the improvements. *See* Blue Br. 3-7 (listing Patent-Eligibility-Conferring Limitations). For example, limitations capturing identity-owner-control can be seen in claim 14 of ‘456 with reference to the embodiment in combined Figures 1 and 3 of ‘456 below.³

³ *See, also*, Appx2505-2507 (the combined Figures annotated with arrows from the language of claims 14 and 17 were presented at the motion-for-summary-judgment hearing leading to this appeal).

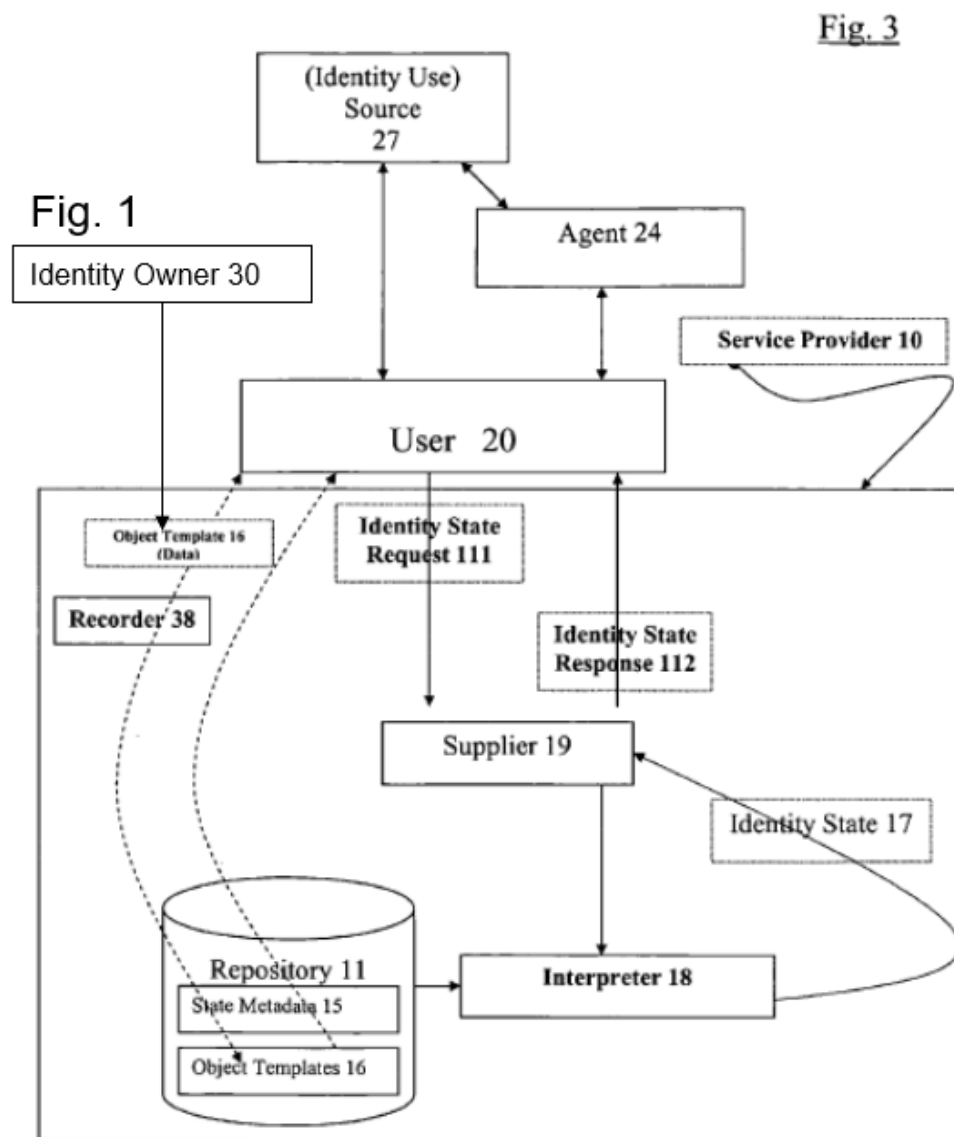


Fig. 3

Fig. 1

As background, claim 14 requires four parties to the transaction -- the “entity”, i.e., identity owner, the “user” 20 (e.g., bank), the “service provider” 10 and the “source” 27 (e.g., merchant). The “source” is implied in claim 14 as the source of the claimed “request by the user [to the service provider] to authorize use of the identity of the entity”. For example, an imposter with the identification of the identity owner

attempts a transaction at a merchant. The merchant sends a request to the bank for the attempted transaction that would use the identification, e.g., debit the identity owner's account and credit the merchant's account in this case. The bank sends a related but different request to the service provider to determine whether the proposed use is authorized, and the service provider responds.

Before the attempted transaction, claim 14 provides identity-owner-control by (i) "establishing, by a user, a set of desired identification information parameters; sending, from the user to a service provider, the set", which is represented by the two-headed dashed arrow between User 20 and the Object Templates 16 in Repository 11 of Service Provider 10, and (ii) "obtaining, by the service provider **from the entity**, information from the entity consistent with the set, the **information including at least one pre-determined condition**", which is represented by the arrow from Identity Owner 30 to Object Template 16 (Data) in Service Provider 10. In addition, the claim requires the "service provider cannot provide the permission unless consistent with the intent of the entity as reflected in the results of said obtaining [information from the entity consistent with the set]."

See '456, 1:64-67 (Appx46) (“an identity owner [can] proactively control[] use of his identity and identification with a system designed specifically for such control”); *see, e.g.*, Appx2226.

Thus, the Claims satisfy *Alice* Step One under *Enfish* and *McRo*. The analysis for abstractness should stop here. Instead, the lower court and the appeal panel compared generalizations of the Claims, seemingly without reviewing the Patents, to hypotheticals of an identity owner (or agent thereof) approaching a bank teller to withdraw money, or an intermediary between two transacting parties. However, these hypotheticals fail upon a review of the Patents and a basic understanding of the Claims.

First, the hypotheticals mistakenly equate a bank or merchant's conditions for sufficient identification information with the claimed “at least one pre-determined condition”. The “pre-determined condition” is a condition for a particular use of the identity, not a condition for verification of identity. As shown in the claim language above, it is predetermined by the identity owner (“entity”), not the bank. The Patents describe avoiding the user setting the conditions, in order to

prevent fraudulent use by, e.g., “a disgruntled employee” at the user. ‘456, 1:31-34.

“Identification information” and “pre-determined condition” are different concepts in the Patents and different terms in the Claims, and should be treated so in any comparisons. To be sure, the Patents and Claims are not about adding steps to verify identity, a brute force solution described in prior art cited in the Patents and suggested at the panel hearing, but rather elegantly modifying conventional transaction processing over computerized networks to allow an identity owner (rather than a bank or merchant) to control use of identity ordinarily sufficient for use.

Second, the order of communications in the hypotheticals is all wrong. For example, in the hypotheticals, the identity owner sends a request to the user to debit the identity owner’s account. In the Claims, such as claim 14 discussed above, the identity owner sends no request to the user, rather the user sends a request to the service provider to determine whether to debit the identity owner’s account.

Third, the hypotheticals often are missing a “source”, such as a merchant, or otherwise have fewer parties than the Claims have.

Fourth, the “service provider” in the hypotheticals has sufficient identity information to authorize a requested transaction but that is not so in the Claims. Compare ‘456, claim 5 (“service provider” has “second information [] insufficient in and of itself to authorize any related use of the identity”) and claim 15 (“service provider” has “second identification information” different from “first identification information”).

Fifth, the hypothetical “user” has access to the “conditions” for use of the identity but that is not so in the Claims. See, e.g., ‘456, claim 14 (“user does not have direct access to the information[/"condition"] provided by the entity”).

Sixth, the hypotheticals don’t determine, using computers in real-time, whether a requested use of identity is authorized for use before an identity owner or imposter would leave a “source”, e.g., merchant, with purchased goods. The Claims, on the other hand, are all “executed on electronic computer hardware in combination with software” to give a determination in real-time whether a presented identity (i.e., sufficient identification information) is permitted by the identity owner for a certain use or transaction.

Seventh, the “service provider” is not an “intermediary”. The latter term was deemed abstract in *Alice* as a long-standing fundamental economic practice. It refers to a third-party that mediates the interests or risks of two parties to a transaction. Here, the “service provider” acts as a limited agent for, and according to the instructions of, the identity owner. It does not mediate the interests of the user.

If a challenger falls back to the position that the “service provider” in the Claims is at least a third party, which is generally a longstanding fundamental practice, then the challenger must face the facts that the “service provider” (i) necessarily includes a computer to perform its function in the Claims to achieve the objectives described in the Patents, *see, e.g.*, ‘456, 5:44-45 and 54-57, (ii) is in a new, specific pathway in a conventional computerized transaction network between the identity owner and the “user”, and (iii) receives and sends specific information in a specific order from/to the “user” and identity owner. As difficult as it may seem initially, the Claims hold up against any comparison to actual or even hypothetical longstanding, fundamental economic practices.

The lower court ignored the tests from *Enfish* and *McRo* under *Alice* Step One and instead asked whether the claims alone improve computer capabilities.

The crucial question is “whether the focus of the claims is on the specific asserted improvement in computer capabilities . . . or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.”...Here, the claims simply recite, in broad, generic fashion, that the methods they describe “be[] executed on electronic computer hardware in combination with software.”

Appx23-23. However, the Claims, in the context of the Patents, the prior art, and the prosecution history, and as confirmed by the unrebutted testimony in two experts’ declarations, are clearly directed to an improvement in existing technology for transaction processing over computerized transaction networks.

The lower court and the appeal panel also unfavorably compared the Claims with those held patent-ineligible in *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089 (Fed. Cir. 2016). However, *FairWarning IP*, underscores why the Claims pass both steps one and two of *Alice*. There, the Court concluded the claims, described as a “method of detecting fraud and/or misuse in a computer environment based on analyzing data such as in log files, or other similar records, including

user identifier data”, were abstract because they described a conventional business practice. *Id.* at 1093-94. That conventional business practice of monitoring for fraud is precisely the prior art method described in the Patents that the Claims distinguish over.

Traditional responses to [fraudulent use of identity] have been inadequate. The most common response involves monitoring the use of identity resources and notifying a consumer after detection of an unusual use of the identity. For example, a credit card company can detect unusual purchase activity and contact the account holder to determine whether the charges were authorized.

‘456, 1:40-46.

At step two, the Court concluded that the claims were simply “implement[ing] an old practice in a new environment.” *Id.* at 1094. Conversely, here the Claims provide a new practice that was in no way conventional, and provide several inventive concepts that were lacking in *FairWarning*.

The Claims here are more analogous to those held patent-eligible in *Ancora* and *McRo*. In *Ancora*, the claims improved the functioning of a generic computer, inhibiting hacking by moving key information into a computer’s BIOS memory, which is harder for a hacker to access. The lower court saw no patent-eligible distinction in having the key

information in the BIOS memory versus any other memory. This Court reversed, finding “[i]mproving security...can be a non-abstract computer-functionality improvement if done by a specific technique that departs from earlier approaches to solve a specific computer problem.” *Ancora*, 908 F.3d at 1348. The claims achieved this by “assigning certain functions to particular computer components and having them interact in specified ways”. *Id.* 1344.

Like *Ancora*, the Claims here are an improvement to computer functioning, albeit in a computer transaction network, to prevent fraudulent use of identity. Key information, i.e., “identification information parameters” from the “user” and “at least one pre-determined condition” from the identity owner, are placed in an additional computer at the “service provider”, which the “user does not have direct access to”. ‘456, claim 11. This improvement prevents a hacker or “disgruntled employee” at the “user” from accessing the key information at the “service provider” and fraudulently using the identity.

In *McRo*, the claims did not recite any computer components but rather a “method for automatically animating lip synchronization”

which this Court described as an “ordered combination of claim steps, using unconventional rules”. *McRo*, 837 F.3d at 1302-1303. The claims improved upon prior animating processes “driven by subjective determinations rather than specific, limited mathematical rules”. *Id.* at 1314.

Similarly, at least the identity-owner-control claims at Blue Br. 5 are an ordered combination of unconventional claim steps that permit an identity owner to automatically control use of her identity over a computerized transaction network. Further, these claims improve upon prior art processes involving subjective determinations of sufficient identification information by merchants and banks.

Alice and its progeny should not become an I-know-abstract-when-I-see-it test for patented software technology.⁴ In determining improvements in existing technology, judges are rarely better than inventors, examiners at the USPTO, and testifying experts with experience in the technology. Yet under *Alice*, judges, with the workload benefits of dismissing patent cases, are incentivized to ignore those

⁴ Indeed, the tests for abstractness under *Alice* and its progeny could apply to all areas of technology. For example, claims to a backhoe could be patent ineligible as the abstract idea or longstanding practice of shoveling implemented with a generic motor.

experts. Further, the courts should be reminded that the clear-and-convincing burden-of-proof for patent-ineligibility of claims substantively reviewed by and negotiated with the USPTO still stands. *See Microsoft v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011). Otherwise, they are just applying the same standard and deference we have in copyright law.

II. Claimed Inventions Cannot Be Proven Patent-Ineligible Under *Alice* Step Two By Clear And Convincing Evidence If the Challenger Has Presented No Accepted Facts for Ineligibility and the Patentee has Presented Accepted Facts for Eligibility From the Patent, the Prosecution History, the Prior Art, Descriptions of “Existing Technology”, Industry Praise, and Admissions of the Challenger.

In analyses under *Alice* Step Two, this Court held “[w]hether claims [] perform well-understood, routine, and conventional activities to a skilled artisan is a genuine issue of material fact making summary judgment inappropriate”, *Berkheimer*, 881 F.3d at 1370, and “whether a claim element or combination of elements would have been well-understood, routine, and conventional to a skilled artisan in the relevant field at a particular point in time is a question of fact”, *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1355 (Fed. Cir. 2018) (“*Aatrix Reh’g*”). This inquiry “may require ‘weigh[ing]

evidence,’ ‘mak[ing] credibility judgments,’ and addressing ‘narrow facts that utterly resist generalization.’” *Id.* (citing *U.S. Bank Nat’l Ass’n v. The Village at Lakeridge, LLC*, 138 S.Ct. 960, 967 (2018)). “Because the patent challenger bears the burden of demonstrating that the claims lack patent eligibility, 35 U.S.C. §282(a), there must be evidence supporting a finding that the additional elements were well-understood, routine, and conventional.” *Aatrix Reh’g* at 1356. “Any fact...that is pertinent to the invalidity conclusion [under 35 U.S.C. §101] must be proven by clear and convincing evidence.” *Berkheimer*, 881 F.3d at 1368.

Here, the Appellee presented no accepted fact that the Patent-Eligibility-Conferring Limitations in Blue Brief 3-7 were well-understood, routine, and conventional under *Alice* Step Two. On the other hand, the Appellant proved by clear and convincing evidence that the Limitations were not well-understood, routine, and conventional. The proof included: (1) citations to the Patents’ specification, the prosecution history, and the prior art; (2) detailed explanation of the claims; (3) descriptions of existing technologies such as LifeLock® and evidence from Equifax that the claimed inventions were not conventional; (4) testimony from two skilled artisans; and (5) praise in

industry publications and admissions from Appellee Ondot that technology corresponding to Patent-Eligibility-Confering Limitations was not a longstanding, fundamental economic practice. *See, e.g.*, Blue Br. 46-63; Gray Br. 16-25. The proof of Appellants against the lack of proof of Appellees compels a ruling of patent-eligibility or at least creates genuine factual disputes making summary judgment improper.

III. A District Court May Not Assert Factual Evidence Outside The Record Without Giving The Patentee Notice Or Opportunity To Rebut The Evidence, And Rely Primarily On This Evidence For Summary Judgment Of Patent Ineligibility Under *Alice*.

The *Alice* analysis today is a judicial construct addressing perceived deficiencies in § 101. As applied to abstract ideas, § 101 is a “coarse eligibility filter” meant to catch only “manifestly abstract” patent claims. *Research Corp. Techs., Inc., v. Microsoft Corp.*, 627 F.3d 859, 869 (Fed. Cir. 2010). Appellees had the burden of demonstrating that the Claims were patent-ineligible as abstract but failed to do so.⁵

Instead, unknown to Appellant until the summary judgment of patent-ineligibility issued, the lower court located four references of allegedly longstanding fundamental practices and read a general

⁵ Appellees’ only evidence of patent-ineligibility was one ABA Article on Trusts that the lower court rejected.

“character” of the claims onto them to find the claims abstract under *Alice* Step One. Appx19-22; *see also* Blue Br. 35-43. It did so while rejecting Appellant’s evidence and without giving Appellant the opportunity to challenge or rebut the references as to their truth, their relevance to the Claims, and whether they are evidence of “longstanding” or “fundamental” economic practices. Even if notice and an opportunity to rebut was afforded, this was a classic exercise for a fact-finder, not the lower court, on summary judgment.

The appeal panel appeared to rely on these same references in its hypotheticals of longstanding, fundamental economic practices alleged to correspond to the Claims. Lower courts should not be fact-finders for patent-ineligibility and certainly not doing so *sua sponte* without any notice prior to the issuance of summary judgment. If they are, the patentee should be given opportunity to challenge or rebut the references by, e.g., presenting competing facts against them.

CONCLUSION

For the foregoing reasons, panel or en banc rehearing should be granted.

Dated: April 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 32(a). This brief contains 3881 words (including diagrams and images), excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type.

Dated: April 2, 2020

/s/ John Demarco
John Demarco

*Counsel for Plaintiff-Appellant
Mantissa Corporation*

ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

MANTISSA CORPORATION,
Plaintiff-Appellant

v.

**ONDOT SYSTEMS, INC., LONE STAR NATIONAL
BANK, LONE STAR NATIONAL BANCSHARES-
TEXAS, INC.,**
Defendants-Appellees

2017-2533

Appeal from the United States District Court for the Southern District of Texas in No. 4:15-cv-01133, Magistrate Judge Dena Hanovice Palermo.

JUDGMENT

ANTHONY JOHN DEMARCO, Young Basile Hanlon & MacFarlane, P.C., Houston, TX, argued for plaintiff-appellant. Also represented by KENNETH GODLEWSKI, Hunter Taubman Fischer LLC, Washington, DC.

RYAN R. SMITH, Wilson, Sonsini, Goodrich & Rosati, PC, Palo Alto, CA, argued for defendants-appellees. Also

represented by ADAM WILLIAM BURROWBRIDGE, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (LOURIE, CLEVINGER, and WALLACH, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

March 3, 2020
Date

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