

No. 2018-1404

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

ANCORA TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

HTC AMERICA, INC., HTC CORPORATION,

Defendants-Appellees.

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Case No. 2:16-cv-01919-RAJ

BRIEF OF APPELLEES
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April 23, 2018

CERTIFICATE OF INTEREST

Counsel for Appellees HTC America, Inc. and HTC Corporation hereby certify the following:

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

HTC America, Inc. and HTC Corporation

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

N/A

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

HTC America, Inc. is a wholly owned, indirect subsidiary of HTC Corp.

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 and who are not already listed on the docket for the current case are:

Colin B. Heideman and Craig S. Summers of Knobbe, Martens, Olson & Bear, LLP

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None

KNOBBE, MARTENS, OLSON & BEAR, LLP

April 23, 2018

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Appellees HTC America, Inc. and HTC Corporation (collectively, “HTC”) represent that there have been no other appeals from the same proceeding in this or any other appellate court. Counsel is not aware of any currently pending case that will directly affect or be directly affected by this Court’s decision in the pending appeal.

Ancora Technologies, Inc. has previously appealed to this Court a judgment that Apple, Inc. did not infringe U.S. Patent No. 6,411,941 (“the ’941 Patent”). *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732 (Fed. Cir. 2014). That litigation has since terminated.

COUNTERSTATEMENT OF THE ISSUE

Whether the district court correctly held that the claims of the '941 Patent are ineligible under 35 U.S.C. § 101 because they recite an abstract idea implemented using the sort of generic computer components that the Supreme Court and this Court have consistently held to be insufficient to transform abstract ideas into patent-eligible inventions.

I. INTRODUCTION

The patent in suit claims software directed to the abstract idea of controlling access to a program. The recited steps include selecting a program, verifying whether the program is licensed, and acting on the program according to the verification. Appx9. The claims recite well-known steps for restricting access to software using generic computer hardware and nothing else. The claims therefore fail to transform the abstract idea into patent-eligible subject matter.

Software verification methods were not new when the '941 Patent was filed in 1998. The patent admits that “[n]umerous methods have been devised for the identifying and restricting of an unauthorized software program’s operation.” Appx23 at 1:11–13. One of the prior art methods discussed in the patent allowed access to a program by checking a license signature stored on the computer’s hard disk. *Id.* at 1:19–21. This “license signature” is the key to unlock the locked software.

Rather than storing that license signature on a hard drive, the claimed invention stores the license signature in a conventional computer’s BIOS (an acronym for “Basic Input/Output System”). BIOS is memory that stores the necessary set of operations for a computer to run when first powered on.

Specifically, the claimed invention stores the license signature in the erasable, non-volatile memory of the BIOS. The specification explains that the claimed invention is performed on “a **conventional** computer having a **conventional** BIOS module.” *Id.* at 1:46–48 (emphasis added).

The specification does not disclose any new BIOS memory, or provide any new or innovative algorithm to interact with the BIOS memory. In fact, the specification merely discloses that “using E²PROM manipulation commands” allows erasing or modifying the BIOS memory. Appx23 at 2:1–5. Therefore, the patent claims steps which use conventional software on conventional computer hardware.

The specification explains one advantage of using the BIOS memory is “that the required level of system programming expertise that is necessary to intercept or modify commands, interacting with the BIOS, is substantially higher than those needed for tampering with data residing in volatile memory such as [a] hard disk.” Appx24 at 3:4–9. But that alleged advantage is a property of the BIOS memory, not based on any software or hardware disclosed in the patent. The invention is performed on “a conventional computer having a conventional BIOS module.” *Id.* at 1:46–48. The patent does not disclose any new or specialized BIOS memory that provides this advantage.

The district court correctly concluded that the claims recite using existing memory for its inherent function of storing data. It also correctly held that the patent discloses using known computer functions. Thus, it concluded that the patent claims are not directed to any improvement in the technology used to implement the abstract idea of restricting access to a program. As a result, it correctly held the patent invalid under *Alice*.

II. COUNTERSTATEMENT OF THE CASE

A. The '941 Patent

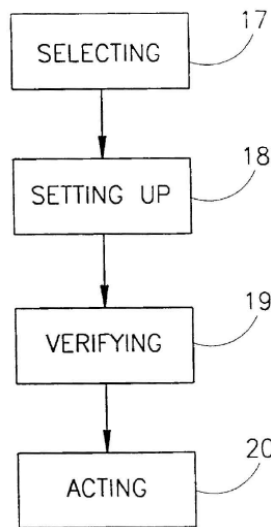
Claim 1 of the '941 Patent is reproduced below:

A method of restricting software operation within a license for use with a computer including an erasable, non-volatile memory area of a BIOS of the computer, and a volatile memory area; the method comprising the steps of:

selecting a program residing in the volatile memory,
using an agent to *set up a verification structure in the erasable, non-volatile memory of the BIOS*, the verification structure accommodating data that includes at least one license record,
verifying the program using at least the verification structure from the erasable non-volatile memory of the BIOS, and
acting on the program according to the verification.

Appx25–26 (emphasis added). The district court correctly observed that Claim 1 is the sole representative claim. Appx3.

Figure 2 shows that the method involves four general steps of selecting, setting up, verifying, and acting.



Appx22.

Those steps are implemented using conventional computer steps with conventional computer hardware components for their intended purposes. For example, the selecting step identifies the program that the user wants to use on the computer. The setting-up step places a license in the BIOS. The verifying step compares license data in the BIOS to data from the program to determine whether they match. Appx25 at 6:29–45. And the acting step restricts use of

the program if there is no match or allows the use if there is a match. *Id.* at 6:40–52.

For the setting-up step, the claims recite “using an agent” to store license information in an erasable, non-volatile memory in the computer’s BIOS. The specification gives no explanation of what the agent is or how to implement it. Indeed, the word agent is not in the specification at all. The specification merely describes that data in the erasable, non-volatile memory of the BIOS may be erased or modified “using E²PROM manipulation commands.” Appx23 at 2:1–5.

B. The District Court Proceedings Below

Ancora sued HTC for infringement “of at least claim 1 of the ‘941 Patent.” Appx31. HTC moved to dismiss the suit under Fed. R. Civ. P. 12(b)(6) because the ‘941 Patent is directed to patent-ineligible subject matter. *See* Appx46–80. HTC argued that Claim 1 was representative. Appx55. Ancora opposed the motion and relied on Claim 1 only. Appx263.

The district court analyzed the motion under *Alice*’s two-step analytical framework to identify whether the patent claims nothing more than an abstract idea. Appx6 (citing, *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347,

2355 (2014)). First, as *Alice* demands, the district court examined whether the claims are directed to an abstract idea. *Id.* (citing *Alice*, 134 S. Ct. at 2355-56).

The district court’s step-one analysis focused on the claims. Appx8 (citing *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1344 (Fed. Cir. 2013)). The district court summarized Claim 1 as “a method of selecting a program, setting a verification structure in the non-volatile memory of the BIOS, verifying the program, and acting on the program according to the verification.” Appx7.

The district court recognized that the patent claims recited computer-related technology. Appx6–7. The district court therefore analyzed “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.” Appx7 (citing *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016)). Specifically, the district court considered Ancora’s argument that installation of a “verification structure” in the BIOS “constitutes a modification to computer hardware” and a novel improvement to computer functionality. Appx7.

The district court understood that it is “relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed

to an abstract idea, even at the first step of the *Alice* analysis.” Appx8 (quoting *Enfish, LLC*, 822 F.3d at 1335). It reserved considering novelty in implementation for the second step of *Alice*. Appx8 (citing *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014)).

The district court determined that the claims of the '941 Patent are not focused on how usage of the BIOS to store the verification structure leads to an improvement in computer security. Appx8 (citing *See Intellectual Ventures I LLC v. Erie Indem. Co.*, 850 F.3d 1315, 1327 (Fed. Cir. 2017)). Instead, the district court concluded that the claims merely call for the setup of the verification structure data in the erasable, non-volatile memory of the BIOS, a memory that is typically used to store data. Appx8. The district court reasoned that “[t]he ease or difficulty of altering this data in the BIOS does not change the function, or represent an improvement in its function.” Appx8.

The district court also examined the “using an agent” step that sets up a verification structure in the BIOS. As the court observed, the claims provide “no other details regarding how the agent sets up the structure, the structure itself (other than it must accommodate data that includes at least one license record), or other details as to how this structure within the BIOS creates an

improvement in computer function.” Appx9. Therefore, the district court concluded that the “using an agent” step was not a focus of the claims. *Id.*

Ancora relied on the patent examiner’s Reasons for Allowance and a Reexamination Certificate to argue that the claims had already been found eligible. Appx9. In response, the district court reasoned that all patents must be approved by an examiner at the USPTO in order to become a patent. *Id.* Therefore, the district court concluded that issuance does not support that the patent is directed to a patent-eligible concept. *Id.*

In concluding step one, the district court held that ’941 Patent claims recite the abstract idea of “selecting a program, verifying whether the program is licensed, and acting on the program according to the verification.” Appx9.

In step two, the district court considered whether the claim limitations furnished an “inventive concept:”

Claims that ‘amount to nothing significantly more than an instruction to apply [an] abstract idea ... using some unspecified, generic computer’ and in which ‘each step does no more than require a generic computer to perform generic computer functions’ do not make an abstract idea patent-eligible.” *Intellectual Ventures I LLC*, 838 F.3d at 1315 (quoting *Alice*, 134 S.Ct. at 2359–60).

Appx9-10. The district court analyzed the “using an agent” and “verifying” limitations that Ancora argued were a non-conventional arrangement of known,

conventional pieces. The district court determined that the claims recite no details regarding how the interaction between these two elements constitutes an inventive concept. Appx10. Specifically, the district court explained:

Nothing in Claim 1 or the other limitations in the '941 Patent sufficiently recite how the use of an agent to place the structure in the BIOS, or placing and using such a structure in the BIOS leads to an improvement in computer functionality. Specifying that the BIOS be used to house the verification structure is not sufficiently transformative so as to make this innovation more than a requirement that a generic computer to perform generic computer functions. Storing data in the memory of a computer component that generally stores data is not transformative.

Appx10-11.

The district court concluded that that these limitations did not transform the abstract idea into something patent-eligible in application. Therefore, the district court granted HTC's motion and held that the '941 Patent claims are directed to a patent-ineligible abstract idea.

III. SUMMARY OF THE ARGUMENT

Alice and subsequent decisions explain that generic computer implementations of abstract ideas are not patent-eligible. Here, as in those cases, the patent claims recite nothing more than an abstract idea implemented on generic computer components performing their inherent functions. The

claims thus lack any inventive concept sufficient to merit exclusive rights against the public.

Ancora shows no error in the district court's decision. Regarding step one, Ancora cannot show that the district court overlooked how the claimed invention changes a computer hardware. The district court correctly determined that the patent does not disclose any change to computer hardware. The district court also correctly explained that merely using existing memory to store an existing license does not change the computer's function, or represent an improvement in its functionality. Indeed, the invention merely tries to control who uses the computer, and nothing more.

The district court also correctly rejected Ancora's argument that the patent examiner's Reasons for Allowance and prior decisions involving the '941 Patent show a technological improvement. The district court explained that the examiner's Reasons for Allowance were relevant to novelty and obviousness, and not whether the claims were directed to eligible subject matter. Further, none of the prior decisions involve subject-matter eligibility.

With respect to step two, the district court correctly rejected Ancora's argument that the "using an agent" and "verifying" steps transformed the abstract idea into something patent eligible. The district court correctly

determined that the claims recite no details regarding how the interaction between these two elements constitutes an inventive concept. Instead, it properly concluded that the claims merely use a generic computer to perform generic computer functions. The district court thus correctly explained that the claims of the '941 Patent do not recite how usage of the BIOS to store a license leads to an improvement in computer functionality or provides an inventive concept, regardless of the statements in the Reasons for Allowance.

Ancora also argues that the district court erred in making factual findings against Ancora at the pleading stage. But the district court did not make factual findings against Ancora; it disagreed with Ancora's arguments. In similar cases, the Supreme Court and this Court have repeatedly authorized dismissals under § 101 at the pleading stage.

Finally, Ancora's preemption argument is without merit. Total preemption is not a stand-alone test for patent-eligibility. Where claims do not add an "inventive concept" to an otherwise abstract idea, they cannot survive regardless of whether they preempt all applications of that idea. Undue preemption is a *consequence* of failing the *Alice* test, not a substitute for it.

IV. ARGUMENT

A. Standard of Review

Patent-eligibility under § 101 may be decided as a matter of law at the Rule 12(b)(6) stage. *See, e.g., Genetic Techs. Ltd. v. Merial L.L.C.*, 818 F.3d 1369, 1373 (Fed. Cir. 2016). This Court, like the Ninth Circuit, reviews the grant of a Rule 12 motion *de novo*. *See, e.g., RecogniCorp, LLC v. Nintendo Co., Ltd.* 855 F.3d 1322, 1325–26 (Fed. Cir. 2017); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

B. Legal Standard

Section 101 “contains an important implicit exception” for abstract ideas, laws of nature, and natural phenomena, which form the “basic tools of scientific and technological work” and may not be patented. *Alice*, 134 S. Ct. at 2354. They belong to the “storehouse of knowledge . . . free to all . . . and reserved exclusively to none.” *Bilski v. Kappos*, 561 U.S. 593, 602 (2010).

While the Supreme Court declined to “delimit the precise contours of the ‘abstract ideas’ category,” it is well-settled that certain types of claims are directed to abstract ideas. *Alice*, 134 S. Ct. at 2357. For example, processing on general purpose computers is abstract. *See, e.g., id.* (claims that recite general-purpose computer components are nevertheless “directed to” an abstract idea);

Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (finding no inventive concept in using a generic computer “to perform well-understood, routine, and conventional activities commonly used in industry”); *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607 (Fed. Cir. 2016) (finding ineligible claims directed to assigning “classification data,” such as a date or timestamp, to digital images and storing the images). Methods of manipulating data are likewise abstract. *Gottschalk v. Benson*, 409 U.S. 63 (1972) (converting binary-coded decimals into pure binary form); *Parker v. Flook*, 437 U.S. 584 (1978) (computing alarm limits in a catalytic conversion process).

When a claim is drawn to an abstract idea, the court must determine whether there is an inventive concept. *Alice*, 134 S. Ct. at 2355; *Mayo Collab. Servs. v. Prometheus Labs*, 566 U.S. 66, 79 (2012) (“What else is there in the claims before us?”). Merely implementing a naked idea using well-known computer components or functions, or limiting the idea to a particular technological environment is insufficient to transform an abstract idea into a patentable invention. *Alice*, 134 S. Ct. at 2357-59; *Ultramercial*, 772 F.3d at 714.

This Court should affirm by applying the *Alice* framework as it has done repeatedly and consistently to similar computer-related inventions. *See, e.g., Ultramercial*, 772 F.3d at 717; *FairWarning IP, LLC v. Iatric Systems, Inc.*, 839 F.3d 1089, 1093 (Fed. Cir. 2016) (holding ineligible “a system and method of detecting fraud and/or misuse in a computer environment based on analyzing data . . . including user identifier data.”); *EasyWeb Innovations, LLC v. Twitter, Inc.*, 689 F. App’x 969 (Fed. Cir. 2017) (holding ineligible claims that recite determining whether a “message was sent by an authorized sender”); *SmartFlash, LLC v. Apple Inc.*, 680 F. App’x 977, 978 (Fed. Cir. 2017) (holding ineligible claims that “determine whether access is permitted” to certain data); *In re Salwan*, 681 F. App’x 938 (Fed. Cir. 2017) (holding ineligible a “device for providing user authorization” to facilitate data transfers “via a network” from “private data storages”); *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1356 (Fed. Cir. 2016) (holding ineligible claims reciting result-focused, functional language); *Accenture Glob. Servs.*, 728 F.3d at 1344-46 (holding ineligible claims reciting only “generalized software components arranged to implement an abstract concept on a computer”); *Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1258–59 (Fed. Cir. 2016) (holding abstract claims directed to “the function of wirelessly communicating regional broadcast

content to an out-of-region recipient, not a particular way of performing that function”).

V. THE DISTRICT COURT CORRECTLY HELD THAT ALL CLAIMS ARE INVALID UNDER SECTION 101.

A. The '941 Patent Claims Are Directed to an Abstract Idea.

The district court correctly concluded that the patent claims were directed to an abstract idea of “selecting a program, verifying whether the program is licensed, and acting on the program according to the verification.” Appx6–9.

The claimed invention is simply using a lock and a key on a computer. Using the BIOS memory for storing the license is similar to using a different hiding place for a key, such as a lockbox or a fake rock. But Ancora’s digital equivalent of the lockbox, the BIOS memory, was not new.

The basic idea of restricting access to something obviously predates computers. Virtually the same method of restricting access is performed by, for example: (1) unlocking a door using a key retrieved from a secure, hidden location, (2) a will-call agent determining whether to release concert tickets to a patron by checking the patron’s identification and verifying that the patron’s name appears on a will-call list, or (3) a security guard determining whether to allow an individual into a secured building by requiring a valid ID confirming

the individual's identity and confirming the person in question has the security clearance to access that particular building. Restricting access to something is a form of organizing human activity that is decidedly ineligible for patenting. Indeed, this Court has held similar software claims restricting access to computers abstract. *See Prism Techs. LLC v. T-Mobile USA, Inc.*, 696 F. App'x 1014, 1017–18 (Fed. Cir. 2017).

The computer operates exactly the same way with or without the alleged invention. There is no change in the computer's capabilities. The only difference is whether a user can access a program on the computer.

Ancora cannot show any error in the district court's step-one analysis.

1. The District Court Did Not Ignore the Text of the Claims.

Ancora argues that the district court “fundamentally disregarded the scope of the claim.” Br. at 28–29. What Ancora really means is that the district court's abstract idea did not include every limitation. But that is not what *Alice* requires. In *Ultramercial*, for example, the patentee claimed a method for displaying an advertisement in exchange for access to copyrighted media. 772 F.3d at 714. Although the claim included eleven steps, and although only six reflected the abstract idea, this Court distilled the basic character of the entire claim into a single phrase: “showing an advertisement before delivering free

content.” *Id.* at 714–16. Ancora can hardly complain that the district court performed a similar analysis here.

The district court appropriately focused on Claim 1’s character as a whole to determine the abstract idea. Appx9. The district court correctly applied *Alice*’s first step to evaluate whether the “basic character of the subject matter” of the asserted claims is drawn to an abstract idea. *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1348–49 (Fed. Cir. 2015). That analysis is driven by the claim language, as courts must ask whether there is an abstract idea “at the heart” of the claims. *Ultramercial*, 772 F.3d at 714; *see also Erie Indem. Co.*, 850 F.3d at 1327; *Elec. Power Grp.*, 830 F.3d at 1351, 1353.

The district court properly recognized that the “using an agent” limitation was not at the heart of the claims. The claims provide “no other details regarding how the agent sets up the structure, the structure itself (other than it must accommodate data that includes at least one license record), or other details as to how this structure within the BIOS creates an improvement in computer function.” Appx9.

Nor does the specification. The specification gives no explanation of what the agent is or how to implement it. “Agent” is not in the specification at

all. The specification merely discloses “using E²PROM manipulation commands” to interact with the BIOS. Appx23 at 2:1–5.

The district court explained, “Reading the claims as a whole it is apparent that their focus is on the abstract concept of selecting a program, verifying whether the program is licensed, and acting on the program according to the verification.” Appx9. Based on that analysis of the claim as a whole, the district court correctly held the method of controlling access to a program is abstract.

2. The District Court Did Not Ignore the Specification.

Nothing in the district court’s decision suggests that it failed to appreciate, much less consider, the specification, and Ancora provides no reason to conclude otherwise. Ancora’s real complaint appears to be that the district court’s analysis focused principally on the claims, which is entirely proper. See *Accenture*, 728 F.3d at 1345; see also *Content Extraction*, 776 F.3d at 1346; *Bancorp Servs., LLC v. Sun Life Assurance Co. of Canada*, 687 F.3d 1266, 1273-74 (Fed. Cir. 2012) (requiring “a full understanding of the basic character of the *claimed* subject matter” (emphasis added)). In any event, Ancora’s concern is a nonissue. “[T]he level of detail in the specification does not

transform a claim reciting only an abstract concept into a patent-eligible system or method.” *Accenture*, 728 F.3d at 1345.

3. **DDR Holdings, Enfish, McRo, and Trading Techs Are Inapposite.**

Ancora’s invocation of this Court’s decisions finding claims not directed to an abstract concept is unavailing.

The *DDR Holdings* patent addressed a problem unique to the Internet: conventional Internet hyperlinks would cause users to be “instantly transported away from a host’s website after ‘clicking’ on an advertisement.” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). The patent claimed “how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink.” *Id.* at 1258. Most importantly, the problem had no analog outside of cyberspace and the claims did not “merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet.” *Id.* at 1257.

The ’941 Patent claims are different from the *DDR Holdings* patent in several important respects. First, the claims are directed to longstanding and fundamental pre-computer or pre-Internet practices—*e.g.*, controlling access to

something. Second, the claims do not override the conventional functioning of any computer component; they merely implement these practices using generic components operating in conventional ways. Third, the claims do not recite any particular way of performing the claims. See *Internet Patents Corp.*, 790 F.3d at 1348 (finding claims abstract where innovation contains “no restriction on how the result is accomplished”). Unlike the unique solutions and improvements to technology claimed in *DDR Holdings*, Claim 1 of the ’941 Patent does not describe altering the function of BIOS memory.

In *Enfish*, this Court held that claims reciting a “specific type of data structure designed to improve the way a computer stores and retrieves data in memory” were not directed to an abstract idea. *Enfish*, 822 F.3d at 1339. The claims focused on the specific improvement and contained limitations on how the rows and columns of the self-referential table were created. See *id.* at 1336. To reach this conclusion, this Court focused on whether the claims described how to accomplish the improvement. In contrast, the ’941 Patent claims are not directed to how to accomplish setting up a verification structure in BIOS. The claims simply direct an agent (*e.g.*, a software routine) to do it without further explanation.

In *McRO*, this Court upheld the eligibility of claims directed to automating lip-syncing in three-dimensional animation because they were “limited to rules with specific characteristics.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016). Those specific, claimed rules allowed computers “to produce ‘accurate and realistic lip synchronization and facial expressions in animated characters’ that previously could only be produced by human animators.” *Id.* Unlike the claims in *McRO*, the ’941 Patent claims do not contain specific rules or techniques that allow for something that previously could not have been accomplished. There are no specific rules claimed here and the prior art accomplished the same tasks. See Appx23 at 1:12–32 (describing prior art methods to validate authorized software usage).

Finally, in *Trading Techs.*, this Court explained that the claims “require a specific, structured graphical user interface paired with a prescribed functionality directly related to the graphical user interface’s structure” *Trading Techs. Int’l, Inc. v. CQG, Inc.*, 675 F. App’x 1001, 1004 (Fed. Cir. 2017). The claim language recited how to accomplish the prescribed functionality in detail. In contrast, the ’941 Patent claims do not contain limitations reciting how to accomplish the claimed functionality.

4. **The '941 Patent Claims Are Not Directed to a Change to Computer Hardware.**

The district court correctly rejected Ancora's argument that the alleged invention is a change in computer hardware: (1) "the verification is constructed"; (2) the "physical installation" of data in BIOS; (3) "a unique *change* to computer hardware ('BIOS')"; (4) "computer hardware constructed ... in a unique manner"; (5) "creating a new and more secure location"; and (6) "BIOS had never previously stored a verification structure . . . let alone the specific type of BIOS claimed." Br. at 14, 21–24, 37. These allegations are absurd in light of the claims, specification, file history, Ancora's admissions in previous litigation, and case law.

The claims recite software acts only. Those acts store and retrieve data on a conventional computer without any change to hardware. None of those steps could be reasonably characterized as physically installing, constructing, or creating new hardware.

The specification explains that BIOS already had a non-volatile memory section. Appx25 at 5:12–16 ("This computer (processor) internally contains a first non-volatile memory area (4) (e.g. the ROM section of the BIOS), a second non-volatile memory area (5) (e.g. the E²PROM section of the BIOS), and a volatile memory area (6) (e.g. the internal RAM memory of the computer).");

see also Appx24 at 3:21–24 (“Today, a processor normally includes a first non-volatile memory, a second non-volatile memory, and data linkage access to a volatile memory.”). Ancora cannot reasonably contend that the specification discloses new hardware.

The Notice of Allowability confirms this. It explains that BIOS memory of existing computers already stored licenses. Appx283.

Furthermore, Ancora did not invent BIOS or its advantage. In a prior litigation with Apple, Ancora explained, “our invention operates on pre-existing computer hardware . . . [the inventor] didn’t invent the computer. He didn’t invent BIOS.” Appx179; *contra* Br. at 5 (“claims do not merely employ conventional BIOS.”). This Court also previously explained, “Thus, the inventors stated that their method ***makes use of the existing computer hardware.***” *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732, 733–34 (Fed. Cir. 2014) (emphasis added).

Finally, this Court recognizes that storing data is not a hardware change. *See, e.g., Ultramercial*, 772 F.3d at 717 (explaining that data manipulation or altering stored data is a result of using computers); *see also CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (“The mere manipulation or reorganization of data, however, does not satisfy the

transformation prong.”). Storing and retrieving data in a conventional computer component is not a physical improvement that satisfies step one. If it were, all software claims would satisfy step one merely by storing data. Such a result would eviscerate *Alice* and its progeny.

5. **The '941 Patent Uses a Conventional Computer Merely as a Tool.**

Ancora argues that Claim 1 does not “invoke a conventional computer ‘merely as a tool.’” Br. at 23–24 (citing *Enfish*, 822 F.3d at 1334–36). Specifically, Ancora argues that the claimed invention uses a specific type of BIOS memory. Br. at 24. As explained above, Ancora cannot reasonably dispute that Claim 1 invokes a conventional computer with conventional BIOS. Indeed, the Summary of the Invention states that the invention is performed on “a conventional computer having a conventional BIOS module.” Appx23 at 1:46–48. Furthermore, the Supreme Court and this Court have repeatedly made clear that merely limiting the field of use of the abstract idea to a particular existing technological environment does not render the claims any less abstract. *Bilski*, 561 U.S. at 610–611 (citing *Diamond v. Diehr*, 450 U.S. 175, 191–92 (1981)); *Affinity Labs*, 838 F.3d at 1258–59.

6. **The '941 Patent is Not Directed Toward a Technological Improvement.**

The district court properly considered computer functionality in step one. Appx8. It recognized, “[i]t is relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed to an abstract idea, ***even at the first step*** of the *Alice* analysis.” Appx8 (quoting *Enfish, LLC*, 822 F.3d at 1335) (emphasis added).

Ancora’s sole basis for arguing that the district court considered computer functionality in step two only is the quote below from the district court’s order, but with the bolded portion removed:

Ancora’s argument that the claims at issue are directed toward an improvement in computer functionality **because the interaction between a verification structure within the BIOS and the program is a novel method to check licensing** is better considered in step two of the *Alice* analysis.

Appx8. The full quote clearly demonstrates that the district correctly followed this Court’s precedent that novelty is considered in step two, not step one. Appx8 (quoting *Ultramercial*, 772 F.3d at 715).

Regarding the step-one analysis of an alleged computer improvement, the district court correctly concluded that the “using an agent” limitation merely recites using software to achieve a result, as explained above. It contains “no

restriction on how the result is accomplished.” *Internet Patents Corp.*, 790 F.3d at 1348. The “essentially result-focused, functional character of claim language has been a frequent feature of claims held ineligible under § 101.” *Elec. Power Grp.*, 830 F.3d at 1356.

Ancora incorrectly argues that “[w]hether the precise details of the preferred embodiment are set forth expressly in the claim is not relevant.” Br. at 27. But, as explained above, the claims lack not only the “precise details of the preferred embodiment,” it contains **no** details whatsoever.

In addition, the district court correctly determined that the claims of the ’941 Patent are not focused on how usage of the BIOS to store the verification structure leads to an improvement in computer security. Appx8 (citing *Erie Indem. Co.*, 850 F.3d at 1327). Instead, the district court concluded that the claims merely call for the setup of the verification structure data in the erasable, non-volatile memory of the BIOS, a memory that is typically used to store data. Appx8. The district court reasoned that the ease or difficulty of altering this data in the BIOS does not change the function, or represent an improvement in the function of the BIOS. Appx8. The ease or difficulty of altering data applies to any data stored in that BIOS memory.

Ancora's reliance on *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1257 (Fed. Cir. 2017) is misplaced. Br. at 25. The *Visual Memory* claims recited a new hardware system and contained limitations related to the advantages of that new memory hardware. *Id.* That new, improved, and more efficient memory system therefore was a technological improvement in computer-related technology such that the claims were not directed to an abstract idea under *Alice* step one.

Furthermore, in *Visual Memory*, this Court distinguished claims reciting elements with new hardware from patent-ineligible claims directed to methods for interacting with existing hardware. *Visual Memory*, 867 F.3d at 1260. For example, this Court explained in *Content Extraction & Transmission LLC v. Wells Fargo Bank*, 776 F.3d 1343 (Fed. Cir. 2014), that claims directed to a method for extracting data from hard copy data, recognizing specific information from the extracted data, and storing that information in memory were ineligible. *Visual Memory*, 867 F.3d at 1260. Similarly, Ancora's claimed methods merely interact with existing hardware and provide no improvement in that existing hardware's functionality.

Ancora's claims are much closer to the "method for controlling access" that this Court held ineligible in *Prism Techs. LLC v. T-Mobile USA, Inc.*, 696 F.

App’x 1014, 1017–18 (Fed. Cir. 2017). Prism’s claims also involved an abstract four step process for software verification, with the verification data stored on an authentication server. *Id.* at 1016. Similar to Ancora’s BIOS memory location arguments, Prism argued that “by combining these components with hardware identity data, the asserted claims ‘yield[] a novel, effective solution to real-world problems, which industry came to adopt several years after Prism’s inventions.’” *Id.* at 1018. Like Ancora, Prism argued that its method enhanced security, making it harder for the verification data to be misappropriated. Also like Ancora, Prism argued that the problem its claims purported to solve was a specific improvement in computer security, and therefore recited a specific improvement to the way computers operate.

This Court disagreed, explaining, “[a]lthough Prism contends that these claims cover a concrete, specific solution to a real-world problem, it does not offer a persuasive argument in support of this conclusion.” *Id.* at 1017. “The patents-in-suit thus are directed to the abstract idea of ‘providing restricted access to resources.” *Id.* The Court also considered Prism’s alleged specific improvement in its step two analysis. *Id.* at 1018. The district court followed a similar analysis in correctly finding Ancora’s claims directed to the abstract idea of providing access to resources in step one.

Ancora also argues that the “using an agent” element is a novel feature that avoids abstractness. Br. at 26–27. The novelty of a claimed feature does not avoid abstractness. *Affinity Labs*, 838 F.3d at 1263. Any issued patent has presumably been allowed over prior art that a patent examiner considered. Following Ancora’s reasoning would eliminate *Alice* step one entirely in favor of the patent examiner’s determination that the claims were not anticipated or obvious in view of the prior art of record.

Finally, Ancora argues that the “PTAB [] found the ’941 Patent to solve a technical problem by use of a technical solution.” Br. at 27. HTC petitioned the PTAB for CBM review of the ’941 Patent. The PTAB issued its decision not to institute, but did not reach the merits of the § 101 ground or other petitioned grounds. Instead, the PTAB based its decision on its view that the invention did not address a business problem, but a technical one. Appx319.

7. The District Court Properly Analyzed the Representative Claim.

From the outset, both parties recognized that the § 101 analysis would be based on a representative claim. HTC’s motion was focused on representative Claim 1 but also explained why the other independent claim, Claim 18, was likewise invalid. Appx55–57. In its opposition, Ancora focused on Claim 1 alone. Appx263. Ancora never explained why Claim 1 was not representative,

never responded to HTC's analysis of Claim 18, and never identified any differences between the representative Claim 1 and the other claims. Appx263–270. Thus, Ancora waived this argument by failing to raise it below.

In any event, Ancora's new dependent claim argument is futile because Ancora never explains how any of the alleged differences affects the § 101 analysis. Under the circumstances, the district court did not err in relying on a representative claim. *See Elec. Power Grp.*, 830 F.3d at 1352; *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1316 n.9 (Fed. Cir. 2016). Finally, Ancora previously conceded that Claim 1 is representative for purposes of the § 101 analysis in its litigation with Apple. *See* Appx140.

B. The '941 Patent Claims Do Not Recite an Inventive Concept.

Merely implementing an idea using well-known computer components or functions or limiting the idea to a particular technological environment is insufficient to transform an abstract idea into a patentable invention. *Alice*, 134 S. Ct. at 2357-59; *Ultramercial*, 772 F.3d at 714. *Elec. Power Grp.*, 830 F.3d at 1356; *see also Accenture*, 728 F.3d at 1344-46 (holding ineligible claims reciting only “generalized software components arranged to implement the abstract concept on a computer.”). Thus, the district court correctly explained, “[s]toring data in the memory of a computer component that generally stores

data is not transformative” and “[p]lacing a verification structure within the BIOS does not transform it into a ‘different state or thing.’” Appx11.

None of Ancora’s objections to the district court’s well-reasoned analysis have merit.

1. **Claim 1 Fails to Recite Significantly More than the Abstract Idea**

Ancora’s attempt to analogize its claims to those in *Bascom* is flawed. Br. at 31–32 (citing *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349 (Fed. Cir. 2016)). The inventive concept in *Bascom* was “the installation of a filtering tool at a specific location, remote from the end users” Br. at 32. The claim in *Bascom* recited details regarding ***both moving*** internet content filtering to a remote server and ***how to implement*** the filtering to maintain the benefits of a localized content filtering system. *See Bascom*, 827 F.3d at 1350. For example, the claim specifically recited, “a remote ISP server coupled to said client computer and said Internet computer network, said ISP server associating each said network account to at least one filtering scheme and at least one set of filtering elements, said ISP server further receiving said network access requests from said client computer and executing said associated filtering scheme utilizing said associated set of logical filtering elements.” *Id.* at 1345.

Ancora's Claim 1 does not measure up. Appx10–11. Ancora analogizes its use of BIOS memory to *Bascom*'s installation of a filtering tool at a specific location. The inventive concept in *Bascom*, however, included not only the tool installation, but also customizable filtering details specific to each end user providing the benefits of a filter on a local computer and the benefits of a filter on an ISP server. In contrast, Claim 1 merely moves the storage location for the license and relies on the known storage properties of BIOS memory.

Bascom explained that claims must provide a “technology-based solution (not an abstract-idea-based solution implemented with generic technical components in a conventional way).” *Id.* at 1351. Merely using BIOS memory in a conventional way, is not enough to make Claim 1 of the '941 Patent transformative. Appx10–11. The claim itself must recite how the use of BIOS “leads to an improvement” through some “non-conventional and non-generic arrangement.” *See Erie Indem. Co.*, 850 F.3d at 1329 (distinguishing *Bascom*, 827 F.3d at 1349-52). Claim 1 does not. It requires that an agent set up the verification structure in BIOS. Such “claim language provides only a result-oriented solution, with insufficient detail for how a computer accomplishes it. Our law demands more.” *See Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332, 1342 (Fed. Cir. 2017).

The district court thus correctly explained, “[s]pecifying that the BIOS be used to house the verification structure is not sufficiently transformative so as to make this innovation more than a requirement that a generic computer to perform generic computer functions.” Appx10–11; *see Content Extraction*, 776 F.3d at 1348 (finding no inventive concept in using a generic computer “to perform well-understood, routine, and conventional activities commonly used in industry”).

Moreover, Ancora argues that “one skilled in the art would not consider storing licensing information for programs in the computer’s BIOS.” Br. at 36. This is demonstrably false. The examiner’s Reasons for Allowance explain that the prior art taught the use of BIOS memory for storing licenses. Appx283; *see also* Appx170:5-7 (“We acknowledge that there was what we call prior art in which the BIOS had information in it. License information.”). Ancora’s characterization of the specification and file history is flawed.

2. **The Patent Office Record Does Not Provide an Inventive Concept.**

Ancora reliance on the examiner’s comments in the Reasons for Allowance for an inventive concept is unavailing. Br. at 34. Specifically, Ancora argues that the examiner recognized an inventive concept in the interaction between the verifying step running at an “OS-level” and the

verification structure in BIOS. Br. at 35–37. But there is no “OS-level” claim language in the verifying step. Claim 1 does not include any “OS-level” limitation at all. The specification also does not include any “OS-level” description either. Neither “OS” nor “operating system” appear anywhere in it. Ancora does not refer to anything in either the claims or specification that supports its “OS-level” interaction argument.

The district court concluded that the Patent Office proceedings were “unpersuasive,” though the district court discussed it in the step-one analysis. Appx9. Those proceedings are also unpersuasive in step two where, as here, the purported inventive concept is not found in the claims. *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1338-39 (Fed. Cir. 2017); *Internet Patents Corp.*, 790 F.3d at 1348.

3. Novelty Alone Does Not Make a Claim Patent-Eligible.

The district court did not ignore the Patent Office’s analysis of novelty, as Ancora argues. Br. at 34. The Patent Office’s initial issuance and confirmation of patentability in a reexamination, standing alone, cannot establish an inventive concept.

Regardless, the Supreme Court and this Court have repeatedly stated that a claim’s novelty is insufficient to establish patent-eligibility; to the contrary,

novelty is assumed. *Flook*, 437 U.S. at 587, 592–95 (a claim to an abstract idea is invalid even though “we assume that respondent’s formula is novel and useful”); *Diehr*, 450 U.S. at 188-89; *see also Symantec*, 838 F.3d at 1315; *Mayo*, 566 U.S. at 88 (even a truly groundbreaking abstract idea, like Einstein’s theory of relativity, cannot make a claim patent-eligible); *Genetic Techs.*, 818 F.3d at 1376; *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1352 (Fed. Cir. 2014).

4. The District Court Properly Understood the Scope of Claim 1.

Ancora identifies no error in the district court’s understanding of the step-two analysis. Ancora quotes the district court out of context. Br. at 35 (quoting Appx10). Read in context, the district court determined that storing a license in BIOS and verifying a program using that license is not transformative because there is no disclosure of how that interaction constitutes an inventive concept. Appx10. Claim 1 merely recites using “a generic computer to perform generic computer functions.” Appx11.

Ancora also complains that the district court’s step-two analysis did not involve the alleged abstract idea it determined in *Alice* step one. Br. at 36. But the district court explained, “[t]he Court disagreed that these limitations transform ***the abstract idea*** into something patent-eligible in application.” Appx11 (emphasis added). Ancora’s argument is unsupportable.

Ancora also contends the district court “viewed the claim scope as just storing data in memory.” Br. at 36. Ancora relied on the using-an-agent and verifying claim limitations as the inventive concept. But the court correctly evaluated those limitations both individually and as an ordered combination. Appx10–11. Ancora’s real complaint is the conclusion that the claims lacked any inventive concept. That was not error—it was a sound rejection of Ancora’s position.

**VI. THE DISTRICT COURT DID NOT ERR BY DECIDING
PATENT ELIGIBILITY ON THE PLEADINGS.**

Ancora accuses the district court of deciding patent eligibility on the pleadings while making factual findings against it. Br. at 37–38. Particularly, Ancora alleges that the court’s determination that the claimed steps were “conventional” is a factual dispute precluding dismissal. This allegation mischaracterizes the district court’s order. There are no genuine factual issues precluding dismissal under § 101.

Ancora contends that “[t]he District Court held as a matter of law that (1) a ‘verification structure in the erasable, non-volatile memory of the BIOS,’ and (2) the interaction between this verification structure and a software program operating in other memory was conventional.” Br. at 37. But the district court did not hold either (1) or (2). Appx10–11.

Regarding (1), the district court explained, “[s]pecifying that the BIOS be used to house the verification structure is not sufficiently transformative so as to make the innovation more than a requirement that a generic computer [] perform generic computer functions.” *Id.* That is a conclusion of law based on the undisputed fact that a computer can store data in BIOS.

Regarding (2), the district court never discussed an interaction between the verification structure and a software program. *Id.* Instead, the district court discussed the interaction between the “using an agent” and the “verifying” limitations. The district court explained that “it is unclear how the interaction between these two elements constitutes an inventive concept.” *Id.* at 10. The court explained that Claim 1 did not sufficiently recite **how** the interaction leads to an inventive concept. *Id.* That is a conclusion of law.

This Court has repeatedly held that eligibility under § 101 is a question of law that courts may resolve on the pleadings. *buySAFE*, 765 F.3d at 1352 (affirming pleading stage judgment of ineligibility under § 101); *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015) (same); *Content Extraction*, 776 F.3d at 1349 (same); *Ultramercial*, 772 F.3d at 717 (same). In its opposition, Ancora did not argue that patent-eligibility turned on factual

determinations or that the district court could not decide the motion on the pleadings.

After the district court's decision, this Court decided *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1370 (Fed. Cir. 2018). But Ancora's reliance on *Berkheimer* is misplaced. Br. at 37-38. In *Berkheimer*, this Court held that whether the claims perform well-understood, routine, or conventional activities may raise a factual dispute. *Berkheimer*, 881 F.3d at 1369. But *Berkheimer* does not upset the district court's analysis because it did not turn on a factual determination.

Here, there is no dispute that storing and retrieving data in the BIOS memory was well-understood and conventional. The specification presumes a skilled artisan could erase or modify data "using E²PROM manipulation commands." Appx23 at 2:1-5. Ancora concedes that "how to configure a programmable operational characteristic of a memory system may well fall within the routine knowledge of one of ordinary skill in the art." Br. at 27 n.4. Therefore, the claims use known software steps on existing computer hardware.

Berkheimer also does not apply to the alleged "interaction" of the limitations. *Berkheimer* cautions that the improvements in the specification only create a factual dispute when those improvements are captured in the claims.

881 F.3d at 1369. This Court held claims 1-3 and 9 in *Berkheimer* ineligible because they did not “recite any of the purportedly unconventional activities disclosed in the specification.” *Id.* Here, the interaction is not captured in the claims and therefore cannot create a factual dispute.

The district court’s ruling does not rest on a genuine dispute over the underlying facts.

VII. CLAIMS ARE NOT PATENT-ELIGIBLE SIMPLY BECAUSE THEY PREEMPT FEWER THAN ALL APPLICATIONS OF AN IDEA.

Ancora argues that the district court erred by ignoring that “the ’941 Patent does not preempt *all* methods to verify software.” Br. at 38–39 (emphasis in original). But the lack of *complete* preemption is not the test for patent eligibility. See *Flook*, 437 U.S. at 589-90; *OIP Techs.*, 788 F.3d at 1362–63 (“that the claims do not preempt all price optimization . . . do[es] not make them any less abstract”); *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (“the absence of complete preemption does not demonstrate patent eligibility”). The preemption concern underlying § 101 is a relative one—namely, whether a claim would tend to impede more innovation than it would promote. *Mayo*, 566 U.S. at 71. Claims like Ancora’s, based on the miniscule contribution to the public store of knowledge in a two-column specification, certainly raise such concerns.

While preemption is the concern underlying the § 101 inquiry, preemption at any level is not a stand-alone test for patent-eligibility. As this Court has observed, “questions on preemption are inherent in and resolved by the § 101 analysis.” *Ariosa*, 788 F.3d at 1379. As HTC explained below, where a court applies the *Alice* framework, “preemption concerns are fully addressed and made moot.” *Id.*; Appx303. Stated differently, preemption is a *consequence* of failing the *Alice* test, not a *substitute* for it. Not surprisingly, this Court has affirmed numerous § 101 invalidity decisions with no preemption analysis. *See, e.g., Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314 (Fed. Cir. 2016); *Content Extraction*, 776 F.3d 1343; *Ultramercial*, 772 F.3d at 713-17; *Intellectual Ventures I v. Capital One Bank (USA)*, 792 F.3d 1363, 1366-71 (Fed. Cir. 2015). The lack of complete preemption cannot save claims that are otherwise directed to patent-ineligible subject matter. *See, e.g., Return Mail Inc. v. U. S. Postal Serv.*, 868 F.3d 1350, 1369-70 (Fed. Cir. 2017); *FairWarning IP*, 839 F.3d at 1098.

VIII. CONCLUSION

The district court correctly held that the ’941 Patent claims the abstract idea of selecting a program, verifying whether the program is licensed, and acting on the program according to the verification, and does not add

significantly more to transform the abstract idea into patent eligible subject matter. Accordingly, this Court should affirm.

Respectfully submitted,

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November 7, 2017

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e). This brief contains 8,356 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font New Times Roman.

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April 23, 2018

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