

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

DESKTOP ALERT INC.,

Plaintiff,

v.

ALERTUS TECHNOLOGIES, LLC,

Defendants.

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) **C.A. NO. 8:22-CV-03337-DLB**
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**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS AND, IN THE
ALTERNATIVE, MOTION FOR SUMMARY JUDGEMENT OF NO PATENT
INVALIDITY UNDER 35 U.S.C. § 101**

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Plaintiff, Desktop Alert, Inc. (“Plaintiff”) submits this opposition to the Motion to Dismiss (ECF Dkt. No. 27) (the “Motion”) filed by Defendant Alertus Technologies, LLC (“ATL”) alleging that the asserted claims of U.S. Patent No. 9,172,765 (*see* Dkt. No. 1-1, the “’765 Patent”) are invalid under Section 101 of the Patent Statute for being directed to an ineligible abstract idea and moves for Partial Summary Judgment that that 75 is not invalid under Section 101.

I. INTRODUCTION

ATL’s Motion should be denied because ATL has not and cannot prove by **clear and convincing evidence** that the claims of the ‘765 Patent are directed to an abstract idea. *See Microsoft Corp. v. I4I Ltd. P’ship*, 564 U.S. 91, 102-03 (2011). Rather, ATL studiously avoids showing the Court that the ‘765 Patent itself clearly and definitively shows that its infringed claims are directed to a technical solution to a technical problem arising in the computer arts, cannot be performed without a computer, and provide an improvement over prior art computerized alert messaging systems and methods.

Patent ineligibility is an issue of law and because ATL’s Motion presents matters outside of the pleadings in requesting dismissal under Rule 12(b)(6), Exhibit B the Court should exercise its discretion to convert ATL’s Motion into a motion for Summary Judgment under Fed. R. Civ. P. 56. Further, as undisputed facts demonstrate that the ‘765 Patent claims are not invalid under 35 U.S.C. § 101 and Plaintiff is entitled to Partial Summary Judgment with respect to the invalidity defense under Section 101 as a matter of law. *See Brother Convenience Store, Inc. v. U.S. Dep’t of Agric.*, Civ. No. GLR-20-1346, 2021 WL 3911594, at *8 (D. Md. Sep. 1, 2021) (“when ‘matters outside the pleadings are presented to and not excluded by the court, the [Rule

12(b)(6)] motion must be treated as one for summary judgment under Rule 56.’”) (citing Fed. R. Civ. P. 12(d)).

II. PLAINTIFF’S STATEMENT OF RELEVANT FACTS

A. The ‘765 Patent Claimed Technology

The ‘765 Patent discloses an improvement to the polling protocols utilized by computers in a network that sends and receives emergency alerts from an alert message cache to end user computers (referred to as “client” computers). Polling is a computer-specific activity in which one machine will check on the status of another before taking a next action. *See* ‘765 Patent, 1:11-16¹ (“The basic concept behind polling models is that the client periodically provides queries to the host or server requesting updated messaging information. Polling models are commonly used for checking email and for other applications that require the timely updating of information such as stock prices and weather.”) In the context of the ‘765 Patent, a client will poll the central server over the network to determine whether there are alert messages for that particular client on the server that need to be retrieved. In response, the central server will either send an alert message destined for the client or will send back a responsive “empty” polling message.

Every polling message to and from the server takes up a certain amount of digital data space on the internet connection that binds the network, which is referred to as a payload. As the number of clients on the network increases, every instance of polling (either from the client to the server or from the server to the client) rapidly reduces the available bandwidth available over the internet network connection to send future polling requests and, more importantly, reduces the bandwidth available to send emergency alert messages to those clients that need them. *See*

¹ Citations to the ‘765 Patent will follow the convention “column”: “line(s)” as was done in the Motion papers.

‘765 Patent, 4:6-19 (“While polling architectures have been widely adopted, as the scaling increases, the performance of the system may be adversely affected.”) In other words, the basic act of polling by either the client or the server involved in an emergency alert messaging network can ultimately defeat the intended purpose of the network to expediently communicate emergency alerts to the end users, especially when the return message is empty. *See* ‘765 Patent, 8:20-24 (“The overhead associated with an “empty” call (no returned new alerts for GetUnreadAlerts) is larger than the payload by far (and this is the most frequent call). Increasing the polling interval only increases the number of these calls, thereby flooding the network.”)

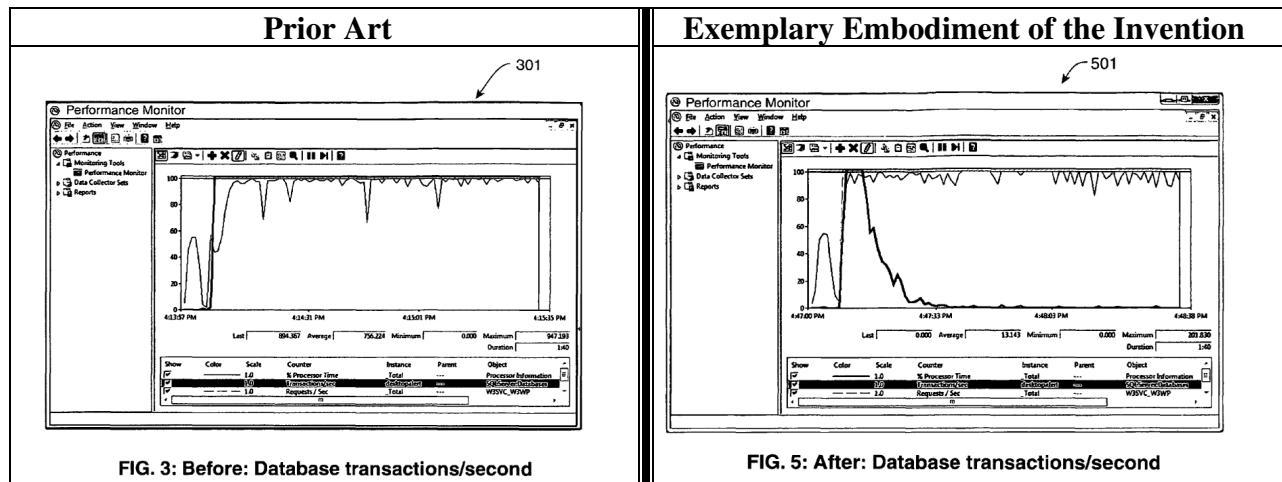
The ‘765 Patent solved this problem by creating a new polling call to be sent before the conventional polling communications take place. This new polling call asks the server whether there are any new alerts to be sent at all, and if none, then the normal polling communication does not transmit, which saves bandwidth and allows more frequent new polling calls to be made. The new polling call is comprised of a uniquely small payload so that it can be transmitted over the network at a higher frequency than was achievable using the normal polling communications but not overcrowd the network connection if and when an alert message is requested in response to one or more of the conventional polling calls:

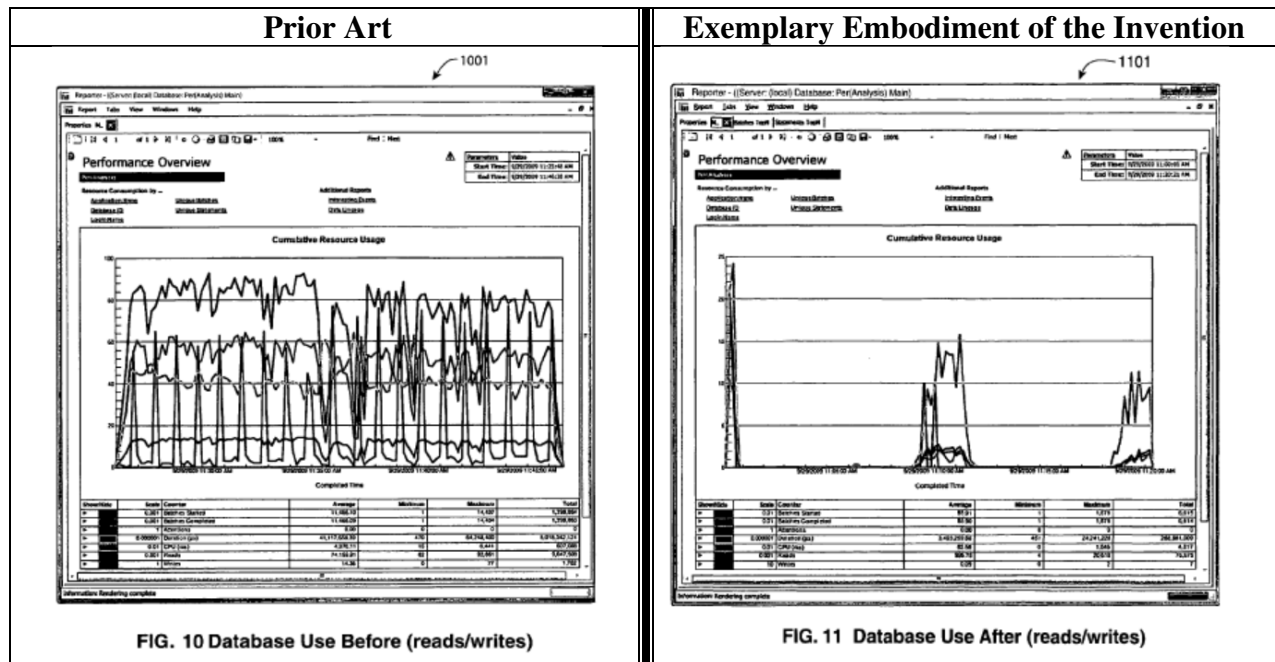
An additional manner in which to improve performance to a polling based system such as the Desktop Alert system is to change the client-server protocol to use a format other than SOAP for the “triggering” GetUnreadAlerts call. In this alternative model, GetUnreadAlerts call remains intact but is not used for polling, rather a new polling call IsNewAlerts is added. This call passes the userId in a tight HTTP packet (not SOAP) to the webserver, approximately 20 bytes of payload. The result of this call is simply a Boolean value: true or false. If true is returned the client makes the formal (and existing) GetUnreadAlerts calls. IsNewAlerts does not require authentication and therefore can bypass the SOAP security layer. FIG. 7 depicts the client request data for GetUnreadAlerts from the server using the SOAP protocol. In contrast referring now to FIG. 8 is a screen shot 801 of a display depicting the improved Req.aspx call using the HTTP GET protocol and response messages is depicted which has a smaller communications and data pay-load.

See '765 Patent, 8:35-61; Figs. 7-8.

Therefore, the '765 Patent claimed technology transformed the computers in the alert network into more lean polling machines by **increasing** the number of polling actions but **reducing** the sequence and payload of these increased number of polling actions. In the case of emergency alerting, the '765 Patented improvement is critical for networks tasked with sending instant message emergency alerts to its end user client computers efficiently and effectively over the computer network. See '765 Patent, 2:11-18. Additionally, the alerts are sent in instant message format to display the alert to the end user's computer graphical interface. See *id.* at 4:3-6.

Using Figures 3, 4, 5, 10, 11, and their related disclosures, the '765 Patent demonstrates how the claimed technology increases the computer performance on which it is implemented:





‘665 Patent, 2:45 – 3:4; 6:11-59. The ‘665 Patent also discloses how an embodiment of the patented improvement “greatly improve[s] the polling performance of the previously available Desktop Alert notification system. It is estimated that the present system results in 300% improvement in comparison with the prior art system while at the same time vastly reducing the database use.”

TABLE 2

Process	Requests/ Second	Database Transactions/Second Required
Existing GetUnreadAlerts	215	756
Improved GetUnreadAlerts	709	3
Limit	1260	n/a

Id. at 6:62 – 7:8 (Table 2). The ‘665 Patent further discloses:

The improvements disclosed above result in significant improvements to the performance of the system. As the example demonstrates, by altering the logic so that the system will seek to obtain new alerts only when the system has created new alerts, the polling frequency may be increased from 215 requests/second to 709 requests/second while dramatically reducing database usage. This

improvement allows a installation to drop the polling interval by a factor of 3 without the requirement of any hardware changes. In other words, if the polling interval of a system is at 60 seconds, the present improvement allows the polling interval to be set at 20 seconds without effecting performance. Even if one were to follow a very conservative approach the present improvement easily allows one to double the polling interval. Consequently, the speed in which messages are communicated to the users is increased. Furthermore, since the database use model has changed dramatically, the database is no longer the limiting factor—its the potential throughput of the GetUnread Alerts web Services calls.

Id. at 7:12-32.

The ‘765 Patent claims a “triggering step” that in combination with second through sixth steps reads on the above disclosures. *See, e.g.*, ‘765 Patent, Claim 1 (“...a first triggering step comprises the use of a HTTP packet comprising a request for a Boolean value relating to whether there are new alert messages and said packet comprises approximately 20 bytes...” and “upon the reception of said unread alert messages in said sixth step, said alert messages are in instant message format and said client opens a window on a display panel to display said alert messages); ‘765 Patent, Claim 10 (“...a first triggering step comprises the use of a HTTP packet comprising a request for a Boolean value relating to whether there are new alert messages and said packet comprises approximately 20 bytes...” and “in response to said requests, said server transmits any unread alert messages and said unread alert message are in instant message format and upon the client's reception of said unread alert messages said client opens a window on a display panel at said client... .”)

Therefore, the ‘765 Patent discloses and claims a software-based solution to a problem that exists only in the realm of computer networks, such as, for example, the ‘765 Patent’s referenced prior art Desktop Alert web application/service+SQL Server. Furthermore, the ‘765 Patent’s claims recite the disclosed specific improvements to the computers in which they are embodied, namely, the generation of a new polling message to precede a subsequent polling

message that is designed for reduced-sized transmission between the client and server to promote efficient and unhindered alert messaging in instant message format.

B. ATL failed to characterize the ‘765 Patent Claimed Technology as a Whole

Nowhere in ATL’s “Background” section will this Court find any of the discussion provided by Plaintiff in Section I.A., *supra*. Instead, ATL deliberately selected portions of the ‘765 Patent that aid its litigation position targeted to overgeneralize the ‘765 Patent’s improvement and frame it outside of the proper technical context in which it was disclosed. But for Plaintiff, the Court would have been led to believe that Figure 1 illustratively captures all of the ‘765 Patent technology. Dkt. No. 27-1 at 3. ATL was aware of the disclosures discussed *supra*, but it studiously avoided showing the Court those figures since they would expose the ‘765 Patent’s technical improvements in their proper context – the realm of computerized communication technology.

With a clearer understanding of the ‘765 Patented technology, the reader can readily see that ATL’s analogy of the ‘765 Patent claims to a telephone operator and hospital staff is inept. At pages 3-4 of its brief, ATL provides an analogy premised on a subset of the recited claim limitations and then follows that discussion on page 5 with the complete claim language, including those limitations it chose to omit from its analogy. By using an incomplete account of the ‘765 Patent claims, ATL presented this Court with a deceptively truncated view of the ‘765 Patent claims to create the fiction that under such a view, the ‘765 Patent claims were akin to a human telephone operator who keeps a paper logbook of entries to provide upon requests from staff at a hospital. *Cf.* Dkt. No. 27-1 at 3-4.

Among the claim limitations that ATL omits from its analogy are the “first triggering step,” “said alert messages are in instant message format,” “said client opens a window on a

display panel to display said alert messages,” and “protocols for the transmission of messages over the internet.” ATL conveniently omitted these limitations in its disjointed human activity analogy because it knows that none of them can be performed by a human nor are they capable of representation as a human activity. For example, ATL’s analogy does not explain how the hospital staff or telephone operator see alert messages in instant message format, which is another purely computer-related technology. ATL also does not show an analogous human activity for its version of the client (e.g., what ATL calls the hospital doctor) “open[ing] a window on a display panel to display the alert messages... .” Indeed, ATL’s analogy openly defies the ‘765 Patent claim language by insisting on a message system via telephone communication when the claims explicitly call for use of protocols for transmission of messages over the internet. ATL further describes its fictitious analogy as follows:

Only if the message counter has changed, will the staff member ask the telephone operator to check for alert messages for that staff member in the logbook. After checking the logbook, the telephone operator will then communicate the alert to the staff member.

Dkt. No. 27-1 at 4. Unlike its fictional paper telephone operator logbook, ATL never explains what it means by a “message counter.” Nor does ATL explain how a hospital staff member would know the results of the so-called “message counter” to prompt them to ask the telephone operator to check the logbook for more alert messages. Like its fragmented analysis of the ‘765 Patent claims, ATL’s analogy is disjointed and underdeveloped.

Unlike in computer-to-computer communication, a telephone operator being called simultaneously by multiple hospital staff will be forced to make every caller hold except the one to whom they are speaking. Further unlike the ‘765 Patent’s new polling transmission, humans cannot make the telephone operator pick up their calls faster merely by changing the content of the calls to the operator. There is simply no analog to the computer technology involved in the

‘765 Patent claims and their claimed technical solution is irreproducible and contrary to reason in the hospital-to-telephone operator context.

C. ATL Never Analyzed the Claims as Properly Construed.

The ‘765 Patent claims, “[a]n improved method for the dissemination of an alert message to a plurality of personal computers using a network communications protocol, said computers comprising clients, each said clients subscribing to a central server....” The construction of the “central server” limitation in the ‘765 Patent is critical because it exposes ATL’s telephone operator analogy as being excluded from the scope of the claims.

During prosecution of the patent application that matured into the ‘765 Patent, the applicant distinguished the “clients” and “central server” recited in the pending claims from a remote paging system that was the subject of U.S. Publication No. 20050181767 to Boland (“Boland”). Exh. A to the Declaration of Joseph Farco (“Farco Decl”) April 20, 2015 Request for Extension, Continued Examination, Amendment and Remarks, page 9 (“Boland uses a plurality of mobile switching centers– not a central server – as the Applicant described and claimed.”) Had ATL presented the ‘765 Patent claims in their entirety and as properly construed, it is apparent that the claims specifically exclude remote paging systems from their scope – a fact that all but destroys the false analogy ATL seeks to make to the telephone operator and hospital staff.

Later in its brief, ATL seems to abandon the telephone operator analogy and refers to the ‘765 Patent claims as using an abstract idea of a tally (i.e., the claimed “alert ID”). Dkt. No. 27-1 at 12. In any event, ATL’s “tally” mischaracterization blatantly avoids the other limitations in the ‘765 Patent claims, including the limitation that includes the specific improvement in

computer and computer network technology, the recited “first triggering step” and an alert message being sent in “instant message format.”

ATL asserts, without support, that “instant message format,” is mere “conventional” technology, Dkt. No. 27-1 at 13, but fails to apprise the Court that the full limitation is “said alert message is in instant message format,” which the applicant added to the claims to distinguish them from alerts that were provided as downloadable webpages. *See* Farco Decl. Ex. A at 9 (“the instant message format is absent from Gorty” and “Applicant’s system and method does not require the downloading of a webpage as suggested by the teachings of Gorty.”) ATL’s attempt to have the Court omit consideration of the instant message format limitation without properly understanding its scope or the fact that it was added for purposes of patentability is alone reason to deny ATL’s defective § 101 motion to dismiss.

III. ARGUMENT

A. Claim 1 is not representative of all of its dependent claims for purposes of 35 U.S.C. § 101.

ATL asserts that “none of the dependent claims present any difference ‘in a manner that is material to the patent-eligibility inquiry.’” Dkt. No. 27-1 at 9 (quoting *Mortgage Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324 n.6 (Fed. Cir. 2016)). Unlike in the case authorities on which ATL relies on pages 8-9 of its brief, Plaintiff chooses to address the ‘765 Patent claims separately and does not agree that Claim 1 is “representative” of Claims 3-8 for purposes of subject-matter eligibility.

Claims 3, 4, 5, 6, 7, and 8 are each materially different from Claim 1 for purposes of the § 101 analysis. Claim 3 requires communications using a SOAP protocol (i.e., a Simple Object Access Protocol utilizing an extensible mark-up language (“XML”)), Claim 4 requires communications using an HTTP protocol (i.e., Hypertext transfer protocol), Claim 5 requires

communications using both a SOAP and an HTTP GET protocol (i.e., an HTTP command to request a file from a web server), Claim 6 requires communications using an RPC protocol (i.e., Remote Procedure Call that causes a separate subroutine to execute in a different computer on the network), Claim 7 requires communications using an RPC/UDP protocol (i.e., a remote procedure call implemented using a uniform datagram protocol), and Claim 8 requires communications using an RPC/TCP protocol (i.e., a remote procedure call implemented using a transmission control protocol).

The ‘765 Patent discloses how its innovative method can achieve the associated reduction in message weights over secure internet transmissions that may also use one or more of SOAP, HTTP, HTTP GET, RPC, RPC/UDP, and RPC/TCP as the secondary polling communication to retrieve the alert messages in instant messaging format. *See* ‘765 Patent, 8:53 – 9:24; Fig. 14 (SOAP message). Thus, dependent claims 3-8 present innovative uses of claim 1’s light payload trigger polling communication in conjunction with other known computer communication protocols to achieve the computer network communication improvement. ATL’s citation to *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1348-49 (Fed. Cir. 2014) is inapposite because the independent and dependent claims in that case were not even directed to improvements in computer functionality. *See Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1260 (Fed. Cir. 2017) (discussing inapt comparison of patent eligible claims to those in *Content Extraction*).

The real reason ATL wants the Court to find Claims 3-8 represented by Claim 1 is because it knows there is no “human activity” equivalent to any of the technical improvements recited in Claims 3-8. The ‘765 Patent teaches how to make computer network alert communications, such as those using SOAP, HTTP, HTTP GET, RPC, RPC/UDP, and

RPC/TCP, achieve their end goal (obtaining alert messages) more efficiently and subject to less data traffic in the process of traversing the network. Other than using the words “routine,” “well-known,” and “conventional” to refer to these computer languages,² ATL never explains why the ‘765 Patent’s technical improvement using HTTP in claim 1 is representative of using that technical improvement in conjunction with a polling communication using a SOAP protocol, an RPC protocol, or an RPC/UDP or RPC/TCP communication. The HTTP GET recitation in the dependent claims is similarly not analyzed by ATL nor does ATL specifically explain why the HTTP GET protocol is represented by the innovative triggering polling HTTP communication recited in claim 1.

For the above reasons, ATL has failed to show that Claim 1 is representative of at least Claims 3-8 for purposes of this Court’s analysis under 35 U.S.C. § 101. Therefore, ATL’s cannot show clear and convincing patent ineligibility of these claims regardless of the outcome of its Motion.

B. The ‘765 Patent Claims Are All Patent Eligible under *Alice*

1. STEP 1 - The ‘765 Patent Claims Are NOT Abstract Ideas

In its discussion of *Alice* Step 1, ATL asserts that this Court look to the claim’s “focus” or “basic thrust” to determine whether it is directed to an abstract idea. That is an inaccurate recitation of the case law. The Federal Circuit approaches the *Alice* Step 1 “directed to” inquiry by asking “what the patent asserts to be the ‘focus of the claimed advance over the prior art.’” *TecSec, Inc. v. Adobe Inc.*, 978 F.3d 1278, 1292-93 (Fed. Cir. 2020) (collecting cases). This requires a “focus on the language of the Asserted Claims themselves ... considered in light of the specification.” *TecSec*, 978 F.3d at 1292 (quoting *Enfish, LLC v. Microsoft Corp.*, 822 F.3d

² ATL uses the word “conventional” no less than 44 separate times in its brief.

1327, 1335 (Fed. Cir. 2016)). In doing so, this Court must avoid “overgeneralizing claims” in the § 101 analysis, because characterizing the claims at “a high level of abstraction” that is “untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule.” *Id.* at 1293 (quoting *Enfish*, 822 F.3d at 1337); *McRO, Inc. v. Bandai Namco Games Am., Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016) (explaining that courts “‘must be careful to avoid oversimplifying the claims’ by looking at them generally and failing to account for the specific requirements of the claims”) (citations omitted).

As explained above, ATL not only overgeneralizes the ‘765 Patent claims but presents this Court with a characterization of those claims that is materially inaccurate in light of the specification. *See TecSec*, 978 F.3d at 1294 (“To arrive at [its materially inaccurate characterization of the representative claims], Adobe had to disregard elements of the claims at issue that the specification makes clear are important parts of the claimed advance in the combination of elements.”) As stated *supra* and in the ‘765 Patent specification, the ‘765 Patent claims are “directed to” an improvement in computer network functionality in which alert messages are transmitted in an instant message format following a unique and innovative digitally light weight polling-type communication followed by the conventional polling exchange. The combination of these two types of polling communications increases the computer network efficiency in which they are used while maintaining adequate bandwidth over the internet connection to allow for expedient transmission of instant message alerts to specific computers in that network when the need arises. *See, e.g., TecSec*, 978 F.3d at 1295 (“The specification elaborates in a way that simultaneously shows that the claims at issue are directed at solving a problem specific to computer data networks.”)

The Federal Circuit has also resolved § 101 issues by comparing claims and specifications from prior cases using common law methodologies, including in cases where it has found claims to be patent eligible. *Amdocs (Isreal) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016) (“the decisional mechanism courts now apply is to examine earlier cases in which a similar or parallel descriptive nature can be seen — what prior cases were about, and which way they were decided.”) For example, the Federal Circuit found the following computer-implemented claims to be patent eligible:

Federal Circuit Case	Claim under Review
<i>TecSec, Inc. v. Adobe Inc.</i>, 978 F.3d 1278, 1282-83 (Fed. Cir. 2020)	1. A method for providing multi-level multimedia security in a data network, comprising the steps of: A) accessing an object-oriented key manager; B) selecting an object to encrypt; C) selecting a label for the object; D) selecting an encryption algorithm; E) encrypting the object according to the encryption algorithm; F) labelling the encrypted object; G) reading the object label; H) determining access authorization based on the object label; and I) decrypting the object if access authorization is granted.
<i>SRI Int’l, Inc. v. Cisco Sys., Inc.</i>, 930 F.3d 1295, 1301 (Fed. Cir. 2019)	1. A computer-automated method of hierarchical event monitoring and analysis within an enterprise network comprising: - deploying a plurality of network monitors in the enterprise network; - detecting, by the network monitors, suspicious network activity based on analysis of network traffic data selected from one or more of the following categories: {network packet data transfer commands, network packet data transfer errors, network packet data volume, network connection requests, network connection denials, error codes included in a network packet, network connection acknowledgements, and network packets indicative of well-known network-service protocols}; - generating, by the monitors, reports of said suspicious activity; and - automatically receiving and integrating the reports of suspicious activity, by one or more hierarchical monitors.

Federal Circuit Case	Claim under Review
<i>Ancora Techs., Inc. v. HTC Am., Inc.</i>, 908 F.3d 1343, 1345-46 (Fed. Cir. 2018)	1. 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.
<i>Visual Memory LLC v. NVIDIA Corp.</i>, 867 F.3d 1253, 1257 (Fed. Cir. 2017)	1. A computer memory system connectable to a processor and having one or more programmable operational characteristics, said characteristics being defined through configuration by said computer based on the type of said processor, wherein said system is connectable to said processor by a bus, said system comprising: a main memory connected to said bus; and a cache connected to said bus; wherein a programmable operational characteristic of said system determines a type of data stored by said cache.

For at least the same reasons provided by the Federal Circuit in *TecSec*, *SRI*, *Ancora*, and *Visual Memory*, the ‘765 Patent claims are similarly directed to a specific improvement in computer capability or network functionality. The most analogous patent eligible claim to those of the ‘765 Patent is in *SRI*, the analogous portions of which being highlighted in the table below:

‘765 Patent Claim 1	SRI
1. An improved method for the dissemination of an alert message to a plurality of personal computers using a network communications protocol, said computers comprising clients, each said clients subscribing to a central server, said server comprising an alert message cache, ... said method comprising... * * * wherein said communications protocol comprises protocols for the transmission of messages over the internet. a first triggering step comprises the use of a HTTP packet comprising a request for a Boolean value relating to whether there are new alert messages and said packet	1. A computer-automated method of hierarchical event monitoring and analysis within an enterprise network comprising: deploying a plurality of network monitors in the enterprise network; detecting, by the network monitors, suspicious network activity based on

comprises approximately 20 bytes, a second step wherein said client contacts the central server and requests the value of said alert ID number in said memory, said value reflecting the number of alert messages received by said central server, a third step wherein said server transmits said value to said client, a fourth step wherein said client compares a stored value at the client with the value of the transmitted alert ID number, and if said transmitted value exceeds said stored value, a fifth step wherein said client transmits a second message to said server and requests for the server to transmit all unread alert messages in a GetUnreadAlerts request from said server that are specific to said client, and if there are unread alert messages specific to said client in said server, a sixth step wherein said server sends to client all unread alert messages specific to the client, and,	analysis of network traffic data selected from one or more of the following categories: {network packet data transfer commands, network packet data transfer errors, network packet data volume, network connection requests, network connection denials, error codes included in a network packet, network connection acknowledgements, and network packets indicative of well-known network-service protocols};
a further step wherein said client updates the stored value in its memory to reflect the number of additional unread alert messages transmitted from said server to said client in response to said second message, and	generating, by the monitors, reports of said suspicious activity; and
wherein, upon the reception of said unread alert messages in said sixth step, said alert messages are in instant message format and said client opens a window on a display panel to display said alert messages....	automatically receiving and integrating the reports of suspicious activity, by one or more hierarchical monitors.

In contrast to the patent eligible language in the above computer-implemented claims and those of the '765 Patent, the patent ineligible claim language discussed in ATL's cited case of *International Business Machines Corporation v. Zillow Group, Incorporated* was clearly directed to generic activities (“[a] method of displaying layered data...”) involving selecting and identifying information (“...selecting one or more objects to be displayed in a plurality of layers; identifying a plurality of non-spatially distinguishable display attributes...”), determining the meaning of the collected information (“...determining a layer order for the plurality of layers...”), and displaying the results (“...displaying the objects with the applied non-spatially distinguishable display attributes based upon the determination...”) all being “divorced from any computer technology” and “without explaining how to accomplish any of the tasks.” 50 F.4th

1371, 1375-79 (Fed. Cir. 2022).³ Indeed, the claims in *Zillow* “do not improve the functioning of the computer, make it operate more efficiently, or solve any technological problem.” *Id.* at 1380-81. This case is unlike anything in ATL’s *Zillow* case.

The other case relied on by ATL in its *Alice* Step 1 analysis, *Intellectual Ventures I LLC v. Symantec Corporation*, involved the Federal Circuit’s review of a jury verdict of patent ineligibility involving claims that recited functions related to sorting email to achieve a desired end result. 838 F.3d 1307, 1316-18 (Fed. Cir. 2016). But the act of sorting email, like the act of sorting mail, was considered a long prevalent fundamental practice, much like risk hedging, classifying and storing images, displaying advertisements in exchange for media, generating task lists, verifying financial transactions, and processing information through a clearing house. *Id.* at 1314 n.5. Again, the claims in *Intellectual Ventures I* are not even remotely comparable to those of the ‘765 Patent.

In contrast, the ‘765 Patent claims an improvement to computerized alert messaging systems that achieves a more efficient use of the alert messaging network comprised of clients and a server. *See SRI*, 930 F.3d at 1303 (patent eligible claims directed to “a specific technique—using a plurality of network monitors that each analyze specific types of data on the network and integrating reports from the monitors—to solve a technological problem arising in computer networks: identifying hackers or potential intruders into the network.”); *TecSec*, 978 F.3d at 1296 (“In light of what the claim language and specification establish, we conclude that the claims are directed to improving a basic function of a computer data-distribution network, namely, network security.”) The ‘765 Patent claims “actually prevent the normal, expected

³ The only other case to which ATL refers in its *Alice* Step 1 analysis is *Content Extraction*, but as the Federal Circuit in the apt case of *Visual Memory* explained, “[t]he claims in *Contract Extraction* ... were not directed to an improvement in computer functionality, which separates the claims in those cases from the claims in the current case.” *Visual Memory*, 867 F.3d at 1260.

operation of a conventional computer network” by inserting a novel triggering step into the computer-to-computer network communication protocol – a triggering step which employs a novel polling-type communication that precedes the conventional polling communication but is lighter in payload and can be sent with greater frequency without the corresponding depletion in network bandwidth resources. *See* ‘765 Patent, 7:12-32, 8:35-61; *see also* *SRI*, 930 F.3d at 1304. The ‘765 Patent describes that its proposed innovative solution is targeted to resolve a problem unique to computers and computer networks. *See Ancora*, 908 F.3d at 1348 (“[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”); *Data Engine Techs. LLC v. Google LLC*, 906 F.3d 999, 1007-08 (Fed. Cir. 2018) (claims reciting “a specific method for navigating through three-dimensional electronic spreadsheets” were eligible because they recited how to “improv[e] computers’ functionality as a tool able to instantly access all parts of complex three-dimensional electronic spreadsheets,” a form of information-organization unique to computers). The ‘765 Patent claims (1, 10, and all others) are the epitome of “specific” improvements in computer capabilities and network functionality and none of them when properly construed and characterized are an abstract idea.

ATL’s resort to isolating various computer structures from the ‘765 Patent claims and referring to them as “conventional” is legally inappropriate under *Alice* Step 1. *See Trading Techs. Int’l, Inc. v. CQG, Inc.*, 675 F. App’x 1001, 1005 (Fed. Cir. 2017) (“claim elements are considered in combination for evaluation under *Alice* Step 1, and then individually when *Alice* Step 2 is reached.”) ATL’s surgical analysis of the words in the ‘765 Patent claims at *Alice* Step 1 is just another desperate attempt to make abstract what is otherwise a specific improvement arising from a unique combination of computer technologies. For example, while ATL makes

much of the existence of alert messages, HTTP packets, and Boolean values, the ‘765 Patent specification explicitly distinguishes the addition of a new triggering step to the polling communication that previously existed and describes this new step as being vastly different from prior art conventional polling protocols, like SOAP:

In this alternative model, GetUnreadAlerts call remains intact but is not used for polling, rather a new polling call IsNewAlerts is added. This call passes the userId in a tight HTTP packet (not SOAP) to the web-server, approximately 20 bytes of payload. The result of this call is simply a Boolean value: true or false. If true is returned the client makes the formal (and existing) GetUnreadAlerts calls. IsNewAlerts does not require authentication and therefore can bypass the SOAP security layer.

See ‘765 Patent, 8:35-61. This new triggering step/polling call never existed until the ‘765 Patent. Similarly, the ‘765 Patent claims’ reliance on alert messages in instant message format is another novel feature that differs from prior art computerized alerts. *Cf.* Farco Decl., Ex. A at 9. ATL’s attempt to deconstruct and scrutinize the aspects of the ‘765 Patent’s claims in isolation fails to analyze the ordered combination of the claimed features, including the first triggering step and alert message in instant message format, which together operate to modify computer and network behavior using known computer architecture. *See TecSec.*, 978 F.3d at 1297 (“[I]t is the combination of techniques that is ‘what the patent asserts to be the focus of the claimed advance over the prior art’”) (citation omitted).

Moreover, to the extent that ATL wishes to critique the ‘765 Patent’s claims for reliance on software, the Federal Circuit has held that “[m]uch of the advancement made in computer technology consists of improvements to software that, by their very nature, may not be defined by particular physical features but rather by logical structures and processes.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016). The Federal Circuit has found software innovations to be patent-eligible where the focus of the claimed advance is on a solution to “a

problem specifically arising in the realm of computer networks” and the claim identifies the “specific” improvement in computer capabilities or network functionality and not just claim a desirable result or function. *TecSec*, 978 F.3d at 1293. That is exactly the nature of the ‘765 Patent claimed technology.

Finally, the ‘765 Patent claims do not present any type of preemption concern as the specification makes clear that other inferior prior art computerized alert messaging networks exist and are distinguishable from the claims. *See* ‘765 Patent, 1:13-17 (“a legacy system for which the present system provides improvements has been developed by Desktop Alert, Inc. of Washington, D.C. which uses an IP-Based alert technology that can be integrated with enterprise-class environments.”); *Farco Decl. Ex. A* at 9 (“the claimed system and method uses is different than Gorty’s method and constitutes an efficient technique that involves a minimum amount of transferred data from the client to the server.”); *McRO*, 837 F.3d at 1315 (no preemption concern when patentee demonstrated alternatives to the claimed process for automatically animating lip synchronization and facial expressions).

Therefore, Claims 1 and 10, as well as every claim depending on them, are neither abstract ideas nor preemptions of basic tools of scientific and technological work. Rather, they are an ordered combination of specific technical improvements to computer networks involved in instant alert message transmission that solved problems that existed only in computer network technology. This Court should find all of Plaintiff’s ‘765 Patent claims to be eligible under 35 U.S.C. § 101 upon proper completion of *Alice* Step 1 and to further find that ATL has failed to prove by clear and convincing evidence that the ‘765 Patent claims are ineligible under 35 U.S.C. § 101 for being abstract ideas.

C. STEP 2 - The ‘765 Patent Claims contain numerous inventive concepts

Under *Alice* Step 2, patent claims have been deemed eligible when they solve a technology-based problem, even with conventional, generic components, combined in an unconventional manner. *See Amdocs*, 841 F.3d at 1300; *see also DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1256-59 (Fed. Cir. 2014); *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349-52 (Fed. Cir. 2016). The Federal Circuit case law makes clear that what matters under *Alice* Step 2 is whether the claimed solution is unconventional – not that it merely comprises conventional components to arrive at an unconventional technical solution.

Here, the ‘765 Patent claims recite the unconventional solution of efficiently using the internet bandwidth of a computer network by placing an unconventional triggering step that is also a polling communication before allowing the conventional polling communication to take place. It then pairs this unique and unconventional sequence with the selective delivery of an alert in an unconventional instant message format to be displayed on one computer after being sent from a server on the network. The advantage achieved by the ‘765 Patent’s unique triggering step in the realm of computer technology is to take advantage of an HTTP packet of the size claimed in the ‘765 Patent that can simultaneously accomplish the necessary server polling function while being of such small payload or size that it would not interfere with the more urgent network communications (the alert messages) nor diminish the network performance by overly burdening the internet connection between the various computers.

ATL’s skeletal *Alice* Step 2 analysis starts with its materially inaccurate and overgeneralization of the ‘765 Patent claims as “a tally” based on “alert ID.” *See* Dkt. No. 27-1 at 15-16. Plaintiff has exposed this gross mischaracterization *supra*, but assuming ATL were to

maintain this gross exaggeration of a portion of all of the ‘765 Patent claim limitations, it fails to acknowledge that any such “tally” could never take place unless and until the unique claimed triggering step has taken place and, if after the “tally” is complete, the alert message would need to be communicated in an innovative instant message format over the network. Nowhere does ATL even address the unconventional sequence of these steps and activities under its own litigation-inspired mischaracterization of the claimed technology.

To exacerbate ATL’s feeble attempts to invalidate the ‘765 Patent under *Alice* Step 2, ATL refers this Court to readily distinguishable cases with claims unlike any of those under review here. *See* Dkt. No. 27-1 at 16-17. For example, the claims and specification at issue in ATL’s *Intellectual Ventures I LLC v. Erie Indemnity Company* case are unlike those of the ‘765 Patent. In *Erie*, certain of the patent claims recited an index for searching databases that used XML-tags, which are tags created using a known mark-up language, XML. 850 F.3d 1315, 1327-28 (Fed. Cir. 2017). However, the specification in *Erie* admitted that any other language besides XML that also used tags could be used for indexing the databases. *Id.* at 1328. In contrast, the ‘765 Patent claims recite, “a first triggering step comprises the use of a HTTP packet comprising a request for a Boolean value relating to whether there are new alert messages and said packet comprises approximately 20 bytes” and the specification distinguishes HTTP from other existing alert message communications protocols:

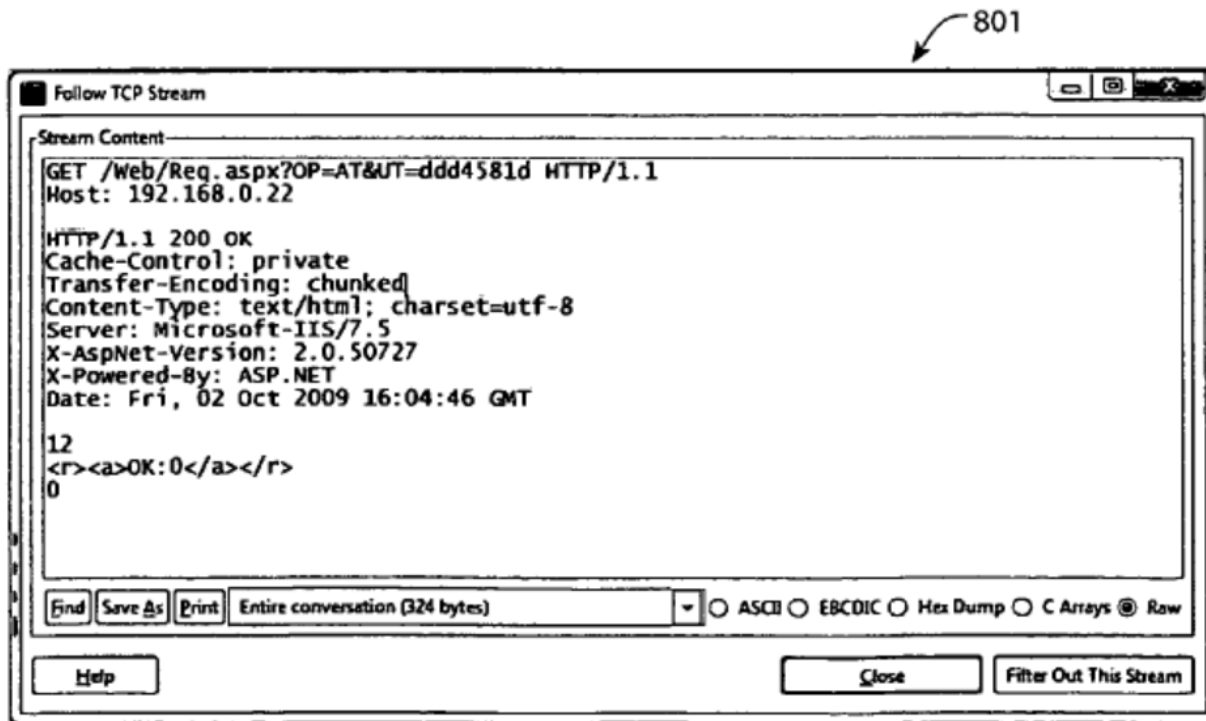
In this alternative model, GetUnreadAlerts call remains intact but is not used for polling, rather a new polling call IsNewAlerts is added. This call passes the userId in a tight HTTP packet (not SOAP) to the web-server, approximately 20 bytes of payload. The result of this call is simply a Boolean value: true or false. If true is returned the client makes the formal (and existing) GetUnreadAlerts calls. IsNewAlerts does not require authentication and therefore can bypass the SOAP security layer. FIG. 7 depicts the client request data for GetUnreadAlerts from the server using the SOAP protocol. In contrast referring now to FIG. 8 is a screen shot 801 of a display depicting the improved Req.aspx call using the HTTP GET

protocol and response messages is depicted which has a smaller communications and data pay-load.

See '765 Patent, 8:35-61; Figs. 7-8. Thus, the use of HTTP in the '765 Patent claims is unlike the use of XML in the *Erie* claims because unlike the patent at issue in *Erie*, the '765 Patent distinguishes the lightweight payload of its novel HTTP-based polling communication (depicted in Figure 8) from the fat or heavy payload of the conventional XML-based SOAP polling communication protocol (depicted in Figure 7):

```
<?xml version="1.0" encoding="utf-8" ?>
- <soap:Envelope xmlns:soap="http://schemas.xmlsoap.org/soap/envelope/"
  xmlns:xsi="http://www.w3.org/2001/XMLSchema-instance" xmlns:xsd="http://www.w3.org/2001/XMLSchema"
  xmlns:wsa="http://schemas.xmlsoap.org/ws/2004/08/addressing" xmlns:wsse="http://docs.oasis-open.org/wss/2004/01/oasis-200401-wss-wssecurity-secext-1.0.xsd" xmlns:wsu="http://docs.oasis-open.org/wss/2004/01/oasis-200401-wss-wssecurity-utility-1.0.xsd">
- <soap:Header>
  <wsa:Action>http://service.desktopalert.net/AlertService.asmx/GetUnreadAlerts</wsa:Action>
  <wsa:MessageID>urn:uuid:2cb954a2-e83a-42ca-98f4-01fedca8b7d2</wsa:MessageID>
- <wsa:ReplyTo>
  <wsa:Address>http://schemas.xmlsoap.org/ws/2004/08/addressing/role/anonymous</wsa:Address>
  </wsa:ReplyTo>
  <wsa:To>http://192.168.0.22/Web/AlertService.asmx</wsa:To>
- <wsse:Security soap:mustUnderstand="1">
  <wsu:Timestamp wsu:Id="Timestamp-d91ed39b-7dc-4859-a220-7940109fc301">
    <wsu:Created>2009-09-19T22:26:38Z</wsu:Created>
    <wsu:Expires>2009-09-19T22:31:38Z</wsu:Expires>
  </wsu:Timestamp>
  <wsse:UsernameToken xmlns:wsu="http://docs.oasis-open.org/wss/2004/01/oasis-200401-wss-wssecurity-utility-1.0.xsd" wsu:Id="SecurityToken-09f8aebb-5c0b-4c35-8ead-5c62b36abbc8">
    <wsse:Username>pbeisel</wsse:Username>
    <wsse:Password Type="http://docs.oasis-open.org/wss/2004/01/oasis-200401-wss-username-token-profile-1.0#PasswordDigest">AzQ217nCc0K+md4+R6HXIARzSIU=</wsse:Password>
    <wsse:Nonce>W/wLHhWhDcPPyKWbVX/zew==</wsse:Nonce>
    <wsu:Created>2009-09-19T22:26:38Z</wsu:Created>
  </wsse:UsernameToken>
  </wsse:Security>
</soap:Header>
- <soap:Body>
  <GetUnreadAlerts xmlns="http://service.desktopalert.net/AlertService.asmx" />
</soap:Body>
</soap:Envelope>
```

FIG. 7

**FIG. 8**

Thus, the ‘765 Patent’s recitation of its technologically distinguishable HTTP packet in the claims is entirely different from the XML-tag recited in the claims under review in *Erie* because while XML was merely one of numerous types of tag-based languages available for the particular database indexing technology under review in that case, the HTTP packet of the ‘765 Patent claims is both described and illustrated as being an innovative vehicle that enhances the alert message transmission speed by reducing the payload of polling communications sent over the computer network.

The claims at issue in ATL’s *buySAFE v. Google, Incorporated* case were directed to using a computer to make a “transaction performance guaranty,” which are nothing remotely like the computer network improvements recited in the ‘765 Patent claims. 765 F.3d 1350, 1355 (Fed. Cir. 2014). Similarly, ATL’s *Accenture Global Services, GmbH v. Guidewire Software, Incorporated* case involved claims directed to performing insurance activities using computers,

which are also far from being of the kind in the ‘765 Patent. 728 F.3d 1336, 1338 (Fed. Cir. 2013). Further distinguishing this case from the one in *Accenture* is the fact that the patent holder in *Accenture* conceded its method claims were patent ineligible, which all but doomed the system claims that recited essentially the same limitations. *Id.* at 1341-42. No such concession exists, nor should it in view of ATL’s failure to provide any evidence, let alone clear and convincing evidence, that the ‘765 Patent claims are invalid under 35 U.S.C. § 101.

Unlike ATL’s cases, the computer technologies to which ATL refers as “conventional” or “generic” in the ‘765 Patent claims are not being used to merely automate abstract ideas; these features are those of the technical environment in which the claimed advance operates to modify and improve the functionality of the machines and machine networks in which it is used. *See SRI*, 930 F.3d at 1304 (“the representative claim improves the technical functioning of the computer and computer networks by reciting a specific technique for improving computer network security”). The ‘765 Patent illustrates in Figures 3, 5, 10, and 11 how the claims’ unconventional arrangement of so-called “conventional” and “generic” claim limitations achieves a concrete and definable improvement in computers and computer network functionality. Even if ATL were to challenge the factual representations in any of the illustrated improvements, the same would amount to a factual dispute that is enough to defeat a motion to dismiss. *See Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1318 (Fed. Cir. 2019) (“factual disputes about whether an aspect of the claims is inventive may preclude dismissal at the pleadings stage under § 101.”)

In summary, ATL has failed to prove by clear and convincing evidence that the ‘765 Patent claims lack an inventive concept under *Alice* Step 2. For these and the foregoing reasons, ATL’s motion to dismiss the Amended Complaint should be denied in its entirety.⁴

IV. CONCLUSION

For the foregoing reasons, ATL’s motion to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6) for patent ineligibility should be denied and the court should enter Partial Summary Judgment that the claims of the ‘765 Patent are patent eligible under 35 U.S.C § 101.

Date: July 6, 2023

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⁴ ATL tries to persuade this Court that if it were to dismiss the Amended Complaint, it must do so with prejudice because Plaintiff already amended its complaint after ATL wrote to its counsel that the patent was invalid under 35 U.S.C. § 101. Motion at 19 (citing *Murj, Inc. v. Rhythm Mgmt. Grp., LLC*, 622 F. Supp. 3d 109, 118 (D. Md. 2022)). No reasonable reading of the *Murj* case could support such a proposition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July 2023, a copy of the forgoing Memorandum in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss and, in the Alternative, Motion for Summary Judgment of No Patent Invalidity Under 35 U.S.C. § 101 was filed via CM/ECF and served on all counsel of record including:

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