

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

COOLEY LLP
HEIDI L. KEEFE (178960)
(hkeefe@cooley.com)
MARK R. WEINSTEIN (193043)
(mweinstein@cooley.com)
MATTHEW J. BRIGHAM (191428)
(mbrigham@cooley.com)
LOWELL D. MEAD (223989)
(lmead@cooley.com)
3175 Hanover Street
Palo Alto, CA 94304-1130
Telephone: (650) 843-5000
Facsimile: (650) 849-7400

Attorneys for Defendants
FACEBOOK, INC., WHATSAPP
INC., INSTAGRAM, INC., and
INSTAGRAM, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BLACKBERRY LIMITED,
Plaintiff,

v.

FACEBOOK INC., WHATSAPP
INC., INSTAGRAM, INC., and
INSTAGRAM, LLC,
Defendants.

COOLEY LLP
MICHAEL G. RHODES (116127)
(rhodesmg@cooley.com)
101 California Street
5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Case No. 2:18-cv-01844-GW-KS

[Assigned to the Hon. George H. Wu]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS**

DATE: August 2, 2018
TIME: 8:30 a.m.
COURTROOM: 9D
JUDGE: Hon. George H. Wu

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. MOTION TO DISMISS COUNTS II, VII, VIII, AND IX (35 U.S.C. § 101)	3
A. BACKGROUND	3
1. The '351 Patent	3
2. The '929 Patent	4
3. The '634 Patent	4
4. The '120 Patent	5
B. LEGAL STANDARD	6
C. ARGUMENT	7
1. Alice Step One – The Patents Are Directed to Patent-Ineligible Abstract Ideas	7
a. The claims of the '351 and '929 patents are directed to the abstract idea of sending advertisements to users based on triggering events.	7
b. The '634 patent claims are directed to the abstract idea of displaying information regarding unread messages.	12
c. The claims of the '120 patent are directed to the abstract idea of silencing message notifications.	14
2. Alice Step Two – The Claims of Blackberry's Patents Recite No Inventive Concept	16
3. Determination of Invalidity Under 35 U.S.C. § 101 Is Appropriate On A Rule 12(b)(6) Motion To Dismiss	19
III. MOTION TO DISMISS (INDIRECT AND WILLFUL INFRINGEMENT)	22
A. Plaintiff has Failed to Plead Pre-Suit Notice of the Asserted Patents	22
B. Plaintiff Also Fails to Plead Facts Sufficient to Satisfy the "Egregiousness" Element of Willful Infringement	25
IV. CONCLUSION	25

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

TABLE OF AUTHORITIES

Page(s)

Cases

<i>3G Licensing, S.A. et al. v. Blackberry Ltd., et al.,</i> No. 17-cv-0082 (D. Del. March 22, 2018)	21
<i>Aatrix Software, Inc. v. Green Shades Software, Inc.,</i> 883 F.3d 1121 (Fed. Cir. 2018)	20
<i>Affinity Labs of Tex., LLC v. DIRECTV, LLC,</i> 838 F.3d 1253 (Fed. Cir. 2016)	<i>passim</i>
<i>Affinity Labs of Texas, LLC v. Amazon.com Inc.,</i> 838 F.3d 1266 (Fed. Cir. 2016)	8, 9
<i>Alice Corp. v. CLS Bank Int’l,</i> 134 S. Ct. 2347 (2014)	<i>passim</i>
<i>Apple, Inc. v. Ameranth, Inc.,</i> 842 F.3d 1229 (Fed. Cir. 2016)	7
<i>Ashcroft v. Iqbal,</i> 556 U.S. 662 (2009)	20, 21
<i>Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC,</i> 827 F.3d 1341 (Fed. Cir. 2016)	16
<i>Berkheimer v. HP Inc.,</i> 881 F.3d 1360 (Fed. Cir. 2018)	20, 21
<i>Bilski v. Kappos,</i> 561 U.S. 593 (2010)	19
<i>buySAFE, Inc. v. Google, Inc.,</i> 765 F.3d 1350 (Fed. Cir. 2014)	19
<i>Chalumeau Power Sys. LLC v. Alcatel–Lucent,</i> No. 11-cv-1175, 2012 WL 6968938 (D. Del. July 18, 2012)	23
<i>Cleveland Clinic Found. v. True Health Diagnostics LLC,</i> 859 F.3d 1352 (Fed. Cir. 2017)	19

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

TABLE OF AUTHORITIES

(continued)

Page(s)

<i>Commil USA, LLC v. Cisco Sys., Inc.</i> , 135 S. Ct. 1920 (2015).....	22
<i>Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n</i> , 776 F.3d 1343 (Fed. Cir. 2014)	3, 19
<i>CyberSource Corp. v. Retail Decisions, Inc.</i> , 654 F.3d 1366 (Fed. Cir. 2011).....	10
<i>DDR Holdings, LLC v. Hotels.com, L.P.</i> , 773 F.3d 1245 (Fed. Cir. 2014)	18
<i>Dealertrack, Inc. v. Huber</i> , 674 F.3d 1315 (Fed. Cir. 2012)	19
<i>Elec. Power Grp., LLC v. Alstom S.A.</i> , 830 F.3d 1350 (Fed. Cir. 2016)	<i>passim</i>
<i>Emazing Lights LLC v. De Oca</i> , No. 15-cv-1561, 2016 WL 7507765 (C.D. Cal. June 20, 2016)	25
<i>Enfish, LLC v. Microsoft Corp.</i> , 822 F.3d 1327 (Fed. Cir. 2016)	11, 15
<i>Exergen Corp. v. Kaz USA, Inc.</i> , Nos. 2016-2315 & 2016-2341, 2018 WL 1193529 (Fed. Cir. Mar. 8, 2018)	20
<i>FairWarning IP, LLC v. Iatric Sys., Inc.</i> , 839 F.3d 1089 (Fed. Cir. 2016)	2, 14, 15
<i>Genetic Techs. Ltd. v. Merial L.L.C.</i> , 818 F.3d 1369 (Fed. Cir. 2016)	19
<i>Halo Elecs., Inc. v. Pulse Elecs., Inc.</i> , 136 S. Ct. 1923 (2016).....	22, 25
<i>I/P Engine, Inc. v. AOL Inc.</i> , 576 F. App'x 982 (Fed. Cir. 2014)	20

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

TABLE OF AUTHORITIES

(continued)

Page(s)

<i>Immersion Corp. v. Fitbit, Inc.</i> , No. 17-cv-3886, 2018 WL 1156979 (N.D. Cal. Mar. 5, 2018).....	18
<i>Intellectual Ventures I LLC v. Capital One Bank (USA)</i> , 792 F.3d 1363 (Fed. Cir. 2015)	7, 8, 9, 15
<i>Intellectual Ventures I LLC v. Capital One Fin. Corp.</i> , 850 F.3d 1332 (Fed. Cir. 2017)	7, 13
<i>Intellectual Ventures I LLC v. Erie Indem. Co.</i> , 850 F.3d 1315 (Fed. Cir. 2017)	11
<i>Int'l Designs Corp., LLC, et al. v. Hair Art Int'l, Inc.</i> , No. 17-cv-8411 (C.D. Cal. Apr. 19, 2018).....	20, 25
<i>Knievel v. ESPN</i> , 393 F.3d 1068 (9th Cir. 2005)	24
<i>Maxell, Ltd. v. Blackberry Corp.</i> , No. 17-cv-1446 (D. Del. Feb. 9, 2018)	1, 17
<i>Mayo Collaborative Servs. v. Prometheus Labs., Inc.</i> , 132 S. Ct. 1289 (2012).....	6
<i>Morsa v. Facebook Inc.</i> , 77 F. Supp. 3d 1007 (C.D. Cal. 2014).....	8
<i>OIP Techs., Inc. v. Amazon.com, Inc.</i> , 788 F.3d 1359 (Fed. Cir. 2015)	19
<i>Parker v. Flook</i> , 437 U.S. 584 (1978).....	12
<i>Puma SE v. Forever 21, Inc.</i> , No. 17-cv-2523, 2017 WL 4771004 (C.D. Cal. June 29, 2017)	22
<i>RecogniCorp, LLC v. Nintendo Co., Ltd.</i> , 855 F.3d 1322 (Fed. Cir. 2017)	21
<i>Smartflash LLC v. Apple Inc.</i> , 680 Fed. App'x 977 (Fed. Cir. 2017)	9

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Soteria Encryption, LLC v. Lenovo U.S., Inc. et al.</i> , No. 16-cv-7958, 2017 WL 3449058 (C.D. Cal. Feb. 27, 2017).....	22
<i>Spherix Inc. v. Juniper Networks, Inc.</i> , No. 14-cv-0578, 2015 WL 1517508 (D. Del. Mar. 31, 2015)	23
<i>Telesaurus VPC, LLC v. Power</i> , 623 F.3d 998 (9th Cir. 2010)	21
<i>In re TLI Commc'ns LLC Patent Litig.</i> , 823 F.3d 607 (Fed. Cir. 2016)	12, 15, 16
<i>TS Patents LLC v. Yahoo! Inc.</i> , 279 F. Supp. 3d 968 (N.D. Cal. 2017).....	11
<i>Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC</i> , 874 F.3d 1329 (Fed. Cir. 2017)	3, 13, 21
<i>Ultramercial, Inc. v. Hulu, LLC</i> , 772 F.3d 709 (Fed. Cir. 2014)	8, 16
<i>Van Buskirk v. Cable News Network, Inc.</i> , 284 F.3d 977 (9th Cir. 2002)	24
<i>Voter Verified, Inc. v. Election Sys. & Software, LLC</i> , 887 F.3d 1376 (Fed. Cir. 2018)	2, 20
 Statutes	
35 U.S.C. § 101.....	passim
 Other Authorities	
Federal Rule of Civil Procedure 12(b)(6).....	passim

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

I. INTRODUCTION

Four of Blackberry’s patents are directed at ineligible ancient communication concepts—who gets a message, how it is sent, and the manner of notification. None of the patents solve a specific technological problem. Rather, they take abstract concepts and apply them “on a computer.” This is not enough to be patent-eligible. Blackberry, when acting as a defendant in other courts, has perhaps said it best—“[a]ppending generic devices to otherwise abstract ideas is not a magic bullet”¹

With this motion, Defendants Facebook, Inc., WhatsApp Inc., and Instagram, LLC² (collectively, “Defendants”) move to dismiss under Federal Rule of Civil Procedure 12(b)(6) all claims related to four of Blackberry’s nine asserted patents: U.S. Patent Nos. 8,296,351 (“the ’351 patent”); 8,676,929 (“the ’929 patent”); 8,209,634 (“the ’634 patent”); and 9,349,120 (“the ’120 patent”) (Counts II, VII, VIII, and IX).³ The patents are invalid under 35 U.S.C. § 101 and the Supreme Court’s two-part test in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014).

The ’351 and ’929 patents are directed to the abstract idea of sending advertisements or other information to users based on a “triggering event,” like a time or location. But businesses have been promoting products and services in this manner for generations, such as sending coupons for a free dessert on your birthday or handing you a coupon when you walk by a certain store.

The claims of the ’634 and ’120 patents are equally abstract, as they are directed to the abstract ideas of displaying or silencing message notifications. The ’634 patent claims the concept of displaying a count of senders that have sent unread messages (*e.g.* “Two people have been trying to reach you—your mom called and your boss called three times”), while the ’120 patent claims silencing notifications for certain messaging

¹ Defs.’ Reply Br. in Supp. of Mot. to Dismiss at 6, *Maxell, Ltd. v. Blackberry Corp., et al.* (“*Maxell*”), No. 17-cv-1446 (D. Del. Feb. 9, 2018) ECF No. 18.

² Instagram, Inc. is no longer an active corporation, but joins this motion if necessary.

³ Although Defendants move to dismiss only these four patents at this juncture, the remaining five patents also fail to claim patent eligible subject matter. Defendants will address the numerous validity issues—including issues arising under Sections 101, 102, 103, 112—of the remaining patents at the appropriate stage.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 threads (e.g. “Hold any calls about the Facebook matter and tell me about those later.”).
 2 Both of these functions have long been part of human communication. None of the
 3 patents recite anything beyond conventional technologies to implement the concepts—
 4 wireless or mobile devices, servers, messaging applications, and the like. And none
 5 improve the technology in any way.

6 District courts have routinely held that claims similar to these are patent-
 7 ineligible on motions to dismiss, and the Federal Circuit has routinely affirmed these
 8 rulings. The Federal Circuit has “repeatedly recognized that in many cases it is possible
 9 and proper to determine patent eligibility under 35 U.S.C. § 101 on a Rule 12(b)(6)
 10 motion.” *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1097 (Fed. Cir. 2016)
 11 (internal quotation and citation omitted); *Voter Verified, Inc. v. Election Sys. &*
 12 *Software, LLC*, 887 F.3d 1376, 1384 (Fed. Cir. 2018). Thus, for the reasons set forth
 13 below, Defendants respectfully request that the Court grant their motion to dismiss
 14 Counts II, VII, VIII, and IX and rule that the ’351, ’929, ’634 and ’120 patents are
 15 invalid under 35 U.S.C. § 101.

16 In addition, Plaintiff’s allegations of willful and indirect infringement in all
 17 Counts must be dismissed because the Complaint is devoid of any factual support for
 18 an essential element of these claims – pre-suit knowledge of the patents. Instead, for
 19 six of the nine patents Plaintiff relies on a single conclusory allegation that Defendants
 20 have had knowledge of the patents “since at least as early as the filing and/or service of
 21 this Complaint.” (Compl. for Patent Infringement, ECF No. 15 (“FAC”) ¶¶ 204, 234,
 22 263, 290, 315, 334.) For the seventh patent (’173 Patent), Plaintiff adds an irrelevant
 23 allegation about indirect notice through the USPTO during prosecution of three
 24 Facebook patent applications. (*See* FAC ¶ 178.) For the remaining two patents, Plaintiff
 25 relies on legally irrelevant communications covered by a non-disclosure agreement
 26 between the parties. (*See* Defs.’ Req. for Judicial Notice, Ex. A (“NDA”); FAC, ¶¶ 8,
 27 122, 149.) Because none of these allegations sufficiently allege pre-suit knowledge of
 28 the patents, Plaintiff’s claims of willful and indirect infringement must be dismissed.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

II. MOTION TO DISMISS COUNTS II, VII, VIII, AND IX (35 U.S.C. § 101)

A. BACKGROUND

1. The '351 Patent

The '351 patent relates to “pushing information” based on location or some other “triggering event.” ('351 patent (Ex. K to FAC), claims 1, 14.) The FAC asserts claims 1 and 14. Claim 1 is representative⁴:

1. A system for pushing information to a mobile device comprising:
a proxy content server that receives information over a computer network from an information source and stores the information to one of a plurality of channels based on pre-defined information categories, wherein the plurality of channels comprise memory locations included in at least one of the proxy content server or a proxy content server database;

the proxy content server to receive a feedback signal over a wireless network that indicates a position of the mobile device, and to use the feedback signal to select a channel for transmission of the information from the selected channel over the wireless network to the mobile device, wherein the information comprises at least one of static advertising information, dynamic advertising information, default advertising information, or content information, and wherein a combination of the static advertising information with one of the dynamic or default advertising information comprises an advertisement or an information bulletin.

('351 patent, claim 1 at 14:8-28.) Claim 14 is identical, except that it calls for the selection of a channel “in response to a triggering event” rather than location. (*Id.*, claim 14 at 15:18-19.) The dependent claims only add *where* the information comes from and is stored (mobile device [2], base station [3], Internet [4, 16], WWW server [6, 18], server database [9, 21], plurality of sources [10, 22], software modules [12, 24], operating systems [13]), *when* it is sent (regular intervals [7, 19], automatically [8, 20], or at a given time [15]), or *what* it contains (particular advertisers [5, 17] or formatted data packets [11, 23]). None of these limitations change the patentability analysis.

⁴ The Federal Circuit has held that it is enough to analyze a “representative claim” under Section 101 when, as here, the claims are substantially similar and linked to the same abstract idea. *See, e.g., Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1349 (Fed. Cir. 2014); *Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC*, 874 F.3d 1329, 1337 (Fed. Cir. 2017) (applying *Alice* framework to “representative claims” resulting in a finding of invalidity under Section 101).

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

2. The '929 Patent

The '929 patent is a continuation of the '351 patent and shares the same written description. The '929 patent claims require that the event triggering the content push be a "time triggering event." For example, claim 1 requires:

1. A method for pushing information to a mobile device, the method comprising:

detecting a triggering event comprising a time triggering event;

determining, by a server, information relevant to the detected triggering event from among information stored in one of a plurality of memory location channels, wherein the information is stored in the one of the plurality of memory location channels based on a category of the information matching a pre-defined category of the one of the plurality of memory location channels;

when the information relevant to the detected triggering event comprises content information, inserting to the content information, by the server, a meta tag for one or more advertisements to be displayed with the content information, wherein the meta tag identifies the one or more advertisements and advertisement display requirements, and wherein the one or more advertisements are selected based on the detected triggering event; and

transmitting the content information that includes the meta tag to the mobile device.

('929 patent (Ex. L to FAC), claim 1 at 14:11-31.) Claim 9 is an equivalent "server" claim. The remaining claims are nothing of substance, merely calling out *what* is sent (types of advertisements [2, 4, 8, 10, 12, 16], meta tag types [6, 14]) and *when* it is sent (mealtime [3, 11], pre-established time [5, 13], repeatedly [7, 15]).

3. The '634 Patent

The '634 patent relates to the display of a count of message correspondents (senders) who have sent unread messages by "visually modif[ying]" an "application's icon." ('634 patent, Abstract.) In other words, "please tell me how many people sent me messages". Independent claims Claim 1 reads⁵:

1. A method of providing notifications of unread messages on a wireless communication device, comprising:

displaying at least one icon relating to electronic messaging on a graphical user interface of the wireless communication device;

⁵ The FAC asserts claims 1, 5-7, 11-13, 17 and 18 of the '634 patent. (FAC ¶ 144.)

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

receiving a plurality of electronic messages on the wireless communication device, the plurality of electronic messages including messages from a plurality of different messaging correspondents; and in response to receiving at least one of the plurality of electronic messages, visually modifying at least one displayed icon relating to electronic messaging to include a numeric character representing a count of the plurality of different messaging correspondents for which one or more of the electronic messages have been received and remain unread.

(’634 patent (attached to the FAC as Ex. B), claim 1 at 11:13-28.) The other independent claims (*i.e.*, 7 and 13) claim systems paralleling the method of claim 1. The dependent claims add obvious ways to view and interact with the icon or message, such as being “selectable” (claims 2, 4, 8, 10, 14, 16) and displaying a “count,” “identifier,” or “preview” (claims 3, 5, 6, 9, 11, 12, 15, 17, 18).

4. The ’120 Patent

The ’120 patent relates generally to silencing message notifications, and more specifically to allowing a user to “select to silence a message thread” such that “the user will no longer receive notifications of new messages added to the thread.” (’120 patent (attached to the FAC as Ex. G), Abstract.) In other words, “hold calls on the Facebook matter and just take a note.”

Claim 24 which is representative of the rest of the claims recites:

24. A non-transitory computer readable medium comprising processing instructions which when executed by a data processor cause the data processor to perform a method for silencing notifications for incoming electronic messages to a communication system, the method comprising:

receiving one or more selected message threads for silencing;

in response to receiving the one or more selected message threads, activating one or more flags, each flag in association with a selected message thread of the one or more selected message threads, wherein the one or more flags indicate that the associated one or more selected message threads have been silenced;

receiving a new incoming electronic message;

identifying the new incoming message as associated with the selected one or more message threads;

determining that a message thread associated with the new incoming message has been flagged as silenced using the one or more flags;

overriding at least one currently-enabled notification setting to prevent

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 a notification pertaining to receipt of the new incoming message from
 2 being activated; and
 3 displaying the new incoming electronic message in an inbox together
 4 with any message thread not flagged as silenced, while silencing any
 5 further notifications pertaining to receipt of the new incoming
 6 electronic message;
 7 wherein the new incoming message thread flagged as silenced is
 8 displayed in the inbox in a different manner than any message thread
 9 not flagged as silenced.
 10 ('120 patent, claim 24 at 18:35-64.) The other independent claims (*i.e.*, 1 and 13)
 11 claim systems and methods paralleling claim 24. The other remaining dependent
 12 claims add obvious types of messaging (group [2, 14], wireless [9]), ways to display
 13 and store [4-6, 10-12, 16-18, 21-23] and ways to silence and unsilence (user specific
 14 [3, 15], unflagging [7, 8, 19, 20]).

15 **B. LEGAL STANDARD**

16 The Supreme Court in *Alice* set out a two-step test for addressing challenges to
 17 claims under 35 U.S.C. § 101. *Alice*, 134 S. Ct. at 2355. First, the court determines
 18 whether the claims “are directed to a patent-ineligible concept,” such as an abstract idea.
 19 *Id.* If the court finds the heart of the claims to be abstract, it then proceeds to the second
 20 step to determine whether “the elements of each claim both individually and as an
 21 ordered combination . . . transform the nature of the claim into a patent-eligible
 22 application.” *Id.* (internal quotation and citation omitted). To survive the second step,
 23 a claim must include “additional features” ensuring that the claim does “more than
 24 simply stat[e] the abstract idea while adding the words ‘apply it.’” *Id.* at 2357 (internal
 25 quotations, citation and brackets omitted). A claim that adds only “well-understood,
 26 routine, conventional activity” does not constitute an “inventive concept.” *Mayo*
 27 *Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1294 (2012). In the
 28 context of computer-related claims, “if a patent’s recitation of a computer amounts to a
 mere instruction to implement an abstract idea on a computer, that addition cannot
 impart patent eligibility.” *Alice*, 134 S. Ct. at 2348 (internal quotations, citation, ellipses
 and brackets omitted).

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 C. ARGUMENT

2 1. *Alice* Step One – The Patents Are Directed to Patent-Ineligible 3 Abstract Ideas

4 The first step looks holistically at the claims’ overall “focus” and “character as a
5 whole.” *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016).
6 Only at the second step—the search for an inventive concept—does the court look
7 “more microscopically” at the claim limitations. *Id.* at 1354.

8 The Federal Circuit has explained that for computer-based claims, the first step
9 of *Alice* asks whether the claims focus on a “specific means or method that improves
10 the relevant technology,” which may pass muster under Section 101, or on a “result or
11 effect that itself is the abstract idea and merely invoke[s] generic processes and
12 machinery,” which cannot. *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1241 (Fed.
13 Cir. 2016) (internal quotation marks and citation omitted). The claims at issue here fall
14 squarely within the latter category.

15 a. The claims of the ’351 and ’929 patents are directed to the 16 abstract idea of sending advertisements to users based on 17 triggering events.

18 “Stripped of excess verbiage,” the claimed concept of the ’351 and ’929 patents
19 is straightforward. *Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1256-
20 57 (Fed. Cir. 2016) (“*Affinity/DIRECTV*”); *see also Intellectual Ventures I LLC v.*
21 *Capital One Fin. Corp.*, 850 F.3d 1332, 1339 (Fed. Cir. 2017) (“*IV/Capital IP*”). These
22 two patents call for advertisements or other information to be sent (or “pushed”) to users
23 following a triggering event. Courts have consistently held that providing advertising
24 or other content based on “information known about the user” is a “fundamental . . .
25 practice long prevalent in our system . . .” *Intellectual Ventures I LLC v. Capital One*
26 *Bank (USA)*, 792 F.3d 1363, 1369 (Fed. Cir. 2015) (“*IV/Capital P*”) (quoting *Alice*, 134
27 S. Ct. at 2356). For example, the Federal Circuit has observed that “[t]here is no dispute
28 that newspaper inserts had often been tailored based on information known about the
customer—for example, a newspaper might advertise based on the customer’s location.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 Providing this minimal tailoring—*e.g.*, providing different newspaper inserts based
 2 upon the location of the individual—is an abstract idea.” *Id.* Similarly, providing
 3 content based on time of day “is also an abstract, overly broad concept long-practiced
 4 in our society. There can be no doubt that television commercials for decades tailored
 5 advertisements based on the time of day during which the advertisement was viewed.”
 6 *Id.* at 1370; *see also, e.g., Morsa v. Facebook Inc.*, 77 F. Supp. 3d 1007, 1014 (C.D.
 7 Cal. 2014) (invalidating claims directed to abstract ideas of “targeting advertisements
 8 to certain consumers, and using a bidding system to determine when and how
 9 advertisements will be displayed”); *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715
 10 (Fed. Cir. 2014) (invalidating claims directed to “the abstract idea of showing an
 11 advertisement before delivering free content”).

12 The claims of the ’351 patent select the appropriate advertisement based on the
 13 location of the user’s wireless device (cellphone). But using location-related
 14 information and access rules to selectively transmit content are also abstractions. The
 15 Federal Circuit has held that “the concept of delivering user-selected media content to
 16 portable devices is an abstract idea.” *Affinity Labs of Texas, LLC v. Amazon.com Inc.*,
 17 838 F.3d 1266, 1267-69 (Fed. Cir. 2016) (“*Affinity/Amazon*”) (invalidating claims
 18 directed to “a network-based media system with a customized user interface, in which
 19 the system delivers streaming content from a network-based resource upon demand to
 20 a handheld wireless electronic device having a graphical user interface.”). Likewise,
 21 the Federal Circuit has invalidated claims directed to a software application that
 22 provided users “out-of-region access to regional broadcast content.”
 23 *Affinity/DIRECTV*, 838 F.3d at 1255-58. Similarly, in *IV/Capital I*, the claims recited
 24 a system providing a website that uses “dynamic web site navigation data” and delivers
 25 webpages tailored to the user based on the navigation data and the user’s personal
 26 characteristics such as “the viewer’s location or address.” *IV/Capital I*, 792 F.3d at
 27 1369. As the Federal Circuit explained, this type of “tailoring of content based on
 28 information about the user—such as where the user lives or what time of day the user

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 views the content—is an abstract idea.” *Affinity/Amazon*, 838 F.3d at 1271 (citing
2 *IV/Capital I*, 792 F.3d at 1369).

3 Both patents recite only conventional and well-known components including
4 mobile devices, servers and/or databases (*i.e.*, “proxy content server” and “proxy
5 content server database”) that include memory locations (or “memory location
6 channels”), wireless networks, and tags used to identify digital content. (*See* ’351
7 patent, claim 1; ’929 patent, claim 9.) The patents concede that these concepts and
8 components were known in the art, acknowledging the variety of well-known mobile
9 devices, the “traditional radio frequency (RF) network,” and that “[s]ystems for
10 transmitting information from databases in a computer network, such as World-Wide-
11 Web (WWW) servers on the Internet, over a wireless network to a mobile device are
12 known.” (*See e.g.*, ’929 patent 1:29-32, 1:37-40, 5:9-21.) Similarly, the shared
13 specification acknowledges that the “proxy content server” may “for example, be a
14 wireless proxy server that functions as a gateway between the computer network and
15 the wireless network”, and that it “may be implemented in several ways”—*i.e.*, it is
16 merely a proxy server, which was known in the art. (*See e.g.*, ’929 patent at 2:62-64;
17 4:19-20.) The specification further admits the existence of network services that
18 “automatically ‘push’ small amounts [of] information” to paging devices, “such as
19 sports scores, weather reports, or stock information.” (*Id.* at 1:44-47.) Use of generic
20 components such as these do not make the abstract idea of delivering content patentable.
21 *See Affinity/DIRECTV*, 838 F.3d at 1255-56 (finding abstract system claim containing
22 “storage medium” and “wireless cellular telephone device”). Likewise, the Federal
23 Circuit has invalidated claims relating to the distribution of content even where the
24 claims also included “rules” for accessing content—*e.g.*, involved controlling users’
25 access to content based on validation criteria such as amount of payment. *Smartflash*
26 *LLC v. Apple Inc.*, 680 Fed. App’x 977, 983-84 (Fed. Cir. 2017). Accordingly, the
27 inclusion of “triggering events” does not make the abstract ideas expressed in the ’351
28 and ’929 patents patent-eligible.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

Indeed, it is not necessary to employ any technology in order to practice the concepts embodied in either the '351 or '929 patents. Consider, for example, an information desk/kiosk in a shopping center in the 1960s:⁶



Workers at the kiosk provided information to shoppers so they could find the nearest clothing store, restaurant, etc. (*i.e.*, provide information based on customer's location) or can find out which stores or restaurants may be open late (*i.e.*, provide information based on time). Kiosks also typically provide coupons, advertising materials, or brochures (*i.e.*, including "static", "dynamic", or "default" advertising information) for the stores or restaurants that match the location, time, or other criteria the customer has specified. These coupons or materials may be stored according to their category in stacks behind the counter or in cubbies (*i.e.*, "channels" or "memory locations") so that the workers can easily find and provide the relevant information to customers. Or, kiosk attendants may pass out advertising materials to customers who come by at a specified time (*e.g.*, a Memorial Day sale or happy hour drink coupons.) Thus, the kiosk (*i.e.*, "proxy content server") is handing out (*i.e.*, "pushing") advertising materials in response to the shopper's location, at a certain time, or based on some other "triggering event." That the underlying idea of the '351 and '929 patents can be accomplished without any technology demonstrates that they "embody the 'basic tools of scientific and technological work' that are free to all men and reserved exclusively to none," and therefore comprise a non-patent-eligible abstract idea. *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011) (explaining that "[s]uch a method

⁶ <https://mallsofamerica.blogspot.com/2006/08/harundale-mall.html>

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 that can be performed by human thought alone is merely an abstract idea and is not
2 patent-eligible under § 101”) (citation omitted).

3 The addition of limitations calling for “meta tag[s]” in the asserted claims of the
4 ’929 patent do not save the claims from being abstract. As claim 1 recites, the meta tag
5 merely “identifies the . . . advertisements and advertisement display requirements.”
6 (’929 patent, claim 1 at 14:24-27.) Per the specification, the meta tags “would normally
7 include an advertising name, a corresponding advertising identifier and perhaps
8 additional information like the number of advertising points for viewing the
9 advertisement.” (’929 patent at 8:35-38.) Thus, the meta tag is merely another piece
10 of electronic information, discrete from the advertising content, that is either sent with
11 or separately from the advertising content being sent or “pushed” to the user. As the
12 Federal Circuit has made clear, “[i]nformation as such is an intangible.” *Elec. Power*,
13 830 F.3d at 1353. The inclusion of additional information does not change the overall
14 focus of the claims, which is to send content (*e.g.*, advertising) upon a triggering event.
15 Rather, the use of a meta tag merely identifies the content being sent (like a post-it note
16 saying “this one”). *Id.*; *see also TS Patents LLC v. Yahoo! Inc.*, 279 F. Supp. 3d 968,
17 994 (N.D. Cal. 2017) (claims employing metadata comprising “name, path, owner, or
18 timestamp” to preview information about a file were directed to the abstract idea of
19 preview-based file or folder sharing) (internal quotation and citation omitted);
20 *Intellectual Ventures I LLC v. Erie Indem. Co.*, 850 F.3d 1315, 1327 (Fed. Cir. 2017)
21 (finding abstract claims relating to XML tags where tags were “used to identify,
22 organize, and locate the desired resource.”).

23 In sum, the ’351 and ’929 patents are not “directed to a specific improvement to
24 the way computers operate.” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335-36
25 (Fed. Cir. 2016) (finding claims focusing “on the specific asserted improvement in . . .
26 capabilities” of a database were not abstract). The disclosed use of a “feedback signal”
27 to determine the position of a mobile device (’351 patent, claim 1), or the use of “meta
28 tags” to identify advertisements (*see* ’929 patent, claim 9) is just that—*use*. The claims

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 use known technologies (*e.g.*, mobile networks and tags) to implement the abstract idea.
 2 But no actual improvement is made to the underlying technology itself. The '351 and
 3 '929 patents do not purport to improve the functioning of mobile devices, mobile
 4 networks, proxy servers, or the like in any way. Rather, they simply describe a process
 5 of delivering specific advertising content to users—which is abstract under Section 101.

6 **b. The '634 patent claims are directed to the abstract idea of**
 7 **displaying information regarding unread messages.**

8 The '634 patent is directed to nothing more than displaying information about
 9 unread messages. “Information as such is an intangible” and, therefore, “we have
 10 treated collecting information, including when limited to particular content (which does
 11 not change its character as information), as within the realm of abstract ideas.” *Elec.*
 12 *Power*, 830 F.3d at 1353-4. The '634 patent claims exactly that—collecting information
 13 about unread messages and displaying it to the user. Nothing in the '634 claims is
 14 “directed to the solution of a ‘technological problem,’ nor is it directed to an
 15 improvement in computer or network functionality,” but instead the claims are directed
 16 to a “general concept . . . without offering any technological means of effecting that
 17 concept.” *Affinity/DIRECTV*, 838 F.3d at 1262 (internal citation omitted).

18 As described above, the claims of the '634 patent are directed to abstract ideas
 19 that could be—and routinely were—performed by human beings without the aid of
 20 computers. *Parker v. Flook*, 437 U.S. 584, 586 (1978) (abstract idea found where “the
 21 computations can be made by pencil and paper calculations”).
 22 Assistants, for example, routinely answer calls, take written
 23 messages on “while you were out” pads, and inform their bosses
 24 about the number of people that tried to reach them, like “two
 25 people called: John once and your husband twice”.



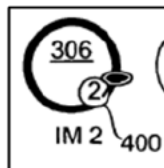
26 Further, specifying that this task be carried out on a wireless device with
 27 messaging applications does not save the claims. *See, e.g., In re TLI Commc'ns LLC*
 28 *Patent Litig.*, 823 F.3d 607, 613 (Fed. Cir. 2016) (noting that it is “well-settled that mere

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 recitation of concrete, tangible components is insufficient to confer patent eligibility to
 2 an otherwise abstract idea”). While the independent claims recite a “wireless
 3 communication device” with a “graphical user interface” displaying at least one “icon
 4 relating to electronic messaging” and “visually modif[ying]” the icon to include a
 5 “numeric character” indicating the quantity of “unread messages,” use of these generic
 6 components does not convey eligibility. Indeed, the ’634 patent does not claim to have
 7 invented wireless communications devices (*e.g.*, cell phones), electronic messaging,
 8 electronic messaging applications, graphical user interfaces, icons, the ability to receive
 9 messages, or the ability to track whether received messages have been read or remain
 10 unread. (*See, e.g.*, ’634 patent, Figs. 1 & 2, 1:41-60, 3:9-15, 3:53-7:31.)

11 Further, the claims do not explain *how* to accomplish the task of modifying the
 12 messaging application icons to include the desired information. Rather, they focus only
 13 on the result—*i.e.*, that the number is somehow displayed—without any explanation of
 14 how the number of unread messengers is tracked or communicated. This is not
 15 sufficient to rescue the claims from abstraction. “[O]ur law demands more” than claims
 16 that “provide[] only a result-oriented solution, with insufficient detail for how a
 17 computer accomplishes it.” *IV/Capital II*, 850 F.3d at 1342; *see also Two-Way Media*,
 18 874 F.3d at 1337 (holding claims ineligible where they recited only “result-based
 19 functional language” without “sufficiently describ[ing] *how* to achieve these results in
 20 a non-abstract way”) (emphasis added).

21 The asserted claims of the ’634 patent do not offer any improvement to the
 22 underlying *functionality* of the wireless device. In fact, nothing happens here at all other
 23 than a number appearing:



24
 25
 26 (’634 Patent, excerpt from Fig. 7.) The specification admits that numerous ways of
 27 visually representing the icon were well known. (’634 Patent, 7:52-54, 8:8-13.) There
 28 is no improvement to the user’s experience as they access the messaging application,

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

no increased efficiency in accessing messages, and no streamlining of the process of retrieving and reviewing messages. The '634 patent claims are thus directed to an abstract idea and offer no concrete improvement to the functioning of wireless devices that would remove them from the realm of abstract ideas.

c. The claims of the '120 patent are directed to the abstract idea of silencing message notifications.

The '120 patent claims all focus on silencing notifications of incoming messages—*i.e.*, setting flags indicating whether the user wants to “silence” a message thread, and using those flags to determine whether to generate a new message notification for a user. The patent acknowledges that electronic “message threads” such as emails and online group discussions and the display of notifications for received messages were part of the generic “background” of the patent. ('120 patent at 1:22-32.) The claims merely take the decades-old concept of selective message delivery—“take a message if someone calls about the Facebook matter”—and apply it in a conventional electronic messaging environment. *See, e.g., FairWarning*, 839 F.3d at 1094 (observing that ineligible claims “merely implement an old practice in a new environment”).

The patent does not purport to provide any concrete new device or technology. On the contrary, the specification proclaims that “[e]mbodiments of the present application are not limited to any particular operating system, mobile device architecture, server architecture, or computer programming language.” ('120 patent at 2:53-55.) The specification embraces that “the current application is not limited to any particular messaging application nor to any particular implementation as to how electronic messages may be stored in memory.” ('120 patent at 11:38-42.) In other words, the claims do not provide any *specific* guidance for accomplishing the claimed functionality. Rather, they articulate only the abstract idea of silencing notifications.

The '120 patent claims are similar to many the Federal Circuit has held to be patent-ineligible. For example, in *FairWarning* the claims recited a technique for detecting fraud by collecting information regarding access to a user’s personal

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 information, analyzing that information according to several “rules” (*e.g.*, how, when
2 and by whom the information had been accessed), and providing notification if it
3 determined that there was improper access after applying the rules. The Federal Circuit
4 found those claims to be directed to the abstract concept of “collecting and analyzing
5 information to detect misuse and notifying a user when misuse is detected”, which has
6 been done by humans to detect fraud “for decades, if not centuries.” *FairWarning*, 839
7 F.3d at 1094-95. The claims of the ’120 patent are *even simpler* than those considered
8 by the Federal Circuit in *FairWarning*, as they apply only a single rule: has the
9 notification flag been set to silent for the particular thread.

10 The ’120 claims also merely cover methods of organizing human activity. For
11 example, in *Intellectual Ventures I LLC v. Capital One Bank (USA)*, the Federal Circuit
12 found that claims directed to methods of storing user-selected pre-set limits on spending
13 in a database and triggering a notification to the user when a limit is met, were “not
14 meaningfully different from the ideas found to be abstract in other cases before the
15 Supreme Court and our court involving methods of organizing human activity.”
16 *IV/Capital I*, 792 F.3d at 1367. Displaying or silencing notifications similarly organizes
17 the basic human activity of communicating by providing notifications for certain
18 communications, and suppressing others.

19 Further, the ’120 patent does not purport to improve the operation of the wireless
20 device itself. Thus, it stands in contrast, for example, to the claims considered by the
21 court in *Enfish*, which purported to improve the functioning of the *computer itself* by
22 providing “increased flexibility, faster search times, and smaller memory
23 requirements.” 822 F.3d at 1337 (citations omitted). The ’120 patent makes no such
24 improvement. It does not add anything to the functioning of the wireless device—no
25 enhancement in performance, efficiency, or usability. And, it recites only conventional
26 and generic technology for carrying out this abstract idea. (*E.g.*, ’120 patent, claim 24
27 reciting “computer readable medium”, “data processor”, and “communication system”);
28 *see also, e.g., TLI*, 823 F.3d at 613-15 (claims recite only conventional and generic

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 computer networking and database technology for carrying out an abstract idea); *see*
2 *also, e.g., Elec. Power*, 830 F.3d at 1354.

3 2. *Alice* Step Two – The Claims of Blackberry’s Patents Recite No 4 Inventive Concept

5 The second *Alice* step requires the Court “to determine whether the claims do
6 significantly more than simply describe [an] abstract method.” *Ultramercial*, 772 F.3d
7 at 715 (citation omitted). In other words, the Court must determine whether the claims
8 “contain[] an inventive concept sufficient to transform the claimed abstract idea into a
9 patent-eligible application.” *Alice*, 134 S. Ct. at 2357 (internal quotations and citation
10 omitted). This inventive concept “must be *significantly more* than the abstract idea
11 itself.” *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349
12 (Fed. Cir. 2016) (emphasis added).

13 Here, the claim limitations do not recite any inventive concept, but instead merely
14 tack well-known concepts, like sending advertising content to users, or displaying or
15 silencing message notifications, onto conventional components, like wireless devices.
16 Courts have repeatedly rejected claims that recite only generic components—like those
17 recited in the ’351, ’929 ’634 and ’120 patents.⁷ *E.g., Affinity/DIRECTV*, 838 F.3d at
18 1262 (finding no inventive concept because “[t]he claim simply recites the use of
19 generic features of cellular telephones, such as a storage medium and a graphical user
20 interface, as well as routine functions, such as transmitting and receiving signals, to
21 implement the underlying idea”); *see also Alice*, 134 S. Ct. at 2357-60 (rejecting
22 argument that recitation of “data processing system,” “communications controller,” or
23 “data storage unit” conferred patent eligibility); *TLI*, 823 F.3d at 613 (rejecting

24 ⁷ For example, the ’351 patent claims recite routine and conventional components
25 including: “mobile device”, “proxy content server”, “computer network”, “proxy
26 content server database”, and “memory locations”. The ’929 patent claims similarly
27 recite: “mobile device”, “server”, and “memory location”. The ’634 patent claims recite
28 routine and conventional components including: “wireless communications device”,
“icon”, “electronic messaging”, “graphical user interface”, and “electronic messages.”
And, the ’120 patent claims recite routine and conventional components including:
“electronic messages”, “data processor”, “non-transitory media”, “electronic
messages”, “message thread” and “flag.”

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 argument that recitation of “telephone unit,” “server,” “image analysis unit,” and
2 “control unit” conferred patent eligibility).

3 Blackberry itself recently argued this point while pursuing a motion to dismiss
4 based on invalidity under Section 101 of a patent relating to obtaining location and
5 orientation information between two portable devices, and then providing directions to
6 get between those two points. *Maxell*, No. 17-cv-1446 (D. Del.). In that case,
7 Blackberry argued that accused infringers “do not have to surrender § 101 arguments
8 simply because the claims recite a physical product” and relied on *Alice* to argue:

9 [I]f that were the end of the § 101 inquiry, an applicant could
10 claim any principle of the physical or social sciences by
11 reciting a computer system configured to implement the
12 relevant concept. Such a result turns *Alice* on its head and
does nothing to prevent patents from monopolizing the basic
tools of scientific and technological work.

13 (Defs.’ Reply Br. in Supp. of Mot. to Dismiss at 9, *Maxell*, No. 17-cv-1446 (D. Del.
14 Feb. 9, 2018) ECF No. 18 (internal quotations and citations omitted).) Blackberry thus
15 concluded that “this Court should grant BlackBerry’s motion to dismiss because
16 ‘device’ claims are not categorically patent eligible.” (*Id.* at 10.) Defendants agree.
17 The four patents that are the subject of this motion may recite “wireless devices,”
18 “communication systems,” and “data processors,” but that does not confer patent
19 eligibility. The ’634 patent concedes that the technical limitations recited in the claims
20 were known in the art by describing prior art systems having graphical user interfaces
21 (GUIs) using well-known icons, the ability to operate on a wireless network and
22 subscribe to several messaging services, including instant messaging services and
23 corporate and personal email accounts. (’634 patent at 1:41-60, 3:9-15, 3:53-7:31, 7:52-
24 54, 8:8-13, Figs. 1 & 2.) The ’351 and ’929 patents make similar concessions,
25 acknowledging that systems for pushing information to users via a wireless network
26 were known. (*See* ’929 patent at 1:37-47.) And the ’120 patent discusses prior art
27 messaging systems that included message threads and use of notifications, such as
28 auditory user alerts, visual alerts, or physical alerts, when new messages are posted.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 ('120 patent at 1:22-46.)

2 Even considering each claim as an “ordered combination” adds nothing to confer
3 patent-eligibility. *Alice*, 134 S. Ct. at 2359-60 (internal quotation and citation omitted).
4 Nothing in the claims “purport[s] to improve the functioning of the computer itself” or
5 to “effect an improvement in any other technology or technical field.” *Id.* at 2359. Nor
6 are the claims “necessarily rooted in computer technology” to “overcome a problem
7 specifically arising in the realm of computer networks.” *DDR Holdings, LLC v.*
8 *Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). Rather, the claims merely
9 “follow[] a conventional order of how data is usually analyzed: data is first *received*,
10 then *processed*, and then signals are *outputted* as a result.” *Immersion Corp. v. Fitbit,*
11 *Inc.*, No. 17-cv-3886, 2018 WL 1156979, at *18 (N.D. Cal. Mar. 5, 2018) (emphasis
12 added). “[M]erely selecting information, by content or source, for *collection, analysis,*
13 *and display*” does not provide an inventive concept. *Elec. Power*, 830 F.3d at 1355
14 (emphasis added).

15 In the case of the '634 patent, the claims follow this same flow, data is: (1)
16 *collected* in the form of “electronic messages including messages from a plurality of
17 different messaging correspondents”, (2) *analyzed* as electronic messages are tallied,
18 and (3) *displayed* by “visually modify[ing]” the icon for the electronic messaging
19 application “to include a numeric character representing the count . . . ” of unread
20 messaging correspondents. ('634 patent, claim 1 at 11:19-21, 11:23-25.) The same is
21 true for the claims of the '120 patent, data is: (1) *collected*, again in the form of
22 electronic messages, (2) *analyzed*, as the flags associated with message threads are read
23 and determined to be “silenced” or not, and (3) *displayed*—or not—in the event the flag
24 is set to “silenced.” ('120 patent, claim 24.) Again for the claims of the '351 and '929
25 patents, data is: (1) *collected* in the form of feedback signals showing location, or
26 information about some other triggering event, (2) *analyzed* to determine whether the
27 triggering event has occurred and if so what information should be selected to be pushed
28 to users as a result of the trigger, and (3) *displayed* to users in the form of advertising

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 content pushed to their mobile devices.

2 Further, none of the patents specify code or algorithms for performing the steps
3 of collecting, analyzing, and displaying. Rather, they simply describe the end goal of
4 each step—to provide or silence a message notification or advertising—in the context
5 of electronic messaging on wireless devices. “[A] mere instruction to implement an
6 abstract idea” with software “cannot impart patent eligibility.” *Alice*, 134 S. Ct. 2358
7 (internal quotation and citation omitted); *see also Dealertrack, Inc. v. Huber*, 674 F.3d
8 1315, 1333-34 (Fed. Cir. 2012) (“The claims are silent as to how a computer aids the
9 method, the extent to which a computer aids the method, or the significance of a
10 computer to the performance of the method.”). Thus, because the four patents at issue
11 in this motion “add nothing of substance to the underlying abstract idea identified at
12 step-one,” of the *Alice* analysis, they are “patent ineligible under § 101.” *Alice*, 134 S.
13 Ct. at 2360.

14 3. Determination of Invalidity Under 35 U.S.C. § 101 Is 15 Appropriate On A Rule 12(b)(6) Motion To Dismiss

16 During the L.R. 7-3 conference, Plaintiff questioned whether the Section 101
17 issues were ripe for determination. Patent eligibility under 35 U.S.C. § 101, however,
18 is a threshold issue of law. *Bilski v. Kappos*, 561 U.S. 593, 602 (2010). Accordingly,
19 the Federal Circuit has “repeatedly affirmed § 101 rejections at the motion to dismiss
20 stage, before claim construction or significant discovery has commenced.”⁸ *Cleveland*
21 *Clinic Found. v. True Health Diagnostics LLC*, 859 F.3d 1352, 1360 (Fed. Cir. 2017)
22 (citing cases).⁹ Indeed, early disposal of such claims can “spare both litigants and courts

23
24 ⁸ No plausible claim construction could confer patent-eligibility because the claims at
25 issue are not directed to any concrete patent-eligible invention. Plaintiff will not be able
26 to identify any proposed claim constructions that could save the claims from invalidity.

27 ⁹ Citing *Genetic Techs. Ltd. v. Meril L.L.C.*, 818 F.3d 1369, 1373-74 (Fed. Cir. 2016)
28 (“We have repeatedly recognized that in many cases it is possible and proper to
determine patent eligibility under 35 U.S.C. § 101 on a Rule 12(b)(6) motion.”); *OIP*
Techs., Inc. v. Amazon.com, Inc., 788 F.3d 1359, 1362 (Fed. Cir. 2015)
(similar); *Content Extraction*, 776 F.3d at 1349 (similar); *buySAFE, Inc. v. Google,*
Inc., 765 F.3d 1350, 1355 (Fed. Cir. 2014) (similar).

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 years of needless litigation.” *I/P Engine, Inc. v. AOL Inc.*, 576 F. App’x 982, 996 (Fed.
2 Cir. 2014). Dismissal now would also bring a semblance of order to a potentially
3 unwieldy nine patent case against multiple parties and product lines.

4 Recent Federal Circuit jurisprudence does not change the rationale for deciding
5 patent-eligibility issues at the initial pleadings stage. In *Aatrix Software*, the Court
6 affirmed that “patent eligibility can be determined at the Rule 12(b)(6) stage.” *Aatrix*
7 *Software, Inc. v. Green Shades Software, Inc.*, 883 F.3d 1121, 1125 (Fed. Cir. 2018);
8 *Voter Verified*, 887 F.3d at 1384 (citing *Aatrix Software*). Similarly in *Berkheimer v.*
9 *HP Inc.* the Federal Circuit recognized that while consideration of patent eligibility
10 under Section 101 may “contain disputes over underlying facts[,] [p]atent eligibility *has*
11 *in many cases been resolved on motions to dismiss . . .*” 881 F.3d 1360, 1368 (Fed.
12 Cir. 2018) (emphasis added). In fact, four claims were affirmed to be patent ineligible
13 in the *Berkheimer* case. As a result, the Federal Circuit acknowledged that “not every
14 § 101 determination contains genuine disputes over the underlying facts material to the
15 § 101 inquiry” and accordingly “[n]othing in this decision should be viewed as casting
16 doubt on the propriety” of determination of issues of patentability under Section 101 at
17 the motion to dismiss stage. *Id.*; *see also Exergen Corp. v. Kaz USA, Inc.*, Nos. 2016-
18 2315 & 2016-2341, 2018 WL 1193529, at *4 (Fed. Cir. Mar. 8, 2018).

19 Blackberry’s attempt to manufacture a factual dispute in the allegations of its
20 FAC (for example by arguing that its claimed inventions were not “well-understood,
21 routine, or conventional”) must fail as these assertions are merely attorney argument
22 which can be disregarded for purposes of the instant motion. (*See* FAC ¶¶ 140, 282,
23 308, 327.) When deciding whether to grant a motion to dismiss, the court must
24 generally accept as true all “well-pleaded *factual* allegations.” *Ashcroft v. Iqbal*, 556
25 U.S. 662, 679 (2009) (emphasis added). However, as this Court recently observed in
26 *International Designs Corp., LLC, et al. v. Hair Art International, Inc.* (“*Int’l*
27 *Designs*”), “the court is not required to accept as true legal conclusions couched as
28 factual allegations.” (Civil Mins. at 4, *Int’l Designs*, No. 17-cv-8411 (C.D. Cal. Apr.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 19, 2018) (Wu, J.) ECF No. 59 (citing *Iqbal*, 556 U.S. at 678).) *See, also, Telesaurus*
 2 *VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (citing *Iqbal*, 556 U.S. 679).
 3 The FAC contains exactly that—legal argument couched as factual allegations.
 4 Defendants’ disagreement with these attorney arguments and legal positions cannot
 5 form the basis for a factual dispute.

6 Further, even assuming, arguendo, that all of the legal conclusions and attorney
 7 arguments included in the FAC were presumed to be true, they still do not save the ’351,
 8 ’929, ’634 or ’120 patents from invalidity under Section 101 because none of them
 9 appear *in the claims themselves*. The two-step test articulated by the court in *Alice*
 10 requires a focus on the *claims*—not the specification, not the state of the art at the time
 11 of the invention, not the motivation of the inventors, and not any other factor. Where
 12 the claims are directed to an abstract idea (*i.e.*, *Alice* step-one is failed), the claims will
 13 also fail at step-two if the required “inventive concept” is not captured in the language
 14 of the claims. (*See, e.g.*, Mem. Op. at 14-15, *3G Licensing, S.A. et al. v. Blackberry*
 15 *Ltd., et al.*, No. 17-cv-0082 (D. Del. March 22, 2018) ECF No. 87 (quoting *Two-Way*
 16 *Media*, 874 F.3d at 1338-39 (“The main problem that Two-Way Media cannot
 17 overcome is that the *claim*—as opposed to something purportedly described in the
 18 specification—is missing an inventive concept.” (emphasis in original)) and
 19 *Berkheimer*, 881 F.3d at 1369 (noting that the improvements over the prior art recited
 20 in the specification are only relevant to step-two of the *Alice* analysis “to the extent they
 21 are captured in the claims.”).) For both the ’634 and ’120 patents, the claims recite only
 22 the abstract concepts of displaying or silencing message notifications, and fail to include
 23 any “inventive concept sufficient to transform the nature of the claim into a patent-
 24 eligible application.” *See RecogniCorp, LLC v. Nintendo Co., Ltd.*, 855 F.3d 1322,
 25 1327 (Fed. Cir. 2017) (internal quotation and citation omitted). The same is true for the
 26 ’351 and ’929 patents—they merely recite the abstract concepts of sending
 27 advertisements or other information to users following a triggering event. Accordingly,
 28 resolution of the issue of patentability of the ’351, ’929, ’634 and ’120 patents is

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

appropriate here, on a Rule 12(b)(6) motion, as the determination does not require resolution of any factual dispute.

III. MOTION TO DISMISS (INDIRECT AND WILLFUL INFRINGEMENT)

A. Plaintiff has Failed to Plead Pre-Suit Notice of the Asserted Patents

It is well-established, and as this Court has previously found, pre-suit knowledge of the patent is a prerequisite to pleading willful infringement in an original complaint. *See Soteria Encryption, LLC v. Lenovo U.S., Inc. et al.*, No. 16-cv-7958, 2017 WL 3449058, at *3 (C.D. Cal. Feb. 27, 2017) (dismissing Plaintiff's claim for willful infringement when it did not alleged pre-suit notice of the asserted patent, reiterating that "a willfulness claim asserted in the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct.")¹⁰; *Puma SE v. Forever 21, Inc.*, No. 17-cv-2523, 2017 WL 4771004, at *3 (C.D. Cal. June 29, 2017) ("Nothing in the *Halo* decision supports [Defendant's] position that a plaintiff pleading willful patent infringement no longer need allege pre-suit knowledge of the patent.") (*Cf. Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016)). Similarly, claims for indirect infringement require knowledge of the asserted patents.¹¹ *See Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015) ("Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.") For the following reasons, Plaintiff's claim of willful and pre-suit indirect infringement in Counts I-IX should be dismissed.¹²

First, the FAC does not provide any allegations that Defendants had pre-suit knowledge of six of the nine patents at issue.¹³ For these six patents (Counts IV-IX),

¹⁰ As this Court did in *Soteria*, the FAC at issue here (which was never served and contains identical allegations) should be treated the same as the original complaint. *Soteria*, 2017 WL 3449058, at *3 n.2.

¹¹ This motion to dismiss is directed solely at pre-suit, not post-suit, indirect infringement allegations. Defendants recognize that this Court has permitted *post*-suit indirect infringement allegations to survive the pleadings stage based on knowledge of the patent through the complaint. *See Soteria*, 2017 WL 3449058, at *2.

¹² Plaintiff's indirect and willful infringement allegations are contained at paragraphs 121-130, 148-157, 176-185, 203-212, 233-242, 262-271, 289-298, 315-319, and 334-338 of the FAC.

¹³ U.S. Patents 8,301,713; 8,429,236; 8,677,250; 9,349,120; 8,296,351; 8,676,929.

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 the FAC alleges only that Defendants have had actual knowledge “since at least as early
2 as the filing and/or service of this Complaint.” (*See, e.g.*, FAC, ¶ 204.) This statement
3 fails to provide any allegation as to Defendants’ knowledge of the patents prior to filing
4 of the FAC, let alone facts sufficient to meet the *Twombly/Iqbal* standard. Plaintiff’s
5 failure to allege pre-suit notice is fatal to its claims.

6 **Second**, Plaintiff’s allegations of pre-suit notice as to the seventh patent (’173)
7 are factually deficient. Plaintiff alleges that “Facebook knew or should have known of
8 the ’173 Patent at least as early as March 7, 2014[,] . . . March 21, 2014[,] . . . or April
9 24, 2014” when the patent office cited the ’173 Patent during prosecution of three of
10 Facebook’s patent applications. (*See* FAC, ¶ 178.) But courts have repeatedly found
11 that a patent examiner’s reference to the patent-in-suit as prior art during prosecution of
12 a defendant’s own patents does not constitute actual knowledge of the patent by the
13 defendant. *See Chalumeau Power Sys. LLC v. Alcatel–Lucent*, No. 11-cv-1175, 2012
14 WL 6968938, at *1 (D. Del. July 18, 2012); *see also Spherix Inc. v. Juniper Networks,*
15 *Inc.*, No. 14-cv-0578, 2015 WL 1517508, at *3 (D. Del. Mar. 31, 2015) (“The fact that
16 the ’123 patent was referenced during prosecution of two of defendant’s over 1,700
17 patents [] is not compelling evidence of knowledge.”). And for good reason: here, it is
18 not reasonable to assume that Facebook had knowledge of the patent at issue simply
19 because it was cited by the patent office during the prosecution of three out of hundreds
20 of Facebook’s patent applications. Thus, any allegations based on the patent office’s
21 citation of the ’173 patent are insufficient to establish pre-suit notice.

22 **Third**, Plaintiff’s allegations with respect to the remaining two patents (’961 and
23 ’634) cannot support a finding of pre-suit notice. The FAC alleges that Defendants
24 were made aware of these patents through notice letters sent from BlackBerry to
25 WhatsApp on March 25, 2016 and April 15, 2016, respectively. (*See* FAC, ¶ 122, 149.)
26 [REDACTED]
27 [REDACTED]

28 ¹⁴ Defendants have concurrently filed a request for judicial notice of the NDA entered

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]

20 [REDACTED] Therefore, Plaintiff's willful and pre-suit indirect
 21 infringement allegations must be dismissed.

22 _____
 23 into between the parties. *See* Defs.' Req. for Judicial Notice in Supp. of Mot. to
 24 Dismiss. The Ninth Circuit has recognized that "a court may look beyond the
 25 pleadings without converting the Rule 12(b)(6) motion into one for summary
 26 judgment." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.
 27 2002). Specifically, courts can consider a document when its contents are not
 28 explicitly alleged in, or physically attached to, the complaint, if the plaintiff's claim
 depends on the contents of the document and there is no dispute as to the document's
 authenticity. *See Knievel v. ESPN*, 393 F.3d 1068, 1072, 1076 (9th Cir. 2005). Here,
 Plaintiff's claims of willful infringement as to the '961 and '634 Patents depend on
 the agreement. (*See*, FAC, ¶¶ 122, 149 (referencing NDA).)

15 [REDACTED]

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

B. Plaintiff Also Fails to Plead Facts Sufficient to Satisfy the “Egregiousness” Element of Willful Infringement

Even if Defendants had pre-suit knowledge, Plaintiff’s willful infringement allegations still fail. As this Court has recognized, for cases of willful infringement “the patentee must show that the infringement was an ‘egregious case[] of misconduct beyond typical infringement’.” (Civil Mins. at 9, *Int’l Designs*, No. 17-cv-8411 (C.D. Cal. Feb. 22, 2018) ECF No. 40 (citing *Halo*, 136 S. Ct. at 1935) (striking willful infringement allegations).) In this case, Plaintiff pleads nothing more than boilerplate language lacking any factual support that make it plausible Defendants engaged in egregious conduct. These are precisely the kind of allegations that fail to meet the *Twombly/Iqbal* standard. See *Emazing Lights LLC v. De Oca*, No. 15-cv-1561, 2016 WL 7507765, at *2 (C.D. Cal. June 20, 2016) (finding that statements such as “[Defendant’s] infringements of the Subject Patent . . . are willful, wanton, deliberate, without license, and with full knowledge of Plaintiff’s rights and ownership therein,” and “[Defendant] acted in bad faith, in a knowing, willful, malicious, fraudulent and oppressive manner, and with the intent and purpose of advancing their own gain at the direct expense of Plaintiff’s rights . . .” are legal conclusions without factual basis that are deemed insufficient under the *Twombly/Iqbal* standard). Therefore, Plaintiff’s willful infringement claims as to all asserted patents should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to dismiss, and hold that the ’351, ’929, ’634, and ’120 patents are invalid under 35 U.S.C. § 101. Defendants also request that the Court dismiss Plaintiff’s willful and pre-suit indirect infringement allegations as to all patents-in-suit.

Dated: June 7, 2018

COOLEY LLP

/s/ Heidi L. Keefe

Heidi L. Keefe (178960)

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COOLEY LLP
HEIDI L. KEEFE (178960)
(hkeefe@cooley.com)
MARK R. WEINSTEIN (193043)
(mweinstein@cooley.com)
MATTHEW J. BRIGHAM (191428)
(mbrigham@cooley.com)
LOWELL D. MEAD (223989)
(lmead@cooley.com)
3175 Hanover Street
Palo Alto, CA 94304-1130
Telephone: (650) 843-5000
Facsimile: (650) 849-7400

COOLEY LLP
MICHAEL G. RHODES (116127)
(rhodesmg@cooley.com)
101 California Street
5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Attorneys for Defendants
FACEBOOK, INC., WHATSAPP INC.,
INSTAGRAM, INC., and INSTAGRAM,
LLC