

In the
United States Court of Appeals
for the Federal Circuit

STEVEN E. BERKHEIMER,

Plaintiff-Appellant,

v.

HEWLETT-PACKARD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Case No. 1:12-cv-09023.
The Honorable **John Z. Lee**, Judge Presiding.

**RESPONSE OF PLAINTIFF-APPELLANT
TO PETITION FOR REHEARING *EN BANC***

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Dated: March 29, 2018



UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Steven E. Berkheimer v. HP Inc., f/k/a Hewlett-Packard Company

Case No. 2017-1437

CERTIFICATE OF INTEREST

Counsel for the:

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

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

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

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

Jonathan L. Loew, Much Shelist P.C.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See Fed. Cir. R. 47.4(a)(5) and 47.5(b).* (The parties should attach continuation pages as necessary).

Undersigned counsel is unaware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

3/29/2018

Date

/s/ James P. Hanrath

Signature of counsel

James P. Hanrath

Printed name of counsel

Please Note: All questions must be answered

counsel of record via the Court's CM/ECF system

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Reset Fields

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INTRODUCTION

Despite the vast array of patent arts, the diversity and complexity of patents, and case-specific applications thereof, HP argues that patent eligibility under 35 U.S.C. § 101 is in all cases a question of law to be decided solely by examination of the patent claims, without examining underlying facts or truly assessing the specification teachings of a patent.

In fact, the two-step framework for determining patent eligibility under *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) and *Mayo Collab. Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012) directs a more nuanced approach, as this Court has repeatedly recognized. In *some* cases, the patent-eligibility analysis under 35 U.S.C. § 101 involves underlying issues of fact. Here, Berkheimer's '713 patent specification describes inventive features "captured" by claims 4-7 that create a factual dispute regarding whether the claimed invention contains limitations beyond those well-understood, routine, and conventional to a skilled artisan at the time of the patent. These inventive features, captured by the claims, provide an inventive concept. They are factually probative of whether they transform an abstract idea into a patent-eligible application by providing benefits that improve database technology and computer functionality.

The panel's case-specific application of the *Alice/Mayo* framework does not necessitate rehearing. The unanimous Opinion does not create new rules or conflict

with other decisions. The panel simply held that *in this case*, the legal conclusion of patent eligibility has factual underpinnings. HP’s suggestion that the Opinion will govern all patent eligibility scenarios is unwarranted.

THE OPINION

The panel correctly followed the Supreme Court’s instructions in *Alice* and the precedents of this Court in its § 101 analysis. Op. at 11-12. The panel vacated a summary judgment holding that *certain* claims of Berkheimer’s U.S. Patent No. 7,447,713 were patent ineligible. The panel held that claims 4-7 contained limitations “directed to the arguably unconventional inventive concept described in the specification,” and whether these claims “perform well-understood, routine, and conventional activities to a skilled artisan is a genuine issue of material fact making summary judgment inappropriate with respect to these claims.”¹ *Id.* at 17. These claims, held the panel, “recite a specific method of archiving that, according to the specification, provides benefits that improve computer functionality,” and “there is at least a genuine issue of material fact in light of the specification regarding whether

¹ The panel affirmed summary judgment that ‘713 patent claims 1-3 and 9 were patent ineligible because they did not recite any limitations requiring the allegedly unconventional features of eliminating redundancy or one-to-many propagation; thus these claims could not provide the inventive concept necessary to satisfy § 101. Op. at 15-16.

claims 4-7 archive documents in an inventive manner that improves these aspects of the disclosed archival system.”² *Id.*

The panel agreed that many cases involving *Alice* have been resolved on motions to dismiss or summary judgment, and its Opinion should not

be viewed as casting doubt on the propriety of those cases. When there is no genuine issue of material fact regarding whether the claim element or claimed combination is well-understood, routine, conventional to a skilled artisan in the relevant field, this issue can be decided on summary judgment as a matter of law.

Op. at 13. The Opinion does not bar judges from making patent-eligibility decisions on dispositive motions. The panel affirmed the district court’s summary judgment determination that other claims of Berkheimer’s patent were “invalid as ineligible” under § 101 because there was no genuine dispute that those claims were conventional and did not “capture” the specification’s taught improvement of computer functionality. Op. at 15-16. But in *some* situations, as here, fact-finding as to whether a claimed invention improves computer functionality or covers

² The ‘713 patent (Appx50-84) teaches other advantageous benefits attributable to the claims such as: (1) object and object relationship access, editing, and reconciliation for compliance with standards or rules pertaining to object redundancy and object and object relationship clarification, differentiation, integrity, and accuracy, (2) management of reconciled objects and object relationships with control of user access thereto and workflow thereon, and (3) system efficiencies, reduced storage space, and time and cost savings. (Appx60-67) at 2:66-3:14; 4:50-5:49; 9:48-61, 14:38-15:14, and 16:41-60.

something more than what was routine or conventional underlies the legal conclusion of patent eligibility.

ARGUMENT AGAINST REHEARING EN BANC

I. THE PANEL CORRECTLY CONSIDERED PATENT ELIGIBILITY

The panel correctly held that while patent eligibility is ultimately a question of law, the district court erred in concluding there are no underlying factual questions in a § 101 inquiry. Op. at 17. The district court’s error arose from its perception of its role in determining patent eligibility:

To undertake the § 101 inquiry in this case, the Court need only consider the asserted claims of the ‘713 Patent, in light of the claim construction order, and apply *Alice*’s two-part test to those claims; no inquiry into underlying factual information is needed.

(Appx12.) The district court concluded that Berkheimer’s claims do not contain an inventive concept under *Alice* step two because they describe “steps that employ only ‘well-understood, routine, and conventional’ computer functions” and are claimed “at a relatively high level of generality.” *Berkheimer v. Hewlett-Packard Co.*, 224 F. Supp. 3d 635, 647-48 (N.D. Ill. 2016) *aff’d in part, vacated in part*, 881 F.3d 1360 (Fed. Cir. 2018) (quoting *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1348 (Fed. Cir. 2014)). The district court made this conclusion without any meaningful analysis, evidentiary support, or consideration of how the ‘713 specification informs the claims and the advantages

and technical improvements attributable to the claims. The panel correctly found this to be error. Op. at 17.

A. The Panel Correctly Recognized That Certain Claims Here Raise Factual Issues Of Inventive Concept Under *Alice* Step 2.

The panel correctly examined the ‘713 patent as informing its *Alice* step two analysis on whether the patent claims transform an abstract idea into a patent-eligible application by containing limitations beyond those well-understood, routine, and conventional to a skilled artisan at the time of the patent to “capture” an inventive concept *or* by providing benefits that improve computer functionality. The panel succinctly summarized Berkheimer’s patent:

The ‘713 patent relates to digitally processing and archiving files in a digital asset management system. ‘713 patent at 1:11-12. The system parses files into multiple objects and tags the objects to create relationships between them. *Id.* at 1:13-18, 16:26-36. These objects are analyzed and compared, either manually or automatically, to archived objects to determine whether variations exist based on predetermined standards and rules. *Id.* at 13:14–20, 16:37–51. This system eliminates redundant storage of common text and graphical elements, which improves system operating efficiency and reduces storage costs. *Id.* at 2:53–55, 16:52–54. The relationships between the objects within the archive allow a user to “carry out a one-to-many editing process of object-oriented data,” in which a change to one object carries over to all archived documents containing the same object. *Id.* at 15:65–16:2, 16:52–60.

Op. at 2.

For *Alice* step 1, the panel held that Berkheimer’s method claims 1-3 and 9 are directed to the abstract idea of parsing and comparing data; claim 4 is directed

to the abstract idea of parsing, comparing, and storing data; and claims 5-7 are directed to the abstract idea of parsing, comparing, storing, and editing data.³ Op. at 10 (citing *In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 613 (Fed. Cir. 2016) and *Content Extraction*, 776 F.3d at 1347).

For *Alice* step 2, the panel “consider[ed] the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent eligible application.” *Id.* at 11-12 (citing *Alice*, 134 S. Ct. at 2355 quoting *Mayo*, 566 U.S. at 78-79). Contrary to HP’s petition at p. 3, the panel did not modify or announce a new *Alice* step two test. The panel recognized – consistent with *Alice* and this Court’s jurisprudence – that the second step of the *Alice* test is satisfied when claim limitations capturing an inventive concept “involve more than performance of ‘well understood, routine, [and] conventional activities previously known to the industry.’” *Id.* at 12 (citing *Content Extraction*, 776 F.3d at 1347-48) (quoting *Alice*, 134 S. Ct. at 2359); see also *Intellectual Ventures I LLC v. Erie Indem. Co.*, 850 F.3d 1315, 1328 (Fed. Cir. 2017) (the features constituting the inventive concept in step two of *Mayo/Alice* “must be more than ‘well-understood, routine, conventional activity’”) (quoting

³ The panel found that even though the parser separates the documents or items into smaller components than the claims determined to be abstract in *Content Extraction* and *TLI*, the concept is the same. Op. at 11.

Mayo, 566 U.S. at 79)); *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1262 (Fed. Cir. 2016) (same); *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016) (it is “now standard for a § 101 inquiry to consider whether various claim elements simply recite ‘well-understood, routine, conventional activit[ies].’”) (quoting *Alice*, 134 S. Ct. at 2359).

Here, the ‘713 specification’s teaching on the prior art and the benefits and advantages of the claimed inventions in improvement of computer functionality raised genuine concrete questions of fact affecting the *Alice* step two inventive concept inquiry as applied to certain of its asserted claims. As the panel found:

The specification describes an inventive feature that stores parsed data in a purportedly unconventional manner. This eliminates redundancies, improves system efficiency, reduces storage requirements, and enables a single edit to a stored object to propagate throughout all documents linked to that object. The improvements in the specification, to the extent they are captured in the claims, create a factual dispute regarding whether the invention describes well-understood, routine, and conventional activities, so we must analyze the asserted claims and determine whether they capture these improvements. (citations omitted)

Op. at 15.

The panel found that claims 1-3 and 9 did not recite an inventive concept sufficient to transform the abstract idea into a patent eligible application. They had conventional limitations which failed to transform the abstract idea into a patent-eligible invention. They did not recite storage of an object structure or one-to-many propagation editing. *Id.* at 15-16.

Claims 4-7, however, contained limitations for the unconventional inventive concept described in the specification. Claim 4 recited “storing a reconciled object structure in the archive without substantial redundancy.” The specification stated that storing object structures in the archive without substantial redundancy improved system operating efficiency and reduced storage costs. *Id.* at 16, ‘713 patent at 16:52–58. The specification also stated that known asset management systems did not archive documents in this manner. *Id.*, ‘713 patent at 2:22–26. Claim 5 depended from claim 4 and further recited “selectively editing an object structure, linked to other structures to thereby effect a one-to-many change in a plurality of archived items.” The specification stated that one-to-many editing substantially reduced the effort needed to update files because a single edit can update every document in the archive linked to that object structure. *Id.*, ‘713 patent at 16:58-60. According to the specification, conventional digital asset management systems cannot perform one-to-many editing because they store documents with numerous instances of redundant elements, rather than eliminating redundancies through the storage of linked object structures. *Id.*, ‘713 patent at 1:22-55, 4:4-9, 16:52-60. Claims 6-7 depended from claim 5 and therefore contained the same limitations. These claims “recite a specific method of archiving that, according to the specification, provides benefits that improved computer functionality.” *Id.* at 17. The panel thus concluded that, at this stage of the case:

there is at least a genuine issue of material fact in light of the specification regarding whether claims 4–7 archive documents in an inventive manner that improves these aspects of the disclosed archival system. Whether claims 4–7 perform well-understood, routine, and conventional activities to a skilled artisan is a genuine issue of material fact making summary judgment inappropriate with respect to these claims.⁴

Id.

B. The *Alice* Patent-Eligibility Analysis Can Involve Underlying Issues of Fact.

Factual issues *can* be embedded in the § 101 inquiry. Sometimes, subsidiary fact-finding is necessary to the legal determination of patent eligibility. That is the case here due to the nature of claims 4-7 and the specification teachings thereon.

The panel acknowledged that patent eligibility under 35 U.S.C. § 101 is ultimately an issue of law, but also observed that the *Alice* patent eligibility inquiry “*may* contain underlying issues of fact.” Op. at 12. (citing *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016)) (emphasis in original) (quoting *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1340-41 (Fed. Cir. 2013) (“Patent eligibility under § 101 presents an issue of law that ... may contain underlying factual issues.”)).

⁴ The Opinion did not say there is a right to jury trial on § 101 factual issues. *See Exergen Corp. v. Kaz USA*, Nos. 16-2315, 16-2341, 2018 WL 1193529 at *6 (Fed. Cir. Mar. 8, 2018) (nonprecedential) (“Whether the Seventh Amendment guarantees a jury trial on any factual underpinnings of § 101 is a question which awaits more in-depth development and briefing than the limited discussion in this case.”)

The panel noted that the Supreme Court, in *Mayo*, acknowledged that the § 101 inquiry “might sometimes overlap” with other fact-intensive inquiries like novelty under § 102. Op. at 12 (citing *Mayo*, 566 U.S. at 90 (“in evaluating the significance of additional steps, the § 101 patent-eligibility inquiry and, say, the § 102 novelty inquiry might sometimes overlap”)); *see also Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1347 (Fed. Cir. 2015) (“pragmatic analysis of § 101 is facilitated by considerations analogous to those of §§ 102 and 103 Courts have found guidance in deciding whether the allegedly abstract idea ... is indeed known, conventional, and routine, or contains an inventive concept, by drawing on the rules of patentability”). Thus the panel reasoned: “Like indefiniteness, enablement, or obviousness, whether a claim recites patent eligible subject matter is a question of law which may contain underlying facts.” Op. at 12 (citing *Akzo Nobel Coatings, Inc. v. Dow Chem. Co.*, 811 F.3d 1334, 1343 (Fed. Cir. 2016) (“Indefiniteness is a question of law that we review de novo, ..., subject to a determination of underlying facts.”)); *Alcon Research Ltd. v. Barr Labs., Inc.*, 745 F.3d 1180, 1188 (Fed. Cir. 2014) (“Whether a claim satisfies the enablement requirement of 35 U.S.C. § 112 is a question of law that we review without deference, although the determination may be based on underlying factual findings, which we review for clear error.”); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 839 F.3d 1034, 1047 (Fed. Cir. 2016) (en banc) (“Obviousness is a question of law based on

underlying facts.”). *See also Teva Pharm. USA Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015) (claim construction may involve extrinsic subsidiary fact finding reviewed for clear error).

The panel recognized that the § 101 inquiry involves a basic question of what is the invention. This is not simply a question of reading the claims; it involves deeper inquiries as to what the invention is “directed to” at *Alice* step one, and—if the claims are directed to one of the exceptions to patent eligibility—whether they add an “inventive concept” at *Alice* step two. *Alice*, 134 S. Ct. at 2355. This requires a factual inquiry to evaluate the technological context of an invention, especially when assessing an inventive concept over what was well-understood, routine, and conventional to a skilled artisan at the time of the invention (which itself is an extrinsically facing historical fact variable based on a patent’s priority date – namely October 2000 for the ‘713 patent).⁵

HP and its amici claim the panel has opened the floodgates for patent assertion entities to manufacture factual allegations, advance an inexhaustible array of

⁵ No prior art was before the district court. HP proffered no evidence to establish what was well-known, conventional, or routine relative to the claims. It merely maintained that “[p]atent eligibility under 35 U.S.C. § 101 is a question of law determined by examining the patent claims.” (Appx1257-1260, Appx1276-1277, Appx1282). The ‘713 specification teaches performance of claims 4-7 did not occur in out-the-box, off-the-shelf computers of October 2000. Op. at 16, ‘713 patent at 2:22-26.

extrinsic evidence, proffer expert opinions, merely write bare assertions⁶ of improvements or advantages into a specification, or create a material issue of fact by the draftsman's or litigant's art. This purported "sea change" is illusory. Dispositive motions may still be made. The panel does not protect claims involving "nonce" word devices, generic computer components, ubiquitous elements, "apply it" directives, expected functionalities, longstanding commercial practices, methods of organizing human activities, and so on. Claims and their informing specifications will still be scrutinized under the *Alice* standard.

II. THE PANEL CORRECTLY APPLIED THE LAW

The panel's consideration of the '713 specification as informing the question of patent eligibility of claims 4-7 is consistent with precedents of both the Supreme Court, (namely *Alice*, *Mayo*, *Teva*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)), and this Circuit.

The *Alice/Mayo* test involves underlying factual questions on inventive concept (e.g., what was inventive versus what was merely routine or conventional *at the time of the invention*). The *Mayo* Court analyzed the written description of the patent at issue in determining whether the claims were inventive. 566 U.S. at 79 ("As

⁶ The Opinion's discussion of the '713 claims and its specification teachings are not bare assertions. The claimed invention is detailed at Figs. 2B, 3, 4, 5A and 5B, and their associated specification disclosures at 2:57-4:49, 6:24-7:16, 8:21-9:61, 16:25-18:14, and as further exemplified at the "attachment" examples of columns 19 to 46. (Appx50-85)

the patents state, methods for determining metabolite levels were well known in the art. ‘623 patent, col.9, ll.12-65, 2 App. 11.”); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498, (1984) (“It surely does not stretch the language of [Rule 52(a)] to characterize an inquiry into what a person knew at a given point in time as a question of ‘fact.’”). In *Microsoft*, the Supreme Court expressly noted that § 101 is a “prerequisite for issuance of a patent,” that it involves factual determinations by the PTO during examination (“for instance, the state of the prior art in the field and the nature of the advancement embodied in the invention”), and that those same factual questions bear on a § 101 patent-eligibility invalidity defense. 564 U.S. at 96-97. And though it made no mention of the presumption of validity in *Alice*, the Supreme Court has continued to recognize since *Alice* that questions of law can turn on underlying findings of fact entitled to deferential clear error review. *Teva*, 135 S. Ct. at 841 (claim construction).

This Court, too, has often relied on the written description as informing the claims when performing the § 101 analysis. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016) (“The specification also teaches that the self-referential table functions differently than conventional database structures.”); *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016) (consulting specification to find the asserted claims contained specific rules-based limitations to the method of automated lip-synchronization); *Bascom*, 827 F.3d at

1350 (“The inventive concept described and claimed in the ‘606 patent is the installation of a filtering tool at a specific location, remote from the end-users, with customizable filtering features specific to each end user.”); *Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1306 (Fed. Cir 2016) (specification’s discussion of the claims’ “distributed architecture” to achieve a technological solution to a technological problem specific to computer networks recited a sufficient “inventive concept”); *Thales Visionix, Inc. v. United States*, 850 F.3d 1343, 1348-49 (Fed. Cir. 2017) (specification discussed non-conventional use of inertial sensors and a mathematical equation to reduce errors in measuring the location and orientation of an object relative to a moving platform amounted to a technical improvement); *Visual Memory LLC v. Nvidia Corp.*, 867 F.3d 1253, 1262 (Fed. Cir. 2017) (specification discussed memory system with “programmable operational characteristics” configurable for use with different processors without the accompanying reduction in performance).

The panel followed precedent when discussing the ‘713 patent’s written description and the factual issues thereby raised in evaluating the inventive concept of claims 4-7 under *Alice*. The record showed the inventor’s improvements over the state of the art. Thus the panel held that “to the extent [such improvements] are captured in the claims, [they] create a factual dispute regarding whether the

invention describes well-understood, routine, and conventional activities[.]” Op. at 15.

III. REHEARING IS UNWARRANTED

HP and its amici offer no compelling reason why the determination of whether something is well-understood, routine, and conventional to a skilled artisan at the time of a patent is *not* a factual inquiry in *some* cases. In assessing inventive concept, what is well-understood, routine, and conventional depends on the particular claim limitations at issue, the priority date of the same, and the specification teachings about the claims and any benefits and advantages attributable to them. Similarly, the *Alice* step two inquiry can have factual issues on whether a claim improves computer functionality as opposed to merely using a computer as a tool.

HP and its amici do not explain why, given the immense landscape of patent endeavor and fact complexities thereof, the legal conclusion of eligibility must always, in all situations, be devoid of factual inquiry and genuinely disputed positions. Indeed, that is not the law. *Alice* and its progeny direct that the search for inventive concept factually inquire whether a claim directed to an abstract idea has “something more” which transforms the abstract idea into a patent-eligible application; whether a claim contains limitations beyond those well-understood, routine, and conventional to a skilled artisan at the time of the patent; whether a claim solves a technical problem; and whether a claim provides benefits that improve

a technical art or advances computer functionality. Such inquiries are fact dependent and fact intensive, ill-suited for judicial decree based on attorney argument, subjective evaluation, and unstated factual explanation. The answer in all cases is not invariably a pure legal judgment. The issue of whether an invention is sufficiently innovative for patent eligibility must be evaluated in light of the scientific and historic facts.

The panel follows the Supreme Court's analysis in *Alice*, which is the same analysis this Court has been applying case by case. There is no reason to extinguish that process now for a broad en banc pronouncement, especially when Berkheimer's case is a case-specific application of established precedent.

CONCLUSION

HP's Petition should be denied.

Dated: March 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitations of Fed. Cir. R. 35(e)(4). This response contains 3,811 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fed. Cir. R. 35(c)(2).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen (14) point Times New Roman font.

Dated: March 29, 2018

/s/ James P. Hanrath _____

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CERTIFICATE OF SERVICE

I, Rose E. Olejniczak, being duly sworn according to law and being over the age of 18, upon my oath deposes and states that:

Counsel Press was retained by Much Shelist P.C., Attorneys for Plaintiff-Appellant, Steven E. Berkheimer, to print this document. I am an employee of Counsel Press.

On March 29, 2018, Much Shelist P.C. authorized me to electronically file the foregoing Response of Plaintiff-Appellant to Petition for Rehearing *En Banc* with the Clerk of the Federal Circuit using the CM/ECF System, which will serve e-mail notice of such filing on the following attorneys:

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Any counsel for Amicus Curiae appearing at the time of this filing will also be served via CM/ECF e-mail notice.

Eighteen paper copies of the response will also be sent to the Clerk of the Court for filing, via Federal Express, within two business days.

March 29, 2018

/s/ Rose E. Olejniczak
Rose E. Olejniczak