UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 18-3629-GW(JCx)	Date	October 25, 2018
Title	*Realtime Adaptive Streaming LLC v. Google LLC, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
C. Jay Chung	Ted G. Dane

PROCEEDINGS: SCHEDULING CONFERENCE

The Court's Final Ruling is circulated and attached hereto. Defendants' Motion [30] would be DENIED without prejudice as to the Claims of the '046 and '477 Patents and GRANTED without prejudice as to Claims 15-30 of the '535 Patent. Plaintiff may file an amended complaint with respect to the '535 Patent within 14 days of this Order.

Court and counsel discuss scheduling. The Court sets the following:

EVENT	COURT'S FINAL
Rule 26(a) Initial Disclosures Due	November 8, 2018
Last Day to Join Additional Parties Without Leave	November 9, 2018
Last Day to Amend Complaint Without Leave	November 9, 2018
Disclosure of Asserted Claims and Infringement Contentions (P.R. 3-1); Document Production Accompanying Disclosure (P.R. 3-2)	November 21, 2018
Last Day to Amend Responsive Pleadings Without Leave	November 30, 2018
Disclosure of Invalidity Contentions (P.R. 3-3); Document Production Accompanying Invalidity Contentions (P.R. 3-4)	January 11, 2019
Preliminary Election of Asserted Claims (no more than 10 asserted claims per patent, and not more than a total of 32 claims)	January 23, 2019

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Initials of Preparer JG

Preliminary Election of Asserted Prior Art (no more than 12 asserted references per patent, and not more than a total of 40 references)	February 8, 2019
Mutual Exchange of Proposed Terms for Construction (P.R. 4-1)	February 28, 2019
Exchange of Preliminary Claim Constructions and Extrinsic Evidence (P.R. 4-2)	March 14, 2019
Joint Claim Construction and Prehearing Statement (P.R. 4-3)	March 28, 2019
Completion of Claim Construction Discovery (P.R. 4-4)	April 25, 2019
Simultaneous Opening Claim Construction Briefs	May 6, 2019
Simultaneous Responsive Claim Construction Briefs	May 20, 2019
Markman Tutorial	June 3, 2019 at 8:30 a.m.
Markman Hearing	June 17, 2019 at 8:30 a.m.
Comply with P.R. 3-7 (Advice of Counsel Defenses)	July 12, 2019
Final Election of Asserted Claims (no more than 5 asserted claims per patent, and no more than a total of 16 claims)	July 12, 2019
Deadline to Complete Fact Discovery	August 12, 2019
Final Election of Asserted Prior Art References (no more than 6 prior art references per patent, and no more than 20 total references)	August 19, 2019
Deadline to Complete ADR	August 23, 2019
Post Mediation Status Conference	August 29, 2019 at 8:30 a.m.
Serve Disclosures for Expert Witnesses by Party with the Burden of Proof	September 9, 2019
Serve Disclosures for Rebuttal Expert Witnesses	October 7, 2019
Deadline to Complete Expert Discovery	November 1, 2019

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Initials of Preparer JG

File Opening Dispositive Motions and any Motions to Strike Expert Testimony (including Daubert motions)	November 15, 2019
File Responses to Dispositive Motions and Motions to Strike Expert Testimony (including Daubert motions)	December 13, 2019
File Replies to Dispositive Motions and Motions to Strike Expert Testimony (including Daubert motions)	January 3, 2020
Hearing on Dispositive Motions and Motions to Strike Expert Testimony	January 23, 2020
Serve Pretrial Disclosures (Witness Lists, Deposition Designations, Exhibit Lists, Short Version of Case, Proposed Jury Instructions, Proposed Verdict Forms) by the Party with the Burden of Proof	February 21, 2020
File Motions in Limine	February 21, 2020
Serve Objections to Pretrial Disclosures; and Serve Rebuttal Pretrial Disclosures	March 6, 2020
File Oppositions to Motions in Limine	March 6, 2020
Serve Objections to Rebuttal Pretrial Disclosures	March 13, 2020
File Replies to Motions in Limine	March 16, 2020
Parties to meet and confer to create joint proposed jury instructions, joint proposed verdict form, joint proposed short version of case, joint exhibit lists, joint deposition designations, and joint witness lists	March 20, 2020
Parties to file joint proposed jury instructions, joint proposed verdict form, joint proposed short version of case, joint exhibit lists, joint deposition designations, and joint witness lists	March 23, 2020
Final Pre-Trial Conference	March 26, 2020 at 8:30 a.m.
First Day Jury Trial	April 7, 2020 at 9:00 a.m.

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Initials of Preparer JG

I. Introduction

On April 30, 2018, Plaintiff Realtime Adaptive Streaming LLC ("Realtime") sued Defendants Google LLC and YouTube, LLC ("Defendants") for patent infringement. Docket No. 1. Realtime currently alleges that Defendants infringe five patents owned by Realtime by assignment. *See* First Amended Complaint ("FAC"), Docket No. 25; *see also* Docket No. 1.

Defendants have moved for partial dismissal of the FAC on the basis that three of Realtime's asserted patents are invalid under 35 U.S.C. § 101. *See generally* Docket No. 30-1; *see also* Docket No. 31 (Realtime's Opposition), Docket No. 32 (Defendants' Reply). Specifically, Defendants argue that Realtime's infringement claims as to U.S. Patent Nos. 8,934,535 ("the '535 Patent"), 9,769,477 ("the '477 Patent"), and 7,386,046 ("the '046 Patent") must be dismissed.

For the reasons stated, Defendants' Motion (Docket No. 30) would be **DENIED** without prejudice as to the claims of the '046 and '477 Patents and **GRANTED** without prejudice as to Claims 15-30 of the '535 Patent. Plaintiff may file an amended complaint with respect to the '535 Patent within 14 days of this Order.

II. Background

The patents challenged by Defendants' Motion relate to systems and methods for data compression and decompression. The '046 Patent issued June 10, 2008 and is titled "Bandwidth Sensitive Data Compression and Decompression." The FAC alleges that Defendants infringe at least Claim 40 of the '046 Patent (FAC ¶ 16), which states,

> 40. A system comprising:
> a data compression system for compressing and decompressing data input;
> a plurality of compression routines selectively utilized by the data compression system, wherein a first one of the plurality of compression routines includes a first compression algorithm and a second one of the plurality of compression routines includes a second compression algorithm; and
> a controller for tracking throughput and generating a control signal to select a compression routine based on the throughput, wherein said tracking throughput comprises tracking a number of pending access requests to a storage device; and
> wherein when the controller determines that the throughput falls below a predetermined throughput threshold, the controller commands the

data compression engine to use one of the plurality of compression routines to provide a faster rate of compression so as to increase the throughput.

'046 Patent, Claim 40.

The '535 Patent issued January 13, 2015 and is titled "Systems and Methods for Video and Audio Data Storage and Distribution." The FAC alleges that Defendants infringe at least Claim 15 of the '535 Patent (FAC ¶ 34), which states,

15. A method, comprising:
determining a parameter of at least a portion of a data block;
selecting one or more asymmetric compressors from among a plurality of compressors based upon the determined parameter or attribute;
compressing the at least the portion of the data block with the selected one or more asymmetric compressors to provide one or more compressed data blocks; and
storing at least a portion of the one or more compressed data blocks.

'535 Patent, Claim 15.

The '477 Patent issued September 19, 2017 and is titled "Video Data Compression Systems." The FAC alleges that Defendants infringe at least Claim 1 of the '477 Patent (FAC ¶ 53), which states,

1. A system, comprising:
a plurality of different asymmetric data compression encoders,
wherein each asymmetric data compression encoder of the plurality of different asymmetric data compression encoders is configured to utilize one or more data compression algorithms, and
wherein a first asymmetric data compression encoder of the plurality of different asymmetric data compression encoders is configured to compress data blocks containing video or image data at a higher data compression rate than a second asymmetric data compression encoder of the plurality of different asymmetric data compression encoders; and
one or more processors configured to:
determine one or more data parameters, at least one of the determined one or more data parameters relating to a throughput of a communications channel measured in bits per second; and
select one or more asymmetric data compression encoders from among the plurality of different asymmetric data compression encoders based upon, at least in part, the determined one or more data parameters.

'477 Patent, Claim 1.

Both parties refer to the '046, '535, and '477 Patents as the "Fallon Patents" because the named inventors on these patents are James J. Fallon et al. The Fallon Patents are all continuations of a common ancestor patent and share a common specification. Further explanation of the specific technology and the scope of the claims, to the extent relevant, will be provided in the Analysis section of this Order.

III. Legal Standards

A. Motion to Dismiss under Rule 12(b)(6)

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a Rule 12(b)(6) motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a Rule 12(b)(6) motion has pleaded "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

B. Patent Eligibility under 35 U.S.C. § 101

An invention or a discovery is patentable if it is a "new and useful process, machine,

manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101. "In choosing such expansive terms . . . Congress plainly contemplated that the patent laws would be given wide scope." *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980). Still, the Supreme Court has identified exceptions to this wide scope to "distinguish patents that claim the building blocks of human ingenuity, which are ineligible for patent protection, from those that integrate the building blocks into something more." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2350 (2014) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 89 (2012)) (internal quotations omitted). These exceptions to patent protection are "laws of nature, natural phenomena, and abstract ideas." *Diamond v. Diehr*, 450 U.S. 175, 185 (1981). While the boundaries of the judicial exceptions remain subject to further development, the Supreme Court has clearly delineated the policy underlying those exceptions: avoiding patents that "too broadly preempt the use of a natural law [or abstract idea]." *Mayo*, 132 S. Ct. at 1294. Thus, patent law should "not inhibit further discovery by improperly tying up the future use of laws of nature [or abstract ideas]." *Id.* at 1301.

In *Mayo*, the Supreme Court "set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice*, 134 S. Ct. at 2355. The first step is to ask "whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If not, the claims fall within the scope of § 101 and are patent-eligible. If the claims are directed to one of the exceptions, the second step is to search for an "inventive concept" that is "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law [or abstract idea] itself." *Mayo*, 566 U.S. at 72-73. In doing so, a court must "consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements provide for an 'inventive concept' that 'transform[s] the nature of the claim' into a patent-eligible application." *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 78-79). If, in considering the claim elements individually and as an ordered combination, they merely recite well-understood, routine, and conventional steps, they will not constitute an inventive concept for patent eligibility purposes. *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1128 (Fed. Cir. 2018).

"Like indefiniteness, enablement, or obviousness, whether a claim recites patent eligible subject matter is a question of law which may contain underlying facts." *Berkheimer v. HP Inc.*,

881 F.3d 1360, 1368-69 (Fed. Cir. 2018). The Federal Circuit has held, for example, that fact questions may arise in the context of step two of the patent eligibility inquiry. *Aatrix*, 882 F.3d at 1128 ("[w]hether the claim elements or the claimed combination are well-understood, routine, conventional is a question of fact."). To the extent patent eligibility questions do turn on a factual issue, an accused infringer must prove invalidity by clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 112 (2011).

IV. Analysis

The Fallon Patents explain that "[t]here are a variety of data compression algorithms that are currently available, both well defined and novel." '046 Patent at 1:24-25. The Fallon Patents state that "a system and method that would provide dynamic modification of compression system parameters so as to provide an optimal balance between execution speed of the algorithm (compression rate) and the resulting compression ratio, is highly desirable." *Id.* at 1:50-54. The Fallon Patents then proceed to discuss at length various limitations within the art of data compression, most of which relate back to these competing concepts. *See generally*, *id.* at 1:24-7:48.

The claims of the Fallon Patents are specifically related to data compression/ decompression technology. Claim 40 of the '046 Patent, for instance, refers to "a data compression system," including a "controller" that "commands the data compression engine to use one of the plurality of compression routines" if the throughput of the system falls below a certain threshold. Similarly, Claim 15 of the '535 Patent refers to selecting one of a collection of "asymmetric compressors" to compress at least a portion of a data block depending on a parameter or attribute of the data block. Claim 1 of the '477 Patent, meanwhile, refers to "a plurality of different asymmetric data compression encoders," where an encoder is selected to compress data at least in part based on one or more data parameters.

A. Alice/Mayo Step One as to the Fallon Patents

Defendants argue that "the purported 'invention' of the Fallon patents is simply choosing the algorithm most appropriate for the conditions of the system." Docket No. 32 at 2. According to Defendants, "[t]his is a quintessential abstract idea." *Id.*

At the first step of the *Alice/Mayo* test, the Federal Circuit has "repeatedly held that inventions which are directed to improvements in the functioning and operation of the computer are patent eligible." *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1127-

28 (Fed. Cir. 2018) (collecting cases). Here, particularly when considering the record in the light most favorable to Realtime as required at the motion to dismiss stage, there is evidence to suggest that the claimed steps for Claim 40 of the '046 Patent and Claim 1 of the '477 Patent are tied to specific computer systems that "improve[ ] computer functionality in some way" rather than being drawn to purely abstract concepts. *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1367 (Fed. Cir. 2018) ("That the parser transforms data from source to object code does not demonstrate non-abstractness without evidence that this transformation improves computer functionality in some way."). As an initial matter, these claims[1] are related to compression/ decompression systems, an area firmly rooted in computer technology. But the Fallon Patent claims further purport to relate to improvements to such compression/decompression technology. Claim 40 of the '046 Patent itself, for instance, recites on its face that "the controller commands the data compression engine to use one of the plurality of compression routines to provide a faster rate of compression so as to increase the throughput." '046 Patent, Claim 40. In other words, the claim itself states that it is directed to improving compression rates, *i.e.*, improving the functioning and operation of a computer. Claim 1 of the '477 Patent, similarly, states that at least one of the claimed asymmetric data compression encoders "is configured to compress data blocks containing video or image data at a higher data compression rate than a second asymmetric data compression encoder." '477 Patent, Claim 1.

Defendants spent a significant portion of their briefing emphasizing that the Fallon Patent claims are directed to "selecting the most optimal among conventional alternatives." *See, e.g.*, Docket No. 32 at 2. The Federal Circuit's decision in *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1259 (Fed. Cir. 2017) is particularly instructive. In that case, the claim at issue recited:

> 1. A computer memory system connectable to a processor and having one or more programmable operational characteristics, said characteristics being defined through configuration by said computer based on the type of said processor, wherein said system is connectable to said processor by a bus, said system comprising:
>
> a main memory connected to said bus; and
>
> a cache connected to said bus;
>
> wherein a programmable operational characteristic of said system determines a type of data stored by said cache.

[1] Defendants present arguments asserting that the three claims identified in the FAC should be considered representative claims for purposes of performing the § 101 analysis. *See* Docket No. 30-1 at 5-8. In light of the Court's determination on the motion, it finds it unnecessary to reach a determination as to whether Claim 40 of the '046 Patent and Claim 1 of the '477 Patent are representative of the other claims in their respective patents. The issue of whether Claim 15 of the '535 Patent is representative of the other claims of the '535 Patent will be addressed *infra*.

Id. at 1257. The Federal Circuit concluded, based on a review of the claims and specification, that the claims were "directed to an improved computer memory system, not the abstract idea of categorical data storage." *Id.* at 1259. The Federal Circuit stressed that a memory system with programmable operational characteristics as claimed provided significant flexibility that "obviate[d] the need to design a separate memory system for each type of processor . . . [and] result[ed] in a memory system that can outperform a prior art memory system." *Id.*

Similar to Claim 40 of the '046 Patent and Claim 1 of the '477 Patent, the claims in *Visual Memory* could have been characterized as focused on a system that makes a choice about data organization based on a parameter of the data. Despite this, the Federal Circuit found that the *Visual Memory* claims were drawn to a patent-eligible concept because they related to improving the functioning of a computer. The use of a programmable operational characteristic increased the flexibility of the computer memory system, and this improvement was discussed by the specification. *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1288 (Fed. Cir. 2018) (considering *Visual Memory* and stating, "[d]epending on the processor type, the invention's memory caches could adjust their function, which allowed the claimed invention to accommodate different types of processors without compromising performance. Both *Enfish* and *Visual Memory* concerned claims that focused on improved ways in which systems store and access data." (citations omitted)); *see also Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1362 (Fed. Cir. 2018) (considering *Visual Memory* and other cases where Federal Circuit has found claims patent eligible as directed to improvements of systems). At least at this stage, for much the same reasons the Federal Circuit found persuasive in *Visual Memory*, the Court cannot conclude as a matter of law that the '046 Patent and '477 Patent are directed to patent-ineligible subject matter.

Defendants attempted to distinguish *Visual Memory* by arguing that it involved a novel and specific computer structure, and specifically a memory system with three operationally defined caches that "yielded a specific improvement in computer functionality." Docket No. 32 at 8. At least at the motion to dismiss stage and on the current record, Defendants have not adequately explained how systems comprising multiple compressors or compression encoders, where an encoder is selected for use based on an evaluation of the relevant data, do not similarly impart some form of structural organization to computer processing and specifically to compression/

decompression that could be compared to the computer memory system claimed in *Visual Memory*.[2] Because the Court concludes for purposes of a determination at the motion to dismiss stage that Claim 40 of the '046 Patent and Claim 1 of the '477 Patent are drawn to a technological improvement under *Alice/Mayo* step one, it need not address *Alice/Mayo* step two for these two claims and Defendants' Motion is **DENIED** without prejudice as to these claims.[3]

At the hearing, Defendants effectively acknowledged that the claims of the '046 and '477 Patents may include aspects that might make it inappropriate to address § 101 invalidity at the motion to dismiss stage. Instead, Defendants focused on arguing that Claim 15 of the '535 Patent is drawn to an abstract idea. Unlike Claim 40 of the '046 Patent and Claim 1 of the '477 Patent, which are system claims, Claim 15 of the '535 Patent is a method claim. Indeed, Claim 15 recites just four method steps: (1) determining a data block parameter; (2) selecting an asymmetric compressor based on the parameter; (3) compressing the data; and (4) storing the data.

As Defendants observe, there is no requirement in the claim language itself that each of Claim 15's steps be performed by a computer program working automatically. Indeed, language in the specification states that a computer user can perform the step of selecting the appropriate asymmetric compressor to use. *See* '535 Patent at 13:4-65 ("As explained below, the selection process may be performed either manually or automatically."); *see id.* at 14:27-36; s*ee also CLS Bank Intern. v. Alice Corp. Pty. Ltd.*, 717 F.3d 1269, 1283 (Fed. Cir. 2013) ("Limitations that represent a human contribution but are merely tangential, routine, well-understood, or conventional . . . cannot confer patent eligibility."). In responding to Defendants' argument at the hearing, Plaintiff emphasized that the claims relate to the use of asymmetric encoders in a way that improves compression/decompression functions. Plaintiff, however, failed to adequately respond to Defendant's key point: that the focus of Claim 15 is not on a particular system for carrying out the claimed steps, but on the abstract idea of making a choice between known options based on an identified parameter. Moreover, as Defendants noted, the patent itself describes that this choice

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[2] As an aside, the Court observes that the claim language at issue in *Visual Memory* did not itself refer to a main memory and three separate caches; it required only one cache.

[3] Even if one were to assume the '046 Patent and '477 Patent were drawn to an abstract idea, there would be a question of fact as to whether the ordered combination of multiple compression encoders selected from a system as claimed in these patents were routine, conventional, and/or well-understood. *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016) ("The inventive concept inquiry requires more than recognizing that each claim element, by itself, was known in the art. As is the case here, an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.").

can be performed manually by a user.

Also unlike Claim 40 of the '046 Patent and Claim 1 of the '477 Patent, Claim 15 of the '535 Patent does not state that performance of the claimed method will result in a faster rate of compression. Claim 15 of the '535 Patent is broad enough to cover circumstances where an asymmetric compressor is (manually) selected that provides no benefit in computer functioning. For instance, Plaintiff did not dispute Defendants' argument at the hearing that a "parameter of at least a portion of a data block" may simply be related to the file type of the data (whether it is an audio or video file, for instance).[4]

Beyond selecting an asymmetric compressor based on a parameter, there is not a suggestion from the claim language that the available compressors are related to improving, for instance, compression speed. Claim 15 of the '535 Patent thus raises significant preemption concerns and is not tethered to a technological improvement at *Alice/Mayo* step one. *See Accenture Glob. Servs. v. GmbH Guidewire Software, Inc.*, 728 F.3d 1336, 1346 (Fed. Cir. 2013) (finding the claims ineligible under § 101 when there were no "additional, substantive limitations . . . [to] narrow, confine or otherwise tie down the claim so that, in practical terms, it does not cover the full abstract idea itself.") (citations omitted). The Court concludes that Claim 15 of the '535 Patent is directed to the abstract idea of making a choice between compressors based on a data parameter.

B. Alice/Mayo Step Two as to Claim 15 of the '535 Patent

Because Claim 15 of the '535 Patent is directed to an abstract idea, the Court considers whether Claim 15 recites an inventive concept at *Alice/Mayo* step two. Thus, the Court "consider[s] the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements provide for an 'inventive concept' that 'transform[s] the nature of the claim' into a patent-eligible application." *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 78-79).

In addressing step two of the *Alice/Mayo* framework, Plaintiff's opposition does not separately address Claim 15 of the '535 Patent and instead bundles it in with a general discussion of all three of the Fallon Patents. As part of its arguments, Plaintiff does not dispute that asymmetric compressors were known in the prior art. *See also* '535 Patent at 1:35-38, 9:60-10:4.

[4] As another example, Claim 9 of the '535 Patent specifically recites: "[t]he method of claim 1, wherein the determining of the parameter or attribute of the at least the portion of the data block excludes determining based only upon reading a descriptor of the at least the portion of the data block." This dependent claim shows just how broad the phrases "parameter" is in the context of the claims.

Instead, Plaintiff again suggests that the combination of multiple asymmetric compressors can lead to greater flexibility in the storage/transfer of data. *See* Docket No. 31 at 23.

Despite this suggestion, Plaintiff's First Amended Complaint provides no allegations suggesting that the method of selecting between multiple asymmetric compressors is unconventional. Even if it had, that argument would fail. "It has been clear since *Alice* that a claimed invention's use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention 'significantly more' than that ineligible concept." *BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018). "[T]he Court only assesse[s] whether the claim limitations ***other than the invention's use of the ineligible concept to which it was directed*** were well-understood, routine and conventional." *Id.* (emphasis added) (citing *Alice*, 134 S. Ct. at 2359–60). Claim 15 of the '535 Patent recites, *inter alia*, "selecting one or more asymmetric compressors from among a plurality of compressors based upon the determined parameter or attribute." This selection – *i.e.*, choosing between asymmetric compressors – is the abstract idea itself. There is no specific requirements in the claims about a relationship between the asymmetric compressors or whether they are even required to exist in the same system. In other words, there is nothing in the claims in addition to the abstract idea that Plaintiff has reasonably argued that could satisfy *Alice/Mayo* step two for Claim 15 of the '535 Patent. Claim 15 of the '535 Patent thus fails to provide an inventive concept under *Alice/Mayo* step two.

C. *Whether Claim 15 of the '535 Patent is Representative of the Other Claims of the '535 Patent*

Defendants argue that Claim 15 of the '535 Patent can be considered representative of the other claims of the '535 Patent. Docket No. 30-1 at 6. Although Plaintiff disputes Defendants' position as a general matter (Docket No. 31 at 24), Plaintiff "does not present any meaningful argument for the distinctive significance of any claim limitations not found in the representative claim" as part of the portion of its opposition addressing Defendants' representative claim position. *Berkheimer*, 881 F.3d at 1365. An independent review of the claims of the '535 Patent also supports the conclusion that at least Claims 16-30 of the '535 Patent are "substantially similar and linked to the same abstract idea" as Claim 15. *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass'n*, 776 F.3d 1343, 1348 (Fed. Cir. 2014). However, Claims 1-14 of the '535 Patent include additional limitations related to selecting an access profile. Plaintiff emphasizes the identification of access profiles as a potentially unconventional aspect of the claims in

submitting its arguments under *Alice/Mayo* step two. *See* Docket No. 31 at 22-23. Rather than meaningfully respond to Plaintiff's argument, Defendants reject it by stating that "'access profile,' is not a limitation of any 'exemplary' asserted claim . . . [and] is therefore not relevant to this motion to dismiss." Docket No. 32 at 14. On this record, it would be inappropriate to conclude that Claim 15 of the '535 Patent is representative as to Claims 1-14.

D. Whether Plaintiff Should Be Granted Leave to Amend as to the '535 Patent

In a footnote, Plaintiff states, "[s]hould the Court be inclined to grant dismissal, Realtime respectfully requests that dismissal be without prejudice to amending the complaint because 'there certainly [are] allegations of fact that, if . . . accepted, would preclude the dismissal.'" Docket No. 31 at 23 n.23 (quoting *Aatrix*, 882 F.3d at 1126). Plaintiff does not provide specific examples of what material it would add regarding the claims of the '535 Patent that could change the outcome, and the Court is not particularly persuaded, based on Plaintiff's arguments in opposition, that Plaintiff could submit additional allegations with respect to these claims that would change the outcome. However, Defendants do not respond to Plaintiff's request in their reply. Accordingly, the Court will allow Plaintiff the opportunity to file an amended complaint as to Claims 15-30 of the '535 Patent if it so chooses.

V. Conclusion

For the reasons stated, Defendants' Motion would be **DENIED** without prejudice as to the claims of the '046 and '477 Patents[5] and **GRANTED** without prejudice as to Claims 15-30 of the '535 Patent. Plaintiff may file an amended complaint with respect to the '535 Patent within 14 days of this Order.

[5] Given recent Federal Circuit authority in this area, the real issue may not be a question of abstractness as much as it is a question of lack of enablement/written description. *Cf. McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016) (observing that broad claims to a genus are subject to additional limits principally in terms of 35 U.S.C. § 112, not necessarily Section 101).