IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WETRO LAN, LLC,	
Plaintiff,	
vs.	**Case No: 2:15-CV-414-RWS-RSP**
EMERSON ELECTRIC CO.,	**JURY TRIAL DEMAND**
Defendant.	

DEFENDANT EMERSON ELECTRIC CO.'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(6)

Respectfully submitted,

By: /s/ Steven E. Holtshouser
　　 Rudolph A. Telscher, Jr.*
　　 Email: rtelscher@hdp.com
　　 Steven E. Holtshouser*
　　 Email: sholtshouser@hdp.com
　　 HARNESS, DICKEY & PIERCE, P.L.C.
　　 7700 Bonhomme, Suite 400
　　 St. Louis, MO 63105
　　 Telephone: 314-726-7500
　　 Facsimile: 314-726-7501
　　 Pro Hac Vice

　　 and

　　 Michael C. Smith
　　 State Bar Card No. 18650410
　　 Siebman, Burg, Phillips & Smith LLP
　　 113 East Austin Street
　　 Marshall, TX 75670
　　 903.938.8900
　　 Email: michaelsmith@siebman.com

　　　　　　　 Attorneys for Defendant Emerson Electric Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INDEX OF EXHIBITS

I.   INTRODUCTION

For purposes of this motion, Emerson accepts Wetro's definition of "non-configurable"[1]

as *not needing* to be configured, as opposed to *not capable* of configuration. This means that the

'918 patent broadly monopolizes all firewalls except those that *require* configuration. The

preemption risk is therefore far greater than Emerson predicted in its opening brief (Dkt. 8 at 29);

hence, the diversity and number of real innovators sued by Wetro in this first round of lawsuits,

with more surely to come. Here, beyond the abstract concept of firewall security, Wetro seeks

such broad preemption based on the simple act of comparing basic data in a look-up table.

If the patent is permitted to stand, any "ready-to-use" firewall with a base rule set, yet

still *capable of customization*, is covered, making it one of the most valuable patents in a

computer society reliant on firewalls. But, Wetro does not explain why such a highly valuable

patent was never licensed or monetized and was abandoned in 2012 only to be resurrected in

2015 solely for troll litigation. The obvious reason is it disclosed no technological advance

usable by real firewall developers. The patent disclosed only a basic look-up table concept, using

addressing information found in every Internet communication. A simple review of the

exemplary, non-limiting tables disclosed in the patent makes this clear. '918 Patent, Col. 6 and 7.

This is why, on June 29, 2015, the Electronic Frontier Foundation gave the '918 patent its

"Stupid Patent of the Month" award, stating the '918 patent "is a terrible patent. . . .[b]ut it earns

a special place in the Pantheon of stupid patents because it is being wielded in one of [sic] most

outrageous trolling campaigns we have ever seen."[2]

---

[1] Wetro fails to identify any claim construction dispute and there is none that affects resolution of this motion.

[2] https://www.eff.org/deeplinks/2015/06/stupid-patent-month-wetro-lan-sues-entire-network-security-industry-expired

Wetro's Response cites outdated, mostly pre-*Alice*,[3] case law, without telling the Court

that even since filing Emerson's Motion, the overwhelming majority of Courts confronting

similarly abstract and uninventive patents are invalidating them, including at the pleading stage.[4]

This district is part of the trend.[5] Affirming *Alice* invalidations has also become routine for the

Federal Circuit, with it having decided five cases *since* Emerson's Motion was filed.[6] Wetro next

misleads this Court by treating the machine-or-transformation tests ("MTT") as a dispositive first

step even though at most it is only a factor in step two. Wetro then badly misapplies the test,

again relying on pre-*Alice* authorities. Wetro even cited the *reversed lower* court decision in

Alice itself.[7] This attempt at misdirection cannot be an accident.[8] Finally, Wetro advances the

---

[3] *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

[4] *See, e.g., Smart Systems Innovations, LLC. v. Chicago Transit Authority*, No. 14 C 08053 (N.D.Il. July 10, 2015) (granting motion to dismiss patent covering use of bankcards to pay fares), Ex. GG; *Appistry, Inc. v. Amazon.com, Inc.*, No. C15-311 MJP, 2015 BL 221776 (W.D. Wash. July 09, 2015) (granting motion to dismiss patent covering project management); *Affinity Labs of Tex., LLC v. DirecTV, LLC*, No. 6:15-cv-00030-WSS 2015 WL 3764350 (W.D. Tex. July 7, 2015) (granting motion to dismiss patent covering regionally broadcast content to persons outside the region); *FairWarning IP, LLC v. Iatric Systems, Inc*., No. 8:14-cv-2685-T-23MAP, 2015 WL 3883958 (M.D. Fla. June 24, 2015) (granting motion to dismiss for patent covering detection of computer fraud); *Mkt. Track v. Efficient Collaborative Retail Mktg*., No. 14 C 4957, 2015 WL 3637740 (N.D.Il. June 11, 2015) (granting motion to dismiss for patent covering data processing).

[5] *Kroy IP Holdings, LLC v. Safeway, Inc.,* No. 2:12-cv-800-WCD, 2015 WL 3452469, at *11-24 (E.D. Tx. May 29, 2015) (invalidating patent directed to providing incentive awards to consumers)

[6] *See*, e.g., *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, No. 2014-1194, 2015 WL 4113722, at *1 (Fed. Cir. July 9, 2015) (invalidation of patent directed to determining price using hierarchies); *Intellectual Ventures I LLC v. Capital One Bank (USA)*, No. 14-1506, 2015 WL 4068798, (Fed. Cir. July 6, 2015) (invalidation of patents directed to computerized budgeting and tailoring information); *Internet Patents Corp. v. Active Network, Inc.,* 2015 WL 3852975 (Fed. Cir. June 23, 2015) (affirmed dismissal for patent directed to retention of data in web page forms using forward and back navigation functions); *OIP Techs., Inc. v. Amazon.com, Inc.*, 2012-1696, 2015 WL 3622181 (Fed. Cir. June 11, 2015) (affirmed granting of motion for judgment on the pleadings for patent directed to automating method of price optimization in an e-commerce environment); *Allvoice Developments US, LLC v. Microsoft Corp*., No. 2014-1258 (Fed. Cir. May 22, 2015) (invalidation of patent directed to speech recognition software).

[7] Wetro Response, Dkt. 14 at 7.

[8] Wetro's counsel are patent specialists who can't possibly believe that their arguments, relating to the most prolific and significant issue in modern patent law, guide this Court to a result that is legally correct. Its Response raises, at a minimum, an ethical question. ABA Model Rule of Ethics 3.3(a)(2).

declaration of an expert who cannot contradict the basic teachings of this patent and who does

not bother to address in a serious manner the preemption concerns raised.[9] The bottom line is

that the '918 patent covers an abstract idea implemented with conventional, generically

described hardware and software and therefore is not patentable under Section 101. It does not

improve Internet security or computer technology. It simply used generically described

technology in a non-configurable look-up table because small business and home users do not

need the robust corporate protection. '918 patent at Col. 2, ll. 61. (home users not targeted by

serious hackers). This is exactly the type of patent the Supreme Court had in mind in *Alice*.

II.   SECTION 101 PRESENTS A THRESHOLD ISSUE DETERMINED AT THE PLEADING STAGE

Relying on outdated or overturned case law[10], Wetro argues that the law disfavors

determination of patent-eligible subject matter at the pleading stage[11]. This argument is

disingenuous at best given that the overwhelming majority[12] of recent cases "treat[] Section 101

analyses like a jurisdictional inquiry and [the Federal Circuit] encourage[s] district courts to

assess Section 101 patent eligibility 'at the outset of litigation' to preserve judicial resources."

Chamberlain Grp., Inc. v. Linear LLC, 2015 U.S. Dist. LEXIS 87876, at *14 (N.D. Ill. 2015).

See also, Internet Patents Corp. 2015 WL 3852975 (affirming 12(b)(6) dismissal); *OIP Techs., Inc.*

2015 WL 3622181at *4 (Mayer, J., concurring) (affirming 12(c) dismissal). Even in this district,

Section 101 issues have been decided on the pleadings. *Clear with Computers, LLC v. Altec*

---

[9] The level of typos common between the Response brief itself and the expert declaration suggest that both were penned by the legal team.

[10] *See, e.g*., *CLS Bank Int'l v. Alice Corp. Pty.*, 717 F.3d 1269 (Fed. Cir. 2013).

[11] Emerson's motion did not require leave of Court. The Federal Rules of Civil Procedure do not authorize a prior restraint on filing a *bona fide* motion under Rule 12(b)(6). Such a prophylactic requirement is not part of this Court's model Docket Control Order on its website. In any event, no such order has been entered in this case.

[12] *See, e.g., Id.* at 16 (cases cited); *Affinity Labs of Tex., LLC,* 2015 WL at n.6. (cases cited).

Indus., Inc., Nos. 6:14-79, 6:14-89, 2015 WL 993392, at *1 (E.D. Tex. Mar. 3, 2015) (granting

12(b)(6) dismissal).

Emerson, following the lead of *Alice*, explored the history of security, including in the

computer realm. Wetro, and its hired expert, surely understand these are relevant background

facts, yet feign fact disputes in a desperate attempt to avoid a ruling at the pleading stage. Its

monetization scheme only works if there is at least a threat of expensive *Markman* proceedings,

discovery, and summary judgment proceedings. Regardless of the absurdity[13] of Wetro's

expert's opinions, Section 101 eligibility is a question of law, not fact.

Wetro is incorrect that Emerson's submission of readily available evidence[14]

demonstrating that securing access is fundamental in human and computer history converts

makes this a motion for summary judgment.[15] These materials are no different than the historical

sources relied on by the Supreme Court in *Alice* or the types of materials considered by other

Courts determining the legal issue of patent-eligible subject matter. *Alice*, 134 S.Ct. at 2356-59.

See also, Emerson Motion, Dkt. No. 8 at 19 n.5. "Because courts may consider documents

incorporated by reference as well as take judicial notice of matters of public record in evaluating

motions for judgment on the pleadings, district courts may look to the contents of the patents

themselves without converting a Rule 12 motion into one for summary judgment." *Smart*

Systems, supra n.4, slip op. at 6 (citations omitted).[16] Moreover these sources of information are

---

[13] *See, e.g.*, Barnett Decl, ¶5 (removing need to program is directed to technology); ¶10 (highlighting what the *Smart Systems* court characterized as "technical jargon" and "obtuse syntax of patents", *supra* n.4, slip op. at 10); ¶19 (unsubstantiated claims).

[14] Wetro criticizes the Wikipedia exhibits, but fails to identify any inaccurate content, nor challenge the authenticity, accuracy or relevance of any exhibits. However, common sense alone establishes the fundamental nature of securing authorized access in human experience.

[15] If this Court does decide to treat this as a motion for summary judgment, then Emerson requests leave to supplement the record with the results of additional investigation.

[16] *See also, Amdocs (Israel Ltd).v. Openet Telecom, Inc.*, 56 F.Supp.3d 813, 822n.3 (E.D.Va. 2014) (granting 12(c) and relying on textbook excerpt); *Tuxis Technologies, LLC v. Amazon.com*, No. 13-1771-

not necessary for this Court to conclude that the subject matter of the '918 patent is patent-

ineligible.[17]

III.   STEP ONE: THE '918 PATENT IS DIRECTED TO THE ABSTRACT CONCEPT OF SECURING ACCESS USING GENERIC COMPUTER COMPONENTS

The cases cited by Emerson show the ease with which computer-implemented patents

meet step one of the abstract idea exception to patent-eligible subject matter, with step two

getting greater scrutiny. Indeed, Wetro could only cite one case, decided 4 years *before* Alice, in

its step one section that found a computer-implemented patent eligible under Section 101. Wetro

Response, Dkt. 14 at 14. After *Alice*, there is no serious doubt that the patent here is directed to

the abstract idea of securing access to a private network. Nevertheless, Wetro argues step one is

not met, because the '918 patent: 1) "uses a tangible device to manipulate[18] electronic data"; and

2) "improves network security devices." *Id.* at 15. First, Wetro ignores the Supreme Court's

dictate in *Alice* that when applying step one to a computer-implemented process, the computer

hardware is disregarded. *Alice*, 134 S.Ct. at 2358. Wetro is also incorrect to state that its patent

"manipulates data." Extraction of data to compare to a lookup table is not manipulation at all. A

communication is either accepted or rejected by the firewall based on simple matching under the

RGA, 2015 WL 1387815, *3n.3 and n.4 (D.De. 2015) (granting 12(b)(6) and relying on Wall St. Journal article and textbook); *Mkt. Track*, supra n.4, at*6 (granting 12(c) and relying on textbook).

[17] Wetro again cites pre-*Alice* cases for the presumption of validity and proof by clear and convincing evidence. Dkt. 14 at 9. Although Emerson's motion should be granted under any standard, neither the presumption of validity nor the clear and convincing standard of proof is applicable to Section 101 legal issues. *See, e.g., Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 720-21 (Fed. Cir. 2014) (Mayer, J. concurring)*; Tranxition, Inc. v. Lenovo (U.S.) Inc*., 2015 U.S. Dist. Lexis 89593 at *9-13 (D.Or. July 9, 2015).

[18] Wetro's reliance on *TQP Dev., LLC v. Intuit, Inc.* 2014 U.S. Dist. LEXIS 20077, at *24 (E.D. Tex. Feb. 19, 2014) (emphasis added) is misplaced. The '918 patent did not claim "a method for *changing* data to make it more secure". It did not have "concrete and valuable effects in the field of [network] communications." *Alice*, 134 S. Ct. at 2355 (internal quotations omitted). In another example of lack of candor, Wetro cites (pre-*Alice)* Rockstar Consortium US L.P., Inc. v. Samsung Elecs. Co*., No. 2:13-CV-00894-JRG, 2014 WL 1998053, at *4 (E.D.Tx. 2014), and argues any patent that "requires a physical act in the world" is not abstract. Wetro fails to disclose that the Federal Circuit later granted a writ of mandamus and transferred the case to Northern District of California. *In re Google, Inc.*, 588 Fed.Appx. 988 (Fed. Cir. 2014).

pre-configured rule set. The patent does not teach manipulation and Wetro provides no contrary

cite to the patent.

Wetro's second point fares no better. The patent repeatedly focuses on the abstract

concept of *dumbing down* configurable firewalls to make the home user and small business

experience user friendly -- not to advance a superior or more secure firewall. The patent

acknowledges that corporate firewalls "exceed the needs" of a home user, i.e., they offer more

protection than is necessary. Id. at Col. 2, ll. 51. *See e.g.*, '918 Patent, Col. 2, ll. 20 – Col. 3, ll. 8

("what is needed is a simple to implement, inexpensive, relatively fast, efficient, and non-user

configurable solution" for home or small office computer user"). Making life easier by removing

technological choices or complexity does not necessarily improve technology. Even Wetro's

expert agrees that the focus of the patent is the *user* not the device. Barnet Decl. ¶¶5, 16, 19 and

27. "Word" would be easier to use if it did not offer so many features, too.

Wetro's argument that its patent does not claim an abstract idea because it "effects a

change in the real world" is simply ridiculous for any party versed in patent law. Two district

court decisions in the past week alone make this clear: *Smart Systems*, supra n.4 (use of bankcard

to pay transit fares); *Appistry, Inc., supra* n.4 (distributed processing of project tasks

implemented in the computer realm is directed to abstract idea); *Tranxition*, 2015 U.S. Dist.

LEXIS 89593, at *13-24 (transitioning of configuration settings from one computer to another

automatically is directed to abstract idea). *See also*, *Intellectual Ventures I, LLC*, 2015 WL

4069798, at *5 (tailoring displayed information based on navigation data and time of day

directed to abstract idea). Although not dispositive, the '918 patent is also abstract because a

human *can* do what a firewall does and humans have imposed secure access in many realms

throughout history. A human could use pre-existing devices to extract source, protocol and

destination data from incoming messages, *manually compare* that data to a pre-approved list of authorized data combinations, and authorize access or not. Wetro's patent teaches nothing more than automating matching.

IV.   STEP TWO: NON-CONFIGURABLE LOOK-UP TABLE AND FIREWALL USE OF TRANSPORT TYPE DATA ARE NOT INVENTIVE CONCEPTS

Wetro points to only two elements to satisfy the requisite inventive concept: (1) a "non-configurable" look-up table (that ironically can be configurable); and (2) including "transport data" in the look-up table. The '918 patent on its face does not claim to have invented look-up tables for firewalls – the most basic of building blocks for a firewall. The purported advance of the '918 patent was the use of non-configurable look-up tables – although it is even broader because it also includes look-up tables that can be configured. If allowed, Wetro would own this vast expanse of firewall market space, while not having advanced technology at all.

Simply removing the configuration step from existing firewalls is not an innovative addition that significantly adds to the technology of network security or computers. It is difficult for an unskilled human to configure a firewall and if required to do so they risk mistakes. A pre-configured one takes human frailty out of the equation, but that is not solving a "particular internet-centric problem." *DDR Holdings*, *LLC v. Hotels.com*, 773 F.3d 1246, 1257-59 (Fed. Cir. 2014). Human error is a factor in many areas beyond computers. Nor is it an example of "overcom[ing] a problem specifically arising in the realm of computer networks." *Id*. at 1257. "Rather than having created any technological innovation, it merely seeks to apply existing technology, just in a purportedly inventive combination." *Smart Systems* No. 14 C 08053, slip op. at 15 (Ex. GG). The '918 patent describes essentially a dummied down version of existing corporate firewalls without teaching any new technology.

A very similar case supports finding the non-configurable element insufficient as an inventive concept. In *Tranxition, Inc.*, 2015 U.S. Dist. LEXIS 89593 (D. Or. July 9, 2015), the court invalidated a patent covering automatic transitioning of configuration settings among computers. A human could migrate personalized computer settings to a new computer manually, but was "'prone to errors that lead to user frustration'". *Id*. at *3. Prior to the patent, humans were doing so, as is the case with manual configuration of firewall settings. The Court stated that even though the precise problem did not arise until the computer era, the nature of the process automated "is a human one." *Id*. at *30. The patent did not disclose an inventive concept, because "[u]sing a generic computer to perform a manual task more efficiently and accurately than a human could is not a patentable idea." *Id*. at * 33 (citations omitted). Similarly, the '918 patent solves only a human process problem that has marketing, entrepreneurial benefits.

Further, the breadth of meaning that Wetro gives to "non-configurable" undercuts its argument. The patent states that "the term non-configurable generally means that the user does not have to adjust settings on the present device and/or the computer." Col. 3, ll. 15-17. Consequently, the patent covers firewalls with look-up tables that are either pre-configured or capable of being configured. This transforms the element into a relatively meaningless limitation. Almost every firewall utilizing data packet-analysis is brought within the scope of the '918 patent.

Wetro devotes only one paragraph to its argument that the transport type element is inventive. Even one word on this would be more than the patent specification says about transport types, its novelty from prior firewalls or its benefits.[19] If this was a new and inventive

---

[19] The ubiquity of using such information perhaps explains the absence of any disclosure whatsoever about how the transport type contributes to the method of filtering data. *See, Internet Patents Corp.*, 2015 WL 3852975 (commending district court's observation that "mechanism for maintaining the state is not described" when patent owner argued claim element of "maintaining the state" was unconventional).

concept, Mr. Trolan hid it from the patent office. Nowhere did the patent even come close to characterizing the use of "transport data" as any kind of invention at all. It appeared only in the claims. Col. 8, ll. 39. Wetro claims in its brief that the element added "something new" and cites to paragraph 14 of its "expert's" declaration. Dkt. 14 at 19. Paragraph 14 says no such thing and even if it did it would be false. Transport layer data was considered in firewalls as early as 1994. *See*, Ex. R-1[20].

The actual content of the pre-configured look-up table ("LUT") is even less inventive. Table 1 of the patent specification lists information stored in the LUT, including static information about protocol, server port and client port. The LUT simply contains information about commonly used ports and associated transport types. Websites are listed[21] as potential sources of data for the LUT, demonstrating that the LUT data is commonly used in network computing.

V.   THE MACHINE-OR-TRANSFORMATION TEST DOES NOT SAVE THE PATENT

Wetro urges this Court to start with the MTT. Wetro Response Dkt. 14 at 11. This violates *Alice*'s dictate to follow the two-step *Mayo* construct in analyzing Section 101 issues. In fact, *Alice* made no mention of the MTT. It first re-appeared in Federal Circuit decisions in late 2014 and then, only as a "useful" clue in step two. In *Ultramercial*, a leading Federal Circuit Section 101 opinion not even cited by Wetro, the Federal Circuit clarified the MTT is only as a "'useful clue'" in step two. 772 F.3d at 716 (citations omitted). Here, the clue is not helpful to Wetro.

---

[20] A copy of Ex. R-1, which is Ex. R submitted by Emerson with the relevant passages highlighted at pages 3, 7, 8, 11-14, 17-18, 23, 27-28.
[21] '918 Patent, Col. 6, ll. 6-34. See also, Col. 7, ll. 25-30 (available chips).

Wetro is in denial and relies exclusively on pre-*Alice* decisions finding the use of a computer sufficient to tie the claims to a "machine." The "machine" in the '918 patent is nothing more than ubiquitous, generically described hardware and software, i.e., firewalls and routers, operating conventionally to achieve conventional results. The '918 patent itself describes the use of existing hardware and software while at the same time stating that the description is not "limiting." *See*, '918 Patent, Col. 4, ll. 26-8, ll. 8. None of the so-called devices required for the claims of the '918 were invented by Steven Trolan. He simply claimed the idea of authorizing secure access and directed that it be done with existing, generically-described hardware.

Nor does the '918 method or apparatus "transform" "unsafe electronic data to safe electronic data." Wetro Response, Dkt. 14 at 14. Rather, it merely *checks unchanged* source, destination and protocol data against a table of approved data. Similar to a password, combination or key, a match authorizes access; otherwise access is denied. *Id*., Col. 7, ll. 59-62. Wetro argues that removing the requirement of configuration is "transformative" but fails to support its argument with any analysis or authority. Wetro Response, Dkt. 14 at 2. The fact that a non-configurable device is different than a configurable device does not mean that the former is transformative. After *Alice*, there is no doubt that tying a method to such "machines" does not satisfy the MTT or render an abstract idea less so. *Mkt. Track,* 2015 WL 3637740, at *11. *See also, DDR Holdings, LLC,* 773 F.3d at 1257 ("[t]he bare fact that a computer exists in the physical rather than purely conceptual realm 'is beside the point.'"); *Kroy IP Holdings, LLC*, 2015 WL 34252469, at *5 (conventional computer functions do not satisfy MTT).

V.   CONCLUSION

Respectfully, Emerson's motion to dismiss should be granted.

Dated: July 16, 2015   Respectfully submitted,

By: /s/Steven E. Holtshouser
     Rudolph A. Telscher, Jr.*
     email: rtelscher@hdp.com
     Steven E. Holtshouser*
     email: sholtshouser@hdp.com
     HARNESS, DICKEY & PIERCE, P.L.C.
     7700 Bonhomme, Suite 400
     St. Louis, MO 63105
     Telephone: 314-726-7500
     Facsimile: 314-726-7501
     *Pro Hac Vice

     and

     Michael C. Smith
     State Bar Card No. 18650410
     michaelsmith@siebman.com
     SIEBMAN, BURG, PHILLIPS & SMITH, LLP
     P.O. Box 1556
     Marshall, Texas 75671-1556
     Telephone: (903) 938-8900
     Facsimile: (903) 767-4620

     Attorneys for Defendant Emerson Electric Co.

11

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on this 16th day of July, 2015, the foregoing was filed electronically

with the Clerk of Court to be served via the Court's Electronic Filing System upon the following:

AUSTIN HANSLEY P.L.L.C.
Austin Hansley
Texas Bar No.: 24073081
Brandon LaPray
Texas Bar No.: 24087888
5050 Quorum Dr. Suite 700
Dallas, Texas 75254
Telephone: (469) 587-9776
Facsimile: (855) 347-6329
Email: Austin@TheTexasLawOffice.com
Email: Brandon@TheTexasLawOffice.com

Attorneys for Plaintiff

/s/ Steven E. Holtshouser

61545908.1

12