

2023-1318, -1441

**United States Court of Appeals
for the Federal Circuit**

ISLAND INTELLECTUAL PROPERTY LLC,

Plaintiff-Appellant,

– v. –

TD AMERITRADE, INC., TD AMERITRADE CLEARING, INC.,
TD AMERITRADE TRUST CO., TD AMERITRADE HOLDING CORP.,
THE CHARLES SCHWAB CORPORATION,

Defendants-Appellees.

*On Appeal from the United States District Court for the
Eastern District of Texas, Case No. 2:21-cv-00273-JRG-RSP
Honorable J. Rodney Gilstrap, Chief Judge*

**CORRECTED COMBINED PETITION FOR PANEL
REHEARING AND REHEARING *EN BANC* FOR
PLAINTIFF-APPELLANT**

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JUNE 18, 2024

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Island Intellectual Property LLC certifies the following:

1. Full Name of Party Represented by me:	2. Name of Real Party in interest represented by me:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party:
Island Intellectual Property LLC	Not applicable	Double Rock Corporation

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

AMSTER, ROTHSTEIN & EBENSTEIN LLP:

Charles R. Macedo

Christopher Lisiewski

Devin Garrity (now at Winston & Strawn LLP)

EMMET, MARVIN & MARTIN, LLP:

John Dellaportas

Judith Swartz (now at Phillips Nizer LLP)

WARD, SMITH & HILL, PLLC:

Claire Abernathy Henry

Charles Everingham, IV

Thomas John Ward, Jr.

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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:

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.

6. Information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees):

None/not applicable.

Dated: June 18, 2024

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TABLE OF CONTENTS

	Page
Certificate of Interest	i
Table of Contents	ii
Table of Authorities	iii
Statement of Counsel Required By Fed. Cir. R. 35 (b)	vi
Introduction	1
Statement of Relevant Facts.....	2
Argument.....	5
I. The Federal Rules Of Civil Procedure, Including Rule 56, Apply To Patent Cases Like All Other Cases.....	5
A. The District Court Committed Reversible Error By Failing To View All Evidence In The Light Most Favorable To Island As The Non-Moving Party	6
B. Genuine Disputes Of Material Fact Should Have Precluded Summary Judgment For TD Ameritrade	7
II. The Failure Of Either The District Court Or The Panel To Conduct An <i>Alice</i> Step 2 Analysis Is Fundamentally At Odds With Binding Supreme Court Precedent.....	10
A. None of the Orders Provide An <i>Alice</i> Step 2 Analysis Of The '286 Patent Claim.....	11
B. By Adopting The District Court's Ruling Without Reasoned Explanation, The Federal Circuit Failed To Cure The Deficiencies Below	12
C. The Panel's Order Here Is In Conflict With The Practice Of A Majority Of Other Circuits.....	15
Conclusion	17
Certificate of Compliance	18
Proof of Service	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AbbVie Deutschland GmbH v. Janssen Biotech, Inc.</i> , 759 F.3d 1285 (Fed. Cir. 2014).....	6
<i>Alice Corp. Pty. Ltd. v. CLS Bank Int’l</i> , 573 U.S. 208 (2014).....	vii, 2
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	4
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	vii
<i>BASCOM Global Internet Servs. v. AT&T Mobility LLC</i> , 827 F.3d 1341 (Fed. Cir. 2016).....	11
<i>Bell Atlantic Corp. v. Twombly</i> , 440 U.S. 544 (2007).....	vii
<i>Berkheimer v. HP Inc.</i> , 881 F.3d 1360 (Fed. Cir. 2018).....	vii, 4, 9
<i>Birth v. United States</i> , 958 F.2d 362 (3d Cir. 1992).....	15
<i>Boazman v. Econ. Lab., Inc.</i> , 537 F.2d 210 (5th Cir. 1976).....	14
<i>Bush v. Palm Beach County Canvassing Bd.</i> , 531 U.S. 70 (2000).....	14
<i>Carter v. Stanton</i> , 405 U.S. 669 (1972).....	14
<i>Cooperative Entertainment, Inc. v. Kollektive Technology, Inc.</i> , 50 F.4th 127 (Fed. Cir. 2022).....	5
<i>Dennison Mfg. Co. v. Panduit Corp.</i> , 475 U.S. 809 (1986).....	14

Hanson v. Aetna Life & Casualty,
625 F.2d 573 (5th Cir. 1980).....15

Island Intellectual Property LLC v. Deutsche Bank AG,
2012 WL 386282 (S.D.N.Y. Feb. 6, 2012).....3

Jang v. Bos. Sci. Corp.,
532 F.3d 1330 (Fed. Cir. 2008).....14

Koninklijke KPN N.V. v. Gemalto M2M GmbH,
942 F.3d 1143 (Fed. Cir. 2019).....11

Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) vii, 4, 6

Mayo Collaborative Servs. v. Prometheus Labs., Inc.,
566 U.S. 66 (2012) vii, 10

Microsoft Corp. v. i4i L.P.,
564 U.S. 91 (2011).....9

Minnesota v. Nat'l Tea Co.,
309 U.S. 551 (1940)14

Pierce v. Dep't of U.S. Air Force,
512 F.3d 184 (5th Cir. 2007).....6

Telectronics Pacing Sys., Inc. v. Ventritex, Inc.,
982 F.2d 1520 (Fed. Cir. 1992).....14

Thomas v. WGN News,
637 F. App'x 222 (7th Cir. 2016)16

United States v. Thomas,
236 Fed. Appx. 410 (10th Cir. 2007).....14

Statutes

35 U.S.C. § 1012

Other Authorities

Benjamin N. Cardozo, *Jurisdiction of the Court of Appeals* (2d ed. 1909) § 613

Rules

11th Cir. R. 36-1, prior to Aug. 1, 200616

1st Cir. R. 36(a).....15

2nd Cir. Internal Operating Procedure 32.1.115

3rd Cir. I.O.P. 6.3.215

4th Cir. R. 36.315

9th Cir. General Order. 4.3.a.....16

D.C. Cir. R. 3616

Fed. Cir. R. 36..... 12, 13, 15

Fed.R.Civ.P. 56(c).....5

STATEMENT OF COUNSEL REQUIRED BY FED. CIR. R. 35 (B)

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court and precedents of this Court: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 440 U.S. 544 (2007); *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 75 (2012) ; *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. May the Court disregard FRCP 56 when deciding summary judgment in a patent litigation, in particular Rule 56’s requirement to apply all inferences in favor of the non-moving party?
2. May the Court invalidate a patent as ineligible on summary judgment without a reasoned analysis under Step 2 of *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014)?

/s/ John Dellaportas
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INTRODUCTION

It is a bedrock principle that federal courts must apply the Federal Rules of Civil Procedure to all civil cases, regardless of subject matter. This includes Rule 56, which governs summary judgment motions. Notwithstanding the foregoing, there has been a broad trend in the District Courts to disregard these standards in patent disputes, leading to unfair and inconsistent results.

The present case presents an extreme example of that trend, and thus an ideal test case for the questions presented. The District Court invalidated a patent as ineligible under 35 U.S.C. § 101 based on a two-sentence “analysis,” ignoring over 1,400 pages of credible evidence in non-movant’s favor. In overcoming the presumption of validity all patents possess under 35 U.S.C. § 282, and instead granting summary judgment of invalidity under 35 U.S.C. § 101, the District Court failed to explain why there was “no genuine dispute as to any material fact,” nor did it “state on the record the reasons for granting or denying the motion” as Rule 56 requires. *See* Appx12-17. Rather than provide proper appellate review of the district court’s opaque and unilluminating analysis, the Federal Circuit Panel compounded the problem by affirming in a single-word decision, without providing any of the missing analysis or rationale for its decision. *See* Addendum.

As if that were not bad enough, the District Court and Federal Circuit Panel also ignored the Supreme Court’s two-step test patent eligibility test set forth in *Alice*

Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208 (2014). Both Courts simply skipped over *Alice* Step 2 in invalidating Island's US Patent No. 7,509,286 ("286 Patent"), and neither Court provided any explanation as to why the '286 Patent was unworthy of the two-step treatment which the Supreme Court held to be required in every case. Without a reasoned Step 2 analysis, neither the parties nor the reviewing court can know the actual basis upon which the decision was rendered.

STATEMENT OF RELEVANT FACTS

This is patent infringement suit. The appellant is Island Intellectual Property LLC ("Island"), an affiliate of Double Rock Corporation ("Double Rock"). Appx1261(¶2). The defendants are TD Ameritrade, Inc. and its related entities, TD Ameritrade Clearing, Inc., TD Ameritrade Trust Company, TD Ameritrade Holding Corp., and Charles Schwab Corporation ("Defendants" or "TD Ameritrade"). Defendants were customers of Double Rock and its affiliates. TD Ameritrade obtained confidential information on Double Rock's technology under an NDA, but never sought (nor obtained) a license to the technology. Instead, months later, it came out with a competing insured deposit sweep program virtually identical to Island's, implementing technology subject to Island's '286 Patent.

The '286 Patent concerns cash deposit sweep and insured deposit financial technology. The patent has proven enormously successful in the insured cash deposit industry, having been widely licensed by major industry players.

(Appx1183-1187(¶302-311); Appx1293-1324). After 15 years of litigation involving many major law firms, no defendant nor any district court ever identified any prior art teaching this specific and inventive method of interest allocation procedures enabling the use of tiered interest rates with aggregated deposit accounts, as embodied in steps [F]-[H] of Claim 1 of the '286 Patent.

In 2021, Island brought a patent infringement case against TD Ameritrade in the Eastern District of Texas, which was assigned to Judge Gilstrap. At the close of discovery, TD Ameritrade moved for summary judgment of invalidity under Section 101. The Magistrate Judge granted the motion, based on a Report (the “Magistrate’s Report”) devoting a mere two sentences to its recommendation that Claim 1 of the ‘286 Patent be found ineligible. Appx1-11. In the process, the Report ignored over 1,400 pages of evidence produced by Island, including, *inter alia*, (i) that the Patent’s Examiner found the detailed method of determining tiered interest rates for aggregated accounts to be inventive, new and not be solved by the closest prior art (Appx1282), (ii) that a different District Court previously found that the same invention provided technical solutions to technical problems necessarily arising in computer environments (*Island Intellectual Property LLC v. Deutsche Bank AG*, 2012 WL 386282 (S.D.N.Y. Feb. 6, 2012)), (iii) that both sides’ experts testified that the claim contained an inventive concept (Appx1198-1204(¶¶345-358)); Appx1258(110:20-111:20); Appx1252-1253(89:4-92:2)), and (iv) that the invention

experienced incredible commercial success and industry acceptance (Appx 1192-1193(¶329-330)). **Significantly, and furthermore, the Magistrate’s Report had no *Alice* Step 2 findings for the ’286 Patent at all.**

Over Island’s Objection, Judge Gilstrap issued a five-page Order (the “Order”, Appx12-17) adopting the Magistrate’s Report in full. The Order did not address the parties’ many material, factual disputes regarding the technical challenges and technical solutions addressed by the ’286 Patent claims, and the unconventional, nonroutine and inventive aspect of utilizing an interest allocation procedure with aggregated accounts to enable tiered interest rates for computer system used to administer insured deposit and sweep products. Although Rule 56(a) requires a court to “state on the record the reasons for granting or denying the [summary judgment] motion,” the Order failed to explain how the 1,400 pages of evidence presented in Island’s favor, construed in a light most favorable to Island, were insufficient to create a triable issue of fact.

The District Court’s failure to apply FRCP 56’s required standard for summary judgment is reversible error. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1364 (Fed. Cir. 2018). The District Court made factual findings against Island, the non-moving party, without explanation, and failed to grant all justifiable inferences in Island’s favor.

The District Court also failed to provide any analysis (let alone a reasoned analysis) under Step 2 of *Alice* in deciding summary judgment of patent-eligibility. This, too, is reversible error. *See, e.g., Cooperative Entertainment, Inc. v. Kollektive Technology, Inc.*, 50 F.4th 127, 135-36 (Fed. Cir. 2022) (vacating ineligibility ruling where District Court failed to conduct proper analysis under *Alice*).

The Federal Circuit Panel’s affirmance, in turn, consisted of just a single-word order “affirmed” which failed to address, let alone rectify, any of the egregious errors by the District Court below. Reconsideration is therefore requested of the Panel and/or the full Court, so as to vacate and remand the grant of summary judgment, which contravened the mandates of the Supreme Court and this Court under *Alice* and FRCP 56, and which failed to provide the parties and the reviewing courts with sufficient analysis to support its conclusion under *Alice* Step 2.

ARGUMENT

I. The Federal Rules Of Civil Procedure, Including Rule 56, Apply To Patent Cases Like All Other Cases

Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). In patent disputes, the law of the regional circuit, here the Fifth Circuit, applies to issues not unique to patent law. *See AbbVie Deutschland GmbH v. Janssen Biotech, Inc.*, 759 F.3d 1285,

1295 (Fed. Cir. 2014). As required by *Anderson* and *Matsushita*, the Fifth Circuit “review[s] a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party’s favor.” *Pierce v. Dep’t of U.S. Air Force*, 512 F.3d 184, 186 (5th Cir. 2007)(citation omitted). That did not happen here.

A. The District Court Committed Reversible Error By Failing To View All Evidence In The Light Most Favorable To Island As The Non-Moving Party

The District Court was presented with an extensive record of over 1,400 pages of evidence of patent eligibility, including patent examiner allowances, inventor testimony, plaintiff expert testimony, defendant expert testimony, prior judicial decisions, and their respective factfinding. In particular, the Patent Office’s distinction of the prior art in its allowance (Appx1282) and other evidence demonstrated that, for purposes of *Alice* Step 2, the particular way in which the ’286 Patent claims solved the technical problems of providing tiered interest rates in aggregate of the deposit accounts—including, using interest allocation procedures as part of the process of determining interest rates in steps [1F], [1G] and [1H], and using the special database structures included in step [1C]—were unconventional, non-routine, and inventive. Appx1198-1204(¶345-358); Appx1183-1186(¶302-308); Appx1186-1187(¶310); Appx 1192-1193(¶329-330); Appx1258(10:20-111:20); Appx1252-1253(89:4-92:2).

The Magistrate’s Report addressed **none** of that evidence *at all*, let alone view such evidence in the light most favorable to Island as the non-moving party. When Island brought this glaring deficiency to Judge Gilstrap’s attention in its Objection (Appx1701-1717), the Judge responded a few weeks later with a 5-page Order rubber-stamping the Magistrate’s Report. His Order, like the Magistrate’s Report, completely failed to recognize, address or otherwise resolve the myriad of factual disputes in Island’s favor as the non-moving party. Rather than address all the evidence of eligibility, Judge Gilstrap waived it all off as “unavailing,” incorrectly alleging that “Island does not explain how such consideration results in a finding that the claim is directed to eligible subject matter.” Appx16.

Thus, to date, no *Alice* Step 2 analysis of the ’286 Patent claim has been provided in **any** of the orders issued by the Courts in these proceedings.

B. Genuine Disputes Of Material Fact Should Have Precluded Summary Judgment For TD Ameritrade

As this Court held in *Berkheimer*, summary judgment is never appropriate on an allegation of subject matter ineligibility where, as here, a genuine issue of material fact exists regarding whether the claims perform well-understood, routine and conventional activities to a skilled artisan. 881 F.3d at 1370.

The District Court’s failure to address the parties’ factual disputes was not because Island failed to highlight them. Island’s summary judgment opposition had

an entire section entitled “RESPONSE TO DEFENDANTS’ ELIGIBILITY ANALYSIS” that relied on the evidence found in the appendix. Appx951-959. Within this Section were subsections entitled “Technological Problems Presented By Prior Art Computer Systems” (Appx952-954) and “Technological Solutions Of ’286 Patent to Technological Problems Presented by Prior Art Computer Systems” (Appx954-959). In those pages, all of Island’s evidence relevant to patent eligibility were clearly summarized and explained in detail.

In particular, that evidence demonstrated that the ’286 Patent was conceived to provide a real-world technical solution to a real-world technical challenge demanded by the marketplace. Appx1262-1264. As co-inventor Bruce R. Bent II attested, sweeps use “account management technology software [which must] be able to manage databases so as to almost instantaneously allocate billions of dollars, sent daily through tens of thousands of intra-bank transfers, by multiple banks with thousands of underlying customers, all while correctly calculating capacity, coverage, and interest for millions of individual accounts held by those banks in aggregated accounts, in a highly regulated economic sector that demands absolute data precision.” Appx1261-1269. These facts were never disputed.

At the time of the invention in 2002, conventional deposit sweep computer systems could not perform such operations. As the Examiner found, the closest prior art at the time—the Oncken patent—expressly taught away from the ’286 Patent’s

use of tiered interest rates due to “the complexity involved in computing the interest earned at each participating banking institution.” Appx476. *Cf. Microsoft Corp. v. i4i L.P.*, 564 U.S. 91, 95-97 (2011) (applying presumption of validity to include Examiner’s analysis under Sections 101, 102, 103).

The ’286 Patent changed all that. It came about when one of the world’s leading financial institutions, American Express, asked the co-inventors of the patents-in-suit to design a computer system that would enable its broker-dealer arm to offer tiered interest rates in aggregated accounts.¹ The ’286 Patent is the outcome of that inventive process. Defendant’s own expert candidly admitted he knew of no publication, prior to the ’286 Patent, having ever referenced an aggregated account paying different rates to different customers (Appx1258(110:20-111:20); Appx1252-1253(89:4-92:2))—further evidence that the ’286 Patent recites steps that were neither well-understood, routine, nor conventional.

Berkheimer confirms that the question of whether claim limitations “involve more than performance of well-understood, routine, [and] conventional activities previously known to the industry” is often a factual determination subject to extrinsic evidence. 881 F.3d at 1370. Yet, despite the mountain of evidence from which a prospective juror could conclude that the use of the interest allocation procedure

¹ The co-inventors of the patents-in-suit ran Double Rock, then known as the Reserve, which managed more than \$100 billion assets at its peak.

recited in element [F] of the '286 Patent claim was not well-understood, routine, or conventional, Judge Gilstrap held the patent ineligible on summary judgement. In doing so, he failed to even consider, much less weigh in Island's favor, the overwhelming evidence that limitations in claim 1 of the '286 Patent were more than performance of well-understood, routine, and conventional activities previously known to the industry, as *Berkheimer* expressly requires.

II. The Failure Of Either The District Court Or The Panel To Conduct An *Alice* Step 2 Analysis Is Fundamentally At Odds With Binding Supreme Court Precedent

The second part of the *Alice* test for subject-matter eligibility is often referred to as a search for an “inventive concept.” *Alice*, 573 U.S. at 217 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71-72 (2012)). An “inventive concept” is an element or combination of elements that is recited in the claim in addition to (beyond) the judicial exception that is sufficient to ensure the claim as a whole amounts to “significantly more” than the judicial exception itself. *Alice*, 573 U.S. at 27-28 (citing *Mayo*, 566 U.S. at 72-73).

Determining whether an inventive concept exists requires considering the additional elements both individually and in combination to see if they amount to significantly more than the judicial exception. In *BASCOM Global Internet Servs. v. AT&T Mobility LLC*, for example, even though the Court found that all the additional claim elements recited generic computer network or Internet components,

the elements in combination amounted to significantly more because of the non-conventional and non-generic arrangement that provided a technical improvement in the art. 827 F.3d 1341, 1350-51 (Fed. Cir. 2016).

A. None of the Orders Provide An *Alice* Step 2 Analysis Of The '286 Patent Claim

Despite piles of evidence showing that at least elements [F], [G], and [H] of Claim 1 of the '286 Patent are unconventional, nonroutine, and inventive, neither the Magistrate in his Report, nor Judge Gilstrap in his Order adopting it, conducted any *Alice* Step 2 analysis whatsoever with respect to that patent. As noted above, the motion record of more than 1,400 pages contained detailed inventor and expert testimony describing how the claimed method: (1) differed from conventional methods of allocating interest, (2) overcame the technical challenges involved in creating a simplified sweep system capable of providing enhanced FDIC insurance coverage while effectively managing thousands of individual client accounts and distributing client funds to aggregated deposit accounts across multiple banking institutions and, in the process, and (3) ***significantly reduced computer processing time*** employed by source and deposit institutions in operating sweeps of enhanced insured deposit programs of that era. Appx951-959.

In this respect, the detailed steps in Claim 1 of the '286 Patent are analogous to the steps in the claims at issue in *Koninklijke KPN N.V. v. Gemalto M2M GmbH*, 942 F.3d 1143, 1151-52 (Fed. Cir. 2019). *Gemalto* held the patent to be eligible

where “[t]he appealed claims require that a varying device be configured to vary original data prior to supplying said original data to the generating device as varied data and that the generating device be configured to generate check data.” Like here, the *Gemalto* appellees alleged that the challenged claims were similar to abstract “data manipulation” claims that had previously been held to be ineligible. *Id.* at 1152. This Court disagreed because, while “the appealed claims also process data (by reordering information via permutation) [,] ... [the] claims specifically recite *how this permutation is used* ... and this specific implementation is a key insight to enabling prior art error detection systems to catch previously undetectable systematic errors”. *Id.* at 1153 (emphasis added). As in *Gemalto*, here the evidence which the District Court ignored and disregarded demonstrates that claim 1 of the ’286 Patent recites specifically *how* a particular method is implemented using interest allocation procedures, key to enabling deposit sweep programs that provide tiered interest rates across multiple aggregated accounts.

B. By Adopting The District Court’s Ruling Without Reasoned Explanation, The Federal Circuit Failed To Cure The Deficiencies Below

Nevertheless, this evidence was roundly ignored in the Magistrate’s Report, and in Judge Gilstrap’s Order adopting it. Then, in a single-word Rule 36 Judgment, the Federal Circuit Panel affirmed the Order invalidating the ’286 Patent in one word, without bothering to provide any explanation whatsoever.

The lack of reasoned explanation by the Federal Circuit Panel is especially problematic here given that the Magistrate *and* District Judge *both* failed to provide any *Alice* Step 2 analysis of claim 1 of the '286 Patent, summarily dismissing all evidence by oversimplifying the claims and failing to account for its specific claim requirements. As a consequence, the record both below and on appeal lacks *any* reasoned explanation regarding why the claim fails to recite an inventive concept sufficient to ensure that the claim as a whole amounts to “significantly more” than the judicial exception itself in accordance with *Alice*.

This Court’s one-word affirmance without explanation under Rule 36 is at odds with fundamental principles of equity and justice underlying appellate review, as outlined by the Supreme Court and recognized in this and other Circuits. That is because the central function of the Appellate Courts is to render justice, not simply to dispose of cases. As Justice Cardozo explained, there is a long appellate tradition of explaining decisions—of not just “declaring justice between man and man, but of settling the law.” Benjamin N. Cardozo, *Jurisdiction of the Court of Appeals* (2d ed. 1909) § 6. Rule 36, particularly as applied here, makes a mockery of that hallowed tradition and renders significant injustice to the parties.

The Supreme Court has often warned the Courts of Appeal to do better. For example, in *Carter v. Stanton*, the Supreme Court vacated and remanded where the District Court’s order was “opaque and unilluminating as to either the relevant facts

or the law.” 405 U.S. 669, 672 (1972); *accord* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (remanding because there was “considerable uncertainty as to the precise grounds for the decision[]” (citation omitted)); *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (remanding for clarification due to “lack [of] an adequate explanation of the basis for the Court of Appeals’ judgment”); *accord, e.g., Jang v. Bos. Sci. Corp.*, 532 F.3d 1330 (Fed. Cir. 2008) (holding a remand for clarification proper where judgment is ambiguous or fails to “supply [a] basis sufficient for a meaningful review”; collecting cases); *United States v. Thomas*, 236 Fed. Appx. 410, 413 (10th Cir. 2007) (“The lack of an adequate explanation by the district court is error because it has left us in the ‘zone of appellate speculation.’” (citations omitted)); *Telectronics Pacing Sys., Inc. v. Ventritex, Inc.*, 982 F.2d 1520, 1526 (Fed. Cir. 1992) (“If the district court’s ‘underlying holdings would otherwise be ambiguous or inascertainable,’ the reasons for entering summary judgment must be stated somewhere in the record” (citations omitted)); *Boazman v. Econ. Lab., Inc.*, 537 F.2d 210, 213 n. 5 (5th Cir. 1976) (“[W]e are authorized to set aside a District Court’s grant of summary judgment when ‘its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants’ claim.’”) (quoting *Carter, supra*).

Fundamentally, “the parties are entitled to know the reasons upon which (summary) judgment(s) ... are based ... if for no other purpose than to secure

meaningful appellate review.” *Hanson v. Aetna Life & Cas.*, 625 F.2d at 575-76 (5th Cir. 1980) (citation omitted). Here, Island is entitled to know the reasons upon which the summary judgment was based. In the absence of *any Alice* Step 2 analysis of claim 1 of the '286 Patent in the Magistrate’s Report or the District Court’s Order, Island was denied meaningful appellate review of the grant of summary judgment. The Federal Circuit’s Rule 36 affirmance adds insult to injury—ratifying the lower court’s judgment despite its failure to provide the requisite analysis, while further failing to provide any reasoned explanation itself.

C. The Panel’s Order Here Is In Conflict With The Practice Of A Majority Of Other Circuits

The Panel’s use of a one-word decision under Rule 36 in this case conflicts with the practice of a majority of other Circuits and continues to be the subject of multiple challenges to the Supreme Court. The First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits all provide an explanation when rendering a decision, either by internal rule or established practice.²

² 1st Cir. R. 36(a) requires an opinion or “summary explanation.” Summary orders issued pursuant to 2nd Cir. Internal Operating Procedure 32.1.1. contain explanations. The Third Circuit permits affirmance by reference to lower court decisions (3rd Cir. I.O.P. 6.3.2) but has not issued a one-word affirmance in over 30 years (*Birth v. United States*, 958 F.2d 362 (3d Cir. 1992)). 4th Cir. R. 36.3 requires reasoning in any summary opinion. The Sixth Circuit has no rule authorizing one-word

Moreover, all Circuits, including the Fifth and Federal Circuits, recognize the need for District Courts to provide reasons for their rulings, and support vacatur where, as here, such reasons are absent or inadequate. In three levels of review, the Courts here could not spare a word to lay out their reasoning.

This case thus provides an opportunity for this Court to either finally eliminate the practice, or else state for high court review why it believes it is proper. The time has come to address this issue *en banc*. The issues presented here are frequently recurring and warrant the attention of the full Court. The Court should grant the Petition, resolve the conflict and uncertainty created by the Panel Decision, and restore the proper role of the Section 101 analysis in securing the efficient determination of patent eligibility in patent litigation.

affirmances. The Seventh Circuit similarly does not have a rule, but in practice provides an explanation for its affirmances. *See, e.g., Thomas v. WGN News*, 637 F. App'x 222, 223 (7th Cir. 2016). The Ninth Circuit provides for “memorandum disposition” of cases, which include a “concise explanation of the Court’s decision” and “such information crucial to the result.” 9th Cir. General Order. 4.3.a. The Eleventh Circuit rescinded its rule permitting affirmances without opinion in 2006. *See* 11th Cir. R. 36-1, prior to Aug. 1, 2006. Finally, the “abbreviated disposition” provided for in D.C. Cir. R. 36(d) requires “a notation of precedents” or “brief memorandum”, while D.C. Cir. R. 36(e) requires that an “opinion, memorandum, or other statement explaining the basis” for the court’s ruling under R. 36(d) “be retained as part of the case file ... and be publicly available there on the same basis as any published opinion.” *Id.* 36(e).

CONCLUSION

For the foregoing reasons, this Petition should be granted and, upon rehearing, the Judgment below should be reversed and remanded for further consideration in accordance with the aforementioned precedents.

Dated: June 18, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitations of Fed. R. App. P. 35(b)(2) because the brief contains 3878 words, excluding the parts of the Petition exempted by Fed. R. App. 32(f) and Federal Circuit Rule 35(c). This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This Petition has been prepared in a proportionally spaced typeface using Microsoft Word Version 2302 in fourteen (14) point Times New Roman font.

Dated: June 18, 2024

/s/ John Dellaportas
John Dellaportas
*Counsel for Appellant Island
Intellectual Property*

PROOF OF SERVICE

I hereby certify that on June 18, 2024, I electronically transmitted this Plaintiff-Appellant Island Intellectual Property LLC's Petition for Rehearing *En Banc* to the Clerk of the Court using the Court's ECF system. I further certify that counsel of record for Defendants-Appellees are being served with a copy of this Petition by electronic means via the Court's ECF system, or by email, as follows:

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ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

ISLAND INTELLECTUAL PROPERTY LLC,
Plaintiff-Appellant

v.

**TD AMERITRADE, INC., TD AMERITRADE
CLEARING, INC., TD AMERITRADE TRUST CO.,
TD AMERITRADE HOLDING CORP., THE
CHARLES SCHWAB CORPORATION,**
Defendants-Appellees

2023-1318, 2023-1441

Appeals from the United States District Court for the Eastern District of Texas in No. 2:21-cv-00273-JRG-RSP, Chief Judge J. Rodney Gilstrap.

JUDGMENT

JOHN G. DELLAPORTAS, Emmet, Marvin & Martin, LLP, New York, NY, argued for plaintiff-appellant. Also represented by CHARLES R. MACEDO, Amster Rothstein & Ebenstein LLP, New York, NY; JUDITH LYNN SWARTZ, Phillips Nizer LLP, New York, NY.

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THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (LOURIE, DYK, and REYNA, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

May 16, 2024
Date



Jarrett B. Perlow
Clerk of Court