

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

GARFUM.COM CORPORATION
Plaintiff,

v.

REFLECTIONS BY RUTH D/B/A
BYTEPHOTO.COM

Defendant.

Case No. 1:14-cv-05919-JEI-KMW
Hon. Judge Joseph E. Irenas

**REPLY BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S
COMPLAINT FOR PATENT
INFRINGEMENT**

MOTION DAY:

Frank L. Corrado
BARRY, CORRADO & GRASSI, PC
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333
fcorrado@capelegal.com

Daniel K. Nazer
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, California 94109
(415) 436-9333
daniel@eff.org

Pro hac vice

Joseph C. Gratz
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
(415) 362-6666
jgratz@durietangri.com

Pro hac vice

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Reflections by Ruth submits this reply brief in support of its motion to dismiss Plaintiff's complaint, pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

Garfum's opposition confirms that this Court should dismiss this case on the pleadings. Although Garfum tries to manufacture a factual dispute, it raises no relevant factual issues. Indeed, in all ways relevant to this motion, Garfum's discussion of its patent is consistent with the analysis in Defendant's opening brief. Defendant *agrees* that the claimed idea is creating a "hierarchical organization by content category and popularity" of "digital content" through "[i]ncorporating user input through votes and categories." Opp'n at 7. This idea—merely a slightly longer way of saying "rank types of content by popular vote"—is plainly abstract and it cannot be saved through application on a conventional computer or the Internet.

Garfum's opposition fails for at least three reasons. *First*, contrary to Plaintiff's suggestion, it is entirely appropriate to find the claims of the '618 patent ineligible on a motion to dismiss. Garfum argues that the Court should defer any decision until after claim construction. But it did not even propose a claim construction. Nor does it explain how claim construction might alter the Court's analysis. Faced with similar arguments, many courts have found that dismissal on the pleadings is appropriate.

Second, Garfum raises entirely irrelevant factual issues. For example, Garfum argues that the claimed invention is not abstract because it was novel when

the patent was filed. But an abstract idea, even if novel, remains abstract. *See Parker v. Flook*, 437 U.S. 584, 588 (1978). The Barnett declaration similarly raises no relevant issues. Stripped of purely legal conclusions or its irrelevant discussion of novelty, the Barnett declaration presents the same analysis of the claims as Defendant's opening brief.

Third, Garfum fails to distinguish binding authority establishing that its patent is invalid under § 101 of the Patent Act. In its opening brief, Defendant explained in detail why the Federal Circuit's recent decision in *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014), applies directly to the facts in this case. *See* Opening Br. at 11-12, 15, 18. Remarkably, Garfum does not even cite, let alone distinguish, this decision. Similarly, Garfum either ignores or fails to distinguish other closely analogous authority. In sum, the opposition brief provides no support for finding the claims patent eligible and Garfum's Complaint should be dismissed.

II. ARGUMENT

A. The Court Should Decide the Threshold Question of Patent-Eligibility on the Pleadings

There is no question that a district court can, in appropriate circumstances, decide eligibility issues on a motion to dismiss. *See, e.g., Bancorp Servs. v. Sun Life Assur. Co. of Canada*, 687 F.3d 1266, 1273–74 (Fed. Cir. 2012). This is such a case. The claims are clear and, as will be seen below, there are no factual disputes relevant to the Court's eligibility analysis.

1. Alice Does Not Require Claim Construction To Decide Patent Eligibility Under § 101

Garfum argues that the Court should defer a decision on eligibility until after claim construction and related discovery. Opp'n at 14-15. But the law does not support this. Many courts have found patents ineligible on motions to dismiss. *See, e.g., DietGoal Innovations LLC v. Bravo Media LLC*, 33 F. Supp. 3d 271, 289-90 (S.D.N.Y. July 8, 2014), *aff'd*, No. 2014-1631 (Fed. Cir. Apr. 8, 2015); *buySAFE, Inc. v. Google Inc.*, 964 F. Supp. 2d 331, 334 (D. Del. 2013), *aff'd*, 765 F.3d 1350 (Fed. Cir. 2014); *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 984 F. Supp. 2d 189, 191, 196 (S.D.N.Y. 2013); Opening Br. at 7-9 (citing further cases).

Garfum primarily relies on *Data Distribution Technologies LLC v. Brer Affiliates Inc.*, Civil No. 12-4878, 2014 WL 4162765 (D.N.J., Aug. 19, 2014). But that case does not hold a court must delay patent eligibility until after formal claim construction. Indeed, such a holding would be directly contrary to Federal Circuit authority. *See Bancorp*, 687 F.3d at 1273-74. Further, *Data Distribution* itself follows a district court decision that expressly applies reasoning from a Federal Circuit case that has since been vacated and reversed.¹ In light of the current state

¹ This is seen where *Data Distribution* follows *Zillow, Inc. v. Trulia, Inc.*, Civ. 12-1549, 2013 WL 4782287, at *7 (W. D. Wash. Sept. 6, 2013). *See Data Distribution*, 2014 WL 4162765, at *7. The reasoning applied there comes from *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335 (Fed. Cir. 2013) (“*Ultramercial I*”). For background, the Federal Circuit issued three opinions in the *Ultramercial* litigation. In the first decision, the appeals court found the challenged claims patent eligible. *See Ultramercial, LLC v. Hulu, LLC*, 657 F.3d 1323, 1330 (Fed. Cir. 2011) (“*Ultramercial P*”) *cert. granted, vacated sub nom. WildTangent, Inc. v.*

of Federal Circuit law and the overruling of *Ultramercial II*, this court should not rely on *Data Distribution Technologies*.

In any event, if Garfum believed that some particular claim construction could save its patent, it should have proposed such a construction. Garfum did not offer a proposed construction of a single claim term. Nor did it explain how claim construction might help its case. In these circumstances, courts have found claim construction unnecessary. *See CyberFone Sys., LLC v. Cellco P'ship*, 885 F. Supp. 2d 710, 715 (D. Del. 2012) (because “plaintiff did not explain how claim construction might alter [the court’s § 101] analysis . . . the court concludes that it may proceed without the benefit of claim construction”). As a recent decision explains:

Plaintiff argues that consideration of patent eligibility under § 101 is premature at this stage of the litigation given the fact-intensive nature of the inquiry. . . . Plaintiff’s Response does not, however, identify any disputed issue of fact or claim construction that requires resolution in order to determine whether Claim 6 is directed to patent-eligible subject matter.

Ultramercial, LLC, 132 S. Ct. 2431 (2012). The second opinion, authored by then Chief Judge Rader, argued that “claim construction normally will be required” before an eligibility decision. *Ultramercial II*, 722 F.3d at 1339. Once again, the Supreme Court vacated the Federal Circuit’s ruling. *WildTangent, Inc. v. Ultramercial, LLC*, 134 S. Ct. 2870 (2014). *Data Distribution* was decided on August 19, 2014, after the Supreme Court vacated the second ruling but before the Federal Circuit reconsidered the case on remand. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014) (“*Ultramercial*”). Although the district court acknowledged that *Ultramercial II* had been vacated, it suggested the “reasoning was sound” and applied it. *Data Distribution*, 2014 WL 4162765, at *7. In relying on this aspect of *Data Distribution*, Garfum is asking the Court to apply authority that is no longer good law.

Given the absence of such dispute and the “salutary effects” of addressing § 101 at the outset of litigation, *see Ultramercial*, 772 F.3d at 718–19 (J. Mayer, concurring), the Court finds that neither separate claim construction proceedings nor further development of the factual record is required before addressing the § 101 issue.

Morales v. Square, Inc., No. 5:13-CV-1092-DAE, 2014 WL 7396568, at *4 (W.D. Tex. Dec. 30, 2014). This case presents an identical situation.

2. Garfum Raises No Relevant Factual Dispute

Defendant’s opening brief includes a detailed discussion of the ’618 patent’s specification and claims. *See* Br. at 2-6. The brief explained that the patent itself repeatedly makes clear that the claimed method is to be performed using generic computer and Internet technology. *Id.* Garfum’s opposition does not rebut this. Instead, Garfum raises factual issues having nothing to do with patent eligibility analysis.

(a) Denying Allegations in a Complaint Does Not Preclude a Rule 12(b)(6) Motion

Garfum first argues that dismissal on the pleadings is inappropriate because Defendant denied certain allegations in Garfum’s Complaint. *See* Opp’n at 6. This is nonsense. Garfum does not even identify which disputed allegations it is referring to nor explain how they are relevant to the question of whether the patent is ineligible under § 101 of the Patent Act. It is true that Defendant denies that it infringes Garfum’s patent. *See* Answer at ¶¶ 8-15. But infringement is entirely irrelevant to this motion. Nothing in Defendant’s Answer precludes dismissal.

(b) The Purported “Novelty” of a Solution Is Irrelevant to Patent Eligibility Under § 101

Garfum argues that its patent should survive a § 101 challenge because it presents a “novel method.” Opp’n at 1. More specifically, it suggests that, prior to the purported invention, databases were not configured to incorporate votes by users. *See id.* 7-8; *see also* Barnett Decl. ¶¶ 10, 19. Even if this were true, it is irrelevant as it confuses abstraction for novelty. The Supreme Court has explained that “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981); *see also Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012) (“Einstein could not patent his celebrated law that $E=mc^2$ ”); *Parker v. Flook*, 437 U.S. 584, 588 (1978) (holding patent claim to abstract idea invalid even though “we assume that respondent’s formula is novel and useful and that he discovered it”). It has long been understood that even a claim that is highly novel may nonetheless lack patentable subject matter. *O’Reilly v. Morse*, 56 U.S. 62, 114 (1853) (“And it has never, we believe, been supposed by any one, that the first inventor of a steam printing-press, was entitled to the exclusive use of steam, as a motive power.”).

(c) The Barnett Declaration Is Irrelevant

Garfum submitted a declaration by James Barnett² with its opposition. This declaration need not be considered—but if it is, it confirms that the claims are invalid under § 101.³

First, it is important to note what is *not* included in the Barnett declaration. The declaration does not include any proposed construction of claim terms that might assist the Court’s analysis. Instead, Barnett improperly testifies as to the ultimate legal issue of whether the claimed invention is abstract. *See* Barnett Decl. ¶ 7. But an expert may not testify regarding issues of law and the Court should disregard such statements. *See, e.g., Casper v. SMG*, 389 F. Supp. 2d 618, 621 (D.N.J. 2005); *see also In re Bilski*, 545 F.3d 943, 950-51 (Fed. Cir. 2008) (“Whether a claim is drawn to patent-eligible subject matter under § 101 is a threshold inquiry” and “an issue of law.”), *aff’d sub nom. Bilski v. Kappos*, 561 U.S. 593, 602 (2010). The Barnett declaration also presents irrelevant evidence about the purported novelty of the invention. *Id.* at ¶¶ 10, 19. For the reasons given above, even if true, this is not relevant to patent eligibility.

² For the purposes of this motion only, Defendant assumes that Barnett could qualify as an expert.

³ A declaration is in any event improper in responding to a motion to dismiss; the factual allegations of the complaint must stand or fall on their own. *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3rd Cir. 1992) (“Review of a Rule 12 (b)(6) motion is “limited to the contents of the complaint and any attached exhibits.”). Defendant does not rely on any documents outside the pleadings in support of its motion to dismiss, so there is no basis to convert this motion to one for summary judgment, as Garfum suggests.

Aside from improper legal conclusions and irrelevant discussion of novelty, the declaration includes a brief presentation of what Barnett contends the claims require. *Id.* at ¶¶ 11-17. There is nothing in this analysis of the claims that conflicts with Defendant’s opening brief. Indeed, this can be seen by comparing the two documents:

Barnett Declaration	Defendant’s Opening Brief
The method of the ’618 patent allows “users to share digital content with other users on the network, and have the digital content promoted through hierarchical organization by content category and popularity.” Barnett Decl. ¶ 8.	The ’618 patent “describes a method for organizing the shared content in accordance with feedback provided by the users.” Opening Br. at 4.
“Claim 1 requires the user’s uploaded multi-media content to be categorized, either automatically or manually based on the contents.” Barnett Decl. ¶ 12.	Claim 1 “recites that the content is to be categorized by ‘subject matter’ . . . the classification of content by subject matter can be done either automatically or manually.” Opening Br. at 15-16.
“Claim 1 further requires that the multi-media content be placed into a ‘hierarchy’ by using the category information, and the competitive measurement system” Barnett Decl. ¶ 14.	The claims of the ’618 patent are directed to a “competitive measurement system” that involves “ranking the content based on a summation of points.” Opening Br. at 15.
“Claim 5 of the ’618 Patent is largely similar to Claim 1, with the addition of round-based contest, which allows for even better organization by requiring extra rounds of user interaction and input.” Barnett Decl. ¶ 15.	“The only other independent claim, Claim 5, is identical [to Claim 1] except that it requires multiple rounds of competition.” Opening Br. at 4.

The Barnett declaration supports Defendant’s analysis of the claims.

B. The Claims of the '618 Patent Are Not Patent-Eligible Under *Alice*

Garfum's patent merely combines conventional computers with the abstract idea of ranking content by category and popularity, and thus falls squarely within the category of patents invalidated under § 101. Neither its asserted novelty, nor the fact that the claims refer to generic computer functions can change that conclusion.

1. The Claims Are Directed to an Abstract Idea

Garfum argues that claims 1 and 5 are not abstract because they require organizing digital content through "hierarchical organization by content category and popularity." Opp'n at 7. But Defendant agrees with this characterization of the claims. Throughout its brief, Garfum focuses on the claim term "hierarchy" but its discussion of this term is entirely consistent with Defendant's brief. As Garfum explains, the claimed invention involves organizing a database by "[i]ncorporating user input through votes and categories." Opp'n at 7. In other words, the method ranks categories of content by counting user votes, *i.e.* a competition by popular vote. Garfum's attempt to describe exactly the same thing using slightly different language does nothing to show that its claims aren't directed to this abstract idea.

Further, Garfum tries to confuse the issue by insisting that the claimed idea was novel. *See* Opp'n at 7 (claiming invention differs from "traditional methods"). But, as is noted above, even if this were true, it would not show the claims are non-abstract.

There are numerous closely analogous cases where courts have found claims to be directed to an abstract idea. *Ultramercial* is directly applicable. In that case, the patent claimed an “abstract idea of showing an advertisement before delivering free content.” 772 F.3d at 715. The court noted that adding “routine additional steps” such as “updating an activity log” or “requiring a request from the consumer to view the ad” could not transform an abstract idea into patent-eligible subject matter. *Id.* at 716. Similarly, the claims in ’618 patent are not transformed into patent-eligible subject matter simply because they involve “ranking” content “based on a summation of points.” ’618 patent at col. 19:28-33; 2:17-25. Garfum did not cite, let alone distinguish, the Federal Circuit’s decision in *Ultramercial*.

Garfum also failed to distinguish two other cases cited by Defendant: *Planet Bingo, LLC v. VKGS LLC*, 576 Fed. App’x 1005 (Fed. Cir. 2014) (unpublished) and *Wolf v. Capstone Photography, Inc.*, No. 2:13–CV–09573, 2014 WL 7639820 (C.D. Cal. Oct. 28, 2014). In *Planet Bingo*, the patent claimed a method of running a bingo game over a computer network. The claims required “assigning a player identifier” and “selecting, storing, and retrieving two sets of numbers.” *Planet Bingo*, 576 Fed. App’x at 1007-08. Similarly, the claims in the ’618 patent require assigning a media category and summing user votes. ’618 patent at col. 19:20-33; 20:10-25. In neither case does this activity render the claim non-abstract.

Wolf presents facts particularly close to this case. Both patents are directed to using a computer to organize media files. In *Wolf*, the claimed method involved organizing photos according to athlete bib number or other athlete-identifying information. *See* 2014 WL 7639820, at *2. Garfum’s patent claims organizing files

by subject category and popularity. Garfum simply states that the patent in *Wolf* was directed to an abstract idea while its claims are not. *See* Opp'n at 10. But it can identify no relevant distinction because none exists.

2. The Patent Itself States that the Claimed Method Can Be Performed With Conventional Hardware and Software

In *Alice*, the Supreme Court held that a claim directed to an abstract idea did not become patent eligible if they “merely require generic computer implementation.” *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 134 S. Ct. 2347, 2357 (2014). As Garfum’s claim takes an abstract idea and applies it to generic computer and Internet technology, it fails this test.

Garfum argues that the claims could not be implemented using conventional database technology. *See* Opp'n at 7 (suggesting a “conventional database” could not practice the method). But this is directly contradicted by the patent itself. The specification discusses databases at Column 10. It is worth quoting the relevant passages in full:

Databases **194**, **197** store software, descriptive data, digital content, system data, and any other data item required by the other components of server apparatus **167**. Databases used as databases **194**, **197** are provided as, for example, a database management system (“DBMS”), an object-oriented database management system (“ODBMS”), a relational database management system (e.g., DB2, ACCESS, etc.), a file system, and/or another conventional database package. In alternative examples, each of database **194**, **197** are implemented using object-oriented technology or via text files that are accessed with a Structured Query Language (SQL) or other tools known to those having ordinary skill in the art. . . .

Databases that are used as database **200** are generally used to manage, organize, and categorize the information that is collected from the users of

the interactive portal. These are implemented on, for example, database **194, 197** of FIG. 1, as a DBMS, an ODBMS, a relational database management system (e.g., DB2, ACCESS, etc.) or another conventional database packages.

'618 patent at col. 10:11-22; 55-61 (emphasis added). The specification states in plain terms that the claimed invention may be implemented using “conventional” database technology.

In essence, Garfum’s argument regarding “conventional” databases is another attempt to conflate novelty and eligibility analysis. Garfum says that, prior to the '618 patent, “conventional databases were not configured to deliver subjective search results.” Opp’n at 8. Even if true, that would not save the claims. The relevant question is whether the claims are directed to taking a conventional database and configuring it to practice the method (*i.e.* by counting votes). That question is answered explicitly by the specification. *See* '618 patent at col. 10:18; 10:60-61. As Defendant’s opening brief explained in detail, the claimed method is implemented on conventional computer and Internet technology. *See* Opening Br. at 2-6, 18–20.

Finally, Garfum suggests that its claims are not abstract because they do not cover other kinds of competition, such as a presidential election. *See* Opp’n at 11. But this is absurd. Recall *Planet Bingo*, where the Federal Circuit invalidated a patent directed to “the abstract idea of managing/playing the game of Bingo.” *Planet Bingo*, 576 Fed. App’x at 1006-07. It would be no response to say that this claim wasn’t abstract because it didn’t cover computerized chess or online poker. Rather, the claim took the abstract idea of playing Bingo and applied it to

conventional computers. This case is no different. The '618 patent takes the abstract idea of organizing digital media by category and popularity (i.e. voting on a favorite photo or movie) and applies it to the Internet.

3. Garfum Has Waived Any Argument Regarding the Patentability of Any Claim Separate and Apart from Claims 1 or 5

In its opposition, Garfum discusses only claims 1 and 5 of the '618 patent. It presents no separate argument in defense of the dependent claims (discussed by Defendant at pages 16-17 of its opening brief). Accordingly, the dependent claims fall along with the two independent claims. *See SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp.*, 225 F.3d 1349, 1359 (Fed. Cir. 2000) (issues not raised with respect to dependent claims are deemed waived).

III. CONCLUSION

All claims of the '618 patent are invalid for failing to claim patent-eligible subject matter. This is not a curable problem with the way the complaint has been pled. It is a fundamental defect in the patent claims themselves, and presents a matter of law that is properly resolved at the pleadings stage. The Complaint should be dismissed with prejudice.

Dated: April 13, 2015

By: /s/ Frank L. Corrado
Frank L. Corrado
BARRY, CORRADO & GRASSI, PC
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

fcorrado@capelegal.com

Joseph C. Gratz (*pro hac vice*)

DURIE TANGRI LLP

217 Leidesdorff Street

San Francisco, CA 94111

(415) 362-6666

jgratz@durietangri.com

Daniel K. Nazer (*pro hac vice*)

ELECTRONIC FRONTIER FOUNDATION

815 Eddy Street

San Francisco, CA 94109

(415) 436-9333

daniel@eff.org

Attorneys for REFLECTIONS BY
RUTH D/B/A BYTEPHOTO.COM