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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FREE STREAM MEDIA CORP.,  
Plaintiff,  
v.  
ALPHONSO INC., et al.,  
Defendants.

Case No. [17-cv-02107-RS](#)

**ORDER DENYING MOTION FOR  
LEAVE TO SEEK  
RECONSIDERATION OR TO  
CERTIFY FOR INTERLOCUTORY  
APPEAL; ORDER TO SUBMIT  
PROPOSED SCHEDULING ORDER**

Earlier this year an order issued denying defendants’ “Alice” motion to dismiss plaintiff’s patent infringement claims. Several months later, defendants filed a motion for leave to seek reconsideration pursuant to Civil Local Rule 7-9, or, in the alternative for certification for interlocutory appeal of the denial of the motion to dismiss. Under Rule 7-9, a party seeking leave to file a motion for reconsideration must: “specifically show reasonable diligence in bringing the motion,” and at least one of the following:

- (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
- (2) The emergence of new material facts or a change of law occurring after the time of such order; or

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(3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Here, defendants’ request for reconsideration presents two basic arguments. First, defendants contend that “overwhelming and dispositive precedent”—including decisions issued after the order in this action—establish that patents relating to “targeted advertising” necessarily claim patent-ineligible ideas. This is a strawman. The order clearly indicated that “targeted advertising,” standing alone, is an abstract idea, ineligible for patent protection under Section 101. *See* Dkt. No. 277 at p. 6 (discussing the holding in *OpenTV, Inc. v. Netflix, Inc.*, 76 F. Supp. 3d 886 (N.D. Cal. 2014) that a patent directed at targeted programming was patent ineligible, but concluding the ’356 patent in suit “is not directed at merely the abstract idea of targeting advertising.”)

Defendants’ stronger argument is that to pass muster under *Alice*, the actual *claims* of the patent must include limitations incorporating purported technological innovations described in the specification—and there is at least an argument that the claims-in-suit here do not do so. The order denying defendants’ motion to dismiss observed:

Alphonso does not dispute that if the patent were so-directed [to a specific implementation of a solution to a problem in the software arts], it would pass the *Alice* test at the first stage. Alphonso argues instead, with some justification, that on their face the claims do not expressly refer to, or obviously address, technological barriers, or how such barriers are being overcome through the invention.

The order concluded, however, that under *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017), the issue was at most one of enablement, not patent eligibility. *See id.* at 1261 (“whether a patent specification teaches an ordinarily skilled artisan how to implement the claimed invention presents an enablement issue under 35 U.S.C. § 112, not an eligibility issue under § 101.”). Defendants now argue the order misapplied *Visual Memory*, insisting the patent

1 claims contain no limitations whatsoever that incorporate any of the supposed inventive aspects  
2 related to overcoming the “technological barriers.” The prior order, however, expressly  
3 concluded, “the claims plainly describe methods and systems that call for the very kinds of  
4 communications between devices that are not possible through conventional devices operating in  
5 standard fashion.”

6 The prior order, of course, issued in the context of a motion to dismiss, without claim  
7 construction. It necessarily is without prejudice to a determination at some future point in the  
8 proceedings that the claims fail under Section 101. Defendants, however, have shown no basis for  
9 reconsideration at this juncture, nor that the matter should be certified for interlocutory appeal.

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11 Separately, prior to the time defendants sought leave to seek reconsideration, the parties  
12 appeared for a case management conference and were advised that the then-scheduled trial date  
13 would be vacated. The parties were ordered to meet and confer and to submit a new proposed  
14 scheduling order. See Dkt. No. 280. No such proposed order has yet been filed. The parties are  
15 directed to file the proposed scheduling order within 15 days.

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17 **IT IS SO ORDERED.**

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19 Dated: June 12, 2018

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22 RICHARD SEEBORG  
23 United States District Judge  
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