

2017-2187, 2017-2189, 2017-2190 & 2017-2222

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**IN THE  
UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT**

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**AUTOMATION MIDDLEWARE SOLUTIONS, INC.,**  
*Plaintiff-Appellant*

v.

**INVENSYS SYSTEMS, INC., SCHNEIDER ELECTRIC USA, INC.,  
ROCKWELL AUTOMATION, INC., ROCKWELL AUTOMATION  
TECHNOLOGIES, INC.,**  
*Defendants-Appellees*

**EMERSON PROCESS MANAGEMENT LLLP, FISHER-ROSEMOUNT  
SYSTEMS, INC., EMERSON INDUSTRIAL AUTOMATION USA INC.,  
ROSEMOUNT INC., EMERSON PROCESS MANAGEMENT POWER &  
WATER SOLUTIONS, INC., EMERSON INDUSTRIAL AUTOMATION  
USA LLC,**  
*Defendants-Cross-Appellants*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TEXAS IN CASE NO. 2:15-CV-00898,  
JUDGE ROBERT W. SCHROEDER, III

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**PLAINTIFF-APPELLANT AUTOMATION MIDDLEWARE  
SOLUTIONS, INC.'S CORRECTED PETITION FOR REHEARING *EN  
BANC***

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Matthew D. Powers  
William P. Nelson  
TENSEGRITY LAW GROUP LLP  
555 Twin Dolphin Drive, Suite 650  
Redwood Shores, CA 94065  
Telephone: (650) 802-6000  
Facsimile: (650) 802-6001

*Attorneys for Plaintiff-Appellant  
Automation Middleware Solutions, Inc.*

October 18, 2018

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## CERTIFICATE OF INTEREST

Counsel for Appellant Automation Middleware Solutions, Inc. (“AMS”) in Appeals Nos. 17-2187; 17-2189; 17-2190; and 17-2222 certify the following:

**1. The full name of every party or amicus represented by me is:**

Automation Middleware Solutions, Inc.

**2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

None.

**3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:**

Automation Middleware Solutions, Inc. is a wholly-owned subsidiary of Wi-LAN Technologies Inc. (a private Delaware corporation). Wi-LAN Technologies Inc. is a wholly-owned subsidiary of Wi-LAN Inc. (a private Canadian corporation). Wi-LAN Inc. is a wholly-owned subsidiary of Quarterhill Inc. (a Canadian corporation) which is a public company listed in Canada and the U.S.

**4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:**

TENSEGRITY LAW GROUP LLP: Matthew D. Powers, William P. Nelson

BRAGALONE CONROY PC: Monte Bond, Jeffrey R. Bragalone, Patrick J. Conroy, Tarry A. Saad, James R. Perkins

WARD & SMITH LAW FIRM: T. John Ward, Jr., J. Wesley Hill, Claire A. Henry

**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:**

Pursuant to Federal Circuit Rule 47.5(a), Appellant states that the following appeals have been consolidated into this lead case:

- Automation Middleware Solutions, Inc. v. Invensys Systems, Inc., et. al., 17-2187 (Lead)
- Automation Middleware Solutions, Inc. v. Emerson Industrial Automation USA Inc., et. al., 17-2189
- Automation Middleware Solutions, Inc. v. Rockwell Automation, Inc., 17-2190
- Automation Middleware Solutions, Inc. v. Emerson Process Management, LLLP, et. al., 17-2222

Dated: October 18, 2018

/s/ Matthew D. Powers  
Matthew D. Powers

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## STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court:

1. The panel decision affirming that the claims at issue were patent-ineligible under § 101 for a failure to recite a tangible embodiment is contrary to this Court's decision in *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018).

2. The panel decision affirming that the claims at issue were patent-ineligible under *Alice* step two, based on disputed issues of fact at the Rule 12 stage, is contrary to this Court's decisions in *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018) and *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018).

3. The panel decision affirming that the claims at issue were patent-ineligible under step one of the eligibility analysis set out in *Alice*, is contrary to this Court's decisions in *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017), *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018) and *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

Dated: October 18, 2018

/s/ Matthew D. Powers  
Attorney of Record for Plaintiff-Appellant  
Automation Middleware Solutions, Inc.

## I. INTRODUCTION

Two recent decisions by this Court, issued following briefing but prior to oral argument in this appeal, seemed to answer important questions about patent eligibility under 35 U.S.C. § 101 in favor of Appellants Automated Middleware Solutions (“AMS”). However, the panel’s Rule 36 affirmance of the district court’s patent-ineligibility rulings throws these answers into doubt, because its summary affirmance provides no explanation for the clear inconsistency between the result and this Court’s precedent.

First, in *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018), this Court found that a patent claim to a “data processing system” fell within the four categories of patent-eligible subject matter despite failing to explicitly recite any tangible component, because the claim “clearly requires a computer operating software, a means for viewing and changing data, and a means for viewing forms and reports.” *Id.* Yet the panel in this appeal affirmed the district court’s ruling that claims that are indistinguishable from the claim in *Aatrix* were not patent eligible, for failure to claim a tangible embodiment.

Second, in *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018), this Court confirmed that the “question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field” under step two of the *Alice* analysis is a “question of fact,” and

material disputes of fact on this question prevent summary judgment or dismissal under Rule 12. Here, the panel affirmed the district court's dismissal of the AMS claims at issue under § 101, based on its finding that the claims at issue were routine and conventional – despite specific intrinsic evidence to the contrary found in the specification, which should have prevented dismissal under *Berkheimer* and *Aatrix*.

Rehearing of this case *en banc* is warranted given the evident contradiction between the guidance provided by *Berkheimer* and *Aatrix*, and the panel's affirmance. By curing the panel's failure to apply these binding precedents, the *en banc* Court will also provide needed guidance to district courts about how *Aatrix* and *Berkheimer* are to be applied in making patent eligibility determinations.

Finally, the panel's affirmance of the district court's finding that the claims at issue were drawn to an abstract idea under step one of the *Alice* analysis is contrary to this Court's decisions in *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017), *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018) and *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016), which found that claims directed to a specific improvement in the functioning of computer systems are not unpatentably abstract.

## **II. BACKGROUND**

The patent claims at issue here describe improvements to systems for precise, software-driven control of motorized mechanical devices, such as specialized cutting



and bending equipment used in a factory setting (“motion control”). Before the inventions claimed in the Appealed Patents (U.S. Patent Nos. 5,691,897 (the “897 Patent”); 8,073,557 (the “557 Patent”); 6,516,236 (the “236 Patent”); and 6,513,058 (the “058 Patent”)), it was difficult or unwieldy for a single application program to communicate with motion control devices manufactured by different vendors. Appx1124, 2:33-39. While a user could rely on automation applications or other “high-level” programs to “simplify the task of programming” and “generate control commands that are passed to the controller,” single-application control of multiple motion control devices required uniformity of software language. *Id.* at 1:61-67; 2:33-39. Vendor-based software incompatibilities resulted in inefficient control of large, complex systems because each piece of equipment with a unique software language required its own application program.

The inventions claimed in the Appealed Patents overcome this problem in the prior art and allow a single application program to control multiple motion control devices—regardless of their manufacturer’s unique software language. They do so by implementing a specialized layer of software, claimed as a “motion control component” and/or “component code,” *see, e.g.*, Appx1250-1251 (236 Patent, Claim 1), that associates or correlates desired motion control operations generated at the application program level with the low-level, hardware-specific driver operations necessary to execute them through the associated motion control devices.

Moreover, through their definition and use of “primitive” motion operations comprising “core driver functions,” and “non-primitive” operations comprising “extended driver functions,” the claimed inventions allow control of multiple hardware devices even in situations where a given command is not supported in a device’s native language. Appx1231, 9:40-10:19. For example, the motion control component can be used to emulate an unsupported extended driver function through a combination of core driver functions, thereby providing “functionality where none would otherwise exist.” Appx1228, 4:25-29.

On March 31, 2017, the district court granted Defendants’ motion to dismiss for failure to recite subject matter within the statutory categories outlined by 35 U.S.C. § 101 as to Claims 1-10 of the 236 Patent and Claim 4 of the 058 Patent, finding that the claims “do not recite processes or claim an invention fixed in a tangible medium.” Appx12. Separately, applying the Supreme Court’s test for patent eligibility set out in *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014), the district court granted also Defendants’ motion to dismiss based on patent ineligible subject matter as to Claims 1-7 of the 236 Patent, Claims 1 and 4 of the 058 Patent, Claims 17–23 of the 897 Patent, Claims 16–22 and 27–30 of the 557 Patent, and Claims 1-4 of the 543 Patent. Appx5-32.

AMS timely appealed the district court’s dismissals of certain claims of the Appealed Patents; briefing on the issues completed in February 2018. Following

briefing but prior to oral argument, this Court issued two decisions that bear directly on the district court's rulings. First, in *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018), this Court found that a patent claim to a "data processing system" recited patent-eligible subject matter even though it claimed no tangible components. Because the claim "clearly requires a computer operating software, a means for viewing and changing data, and a means for viewing forms and reports," the Court found it "is very much a tangible system." *Id.* Second, in *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018), this Court confirmed that the "question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact," and must be proven by clear and convincing evidence. *Id.* at 1368. Despite this new and binding precedent, the panel affirmed the district court's dismissal in a *per curiam* decision under Rule 36.

### III. ARGUMENT

#### A. Rehearing *En Banc* Is Warranted Because The Panel's Affirmance of The District Court's "Tangible Embodiment" Ruling Is Inconsistent With *Aatrix*

This Court's decision in *Aatrix* resolved the question of whether software system claims like Claims 1-3 of the 236 Patent and Claim 4 of the 058 Patent are eligible for patenting even if they do not explicitly recite a "computer" or "memory": they are. In every relevant respect, the claims found patent-ineligible by the district

court (and whose ineligibility was summarily affirmed by the panel) are indistinguishable from those found eligible by a different panel in *Aatrix*. This inconsistent result indisputably warrants rehearing *en banc*.

In *Aatrix*, the claim at issue was directed to a “data processing system” whose only structural elements were a “form file,” a “form file creation program,” a “data file containing data,” and a “form viewer program operating on the form file and the data file,” each directed to various functional software operations. *Aatrix*, 882 F.3d at 1124. Beyond these digital elements, the *Aatrix* claim recited no elements that could literally be considered tangible items, such as a “computer” or “memory.” Despite this, the Court found that “the district court erred to the extent it held that claim 1 of the '615 patent is ineligible solely because it is directed to an intangible embodiment.” *Id.* at 1125. The Court distinguished the *Aatrix* claim from “claims to pure data and claims to transitory signals” that had previously found to be patent-ineligible in cases such as *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014), and *In re Nuijten*, 500 F.3d 1346 (Fed. Cir. 2007), holding that “the rationale of those decisions—failure of the claimed matter to come within any of the four statutory categories: process, machine, manufacture, composition of matter—does not apply here.” *Id.* Instead, the Court explained that, “[l]ike many claims that focus on software innovations, it is a system claim,” and because it “claims a data processing system which *clearly requires a computer*

*operating software*, a means for viewing and changing data, and a means for viewing forms and reports,” the claimed data processing system “is very much a tangible system” that is patent-eligible. *Id.* at 1125-1126. Significantly, the Court’s reasoning – that the claim “clearly requires a computer operating software” and other components, such as a “means for viewing” – is not based on any recitation of a computer, or a viewing means in the claims. Instead, it is the logical and inescapable conclusion to be drawn from the software elements recited: it claims a data processing *system* comprised of software elements, so of course it must run on a “computer operating software” and it is thereby drawn to a tangible embodiment.

The claims of the 236 and 058 Patents affirmed to be ineligible by the panel are no different than the *Aatrix* claim found to be eligible. Like the *Aatrix* claim to a “data processing system,” the appealed 236 and 058 claims are system claims: 236 Patent, Claim 1 claims a “system for generating a sequence of control commands for controlling a selected motion control device”, Appx12062, and 058 Patent, Claim 4 claims a “system for allowing an application program to communicate with any one of a group of supported hardware devices.” Appx11972. Like the *Aatrix* claim, the 236 and 058 Patent claims “clearly require[] a computer operating software” although they do not explicitly recite one, because they each recite software components, each with recited functions, operating as a *system*. Like the *Aatrix* claim, which the Court found requires a “means for viewing and changing data, and

a means for viewing forms and reports,” although it does not explicitly recite them, the 236 and 058 Patents similarly require tangible means to perform the recited functional operations as part of a system. For example, the 236 Patent requires a means for generating a sequence of control commands (*e.g.*, a computer), because it recites as part of the claimed system a “motion control component for generating the sequence of control commands for controlling the selected motion control device based on the component functions of the application program, the component code associated with the component functions, and the driver code associated with the selected software driver.” Appx12063. The 058 Patent similarly requires such a means for generating control commands, as it recites as part of the claimed system a “control command generating module for generating control commands.” Appx11972. Accordingly, like the *Aatrix* claim, the appealed 236 and 058 Patent claims are “very much a tangible system.” *See Aatrix*, 882 F.3d at 1125. Any contrary decision would improperly cause patent eligibility to “turn on the ingenuity of the draftsman.” *See Accenture Global Servs. v. Guidewire Software, Inc.*, 728 F.3d 1336, 1341 (Fed. Cir. 2013) (“Patent eligibility does not turn on the ingenuity of the draftsman.”).

The panel’s affirmance of the district court’s dismissal of these claims as patent-ineligible simply cannot be squared with *Aatrix*. Either *Aatrix* was decided correctly, and the panel’s affirmance must be reversed, or *Aatrix* was incorrectly

decided, and it should be reversed; the panel's affirmance under Rule 36 makes it impossible to know. In either case, rehearing *en banc* is called for.

**B. The Panel's Affirmance of The District Court's *Alice* Step Two Finding That the Appealed Claims Recite Only Routine and Conventional Elements Is Contrary To *Berkheimer* and *Aatrix***

*Berkheimer* and *Aatrix* stated two principles that are irreconcilable with the district court's finding under *Alice* step two that Claims 1-7 of the 236 Patent, Claims 1 and 4 of the 058 Patent, Claims 17–23 of the 897 Patent, Claims 16–22 and 27–30 of the 557 Patent, and Claims 1-4 of the 543 Patent were not patent eligible. The first is that, under the step two analysis, whether a claim element or combination of elements is well-understood, routine and conventional (and therefore not drawn to an inventive concept) is a question of fact that must be proven by clear and convincing evidence. *See, e.g., Berkheimer*, 881 F.3d at 1368; *Aatrix*, 882 F.3d at 1128 (“[T]he second step of the *Alice/Mayo* test requires examining ‘the elements of the claim to determine whether it contains an “inventive concept” sufficient to “transform” the claimed abstract idea into a patent-eligible application’ . . . . Whether the claim elements or the claimed combination are well-understood, routine, conventional is a question of fact.”) Second, where under the record that is properly before the district court, there is a material dispute of fact concerning whether a claim element or combination of elements is well-understood, routine and conventional, it is error for the court to find that claim ineligible at the summary judgment or

dismissal stage. *Berkheimer*, 881 F.3d at 1370 (“Whether claims 4-7 perform well-understood, routine, and conventional activities to a skilled artisan is a genuine issue of material fact making summary judgment inappropriate with respect to these claims.”); In *Aatrix*, in reversing the district court’s patent-ineligibility determination at the Rule 12 stage, the Court held that the step two conventionality “question cannot be answered adversely to the patentee based on the sources properly considered on a motion to dismiss, such as the complaint, the patent, and materials subject to judicial notice.” 882 F.3d at 1128.

Yet that is what the district court did here, and the Panel’s affirmation of that ruling is conflict with both *Berkheimer* and *Aatrix*. Under 5th Circuit law, controlling here, a “district court can grant a motion to dismiss only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief,” and the district court “***must not go outside the pleadings*** and must accept all well-pleaded facts as true, viewing those facts most favorably to the plaintiff.” *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). Despite this, the district court found, citing no support, that the “primitive” and “non-primitive” operations recited in each of the claims were “routine and conventional” and known in the art:

AMS is incorrect that the claimed distinction between primitive and non-primitive operations and emulation of non-primitive operation using primitive ones provide an inventive concept. . . .Further, ***the labels “primitive” and “non-primitive” were in common use in the software arts*** at the time of



invention. Accordingly, the distinction between primitive and non-primitive functions and the emulation of non-primitive functions with primitive ones, considered together, ***amount to no more than a detailed description of routine and conventional tools in the software arts.***” Appx27.

The district court’s finding of fact that “the labels ‘primitive’ and ‘non-primitive’ were in common use in the software arts at the time of invention” misstates the law: as this Court explained in *Berkheimer*, “[w]hether a particular technology is well-understood, routine, and conventional goes beyond what was simply known in the prior art.” 881 F.3d at 1369. More fundamentally, the district court’s fact-finding was improper under *Berkheimer* and *Aatrix*. First, the evidence properly before it at the Rule 12 stage – in particular, the specification of the patents at issue – directly contradicts (and prohibits under *Berkheimer* and *Aatrix*) any finding that “primitive” and “non-primitive” operations were routine and conventional. The district court’s statement in support of this finding that a “printer driver necessarily assembles primitive functions such as moving the print head using a lateral motor and spraying the ink by opening a valve” (Appx27) cannot be squared with the specification, which explicitly states that this printer driver “***approach does not provide the application programmer with the ability to control the hardware in base incremental steps,***” Appx1228, 3:7-18, in other words, to extend the functionality of devices by the assembly of such incremental steps as described in the appealed patents. *See, e.g.*, Appx1228, 4:25-27. The specification further states that while allowing “a user to select a driver associated with a given printer to allow

the application program to print on that given printer” was a “common programming practice,” (Appx1228, 3:1-21), that model was “*not applicable to the development of a sequence of control commands for motion control devices*” for the above-stated failure to provide for hardware control in base incremental steps, specifically refuting the district court’s assertion about printer control. Appx1228.

In fact, the specification consistently teaches that use of a motion control component that represents motion control operations as “primitive operations” and “non-primitive operations” was unconventional in the field of motion control. For instance, the specification describes “WOSA,” a known model of an intermediate software layer, but teaches that this “*model has no relation to motion control devices.*” Appx1227, 2:55-67. The specification further teaches that the use of primitive and non-primitive operations brought a specific inventive concept to the claims, as they delivered new capabilities to motion control devices: “[t]he *use of core driver functions to emulate extended driver functions provides functionality where none would otherwise exist. . .*” Appx1228, 4:25-27. This evidence stood un rebutted by any evidence properly before the district court at the Rule 12 stage. Before the district court, the defendants cited to extrinsic evidence to support their contention that “primitive” and “non-primitive” operations were routine and conventional, Appx279-280, and the district court appears to have credited that evidence in its opinion. Appx26. It was error for the court to disregard the intrinsic

evidence of non-conventionality in favor of extrinsic evidence at the motion to dismiss stage, as such extrinsic evidence was not properly before it. *Aatrix*, 882 F.3d at 1128 (discussing evidentiary “sources properly considered on a motion to dismiss, such as the complaint, the patent, and materials subject to judicial notice.”). The district court’s dismissal was improper even if that extrinsic evidence is taken into account, because at most, that evidence demonstrated the presence of material disputes of fact concerning whether “primitive” and “non-primitive” operations were well-understood, routine and conventional in the field of motion control. *Berkheimer* and *Aatrix* prevent finding ineligibility in the presence of such a dispute.

The panel’s affirmance of the district court’s finding that the Appealed Claims are not patent-eligible cannot be squared with *Berkheimer* or *Aatrix*. This inconsistency warrants rehearing *en banc*.

**C. The Panel’s Affirmance of The District Court’s Finding Under *Alice* Step One Is Contrary To *Enfish*, *Visual Memory*, and *Core Wireless***

This Court’s decisions under step one of the *Alice* analysis – in particular, *Enfish*, *Visual Memory*, and *Core Wireless* – confirm that claims which are directed to specific, **claimed** improvements to the operation of a computer system are not directed to an abstract idea. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016) (patent-eligible claims were “directed to a specific implementation of a solution to a problem in the software arts”); *Visual Memory LLC v. NVIDIA*

*Corp.*, 867 F.3d 1253, 1259-1260 (Fed. Cir. 2017) (patent-eligible claims “are directed to an improved computer memory system, not to the abstract idea of categorical data storage.”); *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1362 (Fed. Cir. 2018) (eligible claims were “directed to a particular manner of summarizing and presenting information in electronic devices.”)

The appealed claims are not directed simply to a “middle translating layer,” as the district court found. Appx20. Like the claims found eligible under *Alice* step one, they are directed to a **particular** middle layer that organizes all motion control commands into the claimed “primitive” and “non-primitive operations.” *See, e.g.*, Appx1250-1251 (236 Patent, Claim 1). In doing so, they provide a specific improvement in the functioning of computer systems for motion control: as the specification explains, this particular organization enables motion control devices to perform motion control operations they could not otherwise support, and “provides functionality where none would otherwise exist.” (Appx1228, 236 Patent, 4:14-28).

The panel’s affirmance of the district court’s step one analysis, which ignored these specifically claimed improvements to computer systems for motion control, cannot be reconciled with this Court’s precedent, and rehearing *en banc* is warranted.

#### **IV. CONCLUSION**

For the reasons described above, the petition for rehearing *en banc* should be granted.

Dated: October 18, 2018

Respectfully submitted,

/s/ Matthew D. Powers

Matthew D. Powers

William P. Nelson

TENSEGRITY LAW GROUP LLP

555 Twin Dolphin Drive, Suite 650

Redwood Shores, CA 94065

Phone: (650) 802-6000

Fax: (650) 802-6001

*Attorneys for Plaintiff-Appellant*

*Automation Middleware Solutions, Inc.*

## **ADDENDUM**

NOTE: This disposition is nonprecedential.

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

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**AUTOMATION MIDDLEWARE SOLUTIONS, INC.,**  
*Plaintiff-Appellant*

v.

**INVENSYS SYSTEMS, INC., SCHNEIDER  
ELECTRIC USA, INC., ROCKWELL AUTOMATION,  
INC., ROCKWELL AUTOMATION TECHNOLOGIES,  
INC.,**  
*Defendants-Appellees*

**EMERSON PROCESS MANAGEMENT LLLP,  
FISHER-ROSEMOUNT SYSTEMS, INC., EMERSON  
INDUSTRIAL AUTOMATION USA INC.,  
ROSEMOUNT INC., EMERSON PROCESS  
MANAGEMENT POWER & WATER SOLUTIONS,  
INC., EMERSON INDUSTRIAL AUTOMATION USA  
LLC,**  
*Defendants-Cross-Appellants*

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2017-2187, 2017-2189, 2017-2190, 2017-2222

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Appeals from the United States District Court for the  
Eastern District of Texas in Nos. 2:15-cv-00898-RWS,  
2:15-cv-01266-RWS, 2:15-cv-01269-RWS, Judge Robert  
Schroeder, III.

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## JUDGMENT

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MATTHEW D. POWERS, Tensegrity Law Group, LLP, Redwood City, CA, argued for plaintiff-appellant. Also represented by WILLIAM P. NELSON; MONTE BOND, PATRICKJ CONROY, JAMES PERKINS, TERRY SAAD, Bragalone Conroy PC, Dallas, TX.

RUDOLPH A. TELSCHER, JR., Husch Blackwell LLP, St. Louis, MO, argued for defendants-cross-appellants. Also represented by KARA RENEE FUSSNER, STEVEN E. HOLTSHOUSER.

TERRENCE J. TRUAX, Jenner & Block LLP, Chicago, IL, for defendants-appellees Invensys Systems, Inc., Schneider Electric USA, Inc. Also represented by REGINALD J. HILL; NICK G. SAROS, Los Angeles, CA; ADAM G. UNIKOWSKY, Washington, DC.

CYNTHIA RIGSBY, Foley & Lardner LLP, Milwaukee, WI, for defendants-appellees Rockwell Automation, Inc., Rockwell Automation Technologies, Inc. Also represented by KEVIN J. MALANEY, MICHELLE A. MORAN, MATTHEW WAYNE PETERS.

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THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (NEWMAN, WALLACH, and HUGHES,  
*Circuit Judges*).

**AFFIRMED. See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT



September 17, 2018  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

**NOTICE OF ENTRY OF  
JUDGMENT WITHOUT OPINION**

JUDGMENT ENTERED: 09/17/2018

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

No costs were taxed in this appeal.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Peter R. Marksteiner

Peter R. Marksteiner  
Clerk of Court

17-2187, 17-2189, 17-2190, 17-2222 - Automation Middleware v. Invensys Systems  
United States District Court for the Eastern District of Texas, Case Nos. 2:15-cv-00898-RWS, 2:15-cv-01266-RWS, 2:15-cv-01269-RWS



**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

717 MADISON PLACE, N.W.  
WASHINGTON, D.C. 20439

PETER R. MARKSTEINER  
CLERK OF COURT

CLERK'S OFFICE  
202-275-8000

**Information Sheet**

**Petitions for Rehearing and Petitions for Hearing and Rehearing En Banc**

**1. When is a petition for rehearing appropriate?**

The Federal Circuit grants few petitions for rehearing each year. These petitions for rehearing are rarely successful because they typically fail to articulate sufficient grounds upon which to grant them. Of note, petitions for rehearing should not be used to reargue issues previously presented that were not accepted by the merits panel during initial consideration of the appeal. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36. Such dispositions are entered if the court determines the judgment of the trial court is based on findings that are not clearly erroneous, the evidence supporting the jury verdict is sufficient, the record supports the trial court's ruling, the decision of the administrative agency warrants affirmance under the appropriate standard of review, or the judgment or decision is without an error of law.

**2. When is a petition for hearing/rehearing en banc appropriate?**

En banc consideration is rare. Each three-judge merits panel is charged with deciding individual appeals under existing Federal Circuit law as established in precedential opinions. Because each merits panel may enter precedential opinions, a party seeking en banc consideration must typically show that either the merits panel has (1) failed to follow existing decisions of the U.S. Supreme Court or Federal Circuit precedent or (2) followed Federal Circuit precedent that the petitioning party now seeks to have overruled by the court en banc. Federal Circuit Internal Operating Procedure #13 identifies several reasons when the Federal Circuit may opt to hear a matter en banc.

**3. Is it necessary to file either of these petitions before filing a petition for a writ certiorari in the U.S. Supreme Court?**

No. A petition for a writ of certiorari may be filed once the court has issued a final judgment in a case.

**For additional information and filing requirements, please refer to Fed. Cir. R. 40 (Petitions for Rehearing) and Fed. Cir. R. 35 (Petitions for Hearing or Rehearing En Banc).**



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**Information Sheet**

**Filing a Petition for a Writ of Certiorari**

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. Instead, a party must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. *See* Supreme Court Rule 10.

**Time.** The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. The time does not run from the issuance of the mandate. *See* Supreme Court Rule 13.

**Fees.** Either the \$300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. *See* Supreme Court Rules 38 and 39.

**Authorized Filer.** The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner as a self-represented individual.

**Format of a Petition.** The Supreme Court Rules are very specific about the content and formatting of petitions. *See* Supreme Court Rules 14, 33, 34. Additional information is available at [https://www.supremecourt.gov/filingandrules/rules\\_guidance.aspx](https://www.supremecourt.gov/filingandrules/rules_guidance.aspx).

**Number of Copies.** Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of both the petition for writ of certiorari and the motion for leave to proceed in forma pauperis must be filed. *See* Supreme Court Rule 12.

**Filing.** Petitions are filed in paper at *Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543.*

Effective November 13, 2017, electronic filing is also required for filings submitted by parties represented by counsel. *See* Supreme Court Rule 29.7. **Additional information about electronic filing at the Supreme Court is available at** <https://www.supremecourt.gov/filingandrules/electronicfiling.aspx>.

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT****CERTIFICATE OF SERVICE**I certify that I served a copy on counsel of record on October 18, 2018

by:

- U.S. Mail
- Fax
- Hand
- Electronic Means (by E-mail or CM/ECF)

Matthew D. Powers/s/ Matthew D. Powers

Name of Counsel

Signature of Counsel

Law Firm

Tensegrity Law Group LLP

Address

555 Twin Dolphin Drive, Suite 650

City, State, Zip

Rewood Shores, CA 94065

Telephone Number

(650) 802-6000

Fax Number

(650) 802-6001

E-Mail Address

matthew.powers@tensegritylawgroup.com

NOTE: For attorneys filing documents electronically, the name of the filer under whose log-in and password a document is submitted must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. Graphic and other electronic signatures are discouraged.

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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/s/ Matthew D. Powers  
\_\_\_\_\_

(Signature of Attorney)

Matthew D. Powers  
\_\_\_\_\_

(Name of Attorney)

Appellant  
\_\_\_\_\_

(State whether representing appellant, appellee, etc.)

Oct 18, 2018  
\_\_\_\_\_

(Date)

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