

2019-2334

In The
**United States Court Of Appeals
For The Federal Circuit**

WHITSERVE LLC,

Plaintiff - Appellant,

v.

DROPBOX, INC.,

Defendant - Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
CASE NO. 1:18-CV-00665-CFC, JUDGE COLM F. CONNOLLY.

**CORRECTED PETITION FOR REHEARING *EN BANC*
OF PLAINTIFF - APPELLANT
WHITSERVE LLC**

**Michael J. Kosma
Stephen F.W. Ball, Jr.
WHITMYER IP GROUP LLC
600 Summer Street
Stamford, CT 06901
203-703-0800**

*Attorneys for Plaintiff-Appellant
WhitServe LLC*

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

CERTIFICATE OF INTEREST

Case Number 2019-2334
Short Case Caption WhitServe LLC v. Dropbox, Inc.
Filing Party/Entity WhitServe LLC

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 05/26/2021

Signature: /s/Michael J. Kosma

Name: Michael J. Kosma

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p>
<p><input type="checkbox"/> None/Not Applicable</p>	<p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>WhitServe LLC</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

Natasha Rodriguez of Whitmyer IP Group LLC (no longer with the firm)		
Stamatios Stamoulis of Stamoulis & Weinblatt LLC		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

WhitServe LLC v. Dropbox, Inc., No. 2021-1475 (Fed. Cir.)		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

TABLE OF CONTENTS

I.	STATEMENT OF COUNSEL.....	1
II.	ARGUMENT.....	3
A.	The Panel Replaced Section 101 With Section 112 And Required the Claims to Recite the Technological Processes Underlying The Technological Improvements.	3
B.	The Panel Disregarded Berkheimer and the Motion to Dismiss Standard When It Overlooked Factual Disputes for the Patent- Eligibility Inquiry.	8
1.	A Factual Dispute Exists at Step One And The Panel Failed To View The Claims From The Perspective Of A POSITA At The Time Of The Invention Regarding “A Specific Technological Improvement.”	9
2.	A Factual Dispute Exists at Step Two And The Court Failed To View The Claims From The Perspective Of A POSITA At The Time Of The Invention Regarding “Well-understood, Routine, And Conventional” Technology.....	11
3.	Factual Disputes Preclude A Finding of Ineligible Subject Matter at The Pleading Stage.....	16
III.	CONCLUSION.....	18
	ADDENDUM	
	CERTIFICATE OF FILING AND SERVICE	
	CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

Cases

<i>Alice Corp. Pty. Ltd. v. CLS Bank Int’l</i> , 573 U.S. 208 (2014).....	1
<i>American Axle & Mfg. v. Neapco Holdings LLC</i> , 966 F.3d 1347 (Fed. Cir. 2020)	4
<i>American Axle & Mfg. v. Neapco Holdings LLC</i> , 967 F.3d 1285 (Fed. Cir. 2019).....	1, 5, 6
<i>BASCOM Global Internet Servs. v. AT&T Mobility LLC</i> , 827 F.3d 1341 (Fed. Cir. 2016)	4
<i>Berkheimer v. HP Inc.</i> , 881 F.3d 1360 (Fed. Cir. 2018)	1, 11
<i>Berkheimer v. HP Inc.</i> , 890 F.3d 1369 (Fed. Cir. 2018)	1
<i>Data Engine Techs. LLC v. Google LLC</i> , 906 F.3d 999 (Fed. Cir. 2018)	9
<i>Diamond v. Diehr</i> , 450 U.S. 175 (1981).....	1, 17
<i>Dropbox, Inc. v. WhitServe LLC</i> , IPR2019-01019, Paper No. 28 (PTAB Oct. 29, 2020).....	17
<i>Enfish, LLC v. Microsoft Corp</i> , 822 F.3d 1327 (Fed. Cir. 2016)	1, 9, 11
<i>Koninklijke KPN N.V. v. Gemalto M2M GMBH</i> , 942 F.3d 1143 (Fed. Cir. 2019)	9
<i>KSR Int’l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007).....	10

<i>Mayo Collaborative Servs. v. Prometheus Labs.</i> , 566 U.S. 66 (2012).....	1, 5
<i>Research Corp. Techs. v. Microsoft Corp.</i> , 627 F.3d 859 (Fed. Cir. 2010)	4
<i>Soft, Inc. v. Fitbit, Inc.</i> , 927 F.3d 1306 (Fed. Cir. 2019).....	12
<i>Uniloc USA, Inc. v. LG Elecs. USA, Inc.</i> , 957 F.3d 1303 (Fed. Cir. 2020).....	11
<i>United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame</i> , 822 F.3d 136 (3d Cir. 2016)	8, 13
<i>University of Rochester v. G.D. Searle & Co.</i> , 375 F.3d 1303 (Fed. Cir. 2004).....	7
<i>Visual Memory LLC v. NVIDIA Corp.</i> , 867 F.3d 1253 (Fed. Cir. 2017)	1, 4, 9
<i>Statutes</i>	
35 U.S.C. § 101	1, 3, 4
35 U.S.C. § 112.....	1, 3, 4

I. STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision (see Addendum attached) is contrary to the law, including at least 35 U.S.C. § 101 and the decision of the United States Supreme Court and the decisions of this Court in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Servs. v. Prometheus Labs.*, 566 U.S. 66 (2012); *Diamond v. Diehr*, 450 U.S. 175 (1981); *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); *Berkheimer v. HP Inc.*, 890 F.3d 1369 (Fed. Cir. 2018); *American Axle & Mfg. v. Neapco Holdings LLC*, 967 F.3d 1285 (Fed. Cir. 2019); *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017); and *Enfish, LLC v. Microsoft Corp*, 822 F.3d 1327 (Fed. Cir. 2016).

I also believe this petition raises the critical questions of, on motion to dismiss for failure to state a claim, whether (1) the enablement requirement of Section 112 is separate and distinct from the subject matter eligibility requirements of Section 101; and (2) the Court can take judicial notice of disputed, material facts, especially at the pleading stage, including facts indicating a technological improvement, establishing several inventive concepts, to find that the invention is invalid under Section 101.

Dated: May 26, 2021

By /s/ Michael J. Kosma
Michael J. Kosma
Counsel for Plaintiff-Appellant
WhitServe LLC

II. ARGUMENT

This Court should rehear this case en banc because in deciding a motion to dismiss for failure to state a claim (1) the Panel applied a Section 101 standard for ineligibility analysis exceeding the boundary between Section 101 and encroaching the fact-intensive enablement test of Section 112; and (2) the Panel disregarded questions of fact raised in the Section 101 analysis and other plausible factual disputes and opted instead to take judicial notice of material, disputed facts, leading to an improper dismissal at the pleading stage.

A. The Panel Replaced Section 101 With Section 112 And Required the Claims to Recite the Technological Processes Underlying The Technological Improvements.

The *en banc* Court should rehear this case because, at the pleading stage, the Panel improperly applied Section 101, and instead imported the fact-intensive enablement test of Section 112. Applying the fact-intensive Section 112 test when deciding patent eligibility, especially when deciding a motion to dismiss, creates inconsistency toward the correct standard and clarification is warranted.

Instead of rebutting the claimed advance over the prior art, the Panel held that “[t]he specification does not, however, explain the technological processes underlying the purported technological improvement” and “the claims rely on the ordinary storage and transmission capabilities of computers within a network and apply that ordinary functionality in the particular context of onsite backup.” (*See*

Order at 9.) In doing so, the Panel required that, to survive a challenge under Section 101, the claims as written must recite the technological processes as to *how* to make a particular invention. However, “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.” *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1261 (Fed. Cir. 2017). In other words, the Panel expanded the Section 101 inquiry to include an additional enablement requirement to be answered under Section 112.

As the Panel has recognized, “the Supreme Court advised that section 101 eligibility should not become a substitute for a patentability analysis related to prior art, adequate disclosure, or the other conditions and requirements of Title 35.” *Research Corp. Techs. v. Microsoft Corp.*, 627 F.3d 859, 868 (Fed. Cir. 2010). “Claims . . . that are not enabled raise questions of patentability, not eligibility.” *BASCOM Global Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341, 1354 (Fed. Cir. 2016) (Newman, J., concurring).

“Eligibility under Section 101 is not the same as patentability under the substantive statutory provisions of novelty (§102), nonobviousness (§103), and description and enablement (§112).” *American Axle & Mfg. v. Neapco Holdings LLC*, 966 F.3d 1347, 1359 (Fed. Cir. 2020) (Newman, J., joined by Moore, O’Malley, Reyna, and Stoll, JJ., dissenting from denial of reh’g *en banc*). The

Supreme Court raised this very concern, stating that directing “the patent eligibility inquiry entirely to these later sections risks creating significantly greater legal uncertainty.” *Mayo Collaborative Servs. v. Prometheus Labs.*, 566 U.S. 66, 90 (2012).

The *American Axle* majority clearly differentiated between eligibility and enablement by describing two distinct *how* requirements in patent law. *See American Axle & Mfg. v. Neapco Holdings LLC*, 967 F.3d 1285, 1302 (Fed. Cir. 2019). The *how* requirement of eligibility “is that the claim itself . . . must go beyond stating a functional result; it must identify ‘how’ that functional result is achieved by limiting the claim scope to structures specified at some level of concreteness, in the case of a product claim, or to concrete action, in the case of a method claim.” *Id.* The *how* requirement of enablement “applies to the specification, not the claims,” and requires that once the “concrete physical structures or actions are set out in the claim, the specification must set forth enough information for a relevant skilled artisan to be able to make and use the claimed structures or perform the claimed actions.” *Id.*

At the motion to dismiss stage, the Panel improperly combined these two *how* requirements of eligibility and enablement. Instead of focusing on the claim language for the eligibility *how* requirement, the Panel concerned itself with the fact-intensive enablement *how* requirement as to the “technological processes

underlying the purported technological improvement.” (See Order at 9.) But, in fact, the claims of the ’437 Patent satisfy the eligibility *how* requirement because the claims recite how the technological improvement is achieved with specific, concrete structures of different system components (e.g., a central computer, at least one database, data processing software) to perform different actions (e.g., outsourcing, modifying, requesting, transmitting for storage) and specific types of data (e.g., the internet-based data in the at least one of the plurality of data records that has been modified by said data processing software according to instructions received from the at least one client computer).

Further, this case is distinguishable from *American Axle*, in that *American Axle* was determined on summary judgment with the benefit of full fact and expert discovery. See *American Axle*, 967 F.3d at 1291.¹ Here, the District Court’s decision was made at the pleadings stage, without any discovery. The Panel’s decision, which is based on conclusory findings of material facts, is therefore even more troubling. Especially when the Panel and the District Court made conclusions for factual questions regarding the enablement requirement. “The written description contains an elucidation of various aspects of an invention as well as material that is necessary for enablement. . . . In any event, it

¹ A petition for a writ of certiorari to the United States Supreme Court is pending. *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, No. 2018-1763.

is fact-intensive.” *See, e.g., University of Rochester v. G.D. Searle & Co.*, 375 F.3d 1303, 1306-1307 (Fed. Cir. 2004).

As explained in the ’437 Patent with reference to Figs. 2 and 3, prior art systems did not have data modified by the client online and did not provide an onsite backup for such data. (*See* WhitServe Opening Br. at 6-7; Appx0024-0031, col.1, ll.45-47, 49-53, col.2, ll.53-54, 56-63, col.2, 1.67-col.3, 1.3.) The Panel overlooked the importance of the client’s control over the data -- namely, offering Internet-based data processing capabilities while allowing the ability to edit and modify and transmit data records and further safeguard the data at a location without Internet access -- presents a technological improvement. (*See* WhitServe Opening Br. at 25; Appx0024-0031, col.2, ll.11-13, 34-35, 40-43, col.3, ll.4-5, 8-13, claims 1, 2, 9, 11, 17, and 19.) The Panel’s eligibility analysis uses a wrong *how* requirement, leading to a conclusion that is contrary to the fact that the claims recite details defining what data is processed and accessible and how the data is processed and accessed (for example, “the internet-based data in the plurality of data records” “that has been modified by said data processing software” “according to instructions received from the at least one client compute” and “internet-based data ... is modifiable over the Internet from the client computer”) and includes further details of the communication between the central computer and the client computer.

Ultimately, the Panel in this case improperly combined the eligibility *how* requirement and the enablement *how* requirement that is articulated by the *American Axle* majority and deepened the uncertainty. As such, a rehearing *en banc* should be granted to clarify the issue.

B. The Panel Disregarded Berkheimer and the Motion to Dismiss Standard When It Overlooked Factual Disputes for the Patent-Eligibility Inquiry.

The Panel overlooked several vital facts, including whether the claims viewed from the perspective of a POSITA at the time of the invention contain the “technological improvement” and are “well-understood, routine, and conventional” technology. On appeal from dismissal for failure to state a claim under the law of the regional circuit—here, the Third Circuit, the Court must accept all factual allegations in the complaint as true and construct them in the light most favorable to WhitServe. *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136, 140 (3d Cir. 2016).

The Panel ignored the fact that Dropbox failed to demonstrate clearly and convincingly that the claims and the specification do not suggest “a technological improvement” or “an inventive concept.” As explained in WhitServe’s Opening Brief, the ’437 Patent explains how the claimed invention is different from the basic and conventional technology existing at the time of the invention in 1999. (See WhitServe Opening Br. at 2-7.) In addition, evidence such as WhitServe’s

commercial success and numerous licenses also support a finding of “a technological improvement” or “an inventive concept.” (*See* WhitServe Opening Br. at 32.)

1. A Factual Dispute Exists at Step One And The Panel Failed To View The Claims From The Perspective Of A POSITA At The Time Of The Invention Regarding “A Specific Technological Improvement.”

As the Panel noted, “[t]o determine whether a claim is directed to patent ineligible subject matter, we may consider whether any claimed advance over the prior art alleged in the written description demonstrates more than an abstract idea, such as an improvement of a technological process, or merely enhances an ineligible concept.” (Order at 7.) At Step One, whether a patent claim is directed to a specific technological improvement should focus on “the claimed advance over the prior art” and be considered “in light of the specification,” which necessarily requires the Court to address Step One considering the state of the art at the date of invention. *Enfish, LLC v. Microsoft Corp*, 822 F.3d 1327, 1335 (Fed. Cir. 2016); *see also, e.g., Visual Memory*, 867 F.3d at 1259-1261; *Koninklijke KPN N.V. v. Gemalto M2M GMBH*, 942 F.3d 1143 (Fed. Cir. 2019). *Data Engine* recognized that fact issues could support a conclusion that the claims provide a technical improvement, as the Court looked beyond the intrinsic evidence to find that the claimed limitation became ubiquitous after the priority date of the patent at issue. *See Data Engine Techs. LLC v. Google LLC*, 906 F.3d 999, 1008 (Fed. Cir. 2018).

However, the Panel did not properly assess the claims from a POSITA's perspective at the time of the invention, showing "the distortion caused by hindsight bias." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). The Panel ignored the emphasis that WhitServe has placed in minding this hindsight. (See WhitServe Opening Br. at 24 and 29-30; WhitServe Reply Br. at 13-14.) Even assuming the technology is common or generic by 2019 standards, it was not so in 1999, and the Panel did not address WhitServe's argument regarding the District Court's examples of "humans secure critical documents, such as wills, deeds, passports, or birth certificates," and "the court's case docket on CM/ECF," which show that the District Court did not fully comprehend the invention and failed to view the claims from the perspective of a POSITA at the time of the invention. (See WhitServe Opening Br. at 30; Appx0013.)

The Panel failed to consider whether clear and convincing evidence is provided by Dropbox to support that there is no improvement of a technological process. Instead, the Panel rephrased the claims with high-level abstraction and concluded "transmitting, saving, and storing of client records is a fundamental business practice that existed well before the advent of computers and the Internet." (Order at 8.) The Panel also concluded "[w]hether the records are stored onsite or offsite does not alter the conclusion that the claims are directed to the abstract idea of maintaining data records." (Order at 9.) But this does affect the

conclusion, particularly when assessed from a POSITA's perspective at the time of the invention. As explained previously, the '437 Patent is not limited to local storage of online data but includes a client's control (processing and accessing) of data that has been modified online. (Appx0024-0031, col.1, l.65-col.2, l.16, col.2, ll.11-13, 34-35, 40-43, col.3, ll.4-5, 8-13, claims 1, 2, 9, 11, 17, and 19.) The claims in the '437 Patent that particularly address how the central computer and client computer process and access the data and are not abstract. *See Uniloc USA, Inc. v. LG Elecs. USA, Inc.*, 957 F.3d 1303, 1309 (Fed. Cir. 2020) (an invention is not rendered abstract even when "the improvement is not defined by reference to 'physical' components") (quoting *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1339 (Fed. Cir. 2016)).

Therefore, the Court should rehear this case because the Court did not properly assess the claims from a POSITA's perspective at the time of the invention regarding the claimed improvement of a technological process.

2. A Factual Dispute Exists at Step Two And The Court Failed To View The Claims From The Perspective Of A POSITA At The Time Of The Invention Regarding "Well-understood, Routine, And Conventional" Technology.

The Panel did not properly consider the "skilled artisan at the time of the patent" in performing its Step Two analysis, and instead took judicial notice of material facts that are in dispute. *See Berkheimer*, 881 F.3d at 1369-70 (at Step Two, "whether a claim element or combination of elements would have been well-

understood, routine, and conventional to a skilled artisan in the relevant field at a particular point in time is a question of fact.") (emphasis added); *see also Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1318 (Fed. Cir. 2019).

As explained above, in 1999 the claimed invention was neither known nor conventional in the art, as evidenced by the specification and the prosecution history of the '437 Patent, the prior art systems did not provide online modification of centrally stored data at the client computer and did not provide an onsite backup of such modified data, and there is no evidentiary record to contradict this. (*See* WhitServe Opening Br. at 2-7; Appx0024-0031, col.1, ll.45-47, 49-53, col.2, ll.53-54, 56-63, col.2, l.67-col.3, l.3; *see also, e.g.*, Fenton, The Death of the Internet, Popular Mechanics (February 7, 2019), <https://www.popularmechanics.com/technology/infrastructure/a26016334/death-of-the-internet/> (noting that in 1997, “[d]ial-up connections ruled,” “[t]here was no cloud computing,” and “[t]here were no smartphones”).)

The Panel failed to identify clear and convincing evidence defining the level of skill at the time of the invention as to the “well-understood, routine, and conventional” technology. Instead, the Panel ignored the fact that the invention provides a nonconventional way in which the data is controlled by client, and took judicial notice to conclude the fact that “the ability to edit and modify data was well known and cannot constitute an inventive concept” and the same goes to “generic

computer component performing routine conventional functions.” (*See* Order at 10-11.) What constituted “well-understood, routine, and conventional” activities at the time of invention requires a factual determination when the evidence on record provides sufficient support, especially at the pleading stage.

Further, the Panel improperly isolated claim limitations, omitted features thereof, and rephrased claims in a high level of abstraction for the “conventional” conclusion. (*See* Order at 10-11.) For example, the Panel failed to apply the correct standard for motion to dismiss at the pleading stage and all factual allegations in the complaint as true and construe them in the light most favorable to WhitServe. *One (1) Palmetto*, 822 F.3d at 140. In addition, there is no evidentiary record to support Dropbox’s argument for the “conventional” conclusion. (*See* Dropbox Br. at 24-26 and 32.)

Despite claim 10 reciting “software executing on said central computer . . . modifying the internet-based data in the plurality of data records according to instructions received from the at least one client computer,” Dropbox simplified the claim language to just modifying data stored in database. (*See* Dropbox Br. at 27.) The Panel agreed with Dropbox and ignored the plain language of the claims as well as the evidence in the specification that the prior art systems described in Figs 2 and 3 do not have the claimed capability. (*See* Order at 10-11.) The Panel stated that “[t]he patent itself discloses that companies were ‘increasingly moving

their data processing systems onto the Internet and providing web interfaces for their customers to see and manipulate their own data.’ ’437 patent at col. 1 ll. 13–16,” (Order at 10), but according to Figs 2 and 3 of the ’437 Patent, such manipulation, if any, happened locally, before being backed up online. (*See* WhitServe Br. at 6-7; Appx0024-0031, col.1, ll.45-47, 49-53, col.2, ll.53-54, 56-63, col.2, l.67-col.3, l.3.)

As another example, while claim 10 recites “internet-based data that is modifiable over the Internet from the client computer,” “software modifying the internet-based data in the plurality of data records according to instructions received from the at least one client computer,” and “a backup copy of at least one of the plurality of data records including the internet-based data in the at least one of the plurality of data records that has been modified by said data processing software,” Dropbox simplified the claim language as sending and receiving a backup copy of records. (*See* Dropbox Br. at 28.) However, the claims recite much more, as shown above, and the ’437 Patent discloses an Internet-based data processing system that allows a user to modify their Internet-based data over the Internet and backup their modified Internet-based data to an onsite location in order to maintain continuity of business and safeguard against data loss. (Appx0024-0031, ’437 Patent, col.1, l.65-col. 2 l. 16.) Attorney argument that manipulates the claim limitations into being “generic” and “entirely conventional”

cannot supplant the presumption of validity at the pleading stage in view of the evidence provided in the specification. (*See* Dropbox Br. at 28-29.)

Regardless, whether the claims provide the inventive concept of improving the state of data processing and storage systems is in dispute, (*see* WhitServe Opening Br. at 29-31; Dropbox Br. at 32; WhitServe Reply Br. at 2-4 and 9-11), and it was error ruling at the pleading stage while ignoring the specification and the prosecution history of the '437 Patent.

Finally, the Panel held that objective indicia of non-obviousness are relevant in a § 103 inquiry, but not in a § 101 inquiry, (Order at 12), but there is no case known by the Appellant that prevents using such evidence --WhitServe's commercial success and numerous licenses -- to support a finding of an inventive concept at Step Two. Although the secondary considerations such as commercial success and licensing are traditionally used to prove non-obviousness, such considerations also demonstrate the merits of the claimed invention and the inventive concept in the claims. At minimum, these secondary considerations introduce a factual dispute as to whether there is an "inventive concept" within the claims sufficient to render them patent eligible.

Therefore, the Court should rehear this case because the Court did not properly assess the claims from a POSITA's perspective at the time of the invention regarding the "well-understood, routine, and conventional" technology.

3. Factual Disputes Preclude A Finding of Ineligible Subject Matter at The Pleading Stage.

The Panel concluded that WhitServe waived any claim construction argument. (*See* Order at 12.) However, as explained in WhitServe’s Opening Brief, the District Court appeared to take issue with the form of the language rather than the substance of the invention. (*See* WhitServe Br. at 37-38.) The factual issues as to whether the claims reflect the substance of the invention must be resolved at claim construction, and such factual disputes, other than the claim construction, should also survive in a dismissal attempt at the pleading stage. This is particularly true if the District Court took issue with claim language but impliedly acknowledged the substance of the invention. (*See* Appx0011-0012 (“WhitServe argues . . . a specific improvement . . . namely, offering multiple users at various locations Internet-based data processing capabilities while allowing the ability to edit and modify and transmit data records and further safeguard the data at a location without internet. . . . The claims, however, do not discuss the technological processes underlying the idea of allowing multiple users at various locations to modify, transmit, and safeguard data.”))

However, limitations in claims outside claim 10 are non-conventional and render the invention patent eligible. For example, claims 2 and 11 each recite “a client’s access to said central computer and said at least one database is limited to the client’s own data.” This limitation narrows the client’s control over certain data

and is novel. (*See* WhitServe Opening Br. at 23-24; *see also* WhitServe Reply Br. at 20.). While the Board instituted review of the '437 Patent, the Board determined that Dropbox's arguments failed to demonstrate a reasonable likelihood that it would prevail in showing the unpatentability of claims 2 and 11 which depends from claim 10.; *Dropbox, Inc. v. WhitServe LLC*, IPR2019-01019, Paper No. 28 (PTAB Oct. 29, 2020) (upholding patentability of claims 2 and 11). Dropbox fails to analyze the claims "as a whole." "In determining the eligibility of respondents' claimed process for patent protection under § 101, their claims must be considered as a whole." *Diamond v. Diehr*, at 188. The same requirement to analyze the claims "as a whole" goes to all the additional limitations recited in the dependent claims, but Dropbox fails to do so. Therefore, factual disputes exist for claim limitations not in claim 10.

Further, there are plausible factual disputes in the interpretation of the specification of the '437 Patent regarding the prior art. For example, as disputed in the briefs, WhitServe and Dropbox do not agree on whether the prior art systems disclosed by the '437 Patent provide online modification of centrally stored data at the client computer and an onsite backup of such modified data. (*See* WhitServe Opening Br. at 2-7; Dropbox Br. at 22, 27, 29, 32; WhitServe Reply Br. at 2-4, 9-11.)

Therefore, the Court should rehear this case because of these disputed facts in view of the evidence on record.

III. CONCLUSION

For the foregoing reasons, WhitServe respectfully requests that the Court grant its petition for panel rehearing or rehearing *en banc*, and rehear this appeal.

Respectfully submitted,

Dated: May 27, 2021

/s/ Michael J. Kosma

Michael J. Kosma
Stephen F.W. Ball, Jr.
Whitmyer IP Group LLC
600 Summer Street
Stamford, CT 06901
Tel: 203-703-0800
Fax: 203-703-0801
Email: mkosma@whipgroup.com
sball@whipgroup.com
rkeeler@whipgroup.com
litigation@whipgroup.com

*Attorneys for Plaintiff-Appellant
WhitServe LLC*

ADDENDUM

NOTE: This disposition is nonprecedential.

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

WHITSERVE LLC,
Plaintiff-Appellant

v.

DROPBOX, INC.,
Defendant-Appellee

2019-2334

Appeal from the United States District Court for the District of Delaware in No. 1:18-cv-00665-CFC, Judge Colm F. Connolly.

Decided: April 26, 2021

MICHAEL JOSEPH KOSMA, Whitmyer IP Group LLC, Stamford, CT, for plaintiff-appellant. Also represented by STEPHEN BALL.

GREGORY H. LANTIER, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, for defendant-appellee. Also represented by CLAIRE HYUNGYO CHUNG; ELIZABETH BEWLEY, Boston, MA.

Before REYNA, SCHALL, and WALLACH, *Circuit Judges*.

REYNA, *Circuit Judge*.

Appellant WhitServe LLC appeals from the United States District Court for the District of Delaware. WhitServe brought an infringement action against Dropbox. Dropbox moved to dismiss WhitServe’s complaint with prejudice on grounds that the patent claims asserted by WhitServe are directed to patent ineligible subject matter. The district court granted Dropbox’s motion to dismiss, and WhitServe appeals. We affirm the judgment of the district court.

BACKGROUND

WhitServe LLC (“WhitServe”) filed suit on May 1, 2018 alleging that Dropbox, Inc. (“Dropbox”) infringes at least claims 10 and 19 of U.S. Patent No. 8,812,437 (“the ’437 patent”). The ’437 patent, entitled “Onsite Backup for Third Party Internet-Based Systems,” generally relates to “safeguarding customer/client data when a business out-sources data processing to third party Internet-based systems,” by backing up the internet-based data to a client’s local computer. ’437 patent col. 1 ll. 6–9. The specification discloses a “central computer,” a “client computer,” a “communications link” between each computer and the Internet, and a “database” containing a plurality of data records. *Id.* at col. 2 ll. 34–52; col. 4 ll. 4–13. The specification further discloses software that is capable of “modifying” the data records by “updating and deleting” data in the data records. *Id.* at col. 4 ll. 26–30. In sum, the disclosed computers can send a request for a copy of data records over the Internet, receive the request, and transmit a copy of the requested data. *See, e.g., id.* at col. 4 ll. 31–41.

Claim 10 is representative of the '437 patent's claims for purposes of this appeal.¹ Claim 10 recites:

A system for onsite backup for internet-based data processing systems, comprising:

a central computer accessible by at least one client computer at a client site via the Internet for out-sourced data processing;

at least one database containing a plurality of data records accessible by said central computer, the plurality of data records including internet-based data that is modifiable over the Internet from the client computer;

data processing software executing on said central computer for outsourcing data processing to the Internet from the at least one client computer, said data processing software modifying the internet-based data in the plurality of data records according to instructions received from the at least one client computer, the modifying including updating

¹ On appeal, WhitServe contests the district court's treatment of claim 10 as representative. *See* Appellant's Br. 17. However, the district court determined that "WhitServe did not challenge Dropbox's treatment of claim 10 as representative or present any meaningful argument for the distinctive significance of any claim limitation not found in claim 10." J.A. 9. In addition, Whitserve's opening brief on appeal does not address any claim of the '437 patent other than claim 10 and thus WhitServe has waived the argument that claim 10 is not representative, and waived argument as to the patent eligibility of other claims in the '437 patent. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006).

and deleting the internet-based data in the plurality of data records;

a client data request, sent from at least one client computer via the Internet to said central computer, the client data request comprising a request for a backup copy of at least one of the plurality of data records;

software executing on said central computer to receive, via the Internet from the at least one client computer, the request for a backup copy of at least one of the plurality of data records including the internet-based data in the at least one of the plurality of data records that has been modified by said data processing software; and

software executing on said central computer to transmit the backup copy of the at least one of the plurality of data record [sic] including the internet-based data in the at least one of the plurality of data records that has been modified by said data processing software to the client site for storage of the internet-based data from the at least one of the plurality of data record [sic] in a location accessible via the at least one client computer;

wherein the location is accessible by the at least one client computer without using the Internet.

Id. at col. 4 ll. 14–50.

Dropbox moved to dismiss WhitServe's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds that the '437 patent's claims recite patent ineligible subject matter pursuant to 35 U.S.C. § 101. On July 25, 2019, the district court granted Dropbox's motion to dismiss, concluding that the claims are directed to an abstract idea and fail to supply an inventive concept that transforms the abstract idea into a patent-eligible application.

WhitServe LLC v. Dropbox, Inc., No. CV 18-665-CFC, 2019 WL 3342949, at *1, *5–6 (D. Del. July 25, 2019).

Specifically, the district court agreed with Dropbox that the '437 patent is directed to the abstract idea of “backing up data records,” and concluded that the claims are not directed to an improvement in computer functionality. *Id.* at *4–5. In addition, the district court found that representative claim 10 “recites only generic computer components performing routine computer functions.” *Id.* at *4. The district court found “nothing inventive in how the [']437 patent arranges the storage of backup data,” reasoning that “[i]t is a well-understood practice of human organization that backup copies are stored in a location separate and distinct from the original location.” *Id.* at *5. The district court reasoned that if the original location was onsite, the conventional backup location would be offsite, or vice versa. *Id.* at *5–6. The district court reasoned that the claims were similar to when “humans secure critical documents, such as wills . . . in a bank safe deposit box, but keep a copy at home for quick reference when needed.” *Id.* at *6.

Further, the district court observed that, contrary to WhitServe’s argument, Dropbox was not required to separately address the patent’s preemptive scope in order to prevail on its motion to dismiss, because preemption “is not a separate and independent test under *Alice*,” but rather is a “concern that undergirds [] § 101 jurisprudence.” *Id.*

The district court rejected WhitServe’s contention that factual issues precluded dismissal, noting that this court has “repeatedly affirmed § 101 rejections at the motion to dismiss stage, before claim construction or significant discovery has commenced,” *id.* (quoting *Cleveland Clinic Found. v. True Health Diagnostics LLC*, 859 F.3d 1352, 1360 (Fed. Cir. 2017)). The court stated that nothing in the allegations set forth in WhitServe’s complaint or in the specification of the '437 patent would create a factual issue regarding patent eligibility. *Id.* at *7.

The district court also rejected WhitServe’s argument that the claims were patent eligible because the United States Patent and Trademark Office (“PTO”) issued the patent and an issued patent is presumed to be valid, and because this court had determined previously, in another action, that the patent claimed eligible subject matter. *Id.* The district court concluded it was not bound by PTO’s decisions and the agency’s allowance of the ’437 patent did not dictate the eligibility analysis. *Id.* In response to WhitServe’s argument concerning the applicability of a prior decision by this court, the district court observed that this court’s decision in *WhitServe LLC v. Computer Packages, Inc.*, 694 F.3d 10 (Fed. Cir. 2012), did not address the eligibility of the ’437 patent, but rather the dissent addressed the eligibility of its family member, and therefore did not constitute a prior decision of this court on the eligibility of the ’437 patent. *Id.*

The district court dismissed WhitServe’s complaint with prejudice and entered judgment in favor of Dropbox. WhitServe appeals this decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

DISCUSSION

We review a district court’s dismissal for failure to state a claim under the law of the regional circuit, here, the Third Circuit. *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1347 (Fed. Cir. 2016). The Third Circuit reviews the grant of a motion to dismiss de novo. *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014). Patent eligibility under § 101 is ultimately a question of law, reviewable de novo, which may contain underlying issues of fact. *Synchronoss Techs., Inc. v. Dropbox, Inc.*, 987 F.3d 1358, 1365 (Fed. Cir. 2021).

The Supreme Court has long held that “abstract ideas,” such as “a fundamental economic practice long prevalent in” our society are patent ineligible subject matter. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216, 219

(2014) (internal quotation marks and citation omitted). The Supreme Court established a two-step inquiry to determine whether a patent covers patent ineligible subject matter, such as an abstract idea. At *Alice* step one, the court decides whether the claims are “directed to” patent ineligible subject matter. *Id.* at 217. To determine whether a claim is directed to patent ineligible subject matter, we may consider whether any claimed advance over the prior art alleged in the written description demonstrates more than an abstract idea, such as an improvement of a technological process, or merely enhances an ineligible concept. *In re: Bd of Trustees of the Leland Stanford Junior Univ.*, 991 F.3d 1245, 1250–51 (Fed. Cir. 2021); *see, e.g., Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 915 F.3d 743, 750 (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 855, 205 L. Ed. 2d 460 (2020).

If the claims are not directed to patent ineligible subject matter, the *Alice* inquiry ends. If the claims are directed to patent ineligible subject matter, the *Alice* inquiry advances to step two. In step two, the court determines whether the claims contain an “inventive concept,”—i.e., an element or a combination of elements that transforms the nature of the claim into a patent-eligible application. *Id.* at 217–18. To uphold a patent at step two, an inventive concept “must be evident in the claims.” *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1338 (Fed. Cir. 2017). We begin our review with *Alice* step one.

I

WhitServe argues on appeal that claim 10 is not directed to an abstract idea. Rather, claim 10 is directed to a technological improvement comprising “a system for on-site storage of a backup copy of Internet-based data that has been updated or deleted over the Internet by the client, which improves the storage, access, flexibility, and security of data processing.” Appellant’s Br. 24. WhitServe relies on *Enfish*, and argues that the ’437 patent is not “simply

directed to storing any data in a general form, but instead is directed to a specific form of storing a specific type of data” See Appellant’s Br. 26 (citing *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1337 (Fed. Cir. 2016) (“the claims are not simply directed to any form of storing tabular data, but instead are specifically directed to a self-referential table for a computer database.”)(emphasis omitted)). According to WhitServe, claim 10 is directed to a practical solution to an internet-based problem. We disagree.

Claim 10 is directed to a system for maintaining data records, in particular, backing up data records. Claim 10 recites a “computer,” a “database,” “data processing software,” and communication via the Internet. ’437 patent col. 4 ll. 14–50. The specification explained that, the “computer is described as being “central” or belonging to a “client,” *id.* at col. 2 ll. 40–43, the “database” merely “contain[s] a plurality of data records,” *id.* at Abstract, and the “software” is capable of “displaying” the data records by “updating” and “deleting” the data, *id.* at col. 2 ll. 37–43. Finally, the claimed computers are described as being capable of sending, over the Internet, a request for a copy of data records, receiving the request, and transmitting a copy of the requested data. *Id.* at col. 4 l. 31–49. In other words, the system is for requesting, transmitting, receiving, copying, deleting, and storing data records. Such transmitting, saving, and storing of client records is a fundamental business practice that “existed well before the advent of computers and the Internet,” *Intellectual Ventures I LLC v. Erie Indem. Co.*, 850 F.3d 1315, 1327 (Fed. Cir. 2017); *see, e.g., Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347 (Fed. Cir. 2014) (“The concept of data collection, recognition, and storage is undisputedly well-known.”). Independent claim 10 is, therefore, directed to an abstract idea.

WhitServe argues that, because the claims require a particular form of storage, namely “onsite” instead of

“offsite,” they are directed to a specific improvement of a technological process. Whether the records are stored on-site or offsite does not alter the conclusion that the claims are directed to the abstract idea of maintaining data records, even if storage of the records is limited to the client’s computer, rather than a web server. *See Intellectual Ventures I*, 838 F.3d at 1319.

WhitServe also argues that the claimed advance demonstrates a patent eligible improvement of a technological process. We disagree. Here, the claimed advance over the prior art, as stated in the specification and in claim 10, is the “onsite backup of data” and a “system for onsite backup of internet-based data processing systems.” ’437 patent col. 2 ll. 62–63; col. 4 ll. 13–14. The specification does not, however, explain the technological processes underlying the purported technological improvement. Instead, as the district court correctly explained, the claims “rely on the ordinary storage and transmission capabilities of computers within a network and apply that ordinary functionality in the particular context of onsite backup.” *WhitServe*, 2019 WL 3342949, at *5. As we have previously noted, claims reciting computer function, or the mere manipulation of data, are directed to an abstract idea. *See, e.g., Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014) (finding that a claim recited an ineligible abstract process of gathering and combining data that did not require input from a physical device). Here the system disclosed in claim 10 claims the computer function of maintaining data records, including storing records at different sites for added protection. This is an abstract idea. Accordingly, we conclude that claim 10 of the ’437 patent is directed to an abstract idea.

II

Step two of the *Alice* inquiry is a lifeline by which claims that are deemed to be directed to patent ineligible subject matter may be saved. At step two, we ask whether

the claim recites an inventive concept that transforms the abstract idea into patent eligible subject matter.

WhitServe contends that an inventive concept lies in the way the client is able to control and modify data—namely, “by offering users Internet-based data processing capabilities while allowing [for] the ability to edit and modify and transmit data records and further safeguard the data at a location without Internet access.” Appellant’s Br. 17, 29. WhitServe asserts that the patent takes the unconventional step of storing backup data onsite (i.e., a particular form of storage).

WhitServe also argues that the claim’s recitation of an internet-based data processing software that allows the ability to “edit and modify” is an inventive concept that transforms the claims into something other than an abstract idea. We disagree. The patent itself discloses that companies were “increasingly moving their data processing systems onto the Internet and providing web interfaces for their customers to see and manipulate their own data.” ’437 patent at col. 1 ll. 13–16. Thus, the ability to edit and modify data was well known and cannot constitute an inventive concept.

As this court has explained, storing data is a “generic computer function[.]” *In re TLI Commc’ns LLC Patent Litig.*, 823 F.3d 607, 612 (Fed. Cir. 2016). We have also noted that “sending and receiving information” over a network are “routine computer functions.” *Intellectual Ventures I LLC v. Erie Indemnity Co.*, 850 F.3d 1315, 1329 (Fed. Cir. 2017); *see also Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1367–68 (Fed. Cir. 2015) (finding that “database” and “communication medium” (including the Internet) are generic computer components); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350, 1355 (Fed. Cir. 2014) (finding that “receiv[ing] and send[ing] the information over a network” is generic).

The claims recite generic computer components performing routine conventional functions. Viewing claim 10's elements in combination does not alter our conclusion because the claims lack a non-conventional and non-generic arrangement. *BASCOM*, 827 F.3d at 1350. Accordingly, we conclude that the '437 patent does not disclose an inventive concept and, as a result, does not transform claim 10 into patent eligible subject matter.

III

WhitServe alleges that certain factual questions precluded a finding of ineligibility at the pleading stage. Specifically, WhitServe contends that whether the claims present an improvement to software and computer functionality is a disputed factual issue. Appellant's Br. 36–37. WhitServe adds that the question of what constitutes a well-known business practice or is well-understood, routine and conventional technology at the time of the invention are also disputed factual issues. *Id.* WhitServe asserts that the district court failed to analyze the claims from the perspective of one skilled in the art at the time of the invention, failed to consider certain objective indicia of nonobviousness (i.e., commercial success), failed to conduct claim construction, and failed to give WhitServe the statutory presumption of validity that exists once a patent issued. *Id.* at 37–44.

These purported factual questions do not preclude dismissal of this case at the pleadings stage, nor do they preclude a finding of ineligibility. Although a § 101 inquiry may implicate underlying factual questions in some cases, “not every § 101 determination contains genuine disputes over the underlying facts material to the § 101 inquiry.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018); *see also BSG Tech LLC v. Buyseasons, Inc.*, 899 F.3d 1281, 1290–91 (Fed. Cir. 2018) (distinguishing *Berkheimer* and affirming judgment of invalidity under § 101). Dismissal is appropriate where factual allegations are not

“plausible” or are “refute[d]” by the record. *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018) (citation omitted). The district court found that there were “no concrete or specific allegations in WhitServe’s complaint or discussions in the specification” regarding any improvements in technology, and thus there was “no factual issue that would preclude [it] from deciding . . . patent eligibility of the [’]437 patent on a motion to dismiss.” 2019 WL 3342949, at *6–7. We agree.

As noted above, we determine that the ’437 patent is patent ineligible on the basis that the claimed systems apply a fundamental business concept of backing up records and provide a generic environment to carry out the abstract idea of obtaining and storing backup copies. Patent eligibility may be determined on the intrinsic record alone where, as here, the specification provides that the relevant claim elements are well-understood, routine and conventional. *See Berkheimer v. HP Inc.*, 890 F.3d at 1371 (Moore, J., concurring in the denial of en banc rehearing).

WhitServe argues that the district court erred by failing to consider objective criteria of non-obviousness as part of the *Alice* inquiry. We disagree. Objection indicia of non-obviousness are relevant in a § 103 inquiry, but not in a § 101 inquiry. Finally, as to claim construction, WhitServe waived any such argument by failing to request claim construction below, and by failing to explain how a different construction of any claim term would lead to a different result. *See Abbott Labs. v. Syntron Bioresearch, Inc.*, 334 F.3d 1343, 1357 (Fed. Cir. 2003) (determining that a litigant who “d[oes] not urge a particular claim construction of the disputed language before the district court[] . . . waive[s] the right to do so on appeal”).

CONCLUSION

The court has considered WhitServe’s additional arguments and finds them unpersuasive. We affirm the judgment of the district court.

WHITSERVE LLC v. DROPBOX, INC.

13

AFFIRMED

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on May 27, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

/s/ Michael J. Kosma

Michael J. Kosma

Stephen F.W. Ball, Jr.

Whitmyer IP Group LLC

600 Summer Street

Stamford, CT 06901

Tel: 203-703-0800

Fax: 203-703-0801

Email: mkosma@whipgroup.com

sball@whipgroup.com

litigation@whipgroup.com

Attorneys for Plaintiff-Appellant

WhitServe LLC

CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B); Fed. Cir. R. 32(b); Fed. R. App. P. 32(f); because:

this brief contains 3,625 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

2. This brief 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) because:

this brief has been prepared in proportionally space typeface using Microsoft Word in 14-point Times New Roman.

/s/ Michael J. Kosma

Michael J. Kosma

Stephen F.W. Ball, Jr.

Whitmyer IP Group LLC

600 Summer Street

Stamford, CT 06901

Tel: 203-703-0800

Fax: 203-703-0801

Email: mkosma@whipgroup.com

sball@whipgroup.com

litigation@whipgroup.com

*Attorneys for Plaintiff-Appellant
WhitServe LLC*