

No. 20-325

In the Supreme Court of the United States

WHITSERVE LLC,

Petitioner,

v.

DONUTS INC., NAME.COM, INC., et al.

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's determination that the relevant claims of Petitioner's patents recite an abstract idea that is not patent-eligible under 35 U.S.C. § 101.

2. Whether the Court of Appeals and the District Court properly held that the issue of patent-eligibility could be resolved at the pleading stage even though Petitioner's Complaint contained conclusory allegations of commercial success.

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

All parties are identified in the caption of this brief. Respondents identify the following parent companies of Name.com: Rightside Operating Co., Rightside Group, Ltd. Respondents identify Tucows, Inc. as a parent company of Enom, LLC.

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Respondents Donuts Inc., Name.com, Inc. and Enom, LLC respectfully submit that the Petition for a writ of *certiorari* should be denied.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted in 809 Fed. Appx. 929. The Court of Appeals affirmed the District Court's ruling. The opinion of the District Court (Pet. App. 14a-34a) is published in the Federal Supplement at 390 F. Supp. 3d 571.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

35 U.S.C. § 101 provides:

Inventions Patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

STATEMENT OF THE CASE

1. This Court's precedent has established that Section 101 contains one "important implicit exception: Laws of nature, natural phenomena, and

abstract ideas are not patentable.” *Alice Corp. Pty. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (internal quotations omitted).

This Court developed the current analysis of patent eligibility under Section 101 in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012) and *Alice Corp. Pty.*, 573 U.S. 208. This Court in *Mayo*, articulated that if the claims recite non-patentable subject matter, *i.e.* laws of nature, natural phenomena and abstract ideas, the question becomes “whether the claims do significantly more” than simply recite the non-patentable subject matter. 566 U.S. at 77. The process must “contain other elements or a combination of elements, sometimes referred to as an ‘inventive concept.’” *Id.* at 72-73.

Subsequently in *Alice*, this Court formulated this analysis into a two-step framework. 573 U.S. at 217-18. At the first step, the court must determine “whether the claims at issue are directed to one of those patent-ineligible concepts.” *Id.* at 217. If so, the court proceeds to the second step, where it must determine whether the claims contain an “‘inventive concept’—*i.e.*, an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.” *Id.* at 217-18 (quoting *Mayo Collaborative Servs.*, 566 U.S. 66, 132 S.Ct. 1289, 1296-97).

Following this Court’s holdings in *Mayo* and *Alice*, the Court of Appeals for the Federal Circuit (“Federal Circuit”) has applied this two-step framework to affirm or vacate findings of patent eligibility at various stages of litigation such as motions to dismiss,

judgments on the pleadings, and motions for summary judgment. See *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354, 1358-59 (Fed. Cir. 2018) (listing cases). The Federal Circuit has consistently held that “patent eligibility under 35 U.S.C. § 101 is ultimately an issue of law” but that the inquiry may contain “underlying issues of fact.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1365 (Fed. Cir. 2018). As such, the Federal Circuit has recognized that not all Section 101 challenges can be resolved at the pleading stage and that some challenges may require claim construction or may involve issues of fact as to “whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field.” *Id.* at 1368. However, the Federal Circuit has noted that a determination of patent eligibility at the pleading stage may be appropriate when, as here, “there are no disputed facts material to the issue of patent eligibility.” *Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1342 n.4 (Fed. Cir. 2018).

2. Since the early days of the profession, attorneys have had to calendar their client’s upcoming due dates and, when those dates near, communicate with the client about the upcoming date. However, U.S. Patent No. 5,895,468 (the “468 Patent”) and U.S. Patent No. 6,182,078 (the “078 Patent”) (collectively “the Patents-in-suit”) disclose that this practice is often “time-intensive, costly, and tedious, with professionals spending countless hours attempting to contact busy clients by telephone or by writing multiple letters attempting to elicit a response from the client.” Pet. App. 54a, 67a. The specifications

acknowledge that other systems had been developed but that they only “facilitate[d] some of the functions which professionals must perform.” Pet. App. 54a, 67a. To “improve[] the speed, efficiency, and reliability of performing professional services for clients,” Petitioner developed the claimed devices and methods of automatically delivering professional services by querying a database containing client reminders, generating a client response form based on a reminder and transmitting it to the client. Pet. App. 54a, 67a.

3. Even under this Court’s pre-*Alice* precedents, the Patents-in-suit are plainly invalid under Section 101. In fact, in an earlier appeal in *WhitServe, LLC v. Computer Packages, Inc.*, 694 F.3d 10 (Fed. Cir. 2012), Judge Mayer dissented from the decision explaining that:

The WhitServe patents are barred at the threshold by [35 U.S.C.] § 101, because they are directed to the abstract idea that it is useful to provide people with reminders of approaching due dates and deadlines...The WhitServe patents purport to solve these problems by disclosing the use of general purpose computers and the Internet to keep track of upcoming client deadlines and to generate client reminders that such deadlines are approaching...[T]he fact that the claimed system is arguably limited to communications between attorneys and other professionals and their clients is insufficient to bring it

within the ambit of section 101. Likewise, the fact that the WhitServe patents contain both method and apparatus claims is insufficient to render them patent-eligible.

Id. at 39-41 (internal quotations and citations omitted). But because the Appellant failed to brief the Section 101 issue on appeal, it was waived and not substantively considered by the panel majority.

4. In 2018, Petitioner brought this lawsuit for patent infringement alleging that Respondents infringed the Patents-in-suit because Respondents make and use computer systems to track and automatically remind clients of upcoming expiration dates of their domain name registrations and to receive client instructions for renewal of domains.

In response, Respondents moved to dismiss alleging that the claims of the Patents-in-suit are directed towards an abstract idea of “reminding clients of needed professional services based on upcoming due dates and communicating with clients to receive their responses to those reminders” and thus are not patent eligible subject matter. Pet. App. 170a. Respondents proposed treating claim 1 of the ’468 Patent and claim 1 of the ’078 Patent as representative. Claim 1 of the ’468 Patent recites:

1. A device for automatically delivering professional services to a client comprising:
 - a computer;
 - a database containing a plurality of client reminders, each of the client

reminders comprising a date field having a value attributed thereto;

software executing on said computer for automatically querying said database by the values attributed to each client reminder date field to retrieve a client reminder;

software executing on said computer for automatically generating a client response form based on the retrieved client reminder;

a communication link between said computer and the Internet;

software executing on said computer for automatically transmitting the client response form to the client through said communication link; and

software executing on said computer for automatically receiving a reply to the response form from the client through said communication link.

Pet. App. 56a-57a.

Claim 1 of the '078 Patent recites:

1. A device for automatically delivering professional services to a client comprising:

a computer;

a database containing a plurality of client reminders, each of the client reminders comprising a date field having a value attributed thereto;

software executing on said computer for automatically querying said database by the values attributed to each client reminder date field to retrieve a client reminder;

software executing on said computer for automatically generating a form based on the retrieved client reminder;

a communication link between said computer and the Internet;

software executing on said computer for automatically transmitting the form through said communication link.

Id. at 70a.

After applying the two-step *Alice* framework to the representative claim (claim 1 of the '468 Patent), the District Court granted Respondents' motion, holding that the asserted claims of the Patents-in-suit were invalid under Section 101. Pet. App. 14a-34a.

Under step one of *Alice*, the District Court concluded that the claims were directed towards the abstract idea of "preparing, sending, and receiving responses to due-date reminders for clients of professional-services." *Id.* at 22a. The District Court concluded that the claims were "not meaningfully different from other claims directed to methods of organizing human activity" and recite the "use of generic computer technology to automate a well-known business practice." Pet. App. 23a-24a. The District Court also noted that "[t]he written description acknowledges that the claimed steps were

already performed in the professional world, where ‘oftentimes an attorney must send a client a reminder, obtain authorization or possibly executed documents from the client and then take some action based on the client’s response.’” *Id.* at 24a (citing the ‘468 Patent). The District Court further concluded that the claims were not directed towards an improvement in computer functionality because “[t]he written description states that the claimed invention seeks to ‘improve[] the speed, efficiency, and reliability of performing services for clients’ by combining into one device the previously disparate methods of performing these tasks.” Pet. App. 28a.

Under step two of *Alice*, the District Court concluded that when considered both individually and as an ordered combination the claims recite nothing more than “generic computer components employed in a customary manner.” *Id.* at 29a (quoting *Audatex N. Am., Inc. v. Mitchell Int’l, Inc.*, 703 F. App’x 986, 990 (Fed. Cir. 2017)). Petitioner argued that the claimed invention allowed for faster and simpler communication. But the District Court rejected this argument, stating that “claiming the improved speed or efficiency inherent with applying the abstract idea on a computer does not provide a sufficient inventive concept.” Pet. App. 30a (internal quotations omitted).

Petitioner argued that it had alleged sufficient facts to state a plausible claim under this second step of the analysis. The District Court rejected this argument, because “neither the patent nor the complaint alleges any improvement in technology.” Pet. App. 32a.

5. Petitioner never argued that claim construction precluded dismissal of the claims at the pleading stage. Nor did Petitioner seek leave to amend its complaint following the District Court’s dismissal to add factual allegations supporting its position. Rather, Petitioner immediately appealed the decision to the Federal Circuit.

6. On appeal, the Federal Circuit affirmed the dismissal in a unanimous, non-precedential decision. Pet. App. 1a-2a. The Federal Circuit agreed that nothing in Petitioner’s claims “transforms the abstract idea that is the focus of its claims into a patent-eligible invention” or “points to any improvement in off-the shelf computers and existing communication networks.” Pet. App. 7a-8a. The Federal Circuit held that the “focus of the claims is simply to use computers and a familiar network as a tool to perform a fundamental economic practice involving simple information exchange.” *Id.* at 7a.

Petitioner argued that licensing of the Patents-in-suit demonstrated an inventive concept. *See* Brief of Petitioner-Appellant at 33-34, *WhitServe, LLC v. Donuts Inc.*, No. 19-2240 (Fed. Cir. Oct. 15, 2019). The Federal Circuit rejected this argument, reasoning that just because “the market found WhitServe’s products or ideas desirable—and took licenses—does not override the now-straightforward conclusion that the patents claim no improvement in computer functionality or other eligible matter.” Pet. App. 9a.

The Federal Circuit also rejected Petitioner’s argument that dismissal of the claims at the pleading stage was improper because factual issues existed as to what constituted “a particular, well-understood,

routine, and conventional technology” at the time of the claimed invention. *See* Brief of Petitioner-Appellant at 39, *WhitServe, LLC v. Donuts Inc.*, No. 19-2240 (Fed. Cir. Oct. 15, 2019). The Federal Circuit explained that factual questions relevant to the Section 101 analysis “do not prevent a judgment on the pleadings when the pleadings and exhibits attached thereto show that there are no plausible factual disputes” as “the specification alone may suffice to resolve the patent-eligibility inquiry.” Pet. App. 10a (internal quotations omitted).

7. Petitioner did not seek rehearing or rehearing *en banc*.

REASONS TO DENY THE PETITION

1. The Petition fails to identify any internal conflict within the Federal Circuit that would warrant a grant of *certiorari*. The Federal Circuit’s standard for deciding patent-eligibility issues on motions to dismiss is clear. Nor does Petitioner identify any conflict between that standard and this Court’s precedents. In considering motions to dismiss based on patent eligibility, the Federal Circuit applies the standard articulated in *Twombly/Iqbal*. As the concurrence in *Aatrix* explained,

“If patent eligibility is challenged in a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), [the Federal Circuit] must apply the well-settled Rule 12(b)(6) standard which is consistently applied in every area of law,” *i.e.* the *Twombly/Iqbal* standard. *Aatrix Software, Inc.*, 890 F.3d at 1357

(Moore, Dyk, O'Malley, Taranto & Stoll, JJ., concurring).

a. Petitioner does not argue that resolution of patent eligibility at the pleading stage is improper, but rather that a court legally errs in its Rule 12(b)(6) analysis “when it relies on its own mind and factual beliefs” and makes “[a] determination of patent ineligibility over a patentee’s factual assertions to the contrary.” Pet. at 18. Specifically, Petitioner argues that:

“The only way a district court can find that a patentee has not met its burden of asserting the factual allegations of validity and eligibility is if [it] *weighs* the factual elements. This is impermissible under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678. Indeed, a district court is *required* to take each of the patentee’s factual allegations concerning patent validity and eligibility as true. *Id.* Thus, upon a patentee’s assertion of patent eligibility, a district court is *required* to find at the pleading stage that the asserted patent is directed to subject matter is not ‘well understood, routine, and conventional’ to a person of ordinary skill in the art at the time of the invention. Upon a patentee’s assertion of commercial success of the claimed invention, a district court is likewise *required* to find at the pleading stage that the claimed invention is not directed to an abstract idea.”

Pet. at 20 (emphasis in original).

Petitioner's position directly contradicts this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). To survive a motion to dismiss, a plaintiff must present sufficient factual matter that, if accepted as true, states a plausible claim for relief which "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. This Court made clear that the analysis of whether a complaint states a plausible claim for relief will be "a context-specific task that *requires the reviewing court to draw on its judicial experience and common sense.*" *Id.* at 679 (emphasis added). The court may begin the analysis by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.*

While "a district court is required to take each of the patentee's factual allegations concerning patent validity and eligibility as true" (Pet. at 20), *Iqbal* does not require the court to then *rely* on those factual allegations, especially when there is evidence rebutting such allegations. Rather, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. Thus, when making a determination of patent eligibility at the pleading stage, the court must draw on its common sense and judicial experience and determine the sufficiency of the factual allegations.

b. The Petition does not clearly articulate which part of the Federal Circuit's decision Petitioner contends is an erroneous application of *Mayo Collaborative Servs.*, 566 U.S. 66. In *Mayo*, on a

motion for summary judgment, this Court considered disclosures in the specification of the patent about the claimed techniques being “routinely” used and “well known in the art.” *Mayo Collaborative Servs.*, 566 U.S. at 79. Based on these disclosures, the Court held that “any additional steps [beyond the law of nature] consist of well-understood, routine, conventional activity already engaged in by the scientific community” and “add nothing significant beyond the sum of their parts taken separately.” *Id.* at 79-80. This Court concluded that an admission by a patent owner in the specification can serve as the basis for finding that the additional elements were well-understood, routine, and conventional. *Id.*

The Petition identifies no inconsistency or error in how the Federal Circuit has applied *Mayo*. The Federal Circuit has held that the patent eligibility inquiry may contain underlying issues of fact but that claims may be deemed patent-ineligible at the motion to dismiss stage “based on intrinsic evidence from the specification.” *Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 912 (Fed. Cir. 2017). “In ruling on a 12(b)(6) motion, a court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit, such as the claims and the patent specification.” *Id.* at 913 (internal quotations omitted).

In *Interval Licensing LLC*, the Federal Circuit recognized that “[p]atent eligibility under 35 U.S.C. § 101 is a question of law that may contain underlying issues of fact” but concluded that “there are no disputed facts material to the issue of patent eligibility” because “the specification admits the

acquisition instructions are ‘generic.’” 896 F.3d 1342 n.4, 1346-47.

Similarly, in *Cleveland Clinic Foundation v. True Health Diagnostics LLC*, the Federal Circuit recognized that “factual issues may be resolved on the pleadings ‘based on the sources properly considered on a motion to dismiss, such as the complaint, the patent, and materials subject to judicial notice.’” 760 Fed. Appx. 1013, 1018 (Fed. Cir. 2019) (quoting *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1128 (Fed. Cir. 2018)). The Federal Circuit rejected the patent owner’s argument that the district court improperly resolved factual issues against it at the pleading stage, finding that because “the specification and prosecution history are clear that the claimed method uses a known technique in a standard way to observe a natural law,” “[t]here is no reason to task the district court with finding an inventive concept that the specification and prosecution history concede does not exist.” *Id.* at 1019.

In each of these cases, (as with the present case), the Federal Circuit held the claims to be patent-ineligible based on the evidence before it, *i.e.* the complaint, specifications and briefing. This practice does not constitute impermissible fact-finding and is consistent with this Court’s decision in *Mayo*.

2. This case would be a poor candidate for review of the Federal Circuit’s application of Section 101 at the motion to dismiss stage.

a. The District Court and the Federal Circuit applied this Court’s precedent in a straightforward manner. There was no dissent from the Federal

Circuit panel's ruling and Petitioner chose not to seek either panel or *en banc* review. Petitioner did not even move to amend its complaint following the District Court's dismissal. The District Court concluded that under *Alice* step one the claims are directed to the abstract idea of "preparing, sending, and receiving responses to due-date reminders for clients of professional-services." Pet. App. 22a. Under *Alice* step two, the District Court also correctly found that the claims do not provide "a sufficient inventive concept" because the claims implement the abstract idea on generic computer components. *Id.* at 30a. Under *Mayo* and *Alice*, the Patents-in-suit are a classic example of unpatentable subject matter.

b. Petitioner argues that the courts below "did not take as true or rely on WhitServe's allegations that the patent is directed to eligible subject matter" but instead "based their 12(b)(6) conclusions on what they considered in their own minds to be 'well understood, routine [and] conventional' at the time of invention in 1996 to a person of ordinary skill in the art" and then "weighed and relied upon their judicially created non-evidence to reach a conclusion of patent ineligibility." Pet. at 23.

Petitioner's characterization is incorrect. The lower courts accepted Petitioner's factual allegations as true, but the fact that the specifications confirmed that the claims recited only routine, well-known steps eliminated any need for the Federal Circuit or the District Court to rely on anything outside the intrinsic evidence normally considered in a Rule 12(b)(6) determination. This case falls in line with several other Federal Circuit decisions and is precisely of the

type where the Federal Circuit recognized that a patent-eligibility analysis may turn on underlying issues of fact, but simply found “no disputed facts material to the issue of patent eligibility.” *See Interval Licensing LLC*, 896 F.3d at 1342 n.4; *Secured Mail Sols. LLC*, 873 F.3d at 912 (affirming dismissal of the claims as invalid under Section 101 “based on intrinsic evidence from the specification”) (internal quotations omitted); *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1166 (Fed. Cir. 2018) (finding that “[t]his is such a case” where “the undisputed facts, considered under the standards required by that Rule, require a holding of ineligibility under the substantive standards of law.”).

c. Even when taken as true, Petitioner’s factual allegations about its alleged commercial success and licensing do not create a question of an inventive concept because as the Federal Circuit correctly noted “ineligible ideas can be valuable.” Pet. App. 9a.

There is also no question of fact as to what constituted “well-understood, routine [and] conventional” at the time of the claimed invention because the specification and asserted claims admit as much. Petitioner’s claims require only generic components—“a computer,” “a database,” “software executing on said computer,” and “a communication link between said computer and the Internet.” Pet. App. 56a-57a, 70a. The specification acknowledges that the network-connected computer is a “professional computer” capable of executing software and describes communication between the professional and the client simply as occurring “through an Internet communication link.” *Id.* at 55a,

68a. The specification likewise makes clear that prior docketing systems commonly utilized a database and software that “notifie[d] the professional of each upcoming deadline a preset time period before the deadline by . . . networked computer.” *Id.* at 54a, 67a. Thus, as the lower courts correctly held, no factual issues precluded a determination of patent eligibility at the pleading stage.

3. Even if the Federal Circuit’s determinations on the application of the *Alice* test here were incorrect (which they were not), Petitioner has not shown how this case has a broader impact sufficient to warrant *certiorari*. Accordingly, there was no fundamental error with the District Court’s analysis or the Federal Circuit’s affirmance that warrants further review.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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