

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MAPLEBEAR INC. D/B/A INSTACART,
Petitioner,

v.

CONSUMERON, LLC,
Patent Owner.

Case IPR2023-00865
U.S. Patent No. 11,238,465

PATENT OWNER'S SUR-REPLY

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PATENT OWNER'S EXHIBIT LIST

Exhibit	Description
2001	Screenshots from “Webvan Distribution Center” video obtained at https://www.youtube.com/watch?v=os66TTScS1o
2002	Walmart Online Order, https://www.walmart.com/cp/3893115
2003	Prosecution History of U.S. Patent No. 10,628,835
2004	LII/Legal Information Institute Definition of “Acquire”
2005	Collins English Dictionary Definition of “Transaction”
2006	Cambridge English Dictionary Definition of “Transaction”
2007	Substitution for Store Pickup and Delivery Items – Walmart.com
2008	Declaration of Dr. Michael Mitzenmacher
2009	Richard Metters, et al., “ <i>Strategic supply chain choices for multi-channel Internet retailers</i> ” (2007)
2010	Carlton H. Scott, “ <i>Efficient Allocation of Online Grocery Orders</i> ”, , Int. J. Productivity and Quality Management, Vol. 1, Nos. 1/2 (2006)
2011	Deposition Transcript of Henry Houh, Ph.D., dated February 13, 2024
2012	Applicant's Remarks/Arguments, dated December 14, 2023
2013	Jonathan J. Hull, “ <i>Mobile Image Recognition: Architectures and Tradeoffs</i> ” Ricoh Innovations, Inc.
2014	Hend S. Al-Khalifa, “ <i>An M-Learning System Based on Mobile Phones and Quick Response Codes</i> ”, Journal of Computer Science 7 (3), 427-430 (2011)
2015	Lauren Elizabeth Stewart, B.S. Adv, “ <i>QR Codes: Creative Mobile Media Approaches</i> ” The University of Texas at Austin (May 2010)
2016	Hairong Li, <i>QR Code Mobile Promotion: An Initial Inquiry</i> , ResearchGate (April 5, 2021), https://www.researchgate.net/publication/279387105

2017	Deposition Transcript of Henry Houh, Ph.D., dated October 20, 2023
2018	Hannu Yrjola and Kari Tanskanen, <u>Grocery E-Commerce Consumer Behavior and Business Strategies</u> 160-163 (2005)

I. INTRODUCTION

The Challenged Claims are patentable because Carr and Lauka are not prior art. The Challenged Claims enjoy priority to the filing date of its parent application, U.S. Patent Application No. 13/270,848 (Ex. 1011, the "'848 Application"), filed on October 11, 2011, because the '848 application discloses "failing to locate a product" and "determining that a product is unavailable."

The parties agree, and common experience confirms, that customers routinely go shopping and determine that a desired product is unavailable. And while Petitioner calls evidence describing this well-known, inherent aspect of the shopping experience "irrelevant," Federal Circuit precedent—which Petitioner ignores—confirms that such inherent and well-known aspects of the invention need not be spelled out *in haec verba* to satisfy the written description requirement. Nevertheless, this limitation is expressly disclosed because the specification describes frustrated customers who received the wrong product when images of goods on the website did not accurately depict the goods that were in stock. The specification also expressly describes the solution to this problem: real-time communication between the customer and agent.

The '848 Application also expressly discloses "obtaining and sending to the customer the information determined from the bar code or QR code including at least one image of the replacement product." This express disclosure is not, as Petitioner

suggests, an undisclosed but “obvious” extension of the disclosure. Nor does the specification “teach away” from sending such information to a customer given that the problem associated with inaccurate images on a website was *solved* via the ’848 application’s disclosure of an agent scanning a product in the store and sending information about the product to a customer in real time.

Finally, Carr does not teach “acquisition request” and “acquiring” under the correct construction; the claim language, specification, and extrinsic evidence confirm that the term “acquisition request” means “a request for an agent to shop for goods on a customer’s behalf.” Petitioner’s argument that collateral estoppel applies is meritless. The Board did not previously decide whether its construction of these terms was appropriate in the context of the ’465 Patent’s claims, which recite an agent purchasing a replacement product. The Board’s prior constructions of these terms are inconsistent with these limitations. Further, Petitioner’s argument that collateral estoppel applies is also foreclosed by Federal Circuit precedent that confirms that IPR decisions are not final for purposes of collateral estoppel until they have been affirmed by the Federal Circuit.

II. THE ’848 APPLICATION DISCLOSES “FAILING TO LOCATE A PRODUCT” AND “DETERMINING THAT A PRODUCT IS UNAVAILABLE”

Petitioner identifies a limited number of things that can go wrong “when an agent is remotely acquiring goods,” including that “the agent fails to locate the

identified good or determines that the identified product is unavailable.” Reply at 3. Petitioner’s argument, however, that the specification “does not convey to a POSITA that the inventors had possession of either the problem or solution of unavailable products” is inconsistent with its own recognition that this aspect of the invention is a well-known and inherent aspect of the shopping experience. *Id.*

A. The Claims Address the Same Remote Acquisition Problem Addressed in the Specification

The background of the invention section explicitly identifies the problems that arise when “a picture may not be available for the item **or the picture will be inadequate to accurately depict the item.**” Ex. 1001 at 1:54-55 (emphasis added). In this case, the product the customer wishes to purchase is not available because there is a mismatch between the customer’s expectation and the product that is actually available. *Id.* at 7:55-63. In the absence of the inventors’ solution to this problem—providing “real-time feedback on the goods to be purchased”—“the person running the errand purchases the **wrong product.**” *Id.* at 1:60-2:1.

Accordingly, the problem of, and solution to, unavailable products is explicitly described in the specification. Reply at 5. In particular, real-time communication between the customer and the agent plainly addresses the issue of the product the customer desired being unavailable because the customer can tell the agent, in real time, that they have not located the correct product.

Petitioner's Reply essentially requires that the '848 Application provide an *in haec verba* description of requested products being unavailable or unable to be located for the claimed scenario to be provided written description support in the "principal embodiment." *Id.* at 2-3, 4-6 (honing in on the "principal embodiment"). This is not the legal standard. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1352 (Fed. Cir. 2010) (en banc) ("[T]he written description requirement does not demand . . . that the specification recite the claimed invention *in haec verba*" (citation omitted)). "The invention is, for purposes of the 'written description' inquiry, *whatever is now claimed.*" *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991). *Vas-Cath Inc.* requires there to be "reasonable clarity." *Id.* Petitioner has not disputed this controlling caselaw and cites no legal basis for its own position.

The '848 Application's wrong product problem, which is resolved by the '848 Application's solution, therefore discloses the claimed scenario where the requested product is not available. See '848 Application at ¶¶ 5-6; Ex. 2008 ("Mitzenmacher Decl."), ¶¶ 42-43 (citing Exs. 2009 and 2010 (describing out of stocks)); Paper 12 ("POR") at 15.

B. The Disputed Limitations are Inherently Disclosed

Petitioner also argues that the '848 Application makes no reference to the specific problem of an agent failing to locate a product identified by the customer or

determining that such product is unavailable. Reply at 2. Not only is that untrue (see Section II.A, *supra*), Petitioner cites no authority suggesting that this is a valid test for written description. *Id.*

To the contrary, in light of the undisputed facts, one skilled in the art would find the failure to locate a desired product an inherent part of the shopping process. *Yeda Rsch. & Dev. Co. v. Abbott GmbH & Co. KG*, 837 F.3d 1341, 1345 (Fed. Cir. 2016) (“Under the doctrine of inherent disclosure, when a specification describes an invention that has certain undisclosed yet inherent properties, that specification serves as adequate written description to support a subsequent patent application that explicitly recites the invention’s inherent properties.”); *Allergan, Inc. v. Sandoz Inc.*, 796 F.3d 1293, 1309 (Fed. Cir. 2015) (“A claim that recites a property that is necessarily inherent in a formulation that is adequately described is not invalid as lacking written description merely because the property itself is not explicitly described.”).

Thus, not only are the limitations common experiences when customers routinely go shopping and fail to locate the product they set out to purchase, but they are inherent in the very act of shopping. Accordingly, because the specification is written for POSITA, and POSITAs were well aware that desired products cannot always be found, the written description requirement is satisfied. Mitzenmacher Decl., ¶¶ 46-47.

C. The Specification Need Not Describe the Well-Known Stock-Out Problem

Moreover, while Petitioner alleges that the identified product in Figure 3 is the requested product, that is not always the case. Reply at 4-6. A skilled artisan knows that requested goods can be out-of-stock or unable to be located and that traditional order pickers were often confronted with what to do when a requested product was out of stock. *LizardTech, Inc. v. Earth Res. Mapping, Inc.*, 424 F.3d 1336, 1345 (Fed. Cir. 2005) (“The patent specification is written for a person of skill in the art, and such a person comes to the patent with the knowledge of what has come before.”) (citation omitted); *see also Zoltek Corp. v. United States*, 815 F.3d 1302, 1308 (Fed. Cir. 2016) (“The written description ‘need not include information that is already known and available to the experienced public.’”); *Immunex Corp. v. Sandoz Inc.*, 964 F.3d 1049, 1064 (Fed. Cir. 2020). Stock-outs are well known; Petitioner does not dispute this.

Petitioner's contention that a POSITA's knowledge of the “stock-out” problem is irrelevant because the claims require both the problem *and* solution is misguided. Reply at 8. Petitioner's view—that the inventors only considered scenarios in which the desired product would be identified—defies common sense and ignores the knowledge of a skilled artisan. *Id.* at 9. The solution the inventors devised—real-time communication between the agent and customer during the acquisition process—is just as effective for dealing with a product that cannot be

found as it is for dealing with a product that is unsatisfactory for some other reason. Ex. 1001 at 7:55-63 (disclosing searching for a replacement product when the inspected product is unsatisfactory). And, as disclosed in the specification, one reason an identified product would be unsatisfactory is when the image of a desired product does not match what is actually in stock. See Section II.A, *supra*. Nevertheless, because a skilled artisan was well aware of the stockout problem at the time of the invention, the written description requirement is satisfied.

Petitioner's narrow focus on the details of one embodiment of the invention improperly ignores the rest of the specification, inherent aspects of the shopping experience, and the well-known fact that sometimes products are out of stock. POR at 24-25. The Challenged Claims, therefore, enjoy written description support from the '848 Application.

III. THE '848 APPLICATION DISCLOSES DETERMINING AN IMAGE FROM A BAR OR QR CODE

In the Institution Decision, the Board did not address the written description support for this limitation. See *generally* Institution Decision. On the full trial record, the Board should determine that the '848 Application provides written description support for “determining the information from the bar or QR code, wherein the information includes at least one image of the replacement product” (claim 1) and “obtaining a bar code [or] QR code of a replacement product . . . sending to the customer the information determined from the bar code or QR code

. . . wherein the information includes at least one image of the replacement product”
(claim 14). Mitzenmacher Decl., ¶ 61.

A. The '848 Application Expressly Discloses Determining an Image of a Product from a Bar Code or QR Code

The '848 Application expressly discloses “obtaining and sending to the customer the information determined from the bar code or QR code including at least one image of the replacement product.” For example, the disclosure describes that “bar codes, QR (Quick Response) codes, image recognition or near field communication can be used in *identifying and communicating information* about the product of concern.” '848 Application at ¶ 8 (emphasis added); *see also id.* at ¶ 23 (“On the other hand, the *product data* can be collected by scanning a bar code associated with the product”) (emphasis added), ¶ 30 (disclosing that bar codes and QR data “enable[e] a host of *information related to the product* to be presented”) (emphasis added). The disclosure also describes that “information regarding the product” includes “*pictures*, bar codes, QR codes, video, [and] instructions.” *Id.* at ¶ 29. Accordingly, the '848 Application discloses scanning bar codes and QR codes to provide information about the product, including product images, to the customer. Mitzenmacher Decl., ¶¶ 62-67.

Petitioner acknowledges some of these disclosures but maintains that “the '848 Application does not contemplate the use of a bar or QR code to retrieve image information from the bar or QR code.” Pet. at 24 (emphasis omitted). The basis for

Petitioner's argument appears to be that "the '848 application lists 'pictures, bar codes, QR codes' as alternative types of product data" and that "there is no disclosure bridging the two concepts, *i.e.* no disclosure that contemplates using a bar/QR code to obtain an image, and sending that obtained image information to the user." *Id.* at 24-25. In fact, the application describes that the image capture device includes image recognition software that a skilled artisan understands is used to identify and scan bar or QR codes to obtain images from links. '848 Application at ¶ 8; Mitzenmacher Decl., ¶¶ 63-64 (citing Ex. 2013 at 1-2 (describing the use of image recognition software to retrieve electronic data such as images that are linked to QR codes)); *see also* Ex. 2014 at 427; Ex. 2015 at 1; Ex. 2016 at 62.

B. The '848 Application Does not "Teach Away" From These Limitations

Petitioner's contention that the '848 Application teaches away from an agent determining images from QR codes of products in a shopping location has no basis in law or fact. Reply at 14-15; Pet. at 26 (suggesting that the "at least one image of the replacement product" cannot be a static image stored in a database because the '465 Patent describes such images as "inadequate"). For one, Petitioner cites no legal support for its contention that "teaching away" is relevant in any way to the written description requirement. 37 C.F.R. § 42.22(a)(2) (requiring "[a] full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence including material facts, and *the governing law*,

rules, and precedent.") (emphasis added). More importantly, the '848 Application expressly discloses scanning a bar code to collect product data, which includes "pictures" or "images" of the product.

The problem that Petitioner appears to be referring to—that static images of a product on a website may not accurately depict the product that is in stock—is irrelevant *because the agent scanning the product in the store can discern whether the image obtained from scanning the bar code accurately represents the product that was just scanned.* This is an entirely different concept from static images displayed on a website that might not accurately represent the product and does not "teach away" from an agent sending pictures obtained from scanning a bar code to a customer. Mitzenmacher Decl., ¶¶ 63-64. Thus, to the extent that there is any merit to Petitioner's novel, unsupported legal argument that "teaching away" can undermine express written description, it fails on the facts because the disparaged technique concerns a customer viewing inaccurate images on a website in the normal online ordering process, not receiving images of a replacement product from an agent who just scanned the product's bar or QR code.

Indeed, the specification describes how sending product images determined based on bar/QR codes *achieves the goals of the invention.* '848 Application at ¶ 30 ("Certainly bar code and QR data may be preferable due to associated accuracies, the ability to readily conduct simultaneous price comparisons for the product via

internet searching or links, and enabling a host of information related to the product to be presented, e.g., nutritional or health information, product ratings and the like.”).

Similarly, during prosecution of the '465 Patent, the applicant amended the then-pending claims to specify that the “information determined from the bar or QR codes include at least one image of the identified product” to highlight the goal of the invention:

To overcome these problems, the current invention requires that information on an identified product for the set of one or more goods be transmitted to the customer using a digital image capture device of an agent. ***This goal is specifically achieved*** by obtaining a bar or QR code of the identified product of a first set of one or more goods; determining the information from the bar or QR code; and sending the information for the customer to approve the purchase of the particular product based on the information determined from the bar or QR code. Claim 1 has been amended to specify that the information determined from the ***bar or QR code includes at least one image of the identified product***.

Ex. 1002 at 63-64 (emphasis added); Mitzenmacher Decl., ¶ 67; Ex. 1038 (“Mitzenmacher Tr.”) at 109:24-112:17.

IV. CARR DOES NOT TEACH AN “ACQUISITION REQUEST” OR “ACQUIRING” UNDER THE CORRECT CONSTRUCTION

A. The Board's Earlier Decisions do not Give Rise to Collateral Estoppel

While the Board decided against Patent Owner with respect to the four proceedings challenging family members of the '465 Patent, this core claim construction issue is still being litigated and appealed. Patent Owner retains the right to, and indeed will argue zealously at the Federal Circuit, that the term “acquisition request” is a request for an agent to shop for the requested goods on a customer's behalf. Only when the Federal Circuit ultimately decides the issue, can collateral estoppel attach. *See IOENGINE, LLC v. PayPal Holdings, Inc.*, Nos. 18-452-WCB, 18-826-WCB, 2022 WL 2800861, at *12-13 (D. Del. June 15, 2022); *see also XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1294 (Fed. Cir. 2018) (“[the Federal Circuit's] ***affirmance renders final*** a judgment on the invalidity of the Freezing Patent, and has an immediate issue-preclusive effect on any pending or co-pending actions involving the patent.”) (emphasis added).

Given that the Federal Circuit may yet reverse the Board's decision with respect to claim construction in IPR2022-01356, IPR2022-01357, IPR2022-01358, and IPR2022-01359, collateral estoppel does not apply Petitioner's arguments to the contrary are wrong, and Petitioner's cited case law is readily distinguishable. Specifically, with respect to *SSIH Equipment S.A. v. USITC*, 718 F.2d 365 (Fed. Cir.

1983), the Federal Circuit “approved, but did not mandate” the ITC’s decision to modify its previous exclusionary order following a district court’s decision to invalidate two out of three patents at issue, which the ITC previously found valid and infringed. *See Stulberg v. Intermedics Orthopedics, Inc.*, 997 F. Supp. 1060, 1069 (N.D. Ill. 1998) (citation omitted). Notably, the Federal Circuit did not consider whether collateral estoppel mandated the ITC to modify its decision. *SSIH Equip.*, 718 F.2d at 370-71 & n.8 (“Further, the issue of whether the Commission had to modify its order under *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), **is reserved**. We hold only that there was a justifiable basis for the modification here.”) (emphasis added).

Additionally, *Medtronic, Inc. v. Teleflex Life Sciences Ltd.*, No. IPR2020-01343, Paper 85 (P.T.A.B. Feb. 23, 2022) is neither precedential, informative, nor apposite. Petitioner ignores the fact that the case was not decided on collateral estoppel grounds and that the panel’s decision did not even consider collateral estoppel. Further, Petitioner glosses over the substance of APJ Paulraj’s concurrence, where he explains that “further clarification from our reviewing authorities on the issue of finality pending appeal would benefit the Board” given “the seemingly contradictory language in some of the case law.” *Id.* at 71.

Put simply, since the Federal Circuit may yet reverse the Board’s decision on claim construction in IPR2022-01356, IPR2022-01357, IPR2022-01358, and

IPR2022-01359, the Board's previous decision is not "final" for collateral estoppel purposes. *See Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979) ("To be 'final' for purposes of collateral estoppel the decision need only be immune, as a practical matter, to reversal or amendment."). Petitioner has cited no controlling authority to the contrary.

B. Carr Does Not Teach "Acquisition Request" and "Acquiring" Under the Correct Construction

The term "acquisition request" is "a request for an agent to shop for goods on a customer's behalf," with "acquiring" covering the agent completing the transaction (purchasing) the goods. Mitzenmacher Decl., ¶¶ 68-87. The claim language, specification, and extrinsic evidence confirm this construction as the evidence demonstrates that an "acquisition request" entails the **agent** shopping for the goods and then "acquiring" the goods by completing whatever transaction is necessary. *Id.*; Mitzenmacher Tr. at 26:1-18. The Board's preliminary rejection of Consumeron's construction is premised on the alternative pre-purchase embodiment, which the Challenged Claims do not read on.

Accordingly, applying the appropriate construction, Carr does not teach an "acquisition request," wherein the agent shops for requested goods, or "acquiring" goods, *i.e.* performing the transaction necessary to obtain the goods, "upon receiving approval of the purchase." Ex. 1001 at Claims 1, 14.

1. Claim Construction: “Acquisition Request” and “Acquiring”

The Board should reconsider its earlier construction of the term “acquisition request” because it is inconsistent with the plain language of the ’465 Patent’s claims. Petitioner’s argument to the contrary relies on a meritless argument that the Board did not rely on in its earlier decisions. Reply at 18 (“The ‘*approve the purchase*’ claim language is in fact not inconsistent with a plain and ordinary construction of ‘*acquisition request*’ . . .”).

The Challenged Claims expressly concern a scenario where the agent is shopping for goods on behalf of the customer. In particular, the agent receives a “first acquisition request” that identifies one or more goods and then cannot locate one or more of the items. Ex. 1001 at Claim 1. Failure to locate a desired item is something that occurs when an agent shops, not when an agent is merely there to pick up pre-purchased goods. Indeed, once the agent determines that she cannot locate an item, she finds and sends information about a “replacement product.” *Id.* It is impossible for this “replacement product” to be a “pre-purchased” product because, until the customer receives the information about the replacement product, any opportunity for the customer to have “pre-purchased” the replacement product has already passed.

Accordingly, Petitioner’s argument—that when “the customer ‘pre-pay[s]’ for the goods (Ex. 1001, 8:25-33), it makes sense that the customer must still approve

their **own** remote purchase (not the agent's)"—is nonsensical. Reply at 19. Because the customer could not have made "their own remote purchase" of the "replacement product," there is no scenario in which the claimed "approval of the purchase from the customer" can refer to the customer's pre-purchase. Instead, as expressly disclosed in the specification and in line with the plain language of the claims, when the customer approves the purchase, that language refers to the customer approving the **agent's** purchase of the replacement product. Ex. 1001 at 7:65-8:4.

Nor is there any inconsistency between Consumeron's proposed constructions of "acquisition request" and "acquiring," as Petitioner baselessly suggests. Reply at 19-20 (pretending not to understand the connection between shopping for a product and purchasing a product). As the specification (and common experience) makes clear, the successful act of shopping for a product terminates with the shopper purchasing the product:

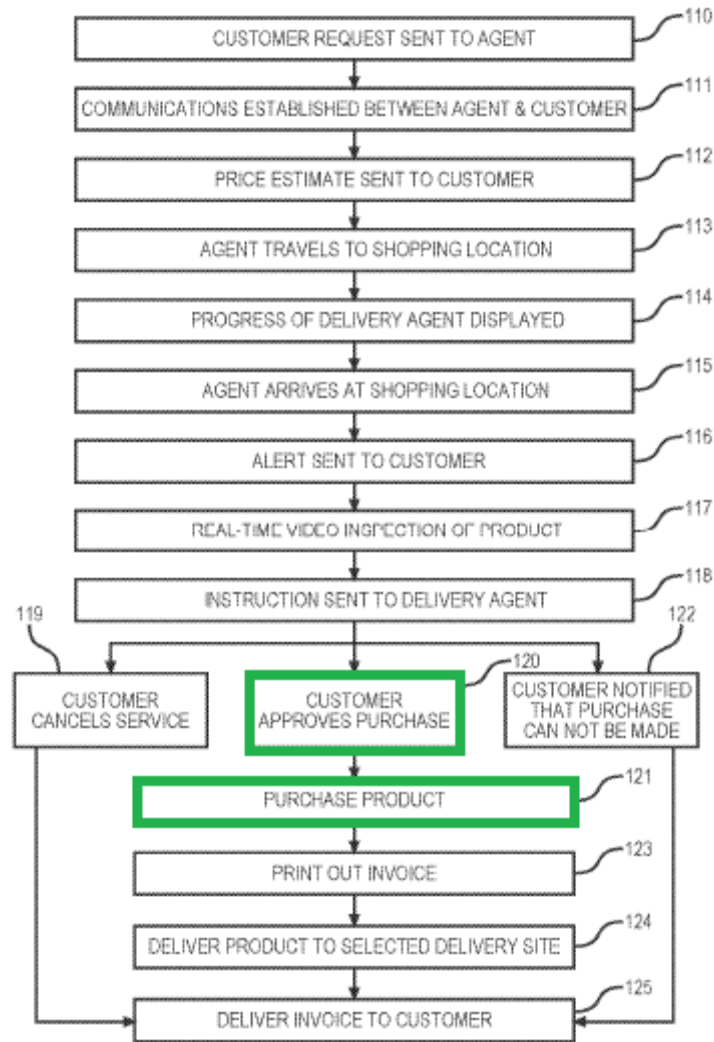


FIG. 3

Ex. 1001 at FIG. 3 (annotated). Notably, however, the agent may acquire goods via *other types of transactions*, such as when the purveyor of the goods offers them for free, or when the agent barter or trades for the goods. *Id.* at 10:50-54. In all cases, however, the agent—not the customer—is the one who enters into the transaction necessary to acquire the goods. Of course, in the claims of the '465 Patent, the

customer approves the agent's "purchase," so the outer bounds of the meaning of the term "acquiring" are merely academic. *Id.* at Claim 1.

Accordingly, in fulfilling the "acquisition request" and "acquiring" steps, the agent shops for and purchases the goods on behalf of the customer. Mitzenmacher Decl., ¶ 77.

2. Carr Does Not Teach or Suggest the "Acquisition Request" and "Acquiring" Limitations Under the Appropriate Construction

Petitioner advances no argument that Carr in view of Lauka satisfies the "acquisition request" or "acquiring" limitations of the '465 Patent. *See* Reply at 21-23. Accordingly, the Board should determine that the claims of the '465 Patent are patentable.

V. CONCLUSION

For all of these reasons, Consumeron respectfully requests that the Board find the Challenged Claims patentable.

Dated: July 3, 2024

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(Case No. IPR2023-00865)

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the portions of the foregoing **PATENT OWNER'S SUR-REPLY** specified in 37 C.F.R. § 42.24 has 3,860 words in compliance with the word limit set forth in 37 C.F.R. § 42.24(c)(4). This word count was prepared using Microsoft Word word-processing system used to prepare this paper.

Dated: July 3, 2024

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CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), that service was made on Petitioner as detailed below.

<i>Date of service</i>	July 3, 2024
<i>Manner of service</i>	Electronic Mail (raghav.bajaj.ipr@haynesboone.com; scott.jarratt.ipr@haynesboone.com; angela.oliver.ipr@haynesboone.com; lyric.stephenson.ipr@haynesboone.com)
<i>Documents served</i>	PATENT OWNER'S SUR-REPLY
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