

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

STODGE, INC. D/B/A POSTSCRIPT

Petitioner

v.

ATTENTIVE, INC.

(record) Patent Owner

IPR2023-01338
Patent No. 11,416,887

**PETITIONER REQUEST FOR REHEARING
UNDER 37 C.F.R. §42.71(d)(2)**

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TABLE OF EXHIBITS

Exhibit No.	Description
1001	U.S. Patent No. 11,416,887 (“ the ’887 patent ”).
1002	Declaration of Dr. Henry Houh.
1003	C.V. of Dr. Henry Houh.
1004	File History of U.S. App. Ser. No. 17/669,114 (issued as the ’887 patent).
1005	U.S. Pat. App. Pub. 2014/0379482 (“ Demsey ”).
1006	U.S. Pat. App. Pub. 2013/0111328 (“ Khanna ”).
1007	U.S. Pat. No. 8,532,283 (“ Haggerty ”).
1008	U.S. Pat. App. Ser. No. 13/461,541 (“ the Haggerty ’541 application ”).
1009	U.S. Pat. App. Pub. 2016/0142858 (“ Molinet ”).
1010	U.S. Prov. App. Ser. No. 62/079,512 (“ The Molinet ’512 Provisional ”).
1011	U.S. Pat. App. Pub. 2015/0178784 (“ Oliver ”).
1012	Cristal, G., “Ad Serving Technology, Understand the marketing revelation that commercialized the internet”, ISBN: 1484867572 (2014)(“ Ad Serving Technology ”).
1013	U.S. Pat. App. Pub. 2015/0142568 (“ Hsu ”).
1014	Plaintiff’s Answering Brief in Opposition to Defendant’s Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(B)(6) in <i>Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript</i> , Case, No. 1-23-cv-00087 (D. Del., Filed March. 15, 2023).
1015	File History of U.S. App. Ser. No. 15/986,569.

1016	Firtman, M., <i>“Programming the Mobile Web, Second Edition”</i> , O’Reilly (2013).
1017	U.S. Pat. App. Pub. 2009/0247140 (“ Gupta ”).
1018	U.S. Pat. No. 5,913,040 (“ Rakavy ”).
1019	RFC 5724, “URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS)”, January 2010.
1020	WO 2005/062596A1 (“ Helkio ”).
1021	Flanagan, D. <i>“JavaScript: The Definitive Guide, Sixth Edition”</i> , O’Reilly Media, Inc. (2011).
1022	Complaint for Patent Infringement in <i>Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript</i> , Case No. 1-23-cv-00087 (D. Del. Filed Jan. 25, 2023).
1023	Scheiner, M., <i>Attentive Gets the Message Out</i> , available at https://crm.org/news/attentive-gets-the-message-out
1024	Levine, B., <i>Led by TapCommerce founders, startup Attentive launches SMS/MMS marketing platform</i> , available at https://martech.org/led-tapcommerce-founders-startup-attentive-launches-smsmms-marketing-platform/
1025	Ha, A, <i>TapCommerce’s founders are back with Attentive</i> , a messaging startup that’s raised \$13M, available at https://techcrunch.com/2018/02/08/attentive-launch/
1026	United States District Courts — National Judicial Caseload Profile, available at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2023.pdf
1027	Scheduling Order in <i>Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript</i> , Case No. 1-23-cv-00087 (D. Del. March 8, 2023).
1028	Mobile Marketing Association, “US Consumer Best Practices

	for Messaging”, version 7.0, (2012), available at https://www.mmaglobal.com/documents/us-consumer-best-practices .
1029	U.S. Pat. No. 7,136,875 (“ Anderson ”).
1030	Excerpt from Amazon.com available at https://www.amazon.com/Serving-Technology-Understand-revelation-commercialized/dp/1484867572/
1031	Excerpt from Google Books available at https://www.google.com/books/edition/Ad_Serving_Technology/PHNHnwEACAAJ?hl=en
1032	Petitioner’s <i>Sotera</i> Stipulation.

Petitioner respectfully requests rehearing under 37 C.F.R. §42.71(d)(2) of the Decision Denying Institution (“Institution Decision”) issued February 26, 2024. Petitioner respectfully submits that the Institution Decision “misapprehended or overlooked” relevant subject matter in the Petition. 37 C.F.R. §42.71(d)(2). Specifically, the Institution Decision may have misapprehended or overlooked several points in the Petition and accompanying declaration of Dr. Houh with respect to motivation to combine (addressed in §I, below) and with respect to reasonable expectation of success (§II, below).

I. MOTIVATION TO COMBINE

Petitioner first respectfully requests rehearing regarding the Institution Decision’s findings concerning the issue of motivation to combine. (Institution Decision, pp. 18-21).

A. Increasing Reach of Haggerty’s Ads

The Institution Decision found that the Petition did not explain “*how* Demsey’s Internet ad techniques would increase the reach of Haggerty’s marketing efforts.” (Institution Decision, p. 19). On this point, Petitioner respectfully submits that the Board may have misapprehended the effect of the proposed combination.

According to the Institution Decision, Haggerty alone does not use advertisements on Web pages. (Institution Decision, pp. 24-25). The proposed combination of the Petition, however, uses the technology of Demsey and Khanna

to allow Haggerty to place ads on Web pages. (Petition, pp. 24, 20-21, 20-28). By enabling the presentation of Haggerty's ads on the Web, the combination increases the reach of Haggerty (Petition, pp. 30-31), because the ads can additionally be seen by people who read Web pages, not just by people who see Haggerty's print ads or non-Web electronic material.

Petitioner thus respectfully requests reconsideration of the Board's finding that the Petition did not adequately explain how the use of Demsey and Khanna would increase the reach of Haggerty's advertisements.

B. Improved Targeting of Ads

The Institution Decision also found that the Petition did not adequately explain how the combination would "help Haggerty better target advertisements to particular users such that one of ordinary skill would have been motivated to incorporate Demsey's technique in Haggerty." (Institution Decision, p. 19). Petitioner respectfully submits that the Board may have misapprehended the argument or overlooked the Petition's explanation.

As the Petition explained, Demsey is an ad-network patent. (Petition, p. 21, *see also*, pp. 20, 24-26)("Demsey provides the standard ad-network functionality")(Ex. 1002, ¶¶70-71). As further explained in the Petition, ad networks allowed improved targeting of ads. (Petition, pp. 15-17)(Ex. 1002, ¶¶48-64). Before ad networks, ads could be targeted at publications, *e.g.*, an ad for cars might be

placed in *Popular Mechanics* magazine or on the magazine's website, based on the assumption that the audience was likely interested in cars. (*Id.*). Ad networks, however, were able to target *individual users* with ads by using ad tags. As the Petition explained:

“This [ad-network] process was advantageous for several reasons. (Ex. 1002, ¶63). With older technology (no ad tags), an advertiser would only know which website would contain the ad, not which users would eventually see the ad. (Ex. 1002, ¶63). Having ad tags that execute when the user views a page, however, allowed the ad tag to collect information about the specific user and the user's device, and send this information to the ad-network server. (Ex. 1002, ¶63). This, in turn, allowed the ad-network server to target an ad directly to the specific user, formatted correctly for the specific user's device. (Ex. 1002, ¶63).”

(Petition, pp. 16-17)(Ex. 1002, ¶63). The Petition and Dr. Houh's declaration explained that this functioning of ad networks was standard technology for web-based advertising in the relevant timeframe (2017). (Petition, pp. 15-17, 21, 24)(Ex. 1002, ¶¶45-48, 59-64, 65, 66, 71, 76). Both the Petition and Dr. Houh expressly stated that this explanation was relevant to the later explanations in the Grounds of unpatentability, including the motivation to combine. (Petition, p. 10, footnote 1; p. 28, footnote 2)(Ex. 1002, ¶82).

Furthermore, Demsey itself also expressly relates to the targeting of individual

users (Ex. 1005, ¶0002, cited in Petition, p. 31), and provides the improvement of targeting users even when the same user uses different devices. (Ex. 1005, ¶0021, cited in Petition, p. 31)(*see also* Petition, pp. 24-26).

Demsey's capabilities improve targeting of ads for Haggerty's system because Haggerty—according to the Institution Decision's own findings (pp. 24-25)—is not using ad-networks to place ads on Web pages. (*See also* Petition, p. 24). Therefore, adding the Web-based capability of Demsey to target individual users provides Haggerty with a capability it did not previously have. (Petition, pp. 24, 31).

Petitioner thus respectfully requests reconsideration of the Institution Decision's findings regarding whether Demsey would improve the targeting of Haggerty's ads.

C. Streamlined Acquisition of Contact Information and Proof of Possession

The Institution Decision also found that “Petitioner does not adequately explain how incorporating Demsey's and Khanna's techniques into Haggerty's method would have resulted in ‘a streamlined method for acquiring the contact information and for acquiring consent to receive marketing communications and proof of possession from people interested in the business's offerings’ that would have ‘appealed to businesses that sell goods and services and that seek new potential customers.’” (Institution Decision, pp. 20-21).

Petitioner respectfully submits that the Board may have misapprehended the

motivation or overlooked the Petition's explanation. The proposed motivation is to use Haggerty's method to improve the ability to acquire contact information for businesses doing advertising. (Petition, p. 30)(“Haggerty's method would have appealed to businesses that sell goods and services and that seek new potential customers...it would have been attractive to have a streamlined method for acquiring the contact information”). In other words, the motivation is a reason to add Haggerty's business method to standard Web advertising systems like Demsey's.

Furthermore, the Petition did explain how the advantage would be achieved. The Petition explained that advertisers in the relevant timeframe (such as those using Demsey's ad network) desired to send text-based communications to potential customers. (Petition, p. 10)(Ex. 1002, ¶¶24-26). However, in the relevant timeframe (2017), industry and legal restrictions could require an advertiser to obtain both the consent of the recipient of such messages, and proof of possession of the mobile device to which the messages were being sent. (Petition, p. 10)(Ex. 1002, ¶¶24-26). One way to prove consent and possession of the mobile device was to receive a text message from the user that opted-in to communications. (Petition, p. 10)(Ex. 1002, ¶¶24-26). For example, the Petition and Dr. Houh detailed the best practices provided in the 2012 Mobile Marketing Association document “U.S. Consumer Best Practices for Messaging”, which was submitted as Ex. 1028, cited on pages 10-11 of the Petition and in ¶25 of Dr. Houh's declaration. This document explained that

advertisers could receive a text message from a user device in order to prove both consent for further communications directed at the mobile device, and possession of the device by the consenting user. (Ex. 1002, ¶25)(Ex. 1028, p. 004, 008, 016). Both the Petition and Dr. Houh expressly stated that this explanation was relevant to the later explanations in the Grounds of unpatentability, including the motivation to combine. (Petition, p. 10, footnote 1; p. 28, footnote 2, Petition, p. 30 (*citing* Ex. 1002, ¶¶24-26))(Ex. 1002, ¶82).

As the Petition explained, Haggerty provides a two-step method for responding to an advertisement that *pre-populates a text message* for a user to send back to the call center. (Petition, pp. 21-24)(Ex. 1002, ¶¶72-76). The Petition further explained that “Haggerty further states that its method provides **a convenient way for a user to respond to an advertisement** (Ex. 1007, 1:53-62) **with lowered risk of mistyping information in the SMS** (Ex. 1007, 9:48-55). (Ex. 1002, ¶74).” (Petition, pp. 23-24)(bolding added). This is a *streamlined* method (because the user does not have to type the text message) for encouraging a user to send a text message to opt-in to further marketing messages. (Petition, p. 30)(*citing* Ex. 1002, ¶¶84, 24-26). The user sending a text message to the advertiser was considered one best practice for obtaining consent and proof of possession, as discussed in Dr. Houh’s declaration at ¶¶24-26, which is specifically cited as relevant to this discussion on page 30 of the Petition. By adding Haggerty to Demsey and Khanna, the advantages

of streamlined acquisition of contact information, as well as the provision of consent and proof of possession, could be realized in Demsey's system, where they were not prior to the combination.

Petitioner thus respectfully requests reconsideration of the Institution Decision's findings with respect to this issue.

D. Capabilities Added to Haggerty

The Institution Decision further found that "Petitioner does not adequately explain why one of ordinary skill in the art would have looked to Demsey for a technique to serve an advertisement that Haggerty already provides for" and that "Petitioner also does not adequately explain how adding Khanna's deeplinking technique improves Haggerty's method, which method already provides a link in an advertisement contained in electronic reading material that, when interacted with, formulates a pre-populated SMS message." (Institution Decision, p. 21).

Petitioner respectfully submits that the Institution Decision may have misapprehended the Petition's argument. The Petition argued that Demsey and Khanna would provide the ability for Haggerty to perform web-based advertising using known ad-network and deeplinking capability. (*e.g.*, Petition, pp. 20-21). Haggerty does not disclose this capability, as the Institution Decision expressly found. (Institution Decision, pp. 24-25). Petitioner respectfully submits that it is inconsistent to find that Haggerty *already* provides for Demsey's web-based

“technique to serve an advertisement” and Khanna’s web-based “deeplinking technique”, while simultaneously finding that “Haggerty does not disclose a webpage, a webpage-based advertisement, and/or any method that involves a user device loading a webpage in a browser.” (Institution Decision, p. 24).

Petitioner thus respectfully requests reconsideration of the Institution Decision’s findings with respect to this issue.

II. REASONABLE EXPECTATION OF SUCCESS

Petitioner also respectfully requests rehearing regarding the Institution Decision’s findings concerning the issue of reasonable expectation of success (Institution Decision, pp. 21-29).

A. Reasonable Expectation of Success Implementing Demsey / Khanna with Haggerty

The Institution Decision found that “Petitioner does not explain how one of ordinary skill in the art would know how to incorporate web-based technologies like those taught in Demsey and Khanna into Haggerty and thereby reach the claimed subject matter”. (Institution Decision, p. 24). In particular, the Institution Decision found that “Petitioner does not explain how one of ordinary skill in the art would incorporate Demsey’s technology into Haggerty’s method so that Haggerty would have the ability to serve an advertisement with an ad tag to a webpage that, when delivered to a mobile device and executed, an advertisement is sent back to the user’s device for display”, and that “Petitioner also does not explain how one of ordinary

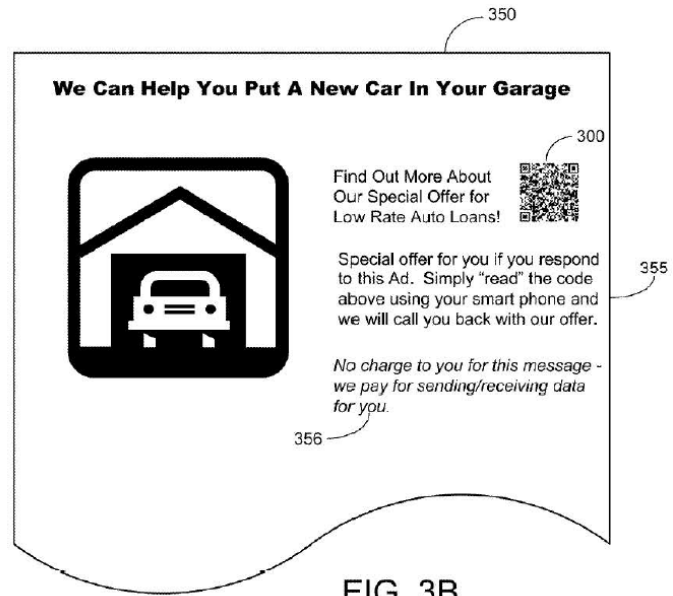
skill would modify Haggerty's method to incorporate Khanna's URI-deeplinking technology into Haggerty so that links in advertisements in the downloaded electronic reading material, when interacted with, transition the mobile device to a different messaging application." (Institution Decision, pp. 24-26).

Petitioner respectfully requests that the Board reconsider its findings with respect to the reasonable expectation of success.

At the outset, Petitioner notes that the relevant timeframe is, at the earliest, 2017. In 2017, web-based advertising was ubiquitous, and the underlying art had developed into a highly sophisticated one. Both the Petition and Dr. Houh provided a relevant background on the development of Web-based advertising, referring, for example, to an entire books of record concerning Ad-serving Technology (Ex. 1012) and Programming the Mobile Web (Ex. 1016). (Petition, pp. 13-17)(Ex. 1002, ¶¶24-64). The prior art reflects the sophistication of web-based advertising. (*e.g.*, Petition, pp. 24-28). Thus, as a background matter, a PHOSITA had already developed a high level of skill in presenting web-based advertisements. (Ex. 1002, ¶94). *See, e.g., Western Union Co. v. Moneygram Payment*, 626 F.3d 1361, 1370 (Fed. Cir. 2010) ("[W]e have subsequently held that applying computer and internet technology to replace older electronics has been commonplace in recent years.");

Beyond this, however, Petitioner respectfully requests that the Board consider whether the Institution Decision overlooked evidence supplied with the Petition. On the general issue of whether Haggerty’s advertisements could have been presented on the Web with a reasonable expectation of success, Haggerty’s advertisements (e.g., Fig. 3B shown at right) consist

of the normal stuff of advertising—text and images—together with a QR code or clickable link that serves as a launching point for Haggerty’s business method. Petitioner does not believe that the Institution Decision found that text and images



were difficult to display in web-based advertisement form in 2017, but even so, Dr. Houh explained how they could be. (Ex. 1002, ¶¶45-62)(Dr. Houh explaining how to construct and serve Web pages having text, images, mobile deeplinks, and ad tags). Dr. Houh’s testimony was directed to the relevant timeframe. (Ex. 1002, ¶67).

Regarding whether a PHOSITA would have reasonably expected success in implementing Haggerty’s “electronic link” in a Web-based advertisement, allowing the user to open a pre-populated text message, the Petition explained that the use in

Web-based content of URIs to build links that can pre-populate a text message was already well-known by 2017. (Petition, pp. 14-15). For example, the Petition cited the 2013 textbook “Programming the Mobile Web” for the fact that “mobile browsers generally offer the ability to invoke the new SMS window from a link”. (Petition, p. 14)(*citing* Ex. 1016, p. 557 and Ex. 1002, ¶¶40-43). The Petition also explained that such URIs had already been *standardized* in RFC 5724, how those URIs could be used in a Web-based URL link, and that the capability was built into typical mobile operating systems at the relevant time. (Petition, pp. 14-15)(*citing* Ex. 1019, pp. 007-008, §2.2, p. 010, §2.5 and Ex. 1002, ¶41). Furthermore, Dr. Houh explained exactly how to use an HTML anchor (<a>) tag to implement a Web URI link that, when clicked, will open a pre-populated text message. (Ex. 1002, ¶¶54-55, 49-53). The Petition and Dr. Houh cited to five references discussing such URIs to create links that pre-populate text messages, demonstrating the requisite skill in the art. (Petition, p. 15)(*citing* Ex. 1016, pp. 557-558, Ex. 1013, ¶0040, Ex. 1011, ¶¶0027-0029, Ex. 1020, pp. 009:33-010:33, Ex. 1010, pp. 015, 021, Ex. 1002, ¶42). The Petition stated that this section was relevant to all grounds (Petition, p. 10, n.1), and referenced the “standard URI protocols available to deeplink to SMS applications, as discussed in the Introduction” in the motivation section on page 30, and referenced the URIs again (citing Dr. Houh’s related testimony) in the mapping of the relevant claim element (1[d]). (Petition, p. 44, *citing* Ex. 1002, ¶114, in turn

citing ¶¶39-44).

Regarding whether a PHOSITA would have reasonably expected success in implementing Haggerty's advertisements using integration tags (the ad tags of Demsey), the Petition explained that ad tags were standard technology implemented with ad networks in the relevant timeframe. (Petition, p. 16)(Ex. 1002, ¶¶48-64). Dr. Houh, in turn, explained how ad tags were implemented in Web pages using code, such as JavaScript. (Ex. 1002, ¶¶56-62). JavaScript is used by Demsey for ad-tag programming. (Ex. 1005, ¶¶0045, 0047, discussed in Petition, p. 25)(Ex. 1002, ¶78). Dr. Houh relied in-part on the 2014 textbook "Ad Serving Technology" (Ex. 1012) and the 2011 textbook "JavaScript, the Definitive Guide, Sixth Edition" (Ex. 1021). (Ex. 1002, ¶¶57, 58, 60, 61). Dr. Houh showed how JavaScript scripts could be embedded into Web pages with a <script> tag (Ex. 1002, ¶56), or downloaded from a server (Ex. 1002, ¶¶56, 51), or facilitated with an <iframe> tag. (Ex. 1002, ¶¶59-60). Dr. Houh described how JavaScript ad tags would execute on a Web page (Ex. 1002, ¶58), described how JavaScript tags could retrieve ads from servers (Ex. 1002, ¶¶59-60, 57), and described the ubiquitous nature of JavaScript and its advantages for Web-based advertising (Ex. 1002, ¶57, quoting Ex. 1012, pp. 053-054). Dr. Houh also provided an example of ad tag programming from the 2006 Anderson reference submitted as Ex. 1029. (Ex. 1002, ¶¶59-60).

Petitioner respectfully requests that the Board consider whether it overlooked

the evidence and argument described above in finding that the Petition and Dr. Houh did not adequately explain why a PHOSITA would have had a reasonable expectation of success in using Demsey and Khanna to implement Haggerty's business method.

B. Reasonable Expectation of Success Implementing Servers

The Institution Decision also found that a PHOSITA would not have had a reasonable expectation of success in combining functionalities into a server in the relevant timeframe, reasoning that “to have a **reasonable expectation of success**, one must be **motivated** to do more than merely to vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result.” (Institution Decision, p. 28)(bolding added)(*quoting Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1365 (Fed. Cir. 2007)).

Petitioner first notes this this finding, captioned under “reasonable expectation of success” (Institution Decision, p. 21), appears to rely on a lack of *motivation*. To the extent that is correct, Petitioner urges the Board to reconsider this finding based on the arguments concerning motivation provided above in §I. *See Endo Pharm. Inc. v. Actavis LLC*, 922 F.3d 1365, 1380 (Fed. Cir. 2019)(“Whether a reference teaches how to achieve the claimed invention speaks to enablement or reasonable expectation of success—entirely separate inquiries from motivation to combine.”).

To the extent the Institution Decision's reasoning is *not* premised on a

motivation to combine, and is instead finding that the Petition did not demonstrate a reasonable expectation of success in providing the necessary software on Haggerty's server, Petitioner respectfully requests that the Board consider whether it misapprehended the application of the Federal Circuit's case law to the present facts. The Board's reasoning is premised on *Pfizer*, which related to an obvious-to-try argument in the pharmaceutical arts. *See Pfizer*, 480 F.3d at 1365. In the pharmaceutical arts, similar molecules having slight differences in functional groups can have significantly different—and something difficult to predict—pharmacological effects, leading to a skepticism that the work necessary to identify working compounds is “obvious”. In the present case, however, the underlying technology is software, which behaves by known rules, and is inherently predictable. (Ex. 1002, ¶¶94, 88). *C.f. RAI Strategic Holdings, Inc. v. Philip Morris Prods. S.A.*, Appeal No. 2022-1862, at *10 (Fed. Cir. Feb. 9, 2024)(unpublished)(evaluating disclosure in the specification, and finding “that, unlike *Indivior*, the invention at issue here falls within the predictable arts”).

Where the underlying technology is predictable (Ex. 1002, ¶¶94, 88), the testimony of Dr. Houh that there was a reasonable expectation of success, and in particular that “the functions of the central server of all three references could easily be combined into a server function under owned and maintained by a single entity, *e.g.* Haggerty's call-center server function” (Ex. 1002, ¶94) is highly credible. As

discussed above, Web-based advertising technologies were already well-established by 2017. (Ex. 1002, ¶94). Unlike the case in *Pfizer*, where the patent challenger argued obviousness based on a plan to “try each of numerous possible choices to see if a successful result was obtained” (*Pfizer*, 480 F.3d at 1365), here no such plan of experimentation is contemplated or necessary, because a PHOSITA would have reasonably expected success in implementing a large variety of different server arrangements. Specifically, none of the prior art references teaches any complex or surprising result that could even hypothetically arise from the arrangement of software on servers, instead teaching that the servers can be implemented in a variety of ways, and implying—in a manner especially reasonable for the year 2017—that the variations between different arrangements are immaterial to the respective inventions. (Petition, pp. 31-32)(Ex. 1002, ¶¶87-88). The ’887 patent similarly places no importance on the particular arrangement of software on servers (Petition, pp. 31, 36)(citing Ex. 1001, 5:4-6:4), instead relying on ordinary skill in the art to implement this aspect of the claims correctly. There is no basis in the record to conclude that a PHOSITA would not have expected success in implementing Demsey and Khanna’s software functionality on a server at Haggerty’s call center.

Petitioner thus respectfully requests that the Board reconsider its Institution Decision.

Date: <u>March 27, 2024</u>	<u>/Matthew A. Smith/ (RN 49,003)</u> Matthew A. Smith SMITH BALUCH LLP 700 Pennsylvania Ave. SE, 2nd Floor Washington, DC 20003 (202) 669-6207 smith@smithbaluch.com <i>Counsel for Petitioner</i>
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Request for Rehearing, was served by electronic mail on the Patent Owner's counsel of record at the United States Patent & Trademark Office having the following email address:

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Date: March 27, 2024

/Matthew A. Smith/ (RN 49,003)