

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

STODGE, INC. D/B/A POSTSCRIPT

Petitioner,

v.

ATTENTIVE MOBILE INC.,

Patent Owner.

Case IPR2024-00069
Patent No. 11,416,897

PATENT OWNER'S PRELIMINARY RESPONSE

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2002	<i>Curriculum Vitae</i> of Sam Malek, Ph.D.
2003	Lex Machina, Motion Metrics Report for 543 orders issued by Magistrate Judge Christopher J Burke (CJB)
2004	<i>Attentive Mobile Inc., v. 317 Labs, Inc. d/b/a Emotive</i> , Case No. 1:22-cv-01163-CJB, Scheduling Order, Dkt. 29 (D. Del. Feb. 24, 2023)
2005	<i>Attentive Mobile Inc., v. Stodge Inc., d/b/a/ Postscript</i> , Case No. 1:23-cv-00087-CJB, Defendant Stodge Inc., d/b/a Postscript's Amended Answer and Counterclaims to Plaintiff's Complaint for Patent Infringement, Dkt. 50 (D. Del. Aug. 25, 2023)
2006	<i>Attentive Mobile Inc., v. Stodge Inc., d/b/a/ Postscript</i> , Case No. 1:23-cv-00087-CJB, Stipulation and Order Amending Schedule For Patent Infringement Counterclaim, Dkt. 74 (D. Del. Oct. 19, 2023)
2007	Lex Machina, U.S. District Court for the District of Delaware, cases between 2013-11-01 and 2023-11-07
2008	<i>Attentive Mobile Inc., v. Stodge Inc., d/b/a/ Postscript</i> , Case No. 1:23-cv-00087-CJB, Scheduling Order, Dkt. 20 (D. Del. Mar. 28, 2023)
2009	<i>Attentive Mobile Inc., v. 317 Labs, Inc. d/b/a Emotive et al.</i> , Case No. 1:22-cv-01163-CJB, Stipulation and [Proposed] Order to Modify Rule 16 Scheduling Order, Dkt. 52 (D. Del. Aug. 31, 2023)
2010	<i>Attentive Mobile Inc., v. Stodge Inc., d/b/a/ Postscript</i> , Case No. 1:23-cv-00087-CJB, Stodge Inc. d/b/a/ Postscript's Initial Invalidity Contentions (D. Del. July 27, 2023)

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2012	Press Release PR Newswire, <i>Attentive Co-Founder & CEO, Brian Long, Recognized as DMN 2019 40UNDER40 Award, Winner</i> (Aug. 6, 2019), https://markets.businessinsider.com/news/stocks/attentive-co-founder-ceo-brian-long-recognized-as-a-dmn-2019-40under40-award-winner-1028421503
2013	Sacra.com, <i>Attentive is a marketing tool for mobile messaging</i> , https://sacra.com/c/attentive/
2014	Eric Lambert, <i>Demystifying Text Marketing, Text-Based Support and "Double Opt-In"</i> , https://www.linkedin.com/pulse/demystifying-text-marketing-text-based-support-double-eric-lambert
2015	Michael Scheiner, <i>Attentive Gets the Message Out</i> (Feb. 27, 2020); https://crm.org/news/attentive-gets-the-message-out
2016	Patrice Hendriksen, <i>Attentive's Compliance Features and Two-Tap Validated by Florida Federal Court</i> (Sept. 16, 2022), https://www.attentive.com/blog/attentives-compliance-florida-federal-court
2017	Abby Miller, <i>"DMN 2018 Award Winners"</i> (Jan. 25, 2019); https://www.dmnnews.com/dmn-2018-award-winners/
2018	2021 Glossy Awards, <i>Best Use of SMS, Attentive and Supergoop!</i>
2019	The Tech Tribune, <i>2023 Best Tech Startups in NYC</i> , https://thetechtribune.com/10-best-tech-startups-in-nyc/

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2021	Business Wire, <i>Attentive Ranks #6 World's Best Software for 2023</i> ", (Sept. 27, 2023); https://www.businesswire.com/news/home/20230927658818/en/Attentive-Ranks-6-World%E2%80%99s-Best-Software-for-2023
2022	PRNewswire, <i>Attentive Ranked #8 on LinkedIn's 2020 Top Startups List in the United States</i> , (Sept. 22, 2020)
2023	The Cloud 100 (Aug. 8, 2023); https://www.forbes.com/lists/cloud100/?sh=6a9a510e7d9c
2024	G2 Fastest Growing Products for 2022, https://www.g2.com/best-software-companies/2022/fastest-growing?rank=23
2025	<i>Attentive's 2022 Year to Date</i> , https://www.attentive.com/year-to-date-2022
2026	BusinessWire, <i>Attentive Named to the 2023 Deloitte Technology Fast 500™</i> (Nov. 8, 2023); https://www.businesswire.com/news/home/20231108028698/en/Attentive-Named-to-the-2023-Deloitte-Technology-Fast-500%E2%84%A2?blaid=5291542
2027	Forbes, <i>Buying Soap Was Just the Start, Now The Company Wants to Text You, Too</i> (Apr. 29, 2022); https://www.forbes.com/sites/laurendebter/2022/04/29/buying-soap-was-just-the-start-now-the-company-wants-to-text-you-too/?sh=2f7416521073
2028	Attentive, <i>Convert visitors into subscribers</i> ; https://www.attentive.com/growth
2029	Patent information for Attentive Mobile Inc., https://www.attentive.com/legal/patents

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2030	Attentive Debuts Signature "Two-Tap" Sign-Up Technology Within Instagram Stories; https://www.attentive.com/blog/attentive-instagram-stories
2031	Why SMS Marketing is The Way of The Future (plus, a spotlight on our friends at attentive®); https://www.sama-labs.com/why-sms-marketing-is-the-way-of-the-future-plus-a-spotlight-on-our-friends-at-attentive/
2032	Barry Levine, <i>Led by TapCommerce founders, startup Attentive launches SMS/MMS marketing platform</i> ; https://martech.org/led-tapcommerce-founders-startup-attentive-launches-smsmms-marketing-platform/
2033	Weetech Solution, <i>TapCommerce's founders are back with Attentive, a messaging startup that's raised \$13M</i> (Apr. 27, 2022); https://www.weetechsolution.com/blog/tapcommerce-founders-are-back-with-attentive
2034	U.S. Patent 10,366,400, <i>Reducing Un-Subscription Rates for Electronic Marketing Communications</i> , to Stephane Moreau et al., issued July 30, 2019
2035	U.S. Patent Appl., 2016/0140627 A1, <i>Generating High Quality Leads For Marketing Campaigns</i> , to Stephanie Moreau, et al., issued May 19, 2016
2036	Attentive, <i>Rethinking messaging-based customer communications</i>
2037	Attentive, <i>Text Message Marketing</i> , https://info.attentive.com/10xrevenue-email-marketing/
2038	<i>Attentive Mobile Inc., v. Stodge Inc., d/b/a Postscript</i> , Case No. 1:3-cv-00087-CJB, Joint Letter Brief, Dkt. 127 (D. Del. Jan. 29, 2024)

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2040	File History for U.S. Patent 11,416,887
2041	User-Agent, https://developer.mozilla.org/en-US/docs/Web/HTTP/Headers/User-Agent
2042	X-Forwarded-For, https://developer.mozilla.org/en-US/docs/Web/HTTP/Headers/X-Forwarded-For
2043	3GPP TS 23.040 V14.0.0 (2017-03), <i>3rd Generation Partnership Project; Technical Specification Group Core Network and Terminals; Technical realization of the Short Message Service (SMS) (Release 14)</i> ; https://www.3gpp.org/ftp/Specs/archive/23_series/23.040/23040-e00.zip

Attentive Mobile Inc. (“Patent Owner” or “Attentive”) submits this Preliminary Response to the Petition of Stodge, Inc. d/b/a Postscript (“Petitioner” or “Stodge”) seeking *inter partes* review of U.S. Patent No. 11,416,897 (“the ’897 patent”).

I. INTRODUCTION

The Board should deny institution for two reasons: (1) discretionary denial under *Fintiv* is appropriate, because the ’897 patent is challenged in two parallel litigations, both of which are scheduled for trial before a final written decision; and (2) the petition is not likely to succeed on the merits, because it improperly uses hindsight to construct three- and four-reference combinations, which still do not render obvious the challenged claims.

The sole ground asserted against the independent claims relies on a hodge-podge of prior art disclosures, cherry-picked from three distinct references, and Petitioner fails to adequately articulate the resulting combination of teachings on which it relies. Even then, the cited prior art disclosures and purported combination still fail to disclose or render obvious key claim limitations. Not one of the cited references discloses a text message subscription service. And were a POSITA to implement Molinet’s deeplinking technology within Agrawal—which lacks an “application ecosystem”—Molinet explicitly instructs transitioning to another

webpage, as opposed to an application, let alone a messaging application, like that disclosed in Oliver. None of the cited art discloses or suggests the challenged claims.

Petitioner's lack of motivation to combine and reliance on hindsight are confirmed by extensive evidence supporting secondary considerations of non-obviousness. Patent Owner's "two-tap" sign-up technology for text messaging subscription services satisfied a long-felt need upon its release, received extensive industry praise, and enjoys tremendous commercial success as a direct result of implementing the patented invention. This evidence demonstrates that a person of ordinary skill in the art would not have redesigned the prior art references contrary to their independent teachings to arrive at the claimed invention.

II. THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 314(a)

Because Congress's goal in enacting post-grant proceedings like IPRs was "to ... limit unnecessary and counterproductive litigation costs," Director Vidal has instructed the Board not to institute IPRs that would "increase, rather than limit, litigation costs." Director's Memo, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* ("Guidance") at 1 (June 21, 2022).

The '897 patent is one of three patents asserted against Petitioner and one of two patents asserted against third party Emotive, in two different competitor

litigations in the District of Delaware. Institution of a parallel IPR proceeding would needlessly increase the cost of resolving the '897 patent's validity, and the Board should exercise its discretionary authority to deny institution.

A. Factor 1: The District Court Has Not Granted A Stay

The first *Fintiv* factor asks “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 6 (PTAB Mar. 20, 2020) (*precedential*). Here, the undisputed answer to both questions is *no*: Petitioner acknowledges no stay has been entered or requested in the parallel litigation (Petition 76), and Petitioner has identified no evidence that one might occur. To the contrary, evidence indicates a stay is unlikely, particularly where there are two multi-patent cases against different competitors. (EX-2003 (indicating Judge Burke has historically granted only 57% of motions to stay pending a PTAB proceeding); *SenoRX Inc. v. Hologic Inc.*, No. 12-0173-CJB, 2013 WL 144255, *9 (D. Del. Jan. 11, 2013) (denying a stay because the pending IPR and reexamination did not cover all asserted claims and the parties were competitors).)

Even where no stay has been requested, the Board has found Factor 1 to favor discretionary denial where “Petitioner present[ed] no evidence that it has requested a stay [] or that a stay is likely.” *Luxshare Precision Industry v. Amphenol Corp.*,

IPR2022-00132, Paper 10 at 9 (PTAB May 3, 2022). Factor 1 weighs in favor of discretionary denial. *Samsung Elecs. Co., Ltd. v. Clear Imaging Research, LLC*, IPR2020-01399, Paper 13 at 11-12 (PTAB Feb. 3, 2021).

B. Factor 2: Two District Court Trials Are Expected Before The Statutory Deadline

Factor 2—the implications of the district court and IPR schedules—also favors denial. *Fintiv*, IPR2020-00019, Paper 15 at 11-12, 17 (PTAB May 13, 2020) (*informative*); Guidance at 1.

Here, an IPR would overlap entirely with the district court litigations. Judge Burke has scheduled trial against Emotive for February 3, 2025; final pretrial briefs are due January 3, 2025. (EX-2004 16-18.) As Petitioner admits (at 76), Judge Burke has scheduled trial against Petitioner for April 7, 2025, with final pretrial briefs due March 14, 2025. (EX-1027, 16, 18.) Furthermore, Petitioner asserted a counterclaim of patent infringement in district court, which will be decided at the same April 7, 2025 trial. (EX-2005 12-16; EX-2006 4.)

Should the Board institute, its final written decision deadline would be May 22, 2025—three and a half months after the Emotive trial and more than a month-and-a-half *after* the trial against Petitioner.

While Petitioner cites a 36-month median time-to-trial in Delaware, the District's median time-to-trial in patent cases is 27 months (or 842 days). (EX-2007

2.) Thus, trial against Emotive would be expected in December 2024, before the scheduled trial date of February 3, 2025. (EX-2004 18.) And trial against Petitioner would be expected in May 2025, roughly consistent with the scheduled trial date of April 7, 2025. (EX-2008 18.)

That is, applying either the scheduled trial dates or the median time-to-trial, IPR would not be complete until the parties have duplicated nearly all validity efforts and expended significant resources in litigating the validity of the '897 patent on three fronts—one at the PTAB and two in Delaware. If instituted, the IPR proceedings would not produce a result until *after* both Delaware trials have taken place, and the parties would spend a year expending precisely the “duplicative,” “unnecessary[,] and counterproductive litigation costs” that the AIA was designed to avoid. *Fintiv*, IPR2020-00019, Paper 11 at 5.

Accordingly, factor two heavily favors discretionary denial.

C. Factor 3: The Parties Will Have Invested Significant Resources In The Parallel Proceedings

Factor 3—the resources invested in parallel proceedings—favors denial “if, at the time of the institution decision [May. 22, 2024], the district court has issued substantive orders related to the patent,” such as “claim construction orders.” *Fintiv* at 9-10, n.16 (collecting cases).

Both the parties and the Court will have invested significant resources in the claim construction process before the Board's institution decision. The two Delaware litigations have consolidated only the claim construction hearing, which took place on January 9, 2024 and after which, the parties were required to submit supplemental briefing. (EX-2009 2-3; EX-2038 1.) The court intends to issue its claim construction order within 60 days of the hearing—no later than March 9, 2024, more than two months before the Board's institution decision. (EX-2008 13.) And at the hearing, the Court expressed its intention to release claim construction decisions on a rolling basis.

The parties have additionally invested significant resources on the merits in the parallel litigation against Petitioner over the last thirteen months and against Emotive for the last seventeen months. Patent Owner has exchanged not only initial infringement and invalidity contentions with both Emotive (in May 2023 and June 2023, respectively) and Petitioner (in June 2023 and July 2023, respectively), but also multiple sets of supplemental contentions over the last nine months. (EX-2004 4; EX-2008 4.) Fact discovery is reaching its end, with both cases past the deadline for substantial completion of document productions and with the parties having served third-party subpoenas and noticed fact witnesses for deposition. Initial expert reports will be due in the Emotive case before the Board's institution decision and

in Petitioner's case less than a month after the Board's institution decision. (EX-2004 5; EX-2008 5.)

In light of the overlapping schedules here and the redundant resources that *will be* wasted should IPR be instituted, this factor favors discretionary denial. *Fintiv* at 6; *NXP USA, Inc. v. Impinj, Inc.*, PGR2022-00005, Paper 20 at 7 (PTAB Aug. 25, 2022) (Board should consider “the duplicative efforts that will occur during the [] duration of [IPR]”).

D. Factor 4: The Issues Overlap

Factor 4—the degree of overlap between the issues in the petition and those before the district court—also strongly supports denial. “[C]oncerns of inefficiency and the possibility of conflicting decisions [are] particularly strong” where “the Board [is] presented with substantially identical prior art arguments.” *Fintiv*, IPR2020-00019, Paper 11 at 12.

Here, both Petitioner and Emotive assert identical prior art in the district court—Oliver, Agrawal, and Molinet—against the '897 patent. (EX-2010 11, 18-19; EX-2011 18-19 (incorporating Petitioner's contentions by reference).) On November 25, 2024, Petitioner filed a stipulation in IPR2023-01338 on the related '887 patent, identifying three IPR proceedings (including this proceeding) and stipulating: “if the petitions are instituted, it will not pursue...invalidity based on the

same grounds set forth in the aforementioned petitions, nor any grounds that could have reasonably been raised in the aforementioned petitions.” (IPR2023-01338, EX-1032.)

The effect of such letter is unclear, given that it was neither contained in the petition in this proceeding, nor filed with the district court. Furthermore, the stipulation, itself, is unclear as to whether all three petitions must be instituted in order for the stipulation to take effect or whether an institution of any one petition will result in Petitioner abandoning its overlapping invalidity claims in the parallel district court litigation.

Regardless, Petitioner's stipulation under the circumstances here carries no weight, because it does not bar Emotive from litigating the very same invalidity challenges before the district court and does not “mitigate[] any concerns of duplicative efforts between the district court and the Board” or “of potentially conflicting decisions.” *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 19 (PTAB Dec. 1, 2020).

The validity of the '897 patent in view of Oliver, Agrawal, and Molinet will be litigated in parallel proceedings. Because institution would multiply burden and create the possibility of inconsistent decisions, Factor 4 weighs in favor of discretionary denial.

E. Factor 5: Both Parties Are Parties In The Parallel Litigation

Factor 5 weighs in favor of denial because Petitioner is a defendant in the parallel litigation and, as such, will have a full, fair opportunity to litigate its invalidity contentions. *See Vizio, Inc. v. Maxell, Ltd.*, IPR2022-01459, Paper 7 at 21-22 (PTAB Apr. 11, 2023); *Nokia of Am. Corp. v. Godo Kaisha IP Bridge*, IPR2022-00755, Paper 9 at 13 (PTAB Nov. 2, 2022).

F. Factor 6: The Petition Does Not Present Compelling Evidence Of Unpatentability

Factor 6—the merits of the petition—also weighs against institution because, as detailed below, the petition fails to show even a “reasonable likelihood” that Petitioner would prevail on any challenged claim. *See* Section VI, *infra*. The petition certainly does not pass the higher threshold of a “compelling” unpatentability challenge that could preclude discretionary denial, which requires a determination that Petitioner is “highly likely” to succeed on the merits. Guidance at 4; *Commscope Techs. v. Dali Wireless, Inc.*, IPR 2022-01242, Paper 23, 3-4 (PTAB Feb. 27, 2023).

* * *

As all six factors weigh for discretionary denial, Patent Owner respectfully requests that the Board exercise its discretion to deny institution.

III. INADEQUACY OF THE PRIOR ART & THE NEED FOR IMPROVED ENGAGEMENT OF PROMOTIONAL CUSTOMERS ON MOBILE DEVICES

With the advent of Internet-connected mobile devices, vendors acquired new ways of engaging users. (EX-2001 ¶22; EX-1001 1:30-32.) Before the '897 patent, users could open a vendor's application or website on a mobile device to select a product or subscribe to promotions. (EX-1001 1:30-32.) For example, the user could provide payment information via the vendor's application or website to complete a transaction. (*Id.* 1:32-34.)

However, these methods often involved pausing the user's current activity to redirect the user to the vendor's application or website. (*Id.* 1:34-38.) Excessive user input, e.g., clicking or tapping the screen, was necessary to complete not only this redirection but also any transaction or subscription. (*Id.*; EX-2001 ¶¶22-23.) These methods caused delay and placed additional burden on the user, often causing the user to leave the transaction/subscription before it was complete and depriving the vendor of a customer. (EX-1001 1:39-41.)

Accordingly, there was a need for an improved method for transitioning a user from one interface to another interface on a mobile device to complete, for example, an enrollment. (EX-1001, 1:42-46, cls. 15, 24.)

IV. THE '897 PATENT'S NEW TECHNOLOGY PLATFORM FOR MESSAGING-BASED SUBSCRIPTIONS AND PAYMENTS FROM A MOBILE DEVICE

A. Overview

The '897 patent discloses an improved technology platform and method for completing messaging-based subscriptions, communications, and/or purchases that a user initiates from a website viewed on a mobile device. (EX-1001, 2:51-61, 1:24-29; EX-2001 §IV(A).) In particular, the challenged claims recite an improved platform and method for enrolling users in text messaging-based subscription services without the need to receive an additional opt-in communication. (EX-1001, cls. 15, 24.)

The challenged claims rely, in particular, on a means for causing a mobile device to transition from a first application to a messaging application—for example, a “custom-generated mobile deeplink.” (EX-1001 3:4-18.) By using such a means within a text message subscription enrollment process in the claimed way, the '897 patent was able to increase and improve customer engagement. (EX-1001 20:32-62.)

For example, the '897 patent's platform may be implemented between three parties connected via a network: a click-to-text server (EX-1001, Fig. 1, 4:46-55, 5:20-32); a client server hosting a webpage (*id.*, cl. 1, 13:20-24); and a user's mobile

device loading the client's webpage (*id.*). The server sends means for displaying an invitation to subscribe to a text messaging subscription service to the mobile device. (EX-1001 5:29-32, 11:54-12:38, cl. 15.) When the user interacts with an invitation to subscribe, a server-provided "means for causing" causes the mobile device to transition from a first application to a messaging application. (EX-1001 8:65-9:10, cl. 15.) The claimed means also causes the device to auto-populate a custom message based on the user data. (EX-1001 cl. 15, 8:65-9:10, 15:38-42.)

When the user taps the send button of the messaging application, the mobile device sends the custom message to the server. (EX-1001 3:31-37, cl. 15.) And upon receiving the custom message, the server—without receiving an opt-in communication from the mobile device—delivers an installment of the text messaging subscription service. (EX-1001 3:38-48, cl. 15.)

In this way, the patented technology platform may be used to implement a "two-tap" enrollment in a text message subscription service. (EX-1001 2:66-3:3 cl. 15, cl. 24; EX-2001 ¶¶28-29.) In doing so, the platform avoids the need for the user to interact with a vendor-specific interface through which a subscription or sign-up is traditionally made. (EX-1001 20:48-53.) But more importantly, implementation of the challenged claims provides dynamic application deeplinking to a messaging application to facilitate a completed enrollment without the need for additional

information, time, or engagement from the mobile device. (EX-1001, 20:53-57, cl. 15; EX-2001 ¶28-29.) By doing so, the '897 patent improved a user's experience while interacting with a client's webpage on a mobile device and increased user engagement with the client's subscription service. (EX-1001 20:57-62; EX-2001 ¶29.)

B. Prosecution History

During prosecution, the examiner issued only one rejection under Section 103, relying on U.S. Application Publication No. 2017/0228797 ("Nath") in view of U.S. Application Publication No. 2021/0233097 ("Doumar"). (EX-1004 193-197.) In its response to this office action, the applicant notes an examiner interview, in which the examiner suggested amending the claims to include additional features related to the applicant's "'two tap' subscription as described in paragraphs" of the specification. (EX-1004 140.)

Contrary to Petitioner's representation of the record, the applicant amended *all* existing independent claims accordingly, reciting, for example, contents of the auto-populated text message, receipt of the custom text message from the mobile device, and delivery of a product, service, or installment of a subscription service to the mobile device without receiving any additional information. (EX-1004 130-131, 133, 135.) In one claim set—unchallenged here—the applicant further amended the

independent claim to include a second mobile device and third and fourth user identifiers. (EX-1004 131; Petition 19.)

For example, per the examiner's suggestion, the applicant amended challenged claim 15 to recite limitations specific to "*a text messaging subscription service*":

- "*means for displaying an invitation to subscribe to a text messaging subscription service;*"
- action "*in response to the mobile device detecting a first interaction with the invitation;*"
- receiving the custom text message "*in response to the mobile device detecting a second interaction with the messaging application;*" and
- "*deliver[ing] an installment of the text messaging subscription service without receiving an opt-in communication after receiving the custom text message.*"

(EX-1004 135 (amended claim 29).) The applicant explained that the prior art failed to recite at least limitations related to delivering a product, service, or installment of a subscription service based on receipt of the text message and without receiving any additional information from the mobile. (EX-1004 143.)

Petitioner mischaracterizes the examiner's allowance as conditioned on independent claim 1's inclusion of a second mobile device and third/fourth user

identifiers. (Petition 19.) In allowing the '897 patent, the examiner noted that applicant's arguments as to all pending claims "were fully considered and were persuasive." (EX-1004 47.) Specifically, the examiner found that "the claimed subject matter of claims 13, 22, 29 and 38 [i.e., all independent claims] appears to be potentially allowable in view of prior art." (*Id.*) While noting that Nath disclosed deep-linked ads that direct the user to another site or application's checkout page, the examiner explained that it did not disclose many of the limitations listed in, for example, the first independent claim. (EX-1004 48-49.) But in quoting the majority of the first independent claim, the examiner included much more than just the second mobile device and third/fourth user identifiers. (*Id.* (reciting limitations related to: interaction with the promotional message; a URI that transitions to a messaging application and auto-populates a text message with the recited content; authenticating a user; and delivery of a product or service based on this authentication and without receiving additional information between receipt of the text message and subscribing the user).) The examiner repeated this same exemplary analysis for Doumar. (EX-1004 50-51.) The fact that the examiner quoted claim 1 for exemplary limitations missing in the prior art does not limit the examiner's basis for allowing all other independent claims, particularly when many of those

limitations explicitly found missing in the prior art are recited in all independent claims. (EX-1004 135.)

The examiner also explicitly considered the same Oliver reference relied upon in the petition. (EX-1004 232.) However, the examiner did not find Oliver relevant enough to cite as part of any rejection and, rather, cited Oliver as mere background information on the state of the prior art. (*Id.*) While Petitioner asserts that the examiner misunderstood Oliver's disclosure (Petition 75), there is no evidence of any misunderstanding. (EX-1004 232-233.) The examiner cited Oliver merely "to further show the state of the art with respect to generating consumer interface and triggering of an advertisement delivery based on received user input or captured by user device sensors." (EX-1004 232.) The examiner accordingly quoted Oliver's background discussion of the state of the prior art, which indicates that existing techniques for SMS message-based responses to promotions were inadequate. (*Id.* 232-233.) There is no indication that this discussion of the state of the prior art was an error.

C. Claim Construction

1. Petitioner's proposed constructions.

Petitioner takes conflicting claim construction positions between the parallel proceedings, asserting here that only two claim terms require construction:

Claim Term	Petitioner's Construction Proposed in Petition:
“means for displaying...” (cl. 15)	Structure: “an integration tag configured to cause performance of the claimed functions” Function: “displaying an invitation to subscribe to a text messaging subscription service via a first application”
“means for causing...” (cl. 15)	Structure: “a URI deeplinking to a messaging application and configured to cause performance of the claimed functions” Functions: “(1) ‘transition...to a second application’ and (2) to ‘automatically populate a custom text message...’”

(Petition 19-20.)

In the district court, however, Petitioner identifies six additional terms for construction. (EX-2039.) In particular, in the district court, Petitioner proposes a narrow construction of “uniform resource identifier” or “URI,” a term which is referenced in the petition’s construction of “means for causing.” (*Compare* Petition 19-20 *with* EX-2039 5-6, 8-17 (proposing that “URI” be construed as “a compact sequence of characters that identifies a resource and that follows the syntax defined by Section 3 of the Internet Engineering Task Force’s RFC 3986 standard”).) By seeking to capitalize on a broader plain-and-ordinary understanding of URI in this proceeding, while narrowing the very same term in district court, Petitioner creates

a likelihood of conflicting decisions and claim interpretation should all three proceedings continue in parallel.

Regarding the two proposed constructions in this proceeding, the parties do not dispute that these terms are means-plus-function terms and do not dispute the functions recited in the claims.¹ (EX-2039 26-34, 43-47.) The parties do dispute the scope of the corresponding structure:

Claim Term	Patent Owner’s Proposed Structure:	Petitioner’s Proposed Structure:
“means for displaying...”	“a tag configured to cause the claimed functions”	“an integration tag configured to cause performance of the claimed functions”

¹ Petitioner’s construction appears to paraphrase the recited functions in the claims. But Patent Owner understands Petitioner to be making the same argument here that it did at the district court—i.e., that the corresponding function for “means for causing” is “causing (1) the mobile device to transition from the first application to a second application different from the first application in response to the mobile device detecting a first interaction with the invitation, the second application being a messaging application, and (2) the second application to automatically populate a custom text message based on the user data.” (EX-2039 26.)

“means for causing...”	“a link configured to cause the claimed functions”	“a URI deeplinking to a messaging application and configured to cause performance of the claimed functions”
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(EX-2039 26, 43; EX-2038 6-8.)

Patent Owner maintains its position from the district court. However, the distinction in scope between the parties’ proposed corresponding structures are irrelevant to the deficiencies of the prior art discussed in this preliminary response, as the prior art does not disclose any means—under either interpretation—that performs the recited function.

Patent Owner and its expert apply the plain and ordinary meaning of all other claim terms. (EX-2001 §IV(B).)

2. The printed matter doctrine does not apply to the challenged claims.

In its discussion of limitations [15b] and [24a], Petitioner asserts that a portion of the limitation constitutes “printed matter that is unrelated to the technical functioning of the alleged invention [] and thus is not a limiting part of the claim.” (Petition 38, 63.) Petitioner provides no further analysis and did not raise this concern in the parallel litigation.

These limitations read in relevant part as follows:

Claim	Claim Language
[15b]	<i>means for displaying an invitation to subscribe to a text messaging subscription service via a first application...</i>
[24a]	<i>loading a webpage containing a promotional message offering a subscription to a text message subscription service...</i>

(EX-1001, cls. 15, 24 (emphasis added)².)

Unlike printed matter, which is merely information content observable by a human and which plays no other role in a claim, these limitations provide necessary context and are functionally related to the inventive purpose of the claims—i.e., providing an improved technology platform and method for completing messaging-based subscriptions. *See, e.g., In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (finding a sequence of digits printed on a circular band limiting because the printed matter and the circularity of the band were interrelated, so as to produce a new product useful for educational and recreational math purposes); *In re Miller*, 418 F.2d 1392, 1396 (Fed. Cir. 1969) (printed numbers on the side of a cup were functional and limiting because they indicated a volumetric relationship that was defined by the claims).

² All emphasis added unless otherwise noted.

“The printed matter doctrine [] raises an issue where the §101 patent-eligibility inquiry and the §102 and §103 novelty and nonobviousness inquiries overlap.” *Praxair Distrib., Inc. v. Mallinckrodt Hosp. Prods. IP Ltd.*, 890 F.3d 1024, 1032 (Fed. Cir. 2018) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 90 (2012)). A printed matter analysis has two steps: first, determining whether the limitation is directed to printed matter; and second, if it is printed matter, whether the limitation should nonetheless be given patentable weight.

First, the challenged claim limitations are not directed to printed matter. “[A] limitation is printed matter only if it claims the content of information.” *In re DiStefano*, 808 F.3d 845, 848 (Fed. Cir. 2015); *Praxair*, 890 F.3d at 1032. While the challenged claim limitations recite a means for displaying an invitation to subscribe to a text messaging subscription service or a webpage containing a promotional message offering a subscription to a text message subscription service, neither of these limitations claims the content—i.e., the arrangement of information—that is displayed or that makes up the promotional message or invitation. (*E.g.*, EX-1001 cls. 15, 24.) That is, the claims do not recite the text or content of the invitation or offer, so long as an invitation to or offer to subscribe to a text messaging subscription service is contained within the webpage. Accordingly, these limitations are not directed to printed matter.

Second, even if the Board were to find that these limitations are directed to printed matter, the limitations are functionally related to the claim as a whole and are deserving of patentable weight. Printed matter is given such weight if the claimed information content has a functional or structural relation to the substrate—i.e., if the printed material is “interrelated with the rest of the claim.” *Praxair*, 890 F.3d at 1032.

Praxair is instructive. *Praxair*, 890 F.3d at 1032, 1035. For example, independent claim 7 of the patent-at-issue in *Praxair* was found to contain a printed matter limitation, requiring that a medical provider make a “recommendation” that treatment be discontinued. *Id.* at 1029. However, this same limitation was found to be deserving of patentable weight within the context of dependent claim 9, because claim 9 required a medical provider to take a specific action—discontinuing treatment—as a result of the recommendation limitation. *Id.* at 1035. The Court and the parties agreed that by interrelating the claimed information with the concrete step of discontinuing treatment, the printed matter had a functional relationship to the rest of the claim and was deserving of patentable weight. *Id.*

Here, the step of inviting a mobile user on a webpage to subscribe to a text messaging subscription service is a necessary functional step that precedes “*deliver[ing] an installment of the text messaging subscription service without*

receiving an opt-in communication after receiving the custom text message.” (EX-1001 cls. 15, 24.) Because the challenged claims are directed to providing an improved technology for enrolling users in a text messaging subscription service, these limitations are necessary to provide the context within which the invention is functional.

For example, were these limitations found non-limiting, the challenged claims would recite “*send[ing] from the at least one server and to a mobile device...means for displaying.*” (E.g., EX-1001 cl. 15.) Where the method or system is implemented without inclusion of an invitation/offer to subscribe to a text messaging subscription service, other limitations—including “*detecting a first interaction with the invitation*” and “*deliver[ing] an installment of the text messaging subscription service*” lack the context necessary to understand their functional steps. That is, limitations [15b] and [24a] are “interrelated with the rest of the claim” and should be afforded patentable weight. *Praxair*, 890 F.3d at 1035.

D. Level of Ordinary Skill in the Art

A POSITA at the time of the invention of the '897 patent (May 2017) would have had a bachelor's degree in an accredited program of computer science, computer engineering, electrical engineering, or a similar discipline, and have 2-3 years of practical work or research experience in mobile and web application

programming. More advanced degrees and/or training in a related discipline can compensate for shorter work experience. (EX-2001 §IV(C).)

V. OVERVIEW OF THE PRIOR ART

Petitioner relies on a cobbled-together compilation of prior art references much like those the examiner found to be deficient during the prosecution history. Specifically, in Ground 1, Petitioner alleges that elements of the claimed invention were known in the prior art and that a POSITA would have been motivated to combine the teachings of Oliver, Agrawal, and Molinet. (Petition 21.) But these references are implemented in distinct advertising mediums and environments, employ very different and unrelated techniques, and pursue discrete goals.

A. Overview of Oliver

Oliver is directed to “creating a passive entity” that, when scanned or read, generates a prepopulated message on a user’s communication device requesting a link to a promotional reward. (EX-1011 [0002]; EX-2001 §V(A).)

Oliver defines these “passive entities” as “images, codes, tags, or any other unique identifiers that may be encoded with uniquely identifying information and codes” and uses this term interchangeably with “generated sign.” (EX-1001 Abstract, [0033].) Petitioner describes this passive entity as “essentially anything with which a mobile device can interact.” (Petition 29.) But the cited disclosures of

Oliver do not support such a broad assertion, and Petitioner provides no supporting explanation. (EX-1011 Abstract, [0007], [0033], [0035], [0027]-[0029]; EX-2001 ¶¶39-40.)

For example, Oliver teaches that once generated, a passive entity or sign may be used in certain media types with which a mobile device may not be able to interact, including radio or satellite. (EX-1011 [0034].) Disclosed examples of a “passive entity” include a QR code, near-field communication (NFC) tag, radio frequency identification (RFID) tag, or short message service (SMS) message. (EX-1011 Abstract, [0003].) Oliver explains that users “activat[e]” a passive entity by scanning, reading, or otherwise inputting the unique information contained in the passive entity into a device operated by the user” or by merely being present near a passive entity while equipped with a passive entity receiver. (EX-1011 [0007].) In particular, Oliver explains that some passive entities require the user to input information contained in the passive entity into their own mobile device to “activate” the passive entity—indicating that direct interaction between those entities and the device is impossible. (EX- 1011 Abstract, [0007], [0033]; EX-2001 ¶40.)

Oliver recognized that while many businesses relied on the use of passive entities on promotional displays and items, such entities were limited to a “one-way trip” from the user’s device to a digital location designed/created by the advertising

business. Oliver also recognized that the business may never know that anyone took an action to activate one of their passive entities. (EX-1011 [0003]-[0006].)

Accordingly, Oliver discloses a “lead generation tool” used to create a passive entity (e.g., QR code or sign). (EX-1011 [0007].) Upon activating this passive entity or entering the information obtained from this entity into a device, the user is prompted to send a message to obtain a link to a reward (e.g., information, discount code, etc.) (EX-1011 [0007], [0026], [0041]-[0042].) After receiving a user's message, Oliver teaches that the link returned to the user may be a “shortened URL that leads to/generates the reward, a tap-to-call link, a URL leading to a webpage with a chat feature,” etc. (EX-1011 [0041].) That is, the user must engage a third time by tapping the reward link to request and obtain the reward via a web browser. (EX-1011 [0042]-[0043].) Oliver describes these reward links as “trackable,” such that a user's information—contained within the reward link—may be saved to a database “for metrics purposes and reporting.” (EX-1011 [0043], [0039].) In this way, Oliver's lead generation tool resolved the identified problem of businesses not knowing when a user activated one of its passive entities. (See EX-1011 [0003]-[0006].)

B. Overview of Agrawal

Agrawal sought to provide an improved technique for determining whether advertising activity associated with web-based links was legitimate or not. (EX-1005 Title, Abstract, 1:18-39, 1:62-2:3; EX-2001 §V(B).)

Agrawal explains that many on-line advertising systems provide advertising links (also referred to by Agrawal as “impressions”) to users when they visit certain webpages. (EX-1005 1:18-20.) When a user clicks a link, the user’s web browser is often directed to an advertiser’s webpage associated with the advertising link. (EX-1005 1:20-25.) Fees for advertising are often calculated on a per-impression or per-click basis. (EX-1005 1:27-39.)

But Agrawal acknowledges that “[t]hese types of fee approaches are vulnerable to attacks where malicious individuals inflate a company’s advertising link click count or impression count,” thereby resulting in inaccurate advertising fees. (EX-1005 1:39-42, 1:51-58.) This may be accomplished through individuals physically clicking on links or programs (e.g., “click-bots or impression-bots”) automatically generating page views and/or clicks. (EX-1005 1:42-50.)

Agrawal therefore discloses a method for “detecting illegitimate advertising-related activity” and assuring accurate advertising-related charges by: obtaining a first set of information when access to a document is requested—i.e., when an

“advertisement query request” is generated (EX-1005 5:45-6:46); obtaining a second set of information when a link is clicked—i.e., when an “advertisement click request” is generated (*id.* 6:47-7:44); and evaluating the collected information. (EX-1005 1:62-2:40.)

Agrawal discloses two different methods of detecting activity. First, detection may be based on a comparison of the two sets of information. (EX-1005 7:45-7:62; EX-2001 ¶¶47-48.) A discrepancy may indicate illegitimate advertising activity, whereas a match may indicate legitimate activity. (EX-1005 7:63-8:12.) Second, detection may be based on a distribution of the obtained information, where legitimate information is collected over a period of time for both ad query requests and ad click requests to generate and store a distribution of that information. (EX-1005 9:29-40.) A second distribution is then collected at predetermined intervals and compared to the stored distribution. (EX-1005 9:40-47.) Matches within a certain threshold indicate legitimate advertising activity, whereas non-matches indicate illegitimate activity during the time period. (EX-1005 9:47-55.)

Agrawal teaches that based on this evaluation, advertising fees may be adjusted to ensure accuracy. (EX-1005 8:59-60, 9:56-58.)

C. Overview of Molinet

Molinet acknowledges the growing development of “application ecosystems” on mobile devices but explains that with this development, the environment on user’s client devices became less cohesive. (EX-1009 [0005].) Molinet teaches that unlike “hyperlinks on the Internet, each application on the client device is unable to easily link to a section of another application on the client device through the application installation process....especially in the case where the other user does not have the application installed on his or her client device.” (*Id.*) Molinet saw a need for a method “of easily directing users to sections within applications...regardless of the type of client device [] and whether the application is installed on the client device.” (*Id.*; EX-2001 ¶51.)

Molinet therefore introduces a method for creating what it refers to as *contextual* deep links—i.e., such that when a user engages with a *contextual* deep link, it will receive a response that is appropriate to the context of the engagement. (EX-1009 Title, cl. 1, [0101], [0045]-[0046]; EX-2001 ¶52.) Molinet discloses an exemplary contextual deep link in the format of “http://link-provider.com/[application identifier]/[unique identifier],” in which the first identifier specifies an application and the second identifier is unique to that link. (EX-1009 [0026]; EX-2001 ¶53.) When a user clicks a contextual deep link, the

user's "client device" sends a request to a contextual deep linking (CDL) server.
(EX-1009 [0025]-[0026].)

Molinet teaches that the CDL server checks the client device for indication that a fingerprint has previously been generated for the client device. (EX-1009 [0017]; EX-2001 ¶54.) Where an indicator is present, the CDL matches its locally stored fingerprint to the indicated fingerprint and retrieves the previously stored contextual information for that device. (EX-1009 [0017].) If no indicator is present, the CDL server generates a fingerprint of the client device and determines contextual information of the request based on the device's characteristics, e.g., "the IP address, operating system version, hardware identifier, operating system provided identifier," etc. (*Id.*)

Molinet teaches that the CDL server then responds to the client device based on the contextual information. (EX-1009 [0018].) Contextual information "may include the platform of the client device [] (e.g., mobile or desktop), the type and version of the operating system executing on the client device [], whether the application [1] is installed on client device [] already, and so on." (EX-1009 [0025].) In this way, Molinet explains, the CDL server is able to send a response to the client device that is contextually appropriate. (EX-1009 [0026].)

Molinet provides three exemplary scenarios. (EX-2001 ¶55.) First, where the user's device does not support an application ecosystem (e.g., a desktop computer), the response will not redirect the user to an application at all; rather, the response will redirect the client device's web browser to a landing page introducing the application. (EX-1009 [0087]-[0088]; EX-2001 ¶56.) Where the user's device supports applications but lacks the specified application, the server redirects the user to the application store to optionally install the application. (EX-1009 [0026].) And finally, where the user's device does have the specified application installed, Molinet teaches that the CDL server may initiate the application on the user's device, which then submits a request to the server for link data associated with any recently used deep links. (EX-1009 [0046]; EX-2001 ¶57.)

The CDL server once again “matches the fingerprint provided by the application with a fingerprint associated with a contextual deep link and sends the associated link data to the application, which can then be used to configure the application.” (EX-1009 [0046].) Molinet describes this configuration as “simply a reference to a location in an application [], such as a section within the application.” (EX-1009 [0024].) “For example, a particular location in a crowd-sourced review application may be a review page for a local restaurant.” (EX-1009 [0024].) Molinet does not disclose configuration of a messaging application.

Molinet's technique mimics one of the prior art techniques explicitly criticized by the '897 patent. (*See* EX-1001 1:30-41.) The '897 patent acknowledged existing methods that allowed users to open a vendor-specific application—for example to select a product or service. (*Id.*) But, as the '897 patent explains, such methods are time-consuming and/or burdensome because they require additional engagement by the user (e.g., to install the specified application or complete a transaction through the vendor's application). (*Id.*; EX-2001 ¶59.)

**VI. THE BOARD SHOULD DENY INSTITUTION BECAUSE
PETITIONER IS NOT REASONABLY LIKELY TO PREVAIL ON
ANY CLAIM**

The Board should deny institution because the petition fails to show a reasonable likelihood of success on any claim. “In an *inter partes* review, the burden of persuasion is on the petitioner. . . . Failure to prove the matter as required by the applicable standard means that the party with the burden of persuasion loses on that point—thus, if the fact trier of the issue is left uncertain, the party with the burden loses.” *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378-79 (Fed. Cir. 2015); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016).

The petition presents two grounds:

Ground 1	Section 103(a)	Obvious over Oliver in view of Agrawal and Molinet	Claims 15-19, 21-30
Ground 2	Section 103(a)	Obvious over Ground 1 in further view of <i>Ad Serving Technology</i>	Claims 15-30

Petitioner's grounds—both of which rely on Ground 1's three-reference combination of Oliver, Agrawal, and Molinet as allegedly rendering obvious independent claims 15 and 24—suffer from two critical deficiencies. First, Petitioner cherry-picks disclosures from three incompatible prior art references, while failing to adequately articulate how or why a POSITA would be motivated to overcome those incompatibilities and combine the chosen disclosures. Second, even if a POSITA were to combine the three references' teachings, Petitioner's combination fails to disclose key limitations of the challenged claims.

A. Petitioner Does Not Articulate Sufficient Motivation to Combine The Teachings of Oliver, Agrawal, and Molinet

Petitioner's combination of three different methods, implemented in dissimilar environments with unrelated goals, is unsupported by any rationale sufficiently demonstrating a POSITA's motivation to combine these references. (EX-2001 §VI(A).)

“[A] patent composed of several elements *is not proved obvious by merely demonstrating that each of its elements was, independently, known in the prior art*.... [I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Petitioner must put forward some “explanation as to how or why the references would be combined to arrive at the claimed invention...[otherwise] hindsight bias [becomes] the thread that stitches together prior art patches into something that is the claimed invention.” *Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1367 (Fed. Cir. 2017) (citation omitted). Hindsight reconstruction of the claimed invention must be carefully guarded against. *KSR*, 550 U.S. at 418.

Petitioner addresses the prior art combination and alleged motivation to combine up front, at Section III(C) of the petition. But this analysis is generic and fails to address why a POSITA would have been motivated to combine particular teachings of the references in a way that practices each limitation of the challenged claims.

Oliver and Agrawal. Petitioner first argues that it was obvious to implement Oliver’s method using Agrawal’s system because “Oliver’s method would have appealed to businesses seeking a streamlined method for acquiring the contact

information of potential customers, and for acquiring the potential customer's consent to receive marketing communications and proof of possession of the mobile device.” (Petition 28.) But Oliver does not disclose acquiring consent to receive marketing communications or proof of possession of a mobile device. (EX-2001 ¶¶63-67.) Rather, Oliver discloses a method for creating passive entities that facilitate a one-time transaction between the business and the user. (*E.g.*, EX-1011 [0008] (returning a single response to the user containing the promotional reward), [0030] (describing the method “for providing a promotional reward to a user [] via a response message, in accordance with the disclosed principles”).)

Oliver explains that by activating a passive entity (*e.g.*, scanning a QR code or inputting information on a device), a user may obtain a link to a “promotional reward.” (*E.g.*, EX-1011 [0039]-[0043].) After a user scans a QR code and sends a message to the web service, the web service creates a trackable reward hyperlink to send back to the user. (EX-1011 [0039]-[0040].) The user receives the reward only upon tapping the link (*i.e.*, engaging a third time with a device). (EX-1011 [0041]-[0042].) Oliver even discloses a token that may be marked as “used” to limit users to one-time rewards. (EX-1011 [0043], [0047].) Petitioner admits this—arguing that Agrawal would help serve Oliver's “express desire to...impose limits on the user's access to promotions.” (Petition 29.) But Oliver cannot do both—*i.e.*,

allegedly motivate the combination of teachings to both obtain consent for future transactions **and** impose limits to disallow future transactions. (*Compare* Petition 28 *with id.* 29.)

That is, Oliver discloses a method for a one-time transactional exchange in which the user scans a passive entity, sends a message to receive a responsive link (or “lead”) to a reward, and taps the link to obtain the reward. Because Oliver does not teach acquiring consent to receive marketing communications or proof of possession of the mobile device, a POSITA would not be motivated, based on Petitioner’s alleged benefits, to implement Oliver’s method. (EX-2001 ¶67.)

Petitioner further argues that a POSITA would have implemented Oliver’s “concept of mobile app deeplinks...as links...in Agrawal’s web ads.” (Petition 28.) But Oliver does not use the term “mobile app deeplinks,” and Petitioner does not explain its assertion that Oliver discloses such deeplinks. (*Id.*) Oliver discloses a method implemented using passive entities—e.g., QR codes, Near-Field Communication (NFC) tags, Radio Frequency Identification (RFID) tags, and Short Message Service (SMS) messages “used on promotional displays and items as a means to navigate a consumer to a particular place in the digital world.” (EX-1011 [0003].) Whereas Oliver discloses encoding information into these passive entities, Agrawal discloses hyperlink or URL-based advertisements. (*Compare* EX-1011

[0027]-[0029] *with* EX-1005 Abstract, Fig. 4, 3:46-58, 8:13-37.) That is, Oliver and Agrawal disclose wholly different operating environments. (EX-2001 ¶¶68-69.)

For example, Dr. Malek explains:

Agrawal's web-based environment relies on web-based protocols to achieve its intended purpose. (*See* EX-1005 1:19-26; Section V(B), *supra*.) Agrawal discloses a method of verifying advertising activity by collecting and comparing information obtained via the client's web browser, which exchanges information with a server via the Hyper Text Transfer Protocol (HTTP). (EX-1005 6:30-43, 6:14-18, 5:29-6:67, Fig. 3.) In contrast to Agrawal, however, Oliver's method for activating a passive entity in order to send an SMS message does not involve a web browser or an exchange of information with a server. (*See generally* EX-1011; *e.g.*, *id.* cl. 1; Section V(A), *supra*.) Oliver teaches that activation of a passive entity will open the SMS client on the mobile device—which does not result in an HTTP request. (EX-1011 [0005]-[0006], [0026]-[0029].) That is, unlike Agrawal, explicitly relies on web-based protocols, Oliver explicitly relies on distinct phone-based messaging protocols.

(EX-2001 ¶70; *see also id.* ¶¶71-75.)

Petitioner concedes that even a difference in the mobile device operating system might result in distinct protocols that make it impossible to implement specific teachings (*e.g.*, deeplinking) without causing an error. (Petition 29-30 (“[A] PHOSITA would have understood that mobile-app deeplinking protocols could

differ between mobile operating environments and would have desired Molinet's ability to 'create a contextual deep link that does not cause an error under any context', and to allow apps to use and manipulate links easily, independent of context.”.) Molinet explicitly distinguishes between capabilities associated with “hyperlinks on the Internet” versus applications on a mobile device. (EX-1009 [0005].) And yet, Petitioner does not address how a POSITA would implement Oliver's teachings within Agrawal's distinct operating environment or whether the resulting combination would even be capable of continuing to practice either reference's teachings. *Pers. Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 994 (Fed. Cir. 2017) (overturning a decision where “the Board nowhere clearly explained, or cited evidence showing, how the combination of the two references was supposed to work”). Indeed, as will be discussed further below in limitation-specific detail, the resulting combination would render Agrawal non-functional, failing to disclose or render obvious the claimed limitations. (See Section VI(B)(2)(i), *infra*.) Accordingly, a POSITA would not be motivated to combine the teachings of Oliver and Agrawal. (EX-2001 ¶76.)

Agrawal and Molinet. Petitioner makes the same mistake as to its alleged motivation for combining Agrawal and Molinet—failing to acknowledge their critical distinctions. (Petition 29-30; EX-2001 ¶¶77-79.) Petitioner argues that it

would have been obvious “to augment Agrawal’s system with Molinet’s capabilities” to “create a contextual deep link that does not cause an error under any context” to allow users to link directly to another application. (Petition 29-30.) But Molinet explicitly teaches that where contextual information for a user device indicates that the device does not support an application ecosystem (e.g., a desktop computer), the user’s interaction with the contextual deep link will cause the client device to open a landing page on a web browser with more information about the application—rather than the application itself. (EX-1009 [0018], [0087]-[0088].)

Agrawal does not disclose a wireless device with an “application ecosystem.” (EX-1009 [0005], [0018], [0021]; *see generally* EX-1005.) That is, “augmenting” Agrawal’s system with Molinet’s method would not produce a resulting combination of teachings under which a user interacts with an advertising link and is transitioned to another application. Rather, as taught by Molinet, the user will be transitioned to another webpage, most likely in the same browser. (*See* EX-1009 [0018], [0087]-[0088].) Because Petitioner’s purported benefit could not be achieved within Agrawal’s system, based on Molinet’s explicit teaching, such a benefit would not motivate a POSITA to make the modification or combination.

Petitioner also argues that a POSITA would be motivated to combine Agrawal’s and Molinet’s teachings based merely on the fact that the two references

are similar and “both use Web-based technology and communications.” (Petition 30-31.) But a “ cursory assertion that the references are drawn from the same broadly characterized field” is insufficient to meet Petitioner’s burden. *Securus Techs., Inc. v. Global Tel*Link Corp.*, IPR2015-00155, Paper 30 at 17 (PTAB Apr. 7, 2016). Furthermore, because Molinet’s teachings do not support the resulting combination on which Petitioner relies, it would first be necessary for a POSITA to modify either Agrawal’s or Molinet’s teachings, requiring a substantial reconstruction and redesign that Petitioner has not supported or explained. (EX-2001 ¶79.) This fact supports that such a combination is the result of hindsight bias. *See In re Ratti*, 270 F.2d 810, 813 (CCPA 1959).

The Asserted Combination. Petitioner’s single-sentence analysis under *KSR* falls well short of acknowledging and addressing the critical distinctions between the references. (Petition 31-32; EX-2001 ¶¶80-81.) There is a distinction between combining known prior art elements A and B when each would have been expected to contribute its own known properties to the final product (obvious) and combining prior art elements to achieve a new, unexpected benefit (non-obvious). *See In re Omeprazole*, 536 F.3d 1361 (Fed. Cir. 2008); *Crocs, Inc. v. U.S. Int’l Trade Comm’n*, 598 F.3d 1294 (Fed. Cir. 2010).

First, Oliver's technique—i.e., activating a passive entity to trigger a one-time transaction in which the user must engage with a trackable reward link—is not being used for its known function in Petitioner's proposed combination. Instead, as explained above, Petitioner relies on a greatly modified application of Oliver's teachings to web-based links to allow for multiple transactions, without explaining or supporting a POSITA's motivation and ability to make those modifications. Second, Molinet is not being used for its known function in Petitioner's proposed combination. As explained above, Molinet explicitly teaches that where implemented within a device lacking an application ecosystem, the contextual deeplink will not transition a user to any other application—let alone a messaging application. (EX-1009 [0018], [0087]-[0088].) Yet Petitioner concludes, without support, that the resulting combination would transition a user to a messaging application. Third, as discussed immediately above, Petitioner misapplies Molinet's teachings, such that the resulting application of Molinet to Agrawal would not achieve the benefits alleged by Petitioner. Accordingly, Petitioner is incorrect that Agrawal's system has been “improved.” (Petition 31-32.)

Rather, the asserted combination would strip Oliver of its inventive aspect—generating passive entities that lead the user to a trackable reward link—or strip Agrawal of its ability to verify web-based advertising activity. (EX-2001 ¶81;

Section VI(B)(2)(i), *infra.*) And the majority of Molinet's teachings regarding a contextual deeplink would be inapplicable, given Agrawal's lack of an application ecosystem. (EX-2001 ¶81.) Thus, Petitioner's sole *KSR* rationale is unsupported.

Finally, Petitioner's generic argument that a POSITA would combine the functionalities of all three references into a single server (Petition 31), merely because each of the references "provides functionality with a server," is plainly insufficient motivation. *See KSR*, 550 U.S. at 415-421; *Securus*, IPR2015-00155, Paper 30 at 17. Petitioner's argument still does not address the distinctions between Oliver's and Agrawal's operating environments and how a POSITA would avoid Molinet's explicit teachings. (EX-2001 ¶82.) Reliance on "isolated teachings of the prior art without considering the over-all context within which those teachings are presented" is improper and should be considered when determining the use of impermissible hindsight. *In re Mercier*, 515 F.2d 1161, 1166 (CCPA 1975); *see generally In re Whiton*, 420 F.2d 1082 (C.C.P.A. 1970).

When Petitioner's failure to show motivation to combine is considered against the backdrop of the references' many distinctions, it is clear that Petitioner's combination of all three references into a single server uses impermissible hindsight bias to select and combine the references. *KSR*, 550 U.S. at 418; Ashley A. Bolt, *Combating Hindsight Reconstruction in Patent Prosecution*, 64 EMORY LAW J.

1137, 1158 (2015) (citing *KSR Int'l Co.*, 550 U.S. at 418) (“[I]f the reasoning [to combine] is not clearly presented in a sensible manner, or if the reasoning is merely conclusory, this suggests the use of impermissible hindsight in the selection and combination of the references. If the combination cannot be explained, it seems likely that, in truth, the combination was derived using the applicant’s specification as a roadmap.”).

As will be explained within the context of specific limitations below, the petition merely assumes—based on Petitioner’s deficient reasons for combining the references—that a POSITA would have combined specific teachings in specific ways to practice the claimed limitations. This generic analysis is insufficient to meet Petitioner’s burden under Section 103 to articulate a POSITA’s motivation to combine the teachings of Oliver, Agrawal, and Molinet. *KSR*, 550 U.S. at 418 (noting there must be “a reason” for a skilled artisan “to combine *the elements* in the way the claimed new invention does”).

B. Grounds 1-2: The Combination of Oliver, Agrawal, and Molinet Does Not Render Obvious Any Independent Claim

Despite cherry-picking disclosures from three references, Petitioner still fails to demonstrate that the Ground 1 combination renders obvious key limitations of the independent claims. (EX-2001 §VI(B).) For example, the combination does not render obvious (1) a text message subscription service, or (2) a means (e.g., a URI)

for causing the mobile to automatically transition from a first application to a messaging application and/or render a user interface of the text messaging application. (EX-1001 cls. 15, 24.)

Petitioner's Ground 2 only contemplates adding a fourth reference, *Ad Serving Technology*, within the context of dependent claim 20 (Petition 72-73); therefore, Ground 2 fails to render obvious either independent claim for the same reasons as Ground 1.

1. The combination fails to disclose or render obvious a text messaging subscription service and related limitations.

None of Petitioner's cited references, nor their combination, discloses or renders obvious the claimed limitations relating to a text messaging subscription service:

Claim Limitation	Claim Language
Cl. [15b]; see also cl. [24a].	<i>send, from at least one server and to a mobile device requesting and/or [loading] a webpage, means for displaying an invitation to subscribe to a text messaging subscription service...</i>
Cl. [15c]; see also cl. [24d]	<i>send ...in response to the mobile device detecting a first interaction with the invitation...</i>
Cl. [15f]; see also cl. [24f]	<i>deliver an installment of the text messaging subscription service without receiving an opt-in</i>

	<i>communication after receiving the custom text message.</i>
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As noted above, Petitioner makes a single-sentence argument that limitation [15b]/[24a] (and only that limitation) contains “printed matter” and is, therefore, non-limiting. (Petition 38.) For the reasons discussed above, unlike printed matter, this limitation provides necessary context and is functionally related to the inventive purpose of the claims. (Section IV(C)(2), *supra*.) Accordingly, it is limiting. Regardless of the Board’s finding on this matter, however, the prior art further fails to render obvious limitation [15f]/[24f].

Substantively, Petitioner makes only a single argument under limitation [15b]/[24a] and a single argument under limitation [15f]/[24f]. (Petition 37, 52-53.) Petitioner asserts it would have been obvious, based on Oliver’s disclosure of “promotional material,” to display an invitation in Agrawal to subscribe to a text messaging subscription service (Petition 37) and that Oliver’s one-time response message containing one or more reward links is “an installment of a text messaging subscription service.” (Petition 52-53.)

Because Agrawal discloses only webpage-based promotional links that transfer a user to another webpage and Oliver discloses only a one-time promotional transaction, neither reference discloses or renders obvious a text messaging

subscription service, let alone displaying an invitation for one or delivering an installment of one. (EX-2001 ¶87.)

Agrawal is directed to a method for verifying activity associated with webpage-based advertising links, illustrated in the figure below:

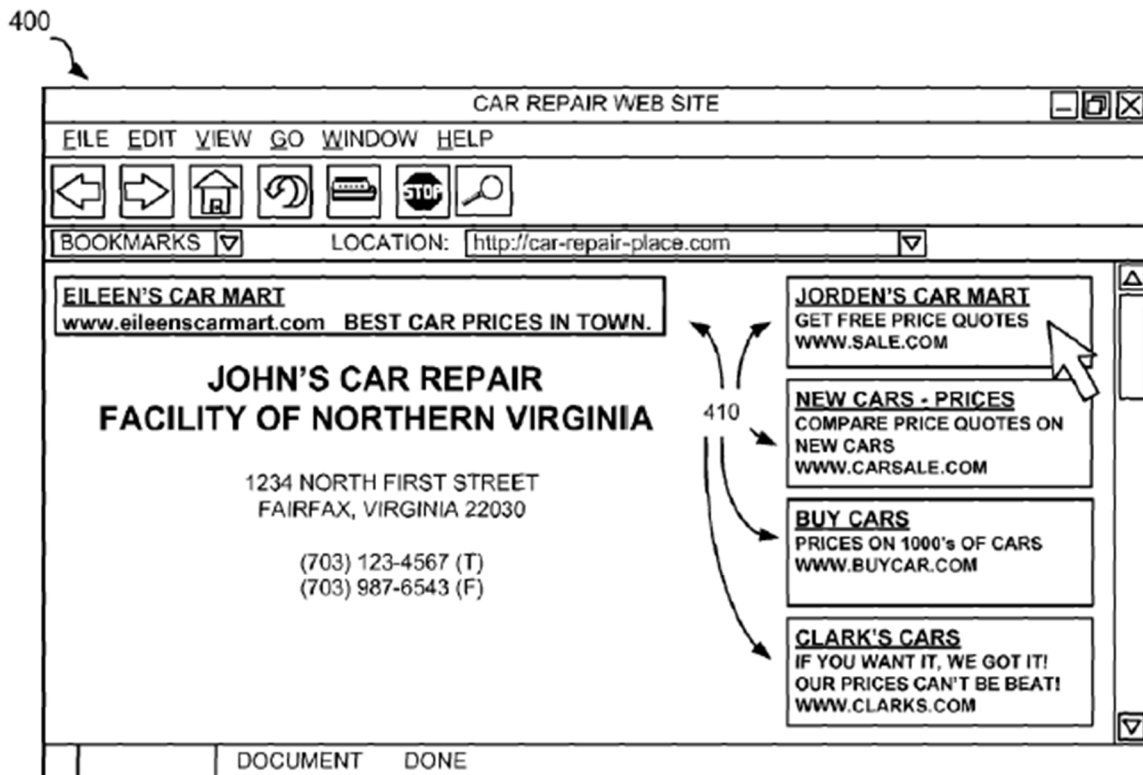


FIG. 4

(EX-1005 Fig. 4.) While some of the text associated with these links could be characterized as invitations—e.g., “Get free price quotes”—these phrases are unrelated to a subscription service (let alone a text messaging subscription service). Interaction with the link will merely transfer the user to the linked webpage, rather than result in any kind of subscription or text message. As Agrawal contains no

disclosure of or relevance to text messaging applications or subscriptions services, Agrawal itself does not motivate the modification of these advertising links to display an invitation for or deliver an installment of a text messaging subscription service. (EX-2001 ¶¶85-88.)

Oliver does disclose a one-time exchange of information via text message; however, Oliver does not disclose a text message subscription service or installments of one. (EX-2001 ¶¶89-94.) Oliver discloses the use of passive entities, the activation of which may result in promotional information being provided to a user. (EX-1011 Abstract, Figs. 1, 4, 7-8.) Oliver describes “the promotional information” as “i.e., a reply message.” (EX-1011 [0025].) Specifically, a user first engages with a passive entity, after which, the user is prompted to engage a second time to send an SMS message to a web application. (*E.g.*, EX-1011 Fig. 4.) The web application then creates and sends a responsive message containing one or more trackable links to the reward(s). (EX-1011, Fig. 5.) The user is then required to engage a third time by tapping one of those links to be transferred to a webpage containing the promotional information or reward. (EX-1011 Fig. 6, [0025].)

Following this one-time response, Oliver does not disclose any further SMS messages. (*See generally* EX-1011.) In fact, Oliver teaches that to receive another message with a reward, the user would have to activate the passive entity and repeat

Oliver's process again. (*See* EX-1011 [0045]; EX-2001 ¶89.) This facilitates Oliver's explicit goal of enabling businesses to track interactions with their passive entities. (EX-1011 [0003]-[0006].) Oliver even discloses a "Use Token," which may be used to "ensure that a given reward *is only accessed once* for every scan." (EX-1011 [0045].)

A POSITA would not, therefore, be motivated based on Oliver's teachings to modify either Agrawal's advertising link or Oliver's passive entity to invite a user to subscribe to a text messaging subscription service when Oliver teaches providing the exact opposite—a limited, one-time transaction. (EX-1011 [0045].) For the same reason, a POSITA would not be motivated to modify Oliver's limited, one-time delivery of promotional material to do the opposite and provide an installment of an ongoing subscription. (EX-2001 ¶91.)

Accordingly, the cited prior art does not render obvious the subscription limitations. *See In re Gordon*, 733 F.2d 900, 902 (Fed. Cir. 1984) (where a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification); *In re Ratti*, 270 F.2d at 813 (where a combination "would require a substantial reconstruction and redesign" of a reference or change the principle of the prior art's operation, such a combination is likely a result of hindsight bias).

Petitioner's reliance on the fact that Oliver discloses a variety of "promotional information" and that it would have been obvious to identify rewards being offered to induce the user to sign up still does not provide a reason that one would display an invitation to subscribe to a text message subscription service. (*See* Petition 37-38 (limitation [15b]).) Indeed, because Oliver only provides a one-time delivery of promotional information, as discussed above, a POSITA would not risk confusing the user by displaying an invitation for a subscription service. (EX-1011 [0045]; EX-2001 ¶93.) Petitioner provides no other explanation for why the cited prior art would render limitation [15b]/[24a] obvious.

As to limitation [15f]/[24f], Petitioner provides only a single sentence asserting that Oliver's generation of a response SMS having reward or sales information in it "is the delivery of an installment of the text messaging subscription service." (Petition 52-53.) Petitioner does not explain how a one-time message corresponds to an installment of a text messaging subscription service. (*See id.*) It does not. (*See* EX-1011 [0045]; EX-1001 2:51-53, 2:66-3:3, 6:60-7:23, Figs. 2A-2D; EX-2001 ¶¶94-95.)

While the '897 patent enables the use of "two-tap signup" across a variety of transactions, the challenged claims specifically recite the application of this two-tap signup method within the context of a text message subscription service, enabling

the ability to enroll a user without the need for further opt-in communications. (*E.g.*, EX-1001 10:50-54, cls. 15, 24, 6:60-7:23, Figs. 2A-2D.) During prosecution of a related patent, which claims priority to the same provisional application that led to the '897 patent, the examiner specifically noted that none of the prior art “alone or if combined, teach or suggest every limitation of the claims of the present invention, *and particularly the interaction of the tag and user causing an enrollment with a de minimis amount of information having been provided.*” (EX-2040 41.)

Oliver's disclosure of a method in which the user must engage twice to receive the responsive message (by activating an entity and sending a message) and a third time to obtain the one-time reward/promotional information (by clicking the returned link) does not disclose delivering an installment of the text message subscription service based on only the first and second user interactions and without receiving an opt-in communication. (EX-1001 cls. 15, 24.) Petitioner offers no argument or explanation as to why limitation [15f]/[24f] would have been obvious, nor would it have been in view of Oliver's contrary disclosures discussed above.

Accordingly, the cited prior art does not render obvious the subscription service limitations.

- 2. The combination fails to disclose or render obvious sending, from a server to a mobile device, a means for causing the device to transition to a messaging application.**

Petitioner's combination does not disclose or render obvious sending a means for causing, or sending a uniform resource identifier (URI) that causes, the mobile device to transition from a first application to a text messaging application.

Claim Limitation	Claim Language
Cl. [15c]	<i>send[ing], from the at least one server and to the mobile device, means for causing (1) the mobile device to transition from the first application to a second application different from the first application in response to the mobile device detecting a first interaction with the invitation, the second application being a messaging application</i>
Cl. [24b-d]	<i>a uniform resource identifier (URI) that deeplinks to a text messaging application ...the URI configured to, in response to a first user interaction with the promotional message via the web browser application, cause the mobile device to (1) automatically render a user interface of the text messaging application</i>

Although Petitioner attempts to simplify this limitation into nothing but “deeplinking” (Petition 17), this limitation contains multiple requirements due to the novel implementation of the patented invention. Specifically, this limitation of claim 15 includes: (1) sending—from a server to a mobile device—a means (e.g., URI) for causing the mobile device to transition from the first application to a

messaging application; and (2) a means (e.g., URI) that is triggered when the mobile device detects interaction with the invitation (or offer) to subscribe to a text messaging subscription service. (EX-1001 cls. 15, 24.)

Because none of the cited references discloses or renders obvious this limitation as a whole, Petitioner relies on improper hindsight bias to construct a combination of all three references. (Petition 42-46.) Petitioner, however, fails to explain why a POSITA would have been motivated to combine and modify the prior art's teachings to achieve the result described, and indeed, a POSITA would not have been motivated to combine or modify such teachings. (EX-2001 §VI(C).)

- i. ***“send, from the at least one server and to the mobile device, means for causing (1) the mobile device to transition from the first application to a second application ...the second application being a messaging application....”***

The petition includes nothing but a single, conclusory sentence that Molinet's URL “causes the operating system on the client device 120 to initiate the application,” which in the case of the combination, is the messaging application.” (Petition 44.) As to any alleged motivation to combine, Petitioner merely refers to its general assertion that “it would have been obvious to implement the business method of Oliver using mobile ads, by using the web-based deeplinking technology of Molinet.” (Petition 43.)

Petitioner's lack of limitation-specific analysis, alone, is reason enough to find that Petitioner has failed to meet its burden in showing that the prior art renders all limitations of the independent claims obvious. *KSR*, 550 U.S. at 418 (noting there must be "a reason" for a skilled artisan "to combine *the elements* in the way the claimed new invention does"). But, furthermore, consideration of the critical distinctions between the prior art references and Molinet's explicit teachings demonstrates that a combination of the references' teachings does not result in the combination Petitioner describes and does not practice this limitation of the claims.

First, Petitioner's assumption that Molinet's contextual deep link could be used to transition to a messaging application as taught by Oliver is unsupported and incorrect, as Molinet (1) discloses nothing about a messaging application (*see generally* EX-1009) and (2) teaches transitioning a device to a webpage—not an application—when Molinet's method is implemented within an environment such as Agrawal's. (*See* EX-1009 [0018].)

Unlike the '897 patent, which specifically claims transitioning a user from a first application to a messaging application, Molinet does not disclose a messaging application. As a result, Molinet's method seeks to address the problem of users potentially not having the advertiser's application installed on their client devices. (EX-1009 [0005].) In such an event, the user is redirected to "an application store

where the user may download and install the application.” (EX-1009 [0018].) One of the many advantages of the ’897 patent’s novel technology is that by transitioning from a first application (e.g., a browser) to a messaging application, there is no need for the user to have first installed a vendor-specific application. (EX-1001 20:32-53.) Molinet lacks this advantage, because Molinet does not contemplate transitioning to a messaging application. (EX-2001 ¶101.)

Additionally, Molinet explicitly teaches transitioning to a webpage—not an application—when implemented within a system like Agrawal’s. (EX-2001 ¶¶102-104.) Recall that Petitioner asserts that a POSITA would implement Oliver’s method within Agrawal’s system, as augmented by Molinet’s method. (Petition 28-30.) But Molinet is primarily directed to a system/method in which mobile devices support application ecosystems. (EX-1009 Title, Abstract, cl. 1, [0005], [0018].) Recognizing the distinct capabilities between “hyperlinks on the Internet” and applications (*id.* [0005]), Molinet discloses modifications to its own method that would be necessary in an environment which does not support an application ecosystem (e.g., a desktop computer). (EX-1009 [0005], [0018], [0021].) When Molinet’s system encounters a device with an operating system that does not support an application ecosystem, Molinet explains that the server’s response “cause[s] the

client device to open a landing page on a web browser with more information about the application”—rather than opening another application. (EX-1009 [0018].)

Agrawal does not disclose a user device with an application ecosystem and does not mention or reference applications at all. (*See generally* EX-1005.) And Figure 4 depicts a typical screen view from a desktop computer. (EX-1005 Fig. 4.) Thus, were a POSITA to use Molinet's teachings to “augment” Agrawal's advertising environment, as Petitioner suggests, Molinet explicitly teaches that the response to the user, upon engaging with one of Agrawal's advertising links, would transition the user to a landing page within the browser, rather than transition the user to another application. (*See* EX-1009 [0018]; EX-2001 ¶104.) Petitioner does not address why a POSITA would have ignored Molinet's explicit teaching.

Accordingly, the combination does not disclose or render obvious any means—whether a link or a URI—that causes “(1) *the mobile device to transition from the first application to a second application different from the first application...the second application being a messaging application.*” (EX-1001, cls. 15, 24.)

Second, Petitioner's underlying assumption that Oliver's method of transitioning to a messaging application could be carried out within the combination

of Agrawal and Molinet is also unsupported and incorrect, because Oliver and Agrawal disclose incompatible methods. (EX-2001 ¶¶105-107.)

Agrawal discloses a method that is specific to a web-based environment. (EX-1005 1:19-26; Section V(B), *supra*.) For example, Agrawal's method of verifying advertising activity is reliant on the ability to collect and compare a first set of information (obtained, e.g., when a user accesses a webpage and generates "an advertisement query request") and a second set of information (obtained, e.g., when a user selects an advertising link and generates an "advertisement click request"). (EX-1005 5:29-6:67, Fig. 3.) Agrawal explains that such information is obtained via the user's web browser which, regardless of how precisely it is collected by the browser, is provided to a server via the Hyper Text Transfer Protocol (HTTP). (EX-1005 6:30-43, 6:14-18; EX-2001 ¶¶70-72, 105.) Petitioner asserts that Molinet's teachings regarding the creation and handling of a contextual deeplink could be used to augment the advertising links disclosed in Agrawal. (Petition 30.)

In contrast to Agrawal, Oliver's method for activating a passive entity to send an SMS message does not involve a web browser or server. (*See generally* EX-1011; Section V(A), *supra*; EX-2001 ¶¶73-76, 105.) Oliver teaches that activation of a passive entity will open the SMS client on the mobile device—which does not involve the exchange of an HTTP request. (EX-1011 [0005]-[0006], [0026]-[0029];

EX-2001 ¶75.) That is, unlike Agrawal, which explicitly relies on web-based protocols to achieve its verification process, Oliver's process explicitly relies on distinct phone-based messaging protocols.

As a result of this distinction, a combination of Agrawal's and Oliver's teachings would necessarily render Agrawal's teachings non-functional and incapable of achieving the reference's explicit goal. (EX-2001 ¶¶105-107.) For example, if one were to implement Oliver's phone-based method of immediately generating an SMS message based on detecting user engagement, as Petitioner suggests, then based on Oliver's teachings, there would be no exchange of information with a web server. (EX-2001 ¶106.) Because Agrawal relies on an exchange of information with the server using web-based protocols, the resulting combination would not be capable of verifying the advertising activity—the very goal Agrawal's method was designed to achieve. (EX-1005 Title, Abstract, 1:62-2:3.) Furthermore, modifying Oliver to the extent necessary to support web-based protocols would entirely change the principle of Oliver's operation and require a substantial redesign of its disclosed method. (EX-2001 ¶106-107.) Thus, no POSITA would be motivated to implement Oliver's teachings within Agrawal. *See In re Gordon*, 733 F.2d at 902; *In re Ratti*, 270 F.2d at 813.

Accordingly, Petitioner's combination of prior art does not disclose or render obvious this limitation, nor would a POSITA have been motivated to combine their teachings in the first place.

ii. ***“in response to the mobile device detecting a first interaction with the invitation [to subscribe to a text messaging subscription service]”***

Petitioner asserts that Agrawal teaches displaying advertisements in webpages containing clickable hyperlinks and renders obvious the mobile device detecting interaction with the link. (Petition 42.) However, as explained above, neither Agrawal—nor the combination of Agrawal, Oliver, and Molinet—discloses or renders obvious an invitation to subscribe to a text messaging subscription service. Section VI(B)(1), *supra*. Accordingly, neither Agrawal, nor its combination with Oliver and Molinet, discloses or renders obvious a mobile device detecting interaction with “*the invitation*” recited in this limitation.

Furthermore, as also explained above, implementing Molinet's teachings within Agrawal would result in transitioning to a webpage—not an application—in response to a user interaction with one of Agrawal's advertising links. (Section VI(B)(2)(i), *supra*.) And no POSITA would be motivated to implement Oliver's teachings within Agrawal when doing so would render Agrawal's intended purpose of verifying advertising activity non-functional. (*Id*; EX-2001 ¶¶108-111.)

Accordingly, Petitioner fails to show that the cited combination of prior art renders obvious transitioning to a messaging application “*in response to the mobile device detecting a first interaction with the invitation.*”

C. Grounds 1-2: The Combination of Oliver, Agrawal, and Molinet Does Not Render Obvious Any Dependent Claim

Because Petitioner fails to establish that Ground 1 renders obvious all limitations of the independent claims, Petitioner cannot show that Ground 1 renders obvious any dependent claim. And because Ground 2 relies on Ground 1 as allegedly rendering obvious the independent claims, Ground 2 cannot succeed.

D. Other Limitations Not Addressed

At this preliminary stage, Patent Owner addresses those deficiencies which clearly show a lack of reasonable likelihood of the petition's success. Patent Owner's decision not to address limitations at this stage in no way reflects a lack of dispute.

VII. SECONDARY CONSIDERATIONS

When assessing obviousness of the claimed invention, objective evidence of secondary considerations pertaining to nonobviousness must be considered, including long-felt but unsolved needs, industry praise, commercial success, etc. *In re Huang*, 100 F.3d 135, 139 (Fed. Cir. 1996). These indicia constitute “the most probative evidence of nonobviousness,” “crucial in avoiding the trap of hindsight

when reviewing, what otherwise seems like, a combination of known elements.” *Leo Pharm. Products, Ltd. v. Rea*, 726 F.3d 1346, 1358 (Fed. Cir. 2013); *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 315 (Fed. Cir. 1985). Such evidence “may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1349 (Fed. Cir. 2012).

A patentee is entitled to a presumption of nexus “when the patentee shows that the asserted objective evidence is tied to a specific product and that product embodies the claimed features, and is coextensive with them.” *Lectrosonics, Inc. v. Zaxcom, Inc.*, IPR2018-01129, Paper 33 at 32 (PTAB Jan. 24, 2020) (*precedential*). Even where this presumption is not established, nexus may be shown where “the evidence of secondary considerations is the direct result of the unique characteristics of the claimed invention.” *Id.* at 33.

A. The Claimed Invention Satisfied a Long-Felt Need

Objective evidence that there was a recognized problem which existed in the prior art for a long period of time without a solution demonstrates long-felt need. *In re Gershon*, 372 F.2d 535, 538-39 (CCPA 1967); *Newell Cos., Inc. v. Kenney Mfg. Co.*, 864 F.2d 757, 768 (Fed. Cir. 1988).

Before the claimed invention, the primary medium for direct marketing to customers was through emails. (EX-2034 1:15-31; EX-2035 [0021].) While SMS messaging was widely adopted and used throughout the world, direct marketing to customers through SMS was rarely used, and sign-up rates were very low. (*See* EX-2012 1 (referring to Patent Owner's platform as helping "businesses create and scale ***a new revenue channel: mobile messaging***").)

As discussed above, known prior art methods suffered from user burden and time-consuming processes, e.g., the need for excessive user input through clicks or screen taps or the need to install a vendor-specific application. (Section III, *supra*; EX-1001 1:30-46.) In the case of SMS messages, consumers had to manually enter their ten-digit phone number, wait to receive a text message, and then reply with the required key phrase (e.g., "Yes" or "Join"). There seemed to be no alternative to this prior art SMS signup process, particularly as "SMS marketing is highly regulated," with numerous legal and carrier restrictions. (EX-2013 12; EX-2014 2-4 (summarizing various regulatory roadblocks for automated SMS messaging).) For example, the Telephone Consumer Protection Act ("TCPA") placed strict regulatory requirements on automated telephone messages (including SMS), e.g., by requiring affirmative consent. 47 U.S.C. § 227; EX-1001 7:19-23.

Thus, there was a long-felt need for an SMS signup solution, without the onerous friction presented by prior art solutions, that still complied with governing regulations. (EX-1001 1:42-46, 7:19-23, Title.) The inventors realized that if the friction could be removed, while also meeting regulatory requirements, the solution would become the direct-to-consumer marketing channel of the future, which, as will be discussed further below, Patent Owner's two-tap technology has become.

The inventors addressed this long-felt but unmet problem with an elegant solution that greatly simplified the sign-up process, while satisfying demanding regulatory requirements. (EX-2001 ¶¶113-120.) Specifically, the patented invention provided an SMS sign-up solution that improved the user process by (1) eliminating the need for manual phone number entry and (2) reducing the time and effort necessary for enrollment by removing a double opt-in's confirmatory message, while still complying with applicable regulations. The inventors' solution—claimed by the '897 patent and embodied in Patent Owner's two-tap technology—enabled an SMS sign-up solution in two simple taps: one tap to interact with a call-to-action button, which deeplinks from one application to a messaging application with a recipient phone number and/or message body prefilled, and one tap to interact with the send button of the messaging application:

At the core of Attentive patent-pending technology is what the company calls the “two-tap” sign-up. The point of this novel feature is to allow brands to lay out the shortest possible path between piquing a user’s interest in the brand, to having them sign up for a regular flow of marketing texts.

(EX-2015 1.) An example of the “Two-Tap” Product is depicted below:



(EX-2016 3.) The patented two-tap solution resolved the problems present in the prior art, eliminating the need for manual entry and double opt-in and making enrollment in a text message subscription service extremely simple for users.

The inventors were the first to recognize that deeplinking technology could not only be used to transfer a user from one application to another, but that it could be used specifically to transfer a user to a messaging application and pre-populate a

message as means for complying with regulatory requirements. The patented claims expressly contemplate and claim the means for doing so—i.e., displaying an invitation or offer to subscribe to a text messaging subscription service (cls. 15, 24), causing the mobile device to automatically transition to a messaging application and populate a custom text message based on the user data (cls. 15, 24), and delivering an installment of the subscription in response to authenticating the mobile device (cls. 15, 19, 24).

The authentication aspect of the claimed invention—against the backdrop of the TCPA—was particularly important in terms of solving the prior art problem. The inventors' solution presented not only a user-friendly solution, but also the new gold standard for compliance.³ The restrictions put in place by the TCPA, telecom carriers, and best practices, such as double opt-in, also served to teach away from the inventors' two-tap solution. (*E.g.*, EX-2014 4 (recommending double opt-in as a “best practice”).) Simply put, the claimed invention enabled direct-to-consumer marketing through SMS messaging, as a result of the claimed technological advancements.

³ For example, a federal court in Florida validated Attentive's compliance features and templates, including its two-tap technology. (EX-2016 2.)

B. The Claimed Invention Received Industry Praise

Industry praise for an invention evidences nonobviousness where the industry praise is linked to the claimed invention.

Patent Owner released its embodying two-tap technology in 2017. This platform for completing messaging-based enrollments initiated from a website on a mobile device received significant industry praise. In 2018, Patent Owner was named “Mobile Marketing Company” of the year by Digital Marketing News (“DMN”). (EX-2017 5.) In 2019, DMN awarded named inventor and co-founder, Brian Long, its 40UNDER40 Award, including for his achievement in creating “a new revenue channel: mobile messaging.” (EX-2012 1.) In 2021, Patent Owner was awarded Glossy’s “Best Use of SMS,” including for its use of “an easy opt-in system and device-agnostic sign-up creatives” that prioritized “convenience and automation.” (Ex-2018 8.) In 2023, The Tech Tribune ranked Patent Owner #10 “Best Tech Startup[] in NYC,” including for “reinventing business-to-consumer communications” as a result of its “SMS-first software platform.” (EX-2019 11.) Customers of Patent Owner’s “two-tap” sign-up specifically recognized the platform’s “[o]ne click opt-in” as the “Gold Standard, often imitated.” (EX-2020 11 (11/10/2023 review), 12 (12/13/2022 review).)

Other praise for Patent Owner's software includes: Businesswire's "#6 World's Best Software" (EX-2021 1); LinkedIn's #8 U.S. Startup (EX-2022 1-2); Forbes's #14 "Cloud 100" (EX-2023 7); and G2's #63 Fastest Growing Products (EX-2024 8).

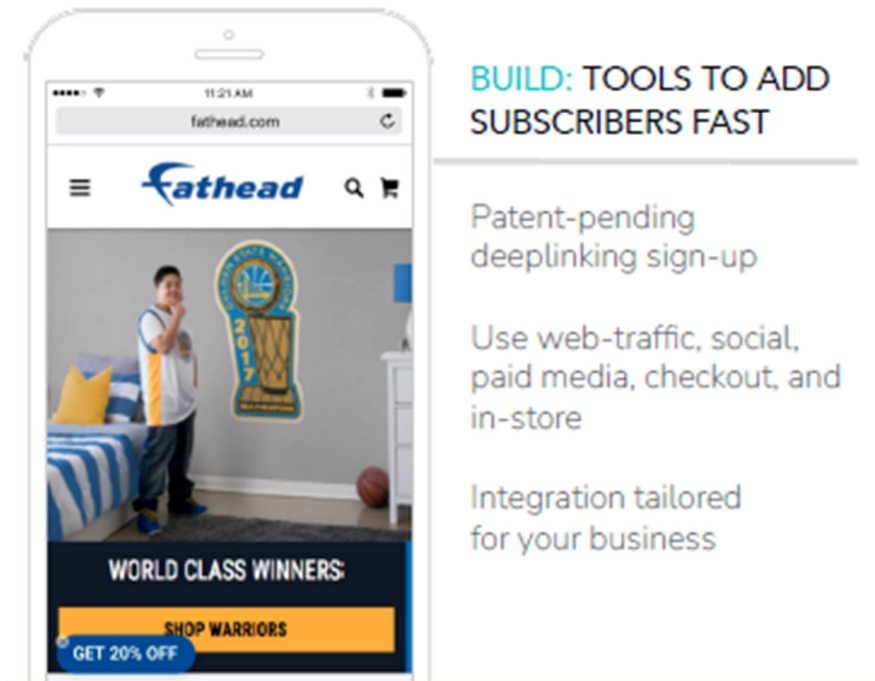
C. Patent Owner's "Two-Tap" Product Enjoys Substantial Commercial Success

A patentee demonstrates commercial success by showing significant sales of the patented product in a relevant market and nexus between the patented invention and the commercial success. *J.T. Eaton & Co. v. Atlantic Paste & Glue Co.*, 106 F.3d 1563 (Fed. Cir. 1997); *Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1311-12 (Fed. Cir. 2006). Advertising the benefits of the claimed invention links the invention to commercial success. *Gambro Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573, 1579 (Fed. Cir. 1997). Also, statements that a product was successful due to the patented features support a finding of nexus. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1368 (Fed. Cir. 2013).

As evidenced below, Patent Owner implemented the claimed invention of the '897 patent in its two-tap technology to meet the growing demand for improved user experience and engagement when interacting with web-based advertisements using a mobile device. Patent Owner was founded in 2016; its first offering, which remains its primary offering, is its two-tap technology. The two-tap technology has

resulted in significant commercial success not only for Patent Owner, but also for its customers. In addition to Patent Owner's own revenue, its two-tap technology has generated “**\$13+ billion in SMS revenue**” in 2022, alone, for its customers from the sending of “**21.8 billion text messages.**” (EX-2025 2.) Patent Owner's two-tap technology also yields significant return on investment for its customers, with them “making an average of \$55 dollars for every \$1 spent.” (EX-2027 3.) Patent Owner was also recently named to the Deloitte Fast 500 list, which highlighted Patent Owner's **1,259% growth rate** from 2019-2022. (EX-2026 1.) As a direct result of its two-tap technology, Patent Owner has become “the #1 conversational marketing platform” (*id.*) and “[t]he biggest company in the space.” (EX-2027 3). There can be no doubt that Patent Owner's two-tap technology is extremely valuable and commercially successful.

Patent Owner advertised its implementation of the '897 patent (and its benefits) in its two-tap technology:

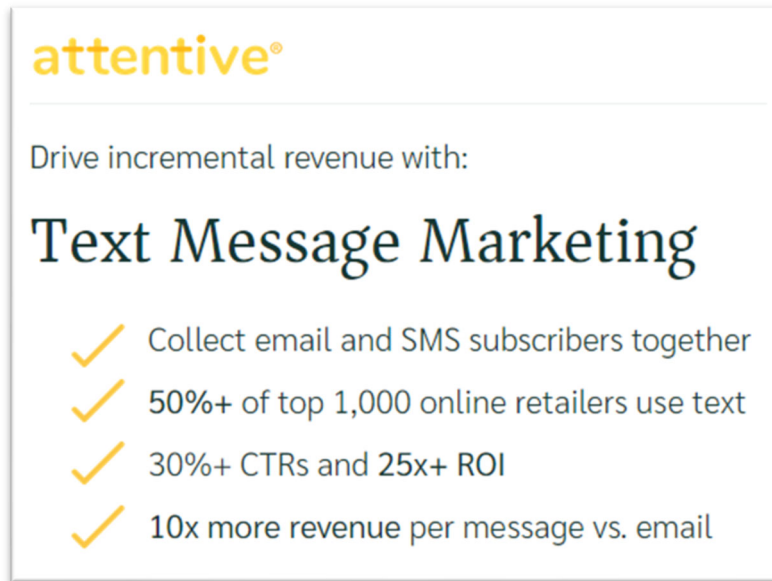


(EX-2036 13.) Patent Owner marketed its patented technology as “[p]owered by Attentive [d]eeplinking” and “[e]asily integrated with existing ad solutions and partners.” (*Id.* 14, 17.)



(EX-2028 3.) Additionally, Patent Owner virtually marks its two-tap technology as practicing the challenged claims. (EX-2029 1.)

Moreover, the extensive promotion by Patent Owner of the improved user experience and enrollment results underscores how such technology drives demand and commercial success of such products. For example, Patent Owner boasts that its embodying product yields significantly higher click-through rates and return on investment:



(EX-2037 1.) When Patent Owner implemented its two-tap sign-up technology on Instagram, it achieved immediate success. (EX-2030 2.)

Other industry leaders have similarly commented on the importance of Patent Owner's two-tap technology—specifically, the user experience and ease of use in completing enrollments in promotional activities. For example, Sacra's corporate report on Patent Owner states the following:

Attentive is a SMS platform that creates personalized messages by leveraging consumer behavior data. Its main feature is “two-tap” sign-up, which lets brands minimize the path between catching a user's interest and convincing them to agree to a regular flow of marketing texts. First, the user notices something on a brand's website that causes them to click on a call to action to opt in. Via Attentive's tech, the user's

text message app automatically displays a pre-written sign-up request, which gets sent to the brand's designated phone number.

(EX-2013 5.) Sama Labs recognized the invention's simplicity as the key to profitability:

Another is with Attentive's patent-pending "two-tap" method on mobile websites. A user taps the pop-up on a brand's mobile site to sign up for SMS. Then, a message giving the brand permission to opt the user in is pre-populated in the user's native text messaging app. The user simply presses send and is opted in to begin receiving messages. Simplicity is key – that's what makes SMS Marketing so profitable.

(EX-2031 2-3; EX-2032 2; EX-2015 1.) "Attentive has made a big achievement which is worth appreciating." (EX-2033 1.)

This evidence shows that the patented, improved method for enrolling users from web-based advertisements and the ability to minimize taps which Patent Owner implemented in its two-tap technology was a substantial factor in the commercial success of the embodying product. It has been well-recognized in the industry that user engagement is critical to obtaining enrollment in promotional activities. (EX-1001 1:30-46.) Patent Owner implemented the claimed invention to accomplish the very objectives of that invention—to improve user experience and engagement when

interacting with web-based advertisements using a mobile device. (EX-2001 ¶¶113-120.)

* * *

Accordingly, Patent Owner's two-tap technology, which implemented the patented method, was commercially successful and received widespread industry praise as a direct result of the claimed invention. The evidence supporting these secondary considerations constitutes strong objective evidence that the claims are nonobvious and confirms Petitioner's reliance on hindsight in constructing its deficient grounds.

VIII. CONCLUSION

Accordingly, the Board should decline to institute the petition.

Date: February 22, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

The undersigned hereby certifies that the portions of the above-captioned PATENT OWNER'S PRELIMINARY RESPONSE specified in 37 C.F.R. § 42.24 includes 13,969 words and therefore complies with the 14,000-word limit set forth in 37 C.F.R. § 42.24. This word count was prepared using Microsoft Word 365 v.2022.

Date: February 22, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **PATENT OWNER'S PRELIMINARY RESPONSE** and all supporting **EXHIBITS 2001-2043** were served by filing the documents through the Patent Trial and Appeal Case Tracking System (P-TACTS) as well sent via Federal Express on February 22, 2024 and courtesy copies were also served via electronic mail, in their entireties on the following:

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