

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ATTENTIVE MOBILE INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 22-1163-CJB
	)	
317 LABS, INC. d/b/a EMOTIVE,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	

DEFENDANT’S INITIAL INVALIDITY CONTENTIONS

Pursuant to the Court’s Scheduling Order (Dkt. No. 29), Defendant 317 Labs, Inc. d/b/a Emotive (“Emotive”) hereby serve its Initial Invalidity Contentions (the “Invalidity Contentions”) for U.S. Patent Nos. 11,416,887 and 11,416,897 (collectively, the “Asserted Patents”).

I. INTRODUCTORY STATEMENT

Emotive understands that Plaintiff Attentive Mobile Inc. (“Plaintiff” or “Attentive”) has asserted the following claims, which are collectively referred to herein as the “Asserted Claims”:

Asserted Patent	Asserted Claims
11,416,887 (the ’887 Patent)	1-20
11,416,897 (the ’897 Patent)	15-30

The Preliminary Infringement Contentions (the “Infringement Contentions”) served by Attentive on May 30, 2023, are vague, ambiguous, and incomplete, and do not provide the specificity necessary to allow Emotive to adequately respond. For example, the Scheduling Order required Plaintiff to produce an initial claim chart “relating each known accused product to the asserted claims each such product allegedly infringes.” Dkt. 29. Attentive has failed to do

so. Specifically, despite the accused Emotive service at issue being a public facing web-based service with publicly accessible functionality, Attentive's Infringement Contentions identify insufficient detail on what aspects of the accused system are alleged to correspond to the asserted claim limitations. As such, the contentions fail to apprise Emotive of Attentive's infringement theories. *See also*, Emotive's June 17, 2023, letter to Attentive.

To the extent that these Invalidity Contentions rely on or otherwise embody particular constructions of terms or phrases in the Asserted Claims, Emotive is not proposing any such constructions as proper constructions of those terms or phrases. Various positions put forth in this document are predicated on the claim constructions Attentive appears to be taking (to the extent Attentive's infringement contentions can be understood), which are often incorrect. Thus, the positions reflected in these contentions are not intended to and do not necessarily reflect Emotive's interpretation of the true and proper scope of Attentive's claims, and Emotive reserves the right to adopt positions on how the claims should be applied that differ from or even conflict with various positions put forth in this document. Emotive offers these Invalidity Contentions in response to Attentive's Infringement Contentions, notwithstanding the deficiencies therein, without prejudice to any position Emotive may ultimately take as to the proper application of the claims. Thus, Emotive's Invalidity Contentions should not be interpreted as suggesting that Attentive's reading of the Asserted Claims is correct, that any of the Asserted Claims are not indefinite, or as an admission that any of Emotive's products or technology, past or present, infringe any claim of the Asserted Patents. Emotive specifically denies any such infringement.

These Invalidity Contentions, including the attached exhibits, are subject to modification, amendment, and/or supplementation for any reason permitted by law and the rules of this court, including in the event that Attentive provides any information that it failed to provide in its

Initial Infringement Contentions or attempts to cure the deficiencies in its Infringement Contentions, including in Emotive's Final Invalidity Contentions, and/or in light of Attentive's Final Infringement Contentions, any findings as to the priority or invention date of the Asserted Claims, and/or positions that Plaintiffs or their expert witness(es) may take concerning claim construction, infringement, and/or invalidity issues. For instance, Attentive has not shown that the claims in its asserted patents can receive the benefit of the associated provisional application. Further, because discovery is not complete, Emotive reserves the right to revise, amend, and/or supplement the information provided herein, including identifying and relying on additional references, should Emotive's further search and analysis yield additional information or references.

The Invalidity Contentions herein are based on Emotive's present knowledge, and Emotive reserves the right to amend these contentions if it identifies new material despite its reasonable efforts to prepare these contentions. Emotive's investigation regarding invalidity of the Asserted Patents over prior art and regarding other grounds of invalidity, including those based on abstract idea under 35 U.S.C. § 101, anticipation under 35 U.S.C. § 102, obviousness under 35 U.S.C. § 103, failure to comply with 35 U.S.C. § 112 is ongoing. There may be products that were known or in public use prior to the filing dates of the applications leading to the Asserted Patents, but Emotive must first obtain additional information regarding these products using available discovery tools.

Moreover, prior art not included in this disclosure, whether known or unknown to Emotive, may become relevant. In particular, Emotive is currently unaware of the extent, if any, to which Attentive may contend that limitations of the Asserted Claims are not disclosed in the prior art identified by Emotive or will contend that any of the identified references does not

qualify as prior art under § 102. To the extent that such issues arise, Emotive reserves the right to identify additional teachings in the same references or in other references that anticipate or would have made the addition of the allegedly missing limitation to the apparatus or method obvious. Relatedly, Attentive has asserted the same patents in another case in Delaware, *Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript*, Case No. 23-00087, and Emotive reserves the right to supplement its invalidity contentions with any prior art or invalidity contentions disclosed during that litigation.

II. INVALIDITY OF THE '887 PATENT

A. Invalidity Based on 35 U.S.C. § 101

Each Asserted Claim of the '887 Patent is invalid for failing to recite patentable subject matter under 35 U.S.C. § 101. Each asserted claim the '887 Patent is directed to an abstract idea. The asserted claims lack an inventive concept because they implement the abstract idea using conventional computing techniques. Each asserted claim of the '887 Patent is therefore directed to an abstract idea and is not patentable under 35 U.S.C. § 101. For example, claim 1 is directed to the abstract idea of enrolling users in promotions and lacks any inventive concept.

Emotive's current position on the invalidity of the '887 patent is encapsulated in Emotive's Motion to Dismiss filed October 31, 2023, Dkt. 9, which is scheduled for hearing on July 14, 2023. Dkt. 43.01.

Emotive's investigation concerning invalidity of the Asserted Patents under Section 101 is ongoing. For example, Plaintiff has not provided adequate infringement contentions and discovery is ongoing. Accordingly, Emotive reserves the right to supplement and/or amend its invalidity contentions with respect to Section 101.

B. Invalidity Based on 35 U.S.C. §§ 102 and 103

1. Background of the Prior Art

As shown below, the asserted claims of the '887 Patent, and each of the elements of the asserted claims, were well known in the art prior to the date of the alleged inventions. Examples of these disclosures and embodiments are identified in the following sections and in the attached Invalidity Claim Charts in Exhibits A-1 through A-4. In addition to the anticipatory and obviousness references identified above, Emotive may also rely on any reference cited in the references identified herein to establish the state of the art and the knowledge of a person of ordinary skill in the art at the time of the alleged inventions of the asserted claims.

2. Identifications of the Prior Art References and Products

Subject to the reservations of rights above, Emotive identifies prior art that anticipates and/or renders obvious one or more of the asserted claims of the '887 Patent. The prior art references and products identified are also relevant to show the state of the art and reasons and motivations for making improvements, additions, modifications, and combinations.

The following prior art references and products anticipate and/or render obvious the asserted claims of the '887 Patent and/or illustrate the state of the art at the time of the alleged invention:

Ex. No.	Prior Art Ref.	Country of Origin	Filing Date	Publication or Issue Date
Ex. A-1	US11,223,586	USA	December 29, 2016	January 11, 2022
Ex. A-2	2015/0134431	USA	November 3, 2014	May 14, 2015
Ex. A-3	2015/0170210	USA	December 11, 2014	June 18, 2015
Ex. A-4	E. Wild & A. Vaha-Sipila, <i>URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS)</i>	USA		January 2010

Ex. No.	Prior Art Ref.	Country of Origin	Filing Date	Publication or Issue Date
Ex. A-5	2007/0208879	USA	March 1, 2007	September 6, 2007
Ex. A-6	US9,917,802	USA	March 14, 2017	September 28, 2017
Ex. A-7	US10,212,113	USA	September 19, 2016	March 22, 2018
Ex. A-8	2013/0277422	USA	March 15, 2013	October 24, 2013
Ex. A-9	US2003/0032409	USA	March 18, 2002	February 13, 2003

3. Past Disclosures

Emotive incorporates by reference all invalidity contentions and any supplemental or amended invalidity contentions or equivalent disclosure of prior art for the '887 Patent served on Attentive in other litigations or patent office proceedings (past, present/ongoing, or future). Specifically, and without limitation, Emotive incorporates by reference disclosures of prior art from the ongoing proceeding below:

- *Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript*, Case No. 23-00087 (D. Del.)

4. Obviousness Type Double Patenting

Discovery is ongoing and Emotive reserves the right to assert that the asserted claims of the '887 Patent are invalid under the doctrine of obviousness-type double patenting.

5. Anticipation and Obviousness

The references in Exhibits A-1 through A-9 disclose elements of the asserted claims explicitly and/or inherently. These references may also be relied upon to show the state of the art at the relevant time and/or that elements of the asserted claims, or any asserted claim as a whole, would have been obvious to a person having ordinary skill in the art at the time of the alleged invention. Obviousness combinations are provided in the alternative to Emotive's anticipation contentions and are not to be construed as suggesting that any reference included in the combinations is not by itself anticipatory.

The references in Exhibits A-1 through A-9 are applied to the Asserted Claims. The fact that Emotive's disclosures pertain only to the asserted claims of the '887 Patent should not be construed to suggest that any of the other claims of the Asserted Patents are valid. Should Plaintiff be permitted to amend its infringement contentions to assert additional or alternative claims, or modify the bases for their contentions, Emotive reserves the right to modify, amend, or supplement these disclosures.

Various references discussed in Exhibits A-1 through A-9 may be of greater or lesser relevance and different combinations of these references may be implicated depending on how Plaintiff applies the claims in their Final Infringement Contentions. In view of Emotive's uncertainty regarding how Plaintiff will contend the claims apply, the discussion of the different references in Exhibits A-1 through A-9 may reflect alternative applications of the prior art against the asserted claims. Emotive reserves the right to combine references from separate charts in additional obviousness combinations. A more detailed discussion of Emotive's Section 102 and/or 103 defenses will be set forth in its expert report(s) on invalidity.

Emotive provides pinpoint citations to exemplary portions of the prior art for the purpose of fairly disclosing the manner in which the prior art references meet the claim limitations. Such citations should not be construed to mean that other portions of the prior art references are not relevant to the invalidity of the claims. Emotive specifically reserves the right to rely on the entirety of any or all of the prior art references—whether charted or not charted—as a basis for asserting invalidity of the Asserted Claims and/or as necessary to supplement its invalidity contentions with additional citations and evidence.

The cited portions of each prior art reference are exemplary and representative of the content of the reference and should be understood in the context of the reference as a whole, as

understood by a POSITA. To the extent a prior art reference is deemed not to anticipate or render obvious a claim as noted in the attached charts for failing to disclose, teach, or suggest one or more limitations of a claim, that claim would nonetheless have been obvious to POSITAs at the time of the invention over the reference itself or by the combination of the reference with one or more other references disclosing the missing claim limitations or the knowledge of a POSITA.

6. Motivation to Combine

A POSITA would have been motivated to combine the preceding references in Exhibits A-1 through A-9 for reasons set forth below. Teachings, suggestions, motivations and/or reasons to modify any of the references and/or to combine any two or more of the references can come from many sources, including the prior art, common knowledge, common sense, predictability, expectations, industry trends, design incentives or need, market demand or pressure, market forces, obviousness to try, the nature of the problem faced, and/or knowledge possessed by a POSITA.

A patent claim may be invalidated based on a teaching-suggestion-motivation (“TSM”) rationale—i.e., that some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior-art reference or to combine prior-art reference teachings to arrive at the claimed invention—the Supreme Court identified additional rationales in *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007). The following of these rationales apply here:

(A) the asserted claims combine prior-art elements according to known methods to yield predictable results;

(B) the asserted claims involve the simple substitution of one known element for another to obtain predictable results;

(C) the asserted claims involve the use of a known technique to improve similar devices (methods, or products) in the same way;

(D) the asserted claims apply a known technique to a known device (method, or product) ready for improvement to yield predictable results;

(E) the asserted claims involve combinations of prior-art references that would have been “obvious to try”—a person of ordinary skill in the art could have reached the asserted claims by choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success;

(F) the asserted claims are simply variations of work from one field of endeavor or a different one that would have been prompted based on design incentives or other market forces because the variations were predictable to one of ordinary skill in the art.

See KSR, 550 U.S. at 414-18 (rejecting the Federal Circuit’s “rigid” application of the teaching, suggestion, or motivation to combine test, and instead espousing an “expansive and flexible” approach); *see also* Department of Commerce, Patent and Trademark Office, Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International Co. v. Teleflex Inc.*, 72 Fed. Reg. 57,526 (Oct. 10, 2007). Indeed, the Supreme Court held that a POSITA is “a person of ordinary creativity, not an automaton” and “in many cases a person of ordinary skill in the art will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR*, 550 U.S. at 420–21.

Thus, even in the absence of a specific teaching, suggestion, or motivation to combine references, the asserted claims here are obvious and therefore invalid. Each of the cited references or devices is in the same field (e.g., online or network connected commercial marketing services), making it obvious for someone of ordinary skill in the art to identify and combine elements from these references. One of ordinary skill in the art would have recognized that improvements could be achieved by combining or modifying prior-art references that describe such improvements. Each of the above prior-art references describes devices or methods that were known to offer such improvements, and, accordingly, one of ordinary skill in the art would have been motivated to combine or modify the references as identified in each of

the combinations above. Indeed, given that the references are in the same field, one of ordinary skill would have readily, with predictable results, taken teachings from one reference and applied them to other references.

Each of the identified prior art references, methods, and systems is related to the field of online or network connected interactive computer systems. And, the references themselves discuss the benefits of applying their disclosures to existing prior art interactive computer systems. Further, the above-identified prior art references, methods, and systems include related patents, patent applications, publications, and/or commercial products from the same inventor, author, or company. A person of ordinary skill in the art would naturally look to related patents, patent applications, publications, and commercial products to provide insight into how the inventors, authors, or companies framed and applied the inventions, teachings, and commercial products.

To the extent that Plaintiff claims that the subject matter of the herein identified prior art references, methods, and systems differs from that claimed in the '887 patent, a person of ordinary skill in the art would have been motivated to combine the teachings of the above-identified prior art references, methods, and systems (and the knowledge of a person of ordinary skill in the art) based on the nature of the problem to be solved, design needs, and market pressures, as well as the express suggestions in the articles such as their described technical and economic advantages.

For example, a person of ordinary skill in the art would have been motivated to use the capabilities of mobile devices available at the time to improve the experience of its users. Specifically, mobile devices available at the time, such as the iPhone or Samsung Galaxy, contained relatively powerful processors and relatively large amounts of memory. By way of

another example, a person of ordinary skill in the art would have been motivated to use the known capabilities of URIs and deep linking, capabilities which have been made known for years.

E. Wilde and A. Vaha-Sipila in particular wrote in January 2010 on the technical capabilities of URIs for deep linking in their memo provided as part of the Internet Engineering Task Force (“IETF”) “URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS).” *See*, <http://www.ietf.org:80/rfc/rfc5724.txt> (January 2010). The memo describes the use of URIs to for linking to a device’s default SMS delivery method, specifying one or more recipients, and prefilling text message content. *See id*, at pp 1, 10, 13.

As another example, to the extent that any reference is found to not disclose “delivery of an installment” as recited in claim 1, a person of ordinary skill would recognize that Liu discloses the delivery of an installment after receiving the text message. *Liu*, US2007/0208879 at ¶ 51. As such, it would have been obvious to a person of ordinary skill to combine the actual delivery of installments upon receipt of the text message at the server.

As another example, to the extent that any reference is found to not disclose “authenticate the mobile device based on the user data received” as recited in Claims 3, 4, 9, a person of ordinary skill would recognize that Hutcheson discloses the use of user data to authenticate a mobile device. *Hutcheson*, US2003/0032409 at ¶ 168.

Moreover, because the ’887 patent simply arranges old elements known in the computer field, with each performing the same function it had been known to perform and yields no more than what one would expect from such an arrangement, the combination is obvious. The above-identified prior art references, methods, and systems merely use those familiar elements for their primary or well-known purposes in a manner well within the ordinary level of skill in the art.

The above-identified prior art also address the same or similar technical issues and suggest the same or similar solutions to those issues. Accordingly, common sense and the knowledge of the prior art render the claims invalid under either Section 102 or Section 103.

The discussion above, which provides additional reasons to combine the above references, should not be construed as an admission that there is any value to the alleged invention of the '887 Patent. As discussed previously, these contentions are based in part on how Plaintiff is apparently applying the asserted claims in their Infringement Contentions, which is a vague, incorrect, and overbroad interpretation of the alleged invention of the '887 Patent. Accordingly, to the extent the above refers to benefits of certain elements or industry trends towards these elements, this is not an admission that the alleged invention of the '887 Patent provides any benefits. To the contrary, properly construed and compared to the prior art, the '887 Patent provides no benefits. Likewise, to the extent the above refers to substituting elements, this is not an admission that the elements subject to the substitution are in any way similar, e.g., perform the same function, in the same way, to reach the same result.

The various elements of the asserted claims were well known in the prior art at the time of the alleged invention, and the combination was obvious to one of skill in the art. The combination simply (a) combines prior-art elements according to known methods to yield predictable results; (b) involves the simple substitution of one known element for another to obtain predictable results; (c) involves the use of a known technique to improve similar devices (methods, or products) in the same way; (d) applies a known technique to a known device (method, or product) ready for improvement to yield predictable results; (e) involves combinations of prior-art references that would have been “obvious to try” – a POSITA could have reached the asserted claims by choosing from a finite number of identified, predictable

solutions, with a reasonable expectation of success; and/or (f) would have been prompted by known work, based on design incentives or other market forces, because such variations were predictable to one of ordinary skill in the art.

Moreover, the Supreme Court has stated that a motivation to combine may be simply “common sense” and that “familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR*, 550 U.S. at 420. Indeed, the Supreme Court held that it is sufficient that a combination of elements was “obvious to try,” holding that, “[w]hen there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp.” *Id.* at 421. Here, all the claim elements are common sense and are easily fit together by one of ordinary skill in the art.

While not necessary, a motivation to combine may also be found in the references themselves. One of ordinary skill in the art would have been motivated to combine a reference that refers to, or otherwise explicitly invites combination with, another reference. Where the references cited herein have such an explicit invitation to combine, that invitation would have motivated one of skill in the art to combine any such references.

Exemplary Obviousness Combinations:

Emotive identifies the following combinations of prior art references that render the Asserted Claims invalid as obvious under 35 U.S.C. § 103. To the extent any Asserted Claim of the '887 Patent is not rendered invalid on anticipatory grounds, the following combinations of prior art references identified in the charts in Exhibits A-1 through A-9 or listed above render obvious the Asserted Claims listed below. Any prior art reference in the “Reference A” column may be combined with any one or more of the prior art references identified in the “Reference

B” column to render the Asserted Claims obvious under 35 U.S.C. § 103. These combinations are offered in the alternative and to the extent any prior art reference identified in the “Reference A” column does not by itself anticipate any one of the Asserted Claims.

Reference A	Reference B
Rosenberg	Georgoff, Rhee, URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS) (“GSM-SMS”), Weinberg, Melzer, Badr, Liu, Hakansson, Adatia, Hutcheson
Georgoff	Rosenberg, Rhee, URI Scheme for GSM-SMS, Weinberg, Melzer, Badr, Liu, Hakansson, Adatia, Hutcheson
Rhee	Rosenberg, Georgoff, URI Scheme for GSM-SMS, Weinberg, Melzer, Badr, Liu, Hakansson, Adatia, Hutcheson

Claim 1. As an example, to the extent that any reference is found to not disclose using a URI to “automatically populating a custom message” as recited in claim 1, a person of ordinary skill would recognize that Wilde discloses this limitation. *See*, E. Wild, A. Vaha-Sipila’s, *URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS)*, (“URI Scheme for GSM-SMS”), INTERNET ENGINEERING TASK FORCE (“IETF”), <http://www.ietf.org:80/rfc/rfc5724.txt> (January 2010). Wilde discloses a method of embedding predetermined custom messages within URIs that are sent using the “user agent’s default SMS delivery method.” *Id.* at 10. A person of ordinary skill in the art would be capable of combining the method of using URIs in Wilde with online advertisement systems (such as those disclosed the prior art) to improve said systems. A person of ordinary skill in the art would be motivated to

make such a combination because by doing so promotes the “consensus of the IEFT community” and allows for predictable interoperability between devices. *Id.* at 1.

Claim 2. As another example, to the extent that any reference is found not to disclose the limitation that the user “device is enrolled without the click-to-text server charging a fee,” *Liu* discloses the enrollment in a promotion without cost. US2007/0208879 at Fig. 6. A person of ordinary skill in the art would be capable of determining that providing promotions for free is standard industry practice and naturally associated with advertisements. A person of ordinary skill in the art would be motivated to make such a mundane combination because most promotions are provided free of charge.

For at least the reasons set forth in Exhibits A-1 through A-9 and discussed above, each prior art reference disclosed in the preceding sections, either alone or in combination with other prior art, also renders the asserted claims invalid as obvious. In particular, each prior art reference may be combined with: (1) information known to persons skilled in the art at the time of the alleged invention; (2) any of the other anticipatory prior art references; and/or (3) any of the additional prior art identified above.

7. Additional Background References

In addition to the anticipatory and obviousness references identified above, Emotive also relies on the references in the table below to establish the state of the art and the knowledge of a person of ordinary skill in the art at the time of the alleged inventions of the asserted claims. The basic concepts and components in the asserted claims were all well-known to persons of ordinary skill in the art prior to the alleged priority date of the Asserted Patent as reflected in the references lists in the below table.

List of Additional Background References

Title or Pat. No. / Pub. No.	Author / Publisher or Inventor	Issue, Publication, or Filing Date
<i>All You Need to Know About Mobile Deep Link</i>	SimiCart	February 14, 2017
<i>Mobile deep linking</i>	Wikipedia	May 24, 2017
<i>Deep Linking in SMS Marketing: How it Works and Why it's Awesome</i>	Textmunication	December 13, 2017

Discovery is ongoing, and Emotive's prior art investigation and third-party discovery is therefore not yet complete. Emotive reserves the right to present additional items of prior art under 35 U.S.C. § 102(a), (b), (e) and/or (g), and/or 35 U.S.C. § 103 located during the course of discovery or further investigation, as well as update its 35 U.S.C. § 102(f) assertions. Emotive further reserves the right to assert invalidity under 35 U.S.C. § 102(c) or (d) to the extent that discovery or further investigation yield information forming the basis for such assertions.

C. Invalidity Based on 35 U.S.C. § 112

Emotive's investigation concerning invalidity under 35 U.S.C. § 112 is ongoing. For example, Plaintiffs have not provided adequate infringement contentions and discovery is ongoing. Thus, Emotive reserves the right to supplement and/or amend its invalidity contentions with respect to § 112. Notwithstanding, the following claim terms are indefinite: the phrase "integration tag configured to be served;" "the URI ... configured to ... in response to the mobile device detecting a user interaction with a promotional message associated with the webpage;" and "without the click-to-text server charging a fee to a user of the mobile device". Such supplementation and/or amendments may include, but are not limited to, invalidity contentions based on indefiniteness, lack of written description, and/or lack of enablement.

III. INVALIDITY OF THE '897 PATENT

A. Invalidity Based on 35 U.S.C. § 101

Each asserted claim the '897 Patent is, same as the '887 Patent, directed to an abstract idea. The asserted claims lack an inventive concept because they implement the abstract idea using conventional computing techniques. Each asserted claim of the '897 Patent is therefore directed to an abstract idea and is not patentable under 35 U.S.C. § 101. For example, claim 15 is directed to the abstract idea of enrolling customers in subscription services and lacks any inventive concept.

Emotive's current position on the invalidity of the '897 patent is encapsulated in Emotive's Motion to Dismiss filed October 31, 2023, Dkt. 9, which is scheduled for hearing on July 14, 2023. Dkt. 43.01.

Emotive's investigation concerning invalidity of the Asserted Patents under Section 101 is ongoing. For example, Plaintiff has not provided adequate infringement contentions and discovery is ongoing. Accordingly, Emotive reserves the right to supplement and/or amend its invalidity contentions with respect to Section 101.

B. Invalidity Based on 35 U.S.C. §§ 102 and 103

1. Background of the Prior Art

As shown below, the asserted claims of the '897 Patent, and each of the elements of the asserted claims, were well known in the art prior to the date of the alleged inventions. Examples of these disclosures and embodiments are identified in the following sections and in the attached Invalidity Claim Charts in Exhibits B-1 through B-4. In addition to the anticipatory and obviousness references identified above, Emotive may also rely on any reference cited in the references identified herein to establish the state of the art and the knowledge of a person of ordinary skill in the art at the time of the alleged inventions of the asserted claims.

2. Identification of the Prior Art References and Products

Subject to the reservations of rights above, Emotive identifies prior art that anticipates and/or renders obvious one or more of the asserted claims of the '897 Patent. The prior art references and systems identified are also relevant to show the state of the art and reasons and motivations for making improvements, additions, modifications, and combinations.

The following prior art references and products anticipate and/or render obvious the asserted claims of the '897 Patent and/or illustrate the state of the art at the time of the alleged invention:

Ex. No.	Prior Art Ref.	Country of Origin	Filing Date	Publication or Issue Date
Ex. B-1	11,223,586	USA	December 29, 2016	October 12, 2017
Ex. B-2	2015/0170210	USA	December 11, 2014	June 18, 2015
Ex. B-3	2015/0134431	USA	November 3, 2014	May 14, 2015
Ex. B-4	E. Wild & A. Vaha-Sipila, <i>URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS)</i>	USA		January 2010
Ex. B-5	2007/0208879	USA	March 1, 2007	September 6, 2007
Ex. B-6	US9,917,802	USA	March 14, 2017	September 28, 2017
Ex. B-7	US10,212,113	USA	September 19, 2016	March 22, 2018
Ex. B-8	2013/0277422	USA	March 15, 2013	October 24, 2013
Ex. B-9	2003/0032409	USA	March 18, 2002	February 13, 2003

3. Past Disclosures

Emotive incorporates by reference all invalidity contentions and any supplemental or amended invalidity contentions or equivalent disclosure of prior art for the '887 Patent served on Attentive in other litigations or patent office proceedings (past, present/ongoing, or future).

Specifically, and without limitation, Emotive incorporates by reference disclosures of prior art from the ongoing proceeding below:

- *Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript*, Case No. 23-00087 (D. Del.)

4. Anticipation and Obviousness

The references in Exhibits B-1 through B-9 and the Prior '897 Charts disclose elements of the asserted claims explicitly and/or inherently. These references may also be relied upon to show the state of the art at the relevant time and/or that elements of the asserted claims, or any asserted claim as a whole, would have been obvious to a person having ordinary skill in the art at the time of the alleged invention. Obviousness combinations are provided in the alternative to Emotive's anticipation contentions and are not to be construed as suggesting that any reference included in the combinations is not by itself anticipatory.

The references in Exhibits B-1 through B-9 and the Prior '897 Charts are applied to the Asserted Claims. The fact that Emotive's disclosures pertain only to the Asserted Claims should not be construed to suggest that any of the other claims of the Asserted Patents are valid. Should Plaintiff be permitted to amend its infringement contentions to assert additional or alternative claims, or modify the bases for their contentions, Emotive reserves the right to modify, amend, or supplement these disclosures.

Various references discussed in Exhibits B-1 through B-9 and the Prior '346 Charts may be of greater or lesser relevance and different combinations of these references may be implicated depending on Plaintiff's proposed claim constructions. In view of Emotive's uncertainty regarding how Plaintiff will contend the claims apply, the discussion of the different references in Exhibits B-1 through B-9 and the Prior '897 Charts may reflect alternative applications of the prior art against the asserted claims. Emotive reserves the right to combine references from separate charts in additional obviousness combinations. A more detailed

discussion of Emotive's Section 102 and/or 103 defenses will be set forth in Emotive's expert report(s) on invalidity.

Emotive provides pinpoint citations to exemplary portions of the prior art for the purpose of fairly disclosing the manner in which the prior art references meet the claim limitations. Such citations should not be construed to mean that other portions of the prior art references are not relevant to the invalidity of the claims. Emotive specifically reserves the right to rely on the entirety of any or all of the prior art references—whether charted or not charted—as a basis for asserting invalidity of the Asserted Claims and/or as necessary to supplement its invalidity contentions with additional citations and evidence.

The cited portions of each prior art reference are exemplary and representative of the content of the reference and should be understood in the context of the reference as a whole, as understood by a person of skill in the art (POSITA). To the extent a prior art reference is deemed not to anticipate or render obvious a claim as noted in the attached charts for failing to disclose, teach, or suggest one or more limitations of a claim, that claim would nonetheless have been obvious to POSITAs at the time of the invention over the reference itself or by the combination of the reference with one or more other references disclosing the missing claim limitations or the knowledge of a POSITA.

5. Motivation to Combine

A POSITA would have been motivated to combine the preceding references in Exhibits B-1 through B-9 and the Prior '897 Charts for at least the reasons set forth herein. Teachings, suggestions, motivations and/or reasons to modify any of the references and/or to combine any two or more of the references can come from many sources, including the prior art, common knowledge, common sense, predictability, expectations, industry trends, design incentives or

need, market demand or pressure, market forces, obviousness to try, the nature of the problem faced, and/or knowledge possessed by a POSITA.

A patent claim may be invalidated based on a teaching-suggestion-motivation (“TSM”) rationale—i.e., that some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior-art reference or to combine prior-art reference teachings to arrive at the claimed invention—the Supreme Court identified additional rationales in *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007). The following of these rationales apply here:

- (A) the asserted claims combine prior-art elements according to known methods to yield predictable results;
- (B) the asserted claims involve the simple substitution of one known element for another to obtain predictable results;
- (C) the asserted claims involve the use of a known technique to improve similar devices (methods, or products) in the same way;
- (D) the asserted claims apply a known technique to a known device (method, or product) ready for improvement to yield predictable results;
- (E) the asserted claims involve combinations of prior-art references that would have been “obvious to try”—a person of ordinary skill in the art could have reached the asserted claims by choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success;
- (F) the asserted claims are simply variations of work from one field of endeavor or a different one that would have been prompted based on design incentives or other market forces because the variations were predictable to one of ordinary skill in the art.

See KSR, 550 U.S. at 414-18 (rejecting the Federal Circuit’s “rigid” application of the teaching, suggestion, or motivation to combine test, and instead espousing an “expansive and flexible” approach); *see also* Department of Commerce, Patent and Trademark Office, Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International Co. v. Teleflex Inc.*, 72 Fed. Reg. 57,526 (Oct. 10, 2007). Indeed,

the Supreme Court held that a POSITA is “a person of ordinary creativity, not an automaton” and “in many cases a person of ordinary skill in the art will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR*, 550 U.S. at 420–21.

Each of the identified prior art references, methods, and systems is related to the field of online or network connected interactive computer systems. And, the references themselves discuss the benefits of applying their disclosures to existing prior art interactive computer systems. Further, the above-identified prior art references, methods, and systems include related patents, patent applications, publications, and/or commercial products from the same inventor, author, or company. A person of ordinary skill in the art would naturally look to related patents, patent applications, publications, and commercial products to provide insight into how the inventors, authors, or companies framed and applied the inventions, teachings, and commercial products.

To the extent that Plaintiff claims that the subject matter of the herein identified prior art references, methods, and systems differs from that claimed in the '897 patent, a person of ordinary skill in the art would have been motivated to combine the teachings of the above-identified prior art references, methods, and systems (and the knowledge of a person of ordinary skill in the art) based on the nature of the problem to be solved, design needs, and market pressures, as well as the express suggestions in the articles such as their described technical and economic advantages.

For example, a person of ordinary skill in the art would have been motivated to use the capabilities of mobile devices available at the time to improve the experience of its users. Specifically, mobile devices available at the time, such as the iPhone or Samsung Galaxy, contained relatively powerful processors and relatively large amounts of memory. By way of

another example, a person of ordinary skill in the art would have been motivated to use the known capabilities of URIs and deep linking, capabilities which have been made known for years.

E. Wilde and A. Vaha-Sipila in particular wrote in January 2010 on the technical capabilities of URIs for deep linking in their memo provided as part of the Internet Engineering Task Force (“IETF”) “URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS).” *See*, <http://www.ietf.org:80/rfc/rfc5724.txt> (January 2010). The memo describes the use of URIs to for linking to a device’s default SMS delivery method, specifying one or more recipients, and prefilling text message content. *See id*, at pp 1, 10, 13.

As another example, to the extent that any reference is found to not disclose “delivery of an installment” as recited in Claims 15 and 24, a person of ordinary skill would recognize that Liu discloses the delivery of an installment after receiving the text message. *Liu*, US2007/0208879 at ¶ 51. As such, it would have been obvious to a person of ordinary skill to combine the actual delivery of installments upon receipt of the text message at the server.

Moreover, because the ’897 patent simply arranges old elements known in the computer field, with each performing the same function it had been known to perform, and yields no more than what one would expect from such an arrangement, the combination is obvious. The above-identified prior art references, methods, and systems merely use those familiar elements for their primary or well-known purposes in a manner well within the ordinary level of skill in the art. The above-identified prior art also addresses the same or similar technical issues and suggests the same or similar solutions to those issues. Accordingly, common sense and the knowledge of the prior art render the claims invalid under either Section 102 or Section 103.

Defendants believe that no showing of a specific motivation to combine the prior art references disclosed above and in the attached charts is required, as each combination of art would have no unexpected results and at most would simply represent a known alternative to one of ordinary skill in the art. *See KSR Int'l Co. v Teleflex, Inc.*, 127 S. Ct. 1727, 1739-40 (2007) (rejecting the Federal Circuit's rigid application of the teaching, suggestion, or motivation to combine test, instead espousing an "expansive and flexible" approach). Indeed, the Supreme Court held that a person of ordinary skill in the art is "a person of ordinary creativity, not an automaton" and "in many cases a person of ordinary skill in the art will be able to fit the teachings of multiple patents together like pieces of a puzzle." *Id.* at 1742. Nevertheless, in addition to the information contained above and elsewhere in these contentions, Defendants hereby identify exemplary motivation and reason to combine the cited art.

In addition, the motivation to combine the teachings of the prior art references disclosed herein is found in the references themselves and: (1) the nature of the problem being solved, (2) the express, implied, and inherent teachings of the prior art, (3) the knowledge of a persons of ordinary skill in the art, (4) the fact that the prior art is generally directed towards methods and systems for single sign-on operations, and/or (5) the predictable results obtained in combining the different elements of the prior art.

Any reference or combination of references that anticipates or makes obvious an asserted independent claim also makes obvious any Asserted Claim dependent from that independent claim because every limitation of each dependent claim was known by a person of ordinary skill at the time of the alleged invention, and it would have been obvious to combine those known limitations with the independent claims at least as a matter of common sense and routine work.

Numerous prior art references, including those identified above and in the Exhibits, reflect common knowledge and the state of the prior art before the priority dates of the '897 patent. As it would be unduly burdensome to create detailed claim charts for the thousands of invalidating combinations, such charts are not provided. For at least the reasons described above and below in the examples provided as well as in the attached claim charts, it would have been obvious to one of ordinary skill in the art to combine any of a number of prior art references, including any combination of those identified in Exhibit B-1 to Exhibit B-9 and the Prior '897 Charts, to meet the limitations of the Asserted Claims. As such, Defendants' inclusion of exemplary combinations, in view of the factors and motivations identified in the preceding paragraphs, does not preclude Defendants from identifying other invalidating combinations as appropriate.

The discussion herein should not be construed as an admission that there is any value to the alleged invention of the '897 Patent. As discussed previously, these contentions are based in part on how Plaintiff is apparently construing the asserted claims in its Infringement Contentions, which is an incorrect and overbroad interpretation of the alleged invention of the '346 Patent. Accordingly, to the extent the below refers to benefits of certain elements or industry trends towards these elements, this is not an admission that the alleged invention of the '346 Patent provides any benefits. To the contrary, properly construed and compared to the prior art, the '346 Patent provides no benefits. Likewise, to the extent the below refers to substituting elements, this is not an admission that the elements subject to the substitution are in any way similar, e.g., perform the same function, in the same way, to reach the same result.

The various elements of the asserted claims were well known in the prior art at the time of the alleged invention, and the combination was obvious to one of skill in the art. The

combination simply (a) combines prior-art elements according to known methods to yield predictable results; (b) involves the simple substitution of one known element for another to obtain predictable results; (c) involves the use of a known technique to improve similar devices (methods, or products) in the same way; (d) applies a known technique to a known device (method, or product) ready for improvement to yield predictable results; (e) involves combinations of prior-art references that would have been “obvious to try” – a POSITA could have reached the asserted claims by choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success; and/or (f) would have been prompted by known work, based on design incentives or other market forces, because such variations were predictable to one of ordinary skill in the art.

Moreover, the Supreme Court has stated that a motivation to combine may be simply “common sense” and that “familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR*, 550 U.S. at 420. Indeed, the Supreme Court held that it is sufficient that a combination of elements was “obvious to try,” holding that, “[w]hen there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp.” *Id.* at 421. Here, all the claim elements are common sense and are easily fit together by one of ordinary skill in the art.

While not necessary, a motivation to combine may also be found in the references themselves. One of ordinary skill in the art would have been motivated to combine a reference that refers to, or otherwise explicitly invites combination with, another reference. Where the

references cited herein have such an explicit invitation to combine, that invitation would have motivated one of skill in the art to combine any such references.

Exemplary Combinations:

As an initial matter, any of the references identified in Exhibits B-1 through B-9 and the Prior '897 Charts may be combined with one or more of each other (including the knowledge of a person of ordinary skill) to render the Asserted Claims obvious. Moreover, Defendants identify the following exemplary combinations of prior art references that render the Asserted Claims invalid as obvious under 35 U.S.C. § 103. To the extent any Asserted Claim of the '897 Patent is not rendered invalid on anticipatory grounds, the following combinations of prior art references identified in Exhibits B-1 through B-9 and the Prior '897 Charts or listed above the Asserted Claims obvious.

Emotive identifies the following combinations of prior art references that render the Asserted Claims invalid as obvious under 35 U.S.C. § 103. To the extent any Asserted Claim of the '897 Patent is not rendered invalid on anticipatory grounds, the following combinations of prior art references identified in the charts in Exhibits B-1 through B-9 or listed above render obvious the Asserted Claims listed below. Any prior art reference in the “Reference A” column may be combined with any one or more of the prior art references identified in the “Reference B” column to render the Asserted Claims obvious under 35 U.S.C. § 103. These combinations are offered in the alternative and to the extent any prior art reference identified in the “Reference A” column does not by itself anticipate any one of the Asserted Claims.

Reference A	Reference B
Rosenberg	Georgoff, Rhee, URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS) (“GSM-SMS”), Weinberg, Melzer, Badr, Liu, Hakansson, Adatia, Hutcheson

Reference A	Reference B
Georgoff	Rosenberg, Rhee, URI Scheme for GSM-SMS, Weinberg, Melzer, Badr, Liu, Hakansson, Adatia, Hutcheson
Rhee	Rosenberg, Georgoff, URI Scheme for GSM-SMS, Weinberg, Melzer, Badr, Liu, Hakansson, Adatia, Hutcheson

For at least the reasons set forth in Exhibits B-1 through B-9 and discussed above, each prior art reference disclosed in the preceding sections, either alone or in combination with other prior art, also renders the asserted claims invalid as obvious. In particular, each prior art reference may be combined with: (1) information known to persons skilled in the art at the time of the alleged invention; (2) any of the other anticipatory prior art references; and/or (3) any of the additional prior art identified above.

Claims 15, 24. As an example, to the extent that any reference is found to not disclose using a URI to “automatically populating a custom message” as recited in Claims 15 and 24, a person of ordinary skill would recognize that Wilde discloses this limitation. *See*, E. Wild, A. Vaha-Sipila’s, *URI Scheme for Global System for Mobile Communications (GSM) Short Message Service (SMS)*, (“URI Scheme for GSM-SMS”), INTERNET ENGINEERING TASK FORCE (“IETF”), <http://www.ietf.org:80/rfc/rfc5724.txt> (January 2010). Wilde discloses a method of embedding predetermined custom messages within URIs that are sent using the “user agent’s default SMS delivery method.” *Id.* at 10. A person of ordinary skill in the art would be capable of combining the method of using URIs in Wilde with online advertisement systems (such as those disclosed the prior art) to improve said systems. A person of ordinary skill in the art would

be motivated to make such a combination because by doing so promotes the “consensus of the IEFT community” and allows for predictable interoperability between devices. *Id.* at 1.

For at least the reasons set forth in Exhibits B-1 through B-8 and the ’897 Prior Charts and discussed above, each prior art reference disclosed in the preceding sections, either alone or in combination with other prior art, also renders the asserted claims invalid as obvious. In particular, each prior art reference may be combined with: (1) information known to persons skilled in the art at the time of the alleged invention; (2) any of the other anticipatory prior art references; and/or (3) any of the additional prior art identified above.

6. Additional Background References

In addition to the anticipatory and obviousness references identified above, Emotive also relies on the references in the table below to establish the state of the art and the knowledge of a person of ordinary skill in the art at the time of the alleged inventions of the asserted claims. The basic concepts and components in the asserted claims were all well-known to persons of ordinary skill in the art prior to the alleged priority date of the Asserted Patent as reflected in the references lists in the below table.

List of Additional Background References

Title or Pat. No. / Pub. No.	Author / Publisher or Inventor	Issue, Publication, or Filing Date
<i>All You Need to Know About Mobile Deep Link</i>	SimiCart	February 14, 2017
<i>Mobile deep linking</i>	Wikipedia	May 24, 2017
<i>Deep Linking in SMS Marketing: How it Works and Why it's Awesome</i>	Textmunication	December 13, 2017

Discovery is ongoing, and Emotive’s prior art investigation and third-party discovery is therefore not yet complete. Emotive reserves the right to present additional items of prior art

under 35 U.S.C. § 102(a), (b), (e) and/or (g), and/or 35 U.S.C. § 103 located during the course of discovery or further investigation, as well as update its 35 U.S.C. § 102(f) assertions. Emotive further reserves the right to assert invalidity under 35 U.S.C. § 102(c) or (d) to the extent that discovery or further investigation yield information forming the basis for such assertions.

C. Invalidity Based on 35 U.S.C. § 112

Emotive’s investigation concerning invalidity under 35 U.S.C. § 112 is ongoing. For example, Plaintiffs have not provided adequate infringement contentions and discovery is ongoing. Thus, Emotive reserves the right to supplement and/or amend its invalidity contentions with respect to § 112. Notwithstanding, the following claim term is indefinite: “user data” in Asserted Claim 15. Such supplementation and/or amendments may include, but are not limited to, invalidity contentions based on indefiniteness, lack of written description, and/or lack of enablement.

Of Counsel:

Richard F. Martinelli
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019-6142
(212) 506-5000

Jonathan Liu
Orrick, Herrington & Sutcliffe LLP
1000 Marsh Road
Menlo Park, CA 94025-1015
(650) 614-7400

Evan Brewer
Orrick, Herrington & Sutcliffe LLP
701 5th Avenue, Suite 5600
Seattle, WA 98104-7097
(206) 839-4300

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ASHBY & GEDDES

/s/ John G. Day

John G. Day (#2403)
Andrew C. Mayo (#5207)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
jday@ashbygeddes.com
amayo@ashbygeddes.com