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,	)	
	)	
Defendant.	)	
ATTENTIVE MOBILE INC.,	)	
	)	
Plaintiff / Counterclaim-Defendant,	)	
	)	
v.	)	C.A. No. 23-087 (CJB)
	)	
STODGE INC. d/b/a POSTSCRIPT,	)	
	)	
Defendant / Counterclaim-Plaintiff.	)	

JOINT CLAIM CONSTRUCTION BRIEF

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3	Excerpts from Deposition of Dr. Nathaniel Polish
4	Dictionary of Computer and Internet Terms (1st Ed.) (2016) ("webpage")
5	Newton's Telecom Dictionary (30th Ed.) (2016) ("webpage")
6	Dictionary of Computer and Internet Terms (1st Ed.) (2016) ("identifier")
7	Transcript of Oral Argument at 129, *Tonal Systems, Inc., v. iFIT, Inc.*, No. 20-1197-GBW-CJB (D. Del. Feb. 23, 2023)
8	Dictionary of Computer and Internet Terms (1st Ed. 2016) ("authentication")
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I. INTRODUCTION

A. Plaintiff's Opening Statement

Defendants' approach to claim construction follows a tired playbook of fabricating non-infringement positions under the guise of clarifying purported ambiguity. Defendants attempt to obtain constructions that depart from the plain and ordinary meaning and improperly import limitations from the intrinsic record. None of the terms Defendants identify are limited by any clear and unequivocal disclaimer found in the intrinsic record. Only one term ("integration tag") is subject to an express definition, which definition Defendants choose to ignore. Only Plaintiff's proposals provide the jury clarity about the meaning of the disputed terms—where any clarification is needed—without improperly incorporating additional limitations.

Defendants' proposals are flawed in numerous ways. For the URI term, Defendants point to extrinsic evidence to overly narrow the term; their proposal for the term, however, only serves to add more ambiguity. For the two terms reciting "means for," the parties agree that they are means-plus-function terms, but Defendants' proposals overly narrow the corresponding structure. Defendants' proposals for the remaining terms all improperly incorporate limitations from the specification or prosecution history. For many of those terms, Defendants seek to rewrite the claim language in a manner that reuses the same words of the disputed terms but unjustifiably adds additional language. Not only is it unnecessary and improper to deviate from the language chosen by the inventors, but the additional language proposed by Defendants also fails to clarify any purported ambiguity and only serves to add ambiguity. Defendants' attempts to rewrite the claims to manufacture non-infringement positions should be rejected.

1. Overview of Patented Technology

The Asserted Patents[1] are generally directed to Attentive's "two-tap" signup technology, which reduces friction for mobile device users to sign up for promotions or subscriptions by collapsing the signup process into two simple taps—an easier, more convenient process than conventional systems that often lost users to failed signups. *See, e.g.*, D.I. 62-1,[2] '887 Patent at 1:30-52.

In traditional systems, tapping promotions would redirect users to sign-up forms, thus pausing the user's previous activities (e.g., viewing websites, reading emails) and demand significant user involvement (e.g., inputting information). The combination of interrupting user activity and replacing it with burdensome sign-up processes, caused many users to abandon the sign-up process. *See id.*

Attentive's patented two-tap system overcame these deficiencies by creating a system where signup can be completed with only two simple taps: tapping promotions automatically opens a messaging application with a prepopulated message and tapping "send" completes signup. *See id.* at 21:54-61; *see also* D.I. 62-4, Provisional Application No. 62/511,413 (the "Provisional Application") at [0008] ("The first tap clicks on the rendered link on a mobile website, and the second tap sends the message.").

Attentive's two-tap system includes three components: a "click-to-text" server, "client server," and a "mobile device." Those components interact with each other in a particular way. The click-to-text server sends the client server an "integration tag." The client server includes that integration tag in a webpage. When the mobile device interacts with the integration tag, it

[1] The Asserted Patents are U.S. Patent Nos. 11,416,887; 11,416,897; and 11,553,074.
[2] For ease of reference, the docket citations herein are to C.A. No. 22-1163 (CJB), unless otherwise noted.

automatically sends user data to the client server or to the click-to-text server. The receiving server uses that received data to create and return a custom URI—one that deeplinks to the mobile device's messaging application with a custom message. If the user sends the message, the click-to-text server enrolls the mobile device in the promotion. *E.g.*, D.I. 62-1, '887 Patent at Claim 1.

The specification provides a general overview of the two-tap process as follows:

> In some implementations, in response to the user selecting, clicking or tapping the "sign-up" link 203 via the first user interface 201, the click-to-text server can dynamically request and receive, from, for example, the client database stored at the memory of the click-to-text server, the client's short code (e.g. 24321), the SMS message body (e.g. "Just send this message to join [Company Name] exclusive insiders, or Just send to purchase this red hat"). The client-to-text server can request and receive a platform specific deeplink (e.g., a URI of the second user interface) that causes the user mobile device's messaging application to be rendered at the user mobile device."
>
> In some implementations, when the user selects/clicks/taps the "send" button via the messaging application to send the message, the message can be sent to the wireless communication provider server (e.g., AT&T, Verizon) of the user mobile device. The wireless communication provider server can then make an application programming interface (API) call to the click-to-text server. The API call can trigger a response message back to the user mobile device with a link to set user's preferences. In some instances, this user preference page can use the same client domain.attn.tv domain specified in the site integration tag as described below.

Id. at 11:35-58.

B. Defendants' Answering Statement

To avoid invalidation of the claims on Section 101 grounds, Attentive argued that they represented concrete, "technical" solutions reflecting the inventors' particular "design choices." (D.I. 16 at 6, 8.) Having overcome the Rule 12 hurdle, Attentive now pivots and attempts to abstract what it once called "design choices" into generic concepts so vague they are basically meaningless. Attentive previously argued that generating and sending a "custom URI" was the key technical advance such that the claims recited more than merely having a computer generate a pre-filled enrollment request. (*Id.* at 6.) It now insists that a "uniform resource identifier," or

"URI," is nothing more than the notion of a "link that identifies a resource." (Attentive Opening Position, Term 1 at 6.) Attentive told the Court that having an integration tag "embed[ded] . . . in a webpage" and then "automatically execute[d]" by a browser was part of an inventive leap that transcended generic use of preexisting technology. (D.I. 16 at 15.) Attentive now argues that an "integration tag" need not be embedded in a webpage nor executed at all; it claims the integration tag does not even need to be "code," but rather merely "integrator instructions," whatever that may mean. (Attentive Opening Position, Term 3 at 34-35.)

The Court should adopt Defendants' proposed constructions, which hew closely to the intrinsic record where the intrinsic record is clear, and which align the terms with their well-established industry meaning where the intrinsic record provides little guidance. "URI," for example, is a term of art; its use was not accidental. Defendants' construction gives the term the meaning a person of ordinary skill in the art would readily recognize. Attentive's construction is not only so broad as to mean essentially nothing, but it reads the term "uniform" out of the claims. Defendants' construction of "integration tag" aligns with the claims' instruction that the integration tag be "executed" and the specification's consistent description of what the integration tag is and does. Attentive's construction unhelpfully changes "integration" to "integrator" and broadens "tag" to "instructions." That neither captures the meaning of the term nor assists the factfinder.

Attentive's other proposals are similarly vague and confusing. Attentive insists that the term "authenticate" has a well-established meaning but refuses to say what that meaning is, pointing to other claim language that does nothing to clarify the term. Likewise, in an apparent dispute about what it means for a text message to be "custom" given the fact that ***every*** text message is at a minimum addressed to a specific recipient, Attentive steadfastly refuses to take a

position. The Court should adopt Defendants' constructions, which attempt to actually clarify the meaning of these and other terms.

C. Plaintiff's Reply Statement

Relying heavily on extrinsic evidence, Defendants seek to improperly rewrite the claims under the guise of claim interpretation. For many terms, Defendants seek to insert redundant limitations into the individual terms and then read them completely out of the context of the language surrounding the terms. Defendants provide no justification for rewriting the claims to inject extrinsic definitions or to shoehorn other limitations that are already expressly recited in the claims into any of the disputed terms. Each of Defendants' proposals should be rejected.

D. Defendants' Sur-Reply Statement

Attentive struggles to defend its overbroad constructions, advancing arguments that defy logic. The Court should adopt Defendants' proposals, which are grounded in the intrinsic record and are consistent with how a POSITA would have understood the terms at the time of invention.

II. AGREED CONSTRUCTIONS

The parties agree on the constructions for the following terms and request that the Court adopt them. *See* D.I. 61 at 2.

Claim Terms or Phrases	Patent/Claim(s)	Agreed Construction
"a mobile device requesting and/or a webpage"	'897 Patent, claim 15	"a mobile device requesting and/or loading a webpage"
"the user data"	'897 Patent, claim 15	"user data sent from the mobile device to the at least one server"
"user data"	'897 Patent, claim 17	"the user data"

III. DISPUTED CONSTRUCTIONS

A. Term 1: "Uniform Resource Identifier (URI)"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"uniform resource identifier (URI)"	Plain and Ordinary Meaning, wherein the	"a compact sequence of characters that identifies a

’887 patent, claim 1; ’897 patent, claims 16 and 24; ’074 patent, claims 1, 8, 16, and 23.	Plain and Ordinary Meaning is “a link that identifies a resource.”	resource and that follows the syntax defined by Section 3 of the Internet Engineering Task Force’s RFC 3986 standard.”

1. Plaintiff’s Opening Position

Plaintiff’s proposed construction is compelled by intrinsic evidence and therefore should be adopted. In contrast, Defendants’ proposed construction appears to be based solely on extrinsic evidence; Defendants’ proposed construction appears nowhere in the intrinsic evidence, nor is it supported by it. Therefore, the Court should reject Defendants’ proposed construction.

As an initial matter, Defendants agree that a URI “identifies a resource,” and the parties’ disputes boil down to two questions. First, does a URI as recited in the asserted patents have to be “a compact sequence of characters?” Second, does a URI have to follow “the syntax defined by Section 3 of the Internet Engineering Task Force’s RFC 3986 standard?” The answer to both questions is no.

As introduced above, nowhere does the intrinsic evidence disclose, let alone require, that the URI is “a compact sequence of characters.” Instead, the specification consistently and repeatedly characterizes the URI as a link that can cause the launch of a second user interface, such as a messaging application. *See, e.g.*, D.I. 62-1, ’887 Patent, at 3:17-23 (“deep linking uses *a uniform resource identifier (URI) that links to a mobile application*”);[3] 11:35-46 (“The client-to-text server can request and receive a platform *specific deeplink (e.g., a URI of the second user interface)* that causes the user mobile device’s messaging application to be rendered at the user mobile device.”); 18:65-19:1 (“[T]he client-to-text server can determine, based on a mobile device identifier, *a uniform resource identifier (URI) (including, for example, a link syntax)* of a second

[3] Emphasis supplied, unless noted otherwise.

user interface at the user mobile device."). The Provisional Application, to which the Asserted Patents claim priority, also consistently and repeatedly discloses a link to cause the launch of a second user interface such as a messaging application, which, as discussed above, is one function performed by the URI. *See, e.g.*, D.I. 62-4, Provisional Application at [0005], [0006], [0007], [0010]-[0012], [0016]-[0018], and [0028]. Accordingly, a URI as recited in the Asserted Patents is a link and does not have to be a compact sequence of characters.

In addition, nowhere does the intrinsic evidence disclose, let alone require, that the URI follow "the syntax defined by Section 3 of the Internet Engineering Task Force's RFC 3986 standard," as proposed by Defendants. The specification at most discloses that the URI can include a link syntax. D.I. 62-1, '887 Patent at 18:62-19:15. The specification, or any other intrinsic evidence, however, does not require the URI to follow any particular syntax. For the above two reasons, the Court should adopt Plaintiff's proposed construction and reject Defendants' proposal.

Furthermore, Defendants' proposed construction would also cause unnecessary confusion to the jury. For example, the jury would have no idea what it means by "a compact sequence of characters," especially how compact is "compact" under Defendants' proposal. The jury would also need additional elaboration, from the Court, about "Section 3 of the Internet Engineering Task Force's RFC 3986 standard" to properly understand and apply the proposed construction. Adopting Defendants' proposed construction, which attempts to import limitations from extrinsic evidence, would not "ensure that the jury fully understands the court's claim construction rulings," as required by the Federal Circuit. *Power–One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1348 (Fed. Cir. 2010). In fact, Defendants' construction would do just the opposite. Plaintiff's proposed construction, on the other hand, is concise and clear to the jury because "link" is a well-known

concept in view of the widespread use of Internet technology. For this additional reason, the Court should adopt Plaintiff's proposed construction and reject Defendants' proposal.

2. Defendants' Answering Position

Attentive asks the Court to define the term "uniform resource identifier" to generically refer to any sort of "link" that refers to any sort of "resource." That is wrong as a matter of fact: as of the priority date, "URI" meant something very specific to a person of ordinary skill. Attentive's proposed construction also violates a cardinal rule of claim construction by reading the term "uniform" out of the claims. The Court should adopt Defendants' construction which correctly reflects the meaning of the term at the relevant time, and is clear and easy to apply.

a) "URI" was a well-known, precisely-defined technical term in 2017, with a well-established meaning.

The term "uniform resource identifier," or "URI," has been part of common industry nomenclature since the 1990s. (Declaration of Benjamin B. Benderson in Supp. of Def.'s Resp. *Markman* Br. (Benderson Decl.) ¶ 18. URIs were conceived and developed in the 1990's by a group of Internet pioneers, including Tim Berners-Lee, who is commonly credited with inventing the World Wide Web. (*Id.*) As the Internet expanded, so did the number of operating systems (*e.g.*, Mac OS, Microsoft Windows, the Linux Operating System, etc.) and protocols (*e.g.*, the HTTP protocol, the FTP protocol, etc.). (*Id.*) Berners-Lee and others recognized that interoperability and efficient navigation of the Web would not be possible without a standardized way of labeling and naming the location of a resource (*e.g.*, documents, images, webpages). (*Id.*) Accordingly, they proposed URIs as a *uniform* and flexible system for identifying resources on the Internet, regardless of the underlying technologies. (*Id.)*

The definition of a URI is memorialized in RFC 3986, a standards document published in 2005 by the Internet Engineering Task Force ("IETF"), the premier standards organization for the

Internet.[4] RFC 3986 explicitly defines a URI as "a compact sequence of characters that identifies an abstract or physical resource," and sets forth the precise syntax that all URIs must share:[5]

URI = [scheme]:[//authority][path][?query][#fragment]

It also defines the various components of a URI (*i.e.*, scheme, authority, path, query, and fragment). Although the most well-known type of URI is a uniform resource locator, *i.e.*, a "URL," used to identify a resource on the Internet, URIs are not so limited. For example:

Example	URI Type	Elements
https://www.example.com/path/to/resource	Unform resource locator, used to identify a resource on the Internet	Scheme: "https" Authority: "www.example.com" Path: "/path/to/resource"
urn:isbn:0451450523	Uniform resource name, used to identify a resource by something other than its location, such as identifying a book by its ISBN	Scheme: "urn" Path: "isbn:0451450523"
ftp://ftp.example.com/files/document.txt	FTP URI, used to identify a file available for transfer on a network	Scheme: "ftp" Authority: ftp.example.com Path: "/files/document.txt"
mailto:info@example.com	Mailto URI, used to identify a destination email address	Scheme: "mailto" Path: "info@example.com"

(Ex. 1, Benderson Decl. ¶ 23.)

[4] IETF has been responsible for standardizing a number of technologies central to the Internet, such as the Transport Layer Security ("TLS") protocol used in HTTPS communications, and the Domain Name System ("DNS") that lets browsers resolve URLs (like "google.com") to IP addresses. (Ex. 1, Benderson Decl. ¶ 19)

[5] Tim Berners-Lee et al., *Uniform Resource Identifier (URI): Generic Syntax*, 1, 16–24 (Jan. 2005), https://www.rfc-editor.org/rfc/pdfrfc/rfc3986.txt.pdf.

The syntax of URIs, as defined in RFC 3986, has remained the same through today. (*Id.* ¶ 25.) In 2017, as now, the URIs used by developers to identify resources within mobile applications to create deeplinks (*i.e.*, links to particular pages or locations within applications) in the Android and iOS operating systems follow the syntax described in RFC 3986. (*Id.* ¶ 34.) Both the U.S. Department of Commerce's National Institute of Standards and Technology and the 2016 Oxford Dictionary of Computer Science call out RFC 3986 in their definitions of "URI." (*See, e.g.*, Brent A. Cheikes et al., U.S. Dep't of Com., NIST 7695, *Common Platform Enumeration: Naming Specification Version 2.3* 1, 4 (2011), https://nvlpubs.nist.gov/nistpubs/Legacy/IR/nistir7695.pdf (defining URI as "[a] compact sequence of characters that identifies an abstract or physical resource available on the Internet. The syntax used for URIs is defined in [RFC3986]." (brackets in original)); URI (uniform resource indicator), *Oxford Dictionary of Computer Science* (7th ed. 2016) (defining URI as "[a]n identifier that uses the syntax defined in RFC 3986.").) It is entirely straightforward to determine whether a string meets the RFC 3986 requirements for a URI; if it weren't, RFC 3986 would not be much good as an interoperability standard, when in fact it has been used by developers the world over for nearly two decades. (Ex. 1, Benderson Decl. ¶ 22.) In other words, the standardized syntax set forth in RFC 3986 is the sense in which the "uniform resource identifier" is "uniform." Without it, programmers and developers would need to negotiate different URI formats across different applications. (*Id.* ¶ 18.)

This unanimous industry consensus about what URI means is precisely why the specification doesn't define the term. "Patent documents are written for persons familiar with the relevant field; the patentee is not required to include in the specification information readily understood by practitioners, lest every patent be required to be written as a comprehensive tutorial and treatise for the generalist, instead of a concise statement for persons in the field." *Verve, LLC*

v. Crane Cams, Inc., 311 F.3d 1116, 1119 (Fed. Cir. 2002). This is therefore a case in which "the district court will need to look beyond the patent's intrinsic evidence and to consult extrinsic evidence in order to understand, for example, the background science or the meaning of a term in the relevant art during the relevant time period." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331 (2015). The extrinsic evidence here makes clear that a person of ordinary skill in the art in 2017 would have readily understood the term "URI" to refer to the standard defined by RFC 3986 and in universal use to define online resources—including in the specific use case of mobile application deeplinking addressed by the Attentive patents. (Ex. 1, Benderson Decl. ¶) Indeed, a person of ordinary skill in the art in 2017 would have known that this ***had*** to be the meaning of URI, because attempting to refer to resources using a non-conforming format would have meant that he or she likely would not have been able to accomplish the Asserted Patents' main goal: create deeplinks to a messaging application in iOS and Android. (Ex. 1, Benderson Decl. ¶)

b) The intrinsic evidence supports Defendants' proposed construction

Because a person of ordinary skill in the art in 2017 attempting to implement the claimed invention in any of the mobile operating systems in common use at the time would have had to follow RFC 3986, the intrinsic record is unsurprisingly consistent with Defendants' proposed construction.

First, the term itself compels a construction in accordance with a standard that specifies a particular format. The claim term is "***uniform*** resource identifier." Defendants' construction gives the full claim term effect via the standard universally used to define URIs as of the priority date (and today). *Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 318 F.3d 1143, 1148 (Fed. Cir. 2003) ("Claim construction begins with the words of the claim"). By contrast, as discussed further below,

the claim language cannot be reconciled with Attentive's construction, which reads the term "uniform" out of the claim entirely.

Second, the specification states that the claimed URIs "can be used across a set of mobile operating systems including, for example, the Apple® iOS system and the Android™ system." ('887 patent at 3:17–23.) As discussed above, both iOS and Android used the URI syntax specified in RFC 3986.

Third, during prosecution, both the examiner and the applicant discussed the "schemes" specified in RFC 3986 as part of the URI syntax. ('569 File History, Feb. 20, 2020 Non-Final Office Action at 4–5, 6, 9 (2-20-2020) ("However, Dossick teaches the URI of the second user interface being uniquely associated with an operating system of the mobile device ([0031]: 'An application (e.g., native application 106} may, however, submit a request to OS 104 to determine if a specific URI scheme is supported'" (emphasis omitted)); '569 File History, Mar. 13, 2020 Response to Office Action at 8-10 ("Dossick discusses that a native application on a mobile device can submit a request to the operating system of the mobile device to determine if a specific URI scheme is supported. For example, Dossick discusses that 'a web browser application might register its ability to handle Uris of the scheme 'http' or 'https'.' (Dossick, [0031]) A URI for a certain scheme can be the same for different operating systems."); '380 File History, Aug. 27, 2021 Amendment and Response to Office Action at 11 ("During the interview, the Examiner specifically identified the disclosure in paragraph [0048] of *Prophete* that '[a URI] is a string of characters used to identify a name of a resource, thus enabling interaction with representations of the resource over a network, using specific protocols' . . . .").)

Finally, other patents in the intrinsic record used the term similarly. For example, U.S. Patent No. 9,811,395, a patent cited by the patents-in-suit, explains that "URI[s] can be opened by

various suitable operating systems" because "the URI is generated using a multi-platform syntax." ('395 patent at 3:61–65; *see also id.* at 8:21–32 ("The common URI syntax can be configured for use by a variety of operating system platforms. In this manner, a URI generated by the first software application can be consistent across operating system platforms.").) U.S. Patent No. 9,806,942, also cited by the patents-in-suit, describes a "uniform resource indicator (URL) scheme" for a corresponding mobile application, and notes that "a mobile app may support multiple URL schemes that may be reflected in the deep link information." ('942 patent at 10:19–34.) And U.S. Patent Application No. 2016/0210334 to Prophete, another reference cited by the patents-in-suit, states the following, clearly referring to RFC 3986:

A uniform resource identifier (URI) is a string of characters used to identify a name of a resource, thus enabling interaction with representations of the resource over a network, using specific protocols. Schemes specifying a concrete syntax and associated protocols define each URI. The most common form of URI is the uniform resource locator (URL), frequently referred to informally as a web address. The URL engine 120 encodes and decodes a URI component as part of the deep linking and state preservation process described below.

('380 File History, Aug. 27, 2021 Amendment and Response to Office Action at 11–12 (quoting U.S. Patent Appl. No. 2016/0210334 at [0048]).)

c) Attentive's construction is inconsistent with the intrinsic evidence and the understanding of a POSA

Attentive's proposed construction, on the other hand, cannot be reconciled with either the intrinsic or extrinsic evidence.

First, Attentive claims that its position is "compelled by intrinsic evidence," but Attentive's proposed construction, *i.e.*, "a link that identifies a resource," comes from nowhere in the intrinsic ***or*** extrinsic record. More problematically, by defining "URI" to be any sort of

identification of a resource via a "link," and by failing to make clear that a URI must hew to an agreed upon syntax, Attentive's construction reads the term "uniform" entirely out of the claim. That alone is sufficient to reject it. *See, e.g.*, *Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1257 (Fed. Cir. 2010); *Nautilus Group, Inc. v. Icon Health and Fitness, Inc.*, 82 F. App'x. 691, 694 (Fed. Cir. 2003) (improper to construe claims in a way that renders claim terms superfluous).

Second, Attentive's contention that a URI is a type of "link" is inaccurate and confusing. As the record makes clear, URIs and links are related concepts, but they are not the same thing. A URI, as the name implies, identifies a resource via a ***uniform*** syntax. (*See* Ex. 1, Benderson Decl. ¶ 29.) "Link" is a broad term that takes many different meanings depending on context. Attentive does not say what it means by "link." In the context of the patent, and of web applications and the Internet more broadly, "link" most commonly refers to a user interface object rendered on a webpage that, when clicked, directs a user to a resource. (*See id.*; '887 patent at 3:5 ("rendered link on a touchscreen"); 3:11–12 ("when the link is clicked"); 3:36–38 ("The mobile device can receive a first signal in response to the user selecting (or tapping) on the rendered link on a first mobile user interface").) In that context, links may contain URIs (often in the form of a URL) as the "href" attribute, but the URIs are not the "links." (*See* '569 File History, Mar. 21, 2019 Non-Final Office Action at 6-7 (describing a deeplink as something that a user "selects (either explicitly or implicitly)," as opposed to a URI, which is "deeplink information"); '155 File History,[6] Mar. 23, 2023 Office Action Summary (claims 1-25) at 13 ("In addition, the combination of Highbaugh and Isaacson discloses . . . receiving the URI in response to sending the indication of the user interaction to the webserver' (Isaacson ¶ 132) where the identifier

[6] All file history citations are either to the file histories of the patents-in-suit or to the file histories of related patents in the chain of priority.

'www.merchant.com/products/hats/greenhat' is sent as part of the deep link, which is in response to the first user interaction." (emphasis omitted)).) A POSA at the time of the invention would have understood a URI is not a link.

Attentive attempts to obfuscate this distinction by citing portions of the specification that use the term "link" and "URI" in the same sentence and claiming that such instances "repeatedly characterize[] the URI as a link." They do not. One of Attentive's examples supports Defendants' construction by stating that deep links may use URIs to direct a user to a mobile application. ('887 patent at 3:17–23 ("deep linking ***uses*** a uniform resource identifier (URI) that ***links to a mobile application***" (emphasis added)).) Another is ambiguous but suggests that a URI can contain the right syntax to create the right type of link in a particular user interface. (*Id.* at 18:64–19:1 ("In response to receiving the HTTP request from the user mobile device, the client-to-text server can determine, based on a mobile device identifier, a uniform resource identifier (URI) (including, for example, a link syntax) of a second user interface at the user mobile device.").) A third uses "e.g." to colloquially suggest that a URI is an example of a "deeplink," but does not explain what a "deeplink" is in this context and certainly does not use "link" as a synonym for "URI." (*Id.* At 11:35–46 ("The client-to-text server can request and receive ***a platform specific deeplink (e.g., a URI of the second user interface) that causes the user mobile device's messaging application to be rendered*** at the user mobile device." (emphasis added)).) At most, it suggests that a URI is one of the attributes that can be used in a link, which is consistent with the notion that a URI is something more specific than a generic "link."

In fact, Attentive elsewhere acknowledges that a URI means something more specific than merely a "link that identifies a resource." With respect to the "means for causing" term, Attentive takes the position that Defendants' identified corresponding structure of "a URI deeplinking to a

messaging application" is "overly limiting"—*i.e.*, too narrow—because the specification supposedly ***also*** associates the claimed function with structures like a "link," a "web link," or a "sign-up link," all of which Attentive says are different from a URI. (Attentive Opening Position, Term 2 at 28-29.) As discussed further below, Attentive is wrong that the specification associates the "means for causing" term with these other structures. (Defendants' Answering Position, Term 2 at 29-32.) But Attentive is right that a "link," a "web link," and a "sign-up link" are different from a URI.[7] And Attentive certainly cannot have it both ways.

Third, and relatedly, Attentive's attempt to elide the distinction between a "URI" and a "link" conflicts with other claim requirements. For example, claim 1 of the '887 patent requires the click-to-text server to "send a uniform resource identifier (URI) to the mobile device in response to the mobile device executing the integration tag." But it is unclear what it would mean to "send" a "link," which, as explained above, is not code or a discrete piece of information but instead a user interface object that is rendered to allow users to navigate from one location to another. (Ex. 1, Benderson Decl. ¶ 29; *see, e.g.*, '887 patent at 3:3–5 ("In some implementations, the purchase and/or subscription process can be initiated via a *rendered* link on a touchscreen mobile device. . . ." (emphasis added)).)

Fourth, as discussed above, the Court should reject Attentive's attempt to abstract the term "URI" to mean something as generic as "a link that identifies a resource" in view of Attentive's successful arguments at the Rule 12 stage that the generation and transmission of a custom URI was the key inventive leap that rendered the crux of the claims something other than the mere creation of a pre-filled enrollment request. (D.I. 16 at 3, 5–6; D.I. 59 at 7–8 ("More specifically,

[7] It is unclear if Attentive contends that a "sign-up link" or a "web link" is somehow not a "link that identifies a resource," but such a contention would be at odds with the plain meaning of these terms. A "sign-up link" presumably directs a user to a resource that enables her to sign up for something; a "web link" presumably directs a user to a resource on the Web.

what[is] key to the patent is that in response to a user clicking on a website's promotional advertising and using a first application, a URI generated by the claim's click-to-text server then deep[l]inks to a second messaging application[,] in which a custom enrollment message with data related to that user or the website that the user visited is automatically populated [in]to the messaging [app]."), 11, 13–14.) The briefing and argument on the Section 101 issues focused on the fact that URIs were preexisting technology (D.I. 16 at 3, 5–6, 15–16; July 14, 2023 Mot. to Dismiss Hr'g Tr. at 25:20–26:5, 16:9–14); now, at claim construction, Attentive suggests that they are actually an abstract concept. This is gamesmanship.

For these reasons, the Court should adopt Defendants' proposed construction.

3. Plaintiff's Reply Position

Defendants spent nearly ten pages on this term but failed to identify a single paragraph in the intrinsic evidence even hinting at, let alone *requiring* that the claimed "uniform resource identifier (URI)" is "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," as proposed by Defendants. Instead, Defendants rely solely on defective extrinsic evidence (*e.g.*, Dr. Bederson's declaration[8]) that contradicts the express teaching of the intrinsic record and therefore should not be considered. None of the intrinsic evidence identified by Defendants actually supports their proposed construction; in fact, the cited evidence tends to undermine Defendants' position. As neither the intrinsic nor the extrinsic evidence support Defendants' proposal, in addition to the fact that Defendants' proposal would cause unnecessary confusion to the jury (a

[8] Defendants use "Benderson" throughout their brief to refer to their supporting declaration, while the signing declarant is Dr. Bederson. Herein, Attentive uses "Bederson" to refer to Defendants' supporting declaration.

fact Defendants did not dispute in their Answering Position), the Court should reject Defendants' proposed construction and adopt Attentive's.

a) Defendants' proposed construction is based solely on extrinsic evidence that contradicts express teachings in the intrinsic evidence and therefore should not be considered.

Defendants first rely *solely* on extrinsic evidence to argue that "a person of ordinary skill in the art in 2017 would have known that [the standard defined by RFC 3986] ***had*** to be the meaning of URI, because attempting to refer to resources using a non-conforming format would have meant that he or she likely would not have been able to accomplish" interoperability across different operating systems, such as iOS and Android. Defendants' Answering Position, Term 1 at 8-11. But none of the asserted claims requires interoperability; in fact, the specification expressly discloses that a URI can be compatible with one operating system and not another, i.e., not interoperable. *See, e.g.*, D.I. 62-1, '887 Patent at 2:7-16 ("The URI of the second user interface is compatible with a first operating system and not a second operating system different from the first operating system."); see also '074 patent at claims 5 and 12. Therefore, the extrinsic evidence relied on by Defendants contradicts the express teaching of intrinsic evidence and therefore should not be considered. *Tempo Lighting, Inc. v. Tivoli, LLC*, 742 F.3d 973, 977 (Fed. Cir. 2014) (holding that an examiner erred by resorting to extrinsic evidence that was inconsistent with the more reliable intrinsic evidence); *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (en banc) ("[A] court should discount any expert testimony 'that is clearly at odds with the claim construction mandated by . . . the written record of the patent.'" (quoting *Key Pharms. v. Hercon Labs. Corp.*, 161 F.3d 709, 716 (Fed. Cir. 1998))). Because Defendants rely exclusively on this defective extrinsic evidence—a fact that Defendants did not dispute in their Answering Position —the Court should reject their proposed construction for this reason alone. Defendants' proposed construction would also exclude disclosed embodiments, in which the URIs are

compatible with one operating system and not another. For this additional reason, the Court should reject Defendants' proposed construction. *See Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1276 (Fed. Cir. 2008) ("We normally do not interpret claim terms in a way that excludes embodiments disclosed in the specification.").

Furthermore, to the extent that some embodiments in the specification do include interoperability, complying with RFC 3986 is not the only approach to achieve this. In fact, Dr. Bederson, Defendants' technical expert, readily admits that "[s]ome operating systems are forgiving and may allow for" syntax that do not follow the RFC 3986. Ex. 1, Bederson Declaration at ¶35. Dr. Polish, Attentive's technical expert, also opines that a URI can be constructed without complying with RFC 3986. Ex. 2, Declaration of Dr. Nathaniel Polish ("Polish Decl.") at ¶¶28-30. For this additional reason, the Court should reject Defendants' proposed construction.

b) The intrinsic evidence cited by Defendants also contradicts their proposed construction.

Defendants also cite intrinsic evidence that allegedly "supports" or "is unsurprisingly consistent with" their proposed construction. Defendants' Answering Position, Term 1 at 11-13. But the truth is quite the opposite; the intrinsic evidence Defendants cite actually contradicts their proposed construction.

First, Defendants contend that the word "uniform" requires interoperability and complain that Attentive's proposed construction reads the word "uniform" out of the claim entirely. *Id.* at 6. But as discussed above, the specification expressly teaches URIs that need not be interoperable, thereby defeating any contentions that "uniform" requires interoperability. *See*, *e.g.*, D.I. 62-1, '887 Patent at 2:7-16; D.I. 62-4, '074 Patent at claims 5 and 12. In addition, Attentive's proposed construction does not exclude interoperability. For example, a POSITA would readily understand that "a link that identifies a resource" can be either system-specific (not interoperable)

or system-agnostic (interoperable), as long as they are compatible with the operating system of the device where the URIs are sent to. Ex. 2, Polish Decl. at ¶32. Accordingly, Attentive's proposed construction does not read any word out of the claim term.

Second, Defendants contend that the specification discloses interoperability. Defendants' Answering Position, Term 1 at 12. But disclosing interoperability does not mean *requiring* interoperability, particularly here, where the specification also discloses embodiments that are NOT interoperable. *See* D.I. 62-1, '887 Patent at 2:7-16. As a result, the cited intrinsic record does not support Defendants' proposed construction and requiring interoperability would be error. *See Accent Packaging, Inc. v. Leggett & Platt, Inc.*, 707 F.3d 1318, 1326 (Fed. Cir. 2013) ("[A] claim interpretation that excludes a preferred embodiment from the scope of the claim is rarely, if ever, correct." (quoting *On–Line Techs., Inc. v. Bodenseewerk Perkin–Elmer GmbH*, 386 F.3d 1133, 1138 (Fed.Cir.2004))).

Third, Defendants rely on the prosecution history, but nothing in the prosecution history requires URIs to be interoperable. Quite the contrary, to overcome an office action citing to the *Dossick* reference, Applicant pointed out that *Dossick* discloses only "URI for a certain scheme [that] can be the same for different operating systems," i.e., *Dossick* discloses only interoperable URI. In contrast, the then-pending claims recited, "URI of the second user interface being *uniquely associated* with an operating system of the mobile device," which is not disclosed by *Dossick*. D.I. 62-15, '569 File History, 03/13 Response to OA at 9 (emphasis added). Therefore, a POSITA, after reviewing the prosecution history, would readily understand that the URI as claimed does not have to be interoperable. Ex. 2, Polish Decl. at ¶¶34-35.

Fourth, Defendants turn to several other patents cited on the face of the Asserted Patents (Defendants' Answering Position, Term 1 at 13), none of which supports Defendants' proposed

construction. For example, U.S. Patent No. 9,811,395 ("the '395 Patent") repeatedly discloses "platform-specific URI." *See, e.g.*, D.I. 62-26, '395 Patent at 4:19-33; 8:46-9:27. This means that the disclosed URI is not interoperable across multiple operating systems, thereby defeating Defendants' proposed construction. Ex. 2, Polish Decl. at ¶¶36-38. In addition, it is unclear how the disclosure in U.S. Patent No. 9,806,942 ("the '942 Patent") that "a mobile app *may* support multiple URL schemes" requires interoperability of the URL scheme. D.I. 62-25, '942 Patent at 10:19–34 (emphasis added). Furthermore, U.S. Patent Application No. 2016/0210334 ("the '334 Publication") expressly defines a URI as "a string of characters used to identify a name of a resource, thus enabling interaction with representations of the resource over a network, *using specific protocols*." *See* D.I. 62-10, '380 File History, 08/27 Response to OA at 11-12 (quoting '334 Publication at [0048]). The '334 Publication is completely silent as to compliance with RFC 3986, or interoperability across operating systems or applications, and to the contrary suggests that the URI can be protocol specific. *See id.*

c) Attentive's proposed construction is consistent with intrinsic evidence and the understanding of a POSA.

Defendants contends that "Attentive's proposed construction … cannot be reconciled with either the intrinsic or extrinsic evidence." But Defendants have not identified any material inconsistency.

First, Defendants contend that Attentive's proposed construction "comes from nowhere in the intrinsic or extrinsic record." Defendants' Answering Position, Term 1 at 23. But they conveniently ignored various paragraphs in the specification that characterize "URI" as a link. *See* Attentive Opening Position, Term 1 at 6-7 (citing D.I. 62-1, '887 Patent at 3:17-23, 11:35-46, 18:65-19:1; D.I. 62-4, Provisional Application at [0005], [0006], [0007], [0010]-[0012], [0016]-[0018], and [0028]).

Second, Defendants complain that "URI is not a link." Defendants' Answering Position, Term 1 at 14. But Attentive never argues that a URI is just a link; instead, Attentive proposes that a URI is a link *that identifies a resource*, which is more than a generic link as contended by Defendants. Indeed, as Dr. Bederson acknowledges, "A URI identifies a resource." Ex. 1, Bederson Declaration at ¶29. Attentive's proposed construction is consistent with Dr. Bederson's statement. Attentive's proposed construction of "URI" is also fully consistent with the proposed construction of the "means for causing" term. With reference to the "means for causing" term, Attentive takes the position that "a link," a "web link," or a "sign-up link" is different from "a URI deeplinking to a messaging application." This position does not contradict the construction that a URI is "a link that identifies a resource," at least because the link, web link, or sign-up link itself does not require deeplinking to a messaging application, i.e., they are different.

Third, Defendants contend that a link is "a user interface object" and cannot be sent. Defendants' Answering Position, Term 1 at 14-15. Nonsense. A POSITA in 2017 would have readily understood that a link could be transmitted, such as between a server and a user. Ex. 2, Polish Decl. at ¶¶39-41.

Fourth, Defendants contend that Attentive's proposed construction is allegedly "an abstract concept," and is therefore somehow inconsistent with its previous positions at Rule 12 stage, where Attentive argued that the generation and transmission of a custom URI was the key inventive leap. Defendants' Answering Position, Term 1 at 16-17. This is, again, false. As an initial matter, Defendants offer no explanation as to why "a link that identifies a resource" is supposedly abstract. Additionally, the Court already found that the Asserted Patents are not directed to an abstract idea, independent of the construction of URI. D.I. 56. Instead, the Court found that the asserted claims recite sufficient narrowing aspects, including the specific use of a URI, despite explaining that "the

patent suggests that the use of URIs with deep[l]inks w[as] known." *Id.* at 14. In other words, Attentive never contended that the mere recitation of URIs was, by itself, the inventive concept supporting patentability; instead, Attentive contended that the use of *custom* URIs contributed to the patentability of the asserted claims. *See, e.g.*, D.I. 16 in C.A. No. 23-087-CJB at 15-17.

4. Defendants' Sur-Reply Position

a) A "*uniform* resource identifier" must be uniform.

"Claim construction begins with the language of the claims themselves." *Imaginal Systematic, LLC v. Leggett & Platt, Inc.*, 805 F.3d 1102, 1108 (Fed. Cir. 2015). Attentive's construction of "uniform resource identifier" ("a link that identifies a resource") gives the term "uniform" no meaning, and indeed reads it out of the claim entirely. Remarkably, Attentive's brief does not address this point at all, and Attentive's expert admitted that Attentive's construction does not reflect the term "uniform" in any way. (Ex. 3, Dr. Nathaniel Polish Deposition Transcript Excerpts ("Polish Tr.") at 66:10–25 ("Q. Okay. So [Attentive's] construction is not attempting to give meaning to the term 'uniform'? A. Not – Not specifically, no.").) Attentive's construction should be rejected for this reason alone. *Merck & Co. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005) ("A claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so.").

b) Attentive's argument concerning interoperability misunderstands Defendants' position and is irrelevant.

Rather than address the glaring problem that its proposal reads "uniform" out of the term, Attentive devotes much of its argument to what appears to be a misunderstanding: the notion that Defendants' construction requires a URI to be "interoperable" between different operating systems and platforms. It does not. The term "interoperable" appears nowhere in Defendants' proposed construction. The expert declaration Defendants submitted makes clear that URIs can follow the

syntax prescribed by RFC 3986 without being interoperable across platforms—for example, the "smsto:" scheme is supported by Android but not Apple's iOS, while the "sms:" scheme is supported by both. (Ex. 1, Bederson Decl. ¶ 34.) Both types of URIs follow the syntax described in RFC 3986, with a scheme (*e.g.*, "sms:" or "smsto:"), followed by a path ("<phone_Number>") and a query ("?body=<message_body>"). Attentive's expert agrees that a URI can conform to RFC 3986 without being interoperable across platforms. (Ex. 3, Polish Tr. at 38:16–18.)

Defendants' only point about interoperability is that the uniform syntax set forth in RFC 3986 promotes it by ensuring that URIs are parsed the same way across operating systems and platforms. (Ex. 1, Bederson Decl. ¶¶ 20–21, 23–26, 28.) In other words, all URIs have a required "scheme,"[9] followed by an optional "authority," a required "path" (although the path can be empty), and an optional "query" and "fragment." (Ex. 1, Bederson Decl. ¶ 20.) This permits URI schemes (like "sms," "http," etc.) to be designed and implemented in a way that makes it trivial for operating systems and platforms to decide to support them should they choose to do so. Attentive's expert admitted that the only part of the specification that suggests to him that Defendants' construction is erroneous is the part that notes that URIs can be specific to an operating system. (Ex. 3, Polish Tr. at 54:1–10; '887 patent at 2:11–14.) But as Attentive's expert also admitted, Defendants' construction is entirely consistent with that premise: a URI may conform to RFC 3896 and be compatible or not compatible with any given mobile platform depending on whether the platform was designed to support a given scheme.[10] (Ex. 3, Polish Tr. at 38:16–18.)

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[9] In fact, Attentive's expert admitted that a URI must begin with a "scheme" like "http" or "ftp," contradicting his testimony that a URI can simply be a "link that identifies a resource" in any way. (Ex. 3, Polish Tr. at 18:13–19:15.)

[10] The references cited in the Attentive patents and prosecution history are consistent with this as well, making clear that certain URI schemes may or may not be supported by a given operating

Because Defendants' construction doesn't require a URI to be "interoperable" between different operating systems and platforms, the bulk of Attentive's reply brief on "URI" is completely irrelevant. Notably, Attentive identifies no other way that Defendants' proposal is inconsistent with any part of the intrinsic evidence. And Attentive has no response to Defendants' extrinsic evidence concerning the venerable history of the term "URI" (which Attentive's expert had no basis to dispute at deposition, (Ex. 3, Polish Tr. at 26:8–27:1)) or how it would have been understood by a POSITA in view of that history. Defendants' proposal is therefore a textbook application of extrinsic evidence considered in the context of the intrinsic record to arrive at a reliable indication of how a POSITA at the time of invention would have understood the term. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (Fed. Cir. 2005) ("extrinsic evidence can help educate the court regarding the field of invention and can help determine what a [POSITA] would understand claim terms to mean" when considered in the context of the intrinsic evidence).

c) Attentive's proposed construction is overbroad

Attentive's arguments concerning its own proposal—"a link that identifies a resource"—only confirm that it is an effort to get "URI" to mean anything at all. Notably, Attentive denies that a "link" in the context of the patents-in-suit is a user interface object that can be clicked or tapped, and argues that it also encompasses "content or data underlying the user interface object" like "an address" or "a pointer." (Ex. 2, Polish Decl.¶¶ 39–41.) Attentive feebly offers that its proposal is more particular than merely a "link" because it requires that the link "identify a resource," but does not explain how it would even be possible to have a link that does not identify

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system or protocol. ('569 File History, Mar. 13, 2020 Response to Office Action at 8-10 (*Dossick*); '380 File History, Aug. 27, 2021 Amendment and Response to Office Action at 11–12 ('334 publication); '395 patent at 4:19–33, 8:46–9:27.) Unsurprisingly, none of them discloses a "URI" that is inconsistent with RFC 3896. To the contrary, the only one of these references to give a concrete example of a URI discloses a string that follows the syntax described in RFC 3986. (*See, e.g.*, '395 patent at FIG. 1B.)

a resource given that a link is presumably linking to ***something***. (Attentive's Reply Position, Term 1 at 21–22.) Attentive's expert agreed during his deposition that the phrase "that identifies a resource" added no substantive requirements to the construction beyond what was required by "link." (Ex. 3, Polish Tr. at 61:3–62:12.) Attentive also gestures at the same paragraphs of the specification that it contends equate a URI and a link, ignoring the discussion in Defendants' brief about why that is not so.[11] (Attentive's Reply Position, Term 1 at 21–22; *see* Defendants' Answering Position, Term 1 at 15-16 (discussing '887 patent at 3:17–23, 11:35–64, 18:64–19:1).) The Court should reject Attentive's attempt to abstract out the meaning of a known technical term into a boundless concept and adopt Defendants' proposal, which captures what "URI" would have meant to a POSITA.

B. Term 2: "means for causing…"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"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, and (2) the second application to automatically populate a custom text message based on the user data" '897 patent, claim 15.	Means-plus-function term under 35 U.S.C. § 112(6). Function: 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.	Means-plus-function term under 35 U.S.C. § 112(6). Function: 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.

[11] Attentive also cites paragraphs from the provisional that do not use the term "URI," without explaining how they supposedly "characterize 'URI' as a link." (Attentive's Reply Position, Term 1 at 22.)

	Corresponding Structure: a link configured to cause the claimed functions.	Corresponding Structure: a URI deeplinking to a messaging application and configured to cause performance of the claimed functions.

1. Plaintiff's Opening Position

The Court should adopt Plaintiff's proposed construction because the intrinsic evidence "clearly links or associates" the corresponding structure as identified in Plaintiff's proposed construction to the function recited in the claim. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1351-52 (Fed. Cir. 2015) (citing *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311 (Fed. Cir. 2012)). In contrast, the corresponding structure in Defendants' proposed construction is over limiting and should be rejected. *See, e.g., Medical Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1213-14 (Fed. Cir. 2003) (recognizing that the Federal Circuit has "been generous in finding something to be a corresponding structure when the specification contained a generic reference to structure that would be known to those in the art and that structure was clearly associated with performance of the claimed function."); *see, e.g.*, *Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1366 (Fed. Cir. 2003) (holding generic "core logic" of computer was corresponding structure for writing data, even though specification did not disclose internal circuitry); *S3 Inc. v. nVIDIA Corp.*, 259 F.3d 1364, 1370-71 (Fed. Cir. 2001) (holding "selector" was adequate corresponding structure even though selector's electronic structure and operation were not disclosed); *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1381-82 (Fed. Cir. 2001) (holding "commercially available" vacuum sensors were adequate corresponding structure for "status sensing means").

Defendants agree that the recited function 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." The parties' dispute focuses on the corresponding structure that is disclosed in the specification to perform the recited function.

Defendants' identified structure, i.e., "a URI deeplinking to a messaging application," can certainly perform the recited function. *See* D.I. 62-1, '887 Patent at 2:7-24. But "a URI deeplinking to a messaging application" is not the only structure disclosed in the intrinsic evidence that can perform the recited function. For example, the specification expressly discloses that a user can simply click "a link" to initiate a mobile messaging application with a pre-populated custom text message. *Id.* at 3:8-28. In another example, the specification discloses that a user can "select, tap or click the *'sign-up' link* 203 and a messaging application (e.g., 211) is opened with a message 213 and a phone number 214 pre-populated to complete the purchase/subscription." *Id.* at 9:4-26; *see also id.* at 13:64-14:4 ("The promotional message 302 includes a *'sign-up' link* 304, when selected, clicked or tapped by the user, initiating a second user interface (not shown here) at the user mobile device."); *id.* at 15:9-18 ("The promotional message 404 includes a *'sign-up' link* 405, when selected, clicked or tapped by the user, initiating a second user interface (not shown here) at the user mobile device.").

In addition to the specification, the Provisional Application also clearly links or associates "a link" or "a web link" to the recited function. *See, e.g.*, D.I. 62-4, Provisional Application at [0006]-[0007] ("In some embodiments, the invention describes a website that creates *a link* that appears on a website, mobile application, mobile advertisement … When the link is clicked … a messaging mobile application is opened on a user's device."); *id.* at [0010]-[0012] ("FIGURE 1 demonstrates the process by which a user can click *a web link* on a mobile website or mobile

application to initiate a prefilled messaging application."); *id.* at [0028] ("If the user clicks *the link* … the ad server … invokes the user's native SMS client."). Therefore, a person of ordinary skill in the art ("POSITA"), after reviewing the intrinsic evidence, would readily recognize the link (e.g., a web link, a sign-up link, or a URI) in the intrinsic evidence and associate it with the recited function.

Plaintiff's proposal also results in a consistent reading of the other claims, while Defendants' proposal does not. For example, claim 16 depends from claim 15 and recites, in relevant part, that "the means for causing comprises a Uniform Resource Identifier (URI)." *See* D.I. 62-2, '897 Patent at Claim 16. Because the dependent claims to the "means for causing" must be narrower than the claims from which they depend, *Alcon Research, Ltd. v. Apotex Inc.*, 687 F.3d 1362, 1367 (Fed. Cir. 2012), Plaintiff's proposal gives meaning to all the claim language, where Defendants' proposal renders aspects of claim 16 superfluous, which is disfavored. *See Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004) ("[I]nterpretations that render some portion of the patent claim language superfluous are disfavored."); *see also Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005) ("A claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so." (citations omitted)).

Accordingly, the Court should adopt Plaintiff's proposed construction and reject Defendants' overly limiting proposal.

2. Defendants' Answering Position

"To meet the definiteness requirement, structure disclosed in the specification must be clearly linked to and capable of performing the function claimed by the means-plus-function limitation." *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc. (d/b/a The Home Depot)*, 412 F.3d 1291, 1299 (Fed. Cir. 2005). A "URI deeplinking to a messaging application"

is the only structure disclosed in the specification that corresponds to the full, recited function of the "means for causing" claim term. (*See, e.g.*, '887 patent at 2:7–14, 2:17–24, 3:64–67, 4:24–32, 10:16–44, 11:42–46, 18:64–19:3, 19:19–24, 21:50–67.)

Attentive admits that "'a URI deeplinking to a messaging application' can certainly perform the recited function," but asserts that Defendants' proposed construction should be rejected because it is "overly limiting." According to Attentive, the specification discloses a "link" as structure that can perform the recited function. Not so. Although the specification on occasion states that a user can open a messaging application with a pre-populated message by clicking on a link, other portions of the specification make clear that it is ***the URI contained within a link*** that causes this function to be performed. (*See, e.g.*, '887 patent at 3:64–67 ("The method includes sending a signal, based on the URI, to cause the second user interface to be rendered at the mobile device with the purchase information pre-populated to fulfill a purchase requested by the user."); 4:24–32 (same); 19:19–24 (same); 10:16–44 ("The client-to-text server can generate a response message including the URI of the second user interface and send the response message to the user mobile device to cause the second user interface to open with message and phone number pre-populated.").)

Attentive's prior litigation positions are consistent with Defendants' construction. In its opposition brief to Postscript's § 101 motion to dismiss, Attentive argued:

> Postscript could ignore those additional structural and functional elements if they were *inherent* to the abstract idea of using prefilled requests—*i.e.*, that they merely "spell out what it means to apply it on a computer." But that is obviously not the case. To the contrary, the recited combination of elements reflects a slew of original design choices. ***For example, the inventors decided that the prefilled message should be created by a custom URI that deep links to the messaging application. They decided that the URI should be created by a click-to-text server in response to user or webpage data received earlier from a mobile device***.

(D.I. 16 at 6 (second emphasis added) (internal citations omitted); *see also id.* at 3 ("The click-to-text server (A) uses that received data to create ***a custom Uniform Resource Locator ('URI') that deep links to the mobile device's messaging application (D) with a custom message*** that includes the click-to-text server's address and an identifier for the user or the webpage, and it communicates that custom URI (4) back to the browser (C)." (emphasis added)).) Thus, it is a URI deeplinking to a messaging application—not a link (which may or may not contain a URI)—that performs the recited function of the "means for causing" limitation.

Attentive separately argues that the doctrine of claim differentiation requires interpreting the corresponding structure to include more than a URI because dependent claim 15 discloses a URI as the corresponding structure. This argument, however, has already been rejected by the Federal Circuit:

> A means-plus-function limitation is not made open-ended by the presence of another claim specifically claiming the disclosed structure which underlies the means clause or an equivalent of that structure. If [that] argument were adopted, it would provide a convenient way of avoiding the express mandate of section 112(6). [The Federal Circuit] hold[s] that one cannot escape that mandate by merely adding a claim or claims specifically reciting such structure or structures.

Laitram Corp. v. Rexnord, Inc., 939 F.2d 1533, 1538 (Fed. Cir. 1991); *see also Welker Bearing Co. v. PHD, Inc.*, 550 F.3d 1090, 1098–99 (Fed. Cir. 2008) ("With regard to claim differentiation, this court is aware that claim 1 of the '478 patent recites a rotating element, while claim 1 of the '254 patent does not. This difference between claims in different patents does not change the meaning of these means-plus-function limitations. By statute, this court must follow the directive to construe these limitations according to § 112 ¶ 6. Because both terms share the same specification with the same structure corresponding to the claimed function, this court cannot give these terms any different scope."); *Medtronic, Inc. v. Advanced Cardiovascular Sys., Inc.*, 248

F.3d 1303, 1313 (Fed. Cir. 2001) ("It is settled law, however, that independent claims containing means-plus-function limitations do not have the same literal scope as dependent claims reciting specifically the structure that performs the stated function.").

3. Plaintiff's Reply Position

Defendants did not address at all the various disclosures of different link structures that are configured to perform the claimed functions. *See, e.g.*, Attentive Opening Position, Term 2 at 28 (citing to '887 patent at 3:8-28; 9:4-26; 13:64-14:4; 15:9-18). Instead, Defendants point to different disclosures (*e.g.*, '887 patent at 3:64-67; 4:24-32; 19:19-24; 10:16-44) to argue that "it is the URI contained within a link that causes this function to be performed." Defendants' Answering Position, Term 2 at 30. But these disclosures merely repeat the undisputed fact that a URI deeplinking to a messaging application is capable of performing the claimed functions. It does not prevent other structures, such as a link, a web link, or a sign-up link, from performing the same functions. In fact, the specification expressly discloses that a link and a URI are in different embodiments to perform the claimed functions. *See, e.g.*, '887 patent at 3:8-28. Nothing cited by Defendants even suggests that a URI must be used in order for the link to initiate the messaging application.

Defendants' again resort to Attentive's prior litigation positions to try and support their positions, and again it fails. Attentive's positions have been consistent, and simply reiterates the same undisputed position that a URI deeplinking to a messaging application is one possible corresponding structure. But nothing in Attentive's prior litigation positions excludes other corresponding structures. In fact, the paragraphs cited by Defendants made it clear that using URI for deep linking to a messaging application is ***not inherent*** to the idea of using prefilled requests. D.I. 16 at 6. In other words, the idea of using prefilled requests can be accomplished by other structures, such as those identified in Attentive's proposed construction.

4. Defendants' Sur-Reply Position

Attentive's argument on the "means for causing" term is an attempt to confuse the Court. Attentive argues that Defendants' proposed corresponding structure for this term—a URI deeplinking to a messaging application—is too limiting because the specification supposedly also associates other structures with the claimed function of (to summarize) causing the mobile device to transition from a first to a second application and automatically populate a custom text message in the second application. Demonstrating the extraordinary breadth of its proposed construction of "URI," Attentive concedes (in the section of the reply brief about the "URI" term) that a "web link" and a "sign-up link" are not distinct from a "URI." (Attentive's Reply Position, Term 1 at 32-33.) Instead, Attentive argues that a "web link" and a "sign-up link" are distinct structures also associated with the "means for causing" term because, unlike Defendants' proposal, ***they do not require deeplinking to a messaging application***. (*Id.*) This is baffling since the claimed function—causing the mobile device to transition to a second application and populate a text message in that application—requires deeplinking to a messaging application. (*See, e.g.*, '887 patent at 3:11–23, 10:16–49.) Attentive's brief does not explain how a "sign-up link" or a "web link" supposedly performs this function without utilizing a URI deeplinking to a messaging application, and indeed Attentive points to no disclosure in the specification of how they would do so. Attentive claims that column 3, lines 8–28, of the '887 patent specification disclose "a link and a URI" performing the claimed function in "different embodiments" (Attentive's Reply Position, Term 2 at 32), but while the cited text uses boilerplate language to suggest that a URI is utilized to perform the deeplinking function "in some embodiments," it does not describe any embodiment in which a URI is not used. This all underscores that it is the URI deeplinking to a messaging application—and not some broader notion of a "link"—that the specification links to the claimed function.

Attentive's reply brief also illustrates why its position now is inconsistent with its position at the § 101 phase. Attentive writes that its § 101 briefing "made it clear that using URI for deep linking to a messaging application is ***not inherent*** to the idea of using prefilled requests"—and thus the corresponding structure for the deeplinking function should be construed to be broader. (Attentive's Reply Position, Term 2 at 32–33.) Attentive did indeed argue that using a URI was not inherent to the idea of using prefilled requests, as a predicate for its claim that the claims were valid ***because the inventors nonetheless made the design choice to use a URI***. (D.I. 16 at 6.) Attentive's argument that the claims are not limited to that "design choice" is a reversal of its prior position.

C. Term 3: "integration tag"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"integration tag" '887 patent, claim 1; '897 patent, claim 16; '074 patent, claims 1, 8, 16, and 23.	Plain and Ordinary Meaning, wherein the Plain and Ordinary Meaning is "integrator instructions"	"code that at some point is included on a webpage and that, when executed, causes a user mobile device to send a request to the click-to-text server for, and receive from the click-to-text server, promotional messages associated with a client"

1. Plaintiff's Opening Position

The Court should adopt Plaintiff's proposed construction because it is the express definition in the specification. More specifically, the specification discloses that "[i]n some embodiments, the memory 103 can store code representing *integrator instructions 105* (*i.e., integration tag*) to be executed by the at least one processor 101 or the user mobile device 150." D.I. 62-1, '887 Patent at 5:35-52. Thus, patentee expressly defined the term "integration tag" as "integrator instructions" in the specification, and this definition should be adopted as the proper construction. *Edwards Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1334 (Fed. Cir. 2009) ("[U]se of 'i.e.' signals an intent to define the word to which it refers."); *see also Abbott Labs. V.*

Novopharm Ltd., 323 F.3d 1324, 1330 (Fed. Cir. 2003) (holding that a patentee "explicitly defined" a term by using "i.e.").

Defendants' proposed construction, on the other hand, not only deviates from the express definition in the specification, but also suffers from at least three additional deficiencies. Defendants' proposed construction is "code that at some point is included on a webpage and that, when executed, causes a user mobile device to send a request to the click-to-text server for, and receive from the click-to-text server, promotional messages associated with a client." *First*, the specification does not require the integration tag itself to be "code" as Defendants' proposal requires. Instead, the specification states that the integration tag is instructions that can "*include[]* code." D.I. 62-1, '887 Patent at 16:49-17:8 (emphasis added). Similarly, the integration tag need not be "execut[able]" code as Defendants' proposal requires. Rather, the specification discloses that "the integration tag is triggered or executed." *Id.* at 12:4-7. The Provisional Application clarifies this by explaining that an integration tag is "[a] tag [that] is attached to the page load event and only fires when the page is fully loaded." D.I. 62-4, Provisional Application at [0023]. It further clarifies that the JavaScript code (e.g., "Loader.js" and "attentive.js") are "loaded" from cloud resources (e.g., "Amazon CloudFront"). *Id.* at [0024]; *see also* D.I. 62-1, '887 Patent at 12:45-62 (exemplary script loading external JavaScript code). Thus, the intrinsic record makes clear that the integration tag itself need not be executable code but can simply be instructions that can relate to or call associated, external code.

Second, Defendants' proposed construction would cause claims 1, 8, 16, and 23 of '074 Patent, as well as claim 16 of '897 Patent, to lack antecedent basis. More specifically, none of the above claims recites any "click-to-text server" that is included in Defendants' proposed

construction, and, therefore, they would lack antecedent basis for "the click-to-text sever" if Defendants' proposed construction is inserted.

Third, Defendants' proposed construction would unnecessarily confuse the jury. For example, it is entirely unclear what it means to the jury by "at some point is included on a web page." The intrinsic evidence never defines or mentions this clause, and the jury would have no clue about when a code needs to be "included on a web page" in order to qualify as an integration tag. The jury would also need further explanation about what "the click-to-text server" is in order to evaluate infringement. For these additional reasons, the Court should reject Defendants' proposed construction.

2. Defendants' Answering Position

The specification makes clear three different times that Defendants' construction is what an integration tag is. ('887 patent at 11:61-65 ("The integration tag includes code, [that] when executed, cause[s] the user mobile device to send a request to the click-to-text server and receive from the click-to-text server promotional messages associated with the client."); 14:37-41 (same); 16:52-55.[12]) When a patentee "repeatedly and consistently" characterizes a claim term in a particular way, that "strongly suggests" that the term should be construed in that manner. *VPN Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1318 (Fed. Cir. 2014); *Nystrom v. TREX Co., Inc.*, 424 F.3d 1136, 1144–45 (Fed. Cir. 2005) (construing the term "board" to mean "wood cut from a log" in light of the patentee's consistent usage of the term and noting that the patentee "is not entitled to a claim construction divorced from the context of the written description and prosecution history"). When, as here, the term has no discernable meaning to a lay jury,

[12] The use of the word "includes" is immaterial, given that nothing in the intrinsic evidence suggests anything *else* the integration tag may include. In any event, Attentive's construction fails even to make clear that the integration tag *includes* code.

construction is needed so that the factfinder knows what an integration tag *is*. *Medicis Pharm. Corp. v. Actavis Mid Atl. LLC*, No. CIV.A. 11-409-LPS-CJB, 2012 WL 2126873, at *6 (D. Del. June 12, 2012), *report and recommendation adopted*, No. CIV.A. 11-409-LPS, 2012 WL 2918071 (D. Del. July 16, 2012).

By contrast, Attentive's proposal replaces the term with another that is, if anything, *more* obscure. Whatever "integrator instructions" may be, it is not the "plain and ordinary" meaning of anything. Attentive's insistence that its proposal is an express definition of "integration tag" is based on reading the specification exactly backwards. The specification refers to "integrator instructions 105 (i.e., integration tag)"; in other words, rather than defining "integration tag" as "integrator instructions," it defines "***integrator instructions***" as ***an example*** of an integration tag.[13] *See Edwards Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1334 (Fed. Cir. 2009) (term being defined *preceded* the "i.e."); *Abbott Lab'ys v. Novopharm Ltd.*, 323 F.3d 1324, 1327, 1330 (Fed. Cir. 2003) (same). To drive home the point that "integrator instructions" are just ***one example*** of an integration tag, the specification later discloses that "the click-to-text server can receive the user identifier in response to an execution of an integration tag (***such as*** the integrator instructions **105** as described with regards to FIG. 1)[.]" ('887 patent at 8:19-24 (emphasis added); *see also id.* at 12:9-13.)

Attentive's three criticisms of Defendants' proposal are equally wrongheaded. First, its claim that the integration tag need not be "code" that is "executed" (which is the purpose of computer code, *see* '887 patent at 20:50-55) contradicts as explicit a disclosure as is possible. The claims themselves specify what happens "in response to the mobile device executing the

[13] Here's a parallel example: "Each student must select a book or a movie. Eliza selected *Anna Karenina* (*i.e.*, a book)." That does not define "book" to mean "*Anna Karenina*"; it defines "*Anna Karenina*" as an example of a book.

integration tag," taking as a given that the integration tag is executed. (*Id.* at claims 1, 5, 18; '074 patent at claims 1, 8, 16, 23.) And the specification states ***dozens*** of times that the integration tag is code that is "executed." ('887 patent at Abstract, 1:56–63, 5:35–46, 8:21–23, 11:62, 12:15–19, 12:22–23, 12:30, 12:32–33, 12:64–65, 12:67–13:1, 13:11, 13:13, 13:16–17, 13:19–20, 13:23–25, 13:28, 14:47–48, 14:51–52, 16:52–53, 16:61–62, 17:3–5, 22:27–28, 24:14.) Indeed, the very sentence that Attentive relies on as an express definition states that "the memory **103** can store ***code*** representing integrator instructions **105** (i.e., integration tag) to be ***executed . . .*** " (*Id.* at 5:35-52 (emphases added).) And the sole example of an "integration tag" that appears in the specification is a set of JavaScript "code." (*Id.* at 12:45-62.[14])

Attentive further argues that the integration tag need not be executed because the specification notes that the "integration tag is triggered ***or*** executed only when the page associated with the client is fully loaded . . ." ('887 patent at 12:4–7; Attentive Opening Position, Term 3 at 35 (quoting '887 patent at 12:4–7).) If Attentive were right that the word "or" necessarily ***contrasts*** two words, then its own proposal would be the first casualty: The specification states that "the click-to-text server can send an integration tag (***or*** site integration tag, ***or*** integrator **105** as described in FIG. 1)," which would indicate that item 105 (elsewhere called the "integrator instructions") is something different from the "integration tag." ('887 patent at 11:59-61.) The fact that the words "triggered or executed" in the specification is not describing an alternative to the integration tag being executed is confirmed by the fact that, in the same embodiment, the specification describes what happens later "[i]n response to the execution of the integration tag." (*Id.* at 12:15.)

[14] Contrary to Attentive's claims, Attentive Opening Position, Term 3 at 35, the provisional application does not contain the words "integration tag." And the "tag" that Attentive refers to in the provisional is expressly stated to be "javascript code." (Provisional Application ¶¶ 21-23.)

Second, Attentive argues that certain claims would lack an antecedent basis for "the click-to-text server" if the definition found in the specification is adopted. But that "goes to the validity, not the construction, of the claim." *Kleen-Tex Indus., Inc. v. Mountville Mills, Inc.*, No. 3:03-CV-093-JTC, 2006 WL 6143073, at *11 n.3 (N.D. Ga. Oct. 30, 2006). In any event, "[w]hen the meaning of the claim would reasonably be understood by persons of ordinary skill when read in light of the specification, the claim is not subject to invalidity upon departure from the protocol of 'antecedent basis.'" *Flash Seats, LLC v. Paciolan, Inc.*, No. CIV.A. 07-575-JJF, 2010 WL 184080, at *13 (D. Del. Jan. 19, 2010), *aff'd*, 469 F. App'x 916 (Fed. Cir. 2012) (alteration in original). Attentive does not argue that this would be the case if Defendants' proposal were adopted.

Third, Attentive suggests that it would "confuse the jury" to be told that the integration tag "at some point is included on a web page." The words are clear, and were included in Defendants' proposal to emphasize, following a meet and confer with Attentive, that there are no temporal *restrictions* on when the integration tag is included on a webpage. To the extent Attentive now wishes to reverse course and argue that the words are unhelpful, Defendants have no objection to removing the words "at some point." As for Attentive's suggestion that "the click-to-text server" is unclear, those words appear in the text of claim 1 of the '887 patent—so the jury will need to understand what they mean regardless.

Fourth, Attentive previously argued to the Court that it should reject Postscript's Section 101 challenge because "[w]hile the abstract idea of using prefilled enrollment requests requires 'receiv[ing] information about how to contact a customer,' it is not *inherent* that one must do so by having a click-to-text server transmit an integration tag to a client server, which ***embeds the tag into a webpage*** and serves the combination to a browser, which ***automatically executes the integration tag*** to return user data to the click-to-text server." (D.I. 16 at 15 (bold emphasis

added).) Attentive now argues that the claims do not require the features of the integration tag it claimed were specific design choices that meant the claims were directed to more than the mere exchange of information. That is not a tenable position.

3. Plaintiff's Reply Position

Defendants ignored the express definition in the specification of this term by stretching both law and fact. First, Defendants admit that "i.e." signals a definition but contend that it only defines "***an example***." Defendants' Answering Position, Term 3 at 37. But the specification uses "i.e.," *not* "e.g." as Defendants appear to be arguing, and neither the *Edwards* nor the *Abbot* case cited by Defendants support this characterization. *See Edwards Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1334 (Fed. Cir. 2009); *Abbott Lab'ys v. Novopharm Ltd.*, 323 F.3d 1324, 1327, 1330 (Fed. Cir. 2003). Instead, the *Edwards* case makes it clear that "i.e." signals an intent to define. *Edwards*, 582 F.3d at 1334. Second, Defendants contend that the specification at most defines "integrator instructions" as an "integration tag" and does not define "integration tag" as "integrator instructions." Defendants' Answering Position, Term 3 at 37. This is form over substance. The definition of "integrator instructions" as "integration tag," as contended by Defendants, equate these two terms and therefore an integration tag is also integrator instructions. Defendants' book/movie analogy in the footnote is also inapposite. *Id.* at 37 (FN 15). The analogy introduces two categories—book and movie—before introducing *Anna Karenina* that is in one of the introduced categories. Nowhere in the specification introduces any categories that integrator instructions may belong to; instead, it is a clear definition.

Defendants point to several paragraphs in the specification describing functions of the integration tag to support their proposed construction. *Id.* at 37-38. But these disclosures do not negate the express definition. *See Boss Control, Inc. v. Bombardier Inc.*, 410 F.3d 1372, 1378

(Fed. Cir. 2005) (holding that the location within the specification in which the definition appears is irrelevant).

Defendants admit that adopting their proposed construction would cause claims 1, 8, 16, and 23 of '074 Patent, as well as claim 16 of '897 Patent, to lack antecedent basis but they contend that this is not a claim construction issue. Defendants' Answering Position, Term 3 at 39. Not so. Indefiniteness is a question of law and in effect part of claim construction. *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 517 (Fed. Cir. 2012). It is also improper to construe an otherwise clear claim to introduce indefiniteness. *See, e.g.*, *Tempo Lighting*, 742 F.3d at 978 (holding that the Board properly avoided the circularity inherent in any attempt to construe claims with an eye to preserving their validity).

Defendants' tentative removal of the words "at some point is included on a web page" creates more problems than it solves. Defendants' Answering Position, Term 3 at 39. Adopting this position would require the integration tag to be included on a webpage all the time, which contradicts express language of the asserted claims. For example, claim 1 of '887 patent recites "an integration tag configured ***to be served*** with a webpage." '887 patent at Claim 1. The plain language of the claim clearly shows that the integration tag can be separate from the webpage it is to be served with.

Defendants again contend that Attentive's claim construction position is inconsistent with its previous litigation positions regarding subject matter eligibility. Not even close. The analysis of subject matter eligibility focuses on the entirety of the claims, which, in addition to reciting an integration tag itself, also recite *specific use* of the integration tag. This does not require that the *definition* of integration tag include all these novel features. Indeed, such a position is nonsensical because it would violate the basic tenant of claim construction that claim language should not be

rendered superfluous. *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 801, 810 (Fed. Cir. 2021) ("It is highly disfavored to construe terms in a way that renders them void, meaningless, or superfluous."). But Defendants' argument that all the other limitations that are already expressly recited in the claims need to be shoehorned into this simple and readily understood claim term attempts to do just that and should be rejected.

4. Defendants' Sur-Reply Position

Attentive's reply contains no response to the following points made in the responsive claim construction brief: (1) The term "integrator instructions" has no discernable meaning to a jury; (2) the specification specifies, multiple times, that "integrator instructions" are an example of an integration tag, not a synonym for it ('887 patent at 8:19-24, 12:9-13); and (3) the "integration tag" is code that must be executed. (Defendants' Answering Position, Term 3 at 37–39.)

What does appear in the reply fails to engage with Defendants' point. First, the rules of English grammar provide that "i.e." characterizes the ***preceding*** phrase, not the subsequent one, as would be necessary for Attentive's argument to work. Attentive complains that this privileges "form over substance," conceding that the form of the words in the specification is inconsistent with the substance of its argument. (Attentive's Reply Position, Term 3 at 40.) It also concedes that when someone reads "*Anna Karenina*, i.e., a book," that does not define a "book." (*Id.*) It says this is because "book" is a category—but so is "integration tag." (Presumably Attentive agrees the one example of an integration tag in the specification is not the only possible one. ('897 patent at 12:45-62).)

Second, Attentive suggests that claims should be construed to avoid potential indefiniteness issues—but the case it cites says precisely the opposite, explaining that this is a doctrine of "limited utility" and that the Patent Trial and Appeal Board was ***right*** to construe a

term as the intrinsic evidence suggested even if it "might render the claims invalid under § 112." *Tempo Lighting, Inc. v. Tivoli, LLC*, 742 F.3d 973, 978 (Fed. Cir. 2014).

Third, Attentive now apparently both supports and opposes the inclusion of the words "at some point is included on a web page" in Defendants' construction. (Attentive's Reply Position, Term 3 at 41.) But its argument appears to be based on the misapprehension that absent those words Defendants' construction "would require the integration tag to be included on a webpage all the time." (*Id.*) That makes no sense—removing that language obviously would not add that requirement.

D. Term 4: "means for displaying…"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"means for displaying an invitation to subscribe to a text messaging subscription service via a first application" '897 patent, claim 15.	Means-plus-function term under 35 U.S.C. § 112(6). Function: displaying an invitation to subscribe to a text messaging subscription service via a first application. Corresponding Structure: a tag configured to cause the claimed functions.	Means-plus-function term under 35 U.S.C. § 112(6). Function: displaying an invitation to subscribe to a text messaging subscription service via a first application. Corresponding Structure: an integration tag configured to cause performance of the claimed functions.

1. Plaintiff's Opening Position

The parties' dispute about this term again boils down to the corresponding structure that performs the recited function. Defendants' identified structure, i.e., "an integration tag," can certainly perform the recited function. *See* D.I. 62-1, '887 Patent at 5:35-42; 11:59-12:14. But "an integration tag" is not the only structure that is disclosed in the intrinsic evidence to perform the recited function. For example, the Provisional Application, to which the Asserted Patents claim priority, clearly links or associates "a tag" or a more specifically a "JavaScript tag" to the recited

function. *See, e.g.*, D.I. 62-4, Provisional Application at [0021]-[0027] ("A. Rendering the link … Step 1. *A tag* is attached to the page load event and only fires when the page is fully loaded … Step 5. *Attentive.js* displays the creative received back from the ad server."). Therefore, a POSITA, after reviewing the intrinsic evidence, would readily recognize the tag (e.g., an integration tag or a JavaScript tag) in the intrinsic evidence and associate it with the recited function.

Plaintiff's proposal also results in a consistent reading of the other claims, while Defendants' proposal does not. For example, claim 16 depends from claim 15 and recites, in relevant part, that "the means for displaying comprises an integration tag." *See* D.I. 62-2, '897 Patent at Claim 16. Because the dependent claims to the "means for displaying" must be narrower than the claims from which they depend, *Alcon Research*, 687 F.3d at 1367, Plaintiff's proposal gives meaning to all the claim language, where Defendants' proposal renders aspects of claim 16 superfluous, which is disfavored. *See Power Mosfet Techs.*, 378 F.3d at 1410 ("[I]nterpretations that render some portion of the patent claim language superfluous are disfavored."); *see also Merck*, 395 F.3d at 1372 ("A claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so." (citations omitted)).

Accordingly, the Court should adopt Plaintiff's proposed construction and reject Defendants' overly limiting proposal.

2. Defendants' Answering Position

The parties agree that the "means for displaying" limitation is governed by § 112(6) and recites the function of displaying an invitation to subscribe to a text message subscription service via a first application. Thus, under black letter law, the corresponding structure must be limited to "the structure, materials, or acts described in the specification as corresponding to [that function] and equivalents thereof." *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347 (Fed. Cir. 2015).

The only structure described in the specification corresponding to the recited function is an integration tag. (*See, e.g.*, '887 patent at 11:61-65 ("The integration tag includes code [that], when executed, cause[s] the user mobile device to send a request to the click-to-text server and receive from the click-to-text server promotional messages associated with the client."); *see also id.* at 5:35–42, 11:66–12:4,12:32–36, 14:34–41, 16:49–61, 17:3–8.) Attentive does not dispute that. Instead, it argues that the Provisional Application describes an additional structure—"a tag" or "JavaScript tag"—as performing the recited function. (Attentive Opening Position, Term 4 at 43.) As explained below, the structure described in the Provisional Application is an integration tag.

Attentive points to a series of steps in the Provisional Application that begin with a "tag…attached to the page load event" that "only fires when the page is fully loaded," and that "checks the ready state of the document of the page and only proceeds when the page is fully ready"—and end with "display[ing] the creative [e.g., ad] received back from the [Attentive] ad server." *Id.* (citing Provisional Appl. ¶¶ 21–27). This mirrors exactly the descriptions of an integration tag in the specification:

> ***The integration tag includes code [that], when executed, cause[s] the user mobile device to send a request to the click-to-text server and receive from the click-to-text server promotional messages*** associated with the client. Specifically, ***the integration tag can be attached to a page load event at the user mobile device***. When the user is opening a page (e.g., a webpage) associated with the client, the request for the promotional message can be sent to the click-to-text server because the page is integrated with the integration tag provided by the click-to-text server. ***In some instances, the integration tag is triggered or executed only when the page associated with the client is fully loaded at the user mobile device*** (i.e., a criteria). ***In some instances, the integration tag can check the ready state of a page (or a document of the page) and only proceeds when the page is fully ready.***

('887 Patent at 11:61–12:9 (emphases added).) Notably, Attentive does not even attempt to explain how "a tag" in its proposed construction differs from the "integration tag" described in the specification.

Attentive also argues that the corresponding structure for "means for displaying" must be broader than an "integration tag" because a dependent claim states that "the means for displaying comprises an integration tag." (Attentive Opening Position, Term 4 at 44.) As discussed for "means for causing" above, this argument is foreclosed by Federal Circuit law. *Supra* at 14–15; *Laitram*, 939 F.2d at 1538.

The Court should thus adopt Defendants' proposed construction, which identifies the only structure in the specification and Provisional Application that performs the recited function.

3. Plaintiff's Reply Position

Defendants contend that the "tag" identified by Attentive in the Provisional Application is an "integration tag" disclosed in the specification because they perform the same functions. Defendants' Answering Position, Term 4 at 44-45. But this is exactly why the "tag" disclosed in the Provisional Application is also a corresponding structure. Given that Defendants already admit that the "tag" disclosed in the Provisional Application can perform the same functions that an integration tag does, the Court should adopt Attentive's proposed construction because the corresponding structure covers both "integration tag" and "tag" that are clearly linked or associated to the recited functions.

Defendants also complain that Attentive does not explain the difference between a tag and an integration tag. Defendants' Answering Position, Term 4 at 45. But Attentive makes it clear that a tag includes both an integration tag and a JavaScript tag and therefore is broader than simply an integration tag. Attentive Opening Position, Term 4 at 43. In addition, an integration tag is

different from a JavaScript tag at least because an integration tag can be written in programming language other than JavaScript.

4. Defendants' Sur-Reply Position

The parties' dispute is a narrow one: whether the corresponding structure for the "means for displaying" term is an "integration tag" (Postscript's proposal) or a "tag" (Attentive's proposal). Attentive concedes that the only structure described in the specification corresponding to the recited function is an integration tag. (*See* Defendants' Answering Position, Term 4 at 45; Attentive's Reply Position, Term 4 at 46.) And, as Postscript explained in its Response, the "tag" that Attentive identifies in the Provisional Application is the integration tag. Attentive agrees that an "integration tag" and "tag" perform the same functions, but nonetheless argues that a "tag" is broader than an "integration tag" because "a tag includes both an integration tag and a JavaScript tag." (*Id.*) Attentive does not explain ***how*** a "tag" differs from an "integration tag," or even why a JavaScript tag would not be an "integration tag." (*See id.*) That is because Attentive is trying to broaden the scope of the "means for displaying" term to allow it to argue that anything can be a "tag." But, under black letter law, the corresponding structure of the term must be limited to that described in the specification—here, an "integration tag." *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347 (Fed. Cir. 2015). Attentive's proposed broader structure should thus be rejected.

E. Term 5: "webpage"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"webpage" '887 patent, claim 1; '897 patent, claims 18 and 19.	Plain and Ordinary Meaning, wherein the Plain and Ordinary Meaning is "a page accessible over the World Wide Web"	"a specific page within a website"

1. Plaintiff's Opening Position

The term "webpage" is a readily understood term and its interpretation—if needed at all—"involves little more than the application of the widely accepted meaning of commonly understood words." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc). A POSITA would have known exactly what it means without any interpretation, as will the lay jurors. For example, one technical dictionary defines a "web page" as follows:

> A document on the World Wide Web. A Web page consists of an HTML file, with associated files for graphics and scripts, in a particular directory on a particular machine (and thus identifiable by an URL). Usually a Web page contains links to other Web pages.

Ex. 4, Dictionary of Computer and Internet Terms (1st Ed.) (2016) at 561. A second technical dictionary similarly defines the term and also explains a webpage's relationship to a website: "An HTML document on the Web, usually one of many that together make up a Website." Ex. 5, Newton's Telecom Dictionary (30th Ed.) (2016) at 1381. Thus, at the time of the claimed inventions (2017), this term had a commonly accepted meaning that was widely understood.

To the extent any construction is necessary at all, Plaintiff's proposal explains what a webpage is without adding ambiguity or improperly imputing additional limitations. Indeed, Plaintiff's proposal is consistent with the term's commonly accepted definitions above but recites "a *page* accessible over the World Wide Web" (rather than a *document*) to be consistent with the intrinsic record. *See* D.I. 62-1, '887 Patent at 11:65-12:4 (describing a "webpage" as "a page (e.g., a webpage) associated with the client").

Defendants' proposal adds ambiguity and confusion in at least two different ways: (1) by adding the concept of a website and (2) by limiting the scope of the term to "a *specific* page." *First*, Defendants' inclusion of the term "website" has the likelihood of causing confusion and adding ambiguity. Defendants claimed during the parties' meet and confers that the specification

creates a distinction between a webpage and a website. While Plaintiff does not necessarily agree, adopting Defendants' proposal would only serve to inject any such ambiguity into the claims, as none of the claims recite "a website." Thus, construing a "website" as "a specific page within a website"—as Defendants' propose—would complicate rather than clarify the issue for a jury.

Second, Defendants' proposed language of "a *specific* page" also adds ambiguity and improperly limits the scope of the term and the claims. The inclusion of "specific" adds ambiguity, for example, because it is unclear whether this added word limits "a webpage" to a specific *type* of page (e.g., a landing page) or whether it is intended to limit a webpage to a specific *number* of pages (e.g., one page)?

The inclusion of "specific" also improperly limits the scope of the term and the claims. For example, claim 1 of the '887 Patent recites, *inter alia*, "an integration tag [is] configured to be served with a webpage;" the "mobile device load[s] the webpage;" there is "a promotional message associated with the webpage;" and the populated custom message "includes an address associated with the click-to-text server and a message body that includes an identifier associated with at least one of the webpage or the user data." *Id.* at Claim 1. Adopting Defendants' proposal would change the scope of the claim and require, for example, that the "integration tag [is] configured to be served with ['a specific page within a website']." *See id.* Rephrasing the claim in this manner implies that the integration tag must be individualized to "a specific page," thereby overly limiting the claim scope in a manner inconsistent with the disclosure of the specification. Indeed, the specification describes the integration tag as a "site integration tag" (*id.* at 11:59-61), thereby indicating that the integration tag need not be individualized for any "specific page" but can apply to an entire site, that is ***all*** pages of a website.

Furthermore, nowhere does the intrinsic evidence disclose, let alone require, that "a webpage" is "a *specific* page within a website." Instead, the specification never uses the word "specific" or any similar phrase in association with the webpage. Rather, the specification expressly contemplates that "a website" refers to a single webpage or a combination of webpages, hence, one webpage, multiple webpages, or all webpages of a website:

> As used herein, the singular forms "a," "an" and "the" include plural referents unless the context clearly dictates otherwise. Thus, for example, the term "a message" is intended to mean a single message or a combination of messages. For another example, "a purchase identifier" is intended to mean a single purchase identifier or a combination of purchase identifiers.

Id. at 4:33-39. Accordingly, a webpage does not refer to "a *specific* page within a website."

For the foregoing reasons, the Court should adopt Plaintiff's proposed construction, to the extent any construction is necessary at all.

2. Defendants' Answering Position

The Asserted Patents distinguish between a "webpage" and a "website." Namely, the patent makes the unremarkable distinction that a webpage refers to a page of a website which can be accessed by a specific URL, rooting, or query. ('887 patent, 12:67-13:12, '897 patent, 13:24-36 ("a webpage from a set of webpages associated with the client's website"); *see also* '887 patent at 14:19-21, '897 patent at 14:43-45 ("message **322** can be displayed as a webpage or as a landing page *of a website*").) Attentive does not appear to dispute that a website is different from a webpage. (Attentive Opening Position, Term 5 at 47 (citing dictionary definition distinguishing webpages from websites).) And Defendants do not dispute that an integration tag can be served with one webpage or multiple webpages.

Using the terms in context, the patents specifically state:

> In some implementations, the integration tag can be customized based on client's preferences. For example, the integration tag can be executed ***when any webpage associated with the client's website***

> is accessed by the user mobile device. In some instances, the integration tag can be executed only ***when a webpage from a set of webpages associated with the client's website*** is accessed by the user mobile device.

('887 patent 12:63-13:3 (emphasis added).) Consistent with this, the patents contemplate at least two alternatives, (1) integration tags served on a website-wide basis; and (2) integration tags that are that are served with individual pages. The patents, similarly, make a distinction between "site integration tags" and "integration tags." (*Id.* at 11:59-61; '897 patent at 11:54-56 ("integration tag (*or* site integration tag, or integrator **105**[)]" (italics added)).) Notably, the patents only claim integration tags served with individual pages and do not claim integration tags served with a "website." For example, claim 1 of the '887 patent states that the "integration tag [is] configured to be served with a webpage" and "the integration tag configured to cause a mobile device loading the webpage."

The parties' dispute centers on the additional claim limitations that relate back to and rely on "*the* webpage" that was served with the integration tag. Plaintiff argues the claims do not distinguish between a website and a webpage because the specification describes a "*site* integration tag" and, therefore, the "integration tag need not be individualized for any 'specific page' but can apply to an entire site, that is all the pages of a website." (Attentive Opening Position, Term 5 at 49 (italics omitted).) Plaintiff's position is at odds with the language of the claim. The Asserted Claims do not recite a "*site* integration tag." Instead, the claims expressly recite an integration tag served with a webpage, not the entire website or other webpages. (*See, e.g.*, '887 patent, claim 1 ("an integration tag configured to be served with ***a webpage***…the integration tag configured to cause a mobile device loading ***the webpage***…" (emphasis added)).) Thus, despite clearly and distinctly contemplating the existence of a "site integration tag," the patent deliberately chose to claim an "integration tag" associated with a *specific* webpage and cannot be read to cover an

unclaimed embodiment. *Cf.*, *Eagle Pharmaceuticals Inc. v. Slayback Pharma LLC*, 382 F. Supp. 3d 341, 344-45 (D. Del. 2019) (even when claims are not read literally, they cannot capture disclosed, but unclaimed, embodiments); *aff'd*, 958 F.3d 1171, 1175-76 (Fed. Cir. 2020); *see also Silvergate Pharms., Inc. v. Bionpharma Inc.*, No. 18-1962-LPS, 2021 WL 1751148, at *25 (D. Del. Apr. 29, 2021) (same).

Similarly, claim 1 of the '887 patent does not recite information associated with *a website including the webpage* (as Attentive seeks to construe the claim). (Attentive Opening Position, Term 5 at 49.) The claim requires "an identified associated with…*the* webpage." Antecedent basis requires "*the* website" to refer to the *specific* webpage served with the "integration tag" as previously recited in the claim. Indeed, when the claim drafters wanted to refer to a different webpage, they knew how to do so. (*See, e.g.*, '887 patent (claim 13 depends from claim 1 and further recites an identification of *a referring webpage*); '897 patent (claim 12 reciting a first webpage and a second webpage)); *Neville v. Found. Constrs., Inc.*, 972 F.3d 1350, 1357 (Fed. Cir. 2020) ("two terms in a claim requires that they connote different meanings") (citing *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n.3 (Fed. Cir. 2006)). When the claim drafters specifically referred to "*the* webpage," it was intentional. (*See, e.g.*, '887 patent, claim 1 ("an identifier associated with…*the* webpage"); claims 3, 4, 9 (reciting things that occur "in response to loading *the* webpage").)

Plaintiff's argument that Defendants' proposed construction would introduce ambiguity regarding the "type" of webpage should be disregarded. (Attentive Opening Position, Term 5 at 48.) Defendants' proposed construction does not make any reference to the "type" of webpage at issue, and therefore, does not introduce the ambiguity that Plaintiff claims.

Given Plaintiff's attempt to impermissibly broaden the scope of the claims by conflating "webpage" with "webpages" and "website," Defendants' proposed construction "specific page within a website" is necessary to clarify the use of the term webpage throughout the claims.

3. Plaintiff's Reply Position

Defendants' Answering Position makes clear that there is no earnest dispute over the meaning of the term "webpage" itself. Indeed, it is a widely understood word with a commonly accepted meaning. *See* Attentive Opening Position, Term 5 at 47. Rather, Defendants seek to construe the term to manufacture a non-infringement position, based on an improper and overly narrow reading of the claims.

Defendants' arguments attempt to import two improper narrowing concepts into the claims: (1) limiting "*a* webpage" to one "specific" page and (2) trying to interpret "an integration tag" differently than "a site integration tag." Neither argument has merit nor is supported by the intrinsic record.

Defendants' first argument, that "a webpage" refers to one "specific" page, should be dismissed out of hand. As used in the claims, "*a* webpage" refers to one or more webpages. As an initial matter, it is commonly accepted that the indefinite article, "a," in patent claims refers to "one or more" unless a patentee evinces a clear intent to limit "a" or "an" to "one." *Azurity Pharms., Inc. v. Alkem Lab'ys Ltd*, No. CV 19-2100-LPS, 2021 WL 5332406, at *3 (D. Del. Nov. 16, 2021) ("As a general rule, the words 'a' or 'an' in a patent claim carry the meaning of 'one or more.'" (quoting *01 Communique Lab., Inc. v. LogMeIn, Inc.*, 687 F.3d 1292, 1297 (Fed. Cir. 2012))). Here, there is no clear intent to so limit the "a" to "one." In fact, the opposite is true. Indeed, the specification expressly states that "the singular forms 'a,' 'an' and 'the' include plural referents unless the context clearly dictates otherwise." *See* Attentive Opening Position, Term 5 at 49 (citing D.I. 62-1, '887 Patent at 4:33-39). Notably, Defendants do not attempt to resolve the

disparity between this express disclosure of the specification and their narrow interpretation of the claims.

Defendants attempt to create a distinction by pointing to the specification's disclosure of exemplary embodiments describing "any webpage associated with the client's website" and "a webpage from a set of webpages associated with the client's website." Defendants' Answering Position, Term 5 at 50 (citing *id.* at 12:63-13-3). This disclosure, however, is inapposite to whether "a webpage" refers to one or multiple webpages. Indeed, no asserted claim recites "a webpage associated with the client's website," or "a webpage from a set of webpages," let alone provides the additional necessary context that would require the use of "a" to mean one specific webpage. Thus, there is no justification for limiting the claims to this one exemplary embodiment, and it would be legal error to do so, as the Federal Circuit has repeatedly "cautioned against limiting the claimed invention to preferred embodiments or specific examples in the specification." *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1328 (Fed. Cir. 2002) (quoting *Comark Commc'ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998)).

Defendants' second argument—that "the patents only claim integration tags served with individual pages and do not claim integration tags served with a 'website'" (Defendants' Answering Position, Term 5 at 50)—directly contradicts the specification. In making their argument, Defendants attempt to distinguish "an integration tag" from "a site integration tag" by cherry-picking the third example below and giving unjustified weight to the "or" in the phrase. But this is disingenuous because when the specification is read as a whole, it is clear "or" is used to show that that site integration tag is another word for integration tag, not a separate thing:

- "integrator instructions 105 (i.e., integration tag)" (D.I. 62-1, '887 Patent at 5:36);
- "an integration tag (such as the integrator instructions 105 as described with regards to FIG. 1)" (*id.* at 8:22-24);

- "an integration tag (or site integration tag, or integrator 105 as described in FIG. 1)" (*id.* at 11:60-61); and
- "the site integration tag can be stored in the memory of the click-to-text server (such as the integrator 105 stored at the memory 103 of the click-to-text server 100 as described with regards to FIG. 1.)" (*id.* at 12:9-13).

Indeed, other descriptions of terms show that "or" is used to identify terms of like kind, not alternatives. *See, e.g.*, D.I. 62-1, '887 Patent at 3:6-7 ("two touch screen taps (or Two-Taps)"), 3:40 ("selecting (or tapping)"), 7:56-57 ("customized (or defined or populated)"), 20:65-66 ("computer-readable medium (or processor-readable medium)"). The Provisional Application further supports Attentive's interpretation, as it discloses that various pages can be targeted: "All pages," "Select pages (URL based)," "Supports rooting," "Supports specific query params," "All pages, except…," and "blacklist[s]." D.I. 62-4, Provisional Application at [0029]. As they admit, "Defendants do not dispute that in integration tag can be served with one webpage or multiple webpages." Defendants' Answering Position, Term 5 at 50. Nothing in the intrinsic record limits the claims to integration tags served with individual—or "specific"—pages.

Lastly, Defendants' claim differentiation argument (Defendants' Answering Position, Term 5 at 51-52) is inapposite and does not lead to a different result. First, claim 13 of the '887 Patent relates to the user data and claims, *inter alia*, that the user data includes "an identification of a referring webpage." D.I. 62-1, '887 Patent at Cl. 13. The term at issue, "a webpage," is different than the "referring webpage" upon which user data is based. *See, e.g.*, *id.* at 5:18-23 (describing user data), 13:19-23 (describing page referrers). Indeed, the antecedent basis for the terms make this clear. Further, the specification makes clear that the integration tag collects user data, such as "page referrer URLs" (i.e., the referring webpage), after the "webpage" opens. *Id.* at 16:57-67. Second, claim 12 of the '897 Patent limits the "webpage" in the independent claim but

simply uses "first" and "second" to differentiate the action of each. Specifically, the "second webpage" offers a product or service (D.I. 62-2, '897 Patent at 23:46-47, 24:20), and the "first webpage" includes a promotional message (*id.* at 24:25-26). In fact, this claim makes clear that the "webpage" could be used across multiple webpages as a pop-up. *See id.* at 14:47-50 ("[T]he promotional message 342 can be displayed in a frame as a pop-up from the webpage 343."). Thus, rather than supporting Defendants' position, this disclosure shows Defendants' position is inconsistent with the specification.

4. Defendants' Sur-Reply Position

The patent draws a clear distinction between webpage and website. (Defendants' Answering Position, Term 5 at 50-52.) For instance, Claim 1 of the '887 patent requires that the message body of the text message contain an identifier associated with the ***webpage*** that is hosted by the client server and provides the integration tag to the end user. ('887 patent at 21:44-67.) That an integration tag may be contained on multiple webpages does not refute that the claimed "webpage" with which an identifier must be associated has to be a specific webpage. Claim 12 of the '897 Patent differentiates between a "first" and "second" webpage, emphasizing that the patentee used "webpage" in the singular, to refer to a particular webpage. (Attentive's Reply Position, Term 5 at 55-56; '897 patent at 24:22-33.) Thus, a POSITA would understand that when claim 1 of the '887 patent recited "loading the webpage" on a mobile device "to send user data," it is referring to the specific webpage with which the integration tag is served. ('887 Patent at 21:44-49.) And when the claim later recites "the webpage" it is referring back that specific page. *Guardant Health, Inc. v. Found. Med., Inc.*, No. 17-1616, 17-1623, 2019 WL 5677748 at *10 (D. Del. Nov. 1, 2019) (explaining that "use of definite articles […] refer[s] to the initial antecedent phrase" (citing *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342-43 (Fed. Cir. 2008)).

Attentive's further argument that "webpage" and "website" are interchangeable because integration tag and site integration tag are "terms of like kind" (Attentive's Reply Position, Term 5 at 55) is meritless. The two terms are ***not*** the same and the patent distinguishes them. (Defendants' Answering Position, Term 5 at 50-52.)

F. Term 6: "identifier associated with at least one of the webpage or the user data"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"identifier associated with at least one of the webpage or the user data" '887 patent, claim 1.	Plain and Ordinary Meaning, wherein the Plain and Ordinary Meaning is "identifier associated with the webpage, the user data, or both without limitation on what the identifier may additionally be associated with"	"identifier associated with (1) the webpage served by the client server with the integration tag; and/or (2) the user data sent by the mobile device loading the webpage"

1. Plaintiff's Opening Position

Here, Defendants seek to construe easily understood plain English that speaks for itself. This claim language requires no special interpretation; rather, the jury will understand the plain English claim language perfectly without any further redefinition by the Court.

Defendants' proposal is incorrect for at least two reasons: (1) it incorrectly changes the claim language from open ended to closed ended, and (2) it improperly injects additional limitations into the claims. *First*, the claims do not require that the "identifier" is *only* associated with the webpage and/or the user data. Rather, it merely requires that the "identifier" is associated with "at least one" of the two. The "identifier," however, could be associated with something else in addition to the webpage and/or the user data. For example, in practice, an identifier could be a keyword that is associated with multiple webpages. Defendants' proposal incorrectly narrows the term to require that the identifier *only* be associated with the webpage and/or the user data.

Second, Defendants' proposal improperly adds limitations to the claim language by changing (A) "the webpage" to "the webpage served by the client server with the integration tag" and (B) "the user data" to "the user data sent by the mobile device loading the webpage." During the parties' meet and confers, Defendants could not articulate why this additional language was needed or any ambiguity that this additional language purportedly resolves. There is no valid reason to deviate from the language chosen by the inventors and approved by the Patent Office.

Combined, the two errors in Defendants' proposal seek to manufacture a non-infringement position that the "identifier" must *only* be associated with the particular webpage served and visited by the user and/or the "identifier" must *only* be associated with the specific user's user data. Under Defendants' interpretation, an identifier that could be used for more than one webpage, for example, would fall outside of the scope of the claims. This interpretation would be wrong, as the intrinsic record provides no justification for so narrowly limiting the term. *See* discussion of intrinsic record related to Term 5, "webpage," *supra*.

Accordingly, the Court should reject Defendants' proposal and adopt Plaintiff's "plain and ordinary" construction that does not add any new limitations to the otherwise clear claim language.

2. Defendants' Answering Position

As with the "webpage" limitation above, Defendants' "identifier" construction, which relates to claim 1 of the '887 patent, is necessary to give effect to the use of the terms "the webpage" and "the user data" in that claim. Plaintiff argues *sub silentio* that the "identifier associated with the webpage" does not need to identify the webpage and the "identifier associated with the user data" does not need to identify the user data. But an "identifier" needs to identify. (*See, e.g.*, '887 patent at 8:25-28 ("user identifier can include […] information identifying the user or the user mobile device"); 15:66-16:10 (discussing user identifier); 18:55-57 ("click-to-text server can look up the purchase information based on the purchase identifier"); 19:6-10 ("the

mobile device identifier can be user identifier").) The patent uses the information contained within the identifier to create the custom text message that identifies the user or purchase information. (*See, e.g., id.* at 8:14-16 ("in response to receiving the message **213**, the click-to-text server can authenticate the user based on the user identifier"), 15:66-16:10 (similar), 17:17-29 (similar); 8:45-47 ("determine, based on user identifier, if the user is a new subscriber or an existing subscriber"), 19:57-60 (same).)

Plaintiff has two objections to Defendants' proposed construction. But only one of the objections relates to the actual dispute between the parties. Plaintiff's first objection—that Defendants' construction is somehow "closed ended" and limits the identifier to being *only* associated with the webpage and/or the user data—is simply manufactured out of thin air. (Attentive Opening Position, Term 6 at 57-58.) Defendants' construction does not contain the word "only" and does not so limit the claim.

Plaintiff's second objection is the true dispute between the parties. "The webpage" and "the user data," as used in this term, relate back to the earlier use of those terms in the claim. In particular, "the webpage" for this limitation is "the webpage served by the client server with the integration tag" recited in the "send, to a client server," limitation of claim 1. ('887 patent at 21:44-49.) And "the user data" in this limitation refers back to "a mobile device loading the webpage via a first application to send user data." (*Id.*) In other words, "the user data" is "the user data sent by the mobile device loading the webpage," as set forth in Defendants' construction. Attentive has no rebuttal to this second point and instead relies on its spurious argument that the Defendants are inserting some "only" limitation that does not appear in Defendant's proposed construction. (Attentive Opening Position, Term 6 at 58.)

3. Plaintiff's Reply Position

Here again, there appears to be no earnest dispute among the parties as to the meaning of any specific word in this term, and again, Defendants' proposal only serves to manufacture a non-infringement position by improperly rewriting the claim language. As addressed in Attentive's Opening Position, Attentive's proposal stays true to the claim language and keeps the term open ended, while Defendants' proposal improperly narrows two aspects of this term in order to manufacture a non-infringement position that the "identifier" must only be associated with the particular webpage served and visited by the user and/or the "identifier" must only be associated with the specific user's user data. As with the "webpage" term, the intrinsic record provides no justification for so narrowly limiting the term.

Defendants' Answering Position begins with a misleading and unsupported argument that "an 'identifier' needs to identify." Defendants' Answering Position, Term 6 at 57-58. While Attentive does not necessarily disagree with that assertion in the abstract, notably, Defendants' proposal does nothing to clarify *how* the identifier identifies anything, nor does it provide an interpretation of the word "identifier." In the context of the claims, the "identifier" at issue is used for authentication and enrollment purposes. *See* D.I. 62-1, '887 Patent at Cls. 3, 10, 19. For example, dependent claim 3 recites authenticating the mobile device "based on the user data received in response to the mobile device loading the webpage and the identifier received with the custom message." *Id.* at Cl. 3. Thus, the identifier need only have some relation with (hence, "associated with") at least one of the webpage or the user data. Indeed, generally speaking, an "identifier" is simply a label. *See* Ex. 6, Dictionary of Computer and Internet Terms (1st Ed.) (2016) at 244 (defining "identifier," *inter alia*, as "[a]ny text string used as a label").

While the open-ended claim language allows for the identifier to be associated with something else in addition to at least one of the webpage or the user data, Defendants' proposal

improperly limits the term not only just only the webpage or the user data, but also to only the single webpage served and/or the specific user data sent. In conjunction with their proposal on the prior term, "a webpage," Defendants seek to rewrite the claims to completely change their scope and intended meaning.

Neither the words of the claims nor the intrinsic record supports limiting the "identifier" to only identifying the single webpage or user data, as Defendants intend. As explained for the previous term, for example, "a webpage" refers to one or more webpages, and, thus, the identifier can be associated with the one or more webpages or user data.

Attentive does disagree with Defendants' assertion that "[t]he patent uses the information contained within the identifier to create the custom text message that identifies *the user or purchase information*." Defendants' Answering Position, Term 6 at 58. As expressly stated in the claims, the identifier is "associated with" at least one of *the webpage or the user data*. Indeed, Defendants' citations to descriptions from the specification for "user identifier" and "purchase identifier" are inapposite and irrelevant to this term as these are different identifiers than the "identifier" at issue. *See id.* Indeed, the dependent claims clarify that the "user identifier" and the "identifier" at issue are in fact different. For example, claim 13 requires that the user data includes, *inter alia*, "a mobile device identifier." D.I. 62-1, '887 Patent at Cl. 13. The specification discloses that "the mobile device identifier can be a user identifier." *Id.* at 19:6-7. Thus, the identifier at issue is not itself the "mobile device identifier" but rather may be "associated with" the "mobile device identifier." *Compare id.* at Cl. 13 *with id.* at Cls. 3, 10, 19. Defendants improperly and incorrectly conflate these two terms. *See Neville v. Found. Constrs., Inc.*, 972 F.3d 1350, 1357 (Fed. Cir. 2020) ("two terms in a claim requires that they connote different meanings") (citing *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n.3 (Fed. Cir. 2006)).

Next, Defendants baldly assert that their proposal does not limit the term by its use of "and/or" in place of "at least one of." This is disingenuous. Basic grammar dictates that "at least one of **A** or **B**" has a different meaning than "**A** and/or **B**":

Phrase	Scope
"at least one of **A** or **B**"	(1) **A**, (2) **B**, (3) **A** & **B**, (4) **A** & **C**, (5) **B** & **C**, (6) **A**, **B**, & **C**, etc.
"**A** and/or **B**"	(1) **A**, (2) **B**, (3) **A** & **B**

To the extent Defendants do not intentionally mean to change the meaning of "at least one," their proposal should be rejected at least as it unnecessarily adds ambiguity to the scope of the phrase.

Lastly, Defendants attempt to justify rewriting the claim language by fabricating a dispute about whether the webpage and the user data relate back to the earlier use of those terms. Defendants' Answering Position, Term 6 at 58. There is no dispute; those terms of course find antecedent basis in the prior limitation. There is no need, however, to restate the entirety of the claim language relating to those terms, particularly where Defendants' proposal changes the phrasing and order of the words in order to alter the scope of the claim, as addressed in Attentive's Opening Position on this term. Attentive Opening Position, Term 6 at 57.

In sum, Defendants present no justification for rewriting the claim language and no explanation why any construction is needed at all. To the extent any construction is needed, Attentive's proposal more naturally comports with the originally intended claim scope.

4. Defendants' Sur-Reply Position

Attentive's argument on reply ignores the specification and interprets "identifier" in a way that lacks written description and would not fulfill the functionality of identifier. The specification uses the term "identifier" (paired with a modifying word) only to refer to the unique identification of a specific item for a specific purpose, like a mobile phone identifier identifying a specific mobile

phone ('887 patent at 3:54-67), a user identifier identifying a specific user (*id.* at 8:14-44), or a purchase identifier identifying a specific purchase. (*id.*at 9:27-47). Attentive's proposed construction, by contrast, requires nothing more than that the claimed identifier bear some (any) relation to the thing it is supposed to be identifying. As Defendants noted in their initial brief, it removes the notion that the identifier identify.[15] Apart from the fact that such a construction would be inconsistent with the very term being construed, it is also at odds with the way the specification uses the term. The specification contains no support for identifiers that don't identify, nor disclose how such an "identifier" would fulfill the purpose of the invention. (Defendants' Answering Position, Term 6 at 58-59); *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1479 (Fed. Cir. 1998) (rejecting broad construction in part as outside stated purpose of the invention). The Court should adopt Defendants' proposal, which gives a concrete meaning to the term being construed.

G. Term 7: "custom [text] message"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"custom [text] message" '887 patent, claim 1; '897 patent, claims 15 and 24.	Plain and Ordinary Meaning, wherein the Plain and Ordinary Meaning is "message that is customized"	"message with its editable parts customized"

1. Plaintiff's Opening Position

A "custom message" is just that: a message that is customized. Defendants agree that there is no need to interpret either "custom" or "message" as they reuse the terms in their proposal. Here again, Defendants only seek to improperly inject additional limitations into the clear and well understood language. Moreover, Defendants' proposal introduces ambiguity by adding a foreign

[15] Contrary to Attentive's argument, Defendants' proposed construction does not limit the claim to a single identifier associated with ***only*** the webpage or the user data. But the identifier must ***identify*** the webpage or user data.

concept of editable versus noneditable parts of a message, a concept not addressed in the specification or recited in the claims.

The specification describes various embodiments of a "custom message." For example, it explains that "the content of the message 213 and/or the phone number 214 can be customized (or defined or populated). . . ." D.I. 62-1, '887 Patent at 7:54-59. The specification also describes that the message and/or the phone number may be "fixed and cannot be changed" or, alternatively, "the user has an option to change [them]." *Id.* at 7:65-8:3. Defendants' unsupported requirement that the "editable parts [be] customized" only serves to add ambiguity and confusion as to whether the editable parts need to be fixed or can be changed by an end user.

As Plaintiff understands Defendants' proposal, the message's "editable parts" refers to the content of the message and the destination phone number. Thus, Defendants' proposal would require that both aspects be customized. This, however, would be inconsistent with the claims themselves. For example, while claim 1 of the '887 Patent recites "a custom message … that includes an address associated with the click-to-text server and a message body that includes an identifier associated with at least one of the webpage or the user data" (*id.* at 21:60-64), claim 15 of the '897 Patent only requires that "a custom text message" is populated (D.I. 62-2, '897 Patent at 24:53). Different still, claim 24 of the '897 Patent only requires that "a custom text message with a destination address for a recipient of the custom text message" be populated. *Id.* at 26:10-12. Thus, not only do the claims themselves dictate what information is "customized (or defined or populated)" (D.I. 62-1, '887 Patent at 7:54-59), but also Defendants' proposal is inconsistent with the express language of the claims. Thus, Defendants' proposal should be rejected as the words of the claims control. *See Digital Biometrics, Inc. v. Identix, Inc.*, 149 F.3d 1335, 1344

(Fed. Cir. 1998) ("Even within the intrinsic evidence, however, there is a hierarchy of analytical tools. The actual words of the claim are the controlling focus.").

Thus, no construction is needed beyond affording the term its plain and ordinary meaning.

2. Defendants' Answering Position

The dispute here relates to what differentiates a "custom text message" from a "text message." All text messages contain the sender's phone number and the recipient's number. Because these are parts of every text message, they cannot be what distinguishes a custom [text] message from just "a text message." To do so would impermissibly read "custom" out of the claim language. *Cephalon, Inc. v. Abraxis Bioscience, LLC*, 618 F. App'x. 663, 666 (Fed. Cir. 2015) ("[a] claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so") (citing *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005)).

Defendants' proposed definition clarifies that a custom text message requires the editable parts of a message to be customized and thus distinguishes a *custom* text message from "a text message."

Defendant's construction requiring the editable portions of the text message to be edited is supported the specification. The claims and specification in the patent clearly discuss editable portions of the text message embodied by Defendants' proposed definition. ('887 patent at 19:37–44; '897 patent at 19:62–20:2 (distinguishing between the content of the message and the phone number and stating both can be customized).) Merely providing the destination or recipient address—as Attentive argues—cannot be understood to create a custom text message. While the patent notes that certain destination address fields may be "customized" as either a "short code cellular number" or a "long code cellular number", '887 patent at 7:59–60; '897 patent at 7:53–

54, that is customization of the phone number, not the message. (*See e.g.,* '887 patent at 19:37–44; '897 patent at 19:62–20:2.)

Moreover, if simply providing a destination address renders a text message "custom" then the term "custom" would be completely superfluous. For example, claim 24 of the '897 patent requires a URI that "automatically populate[s] a custom text message with a destination address for a recipient of the custom text message." But if adding a recipient's phone number was the act that renders a text message "custom," then the claim would have been written "automatically populating ***a text message*** with a destination address for a recipient ***to create a*** custom text message." Moreover, there would be no difference in scope if the term "custom" was deleted from the claim:

Original	Custom Deleted
in response to a first user interaction with the promotional message via the web browser application, cause the mobile device to […] and (2) **automatically populate a custom text message with a destination address for a recipient of the custom text message, the text messaging application configured to send the custom text message** upon detection of a second user interaction with the text messaging application; and	in response to a first user interaction with the promotional message via the web browser application, cause the mobile device to […] and (2) **automatically populate a text message with a destination address for a recipient of the text message, the text messaging application configured to send the text message** upon detection of a second user interaction with the text messaging application; and

As can be seen above, the edited claim on the right deletes the word "custom," but still requires a text message with a destination address for the recipient. Thus, Attentive's view that a message can be customized by inserting the required destination address improperly reads the word "custom" out of the claim. *Cephalon*, 618 F. App'x. at 666 (citing *Merck & Co., Inc. v. Teva Pharms. USA, Inc.*, 395 F.3d at 1372). As Attentive admits, claims reside at the top of the hierarchy of claim interpretation. (Attentive Opening Position, Term 7 at 64-65.) Thus, an interpretation that would render the words of claim 24 superfluous should be rejected.

Claim 1 of the ’887 patent similarly requires a URI configured to cause the mobile device to “automatically populate a custom message in the messaging application that includes an address associated with the click-to-text server *and* a message body that includes an identifier associated with at least one of the webpage or the user data.” (’887 patent at 21:50–65 (italics added).) As such, the claim language requires a custom message with *not only* a populated recipient address *but also* a message body customized with an identifier associated with the webpage or the user data.

Attentive’s citations to the specification do not support a different result. (Attentive Opening Position, Term 7 at 64.) Both of Attentive’s citations distinguish between customizing/changing a phone number and customizing/changing a message. (*See, e.g.*, ’887 patent at 15:41–61; ’897 patent at 15:65–16:18.) The patents’ clear distinction between messages and recipients phone numbers supports Defendant’s proposed construction.

Attentive’s final argument that Defendants’ proposal would somehow require all editable parts to be edited to create a customized text message is spurious. Defendants’ construction does not say “*all* its editable parts customized.”

3. Plaintiff’s Reply Position

Defendants’ proposal should be rejected as it (1) is inconsistent with the express language of the claims themselves and (2) injects ambiguity into otherwise clear claim language.

As addressed in Attentive’s Opening Position, this term is used in three different independent claims with distinct requirements for what aspects need be customized:

- Claim 1 of the ’887 Patent: *both* “an address associated with the click-to-text server and a message body that includes an identifier associated with at least one of the webpage or the user data” (D.I. 62-1, ’887 Patent at 21:60-64);

- Claim 15 of the '897 Patent: *only* requires that "a custom text message" is populated without specifying what parts are customized (D.I. 62-2, '897 Patent at 24:53); and
- Claim 24 of the '897 Patent: *only* "a destination address for a recipient of the custom text message" (*id.* at 26:10-12).

Defendants' proposal—requiring the message's "editable parts [be] customized"—fails to account for the differences in the claim language.

Defendants' retort to this argument is to cast it aside as "spurious" and proclaim that their proposal does not say "*all* its editable parts customized." Defendants' Answering Position, Term 7 at 66. This hatches the second problem with Defendants' proposal: it is entirely ambiguous as even Defendants cannot identify what "editable parts" need to be customized, let alone in a manner consistent with the individual claims. Defendants also fail to explain or provide any support for the phrase "editable parts," which appears nowhere in the intrinsic record. This begs yet further questions: What are the "editable parts;" only the address and message body? What is being distinguished by "editable parts"; non-editable parts? If so, how do non-editable parts play into the scope of the claims? Neither Defendants' proposal nor their Answering Position answers these questions. Given the ambiguity created by Defendants' proposal, the jury would require special instructions as to how to resolve Defendants' proposal with the express language of the claims.

In contrast, Attentive's proposal stays true to the language of the claims themselves without injecting any ambiguity. As Attentive proposes, no construction is needed beyond affording the term its plain and ordinary meaning, which is a "message that is customized."

Defendants' argument (Defendants' Answering Position, Term 7 at 65) that Attentive's proposal renders "custom" superfluous is a red herring. Defendants are correct that "there would be no difference in scope if the term 'custom' was deleted from the claim." *Id.* at 26. That, however, is not a result of Attentive's proposed construction, but rather, it results from the fact

that the language of the individual claims themselves define this term and dictate what parts must be customized, as addressed above. In other words, the claims themselves specify what must be "customized" about the message.

To be sure, as addressed in Attentive's Opening Position, the specification explains what it means to be "customized": "the content of the message 213 and/or the phone number 214 can be customized (*or defined or populated*). . . ." D.I. 62-1, '887 Patent at 7:54-59. Consistent with that disclosure, the claims at issue recite "automatically populate a custom [text] message" and each recite for themselves what aspects need to be customized. The claims speak for themselves. *See Digital Biometrics, Inc. v. Identix, Inc.*, 149 F.3d 1335, 1344 (Fed. Cir. 1998) ("Even within the intrinsic evidence, however, there is a hierarchy of analytical tools. The actual words of the claim are the controlling focus.").

Defendants' proposal—which itself reuses "customized"—should be rejected as inconsistent with the claim language and ambiguous. Defendants provide no valid reason to deviate from the language chosen by the inventors and approved by the Patent Office.

4. Defendants' Sur-Reply Position

Defendants' brief makes clear that customizing a message body or other "editable portions" of a text message makes it a "custom [text] message." (Defendants' Answering Position, Term 7 at 65-66.) Attentive seeks to read this limitation out of the claim. Attentive suggests that "population of a destination address" renders a text message custom. (Attentive's Reply Position, Term 7 at 68-69.) But that is a necessary part of every text message. The other claims Attentive cites only require that a custom message ***contain*** a destination address and a message body, ('887 patent, 21:50-67 (Claim 1)), or that or that it be "based on user data," with no indication that the message is "custom" if it fulfills those requirements. ('897 patent, 24:46-54 (Claim 15).) Indeed,

simply populating the "destination address" cannot be what makes the text message custom as all text messages require a destination. (Defendants' Answering Position, Term 7 at 65-66.)

Attentive also suggests that "custom text message" need not be defined because the term "customized" is synonymous with "defined" or "populated," (Attentive's Reply Position, Term 7 at 69), but this position is contradicted by the presence of all three terms in the claims. (*See* '887 patent 21:44-22:5 (Claim 1); 24:20-23 (Claim 20); '897 patent 24:39-60 (Claim 15); 25:62-26:15 (Claim 24).)

H. Term 8: "authenticate the mobile device"/"authenticate a user of the mobile device"

Claim Term	Plaintiff's Proposal	Defendants' Proposal
"authenticate the mobile device" '887 patent, claims 3, 4, 9, 10; '897 patent, claim 19. **"authenticate a user of the mobile device"** '887 patent, claims 6 and 7.	No construction necessary, as each of the claims that use the terms specify how the authentication is to be performed.	"verify the identity of the mobile device" / "verify the identity of a user of the mobile device"

1. Plaintiff's Opening Position

No construction is necessary, as Plaintiff proposes, as the claims themselves specify how authentication is performed. In contrast, Defendants' proposed construction appears to be based solely on extrinsic evidence; in fact, nowhere does the intrinsic evidence even mention the language in Defendants' proposed construction, much less support it. Therefore, the Court should reject Defendants' proposed construction.

As an initial matter, the language of the claims that use the terms provides the plain meaning of the disputed terms. When the plain language of a claim defines a claim term, the language of the claims controls, and no further construction is necessary. *See, e.g.*, *Cordance*

Corp. v. Amazon.com, Inc., 636 F. Supp. 2d 310, 322 (D. Del. 2008), *aff'd*, 658 F.3d 1330 (Fed. Cir. 2011) ("The court agrees [] that no construction of this term is necessary and that the claim language following the disputed phrase defines the phrase."). For example, claim 19 of the '897 Patent recites "authenticate the mobile device based on matching the second user identifier matching the first user identifier. . . ." D.I. 62-2, '897 Patent at 25:21-22. Here, the claim itself makes clear that "matching" the two identifiers is all that is required to "authenticate the mobile device." Similarly, the other claims that use these terms recite that the authentication is based on specific types of information, thereby imparting the plain meaning to the term. *See, e.g.*, D.I. 62-1, '887 Patent at Claims 3, 9 ("authenticate the mobile device based on the user data [received / sent] in response to the mobile device loading the webpage and the identifier received with the custom message"); *id.* at Claim 4 ("authenticate the mobile device based on the user data received in response to the mobile device loading the webpage"); *id.* at Claim 6 ("authenticate a user of the mobile device based on the custom message satisfying a predefined criteria"); *id.* at Claim 7 ("authenticate a user of the mobile device based on information in the custom message appearing on a white list or being absent from a black list"); *id.* at Claim 10 ("authenticate the mobile device based on the identifier received with the custom message"). Courts faced with similar claim language have determined that no construction is necessary. *See, e.g.*, *MAZ Encryption Techs., LLC v. Lenovo (United States) Inc.*, No. CV 13-303-LPS, 2015 WL 4035049, at *10 (D. Del. June 30, 2015) (determining no construction necessary for term, "authenticate a user based on the biometric user identifying information").

Defendants' attempt to limit the term to "verify the identity of the [user / mobile device]" is wrong as Defendants' proposal is not based on the specification or the claim language. The intrinsic record does not recite or support Defendants' proposal. The closest phrase remotely

similar to Defendants' proposal comes from the Provisional Application, which recites, "the system may still correctly identifies [sic: identify] [the user's] subscription or purchase." D.I. 62-4, Provisional Application at [0019]. In fact, this disclosed concept of identifying a user's subscription is in line with the language of the claims, for example, matching collected identifiers to identify a subscription. Thus, it appears that Defendants plucked their proposal from an extrinsic source. Particularly as the claim language provides substantial guidance as to the meaning of the terms, any extrinsic resources should be given significantly less weight. *See Phillips*, 415 F.3d at 1314, 1317 ("[C]laims themselves provide substantial guidance as to the meaning of particular terms," whereas extrinsic evidence is "less significant than the intrinsic record.").

Furthermore, the term "authenticate" is clear to the jury because authentication is a well-known concept in view of the widespread use of Internet technology. In contrast, Defendants' proposal of "verify the identity of" would also cause unnecessary confusion to the jury. For example, the jury would have no idea what type or extent of verification is required. The jury would also need additional elaboration, from the court, about whether "verify[ing] the identity" requires verifying personal or account information, for example, to properly understand and apply the proposed construction. Adopting Defendants' proposal, therefore, would not "ensure that the jury fully understands the court's claim construction rulings." *Power–One, Inc.*, 599 F.3d at 1343. For this additional reason, the Court should decline to construe these terms.

2. Defendants' Answering Position

The Court should adopt Defendants' proposed construction for "authenticate the mobile device" and "authenticate a user of the mobile device."

Attentive proposes no construction of these terms, claiming their meaning will be "clear to the jury." However, apart from pointing to other claim limitations, Attentive's brief does nothing to clarify what it thinks the term "authenticate" means. This Court has made clear that "[n]ever,

never, never should any party go into a claim construction in [this] district without a proposed construction." (Ex. 7, Transcript of Oral Argument at 129, *Tonal Systems, Inc., v. iFIT, Inc.*, No. 20-1197-GBW-CJB (D. Del. Feb. 23, 2023).) Thus, as a preliminary matter, Attentive's refusal to provide a construction of this term runs afoul of this Court's guidance.

Attentive tries to justify its failure to say what it thinks this term means by pointing to other claim language that supposedly defines the term, but Attentive's examples only demonstrate the need for a construction. Attentive cites to a number of claims that require the step of "authenticating" a user or a mobile device "based on" particular types of data like "the user data received in response to the mobile device loading the webpage and the identifier received with the custom message." (D.I. 62-1; '887 patent at claim 3.) Contrary to Attentive's conclusory assertion, saying that the authentication of the mobile device is performed (for example) "based on the user data received in response to the mobile device loading the webpage and the identifier received with the custom message" does nothing to make clear what it means to "authenticate the mobile device." If merely receiving these items is sufficient, then the dependent claim would add nothing to the independent claim, which already requires that the user data and the identifier be received. (*Id*., at claim 1); *AK Steel Corp. v. Sollac & Ugine*, 344 F.3d 1234, 1242 (Fed. Cir. 2003) ("[D]ependent claims are presumed to be of narrower scope than the independent claims from which they depend."). If something must be done with this information in order to "authenticate" the user or the mobile device, what is that something? Attentive's failure to propose a construction leaves Postscript, the Court, and eventually the jury to guess at the answer.

By contrast, Postscript's construction tracks the plain and ordinary meaning of the term that the specification is obviously using. Both of the technical dictionaries Attentive cites in support of its other constructions define authentication as verifying identity. (*See* Ex. 8,

Authentication, Dictionary of Computer and Internet Terms at 110 (1st Ed. 2016) ("[t]he process of verifying the identity of a user, computer, device . . ."); *see also* Ex. 9, *Authenticate*, Newton's Telecom Dictionary at 166 (30th Ed. 2016) ("[t]o verify the identity of a user, device . . .").) And while the specification only mentions the term a couple of times, it likewise uses the term in this sense: it is unclear what else the specification can possibly mean when it says that "[i]n some implementations, in response to receiving the message 213, the click-to-text server can authenticate the user based on a user identifier."[16] ('887 patent at 8:14-16.)

Finally, Attentive claims that Postscript's construction will confuse the jury because "the jury would have no idea what type or extent of verification is required" or "whether verifying the identity requires verifying personal or account information." Attentive Opening Position, Term 8 at 72. Attentive does not explain why the jury would think that verification of identity is a matter of extent or that a particular type of verification is required. At any rate, Postscript's construction is surely more helpful to the jury than Attentive's assertion that authentication is "a well-known concept in view of the widespread use of Internet technology," without any further explanation.

For the foregoing reasons, the Court should adopt Postscript's construction of these terms.

3. Plaintiff's Reply Position

Defendants' Answering Position sets up various straw man arguments but fails to justify its proposal with intrinsic record support, instead relying solely on extrinsic evidence. In contrast,

[16] For this reason, *MAZ Encryption Techs., LLC v. Lenovo (United States) Inc.*, No. CV 13-303-LPS, 2015 WL 4035049 (D. Del. June 30, 2015) is distinguishable: there, the defendant was attempting to limit the term "authenticate a user based on the bio-metric user identifying information" to a specific authentication algorithm found nowhere in the specification. *Id.* at *10. Postscript's proposed construction does not do that. And other courts have construed the term similarly. *See, e.g.*, *SSL Servs., LLC v. Citrix Sys.*, Inc., 816 F. Supp. 2d 364, 383 (E.D. Tex. 2011) (construing authentication as "verification of identity"); *Meetrix IP, LLC v. Citrix Systems, Inc.*, No. 1:16-cv-1033-LV, 2017 WL 5986191, at *8 (W.D.Tex. Dec. 1, 2017) (construing "authenticate" as "verify the authenticity of").

Attentive's proposal is that the claims speak for themselves; no construction of these terms is needed, as the claims using these terms specify how the authentication is to be performed.[17]

Defendants begin by claiming that Attentive refuses to say what authenticate means. Defendants' Answering Statement Opp. at 3. Not so. Rather, Attentive explained in its Opening Position that the Provisional Application provides the best explanation of this term: "identif[y] [the user's] subscription or purchase." D.I. 62-4, Provisional Application at [0019]. Attentive further explained that this disclosed concept of identifying a user's subscription is in line with the language of the claims, for example, matching collected identifiers to identify a subscription. *See* D.I. 62-2, '897 Patent at 25:21-22. Attentive also walked through each claim that uses these terms to demonstrate that the claims themselves dictate how the authentication is done. Attentive Opening Position, Term 8 at 69-70.

Defendants' claim that Attentive conflates authenticating with "receiving" is a straw man argument. *See* Defendants' Answering Position, Term 8 at 72. As explained, this is not Attentive's position. Defendant then faults Attentive's position as failing to explain what "must be done with this information in order to 'authenticate' the user or the mobile device." *Id.* Another fallacy. As mentioned, the claims and intrinsic record make clear that the action is to identify a user or mobile device's subscription.

Defendants then pivot and claim that their proposal "tracks the plain and ordinary meaning of the term that the specification is *obviously* using." *Id.* In support, they only cite to *extrinsic* dictionaries. In fact, their only citation to the intrinsic record is to a phrase that parrots the claim

[17] Attentive is aware of the Court's guidance in *Tonal Systems, Inc., v. iFIT, Inc.*, No. 20-1197-GBW-CJB (D. Del. Feb. 23, 2023). Attentive respectfully submits that it complied with the Court's guidance by not merely proposing "no construction necessary" but explaining in its proposal why no construction was necessary. Additional supporting reasons are provided in Attentive's Opening Position for these terms.

language, "authenticate the user based on a user identifier." *Id.* (citing D.I. 62-1, '887 Patent at 8:14-16). None of Defendant's citations or arguments finds support from the intrinsic record. Rather, Defendants' proposal contradicts the intrinsic record by requiring authentication to verify the identity of the *user or mobile device*, while the intrinsic record discloses identifying the *subscription* of the user or mobile device. *See* D.I. 62-4, Provisional Application at [0019].

Next, Defendants fault Attentive for supposedly not explaining "why the jury would think that verification of identity is a matter of extent." Defendants' Answering Position, Term 8 at 74. This again is false. For example, Attentive explained that a jury would not understand whether Defendants' proposal requires verifying personal or account information of the user. Attentive Opening Position, Term 8 at 71. This is precisely where Defendants' proposal adds ambiguity. Defendants' proposal at least implies verifying personal information such as the user's name or account number. The intrinsic record, however, does not support this level of inquiry. The identity of the user or mobile device need not be verified; rather, as explained, authentication is used to identify the subscription. *See* D.I. 62-4, Provisional Application at [0019].

Lastly, the cases cited by Defendants are distinguishable and inapposite to the dispute here. In *SSL Services, LLC v. Citrix Systems*, *Inc.*, the intrinsic record supported the construction as it expressly described "a method of establishing the identity." 816 F. Supp. 2d 364, 383 (E.D. Tex. 2011). In *Meetrix IP, LLC v. Citrix Systems, Inc.*, the court resorted to relying on extrinsic evidence where, unlike here, the intrinsic evidence and surrounding claim language provided "little context" for the term. No. 1:16-cv-1033-LV, 2017 WL 5986191, at *8 (W.D. Tex. Dec. 1, 2017). Here, however, the plain language of the claims that use these claim terms further defines these claim terms, as supported by the disclosure of the Provisional Application. Indeed, the actual words of the claim should be the controlling focus. *See Digital Biometrics, Inc.*, 149 F.3d at 1344

("The actual words of the claim are the controlling focus."). Unlike Defendants' cases, the facts at issue here are very similar to those in *MAZ Encryption Techs., LLC v. Lenovo (United States) Inc.*, where the court determined that no construction was necessary for the term, "authenticate a user based on the biometric user identifying information," because the claims themselves specified what was meant. No. CV 13-303-LPS, 2015 WL 4035049, at *10 (D. Del. June 30, 2015). Defendants' arguments do not distinguish this case. While the defendant in that case may have proposed a deficient construction of an algorithm that lacked intrinsic support, it does not change the fact that the claims themselves defined the plain meaning of the term, the same as the claims do here.

4. Defendants' Sur-Reply Position

In its opening briefing, Attentive took the position that the "authenticate" term needed no construction because the claims themselves defined it. (Attentive's Opening Position, Term 8 at 70-72.) In response, Defendants pointed out that the claims did no such thing, because stating what information is used does nothing to define what authentication requires to be done with that information. (Defendants' Answering Position, Term 8 at 73.) On reply, Attentive pivots to a new proposal: that "authenticate" should be construed to mean "identify the user's subscription or purchase." (Attentive's Reply Position, Term 8 at 75.) This proposal does not make sense because most of the claims that use the term "authenticate" anticipate that the authentication will be performed ***before*** a user is subscribed to the claimed promotion (and do not contemplate a purchase at all). For example, claim 1 of the '887 patent requires the mobile device to "send user data to at least one of the client server or the click-to-text server." (D.I. 62-1; '887 patent at 21:47-49 (claim 1).) Once that occurs, the click-to-text server defines and sends a URI to the mobile device that enables the mobile device to populate and send a text message containing an identifier to the click-to-text server. When the text message is received, the user is enrolled in a promotion as a last step.

Dependent claim 3 adds the requirement of "instructions to cause the click-to-text server to authenticate the mobile device based on the user data received in response to the mobile device loading the webpage and the identifier received with the custom message." (*Id*., at 22:10-15 (claim 3).) At the time the user data and the identifier are received, and the authentication takes place, there is no "subscription" to "identify." The user is subscribed only later.

Attentive thus ties itself into knots to avoid the term "authenticate" being given the ordinary, plain-English meaning encompassed in Defendants' construction. It criticizes that construction for not being taken verbatim from the intrinsic record, but Attentive's own proposal is hardly more faithful to the intrinsic record, since—leaving aside the fact that it makes no sense in the context of the claims—the language it identifies in the provisional application is in no way linked to the term "authenticate," which does not appear in the provisional at all.

The only substantive argument Attentive advances against Defendants' construction is that a jury will supposedly be confused about whether "Defendants' proposal requires verifying personal or account information of the user." (Attentive's Reply Position, Term 8 at 76.) It is not clear what the difference is, especially since two sentences later Attentive says that a user's "account number" is "personal" information. (*Id.*) At any rate, what is required is verification sufficient to confirm the identity of the user or the mobile device, whatever form that confirmation takes in the system under discussion. On the spectrum of concepts with which jurors in patent cases are required to grapple, this one should not rank as particularly challenging. Many jurors will have had regular encounters in their online lives with various ways performing authentication using user IDs, passwords, two-factor authentication, IP addresses, and the like.

IV. CONCLUSION

A. Plaintiff's Position

Accordingly, the Court should reject Defendants' attempts to manufacture non-infringement positions by improperly injecting narrowing limitations from the specifications into the disputed claim terms. Rather, the Court should afford their terms their plain and ordinary meaning or not construe the terms as proposed by Plaintiff.

B. Defendants' Position

Accordingly, Defendants respectfully request that the Court adopt Defendants' proposed constructions.

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