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January 29, 2024

The Honorable Christopher J. Burke
U.S. District Court
for the District of Delaware
J. Caleb Boggs Federal Building
844 North King Street
Wilmington, DE 19801

VIA ELECTRONIC FILING

Re: *Attentive Mobile Inc. v. 317 Labs, Inc. d/b/a Emotive*, C.A. No. 22-1163 (CJB);
Attentive Mobile Inc. v. Stodge Inc. d/b/a Postscript, C.A. No. 23-87 (CJB)

Dear Judge Burke:

Pursuant to the Court's January 9, 2024 Oral Order, Plaintiff Attentive Mobile Inc. ("Attentive") and Defendants 317 Labs, Inc. d/b/a Emotive ("Emotive") and Stodge Inc. d/b/a Postscript ("Postscript") (Emotive and Stodge collectively, "Defendants") jointly submit this letter regarding the parties' remaining dispute(s), current respective proposals, and respective positions for Term 3 ("*integration tag*"), Term 4 ("*means for displaying*"), and Term 6 ("*identifier associated with at least one of the webpage or the user data*").

The following attorneys, including at least one Delaware Counsel and at least one Lead Counsel per party, participated in a verbal meet-and-confer (by Teams), on January 19, 2024, which lasted approximately 48 minutes:

Counsel for Attentive:
Delaware Counsel: Michael J. Flynn from Morris Nichols Arsht & Tunnell LLP
Lead Counsel: Ryan A. Schmid from King & Spalding LLP

Counsel for Emotive:
Delaware Counsel: John G. Day from Ashby & Geddes
Lead Counsel: Michael Chow, and Jonathan Liu from Orrick, Herrington, & Sutcliffe LLP

Counsel for Postscript:
Delaware Counsel: Alexandra M. Joyce of McCarter & English, LLP
Lead Counsel: Hannah Jiam, of Morrison Foerster, and
Raghav Krishnapriyan from Orrick, Herrington, & Sutcliffe LLP

As addressed in more detail below, the parties were able to reach certain agreements regarding the claim construction disputes via the meet-and-confer and/or through further correspondence.

1. **Term 3: "*integration tag*"**

Plaintiff's Proposed Construction	Defendants' Proposed Constructions
Plaintiff's Original Proposal: Plain and Ordinary Meaning, wherein the Plain and Ordinary Meaning is "integrator instructions" Plaintiff's Amended Proposal: Plain and Ordinary Meaning, wherein the Plain and Ordinary Meaning is "an HTML <script> tag integrated with a webpage that includes or points to code (including code in interpreted programming languages, such as JavaScript)"	Defendants' Original Proposal: "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" Defendants' Amended Proposal: "code (including code in interpreted programming languages, such as JavaScript and code within HTML <script> tags) that, when executed, causes a user mobile device to send a request to a click-to-text server for, and receive from the click-to-text server, promotional messages associated with a client"

Joint Statement

The parties met and conferred and exchanged correspondence on this term and believe they have narrowed their disputes regarding this term.

Plaintiff Attentive's Position

During the meet and confer process, Defendants had agreed to Attentive's proposal for the first phrase of the construction (i.e., "an HTML <script> tag integrated with a webpage that includes or points to code (including code in interpreted programming languages, such as JavaScript)"), such that the sole remaining dispute related to the "causes" phrase.[1] Defendants, however, subsequently retracted their agreement and proposed similar but seemingly broader language. For example, without the "causes" phrase, Defendants' proposal is simply "code…." *Cf.* Tr.[2] at 138:2-6 (Ms. Jiam: "And so the jury can't just simple [sic] be told, 'Oh, it's just code.'"). Furthermore, Attentive disagrees that this is a "coined term." The claimed "integration tag" uses

[1] The "causes" phrase refers to the language, "that, when executed, causes a user mobile device to send a request to a click-to-text server for, and receive from the click-to-text server, promotional messages associated with a client."

[2] As used herein, "Tr." refers to the transcript of the *Markman* Hearing held on January 9, 2024.

the ordinary meaning of "tag" and "integrate" to refer to an HTML tag integrated on a webpage. Because the claims recite specific functions the integration tag must perform (as addressed below), the parties (at least at some point) agreed that the tag must be an HTML <script> tag that includes or points to code.[3] This is entirely consistent with the exemplary embodiment of an integration tag disclosed in the specifications. D.I. 62 ("JCCC"), Ex. 1, '887 Patent at 12:47-62; D.I. 112-1, Attentive's Cl. Constr. Slides, at 54; Tr. at 116:3-14. Thus, Attentive respectfully submits that its proposal is the only one that is consistent with (1) the disclosure of the specifications and (2) the express requirements of the claims themselves.

Turning to the "causes" phrase, Attentive maintains its position that the "causes" phrase is both unnecessary and improper, because each and every one of the claims recites the specific use of the integration tag required by that particular claim. In other words, Defendants' "one-size-fits-all" proposal conflicts with the specific use of the integration tag expressly recited in the claims. At the *Markman* Hearing, the Court focused on two aspects of the phrase: how do the claims define the interaction between (1) the integration tag and the click-to-text server and (2) the integration tag and the promotional message. *See, e.g.*, Tr. at 148:10–149:7. Below, Attentive addresses these issues for the asserted claims[4] of each asserted patent. Key to both of these inquiries is that the "causes" phrase Defendants propose comes from specification embodiments that are expressly optional. *See, e.g.*, JCCC, Ex. 1, '887 Patent at 12:32–36 ("can send"), 14:34–41 ("can be retrieved"), 17:3–8 ("can send"); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1330–32 (Fed. Cir. 2003) (use of can denotes optional functionality); D.I. 112-1, Attentive's Cl. Constr. Slides, at 56–58. Importing expressly optional specification embodiments into each of the claims would be committing "one of the cardinal sins of patent law." *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1340 (Fed. Cir. 2001). Further, importing these optional specification limitations into the claims would also contradict and/or render superfluous the express language of the claims themselves that already specify the function of the integration tag, violating yet another cardinal rule of claim construction. *See 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."); *Virco Mfg. Corp. v. SSI Liquidating, Inc.*, No. CV 20-906-LPS-CJB, 2022 WL 1184060, at *2 (D. Del. Apr. 21, 2022) (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005)) (Burke, J.) (describing that the language of the claims controls); D.I. 112-1, Attentive's Cl. Constr. Slides, at 49–50.

The only asserted independent claim that specifies any interaction between a "click-to-text server" and the integration tag is claim 1 of the '887 Patent, where the click-to-text server is only required to "send, to a client server, an integration tag."[5] JCCC Ex. 1, '887 Patent at Cl. 1. No

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[3] Attentive proposed the phrase "that includes or points to" to capture the parties' understanding that the integration tag can work with code that resides on a remote server and need not be "included" on a webpage.

[4] The Asserted Claims are as follows: '887 Patent, claims 1-20; '897 Patent, claims 15-30; and '074 Patent, claims 1-30. The asserted independent claims are as follows: '887 Patent, claim 1; '897 Patent, claims 15 and 24; and '074 Patent, claims 1, 8, 16, and 23.

[5] Notably, Postscript objected to slide 14 of Attentive's "Overview of the Technology" section of its Technology Tutorial (submitted with D.I. 98 in 1:23-cv-000087-CJB) as "incongruent with the

further interaction with the click-to-text server is required by this claim. The claim also recites the specific function of the integration tag, which is only required to "send user data to at least one of the client server or the click-to-text server"—not to request/receive a promotional message. *Id.* While claim 1 does recite "a promotional message," the claim places no restriction on how the mobile device requests or receives the promotional message—let alone that the integration tag request/receive the promotional message from the click-to-text server. Significantly, dependent claims 15 and 16 demonstrate that claim 1 does not require the integration tag to request/receive the promotional message, as each narrows the independent claim to require that "the integration tag includes code to cause the first application to display the promotional message" under specific conditions. *Id.* at Cls. 15-16. For the '897 Patent, the only asserted claim that recites an integration tag is dependent claim 16, where the "means for displaying" recited in claim 15 is narrowed to "comprise[] and integration tag." JCCC Ex. 2, '897 Patent at Cl. 16. Claim 15 does not recite a click-to-text server but recites "at least one server" that is required to send the "means for displaying an invitation to subscribe to a text messaging subscription service." *Id.* at Cl. 15. No further interaction is required between the at least one server and the integration tag. Thus, in claim 16, the integration tag is the structure that performs the claimed function (i.e., "displaying an invitation…"), where the "causes" phrase at issue is redundant of or inconsistent with the claimed function, as no back-and-forth communication with the click-to-text server—or any server—is required by claim 15. Lastly, and perhaps more clearly than the other claim sets, the claims of the '074 Patent precisely recite what the integration tag must do and demonstrate that Defendants' "causes" phrase is inconsistent with the express language of the claims. The independent claims of the '074 Patent require that the mobile device receives "an integration tag included in a webpage" or the defining of "an integration tag configured to be included on a webpage." JCCC Ex. 3, '074 Patent at Cls. 1, 8, 16, & 23. In a separate limitation, the claims require the mobile device to send certain information (e.g., a mobile device identifier and a request to receive a different identifier) in response to the integration tag executing. *Id.* In response to receiving this information, the mobile device receives "a first signal causing a frame to be displayed with the webpage via the web browser application, the frame including a promotional message associated with joining a subscription list." Defendants' "causes" phrase clearly conflicts with at least the "first signal" limitation, which provides the promotional message to the mobile device. These claims also demonstrate that when the applicants intended to claim requesting/receiving a promotional message, they knew how to do so and did. Further, none of the claims of the '074 Patent recite "a click-to-text server" but only recite "at least one server."[6] Accordingly, Attentive respectfully submits that Defendants' "causes" phrase should be rejected.

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claims of [Attentive's] asserted patents" on the basis that "only one of the asserted patents has claims that require a click-to-text server and a client server (D.I. 67, Ex. 1 ('887 patent), claim 1); the claims of the other two asserted patents merely require 'at least one server' (*id.*, Ex. 2 ('897 patent), claims 15, 24 & Ex. 3 ('074 patent), claim 23) or 'at least one web server' ('074 patent, claims 1, 8)." D.I. 101 in 1:23-cv-000087-CJB at 1.

[6] Asserted independent claim 16 and claims 17–22, which depend therefrom, do not recite any server but do recite an integration tag. D.I. 62-3, '074 Patent at Cls. 16–22.

Defendants' Position

Defendants' proposed construction, but not Plaintiff's, accounts for the fact that the word "integration tag" is a coined term with no understood meaning outside the corners of the patents-in-suit and their file histories. Plaintiff presents no evidence that the term was known to or readily understandable to a person of ordinary skill in the art ("POSA"), much less that a POSA would understand it as being limited to an HTML `<script>` tag. "Because coined terms have no 'ordinary and customary meaning' known to a POSA, the relevant inquiry is to examine the intrinsic evidence for 'objective boundaries to the scope of the term.'" *Jackson v. NuVasive, Inc.*, No. CV 21-53-RGA, 2023 WL 3721562, at *6 (D. Del. May 30, 2023) (quoting *Iridescent Networks, Inc. v. AT&T Mobility, LLC*, 933 F.3d 1345, 1353 (Fed. Cir. 2019)). Thus, "consistent and numerous references" in the specification to the characteristics of the coined term "operate[] as an objective boundary to the scope of the term," even in the absence of an express definition. *Id.* (construing term based on "constent[] refer[ences] throughout the specification); *CoolTVNetwork.com, Inc. v. Blackboard Inc.*, 2020 WL 6536960, at *9 (D. Del. Nov. 6, 2020) (finding the term "shop mode" required allowing a user to add items to a shopping cart because "when the specification mentions 'shop mode,' it always does so with reference to the ability to add an item to the user's shopping cart"); *see also Indacon, Inc. v. Facebook, Inc.*, 824 F.3d 1352, 1357 (Fed. Cir. 2016) (a coined term "cannot be construed broader than the disclosure in the specification"). Put differently, without looking at how the patentee uses the term "integration tag," it is impossible to give the term any meaning at all. Plaintiff does not deny that the specification repeatedly and consistently describes the integration tag as causing the steps that Defendants' proposal requires. JCCC Ex. 1, '887 Patent at 11:61–65; 14:37–41; 16:52–55. It contends that this is an exemplary embodiment, but not only is that irrelevant in the context of a coined term, it misconstrues the language of the specification: The specification explains that "[i]n some implementations, the click-to-text server can send an integration tag," and then goes on to explain that "[t]he integration tag includes code, when executed, [to] cause 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." In other words, the specification is describing what an integration tag must include in every embodiment that features an integration tag. *Id.* at 11:59–65.

Plaintiff's remaining argument is that some claims recite other requirements that the integration tag must satisfy. But Defendants' proposal specifies the characteristics that an integration tag must have; nothing in the proposal precludes a claim from imposing additional requirements. Plaintiff does not contend, for example, that any of the requirements of claim 1 of the '887 patent or claim 16 of the '897 patent are inconsistent with Defendants' construction. Nor does the claim differentiation argument that Plaintiff attempts with claims 15 and 16 of the '887 patent work. Claim 15 requires the integration tag to "include[] code to cause the first application to display the promotional message in an iframe." *Id.*, Cl. 15. Because Defendants' proposal says nothing about iframes, claim 15 would not be coextensive with claim 1 if Defendants' proposal were adopted—and therefore claim differentiation does not apply. *See Kemco Sales, Inc. v. Control Papers Co.*, 208 F.3d 1352, 1363 (Fed. Cir. 2000) (holding that the district court did not violate the doctrine of claim differentiation when it imported an explicit limitation from a dependent claim into an independent claim, because the dependent claim still contained an additional limitation that resulted in a narrower scope); *Oy v. Verizon Servs. Corp.*, No. CV 12-

715-CJB, 2014 WL 7385615, at *13 (D. Del. Dec. 23, 2014). The same is true of claim 16, which requires the integration tag to include "code to cause the first application to display the promotional message in response to a business rule being met." Because Defendants' proposal says nothing about business rules, claim differentiation does not apply. As for the '074 patent, Plaintiff argues that the independent claims "clearly conflict[]" with Defendants' proposal because they require the mobile device to send certain information in response to the integration tag executing and to receive "a first signal causing a frame to be displayed with the webpage via the web browser application, the frame including a promotional message associated with joining a subscription list." But those elements are consistent with Defendants' proposal, which also requires sending a request to a server and receiving promotional messages. Nor are they redundant, because they specify additional requirements (*e.g.*, a frame that includes the promotional message).

Plaintiff's proposal construing an "integration tag" as an HTML `<script>` tag that "includes or points to" code is also inconsistent with the functions an integration tag must undisputedly perform. For example, claim 1 of the '887 patent states that the integration tag must be "configured to cause a mobile device loading the page via a first application to send user data to at least one of the client server or the click-to-text server." JCCC Ex. 1, '887 Patent at Cl. 1. But a `<script>` tag alone cannot perform this function; it is code (e.g., JavaScript code) either within the `<script>` tag or elsewhere that does so.[7] JCCC Ex. 4, Provisional Application No. 62/511,413 ¶ 14 ("Information can be collected by javascript code, which is part of the patent holders process."); *see id.* ¶¶ 21-22 (describing "Javascript tags" and "Sample javascript code" for data collection and link rendering).

2. Term 4: "*means for displaying an invitation to subscribe to a text messaging subscription service via a first application*"

Plaintiff's Proposed Construction	Defendants' Proposed Constructions
Agreed Function: "displaying an invitation to subscribe to a text messaging subscription service via a first application"	
Plaintiff's Proposal for the Corresponding Structure: a tag configured to cause the claimed functions	Defendants' Proposal for the Corresponding Structure: an integration tag configured to cause performance of the claimed functions

Joint Statement

The sole dispute between the parties pertains to the corresponding structure for the term.

Regarding the Court's questions at the *Markman* Hearing (Tr. at 154:154:14-155:7), the parties agree that the JavaScript tag described in the provisional application is an embodiment of

[7] Defendants tentatively agreed to different wording for their proposal on January 25 in the interest of reducing disputes for the Court, but on further consideration of the intrinsic record identified the problems above.

an integration tag. The parties also agree that an integration tag can be written in JavaScript or in a language other than JavaScript.

Plaintiff Attentive's Position

Attentive maintains its position that the specification discloses multiple corresponding structures using tags for "*means for displaying an invitation to subscribe to a text messaging subscription service via a first application*." Defendants, on the other hand, unduly limit the construction to an integration tag—a *single* embodiment of "*means for displaying*" found in the specification—"[b]ut 'an integration tag' is not the only structure that is disclosed in the intrinsic evidence to perform the recited function."[8] DI-117, Revised Joint CC Brief, Plf.'s Open. Position, at 43. Fundamentally, while an integration tag (despite the present disputes) requires "an HTML <script> tag integrated with a webpage that includes or points to code," the "*means for displaying*" need only render an invitation on the display of the mobile device. On a website, for example, any user-facing rendered object—buttons, images, links, forms, text, etc.—includes a "*means for displaying*," since it results in rendering an invitation on the display of the mobile device. As identified below, the specifications of the asserted patents explain as much. Additionally, an integration tag *could* operate exclusively on the backend—resulting in no display being rendered to a mobile device. Since "*means for displaying*" must ostensibly result in displaying, the specification discloses at least three corresponding structures for the claimed function: (1) `<button>`, `<svg>`, `<polygon>`, and other display-rendering tags (JCCC Ex. 1, '887 Patent at 7:34–41, 7:61–65, 9:4–10, 9:52–10:7; *see also id.* at Fig. 2A (depicting a promotional message **202** and a sign-up link **203**); D.I. 112-1, Attentive's Cl. Constr. Slides, at 66); (2) `<iframe>` tags (JCCC Ex. 1, '887 Patent at 7:34–39, 12:40–41; *see also* D.I. 112-1, Attentive's Cl. Constr. Slides, at 67–69); and (3) integration tags (e.g., `<script>` tags, per the parties' agreement) (JCCC Ex. 1, '887 Patent at 14:47–56; 17:3–8; *see also* D.I. 112-1, Attentive's Cl. Constr. Slides, at 70).

The specifications disclose that all of the aforementioned elements render an object comprising an invitation, for example, the `<button>` tag renders a clickable button; the `<svg>` tag renders vector-drawn images; the `<polygon>` tag renders a shape. The specifications discuss rendering a sign-up link **203** and a promotional message **202** on a user interface **201**. JCCC Ex. 1, '887 Patent at 7:34–41, 7:61–65, 9:4–10. The specification then discloses exemplary tags used in creating the sign-up link **202** or promotional message **203** when transmitting information to a server in an HTTP POST request—none of these tags, however, require any integration with a webpage. *Id*. at 9:52–10:7. Therefore, implementing Defendants' construction of "*means for displaying*" would read out these structures disclosed in the specification. Moreover, if Defendants' construction of "*means for displaying*" as "an integration tag" were to be adopted, the construction would completely read out the `<iframe>` embodiment because neither party's construction for integration tag includes an `<iframe>` tag. Specifically, an integration tag, under

[8] Plaintiff respectfully submits that waiver is not appropriate here. The Court instructed the parties to submit supplemental briefing on what the *real issues* were on this term. Tr. at 154:17. While the parties' briefing focused on the provisional application's "tag," the broader dispute is what corresponding structure(s) is disclosed in the intrinsic record that performs the claimed function. Plaintiff only attempts to clarify the dispute to ensure the Court's construction plainly reflects the disclosure of the specifications.

both parties' proposals, requires an HTML `<script>` tag and/or "code," where an `<iframe>` tag may not include either.

Therefore, because the specification explicitly discusses at least two other specific corresponding structures for the claimed "*means for displaying*" in addition to an integration tag, Attentive respectfully submits that its proposal is the only proposal that is consistent with and supported by the specification and claim language, whereas Defendants' construction unduly narrows the scope of a means-plus-function claim term, contravening Federal Circuit precedent.

Defendants' Position

Rather than address the questions posed by the Court at the hearing, Tr. at 154:14–155:17, Plaintiff attempts to conjure up new corresponding structures that were not discussed in its briefing. It now contends that the term can encompass "***any*** user-facing rendered object" including "buttons, images, links, forms, text, etc." (Emphasis added.) As a threshold matter, this new argument (based on new corresponding structures) is waived—and should be rejected for that reason alone. It also fails on the merits because any plausibility to Attentive's new argument derives from eliding other requirements imposed by the claim. The claim term is "means for displaying ***an invitation to subscribe*** to a text messaging subscription service via a first application." JCCC Ex. 2, '897 Patent at Cl. 15 (emphasis added). The claim then explains that the mobile device must "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***." *Id.* (emphasis added). Thus, the "means for displaying" does not just "render an image on the display," but provide an invitation, interactions with which can be detected. That can only be done through code, and the patents-in-suit call the code that performs that function an integration tag.

The two other candidates for the "means for displaying" that Plaintiff advances for the first time are (1) `<button>`, `<svg>`, `<polygon>`, and other display-rendering tags; and (2) `<iframe>` tags. Of the four citations to the specification Plaintiff provides to support the first candidate, only the last (JCCC Ex. 1, '887 Patent at 9:54–10:7) discusses those tags at all. And the specification, in a portion that Plaintiff does ***not*** quote, explains that those tags are part of "[a]n example HTTP form that POSTs to the client-to-text server," (*id.* at 9:46–48). Nowhere are those tags described as displaying an invitation to subscribe to a text messaging subscription service. The second candidate (`<iframe>` tags) is even further from the mark, because both the claims and the specification disclose that a frame or iframe can ***contain*** a promotional message, but does not constitute a ***means for displaying*** an invitation—that functionality is provided by the integration tag. JCCC Ex. 1, '887 patent at 7:34–39 ("The first user interface **201** displays a promotional message **202** (e.g., ***within a frame*** of the first user interface 201)" (emphasis added)); JCCC Ex. 2, '897 patent at Cl. 15 ("wherein the integration tag includes code to cause the first application to display the promotional message in an iframe"). Thus, Plaintiff's alternative candidates for a corresponding structure for the "means for displaying" should be rejected not just because they are untimely, but also because they find no support in the specification.

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

Agreed Construction
"information (such as a string of characters or keyword) having a designed association with at least one of: (1) the webpage; or (2) the user data"

Joint Statement

Through the parties' meet-and-confer and further correspondence, the parties believe they have resolved all of the disputes related to this term and respectfully request that the Court adopt the above-identified agreed construction on the term.

Respectfully,

Michael Flynn (# 5333)
Counsel for Plaintiff Attentive Mobile Inc.

cc: Clerk of Court (Via Hand Delivery)
All Counsel of Record (Via Electronic Mail)