

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ENS LABS LTD

Petitioner,

v.

UNSTOPPABLE DOMAINS INC.

Patent Owner.

IPR2024-00872

U.S. Patent No. 11,558,344

PATENT OWNER'S PRELIMINARY RESPONSE

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PATENT OWNER'S EXHIBIT LIST

EX2001	Declaration of Dr. Richard Newman in Support of Patent Owner Preliminary Response
EX2002	CV of Dr. Richard Newman
EX2003	Current search results for Brantly Millegan on Medium website
EX2004	Current search results for the title of Millegan on Medium website
EX2005	Featured stories on medium.com, Internet Archive snapshot August 13, 2019
EX2006	Current search results for Nick Johnson on Read the Docs' website
EX2007	Current search results for the title of Johnson on Read the Docs' website
EX2008	Current search results for Ethereum Name Service on Read the Docs' website

I. INTRODUCTION

The Board should deny institution. Petitioner relies on a combination of non-patent literature references Millegan (EX1004) and Johnson (EX1003), as the basis for all its obviousness Grounds. Petitioner provides no reason to believe, however, that either Millegan or Johnson qualifies as a printed publication. The Petition merely presents conclusory assertions, devoid of any substantive explanation or analysis whatsoever. And the cited testimony from Nathaniel E. Frank-White (Frank-White Affidavit, EX1018) and James McDonald (McDonald Declaration, EX1002), which the Petition seeks to improperly incorporate by reference, at best presents evidence that the non-patent literature references may have been posted to obscure websites. This meager evidentiary showing does not meet Petitioner's burden under *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 16-17 (PTAB Dec. 20, 2019).

Additionally, institution should be denied because the Petitioner fails to carry its burden to show that the claims would have been obvious. For example, the Petition fails to show how the combination of Johnson and Millegan teaches “*receiving the one or more resolution records of the domain; and utilizing the received one or more resolution records to resolve the name of the domain.*” Pet. 34-36. Rather than teaching the claimed limitations, Johnson teaches receiving data “associated with” ENS records but not the record itself. And Millegan describes

receiving “a .onion address” that is “grab[ed] [from]...the ENS record.” EX1004,

2. This means that Petitioner's references fail to teach what is claimed.

These deficiencies, which impact all Grounds, confirm that Petitioner has not established a reasonable likelihood of prevailing on any challenged claim. The Board should deny institution.

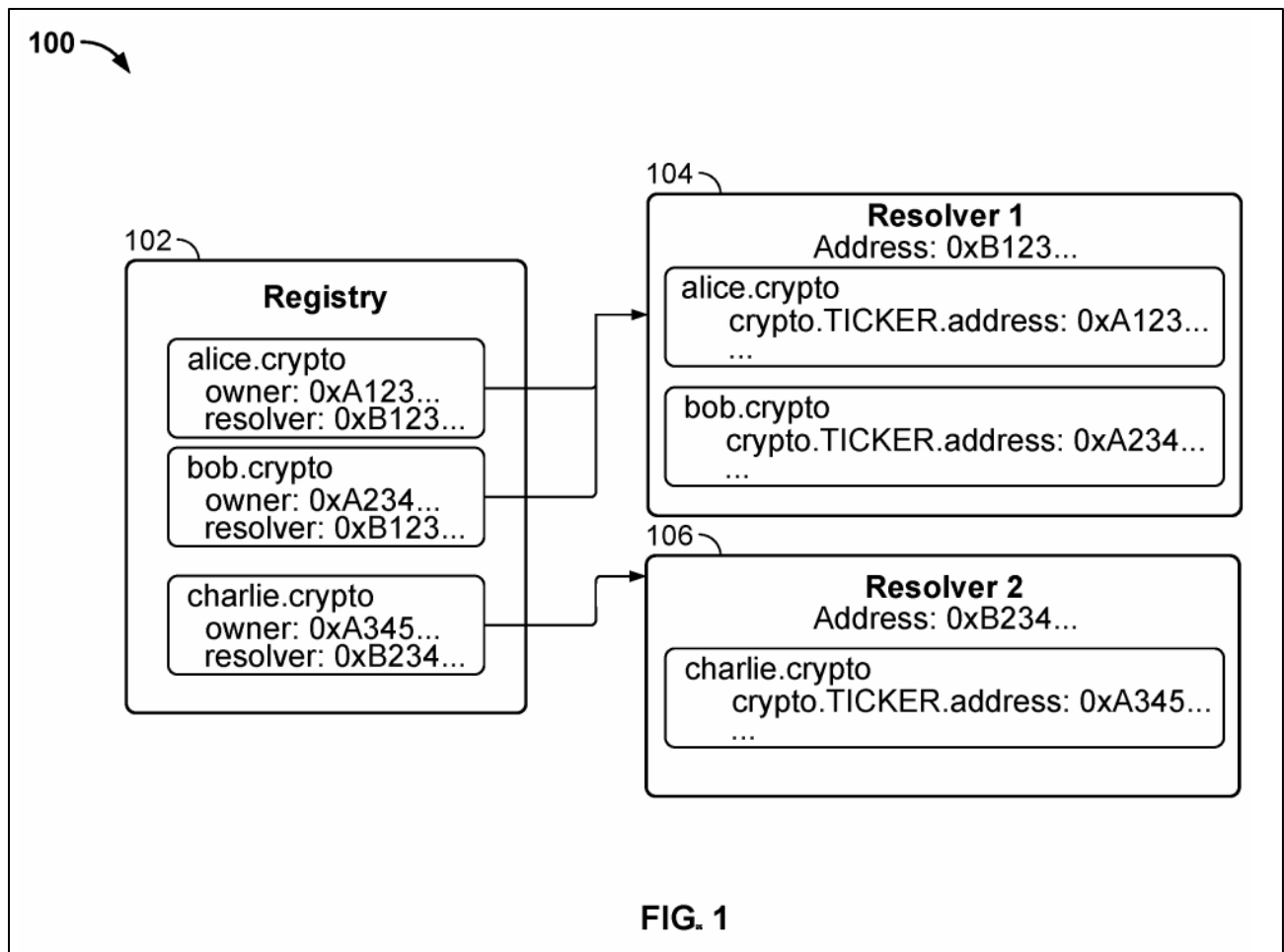
II. OVERVIEW OF THE '344 PATENT

The technology of the '344 patent at issue relates to methods and systems for resolving a name of a blockchain domain. EX1001, 1:6-10, 2:25-65, Abstract.

According to the '344 patent, the traditional domain name system (DNS) is centralized and may not be able to fulfill its duty. “For example, the central entity may become a central point of failure, stifle innovation, or unjustly institute policies that prevent flow of information.” EX1001, 1:29-31. As such, “there exists a need for a way to enable [a] web browser to resolve these domains using [a] new mechanism.” EX1001, 1:33-36.

To address this need, the '344 patent discloses a decentralized name resolution service using smart contracts. EX1001, 3:12-13. The '344 patent's “smart contract includes self-executing code that functions to implement an agreement deployed to store state and execute code on the blockchain.” EX1001, 13-15. According to the '344 patent, the “smart contracts of the decentralized name service govern how domains are created, managed, and utilized” and “every

domain is issued a non-fungible token on the blockchain.” EX1001, 3:15-22. An exemplary smart contract 102 that stores entries associated with three domains is depicted at Figure 1, which is shown below. EX1001, 4:9-11; FIG. 1.



A smart contract may include one or more of the following standard record types allowing “standard interpretation” by clients:

- crypto.*-Records related to crypto payments
- dns.*-DNS resolution records
- dweb.*-Resolution records related to distributed content
- network protocols

browser.*-Resolution configuration/preference records
for web browser

EX1001, 6:3-11.

The '344 patent's method discloses that "a request is made to a smart contract of the blockchain for one or more resolution records for the domain, and at 1208, the requested record(s) are received." EX1001, 17:25-27, FIG. 12. "For example a call is made to a function of the smart contract to request resolution records of a specified domain." EX1001, 17:28-29. "[T]he smart contract can be invoked to obtain one or more records that can be used to resolve the domain of the name identifier to obtain the corresponding web resource." EX1001, 17:38-41. "[W]hen the request is made to the smart contract of the blockchain, the smart contract returns the one or more resolution records managed in the blockchain for the domain of the name identifier to be resolved." EX1001, 17:41-45.

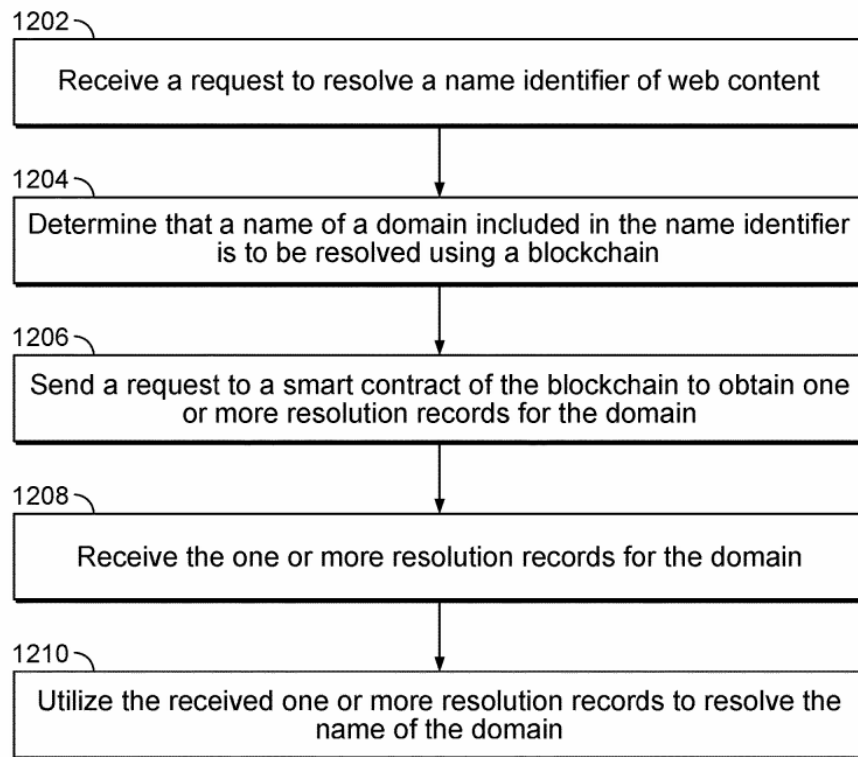


FIG. 12

The '344 patent's resolution records that are received by the client are described as follows:

Examples of the resolution records include any traditional DNS record (e.g., redirect address/URL of a redirect record, IP address of a dns.A record, or any other record supported by the DNS protocol), any decentralized web record (e.g., hash value of any supported decentralized web protocol), and configuration record(s) (e.g., record specifying a list of preferred protocols in a preferred order such that if multiple protocols are supported by the destination of the resolved domain, the protocol to be utilized is selected based on the order of the list).

EX1001, 17:46-55. The '344 patent's one or more resolution records "allow[s]

standard interpretation by [the] clients,” to resolve the name of the domain.

EX1001, 6:3-4.

III. OVERVIEW OF THE ASSERTED REFERENCES

A. Millegan (EX1004).

Millegan purports to be a blog of Brantly Millegan that discloses that “the Ethereum Name Service (ENS) now supports the resolution of Tor .onion addresses.” EX1004, 1. In contrast to the ’344 patent, which provides resolution records to the client, in Millegan the ENS system is that which resolves the name of the domain by extracting the .onion address from the ENS record and the actual record is not sent. EX1004, 2 (“MetaMask does a look-up on ENS on Ethereum, grabbing the .onion address...in the ENS record...and returning it to the address bar in the Tor Browser.”). This means that no further resolution takes place at the client.

B. Johnson (EX1003).

Johnson is titled “ENS Documentation Release 0.1,” that is marked on its cover page with the date “Mar 30, 2019.” EX1003, 1. In contrast to the ’344 patent, which provides resolution records to the client that resolves the name of the domain, Johnson’s ENS registry resolvers “are responsible for the actual process of translating names into addresses.” EX1003, 3. Johnson does not provide the actual ENS records externally, but rather provides data extracted from the record.

IV. PERSON OF ORDINARY SKILL IN THE ART

For purposes of this Preliminary Response only, Patent Owner applies Petitioner's proposed level of ordinary skill in the art: "a Bachelor's degree (or international equivalent) in computer science, mathematics, or related fields, and at least 2 years of experience with software programming projects including at least six months experience with blockchain technologies" or alternatively "[no] Bachelor's degree (or equivalent) so long as that person had sufficient relevant industry experience, such as an additional two years more of experience with software programming projects (making the minimum for this person four years of such experience)...[but] would still need to have at least six months experience with blockchain technologies." Pet. at 13.

V. CLAIM CONSTRUCTION

For purposes of this Preliminary Response only, Patent Owner agrees that claim construction is unnecessary. Patent Owner reserves the right to address claim construction in this proceeding if instituted or in other proceedings.

VI. PETITIONER FAILS TO CARRY ITS BURDEN TO ESTABLISH THAT MILLEGAN AND JOHNSON QUALIFY AS PRINTED PUBLICATIONS.

Petitioner bears the burden of proof to establish entitlement to relief. 37 C.F.R. § 42.108(c). To meet its burden, Petitioner must show with particularity why each challenged claim is unpatentable. *Harmonic Inc. v. Avid Tech., Inc.*, 815

F.3d 1356, 1363 (Fed. Cir. 2016); 37 C.F.R. § 42.104(b). The burden of persuasion never shifts to Patent Owner. *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015).

A petitioner in an IPR may request to cancel as unpatentable one or more claims of a patent only on a ground that could be raised under 35 U.S.C. § 102 or 103 and only based on prior art consisting of patents or printed publications. *See* 35 U.S.C. § 311(b). Under the precedential *Hulu* standard, “there is no presumption in favor of finding that a reference is a ‘printed publication’” and “the burden is on the petitioner” to sufficiently establish the public accessibility of a reference. *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 16 (PTAB Dec. 20, 2019) (precedential). “[A]t the institution stage, the petition must identify, with particularity, evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent and therefore that there is a reasonable likelihood that it qualifies as a printed publication.” *Id.*, 13. A reference qualifies as a printed publication only upon “a satisfactory showing that such document has been disseminated or otherwise made available to the extent persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it.” *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008) (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006)).

Here, Petitioner relies on both Millegan and Johnson as the basis for all presented Grounds and alleges that these references are printed publications under 35 U.S.C. § 102(a)(1). Pet. 14, 15-17. For the multiple independent reasons discussed below, Petitioner fails to carry its burden to establish that these references qualify as printed publications.

A. Petitioner has failed to show that Millegan is a prior art printed publication.

1. Petitioner's lack of analysis is facially insufficient to establish that Millegan qualifies as a prior art printed publication.

The Petition lacks any substantive analysis or explanation as to how the Millegan reference qualifies as a prior art printed publication. Instead, the Petition only includes the following brief conclusory statement, with citations to testimony in the Frank-White Affidavit, and the McDonald Declaration:

Millegan, entitled “ENS Now Supports Tor. Onion Address Resolution,” published at least as early as August 13, 2019. EX1002 at 67-69; EX1004 at 1. Millegan was captured and archived by the Internet Archive on August 15, 2019. EX1004; EX1018. This document was publicly accessible to a PHOSITA as of that date. EX1002 at 67-69. Millegan is a printed publication and is prior art under 35 U.S.C. § 102(a)(1).

Pet. 17.

This brief conclusory statement cannot satisfy the threshold requirement that the Petition “identif[y], in writing and with particularity, each claim challenged,

the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.” 35 U.S.C. § 312(a)(3); *see also* 37 C.F.R. § 42.104(b) (stating that the petition must “[p]rovide a statement of the precise relief requested for each claim challenged” by identifying “[h]ow the construed claim is unpatentable under the statutory grounds identified”).

To the extent the Petition seeks to make its arguments based on the cited testimony from the Frank-White Affidavit and the McDonald Declaration, this amounts to improper incorporation by reference in direct contravention to the rules. *See* 37 C.F.R. § 42.6(a)(3) (“Arguments must not be incorporated by reference from one document into another document.”). The importance of this requirement has been stressed repeatedly by the Federal Circuit, which has explained that it is not for the Board to “search the record for pertinent facts, and inject [its] own reasoning.” *3M Company v. Westech Aerosol Corporation*, IPR2018-00576, Paper 49 at 8 (PTAB Feb. 4, 2020); *see also Parus Holdings, Inc., v. Google LLC*, 70 F.4th 1365, 1370 (Fed. Cir. 2023) (finding that the Board properly disregarded arguments that were incorporated by reference in violation of 37 C.F.R. 42.6(a)(3)); *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999) (“A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.”); *Cisco Sys., Inc. v. C-Cation Technologies, LLC*, IPR2014-00454, Paper 12 at 10 (PTAB Aug. 29, 2014) (informative) (it is

not for the Board to “play archaeologist with the record”) (quoting *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999)).

Thus, the Petition’s lack of any substantive analysis or explanation as to how Millegan qualifies as a prior art printed publication represents a fatal flaw that alone requires denial of institution. *See Microsoft Corporation v. Throughputer, Inc.*, IPR2023-00852, Paper 18 at 18 (PTAB Nov. 9, 2023) (denying institution upon a finding that the Petition improperly attempted to “make its arguments based on the cited testimony from Ms. Munford” and explaining that “fail[ing] to develop any argument regarding the prior art status of Tuan represents a fatal flaw in the Petition.”).

Additionally, for the reasons discussed below, even if considered, the Frank-White Affidavit and the McDonald Declaration fail to present sufficient evidence to establish that Millegan was publicly accessible such that it qualifies as a prior art printed publication before the critical date of the ’344 patent.

2. The Frank-White Affidavit fails to support public accessibility of Millegan.

Petitioner’s Frank-White Affidavit states that the Internet Archive’s “Wayback Machine” allows for pages “stored in the Internet Archive’s web archive” to be browsed. EX1018, 1. Notably, the Frank-White Affidavit only describes that the Wayback Machine allows for searching “by URL (i.e., a website

address).” The Frank-White Affidavit provides no evidence that the Internet Archive is word searchable. EX1018, 1. In other words, the Frank-White Affidavit does not present any evidence that an interested person (who did not already know of the existence of the URL) would have located Millegan in the Internet Archive’s web archive with reasonable diligence. There is also no evidence that the Internet Archive’s web archive was word searchable by querying an internet search engine before the critical date such that it would have led to Millegan appearing in the search results.

Accordingly, the Frank-White Affidavit’s showing is insufficient, since a reference “is not publicly accessible if the only people who know how to find it are the ones who created it.” *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1372 (Fed. Cir. 2019). And Petitioner’s attempt to make a showing that Millegan was technically accessible on the Internet Archive falls short, since “public accessibility requires more than technical accessibility.” *Id.* at 1369; *see also First Solar, Inc. v. Rovshan Sade*, IPR2023-00827, Paper 13 at 18 (PTAB Nov. 16, 2023) (denying institution upon a finding that “Petitioner’s Frank-White Affidavit only indicates that the Wayback Machine is searchable ‘by URL,’” and therefore insufficient to establish public accessibility).

Thus, the Frank-White Affidavit, even if considered as incorporated by reference in the Petition (which is improper per 37 CFR § 42.6(a)(3)), fails to meet

Petitioner's burden at the institution stage.

3. The McDonald Declaration also fails to support public accessibility of Millegan.

Petitioner's McDonald Declaration fails to support public accessibility of Millegan because (a) it presents conclusory and factually unsupported assertions, (b) it fails to provide evidence that a POSITA could have reasonably found Millegan, and (c) the cited exhibits EX1055 and EX1056 do not provide evidentiary support.

- a) The McDonald Declaration's conclusory and factually unsupported assertions are insufficient to establish that Millegan is a printed publication.

In support of Petitioner's allegation that Millegan was publicly accessible, the McDonald Declaration asserts that "Brantly Millegan was known as one of the core team at the ENS Labs at this time, and was also known for authoring several articles describing ENS." EX1002, ¶68. This assertion, however, is not supported by any evidence corroborating such knowledge of persons skilled in the art and fails to identify any other articles allegedly authored by Brantly Millegan. The McDonald Declaration further asserts that "medium.com...was a common platform for discussion of ENS aspects, features and uses at the time," again without providing any corroborating evidence. EX1002, ¶68. The McDonald Declaration concludes with the unexplained statement that "a PHOSITA would

have accessed Millegan in the course of keeping up with latest developments in ENS.” EX1002, ¶68. But the McDonald Declaration does not explain how a person of ordinary skill would have allegedly “accessed Millegan,” and the McDonald Declaration provides no explanation for its presumption that a person of ordinary skill would have been “keeping up with [the] latest developments in ENS.” Notably, the ’344 patent specification makes no mention whatsoever of “ENS” or the “Ethereum Naming Service.”

Consistent with precedent and applicable rules, the Board should reject the McDonald Declaration’s conclusory and factually unsupported assertions. *See Samsung*, 929 F.3d 1363, 1367 (holding that the Board properly “faulted Samsung for offering only ‘conclusory and factually unsupported’ assertions that those skilled in the art were aware of the MPEG Website.”); *Upjohn Co. v. Mova Pharm. Corp.*, 225 F.3d 1306, 1311 (Fed. Cir. 2000) (“Lack of factual support for expert opinion going to factual determinations, however, may render the testimony of little probative value in a validity determination.”) (quoting *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 294 (Fed. Cir. 1985)); *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9, 15 (PTAB Aug. 24, 2022) (“[T]he cited declaration testimony is conclusory and unsupported, adds little to the conclusory assertion for which it is offered to support, and is entitled to little weight.”); *see also* 37 CFR § 42.65 (“Expert testimony that does not disclose the

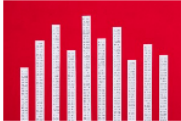
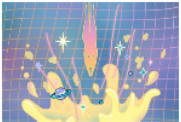
underlying facts or data on which the opinion is based is entitled to little or no weight.”).

Moreover, and contrary to the McDonald Declaration's unsupported assertions, Dr. Newman provides direct personal testimony establishing the opposite. Dr. Newman was “an expert at the time and was actively involved in the crypto community, including teaching courses on blockchain and Ethereum, writing papers related to blockchain and Ethereum technologies, and attending crypto related conferences.” EX2001, ¶35. Dr. Newman testifies that although he was active in the crypto community, he “personally never became aware of Brantly Millegan or that he authored articles or blogged about ENS or related crypto technology.” EX2001, ¶35. According to Dr. Newman, “the fact that I was not aware of Brantly Millegan or reviewed any article or blog authored by him, even though I was active in the cryptocurrency space, indicates that Brantly Millegan's oeuvre was not part of the background knowledge of a person of skill as the McDonald Declaration asserts.” EX2001, ¶35.

Dr. Newman further testifies that the “website medium.com was not known to [him] personally, either generally or professionally as a platform for discussion of ENS topics.” EX2001, ¶35. After reviewing the currently available medium.com website, Dr. Newman testifies that the “medium.com website appears to be a generic blog site potentially covering thousands of different unrelated

topics that are not specifically relevant to persons of ordinary skill in the art relevant to the '344 patent.” EX2001, ¶36. And, on August 13, 2019 (when Millegan was allegedly available), the medium.com website did not mention Millegan, but rather provided a list of “Featured stories” that covered “different unrelated topics, ranging from tribal death penalty decisions, menopause, human psychology, exercising, and political commentaries, among others.” EX2001, ¶36.



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EX2004, 1-3.

As Dr. Newman explains, “a person in the art would have no reason to look to or access the medium.com website in their professional capacity, since the website is a generic blog site that covers a wide range of unrelated topics and does not appear to be a source of information specifically directed to those in the art to which the ’344 patent pertains.” EX2001, ¶37; *see In re Klopfenstein*, 380 F.3d 1345, 1351 (Fed. Cir. 2004) (citing Judge Learned Hand) (an “ephemeral” document can be a printed publication, but only when it “goes direct to those whose interests make them likely to observe and remember whatever it may contain”).

b) The McDonald Declaration does not provide evidence that a person of ordinary skill could have reasonably found Millegan.

Even if a person of ordinary skill would have known of Brantly Millegan and the medium.com website (which Petitioner has not demonstrated), the McDonald Declaration fails to explain “with particularity” how an interested person would have used that knowledge to locate Millegan (EX1004) on the medium.com website at the time. *See Hulu*, IPR2018-01039, Paper 29 at 16. Petitioner simply ignores that it is “critical” for the party proffering a reference to provide “evidence that a person of ordinary skill could have reasonably found” the reference. *Samsung*, 929 F.3d at 1369. The McDonald Declaration’s evidentiary deficiency is fatal. *See id.* at 1367 (holding that the Board properly found that

“Samsung has failed to present evidence that a person interested and skilled in the art could reasonably have found WD4 on the MPEG site in October 2011, even if the user had access and knew the reference was there.”).

Here, there is no evidence or argument that Millegan was available on the home page of medium.com. There is also no evidence, or even argument, that at the time medium.com provided a search function or that an interested person would have found Millegan using the medium.com website's own search functions and applying reasonable diligence. The McDonald Declaration also fails to provide any argument or evidence sufficient to make a showing that Millegan was “indexed . . . (through search engines or otherwise)” and thus locatable by an internet search engine in the medium.com website, for example by performing keyword searches. *See Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1381 (Fed. Cir. 2012). Under similar circumstances, the Federal Circuit concluded that the petitioner failed to demonstrate public accessibility. *See Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1350 (Fed. Cir. 2016) (finding insufficient evidence of public accessibility for an asserted Internet reference where the patent challenger had not put forth evidence demonstrating that a search would have led to the reference).

In addition, the McDonald Declaration does not put forth any argument or evidence demonstrating that any search functionality would have been reliable,

such that a person of ordinary skill in the art would have located Millegan; this is yet another piece of missing evidence. *See Acceleration Bay LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773 (Fed. Cir. 2018) (finding insufficient evidence of public accessibility because the evidence did not demonstrate that the search functionality was reliable); *see also Blue Calypso*, 815 F.3d at 1350.

Moreover, Dr. Newman accessed the currently available medium.com website and testifies that “using currently available search functions (which the McDonald Declaration does not evidence were available at the time), I performed a search for the name ‘Brantly Millegan’ and was unable to locate any blog or article authored by Brantly Millegan.” EX2001, ¶38; EX2003. Dr. Newman also performed a search for the title of Millegan, i.e., “ENS Now Supports Tor .Onion Address Resolution” and again “was unable to locate it.” EX2001, ¶38; EX2004. Notably, Petitioner’s McDonald Declaration makes no attempt to provide any explanation whatsoever as to why Brantly Millegan’s blogs or articles, allegedly available at the time, cannot be identified using currently available search functions. It is Petitioner’s burden to make the requisite showing at the institution stage and the burden never shifts to Patent Owner.

Thus, even if an interested person would have known of Brantly Millegan and of the medium.com website (which Petitioner has not demonstrated), there is no showing that an interested person would have been able to locate Millegan on

the medium.com website before the critical date. This deficiency is fatal.

c) EX1055 and EX1056 do not provide evidentiary support.

In an apparent attempt to divert attention from its glaring evidentiary deficiencies, the McDonald Declaration asserts that “Millegan was picked up and subsequently re-published on 8/14/2019 and 8/15/2019 on other websites serving news to the crypto community, which are presently accessible.” EX1002, ¶68 (citing EX1055 and EX1056). The assertion that these exhibits evidence that Millegan was “re-published,” however, is unsupported. Comparing Millegan (EX1004) with both EX1055 and EX1056 shows numerous unexplained differences, including different titles, different content, and uncredited authorship, among other differences that on their face indicate that EX1055 and EX1056 are not a republication of Millegan, filed as EX1004.

And even if EX1055 and EX1056 “are presently accessible,” as the McDonald Declaration asserts, this does not mean that they were available at the time (which is the requisite showing). There is no supporting evidence to indicate whether any of the various dates that are printed on EX1055 and EX1056 correspond to a date of public availability. For example, EX1055 on the first page includes a date of “THURSDAY MARCH 28, 2024,” another date of “3/28/24,” another date of “08/14/2019” and yet another date of “© 2016 - 2024 CryptoNinjas Disclosures.” EX.1055, 1. Similarly, EX1056 has multiple dates on the first page,

including “3/28/24” at the top and another date of “15 August 2019.” EX1056, 1. Neither the Petition nor the McDonald Declaration provide any explanation as to the meaning of these dates. Because there is no evidence from someone with knowledge about what the dates mean in terms of the public accessibility of the references, EX1055 and EX1056 have no bearing on the public accessibility of Millegan (EX1004) at the time. *See Adam Agan Ltd. v. Bayer Cropscience LP*, PGR2022-00057, Paper 9, 31–32 (PTAB Feb. 13, 2023) (denying institution where reliance on a “dc.date.available” (sic) for a dissertation was insufficient “[w]ithout any additional evidence such as testimonial evidence from someone with knowledge about what this electronic record means in terms of the public accessibility of the reference”).

In addition to the above problems, the McDonald Declaration’s reliance on the dates of “8/14/2019” and “8/15/2019” in EX1055 and EX1056 is impermissible hearsay. *See* Fed. R. Evid. 802; *Apple Inc. v. DSS Tech. Management, Inc.*, IPR2015-00373, Paper 8 at 10-11 (PTAB June 25, 2015) (the “stamped date, however, would appear to be a hearsay statement to the extent that it would be offered for its truth.”); *ServiceNow, Inc. v. Hewlett-Packard Co.*, IPR2015-00707, Paper No. 14 at 9–10 (P.T.A.B. Nov. 2, 2015) (finding a copyright date printed on the document impermissible hearsay to establish public accessibility).

Because Petitioner has failed to carry its burden to identify, with

particularity, evidence sufficient to establish a reasonable likelihood that Millegan, was publicly available as of the purported publication date, institution must be denied.

B. Petitioner has failed to show that Johnson is a prior art printed publication.

1. The Petition showing is facially insufficient to establish that Johnson qualifies as a prior art printed publication.

The Johnson reference includes no conventional publication markings. *See* EX1003, *generally*. And the Petition only presents the following short conclusory assertion, devoid of any substantive explanation or analysis, that Johnson qualifies as a prior art printed publication:

Johnson, entitled “ENS Documentation, Release 0.1,” was published on March 30, 2019. EX1003. Johnson was captured and archived by the Internet Archive on December 13, 2019.³ EX1003; EX1018. Johnson was publicly accessible to a PHOSITA as of that date, if not earlier. EX1002 at 58-60. Johnson is a printed publication and is prior art under 35 U.S.C. § 102(a)(1).

Pet. 15.

The Petition's conclusory assertion is facially insufficient. 35 U.S.C. § 312(a)(3); *see also* 37 C.F.R. § 42.104(b). And to the extent that the Petition purports to make its arguments by incorporating the cited testimony from the Frank-White Affidavit and the McDonald Declaration, the Board should reject this improper attempt as discussed above. *See* 37 CFR § 42.6(a)(3) (“Arguments must

not be incorporated by reference from one document into another document.”); *DeSilva* 181 F.3d 867 (7th Cir. 1999) (“A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.”); *Cisco*, IPR2014-00454, Paper 12 at 10 (it is not for the Board to “play archaeologist with the record”) (quoting *DeSilva*) (citing Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 Fed. Reg. 48,612, 48,617 (Aug. 14, 2012)). The Petition’s deficiency represents a fatal flaw that warrants denying institution. *See Microsoft*, IPR2023-00852, Paper 18 at 18 (PTAB Nov. 9, 2023) (denying institution upon a finding that the Petition improperly attempted to “make its arguments based on the cited testimony from Ms. Munford” and that “fail[ing] to develop any argument regarding the prior art status of Tuan represents a fatal flaw in the Petition.”).

Regardless, for the reasons discussed below, both the Frank-White Affidavit and the McDonald Declaration do not set forth evidence sufficient to create a reasonable likelihood that Johnson qualifies as a prior art printed publication.

2. The Frank-White Affidavit fails to support public accessibility of Johnson.

Consistent with the discussion above regarding Millegan, Petitioner’s Frank-White Affidavit only states that the Wayback Machine is searchable “by URL (i.e., a website address),” rather than using any combination of search words. EX1018,

1. There is no evidence that an interested person (who did not already know of the URL, i.e., “<https://buildmedia.readthedocs.org/media/pdf/ens/latest/ens.pdf>” (*see* EX1018, 19)) would have located Johnson either using the Wayback Machine or by querying an external internet search engine before the critical date of the ’344 patent. As such, any alleged availability of Johnson on the Internet Archive falls short, since “public accessibility requires more than technical accessibility.” *Samsung*, 929 F.3d at 1369; *see also First Solar*, IPR2023-00827, Paper 13 at 18 (PTAB Nov. 16, 2023) (denying institution upon a finding that “Petitioner’s Frank-White Affidavit only indicates that the Wayback Machine is searchable ‘by URL,’” and therefore insufficient to establish public accessibility).

Thus, the Frank-White Affidavit cannot satisfy Petitioner’s burden at the institution stage to show that Johnson qualifies as a printed publication.

3. The McDonald Declaration also fails to support public accessibility of Johnson.

Petitioner’s McDonald Declaration fails to support public accessibility of Johnson because (a) it presents conclusory and factually unsupported assertions, (b) it fails to provide evidence that a POSITA could have reasonably found Johnson, and (c) the cited exhibits EX1053 and EX1054 do not provide evidentiary support.

- a) The McDonald Declaration's conclusory and factually unsupported assertions are insufficient to establish that Johnson is a printed publication.

The McDonald Declaration asserts that “Johnson was published by Ethereum Name Service on Read the Docs’ website that was widely known to software developers.” EX1002, ¶59. The record, however, is devoid of any corroborating evidence establishing that this website was widely known to those in the art and, consequently, the McDonald Declaration’s unsupported assertion should be given no weight. *See Samsung*, 929 F.3d at 1367 (holding that the Board properly “faulted Samsung for offering only ‘conclusory and factually unsupported’ assertions that those skilled in the art were aware of the MPEG Website.”); *Upjohn*, 225 F.3d at 1311 (“Lack of factual support for expert opinion going to factual determinations, however, may render the testimony of little probative value in a validity determination.”) (quoting *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 294 (Fed. Cir. 1985)); *Xerox*, IPR2022-00624, Paper 9, 15 (“[T]he cited declaration testimony is conclusory and unsupported, adds little to the conclusory assertion for which it is offered to support, and is entitled to little weight.”); *see also* 37 CFR § 42.65 (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”).

Moreover, and contrary to the McDonald Declaration, Dr. Newman provides

personal testimony that further supports a finding that Johnson does not qualify as a printed publication. Dr. Newman testifies that “during the course of my extensive experience with blockchain and crypto technology, I personally did not become aware that Ethereum Name Service published a developer’s guide on Read the Docs’ website and I also did not know that this website included an ENS developers guide that was accessed by others in the art.” EX2001, ¶30. As such, Dr. Newman testifies that “based on my technical experience and interaction with others in the art, I disagree with Mr. McDonald that ‘a PHOSITA would have accessed Johnson in the course of keeping up with latest developments in Ethereum,’ since I personally kept up with the latest developments in Ethereum and yet never accessed ENS documents on the Read the Docs’ website.” EX2001, ¶30. Nor was Dr. Newman “aware of anyone else in the art that had accessed Read the Docs’ website to obtain ENS documents therefrom.” EX2001, ¶30.

b) The McDonald Declaration does not provide evidence that a person of ordinary skill could have found Johnson.

Even if Read the Docs’ website was widely known (which Petitioner has not shown), the McDonald Declaration provides neither evidence nor explanation of how an interested person would have located Johnson on the Read the Docs website before the critical date. *See Hulu*, IPR2018-01039, 1367, Paper 29 at 16. The McDonald Declaration’s evidentiary deficiency is fatal since it is “critical”

that there be “some evidence that a person of ordinary skill could have reasonably found” the reference. *Samsung*, 929 F.3d at 1369 (holding that the Board properly found that “Samsung has failed to present evidence that a person interested and skilled in the art could reasonably have found WD4 on the MPEG site in October 2011, even if the user had access and knew the reference was there.”).

The McDonald Declaration fails to provide any evidence, or even argument, sufficient to establish that a skilled artisan would have been able to locate Johnson on the Read the Docs website using that website’s search function or that Johnson was “indexed . . . (through search engines or otherwise)” and thus locatable by an internet search engine. *See Voter Verified*, 698 F.3d at 1381; *see also Blue Calypso*, 815 F.3d 1331, 1350 (Fed. Cir. 2016) (finding insufficient evidence of public accessibility for an asserted Internet reference where the patent challenger had not put forth evidence demonstrating that a search would have led to the reference).

Notably, Dr. Newman accessed the currently available Read the Docs website and “[u]sing currently available search functions...performed a search for ‘Nick Johnson,’ which yielded 108 results but none of which led to the Johnson reference filed by Petitioner.” EX2001, ¶31; EX2006. Dr. Newman also “performed a search for the title of Johnson ‘ENS Documentation Release 0.1’ which yielded ‘0 results.’” EX2001, ¶31.

0 results for "ENS Documentation Release 0.1"

No results found.

EX2007. Dr. Newman, in a last-ditch effort to find the Johnson reference, searched for “Ethereum Name Service” and received 530 results, none of which corresponded to Johnson. EX2001, ¶31; EX2008.

Critically, the searches failed to turn up the Johnson reference, even though it is located at “<https://buildmedia.readthedocs.org/media/pdf/ens/latest/ens.pdf>.” Although Dr. Newman’s search results reflect only the currently available searching capabilities on the Read the Docs’ website, they strongly suggest that the Johnson reference was not indexed (or if it was, the website’s search functionality is unreliable). Given these results, it is no surprise that Petitioner makes no argument and presents no evidence regarding search reliability in support of its assertion that Johnson was publicly available. *See Acceleration Bay LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773 (Fed. Cir. 2018) (finding insufficient evidence of public accessibility because the evidence did not demonstrate that the search functionality was reliable); *see also Blue Calypso*, 815 F.3d at 1350.

c) EX1053 and EX1054 do not provide evidence that Johnson was published before the critical date.

In a failed attempt to present evidence, the McDonald Declaration asserts

that EX1053 and EX1054 evidence public availability because “Johnson and the URL address where it was located were also cited in IEEE academic publications.” EX1002, ¶59 (citing EX1053 at 19, 32, fn192; EX1054 at 271, 278, fn.6.). But a close review reveals nothing of the sort. Contrary to the McDonald Declaration, cited EX1053 indicates that the document was only accessed October 3, 2021, which is *after* the '344 patent's critical date:

[217] N. Johnson. “ENS Documentation.” 2019. <u>Accessed: Oct. 3, 2021.</u> [Online]. Available: https://buildmedia.readthedocs.org/media/pdf/ens/latest/ens.pdf

EX1053, p. 39. An alleged showing of access *after* the '344 patent's critical date cannot provide evidence that persons in the art were aware of Johnson and were able to access the document before the critical date. Petitioner's inability to identify supporting evidence suggests that Johnson was not available before the critical date.

Similarly, cited EX1054 does not support the McDonald Declaration's assertion. EX1054 appears to be a 2018 document that cites to a document that was available at: “<https://media.readthedocs.org/pdf/ens/latest/ens.pdf>”:

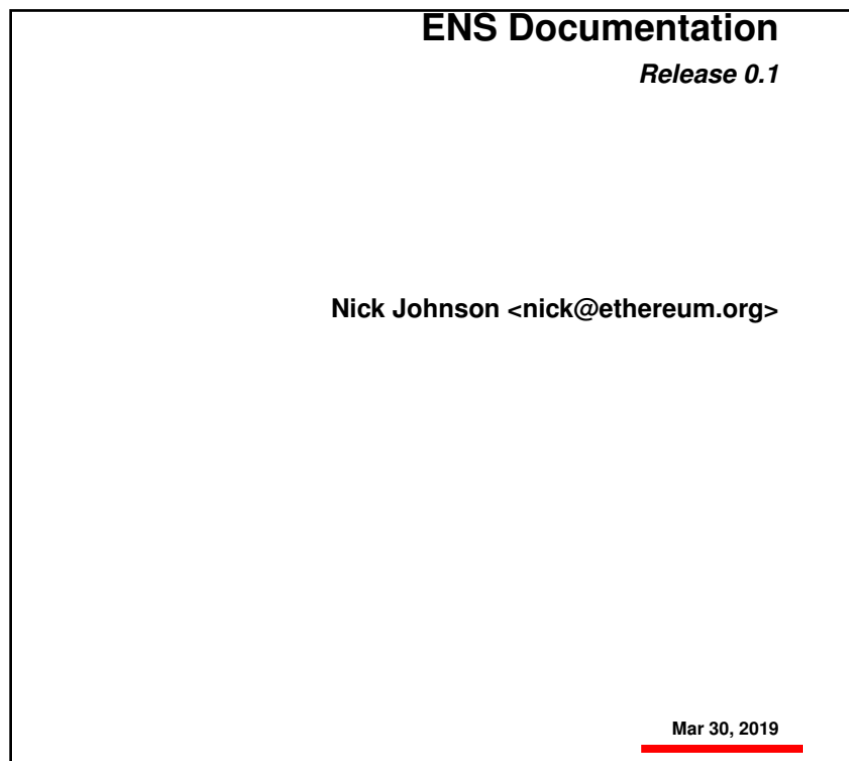
978-1-5386-9380-3/18/\$31.00 <u>©2018 IEEE</u> DOI 10.1109/SmartWorld.2018.00081

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[6] N. Johnson, *ENS Documentation Release 0.1*, <https://media.readthedocs.org/pdf/ens/latest/ens.pdf>.

EX1054, 1, 6.

In contrast to the 2018 document cited in EX1054, the Johnson reference was purportedly created in “Mar 30, 2019” (later in time) and was located at a different URL: “<https://buildmedia.readthedocs.org/media/pdf/ens/latest/ens.pdf>”:



EX1003, 1; EX1018, 20.

<https://web.archive.org/web/20191213174021/https://buildmedia.readthedocs.org/media/pdf/ens/latest/ens.pdf>

EX1018, 19.

The McDonald Declaration does not even attempt to explain any of the noted discrepancies in dates and URL locations, or how EX1054 can possibly provide evidence that Johnson was publicly available. Indeed, it cannot since the Johnson reference was not even alleged to be in existence until March 30, 2019, and located at a different URL. Accordingly, neither EX1053 nor EX1054 support the McDonald Declaration's assertions of public availability.

Therefore, for the above noted independent reasons, Petitioner has failed to set forth evidence sufficient to establish a reasonable likelihood that Johnson qualifies as a prior art printed publication and institution must be denied.

C. Instituting a trial would be a futile waste of Board and party resources.

This IPR proceeding came as a surprise to Patent Owner Unstoppable Domains. The '344 patent is not involved in any litigation—nor has it ever been—and Unstoppable Domains had not threatened Petitioner (or anyone else) with potential litigation over the '344 patent. Unstoppable Domains had not, prior to this proceeding, sought or offered to license the '344 patent.

Petitioner voluntarily chose to initiate this proceeding on their own *sua sponte* initiative. Petitioner faced no one-year time bar deadline, nor was there any urgency from possible *Fintiv* considerations. Petitioner presumably devoted all the time necessary to develop its case and supporting evidence. But on the critical,

threshold issue of whether its relied-upon references are even prior art, Petitioner could only muster a threadbare, insufficient showing.

There is no reason to believe that Petitioner has—or could find—further evidence to support its contentions about Millegan and Johnson. And it would be improper to allow Petitioner to raise new or different arguments about their alleged publication status that were not presented in the Petition. Instituting with an expectation of further factual development or new publication arguments would be improper and futile, since “it is the petitioner’s burden to make clear when [] arguments are being presented and to sufficiently expound on each one.” *Netflix, Inc. v. DivX, LLC*, 84 F.4th 1371, 1380 (Fed. Cir. 2023); *see also Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’”).

The Board can and should decide this case now by denying institution

D. Petitioner fails to establish that the claims are unpatentable.

In addition to Petitioner’s failure to establish that Millegan and Johnson qualify as printed publications, the Board should also deny institution because Petitioner has failed to meet its burden to “show with particularity why the patent it challenge[s] is unpatentable.” *Harmonic, Inc.*, 815 F.3d at 1363; 37 C.F.R.

§ 42.104(b).

1. The Petition fails to show “*receiving the one or more resolution records of the domain.*”

The Petition asserts that the cited references teach “*receiving the one or more resolution records of the domain.*” According to the Petition, “Johnson discloses this limitation in the form of the user code receiving from the resolver the resource associated with the queried ENS name.” Pet. 34. Additionally, the Petition asserts that “Millegan also discloses receiving a website address (e.g., a *.onion* address) as a result of the ENS resolution.” Pet. 35.

Petitioner's asserted art discloses “*resolution records*” in the form of ENS records—but that is not what the Petition relies upon. Rather, it relies on individual pieces of data extracted from the ENS record. Specifically, the Petition identifies Johnson's “resource associated with” an ENS record as “correspond[ing] to the [claimed] ‘resolution record’” and not the record itself. Pet. 34-35. Petitioner makes a similar argument with respect to Millegan, arguing that an “*.onion* address,” which is extracted from the “ENS record,” corresponds to the claimed “*record.*” Pet. 35; *see* Ex.1004, 2 (ENS system “grab[s] the *.onion* address...in the ENS record...and return[s] it to the address bar.”). In its analysis, the Petition purports to interpret the claim terms according to their “plain and ordinary meaning,” but nonetheless broadly asserts that a “resolution record is described in

the '344 Patent as what is returned from the resolver.” Pet. 13-14, 34-35 (citing EX1001, 17:28-55). In so doing, the Petition fundamentally misunderstands the '344 patent, which does not broadly indicate that any data returned by a resolver corresponds to a “*resolution record*[].”

As Dr. Newman explains, “[i]n the '344 patent, consistent with the plain and ordinary meaning, records are described as a type of data structure that includes multiple pieces of data or information that may be interpreted to resolve the domain name,” as indicated below:

...a list of known standard records is defined to allow standard interpretation by clients. In some embodiments, standard record types include:

- crypto.*-Records related to crypto payments
- dns.*-DNS resolution records
- dweb.*-Resolution records related to distributed content network protocols
- browser.*-Resolution configuration/preference records for web browser

EX1001, 6:3-11.

According to Dr. Newman, “a POSITA would have understood that within a specific resolution record a variety of data is included.” EX2001, ¶45. For example, the '344 patent's DNS resolution record (dns.*) includes “redirect address/URL of a redirect record, IP address of a dns.A record, or any other record

supported by the DNS protocol.” EX1001, 17:46-49. “A POSITA would not have understood the ’344 patent as identifying a specific ‘address’ included in the DNS record as the claimed ‘*resolution records*’—which is precisely what the Petition is doing.” EX2001, ¶45. “On the contrary, the DNS record would be understood to correspond to a resolution record that is received and used by the client to resolve the name of the domain.” EX2001, ¶45. As another example, the ’344 patent’s browser configuration resolution record (browser.*) includes “a list of preferred protocols in a preferred order such that if multiple protocols are supported by the destination of the resolved domain, the protocol to be utilized is selected based on the order of the list.” EX1001, 17:51-55. “In the context of a browser configuration resolution record, the ’344 patent’s disclosure does not support an interpretation where an individual piece of data, e.g., a preferred protocol, extracted from the browser configuration resolution record corresponds to the claimed ‘*resolution record*.’” EX2001, ¶45. “The ’344 patent’s browser configuration resolution record itself would be understood to correspond to what is claimed.” EX2001, ¶45.

Petitioner does not explain how an individual piece of data extracted from an ENS record meets this limitation. Petitioner strategically chose to forgo offering any position on claim construction, although it had a burden to do so with its Petition. Pet. 13-14; 37 CFR § 42.104(b)(3). (the petition must explain “[h]ow the

challenged claim is to be construed.”).

For at least this reason, the Petition fails because Johnson and Millegan do not disclose “*receiving the one or more resolution records of the domain.*”

EX2001, ¶46.

2. The Petition also fails to show “*utilizing the received one or more resolution records to resolve the name of the domain.*”

After ignoring that the claim requires receiving one or more resolution records, the Petition in a single conclusory paragraph asserts that using the received “.*onion* address[] to access the website”¹ teaches “*resolv[ing]*” the name of the domain. Pet. 35. Notably, the Petition does not even attempt to explain the alleged equivalency of accessing a website and “*resolv[ing]*” a domain name.

This is not surprising, since the Petition’s mapping is irreconcilable with what is claimed. As Dr. Newman explains, “the Petition’s assertion that the ENS system itself uses the ENS record to resolve the name of the domain and extract the

¹ The Petition only asserts that “Millegan thus discloses the limitation” and does not assert that Johnson’s “resource” (identified at limitation [1e]) discloses limitation [1f]. Pet. 35. But even if considered, Johnson makes clear that its ENS registry resolvers “are responsible for the actual process of translating names into addresses,” which is contrary to what is claimed. EX1003, 7.

‘.onion address’ is contrary to the last claimed step of ‘*utilizing the received one or more resolution records to resolve the name of the domain.*’” EX2001, ¶49; Ex.1001, 21:41-42; Ex.1004, 2 (ENS system “grab[s] the .onion address...in the ENS record....”). “A POSITA would have understood that in order to ‘*resolve the name of the domain,*’ as the claim requires, the received record is used at the client in an interpretation step to extract data from the record corresponding to the name of the domain.” EX2001, ¶50; EX1001, 6:3-11 (“...allow standard *interpretation* by clients...”). “Because in Millegan the ENS system is that which resolves the name of the domain by extracting the .onion address from the ENS record, no further resolution takes place at the client; this is why Millegan only discloses that it ‘return[s] [the .onion address] to the address bar’ and discloses no further resolving step.” EX2001, ¶50; EX1004, 2.

Accordingly, the Petition fails to carry its burden to demonstrate that Millegan teaches “*utilizing the received one or more resolution records to resolve the name of the domain.*” For this additional reason, the Petition fails and institution should be denied.

VII. CONCLUSION

Accordingly, for the numerous independent reasons articulated above, Petitioner has failed to meet its burden to demonstrate a reasonable likelihood that it will prevail as to any of the Challenged Claims and the Board should decline to

institute *inter partes* review.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to 37 C.F.R. § 42.24(d), Patent Owner hereby certifies, in accordance with and in reliance on the word count provided by the word-processing system used to prepare this Patent Owner's Preliminary Response, that the number of words in this paper is 7,500. Pursuant to 37 C.F.R. § 42.24(d), this word count excludes the table of contents, table of authorities, mandatory notices under § 42.8, certificate of service, certificate of word count, appendix of exhibits, and any claim listing.

Dated: August 29, 2024

/David L. McCombs/

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CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with 37 C.F.R. § 42.6(e) and 37 C.F.R. § 42.105, service was made on Petitioner as detailed below.

Date of service August 29, 2024

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