IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ATTENTIVE MOBILE INC.,   )
)
    Plaintiff / Counterclaim-   )
    Defendant,   )
)
    v.   )   Civil Action No. 23-87-CJB
)
STODGE, INC., d/b/a POSTSCRIPT,   )
)
    Defendant / Counterclaim-   )
    Plaintiff.   )

MEMORANDUM ORDER

Presently before the Court is Defendant/Counterclaim-Plaintiff Stodge, Inc. d/b/a

Postscript's ("Postscript") motion for summary judgment No. 3 ("Motion"), (D.I. 470), which

seeks summary judgment on the ground that Postscript's asserted United States Patent No.

11,709,660 ("the '660 patent") is not invalid for obviousness. The Court has also reviewed the

briefing related thereto, (D.I. 487; D.I. 507; D.I. 570), and the relevant legal standards,

Acceleration Bay, LLC v. Amazon Web Servs., Inc., Civil Action No. 22-904-RGA, 2024 WL

4164876, at *2-3 (D. Del. Sept. 12, 2024). Having done so, it hereby ORDERS that the Motion

is DENIED for the reasons that follow.

1.   Postscript argues here that the opinions of Plaintiff/Counterclaim-Defendant

Attentive, Inc.'s ("Attentive") invalidity expert, Dr. Nathaniel Polish, are conclusory and

otherwise insufficient to create a genuine issue of material fact as to whether the asserted claims

are obvious. (D.I. 487 at 21); *Schumer v. Lab'y Computer Sys., Inc.*, 308 F.3d 1304, 1315-16

(Fed. Cir. 2002) (noting that expert testimony regarding obviousness "is insufficient if it is

merely conclusory"); *see also Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1152 (Fed.

Cir. 2004). It asserts that this is so by pointing to three categories of Dr. Polish's opinions, which the Court will address in turn.

2. First, Postscript addresses 21 specific combinations discussed in Dr. Polish's opening expert report (the "Specific Combinations"), explaining why it thinks Dr. Polish's opinions there are deficient and unduly conclusory; in doing so, it representatively focuses on limitation 1D and the Orr/Sundaram combination that are described in paragraphs 187 and 189-92 of Dr. Polish's report. (D.I. 487 at 21-23) It does not appear that this combination is still at issue in this case anymore. (*See* D.I. 690, ex. 2 at 5) But assuming that this example is meant to be a proxy for all of Dr. Polish's opinions as to all relevant Specific Combinations (including one or more that *are* still at issue in the case), the Court concludes that Dr. Polish's opinions here are sufficient to demonstrate a genuine issue of material fact.

3. More specifically, here Postscript's first assertion is that Dr. Polish's reference to the presence of application programming interfaces ("APIs") in Sundaram isn't specific enough to explain how certain API-related claim limitations are met. (D.I. 487 at 22-23) Attentive did not respond to this assertion. (D.I. 507 at 23-24) And Dr. Polish's opinions on these points surely could have been more fulsome. But from looking at paragraph 187 of Dr. Polish's report, the Court can see how Dr. Polish is there sufficiently asserting that Sundaram discloses an application builder platform (i.e., "platforms"), that are controlled by the application operator (i.e., the user of the API) and that must be subscribed through an API notification channel ("through . . . APIs"). (D.I. 489, ex. 17 at ¶ 187; *see also* D.I. 487 at 22-23) Postscript also argues that Dr. Polish does not say enough about why a person of ordinary skill in the art ("POSITA") would be motivated to combine the references at issue and have an expectation of success in doing so. (D.I. 487 at 23) Here, Attentive did not provide a narrative response to this

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line of argument (instead, it just block quoted a portion of Dr. Polish's report), which didn't really move the ball forward. (D.I. 507 at 24) But the Court can see how in paragraphs 189-92 of his report, Dr. Polish is pointing to numerous different facts (i.e., that the references are in the "same field of endeavor[,]" or that they both involve the use of conventional and "well known technique[s] for communicating information between software programs" or that Sundaram recognized a problem in the art along with certain "needs" that the combination could "fulfill[]"). (*See, e.g.*, D.I. 489, ex. 17 at ¶¶ 189-92) That testimony is sufficient to withstand summary judgment on this point. *See, e.g.*, *Hong Kong uCloudlink Network Tech. Ltd. v. SIMO Holdings Inc.*, 548 F. Supp. 3d 916, 924-25 (N.D. Cal. 2021); *Cellular Commc'ns Equip., LLC v. Apple Inc.*, CIVIL ACTION NO. 6:14-cv-251, 2016 WL 6884076, at *3 (E.D. Tex. Aug. 30, 2016); *cf. Google LLC v. Sonos, Inc.*, 2023-1259, 2024 WL 2350509, at *3 (Fed. Cir. May 23, 2024); *Indect USA Corp. v. Park Assist, LLC*, Case No.: 18-cv-02409-BEN-DEB, 2021 WL 4428923, at *3 (S.D. Cal. Sept. 24, 2021).

4.   Second, Postscript takes issue with Dr. Polish's testimony as to the Klaviyo Flows reference, and particularly with one paragraph in which Dr. Polish was arguing that Klaviyo Flows in combination with Attentive Journeys renders a particular claim limitation obvious. (D.I. 487 at 23-24 (citing D.I. 489, ex. 17 at ¶ 275)) As it appears that this combination is no longer at issue in the case, (D.I. 690, ex. 2 at 5), the Court denies this portion of the Motion as moot.

5.   Third, Postscript takes issue with the "rest of the thousands of remaining Unspecific Combinations" (the "Unspecific Combinations") referenced in Dr. Polish's report. (D.I. 487 at 24) In light of Attentive's current obviousness case, which does not include these

Unspecific Combinations, (D.I. 690, ex. 2 at 5), the Court also denies this portion of the Motion as moot.

Dated: August 15, 2025

Christopher J. Burke
Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE