IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

MEMORANDUM ORDER

Presently pending before the Court is Defendant Attentive Mobile, Inc.'s ("Attentive" or "Defendant") Motion for a Limited Post-Trial Evidentiary Hearing Regarding Its Defense to Ineligibility Under 35 U.S.C. § 101 ("Section 101") (the "Motion"). (D.I. 812) Plaintiff Stodge, Inc. d/b/a Postscript ("Postscript" or "Plaintiff") opposes the Motion. For the reasons set forth below, the Motion is GRANTED.[1]

1. On August 18, 2025, the Court issued a Memorandum Opinion and accompanying Order denying Attentive's motion for summary judgment of invalidity of United States Patent No. 11,709,660 (the "'660 patent") under Section 101 (the "Section 101 MO"). (D.I. 746; D.I. 747) The Section 101 MO first explained that at step one of the *Alice* test, Attentive had argued that the '660 patent was directed to the abstract idea of "messaging users in response to relevant events[,]" because the asserted claims purportedly accomplished this function in a conventional and generic way. (D.I. 746 at ¶¶ 4, 6, 8) The Court ultimately concluded that the record was "rife with genuine disputes of material fact as to whether the '660

[1] The parties have jointly consented to the Court's jurisdiction to conduct all proceedings in this case, including trial, the entry of final judgment and all post-trial proceedings. (D.I. 14)

patent claims a messaging system that is conventional" and that Attentive therefore failed to meet its burden of demonstrating that the patent is directed to an abstract idea at step one. (*Id.* at ¶ 10; *see also id*. at ¶ 6 (referencing the existence of "factual disputes" in the record as to this issue)); *see also, e.g.*, *Broadband iTV, Inc. v. Amazon.com, Inc.*, 113 F.4th 1359, 1369 (Fed. Cir. 2024) ("[W]e have recognized that it may be necessary to analyze conventionality at step one as well as step two, such as to determine . . .what the patent asserts is the claimed advance over the prior art. . . . Put another way, analyzing the conventionality of the claimed content management system and templates at step one is proper for the purpose of determining what the claims are directed to."); *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 966 F.3d 1347, 1350-51 (Fed. Cir. 2020) ("The step-one 'directed to' inquiry in this case . . . is what the claim says. As to that question, the panel does not suggest that there can never be a factual issue, but there is no such factual issue here.") (Dyk, J., concurring in the denial of rehearing en banc); *Sysmex Corp. v. Beckman Coulter, Inc.*, Civil Action No. 19-1642-JFB-CJB, 2022 WL 1808325, at *5 n.7 (D. Del. June 2, 2022) (citing numerous district court opinions in which those courts found, in assessing *Alice*'s step one, that underlying factual disputes precluded resolution of a Section 101-related dispute).[2]

[2] It should have come as little surprise to the parties that in the Section 101 MO, the Court addressed their Section 101 dispute—and the parties' factual disagreements about whether the asserted claims are directed to conventional and generic computer technology—in discussing *Alice*'s step one. That is because, as the Court noted in the Section 101 MO, the parties focused nearly all of their attention in their briefing on step one—including by making arguments there about whether there were or were not disputed questions of fact with regard to the defense. (D.I. 746 at ¶ 4) For example, Attentive's opening brief spent over nine pages setting out its position with regard to step one, and a little over four pages arguing step two. (D.I. 471 at 4-18) Postscript's responsive brief expended seven pages on step one and four sentences (that spanned less than half of a page) on step two. (D.I. 516 at 4-12) The crux of Attentive's step one argument was that the claims were directed to an abstract idea because all of the claim limitations were conventional. (*See, e.g.*, D.I. 471 at 6 (asserting that the only question

2. The parties now dispute whether Attentive's Section 101 defense remains in the case. Attentive's position is that, following the Court's issuance of the Section 101 MO, the "patent-ineligibility issue remains live, and should be resolved by the Court after a limited, post-trial evidentiary hearing and briefing by the parties[.]" (D.I. 810 at 20) As for Postscript, it takes the view that because Attentive removed the Section 101 issue from the Pretrial Order ("PTO") prior to trial, Attentive has waived its right to have that defense adjudicated; Postscript's argument here is premised on Federal Rule of Civil Procedure 16(d), which states that a pretrial order "controls the course of the action unless the court modifies it." (*Id.* at 6-14); Fed. R. Civ. P. 16(d). In other words, Postscript's position is that because Attentive removed all reference to Section 101 from the PTO shortly before trial, the result is that the defense was no longer in "the action," under the meaning of Rule 16(d). (*Id.*) Moreover, Postscript argues that Attentive's current proposal—i.e., to put the remaining disputed factual issues before the Court at a bench trial—is wrong, because such disputes must be resolved by a jury, and should have been decided during the August 2025 jury trial. (D.I. 810 at 14-20)

3. Certainly, Attentive shares some blame as to where we currently stand regarding this Section 101 problem. Despite the fact that the Section 101 MO denied summary judgment

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remaining for the Court at step one "is whether the claims further recite some purportedly new and useful way to accomplish these inherent functions in the context of the Internet" and that Postscript's expert relied only on the "'unique combination' of claim elements, *which does not raise any material fact as to their conventionality*") (certain emphasis omitted; certain emphasis added); *id.* at 6-14 (arguing at step one that each of the functions of the claims are conventional)) Postscript took just the opposite view, arguing at step one that there was a disputed factual question regarding the conventionality inquiry. (D.I. 516 at 4-12 (asserting that "Attentive's analysis at *Alice* step two suffers the same flaws *as it did at Alice step one* by ignoring this implementation-specific detail, conflating the claims with automations, and assuming the claimed functionality is found in the prior art *when that is a disputed factual question*. . . . . [and] should be rejected for the same reasons") (certain emphasis added))

by explaining that the record was "rife with" material factual disputes regarding conventionality, Attentive informed Postscript on August 19, 2025, the day after the MO issued ("Attentive's August 19 email") that "Attentive does not intend to present evidence regarding ineligibility . . . at trial because the Court's definitive step one determination sufficiently preserved the 101 issue for appeal without requiring additional evidence at trial." (*Id.*, ex. 12 at 1) And based on that position, Attentive removed all references to Section 101 from further pretrial filings, including the jury instructions, verdict form and PTO. (*See* D.I. 810 at 8) Six days later—in the early morning hours of the day that the jury trial began (i.e., August 25, 2025)—Attentive filed a letter with the Court, seeking clarification on the Section 101 issue ("Attentive's clarification letter"). (D.I. 781) Attentive's clarification letter requested that, to the extent that the Court *had* found there to be remaining underlying disputed factual issues concerning patent eligibility (which it clearly had, as noted above), then the Court should address these disputes at a bench trial or at a hearing that would occur after the jury trial. (D.I. 781 at 1-2) From there, Attentive did not orally raise the Section 101 issue prior to the start of trial, or otherwise mention it during the first two days of trial. (*See* Trial Tr. Volume I & II) Instead, it first addressed Section 101 during day three of the trial (i.e., on August 27, 2025)—after Postscript had rested its case. (Trial Tr. Volume III at 865, 869-72)

4. Based on the content of the Section 101 MO—again, a decision in which the Court clearly and repeatedly stated its belief that there were genuine disputes of material fact regarding the defense that precluded summary judgment—the Court does not understand how, on August 19, Attentive came to the conclusion that the Section 101 issue was then ready to be appealed. (*Id*. at 872) And Attentive really should have sought any required clarification regarding this Section 101 issue sooner than it did.

5. That said, the Court can't conclude that Attentive waived its right to present this defense by failing to include it in the PTO (or otherwise). (D.I. 810 at 22-24) While it may be good practice to include in the PTO some reference to all issues that must ultimately be decided in a case, the caselaw suggests that if there is an issue of law that should be resolved by a Court, then reference to that issue need not be included in a PTO in order to preserve it for the Court's determination following a jury trial. *See, e.g.*, *G. David Jang, M.D. v. Bos. Sci. Corp.*, 872 F.3d 1275, 1289 (Fed. Cir. 2017) (rejecting the plaintiff's argument that because the defendant's ensnarement defense was not listed in the pretrial order, it was waived, and noting that a pretrial order governs "trial . . . but ensnarement is a legal question for the district court to decide"); *Medtronic, Inc. v. Bos. Sci. Corp.*, Civ. No. 07-823-SLR, 2015 WL 3430123, at *3 (D. Del. May 27, 2015) (rejecting the defendant's position that the plaintiff had waived its request for attorney fees under a contract since "such a claim was not in the pretrial order[,]" because "there were no issues of fact to present to a jury" with respect to that claim); *cf. Basista v. Weir*, 340 F.2d 74, 85 (3d Cir. 1965) ("[A] pretrial order when entered limits the issues *for trial* and in substance takes the place of pleadings covered by the pretrial order.") (emphasis added); *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir. 1987) ("The finality of the pretrial order contributes substantially to the orderly and efficient *trial* of a case.") (emphasis added). At the time that the PTO was submitted, Attentive says that its understanding was that: (1) the Section 101 issue was a legal issue; (2) the Court had definitively resolved that issue; and (3) it planned to appeal the Court's decision soon thereafter. Even after Attentive modified that position a bit on the eve of trial, its stated position was still that the Section 101 defense was for the Court to decide—and that any disputed issues of fact should be resolved by the Court *following* the jury trial. (D.I.

781) In light of this, it would be understandable why Attentive removed reference to Section 101 from the PTO—the order that would govern only issues *to be tried*.

6. Now, was Attentive *correct* in its stated view that the Court (and not a jury) must ultimately resolve a Section 101 dispute like this one (i.e., one as to which there are material factual disputes)? Frankly, the Court is unsure of the answer. Indeed, the United States Court of Appeals for the Federal Circuit has deemed this an open and difficult question, and it has not yet taken a position on the issue. *Exergen Corp. v. Kaz USA, Inc.*, 725 F. App'x 959, 968 (Fed. Cir. 2018) ("Whether the Seventh Amendment guarantees a jury trial on any factual underpinnings of § 101 is a question which awaits more in-depth development and briefing than the limited discussion in this case."); *see also In re Biogen '755 Pat. Litig*., 335 F. Supp. 3d 688, 730 (D.N.J. 2018) (noting *Exergen*'s statement above), *rev'd and remanded on other grounds sub nom. Biogen MA Inc. v. EMD Serono, Inc.*, 976 F.3d 1326 (Fed. Cir. 2020). But waiver must be knowing, voluntary and intelligent, i.e., it must amount to an *intentional* relinquishment or abandonment of a *known* right or privilege. *RBS Citizens, N.A. v. Caldera Mgmt., Inc*., Civil Action No. 08-0242, 2009 WL 3011209, at *3 (D. Del. Sept. 16, 2009) (citations omitted). And under the circumstances here, the Court cannot say that Attentive's acts in removing any reference to Section 101 from the PTO (and later asking the Court to resolve any remaining Section 101 disputes) indicates that Attentive intentionally relinquished a known right to anything.

7. Moreover, Postscript also shares significant blame for our current predicament. Postscript's currently stated position is that any remaining disputed factual issues needed to be decided by the jury during the jury trial. But if this was Postscript's view, then it should have spoken up loudly about this prior to the start of the trial—so that if the Court were to disagree

with Postscript's stance on waiver (which the Court now has), Postscript could have maintained the ability to have the jury address Section 101. Yet despite multiple opportunities to assert this position prior to the start of trial, Postscript did not do so. First, in response to Attentive's August 19 email, Postscript told Attentive that it did not agree with Attentive's characterization of the Court's Section 101 MO—but Postscript *also* did not protest Attentive's removal of references to Section 101 from the PTO and other pretrial filings. (D.I. 810, ex. 12 at 1) And in response to Attentive's clarification letter, Postscript only argued that Attentive had *waived* the Section 101 defense; while it noted its stance that a jury could address the Section 101 issue, Postscript did not argue that if the Court disagreed that Attentive had waived the issue, the jury *must* decide it at the jury trial. (D.I. 782; *see also* D.I. 810 at 25) Nor did Postscript mention the Section 101 defense during the first two days of trial. (*See* Trial Tr. Volume I & II) Indeed, in light of these facts, even if Postscript is correct that factual disputes underlying Section 101 must be resolved by a jury, Postscript itself has waived any right to such a jury trial. In this scenario, Postscript would have *known* that a jury needed to resolve this defense (were it not to be deemed waived), but then failed to advocate for that position before the jury trial began. *See Exergen Corp.*, 725 F. App'x at 967-68 (concluding that the defendant waived any "potential right to a jury trial for fact issues underlying [Section] 101" where, *inter alia*, the defendant did not press the view that a jury was required to decide such issues in the PTO (instead agreeing there that Section 101 is a question of law to be decided by the court with the court permitted to elect a jury to decide underlying factual issues), and did not object when the court decided during the jury trial not to give the jury any special verdict questions regarding Section 101); *cf. Astellas Pharma Inc. v. Sandoz Inc.*, 1:20CV1589, 2024 WL 4554799, at *4-5 (D. Del. Oct. 22, 2024) (holding that the plaintiff waived its right to a jury trial on issues that had been tried to the court

at a bench trial, because "in determining whether a party waived their right to a jury trial, the focus of the courts is the litigant's conduct" and "[a]t no point during the lead up to the bench trial, did Astellas object to the bench trial, wait for its legal remedies to ripen, or indicate it would prefer to have infringement and validity decided by a jury").

8. With both sides sharing some blame as to how we have ended up where we are today as to Attentive's Section 101 defense, and with the Court not in agreement that Attentive waived the issue by removing it from the PTO, the Section 101 issue still has to be resolved. Therefore, Attentive's request for a "limited [lasting no more than a half day], post-trial evidentiary hearing concerning Attentive's patent-eligibility defense under Section 101, followed by briefing along with proposed findings of fact and conclusions of law" is GRANTED. (D.I. 810 at 26) By no later than 14 days from the date of this Memorandum Order, the parties shall meet and confer and submit a joint status report of no longer than two single-spaced pages that provides their views about how the hearing and briefing shall proceed.

Dated: November 7, 2025

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