UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

RED BEND LTD., and
RED BEND SOFTWARE INC.,

                Plaintiffs,

        v.

GOOGLE INC.,

                Defendant.

Civil Action No. 09-cv-11813-DPW

PLAINTIFFS RED BEND LTD. AND RED BEND SOFTWARE INC.'S
REPLY CLAIM CONSTRUCTION BRIEF

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I.   PRELIMINARY STATEMENT

Google's brief is fraught with altered and incomplete quotations of the specification and prosecution history of the '552 Patent, entirely divorced from their contexts. Google further ignores the literal claim text of the Asserted Claims, which carefully define the contours of the invention, asking this Court instead to limit the claims to the "essential" aspects or "key teachings" of the '552 Patent, in contravention of black-letter patent law. Finally, Google would have the Court construe the Disputed Terms so narrowly that they would read on nothing useful, and certainly not on the patent's preferred embodiment. By contrast, Red Bend's constructions completely align with the claim text, specification descriptions, file history and the English language. Accordingly, Red Bend respectfully requests that this Court adopt Red Bend's proposed constructions.

II.   ARGUMENT

A.   Google's Attempt to Limit the Claims to the "Essence" of The Invention Should Be Rejected

1.   Google's Claim Construction Approach Invites Legal Error

Google repeatedly urges this Court to determine the "essential" aspects, "key teachings," "key to" and "heart of" the invention (Google Br. at 7, 12, 14, 15), and to construe the claims in light of that determination. Although this is a common strategy for patent infringers, it is legally flawed. As the Supreme Court said nearly 50 years ago: "there is no legally recognizable or protected 'essential' element, 'gist' or 'heart' of the invention in a combination patent." *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 344-45 (1961). Instead, "the claims made in the patent are the sole measure of the grant." *Id.* at 339. Accordingly, in construing the claims, the Court should focus on the disputed terms in the context of the very specific claim text that defines the applicant's right to exclude, and should

not attempt to determine "essential" aspects of the invention (*Cf.* Google Br. at 12). *See Panduit Corp. v. Dennison Mfg. Co.*, 774 F.2d 1092, 1093 & n.18 (Fed. Cir. 1985) (noting that "the district court here lost sight of the fundamental rule that 'it is the claims that measure the invention,' and blaming the district court's error on "defense counsel's contention that each patent should be evaluated for what counsel called its 'essence'"), *opinion adopted after remand at* 810 F.2d 1561, 1575 n.33 (1987).

Moreover, this Court should not, as Google proposes, limit the claims by examining the "particular technique" taught in the specification and concluding that the technique described there "*is* the invention." (*Cf. e.g.,* Google Br. at 1, 13 emphasis in original). *See Phillips v. AWH Corp.,* 415 F.3d 1303, 1323 (Fed. Cir. 2005) (*en banc*) (noting, "although the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments" because "claims may embrace different subject matter than is illustrated in the specific embodiments in the specification"). In short: "claims, not specification embodiments, define the scope of patent protection. The patentee is entitled to the full scope of his claims . . . ." *Kara Tech. Inc. v. Stamps.com Inc.,* 582 F.3d 1341, 1347 (Fed. Cir. 2009).

2. <u>Google Mischaracterizes the Invention</u>

Even if the Court were to engage in the legally-flawed analysis proposed by Google, the "essence" of the invention described by the Asserted Claims is much different from what Google suggests. The purpose of the invention, as explained in the specification and file history, is to attempt to reduce the size of the output of a differential comparison utility applied to two programs or data tables containing references that consist of the actual physical location or actual sequential location of other entries in that file or data table, where certain changes to references have been introduced as a result of inserts and/or deletes occurring between the two

programs or data tables. (*See* Edwards 7/29/10 Decl. ¶¶ 5-6)[1]. Contrary to Google's

suggestions, the '552 Patent makes no attempt to "eliminat[e]" references. (Google Br. at 1).

Instead, the '552 Patent attempts to prevent from being reflected in the difference result certain

changes to references.[2] (*See* Exh. 1,[3] '552 Patent at 10:5-15, "reference 8 *has been changed* to

11…It is accordingly an object of the invention to give rise to a situation where *modifications of*

this kind will be modified to invariant references with the obvious consequence that *they* are not

reflected in the difference result") (emphasis supplied). (*See also* Edwards 7/29/10 Decl. ¶ 9).

    B.   **Google's Constructions Rely Too Heavily on a Tenuous**
           and Out of Context Interpretation of the Prosecution
           History, the Least Reliable Source of Intrinsic Evidence

           1.   **The Case Law Does Not Support Google**

Google's proposed constructions of the Disputed Terms rely heavily on the

prosecution history of the '552 Patent. As an initial matter, of the types of intrinsic evidence

(claims, specification, and prosecution history) considered in performing a claim construction

analysis, the prosecution history is the least useful. *See Phillips,* 415 F.3d at 1317 (because the

prosecution history "represents an ongoing negotiation between the PTO and the applicant,

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[1] The concept of physical location and sequential locations are encapsulated in the '552 Patent's definition of "reference" as "either an address or a number used to compute an address." (Exh. 1, '552 Patent 2:42-45). The Parties have agreed on this definition. This concept is also explained in the file history. (*See* Exh. C, RedBend149 (discussing references as referring to "actual physical location of other elements" or "their absolute sequential location")).

[2] Even in the Summary of Invention section, the '552 Patent is clear that the "net effect is that that the invariant reference *entries* (between the modified old program and the modified new program), will not appear in the difference result." (Exh. 1, '552 Patent at 3:41-46) (emphasis added). The claimed technique does not attempt to eliminate *references* from the difference result.

[3] Citations to numerical exhibits refer to the Exhibits attached to the Declaration of Jennifer C. Tempesta in Support of Red Bend's Opening Claim Construction Brief (Docket No. 97). Citations to alphabetical exhibits refer to the Exhibits attached to the Declaration of Susan Baker Manning in Support of Google's Opening Claim Construction Brief (Docket No. 94).

rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes"). The Federal Circuit repeatedly instructs that claim construction is to be dictated principally by the patent's claims and specification. *Id.* at 1314-15. Moreover, when considering the patent's prosecution history, the Federal Circuit further instructs that statements relied upon must be placed in "context" and must reflect a "clear disavowal" of subject matter. *Gemstar-TV Guide Int'l, Inc. v. Int'l Trade Comm'n,* 383 F.3d 1352, 1366 (Fed. Cir. 2004). Google instead mischaracterizes and improperly places heavy reliance on snippets of text taken from the '552 Patent's file history without regard to the context in which those statements were made. When considered in context, the prosecution history does not demonstrate any disclaimer of claim scope with regard to the Asserted Claims and certainly not to the sweeping extent that Google argues. *See, e.g., Omega Eng'g, Inc, v. Raytek Corp.,* 334 F.3d 1314, 1323 (Fed. Cir. 2003) (noting "'heavy presumption' that claim terms carry their full ordinary and customary meaning, unless the patentee unequivocally imparted a novel meaning to those terms or expressly relinquished claim scope during prosecution") (citation omitted).

2. The File History Supports Red Bend

During prosecution of the '552 Patent, the Patent and Trademark Office issued an Office Action rejecting all claims as anticipated by each of two Japanese publications: JP 404242829A to Okuzumi *et al.* ("Okuzumi"), and JP 05091550A to Kenji *et al.* ("Kenji"). (*See* Exh. C, RedBend128-135; *see also* Google Exhs. G (Okuzumi) & H (Kenji)).

Okuzumi explicitly deals with a "computer source program." (Exh. G at Abstract, Claim 1; Edwards 7/29/10 Decl. ¶ 10). In the response to the Office Action, the applicant amended unasserted Claim 1, inserted the word "executable" into the preamble of the executable program claims (*see* Red Bend's Opening Claim Construction Brief at 6; Exh. C, RedBend148), and distinguished Okuzumi as:

explicitly mention[ing] 'source', and even more, this prior art reference contains a step of sorting 'statements' (a common name for an element of a source program) according to their 'character strings', such as in 0011

(*See* Exh. C, RedBend151). In other words, Okuzumi sorts and refers to statements by their character strings, which is much different from the type of diff utility with which the applicant was concerned. (*See* Edwards 7/29/10 Decl. ¶¶ 11-13). The applicant's arguments distinguish Claim 1 of the '552 Patent as operating on executable programs and not the purely symbolic representations operated on by Okuzumi. The applicant explained that source code techniques are distinguishable because those files contain only *symbolic* references:

> Such sources are purely symbolic in the sense that they do not mention actual physical location of other elements in the source nor their absolute sequential location. Rather, any of required references in a source are made through symbolic names which themselves are part of the source.

(Exh. C, RedBend149; Edwards 7/29/10 Decl. ¶¶ 11-12). Thus, the applicant's focus in making the distinction between Claim 1 and Okuzumi was on the symbolic references that appear in source code as opposed to numeric references (*i.e.,* physical addresses in memory) of an executable program.[4] The focus was not simply whether the code is executable but whether or not there are "references" as defined in the '552 Patent. *Id.*[5]

Google, relying on snippets of prosecution history text taken out of context makes

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[4] As noted previously, the Parties agree that the term "references" in the '552 Patent is limited to numeric references.

[5] Google's statement that the files in which executable programs are stored are called "binary files" (Google Br. at 8, n.3), is potentially misleading. Every computer file is stored as a binary file, regardless of whether it is text, data, or executable. (Edwards 7/29/10 Decl. ¶¶ 11-12). The relevant issue in this case relates to the contents of the file, rather than the manner in which that content is encoded and stored. In particular, because of the applicant's definition of "references," the asserted claims are limited to diff techniques between data tables (including programs) that include at least some numeric references to other portions of that data table. *See supra* n.1. Because Okuzumi disclosed source code files with no such references, it was irrelevant to the applicant's claims.

an argument that is unsupported by a reasonable reading of the entire statement the applicant

made with regard to Okuzumi. Indeed, Google's selective quotations consistently leave out

language that qualifies the applicant's statements as pertaining *only* to Claim 1 (which is not an

Asserted Claim). In particular, Google has left out the bracketed phrases in the following

quotations.

- "[In contrast,] *the present invention,* [according to amended Claim 1,] defines an executable program," (Google Br. at 8, citing RedBend151, and highlighting contrast of amended claim 1 with Okuzumi) (emphasis in Google's quote).

- "In extracting a diff between 2 versions of executable files [as defined in amended Claim 1,] there is no source involved, and *neither statements, nor any textual or other symbolic representation of the program even exist.*" (Google Br. at 9) (emphasis in Google's quote).

Google further ignores other comments by the applicant distinguishing Okuzumi on

grounds unrelated to the one Google focuses on, including:

> Moreover, Claim 1 defines "preparatory" actions in connection with the *references* in order to produce the modified program (see Claim 1, steps a(i) and b(i)). Only after this preparatory action the diff operation is performed. In Okuzumi et al., there is no suggestion to apply preparatory actions that pertain to the *references*. *References in accordance with the present application are defined in page 4, lines 2 to 4,* … Note the references 5, 8, 1, 1, 13 and 11 (designated 41' through 46') as distinguished from addresses (1 to 15). *The processing of the references* and the reference entries *is not even remotely suggested in Okuzumi* and *a fortiori* not as a preparatory step for the application of diff. Note that *by Okuzumi, "order table"* is a table reflecting a specific re-ordering of the source statements. The latter not only directs to source and not to executable program, but also *may only correspond to addresses and not to references.*

(Exh. C, RedBend152) (emphasis supplied)

The applicant's deliberate and multiple qualifications of its arguments as being

limited to Claim 1, and its additional arguments based on Okuzumi's failure to disclose

preparatory processing of "references" are ignored by Google's incomplete and out of context

citations. (Google Br. at 9). Further, even though the applicant stated that the arguments made

with respect to amended Claim 1 "will later apply to *other* Claims, *mutatis mutandis,*" meaning subject to certain necessary and important changes, Google wishes to unfairly apply the applicant's arguments, wholesale, across the board, to *all* claims, without regard to the differing claim text at issue, the applicant's complete explanation, qualifications and explicit restrictions. (*See* Exh. C, RedBend149-55; Google Br. at 9). This is clearly improper. [6]

C. "Invariant References"

Red Bend Proposal	Google Proposal
Values made the same.	Values made the same in the modified old and new programs (or data tables) for corresponding reference entries so that the reference addresses are excluded from the difference result.

Google's proposal that "invariant references" be construed to include the limitation "so that the reference addresses are excluded from the difference result" is not supported by the plain language of the asserted claims, the specification, the file history or the testimony of the inventor, and improperly conflates the terms "references" and "addresses". (*See* Red Bend's Opening Claim Construction Brief at 11-15). Indeed, what exactly does Google mean by excluding "the reference addresses" from the difference result? What is a "reference address"? Which "reference addresses"? (Google Br. at 14-15; Edwards 7/29/10 Decl. ¶¶ 7-8).

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[6] Google citations to case law for the proposition that "[g]lobal comments in the prosecution history made to distinguish the applicants' claimed invention from the prior art limit all claims of patent" are inapposite. (Google Br. at 12, citing *Digital Biometrics, Inc. v. Identix, Inc.*, 149 F.3d 1335, 1347 (Fed. Cir. 1998); *Honeywell Int'l, Inc. v. ITT Indus., Inc.*, 452 F.3d 1312, 1318 (Fed. Cir. 2006); *SciMed Life Sys. v. Advanced Cardiovascular Sys.,* 242 F.3d 1337, 1343 (Fed. Cir. 2001); *Pharmacia & Upjohn Co. v. Mylan Pharms. Inc.*, 170 F.3d 1373, 1378 (Fed. Cir. 1999)).

In *Digital Biometrics,* the remarks at issue "were made with respect to 'all of the pending claims . . . .'" 149 F.3d at 1347. As illustrated above, that is not the case here. Further, *Honeywell*, 452 F.3d at 1318, and *Scimed*, 242 F.3d at 1343, relate to statements made in the specification itself (not the prosecution history) that evidenced clear and unmistakable limits on the patentee's invention. Finally, in *Pharmacia*, the patentee clearly stated what the "key feature of the present invention is" which was found to limit the claim scope. 170 F.3d at 1378. The applicant here never identified a "key feature" that would apply to all claims.

At best, the specification discloses that (in a preferred embodiment) the changes to some

references are not reflected in the difference result after the diff utility is applied. (Exh. 1, '552

Patent at 10:10-15; *supra* at 2-3 & n.2). But, even this is not required by the claims.

More specifically, the claims require only that substantially each changed

reference be reflected as invariant prior to generating the compact difference result. (*See e.g.,*

Exh. 1, '552 Patent, Claim 8). Google nonetheless cites to several portions of the specification

describing a preferred embodiment, arguing that they support its limiting proposal. (Google Br.

at 13). This is legally improper. *Phillips*, 415 F.3d at 1323 ("we have expressly rejected the

contention that if a patent describes only a single embodiment, the claims of the patent must be

construed as being limited to that embodiment"). Indeed, the specification itself reveals the flaw

in Google's argument: "The invention is by no means bound by this particular example." (Exh.

1, '552 Patent at 3:23-26).[7]

Moreover, Google's construction would unduly restrict the scope of the invention,

forcing use of certain diff utilities over others. This is so because the handling of invariant

references during the generation of the compact difference result is dependent on the

implementation of the diff utility used -- some utilities work differently from others, identifying

fewer or more differences in the files compared. (*See* Exh. E, S. Peleg Dep. at 35:25-36:15,

104:14-18; Edwards 7/29/10 Decl. ¶¶ 3-4). As such, construing "invariant references" to include

the limitation that "reference addresses are excluded from the difference result" would restrict

the scope of the invention to particular diff utilities that would necessarily identify as matching

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[7] Thus, Google's reliance on *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 864 (Fed. Cir. 2004) for the proposition that limiting statements defining the invention as a whole are more likely to be found in the summary of the invention (Google Br. at 13 n. 6), is entirely inapposite. Here, the inventor explicitly stated that the description therein was not limiting. (Exh. 1, '552 Patent at 3:23-26).

(and therefore exclude) all invariant references. If the inventor intended such a limitation, he would have (and could have) said so explicitly, such as by stating "generating said compact difference result such that all of said invariant references do not appear." The fact that he did not do so confirms that the invention's scope should not be so-limited. *Kara,* 582 F.3d at 1347.

Thus, contrary to Google's proposed construction, not all "reference addresses," however defined, and certainly not all invariant references must be excluded from the difference result. Accordingly, Red Bend's construction should be adopted by the Court.

D.   "Compact Difference Result"

Red Bend Proposal	Google Proposal
A difference result of a smaller size as compared to a conventional difference result (obtained by using techniques in existence prior to the invention of the patent-in-suit) *in which the need to reflect changes to references due to delete/insert modifications is reduced or eliminated.*	A difference result in which references that have changed due to delete/insert modifications do not appear.

Google's proposed construction of "compact difference result" is overly narrow and would require that *all* references that have changed due to delete/insert operations be excluded from the difference result -- directly contradicting other explicit language in the claim. (Red Bend Opening Br. at 10). Specifically, the claim language only requires that "substantially each" -- not all -- changed references be "reflected as invariant references" (and potentially do not appear). (*See* Exh. 1, '552 Patent Claim 8(b)(i)). To read this limitation out of the claim would be improper. *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993) ("to construe the claims in the manner suggested by TI would read an express limitation out of the claims. This, we will not do . . . . ").

Google's reliance on *LizardTech, Inc. v. Earth Resource Mapping, Inc.,* 424 F.3d 1336, 1344 (Fed. Cir. 2005), is misplaced. *LizardTech* involved a finding that the claims were invalid for failure to meet the written description and enablement requirements. 424 F.3d at

1344-46. This is a separate issue from claim construction and it is error to attempt to redraft the claims based on a potential invalidity challenge that might later be made. *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 914 (Fed. Cir. 2004). Further, even if such an invalidity challenge were later made, it would fail as the specification supports Red Bend's proposed construction. (*See* Exh. 1, '552 Patent at 3:30-36; 14:5-14).[8]

Further, it is Google's construction that attempts to "unmoor the claims from the teachings of the patent." (Google Br. at 15). In particular, only Red Bend's construction incorporates the concept of a "smaller" diff result. In contrast, Google's proposed construction would be met by techniques that produced a diff just as large as prior art diffs. (Edwards 7/29/10 Decl. ¶¶ 5-6). Thus, Google's proposed construction including its extraneous and inconsistent limitation should not be adopted by this Court. Based on the foregoing and the arguments presented at § V.A. of Red Bend's Opening Claim Construction Brief, Red Bend's construction of "compact difference result" should be adopted.

E. "Data Table"

Red Bend Proposal	Google Proposal
A table of entries, where an entry is an addressable unit within the data table. Each entry may have a different size. An executable program is one example of a data table.	A table of entries, each of which may have a different size. An executable program is one example of a data table. It cannot be source or other symbolic code.

Google improperly reads the prosecution history as prohibiting a data table from including source or other symbolic code and mischaracterizes the testimony of Red Bend's expert, Professor Edwards, to support its position.[9] Google also mischaracterizes Red Bend's

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[8] Red Bend's construction does cover the embodiments described in the '552 Patent, contrary to Google's unsupported suggestion. (Google Br. at 15)

[9] Tellingly, Google misquotes and mischaracterizes the declaration of Stephen Edwards (Google Br. at 17 n.8). Instead, what he said was "[i]n this context" (knowing that an executable program is a subset of a data table) he did not need to repeat the infringement analysis he performed on

Opening Brief in connection with its motion for a preliminary injunction as having "conceded" that all the asserted server-side claims are "substantially identical." (Google Br. at 17 n.8). Red Bend did not concede this, and the pages of Red Bend's brief cited by Google offer no support for its position. Moreover, Google cites no case, and Red Bend is unaware of any, that would permit a claim limitation to be added to a claim based on extrinsic evidence.

Regarding the file history, Google again cites a portion out of context. The citation Google provides merely explains that a "data table" of the applicant's claims would not read on (*i.e.,* "embrace") Okuzumi's source code files:

> Claims 35 to 68 are basically similar to 1 to 34, respectively, except for the fact that they recite data table instead of executable program. Data table is discussed on page 4, line 9 of the application *and do not embrace source code as in Okuzumi.*

(Exh. C, RedBend154) (emphasis added).[10] The reason for this conclusion is explained earlier in the response. Namely, source files such as those in Okuzumi contain symbolic references, not physical locations specified by addresses, as in the applicant's claims:

> Such sources are purely symbolic in the sense that they do not mention actual physical location of other elements in the source nor their absolute sequential location. Rather, any of required references in a source are made through symbolic names which themselves are part of the source.

(*Id.* at RedBend149). Thus, that a data table does not embrace source code "as in Okuzumi" simply means that Okuzumi's references are symbolic, not numeric "references" as defined in the applicant's claims, and therefore would not be covered by applicant's claims.

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the data table claim. (Docket No. 9, Edwards 11/17/09 Decl. ¶ 25; *see also* Edwards 7/29/10 Decl. ¶ 15).

[10] The applicant also distinguished Okuzumi, in connection with the client side "data table" claims 46, 59 "for the reasons elaborated in connection with Claims 1, 12 and 25." (Exh. C, RedBend154-55). But the applicant did not amend the "data table" claims, and there were many distinguishing reasons expressed by the applicant, none rising to the level of a clear disavowal of scope. (*See id.* at RedBend148; Red Bend152). *See also Gemstar-TV,* 383 F.3d at 1366.

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Google's proposed construction is far too limiting. Under Google's construction a data table could not contain *any* source or symbolic code. This construction is improper for many reasons (Red Bend Opening Br. at 15-16; Edwards 7/29/10 Decl. ¶ 14), but mainly because it would exclude from its definition an executable program stored in the Windows Portable Executable file format, a specific example of a data table which both parties' experts agree contain some symbolic code (Exh. 3, Walker Dep. 124:22-125:21; 128:1-128:7; Docket No. 60, Edwards Reply Decl. ¶ 27; Exh. 1, '552 Patent at 2:61-63; Edwards 7/29/10 Decl. ¶ 15). Google's proposed construction should be rejected.

F. "Executable Program"

Red Bend Proposal	Google Proposal
A program comprising machine language instructions and corresponding bytes of data used by the program that are ready to be run on a computer.	A program comprising machine language instructions and corresponding bytes of data used by the program that are ready to be run on a computer, excluding source or other symbolic code.

Google's proposed construction of "executable program" is so narrow that it would exclude all executable programs stored in the common Windows executable file format, which its own expert agrees contain symbolic code. (Exh. 3, Walker Dep. 124:22-125:21; 128:1-128:7). Further, as discussed in § II.A., *supra,* and in Red Bend's Opening Claim Construction Brief at § V.D., the prosecution history does not go as far as Google suggests.[11] Google further mischaracterizes and incompletely quotes portions of the prosecution history, leaving out language that qualifies certain statements made as limited to Claim 1, and then cites cases for the proposition that "characterizations of 'the invention' are limiting." (Google Br. at 16). The cited

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[11] As mentioned in Red Bend's Opening Claim Construction Brief, the statement in the prosecution history states merely that no "textual or symbolic *representation of the program* even exist." (Exh. 2, RedBend151) (emphasis added). Thus, at best for Google, the prosecution history would support a definition that excluded "source or other symbolic representation of *the entire program.*"

case law is distinguishable. For instance, in *Digital Biometrics*, the court noted:

> [t]he remarks contained in the block quote recited above were made without reference to a particular claim. Instead the remarks were made with respect to 'all of the pending claims [that] stand rejected . . .

149 F.3d at 1337. Here, each of Google's quotes from the prosecution history are specifically qualified as directed to Claim 1. Google's reliance on the cited case law is, therefore, misplaced at best. *See also supra* n. 6.

Google also relies on the following statement from Red Bend's Supplemental Response in the Reexamination of the '552 Patent as requiring that executable programs exclude all source or symbolic code:

> the claimed techniques are intended to operate on files *after* references have been resolved to become numeric, as opposed to symbolic -- thereby permitting the techniques of the '552 Patent to be applied to executable files and data tables

(Google Br. at 16, quoting Exh. D at 12). This statement, however, simply means what it says -- that data tables or programs upon which the claimed techniques are intended to operate are those in which numeric references to physical locations or sequential locations in memory appear. The statement makes no disclaimer of all source or symbolic data. More importantly, the remaining portion of Red Bend's Supplemental Response in the Reexam (which Google fails to cite), clearly states that the applicant's comments are "not meant to suggest that the claimed executable files must exclude *all* symbolic information." (Exh. D at 9 n.2). Accordingly, Red Bend respectfully requests that the Court reject Google's proposed construction and instead adopt Red Bend's construction of "executable program."

G. "Modified (Old/New) (Data Table/Program)"

Claim Term	Claim	Red Bend Proposal	Google Proposal
modified old data table	42, 46, 55, 59	An interim result, such as tables or data structures, related to the old data table.	A version of the actual program or data table in its original executable form, with certain portions replaced.
modified old program	8, 12, 21, 25	An interim result, such as tables or data structures, related to the old executable program.	
modified new data table	42, 46, 55, 59	An interim result, such as tables or data structures, related to the new data table.	
modified new program	8, 12, 21, 25	An interim result, such as tables or data structures, related to the new executable program.	

Google proposes a construction of these terms that finds no support in the claims,[12] specification, or prosecution history -- and is apparently based on descriptions of an embodiment covered by the *unasserted* claims of the '552 Patent, and incomplete quotations taken out of context so as to distort their meaning.

Google's proposed construction of these terms requires that the modified old/new programs/data tables have "certain portions replaced." As stated in Red Bend's Opening Claim Construction Brief, none of the Asserted Claims use the word "replacing," as required by Google's construction. (Red Bend Opening Br. at 23; Edwards 7/29/10 Decl. ¶¶ 17-18). While the unasserted independent claims and the description of one embodiment recite "replacing," Google's attempt to inject this limitation into claims that do not recite it is improper and should be rejected. *See, e.g., Phillips,* 415 F.3d at 1314 ("Differences among claims can . . . be a useful guide in understanding the meaning of particular claim terms."); *Kara,* 582 F.3d at 1347 ("when the inventor wanted to restrict the claims to require the use of a key, he did so explicitly"). There is a clear difference understood by a person skilled in the art between "replacing" references and

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[12] Contrary to Google's argument, the "language" of *no* asserted claim requires invariant references be "inserted" into modified programs/data tables. (Google Br. at 12).

performing a technique where references are reflected as invariant. (Edwards 7/29/10 Decl. ¶ 17). Google ignores this distinction.

Google also uses flawed logic and relies on incomplete quotes from the prosecution history, one of which is so fragmented that the original sentence from which it is taken is difficult to identify. According to Google:

> The applicant was explicit that the "diff" is "extract[ed] . . . between 2 versions of executable files" and "there is no source involved, and neither statements, nor any textual or symbolic representation of the program even exist."

(Google Br. at 19). Google then concludes that the modified old/new programs/data tables must be executable based on the above "quote" from the prosecution history and because they are used to generate the compact difference result. However, the "quote" is not really a quote at all. The portion of the prosecution history to which Google refers actually reads:

> In extracting a diff between 2 versions of executable files as defined in amended Claim 1, there is no source involved, and neither statements, nor any textual or other symbolic representation of the program even exist.

(Exh. C, RedBend151). When read in context, with its clear qualifying language, this text in no way supports the sweeping statement that for all the Asserted Claims, regardless of their text, "the diff is extracted between 2 versions of executable files." Google's conclusion is therefore unfounded[13] and its proposed construction of these terms should be rejected.

III.   CONCLUSION

For these reasons, and those stated in Red Bend's Opening Claim Construction Brief, Red Bend respectfully requests that this Court adopt Red Bend's constructions.

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[13] Google further cites two other portions of the prosecution history. (*See* Google Br. at 19). In each case, if read in context, it is apparent that the applicant is distinguishing the source program inputs of Okuzumi from the executable inputs of specific claims of the '552 Patent. (*See* Exh. C, RedBend153-55). Additionally, Google's citations to the applicant's statement about the Miller reference fail to show a clear disclaimer. (Edwards 7/29/10 Decl. ¶ 18).

Dated: July 29, 2010   Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 29, 2010.

By: */s/ Jennifer C. Tempesta*

Jennifer C. Tempesta