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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

GOOGLE INC., a Delaware corporation,	Civil No.: 09-642-HU
Plaintiff,	
v.	**TRAFFIC INFORMATION, LLC'S RESPONSIVE CLAIM CONSTRUCTION BRIEF**
TRAFFIC INFORMATION, LLC, a Texas limited liability company,	
Defendant.	

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I.   INTRODUCTION

Google, Inc.'s ("Google") Opening Claim Construction Brief can be broken down into two main areas. The first area is Google's assertion that certain claims from the Traffic Patent are invalid for indefiniteness. Google, however, has failed to show by clear and convincing evidence that any claim of the Traffic Patents is indefinite. The Court should therefore reject Google's assertion that the Traffic Patents are indefinite. The second area involves Google's serious misapplication of the most basic principles of claim construction. Google urges this Court to ignore time-tested rules of claim construction to arrive at constructions that are improper and, at times, nonsensical. The Court should not accept Google's constructions, which stem from its flawed approach to claim construction.[1]

II.   LEGAL STANDARDS

Traffic previously set forth the standards by which courts construe claims. For simplicity, these principles will not be repeated here. Traffic would, however, draw the Court's attention to additional relevant case law.

A.   High Burden For Showing Indefiniteness

Google argues that the claims of the Traffic Patents are indefinite. The issue of whether a patent is indefinite is a question of law for the courts. *See Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1378 (Fed. Cir. 1999). A party claiming indefiniteness must demonstrate that a claim is indefinite by clear and convincing evidence. *See Al-Site Corp. v. VSI Int'l, Inc.*, 174 F.3d 1308, 1323 (Fed. Cir. 1999) (citing 35 U.S.C. § 282) ("Issued patents have a strong presumption of

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[1]   References to Traffic's Opening Claim Construction Brief herein will be in the form of "Traffic at X," (Doc. 53) where "X" indicates the page number. Likewise, references to Google's Opening Claim Construction Brief will be in the form of "Google at Y," (Doc. 52) where "Y" indicates the page number.

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validity in infringement proceedings. Hence, an accused infringer who defends on grounds of patent invalidity bears the burden of showing patent invalidity by clear and convincing evidence."). To show indefiniteness, therefore, an infringer must prove "by clear and convincing evidence, that the specification lacks adequate disclosure of structure to be understood by one skilled in the art as able to perform the recited functions." *See Intel Corp. v. VIA Technologies, Inc.*, 319 F.3d 1357, 1366(Fed. Cir. 2003). Proof of indefiniteness carries an exacting standard. *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 2010 U.S. App. LEXIS 11122 (Fed. Cir. June 2, 2010).

The general principles of claim construction apply in determining definiteness. *See Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1348 (Fed. Cir. 2005). Courts look to whether those skilled in the art would understand what is claimed. *See, e.g.*, *Morton International, Inc. v. Cardinal Chemical Co.*, 5 F.3d 1464, 1470 (Fed. Cir. 1993); *see also North American Vaccine, Inc. v. American Cyanamid Co.*, 7 F.3d 1571, 1579 (Fed. Cir. 1993) (stating that "it is well-established that the determination whether a claim is invalid as indefinite depends on whether those skilled in the art would understand the scope of the claim when the claim is read in light of the specification.") Claims are presumed valid and may only be found indefinite if the claim is insolubly ambiguous, and no narrowing construction can be adopted. *Exxon Research & Eng'g Co. v United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). Further, claims are not indefinite even if though it may be a "formidable task to understand a claim, and the result not unanimously accepted." *See Invitrogen Corp. v. Biocrest Manufacturing, L.P.*, 424 F.3d 1374, 1383 (Fed. Cir. 2005).

As shown below, Google has failed to meet the exacting standard for showing indefiniteness, because it has not shown by clear and convincing evidence that any claim of the Traffic Patents is indefinite. Accordingly, the Court should reject Google's indefiniteness arguments.

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B.   The "Cardinal Sin" of Claim Construction

Google consistently urges this Court to limit the claims of the Traffic Patents to specific embodiments disclosed in the patents' specifications. As discussed in Traffic's Opening Claim Construction Brief, this is a "cardinal sin" of claim construction that the Federal Circuit has "repeatedly warned" against, and is entirely improper. *See Philips v. AWH Corp.*, 415 F.3d 1303, 1320 (Fed. Cir. 2005) ("[O]ne of the cardinal sins of patent law [is] reading a limitation from the written description into the claims."). Further, even if the specification describes very specific embodiments or even one single embodiment, it is improper to import those limitations into the claims, unless it is *clear* that the patentee intended that the "claims and the embodiments in the specification to be strictly coextensive." *JVW Enterprises, Inc. v. Interact Accessories, Inc.*, 424 F.3d 1324 (Fed. Cir. 2005) (quoting *Philips*, 415 F.3d 1323). Where there is not a clear intent on the part of the patentee to limit the claims, the court cannot import limitations from specific embodiments. *Id.*

"There must be a textual reference in the actual language of the claim with which to associate a proffered claim construction." *Johnson Worldwide Assocs., Inc. v. Zebco Corp.*, 175 F.3d 985, 990 (Fed. Cir. 1999). It is highly improper for the courts to include elements not mentioned in the claim. *Philips*, 415 F.3d at 1312 ("if we once begin to include elements not mentioned in the claim, in order to limit such claim…we should never know where to stop.") (quoting *McCarty v. Lehigh R.R. Co.*, 160 U.S. 110, 116 (1895)).

As described below, Google encourages the Court to commit this cardinal sin multiple times. The Court should reject these attempts.

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III.   ARGUMENT

A.   The Traffic Patents Are Not Indefinite

Google's primary argument is that the claims of U.S. Patent Nos. 6,785,606 and 6,466,862 (the "Traffic Patents") are indefinite. The reasons Google sets forth for this position are unconvincing and incorrect. Google has certainly not met the exacting standard required to find that a claim is indefinite. *Haemonetics Corp.*, 607 F.3d 776. Rather, the claims of the Traffic Patents are amenable to construction and are not insolubly ambiguous.

Google has identified a multitude of terms and phrases from the claims of the Traffic Patents suggesting that they are indefinite, including "said user", "less than all available traffic information", "traffic information", "traffic information representative of said signals transmitted by said traffic monitors", "information representative of…selected portions of said traffic information database", and "data representative of traffic." (Google at 13).

1.   "Traffic information"

"Traffic information" is a phrase present in the majority of these so-called "indefinite" phrases. The specification provides ample support for the meaning of this phrase. Google claims that the specification provides "no explanation" for what types of "information about traffic are intended to be within the scope of the claims." (Google at 16). Google in the very same page of its brief contradicts itself, however, by admitting that the "specification teaches that *some types of information about traffic ought to be displayed … [and] that other types of information about traffic are preferably not displayed." Id*. (Emphasis added). Google further contradicts itself by pointing out that certain types of data should be screened out, and not included as traffic information. (Google at 17). Google even goes on to handily point out examples from the specification of what is

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not traffic data, *i.e.* "commuters located at stop signs, at the side of the road, at underpasses and overpasses, or on unknown streets." (Google at 17); *see also* (20:1-21:42).

Beyond Google's contradictory position on the asserted indefiniteness of "traffic information," the intrinsic evidence provides extremely clear guidance as to the scope and meaning of "traffic information." The claims themselves, for example, state that the computer system provides to the mobile user stations "traffic information *representative of said signals transmitted by said traffic monitors*." (22:50-55) (emphasis added). As further described by the claims, "said signals transmitted by said traffic monitors" equates to "a signal including data representative of vehicular movement." (22:38-40). Accordingly, the computer system provides to the mobile user stations "traffic information representative of a signal including data representative of vehicular movement." The claims therefore provide guidance as to the scope of traffic information, *i.e.*, that it may be representative of vehicular movement.[2] They therefore are clearly not indefinite.

The specification also provides ample guidance as to the meaning of this phrase. As discussed in Traffic's Opening Claim Construction brief, "traffic information" is representative of data provided by the traffic monitors, which data could include the speed, velocity, or frequency of vehicles on the road. (Traffic at 5-6); *see also* (6:15-18). "Traffic information" could also be representative of data provided by the traffic monitors, which data could include traffic density, traffic flow, and/or average vehicle speed. (9:58-61; 10:15-26; 13:28-32). "Traffic information" could also be representative of data provided by the traffic monitors, which data could include the position and/or change in position of the vehicle. (Traffic at 11-12); *see also* (7:63-13:1-25). The

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2   Google admits this, as well, stating "Thereafter, the 'computer system…provid[es]…traffic information representative of said signals.' Thus, in claim 1, the 'traffic information' must be representative of the signal, and the signal must be representative of vehicular movement." (Google at 16).

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specification includes numerous descriptions of data that the computer system can process into "traffic information," including but not limited to traffic flow, vehicle frequency, traffic density, vehicle position and/or the change in position of vehicles. (6:40-7:62, 9:58-61; 10:15-26; 13:28-32). Even if the claims were insufficient to provide a meaning for traffic information, the specification provides more than enough guidance for one skilled in the art to ascertain the phrase's meaning. "Traffic information" is therefore not an insolubly ambiguous phrase. Google has not met the burden of providing clear and convincing evidence that it is indefinite, and therefore has failed to meet the exacting standard of finding indefiniteness. The Court should reject Google's argument that the phrase "traffic information" is indefinite.

2. "Representative of"

In an effort to bolster its position that "traffic information" is indefinite, Google seeks to construe a number of other phrases that include "traffic information," claiming that they are also indefinite.[3] For example, Google seeks to construe several phrases that include the language "representative of." The language of the "representative of" claim elements is perfectly clear, though.

Google, however, proposes to introduce hypothetical language into the claim (i.e., "data from said signals transmitted by said traffic monitors"), in an attempt to distract the Court and draw attention away from the actual claim language (which is not indefinite). (Google at 19). Google does not explain why including the phrase "representative of" (i.e., the *actual* claim language) would somehow prevent an accused infringer from determining whether it is practicing the accused system.

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3   The "traffic information" phrases that Google asserts are indefinite also include "less than all available traffic information", "traffic information representative of said signals transmitted by said traffic monitors", "information representative of…selected portions of said traffic information database", "data representative of traffic." (Google at 13).

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Id. Rather, Google merely sets forth an argument that the "ambiguity" of the word "representative" would render invalid the collection and presentation limitations discussed in the patent. *Id.* Google's accusation that the specification includes no instruction regarding how the raw signal data is processed completely falls apart in light of Google's admission that the Traffic Patents provide "a few examples" of how raw signal data is to be manipulated or processed to represent traffic. (Google at 20). Further, Google complains that the specification does not describe how to create "useful representations," while at the same time acknowledging that it provides examples of same.[4]

Google's position also misses the mark by asserting that "Traffic's suggestion that the Court simply ignore the 'representative of' language in the claims is itself evidence that this phrase inserts a problematic ambiguity into the language of the claims." (Google at 21). Traffic has not and is not now suggesting that any language from the claims be ignored. Google apparently seeks to construe the phrase "representative of" completely out of context. Traffic's actual position is that the "representative of" language should be read along with the other words in the claim, such as "traffic information representative of said signals transmitted by said traffic monitors", "information representative of…selected portions of said traffic information database", and "data representative of traffic." Read in this context, "representative of" has exactly the meaning that Traffic has proposed in its Opening Claim Construction Brief. Accordingly, the Court should adopt Traffic's construction for the "representative of" phrases.

3. "Selected portions"

Google's argument is also faulty with regard to its assertion that the "selected portions" language of the claims is indefinite. (Google at 22). Google accuses Traffic of attempting to rewrite

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4   Google asserts that these examples are "unhelpful," yet provides no explanation as to *why* they are unhelpful.

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the claim language; here though, it is Google that is attempting to change the claim language by adding new terms. Specifically, Google seeks to include additional language regarding "who or what 'selects' portions of the database." (Google at 21-22). Quite contrary to Google's assertion, defining "selected portions" to mean "certain" does not read anything out of the claims. This is in line with the plain meaning of the word "selected." Traffic's proposed construction comports with the plain meaning of the terms here, and is proper when read in context of the intrinsic evidence. Google, by insisting that the claims explicitly declare who or what does the selecting, is attempting to insert new language into the claims. This is improper, and the Court should reject Google's approach.

4. "Less Than All Available Traffic Information

Google further complains that the specification does not describe what amount of traffic information constitutes "less than all available traffic information." (Google at 18). Google's position is that this is a term of degree, and the specification does not provide boundaries for that degree. *Id.* Not so. The intrinsic evidence provides clear limits on the amount of traffic information that constitutes "less than all available traffic information," as set forth in Traffic's Opening Claim Construction Brief. (Traffic at 34). Further, Traffic need not identify the "degree" with mathematical precision, as Google would require. *See Oakley, Inc. v. Sunglass Hut International*, 316 F.3d 1331 (Fed. Cir. 2003) (citing *In re Marosi*, 710 F.2d 799, 802-803 (Fed. Cir. 1983)); *see also Modine Mfg. Co. v. U.S. Int'l Trade Comm'n*, 75 F.3d 1545 (Fed. Cir. 1996) ("Technical terms are not *per se* indefinite when expressed in qualitative terms without numerical limits.")

Moreover, *Seattle Box Co., Inc. v. Indus. Crating & Packing, Inc.*, relied upon by Google, does not support Google's position, but rather cuts against it. *Id.*, 731 F.2d 818, 826 (Fed. Cir. 1984). In that case, the "word of degree" used was "substantially equal to" – not even a word of

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degree at issue in this case. *Id.* Further, the court in *Seattle Box* found that the "substantially equal to" language *was* sufficiently definite. *Id.* Here, the "word of degree" is "less than all." This language provides a very clear limit: less than one hundred percent and more than zero percent. One of ordinary skill in the art would absolutely know what less than one hundred percent means. *Id.* (stating that a claim is not indefinite where "one of ordinary skill in the art would understand what is claimed when the claim is read in light of the specification.")

Google also relies on *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010). *Enzo* involved the issue of whether "not interfering substantially" was an indefinite "word of degree." *Id.* This is not at all similar to the "word of degree" used here, which is "less than all." Accordingly, *Enzo* is inapposite, and Google's reliance thereon is misplaced.

Here, Google has not carried its burden of showing that "less than all available traffic information" is indefinite. Accordingly, the Court should adopt Traffic's construction of the phrase. *Id.* (rejecting the defendant's indefiniteness argument where defendant failed to carry its burden of persuasion that the claim term was indefinite.)

5. "Said user"

Google argues that "said user" in claim 9 is indefinite because it lacks an antecedent basis. (Google at 14-15). This argument is without merit. Even if "said user" lacked an antecedent basis, which Traffic does not concede, it finds sufficient support in the context of the claims to be definite per 35 U.S.C. § 112, ¶ 2.

It is black letter law that terms that may lack an antecedent basis are not necessarily indefinite. For example, Manual of Patent Examining Procedure § 2173.05(e) states that "the failure to provide antecedent basis for terms does not always render a claim indefinite. If the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite."

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This approach has been adopted by the courts, as well. *See*, *e.g.*, *Bose Corp. v. JBL, Inc.*, 274 F.3d 1354, 1359 (Fed. Cir. 2001) ("The definiteness of the language employed must be analyzed--not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.") (quoting *In re Moore*, 169 U.S.P.Q. 236, 238 (CCPA 1971)); *see also Philips*, 415 F.3d 1314 ("[T]he context in which a term is used in the asserted claim can be highly instructive.")

Here, read in context of the claims – particularly claim 1, from which claim 9 depends – "said user" is sufficiently-well defined so as to be definite. Claim 1 clearly discusses a computer system that provides traffic information to mobile user stations. (22:50-55). Claim 1 further discloses that the mobile user stations are connected to a global positioning system receiver. (22:45-46). Claim 9 discloses latitude and longitude information being supplied to the computer system. (23:13-14). Google's argument that a human being provides the latitude and longitude information disclosed in claim 9 defies logic; the global positioning system receiver disclosed in claim 1 would be rendered useless if a human being supplied the latitude and longitude information. Google's position requires reading the claim out of context and in a vacuum. Moreover, Google's position that a human being enters the latitude and longitude information manually contradicts Google's position that "the purpose for traffic's invention is to provide data relevant to users without significant user manipulation." (Google at 5). Google specifically states "[i]mmediacy and currency of the information, and *ease of access to the information by a commuter actively engaged in driving a vehicle*, are therefore key advantages claimed for the system, and any interpretation of the claims must take account of those advantages." (Google at 6) (emphasis added). A human being "actively engaged in driving a vehicle" would *not* find it easy to look up or otherwise determine his latitude and longitude, then enter these coordinates into his mobile user station, all while driving. Google's

argument that "said user" could be a human being is incompatible with the intrinsic evidence, as well as Google's general position with regard to the Traffic Patents. The Court should heed Google's advice here, and interpret "said user" consistently with the Traffic Patents' advantage of "ease of access to the information by a commuter actively engaged in driving a vehicle." The Court should further adopt Traffic's construction of "said user," which is consistent with same.

B. Mobile User Station and Traffic Monitor Need Not Be Distinct

Google spends considerable time arguing that a mobile user station cannot be a traffic monitor, presumably because Google's system includes a mobile user device that is likewise a traffic monitor. Google then goes on to urge the court to improperly impose a requirement that a "traffic monitor" remain stationary. Google's arguments lack merit.

1. A "mobile user station" can be a "traffic monitor"

As discussed in Traffic's Opening Claim Construction Brief, Google egregiously commits the "cardinal sin" of claim construction – importing limitations from the specification into the claims – in its construction of the phrases "mobile user station" and "traffic monitor." (Traffic at 10-11); *see also Phillips*, 415 F.3d at 1320 ("[O]ne of the cardinal sins of patent law [is] reading a limitation from the written description into the claims"). Google has cherry-picked particular embodiments from the specification, and improperly seeks to import those embodiments to narrow the claims. For example, Google quotes a block of text from line 13, column 14 through line 13, column 57 of the specification, in which "the system may provide traffic information without the use of monitors 20 at all, relying solely on information derived from the mobile user stations 52." (Google at 23-24). This is but a single embodiment in the specification, with no indication that the claims are to be limited thereby – it would be a "cardinal sin" of claim construction to read this embodiment into the claims. *Id.*

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Further, the fact that Google found one embodiment in the specification in which mobile user stations and traffic monitors are distinct does not necessitate narrowing the scope of the claims to *require* that they are distinct. Such narrowing is impermissible, and in fact, the claims may "embrace different subject matter than is illustrated in the specific embodiments in the specification." *Nazomi Communications, Inc. v. Arm Holdings, PLC*, 403 F.3d 1364, 1369 (Fed. Cir. 2005); *see also Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 866 (Fed. Cir. 1997) ("device claims are not limited to devices which operate precisely as the embodiments described in detail in the patent.") Moreover, even though an embodiment in the specification envisions that the mobile user station and traffic monitors are distinct, it is the claims – which do not require that the two be distinct – that are controlling. *See NTP v. Research in Motion*, 418 F.3d 1282, 1309 (Fed. Cir. 2005). For example, in *NTP*, the patents at issue disclosed an "RF receiver" and a "destination processor." *Id*. The accused infringer argued that because these two elements appeared separately in the patent, they must be separate and distinct. *Id*. In rejecting the accused infringer's argument, the court agreed with the district court, which stated "while it appears that [the patentee] envisioned a portable and mobile RF receiver that is physically separate from the bulkier destination processor (*i.e.*, laptop or desktop computer) the claims do not impose this requirement." *Id.* Likewise, here, the claims do not impose any requirement that the traffic monitors be separate and distinct from the mobile user stations. It would therefore not be proper to require that they be separate and distinct.

While as a general proposition, Google is correct in stating that "[i]n patent claims, different words are presumed to have different meanings", Google's argument misses the point here. (Google at 24) (citing *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 807 (Fed. Cir. 2007). Traffic is not

asserting that "traffic monitors" and "mobile user station" have the *same* meaning.[5] Rather, Traffic

is asserting that it is possible, and entirely consistent with the claims, that a mobile user station could

be a subset of "traffic monitors." For example, if a mobile user station is a cellular phone that has

the capability of sensing, measuring, detecting, and/or determining vehicular movement then it is

also a traffic monitor. The specification specifically describes that *any* device that can measure these

types of parameters is a traffic monitor. (6:24-52).

Furthermore, the specification actually describes embodiments in which "traffic monitors"

and "mobile user stations" are *not* separate and distinct. The specification discusses the use of a

mobile user station to measure traffic data, such as by measuring using the mobile user station's

attached global positioning system receiver to measure the mobile user station's velocity:

> Similarly, where traffic information is derived from individual mobile users stations
> 52 in vehicles 60 which report latitude and longitude derived from the mobile GPS
> receivers 62, the computer system 40 can easily associate the traffic information
> received from the mobile user station 52 with the map database based on the user's
> reported latitude and longitude.

(14:64-15:3); *see also*, (12:38-67). The mobile user station is also capable of measuring its position

and/or the change in its position.   *Id.* The mobile user stations provide the measured data to the

computer system. *Id*. This is precisely how the specification describes "traffic monitors" as

functioning. (*See*, *e.g.*, 4:45-56). Accordingly, the Traffic Patents specifically discuss the use of

traffic monitors that are mobile, *i.e.*, mobile user stations that are equipped with global positioning

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5   Traffic proposed the following constructions: "traffic monitors" means any device used to
sense, measure, detect, and/or determine vehicular movement and transmit and/or provide a signal
representative of vehicular movement"; and "mobile user station" means "an easily moving or
movable device that can transmit data to and/or receive data from the network. The mobile user
station may be a cellular phone or other handheld unit, or may be installed within a car."

system receivers. Google's construction runs afoul of the claim-construction rule against excluding preferred embodiments from the scope of the claim, and its argument is therefore without merit.

2. "Traffic monitors" need not be stationary

Google's argument that the claimed traffic monitors must be stationary is an extension of its flawed argument that traffic monitors and mobile user stations must be distinct. (Google at 24). Google construes "traffic monitors" such that the devices are required to remain stationary. This argument lacks merit, and such a construction of "traffic monitors" would fly in the face of well-established claim construction principles.

To support its flawed argument, Google identifies an embodiment in the specification in which the traffic monitors are stationary. (Google at 24). Google also points out several figures from the Traffic Patents that show the traffic monitors as stationary. *Id.* Despite these specific embodiments, the stationary limitation urged by Google should *not* be read into the claims. To read a limitation from the written description into the claims in this manner would be to commit a "cardinal sin" of claim construction. *See Philips*, 415 F.3d at 1320.

The cases relied on by Google to support its position are to no avail. For instance, while the court in *Inpro II v. T-Mobile*, 450 F.3d 1350, 1355 (Fed. Cir. 2006), found that the only host interface described in the specification was a direct parallel bus interface, the court also noted that the "specification *emphasizes* the importance of a parallel connection in solving the problems of the previously used serial connection." *Id*. (emphasis added). In other words, the limitations in the specification in *Inpro* were *essential* to the invention. Here, "stationary traffic monitors" are merely one form of the invention, and are by no means essential. Likewise, *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1341 (Fed. Cir. 2001), does not support Google's position. The court in *SciMed* limited the claim scope where the written description

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enabled *only* catheters with coaxial lumens. However, Google fails to mention that the specification

of the patent at issue in *SciMed* specifically stated:

> The intermediate sleeve structure defined above is the basic sleeve structure *for all embodiments of the present invention contemplated and disclosed herein* – namely, an inner core tube bonded to a distal portion of the main catheter shaft, with an outer sleeve forming an annular continuation of the inflation lumen through the main shaft between the core tube and outer sleeve.

Id. at 1343 (emphasis added).

The patentee in *SciMed* very clearly and specifically limited the invention to only include the

embodiments contemplated and disclosed by the patent. *Id*. The Traffic Patents include no such

limitation. Accordingly, *SciMed* is inapposite.

Similarly, *ICU Medical Inc. v. Alaris Medical Systems, Inc.*, 558 F.3d 1368, 1375-76 (Fed.

Cir. 2009), also cited by Google, is to no avail. That case construed a claim narrowly where *every*

disclosed embodiment was consistent with a narrow interpretation of the claim. *Id*. This is not the

case here. Instead, the Traffic Patents specifically discuss the use of traffic monitors that are mobile,

i.e., mobile user stations that are equipped with global positioning system receivers. (13:33-36;

14:64-15:3). In other words, the Traffic Patents are not limited to traffic monitors that are

stationary, as argued by Google. Google's argument that the traffic monitors disclosed by the

Traffic Patents must be stationary therefore fails. Accordingly, the Court should reject Google's

construction of "traffic monitors," and adopt Traffic's construction of same.

C. Google's Use of "Current and "Multiple" In Its Constructions Should be Rejected

As discussed below, Google improperly attempts to use the terms "current" and "multiple" to

narrow the scope of the following phrases: "traffic monitors", "traffic information", "traffic

information representative of ...", "information representative of ...", "data representative of traffic", and "vehicular movement".

1. Google's use of "current" should be rejected

Google improperly uses the term "current" in many of its constructions (*e.g.*, "traffic information," "traffic monitors," and the various other "traffic information" terms Google has identified). For example, Google asserts that "traffic monitors" only are capable of determining "current" traffic information. (Google at 25). The Court should reject Google's improper attempt to read a limitation from a specific embodiment into the construction of any claim term here. *Phillips*, 415 F.3d at 1320. Contrary to Google's assertion, the specification does not limit the traffic monitors to sensing or detecting "current" values. Rather, it also discusses other embodiments, such as: "the detector 22 could measure the *average* speed of the vehicles (cars or trucks) 14 at locations along the road 12." (6:32-34) (emphasis added). "Average" is not at all the same as "current." Requiring the traffic information here to be "current" would read out this embodiment. Further, as discussed in Traffic's Opening Claim Construction Brief, the traffic monitors may also "measure traffic flow, consisting of the number of vehicles passing a certain point for a unit of time (e.g. vehicles per second)." (6:37-39); (Traffic at 11). "A unit of time" can be any length of time; the unit could be a five-minute period, an hour, or day, for example. Further, in reference to adding traffic information to the traffic database, the specification states:

> [T]he amount of time over which data is collected and averaged may be varied. Ideally, the traffic information presented represents traffic conditions at that moment in time. However, it may be necessary to collect data for a length of time in order to gather enough data to either report any traffic information at all, or to insure that the traffic information is truly representative of conditions at that location.

(16:25-32). The Court should reject Google's attempts to improperly limit the scope of the claims to a particular disclosed embodiment in the specification. Here, the Court should reject Google's attempt to require that "current" be included in the construction of any of the phrases at issue.

2. Google's use of "multiple" should be rejected

Likewise, the Court should reject Google's attempts to require that the term "multiple" be incorporated into the claim constructions. Google's addition of "multiple vehicles" to its constructions for terms such as "traffic monitors" is highly improper, in light of the specification. (*See, e.g.*, 6:17-21). Google's proposed construction would read out specific embodiments from the specification. For example, the specification discusses an embodiment wherein "the traffic monitors may detect ***the speed*** of ***individual*** vehicles traveling along a road." *Id*. (emphasis added). Google's proposed construction completely ignores this embodiment. This is a completely improper construction.

Google's proposed construction that would require "multiple vehicles" is improper and has no grounding in the claims or specification. Accordingly, the Court should reject Google's construction.

D. Google's Improper Construction of "Traffic Information" Renders Google's Alternative Constructions Improper

As discussed above and in Traffic's Opening Claim Construction Brief, Google's proposed construction of "traffic information" is flawed. (Traffic at 6-8). The improper construction proposed by Google infects each of Google's proposed constructions for terms related to the phrase "traffic information," including "traffic information database," and "vehicular movement." Google's incorrect interpretation and attempt to restrict "traffic monitors" and "mobile user stations" to be mutually exclusive further poisons Google's remaining proposed constructions. (*e.g.*, Google at 31).

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1. Traffic information database

Google's main argument for its incorrect construction of "traffic information database" is that the traffic information database contains data from the mobile user stations and cannot contain data obtained from the traffic monitors, as the two are distinct. (Google at 32). However, as seen above, "traffic monitors" and "mobile user stations" need not be distinct. Accordingly, contrary to Google's assertion, a traffic information database that contains data obtained from mobile user stations *also* contains data obtained from traffic monitors.

Google further asserts that the phrase is meaningless and that Traffic's construction of this phrase is "acontextual," despite the fact that Traffic's construction uses a very commonly-understood definition for "database." (Google at 32). Google provides no real analysis here, and merely begs the question – its argument here boils down to "traffic information database" is vague and meaningless because it is indefinite. *Id.* This fallacy is not grounds to import Google's incorrect construction of "traffic information" into the construction of "traffic information database." Rather, the Court should adopt Traffic's construction, which is solidly grounded in the intrinsic evidence, as well as the common meaning of this phrase.

2. Vehicular movement

As explained below, Google's construction of "vehicular movement" ignores key language in the claims. (Google at 33). Google states that the "patents equate 'vehicular movement' with 'traffic information.'" (Google at 33). This is incorrect. The terms are related, but they are by no means equivalent. For example, Google glosses over the fact that the "signal" from the traffic monitors to the computer system here is *representative* of vehicular movement. (22:38-39). The claims do not recite that the "signal" from the traffic monitors to the computer system is identical or equivalent to the vehicular movement, as Google suggests. Further, the actual "traffic information"

provided to the mobile user station is *representative* of the signal from the traffic monitors. (22:52-54). Vehicular movement, on the other hand, may include the actual speed or velocity of a vehicle, or the position and/or change in position of a vehicle. (6:18-20; 6:49; 6:58-59; 7:57-58; 7:63-8:21; 13:1-25) (Traffic at 11-13). Again, the claims do not recite that these claim limitations – "vehicular movement" and "traffic information" – are identical or equivalent in any way.

Moreover, as Google points out, "[i]n patent claims, different words are presumed to have different meanings." (Google at 24) (citing *Acumed*, 483 F.3d 807). Here, Google's efforts to conflate "traffic information" and "vehicular movement" vitiates this well-established principle by assigning two completely different terms the exact same meaning. "Traffic information" and "vehicular movement" are clearly distinct concepts that cannot and should not be collapsed down to have the same meaning. Had the patentee intended for "traffic information" and "vehicular movement" to have the exact same meaning, it would not have used two different terms. It did not do so, however, indicating that the terms are to have different meanings. The Court should reject Google's flawed approach.

Google's flawed interpretation here effectively reads out language from the claims. The Court should reject Google's assertion that "vehicular movement" and "traffic information" should have identical constructions.

E. Google's Constructions of the "Providing …In Response" Terms Are Improper

Google's constructions for the terms involving the phrase "providing…in response" are improper and are based on misapplications of common claim construction principles. The Court should reject Google's proposed constructions here, as well.

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1. The Traffic Patents do not mix
system and method claims

Google argues that the Traffic Patents are invalid because their claims recite both a system and a method for using that system in the same claim. (Google at 35). As stated by Google, Google's argument is not ripe at this stage of the proceedings. In any event, it is without merit. The Traffic Patents do not include claims that recite both a system and a method for using that system in the same claim. As such, the Traffic Patents are not invalid for indefiniteness.

Google's reliance on *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005) here is misplaced. *IPXL* only applies where the same claim recites both a method *and* a system. Post-*IXPL* courts have held that where "[t]he clause at issue is not a separate method step, but rather is descriptive of the apparatus itself," the holding of IPXL is not implicated. *See*, *e.g.*, *Sienna LLC v. CVS Corp.*, 2007 U.S. Dist. LEXIS 2, 2007 WL 13102, at *8 (S.D.N.Y. Jan. 3, 2007).

Further, in almost all cases where this issue has been raised post-*IPXL*, the courts have found that the suspect claims did not cover both an apparatus and a method, but rather were apparatus claims containing functional limitations. *See Ricoh Co.. v. Katun Corp.*, 486 F. Supp. 2d 395, 412 (D.N.J. 2007); *see also Lamoureux v. AnazaoHealth Corp.*, 669 F. Supp. 2d 227, 263 (D.Conn. 2009) (citing *Ricoh*, 486 F.Supp. 2d 412). A "functional limitation" in a claim is a limitation that "define[s] something by what it does, rather than by what it is (*e.g.*, as evidenced by its specific structure or specific ingredients)." *See* Manual of Patent Examining Procedure § 2173.05(g). Importantly, "function language does not, in and of itself, render a claim improper." *Id*.; *see also CollegeNet, Inc. v. XAP Corporation*, 442 F. Supp. 2d 1036, 1062 (D.Or. 2006). (holding that "the challenged claims are not indefinite because they include descriptions of the apparatus and functional limitations associated with the apparatus as did the claims that passed muster in *IPXL*.")

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Here, the Traffic Patents include functional limitations. Specifically, the language that Google claims discloses a method is merely functional language. For example, "providing" and "requesting" clearly define Traffic's traffic information system by what it *does*. *See* Manual of Patent Examining Procedure § 2173.05(g). Accordingly, the claims do not mix method and system claims, and *IPXL* is not implicated.

Furthermore, the method claims in *IPXL* required a human actor to perform certain steps. Specifically, the claim at issue in *IPXL* recited: "The *system of claim 2* [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and *the user uses the input means* to either change the predicted transaction information or accept the displayed transaction type and transaction parameters." *See IPXL*, 430 F.3d 1384 (emphasis in original). That was a radically different situation than here, where the claims at issue make no mention of a human user or actor doing anything at all. (24:13-42). For example, in claim 21, the "providing" function argued by Google is performed by the computer system and the mobile user station itself– *not* a human being.[6] *Id.* Here, where the claims include no methods, but only functional limitations,*IPXL* is not implicated, and the patents are not invalid for indefiniteness. *Sienna*, 2007 U.S. Dist. LEXIS 2, 2007 WL 13102, at *8.

2. Minimal manipulation by the user is not required for a response

Google yet again urges the Court to commit a "cardinal sin" of claim construction by adopting Google's improper importation into the "providing in response to" limitations of a

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6   The term "requesting" does not appear in claim 21, as Google indicates. (Google at 34). Rather, the claim recites "at least one of the mobile user stations providing a request to said computer system." (24:28-37). Even if the claims recited the phrase "requesting," there is no human actor claimed that would perform this function. As such, *IPXL* is not implicated. *Sienna*, 2007 U.S. Dist. LEXIS 2, 2007 WL 13102, at *8

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requirement that the "response must minimize manipulation by the user." (Google at 36). This proposed construction seeks to import limitations from the specific embodiments in the specification into the claims. *See Philips*, 415 F.3d at 1320 ("[O]ne of the cardinal sins of patent law [is] reading a limitation from the written description into the claims").

Claim 1(e) of the '862 patent recites that "the computer system, in response to a request for traffic information from one of said mobile user stations, providing in response thereto….traffic information representative of said signals transmitted by said traffic monitors." (22:50-55). Claim 21(d) of the '862 patent includes the other "providing" limitation at issue. (24:28-37). Notably, no mention is made in either of these limitations of "minimization" of manipulation. That certain embodiments in the specification reference ease of use (4:18-27), or other such concepts, such as the difficulty of operating a computer while driving (1:60-2:3), does not indicate that such concepts should be read into the claims. *See, e.g., Va. Panel Corp.*, 133 F.3d 866 ("[D]evice claims are not limited to devices which operate precisely as the embodiments described in detail in the patent.")

Accordingly, Google's proposed construction of adding a "minimization" requirement to the "providing …in response" terms is improper. It should therefore be rejected by the Court.

3. Responses do not need to occur simultaneously with requests

Google's proposed construction for the "providing…in response" terms is nonsensical and should be rejected by the Court. Specifically, Google's construction requires that the response and the request occur simultaneously. This construction finds no support in the claims or the specification and defies logic.

Google points to a section of the specification that describes the commuter "immediately" determining traffic information. (Google at 39). Google leaps to the conclusion that the word

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"immediately" means "simultaneously" then seeks to improperly force this bizarre interpretation into the claims. It would be improper here to merely attempt to read a limitation from one embodiment into the claims. *See, e.g., Philips*, 415 F.3d at 1320; *see also Va. Panel Corp*., 133 F.3d 866. Google goes beyond this, however, to attempt to read a limitation that *does not even exist* from the specification into the claims. The claims and the specification do *not once* state that the request for information must occur simultaneously with the response. As noted above, it is highly improper for the courts to include elements not mentioned in the claim, as Google is attempting to do here. *Philips*, 415 F.3d at 1312 ("if we once begin to include elements not mentioned in the claim, in order to limit such claim…we should never know where to stop.") (quoting *McCarty*, 160 U.S. 116).

Indeed, the language from the specification quoted by Google contradicts its position here. (Google at 39). The phrase "[t]he commuter does not have to wait for a periodic traffic report" indicates that "immediately," quoted by Google here, simply means that the user may retrieve traffic information at his or her whim, rather than waiting. The specification further supports this interpretation by stating that the system "allows the user to obtain immediate information rather than waiting for the broadcast of information at specified times." (10:11-13).

Further, the very meaning of "response" indicates that it follows something sequentially (*i.e.*, a "response" to a question necessarily occurs at some point in time after the question). It makes little sense at all to suggest that a response to a request could come at the exact same instant in time as the request itself. Google's statement that "any separation in time of the two events would destroy the immediacy of the information" likewise makes little sense. (Google at 39).

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Someone skilled in the art would not interpret "immediately," as used in the specification[7], to require simultaneity. Such an interpretation would require some type of clairvoyance on the part of the disclosed traffic information system. Such "mindreading" devices are not known by those skilled in the art today, much less at the time of the patenting of the Traffic Patents.

Google's proposed construction requiring simultaneity makes no sense and finds no support in the Traffic Patents or in common sense. Accordingly, the Court should reject Google's flawed construction here.

IV. CONCLUSION

Google has not shown by clear and convincing evidence that any claim from the Traffic Patents is indefinite. Further, Google's proposed constructions are derived from serious misapplications of well-established claim construction standards. The Court should therefore reject Google's proposed constructions, and adopt Traffic's proposed constructions.

Respectfully submitted,

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7   Again, the word "immediately" does not appear at all in the claims.

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