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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GOOGLE INC.,

Plaintiff,

v.

TRAFFIC INFORMATION LLC,

Defendant.

No. CV09-642-HU

PLAINTIFF'S REBUTTAL CLAIM CONSTRUCTION BRIEF

By Plaintiff Google Inc.

Plaintiff Google Inc. ("Google") respectfully submits its Rebuttal Claim Construction Brief herewith.

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I. Summary Of Argument

Traffic Information LLC's ("Traffic's") Opening Claim Construction Brief demonstrates the difficulty of construing a patent that consists of ordinary terms that, taken out of context, have a broad and unfocused range of meanings: the claims of the patent can be twisted, after issuance, to fit any infringement contention.[1] Instead of providing an appropriate context for its claim term proposals, however, Traffic asks the Court (1) to rewrite the issued claims to remove limitations inherent in the language of the patent and intrinsic evidence, and (2) to adopt vague and broad constructions that merely "reshuffle" words from the claim terms and rely on extrinsic dictionary definitions. Traffic's proposals offer no additional clarity to the vague words of its patent claims.

Google's proposed constructions, in each case, are based on the words of the specification of the Traffic Patents, and they focus the claims on the invention as actually described.

II. Argument

A. Traffic's Inability To Express Plainly The Scope Of Its Claim Terms Demonstrates That The Terms Are Insolubly Indefinite

Traffic argues that the terms Google identifies as indefinite are capable of meaning, yet finds itself at a loss to explain how a person of ordinary skill in the art could read the patent and understand what the limits of the claims are. Any word that can be found in a dictionary has a

[1] *White v. Dunbar* , 119 U.S. 47, 51 (U.S.1886) ["Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express."]

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meaning – the question is whether the terms ***as used in the patents*** can be understood by one of ordinary skill in the art with sufficient clarity that the bounds of the invention can be understood.

Despite Traffic's claim that "a skilled artisan could easily discern the boundaries of the claim language,"[2] Traffic fails to show from the text of its patent what meaning a person of ordinary skill in the art might give to those terms. Instead, Traffic proffers open-ended constructions that go well beyond the bounds of the invention that Traffic submitted to the U.S. Patent Office ("PTO"), as set forth in the intrinsic evidence of the patents' claims, specification, and prosecution history.

1. Traffic Admits That There Is No Antecedent Basis for "Said User"

In its opening brief, Traffic admits that "said user" in Claim 9 of the '862 Patent lacks an antecedent basis, yet contends that "mobile user station" provides the basis for "said user." Traffic's solution is to take two unambiguously different phrases and treat them as though they mean the same thing. Traffic's introduction of an ambiguity into the claim simply compounds the problem and underscores the fact that Claim 9 is fatally indefinite.

Traffic argues that the Court should assume that "said user" refers to a "mobile user station." However, the two terms unambiguously mean two different things. While "user" and "mobile user station" are both nouns, the former term refers to a human being and the latter refers to a device. Traffic's attempt to equate a "user" (person) with a "mobile user station" (thing) ignores this fundamental principle and abandons the plain meaning of the terms for a quick fix. As discussed later, selecting which portions of the road are of interest varies considerably depending on whether selection is done by a user or the device. Traffic at 23 ("The

[2] Traffic Br. at 7.

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specification makes it clear that the 'selecting' can be done by either the mobile user station *or* the computer system") (citations omitted) (emphasis in original). According to Traffic's own citations to the specification, "said user" could refer to three different things: the mobile user station, the computer system, or the person who uses the system. *See* '862 Patent at 9:23-9:27; 11:3-19; and 15:38-45. [Comment: Please Verify] Faced with these three options, Traffic identifies no reason why "mobile user station" in particular provides the basis for "said user."

Without explicitly stating so, Traffic asks the Court to repair an error through the claim construction process, rather than seek amendment of the claim through the proper channels from the Patent Office. *See*, 35 U.S.C. § 254 or § 255. However, this Court "can correct an error ***only if*** the error is evident from the face of the patent." *Group One, Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 1303 (Fed.Cir.2005) (emphasis added). If the claim is subject to more than one reasonable construction, such that the court would be "required to guess as to what was intended," the nature of the error is not clear from the face of the patent and the claim is indefinite. *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1358 (Fed. Cir. 2003). Here, it is not at all evident from the face of the patent that the applicant meant to refer to the mobile user station rather than the user of that station. Traffic cannot manufacture the missing antecedent basis by inserting ambiguity into the meaning of "user."

Accordingly, there is an insoluble ambiguity regarding the meaning of "said user" caused by the lack of an antecedent basis for that term, which requires the Court to declare the term, and therefore Claim 9 of the '862 Patent, indefinite.

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2. Traffic's Proposed Construction Of "Traffic Information" Illustrates The Indefiniteness Of The Phrase

The term "traffic information" is inherently amorphous, and Traffic's proposed definition – "data regarding traffic conditions…and/or other data representative of the movement of vehicles on a road" – does not bring clarity to the term; as with other terms defined by Traffic, the definition merely reshuffles the order of the words. The definition Traffic advocates would render the claims of the patent meaningless and invalid for indefiniteness.

Traffic's overbroad proposal attempts to recapture into the scope of the claim types of "information" that Traffic clearly disclaimed in the patent specification. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) ["the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor. In that instance . . . the inventor has dictated the correct claim scope, and the inventor's intention, as expressed in the specification, is regarded as dispositive."]; *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337 (Fed. Cir. 2001) ["Where the specification makes clear that the invention does not include a particular feature, that feature is deemed to be outside the reach of the claims of the patent, even though the language of the claims, read without reference to the specification, might be considered broad enough to encompass the feature in question."].

The references by the applicant to "traffic information" in the patents demonstrate that the applicant had a specific type of information in mind. The specification describes several examples of data (e.g., commuters located at stop signs, at the side of the road, at underpasses and overpasses, or on unknown streets, and data from handheld computing devices) that do not constitute "traffic information" within the scope of the patent; indeed the specification teaches

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that such data should be "screened" and not used for analysis or display.[3] Further, the applicant teaches away from representations of information that merely display "traffic flow relative to a single, fixed value" as being unhelpful in judging actual vehicular speed in comparison to posted speed limits.[4] Apart from these isolated examples of excluded data, the patent specification provides no coherent description of any meaningful limits on the types of "traffic information" intended for display on user stations, thereby failing to put the public on notice of the explicit boundaries of the applicant's right to exclude others from practicing the applicant's invention.

3. Traffic Fails To Identify The Method By Which "Less Than All Available Traffic Information" Is Determined

Claim 22 of the '606 Patent requires that "less than all available traffic information is displayed" by the mobile user station. Traffic states that the degree of information that constitutes "less than all" is anywhere between zero and one hundred percent. This argument fails to address the problems Google identifies in its Opening Brief. The language "less than all available traffic information" is indefinite because the patent fails to teach the criteria by which the subset of information is chosen. See *Honeywell Int'l, Inc. v. Int'l Trade Comm'n*, 341 F.3d 1332, 1339 (Fed. Cir. 2003) [claim indefinite where patent failed to teach how to measure whether limitation was met]. The language is indefinite as well as to the degree to which the information is "less than all" of the available information. *Hearing Components, Inc. v. Shure Inc.*, 600 F.3d 1357, 1367 (Fed. Cir. 2010) ["Not all terms of degree are indefinite. However, the specification must 'provide[ ] some standard for measuring that degree.' (citations omitted)] "Less than all available" is a term of degree used to describe the boundaries of the claim, but no

[3] '862 Patent, 20:1 – 21:42.
[4] '862 Patent, 21:43-52.

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standard for measuring the appropriate degree of traffic information to be provided is given in the specification. As a result, the reader cannot determine what portions of the collected traffic information should be provided, or what amount "less than all available" is sufficient to practice the invention. *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010) ["When a 'word of degree' is used, the court must determine whether the patent provides 'some standard for measuring that degree'." (citations omitted)]

The previous section mentioned that the specification disparages certain types of information as unhelpful in judging actual speed of multiple vehicles traveling along a road.[5] However, apart from these isolated examples of disfavored information, the specification does not define the quantity of traffic information that constitutes the "less than all available" traffic information included within the scope of this claim. Thus, the Court should hold claim 22 of the '606 Patent invalid based upon the indefiniteness of the phrase "less than all available traffic information."

4. Traffic Reads Out the "Representative Of" Claim Limitation

Three terms in dispute between the parties employ the phrase "representative of": "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." Instead of addressing the "representative of" language, Traffic simply pretends that it does not exist, thus "reading out" the claim language. *Collegenet, Inc. v. XAP Corp.*, 2004 U.S. Dist. LEXIS 22370, *12-13 (D. Or. October 29, 2004) ["It is also

[5] '862 Patent, 21:43-52.

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improper to eliminate, ignore, or "read out" a claim limitation from a claim in order to extend a patent to subject matter disclosed, but not claimed."]

Traffic glosses over the problematic fact that the patent suggests that "representative of" requires some processing of the raw signal data, yet the written description offers no explanation of how the data is to be processed, nor of the standards by which the processed data is judged to be useful. As a result, it is not possible to determine what information provided by a computer system is "representative of traffic" as required by the claims, because no method is described for creating useful representations – only examples of unhelpful representations are provided. *Hearing Components*, 600 F.3d at 1367 [Specification must provide some standard for determining the degree.]

One of the "representative of…" phrases for construction has the additional modifier that the "information" is "representative of…selected portions of said traffic information database." Traffic's construction defines "selected portions" to mean "certain data." The substitution of an indefinite term with another ambiguous term is improper because "certain data" offers no further clarification as to who or what "selects" portions of the database and how that information is selected.

B. Traffic's Proposed Constructions Relating To The "Monitor" "User" "Station" And "Graphic Display" Conflict With The Specification's Teachings.

1. A "Traffic Monitor" Is A Stationary Device

Traffic's attempt to include mobile devices within the definition of "traffic monitor," a term which is used in Claim 1 of the '862 Patent and Claim 22 of the '606 Patent, ignores the distinctions between the traffic monitors and mobile user stations clearly and repeatedly drawn

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by the applicant. Claim 1 of the '862 Patent and Claim 22 of the '606 Patent refer to traffic monitors and mobile user stations as separate devices.[6] Traffic argues that Google's construction of traffic monitors as distinct devices from mobile user stations ignores a specific embodiment of the invention set out in the specification, but Traffic is in error in that regard. Each independent claim does not have to be read to encompass each embodiment described in the specification. See *Cordis Corp. v. Boston Scientific Corp.*, 188 F. App'x 984, 990 (Fed. Cir. 2006) ["[W]hen a patent includes two inventive components, particular claims may be directed to one of those inventive components and not to the other."]. The supposedly excluded embodiment Traffic identifies is captured in Claim 21 of the '862 Patent. Claim 21 of the '862 Patent claims a system that employs signals received from "a plurality of mobile user stations," but does not include the term "traffic monitors. As described in the specification, the system, claimed in Claim 21, "may provide traffic information without the use of [traffic] monitors 20 at all, relying solely on information derived from the mobile user stations 52."[7] Traffic conveniently ignores this key language in attempt to manufacture equivalence between stationary traffic monitors and mobile user stations.

In fact, Traffic ignores completely the fact that the specification depicts a traffic monitor only as a stationary device, therefore properly limiting the scope of the claims. *Inpro II v. T-Mobile*, 450 F.3d 1350, 1355 (2006); *SciMed Life Sys.*, 242 F.3d at 1341; *ICU Medical Inc. v. Alaris Medical Systems, Inc.*, 558 F.3d 1368, 1375-76 (Fed. Cir. 2009). Contrary to Traffic's assertion in its Opening Brief,[8] the "stationary" limitation is not found merely in the description

[6] '862 Patent, 22:52-55; 606 Patent, 24:51-53.
[7] '862 Patent, 13:19-21 (emphasis added).
[8] Traffic Brief at 10.

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of one of the embodiments. The Summary of the Invention states: "The traffic information database may be derived from information obtained from stationary traffic monitors, mobile user stations, or a combination thereof."[9] This limitation is employed consistently throughout the specification. Figures 1, 2, 7, and 11 of both the '862 Patent and the '606 Patent show only stationary devices when referencing traffic monitors (depicted as item 20). In fact, the patents describe a system that combines signals from mobile user stations as advantageous precisely because a mobile user station provides information superior to "that collected by stationary sensors" such as the detectors in traffic monitors, and more cost advantageous because "it is not necessary to install traffic monitors 20" for example, on every road.[10] Moreover, the system based on mobile user stations, as described in Claim 21, is superior because "if a stationary sensor 20 fails, no data can be collected from that location."[11]

Traffic's argument for that a traffic monitor should include any and all devices that can monitor traffic rests exclusively on the dictionary definition of "monitor." The Federal Circuit has explained, however, that "[t]he main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent." *Phillips* 415 F.3d at 1321. When Traffic's abstract construction, derived from extrinsic evidence, is considered in the proper context of the intrinsic evidence and the manner in which the applicants chose to claim the invention, Traffic's construction clearly conflicts with the intrinsic evidence.

[9] '862 Patent, 5:16-18 (emphasis added).
[10] '862 Patent, 13:33-44 (emphasis added).
[11] '862 Patent, 13:52-53 (emphasis added).

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Traffic's invocation of the "cardinal sin" of reading limitations described in the embodiments into the claims is unjustified. Google's proposed construction of "traffic monitor" as a stationary device gives meaning to both "traffic monitor" and "mobile user station" consistent with the intrinsic evidence of the specification and the claims. Traffic's claim that traffic monitors are not stationary devices contradicts the specification and ignores the distinctions drawn by the patentee between traffic monitors and mobile user stations. Accordingly, the Court should construe "traffic monitor" in part as a "stationary device."

2. Traffic's Construction Of "Traffic Monitor" Reads Out The Primary Benefit Of The Alleged Invention – *Current* Traffic Information.

Traffic's proposed construction, which merely incorporates its construction of "vehicular movement," ignores the clearly stated benefit of the alleged invention and the language of the specification. The specification explains that "[a] user can obtain immediate and contemporaneous traffic conditions, such as average vehicular speed, traffic flow, or vehicle frequency, for a plurality of locations along a road."[12] Importantly, the patentee distinguished the claimed invention from prior art that provided "stale information" and showed "slow response to quickly changing traffic conditions"[13] "Preferably, the GPS location is sent together with the current time at the user station so that delays incurred in transmission do not change the result."[14] By describing its system as providing "immediate and contemporaneous traffic conditions" and distinguishing the system over the prior art on that basis, the patentee expressly defined the limited scope of the invention. *Honeywell Intl. v. ITT Indus.* 452 F.3d 1312, 1319-20

[12] '862 Patent, 10:15-17 (emphasis added). At page 19 of Traffic's brief, Traffic itself relies on this passage and emphasizes the capability for obtaining immediate information without waiting for a periodic traffic report as a key aspect of the invention.
[13] '862 Patent, 1:53 and 2:7.
[14] '862 Patent, 12:61-64.

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(Fed. Cir. 2006) ["It is precisely because the written description has identified carbon fibers as electrically conductive, and yet it denigrated carbon fibers' applicability to the claimed invention, that we find a disavowal of that subject matter."]

Tellingly, Traffic truncates its primary citation on this point to claim misleadingly that the unit of time over which information is collected "could be a five-minute period, an hour, or day, for example." In support, Traffic cites the '862 Patent at 16:25-32:

> Similarly, the 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.

The specification states immediately thereafter, at 16:32-36:

> Where traffic density is high, the length of time over which data is collected and used to determine traffic conditions may be short, for example ***three minutes***. In contrast, where traffic levels are light, data may be collected for a long period of time, such as ***fifteen minutes***.

The "long period of time" identified by the applicant is fifteen minutes, consistent with Google's proposed construction that the information be "current" – not a full day, as claimed by Traffic.

The Court should adopt Google's proposed constructions for "traffic monitor" because the purpose of the alleged invention is to provide current information and because the specification, without exception, describes the traffic monitors detecting and providing current information.

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3. Multiple Vehicles Must Be Measured In Order To Determine "Vehicular Movement" And "Traffic Information"

Traffic claims that Google's reference to "multiple vehicles" in its construction of "traffic monitor" is inappropriate in light of the specification. However, Traffic's primary citation on this point refers to traffic monitors detecting "the speed of individual ***vehicles*** traveling along a road."[15] Traffic highlights the word "individual" but ignores that the term is followed by "vehicles" – plural. It is axiomatic that in order for Traffic's alleged invention to work, the system must detect and display information regarding multiple vehicles. This is implicit in the terms "frequency" and "flow." Logically, the utility of the alleged invention is lost where the system is simply reporting back to a commuter the speed of his or her own individual vehicle, or that of a single other vehicle. The specification describes varying the location of the traffic monitors and the length of time over which information is collected because "where traffic density is low, there may be few vehicles from which to gather data."[16] Thus, the patent contemplates that data must be gathered from multiple vehicles in order to provide traffic information. Accordingly, the construction of traffic monitor must include a reference to "multiple vehicles."

4. The Only Information That A "Traffic Monitor" Must Detect Is The Current Speed, Frequency, Or Flow Of Multiple Vehicles.

Like Google, Traffic's proposed construction incorporates its construction of "vehicular movement." However, Traffic's proposed construction of "traffic monitor" ignores the context in which the term is used in the patent. The only types of useful "traffic information" identified in the specification as being reported by the traffic monitors include the speed, frequency, or

[15] '862 Patent at 6:17-21.
[16] '862 Patent 16:15-17.

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flow of multiple vehicles. As argued below, the vehicular movement reported by traffic monitors does not include the "position" of a vehicle. The remaining examples cited in Traffic's own brief, "velocity, speed . . . and/or change in position" all boil down to "speed, frequency, or flow" – the elements identified by Google, which are taken directly from the language of the patent. Nothing in the specification indicates that the relevant claim language can be interpreted to cover data other than speed, frequency, or flow. *Meade Instruments Corp. v. Yamcon, Inc.*, 197 Fed.Appx. 929, 932 (Fed. Cir. 2006) [specification taught away from broad construction and every embodiment included proposed limitation].

Accordingly, the Court should identify the information detected by traffic monitors as limited to "speed, frequency or flow."

5. Traffic's Proposed Construction of Mobile User Station Is Inconsistent With What Is Explicitly Claimed In the Patents

Traffic's proposed construction of mobile user station is redundant of the claim language and otherwise fails to provide meaning or clarity to the term. Claim 1 identifies the mobile user stations as being "connected to a global positioning system receiver, a display, and a communicating device." Yet, Traffic's proposed construction claims a device that by itself "can transmit data to and/or receive data from the network." When the portions of the patent cited by Traffic are examined, it is clear that there is no support for construing a mobile user station as providing on its own the functions of transmitting or receiving information. Claim 1 explicitly states that the mobile user station is "connected to" the receiver and communicating device. Furthermore, Traffic refers to FIG. 4 of the patent, which shows the mobile user station 52 as separate from the receiver/transmitter 64 and the GPS receiver 62. Accordingly, Traffic has no

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support for its construction that a mobile user station is a device that performs transmitting and receiving functions.

Traffic proposes to further construe mobile user station as "a cellular phone or other handheld unit," or a device that "may be installed within a car." While Traffic cites numerous examples from the patents that refer to these types of devices and multiple dictionary definitions of the term "mobile", it fails to explain why it is necessary to clarify the word "mobile" for the fact finder. The fact that the device is mobile is evident from the term "mobile user station." Accordingly, there is no need to add the additional, unhelpful verbiage proposed by Traffic.

By contrast, Traffic's only criticisms of Google's proposed construction is that Google's construction makes it clear that a mobile user station is not a traffic monitor, as those terms are used in the patent, and that a mobile user station is capable of determining traffic information. The former complaint is refuted above in discussing traffic monitors, and the latter complaint is a red herring. Traffic argues that, because the computer system may determine traffic information, a mobile user station may not. However, the mobile user station and the computer system both possessing the capability to determine traffic information are not mutually exclusive concepts, and is fully consistent with the intrinsic evidence. Accordingly, Traffic's reasoning is without merit.

6. A "User" Is A Commuter Who Operates A Mobile User Station

As previously noted, Traffic's proposed construction of "user" as a "mobile user station" simply makes no sense and finds no support in the patents, which frequently and consistently refer to a user separately from a mobile user station. Should the Court decide that the phrase

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"said user" is not indefinite, it should apply the only logical construction to the term "user," which is Google's proposal that a user is "a person who operates a mobile user station."

7. Traffic's Proposed Construction Of "Displayed Graphically" Is Overbroad And Contrary To The Specification

Traffic argues that the term "displayed graphically" means "in a pictorial format." Neither this construction nor Traffic's argument regarding why it should be adopted adds anything to an understanding of what is claimed in the patents. Traffic simply cites to a dictionary definition of "graphics" that establishes that graphics are computer drawings, an issue that is not in dispute. Traffic does not identify why "pictorial" is any clearer than "graphical." In truth, "graphical" is a simple enough term. The problem with Traffic's position is that Traffic completely ignores the fact that the patent distinguishes graphical displays from textual displays. For example, the patent provides that "It is not necessary to provide a graphical representation of the road 12. Instead, information could be provided in a textual manner . . . ."[17] Figures 3 and 6 depict providing information as a "text message," [item 130] distinct from the traffic information, which is displayed graphically. [18] The specification further describes the alternative use of graphical and textual representations for the information to be displayed by the system: "The information could be sent to be displayed, such as in FIG. 3, or could be sent alternatively in a text or graphical format via e-mail."[19]

Google's proposed construction considers the term "displayed graphically" as that term is used in the patent. Traffic's meaningless substitution of "pictorial" for "graphical" ignores the

[17] '862 Patent, 9:29-42 and 50-52.
[18] '862 Patent, 10:38-52 (emphasis added).
[19] '862 Patent, 11:7-12.

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specification and will not assist the jury in determining issues such as infringement and invalidity.

C. Traffic's Proposed Constructions Of The Traffic Information-Related Terms Promote Ambiguity

1. "Traffic Information" Must Be Construed Consistent With The Claim Language

Traffic fails to address the fact that the terms "traffic information" and "traffic information database" are treated as separate terms in the claims and specification of the patents. The phrase "traffic information" is used only as part of "traffic information representative of said signals transmitted by said traffic monitors." Accordingly, "traffic information" must be limited by the claim language to the data that is transmitted by the traffic monitors. Traffic gives no explanation as to why the "traffic monitor" limitation should be written out of the plain language of the claims. The specification repeatedly, explicitly describes traffic information as the information detected by the traffic monitors.

Traffic cannot dispute that the patent consistently refers to the data provided directly from the traffic monitors as "traffic information." In the Detailed Description of the Preferred Embodiments, the specification explains that "the traffic monitors 20 measure traffic information."[20] The specification further describes that "The traffic monitors 20 detect or otherwise sense traffic to provide traffic information."[21] The patent repeatedly describes the information provided by the traffic monitors as "traffic information." Traffic fails to identify any difference between the data described in the patent as being provided by traffic monitors and the

[20] '862 Patent, 6:16-19.
[21] '862 Patent, 9:56-61.

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information that is displayed on the mobile user stations as "representative" of those signals. "Traffic information" is an inherently ambiguous term, but traffic information "representative of said signals transmitted by said traffic monitors" is even more ambiguous. Accordingly, should the Court attempt to provide meaning to the term, it must limit its construction to the way the terms are used in the patent, which repeatedly refers to the traffic monitors detecting or measuring the information (speed, frequency, or flow) otherwise identified as "traffic information."

2. By Conflating Its Constructions Of "Traffic Information Database" And "Traffic Information," Traffic Ignores The Language Of The Patent

Claim 21 defines "traffic information database" as "containing data representative of traffic." As noted elsewhere, Traffic's use of the term "representative of" renders the Claim 21 indefinite. Alternatively, should the Court decide to construe "traffic information database" so as to render the claim valid, it should interpret the term as a database containing "data representative of traffic," i.e., "a database containing the current speed, frequency, or flow of multiple vehicles traveling along a road."

To the extent that Traffic incorporates its construction of "traffic information" into its proposed construction of "traffic information database," all the reasons stated above for rejecting Traffic's construction of "traffic information" are also applicable here. By contrast, Google's proposed construction of "traffic information" is fully consistent with how the term is used in the patents.

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3. Traffic's Proposed Construction Of "Selected Portions" Offers No Additional Clarity

Traffic claims that "information representative of selected portions of said traffic information database" should be construed as "certain data from the map database and certain data from the traffic information database are transmitted to the mobile user station." For some unexplained reason, Traffic attempts to read into the construction of this term a requirement that the information include data from the map database, yet Traffic's construction fails to rectify the problem that the phrase "representative of" has no definite meaning in the context of the patent. Instead, Traffic merely substitutes the phrase "certain" for "representative of." The indefiniteness of the phrase "representative of" is addressed elsewhere, but underlying both that argument and Traffic's proposed construction is Traffic's failure to identify why or how "certain" adds more clarity than "representative of." Substituting one for the other is a wasteful, unnecessary, and confusing exercise, and neither term is sufficiently defined in the specification to provide adequate notice to the public of the boundaries of the applicant's invention. However, should the Court attempt to provide meaning to the term "selected portions," both Traffic and Google agree that the term should be construed consistently with their respective constructions of "traffic information database."

Unlike Traffic's construction, Google's construction offers the added and necessary clarification that the entity selecting the information is the user. The information provided to the mobile user station is provided pursuant to a request by the user. The references cited by Traffic consistently refer to selection by the user: "[t]he user may select," "[w]hen a user requests," "a

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user may indicate," "[t]he user sends a request."[22] Accordingly, Traffic's argument that "[t]he specification makes it clear that the 'selecting' can be done by either the mobile user station *or* the computer system" is contradicted by the very passages relied upon by Traffic.

For the foregoing reason, the Court should adopt Google's proposed construction if it determines that a construction of the term is possible.

4. "Vehicular Movement" Does Not Include the Position of a Vehicle

Traffic defines "vehicular movement" as "the velocity, speed, position, and/or change in position of a vehicle." This construction is different from Traffic's proffered construction of "traffic information," yet no rationale or support is given by Traffic for its decision to distinguish between the two concepts. The primary difference between Traffic's constructions of "traffic information" and "vehicular movement" is that Traffic attempts to read into the term "vehicular movement" the position of a vehicle. The ordinary meaning of "position," however, is at odds with the concept of "movement." A vehicle's position is, necessarily, a static measurement of the vehicle's location; "movement" necessarily implies that a vehicle is not static.

The three citations given by Traffic for including the "position" of a vehicle in its construction of vehicular movement fail to support the construction. Namely, the '862 Patent at 7:63-8:21 describes a traffic monitor determining the speed of a vehicle, but "position" is not used in the cited portion of the specification. The '862 Patent at 9:13-57 describes collecting from traffic monitors and/or mobile user stations the average vehicle speeds, traffic flow

[22] '862 Patent, 9:23-27 ["The user may select which portions of the road 12 are of interest, and the computer system 40 may transmit traffic information corresponding to that portion of the road 12.]; 15:38-45 ["When a user requests traffic information from the computer system 40, the computer system 40 transmits the requested data based on either the geographic location of the user, or for the geographic location requested by the user.]; 11:3-19 ["For example, a user may indicate that it wishes to receive a traffic report every morning at 7:30 a.m."].

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(vehicles per second) or vehicle frequency. Again, there is no reference to "position." Finally, 13:1-25 is irrelevant to the term "vehicular movement" because that portion of the specification describes the computer system correlating the geographic location of the mobile user stations with traffic information. As set forth above, traffic monitors, not mobile user stations, provide "vehicular movement."

The bottom line is that Traffic is attempting to over-interpret "vehicular movement." The term "vehicular movement" appears only in Claim 1(a) of the '862 Patent and Claim 22(a) of the '606 Patent where it is used to describe the data that is transmitted by the traffic monitors; the specification does not refer to the term at all.

> a plurality of traffic monitors, each said traffic monitor comprising at least a detector and a transmitter, said detector providing a signal including **data representative of vehicular movement** and said transmitter transmitting said signals[23]

Thus, "vehicular movement" must be construed according to the context in which it is used in the claims. The concept of the computer system using the longitude and latitude reported by mobile user stations is separately captured in Claim 22 of the '862 patent, which makes no reference to vehicular movement. Accordingly, this concept is not "eviscerated" from the patents as a result of Google's definition of the term "vehicular movement," as argued by Traffic. Each embodiment need not be captured in every claim. See *Cordis*, 188 F. App'x at 990.

Finally, the only reference in the patent to the word "position" (not mentioned by Traffic) describes using the position of the commuter's own vehicle as a graphic feature around which the "*traffic information* and roadway data," are displayed on the mobile user station:

[23] '862 Patent, Claim 1(a), 22:36-40.

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> In the Centered display, the mobile user station 52 determines the longitude and latitude of the commuter based on the GPS receiver 62. **The mobile user station 52 then displays the position of the commuter at the center of the display 54 as shown in FIG. 13. The traffic information and roadway data is then displayed around the commuter** by comparing the longitude and latitude of the user with the longitude and latitude associated with the various map locations contained in the map database.[24]

The only movement data actually referenced in the specification are the vehicles' "speed, frequency, or flow" captured by Google's construction. Traffic's reference to "change of position" is merely redundant of these data points and, thus, superfluous. Accordingly, the Court should adopt Google's construction of "vehicular movement" as including the "speed, frequency, or flow" of vehicles.

5. Traffic Fails To Grasp Why The "Providing" And The "In Response Thereto" Steps Can Only Be Interpreted As Occurring Simultaneously.

Traffic's criticisms of Google's proposed construction of "providing…in response thereto" fail to address the points raised by Google. Traffic ignores *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005), which teaches that system claims and method claims must be distinctly claimed. As in *IPXL*, because the applicant chose to claim its alleged invention as a system instead of a method of providing traffic information, Traffic has restricted itself to a situation where a person will not be able to determine when the claim is infringed. *Id*. Here, as a result of the manner in which Traffic claims its invention, Traffic's system must request and provide information at the same time because that is the only way that the system could be in complete existence at one point in time. This is further consistent with the advantages touted by the patent, that the system immediately provides contemporaneous

[24] '862 Patent, 16:64 – 17:6.

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traffic information.[25] Traffic advocates ignoring these implicit limitations, relying instead on the dictionary definition of "response." Extrinsic evidence, such as the dictionary definition relied upon so heavily by Traffic, "is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." *Phillips*, 415 F.3d at 1318. Accordingly, the only valid interpretation of this system claim requires simultaneous request and provision of information, not sequential steps that are characteristic of a method claim.

6. The System Must Minimize Manipulation By The Commuter While Driving.

Traffic claims that requiring the system to minimize the manipulation required of the commuter while driving "finds no support in the patent." Traffic's patents, however, repeatedly tout the minimization of manipulation while driving as a benefit of the system over the prior art and further describe the system as having attributes that achieve this goal.[26] Furthermore, the fact that the claimed system minimizes manipulation does not mean that the system cannot provide traffic information upon user request, as argued by Traffic. Traffic's reliance on a broad dictionary definition of the word "provide" over the intrinsic evidence leads Traffic to an unreliable claim construction. See *id.* In contrast, Google's construction finds ample support in the intrinsic evidence, which the Federal Circuit accords far greater weight than dictionary definitions. Accordingly, any construction of the "providing…in response" terms must include a limitation that the information provided minimize manipulation by the commuter while driving.

[25] '862 Patent, 12:63-64 and 10:15-18.
[26] '862 Patent 1:60-67; 2:1-33:8-11; 4:18-27; 16:57-62; 17:24-34; 19:63-64.

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D. The Court Should Not Construe Terms – Computer System, Interconnected, And Map Database – That Are Not In Dispute And Have An Ordinary Meaning

This Court should only construe those terms that are in dispute and necessary to a resolution of this matter. *Collegenet,* 2004 U.S. Dist. LEXIS 22370 *38-*39. Traffic has asked the Court to construe three terms, computer system, interconnected, and map database, without bothering to identify why the Court should do so. Moreover, Traffic admits that its proposed constructions simply capture the ordinary meanings of the terms and cites dictionary definitions it claims support these ordinary meanings. The parties therefore must agree that it would be clear to one of ordinary skill in the art from the usage of the terms that their meaning comports with the ordinary and everyday sense of the term. The Court should decline Traffic's invitation to engage in such a wasteful exercise.

III. Conclusion

Google respectfully asks that the Court issue its Order construing the terms of the patents at issue as set out in Exhibit A to its Opening Claim Construction Brief under the column reflecting Google's position.

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