

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

FARE TECHNOLOGIES, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 6:22-cv-00317-ADA
	)	
UBER TECHNOLOGIES, INC. d/b/a UBER,	)	
	)	
Defendant.	)	
_____	)	

**UBER'S RESPONSE TO PLAINTIFF'S
SUR-REPLY CLAIM CONSTRUCTION BRIEF**

Defendant Uber Technologies, Inc. (“Uber”) hereby submits this response to Plaintiff Fare Technologies, LLC’s (“Fare”) sur-reply claim construction brief. (Dkt. 38 (“Sur-Reply”).) A response is required because Fare’s sur-reply improperly relies on new, previously undisclosed extrinsic evidence not previously found in Fare’s responsive claim construction brief. (Dkt. 34.)

Fare’s New Extrinsic Evidence Is Irrelevant

Fare’s sur-reply relies on two pieces of extrinsic evidence: D.C. Law 6-97, District of Columbia Taxicab Commission Establishment Act of 1985 and a 2008 Washington Business Journal Article. (Dkt. 38-1.) Fare’s reliance on this evidence violates the Court’s OGP and scheduling order, which required the disclosure of all extrinsic evidence by September 22, 2022. (OGP Version 4.2 at 13; Dkt. 27 at 2; Dkt. 28 at 1.)

Even if the Court were to consider this new evidence, it is irrelevant to the issues before the Court. The new evidence, at best, suggests that at some point prior to 2008, Washington DC’s taxis charged passengers based on the number of “zones” their taxi traveled through. (Dkt. 38-1, Ex. 1.) Fare relies on this evidence to make an unfounded argument that Washington DC taxis did not have meters prior to 2008 and, accordingly, the Court should reject Uber’s proposed construction which requires that a taxi be “fitted with a meter.” (Sur-Reply at 4-5.) Fare, however, presents *no evidence* that pre-2008 Washington DC taxis did not have a meter – only that their fares were based on zones. Presumably, such taxis needed a metering system to determine the price of the ride, including number of zones traveled and surcharges. Thus, Fare’s new evidence does not rebut or contradict Uber’s proposed construction.

Fare’s argument about meters in pre-2008 Washington DC taxis is also irrelevant because the ‘727 Patent is directed to a taxi trip meter system where a taxi fare is “determined by a taximeter based on trip distance and waiting time.” (Ex. 1, ‘727 Patent, 1:24-25.) A taxi in a zone system, like the one discussed in Fare’s new evidence, does not rely on distance traveled

and waiting time to determine a taxi fare and, thus, is irrelevant to the meaning of “taxi” in the ‘727 Patent to a POSITA.

Fare’s Speculation About A POSITA’S Understanding Lacks Support

Throughout its sur-reply, Fare makes assertions about the understanding of a POSITA, based in part on its new extrinsic evidence. For example, Fare asserts that a term is “simple and easily understood by a POSITA” (Sur-Reply at 3) and that “a POSITA would not have been confused as to the meaning and scope of a term.” (*Id.* at 6.) Fare, however, failed to provide the opinion of a POSITA, like Dr. Mundy, and thus can only speculate as to the understanding of these terms to a POSITA. Those types of statements should not be considered by the Court. *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”); *see, also, Seagen Inc. v. Daiichi Sankyo Co.*, No. 2:20-CV-00337-JRG, 2021 WL 4168660, at *14 (E.D. Tex. Sep. 14, 2021) (rejecting defendants’ proposed construction where plaintiff provided unrebutted expert testimony and defendants instead relied “solely on attorney argument for [their] interpretation”).

Fare did not provide any expert testimony on its new extrinsic evidence and its relationship to the claim terms at issue, nor does Fare provide any evidence of what one of skill in the art would understand the claims to require. In contrast, Uber provides expert testimony that considers the timely disclosed extrinsic evidence and states that one of skill in the art would understand the term “taxi” to be “an automobile licensed for hire as a taxi or taxicab and fitted with a meter.” (Dkt. 31-4 at ¶¶ 25-33.) Uber’s expert testimony is unrebutted.

Fare Does Not Specify A POSITA’S Understanding Of The Terms At Issue

Equally troubling, Fare’s sur-reply states that each term should be given its plain and ordinary meaning, but does not explain that meaning, even after relying on the new extrinsic evidence. Fare’s reluctance to state or even explain the meaning of these terms to a POSITA is a

red flag. Fare is setting up a situation where, presumably, the infringement experts will dispute the scope of the disputed terms, which under *O2 Micro* would require the Court to resolve the exact construction issues currently presented. Fare had the opportunity to set forth its understanding of the terms and their scope, and declined to do so. It should not be given a second chance during or after the close of expert discovery.

* * * *

For the reasons set forth herein and in Uber's opening and reply briefs, the Court should adopt Uber's proposed constructions for each of the five identified terms.

Dated: December 14, 2022

By: /s/ Melissa R. Smith

Melissa R. Smith
Texas State Bar No. 24001351
GILLIAM & SMITH, LLP
303 South Washington Avenue
Marshall, Texas 75670
Telephone: 90.934.8450
Facsimile: 903.934.9257
Email: melissa@gilliamsmithlaw.com

Benjamin J. Bradford (*pro hac vice*)
Lisa M. Schoedel (*pro hac vice*)
Yusuf Esat (*pro hac vice*)
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
Telephone: 312-840-7224
Facsimile: 312-840-7324
BBradford@jenner.com
LSchoedel@jenner.com
YESat@jenner.com

Attorneys for Defendant Uber Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, the foregoing was served upon counsel of record via the Court's CM/ECF system.

/s/ Melissa R. Smith
Melissa R. Smith