

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

AUTO TELEMATICS LTD.,

Plaintiff,

v.

UNITED SERVICES AUTOMOBILE
ASSOCIATION,

Defendant.

Civil Action No. 6:22-CV-00474

JURY TRIAL DEMANDED

USAA’S REPLY CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

The purpose of the *Markman* process is to help the Court resolve disputes about claim construction so that the jury can do its job. Plaintiff’s brief is divorced from that objective. It begins with *four* pages of supposed “background” about the named inventor and his expertise in matters concerning beetles, bread, and breakfast cereal. Opp. at 1-5. And in what evolves into a theme, those four pages are devoid of a single citation to substantiate the supposed facts offered to the Court. When Plaintiff’s brief eventually turns to the claim terms, it is loaded with assertions of how a POSITA would understand the claims—but they are no more than the assertions by Plaintiff’s lawyers unsupported by testimony or the record.

Instead of addressing USAA’s positions, Plaintiff veers off course and responds to strawmen or puts on sideshows that have no relevance to claim construction. The upshot is that Plaintiff seeks to avoid the plain and ordinary meaning of its own claim language. And when the meaning is legally indefinite, Plaintiff responds with pages of attorney argument that inject limitations found nowhere in the words of the claims themselves, or in any saving claim construction offered by the Plaintiff.

II. CLAIM TERMS FOR CONSTRUCTION: THE PARTIES DISAGREE WHAT THE PLAIN AND ORDINARY MEANING IS

A. “sensor set”

Admitting what it cannot deny, Auto Telematics agrees that “or” means “or” and initially concedes that a “sensor set” may “include an image sensor, an audio sensor, an accelerometer, or a positioning module alone” Dkt. No. 34 at 7 (emphasis in original). Fearing an invalidity argument not before the Court, Auto Telematics then walks the admission back, and asks the Court to rewrite the “sensor set” limitation to require multiple sensors. *See* Dkt. No. 34 at 4. The role of the judiciary in claim construction, however, is not to rewrite the claims to save them but to

interpret the claims *as written* based on the understanding of a POSITA. *See, e.g., Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1374 (Fed. Cir. 2014) (“Claim terms should be given their plain and ordinary meaning to one of skill in the art at the relevant time and cannot be rewritten by the courts to save their validity.”).¹

Moreover, the Federal Circuit has held that construing claims to preserve validity – as Auto Telematics seeks to do here – is a last resort to be reached only if a claim is subject to multiple interpretations “after applying all the available tools of claim construction.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1327 (Fed. Cir. 2005), cert. denied, 546 U.S. 1170 (2006) (*en banc*) (“While we have acknowledged the maxim that claims should be construed to preserve their validity, we have not applied that principle broadly, and we have certainly not endorsed a regime in which validity analysis is a regular component of claim construction. Instead, we have limited the maxim to cases in which the court concludes, after applying all the available tools of claim construction, that the claim is still ambiguous.”). We are not at the point of last resort. Instead, the question now is limited to the proper construction of “sensor set”: construing “or” to mean “or,” or adopting Plaintiff’s nose of wax.² Aside from it being substantively wrong, it would be procedurally

¹ Plaintiff cannot decide what it is mad about. On the one hand, it chastises USAA for not saying enough about a written description defense disclosed in *preliminary* invalidity contentions (“[USAA is] conceal[ing] the true aim of its construction from the Court”) and on the other hand, admonishes USAA for “shoehorn[ing] its written description arguments into its claim construction brief.” Opp. at 8-9. Regardless, Auto Telematics makes premature assumptions about the relevance of supposed written description issues, and ignores that claim construction is to be done *objectively*, without regard to how a construction would impact one party or the other. *See, e.g., Sinorgchem Co., Shandong v. International Trade Com’n*, 511 F.3d 1132, 1146 (Fed. Cir. 2007) (Newman, J.) (dissenting) (“The health of innovative technology requires confidence in objective rules of claim construction, and in uniform judicial application of the rules.”).

² The language through which claims are expressed is not a nose of wax to be pushed and shoved into a form that pleases and that produces a particular result a [party] may desire. The public generally, and in particular, the patentee’s competitors, are entitled to clear and specific notice

premature for the Court to narrowly construe “sensor set” to try to preserve its validity where the supposed invalidity issue has not been crystallized for the Court, let alone briefed. *Abbott Lab's v. Baxter Pharm. Prod., Inc.*, 334 F.3d 1274, 1282 (Fed. Cir. 2003) (“without the issue of validity properly presented for the record, the district court erred by giving the claim term ‘effective amount’ a narrow reading to preserve its validity.”).

Auto Telematics urges that the scope of the “sensor set” limitation is determined “based on the context in which the term” is used but, tacitly admitting that its construction is unworkable, fails to tell the Court with what that scope is. Dkt. No. 34 at 7. Instead, Auto Telematics argues for ambiguity, urging that “a POSITA would look to the rest of the claim to understand what sensor or combination of sensors is required to meet the rest of the claim language.” *Id.* at 7. This “interpretation,” however, is contrary to Federal Circuit law because it would result in various claim-specific definitions of “sensor set.” *In re Varma*, 816 F.3d 1352, 1363 (Fed. Cir. 2016); *Evolusion Concepts, Inc. v. HOC Events, Inc.*, 22 F.4th 1361, 1365 (Fed. Cir. 2022) (“claim terms are normally used consistently throughout the patent”). The Federal Circuit explained in *In re Varma* that there is a strong presumption that “the same phrase in different claims of the same patent should have the same meaning” *In re Varma*, 816 F.3d at 1363. There is a strong presumption that the meaning of claim limitations, like “sensor set,” must be fixed and not customizable on a claim-by-claim basis. *Id.* This strong presumption may be overcome if – and only if – “it is clear that the same phrase has different meanings in different claims.” *Id.* Auto

of what the inventor claims as his invention. That is not an easy assignment for those who draft claims, but the law requires it, and our duty demands that we enforce the requirement. ***There is no room in patent claim interpretation for the equivalent of the cy pres doctrine; that would leave the claiming process too indefinite to serve the purposes which lie at the heart of the patent system.***

Exxon Chemical Patents, Inc. v. Lubrizol Corp., 64 F.3d 1553, 1563 (Fed. Cir. 1995) (Plager, J., concurring).

Telematics has made no such showing, and has failed to identify what that supposed claim-by-claim meaning is, or establish that the jury would be able to readily make that claim-by-claim determination without straying into claim construction, and without being POSITAs.

As explained in USAA’s brief, Dkt. No. 33 at 5-6, the intrinsic record allows, but does not require, a “sensor set” to include multiple sensors. For example, the specification discloses each sensor as an option, not a requirement, to satisfy the “sensor set” limitation. *See, e.g.*, ’271 Patent at 3:1-8 (“For example, **if the sensor set comprises** an accelerometer, [acceleration can be measured] . . . Similarly, **if the sensor set comprises** an image sensor, [video footage can be captured] .”) (emphasis added). Therefore, in context, a POSITA would understand that a “sensor set” may be comprised of any one of the listed sensors (an image sensor, an audio sensor, an accelerometer, or a positioning module), or a combination thereof. Ex. 7 (Second Andrews Decl.) at ¶¶ 6-9, 11. Auto Telematics fears an invalidity argument that no one has briefed and argues otherwise. But it cannot point to a single case (and USAA found none) where an unambiguous “or” list in a claim was construed to require more than one item in the list based on how a POSITA would interpret *other* limitations in the claim. If such a case exists for Auto Telematics’s position, surely it will be in its sur-reply.

For these reasons, the Court should construe “sensor set” to be comprised of any one of the listed items (an image sensor, an audio sensor, an accelerometer, or a positioning module), or a combination thereof.

B. “driving period”

Auto Telematics shows its hand, revealing why “driving period” needs construction. Belying its position that the “term does not need to be construed,” Auto Telematics seeks to eliminate the claim requirement altogether. USAA, on the other hand, hems close to the claim language with its construction, so much so that Auto Telematics’s first argument is that USAA’s

construction “[m]erely recit[es] the claim language.” And while USAA appreciates that argument, it notes that it is Auto Telematics’s rewriting of its own claims that forces USAA to seek enforcement of what the claims actually say.

After acknowledging that USAA relied on the intrinsic record for its construction, Auto Telematics’s brief goes downhill. Specifically, it contends USAA’s construction is improper because it “adds” two limitations: (1) that the mobile device must be removably attached for the entire duration of the driving period; and (2) that the mobile device must be removably attached as a precondition to the driving period. But these are not “added” limitations – they are the actual claim requirements that Auto Telematics tries to evade in alleging infringement. Last, Auto Telematics contends that USAA ignores the supposed distinction between “removably attached” and “removably affixed,” but (1) USAA’s construction uses “attached” for claims that say “attached” and “affixed” for claims that say “affixed” and (2) Auto Telematics admits that there’s no difference between these terms.

1. The claims require that the mobile device “is removably attached” during the driving period.

Starting with a seemingly subtle edit to its claim language, Auto Telematics suggests that the mobile device need only “be” removably attached at *some point* during the driving period, or for a duration of time less than the entire driving period. Opp. at 13-14. Auto Telematics’s surreptitious attempt to alter the scope of its claims to encompass a driving period when the mobile device is *not* removably attached is improper because a POSITA would not understand “a driving period *during which* a mobile device is removably attached” to encompass a period where the mobile device is not removably attached.

A POSITA would not understand the claim to only require the mobile device “be removably attached” at some point during the driving period, or for a duration of time less than

the entire driving period. A POSITA would understand that for a “driving period” to exist, not only must the vehicle be in use, but the mobile device “is removably attached.” Ex. 7 at ¶ 15. A POSITA would also understand that this requirement is compelled by the claim language and is supported by the specification, including the benefits associated with attaching the mobile device during the driving period, such as to keep the mobile device “in the correct position and orientation relative to the vehicle.” *Id.* at ¶¶ 16-20. Indeed, there is no disclosure in the specification of a “driving period” where the mobile device is not “removably attached/affixed.” *Id.* at ¶ 25. Auto Telematics’s position would incomprehensibly allow the claim element to be met even if the mobile device was only attached or affixed to the vehicle for an instant of the “driving period.” *See Id.* at ¶ 24.

Auto Telematics makes its argument by rewriting the claim. It turns “a driving period *during which* the mobile device *is* removably attached [or affixed] to the vehicle” into “the mobile device *be* removably attached or removably affixed during the driving period.” Dkt. No. 34 at 14. This is not what the claims say, but is an attempt to evade that the claims are *defining* what a “driving period” is: the period when the mobile device is removably attached/affixed *and* the vehicle is in use/being driven by the driver. This attempt to change the claims should be rejected.

More than anything else, it is what Auto Telematics’s brief does not say that calls into serious question its argument about “removably attached.” To review, USAA’s construction recites: “The ‘driving period’ requires that: 1) the mobile telecommunications device is removably [attached / affixed] to the vehicle; *and 2) the vehicle is [in use / being driven by the driver].*” Auto Telematics’s brief is conspicuously silent on the second half of the construction, and raises no arguments about (1) whether the vehicle has to be in use / being driven by the driver during the “entire” “driving period” or (2) whether the vehicle has to be in use / being driven by the driver

“for the driving period to start.” *See* Opp. at 13-14. Because both requirements arise out of the same grammatical construct of the claims, if the second half of USAA’s construction is correct (as Auto Telematics does not dispute), then the first half is, too. Surely, if Auto Telematics disagreed, it would have used its remaining pages to explain why the “during which” language of the claims has a different impact on “removably attached / affixed” than it does on “the vehicle is in use / being driven by the driver.”

Auto Telematics’s newly minted construction is in line with its attempt to build an argument to present to a jury implying that the *mere capability* for the mobile device to be connected would suffice to meet the claim element. Or, at least, to attempt to improperly shift the burden to USAA to prove that the mobile device was not connected *at some point* during the driving period. Auto Telematics might urge otherwise, but its contentions tell a different story.

2. Auto Telematics relies on mere capability of attachment/affixing.

Auto Telematics’s infringement contentions evade the “removably attached / affixed” limitation. Dkt. No. 34 at 12. For both “is removably attached” and “is removably affixed,” Auto Telematics states that the “the SafePilot App works **at least when** the mobile telecommunications device is removably [attached/affixed] to the vehicle via a USB cable, via a Bluetooth connection, or [attached/affixed] to the vehicle via another physical or electronic connection (e.g., a phone holder or mount within the vehicle).” Dkt. No. 33-2, at 47; Ex. 8 (’369 claim chart) at 118. In other words, Auto Telematics states that the SafePilot App *continues to work* if the mobile device is attached or affixed. But Auto Telematics does not allege that the mobile device *is* removably attached during the “driving period,” or that it is a condition of a “driving period,” or that it is a requirement for the accused system to operate. Thus, Auto Telematics’s infringement allegations are based on the mere allegation that “attachment” does not cause dysfunction of the accused system, and its claim construction positions should be evaluated accordingly.

3. The Claims Require a Determination of a Start of the Driving Period.

For the start of the driving period, Auto Telematics takes issue with USAA's supposed position that the system must "confirm" that the mobile device is attached. But USAA's construction does not include the word "confirm." To the extent that Auto Telematics takes issue with the word "confirm" appearing in one sentence in USAA's brief, Auto Telematics misapprehends, and USAA confirms that it is not seeking something other than its construction. But insofar as Auto Telematics argues that the claim does not require that the mobile device "is removably attached" for a driving period to start, USAA disagrees. The claim language is clear. The system must determine a start of the driving period; and a "driving period" is "during which" the mobile device "is removably attached" and "the vehicle is in use." The joining of these two requirements via "during which" means that a driving period can only occur if the mobile device "is removably attached" and "the vehicle is in use."

4. The Supposed Distinction between Affixed and Attached.

Auto Telematics argues that USAA "ignores the difference between" "affixed" and "attached." Dkt. No. 34 at 16-17. Auto Telematics is shadow-boxing. USAA's construction does not take a position on this issue because it recites "[attached / affixed]" to assign "attached" to the claims that use that term, and "affixed" to the claims that use that term.³ But the argument that Auto Telematics offers is so strained that USAA will respond briefly.

Auto Telematics insists that "affixed" and "attached" mean different things, but does not explain *how* they differ. *Id.* The usage of the terms in the specification indicate that they are

³ In the same vein, USAA's construction recites "[in use / being driven by the driver]" to assign "in use" to the claims that recite it, and "being driven by the driver" to the claims that recite that. Auto Telematics does not raise an issue about USAA's supposed conflation of these terms, but as noted earlier, Auto Telematics's failure to address the second half of USAA's construction says a great deal about its approach to the first half.

synonyms. *Compare* Dkt. No. 34-1, Ex. 1 at 3:1-4 (“if the sensor set comprises an accelerometer, the acceleration of the vehicle can be more accurately measured due to the mobile device being firmly attached to the vehicle”) *with id.* at 14:54-58 (“The adapter 21 may comprise a flexible telescopic arm, configured with a suction cup at one end for affixing the adapter to the windshield 19, and a dock arranged at the opposite end for securely holding the telecommunications device 17 in place.”). Further, Auto Telematics’s infringement contentions identify the *exact same* functionality of the accused products for the limitations that include “affixed” and “attached,” simply swapping one word for the other. *Compare* Dkt. No. 33-2, Ex. 1 (’271 claim chart) at 47 *with* Ex. 8 at 118.

Because Auto Telematics identified no actual difference between affixed and attached, and because it uses the terms interchangeably, the Court should treat affixed and attached as synonyms.

III. CLAIM TERMS THAT ARE INDEFINITE

A. “driving information”

As explained in USAA’s brief, the limitation “driving information” is hopelessly ambiguous for having three potentially conflicting potential meanings. Dkt. No. 33 at 12-18. Specifically, within the context of the ’271 patent, “driving information” may be:

- “derived based on inputs [. . .] and sensor data”;
- “compris[ing] at least one of a driving score and sensor data captured and processed by the remote mobile telecommunications device”; **or**
- “process[ed]” by the “data logging system” to “generate a driving score.”

See Dkt. No. 33 at 13; *see also* ’271 Patent at 32:55–56, 32:61–62, 32:67–33:2. All three cannot simultaneously be true. Yet, in responding, Auto Telematics does not address the testimony of a POSITA, proffer any testimony from a POSITA, or present an alternative way of interpreting “driving information” to mean something specific. *See, e.g.,* Dkt. No. 34 at 19-20. Instead, Auto

Telematics argues “USAA does not provide any reason why driving information cannot be derived from and also comprise ‘sensor data.’” *Id.* But USAA’s brief explains why a POSITA would understand that being “derived from” is different from “comprising.” Dkt. No. 33 at 13; *see also* Dkt. No. 33-8 (First Andrews Decl.) at ¶ 39. And USAA’s brief explains that although the specification hints at the possibility that there are two forms of “driving information,” that implementation is not claimed. Dkt. No. 33 at 17; *see also* Dkt. No. 33-8 at ¶¶ 47, 48.

Moreover, Auto Telematics relies on the fact that the “the specification describes sensor data being down-sampled before being stored as driving information” as evidence that “the driving information may also include sensor data. Dkt. No. 34 at 21. Contrary to Auto Telematics argument, however, this only shows that the original sensor data must be transformed or down-sampled to yield the claimed “driving information.” Similarly, Auto Telematics suggests that “derived based on” *could* “mean that the inputs received by the user interface are merely packaged together with sensor data.” Dkt. No. 34 at 20. As explained in USAA’s brief, however, because there is no “clearly identifiable” difference between “sensor data” that is “captured and processed” to become “driving information” and “sensor data” that is “comprise[d]” in “driving information,” a POSITA would not be able to ascertain the scope of the “driving information” term with reasonable certainty. *See Techler v. Norstrud*, 475 F.2d 1192, 1195 (C.C.P.A. 1973) (“‘[D]ouble inclusion’ is governed by 35 U.S.C. § 112 and is regarded as improper when it renders a [claim] indefinite or where the separate structures are not clearly identifiable.”). And if a POSITA would not be able to follow Auto Telematics’s convoluted and internally inconsistent explanation of “driving information”, how could a jury hope to?

In sum, either “driving information” is indefinite *or* the Court should adopt a narrowing construction limited by the arguments made in Auto Telematics’s briefing.

B. “driving score”

Conceding “careless drafting,” Auto Telematics asks this Court to rewrite the claims to save “driving score” from indefiniteness. This request should be denied. *Lucent Tech. v. Gateway*, 525 F.3d 1200, 1215 (Fed. Cir. 2008) (“courts may not redraft claims to cure a drafting error made by the patentee, whether to make them operable or to sustain their validity”). In making this request, Auto Telematics implicitly acknowledges that a POSITA would not be able to ascertain the meaning of the term *as written* with reasonable certainty. Dkt. No. 33-8 at ¶ 66. In an effort to take the focus off its own patents, Auto Telematics relies on the supposed definition of “driving score” in a prior art reference, but that reference proves that “driving score” does not have an established meaning, and that recourse to the troubled specification is necessary.

Indeed, Auto Telematics sidesteps the circular definition of “driving score” that appears in its own specification, and renders indefinite all of the claims in which “driving score” appears.⁴ In hope of getting a response in the sur-reply, the issue is this “disclosure”:

Preferably, the mobile device is controlled by the executed application to process the driving information to generate a driving score. The driving information may comprise the driving score.

’271 Patent at 10:14–17 (emphasis added); *see also Id.* at 11:66-12:3.

The patent makes no sense, and Auto Telematics makes no effort to clarify. Its only “response” is to point to the claim language and argue that because it does not recite the circular definition, the specification can be ignored. Dkt. No. 34 at 28. But because a POSITA must look to the specification to understand what a “driving score” is, Auto Telematics’s argument does nothing to resolve the indefiniteness created by the portions of the specification cited by USAA.

⁴ ’271 Patent, claims 6, 7; ’487 Patent, claim 9; ’369 Patent, claim 18; and ’879 Patent, claims 1, 21, 46, 51, 54, 55.

Kinetic Concepts, Inc. v. Wake Forest Univ. Health Scis., Consolidated Civil Action No. SA-11-CV-163-XR, at *9 (W.D. Tex. Nov. 25, 2013) (citing *Phillips v. AWH Corp.* 415 F.3d 1303, 1315 (Fed. Cir. 2005)) (“The specification is the “best source” for understanding the meaning of a term because “the person of an ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent.””). Auto Telematics’s apparent argument that a POSITA would ignore the disclosure cited by USAA is contrary to the claim construction process, unsupported by evidence, and contrary to the testimony of Mr. Andrews.

1. “Careless Drafting” and Circular Logic Doom Claims 6 and 7.

Auto Telematics admits that the use of “driving score” twice in claims 6 and 7 “may not be common draftsmanship” but excuses such “careless drafting in the prosecution of the patent” because it “does not create ambiguity in the meaning of the patent’s claims nor demonstrate that a person skilled in the art would be unable to discern its readily understood meaning within the context of the patent.” Dkt. No. 34 at 26 (citing *Vidir Mach. Inc. v. United Fixtures Co.*, 570 F. Supp. 2d 693, 707 n.10 (M.D. Pa. 2008)). But unlike the non-binding Pennsylvania “authority” of *Vidir*, the ambiguity here is apparent, as Auto Telematics admits that “ ‘driving score . . . to determine a risk profile’ may be different” as between Claims 6 and 7. Dkt. No. 34 at 25. Of note, Auto Telematics does not rebut the testimony of a POSITA proffered by USAA, or proffer any if its own.

Recognizing the ambiguity, Auto Telematics attempts to revise the claims and parts of the specification to recite a “first” driving score, and a “second” driving score. *See* Dkt. No. 34 at 25 (“There is a **(first)** driving score, which may be included in the driving information, and a **(second)** driving score generated based on driving information.”) (emphasis added). Any such revision would need the blessing of this Court. But it also is an admission that the claims as written are

indefinite. Thus, Auto Telematics asks the Court to make a decision – rewrite the claims and specification, or find the claims indefinite.

Auto Telematics goes on to state that “Claims 6 and 7 of the ’271 Patent are drafted to include both embodiments” (both embodiments being the “first” driving score included in the driving information and the “second” driving score generated based on driving information). *Id.* at 24. This argument is nonsensical. The two embodiments of a “driving score” are different, inconsistent alternatives to each other and cannot be encompassed by a single claim.

Auto Telematics uses the re-imagined “first” and “second” driving scores to invent examples where the “driving score” may be both an input and an output (“In the embodiment where the driving information already comprises a driving score, the processing to generate “a driving score . . . to determine a risk profile” may be—for example, linking the driving score to a specific vehicle and/or driver. In the embodiment where the driving information does not comprise a driving score (or does not expressly have to comprise a driving score), the processing to generate “a driving score . . . to determine a risk profile” may be different—for example, transforming sensor data into a driving score that is then linked to a vehicle and/or driver.”) But by offering these examples, Auto Telematics admits that the term “a driving score” as used to determine a risk profile, may mean *two completely different things*, depending on which driving score is deemed applicable, *even though the claims don’t differentiate between two different driving scores*.

Auto Telematics urges that a POSITA would understand “that these recitations of “driving score” refer to two different things in these claims—regardless of the fact that they use the same root term,” but provides no expert testimony to back up this assertion. Dkt. No. 34 at 26. Conversely, USAA provided the declaration of Mr. Andrews to show exactly why the term is indefinite.

2. Auto Telematics's Argument for Claim 7 Does Not Make Sense

Auto Telematics does not contest that “driving score” appears three times in Claim 7, and that “the driving score” has no proper antecedent basis. Dkt. No. 34 at 26. Nor does Auto Telematics contest that, as written, *either* instance of “a driving score” could serve as the antecedent basis. *Id.* at 26-27. Instead, Auto Telematics posits that the question is “what a POSITA would understand the claims to mean in light of the specification as a whole,” and then itself answers with what a POSITA would understand. *Id.* at 27. But this is rank speculation, because again, Auto Telematics has provided no evidence in support.

Moreover, it is nonsensical. Auto Telematics asserts that “a POSITA would understand the differing uses of “driving score” in Claim 7: one that may be a part of “driving information” and another that is generated to determine a risk profile.” Auto Telematics then posits that a “POSITA would understand that the driving score used to determine the risk profile in Claim 7 would be the score used to define an insurance premium.” Dkt. No. 34 at 27. But the second “driving score,” i.e. the one “used to determine the risk profile,” is derived from the “driving information.” And the “driving information” already comprises the first “driving score.” So Auto Telematics's identification of “the driving score used to determine the risk profile” as the proper antecedent basis for “the driving score” does not resolve the ambiguity that they admit exists, even if a POSITA would understand the multiple instances of “driving score” in Claim 7 as Auto Telematics alleges (of which there is no evidence).

In contrast to Auto Telematics's hand waving, USAA provided expert testimony and an analysis of the claims and specification. Dkt. No. 33 at 22-24. As Mr. Andrews explained, the specification does not identify which “a driving score” is the one being used to “define an insurance premium,” and a POSITA, and the public (including the jury), would be left to guess the bounds of this claim in light of the ambiguous “the driving score.” *Id.* at 24. Claim 7 is indefinite.

3. Katsman proves “driving score” did not have an established meaning.

Auto Telematics relies on U.S. Patent Application Publication No. 2010/0157061 (“*Katsman*”), a prior art reference cited during prosecution, to defend its position that driving score was an established term. Not only does *Katsman* not offer an established meaning of “driving score,” it actually proves that “driving score” did not have an established meaning. The driving score in *Katsman* may be determined based on information related to the driver. But that “driving score” is not derived from sensors, but rather from “the number and the nature of recorded traffic events in which the member driver was involved.” *Katsman* at ¶ 0065. Importantly, the driving score could be affected by incidents unrelated to the vehicle being driven by the subject of the driving score. For example, a person’s driving score may be based on incidents reported by the person about *other* vehicles (not the person’s own vehicle). *Id.* (“When a member driver contributes to road safety **by reporting unsafe driving by another driver** or unsafe road conditions, the member driver’s score may be raised.”) (emphasis added). This is why USAA’s expert Mr. Andrews stated in his declaration that “driving score” did not have an “established definition at the time of the alleged invention.” *See* Dkt. No. 33-8 at ¶ 53.

Accordingly, the Court should find “driving score” indefinite. If Court accepts Auto Telematics’s (wrong) arguments to rewrite the claims, then it must also adopt saving constructions that implement Auto Telematics’s arguments.

IV. CONCLUSION

USAA respectfully requests that the Court adopt USAA’s proposed constructions.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically on January 25, 2023, and was served via CM/ECF on all counsel who are deemed to have consented to electronic service.

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