

**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 OPENING CLAIM CONSTRUCTION BRIEF**

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## I. INTRODUCTION

USAA respectfully submits this brief in support of its proposed constructions of terms from U.S. Patent Nos. 9,311,271 (the “’271 Patent”), 9,633,487 (the “’487 Patent”), 10,192,369 (the “’369 Patent”), and 10,198,879 (the “’879 Patent”) (collectively the “Asserted Patents”), all asserted by Auto Telematics and all part of a single patent family.<sup>1</sup> These patents are about using a standard mobile device—like an iPhone—to monitor how a person is driving a car. For example, speeding or excessive acceleration/braking can be detected and recorded. In one implementation, the asserted patents suggest adjusting a driver’s automobile insurance premium based on the monitoring. The asserted patents admit that such functionality was routinely performed in the prior art by purpose-built “black boxes”; the supposed innovation of the asserted patents is to do the same thing using an iPhone. *See, e.g.*, ‘271 Patent at Background.

While this brief raises a few issues concerning indefiniteness—about which the parties naturally disagree—there are only two terms where the parties disagree about the plain and ordinary meaning. Those disagreements are straightforward and turn on whether the claims mean what they say. Resolution of these disagreements will be impactful because the two disputed terms appear in every single claim of the asserted patents.

The first dispute concerns the so-called “sensor set” limitation, which every claim defines as “comprising an image sensor, an audio sensor, an accelerometer, or a positioning module, or a combination thereof.” USAA’s position is that any one of the sensors (an image sensor, an audio sensor, an accelerometer, *or* a positioning module) *or* a “combination thereof” satisfies the claim limitation. Auto Telematics, in an unusual move for a patentee, seeks to narrow this limitation,

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<sup>1</sup> All four patents have identical specifications. For convenience, all references to the specification cite to the ‘271 Patent.

and suggests that “or” means “and.” But, “or” means “or.” That is enough to rule in USAA’s favor.

The second dispute concerns the so-called “driving period” limitation, which every claim defines as the “period during which the mobile device is removably attached to the vehicle and the vehicle is in use.”<sup>2</sup> USAA’s position is that the claims mean what they say, and that there are two necessary conditions for a “driving period”: (1) the mobile device is “removably attached” to the vehicle and (2) the vehicle is in use. Auto Telematics rewrites the claims, advancing in its infringement contentions that the mobile device need only be *capable* of being “removably attached” to the vehicle. Again, ruling that the plain language of the claims controls is enough to rule in USAA’s favor.

## II. LEGAL STANDARDS

USAA recognizes that the Court is well versed on the law as it relates to claim construction, and therefore spares the Court an extended recitation of the various rules, canons, and principles.

### A. General Tenets of Claim Construction

A key principle in resolving the disputes in this brief is that “[t]he actual words of the claim are the controlling focus.” *Digital Biometrics, Inc. v. Identix, Inc.* 149 F.3d 1335, 1344 (Fed. Cir. 1988). The words of a claim are generally given their ordinary and customary meaning, which is the meaning that the term would have to a person of ordinary skill in the art at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (*en banc*). “Importantly, the person of ordinary skill in the art is deemed to read the claim term not

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<sup>2</sup> Some claims refer to the mobile device being “removably affixed” (as opposed to “removably attached”) and the vehicle “being driven by the driver” (as opposed to “in use”). Neither party asserts that these differences impact the parties’ dispute.

only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Id.* at 1313. Accordingly, “the only meaning that matters in claim construction is the meaning in the context of the patent.” *Trs. of Columbia Univ. v. Symantec Corp.*, 811 F.3d 1359, 1363 (Fed. Cir. 2016).

**B. Definiteness under 35 U.S.C. § 112, ¶ 2<sup>3,4</sup>**

Patent claims must particularly point out and distinctly claim the subject matter regarded as the invention. 35 U.S.C. § 112, ¶ 2. “The claim or claims must conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description.” 37 C.F.R. § 1.75(d)(1). When read in light of the intrinsic evidence, the claim must “inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. BioSig Instruments, Inc.*, 572 U.S. 898, 909–10 (2014). “[The] patent must be precise enough to afford clear notice of what is claimed, thereby ‘appris[ing] the public of what is still open to them.’” *Id.* at 909 (alteration in original) (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996)). “Otherwise there would be ‘[a] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.’” *Id.* at 909–10 (alteration in original) (quoting *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942)). If the claim fails to provide such precision

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<sup>3</sup> Because the Asserted Patents list an effective filing date before the adoption of the Leahy-Smith America Invents Act, Pub. L. No. 112–29, § 4(e), 125 Stat. 284, 296–97 (2011), the previous version of § 112 governs. See *AbbVie Deutschland GmbH & Co. v. Janssen Biotech, Inc.*, 759 F.3d 1285, 1290 n.3 (Fed. Cir. 2014).

<sup>4</sup> This briefing regarding certain claim terms being indefinite under § 112, ¶ 2 is made without waiver of any arguments USAA may separately advance regarding claims being invalid due to failure to comply with § 112, ¶ 1 requirements, or non-indefiniteness arguments under § 112, ¶ 2.

and certainty, the claim is invalid and indefinite. *Id.* at 901. As it is a challenge to the validity of a patent, the failure of a claim to comply with § 112 must be shown by clear and convincing evidence. *Id.* at 912 n.10.

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

#### A. “sensor set”

| Term / Patent(s)                                                                                                                                                                                                                                                                                                                                                                                                       | USAA’s Proposed Construction                                                                                                                                           | Auto Telematics’s Proposed Construction |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|
| <p>All claims in the Patents in Suit include this limitation either explicitly, or by virtue of their dependency. The term explicitly appears in the following claims:</p> <ul style="list-style-type: none"> <li>• ’271 Patent – Claims 1, 4, 6, 7</li> <li>• ’487 Patent – Claim 1</li> <li>• ’369 Patent – Claims 1, 22, 24, 26, 27</li> <li>• ’879 Patent – Claim 1, 21, 42, 46, 47, 49, 51, 52, 54, 55</li> </ul> | <p>The “sensor set” comprises any one of the listed items (an image sensor, an audio sensor, an accelerometer, or a positioning module), or a combination thereof.</p> | <p>No construction required.</p>        |

The term “sensor set” requires construction because Auto Telematics disagrees that “or” means “or.” USAA requests a construction to enforce that the claim language means what it says, and that a single sensor is sufficient to satisfy the “sensor set” claim limitation. This is critical for understanding the scope of the allegedly infringing activity, the scope of prior art that would invalidate the asserted claims, and other potential invalidity issues.

For example, Auto Telematics’s infringement contentions urge that this claim limitation is met by alleging that an iPhone includes a camera, microphone, accelerometer, *and* positioning module. Ex. 1 (’271 claim chart) at 10-15. When confronted with this inconsistency between

“or” and “and” during the pre-briefing meet-and-confer, Auto Telematics equivocated and submitted that the scope of this limitation can vary based on the circumstances. That cannot be. “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.” *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1563 (Fed. Cir. 1995) (Plager, J., concurring).

Consistent with the plain and ordinary meaning of “or,” the Court should construe “sensor set” to 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. Only USAA’s proposed construction is consistent with the intrinsic record and the definition of “or.”

**1. USAA’s Proposed Construction is Consistent with the Intrinsic Record**

The intrinsic record compels USAA’s construction of “sensor set.” The specification discloses a “sensor set” that has “at least one” of the listed items (an image sensor, an audio sensor, an accelerometer, or a positioning module):

Aspects of some exemplary implementations provides a mobile telecommunications device adapted for installation to a vehicle configured to log driving information associated with the vehicle when driven, the mobile device comprising: a **sensor set** comprising **at least one** of an image sensor, an audio sensor, an accelerometer and a positioning module . . .

’271 Patent at 1:59-2:9 (emphasis added). The specification discloses each specific sensor as an option, not a requirement, to satisfy the “sensor set” limitation:

For example, **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. Similarly, **if the sensor set comprises** an image sensor, for example, for capturing video footage of the road ahead, better footage can be obtained as the mobile device can be held in the correct position and orientation relative to the vehicle.

’271 Patent at 3:1-8 (emphasis added).

**Preferably**, the **sensor set** comprises an accelerometer for detecting the acceleration of the mobile device.

'271 Patent at 8:7-8 (emphasis added).

**Preferably**, the **sensor set** comprises an image sensor such as a camera.

'271 Patent at 8:21-22 (emphasis added).

**Preferably**, the **sensor set** comprises an audio sensor such as a microphone.

'271 Patent at 8:59-60 (emphasis added).

**Preferably**, the **sensor set** comprises a positioning module arranged to determine the position of the mobile device.

'271 Patent at 8:64-65 (emphasis added).

**Preferably**, the **sensor set** comprises an orientation sensor for determining the orientation of the mobile device.

'271 Patent at 9:11-12 (emphasis added).

**Preferably**, the **sensor set** comprises a user-input device arranged to receive an input from a user.

'271 Patent at 9:25-26 (emphasis added).

The prosecution history also supports USAA's proposed construction of "sensor set." For example, during prosecution of the '271 Patent, the Examiner identified the use of the "or" language as a reason to reject an independent claim by pointing to prior art having just one of the listed sensors. Ex. 2 ('271 File History, Sept. 23, 2015 Final Office Action) at 7.

## **2. "Or" means "or"**

USAA's proposed construction, consistent with and supported by the intrinsic record, is also in line with the plain English definition of "or." Dictionaries consistently define "or" to indicate alternatives. *See, e.g.*, Ex. 3 (COLLINS DICTIONARY (10th ed. 2009) (Reissued with Revised Supplement 2010)) at USAA-AT\_00002434 (defining "or" as "used to join alternatives"); *see also* Ex. 4 (THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH

LANGUAGE (4th ed. 2006)) at USAA-AT\_00002439 (defining “or” as “used to indicate an alternative, usually only before the last term of a series); *see also* Ex 5 (THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005)) at USAA-AT\_00002445 (defining “or” as “used to link alternatives”).

The Federal Circuit has “consistently interpreted the word ‘or’ to mean that the items in the sequence are alternatives to each other. *Schumer v. Laboratory Computer Systems, Inc.*, 308 F.3d 1304, 1311 (Fed. Cir. 2002); *see also SkinMedica, Inc. v. Histogen Inc.*, 727 F.3d 1187, 1199 (Fed. Cir. 2013) (“The disjunctive “or” plainly designates that a series describes alternatives.”); *see also IBSA Institut Biochimique, S.A. v. Teva Pharms. USA, Inc.*, 966 F.3d 1374, 1379 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 2470 (2021) (“These disjunctive lists designate that a “half-liquid” is an alternative to the other members of the list, including pastes and gels.”). In *Schumer*, the Federal Circuit vacated summary judgment of no infringement and invalidity and remanded because the district court erred in construing a patent claim to require that a digitizer translate all three attributes of origin, scale, and angle of rotation, where the plain meaning of “or” in the claim compelled the conclusion that the claim only required translation of any one of the three attributes. *Schumer*, 38 F.3d at 1311.

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”**

| Term / Patent(s)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | USAA’s Proposed Construction                                                                                                                                                                      | Auto Telematics’s Proposed Construction |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|
| <p>All claims in the Patents in Suit include this limitation either explicitly, or by virtue of their dependency. The term explicitly appears in the following claims:</p> <ul style="list-style-type: none"> <li>• ’271 Patent – Claims 1, 4 (“determine . . . a start of a driving period during which the mobile telecommunications device is removably attached to the vehicle and the vehicle is in use”)</li> <li>• ’271 Patent – Claims 6, 7 (“a driving period during which the remote mobile telecommunications device is removably attached to the vehicle being driven by the driver”)</li> <li>• ’487 Patent – Claim 1 (“determine . . . a start of a driving period during which the mobile device is removably attached to the vehicle and the vehicle is in use”)</li> <li>• ’369 Patent – Claim 1, 26, 27 (“determine . . . a start of a driving period during which the mobile device is removably attached to the vehicle and the vehicle is in use”)</li> <li>• ’879 Patent – Claims 1, 46 (“determine . . . a start of a driving period during which the mobile telecommunications</li> </ul> | <p>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].</p> | <p>No construction required.</p>        |

| Term / Patent(s)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | USAA's Proposed Construction | Auto Telematics's Proposed Construction |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|-----------------------------------------|
| <p>device is removably attached to the vehicle and the vehicle is in use")</p> <ul style="list-style-type: none"> <li>• '879 Patent – Claims 21, 51 ("determine . . . a start of a driving period during which the mobile telecommunications device is removably attached to the vehicle and the vehicle is being driven by the driver")</li> <li>• '879 Patent – Claims 54, 55 ("determine . . . a start of a driving period during which the mobile device is removably affixed to the vehicle and the vehicle is in use")</li> </ul> |                              |                                         |

The term “driving period” requires construction because Auto Telematics apparently disagrees with the actual language of its claims. The relevant portion of Claim 1 of the '271 Patent, which is representative of all claims for purposes of this dispute, recites:

determine, based on at least one of the inputs received by the user interface and sensor data from the device's sensor set, a start of a **driving period** during which the mobile device is removably attached to the vehicle and the vehicle is in use . . .

Accordingly, a “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].<sup>5</sup> If the system is not required to confirm that the mobile device has been “removably attached” for there to be a “driving period,” the claim cannot be infringed. But Auto Telematics’s infringement contentions contradict this requirement of the claims, requiring the mere capability of attachment. *See e.g.*, Ex. 1 (’271 claim chart) at 47. Construction is therefore necessary because it underlies a dispute in Auto Telematics’s infringement contentions, and impacts the scope of relevant prior art for USAA’s invalidity case.

Attachment of the mobile device is not a mere feature, but a critical aspect of the Asserted Patents. The specification describes the perils of using generic mobile devices, such as the fact that they are “are not designed to withstand events such as catastrophic crashes” and that they “are usually not necessarily configured to appropriately detect conditions that may need to be recorded.” ’271 Patent at 2:53-56. Additionally, loose devices are often “not best placed to generate sensor data associated with the behaviour of a vehicle.” *Id.* at 2:58-59. To overcome these problems, the specification teaches attaching or affixing the device, noting distinct advantages:

the acceleration of the vehicle can be more accurately measured due to the mobile device being firmly attached to the vehicle. Similarly, if the sensor set comprises an image sensor, for example, for capturing video footage of the road ahead, better footage can be obtained as the mobile device can be held in the correct position and orientation relative to the vehicle.

*Id.* at 3:2-8. Despite the claim language that a device must be attached to the vehicle, and the corresponding advantages detailed in the specification, Auto Telematics’s infringement

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<sup>5</sup> Some claims refer to the mobile device being “removably affixed” (as opposed to “removably attached”) and the vehicle “being driven by the driver” (as opposed to “in use”). Neither party asserts that these differences impact the parties’ dispute.

contentions do not identify any requirement for specific attachment, and instead identifies

numerous *possibilities* for “removably attached/affixed.” Auto Telematics states:

the SafePilot App works at least when the mobile telecommunications device is removably affixed to the vehicle via a USB cable, via a Bluetooth connection, or attached to the vehicle via another physical or electronic connection (e.g., a phone holder or mount within the vehicle).

Ex. 1 ('271 claim chart) at 47. But Auto Telematics neither identifies any one of the possibilities as *necessarily* performed, nor identifies any one of the possibilities as *necessary* in order for the driving period to start. *See id.* Auto Telematics’s infringement contentions flout the claim language and suggest that the mere capability for attachment is sufficient, *i.e.*, the accused system would continue to function if attached, rather than a *requirement* of actual attachment as claimed.

Auto Telematics’s position conflicts with binding precedent. As the Federal Circuit has stated on numerous occasions, claim construction must begin and remain centered on the claim language. *See, e.g., Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298 (Fed. Cir. 2003); *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004). Additionally, words and phrases in a claim are generally given their ordinary and customary meanings. *Philips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (*en banc*). There are two exceptions to this rule. The first is if the patent's specification reveals that the patentee has used a term in a way that differs from its plain meaning. *Brookhill-Wilk*, 334 F.3d at 1298. The second is that if the patentee clearly disavowed any claim scope, the claim must be so limited. *See Thorner v. Sony Comput. Entm't Am. LLC*, 669 F.3d 1362, 1367 (Fed. Cir. 2012). Neither exception applies here. Thus, the Court should bind the patentee to the words of its own claims and construe this term to require that the device “is” attached, and not “could be” attached, as suggested by Auto Telematics.

#### IV. CLAIM TERMS THAT ARE INDEFINITE

##### A. “driving information”

| Term / Patent(s)  | USAA’s Proposed Construction | Auto Telematics’s Proposed Construction |
|-------------------|------------------------------|-----------------------------------------|
| • ’271 Claims 6,7 | <i>indefinite</i>            | No construction required.               |

There are multiple instances of “driving information” in each of Claims 6 and 7 of the ’271 Patent. For example, Claims 6 and 7 of the ’271 Patent recites first, “the driving information derived based on . . . sensor data from a sensor set,” second, “wherein the driving information comprises at least one of a driving score and sensor data,” and third, the driving information is “process[ed]” by the “data logging system” to “generate a driving score.” *See e.g.* ’271 Patent at 32:55–56, 32:61–62, 32:67–33:2. A POSITA cannot reasonably ascertain the scope of “driving information” based on these three conflicting meanings.

##### 1. “Driving information” is hopelessly ambiguous because it has at least three conflicting potential meanings

The relevant portion of Claims 6 and 7 recites (emphasis added):

a communications interface arranged to communicate with the **remote mobile telecommunications device**, and receive **therefrom**: [...] driving information to be logged to that corresponding account; the **driving information** derived based on inputs received by a user interface of the remote mobile telecommunications device and **sensor data** from a sensor set of the remote mobile telecommunications device [...]

wherein the **driving information comprises at least one of a driving score and sensor data** captured and processed by the remote mobile telecommunications device during a driving period . . . the data logging system being further arranged to **process the driving information** logged to a corresponding account **to generate a driving score** used to determine a risk profile for at least one of the vehicle and driver.

In these claims, “driving information” appears at least three times. In the first instance, the driving information is “derived based on inputs [...] and sensor data,” in the second instance, the driving information “comprises at least one of a driving score and sensor data captured and processed by the remote mobile telecommunications device,” and in the last instance, the driving information is “process[ed]” by the “data logging system” to “generate a driving score.” *See e.g.* ’271 Patent at 32:55–56, 32:61–62, 32:67–33:2.

In the first two instances, the relationship between the “driving information” and the “sensor data” are different. A POSITA would understand that being “derived from” is different from merely “comprising.” Ex. 6 (Andrews Decl.) at ¶ 39.

The second instance recites that the driving information “comprises at least one of a driving score and sensor data captured and processed by the remote mobile telecommunications device.” ’271 Patent at 32:61–62. Here, the “driving score” appears to be a part of the “driving information,” but its origin is unknown. It appears that the “sensor data” is “captured and processed by the remote mobile telecommunications device,” but not the “a driving score,” because a “driving score” is not a metric that can be “captured”—it must be calculated or generated in some manner. Ex. 6 (Andrews Decl.) at ¶ 62.

In the third instance, the driving information plays an entirely different role and is used by the data logging system to generate “a driving score,” which it “comprises” according to the first instance. As explained below in § IV.B.1, that is an impossibility: either the driving information came *after* the driving score, thus it “comprises . . . a driving score” in the second instance, or that the driving information came *before* the driving score, thus it could be “processed” to “generate a driving score” as recited in the third instance. It cannot be both. Ex. 6

(Andrews Decl.) at ¶ 42. Therefore, what constitutes “driving information” is hopelessly inconsistent and not reasonably certain to a POSITA. Ex. 6 (Andrews Decl.) at ¶ 43.

**a) The specification establishes that “driving information” is derived from “sensor data,” and “sensor data” is not a subset of driving information. Thus, “driving information” cannot comprise “sensor data.”**

When the specification talks about how driving information is created, it says that driving information is derived or processed from sensor data. For example:

For example, the sensor data can be processed at a first sampling rate and then down-sampled to a fraction of the first sampling rate for storage as driving information.

’271 Patent at 4:55–58.

For example, the mobile device may be configured such that when a driving incident is detected, such as a collision involving an automobile **3**, driving information (including image data captured by the mobile device) derived from the sensor data is automatically forwarded to the insurance server **5** [...]

’271 Patent at 13:49–54.

Forwarded data may also comprise sensor data, and any relevant derived driving information.

’271 Patent at 13:65–66.

As mentioned previously, sensor data captured from any one of the aforementioned data capture modules **21, 23, 25, 27** is processed by the processor module **33**, to generate driving information. By driving information is intended any data which may be derived from raw sensor data captured by any one of the aforementioned modules **21, 23, 25, 27**. For example, g-force data is driving information which is derived from the sensor data sampled by the accelerometer **23**. The skilled reader will be familiar with the plurality of types of driving information that may be derived from sensor data sampled by the aforementioned modules, and accordingly a complete list of the different types of driving information that may be derived from sampled sensor data is omitted for brevity.

’271 Patent at 16:20–33.

The data file informs the insurance provider that a driving incident has occurred and provides the insurance provider with the sensor data and derived driving information.

'271 Patent at 19:40–43.

The analysis may comprise comparing measured sensor data and/or derived driving information with a data model.

'271 Patent at 20:22–23.

Further, the specification describes “sensor data” and “driving information” as two separate elements: “sensor data” is *not* a subset of “driving information.” For example:

The term ‘marked variation’ is to be understood to relate to a significant change in sensor data and/or driving information occurring over a very short time period. In other words, a detected impulse in recorded sensor data and/or driving information, indicative of a significant change in the state of motion of the vehicle occurring over a short time period.

'271 Patent at 18:65–19:4.

Once a driving incident, such as a collision, has been detected, and the data file comprising the associated sensor data and driving information has been securely stored in protected storage **34 b**.

'271 Patent at 19:36–39.

The analysis may comprise comparing measured sensor data and/or derived driving information with a data model.

'271 Patent at 20:22–23.

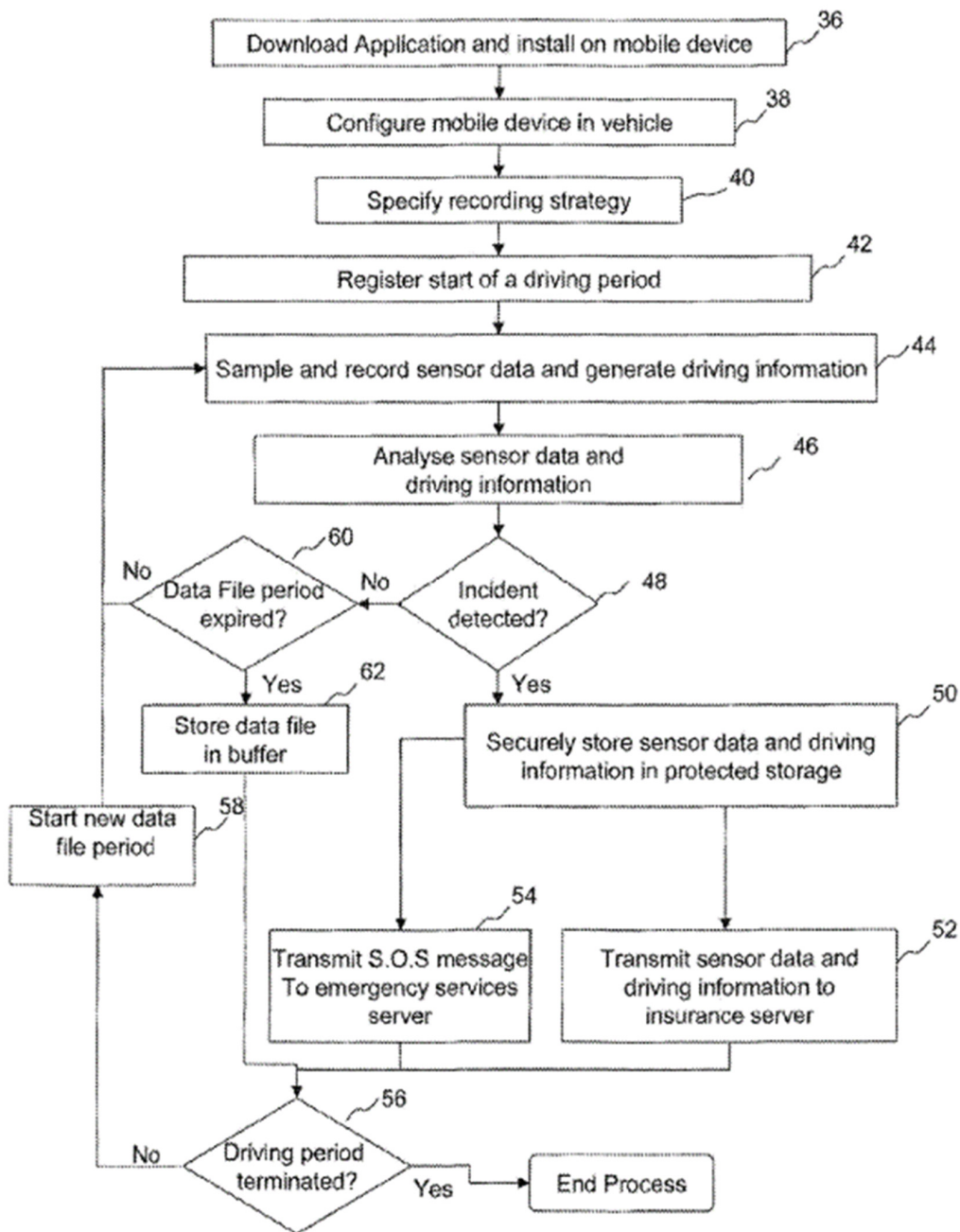


Fig. 4a

'271 Patent at Fig. 4a (Step 46 recites "analyse sensor data and driving information")

The intrinsic record explains that sensor data and driving information are separate elements, where the latter is derived from the former. It is thus insolubly ambiguous to a POSITA how the “driving information” is both “derived from sensor data” and “comprises sensor data” as recited in Claims 6 and 7 of the ’271 Patent. Ex. 6 (Andrews Decl.) at ¶ 46.

**b) “Sensor data” cannot both be “captured and processed” to become driving information, and at the same time, “comprised” in the “driving information.”**

The relevant portion of Claims 6 and 7 recite (emphasis added):

a communications interface arranged to communicate with the **remote mobile telecommunications device**, and receive **therefrom**: [...] driving information to be logged to that corresponding account; the **driving information derived** based on inputs received by a user interface of the remote mobile telecommunications device **and sensor data from a sensor set of the remote mobile telecommunications device** [...]

wherein the **driving information comprises** at least one of a driving score and **sensor data captured and processed by the remote mobile telecommunications device** during a driving period [...]

In the first two instances of “driving information,” the relationship between the “driving information” and the “sensor data” are different. A POSITA would understand that being “derived from” is different from merely “comprising.” Ex. 6 (Andrews Decl.) at ¶ 39. But what if there are two sets of “sensor data,” and a first set is “captured and processed” to become “driving information,” while a second set is “comprise[d]” in “driving information”? While the specifications hints to this possibility, that is a particular implementation not claimed here. Ex. 6 (Andrews Decl.) at ¶¶ 47, 48.

The only part of the specification that *might* disclose driving information that “comprises” “sensor data” recites as follows:

In particular, the executed application may control the mobile device to store a summary of the driving period. The summary may comprise compressed and/or summarised driving information. For example, the sensor data can be processed at a first sampling rate and then down-sampled to a fraction of the first sampling rate for storage as driving information. '271 Patent at 4:52–58.

Here, the specification points to two different sets of sensor data, with each one sampled at different sampling rates. Yet there is no such distinction in the claim language. In other words, in Claims 6 and 7, there is no “first” or “higher sampling rate” sensor data that was used to derive “driving information,” and “second” or “lower sampling rate” sensor data for storage. Ex. 6 (Andrews Decl.) at ¶ 48. The claim language makes no attempt to distinguish two separate sets of sensor data for different purposes. *Id.* “[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.” *Techler v. Norstrud*, 475 F.2d 1192, 1195 (C.C.P.A. 1973). Here, there is no “clearly identifiable” difference between the two arguably different sets of “sensor data” in the claim language, thus rendering the claim indefinite under 35 U.S.C. § 112.

For the foregoing reasons, “driving information” is hopelessly ambiguous for having three potentially conflicting potential meanings, and a POSITA would not know the scope of the purported invention with reasonable certainty. Claims 6 and 7 of the '271 Patent are thus indefinite and invalid.

**B. “driving score”**

| Term / Patent(s)                                                                                                                                                                                       | USAA’s Proposed Construction | Auto Telematics’s Proposed Construction |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|-----------------------------------------|
| <ul style="list-style-type: none"> <li>• ’271 Patent – Claims 6, 7</li> <li>• ’487 Patent – Claim 9</li> <li>• ’369 Patent – Claim 18</li> <li>• ’879 Patent – Claims 1, 21, 46, 51, 54, 55</li> </ul> | Indefinite.                  | No construction required.               |

“Driving score” was not an established term of art with an established definition at the time of the alleged invention, and the circular, nonsensical explanation of “driving score” in the specification would leave a POSITA unable to ascertain its meaning with reasonable certainty. Ex. 6 (Andrews Decl.) at ¶ 53. Every claim reciting “driving score” is indefinite as a result. Additionally, in the Claim 7 of ’271 Patent, “the driving score” is insolubly ambiguous because it lacks a proper antecedent basis.

**1. The specification provides a circular, nonsensical explanation of a “driving score,” making every claim using the term indefinite.**

“Driving score” is not an established term of art, so a POSITA would have to look to the specification to understand it. Ex. 6 (Andrews Decl.) at ¶ 53. And when she does, all she will find is confusion. *Id.* This renders Claims 6 and 7 of the ’271 Patent, Claim 9 of the ’487 Patent, Claim 18 of the ’369 Patent, and Claims 1, 21, 46, 51, 54, 55 of the ’879 Patent invalid as indefinite.

The specification states that “driving information” is processed to create a “driving score.” So far, so good. But then the specification throws a curveball, explaining that the “driving information *may comprise* the driving score.” ’271 Patent at 10:16–17. As a matter of logic, it makes no sense for “driving information” to *comprise* the result of the processing. By analogy, one could say that one’s LSAT test answers (“driving information”) are processed to

create their LSAT score (“driving score”). But it makes no sense to say that one’s LSAT test answers *comprise* their LSAT score. Yet, that’s exactly what the specification does:

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).

Preferably, **the driving information comprises a driving score.** Preferably, **the driving information comprises sensor data captured and processed by the mobile device** during a driving period during which the mobile device is installed to a vehicle being driven by a driver. ’271 Patent at 11: 66–12:3 (emphasis added).

The specification further describes a logging system that processes the driving information and generates a “driving score”:

According to a sixth aspect of the present disclosure there is provided a data-logging system for **logging driving information** comprising: a database for **storing a plurality of accounts** 11:52-55 (*emphasis added*)

Preferably, the system is arranged to **process the driving information logged to the corresponding account to generate a driving score.** ’271 Patent at 12:4–6 (emphasis added).

A POSITA would notice that the information used to generate the “a driving score” is the driving information that was logged and stored as part of the “account” in the logging system database, thus this instance of the “a driving score” was not generated by the application on the mobile device, but was instead generated by the remote logging system. Ex. 6 (Andrews Decl.) at ¶ 58. These two disclosures in the specification are therefore in conflict with each other, and they cannot both be true. *Id.*

This circle of confusion is made even worse in Claims 6 and 7 of the ‘271 Patent. For example, those claims recite:

...the driving information comprises at least one of a driving score and sensor data captured and processed by the remote mobile telecommunications device

'271 Patent at Claim 6 (*see also* Claim 7)

***...the data logging system*** being further arranged to ***process the driving information logged to a corresponding account to generate a driving score...***

'271 Patent at Claim 6 (*see also* Claim 7) (*emphasis added*)

Here, Claims 6 and 7 first recite a device-generated “driving information” which “comprises . . . a driving score,” then the data logging system “process[es]” the “driving information” to “generate a driving score.” This language raises the question that, if the driving information generated by the mobile device already includes a driving score, then how and why does the logging system also generate a driving score? Ex. 6 (Andrews Decl.) at ¶ 61. Neither can a POSITA tell if this second instance of “a driving score,” generated by the data logging system, is the same or different from the first instance of “driving score,” generated by the mobile device. *Id.*

On the other hand, if Auto Telematics contends that there are two separate “driving scores”—one is a part of the driving information, the other is generated by the “data logging system” after processing the driving information,” there is no support in the specification for that. The specification does not describe an embodiment having two separate driving scores. Ex. 6 (Andrews Decl.) at ¶ 63; *see also* '271 Patent at 11:63–65 (“The remote mobile device may be a mobile device in accordance with one of the first to fourth aspects of the present disclosure.”). Further, based on the claim language, the “driving information” comprises “at least one of a driving score and sensor data,” while the same “driving information” is used to generate a “second” “driving score.” This means the first “driving score” is partially used for the

generation of the second “driving score,” but the specification does not explain how this can be done. Ex. 6 (Andrews Decl.) at ¶ 64.

In fact, even Auto Telematics seems perplexed by “driving score” limitations in Claims 6 and 7 of the ‘271 Patent. In its infringement contentions, it first asserts that “[a]s one alternative, the driving information that the data-logging system is configured to receive from the remote mobile telecommunications device comprises a driving score,” accompanied by a screenshot from USAA’s mobile application, then that “[a]s a non-exclusive alternative, the driving information that the data-logging system [*i.e.*, server] is configured to receive from the remote mobile telecommunications device comprises sensor data captured and processed by the remote mobile telecommunications device that is used to calculate a driving score after being received by the datalogging system.” Ex. 1 (’271 claim chart) at 158–59, 212–13. The claim language, however, does not provide for two driving scores, or that the two driving scores are “alternatives” to each other. The scope of “driving score” is not only unclear to a POSITA—it appears to be unclear to Auto Telematics as well.

Because of the nonsensical explanation of the term in the specification and the failure of the intrinsic record to resolve that ambiguity, a POSITA would not be able to decipher the meaning of a “driving score.” Ex. 6 (Andrews Decl.) at ¶ 65. Claims 6 and 7 of the ’271 Patent, Claim 9 of the ’487 Patent, Claim 18 of the ’369 Patent, and Claims 1, 21, 46, 51, 54, 55 of the ’879 Patent are therefore invalid for being indefinite.

**2. Claim 7 of the ‘271 Patent is invalid for the additional, independent basis that the “the driving score” has an insolubly ambiguous antecedent basis**

In addition to the two instances of “a driving score,” Claim 7 of the ’271 Patent further recites “wherein *the* driving score is used to define an insurance premium associated with the account [...]” ’271 Patent at 34:15–16. In specific:

wherein the driving information comprises at least one of a driving score and sensor data captured and processed by the remote mobile telecommunications device during a driving period during which the remote mobile telecommunications device is removably attached to the vehicle being driven by the driver, the data logging system being further arranged to process the driving information logged to a corresponding account to generate a driving score used to determine a risk profile for at least one of the vehicle and driver; and,

wherein the driving score is used to define an insurance premium associated with the account and the data logging system is further arranged to communicate to the remote mobile telecommunication device an insurance offer generated in response to the driving information received from the remote mobile telecommunications device.

The claim recites “a driving score” twice: one, highlighted in yellow, received from the mobile device, and one, highlighted in green, generated on the “data logging system.” Finally, there is a recitation of “*the* driving score” highlighted in blue. A POSITA would not be able to ascertain which “driving score”—the yellow one or the blue one—is being used to “define an insurance premium” with reasonable certainty. Ex. 6 (Andrews Decl.) at ¶ 68.

Under 35 U.S.C. § 112, ¶ 2, the claims of a patent must “**particularly point[ ] out and distinctly claim[ ]** the subject matter which the applicant regards as his invention.” (emphasis added). “[A] patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). A failure to provide antecedent basis for a claim term renders it indefinite when a POSITA is left with multiple, plausible ways to interpret a claim. *E.g., Bushnell Hawthorne, LLC v. Cisco Systems, Inc.*, 813 Fed. Appx. 522, 526-27 (Fed. Cir. 2020) (holding that the phrase “said different IP Address” rendered the claims indefinite as indefinite because “[w]ith three different IP addresses to choose from, a POSA faced with the ‘said different IP Address’ limitation is left to wonder which of the different IP addresses is ‘said’ different one.”).

That is the case here. “[T]he driving score” has no proper antecedent basis in Claim 7, because *either* instance of “a driving score” could serve as the antecedent basis. Ex. 6 (Andrews Decl.) at ¶ 69. The specification does not provide any explanation or instructions on which one of “a driving score” is the one being used to “define an insurance premium” in the context of Claim 7. Ex. 6 (Andrews Decl.) at ¶ 68. A POSITA, and the public, would be left to guess the bounds of this claim in light of the ambiguous “the driving score.” *Id.* Thus, a POSITA would not know the scope of the purported invention recited in Claim 7 with reasonable certainty. *Id.* This claim is indefinite. *See Bushnell*, 813 Fed. Appx. at 526.

## **V. CONCLUSION**

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

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Respectfully Submitted,

**FISH & RICHARDSON P.C.**

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**CERTIFICATE OF CONFERENCE**

The undersigned hereby certifies that the counsel for USAA (Ms. Elizabeth G.H. Ranks, Ms. Nan Lan, and Ms. Caitlin Dean) and counsel for Plaintiff (Mr. Andrew Wright) met-and-conferred via telephone regarding the disputed claim terms. During the conference, the parties discussed and acknowledged their disagreement concerning the “plain and ordinary meaning” of the identified two briefed terms, as well as a global disagreement as to the indefiniteness issues.

/s/ Michael T. Zoppo  
Michael T. Zoppo

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was filed electronically on December 19, 2022, and was served via CM/ECF on all counsel who are deemed to have consented to electronic service.

/s/ Michael T. Zoppo  
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