

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF TEXAS
 MARSHALL DIVISION

EMERGING AUTOMOTIVE LLC,) (
 PLAINTIFF,) (CIVIL ACTION NO.
) (2:23-437-JRG
 VS.) (MARSHALL, TEXAS
) (
 KIA CORPORATION, ET AL.,) (FEBRUARY 14, 2025
 DEFENDANTS.) (1:30 P.M.

CLAIM CONSTRUCTION HEARING

BEFORE THE HONORABLE ROY S. PAYNE

UNITED STATES MAGISTRATE JUDGE

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24 (Proceedings recorded by mechanical stenography, transcript
25 produced on a CAT system.)

01:30:47 1 COURT SECURITY OFFICER: All rise.

01:30:48 2 THE COURT: Good afternoon. Please be seated.

01:30:49 3 For the record, we're here for the claim

01:31:04 4 construction hearing in Emerging Automotive versus Kia

01:31:13 5 Corporation, et al., which is under our Lead Case No.

01:31:17 6 2:23-437.

01:31:20 7 Would counsel state their appearances for the

01:31:21 8 record?

01:31:22 9 MS. FAIR: Good afternoon, Your Honor. Andrea

01:31:23 10 Fair on behalf of Emerging Automotive. I'm joined today by

01:31:26 11 Mr. Marc Belloli and Mr. Jerry Tice. And we're ready to

01:31:29 12 proceed.

01:31:29 13 THE COURT: All right. Thank you, Ms. Fair.

01:31:31 14 MR. SMITH: And, Your Honor, for Defendant,

01:31:35 15 Toyota, Michael Smith. And I have with me Mr. James

01:31:39 16 Barney, Mr. Aidan Skoyles, and Mr. Ryan Davies. And we're

01:31:42 17 ready to proceed.

01:31:42 18 THE COURT: All right. Thank you, Mr. Smith.

01:31:44 19 MR. WATKINS: Good afternoon, Your Honor. For

01:31:46 20 Defendant Kia, Brett Watkins from Quinn Emanuel. Joining

01:31:49 21 me is also Joe Paunovich from Quinn Emanuel.

01:31:52 22 THE COURT: All right.

01:31:53 23 MR. WATKINS: And we're ready to proceed.

01:31:54 24 THE COURT: Thank you, Mr. Watkins. I appreciate

01:31:55 25 that.

01:31:56 1 I will also note for the record that this
01:32:02 2 afternoon, we distributed to counsel for both sides a set
01:32:05 3 of preliminary constructions of the disputed terms.

01:32:11 4 I'll emphasize for the record that the intent of
01:32:15 5 issuing those preliminary constructions is not to cause
01:32:20 6 either side from abandoning the positions that they think
01:32:24 7 are appropriate. Rather, the intent is to let counsel know
01:32:29 8 where the Court is after the initial review of the record
01:32:35 9 and the briefing so that you can focus your arguments where
01:32:39 10 you think the Court may have most gone astray.

01:32:43 11 I do reserve the right to alter these preliminary
01:32:48 12 constructions and not uncommonly do change them based on
01:32:52 13 the arguments received at this hearing. So I hope that
01:32:56 14 they'll be taken in that spirit.

01:32:58 15 I would like to hear the arguments on a
01:33:02 16 term-by-term basis, but I'm happy to take them in whatever
01:33:05 17 order or even to group them if counsel think that's more
01:33:13 18 efficient.

01:33:13 19 And having said that, I'll turn it over first to
01:33:20 20 counsel for Plaintiff.

01:33:21 21 MR. BELLOLI: Your Honor, we actually have an
01:33:22 22 agreement on which terms, and I'll let --

01:33:25 23 THE COURT: All right. I was just saying if you
01:33:27 24 can speak at the podium, we'll get you on the record
01:33:29 25 better, but that's fine, Mr. Belloli. Thank you.

01:33:34 1 Mr. Watkins, if you want to note the agreements.

01:33:37 2 MR. WATKINS: Thank you, Your Honor.

01:33:37 3 With what you just said in mind, the parties have
01:33:41 4 spoken before the hearing, and -- and we have made an
01:33:45 5 agreement to focus certain terms and to rest on the briefs
01:33:49 6 for other terms. I'll go ahead and let you know which
01:33:52 7 terms we've agreed to rest on the briefs for so we can
01:33:54 8 proceed on the other terms.

01:33:56 9 THE COURT: All right.

01:33:56 10 MR. WATKINS: That would include, in Your Honor's
01:33:59 11 preliminary constructions, Term B, Term D, Term E, Term F,
01:34:10 12 Term I, Term J, Term K, and Term -- Term M -- M as in Mary.

01:34:28 13 THE COURT: All right. Thank you, Mr. Watkins.

01:34:38 14 MR. BELLOLI: Your Honor, and we've otherwise
01:34:40 15 agreed to go in order and with the Defendants going first
01:34:47 16 for each of the six terms we're arguing.

01:34:47 17 THE COURT: All right. That's very good.

01:34:50 18 In that case, Mr. Watkins, you may proceed.

01:34:53 19 MR. WATKINS: Thank you, Your Honor.

01:34:54 20 We have a slide presentation that I think my
01:34:54 21 colleague at -- there it is -- will pull up.

01:34:56 22 So the first term in Your Honor's preliminary
01:34:58 23 constructions -- the first term addressed in the parties'
01:35:02 24 briefs is electronic key, and it's also called eKey or
01:35:07 25 e-key in the asserted patents.

01:35:09 1 So for this term, from Defendants' perspective,
01:35:16 2 there are a couple of primary disputes, the first of which
01:35:21 3 is what the electronic key allows a user to do. And from
01:35:24 4 our perspective, that requires that the electronic key
01:35:27 5 allow a user to operate a vehicle or use a vehicle.

01:35:31 6 And we've included "subject to defined privileges
01:35:35 7 or conditions" because that's an aspect of these patents
01:35:37 8 that use of an electronic key can be limited based on these
01:35:41 9 separately defined privileges or conditions.

01:35:44 10 I've got a few slides that shows how electronic
01:35:50 11 key shows up in the patents.

01:35:51 12 If we could go to the next one.

01:35:53 13 Electronic key shows up multiple times in each of
01:35:56 14 the asserted claims. In '026, Claim 1, shown here, we see
01:36:02 15 that it is used in the preamble and is referenced in the
01:36:06 16 context of use the vehicle via one or more electronic keys.
01:36:13 17 And the claim subsequently refers to use of the vehicle via
01:36:19 18 the electronic key.

01:36:20 19 And then it says at the end in the last
01:36:23 20 highlighted portion here that use of the vehicle via the
01:36:26 21 electronic key must be consistent with the privileges of
01:36:30 22 the unique access code.

01:36:31 23 Similar concepts show up in the claims of the
01:36:35 24 other patent. '659 patent, Claim 1, for example, has the
01:36:39 25 term "electronic key," and this claim uses eKey for -- as a

01:36:44 1 shorthand. Again, it references an electronic key that
01:36:49 2 enables use of the vehicle, and it must be consistent with
01:36:51 3 separately defined privilege settings.

01:36:54 4 Turning to '188 patent, Claim 1, again, references
01:36:59 5 electronic key and uses e-key as the shorthand in this
01:37:03 6 instance. And it references an electronic key that also
01:37:07 7 enables use of a vehicle, and this time consistent with
01:37:10 8 separately defined conditions of use.

01:37:12 9 So one of the aspects of the claim that we sought
01:37:18 10 to construe was what an electronic key is, and we've
01:37:22 11 proposed electronic data. I see that that's reflected in
01:37:26 12 Your Honor's preliminary claim construction.

01:37:28 13 From our perspective, that's correct. It's
01:37:30 14 because e-keys are described as data that can be
01:37:36 15 transmitted between devices, stored on devices, encrypted,
01:37:38 16 for example. And for that reason, it wouldn't -- an
01:37:41 17 electronic key would not be a -- simply a key that is
01:37:44 18 electronic, as Plaintiffs have described it in their brief.

01:37:47 19 Second, on the next slide, one of the points that
01:37:51 20 we sought to establish in our brief and -- and is reflected
01:37:55 21 in our claim construction is that electronic keys described
01:38:00 22 in the patent are essentially an electronic form of a
01:38:05 23 normal car key.

01:38:06 24 So a normal car key allows a user to do things
01:38:10 25 like drive the vehicle, lock the vehicle, unlock the

01:38:13 1 vehicle, et cetera. And, you know, we see in the
01:38:16 2 description shown here in Figure 33 that the device of Bob,
01:38:23 3 his device, has an e-key that allows him to, as described
01:38:28 4 in the specification, activate, open, lock, turn on, unlock
01:38:32 5 the vehicle.

01:38:33 6 So these are functions that an e-key allows a user
01:38:37 7 to do with their vehicle, and that's potentially limited by
01:38:43 8 separately defined privileges. But in its most basic form
01:38:47 9 when not limited by privileges, an e-key is -- it allows
01:38:50 10 you to do the things that a normal car key would do.

01:38:53 11 Turning to the next slide, we've got the
01:38:59 12 description of e-keys as being something that can be shared
01:39:02 13 with associated privileges set by the owner.

01:39:05 14 So, for example, here, it shows the owner, John,
01:39:11 15 having shared an e-key with his friend, Bob, and Bob can
01:39:16 16 use the vehicle subject to privileges that are set by the
01:39:20 17 owner, John.

01:39:21 18 So what the -- the issue here is that the question
01:39:27 19 is what is an e-key or an electronic key? And from our
01:39:33 20 perspective, it really is just the electronic form of a
01:39:37 21 vehicle key. What people -- anyone who's driven a vehicle
01:39:41 22 would probably understand it. A vehicle key allows you to
01:39:45 23 do a variety of things, including drive a vehicle. That's
01:39:48 24 what an electronic key allows a user to do.

01:39:50 25 The claims separately refer to privilege settings.

01:39:54 1 Those uses that an electronic key allows can be limited
01:39:58 2 depending on privileges. But that doesn't change the fact
01:40:01 3 that the electronic key, absent those privileges or
01:40:06 4 separate from the privileges, has the capability that a
01:40:08 5 normal car key would have.

01:40:10 6 And, Your Honor, with -- subject to any questions
01:40:21 7 from Your Honor, I'll turn the podium over to opposing
01:40:25 8 counsel.

01:40:25 9 THE COURT: Well, tell me. I do understand that
01:40:28 10 there's an analogy to a physical key, but you're relying
01:40:35 11 very heavily on that to conclude that the electronic key
01:40:39 12 has to have the ability to do whatever a physical key would
01:40:46 13 do.

01:40:46 14 What in the disclosure do you think justifies that
01:40:54 15 requirement?

01:40:55 16 MR. WATKINS: Well, Your Honor, it's a couple of
01:40:58 17 things. First, the electronic key is described in the
01:41:02 18 specification as shown, for example, on -- I think it's the
01:41:07 19 previous slide. Yes.

01:41:09 20 So, for example, here's one that I showed
01:41:13 21 previously. It's in relation to Figure 33. It describes
01:41:15 22 the functionality that allows -- or that the electronic key
01:41:19 23 allows the person holding the key to do. Of course, there
01:41:23 24 can be restrictions on that. There can be limitations.
01:41:26 25 Those are described in the context of the patent as

01:41:29 1 privileges or conditions of use.

01:41:31 2 But separate from those privileges, an electronic
01:41:34 3 key is described in the patent as providing access to the
01:41:38 4 vehicle so that the user can use the vehicle. How would a
01:41:41 5 person use a vehicle? If I hand my key to my wife or if I
01:41:45 6 just tell her, you can use my vehicle, it's so that she can
01:41:50 7 drive the vehicle. She can access the vehicle, drive it,
01:41:53 8 do whatever she needs to do with it. That's how people use
01:41:57 9 vehicles, and that's how the patent describes electronic
01:42:00 10 keys. There are separately defined privileges and that can
01:42:03 11 limit those uses, but that's a separate issue.

01:42:06 12 THE COURT: You can use a vehicle without driving
01:42:09 13 it.

01:42:09 14 MR. WATKINS: Of course you can.

01:42:10 15 THE COURT: So why would the ability to drive it
01:42:14 16 be a necessary function of the e-key?

01:42:20 17 MR. WATKINS: It's because the reading, the
01:42:23 18 interpretation, the understanding of e-key in this context,
01:42:28 19 in the context of vehicles, a key allows you to do things
01:42:33 20 that you would normally do with a vehicle. That includes a
01:42:35 21 whole host of things. Includes driving the vehicle,
01:42:39 22 includes starting the vehicle, unlocking the vehicle.
01:42:42 23 Those are uses of a vehicle.

01:42:44 24 The patent describes that that can be limited, but
01:42:50 25 that's a separate issue. That's the privileges and

01:42:52 1 conditions of use. The only limitations described in the
01:42:54 2 patent on how a vehicle can be used relate to those
01:42:58 3 privileges and conditions. That would be -- to interpret
01:43:03 4 e-key as being something less than full use of the vehicle
01:43:06 5 would interpret -- would be taking something -- an aspect
01:43:10 6 of the privileges or conditions of use and adding it to the
01:43:13 7 definition of e-key.

01:43:15 8 THE COURT: What is your reading of Column 4,
01:43:20 9 starting at Line 9, where it talks about at least one of
01:43:25 10 the functions of the vehicle, opening, starting, using user
01:43:33 11 interfaces, and the like.

01:43:34 12 MR. WATKINS: Right, Your Honor. And I saw that
01:43:36 13 that's something that was referenced in Plaintiff's brief.

01:43:39 14 So if you read that in the context of the
01:43:45 15 surrounding specification, the portion at Column 4,
01:43:52 16 starting on Line 9, is a continuation of a discussion that
01:43:56 17 starts in the previous columns -- column at Line 3,
01:44:03 18 starting at Line 20 -- or, I'm sorry, Column 3, starting at
01:44:06 19 Line 20, where it describes an e-key that can be shared
01:44:09 20 with another person, and it is generated upon request that
01:44:17 21 includes a condition of use of the vehicle.

01:44:18 22 And then the -- it goes on to describe how those
01:44:24 23 conditions for use of the vehicle can be violated and
01:44:27 24 monitored and things like that.

01:44:28 25 So that discussion in Column 4 is a continuation

01:44:32 1 of this discussion in Column 3 that separately says -- or
01:44:36 2 that in that same embodiment says there's an e-key and
01:44:39 3 there are condition of use.

01:44:40 4 The discussion in Column 4 about what those
01:44:43 5 capabilities are is based on what capabilities may or may
01:44:48 6 not be allowed by the condition of use.

01:44:58 7 THE COURT: And is there any particular language
01:45:03 8 in the '026 that you can point to that confirms your
01:45:11 9 approach that at a base level, the e-key has to have all of
01:45:18 10 the capabilities of a physical key -- of what is expected
01:45:24 11 of a physical key?

01:45:26 12 MR. WATKINS: Well, I think -- you know, Your
01:45:36 13 Honor, the context of the specification, starting in the
01:45:39 14 background, if you look at the bottom of Column 1, it
01:45:43 15 describes how vehicles provide a means to enable humans to
01:45:50 16 drive from place to place, vehicles become an indispensable
01:45:56 17 mode of transportation, provide the freedom to travel, they
01:46:00 18 can be publicly operated. It's describing what people
01:46:05 19 normally expect of their vehicle. It's describing ways
01:46:09 20 that people use their vehicle. And then e-keys enable that
01:46:13 21 use.

01:46:14 22 The claims reference electronic keys or e-keys for
01:46:21 23 use of the vehicle. These are uses that are described in
01:46:24 24 the patent. And a person of ordinary skill in the art
01:46:25 25 would understand the context -- the term "e-key" in that

01:46:28 1 context.

01:46:29 2 THE COURT: What is the importance -- and I'm
01:46:35 3 asking you this so that you can tell me this because I
01:46:41 4 don't know what the implications of this are. But what is
01:46:46 5 the importance of saying that the e-key has the capability
01:46:50 6 for everything and that any restrictions are just
01:46:55 7 privileges and conditions?

01:46:56 8 MR. WATKINS: Well, I think it's -- it's the way
01:47:01 9 that the term should be interpreted in the context of the
01:47:05 10 specification. I think the importance of that is just that
01:47:11 11 a person of ordinary skill in the art is deemed to have
01:47:13 12 read the specification and understood its disclosures and
01:47:15 13 to interpret it according to the plain and ordinary meaning
01:47:18 14 and things like that.

01:47:19 15 And doing so -- reading the term "e-key," a person
01:47:23 16 of ordinary skill in the art would understand that it
01:47:25 17 provides those types of functionalities, the normal types
01:47:29 18 of functionalities that a person would expect of a vehicle
01:47:33 19 key.

01:47:33 20 It also describes separately privileges. That's
01:47:36 21 something that is described in the context of if you want
01:47:39 22 to share your vehicle with another person, you can share
01:47:43 23 your vehicle with them by sending them the e-key, maybe
01:47:47 24 imposing certain restrictions on that use. But the e-key
01:47:50 25 that you own, you have -- you're the owner. You have full

01:47:53 1 access. That e-key provides the ability for you to drive
01:47:56 2 the vehicle, to do things like that. That's -- that's the
01:47:59 3 fundamental, you know, baseline capability of the e-key.
01:48:07 4 The owner of the vehicle would not expect there to be an
01:48:09 5 e-key that does not provide them with the capabilities that
01:48:11 6 they would have with their key fob, for example.

01:48:16 7 THE COURT: All right. Thank you, Mr. Watkins.

01:48:22 8 MR. WATKINS: Thank you, Your Honor.

01:48:23 9 MR. BELLOLI: Your Honor, any questions for
01:48:39 10 Plaintiff?

01:48:43 11 THE COURT: I guess I would like to hear your
01:48:46 12 response to the Defendants' argument.

01:48:49 13 MR. BELLOLI: Okay. The -- I always mess up here.
01:49:03 14 So we are talking about, Your Honor, the
01:49:06 15 standalone term "electronic key." It's not standalone --
01:49:09 16 it's not the term plus other parts of the claim.

01:49:13 17 What I'd like to emphasize is the two parts of the
01:49:17 18 Defendants' construction that they want to import are this
01:49:22 19 concept of operation and then this concept of privileges.
01:49:26 20 But both of those things -- or one of them doesn't belong
01:49:29 21 in the claim at all, and the other one is talked about
01:49:31 22 elsewhere in the claim but is not part of the standalone
01:49:35 23 construction of electronic key.

01:49:36 24 So Your Honor hit the nail right on the head, is
01:49:40 25 that in Column 4 of the '026 patent, what I have on the

01:49:44 1 ELMO here, where it talks about in some implementations,
01:49:48 2 the e-key provides access to at least one of the operating
01:49:51 3 functions of the vehicle or opening the vehicle or starting
01:49:54 4 the vehicle, so you can have an e-key that could do any one
01:49:58 5 of these things or all of them. As it says in Column 4
01:50:01 6 there: Or combinations thereof.

01:50:03 7 So this is permissive. You could have all
01:50:08 8 different kind of e-keys. I had a car at one point that
01:50:10 9 the key to -- the physical key to open the door was
01:50:13 10 separate and apart from the one that starts. And that's
01:50:16 11 what this is saying here. You could have e-keys for
01:50:18 12 different functions or you could have one key that does
01:50:21 13 lots of different functions of the vehicle. But it's
01:50:26 14 permissive. It's not that there has to be multiple
01:50:29 15 functions.

01:50:29 16 And the reason that the claims here -- the claims
01:50:32 17 talk about unlock, locking the car, and starting the car.
01:50:35 18 That reinforces the fact that if the claims say that you
01:50:39 19 need to have both of those functions for the claimed
01:50:42 20 e-keys, that they are permissive aspects of any one e-key.

01:50:48 21 With respect to the privileges portion of
01:50:52 22 Defendants' construction, if we could have Defendants'
01:50:56 23 Slide 5 -- the first highlighted portion of the claim on
01:51:06 24 the right-hand side of Defendants' Slide 5, it talks about
01:51:11 25 the unique -- in what's highlighted there: The unique

01:51:16 1 access code is associated with privileges for use of the
01:51:17 2 vehicle.

01:51:18 3 It's the unique access code that the privileges
01:51:20 4 are associated with, not necessarily the electronic key
01:51:23 5 directly. It may be indirectly later on.

01:51:25 6 But, again, this reinforces the fact that
01:51:29 7 privileges are not something that define the standalone
01:51:32 8 term "e-key." They're something that can be imposed upon
01:51:36 9 the e-key per the claim, but they're not part of the
01:51:40 10 standalone definition of an e-key. Because just like a
01:51:46 11 regular physical key, I could hand it to Your Honor or my
01:51:49 12 partner, and there's no privileges or restrictions or
01:51:54 13 anything like that. You just have possession of it. You
01:51:57 14 can use it. You could have such an e-key.

01:52:00 15 The claim do impose, you know, certain privileges.
01:52:03 16 But it -- again, we're talking about the standalone
01:52:07 17 definition of electronic key, and it's simply a key that's
01:52:12 18 electronic. A key that enables one or more functions of
01:52:18 19 the vehicle per Your Honor's preliminary construction.

01:52:23 20 THE COURT: All right. Thank you, Mr. Belloli.

01:52:33 21 And certainly you can respond if you want to, or
01:52:36 22 go to the next term, whichever you want.

01:52:40 23 MR. WATKINS: Sorry, Your Honor. I do have a few
01:52:43 24 follow-up points.

01:52:44 25 So Mr. Belloli said that the term "privileges," it

01:52:49 1 should not be imported into the term "electronic key."

01:52:54 2 And, you know, the claims do reference privileges

01:52:56 3 separately.

01:52:57 4 The reason for which you would interpret

01:53:02 5 electronic key as we propose is that the capabilities of

01:53:05 6 the electronic key are potentially limited by privileges.

01:53:09 7 The privileges are separately defined in the claims. And

01:53:12 8 in this claim, for example, in Claim 1 of the '026 patent,

01:53:15 9 it says that the privileges are defined for the unique

01:53:19 10 access code and then the use of the vehicle that is allowed

01:53:22 11 must be consistent with the privileges.

01:53:24 12 So the reason for interpreting electronic key the

01:53:27 13 way that we proposed is so that it can allow for privileges

01:53:31 14 to limit those uses of the electronic key.

01:53:34 15 Mr. Belloli also pointed out that the "electronic

01:53:42 16 key" term is a standalone term, and it should be

01:53:45 17 interpreted separately. I think -- I agree. I think that

01:53:48 18 it should be interpreted in the way that a normal person

01:53:51 19 would understand what a vehicle key allows a user to do.

01:53:54 20 It should also be interpreted in the context of the

01:53:57 21 patents. The patents described that electronic keys can

01:54:00 22 allow a variety of uses, and then those uses may be

01:54:05 23 limited.

01:54:06 24 I won't respond to Mr. Belloli's discussion of

01:54:09 25 Column 4 because I already addressed it, unless Your Honor

01:54:12 1 would like some follow-up comments on that.

01:54:15 2 THE COURT: No, I do understand the arguments.

01:54:16 3 MR. WATKINS: Thank you.

01:54:17 4 THE COURT: Thank you.

01:54:27 5 MR. SKOYLES: Good afternoon, Your Honor. Aidan
01:54:35 6 Skoyles for the Defendants.

01:54:36 7 We're going to skip Term B and move to Term C,
01:54:40 8 that's the "privileges" term -- or terms, I should say.

01:54:43 9 Now, we've already discussed privileges a little
01:54:46 10 bit in the context of Term A. I want to come right to it,
01:54:49 11 and that is the potential issue with a construction of the
01:54:52 12 privileges -- "privileges" terms, the plain and ordinary
01:54:57 13 meaning, is it might be so broad as to capture the
01:55:00 14 colloquial meaning of driving privileges.

01:55:04 15 Imagine a parent who takes away the driving
01:55:07 16 privileges of a misbehaving teenager. I've taken away your
01:55:11 17 driving privileges. I've completely taken away your access
01:55:11 18 to the vehicle. That's inconsistent with how privileges is
01:55:14 19 used in the context of these patents, and that's what
01:55:17 20 drives Defendants' proposal for a construction here.

01:55:21 21 In the context of these patents, a -- the
01:55:23 22 privileges are permitted uses of the vehicle, and we'll
01:55:26 23 look at some of those.

01:55:27 24 As a preliminary matter, the specification and the
01:55:30 25 claims of the three e-key patents use privileges and

01:55:35 1 conditions of use interchangeably. So we would argue that
01:55:38 2 a single construction is appropriate for all three variants
01:55:41 3 of the privileges and conditions of use term.

01:55:43 4 What emerges from an analysis of just Claim 1 of
01:55:49 5 the '026 patent is that the privileges modify how the
01:55:53 6 vehicle is used via the e-key and not simply whether it is
01:55:57 7 used.

01:55:58 8 Claim 1 talks about making a request to unlock the
01:56:01 9 vehicle, analyzing a unique access code, looking at those
01:56:06 10 privileges, and then permitting access to the vehicle
01:56:09 11 consistent with the privileges of the unique access code.
01:56:12 12 That's an indication that the access code and those
01:56:16 13 privileges modifies how you're using the vehicle and not
01:56:19 14 merely whether you're using it.

01:56:21 15 If we go to the next slide.

01:56:23 16 The specification provides a few examples of
01:56:27 17 potential privileges, things like what type of access is
01:56:29 18 permitted, what speed limits might be permitted, geographic
01:56:34 19 restrictions, amounts of time the e-key would be valid.
01:56:37 20 We've included those in our construction because we think
01:56:39 21 they'll be helpful to the jury.

01:56:40 22 The specification in, for example, Figure 26 but
01:56:45 23 really in a number of different places points to use cases
01:56:48 24 where an owner might want to specify a particular level of
01:56:52 25 driving privileges for a driver. For example, a valet.

01:56:56 1 You drop your car off at the valet, you might say: Here,
01:57:01 2 you have can access to my car, but not in an unfetterred
01:57:04 3 way. You can only use it, let's say, to drive maximum 30
01:57:06 4 miles an hour or only to drive it within five miles of
01:57:09 5 where I am. You provide that valet with an e-key, but that
01:57:12 6 e-key would be subject to privileges or constraints of use
01:57:16 7 that modify how the valet uses the vehicle and not merely
01:57:20 8 whether they use it.

01:57:21 9 In the next slide, I've kind of gone through
01:57:26 10 back -- some of that plain and ordinary meaning of driving
01:57:28 11 privileges. Right? Imagine the parent who takes away the
01:57:32 12 driving privileges. I think that's how driving privileges
01:57:35 13 are often used in common parlance. And that usage is
01:57:40 14 simply inconsistent with the specification because it
01:57:41 15 doesn't modify how the access is provided. It simply takes
01:57:44 16 it away.

01:57:44 17 The claims here, to begin with, are kind of the
01:57:48 18 reverse. They talk about providing access.

01:57:49 19 Let's go to the next slide, please.

01:57:51 20 Providing access limited in a certain way. So
01:57:55 21 imagine a parent who instead says something like, well, you
01:57:57 22 have driving privileges but only for daylight hours.
01:58:00 23 That's a circumstance where privileges is being used
01:58:04 24 consistent with the specification. It's providing a
01:58:06 25 limited privilege that somehow modifies how the access is

01:58:11 1 given and not simply whether or not the access is given.

01:58:15 2 In the next slide, I expand a little bit on the
01:58:19 3 kinds of examples in the specification, which were type of
01:58:22 4 access, speed limits, geographic limitations, and amounts
01:58:25 5 of time.

01:58:27 6 How will that work as a privilege? The privilege
01:58:30 7 for type of access might be you can use my car via my
01:58:35 8 electronic key, but you cannot unlock the trunk. Or you
01:58:38 9 can use my car, but you cannot exceed 55 miles an hour. Or
01:58:42 10 you can use my car, but you can't take it outside of Texas.
01:58:45 11 Or you can use it for the next 10 hours. All of these are
01:58:49 12 examples consistent with the specification that are somehow
01:58:52 13 providing less than unfettered access to the vehicle.

01:58:56 14 I want to spin back and look at what came up
01:59:01 15 during the prosecution. During examination of this claim,
01:59:04 16 the examiner rejected the claims in view of a reference to
01:59:09 17 Ehrman. Ehrman taught a rental car system where a user
01:59:10 18 would access the vehicle with an identifier and a password.
01:59:13 19 It didn't put constraints on how you use the vehicle. And
01:59:15 20 the applicants responded to say: No, nothing is disclosed
01:59:19 21 in Ehrman on how privileges are defined for the unique
01:59:24 22 access code, because you would simply rent your car and use
01:59:25 23 it however you wanted to. In a response, the examiner
01:59:31 24 issued a notice of allowance.

01:59:33 25 Now, construing privileges to be consistent with

01:59:35 1 the plain and ordinary meaning risks recapturing that
01:59:37 2 unfettered use that was distinguished during prosecution.
01:59:42 3 That notion came up again much more recently in EA's
01:59:48 4 response to the IPR that we filed.

01:59:49 5 In that response, EA characterized the e-key as
01:59:53 6 providing privileges for the user, including speed limits,
01:59:58 7 geographic restrictions, amounts of time, the very same
02:00:01 8 examples from the specification. They pointed out that in
02:00:04 9 the '026 patent, for example, the child driver might be
02:00:08 10 provided with restricted use of the vehicle. That would be
02:00:10 11 privilege-based use of the vehicle, less than unfettered
02:00:14 12 access.

02:00:15 13 EA attempted to specifically distinguish Zaid --
02:00:20 14 Zaid was the reference petitioners advanced to the IPR --
02:00:23 15 saying Zaid provided unfettered vehicle access. And so a
02:00:29 16 broad construction now, a plain and ordinary meaning
02:00:31 17 construction, again, risks recapturing that unfettered
02:00:35 18 access consistent with a colloquial understanding of what
02:00:39 19 driving privileges may be. These patents are not referring
02:00:41 20 to that kind of privilege. They're referring to something
02:00:44 21 less. It doesn't matter really what it is that's less than
02:00:48 22 unfettered access, but it's something less.

02:00:50 23 I can address a number of EA's arguments if you
02:00:55 24 think that would be helpful, Your Honor, or happy to answer
02:00:57 25 any questions.

02:00:57 1 THE COURT: How does your proposed construction
02:01:03 2 accomplish what you're arguing for?

02:01:06 3 MR. SKOYLES: Can we go back to Defendants'
02:01:08 4 proposed construction, please?

02:01:10 5 So Defendants' proposed construction suggests that
02:01:15 6 these privileges, whether they're privileges or conditions
02:01:18 7 of use, provide permitted access, less than unfettered
02:01:22 8 access. It's not simply providing access. It's not simply
02:01:28 9 whether or not you have access. It's that you have access
02:01:31 10 in some way that is permitted, limited, and we provide the
02:01:35 11 examples consistent with the spec.

02:01:37 12 THE COURT: Why is permitted the same as limited?
02:01:42 13 What is there that says unfettered access is not permitted?

02:01:47 14 MR. SKOYLES: I think our understanding is that
02:01:49 15 unfettered access is not limited access.

02:01:51 16 THE COURT: I understand that. But it can be
02:01:53 17 permitted. Does your construction require limited access?

02:02:01 18 MR. SKOYLES: I think we would be okay with the
02:02:03 19 word "limited" instead of "permitted," Your Honor.
02:02:05 20 Anything less than unfettered access is what we're trying
02:02:09 21 to get at. Permitted may not be the best word. Limited
02:02:12 22 use is the notion that I think the Plaintiff and the
02:02:15 23 patentee is trying to get through when he filed his patents
02:02:18 24 is this e-key gives you limited access to the vehicle.

02:02:21 25 THE COURT: So your argument would be that

02:02:24 1 privileges for use cannot be unlimited use?

02:02:36 2 MR. SKOYLES: That's right, Your Honor.

02:02:39 3 THE COURT: I can understand where individual
02:02:44 4 settings would be less than everything, but I really -- I
02:02:54 5 had -- there seemed to me to be a disconnect between your
02:02:58 6 arguments and your proposed construction.

02:03:03 7 MR. SKOYLES: Could I offer one clarification,
02:03:05 8 Your Honor?

02:03:05 9 THE COURT: Yes.

02:03:07 10 MR. SKOYLES: The claim envisions that the e-key
02:03:09 11 has privileges associated with it. For an owner driver,
02:03:15 12 the owner may have complete privileges. But the patent
02:03:20 13 contemplates a system that is at least capable of providing
02:03:23 14 limited access.

02:03:27 15 Although the owner may have full rights, the
02:03:29 16 teenager driver may have less than full rights. So that
02:03:32 17 when that e-key is provided, it's associated with somehow
02:03:35 18 limited privileges.

02:03:48 19 I think that comes up again -- if we can go to
02:03:52 20 Claim 1 on the next -- next slide. One further down.
02:03:58 21 Maybe two further down.

02:03:59 22 Slide 18 -- I'm sorry, Slide 17.

02:04:11 23 Slide 17 has the final limitation of Claim 1 which
02:04:14 24 talks about the notion of evaluating the privileges
02:04:18 25 associated with a unique access code and then providing

02:04:20 1 access to the vehicle consistent with those privileges.

02:04:24 2 So if the privileges in your key say you're the
02:04:26 3 owner, you have complete access, then you get full access.
02:04:31 4 But the privileges can be specified so that you have less
02:04:35 5 than complete access.

02:04:42 6 THE COURT: You know, access to the vehicle would
02:04:46 7 typically be understood to be talking about unlocking.
02:04:56 8 Access to the functions of the vehicle would be use.

02:05:07 9 And at some points in your briefing, it seemed to
02:05:09 10 me that you were taking the position that use requires
02:05:12 11 driving. It seems to me that there are a lot of these
02:05:19 12 words that are being used in ways that -- it's hard for me
02:05:25 13 to understand the implications of some of these. But in
02:05:32 14 this case on this term, what you're seeking is that
02:05:38 15 privileges be understood to be limited use of the vehicle.

02:05:47 16 MR. SKOYLES: That's right. At least potentially
02:05:50 17 limited use. The claim talks about limitations on use. So
02:05:56 18 the privileges could be associated with limitations on use,
02:06:04 19 such as the examples that we cite in Slide 18 and in our
02:06:08 20 constructions.

02:06:10 21 THE COURT: And what is, you think, the best
02:06:18 22 evidence of a prosecution history disclaimer?

02:06:24 23 MR. SKOYLES: I think I would go to what we said
02:06:28 24 about the comments on Ehrman, so that's Slide 23.

02:06:32 25 THE COURT: That's the one on mere access?

02:06:37 1 MR. SKOYLES: In Slide -- so in overcoming the
02:06:40 2 rejection to Ehrman, the commentary is a little ambiguous,
02:06:45 3 I grant you that, but the applicants tried to differentiate
02:06:49 4 between Ehrman and the pending claims by saying that Ehrman
02:06:51 5 didn't disclose how privileges are defined for the unique
02:06:54 6 access code because Ehrman simply provided the rental car
02:06:59 7 user with a user name and password which they might enter
02:07:02 8 and then access the vehicle in an unfettered way.

02:07:10 9 The IPR is similar. In the IPR, the applicants
02:07:16 10 distinguished Zaid, arguing that Zaid provided unfettered
02:07:21 11 access. That's language literally from the POPR in the IPR
02:07:24 12 filing.

02:07:30 13 THE COURT: All right. Thank you, Mr. Skoyles.

02:07:38 14 MR. BELLOLI: I'll start with Your Honor's last
02:07:56 15 question there, which was on the prosecution history.

02:07:59 16 Counsel said that -- you know, he said, I'll admit
02:08:03 17 that the prosecution history is a bit ambiguous on this
02:08:06 18 point. And when you're talking about disclaimer, claim
02:08:10 19 construction law is it has to be clear and unambiguous. It
02:08:13 20 has to be a very clear disclaimer. So that's, I think,
02:08:17 21 kind of admitted that there's not a disclaimer there that
02:08:21 22 meets the requirements of the law.

02:08:22 23 Looking at Defendants' construction on the ELMO
02:08:24 24 here, there's just two big problems with it. And the first
02:08:28 25 one is all the examples, such as Your Honor and a number of

02:08:39 1 other courts have held that non-limiting examples, there's
02:08:44 2 no reason to include them. That's the Alexsam case, 2021
02:08:47 3 Westlaw 7709964, at Page 6 where Your Honor collected a lot
02:08:52 4 of cases on this point. And we would agree with that case,
02:08:57 5 that it's not helpful when you're looking for a definition,
02:09:00 6 not examples here.

02:09:02 7 Otherwise, this construction is just taking the
02:09:05 8 word -- the words "privileges" and "condition" and
02:09:11 9 substituting them -- substituting the word "permitted."
02:09:15 10 The word "permitted" or any variation thereof, permit,
02:09:21 11 anything permits, is not in these specifications, nowhere,
02:09:24 12 does not appear. The word "privilege" appears 104 times.
02:09:28 13 The word "condition" appears 26 times. There's no reason
02:09:31 14 to substitute one word for the other.

02:09:32 15 And I agree with Your Honor when you say: I don't
02:09:35 16 understand the implications of what they're doing here.
02:09:37 17 Neither do I, because they're -- if they get this
02:09:40 18 construction, I don't know what they're going to argue that
02:09:43 19 permitted means than just a plain and ordinary meaning of
02:09:48 20 privileges doesn't. So there's just no compelling reason
02:09:52 21 to switch one word for the other. They're not synonyms --
02:09:55 22 or they don't appear to be. So there's just no reason for
02:10:01 23 this --

02:10:01 24 THE COURT: One argument that Mr. Skoyles made was
02:10:04 25 that privileges might be understood by the jury to be

02:10:12 1 dealing with a situation where it's a question of whether
02:10:16 2 or not you can use the vehicle at all. What is your
02:10:22 3 response to that argument?

02:10:23 4 MR. BELLOLI: Well, I don't know what they mean by
02:10:26 5 use in that -- that context. If they mean drive off,
02:10:33 6 then -- then, no, that's not -- that's not what this is --
02:10:35 7 this is talking about. This is -- you know, any kind of
02:10:39 8 additional privilege beyond -- beyond locking and starting,
02:10:48 9 that's imparted.

02:10:51 10 THE COURT: And locking and starting are called
02:10:53 11 out separately in Claim 1?

02:10:56 12 MR. BELLOLI: Correct.

02:10:57 13 THE COURT: All right. Thank you, Mr. Belloli.

02:11:18 14 MR. SKOYLES: Just a brief response, Your Honor.
02:11:21 15 Regarding disclaimer, the statements that -- excuse me.
02:11:27 16 The statements EA made in its response to the IPR arguing
02:11:32 17 that Zaid disclosed unfettered access are, I think, quite
02:11:36 18 unambiguous. It should be clear in the context of their
02:11:41 19 arguments in the IPR that unfettered access cannot be
02:11:45 20 privileges.

02:11:45 21 Regarding the examples that counsel criticized, I
02:11:53 22 don't think these examples are particularly confusing. I
02:11:56 23 think they would be helpful for the jury. There's no
02:11:58 24 suggestion that all of the examples would be required for a
02:12:00 25 privilege to be a privilege. Any of them would meet the

02:12:04 1 mark.

02:12:05 2 Counsel argued there was no reason to substitute
02:12:09 3 the word "privileges" with "permissions" or "permitted"
02:12:12 4 uses. I think Your Honor identified the issue, which is
02:12:17 5 that there is a colloquial meaning for driving privileges,
02:12:21 6 and that is inconsistent with how privileges is used in
02:12:24 7 these patents.

02:12:26 8 THE COURT: You know, as far as Zaid and the
02:12:30 9 unfettered access code, Claim 1 separately calls out
02:12:36 10 subsystem for enabling unlocking and a subsystem for
02:12:43 11 starting, doesn't it?

02:12:46 12 MR. SKOYLES: It does.

02:12:47 13 THE COURT: So this -- in order to read on -- in
02:12:54 14 order for this claim to read on it, the system would not
02:12:57 15 allow unfettered access, would it?

02:13:02 16 MR. SKOYLES: I believe the final part in the
02:13:05 17 limitation talks about providing access to those starting
02:13:08 18 and unlocking components consistent with the privileges for
02:13:11 19 use.

02:13:12 20 So the privileges might modify, for example, when
02:13:16 21 you could unlock or start the vehicle, and that would be a
02:13:20 22 privilege limited to a time of use, for example.

02:13:27 23 THE COURT: All right. Well, I will look further
02:13:29 24 at Zaid and evaluate your argument further.

02:13:37 25 MR. SKOYLES: Thank you, Your Honor.

02:13:38 1 THE COURT: Thank you, Mr. Skoyles.

02:13:43 2 MR. BARNEY: Good afternoon, Your Honor. James
02:13:51 3 Barney on behalf of the Defendants.

02:13:53 4 The next limitation is the one that you have
02:13:55 5 annotated as G in your preliminary constructions.

02:13:58 6 And if I could have Slide 42, please.

02:14:01 7 Your Honor, this is a fairly long limitation, but
02:14:40 8 it's worth -- it's worth just reading through one time here
02:14:43 9 on the record because the problem with this limitation is
02:14:47 10 that it has an if-clause that is never closed, which
02:14:51 11 renders the claim essentially unreadable and
02:14:55 12 uncomprehensible.

02:14:55 13 The claim requires that the vehicle is configured
02:14:57 14 to receive information from the server to authenticate the
02:15:00 15 request by the mobile device, and if the request is
02:15:04 16 authentic and the mobile device is provided with data to
02:15:07 17 enable an electronic key to use the vehicle and the
02:15:11 18 electronics of the vehicle instructs the subsystem of the
02:15:13 19 vehicle to enable unlocking of the vehicle and enables
02:15:17 20 starting of the vehicle for use of the vehicle via the
02:15:19 21 electronic key consistent with the privileges of the unique
02:15:22 22 access code, and so as you can see there, the "if" circled
02:15:26 23 in green followed by the three "ands" circled in red is not
02:15:31 24 a recognizable sort of English language clause that you can
02:15:34 25 understand or define the meaning of.

02:15:36 1 The claim, in short, is -- it contains an error.
02:15:42 2 And, unfortunately, that error cannot be corrected by
02:15:46 3 Your Honor because there are multiple ways that the error
02:15:50 4 can be corrected, and I'm going to expand on that in a
02:15:52 5 moment.

02:15:52 6 Next slide, please.

02:15:55 7 Now, the Plaintiff argues that there's an implied
02:16:01 8 "then," and we don't dispute that a comma in certain
02:16:04 9 circumstances can imply "then," such as if it rains, you
02:16:08 10 get wet. There's no question about that.

02:16:10 11 But that's not what the structure of this clause
02:16:12 12 is. This clause is more like if it rains and you get wet
02:16:17 13 and you take a taxi home. That's an indecipherable
02:16:22 14 if-clause that doesn't have a "then," either implied or
02:16:25 15 express.

02:16:27 16 So the problem with their argument, essentially
02:16:28 17 replacing that comma with an implied "then," is that the
02:16:31 18 claim is still unreadable. It would say: If the request
02:16:35 19 is authentic, then and the mobile is provided with data,
02:16:40 20 et cetera. So it still is an unreadable claim.

02:16:43 21 The only way to make this claim make sense with
02:16:46 22 that implied "then" is to delete the first "and," which I
02:16:50 23 believe is what you've done in your preliminary guidance.

02:16:53 24 The problem with that is, that was specifically
02:16:55 25 disallowed by the PTO. And I would like to -- to get to

02:17:00 1 that point right now. And this, I believe, is important
02:17:04 2 because it goes to the issue of whether that "and" can be
02:17:08 3 corrected by this Court by essentially deleting that
02:17:11 4 "and."

02:17:12 5 And before I get to the prosecution history here,
02:17:14 6 I would like to draw Your Honor's attention -- you can keep
02:17:17 7 it on that slide, please -- to the cases we cited in our
02:17:21 8 brief. And this goes to the question of when does a
02:17:23 9 District Court have the authority to correct a claim?

02:17:26 10 And we cited a Federal Circuit case, which is the
02:17:33 11 Micro -- excuse me, the Novo Industries case from 2003.
02:17:38 12 And as explained in that case, the ability of a District
02:17:40 13 Court to correct a claim derives from a 1923 decision
02:17:44 14 called Essex -- 1926 decision called Essex.

02:17:50 15 And in 2003, the question arose before the Federal
02:17:53 16 Circuit as to whether that ability of a District Court to
02:17:57 17 correct a claim was superseded or preempted by the
02:18:01 18 enactment of Sections 254 and 255 in the patent statute
02:18:08 19 which allow the Patent Office to correct claims and doesn't
02:18:08 20 say anything about whether a District Court can correct
02:18:11 21 claim language.

02:18:11 22 And in resolving that challenge, the Federal
02:18:14 23 Circuit concluded -- and I'm now reading from 350 F.3d at
02:18:21 24 Page 1356. It concluded that a District Court can correct
02:18:26 25 only Essex-type errors. A District Court can correct a

02:18:30 1 patent only if, one, the correction is not subject to a
02:18:33 2 reasonable debate based on consideration of the claim
02:18:36 3 language in the specification; and, two, the prosecution --
02:18:40 4 prosecution history does not suggest a different
02:18:42 5 interpretation of the claims.

02:18:44 6 Now, with that in mind, I would like to go through
02:18:46 7 what happened during prosecution. So on Slide 44, this is
02:18:51 8 an amendment that the applicant submitted after the claims
02:18:54 9 were allowed but before the -- before they were issued.

02:18:58 10 And in that amendment, the -- or requested amendment, the
02:19:01 11 applicant requested several different types of -- types of
02:19:04 12 corrections, most of which were actually accepted by the
02:19:08 13 examiner except for this one.

02:19:11 14 This correction on Claim 1 of the '026 patent, the
02:19:13 15 applicant requested that that first "and" be deleted, the
02:19:17 16 very thing that is also deleted in Your Honor's preliminary
02:19:21 17 guidance.

02:19:21 18 And in support of this correction on the
02:19:24 19 right-hand side, the applicant argued to the examiner that
02:19:28 20 the amendment is being filed to address antecedent basis
02:19:31 21 issues and correct minor grammar typos. And they requested
02:19:37 22 entry of this amendment.

02:19:38 23 So a couple of things there. First of all, EA
02:19:41 24 conceded that the claim contains an error because that's
02:19:44 25 what a grammar typo is. Typo is short for typographical

02:19:50 1 error. So there's no question that the claim contains an
02:19:50 2 error.

02:19:52 3 And the specific request by the applicant was to
02:19:54 4 delete that first "and." By deleting the first "and," that
02:19:57 5 allows the comma that precedes that "and" to serve as an
02:20:02 6 implied "then." And then that claim would make sense.
02:20:05 7 That was the request to the examiner.

02:20:07 8 But the examiner -- if I could have the next
02:20:14 9 slide, please -- the examiner rejected that request. And
02:20:18 10 specifically, although the examiner accepted many of the
02:20:20 11 other changes that the applicant proposed, it wasn't like
02:20:23 12 the examiner was just willy-nilly denying everything. The
02:20:26 13 examiner accepted some of the changes, but for this
02:20:27 14 specific change, the examiner rejected that change and said
02:20:30 15 Claim 1 broadens the scope by removing a limitation from an
02:20:36 16 if-clause through deletion of the "and." Further
02:20:39 17 consideration would be required in light of the broader
02:20:41 18 claim scope.

02:20:41 19 So what is important about this? Well, the PTO
02:20:46 20 rejected this amendment because it would broaden the
02:20:50 21 if-clause. That means the PTO rejected EA's assertion that
02:20:55 22 the if-clause merely is if the -- if the request is
02:20:59 23 authentic. Because remember, by deleting that "and,"
02:21:02 24 that's what the applicant was essentially doing. It was
02:21:06 25 basically saying the if-clause is only if the request is

02:21:10 1 authentic, and then everything that follows the comma is
02:21:13 2 part of the "then" clause. The examiner disagreed with
02:21:15 3 that and said, no. By removing that "and," you are
02:21:21 4 removing a limitation from the if-clause through deletion
02:21:24 5 of the "and," and, therefore, further consideration would
02:21:27 6 be required in light of that broader claim scope.

02:21:29 7 So the very construction that the -- that EA is
02:21:36 8 now arguing here was rejected by the PTO when they tried to
02:21:40 9 make that amendment after allowance of the claims.

02:21:42 10 Now, rather than fix the problem through continued
02:21:46 11 examination, which they could have done, the examiner was
02:21:51 12 essentially inviting them to do that, further consideration
02:21:55 13 would be required. They simply could have put the patent
02:21:58 14 back into re-examination -- or continued examination, and
02:22:02 15 then -- and then done whatever they wanted to, and the
02:22:04 16 examiner could have then evaluated this broader claim scope
02:22:07 17 in light of the prior art.

02:22:08 18 But instead, because they wanted those claims to
02:22:10 19 issue immediately, they allowed the claims to issue with a
02:22:13 20 known error.

02:22:15 21 Now, I bring this up because I want to go back to
02:22:19 22 the requirements that the Federal Circuit has set out for
02:22:22 23 correcting claims. And one of the -- the second -- the
02:22:24 24 first requirement is the correction cannot be subject to
02:22:27 25 reasonable debate based on a consideration of the claim

02:22:29 1 language in the specification.

02:22:30 2 But the second requirement is the prosecution
02:22:33 3 history does not suggest a different interpretation of the
02:22:37 4 claims.

02:22:37 5 So, Your Honor, this prosecution history clearly
02:22:40 6 suggests that an interpretation of the claim that deletes
02:22:43 7 the first "and" is not appropriate.

02:22:45 8 THE COURT: Well -- and to the extent that we can
02:22:48 9 read from this some understanding of the examiner as to the
02:22:54 10 scope of the claim and to the extent we care about it, the
02:22:58 11 examiner clearly also didn't find that indefinite.

02:23:04 12 MR. BARNEY: Well, Your Honor, that's true, but
02:23:05 13 the problem is we don't know what the examiner -- how the
02:23:08 14 examiner was reading this claim. And obviously, when
02:23:11 15 claims are held invalid, that necessarily means the
02:23:15 16 examiner, you know, missed something. So examiners do make
02:23:18 17 mistakes.

02:23:18 18 And in this case, I would just point out that the
02:23:21 19 applicant included -- allowed the claims to reach the
02:23:26 20 issuance stage with many errors in them, okay, and then had
02:23:30 21 to go back after the fact and correct the errors. And, in
02:23:34 22 fact, there was another patent that used to be in this case
02:23:37 23 where the same thing happened. The applicant actually
02:23:39 24 submitted the entire wrong claim set -- that was the '244
02:23:43 25 patent -- and the examiner issued the patent with an

02:23:45 1 entirely incorrect claim that had never been allowed. And
02:23:48 2 then EA had to go back and request a certificate of
02:23:53 3 correction on that claim, and the Patent Office denied
02:23:56 4 that, and so they were forced to withdraw that patent from
02:24:01 5 this case.

02:24:01 6 That is just an example of examiners are not
02:24:03 7 perfect and especially not when the applicant is submitting
02:24:03 8 claims with lots of errors in them. And that's what we
02:24:06 9 have here, essentially somewhat sloppy prosecution and then
02:24:10 10 trying to fix the -- fix the errors on the back end. For
02:24:14 11 this particular error, the examiner said, no, you can't fix
02:24:16 12 this error because it would change the scope of the claim
02:24:19 13 as I understand it.

02:24:20 14 Now, how did the examiner understand the claim, we
02:24:23 15 don't know, but one thing we know for sure is the examiner
02:24:26 16 did not -- if I could go back one slide. The examiner did
02:24:30 17 not understand the claim the way the applicant was trying
02:24:33 18 to correct it here where the if-clause is simply if the
02:24:36 19 request is authentic. The examiner said, no, that is not
02:24:40 20 what the if-clause means because the examiner said by
02:24:42 21 removing that "and," you are now broadening out the -- the
02:24:47 22 if-clause. Okay. So we know that wasn't what the examiner
02:24:51 23 understood.

02:24:51 24 Now, this leads me to my other point. The other
02:24:55 25 part of the test for whether the District Court can correct

02:24:58 1 a claim is the correction cannot be subject to a reasonable
02:25:02 2 debate.

02:25:03 3 So now I want to talk about the other reasonable
02:25:06 4 ways this claim could be construed.

02:25:11 5 If I can go forward two slides.

02:25:13 6 So we've already talked about this one. This
02:25:15 7 would be one legitimate way to correct the claim. You
02:25:18 8 simply delete that first "and." The comma now serves as an
02:25:23 9 implied "then," and the claim is now corrected.

02:25:24 10 But the problem is the PTO rejected this
02:25:28 11 amendment. So this cannot be the correction the Court
02:25:33 12 applies because the Federal Circuit has said you cannot
02:25:35 13 correct a claim if the prosecution history does not suggest
02:25:38 14 a different interpretation. And here --

02:25:40 15 THE COURT: I think that what Novo is talking
02:25:42 16 about there in the prosecution history suggesting a
02:25:47 17 different interpretation is looking at what the patentee
02:25:51 18 represents, not trying to interpret whether the examiner
02:25:58 19 understood it that way.

02:26:01 20 MR. BARNEY: Your Honor, I don't see that in Novo.
02:26:04 21 In Novo, the Court certainly did go through and look at the
02:26:10 22 prosecution history which involved a rejection of one claim
02:26:14 23 and then in response to the rejection of that claim the
02:26:17 24 addition of a new claim. And in the -- in adding that new
02:26:21 25 claim, this sort of error arose, which created an ambiguity

02:26:25 1 in the -- in the newly added claim which the examiner
02:26:28 2 apparently didn't catch and allowed the claim to issue.
02:26:32 3 And, in fact, the District Court corrected the claim and
02:26:34 4 then the Federal Circuit said that was legal error because
02:26:37 5 the District Court corrected it in a way that was first of
02:26:42 6 all, inconsistent or at least called into question by the
02:26:45 7 prosecution history but also because there was multiple
02:26:49 8 different ways to correct the claim, which is the next
02:26:51 9 point that I was going to get to.

02:26:52 10 THE COURT: All right. You had said that the --
02:26:54 11 the deletion of that first "and" could not be a reasonable
02:26:59 12 way because of what the examiner did. And do you have any
02:27:04 13 authority for the proposition that if the examiner declines
02:27:09 14 to correct something, that it cannot thereafter be
02:27:16 15 corrected by the Court?

02:27:18 16 MR. BARNEY: Well, Your Honor, I would say Novo is
02:27:20 17 the authority, because the way I read it is it's not enough
02:27:26 18 just to say -- if we could go back one slide. It's not
02:27:30 19 enough for the Court to look at what the examiner did and
02:27:33 20 say, well, I disagree with the examiner on that. To me it
02:27:35 21 is clear, and the examiner just didn't understand it. Novo
02:27:40 22 says in those situations, it has to go back to the PTO to
02:27:43 23 correct. Because remember, the whole point of Novo was
02:27:47 24 trying to make consistent the pre-existing Supreme Court
02:27:52 25 authority for District Courts to correct claims and the

02:27:57 1 statutory authority that Congress gave to the Patent Office
02:27:59 2 and not to District Courts to correct claims.

02:28:01 3 And so the Federal Circuit tried to harmonize
02:28:04 4 those two by saying, well, the District Court only has that
02:28:08 5 authority in very limited circumstances and does not have
02:28:10 6 that authority if there's anything in the prosecution
02:28:12 7 history that suggests a different result.

02:28:14 8 And the reason is -- there's real-world reasons
02:28:17 9 for this, Your Honor, and that is correcting through the
02:28:19 10 Patent Office has implications that don't arise when a
02:28:23 11 District Court Judge corrects the claims.

02:28:25 12 For instance, one of the things that EA could have
02:28:28 13 done but didn't, they could have gone back to the Patent
02:28:31 14 Office during this litigation once they saw our invalidity
02:28:34 15 contentions and knew that we were challenging this claim on
02:28:37 16 this basis, and they could have requested a certificate of
02:28:40 17 correction from the Patent Office. In fact, they did that
02:28:40 18 with another one of their patents, which they ended up
02:28:44 19 having -- having to withdraw from the case.

02:28:45 20 They didn't do that because if they had done that
02:28:47 21 and they had gone through the process of 35 U.S.C. 255, had
02:28:52 22 they succeeded in getting the claim corrected, they would
02:28:56 23 only get damages going forward. Because of the way the
02:28:58 24 statute is written, it doesn't -- it doesn't have
02:29:02 25 retroactive damages effect.

02:29:03 1 But doing it through the District Court doesn't
02:29:06 2 have that retroactive limitation, and so you get different
02:29:10 3 results depending on which direction you go.

02:29:12 4 And what the Federal Circuit was trying to do was
02:29:14 5 harmonize the fact that Congress very clearly gave the
02:29:15 6 Patent Office the authority to correct claims. And there's
02:29:18 7 no statute that says District Courts have that authority.

02:29:22 8 There is authority in the statute for District
02:29:24 9 Courts to correct inventorship, as an example, but not
02:29:27 10 claims. And so the Federal Circuit was trying to harmonize
02:29:30 11 that fact and essentially carved out a fairly narrow area
02:29:36 12 where District Courts can correct claims if the error is so
02:29:39 13 clear and so obvious and there's no hint in the -- excuse
02:29:43 14 me, in the prosecution history that there might be a
02:29:45 15 different interpretation.

02:29:46 16 Otherwise, you're essentially usurping Congress's
02:29:54 17 grant of authority to the Patent Office to correct these
02:29:58 18 types of errors. So that's what this Novo case, as I read
02:30:01 19 it, was all about.

02:30:03 20 THE COURT: All right.

02:30:04 21 MR. BARNEY: Now, going to the -- my second point.
02:30:07 22 So we've talked about the prosecution history. And if I
02:30:09 23 could move forward a couple slides. And we've talked about
02:30:12 24 the fact that one way to correct this claim would be to
02:30:14 25 delete the first "and." There's no question about that.

02:30:17 1 But there's also other ways to correct the claim that are
02:30:20 2 perfectly viable.

02:30:22 3 Another way to correct the claim would be to
02:30:24 4 delete the second "and" and just insert a comma after
02:30:27 5 vehicle. And in that case, the if-clause would basically
02:30:30 6 become if the request is authentic and the mobile device is
02:30:34 7 provided with data to enable an electronic key to use the
02:30:38 8 device and the "then" clause has two requirements, the red
02:30:41 9 requirement and the blue requirement. That is a perfectly
02:30:45 10 logical and acceptable and sort of grammatically correct
02:30:49 11 way to correct this claim. And it does -- it does no more
02:30:53 12 violence to the language than deleting the first "and."
02:30:58 13 Whether you delete the first and or the second "and,"
02:31:00 14 you're deleting one word.

02:31:02 15 THE COURT: What would be the function then of the
02:31:03 16 "if the request is authentic"?

02:31:06 17 MR. BARNEY: It's -- it's part of a compound
02:31:08 18 if-clause, so --

02:31:09 19 THE COURT: You wouldn't need it, though -- if the
02:31:12 20 mobile device is provided with the data, it doesn't matter
02:31:14 21 whether the request was authentic, does it?

02:31:17 22 MR. BARNEY: I respectfully disagree, Your Honor.
02:31:19 23 Those are two different steps. As a matter of fact, you
02:31:21 24 could provide data to enable the electronic key without
02:31:25 25 authentication and vice versa.

02:31:26 1 THE COURT: Yes, you can -- that's my whole point.
02:31:29 2 There's no need to authentic it if you are in the
02:31:32 3 limitation skipping over the authentication and saying that
02:31:39 4 the mobile device is provided with the data.

02:31:43 5 MR. BARNEY: Your Honor, I'm not entirely sure I
02:31:47 6 understand your question, but I will try to answer it. But
02:31:49 7 if I get it wrong, I -- if I'm missing your question, I
02:31:52 8 apologize.

02:31:52 9 THE COURT: It's just that it's not an "if the
02:31:54 10 request is authentic" anymore because you have gone on and
02:31:58 11 included in your premise that the mobile device is provided
02:32:02 12 with the data.

02:32:03 13 MR. BARNEY: Well, what we're doing with this
02:32:06 14 second proposed correction is showing that you could have a
02:32:09 15 compound if-clause. So now you have to have two things
02:32:12 16 that are true.

02:32:13 17 And remember, this is actually not inconsistent
02:32:16 18 with what the examiner said, because remember, the examiner
02:32:19 19 said that by deleting the "and," you were broadening out
02:32:23 20 the -- you were broadening the if-clause by which -- that
02:32:28 21 means you're removing a limitation from the if-clause.

02:32:30 22 So the examiner clearly thought there was more in
02:32:33 23 the if-clause than just "if the request is authentic"
02:32:36 24 because when they tried to remove that "and" and make that
02:32:39 25 if-clause mean simply "if the request is authentic," the

02:32:42 1 examiner said, no, you can't do that because you're
02:32:45 2 broadening out the if-clause.

02:32:47 3 And so we know the examiner already assumed that
02:32:49 4 there was more in that if-clause than just that first part.
02:32:52 5 We just don't know how much more because it depends on
02:32:56 6 which "and" you delete.

02:32:57 7 So this -- this second one very -- very well could
02:33:01 8 have been what the examiner was thinking maybe, but we
02:33:04 9 don't know because there's also a -- and by the way, this
02:33:07 10 is consistent with one of the embodiments I'll show you on
02:33:09 11 the next slide.

02:33:10 12 Not every embodiment requires this sequence of
02:33:14 13 events but at least one of them does. And so this Figure
02:33:18 14 32 and 33 embodiment has a step of decrypting the e-key.
02:33:23 15 It then provides data to enable the electronic key to use
02:33:26 16 the vehicle. And, Your Honor, what that means is --

02:33:29 17 THE COURT: You put the "then" in the right place
02:33:31 18 there, but that's not where your other reading would put
02:33:34 19 it.

02:33:35 20 MR. BARNEY: Well, no, but this one does require
02:33:38 21 both of those first two things to happen. The request has
02:33:41 22 to be authenticated, and the mobile device has to be
02:33:45 23 provided with data to enable the electronic key to use the
02:33:47 24 vehicle. Because remember, an electronic key by itself
02:33:50 25 does not necessarily enable you to -- to use the vehicle.

02:33:53 1 It has to be activated, which is what's shown in Step 724.
02:33:58 2 Now, you have an active e-key. So now you've performed a
02:34:02 3 second step. You've provided data to that e-key to
02:34:05 4 activate it. And now the "then" clause allows you to open
02:34:09 5 and -- open or unlock and turn on the vehicle.

02:34:14 6 Anyway, this is a second possibility of how this
02:34:19 7 claim could be interpreted, and this may well have been
02:34:21 8 what the examiner was thinking. We know the examiner was
02:34:24 9 not thinking what EA is arguing now where the if-clause is
02:34:28 10 just "if the request is authentic" because the examiner
02:34:31 11 rejected their request to actually apply that
02:34:34 12 interpretation.

02:34:35 13 But there's also another possibility. You
02:34:37 14 could -- you could delete the third "and," and now you have
02:34:42 15 an even more limited if-clause.

02:34:44 16 Now, in order to satisfy the if-clause, you have
02:34:46 17 to have the request is authentic, the mobile device is
02:34:49 18 provided with data to enable an electronic key, and the
02:34:53 19 electronics of the vehicle instructs the subsystem of the
02:34:55 20 vehicle to unlock the vehicle. Only then do you get to the
02:35:00 21 "then" clause which is enabling starting of the vehicle.
02:35:02 22 And this is also consistent with the Figure 32 and 33
02:35:06 23 embodiment that I just showed you.

02:35:07 24 So you have at least three different
02:35:09 25 interpretations. There's actually more. There's other

02:35:11 1 ways you could parse this claim. I don't want to belabor
02:35:14 2 the point, but the examiner may have read it this way. And
02:35:20 3 if the request is authentic and the mobile device is
02:35:22 4 provided with data to enable an electronic key to use the
02:35:26 5 vehicle and the electronics of the vehicle, comma, then
02:35:31 6 instructs the subsystem of the vehicle to enable unlocking
02:35:34 7 of the vehicle and enable starting of the vehicle.

02:35:37 8 So my point is, Your Honor, there are many
02:35:40 9 different ways to correct the claim and make it
02:35:43 10 grammatically sensible, all of which are consistent with
02:35:47 11 the specification -- with different embodiments in the
02:35:49 12 specification. And we just don't know which of those the
02:35:52 13 examiner had in mind.

02:35:52 14 The only thing we know for sure is that the
02:35:55 15 examiner did not have in mind the one that EA is proposing
02:35:58 16 now where the if-clause is simply if the request is
02:36:01 17 authentic. The examiner clearly rejected that by rejecting
02:36:04 18 the "and" edit and saying that that edit would broaden the
02:36:08 19 if-clause.

02:36:09 20 And so I go back once again to the standard for
02:36:14 21 correcting the claim. We've already talked about the fact
02:36:16 22 that the prosecution history does not support their
02:36:21 23 argument and the deletion of the first "and."

02:36:23 24 But, moreover, the first part of the Federal
02:36:27 25 Circuit's decision says that the correction cannot be

02:36:29 1 subject to reasonable debate. And this Court in the -- in
02:36:38 2 the -- the Smith v. ORBCOMM case, which we also cited in
02:36:43 3 our brief -- and this is 2015 Lexis 120804 -- I'm at Page
02:36:50 4 43. On that prong, the -- this Court noted that Novo
02:36:57 5 Industries and Essex indicate that the no reasonable debate
02:37:01 6 standard is a -- is difficult to overcome.

02:37:04 7 So it's a difficult standard to overcome. And
02:37:06 8 what we've shown here is that there are multiple different
02:37:09 9 ways to reasonably parse this claim. And so I don't think
02:37:13 10 they can overcome the fact that there's multiple obvious
02:37:16 11 ways that you could fix this claim, all of which finds
02:37:20 12 support in the specification.

02:37:21 13 So I'm going to just quickly review here because I
02:37:25 14 know I've been up here for a while. But there's no
02:37:28 15 question there's a typo, a grammar error in Claim 1. They
02:37:33 16 admitted it during prosecution.

02:37:34 17 The PTO rejected their request to delete that
02:37:38 18 first "and" because it would broaden the if-clause beyond
02:37:40 19 what was allowed. They could have fixed the problem by
02:37:43 20 going through continued examination. Instead, they allowed
02:37:46 21 the claim to issue with a known error.

02:37:48 22 So this is a problem of EA's own making, and that
02:37:51 23 is also a point that Judge Gilstrap made in that -- in that
02:37:57 24 Smith v. ORBCOMM case, that the examiner had -- excuse me,
02:38:00 25 the applicant had multiple opportunities to fix this

02:38:03 1 problem but didn't.

02:38:05 2 And now EA wants the Court to apply the exact same
02:38:08 3 interpretation that the PTO rejected where the if-clause
02:38:11 4 only says if the request is authentic, and we know the
02:38:14 5 examiner did not construe the claim that way.

02:38:16 6 They don't dispute, as far as I can tell in their
02:38:20 7 briefing, that there are multiple legitimate ways that this
02:38:23 8 typo can be fixed, each of which has a different scope and
02:38:27 9 each of which is supported by the specification.

02:38:29 10 Because of this, Your Honor, under my
02:38:31 11 understanding of the Federal Circuit's rules for judicial
02:38:37 12 correction, we don't believe judicial correction is
02:38:39 13 available. My fear, Your Honor, is that the -- and I, of
02:38:43 14 course, do not say this lightly in any way, Your Honor, but
02:38:45 15 my fear is that the proposed construction in your initial
02:38:49 16 guidance would constitute reversible error because it
02:38:52 17 contradicts what the examiner said during prosecution, and
02:38:56 18 it doesn't take into consideration the different fixes
02:38:59 19 that -- that are available for correcting the claim. Our
02:39:04 20 position, Your Honor, is that the claim is indefinite.

02:39:06 21 THE COURT: And I will look hard at your argument
02:39:11 22 regarding the multiple reasonable ways to correct it
02:39:18 23 because I think that that's clearly what Novo is talking
02:39:20 24 about.

02:39:22 25 As far as the second part of it, I think what the

02:39:27 1 Circuit is telling us to look at is whether the applicant
02:39:33 2 has taken a position during prosecution history that runs
02:39:41 3 counter to the argument being made to correct it during the
02:39:47 4 litigation. I don't think it is intended to have us try
02:39:52 5 and determine what the examiner was looking at or thinking.
02:40:01 6 But I will look further at the case law on that as well.

02:40:05 7 MR. BARNEY: Understood, Your Honor. And I would
02:40:06 8 only just suggest if you look at the case as a separation
02:40:10 9 of powers-type of -- type of case where the Court was
02:40:14 10 trying to strike a balance between the authority given to
02:40:17 11 the Patent Office by Congress versus the -- I would call it
02:40:22 12 the residual authority that was left over from the 1926
02:40:27 13 Supreme Court case, perhaps that might -- you might see it
02:40:30 14 in a different light, but I would defer to Your Honor, of
02:40:33 15 course.

02:40:33 16 THE COURT: Well, I do understand that, and I
02:40:34 17 appreciate your arguments, and I'll look hard at them.

02:40:38 18 Thank you, Mr. Barney.

02:40:40 19 MR. BARNEY: Yes, sir.

02:40:41 20 MR. BELLOLI: Your Honor, I just want to take this
02:40:48 21 back to the 10,000-foot view, and that's what is
02:40:51 22 indefiniteness? Indefiniteness is when a claim fails to
02:40:55 23 inform with reasonable certainty about the scope of the
02:40:57 24 invention. And what Defendants' argument is there's three
02:41:00 25 different ways to interpret this claim.

02:41:04 1 Ms. Fair, if I could have Slide 27 from --
02:41:09 2 There's only one way to look at this claim, and
02:41:16 3 I'll explain why. There's the conditional clause.
02:41:19 4 Everyone agrees that the conditional clause at least begins
02:41:22 5 with "and if the request is authentic." The question then
02:41:26 6 is where does the main clause start? It has to start with
02:41:29 7 the comma. That's where main clauses -- that's where
02:41:32 8 conditional clauses and -- and main clauses begin.
02:41:38 9 And Defendants argue there's two other ways to
02:41:41 10 interpret this -- this claim, but in both of their
02:41:44 11 alternative interpretations, they move the comma. They're
02:41:48 12 the ones that are trying to rewrite this claim. At Slide
02:41:51 13 47 and 49 that Defendants had where to have their different
02:41:56 14 interpretation, they move that comma. So that's, I would
02:42:01 15 say, an implicit admission that this is the only way to
02:42:05 16 view this claim is that the language on Plaintiff's Slide
02:42:09 17 27, the conditional clause is what's in blue and the main
02:42:13 18 clause is what's in yellow.
02:42:15 19 And, I mean, the Court is free to make a
02:42:18 20 correction, but we submit that no correction even is needed
02:42:22 21 because there is no other way to look at this broader
02:42:26 22 clause than that the conditional clause ends at the comma
02:42:30 23 and the main clause is -- and then everything that follows.
02:42:34 24 And unless the Court has any specific questions,
02:42:40 25 we'll submit the rest on the papers.

02:42:42 1 THE COURT: So under your reading, you're saying
02:42:44 2 there's no error at all?

02:42:45 3 MR. BELLOLI: You mean if there is, it can be
02:42:50 4 corrected, but there isn't because, I mean, it says "and
02:42:53 5 if," so the conditional clause is introduced with an
02:42:57 6 "and" -- and the main clause is introduced with an "and."
02:42:59 7 And the examiner didn't think that there was any issue with
02:43:02 8 this either.

02:43:06 9 This is the only way to read this claim. It can't
02:43:08 10 be -- they say -- the Defendants say there's three ways to
02:43:11 11 read the claim, and that's why it's indefinite. But this
02:43:14 12 is the only way because their two interpretations involve
02:43:18 13 moving the comma.

02:43:19 14 THE COURT: How is the -- what I'll refer to as
02:43:22 15 the second "and" --

02:43:22 16 MR. BELLOLI: Uh-huh.

02:43:24 17 THE COURT: -- which you have as the first word in
02:43:27 18 the main clause --

02:43:28 19 MR. BELLOLI: Uh-huh.

02:43:29 20 THE COURT: -- how is that read consistent with
02:43:34 21 "then"?

02:43:35 22 MR. BELLOLI: Well, it's "and if," "and then."
02:43:39 23 The "then" is silent. Just like most -- or most if/then
02:43:46 24 clauses because the "then" is silent.

02:43:48 25 THE COURT: You know, the "then" can be silent if

02:43:50 1 it immediately follows the comma, but --

02:43:53 2 MR. BELLOLI: Well, it's just -- I mean, to the
02:43:55 3 extent it's an error, there's no reasonable -- you know,
02:43:59 4 other way to read this claim, and it can be corrected
02:44:02 5 because there's no dispute. It's not subject to reasonable
02:44:08 6 debate.

02:44:10 7 And, otherwise -- I mean, looking at --
02:44:12 8 indefiniteness is about you don't understand what's going
02:44:14 9 on here. You don't understand the scope of the claim.
02:44:17 10 They say there's three ways to read it. We're saying
02:44:19 11 there's only one way to read this and that that's how you
02:44:24 12 separate the conditional "and then" clauses.

02:44:28 13 THE COURT: But you're saying there's no error in
02:44:30 14 it?

02:44:30 15 MR. BELLOLI: It's really an alternative argument.
02:44:30 16 If there's an error, you can certainly correct it because
02:44:34 17 there's only one way to read this claims. And if there's
02:44:35 18 not, it's -- there's only one way to read this as well
02:44:38 19 because you can't move the comma around the way Defendants
02:44:42 20 do to reach their other two interpretations.

02:44:47 21 THE COURT: All right.

02:44:49 22 MR. BELLOLI: Thank you, Your Honor.

02:44:50 23 THE COURT: Thank you.

02:44:54 24 MR. BARNEY: Nothing further from us unless you
02:44:58 25 have questions, Your Honor.

02:44:58 1 THE COURT: Not at this time, Mr. Barney. Thank
02:45:04 2 you.

02:45:04 3 MR. BARNEY: Thank you, Your Honor.

02:45:07 4 MR. WATKINS: Your Honor, I'll be addressing
02:45:21 5 Term -- Term H in Your Honor's preliminary constructions.

02:45:26 6 So the issue that we flagged, and -- and it seems
02:45:31 7 pretty apparent based on the language, is that there are --
02:45:33 8 there's an antecedent basis issue with the term "subsystem"
02:45:37 9 in Claim 1 of the '026 patent. And the term -- so the
02:45:43 10 patent -- the claim recites a subsystem of the vehicle for
02:45:47 11 enabling unlocking of the vehicle. So that's one "a sub
02:45:52 12 system."

02:45:53 13 Then it recites a subsystem of the vehicle for
02:45:56 14 enabling starting of the vehicle for use of the vehicle.
02:45:58 15 That's a second subsystem.

02:46:00 16 Then it recites that the electronics of the
02:46:03 17 vehicle instructs the subsystem of the vehicle to enable
02:46:06 18 unlocking of the vehicle and enable starting of the
02:46:11 19 vehicle.

02:46:11 20 And so what I'd like to do is turn to the next
02:46:13 21 slide to sort of focus a little bit more clear -- we can
02:46:19 22 skip this one and go to the next slide after this.

02:46:21 23 So here, the question that's raised by this
02:46:22 24 language, which I've highlighted in yellow and blue,
02:46:25 25 respectively, is which of the two subsystems of the vehicle

02:46:27 1 that are previously recited does the electronics of the
02:46:31 2 vehicle instruct? That's not answered by the claim
02:46:35 3 limitation, the Claim 1. And for that reason, there's a
02:46:38 4 lack of antecedent basis problem, and it renders the claim
02:46:42 5 indefinite because there's no reasonable certainty of which
02:46:47 6 subsystem the claim requires the electronics instruct.

02:46:50 7 So if we go to the next slide.

02:46:52 8 I won't focus on this right now, because, Your
02:46:58 9 Honor, a lot of my discussion that I plan to present was an
02:47:02 10 explanation of why Emerging Auto's reading of this claim
02:47:08 11 language was, in our view, inappropriate and nonsensical.
02:47:12 12 Based on Your Honor's preliminary construction, it doesn't
02:47:15 13 appear that Your Honor has adopted that interpretation. So
02:47:18 14 to the extent Emerging Automotive -- their counsel stands
02:47:21 15 up and wants to make that argument, I can respond to it
02:47:24 16 later, but for now, I'll just skip past that so --

02:47:26 17 One moment -- okay. So we can go to Slide 58,
02:47:40 18 please.

02:47:40 19 Of course, Your Honor is aware that the Court --
02:47:45 20 it's not the Court's role to rewrite claims just to
02:47:49 21 preserve their invalidity. That's a well established
02:47:51 22 principle of patent law from the Federal Circuit.

02:47:54 23 And if we go on to the next slide, we will point
02:47:57 24 out that there are multiple different possibilities for
02:48:01 25 correcting the claim if one were to even try to do that.

02:48:06 1 But each one would require rewriting Claim 1.

02:48:10 2 Four possibilities I've listed here. First, the
02:48:13 3 unlocking subsystem, the first subsystem that's recited, is
02:48:18 4 the one that's instructed to enable both unlocking and
02:48:21 5 starting.

02:48:23 6 Option 2, the unlocking subsystem is instructed to
02:48:26 7 enable unlocking and then to interface with the starting
02:48:30 8 subsystem to enable starting. So that would be one where
02:48:34 9 the instruction from the electronics of the vehicle goes to
02:48:37 10 the unlocking system, which then provides -- relays the
02:48:42 11 instruction to enable starting to the other subsystem.

02:48:44 12 THE COURT: And is there anything in the
02:48:46 13 specification that would support that?

02:48:47 14 MR. WATKINS: Yes, Your Honor, and I can point you
02:48:50 15 to it. I'll just quickly -- actually, we can go to it.

02:48:54 16 Let me use the ELMO.

02:49:15 17 So, Your Honor, here we have Column 2 of the '026
02:49:18 18 patent. This is the only place in the '026 patent where it
02:49:22 19 references the subsystems claimed in Claim 1. And, you
02:49:27 20 know, generally speaking, if you start at -- Line 26, this
02:49:32 21 is language that looks to track the claim language of Claim
02:49:35 22 1. There are some important differences. I'll point out a
02:49:39 23 few of them here, so it's not exactly the same.

02:49:41 24 But in general, you start with some language
02:49:46 25 relating to the vehicle, and then you have the vehicle

02:49:52 1 includes electronics and a subsystem of the vehicle to
02:49:57 2 enable unlocking of the vehicle.

02:49:58 3 So that's the first -- that corresponds to the
02:50:01 4 first subsystem recited in Claim 1.

02:50:07 5 Then it says the subsystem of the vehicle -- or
02:50:09 6 the subsystem, the one that's just referenced, is
02:50:17 7 interfaced with the electronics and a subsystem of the
02:50:20 8 vehicle for enabling starting of the vehicle.

02:50:22 9 So here it's referencing interfaces, one between
02:50:24 10 the electronics and the subsystem for unlocking, and then
02:50:27 11 there's an interface between the subsystem for unlocking
02:50:30 12 and the subsystem for starting.

02:50:32 13 So here's support for the second possibility that
02:50:36 14 I referenced before where the unlocking subsystem receives
02:50:41 15 the instructions from the electronics and then relays those
02:50:44 16 instructions for -- to enable starting to the other
02:50:47 17 subsystem.

02:50:47 18 Now, I'll note that this language relating to the
02:50:55 19 interface with the subsystem for starting the vehicle,
02:50:59 20 that's not in Claim 1 of the '026 patent. There is
02:51:02 21 reference to an interface between the subsystem for
02:51:06 22 unlocking, and maybe we can go back to Claim 1 so I can
02:51:10 23 highlight this.

02:51:19 24 So if we go to Slide 52.

02:51:21 25 So Claim 1 in the first limitation -- the first

02:51:29 1 subsystem limitation references the subsystem being
02:51:33 2 interfaced with the electronics, but it doesn't say
02:51:36 3 anything about another interface with the other subsystem.

02:51:39 4 So there's some open question here as to whether
02:51:44 5 the Possibility 2 is appropriate, but there is support in
02:51:47 6 the specification that we can point to that says, well,
02:51:49 7 there's a second interface between the subsystems, so maybe
02:51:51 8 that's right.

02:51:51 9 Of course, I think the problem here, Your Honor,
02:51:55 10 is that there isn't any disclosure in the specification
02:51:59 11 of subsystems that are interfaced with electronics to do
02:52:03 12 what's claimed here. The only disclosure in the
02:52:07 13 specification relevant to subsystems that are recited in
02:52:11 14 Claim 1 that we can find is in Column 2.

02:52:17 15 And I'll switch back to the ELMO. I'm sorry about
02:52:19 16 that.

02:52:25 17 The problem with Column 2, although it tracks the
02:52:29 18 language of Claim 1, and there are some differences, it
02:52:32 19 also has the same problem. So there's this -- I'll call it
02:52:40 20 1 -- my handwriting is not great, but we'll work with
02:52:43 21 it -- 2. So there's two subsystems. And then towards the
02:52:47 22 bottom of the claim, like in Claim 1, it references the
02:52:51 23 electronics of the vehicle instructs the subsystem of the
02:52:56 24 vehicle to enable unlocking of the vehicle and enable
02:53:01 25 starting of the vehicle.

02:53:02 1 So Claim 1 -- I'm sorry, Column 2 of the '026
02:53:08 2 patent, just Claim 1, has the same antecedent basis
02:53:12 3 ambiguity. It's not clear which of the two subsystems it's
02:53:15 4 referencing. And there's no disclosure of subsystems
02:53:19 5 communicating with each other. There's no disclosure of
02:53:22 6 one subsystem implementing both. There's no such
02:53:24 7 disclosure of electronics that are communicating with two
02:53:30 8 different subsystems, which would be the last possibility
02:53:33 9 that I would have identified.

02:53:39 10 So are we still on that slide? Slide --

02:53:53 11 MR. SKOYLES: 59.

02:53:54 12 MR. WATKINS: Yes, 59.

02:53:55 13 So the Option 3 -- actually I'll go through them
02:53:58 14 in order. The starting subsystem, the second subsystem is
02:54:00 15 the one that's instructed, and it's to enable both
02:54:03 16 unlocking and starting. So the claim doesn't say which
02:54:06 17 subsystem it is. One of them is instructed.

02:54:08 18 The fourth option is the unlocking subsystem, the
02:54:12 19 first one, is instructed to enable unlocking and the
02:54:15 20 starting subsystem is separately instructed to enable
02:54:20 21 starting. That appears to be the one that Your Honor has
02:54:22 22 leaned towards in your preliminary interpretation by
02:54:28 23 injecting -- or inserting "respective."

02:54:32 24 So I'll just read Your Honor's preliminary real
02:54:36 25 quick: The electronics of the vehicle instructs the

02:54:40 1 respective subsystem of the vehicle to enable unlocking of
02:54:41 2 the vehicle and then enable starting of the vehicle.

02:54:45 3 The way I understand that is that Your Honor is
02:54:47 4 leaning towards Possibility 4, but there's no real informed
02:54:51 5 way to make the decision between these four different
02:54:55 6 possibilities in the specification. Option 4 may be one,
02:54:59 7 Option 2, Option 1. I pointed to Option 2 as its support
02:55:06 8 within Claim 2 of the -- or, sorry, Column 2 of the patent.

02:55:14 9 And I would also note one issue we have here is
02:55:17 10 that Emerging Automotive hasn't actually requested a
02:55:21 11 correction of the patent. Your Honor's preliminary
02:55:23 12 construction appears to insert a word, and I'm not sure if
02:55:27 13 that's intended to be a construction or a correction, but
02:55:31 14 we don't have a situation where --

02:55:32 15 THE COURT: I don't consider that --

02:55:32 16 MR. WATKINS: -- something that was proposed by
02:55:32 17 Plaintiff. Sorry.

02:55:34 18 THE COURT: I don't consider that to be a
02:55:36 19 correction.

02:55:36 20 MR. WATKINS: Okay.

02:55:37 21 THE COURT: That is what I believe is the only
02:55:41 22 reasonable construction of the -- of the limitation.

02:55:46 23 But I understand that you have offered other ways
02:55:51 24 to look at it.

02:55:51 25 MR. WATKINS: Yes. And just -- I would refer

02:55:54 1 Your Honor to that description in Column 2 that I went
02:55:56 2 through on the ELMO as support for different possibilities.

02:56:01 3 THE COURT: All right.

02:56:01 4 MR. WATKINS: With that, Your Honor, I will turn
02:56:03 5 it over to Plaintiff's counsel unless you have further
02:56:06 6 questions.

02:56:07 7 THE COURT: All right. Thank you.

02:56:08 8 MR. BELLOLI: May I please have the ELMO?

02:56:12 9 So this is Plaintiff's Slide 40 on the ELMO with
02:56:24 10 Claim 1 of the '026 patent up there.

02:56:29 11 And I think Your Honor is correct, there is only
02:56:32 12 one way to read this. You have two subsystems highlighted
02:56:35 13 in blue and green on the left-hand side, and then you have
02:56:37 14 on the right-hand side of the claim here, on Slide 40, the
02:56:43 15 electronic key or mobile device provided with data to
02:56:46 16 enable an electronic key. And that electronic key can do
02:56:48 17 two things. It can unlock and start, and that's obviously
02:56:53 18 harkening back to those subsystems.

02:56:55 19 So there's no other way to read the claim. And
02:56:59 20 other than that, we submit on the papers unless Your Honor
02:57:03 21 has any questions.

02:57:04 22 THE COURT: What do you have to say about the
02:57:06 23 reference to Column 2, Line 29, and following that
02:57:16 24 Mr. Watkins was referring to?

02:57:17 25 MR. BELLOLI: He said -- or has -- contains

02:57:19 1 essentially the same language as the claim. So if it's
02:57:21 2 consistent with -- I don't see how that language affects
02:57:25 3 really anything in the interpretation of the claim. It was
02:57:29 4 clearly two subsystems. And there's an electronic key that
02:57:32 5 can be used to unlock and start via them.

02:57:42 6 THE COURT: And do you agree that there are
02:57:45 7 references to the subsystems interfacing one another and
02:57:55 8 offering instructions that go beyond what that subsystem
02:58:00 9 itself is enabling?

02:58:04 10 MR. BELLOLI: I'm not -- I don't understand that
02:58:06 11 question, Your Honor.

02:58:08 12 THE COURT: I understood Mr. Watkins to point to a
02:58:13 13 disclosure that indicated that one subsystem could, through
02:58:20 14 interface, instruct another subsystem.

02:58:22 15 MR. BELLOLI: I mean, I don't -- I don't -- I read
02:58:28 16 that column just as I read the claim because it uses
02:58:31 17 essentially the same language as he said, and there's
02:58:34 18 clearly two subsystems, you have an electronic key that can
02:58:37 19 be used that instructs, you know, one or both subsystems.
02:58:46 20 It's the electronic key that unlocks these things so to
02:58:48 21 speak. And it's really the only way to read the claim.

02:58:52 22 THE COURT: All right.

02:58:52 23 MR. BELLOLI: Thank you.

02:58:56 24 MR. WATKINS: Your Honor -- sorry, may I?

02:59:03 25 THE COURT: Yes.

02:59:04 1 MR. WATKINS: Thank you.

02:59:05 2 Just briefly, I -- based on the slide that counsel
02:59:11 3 for Plaintiff just showed and Your Honor's preliminary
02:59:14 4 construction, it's not clear to me that they match. I'm
02:59:18 5 really at a loss as to understand whether Your Honor's
02:59:21 6 construction is meant to match with what Plaintiff showed
02:59:26 7 as far as their position regarding the scope of the claim
02:59:30 8 and how the claim should be interpreted.

02:59:32 9 So the issue -- and this is the part of my
02:59:39 10 presentation that I had skipped over, but if you could go
02:59:44 11 to Slide 57.

02:59:46 12 So at the top left of this slide, I've shown that
02:59:51 13 same section of Column 2 that we looked at before on the
02:59:54 14 ELMO. This is the bottom part of it where it has the
02:59:57 15 corresponding language to what's recited in the disputed
03:00:01 16 claim language.

03:00:02 17 And so it says: The mobile device is provided
03:00:06 18 with data to enable an electronic key to use the vehicle,
03:00:09 19 comma, and the electronics of the vehicle instructs the
03:00:13 20 subsystem of the vehicle to enable unlocking of the vehicle
03:00:16 21 and enable starting of the vehicle for use of the vehicle.

03:00:18 22 To the extent Plaintiffs are arguing that the
03:00:25 23 claim should be read as they propose like in bottom
03:00:28 24 right -- this is our interpretation, I believe the
03:00:31 25 highlighting matches with the highlighting that Plaintiff's

03:00:33 1 counsel showed on their slide -- they're interpreting the
03:00:37 2 mobile device has provided data to enable -- that's one
03:00:41 3 thing. And then the first thing that it's provided with
03:00:47 4 data to enable is an electronic key to use the vehicle and
03:00:50 5 the electronics of the vehicle instructs the subsystem of
03:00:52 6 the vehicle to enable unlocking of the vehicle.

03:00:56 7 Well, I mean, that's not supported by the
03:00:57 8 specification because of the -- the specification, the
03:01:00 9 punctuation there and sort of indicates a different way to
03:01:02 10 parse the claim language.

03:01:03 11 So I'm just searching for some reasoned way to
03:01:10 12 proceed here because it was my understanding of
03:01:12 13 Your Honor's proposed construction that the -- that
03:01:19 14 Your Honor was not sort of agreeing with that construction
03:01:23 15 that Emerging Automotive had proposed. And so it's not
03:01:25 16 clear to us if the preliminary construction would reflect
03:01:30 17 that or not.

03:01:33 18 THE COURT: Well, Emerging Auto did not propose a
03:01:35 19 construction.

03:01:38 20 MR. WATKINS: I agree, Your Honor. Yes, that's
03:01:40 21 correct.

03:01:40 22 THE COURT: I was not agreeing with or disagreeing
03:01:42 23 with something they didn't propose.

03:01:44 24 MR. WATKINS: And maybe I was just confused by
03:01:46 25 counsel's argument that there's only one way to read -- or

03:01:50 1 that the claim is readily understood. And I don't know if
03:01:53 2 they were agreeing with your preliminary construction or
03:01:55 3 not. But to the extent they are maintaining that the claim
03:01:59 4 should be parsed in the way that they described in their
03:02:02 5 brief and as I think reflected on the bottom right of this
03:02:05 6 slide, we would certainly disagree with that. That's the
03:02:08 7 part of my presentation I initially skipped, and I just
03:02:12 8 wanted to come back and describe our disagreement with
03:02:14 9 that.

03:02:18 10 THE COURT: All right.

03:02:18 11 MR. WATKINS: Thank you.

03:02:19 12 THE COURT: Thank you, Mr. Watkins.

03:02:20 13 MR. BELLOLI: Nothing further, Your Honor.

03:02:21 14 THE COURT: All right. Mr. Barney, I have a
03:02:25 15 follow-up question for you about the last term that we
03:02:28 16 argued because it wasn't until Mr. Watkins directed me to
03:02:33 17 Column 2 that I saw.

03:02:38 18 But on the question of the "and," there is a
03:02:50 19 provision in the abstract and in the summary in Column 2
03:02:58 20 where the language is repeated -- the same language that's
03:03:07 21 in the claim limitation we are talking about but without
03:03:10 22 the "and." And why does not that indicate what the intent
03:03:20 23 of the -- of the patentee was?

03:03:24 24 MR. BARNEY: Your Honor, that certainly supports
03:03:28 25 one interpretation. That supports the interpretation where

03:03:32 1 you delete the first "and." And if that were the only
03:03:38 2 evidence in the record that you -- Your Honor probably
03:03:40 3 would have a very good point. But the problem is that
03:03:43 4 prosecution history where they attempted to do that very
03:03:46 5 thing, delete that "and" to make it consistent with that
03:03:48 6 portion of the specification and the examiner said, no, you
03:03:52 7 can't do that because deleting the "and" broadens the
03:03:56 8 if-clause.

03:03:57 9 Now, the if-clause in this portion of the
03:04:00 10 specification is just if the request is authentic. The
03:04:03 11 examiner said by deleting the "and" in the claim language,
03:04:08 12 you would be broadening the if-clause. And so the examiner
03:04:12 13 clearly was not reading the claim language the same way as
03:04:16 14 this portion of the specification. The examiner was
03:04:18 15 reading the claim language in such a way that the if-clause
03:04:22 16 included more than just if the request is authentic.

03:04:25 17 The problem is we don't know how much more. We
03:04:27 18 don't know whether it was perhaps just the next clause,
03:04:31 19 which would make it consistent with that Figure 32 and
03:04:34 20 Figure 33 embodiment that I showed or perhaps something
03:04:39 21 else. And that's what renders this claim term ambiguous.

03:04:43 22 THE COURT: Well, it seems that you're putting all
03:04:45 23 of your eggs in the examiner basket, and I'll have to
03:04:52 24 reread Novo and the -- its progeny on whether or not that
03:04:55 25 is what they intended by the reference to prosecution

03:04:58 1 history.

03:04:59 2 MR. BARNEY: Your Honor, understood. I'm

03:05:00 3 putting -- I'm putting some eggs in both baskets, but your

03:05:04 4 point is well taken, Your Honor.

03:05:06 5 THE COURT: All right. Thank you, Mr. Barney.

03:05:08 6 All right. Mr. Davies.

03:05:32 7 MR. DAVIES: Good afternoon, Your Honor. Ryan

03:05:35 8 Davies for Toyota.

03:05:36 9 This will take us to Term L, as in Lima, where

03:05:41 10 I'll be talking about the user profile patents. That's the

03:05:47 11 '268 patent, which is asserted only against Toyota.

03:05:49 12 I'd like to just briefly overview what this patent

03:05:51 13 is about since we won't be talking about e-keys anymore,

03:05:55 14 but it's about the basic idea of having a portable user

03:05:59 15 profile that automatically loads your preferences in one of

03:06:02 16 multiple vehicles that are out there.

03:06:06 17 I would also like to point out that although it's

03:06:08 18 not before Your Honor, there is a pending motion to dismiss

03:06:12 19 that was filed by Toyota under ineligibility to challenge

03:06:18 20 the claims of the '268 patent. And all I'll say about that

03:06:23 21 is that at that time, neither party had argued that any

03:06:27 22 specific construction was necessary to resolve the

03:06:31 23 ineligibility question, but now at this point in the case,

03:06:34 24 we're deeper in and the time has come for some clarity on

03:06:38 25 the theories that are at play and how Plaintiff plans to

03:06:41 1 show infringement.

03:06:42 2 So we need the Court's resolution on questions of
03:06:47 3 claim scope that were presented in our briefing.

03:06:50 4 Going back to the '268, it's all about the idea of
03:06:53 5 having a vehicle automatically apply settings that's
03:06:58 6 somehow is tied to your user profile. It's expressed in
03:07:02 7 many different -- different ways throughout the patent from
03:07:07 8 its title through the abstracts all the way to the claims.
03:07:10 9 But the idea is a user can drive lots of different cars.
03:07:14 10 The user has a profile that can move between them and is
03:07:17 11 transferred to the vehicle. The user settings are
03:07:21 12 seamlessly transferred. That's an advantage that's touted
03:07:25 13 in the patent. And the settings are automatically applied,
03:07:28 14 all based on the user profile.

03:07:29 15 The kind of settings that we're talking about are
03:07:34 16 seat settings, your temperature, your radio presets.

03:07:38 17 So if we'll go to the next slide.

03:07:40 18 The term that we're talking about here is this
03:07:49 19 lengthy phrase, and we certainly appreciate the Court's
03:07:52 20 preliminary instruction. I just want to refocus where I
03:07:57 21 think the dispute really lies, and that's where -- we know
03:08:02 22 what's not in dispute really is the meaning of plurality,
03:08:05 23 of course. Also, that's -- it's the server that's doing
03:08:08 24 the identifying here.

03:08:09 25 So in the Court's preliminary instruction, I

03:08:12 1 noticed adding the language "identifying by the server,"
03:08:15 2 Toyota is okay with that. But I don't think that really
03:08:19 3 moves the ball anywhere that matters.

03:08:21 4 What's still in dispute is the scope of what it
03:08:23 5 means for the server to identify a plurality of vehicles it
03:08:30 6 has available. And we would submit that that
03:08:34 7 identification of some group of available vehicles has to
03:08:37 8 be tied back to the user profile.

03:08:38 9 So perhaps if Your Honor was amenable to modifying
03:08:42 10 the preliminary instruction, just adding at the very end
03:08:46 11 "for applying the user profile" might get us to where I
03:08:51 12 think Defendants would be okay.

03:08:52 13 So the selected vehicle being one of a plurality
03:08:57 14 of vehicles identified as available by the server or
03:08:59 15 applying the user profile.

03:09:01 16 If we go to the next slide, there's -- there's
03:09:10 17 support for this proposal. Our proposal, it stays true to
03:09:14 18 the plain meaning of the claims in light of the intrinsic
03:09:17 19 record, and it appropriately takes accounts of the
03:09:18 20 statements that were made in the prosecution history,
03:09:20 21 including the amendment, which introduced this very
03:09:23 22 limitation that we're talking about.

03:09:24 23 The intrinsic record is strong. There are two
03:09:28 24 main things I'm going to be talking about. One is the
03:09:32 25 prosecution history where the amendment was made to

03:09:34 1 introduce this feature, and also the -- the IPR which is
03:09:38 2 also intrinsic evidence and where a patent owner relied
03:09:43 3 heavily on this very feature.

03:09:45 4 And the only natural resolution of this is that
03:09:49 5 Defendants' construction is the correct one.

03:09:51 6 So if we move on to the next slide, I'll just
03:09:57 7 briefly walk through the prosecution history.

03:09:58 8 It started with a rejection of all the claims in
03:10:02 9 view of references from the PTO, mainly the Hendrix
03:10:06 10 reference. The applicant had argued that this reference,
03:10:09 11 which is about a vehicle sharing system and managing how
03:10:14 12 those vehicles are able to be used in the system, that
03:10:18 13 there was no -- no user profile that can automatically set
03:10:23 14 one or more preferences of the vehicle. They leaned
03:10:26 15 heavily on this. That wasn't affective.

03:10:28 16 The next action was a final rejection where the
03:10:31 17 examiner explicitly put on the record this interpretation
03:10:33 18 that a user profile, user preferences of the vehicle, these
03:10:37 19 are brought limitations that could indicate one of the many
03:10:41 20 preferences of the vehicle and the actions that can be
03:10:43 21 taken.

03:10:44 22 It was in response to this that applicant
03:10:46 23 conceded, okay, an amendment is necessary, we have to
03:10:50 24 narrow the claims, and specifically added the language that
03:10:53 25 we're talking about now: The selected vehicle being one of

03:10:56 1 a plurality of vehicles identified as available by the
03:10:58 2 server.

03:10:58 3 And if we go to the next slide, we know that an
03:11:04 4 interview happens. What was discussed at the interview
03:11:07 5 we're not quite sure of, but we know that there was
03:11:10 6 emphasis on this feature of the user profile be transferred
03:11:14 7 to the vehicle and apply the settings. That's reflected in
03:11:18 8 the remarks that were made in the accompanying amendment,
03:11:19 9 too. That's -- all the claims together, Claims 1, 10, 20,
03:11:23 10 all the independent claims, they've got all these features
03:11:26 11 that make them allowable over the art.

03:11:34 12 And if you'll go to the next slide.

03:11:34 13 The result of all this, there's various back and
03:11:38 14 forth between the applicant and the examiner. The
03:11:39 15 arguments are imprecise and kind of blended different
03:11:42 16 features of different claims, but the clarity we get is
03:11:44 17 that both the applicant and the examiner seem to consider
03:11:47 18 that these are the features that distinguished from the
03:11:50 19 art, one of them being that there's a provision of options
03:11:56 20 of vehicles that are available for applying the user
03:12:01 21 profile.

03:12:01 22 And the next slide.

03:12:02 23 We get to the IPR where the patent owner relied
03:12:09 24 specifically on this prosecution history calling out
03:12:13 25 explicitly this claim limitation 10[b] and the amendment

1 made to it. And once again, that's this feature, the
2 selected vehicle being one of a plurality of vehicles
3 identified as available by the server, as they were touting
4 all the very specific actions that the server takes in
5 arguing that the grounds presented in the petition were
6 deficient.

7 Now, if you go to the next slide.

8 What Defendants' construction doesn't do is it is
9 not improperly importing any limitations from the
10 specification. What the specification is doing here is
11 providing valuable context. The only description of
12 available in the entire specification is with reference to
13 this example that's on the screen here where the servers
14 will forward a list of available vehicles that are
15 proximate to the user for which he can from them select
16 which one he's going to use, get in, and apply his profile
17 to and drive off in.

18 The reply brief by Plaintiff doesn't identify any
19 embodiments that would be excluded by the construction
20 we're proposing. They just seem to want something broader,
21 but what that is, it's not clear.

22 The characteristic of availability, what is
23 available? It's tied back to the user profile. So
24 whatever available is, it has to be related to being able
25 to apply your user profile to those vehicles.

03:13:49 1 THE COURT: So are you arguing that available has
03:13:53 2 to be understood to mean that the vehicle meets all of the
03:14:00 3 user's profile settings?

03:14:01 4 MR. DAVIES: Your Honor, I'm not advocating a
03:14:04 5 particular meaning. I don't think it's our role. I think
03:14:08 6 it's the patentee's role to define what the claims mean.
03:14:11 7 And what's clear at least is different from being
03:14:13 8 compatible, which is something more specific, so you have
03:14:17 9 the universe of vehicles, then you have something that's
03:14:20 10 available, and then you have compatible settings that you
03:14:22 11 can apply to a particular vehicle.

03:14:28 12 THE COURT: Well -- all right. I'm trying to
03:14:30 13 understand what the significance of adding "to the user"
03:14:37 14 after "available" is as opposed to "available to the user."
03:14:46 15 You're -- you are meaning that it's not available to the
03:14:49 16 user unless it meets the user's profile settings?

03:14:58 17 MR. DAVIES: Would mean that the vehicle is able
03:14:58 18 to apply the user profile. That's what it would mean.

03:15:02 19 While we're on this point, I would also like to
03:15:04 20 point out something that Plaintiffs brought up in their
03:15:07 21 briefing, which was that "to the user" is something we're
03:15:10 22 improperly importing and somehow we're making this a
03:15:14 23 requirement that there has to be a presentation to the user
03:15:17 24 of what's available. That's not what we're arguing. We're
03:15:22 25 arguing that the available vehicles are available to the

03:15:25 1 user. And that's what was intended by that. But, of
03:15:30 2 course, we're amenable to some modifications of this
03:15:33 3 language.

03:15:44 4 THE COURT: And so I think I am understanding
03:15:54 5 correctly. You're saying it's not available to the user
03:15:57 6 unless it is able to meet all of the user's profile
03:16:08 7 settings?

03:16:09 8 MR. DAVIES: I may need to think about that,
03:16:11 9 but --

03:16:11 10 THE COURT: I mean, available to the user or --
03:16:14 11 I'm sorry, available would just mean it's sitting there on
03:16:18 12 the lot available. And it's not necessarily tied to the
03:16:22 13 question of whether or not it satisfies all of the user's
03:16:27 14 profile settings.

03:16:29 15 MR. DAVIES: Correct. I understand, Your Honor.
03:16:30 16 Yes, that would be what I understand that to mean. Simply
03:16:35 17 available doesn't do it. It has to be available to apply
03:16:38 18 the user's profile, which could mean that, yes, that
03:16:43 19 available -- that vehicle is available for allowing the
03:16:46 20 user to put his settings that are specified in that profile
03:16:51 21 into that vehicle.

03:16:52 22 THE COURT: All right.

03:16:59 23 MR. DAVIES: But, again, there is separately
03:17:00 24 recited the compatibility requirement, which is something
03:17:04 25 different.

03:17:20 1 THE COURT: One reason I ask is that I'm not sure
03:17:23 2 that just including the language to the user accomplishes
03:17:30 3 the limitation that you're seeking.

03:17:44 4 MR. DAVIES: Your Honor, perhaps I'm just kind of
03:17:48 5 thinking on the fly here but striking to the user, the
03:17:52 6 thing that's important is the highlighted in this slide
03:17:56 7 here, "for applying the user profile."

03:18:06 8 THE COURT: So your understanding of this would be
03:18:11 9 that if any one of the items in the profile is not present
03:18:15 10 or, you know, enabled in the vehicle, then it's not
03:18:22 11 available?

03:18:23 12 MR. DAVIES: That may be something I'd need to
03:18:29 13 think about a little further. I'm not sure if I can give
03:18:32 14 an answer right on the spot now.

03:18:46 15 THE COURT: All right. Thank you, Mr. Davies.

03:18:47 16 MR. DAVIES: Thank you, Your Honor. I'll sit
03:18:49 17 down.

03:18:49 18 THE COURT: I'll give you a chance to respond to
03:18:51 19 the argument. Thank you.

03:18:51 20 MR. DAVIES: Thank you.

03:18:52 21 MR. TICE: May I have the ELMO, please?

03:19:06 22 Good afternoon, Your Honor. Jerry Tice on behalf
03:19:20 23 of the Plaintiff.

03:19:20 24 As my colleague mentioned at the beginning of his
03:19:26 25 presentation, Claim 12, also Claim L in your preliminary

03:19:33 1 construction, is a lengthy phrase. It's actually three
03:19:36 2 phrases.

03:19:37 3 The first phrase is: Identifying a selected
03:19:43 4 vehicle for applying the user profile.

03:19:45 5 The second phrase is: The selected vehicle having
03:19:48 6 a plurality of settable settings.

03:19:50 7 And the third is: The selected vehicle being one
03:19:52 8 of a plurality of vehicles identified as available by the
03:19:56 9 server.

03:19:56 10 And these phrases taken alone and together are
03:20:04 11 straightforward words that we say do not need construction.

03:20:08 12 And when we look at Defendants' proposed
03:20:10 13 construction, it's -- it seems to be a lot of changing
03:20:16 14 words, changing the order of things, and sneaking in
03:20:18 15 additional words here or there. And, you know, after my
03:20:22 16 colleague's presentation, it's not clear to me what the
03:20:26 17 definition is supposed to be doing, but there are at least
03:20:30 18 a few problems with it.

03:20:31 19 The biggest one is there's no reason to rewrite
03:20:34 20 the claim at all, especially in this matter that
03:20:38 21 essentially takes the entire element and just rephrases it.

03:20:42 22 Second, we take issue with injecting the phrase
03:20:47 23 "to the user" into the term.

03:20:49 24 Now, what we thought we understood but more
03:20:53 25 unclear now is that "to the user" meant that the server

03:20:59 1 identifies two or more vehicles that are available to the
03:21:02 2 user, meaning that there has to be at least two vehicles
03:21:06 3 that are available to the user at any given time.

03:21:09 4 THE COURT: And do you consider a vehicle
03:21:12 5 available to the user even if it doesn't satisfy all of the
03:21:19 6 user's profile settings?

03:21:21 7 MR. TICE: I do, Your Honor. I think a vehicle is
03:21:24 8 available to the user if the user is able to use the
03:21:27 9 vehicle. And I think that it kind of gets into the point
03:21:34 10 of the '268 patent and the claims is that the '268 patent
03:21:39 11 is about portability of settings in a vehicle, and kind of
03:21:45 12 what that means is if I, you know, get in Car A and I set
03:21:53 13 my settings, I get in Car B and have different settings,
03:21:57 14 then I can have settings on the server that are my
03:22:00 15 preferences. And my Car A and my Car B may not have the
03:22:03 16 exact same settings. One may have a sunroof. One may have
03:22:06 17 a seat heater.

03:22:09 18 And kind of the purpose of the '268 patent or one
03:22:12 19 of the purposes is that it will perform a compatibility
03:22:18 20 check, the server will, to see what settings I can actually
03:22:22 21 apply to the vehicle that I am in. So in that sense, yes,
03:22:23 22 I would say a vehicle is available to a user even if all of
03:22:28 23 the users' settings are not available to be set in that
03:22:33 24 vehicle.

03:22:42 25 THE COURT: And you would agree, though, that in

03:22:44 1 order to satisfy this limitation, the plurality of vehicles
03:22:47 2 identified as available are vehicles that are available to
03:22:52 3 the user?

03:22:53 4 MR. TICE: No, I disagree, Your Honor. And I
03:22:55 5 think there are many examples in the specification that do
03:23:01 6 not comport with that understanding.

03:23:03 7 So if I could direct you to Column 6, Lines 43 to
03:23:16 8 46, and it describes one of the benefits of the '268
03:23:20 9 patent. And in this section, it describes a user who gets
03:23:26 10 a new car. And that user has his or her settings set in
03:23:33 11 the old car, and they're saved on the server. When the
03:23:35 12 user gets a new car, the user can then apply the settings
03:23:40 13 to the new car.

03:23:41 14 Now, oftentimes, and probably most likely, the old
03:23:44 15 car is no longer available to the user. The patent is
03:23:49 16 about the portability of user settings from one car to
03:23:52 17 another. The user doesn't have to have many cars available
03:23:57 18 to him or her at one given time.

03:24:00 19 Another example from the specification --

03:24:03 20 THE COURT: Well, this limitation requires that
03:24:07 21 there be a plurality of vehicles identified as available.
03:24:12 22 So how would that apply to the situation you're describing?

03:24:16 23 MR. TICE: I agree, Your Honor. The term requires
03:24:21 24 a plurality of vehicles that are available, and those are
03:24:25 25 vehicles that are available for applying user settings.

03:24:30 1 Now, let me direct you to Claim 7, if I may -- or
03:24:34 2 Figure 7, if I may. And I think Figure 7 illustrates
03:24:41 3 several problems with what I understand Defendants'
03:24:44 4 proposed construction to be to the extent I do understand
03:24:47 5 it. And this figure is discussed in Column 16 along Lines
03:24:56 6 46 to about 67. And Figure 7 shows a scenario where a
03:25:05 7 user, Bob in this case, walks up to a car. And we can see
03:25:09 8 that car here is a Make -- Maker C, Model M7. And this is
03:25:09 9 the only car in this embodiment that's discussed.

03:25:18 10 So there's one car. Bob identifies that car via
03:25:23 11 Bob's device, and it goes up to the server.

03:25:26 12 Now, the server has many automakers in its
03:25:31 13 embodiment and many models. And those are the plurality of
03:25:36 14 vehicles that are available. And as Bob has Make C, M7,
03:25:46 15 the server has Make C, M7. So the server is able apply
03:25:46 16 Bob's user profile to that make and model.

03:25:53 17 Now, if Bob were to later to walk up to a vehicle
03:25:56 18 a Make A, M1, it could apply that one, too. So that is
03:25:59 19 what the plurality of vehicles is getting at, Your Honor.
03:26:04 20 That is kind of what was discussed in prosecution to
03:26:07 21 overcome the claims is that the server performs this
03:26:10 22 compatibility check to determine which settings are
03:26:15 23 compatible with specific vehicles.

03:26:19 24 And a clarification that was added for multiple
03:26:21 25 vehicles was that there has to be multiple available

03:26:26 1 vehicles in a server for applying the settings. Otherwise
03:26:29 2 it wouldn't really make sense to perform a compatibility
03:26:38 3 check to apply certain settings to certain cars based on
03:26:41 4 those cars' capabilities.

03:27:04 5 THE COURT: All right.

03:27:05 6 MR. TICE: So if I may, Your Honor, back to the
03:27:07 7 Defendants' proposed construction, there's a couple of
03:27:14 8 problems that we see with it.

03:27:17 9 One, when you completely rewrite an entire
03:27:20 10 limitation using different orders, different phrases,
03:27:23 11 you're going to change the scope. Whether intentional or
03:27:26 12 not, you're just going to.

03:27:26 13 And then two additional problems is as we just
03:27:30 14 mentioned, Emerging Auto disagrees that a user has to have
03:27:36 15 multiple vehicles available to him or her at any given
03:27:42 16 time.

03:27:42 17 And then the third kind of issue we take with the
03:27:46 18 definition is that we disagree that the server is required
03:27:52 19 to identify this selected vehicle. As we showed in Figure
03:27:59 20 7 on the ELMO, there's multiple things that identify the
03:28:04 21 selected vehicle. When Bob walks up to the car, he
03:28:11 22 identifies and selects the vehicle. Bob's device
03:28:12 23 identifies the selected vehicle, and the server also
03:28:13 24 identifies the selected vehicle and that Bob's device sends
03:28:17 25 the information to the server.

03:28:19 1 So with those three issues excluded from
03:28:24 2 Defendants' proposed construction, I mean, I think we're
03:28:27 3 just left with the claims as they're written and easily
03:28:30 4 understood and no construction is necessary.

03:28:38 5 THE COURT: And so tell me again the other devices
03:28:41 6 that you would contend identify the selected vehicle in
03:28:45 7 Claim 10.

03:28:49 8 MR. TICE: Yes, Your Honor.

03:28:50 9 One would be Bob's device. In this scenario,
03:28:52 10 Figure 7, Bob approaches the vehicle Make C, M7, and the
03:29:02 11 phone senses the vehicle and sends that information to the
03:29:04 12 server. So Bob's device is identifying the selected
03:29:07 13 vehicle, in addition to Bob who is identifying the selected
03:29:11 14 vehicle. And, of course, the server identifies the
03:29:13 15 selected vehicle, as well.

03:29:15 16 And if we look at the claim, I think it tells you
03:29:25 17 that it's not the server that necessarily identifies the
03:29:31 18 selected vehicle.

03:30:02 19 We have Claim 10, Your Honor -- the first
03:30:11 20 limitation of Claim 10 is receiving, at a server. The
03:30:19 21 third limitation, determining, by the server. The next
03:30:30 22 limitation, sending, by the server. But if we're looking
03:30:37 23 at the limitation that we're talking about now,
03:30:41 24 limitation -- Term L, it just says identifying a selected
03:30:43 25 vehicle.

03:30:49 1 THE COURT: From among a plurality of vehicles
03:30:52 2 identified as available by the server.

03:30:54 3 MR. TICE: Yes, Your Honor.

03:30:58 4 THE COURT: There's no reference to any other
03:31:01 5 device in this claim.

03:31:04 6 MR. TICE: Yes, I would agree, Your Honor. And it
03:31:06 7 could be multiple devices, as we discussed in relation to
03:31:10 8 Figure 7.

03:31:13 9 THE COURT: All right. Thank you, Mr. Tice.

03:31:23 10 MR. DAVIES: Your Honor, I'll just briefly respond
03:31:35 11 to -- I think what is clear, no one can dispute, is that a
03:31:39 12 server identifies a plurality of vehicles as available.
03:31:47 13 That's quite clear from the claim language.

03:31:48 14 What my friend also just said was that the
03:31:53 15 compatibility check really only makes sense in a certain
03:31:57 16 scenario, and that's when you have some pool of vehicles,
03:32:01 17 and from that you're able to apply compatible settings to
03:32:06 18 the selected one. So there you have some differentiation.

03:32:10 19 And another thing that I heard was that it seems
03:32:14 20 that Plaintiff is okay with a definition of available that
03:32:17 21 means available to "the user." So "the user" is able to
03:32:21 22 use the vehicle was something I think I heard, and
03:32:26 23 Defendant would be okay with that kind of construction that
03:32:31 24 encompasses a determination of plurality of available
03:32:34 25 vehicles and the available vehicles are the ones that "the

03:32:38 1 user" is able to use.

03:32:41 2 And that's all I have.

03:32:42 3 THE COURT: All right. Thank you, Mr. Davies.

03:32:50 4 MR. TICE: Just briefly, Your Honor, I would note
03:32:52 5 that Emerging Auto would disagree that there needs to be a
03:32:56 6 plurality of vehicles available to the user at a given
03:33:00 7 time.

03:33:01 8 THE COURT: All right. Thank you.

03:33:08 9 MR. DAVIES: And I think that brings us to the
03:33:10 10 final term that we'll be arguing today, which is N, as in
03:33:18 11 Nancy.

03:33:18 12 And, Ms. Andrews, if we could have the slides.

03:33:21 13 Thank you.

03:33:22 14 This term is about changes. And like before, it's
03:33:30 15 rather lengthy -- and if we'll go to the next slide -- it
03:33:34 16 makes some sense with color coding to decipher what the
03:33:41 17 dispute is.

03:33:43 18 So the problem is there's no clear antecedent for
03:33:46 19 the changes that's referenced repeatedly throughout the
03:33:50 20 claim. And there's multiple possible ways to interpret
03:33:55 21 what the changes could refer to if the Court were to
03:33:58 22 rewrite the claim language.

03:33:59 23 So I'll just walk through it. If we begin:

03:34:03 24 Communicating to the cloud processing system by the

03:34:06 25 vehicle, changes to the user settings -- the first instance

03:34:09 1 highlighted in yellow -- the cloud processing system
03:34:12 2 processing the changes -- no problem there, we're referring
03:34:15 3 back to the previously recited changes -- and other
03:34:18 4 changes -- okay, we've introduced something new, the green
03:34:21 5 highlighted other changes, that's something different -- to
03:34:24 6 the user setting to learn behavior associated with the
03:34:28 7 changes.

03:34:29 8 Oh, now we've got a problem. In this instance, we
03:34:32 9 don't know which changes we're referring to. It could be
03:34:36 10 the yellow changes that are first introduced. It could be
03:34:40 11 the other changes, or it could be both. The specification
03:34:46 12 provides descriptions of all three of these scenarios. So
03:34:49 13 we're not left with guidance as to what is the proper one
03:34:53 14 to choose from.

03:34:53 15 If we continue on, it gets worse. The changes to
03:34:57 16 the user settings; and receiving by the vehicle, from time
03:35:00 17 to time, automatic changes -- okay, we've introduced even
03:35:03 18 further changes here, the blue highlighted one -- automatic
03:35:07 19 changes to the user settings of the vehicle, wherein a
03:35:09 20 repeat pattern of the changes is qualified as learned
03:35:14 21 behavior -- another instance of the changes, and it's
03:35:16 22 unclear whether this refers back to the same prior
03:35:19 23 invocation of the changes, which was in the red highlighted
03:35:23 24 instance or if that's, again, something different because
03:35:27 25 now we've got automatic changes which can be thrown into

03:35:31 1 the mix here.

03:35:31 2 So if we go to the next slide, we'll talk about
03:35:36 3 how there are multiple different interpretations here. It
03:35:40 4 seems that the Court's preliminary construction is leaning
03:35:45 5 towards taking the red highlighted, "the changes," as being
03:35:50 6 the yellow changes and other changes -- and the green
03:35:55 7 changes. So that would not be this instance. This would
03:35:58 8 actually be read out if that were the interpretation to be
03:36:01 9 adopted.

03:36:02 10 But that wouldn't be appropriate because the
03:36:05 11 specification talks about how the scenario is possible.
03:36:09 12 It's one of the many that are discussed and talked about as
03:36:15 13 having all the advantages that would produce -- be produced
03:36:19 14 in this system.

03:36:20 15 So as examples here, the specification talks about
03:36:23 16 the particular instance where settings are changed by the
03:36:26 17 user himself in one session of using the vehicle, and those
03:36:29 18 are the changes that are taken and learned from and used
03:36:35 19 for -- for updating the user profile.

03:36:37 20 And you see in the quote here at the bottom of
03:36:40 21 this slide: The settings that are made by the user -- and
03:36:42 22 then repeatedly referencing thereafter -- the user making
03:36:46 23 changes to his profile and those changes are communicated
03:36:50 24 back into a feedback loop to maintain the user's best liked
03:36:57 25 preferences.

03:36:57 1 If you go to the next slide, this is an
03:37:00 2 illustration of what we think corresponds to that
03:37:02 3 embodiment where in the highlighted box in Figure 9A, Box
03:37:07 4 372, the changes that the user makes are used to update or
03:37:16 5 save settings based on what the user has done in the
03:37:24 6 vehicle.

03:37:24 7 If we go to the next slide, another embodiment
03:37:28 8 illustrated by the figures where on the right, you can see
03:37:32 9 a user could manipulate the temperature settings in the
03:37:36 10 vehicle. The specification talks about what's done with
03:37:40 11 that data taken after the user actually makes those
03:37:43 12 adjustments. And in Figure 15, you can see learning is one
03:37:47 13 of the things that it can do, and that would be another
03:37:49 14 example of this feedback loop that happens with just the
03:37:53 15 user making changes on the vehicle that gets fed back and
03:37:59 16 behavior is learned from that.

03:38:00 17 If we go to the next slide.

03:38:01 18 This is a different interpretation where the
03:38:05 19 learned behavior is not those settings but instead there
03:38:08 20 are other -- other changes to the settings. And explicitly
03:38:14 21 in the specification, it calls this out. The bullet point
03:38:18 22 referencing Column 15, Lines 24 to 30: User 1 can make
03:38:24 23 changes on behalf of User 2. That means some other changes
03:38:27 24 than the ones that the user himself is making can be taken
03:38:30 25 into account to update settings and update the user's

03:38:34 1 profile.

03:38:35 2 If you go to the next slide.

03:38:37 3 Further still, there's the interpretation where
03:38:40 4 both of those things are taken into account. The
03:38:44 5 specification, sure, it has support for that, too, but in
03:38:47 6 addition to these other embodiments, too. So by adopting
03:38:51 7 the one instance here of what's on the screen, that would
03:38:56 8 be reading out those other two possible interpretations.

03:39:03 9 And we know that according to Federal Circuit law
03:39:06 10 any construction that would read out embodiments of the
03:39:09 11 specification can't -- is rarely if ever correct, I think,
03:39:12 12 is the language.

03:39:15 13 The impression we're left with, the changes, it's
03:39:19 14 ambiguous. The specification provides multiple plausible
03:39:23 15 alternatives, and we're not sure which one it refers to.
03:39:27 16 In fact, the specification even says it should be
03:39:30 17 interpreted broadly. You know, there's some language like
03:39:34 18 that which would infer -- which would suggest that it's --
03:39:39 19 it wouldn't be this one, Interpretation 3. That would be
03:39:43 20 even narrower. If it's taken together, changes to the user
03:39:47 21 settings, plus the other changes and requiring both of
03:39:51 22 them. If we were to say, oh, no, take it as broadly as
03:39:54 23 possible, that would mean one or the other. But, again,
03:39:57 24 that's not what we have here.

03:39:58 25 Again, that's another alternative, but we're not

03:40:00 1 sure which -- what's actually invoked by the changes that's
03:40:05 2 recited in the claims.

03:40:06 3 And that's all I have unless Your Honor has
03:40:09 4 questions.

03:40:10 5 THE COURT: Not at this time. Thank you,
03:40:12 6 Mr. Davies.

03:40:12 7 MR. DAVIES: Thank you, Your Honor.

03:40:13 8 MR. TICE: Claim Term 14, Your Honor, it's
03:40:40 9 labeled N on your preliminary construction, which I think
03:40:43 10 hit -- it the nail on the head.

03:40:44 11 What the claim requires is receiving changes from
03:40:47 12 the vehicle and receiving other changes. This is detailed
03:40:52 13 in the spec throughout. It shows the server can receive --
03:40:58 14 or, excuse me, the cloud processing system can receive
03:41:00 15 changes from the vehicle, receive changes from a user's
03:41:05 16 application, receive changes from other users, other
03:41:10 17 vehicles, et cetera. So we know there's many inputs that
03:41:15 18 can be received by the cloud processing system.

03:41:16 19 Now, what the claim requires is you receive
03:41:20 20 changes from the vehicle, and you receive other changes.
03:41:23 21 Then the claim states that you learn behavior associated
03:41:28 22 with the changes, and those are the changes from above.

03:41:31 23 Now, my colleague mentioned a few embodiments in
03:41:36 24 the specification. One was an embodiment where the user
03:41:41 25 changed changes in the vehicle, and those changes were used

03:41:44 1 for learned changes.

03:41:46 2 A second was the server received changes from
03:41:51 3 outside the vehicle, and learned changes were learned from
03:41:54 4 those.

03:41:55 5 But what the claim requires here is that the cloud
03:41:59 6 server receive both. And it's clear that it processes both
03:42:03 7 to learn the behavior of the user.

03:42:07 8 Now, what is not in any of the embodiments that
03:42:10 9 I'm aware of is that the server is, you know, receiving
03:42:15 10 changes from the vehicle, receiving other changes, throwing
03:42:18 11 out some of them, ignoring them, and only learning behavior
03:42:22 12 from the received vehicle.

03:42:25 13 So with the way the claim is written, I think -- I
03:42:27 14 think it's very clear that you're receiving the two
03:42:30 15 changes, and you're processing those to do the learned
03:42:33 16 behavior. And that's the first red changes here.

03:42:37 17 And then the second red changes is what's
03:42:40 18 qualified as learned behavior. So I think that
03:42:43 19 Your Honor's preliminary construction recognizes this, and
03:42:48 20 nothing further from us, Your Honor.

03:42:49 21 THE COURT: All right. Thank you, Mr. Tice.

03:42:54 22 MR. DAVIES: Your Honor, may I --

03:42:54 23 THE COURT: Yes.

03:43:04 24 MR. DAVIES: -- respond?

03:43:05 25 Just one thing. To have the rewrite that the

03:43:10 1 preliminary construction and what Emerging Auto would
03:43:13 2 suggest, that would have the very same phrase "the changes"
03:43:18 3 that's in the claims refer to different things in different
03:43:20 4 spots, and that cannot happen. That is against the very
03:43:25 5 principles of claim construction law that we think are
03:43:29 6 pertinent in this case.

03:43:32 7 THE COURT: All right.

03:43:32 8 MR. DAVIES: And with that, that's all I have.

03:43:34 9 THE COURT: I understand that argument. Thank
03:43:35 10 you, Mr. Davies.

03:43:38 11 MR. TICE: And nothing further, Your Honor.

03:43:40 12 THE COURT: All right. Well, you have given me a
03:43:46 13 lot to review further, which I intend to do. And I will
03:43:51 14 endeavor to get a claim construction order out promptly.
03:43:54 15 So I thank you for your arguments.

03:43:55 16 And with that, we're adjourned.

03:43:58 17 COURT SECURITY OFFICER: All rise.

03:43:59 18 (Hearing concluded at 3:43 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
CERTIFIED SHORTHAND REPORTER
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