

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

Auto Telematics Ltd.,

Plaintiff,

v.

United Services Automotive Association,

Defendant.

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Civ. No. 6:22-CV-00474-ADA-DTG

Jury Trial Demanded

PLAINTIFF'S CLAIM CONSTRUCTION SUR-REPLY BRIEF

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES 2

I. INTRODUCTION 1

II. CLAIM TERMS USAA INCORRECTLY CONTENTS REQUIRE CONSTRUCTION 1

 a. “sensor set” 1

 b. “driving period” 4

III. CLAIM TERMS USAA INCORRECTLY CONTENTS ARE INDEFINITE..... 7

 a. “driving information”..... 8

 b. “driving score” 9

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

AVM Techs., LLC v. Intel Corp.
No. 15-33-RGA, 2016 WL 41827402016 (D. Del. Aug. 5, 2016)3

Dynocom Indus., Inc. v. Mainline Auto. Equip. Pty. Ltd.
No. 2:16-CV-00553-JRG-RSP, 2017 WL 30208262017 (E.D. Tex. July 17, 2017)3

Fintiv, Inc. v. Apple Inc.
Civ. No. 6:18-CV-00372, Dkt. No. 86 (W.D. Tex. Nov. 27, 2019)2, 3

Freescale Semiconductor, Inc. v. Promos Techs., Inc.
561 F. Supp. 2d 732 (E.D. Tex. 2008).....2

Kemin Foods, L.C. v. Omniactive Health Techs., Inc.
Civ. No. 8:07-CV-1308-T-33TGW, 2009 WL 315670 (M.D. Fla. Sept. 27, 2009).....3

Phillips v. AWH Corp.
415 F.3d 1303 (Fed. Cir. 2005).....1

Thorner v. Sony Computer Entm’t Am. LLC
669 F.3d 1362 (Fed. Cir. 2012).....2

Toshiba Corp. v. Imation Corp.
681 F.3d 1358 (Fed. Cir. 2012).....1

I. INTRODUCTION

USAA has not shown that any term from the Asserted Patents requires a construction. Thus, the default claim constructions—the plain and ordinary meaning—should apply to each term. Additionally, USAA has not demonstrated by clear and convincing evidence that any term from the Asserted Patents is indefinite. These terms, too, should be given their plain and ordinary meaning. Auto Telematics relies for the most part on the arguments made in its Response brief (Dkt. No. 34), which USAA either ignores or fails to rebut meaningfully. Below, Auto Telematics addresses a few discrete arguments made in USAA’s Reply (Dkt. No. 35).

II. CLAIM TERMS USAA INCORRECTLY CONTENDS REQUIRE CONSTRUCTION

a. “sensor set”

Contrary to USAA’s arguments, Auto Telematics has not asked the Court to “rewrite” the “sensor set” limitation. *See* Reply at 1. Auto Telematics is simply asking the Court to follow black-letter patent law: decline to construe the terms and instead give them their plain and ordinary meaning because (1) the patentee has not acted as his own lexicographer, (2) the patentee has not clearly and unmistakably disavowed claim scope, and (3) the meaning and scope of the terms is easily discernable even to a layperson reading the claims. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (Fed. Cir. 2005) (two exceptions to the general rule that plain and ordinary meaning controls); *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1369 (Fed. Cir. 2012) (absent exceptions, plain and ordinary meaning controls).

USAA fails to acknowledge or appreciate the purpose of claim construction. Claim construction is the first step in the infringement analysis. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996) (“[There are] two elements of a simple patent case, construing the patent and determining whether infringement occurred”). Here, USAA’s request that the

Court give a specific and precise definition to “sensor set” would do nothing to resolve issues of infringement or validity. For example, defining the scope of a claim signals to a defendant (or potential defendant) whether their actions infringe the claims. Here, there is no question that the accused USAA system includes each sensor listed in the claim—so USAA’s proposed construction would do nothing to move the needle in this regard. With regards to validity, the analysis is similar: “sensor set” is satisfied if one or more of the listed sensors is present in a mobile device in the prior art. The remainder of each claim—in light of the disclosures in the specification—simply provides additional information to a POSITA about which particular sensor or sensors are necessary to carry out the function of a particular claim. This is not a question of claim scope; rather, it is a fact question about what an accused system includes or what the prior art discloses.

This Court considered a similar situation in *Fintiv v. Apple*, where the defendant argued that a construction of “mobile device information” was necessary to resolve the issue of whether “other types of information . . . qualify as mobile device information.” More specifically, Apple argued that a specific construction was necessary because “[w]ithout such a construction, a jury may be misled into thinking that other types of information . . . qualify as mobile device information.” *Fintiv, Inc. v. Apple Inc.*, Civ. No. 6:18-CV-00372, Dkt. No. 86 at 25 (W.D. Tex. Nov. 27, 2019). The Court rejected this rationale and declined to construe the term, noting that “neither of the exceptions to the general rule that plain-and-ordinary meaning applies are present here.” *Id.* at 26 (citing *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012)).

Whether a particular piece of information is mobile device information or not is a fact question, which is for the jury to decide. *Freescall Semiconductor, Inc. v. Promos Techs., Inc.*, 561 F. Supp. 2d 732, 757 (E.D. Tex. 2008)) (“Whether types of metal ions in addition to those specifically listed in the specification should be considered mobile ions will be a question of fact based on the proper construction of this term. The court need not determine this fact question during the claim

construction process.”); *AVM Techs., LLC v. Intel Corp.*, No. 15-33-RGA, 2016 WL 41827402016, at *9 (D. Del. Aug. 5, 2016) (“Whether a particular accused product has one input transistor or multiple input transistors is a fact question for a jury to decide. Intel has thus failed to show that its proposed limitation is warranted as a matter of claim construction.”); *Dynocom Indus., Inc. v. Mainline Auto. Equip. Pty. Ltd.*, No. 2:16-CV-00553-JRG-RSP, 2017 WL 30208262017, at *8 n.2 (E.D. Tex. July 17, 2017) (“determining the amount of allowable misalignment that would be considered a ‘common axis’ is likely a fact question, and not a claim construction issue.”).

Fintiv, Civ. No. 6:18-CV-00372, Dkt. No. 86 at 26. As the Court further noted, “[t]he Seventh Amendment guarantees a trial by jury and this Court will not ‘invade the province of the jury by deciding factual issues.’” *Id.* (quoting *Kemin Foods, L.C. v. Omniactive Health Techs., Inc.*, Civ. No. 8:07-CV-1308-T-33TGW, 2009 WL 315670, at *10 n.8 (M.D. Fla. Sept. 27, 2009)). Similarly, here, the question of whether the accused system includes the necessary sensor elements and the other limitations of the claim or whether the prior art discloses the invention are fact questions for the jury, not a question of claim construction the Court must address.

USAA’s suggestion that the plain and ordinary meaning of the term “fails to tell the Court what the scope is” is wrong. *See* Reply at 2. Claim terms need not be read in isolation from all other terms when determining claim scope. When reading the entirety of any claim in light of the specification, the sensors required to carry out claim terms are clear, and would be clear to a POSITA. USAA does not—and cannot—provide a single example to the contrary. If USAA’s argument were true, patents could never claim anything in the alternative without having an indeterminate claim scope.

USAA inconsistently argues that the claim scope is unclear but asks for a specific construction (without asserting indefiniteness). This strategy is telling. Laid bare, USAA’s arguments have nothing to do with claim scope. As previewed in its invalidity contentions, USAA intends to argue at a later date that every embodiment of the patents must be capable of being carried out by any single sensor and by every possible combination of sensors. But that is not the

argument before the Court, and setting up such an argument is not the purpose of claim construction.

Contrary to USAA’s arguments (Reply at 3), if the Court adopts the plain and ordinary meaning of “sensor set,” it **does** allow the meaning of “sensor set” to be fixed and to be used consistently throughout the claims. A “sensor set” is a set of sensors comprising one or more of the listed sensors—just as the claim language says. USAA’s insistence that this straightforward understanding of the claim language is somehow deficient can only be explained as an attempt to gain leverage in the as-yet-unbriefed written description arguments. The Court need not wade into, much less decide, those issues now. Instead, it should decline to construe this straightforward claim term and hold that the plain and ordinary meaning of the term applies.

b. “driving period”

USAA argues that adopting the plain and ordinary meaning of “driving period” is tantamount to “eliminat[ing] the claim requirement altogether.” Reply at 4. USAA errs. The claim language provides, *e.g.*, “a driving period during which the mobile device is removably attached to the vehicle and the vehicle is in use.” ’271 Patent at Claim 1. That language is straightforward and easy to understand. USAA does not provide any compelling argument why it should be rewritten.

USAA goes on to argue Auto Telematics concedes that USAA “[m]erely recit[es] the claim language.” USAA errs anew. In fact, Auto Telematics argued that “**lo[n] its face**, USAA’s proposed construction **appears** just to recite language that already appears elsewhere in the claim.” Response at 12 (emphases added). Of course, appearances can be deceiving, and so too is USAA’s proposed construction. USAA’s arguments eventually make clear that its proposed construction seeks to modify the claim language by improperly introducing limitations that are not recited in the claims and cannot be justified in light of the specification. USAA’s proposed construction

would actually amount to a significant rewriting the claim language to state the following (example from '271 Patent at Claim 1):

determine, based on inputs received by the user interface and sensor data from the sensor set, a start of a driving period **which to begin requires that the mobile device be removably attached to the vehicle and the vehicle be in use, and for the entire duration of which the mobile device must be attached to the vehicle and the vehicle must be in use and before the start of which the system must confirm that the mobile device is so attached** ~~during which the mobile device is removably attached to the vehicle and the vehicle is in use~~

Again, these erroneous limitations are not even explicitly recited in USAA's proposed construction. Instead, they appear only in the arguments, revealing USAA's hopes to secure a seemingly innocuous claim construction only to argue that the Court must have agreed with all the ancillary limitations that do not appear directly in the proposed construction. This is improper and should be rejected.

USAA doubles down on its misplaced argument that the system must determine that the mobile device is attached to the vehicle before a driving period can start. *See* Reply at 8. In this regard, USAA argues that "[t]he claim language is clear. The system must determine the start of a driving period." *Id.* It is true that "a start of a driving period" is determined in the claim. But the claim itself defines how this occurs—not lawyer argument posited by USAA. USAA attempts to introduce other limitations above and beyond what is contained in the claim language to *define* what a "driving period is," despite the fact that the claim already defines what is required to register the start of a driving period. For example:

determine, based on inputs received by the user interface and sensor data from the sensor set, a start of a driving period

wherein the mobile communications device is controlled by a downloaded application to control the mobile device to **register the start of the driving period in response to an initialization input generated automatically in response to the sensor data having predetermined values, wherein the initialization input is generated in response to sensor data reflecting a detected speed above a predetermined threshold.**

'271 Patent at Claim 1 (emphases added). It is these elements that define the start of the driving period—not the “removably attached” and “in use” elements, which merely provide additional limitations in the claim. Additionally, USAA completely ignores and therefore concedes by implication Auto Telematics’s claim differentiation argument. *See* Response at 15 (discussing dependent Claim 2, which recites in part, “register[ing] the attachment of the mobile device to the vehicle”). The artificial construction USAA posits misses the mark because it would render Claim 2 duplicative and meaningless.

As Auto Telematics noted (Response at 13–14), USAA improperly seeks to limit the “driving period” to require that the mobile device be attached or affixed to the vehicle for the entire duration of the driving period, even though the claim uses the word “during.” *See*. USAA quibbles with this criticism, arguing its understanding is wrong but again providing no support other than its own argument that it does not like that interpretation. Only Auto Telematics’s understanding gives appropriate breadth to the claim (as the law of claim construction requires) and uses the word “during” in accordance with its plain and ordinary meaning (as the law also requires). For example, in the course of the Super Bowl next Sunday, to the delight of some and an annoyance to others, advertisements will be presented. Those ads are not played *for the duration of* the Super Bowl broadcast. They are played *during* the broadcast—*i.e.*, at certain points in time or stages within the broadcast. Similarly, here, the subject claim limitation is that the mobile device must be removably attached to the vehicle *during* the driving period. It may be for the duration of the driving period—but it does not have to be.

USAA attempts to make hay about Auto Telematics’s characterization of the claim as requiring that the mobile device “be” removably attached, whereas the claims say the mobile device “is” removably attached. *See* Reply at 5. But USAA does not define for the Court any

meaningful difference between “be” and “is” in this context. Indeed, the definition of “is” is “the present tense third-person singular of be.” *See* Exhibit 1, Merriam-Webster definition of “is.”

USAA again repeats its incorrect arguments about “mere capability” of attachment, citing Auto Telematics’s infringement contentions, which state that “the SafePilot App works at least when the mobile telecommunications device is removably [attached / affixed] to the vehicle.” Reply at 7. This is altogether irrelevant. The excerpt from the infringement contentions is simply a factual statement, based on publicly available information, about how the SafePilot App appears to function. The infringement contentions might also say that “the SafePilot App can be installed on a phone.” Does that mean that all that is required to prove infringement is that an app can be installed on a phone? Of course not. The arguments regarding Auto Telematics’s infringement contentions are inapposite and add nothing to USAA’s erroneous views about this claim term.

USAA incorrectly argues that Auto Telematics has not identified any actual differences between “attached” and “affixed.” In fact, it has, providing dictionary definitions for both. *See* Response at 17 (citing Exhibits 6, 7).

III. CLAIM TERMS USAA INCORRECTLY CONTENTS ARE INDEFINITE

Expert testimony is typically of little value in claim construction. It can be useful when offered to shed light on difficult technical issues or explain the state of the art, but it is unhelpful when it does no more than make attorney arguments about, *e.g.*, the ordering of the words in a claim or where citations appear in the specification. *See* Response at 18–19. USAA ignores Auto Telematics’s criticism of its expert, essentially patting itself on the back for relying on expert testimony for the precise purpose that the Supreme Court and this Court have discounted its weight—and then criticizing Auto Telematics for not doing the same. *See, e.g.*, Reply at 13 (criticizing Auto Telematics for not using an expert to regurgitate the fact that two different instances of “driving score” in a claim both use the same root word). USAA’s expert is a technical

expert, not a linguistics expert. His testimony is of no value here and should be accorded no weight.

a. “driving information”

USAA’s argument here seems to hinge on the idea that “derived from” is necessarily different from “comprising.” That the words are “different” is not in dispute, but it is also not the question at hand. The relevant question is whether “driving information” could be “derived from” sensor data **but at the same time** “comprise” sensor data. USAA does not demonstrate why it cannot. In fact, USAA even admits that the specification shows it can. *See* Reply at 10. For example, sensor data can be down-sampled and then stored as “driving information.” In that example, the driving information is both derived from sensor data, and comprises sensor data. The debate should end there.

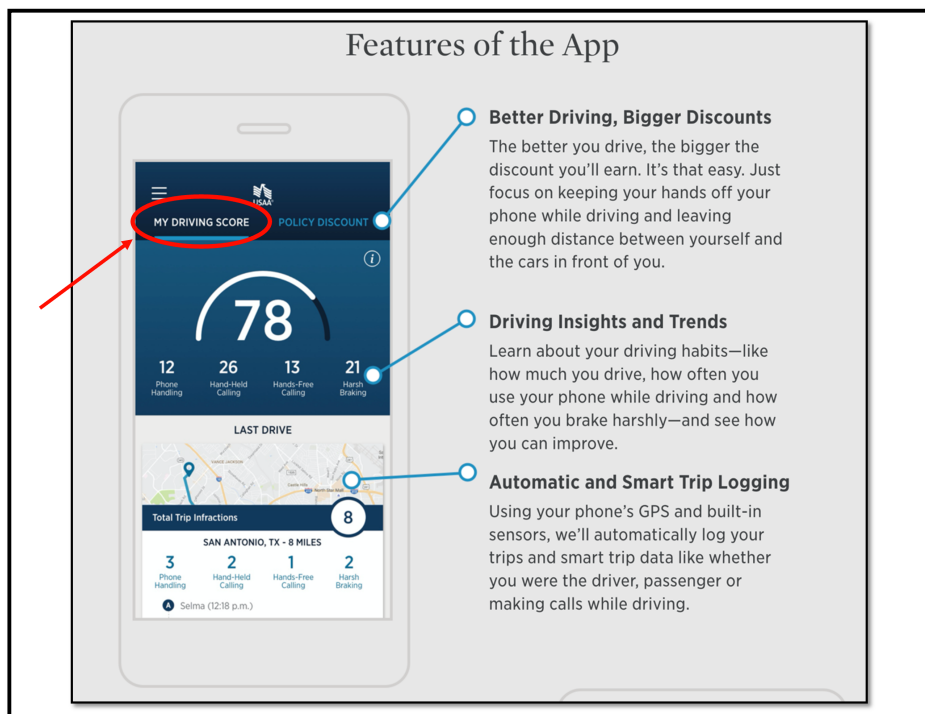
But USAA is not happy with this disclosure in the specification, arguing instead that the down-sampling “is not claimed.” Reply at 10. But if the claim term is written in such a way that it **allows** the embodiment specifically described in the specification, then it is within the scope of the claim. In other words, while the claim may not specifically recite down sampling, it is within the scope allowed by the claim unless barred. Alternatively, in certain embodiments, the sensor data could be driving information even if **not** down-sampled, as discussed below.

USAA next argues that there needs to be a “‘clearly identifiable’ difference between ‘sensor data’ that is ‘captured and processed’ to become ‘driving information’ and ‘sensor data’ that is ‘comprise[d]’ in ‘driving information.’” Reply at 12. USAA provides no reason why there needs to be a “‘clearly identifiable” difference between the two instances of sensor data. In fact, there need be no difference at all; rather, they can be the same sensor data. To explain: “driving information” is distinct from “sensor data” because the claim requires that “driving information” be derived from (1) “sensor data” and (2) “inputs received by a user interface of the remote mobile telecommunications device.” *See, e.g.,* ’271 Patent at Claim 1. In contrast, “sensor data” is not

claimed as being “derived from user inputs.” Thus, “sensor data” and “driving information” are distinct. However, the sensor data that driving information is derived from need not be distinct from the sensor data that is part of a driving score. For example, sensor data could be captured, not “transformed” in any way, and then processed such that it is combined with “inputs received by a user interface” to become “driving information.” In this example, the “driving information” was derived from “sensor data” and also comprises the very same “sensor data.” The sensor data can be—but need not be—identical (*e.g.*, it could be down-sampled, such that it is not identical).

b. “driving score”

USAA cannot credibly argue to this Court that it does not understand what a “driving score” is. USAA’s website—when describing the accused SafePilot system—uses this precise language to describe the score that it gives drivers when determining whether they are entitled to insurance premium discounts:



usaa.com/insurance/safedriving?akredirect=true (annotation added)

— How is my earned discount calculated?

We base your earned discount on your driving score, which you'll see in the USAA SafePilot App. This driving score will factor how often you handle your phone while driving, if you're making hands-free calls, if you brake harshly and how much you drive. While we understand that some defensive driving situations may require you to brake, try to keep erratic driving to a minimum to earn the highest possible discount.

If there are multiple drivers on your policy, we'll base your household earned discount on the driving behaviour of all drivers enrolled in USAA SafePilot. The highest possible discount you may earn depends on how many eligible drivers are participating in the program. We recommend that all eligible drivers participate in the program.

— When will I receive my discount?

After you enroll in the USAA SafePilot program, we'll apply a participation discount of up to 10% to your auto insurance policy. Before your policy renews, we'll use your household's trip data to determine which drivers have met the requirements for an earned discount.

We'll apply the earned discount from these drivers to your policy's next term at renewal and remove their participation discount. The policy term's effective date is referenced in the USAA SafePilot App on the discount tab.

— What if I change my mind and don't want to participate?

That's OK. You can cancel your enrollment in the program any time.

— Will my driving information impact my insurance rates?

No. We will only use your driving information to calculate your discount. Your driving information won't have an impact on your auto insurance policy rate, although your rate may vary based on other factors.

usaa.com/insurance/safedriving?akredirect=true (annotation added)

USAA's feigned ignorance about this term is surprising, given that it uses precisely the same language to describe a "driving score" in the accused system.

USAA argues Auto Telematics "concedes" careless drafting in this case because it cited to this Court's decision in *Digital Retail Apps* for the proposition that "careless drafting . . . does not create ambiguity." Of course, citing to that case is no such concession. The term "driving score" is easily ascertainable, even to a lay juror. That meaning is supported by the *Katsman* reference discussed in Auto Telematics's Response, which explains that a driving score "reflect[s] the quality of the driving behavior of the driver." See Response at Exhibit 9, ¶ 65.

What USAA is actually arguing, however, is that "driving score" must have a highly specific and technical meaning, the calculation of which must be provided with mathematical precision, or else it is indefinite. See Reply at 15. But the claims do not require any such meaning

or precision. The question—again—is what a POSITA would understand. Here, the POSITA—based on the specification and informed by his or her general knowledge (including knowledge of *Katsman*) would understand that a driving score could be calculated in a variety of ways. The point is that it provides some assessment of driving behavior.

USAA complains that the '271 Patent “makes no sense,” citing to the following passage with no further explanation:

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

Reply at 11 (citing '271 Patent at 10:14–17, 11:66–12:3).

This portion of the specification is easily explainable. The driving information may comprise the driving score. If so, processing the driving information to generate a driving score could mean, for example, extracting from the driving information the portion that is the driving score, to produce a driving score—to save in a file, to use as a variable in a further calculation, or to display to a user, for example. In the instance that the driving information does not comprise a driving score (but comprises sensor data), processing the driving information to generate a driving score could include taking sensor data and transforming it into a driving score.

Claims 6 and 7 are consistent with this understanding of the specification. There, the “driving information comprises at least one of a driving score and sensor data.” Again, if the driving information comprises a driving score already, then generating a driving score could require only extracting the driving score from the driving information as a whole. If the driving information comprises sensor data, then the driving score must be generated using the sensor data. Auto Telematics explained this in its Response, and USAA is countering by burying its head in the sand, ignoring the logical explanation.

USAA claims that two embodiments cannot be encompassed by a single claim, but it

provides no legal authority for this sweeping proposition. *See* Reply at 13. A POSITA reading the claim language in light of the specification would understand that the claim could encompass both embodiments. USAA’s claim that the “driving score” means “two completely different things” is incorrect. The claim simply provides that the “driving score . . . to determine a risk profile” may be generated two different ways: (1) from driving information comprising sensor data; or (2) from driving information comprising a driving score.¹

Auto Telematics’s position regarding “driving score” in Claim 7 is consistent with the use of the term in the claim and specification. The claim permits (but does not require) the driving information to comprise a driving score. The claim requires that “the data logging system [be] further arranged to process the driving information logged to a corresponding account to generate a driving score used to determine a risk profile.” Again, in the instance where the driving information already comprises a driving score, the data logging system may need only extract the driving score to generate a driving score. In the instance where the driving information comprises sensor data (but not necessarily a driving score), that sensor data would be used to generate the driving score.

A POSITA would understand that the “third” instance of driving score, *i.e.*, “the driving score used to define an insurance premium,” refers to the driving score generated by the data logging system, whether that driving score was generated, for example, via extraction from driving information or generated using sensor data in the driving information. This would be apparent to a POSITA because in both embodiments, the data logging system generates a driving score from

¹ For example, a driving score could be initially determined using only sensor data. Subsequent driving scores for the same driver, however, may be determined by using a previously calculated driving score as a baseline and then using additional sensor data to calculate a change to that previously calculated driving score.

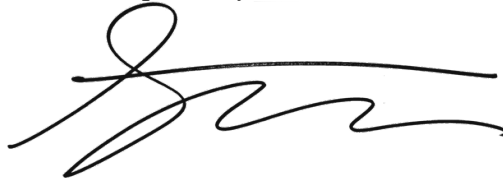
driving information, and then **that** driving score is used to define an insurance premium, and the data logging system is arranged to communicate an insurance offer.

IV. CONCLUSION

For the foregoing reasons and those stated in its Response brief, Auto Telematics respectfully requests that this Court enter a Claim Construction Order adopting Plaintiff's proposed constructions.

Dated: February 6, 2023

Respectfully submitted,



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