

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

EMERGING AUTOMOTIVE LLC,

Plaintiff,

v.

KIA CORPORATION and KIA AMERICA,  
INC.,

Defendants.

Civil Action No. 2:23-cv-00437-JRG

LEAD CASE

EMERGING AUTOMOTIVE LLC,

Plaintiff,

v.

TOYOTA MOTOR CORP., ET AL.,

Defendants.

Civil Action No. 2:23-cv-00434-JRG

MEMBER CASE

**PLAINTIFF'S OPPOSITION TO THE KIA AND TOYOTA DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT REGARDING EFFECTIVE FILING DATES**

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## I. INTRODUCTION<sup>1</sup>

To provide priority support for the claims, an applicant need only “convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention.” *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991). The Kia and Toyota Defendants (“Defendants”) argue that, as a matter of law, the ’729 Application does not convey that the inventors possessed the claimed “electronic key” of the asserted patents. In making the argument, Defendants rely on misstatements of the record with respect to other claims of other patents and other applications. But when considering the question in the correct lens, the ’729 Application discloses that a user may receive data at a mobile device, log in to an “access management system” using the device, including through a “mobile application,” to “access” and “remote[ly] start, remote[ly] stop etc” the vehicle. Ex. C, [0091], [0093], [0098]. “A POSITA would have recognized that the inventors possessed ‘electronic keys.’” Ex. L, ¶ 75.

## II. ISSUE BEFORE THE COURT

Defendants did not identify the issue before the Court. It is a simple one: whether the ’729 Application—which discloses the generation and transfer of data and that a user may log into a mobile phone application to access a vehicle, remotely start a vehicle, and set settings for a vehicle—would have conveyed to a POSITA that the inventors possessed the claimed “electronic key.”

## III. RESPONSE TO STATEMENTS OF FACT

1. SOF 1: Undisputed.
2. SOF 2: Undisputed that Defendants’ selectively quoted portions of the ’729 Application. Disputed that the ’729 Application is limited to EV charging. The ’729 Application

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<sup>1</sup> Exs. A-M are attached to Defendants’ Motion. Exs. 1-4 are attached to the Belloli Declaration.

includes many embodiments, including embodiments for accessing and starting a vehicle using a mobile device. Undisputed that the '729 Application did not use the exact language as the asserted claims, which is not a requirement of priority. Disputed that the '729 Application does not “disclose a request from a mobile device to unlock a vehicle”—the '729 Application discloses a “login-profile mobile application” that can be used to “allow[] access to [a] vehicle” and “allow [a user] to operate the vehicle.” Ex. D, ¶¶ 90, 94, 98, 102. Disputed that the '729 Application does not provide written description support for the claims of the asserted patents. As set forth below, the '729 Application does.

3. SOF 3: Undisputed that the '638 Application is a CIP that includes additional disclosures. However, what the '638 Application discloses is not the issue before the Court.

4. SOF 4: Undisputed that Defendants generated a redline document. Disputed that the “pre-existing materials” did not fully convey that the inventors had possession of “the use of e-keys.” As set forth below, the '729 Application provides support for an “electronic key.”

5. SOF 5: Undisputed that in prosecution of an application for a patent that is not at issue in this case, Emerging Auto demonstrated that those claims are supported by the '900 application, as the Examiner requested. That demonstration was sufficient to overcome the prior art in that application. However, Emerging Auto never discussed the '729 Application, much less admitted that the claims were not supported by the '729 Application or any other application.

#### **IV. LEGAL STANDARD**

To be afforded the filing date of an earlier application, the priority application need only “convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention.” *In re Alton*, 76 F.3d 1168, 1172 (Fed. Cir. 1996) (quoting *Vas-Cath*, 935 F.2d at 1563-64); *see also Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1336 (Fed. Cir. 2010). “The test for sufficiency of support in an application is not the presence or

absence of literal support in the specification for the claim language . . . instead, it is whether the disclosure of the application relied upon . . . reasonably conveys to the artisan that the inventor had possession at the time of the later claimed subject matter.” *Supercell Oy v. Gree, Inc.*, PGR2018-0064, Paper 8 at 6 (P.T.A.B. Oct. 18, 2018) (citing *Vas-Cath*, 935 F.2d at 1560; *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983)). Whether a document provides adequate support is a question of fact. *In re Alton*, 76 F.3d at 1168.

It is well-settled that the disclosure must be viewed from the perspective of a POSITA. *Boston Sci. Corp. v. Johnson & Johnson*, 647 F.3d 1353, 1366 (Fed. Cir. 2011). Accordingly, “in some circumstances, a patentee may rely on information that is ‘well-known in the art’ for purposes of meeting the written description requirement.” *Id.* (quoting *Falko-Gunter Falkner v. Inglis*, 448 F.3d 1357, 1366-68 (Fed. Cir. 2006)).

The disclosure need not “recite the claimed invention *in haec verba*.” *Ariad*, 598 F.3d at 1352; *see also Union Oil Co. of Cal. v. Atl. Richfield Co.*, 208 F.3d 989, 997 (Fed. Cir. 2000) (the requirement “does not require the applicant to describe exactly the subject matter claimed.”) (internal quotes omitted); *Supercell Oy*, Paper 8 at 9 (“word-to-word identity is not required”). Indeed, the required disclosure “varies with the nature and scope of the invention at issue, and with the scientific and technologic knowledge already in existence.” *Capon v. Eshhar*, 418 F.3d 1349, 1357 (Fed. Cir. 2005); *see also id.* at 1358 (“As each field evolves, the balance also evolves between what is known and what is added by each inventive contribution.”). There is no requirement for an applicant to redescribe what is readily known in the art; instead, the applicant must simply adequately describe improvements to the art. *Id.* at 1357-58 Expert testimony, such as that found in Dr. Malek’s report, can be used to establish the perspective of a POSITA. *See Falko-Gunter*, 448 F.3d at 1366.

In fact, applicants can “utilize any particular form of disclosure to describe the subject matter claimed.” *In re Alton*, 76 F.3d at 1172; *Bd. of Trs. of Leland Stanford Junior Univ. v. Chinese Univ. of Hong Kong*, 860 F.3d 1367, 1375 (Fed. Cir. 2017) (“the written description requirement [is satisfied] when the essence of the original disclosure conveys the necessary information—regardless of how it conveys such information, and even when the disclosure’s words are open to different interpretations.”) (cleaned up). For example, “drawings alone may provide an adequate written description under [35 U.S.C.] § 112 if they describe what is claimed and convey to those of skill in the art that the patentee actually invented what is claimed.” *Cummins-Allison Corp. v. SBM Co.*, 484 F. App’x 499, 505 (Fed. Cir. 2012).

## V. ARGUMENT

The issue before the Court is whether the ’729 Application would have conveyed to a POSITA that the inventors were in possession of the claimed “e-keys,” a term that the Court preliminary construed as “electronic data that enables one or more functions of the vehicle.” Tellingly, the first two of Defendants’ three arguments have nothing to do with this question.

*First*, Defendants misrepresent that the applicant “admitted”—in an application for a patent that is not asserted in this case—that the priority date is later. Doing anything but analyzing the ’729 Application, Defendants take a winding approach of comparing claims of a different application to one of the claims asserted here, comparing that to the ’638 Application—which is not at issue here—and then comparing that to see if there is verbatim disclosure in the ’729 Application. Even after all this mental juggling, a review of just the first paragraph of Defendants’ argument illuminates the misrepresentation: the applicant never “admitted” anything related to the ’729 Application or even mentioned it at all. Emerging Auto simply showed that the claims at issue there were entitled priority to the ’638 Application, which is what the Examiner requested and what was sufficient to overcome the prior art at issue in that application.

*Second*, Defendants misrepresent that the Examiner in an EPR “concluded that the proper priority date for the ’659 Patent is October 25, 2013.” Dkt. 181 at 2, 9. A cursory review of the record demonstrates that Defendants’ representation is, again, flat wrong, even if the Examiner’s (non-final) “conclusions” were binding on this Court. Of course, they are not. *See, e.g., Tinnus Enters., LLC v. Telebrands Corp.*, 846 F.3d 1190, 1202 n.7 (Fed. Cir. 2017) (Patent Office post-grant decisions not binding on an Article III court).

It is clear why Defendants do not tackle the relevant issue head-on. When the ’729 Application is actually considered, there is no question that a POSITA would have recognized the inventors had possession of the claimed “e-keys.” Defendants are left only to argue that the ’729 Application does not use the word “e-key,” but that is unnecessary under black letter law. The ’729 Application provides support for the claims—indeed, should the Court be inclined to grant summary judgment, it would be in favor of Emerging Auto. At a minimum, there is much more than the minimum “sufficient evidence” a jury would need to make this finding.

**A. The ’729 Application conveys to a POSITA that the inventors possessed the “e-key” subject matter.**

Defendants’ third and final argument is the only argument that bears on the issue before the Court. Defendants argue that the claims of the ’188, ’026, and ’659 patents recite an “ekey,” “e-key,” or “electronic key” that the ’729 Application does not “make reference to, or otherwise describe.” Defendants are incorrect.

In the context of the asserted claims, a mobile device may utilize an “electronic key” or “e-key” to “use [a] vehicle,” including, e.g., unlocking and starting the vehicle. *See, e.g., Ex. 1* (’026 patent), claim 1. The Court preliminarily construed the “electronic key” terms as “electronic data that enables one or more functions of the vehicle.” The ’729 Application describes that a user may access a “mobile application” using a “personal electronic device (e.g., phone, tablet, etc.),” that

“data is acquired, shared or accessed [and] can be launched on a user’s device,” and that the mobile device “allows access to [a] vehicle” and allows for “remote start, “remote stop, etc.” Ex. 2 (Malek Validity Rpt.), ¶¶ 72-74 (quoting ’729 Application). These statements convey the inventors had possession of electronic keys.

Dr. Malek provided nearly eleven pages describing his opinion that a POSITA would have recognized from the ’729 Application that the inventors had possession of the claims, including electronic keys. *Id.*, ¶¶ 71-89. As Dr. Malek explained, “a POSITA would have recognized from the ’729 application that the inventors did have possession of the claimed inventions of the ’026, ’659, and ’188 patents, including “electronic keys” (aka e-keys and eKeys). *Id.*, ¶ 72. While Dr. Malek’s opinions and discussion of various disclosures are too voluminous to fully retread in this opposition, even a small subset demonstrates the point. After describing that a user could log into an account, via a mobile device and an app, to “access” the vehicle,” he opined:

Further, a POSITA would have recognized that by logging in on a device, such as into a “login-profile application” on a smartphone in order to remotely start, change profile settings, access, etc. a vehicle, ***the device would include “electronic data” for enabling those functions of the vehicle, as electronic devices require underlying data, which would be electronic, to carry out that functionality.*** A POSITA would have recognized that the inventors possessed this concept. Indeed, throughout the ’729 application is discussion of “data,” “databases,” and using and transferring data. *Id.*, ¶¶ 5, 10, 11, 16, 84, 102, etc.

In my opinion, the ’729 application would have conveyed to a POSITA that the inventors possessed the “e-keys” at the time of the invention, including “enabling access to use the vehicle via one or more electronic keys,” “generating, by the server, the e-key,” and “the mobile device is configured to use the eKey.” The ’729 application describes “cloud based processing technologies” communicating with vehicles and smart devices. *Id.*, ¶¶ 5, 16, 17. Cloud services provide ***“data back to the user, either by way of a mobile application, internet browser, vehicle interface, etc.”*** *Id.*, ¶ 18. The user may register a computer account on a “cloud distributed system to manage access” to vehicles, including to “create logins to his or her vehicle(s). *Id.*, ¶ 90. A user accessing an application on a mobile device may access, operate, apply setting changes, etc. of a vehicle. *Id.*, ¶¶ 93, 98. As such, the ’729 application would have conveyed to a POSTIA that an electronic key is generated on a cloud distributed system, which is a server, and provided for use on a user’s device to enable one or more functions of a vehicle.

*Id.*, ¶¶ 75-76.

Defendants imply that Dr. Malek identified “log-ins” as the only purported disclosure of the claimed e-key. Dkt. 181 at 13-15. But while logging in to an account to, e.g., unlock or start a vehicle is certainly relevant to what a POSITA would have recognized, it does not tell the full story of Dr. Malek’s opinions. Dr. Malek opined that a user may login to a “login-profile application” on a mobile device to “remotely start, change profile settings, access, etc.” which would have conveyed to a POSITA “‘electronic data’ for enabling those functions of the vehicle, as electronic devices require underlying data, which would be electronic, to carry out that functionality.” Ex. 2, ¶ 75. That Dr. Malek reiterated this opinion in deposition is not a “gotcha.”<sup>2</sup> In deposition he simply confirmed his opinion. Ex. 3 (Malek Validity Dep. Tr.), at 123:14-125:11.

Defendants complain that Dr. Malek testified that “some unidentified, underlying data, not explicitly recited in the ’729 Application” provides support for e-keys. Dkt. 181 at 14. But the question is what the disclosures of the invention would have conveyed to a POSITA. Dr. Malek explained that the ’729 Application describes generating and providing data to a mobile device for users to use the vehicle. Ex. 2, ¶¶ 75-76; *see also* Ex. 3, at 136:11-138:14:

So, again, I -- on page -- on paragraph 75, I say, the POSITA would have recognized that by logging in on the device, such as into a log-in profile application on the smartphone, in order to remotely start, change profile settings, access, et cetera, the vehicle -- the device would include electronic data for enabling those functions of the vehicle as electronic devices require underlying data, which would be electronic, to carry out that functionality. And then -- and then I go on to cite how a POSITA would have recognized that the inventors possess this concept, also by the disclosures in the ’729 patent application, to various data and databases that are transferred to the mobile device.

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<sup>2</sup> Defendants attached the wrong transcript to their motion. Exhibit K is for Dr. Malek’s opinion on Toyota’s infringement. He discussed his opinion on priority in a separate deposition, on April 7, 2025, an excerpted transcript is attached hereto as Exhibit 3.

What I'm saying, just to be clear, is that '729 describes that a user can log in to an application. And once a user logs in to that application on the mobile device, it receives data from -- from the server. And that data is what allows it to implement its functionality of being able to -- you know, to engage with the vehicle by being able to, you know, send one or more commands to the vehicle, essentially, to enable one or more functions of the vehicle, such as starting, stopping, unlocking and so on. And that data that is received by the mobile device is consistent with the Court's understanding or the Court's construction that electronic key is electronic data that enables one or more functions of the vehicle. I believe a POSITA would have read the '729 application and realized that it is disclosing electronic data that enables one or more functions of the vehicle.

It is unclear what more specificity Defendants seek, and none is required to resolve the issue at hand, as the Court's preliminary construction does not require a "specific" type of data. Even if the '729 Application does not identify the data by name, neither does the specification of the asserted patents, which was used for the Court's preliminary construction of e-keys. The term as construed does not require any specific type of "data for enabling one or more functions of the vehicle," and there is no question that the '729 Application conveys that the inventors possessed such data in a non-limiting fashion.

Defendants also cite to Dr. Malek's table for limitation 1[a] of the '188 patent. Dkt. 181 at 11-12. Tellingly, Defendants do not include the table in its excerpted exhibit (Ex. L) and, in their brief, modify the table to address only two of the citations from the table to argue "electronic keys" are not disclosed. *Id.* But the two citations Defendants pluck are relevant to the issue at hand—they disclose "Internet Applications" and "cloud-based services" connecting smart devices and vehicles—which are related to limitation 1[a]. *See* Dkt. 181 at 11-12. Defendants ignore the other citations to the relevant portions of the '729 Application and Dr. Malek's narrative explanation of the "e-key" terms. *Id.* at 11-13.

Further, for "coded data"—a term that appears only in the claims of the '659 patent—Dr. Malek likewise provides multiple pages of explanation. Ex. 2, ¶¶ 79-81 ("the '729 application does disclose 'coded data,' as claimed in the '659 patent."). He explains that the '729 Application

discloses many instances of “coded data” (¶ 79), and that it discloses “providing ‘Login Credentials’ and ‘vehicle data’ to a vehicle ... for unlocking and use of the vehicle” (¶¶ 80-81). He further explained that a POSITA would understand the inventors possessed that coded data includes privileges settings, such as “weekend driving” or “valet restrictions,” etc. *Id.*, ¶ 81. The claimed “coded data” is supported.

In one sentence without explanation, Defendants also say that the ’729 Application does not identify a “unique access code”—a term that only appears in the ’026 patent. Dkt. 181 at 11. As Dr. Malek explained, the ’729 Application discloses that requests to the vehicle can include “Login Credentials” and “vehicle data.” Ex. 2, ¶ 80. A POSITA would have recognized that a user’s login credentials (e.g., “user identification and password, or an authentication method” or “*access codes*” (Ex. C, ¶¶ 16 23 (emphasis added)) provide full support for the “unique access code” of the ’026 patent.

After mischaracterizing Dr. Malek’s opinions to be limited to “login credentials,” Defendants argue that login credentials do not disclose the “full scope of e-keys.” Dkt. 181 at 14. But as Dr. Malek explained, a POSITA would have understood the mobile device used for accessing and unlocking a vehicle to include electronic data for doing so. Ex. 2, ¶¶ 71-79. This data is not described in any limiting manner; nor is the “cloud processing” server described in a limiting manner. Moreover, Emerging Auto disagrees that the accused systems are “non-cloud-based systems”—a point Defendants never explain. Dkt. 181 at 14. The ’729 Application, through the non-limited disclosures of data and servers, confirms that a POSITA would have recognized that the inventors had possession of the full scope of the claim.

In short, for every claim of the asserted patents, Dr. Malek opines that it is supported by the ’729 Application, including with pages of explanation. The ’729 Application, which describes

logging in to an application, receiving data, and accessing and starting a vehicle using a mobile device would have conveyed to a POSITA that the inventors possessed “e-keys.”

**B. Most of Defendants’ arguments are unrelated to the question at hand.**

Tellingly, over half of Defendants’ motion sidesteps what the ’729 Application would have conveyed to a POSITA.

**1. The ’729 Application is not required to use the word “e-key” to convey that the inventors had possession of an “e-key.”**

Throughout the motion, Defendants argue that the ’729 Application does not use the word “electronic key,” “e-key,” or “eKey.” *See, e.g.*, Dkt., 181 at 1, 5, 10, 13, 15. It is black letter law that the disclosure need not “recite the claimed invention *in haec verba.*” *Ariad*, 598 F.3d at 1352; *see also Union Oil Co.*, 208 F.3d at 997 (the requirement “does not require the applicant to describe exactly the subject matter claimed.”) (internal quotes omitted); *Supercell Oy*, Paper 8 at 9 (“word-to-word identity is not required”). The question is whether a POSITA would have recognized that the inventors had possession of e-keys, preliminary construed as “data that enables one or more functions of the vehicle.” Through the proper lens, and as demonstrated above, it is clear the ’729 Application conveys this possession under any reasonable construction of the term.

**2. Whether the claims are also supported by another application is not the question before the Court.**

Defendants’ primary argument is to (1) take a claim that is not at issue in this case from an application for a patent that is not asserted in this case, (2) use color coding to try and compare that claim to one of the many asserted claims in this case, (3) compare that comparison to “exemplary” disclosures of the ’638 Application, and (4) contend that the verbatim disclosure is not recited in the ’729 Application. Setting the four layers of mental gymnastics aside, Defendants’ conclusion is a misrepresentation of the record.

In the '448 Application, Emerging Auto merely stated that the then-pending claims were supported by the '638 Application, and that the '638 Application was "*filed* on October 25, 2013." Ex. G, at 9 (emphasis added). Emerging Auto concluded by stating that "the claims have a priority date to *at least as early as* October 25, 2013." *Id.* at 14 (emphasis added). There was no admission that the claims of that application—or the different claims at issue in this case—were unsupported by the '729 Application.

In this Office Action response, Emerging Auto did not discuss the '729 Application at all, much less make any "admissions" about what it conveyed. Instead, Emerging Auto discussed the '638 Application, as the Examiner asked Emerging Auto to do. *Id.* at 9. Moreover, there was no reason for Emerging Auto to discuss earlier applications because the '638 Application predated the Chen reference used as a rejection. *Id.* at 14. Under the proper lens, and as shown above, there is more than sufficient evidence for a jury to find that the '729 Application supports the claim.

**3. The Examiner never found that the "e-key" claims were not supported by the '729 Application.**

Defendants' second argument is also irrelevant and misrepresents the record. *See* Dkt. 181 at 9. As Dr. Malek explained in his validity report, in the EPR, the Examiner never mentioned or analyzed the '729 Application. Ex. 2, ¶¶ 88-89 (citing and discussing Ex. 4). The Office made no final determination on the issue of priority and invited Patent Owner to submit a mapping for consideration. Ex. 4, at p. 3. Moreover, Patent Owner was not required to submit a mapping to the '729 application because it did "not seek to traverse any prior art currently of record based on priority." Ex. 2, ¶ 89 (quoting Ex. 4, at p. 3). There was no reason for Emerging Auto to submit a mapping to the '729 Application or for the Examiner to consider it because the art at issue predated the '729 Application. Ex. 2, ¶ 89.

## **VI. CONCLUSION**

Setting aside red herrings, the issue before the Court is whether in view of the '729 Application a POSITA would have recognized that the inventors possessed the claims of the asserted patents, including an “electronic key.” Because the '729 Application described, among other things, that a user could receive data, log into a mobile phone application to access a vehicle and remotely start a vehicle, a POSITA would have understood the inventors possessed “electronic keys,” which the Court preliminary construed to mean “data that enables one or more functions of a vehicle.” Defendants’ motion should be denied.

Dated: April 28, 2025

Respectfully submitted,

/s/ Marc Belloli

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 28, 2025, a true and correct copy of the foregoing document was served via electronic delivery to all counsel of record.

/s/ Marc Belloli  
Marc Belloli

