

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
**Chief Judge Philip A. Brimmer**

Civil Action No. 18-cv-00691-PAB-STV

WRIGHT MEDICAL TECHNOLOGY, INC.,

Plaintiff,

v.

PARAGON 28, INC.,

Defendant.

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**ORDER**

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This matter is before the Court on the parties' Joint Motion for Determination [Docket No. 148], wherein the parties ask the Court to construe certain disputed terms in nine patents.<sup>1</sup> On April 26, 2019, the Court held a claim construction hearing pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). Docket No. 149.

**I. BACKGROUND**

On March 23, 2018, plaintiff Wright Medical Technology, Inc. filed this lawsuit against defendant Paragon 28, Inc. alleging patent infringement. Docket No 1. Plaintiff

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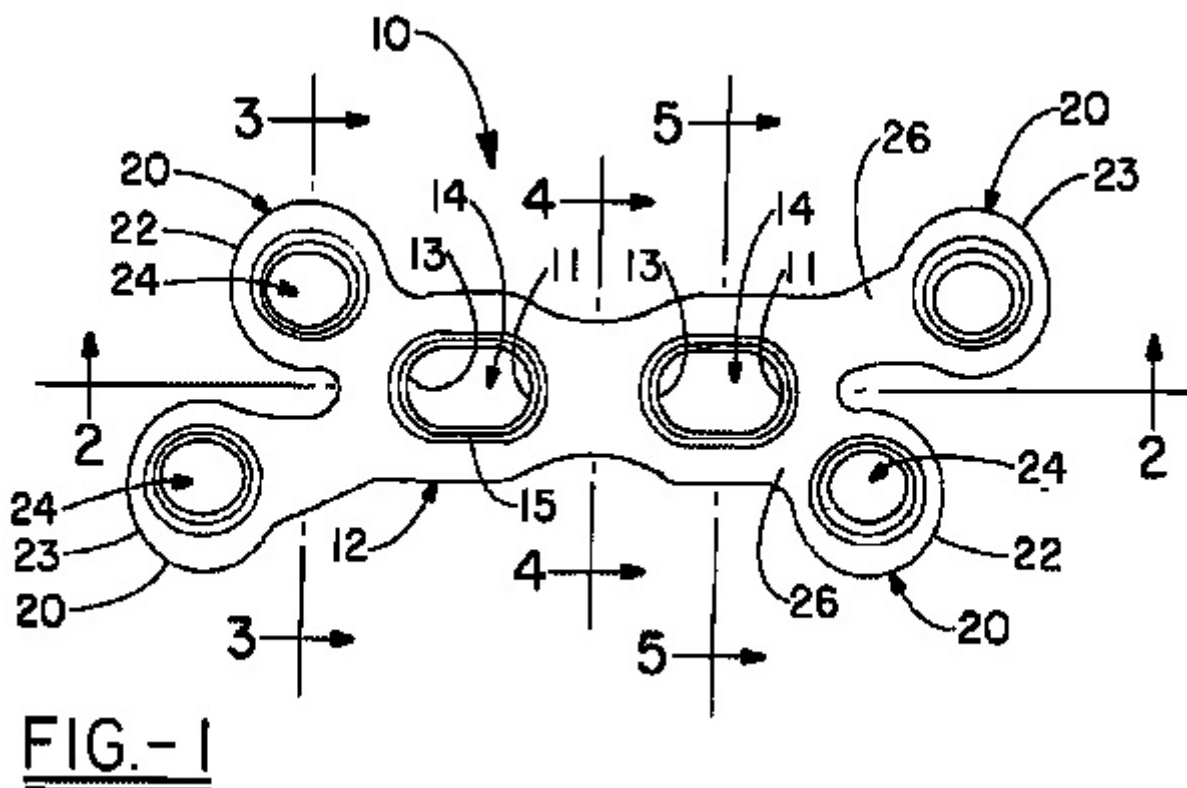
<sup>1</sup> The patents at issue are U.S. Patent Nos. 7,771,457 (issued Aug. 10, 2010) ("the '457 Patent"); 8,100,954 (issued Jan. 24, 2012) ("the '954 Patent"); 8,118,846 (issued Feb. 21, 2012) ("the '846 Patent"); 8,118,848 (issued Feb. 21, 2012) ("the '848 Patent"); 9,144,443 (issued Sept. 29, 2015) ("the '443 patent"); 9,259,251 (issued Feb. 16, 2016) ("the '251 Patent"); 9,259,252 (issued Feb. 16, 2016) ("the '252 Patent"); 9,259,253 (issued Feb. 16, 2016) ("the '253 Patent"); and 9,545,278 (issued Jan. 17, 2017) ("the '278 Patent") (collectively, the "patents"). Docket No. 89 at 6-7 ¶¶ 20-29.

filed its Third Amended Complaint [Docket No. 89] on September 28, 2018, claiming that defendant has infringed upon ten of its patents, nine of which are at issue in this claim construction matter.<sup>2</sup> Docket No. 89 at 5-6, ¶¶ 17; Docket No. 134 at 4.

Each patent at issue relates to orthopedic plates used in bone fracture repair or reconstruction. Docket No. 89 at 8, ¶¶ 30; '457 Patent, col. 1, ll. 62-67; col. 2, ll. 1-2. These devices are designed for use in repairing smaller bones, such as the clavicle, elbow, and knee and can bend laterally to wrap or spiral around a bone. *Id.*, col. 2, ll. 25-28, 33-36. An example of an orthopedic plate is shown in Figure 1 of the '954 Patent:

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<sup>2</sup> The parties did not identify any claim terms that require construction in the '710 Patent, which relates to a surgical instrument. Docket No. 134 at 3 n.1.



The preferred embodiment of this plate includes a trunk portion (12) with two or more screw holes or slots (14) along the trunk's longitudinal axis. '457 Patent, col. 5, ll. 6-11. The area linking the screw holes to the trunk portion has a narrowed waist area (26) that may bend relative to the trunk's longitudinal axis. *Id.*, ll. 34-36. The plate has at least one but preferably two sets of arms (20) and each arm includes a screw hole (24). *Id.*, 43-44; 51-52. In each set of arms, the arms will be different lengths and will diverge from the trunk at different angles, *id.*, 44-46; 54-58, so that when the arms are wrapped around and secured to a bone, the screw used to secure one arm will not impinge the screw securing the other. *Id.* at col. 6, ll. 41-46.

The '457 and '954 Patents have the same specification, as do the '251, '252, '253, '278, '443, and '846 Patents. Docket No. 134 at 4. The '848 Patent has its own specification. *Id.* These specifications are substantially similar.<sup>3</sup>

The parties ask the Court to construe ten different claim terms found in over 100 claims across the nine patents. The Court must construe these claim terms consistently across each patent and each claim. *See Boss Indus., Inc. v. Yamaha Motor Corp., U.S.A., Inc.*, 333 F. App'x 531, 536-37 (Fed. Cir. 2009) (unpublished) (finding that the district court did not err in construing a term consistently for multiple patents where the patents' specifications were "nearly identical" and where the patents "share[d] many common terms with [their] sister patents").

Due to the large number of claims containing the disputed claim terms, the Court will not set out each use of each term. However, Claim 1 of the '457 Patent, which contains all of the disputed claim terms, is instructive as to the context in which each claim term is used. Claim 1 describes:

1. A surgical plate system capable of being used to stabilize a small bone fracture comprising

a **Y-shaped** plate that has an inferior surface and which has a concentric superior surface forming a portion of a cylinder, the plate **consisting of** a trunk and a pair of a first arm and a second arm,

the **trunk** having a linear medial longitudinal axis along the superior surface extending between a first and a second **end**, and

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<sup>3</sup> Because the specifications are substantially similar, they will be referred to in the singular unless otherwise noted. References to identical language from the common specifications will be cited to the '457 and '251 specifications unless otherwise noted.

the inferior surface of the plate defining a curve transverse to the medial axis,

the first **arm** and the second arm extending from the first end of the trunk, the inferior surface of the first arm and of the second arm following the same curve as the inferior surface of the trunk,

the first arm having an **ear** with at least one screw hole defining a first **screw axis** perpendicular to a tangent to the top surface of the first ear, the first ear being attached to the trunk by a **linking section** having a **waist**, a first angle and a first length being defined by a line from the center of the first arm screw hole to **the intersection of the medial longitudinal axis** of the trunk, and,

the second arm having a second ear with at least one second screw hole defining a second screw axis perpendicular to a tangent to the top surface of the second ear, the second ear being attached to the trunk by a linking section having a waist, a second angle and a second length being defined by a line from the center of the second arm screw hole to the intersection of the medial longitudinal axis of the trunk, and

the first angle and the first length being different from the second angle and the second length whereby the first screw axis and the second screw axis converge toward the inferior side of the plate but do not intersect.

'457 Patent, Claim 1, col. 8, ll. 23-57 (emphasis added).

## II. LEGAL STANDARDS FOR PATENT CLAIM CONSTRUCTION

Claim construction is a question of law for the court, *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325 (2015), guided by Federal Circuit precedent. See *SunTiger, Inc. v. Scientific Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999). The Federal Circuit has made clear that “there is no magic formula or catechism for conducting claim construction.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1324 (Fed. Cir. 2005) (en banc). Nevertheless, there are several key sources and doctrines that

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