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

FLEXUSPINE, INC., *Plaintiff,* v. GLOBUS MEDICAL, INC., *Defendant.*	§ § § § § § § § § § § §	Case No. 6:15-CV-201-JRG-KNM

MEMORANDUM OPINION AND ORDER

On April 8, 2016, the Court issued an order construing the disputed claim terms of United States Patent Numbers 7,204,853 ("the '853 Patent"), 7,316,714 ("the '714 patent"), 7,909,869 ("the '869 Patent"), 8,123,810 ("the '810 Patent"), and 8,647,386 ("the '386 Patent") asserted in this suit by Plaintiff Flexuspine, Inc. ("Plaintiff") against Defendant Globus Medical, Inc. ("Defendant"). During the Pretrial Conference held on July 7, 2016, the parties identified a dispute regarding the scope of the terms "configured to" and "configured such that." The Court allowed the parties to file supplemental claim construction briefing. After considering the parties' supplemental briefing (Doc. Nos. 151, 153, and 163), the Court issues this Supplemental Claim Construction Memorandum Opinion and Order, and **ADOPTS** the constructions set forth below.

I. BACKGROUND

The asserted patents relate to expandable intervertebral implants. The '853 and '714 Patents disclose device claims directed toward artificial spinal unit assemblies. The '810 Patent discloses an intervertebral implant with a "wedged" expansion member. The term "configured to" appears in claim 1 of the '853 Patent, claims 1 and 2 of the '714 Patent, and claim 17 of the '810 Patent. The term "configured such that" appears in claim 1 of the '714 Patent. Claim 1 of the '853 Patent is an exemplary claim and recites the following elements (disputed term in italics):

> 1. An intervertebral implant for a human spine, comprising:
> an upper body comprising an inferior surface and a superior surface, wherein the superior surface of the upper body is *configured to* engage a first vertebra of the human spine;
> a lower body comprising a superior surface and an inferior surface, wherein the inferior surface of the lower body is *configured to* engage a second vertebra of the human spine;
> an insert *configured to* be positioned between the superior surface of the lower body and the inferior surface of the upper body before insertion of the intervertebral implant between the first vertebra and the second vertebra of the human spine; and
> an expansion member *configured to* elevate the insert to increase a separation distance between the upper body and the lower body after insertion of the intervertebral implant in the human spine, and wherein a portion of the superior surface of the lower body is *configured to* inhibit backout of the expansion member from the intervertebral implant.

II. APPLICABLE LAW

"It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Innova/Pure Water Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). In claim construction, courts examine the patent's intrinsic evidence to define the patented invention's scope. *See id.*;

C.R. Bard, Inc. v. U.S. Surgical Corp., 388 F.3d 858, 861 (Fed. Cir. 2004); *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Grp., Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001). This intrinsic evidence includes the claims themselves, the specification, and the prosecution history. *See Phillips*, 415 F.3d at 1314; *C.R. Bard, Inc.*, 388 F.3d at 861. Courts give claim terms their ordinary and accustomed meaning as understood by one of ordinary skill in the art at the time of the invention in the context of the entire patent. *Phillips*, 415 F.3d at 1312–13; *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1368 (Fed. Cir. 2003).

The claims themselves provide substantial guidance in determining the meaning of particular claim terms. *Phillips*, 415 F.3d at 1314. First, a term's context in the asserted claim can be very instructive. *Id.* Other asserted or unasserted claims can also aid in determining the claim's meaning because claim terms are typically used consistently throughout the patent. *Id.* Differences among the claim terms can also assist in understanding a term's meaning. *Id.* For example, when a dependent claim adds a limitation to an independent claim, it is presumed that the independent claim does not include the limitation. *Id.* at 1314–15.

"[C]laims 'must be read in view of the specification, of which they are a part.'" *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc)). "[T]he specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.'" *Id.* (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)); *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002). This is true because a patentee may define his own terms, give a claim term a different meaning than the term would otherwise possess, or disclaim or disavow the claim scope. *Phillips*, 415 F.3d at 1316. In these situations, the inventor's lexicography governs. *Id.* Also, the specification may resolve ambiguous claim terms "where

the ordinary and accustomed meaning of the words used in the claims lack sufficient clarity to permit the scope of the claim to be ascertained from the words alone." *Teleflex, Inc.*, 299 F.3d at 1325. But, "'[a]lthough the specification may aid the court in interpreting the meaning of disputed claim language, particular embodiments and examples appearing in the specification will not generally be read into the claims.'" *Comark Commc'ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir. 1988)); *see also Phillips*, 415 F.3d at 1323. The prosecution history is another tool to supply the proper context for claim construction because a patent applicant may also define a term in prosecuting the patent. *Home Diagnostics, Inc., v. Lifescan, Inc.*, 381 F.3d 1352, 1356 (Fed. Cir. 2004) ("As in the case of the specification, a patent applicant may define a term in prosecuting a patent.").

Although extrinsic evidence can be useful, it is "'less significant than the intrinsic record in determining the legally operative meaning of claim language.'" *Phillips*, 415 F.3d at 1317 (quoting *C.R. Bard, Inc.*, 388 F.3d at 862). Technical dictionaries and treatises may help a court understand the underlying technology and the manner in which one skilled in the art might use claim terms, but technical dictionaries and treatises may provide definitions that are too broad or may not be indicative of how the term is used in the patent. *Id.* at 1318. Similarly, expert testimony may aid a court in understanding the underlying technology and determining the particular meaning of a term in the pertinent field, but an expert's conclusory, unsupported assertions as to a term's definition is entirely unhelpful to a court. *Id.* Generally, extrinsic evidence is "less reliable than the patent and its prosecution history in determining how to read claim terms." *Id.*

III. CONSTRUCTION OF DISPUTED TERM

1. "configured to" and "configured such that"

Disputed Term	Plaintiff's Proposal	Defendant's Proposal
"configured to" / "configured such that"[1]	"constructed to operate without modification"	"designed to"

a) The Parties' Positions

The parties dispute whether the term "configured to" means "constructed to operate without modification," as Plaintiff proposes, or if it means "designed to," as Defendant proposes. Plaintiff argues that the asserted claims are apparatus claims, and that infringement of the claims occurs when the accused apparatus "is used or is available for use." (Doc. No. 151 at 2) (citing *Mass Engineered Design, Inc. v. Ergotron, Inc.*, 633 F. Supp. 2d 361, 378 (E.D. Tex. 2009)). According to Plaintiff, the appropriate interpretation of "configured to" is that the accused implant is actually constructed such that it is capable of operating in the manner specified by the asserted claims at any time, without modification. (*Id.* at 3.)

Plaintiff further argues that the specification describes how the structure of the preferred embodiment "operates to expand the implant from a contracted to an expanded state, and how it interacts within the human spine." (*Id.*) According to Plaintiff, "[t]his suggests that the patentee contemplated that the components would be arranged and the implant would be constructed such that it is capable of, and actually does perform, a particular operation when used." (*Id.*) Plaintiff further contends that a "precise arrangement of components to achieve the claimed operation (or a specific intent to arrange them or operate them in a certain way) is not required." (*Id.*) Plaintiff also argues that the extrinsic evidence indicates that "configured" means "to set up for operation" or "to arrange or prepare (something) so that it can be used" (*Id.*) (citing Merriam-

[1] The order will generally discuss the term "configured to" with the understanding that the analysis applies equally to the term "configured such that."

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