United States District Court,
W.D. Texas, Austin Division.

SPINAL CONCEPTS, INC,
v.
EBI, L.P.

No. A-02-CA-636 LY

April 13, 2004.

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MARKMAN REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE FN1

FN1. The Court addresses its findings on claim construction by Report and Recommendation due to the potentially dispositive nature of *Markman* rulings. *See* Ade Corp. v. KLA-Tencor Corp., 288 F.Supp.2d 590, 592 (D.Del.2003) ("A magistrate judge's patent claim construction and decisions on dispositive motions are subject to plenary review") (emphasis added).

ANDREW W. AUSTIN**, United States Magistrate Judge.**

TO: THE HONORABLE LEE YEAKEL UNITED STATES DISTRICT JUDGE

Before the Court are Spinal Concepts' Claim Construction Brief filed February 20, 2004 (Clerk's Doc. No. 66); Defendants' Claim Construction Brief filed February 20, 2004 (Clerk's Doc. No. 63); Spinal Concepts' Reply Brief filed March 5, 2004 (Clerk's Doc. No. 68); and, Defendants' Reply Brief filed March 5, 2004 (Clerk's Doc. No. 69). FN2 A *Markman* (Claim Construction) hearing was held on March 29, 2004.

FN2. The Court has also received Spinal Concepts' Technology Tutorial filed February 20, 2004 (Clerk's Doc. No. 65) and Defendants' Technology Tutorial filed February 20, 2004 (Clerk's Doc No. 62).

The Magistrate Court submits this Report and Recommendation on Claim Construction to the United States District Court pursuant to 28 U.S.C. s. 636(b), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local

Rules for the Assignment of Duties to United States Magistrate Judges. After reviewing the parties' pleadings, including the patents at issue, and the relevant case law, and after due consideration of the parties' oral arguments, the undersigned recommends the following claims construction.

I. BACKGROUND

On October 3, 2002, Plaintiff Spinal Concepts, Inc. ("Spinal Concepts") filed this patent infringement action against EBI, L.P., EBI Medical Systems, Inc., Electro-Biology, Inc., Biomet, Inc., and Biomet Orthopedics, Inc. ("Defendants"). Spinal Concepts develops, manufactures, and sells surgical products for spinal fixation and it is the assignee of the two patents at issue in this case: U.S. Patent Nos. 6,331,179 ("the '179 Patent") and 6,454,769 ("the '769 Patent"). Both patents concern spinal plate systems and methods for the fixation of the human spine. Defendants design, develop, manufacture and sell orthopaedic products.

According to Plaintiff Spinal Concepts, representatives of one or more Defendants met with Spinal Concepts representatives in September 1999 to discuss a possible licensing and/or purchasing agreement involving Spinal Concepts' technology. (Plf.Compl.para.para. 21, 25). At this meeting, Defendants' representatives were shown Spinal Concepts' products. (*Id*. para. 23). As a measure to protect Spinal Concepts' proprietary rights, Defendants' representatives signed a confidential disclosure agreement before the meeting was held. (*Id*. para. 21). Ultimately, however, no business relationship developed. (*Id*. para. 26).

It is Spinal Concepts's position that, following that meeting, Defendants "sold, made, imported, and/or used infringing spinal fixation products ... which infringe upon one or more of the claims of the Spinal Concepts Patents." (*Id*. para. 28). Spinal Concepts asserts patent infringement claims, including willful infringement, as well as a breach of contract claim. Spinal Concepts seeks, among other types of relief, monetary damages, which could include reasonable royalties and lost profits. Defendants, in turn, raise several affirmative defenses, including patent invalidity and noninfringement, and assert counterclaims for declaratory judgment as to the invalidity of Spinal Concepts' patents. (Defs.' Answer).

At this stage of the litigation, the parties seek construction of disputed terms in the patents at issue. Specifically, the parties seek construction of Claims 1, 2, 9, 17, and 21 in the '769 Patent and Claims 1, 2, 4, 32, 40, 41, 42, and 50 in the '179 Patent.

II. STANDARD OF REVIEW

Patent infringement analysis entails two steps: the first step is determining the meaning and scope of the patent claims, also known as claim construction or interpretation; the second step is comparing the properly construed claims to the device accused of infringing. Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). The interpretation and construction of patent claims, which define the scope of the patentee's rights under the patent, is a matter of law exclusively for the court. Id. at 970-71.

The analytical focus must begin and remain centered on the language of the claims themselves, for it is that language that the patentee chose to use to particularly point out and distinctly claim the subject matter of his invention. Interactive Gift Exp., Inc. v. CompuServe Inc., 256 F.3d 1323, 1331 (Fed.Cir.2001). In interpreting an asserted claim, the court looks first to the intrinsic evidence of record, *i.e.,* the patent itself, including the claims, the specification and the prosecution history. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). "Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language." *Id* .

In reviewing the intrinsic evidence, the court looks first to the words of the claims themselves, both asserted and nonasserted, to define the scope of the patented invention. Vitronics, 90 F.3d at 1582. "The terms used in the claims bear a 'heavy presumption' that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art." Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202 (Fed.Cir.2002), *cert. denied,* 538 U.S. 1058, 123 S.Ct. 2230, 155 L.Ed.2d 1108 (2003). Unless compelled otherwise, a court will give a claim term the full range of its ordinary meaning as understood by persons skilled in the relevant art. *Id.* The ordinary and customary meaning of a claim term may be determined by reviewing a variety of sources, including the claims themselves, dictionaries and treatises, and the written description, the drawings, and the prosecution history. Intellectual Prop. Dev., Inc. v. UA-Columbia Cablevision of Westchester, Inc., 336 F.3d 1308, 1314 (Fed.Cir.2003).

"Although words in a claim are generally given their ordinary and customary meaning, a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition of the term is clearly stated in the patent specification or file history." Vitronics, 90 F.3d at 1582. A court will deviate from the ordinary meaning of the disputed claim language if the patentee has "[chosen] to be his own lexicographer," *id.,* or if the patentee has relinquished a potential claim construction in an amendment to the claim or in an argument to overcome or distinguish a reference during patent prosecution. *See* Interactive, 256 F.3d at 1331.

The second level of the court's analysis is focused on the specification, which contains a written description of the invention that is clear and complete enough to enable those of ordinary skill in the art to make the invention and use it. Vitronics, 90 F.3d at 1582. The specification is the single best guide to the meaning of a disputed term. *Id.* "Thus claims must be construed so as to be consistent with the specification, of which they are a part." Merck & Co., Inc. v. Teva Pharm. USA, Inc., 347 F.3d 1367, 1371 (Fed.Cir.2003). In looking to the specification to construe claim terms, the court, however, must avoid reading limitations appearing in the specification into the claims. Interactive, 256 F.3d at 1331.

Third, the court may also consider the prosecution history of the patent. Vitronics, 90 F.3d at 1582. The prosecution history is significant in determining the meaning of the claims because it contains the complete record of the proceedings before the Patent and Trademark Office ("PTO"), including any express representations made by the applicant regarding the scope of the claims. *Id.* The prosecution history, however, should not be used to enlarge, diminish or vary the limitations in the claims. Markman, 52 F.3d at 980.

Ordinarily, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. Vitronics, 90 F.3d at 1583. "If the meaning of the claim limitations is apparent from the totality of the intrinsic evidence, then the claim has been construed." Interactive, 256 F.3d at 1332. However, if a claim limitation remains unclear, the court may look to extrinsic evidence, such as expert testimony, to help resolve the lack of clarity. *See id.* "Relying on extrinsic evidence to construe a claim is proper only when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence." *Id.* (internal quotation marks omitted). "Such instances will rarely, if ever, occur." Vitronics, 90 F.3d at 1585.

III. CLAIM CONSTRUCTION FOR PATENT '769

A. Claim 1

Claim 1 of the '769 Patent reads as follows:

1. A spinal fixation system, comprising:

a plate for stabilizing a spine, the plate comprising a borehole;

a bone screw comprising a **head** and a shank;

a **ring** for **inhibiting backout** of the bone screw from the plate, the ring being positionable within the borehole plate **between** the plate and the bone screw **during use,** and wherein the ring **allows** the bone screw to be inserted into a bone at a **desired angle** relative to the plate;

and wherein the head and the ring are **configured to couple together without fixedly engaging the ring to the plate during use.**

See Spinal Concepts' Br., Exh. C (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "head"

The term "head" in Claim 1 should be construed as: "the upper portion of the screw having a greater diameter than the shaft of the bone screw."

The Court rejects Defendants' proposed construction, "an upper extremity," as too broad and inconsistent with the use of the term within the patent. This definition fails to capture the true meaning of the word as used in this patent. As used in the patent, the head of the screw does not merely refer to "an upper extremity" of the screw. The main function of the head of the screw in this patent is to both secure the plate to the bone and the screw to the plate, and to cause the ring to expand during insertion of the screw so as to interlock with the head. To accomplish its function, the head must be wider than the body of the screw, the shank. *See* Col. 8, ln. 54-65 ("As the screw head is screwed into the ring, the ring preferably expands outwardly from its inner surface to accommodate the increasing width of the screw head ... The force exerted by head against the inner surface of ring preferably presses the ring into a fixed engagement against inner surface of borehole"). If the head were the same size as the shank, as Defendants propose, then the shank, and not just the head, would expand the ring and interlock with the ring. This would be inconsistent with the purpose of the invention, however, as a portion of the screw would be protruding from the plate. *See, e.g .,* Col. 1, ln. 67; Col. 2, ln. 1-2 ("It is intended that if screw backout occurs, the screw will remain connected to the plate so that it cannot easily contact internal tissue structures"). Moreover, if the head and the shank were the same size, the bone plate could not be affixed to the bone. It is the wider diameter of the head that secures the screw within the borehole and to the bone. *See* Col. 5, ln. 46.

Here, the specification clearly justifies departing from the ordinary meaning of the term "head." *See* Union Carbide Chem. & Plastics Tech. Corp. v. Shell Oil Co., 308 F.3d 1167, 1178 (Fed.Cir.2002). As previously noted, claims must be construed so as to be consistent with the specification. Merck, 347 F.3d at 1371. To define "head" simply as "an upper extremity" would deprive this part of the screw of its function in this spinal fixation system. Such construction cannot stand. The term "head" in Claim 1 should be construed as "the upper portion of the screw having a greater diameter than the shaft of the bone screw." This Court's review of the written description and drawings of the patent confirms that this construction is the most consistent with the patentee's use of the term throughout the patent. *See* SuperGuide Corp. v. DirecTV

Enter., Inc., 358 F.3d 870, 875 (Fed.Cir.2004).

2. "ring"

The term "ring" in Claim 1 should be construed as: "any member capable of fitting between the inner surface borehole and the bone screw to connect the bone screw to the bone plate."

When a patent applicant has elected to be a lexicographer by providing an explicit definition in the specification for a claim term, the definition selected by the patent applicant controls. Renishaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1249 (Fed.Cir.1998). *See* Dow Chem. Co. v. Sumitomo Chem. Co., Ltd., 257 F.3d 1364, 1373 (Fed.Cir.2001) ("The specification acts as a dictionary when it expressly defines terms used in the claims ..."). "The patentee's lexicography must, of course, appear with 'reasonable clarity, deliberateness, and precision' before it can affect the claim." Renishaw, 158 F.3d at 1249. Such is the case here. The term "ring" is clearly defined in the specification at Column 9 of the '769 Patent. Accordingly, this definition controls. *See* Voice Tech. Group, Inc. v. VMC Sys., Inc. ., 164 F.3d 605, 613-14 (Fed.Cir.1999) ("When the meaning of a term as used in the patent is clear, that is the meaning that must be applied in the construction of the claim ...").

3. "inhibiting backout"

The term "inhibiting backout" in Claim 1 should be construed as: "prohibiting, preventing or restraining backout."

The ordinary meaning of "inhibit" encompasses the following definitions: to hold back, restrain, prohibit, forbid, suppress or restrain. AMERICAN HERITAGE DICTIONARY 929 (3d ed.1996). As used in the claim and in the rest of the patent, the term "inhibit" is not limited to "prohibit," as Defendants contend. Rather, that term is used in the broader sense of inhibit to include "restrain" and "prevent." Therefore, the acquired meaning of the term "inhibiting backout" is "prohibiting, preventing or restraining backout." *See* Texas Digital, 308 F.3d at 1203 ("If more than one dictionary definition is consistent with the use of the words in the intrinsic record, the claim terms may be construed to encompass all such consistent meanings"); Inverness Medical Switzerland GmbH v. Warner Lambert Co., 309 F.3d 1373, 1379 (Fed.Cir.2002) (a word that has an ordinary meaning encompassing two relevant alternatives may be construed to encompass both alternatives unless the specification or prosecution history clearly demonstrates that only one of the multiple meanings was intended).

4. "between"

This Court finds that the term "between" in Claim 1 need not be construed. Because the meaning of the term "between" as used in this claim is clear and self-explanatory, it needs no interpretation. *See* Liquid Dynamics Corp. v. Vaughan Co., No. 01-C-6934, 2002 WL 1769979, at (N.D.Ill. Aug.1, 2002), *vacated on other grounds,* 355 F.3d 1361 (Fed.Cir.2004) ("Phrase 4's plain language is unambiguous, and claim construction is unnecessary"). The parties' proposed definitions are more likely to confuse the jury than to educate them. Given the unambiguous nature of the term "between," no interpretation is needed.

5. "during use"

The term "during use" in this instance should be construed as: "during or after implantation of the spinal fixation system."

Neither of the parties' proposed construction is entirely accurate. The term "during use" in this particular instance is part of the description of the ring, and particularly specifies the position of the ring relative to the plate and the bone screw, *at all times* after implantation, not just upon screw backout, as Spinal Concepts argues. Furthermore, within this section of Claim 1, the term "during use" also refers to the position of the ring during insertion of the bone screw. The ring is "positionable within the borehole between the plate and the bone screw" during implantation as well as after. *See* Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc., 334 F.3d 1294, 1299 (Fed.Cir.2003) (the context of the surrounding words of the claim must also be considered in determining the ordinary and customary meaning of disputed terms).

6. "allows"

The term "allows" in Claim 1 should be construed as: "to let do or happen, or permit."

The ordinary meaning of "allow" is "to let do or happen; permit." AMERICAN HERITAGE DICTIONARY 50. As used in the claim, "allows" does not mean to "enable," as Defendants propose. There is no "active" connotation to this word as used in the claim and throughout the patent. Rather, the term is used in a "passive" way in this claim and in other claims in this patent. *See* Claims 70-72, 74, Col. 17. Defendants have not overcome the "heavy presumption" that the word "allows" means anything other than its ordinary meaning. *See* Texas Digital, 308 F.3d at 1202. As such, the term "allows" should be construed consistent with its ordinary meaning. *See* Chef America, Inc. v. Lamb-Weston, Inc., 358 F.3d 1371, 1373 (Fed.Cir.2004) (ordinary, simple English words whose meaning is clear and unquestionable and there is no indication that their use in the patent changes their meaning, mean exactly what they say).

7. "desired angle"

The term "desired angle" in Claim 1 should be construed as: "chosen angle."

Spinal Concepts contends that the proper construction of this term is "the surgeon can implant the screw through the borehole in the plate at a number of different angles depending on the particular circumstances in a given surgery." This proposed construction, however, is an attempt to read limitations into the claim from the written description. Such a construction is impermissible. *See* Prima Tek II, L.L.C. v. Polypap, S.A.R.L., 318 F.3d 1143, 1148 (Fed.Cir.2003) ("limitations may not be read into the claims from the written description"). As used in the claim, the term "desired angle" refers to that angle selected or chosen for the particular patient. The proper construction of this term therefore is "chosen angle." *See* Merck, 347 F.3d at 1371 ("A fundamental rule of claim construction is that terms in a patent document are construed with the meaning with which they are presented in the patent document").

8. "configured to couple together without fixedly engaging the ring to the plate during use"

The phrase "configured to couple together without fixedly engaging the ring to the plate during use" in Claim 1 should be construed as: "designed to link together or connect so that the ring is not firmly or permanently interlocked with the plate after implantation of the spinal fixation system."

(a) "configured"

The parties agree that the term "configured" means "designed." The parties' proposed construction is in accord with the ordinary meaning of the term, *see* AMERICAN HERITAGE DICTIONARY 395, and is

consistent with the use of the term in the claim. Therefore, the term "configured" should be construed as "designed."

(b) "couple"

The term "couple" should be construed as "to link together or connect." *See* AMERICAN HERITAGE DICTIONARY 429. Of all the multiple meanings of this term, this definition is the most consistent with the use of this term in the patent. *See* Texas Digital, 308 F.3d at 1203.

(c) "without fixedly engaging the ring to the plate"

Defendants argue that this phrase must be construed as "without forming a locking engagement" under the doctrine of prosecution disclaimer. Defendants claim that, during the prosecution of the '769 Patent, Spinal Concepts distinguished the prior art, the "Bono Patent," by describing it as "forming a locking engagement, which is also fixed engagement," Defs.' Br., App. L, at 18, and that, as a result, these statements constitute an "explicit definition" of the phrase "without fixedly engaging." The Court disagrees.

The doctrine of prosecution disclaimer precludes a patentee from recapturing through claim interpretation specific meanings disclaimed during prosecution. Omega Eng. g, Inc. v. Raytek Corp., 334 F.3d 1314, 1323 (Fed.Cir.2003). The prosecution disclaimer doctrine, however, does not apply where the alleged disavowal is ambiguous. Id. at 1324. For the doctrine to apply, the alleged disavowing actions or statements made during prosecution must be both clear and unmistakable. Id. at 1326. Spinal Concepts, as the patentee, did not clearly and unmistakably disavow its proposed construction. While Spinal Concepts distinguished the Bono Patent with the language proposed by Defendants, it did not "deliberately and unambiguously define its invention" as a device including a head and a ring configured "without forming a locking engagement." *See* id. at 1326.

Additionally, the doctrine of prosecution disclaimer does not apply because Spinal Concepts' proposed construction is not inconsistent with what it argued during prosecution. *See* Schumer v. Laboratory Computer Sys., Inc., 308 F.3d 1304, 1314 (Fed.Cir.2002). During prosecution, Spinal Concepts argued that the Bono Patent involved a ring fixedly attached to the plate while its proposed invention figured a ring not fixedly attached to the plate. *See* Amendment; Response to Office Action Mailed Jan. 4, 2000 at 18, App. L to Defs.' Br. In its proposed interpretation, Spinal Concepts still maintains that the ring in the '769 Patent "is not finally or permanently locked to the plate." *See* Exh. A to Spinal Concepts' Br. at 6. The prosecution history therefore does not justify deviation from the plain and ordinary meaning of this phrase.

The ordinary meaning of the phrase "without fixedly engaging the ring to the plate," as understood by persons skilled in the relevant art, is "the ring is not firmly or permanently locked with the plate." This construction is consistent with the specification. *See* Merck, 347 F.3d at 1371.

(d) "during use" FN3

FN3. Ordinarily, the same terms in a patent have the same meaning. *See* Dayco Products, Inc. v. Total Containment, Inc., 329 F.3d 1358, 1371 (Fed.Cir.2003) (if a claim term appears in more than one claim it should be construed the same in each); Phonometrics, Inc. v. Northern Telecom Inc., 133 F.3d 1459, 1465 (Fed.Cir.1998) ("A word or phrase used consistently throughout a claim should be interpreted consistently"). The varied use of this phrase throughout the patent, however, indicates that it has no universal meaning and that it must be interpreted within the context of the other words in the claim. *See*

Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc., 340 F.3d 1298, 1308 (Fed.Cir.2003) ("varied use of disputed term in the written description attests to the breadth of a term rather than providing a limiting definition"); Pitney-Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1311 (Fed.Cir.1999) (where the language of the written description is sufficient to put a reader on notice of the different uses of a term, it is appropriate to depart from the normal rule of construing seemingly identical terms in the same manner). Since "claims are not construed in a vacuum, but rather in the context of the intrinsic evidence, *viz.*, the other claims, the specification, and the prosecution history," Jansen v. Rexall Sundown, Inc., 342 F.3d 1329, 1333 (Fed.Cir.2003), the phrase "during use" should be construed anew in each instance where its meaning is disputed.

This phrase in this instance is part of the general description of the invention-the spinal fixation system-once assembled inside the patient's body and attached to the bone. It should be construed to mean "after implantation." The Court disagrees with Spinal Concepts' argument that, as used in this instance, the phrase connotes "no specific temporal limitation." *See* Spinal Concepts' *Markman* Presentation at 9. It is clear from the patent that the ring and the head are not "coupled together" until the device has been implanted. As such, this phrase means "after implantation."

In short, the phrase "configured to couple together without fixedly engaging the ring to the plate during use" should be construed as: "designed to link together or connect so that the ring is not firmly or permanently interlocked with the plate after implantation of the spinal fixation system."

B. Claim 2

Claim 2 of the '769 Patent reads as follows:

2. The system of claim 1, wherein the ring is configured to substantially surround the head **during use,** and wherein rotating the bone screw **rotates** the ring when the ring and bone screw are coupled together.

See Spinal Concepts' Br., Exh. C (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "during use"

The phrase "during use" in Claim 2 should be construed to mean "after implantation."

The Court rejects Spinal Concepts' proposed construction ("upon the screw backing out from the bone") as too narrow. Within the context of this claim, and as described in the patent, the ring surrounds the head of the screw at all times after implantation, including, but not limited to, when the screw backs out. The phrase should be given a broad, rather than narrow, definition. *See* Brookhill-Wilk 1, 334 F.3d at 1301-02 (where the written description supports a broader interpretation of the disputed claim term, the court is constrained to follow the language of the claim and to give the claim term "its full breadth of ordinary meaning as understood by persons skilled in the relevant art").

2. "rotates"

The term "rotates" in Claim 2 should be construed as: "to turn about an axis relative to the wall of the plate."

The Court adopts Spinal Concepts' proposed construction because it is both in accord with the term's

ordinary meaning, *see* AMERICAN HERITAGE DICTIONARY 1570, and offers a more accurate description of the patentee's use of this term in this claim and the rest of the patent. The word "rotate" is used in this patent to describe the conical range of movement of which the ring is capable. While Defendants' proffered construction ("positions at an angle") is not erroneous, Spinal Concepts' proposal is more accurate and more in line with the term's ordinary meaning.

C. Claim 9

Claim 9 of the '769 Patent reads:

9. The system of claim 1, wherein the ring is **movable** within the borehole such that the shank is rotatable in a substantially conical range of motion to **allow** the shank to be positioned at a **selected angle** relative to the plate.

See Spinal Concepts' Br., Exh. C (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "movable"

The term "movable" in Claim 9 should be construed as: "capable of changing position."

The ordinary meaning of this term is "capable of changing position." AMERICAN HERITAGE DICTIONARY 1182. The problem with Defendants' proposed construction ("positionable at an angle") is that it renders the language "to be positioned at a selected angle" superfluous. Such construction is therefore improper. *See* Nautilus Group, Inc. v. Icon Health and Fitness, Inc., 82 Fed.Appx. 691, 694 (Fed.Cir.2003) (unpublished) (finding the district court's claim construction erroneous because it rendered claim terms superfluous).

2. "allow"

The term "allow" in Claim 9 should be construed as: "to let do or happen, or permit."

Because the meaning of this term is consistent throughout this patent, it should be given the same construction as in Claim 1. *See* Dayco, 329 F.3d at 1371 (if a claim term appears in more than one claim it should be construed the same in each); Phonometrics, 133 F.3d at 1465 ("A word or phrase used consistently throughout a claim should be interpreted consistently").

3. "selected angle"

The phrase "selected angle" in Claim 9 should be interpreted to mean "chosen angle."

It is undisputed that the phrase "selected angle" in Claim 9 and "desired angle" in Claim 1 have the same meaning. As such, they should be given the same construction. *See* Pickholtz v. Rainbow Tech., Inc., 284 F.3d 1365, 1373 (Fed.Cir.2002) (same construction for different terms because the terms were used as synonyms); Tate Access Floors, Inc. v. Maxcess Tech., Inc., 222 F.3d 958, 968 (Fed.Cir.2000) (same construction for different terms because terms were used interchangeably in the specification).

D. Claim 17

Claim 17 of the '769 Patent reads:

17. The system of claim 1, wherein the ring substantially surrounds the head of the bone screw, and wherein the bone screw is capable of being angulated relative to the plate **during use** such that the head remains below the upper surface of the plate.

See Spinal Concepts' Br., Exh. C (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "during use"

The phrase "during use" in Claim 17 should be construed as: "during implantation."

It is clear from the surrounding text that "during use" in this context refers to that step in the process when the bone screw is "capable of being angulated." The written description indicates that the bone screw can be positioned at the desired angle during insertion *only*, and not after implantation when the bone screw is already completely inside the bone. *See Col*. 6, ln. 8-9, 63-67; Col. 7, ln. 1. Given the context and the specification, the proper construction of "during use" in this claim is "during implantation." *See* Middleton, Inc. v. Minnesota Mining and Mfg. Co., 311 F.3d 1384, 1387 (Fed.Cir.2002) (the most important indicator of the meaning of disputed term is its usage and context within the claim itself).

E. Claim 21

Claim 21 of the '769 Patent reads:

21. The system of claim 1, wherein the ring is **rotatable** within the borehole so that the shank is positionable through the ring at a selectable angle that is less than about 15 degrees relative to a plane substantially perpendicular to the plate.

See Spinal Concepts' Br., Exh. C (Clerk's Doc. No. 66) (emphasis added) (disputed term in bold).

1. "rotatable"

The term "rotatable" in Claim 21 should be construed to mean "capable of turning about an axis."

Both parties agree that this term should be construed consistent with the acquired meaning of the term "rotates" in Claim 2. Since "rotatable" in this claim describes the range of motion of the ring within the borehole as does "rotates" in Claim 2, it should be given the same construction. *See* Dayco, 329 F.3d at 1371; Phonometrics, 133 F.3d at 1465. FN4

FN4. The Court recognizes that the term "rotates" in Claim 2 has been construed as "to turn about an axis *relative to the wall of the plate*." However, in light of the surrounding text in Claim 21, the phrase "relative to the wall of the plate" would prove redundant. *See* Nautilus, 82 Fed. Appx. at 694. The term "rotatable" therefore should be construed simply as "capable of turning about an axis."

IV. CLAIM CONSTRUCTION FOR PATENT '179

A. Claim 1

Claim 1 of the '179 Patent reads as follows:

1. A bone plate system comprising:

a plate configured to stabilize a bone structure;

a hole passing through the plate;

a **ring** positionable within the hole, the ring comprising a **deflectable portion;**

a **fastener** positionable through the ring such that a **head** of the fastener engages the ring, the fastener configured to couple the plate to a bone; and

wherein the **deflectable** portion of the ring is configured to **deflect outwards** when the head is initially positioned in the ring and wherein the **deflectable portion** is configured to **deflect inwards** after passage of a portion of the head into the ring **to couple the fastener to the ring so that removal of the fastener from the plate is inhibited.**

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "ring"

The term "ring" in Claim 1 should be construed as: "a circular band."

This construction, which is based on this term's ordinary meaning, *see* AMERICAN HERITAGE DICTIONARY 1555, is the most consistent with the use of this term in the claim and in the patent. *See* Texas Digital, 308 F.3d at 1203. Spinal Concepts' proffered construction ("a circular band that may include a gap") would be redundant in light of Claim 35 FN5 and the written description. *See* Col. 6, ln. 40-41 ("Gap may exist in each of the rings"). Moreover, Spinal Concepts's proposal seeks to have an additional limitation, the term "gap," read into this claim. The word "gap" is nowhere found in Claim 1. Spinal Concepts' construction is unacceptable. *See* Northern Telecom Ltd. v. Samsung Elec. Co., Ltd., 215 F.3d 1281, 1290 (Fed.Cir.2000) ("This court has repeatedly and clearly held that it will not read unstated limitations into claim language").

FN5. Claim 35 teaches: "The system of claim 33, wherein the ring further comprises an *opening in a wall* of the ring, the opening configured to allow the ring to expand and contract." Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added). To construe "ring" as Spinal Concepts proposes would make this language in Claim 35 superfluous. *See* Nautilus, 82 Fed. Appx. at 694.

2. "deflectable portion"

The phrase "deflectable portion" in Claim 1 should be construed as: "a part of the ring that can expand, contract or bend."

The term "deflect" has multiple dictionary definitions, including "bend or deviate." *See* AMERICAN HERITAGE DICTIONARY 490. Although "bend" is the definition most consistent with the use of the

terms "deflect" and "deflectable" in this claim, it does not fully describe what it is meant by this term in the patent. *See* Storage Tech. Corp. v. Cysco Sys., Inc., 329 F.3d 823, 831 (Fed.Cir.2003) (claim construction is interpreting what it is meant by a word in a claim); Texas Digital, 308 F.3d at 1203 (court must determine which of the possible meanings of the terms in question was intended by the inventor). Neither "deflect" nor "deflectable" is used in the specification. Rather, the specification refers to the ring as contracting, expanding *and* bending. *See* Col. 2, ln. 55, 64-66; Col. 3, ln. 38; Col. 6, ln. 41-43; Col. 10, ln. 29-34; Col. 11, ln. 56-57; Col. 12, ln. 66-67; Col. 13, ln. 1-5. As used in this claim, the terms "deflect" and "deflectable" were clearly intended to convey all the possible ways this part of the ring could move in reaction to the head of the fastener. The acquired meaning of the terms "deflect" and "deflectable" must therefore include contracting and expanding as well as bending. *See* Brookhill-Wilk 1, 334 F.3d at 1301-02.

The most relevant definition of the term "portion" as used in this claim is "a section or quantity within a larger thing; a part of a whole." *See* AMERICAN HERITAGE DICTIONARY 1412. The Court rejects Defendants' proposed construction ("separated part") because it connotes a section that is *apart* from the ring and not *a part* of the ring, as it is described in the claim. The prosecution history does not, as Defendants contend, justify departing from the ordinary meaning of the term "portion." What the prosecution file shows is Spinal Concepts distinguishing its invention from the Bono Patent by focusing on Bono's "use of a threaded connection between the fastener and the ring." Amendments/Response to Office Action Mailed Dec. 14, 2000 at 5, Exh. I to Defs.' Br. What Spinal Concepts actually argued, during prosecution, was that Bono's "threaded connection" did not require the contractible/expandable/bendable part of the ring to contract or bend inwards after a portion of the head of the fastener had proceeded into the ring. *Id*. The prosecution history therefore does not support Defendants' proposed construction.

Based on the foregoing, the acquired meaning of the phrase "deflectable portion" in Claim 1 is "a part of the ring that can expand, contract or bend."

3. "fastener"

The term "fastener" in Claim 1 should be construed to mean "any elongated member, threaded or non-threaded, which is securable within a bone."

This term is clearly defined in the specification. *See* Col. 6, ln. 35-37. Since the patentee acted as his own lexicographer, this definition controls. *See* Voice Tech. Group, 164 F.3d at 613-14 ("When the meaning of a term as used in the patent is clear, that is the meaning that must be applied in the construction of the claim ..."). Defendants' proffered construction is improper because it attempts to use statements in the written description-examples of a fastener-to affect the scope of this claim when the patentee has clearly and unambiguously set forth an explicit definition for this term, which does not include these examples. *See* Johnson Worldwide Assoc., Inc. v. Zebco Corp., 175 F.3d 985, 989-90 (Fed.Cir.1999).

4. "head"

The term "head" in Claim 1 should be construed as: "the upper portion of the fastener having a greater diameter than the shaft of the fastener."

As with the term "head" in Claim 1 of the '769 Patent, the term "head" in this claim should not be given its ordinary meaning. To define "head" as an "upper extremity," as Defendants propose, or as "the uppermost part," or "the top," *see* AMERICAN HERITAGE DICTIONARY 831, would rob this word of its full intended meaning. Both the language of Claim 1 and the specification indicate that the head of the fastener

must be wider than the shank. If the head and the shank had the same diameter, the head would not be the only portion of the fastener that "engages the ring" as the fastener is inserted. *See* Claim 1 at Col. 14, ln. 43-44. Further, the fact that it is the head, and not the shank, which causes the ring to "deflect outwards" implies that the diameter of the head is greater than the diameter of the shank. *See* id. at ln. 46-47. In addition, for the head of the fastener to secure the plate to the bone and the fastener to the plate, the head of the fastener must also be wider than the shank.

It is well-settled that the usage of the disputed claim term in the context of the claims as a whole informs the proper construction of the terms. Abbott Laboratories v. Syntron Bioresearch, Inc., 334 F.3d 1343, 1351 (Fed.Cir.2003). *See* Middleton, 311 F.3d at 1387 (the most important indicator of the meaning of disputed term is its usage and context within the claim itself). Moreover, a review of the written description and drawings of the patent confirms that this Court's construction is the most consistent with the patentee's use of the term throughout the patent. *See* SuperGuide, 358 F.3d at 875. The proper construction of the term "head" in Claim 1 should therefore be "the upper portion of the fastener having a greater diameter than the shaft of the fastener."

5. "deflectable portion"

The phrase "deflectable portion" in this instance should also be construed as: "a part of the ring that can expand, contract or bend."

There is no question that this phrase has the same meaning in both instances in which it is used in Claim 1. As such, it should be given the same construction. *See* Dayco, 329 F.3d at 1371 (if a claim term appears in more than one claim it should be construed the same in each); Phonometrics, 133 F.3d at 1465 ("A word or phrase used consistently throughout a claim should be interpreted consistently").

6. "deflect outwards"

The phrase "deflect outwards" in Claim 1 should be construed as: "to expand or bend away from the center."

The parties agree that the term "outwards" means "away from the center." Since this is the ordinary meaning of "outwards," *see* AMERICAN HERITAGE DICTIONARY 1287, and is consistent with its use in the claim, *see* Texas Digital, 308 F.3d at 1203, this definition should be adopted. The acquired meaning of the term "deflect," as explained above, is "to contract, expand, or bend." Because "deflect" is qualified by "outwards" in this instance, it means only "to expand or bend." This part of the ring could not "contract" away from the center. Accordingly, in this context, the term "deflect" should be construed to mean only "to expand or bend." *See* ResQNet.com, Inc. v. Lansa, Inc., 346 F.3d 1374, 1378 (Fed.Cir.2003) ("This court discerns the meaning of claim language according to its usage and context").

7. "deflect inwards"

The phrase "deflect inwards" in Claim 1 should be construed as: "to contract or bend towards the center."

Once again, the parties are in agreement that the term "inwards" means "towards the center." The Court agrees with this proposed construction. "Towards the center" is one of multiple dictionary definitions, *see* AMERICAN HERITAGE DICTIONARY 950, and is consistent with its usage in the claim. *See* Texas Digital, 308 F.3d at 1203. As to "deflect," because it is qualified by "inwards," it should be construed to

mean only "to contract or bend." "Expand" is not appropriate in this context. *See* ResQNet.com, 346 F.3d at 1378.

8. "to couple the fastener to the ring so that removal of the fastener from the plate is inhibited"

The phrase "to couple the fastener to the ring so that removal of the fastener from the plate is inhibited" in Claim 1 should be interpreted as: "to link together or connect the fastener to the ring so that backout of the fastener from the plate is prohibited, prevented, or restrained."

(a) "to couple"

The term "couple" should be construed as "to link together or connect." *See* AMERICAN HERITAGE DICTIONARY 429. Of all the multiple meanings of this term, this definition is the most consistent with the use of this term in the patent. *See* Texas Digital, 308 F.3d at 1203. As used in the patent, the ring and the head are configured to connect with one another. *See* Col. 11, ln. 30-40 ("fastener backout from the bone plate may be resisted by the locking mechanism-groove connection between locking mechanism and the ring"); Col. 12, ln. 7-9 ("engagement of a finger of a ring on groove may inhibit fastener from backing out"); Col. 13, ln. 58-61 ("if the fastener becomes loose within the bone, fastener backout from the bone plate may be resisted by the ridge-rim connection between fastener head and ring").

Defendants' proposed construction ("to fasten or join") for this term is inconsistent with its usage in the patent. As used in the patent, "couple" connotes a looser configuration between the ring and the head than that proposed by Defendants. As described in the specification, in some embodiments there is "some freedom of movement in the connection between the ridges on the paddles [of the ring] and the rim [on the fastener head] to allow a fastener to back out slightly from a bone after insertion." Col. 13, ln. 65-67; Col. 14, ln. 1. Clearly, the term "couple" was not intended to mean "fasten." Rather, the specification demonstrates that its acquired meaning is "to link together or connect." *Cf*. Inverness, 309 F.3d at 1379 (a word that has an ordinary meaning encompassing two relevant alternatives may be construed to encompass both alternatives *unless* the specification or prosecution history clearly demonstrates that only one of the multiple meanings was intended).

(b) "removal"

The term "removal" should be construed as "backout." The ordinary meaning of "removal" is inconsistent with the purpose of the invention-prevention of backout of the fastener. *See* Col. 1, ln. 45-52; Col. 2, ln. 35-37. The patent continuously talks about reducing and inhibiting *backout,* not removal. *See* Col. 1, ln. 52; Col. 2, ln. 37; Col. 3, ln. 6; Col. 4, ln. 45; Col. 11, ln. 32; Col. 12, ln. 8, 55-56; Col. 13, ln. 59-60. Except for Claims 1, 24, 32, 47, 89, and 103, "removal" is used throughout the patent in the context of extracting the fastener from the plate and the bone. *See* Col. 4, ln. 18-24; Col. 14, ln. 5; Col. 18, ln. 29-33. Even its usage in Claims 24, 47, 89, and 103 conform to its ordinary meaning of "to transfer or convey from one place to another." *See* AMERICAN HERITAGE DICTIONARY 1527. That is not how "removal" is used in Claims 1 and 32. The only meaning of "removal" in these claims that would align with the purpose of the invention is "backout." Accordingly, the acquired meaning of the term "removal" in Claim 1 is "backout." *See* Apple Computer, Inc. v. Articulate Sys., Inc., 234 F.3d 14, 25 (Fed.Cir.2000) ("claim must be interpreted in light of the teachings of the written description and purpose of the invention described therein"); Renishaw, 158 F.3d at 1250 ("The construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction").

(c) "inhibited"

The acquired meaning of the term "inhibited" in Claim 1 is "prohibited, prevented or restrained." Contrary to Defendants' assertions, the meaning of this term in this claim and throughout the patent is not limited to "prohibited." Rather, the term is at times used interchangeably with reducing and resisting, which are closer in meaning to "prevented" or "restrained" than to "prohibited." *See* Col. 2, ln. 54; Col. 7, ln. 40-50; Col. 11, ln. 32. "Inhibited" should therefore be construed broadly to include the full range of consistent meanings. *See* Texas Digital, 308 F.3d at 1203 ("If more than one dictionary definition is consistent with the use of the words in the intrinsic record, the claim terms may be construed to encompass all such consistent meanings").

B. Claim 2

Claim 2 of the '179 Patent reads:

2. The bone plate system of claim 1, wherein the deflectable portion of the ring comprises a **ridge** that is **configured to engage** a top surface of the head of the fastener.

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "ridge"

The term "ridge" in Claim 2 should be construed to mean "a narrow section protruding inward."

Defendants are correct when they argue that the ordinary meaning of "ridge" is inconsistent with its use in the patent. As depicted in the drawings and as described in the specification, a ridge is a part of the ring that protrudes inward to connect, or "snap onto/into," the head of the fastener. *See* Fig.21, 23a-c; Col. 4, ln. 36-38; Col. 13, ln. 54-56. Neither party's proposal is completely accurate. By construing "ridge" as "a narrow section protruding inward," the Court remains true to the term's intended meaning as evidenced in the drawings and the written description. *See* SuperGuide, 358 F.3d at 875.

2. "configured to engage"

The phrase "configured to engage" in Claim 2 should be construed as: "designed to interlock with or snap onto."

The only relevant dictionary definition for "engage" is "to interlock or cause to interlock; mesh." *See* AMERICAN HERITAGE DICTIONARY 610. Both parties propose a construction that includes this definition to some extent. Spinal Concepts' proposal renders superfluous other language in the claim and thus must be rejected. Defendants' proposal, on the other hand, is too narrow. "Interlock with" conveys a tighter connection between the ridge of the ring and the head of the fastener than intended by the patentee. This claim teaches that the ridge in the ring is designed to connect with the head of the fastener. The written description is more specific about *how* the ridge and the head connect: the ridges of the ring *snap* onto the rim on the fastener head. *See* Col. 13, ln. 54-56. Moreover, the patent indicates that this ridge-rim connection allows the fastener to move slightly, and safely, after insertion in response to the patient's movement without the fastener protruding from the plate. *See* Col. 3, ln. 10-16; Col. 4, ln. 63-67; Col. 5, ln. 1-2; Col. 11, ln. 29-39; Col. 13, ln. 65-67; Col. 14, ln. 1-3. Defendants' proposed construction would not permit such "freedom of movement in the connection" between the ridge of the ring and the head of the

fastener and must also be rejected.

The acquired meaning of the phrase "configured to engage" is "designed to interlock with or snap onto." FN6 This construction is consistent with the claim language as well as the specification and the drawings. *See* Super Guide, 358 F.3d at 875.

FN6. There is no dispute that the term "configured" means "designed." *See* AMERICAN HERITAGE DICTIONARY 395.

C. Claim 4

Claim 4 of the '179 Patent reads:

4. The bone plate system of claim 1, wherein the ring is configured to **move** within the hole to **allow** a shank of the fastener to be inserted into the bone at an angle that is oblique to the plate.

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "move"

The term "move" in Claim 4 should be construed as "to change position."

Defendants' proposed construction ("position at an angle") would render "to be inserted into the bone at an angle" superfluous and is thus improper. *See* Nautilus, 82 Fed.Appx. at 694. The Court's construction is based on the ordinary meaning of the word "move," which is consistent with its usage in the claim and the patent. *See* Chef America, 358 F.3d at 1373 (ordinary, simple English words whose meaning is clear and unquestionable and there is no indication that their use in the patent changes their meaning, mean exactly what they say).

2. "allow"

The term "allow" in Claim 4 means "to let do or happen, or permit."

Contrary to Defendants' assertions, "allow" in this claim, and in this patent, does not mean to "enable." There is no "active" connotation to this word as used in the claim and throughout the patent. Rather, the term is used in a "passive" way. *See, e.g.,* Col. 4, ln. 57-60, 66-67; Col. 7, ln. 20-21; Col. 11, ln. 8-11; Col. 12, ln. 37-41, 67; Col. 13, ln. 2-5. Because Defendants have not overcome the "heavy presumption" that the word "allow" means anything other than its ordinary meaning, *see* Texas Digital, 308 F.3d at 1202, the term "allow" should be construed consistent with its ordinary meaning. *See* Chef America, 358 F.3d at 1373.

D. Claim 32

Claim 32 of the '179 Patent reads as follows:

32. A bone plate system, comprising:

a plate;

a hole through the plate, the hole extending from a top surface of the plate to a bottom surface of the plate, and wherein a portion of the plate forms a wall of the hole;

a **fastener** for coupling the plate to a bone, the fastener comprising a **head** and a shank, wherein a first portion of the head has a first diameter and a second portion of the head has a second diameter that is smaller than the first diameter;

a ring configured to **inhibit removal** of a fastener from the plate when the ring is positioned in the hole and the fastener is positioned through the ring, the ring comprising an outer surface, an inner surface and **a ridge on a portion of the inner surface;** and

wherein the **ridge is expanded outwards** when the first portion of the head passes into the ring, and wherein the **ridge moves inward until the ridge contacts the head when the second portion of the head is positioned next to the ridge during use.**

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "fastener"

The term "fastener" in Claim 32 should be construed as "any elongated member, threaded or non-threaded, which is securable within a bone."

As noted above in the discussion of Claim 1, this term is defined in the specification. *See* Col. 6, ln. 35-37. Since the patentee acted as his own lexicographer, this definition controls. *See* Voice Tech. Group, 164 F.3d at 613-14 ("When the meaning of a term as used in the patent is clear, that is the meaning that must be applied in the construction of the claim ..."). "Fastener" in Claim 32 and in Claim 1 have the same meaning, the special meaning selected by the patentee, and should be construed in the same manner. *See* Dayco, 329 F.3d at 1371 (if a claim term appears in more than one claim it should be construed the same in each); Phonometrics, 133 F.3d at 1465 ("A word or phrase used consistently throughout a claim should be interpreted consistently").

2. "head"

The term "head" in Claim 32 should be construed as: "the upper portion of the fastener having a greater diameter than the shaft of the fastener."

The term "head" here should be construed the same as "head" in Claim 1. *See* Dayco, 329 F.3d at 1371; Phonometrics, 133 F.3d at 1465. As with Claim 1, the language of Claim 32 and the specification indicate that the head of the fastener *must* be wider than the shank. For the head of the fastener to secure the plate to the bone and the fastener to the plate, as taught in Claim 32, the head of the fastener must be wider than the shank. This Court's review of the written description and drawings of the patent confirms that this construction is the most consistent with the patentee's use of the term throughout the patent. *See* SuperGuide, 358 F.3d at 875. The proper construction of the term "head" in Claim 32, as well as Claim 1, should therefore be "the upper portion of the fastener having a greater diameter than the shaft of the fastener."

3. "inhibit removal"

The phrase "inhibit removal" in Claim 32 should be construed as: "prohibit, prevent, or restrain backout."

It is undisputed that this phrase should be construed consistent with the construction given to the terms "inhibit" and "removal" in Claim 1. Accordingly and for the reasons stated above, the acquired meaning of "inhibit removal" in Claim 32 is "prohibit, prevent, or restrain backout." *See* Dayco, 329 F.3d at 1371; Phonometrics, 133 F.3d at 1465.

4. "a ridge on a portion of the inner surface"

The phrase "a ridge on a portion of the inner surface" in Claim 32 should be construed as: "a narrow section protruding inward on a portion of the inner surface."

The acquired meaning of this phrase is consistent with this Court's construction of the term "ridge" in Claim 2. As previously discussed, the ordinary meaning of "ridge" is inconsistent with its use in the patent. Since the ridge is pictured and described as a part of the ring that protrudes inward to connect with, or "snap onto/into," the head of the fastener, *see* Fig.21, 23a-c; Col. 4, ln. 36-38; Col. 13, ln. 54-56, it should be interpreted to mean "a narrow section protruding inward."

5. "ridge is expanded outwards"

The phrase "ridge is expanded outwards" in Claim 32 means: "ridge is opened up or bent away from the center of the ring."

Based on its ordinary meaning and its usage on the claim, the term "expanded" should be construed as "opened up or bent away." As used in the claim, "expanded" encompasses both definitions and must therefore be construed broadly. *See* Inverness, 309 F.3d at 1379 (a word that has an ordinary meaning encompassing two relevant alternatives may be construed to encompass both alternatives unless the specification or prosecution history clearly demonstrates that only one of the multiple meanings was intended).FN7

FN7. The parties agree that the term "outwards" should be given its ordinary meaning of "away from the center." *See* AMERICAN HERITAGE DICTIONARY 1287.

6. "ridge moves inward until the ridge contacts the head when the second portion of the head is positioned next to the ridge during use"

The phrase "ridge moves inward until the ridge contacts the head when the second portion of the head is positioned next to the ridge during use" in Claim 32 should be construed as: "ridge moves towards the center of the ring up to the time that the ridge and the second (narrower) portion of the head of the fastener come together or touch during implantation."

As used in the claim, this phrase speaks to the interaction between the fastener head and the ridge during insertion of the fastener into the ring. First, the ridge expands when the first portion of the head, with the greater diameter, goes through the ring. Then, it contracts until the second portion of the head, with the smaller diameter, is next to it; that is, until the ridge and the second portion of the head are next to each other. In this context, the phrase "during use" clearly refers to the point when the fastener is inserted through

the ring during implantation.

E. Claim 40

Claim 40 of the '179 Patent reads:

40. The system of claim 32, wherein the ring is configured to substantially surround the head **during use.**

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "during use"

"During use" in this claim should be construed as: "after implantation of the bone plate system."

Spinal Concepts argues that in this context "during use" means "upon the fastener backing out of the bone." While it is true that the ring surrounds the head of the fastener during backout, this is not the only time when it does so. Rather, as described in the specification, the ring is designed to surround the head of the fastener *at all times* after the fastener has been fully inserted into the bone, whether or not the fastener is backing out of the bone. Accordingly, the phrase "during use" in Claim 40 means "after implantation of the bone plate system."

F. Claim 41

Claim 41 of the '179 Patent reads:

41. The system of Claim 32, wherein the ring is configured to **rotate freely** relative to the wall when the ring is **coupled** to the fastener.

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "rotate freely"

The phrase "rotate freely" in Claim 41 should be construed to mean "to turn about an axis freely."

The acquired meaning of the term "rotate" in this claim comes from its ordinary meaning, *see* AMERICAN HERITAGE DICTIONARY 1570, and its usage in this claim. The word "rotate" is used in this patent to describe the conical range of movement of the ring within the hole of the bone plate. Defendants' proposed construction ("freely position at an angle") is not as accurate as Spinal Concepts' proposed definition.FN8

FN8. The term "freely" needs no construction. *See* Liquid Dynamics, 2002 WL 1769979, at *6 ("Phrase 4's plain language is unambiguous, and claim construction is unnecessary").

2. "coupled"

The term "coupled" in Claim 41 means "linked together or connected."

"Coupled" in this claim carries the same meaning as "couple" in Claim 1. Accordingly, it should be given

the same construction. *See* Dayco, 329 F.3d at 1371 (if a claim term appears in more than one claim it should be construed the same in each); Phonometrics, 133 F.3d at 1465 ("A word or phrase used consistently throughout a claim should be interpreted consistently"). The term "coupled" therefore should be interpreted as "linked together or connected."

G. Claim 42

Claim 42 of the '179 Patent reads:

42. The system of claim 32, wherein the head comprises a tapered outer surface configured to expand the ring against an inner surface of the hole when the head is positioned within the ring **during use .**

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "during use"

The phrase "during use" in Claim 42 should be construed as: "during implantation."

As used in this claim, the phrase "during use" was intended to mean during insertion of the fastener. The phrase is used here in the context of describing how the head forces the ring to expand, which only happens as the fastener is inserted through the ring. "During use" in this claim has only one meaning: "during implantation." *See* ResQNet.com, 346 F.3d at 1378 ("This court discerns the meaning of claim language according to its usage and context").

H. Claim 50

Claim 50 of the '179 Patent reads:

50. The system of claim 32, wherein the ring is configured to **swivel** within the hole to **allow** the fastener shank to be inserted into the bone at an angle that is oblique to the plate.

See Spinal Concepts' Br., Exh. B (Clerk's Doc. No. 66) (emphasis added) (disputed terms in bold).

1. "swivel"

The term "swivel" in Claim 50 means "pivot."

The Court agrees with both parties in that the ordinary meaning of the word "swivel" should be applied in construing this term. "Swivel" in this context means "pivot." Spinal Concepts proffers a construction that, while based on the ordinary meaning, does not define the term with sufficient clarity. Defendants' proposed construction is improper because it renders superfluous other language in the claim. *See* Nautilus, 82 Fed. Appx. at 694.

2. "allow"

The acquired meaning of the term "allow" in Claim 50 is "to let do or happen, or permit."

The meaning of "allow" in this claim is the same as in Claim 4. Thus, it should be construed in the same

manner. *See* Dayco, 329 F.3d at 1371; Phonometrics, 133 F.3d at 1465.

V. CONCLUSION

The Magistrate Court **RECOMMENDS** that the District Court **CONSTRUE** the disputed claim terms as set forth above.FN9

FN9. A summary of this Court's construction of the patent claims at issue has been attached.

VI. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See* Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir.1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. s. 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 150-53, 106 S.Ct. 466, 472-74, 88 L.Ed.2d 435 (1985); Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir.1996) (en banc).

The Clerk is directed to send a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

CONSTRUCTION OF CLAIMS FOR U.S. PATENT No. 6,454,769 ('769)

Disputed Terms

The term "head" means the upper portion of the screw having a greater diameter than the shaft of the bone screw.

The term "ring" means any member capable of fitting between the inner surface borehole and the bone screw to connect the bone screw to the bone plate.

The phrase "inhibiting backout" means prohibiting, preventing or restraining backout.

The phrase "during use" in Claim 1 (first instance) means during or after implantation of the spinal fixation system.

The term "allows" / "allow" means to let do or happen, or permit.

The phrase "desired angle" means chosen angle.

The phrase "configured to couple together without fixedly engaging the ring to the plate during use" means

designed to link together or connect so that the ring is not firmly or permanently interlocked with the plate after implantation of the spinal fixation system.

The phrase "during use" in Claim 2 means after implantation.

The term "rotates" means to turn about an axis relative to the wall of the plate.

The term "movable" means capable of changing position.

The phrase "selected angle" means chosen angle.

The phrase "during use" in Claim 17 means during implantation.

The term "rotatable" means capable of turning about an axis.

CONSTRUCTION OF CLAIMS FOR U.S. PATENT No. 6,331,179 ('179)

Disputed Terms

The term "ring" means a circular band.

The phrase "deflectable portion" means a part of the ring that can expand, contract or bend.

The term "fastener" means any elongated member, threaded or non-threaded, which is securable within a bone.

The term "head" means the upper portion of the fastener having a greater diameter than the shaft of the fastener.

The phrase "deflect outwards" means to expand or bend away from the center.

The phrase "deflect inwards" means to contract or bend towards the center.

The phrase "to couple the fastener to the ring so that removal of the fastener from the plate is inhibited" means to link together or connect the fastener to the ring so that backout of the fastener from the plate is prohibited, prevented or restrained.

The term "ridge" means a narrow section protruding inward.

The phrase "configured to engage" means designed to interlock with or snap onto.

The term "move" means to change position.

The term "allow" means to let do or happen, or permit.

The phrase "inhibit removal" means to prohibit, prevent, or restrain backout.

The phrase "a ridge on a portion of the inner surface" means a narrow section protruding inward on a

portion of the inner surface.

The phrase "ridge is expanded outwards" means ridge is opened up or bent away from the center of the ring.

The phrase "ridge moves inward until the ridge contacts the head when the second portion of the head is positioned next to the ridge during use" means ridge moves towards the center of the ring up to the time that the ridge and the second (narrower) portion of the head of the fastener come together or touch during implantation.

CONSTRUCTION OF CLAIMS FOR U.S. PATENT No. 6,331,179 ('179) **(continued)**

Disputed Terms **(cont.)**

The phrase "during use" in Claim 40 means after implantation of the bone plate system.

The phrase "rotate freely" means to turn about an axis freely.

The term "coupled" means linked together or connected.

The phrase "during use" in Claim 42 means during implantation.

The term "swivel" means pivot.

W.D.Tex.,2004.
Spinal Concepts, Inc. v. EBI, L.P.

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