

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NANOBEBE US INC.,

*Plaintiff and
Counterclaim Defendant,*

v.

MAYBORN (UK) LIMITED,
MAYBORN USA, INC.,
MAYBORN GROUP LIMITED.

*Defendants and
Counterclaim Plaintiffs.*

Civ. A. No. 1:21-cv-08444-GHW

JURY TRIAL DEMANDED

MAYBORN'S REPLY CLAIM CONSTRUCTION BRIEF

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The claim terms at issue in this case are plain and their meaning is clear. Instead of grappling with this simple truth, Nanobebe clutters its brief with irrelevant matters like its own product configurations, that Nanobebe is a “start-up,” and the ridiculous notion that the asserted patents do not cover Mayborn’s own Closer to Nature Products. None of this matters to the claim construction questions presented. What does matter is the intrinsic record and Federal Circuit law. Nanobebe’s constructions flout both, repeatedly asking this Court adopt constructions that either read out preferred embodiments or import limitations from the specification that are not found in the claims, which the Federal Circuit calls one of the “cardinal sins of patent law.”

I. DISPUTED CONSTRUCTIONS¹

A. The '930 Patent

1. “a teat portion” (claim 14)

Mayborn’s Construction	Nanobebe’s Construction
“part projecting generally perpendicular to the mouth of the vessel and disposed above the areola portion”	“the entire part projecting generally perpendicular to the mouth of the vessel, disposed above the areola portion, which extends into a baby’s mouth for feeding”

Nanobebe wrongly stated that Mayborn’s proposed construction is “a part projection...” instead of a “part projecting...” (Opp. at 12.) This error pervades most of Nanobebe’s argument and renders it nonsensical. For example, Nanobebe states that “it is unclear exactly what a ‘part projection’ even refers to or encompasses” and that Mayborn “advocat[es] that a teat portion is some undefined part of a projection.” (Opp. at 13.) But that is not Mayborn’s construction.

¹ After seeing Mayborn’s opening brief, Nanobebe abandoned its arguments on the following terms, in effect conceding that Mayborn’s proposed construction is correct: “sloping portion that extends outwardly and downwardly relative to said upper rim,” “a majority of the collar’s outmost surface,” “nipple,” “bite region / the mouthpiece defining a bite region,” “downward domed shape that extends outwardly and downwardly from the flex region,” and “apart from the mouthpiece.” The Court should decline Nanobebe’s request to adopt claim constructions for which it presents no argument.

Nanobebe's error creates needless controversy where there is actually agreement. The reality is that the parties do not disagree that the proper construction of this term includes the "part projecting generally perpendicular to the mouth of the vessel and disposed above the areola portion." This is a plain and ordinary understanding of the term that will be easily understood by the jury. Mayborn would also add "the" to the beginning of its construction to add clarity.

But Nanobebe's additional language adds confusion, not clarity. If "the entire part . . . which extends into a baby's mouth for feeding" is part of the construction then the parties and jury will be forced to grapple with questions like: "How big is a baby's mouth?," "How far down the nipple or areola will a baby latch?," and "Does the size of the defined teat change based on the size of the baby?" This issue is created by importing functional limitations into the claims and is why the practice is frowned up on by the Federal Circuit. *See Ecolab v. Envirochem*, 264 F.3d 1358, 1367 (Fed. Cir. 2001). So too here.

2. "a teat portion having a variable wall thickness" (claim 14)

Mayborn's Construction	Nanobebe's Construction
plain meaning	"a teat portion having a helical groove"

Here, Nanobebe's proposed construction improperly removes the applicants' chosen words from the claim ("variable wall thickness") and replaces them with its own ("helical groove").² In doing so, it asks this court to commit "one of the cardinal sins of patent law" and "read[] a limitation from the written description into the claims." *Blazer v. Best Bee Bros. LLC*, No. 2022-1033, at *8 (Fed. Cir. Nov. 16, 2022); *see also, Phillips v. AWH Corp.*, 415 F.3d 1303, 1320 (Fed. Cir. 2005) (quoting same); *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed. Cir.

² Nanobebe also states, confusingly, that "at minimum, this term should be construed to require increased flexibility, so it does not include characteristics with the opposite function and utility." (Opp at 19.) To the extent Nanobebe intended this language to be part of its proposed construction it should have included it in its proposal so that it could be properly considered.

2014) (“we do not read limitations from the embodiments in the specification into the claims”).

Nanobebe’s argument ignores that the specification describes that the “[t]he teat 110 is formed from an elastomer with **walls of decreasing thickness**” and that the “teat can be textured . . . to enhance operation or realism.” (’930 Pat. at 4:11–12; 24-25.) That the teat can also have a helical groove is no reason to add such a requirement to the claim, particularly when the applicant chose particular words for the claim and was awarded a patent with that claim scope.

Nanobebe’s reliance on *Watts* and *Wang* is misplaced and unhelpful to the court. In *Watts*, a limitation from the specification was added to the claim because the applicant used limiting language in the specification to make clear that “the present invention” was limited to a particular embodiment. *Watts v. XL Systems, Inc.*, 232 F.3d 877, 883 (Fed. Cir. 2001) (“the specification actually limits the invention to structures that utilize misaligned taper angles, stating that ‘[t]he present invention utilizes [the varying taper angle] feature.’”). No such limiting language is found in the ’930 patent and Nanobebe does not claim that there is. In *Wang*, the “the inventors disclaimed the broader construction in a statement during prosecution.” *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373 (Fed. Cir. 2003) (summarizing the reasons for the opinion in *Wang Lab., Inc. v. America Online, Inc.*, 197 F.3d 1377, 1382 (Fed. Cir. 1999).) In distinguishing *Wang*, the *Altiris* court went even further and held that “merely because the specification only describes one embodiment is not a sufficient reason to limit the claims to that embodiment.” *Id.* at 1372. Indeed, the Federal Circuit has “repeatedly cautioned, claims should not be limited to preferred embodiments or specific examples in the specification.” *VLSI Tech. v. Intel Corp.*, No. 2021-1826, at *10 (Fed. Cir. Nov. 15, 2022); *see also, Linear Technology v. International Trade*, 566 F.3d 1049, 1058 (Fed. Cir. 2009) (We have repeatedly held that, even in situations when only one embodiment is disclosed, the claims generally should not be narrowed to cover only the disclosed embodiments or examples in the specification.); *Liebel-Flarsheim Company v. Medrad, Inc.*, 358

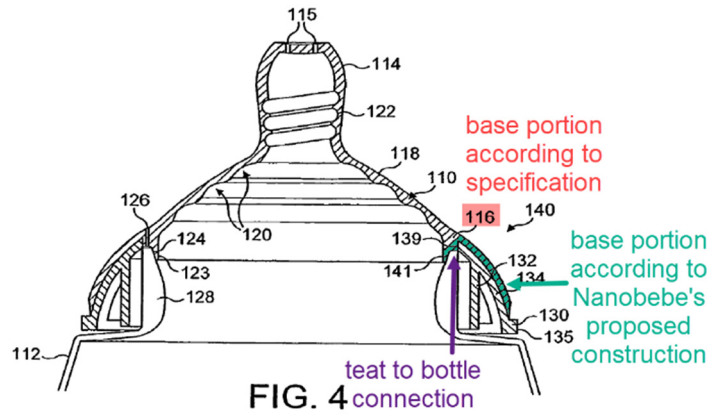
F.3d 898, 906 (Fed. Cir. 2004) (“Even when the specification describes only a single embodiment, the claims of the patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope”); *Brookhill-Wilk I, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1301 (Fed. Cir. 2003) (“The statements from the description of the preferred embodiment are simply that — descriptions of a preferred embodiment . . . [which] do not indicate that the invention can only be used in such a manner.”).

3. “base portion” (claim 14)

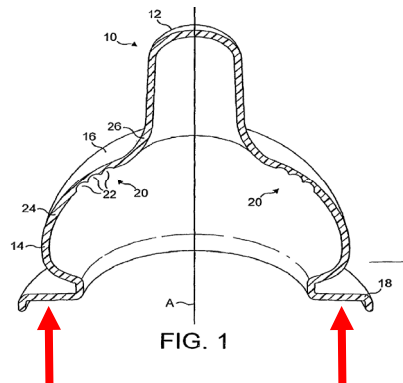
Mayborn’s Construction	Nanobebe’s Construction
“part below the areola portion”	“the lowest portion of the nipple, beginning where the nipple meets the top rim of the vessel, that is mountable to the vessel”

Nanobebe’s proposed construction is difficult to understand and is contradictory to the specification, thus cannot be correct. *Epos Techs. Ltd. v. Pegasus Techs. Ltd.*, 766 F.3d 1338, 1347 (Fed. Cir. 2014) (“the district court’s construction is incorrect because it reads out preferred embodiments. A claim construction that excludes a preferred embodiment ... is rarely, if ever correct and would require highly persuasive evidentiary support.”); *Primos, Inc. v. Hunter’s Specialties, Inc.*, 451 F.3d 841, 848 (Fed. Cir. 2006) (“we also should not normally interpret a claim term to exclude a preferred embodiment.”).

Figure 4 of the ’930 patent provides a cross section of an embodiment of the invention. In that figure, base portion 116 is clearly identified as being located above where the “nipple meets the top rim of the vessel.” Under its most generous reading, Nanobebe’s proposed construction would read this preferred embodiment out of the claim because the base portion under their construction would begin where the teat contacts the bottle and end at the lowest portion of the nipple, which is not consistent with the specification.



Nanobebe’s proposed construction also contradicts the clear distinction between the “flange” and the “base portion” required by the claim language, the specification, and the file history. Nanobebe admits this distinction exists but is simply wrong that its construction “properly distinguishes” between these two elements. Instead, it conflates these two elements. As much can be seen by considering the embodiment in Figure 1:



“where the nipple meets the top rim of the

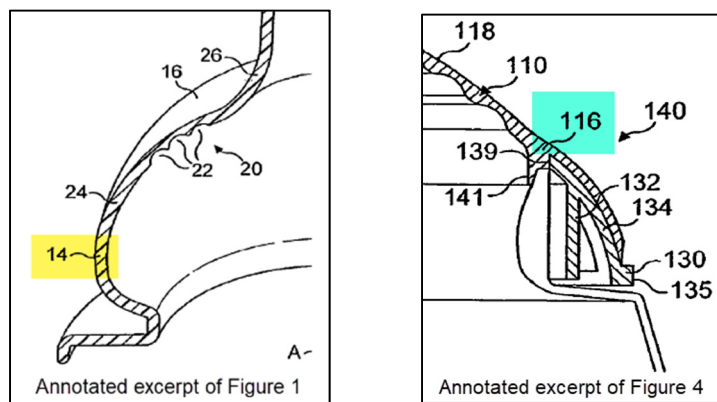
As can be clearly seen in this embodiment, “where the nipple meets the top rim of the vessel” is the “flange 18” and not “base portion 14.”

4. “domed configuration” / “a base portion having a domed configuration” (claim 14)

Mayborn’s Construction	Nanobebe’s Construction
“wide circular base with an arc-shaped cross-sectional profile”	“having a rounded shape in profile”

In what has become a familiar refrain, Nanobebe’s proposal for this term contradicts the specification and reads out a preferred embodiment. *Epos Techs* at 1347 (“the district court’s

construction is incorrect because it reads out preferred embodiments.”). The figures of the ’930 patent describe two base portions, base portion 14 in Figure 1 and base portion 116 in Figure 4. In neither case are the base portions shown as rounded in the sense of a hemisphere as Nanobebe argues. In Figure 1, base portion 14 is depicted as nearly flat and just above a tight curve. In Figure 4, base portion 116 is similarly depicted as a nearly flat section above a more tightly curved region. In both embodiments, these base portions are shown as arc-shaped sections, which can have varying degrees of curvature, as opposed to rounded like a hemisphere.



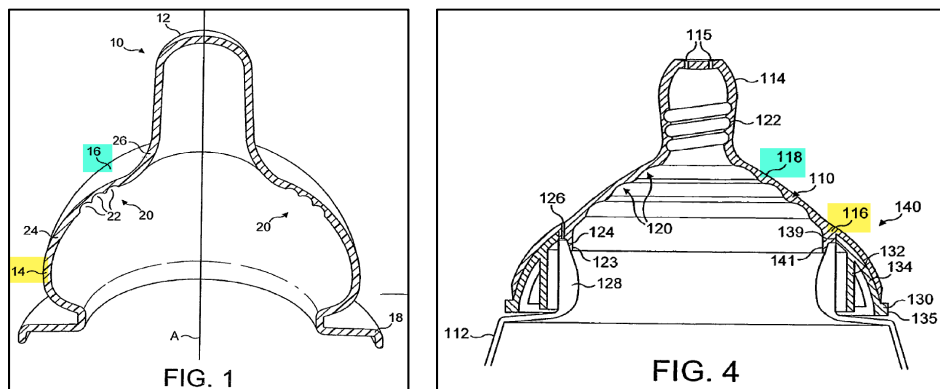
Nanobebe’s reliance on dictionary definitions from 2022 to support its proposed construction is also misplaced. This is because the “court must ensure that any reliance on dictionaries accords with the intrinsic evidence: the claims themselves, the specification, and the prosecution history.” *Free Motion Fitness, Inc. v. Cybex Intern*, 423 F.3d 1343, 1348 (Fed. Cir. 2005). Here, Nanobebe’s selected definitions contradict what is plainly shown in the figures—that the base portion is arc-shaped, not rounded.

5. “an areola portion” (claim 14)

Mayborn’s Construction	Nanobebe’s Construction
“part extending beyond the bottom of the teat portion”	“a surface area, that includes a different characteristic and functionality than the rest of the nipple, surrounding and extending beyond the bottom of the teat portion [as construed by Nanobebe]”

Nanobebe's proposed construction imports the vague, and unclaimed, requirements that the areola portion include "a different characteristic and functionality than the rest of the nipple." Its brief reveals an even more improper understanding of its construction, and the true motive behind its proposal. Nanobebe states that its construction "requires that . . . the areola portion . . . includes the flex region." (Opp at 14.) Of course this is found nowhere in the claim and is simply another instance of Nanobebe encouraging this court to commit "a cardinal sin of claim construction" and import into the construction unclaimed limitations from the specification. *Blazer* at *8.

Nanobebe further ignores preferred embodiments in the specification when it argues that the "areola portion . . . is the widest part of the nipple structure." (Opp. at 14.) Nanobebe's proposal is flatly contradicted by Figures 1 and 4, which show the base portion 1(4 or 116) is wider than the areola portion (16 or 118), and therefore cannot be correct.³



The claim language is clear and easily understood. The only limitation required for the areola portion is that it be between the teat and base portions. Nanobebe's proposal adds limitations and improperly limits the claim scope, and should be rejected.

³ Nanobebe also attempts to support its argument with reference to the testimony of inventor Ian Webb. (Opp. at 14.) Nanobebe mischaracterizes his testimony, but it is also not relevant. *E-Pass Technologies, Inc. v. 3Com Corp.*, 343 F.3d 1364, 1370 n.5 (Fed. Cir. 2003) ("this court has often repeated that inventor testimony is of little probative value for purposes of claim construction.").

6. “at least partially inwardly” (claim 14)

Mayborn’s Construction	Nanobebe’s Construction
plain meaning	indefinite

The Court should reject Nanobebe’s indefiniteness argument because a POSITA would understand the scope of the claim when read in light of the specification.

It is important to view this term in the full context of the claim. From an excerpt of the claim with the limitation at issue, shown below, it can be seen that this term is only one of four elements characterizing the air inlet valve. Other elements require the valve to extend through the base and project in a downward direction.

a one-way air inlet valve (i) extending through said base, (ii) projecting downwardly from the base portion, (iii) having a length that does not extend past the collar's lower rim, and (iv) disposed at **least partially inwardly** from the collar;

In this context, it is easy to understand that the claim term places the valve, which extends through the base and has a downward projection, at least partially inward from the collar. A POSITA would have no trouble understanding that term in the context of the claim. (Fletcher Dec. at ¶¶ 31-33., Ex. E.) The specification provides further context for a POSITA understand this term. For example, Figure 4 shows an embodiment where the valve is inward from the collar and Figure 6 shows an embodiment where the valve is partially inward of the collar in Figure 6. (Ex. E at ¶¶ 34-35.).

Nanobebe is wrong that a POSITA would not understand this term. Indeed, Nanobebe’s own expert, Mr. Silver—put forward by Nanobebe as its sole evidence for indefiniteness—used similar language in *his own patent claims*. One of Mr. Silver’s patents regarding a breastshield for a breastpump claims that the “the breastshield is at least partially contained within the housing.” (U.S. Pat. No 10,493,188, Claim 1.) The Court may properly—and should—give no weight to this litigation inspired testimony. Even if unrebutted, it would fall far short of Nanobebe’s clear

and convincing burden of proving the claim is invalid. But it is rebutted. (Ex. E at ¶¶ 38-41.) The claim is not invalid as indefinite. (Ex. E at ¶¶ 31-41.)

B. The '244 Patent

1. “mouthpiece” (claims 21, 24, 27)

Mayborn's Construction	Nanobebe's Construction
“part projecting generally perpendicular to the mouth of the vessel and disposed above the areola portion”	“teat portion, i.e., the entire part projecting generally perpendicular to the mouth of the vessel, disposed above the areola portion, which extends into a baby's mouth for feeding”

The parties agree that the “mouthpiece” of the '244 patent should be given the same construction as “teat portion” of the '930 patent. Mayborn incorporates its arguments for “teat portion” here.

2. “flex region” (claim 21)

Mayborn's Construction	Nanobebe's Construction
“a region having surface characteristics that control flexing”	“a region having characteristics, e.g., grooves or channels, specifically designed to enable flexing”

Nanobebe's proposal that the flex region “enable” flexing rather than “control” flexing is not correct. The specification teaches that the nipple can be made of “any appropriate elastic material.” ('244 patent, 3:11.) By its very nature, a nipple made from an elastic material will flex. Flexing is thus enabled in the nipple whether or not it has a flex region, rendering Nanobebe's construction meaningless.

What is critical for the flex region is that it controls the amount of flexing. The specification notes that in the embodiments shown that grooves “in conjunction with the decreasing wall thickness provid[e] a more natural stretching characteristic and sensory feedback to the infant.” ('244 patent, 4:22-25.) This stretching and feedback characteristic is not created simply by enabling flexing, it is creating by controlling the flexing so that it more closely

approximates nature. It is the characteristics of the nipple that control how much the nipple will flex, and the location of the flexion, when it is in use.

Nanobebe’s insistence that the construction include “e.g., grooves or channels” only serves to confuse the jury and influence the placement of artificial limits to the claim that do not otherwise exist. If, as Nanobebe states, these examples don’t actually limit the claim, then why include them? This is why courts exclude examples from constructions. *See C&M Oilfield Rentals, LLC v. Apollo Lighting Sols. Inc.*, No. 6:21-CV-00544-ADA, 2022 U.S. Dist. LEXIS 65180, at *17 (W.D. Tex. Apr. 7, 2022) (“the Court excludes the examples because they may potentially mislead the jury”). Furthermore, the specification is certainly not so limited. It expressly notes that nipple can have “walls of decreasing thickness . . . providing a more realistic flexing characteristic . . . [and] further includes undulating grooves.” (’244 patent, 4:13-16.)

3. “flex of the mouthpiece towards and away from a lower portion of the nipple” (claim 21)

Mayborn’s Construction	Nanobebe’s Construction
plain meaning	“up and down movement of the mouthpiece relative to a lower portion of the nipple”

As explained in Mayborn’s opening brief, the specification describes flexing of the mouthpiece toward and away from a lower portion of the nipple that is more than just up and down. Nanobebe again tries to inappropriately read limitations into the claim and its proposal should be rejected.

II. CONCLUSION

In sum, Mayborn’s proposed constructions align with the intrinsic and extrinsic record and add clarity. Nanobebe’s attempts to import limitations should be rejected as improper.

Dated: November 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 30, 2022, a true and correct copy of the foregoing document was served on all counsel of record.

/s/ John S. Goetz

John S. Goetz