

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

PROVISUR TECHNOLOGIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 21-cv-06113-SRB
	)	
WEBER, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff Provisur Technologies, Inc.’s (“Plaintiff” or “Provisur”) Opening Suggestions Regarding Claim Construction of Weber Counterclaim Patents. (Doc. #262.) Defendants Weber, Inc., Weber Maschinenbau GmbH Breidenbach, and Weber Maschinenbau GmbH Neubrandenburg (“Defendants” or “Weber”) filed a response (Doc. #272), and Plaintiff filed a reply brief (Doc. #283). The purpose of this Order is to construe disputed terms in Defendants’ U.S. Patent Nos. 8,529,321 B2 (the “‘321 Patent”), 10,647,013 B2 (the “‘013 Patent”), and 11,331,823 B2 (the “‘823 Patent”).

I. FACTUAL BACKGROUND¹

This is the third patent infringement case filed in this Court by Plaintiff against Defendants. *See Provisur Technologies, Inc. v. Weber, Inc., et al.*, Case No. 19-cv-06021-SRB (W.D. Mo.) (“*Provisur I*”); *Provisur Technologies, Inc. v. Weber, Inc. et al.*, Case No. 20-cv-06069-SRB (W.D. Mo.) (“*Provisur II*”). All three cases generally allege that Defendants’ food slicing machines infringe Plaintiff’s patents. *Provisur I* and *II* were consolidated, and a jury trial

¹ This Order assumes familiarity with the facts of this case, the ‘321, ‘013, and ‘823 patents, and the arguments presented by the parties. This Order discusses only those facts and issues necessary to resolve the disputed claims.

commenced on October 14, 2022. In part, the jury found that Defendants willfully infringed Plaintiff's patents.

In this case (“*Provisur III*”), Defendants filed patent infringement counterclaims against Plaintiff. Count 2 alleges in part that “Provisur has directly infringed and continues to directly infringe one or more claims of the ‘321 Patent . . . by making, using, offering to sell, selling, and/or importing into the United States products that include, but are not limited to, the Hoegger TrimX[.]” (Doc. #204, ¶ 60.) Counts 3 and 4 allege in part that “Provisur has directly infringed and continues to directly infringe one or more claims of the ‘013 Patent [and ‘823 Patent] . . . by making, using, offering to sell, selling, and/or importing into the United States products that include, but are not limited to, the SX330 Slicer and the SX380 Slicer[.]” (Doc. #204, ¶¶ 78, 97.)

On November 17, 2023, Plaintiff filed an opening claim construction brief (Doc. #262) which requests the Court construe six disputed claim terms. Defendants filed a responsive brief (Doc. #272), and Plaintiff filed a reply brief (Doc. #283). On January 18, 2024, the Court presided over a claim-construction hearing (i.e., *Markman* hearing). *See Markman v. Westview Instru., Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), *aff’d*, 517 U.S. 370 (1996); Patent L.R. 4.6.

The six disputed claim terms are as follows:

- (1) “Separation of the fat cover from the flesh component (‘321 claim 1); separating the fat cover from the flesh component” (‘321 claim 14);
- (2) “Travel profile” (‘321 claims 1 and 14);
- (3) “A cutting blade whose position is variable relative to a product support” (‘321 claim 1);
- (4) “A removal device for a removal of a material web from the material store” (‘013/823 all claims);

(5) “A device for determining a size of the loop formed in the loop store . . .” (‘013 claims 2, 17, and 19); and

(6) “Determining . . . detecting . . .” (‘013 claim 2), “Determining . . . detection . . .” (‘013 claim 17 and dependent claim 18), “Determination . . .” (‘013 claim 16, ‘823 claim 12).

(Doc. #262, p. 24; Doc. #283, p. 19.)²

Upon review and consideration of the patent claims, specifications, and the prosecution history, in addition to the parties’ claim-construction briefs, applicable law, and presentations by counsel, the Court hereby issues this Order to construe the disputed terms. For the reasons discussed herein, the Court construes the terms as follows:

DISPUTED TERMS	CONSTRUCTION
“Separation of the fat cover from the flesh component;” “separating the fat cover from the flesh component”	“Removal of a portion of the outer layer of the fat cover (i.e. rind and fat) from the flesh component”
“Travel profile”	“Contour of the fat trimming blade position”
“A cutting blade whose position is variable relative to a product support”	Plain and ordinary meaning: “A cutting blade whose position is variable relative to a product support” (e.g., “related each to the other” or “comparative”)
“A removal device for a removal of a material web from the material store”	“The removal device has two parts: (1) a roll-off drive driving material off the material roll, and (2) a conveying roller providing the material to the loop store”
“A device for determining a size of the loop formed in the loop store . . .”	Plain and ordinary meaning: “A device for determining a size of the loop formed in the loop store . . .”

² All page numbers refer to the pagination automatically generated by CM/ECF.

“Determining . . . detecting . . .” “Determining . . . detection . . .” “Determination . . .”	“capable of determining . . . detecting . . .”
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II. LEGAL STANDARD

Claim construction, “including terms of art,” is a matter of law. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 321 (2015) (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388–89 (1996)). This Court looks to the Federal Circuit for persuasive guidance when evaluating patent-related matters, *U.S. Water Servs., Inc. v. ChemTreat, Inc.*, 794 F.3d 966, 970 (8th Cir. 2015), and the following claim-construction analysis is guided by the Federal Circuit’s landmark opinion in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005). When construing claims, the Court begins with the words of the claim, which define the invention and its scope. Claim terms “are generally given their ordinary and customary meaning”—that is, “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Id.* at 1312–13 (citations omitted).

In ascertaining the ordinary and customary meaning of a patent claim term, a court may consider various sources of information, which are traditionally categorized as either “intrinsic” or “extrinsic” evidence. *See id.* at 1314. Intrinsic evidence generally encompasses “the words of the claims themselves,” the specifications of the patent, and the patent’s prosecution history. *Id.* The specifications section of a patent, which describes the specific embodiments of the invention in a “full” and “exact manner,” is “highly relevant to the claim construction analysis” and can be the “single best guide to the meaning of the disputed term.” *Id.* at 1311–12, 1315 (citing 35 U.S.C. § 112); *accord Vitronics Corp v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (“The specification contains a written description of the invention which must be clear and

complete enough to enable those of ordinary skill in the art to make and use it. Thus, the specification is always highly relevant to the claim construction analysis.”). Additionally, the prosecution history of the patent, meaning the record of the proceedings before the U.S. Patent and Trademark Office (“PTO”), is also helpful in the claim-construction analysis and provides the Court with “evidence of how the PTO and the inventor understood the patent.” *Phillips*, 415 F.3d at 1317.

A court may also consider sources of extrinsic evidence when construing a claim term, which “consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises.” *Id.* (citation omitted). These sources of evidence are often utilized to “provide background on the technology at issue, to explain how an invention works, to ensure that the court’s understanding of the technical aspects of the patent is consistent with that of a person of skill in the art, or to establish that a particular term in the patent or the prior art has a particular meaning in the pertinent field.” *Id.* at 1318. However, the intrinsic record remains more significant to determining the legally operative meaning of claim language, and extrinsic evidence cannot be used to “vary or contradict the claim language” itself. *Vitronics Corp.*, 90 F.3d at 158; *see also Phillips*, 415 F.3d at 1318 (noting “extrinsic evidence in general [i]s less reliable than the patent and its prosecution history in determining how to read claim terms”).

III. DISCUSSION

Plaintiff proposes a construction for each disputed term. Defendants generally argue that the terms do not require further construction but also offer a proposed construction in the alternative. The parties argue that their respective constructions are supported by the intrinsic

evidence, extrinsic evidence, and would aid the Court and the jury in understanding the disputed terms. Each disputed term is addressed below.

1. The ‘321 Patent

In general, the ‘321 patent describes a measurement device for determining the thickness of the fat cover of a meat product. The measurement device determines which portion of the meat product to remove based on the measured fat cover. (Doc. #204-2, p. 2) (“[A] measuring device for determining the thickness of a layer of fat of a meat product comprising a premium cut part and a layer of fat . . . and to a method for determining the thickness of a layer of fat of a meat product and to a method for separating a layer of fat of a meat product.”). The parties dispute three terms in the ‘321 patent.

A. Term I: “Separation of the fat cover from the flesh component;” “separating the fat cover from the flesh component”

The table below depicts the two competing constructions offered by the parties for the plain and ordinary meaning of this term:

PROVISUR’S PROPOSED CONSTRUCTION	WEBER’S PROPOSED CONSTRUCTION
Removal of the outer layer of fat and skin from the meat	Plain and ordinary meaning, including separation of at least a portion of the fat cover (i.e., rind and fat) from the flesh component

Plaintiff argues its proposed construction is “exactly as it is described in the patent as well as many other industry sources,” and “will help explain the ‘fat cover’ separation for the jury[.]” (Doc. #262, p. 8.) Plaintiff acknowledges the specification defines “fat cover” as “the rind and the fat,” but argues that “skin will be a simpler word than rind for the jury.” (Doc. #262, p. 9, n.2) (quotation marks omitted). Plaintiff further argues that “separation” should be

replaced with “removal” and that this term means “separating an entire ‘layer’ of fat (and not just portions or pockets of fat).” (Doc. #262, pp. 9-10).

Upon review, the Court finds this term requires a construction but declines to fully adopt either party’s proposed construction. First, “fat cover,” is expressly described in the specification as “the rind and the fat.” (Doc. #272, p. 8.) Plaintiff’s attempt to substitute “skin” for “rind” is not necessary and is not supported by the record. Consequently, “fat cover” will be construed as stated in the specification: “the rind and the fat.”

Second, Plaintiff requests that “separation” be construed as “removal.” The Court agrees. Although the claim itself does not use the term “removal,” the record shows that the outer layer at issue must be removed. Using the term “removal” instead of “separation” will provide greater clarity for the Court and the jury.

Third, Plaintiff argues this term requires the separation of the entire fat cover. This argument is rejected because the specification describes an embodiment where portions of the fat cover will remain. In particular,

The position of the knife bar relative to the first conveyor belt 14 and in particular the height of the cutter bar above the upper side 16 of the first conveyor belt 14 can be set in dependence on the thickness of the fat cover layer to be separated **or on the thickness of the fat cover layer which should remain on the flesh component.**

(Doc. #272, p. 10.) “[T]here is a strong presumption against a claim construction that excludes a disclosed embodiment[.]” *Nobel Biocare Services AG v. Intradent USA, Inc.*, 903 F.3d 1365, 1381 (Fed. Cir. 2018). Plaintiff has failed to overcome this presumption and the Court declines to read out this embodiment. The Court finds that the record generally supports Defendants’ proposed construction of “a portion of the fat cover (i.e., rind and fat).”

However, based upon the record and the parties’ arguments at the *Markman* hearing, the Court finds that Defendants’ proposed construction requires further specificity. The construction set forth below comports with the extrinsic and intrinsic evidence, and will provide clarity for the Court and the jury. The Court construes the first disputed term as follows:

TERM	CONSTRUCTION
“Separation of the fat cover from the flesh component;” “separating the fat cover from the flesh component”	“Removal of a portion of the outer layer of the fat cover (i.e. rind and fat) from the flesh component”

B. Term II: “Travel profile”

The table below depicts the two competing constructions offered by the parties for the plain and ordinary meaning of this term:

PROVISUR’S PROPOSED CONSTRUCTION	WEBER’S PROPOSED CONSTRUCTION
“Contour of the fat trimming blade height over the length of the meat product”	Contour of the fat trimming blade position

Plaintiff contends the claims:

require that the ‘travel profile’ be a contour of blade height over length. The travel profile relates a blade height (claim 1’s ‘position of the cutting blade relative to the product support,’ and claim 14’s ‘position in a direction transverse to the feed direction’) to positions along the length of the meat product (claim 1’s ‘product feed,’ and claim 14’s ‘feed of the meat product’). In simpler words, the travel profile forms a contour along a graph of blade **height over the length of the meat product**.

(Doc. #262, pp. 12-13) (emphasis supplied).

In part, Plaintiff argues its interpretation is supported by the prosecution history. Defendants represented to the Examiner that “the disclosed embodiments of the presently claimed invention are directed to an apparatus and method” in which “the height of the cutting blade is varied over the length of the meat product, based on the stored travel profile associated

with the determined anatomy of the meat product.” (Doc. #262, p. 13.) According to Plaintiff, Defendants’ “self-declared ‘travel profile’ is a contour of the fat trimming blade height over the length of the meat product.” (Doc. #262, p. 13.)

Upon review, the Court rejects Plaintiff’s “height over the length” construction. Claim 1 recites a “travel profile” that is “stored in the control unit in accordance with which the position of the cutting blade relative to the product support is to be set in dependence on a product feed.” (Doc. #272, p. 11.) Claim 14 recites “setting a position of a cutting blade in dependence on the determined thickness of the fat cover in accordance with a preset travel profile and in dependence on a feed of the meat product” “wherein during the separating, the cutting blade is at the set position according to the travel profile.” (Doc. #272, p. 11.)

These claims are not limited to a horizontal cutting blade. The Court agrees with Defendants that:

Independent claims 1 and 14 recite that the ‘position’ of the cutting blade is set by the travel profile. This position is not limited to its ‘height over the length of the meat product.’ Nothing in the claims or specification compels that narrow interpretation. Rather, the claims themselves dictate a broad interpretation for these independent claims. Claim 12 which depends from claim 1 specifically limits the claimed ‘position’ of the cutting blade to its ‘height.’ The ‘doctrine of claim differentiation disfavors reading a limitation from a dependent claim into an independent claim.’ *Virnetx, Inc. v. Cisco Sys. ’s, Inc.*, 767 F.3d 1308, 1316 (Fed. Cir. 2014) (noting this doctrine is ‘at its strongest . . . where the limitation that is sought to be ‘read into’ an independent claim already appears in a dependent claim’).

(Doc. #272, pp. 12-13) (internal citations omitted).

Plaintiff’s arguments in support of its proposed construction are rejected. Plaintiff relies heavily on the prosecution definition discussed above. However, the applicant also described the “presently claimed ‘travel profiles’ (i.e. contours of the fat trimming blade)[.]” (Doc. #272, p.

12.) Defendants’ proposed construction most closely comports with the overall record, including the claim language, the specification, and the prosecution.

Consequently, the Court construes this disputed term as follows:

TERM	CONSTRUCTION
“Travel profile”	“Contour of the fat trimming blade position”

C. Term III: “A cutting blade whose position is variable relative to a product support”

The table below depicts the two competing constructions offered by the parties for the plain and ordinary meaning of this term:

PROVISUR’S PROPOSED CONSTRUCTION	WEBER’S PROPOSED CONSTRUCTION
“The position of the cutting blade varies up and down above the product conveyor surface”	Plain and ordinary meaning: “A cutting blade whose position is variable relative to a product support (e.g., ‘related each to the other’ or ‘comparative’)”

Plaintiff argues “relative to” needs to be construed because it is “bound to be a source of confusion for the jury.” (Doc. #262, p. 15.) Plaintiff believes relative “necessitates vertical movement” because “[w]hen the blade varies up and down, its relative distance from the horizontal conveyor surface varies.” (Doc. #262, p. 15.) Plaintiff points to intrinsic and extrinsic evidence in support of its proposed construction. In response, Defendants argue this term can be understood by the jury and does not need further construction.

Upon review, the Court finds this term should be given its plain and ordinary meaning.

In particular, the Court agrees with Defendants that:

The plain meaning of ‘relative to’ is ‘related each to the other’ or ‘comparative.’ This is reinforced by the ‘321 Patent’s written description. The specification describes embodiments where the position of the cutting blade is adapted compared to a product support for differing thicknesses in fat covers: ‘The cutting device can include a cutting blade, in particular a cutter bar, whose position, and in particular whose height, is variable relative

to a product support. In this manner, the cutting device and in particular the cutting blade position can be adapted to differently thick fat covers or the thickness can be set with which the fat cover is separated from the flesh component.’ The position of the cutting blade is generally set based on the anatomy of the food product. *Id.* at 5:29-42 (‘change in the setting of the cutter bar in dependence on the feed of the meat product 12 to be processed while taking account of the determined anatomy of the respective meat product 12 to be processed.’). In other words, the cutting blade must be able to change positions to account for different food product shapes and sizes. This ‘position’ change can be up and down, left and right, or variable in any radius compared to the product support.

(Doc. #272, pp. 15-16) (some internal citations omitted).

Consequently, and for the additional reasons stated by Defendants, the Court construes this disputed term as follows:

TERM	CONSTRUCTION
“A cutting blade whose position is variable relative to a product support”	Plain and ordinary meaning: “A cutting blade whose position is variable relative to a product support” (e.g., “related each to the other” or “comparative”)

2. The ‘013 Patent and ‘823 Patent

The ‘013 and ‘823 patents generally describe an apparatus (e.g., an interleaver) that provides web-like interleaving sheet material at a cutting region to introduce interleaving sheets at the cutting region. (Doc. #204-3). In less technical terms, the patents “involve interleavers that put sheets of paper between meat/cheese slices.” (Doc. #262, p. 16.) The parties dispute three terms of the ‘013 and ‘823 patents.

A. Term I: “A removal device for a removal of a material web from the material store” (‘013 and ‘823 patents)

The table below depicts the two competing constructions offered by the parties for the plain and ordinary meaning of this term:

PROVISUR'S PROPOSED CONSTRUCTION	WEBER'S PROPOSED CONSTRUCTION
"The removal device has two parts: (1) a roll-off drive driving material off the material roll, and (2) a conveying roller providing the material to the loop store"	Plain and ordinary meaning: "A removal device for a removal of a material web from the material store"

Plaintiff states that Defendants' "infringement contentions appear to accuse a one-part roller as being the removal device," but that "a removal device" is actually a "two-part structure." (Doc. #262, pp. 17-18.) Plaintiff argues in part that the patent specification defines "the removal device in terms of its two parts: '[1] The individual roll-off drives 21 and [2] the common conveying device 23 *form a removal device* of the interleaver *in accordance with the invention.*'" (Doc. #262, p. 18) (citations and quotation marks omitted) (emphasis in original).

In further support of its proposed construction, Plaintiff relies on means-plus-function claiming. See 35 U.S.C. § 112(f). "Means-plus-function claiming occurs when a claim term is drafted in a manner that invokes 35 U.S.C. § 112(f)." *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347 (Fed. Cir. 2015). Under § 112(f), a patentee may claim its invention "as a means or step for performing a specified function without the recital of structure[.]" 35 U.S.C. § 112(f). If the patentee does so, the claim is limited to the "corresponding structure . . . described in the specification and equivalents thereof." *Id.*³

"In construing a means-plus-function limitation, a court must identify both the claimed function and the corresponding structure in the written description for performing that function. *Northrup Grumman Corp. v. Intel Corp.*, 325 F.3d 1346, 1350 (Fed. Cir. 2003). "Determining

³ "Through § 112(f), Congress struck a balance in allowing patentees to express a claim limitation by reciting a function to be performed rather than by reciting structure for performing that function, while placing specific constraints on how such a limitation is to be construed, namely, by restricting the scope of coverage to only the structure . . . described in the specification as corresponding to the claimed function and equivalents thereof." *Williamson*, 792 F.3d at 1347.

the claimed function and the corresponding structure for a claim limitation written in means-plus-function format is a matter of claim construction[.]” *Id.* “[T]he use of the word ‘means’ in a claim element creates a rebuttable presumption that § 112[f] applies.” *Williamson*, 792 F.3d at 1348-49. “[T]he failure to use the word ‘means’ also creates a rebuttable presumption . . . that § 112[f] does not apply.” *Id.*

Here, Plaintiff argues that:

because Weber chose to claim a generic ‘removal device’ in purely functional terms, its invention must be limited to the [two-part removal device] . . . as captured in Provisur’s construction. There is a long line of controlling case law that holds a generic patent term like ‘device’ is a functional ‘nonce word’ subject to the statutory requirements of §112(f).

(Doc. #262, p. 20) (citing and quoting cases). Plaintiff further emphasizes “the specification describes the ‘removal device’ as a ‘means’ that performs its function ‘by means of the roll-off drives 21 and the conveying device 23[.]’” (Doc. #262, p. 21.) Defendants oppose Plaintiff’s proposed construction and argue that the plain and ordinary meaning should apply.

Upon review, the Court agrees with Plaintiff that:

When Weber drafted the patent, it explicitly defined the removal device as having two parts: “by means of the removal device, *that is* by means of [1] the roll-off drives 21 and [2] the conveying device 23.” (Ex. 2, Col. 12:44-49.) (emphasis added) Weber was clear that this definition did not just apply to one exemplary embodiment, but to any removal device “in accordance with the invention.” (Ex. 2, Cols. 8:58-65, 9:22-28.) And Weber repeated this definition four times, using the term “removal device” to indicate a device “form[ed]” from, “comprising” and “that is” the (1) roll-off drives and (2) conveying device. (Ex. 2, Col. 8:58-65, 9:22-28, 11:41-47, 12:44-49.) Weber’s Reply arguments do not overcome this clear definition in the patent . . . Weber is [also] wrong that 35 U.S.C. § 112(f) does not apply.

(Doc. #283, p. 12) (footnote omitted) (emphasis in original). Plaintiff’s proposed construction will also assist the jury. *See 3M Innovative Props. Co. v. Dupont Dow Elastomers LLC*, 361 F. Supp. 2d 958, 964 (D. Minn. 2005) (citing *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356,

1366 (Fed. Cir. 2004)) (noting “the Court’s fundamental duty in a patent case is to provide the jury with instructions adequate to ensure that the jury fully understands the court’s claim construction rulings and what the patentee covered by the claims”).

For these reasons and for the additional reasons stated by Plaintiff, and without finding that this is a § 112(f) means-plus-function claiming, the Court construes this disputed term as follows:

TERM	CONSTRUCTION
“A removal device for a removal of a material web from the material store”	“The removal device has two parts: (1) a roll-off drive driving material off the material roll, and (2) a conveying roller providing the material to the loop store”

B. Term II: “A device for determining a size of the loop formed in the loop store . . .”

The table below depicts the two competing constructions offered by the parties for the plain and ordinary meaning of this term:

PROVISUR’S PROPOSED CONSTRUCTION	WEBER’S PROPOSED CONSTRUCTION
“The claimed ‘device . . .’ is a pressure sensor, called a manometer, connected to a control device.”	Plain and ordinary meaning: “A device for determining a size of the loop formed in the loop store . . .”

Plaintiff contends its proposed construction “parallels the requirements of th[e] claim language.” (Doc. #262, p. 22.) In support, Plaintiff argues that the:

claims require ‘detecting changes in at least one of a pressure differential and a flow condition . . .’ or ‘detection of a pressure drop . . .’; the ‘pressure sensor’ is what does the detection. The claim requires ‘determining a size of the loop . . .’; the control device is what does the determining.

(Doc. #262, p. 22.) Plaintiff further emphasizes that the specification “uses the technical word ‘manometer’ for the pressure sensor.” (Doc. #262, p. 23.) “As a separate rationale,” Plaintiff

argues its “pressure sensor . . .” construction is required as a means-plus-function interpretation of this claim element by statute.” (Doc. #262, p. 24.) Defendants oppose a construction and argue the plain and ordinary meaning should control.

Upon review, the Court agrees with Defendants that:

The specification of the ’013 Patent describes a variety of measurement techniques to determine the size of loop in a loop store. *See* D.I. 262, Ex. 2, 4:17-22, 5:31-46 (the position of the apex or of a region of the loop comprising the apex), 4:57-67 (the varying influence of the material loop on a suction device, including pressure conditions and/or flow conditions), 5:1-3 (vacuum measurement), 5:4-13 (local vacuum measurement), 6:23-39 (contact of the material against an opening), 6:46-52 (contact of the material web against the sensor, e.g., capacitively, inductively, electromechanically, and/or electrostatically). The disputed limitation appears in claims 2, 17, and 19 which recite some of these enumerated techniques. For example, claims 2 and 19 recite a ‘device for determining a size of the loop formed in the loop store, the device detecting changes in at least one of a pressure differential and a flow condition . . . wherein the changes in the pressure differential and/or the flow condition represent a varying influence of the material loop on the air permeable portion of the contact surface.’ Claim 17 recites ‘a device for determining a size of the loop formed in the loop store based on the detection of a pressure drop within the at least one vacuum chamber...’ The claims do not limit themselves to the types of devices that perform these measurement techniques, and nothing in the specification or prosecution history requires limiting the claims to any specific device.

(Doc. #272, pp. 23-24.) The Court rejects Plaintiff’s arguments to the contrary, including its means-plus-function arguments. For these reasons, and the additional reasons stated by Defendants, the Court construes this disputed term as follows:

TERM	CONSTRUCTION
“A device for determining a size of the loop formed in the loop store . . .”	“A device for determining a size of the loop formed in the loop store . . .”

C. Term III: “Determining . . . detecting . . .” “Determining . . . detection . . .” “Determination . . .”

The table below depicts the two competing constructions offered by the parties for the plain and ordinary meaning of this term:

PROVISUR’S PROPOSED CONSTRUCTION	WEBER’S PROPOSED CONSTRUCTION
Plain and ordinary meaning (which requires actually determining and detecting, rather than merely being capable of determining or detecting)	Plain and ordinary meaning including “capable of determining . . . detecting . . .”

As to the final term, Plaintiff states the “parties dispute what it means for the claimed device to be ‘determining a size of the loop’ and ‘detecting changes in at least one of a pressure differential and a flow condition’ in claim 2 of the ’013 patent (and related terms).” (Doc. #262, p. 26.) Plaintiff argues the term requires a device that requires “actual determining and detecting.” (Doc. #262, p. 26.) Defendants contend the term encompasses a device that is “capable of” determining or detecting. (Doc. #272, pp. 28-29.)

In support of its construction, Plaintiff argues in part that the patent language requires:

the information ‘obtain[ed]’ by the suction device is a single ‘vacuum measurement,’ a ‘local vacuum measurement,’ or a plurality of ‘vacuum measurements.’ These vacuum measurements are taken by a ‘sensor, that includes a ‘pressure measurement device.’ And this pressure measurement device actually communicates the information it detects about pressure changes ‘to a control.’ When the vacuum sensor ‘detects the presence of the lower loop end’ by detecting the drop in pressure that occurs ‘[a]s soon as this [sensor] opening is at least partly closed by the material web,’ it is recognizing the ‘loop size’ and then ‘communicat[ing] it to a control.’ Indeed, the device for determining/detecting in the patent always includes control 39 that actually determines or sensor 159 that actually detects.

(Doc. #262, p. 26) (citing and quoting the ’013 patent). Plaintiff also argues its construction is supported by extrinsic evidence.

Upon review, the Court rejects Plaintiff’s arguments. Instead, the Court agrees with Defendants that:

The claim language . . . is dispositive. The full claim language at issue is: ‘a device **for determining** a size of the loop formed in the loop store, the device detecting changes in at least one of a pressure differential and a flow condition[.]’ D.I. 262, Ex. 2, claim 2. It has been well-established that the ‘for determining’ language, absent lexicography or disclaimer, expressly recites capability as opposed to actual operation. In *Finjan, Inc. v. Secure Computing Corp.*, the Federal Circuit found system claims that required ‘a logical engine *for preventing* execution;’ ‘a communications engine *for obtaining* a downloadable;’ and ‘a linking engine . . . *for forming* a sandbox package,’ all ‘describe capabilities’ without requiring any components be ‘active or enabled.’ *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1206-07 (Fed. Cir. 2010).

(Doc. #272, p. 28) (emphasis in original).

For these reasons, and the additional reasons stated by Defendants, the Court construes this disputed term as follows:

TERM	CONSTRUCTION
““Determining . . . detecting . . .” “Determining . . . detection . . .” “Determination . . .”	“capable of determining . . . detecting . . .”

IV. CONCLUSION

Accordingly, the Court ORDERS the constructions of the disputed terms as described herein.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: January 22, 2024