

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ESSITY HYGIENE AND HEALTH AB,
ESSITY HMS NORTH AMERICA
INC.,

Plaintiffs,

v.

FIRST QUALITY PRODUCTS, INC.,
FIRST QUALITY RETAIL SERVICES,
LLC, FIRST QUALITY CONSUMER
PRODUCTS, LLC, FIRST QUALITY
PRODUCTS, LLC, FIRST QUALITY
ENTERPRISES, LLC,

Defendants.

C.A. No. 24-374 (GBW)

JURY TRIAL DEMANDED

JOINT CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

A. Plaintiffs' Opening Statement

Plaintiffs Essity Hygiene and Health AB and Essity HMS North America Inc. (“Essity” or “Plaintiffs”) submit the following opening brief regarding claim construction of an element of dependent claim 21 of U.S. Patent No. 9,308,138 (Ex. A, the “’138 Patent”). Essity further submits the declaration of Donald Sheldon (Ex. B, “Sheldon Decl.”) in support of its opening brief.

Defendants seek a determination that the “entire crotch portion” term of dependent claim 21 is indefinite. That term, however, is clearly defined by the specification, well-known to a person of ordinary skill in the art, and used widely and consistently in the art. The term “entire crotch portion” should be found not indefinite and should be afforded its ordinary and customary meaning.

Essity’s ’138 Patent is entitled “Absorbent article having intake structure.” It was filed on June 28, 2011 by inventors Patrik Andersson, Malin Lundman, and Per Bergstrom and assigned to SCA Hygiene Products AB, now Plaintiff Essity Hygiene & Health AB. In this patent-infringement case, Essity asserts that Defendants infringe at least claims 1, 3-5, 7-8, 18-19, 21, 24, and 25 of the ’138 Patent.

The ’138 Patent discloses that one problem in the prior art was “the side leakage problem”—*i.e.*, that because of the “limited space available in the crotch

portion of the underwear, the articles are by necessity designed with relatively small width. For this reason, a particular problem with such articles is that they may leak at the side edges, before the full absorption capacity of the article has been utilized.” ’138 Patent, 1:21-29. The solution as stated and claimed in the ’138 Patent is “an absorbent article having improved intake capacity, fluid distribution properties, and leakage security.” ’138 Patent, 2:3-5.

The inventions claimed in the ’138 Patent require that the fluid flow control structure is a layered structure comprising a non-perforated fibrous polymeric layer and a first perforated polymeric layer. *See* ’138 Patent, cl. 1. The inventions claimed in the ’138 Patent further require that the first absorbent layer has “an opening that passes through the first absorbent layer from one major surface to an opposing major surface and therebetween the opening is surrounded by a closed periphery of first absorbent layer.” *See* ’138 Patent, cl. 1. As further required by claim 1, “the opening extends along a longitudinal center line of the absorbent article, the longitudinal center line being in parallel with the longitudinal direction of the absorbent article, and the fluid permeable top sheet is in direct contact with the fluid flow control structure via the opening.” *See* ’138 Patent, cl. 1. The inventors of the ’138 patent therefore solved the stated problem of side leakage by inventing an absorbent article with a fluid permeable topsheet, an impermeable backsheet, an absorbent core with an opening, and a multi-layer fluid flow control

structure disposed between the first absorbent core with an opening and a second absorbent core, as set forth in the claims of the '138 Patent. *See* '138 Patent, cl. 1.

Claim 21 of the '138 Patent introduces a further requirement for the opening recited in Claim 1. Claim 21 recites “[t]he absorbent article according to claim 1, wherein the opening extends through an entire crotch portion of the absorbent article.” *See* '138 Patent, cl. 21. Thus, putting together claims 1 and 21, the opening extends along the longitudinal center line of the absorbent article and through an entire crotch portion of the article.

The specification of the '138 Patent clearly sets out the definition of “crotch portion.” *See* '138 Patent, 5:53-6:3 (“The crotch portion, as used herein, is the portion of the article that is designed to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer.”). The specification of the '138 Patent also references this crotch portion several times. *See, e.g.,* '138 Patent, 1:24-26 (“[T]hese articles have to be sized and configured to fit in the limited space available in the crotch portion of the underwear . . .”), 1:64-67 (“[T]here is still a great need for further improvements of the side leakage security for the kind of absorbent article that is worn in the crotch portion of an undergarment.”), 2:46-55 (“The wetting area of the article is the part of the article which is designed to be initially wetted by emitted fluid when the article is being worn and is located in a crotch area of the absorbent article.”). As described in the specification, Figures

5a-5d differentiate between absorbent articles with openings in the crotch portion (Figures 5a and 5d) as contrasted with absorbent articles with openings not in the crotch portion (Figures 5b and 5c). *See* '138 Patent, 13:12-37.

B. Defendants' Answering Statement

This claim construction dispute arises from Essity Hygiene and Health AB's ("Essity's") assertion of U.S. Patent No. 9,308,138 (the '138 patent) against Defendants First Quality Retail Services, LLC, First Quality Consumer Products, LLC, First Quality Products, LLC and First Quality Enterprises, LLC (collectively "First Quality").

First Quality respectfully requests that the Court find the only disputed claim term – “an opening extending through an entire crotch portion of the absorbent article” – indefinite for failing to inform those skilled in the art about the scope of the invention with reasonable certainty.

The term “entire crotch portion” does not appear anywhere in the specification other than in the disputed claim term. While the patent does refer to “crotch portion” in general terms, the specification does not provide the required reasonable certainty about what *the outer bounds of the crotch portion* are. Plaintiffs' arguments to the contrary are unavailing. Indeed, Plaintiffs' expert's testimony confirms there is no commonly understood size or dimension for the crotch portion.

The specification likewise does not provide the required reasonable certainty about what it means for an opening to extend through an entire crotch portion. And, again, Plaintiffs' expert's testimony merely confirms the ambiguity. At best, he seemed to suggest that a subjective understanding of a manufacturer's intent was necessary to determine infringement.

The Court should find the disputed claim term invalid as indefinite.

C. Plaintiffs' Reply Statement

In attempting to render a term indefinite that is well-defined, ordinary in the patent specification and well-understood in the art, Defendants obfuscate and create ambiguity where none exists. The claimed product is designed to be worn in a person's crotch, yet Defendants argue that a POSA doesn't know what a "crotch portion" of that product is. Defendants demand precision and exactitude where none is required and provide no evidence that a POSA would find the '138 Patent's definitions and descriptions lacking. The Court should simply order that "crotch portion" has its plain and ordinary meaning as reflected in the specification and this dispute will be resolved.

First, Defendants reveal the true nature of their dispute: the '138 Patent's definition of "crotch portion." The intrinsic record provides a clear definition of "crotch portion." *See* Ex. A, 5:59-64. Yet Defendants downplay the concrete definition provided in the specification of the '138 Patent as "refer[ring] to 'crotch

portion’ in general terms,” *supra*, 4, fluffing off the intrinsic evidence so they can shift the focus to extrinsic evidence. Defendants’ attempt to create artificial ambiguity as an excuse to reference irrelevant extrinsic evidence should be rejected. Even if Defendants’ improper extrinsic evidence is considered, it demonstrates the clarity of the terms “crotch portion” and “entire crotch portion” and substantial knowledge in the art as of 2011.

Second, the intrinsic evidence, Mr. Sheldon’s testimony, and other extrinsic evidence (including Defendants’ own patent) confirm that a POSA would understand the contours and dimensions of an opening extending through an “entire crotch portion” of an absorbent article with reasonable certainty. This is all the law requires. As such, Defendants’ argument that “the specification does not provide the required reasonable certainty about what *the outer bounds of the crotch portion are*” (*supra*, 4) fails. Defendants’ purported bafflement bears no legal significance, and it is telling that Defendants could not find an expert to opine that a POSA in the field of adult incontinence products would be similarly confounded. To be sure, Defendants’ counsel spent a day trying to confuse Essity’s expert Donald Sheldon at his deposition. But at no point did Mr. Sheldon—the only expert providing an opinion here—testify that “crotch portion” or “entire crotch portion” were ambiguous terms in the art or that they were not sufficiently defined in the ’138 Patent.

Third, Defendants ignore the fact that “entire crotch portion” is not a term used in isolation in Claim 21. Rather, Claim 21 is dependent on Claim 1, and the requirements set forth in Claim 1 help to define and limit what “entire crotch portion” means in the context of Claim 21. For Claim 21, the opening described in the specification and claimed in Claim 1, which extends in a longitudinal direction, must extend longitudinally **through** an “entire crotch portion” of the absorbent article. Reading Claim 21 in light of Claim 1 provides even more clarity regarding the scope of “entire crotch portion.” This term is definite.

D. Defendants’ Sur-Reply Statement

Plaintiffs’ reply confirms an “opening extending through an entire crotch portion of the absorbent article” is indefinite. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). The dispute is not about a crotch portion’s general location. Claim 21 requires the opening to “extend[] through the entire crotch portion.” The intrinsic and extrinsic evidence do not provide reasonable certainty as to the crotch portion’s outer bounds. Plaintiffs’ inconsistent positions confirm indefiniteness.

II. AGREED-UPON CONSTRUCTIONS

The parties have agreed to the following constructions with respect to terms in dependent claim 18 and 19:

<u>Claim Term(s) or Element(s)</u>	<u>Agreed Construction</u>
“the compression test disclosed herein” (Claim 18)	the compression test described at col. 8:56-9:45
“the modified ASTM D 4032-82 CIRCULAR BEND PROCEDURE” (Claim 19)	the modified ASTM D 4032-82 CIRCULAR BEND PROCEDURE described at col. 8:5-55

III. DISPUTED CONSTRUCTION

The parties have only one claim construction dispute, relating to a term in dependent claim 21:

<u>Claim Term(s) or Element(s)</u>	<u>Essity Proposed Construction</u>	<u>First Quality Proposed Construction</u>
“entire crotch portion” (Claim 21)	Not Indefinite; ordinary meaning, no construction necessary; <i>i.e.</i> , the entire portion of the article that is designed to be placed in the crotch of the wearer and to be in contact with the pudendal area of the wearer.	Indefinite

A. Claim 21 – “Entire Crotch Portion”

1. Plaintiffs’ Opening Position

a) Legal Standard for Definiteness

A patent challenger bears the burden of proving indefiniteness by clear and convincing evidence. *See Astellas Pharma Inc. v. Lupin Ltd.*, No. 23-819-JFB-CJB, 2024 WL 4626225, at *4 (D. Del. Oct. 30, 2024) (citing *Microsoft Corp. v. i4i Ltd. P’Ship*, 564 U.S. 91, 95 (2011)). A claim is indefinite only if, when “read in light of the specification” and “prosecution history,” it “fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). The Supreme Court in *Nautilus* recognized that language has “inherent limitations”—as a result, the “reasonable certainty” standard strikes a “delicate balance,” “affording clear notice of what is claimed” while recognizing the inherent limitations of language. *Id.* at 909 (citing *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002)). The test for definiteness “does not require that a potential infringer be able to determine *ex ante* if a particular act infringes the claims.” *See Nevro Corp. v. Bos. Sci. Corp.*, 955 F.3d 34, 40 (Fed. Cir. 2020) (holding claim term not indefinite where “a skilled artisan would be able to quickly determine whether” infringement had occurred). Rather, “the public notice function underlying [the definiteness] requirement demands that a patentee apprise the public ‘of what is still open to them.’” *See Niazi Licensing Corp. v. St.*

Judge Med. S.C., Inc., 30 F.4th 1339, 1346 (Fed. Cir. 2022) (quoting *Nautilus*, 572 U.S. at 909).

b) “Entire crotch portion” has a common, ordinary meaning and is defined by the specification with reasonable certainty.

The term “entire crotch portion” is not indefinite because “crotch portion” and “entire crotch portion” are “common words with common meaning,” and “[t]he intrinsic evidence uses those terms consistent with their ordinary meanings.” *See Quest Diag. Investments LLC v. Lab. Corp. of Am. Holdings*, No. 18-1436-MN, 2020 WL 210799, at *5 (D. Del. Jan. 14, 2020) (finding common terms not indefinite). Here, the specification of the ’138 Patent defines “crotch portion” consistently with its ordinary meaning in the art: “the portion of the article that is designed to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer.” ’138 Patent, 5:53-6:3; *see also id.*, 11:6-10 (“The crotch portion **15** is that portion of the incontinence protector **1** which is intended to be placed against the crotch of a wearer during wearing of the protector **1** and to constitute the main acquisition area for body fluid that reaches the protector **1**.”); Sheldon Decl., ¶ 25. “Entire” modifies “crotch portion” in claim 21 in a common and reasonably certain way: the opening in the first absorbent layer must extend longitudinally through an entire portion of the article that is designed to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer.

'138 Patent, cls. 1, 21; Sheldon Decl., ¶ 26. Given these clear definitions, the public is fully apprised “of what is still open to them.” *Nautilus*, 572 U.S. at 909. No more is required of a patentee to demonstrate that its claim is not indefinite.

c) A POSA would have understood with reasonable certainty what “entire crotch portion” meant in 2011.

A POSA reading the specification of the '138 Patent would be reasonably certain of the parameters of the term “entire crotch portion” and would have no difficulty quickly determining whether a particular product was covered by the claims. *Nevro Corp.*, 955 F.3d at 40; Sheldon Decl., ¶ 25.

A POSA in this field at the time the '138 Patent was filed in 2011 would have had (1) a degree or certificate in chemical engineering, chemistry, paper engineering, materials science, biology or a related field; and (2) two to four years of work experience in product design and testing of disposable absorbent articles, such as diapers, sanitary napkins and incontinence pads. Sheldon Decl., ¶ 19. Less work experience may be compensated by a higher level of education, and vice versa. *Id.*

The teachings of the '138 Patent regarding the “crotch portion” of an absorbent article are consistent with the understanding in the art as of June 28, 2011. Sheldon Decl., ¶ 26. The term “crotch portion” has been used consistently since at least 2011 throughout the absorbent article industry to describe a specific portion of an absorbent article that is designed to be in contact with the pudendal

area of a wearer—consistent with how “crotch portion” is used and defined in the ’138 Patent. *Id.* Further, “entire crotch portion” is used to describe the entirety along the longitudinal center line of a portion of an absorbent article that is designed to be in contact with the pudendal area of a wearer—consistent with how a POSA would view the scope of claim 21. *Id.*

Even without the ’138 Patent’s specification, a POSA would know that an absorbent article is typically divided into portions. Sheldon Decl., ¶ 29. The front portion of an absorbent article extends upward toward the navel or pubic bone region. *Id.* The rear portion of an absorbent article extends rearward toward the buttocks. *Id.* The crotch portion of an absorbent article lies between the front portion and rear portion, designed to be centered approximately on the pudendal or perineal area of the wearer—the “main acquisition area for body fluid.” *Id.*; ’138 Patent, 11:4-10.

Figure 1 of the ’138 Patent sets out the ordinary and customary placement of the crotch portion in an absorbent article. Element 13 identifies the front portion (pink), element 14 identifies the rear portion (blue), and element 15 identifies the crotch portion (green). *See* Sheldon Decl., ¶ 30:

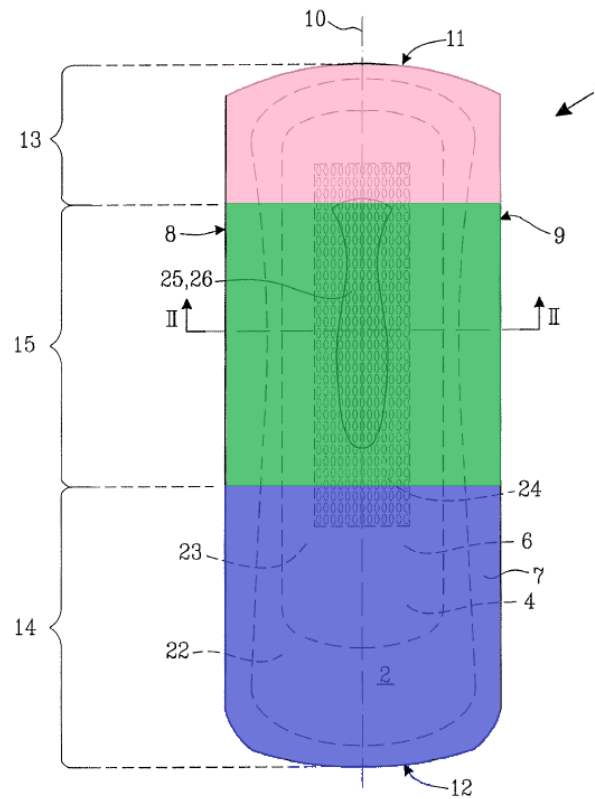


Fig. 1

Absorbent articles are typically identified with a front portion, crotch portion, and rear portion the way it is set out in Figure 1 of the '138 Patent. Sheldon Decl., ¶ 31. In this way, a POSA would be able to look at any absorbent article and know with reasonable certainty what a crotch portion is and what an entire crotch portion is. *Id.* This is true whether or not a crotch portion of an absorbent article is explicitly labeled as such. *Id.*

In addition, a POSA in 2011 would have readily understood what is meant by “entire crotch portion.” Sheldon Decl., ¶ 32. Based on the knowledge of a POSA and the specification of the ’138 Patent, a POSA would understand that an opening along a longitudinal center line of a crotch portion of an absorbent article

could extend through any amount of the crotch portion. *Id.* Similarly, a POSA would understand that an opening along a longitudinal center line of an entire crotch portion of an absorbent article requires that the opening extends at least through the entire portion of the article that is designed to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer, and may also extend into the front or rear portion of the absorbent article. *Id.*

As a result, a POSA would be able to examine an absorbent article design and know quickly and with reasonable certainty what an entire crotch portion is—the entirety of the portion labeled or identified as the crotch portion. Sheldon Decl., ¶ 33.

2. Defendants’ Answering Position

a) **Legal standard for indefiniteness**

A patent’s claims “define[] the scope of the patentee’s rights.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). Claim construction is a question of law governed by the intrinsic evidence and informed by extrinsic evidence if necessary to understand “the background science or the meaning of a term in the relevant art during the relevant time period.” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 326-27, 331 (2015). “Experts may explain terms of art and the state of the art at any given time, but they cannot be used to prove the legal construction of a writing.” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335,

1339 (Fed. Cir. 2015).

Under 35 U.S.C. § 112, a patent claim is invalid as indefinite if its language when “read in light of the specification . . . and the prosecution history, fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus*, 572 U.S. at 901. “[A] patent must be precise enough to afford clear notice of what is claimed, thereby ‘apprising the public of what is still open to them.’” *Id.* at 909. Otherwise, there would be a “zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.” *Id.* at 909-10. When a patentee fails to adequately claim its invention, courts “will not redraft claims to preserve their validity.” *Horizon Pharma, Inc. v. Dr. Reddy’s Lab’ys, Inc.*, No. CV-15-3324-SRC, 2018 WL 6040265, at *5 (D.N.J. Nov. 19, 2018); *see also Adaptix, Inc. v. Huawei Techs. Co.*, 74 F. Supp. 3d 832, 838 (E.D. Tex. 2014) (“[The Supreme Court’s 2014 decision in] *Nautilus* abrogated the use of a ‘narrowing construction’ to avoid a finding of indefiniteness.”).

Indefiniteness must be shown by clear and convincing evidence. *See, e.g., Teva Pharms.*, 789 F.3d at 1345. “Indefiniteness is a matter of claim construction, and the same principles that generally govern claim construction are applicable to determining whether allegedly indefinite claim language is subject to construction.” *Kyowa Hakka Bio, Co., Ltd. v. Ajinomoto Co.*, C.A. No. 17-313-MSG, 2020 WL 3403207, at *5 (D. Del. June 19, 2020) (internal quotations

omitted). In the District of Delaware, “indefiniteness ... is decided ... frequently at the claim construction stage.” *ESCO Grp. LLC v. Deere & Co.*, C.A. No. 20-1679-WCB, 2023 WL 4199413, at *10 (D. Del. June 22, 2023); *see also, e.g., Cisco Sys. Inc. v. Ramot At Tel Aviv Univ. Ltd.*, C.A. No. 21-1365-GBW, 2024 WL 4751590, at *7 (D. Del. Nov. 12, 2024) (finding certain claims indefinite at the claim construction stage); *Array BioPharma, Inc. v. Alembic Pharms. Ltd.*, C.A. No. 22-1277-GBW, 2024 WL 1637354, at *3 (D. Del. Apr. 16, 2024) (finding a claim term indefinite at the claim construction stage).

b) An “opening extending through an entire crotch portion” is indefinite

Claim 21 of the ’138 patent is invalid because the requirement that the opening extend through “the entire crotch portion” of the first absorbent layer is indefinite. This limitation fails to inform those skilled in the art about the scope of the invention with reasonable certainty. Plaintiffs’ arguments to the contrary are without merit. Plaintiffs’ arguments rely on a purported definition of “crotch portion” from the specification. But the term “crotch portion” as used in the specification fails to delineate with reasonable certainty the outer boundaries of this portion of the absorbent article. It also fails to explain with reasonable certainty what is required for an opening to extend through the entire crotch portion, as opposed to only part of the crotch portion. These two ambiguities prevent potential infringers from determining whether their products fall within the

scope of claim 21, thereby violating the definiteness requirement established in *Nautilus*.

i. A Person of Ordinary Skill in the Art Would Not Understand What the Outer Bounds of the Crotch Portion Are with Reasonable Certainty

A person of ordinary skill in the art would not understand the outer bounds of the “crotch portion” even when referencing the ’138 patent specification. Although the patent references the “crotch portion” in general terms, it fails to provide any objective, repeatable criteria—such as structural features, measurements, or spatial orientation—that would allow a skilled artisan to determine its boundaries with reasonable certainty. Instead, the patent defines the crotch portion by reference to the anatomy of the wearer (i.e., the pudendal region), which is inherently variable and subjective. This lack of a consistent, structure-based definition raises significant ambiguity as to where the crotch portion begins and ends, and thus whether an opening “extends through” the “entire” crotch portion as required by claim 21. *See, e.g., Bombardier Recreational Prods. Inc. v. Arctic Cat Inc.*, 785 F. App’x 858, 867 (Fed. Cir. 2019) (“Even if a claim term’s definition can be reduced to words, the claim is still indefinite if a person of ordinary skill in the art cannot translate the definition into meaningfully precise claim scope.”) (quoting *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1251 (Fed. Cir. 2008)).

None of the other references to “crotch portion” in the intrinsic record resolve this ambiguity. They confirm that Plaintiffs’ attempts to define it fall short of the standard set by *Nautilus v. Biosig Instruments, Inc.*, 572 U.S. 898 (2014). And the extrinsic evidence, including the testimony of Plaintiffs’ own expert, only confirms this term is ambiguous.

First, the ’138 patent specification demonstrates the “crotch portion” is unclear with respect to its outer boundaries and position within the absorbent article. The primary description Plaintiffs rely on in arguing the claim is definite is a statement that “the portion of the article that is designed to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer.” *See supra* at 3, 10 (citing ’138 Patent, 5:53–6:3). However, the ’138 patent also explains that the absorbent article may be positioned toward either the front or rear of the wearer, and that aspects of the absorbent article may vary in size, shape, or other dimensions to assist the user in properly placing the article within their underwear. ’138 Patent, 5:65–6:3. This disclosure makes clear that the design of the article is not necessarily symmetrical and that the different portions of the absorbent article may differ significantly. As a result, the location of the crotch portion in the absorbent article is not in a fixed position relative to the overall geometry of the article. Because the location and boundaries of the “entire crotch portion” may vary based on the article’s intended orientation and fit, the term is

unclear. *See, e.g., Samy Abdou v. Alphatec Spine, Inc.*, No. 12-CV-BEN (RBB), 2014 WL 6611422, at *8-9 (S.D. Cal. Nov. 19, 2014) (finding that “nothing in the claims or specification tells a person of ordinary skill in the art what the anatomical position, anatomical relationship, spatial relationship, or proximity should be to accurately target the surgical site.” Thus, “the absence of identified boundaries in terms of proximity, distance, or location render[ed] the claims indefinite” under the *Nautilus* standard.).

The figures in the ’138 patent further demonstrate the ambiguity of “crotch portion.” The figures omit any labels or indicators that would clarify the location or extent of the crotch portion. Although Plaintiffs point to Figure 1 as “set[ting] out the ordinary and customary placement of the crotch portion in an absorbent article,” *Supra* 12 (citing Sheldon Decl., ¶ 30), this figure provides no actual landmarks regarding where the crotch portion begins or ends. Moreover, Plaintiffs’ expert repeatedly referred to this drawing as inaccurate and was unable to define the “crotch portion” without referencing wearer anatomy (*i.e.*, the perineum /

pubdental area) of the user. *See* Ex. C, Sheldon Dep. Tr. at 19:3-15¹, 26:13-23², 27:2-6³, 29:19-23⁴. This absence of objective structure-based landmarks leaves the scope of the term “entire crotch portion” uncertain, as a person of ordinary skill in the art must subjectively interpret the anatomical reference to determine whether the limitation is met. This failure to anchor a user-dependent feature to the product’s physical structure renders claim 21 indefinite. *See, e.g., Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014) (“The claims,

¹ A: I’m not saying if the opening is in the crotch portion does it meet 21. It could be a very small opening. I’m just responding to your question about this particular drawing. And I can't go beyond, I mean, this drawing as shown does not extend through the entire portion of the crotch area as in claim 21 because it doesn't extend to the back. But I'm saying is, it extends to the frontward. So in this drawing it may be an inaccurate drawing.

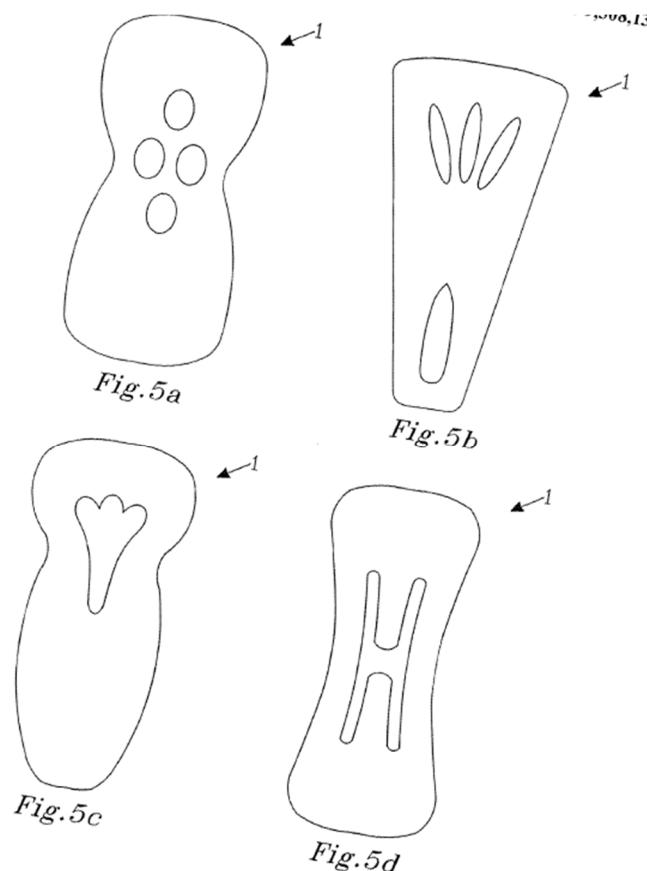
² A: I’m saying figure 1 as it is drawn, inaccurate as it is, the rear portion as shown in figure 21 is short of the entire crotch region as defined by 15. I’m saying it's short. I'm additionally saying a person of ordinary skill in the art would know that you, when you design an absorbent area, just as 15, 16 area, that it's got to be under the perineum [] area for absorbency. It's got to be between the anus and between the urethra. That's what it has to be.

³ A: As I’ve said before, it fully meets the, the claim 1, but in this area, does this figure, inaccurate as it was, extend entirely to the rear of the crotch portion, I'm saying it doesn't fully extend to the rear. But it exceeds in the front. So perhaps it's positioned a little bit different, but a person of ordinary skill in the art would know that you design the product to be absorbing. So whether it's a crotch region or the entire crotch region, it would mean the same to a person of ordinary skill in the art.

⁴ A: Well, I mean, obviously based upon visually looking at an inaccurate drawing, it does not extend fully to the end of the crotch region, but it's awfully close, so we're in nuances of millimeters here.

when read in light of the specification and the prosecution history, must provide objective boundaries for those of skill in the art.”).

The specification’s other discussions of “crotch portion” likewise fail to provide clarity regarding what the placement and outer bounds of the crotch portion may be. Figures 5A through 5D, for example, illustrate various embodiments with openings. Two (Figures 5A and 5D) have an opening or openings that are located within what is referred to as the crotch portion of the absorbent article. *See* ’138 Patent, Figs. 5A–5D; *see also id.* at 13:12–37. The figures themselves provide no landmarks or even annotations to show where the crotch portion may begin or end:



And the specification likewise does not indicate whether the openings in Figures 5A and 5D extend through the “entire” crotch portion or only part of it, nor does the specification provide any objective criteria for determining the boundaries of the crotch portion in these or any other embodiments. *Id.* at 13:12–37 (indicating that Figure 5A has openings in the crotch portion and that Figure 5D “may be particularly suited for incontinence protectors where it may be desired to quickly channel fluid from the crotch portion of the absorbent article towards the end thereof” but failing to disclose one way or another whether any of the openings in these figures extend across the entire crotch portion). Without defined start and end points for the crotch portion, a person of ordinary skill in the art has no way to assess whether the depicted openings satisfy the limitation of claim 21. *See, e.g., 4WEB, Inc. v. NuVasive, Inc.*, No. 24-CV-1021-JLS (MMP), 2025 WL 525112, at *15 (S.D. Cal. Feb. 18, 2025) (finding “central portion” indefinite because “due to the various shapes of implants, various central portions are contemplated,” but “what is less clear from the specification is what the scope of the ‘central portion’ is in any given implant.”).

Second, the extrinsic evidence confirms there is no commonly understood size or dimension for crotch portion. Indeed, Plaintiffs’ expert *concedes* that the size and dimensions of this region can vary based on age, and gender of the wearer:

Q: Do you agree that the size of the pudendal area is different between a male and female in general?

A: I would, I would say my experience is **the pudendal area between the anus and urethra of a female is approximately 2 inches. For a male it may be 3 inches.**⁵ But if a person, a male is using these products, they're elderly, there's a lot of atrophy going on in the body. So the penis is shrinking, and, therefore, a product design like this could work well for a male.

Q: So a diaper for a newborn infant will have a smaller crotch portion than a full size adult male diaper, correct?

A: I haven't, I believe so, yes. I believe so as a person of ordinary skill in the art, **there's differences between the absorbent areas, the crotch portion in an infant versus a full-sized adult.**

See Ex. C, Sheldon Dep. Tr. at 35:16-36:1, 37:3-13. This is consistent with both the specification of the '138 patent (5:65–6:3) and with the prior art (Ex. D, US20100108554). For example, US20100108554, teaches “a person of ordinary skill in the art an absorbent article adapted to be worn by a female *may have a different crotch length than the crotch length* for the article worn by a male.” Ex. C, Sheldon Dep. Tr. at 45:13-46:21 (referring to paragraph 74 of Ex. D US20100108554) (emphasis added).

Plaintiffs' expert also acknowledged that Kimberly-Clark, in at least one of its patents, defined the crotch region as 7–10 centimeters, or “about three to four

⁵ Emphasis added unless otherwise noted.

inches for their crotch region,” i.e., a different length than the 2-3 inches he proposed. *See* Ex. C, Sheldon Dep. Tr. at 61:7-16, 67:25-68:18 (referring to Ex. E WO2001024755 at 8:19-23).

And a *different* Essity patent than the one asserted here offers yet another standard for determining the size of “crotch region.” In an SCA Hygiene (now Essity) patent, the crotch region is defined, “in the normal case,” as being determined by “first locating the crotch point of the absorbent core and then measuring forward and backward a distance equal to 25% of the total length of the core.” Exhibit F, US. Patent No. 7,888,549 at 5:6-10. That same patent also explains that in the case of an “asymmetrically placed core,” “the crotch region may be shorter than 50 % of the total length of the core.” *Id.* at 5:23-28. These examples illustrate that there is no uniform or industry-wide standard for determining the size or boundaries of the “crotch portion.” Different manufacturers define the term using different methodologies—some based on anatomical approximations, others on structural measurements relative to the absorbent core.

Plaintiffs’ expert acknowledged that the term crotch portion has different meanings depending on how the absorbent article is manufactured. Ex. C, Sheldon Dep. Tr. at 77:25-78:13 (“What I understand as a person of ordinary skill in the art looking at the ’138 patent, that product is manufactured in the machine direction.

So it runs this way, (indicating), so they manufacture it this way. As I've been saying in this other patent, the '549, the product is manufactured sideways and it's not the same product. It's not the same equipment and different people reference different terms. So the crotch point, it does not appear in the '138. The crotch region that is talking about in the '549 is totally different than the '138. They're totally different products and patents.”).

Because claim 21 of the '138 patent is not limited to a particular manufacturing method, the fact that the crotch portion would be defined differently depending on its manufacturing method alone renders the limitation “entire crotch portion” indefinite. *See, e.g., Teva Pharms.*, 789 F.3d at 1341 (concluding that the term “molecular weight” was indefinite, because “[t] are three different measures of molecular weight relevant to this appeal: peak average molecular weight (M_p), number average molecular weight (M_n), and weight average molecular weight (M_w)” and the patent record did “not convey with reasonable certainty the measure of molecular weight to be used.”).

ii. A Person of Ordinary Skill in the Art Would Not Understand With Reasonable Certainty What It Means for an Opening to Extend Through an “Entire Crotch Portion”

Even if the outer boundaries of the crotch portion were known with reasonable certainty—which they are not—a person of ordinary skill in the art would still be unable to ascertain with reasonable certainty the scope of claim 21.

This is because the claim requires that the opening extend “through an entire crotch portion,” yet provides no objective guidance as to what qualifies as “extending through an entire crotch portion.”

As a threshold matter, the phrase “**entire crotch portion**” does not appear anywhere in the specification apart from claim 21. Plaintiffs improperly point to the portion of the specification that defines “**crotch portion**” to suggest that the term “**entire crotch portion**” is also defined. *See, e.g., supra* 10 (quoting ’138 patent, 5:53-6:3). That is incorrect. The distinction between “crotch portion” and “entire crotch portion” is relevant, because claim 21 of the ’138 patent specifically requires that the opening in the first absorbent layer extend through an “*entire* crotch portion” of the absorbent article. For the reasons discussed below, the term “entire crotch portion” is indefinite.

First, the specification provides no guidance as to whether the term “entire” requires the opening to physically extend across the full outer boundaries of the crotch portion, or whether it is sufficient for the opening to merely extend across a majority—or even a substantial portion—of that region. As a result, a person of ordinary skill in the art is left to guess whether an opening that spans, for example, 60%, 80%, or nearly all—but not all—of the crotch portion would fall within the scope of the claim. This lack of clarity introduces significant uncertainty as to what is required for an opening to extend through “an entire crotch portion” and

renders the claim scope indefinite. *See Interval Licensing LLC*, 766 F.3d at 1371 (“The claims, when read in light of the specification and the prosecution history, must provide objective boundaries for those of skill in the art.”).

Second, the phrase “extends through an entire crotch portion” is ambiguous with respect to directionality. For example, does the phrase require that the opening span the entire length of the crotch portion (e.g., from the front waist region to the rear waist region), the entire width (e.g., from one side edge to the other), or both. The claim language provides no objective guidance on this point, and the specification does not resolve the ambiguity, offering no consistent description or measurement criteria for what constitutes “entire” in this context. Without clearly defined boundaries or orientation, a person of ordinary skill in the art is left to speculate as to what degree and direction of coverage is required to meet the claim limitation. This uncertainty about whether partial coverage satisfies the claim—or whether full coverage along one or more axes is required—renders the scope of the claim indefinite. *See, e.g., Targus Int’l LLC v. Victorinox Swiss Army, Inc.*, C.A. No. 20-464-RGA, 2021 WL 1737531, at *4 (D. Del., May 3, 2021) (finding the phrase “pouch openings [is/are] . . . oriented in a direction substantially parallel to the planar surface” indefinite because the claim lacked objective guidance as to what “direction” the opening was “oriented”).

Third, the ambiguity surrounding what is required for the opening to extend

through an “entire crotch portion” is not resolved by the examples or figures in the ’138 patent specification. Other than the arbitrary demarcation of the crotch area as section 15 in Figure 1, there are no landmarks depicted in these drawings or described elsewhere in the specification to suggest how far and in what direction the opening must extend in order have extended the “entire crotch portion.”

Indeed, Plaintiffs’ expert, Mr. Sheldon, struggled to articulate how far an opening in Figure 1 must extend in order to meet the limitation of claim 21 and whether a person of ordinary skill in the art could determine whether the opening in Figure 1 met the limitations of claim 21 at all:

Q: So what I’m struggling with because of that definition, are you saying that because the opening in figure 1 is depicted as being in the crotch region, does it meet this limitation of extending through the entire crotch portion of the absorbent article, yes or no?

A: I’m saying as drawn in figure 1, as shown in figure 1, it doesn’t come to the rear of the entire crotch portion.

Q: So are you saying no, it does not meet this limitation?

A: Figure 1?

Q: Yes.

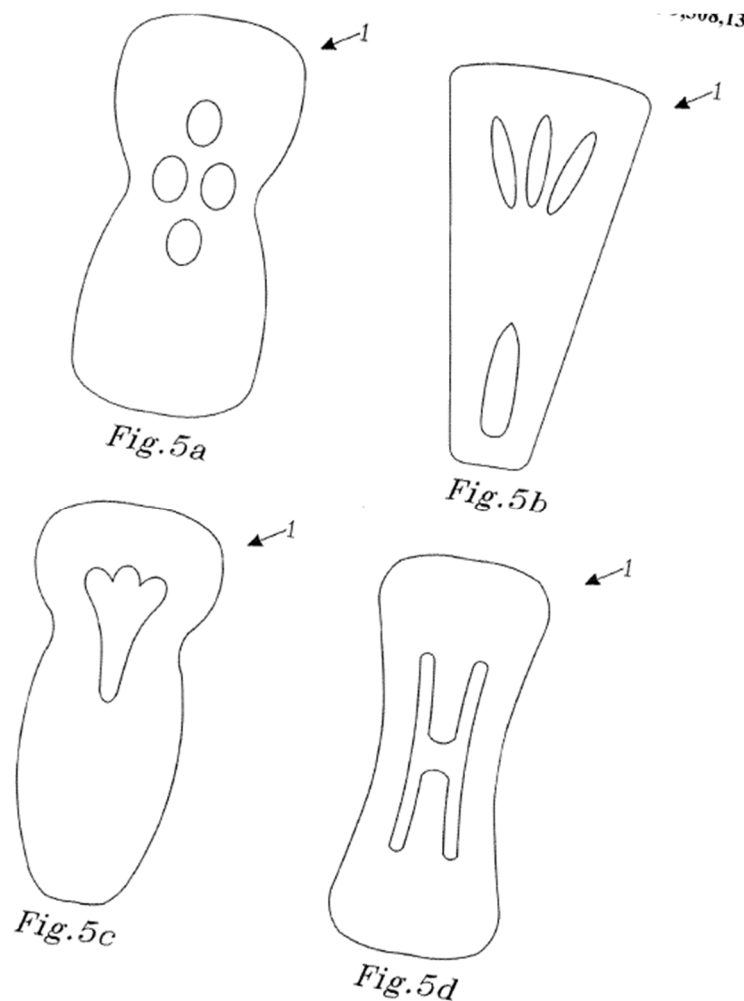
A: Well, I mean, obviously based upon visually looking at an inaccurate drawing, it does not extend fully to the end of the crotch region, but it’s awfully close, so we’re in nuances of millimeters here.

Q: But figure 1 does not meet claim 21?

A: Claim, Figure 1 does not show that the, that the opening area extends through the entire crotch region, it’s

just in the crotch region. I'm back to the point I don't see a difference between entire and crotch region because of the intention of the product.

See Ex. C, Sheldon Dep. Tr. at 29:6-23, 30:8-14. Plaintiffs' expert's testimony regarding the openings depicted in Figures 5A – 5D further underscores the ambiguity inherent in the claim term “entire crotch portion.”



With respect to Figure 5A, which illustrates four oval-shaped openings without clearly defined boundaries for the crotch portion, Mr. Sheldon asserted that it falls within the scope of the claim requiring “an opening [that] extends through

an entire crotch portion of the absorbent article.” Specifically, he opined that Figure 5A met claim 21’s requirements because “[i]ndividually there are four openings the crotch area and *individually they conglomerate to form the extend through the entire crotch area.*” Ex. C, Sheldon Dep. Tr. at 93:9-11. Claim 21 explicitly refers to “*an* opening,” indicating a single opening, whereas Figure 5A depicts multiple discrete openings. Moreover, the expert’s characterization of these separate openings as “conglomerating” to form an opening that extends through the entire crotch area lacks any objective basis or clear standard. This interpretation introduces ambiguity, making it impossible for a person of ordinary skill in the art to determine the scope of the claim with reasonable certainty, thereby rendering the claim indefinite.

Likewise, Figure 5C, which has a single opening in the top third of the figure, and Figure 5D, which has an H shaped opening in the middle of the figure, both allegedly fall within the scope of claim 21, according to Essity’s expert. Ex. C, Sheldon Dep. Tr. at 31:23-32:10, 96:12-20; *see also id.* at 97:9-20 (explaining the opening in 5C extends into the front portion but not the rear portion). Notably, Essity’s opening brief argues that Figure 5C does not have an opening in the crotch portion. *See, supra* 4.

Although Plaintiffs’ expert concluded that the absorbent article in Figure 5B did not have an opening that extended through the crotch portion, when pressed

further, Plaintiffs’ expert testified that “as a person of ordinary skill in the art, I would understand that [this article] is designed for someone sleeping on their side” and that “the nature of this design would indicate that for someone who has leakage problems and sleeps on their side **may position the front portion to the crotch area**” and finally that “the consumer may choose to position the product backwards **to utilize it in a more effective way.**” Ex. C, Sheldon Dep. Tr. at 94:23-95:25.

Whether or not Plaintiffs’ expert is correct that a side sleeper may place the product in a certain manner, this highlights the fundamental flaw of Plaintiffs’ definition of “entire crotch portion.” Plaintiffs’ expert appears to suggest that to determine infringement of claim 21, a person of ordinary skill in the art must have a subjective understanding of the manufacturer’s intent in designing an absorbent article—intent with respect to how the absorbent article must be worn by a user—and not any particular uniform guidelines, measurements or landmarks on an absorbent article. *See, e.g., NuVasive, Inc. v. Alphatec Holdings, Inc.*, 557 F. Supp. 3d 1069, 1078 (2021) (finding a “subjective limitation that fails to inform those of skill in the art about the scope of the invention with reasonable certainty” invalid).

In sum, the specification does not provide any objective boundaries or measurable criteria from which a person of ordinary skill could determine what constitutes the “entire crotch portion of the article.” Nothing in the definition of

“crotch portion” or in the examples provided in the specification provide a skilled artisan with the understanding of what it means for an opening to extend across the “entire crotch portion.”

c) Plaintiffs’ Conclusory Arguments Do Not Resolve the Indefiniteness of Claim 21

Plaintiffs’ expert’s conclusory assertion that a person of ordinary skill in the art in 2011 “would have readily understood” what is meant by “entire crotch portion” adds no support to Plaintiffs’ position. *Supra* 13-14. As with Plaintiffs’ briefing, the expert merely repeats or paraphrases portions of the specification and then offers the unsupported conclusion that a person of ordinary skill in the art would know what the term means. Sheldon Decl., ¶ 28.

But a conclusory expert opinion cannot convert a legal question of claim construction—such as whether the patent informs a skilled artisan with reasonable certainty—into a factual matter for expert resolution. *See Teva Pharms.*, 789 F.3d at 1342 (“Determining the significance of disclosures in the specification or prosecution history is part of the legal analysis of the intrinsic evidence.”); *see also Saso Golf, Inc. v. Nike, Inc.*, 843 F. App’x 291, 296 (Fed. Cir. 2021) (an “expert’s conclusory statement that all terms in the patent “have readily ascertainable meaning[s]” is no more than a recitation of the ultimate conclusion”). Here, Plaintiffs’ expert provides solely conclusory analysis of the extrinsic evidence and therefore his opinion should be given no weight.

Neither the Plaintiffs nor their expert can point to any other guidance from the specification, the prosecution history or the general knowledge of a skilled artisan to show the outer bounds of the “entire crotch portion.”

First, Plaintiffs’ expert makes the same error Plaintiffs make by suggesting an understanding of the meaning of “crotch portion” in 2011 is sufficient to understand the term “entire crotch portion.” *Supra* 11-12 (discussing the meaning of “crotch portion” in the industry) (citing Sheldon Decl., ¶ 26). As explained *supra*, that is incorrect.

Second, Plaintiffs’ expert misleadingly argues that “‘entire crotch portion’ is used to describe the entirety along the longitudinal center line of a portion of an absorbent article that is designed to be in contact with the pudendal area of a wearer, consistent with how a person of ordinary skill in the art would view the scope of claim 21.” *Supra* 11-12. (citing Sheldon Decl. ¶ 26). He provides no citation to support this incorrect conclusion. The ’138 patent refers to a “longitudinal center line” in the context of the absorbent article’s structure. Specifically, claim 1 describes “an opening [that] extends along a longitudinal center line of the absorbent article, the longitudinal center line being in parallel with the longitudinal direction of the absorbent article.” However, the ’138 patent does not use the “longitudinal center line” to define or clarify the boundaries of the “entire crotch portion.”

Third, Plaintiffs and Plaintiffs’ expert suggest that the general idea that “an absorbent article is typically divided into portions” is sufficient to show what the outer bounds of that “portion” of the absorbent article really is. Not so. As support, Plaintiffs direct this Court’s attention to an annotated version of Figure 1, that shows that the crotch portion (green) is generally located between a front portion (pink) and a rear portion (blue):

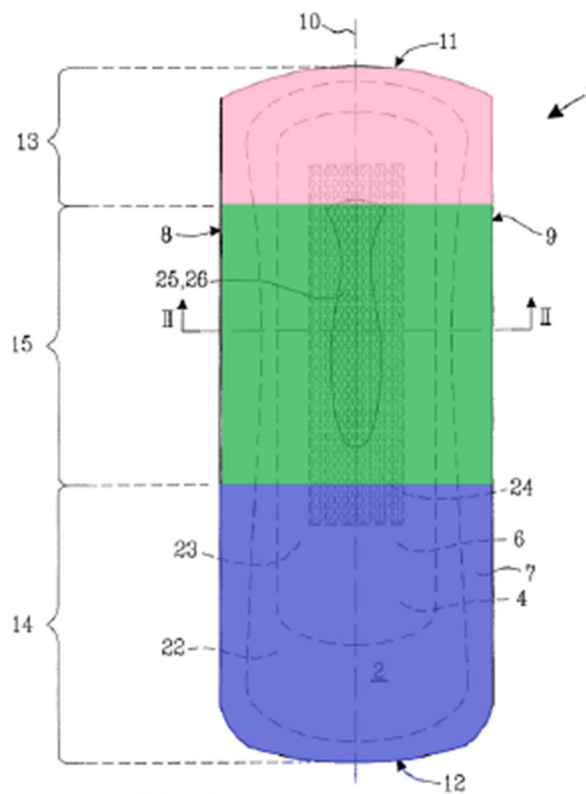


Fig. 1

Supra 12-13 (also citing to '138 patent, 11:4-10). As explained *supra*, the patent’s disclosure that region 15 is the crotch portion is insufficient. Plaintiffs and their expert fail to point to **any** objective landmarks or features that would allow a

person of ordinary skill in the art to determine where the front portion ends and the crotch portion begins when looking at an absorbent article that has not been annotated with the annotations found in Figure 1.

Finally, Plaintiffs and their expert argue that “a POSA would understand that an opening along a longitudinal center line of a crotch portion of an absorbent article could extend through any amount of the crotch portion.” *See supra*, 13-14. But that is precisely the point. Based on the annotations of Figure 1, it does not appear that the opening 25 in that figure extends through the *entire* crotch portion. Without defined boundaries, a person of ordinary skill in the art has no way to ascertain whether the opening truly extends through the entire crotch portion, rendering the claim indefinite.

3. Plaintiffs’ Reply Position

a) **“Crotch portion” is a term clearly defined by the specification and well known in the art.**

For the first time, Defendants attempt to argue that the term “crotch portion” is indefinite, despite the clear definition provided by the specification. *See generally supra*, 16-35; Ex. B, ¶¶ 24-33. Defendants’ arguments are not only wrong, but they violate the Court’s procedures by introducing a new term for construction months after the deadline to do so. *See* D.I. 16, ¶ 8. Nevertheless, Essity responds to Defendants’ arguments.

i. The intrinsic evidence provides reasonable certainty regarding the term “crotch portion.”

Defendants rely solely on attorney argument and a tortured reading of Mr. Sheldon’s opinions and testimony to manufacture a dispute about the term “crotch portion.” To start, Defendants argue that “the patent defines the crotch portion by reference to the anatomy of the wearer (i.e., the pudendal region), which is inherently variable and subjective.” *Supra*, 17. This is incorrect for several reasons. First, the patent refers to the crotch portion as the “portion of the article that is *designed* to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer. Ex. A, 5:59-64 (emphasis added). This does not require reference to any particular wearer’s anatomy as Defendants contend. Instead, it requires a particular design based on a POSA’s knowledge of the dimensions required for a crotch portion of an absorbent article. *See* Ex. C, 63:24-25 (“Anybody who designs absorbent products understands a crotch region.”).

Second, these dimensions are not variable and subjective; they are fixed and very well-known to a POSA. As Mr. Sheldon testified at his deposition numerous times, the crotch portion of an adult incontinence product is fixed regardless of the size of the wearer:

Q: And there would be a difference in size of the crotch region, for example, in an extra-large-sized adult diaper versus an extra-small-sized adult diaper, correct?

A: No.

Q: The crotch region would be identical between an extra-small and an extra-large adult diaper?

A: The distance between the anus and the urethra doesn't change depending upon your weight. Just like your eyes don't change if you gain weight and your eyes' position don't change when you lose weight. It's a fixed position. It's anatomical.

Ex. C, 37:15-38:2; *see also id.*, 38:16-19 (“But it’s the crotch portion. It’s the area that’s got to cover the anus to urethra to absorb fluids because that’s what the product is designed for.”), 39:23-25 (“The crotch portion is a portion that’s fixed with the body.”), 40:4-5 (“The crotch, the body, which is the crotch, is a fixed space.”). And even when faced with an extreme hypothetical of whether “a diaper for a newborn infant will have a smaller crotch portion than a full-size adult male diaper,” Mr. Sheldon simply responded that “[a]s a person of ordinary skill in the art, there’s differences between the absorbent areas, the crotch portion in an infant versus a full-sized adult.” *Id.*, 37:3-13. As such, Mr. Sheldon’s testimony indicates that a POSA as of 2011 would have had “an objective baseline to interpret the claims” with respect to designing an opening extending through a crotch portion of an absorbent article for an adult male, adult female, or infant. *See Total Control Sports, Inc. v. Precision Impact*, No. 17-cv-09281, 2019 WL 6464002, at *9 (N.D. Ill. Dec. 2, 2019); *Sonix Tech. Co., Ltd. v. Publications Int’l, Ltd.*, 844 F.3d 1370, 1378 (Fed. Cir. 2017) (finding the term “visually negligible,” which referred to

graphics designed to be negligible to the human eye, was definite because it relied on an objective baseline despite differences in human eyesight).

(1) The case law supports definiteness.

Defendants' reliance on *Abdou v. Alphatec Spine, Inc.* is misplaced. No. 12-cv-BEN (RBB), 2014 WL 6611422 (S.D. Cal. Nov. 19, 2014). The patent at issue there required mounting a device for treating spinal injuries relative to some point between two vertebrae, with two other devices attached to the first device and to a second area along the spine. *Id.* at *8. The issue was that “the locations of the insertion and attachment points were necessary for the device to function properly, and the patent did not identify where the locations should be.” *See Total Control Sports*, 2019 WL 6464002, at *9 (citing *Abdou*, 2014 WL 6611422, at *8). That is very different from the term “entire crotch portion” here, which by the specification's definition and its very name defines where the location of the opening “should be.” *See* Ex. B, ¶ 32; Ex. A, 5:53-6:3.

Federal Circuit precedent is instructive here. For example, in *Ironburg Inventions Ltd. v. Valve Corp.*, 64 F.4th 1274, 1288 (Fed. Cir. 2023), the Federal Circuit held that the language italicized below did not render the limitation indefinite:

a first back control and a second back control, each back control being located on the back of the controller and each back control *including an elongate member that extends substantially the full distance between the top edge and the bottom edge and is inherently resilient and flexible.*

Id. at 1282. The accused product—a handheld controller for a game console—is shown below. *Id.* at 1283:



There are no “objective boundaries” or “landmarks” on this device to show a POSA where the elongate member should begin and end. Yet the Federal Circuit agreed with the district court’s holding that the claim term was not indefinite based on the purpose of the claimed structure: “[w]ith respect to the rear controls, the word ‘substantially’ is reasonably precise, given that the purpose of the elongate shape is to allow ‘a user to engage the paddles with any of the middle, ring, or little finger.’” *Id.* at 1288. Similarly, here, the design and purpose of the absorbent article is clear: to have an opening in the crotch of the wearer and in contact with the pudendal area of the wearer in order to absorb fluid. *See, e.g.*, Ex. B, ¶ 32; Ex. C, 14:15-18; Ex. A, 5:53-6:3.

Similarly, in *Grace Instrument Indus., LLC v. Chandler Instruments Co.*, 57 F.4th 1001, 1009 (Fed. Cir. 2023), the Federal Circuit concluded that the term

“enlarged chamber” was not indefinite: “in the context of this patent, ‘enlarged chamber’ does not require that chamber to be larger than some baseline object; rather it must be large enough to accomplish a particular function.” *Id.* As stated by the *Ironburg* court:

The indefiniteness challenge in *Grace* was unsuccessful because a person of ordinary skill in the art would know when a chamber is large enough to accomplish the function identified in the patent. Likewise, here, a person of ordinary skill in the art would know that an elongate member extends substantially the full distance between the top and bottom edge of a controller when the elongate member is long enough for different-sized hands to engage with the member using a middle, ring, or little finger.

Ironburg Inventions, 64 F.4th at 1288. It is clear from Federal Circuit precedent that, even if the design of an invention requires applicability to different-size anatomy, it is not indefinite. Here, a POSA would understand when an opening is designed to be large enough to extend through an “entire crotch portion” of the absorbent article based on the intrinsic definitions. The absolute precision of the boundaries Defendants seek is simply not required.

(2) Mr. Sheldon’s testimony regarding the Figures in the ’138 Patent does not support a finding of indefiniteness.

Defendants focus heavily on Mr. Sheldon’s testimony regarding Figures 1 and 5 of the ’138 Patent, which does nothing to move the needle. With respect to Figure 1, Mr. Sheldon merely pointed out that—based on his understanding of the entire specification—the opening in Figure 1 “is phased a little bit more forward

than I would have expected and a little bit shorter than I would have expected.”

Ex. C, 17:5-8:6. That is, Mr. Sheldon understands that “the rear portion [of the opening] does not extend all the way to the rear of the crotch portion” (*id.*, 18:7-13) and that “figure 1 does not show that the [] opening area extends through the entire crotch region, it’s just in the crotch region” (*id.*, 30:8-14). At no point did Mr. Sheldon testify that a POSA would not understand the boundaries of the crotch portion with reasonable certainty, nor do Defendants have any intrinsic or extrinsic evidence demonstrating such a lack of understanding. And Defendants cite no authority that the figures in a patent must align with and define every dependent claim limitation for such a limitation to be definite.

With respect to Figures 5A-5D, Defendants argue that the lack of “objective criteria” and “defined start and end points for the crotch portion” make the crotch portion indefinite. *Supra*, 22. Not so. As a preliminary matter, Defendants cite no authority for the prospect that a patent figure must provide “actual landmarks” (*supra*, 19) for where a particular region begins and ends. As explained above, the Federal Circuit has rejected such arguments where, as here, a POSA would understand when a particular element incorporates the proper dimensions to accomplish the function identified in the patent with reasonable certainty. *See Ironburg Inventions*, 64 F.4th at 1288. And regardless, Figure 1 clearly provides

those landmarks, with dotted lines indicating the boundaries of the crotch portion in that embodiment.

Regardless whether Defendants are able to define the crotch portion of an absorbent article based on the disclosures in the '138 Patent, a POSA has no difficulty doing so. In fact, at his deposition, Mr. Sheldon was able to determine whether the absorbent articles in Figures 5A-5D met the limitations of Claim 21 in seconds, despite not previously providing any opinion regarding these Figures. *See* Ex. C, 31:14-15 (13 seconds to determine that Figure 5A met the limitation of Claim 21), 31:20-22 (3 seconds for Figure 5B), 32:1-3 (1 second for Figure 5C), 32:8-10 (2 seconds for Figure 5D). This perfectly aligns with Mr. Sheldon's opinion that "a POSA would be able to examine an absorbent article design and know with reasonable certainty what an entire crotch portion is in the context of the '138 Patent." Ex. B, ¶ 33.

Again, Defendants' case law citation falls short. In *4WEB, Inc. v. NuVasive, Inc.*, No. 24-cv-1021-JLS, 2025 WL 525112 (Feb. 18, 2025), the district court found the term "central portion" indefinite. *Id.* at *14-15. In that case, however, the court found that the examples in the specification taught conflicting numerical ranges in defining the "central portion," providing "no clarity as to how a skilled artisan should decide where to land on that spectrum." *Id.* In contrast, as explained above and based on the disclosures in the '138 Patent, a POSA would

understand how to design an absorbent article that is (1) to be placed in the crotch of a wearer and (2) to be in contact with the pudendal area of the wearer. *See* Ex. B, ¶ 32; Ex. A, 5:53-6:3. It is telling that Defendants have found no expert to opine that a POSA would lack such understanding.

b) The extrinsic evidence, to the extent needed to resolve this dispute, favors definiteness

Analyzing indefiniteness “involves consideration of primarily the intrinsic evidence, *viz.*, the claim language, the specification, and the prosecution history.” *Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374, 1378 (Fed. Cir. 2015). “[C]ourts are permitted to consider extrinsic evidence” as long as the extrinsic evidence is not “used to contradict claim meaning that is unambiguous in light of the intrinsic evidence.” *Profectus Tech. LLC v. Huawei Techs. Co.*, 823 F.3d 1375, 1380 (Fed. Cir. 2016) (internal citations omitted). Where a claim term is unambiguous from the intrinsic record alone, as it is here, the court “need not consider any extrinsic evidence.” *GE Lighting Sols., LLC v. Lights of Am., Inc.*, 663 F. App’x 938, 941 n.3 (Fed. Cir. 2016). Because the intrinsic record here is clear, extrinsic evidence is unnecessary to resolve this dispute.

To the extent the Court is inclined to examine the extrinsic evidence, it favors Essity, not Defendants, demonstrating the considerable knowledge in the art at the time of the ’138 Patent. For example, paragraph 74 of Exhibit D confirms that a POSA as of 2011 would have understood and had access to the required

measurements for the crotch portion in an absorbent article designed for a man or for a woman. Exhibit E (at 8:19-23) confirms that a POSA would understand that the crotch region of an adult absorbent article would fall somewhere in the narrow range of 7-10 centimeters. And Exhibit F is an irrelevant patent that defines “crotch region” by reference to a “crotch point” and a “crotch line,” which a POSA would understand diverges from the plain and ordinary meaning of “crotch region” or “crotch portion.” Ex. C, 76:2-14 (Mr. Sheldon noting that a patent drafter can act as a “lexicographer” and that “the crotch point is different in this patent [Exhibit F] than in the ’138 patent. There’s no crotch point in the ’138.”).

Importantly, Mr. Sheldon provided no opinion in his declaration or at his deposition that a POSA—in examining the extrinsic evidence—would view the ordinary meaning of “crotch portion” or “entire crotch portion” any differently from how it is defined in the ’138 Patent. Defendants’ cherry-picked statements about manufacturing and crotch length (*supra*, 22-25) do not prove otherwise. Indeed, when asked if “a person of ordinary skill in the art would define the crotch differently depending on how the product is manufactured,” Mr. Sheldon responded “No. I would define the product, the crotch region as the [perineum] where it’s designed for absorbency.” Ex. C, 78:16-24.

And Defendants themselves define “crotch portion” in their patents the same way Essity defines “crotch portion” in the ’138 Patent. For example, U.S. Patent

No. 7,963,953 (Ex. G), entitled “Article with Adjustable Elastomeric Waist Belt,” is assigned to Defendant First Quality Retail Services, LLC and was filed September 27, 2007, before the priority date of the ’138 Patent. This patent describes an absorbent article with a front portion, rear portion, and crotch portion as in the ’138 Patent:

The main body of the article has a front portion 30, a rear portion 40, *a crotch portion 20 connecting the front 30 and rear 40 portions*, and a rear waist edge 78. *The crotch portion 20 is substantially rectangular in shape*, and the front 30 and rear 40 portions are adjacent to the shorter edges of the crotch portion 20.

Ex. G at 4:52-63 (emphasis added). The specification of the ’953 Patent goes on to say that “the crotch region 20 of the diaper covers the crotch portion of the wearer.” *Id.* at 5:13-15. Defendants then claim a “disposable absorbent article comprising: a main body having a front portion, a rear portion and a crotch portion intermediate said front and rear portions,” with no further description or explanation for such crotch portion. *Id.*, cl. 1. Thus, those working in the field of absorbent articles prior to 2011—including Defendants—understood that the crotch portion of an absorbent article is the portion of the article designed to cover the crotch of the wearer, strikingly similar to how “crotch portion” is defined in the ’138 Patent. As a result, if Defendants believe that extrinsic evidence is necessary to determine whether the term “entire crotch portion” is definite, they need look no further than their own patents for proof that it is. And it is difficult to square

Defendants’ disclosures in Exhibit G—which treat “crotch portion” as a term well known in the art—with Defendants’ arguments here.

c) A POSA would understand with reasonable certainty what it means for an opening to extend through an “entire crotch portion” of an absorbent article.

Defendants next set their sights on the word “entire,” a common word with a well-known meaning. And Mr. Sheldon’s definition of “entire crotch portion” is similarly clear: “an entirety along the longitudinal center line of a crotch portion, which is ‘the portion of the article that is designed to be placed in the crotch of a wearer and to be in contact with the pudendal area of the wearer.’” Ex. B, ¶ 33 (citing Ex. A, 5:53-6:3). Defendants misleadingly try to turn “entire” into a term of degree, arguing that “entire” could mean “a majority,” “a substantial portion,” “60%,” “80%,” or “nearly all—but not all.” *Supra*, 26. This is nonsense. Entire means entirety—the whole thing, not part.

Further, despite Defendants’ arguments to the contrary, it is entirely proper to point to “crotch portion” to inform the definition of “entire crotch portion.” Mr. Sheldon testified that, in the context of the ’138 Patent, a POSA would view an opening “extending through” a crotch portion or “extending through” an entire crotch portion—as required by Claim 21—as coextensive. *See* Ex. C, 120:21-121:4 (“And as I said before, the crotch portion and entire crotch portion to me, as a person of ordinary skill in the art, I would understand means the same.”). In

terms of Claim 21, wherein the opening must extend through an entire crotch portion, Mr. Sheldon's opinion is that the opening must simply extend through an entirety of the portion identified and described in the specification as the crotch portion. Ex. B, ¶ 33.

Defendants further err in their analysis, arguing that a POSA "is left to speculate as to what degree and direction of coverage is required to meet the claim limitation" of Claim 21. *Supra*, 27. This argument improperly ignores the requirements and limitations of Claim 1 that must be imported into Claim 21. Claim 1 recites

An absorbent article having a longitudinal direction and a transverse direction, side edges extending in the longitudinal direction and end edges extending in the transverse direction and comprising . . .

an opening that passes through the first absorbent layer from one major surface to an opposing major surface and therebetween the opening is surrounded by a closed periphery of first absorbent layer...wherein the opening extends along a longitudinal center line of the absorbent article, the longitudinal center line being in parallel with the longitudinal direction of the absorbent article, and the fluid permeable top sheet is in direct contact with the fluid flow control structure via the opening.

Ex. A, cl. 1. Thus, it is clear from Claim 1 that the opening extends ***along a longitudinal center line*** of the absorbent article. For purposes of Claim 21, the opening must extend both longitudinally along a longitudinal center line of the absorbent article ***and*** through an entire crotch portion of the absorbent article. This orientation provides objective guidance as to the direction the opening is

oriented—in direct contrast with the court’s reason for being unable to construe “substantially parallel” in *Targus International LLC v. Victorinox Swiss Army, Inc.*, C.A. No. 20-464-RGA, 2021 WL 1737531, at *4 (D. Del., May 3, 2021).⁶ And for these same reasons, Defendants’ argument that “the ’138 patent does not use the ‘longitudinal center line’ to define or clarify the boundaries of the ‘entire crotch portion’” (*supra*, 33) misses the mark. The “entire crotch portion” is not a term used in isolation; it refers to the extent of the opening, which Defendants concede “extends along a longitudinal center line of the absorbent article.” *Supra*, 33 (citing Ex. A, cl. 1).

Further, Mr. Sheldon did not “struggle to articulate how far an opening in Figure 1 must extend in order to meet the limitation of Claim 21.” *Supra*, 28. Rather, as explained above, Mr. Sheldon agreed that in Figure 1, the opening “does not extend through the entire crotch region as demarcated by item 15.” Ex. C, 21:9-19. And as the only expert providing an opinion here, Mr. Sheldon never testified that a POSA would be incapable of understanding the boundaries of the crotch portion with reasonable certainty as a result of Figure 1 or anything else.

⁶ Essity notes that Defendants misrepresent the holding in *Targus*; in that case the court did not find “substantially parallel” indefinite. Rather, it found that it was “unable to construe the [substantially parallel] term” and that it could “address the consequences of this ruling in connection with summary judgment.” *Targus*, 2021 WL 1737531, at *11.

Defendants further fault Mr. Sheldon for his testimony that, with respect to Figure 5A, the four openings “conglomerate to form the extend through the entire crotch area.” *Supra*, 30 (citing Ex. C, 93:9-11). But Mr. Sheldon never testified that this conglomeration is what makes Figure 5A meet the limitations of Claim 21. And regardless, Claim 1 uses comprising language and the indefinite article “an” with respect to “an opening.” The Federal Circuit “has repeatedly emphasized that an indefinite article ‘a’ or ‘an’ in patent parlance carries the meaning of ‘one or more’ in open-ended claims containing the transitional phrase ‘comprising.’” *Convolve, Inc. v. Compaq Computer Corp.*, 812 F.3d 1313, 1321 (Fed. Cir. 2016); *see also* Ex. A, 2:56-62 (“The first absorbent layer in an absorbent article may have one or more openings. . . .”). Mr. Sheldon’s testimony therefore aligns with the specification and the legal standards for patent interpretation.

With respect to Figure 5C, in its opening brief, Essity noted the specification’s lack of reference to a crotch portion when discussing Figure 5C—Essity’s sole reference to Figure 5C. *Supra*, 4. This only underscores the importance of the perspective of a POSA in interpreting a patent’s disclosures, as Mr. Sheldon was able to quickly discern that Figure 5C does in fact meet the limitation of Claim 21 at his deposition. Ex. C, 32:1-3.

Next, Defendants argue that determining infringement of Claim 21 requires examining “intent with respect to how the absorbent article must be worn by a

user—and not any particular uniform guidelines, measurements or landmarks on an absorbent article.” *Supra*, 31. This is based on a misunderstanding of Mr. Sheldon’s testimony with respect to Figure 5B. Defendants acknowledge Mr. Sheldon’s testimony that Figure 5B does not meet the limitation of Claim 21. Ex. C, 31:16-22. Later in his deposition, Mr. Sheldon simply explained that users may use a product differently from how it was designed. But his opinions—and Essity’s position—have been clear and consistent that determining whether a product meets the limitations of Claim 21 are based on how the product is designed, not how it is used by a particular wearer. *See* Ex. C, 97:22-98:6:

Q: If a user were to position the absorbent article such that the openings in the front region were aligned with the crotch portion anatomically, would it fall within the scope of Claim 21?

A: I can only discuss the design of the product and the design of the product is independent of the way that you, the consumer wants to use it.

See also Ex. B, ¶¶ 24-33. In other words, how a wearer might use a product does not impact its design for purposes of assessing the bounds of Claim 21. Again, Defendants fabricate ambiguity where none exists.

d) Mr. Sheldon’s opinions are clear and rooted in the specification and his considerable knowledge.

Defendants next downplay Mr. Sheldon’s opinions as “conclusory.” *Supra*, 32. But Mr. Sheldon spent a significant amount of time reviewing the specification of the ’138 Patent in view of the knowledge in the art in 2011 and concluded that a

POSA would have easily understood what “entire crotch portion” means in the context of the ’138 Patent. Indeed, at his deposition, Mr. Sheldon testified “I do understand crotch regions. Anybody who designs absorbent products understands a crotch region.” Ex. C, 63:23-25.

Mr. Sheldon did not merely state that “entire crotch portion” has a “readily ascertainable meaning” as Defendants argue in an effort to shoehorn his opinions into irrelevant case law. *Supra*, 32. Rather, he reviewed the specification, opined that the definitions and examples in the specification aligned with the knowledge of a POSA, and opined that, given these definitions, a POSA would have had no difficulty defining with reasonably certainty the boundaries of the entire crotch portion, “whether or not the absorbent article has a crotch portion explicitly labeled.” Ex. B, ¶ 31. Any disagreement by Defendants is presented solely as attorney argument, not evidence, and Defendants’ own opinions bear no weight. And Defendants’ disagreements with Mr. Sheldon’s opinions certainly do not render those opinions conclusory.

As explained above, “crotch portion” informs the meaning of “entire crotch portion,” and Defendants provide nothing but their own disagreement for why that is not so. Further, as explained above, it is not misleading at all for Mr. Sheldon to opine that the use of “longitudinal center line” applies to the opening that extends along an entire crotch portion. “Entire crotch portion” is not a term used in

isolation; it refers to the extent of the opening, which in turn “extends along a longitudinal center line of the absorbent article.” ’138 Patent, cl. 1. And region 15 of Figure 1 clearly defines the crotch portion in the ’138 Patent. As noted above, the Federal Circuit routinely rejects arguments requiring “objective landmarks or features” (*supra*, 34) for definiteness. *See, e.g., Ironburg Inventions*, 64 F.4th at 1288. And tellingly, Defendants provide no expert testimony that a POSA would need such objective landmarks or features to determine the position and boundaries of an opening extending through an entire crotch portion. Finally, Defendants completely misunderstand Essity’s position and Mr. Sheldon’s opinion that “a POSA would understand that an opening along a longitudinal center line of *a crotch portion* of an absorbent article could extend *through any amount of the crotch portion*.” *Supra*, 13-14; Ex. B, ¶ 32 (emphasis added). This statement was used to contrast “crotch portion” from “entire crotch portion”—indeed, the very next sentence says:

Similarly, a POSA would understand that an opening along a longitudinal center line of *an entire crotch portion* of an absorbent article requires that the opening extends *at least through the entire portion* of the article that is designed (1) to be placed in the crotch of a wearer and (2) to be in contact with the pudendal area of the wearer, and may also extend into the front or rear portion of the absorbent article.

Supra, 14; Ex. B, ¶ 32 (emphasis added). And this aligns with Mr. Sheldon’s testimony that Figure 1 fully meets Claim 1 but not Claim 21 because “it doesn’t

fully extend to the rear.” Ex. C, 27:2-6. In other words, an opening extending through a “crotch portion” along a longitudinal center line of an absorbent article can encompass any length of a crotch portion, but an opening extending through an “entire crotch portion” along a longitudinal center line of an absorbent article must encompass at least an “entire” length of the crotch portion. These are elementary, foundational terms to a POSA.

4. Defendants’ Sur-Reply Position

a) **Plaintiffs Fail to Address Defendant’s Core Arguments Regarding “Entire Crotch Portion.”**

As previously explained, the dispute is about the “*entire* crotch portion.” *See, e.g., supra*, 4-5, 16. Plaintiffs allege First Quality is “for the first time,” “argu[ing] that the term ‘crotch portion’ is indefinite.” *Supra*, 35. Not so. The specification’s description of “crotch portion” does not allow a POSA to understand its boundaries for purposes of the required opening. *Supra*, 16-25. Thus, the term “*entire* crotch portion” is indefinite.

Despite Plaintiffs’ arguments about “crotch portion,” nothing in the intrinsic evidence or their expert’s testimony provides “an objective baseline to interpret the claims” for designing an opening extending through an *entire* crotch portion. *See supra*, 36-38.

The parties agree extrinsic evidence is unnecessary because intrinsic evidence resolves the dispute. *Supra*, 43. Thus, Plaintiffs’ expert, as extrinsic

evidence, should be disregarded. *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed Cir. 2005) (en banc); *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1370 (Fed. Cir. 2014) (where indefiniteness clear from intrinsic record, expert testimony unnecessary).

The intrinsic record is not “clear”—it refers to the “crotch portion,” not the “entire crotch portion,” relies on generalized references to the “pubdental area,” and fails to define its boundaries within the claimed article. *See, e.g., supra*, 17-22. The claims, when read in light of the intrinsic evidence, must provide objective boundaries for those of skill in the art. *Interval Licensing* 766 F.3d at 1371. Claim 21 does not. *Supra*, 17-22, 26-27, 31-32. They do not.

Indeed, Plaintiffs’ reliance on their expert confirms the intrinsic record lacks objective boundaries. *See supra*, 36-38 (discussing expert in “intrinsic evidence” section).

i. Plaintiffs Ignore the Word “Entire”

Plaintiffs’ defense of the term “crotch portion” in isolation is unavailing.

First, Plaintiffs argue the patent’s description of crotch portion “does not require reference to any particular wearer’s anatomy” because it “refers to the crotch portion as the ‘portion of the article that is *designed* to be placed in the crotch of a wearer and to be in contact with the pudental area of the wearer.’” *Supra*, 36 (emphasis original); *id.*, 50. Whether the definition is sufficient to

understand the meaning of crotch portion generally is irrelevant. Without objective, repeatable criteria—such as structural features, measurements, or spatial orientation of the claimed absorbent article itself—a POSA would not know how to identify the boundaries of the *entire* crotch portion in the claimed article. *Supra* 16-18.

Second, Plaintiffs argue the dimensions of a crotch portion are “fixed and very well-known to a POSA” because their expert, at times, testified that anatomical features are “fixed.” *Supra*, 36-37. Plaintiffs ignore the patent’s explanation that absorbent article may be positioned toward the front or rear of the wearer, and that it may vary in dimension or shape. *Supra*, 18-19 (citing Ex. A, 5:65-6:3), 30-31. Plaintiffs also ignore their expert’s testimony that the pudendal area of a female and male differs. Ex. C, 35:19-22; *see also id.*, 35:4-11 (patent not limited to female articles); *Supra*, 22-23.

ii. Plaintiffs’ Case Law is Inapposite

Plaintiffs are incorrect that the case law “supports definiteness.” *Supra*, 38.

First, Plaintiffs’ conclusory attempt to distinguish *Abdou v. Alphatec Spine, Inc.*, 2014 WL 6611422 (S.D. Cal. Nov. 19, 2014), fails. *Supra*, 38. Plaintiffs assert “entire crotch portion” is “very different” from *Abdou* because in *Abdou*, the patent did not identify where the locations of the insertion and attachment points of two devices along a spine should be. Contrastingly, “entire crotch portion”—by

virtue of its name and the specification’s “definition”—allegedly defines where the opening “should be.” *Id.* But this conclusory assertion *omits* that the alleged “definition” in the specification is of “crotch portion,” *not* “*entire* crotch portion.” Ex. A, 5:59-62. Plaintiffs do not identify any objective boundaries in the specification that delineate the limits of the “entire crotch portion.” None exist. *Supra*, 4-5, 16-17. And, even if the relative position or size of the pudendal area were readily ascertainable, that does not fix the crotch portion’s relative to the front and rear portions of the article (i.e., centered or positioned asymmetrically). Without clear structural landmarks, this case is squarely analogous to *Abdou*, where indefiniteness arose from the absence of objective criteria for determining relative placement. *Supra*, 18-21, 27-28, 31, 33-35.

Second, Plaintiffs’ attempt to distinguish *4WEB, Inc. v. NuVasive, Inc.* fails. Plaintiffs mischaracterize *4WEB*, claiming indefiniteness turned solely on conflicting numerical definitions of “central portion.” *Supra*, 42-43. But *4WEB* held a term is indefinite when “the intrinsic evidence provides no objective boundaries to the scope of the term.” 2025 WL 525112, at *14 (S.D. Cal. Feb. 18, 2025) (internal citations omitted). That reasoning applies here. As with “central portion” in *4WEB*, “entire crotch portion” lacks fixed, objective boundaries and instead relies on vague anatomical references that vary across users and products. *Supra*, 22. Plaintiffs’ reference to the pudendal region offers no measurable

landmarks or dimensions, and unlike *4WEB*, there are no numerical metrics at all—further highlighting indefiniteness.

Finally, Plaintiffs’ reliance on *Ironburg* and *Grace* is misplaced. *Supra*, 38-42.

In *Ironburg Inventions Ltd. v. Valve Corp.*, the court found the claim limitation “elongate member ... extends substantially the full distance between the top and bottom edge,” was not indefinite for the accused game controller. 64 F.4th 1274, 1281 (Fed. Cir. 2023). Plaintiffs point to the Federal Circuit’s conclusion that “the word ‘substantially’ is reasonably precise, given [] the purpose of the elongate shape.” *Supra*, 38-39 (quoting *Ironburg*, 64 F.4th at 1288). But in *Ironburg*, the game controller had a defined top and bottom edge and therefore “substantially the full distance” could be determined based on those boundaries and the elongate member’s purpose. *Ironburg*, 64 F.4th at 1287-89. Here, without such boundaries, the scope of “entire” crotch portion cannot be determined.⁷

Plaintiffs overstate *Ironburg*, suggesting the Federal Circuit routinely rejects arguments requiring “objective landmarks or features” for definiteness. *Supra*, 41,

⁷ Plaintiffs are incorrect that “Figure 1 clearly provides those landmarks.” *Supra*, 41-42. The “dotted lines” do not match an actual product. *See* Ex. C, 13:14-18 (“this is not an engineering drawing ... it’s not necessarily accurate.”).

52. Not so. The claims must provide an “objective boundary for a skilled artisan.” *Ironberg*, 64 F.4th at 1288; *Supra*, 20-21, 26-27.

And *Grace Instrument Industries LLC v. Chandler Instruments Co.* held that an “enlarged chamber” did not require the chamber to be “*larger than* some baseline object” to render the term sufficiently definite because “in the context of this patent, ... it must be *large enough* to accomplish a particular function.” 57 F.4th 1001, 1009 (Fed. Cir. 2023) (emphasis original). Plaintiffs argue this confirms that “even if the design of an invention requires applicability to different-size anatomy, it is not indefinite.” *Supra*, 40. If the dispute were whether the opening was large enough to perform its intended purpose, *Grace* might apply. But the dispute is different: whether the term “an opening extending through an *entire* crotch portion of the absorbent article” is definite. It is not.

iii. Mr. Sheldon’s Testimony Regarding the Figures Demonstrates Indefiniteness

First Quality explained how Figures 1 and 5A-5D do not provide any landmarks regarding where the crotch portion begins or ends. *Supra*, 19-22. First Quality also explained how Mr. Sheldon’s testimony underscores the ambiguity of “entire crotch portion.” *Id.*, 28-31. Plaintiffs’ attempt to defend his testimony fails. *Supra*, 40-43. His inability to articulate consistent, objective boundaries for “entire crotch portion” and to explain why the different Figures show, or do not show, an opening extending through the entire crotch portion underscores the lack

of reasonable certainty required under *Nautilus*.

First, Plaintiffs argue Mr. Sheldon’s testimony regarding Figure 1 is consistent with the specification because Figure 1 does not meet claim 21. *Supra*, 40-41, 48, 51-53. But Plaintiffs are cherry-picking testimony; Mr. Sheldon repeatedly discussed the alleged “inaccuracy” of Figure 1 and was equivocal. *Supra*, 28-29. To the extent Plaintiffs contend he testified Figure 1 does not meet Claim 21, that is incorrect. When pressed, he stated that despite his admission that “the rear portion [of the opening] does not extend all the way to the rear of the crotch portion,” (*supra*, 41), Figure 1 “**does meet the limitation of claim 21** because as I said, ‘crotch portion’ and ‘entire crotch portion’ as a person skilled in the art would understand, that means the same. So it’s in the crotch portion.” Ex. C, 18:7-20 (emphasis added); *see also id.*, 15:21-24, 120:21-121:14. The record shows Mr. Sheldon’s testimony was internally inconsistent and failed to demonstrate that a POSA would understand the claim scope with reasonable certainty—the problem *Nautilus* seeks to avoid.

Second, Plaintiffs argue Mr. Sheldon’s ability to quickly answer whether Figures 5A-5D meet Claim 21’s limitation supports a finding of definiteness. *Supra*, 42, 49. Plaintiffs cite no authority for the proposition that an expert’s speed in opining supports definiteness. Moreover, while Mr. Sheldon was quick to assert whether certain figures fell within Claim 21’s scope, his underlying rationale was

inconsistent and poorly supported. *See supra*, 29-31. Plaintiffs leave this unaddressed. Plaintiffs also fail to explain why their opening brief stated that Figure 5C is not in the scope of claim 21 (*supra*, 4), but Mr. Sheldon testified that it is (Ex. C, 32:1-3). Plaintiffs contend this difference “underscores the importance of the perspective of a POSA in interpreting a patent’s disclosures” but do not address how this discrepancy highlights indefiniteness. *Supra*, 49. And, Plaintiffs’ argument that Mr. Sheldon never testified Figure 5A’s four openings conglomerate to form an “opening” that meets claim 21 (*supra*, 49) is directly contradicted by his testimony. Ex. C, 93:9-11.

b) Extrinsic Evidence Supports Indefiniteness

Plaintiffs contend that to the extent extrinsic evidence is required, it supports their position. *Supra*, 43. But Plaintiffs’ arguments underscore the ambiguity.

First, Plaintiffs do not dispute that Exhibit D teaches that absorbent articles for males and females may have different crotch lengths. *Supra*, 23. Instead, Plaintiffs argue a POSA would have had access to a range of measurements used in the design of certain articles. *Supra*, 43-44. But that access does not establish a uniform, industry-wide definition for the “entire crotch portion.”

Second, Exhibit E’s mention of a 7-10 cm region (*supra*, 44) does not clarify *where* on the product that region begins or ends. Nor do Plaintiffs reconcile their statement that Exhibit E confirms “the crotch region of an adult absorbent article

would fall somewhere in the narrow range of 7-10 centimeters,” i.e., 3-4 inches (*supra*, 44), with their expert’s testimony that it would be 2-3 inches. Ex. C, 35:16-22, 61:7-16; *supra*, 23-24.

Third, Exhibit F is not “irrelevant” (*supra*, 44); it confirms there is no uniform standard for determining the size or boundaries of the “crotch portion.” *Supra*, 24. And Plaintiffs do not reconcile Mr. Sheldon’s testimony that he would not “define the crotch differently depending on how the product is manufactured” (*supra*, 44 (quoting Ex. C, 78:16-24)) with his distinguishing of Exhibit F as “manufactured sideways” rather than “in the machine direction.” Ex. C, 72:2-78:3.

Finally, Plaintiffs’ reliance on Exhibit G’s alleged definition of “crotch portion” (*supra*, 44-45) fails to demonstrate that the term *entire* crotch portion has a definite meaning. Exhibit G does not use the term “entire crotch portion,” nor does it discuss an “opening” in the “crotch portion” or provide any definition of a crotch portion’s boundaries. This is merely a repeat of Plaintiffs’ attempt to defend the term “crotch portion” in isolation. *Supra*, 53-55.

c) A POSA Would Not Understand With Reasonable Certainty The Meaning of Entire Crotch Portion

After spending the majority of their Reply focused on “crotch portion,” Plaintiffs unsuccessfully argue a POSA would understand with reasonable certainty what “*entire* crotch portion” means. *Supra*, 46-50.

First, Plaintiffs argue the term “entire” is not a term of degree, and that it must mean the whole thing—not part, or even “nearly all.” *Supra*, 46. On that, the parties agree. However, without an objective understanding of where the crotch portion begins and ends, “entire” provides no meaningful limitation. *Supra*, 16-32.

Second, while Plaintiffs argue it is proper to rely on “crotch portion” to define “entire crotch portion” (*supra*, 45), the descriptions of “crotch portion” do not establish the outer bounds of “entire crotch portion.” *Supra* 4-5, 16-17, 31-32, 53-60. Moreover, Plaintiffs’ sole justification for this argument (*supra*, 46)—that its expert equates crotch portion and entire crotch portion—is legally improper. *See, e.g., Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006) (proposed construction improper where it renders a phrase superfluous). And Plaintiffs contradict it elsewhere. *Supra*, 52-53 (correctly noting an opening through a “crotch portion” may span any length, while one through the “*entire* crotch portion” must span its full length).

Finally, Plaintiffs make two arguments predicated on claim 21 depending from claim 1. Both fail.

First, Plaintiffs argue claim 1’s limitation that the opening “extends along a longitudinal center line of the absorbent article” resolves any ambiguity in “entire crotch portion.” *Supra*, 47-48. But this conflates direction with length. While the

longitudinal center line may indicate the opening's orientation, it says nothing about how far it must extend to satisfy the "entire crotch portion" requirement.

Second, Plaintiffs argue claim 1's use of the indefinite article "an" saves Mr. Sheldon's opinion that the four separate openings in Figure 5A meet claim 21. *Supra*, 49. Not so. While "an" can mean "one or more," that does not justify aggregating multiple, distinct openings across a product into a single "opening." *See, e.g., Salzar v. AT&T Mobility LLC*, 64 F.4th 1311, 1317 (Fed. Cir. 2023) (while "a" does not require only one, "limitations referring back" require at least one "be capable of performing each of the claimed functions"). Thus, while claim 1 may permit more than one opening, claim 21 requires that at least one opening extend through the entire crotch portion. Plaintiffs' position highlights claim 21's indefiniteness.

d) Mr. Sheldon's Testimony Should Be Disregarded

Plaintiffs argue Mr. Sheldon's opinions should not be dismissed as conclusory because he reviewed the specification, applied his knowledge of the art, and opined that a POSA would understand "entire crotch portion" with reasonable certainty. *Supra*, 50-51. But this is exactly the type of conclusory testimony the Federal Circuit has found insufficient. *Supra*, 32. When confronted with actual extrinsic evidence of how a POSA would understand "crotch portion," Mr. Sheldon could not reconcile his conclusory statements with that evidence. *Supra* 58-60;

supra, 28-32. He offers no rationale a POSA could apply to understand the scope of claim 21—only his personal assurance that a POSA would understand. This is insufficient. *Supra*, 32.

IV. CONCLUSION

A. Plaintiffs' Conclusion

Defendants cannot demonstrate the indefiniteness of “entire crotch portion” by clear and convincing evidence.

B. Defendants' Conclusion

For these reasons, the Court should find that “entire crotch portion” is indefinite.

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