IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

VERMEER MANUFACTURING COMPANY,	)	
Plaintiff,	)	Case No. 4:19-cv-00050-CRW-HCA
vs.	)	
THE TORO COMPANY,	)	
Defendant.	)	

VERMEER MANUFACTURING COMPANY'S
REBUTTAL CLAIM CONSTRUCTION BRIEF

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I. ARGUMENT

In its opening brief, Toro repeatedly ignores the clear intrinsic record and controlling claim construction principles that foreclose its narrow proposed constructions. Vermeer respectfully requests the Court to adopt its proposed constructions.[1]

A. A Loader Apparatus "For Standing *or* Walk-Behind Operator Control"—Toro's Estoppel Argument is Legally and Factually Flawed.

Toro asks the Court to construe the disjunctive "or" to mean the conjunctive "and." Toro's Brief at 5–9. Toro does not contend that this is the plain and ordinary meaning of the word "or." Instead, Toro incorrectly argues that Vermeer disclaimed the ordinary meaning of "or" during prosecution.[2]

"The burden to show prosecution disclaimer is high because '[c]laim terms are entitled to a heavy presumption that they carry their ordinary and customary meaning to those skilled in the art in light of the claim term's usage in the patent specification.'" *Saffran v. Johnson & Johnson*, 712 F.3d 549, 570 (Fed. Cir. 2013) (citation omitted). Thus, the normal, disjunctive meaning of "or" must apply unless there has been a "clear and unmistakable" disavowal of claim scope. *Omega Eng'g, Inc., v. Raytek Corp*., 334 F.3d 1314, 1325–26 (Fed. Cir. 2003). Disavowing

[1] Toro represents to the Court that "incorporation of well known 'vertical lift' or 'high lift' loader arms from traditional larger skid steer loaders" was "the logical next evolution" of Toro's compact utility loaders. Doc. 50 ("Toro's Brief") at 2. Although Toro's assertions are not relevant to the claim construction issues before the Court, Vermeer notes that *Toro made the exact opposite representation to the Patent Office*. Ex. 7 (Toro's U.S. Patent No. 10,221,540), 2:21–26 ("While high lift loader arms are known on full size skid steer loaders as disclosed in U.S. Pat. No. 5,542,814, *the use of such high lift loader arms on a compact utility loader has been considered difficult if not impossible* due to size and durability constraints.") (emphasis added). References herein to Exhibits 1–6 are to the exhibits that were filed with the August 23, 2019 Declaration of Marc W. Vander Tuig (Doc. 51-1). References herein to Toro Exhibits A–I are to the exhibits that were filed with the August 23, 2019 Declaration of Jordan L. Weber (Doc. 50-1). Exhibits 7–14 are being filed concurrently with Vermeer's Rebuttal Claim Construction Brief.

[2] Toro purports to rely on the doctrine of "prosecution history estoppel." Toro's Brief at 5. Prosecution history estoppel is a limitation on the doctrine of equivalents, not a claim construction doctrine. *See Southwall Technologies, Inc. v. Cardinal IG Co*., 54 F.3d 1570, 1578 (Fed. Cir. 1995) ("There is, however, a clear distinction between following the statements in the prosecution history in defining a claim term, and the doctrine of prosecution history estoppel, which limits expansion of the protection under the doctrine of equivalents . . . ."). Regardless, Toro's prosecution-disclaimer arguments are factually unfounded.

statements must be "so clear as to show reasonable clarity and deliberateness and so unmistakable as to be unambiguous evidence of disclaimer." *Id*. at 1325 (citations omitted).

Here, Toro's disavowal argument is based on a single, ambiguous reference in a cursory interview summary written by the *examiner*, not the applicant. During prosecution of Vermeer's first patent application, the examiner cited the prior-art Yasuda patent. Ex. 2 at VMR000237–239. The Yasuda patent described a full-size skid steer with controls located within the cabin positioned toward the front of the skid steer, where the operator sits. *See* Ex. 8 at Fig. 1. Vermeer conducted a telephone interview with the examiner. During the interview, Vermeer explained that, unlike Yasuda, its claimed invention required that the control station be mounted toward the rear of the compact tool carrier. *See* Ex. 9 at VMR000292. As reflected in the examiner's summary of the interview, the location of the control station at the rear of the machine was the feature distinguishing the claimed invention from Yasuda—not whether the rear-mounted controls were configured for ride-on or walk-behind operation. *Id*. ("In contrast, the tool carrier of the instant invention has a walk-behind operator control *disposed at the rear of the carrier*.") (emphasis added). The examiner also noted that "[a]n amendment to claim 1 further defining an engine bracket that is spaced from the rear end of the mainframe . . . would define over the Yasuda et al. patent which requires its engine to be located at the rear of the mainframe away from the cabin (4)." *Id.*

After the interview, Vermeer filed formal written arguments distinguishing Yasuda from the claimed invention. *Id.* at VMR285. As it had in the interview, Vermeer distinguished Yasuda based on the rearward location of the control station (unlike Yasuda) and the fact that the engine bracket was spaced from the rear of the mainframe (unlike Yasuda). *Id.* Vermeer's written argument did not even mention claim language concerning ride-on or walk-behind

operation. Vermeer also added the engine bracket amendment that had been discussed in the interview. *Id.* at VMR277. The Notice of Allowability noted that the examiner was allowing the claims in response to this January 21, 2016 amendment. *Id.* at VMR000298.

In sum, the prosecution record makes clear that the rear positioning of the operator controls and the positioning of the engine bracket were sufficient to distinguish Yasuda and Vermeer never relied on the claim language relating to stand-behind or walk-behind operation. Yet Toro now asks the Court to find that Vermeer somehow also changed the disjunctive meaning of "or." There is no legal or factual basis for finding a clear and unmistakable disavowal based on the *examiner's* offhand and ambiguous statement. *See Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ. v. Hedrick*, 573 F.3d 1290, 1297 (Fed. Cir. 2009) (rejecting a disavowal argument based on a terse examiner's interview summary, finding a "wide chasm" between "the weak inference from the [examiner's] summary" and "a clear and unmistakable disavowal as required to limit a claim term".); *Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc*., 628 F.3d 1359, 1369–70 (Fed. Cir. 2010).

Toro's cited cases have no application here. In *Omega Engineering*, the Federal Circuit found a disavowal because "Omega *repeatedly insisted* that its invention differed from the prior art" based on the feature at issue. *Omega*, 334 F.3d at 1326–27 (emphasis added). Critically, the court found that Omega's disavowal was unmistakable in that it was the only possible interpretation of the prosecution statements. *Id*. Here, there is no such statement in the record.

And in the *Sanofi-Aventis* case also relied on by Toro, the issue was whether the claim, which required an "isolated DNA enhancer," could also include promoter DNA. *Sanofi-Aventis Deutschland GmbH v. Genentech, Inc*., 473 F. App'x 885, 888–89 (Fed. Cir. 2012). During

prosecution, Sanofi had expressly distinguished the prior art because it included a promoter sequence. *Id*. Thus, the court found "a clear and unmistakable disavowal." *Id*. at 889.[3]

Here, in stark contrast to those cases, the examiner's single vague reference to "walk-behind operation" in the interview summary appears to be a short-hand description of the rear-located operator station. In any event, Vermeer itself never distinguished the prior art based on walk-behind operation. At the very least, the examiner's notes are amenable to more than one reasonable interpretation, and therefore they cannot represent a disavowal. *See Cordis Corp. v. Medtronic AVE, Inc*., 339 F.3d 1352, 1359 (Fed. Cir. 2003).

Toro also cites several cases to support its argument that "or" means "and." Toro's Brief at 8–9. None of these cases support Toro's position. In *Ameranth, Inc. v. Menusoft Sys. Corp*., the claim language at issue concerned software configured to send information to a handheld computing device "or" a Web page. No. 2:07-cv-271, 2010 WL 1610079, *6 (E.D. Tex. April 21, 2010) ("application software for generating a second menu from said first menu and transmitting said second menu to a wireless handheld computing device or Web page"). The intrinsic evidence in that case made it clear that claimed software embodiment was programmed to enable sending the information to both destinations. Here, by contrast, the specification

[3] Toro's remaining cases also fail to support its argument. *See, e.g., SanDisk Corp. v. Memorex Products, Inc*., 415 F3d 1278, 1287 (Fed. Cir. 2005) (*reversing* a finding of prosecution disclaimer and noting that an "ambiguous disclaimer, however, does not advance the patent's notice function or justify public reliance, and the court will not use it to limit a claim term's ordinary meaning."); *Chimie v. PPG Indus., Inc*., 402 F.3d 1371, 1384–85 (Fed. Cir. 2005) (patentee admitted disclaiming subject matter during prosecution, but argued that disclaimer only applied to process claims—an argument the court rejected as factually unfounded); *Ballard Medical Products v. Allegiance Healthcare Corp*., 268 F.3d 1352, 1359–60 (Fed. Cir. 2001) (patentee admitted that inventor disclaimed subject matter during prosecution, but argued that the disclaimer only applied to some of the claims—an argument the court rejected as factually unfounded); *Uship Intellectual Properties, LLC v. U.S*., 714 F.3d 1311, 1315 (Fed. Cir. 2013) (disclaimer found based on express statement that the claims were limited); *Southwall Techs., Inc. v. Cardinal IG Co*., 54 F.3d 1570, 1579–84 (Fed. Cir. 1995) (applying prosecution history estoppel—a doctrine that limits the scope of the doctrine of equivalents—rather than the prosecution disclaimer doctrine relevant to claim construction).

describes at least two embodiments: a loader configured for standing operating control and a loader configured for walk-behind operator control. *See* Ex. 1 at 3:46–61.

Finally, the *B-50.com* case concluded that "or" was used in its common inclusive sense, *i.e.*, "A or B, or both." *B-50.com, LLC v. InfoSync Services, LLC*, No. 3:10-cv-1994, 2014 WL 285096, *6–*8 (N.D. Tex. January 27, 2014). This supports Vermeer's construction, which applies the inclusive sense of "or" and undermines Toro's argument, requiring *both* A and B.

B. The Court Should Reject Toro's Attempt to Graft Additional Limitations onto the Plain and Ordinary Meaning of the Claims.

1. The plain and ordinary meaning of "mainframe" is not limited to a "single weldment."

Toro does not contend that the ordinary meaning of "mainframe" is limited to a "single weldment." And Toro steadfastly avoids dealing with the inconsistency between its narrow proposed construction and the dependent claims that expressly add the "single weldment" limitation. These dependent claims foreclose Toro's narrow construction under the doctrine of claim differentiation. *See* Doc. 51 ("Vermeer's Brief"), 11–12.

Toro relies solely on a lexicography argument. Toro has identified the following isolated passage in the specification to support its narrow interpretation: "As used herein, the term 'mainframe' *generally* refers to a single weldment to which the loader 8 is attached, optionally through one or more pivotal linkages." Ex. 1 at 4:12–15 (emphasis added).

In certain exceptional circumstances, "the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005). But this narrow lexicography exception requires that the inventor clearly express an intent to "'set forth a definition of the

disputed claim term' other than its plain and ordinary meaning." *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (citations omitted).

The specification language relied on by Toro does not satisfy this standard, because the language merely notes that mainframes will "*generally*" be a single weldment. The word "generally" means "in most cases" and contemplates variability. Ex. 10; *see also, e.g., Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc*., 340 F.3d 1298, 1311 (Fed. Cir. 2003) ("'generally parallel' envisions some amount of deviation from exactly parallel."). The specification purposefully did not state that the mainframe must be a single weldment or that the term "mainframe" means "single weldment." This language simply shows that the preferred embodiment has a mainframe that constitutes a single weldment. This unremarkable fact fails to meet the stringent lexicography standard.

Toro's cases fail to justify limiting the scope of "mainframe" to the single-weldment preferred embodiment. For example, in the *Cultor* case, the specification language left no room for doubt as to whether the statement was intended to limit the scope of the claim:

> As used herein, the expression "water-soluble polydextrose" (also known as polyglucose or poly-D-glucose) *specifically refers to* the water-soluble polydextrose prepared by melting and heating dextrose (also known as glucose or D-glucose), preferably with about 5–15% by weight of sorbitol present, in the presence of a catalytic amount (about 0.5 to 3.0 mol %) of citric acid.

Cultor Corp. v. A.E. Staley Mfg. Co., 224 F.3d 1328, 1330 (Fed. Cir. 2000) (emphasis added).[4] Unlike the "specifically refers to" language in *Cultor*, Vermeer's use of "generally refers to"

[4] The other case relied on by Toro similarly uses definitional language that unmistakably demonstrates that the patentee intended to limit the scope of the claim. *Sinorgchem Co., Shandong v. Int'l Trade Comm'n*, 511 F.3d 1132, 1136 (Fed. Cir. 2007) (finding the following language definitional: "A 'controlled amount' of protic material *is an amount* up to that which inhibits the reaction of aniline with nitrobenzene, e.g., up to about 4% H_2O based on the volume of the reaction mixture when aniline is utilized as the solvent.") (emphasis added).

intentionally avoided limiting the scope of the claim. And the dependent claims in the Vermeer Patents confirm this fact by expressly reciting the "single weldment" limitation.

Toro points out that the specification expressly used the words "single weldment" to connote a loader-arm configuration different than one having components attached via fasteners. Toro's Brief at 11. But this fact undermines Toro's argument. When Vermeer intended for a component of the compact tool carrier to be a single weldment construction, *it expressly said so*. This is seen, for example, in both the portion of the specification cited by Toro and in the dependent claims, which logically preclude Toro's construction.

Toro mistakenly asserts that Vermeer "stressed and highlighted the significance of the single weldment mainframe design depicted in the specification." Toro's Brief at 11. This is simply not so. The slides that Toro cites make no mention of "single weldment," and they were presented to show the substantial innovation that was required to move from the old radial-lift loader configuration to the new, lower-profile, vertical-lift configuration. *See* Ex. 11 at VMR001419–1454. These distinctions were repeated in the formal submission made by Vermeer following the interview. *Id*. at VMR001372–76. These arguments had no relationship to the single-weldment mainframe required by some of the dependent claims.

Finally, Toro attempts to manufacture relevance from (1) a non-infringement allegation that it hopes to make based on its narrow construction of "mainframe" and (2) the fact that Vermeer used words other than "mainframe" in the '266 patent ("loader support" and "rigid frame," for example). *See* Toro's Brief at 14–15. These facts provide no support for the inferences Toro attempts to make to support its claim-construction argument. Patentees routinely diversify the language used to claim their inventions. For example, Vermeer also uses the term "loader apparatus," rather than "compact tool carrier." Toro's attempt to draw

meaningful inferences from these differences rings especially hollow given Toro's refusal to address the dependent claims that foreclose Toro's proposed construction.

2. The plain and ordinary meaning of "loader support" and "rigid frame" is not limited to a "single weldment."

Toro makes two primary arguments in support of its narrow construction. Neither has merit. First, Toro argues that Vermeer acted improperly by using different language in the '266 patent than it used in the earlier '386 and '750 patents. There is, however, nothing improper about Vermeer diversifying the language used to protect its invention—especially in light of the fact that Toro was actively attempting to apply a very narrow meaning to the word "mainframe." By using "loader support" or "rigid frame," Vermeer clearly announced to the Patent Office and the public that it was claiming its invention more broadly than the narrow meaning that Toro has incorrectly ascribed to "mainframe."[5]

Second, Toro argues that "loader support" and "rigid frame" should be construed to include a single-weldment mainframe. Toro's arguments for this construction track its arguments for narrowly construing "mainframe" and "pivotally attached." For the reasons discussed in connection with those terms, Toro's attempt to graft additional limitations onto the straightforward claim language fails. *See* Sections I.B.1 and I.B.3.

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[5] None of the cases cited by Toro support its argument. In *Total Containment*, the court refused to apply the doctrine of claim differentiation to a dependent claim added during reexamination in determining the meaning of the original claim. *Total Containment, Inc. v. Environ Prod., Inc*., 106 F.3d 426, *2 (Fed. Cir. 1997). Here, by contrast, the claim differentiation doctrine is inapplicable to the proper meaning of "loader support" or "rigid frame." Further the dependent claims foreclosing Toro's "single-weldment" construction of mainframe were original claims—not claims added by reexamination. Ex. 5 at VMR013962 (claim 3), VMR013964 (claim 13), VMR013965 (claim 17), VMR013967 (claim 20), VMR013971 (claim 33); Ex. 9 at VMR000026–30 (claims 3, 9); Ex. 12 at VMR000356–60 (claims 2, 8). This fact also distinguishes *Cave Consulting Group., LLC v. OptumInsight, Inc*., which dealt only with non-original dependent claims. 725 F. App'x 988, 995 (Fed. Cir. 2018) (expressly noting that "originally filed claims are part of the specification" and provide a compelling basis for claim differentiation). Finally, *Neev v. Alcon LenSx, Inc*. considered whether a claim was impermissibly broadened during reexamination under 35 U.S.C. § 305—an issue wholly unrelated to the claim construction issues before the Court. No. 8:15-cv-00336, 2017 WL6886670, *13 (C.D. Cal. June 30, 2017).

3. The plain and ordinary meaning of "pivotally attached" does not require a direct attachment with no intervening structure.

Toro's attempt to restrict the plain meaning of "pivotally attached" to a *direct* attachment fails. The error of Toro's narrow proposed construction of "pivotally attached" is evident in light of the related term "pivotally connected." Claims 4 and 6 of the '266 patent use the term "pivotally connected" to describe the connection between the loader arm and the loader support. Ex. 1 at 7:11 –13, 7:17–20. Both claims depend from claim 1, which expressly requires that the loader be "free from direct attachment to the loader support." *Id*. at 6:52–54. Therefore, the pivotal connection in dependent claims 4 and 6 *cannot* require a direct connection. Toro has no basis for concluding that plain meaning of "pivotally attached" requires a direct connection while the plain meaning of "pivotally connected" does not.[6]

"[T]he ordinary meaning of 'attached' *includes both direct and indirect attachment*." *Southco, Inc. v. Fivetech Tech., Inc.*, 611 F. App'x 681, 686 (Fed. Cir. 2015) (emphasis added). Thus, to restrict the term to exclude indirect attachment, Toro must demonstrate that the patentee either: (1) acted as its own lexicographer and expressly redefined the term; or (2) clearly and unmistakably disavowed the full scope of the term. *Thorner*, 669 F.3d at 1365. Absent one of those two exceptions, the full scope of the term applies. *See id.* at 1367.

Here, neither of the exceptions applies to limit the scope of "pivotally attached" to only direct attachment. Toro does not contend that the patentee expressly defined "pivotally attached." And Toro's attempt to concoct a disavowal falls well short of the exacting standard.

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[6] Blindly pushing for narrow constructions, Toro initially lumped "pivotally connected" and "pivotally attached" together, asking the Court to construe them as meaning attached/connected "by a pivot with no other intervening structure." Doc. 49 at 3. Toro has withdrawn its proposed construction for "pivotally connected" and no longer contends that this term should be construed the same as "pivotally attached." Toro's recent about-face betrays the weakness of its current position.

First, the claims themselves plainly show that "pivotally attached" is not limited to direct attachment. The patent claims specifically recite "direct" pivotal attachment in some places, while not reciting "direct" attachment in other places. *See* Vermeer's Brief at 16–18. This demonstrates that, where a "direct" attachment is not recited, then the attachment may be either direct or indirect. *See, e.g., Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1329 (Fed. Cir. 2006) (because the "term 'rigid' appears in connection with 'insert'" in one claim, but not in other claims, "it implies that the term 'insert,' when used elsewhere in the patent, does not inherently carry a 'rigid' limitation").[7] Nothing in Toro's dictionary definitions supports a contrary conclusion—which is apparent given Toro's heavy reliance on the specification and the prosecution history.

In discussing the patent specification, Toro appears to believe that a passage describing the benefits of *lower pivot points* is actually describing the benefits of *direct pivotal attachments*. *See* Toro's Brief at 18 (citing the '266 patent at 6:7–12). Toro is clearly mistaken: the cited language has nothing whatsoever to do with the presence or absence of "intervening structure," nor of direct or indirect attachments. There is certainly no clear and unmistakable disclaimer.

Toro goes on to mischaracterize Vermeer's reexamination arguments, asserting that Vermeer "expressly pointed out and relied on the distinction between 'direct' and 'indirect' attachments to the mainframe to overcome rejections during the initial reexamination of the '386 Patent." Toro's Brief at 19. But the record shows that Vermeer did not even mention "direct" or "indirect" attachments, other than an introductory observation about the prior-art references. *See*

[7] *See also, e.g., Intellectual Ventures I LLC v. T-Mobile USA, Inc.*, 902 F.3d 1372, 1379 (Fed. Cir. 2018) (improper to restrict the ordinary scope of a claim term where the patentee expressly restricted the term elsewhere in the claims); *see also, e.g., Unwired Planet, LLC v. Apple Inc.*, 829 F.3d 1353, 1359 (Fed. Cir. 2016) ("If the patentee intended to restrict the claims-at-issue to require [a certain limitation expressly recited in other claims], it could have included that same limitation.").

Ex. 11 at VMR001371–1372. The direct/indirect distinction had nothing to do with Vermeer's actual argument, which covers the nine pages after the language that Toro plucked out of context. *See id.* at VMR001373–1381. There was no disavowal.

The cases cited by Toro are likewise irrelevant to the issue here. *See* Toro's Brief at 16–17. As Toro itself explained to another court, *Ethicon* "merely stands for the proposition that 'direct or indirect' connection is an inappropriate definition when: 1) it seeks to include two '*distant elements*' connected only by way of multiple intervening structures; and 2) there is no support in the intrinsic evidence for such an interpretation." Ex. 13 at 5 (discussing *Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp.*, 93 F.3d 1572 (Fed. Cir. 1996)). Here, there is no issue of "distant elements," and the intrinsic evidence actually compels the conclusion that "pivotally attached" is *not* limited to direct attachment. *See* Vermeer's Brief at 16–19.

In *Max Rack*, the court considered the *location* of a claimed pivotal attachment between two bars. *Max Rack, Inc. v. Hoist Fitness Sys., Inc.*, No. 2:05-cv-784, 2009 WL 10677175, at *11–12 (S.D. Ohio Aug. 14, 2009). The court construed the claim to require the pivotal attachment to be at the top or bottom of the bar, because the claims expressly required the attachment to be "at at least one of the tops and bottoms of each of said bars." *Id.* at *12. This location was also required by the prosecution history. *Id.* By contrast, Vermeer's claims recite pivotal attachment between parts of the machine, but do not require a specific location.

The court in the *Southco* case only restricted the claim to direct attachment because other claim limitations *required* a direct attachment. *Southco*, 611 F. App'x at 686. No such issue exists here. As for the *Freight Tracking* case, the court simply found that a claim requiring "*attaching* a number of GPS receivers to a number of freight containers in [a] freight yard" was not infringed by attaching GPS receivers to separate vehicles used to pick up the freight

containers. *Freight Tracking Techs., LLC v. VA Int'l Terminals, LLC*, No. 2:13-cv-708, 2015 WL 12602436, at *3–4 (E.D. Va. May 27, 2015). The case has no relevance here.

Finally, injecting an undefined "intervening structure" will only create confusion—a fact that Toro itself recognized in a different case, when the shoe was on the other foot:

> "[The] proposed interpretation begs the question of what constitutes 'intervening structure?' Presumably, it would be impossible for *any* embodiment to meet this claim limitation because *some* intervening structure is necessary or required to attach or secure the actuator being used to the loader arms."

Ex. 14 at 28. Here, Toro asks the Court to introduce the very same confusion that it previously represented would be improper (albeit to a different court).

4. The plain and ordinary meaning of "front linkage" and "rear linkage" does not require any particular orientation.

With its narrow proposed construction, Toro invites the Court to import limitations from the preferred embodiment described in the specification, contrary to controlling precedent. *Phillips*, 415 F.3d at 1323 ("we have expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment."). Toro provides no legitimate basis for doing so. Toro's only argument is that the appearance of the word "the" in the claims "*compels* a construction consistent with the linkages called out in the specification . . . ." Toro's Brief at 33 (emphasis added). This argument fails. First, the claim introduces the terms using the indefinite article "a." Ex. 1 at 8:66–67 ("a front linkage . . . a rear linkage"). The later references to "*the* front linkage" or "*the* rear linkage" (Ex. 1 at 9:3–4, 9:22–23) simply point back to these antecedents, consistent with standard claim-drafting protocol.[8] Second, the case cited by Toro does not support its imaginary

[8] *See, e.g.*, *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1356 (Fed. Cir. 1999) ("'a discharge rate' in clause [b] is referring to the same rate as the term 'the discharge rate' in clause [d]"); MPEP 2173.05(e).

legal proposition that the word "the" justifies importing limitations from the specification. In fact, the case directly undermines Toro's argument. *See Weekend Warriors Trailers v. Thor California Inc.*, 03-cv-2223, 2005 WL 6225203, *5 (C.D. Cal., March 31, 2005) (rejecting a narrow construction because the claim term was introduced by the indefinite article "a.").

5. The plain and ordinary meaning of "pivot point" does not require construction.

Toro agrees that "pivot point" is "not a technical term." Toro's Brief at 20. The jurors need no assistance in understanding this straightforward term. And even if they did, changing "pivot" to "pivotal motion" and replacing the noun "point" with "axis"—as Toro asks the Court to do—would not help. Grafting the "axis" concept onto this straightforward claim language may also confuse the jury, given that the specification distinguishes between a "rotational axis" and a "pivot point." *See, e.g.*, Ex. 1 at 5:21–23 ("The rotational axis R and the forward pivot point P_1 of the first side 38*a* of the mainframe 10 are separated by a vertical distance D2.").[9]

C. "Barrier Guard" Is Not Indefinite.

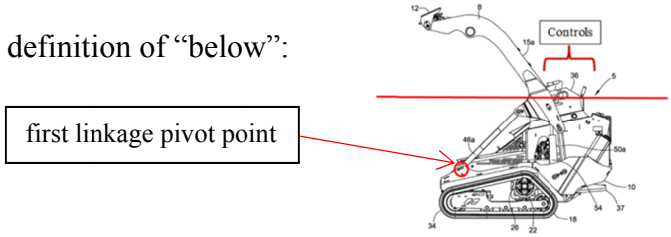
As Vermeer has explained, "barrier guard" is simply a label used to identify the perimeter of the machine structure. Vermeer's Brief at 21–22. The specification makes this plain: "the perimeter of the machine structure . . . forms a barrier guard." Ex. 1 at 4:1–4. Despite this clear and explicit guidance, Toro asserts that this language is indefinite. Toro wrongly suggests that the Patent Office has found this claim language invalid as indefinite under 35 U.S.C. § 112(b). *See* Toro's Brief at 34–35. In fact, after Vermeer added this "barrier guard" language to the specification and the pending claims, the Patent Office never once challenged the definiteness of

[9] The *Balsam Brands* case cited by Toro provides no support for its unnecessary construction. The *Balsam Brands* court considered a different term ("pivot joint") in the context of a different patent (describing an artificial Christmas tree) to reach a different construction. *Balsam Brands Inc. v. Cinmar, LLC*, No. 3:15-cv-04829, 2016 WL 8346172, *2–*10 (N.D. Cal. Sept. 1, 2016).

this language—even though the examiner closely scrutinized the claims for definiteness. *See, e.g.*, Ex. 5 at VMR013668 (rejecting then pending claims 29–33 as indefinite based on other language that the examiner deemed indefinite under § 112(b)). Toro relies on a non-final rejection in the pending reexamination that did not involve the issue of definiteness under § 112(b). Ex. A (July 19, 2019 Office Action), p. 20, n.4. The comments by the reexamination examiner fail to support Toro's argument, especially in light of the fact that he (1) did not have the authority to address indefiniteness[10] and (2) found the claims definite enough to conclude that the prior art reference contained a barrier guard—pointing to a figure showing "the perimeter of the frame around the operator's area." *Id*. at 20. Toro has not shown that one would have difficulty understanding what is meant by "barrier guard"—much less clear and convincing evidence that the claims "fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus, Inc. v. Biosig Instruments*, 572 U.S. 898, 901 (2014).

D. The Court Should Construe the Term "Disposed Below the Operator Controls" Consistently with the Intrinsic Evidence.

Toro admits that its narrow proposed construction would exclude the embodiment depicted in the '266 patent. Toro's Brief at 28. Specifically, the first linkage pivot point[11] would not satisfy Toro's narrow definition of "below":



The Federal Circuit has noted that "a claim interpretation that excludes a preferred embodiment

[10] *See* 37 C.F.R. § 1.552 (allowing § 112 scrutiny during reexamination only of "subject matter added or deleted in the reexamination proceeding," not of original claim language, which was already examined once under § 112).

[11] In its opening brief, Vermeer inadvertently circled the incorrect pivot point. Vermeer's Brief at 23. As correctly shown here, there is no doubt that Toro's strained interpretation of "below" would exclude the preferred embodiment (which Toro freely admits).

from the scope of the claim is rarely, if ever, correct." *Accent Packaging, Inc. v. Leggett & Platt, Inc*., 707 F.3d 1318, 1326 (Fed. Cir. 2013). Yet this is precisely what Toro asks the Court to do. By contrast, Vermeer's proposed construction of "below" ("at a lower level than") is not only supported by plain meaning of the word (*see* Ex. 4), but also comfortably accommodates the embodiment described in the '266 patent, as shown by the red line in Figure 3, above.[12]

E. The Court Should Construe the Term "Disposed Between the Operator Controls and the Bottom of the Rigid Frame and/or Disposed Forward of the Control Station" Consistently with the Intrinsic Evidence.

The dispute between the parties with regard to this term[13] is whether all six pivot points must *collectively* satisfy the same condition. Toro argues that they must, simply because the word "and" is used at the end of the list of pivot points. Toro's Brief at 31. Toro marshals numerous cases to argue that "and" is conjunctive. Toro misses the point. Vermeer does not dispute that the list is conjunctive in the sense that every single one of the pivot points must satisfy one or the other of the identified conditions. But they need not all satisfy the *same* condition. Any doubt that this is the proper reading of this claim is confirmed by dependent claim 10, which specifies that two of the pivot points satisfy one condition, while the remaining four pivot points must satisfy the other condition. *See* Vermeer's Brief at 25.

II. CONCLUSION

Toro's narrow proposed constructions do not comport with the plain meaning of the claim language and the intrinsic evidence. Vermeer respectfully requests the Court to adopt Vermeer's proposed constructions.

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[12] The case that Toro cites does not support its position. *Zimmer Surgical, Inc. v. Stryker Corp*., No. 1:16-cv-00679, 2018 WL 3038515, *12–*13 (D. Del., June 19, 2018) (rejecting a construction that would require "below" to mean "directly beneath," even when one of the embodiments showed this configuration).

[13] Toro also proposes a definition for "between." Vermeer does not dispute that the plain meaning of "between" here means "in the space separating."

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