UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Spinelogik, Inc., **Plaintiff,** **v.** **Globus Medical, Inc.,** **Defendant.**	**Case No. 2:23-cv-529**

PLAINTIFF'S OPENING CLAIM CONSTRUCTION BRIEF

In accordance with the governing Amended Docket Control Order [Dkt. No. 49], and further in accordance with Local Patent Rule 4-5(a), Plaintiff Spinelogik, Inc. respectfully submits this Opening Claim Construction Brief.

The Asserted Patents are as follows: U.S. Patent Nos. 8,460,385 ("the '385 Patent") and 9,730,805 ("the '805 Patent") (hereinafter referred to collectively as "the Spinelogik Patents" or "the Asserted Patents").

The Asserted Claims are as follows: Claim Claims 1, 2, 7 and 9 of the '385 Patent and Claims 1, 5, 11, 15, 16 and 17 for the '805 Patent.

The terms identified by Defendant as requiring construction are presented below in the order they appear in the Asserted Claims, beginning with Independent Asserted Claim 1 of the '385 Patent.

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I. Brief Technological Background Summary

By way of introduction, Plaintiff provides this brief overview of the inventions of the Asserted Patents. Broadly and generally, the inventions as claimed solved certain technological problems associated with spinal implants and surgical procedures for spinal fusion and stabilization. Primarily, the inventions present a novel means of a spinal fusion device and delivery mechanism which, plainly, represents a vitally important and more rapid, reliable fusion between unstable vertebral segments and avoid the considerable medical and economic impact of failed spinal fusions. *See, e.g.,* '385 Patent at 2:11-3 (for ease of reference, true and correct copies of the Asserted Patents are attached hereto as Exhibits A and B). Further, the inventions as claimed are directed to specific embodiments of the invention provide an apparatus that (1) delivers a fusion member between two vertebral bodies after at least a portion of the fibrocartilaginous disc between the vertebral bodies has been removed, and (2) affixes the fusion member to the vertebral bodies. *See id.* at 2:18-22. In some embodiments, the apparatus includes (1) a fusion member that is delivered and positioned between the vertebral bodies, (2) a delivery mechanism that delivers and positions the fusion member between the vertebral bodies, and (3) an anchoring member that affixes the fusion member to the vertebral bodies.. *See id.* at 2:22-8.

II. Legal Framework

Plaintiff recognizes that the Court is fully versed on the law as it relates to claim construction, and will therefore not burden the Court with an extended recitation of the various rules, canons, and principles. For purposes of the specific terms at issue in this case, however, and based on Defendant's erroneous and artificially-narrow proposed constructions, it is evident to Plaintiff that Defendant intends to (attempt to) import a variety of extraneous and unwarranted limitations into the claims. Of course, to do so is clearly erroneous, and Defendant already knows it.

The law on this issue is clear: While the specification is highly relevant to the claim construction

analysis, "it is improper to import limitations from the specification unless the patentee has demonstrated a clear intent to limit claim scope." *Martek Biosci. Corp. v. Nutrinova, Inc.,* 579 F.3d 1363, 1381 (Fed. Cir. 2009). It is the claims, "not specification embodiments," which define the scope of patent protection; "[t]he patentee is entitled to the full scope of his claims" and is not limited "to his preferred embodiment" and the Court will not "import a limitation from the specification into the claims." *Kara Tech Inc. v. Stamps.com Inc.,* 582 F.3d 1341, 1348 (Fed. Cir. 2009); *see also Comaper Corp. v. Antec, Inc.,* 596 F.3d 1343, 1348 (Fed. Cir. 2010) (cautioning "against confining the claims to [preferred] embodiments"). Even where "a patent describes only a single embodiment, the claims should not be construed as limited to that embodiment" absent a clear disavowal of claim scope. *Phillips v. AWH Corp.,* 415 F.3d 1303, 1323 (Fed. Cir. 2005); *see also Linear Tech Corp. v. ITC,* 566 F.3d 1049, 1057–58 (Fed. Cir. 2009) (explaining that it is improper to limit a claim to embodiments described in the specification where "there is no clear intention to limit the claim scope").

As the Federal Circuit has explained, District Courts should forgo detailed dictionary analysis during claim construction if the term is commonplace, and "merely rephrasing or paraphrasing the plain language of a claim by substituting synonyms does not represent genuine claim construction." *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 863 (Fed. Cir. 2004); *see also U.S. Surgical Corp. v. Ethicon, Inc.,* 103 F.3d 1554, 1568 (Fed. Cir. 1997) (claim construction "is not an obligatory exercise in redundancy"); *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) ("[D]istrict courts are not (and should not be) required to construe every limitation present in a patent's asserted claims").

Against this backdrop, Plaintiff addresses the terms as requested to be construed by Defendant.

III. Argument

A. "curved channel" ['385 Patent, Claim 1]

The first phrase identified by Defendant is the straightforward limitation which recites: "curved channel." Such phrase is unremarkable and unambiguous on its face, and is readily understandable to a lay jury. Nevertheless, Defendant proposes a self-serving construction importing unwarranted limitations which seek to rewrite the claims to redefine "curved channel" as "channel that has a curved path."

Term	Plaintiff's Proposed Construction	Defendant's Proposed Construction
"curved channel"	No construction necessary; plain and ordinary meaning.	"channel that has a curved path"

Again, this term has a plain meaning that would be readily understood by a jury and nothing in the specification or prosecution history justifies departing from that plain meaning. First, there is no reason to substitute a definition from extrinsic evidence for "curved channel" since this is a straightforward, everyday, simple phrase. As noted above, this Court may properly decline to construe a claim term such as this if its plain meaning can be readily understood. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008); *ActiveVideo Networks, Inc. v. Verizon Comms., Inc.*, 694 F.3d 1312, 1325-26 (Fed. Cir. 2012). Merely substituting in a long definition for a very simple phrase – "curved channel" – would not aid the jury, and invites unwarranted ambiguity by inserting the concept of "path."

Additionally, "curved path" does not necessarily mean "curved channel" and there is no justification to narrowly construe it in a manner that is inconsistent with its plain and ordinary meaning. The prosecution history can be used to limit the scope of a claim only where there has been a "clear and unmistakable disclaimer" of claim scope. *01 Communique Lab., Inc. v. LogMeIn, Inc.*, 687 F.3d 1292, 1297 (Fed. Cir. 2012) (internal quotes and citations omitted). Because the prosecution history "represents an ongoing negotiation between the PTO and the applicant, it often lacks the clarity of the specification

and thus is less useful for claim construction purposes." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005).

Defendant's proposed construction should be rejected because it is not consistent with the plain and ordinary meaning and its use of the term "path" introduces ambiguity into the scope of the claim.

B. "cross-sectional planes are parallel to each other" ['385 Patent, Claim 1]

The second phrase identified by Defendant is (once again) a plain and straightforward limitation which recites simply (in context): "wherein the first and second *cross-sectional planes are parallel to each other*." Once again, the language selected by the patentee and allowed by the Patent Examiner is unremarkable and unambiguous on its face, and is readily understandable to a lay jury. Nevertheless, in an obvious attempt to manufacture a non-infringement fallback position, Defendant proposes a plainly erroneous construction which imports numerous false limitations, introduces new and unclaimed ambiguities, and artificially reduces the scope of the claim far beyond what is actually recited.

Term	Plaintiff's Proposed Construction	Defendant's Proposed Construction
"cross-sectional planes are parallel to each other"	No construction necessary; plain and ordinary meaning.	"cross-sectional planes passing through the entire curved channel paths (e.g., as shown in FIG. 46B) and are parallel to each other"

Defendant asks this Court to construe a simple plain-English phrase, "cross-sectional planes," with a self-serving and wholly unnecessary combination of *seven words and reference to a Figure that combine to express multiple distinct points*. Based on this alone, it is apparent that Defendant is improperly importing a variety of new and unclaimed limitations into this single claim element. First, Defendant incorrectly posits that the "cross-sectional planes" must be "passing through the entire curved channel paths (e.g., as shown in FIG. 46B)," a proposal which has no basis and no express lexicography, but rather depends upon a mere inference from a single excerpt of the specification discussing one exemplary

embodiment of the invention. Nothing in the specification teaches or requires that the claimed "cross-sectional planes" be "passing through the entire curved channel paths." The referenced Figure 46B is merely an alternative embodiment described by the patentee and does not limit Claim 1.

Even if this Figure 46B were the only embodiment described by the '385 Patent, Defendant's "passing through the entire curved channel paths" construction would still be improper. *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed. Cir. 2014) ("This court has 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"). In any event, there is nothing in the intrinsic record supporting the absolute notion that the "cross-sectional planes" must be specially "passing through the entire curved channel paths," and such term introduces new ambiguities.

Defendant's proposed construction introduces many concepts that are unnecessary and themselves subject to further construction. By adding so many superfluous words, Defendant creates ambiguity and invites disputes rather than clarifying anything. By way of example, the jury will be left to question: (i) What it means for the ""cross-sectional planes" to be "passing through the entire curved channel paths"; (ii) What qualifies as "passing"; and (iii) How is "entire" evaluated? These questions introduce confusion and are entirely unnecessary, as the jury will readily appreciate what "cross-sectional planes" means and there is nothing in the record that supports redefining it with Defendant's seven-word proposal.

C. "delivery mechanism" ['805 Patent, Claim 1, 6, 11, 17]

Next, Defendant identifies the plain and straightforward limitation which recites simply (in context): "a *delivery mechanism* for delivering the fusion member between the two vertebral bodies, the *delivery mechanism* extending outside a patient's body to a medical practitioner while the *delivery mechanism* is coupled to the fusion member and the fusion member is positioned between the two vertebral bodies, the *delivery mechanism* having a second plurality of channels, wherein each channel of the first

plurality of channels is configured to be aligned with a different channel of the second plurality of channels when the *delivery mechanism* delivers the fusion member between the two vertebral bodies;." Once again, the language selected by the patentee and allowed by the Patent Examiner is unremarkable and unambiguous on its face, and is readily understandable to a lay jury. The Asserted Claims themselves provide readily understandable context for the jury, and Defendant's proposed construction introduces unnecessary confusion and unduly restricts the scope of the apparatus claim as drafted.

Term	Plaintiff's Proposed Construction	Defendant's Proposed Construction
"delivery mechanism"	No construction necessary; plain and ordinary meaning.	"insertion tool separate from the driving member"

Defendant seeks to introduce the concepts of "insertion tool" and "driving member" into the claim where none otherwise exists, and thus unduly complicates a simple claim. Moreover, the claim language itself defines the "delivery mechanism," and in part, as merely requiring it "delivers the fusion member between the two vertebral bodies." Nothing more. Further, Defendant's effort to introduce a functional purpose for the "delivery mechanism" is misplaced and improper, inasmuch as the apparatus claim is not so limited, and is defined in structural terms. *See, e.g., Toro Co. v. White Consol. Industries, Inc.,* 266 F.3d 1367, 1371 (Fed. Cir. 2001) ("An invention claimed in purely structural terms generally resists functional limitation") (collecting cases).

D. "each channel of the fusion member is curved" ['805 Patent, Claim 5, 16]

The fourth phrase identified by Defendant, and similar to "curved channel," is another plain and straightforward limitation which recites simply (in context): "The apparatus of claim 1, wherein *each channel of the fusion member is curved*." Once again, the language selected by the patentee and allowed by the Patent Examiner is unremarkable and unambiguous on its face, and is readily understandable to a lay jury. Nevertheless, Defendant proposes an overly restrictive and narrow construction which does not

comport with the plain and ordinary meaning.

Term	Plaintiff's Proposed Construction	Defendant's Proposed Construction
"each channel of the fusion member is curved"	No construction necessary; plain and ordinary meaning.	"each channel of the fusion member has a curved path"

Again, this term has a plain meaning that would be readily understood by a jury and nothing in the specification or prosecution history justifies departing from that plain meaning. First, there is no reason to substitute a definition from extrinsic evidence for "channel of the fusion member is curved" since this is a straightforward, everyday, simple phrase. As noted above, this Court may properly decline to construe a claim term such as this if its plain meaning can be readily understood. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008); *ActiveVideo Networks, Inc. v. Verizon Comms., Inc.*, 694 F.3d 1312, 1325-26 (Fed. Cir. 2012). Merely substituting in a long definition for a very simple phrase – "curved channel" – would not aid the jury, and invites unwarranted ambiguity by inserting the concept of "path."

Additionally, "curved path" does not necessarily mean "curved" and there is no justification to narrowly construe it in a manner that is inconsistent with its plain and ordinary meaning. The prosecution history can be used to limit the scope of a claim only where there has been a "clear and unmistakable disclaimer" of claim scope. *01 Communique Lab., Inc. v. LogMeIn, Inc.*, 687 F.3d 1292, 1297 (Fed. Cir. 2012) (internal quotes and citations omitted). Because the prosecution history "represents an ongoing negotiation between the PTO and the applicant, it often lacks the clarity of the specification and thus is less useful for claim construction purposes." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005).

Defendant's proposed construction should be rejected because it is not consistent with the plain and ordinary meaning and its use of the term "path" introduces ambiguity into the scope of the claim.

V. Conclusion

Defendant's erroneous proposed constructions should be rejected, and Plaintiff's should be accepted for all the reasons set forth above.

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Respectfully Submitted

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