

United States District Court,
C.D. California.

INTERACTIVE HEALTH LLC,
v.
KING KONG USA, INC.

No. CV 06-1902-VBF (PLAx)

June 7, 2007.

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PROCEEDINGS (IN CHAMBERS): CLAIMS CONSTRUCTION ORDER

VALERIE BAKER FAIRBANK, District Judge.

CIVIL MINUTES-GENERAL

Rita Sanchez, Courtroom Deputy.

This case involves U.S. Patent No. 6,629,940 (the "'0 Patent"). Plaintiff Human Touch, LLC (formerly Interactive Health LLC), brings allegations of infringement of the '0 Patent against Defendants King Kong USA, Inc. ("King Kong") and WFO Imports, LLC and Blair Hayes ("WFO"), *et al.* This case results from the consolidation of two separate infringement suits brought by Plaintiff. *See* Order Consolidating Case No. CV 06-01902 MMM(FMOx) and Case No. CV 06-03499 MMM (PLAx)(issued by Judge Margaret M. Morrow and filed on February 7, 2007).

This court received and read two sets of claims construction briefs each from Plaintiff, King Kong, and WFO, and the declarations and exhibits thereto, including one claims construction chart from each of these parties as well as a jointly-created claims construction chart. The court provided the parties with a Tentative Claims Construction Order on April 18, 2007, and heard oral argument on claims construction on April 20, 2007. On April 30, 2007, the court ordered additional briefing on two disputed terms. The court then received an additional claims construction brief from Plaintiff, King Kong and WFO and the supporting documents thereto, including a complete copy of the prosecution history of the '0 Patent. The court provided the parties with an additional Tentative Claims Construction Order on May 29, 2007, and on May 30, 2007 the court heard additional oral argument on claims construction. For the reasons stated below, the

court construes the '0 Patent's claim language as follows.

Patent Claim Terms In Dispute

The Court finds that the following claims are in dispute:

1. "a lower leg massager," as used in claims 1, 8, and 9;
2. "right and left massaging member," as used in claims 1, 8, and 9;
3. "an elongated board," as used in claims 1, 8, and 9;
4. "a predetermined length and a predetermined width," as used in claims 1, 8, and 9;
5. "an inside surface bounded by the lengths and width thereof," as used in claims 1, 8, and 9;
6. "a predetermined distance," as used in claims 1, 8, and 9;
7. "lengthwise inclined angle," as used in claims 1, 3, 8, 9, and 11;
8. "widthwise inclined angle," as used in claims 1, 8, and 9;
9. "toward and away from each other," as used in claims 1, 2, 3, 8, 9 and 11;
10. "the lengthwise inclined angle changes to an opposite lengthwise inclined angle," as used in claims 1, 8, and 9;
11. "the extent of the widthwise inclined angle also changing," as used in claims 1, 8, and 9;
12. "leaf springs," as used in claims 1 and 14;
13. "resiliently deformable in a direction of thickness," as used in claims 14;
14. "allowing the right and left massaging members to move longitudinally" as used in claims 4, 8, and 9;
15. "footrest," as used in claim 8;
16. "revolving shaft," as used in claim 8;
17. "guide member" as used in claims 4, 8 and 9;
18. "axially intermediate," as used in claims 4, 8 and 9;
19. "cam surface inclined with respect to the revolving shaft," as used in claims 4, 8 and 9.

Disputed Term 1. "A Lower Leg Massager" (Claims 1, 8, and 9)

The only party to offer a clarifying construction for "[a] lower leg massager" is WFO. WFO proposes that

"[a] lower leg massager" should be construed to mean "a device for massaging a person's lower leg." This amounts to a mere repetition of the claim language. *See* U.S. Surgical Corp. v. Ethicon, Inc., 103 F.3d 1554, 1568 (Fed.Cir.1997) ("The *Markman* decisions do not hold that the trial judge must repeat or restate every claim term in order to comply with the ruling that claim construction is for the court. Claim construction is a matter of resolution of disputed meanings and technical scope, to clarify and when necessary to explain what the patentee covered by the claims, for use in the determination of infringement. It is not an obligatory exercise in redundancy.").

The Court rejects WFO's proposed language and finds that this term **needs no clarifying construction.**

Disputed Term 2. "A Right And Left Massaging Member"

Claims 1, 8, and 9 all describe a "massaging device each having a right and left massaging member each formed of an elongated board having a predetermined length and a predetermined width." WFO contends that "a right and left massaging member" means "members that contact and massage the leg." Plaintiff opposes any construction of the term, but states that if interpretation is necessary, the term should be construed to mean "the right and left massage members directly or indirectly massage the leg."

In support of its construction, WFO points to the following statements in the specification: "In order to massage the lower leg of a person with this massager, both of the lower legs of the person are placed between the pair of right and left massaging members"; FN1 and "[t]herefore, a single massaging member can adequately massage over a wide range of the lower leg along the length thereof without providing a plurality of massaging members along the length of the lower leg." FN2 WFO also points to Figure 1, which, it contends, "shows right and left massaging members that contact the lower leg of the person." FN3

The court agrees with Plaintiff that neither the claim language nor the specification require the massaging members to directly contact the leg. Figure 1, and the passages cited by WFO indicate only that the massaging members massage a lower leg placed between a right and left massaging member. They do not indicate whether the massaging members directly contact the leg. Indeed, as Plaintiff points out, WFO's proposed construction would contradict the specification, which discloses a footrest that "is constructed by covering the entire lower leg massager with a covering member such as a raised cloth or the like." FN4

A construction that excludes the preferred embodiment is "rarely, if ever correct." *Sandisk Corp. v. Memorex Prods.*, 415 F.3d 1278, 1285 (Fed.Cir.2005). *See also* *Glaxo Group Ltd. v. Apotex, Inc.*, 376 F.3d 1339, 1347 (Fed.Cir.2004)("[C]laims should rarely, if ever, be construed to exclude a preferred embodiment.") Any construction of the term "a right and left massaging member" that requires the members to contact the legs would exclude the preferred embodiment disclosed in the specification. Accordingly, the court **rejects WFO's proposal** that "a right and left massaging member" be construed to mean "members that contact and massage the leg." Moreover, the court further concludes that the term "a right and left massaging member" **needs no clarifying construction.**

Disputed Term 3: "Elongated Board" (claims 1, 8, and 9)

WFO contends that "elongated board" means "a substantially rectangular board." King Kong asserts that an "elongated board" must be rectangular because it has a constant predetermined length and width. Plaintiff, by contrast, argues that "elongated board" needs no construction at all. If any clarification is necessary, Plaintiff contends, then the term should be construed to mean "a board longer in length than width." According to WFO, the ordinary meaning of "elongated" is "longer in length than in width, or substantially

rectangular."

Courts are free to consult dictionaries and technical treatises when construing claim terms "so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed.Cir.2005). *Webster's New Collegiate Dictionary*, upon which WFO relies, defines "elongated" as "stretched out: lengthened" or "long in proportion to width: slender." FN5 The fact that an item is "stretched out," "lengthened," or "long in proportion to width," however, does not necessarily mean that it is "substantially rectangular." An item may be oval or tapered at one end, for example, and yet be "stretched out," "lengthened," or "long in proportion to width."

Neither "elongated" nor "board" limits the claim to rectangular structures. While "board" is generally understood to refer to a rectangular object that is longer than it is wide, FN6 the fact that "board" is used in combination with "elongated" strongly suggests that in the context of the '940 patent, "board" does not inherently mean something rectangular. *See Phillips*, 415 F.3d at 1314 ("To begin with, the context in which a term is used in the asserted claim can be highly instructive. To take a simple example, the claim in this case refers to 'steel baffles,' which strongly implies that the term 'baffles' does not inherently mean objects made of steel"). An inventor is allowed to be his own lexicographer, and may imply in the specification that a claim term has other than its ordinary meaning. *Schoenhaus v. Genesco, Inc.*, 440 F.3d 1354, 1358 (Fed.Cir.2006). Otherwise, as Plaintiff points out, there would be no need to modify "board" with the adjective "elongated." *See Primos, Inc. v. Hunter's Specialities, Inc.*, 451 F.3d 841, 848 (Fed.Cir.2006) ("the terms 'engaging' and 'sealing' are both expressly recited in the claim and therefore 'engaging' cannot mean the same thing as 'sealing'; if it did, one of the terms would be superfluous"); *see also Id.* at 847 ("the claims use both terms, 'engaging' and 'sealing,' and thus each term is presumed to have a distinct meaning"); *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1119-20 (Fed.Cir.2003) (a party's claim "interpretation largely reads the term 'operatively' out of the phrase 'operatively connected.' While not an absolute rule, all claim terms are presumed to have meaning in a claim."). The claim language therefore suggests that neither "elongated" nor "board," as used in the patent, refer inherently to something that is rectangular in shape. Moreover, the '940 Patent's use of the phrase "elongated rectangular shape" to describe the base plate against which the massaging device is placed FN7 suggests that "elongated" does not mean "rectangular." FN8 As Plaintiff points out, if the inventor had believed "elongated" to mean "rectangular," then there, would have been no need to add "rectangular." The claim language therefore suggests that neither "elongated" nor "board," as used in the patent, refer inherently to something that is rectangular in shape.

WFO next argues that its construction of "elongated board" is supported by the specification. In particular, it points to language in the specification indicating that "each massaging member has a longitudinal length L extending from the lower knee region to the portion near the ankle of the lower leg." FN9 Contrary to WFO's interpretation, however, this language establishes only that the board's length is determined by the distance between the "lower knee region" and the "portion near the ankle of the lower leg." Understood in the context of the word, "elongated," the wording indicates that the length L is longer than the width. There is no corresponding language to indicate that the width must be uniform throughout the length of the board.

WFO and King Kong next argue that "elongated board" necessarily means a board that is rectangular in shape because that is the only shape disclosed in the specification and the accompanying figures. This argument fails because it runs contrary to the Federal Circuit's repeated admonitions against importing limitations from the preferred embodiment into a claim. *See Comark Communications, Inc. v. Harris Corp.*,

156 F.3d 1182, 1186-87 (Fed.Cir.1998) (noting the Federal Circuit's "repeated statements that limitations from the specification are not to be read into the claims"); *Texas Instruments, Inc. v. United States Int'l Trade Comm'n*, 805 F.2d 1558, 1563 (Fed.Cir.1986) ("This court has cautioned against limiting the claimed invention to preferred embodiments or specific examples in the specification").

Finally, King Kong argues that the inventor of the '0 Patent expressly renounced any claim to boards that are not rectangular in shape. King Kong's argument here (and with respect to Disputed Term 4, "having a predetermined length and a predetermined width") rely on the prosecution history and are based on the addition of Disputed Term 4, "a predetermined length and a predetermined width." FN10 Accordingly, the court will take up King Kong's argument from the prosecution history in that section of the Order.

The Court **rejects Defendants' proposed constructions** of "elongated board" and **King Kong's proposal** to construe "board" to mean "any of various construction materials manufactured in thin, flat, rectangular sheets." The Court finds that "elongated board" **needs no clarifying construction.**

Disputed Term 4. "A Predetermined Length and a Predetermined Width"

Claims 1, 8 and 9 disclose a "massaging device having a right and left massaging member each formed of an elongated board having a predetermined length and a predetermined width ..." FN11 In its Opening and Responsive Claims Construction Briefs, WFO argued that "a predetermined length and a predetermined width" means "the boards of the massaging members have lengths and widths that are determined beforehand and do not change after assembly or during use." King Kong argued that the term meant "two substantially flat and rectangular members." Plaintiff, by contrast, contended that "predetermined" does not require a clarifying construction. If any construction is necessary, it proposes that "predetermined" be construed to mean "determined in advance."

The court continued the Markman hearing to allow additional briefing and oral argument on this disputed term (and Disputed Term 6, "A Predetermined Distance") and advised the parties that it intended to consider giving some meaning to the phrase "having a predetermined length and a predetermined width" rather than treating it as mere surplusage. Because King Kong's argument was based in part on the prosecution history of the '0 patent, the court required King Kong to provide a full copy of that prosecution history. The court reviewed the prosecution history and heard additional oral argument on May 30, 2007.

The initial application included only one independent claim: "A lower leg massager comprising: massaging means comprising a pair of right and left massaging members arranged in an opposed manner at a space as wide as a lower leg can be fitted there between and formed of board elongated in the direction along the length of the lower leg ..." FN12 The independent claim further disclosed a "driving means for moving a pair of right and left massaging members ..." FN13 The PTO provided two different reasons for rejecting this claim language. First, the PTO stated that "it is not clear what structure has been suggested by 'formed of board elongated in ...' ".FN14 Second, the PTO rejected this entire independent claim as well as dependent claims 2, 3 and 8 (disclosing the driving means and design of the massaging members) for being anticipated by prior art (namely, the Shimizu Patent).FN15 The applicant then amended its claims into their current form (without providing any detailed argument or explanation), and the PTO granted the patent.

King Kong's argument is essentially that, based on the prosecution history, the court should find that "having a predetermined length and a predetermined width" was added to differentiate the '0 patent from the Shimizu patent with respect to the Shimizu patent's disc-shaped massaging members. However, the

prosecution history is not clear enough to support King Kong's argument. As King Kong notes, the applicant's amendment remarks state that to overcome the indefiniteness objection, the applicant "amended" the relevant claim (and others), presumably to add structural limitations.FN16 To overcome the anticipation objection, the applicant stated that it had "rewritten" the relevant claim (combining it with some dependent claims) into a new independent claim.FN17 Based on this evidence, it is impossible to determine exactly which ground for rejection (indefiniteness vs. anticipation) formed the basis for any particular additional structural limitation. Without knowing that, the court cannot know whether the applicant added this language merely to add some structure to the claim, or with the intent of disclaiming massaging members with particular geometric characteristics. As in many other cases, here the prosecution history is too ambiguous to be of much use during claim construction. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed.Cir.2005)("[B]ecause the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes"); *Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1580 (Fed.Cir.1996)(prosecution history's ambiguity made it "unhelpful as an interpretive resource" for claim construction).

King Kong's proposed construction also lacks support in the claim language's ordinary meaning. As Plaintiff pointed out at oral argument, any shape that is longer than it is wide (e.g., an oval, ellipse, or trapezoid) may be said to have a length and a width—even a "predetermined" or "fixed" width and length—regardless of whether the length and width are constant at all points along the shape. Finally, King Kong's construction would exclude the preferred embodiment; Figure 2 of the '0 patent depicts massaging members that are curved on the upper edge rather than rectangular.FN18

The Court must therefore reject King Kong's proposed construction because it adds limitations that are not supported by the intrinsic evidence of the claim language, specification, or prosecution history, and are not within the ordinary meaning of the word "predetermined."

On the other hand, Plaintiff's proposal (that "predetermined" merely means "determined in advance") is untenable. It is an important canon of claim construction that courts should give meaning to all terms of a claim rather than treating claim language as "mere surplusage." *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1372 (Fed.Cir.2005)("A claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so"); *Texas Instruments, Inc. v. Int'l Trade Comm'n*, 988 F.2d 1165, 1171 (Fed.Cir.1993)(rejecting a claim interpretation because it would render other claim language mere surplusage). Plaintiff's interpretation of "predetermined" (that it requires no clarifying construction or that it merely means "determined in advance") violates that canon of construction. Plaintiff's construction says nothing more than that the members have a length and a width when they leave the factory; if that were the intent, the applicant could have deleted the word "predetermined" without altering the claim's meaning.

WFO's position is that airbags are at the heart of the dispute over this term. As WFO points out the '0 Patent's background discussion "describes the prior art's usage of inflating and deflating airbags with lengths and widths that varied during operating." FN19 WFO further states that "[t]he '940 Patent's use of 'predetermined' was to avoid and disclaim these prior art airbags acting as massaging members and to define the '940 Patent's massaging members as having fixed lengths and widths. To that end, the specification makes no mention that the inventor actually sought to cover changing massaging members, or massaging members that used airbags." FN20 The court agrees that there is some support for WFO's arguments in the prosecution history.

WFO's proposed construction adds two elements: the dimensions "determined beforehand" do not change (1) after assembly or (2) during use. The court rejects the first of these as an additional limitation not supported by the claim language, specification, prosecution history. Moreover, the court must observe the canon of construction that requires all instances of a patent term to be construed consistently. *Fonar Corp. v. Johnson & Johnson*, 821 F.2d 627, 632 (Fed.Cir.1987). To construe "predetermined" as disclaiming a lower leg massager in which the size of the massaging members might be adjusted after assembly would be inconsistent with the court's interpretation of "predetermined" as part of "predetermined distance." FN21 However, the court does accept the second part of WFO's proposed construction. If the massaging members' length and width changed during operation, the claim language stating that the members have a "predetermined length and a predetermined width" would be rendered meaningless. Such devices already exist; as WFO points out, the '940 Patent's "Background Art" section specifically mentions prior art devices involving airbags which deliver the massage by expanding and contracting.FN22 Such airbags have a length and a width when they leave the factory, but a reasonable reading of the '940 Patent's language would exclude such devices.

Finally, Plaintiff points out that claim 14 discloses massaging members that are "resiliently deformable in the direction of thickness." FN23 Depending on how length and width are measured, it is arguably true that to the extent the massaging members deform during use, their length and width may also change. But this concern is easily addressed. The court construes "**having a predetermined length and a predetermined width**" to mean "**having a length and width that are determined beforehand and do not change during operation, except to the extent that the massaging members are resiliently deformable in the direction of thickness, as set forth in Claim 14.**"

Disputed Term 5: "an inside surface bounded by the lengths and width thereof"

WFO proposes that "an inside surface bounded by the lengths and width thereof" should be construed as "the inside surface of the massaging members are geometrically limited or confined by the lengths and widths of the massaging members, which are defined by the predetermined lengths and widths of the elongated boards." FN24 The court **rejects** this construction as a mere restatement of the claim language. The court agrees with Plaintiff that this claim language **needs no clarifying construction.**

Disputed Term 6: "A Predetermined Distance"

Claims 1, 8 and 9 disclose that the massaging members have "inside surfaces opposing each other at a predetermined distance ..." FN25 King Kong contends that "predetermined distance" means "set so that widthwise inclination can give user a complex massaging operation such as rubbing up and rubbing down massage." WFO asserts that "a predetermined distance" means "a distance that is determined beforehand and does not change after assembly or during use," while "a predetermined length and a predetermined width" means "the boards of the massaging members have lengths and widths that are determined beforehand and do not change after assembly or during use." Plaintiff, by contrast, contends that "predetermined" does not require a clarifying construction. If any construction is necessary, it proposes that "predetermined" be construed to mean "determined in advance."

During oral argument, the parties provided a helpful discussion of the construction of the word "distance" as used in Claims 1, 8 and 9. Contrary to the analysis in this court's April 18, 2007 Tentative Claims Construction Order, this court agrees that the "distance" referred to in these claims is not the distance between any point on the right massaging member and any point on the left massaging member; rather, the

"distance" referred to is the distance between the points on the inside surface of the members where they are attached to the revolving shaft.

WFO's proposal, that "predetermined distance" means "a distance that is determined beforehand and that does not change after assembly or during use" inspired extensive argument both in the briefs and during members to move along the revolving shaft during use.

Again the court will emphasize that "predetermined" must be given some meaning. The parties have agreed that, at the very least, "predetermined" means "determined beforehand," but then, what does "determined" mean? At oral argument, WFO's counsel correctly pointed out that even if "predetermined" means something less than "fixed," it must mean something more than "changing." Common sense, and a view of the '0 patent as a whole, compel the conclusion that "a predetermined distance" cannot be a distance that is changing even while the machine is performing its massage function. This conclusion is also supported by the fact that the massaging members "abut" the "fixed" cam members. As Plaintiff's counsel pointed out at oral argument on May 30th, claims 4, 8, and 9 depict cam members that are "fixed" at axially intermediate positions of the revolving shaft (see Disputed Terms 18 and 19). FN26

However, the court rejects WFO's proposed construction that the distance between the massaging members "does not change after assembly." The court will not import functional limitations that are not contained in the claim language, specification, or procedural history. The court will not opine as to what level (if any) of "adjustability" is contemplated by the '0 Patent. But the claim language does not appear to specify a particular moment (*e.g.*, during assembly) when the distance must have been determined.

The court construes "**a predetermined distance**" to mean "**a distance determined beforehand and not changing during operation, measured between the points on the revolving shaft where the opposing massage members are mounted.**"

Disputed Terms 7 and 8. "Lengthwise inclined Angle" and "widthwise inclined angle" (Claims 1, 3, 8, 9, and 11)

Claims 1, 8, and 9 disclose a massaging device that has "a right and a left massaging member ... each having an inside surface bounded by the lengths and width thereof, ... the inside surfaces having a lengthwise inclined angle there between, and also a widthwise inclined angle there between." FN27 Dependent claims 3 and 11 both claim the lower leg massager "wherein the driving device changes the extent of the widthwise inclined angle of the right and the left massaging members with respect to the lower leg when the massaging members are moved toward and away from each other." FN28

King Kong's proposed construction accurately represents the angles shown in figures 4(a) and 6(b), which are "less than perpendicular." The claim language does not support King Kong's proposal that a limitation of "less than perpendicular" be read into the claim term, however, and the patent does not otherwise support a construction that excludes a perpendicular lengthwise or widthwise inclined angle. The Court thus **rejects King Kong's proposed construction.**

Plaintiff asserts that "lengthwise inclined angle" and "widthwise inclined angle" means "an angle formed by the intersection of the line extending along the length [or width] of the inside surface of the right massaging member and the line extending along the length [or width] of the inside surface of the left massaging member." WFO counters with "the angle formed between the inside surfaces of the massaging members

defined along their lengths [or widths] when viewed from a top view [or front view]."

WFO's proposal seems to be an attempt to clearly differentiate between the "length" and the "width" of the massaging members. However, WFO's proposed language is unhelpful. *Webster's Collegiate Dictionary* defines "length" as "the longer or longest dimension of an object," and defines "width" as the horizontal measurement taken at right angles to the length." The "length" of a board does not change based on the direction from which it is viewed.FN29 As a result, the "lengthwise inclined angle" and "widthwise inclined angle" are the same regardless of the angle from which they are viewed. WFO's proposed construction would do nothing to clarify the claim language.

Accordingly, the Court **adopts Plaintiff's proposed construction** that "lengthwise inclined angle" and "widthwise inclined angle" means "an angle formed by the intersection of the line extending along the length [or width] of the inside surface of the right massaging member and the line extending along the length [or width] of the inside surface of the left massaging member."

Disputed Term 9. "Toward And Away From Each Other": Claims 1, 3, 8, 9, and 11

Claims 1, 8, and 9 disclose "a driving device for moving the right and the left members toward and away from each other *so that* the lengthwise inclined angle changes to an opposite lengthwise inclined angle, the extent of the widthwise inclined angle *also* changing when the right and the left members move toward and away from each other" (emphasis added). Dependent claims 3 and 11 claim a lower leg massager "wherein the driving device changes the extent of the widthwise inclined angle of the right and the left massaging members with respect to the lower leg when the massaging members are moved toward and away from each other." Plaintiff contends that "toward and away" means "some part of the inside surface of the right massaging member increases or decreases its distance from some part of the inside surface of the left massaging member; in other words, the right and left massaging members tilt toward and away from each other." King Kong argues that the phrase must be construed as "entail[ing] a complex massaging operation which is a rubbing up or rubbing down massage." WFO declines to offer an proposed construction, believing that the phrase stands on its own.

The claim language's use of the transitional phrase, "so that," makes clear that the movement "toward and away from each other" requires only the movement from one lengthwise inclined angle to the opposite lengthwise inclined angle. The change of lengthwise angles is a necessary precondition to movement "toward and away from each other." Plaintiff's construction must be rejected, because it would embrace a motion by which the widthwise inclined angle changes but the lengthwise inclined angle does not.

The rejection of Plaintiff's proposed construction is supported by the claim language in dependent claims 3 and 11, which disclose a lower leg massager "wherein the driving device changes the extent of the widthwise inclined angle of the right and left massaging members with respect to the lower leg when the massaging members are moved toward and away from each other." FN30 If, as Plaintiff contends, the phrase "move toward and away from each other" embraced changes in the widthwise inclined angle, then there would be no need for the inventor to specify that the widthwise inclined angle changes "when the massaging members are moved toward and away from each other." The two phrases would be redundant.

Plaintiff's citation of the written description does not change this conclusion. The specification points to a series of figures that show "the action of the respective massaging means in association with change over time." FN31

The Court **rejects Plaintiff's construction**. The Court also **rejects King Kong's construction** (that the phrase must be construed as "entail[ing] a complex massaging operation which is a rubbing up or rubbing down massage") because it impermissibly imports a functional limitation into a claim that recites structural terms. *Toro Co. v. White Consol. Ind., Inc.*, 266 F.3d 1367, 1371 (Fed.Cir.2001).

Because the term "toward and away from each other" is clear when used in combination with, "so that the lengthwise inclined angle changes to an opposite lengthwise inclined angle," the court finds the claim language **needs no clarification**.

Disputed Term 10. "The Lengthwise Inclined Angle Changes To An Opposite Lengthwise Inclined Angle": Claims 1, 8, and 9

Plaintiff proposes that "an opposite lengthwise inclined angle" be construed to mean "at one point in time, the lines extending along the length of the inside surfaces of the right and left massaging members intersect beyond one lengthwise end of the massaging members to form a lengthwise inclined angle, and at another point in time, those lines intersect beyond the other lengthwise end of the massaging members to form an opposite lengthwise inclined angle." King Kong proposes, "a mirror image equal to the lengthwise inclined angle." WFO, in turn, asserts that "an opposite lengthwise inclined angle" means that "the lengthwise inclined angle changes to another lengthwise inclined angle that is in the opposite direction and in the same and opposite amount."

Defendants contend that Plaintiffs construction is inadequate because it reads "opposite" out of the claim term. Claims 1, 8, and 9 all recite "a driving device for moving the right and the left members toward and away from each other so that the lengthwise inclined angle changes to an opposite lengthwise inclined angle." "Opposite" ordinarily means "opposed," "facing," or "being the other of a matching or contrasting pair." *See Webster's Third New International Dictionary* (1976), at p. 1583.

As Plaintiff points out, however, the claim states, "... to an opposite angle" and not "... to the opposite angle." "An," it contends, forecloses King Kong and WFO's constructions, which require that an "opposite angle" be the opposite, or mirror image, angle.

"[W]hen claim language or context suggests an ambiguity in application of the general meaning of an article, th[e] court undertakes an examination of the written description and the prosecution history to ascertain whether to limit the meaning of 'a' or 'an'." *KCJ Corp., v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1356 (Fed.Cir.2000); see also *Insituform Technologies, Inc. v. Cat Contracting, Inc.*, 99 F.3d 1098, 1105-06 (Fed.Cir.1996). Figure 4(a) of the '940 Patent's specification depicts angle AL created by the lengthwise inside surfaces of the two massaging members. When the rotating shaft that runs through both massaging members is rotated one-quarter turn, the two lengthwise inside surfaces are parallel to one another, as shown in figure 4(b). Figure 5(a) shows that when the rotating shaft is rotated one-half turn, the two lengthwise inside surfaces create an angle that is in the opposite direction from angle AL depicted in figure 4(a). This angle in figure 5(a) is not labeled. Finally, figure 5(b) depicts two parallel lengthwise inside surfaces, representing the position of the massaging members when the rotating shaft is rotated three-quarters turn.FN32

The angle shown in figure 5(a) is not labeled. Had the magnitude of the angle been identical to AL, a person reasonably skilled in the art would likely have denominated the two angles AL1 and AL2 or some variation

thereof. The lack of a label or any other wording suggesting that the angle in 5(a) is identical in amount to the angle AL in figure 4(a) thus supports Plaintiff's contention that the angles need not be of equal magnitude.

The Court thus **rejects Defendants' proposed constructions** requiring that the "opposite angle" be a "mirror image" or "of equal magnitude." The Court **adopts Plaintiff's construction** that "an opposite lengthwise angle" means that "at one point in time, the lines extending along the length of the inside surfaces of the right and left massaging members intersect beyond one lengthwise end of the massaging members to form a lengthwise inclined angle, and at another point in time, those lines intersect beyond the other lengthwise end of the massaging members to form an opposite lengthwise inclined angle."

Disputed Term 11. "the extent of the widthwise inclined angle also changing when the right and the left members move toward and away from each other"

Plaintiff proposes no clarifying construction for "the extent of the widthwise inclined angle also changing" (when the right and left members move toward and away from each other.) King Kong argues that this language, in combination with the "toward and away" language, "entails a complex massaging operation which is a rubbing up or rubbing down massage. The Court has already rejected this proposed construction.FN33

WFO argues that "the extent of the widthwise inclined angle also changing" means "the magnitude of the widthwise angle also changes when the massaging members are moving." The Court rejects WFO's proposed construction. First, WFO offers no argument at all for construing "mov[ing] toward and away from each other" as simply "moving." As Plaintiff points out, this construction "introduces a limitation that the widthwise inclined angle be changing even if the massaging member paddles are engaged in some other motion besides [moving toward and away from each other]." FN34 Moreover, the Court agrees with Plaintiff that Defendant's construction of "extent" as "magnitude" adds nothing to the phrase; in the context of the language of the '940 Patent, "the extent of the ... angle" is clear enough to need no further interpretation. FN35

The Court **rejects Defendants' constructions** and finds that "the extent of the widthwise inclined angle also changing when the right and the left members move toward and away from each other" **needs no clarification.**

Disputed Term 12. "Leaf springs" (claims 1 and 14)

Plaintiff construes "leaf springs" to mean "one or more layers, plys, or sheets that resiliently resist(s) bending or deforming." Defendants rely on lay dictionary evidence to support their assertion that the ordinary meaning of "leaf springs" is a spring made out of multiple layers or strips. Defendants point out that the term is not defined in the language of the claims, specifications, or prosecution history. Plaintiff counters that Defendants' arguments are refuted in the '0 Patent's description of the preferred embodiment, including Figures 1, 2 and 3. Claim 1 of the patent states that "the right and the left massaging members are formed of leaf springs that are resiliently deformable in the direction of thickness." FN36 The description of the preferred embodiment makes clear that the right and left massaging members are labeled Number 7 in Figures 1, 2, and 3; in each of these drawings the massaging members appear to be composed of a single layer. That the preferred embodiment differs from the "ordinary meaning" posited by Defendants is given further support by the fact that according to WFO, a "leaf spring" is necessarily arc-shaped; Figures 1, 2, and 3 depict right and left massaging members that are clearly not arc-shaped.

The Federal Circuit has made clear that claims constructions that exclude the preferred embodiment are highly disfavored. *See, e.g., Sandisk*, 415 F.3d at 1285; *Glaxo*, 376 F.3d at 1347. Defendant's constructions of "leaf springs" would exclude Plaintiff's preferred embodiment based solely on evidence gleaned from lay dictionaries. Accordingly, the Court **rejects defendants' constructions**.

Because "leaf springs" as set forth in the claim language differs from its ordinary meaning, the Court accepts that a clarifying construction of the term is necessary. The Court **adopts Plaintiff's construction** of "leaf springs" to mean "one or more layers, plies, or sheets that resiliently resist(s) bending or deforming."

Disputed Term 13. "Resiliently deformable in a direction of thickness" (claim 14)

King Kong argues that "the phrase, 'resiliently deformable in a direction of thickness' means that the massaging members bend." Plaintiff responds that Defendant's language is "unhelpful, because it omits the detail that deformation is in a direction of thickness, and it may suggest that the members bend and stay bent." The court agrees.

In its reply brief, King Kong adds the qualifying construction that "the bending is of sufficient degree and magnitude so that the user does not feel pain." The Court rejects this proposed language as it imports a functional limitation from the specification into a claim that recites only structural limitations (*i.e.*, the deformability and resiliency of the leaf spring.) *See Toro*, 266 F.3d at 1371.

The Court **rejects King Kong's construction** and finds that the phrase "resiliently deformable in a direction of thickness" **needs no clarification**.

Disputed Term 14. "Allowing the right and left massaging members to move longitudinally" (claims 4, 8 and 9)

Claims 4, 8, and 9 refer to "A lower leg massager comprising ... a massaging device ... [and] a driving device ... [comprising a revolving shaft a cam member and] a guide member for allowing the right and left massaging members to move longitudinally with respect to the revolving shaft but restricting a rotation with respect to the revolving shaft." Plaintiff and Defendants make a number of different arguments with respect to this language.

King Kong asserts that all of the language in the "guide member" subparagraphs, taken together, represent a means-plus-function limitation; as a result, the proper construction of this language should be limited to "a guide pin 23 on the board that fits into a guide rail or slot 24." As discussed below (see Disputed Term 17), the Court holds that "guide members" is a structural term, not a means-plus-function limitation. That this structural term is followed by functional language does not change it into a means-plus-function limitation. The Court thus **rejects King Kong's construction**.

Plaintiff construes "allowing the right and left massaging members to move longitudinally" means "allowing *some part of the inside surface* of the right and left massaging members to move, *i.e.*, tilt, longitudinally." WFO argues that the claim needs no clarifying construction and that Plaintiff's construction inappropriately broadens the scope of the claim language to cover movement of the left and right massaging members "that is random, non-sequential, and non-parallel." FN37 It is unclear to the Court how a guide member might prevent "random" or "non-sequential" movements; nothing in the language of claims 4, 8, and 9 touch on the randomness or sequentiality of the movements allowed or prevented by the guide members. The heart of the

matter is whether Plaintiff's proposed addition of "some part of the inside surface of" changes the claim so as to allow for "non-parallel" movements.

Claims are to be construed in the context of the entire patent. Taking into account the intrinsic evidence of the claim language, description, and drawings, it is clear to the Court that "allowing the right and left massaging members to move longitudinally with respect to the revolving shaft but restricting rotation with respect to the revolving shaft" means that the guide member "directs the motion" FN38 of the massaging members so that they can perform their intended function, *i.e.*, that they are allowed to move "toward and away from each other so that the lengthwise inclined angle changes to an opposite lengthwise inclined angle" as stated in claims 1, 8 and 9. Plaintiff points to this interpretation by stating that its construction of the two phrases "move toward and away from each other" and "move longitudinally" are "analogous" and "proceed[] along the same logical lines." FN39 That the claim language differs in each case is understandable; in claims 1, 8, and 9, Plaintiff is describing with specificity the way in which the right and left massage members move to perform their function, while in claim 4 and the "guide member" subparagraphs of claims 8 and 9, Plaintiff is describing the movements allowed by the guide member.

The Court therefore **construes** "allowing the right and left massaging members to move longitudinally" to mean "**allowing the right and left massaging members to move toward and away from each other, as set forth in claim 1.**"

Disputed Term 15. "footrest" (claim 8)

Plaintiff asserts that "footrest" as used in Claim 8 ("a footrest having a lower leg massager") requires no clarifying construction, but if the Court requires one, suggests "an item for directly or indirectly resting or supporting a foot or feet," or, alternatively, "the leg massager unit with cloth covering it." King Kong asserts that it should be construed as "a rest for the foot." WFO disputes the second of Plaintiff's suggested constructions, pointing out that the construction would render the claim language redundant. Plaintiff is concerned that the Defendants "hope to import the implied limitation of direct contact for the feet into Claim 8, which the mechanism would not have when it is being used as a leg massager."

An inventor is allowed to be his own lexicographer, and may imply in the specification that a claim term has other than its ordinary meaning. Schoenhaus, 440 F.3d at 1358. The '0 Patent's preferred embodiment notes that "footrest" is illustrated as Element 31 in the specification diagrams. FN40 Element 31 appears in Figures 8(b) and 9, and in both instances, Element 31 is congruent with Element 1 (the "lower leg massager"). In both cases, the "footrest" appears to be designed to directly contact either the lower leg by itself or possibly the lower leg and foot together. In neither drawing is there a separate footrest that would contact only the foot, or a separate section of the leg massager that appears specifically designed to accommodate a foot. In other words, it appears from the specification language and drawings that the lower-leg massager *is* what Claim 8 refers to as a "footrest."

The proper construction of Claim 8's "footrest," then, differs from the word's ordinary meaning. As a result, the Court rejects Plaintiff's argument that the term needs no clarifying construction. The Court **adopts Plaintiff's alternative construction** as set forth in the Joint Claims Construction chart, and finds that "footrest" means "**a support for the lower legs.**" FN41

Disputed Term 16. "Revolving shaft" (claim 4, 8 and 9)

Plaintiff and WFO propose no clarifying construction for this phrase. In its claims construction chart (but

not the claims construction briefs before the Court) King Kong construes "revolving shaft" to mean "a shaft that revolves in different directions." This construction appears only in the claims construction charts; King Kong's briefs provide no argument for the construction. Thus the Court is left with the choice whether to add "in different directions" to the construction of this phrase without the guidance of any argumentation by any party.

As "revolving shaft" and "a shaft that revolves" are completely synonymous, the only substantive addition King Kong proposes is the phrase "in different directions." Thus Defendant's construction serves no purpose other than to exclude shafts that revolve in only one direction. Neither the claim language nor any other intrinsic or extrinsic evidence supports Defendant's proposed limitation, and the Federal Circuit has repeatedly cautioned against importation of additional, extraneous limitations into a patent's claim terms. *See, e.g.*, Phillips, 415 F.3d at 1320. This Court declines to import the limitation proposed by King Kong.

The Court **rejects King Kong's construction** and finds that "revolving shaft" **needs no clarification**.

Disputed Term 17. "Guide members" (claims 4, 8, and 9)

King Kong argues that "guide members" is a means-plus-function limitation because as set forth in Claims 4 and 8, the "guide members" are defined not by their structure but by their function, *i.e.*, "for allowing the right and left massaging members to move longitudinally with respect to the revolving shaft but restricting a rotation with respect to the revolving shaft." FN42 Plaintiff responds that both "guide" and "member" are structural terms in ordinary usage.

The Federal Circuit has held that "the use of the term 'means' is central to the analysis, because the term 'means,' particularly as used in the terms 'means for' is part of the classic template for functional claim elements." *Lightning World v. Birchwood Lighting*, 382 F.3d 1354, 1358 (Fed.Cir.2004) (citation and internal quotes omitted.) "[W]e have seldom held that a limitation not using the term 'means' must be considered to be in means-plus-function form." *Id.* at 1362. This is a presumption which may be overcome, but the mere fact that a mechanism is described in functional terms, or that a term (such as "member") does not bring to mind a particular structure, is not dispositive. *Id.* at 1360; *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1369-1370 (Fed.Cir.2002).

The Court may consult a dictionary "to determine if a disputed term has achieved recognition as a non denoting structure, even if the noun is derived from the function performed." *Lighting World*, 382 F.3d at 1360 (citation omitted). As Plaintiff points out, *Webster's Third New International Dictionary* defines "guide" as "a contrivance for directing the motion of something; *esp.*: such a contrivance (as in a tool) having a directing edge, surface, or channel." FN43 That Plaintiff intended to use "guide" in this way is supported by the language of the specification, which states that "[t]he guiding member comprises a guide pin projecting from the center of the lower edge of the massaging member downwardly, and a guide rail with which the guide pin engages ... the guide rail extends in the same direction as the revolving shaft immediately under the revolving shaft on the base plate for guiding the projecting end of the guide pin so as to be capable of moving in the axial direction of the revolving shaft ... but not in the direction orthogonal to the axial direction." FN44 Moreover, "member," while a broad term, may denote structure. *See, e.g.*, *CCS Fitness*, 288 F.3d at 1367 (" 'member,' as defined by common and technical dictionaries, refers to a structural unit such as a ... beam or tie, or a combination of these ..."). FN45 Because both "guide" and "member" are nouns denoting structure, the court finds that "guide members" is **not a mean-plus-function limitation**.

As the Court finds that the phrase "guide member" is clear in combination with the phrase "for allowing the right and left massaging members to move longitudinally with respect to the revolving shaft but restricting a rotation with respect to the revolving shaft," the Court finds that the phrase "guide member" **does not need clarification.**

Disputed Term 18. "Axially intermediate" (claims 4, 8, and 9)

King Kong construes "axially intermediate" to mean "in the middle of the shaft rather than toward the ends." The other parties propose no competing construction. Courts are free to consult dictionaries and technical treatises when construing claim terms "so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents." FN46 *Merriam-Webster's Collegiate Dictionary* defines "axial" as "situated around, in the direction of, on, or along an axis," and "intermediate" as "being or occurring at the middle place, stage, or degree or between extremes." FN47 Figures 1, 2, 4(a), 4(b), 5(a), 5(b), 6(a), 6(b), 7(a) and 7(b) of the '940 Patent depict the massaging members (and cams to which they are attached) as located between the extreme ends of the axis of the rotating shaft.

Because "axially intermediate" is clear in the context of the patent language, the Court finds that it **needs no clarifying construction.**

Disputed Term 19. "Cam surface inclined with respect to the revolving shaft" (claims 4, 8, and 9)

King Kong proposes that "cam surface inclined with respect to the revolving shaft" be construed as "the cam surface is flat and forms an angle with revolving shaft [sic]." FN48 King Kong's Reply to Plaintiff's Construction Brief asserts that a 180-degree rotation of the inclined angle creates "a mirror image." FN49 Finally, in the joint construction chart, King Kong adds that the cam forms a "single" angle with the revolving shaft.

Plaintiff disputes King Kong's construction that "the cam surface is flat" because it imports a limitation from the preferred embodiment. FN50 Plaintiff's argument is supported by the fact that King Kong's proposal of this construction cites "elements 17, 15 in Fig. 1-3." FN51 No other intrinsic evidence supports King Kong's construction. This reference to the preferred embodiment is insufficient to support the imposition of a new structural limitation. Finally, King Kong's assertion that the cam forms a "single" angle is in essence a recapitulation of its assertion that "the cam surface is flat," since a non-flat cam surface would necessarily form multiple or changing angles with respect to the cam surface.

The Court **rejects King Kong's construction.** The Court also finds that the patent language depicting a "cam surface inclined with respect to the revolving shaft," when taken in the context of the entire patent including the specification and drawing of the preferred embodiment, is clear enough to **need no clarifying construction.**

The clerk shall serve a copy of this Order on all parties.

IT IS SO ORDERED.

FN1. '0 Patent, col 7:3-5 (references to diagram omitted).

FN2. Id., col. 8:22-25 (references to diagram omitted).

FN3. WFO Opening Claim Constr. Brief at 7:16-19; see also '0 Patent at Fig. 1.

FN4. '0 Patent, col. 9, ll. 1-4 (references to diagram omitted).

FN5. *Id.* at 8:8-10; see also Declaration of E. Tim Walker in Support of Defendants WFO Import LLC and Blair Hayes' Opening Claim Constr. Br. ("Walker Deck"), Exh. D (excerpts from *Webster's Ninth New Collegiate Dictionary* (9th ed.1983)).

FN6. *See Webster's Third New International Dictionary* (1976) at 243 (defining "board" as "a piece of sawed lumber of little thickness but considerable surface area usu. being rectangular and of a length greatly exceeding its width").

FN7. '0 Patent, col. 4:25.

FN8. *Id.*

FN9. '0 Patent, col. 4:65-67 (references to diagram omitted.)

FN10. *See pp. 7-8, infra.*

FN11. '0 Patent, col. 9:61-col. 10:2.

FN12. '0 Patent file wrapper, attached as exhibit to Clement Chang's Third Supplemental Claim Construction Declaration, p. 28 of 387.

FN13. *Id.*

FN14. *Id.* at p. 138 of 387.

FN15. *Id.* at p. 138-39 of 387.

FN16. *Id.* at p. 157 of 387.

FN17. Id.

FN18. '0 Patent, Fig. 2.

FN19. WFO's Supp. Cl. Const. Br. 5 (citing '0 Patent at col. 1:27-35).

FN20. Id. at 6.

FN21. See Disputed Term 6, below.

FN22. '0 Patent, col 1:27-55. This court does *not* find that all devices which include airbags are disclaimed by the '0 patent. As Plaintiff rightly points out, it is possible for a device to infringe even though it contains additional elements. (Pl.'s Supp. Cl. Const. Br. 8.)

FN23. '0 Patent, col. 10:11-14.

FN24. WFO's Opening Claim Constr. Brief 11.

FN25. '0 Patent, col. 9:61-col. 10:2.

FN26. The court does not hold that "predetermined" necessarily means "fixed;" moreover, the court is not offering a construction of "fixed," which is not a disputed term for the purposes of this Order.

FN27. '0 Patent, col. 9:61-col. 10:4.

FN28. '0 Patent, col. 10:23-27.

FN29. *Webster's Collegiate Dictionary* 712, 1431 (11th Ed.2003).

FN30. '0 Patent, col. 10:22-25; col. 12:28-32.

FN31. "0 Patent, col. 7:14-col. 8:20.

FN32. "0 Patent, col. 7:20-col. 8:6.

FN33. See Disputed Term 9, above.

FN34. Pl.'s Responsive Claim Constr. Br. 20.

FN35. *See id.*

FN36. "0 Patent, Col. 10:11-14.

FN37. WFO's Opening Claim Constr. Br. 24.

FN38. *See Webster's Collegiate Dictionary* 555 (11th Ed.2003)(defining "guide" as "a device for steadying or directing the motion of something").

FN39. Pl.'s Opening Claim Constr. Br. 13.

FN40. "0 Patent, Col. 9, lines 1, 12, 32.

FN41. Joint Claim Constr. Chart 17.

FN42. King Kong's Opp. To PL's Claim Constr. Br. 7-8.

FN43. *Webster's Third New International Dictionary* 1009 (2002 ed.) (Cited in Pl.'s Responsive Claims Constr. Constr. Br. 18.)

FN44. "0 Patent, col. 6:1-10.

FN45. *Merriam-Webster's Collegiate Dictionary* 774 (11th Ed.2003).

FN46. Phillips, 415 F.3d at 1318 (citation omitted).

FN47. *Id.* at 87 and 653.

FN48. King Kong's Reply to Pl.'s Constr. Br. 5.

FN49. *Id.*

FN50. Pl.'s Responsive Claim Constr. Br. 21.

FN51. King Kong's Reply to Pl.'s Constr. Br. 5.

C.D.Cal.,2007.

Interactive Health LLC v. King Kong USA, Inc.

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