

United States District Court,
S.D. Florida.

ARMOR SCREEN CORPORATION, a Florida Corporation,
Plaintiff.

v.
STORM CATCHER, INC., a Florida Corporation, et al,
Defendants.

No. 07-81091-Civ

March 10, 2009.

Jeremy Dutra, Squire Sanders & Dempsey, Washington, DC, Robert C. L. Vaughan, Javier Asis Lopez, Squire Sanders & Dempsey LLP, Miami, FL, for Plaintiff.

Andrew William Ransom, Benjamin Michael Hanrahan, John Fulton, Jr., David Andrew Gast, Oliver Alan Ruiz, Malloy & Malloy, Clifford Lawrence Rostin, Kaplan Zeena, Raquel Aurora Regalado-Herrera, Herrera & Regalado-Herrera PA, Miami, FL, for Defendants.

REPORT AND RECOMMENDATION

ANN E. VITUNAC, United States Magistrate Judge.

THIS CAUSE is before the Court on Order of Reference (DE 36), filed April 9, 2008, from U.S. District Judge Kenneth L. Ryskamp "for a hearing ... and decision on defendants' motion for claim construction [**DE 30**]," Order of Reference (DE 59), filed May 13, 2008, from U.S. District Judge Kenneth L. Ryskamp for this Court "to take all necessary and proper action as required by law, and/or to submit a Report and Recommendation to this Court on ... defendants' motion for a hearing on its motion for claim construction [**DE 31**], filed on April 3, 2008 ..." and Order of Reference (DE 64), filed May 16, 2008, from U.S. District Judge Kenneth L. Ryskamp "for all pretrial matters and to take all necessary and proper action as required by law, and/or to submit a Report and Recommendation to this Court."

Before the Court is the parties' Joint Claim Construction Statement (DE 161), filed November 20, 2008. Pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996), a claim construction hearing was held on January 15, 2009. This matter is now ripe for review.

BACKGROUND

This case involves parties that manufacture and install hurricane protection screens in Florida. On November 16, 2007, Plaintiff filed a Complaint (DE 1) against several Defendants alleging causes of action under federal and Florida law for patent infringement, unfair competition and false advertising, deceptive and unfair trade practices, and tortious interference with business relationships. The Complaint alleges that

Defendants have infringed the following two patents owned by Plaintiff: (1) U.S. Patent No. 6,325,085 (issued December 4, 2001) (Patent '085), entitled "Flexible Protective System to Prevent Penetration of Wind Borne Missiles," and (2) U.S. Patent No. 6,865,852 (issued March 15, 2005) (Patent '852), entitled "Flexible Wind Abatement System."

The Complaint alleges Defendants make, use, market, distribute, and/or sell flexible hurricane protection systems under the brand name "Storm Catcher" that infringe upon Patents '085 and '852. The Complaint further alleges that Defendants falsely represent that Storm Catcher systems are somehow associated with Plaintiff's Armor Screen systems, and that Defendants intentionally interfered with Plaintiff's relationships with its Armor Screen system dealers. On August 29, 2008, Plaintiff filed a First Amended Complaint (DE 110) to add previously unnamed Defendants Storm Smart Industries, Inc. and Storm Smart Sales, Inc., and to add claims against these additional Defendants. In their respective Amended Answers (DE 118, 119, 120, 121, 122, 123), Defendants generally deny liability and allege numerous affirmative defenses and counterclaims, including challenges to the validity of the patents at issue.

On April 3, 2008, Defendants filed a motion asking the Court to adopt proposed constructions of certain claim terms of the patents in suit (DE 30, 51). Defendants also requested a claim construction hearing (DE 31). On April 9, 2008, the District Court referred the matter to the undersigned to conduct a hearing and issue a report and recommendation regarding the claim construction issues (DE 36). As a result of this referral, this Court held a preliminary hearing on April 30, 2008 (DE 53). On July 3, 2008, this Court entered an Omnibus Order (DE 77) setting forth a claim construction briefing schedule, which was to occur simultaneously with discovery. On July 25, 2008, in accordance with the briefing schedule, Plaintiff filed two Claim Charts (DE 84), one for each patent, identifying all asserted claims and accused devices. Plaintiff also included a comparison chart identifying its proffered construction of each asserted claim and its contentions of how each Defendant infringes that claim. Thereafter, the parties exchanged claim construction statements amongst themselves. Ultimately, the parties filed a Joint Claim Construction Statement (DE 161) with the Court identifying the remaining claim construction issues in the case.

THE PARTIES' JOINT CLAIM CONSTRUCTION STATEMENT

The parties identified eight claims as being at issue: (1) independent claim 10 of Patent '085, and (2) independent claim 1 and dependent claims 2, 3, 4, 6, 8 and 9 of Patent '852. FN1 In their joint statement, the parties identified their agreed construction of claims 3, 4, and 6 of Patent '852. As to the remaining five claims, the parties identified their agreed construction of portions of those claims. The parties also identified portions of the claims remaining in dispute. Specifically, the parties identified a total of eighteen disputed claim terms. As to each disputed claim term, the parties set forth their proposed construction. The parties submitted intrinsic and extrinsic evidence in support of their respective constructions. Additionally, the parties provided written rebuttal statements to the proposed constructions of disputed terms submitted by the opposing party.

FN1. By statute, a claim may be written in independent or dependent form. 35 U.S.C. s. 112. Independent claims are those which stand on their own, whereas dependent claims depend on a single claim or on several claims and generally express particular embodiments.

The parties filed the following evidentiary materials, which the Court has reviewed:

Exhibit Patent '085

A:

Exhibit Patent '085's Prosecution File History: This exhibit comprises the official written record of
B: proceedings in the U.S. Patent and Trademark Office (PTO) detailing the prosecution of the patent application for Patent '085.

Exhibit Patent '852

C:

Exhibit Patent '852's Prosecution File History: These exhibits comprise the official written record of
D-1 proceedings in the PTO detailing the prosecution of the patent application for Patent '852.

and D-
2:

Exhibit Plaintiff's Rebuttal of Defendants' Proposed Claim Construction. Plaintiff's rebuttal arguments
E: correspond with the disputed claim terms for each asserted claim set forth in the Joint Claim Construction Statement.

Exhibit Plaintiffs extrinsic evidence in support of its proposed constructions including (1) two expert
F-1 reports of John D. Pratt, dated September 21, 2008 and October 27, 2008, respectively, (2) U.S.
through Patent No. 6,176,050 (Patent '050) (Patent '085 cites and is a continuation-in-part of Patent '050),
F-5: (3) McGraw-Hill Dictionary of Scientific and Technical Terms' definition of "opposite side," and
(4) Merriam-Webster Online Dictionary's definition of "juxtaposed."

Exhibit Defendants' Rebuttal of Defendants' Proposed Claim Construction. Defendants' rebuttal
G: arguments are set forth in a chart and correspond with the disputed claim terms for each asserted claim set forth in the Joint Claim Construction Statement.

Exhibit Defendants' extrinsic evidence in support of its proposed constructions including (1) proposed
H-1 claim construction charts for Patents '085 and '852, (2) two expert reports of Do Y. Kim, dated
through September 22, 2008 and October 27, 2008, respectively, (3) the April 3, 2008 memorandum of
H-7: law filed with the Court in support of Defendants' first motion for claim construction, (4) the
November 13, 2008 expert report of Lee A. Swanger, and (5) Merriam-Webster Online
Dictionary's definition of "survival."

MARKMAN HEARING

On January 15, 2009, this Court held a hearing to permit the parties to provide a concise overview of their written claim construction submissions and the underlying subject matter and general background of the disputed patent claims. The parties first informed the Court that they had reached no further stipulations other than those set forth in their Joint Claim Construction Statement, but stated that their proposed constructions were "not far apart." The Court confirmed that individual Defendant Stephen Johnson fully joined in the proposed constructions set forth by the other Defendants. The Court also confirmed with the parties that there has been no prior court construction of the patent claims at issue. Upon inquiry by the

Court, the parties corrected their agreed construction of the claim term "a peripheral hem" in claim 2 of Patent '852 as being "At least one panel ..." rather than "The at least one panel ..."

Each party began by presenting a general overview of the background of Patents '085 and '852. Then, each party presented in detail its respective proposed constructions of each disputed claim term with references to evidence in support thereof. For ease of reference, the parties' relevant proffers as to each disputed claim term is included as part of the discussion of each such claim term below. At the hearing, each party relied almost exclusively on intrinsic evidence. No witnesses testified. During the course of the hearing, the parties stipulated to agreed constructions of two additional claim terms originally disputed. At the close of the hearing, the Court reserved ruling on the claim construction issues.

DISCUSSION

A patent infringement analysis entails two steps. First, as a matter of law, a court must determine the meaning of the patent claims asserted to be infringed. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). Second, a court must apply the facts to determine if the device accused of infringing falls within the scope of the claims as construed, *Id.* Only the first step, commonly referred to as claim construction, is presently at issue before the Court.

The Court begins its analysis by discussing applicable law governing claim construction. The Court will then undertake the task of construing the claim terms in light of the law and the evidence.

I. CLAIM CONSTRUCTION STANDARDS

A patent describes the scope of an invention and alerts the public as to what exclusive rights a patentee owns, while also alerting as to what remains open to the public. By statute, a patent consists of "one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. s. 112. A patent must include a written description of the invention that will enable one of ordinary skill in the art to make and use it. *Id.*

Patent claims are construed by the Court as a matter of law, *Markman*, 52 F.3d at 979 (a "court has the power and obligation to construe as a matter of law the meaning of language used in the patent claim): *see also* *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed.Cir.1998) (en banc). A "patent covers the invention or inventions which the court, in construing its provisions, decides that it describes and claims." *Markman*, 52 F.3d at 979.

Federal Circuit case law sets forth principles to guide courts in construing patent claims. These principles, however, are not hard and fast rules. *See* *Phillips v. AWH Corp.*, 415 F.3d 1303, 1324 (Fed.Cir.2005) (en banc) ("[T]here is no magic formula or catechism for conducting claim construction."). Ultimately, the Court's construction must be guided by the claim language in context of the entire patent. *Id.* at 1312 (reaffirming that the claims are of primary importance in determining what is covered by the patent); *Nystrom v. Trex Co.*, 424 F.3d 1136, 1142 (Fed.Cir.2005) (acknowledging that the "construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction"). Indeed, it is a long-standing " 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude,' " and it would be error " 'to construe it in a manner different from the plain import of its terms.' " *Phillips*, 415 F.3d at 1312 (citations omitted). While a court's construction is guided by claim language, a court may not redraft

claims, even when the only reasonable interpretation results in a nonsensical claim. *See* *Chef America, Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371, 1374 (Fed.Cir.2004) (collecting cases). Thus, when the claim is unambiguous and there is only one reasonable construction of the claim language, the court must give the claim that construction. *See id.*

Disputed claim terms are not viewed in a vacuum, but in context of the claim language and the entire intrinsic record, which includes the claims themselves, the specification, and the prosecution file history. *Nystrom*, 424 F.3d at 1142; *Phillips*, 415 F.3d at 1313-15: *see also* *Free Motion Fitness, Inc. v. Cybex Int'l, Inc.*, 423 F.3d 1343, 1348 (Fed.Cir.2005). Claim construction analysis requires a court to view the claims "in the context of those sources available to the public that show what a person of skill in the art would have understood" the disputed language to mean. *Phillips*, 415 F.3d at 1314. Federal Circuit case law classifies these sources into categories, each having different weight.

First, a court must look to the words of the claims themselves, The "words of a claim 'are generally given their ordinary and customary meaning.' " *Id.* at 1312 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996)). Ordinary meaning "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Id.* at 1313. "Courts construe claim terms in order to assign a fixed, unambiguous, legally operative meaning to the claim." *Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1377 (Fed.Cir.2005).

The Federal Circuit recognizes that "the context in which a term is used in the asserted claim can be highly instructive." *Phillips*, 415 F.3d at 1314: *see also* *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed.Cir.2003) ("While certain terms may be at the center of the claim construction debate, the context of the surrounding words of the claim also must be considered in determining the ordinary and customary meaning of those terms."); *Black & Decker, Inc. v. Robert Bosch Tool Corp.*, 260 F. Appx, 284, 287 (Fed.Cir.2008). In other words, in addition to the disputed claim term's language, a court can also look to the language of other claims in determining the proper construction of a particular term. *Phillips*, 415 F.3d at 1314 (finding that "[o]ther claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term"). Since "claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in other claims." *Id.* Additionally, "differences among claims can also be a useful guide in understanding the meaning of particular claim terms;" as an example, "the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim." *Id.* at 1314-15.

Second, a court should review the patent specification. The specification serves to instruct and enable those skilled in the art to use the invention as well as to provide a best mode for practicing the invention. *Id.* at 1323. "[T]he specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." *Id.* at 1315; *Teleflex, Inc. v. Ficoso N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed.Cir.2002), This is true because a patentee may define his own terms, give a claim term a different meaning than the term would otherwise possess, or disclaim or disavow the claim scope. *Phillips*, 415 F.3d at 1316; *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374 (Fed.Cir.2008). The specification may also resolve ambiguous terms "where the ordinary and accustomed meaning of the words used in the claims lack sufficient clarity to permit the scope of the claim to be ascertained from the words alone." *Teleflex*, 299 F.3d at 1325.

It is not improper for a court to rely heavily on the specification for guidance on interpreting the claim.

Phillips, 415 F.3d at 1323. The claims, however, may cover only a portion of the procedure or a part of the invention disclosed in the specification. *See id.* at 1327; *Ventana Med. Sys., Inc. v. BioGenex Labs. Inc.*, 473 F.3d 1173, 1181 (Fed.Cir.2006). In using the specification, a court is cautioned against importing a limitation from the specification into the claim or confining the claims to the preferred embodiments. Phillips, 415 F.3d at 1323; *see also* *Ventana Med. Sys., Inc.*, 473 F.3d at 1181; *Varco, L.P. v. Pason Sys. USA Corp.*, 436 F.3d 1368, 1373 (Fed.Cir.2006) ("this court will not at any time import limitations from the specification into the claims"). While noting that the distinction between using the specification to interpret a claim's meaning and importing limitations from the specification into that claim can be difficult to apply in practice, the Federal Circuit advises that these principles can be applied with reasonable certainty if the court focuses on "understanding how a person of ordinary skill in the art would understand the claim terms." Phillips, 415 F.3d at 1323.

Third, the Court can review the prosecution file history for the patent as part of the intrinsic record. Phillips, 415 F.3d at 1317; *Ventana Med. Sys., Inc. v. BioGenex Labs. Inc.*, 473 F.3d 1173, 1181 (Fed.Cir.2006); *MBO Labs., Inc. v. Becton, Dickinson & Co.*, 474 F.3d 1323, 1329 (Fed.Cir.2007) (the specification and prosecution history give meaning and scope to the words in the claims). The prosecution history "directly reflects how the patentee has characterized the invention." *MBQ Labs.*, 474 F.3d at 1329. However, because the prosecution history represents 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, 415 F.3d at 1317. Nevertheless, it can be helpful "by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of the prosecution." *Id.* "Disclaimers based on disavowing actions or statements during prosecution ... must be both clear and unmistakable." *Sorensen v. Int'l Trade Comm'n*, 427 F.3d 1375, 1378-79 (Fed.Cir.2005). Further, it is the applicant and not the examiner who must " 'give up or disclaim subject matter' " that would otherwise be included within a claim's scope. *Id.* at 1380 (citation omitted). An examiner's statement alone will not necessarily limit a claim. *Bell Atlantic Network Servs., Inc. v. Covad Commc'ns Group, Inc.*, 262 F.3d 1258, 1273 (Fed.Cir.2001).

Fourth, and least important of all the sources a court should consider, is extrinsic evidence. Unlike intrinsic evidence, which consists of the claims, specification, and prosecution file history, extrinsic evidence, such as expert opinions, witness testimony, dictionaries, treatises, or other material not part of the public record associated with the patent, is less significant in determining the meaning of disputed claim language. Phillips, 415 F.3d at 1317; *MBO Labs.*, 474 F.3d at 1329. Within the class of extrinsic evidence, dictionaries and treatises may be helpful to the Court in determining the true meaning of the language, as they can be used to understand the technology and construe the claim terms as long as that construction is not inconsistent with the patent documents. Phillips, 415 F.3d at 1318, 1322-23. Finally, the Federal Circuit recognizes that "claims should be so construed, if possible, as to sustain their validity," but this maxim only applies after the court has applied all of the other tools of claim construction and the claim is still ambiguous. *See id.* at 1327; *see also* *Liebel-Flarsheim*, 358 F.3d at 911.

II. CONSTRUCTION OF THE ASSERTED PATENT CLAIMS

As a preliminary matter, after reviewing all of the evidence, including the extensive materials constituting extrinsic evidence provided by the parties as part of the Joint Claim Construction Statement, the Court concludes that it need not consider the extrinsic evidence in construing the claim language at issue. At the hearing, the parties relied very little on such extrinsic evidence and focused almost exclusively on intrinsic evidence in support of their proposed constructions. Moreover, the Court finds that the plain language of the

claims themselves as well as the other intrinsic evidence of record, *i.e.*, the specification and the prosecution history of both patents, resolves any ambiguity in the disputed claim terms and fully supports the Court's construction set forth below. *See Vitronics*, 90 F.3d at 1582 ("[If] an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term ... it is improper to rely on extrinsic evidence.").

PATENT '085

The only claim of Patent '085 asserted by Plaintiff is claim 10, which discloses:

"10. A storm survival kit for protecting a portion of the interior of a structure from the force of the wind and objects carried thereby, said kit comprising a textile material having a fail strength of between 61.3 and 675 pounds per square inch and interstices in the range of 0.6 to 4.8 millimeter, said textile material having at least two opposing edges, said edges having means for securing said textile material to said structure."

1. "storm survival kit"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
storm survival kit	A protective barrier device configured to be quickly deployed on or within a portion of a structure for protecting an interior portion of the structure from the force of the wind and objects carried thereby.	A protective element configured to be quickly deployed to protect a life.

Defendants argue that the ordinary meaning of the term "survival" is "the continuation of life or existence" and not the protection of manmade structures. FN2 Plaintiff counters that such construction "ignores and improperly limits the claim language" because the patentee unequivocally explains in the specification that the invention relates to a protective barrier device to secure not only occupants, but also property.

FN2. Defendants also rely on (1) the applicant's September 5, 2003 amendment in successor Patent '852's prosecution history stating that claim 10 "recites a kit for use in the interior of a building," and (2) a PTO examiner's August 27, 2001 Notice of Allowability statement in Patent '085's prosecution history, to support their argument that claim 10 should be construed as meaning the device must be deployed in the interior of a building. Defendants cite these two prosecution statements, which represent a consistent point of argument, in their rebuttal statement of other claim terms. The Court concludes that Defendants' arguments based on these prosecution statements are more appropriately reserved for discussion in the next and final claim term sections. Accordingly, the Court addresses these arguments in those sections.

The Court concludes that Plaintiff's construction of this claim term is accurate. A review of the surrounding words of claim 10 itself reveals that the phrase "storm survival kit" contemplates a device for use in "protecting a portion of the interior of a structure" from wind and windborne objects, Patent '085, col. 7, Ins. 24-26. Moreover, the specification expressly describes the claimed invention as relating to the "protection of *property* against high winds" and distinguishes prior art as lacking an inexpensive protective barrier for use in "protecting the occupants *and the property*." Patent '085, col. 1, Ins. 13-14; col. 1, Ins. 60-63 (emphasis added). The summary of the invention section of the specification again describes the invention as contemplating the provision of "continuous protection for the occupants *and the property*." Patent '085, col. 2, Ins. 1-4 (emphasis added). Thus, an examination of "storm survival kit" within the context of claim 10's own language, as well as the patent specification, leads to the conclusion that it would be improper to limit

this claim to meaning a device to protect a life as urged by Defendants. Instead, viewing the claim language in light of the specification shows that "storm survival kit" encompasses the protection of the interior portion of the structure, including but not limited to persons and property contained therein. Accordingly, the Court adopts Plaintiff's proposed construction of "storm survival kit."

2. "protecting a portion of the interior of a structure from the force of the wind and objects carried thereby"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
protecting a portion of the interior of a structure from the force of the wind and objects carried thereby.	A protective barrier device configured to be quickly deployed on or within a portion of a structure for protecting an interior portion of the structure from the force of the wind and objects carried thereby.	The protective element configured to be quickly deployed in an interior of a building to protect a life.

The key dispute between the parties is whether claim 10 is meant to include only protective devices placed on the inside of a structure, or if it is meant to include devices placed inside or outside of a structure. Defendants contend that the phrase should be limited to a device configured to be quickly deployed only "in an interior of a building to protect a life." On the other hand, Plaintiff asserts that there is no structural feature described by this phrase, *i.e.* the phrase should not be narrowly interpreted to include only devices deployed on the interior of a structure. Plaintiff argues that this claim term, when read together with the specification, clearly encompasses a device that can be configured for quick deployment inside or outside of a structure.

For the reasons already noted in the previous section, the Court rejects the portion of Defendants' proffered construction limiting this claim term to protection of a life. As to the interior/exterior dispute, Defendants referred the Court to figures 2, 3, and 8 of Patent '085 at the hearing in support of their argument that this term should be construed to include only devices placed on the inside of a building. While it is true that these three figures show the placement of the device inside a structure, Defendants' selective and isolated reference to and reliance upon these figures alone is both misleading and misplaced. Indeed, figures 9 and 10 of Patent '085 clearly show the placement of the patented device on the outside of a structure, which offers support for a construction encompassing a device configured for placement on the inside or outside of a structure.

Defendants also rely heavily on a September 5, 2003 amendment by the patentee during the prosecution of Patent '852, a continuation-in-part of Patent '085. The Court has reviewed the relevant prosecution history related to this September 5, 2003 amendment. This prosecution history shows that during the prosecution of Patent '852, a PTO examiner rejected claim 1 of the originally filed Patent '852 application based on the judicially created doctrine of double patenting. Specifically, the examiner stated that the proposed claim, if allowed, "would improperly extend the 'right to exclude' already granted" by claim 10 of Patent '085, JCCS, FN3 Exhibit D (DE 161-5), July 3, 2003 Official Action at 4. In response to this PTO examiner rejection, the applicant, through counsel, filed the September 5, 2003 amendment, which states:

FN3. JCCS refers to the parties' Joint Claim Construction Statement (DE 161).

"Claim 10 of [Patent '085] recites a kit for use in the interior of a building having a material *with opposite edges which are connected to the building*. The instant application is directed to a material for extended use and one edge is connected to the building and the opposing edge is connected to the ground. This is a fundamental difference between the patent claim and the application. There is no teaching in [Patent '852's] application to use [the invention set forth in Patent '852] in the interior of a building. Therefore, it is not evidence how any claim that may be allowed in this application would extend the life of claim 10 of the patent."

JCCS, Exhibit D (DE 161-5), September 5, 2003 Amendment at 3-4 (emphasis in original). After this amendment was filed, the PTO examiner once again repeated its double patenting objection. JCCS, Exhibit D (DE 161-5), December 1, 2003 Office Action at 3. Ultimately, and as suggested by the examiner, the applicant overcame the rejection by filing a terminal disclaimer under 37 C.F.R. s. 1.321(c). FN4 JCCS, Exhibit D (DE 161-5), February 10, 2004 Terminal Disclaimer.

FN4. A terminal disclaimer is a binding statement made with the PTO in a case where more than one patent has been obtained by the inventor on the same invention. The disclaimer will state that the later patent will expire at the same time as the former patent and the later patent will be enforceable only as long as both the patents are commonly owned.

While the Court recognizes that explicit arguments made during a later prosecution to overcome prior art can lead to narrow claim interpretations, *Seachange Int'l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1372-73 (Fed.Cir.2005) ("[w] here an applicant argues that a claim possesses a feature that the prior art does not possess in order to overcome a prior art rejection, the argument may serve to narrow the scope of otherwise broad claim language"), any such disclaimer must be clear and unambiguous. *Id.* at 1373: *see also* *Purdue Pharma L.P. v. Endo Pharm., Inc.*, 438 F.3d 1123, 1136 (Fed.Cir.2006) ("[u]nder the doctrine of prosecution disclaimer, a patentee may limit the meaning of a claim term by making a clear and unmistakable disavowal of scope during prosecution"). In determining whether the doctrine of prosecution disclaimer applies to disavow a claim's scope, the prosecution history must be considered in its entirety. *Seachange*, 413 F.3d at 1372.

Here, Defendants argue that the applicant's statement in the September 5, 2003 amendment that "Claim 10 ... recites a kit for use in the interior of a building" narrows the scope of claim 10 to cover only devices used "in an interior of a building." Plaintiff counters that this statement does not amount to a clear and unambiguous disclaimer of claim scope. This Court agrees with Plaintiff. Viewing the prosecution history in its entirety shows that, in an effort to overcome the examiner's rejection, the applicant emphasized that claim 10 of Patent '085 discloses a device "having a material with "opposite edges *which are connected to the building*" while Patent '852's application "is directed to a material for external use and one edge is connected to the building and the opposing edge is connected to the ground." JCCS, Exhibit D (DE 161-5), September 5, 2003 Amendment at 3 (emphasis in original). A reasonable reading of the amendment in context is that the applicant attempted to distinguish claim 10 from Patent '852's application on the basis of whether the edges were connected to the building or not, rather than whether the device is deployed in the interior or exterior of a structure. Under these circumstances, the Court declines to find the later prosecution statement to be a clear, unequivocal disclaimer limiting the coverage of Patent '085's claim 10 to placement of the patented device only in a structure's interior.

This Court finds additional support for this conclusion when considering that Patent '085's specification unambiguously provides for the device to be placed inside or outside of a structure, *See Elbex Video, Ltd.*

v. Sensormatic Elecs. Corp., 508 F.3d 1366, 1372 (Fed.Cir.2007) (reaffirming that "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") (quoting Phillips, 415 F.3d at 1317). Specifically, Patent '085's Abstract states that the "flexible material may be included within the confines of a building in a free standing form or incorporating one or more interior walls of the building or structure" or "attached to the exterior of a structure to cover openings in the structure." Patent '085, Abstract. Further, the specification expressly contemplates use of the material "as an enclosure within the building or structure [which] could be free standing or incorporate one or more interior walls of the building or structure," while also expressly providing for the use of "material deployed *on the outside of buildings* to cover small openings such as windows and doors." *Id.* at col. 2, Ins. 5-11. The patent specification also refers to the patented device as being placed "on or inside" and "on or within" a structure. Patent '085, col. 1, Ins. 14-16; col. 1, Ins. 61-62.

The Court concludes that the phrase "protecting a portion of the interior of the structure" is meant to be an intended use of the device rather than a limitation on where the device is placed. A review of the claim and specification does not support the narrowing construction proposed by Defendants. To the contrary, Plaintiff's proposed interpretation is consistent with the claim language and specification. Thus, the Court declines to construe this disputed phrase as being limited to a device deployed only in a structure's interior and hereby adopts Plaintiff's proposed construction, which accurately refers to a protective barrier device configured to be placed on the interior or exterior of a structure with the overall intended purpose of protecting the structure's interior.

3. "*a textile material*"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
a textile material	A woven, knitted, nonwoven or extruded material.	A single protective element formed of a woven synthetic material such as polypropylene formed in a monofilament and woven into a geotextile.

At the hearing, Defendants maintained that the parties' proposed constructions are "not too far apart," A comparison of the parties' proposals, however, tends to show otherwise. In the end, the Court concludes that Plaintiff's proposed construction is proper. Patent '085's summary of the invention states that the "invention contemplates the use of a flexible barrier of woven synthetic textile." Patent '085, col. 1, Ins. 65-66. The specification later discloses figure 7 as illustrating a preferred construction of the "textile material of this invention" and states that a "suitable material" for use as the textile material "is polypropylene formed in a monofilament and woven into a geotextile." Patent '085, col. 5, Ins. 19-22. That very same paragraph goes on to state that "[w]hile a woven material is shown [in figure 7], the material may be knitted, nonwoven or extruded with apertures formed therein." Patent '085, col. 5, Ins. 25-30. It is clear that Defendants' proposed construction selectively excludes this latter portion of the paragraph and, thus, improperly confines the claim language to a narrow version of the preferred embodiment.

The Federal Circuit consistently emphasizes that courts may not limit a claim to a particular embodiment appearing in the written description when the claim language is broader than the embodiment, *i.e.* courts may not import limitations from the specification into the claim. *See* Varco, 436 F.3d at 1373 ("this court will not at any time import limitations from the specification into the claims"); *Resonate Inc. v. Alteon Websystems, Inc.*, 338 F.3d 1360, 1364-65 (Fed.Cir.2003) ("a particular embodiment appearing in the

written description may not be read into a claim when the claim language is broader than the embodiment"). In this case, the term "textile material" encompasses a broader meaning than that which is set forth by Defendants. The Court concludes that Plaintiff's interpretation is more accurate and, thus, construes "a textile material" as meaning "a woven, knitted, nonwoven or extruded material."

4. "having a fail strength of between 61.3 and 675 pounds per square inch "

This claim term sets forth certain strength characteristics of the textile material. Following a discussion with the Court at the Markman hearing, the parties stipulated to the following construction of this previously disputed term: "The maximum stress at which the textile material bursts, being between 61.3 and 675 pounds per square inch."

5. "interstices in the range of 0.6 to 4.8 millimeter"

As set forth in the Joint Claim Construction Statement (DE 161), the parties agree that this term means: "Having spacing between the warp or weft that are between about 0.6 millimeters and 4.8 millimeters."

6. "at least two opposing edges"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
at least two opposing edges	No construction necessary- ordinary meaning.	The single protective element having at least two edges disposed in parallel to one another.

Plaintiff contends that the ordinary meaning of this claim language is apparent and that no construction is necessary. Defendants maintain that "two opposing edges" should be construed to mean "at least two edges disposed in parallel to one another." Defendants cite no intrinsic evidence to support their proposed construction. At the hearing, Plaintiff argued that the term "parallel" is a narrower subset of "opposing" and that nothing in the claim or specification supports the Defendants' narrower construction. Plaintiff further noted that claim 9 of Patent '852 expressly uses the term "parallel," while the instant claim 10 of Patent '085 expressly uses the term "opposing." Defendants offered no rebuttal to Plaintiffs argument at the hearing.

The problem with Defendants' proposal is that the ordinary meaning of the term "opposing" does not necessarily connote edges that are parallel to one another and Defendants cite no intrinsic evidence to support their narrower construction. The Court agrees with Plaintiff that Defendants' proposed construction impermissibly narrows the claim language, The Court concludes that the ordinary meaning of "at least two opposing edges" is readily apparent and that no construction is necessary.

7. "said edges having means for securing said textile material to said structure "

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
said edges having means for securing said	A fastener that secures at least one edge of the textile material to an interior or exterior surface of a structure, The structure and equivalents thereof to the fastener is a first fastener configured for being affixed to an interior or exterior surface of the structure and a second fastener that is secured to or formed integral with the edges of the textile material, the first and	At least two opposing edges of the single protective element include a fastener to mount the single protective element to the interior of the structure in a manner that defines an enclosure or shelter in the interior of the structure in which one or more

textile second fasteners being releasably secured to each other. person is protected.
material
to said
structure.

The parties agree that this claim term is a means-plus-function clause to be construed in accordance with section 112 of Title 35 of the United States Code. Section 112 states:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material or acts described in the specification and equivalents thereof.

35 U.S.C. s. 112. Notably, a patentee's use of the word "means" in a claim limitation, as is the case here, creates a presumption that means-plus-function treatment applies. *Welker Bearing Co. v. PHD, Inc.*, 550 F.3d 1090, 1096 (Fed.Cir.2008).

Construing a means-plus-function limitation includes two steps. The first step is to identify the function recited in the claim. *Asyst Techns., Inc. v. Empak, Inc.*, 268 F.3d 1364, 1369 (Fed.Cir.2001). The next step is to identify the corresponding structure set forth in the written description that performs that claimed function. *Id.* Section 112 does not "permit limitation of a means-plus-function claim by adopting a function different from that explicitly recited in the claim," nor does it "permit incorporation of structure from the written description beyond that necessary to perform the claimed function." *Micro Chem., Inc. v. Great Plains Chem. Co.*, 194 F.3d 1250, 1257-58 (Fed.Cir.1999).

The Court turns first to identifying the function recited in the claim. The claim clearly expressly recites a "means ... for" performing the specified function of "securing said textile material to said structure," Thus, this Court identifies securing the textile material to the structure as the claimed function.

Next, the Court turns to the written description to identify the structure corresponding to the function recited in the claim. The corresponding structure may embrace more than the preferred embodiment; a means-plus-function claim encompasses all structures in the specification corresponding to that element and equivalent structures. *Micro Chem.*, 194 F.3d at 1258. When multiple embodiments in the specification correspond to a claimed function in a patent claim, proper application of statutory means-plus-function language generally reads the claim element to embrace each of those embodiments. *Id.*

The parties agree that the structure corresponding to the claimed securing function is a fastener. The parties also agree that the specification discloses a broad range of fasteners. One primary disagreement between the parties centers on whether the claim means that the material is secured by fastener to the interior or exterior surface of a structure (Plaintiff's proposal) or secured to the interior of a structure only and for the sole purpose of protecting one or more persons (Defendants' proposal). As to this disagreement, the Court incorporates by reference its prior discussion finding that while claim 10 provides for the protection of a structure's interior, the claim language does not limit the placement of the patented device to the interior of a structure only. To the contrary, the patent contemplates a device configured to be placed on the interior or exterior of a structure. Additionally, for reasons already stated above, the Court rejects the portion of Defendants' proposal limiting this claim to the protection of lives only.

A second disagreement between the parties is whether this claim term should be construed to mean fasteners positioned and secured in a manner that defines an enclosure or spacing. At the hearing, Defendants argued that Patent '085 goes to great lengths to discuss how the material is secured and that all disclosed embodiments include a defined space. Defendants assert that a proper construction of this claim term must discuss the location and orientation of the fasteners, *i.e.* where and how the fasteners are secured. According to Defendants, a construction without such discussion would "ensnare prior art" by encompassing a broad multitude of devices such as tramp olines and awnings. Defendants cite an examiner's statement of reasons for allowance in Patent '085's prosecution history. Specifically, on August 27, 2001, the examiner filed a Notice of Allowability, which notified the applicant that his application was placed in condition for allowance of claims 1 through 20 of Patent '085. This Notice of Allowability states:

"The following is an examiner's statement of reasons for allowance: No prior art of record shows the material having the specific characteristics as claimed nor used in the orientations as claimed, nor any motivation to do so."

JCCS, Exhibit B (DK 161-3), August 27, 2001 Notice of Allowability at 2. The Notice of Allowability provides no further explanation other than this single, unilateral statement by the examiner. Defendants conceded at the hearing that this statement is not binding on the Court, but described it as significant in terms of the necessity for discussing orientation, *i.e.* as support for Defendants' proposal that the instant claim term be construed as including a fastener in a manner that "defines an enclosure or shelter." Plaintiff countered that, in terms of orientation, the patent itself teaches the placement of fasteners "on the structure." Plaintiff explained that a review of the written description and corresponding figures reveals all types of different fasteners, but that the fasteners are always placed on a surface of the structure in order to anchor the fabric to the structure. The Court agrees with Plaintiff and looks to the specification to identify the structure corresponding to the recited claim function.

Patent '085's Summary of the Invention section explains that:

"[I]t is an objective of the instant invention to teach the use of synthetic textile within the walls of some or all of the rooms of a structure. The material may be disposed and secured between the inner finished wall and the sub assembly of studs or other support structure ... It is a further objective of the instant invention to teach the use of a synthetic textile material which can be quickly mounted to fasteners in a wall and in the floor of a room to provide missile impact protection inside the room."

Patent '085, col. 2, Ins. 13-15. The specification describes one embodiment of the fastener structure as follows: "The textile material **14** is fastened to the subassembly **13** by any manner of mechanical or chemical fastening means, for example staples, nails or adhesive. The textile material may also be fastened to the interior wall in the same manner." Patent '085, col. 3, Ins 1-5. The specification describes as part of "another less expensive embodiment" illustrated in figure 2 the following fastener structure: "a line of fasteners **41** mounted along the upper portion [of a wall] ... approximately 5 feet above the floor, in recesses **49**. These fasteners cooperate with fasteners **42** in the edge of the textile material. The fasteners **42** are constructed, as shown in FIG, **4**, with loops **46** fixed to the material, rings **47** threaded through the loops and the base of the clamps **48**." Patent '085, col. 4, Ins. 1-7. The specification goes on to state that "[t]he fasteners **41** may be eye bolts, as shown in FIGS. **4**, **5**, and **6**, or hooks which are installed in the wall ... Rather than eye bolts or hooks, the wall fasteners may be internally threaded holes which accept bolts mounted in the edge of the textile material." *Id.*, col. 4, Ins. 10-17. The specification further explains, in describing anchoring devices located in the floor, that such "anchoring devices **43** may be formed in the

same manner as the upper fasteners 42." *Id.*, col. 4, Ins. 19-21.

In describing yet another embodiment variation, illustrated in figure 10, the specification explains that the "textile is secured by fasteners [sic] 92 at the upper corners [sic] of the window ... The bottom of the textile is mounted on extension fasteners [sic] 92 at the bottom corners of the window." *Id.*, col. 4, Ins. 32-35. The specification also discloses "FIGS. 4, 5, and 6 as show[ing] different embodiments of the fasteners that are used to attach the flexible material to the inner or interior walls and floor of a structure." *Id.*, col. 5, Ins. 13-15.

Patent '085's written description therefore provides for fasteners configured for installation or mounting on an interior or exterior surface of a structure. The written description further provides that these fasteners are to cooperate with fasteners secured to or formed integral with edges of the textile material in order to perform the recited function of securing the material to the structure. This more general fastener structure corresponds to the "means for securing" function and embraces the alternative embodiments and structures set forth in the specification corresponding to this recited function. Accordingly, this Court rejects both parties' proposals and construes this claim term to mean "a fastener or fasteners configured for installation or mounting on an interior or exterior surface of a structure that cooperate with fasteners secured to or formed integral with edges of the textile material for the purpose of securing or connecting the textile material to the structure."

PATENT '852

Plaintiff asserts independent claim 1 and dependent claims 2, 3, 4, 6, 8 and 9 of Patent '852. The parties agree on the construction of claims 3, 4, and 6. Claims 2, 8, and 9, remain disputed. The Court notes initially that Patent '852 is the last patent in the chain of three patents involving flexible wind abatement systems, including Patent '085, which is the predecessor to Patent '852.

The history of this chain of patents is recited in Patent '852, col. 1, lns 1-6. Patent '852 expressly incorporates by reference "[t]he content of all the prior applications and the prior art cited in each of the applications." Patent '852, col. 1, Ins. 8-10. The Court finds this statement to be especially important because prior art cited in a patent or in the prosecution history of the patent constitutes intrinsic evidence. *See Markman*, 52 F.3d at 979-80; *Kumar v. Ovonic Battery Co., Inc.*, 351 F.3d 1364, 1368 (Fed.Cir.2003); *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996). Accordingly, this Court remains mindful of predecessor applications and prior art cited in each of these predecessor applications in construing Patent '852's claims.

A. Independent Claim 1

Claim 1 is a process claim that recites a series of steps as follows:

"1. A process for maintaining integrity of a structure containing frangible portions subject to impact from wind-borne objects comprising:

providing a protective barrier device formed of a flexible mesh material having a burst strength greater than 61.3 psi and an interstice size constructed and arranged to prevent passage of wind-borne objects greater than about 3/16 inch in diameter;

positioning said protective barrier device in a juxtaposed relation to said frangible portions of said structure;

and

securing said protective barrier to said structure;

wherein said protective barrier provides reduction of wind force sufficient to maintain the integrity of said structure and said protective barrier device is resistant to ultra violet, biological, and chemical degradation."

1. "A process for maintaining integrity of a structure containing frangible portions subject to impact from wind-borne objects"

Claim Term	Plaintiff's Proposed Construction	Defendants* Proposed Construction
A process for maintaining the integrity of a structure containing frangible portions subject to impact from windborne objects	No construction necessary-ordinary meaning.	A process to maintain an entire structure whole, wherein the structure contains a plurality of breakable portions.

The parties' core dispute is whether the claimed process is a process for generally protecting structural elements without specific regard to the protection of non-structural elements like windows and doors, as urged by Plaintiff, or a process for protecting a single entire structure, including walls, windows, eaves, doors and roof, as urged by Defendants. This core dispute represents a consistent point of dissension between the parties over the construction of claim 1 in its entirety. More specifically, the parties disagree about whether claim 1 involves a single protective article that covers the entire structure. Plaintiff maintains that it does not, while Defendants claim that it does.

In their rebuttal statement, Defendants claim that the term "integrity" plainly means the quality or condition of being whole or undivided, such that the claimed process requires the invention to "shield the walls from wind forces, shield the eaves from the uplifting wind forces, prevent the frangible portions from breaking, and provide the downward force on the roof," "In other words," Defendants state, "only protecting select portions of said entire structure and exposing other areas to be exposed to wind forces, uplift forces, *and* windborne objects would put at risk the integrity of said structure," (emphasis in original). This Court disagrees. The specification itself shows that structural integrity may be maintained even if only select portions of the structure are shielded or protected. For instance, in distinguishing prior art, the specification discusses "a curtain adequately spaced out from and in front of the structure of the building to be protected" as "afford[ing] frontal protection" and "also serv[ing] to tie down the roof and protect it from blowing off." Patent '852, col. 2, Ins. 42-46. Further, the specification states that the "envelope of a structure is secured even if a window has failed." Patent '852, col. 5, Ins. 41-43. This Court finds that constructing the claim's scope to maintaining "an entire structure whole" is inconsistent with these specification statements.

Additionally, the Court finds it to be generally accepted and apparent that a structure's integrity can be maintained by reducing wind forces and protecting the structure generally against windborne objects. This objective may be attained by covering portions of the structure and does not necessarily require the entire structure to be covered and protected. As emphasized by Plaintiff at the hearing, Patent '852's specification expressly incorporates by reference the content of all prior applications and prior art, which clearly encompasses barrier devices that are designed to shield or protect select portions of a structure, such as windows.

The Court concludes that construction of this claim preamble is not necessary. Rather, this preamble should be given its plain and ordinary meaning. The Court finds that the meaning of a process aimed at "maintaining the integrity of a structure," said structure defined as "containing frangible portions subject to impact from windborne objects" as understood by a person of ordinary skill in the art is readily apparent and, thus, claim construction is unwarranted.

2. "a protective barrier device formed of a flexible mesh material"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
a protective barrier device formed of a flexible mesh material	One or more panels of a flexible textile material that acts as a barrier against wind and windborne objects.	A single protective article that is structured to engage, shield and protect the entire structure, and is formed of one or more panels of a flexible textile material.

The parties agree that the protective barrier device is formed of one or more panels of a flexible textile material. Consistent with this agreement, Patent '085's abstract expressly states that the device comprises "a flexible material ... in the form of a panel or several panels." The parties disagree, however, as to whether the panel or panels form one single protective article, Plaintiff claims that it does not, whereas Defendants claim that it does.

Specifically, Defendants assert that "protective barrier device" means a "single protective article that is structured to engage, shield and protect the entire structure." In the Joint Claim Construction Statement, Defendants cite only the written description of figure 1 as support for their argument that this claim covers a single protective device for securing an entire structure. The illustration of figure 1, a preferred embodiment of the invention, depicts a protective barrier device completely covering an entire structure. Patent '852, fig. 1. According to the detailed written description of figure 1, the barrier device is "deployed to completely envelop the building structure." The written description further explains that "the roof is completely covered" by multiple panels joined together that provides "a continuous barrier surrounding the structure." Patent '852, col. 7, Ins. 2-15.

Defendants' essentially rely on a single embodiment theory; that is, that the Court's construction should reflect one single, preferred embodiment, which in this case, is the single barrier device structured to protect an entire structure, as illustrated in figure 1, Admittedly, figure 1's illustration and written description supports Defendants' proposal. However, the Federal Circuit specifically rejects single embodiment theories, stating that:

"[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments. In particular, 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. That is not just because section 112 of the Patent Act requires that the claims themselves set forth the limits of the patent grant, but also because persons of ordinary skill in the art rarely would confine their definitions of terms to the exact representations depicted in the embodiments."

Phillips, 415 F.3d at 1323: *see also* Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1204 (Fed.Cir.2002). Accordingly, it is clear that the proper construction of "protective barrier device" should not

be limited to any single preferred embodiment described in the specification, which includes figure 1.

Plaintiff proposes that "protective barrier device" means "a barrier against wind and windborne objects." This Court agrees. A review of the surrounding claim language of the first step recited in claim 1 shows that the phrase "protective barrier device" contemplates a device "arranged to prevent passage of wind-borne objects." The fourth step in this process claim states that "said protective barrier provides reduction of wind force."

In addition to the above surrounding claim terms, the specification specifically describes the invention as a "device for protection of property against high winds comprising a flexible material ... utilized to protect the side of a structure including its windows and doors from the strong winds and debris impacts occurring during a hurricane." Patent '852, Abstract. The specification further states that the "invention relates to the protection of property against high winds and, in particular, to a flexible protective barrier device for securing property from damage from the wind itself and from the impact of foreign objects carried by the wind." Patent '852, Col 1., Ins. 13-17. Distinguishing prior art, the specification states that "what is lacking in the art is a flexible protective barrier constructed from a mesh material that can be easily stored and deployed for protecting the frangible portion of a structure from objects carried by the wind." Patent '852, Col. 2, Ins. 50-54. In light of the foregoing, this Court adopts a slightly modified version of Plaintiff's proposed construction and construes this claim term to mean "a protective barrier device in the form of one or more panels of a flexible textile material that acts as a barrier against wind and windborne objects."

3, "a burst strength greater than 61.3 psi"

Following a discussion with the Court at the Markman hearing, the parties stipulated to the following agreed construction of this term: "The maximum stress at which the textile material bursts when impacted by a blunt wind-borne object is greater than 61.3 pounds per square inch."

4. "an interstice size constructed and arranged to prevent passage of wind-borne objects greater than about 3/16 inch in diameter"

As set forth in the Joint Claim Construction Statement (DE 161), the parties agree that this term means: "Having spacing between the warp or weft that prevent the passage of wind-borne objects with a diameter greater than approximately 3/16 inch."

5. "positioning said protective barrier device in a juxtaposed relation to said frangible portions of said structure"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
positioning said protective barrier device in a juxtaposed relation to said frangible portions of said structure	Placing the protective barrier device in front of frangible portions of the structure that are subject to breakage by wind or windblown objects.	The protective barrier device is positioned in front of the frangible portions, and is spaced apart from the frangible portions of the structure at a minimum calculable distance.

A review of the proffered constructions shows that the parties agree that this claim requires the protective barrier device to be in front of frangible portions of the structure. The parties' disagreement centers on whether the claim term requires spacing of the barrier device apart from a structure's frangible portions at a minimum calculable distance.

In its rebuttal statement, Plaintiff states that the specification does not define the term "juxtaposed," but that the term's ordinary meaning is placed side-by-side. Plaintiff also contends that the specification does not contemplate that there be any spacing between the barrier device and a structure's frangible portions. Defendants counter in their rebuttal statement that "[t]he centerpiece of [Patent '852's] specification devotes significant passage as to this feature of using a formula for calculating minimum spacing requirements." At the hearing, both parties agreed that the term "juxtaposed" should be defined.

The Court agrees with Defendants. The Court looks to the specification for guidance in ascertaining the scope of the instant claim term and, in particular, the meaning of the term "juxtaposed." Although "juxtaposed" is not expressly defined in the specification, the specification is replete with passages showing that this term should be construed to mean spaced apart from a structure's frangible portions. This Court counts over ten such specification passages. For instance, the specification's summary of the invention section states that "[t]he flexible barrier of the invention is placed a distance out from the surface to be protected" and that the barrier's deflection "is a determinate of the minimum distance that this barrier is to be spaced out from the frangible area to be protected." Patent '852, col. 3, Ins. 10-12; Ins. 19-21. The specification further states that "[t]his invention provides a method of calculating the minimum spacing of said barrier from the frangible surface" and "[t]he use of flexible fabric distance out from the frangible area as a protective barrier allows extended deceleration ... [b]y mounting the protective barrier device some distance from the frangible surface, a distance that is calculable, the missile can be decelerated to a stop prior to contacting the frangible surface." Patent '852, col. 3, Ins. 45-47; col. 4, In. 61-col. 5, In. 1.

The summary of the invention section goes on to state that "[a] feature of this invention is spacing the barrier out from and in front of the frangible area to be protected...[a]nother feature is the formula for calculating minimum spacing" and "[t]he barrier is sufficiently spaced from the structure being protected in order to absorb and dissipate the energy from impact prior to the impacting object reaching the structure." Patent '852, col. 5, Ins. 17-22; Ins. 30-33. As part of the detailed description of the preferred embodiment, the specification states that "to calculate the minimum distance that the barrier must be placed out from the area to be protected, the frontal area, weight and speed of the test missile must also be known." Patent '852, col. 6, Ins. 50-53. The detailed description also sets forth criteria "constitut[ing] the basis for calculating the spacing of the barrier from the object being protected" and that "[s]aid spacing is calculated" according to a three-step process expressly set out in the specification. Patent '852, col. 8, Ins. 24-43.

The foregoing specification statements clearly establish a proper basis for this Court to construe this claim term as proposed by Defendants. Indeed, the specification goes to great lengths to describe the patented invention as requiring spacing of the barrier device apart from a structure's frangible portions at a minimum calculable distance. Thus, this Court adopts Defendants' proposed construction and constructs the instant claim term to mean "the protective barrier device is positioned in front of the frangible portions, and is spaced apart from the frangible portions of the structure at a minimum calculable distance."

6. "securing said protective barrier to said structure"

Claim Term	Plaintiffs Proposed Construction	Defendants' Proposed Construction
securing said protective barrier to	Connecting at least one edge of the protective barrier	Attaching a plurality of anchoring systems to the ground at select portions of the protective barrier device so as to hold it on the structure and/or fastening the protective barrier device to the roof

said structure device to the structure. at a point at or above the cave.

Plaintiff asserts in its rebuttal statement that the claim requires securing the protective barrier "to said structure," not the ground, and that Defendants' proposal improperly narrows the claim by importing limitations from embodiments disclosed in the specification. In rebuttal, Defendants argue that construing this claim term within the context of the entire patent, the protective barrier is required to protect the entire structure and "does not require physical attachment to the structure." Defendants contend that "numerous of the embodiment[s] illustrated in [Patent '852] show connecting the single protective barrier device to the ground around the perimeter of the structure so as to achieve the securement of the barrier device to the structure." At the hearing, Plaintiff argued that the claim language itself says nothing about securing the barrier to the ground. Defendants' countered by referencing illustrated figures 1, 2, 4, and 8, which show the device anchored to the ground or at or above a structure's cave. While conceding that the protective barrier can also be secured to the structure, Defendants argue that such securing must be at or above the eave.

The Court finds Defendants' argument to be counter-intuitive and inconsistent with the claim's plain language. The claim language clearly and plainly states "securing said protective barrier to said structure" and says nothing about securing the barrier to the ground, as urged by Defendants. Defendants' reliance upon specific figures in the specification is misplaced. As has been stated consistently throughout this Report and Recommendation, the Federal Circuit clearly prohibits courts from improperly importing limitations from the specification into a claim. *Varco*, 436 F.3d at 1373, More specifically, courts are not to confine claims to embodiments described in a specification. *Phillips*, 415 F.3d at 1323. Here, Defendants primarily rely on specific figures and their corresponding written descriptions. Because this Court is not permitted to narrowly confine the instant claim term to these specific embodiments, this Court rejects Defendants' proposal.

Moreover, as noted by Plaintiff in its rebuttal statement, claim 10 of Patent '085 includes the claim term "securing said textile material to said structure." Since Patent '852 is a continuation-in-part of Patent '085, the common claim term "securing" in both patents should be construed consistently. *See NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1293 (Fed.Cir.2005) (holding that because the patents at issue "all derive from the same parent application and share many common terms, we must interpret the claims consistently across all asserted patents"). This Court construes "securing said textile material to said structure" in claim 10 of Patent '085 to mean "securing or connecting the textile material to the structure." Similarly, the instant claim language means "securing or connecting the protective barrier device to the structure."

The parties agree that protective barrier device means "one or more panels of a flexible textile material." The parties also agree that the protective barrier device can be secured to the structure, except that Defendants argue that the device can also be secured to the ground in a manner that holds the device onto the structure and, if it is secured to the structure, such securing must be at or above the cave. Although the specification reveals an embodiment in which part of the protective device is indeed anchored to the ground and secured at or above the cave, there is no evidence to support a construction narrowing the claim to only these two methods of securement. Instead, the Court reads the instant claim language in view of the specification, which specifically incorporates prior art and predecessor patents, to mean that the device is in some manner secured or connected to some portion of the structure itself. The Court finds Plaintiff's proffered construction to be consistent with this reading and hereby adopts it as the proper construction of this claim term.

7. "said protective barrier provides reduction of wind force sufficient to maintain the integrity of said structure"

Claim Term	Plaintiffs Proposed Construction	Defendants' Proposed Construction
said protective barrier provides reduction of wind force sufficient to maintain the integrity of said structure	No construction necessary-ordinary meaning.	The protective barrier device is structured and disposed to reduce wind forces affecting all the vulnerable parts of the building, including under the eaves or overhangs, on the walls, and on the windows and doors, so that the structure is maintained whole.

The dispute between the parties over the instant phrase "maintain the integrity of said structure" in the instant claim term is essentially the same as their dispute over "process for maintaining integrity of a structure" in claim 1's preamble. The Court incorporates by reference its prior discussion covering this latter dispute, which sets forth specification statements showing that structural integrity may be maintained, as contemplated by claim 1, even if only select portions of the structure are shielded or protected. Additionally, the Court incorporates by reference its prior discussion rejecting what this Court described as Defendants' single embodiment theory related to figure 1.

This Court concludes that a person of ordinary skill in the art would readily understand this claim term as is. It is clear to this Court that this claim term contemplates a protective barrier device that aims to sufficiently reduce wind forces in order to maintain a structure's integrity. To construe the phrase "maintain the integrity of said structure" to mean "to reduce wind forces affecting all the vulnerable parts of the building, including under the eaves or overhangs, on the walls, and on the windows and doors, so that the structure is maintained whole" would unnecessarily limit the claim language for reasons stated in the foregoing sections. Any additional construction by this Court is unwarranted and not necessary. Instead, this claim term should be given its plain and ordinary meaning.

8. "said protective barrier device is resistant to ultra violet, biological, and chemical degradation"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
said protective barrier device is resistant to ultra violet, biological, and chemical degradation	No construction necessary-ordinary meaning.	The protective barrier device comprises at least a modicum of resistance to ultraviolet, biological, and chemical degradation.

In support of their proposed construction, Defendants stated in their rebuttal statement and again at the hearing that the term "resistant" is unclear and requires definition as to the degree or amount of resistance. In this Court's view, to insert the phrase "at least a modicum of resistance" would be contrary to the way the instant claim term is used in the patent and inconsistent with the manner in which a person of ordinary skill in the art would understand the term. Indeed, nothing in the claims themselves or in the specification supports Defendants' proffered construction. The claim very plainly states that the protective barrier device "is resistant to ultra violet, biological, and chemical degradation." The specification explains that "the material of the fabric preferably would be resistant to the ultra violet radiation, and to biological, and chemical degradation such as are ordinarily found outdoors" and that "[t]his invention contemplates either

coating the material or utilizing material with inherent resistance to withstand these elements." *Id.* col. 3, Ins. 56-61. The specification goes on to set forth specific types of materials "found to be acceptable" and "sufficiently resistant." Patent '852, col. 3, Ins. 61-col. 4, In. 3.

Were this Court to adopt Defendants' proposal, it would be impermissibly rewriting the claim by adding a term that extends beyond the words of the claims and the specification. This Court's role is to interpret, not to rewrite or redraft, the claim. *Chef America*, 358 F.3d at 1374. This Court concludes that a person of ordinary skill in the art would understand "said protective barrier device is resistant to ultra violet, biological, and chemical degradation." The words themselves are clear and any additional construction by the Court is unnecessary and unsupported by intrinsic evidence.

B. Dependent Claim 2

Claim 2 depends upon the process disclosed in claim 1 as follows:

"2. The process of claim 1 wherein said protective barrier device is formed as at least one panel including a peripheral hem adapted to secure said panel to said structure."

1. "at least one panel"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
at least one panel	The protective barrier device includes at least one panel of a flexible textile material.	A single protective article structured to engage, shield and protect the entire structure, formed of at least one panel of a flexible textile material.

Plaintiff asserts in its rebuttal statement that Defendants' proffered construction of this dependent claim term is based on an incorrect construction of claim 1. Defendants cite to the written description of figure 1 located at column 7, lines 2 through 24, of the specification as rebuttal evidence in support of their proposal. By relying solely upon the specification's written description of figure 1, which is a preferred embodiment of the invention, Defendants once again resort to what this Court characterizes as a single-embodiment theory. In construing claim 1, upon which claim 2 depends, the Court rejected such theory finding it improper to narrowly confine Patent '852's claim language to one single preferred embodiment illustrated and described in the specification. Rather than repeat this prior discussion, this Court refers the District Court and the parties to this Court's express findings above related to the claim term "a protective barrier device formed of a flexible mesh material."

Claim 2 discloses a "process of claim 1 wherein said protective barrier device is formed as at least one panel ..." As previously noted, the parties agree that the "protective barrier device" in claim 1, upon which claim 2 depends, is formed of one or more panels of a flexible textile material. The instant dependent claim plainly states that the protective barrier device "is formed of at least one panel." The plain meaning of "at least one" is one or more, and no intrinsic evidence shows that these words of the claim were used differently by the inventor. *See Carroll Touch, Inc. v. Electro Mech. Sys., Inc.*, 15 F.3d 1573, 1577 (Fed.Cir.1993) ("the words of a claim are generally given their ordinary and accustomed meaning, unless it appears from the specification or the file history that they were used differently by the inventor"). The Court finds the meaning of this language to be readily apparent to one skilled in the art, such that no construction is

required. In light of the foregoing, this Court rejects both parties' proposals and finds in favor of construing this claim term according to its plain and ordinary meaning.

2. "*peripheral hem*"

As set forth in the Joint Claim Construction Statement (DE 161) and clarified at the hearing, the parties agree that this term means: "At least one panel includes a hem along its perimeter."

3. "*adapted to secure said panel to said structure*"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
adapted to secure said panel to said structure	One or more of the edges of the panel incorporates a fastening structure for connecting the panel to the structure.	The reinforced edge is structured to be fastened to the ground by an anchoring system so as to hold the protective barrier device on the structure.

Plaintiff asserts in its rebuttal statement that Defendants' proposal "is inconsistent with the ordinary and customary meaning of this claim language, improperly narrows the claim by importing limitations from the specification, and fails to construe consistently identical claim terms relating in related patents," Defendants counter in their rebuttal statement that "[i]n the described embodiments of the '852 patent, the peripheral hem is connected to fasteners anchored to the ground or connected to adjacent panels" and that "[n]o direct connecting of the hem to the structure is disclosed," Thus, Defendants maintain that " 'adapted to secure' more properly means positioning one or more panels in an at least partially overlying relation to the roof of the structure and anchoring the one or more panels to the ground around the perimeter of the structure via the peripheral hem."

Claim 2 discloses that the barrier device is formed "as at least one panel including a peripheral hem adapted to secure the panel to the structure," For reasons similar to those stated above in the discussion of "securing said protective barrier to said structure" in claim 1, the plain import of the instant claim language makes clear that it is properly construed to mean at least one edge of the panel is secured or connected to the structure, Claim 2 clearly states that the barrier device formed as at least one panel including a peripheral hem, as earlier defined, is "adapted" to secure the panel to the structure. The Court turns to the specification for guidance in constructing the meaning of "adapted." According to the specification, "[t]he panels may also be fabricated with a selvage or a hem ... [which] may include commercially available grommets or rings to accept the tie-down hardware." Patent '852, Col. 10, Ins. 33-37. That same section also states that "[t]he edges at the top and bottom of each panel of the curtain are folded over one or two times, forming a hem, to assure the structural integrity of the panels. The side edges of the curtains may be suitably attached to the siding of the building ... in which the material is wrapped around a batten ... which is in turn fastened to the wall with appropriate screws." Patent '852, Col. 10, Ins. 61-67. This Court's review of the claim language and specification, including the above specification disclosures, leads it to conclude that a slightly modified version of Plaintiffs proposal is proper. Specifically, the Court construes this claim term to mean "one or more edges of the panel includes a hem along its perimeter that incorporates a fastening structure for connecting the panel to the structure."

C. Dependent Claims 3, 4, and 6

Claims 3, 4, and 6 disclose the following:

- "3. The process of claim 1 wherein said protective barrier device is a textile formed from synthetic threads.
- 4. The process of claim 2 wherein said synthetic threads are polypropylene
- 6. The process of claim 2 wherein said panel is transparent."

As set forth in the Joint Claim Construction Statement (DE 161), the parties agree that the ordinary meaning of the claim language of all three of these dependent claims is apparent and that no construction is necessary.

D. Dependent Claim 8

Claim 8 discloses:

"8. The process according to claim 1 further including a step of: providing a plurality of releasable fasteners for attachment of said protective barrier to said structure."

1. *"a plurality of releasable fasteners for attachment of said protective barrier to said structure"*

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
a plurality of releasable fasteners for attachment of said protective barrier to said structure	No construction necessary- ordinary meaning.	A number of fasteners structured to temporarily secure adjacent panels to one another so as to define the single barrier device in a manner that maintains the integrity protective of the single protective barrier device such that the separate anchoring system disposed at only select locations can hold the entire protective barrier device on the structure.

Plaintiff asserts in its rebuttal statement that Defendants' proposal disregards the well settled rule that construction must begin and remain centered on the claim language. Plaintiff argues that Defendants "ignore the unambiguous claim language" in an improper "attempt to rewrite the claim." According to Plaintiff, Defendants "also violate the principles that limitations not be imported from the specification into the claim and that claims are not to be confined to those embodiments described in the specification." Defendants counter that someone of ordinary skill in the art would construe "releasable fasteners" to mean readily easy to separate like velcro or latches. Defendants maintain that Patent '852 does not disclose any releasable fastener attached to the structure. Instead, Defendants assert that Patent '852 discloses embodiments illustrating the "attachment of the protective barrier to the structure via fasteners anchored to the ground."

Claim 8 discloses the process of claim 1 plus an additional step of providing a plurality of releasable fasteners for attachment of the barrier device to the structure, Defendants would have this Court construe claim 8 as meaning a number of fasteners to secure adjacent panels to each other in order to form a single protective barrier device. Plaintiff contends that claim 8 plainly means what the language itself says, that a plurality of fasteners connect the barrier device to the structure and not to each other. This Court agrees with Plaintiff. In so agreeing, the Court follows Federal Circuit precedent establishing that "[i]n construing claims, the analytical focus must begin and remain centered on the language of the claims themselves, for it is that language that the patentee chose to use to 'particularly point[]' out and distinctly claim[] the subject

matter which the patentee regards as his invention.' " Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1201-02 (Fed.Cir.2002) (citing 35 U.S.C. s. 112; Interactive Gift Express, Inc. v. Compuserve, Inc., 256 F.3d 1323, 1331 (Fed.Cir.2001)). Federal Circuit precedent further holds that "terms used in the claims bear a 'heavy presumption' that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art," and "unless compelled otherwise, a court will give a claim term the full range of its ordinary meaning as understood by persons skilled in the relevant art." Id. at 1202 (citations omitted). Such is the case here, Specifically, the Court concludes that Defendants' proposal is unsupported by the claim language. Further, the Court declines to rewrite the claim language, which would effectively import limitations from the specification. The Court finds the ordinary and customary meaning of this claim language to be readily apparent such that additional construction is unwarranted.

E. Dependent Claim 9

Claim 9 discloses:

"9. The process according to claim 2 wherein said protective barrier includes a plurality of said panels, each said panel having parallel edges being releasably connected to said structure by a plurality of cooperating releasable fasteners spaced therealong."

1. "*a plurality of said panels*"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
a plurality of said panels	No construction necessary-ordinary meaning.	A single protective article that is structured to engage, shield and protect the entire structure is formed of a number of panels of a flexible textile material.

Plaintiff asserts in its rebuttal statement that Defendants' proposal is based on an incorrect construction of claim 1, Defendants cite to the written description of figure 1 located at column 7, lines 2 through 24, of the specification as rebuttal evidence in support of their proposal. By relying solely upon the specification's written description of figure 1, which is a preferred embodiment of the invention, Defendants again improperly rely upon a single, preferred embodiment of the invention. In construing claim 1, upon which claim 2 and claim 9 depend, the Court found it to be improper and impermissible to narrowly confine Patent '852's claims to figure 1, which is a preferred embodiment illustrated and described in the specification, Rather than repeat this prior discussion, this Court refers the District Court and the parties to this Court's express findings above related to the claim term "a protective barrier device formed of a flexible mesh material."

Claim 9 claims a "process according to claim 2 wherein said protective barrier includes a plurality of said panels ..." As previously noted, the parties agree that the "protective barrier device" in claim 1, to which claim 2 and 9 refer, is formed of one or more panels of a flexible textile material. The instant dependent claim plainly states that the protective barrier device "is formed of a plurality of said panels." As discussed previously, the plain meaning of the claim language "at least one" in dependent claim 2 is "one or more," Here, the claim language "plurality" plainly means "a number greater than one." Thus, the instant claim language means more than one or a number of panels, as opposed to claim 2 which means one or more panel or panels. The Court finds such meaning of this language to be readily apparent to one skilled in the

art, such that no construction is required. Accordingly, this Court agrees with Plaintiff that this claim term should be given its plain meaning.

2. "each said panel having parallel edges being releasably connected to said structure by a plurality of cooperating releasable fasteners spaced therealong"

Claim Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
each said panel having parallel edges being releasably connected to said structure by a plurality of cooperating releasable fasteners spaced therealong	No construction necessary-ordinary meaning.	Each of the panels include adjacent edges that line up with one another and are temporarily fastened with one another by a zipper, clamp or hook and loop strips so as to maintain the integrity of the single protective barrier device and hold the protective barrier device, and thereby the panels that define it, on the structure as a result of a separate anchoring system secured to the ground only at selective points around the protective barrier device.

In its rebuttal statement, Plaintiff asserts a similar argument to that set forth in support of its proffered construction of the single disputed claim term of claim 8. In their rebuttal statement, Defendants assert the exact same argument set forth in support of its proffered construction of claim 8. Claim 9 states that "each said panel" of the protective barrier has parallel edges that are "releasably connected to said structure by a plurality of cooperating releasable fasteners spaced therealong." The plain import of this claim language is that each panel comprising the protective barrier is connected to the structure by way of "cooperating releasable fasteners spaced" along each panel. In other words, the ordinary meaning of this claim language is that each panel has releasable fasteners that cooperate with releasable fasteners on the structure to releasably connect each panel of the barrier device to the structure. As in claim 8, Defendants would have this Court construe claim 9 as meaning panels with "adjacent edges that line up with one another and are temporarily fastened with one another." Plaintiff counters that claim 9 means what it says; that the panels are releasably connected to the structure and not each other. Defendant goes even further and would have this Court construe this claim term to mean that the panels temporarily fastened together would "maintain the integrity of the single protective barrier device" and hold the device "on the structure as a result of a separate anchoring system secured to the ground."

For similar reasons to those outlined in the discussion of claim 8, this Court agrees with Plaintiff. Such agreement is consistent with Federal Circuit precedent requiring the focus of claim construction to center on the claim language. *Texas Digital Sys.*, 308 F.3d at 1201-02 (Fed.Cir.2002) (citations omitted). The Court concludes that Defendants' proposal is unsupported by the claim language. Further, the Court declines to rewrite the claim language, which would effectively import limitations from the specification. The Court finds the ordinary and customary meaning of this claim language to be readily apparent such that no construction is necessary.

RECOMMENDATION TO THE DISTRICT COURT

This Court concludes that the foregoing establishes the correct construction of the patent claim terms at issue. In reaching this conclusion, the Court has considered the voluminous submissions by the parties, including memoranda, summaries, charts, and exhibits, as well as argument of counsel at the Markman

hearing held on January 15, 2009. Accordingly, this Court respectfully RECOMMENDS that the District Court construe the terms in claim 10 of Patent '085 and claims 1, 2, 3, 4, 6, 8 and 9 of Patent '852 as set forth above.

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable United States District Judge Kenneth L. Ryskamp, within ten (10) days after being served with a copy. *See* 28 U.S.C. s. 636(b)(1)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. *See* United States v. Warren, 687 F.2d 347, 348 (11th Cir.1982), *cert. denied*, 460 U.S. 1087, 103 S.Ct. 1781, 76 L.Ed.2d 351 (1983).

S.D.Fla.,2009.

Armor Screen Corp. v. Storm Catcher, Inc.

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