

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIUS ZORN, INC.,

Plaintiff,

v.

MEDI MANUFACTURING, INC.

Defendant.

Case No.: 3:15-CV-02734-GPC-RBB

**CLAIM CONSTRUCTION ORDER
CONSTRUING DISPUTED CLAIM
TERMS OF U.S. PATENT NO.
7,329,232 B2**

The parties, Julius Zorn, Inc. (“Juzo”) and CircAid Medical Products, Inc. (“CircAid”),¹ to this patent infringement seek construction of ten claim terms found in U.S. Patent No. 7,329,232 B2, a therapeutic compression device. The claim construction hearing was held on January 5, 2017. The parties have submitted a Joint Claim Construction Chart, Dkt. No. 31, and a Joint Claim Construction Worksheet, Dkt. No. 32. The parties’ competing claim constructions are detailed in the claim construction briefs submitted by Juzo, Dkt. No. 34, and CircAid, Dkt. No. 33. Both parties filed responses to one another’s proposed claim constructions. Dkt. Nos. 36, 37. Having considered the

¹ On March 1, 2017, the Court granted the parties’ joint motion to substitute Medi Manufacturing, Inc. for CircAid Medical Products, Inc. as the Defendant because the two companies recently merged. Dkt. No. 46. Although this substitution is now reflected in the case caption, the Court will refer to the Defendant as CircAid, in this order, for the sake of consistency with the claim construction record.

moving papers and oral argument, the Court construes the terms in accordance with the principles set forth by the Federal Circuit on claim construction and orders as follows.

BACKGROUND

Defendant CircAid holds U.S. Patent No. 7,329,232 B2 (“the ‘232 patent”) entitled “Limb Encircling Therapeutic Compression Device.” Exhibit A, Dkt. No. 35-1 at 15. The Limb Encircling Therapeutic Compression Device is a “garment” with “inner and outer surfaces” with a “central region of substantially inelastic material.” The ‘232 Patent at 3:43-46. The garment contains a “plurality of bands” that extend “from the opposite lateral regions” of the garment so as to “encircle the limb.” *Id.* at 3:47-52. To use the garment, the user “encircles the limb, the inner surface of the garment placed against the limb, and draws the first lateral region toward the second longitudinal edge to stretch the central region.” *Id.* at 3:52-56. The effect of this action is to “provide a tension in the garment that will compress the limb.” *Id.* at 3:55-56. Plaintiff, bringing this suit protectively, argues that its intellectual property does not infringe on CircAid’s and that it is entitled to a declaratory judgment of non-infringement. Dkt. No. 1.

LEGAL STANDARD

Claim construction is a matter of law to be determined by the court. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015); *Markman v. Westview Instr., Inc.*, 517 U.S. 370, 372 (1996). The purpose of claim construction is for the court to “determin[e] the meaning and scope of the patent claims asserted to be infringed.” *O2 Micro Intern. Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) (citing *Markman*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc)). “It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). As such, claims are to be construed in a manner that “stays true to the claim language and most naturally aligns with the patent’s description of the invention.” *Id.* at 1316.

1 To construe disputed terms, the court first looks to the claims themselves. *See*
2 *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed.
3 Cir. 2004). Generally, claim language is given its “ordinary and customary meaning,”
4 which is “the meaning that the term would have to a person of ordinary skill in the art in
5 question at the time of the invention.” *Phillips*, 415 F.3d at 1312-13. In cases where the
6 “ordinary and customary meaning” is clear, claim construction involves “little more than
7 the application of the widely accepted meaning of commonly understood words.” *Id.* at
8 1314. “The ordinary and customary meaning of a claim term is the meaning that the term
9 would have to a person of ordinary skill in the art in question at the time of the
10 invention.” *Id.* at 1313. In cases where it is not immediately apparent what a person of
11 ordinary skill in the art would understand a claim to mean, the court looks to other
12 sources to decipher the correct meaning. *Id.* at 1314. Those sources include intrinsic and
13 extrinsic evidence “available to the public that show what a person of skill in the art
14 would have understood disputed claim language to mean.” *Id.* “Importantly, the person
15 of ordinary skill in the art is deemed to read the claim term not only in the context of the
16 particular claim in which the disputed term appears, but in the context of the entire
17 patent, including the specification.” *Id.* at 1313.

18 When such clarity is required, a court begins by examining the intrinsic record,
19 consisting of the language of the claims, the patent specification and, if in evidence, the
20 prosecution history of the challenged patent. *Id.* at 1314; *see also Vederi, LLC v. Google,*
21 *Inc.*, 774 F.3d 1376, 1382 (Fed. Cir. 2014). “The appropriate starting point . . . is always
22 with the language of the asserted claim itself.” *Comark Comms., Inc. v. Harris Corp.*,
23 156 F.3d 1182, 1186 (9th Cir. 1998). The context in which a disputed term appears often
24 provides substantial guidance as to the meaning of the term. *See Phillips*, 415 F.3d at
25 1313-14. A disputed term must be construed “consistently with its appearance in other
26 places in the same claim or in other claims of the same patent.” *Rexnord Corp. v.*
27 *Latiram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001). “A claim construction that gives
28

1 meaning to all the terms of the claim is preferred over one that does not do so.” *Vederi*,
2 774 F.3d at 1383.

3 As for other intrinsic evidence, the specification “is always highly relevant to the
4 claim construction analysis” and “usually dispositive.” *Philips*, 415 F.3d at 1315. In
5 fact, it has been observed that “[a]part from the claim language itself, the specification is
6 the single best guide to the meaning of a claim term.” *Vederi*, 774 F.3d at 1382; *see also*
7 *Philips*, 415 F.3d at 1315. “[A] claim construction that excludes [a] preferred
8 embodiment [described in the specification] is rarely, if ever, correct and would require
9 highly persuasive evidentiary support.” *Adams Respiratory Therapeutics, Inc. v. Perrigo*
10 *Co.*, 616 F.3d 1283, 1290 (Fed. Cir. 2010). Furthermore, the “written description part of
11 the specification” should not be read to “delimit the right to exclude [as] [t]hat is the
12 function and purpose of claims.” *Markman*, 52 F.3d at 980. Stated differently, a “claim
13 construction must not import limitations from the specification into the claims.” *Douglas*
14 *Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1342 (Fed. Cir. 2013). It is,
15 therefore, “improper to read limitations from a preferred embodiment described in the
16 specification—even if it is the only embodiment—into the claims absent a clear
17 indication in the intrinsic record that the patentee intended the claims to be so limited.”
18 *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1327 (Fed. Cir. 2012) (citations omitted).

19 “A patentee is,” however, “free to be his own lexicographer.” *Markman*, 52 F.3d
20 at 980. Where the inventor gives a term a special meaning, “the inventor’s lexicography
21 governs.” *Philips*, 415 F.3d at 1316. Similarly, where the inventor specifically disclaims
22 a certain scope in the specification, that disclaimer is dispositive. *Id.*

23 Generally speaking, “an analysis of the intrinsic evidence alone will resolve any
24 ambiguity in a disputed claim term.” *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d
25 1576, 1583 (Fed. Cir. 1996). Where that is the case, “it is improper to rely on the
26 extrinsic evidence” as “[t]he claims, specification, and file history, rather than extrinsic
27 evidence, constitute the public record of the patentee’s claim, a record on which the
28 public is entitled to rely.” *Id.* However, to the extent “the intrinsic record is ambiguous,

1 and when necessary,” a court “may rely on extrinsic evidence, which consists of all
 2 evidence external to the patent and prosecution history, including expert and inventor
 3 testimony, dictionaries and learned treatises.” *Power Integrations, Inc. v. Fairchild*
 4 *Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1360 (Fed. Cir. 2013). Extrinsic evidence,
 5 however, is “less significant than the intrinsic record” and “less reliable than the patent
 6 and its prosecution history in determining how to read claim terms.” *Phillips*, 415 F.3d at
 7 1317-18 (internal quotations and citation omitted).

8 Finally, “terms do not need to be construed [where] they are neither unfamiliar to
 9 the jury, confusing to the jury, nor affected by the specification or prosecution history.”
 10 *See Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 528 F.
 11 Supp. 2d 967, 976 (N.D. Cal. 2007) (citing *United States Surgical Corp. v. Ethicon, Inc.*,
 12 103 F.3d 1554, 1568 (Fed. Cir. 1997) (“Claim construction is a matter of resolution of
 13 disputed meanings and technical scope, to clarify and when necessary to explain what the
 14 patentee covered by the claims, for use in the determination of infringement. It is not an
 15 obligatory exercise in redundancy.”)). But where the parties dispute the scope of a claim
 16 term, it is the court’s duty to resolve the dispute. *O2 Micro*, 521 F.3d at 1362.

17 DISCUSSION

18 The disputed terms are as follows: (1) “substantially inelastic material” (Claim 1);
 19 (2) “flat central region” (Claim 1); (3) “lateral regions disposed on opposite sides of the
 20 central region” (Claim 1(a)); (4) “a plurality of bands extending from lateral margins
 21 disposed at opposite edges of said opposite lateral regions wherein the bands extending
 22 from the opposite lateral regions are juxtaposed to pass between one another” (Claim
 23 1(b)); (5) “proximal and distal edges” (Claim 1(b)(ii)); (6) “one or both edges comprise a
 24 curve or indentation” (Claim 1(b)(ii)); (7) “the central and lateral regions are biased into a
 25 three-dimensional curvature (Claim 2); (8) substantially perpendicular” (Claims 3, 6); (9)
 26 “said angle is independently selected for each band” (Claim 5); (10) “each of said bands”/
 27 “said opposing bands”/ “said plurality of bands” (Claims 1(b), 3, 4, 5). The Court will
 28 address each in turn.

1 **1. “substantially inelastic material”**

2 Juzo proposes that the claim be construed as “indefinite” or, in the alternative, that
3 it be construed to mean “material that has essentially zero stretch.” Dkt. No. 31 at 2.
4 Specifically, Juzo argues that “[a]ny construction that allows a percentage of stretch other
5 than essentially zero is contrary to the plain meaning and is unsupported by the intrinsic
6 evidence, while any construction (or non-construction) that leaves the amount of stretch
7 undefined and uncertain lacks the requisite clarity of claim scope and renders the claims
8 invalid as indefinite.” Dkt. No. 34 at 7. CircAid, by contrast, contends that no
9 construction is necessary as the term should be given its “plain meaning.” *Id.* Because
10 the parties dispute the scope of the claim term, the Court must resolve the dispute as a
11 matter of law. *See O2 Micro*, 521 F.3d at 1361.

12 The central disagreement between the parties concerns whether or not the claim
13 “substantially inelastic material” can include material with some limited stretch or
14 elasticity. For the reasons stated below, the Court concludes that the plain and ordinary
15 meaning of “substantially inelastic material,” which is the meaning the term would have
16 to a person skilled in the art after reviewing the intrinsic record, is broad enough to
17 include fabric with limited stretch or elasticity and is not, otherwise, indefinite. *See O2*
18 *Micro*, 521 F.3d at 1360 (“Words of a claim are generally given their ordinary and
19 customary meaning, which is the meaning a term would have to a person of ordinary skill
20 in the art after reviewing the intrinsic record at the time of the invention.”)

21 The term “substantially inelastic material” appears in Claim 1 as follows: “a flat
22 central region having inner and outer surfaces, said central region comprising
23 substantially inelastic material.” The ‘232 Patent at 16:9-10. Claim 1 does not define the
24 term “substantially inelastic material.” The Court also notes that nothing in the claim
25 language requires that substantially inelastic material be fabric with essentially zero
26 stretch or otherwise suggests that substantially inelastic material must have only
27 negligible stretch characteristics. *See generally* the ‘232 Patent at 16:6-28. The Court
28 further concludes that the word “substantially” is a meaningful modifier that allows for

1 deviation from the word it seeks to modify. *Liquid Dynamics Corp. v. Vaughan Co., Inc.*,
 2 355 F.3d 1361, 1368-69 (Fed. Cir. 2004). Here, “substantially” modifies “inelastic.” As
 3 such, the plain and ordinary meaning of the phrase “substantially inelastic material” is
 4 broad enough to include fabrics with some, limited, elasticity or stretch. *See Philips*, 415
 5 F.3d at 1314 (where the ordinary meaning as understood by a person of skill in the art is
 6 “readily apparent even to lay judges,” claim construction “involves little more than the
 7 application of the widely accepted meaning of commonly understood words.”).

8 Juzo nonetheless argues that its proposed construction is the only one that is
 9 faithful to the claim language and supported by the intrinsic record because the
 10 specification “clearly states that ‘substantially inelastic material’ does not stretch, and
 11 that even slightly elastic materials are excluded from its scope.” Dkt. No. 34 at 7. The
 12 Court disagrees. Notwithstanding Juzo’s protestations to the contrary, the specification’s
 13 description of the preferred embodiments states quite the opposite. In fact, the
 14 specification specifically provides that “[n]eoprene fabric is particularly advantageous in
 15 that *stretch characteristics* permit it to shape, mold, and conform to the body, while
 16 applying a near inelastic compression to the body part.” *See* the ‘232 Patent at 9:21-42.
 17 The specification also refers to Velcro 3610 and Velcro 3800 as being preferred fabrics
 18 and describes both as being “flexible” and the latter, specifically, as having “limited
 19 stretch.” *See* the ‘232 Patent at 6:49-56 (“In one mode of fabrication, the therapeutic
 20 compression garments shown in FIG. 1, FIG. 3, and FIG. 5 are made in one piece from a
 21 flexible, foldable hook and loop type fabric (e.g. Velcro TM) having an outer loop surface
 22 which is preferably a light weight loop fabric of the type designated Velcro 3610 or
 23 Velcro 3800, the former being substantially inelastic and the latter having *a limited*
 24 *stretch* at least in the vertical or longitudinal direction.”)

25 In other words, the specification unmistakably contemplates the use of fabric with
 26 some elasticity or stretch for use in the preferred embodiments. *See id.* at 6:56-59
 27 (“Other suitable materials range from *inelastic* to those with *some elasticity* such as
 28 neoprene that has a small amount of elasticity especially in the longitudinal but also

1 circumferential axis.”) If the Court were to construe “substantially inelastic material” as
2 “material that has essentially zero stretch,” as Juzo proposes, then many of the preferred
3 embodiments — described as having some stretch or elasticity — would be read out of
4 the patent. Such a construction, however, is highly disfavored. “[A] claim construction
5 that excludes [a] preferred embodiment [described in the specification] is rarely, if ever,
6 correct and would require highly persuasive evidentiary support.” *See Adams*
7 *Respiratory*, 616 F.3d at 1290.

8 Juzo has not offered the highly persuasive evidentiary support needed to convince
9 the Court that the correct claim construction reads out the preferred embodiments and
10 warrants a departure from the plain and ordinary meaning of the term. In support of its
11 position, Juzo contends that the above-mentioned portions of the specification should be
12 disregarded because CircAid, despite discussing materials with semi-elastic, limited
13 stretch, and elastic properties,² only claimed “substantially inelastic material.” *See* Dkt.
14 No. 34 at 8. But this argument hinges on a predicate that the Court rejects. Juzo avers
15 that the term “substantially inelastic material” cannot include material with limited
16 stretch or greater because the patent only provides one example of material that is
17 “substantially inelastic,” and that material is Velcro 3610. *See* Transcript of Oral
18 Argument, Dkt. No. 43 at 4-5. Thus, because Velcro 3610 has “no material stretch”³
19 Juzo argues that the claim term must be defined as having the stretch properties of Velcro
20 3610. *Id.*

21 The Court, however, is not persuaded that the patent has only provided one
22 example of “substantially inelastic material.” Just because the specification describes one
23 type of fabric (namely, Velcro 3610) as “substantially inelastic” does not mean that every
24 other material described in the preferred embodiments is not “substantially inelastic.” In
25

26
27 ² The specification’s problematic description of “elastic” materials is discussed in greater detail below.

28 ³ Juzo provided Defendant and the Court with a sample of Velcro 3610 at oral argument. Moreover, Defendant did not dispute that Velcro 3610 is correctly characterized as having “no material stretch.”

1 fact, such a reading is highly circumspect in light of the specification's identification of
2 neoprene and Velcro 3800, two fabrics described by the patent as having more stretch
3 than Velcro 3610, as preferred fabrics. That, it would seem to the Court, is an equally
4 clear indication that the patentee intended materials with limited stretch or some elasticity
5 to be covered by the claim's scope.

6 That being said, in drawing this conclusion, the Court is not blind to the fact that
7 the specification's description of preferred materials sends mixed signals. On the one
8 hand, it explains that suitable fabrics are those that range from "inelastic to those with
9 some elasticity such as neoprene." The '232 Patent at 6:56-59. Yet on the other hand,
10 the specification also describes various preferred embodiments as having (1) "a central
11 region 10 made of a *semi-elastic material* such as neoprene and essentially inelastic
12 band"; (2) as being "*made from an elastic fabric* or an inelastic Velcro-loop type fabric or
13 combination of both"; or (3) as being "*made from an elastic Neoprene fabric* or an
14 *inelastic Velcro-loop type fabric* or combination of both"). *Id.* at 10:61-65, 10:5-7,
15 10:18-20.

16 At most, however, Juzo's citation to these and other passages demonstrates that the
17 specification is ambiguous as to the stretch characteristics encompassed by "substantially
18 inelastic material," not that the specification is clear-as-day that any material with limited
19 stretch is not included in the claim scope. Ambiguous language in the specification,
20 however, is not sufficient to support a disavowal. *See Poly-America, L.P. v. API*
21 *Industries, Inc.*, 839 F.3d 1131, 1136 (Fed. Cir. 2016) (observing that the "standard for
22 disavowal is exacting, requiring clear and unequivocal evidence that the claimed
23 invention includes or does not include a particular feature."). As such, because Juzo's
24 argument does not provide clear and unequivocal evidence that the scope of the term
25 "substantially inelastic material" excludes fabric with limited stretch or greater, the Court
26 rejects Juzo's proposed construction, which unnecessarily limits the plain and ordinary
27 meaning of the term. *See Home Diagnostics, Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1357
28 (Fed. Cir. 2004) ("a patentee may claim an invention broadly and expect enforcement of

1 the full scope of that language absent a clear disavowal or contrary definition in the
2 specification.”).

3 The Court is also not persuaded by Juzo’s argument that this term is indefinite
4 under 35 U.S.C. § 112.⁴ As Juzo points out, a claim is indefinite if it “fails to inform,
5 with reasonable certainty, those skilled in the art about the scope of the invention.” Dkt.
6 No. 34 at 16 (citing *Nautilus, Inc. v. Biosig Instruments*, 134 S. Ct. 2120, 2124 (2014))
7 (emphasis omitted). “Reasonable certainty,” however, does not require that a claim
8 provide “absolute or mathematical precision.” *Interval Licensing LLC v. AOL, Inc.*, 766
9 F.3d 1364, 1370-71 (Fed. Cir. 2014). All that is required is that the claim language allow
10 a person of ordinary skill to discern from the claims and specification what the bounds of
11 the claim are to a reasonable certainty. *Id.* at 1382. Stated differently, there must not be
12 a “zone of uncertainty” regarding claim scope. *Nautilus*, 134 S. Ct. at 2129.

13 Juzo contends that the plain and ordinary meaning of “substantially inelastic
14 material” renders the term indefinite because it leaves a “zone of uncertainty” as to the
15 degree of elasticity that is covered or not covered by the claim. *See* Dkt. No. 34 at 9.
16 The Court disagrees. The Federal Circuit has oft-observed that the term “substantial” is a
17 “meaningful modifier implying ‘approximate,’ rather than ‘perfect,’” and that such
18 modifiers are “descriptive terms commonly used in patent claims to avoid a strict
19 numerical boundary to the specified parameter.” *Liquid Dynamics, Inc.*, 355 F.3d at
20 1368. The Court, therefore, rejects Juzo’s contention that just because the term
21 “substantially inelastic” does not make clear what numerical degrees of elasticity are
22 covered, that the term is somehow indefinite. *See id.*; *see also Cordis Corp. v. Medtronic*
23 *Ave., Inc.*, 339 F.3d 1352, 1361 (Fed. Cir. 2003) (concluding that “substantially uniform
24 thickness” should be interpreted as “of largely or approximately uniform thickness”
25

26
27 ⁴ “The specification shall contain a written description of the invention, and of the manner and process
28 of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the
art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall
set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.”

1 unless other intrinsic evidence imposes a “clear and unmistakable disclaimer” requiring a
 2 narrowing of the language); *Anchor Wall Sys. v. Rockwood Retaining Walls, Inc.*, 340
 3 F.3d 1298, 1311 (Fed. Cir. 2003) (finding that nothing in the record clearly limited the
 4 scope of “generally parallel” to the point that the adverb should be read to not broaden
 5 the meaning of parallel). Accordingly, the Court concludes that the term “substantially
 6 inelastic” is not indefinite or, at the very least, that Juzo has not carried its burden to
 7 demonstrate that the term is invalid for indefiniteness. *See Microsoft Corp. v. I4I Ltd.*
 8 *P’ship*, 564 U.S. 91, 97 (2011) (the party asserting invalidity must show it by clear and
 9 convincing evidence).

10 In sum, the Court agrees with CircAid that Juzo’s proposed construction narrows
 11 the plain and ordinary meaning, as understood by a person skilled in the art, of the term
 12 “substantially inelastic material.” The term “substantially inelastic material” covers
 13 material with some stretch or elasticity, as the term “substantially” is a well-understood
 14 modifier that allows for some deviation from the word it seeks to modify. *See Liquid*
 15 *Dynamics*, 355 F.3d at 1368-69. Accordingly, the Court construes “substantially inelastic
 16 material” as “largely but not wholly inelastic material.” *See York Products, Inc. v.*
 17 *Central Tractor Farm & Family Center*, 99 F.3d 1568, 1573 (Fed. Cir. 1996)
 18 (recognizing that a plain and ordinary meaning of “substantially” includes “largely but
 19 not wholly that which is specified”).⁵

20 **2. “flat central region”**

21 Juzo contends that this term is indefinite or, in the alternative, that it should be
 22 construed as “the region including the entire central axis of the garment running from the
 23 top to the bottom of the garment is level or even without raised areas or indentations
 24 when the garment is laid out.” Dkt. No. 34 at 9. By contrast, CircAid argues that the
 25

26
 27 ⁵ The Court has construed the present term in accordance with the principles set forth by the Federal
 28 Circuit. To the extent that the Court’s claim construction presents any invalidity issues, Juzo may
 appropriately address the issue at a later stage of the proceedings.

1 term “flat” should be construed as “non-tubular” and that “central region” does not
 2 require further construction. Dkt. No. 33 at 9. Because the parties dispute the scope of
 3 the claim term, the Court must resolve the disagreement as a matter of law. *See O2*
 4 *Micro*, 521 F.3d at 1361.

5 Here, the crux of the parties’ dispute concerns whether or not the intrinsic record
 6 provides sufficient evidence to justify departing from the plain and ordinary meaning of
 7 “flat” and adopting CircAid’s proposed construction of “non-tubular.” For the reasons
 8 that follow, the Court finds that the term “flat” does not mean “non-tubular,” a term of
 9 substantially greater scope than the plain and ordinary meaning of the term. The Court
 10 also rejects Juzo’s construction of “flat” as overly-restrictive and, instead, concludes that
 11 the term “flat” bears its plain and ordinary meaning, as understood by a person of
 12 ordinary skill in the art in light of the claims and specifications. *See O2 Micro*, 521 F.3d
 13 at 1360 (“Words of a claim are generally given their ordinary and customary meaning,
 14 which is the meaning a term would have to a person of ordinary skill in the art after
 15 reviewing the intrinsic record at the time of the invention.”)

16 The Court begins, as it must, with the claim language. Claim 1 states that the
 17 present invention is a garment “comprising: a *flat central region* having inner and outer
 18 surfaces, said central region comprising substantially inelastic material, and lateral
 19 regions disposed on opposite sides of the central region.” The ‘232 patent at 16:8-11
 20 (emphasis added). There is nothing in the language of claim 1 that broadens the meaning
 21 of “flat” to mean “non-tubular.” *See* the ‘232 Patent at 16:6-27.

22 CircAid argues, however, that its proposed construction is nonetheless supported
 23 by the claim language because “garments that are contoured to fit the body part are not
 24 merely disclosed, but are the preferred embodiment.” Dkt. No. 33 at 10. Indeed, the
 25 specification does repeatedly explain that the garment is designed to conform to the
 26 shapes of body parts. *See* the ‘232 Patent at 13:55-14:2 (“The therapeutic compression
 27 garment of FIG.10 consists of a central region . . . *that accommodates the limb shape* . . .
 28 Darts may be cut into a single piece of fabric to *create a central region that*

1 *accommodates the limb shape*. Darts or seams are sewn into the central region *enable the*
 2 *garment to conform to the bent shape* of an arm at the elbow, the leg at the knee, or
 3 another jointed body part.”) (emphasis added); *see also id.* at 14:2-13 (“Also, by varying
 4 the width of the central region, the garment would be formed to taper, or otherwise vary
 5 in circumference, in order to conform to the shape of the body part. . . . The darts are
 6 closed by sewing the curved edges together, *creating a bend or limb-accommodating*
 7 *contour* in the finished garment so that when the lateral regions are wrapped around and
 8 towards each other, the central and lateral regions are biased into a three-dimensional
 9 curvature in order to fit the body part.”) (emphasis added). Thus, because garments that
 10 can accommodate limb shapes are preferred embodiments, *see* the ‘232 at 3:57-59,
 11 CircAid argues that the Court should adopt its proposed construction because Juzo’s
 12 proposed construction reads out those preferred embodiments.

13 As an initial matter, the Court agrees with CircAid that Juzo’s proposed
 14 construction essentially reads out a preferred embodiment. “[A] claim construction that
 15 excludes [a] preferred embodiment [described in the specification] is rarely, if ever,
 16 correct and would require highly persuasive evidentiary support.” *See Adams*
 17 *Respiratory*, 616 F.3d at 1290. Juzo argues that its proposed construction comports with
 18 the generally understood meaning of “flat.” *See* Dkt. No. 11 at 34. Juzo seeks to
 19 construe flat as “level or even *without raised areas or indentations when the garment is*
 20 *laid out*.” This additional language, however, is unnecessarily limiting.

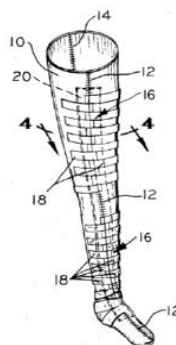
21 For one, the Court finds no support for the addition of “without raised areas or
 22 indentations” in the claim language. The Court further notes that the addition of the word
 23 “indentation” would actually add confusion and ambiguity to the claim terms because the
 24 word “indentation” already appears in claim 1 in the context of the present invention’s
 25 plurality of bands. *See* the ‘232 patent at 16:19-20 (“wherein one or both edges comprise
 26 a curve of indentation.”) Two, there is no support for this additional language in the
 27 specification. Juzo suggests that its definition is supported by FIG.8, which depicts “a
 28 level or even sheet of material when the garment is laid out” with “no raised portions,

1 curved sections, indentions or the like.” *See* Dkt. No. 34 at 12. Yet because it is not
 2 proper to read limitations from the preferred embodiments into the claim terms, the Court
 3 rejects Juzo’s attempt to do so here. *See Douglas Dynamics*, 717 F.3d at 1342 (“a claim
 4 construction must not import limitations from the specification in the claims.”)

5 While the Court agrees with CircAid that the specification cuts against Juzo’s
 6 proposed construction, it nonetheless rejects CircAid’s argument that there is sufficient
 7 intrinsic evidence to support construing “flat” as “non-tubular.” The specification
 8 language that CircAid relies upon, *see supra*, establishes that the present invention
 9 includes garments with some three-dimensional shape, but it does not rise to the level of a
 10 disclaimer of the plain and ordinary meaning of “flat” and an embrace of a word that
 11 nearly means the opposite, “non-tubular.” Put simply, the specification reveals no intent
 12 to give the term “flat” a special meaning. *See Philips*, 415 F.3d at 1316 (inventor’s
 13 lexicography governs where term given special meaning).

14 The Court is also unconvinced that the prosecution history provides the support
 15 needed to provide “flat” with any special meaning. CircAid argues that the prosecution
 16 history lends support to its construction of “flat” as “non-tubular” because the term “flat”
 17 was added to the claims in order to distinguish the present invention from prior art
 18 devices that were tubular. Dkt. No. 33 at 9. CircAid’s argument places a particular
 19 emphasis on the Fowler garment, U.S. Patent No. 3,856,008, which was a “tubular
 20 garment” that had a central region that was a “wall of a long hollow cylinder,” which by
 21 definition is “arcuate or curved.” *Id.*

22 Ex. C (U.S. Patent No. 3,856,008 Fig. 1)



1 The Fowler garment, U.S. Patent No. 3,856,008, Dkt. No. 33-4 at 2. Accordingly,
2 CircAid contends, because “it is clear from the patent that ‘flat’ was added to distinguish
3 the invention from tubular prior art . . . ‘flat’ should be construed as ‘non-tubular.’” Dkt.
4 No. 33 at 11.

5 However, that the patent writer added the term “flat” in order to differentiate the
6 present invention from prior art, which was tubular, does not mean that the patentee
7 surrendered only tubular garments when claiming the present invention. “[T]here is no
8 principle of patent law that the scope of a surrender of subject matter during prosecution
9 is limited to what is absolutely necessary to avoid a prior art reference that was the basis
10 for an examiner’s rejection. To the contrary, it frequently happens that patentees
11 surrender more through amendment than may have been absolutely necessary to avoid
12 particular prior art.” *Norian Corp. v. Stryker Corp.*, 432 F.3d 1356, 1361 (Fed. Cir.
13 2005).

14 Here, by describing the present invention as a garment with a “flat central region”
15 and providing for three-dimensionality in order to fit the body part, the patentee limited
16 the claim beyond what was necessary in order to overcome prior art. CircAid cannot,
17 therefore, now argue that a broader construction was contemplated in light of the
18 prosecution history. *See id.* at 1362; *see also Int’l Rectifier Corp. v. IXYS Corp.*, 361
19 F.3d 1363, 1371 (Fed. Cir. 2004) (“The district court was not free to attribute new
20 meaning to the term or to excuse the patentee from the consequences of its own word
21 choice.”); *Fantasy Sports Props., Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108, 1114-15
22 (Fed. Cir. 2002) (rejecting patentee’s argument that “bonus points” should be read
23 broadly based on efforts to distinguish the invention from prior art). Accordingly, the
24 Court concludes that the patentee surrendered any garment that does not have a “flat
25 central region” as that term would have been understood by a person of ordinary skill in
26 the art, after consideration of the claim language and specification.

27 Ultimately, the plain and ordinary meaning of a term must be understood through
28 the lens of a person with ordinary skill in the art upon review of the intrinsic record. *See*

1 *O2 Micro*, 521 F.3d at 1360. Thus, the Court must construe the ordinary meaning of flat
 2 in light of, not in spite of, the specification’s clear intent to include garments that are
 3 contoured to accommodate a limb. Accordingly, the Court concludes that the plain and
 4 ordinary meaning of “flat” must be broad enough to encompass a small degree of three-
 5 dimensionality. Thus, the Court construes “flat” as “level when laid out, allowing for
 6 three-dimensionality in order to fit the body part.”

7 **2a. “central region”**

8 Juzo further contends that the Court needs to construe the term “central region” in
 9 addition to the term “flat.” Juzo argues that the term needs construction because the
 10 boundaries of the central region inform what region must be “flat” and to what region the
 11 “plurality of bands” must fasten.⁶ As such, Juzo proposes construing “central region” to
 12 mean “the entire central axis of the garment running from the top to the bottom of the
 13 garment.” *See* Dkt. No. 33 at 13-14. CircAid contends that the term need not be
 14 construed because a juror would understand its plain and ordinary meaning. *See* Dkt. No.
 15 36 at 6.

16 It is worth reiterating that “the ordinary and customary meaning of a claim term is
 17 the meaning that the term would have to a person of ordinary skill in the art in question.”
 18 *Phillips*, 415 F.3d at 1313. Moreover, “the person of ordinary skill in the art is deemed to
 19 read the claim term not only in the context of the particular claim in which the disputed
 20 term appears, but in the context of the entire patent, including the specification.” *Id.*
 21 Here, the Court agrees with Juzo that the meaning of “central region,” when read in light
 22 of the claim terms and the specification, must include the entire longitudinal axis of the
 23 garment.

24
 25
 26
 27 ⁶ *See* the ‘232 Patent at 16:12-17 (“a plurality of the bands extending from lateral margins . . . wherein
 28 the bands extending from the opposite lateral regions are juxtaposed to pass between one another and
 fasten onto the flat central region of the garment.”)

1 The ‘232 patent describes the invention as having only three regions, a single
 2 “central region” and two “lateral regions.” *See* the ‘232 patent at 16:5-65. Claim 1
 3 describes the garment as having a “flat central region . . . and lateral regions disposed on
 4 opposite sides of the central region.” The ‘232 patent at 16:8-11. Claim 2 describes the
 5 garment as “claim 1 wherein the central and lateral regions are biased into a three-
 6 dimensional curvature.” *Id.* at 16:28-30. The claim language makes no reference to any
 7 other region. Likewise, the specification and all of the preferred embodiments do not
 8 speak of any other region. As such, the Court finds that a person of ordinary skill in the
 9 art would understand the term “central region” to be mutually exclusive of the “lateral
 10 regions” and to include the entire central axis of the garment. If the central region did not
 11 run the longitudinal length of the garment, then there would be additional regions resting
 12 above and below the “central region” that are not encompassed by the “lateral regions”
 13 and that are not described anywhere else in the patent. Accordingly, the Court concludes
 14 that a person of ordinary skill in the art would understand the plain and ordinary meaning
 15 of “central region,” when read in light of the claims and specification, to include the
 16 region comprising the entire longitudinal axis. As such the Court construes “central
 17 region” as “the central region, including the entire longitudinal axis of the garment.”

18 In sum, the Court construes “a flat central region” as “a central region, including
 19 the entire longitudinal axis of the garment, that is level when laid out, allowing for three-
 20 dimensionality in order to fit the body part.”⁷

21 ////

22 ////

23
 24
 25 ⁷ The Court has construed this term in accordance with the principles of claim construction as laid out by
 26 the Federal Circuit. The Court, therefore, rejects Juzo’s contention that the claim term “flat central
 27 region” is indefinite. *See Young v. Lumenis, Inc.*, 492 F.3d 1336, 1346 (Fed. Cir. 2007) (“Claims are
 28 considered indefinite when they are not amenable to construction Thus, the definiteness of claim
 terms depends on whether those terms can be given any reasonable meaning.”) (internal citation
 omitted). To the extent that the Court’s claim construction presents any invalidity issues, Juzo may
 appropriately address the issue at a later stage of the proceedings.

3. “lateral regions disposed on opposite sides of the central region”

According to Juzo, this phrase is either indefinite or should be construed to mean “separate pieces connected to opposing sides of the flat central region.” Dkt. No. 34 at 14. CircAid contends that this phrase should be construed according to its ordinary meaning. In the event that the Court decides to construe the term, CircAid avers that the term “lateral” should be interpreted as “side.” Dkt. No. 33 at 11. Because the parties dispute the scope of the claim term, the Court must resolve the dispute as a matter of law. *See O2 Micro*, 521 F.3d at 1361.

Here, the parties’ dispute concerns the boundary between the central region and lateral regions. Juzo argues that because the claims require that the “plurality of bands” actually “fasten onto the flat central region of the garment,” one must be able to differentiate the “central region” from the “lateral region.” *See* Dkt. No. 34 at 14; the ‘232 Patent at 16:16-17. According to Juzo, however, only the preferred embodiments depicted at FIGS. 8, 9, and 15, have discernible boundaries because they are the only garments that depict three separate piece of fabric.

FIG. 8

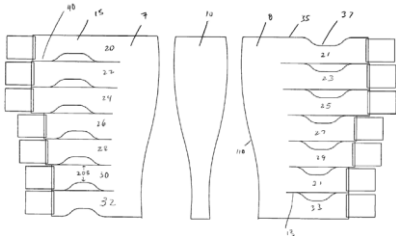


FIG.9

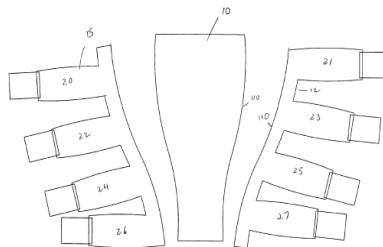
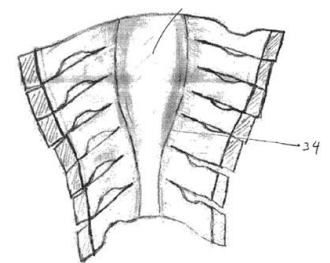


FIG. 15



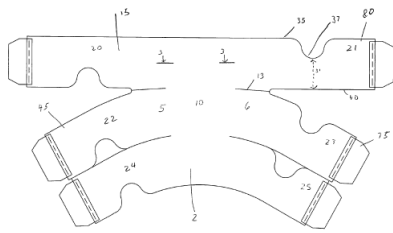
See the ‘232 Patent at Sheet 5, 6, 12, Dkt. No. 35-1 at 7-8, 14. Absent three separate pieces of fabric, Juzo argues, “it is impossible to distinguish” the central from the lateral regions. Dkt. No. 34 at 15. It is, therefore, Juzo’s position that the patent claims “cannot cover a unitary sheet of material” such as those depicted in FIGS. 3, 5, and 13. *Id.*

////

////

////

FIG. 3



The ‘232 Patent at Sheet 3, 4, 10, Dkt. No. 35-1 at 5-6, 12. Accordingly, Juzo argues, either the Court should adopt its proposed construction of “separate pieces connected to opposing sides of the flat central region” or find that the claim term is invalid because it is indefinite. *See* Dkt. No. 34 at 17.

1 415 F.3d at 1327. Rather, “while [the Federal Circuit] has acknowledged the maxim that
2 claims should be construed to preserve their validity, [it] ha[s] not applied that principle
3 broadly, and [it] ha[s] certainly not endorsed a regime in which validity analysis is a
4 regular component of claim construction. Instead, [it] ha[s] limited the maxim to cases in
5 which “the court concludes, after applying all the available tools of claim construction,
6 that the claim is still ambiguous.” *Id.*; see also *Generation II Orthotics Inc. v. Med. Tech.*
7 *Inc.*, 263 F.3d 1356, 1365 (Fed. Cir. 2001) (claims can only be construed to preserve their
8 validity where the proposed claim construction is “practicable,” is based on sound claim
9 construction principles, and does not revise or ignore the explicit language of the claims).
10 The Court, however, concludes that Juzo’s proposed construction is not “practicable” as
11 it finds no support in the claim terms, or the specification, and reads out a handful of
12 preferred embodiments.

13 Because the Court is not prepared to adopt Juzo’s proposed construction, it must
14 now contend with Juzo’s argument that the claim term is invalid for indefiniteness. As
15 stated previously, a claim is indefinite if it “fails to inform, with reasonable certainty,
16 those skilled in the art about the scope of the invention.” *Nautilus*, 134 S. Ct. at 2124
17 (emphasis omitted). The Federal Circuit has interpreted the *Nautilus* standard to require
18 that the claim, when read in light of the specification and prosecution history, provide
19 objective boundaries for those skilled in the art. *Interval Licensing*, 766 F.3d at 1371.
20 If, however, the intrinsic record is so lacking in explanation that a skilled artisan is left
21 “to consult the unpredictable vagaries of any one person’s opinion” in order to
22 understand the scope of the claim term, then the term is indefinite. *Dow Chemical Co. v.*
23 *Nova Chemicals Corp. (Canada)*, 803 F.3d 620, 635 (Fed. Cir. 2015).

24 The Court is not persuaded that Juzo has demonstrated, here, by clear and
25 convincing evidence that the specification provides no objective boundaries between the
26 central and lateral regions of the present invention in unitary garments. Juzo argues that
27 it is “impossible” to distinguish the lateral from the central regions absent a seam
28

1 between the various regions. The Court, however, finds that there are objective
2 boundaries for differentiating between the “lateral regions” and the “central region.”

3 Per the claim language, the central region must be “flat,” meaning “level when
4 laid out, allowing for three-dimensionality in order to fit the body part,” and it must be
5 “substantially inelastic,” meaning “largely but not wholly inelastic.” The specification
6 further explains that the “central region” is what is wrapped “around the body part.” The
7 ‘232 Patent at 6:60-61 (“The central region 10 is wrapped partially around the body
8 part.”); *id.* at 9:50-52 (“In certain embodiments, the central region 10 is wider proximally
9 than distally to accommodate the larger circumference of proximal limb segments.”); *id.*
10 at 10:7-8 (“The garment has a central region 10 for wrapping partially around the body
11 part.”) It is also the region that “stretches,” that “provides [the] tension,” and that
12 “compresses the limb.” The ‘232 Patent at 6:45-48 (“ . . . drawing the first and second
13 lateral regions toward each other, which tensions the central region, and thereby tensions
14 the central region [sic], thereby providing a tension in the garment that compresses the
15 limb.”); *id.* at 7:23-25 (“ . . . which stretches the central region, thereby providing a
16 tension in the garment that compresses the limb”).

17 By contrast, the lateral regions are not required to be “substantially inelastic,” or to
18 be “flat,” and the specification never describes the lateral regions as providing “tension”
19 or performing the “compression.” Instead, the specification describes the “lateral
20 regions” as those regions that are drawn “toward each other” when wrapping the garment
21 around a body part. *See* the ‘232 Patent at 3:54-56 (“In use, the user encircles the limb. . .
22 and draws the first lateral region toward the second longitudinal edge to stretch the
23 central region and thereby provide a tension in the garment that will compress the limb”);
24 *id.* at 6:44-46 (“ . . . [the bands are secured] drawing the first and second lateral regions
25 toward each other, which tensions the central region”). Accordingly, the Court finds that
26 a person of ordinary skill in the art could distinguish between the lateral and central
27 regions, even in one-piece garments, given these objective boundaries.
28

1 In sum, the Court concludes that the claim term does not introduce the “zone of
 2 uncertainty” prohibited by the *Nautilus* standard. Although one-piece garments of the
 3 present invention do not contain a seam between the central and lateral regions, the Court
 4 finds that a person skilled in the art would be able to differentiate between the two
 5 regions given the specification’s description of the “central region” as flat, substantially
 6 inelastic, and as the region supplying the tension and compression in the garment. Thus,
 7 the Court concludes that the claim is not invalid for indefiniteness as Juzo has not shown
 8 by clear and convincing evidence that there is a “zone of uncertainty” impossible to
 9 discern between the two regions. *See Exxon Research & Eng’g Co. v. United States*, 265
 10 F.3d 1371, 1375 (Fed. Cir. 2001) (a court should not hold a claim invalid if the meaning
 11 is discernible “even though the task may be formidable and the conclusion may be one
 12 over which reasonable persons disagree.”) Accordingly, the Court sides with CircAid
 13 and concludes that the term “lateral regions disposed on opposite sides of the central
 14 region,” should bear its plain and ordinary meaning. The Court, therefore, construes the
 15 term as “the regions located at either side of the central region.”

16 **4. “a plurality of bands extending from lateral margins disposed at opposite**
 17 **side edges of said opposite lateral regions wherein the bands extending from**
 18 **the opposite lateral regions are juxtaposed to pass between one another”**

19 The construction proposed by Juzo interprets this passage to mean “at least two
 20 bands on each side of the garment positioned such that at least one band on each side
 21 passes immediately between two bands on the opposite side.” Dkt. No. 34 at 17.
 22 CircAid, by contrast, contends that the passage should be given its plain meaning or, in
 23 the alternative, that “juxtaposed” should be construed as “close together or side by side.”
 24 Dkt. No. 33 at 14. Because the parties’ dispute concerns claim scope, the Court must
 25 resolve it as a matter of law. *See O2 Micro*, 521 F.3d at 1361.

26 The disagreement between Juzo and CircAid, here, concerns whether this phrase
 27 can include garments with three bands, where there are two bands on one side of the
 28 garment and one on the other. *See* Dkt. No. 34 at 17-18. Juzo argues that the claim

1 language itself requires that there be at least two bands on each side of the compression
2 garment and that at least two bands, one on each side, pass between another set of two
3 bands. *Id.* CircAid counters by noting that Juzo’s proposed construction is unnecessarily
4 limiting because it reads “a plurality of bands” as being required for each side of the
5 garment rather than for the garment as a whole. Dkt. No. 36 at 9. Accordingly, CircAid
6 argues that the plain and ordinary meaning of the claim term encompasses a garment with
7 three bands: “two extending from one lateral margin and one from the other.” *Id.* For the
8 reasons that follow, the Court sides with CircAid and concludes that the claim language
9 is broad enough to include a garment with two bands on one side, and one on the other.

10 The Court begins with the disputed claim language.

11 **b.** a *plurality of bands* extending from lateral margins disposed at opposite
12 edges of said opposite lateral regions, wherein *the bands* extending from the
13 opposite lateral regions *are juxtaposed to pass between one another* and fasten
onto the flat central region of the garment.

14 The ‘232 Patent at 16:12-17 (emphasis added). The Court starts by noting that this
15 language does not require that the garment have more than three bands. The Court
16 further notes that the claim language describes the “plurality of bands” in reference
17 to the garment as a whole, (e.g. “from lateral margins,” “at opposite edges of said
18 opposite lateral regions,” “extending from opposite lateral regions”), rather than in
19 reference to any specific region of the garment, thus cutting against the argument
20 that there must be a “plurality of bands” extending from each lateral margin.

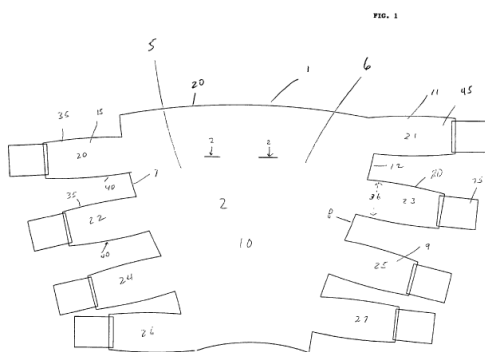
21 Finally, the Court observes that the term “one another” is a reciprocal term
22 explaining that the positioning of the bands should be understood in a relational
23 manner, and not in reference to a discrete number of bands.

24 Nevertheless, Juzo argues that the claim language lends support to its
25 argument. In fact, it contends that the claim’s description of the “plurality of
26 bands” specifies the “position” and “location” of the bands because the language
27 requires that the “plurality of bands” actually “pass between one another.” Dkt.
28

No. 34 at 17. Thus, Juzo argues, because only those bands that have a band physically flanking it from above and below actually “pass between,” its proposed construction is correct. *Id.* The Court, however, disagrees that the plain and ordinary meaning of a plurality of bands juxtaposed to pass between one another is so limiting.

The first half of the disputed claim term introduces the concept of “a plurality of bands” and explains that they extend from the opposite lateral margins. *See* the ‘232 Patent at 16:12. The second half of the claim term limits the plurality of bands by explaining that they must be positioned so as to be “juxtaposed to pass between another.” In other words, all of the bands contained within the “plurality of bands” must be “juxtaposed to pass between one another,” and no one band is omitted from that limitation.

Turning to the specification, a person skilled in the art would see examples of garments with a “plurality of bands” and examples of how they are “juxtaposed to pass between one another.” Take FIG. 1 for instance.



The ‘232 Patent at Sheet 1, Dkt. No. 35-1 at 2. FIG. 1 has eight bands, together constituting a “plurality of bands.” Yet of the eight bands present on the garment, only six can ever physically pass through two other bands, because the top and bottom bands represent the top and bottom boundaries of the garment. Juzo proposes that this fact (i.e., the fact that a top and bottom band will never physically pass two other bands) means that only the six inner bands are

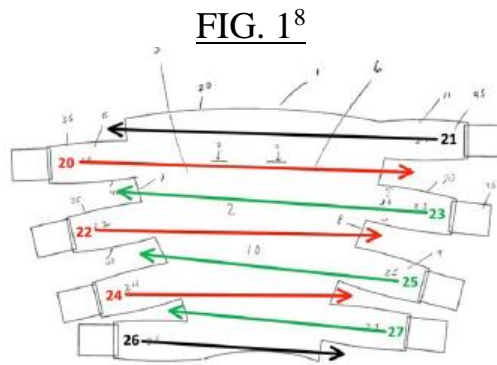
1 “juxtaposed to pass between one another” and only those six bands comprise a
2 “plurality of bands.” This conclusion, however, makes little sense. The claim
3 language does not state that only the inner bands are juxtaposed to pass between
4 one another. Likewise, the claim also does not state that the “plurality of bands”
5 referenced in the first half of the term only include the inner bands of a garment.
6 In fact, the claim language does not differentiate between the garment’s bands at
7 all (i.e., by indicating that some comprise “a plurality of bands” while the others
8 are omitted from the definition because they cannot be “juxtaposed to pass
9 between one another.”) Accordingly, a person skilled in the art would understand
10 the phrase “juxtaposed to pass between one another” to describe all the bands of
11 any given garment, including the top and bottom bands that create an interval or
12 space through which just one other band can pass.

13 Despite what Juzo argues, any other conclusion would be untenable because
14 it would mean that the term “plurality of bands” does not refer to all of the bands in
15 any given garment. Such a construction is not supported by the claim language,
16 which speaks of the garment’s bands only in terms of a “plurality of bands,” and
17 the specification, which does not speak of any bands that are not included within
18 the “plurality of bands.” As such, the Court sees no reason to conclude that the
19 plain and ordinary meaning of the disputed term precludes a garment with only
20 three bands, two on one side, and one on the other. Contrary to what Juzo argues,
21 the juxtaposition of three bands would create a space sufficient for the bands to
22 pass between one another.

23 In reaching this conclusion, the Court also rejects Juzo’s other arguments in
24 support of its proposed construction. For one, the Court declines to import limitations
25 from the preferred embodiments into the claim term. Thus, just because none of the
26 preferred embodiments depict a garment with less than four bands does not mean that
27 there must be at least two bands on each side of the garment. *See Douglas Dynamics*,
28 717 F.3d at 1342 (a “claim construction must not import limitations from the

specification into the claims.”) Two, the Court is also not persuaded by Juzo’s argument that the patentee’s description of the claim term evinced an intent to require at least two bands on each side of the garment. Juzo notes that CircAid added the language “juxtaposed to pass between one another” in order to overcome a prior art rejection. Dkt. No. 34 at 18. CircAid explained the addition as follows:

This feature of the invention is described in the specification at pages 5 and 11 and is clearly seen in Fig. 1 . . .



where bands 20, 22, 24 and 26 are juxtaposed with bands 21, 23, 25 and 27 such that band 20 passes between bands 21 and 23; band 23 passes between bands 20 and 22; band 22 passes between bands 23 and 25, etc. when the device is wrapped around the patient’s limb.

Id. (emphasis omitted). Because this explanation does not describe the top band, 21, or the bottom band, 26, as passing between another band, Juzo argues that there cannot be a “plurality of bands juxtaposed to pass between one another” when only one band, situated on one side of the device, passes through two bands, on the opposite side. *Id.* at 18-19.

Yet as the Court concluded above, the claim language “juxtaposed to pass between one another” does not attach only to the inner bands, but rather, it necessarily modifies the plurality of bands, which includes top and bottom bands. Adopting Juzo’s construction would omit the top and bottom bands from the “plurality of bands” disclosed in the garment, which would render the claim language and patent confusing and

⁸ This labeled reproduction of FIG. 1 appears in Juzo’s Claim Construction Brief. Dkt. No. 34 at 19.

1 incomplete. Moreover, the plain language of the claim term does not require that more
 2 than one band pass between two other bands. Instead, it refers to the bands as an entity
 3 and describes all of them as passing between one another; and this language, as stated
 4 previously, is broad enough to include a garment that has two bands on one side and one
 5 on the other.

6 Accordingly, the Court agrees with CircAid and adopts the plain and ordinary
 7 meaning of the claim term. Thus, it construes “a plurality of bands extending from
 8 lateral margins disposed at opposite side edges of said opposite lateral regions,
 9 wherein the bands extending from the opposite lateral regions are juxtaposed to pass
 10 between one another” as “a plurality of bands extending from lateral margins
 11 disposed at opposite side edges of said opposite lateral regions, wherein the bands
 12 extending from the opposite lateral regions are juxtaposed to allow at least one band
 13 to pass through two others on the opposite side.”

14 **5. “one or both edges comprise a curve or indentation”**

15 Juzo avers that “one or both edges comprise a curve” should be construed as “at
 16 least one of the edges is curved throughout its length,” Dkt. No. 34 at 19, and that “one or
 17 both edges comprise a[n]. . . indentation” should be construed as “at least one of the
 18 edges has a recess formed into the edge of a band that mates (engages) with a recess in
 19 another band,” *id.* at 22. In contrast, CircAid argues that both terms should be given their
 20 plain meaning and that, if necessary, comprise should be construed as “includes.” Dkt.
 21 No. 33 at 16. Because the parties present differing constructions of the claim’s scope, the
 22 Court must decide the dispute as a matter of law. *See O2 Micro*, 521 F.3d at 1361.

23 **5a. “One or both edges comprise a curve”**

24 Here, the dispute over claim scope consists of whether the phrase “one or both
 25 edges comprise a curve” can include an “edge that transitions from the top or bottom
 26 edge to a side edge.” Dkt. No. 34 at 19. Juzo argues that this claim term does not
 27 encompass a curve that is a transition from one edge to another for two reasons: (1) the
 28 specification limits the term to only “edges curved throughout their length” and (2) the

1 patentee disavowed a transitional curve in the prosecution history. *See* Dkt. No. 34 at 19-
2 21. For the following reasons, the Court rejects both contentions and concludes that the
3 claim language is broad enough to include a curve that transitions from one edge to a side
4 edge.

5 Claim 1 states that “each of said [plurality of] bands” comprises “proximal and
6 distal edges, wherein one or both edges comprise a curve or indentation.” The ‘232
7 Patent at 16:19-20. As written, this term is not ambiguous. Moreover, the claim term is
8 not given any special definition or meaning by the claim language. The Court also notes
9 that the claim language does not require that the edge include a curve throughout its
10 length or state that transitional edges are omitted from the claim term.

11 As for Juzo’s contention that the term “one or both edges comprise a curve” must
12 mean “at least one edge is curved throughout its length,” the Court finds that there is no
13 support for this construction in the intrinsic record. Put simply, Juzo’s proposed
14 construction is unnecessarily limiting. For one, Juzo’s proposed construction improperly
15 imports a limitation from the preferred embodiments into the claim term. Juzo argues
16 that because FIGS. 1, 3, 5, 9, 10, and 13 all have edges that are curved throughout their
17 length, the term “one or both edges comprise a curve” must mean “at least one of the
18 edges is curved throughout its length.” Dkt. No. 34 at 21. It is, however, “improper to
19 read limitations from a preferred embodiment described in the specification . . . into the
20 claims absent a clear indication in the intrinsic record that the patentee intended the
21 claims to be so limited.” *Dealertrack, Inc.*, 674 F.3d at 1327 (citations omitted); *see also*
22 *Douglas Dynamics*, 717 F.3d at 1342 (a “claim construction must not import limitations
23 from the specification into the claims.”) Thus, because there is no clear indication in the
24 written description that curves must run “throughout the length” of the band edges, as
25 opposed to somewhere or anywhere on the band, the Court rejects this argument.

26 Two, the Court also rejects Juzo’s attempt to limit the term “one of both edges
27 comprise a curve” by arguing that the alleged purpose of having edges with curves is
28 limiting. Juzo contends that, according to the specification, the “curves” in the band

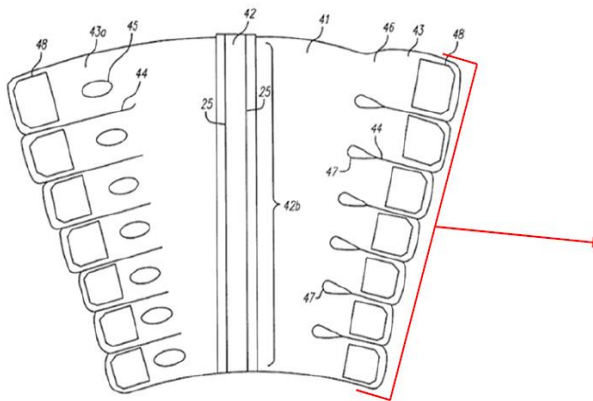
edges accomplish one of two purposes: (1) “avoid[ing] gaps between spaced apart bands by widening the band toward the middle so that no gap occurs due to “necking” or (2) “enabl[ing] the bands to pass between one another when they are not offset.” Dkt. No. 34 at 21. Thus, Juzo contends, because its proposed construction accomplishes the dual purpose of preventing necking and overlap, its proposed construction is the correct one. *Id.*

“Claim construction,” however, “is a function of the words of the claim not the ‘purpose’ of the invention.” *See Source Vagabond Systems Ltd. v. Hydrapak, Inc.*, 753 F.3d 1291, 1301 (Fed. Cir. 2014). Here, the term “one or both edges comprise a curve” does not mean a curve to prevent necking, or to prevent overlap, because nothing in the claim language modifies or restricts the word “curve” in any way. *See York Products*, 99 F.3d at 1573 (concluding that it was incorrect to tie the meaning of a claim term to the function of the invention absent a clear indication that the purpose was limiting). There is also no clear indication that the specification’s description of “necking” and “overlapping” must be read as a limitation on the claim term “one or both edges comprise a curve.” The specification’s description of “necking” and “overlap” is stated in permissive, not mandatory, terms. *See, e.g.*, the ‘232 Patent at 7:36-38 (“The width 36 of a band *can* be sized to account for the reduced surface caused by necking that can occur when using an elastic material for the bands”) (emphasis added); *id.* at 7:41-43 (“*For example*, if the distal and/or proximal edges of overlapping bands are curved outward to compensate for necking . . . ” (emphasis added); *id.* at 9:64-66 (“The bands *can also have* varying widths 36, as can the length of the bands to accommodate any necking that occurs”) (emphasis added). The patentee, therefore, is entitled to the full scope of the plain and ordinary meaning of “one or both edges comprise a curve.” *See Home Diagnostics*, 381 F.3d at 1357 (“a patentee may claim an invention broadly and expect enforcement of the full scope of that language absent a clear disavowal or contrary definition in the specification.”)

1 The Court further concludes that an “edge that transitions from the top or bottom
 2 edge to a side edge” is included within the claim scope. Juzo’s contention that the
 3 expression “one or both edges comprise a curve” cannot include an “edge that transitions
 4 from the top or bottom edge to a side edge” is contradicted by the preferred embodiment
 5 depicted at FIG. 12, which discloses an edge that only has a curve that transitions from
 6 the top and bottom edges to the side edges and interior of the garment. *See* the ‘232
 7 Patent at Sheet 9, Dkt. No. 35-1 at 11. “[A] claim construction that excludes [a] preferred
 8 embodiment [described in the specification] is rarely, if ever, correct and would require
 9 highly persuasive evidentiary support.” *Adams Respiratory*, 616 F.3d at 1290.

10 Juzo, however, has not presented such highly persuasive evidentiary support, here.
 11 Notwithstanding its protestations to the contrary, the prosecution history does not amount
 12 to a clear disavowal of “an edge that transitions from the top or bottom edge to a side
 13 edge” from the claim’s scope. Juzo essentially argues that the scope of “one or both
 14 edges comprises a curve” cannot include a curved transition because one of the figures
 15 depicted in prior art — namely, FIG. 15 of U.S. Patent No. 6,338,723 (“the ‘723 patent”)
 16 — disclosed the exact same “curved transition” that CircAid seeks to include in the
 17 claim’s scope. *See* Dkt. No. 34 at 21.

18 FIG. 15



27 Carpenter Figure 15, Dkt. No. 34 at 21; *see also* U.S. Patent No. 6,338,723 (“the ‘723
 28 patent”), Exhibit E, Dkt. No. 35-5 at 12. The issue, however, with Juzo’s reasoning is

1 that the prosecution history did not clearly distinguish the present invention from FIG. 15
 2 on the basis of the disputed curved transitions, but on the basis of another claim feature –
 3 namely, the “planar distal region.”⁹ As CircAid points out, the patentee distinguished the
 4 present invention from FIG. 15 by (1) noting that FIG. 15 lacked *both* “edges comprising
 5 a curve” *and* bands with “planar distal regions,” and (2) by observing that FIG.15 clearly
 6 lacked planar distal regions. Accordingly, because the ‘232 applicant overcame the prior
 7 art depicted at FIG. 15 by demonstrating that the prior art did not contain the limitation of
 8 “planar distal regions,” Juzo’s argument fails because the prosecution history is
 9 inconclusive as to whether FIG. 15 also lacked “one or both edges compris[ing] a curve.”

10 In sum, the Court sides with CircAid and concludes that the term “one or both
 11 edges comprise a curve” should be construed in accordance with its plain and ordinary
 12 meaning. The Court further concludes that this claim term can include an “edge that
 13

14
 15 ⁹ Carpenter Figure 15 is mentioned twice in the prosecution history. The first reference reads as follows:
 16 Carpenter Figures 15, 18, 21, and 40 disclose bands in which slots 45 (depicted above) or
 17 orifices are formed in the distal region of a plurality of bands. New claim 15 limits the
 18 distal region to one that is *planar*, that is to say, having a surface without voids, orifices,
 or slots formed therethrough.

19 Exhibit D, Dkt. No. 35-4 at 5. This paragraph makes clear that the ‘232 patent distinguished itself from
 20 Figure 15 by virtue of the fact that the present invention has planar bands, meaning, bands without
 voids, orifices, or slots. *See* the ‘232 patent at 16:17-18 (“each of said bands comprising (i.) a planar
 distal region”). The second reference to Figure 15 goes on to note that:

21 None of the garments disclosed in Carpenter’s Figures 15, 16, 18, 21, and 40 contain
 22 limitations to bands in which the distal regions of bands are *both* planar *and* comprise
 23 curved edges. Since all of the limitations in new claim 15 are found in none of the
 24 Carpenter reference figures, the present invention, as newly claimed, avoids anticipation
 by the figures disclosed in Carpenter.

25 Exhibit D, Dkt. No. 35-4 at 6 (*italics in original*) (underlines added). Accordingly, the ‘232 applicant
 26 distinguished its invention from Figure 15 not on the basis that Figure 15 did not have an edge
 27 comprising a curve, but because it did not have an “edge comprising a curve” plus planar bands. Thus,
 28 because the ‘232 applicant overcame the prior art depicted at Figure 15 by demonstrating that the prior
 art did not contain “planar distal regions,” Juzo’s argument fails because its reasoning depends upon
 Figure 15 being clearly differentiated as having “edges that comprise a curve.”

transitions from the top or bottom edge to a side edge.” Accordingly, the Court construes “one or both edges comprise a curve” as “one or both edges includes a curve at any point along, or at either terminal end, of the edge.” *See CIAS, Inc. v. Alliance Gaming Corp.*, 504 F.3d 1356, 1360 (Fed. Cir. 2007) (“In the patent claim context the term “comprising” is well understood to mean “including but not limited to” and also noting that the term “comprising” embraces “comprises”).

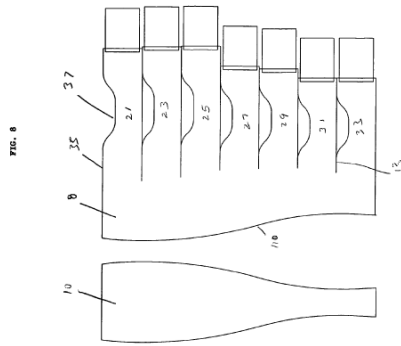
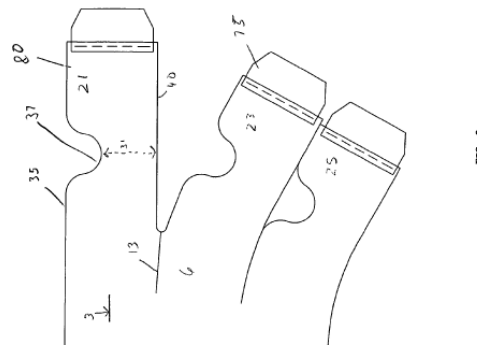
5b. “one or both edges comprise a[n] . . . indentation”

The relevant dispute, here, is whether this term can include “notches that extend into the main body of the garment.” Dkt. No. 34 at 22. Juzo argues that such notches cannot be contained within the claim scope because the term “indentation,” when read in light of the specification, requires that the term be limited by the disclosed purpose of having “indentations” in the band edges. *See* Dkt. No. 34 at 22-23. CircAid, by contrast, argues that “indentation” has no special meaning and thus should be given the scope of its plain and ordinary meaning. For the reasons that follow, the Court agrees with CircAid and concludes that the scope of the claim includes “notches” that occur anywhere along the edge, including into the body of the garment.

The Court begins with the claim itself. Claim 1 states that “each of said [plurality of] bands” comprises “proximal and distal edges, wherein one or both edges comprise a[n] . . . indentation.” The ‘232 Patent at 16:17, 19-20. The parties concede that the claim language does not provide the term “indentation” with any special meaning. *See* Dkt. No. 33 at 16; Dkt. No. 34 at 22. The parties also do not dispute that the specification does not use the word “indentation.” *See* Dkt. No. 33 at 16; Dkt. No. 34 at 22.

Notwithstanding the fact that the word “indentation” does not appear in the specification, Juzo argues that the “recesses,” which are described throughout the specification, must refer to the disclosed “indentation.” Dkt. No. 34 at 22. Juzo notes that a synonym for indentation, “recesses,” appears in reference to FIGS. 3 & 8 of the ‘232 patent. Dkt. No. 34 at 23.

////

FIG. 3FIG. 8

The ‘232 Patent, Sheet 3 & 5, Dkt. No. 35-1 at 5-7. The specification, Juzo emphasizes, describes both figures as having “recesses” that “form[] in either the proximal or distal edges of the bands to facilitate wrapping engagement by juxtaposition of the proximal and distal recessional edges of opposing bands.” *Id.* at 4:4-7. Thus, Juzo argues, because the purpose of those recesses is to “accommodate interlocking with an opposing band’s recess to allow the bands to overlap without bunching,” that meaning should be read into the claim term. Dkt. No. 34 at 22-23.

The Court, however, is not persuaded by Juzo’s argument. Even if it is correct to equate the “recesses” described in FIG. 3 & 8 with the claimed “indentations,” there is no clear indication in the specification that the patentee intended for any purpose attributed to those “recesses” to be limiting. *See, e.g.*, the ‘232 Patent at 7:45-50 (“Referring to FIG. 3, the bands *may* include areas of reduced width 31 created by a recess formed into a proximal 35 or distal edge 40 of the band.”) (emphasis added); *id.* at 10:61-62; *id.* at 11:7-15 (“FIG. 8 has . . . bands [with] a region of reduced width 205 formed by recesses 37 in a proximal and distal edge of the band”); *id.* at 4:4-7 (“*Still other embodiments* provide bands in which recesses are formed in either the proximal or distal edges of the bands.”) (emphasis added). The claim language does not state “wherein one or both edges comprise a[n] . . . indentation to facilitate wrapping engagement.” *See York Products*, 99 F.3d at 1573 (reasoning that if “substantial height” only meant “ample height to accomplish a purpose, the claim would need to read [as] ‘only so much height

1 as necessary to affix a structure against movement.”) Accordingly, because there is no
2 such limitation following the claim term “indentation,” the Court will not read in such a
3 limitation. *See Source Vagabond*, 753 F.3d at 1301 (“Claim construction is a function of
4 the words of the claim not the ‘purpose’ of the invention.”); *see also Douglas Dynamics*,
5 717 F.3d at 1342 (“a claim construction must not import limitations from the
6 specification in the claims.”); *Home Diagnostics*, 381 F.3d at 1357 (“a patentee may
7 claim an invention broadly and expect enforcement of the full scope of that language
8 absent a clear disavowal or contrary definition in the specification.”).

9 The Court is also not convinced that the prosecution history supports Juzo’s
10 proposed construction. Juzo’s argument, in this respect, is a recapitulation of the
11 argument it made as to the claim term “one or both edges comprise a curve,” discussed
12 *supra*. In short, it contends that because the ‘232 applicant added the “curve or
13 indentation” limitation in order to overcome the ‘723 prior art, the word “indentation”
14 must be narrowed in order to not include the patent that was overcome. Dkt. No. 34 at
15 22. As such, Juzo concludes that because FIG. 15 of the ‘723 patent has indentations that
16 extend into the body of the garment, the word “indentation” in the claim term cannot be
17 read to have that meaning.

18 The Court rejects this argument for the same reason it rejected the argument when
19 made to support Juzo’s proposed construction of “one or both edges comprise a curve.”
20 The prosecution history of the present invention did not distinguish itself from FIG. 15 of
21 the prior art by stating that the present invention had “indentations” while FIG. 15 did
22 not, but by stating that FIG. 15 did not have “planar bands” and an “edge comprising a
23 curve or indentation,” while the present invention had both. Accordingly, because the
24 ‘232 patent applicant overcame the prior art by demonstrating that the present invention
25 had a combination of qualities that the prior art did not, Juzo’s argument fails.

26 Finally, the Court also rejects Juzo’s argument that the term “one or both edges
27 comprise a[n] . . . indentation” cannot include a notch that extends into the body of the
28 garment. For one, because the Court rejects Juzo’s argument that the prosecution history

1 supports its claim construction, Juzo’s position that the claim term cannot include notches
 2 that extend into the body of the garment finds no support in the intrinsic record. Two,
 3 Juzo has offered no persuasive reason as to why the claimed indentation cannot occur at
 4 the end of the edge, where it meets the body of the garment. Indeed, the plain and
 5 ordinary meaning of “one or both edges comprise a[n] . . . indentation” would suggests
 6 that the indentation can be included at any point along the length of the edge, and does
 7 not have to somehow be “within the edge.”

8 To conclude, the Court agrees with CircAid that the claim term “one or both edges
 9 comprise a[n] . . . indentation” should be construed in accordance with its plain and
 10 ordinary meaning. Accordingly the Court construes “one or both edges comprise a[n] . . .
 11 indentation” as “one or both edges includes an indentation occurring at any point along,
 12 or at either terminal end, of the edge.” *See CIAS*, 504 F.3d at 1360 (stating that “the term
 13 ‘comprising’ is well understood to mean ‘including but not limited to’” and also noting
 14 that the term “comprising” embraces “comprises”).

15 **6. “proximal and distal edges”**

16 Claim 1 states that “each of said [plurality of] bands” includes “proximal and distal
 17 edges.” The ‘232 Patent at 16:19. Juzo readily admits that the plain and ordinary
 18 meaning of “proximal and distal edges” is “top and bottom edges.” Dkt. No. 34 at 19
 19 (“The parties agree that the phrase ‘proximal and distal edges’ of a band generally refer
 20 to the top and bottom edges of a band.”) Notwithstanding this concession, Juzo
 21 nonetheless argues that “proximal and distal edges” should be construed as “the top and
 22 bottom edges of the band extending from the lateral margin and excluding the transition
 23 from top edge or bottom edge to side edge” because the prosecution history indicates that
 24 “proximal or distal edges comprising a curve” cannot include a curved edge that
 25 transitions from the top or bottom edge to a side edge. *Id.* at 19-20. Yet, as stated above
 26 *supra* Section 5a, the Court rejects Juzo’s argument that the prosecution history was
 27 “crystal clear” in exempting a curved transitional edge from the scope of the claim term
 28 “one or both edges comprise a curve.” Accordingly, the Court similarly rejects Juzo’s

1 attempt to use the prosecution history, here, as a means to jettison transitional edges from
2 the scope of the term “proximal and distal edges.”

3 Accordingly, the Court adopts the plain and ordinary meaning of “proximal and
4 distal edges” and construes the term as “top and bottom edges.”

5 **7. “the central and lateral regions are biased into a three-dimensional**
6 **curvature”**

7 Juzo avers that this phrase should be construed to mean “a three-dimensional
8 curvature is formed at intersections of the central region and lateral regions.” Dkt. No. 34
9 at 23. CircAid once again argues that no construction is necessary. Dkt. No. 33 at 17.
10 Because the parties dispute the claim scope of this term, the Court must resolve the
11 disagreement as a matter of law. *See O2 Micro*, 521 F.3d at 1361.

12 Turning first to the claim language, this phrase appears in dependent Claim 2, as
13 follows: “The garment according to claim 1 wherein the central and lateral regions are
14 biased into a three-dimensional curvature in order to fit the body part.” The ‘232 patent
15 at 16:28-30. The Court notes that nothing in the language itself requires that the three-
16 dimensionality must form at the intersection of the central and lateral regions. The Court
17 also observes that there is no clear indication in the specification that the three-
18 dimensionality must form at the intersection of the two regions. *See, e.g.*, the ‘232 patent
19 at 4:56-58 (“Preferred embodiments of the garment involve the central and lateral regions
20 which are biased into a three-dimensional curvature in order to fit the body part.”)

21 Turning to the specification, the Court further concludes that it is improper to rely on
22 FIGS. 8, 9, and 15, all of which contain a three-dimensional curvature at the intersection
23 of the central and lateral regions, as a limitation on the claim’s scope. *See Douglas*
24 *Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1342 (Fed. Cir. 2013) (A “claim
25 construction must not import limitations from the specification into the claims.”)

26 Notwithstanding the lack of support in the intrinsic record for any departure from
27 the plain and ordinary meaning of the claim term, Juzo contends that its proposed
28 construction is the correct one because only its interpretation makes clear that the “central

1 region alone” cannot be biased into a three-dimensional curvature. Dkt. No. 33 at 23.
2 This is so, Juzo argues, because any construction of the term “the central and lateral
3 regions are biased into a three-dimensional curvature” that allows the central region by
4 itself to be biased contradicts the claim requirement that the central region be flat. *Id.* In
5 other words, Juzo is arguing that the interrelationship between its proposed construction
6 of “flat central region” in independent claim 1, necessitates that the Court adopt its
7 proposed construction of “the central and lateral regions are biased into a three-
8 dimensional curvature” in dependent claim 2.

9 The Court, however, has rejected Juzo’s proposed construction of “flat central
10 region.” As stated above, *supra* Section 2, the Court disagrees that the plain and ordinary
11 meaning of “flat,” read in light of the intrinsic record, means “level or even without
12 raised areas or indentations when laid out.” Instead, the Court finds that the term “flat” is
13 broad enough to include some three-dimensionality and should be construed as “level
14 when laid out, allowing for three-dimensionality in order to fit the body part.” As such,
15 the Court is not persuaded by any argument, like Juzo’s here, that relies on a proposed
16 construction that the Court has rejected. The Court has determined that the plain and
17 ordinary meaning of “flat central region” allows for some three-dimensionality in order to
18 fit the body part. Accordingly and contrary to what Juzo contends, there is no inherent
19 conflict between independent claim 1 and dependent claim 2 that requires a limiting
20 interpretation of “the central and lateral regions are biased into a three-dimensional
21 curvature.”

22 In sum, the Court concludes that the intrinsic record does not support any departure
23 from the plain and ordinary meaning of “the central and lateral regions are biased into a
24 three-dimensional curvature.” The patentee is entitled to the full scope of the plain and
25 ordinary meaning of the words used in the claim, as understood in light of the intrinsic
26 record by a person of ordinary skill in the art. *See Home Diagnostics*, 381 F.3d at 1357
27 (“a patentee may claim an invention broadly and expect enforcement of the full scope of
28 that language absent a clear disavowal or contrary definition in the specification.”) The

1 Court, therefore, construes the term as “the central and side regions are formed into a
2 three-dimensional curvature.”

3 **8. “substantially perpendicular”**

4 With regards to the term “substantially perpendicular,” Juzo contends that the term
5 is indefinite or, in the alternative, that the Court should construe it to mean “essentially
6 90 degrees *within manufacturing tolerances*.”¹⁰ Dkt. No. 34 at 24. CircAid maintains
7 that no construction is necessary because the words used have a plain and ordinary
8 meaning. Because the parties dispute the claim’s scope, the Court’s must resolve the
9 matter as a question of law. *See O2 Micro*, 521 F.3d at 1361.

10 Here, the dispute concerns whether or not the term “substantially perpendicular”
11 can cover any band angle or, put differently, whether a band angle can be both
12 “substantially perpendicular” and “non-normal” at the same time. *See* Dkt. No. 34 at 25.
13 For the following reasons, the Court agrees with Juzo insofar as it contends that the scope
14 of the term “substantially perpendicular,” when read in light of the intrinsic record,
15 cannot mean “non-normal.” The Court disagrees, however, that it is necessary to adopt
16 Juzo’s proposed construction in order to give the claim its plain and ordinary meaning.

17 Beginning with the claim language, the Court observes that the term “substantially
18 perpendicular” first appears in Claim 3, “[t]he garment of claim 2 wherein said opposing
19 bands extend *substantially perpendicular* to a longitudinal axis of said central region, and
20 said proximal and distal edges are substantially parallel to each other.” The ‘232 Patent
21 at 16:31-34 (emphasis added). The term appears again in Claim 6: “the garment of claim
22 5 wherein at least one set of opposing bands extends *substantially perpendicular* to a
23 longitudinal axis of said central region, and said proximal and distal edges are
24 _____

25 ¹⁰ At oral argument, Juzo abandoned its defense of the words “within manufacturing tolerances,” located
26 at the end of its proposed construction. Transcript of Oral Argument, Dkt. No. 43 at 55:5-8 (“frankly, it
27 [“within manufacturing tolerances”] probably should have been deleted before we submitted the final
28 proposal to the Court. I think we would be happy saying “substantially perpendicular” means essentially
90 degrees.”) As such, the Court will treat Juzo’s proposed construction as arguing for “essentially 90
degrees.”

1 substantially parallel to each other; and at least one set of opposing bands extends at a
 2 non-normal angle to the longitudinal axis of the central region” *Id.* at 16:44-50
 3 (emphasis added). The claim language does not indicate that the word “substantially
 4 perpendicular” has any special meaning in the art. The claim language does, however,
 5 contrast bands that extend “substantially perpendicular” from bands that extend “at a non-
 6 normal angle.” *See id.* That the term “substantially perpendicular” is contrasted with
 7 “non-normal angle” evidences an intent to define these two terms as mutually exclusive.

8 The specification supports construing the two terms as mutually exclusive. *See id.*
 9 at 3:60-66 (“Various embodiments are provided in which the opposing bands extend
 10 *either* substantially perpendicular to a longitudinal axis of the central region . . . *or* the
 11 bands extend from a lateral region *at an angle* with respect to a longitudinal axis of the
 12 central region.”) (emphasis added); *id.* at 6:29-32 (“a device may comprise sets of
 13 opposing bands which all extend perpendicularly from the longitudinal axis, or all extend
 14 at non-normal angles; or any combination of normal and non-normal angles.”) As such,
 15 the Court concludes that an angle cannot be both “substantially perpendicular” and “non-
 16 normal.”

17 That the Court finds “substantially perpendicular” and “non-normal” to be
 18 mutually exclusive terms, however, does not necessitate that the Court adopt Juzo’s
 19 proposed construction. Juzo’s proposed construction does not argue for a departure from
 20 the plain and ordinary meaning of “substantially perpendicular,” but instead argues that
 21 “the claim language affirms the ordinary meaning of ‘substantially perpendicular’ to be
 22 ‘essentially 90 degrees.’” Dkt. No. 34 at 25. It is unclear, however, how “essentially 90
 23 degrees” gives the term greater clarity than does “substantially perpendicular.” Thus,
 24 because Juzo’s proposed construction does not “define[] the claim with greater precision
 25 than had the patentee,” *see Pall Corp. v. Hemasure Inc.*, 181 F.3d 1305, 1308 (Fed. Cir.
 26 1999), and because it does not offer any intrinsic evidence otherwise justifying a
 27 departure from the plain and ordinary meaning, *see, e.g., Source Vagabond*, 753 F.3d at
 28 1299-01, the Court will not adopt Juzo’s proposed construction.

1 To conclude, the Court agrees with Juzo insofar as it argues that an angle that
 2 extends “substantially perpendicular” cannot also be a “non-normal angle,” but declines
 3 to adopt Juzo’s proposed construction of “essentially 90 degrees” because it
 4 unnecessarily rewrites the claim term where there is no dispute that the plain and ordinary
 5 meaning of “substantially perpendicular” applies. Furthermore, the Court rejects Juzo’s
 6 hasty argument that this claim term is indefinite. As the Court stated above with regard
 7 to its construction of the term “substantially inelastic material,” the term “substantial” is a
 8 “meaningful modifier implying ‘approximate,’ rather than ‘perfect.’” *Liquid Dynamics,*
 9 *Inc.*, 355 F.3d at 1368. Because this claim term is amenable to a reasonable construction,
 10 the Court rejects Juzo’s contention that the term is indefinite. *See Young v. Lumenis, Inc.*,
 11 492 F.3d 1336, 1346 (Fed. Cir. 2007) (“Claims are considered indefinite when they are
 12 not amenable to construction Thus, the definiteness of claim terms depends on
 13 whether those terms can be given any reasonable meaning.”) (internal citation omitted).

14 The Court, therefore, construes the term “substantially perpendicular” as “at an
 15 angle that is largely but not wholly perpendicular, and not a non-normal angle.” In
 16 context, the term reads as follows in Claim 4 and 6: “opposing bands extend *at an angle*
 17 *that is largely but not wholly perpendicular, and not a non-normal angle*, to a
 18 longitudinal axis”

19 **9. “Said angle is independently selected for each band”**

20 With respect to this claim term, Juzo contends that it should be construed to mean
 21 “each of said bands has an angle that is selected during design without consideration of
 22 the angle of any other band.” Dkt. No. 34 at 26. CircAid disagrees and argues that the
 23 term should be given its plain and ordinary meaning. Dkt. No. 33 at 18. Because the
 24 parties dispute claim scope, the Court must resolve the disagreement as a matter of law.
 25 *02 Micro*, 521 F.3d at 1361.

26 The relevant dispute, here, concerns the meaning of “independently selected” and
 27 the relationship between the band angles. Juzo argues that the phrase “independently
 28 selected” should be taken to mean that the angles of the bands do not rely on one another.

1 *See* Transcript of Oral Argument, Dkt. No. 43 at 60:10-12. CircAid, in turn, argues that
2 the phrase does not need to be construed because the intrinsic record confirms that this
3 phrase simply means “angles extend independently of each other” and, thus, the plain and
4 ordinary meaning is sufficient. Dkt. No. 33 at 18. For the reasons that follow, the Court
5 rejects CircAid’s position that no construction is necessary, rejects Juzo’s proposed
6 construction, and instead construes the term according to its plain and ordinary meaning
7 as understood by skilled artisan in light of the intrinsic record. *See 02 Micro*, 521 F.3d at
8 1360 (“Words of a claim are generally given their ordinary and customary meaning,
9 which is the meaning a term would have to a person of ordinary skill in the art after
10 reviewing the intrinsic record at the time of the invention.”)

11 To that end, the Court begins by analyzing the claim language itself. The phrase
12 “said angle is independently selected for each band” appears once in the claim language,
13 specifically, at Claim 5:

14 The Garment of claim 1 wherein each of said bands extend from a lateral
15 region at an angle with respect to a longitudinal axis of the central region, *and*
16 *said angle is independently selected for each band.*

17 The ‘232 Patent at 16:40-43 (emphasis added). As an initial matter, the Court finds the
18 disputed language, when read in isolation, to be ambiguous. As is evidenced by the
19 dispute between the parties, the challenged language raises questions about how a band is
20 “independently selected” and when it is “independently selected.” *See* Transcript of Oral
21 Argument at 57:21-58:4.

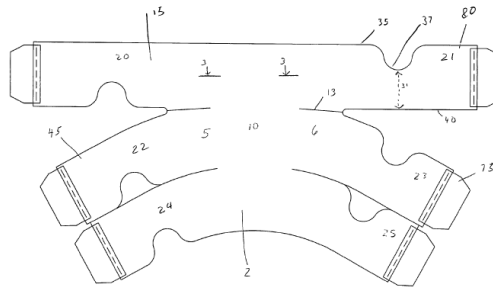
22 A court, however, does not read a disputed term in isolation, but rather, in the
23 context in which it appears in the claim and in the context of the entire patent, including
24 the specification. *See Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1477
25 (Fed. Cir. 1998). In this way, the Court can begin to ascribe some meaning to the
26 disputed term by analyzing the relationship between Claim 5 and the other claims.

27 Claim 1, upon which Claim 5 is dependent, says nothing of band angles. *See*
28 *generally id.* at 16:6-27. As such, there is a presumption that Claim 5 adds a limitation to

1 the band angles, that is, a limitation that is not present in Claim 1. *See Phillips*, 415 F.3d
 2 at 1315. The first half of Claim 5 explains that the bands extend *at an angle* with respect
 3 to the x-axis of the central region. A person skilled in the art would understand “at an
 4 angle” to refer to an angle that is not “substantially perpendicular.” This is so because
 5 both Claims 3 and 6 specifically describe bands that extend “substantially perpendicular”
 6 and Claim 6 specifically contrasts angles that are “substantially perpendicular” with
 7 angles that are “non-normal.” *See* the ‘232 Patent at 16:32-34; *id.* at 16:44-51. Indeed,
 8 the specification further reinforces this conclusion, that is, that it is correct to distinguish
 9 between bands that extend “at an angle” from those that extend “substantially
 10 perpendicular.” *See* the ‘232 Patent at 4:60-65 (“Various embodiments are provided in
 11 which the opposing bands extend *either substantially perpendicular* to a longitudinal axis
 12 of the central region . . . *or* the bands extend from a lateral region *at an angle* with respect
 13 to a longitudinal axis of the central region, or combinations therefore.”) Moreover, such
 14 a conclusion syncs with the Court’s interpretation of “substantially perpendicular,”
 15 discussed *supra* Section 8.

16 Although the specification (arguably) does not depict a garment with a plurality of
 17 bands “wherein *each of* said bands extend from a lateral region *at an angle* with respect
 18 to a longitudinal axis,” the specification contains many examples of how bands may
 19 extend “at an angle.” The preferred embodiments that include ~~a plurality of~~ bands
 20 extending at an angle, as to the central axis of the garment, are FIGS. 1, 3, 5, 9, 10, and
 21 13. The band angles of those six garments can be contrasted with the garments depicted
 22 at FIGS. 8, 12, and 15, all of which have bands that only extend “substantially
 23 perpendicular.” FIGS. 1, 3, 5, 9, 10 and 13 are key to understanding the meaning of the
 24 disputed term “said angle is independently selected for each band.” Juzo proposes that
 25 the phrase “independently selected for each band” means “without consideration of the
 26 angle of any other band.” Dkt. No. 34 at 26. While the Court appreciates that Juzo’s
 27 proposed construction seeks to give effect to the word “independent,” this interpretation
 28 is untenable in light of the preferred embodiments. When looking at the preferred

embodiments depicted at FIGS. 1, 3, 5, 9, 10, and 13, it is evident that the bands that extend at an angle are purposefully placed. Take FIG. 5 for instance.



The ‘232 Patent at Sheet 4, Dkt. No. 35-1 at 6. There is nothing haphazard about the placement of these bands, and it is clear that the four bands placed “at an angle” were not chosen in isolation from one another or in a vacuum. By contrast, the bands that extend “at an angle” complement one another. As such, it would not make sense to adopt some version of Juzo’s proposed construction and to conclude that the band angles cannot rely on one another, when each of the preferred embodiments with bands that extend “at an angle” clearly contemplate some synchrony between the various angles.

Then again, the Court is also not satisfied with CircAid’s argument — that is, that no construction is necessary — because it does not resolve the claim dispute. “A determination that a claim term ‘needs no construction’ or has the ‘plain and ordinary meaning’ may be inadequate when a term has more than one “ordinary” meaning or when reliance on a term’s ‘ordinary’ meaning does not resolve the parties’ dispute.” *O2 Micro*, 521 F.3d at 1361. Here, the parties do not argue that the phrase “independently selected” has any special meaning, but rather, they dispute the scope of the claim term and when the claim term is satisfied. *See id.* Thus, it is the Court’s role “to determine what claim scope is appropriate in the context of the patents-in-suit.” *See id.*

Accordingly, the Court declines to adopt either parties’ proposed construction and instead concludes that a person of ordinary skill in the art, upon review of the intrinsic

record, would understand “said angle is independently selected for each band” to mean “said angle is individually selected for each band.”¹¹

10. “each of said bands”/ “said opposing bands”/ “said plurality of bands”¹²

The only bands described in the present invention are the “plurality of bands” introduced in Claim 1. The ‘232 Patent at 16:12-17 (“a plurality of bands . . . each of said bands comprising”) Thus, Juzo argues, any subsequent reference to “each of said bands” (*id.* at 16:17 & 40), “said opposing bands” (*id.* at 16:31), and “said plurality of bands” (*id.* at 16:35), must necessarily refer to the “plurality of bands” disclosed in Claim 1, or else the scope of these terms would be uncertain and indefinite. Dkt. No. 34 at 27 (citing *Energizer Holdings, Inc. v. Int’l Trade Comm’n*, 435 F.3d 1366, 1370 (Fed. Cir. 2006)). CircAid does not contest that the “plurality of bands” are the antecedent basis for these various terms, but instead, argues that the plain and ordinary meaning is sufficient to give the disputed terms meaning. Dkt. No. 36 at 13. CircAid adds that it would be “inappropriate to lump . . . all together” references to “said bands,” “each of said bands,” or “said opposing bands” given that their meaning is slightly distinct. *Id.* Because the parties dispute claim scope, the Court must resolve the disagreement as a matter of law. *02 Micro*, 521 F.3d at 1361.

The Court agrees with Juzo that these various references to “bands” must refer to the plurality of bands disclosed in Claim 1. Accordingly, the Court concludes that the references to “each of said bands,” “said opposing bands,” and “said plurality of bands” must refer to the “plurality of bands” disclosed in Claim 1, as that is the only proper

¹¹ Because the Court rejects both parties’ proposed constructions, it will not address the parties’ dispute over whether the challenged term is a “structural” or “product-by-process” claim. Juzo argues that its proposed construction is correct because the disputed term is a “product-by-process” claim, that is, one in which “the process details” become part of, or a limitation on, the “invention.” *See, e.g., Abbot Laboratories v. Sandoz, Inc.*, 566 F.3d 128, 1291 (Fed. Cir. 2009). However, because the Court finds Juzo’s proposed construction untenable in light of the specification, and because the Court finds that the proper interpretation of the claim does not turn on whether it is a product-by-process claim, the Court will not wade into the dispute.

¹² Although Juzo’s brief argues that the term “said bands” needs to be construed, the Court does not find any instance in which the term “said bands” appears without the preceding term of “each of.” Accordingly, the Court construes, “said bands” as part of its construction of “each of said bands.”

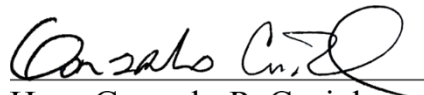
1 antecedent basis. The Court, therefore, construes the terms as follows. In Claim 1, “each
2 of said bands comprising” is construed as “each of said plurality of bands comprising
3” In Claim 3, “the garment of claim 2 wherein said opposing bands extend” is
4 construed as “the garment of claim 2 wherein said opposing bands, comprising a plurality
5 of bands, extend” In Claim 4, “said plurality of bands” is construed as “said
6 plurality of bands referenced in Section 1b are spaced-apart” And finally, in Claim
7 5 “[t]he garment of claim 1 wherein each of said bands extend from” is construed as
8 “[t]he garment of claim 1 wherein each of said plurality of bands extend from”

9 CONCLUSION

10 For the foregoing reasons, the Court issues this claim construction order on the
11 disputed terms.

12 **IT IS SO ORDERED.**

13
14 Dated: March 13, 2017

15 
16 Hon. Gonzalo P. Curiel
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28