

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**BONUTTI SKELETAL INNOVATIONS
LLC,**

Plaintiff,

v.

Case No: 6:12-cv-1379-Orl-22TBS

**LINVATEC CORPORATION and
CONMED CORPORATION,**

Defendants.

ORDER

This cause comes before the Court for construction of eight terms across nine patents.¹ Plaintiff Bonutti Skeletal Innovations LLC (“Bonutti”) filed a claim construction brief (Doc. No. 83) to which Defendants Linvatec Corporation and Conmed Corporation (collectively, “Linvatec”) filed a Response brief (Doc. No. 95). On January 24th, the Court held a joint claim construction hearing for this case and a highly related action in which Bonutti sued another medical device company for infringement of many of the same patents. All of the patents-in-suit were invented by Dr. Peter Bonutti, and pertain to devices and methods for inserting and anchoring sutures in the course of surgical procedures.

I. LEGAL STANDARDS FOR CLAIM CONSTRUCTION

The Court construes a patent claim as a matter of law. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). To construe claims, the Court begins with the words of the claims

¹ The patents-in-suit include U.S. Patent Nos. 5,527,343 (the “343 Patent”); 5,718,717 (the “717 Patent”); 5,814,072 (the “072 Patent”); 5,921,986 (the “986 Patent”); 5,980,559 (the “559 Patent”); 6,500,195 (the “195 Patent”); 6,638,279 (the “279 Patent”); 7,087,073 (the “073 Patent”); and 8,147,514 (the “514 Patent”).

themselves. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Generally, the Court accords the words of a claim “their ordinary and customary meaning,” which is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (en banc) (internal citations and quotation marks omitted). Persons of ordinary skill in the art do not read the claim term in isolation, but in the context of the entire patent. *Id.* at 1313. If the ordinary meaning of claim language is “readily apparent even to lay judges,” then claim construction requires “little more than the application of the widely accepted meaning of commonly understood words.” *Id.* at 1314. But because the meaning of a claim term as understood by a person skilled in the art is often not immediately apparent, the Court looks to both intrinsic evidence (the words of the claims themselves, the specification, and the prosecution history) and extrinsic evidence (sources like dictionaries and expert testimony). *Id.* at 1314 (internal citations and quotation marks omitted); *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1328 (Fed. Cir. 2008).

The patent’s specification is “the single best guide to the meaning of a disputed term,” as it may reveal that the patentee intended a special definition to apply to a claim term that differs from its ordinary meaning or that the patentee intentionally disclaimed, or disavowed, the claim’s scope. *Phillips*, 415 F.3d at 1315-16 (internal citations and quotation marks omitted). The Court also considers the prosecution history, which is created by the patentee in an attempt to explain and obtain the patent. *Id.* at 1317. The prosecution history consists of the complete record of proceedings before the Patent and Trademark Office (“PTO”) and the prior art cited during the examination of the patent. *Id.* Unlike the specification, which is a final product, the prosecution history is less useful in claim construction because it represents the ongoing negotiations between the PTO and applicant. *Id.* (internal citations and quotation marks omitted).

The Court also looks at the prosecution history to determine whether the applicant “clearly and unambiguously” disclaimed an interpretation of claim scope in order to obtain the patent grant. *Middleton, Inc. v. Minn. Mining and Mfg. Co.*, 311 F.3d 1384, 1388 (Fed. Cir. 2002) (quoting *Standard Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 452 (Fed. Cir. 1985)). A patentee disclaims an interpretation by “clearly characterizing the invention in a way to try to overcome rejections based on prior art,” as opposed to simply describing features of the prior art without distinguishing the claimed invention based on those features. *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374-75 (Fed. Cir. 2008) (citations omitted). Thus, the Court protects the public’s reliance on the definitive statements made during the prosecution by precluding the patentee from “recapturing” through claim construction an interpretation disclaimed during prosecution. *Id.* at 1374 (quoting *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323-24 (Fed. Cir. 2003)). However, “if the specification expressly defines a claim term, and remarks made to distinguish claims from the prior art are broader than necessary to distinguish the prior art, the full breadth of the remark is not a clear and unambiguous disavowal of claim scope as required to depart from the meaning of the term provided in the written description.” *Computer Docking*, 519 F.3d at 1375 (internal quotation marks omitted) (quoting *3M Innovative Props. Co. v. Avery Dennison Corp.*, 350 F.3d 1365, 1373 (Fed. Cir. 2003)).

Extrinsic evidence, such as expert testimony and dictionary definitions, is helpful but “less significant than the intrinsic record.”² *Phillips*, 415 F.3d at 1317 (citations and quotation marks

² Courts accord extrinsic evidence less weight because (1) it is not part of the patent and was not created at the time of patent prosecution; (2) the court construes claims with reference to a hypothetical person of skill in the art, and extrinsic publications may not be written by or for skilled artisans; (3) expert reports and testimony generated at the time and for the purpose of litigation can suffer from bias, unlike intrinsic evidence; (4) the universe of potential extrinsic evidence is “virtually unbounded,” and each party is likely to choose the pieces of extrinsic

omitted). However, expert testimony about claim terms that is conclusory, unsupported or “clearly at odds” with the intrinsic evidence is not useful. *Id.* at 1318. While dictionaries and treatises are relevant, the Court must ensure that the dictionary definition does not contradict a definition “found in or ascertained by a reading of the patent documents.” *Id.* at 1322-23 (quoting *Vitronics*, 90 F.3d at 1584 n.6). “In sum, extrinsic evidence may be useful to the court, but it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence.” *Phillips*, 415 F.3d at 1319. Finally, while the Court construes the claim in light of the intrinsic and extrinsic evidence, it is also appropriate for the Court to consider the accused device when determining what aspect of the claim should be construed. *Exigent Tech., Inc. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1309 n.10 (Fed. Cir. 2006) (internal citations and quotation marks omitted).

Several other principles guide the Court’s construction of claim terms. First, the Court presumes that the same terms appearing in different portions of the claims have the same meaning, unless the specification and prosecution history clearly demonstrate that the terms have different meanings at different portions of the claims. *Fin Control Sys. Pty, Ltd. v. OAM, Inc.*, 265 F.3d 1311, 1318 (Fed. Cir. 2001). While the “[i]nterpretation of a disputed claim term requires reference to the other claims,” *Georgia-Pacific Corp. v. U.S. Gypsum Co.*, 195 F.3d 1322, 1331 (Fed. Cir. 1999), “the presence of a dependent claim that adds a particular limitation raises a presumption that the limitation in question is not found in the independent claim.” *Liebel-Flarsheim Co. v.*

evidence most favorable to its case; and (5) “undue reliance on extrinsic evidence poses the risk that it will be used to change the meaning of the claims in derogation of the ‘indisputable public records consisting of the claims, the specification and the prosecution history,’ thereby undermining the public notice function of patents.” *Phillips*, 415 F.3d at 1318-19 (internal citations and quotation marks omitted).

Medrad, Inc., 358 F.3d 898, 910 (Fed. Cir. 2004) (citation omitted). Finally, “a construction that renders the claimed invention inoperable should be viewed with extreme skepticism.” *Talbert Fuel Sys. Patents Co. v. Unocal Corp.*, 275 F.3d 1371, 1376 (Fed. Cir. 2002) (citation omitted), vacated and remanded on other grounds, 537 U.S. 802, 123 S. Ct. 70 (2002).

A handful of terms appear in means-plus-function limitations of the asserted patents. A means-plus function limitation is governed by 35 U.S.C. § 112 ¶ 6,³ which provides:

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

Determining whether claim language articulates a means-plus-function limitation is a matter of law. *TriMed, Inc. v. Stryker Corp.*, 514 F.3d 1256, 1259 (Fed. Cir. 2008) (citation omitted). Claim language that uses the word “means” “creates a presumption that § 112 ¶ 6 applies.” *Id.* (citation omitted). “If, in addition to the word ‘means’ and the functional language, the claim recites sufficient structure for performing the described functions in their entirety, the presumption of § 112 ¶ 6 is overcome—the limitation is not a means-plus-function limitation.” *Id.* (citation omitted). However, sufficient structure exists only when “the claim language specifies the exact structure that performs the functions in question without need to resort to other portions of the specification or extrinsic evidence for an adequate understanding of the structure.” *Id.* at 1259-60.

II. '072 PATENT TERMS

³ Although the recently enacted America Invents Act amended 35 U.S.C. § 112, the old version of the statute applies to the patents asserted in this suit. Regardless, subsection (f) of the new version of the statute is not materially different from paragraph 6 of the old version. *See* Pub. L. No. 112-29, § 4(c)(6), 125 Stat. 284, 296 (2011).

The '072 Patent (Doc. No. 83-5) discloses an improved suture anchor inserter that facilitates positioning of the suture anchor within the body and includes an end shaped to pierce body tissue.

A. “Changing the orientation of the anchor relative to [various elements of the device or body tissue]”

Bonutti	Linvatec
Plain meaning	Changing the position of the anchor with respect to the [applicable device element]

The suture anchor inserter described in the '072 Patent is designed to facilitate “chang[ing] the orientation” of the anchor relative to the inserter, one of the components of the inserter, or body tissue. The dispute is whether that change in orientation requires changing the position of the anchor with respect to the position of the device component or body tissue, or whether any change in the orientation of the anchor (such as rotating the anchor around the inserter shaft or moving the anchor along the shaft) is sufficient.

Importing a limitation from particular embodiments disclosed in the Specification into the claims is typically disfavored. *Phillips*, 415 F.3d at 1323. However, when the embodiments “define the outer limits of the claim term,” they may limit the invention as a whole. *Id.* “Claim terms are properly construed to include limitations not otherwise inherent in the term only ‘when a patentee sets out a definition and acts as his own lexicographer,’ or ‘when the patentee disavows the full scope of a claim term either in the specification or during prosecution.’” *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1283 (Fed. Cir. 2012) (quoting *Thorner v. Sony Computer Entm’t Am., LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012)). An inventor acts as his own lexicographer when he “clearly set[s] forth a definition of the disputed claim term other than its plain and ordinary

meaning.” *Thorner*, 669 F.3d at 1365 (citation and quotation marks omitted). Bonutti argues that limiting the change in orientation to changing the position of the anchor would amount to importing limitations from the Specification, while Linvatec claims that its construction is not limited to changing the position of the anchor, but merely prevents Bonutti from claiming that any change to the anchor could constitute a change in its orientation.

In this case, neither the claim language nor the Specification supports Linvatec’s proposed limitation. Exemplary claim 46, on which several subsequent claims depend, discloses a “method of positioning a suture anchor in body tissue” that includes a step of “changing the orientation of the anchor relative to the member while the end portion of the member is disposed in the passage in the anchor along with the suture.” ’072 Patent at 18:31-33. Independent claim 62 also fails to limit how “changing the orientation” must be accomplished. In contrast, the dependent claims following Claims 46 and 62 propose specific methods of changing the orientation: transmitting force from the suture to the anchor by tensioning the suture (claim 53) and/or applying force against an inner side surface of the passage in the anchor with the inserter shaft (claim 54). *Id.* at 19:1-6. Although these dependent claims suggest changing the orientation of the suture by pivoting it around the inserter shaft, the Specification makes clear that a surgeon can “change the orientation of the anchor relative to the body tissue by pivoting or otherwise moving the anchor relative to body tissue.” *Id.* at 1:16-20.

Linvatec uses almost an entire page of its brief in order to demonstrate that its accused product does not change in orientation. While this may or may not be true, it is a noninfringement argument that is irrelevant to claim construction. The Court adopts the plain meaning of “changing the orientation” because it has no specialized meaning to a person of ordinary skill in the art and the written description does not mandate a more limited construction.

B. “Pierce / Piercing / End surface means for piercing”

Bonutti	Lintratec
“Pass through”	Make a hole in or through, which must be more than moving through

The first disputed issue is whether the terms “pierce” and “piercing” require formation of a hole or merely moving through a pre-formed opening. The terms appear in several dozen of the 237 claims in the ’072 Patent and the reexamined ’072 Patent.

On at least four occasions, the Specification specifically links the terms at issue with forming a hole or opening. *See* ’072 Patent at 3:44-45 (“By piercing the body tissue with the point 76, an opening is initially formed”); 7:1-8 (“Manual force is applied to the handle 22 to cause the point 76 . . . to pierce the surface 130. As this occurs, a circular opening is formed in the skin by the point”); 7:26-28 (“The point 76 pierces the flesh 134 ahead of the anchor 30 to initiate the formation of an opening in the flesh for the anchor”); 10:22-26 (“A downward force is then manually applied[,] . . . [which] causes the point 76a on the shaft 24a to pierce the outer side surface 130a of the skin 132a. . . . As this occurs, an opening is formed by the point 76a in the skin 132a”). The Specification also contrasts using the inserter “to pierce soft body tissue” with using the inserter “to position anchors in preformed openings in hard body tissue.” ’072 Patent at 3:53-55.

Bonutti references the Specification for a passage indicating that the suture anchor inserter could pierce with a pointed tip or a “blunt end,” but fails to note that in the latter circumstance, the inserter shaft would have a “cross sectional size” that is “so small as to enable the shaft to pierce body tissue with a blunt end.” ’072 Patent at 3:35-43. Bonutti also cites dictionary definitions that include the phrase “pass through” in their definitions of “pierce,” but these references are

inconsistent and in any event less relevant to the Court's construction than the overwhelming Specification evidence.

Bonutti argues that the doctrine of claim differentiation works in its favor because certain claims in the '072 Patent specifically mention forming an opening in the context of piercing. *See* '072 Patent at 13:17-19, 16:16-17, and 27:23-25. The doctrine of claim differentiation creates a presumption that dependent claims are of narrower scope than the independent claims from which they depend. *AK Steel Corp. v. Sollac & Ugine*, 344 F.3d 1234, 1242 (Fed. Cir. 2003) (citation omitted). Therefore, "the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim." *Phillips*, 415 F.3d at 1314-15 (citation omitted). However, the claim differentiation presumption is "not a hard and fast rule and will be overcome by a contrary construction dictated by the written description or prosecution history." *Regents of Univ. of Cal. v. Dakocytomation Cal., Inc.*, 517 F.3d 1364, 1375 (Fed. Cir. 2008) (quoting *Seachange Int'l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1369 (Fed. Cir. 2005)).

In addition to the above-mentioned Specification evidence, the prosecution history in this case clearly supports a construction of "pierce" that requires making a hole. In written remarks to his amended '072 Patent application, Dr. Bonutti distinguished prior art by noting that "there is nothing in the patent to DiPoto et al. which even remotely suggests that the guide wire and anchor will be moved together into an opening formed in body tissue during piercing of the body tissue." *Bonutti Skeletal Innovations LLC v. Arthrex, Inc.*, No. 6:13-cv-620-ACC-TBS, Doc. No. 64-17 at p. 37 (M.D. Fla. Jan. 3, 2014) (emphasis in original). In this case, the written description and the prosecution history overcome the three claims (out of more than 200) that create a potential claim differentiation presumption.

For these reasons, the Court will construe “pierce” as “make a hole in or through.”

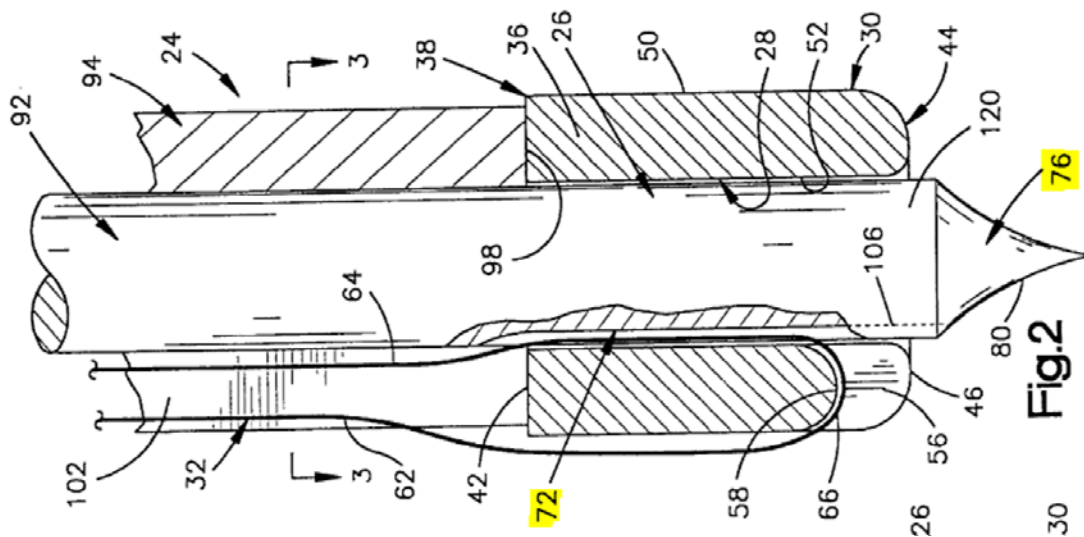
Linvatec claims that a mean-plus-function limitation arises in Claims 78, 90, 104, and 122 of the '072 Patent. When a patentee uses the word “means” in a claim, a presumption arises that he did so in order to invoke 35 U.S.C. § 112 ¶ 6. *TriMed*, 514 F.3d at 1259. The presumption may be rebutted in one of two ways: “(1) if a claim term uses the word ‘means’ but recites no function which corresponds, or (2) if the claim recites a function but also recites sufficient structure or material for performing the claimed function.” *Bausch & Lomb Inc. v. Moria S.A.*, 222 F. Supp. 2d 616, 630 (E.D.P.A. 2002) (citing *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1302 (Fed. Cir. 1999)).

Bonutti admits that the claims use functional language, but argues that the term “end surface” specifies sufficient structure to take the limitation outside the scope of § 112, ¶ 6. This is not the case. A claim term might specify sufficient structure if it is itself a structural term or if the claim provides a detailed description of the purported structure. *See Enviro Corp. v. Clestra Cleanroom, Inc.*, 209 F.3d 1360, 1364-65 (Fed. Cir. 2000) (holding that claims containing the phrase “second baffle means . . .” were not means-plus-function claims because the term “baffle” is a technical term with a specific meaning to a person skilled in the art and the claims went on to describe the second baffle as “having inner surfaces for directing airflow . . .”). In this case, Bonutti does not argue that “end surface” is a technical term known to those skilled in the art to imply a particular structural element, nor is there any further description of the “end surface” in the asserted claims. In contrast, claim 78 uses the term “surface” to refer to multiple different structural components of the shaft that is part of the suture anchor inserter apparatus. *See '072 Patent at 22:9-18* (disclosing “end surface means,” “pusher surface means,” and “positioning

surface means”). As such, the Court construes the term “end surface means” as a means-plus-function limitation under § 112, ¶ 6.

The first step in construing a means-plus-function limitation is to determine the claimed function. Here, the parties agree that the function is to pierce body tissue ahead of the first surface area on the anchor during insertion of the anchor into body tissue. The Court will cross-apply its construction of “pierce” to this function. The second step is to “ascertain[] the corresponding structure in the written description that is necessary to perform that function.” *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003) (citation omitted). “Corresponding structure” is limited to that which “the specification or prosecution history clearly links or associates” with the function recited in the claim. *Id.* (quoting *B. Braun Med. v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997)).

The dispute over the corresponding structure centers on whether the “end surface” must be pointed or whether it can also be a blunt end, rounded, or flat. Reference to Figure 2 helps to resolve this issue:



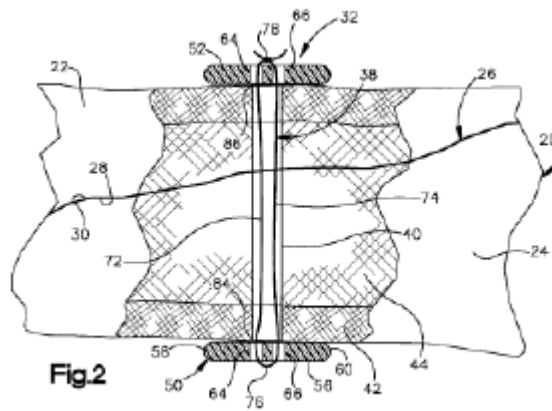
'072 Patent at p. 2 (highlights added by the Court). Where the Specification mentions a rounded or flat configuration, it is referring to the “leading end portion 72,” which may or may not have “a point 76.” '072 Patent at 3:22-34. But according to the Specification, it is the “point 76 on the leading end of the shaft,” not the leading end portion 72, that is used to “pierce body tissue.” '072 Patent at 3:36-39. Thus, the structure cannot include any “end surface and equivalents” that is mentioned in the Specification, as Bonutti suggests. The Specification does support treating a “blunt end” of the leading end of the shaft as a piercing structure, but only if the blunt end is “so small as to enable the shaft to pierce body tissue.” '072 Patent at 3:41-43. This caveat is important, and does not fit under Bonutti’s construction of the “end surface” structure. Accordingly, the Court adopts the following constructions of the function and structure:

Function: “Piercing body tissue (as construed above) ahead of the first surface area on the anchor during insertion of the anchor into body tissue.”

Structure: “A point (e.g., 76 in '072 Patent drawings, or as otherwise described in '072 Patent) on the leading end of the shaft that is movable in a passage in the anchor.”

III. '986 AND '279 PATENT TERMS

The '986 Patent relates to a new method for securing sections of a fractured bone and/or securing body tissue to bone. '986 Patent (Doc. No. 83-6) 1:19-21. A suture extending through a passage in a fractured bone holds sections of the bone against movement relative to each other; alternatively, body tissue may be held against movement relative to bone by a suture extending through a passage in the bone. '986 Patent at 1:21-27. Figure 2 of the '986 Patent demonstrates how this might occur:



'986 Patent at p. 3. The '279 Patent (Doc. No. 83-9) is a continuation-in-part of the '986 Patent.

A. "Suture"

Bonutti	Lintratec
Plain meaning	A strand or fiber used to sew parts of the body, which is distinct from bone or body tissue including muscle, ligament, cartilage or other tissue

The issue here is whether the "suture" disclosed in these patents must be separate and distinct from bone and body tissue. Although the relevant Specifications state that the suture "may be formed of any desired natural or artificial material," '986 Patent at 3:1-2, there is nothing to suggest that the meaning of the term "suture," in the context of the asserted patents, could include ligaments or other forms of body tissue. The patents distinguish sutures from body tissue throughout the Specification and claims; e.g., by stating that "[b]ody tissue may be held against movement relative to bone by a suture." '986 Patent 1:24-27. Different terms in the same claim are presumed to have different meanings. *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1382 (Fed. Cir. 2008) (citing *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n.3 (Fed. Cir. 2006)).

Additionally, the Court is aware that the Patent Trial and Appeal Board (“PTAB”) recently granted petitions to institute *inter partes* review of the ’514 Patent and the ’986 Patent, and in so doing interpreted “suture” to mean “a thread or wire used for joining of the edges of a wound or incision by stitching” based on its common medical definition. *See* Doc. No. 115. The PTAB interprets a claim term according to “its broadest reasonable construction in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.100(b).⁴

Here, Bonutti provides no evidence that is sufficient to overcome the presumption that different terms in the same claim have different meanings. The Court cannot construe “suture” in such a way as to allow it to mean the same thing as the bone and body tissue that it sews together. The Court adopts the following construction for “suture”: “A strand or fiber used to sew parts of the living body, which is distinct from bone or body tissue including muscle, ligament, cartilage or other tissue.”

B. “Body tissue”

Bonutti	Lintratec
Plain meaning; alternatively, “fibrous and non-fibrous, and soft and hard tissue, including, but not limited to, bone, muscle, tendon, ligament, and cartilage”	Fibrous and non-fibrous tissue, such as muscle, ligament, cartilage or other tissue, distinct from bone

The only dispute here is whether, in the context of these two patents, the claim term “body tissue” includes bone. Although medical dictionaries generally include “bone” under their definitions of “body tissue” and other asserted patents distinguish between “hard body tissue” (i.e., bone) and “soft body tissue,” *see, e.g.*, ’073 Patent at 1:19-21, the ’986 and ’279 Patents

⁴ The Court is not bound by the PTAB’s construction of a term and does not rely on it here.

specifically distinguish between “body tissue” and “bone” throughout the claim language. *See* ’986 Patent at 25:51 (“A method of positioning body tissue relative to a bone”); 26:25-26 (“ . . . to press the body tissue against the second side of the bone”); 26:52 (“A method of positioning body tissue relative to bone”); 26:59-60 (“ . . . to press the body tissue against a second side of the bone”); *see also* ’279 Patent at 30:10 (“A method of positioning body tissue relative to a bone”); 30:23-24 (“ . . . causing the first body tissue to become engaged with the bone”). Different terms in the same claim are presumed to have different meanings. *Helmsderfer*, 527 F.3d at 1382 (citation omitted).

The Specification is also consistent in delineating body tissue from bone. It includes a section titled, “Retaining Body Tissue Against Bone,” ’986 Patent at 8:15, and describes an embodiment disclosing a method of holding “body tissue against movement relative to a bone.” ’986 Patent at 8:21-22. When describing a method of securing bone to bone (or bone fragment to bone), Dr. Bonutti consistently avoided using the term “body tissue” to describe bone. Instead, the Specification provides that “the bone suture assemblies 32 could be utilized to connect a fragment of a bone to the main portion of the bone.” ’986 Patent at 2:38-40. Even though the ordinary meaning of “body tissue” probably encompasses “bone,” in this case, “the patentee intended a special definition to apply to a claim term that differs from its ordinary meaning.” *Phillips*, 415 F.3d at 1315-16 (internal citations and quotation marks omitted).

For these reasons, the Court will construe “body tissue” as “Fibrous and non-fibrous tissue, such as muscle, ligament, cartilage or other tissue, distinct from bone.”

IV. ’514 PATENT TERM

A. “Flexible member”

Bonutti	Lintratec
Plain meaning	A bendable structure, wherein

	the structure is distinct from a body segment including bone or body tissue
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Construction of “flexible member” presents the same dispute as “suture”—whether the term encompasses bone or body tissue. The Court will construe the term in order to clarify that the disclosed “flexible member” in the ’514 Patent is distinct from bone or body tissue, but there is no reason to insert synonyms for common words like “flexible” and member.” Accordingly, the Court construes “flexible member” as “flexible member, which is distinct from a body segment including bone or body tissue.”

V. ’195 PATENT TERM

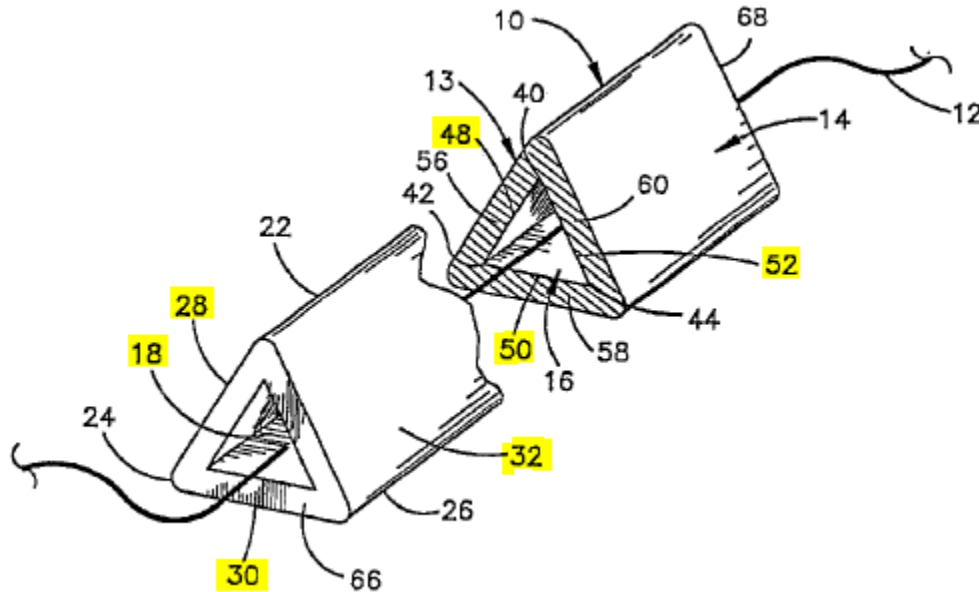
The ’195 Patent discloses suture anchors that are configured in a manner that helps prevent undesirable sideways movement of the suture relative to the anchor, concentrates force to the inner corner portions of the anchor, and stabilizes the anchor within body tissue. ’195 Patent (Doc. No. 83-8) 9:27-31, 10:47-53.

A. “A passage in the anchor”

Bonutti	Linvatec
Plain meaning: a road, path, channel, or course by which something passes	A channel between two openings in the anchor

Bonutti does not cite the claim language or Specification for support of its construction; instead, Bonutti relies on a generic dictionary definition that discusses “passage” in the context of traveling through mountains. The central dispute pertains to whether the “passage” must have some length, and thus an opening on either end, or could merely be a hole. The Specification decisively favors the former. It describes “open ends of the passage 18 which extends through the anchor,” strongly suggesting that the passage has some enclosed length. ’195 Patent at 3:46-50;

3:22-23. The passage is surrounded by “flat rectangular inner side surface areas 48, 50, and 52 . . . which extend parallel to and are spaced equal distances from the outer side surface areas 28, 30, and 32.” *Id.* at 3:56-61. The included figure provides a clarifying visual depiction:



'195 Patent at p. 2.

Based on the clear description provided by the Specification, the Court construes “a passage in the anchor” as “a channel between two openings in the anchor.”

VI. '343 PATENT TERM

The '343 Patent relates to a new and improved method for positioning a suture anchor within a patient's body by using tension on a suture to pivot the suture anchor into a secure position. *See* '343 Patent (Doc. No. 83-3) 5:32-49. This is done by pulling on the suture to pivot the anchor, such that the anchor is no longer aligned with the hole through which it was inserted.

A. “Anchor”

Bonutti	Linvatec
Plain meaning; alternatively,	An anchor that cannot fit back

suture anchor	through the hole it went in, distinct from screws or anchors with pointed ends
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Bonutti argues that the term “anchor” in the ’343 Patent, as in all the other patents-in-suit, refers to a suture anchor with no specific limitations. Linvatec insists that the Specification explicitly disclaimed anchors that “anchor themselves by digging into tissue as does a screw or an anchor with a pointed end.” ’343 Patent at 6:56-59. Linvatec seeks to include this disclaimer in its construction of “anchor” within the ’343 Patent because Linvatec’s accused product has a pointed end. The disclaimer was not specific to a particular embodiment; instead, the ’343 Patent stated that the “anchors of the present invention” do not anchor themselves by digging in. The anchors disclosed in the ’343 Patent are supposedly unique because they are “not able to fit back through the hole they went in.” ’343 Patent at 6:56-61.

The sections of the Specification cited above present a clear disavowal of claim scope. “Claim terms are properly construed to include limitations not otherwise inherent in the term . . . ‘when the patentee disavows the full scope of a claim term either in the specification or during prosecution.’” *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1283 (Fed. Cir. 2012) (quoting *Thorner v. Sony Computer Entm’t Am., LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012)). Here, the patentee unambiguously disclaimed suture anchors that “anchor themselves by digging into tissue as does a screw or an anchor with a pointed end.” ’343 Patent at 6:57-58. Contrary to Linvatec’s position, however, the patentee did not unambiguously disclaim anchors that have pointed ends, merely anchors that function by digging into tissue. It may well be that Linvatec’s anchor does not infringe Claim 1 of the ’343 Patent, but the Specification only supports a disclaimer of the method of anchoring by digging into tissue.

The Court will accordingly construe “anchor” as used in the ’343 Patent as “an anchor that does not anchor itself by digging into tissue as does a screw or an anchor with a pointed end.”

VII. ’559 AND ’717 PATENT TERM

A. “Material which expands”

Bonutti	Linvatec
Plain meaning	Material which increases in overall size or volume to retain the suture anchor in the body tissue, which is more than material which absorbs and does not include non-expanding material such as resorbable lactide/glycolide polymer

The primary dispute with respect to the ’559 Patent is whether Bonutti disclaimed an anchor made of “resorbable lactide/glycolide polymers” when prosecuting U.S. Patent No. 6,572,635 (the “’635 Patent”). The ’635 Patent is not asserted in this case, but it is a continuation patent that claims priority to the ’559 Patent.

A clear and unambiguous disavowal of claim scope during prosecution of a later patent supports a limiting construction in an earlier patent when the patents are directly related in a familial relationship. *Capital Mach. Co., Inc. v. Miller Veneers, Inc.*, 524 F. App’x 644, 649 (Fed. Cir. 2013) (citing *Microsoft Corp. v. Multi-Tech Sys., Inc.*, 357 F.3d 1340, 1350 (Fed. Cir. 2004)).

In this case, the Examiner rejected several claims of the ’635 Patent as being unpatentable over U.S. Patent No. 5,021,059 to Kensey (the “Kensey ’059 Patent”). *Bonutti Skeletal Innovations LLC v. Arthrex, Inc.*, No. 6:13-cv-620-ACC-TBS, Doc. No. 65-10 at p. 50 (M.D. Fla. Jan. 3, 2014). In response, Bonutti distinguished the Kensey ’059 Patent by arguing that it “does not disclose or suggest an anchor that expands upon contact with body fluid, as claimed in the present invention.”

(*Id.*) Bonutti described the “anchoring component 202” of the Kensey ’059 Patent as a “thin, narrow, strip of material, such as a resorbable lactide/glycolide that is resistant to deformation.”

(*Id.*) Crucially, Bonutti argued that, “based on the function and the material from which it is made,” the anchoring component disclosed in the Kensey ’059 Patent “could not be an expandable material.” (*Id.* at pp. 50-51.) Bonutti also noted that the “anchor [disclosed in the Kensey ’059 Patent] does not take up fluid.” (*Id.* at p. 51.) Finally, in remarks to a subsequent Amendment to the ’635 Patent, Bonutti again claimed that “Kensey does not teach or suggest any anchoring component that expands.” (*Id.* at p. 67.)

This disavowal is clear and unambiguous. In repeated attempts to distinguish the ’635 Patent from Kensey, Bonutti expressly listed an anchoring component made of “resorbable lactide/glycolide” as one that “could not be an expandable material” based in part on the “the material from which it is made.” (*Bonutti v. Arthrex*, Doc. No. 65-10 at pp. 50-51.) The point of applying prosecution history disclaimers is to protect the public’s reliance on the definitive statements made during prosecution by preventing the patentee from “recapturing” through claim construction an interpretation disclaimed during prosecution. *Computer Docking*, 519 F.3d at 1374 (citation omitted). Therefore, the Court will adopt the following construction of “material which expands”: “material that increases in overall size or volume to retain the suture anchor [means] in body tissue, but not including non-expanding material such as resorbable lactide/glycolide polymers.”


VIII. CONCLUSION

The Court adopts the following constructions:

<u>Patent</u>	<u>Claim Term</u>	<u>Construction</u>
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'072	“Changing the orientation of the anchor relative to [various elements of the device or body tissue]”	Plain meaning
'072	“pierce / piercing”	“Make a hole in or through”
'072	“End surface means for piercing body tissue ahead of the first surface area on the anchor during insertion of the anchor into body tissue”	<u>Function</u> : “Piercing body tissue (as construed above) ahead of the first surface area on the anchor during insertion of the anchor into body tissue” <u>Structure</u> : “A point (e.g., 76 in '072 Patent drawings, or as otherwise described in '072 Patent) on the leading end of the shaft that is movable in a passage in the anchor”
'986, '279	“Suture”	“A strand or fiber used to sew parts of the living body, which is distinct from bone or body tissue including muscle, ligament, cartilage or other tissue”
'986, '279	“Body tissue”	“Fibrous and non-fibrous tissue, such as muscle, ligament, cartilage or other tissue, distinct from bone”
'514	“Flexible member”	“Flexible member, which is distinct from a body segment including bone or body tissue”
'195	“A passage in the anchor”	“A channel between two openings in the anchor”
'343	“Anchor”	“An anchor that does not anchor itself by digging into tissue as does a screw or an anchor with a pointed end”
'559, '717	“Material which expands”	“Material that increases in overall size or volume to retain the suture anchor [means] in body tissue, but not including non-expanding material such as resorbable lactide/glycolide polymers”

DONE and ORDERED in Chambers, in Orlando, Florida on March 25, 2014.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties