

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

KneeBinding, Inc., a Delaware corporation,	)	
Plaintiff(s),	)	
	)	
v.	)	Case No. 2:15-cv-121-wks
	)	
Marker Volkl USA, Inc., a New Hampshire	)	
Corporation	)	
Defendant(s).	)	

**Plaintiff KneeBinding, Inc.’s Response To Marker Volkl USA, Inc.’s Opening Claim**

**Construction Brief**

KneeBinding, Inc. (“KneeBinding”) submits this response to Marker Volkl USA, Inc.’s (“Marker”) Opening Claim Construction Brief regarding the construction of certain terms of Claim 1 of U.S. Patent No. 8,955,867 (the “867 Patent”).

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## LIST OF AUTHORITIES

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15. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1348 (Fed. Cir. 2015)
16. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1292 (Fed. Cir. 2015)
17. *Symantec Corp. v. Computer Assocs. Int'l, Inc.*, 522 F.3d 1279, 1288 (Fed. Cir. 2008)

## I. INTRODUCTION

Marker's opening claim construction brief fails to present evidence or law to overcome the "heavy presumption" that the terms of Claim 1 should be given their plain and ordinary meaning as proposed by KneeBinding. *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1350 (Fed. Cir. 2013); *Epistar Corp. v. Int'l Trade Comm'n*, 566 F.3d 1321, 1334 (Fed. Cir. 2009) ("A heavy presumption exists that claim terms carry their full ordinary and customary meaning, unless [a party] can show the patentee expressly relinquished claim scope."); *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). KneeBinding asserts that a Person of Skill in the Art ("POSITA") would easily understand the terms of Claim 1 in the context of the claim itself, the patent specification, and the prosecution history of the patent application.

Marker proposes a rewrite of Claim 1 to avoid infringement of the '867 Patent by its accused Kingpin binding. It fears the plain and ordinary language of Claim 1 because it substantiates KneeBinding's allegation of infringement. It is for this reason that Marker originally asked for the construction of 14 claim terms. Marker's effort to rewrite the claim language alters the meaning of the language, and therefore the underlying protections afforded by the patent. KneeBinding asks this Court to hold that the patentee's language of Claim 1 shall be given its ordinary meaning and shall not allow Marker to effectively rewrite the '867 Patent.

Marker erroneously asserts that several terms are indefinite or that the words of Claim 1 cannot be understood by a POSITA or ski binding designer. Marker, however, submitted no evidence to support this argument. Moreover, it submitted no statement or evidence of the level of skill of a POSITA. Marker cannot credibly argue what a POSITA would or would not know without discussing the level of knowledge of the POSITA. Without evidence, Marker cannot

meet its burden of proving indefiniteness or overcome the “heavy” presumption that the Court should give the language of Claim 1 its ordinary meaning.

On the contrary, KneeBinding presented evidence in its opening brief that a POSITA would have knowledge and experience designing ski bindings, and thus, a POSITA would have an understanding of the terms of Claim 1. Further, KneeBinding presented evidence that the United States Patent and Trademark Office (“PTO”) patent examiner i) understood the meaning of the terms of Claim 1, ii) examined the claims for validity against the prior art on five separate occasions, and iii) issued the claims as a valid patent. Although the PTO examiner originally ruled that certain terms were indefinite, the examiner concluded that the applicant fixed any indefiniteness before allowing the claims. The Federal Circuit has recently held that the fact that an examiner understood the meaning of a claim term and applied that meaning to the examination of prior art supports a finding that the term is not indefinite. *Technology Co., LTD. v. Publications International, LTD*, No. 16-1449 (Fed. Cir. Jan. 5, 2017). Simply, Marker has not met its burden that Claim 1 is indefinite by clear and convincing evidence. *See Sonix Technology Co., LTD. v. Publications International, LTD*, No. 16-1449 at pg. 11 (indefiniteness must be proven by clear and convincing evidence)(citing *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1345 (Fed. Cir. 2015)). Marker has no evidence of indefiniteness only argument.

Marker erroneously ignores the ordinary meaning of the words of Claim 1 as instructed by the Federal Circuit. Marker instead begins by presuming the words of Claim 1 have no meaning and proceeds to rewrite the patentee’s claim language. There are only two exceptions to the rule that a claim term shall be given its ordinary meaning: “1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution.” *Thorner v. Sony Computer Ent. America*

*LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). Marker has not proven either exception applies to any term at issue in this case.

Marker presented no legal basis for the Court to adopt its claim construction proposals. Should the Court desire to clarify certain language of the claims, KneeBinding presented alternative language proposals that it believes closely track the ordinary meaning of the claim. To be clear, however, KneeBinding reasserts its position that the Court should not rewrite the language of the claims, and the Court should hold that each term should be given its ordinary meaning.

## II. ARGUMENT

### A. Marker's proposed constructions are contrary to established legal standards.

#### 1. Neither KneeBinding's earlier patents nor the '867 Patent specification limit the meaning of the terms of Claim 1.

There is no reason to replace the words of Claim 1. The fact that earlier related patents used language from the specification does not alter this conclusion. A claim's language defines the scope of the claim, and Claim 1 is not limited by specific embodiments disclosed in the specification. *See Liebel–Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004). Taking this a step further, the court has held that claim language should not be limited by the specification “[e]ven when the specification describes only a single embodiment” *See Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371-1372 (Fed. Cir. 2014); *Liebel–Flarsheim Co. v. Medrad, Inc.*, 358 F.3d at 906 (quoting *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002)). The '867 Patent specification does not limit the scope of the claims. *See SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1340 (Fed. Cir. 2001).

Furthermore, nothing in the earlier patents or their prosecution history demonstrates that the patentee disavowed any claim scope. In fact, Marker does not cite to any disavowal of claim scope. Therefore, the language in Claim 1 is heavily presumed to have its ordinary meaning. *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d at 1350. To disavow claim scope, the patentee must explicitly limit the form of the invention to the embodiments in the specification. *See Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d at 1372. Here, the patentee never expressly or implicitly disavowed claim scope. The Court should give Claim 1 its full breadth.

Likewise, neither KneeBinding's ownership changes or Marker's Kingpin marketing efforts affect the scope of Claim 1. Claim language controls, and Marker's attempts to distract the Court from the claim language by raising these issues is a red herring. In fact, the same law firm and patent attorneys, Wilmer Cutler Pickering Hale and Dore LLP, filed all three patent applications and drafted the claims throughout the entire process. This same firm had the relationship with this PTO examiner regarding the subject matter of this patent. This strengthens the notion that the examiner truly understood the patent claims when the patent issued.

**2. Marker has not proven either of the two exceptions to the rule that claim terms shall be given their ordinary meaning.**

There are only two exceptions to the rule that a claim term shall be given its ordinary meaning: "1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution." *Thorner v. Sony Computer Ent. America LLC*, 669 F.3d at 1365. In *Thorner*, the parties disputed the meaning of the term "attached to said pad." *Id.*, at 1364. The plaintiff argued that the term should be given its ordinary meaning. The Defendant argued that "attached to said pad" should be construed as affixed to the exterior surface of the pad and does not include embedded within said pad. *Id.* The district court ruled that the specification implicitly defined

“attached” to mean “affixed to an exterior surface.” The Federal Circuit overturned the district court’s ruling and held that “attached to said pad” should be given its ordinary meaning. *Id.*, at 1368. The Court noted that “attached” is a broader term than “embedded” and should have its plain meaning of attached to either an interior or exterior. *Id.*, at 1368. The Court found that although the patentee used the word embedded in the specification and never used the term attached when referring to an attachment to an inner surface, the patentee neither explicitly redefined the claim term “attached” nor disavowed any scope of the term “attached”; therefore, the word should be given its ordinary meaning.

In another case following *Thorner*, the Federal Circuit again reversed a district court claim construction that did not give a term its ordinary meaning. *Info-Hold, Inc. v. Applied Media Technologies Corp.*, 783 F.3d 1262, 1266 (2015). The district court held that the term “transmit” should be limited by the specification and defined to mean “initiate a contact with and send an electronic signal to another device.” *Id.*, at 1266. The defendant argued that the specification should limit the claims. *Id.*, at 1266-67. The court noted in reversing the district court that it has “expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment.” *Id.* at 1267, (quoting *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d at 906). The court found “a lack of a clear, intentional disavowal of claim scope” that would require redefinition of “transmit,” and it held that there was “no basis to depart from the ordinary and customary meaning of the term.” *Id.*, at 1267 (citing e.g., *Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1204 (Fed. Cir. 2002) (the presumption favoring ordinary meaning will only be overcome by the inventor's use of words that represent “a clear disavowal of claim scope”), cert. denied, 538 U.S. 1058, 123 S.Ct. 2230, 155 L.Ed.2d 1108 (2003)).



Time and time again, the Federal Circuit has ruled that claim terms should be given their ordinary meaning unless the evidence proves that the patentee explicitly redefined the claim. *See e.g., Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d at 1371 (district court's limiting claim construction overturned and claim terms given their ordinary meaning); *Saunders Gr. v. Comfortrac*, 492 F.3d 1326, 1331 (Fed. Cir. 2007) (term "pneumatic cylinder" given its ordinary meaning and not is limited to pneumatic cylinders containing at least one pressure activated seal); *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d at 911 (claim term not limited to embodiments of specification). Here, as in the above cases, simply no good reason exists to replace the language of the claims with Marker's proposed language.

### 3. Claim terms are not indefinite.

Indefiniteness must be proven by **clear and convincing evidence**. *Sonix Technology Co., LTD.*, at pg. 11; *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 789 F.3d at 1345. As both parties have stated, a patent claim is indefinite if it does not inform a POSITA, "with reasonable certainty", about the scope of the patent claim. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014). Marker has not defined the level of knowledge of a POSITA, and Marker has no evidence that a POSITA would not understand any term of Claim 1 or find that Claim 1 fails to "inform, with reasonable certainty, those skilled in the art about the scope of the invention." Marker has not proven by clear and convincing evidence the indefiniteness of any term. Marker has submitted no clear and convincing evidence that a POSITA would not know the scope of Claim 1.

Claim 1 of the '867 Patent clearly delineates the patentee's invention. A plain reading of Claim 1 reveals the invention of a ski binding heel unit that contains two distinct retention/release mechanisms. Claim 1 further sets forth the various assemblies and elements and

their relationships to each other to ensure that the lateral release assembly retains/releases laterally without affecting vertical retention/release, and vice versa. No term of Claim 1 is indefinite.

Moreover, recently the Federal Circuit held that a PTO examiner's ability to ascertain the meaning and scope of a patent term and compare that claim term to the prior art supports a finding that the term is definite. *Sonix Technology Co., LTD. v. Publications International, LTD*, No. 16-1449 (Fed. Cir. Jan. 5, 2017). The court reversed the district court's conclusion that the phrase "visually negligible" was invalid under 35 U.S.C. § 112 as indefinite. The court relied in part upon the fact that the "examiner was able to understand and apply the term in performing a search for prior art and make an initial rejection." *Sonix Technology Co., LTD. v. Publications International, LTD*, No. 16-1449 at pg. 11. That is exactly what happened here. The examiner repeatedly compared the scope of the claim to the prior art. The terms here are likewise not indefinite.

#### **4. Claims terms are not drafted using means-plus-function language**

Marker's claim that certain terms in Claim 1 are means-plus-function limitations drafted in accordance with 35 U.S.C. § 112(f) is far reaching and grasping at the slimmest argument. A claim term is presumed **not** to be a means-plus-function claim term when as here the word "means" is not used. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1348 (Fed. Cir. 2015) (en banc). Further, a term is not written in means plus function language when the words of the claim are understood by a POSITA to have a sufficiently definite meaning as the name for structure. *Williamson v. Citrix Online, LLC*, 792 F.3d at 1348. Marker's analysis again falls short on both points. The terms that Marker identifies as means-plus-function terms do not recite the word "means" and do recite structure, structure that the examiner compared to the prior art and

concluded that the patent should issue. The terms “lateral release assembly” and “linkage element” are structural terms within the context of the '867 Patent. A “lateral release assembly” is an assembly that releases laterally, and a “linkage element” is an element that links two assemblies. These terms have meaning in the context of Claim 1. Marker simply cannot overcome the presumption that the terms above are **not** means-plus-function terms. Both terms don't use the word “means”, and they do connote structure.

#### **5. Preamble is not limiting.**

KneeBinding does not concede that the preamble of Claim 1 is limiting. KneeBinding has not acknowledged that the preamble is limiting as asserted by Marker. Dkt. #46, pg. 6. KneeBinding does not believe that any terms in the preamble need interpretation. Marker proposed that the terms of the preamble needed interpretation by the Court. KneeBinding contends no interpretation of the preamble or any other term is necessary.

The preamble of a patent claim is the language that precedes the word “comprising”. A preamble is generally not limiting. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1292 (Fed. Cir. 2015); *Symantec Corp. v. Computer Assocs. Int'l, Inc.*, 522 F.3d 1279, 1288 (Fed. Cir. 2008). Preamble language that states the purpose or intended use of an invention is not limiting on the scope of the invention. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d at 1292. The preamble of the '867 Patent was not viewed as a limitation in the prosecution history of the patent and was not relied upon by the patentee to overcome prior art. *See Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d at 1292. Here, the preamble merely recites the purpose of the invention, to separate and isolate force vectors applied to a safety binding that secures the heel of a boot to a ski. It does not recite the structural elements of the invention.

**B. Marker fails to define the skill level of a POSITA.**

The parties agree that language of Claim 1 must be given its ordinary and customary meaning that it would have to a POSITA at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1312-13. Furthermore, a claim is definite if it teaches a POSITA, with reasonable certainty, about the scope of the invention. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. at 2124. KneeBinding asserts that a POSITA in this case has at least five years of ski binding design experience. Its supports this assertion with evidence of the Inventor's experience, KneeBinding's experience as a binding manufacturer, and Marker's experience as a binding manufacturer. Given the background of a POSITA, KneeBinding's claim construction proposals are based in part upon the POSITA's knowledge and experience.

Marker failed to define the experience of a POSITA. Although Marker argues that a POSITA would find certain claims of the '867 Patent indefinite, Marker offered no argument or evidence as to the skill level of a person interpreting the '867 Patent. Without knowledge of the level of skill of a POSITA, Marker has no support for its proposals. Clearly the words of the '867 Patent have more meaning to a ski binding designer than a layperson. Marker omits this fact in its analysis. Marker's failure to define the skill level of a POSITA undermines each of its proposed claim constructions. Most importantly, Marker's failure to define the skill level of a POSITA should defeat Marker's claims that the '867 Patent is indefinite, because Marker cannot prove by clear and convincing evidence that a POSITA would not reasonably understand the scope of Claim 1 of the '867 Patent.

In the next two sections, KneeBinding will address Marker's arguments regarding each claim term.

**C. Each term of Claim 1 is definite because each term informs a POSITA, “with reasonable certainty”, about the scope of the patent claim.**

The terms of Claim 1 are definite because each has an ordinary meaning to a POSITA, the PTO examiner found the terms definite and compared the terms to the prior art, and Marker has no evidence to prove a POSITA would not understand the scope of each term with reasonable certainty. Prior to KneeBinding’s opening brief, KneeBinding provided Marker a chart of each term and the location of each section of the patent or evidence to support its proposed construction. See Dkt. #45.4 (Exhibit C). This section discusses each term Marker wrongly asserts is indefinite.

**1. “safety binding”**

As stated previously in Section A.5 above, the preamble of the claim is not limiting and the term “safety binding” does not limit the claim. The term “safety binding” is the subject matter of the claim. The invention is a “safety binding” with structure recited in Claim 1. Regardless, “safety binding” needs no interpretation by the Court.

Marker presents no evidence that a POSITA would not understand the term “safety binding” and that the term is indefinite. Without evidence, it cannot sustain its clear and convincing evidentiary burden. Marker starts with the argument that the term “safety binding” has no meaning, and then seeks to support this argument that the term is indefinite. Marker skips a step, however, and fails to recognize what is known to POSITAs and laypersons alike; a safety binding is a binding that releases. The '867 Patent is clear that the invention relates to ski bindings that release. Dkt. #45.6 (Exhibit E), '867 Patent, Col. 1, ll. 18-23. Marker even somewhat concedes this point in the end. Dkt. #46, pg. 9. Moreover, Marker bindings meet international standards for release as noted in KneeBinding’s opening brief. Dkt. #45, pg. 14 (Exhibit K). A safety binding is a binding that releases as opposed to a binding that does not.

The examiner did not believe the term safety binding was indefinite, and the examiner's actions are evidence that the term is not indefinite. *Sonix Technology Co., LTD. v. Publications International, LTD*, No. 16-1449 at pg. 11. Claim 1 is not limited to a particular type of safety binding, it is limited to a safety binding with the recited elements of Claim 1. The public notice function of Claim 1 is met. The public would certainly understand that the structures recited in Claim 1 apply to a ski binding that releases. The Court should give "safety binding" its plain and ordinary meaning and not find that the term is indefinite.

**2. "having a lateral release assembly for apply lateral securing pressure to the ski boot"**

Marker argues that the term "lateral release assembly for apply lateral securing pressure to the ski boot" connotes no structure and is indefinite. Marker again presents no evidence to support this conclusion, and no counter argument to the fact that the examiner defined this term and applied it to the prior art. Within the context of the '867 Patent it is clear that the "lateral release assembly" is an assembly that releases laterally and secures the boot while skiing.

Marker wrongly attempts to distinguish between a release and a retention assembly. The word "release" in and of itself presumes a prior state of retention just as the act opening a door presumes it was closed. A POSITA would know that a ski binding heel unit must both retain the ski boot for skiing and release the ski boot under potentially injurious non-skiing loads (*i.e.*, when a skier falls). The '867 Patent makes this clear. The '867 Patent is clear that the invention relates to ski binding heel units that have a jaw that is adapted to hold a boot and move between a boot retention and boot release position. Dkt. #45.6 (Exhibit E), '867 Patent, Col. 1, ll. 21-23. Furthermore, the specification discusses "striking a decisive balance over release and retention by incrementally reversing polarity between release and retention during the course of lateral heel movement..." Dkt. #45.6 (Exhibit E), '867 Patent, Col. 10; ll. 54-56.

The patent specification discloses different mechanisms that retain and release the heel of a boot in the lateral or side-to-side direction. The '867 Patent Abstract outlines one such mechanism in the first sentence; “[s]ki binding heel unit includes lateral release cams and a vector decoupler mechanism that provide lateral shear release of the heel of a ski boot from a ski.” Dkt. #45.6 (Exhibit E), '867 Patent, Abstract. The Summary of the Invention discusses generally a lateral release assembly. Additionally, the patent specification starting at Column 8, line 63 also provides one such lateral release mechanism: “Fig. 3 illustrates a top view of a lateral release mechanism.” See Dkt. #45.6 (Exhibit E), '867 Patent, Col. 8, ln. 63. Again, the claims are not limited by the embodiments of the specification. *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d at 906. The broad term “lateral release assembly” encompasses the specific structures of the specification as well as other assemblies that release laterally and apply laterally securing pressure to the ski boot. Marker has not shown that a POSITA would not understand the term “lateral release assembly” to mean an assembly that releases laterally.

The term “lateral release assembly” is not a means plus function term. First, the term does not recite the word “means”. As importantly, the term connotes a definite structure; an assembly that releases laterally and applies securing pressure to the heel of the boot. Lateral release assembly is not a “nonce” term as argued by Marker. It is a term like vertical release assembly only in a different plane. Marker’s attempt to turn the phrase “having a lateral release assembly for apply lateral securing pressure to the ski boot” into means-plus-function language is preposterous.

The term “lateral release assembly” is not indefinite simply because it can comprise different elements. In fact, the PTO examiner understood the term “lateral release assembly” and originally rejected the patentee’s invention over prior ski bindings with different lateral release

assemblies. Then, after five examinations, the examiner finally concluded that none of the earlier lateral release ski bindings had all of the elements of Claim 1. Marker argues that a POSITA would not understand the term “lateral release assembly”, but it fails to recognize that that PTO examiner did understand the term and did apply the term to prior ski bindings. Since Marker cannot prove by clear and convincing evidence that “lateral release assembly” is indefinite, and since no exception to the ordinary meaning rule applies to this term, the Court should give the term “lateral release assembly” its ordinary meaning.

### 3. “linkage element”

As with other terms of Claim 1, Marker completely ignores the words of the claim when attempting to define them. Here, the term “linkage element” in the context of Claim 1 is an element that “links” other elements in the claim. Marker essentially argues that a POSITA would not understand the term “link”. Although KneeBinding feels the term “linkage element” needs no definition beyond the claim language, it was clear from the litigation that the parties disputed the term. KneeBinding therefore provide the definition “an element that allows free-coupling between the upper heel assembly and the lower heel assembly” consistent with the specification. Dkt. #45.6 (Exhibit E), '867 Patent, Col. 8, ll. 25-63.

The term “linkage element” informs a POSITA with reasonable certainty “what is claimed.” The upper heel assembly and lower heel assembly are linked together. The patent makes this fact clear. As noted in KneeBinding’s opening claim construction brief, the specification refers to an element that links the lateral release assembly of the upper heel assembly to the lower heel assembly. Dkt. #45.6 (Exhibit E), '867 Patent, Col. 8, ll. 25-37; Col. 8, ll. 50-54. The specification states that the lateral release cam of the upper heel assembly has an “open linkage” to the lower heel assembly. *Id.* at Col. 8, ll. 50-54. Furthermore, the patent specification states



“the vector decoupler assembly...also allows free coupling” of the lateral release cam of the upper heel assembly to the lower heel assembly. *Id.* at Col. 8 ll. 25-37. Moreover, the specification states that the lateral release cam of the upper heel assembly has an “open linkage” to the lower heel assembly. *Id.* at Col. 8, ll. 50-54. Marker is incorrect when it argues that the patent contains no “linkage” discussion.

The PTO examiner understood the meaning of the term “linkage element”. The examiner found three pieces of prior art to contain a “linkage element”: Weigl et al. (U.S. Patent 6, 165,883); Stritzl et al. (U.S. Patent 4,858,946); and Gertsch (U.S. Patent 4,505,494) (twice). In each case, the “linkage element” was a different component. This demonstrates that the examiner not only understood the term as it applied to the '867 Patent, but she also understood the term as applied to other patents. The Federal Circuit has found this fact to support a finding that a claim term is definite. Marker’s argument without evidence that a POSITA would be “left without guidance on the meaning of the term linkage element” is merely an advocate’s position. It certainly does not meet the clear and convincing hurdle. The term “linkage element” is not indefinite. Since Marker proposed no meaning for the term, the Court should adopt KneeBinding’s proposed definition.

#### **4. “a first surface” and “a second surface”**

Marker asserts that the terms “first surface” and “second surface” are indefinite. Yet, the claim itself defines these terms. The “linkage element”, “a first surface”, and “a second surface” cooperate to limit the motion of the lateral release assembly. Additional surfaces may also act to limit motion, but Claim 1 requires at least a “first surface” and a “second surface”. The patent specification identifies two such surfaces in Figure 2, elements 58, 59. Dkt. #45.6 (Exhibit E), '867 Patent. Further Col. 7 of the patent specification discusses the surfaces of elements 58 and

59 maintaining lateral release assembly rotating and translating in the lateral direction. Dkt. #45.6 (Exhibit E), '867 Patent, Col. 7 32-62. Claim 1 broadly recites these elements as a “first surface” and a “second surface” so as to permissibly not limit Claim 1 to a specific embodiment of the invention.

Moreover, Claim 2 of the '867 Patent also illuminates the meaning of the “first surface” and the “second surface”. The court has held that “[d]ifferences among claims can also be a useful guide in understanding the meaning of particular claim terms,” and a dependent claim that adds a limitation gives rise to a presumption that the independent claim does not contain that limitation. *Phillips v. AWH Corp.*, 415 F.3d at 1314-15. Here, Claim 2 depends from Claim 1 and adds the further requirement that the “first surface” and the “second surface” must be substantially parallel to each other. In other words, the “first surface” and the “second surface” of Claim 1 are not limited to parallel surfaces, and the “first” and “second” surface should be interpreted broadly to include any surface that cooperates with the “linkage element” to limit the motion of the lateral release assembly.

Lastly, Marker again presents no evidence that a POSITA would not understand the meaning of the “first surface” and the “second surface” in the context of the claim. The examiner specifically rejected the patent application as indefinite because of the terms “first surface” and “second surface”, and then allowed the claim after the applicant fixed the usage of the terms. Further, the examiner found first and second surfaces in the prior art. The court should adopt the ordinary meaning of the terms “a first surface” and “a second surface” and not find that the terms are indefinite.

**D. Marker does not rebut the presumption that the remaining terms of Claim 1 should be given its ordinary meaning.**

Marker fails to start with the ordinary meaning of each claim term. Instead, Marker begins with the conclusion that the claim term has no meaning and then attempts to support its conclusion with argument. Marker ignores that fact that each claim term has an ordinary meaning, and the ordinary meaning shall be “heavily” presumed to apply absent and exception outlined above to this rule. *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1350 (Fed. Cir. 2013); *Thorner v. Sony Computer Ent. America LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012); *Epistar Corp. v. Int'l Trade Comm'n*, 566 F.3d 1321, 1334 (Fed.Cir.2009)(“A heavy presumption exists that claim terms carry their full ordinary and customary meaning, unless [a party] can show the patentee expressly relinquished claim scope.”). No exceptions to the ordinary meaning rule apply in this case. The Court should adopt the ordinary meaning of each remaining term.

**1. “Vector decoupling assembly for separating and isolating two or more force vectors”**

This term needs no redefinition, and the Court should adopt its ordinary meaning. As stated earlier, this term is in the preamble and is not limiting. The term merely states the purpose of the invention “separating and isolating two or more force vectors”. Regardless, the term should be presumed to have its ordinary meaning because neither exception to the rule exists; the patentee has not set forth a special definition, and the patentee has not disavowed the full scope of a claim term. The Court should adopt KneeBinding’s proposal.

Marker wrongfully dispatches with the “heavy presumption” and moves quickly to rewriting the claim. Marker’s proposal fails the court’s framework for construing a claim term that starts with the claim language itself. Marker has not supported its proposal with any evidence that a POSITA would need to rewrite the language of the claim. The Court should give the term

“Vector decoupling assembly for separating and isolating two or more force vectors” its ordinary meaning and not limit the term to only separating vertical force vectors and lateral force vectors as proposed by Marker.

**2. “securing a heel portion of a ski boot to a ski”**

Again, this term needs no definition. As above, the term is in the preamble and not limiting. Regardless, the ordinary meaning of the terms should apply. It is unclear why Marker seeks to rewrite the claim language. In the context of the preamble the claim recites a safety binding that secures a heel portion of a ski boot to a ski. No further interpretation is necessary.

Marker argues that the parties’ constructions are not far apart. This is untrue. KneeBinding asks this Court to find that no claim construction is necessary and that the claim term shall be construed to have its ordinary meaning. Marker seeks to replace the claim language with its own. KneeBinding requests that the Court find that no claim construction is necessary and that the term “securing a heel portion of a ski boot to a ski” should be construed to have its ordinary meaning.

**3. “Lower Heel Assembly” and “Upper Heel Assembly”**

These two terms need no further construction. The Court should not narrow Claim 1 with Marker’s additional proposed language “and does not have any components or parts in common with, the upper heel assembly” that just does not appear in the claim. Claim 1 recites an invention comprised of two assemblies: a “lower heel assembly” and “upper heel assembly”. The relationship of the assemblies and their elements is contained in other limitations. Marker erroneously attempts to narrow Claim 1 by completely segregating each assembly. However, nowhere does the patentee limit the scope of Claim 1 such that no components in “Lower Heel

Assembly” are in the “Upper Heel Assembly” and vice versa. The patentee’s ordinary claim language should control the scope of the claim.

The rules of claim construction require one to start with the claim language and then determine if the patentee has expressly disavowed any claim scope. Contrary to law, Marker argues that the terms should be limited by the specification. Marker’s references in the specification, however, are to the heel “housing” and not the broader term heel “assembly.” Patentee clearly chose to use broad language and not disavow scope.

Marker also incorrectly ignores the fact that the '867 Patent specification discusses an embodiment of the invention where a portion of the “lateral release assembly” of the “upper heel assembly” is located in the “lower heel assembly”. In one embodiment, the lateral release cam 17 is in the “upper heel assembly” and its mating cam surface 27a is in the “lower heel assembly.” Dkt. #45.6 (Exhibit E), '867 Patent, Fig. 4. These elements act together to permit lateral retention/release. Although the many components of the “lateral release assembly” are in the “upper heel assembly”, the cam surface that the “lateral release assembly” reacts against, element 27a, is in the “lower heel assembly.” The Marker Kingpin binding has this same construction. Claim 1 does not recite the requirement that all components of the “lower heel assembly” shall contain no components of the “upper heel assembly” and vice versa. The patentee specifically did not draft Claim 1 to include such a limitation, and the patent specification provides examples to support the claim language. The Court should reject Marker’s proposal to rewrite the claim to include additional limitations not drafted by the patentee.

The law states that a claim term shall be given its ordinary meaning except: “1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution.”

*Thorner v. Sony Computer Ent. America LLC*, 669 F.3d at 1365. In this case, neither exception applies. The Court should give the terms “lower heel assembly” and “upper heel assembly” their ordinary meaning and not further limit the terms by requiring each assembly to not have any components or parts in common with the other assembly.

#### 4. “fixedly attached”

KneeBinding believes that the entire claim phrase “a linkage element fixedly attached to the lateral release assembly” should be given its plain and ordinary meaning. The dispute between the parties, as understood by KneeBinding, is what does it mean to be “fixedly attached.” KneeBinding believes this simple dispute can be resolved without rewriting the whole claim phrase. KneeBinding asserts that is something is “fixedly attached”, when it is attached in such a way that it “cannot be detached without damaging or breaking the ski binding.” KneeBinding’s proposal resolves the definition of “fixedly attached” while staying true to the remaining language of the claim and not rewriting it.

In the alternative, KneeBinding will agree that the term “fixedly attached” shall have its ordinary meaning.

#### 5. “wherein the linkage element, a first surface and a second surface cooperate to limit motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski”

The final claim term at issue captures a portion of the essence of the invention, but yet again Marker attempts a claim rewrite. As is clear from Claim 1, the specification of the '867 Patent, and the prosecution history, a purpose of the invention is that at least two retention/release mechanisms in a ski binding are separated and isolated from each other such that the forces acting on the vertical retention/release assembly do not influence or conflict with the forces

acting on the lateral retention/release assembly and vice versa. The Abstract states that, “[t]he vector decoupler mechanism restricts heel unit lateral rotation and translation to a controlled path” Dkt. #45.6 (Exhibit E), '867 Patent. This final claim limitation of Claim 1 captures this idea by stating that the structural elements the “linkage element”, the “first surface”, and the “second surface” cooperate to keep the lateral assembly moving laterally. Maintaining the lateral release assembly in the lateral plane is an element of the invention. The language of Claim 1 is specifically not limited in such a way that *only* a “first surface” and a “second surface” limit motion of the lateral release assembly. In fact other surfaces may play some role in maintaining pure lateral movement. Marker’s attempt to insert the word “only” into the final claim element is illogical.

As with the other terms, Marker deviates from the rules of claim construction. Marker cites to no passage where the patentee has limited the scope of the plain language. Marker inserts the limiting term “only” as Marker has attempted to do with other terms above. There is simply no exception that applies to limit the claim term beyond its plain language. The Court should give the phrase its ordinary meaning and not insert the word “only” as proposed by Marker.

### III. CONCLUSION

KneeBinding requests the Court to adopt the language of the patentee and rule that the terms in question shall be given their ordinary meaning. Marker requests the Court to rewrite the claims in a thinly veiled attempt to avoid infringement. Marker has not met its clear and convincing hurdle on indefiniteness, and Marker has not provided the legal basis or evidence to overcome the presumption that a Claim’s terms should be given their ordinary meaning. Each term connotes structure to a POSITA with ski binding experience. Marker has not proven that

any term should be limited by an exception to the ordinary meaning rule. The Court should adopt KneeBinding's proposals.

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UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

KneeBinding, Inc., a Delaware corporation,

Plaintiff,

v.

Marker Volkl USA, Inc., a New Hampshire  
corporation,

Defendant.

No. 2:15-cv-00121-wks

**CERTIFICATE OF SERVICE**

I hereby certify that on January 20, 2017, I served a copy of Plaintiff KneeBinding, Inc.'s Response To Marker Volkl USA, Inc.'s Opening Claim Construction Brief on the Attorneys for the Defendant Marker Volkl USA, Inc. using the CM/ECF system at the electronic mail addresses listed below and registered with the ECF system for this matter.

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