

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	EDCV 17-02507 AG (AGRx)	Date	October 24, 2018
Title	NEVILLE v. FOUNDATION CONSTRUCTORS, INC.		

Present: The Honorable	ANDREW J. GUILFORD		
Lisa Bredahl	Not Present		
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		

Proceedings: **[IN CHAMBERS] CLAIM CONSTRUCTION ORDER (DKTS. 31, 32, 35, 37) AND ORDER REGARDING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' OPENING CLAIM CONSTRUCTION BRIEF AND EXHIBITS (DKT. 36)**

Plaintiffs allege that Defendants infringe U.S. Patent Nos. 7,914,236 (“the ’236 Patent”), 9,284,708 (“the ’708 Patent”), and 9,587,362 (“the ’362 Patent”). (*See* Dkt. 1.) Before the Court is the issue of claim construction. Plaintiffs have also moved to strike significant portions of Defendants’ claim construction briefing based on Defendants’ failure to disclose supporting evidence in earlier claim construction disclosures required by this Court’s Patent Local Rules. (Dkt. 36.) This Order addresses the parties’ disputes.

1. BACKGROUND

The ’236 and ’708 Patents are titled “Screw Pile Substructure Support System” and the ’362 Patent is titled “Systems and Methods for Coupling a Drill Rig to a Screw Pile.” The ’362 and ’708 Patents are continuation patents of the ’236 Patent, and all three share substantially the same specification. Because the asserted patents share substantially the same specification, the Court will cite the ’236 Patent unless otherwise noted.

Plaintiff Steve Neville is the inventor and owner of the asserted patents. (Dkt. 1 ¶¶ 13, 16, 19.) Plaintiff TDP Support, Inc. is the exclusive licensee “for manufacturing, offering for sale, and selling screw pile substructure support systems” in accordance with the ’236 and ’708 Patents. (Dkt. 1 ¶¶ 14, 17.) Plaintiff Substructure Support, Inc. is the exclusive licensee “for using

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screw pile substructure support systems” in accordance with the ’236 and ’708 Patents. (*Id.* ¶¶ 15, 18.) Substructure is also the exclusive licensee “for practicing the methods for preparing a screw pile for installation by a drill rig” as claimed in the ’362 Patent. (*Id.* ¶ 20.)

The asserted patents generally describe “[a] method and apparatus . . . for the installation of a foundation pile in a soil bed.” ’236 Patent at 1:15–17; *see also id.* at 3:66–67. The asserted patents state that they are focused on solving the problem of providing a “more elegant approach to foundation pile placement providing such benefits as may include a faster pile placement speed, lower cost and greater ease of use as well as higher load capacity piles.” ’236 Patent at 1:66–2:3. The patents state,

[i]n contrast to prior art drilled foundation pile systems which use a low torque and an efficient drill tip which must be retrieved from the drilling site after drilling is complete, in an exemplary embodiment of the present invention a pile is provided with a fixed tip having a helical flight thereon which draws the pile into a soil bed when a torque is applied to the pile.

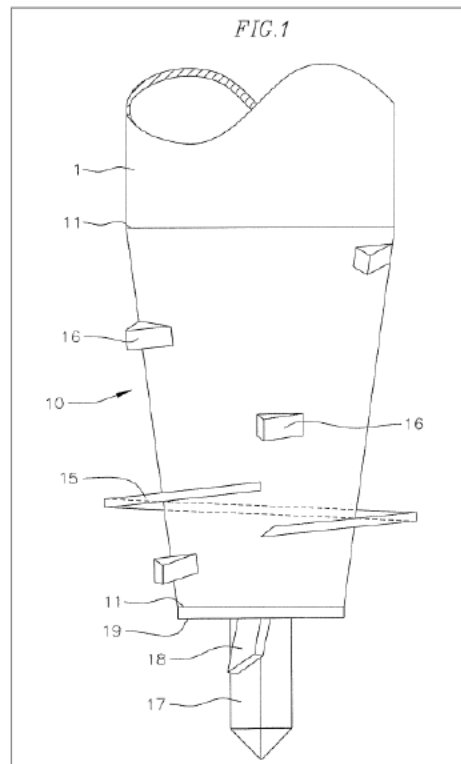
Id. at 3:67–4:6. In other words, rather than just hammering a pile into the ground like some prior art methods, the asserted patents relate to a method that uses “torque,” or a twisting movement, in conjunction with a ridge (“helical flight”) and other features on the drill tip for screwing the pile into the ground.

Figure 1 shows a “conical pile tip according to one embodiment of the present invention.” ’236 Patent at 3:32–33. According to the patents, “the pile tip 10 allows the pile 1 to be set into a soil bed by applying a torque to the distal end of the pile 1 (not shown) using a standard drilling rig.” ’236 Patent 4:8–10. “The helical flight 15 helps draw the pile tip 10 down into a soil bed during placement, and the cutter teeth 16 serve to break up the soil to allow the pile tip 10 to better penetrate into the bed.” ’236 Patent at 4:20–23.

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'236 Patent at Figure 1.

2. LEGAL STANDARD

2.1. Construing Claims Generally

Claim construction is the process of determining the meaning and scope of patent claims. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). It is a matter for the court. *Id.* at 979.

The words of a claim are given their ordinary and customary meaning as understood by a person of ordinary skill in the art at the time of the invention reading the patent specification.

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Phillips v. AWH Corp., 415 F.3d 1303, 1312–13 (Fed. Cir. 2005). In some cases, this may “be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Id.* at 1314. But it “often requires the judge only to examine and to construe the document’s words.” *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 841 (2015).

Although claims are read in light of the specification, limitations from the specification must not be imported into the claims. *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186–87 (Fed. Cir. 1998). For the specification to define a term to mean something other than its ordinary meaning, it must set out its definition in a manner sufficient to provide notice of that meaning to a person of ordinary skill in the art. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

The prosecution history is also a part of the intrinsic evidence consulted during claim construction. *See Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1324 (Fed. Cir. 2002). But “because the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes.” *Phillips*, 415 F.3d at 1317.

Sometimes a court may look to other publicly-available sources to show “what a person of skill in the art would have understood disputed claim language to mean.” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys. Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004). These sources include “extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* Extrinsic evidence includes “expert and inventor testimony, dictionaries, and learned treatises.” *Phillips*, 415 F.3d at 1317 (internal citation omitted). Extrinsic evidence may not be used to contradict claim meaning that is unambiguous in light of the intrinsic record. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1290 (Fed. Cir. 2015).

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3. ANALYSIS

Before proceeding to the parties’ agreed and disputed terms, a few things are worth noting. First Defendants’ briefing raises some concerns, both procedural and substantive. Defendants’ briefs use font size and line spacing that violate the Central District’s Local Rules and effectively allow them to circumvent page limits. *See* L.R. 11-3.1.1 (“[a] proportionally spaced font must be standard (e.g., non-condensed) 14-point or larger, or as the Court may otherwise order.”); *see also* L.R. 11-3.6. Any future filings in this case must comply with these requirements.

Plaintiffs’ motion to strike raises some significant and concerning shortcomings with Defendants’ evidentiary disclosures leading up to claim construction. For multiple terms in the Joint Claim Construction and Prehearing Statement, Defendants listed “none” for their intrinsic/extrinsic evidence. Yet, their claim construction briefs rely on extensive intrinsic and extrinsic evidence for these same claim terms. Plaintiffs also outline a consistent pattern of Defendants failing to timely disclose materials required by the federal and local rules during this litigation that, according to Plaintiffs, has led to ongoing delay and uncertainty about Defendants’ litigation positions. Defendants do not substantively respond to Plaintiffs’ description of Defendants’ litigation conduct. But it’s not necessary to strike Defendants’ late-disclosed evidence. As the sections below will show, Defendants have failed to submit any successful claim construction positions as far as the claim terms where Plaintiffs seek to strike Defendants’ evidence and arguments. (The only term construed consistent with Defendants’ proposal is “pile,” and Plaintiffs have not moved to strike Defendants’ arguments/evidence for that term.) Plaintiffs have also not separately brought motions regarding the other conduct they complain about. To the extent Defendants continue to act in an unreasonable manner during litigation, Plaintiffs should consider whether Defendants’ conduct is worth raising with the Court (either before the Magistrate Judge or this Court) earlier rather than later, both so concerns can be promptly addressed and so that Plaintiffs can create a record to support any later requests for attorney’s fees under 35 U.S.C. § 285, to the extent Plaintiffs are the ultimate prevailing party.

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Second, two of the parties’ claim construction disputes suggest a failure to adequately meet and confer. The parties’ arguments regarding the terms “adapter bracket” and “fixedly attached” are essentially semantic disputes where it seems that considerable effort could have been saved if the parties simply engaged in a reasonable discussion about the meaning of these terms and the impact of their competing proposals on dispositive issues in this case, including infringement and invalidity. The Court reviews the parties’ arguments in later sections of this Order, but takes this opportunity to caution the parties that the requirements of Local Rule 7-3 carry meaning and frivolous disputes do not make either party look good.

3.1. Agreed Constructions

In the parties’ Joint Claim Construction and Prehearing Statement (Dkt. 30 at 2–3), the parties agree on constructions for six terms:

Claim Term	Parties’ Agreed Construction
“adapter plate” (’236 Patent, Claim 15; ’708 Patent, Claim 10)	“a panel or sheet of material on a device for connecting pieces of equipment”
“adapter pivot” (’236 Patent, Claim 15; ’708 Patent, Claim 10)	“a round shaft or pin about which something turns or swivels, on a device used for connecting pieces of equipment”
“closing” (’708 Patent, Claims 1, 31 & 39; ’362 Patent, Claims 1, 14 & 17)	“blocking or eliminating the opening of”
“coupled” (’236 Patent, Claims 15 & 20; ’708 Patent, Claims 10–11, 21, 29 & 32; ’362 Patent, Claims 1, 14–15 & 17)	“connected” or “joined”

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Claim Term	Parties' Agreed Construction
"frustro-conical" ('708 Patent, Claim 29; '362 Patent, Claim 15)	"having the shape of cone with narrow end, or tip, removed"
"perpendicular" ('236 Patent, Claims 1, 19, 29, 32 & 33; '708 Patent, Claims 11, 29 & 32; '362 Patent, Claims 1, 14–15 & 17)	"at or nearly at a right angle, i.e., at 90° or approximately 90° to another element"

In footnotes, Plaintiffs explain and Defendants acknowledge that “the term ‘frustro-conical’ appears to have been misspelled in the ‘708 and ‘362 Patents, [but] the correct spelling should be ‘frusto-conical.’” (Dkt. 30 at 2, n.1; Dkt. 31 at 6, n.2; Dkt. 32 at 23, n.5.)

3.2. Disputed Terms

- 3.2.1. “end plate” ('236 Patent, Claims 1, 4, 16, 19, 22–23, 29 & 32–33; '708 Patent, Claims 1, 19, 21, 26, 29, 31 & 39; '362 Patent, Claims 1, 11–12, 14–15 & 17) / “plate” ('236 Patent, Claims 1, 4, 16, 19, 22–23, 29 & 32–33; '708 Patent, Claims 1, 19, 21, 26, 29, 31 & 39; '362 Patent, Claims 1, 11–12, 14–15 & 17)

Term	Plaintiff's Proposed Construction	Defendants' Proposed Construction
"end plate"	No construction necessary, Alternatively, “a cap on the end of the conical or tapered body”	“a flat plate is a driving shoe or driving point at the bottom end or driving tip of a pile, at the foot of the pile, and used to facilitate entry of the pile into the ground” Alternatively,

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		“a flat sheet of material for disposition at the end of an element”
“plate”	No construction necessary, Alternatively, “a cap on the conical or tapered body”	“a flat piece or sheet of metal”

The Court first questions why the parties presented separate sections of argument for the terms “end plate” and “plate.” The parties’ presentation is perplexing because the term “plate” only appears in two contexts in the claims: in the phrase “end plate” and the phrase “adapter plate.” The parties have submitted an agreed construction for the term “adapter plate” as “a panel or sheet of material on a device for connecting pieces of equipment.” Separately construing “plate” could potentially lead to an inconsistent construction with this agreed construction. Plaintiffs blame Defendants for the separate briefing sections regarding “plate” as a late-proposed addition to the parties’ claim construction briefing. And Defendants don’t seem to dispute this – they provide a confusing argument about how construing “plate” separate from “end plate” “highlights that the extrinsic evidence and intrinsic evidence are in accord.” (Dkt. 32 at 20.) The parties effectively admit that the real dispute regarding the term “plate” is solely in the context of the phrase “end plate.” The Court declines to separately perform a claim construction analysis for the term “plate” apart from the phrase “end plate.”

The parties’ dispute over the construction of the term “end plate” relates to whether the end plate must be flat and perpendicular to the centerline. (Dkt. 32 at 16; Dkt. 37 at 2.) Defendants argue the term “end plate” must be limited to a flat plate based on a prosecution history disclaimer argument. Defendant asserts that Plaintiffs disavowed a claim interpretation that would encompass a non-flat surface by “adding the terms ‘substantially flat surface’ and ‘perpendicular to the centerline of the tubular pile’ to describe ‘end plate’” to claims of the ’236 Patent during prosecution. (Dkt. 32 at 3.) Defendants further argue that “[t]he ordinary

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meaning of ‘flat’ is flat . . . [and] [o]nly a flat plate can be at a right angle to the pile.” (*Id.* at 5.) In comparison, Plaintiffs argue that the “jury as laypersons will be able to understand this term without construction.” (Dkt. 31 at 13.) Plaintiffs state that no disavowal of claim scope occurred, but in any instance, “[s]ubstantially flat’ is not the equivalent of ‘flat,’” *id.* at 15, and “it would be improper to read the limitation of ‘a substantially flat surface’ into those claims that do not have this express limitation.” (*Id.* at 16.) Plaintiffs offer an alternative construction including the term “cap.” (Dkt. 30-1 at 4.) Defendants disagree with this construction, both based on a prosecution history disclaimer argument and some other arguments about the plain meaning and implications of the word “cap.” (Dkt. 35 at 1.)

The term “end plate” is recited in the ’236, ’708, and ’362 Patents. As Plaintiffs observe, the claims of the three patents include different language in relation to the recitation of an “end plate.” (*See* Dkt. 37 at 7.) For example, in the ’236 Patent, all of the independent claims state that the “end plate” has “a substantially flat surface disposed perpendicular to the centerline of the tubular pile.” *See* ’236 Patent at Claim 1, *see also id.* at Claims 19, 29, 32, 33 (same). In contrast, none of the claims reciting “end plate” in the ’362 Patent require it to be “substantially flat” or “perpendicular to the centerline.” *See* ’362 Patent at Claim 1 (“an end plate welded to and closing the second end of the tapered portion”); *see also id.* at Claims 11–12, 14–15, and 17. The independent claims of the ’708 Patent recite a variety of end plate configurations. These include “an end plate closing the second end of the tapered portion”, ’738 Patent at Claim 1, “a circular end plate configured to be attached to the drill rig head,” *id.* at Claim 19 (dependent claim), and “an end plate coupled to an end of the cylindrical section and having a substantially flat surface disposed perpendicular to the centerline of the tubular pile,” *id.* at Claim 29.

Defendants spend a lot of ink arguing that Plaintiffs disclaimed the scope of “end plate” because “*flat* shape, and its’ being *perpendicular* to the pile centerline, was *added* after the examiner initially rejected the patent for both indefiniteness and for obviousness in view of the prior art.” (Dkt. 32 at 4 (emphasis in original).) Defendants’ supposed “disclaimer” occurred during the prosecution history of the ’236 Patent, where, as already noted, all of the independent claims on their face recite that an end plate has “a substantially flat surface disposed perpendicular to the centerline of the tubular pile.” There is no dispute about this. The problem with Defendants’ argument is that Defendants do not adequately explain why the claims of the ’708 Patent and ’362 Patents, which (for the most part) do not include the

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“substantially flat”/“perpendicular” claim language but include other limitations not found in the claims of the ’236 Patent, must similarly be limited so that end plate requires these same limitations. Defendants have not shown disclaimer as to the claims in these other patents on the current record.

The specification additionally fails to support Defendants’ position. While the specification does teach that the end plate can have “a substantially flat surface disposed perpendicular to the centerline of the tubular pile,” *see* ’236 Patent at 2:12–13; 2:29–32; 2:55–57; 3:5–7, the end plate is not limited to those embodiments. *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1373 (Fed. Cir. 2014) (construing a claim term and finding it was not limited to the embodiments disclosed in the specification). Elsewhere, the specification refers to the end plate in broad terms, stating, for instance, “[t]he end plate **19** caps off the end of the conical body of the pile tip **10**, closing it off from the soil in which it is to be placed.” *Id.* at 4:26–28; *see also id.* at 6:57–59 (“[a]n end plate **49** is provided as a bottom surface to the conical body of the pile tip **40**.”). Neither these portions of the disclosure nor the remaining aspects of the asserted patents’ specifications require that the end plate is necessarily limited to being substantially flat and perpendicular to the centerline.

Although not necessarily relevant because Defendants have not shown that “end plate” must be limited to a substantially flat end plate in all instances, Defendants’ argument that “substantially flat” means “flat” still deserves a comment, as the term “substantially flat” separately appears in some of the claims. Defendants argue that “substantially flat” must mean “flat” because “[o]nly a flat piece of metal can be ‘disposed *perpendicular* to the centerline of the tubular pile’ as a matter of geometric principle.” (Dkt. 32 at 3.) Defendants’ argument would only apply if the end plate was required to be perpendicular to the centerline along the entire width of the end plate. Defendants are not arguing for such a limitation and such a limitation is not found in the claims or specification. Moreover, as a general matter of claim construction, there is a presumption that every term in a claim has meaning. *In re Power Integrations, Inc.*, 884 F.3d 1370, 1376 (Fed. Cir. 2018) (reversing the district court’s claim construction because it rendered certain claim language meaningless). Defendants would effectively read the term “substantially” out of the claims where it appears, contrary to that presumption. Defendants have not presented a sufficient basis for why doing so would be appropriate.

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Beyond the parties' arguments about whether an "end plate" must be flat, the parties spend a lot of time disputing Plaintiffs' use of the term "cap" in their alternative proposed construction. Defendants argue that the term is confusing because of its alternative plain meanings (e.g., as a type of hat – an argument that costs Defendants some credibility, right along with its "cap cap" argument (Dkt. 32 at 20)). Defendants also argue that it would be improper to use the word "cap" in the construction of "end plate" because "cap" was initially recited in some of the claims in the '236 Patent application, but removed during prosecution. Plaintiffs argue that their alternative proposed construction of "a cap on the end of the conical or tapered body" is consistent with the specification, which states, "[t]he end plate **19 caps off** the end of the conical body of the pile tip **10 . . .**" '236 Patent at 4:26–28 (emphasis added). In other words, Plaintiffs take the use of the verb "cap" in the specification and argue that an end plate can be described by the noun "cap." These aren't particularly compelling arguments from either party. Ultimately, even though the prosecution history of the '236 Patent suggests that the terms "end cap" and "end plate" were used interchangeably, there is no basis to believe that a juror would have an easier time understanding one term over the other.

Defendants, meanwhile, argue that "end plate" can be alternatively construed as "a flat sheet of *material* for disposition at the end of an element," but that "plate" should be construed as "a flat piece or sheet *of metal*." Defendants haven't identified sufficient evidence in the intrinsic record or in the plain meaning of the word "end plate" to support the conclusion that the term "end plate" requires a plate made out of metal.

After considering the parties' arguments, the Court finds no construction is necessary for the term "end plate" in the context of the claims.

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3.2.2. “adapter bracket” (’236 Patent, Claim 15; ’708 Patent, Claim 10)

Plaintiffs’ Proposed Construction	Defendants’ Proposed Construction
No construction necessary Alternatively, “an object that is used to support or hold something in place on a device for connecting pieces of equipment”	“a steel unit designed to connect a specific pile type to a specific pile hammer.” Defendants propose modifying to broaden “pile hammer to “pile hammer or driving tool” Alternatively, “an object that is used to support or hold something in place on a device for connecting pieces of equipment that cannot be connected directly”

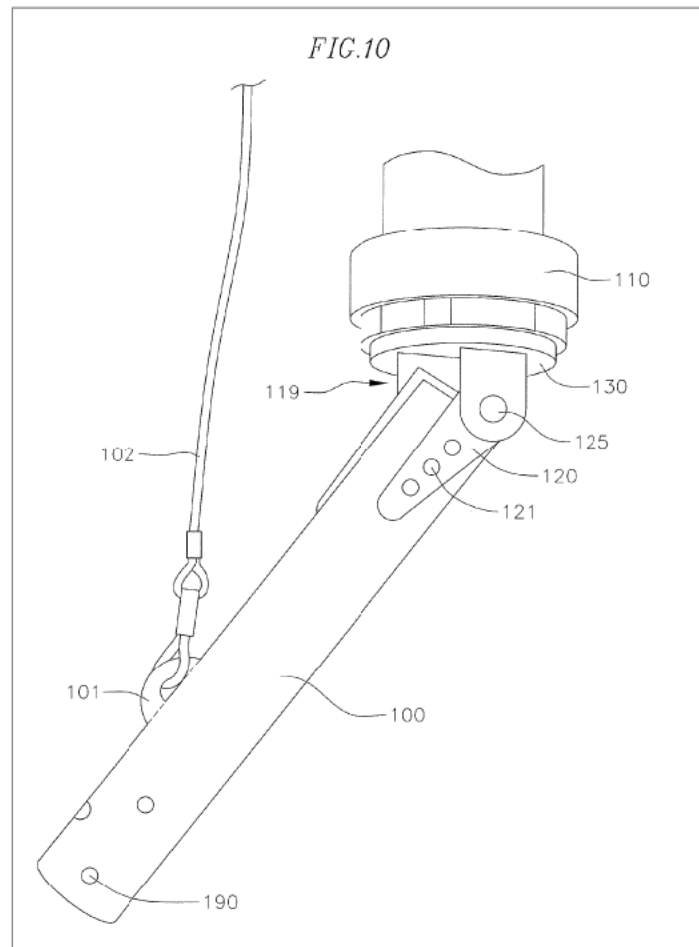
In the footnote, Plaintiffs explain that the term “‘adapter bracket’ is used in the claims, [while] ‘adaptor bracket’ is used within the specification.” (Dkt. 31 at 7, n.3.) Plaintiffs state that this was a typographical error, and that “the terms ‘adapter’ and ‘adaptor’ have the same meaning and are interchangeable.” (*Id.*)

The asserted patents depict an adapter bracket **120** in Figure 10:

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'236 Patent at Figure 10. The asserted patents describe the adapter bracket **120** as part of the “adaptor **119**” that “secures” the driver tool **100** to a standard drilling rig head **110**. '236 Patent at 7:54–62.

Claim 15 similarly recites:

15. The screw pile substructure support system of claim **14**, further comprising an adapter for securing the reusable driver tool to a drill rig head,

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wherein the adapter includes *an adapter bracket* coupled to the driver tool, an adapter plate coupled to the drill rig head, and an adapter pivot coupled to the adapter plate and the *adapter bracket*.

'236 Patent, Claim 15 (emphasis added). As previously stated, the parties have agreed to constructions for two other terms in the same claims as “adapter bracket”:

Claim Term	Parties’ Agreed Construction
“adapter plate” ('236 Patent, Claim 15; '708 Patent, Claim 10)	“a panel or sheet of material on a device for connecting pieces of equipment”
“adapter pivot” ('236 Patent, Claim 15; '708 Patent, Claim 10)	“a round shaft or pin about which something turns or swivels, on a device used for connecting pieces of equipment”

The parties’ primary dispute regarding this term relates to the language “that cannot be connected directly” in Defendants’ alternative proposed construction. (*See* Dkt. 31 at 9.) Defendants do not address their original proposed construction in their briefs, and Plaintiffs similarly focus on Defendants’ alternative construction language (although Plaintiffs do take a moment to observe in their Responsive Claim Construction Brief that Defendants appear to have abandoned their original proposed construction (Dkt. 37 at 3)). Plaintiffs argue that the phrase “that cannot be connected directly” is “unnecessarily narrow and restrictive, and is subject to misinterpretation.” (Dkt. 31 at 9.) Defendants, for their part, explain that they include this limiting language in their proposed construction because “[t]he adapter bracket is a hoisting tool to hold the pile in place while lifted, and again while screwed into the ground by the torque machine on the drill rig. The pile top and drill rig cannot be connected directly during the driving.” (Dkt. 32 at 14.) Plaintiffs respond that “[a]lthough it may not be advisable or practical, welding or fusing together two pieces of equipment is possible” and Defendants’

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proposal might lead to jury confusion. (Dkt. 37 at 3.) Plaintiffs argue that Defendants’ proposed construction would “distract from the substantive issues in this case.” (*Id.*)

Both parties’ arguments are confusing and irrelevant given the other limitations in Claim 15 of the ’236 Patent and Claim 10 of the ’708 Patent. The Court is particularly perplexed as to why Defendants only urged their additional proposed language in the context of the term “adapter bracket” and not “adapter plate” or “adapter pivot.” It’s also unclear whether the parties’ dispute holds any relevance in the context of dispositive issues in this case, including non-infringement and invalidity.

The Court concludes on the limited record that Defendants’ proposed additional phrase is unnecessary and should be rejected as potentially confusing. The term “adapter bracket” is construed as “an object that is used to support or hold something in place on a device for connecting pieces of equipment,” consistent with the agreed portions of the parties’ competing constructions.

3.2.3. “fixedly attached” (’236 Patent, Claims 1, 19, 29 & 32–33)

Plaintiffs’ Proposed Construction	Defendants’ Proposed Construction
No construction necessary Alternatively, “securely attached and not readily moveable”	“securely attached and not readily detachable”

The term “fixedly attached” appears in Claims 1, 19, 29, 32, and 33 of the ’263 Patent. The term appears in two contexts. Claim 1, for instance, recites:

1. A screw pile substructure support system, comprising:

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a tubular pile having a centerline and a first diameter, wherein the tubular pile comprises a first cylindrical section and a second cylindrical section attached by a weld;

...

an end plate ***fixedly attached*** to the second end of the pile tip, the end plate having a substantially flat surface disposed perpendicular to the centerline of the tubular pile . . .

'263 Patent at Claim 1 (emphasis added). In comparison, Claim 32 recites:

32. A screw pile substructure support system comprising:
a tubular pile having a centerline, wherein the tubular pile comprises a first cylindrical section ***fixedly attached*** to a second cylindrical section;
a pile tip comprising:

...

an end plate having a substantially flat surface disposed perpendicular to the centerline of the tubular pile;

...

wherein the end plate is ***fixedly attached*** to the pile tip . . .

'263 Patent at Claim 32 (emphasis added). The parties agree that the term “fixedly attached” at least requires secure attachment between components. (Dkt. 31 at 12; *see also* Dkt. 30.) The remainder of the parties’ purported dispute appears mostly semantic. (Dkt. 31 at 12; *see also* Dkt. 30.)

Defendants argue the term “fixedly attached” “really means welded together” or “something as permanent as welding – not detachable.” (Dkt. 35 at 8.) Defendants state that components that are “clamped, screwed, bolted, or even super-glued” would not be covered by their proposed construction. (Dkt. 35 at 8.)

Plaintiffs effectively concede that under their proposed construction, the components would not be readily detachable. (Dkt. 37 at 4.) Plaintiffs explain that “[t]o detach, an object must necessarily move; to move the object need not detach.” (*Id.* at 4.) On this basis, Plaintiffs argue that Defendants’ proposed construction is actually the broader proposal because it does not address the issue of whether the components should be able to move relative to one

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another even when attached to each other. Plaintiffs refer to the examples in the patent regarding welding components together, but do not suggest that the term “fixedly attached” must be limited to welded components.

To the extent Defendants’ argument (although not necessarily reflected in their proposed construction) is that “fixedly attached” means welded, Defendants have not identified any language in the written description demonstrating that the patent applicant intended to depart from the plain and ordinary meaning of “fixedly attached” and limit it specifically to attachment by welding. Although the embodiments in the specification generally refer to welding the relevant components together, Defendants do not identify any language showing that the patent applicant specifically intended to limit the scope of the claims to the embodiments disclosed in the specification. *Hill-Rom Servs.*, 755 F.3d at 1371.

Without understanding the exact contours of the parties’ dispute or its relevance to dispositive issues in this case, the Court construes the term “fixedly attached” as “securely attached and not readily moveable or detachable.”

3.2.4. “pile” (’236 Patent, Claims 1, 2, 4, 6–9, 14–20, 22–24, 27–30, 32 & 33; ’708 Patent, Claims 1–6, 9–23, 25–26, 29, 31–32, 35–37 & 39; ’362 Patent, Claims 1, 4–5, 7–9, 14–15 & 17–18)

Plaintiffs’ Proposed Construction	Defendants’ Proposed Construction
“structural member that supports a foundation”	“a slender deep foundation unit, made of wood, steel, or concrete, or combinations thereof, which is either pre-manufactured and placed by driving, jacking, jetting, or screwing, or cast-in-situ [in place] in a hole formed by driving, excavating, or boring” Alternatively, “a slender and linear (straight) deep foundation unit that supports a foundation”

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Defendants argue that Plaintiffs’ proposed construction for “pile” is “vague and over-inclusive.” (Dkt. 32 at 22.) Defendants state that “Plaintiffs’ definition is so broad it includes other foundation types, such as mat slabs, spread footings, poured piers – essentially anything that has a structural foundation for supporting a building load.” (*Id.*) Defendants submit at least three more alternative proposed constructions for “pile” in their Responsive Claim Construction Brief, with each emphasizing that a pile must be long and/or slender. (Dkt. 35 at 9.) Defendants also observe (despite the language in their alternative proposed construction) that “technically, the pile is not just ‘supporting’ the foundation, it is part of the foundation.” (*Id.*)

Plaintiffs fail to meaningfully respond to Defendants’ arguments in their Responsive Claim Construction Brief, particularly Defendants’ argument that Plaintiffs’ construction would impermissibly cover foundation components that are not piles. Plaintiffs instead repeat an argument they first raised in their Opening Claim Construction Brief, asserting that the words used in Defendants’ proposed constructions are “vague and undefined.” (Dkt. 37 at 10.) Ironically, some of the same terms and concepts in Defendants’ alternative proposed construction appear in the three extrinsic evidence definitions Plaintiffs use to support their proposed construction. Plaintiffs’ dictionary definitions refer to, for instance, a “long slender column” or a “long column” to “carry a vertical load” or “provide a foundation.” (Dkt. 31 at 20 (citing Dkt. 31-1 at 42 (Merriam-Webster Dictionary Website Printout, defining “pile” as “a long slender column usually of timber, steel, or reinforced concrete driven into the ground to carry a vertical load”), 67 (Dictionary.com Printout, defining “pile” as “a long column of timber, concrete, or steel that is driven into the ground to provide a foundation for a vertical load (a bearing pile) or a group of such columns to resist a horizontal load from earth or water pressure (a sheet pile)”), 78 (Oxford Living Dictionaries Website Printout, defining “pile” as “a heavy stake or post driven vertically into the bed of a river, soft ground, etc., to support the foundation of a superstructure”).)

Neither party argues that the term is being used in the asserted patents in a way that is inconsistent with its plain and ordinary meaning, and specifically in a way that should be interpreted as broader than its usual plain and ordinary meaning. Thus, after considering the

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parties’ arguments and evidence, the term “pile” is construed as “long column that provides support as part of a foundation.”

4. DISPOSITION

These claim constructions shall govern in this case. Plaintiffs' Motion to Strike (Dkt. 36) is **DENIED**.

Initials of Preparer _____ : _____
