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United States District Court, E.D. New York.

CERTICABLE LLC, Plaintiff,

v.

POINT 2 POINT COMMUNICATIONS CORPORATION and ROMAN KRAWCZYK, Defendants.

23-CV-5322(NJC)(SIL)

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Filed 03/11/2025

REPORT AND RECOMMENDATION

STEVEN I. LOCKE United States Magistrate Judge

*1 Presently before the court in this patent litigation, on referral for Report and Recommendation from the Honorable Nusrat J. Choudhury, is the parties' dispute regarding the claim construction of terms contained in [United States Patent No. 10,444,454 \(the "'454 Patent'"\)](#). See Docket Entry ("DE") [63]. In this action, Plaintiff Certicable LLC ("Plaintiff" or "Certicable") alleges, *inter alia*, that Defendants Point 2 Point Communications Corporation ("P2P") and Roman Krawczyk ("Krawczyk" and together, "Defendants") infringed upon its interest in the ['454 Patent](#).¹ See Second Amended Complaint ("SAC"), DE [28], ¶¶ 23-45. On October 30, 2024, the Court held a *Markman*² hearing to aid in providing a recommendation regarding the construction of the disputed terms. DE [70]. The Court respectfully recommends that the disputed terms be construed as described herein.

I. BACKGROUND

A. The ['454 Patent](#)

The ['454 Patent](#) relates to a fiber optic cable assembly. SAC ¶ 1, 23-35; Declaration of Mark Berkowitz, Ex. 2, DE [63-8] (the ["'454 Patent'"](#)). Fiber optic cable assemblies deal with fiber optic cables and the various surrounding outer layers, including those that protect the inner cables. *Id.* To provide context, the Court first describes fiber optic cable assemblies in general and then the claims included in the ['454 Patent](#).

1. Fiber Optic Cable Assemblies in General

In general, optical fibers "conduct light for transmitting voice, video and/or data." See ['454 Patent](#), Col. 1. Fiber optic cable assemblies refer to the complete assembly of fiber optic cables, including protective layering such as, among other things, buffer tubes, ripcords, stiffeners, strengthening material, and outer and inner protective coverings. *Id.* at Col. 2. Fiber optic cable assemblies "provide protection for the optical fiber or fibers within the environment in which the cable is installed." *Id.* Factors that may require protection for fiber optic cable assemblies include, among other things, exposure to wetness or other weather conditions, high pulling tension in installation, exposure to chemicals, and protection from rodents. *Id.* Therefore, the assembly of a cable may vary based upon the number of optical fibers and where and how the cable will be installed. *Id.* at Cols. 2-4.

A relevant specification when assembling fiber optic cables – particularly for purposes of the current claim construction – is the cable assembly's "bend radius." When fiber optic cables are bent, the light that is transmitted is reduced, thereby diminishing the quality of the data and/or information being sent. *Id.* at Col. 2-3. Accordingly, cables are generally designed to minimize bending. *Id.* Generally, the normal recommendation for a fiber optic cable bend radius when under tension during pulling is

20 times the diameter of the cable. *Id.* This specification is referred to as “20D.” *Id.* When not under tension, the minimum recommended long term bend radius is 10 times the cable diameter. *Id.* This specification is referred to as “10D.”

2. Specifications and Claims of the '454 Patent

*2 The '454 Patent describes a specific armored fiber optic cable assembly. The claim states that the assembly “includes at least one fiber optic fiber; and an armor for providing crush resistance for the at least one fiber cable, the armor being a spiral tube having a gap between each spiraling ring of the spiral tube, the gap allowing the fiber optic cable assembly to have a bend radius of $\geq 5 D$.” *Id.* Described differently, the technology covered is a cable assembly that “is armored yet flexible with a smaller [outside diameter] than conventional armored fiber optic cables typically used in the telecommunications market.” *Id.* at Col. 2. To this end, the '454 Patent includes the following claims:

1. A fiber optic cable assembly comprising:

a non-interlocking armor, the non-interlocking armor being formed from a single spiral tube having a gap between each spiraling ring of the spiral tube, the gap allowing the fiber optic cable assembly to have a bend radius of $\geq 5 D$;

an outer jacket, the outer jacket having an inside diameter slightly greater than an outside diameter of the non-interlocking armor;

a pull material, the pull material being positioned underneath the outer jacket and on top of the non-interlocking armor; and

at least one fiber optic fiber.

2. The fiber optic cable assembly of **claim 1** further comprising:

an inner jacket, the inner jacket having an outside diameter slightly less than an inner diameter of the non-interlocking armor; and

a strengthening material, the strengthening material surrounding the at least one fiber optic fiber underneath the inner jacket.

3. The fiber optic cable assembly of **claim 2** wherein the single, continuous metallic strip is stainless steel.

4. A fiber optic cable assembly comprising: at least one fiber optic fiber; and

an armor for providing crush resistance for the at least one fiber optic cable, the armor being a single spiral tube having a gap between each spiraling ring of the spiral tube, the gap allowing the fiber optic cable assembly to have a bend radius of $\geq 5 D$.

5. The fiber optic cable assembly of **claim 4** wherein the spiral tube is stainless steel.

6. The fiber optic cable assembly of **claim 5** further comprising: an outer jacket, the outer jacket having an inside diameter slightly greater than an outside diameter of the non-interlocking armor; and

a pull material, the pull material being positioned underneath the outer jacket and on top of the non-interlocking armor.

7. The fiber optic cable assembly of **claim 6** further comprising:

an inner jacket, the inner jacket having an outside diameter slightly less than an inner diameter of the non-interlocking armor; and

a strengthening material, the strengthening material surrounding the at least one fiber optic fiber underneath the inner jacket.

Id. at Cols. 5-6.

The '454 Patent includes the following lateral diagram of the assembly at issue, as well as the head-on cross-section view, to describe the various layers of the assembly.³

Tabular or graphical material not displayable at this time.

Moving from the inner layer to the outer layer:

- Layer 20 reflects fiber optic fibers. These are the fibers that transmit data and/or information and are what the remaining layers seek to protect.
- Layer 18 reflects inner strengthening material. This material “at least partially” surrounds the optical fibers. It may be formed of any suitable material and is intended to provide cushioning for the fibers, thereby ensuring that the optical fibers do not stretch or bind within the cable.
- *3 - Layer 16 reflects an inner jacket. This provides a layer of protection for the optical fibers in the event the outer protective layer and stainless steel armor are damaged. The material, color, and thickness may vary depending on the environment in which the cable is installed.
- Layer 14 reflects stainless steel armor. This layer provides increased crush protection, higher axial strength, and corrosion resistance. The material, thickness, and inner and outer diameters may vary.
- Layer 12 reflects outer pull material. This is the layer below the outer jacket and “can be aramid fibers which absorb the tension needed to pull the cable during installation.” If pulled hard, “the aramid fibers will not stretch but may eventually break when tension exceeds their limits.” This term is at issue in the instant briefing.
- Layer 10 reflects the outer jacket. This is the outermost layer and its specifications, including color and thickness, may vary based on the environment in which the cable is to be installed.

Id.

Three phrases in the claims of the '454 Patent are at issue: (1) “pull material” as it appears in claims 1 and 6; (2) “bend radius of $\geq 5 D$ ” as it appears in claims 1 and 4; and (3) “slightly greater than” as it appears in claims 1 and 6. *See* Defendants’ Responsive Claim Construction Brief (“Defs.’ Br.”), DE [63-6], at 2-3, 7-10. Defendants assert that “pull material” requires construction and that both “bend radius of $\geq 5 D$ ” and “slightly greater than” are indefinite pursuant to 35 U.S.C. § 112.⁴ *Id.* at 7-10. Plaintiff asserts that each phrase should be given its plain and ordinary meaning. *See* Certicable LLC’s Opening Claim Construction Brief (“Pl.’s Br.”), DE [63-1], at 9-16.

B. Procedural Background

By way of a July 12, 2023 Complaint, Plaintiff commenced this action against P2P, asserting a single cause of action for infringement of the '454 Patent. DE [1]. On July 27, 2023, Certicable filed an Amended Complaint against P2P in which it asserted additional claims for statutory and common law trademark violations. DE [8]. On November 8, 2023, Plaintiff filed the Second Amended Complaint, which is the operative pleading in this action, asserting claims against P2P and Krawczyk for: (1) infringement of the '454 Patent; (2) trademark infringement pursuant to the Lanham Act; and (3) common law trademark infringement. DE [28]. The merits of Plaintiff’s causes of action are not presently at issue, only construction of the disputed claims.

On June 27, 2024, the parties submitted claim construction briefing, DE [63], and, on October 30, 2024, the Court held a *Markman* hearing, at which, the parties presented argument in support of their positions regarding claim construction. DE [70]; *see* Transcript of October 30, 2024 *Markman* Hearing (“Hearing Tr.”), DE [71]. Although the Court invited the parties to submit expert testimony in support of their respective positions regarding claim construction, *see* Electronic Order dated March 12,

2024, neither side did so. DE [63]. For the reasons set forth herein, the Court respectfully recommends that the claim terms be construed as set forth below.

II. LEGAL STANDARD

*4 Courts have observed that “[c]laim construction is the single most important event in the course of a patent litigation” as it “defines the scope of the property right being enforced, and is often the difference between infringement and non-infringement, or validity and invalidity.” *Radiancy, Inc. v. Viatek Consumer Prods. Grp., Inc.*, No. 13-CV-3767(NSR)(LMS), 2015 WL 221063, at *2 (S.D.N.Y. Jan. 14, 2015) (quoting *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011)). Therefore, “[t]he purpose of claim construction is to define terms so that a jury may be properly instructed.” *Allele Biotechnology & Pharms., Inc. v. Regeneron Pharms., Inc.*, No. 20-CV-8255(PMH), 2022 WL 17417291, at *3 (S.D.N.Y. Dec. 5, 2022) (citing *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1366 (Fed. Cir. 2004)). Claim construction “is the judicial statement of what is and is not covered by the technical terms and other words of the claims.” *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1352 (Fed. Cir. 2001). Claim construction is a question of law to be decided by the court. *Markman*, 517 U.S. at 381-82, 116 S. Ct. at 1392. Thus, “before reaching any determination on infringement, the court must construe the patent’s claim limitations to define the invention which a patentee has a right to exclude others from practicing, in the absence of the patentee’s permission or authorization.” *Mich & Mich. TGR, Inc. v. Brazabra, Corp.*, 128 F. Supp. 3d 621, 631 (E.D.N.Y. 2015).

III. DISCUSSION

As stated above, three issues are presently before the Court: (1) construction of the term “pull material”; (2) whether the term “bend radius ≥ 5 D” is indefinite; and (3) whether the term “slightly greater than” is indefinite. Defs.’ Br. at 5-9. The Court respectfully recommends that all three terms be given their plain and ordinary meaning and that no further construction is required.

A. Construction of “pull material”

1. Construction Standard

In matters of claim construction, claim language is generally given its “ordinary and customary meaning,” that is, “the meaning that the [language] 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); see *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 904 F.3d 965, 971 (Fed. Cir. 2018) (holding that the court must assign disputed terms their ordinary and customary meaning as they would have been understood by a person of ordinary skill in the art when read in the context of the patent specification and prosecution history); *Chamberlain Grp. Inc. v. Lear Corp.*, 516 F.3d 1331, 1335 (Fed. Cir. 2008) (“To construe a claim term, the trial court must determine the meaning of any disputed words from the perspective of one of ordinary skill in the pertinent art at the time of filing.”). Therefore, “[t]he first and most important reference point for a court is the language of the claims.” *Radiancy, Inc.*, 2015 WL 221063, at *2 (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)); *Phillips*, 415 F.3d at 1312 (holding that the court first looks to the language of the claim and applies the “ordinary and customary meaning” of the language used). A court will not construe a claim that is clear on its face. *Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1371 (Fed. Cir. 2002).

The strong presumption favoring “the ordinary meaning of claim language as understood by one of ordinary skill in the art” may be overcome where: “(1) the patentee has chosen to be his own lexicographer; or (2) where a claim term deprives the claim of clarity such that there is no means by which the scope of the claim may be ascertained from the language used.” *Bell Atl. Network Servs., Inc. v. Covad Commc’ns Grp., Inc.*, 262 F.3d 1258, 1268 (Fed. Cir. 2001) (quotations omitted). When a patentee chooses to be his own lexicographer and uses terms in a manner other than their ordinary meaning, the intended definition of

the term must be “clearly stated in the patent specification or file history.”  *Vitronics*, 90 F.3d at 1582; see  *Thorner v. Sony Comp. Entm't Am., LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (“There are only two exceptions to this general rule: (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.”). When necessary, “the court looks to ‘those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.’ ”  *Phillips*, 415 F.3d at 1314 (quoting  *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)).

*5 Defendants assert that a person of ordinary skill in the art – often referred to as a “POSITA” – “would have at least a bachelor's degree in mechanical engineering, or the equivalent experience in the design and development of armored fiber optic cable assemblies.” Defs.’ Br. at 5. Plaintiff disputes “that it is necessary to determine the level of skill in the art for the claim construction issues to be decided here.” See Certicable LLC’s Reply Claim Construction Brief (“Pl.’s Reply. Br.”), DE [63-10], at 1. Certicable claims that the disputed terms are not subject to construction as the terms “adhere to their widely accepted meaning.” *Id.* at 2. Neither party offers expert testimony or evidence that would assist the Court in determining the appropriate background or credentials of a POSITA.

2. The Term “pull material” Does Not Require Construction

Defendants only seek construction of the term “pull material,” which appears in claims 1 and 6 of the ‘454 Patent. Defs.’ Br. at 5-7; ‘454 Patent’ at Cols. 5, 6. Defendants argue that the term should be construed as “material that absorbs tension while pulling the fiber optic cable during installation.” Defs.’ Br. at 5. They argue that “[a]ny other interpretation ... would ignore the ‘454 Patent’s mandate that the only proper method for pulling a fiber optic cable is to ‘attach a pull rope’ to the ‘pull material’ ... to install the cable.” *Id.* Defendants further assert that “the pull material is a special material designated for a special purpose.” *Id.* Defendants argue that Certicable “reads ‘pull’ out of the claims,” and instead treats the term simply as “material.” Defs.’ Br. at 5-7. At the *Markman* hearing, Defendants further argued that Plaintiffs seek to simply rely “on where it is located within [the] ... cross-section of [the] cable.” Hearing Tr. 8:16-17.

In opposition, Plaintiff disputes that the phrase requires construction and proposes giving it its plain and ordinary meaning. Pl.’s Br. at 9-10. Certicable argues that the “claims themselves provide the necessary context—it is a material ‘positioned underneath the outer jacket and on top of the non-interlocking armor.’ ” *Id.* At the *Markman* hearing, Plaintiff further argued that Defendants’ proposed construction “imports an installation aspect that doesn’t exist in the claim.” See Hearing Tr. 43:17-24.⁵ According to Certicable, “[t]he claim covers a fiberoptic cable assembly regardless of if it’s being installed or if it’s sitting on a table.” *Id.* The Court agrees that construction of the term “pull material” is unnecessary.

The Court begins with the language of the claims.  *Marine Polymer Techs., Inc. v. HemCon, Inc.*, 672 F.3d 1350, 1358 (Fed. Cir. 2012). Both claims at issue state that the invention includes “a pull material, the pull material being positioned underneath the outer jacket and on top of the non-interlocking armor.” ‘454 Patent’ at Cols. 5, 6. Contrary to Defendants’ position, the claims neither reference any specific material to be used in this layer nor reference installation. Although a patent’s specification is “highly relevant to claim construction analysis,”  *Phillips*, 415 F.3d at 1315, that does not affect the Court’s inquiry here. The specification of the ‘454 Patent states that the “outer pull material *can* be aramid fibers which absorb the tension needed to pull the cable during installation.” See ‘454 Patent’ at Col. 4 (emphasis added). It does not specify what it must be. Likewise, the specification identifies a “proper *method*” of pulling fiber optic cables, not the exclusive manner in which they must be pulled. *Id.* Accordingly, contrary to Defendants’ arguments that the examples contained in the specification are “mandates” to be applied to the claims in the ‘454 Patent, see Defs.’ Br. at 6, they are not requirements and do not support a conclusion that construction is necessary. See *3rd Eye Surveillance, LLC v. United States*, 140 Fed. Cl. 39, 66 (Fed. Cl. 2018) (“[A]lthough ‘specification is important in discerning the meaning of the claims, federal trial judges must not import or graft limitations from the specification into the claim.’ ”) (quoting *Advanced Aerospace Techs., Inc. v. United States*, 122 Fed. Cl. 445, 457

(Fed. Cl. 2015));  *Lemelson v. United States*, 752 F.2d 1538, 1522 (Fed. Cir. 1985) (holding that the description in a patent's specification does not dictate reading such a limitation into the claim).

*6 Defendants further argue that extrinsic evidence supports their position. Defs.' Br. at 6-7. In this regard, they cite: (1) a document titled "General Guidelines for Installing Fiber Optic Cable," DE [63-7];⁶ (2) a January 4, 2024 cease and desist letter that Plaintiff sent to non-party American Cable Assemblies, DE [63-8]; and (3) a January 4, 2024 cease and desist letter that Plaintiff sent to non-party Amerifiber, DE [63-9]. Defendants present the article without substantiation, authentication, or description as to why it supports their proposed construction of "pull material" as it relates to the '454 Patent. Moreover, while the legal demand letters are not relevant evidence in any capacity, they simply identify examples of materials that *may* serve as "pull material." See DE [63-8], [63-9] (both stating "pull material (e.g. Kevlar or similar fibers)"). As described above, just as the patent's specification does not import limitations into the claims, neither does a demand letter sent to a non-party to this action. *3rd Eye Surveillance, LLC*, 140 Fed. Cl. at 66; *Lemelson*, 752 F.2d at 1522. Accordingly, Defendants do not identify extrinsic evidence demonstrating the need for claim construction.

Finally, Defendants assert that "[a] POSITA would also agree with Defendants' construction." Defs.' Br. at 6. They do not provide any substantiation or support for this argument. Although they state that a POSITA "would have at least a bachelor's degree in mechanical engineering, or the equivalent experience in the design and development of armored fiber optic cable assemblies," see *id.* at 5, they again fail to provide any credible support.

Based upon the foregoing, the Court respectfully recommends that construction of "pull material" is not required and that the jury be instructed that the phrase be given its plain and ordinary meaning.

B. Phrases Challenged for Indefiniteness

Defendants assert that the phrases "bend radius of ≥ 5 D" and "slightly greater than" – both of which appear in claims 1 and 6 of the '454 Patent – are indefinite pursuant to 35 U.S.C. § 112. Defs.' Br. at 7-10. Plaintiff disputes this and proposes that each of these terms be given their "plain and ordinary meaning." Pl.'s Br. at 12-14, Pl.'s Reply Br. at 4-5. Defendants fail to establish that either challenged term is indefinite.

1. Indefiniteness Standard

It is well established that "an indefinite claim is an invalid claim." *Kewazinga Corp. v. Microsoft Corp.*, No. 18-CV-4500(GHW), 2019 WL 3423352, at *24 (S.D.N.Y. July 29, 2019) (citing 35 U.S.C. § 112). To that end, 35 U.S.C. § 112 requires that a specification "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter" of the invention. 35 U.S.C. § 112(b). "Indefiniteness is a matter of claim construction, and the same principles that generally govern claim construction are applicable to determining whether allegedly indefinite claim language is subject to construction."

  *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008). Therefore, "the question of indefiniteness is a question of law for the Court."  *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 517 (Fed. Cir. 2012).

"[A] patentee need not define his invention with mathematical precision in order to comply with the definiteness requirement."

  *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1374, 1384 (Fed. Cir. 2005). Rather, "[t]he definiteness requirement, so understood, mandates clarity, while recognizing that absolute precision is unattainable."  *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910, 134 S. Ct. 2120, 2129 (2014). To be sufficiently definite, "a claim must contain objective boundaries to provide sufficient notice to those of skill in the art to understand the invention."  *Avenue Innovations, Inc. v. E. Mishan & Sons Inc.*, 310 F. Supp. 3d 457, 462 (S.D.N.Y. 2018) (citing *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1363, 1371 (Fed. Cir. 2014)); see  *Nautilus, Inc.*, 572 U.S. at 910, 134 S. Ct. at 2129 (holding that "a patent's claims, viewed in light of the specification and prosecution history, [must] inform those skilled in the art about the scope of the invention with reasonable

certainty”). A party claiming indefiniteness “has ‘the burden of proving indefiniteness by clear and convincing evidence.’ ” *Shunock v. Apple, Inc.*, No. 23-CV-8598(JLR), 2025 WL 33431, at *4 (S.D.N.Y. Jan. 6, 2025) (quoting  *BASF Corp. v. Johnson Matthey Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017)); see *Uni-Sys, LLC v. U.S. Tennis Ass'n Nat'l Tennis Ctr. Inc.*, No. 17-CV-147(KAM)(CLP), 2020 WL 3960841, at *25 (E.D.N.Y. July 13, 2020) (“Because patents are presumed to be valid, a party asserting indefiniteness must prove its case by clear and convincing evidence.”) (citing  *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95, 131 S. Ct. 2238 (2011)); *VR Optics, LLC v. Peloton Interactive, Inc.*, 345 F. Supp. 3d 394, 398 (S.D.N.Y. Nov. 5, 2018) (“Indefiniteness must be proven by clear and convincing evidence.”).

2. Defendants Fail to Establish that the Term “bend radius of ≥ 5 D” is Indefinite

*7 Defendants assert that the term “bend radius of ≥ 5 D” is indefinite. Defs.’ Br. at 7-9. The Court disagrees.

The parties do not dispute that the term “bend radius” is commonly used in the cable industry. See Pl.’s Br. at 12; Defs.’ Br. at 7. Plaintiff describes it as “the ability of a cable to bend without sustaining damage.” Pl.’s Br. at 12. Defendants counter that it is the radius of a pipe around which a cable can wrap. Defs.’ Br. at 7. At the *Markman* hearing, the parties agreed that it means “the radius of a circle circumscribed by a bent cable.” See Hearing Tr. 20:16-17, 21:6-8, 49:15-23.

Likewise, there is no substantive dispute as to the meaning of the phrase “5D.” Plaintiff explains that “D” refers to the outside diameter of the cable and the bend radius is a multiple of D. Pl.’s Br. at 12. Defendants explain that a specification of “5D” means “a bend radius that is greater than or equal to five times the diameter of the cable.” Defs.’ Br. at 7. At the *Markman* hearing, the parties agreed that “5D” corresponds to the diameter of a cable being bent. See Hearing Tr. 20:16-17, 21:6-8, 49:15-23, 50:6-7. The parties’ disagreement lies in whether “bend radius of ≥ 5 D” as used in the *’454 Patent* is adequately definite.

Defendants argue that the claimed “bend radius” is indefinite because “the range is completely unbounded” and the claims therefore “ascribe no meaning to the terms ‘bend radius’ or ‘D.’ ” Defs.’ Br. at 8. They assert that a hypothetical cable with a bend radius of infinity – that is, a cable that does not bend at all – would be protected by the *’454 Patent*, thereby rendering “5D” meaningless. *Id.* This is inconsistent with both their substantive briefing and their argument at the *Markman* hearing, however, as they concede that the meaning of both phrases is understood and consistent with Plaintiff’s understanding. See Defs.’ Br. at 7; Hearing Tr. 20:16-17, 21:6-8, 49:15-23, 50:6-7. Plaintiff argues that the use of open-ended ranges does not render claims indefinite. Pl.’s Reply Br. at 4.

Although the *’454 Patent* does not contain an upper parameter for the bend radius, courts have held that unbound terms are not *per se* indefinite. See, e.g.,  *Steuben Foods, Inc. v. Oystar Grp.*, No. 10-CV-780(EAW)(JJM), 2020 WL 13823256, at *5 (W.D.N.Y. Mar. 16, 2020) (holding that a claim was not indefinite where it allowed for production of an indefinite number of bottles per minute); *All Cell Techs., LLC v. Chevron N. Am., Inc.*, No. 18 C 1419, 2021 WL 2986286, at *14 (N.D. Ill. July 15, 2021) (holding that the phrase “greater” did not render a claim indefinite even where an upper limit was not defined). Although the wording of the *’454 Patent* may be inartful, “poor drafting does not provide clear and convincing evidence sufficient to render ... claim terms indefinite.” *VR Optics, LLC*, 345 F. Supp. 3d at 401; *Polaris PowerLED Techs., LLC v. VIZIO, Inc.*, No. CV 23-3487(GW)(PD), 2024 WL 3075257, at *7 (C.D. Cal. May 8, 2024) (holding that inartful drafting did not establish indefiniteness by clear and convincing evidence). To that end, “[c]ourts can neither broaden nor narrow the claims to give the patentee something different than what he has set forth.”  *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1433 (Fed. Cir. 1988).

*8 Here, Defendants have failed to meet their burden. They have presented no evidence – expert or otherwise – upon which the Court may rely refuting the definiteness of the term. And they have certainly failed to establish by clear and convincing evidence that the term is indefinite. See, e.g., *Artec Europe S.A.R.L. v. Shenzhen Creativity 3d Tech. Co., Ltd.*, No. 22-CV-1676(OEM)(VMS), 2024 WL 4479810, at *22 (E.D.N.Y. Oct. 11, 2024) (holding that a claim of indefiniteness failed where the challenged phrasing made clear the function of the device). To this end, although “submission of expert testimony

attesting to the indefiniteness of a term is not conclusive,” *Nanobebe US Inc. v. Mayborn (UK) Ltd.*, No. 21-CV-8444(JLR), 2023 WL 2986936, at *11 (S.D.N.Y. Apr. 18, 2023), here, Defendants have submitted no expert testimony that would assist in a finding of indefiniteness, and the simple fact that the upper bound of the term is without limit is insufficient on its own to satisfy the burden. Accordingly, the Court respectfully recommends that the term “bend radius of $\geq 5 D$ ” be considered sufficiently definite and be given its plain and ordinary meaning.

3. Defendants Fail to Establish that the Term “slightly greater than” is Indefinite

Claims 1 and 6 include “an outer jacket, the outer jacket having an inside diameter slightly greater than an outside diameter of the non-interlocking armor.” Defendants argue that the phrase “slightly greater than” is indefinite and that “[t]here is nothing in the ’454 Patent that explains what ‘slightly’ could mean.” Defs.’ Br. at 9-10. They assert that “ ‘slightly greater’ is simply a term of degree that doesn’t really mean anything at all by itself.” Hearing Tr. 63:16-18. Plaintiff counters that “the claimed cable assembly can accommodate a wide range of fiber optic cores,” and that “using a ‘term of degree,’ *i.e.* ‘slightly greater than’ makes practical sense and comports with the law.” Pl.’s Reply Br. at 5-6. At the *Markman* hearing, Plaintiff’s counsel further argued that “slightly greater than” only requires that “[t]he outer jacket has to be larger than the armor tube so that it can ... surround the armor tube and fit the pull material inside.” See Hearing Tr. 66:1-4.

As set forth above, courts have observed that “ ‘absolute precision is unattainable’ when drafting patent claims.” *VR Optics, LLC*, 345 F. Supp. 3d at 398 (quoting  *Nautilus*, 572 U.S. 898 at 909, 134 S. Ct. at 2129). More specifically, although the term “slightly greater than” is a “term of degree,” a term of degree is not *per se* indefinite.  *One-E-Way, Inc. v. Int’l Trade Comm’n*, 859 F.3d 1059, 1067 (Fed. Cir. 2017); see  *Sonix Tech. Co. v. Publ’ns Int’l, Ltd.*, 844 F.3d 1370, 1377 (Fed. Cir. 2017) (“Because language is limited, [the Federal Circuit has] rejected the proposition that claims involving terms of degree are inherently indefinite.”). “[C]laim language employing terms of degree has long been found definite where it provided enough certainty to one of skill in the art when read in the context of the invention.” *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 30 F.4th 1339, 1347 (2d Cir. 2022). “[W]here a claim uses words of degree, the court should consider whether the specification ‘provides some standard for measuring that degree.’ ” *Uni-Sys., LLC*, 2020 WL 3960841, at *28 (quoting  *Seattle Box Co., Inc. v. Indus. Crating & Packaging, Inc.* 731 F.2d 818, 826 (Fed. Cir. 1984)). As the parties challenging definiteness, Defendants bear the burden of presenting “clear and convincing evidence that a person of ordinary skill in the art would not understand” what “slightly greater than” means. *Midwest Athletics & Sports All. LLC v. Xerox Corp.*, No. 19-CV-6036(EAW), 2020 WL 7692767, at *22 (W.D.N.Y. Dec. 28, 2020) (rejecting claim of indefiniteness where the challenging party failed to present clear and convincing evidence).

The ’454 Patent describes the various layers of the relevant cable assembly, including an “outer jacket having an inside diameter slightly greater than an outside diameter of the non-interlocking armor.” Although the Patent does not state with specificity the diameter of any of the multiple layers, courts have held that a failure to specify a limitation does not necessitate a finding of indefiniteness. See  *VDP Patent, LLC v. Welch Allyn Holdings, Inc.*, 623 F. Supp. 2d 414, 427 (S.D.N.Y. 2008);  *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 891 F. Supp. 751, 810 (E.D.N.Y. 1995) (“[T]he defendant’s contention that the limitation is indefinite because it does not indicate the degree of [limitation] is rejected.”);   *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1335 (Fed. Cir. 2010) (“Because the intrinsic evidence here provides ‘a general guideline and examples sufficient to enable a person of ordinary skill in the art to determine [the scope of the claims],’ the claims are not indefinite even though the construction of the term ‘not interfering substantially’ defines the term without reference to a precise numerical measurement.”) (quoting  *In re Marosi*, 710 F.2d 799, 803 (Fed. Cir. 1983));  *One-E-Way, Inc.*, 859 F.3d at 1067 (“While we note that ‘virtually’ is a term of degree, one that slightly expands the scope of the term ‘free from interference,’ the inclusion of ‘virtually’ in these claims does not render them indefinite.”). To this end, Courts have specifically held that the word “slightly” does not render a claim indefinite. See, e.g., *Z-Man Fishing Prods., Inc. v. Queen*, No. 19-CV-147(KDB)(DCK), 2020 WL 7264469, at *12 (W.D.N.C. Dec. 10, 2020) (holding that the phrase “slightly larger” was not indefinite based upon “the context to the claims”); *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Inc.*, No. C 11-1036(WHA), 2017 WL 5235647, at *4 (N.D. Cal.

Nov. 11, 2017) (striking portion of expert report “regarding how the ‘slightly larger’ phrase renders [the patent] invalid due to indefiniteness”); *Applied Med. Res. Corp. v. Johnson & Johnson*, No. CV 03-1322(MLG), 2004 WL 5700627, at *4 (C.D. Cal. Dec. 9, 2004) (holding that the term “slightly above” did not require construction).

*9 Again, Defendants have failed to meet their burden. As the party claiming indefiniteness of the ‘454 Patent, Defendants bear the burden of presenting clear and convincing evidence, but they have failed to provide any expert testimony that would either assist the Court in evaluating the definiteness of the disputed terms or understanding what a POSITA would understand the challenged term to mean. Despite Defendants’ bald assertion that “[a] POSITA would also agree with Defendants’ construction,” see Defs.’ Br. at 6, they offer nothing that would allow the Court to evaluate either who qualifies as a POSITA or why a POSITA would agree with their construction. Moreover, Defendants’ argument that the claims are indefinite because, “to a lay person, every technical issue in this case will be slight,” *id.* at 9, is irrelevant, as “the issue is not what the term would mean to an average lay person, but what that term or phrase would have meant to one ‘of ordinary skill in the art in question at the time of the invention.’ ” *Leveraged Innovations, LLC v. NASDAQ OMX Grp., Inc.*, No. 11 Civ. 3203(KBF), 2012 WL 4062100, at *4 (S.D.N.Y. Sept. 14, 2012) (quoting *Phillips*, 415 F.3d at 1313); see *Baseball Quick, LLC v. MLB Adv. Media L.P.*, No. 11-CV-1735(KBF), 2014 WL 3728623, at *9 (S.D.N.Y. July 25, 2014) (“In construing the meaning of a term, the issue is not what that term would mean to an average lay person, but what that term or phrase would have meant to one of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.”) (internal quotation omitted).

Insofar as Defendants rely upon *Unwired Planet LLC v. Google Inc.*, 111 F. Supp. 3d 1120 (D. Nev. 2015), *Uni-Sys.*, 2020 WL 3960841, and *Midwest Athletics & Sports All. LLC*, 2020 WL 7692767, at *22, see Defs.’ Br. at 10, in each of these cases, the court: (1) observed that the party challenging definiteness had the burden of doing so by clear and convincing evidence; and (2) relied on expert testimony that the parties submitted in reaching its conclusion. Having offered no evidence of how a POSITA would understand “slightly greater than,” Defendants have failed to present clear and convincing evidence that the phrase is indefinite. *Sonix Tech. Co.*, 844 F.3d at 1380-81 (holding that a term of degree was not indefinite, while also relying upon expert testimony in doing so); *Lumos Tech. Co., Ltd. v. JEDMED Instr. Co.*, No. 16-CV-6939(DLC), 2017 WL 3328245, at *5 (S.D.N.Y. Aug. 4, 2017) (holding that construction was not necessary for a term of degree that was sufficiently definite).

Based upon the foregoing, Defendants have failed to satisfy their burden of demonstrating that the challenged terms are indefinite, and the Court respectfully recommends that the term “slightly greater than” be deemed sufficiently definite and construed in accordance with its plain and ordinary meaning.

IV. CONCLUSION

For the reasons set forth herein, the Court respectfully recommends: (1) the phrase “pull material” be given its plain and ordinary meaning as proposed by Plaintiff; (2) the phrase “bend radius of ≥ 5 D” be considered adequately definite pursuant to 35 U.S.C. § 112 and be given its plain and ordinary meaning; and (3) the phrase “slightly greater than” be considered adequately definite pursuant to 35 U.S.C. § 112 and be given its plain and ordinary meaning.

V. OBJECTIONS

A copy of this Report and Recommendation is being served on all parties by electronic filing on the date below. Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen days. See 28 U.S.C. § 636(b) (1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a) and 6(d). Failure to file objections within this period waives the right to appeal the District Court's Order. See *Ferrer v. Woliver*, No. 05-CV-3696, 2008 WL 4951035, at *2 (2d Cir. Nov. 20, 2008); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

All Citations

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Footnotes

- 1 Plaintiff also asserts claims for trademark infringement, *see* Second Amended Complaint ¶¶ 46-66, which are not at issue in the present Report and Recommendation.
- 2  *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391, 116 S. Ct. 1384, 1396 (1996) (holding that interpretation and construction of patent terms are issues for the judge).
- 3 The numbering in the lateral diagram corresponds to the numbering in the cross-section diagram. Although the lateral diagram contains a layer 22 that does not appear in the cross-section diagram, it is not relevant here.
- 4 The parties had previously submitted a Joint Claim Terms Chart including three additional terms subject to construction and two additional terms that Defendants asserted are indefinite. DE [61]. Although Defendants have not abandoned any legal claims related to these terms, they have abandoned any assertion that they require construction. *See* Hearing Tr. 4:4-22.
- 5 It bears noting that, on two separate occasions at the *Markman* hearing, Plaintiff's counsel acknowledged that it would be more appropriate for an expert to opine as to a POSITA's interpretation or understanding of "pull material." *See* Hearing Tr. 40:6-13, 42:1-6. Nevertheless, as noted above, despite the Court's invitation to submit expert evidence in support of their respective positions, *see* Electronic Order dated March 12, 2024, neither party did so. *See* DE [63].
- 6 Defendants do not submit their exhibits as attachments to an attorney affidavit or an affidavit of anyone else with knowledge. Instead, they simply attach the unverified exhibits to their claim construction brief. DE [63].

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