

Paul W. Garrity (pgarrity@sheppardmullin.com)
SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP
30 Rockefeller Plaza
New York, New York 10112-0015
Telephone: (212) 653-8700
Facsimile: (212) 653-8701

Martin R. Bader (mbader@sheppardmullin.com)
(admitted *pro hac vice*)

William J. Blonigan (wblonigan@sheppardmullin.com)
(admitted *pro hac vice*)
SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP
12275 El Camino Real, Suite 200
San Diego, California 92130-2006
Telephone: (858) 720-8900
Facsimile: (858) 509-3691

*Attorneys for Plaintiff-Counterdefendant
WundaFormer, LLC*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WUNDAFORMER, LLC,

Plaintiff,

v.

FLEX STUDIOS, INC.;
FLEX STUDIOS UNION SQUARE, LLC;
AND FLEX STUDIOS NOHO, LLC,

Defendants.

FLEX STUDIOS, INC.,

Counterplaintiff,

v.

WUNDAFORMER, LLC,

Counterdefendant.

Joshua A. Berman
James M. Bollinger
TROUTMAN SANDERS LLP
875 Third Avenue
New York, New York 10022
(T) (212) 704-6000
(F): (212) 704-6288
james.bollinger@troutmansanders.com
joshua.berman@troutmansanders.com

*Attorneys for Defendants Flex Studios,
Inc.,
Flex Studios Union Square, LLC, and
Flex Studios NoHo, LLC*

Docket No. 1:15-cv-4802 JSR

JOINT CLAIM CONSTRUCTION BRIEF

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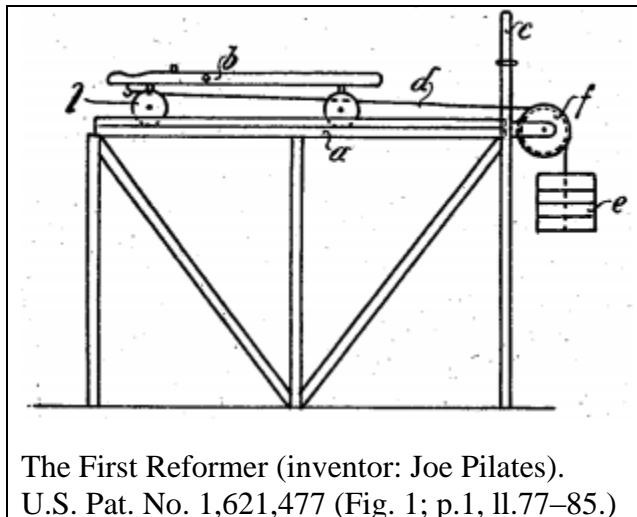
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I. PLAINTIFF'S PRELIMINARY STATEMENT

A. The Pilates Reformer

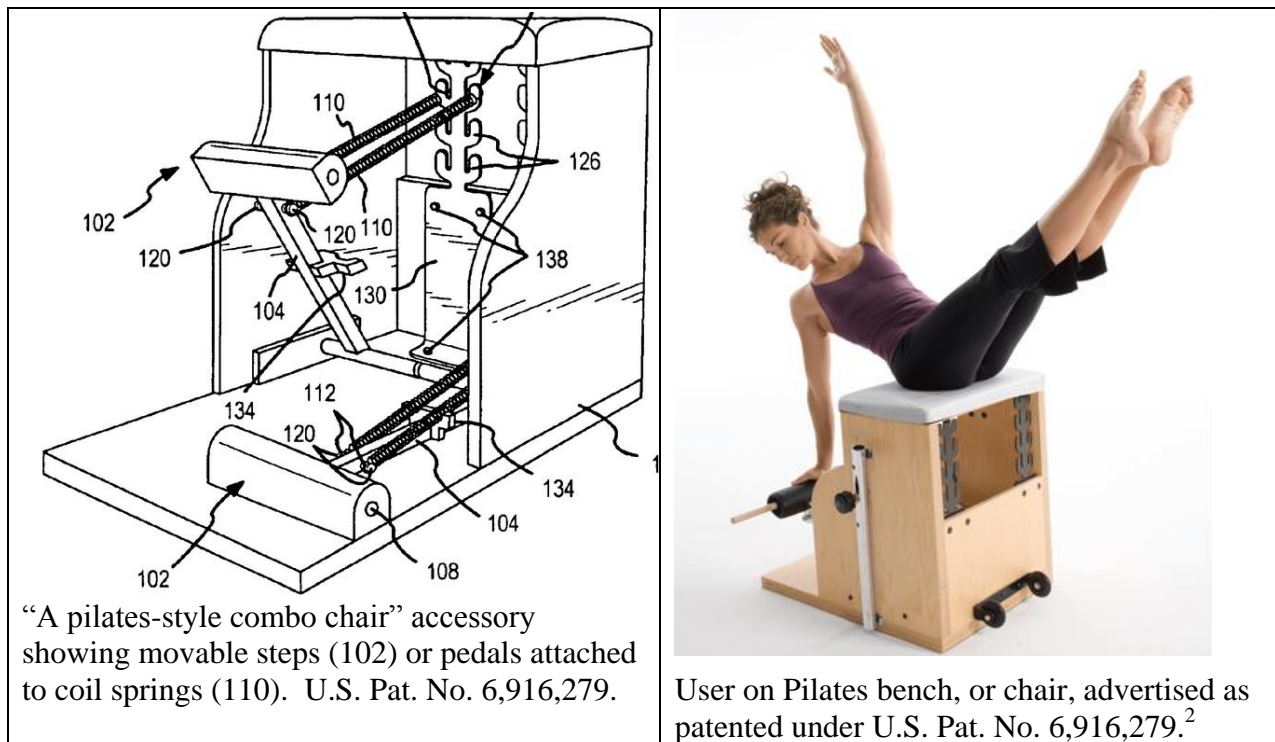
Pilates is a form of exercise that seeks to increase strength, flexibility, and muscular control based primarily on resistance training. (1:15–22¹.) It is commonly performed on a specialized and unique piece of exercise equipment known in the art as a “reformer.” (1:24–37; see also the title of the ’953 Patent and the titles of various prior art cited on the ’953 Patent, using the term “reformer.”) A reformer is fundamentally an apparatus comprising a stationary frame that supports a carriage horizontally movable against resistance on rollers along longitudinal rails mounted to the frame. The original reformer, patented in 1927, included cables and a pulley system and/or springs that could be used to move the carriage and return it to its original position. (1:23–26.)



Joe Pilates and others built on this foundation by using props/accessories in conjunction with this standard reformer. (1:42–66.) Props included benches, also known as chairs, bars, and handles. (*Id.*) These props were used as separate pieces of equipment and set aside when not in use, or, for some, installed using tools and fasteners when being used and uninstalled when not in use. (1:62–2:3.) For example, the prior art cited on the face of the ’953 Patent includes the

¹ Plaintiff cites to its patent using the column:line format, such that column 1, line 1 would be cited “1:1,” and column 1, lines 15 to 22, is cited “1:15–22.” Plaintiff cites the Abstract of its patent as “Abstract.”

accessory shown in the drawing and picture below, which is called a bench or chair:



Pilates reformers for studio use typically sell for about \$3,000 to \$10,000 each, depending on quality and included accessories. (Joint Appendix (“A000”), A0001–3.) Accordingly, exercise studios typically purchase reformers and then sell individual or group sessions using the machines at a per-class rate. This allows for professional instruction and supervision and/or help when reconfiguring the reformers and/or accessories as needed. (2:4–20.)

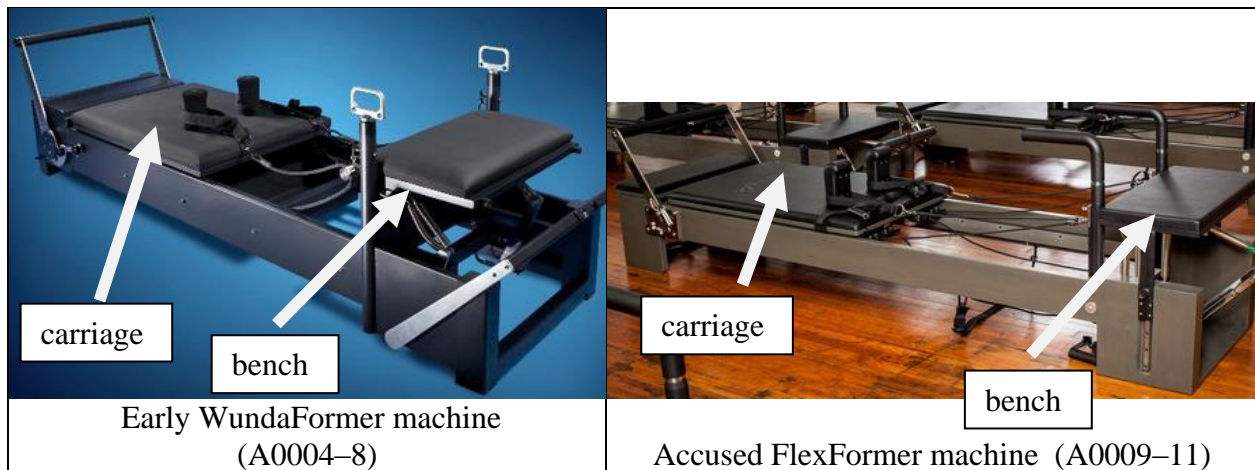
B. The Parties

Plaintiff sells a Pilates reformer known as the WundaFormer[®]. The WundaFormer was the first reformer to include built-in, adjustable bench, jump-board, and ballet-bar components that allowed easy, fast, and seamless transitions between Pilates exercises. Plaintiff sells the WundaFormer exclusively to franchisees of a third party, WundaBar Franchising, Inc. for use at

² www.pilates.com/BBAPP/V/store/chairs/pilates-combo-chair.html.

WundaBar® Pilates exercise studios.³ (Dkt. 40, at ¶ 3.) There are currently six WundaBar Pilates studios, the first of which opened in 2011. Each WundaBar studio features between 10 and 12 WundaFormers in a room. Clients pay to take private and small-group classes using a WundaFormer reformer. Classes are set to energetic music and led by a professional Pilates instructor, who guides clients through a series of exercises for about 30 to 45 minutes per class.

Starting in January 2015,⁴ Defendants began offering Pilates classes using a reformer they call the FlexFormer®. (Dkt. ¶ 33.) Commercial embodiments of the WundaFormer and FlexFormer are shown below:



Both machines include a rolling carriage and a bench (or chair) with a movable step or pedal (as shown at the right of each picture).

C. The '953 Patent

The '953 Patent relates to Pilates reformers, and is titled *Reformer Apparatus Having Integral Ergonomic Purchase Translatable In To Deployed and Stowed Positions*. (1:9-13.) Inventor Amy Jordan filed the application which became the '953 Patent on February 4, 2011. The '953 Patent issued December 10, 2013, with six independent claims (claims 1, 5, 6, 10, 11, and 15) and 10 dependent claims (claims 2-4, 7-9, 12-14, and 16). Plaintiff claims Defendants

³ www.wundabar.com

⁴ Plaintiff alleged January 2014 its operative complaint (Dkt. 40, ¶ 33), but further investigation suggests Defendants did not begin offering classes on the FlexFormer until a year later.

infringe claims 1, 11, 12, 15 and 16. (A0188–204.)

The Patent Office considered 110 cited references while examining the application for the '953 Patent. The Patent Examiner did not reject what became claims 2–4, 7–9, or 11–16. But the Examiner rejected what eventually issued as claims 1–5 and 11–16 one time during patent prosecution (the “Office Action”). (A0108–116) Specifically, the Examiner rejected those claims for obviousness under 35 USC § 103(a) over U.S. Patent No. 7,857,736, to Merrithew, in view of U.S. Patent No. 5,607,381, to Endelman. In response, on March 23, 2013 Jordan amended what became independent claims 1, 5, 6, and 10 (the “Response”). She amended what became claims 1, 6, and 10 from dependent form into independent form and amended claim 5 to incorporate limitations from two canceled claims. (Response 9, 12 (A0124, A0127).) Some of these claim amendments, to the extent they are relevant to the construction of the claims, are described in more detail below. After receiving Ms. Jordan’s Response, the Patent Office allowed all of the pending claims in a Notice of Allowance dated August 26, 2013. (A0142.)

D. Plaintiff Proposes Constructions That Are Consistent with the Intrinsic Evidence, Whereas Defendants Attempt to Improperly Import Limitations from the Specification into the Claims

Plaintiff’s proposed constructions are all consistent with the words of the claims themselves, the remainder of the specification, including the patent figures, and the prosecution history before the Patent Office. They are also consistent with how a person of ordinary skill in the art of the invention would understand the claims and the '953 Patent disclosure. All of Defendants’ proposed constructions attempt to import substantial limitations into the claims from the specification, which is improper as a matter of law. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc) (“To avoid importing limitations from the specification into the claims, it is important to keep in mind that the purposes of the specification are to teach and enable those of skill in the art to make and use the invention and to provide a best mode for doing so.”)

II. DEFENDANTS' PRELIMINARY STATEMENT

In this patent dispute, Plaintiff Wundaformer, LLC (“Wunda”) asserts three basic theories of infringement against Flex Studios, Inc., Flex Studios Union Square, LLC, and Flex Studios Noho, LLC (collectively, “Flex”) and its reformer product, known as the “Flexformer.” Each and all of Wunda’s theories can be disposed of as a matter of law once the proper claim construction at issue is determined.

A. Claim 1 of the ‘953 patent is Foreclosed by Prosecution History Estoppel (PHE) from any Claim Construction Allowing for Doctrine of Equivalents

It is undisputed that the accused product, the “Flexformer” does not have a “rotatable bench” and thus Wunda concedes that there is no *literal* infringement. (A0015). Yet, Wunda still asserts that claim 1 is infringed – asserting infringement under the Doctrine of Equivalents for this claim element. There can be no such claim as a matter of law because the patentee for the ‘953 patent clearly amended claim 1 to include the specific feature of a rotatable bench. This amendment was made specifically to avoid prior art and thus is classic prosecution history estoppel that precludes Wunda’s infringement claim. *See, e.g., Honeywell Int’l, Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131, 1143 (Fed. Cir. 2004) (canceling a broader independent claim and replacing it with a dependent claim rewritten into independent form was a clear surrender of the broader subject matter and presumptively barred application of the doctrine of equivalents).

Simply stated, Wunda is precluded from any expanded construction of “rotatable bench” to include non-rotational embodiments. *Id.* Proper construction on this term – one that excludes the Doctrine of Equivalents - removes this issue and theory from the case as a matter of law.

B. The Spring Access Panel of the Accused Device is Incapable of Being A “Purchase” that is “Deployed” Under the Proper Claim Construction

In its recent amended infringement contentions, Wunda asserts that a *spring access panel* – used to access and adjust spring tension on the Flexformer but otherwise closed for all

exercising – infringes several asserted claims of the ‘953 patent when it is opened. (*See, e.g.*, A0027-29). Wunda states that opening this panel “deploys” the panel and that it is an “ergonomic purchase” for use in exercising. (*Id.*). This is a clearly frivolous argument that is quickly disposed of given the proper definition of “deployed” and “ergonomic purchase” as used in each of the asserted claims. These terms are explicitly defined by the patent and these definitions control. *See, e.g., Jack Guttman, Inc. v. Kopykake Enters.*, 302 F.3d 1352, 1360 (Fed. Cir. 2002). An *access panel* is excluded as a matter of law.

C. The Accused Device is Incapable of Being Translated into a “Stowed” Position Under the Proper Construction for “Stowed”

Each claim of the ‘953 patent mandates two distinct configurations for a given component of the reformer: a “deployed” position for exercising using the component and a “stowed” position for storage of the component when it is not in use. The intrinsic record demonstrates that the “stowed” position not only allows for storage of a component, it is a configuration that *precludes* use of that component for exercising. The following passage from the ‘953 patent makes this crystal clear:

A component translated to a stowed position, in practical terms, is *no longer reachable for the same purchase achieved by a user in the position on the reformer from which she gained the purchase when the component was deployed*. (5:63-67) (emphasis added).

Recognizing that this passage undermines its entire case, Wunda’s opening brief simply removes this passage from the definition of “stowed” provided by the patent – as if it didn’t exist. Because “stowed” is defined by the patent and its definition clearly precludes the use of a component of the reformer for exercising in this configuration, the proper construction of this term will end the dispute on infringement.

There are other terms in dispute; resolution of the above three however leads to a finding

of non-infringement as a matter of law.

III. CONSTRUCTION OF DISPUTED CLAIM TERMS

A. “Ergonomic Purchase”

1. Plaintiff’s Opening Position

Asserted Claims	Claim Language	Plaintiff’s Proposed Construction
1, 11, 12, 15, and 16	ergonomic purchase	a stable surface other than the carriage that provides leverage, or a hold, to a human using the reformer

“Ergonomic purchase” is used in the specification to reference a surface which a user may reach with a part of her body to obtain a “purchase”—*i.e.*, a hold or leverage. (*See, e.g.*, 1:51–57 (using “purchase” to refer to a “hold to help stabilize the body” provided by a surface).) The specification illustrates what it means by ergonomic purchase in various ways.⁵ First, the specification states:

The term “ergonomic purchase” as used herein means *a surface designed for contacting by a human* engaged in exercise, such as by *grasping, holding, or pressing the hand, foot, or other part of the body against the surface* while mounted on the moving carriage, to achieve *stability or to establish leverage* for pushing or pulling the carriage by muscle flexure and friction at the point of contact. Contemporary dictionary definitions of the term purchase used in this mechanical sense may apply equally to the use of the term throughout this disclosure. For example, purchase may denote both the surface providing stabilizing contact, and the point of frictional contact achieved on the surface. In embodiments of the invention herein, an ergonomic purchase is reachable by a user mounted on the moving carriage, and *so the carriage itself is excluded from the definition of ergonomic purchase.* (5:12–26.)

The specification also discusses “an exemplary embodiment for a reformer apparatus having an ergonomic purchase” which it describes as having at least one of three different translatable ergonomic purchases—a bench (*e.g.*, 2:46–61; 4:23–26), a jump board (*e.g.*, 2:62–

⁵ The claims recite an “ergonomic purchase” that is (1) “integral to the reformer” (claims 1, 2, 6, 10, 15), (2) “translatable into deployed and stowed positions,” or having means for such translation, (claims 1, 2, 6, 10, 15), *or* (3) “confined to the frame and translatable into a stowed position for spatial efficiency and into a deployed position that enables a user mounted on the carriage to reach the purchase” (claim 11). These three characteristics of the ergonomic purchase are addressed with respect to other claim terms below, so the Court need not incorporate them into its construction of “ergonomic purchase.”

3:11; 4:23–26), and a ballet bar (*e.g.*, 3:12–27; 4:23–26)—or any combination of the three. (*See, e.g.*, Abstract; 3:43–47 (“The purchase may be a rotatable bench, a slidable and rotatable jump board, a vertically adjustable ballet bar, or the reformer may include a combination of these purchases.”))

In the Office Action, the Examiner argued that Merrithew disclosed a reformer with “a rotatable purchase/ballet bar” and Endelman disclosed “a telescopic horizontal bar, a pivotal platform/bench/jump board [], [and] rotatable pivotal platforms,” (Office Action 2 (A0110).) In her Response, Jordan distinguished what became claims 11–16 of the ’953 Patent from Merrithew and Endelman based, in part, on the recited “ergonomic purchase.” (Response 16 (A0131).) She argued:

*A consistent feature in every embodiment of the invention is an ergonomic purchase that is translatable into deployed and stowed positions. Among other things, this means that **the purchase – whether a bench, jump board, or ballet bar** – is movable or moveably adjustable with respect to other parts of the apparatus.*

(*Id.* at 17 (bold italics added).) Neither the Office Action nor Jordan’s Response used the term “ergonomic purchase” inconsistent with how that term is used in the specification, which describes that an ergonomic purchase is a stable surface that provides leverage, or a hold, to a human using the reformer. Thus, the claims, including the specification, and the prosecution history indicate that an “ergonomic purchase” is “a stable surface other than the carriage that provides leverage, or a hold, to a human using the reformer.”

2. Defendants’ Answering Position

Asserted Claims	Claim Language	Defendants’ Proposed Construction
1, 11, 12, 15, and 16	ergonomic purchase	a surface designed for contacting by a human engaged in exercise, such as by grasping, holding, or pressing the hand, foot, or other part of the body against the surface while mounted on the moving carriage, to achieve stability or to establish leverage for pushing or pulling the carriage by muscle flexure and friction at the point of contact

The claim term “ergonomic purchase” is explicitly defined in the ’953 patent

specification as follows:

The term “ergonomic purchase” as used herein means a surface designed for contacting by a human *engaged in exercise*, such as by grasping, holding, or pressing the hand, foot, or other part of the body against the surface while mounted on the moving carriage, to achieve stability or to establish leverage for pushing or pulling the carriage by muscle flexure and friction at the point of contact. (5:11-17) (emphasis added).

Thus, the patentee acted as her own lexicographer in explicitly defining the claim term “ergonomic purchase.” See *Jack Guttman*, 302 F.3d at 1360 (“It is black letter law that a patentee can ‘choose to be his or her own lexicographer by clearly setting forth an explicit definition for a claim term that could differ in scope from that which would be afforded by its ordinary meaning.’”) (quoting *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001)). “The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.” *Id.* (quoting *Vitronics Corp. v. Conception, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Under the Federal Circuit’s precedent, “the patentee’s lexicography must govern the claim construction analysis.” *Braintree Labs., Inc. v. Novel Labs., Inc.*, 749 F.3d 1349, 1356 (Fed. Cir. 2014) (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc)). “Where, as here, the patentee has clearly defined a claim term, that definition ‘usually . . . is dispositive; it is the single best guide to the meaning of a disputed term.’” *Jack Guttman*, 302 F.3d at 1360 (quoting *Vitronics*, 90 F.3d at 1582).

Flex’s proposed construction for “ergonomic purchase” mirrors the definition for that term supplied in the ‘953 patent specification and therefore should be adopted in line with controlling authority. In contrast, Wunda’s proposed construction for “ergonomic purchase” conspicuously deviates from the explicit definition supplied in the ‘953 patent specification in meaningful ways—this despite Wunda’s own acknowledgement that the term “ergonomic purchase” is used consistently throughout the intrinsic and extrinsic evidence. See *supra* at 8

(“Neither the Office Action nor Jordan’s Response used the term ‘ergonomic purchase’ inconsistent with how that term is used in the specification . . .”). Stated differently, nothing in the intrinsic or extrinsic evidence suggests a different meaning for “ergonomic purchase” than the meaning explicitly set forth by the patentee in the ‘953 patent specification.

And yet, Wunda advances a construction for the term “ergonomic purchase” that selectively omits key language from the specification’s definition of that term. This blatant cherry-picking is evidenced by the bolding of some phrases, but not others, in Wunda’s block quotation of the relevant portion of the ‘953 specification defining “ergonomic purchase.” *See supra* at 7-8. For example, in quoting the portion of the specification that explicitly defines “ergonomic purchase,” Wunda fails to bold—and, consequently, fails to include as part of its proposed construction—the following features concerning an “ergonomic purchase”:

- The purchase is a surface designed for contacting by a human “***engaged in exercise.***” (5:12-13) (emphasis added).
- The purchase is a surface designed for contacting by a human “***while mounted on the moving carriage.***” (5:14-15) (emphasis added).
- The purchase is a surface designed for contacting by a human to achieve stability or to establish leverage “***for pushing or pulling the carriage.***” (5:16) (emphasis added).

Wunda’s attempt to sweep the foregoing qualifications on the meaning of “ergonomic purchase” under the rug should be ignored. Instead, Flex’s proposed construction for “ergonomic purchase” should be adopted because: (1) claim terms that are explicitly defined in a patent specification are to be construed in accordance with that explicit definition barring exceptional circumstances not present here; (2) Flex’s proposed construction mirrors the explicit definition supplied in the patent specification and is therefore supported by controlling legal authority; and (3) Wunda’s proposed construction conspicuously and improperly omits key features concerning the meaning of “ergonomic purchase” in an effort to expand the definition

for that term well beyond the bounds set forth in the patent specification.

3. Plaintiff's Reply Position⁶

Defendants argue that Plaintiff's proposed construction of "ergonomic purchase" "deviates from the explicit definition in the '953 patent specification," and that Plaintiff omits what Defendants call "features concerning an 'ergonomic purchase.'" These arguments are unfounded. The specification does not expressly define "ergonomic purchase" to require anything besides "a stable surface other than the carriage that provides leverage, or a hold, to a human using the reformer." But Defendants attempt to add additional limitations using the specification's description of *exemplary ways to use* an ergonomic purchase, which are explicitly introduced by the phrase "such as":

The term "ergonomic purchase" as used herein means a surface designed for contacting by a human engaged in exercise, *such as by grasping, holding, or pressing the hand, foot, or other part of the body against the surface while mounted on the moving carriage, to achieve stability or to establish leverage for pushing or pulling the carriage by muscle flexure and friction at the point of contact.* (5:12–18.)

The claims are not limited to such examples, and Defendants' attempt to limit them to these examples improperly imports limitations from the specification into the claims. *Phillips*, 415 F.3d at 1323. Moreover, to include this exemplary-use language in the construction of "ergonomic purchase" would improperly "inject[] a use limitation into a claim written in

⁶ **NOTICES:** For clarity, Plaintiff provides the following two notices concerning this joint brief, because Defendants would not consent to re-organizing the brief for what Plaintiff considered to be the Court's convenience. First, in the early morning of September 22, 2015, Plaintiff amended its Infringement Contentions by removing its contentions that Defendants infringe claims 1, 12, and 16. Plaintiff is now asserting only claims 11 and 15. This will streamline the case and minimize the number of issues the Court must decide. The Amended Infringement Contentions are included at A0188–204. Plaintiff would have made minor line edits to its opening portions of the brief to remove reference to claims no longer being asserted. Second, although Plaintiff formatted its opening portion in a way it believed would result in the parties addressing the claim terms in the Plaintiff–Defendants–Plaintiff order contemplated in the Court's briefing instructions, Defendants addressed the term "stowed" in the section on the "translatable" limitations, which came before the section on "stowed." Because Defendants would not agree to move the portion of the brief devoted to the "stowed" term up one section, this brief features Defendants addressing the "stowed" term before Plaintiff.

structural terms,” such that “the same apparatus might infringe when used in one activity, but not infringe when used in another.” *See Paragon Solutions, LLC v. Timex Corp.*, 566 F.3d 1075, 1081 (Fed. Cir. 2009) (“[A]pparatus claims cover what a device is, not what a device does.”) (quoting *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 909 F.2d 1464, 1468 (Fed. Cir. 1990) (alteration in original)). As the Federal Circuit explained in *Paragon*, “[c]onstruing a non-functional term in an apparatus claim in a way that makes direct infringement turn on the use to which an accused apparatus is later put confuses rather than clarifies, frustrates the ability of both the patentee and potential infringers to ascertain the propriety of particular activities, and is inconsistent with the notice function central to the patent system.” *Id.* at 1091.

By contrast, Plaintiff’s proposal avoids this error by omitting the exemplary ways in which a user can contact the ergonomic purchase and indicating that the ergonomic purchase is “a stable surface other than the carriage that provides leverage, or a hold, to a human using the reformer,” regardless of how a person happens to be using the reformer, or whether a person is mounted on the carriage or elsewhere when using the reformer. Of course, every ergonomic purchase disclosed in the specification is indisputably an exercise apparatus—*i.e.*, a bench, a ballet bar, a jump board, and handles. (*See, e.g.*, 9:30–33). So if the Court wishes to clarify that any “human using the reformer” would be using it for exercise, Plaintiff would not dispute that. Such a construction would read, “a stable surface other than the carriage that provides leverage, or a hold, to a human using the reformer *for exercise*,” or alternatively “a surface designed for contacting by a human engaged in exercise.”

Defendants also argue that their proposal merely “mirrors the definition” in the specification. But Defendants’ argument and proposed construction omit, without any explanation, the following written description, which directly follows the portion of the specification Defendants rely on:

In embodiments of the invention herein, an ergonomic purchase is reachable by a user mounted on the moving carriage, and so the carriage itself is excluded from the definition of ergonomic purchase. (5:12–26.)

As a result, under Defendants’ proposal, the carriage itself would qualify as an “ergonomic purchase” even though the specification says it is not. (5:25–26.)

B. The “Translatable” Limitations

1. Plaintiff’s Opening Position

Asserted Claims	Claim Language	Plaintiff’s Proposed Construction
1	ergonomic purchase . . . translatable into deployed and stowed positions	ergonomic purchase moveable into deployed and stowed positions
11	ergonomic purchase . . . translatable into a stowed position for spatial efficiency	ergonomic purchase moveable into a stowed position
11	ergonomic purchase . . . translatable into a deployed position that enables a user mounted on the carriage to reach the purchase	ergonomic purchase moveable into a deployed position that a user can reach while on the carriage

The above three limitations all include the terms “ergonomic purchase” (above) and “translatable,” and are thus referred to as “the translatable limitations.” Every ergonomic purchase discussed in the claims and the specification is translatable, as the patent’s Title states: “Reformer Apparatus Having Integral Ergonomic Purchase *Translatable* into Deployed and Stowed Positions.” The specification says that the term “translate” at least encompasses either linear motion or, alternatively, rotation:

The term “translate” (and its derivatives, such as “translation” and “translatable”) is used herein in the sense that means *physical movement of one component with respect to another, such as by linear motion or by rotation* about an axis. Contemporary dictionary definitions of the term translate consistent with this mechanical sense may apply equally to the use of the term throughout this disclosure. (5:39–45 (emphasis added).)

The 2011 edition of the American Heritage Dictionary of the English Language, published the year of the ’953 Patent application, defines “translation” in the field of physics broadly, as: “Motion of a body in which every point of the body moves parallel to and the same distance as every other point of the body.” (A0181.) Consistent with how the term is used throughout the ’953 Patent, this definition encompasses linear motion and rotation. Thus, a person of ordinary skill in the art would understand the translatable limitations to require that the

ergonomic purchase is movable, but nothing more.

The specification details exemplary embodiments of each of the three translatable ergonomic purchases mentioned above (bench, ballet bar, and jump board). (*See, e.g.*, 9:30–31 (“the ergonomic purchases—bench 43, ballet bar 49, jump board 51”); 4:1–3 (“FIG. 3 is a top perspective view of the reformer of FIG. 2 showing translatable purchases—jump board, and ballet bar—in stowed positions.”).) It explains that “[a]n ergonomic purchase according to the invention, and variations thereof reflective of the invention, enhances the conventional design of a Pilates reformer.” (4:66–5:2.) However, consistent with black-letter patent law, it cautions:

Exemplary embodiments of the invention have been disclosed in an illustrative style. Accordingly, the terminology employed throughout should be read in a non-limiting manner. Although minor modifications to the teachings herein will occur to those well versed in the art, it shall be understood that what is intended to be circumscribed within the scope of the patent warranted hereon are all such embodiments that reasonably fall within the scope of the advancement to the art hereby contributed, and that that scope shall not be restricted, except in light of the appended claims and their equivalents. (12:9–19.)

One exemplary embodiment of an ergonomic purchase is a translatable bench or “a rotatable bench.” (2:44–58 (“In one embodiment ... the ergonomic purchase comprises a rotatable bench rotatably confined to one end of the reformer.”).) The ’953 Patent describes this bench as having two planar surfaces, normal (*i.e.*, perpendicular, or at a right angle) to one another such that the bench can be rotated, or flipped, so that either surface is facing upwards. (2:48–62.) This allows a user to adjust how high the upward-facing surface of the bench reaches compared to the carriage. In one configuration, “the *first* planar surface lies substantially ... at a first elevation,” and in another configuration “the *second* planar surface lies substantially ... at a second elevation.” (2:50–58.) This “provides a seat at the carriage level” in one configuration and “at a level other than carriage level” in another configuration. (2:58–61.) Comparing Figures 10 and 11, excerpted below, shows the effect of rotating the example bench 43 to achieve different heights or elevations:

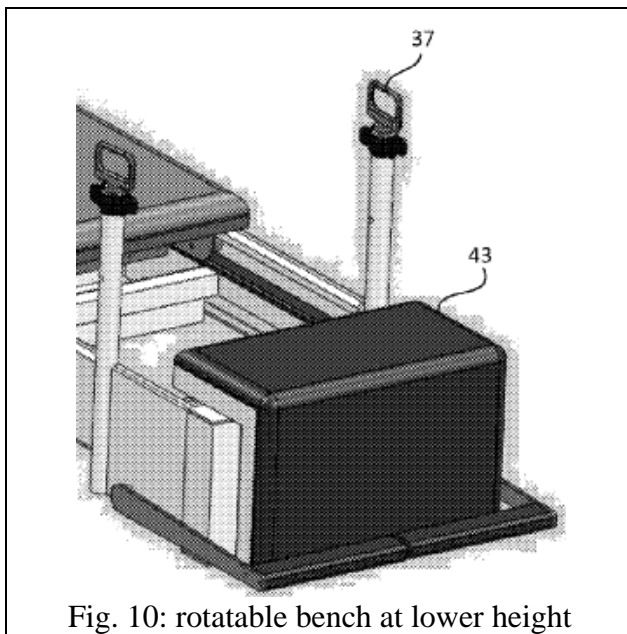


Fig. 10: rotatable bench at lower height

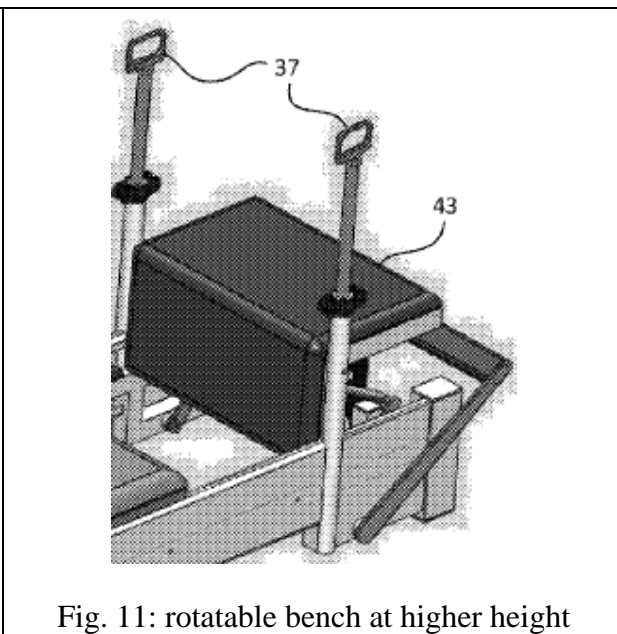
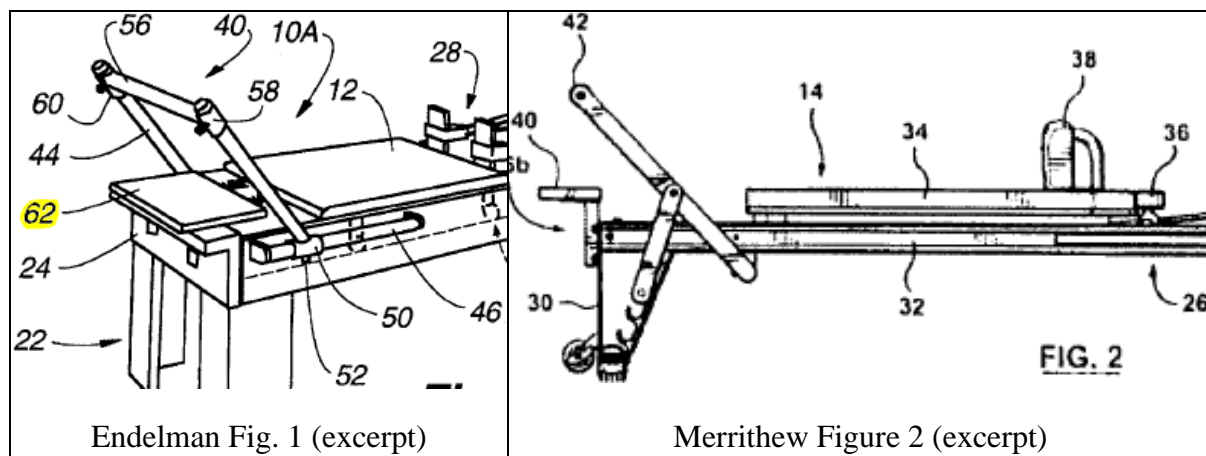


Fig. 11: rotatable bench at higher height

Figures 2–5, 9, and 18–21, and the related disclosures, provide further details about the example bench. (6:52–7: 33, 8:31–9:13, 9:40–47, 9:66–10:26.)

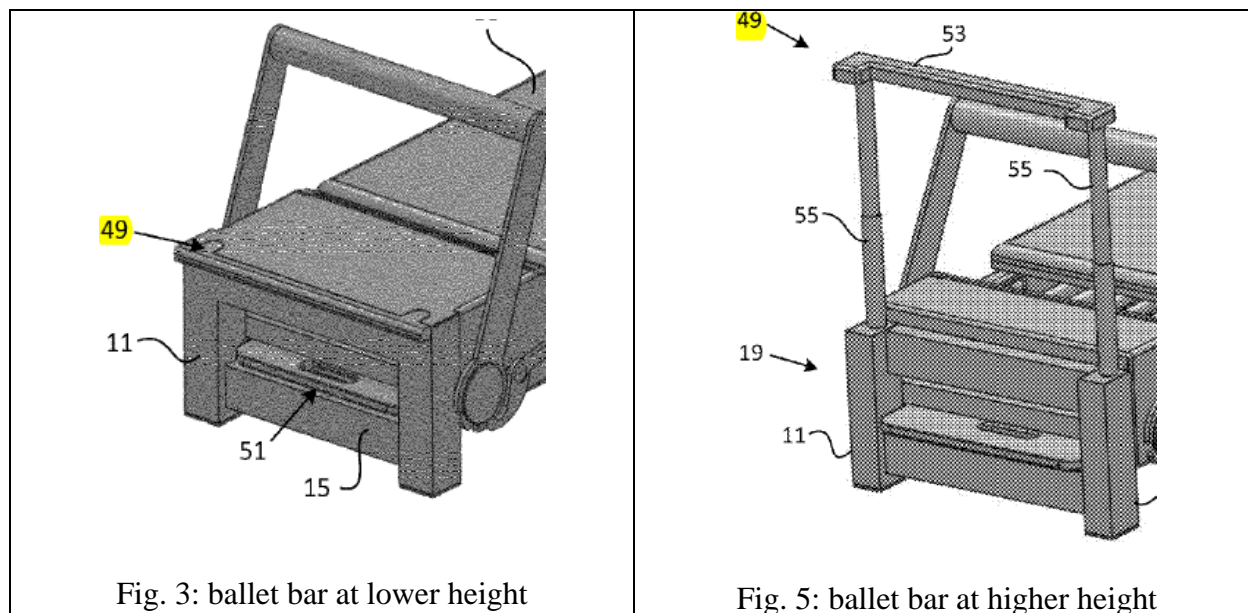
The prosecution history offers a consistent view that a translatable bench may move by not being in “a single, fixed position.” (Response 18 (A0133).) As mentioned above, the Office Action rejected various claims based on the combination of Merrithew and Endelman, pictured in relevant part below:



Referring to a flat surface (62) shown in Endelman (above-left), Jordan distinguished it from the claimed “translatable” ergonomic purchase because it lacked a *movable* flat purchase. Namely, in Endelman Figure 1, Jordan successfully argued, “Plate 62 is a foot rest [and] [t]here is no

teaching or suggestion in *Endelman* that plate 62 is *movable* or translatable into deployed or stowed positions. It is shown in a single, fixed position.” (Response 18 (emphasis in original) (A0133).) Thus, a person of ordinary skill in the art would recognize that a movable bench is translatable as used in the specification.

Another exemplary embodiment of an ergonomic purchase is a translatable ballet bar 49, which the specification also refers to as “a vertically adjustable ballet bar.” (*See, e.g.*, 3:11–27.) It constitutes an example of translation of an ergonomic purchase through retraction. Specifically, the ’953 Patent describes this ballet bar as optionally having “a substantially horizontal crossbar vertically supported by telescoping arms” that “may be retracted within the frame of the reformer to lower the crossbar to an elevation substantially level with the carriage” and “extended beyond the frame to raise the crossbar to an elevation substantially higher than the carriage.” (*Id.*) This allows a user to adjust how high the ballet bar reaches compared to the carriage. Figures 3 and 5, excerpted below, show the effect of raising and lowering the example ballet bar 49 to achieve different heights (6:63–7:1):



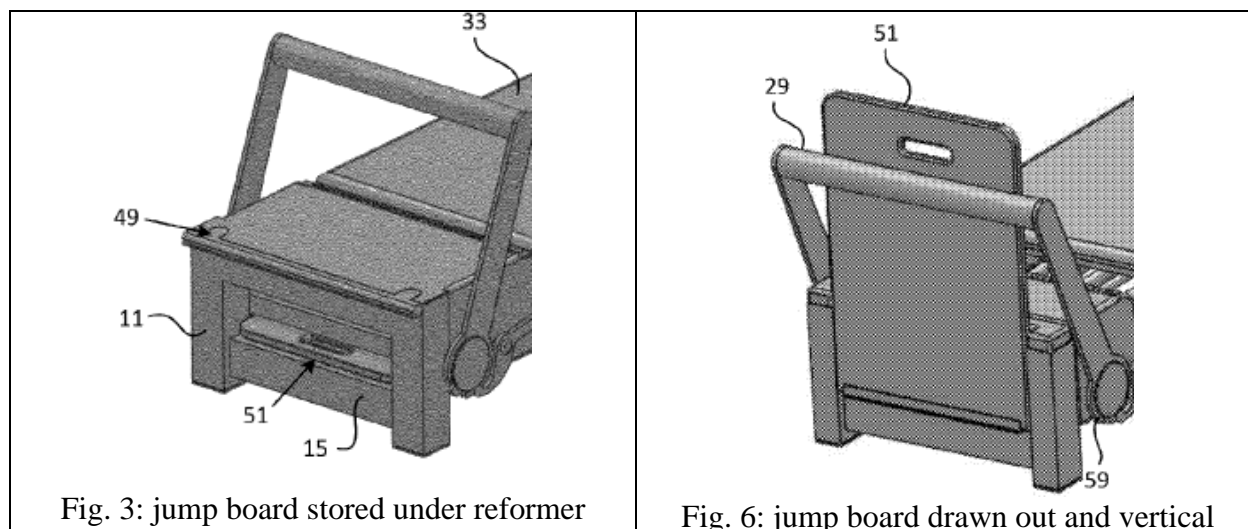
Figures 4, 5, 9, and 22–25, and the related disclosure, provide details about the example ballet bar. (7:8–33, 9:14–25, 10:27–11:42.)

The prosecution history further confirms this understanding. In her Response, Jordan distinguished what became claims 11–16 from Merrithew and Endelman based, in part, on the recited “ergonomic purchase translatable into deployed and stowed positions.” (Response 16 (A0131).) She argued:

A consistent feature in every embodiment of the invention is an ergonomic purchase that is translatable into deployed and stowed positions. Among other things, this means that the purchase – whether a bench, jump board, or ballet bar – is *movable* or *moveably adjustable* with respect to other parts of the apparatus.

(Response 17 (emphasis in original) (A0132).) A person of ordinary skill in the art would interpret these arguments to further suggest translation can occur through vertical adjustment.

Yet another exemplary embodiment of an ergonomic purchase is a translatable jump board. As shown below, “a slidable and a rotatable jump board confined to one end of the reformer” can be “stored beneath a portion of the reformer when not in use, and when needed, drawn out and rotated to a vertical position.” (2:62–3:10.)



Figures 3, 6, 7, 11, and 26–28 provide further details about the example jump board. (6:63–7: 7, 7:34–8:6, 11:43–12:8). Thus, the claims, the specification, and the prosecution history each support that a person of ordinary skill in the art would understand the translatable limitations to mean the ergonomic purchase is *movable* into a stowed and/or deployed position.

Finally, the specification and prosecution history support construing the portion of claim 11 stating that “a deployed position that enables a user mounted on the carriage to reach the purchase” consistent with its ordinary meaning, *i.e.*, “a deployed position that a user can reach while on the carriage.” Defendants’ proposal suggests an additional limitation based on whether the ergonomic purchase is “intended for use as part of an exercise.” But the specification indicates accessories should always be available for use as part of an exercise. As the ’953 Patent emphasizes, Jordan recognized “especially the need to allow users to transition quickly from one exercise to another” (2:21–24) without having to “interrupt [the] exercise regimen” (1:67) or waste time waiting as a group-class instructor “moves from machine to machine, assisting with installations” (2:16–20). Regarding the bench in particular, the specification says “the bench when stowed provides a seat at the carriage level” (2:58–59) and identifies “chairs” as accessories for performing Pilates exercises (1:62–66). It also identifies a “board or other planar surface extending in a direction normal to the horizontal carriage” as a component which “can be placed at one end of the reformer to afford the user a purchase or hold to help stabilize the body while the user moves the carriage to and fro...” (1:49–57.) As shown in Figure 10, the bench (43) has a “planar surface extending in a direction normal to the horizontal carriage” (*i.e.*, away from the center of the machine) that is available for a user to grab or hold to stabilize the body while rolling the carriage back and forth. Thus, the specification and prosecution history support construing the portion of claim 11 reciting “a deployed position that enables a user mounted on the carriage to reach the purchase” consistent with its ordinary meaning, “a deployed position that a user can reach while on the carriage.”

2. Defendants’ Answering Position

Asserted Claims	Claim Language	Defendants’ Proposed Construction
1	ergonomic purchase . . . <i>translatable into deployed and stowed positions</i>	a rotatable bench rotatably movable into a first position in which the rotatable bench is available and intended for use by a user exercising by means of the reformer and a second position in which the rotatable bench is neither available

		nor intended for use by a user exercising by means of the reformer.
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a. Claim 1 Requires the Ergonomic Purchase to Take the Form of a Rotatable Bench

The “ergonomic purchase” of claim 1 must be limited to a “rotatable bench” because claim 1 explicitly *requires such a limitation*. Specifically, claim 1 includes the requirement: “wherein the ergonomic purchase comprises a rotatable bench rotatably confined to one end of the reformer.” (12:30-31). Words mean what they say – and because claim 1 defines the ergonomic purchase as a rotatable bench within the claim, this clearly controls the construction of this term.

More critically, this narrowing of the claim by requiring that the “ergonomic purchase” comprises a “rotatable bench...” was added to the original claim during patent prosecution after the examiner had rejected the claim as “obvious” in view of the prior art. (A0110) (rejecting, *inter alia*, claim 1 under 35 U.S.C. § 103(a) as obvious in view of the prior art). To overcome this rejection, Wunda amended the claim with this new limitation. (A0117; A0124-27) (amending claim 1 to include the “rotatable bench” limitation and arguing why the prior art failed to teach that limitation). Because the “rotatable bench” limitation was added by amendment to the pending claims in this manner, its scope is explicitly limited to this exact structure and cannot be expanded. The term simply cannot be expanded under the Doctrine of Equivalents to cover any other structure, as Wunda surrendered all such possible equivalents under the Doctrine of prosecution history estoppel. *Honeywell*, 370 F.3d at 1143.

In its Infringement Contentions, Wunda concedes that claim 1 is limited to a rotatable bench (A0028-30) – a feature completely absent from the accused Flexformer. In fact, Wunda’s Infringement Contention makes clear that its allegation of infringement is based on the Doctrine of Equivalents – and it has no claim of *literal* infringement. (A0015; A0028-30). Specifically,

Wunda asserts that it is entitled to a range of “ergonomic purchases” under the DOE that is not explicitly limited to a “rotatable bench.” Wunda contends that the term “ergonomic purchase,” as used in claim 1, may embody any number of different components. *See supra* at 12 (“The specification details exemplary embodiments of each of the three translatable ergonomic purchases mentioned above (bench, ballet bar, and jump board).”). This is of course incorrect.

To properly resolve this disputed construction issue, Flex requests that the Court adopt its proposed construction as clearly mandated by the words of the claim, and to further limit the construction to that precise “rotatable bench” structure provided by claim 1 and exclude any claim of Doctrine of Equivalents as a matter of law.

b. The Rotatable Bench is Only Movable Rotationally About an Axis

As noted above, Wunda proposes that the term “translatable” means “movable,” for example, by linear motion or by rotation. *See supra* at 11 (“The specification says that the term ‘translate’ at least encompasses either linear motion or, alternatively, rotation.”). Again, this construction ignores the fact that the ergonomic purchase is required to be a “rotatable bench” in the limitation set forth in claim 1, and the “rotatable bench” is only movable rotationally about an axis. (2:50-55) (“The reformer is configured so that when the bench is *translated by rotation to the stowed position* . . . [t]he reformer is further configured so that when the bench *is translated by rotation to the deployed position*”) (emphasis added).

Thus, the term “translatable” takes on a narrower meaning in claim 1, where the ergonomic purchase is a rotatable bench that is only moved between the two configurations “stowed” and “deployed” by rotation. Flex’s proposed construction properly takes this fact into account and should therefore be adopted.

c. “Deployed” is Explicitly Defined Within the ‘953 Patent Specification and that Definition Controls

The term “deployed” is explicitly defined within the ‘953 patent specification. The inventor, acting as her own lexicographer, provided an explicit definition of this term as follows:

The term “deployed” as used herein means a state or position of a component of the reformer in which the component is *intended to be used by a user* exercising by means of the reformer. For example, an ergonomic purchase in a deployed condition *has been translated*, or moved and possibly fixed into a position on the reformer, that allows it to be reached for purchase by a user mounted exercising with the aid of the reformer. Contemporary dictionary definitions of the term deployed used in this mechanical sense may apply equally to the use of the term throughout this disclosure. (5:46-55) (emphasis added).

This definition, and its counterpart definition for the term “stowed” (discussed *infra* at 23-27, 31-33) were important elements of the manner the inventor chose to describe her invention. Specifically, the entire disclosure is focused on creating two separate configurations for a given component of the reformer - configurations that individually have a distinct function. The first configuration is defined as “deployed” and is directed to an arrangement that captures the use of the reformer component for exercising. The second or “stowed” configuration is distinct and separately defined to exclude such use. (*See infra* at 23-27, 31-33). Importantly, as presented, the alleged innovation for the reformer was predicated on the precisely defined and explicitly different functions associated with these two configurations. (2:33-35) (“The improvement generally comprises an ergonomic purchase that is integral to the reformer and that is translatable into both deployed and stowed positions.”).

Flex’s proposed construction applies the explicit specification definition by construing the deployed position as “a first position in which the rotatable bench is available and intended for use by a user exercising by means of the reformer.”

The specification definition requires “deployed” is a configuration that: “*is intended to be used by a user exercising by means of the reformer*” (5:47-49) (emphasis added). Flex’s

proposed construction captures this by providing, “a first position in which the rotatable bench is . . . *intended for use by a user exercising by means of the reformer.*” The phrase “intended for use by a user exercising by means of the reformer” included as part of Flex’s proposed claim construction comes directly from the specification’s definition of the term “deployed,” which must control the claim construction analysis. *Braintree Labs.*, 749 F.3d at 1356.

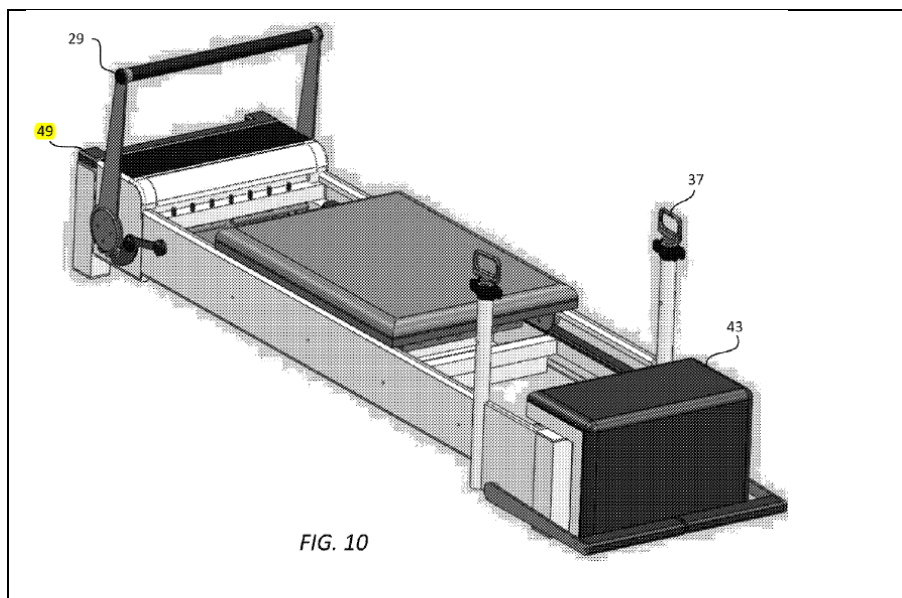
In addition, Flex’s construction is consistent with the specification and the framework provided by the inventor for describing her invention using a convention based on the two distinct configurations and the separate functions associated with each. Because this clear convention of two configurations is the foundation on which the inventor disclosed and claimed her invention, persons skilled in this art would clearly understand that this terminology should control. For purposes of the ‘953 patent, a person of ordinary skill in the art at the time of the invention would be someone with a bachelor’s degree in engineering and/or someone with 3-4 years experience training people using, or designing, exercise equipment. Under controlling law this is the construction that the Court should adopt. *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys., LLC*, 350 F.3d 1327, 1338 (Fed. Cir. 2003) (“The words used in the claims must be considered in context and are examined through the viewing glass of a person skilled in the art.”).

Wunda criticizes this aspect of Flex’s proposed construction by stating that “the specification indicates accessories *should always be available for use as part of an exercise.*” *See supra* at 16 (emphasis added).

Wunda’s argument is directly contradicted by the ‘953 patent specification. For example, in discussing the translatable jump board accessory (*see supra* at 15-16), Wunda reproduces Figs. 3-4 of the ‘953 patent showing the jump board in stowed and deployed positions,

respectively. Wunda quotes the '953 specification as stating that the jump board can be “stored beneath a portion of the reformer *when not in use*, and *when needed*, drawn out and rotated to a vertical position.” *Supra* at 15 (quoting the '953 patent at 2:62-3:10) (emphasis added). Thus, the '953 patent is crystal clear that the jump board is *not* always available for use as part of an exercise. In fact, when in the stowed position, the jump board is barely even visible, let alone available for use as part of an exercise. (7:3-7) (“The jump board 51 is in its stowed position [in Fig. 3], wherein most of the jump board lies partially beneath the carriage and remains hidden from sight.”).⁷

The “ballet bar” (49) represents another example of a reformer accessory that is not available for use as part of an exercise when in the stowed position, as shown in Fig. 10:



According to the specification, “FIG. 10 is an aft end perspective view of another embodiment of a reformer according to the invention showing all purchases--bench, *ballet bar*

⁷ To the extent that Wunda contends that a component is “available for use as part of an exercise” merely by virtue of being attached to the reformer, Wunda conflates the phrase “available for use as part of an exercise” with the term “integral,” which is explicitly defined within the '953 patent specification. (5:27-35).

[49], and jump board--in stowed positions.” (4:23-26) (emphasis added). As shown in Fig. 10, neither the ballet bar 49, nor the jump board (which is not even visible), are available for use as part of an exercise while in their respective stowed positions.

And finally, the rotatable bench, when rotated to the “stowed” position, moves the top surface away from the carriage, into a second remote, outwardly facing and vertical configuration that renders that top surface unavailable for exercising. This is of course the second “stowed” configuration that has no purpose other than to reduce the reformer volume for storage or shipping. (9:28-33) (“This view [Fig. 10] illustrates one example of the manufacturer’s preferred configuration for shipping the reformer and minimizing the size of its shipping container. Accordingly, the ergonomic purchases--**bench 43**, ballet bar 49, jump board 51, and handles 37--have been translated to their stowed positions.”) (emphasis added).

Flex’s proposed construction should be adopted because it properly incorporates the definition for “deployed” supplied in the specification and is otherwise consistent with the intrinsic evidence.

d. “Stowed” is Properly Construed in Accordance with the Explicit Definition for that Term Provided within the Specification, the Examples in the Specification, and Common Usage of That Term

As with “deployed,” the inventor of the ‘953 patent explicitly defined the term “stowed”—a definition that now controls the construction of this term:

The term “stowed” as used herein means a state or position of a component of the reformer which collapses the overall volume of the reformer to a minimum, insofar as the volume may be affected by the component. In other words, it is the position of the component that will allow the reformer to be **packaged within the smallest possible container**, or the position of the component which renders the reformer **most suitable for storage** according to the manufacturer. A component translated to a stowed position, in practical terms, is **no longer reachable for the same purchase achieved by a user in the position on the reformer from which she gained the purchase when the component was deployed**. Contemporary dictionary definitions of the term stowed used in this mechanical sense may apply

equally to the use of the term throughout this disclosure. (5:56-6:3) (emphasis added).

Where, as here, the inventor acts as her “own lexicographer,” the definition provided in the specification controls. *Braintree Labs.*, 749 F.3d at 1356. Flex’s proposed construction is first based on this explicit specification definition of “stowed.” Flex’s proposed construction is also fully consistent with the common understanding of the term in the context of exercise machines. (A0184) (supplying the definition of “stow” from the 2009 edition of Merriam-Webster’s Collegiate Dictionary as “*to put away for future use*”) (emphasis added). And finally, Flex’s construction is fully faithful to the intrinsic record—the patent specification and each of the illustrations of the “stowed” configuration. (Figs. 2-3, 8, 10-11; 2:35-38; 6:66-7:7; 7:18-21; 7:30-33; 8:8-9; and 9:26-33).

In view of all of the foregoing evidence and the clear intrinsic record, “stowed” is properly construed as “a second position in which the rotatable bench is neither available nor intended for use by a user exercising by means of the reformer.” *Phillips*, 415 F.3d at 1316 (“The construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.”) (quoting *Renishaw PLC v. Marposs Societa' Per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998)). Indeed, consistent with the overall disclosure in the ‘953 patent.

This proposed construction for “stowed” represents the converse of Flex’s proposed construction for “deployed,” a characteristic also recognized by Wunda in its opening passage: “[t]he asserted claims use stowed simply as an alternative to deployed.” *See infra* at 28.

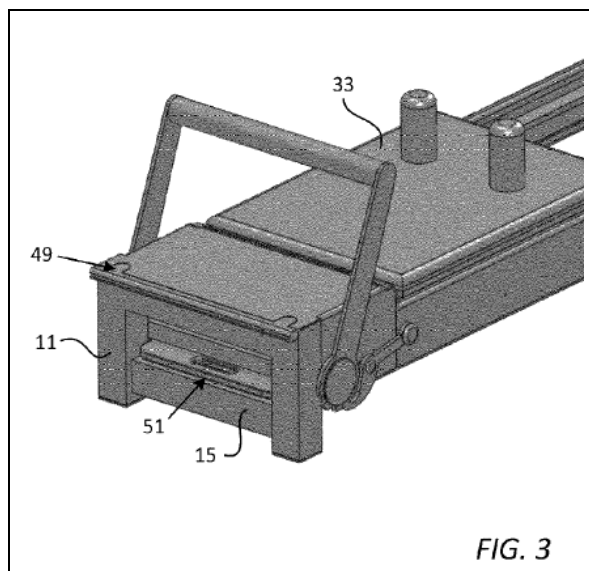
As “deployed” is properly construed within the context of the claim phrase “ergonomic purchase . . . *translatable into deployed and stowed positions*” as “a first position in which the rotatable bench is available and intended for use by a user exercising by means of the reformer”

(*see supra* at 19-23), it follows that “stowed”—which Wunda acknowledges is simply an alternative to deployed—should be construed as “a second position in which the rotatable bench is neither available nor intended for use by a user exercising by means of the reformer.”

Wunda’s proposed construction for the claim phrase “ergonomic purchase . . . *translatable into deployed and stowed positions*” ignores the intrinsic record, and the clear definition provided by the “953 patent. In providing support for its proposed construction, Wunda cites to the same definitional passage in the specification regarding what “stowed” means – but then *incredibly removes* by ellipsis the key passage of the definition reflecting the explicit requirement that the “stowed” position removes the “ergonomic purchase” from exercising use when in the stowed configuration. *Compare infra* at 29 (quoting the specification’s definition of “stowed,” but omitting the critical language via an ellipsis), *with* 5:63-67. This abridgement of the definition to remove this key passage is simply improper and speaks volumes regarding the weight to be given Wunda’s argument on this point: absolutely none. The following passage cannot be ignored:

A component translated to a stowed position, in practical terms, ***is no longer reachable for the same purchase achieved by a user in the position on the reformer from which she gained the purchase when the component was deployed.*** Contemporary dictionary definitions of the term stowed used in this mechanical sense may apply equally to the use of the term throughout this disclosure. (5:63-6:3) (emphasis added).

Because the specification defines “stowed” in terms of the availability and usability of the component for performing an exercise, this controls the construction of this term. Other portions of the ‘953 patent specification, including the figures, also support a construction for “stowed” based on the accessibility and usability of a given component in a particular position. For example, FIG. 3 is a top perspective view of the reformer showing the jump board 51 in the stowed position. (4:1-3).



In describing the stowed position of the jump board 51, the '953 patent specification provides, "[t]his configuration [the stowed position] allows the jump board to be stored beneath a portion of the reformer *when not in use*, and *when needed*, drawn out and rotated to a vertical position *to provide a push-off surface that faces the carriage*." (3:7-10) (emphasis added). Thus, other portions of the specification outside of the explicit definition of "stowed," also define "stowed" in terms of the availability and usability of a given component in a particular position.

The explicit definition of "stowed" provided in the '953 patent specification states that "[c]ontemporary dictionary definitions of the term stowed used in this mechanical sense may apply equally to the use of the term throughout this disclosure." (5:67-6:3). In fact, the 2009 edition of the Merriam-Webster Collegiate Dictionary defines "stow" as "to put away *for future use*." (A0184) (emphasis added). Thus, contemporary dictionary definitions also define "stowed" in terms of the availability and usability of something while in a particular position. This is of course consistent with our everyday understanding of items that are collapsible for enhanced storage. The device, whether a laptop computer, a handle for a roller-board suitcase, a folding tray, a pair of eyeglasses - all collapse to a configuration that while more compact, is not available or intended for further use.

In sum, the term “stowed,” as used within the claim phrase “ergonomic purchase . . . *translatable into deployed and stowed positions*,” should be construed to mean “a second position in which the rotatable bench is neither available nor intended for use by a user exercising by means of the reformer,” as proposed by Flex.

Asserted Claims	Claim Language	Defendants’ Proposed Construction
11	ergonomic purchase . . . <i>translatable into a stowed position for spatial efficiency</i>	An ergonomic purchase ⁸ movable into a position in which (i) the ergonomic purchase is neither available nor intended for use by a user exercising by means of the reformer and (ii) the overall volume of the reformer is collapsed to a minimum.

Flex’s proposed construction for the phrase “ergonomic purchase . . . *translatable into a stowed position for spatial efficiency*,” in claim 11, is based on similar logic to that with regard to its proposed construction for “ergonomic purchase . . . *translatable into deployed and stowed positions*,” recited in claim 1. However, it differs in three primary respects:

- “ergonomic purchase” rather than “rotatable bench,” because the claim 11 ergonomic purchase is not limited to a rotatable bench, as in claim 1.
- “movable” rather than “rotatably movable,” because the claim 11 ergonomic purchase is not limited to the form of a rotatable bench.
- Wunda’s proposed construction improperly attempts to read the phrase “for spatial efficiency” out of the claim

Accordingly, Flex’s proposed claim construction should be adopted for this phrase as it is in alignment with controlling precedent.

⁸ For brevity and clarity, Flex did not incorporate its proposed construction for the claim term “ergonomic purchase,” as used by itself (*see supra* at 9), into its proposed construction for this phrase from claim 11. However, such a substitution would be acceptable without departing from the spirit of Flex’s proposed construction for the phrase “ergonomic purchase . . . *translatable into a stowed position for spatial efficiency*.”

Asserted Claims	Claim Language	Defendants' Proposed Construction
11	ergonomic purchase . . . <i>translatable into a deployed position that enables a user mounted on the carriage to reach the purchase</i>	An ergonomic purchase movable into a position in which the ergonomic purchase is available and intended for use as part of an exercise by a user mounted on the carriage of the reformer.

The key distinction between the parties' proposed constructions for this claim phrase relates to the impact of the term "deployed." As discussed above in the context of the phrase "ergonomic purchase . . . *translatable into deployed and stowed positions*" set forth in asserted claim 1, the term "deployed" is explicitly defined in the '953 patent specification (5:46-55) and nothing in the intrinsic or extrinsic evidence suggests that this definition of "deployed" should not control.

Wunda's proposed construction improperly seeks to avoid the clear definition of "deployed" set forth in the '953 patent specification (5:46-55). Accordingly, Flex's proposed construction of this phrase from claim 11 should be adopted.

3. Plaintiff's Reply Position

As a preliminary matter, and as mentioned above, Defendants insisted on presenting their arguments regarding the construction of "stowed" before Plaintiff presented its arguments concerning that term. Rather than complicate the matter by inserting Plaintiff's reply concerning "stowed" here, Plaintiff reserves that argument for its proper place—after Plaintiff's opening argument on "stowed." Further, much of Defendants discussion above concerns claim 1. Plaintiff is not asserting claim 1, and the parties did not identify for construction any terms that occur in claim 1, but not in the asserted claims. Thus, the Court need not construe any terms appearing in claim 1 separately. *See Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001) ("a claim term should be construed consistently with its appearance in other places in the same claim or in other claims of the same patent").

Defendants argue that the term “a deployed position that enables a user mounted on the carriage to reach the purchase” should not be given its ordinary meaning of “deployed position that a user can reach while on the carriage,” contending that the specification defines “deployed” as a configuration “intended for use by a user exercising by means of the reformer.” (Referring to 5:46–55.) But for purposes of claim construction, apparatus claims cannot be construed in terms of how the apparatus might be used. *Paragon*, 566 F.3d at 1081, 1091. Rather than follow the law on this point, Defendants are attempting to re-write the claim where no construction is required—a jury can easily determine whether a user will be able to reach the purchase.

By contrast, Plaintiff’s proposal avoids Defendants’ error by indicating that “a deployed position that enables a user mounted on the carriage to reach the purchase” should take its ordinary meaning of “deployed position that a user can reach while on the carriage.” While this is not improperly limited based on the intended use of the claimed apparatus, as Defendants propose, it is entirely consistent with the specification’s reference to “a state or position . . . in which the component is intended to be used,” regardless of how a person happens to be using the reformer. As with the term “ergonomic purchase,” discussed above, because every *deployed* ergonomic purchase disclosed in the specification is meant to be used for exercise, Plaintiff would not dispute modifying its proposed construction to clarify that an “ergonomic purchase . . . translatable into a stowed position for spatial efficiency, and translatable into a deployed position that enables a user mounted on the carriage to reach the purchase” is an “ergonomic purchase moveable into a stowed position, and into a deployed position that a user can reach while on the carriage *for exercise*.” As set forth above, however, Plaintiff does not agree with Defendants that the terms “stowed” and “deployed” must be “converse” configurations distinguishable “in terms of the availability and usability of the component for performing an exercise.” That is not supported by a proper reading of the specification. *Phillips*, 415 F.3d at 1323.

C. **“Stowed”**1. **Plaintiff’s Opening Position**

Asserted Claims	Claim Language	Plaintiff’s Proposed Construction
1, 11, 12, 15 and 16	stowed	a position of an ergonomic purchase that reduces the volume occupied by the reformer

The asserted claims use stowed simply as an alternative to deployed. However, the claims that are not asserted against Defendants shed a some light on the appropriate construction of “stowed.” For example, claim 2 recites an embodiment having a rotatable bench “wherein when the bench is translated by rotation into the stowed position, [a] first planar surface lies substantially within a plane parallel to the carriage at a first elevation.” When the ballet bar of claim 5 is “translated to the stowed position, the telescoping arms are retracted within the frame to lower the crossbar to an elevation substantially level with the carriage.” Claim 6 recites that “when the jump board is translated to the stowed position, the jump board and sliding guide lie substantially within a common plane.” The claims, therefore, suggest that “stowed” reflects the position of an ergonomic purchase, including, for example, its elevation with respect to the carriage and sliding guide of the reformer.

The specification uses “stowed” to reference a state or position of a component of the disclosed reformer that reduces the reformer’s volume:

The term “stowed” as used herein means a state or position of a component of the reformer which *collapses the overall volume* of the reformer to a minimum, insofar as the volume may be affected by the component. In other words, it is the position of the component that will allow the reformer to be packaged within the smallest possible container, *or the position of the component which renders the reformer most suitable for storage* according to the manufacturer. Contemporary dictionary definitions of the term stowed used in this mechanical sense may apply equally to the use of the term throughout this disclosure.

The specification also states that “[w]ith the purchase translated to the stowed position the reformer is collapsed into *a smaller overall volume* for spatial efficiency for storage, transport, or during periods of nonuse.” (2:35–38.)

The specification provides figures and examples of a stowed position of each of the bench, ballet bar, and jump-board which illustrate how the position of each affects the volume of the reformer. (*See, e.g.*, Figs. 3–6, 10, 11; 2:35–37 (“With the purchase translated to the stowed position the reformer is collapsed into a smaller overall volume...”); 5:56–61 (“‘stowed’ as used herein means a state or position of a component of the reformer which collapses the overall volume of the reformer to a minimum, insofar as the volume may be affected by the component. In other words, it is the position of the component that will allow the reformer to be packaged within the smallest possible container....”) Each set of figures in the section concerning the translatable limitations, above, shows what the specification characterizes as a stowed ergonomic purchase, on the left, and a deployed ergonomic purchase, on the right, all of which can be defined by how the elevation of the ergonomic purchase affects the volume of the reformer. (Figs. 3–6, 10, 11.) By comparing the figures (which are consistent with the rest of the specification), a person of ordinary skill in the art would understand that putting one or more of the ergonomic purchases in a stowed position reduces the volume occupied by the reformer. (*Compare* Figs. 10 (stowed bench 43 and ballet bar 49) and 11 (stowed ballet bar and jump board 51) with Figs. 5 (deployed bench 43 and ballet bar 53) and 6 (deployed bench and jump board 51); 5:56–61.)

This is consistent with how a person of ordinary skill in the art would read the rest of the specification. Regarding the embodiment of the rotatable or movable bench, “the bench when stowed provides a seat at the carriage level” and “when deployed, the bench may provide a seat at a level other than carriage level” (2:58–61.) Thus, the stowed bench and the deployed bench can equally be used as a seat for performing exercises. (1:62–66 (indicating that, in Pilates, chairs are used for exercise).) The only difference, however, is the level of the seat compared to “carriage level.” When at the deployed position, the overall volume of the reformer will be greater than when the bench is “stowed,” because a lower seat reduces the volume occupied by the reformer.

Regarding the embodiment of the ballet bar, “[w]hen the ballet bar is translated to the stowed position, the telescoping arms may be retracted within the frame of the reformer to lower the crossbar to an elevation substantially level with the carriage.” (3:18–21.) This suggests that a ballet bar may be stowed when its crossbar is flush with the carriage. (6:66–7:1.)

Additionally, however, claim 14 provides for a stowed ballet bar that is not retracted to be flush with the frame. It recites that “the ballet bar in the stowed position [is] at least partially retracted within the one transverse end.” The phrase “at least partially retracted” indicates the ballet bar may also be at least partially expanded. Accordingly, these descriptions of a ballet bar show that the difference between the stowed and deployed ballet bar cannot depend on whether it is fully retracted, or flush, within the reformer, but on whether it is “at least partially retracted.” A partially retracted ballet bar reduces the volume occupied by the reformer, but nothing more.

Finally, regarding an embodiment of the jump board, “[t]he jump board [] is in its stowed position, wherein most of the jump board lies partially beneath the carriage [] and remains hidden from sight” such that “only the extreme end of the jump board is visible.” (7:1–7.) Positioning most of the jump board to lie partially beneath the carriage reduces the volume occupied by the reformer. A person of ordinary skill in the art would thus understand the term “stowed” described in the specification and recited in the claims to mean “a position of an ergonomic purchase that reduces the volume occupied by the reformer.”

2. Defendants' Answering Position

Asserted Claims	Claim Language	Defendants' Proposed Construction
1,11, 12, 15, and 16	stowed	a state or position of a component of the reformer which collapses the overall volume of the reformer to a minimum. In other words, it is the position of the component that will allow the reformer to be packaged within the smallest possible container, or the position of the component which renders the reformer most suitable for storage according to the manufacturer. A component translated to a stowed position, in practical terms, is no longer reachable for the same purchase achieved by a user in the position on the reformer from which she gained the purchase when the component was deployed. Consistent with contemporary dictionary definitions, "stowed" means to put something that is not being used in a place where it is available, where it can be kept safely, etc. <i>See</i> http://www.merriam-webster.com/dictionary/stowed .

Wunda requested that the parties construe the term "stowed" by itself. Flex's proposed construction is based on the explicit '953 patent specification definition of "stowed." However, Flex submits that the term is more properly construed in the context of the asserted claims.

Regardless, Wunda's proposed construction for "stowed," i.e., "a position of an ergonomic purchase that reduces the volume occupied by the reformer," is fatally flawed.⁹ First, Wunda quotes the specification definition for "stowed" yet, as noted above, omits (using an ellipsis) the key language relating to accessibility and usability. *See supra* at 29; (5:63-67) ("A component translated to a stowed position, in practical terms, is no longer reachable for the same purchase achieved by a user in the position on the reformer from which she gained the purchase

⁹ Wunda cites to dependent claim 14 in support of its overly broad construction for "stowed." *Supra* at 30. However, dependent claims cannot be broader than the claims from which they depend. *See Pfizer Inc. v. Ranbaxy Labs.*, 457 F.3d 1284, 1291-1292 (Fed. Cir. 2006) (finding a dependent claim that was broader than the claim from which it depended to be invalid for that reason).

when the component was deployed.”).

Second, Wunda acknowledges that the “asserted claims use stowed simply as an alternative to deployed.” *Supra* at 28. Given that deployed is explicitly defined within the specification as meaning “a state or position of a component of the reformer in which the component is intended to be used by a user exercising by means of the reformer” (5:46-49), it follows that the alternative to deployed would be a position in which the component is not available or intended for use by a user exercising by means of the reformer. Flex’s proposed constructions account for this.

Finally, and as noted above, the specification defines and illustrates the stowed position in each instance as a location that no longer allows any use of the surface of the purchase after it is moved into the stowed position (e.g., the jump board, ballet bar, and rotatable bench) (*see* Figs. 2-3, 8, 10-11) and states as to the jump board that it is placed in its stowed position “when not in use” (3:7-10). Because this is the core requirement of every embodiment, Wunda’s proposed construction cannot survive as it fails to account for the accessibility or usability of a component in the “stowed” position.

3. Plaintiff’s Reply Position

Defendants argue that Plaintiff’s proposed construction of “stowed” “abridges” the definition provided in specification by allegedly ignoring the following description:

A component translated to a stowed position, in practical terms, is no longer reachable for the same purchase achieved by a user in the position on the reformer from which she gained the purchase when the component was deployed. (5:63–67.)

According to Defendants, this “key passage” “controls the construction” and requires that “stowed” be construed “based on the accessibility and usability of a given component in a particular position.” Just as they did with the term “ergonomic purchase,” Defendants are attempting to add additional limitations using the specification’s description of how the invention

can be used in practice and limit the invention to one exemplary embodiment. This invites legal error. Indeed, their “key passage” above is explicitly couched “in practical terms” and immediately follows the passages relied upon by Plaintiff to support its proper construction.

Further, as explained above, apparatus claims cannot be construed in terms of how the apparatus might be used, because doing so would improperly make infringement of an apparatus claim depend on use or function, not structure. *Paragon*, 566 F.3d at 1081, 1091. Additionally, as quoted in the above discussion of “ergonomic purchase,” the specification uses “the term purchase [] in [a] mechanical sense” as a term of art, where “purchase may denote both the surface providing stabilizing contact, and the point of frictional contact achieved on the surface.” (5:18–23.) By arguing that “the stowed position in each instance [is] a location that no longer allows *any* use of the surface of the purchase,” Defendants presume, without explanation, that “purchase,” as used here, means “surface” and that the phrase in the specification “no longer reachable for the same purchase achieved” requires that the surface is no longer reachable for use *at all*. But Defendants do not account for the fact that the specification also explains that the term “purchase” can mean “the point of frictional contact achieved on the surface.” This is the meaning intended in the “key passage” Defendants rely on. Specifically, the passage says “no longer reachable for the same purchase achieved by a user,” which can only be interpreted in view of the specification to mean “no longer reachable for the same point of frictional contact.” Thus, the specification discloses that a component moved from deployed to stowed can still be reachable for a *different* purchase, or frictional leverage or hold, “by a user in the position on the reformer from which she gained the purchase when the component was deployed.” (Decl. of Steven M. Lenz (“Lenz Decl.”) ¶ 7.) Contrary to Defendants’ proposal, the specification and claims indicate a component, when stowed, may be available for use to achieve a different purchase than when the component was deployed.

Defendants also argue that the Court should consider the secondary meaning of “stow” in the 2009 edition of the Merriam-Webster Collegiate Dictionary, which is “to put away for future use.” However, the primary meaning of “stow” in the 2011 edition of the American Heritage

Dictionary of the English Language, published the year of the '953 Patent application, is “[t]o place or arrange, especially in a neat, compact way” and “[t]o fill (a place or container) by packing tightly.” (Lenz Decl. ¶ 11, Ex. 3; A0187.) Rather than require unavailability for use, its references to a “compact” arrangement and “packing tightly” further support Plaintiff’s proposed construction of “a position of an ergonomic purchase that reduces the volume occupied by the reformer.” Defendants have no basis for choosing one dictionary definition and excluding others, where, as here, the specification explicitly states, “[c]ontemporary dictionary definitions of the term stowed used in this mechanical sense may apply equally to the use of the term throughout this disclosure” (5:57–6:3) and says, “The term ‘stowed’ as used herein means a state or position of a component of the reformer **which collapses the overall volume of the reformer to a minimum**, insofar as the volume may be affected by the component.” (5:56–59.)

Consistent with this disclosure, when Defendants’ counsel asked the inventor why reducing the volume of a reformer was an advantage, she explained that it allows Pilates-studio owners to minimize square footage required for conducting classes and thus minimize rent. (A0207–08, 211–12, 215–16.)

Additionally, Defendants argue that the preferred embodiment of the jump board and ballet bar are examples of stowed components that are “not available for use as part of an exercise when in the stowed position.” Defendants further argue that “the top surface” of the preferred embodiment of a rotatable bench faces “away from the carriage, into a second remote, outwardly facing and vertical configuration that renders that top surface unavailable for exercising.” However, Defendants have no support for such a conclusion by way of expert- or fact-witness testimony. Contrary to Defendants’ argument, a person of skill in the art would not find it meaningful that one surface of the embodiment of the bench disclosed in the specification faced outward from the carriage when the bench is stowed. (Lenz Decl. ¶¶ 8–10 (showing and discussing people exercising on a commercial embodiment while one surface of the bench faces outward).) For example, when Defendants’ counsel deposed a Pilates instructor who uses Plaintiff’s commercial embodiment of the invention to teach classes, she testified that a surface

of the chair facing away from the carriage is used for exercise and explained that “for example, you might have your—you might need to grip your hands around [it] or you might be—have your legs against it to stabilize you as you’re doing a different exercise” and listed various exercises people actually do when the chair is in the “down” (*i.e.*, stowed) position. (A0218–20.) Likewise, the inventor, also a Pilates instructor, confirmed during her deposition that users commonly exercise using that same chair in the “down” (*i.e.*, stowed) position. (A0208, 210.)

Further, as explained above, the specification explicitly indicates that the bench, whether stowed or deployed, can be used for performing exercises. (1:62–66 (indicating that, in Pilates, chairs are used for exercise); 2:58–61 (indicating the bench may provide a seat when stowed and deployed).) The unreasonableness of Defendants’ assumption that the chair cannot be used when stowed, or down, is best manifest in the series of figures provided in the declaration of Plaintiff’s expert. He explains that a person of ordinary skill in the art reading the patent specification would understand that the chair or bench is usable for exercise when stowed or deployed. (Lenz Decl. ¶¶ 8–10.) Moreover, as those figures showing people exercising make clear, a person exercising can access both upholstered surfaces of the chair to gain a purchase, or hold, whether the chair is stowed or deployed. (Lenz Decl. ¶ 8.) Unlike these examples, which are based on how a person of ordinary skill in the art would envision the invention to be used for exercise based on the specification, Defendants’ argument based on “our everyday understanding of items that are collapsible for enhanced storage,” such as “a laptop computer, a handle for a roller-board suitcase, a folding tray, [and] a pair of eyeglasses,” appears to issue from the perspective of a lawyer working on a laptop while traveling on an airplane. None of Defendants’ examples illustrate how and why a person of ordinary skill in the art at the time of the invention would understand the preferred embodiment of a bench disclosed in the patent specification to preclude its availability for use in exercise—again, assuming (improperly) apparatus claims may be construed based on how the apparatus might be used.¹⁰

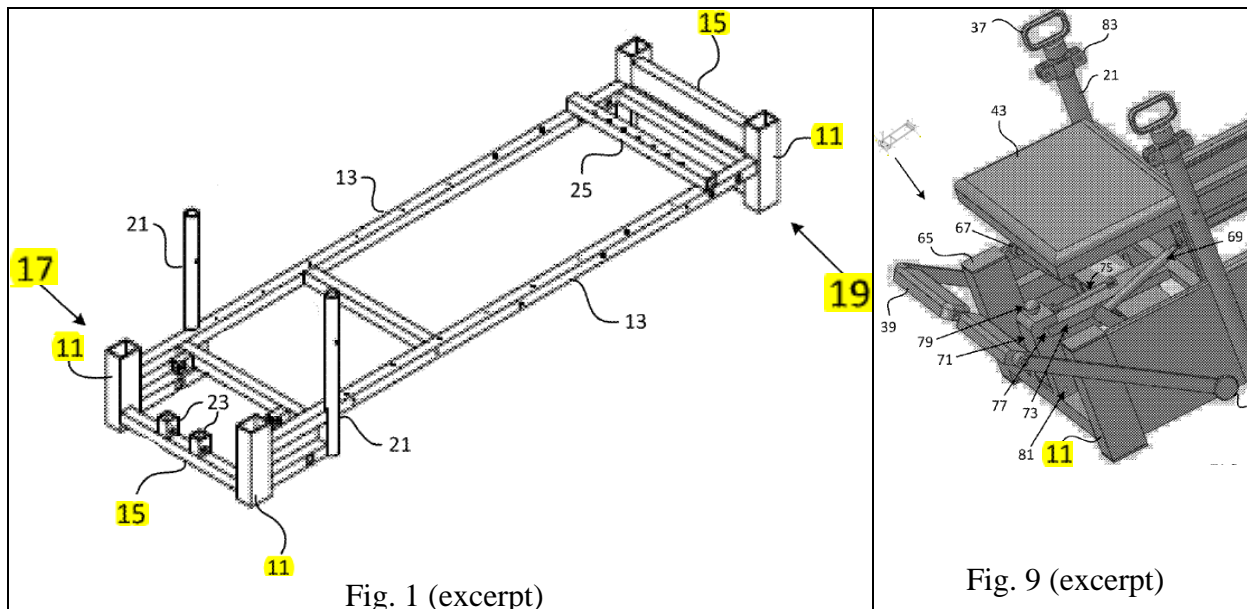
¹⁰ Defendants argue in a footnote that if claim 14 served as an example that a partially expanded ergonomic purchase may nevertheless be considered “stowed,” as Plaintiff pointed out, that fact

D. The “Transverse End” Limitations**1. Plaintiff’s Opening Position**

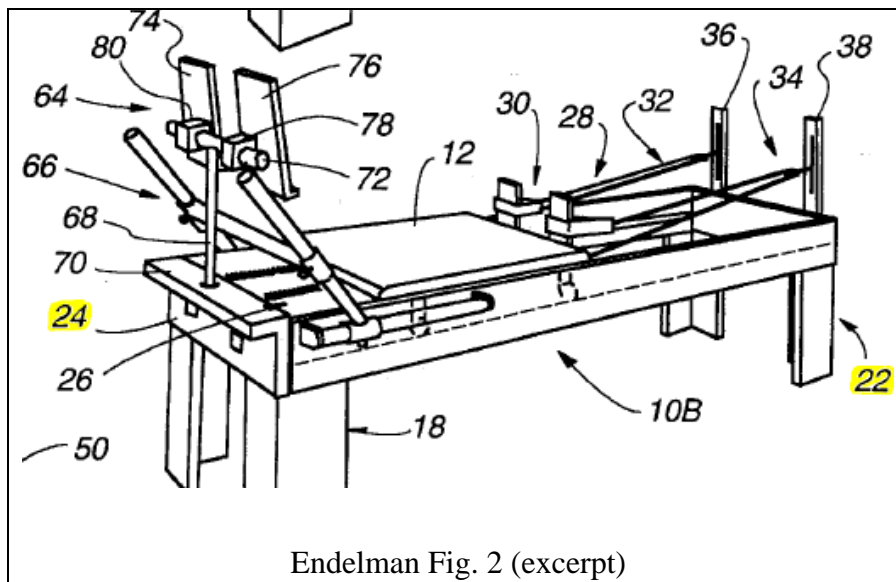
Asserted Claims	Claim Language	Plaintiff’s Proposed Construction
11	transverse end comprising a pair of bases and a transverse member connected therebetween	a portion of the reformer which includes a pair of supports connected by at least one horizontal structure
15	transverse end comprising a base pair and connecting transverse member	

Claim 11 recites a reformer comprising two transverse ends, and claim 15 claims a reformer comprising “a transverse end.” Thus, the reformer can have one or more transverse ends. In the reformer of claim 11, the two transverse ends are “connected by longitudinal rails” and each comprises “a pair of bases and a transverse member therebetween.” In the reformer of claim 15, the transverse end comprises “a base pair and connecting transverse member.” The structure common to both is two bases with a transverse member between them. Consistent with that, as shown below, Figure 1 shows, “[a]t either end of the frame, a pair of bases 11 and a transverse member 15 combine to form a transverse end. In this embodiment, there is a front transverse end 19 and an aft transverse end 17” and Figure 9 shows “the aft transverse end 17.” (6:10–14; *see also* 3:28–37; 6:16–21; 8:34–37.)

somehow violates the statutory requirement that claim 14, a dependent claim, be narrower than claim 11, the corresponding independent claim from which claim 14 depends. *See* 35 U.S.C. § 112(d). Defendants do not explain why this should be so. The case Defendants cite for this point held that a dependent claim is invalid unless it specifies a further limitation of at least some subject matter of its corresponding independent claim. *Pfizer, Inc. v. Ranbaxy Labs. Ltd.*, 457 F.3d 1284, 1291–92 (Fed. Cir. 2006). The dependent claim in that case was “completely outside the scope of” the independent claim and was thus found invalid. *Id.* at 1292. To the contrary, claim 14 further limits claim 11 in several ways. Most notably, unlike claim 14, it is limited to embodiments where the ergonomic purchase is a ballet bar. *See Mantech Env'tl. Corp. v. Hudson Env'tl. Servs.*, 152 F.3d 1368, 1376 (Fed. Cir. 1998) (explaining that only one limitation of a dependent claim must differ in scope from the independent claim to satisfy the rule).



Also consistent with the use of “transverse end” in the claims, during patent prosecution, Jordan referenced Merrithew Figure 2 (shown in § IV.B.1, above) and explained, “*Merrithew’s* foot bar 42 is vertically adjustable by means of linkage and racks that do not form part of a transverse end 30” and that are “secured to the horizontal frame 26” which “is clearly not a transverse end, but rather the longitudinal frame member that runs *between* the transverse ends.” (Response 17 (emphasis in original).) Referencing Endelman Figure 1 (shown in § IV.B.1, above) and Figure 2 (below), she identified “*Endelman’s* transverse end [as] compris[ing] end piece 24 and legs 22.” (Response 17 (A0132).)



A person of ordinary skill in the art would thus understand the transverse-end limitations to mean “a portion of the reformer which includes a pair of supports connected by at least one horizontal structure.”

2. Defendants’ Answering Position

Asserted Claims	Claim Language	Defendants’ Proposed Construction
11	transverse end comprising a pair of bases and a transverse member connected therebetween	An end portion of the reformer frame comprised of two vertical legs to support the frame of the reformer and a horizontal crossbar connecting the two vertical legs.
15	transverse end comprising a base pair and connecting transverse member	

The parties’ proposed constructions for the “transverse end” limitations have notable differences. Wunda improperly attempts to broaden by selectively omitting key features, whereas Flex’s proposed construction remains true to the claim language and specification:

- “portion of the reformer” (Wunda) vs. “*end* portion of the reformer *frame*” (Flex). Flex’s proposed construction comes directly from the claim language, while Wunda’s proposed construction attempts to read the terms “end” and “frame” out of claims 11 and 15. For example, claim 11 recites “A reformer comprising: a rectangular *frame* having two transverse *ends* . . .” (14:3-4) (emphasis added). Thus, the two transverse ends define the boundaries of the reformer frame about a particular plane. Similarly, claim 15 recites “A reformer comprising: a rectangular *frame* . . . having a transverse *end*,” which again requires that the “transverse end” be disposed at an end of the reformer frame. (14:32-24) (emphasis added).
- “pair of bases” / “base pair” as merely “supports,” (Wunda) vs. “vertical legs” (Flex). Each and every figure of the ‘953 patent that shows the bases 11, shows them as vertical legs that support the frame 10. (See, e.g., Figures 1 and 9). Simply put, the specification never discloses, nor envisions, any embodiment in which the “pair of bases” / “base pair” are anything other than vertical legs. Additionally, during prosecution, the patentee identified the vertical legs 22 shown in Figure 2 of the Endelman reference as corresponding to the “pair of bases” / “base pair”: “*Endelman’s* transverse end comprises end piece 24 and legs 22.” (A0132). Thus, prosecution history intrinsic evidence counsels in favor of a construction for the “pair of bases” / “base pair” as constituting vertical legs. Further, the specification describes the “pair of bases” / “base pair” as providing housings for the telescoping arms 55 of the ballet bar 49. (7:28-30) (“In the stowed position, each of the bases 11 provides a housing into which telescoping arms 55 may be fully retracted.”). Clearly, the “pair of bases” / “base pair” could not provide housings for telescoping arms

unless they are “vertical legs.” For example, if the “pair of bases” / “base pair” are merely “supports” (e.g., flat supports) as Wunda alleges, then they could not serve one of their key functions.

- “transverse member” as “*at least one* horizontal structure” (Wunda) vs. “a horizontal crossbar” (Flex). Wunda’s proposed construction improperly broadens the limitation to include the possibility of several, discrete “transverse members.” Claims 11 and 15 merely recite “a pair of bases and *a* transverse member connected therebetween” or “a base pair and connecting transverse member.” (14:35-36). Nothing in the patent discloses a multiple “transverse members” embodiment.

3. Plaintiff’s Reply Position

Defendants take issue that Plaintiff’s proposal does not include the terms “end” and “frame.” Although other language in claims 11 and 15 already specifies that each “transverse end” is an end portion of the reformer frame, Plaintiff would not object to modifying its proposed construction to include the underlined language that follows: “an end portion of the reformer frame which includes a pair of supports connected by at least one horizontal structure.”

Defendants also argue that “pair of bases and a transverse member connected therebetween” cannot mean “pair of supports connected by at least one horizontal structure,” because the patent figures show what Defendants call “vertical legs,” and Jordan identified Endelman’s transverse end as including “legs 22.” Again, Defendants are importing limitations from one embodiment of the specification into the claims, which invites legal error. *Phillips*, 415 F.3d at 1323. Defendants also contend that nothing but vertical legs could “provid[e] housings for the telescoping arms 55 of the ballet bar 49.” Not only is this incorrect, but again improperly attempts to limit the claims based on a single example of one type of ergonomic purchase described in the specification. Not only could a housing for telescoping arms be provided in other than vertical legs (Lenz Decl. ¶ 18), but the term “vertical legs” appears nowhere in the ’953 Patent, and the patent specification would not lead a person of ordinary skill in the art to define “base” in such a limited manner. (Lenz Decl. ¶¶15–17.) Further, the base members *11* made of rectangular tubing shown in Figure 1(6:29–30) are merely exemplary base members disclosed as part of the preferred embodiment. (Lenz Decl. ¶ 18.) The Federal Circuit

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,” because the claims define the invention, not the embodiments disclosed in the specification, and “because persons of ordinary skill in the art rarely would confine their definitions of terms to the exact representations depicted in the embodiments.” *Phillips*, 415 F.3d at 1323. Accordingly, a person of ordinary skill in the art would not view the disclosure as limited to “vertical leg” base members. (Lenz Decl. ¶¶ 15–18.)

E. The “Arrested” Limitations

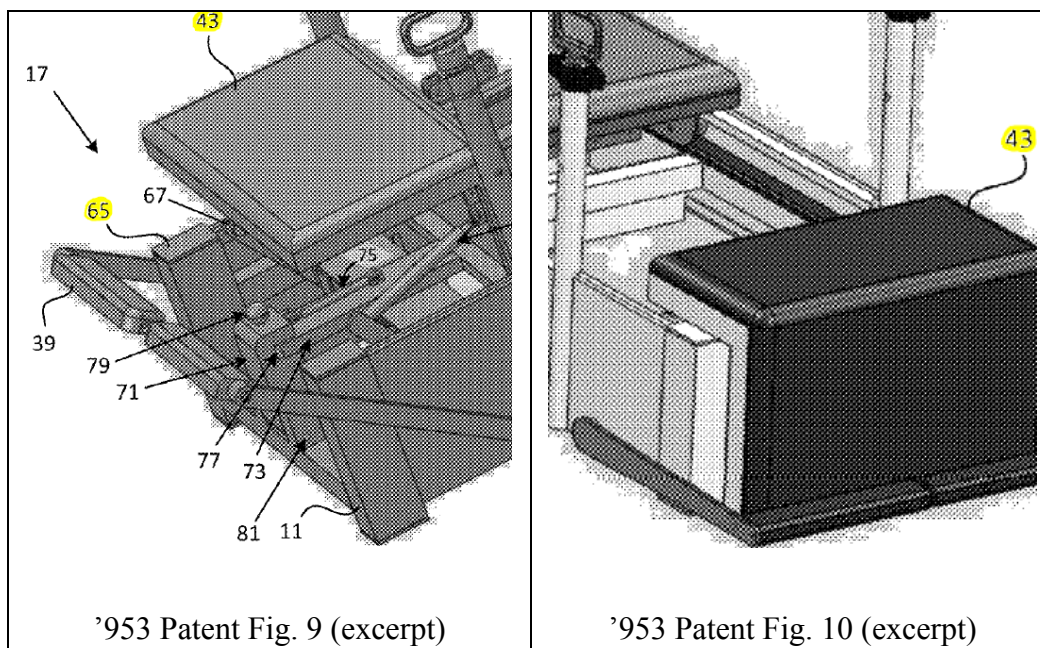
1. Plaintiff’s Opening Position

Asserted Claims	Claim Language	Plaintiff’s Proposed Construction
11	wherein a transverse end arrests the ergonomic purchase in the stowed or deployed position	a/the transverse end mechanically stops the ergonomic purchase from movement with respect to other parts of the reformer while in the stowed or deployed position
15	ergonomic purchase is arrested by the transverse end in the deployed or stowed position	
12	a rotatable bench arrested in the stowed position by one of the transverse ends	a rotatable bench mechanically stopped by the transverse end from movement with respect to other parts of the reformer while in the stowed position

Claims 8, 11, 12, and 15 each use the “arrested” or “arrests” in relation to a transverse end of the reformer to mean “a/the transverse end mechanically stops the ergonomic purchase from movement with respect to other parts of the reformer while in the stowed or deployed position.” In claim 8, a pair of “lever arms arrests the jump board between the foot bar and the end of the reformer.” In claims 11, 12, and 15, a transverse end arrests an ergonomic purchase in a deployed and/or stowed position.

The specification describes that “one of the transverse ends arrest[s] the purchase when fully translated to the stowed or deployed position” (Abstract) and discusses an embodiment where “one of the transverse ends accommodates or arrests the purchase when fully translated to the stowed or deployed position” (3:41–43). Describing the embodiment of Figure 9 (pictured below this paragraph), which shows the bench 43 in the deployed position (4:20–22), the

specification explains that “the top surface 65 of each base member 11 of the aft transverse end 17 may be formed from a solid plate, as shown [below], to provide a placement area for arresting the rotatable bench 43 in the stowed position.” (8:34–37.) A solid plate is portrayed (although not numbered) in the embodiment of Figure 10 (pictured below this paragraph), which shows the bench 43 in the stowed position (4:23–26), sitting on or near the solid plate.



The prosecution history confirms this understanding. In her Response, Jordan distinguished what became claims 11–16 from Merrithew and Endelman based, in part, on the recitation, “wherein a transverse end arrests the ergonomic purchase in the stowed or deployed position.” (Response 16, (A0131).) She argued:

A consistent feature in every embodiment of the invention is an ergonomic purchase that is translatable into deployed and stowed positions. [This] means that the reformer is configured so that movement of a purchase is arrested, or *mechanically stopped*, by one of the stationary transverse ends 17 or 19 [referenced on the frame of Figure 1 (shown in § IV.D.1, above)].

(Response 17 (emphasis in original) (A0132).) Jordan additionally argued that “it is not enough for Merrithew or Endelman to teach or suggest this limitation because they disclose a transverse end and that merely supports an ergonomic purchase. The transverse end must stop the movement of a movably adjustable purchase in order to teach this limitation.” (A0132). Referencing

Endelman Figure 2 (shown in § IV.D.1, above), she argued, “Foot plates 74 and 76, and spanning bars 56 and 86, are clearly not arrested by a transverse end of the reformer.” (Response 17 (A0132).) A person of ordinary skill in the art would, therefore, understand these disclosures to mean the arrested limitations mean “the transverse end mechanically stops the ergonomic purchase from movement with respect to other parts of the reformer while in the stowed or deployed position.”

2. Defendants’ Answering Position

Asserted Claims	Claim Language	Defendants’ Proposed Construction
11	wherein a transverse end arrests the ergonomic purchase in the stowed or deployed positions	Wherein an end portion of the reformer frame comprised of two vertical legs to support the frame of the reformer and a horizontal crossbar connecting the two vertical legs stops the movement of the ergonomic purchase at one end of the ergonomic purchase’s range of movement in a stowed position or in a deployed position ¹¹
15	ergonomic purchase is arrested by the transverse end in the deployed or stowed position	Ergonomic purchase’s movement is stopped at one end of the ergonomic purchase’s range of movement by an end portion of the reformer frame comprised of two vertical legs to support the frame of the reformer and a horizontal crossbar connecting the two vertical legs in a deployed position or a stowed position
12	a rotatable bench arrested in the stowed position by one of the transverse ends	A rotatable bench’s movement is stopped at one end of the rotatable bench’s range of movement in a stowed position by an end portion of the reformer frame comprised of two vertical legs to support the frame of the reformer and a horizontal crossbar connecting the two vertical legs.

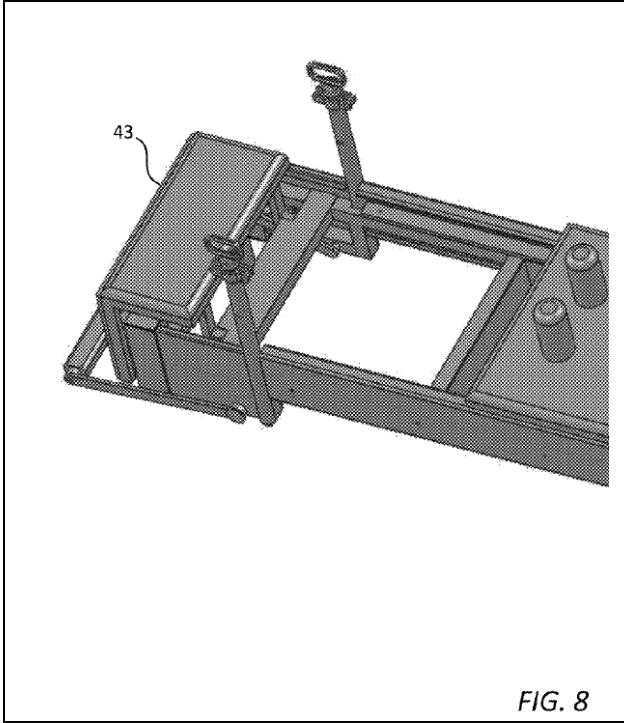
The “arrested” limitations incorporate many claim terms (e.g., “ergonomic purchase,”

¹¹ For brevity and clarity, Flex did not incorporate its proposed constructions for “stowed” (i.e., “a position in which the ergonomic purchase is neither available nor intended for use by a user exercising by means of the reformer”) or “deployed” (i.e., “a position in which the ergonomic purchase is available and intended for use by a user exercising by means of the reformer”) into its proposed constructions for the “arrested limitations. However, such substitutions would be acceptable without departing from the spirit of Flex’s proposed constructions for the “arrested limitations.”

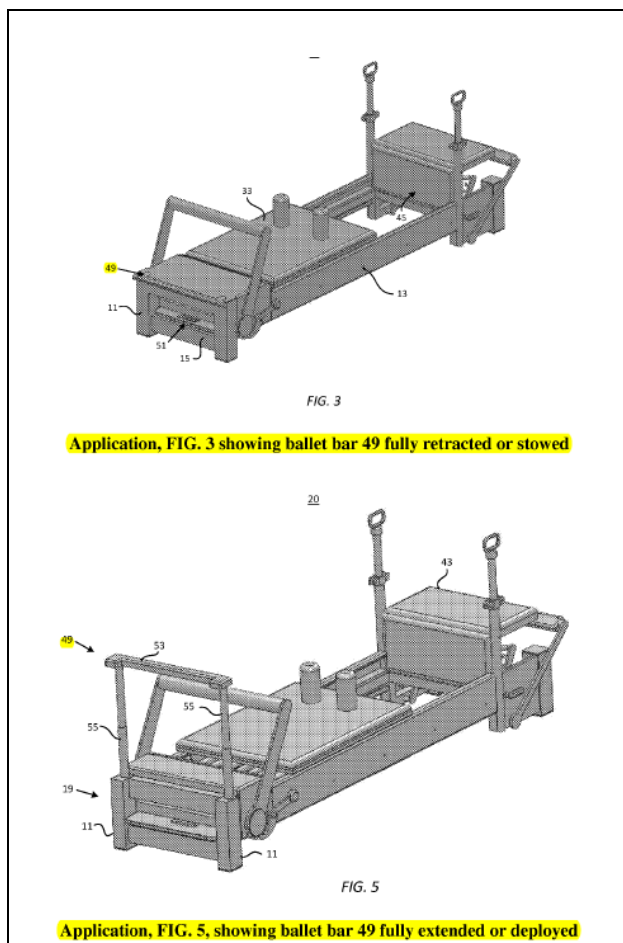
“transverse end,” “deployed,” “stowed,” etc.) discussed above, such that Flex’s proposed constructions here incorporate its constructions proposed and discussed above. However, Wunda’s proposed constructions for the “arrested limitations” inexplicably fail to incorporate its proposed constructions for the clearly defined claim terms, apparently indicating that Wunda believes the plain and ordinary meaning of those clearly defined claim terms should apply.

Flex’s proposed constructions, unlike that of Wunda, indicate that the transverse end “stops the movement of the [ergonomic purchase / rotatable bench] *at one end of the* [ergonomic purchase’s / rotatable bench’s] *range of movement* in the deployed or stowed positions.” Flex’s proposed construction is supported by the explicit intrinsic evidence, including the specification and prosecution history:

“The reformer is configured so that one of the transverse ends accommodates or arrests the purchase when *fully translated* to the stowed or deployed position.” (3:41-43) (emphasis added). The statement “fully translated,” may be fairly interpreted as referring to one end of the purchase’s range of movement. Indeed, this position is supported by every figure in the ‘953, all of which illustrate ergonomic purchases being arrested by a transverse end *at one end of the purchase’s range of movement*. Fig. 8 is illustrative and shows the rotatable bench 43 arrested by a transverse end (i.e., the top surfaces 65 of bases 11) at one end of the rotatable bench’s range of movement:



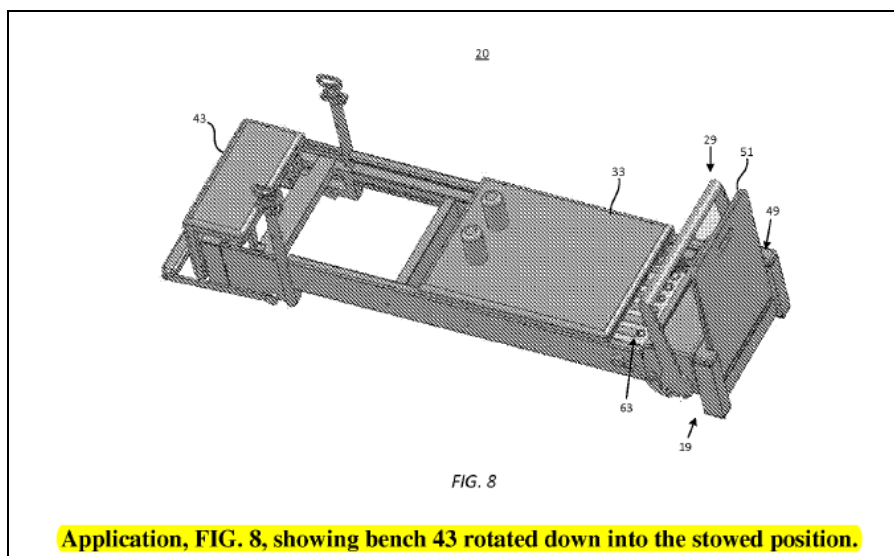
The prosecution history also supports Flex’s proposed construction. For example, the patentee presented the following annotated illustration of Figures 3 and 5 as part of its first office action response (A0130):



As shown with regard to annotated Fig. 3, the patentee clearly equated a position in which the ballet bar 49 is “fully retracted” within a transverse end (i.e., “arrested by the transverse end”) as representing the “stowed” position for the ballet bar 49 in stating, “Application, FIG. 3 showing the ballet bar 49 *fully retracted or stowed.*” (A0130) (emphasis added). Thus, the patentee indicated that the ballet bar 49 was arrested by the transverse end (i.e., bases 11 and transverse member 15) in the stowed position when it was “fully retracted,” i.e., *at one end of the ballet bar’s range of movement.* Similarly, the patentee clearly equated a position in which the ballet bar 49 is “fully extended” from a transverse end (i.e., arrested by the transverse end”) as representing the “deployed” position for the ballet bar 49 in stating, “Application, FIG. 5, showing ballet bar 49 *fully extended or deployed.*” (A0130) (emphasis

added). Thus, the patentee indicated that the ballet bar 49 was arrested by the transverse end in the deployed position when it was “fully extended,” i.e., *at one end of the ballet bar’s range of movement*.

Within the same office action response, the patentee also demonstrated to the Patent Office how a transverse end stopped the movement of the rotatable bench 43 in the stowed position *at one end of the rotatable bench’s range of movement* (A0126):



Thus, Flex’s proposed construction for “arrests” / “arrested” should be adopted because it is clearly supported by the intrinsic evidence, including the specification and prosecution history.

3. Plaintiff’s Reply Position

Defendants argue that the “arrested” limitations should limit the claims by requiring that a transverse end stops movement of an ergonomic purchase when “fully translated” and “at one end of the ... range of movement in the deployed or stowed positions.”¹² Again, Defendants are

¹² Defendants also argue that Plaintiff’s construction would not incorporate the Court’s constructions of other terms embedded in the “arrested” limitations. Plaintiff would not dispute the Court incorporating its constructions of such other terms into its construction of the “arrested” limitations, but submits that repeating them would be overly complicated, redundant, and unnecessary. Defendants also indicate that they proposed a construction of “deployed.” But neither party listed “deployed” as requiring construction under Local Rule 11. (Dkt. 41.)

improperly attempting to read limitations from the specification into the claims. *Phillips*, 415 F.3d at 1323. The claims say nothing about the “range of movement in the deployed or stowed positions.” However, the specification, including unasserted claim 14 provide specific examples of an ergonomic purchase that is in the “stowed” position even though it is not fully retracted. (Abstract; 3:40–43; 7:28–33; 11:26–28; claim 14.) The specification does not support (and there is no reference anywhere in the specification to) adding a limitation specific to “one end of an ergonomic purchase’s range of movement.” Consistent with claim 14, “in one embodiment, the [stowed or deployed] ballet bar may be maintained in any position within its telescoping range,” not just at one end of that range. (3:18–27.) Defendants do not address, for example, the fact that the specification discloses the ballet bar as “partially retracted,” and yet stowed, in one embodiment. (*See, e.g.*, claim 14). Confusingly, Defendants’ proposal also uses the term “stowed” inconsistent with Defendants’ own proposed construction for that term, which depends on whether the ergonomic purchase is intended or available for use, not whether it is at one end of its range of movement. Defendants’ proposed construction is improper and should be rejected.

F. “Means for Translating ...”

1. Plaintiff’s Opening Position

Asserted Claims	Claim Language	Plaintiff’s Proposed Construction
15	means for translating the ergonomic purchase into deployed and stowed positions so that the ergonomic purchase is arrested by the transverse end in the deployed or stowed position	<p><u>Function</u>: moving the ergonomic purchase into deployed and stowed positions so the ergonomic purchase is arrested by the transverse end in the deployed or stowed position</p> <p><u>Structures</u>: a sliding guide with a hinge, and optional handle, mechanical stop, and/or guide wings; a substantially horizontal crossbar vertically supported by telescoping arms; rotatably adjustable locking means, such as a spring-loaded mechanical pawl removably lockable within notches in a rotary latch; hinges attached underneath the bench and pinned brackets; a notched pivoting post, a locking bar, a tension spring, and optional stops; cylindrical tubing with inner and outer shafts and a clamp or push or pull locking mechanism, optional magnet, bushing, guide bar, and guide tube with or without a guiding slot; or guide wings configured with runners with an optional stopping edge and a guide plate, guide rails, or longitudinal members; and/or all equivalents thereto</p>

This is a means-plus-function element to “be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.” 35 USC § 112(f). The specification includes the claims. *Id.* (“The specification shall conclude with one or more claims”) The relevant function is “translating the ergonomic purchase into deployed and stowed positions so that the ergonomic purchase is arrested by the transverse end in the deployed or stowed position.” That is, “moving” the ergonomic purchase into deployed and stowed positions so the ergonomic purchase is “mechanically stopped” by the transverse end in the deployed or stowed position. (*See* § IV.E.1, above.)

The specification (including claims) discloses several structures a person of ordinary skill in the art would recognize as used in moving the ergonomic purchase to achieve the claimed function. Claim 5 recites “telescoping arm” structures for vertically translating an ergonomic purchase comprising “a substantially horizontal crossbar.” The specification similarly describes a substantially horizontal crossbar vertically supported by telescoping arms. (3:16–27; 7:12–13.) Claim 6 describes structure for sliding and rotating an ergonomic purchase using a hinged sliding

guide. The specification similarly describes a sliding guide with a hinge, and optional handle, mechanical stop, and/or guide wings (2:66–3:7; 7:56–8:3; 11:42–12:8) and guide wings configured with runners with an optional stopping edge and a guide plate, guide rails, or longitudinal members (11:66–12:8).

The specification further describes a “pivoting mechanism” that allows rotational freedom (8:53–64), “mounting brackets” that allow, for example, rotation (6:16–18), rotatably adjustable locking means, such as a spring-loaded mechanical pawl removably lockable within notches in a rotary latch (7:39–8:1), hinges attached underneath the bench and pinned brackets (8:37–40), a notched pivoting post, a locking bar, a tension spring, and optional stops (8:41–64; 10:15–21), cylindrical tubing with inner and outer shafts and a clamp or push or pull locking mechanism, optional magnet, bushing, guide bar, and guide tube with or without a guiding slot (9:14–26; 10:30–32; 10:54–59; 11:6–9; 11:34–40) and/or all equivalents thereto.

Defendants’ proposed construction, “telescoping arms, a hinged portion of a jump board, hinges, and equivalents thereof” is unduly limited. It includes some of the disclosed structures, but not others. Plaintiff does not dispute that “telescoping arms” falls within “cylindrical tubing with inner and outer shafts and a clamp or push or pull locking mechanism, optional magnet, bushing, guide bar, and guide tube with or without a guiding slot,” but “telescoping tubes” alone does not capture much of the additional structure disclosed in the specification. The additional structure is important in order to not improperly limit the claims, but also because it suggests additional equivalents that fall within the scope of the claims. 35 USC § 112(f) (requiring that means-plus-function “claim[s] shall be construed to cover the corresponding structure, material, or acts described in the specification *and equivalents thereof*”¹³ (emphasis added).

2. Defendants’ Answering Position

Asserted Claims	Claim Language	Defendants’ Proposed Construction
15	means for translating the ergonomic purchase into	<u>Function</u> : translating the ergonomic purchase into deployed and stowed

¹³ Plaintiff’s proposal uses “thereto” instead of “thereof,” but either word would be acceptable.

	deployed and stowed positions so that the ergonomic purchase is arrested by the transverse end in the deployed or stowed position	positions so that the ergonomic purchase is arrested by the transverse end in the deployed or stowed position <u>Structures:</u> Telescoping arms, a hinged portion of a jump board, hinges, and equivalents thereof.
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The parties propose very similar constructions with regard to the function of the “means for translating” limitation of claim 15. However, the parties propose very different constructions for the corresponding structures. The parties’ positions divert across two primary lines: (1) which embodiments of the “ergonomic purchase” should be considered in assessing the “means for translating” and (2) whether structures that are solely designed to *lock* a given purchase in place—as opposed to structures designed to actually *translate* an ergonomic purchase—should be included within the construction for “means for translating.”

As with all of the previous claim terms, Flex’s proposed construction addresses the claim term “means for translating” within the context of claim 15, whereas Wunda’s proposed construction addresses the term in a vacuum with the goal of broadening the scope of claim 15 beyond its reasonable bounds. The only ergonomic purchases that are arrested by a transverse end are the ballet bar, jump board, and rotatable bench. (*See, e.g.*, Figure 10). Accordingly, only structures configured to translate the ballet bar, jump board, and rotatable bench into deployed and stowed positions should be included as corresponding structures for the “means for translating” claim limitation. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347 (Fed. Cir. 2015) (noting that means plus function claims “restrict[] the scope of coverage to only the structure, materials, or acts described in the specification *as corresponding to the claimed function*”) (emphasis added). Flex has identified the following straightforward structures for translating these ergonomic purchases:

- Telescoping arms used to translate the ballet bar between its stowed and deployed positions. *See, e.g.*, 7:8-21 (“[B]allet bar 49 is an assembly that includes a substantially horizontal crossbar 53 that is vertically supported by **two telescoping arms 55** When the ballet bar 49 is translated to the deployed position, the **telescoping arms 55** are extended beyond the frame 10 to raise the crossbar 53 to an elevation substantially higher than the carriage 33. When the ballet bar 49 is translated to the stowed position, the **telescoping arms 55** are retracted within the front transverse end 19 of frame 10 to lower the crossbar to an elevation substantially level with the carriage.”) (emphasis added).
- A hinged portion of the jump board is used to translate the jump board between its stowed and deployed positions. *See, e.g.*, 7:56-62 (“The jump board 51 may then be withdrawn from the front end of the reformer until the sliding guide reaches its furthest outward displacement, which places **a hinged portion of the jump board** beyond the front transverse end 19, and **allows the jump board to be rotated toward the carriage to its deployed position** while the sliding board remains stationary.”) (emphasis added).
- Hinges are used to translate the rotatable bench between its stowed and deployed positions. *See, e.g.*, 8:37-39 (“**A means for rotating the bench, such as hinges 95** (FIG. 19), may be attached underneath the bench.”) (emphasis added).

Accordingly, pursuant to Flex’s proposed construction, the structures corresponding to “means for translating” should include telescoping arms, a hinged portion of a jump board, hinges, and equivalents thereof.

Wunda’s proposed construction for structures corresponding to “means for translating” should be ignored at least for the reason that Wunda includes structures that lock and translate various ergonomic purchases (e.g., handles 37 and foot bar 29) **that are not ever arrested by a transverse end**. Recall that claim 15 recites “means for translating the ergonomic purchase . . . **so that the ergonomic purchase is arrested by the transverse end** in the deployed or stowed position.” (14:41-44) (emphasis added). Accordingly, any structures for locking and/or translating ergonomic purchases that are never arrested by a transverse end must be excluded from any construction for “means for translating.”

The following reflects a listing of structures that Wunda has improperly included within its construction for “means for translating” because these structures are only used to lock or translate ergonomic purchases *that are never arrested by a transverse end*:

- rotatably adjustable locking means, such as a spring-loaded mechanical pawl removably lockable within notches in a rotary latch (used to translate and/or lock foot bar 29, which is not arrested by a transverse end) (*see* 7:34-46);
- cylindrical tubing with inner and outer shafts and a clamp or push or pull locking mechanism (used to translate and/or lock handles 37, which are not arrested by a transverse end) (*see* 9:14-25).

The remaining structures identified in Wunda’s list (aside from telescoping arms, a hinged portion of a jump board, hinges, and equivalents thereof) should also be excluded from the adopted construction for “means for translating” because these structures are merely used to lock various ergonomic purchases in place. For example, Wunda has included “a notched pivoting post, a locking bar, a tension spring, and optional stops” within its construction for structures corresponding to “means for translating.” *See supra* at 43. However, all of these structures are disclosed as “means for releasably **locking** the bench in its deployed position” in the specification. (8:41-64) (emphasis added). Thus, Flex’s proposed construction for structures corresponding to “means for translating” should be adopted for the additional reason that it, properly, only includes means for translating ergonomic purchases and does not include structures designed solely to lock an ergonomic purchase in place.

3. Plaintiff’s Reply Position

Defendants do not offer any reason not to adopt Plaintiff’s proposed construction of the function for this means-plus-function limitation. Regarding the structures for performing that function, however, Defendants offer two criticisms. First, Defendants argue that Plaintiff’s proposed structure constitutes “means” Defendants allege are not arrested by a transverse end—namely, the foot bar and handles. However, a person of ordinary skill in the art would not

understand the mechanisms for translating ergonomic purchases to be confined to translating them based on whether or not they are arrested by the transverse end. (*See* Lenz Decl. ¶ 21.)

Defendants' second critique is that all other structure Plaintiff identified ("aside from telescoping arms, a hinged portion of a jump board, hinges, and equivalents thereof") are merely used to lock various ergonomic purchases in place." But the means-plus function limitation recites that "the ergonomic purchase is arrested," which a person of ordinary skill in the art would consider to include being "locked in position." (Lenz Decl. ¶ 20.) The sliding guide with a hinge, and optional handle, mechanical stop, [and] guide wings; the mounting brackets and additional transverse members ; the notched pivoting post, a locking bar, a tension spring, and optional stops; and the guide wings configured with runners with an optional stopping edge and a guide plate, guide rails, or longitudinal members are all disclosed as means for "moving the ergonomic purchase into deployed and stowed positions so the ergonomic purchase is arrested by the transverse end in the deployed or stowed position." (Lenz Decl. ¶ 21.)

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Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: s/ Martin R. Bader
Martin R. Bader

Paul W. Garrity
30 Rockefeller Plaza
New York, New York 10112
Tel. (212) 653-8700
Fax (212) 653-8701
pgarrity@sheppardmullin.com
Martin R. Bader (admitted *pro hac vice*)
William J. Blonigan (admitted *pro hac vice*)
12275 El Camino Real, Suite 200
San Diego, California 92130
Tel. (858) 720-8900
Fax (858) 509-3691
mbader@sheppardmullin.com
wblonigan@sheppardmullin.com

Attorneys for Plaintiff–Counterdefendant
WundaFormer, LLC
SHEPPARD, MULLIN, RICHTER & HAMPTON llp

TROUTMAN SANDERS LLP

By: s/ James M. Bollinger
James M. Bollinger

Joshua Berman
James Bollinger
875 Third Avenue New York, NY 10022
(212) 704-6000
(212) 704-5929 (Fax)
joshua.berman@troutmansanders.com
james.bollinger@troutmansanders.com
Attorneys for Defendants–Counterplaintiffs
Flex Studios, Inc., Flex Studios Union Square, LLC, Flex
Studios Noho, LLC

CERTIFICATE OF SERVICE

I hereby certify that the above document was served on all parties of record by email on September 24, 2015.

By: s/ William J. Blonigan
William J. Blonigan

312275 El Camino Real, Suite 200
San Diego, California 92130
Tel. (858) 720-8900
Fax (858) 509-3691
wblonigan@sheppardmullin.com