

2020-1047

In The
**United States Court Of Appeals
For The Federal Circuit**

HOIST FITNESS SYSTEMS, INC.,
Plaintiff - Appellant,

v.

TUFFSTUFF FITNESS INTERNATIONAL, INC.,
Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
ORIGINATING CASE NO.: 5:17-CV-01388-AB-KK

**COMBINED PETITION FOR
PANEL REHEARING AND REHEARING *EN BANC***

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-1047

Short Case Caption Hoist Fitness Systems, Inc. v. TuffStuff Fitness International, Inc.

Filing Party/Entity Appellant - Susan B. Meyer

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 11/02/2020

Signature: /s/ Susan B. Meyer

Name: Susan B. Meyer

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>Hoist Fitness Systems, Inc.</p>	<p>Hoist Fitness Systems, Inc.</p>	<p>None</p>

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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STATEMENT OF COUNSEL UNDER FEDERAL CIRCUIT RULE 35(B)

Based on my professional judgment, I believe the panel decision is contrary to this Court’s decision in *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed.Cir.2014); *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed.Cir.2012); and *Vitronics Corp. v. Conception, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996) which themselves conflict with other authorities creating discord in the Federal Circuit.

Based on my professional judgment, I further believe this appeal requires *en banc* consideration to secure uniformity in the Court’s decisions by answering the following precedent-setting questions of exceptional importance: When construing claim terms, are courts permitted to refer to the intrinsic record to narrow claim scope *only* when a patentee either makes a clear and unambiguous disavowal or acts as its own lexicographer (the “strict” approach); or are courts permitted to narrow claim scope by considering specification content more generally (the “holistic approach”)? If both, when is each to be used?

Gordon Rees Scully Mansukhani, LLP

/s/ Susan B. Meyer

Susan B. Meyer

Attorney of Record for Appellant

HOIST FITNESS SYSTEMS, INC.

INTRODUCTION

This case should be reheard to correct a clearly erroneous claim construction (the “Construction”) resulting from points of law and fact which the panel overlooked or misapprehended.¹ *See* Sec. I-II *infra*. The disputed terms should have been afforded their ordinary meaning instead of narrowed in a manner yielding incongruous results.

Because the narrowing Construction was affirmed without finding a clear disavowal of claim scope in the specification or prosecution history and without finding that the patentee acted as its own lexicographer, this case should also be reheard *en banc* to resolve the intra-Circuit split governing claim construction.

The *en banc* panel should address whether courts are permitted to narrow claim scope only when a patentee either makes a clear disavowal or acts as its own lexicographer; or whether courts are justified to narrow claim scope by considering the specification generally. That answer would provide uniformity in cases and addresses a question of exceptional importance for the Court’s jurisprudence, litigants, inventors, attorneys, investors, judges and the patent system *in toto*.

BACKGROUND

This is a case about weightlifting machines with moving user supports. Defendant TuffStuff insisted the district court construe the “pivotally

¹ A copy of this Court’s October 2, 2020 opinion (“Opinion”) is at Addendum 1.

mout[ed]/[ing]” terms four times, each time pushing the court to a narrower construction until it ultimately arrived at a construction that is both less clear and narrower than the intrinsic evidence supports or the law provides. If any is needed, the construction used by the district court in denying TuffStuff’s motion for summary judgment is most correct: “the plain language of the claims simply requires a pivotal relationship between the user support frame and the main fame.” Appx80. If a specifically shaped movement path is somehow required, then the only shape disclosed in all six patents is an arc, not a circle.

TuffStuff’s relentless campaign to narrow the patent claims finally succeeding the day before trial, when the district court incorporated “more synonymous with circular” into the Construction, and struck Hoist’s expert report addressing the previously-adopted “generally concentric” construction. Appx9440. Thereafter, Hoist had no choice but to stipulate to non-infringement and appeal. Appx26-28.

The appellate panel found that the “specifications **compel** a construction of ‘pivotally moun[ed]/[ing]’ that requires generally concentric motion, where concentric is ‘more synonymous with circular’ than ‘having a common center’” and affirmed the Construction. Addendum, Opinion (“Op.”) at 14 (emphasis added).

However, the disputed terms are unambiguous and do not require a narrowed and confusing construction. Juxtaposing the plain claim language with the affirmed Construction reveals these deficiencies:

<u>Original Language</u>	<u>The Construction</u>
“pivotally mount[ed]/[ing] relative to”	“mount[ed]/[ing] such that the overall movement relative to the main frame is generally concentric [where “concentric” is “more synonymous with circular” rather than meaning “having a common center”]; provided, however, that movement need not be perfectly circular”

LEGAL AND FACTUAL ERRORS OVERLOOKED OR MISAPPREHENDED BY THE PANEL

I. Absent Disclaimer or Lexicography, a Narrowed Construction is Error.

The Opinion erred in limiting the “pivotally mount[ed]/[ing]” claims to require the “overall movement” of the user support must be “generally concentric,” where “concentric” is “more synonymous with circular” and not “having a common center.” The Construction results in scope narrower than the plain and ordinary meaning as those terms would be understood by a person of ordinary skill in the art at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed.Cir.2005). Accordingly, the Opinion errs as a matter of law.

Narrowing claims may be appropriate where the specification “reveal[s] a special definition given to a claim term by the patentee that differs from the

meaning it would otherwise possess.” *Phillips*, at 1316. But in such instances, “a patentee must ‘clearly set forth a definition of the disputed claim term’ other than its plain and ordinary meaning.” *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed.Cir.2012); quoting *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed.Cir.2002). “It is not enough for a patentee to simply disclose a single embodiment or use a word in the same manner in all embodiments, the patentee must ‘clearly express an intent’ to redefine the term.” *Thorner*, at 1365; quoting *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1381 (Fed.Cir.2008).

Narrowing may also be appropriate if the specification reveals “an intentional disclaimer, or disavowal, of claim scope.” *Phillips*, at 1316. However, narrowing on this basis demands “expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope.” *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1306 (Fed.Cir.2011); quoting *Epistar Corp. v. Int'l Trade Comm'n*, 566 F.3d 1321, 1335 (Fed.Cir.2009).

Neither the district court nor the panel found that Hoist had acted as its own lexicographer in specially defining the “pivotally mount[ed]/[ing]” claim terms, or the subsidiary “concentric” term which was further construed. Similarly, there was no conclusion that Hoist made a clear disavowal of claim scope. Given these precepts, it was error to narrow the scope of the disputed terms. If the

“mount[ed]/[ing]” terms require a construction incorporating motion, the limiting characterization common to both single pivot and multi-pivot movement disclosed in the intrinsic evidence is “arcuate” motion.

A. The Panel Overlooked that Lateral Movement was Adjudicated as Within the Scope of the Claims and Unrefuted.

Hoist demonstrated and maintains that the four-bar linkage embodiments “always include a lateral component in addition to a pivotal component.” Op. at 14, *citing* Oral Arg. at 4:19–5:05. However, the panel found that it did “not read the specifications to encompass lateral movement in the manner Hoist argues” and that the specifications “compel” a reading of “circular” movement path. Op. at 14-15.

When, two weeks before trial, the district court adopted its “generally concentric” construction, it was premised on the subsidiary factual finding that four-bar linkages *do* include a lateral movement component. Appx52 (“Hoist has submitted sufficient evidence to show that the movement around that average point is not perfectly pivotal.”); Appx103 (“any assertion [] that the patent claims are limited to only cover single pivots or *limited types of four-bar linkages* is rejected as an impermissibly narrow and late-raised claim construction argument.”). The panel made no reference to this subsidiary factual finding and instead focused on minor instances in the specifications stating that that four-bar linkage mechanisms may “duplicate” or provide the “equivalent” pattern of a single pivot. Op. at 14-15.

Indeed, until the final construction made the day before trial, the district court's prior constructions had specifically included within the scope of the claims, all motion created by a four-bar linkage, without limitation. Appx52-53; Appx102. The court found that "a greater range of complex movement is contemplated by the patents and claims than movement practically indistinguishable from a circle." Appx102.

Absent finding "clear error," the panel may not disregard this subsidiary factual finding. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325–26 (2015). The panel overlooked this fact, which merits rehearing.

B. The Panel's Focus on Select Multi-Pivot Embodiments Providing Motion "Equivalent" to a Single Pivot, Paired with Incorrectly Finding "Concentric" Means "Circular," Overlooked Other Disclosures to the Contrary.

The panel incorrectly paired (a) disclosures in the specifications of the '949 and '209 patents stating that a four-bar pivot may, if desired, produce motion like a single pivot, with (b) a statement from the '251 Patent characterizing the movement of a prior art single-pivot exercise arm as "concentric" or "circular." Op. 15-16.

First, the '251 patent's sentence *alone* caused the panel to deny "concentric" its plain meaning (having a common center), and instead affirm the derivative

“circular” construction.² The sentence is only in the “Background” section and discusses the “exercise arms” of prior art. Appx274. This is neither a discussion of the invention at issue, nor the movement of the user support.

That the exercise arms of a prior art machine exhibit concentric and circular motion (an unremarkable conclusion) does not mean that *all* concentric motion must *necessarily* be circular. Both experts agreed that the plain meaning of “concentric” is “having a common center” (Appx8097; Appx9344, l.14) and nothing in this sentence mandates that a device exhibiting concentric motion (turning around a common center like a theoretical pivot axis) must also be circular. The panel misapprehended that the sentence does not deviate from the ordinary meaning of “concentric.” However, even if it did, an isolated, stray inconsistency is insufficient basis for a narrowed overall construction. *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732, 738 (Fed.Cir.2014) (When the “terms at issue have so clear an ordinary meaning that a skilled artisan would not be looking for clarification in the specification,” the ordinary meaning of a claim term cannot be overcome “by a few passing references that do not amount to a redefinition or disclaimer.”).

² It also had the devastating effect of excluding Hoist’s expert from referring to the ordinary meaning of “concentric” motion. This, despite the fact that the district court had – less than two weeks earlier—also precluded TuffStuff’s expert from focusing on movement “indistinguishable from a circle.” Appx105.

Second, the panel misapprehended statements that certain four-bar linkage embodiments may produce “movement equivalent to” a single pivot reflect mere capabilities or goals, but not the bounds of invention. Simultaneously, the panel overlooked significant disclosure regarding other motion paths. It is impermissible to use a goal or achievable result stated in a patent to narrow claim scope. *See Intel Corp. v. U.S. Int'l Trade Comm'n*, 946 F.2d 821, 836 (Fed.Cir.1991)(rejecting reading into the claims a stated goal of withstanding 300 hours of ultraviolet exposure); *citing Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 987 (Fed.Cir.1988); *also Lemelson v. United States*, 752 F.2d 1538, 1551–52 (Fed.Cir.1985).

The disclosure from the ‘209 patent states that the “*advantage* of the four-bar pivot system with the theoretical pivot is that it duplicates the movement pattern of a single point pivot that might normally be located in an area impossible to access....” Op. at 15 (emphasis added). The disclosure in the ‘949 patent states even more permissively that a “four bar linkage ... *can* be arranged to produce movement equivalent to a single pivot at an inaccessible location....” *Id.* (emphasis added). Nowhere in the six patents does the patentee say all of the devices *must* duplicate a fixed pivot or that *all* four-bar linkage embodiments do so.

The term “concentric” is found only *twice* across all six patents. Appx183, Col. 1:18; Appx245, Col. 1:54. Similarly, the patents only contain seven instances

of “circle” or “circular.” Appx183, Col. 15:12; Appx113, Col. 3:67; Appx245 Col. 1:54; 3:5; 3:10; 3:20; 3:27. These terms are entirely absent from half of the asserted patents, are *never* used to describe the user support motion path, and are not found in the claims. In contrast, some form of “arc” is found in *every* patent for a combined two *sixty-two* instances, inclusive of characterizing the user support motion path *in the claims*.

Importantly, the “mount[ed]/[ing]” element does not restrict motion, and motion is separately addressed in the claims. Claim 6 of the ‘209 patent states that the user support frame is “moving in a first direction between a start position and an end position” and provides that “the seat portion having a rear end and a forward end and rotating downwardly at its rear end and upwardly as its forward end between the start and end positions...” Appx180, Col. 15:32-42. Claim 21 states that its user support moves “in a predetermined *arcuate path* between a start position and an end position...” and “the seat portion having a rear end which is at a first elevation at the start position of an isolation exercise and is at a second, lower elevation at the end position...” Appx180-181, Col. 16:66- 17:14 (emphasis added). Claim 1 of the ‘938 patent *twice* refers to the “arcuate exercise movement path of the user support frame.” Appx228. Claim 22 of the ‘880 patent requires “rotation about a user support pivot axis.” Appx217. The ‘440 patent requires “rotation” of the user support. Appx241-242. The ‘251 patent also includes motion

constraints by claiming the “combined motion of the user, user support frame, and user engagement device...” Apx284-285. Where claims already have such language, a construction should not supplant them and make their existence superfluous, especially in the absence of disclaimer and lexicography. *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed.Cir.2004).

The greatest impact of the patents’ sparse discussion of circular motion is that the inventors knew how to claim such movement if they so intended, but chose not to. *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1333 (Fed.Cir.2010). Because those terms are not found in the claims, a construction which imports those limitations from the specifications into the claims should be reversed.

Lastly, the ‘880, ‘938 and ‘440 patents contain none of the specification language the panel found “compelled” the narrowed construction. To so restrict those patents is unjust. *See Saunders Grp., Inc. v. Comfortrac, Inc.*, 492 F.3d 1326, 1333 (Fed.Cir.2007) (A narrowed construction of one patent does not apply across entire family at least to “patent [which] omits that language from the asserted claims[.]”).

Here, the asserted patents include two parent patents, two CIPs, and two divisionals. This Court should not import the limitations of one patent across the entire family absent finding both that the patentee intended to narrow, and intended for that narrowing to propagate throughout. *See Advanced Cardiovascular Sys.,*

Inc. v. Medtronic, Inc., 265 F.3d 1294, 1305-06 (Fed.Cir.2001)(Declining import a limitation from parent patent’s prosecution history into child patent where “[t]he patentee’s whole point in filing the [child] was to secure broader claims.”).

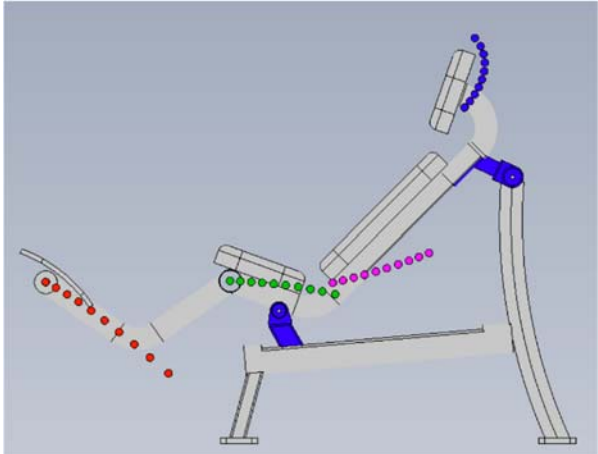
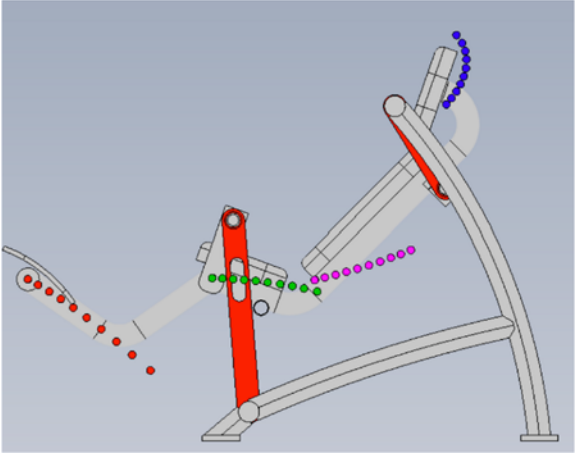
The language relied upon in the Opinion regarding embodiments that create movement equivalent to a single pivot and the alleged synonymous use of the terms “concentric” and “circular” is absent from the ‘880, ‘440, and ‘938 patents. Instead, the ‘880 patent discusses the impact of a pivotally mounted user support as “mimic[ing] the natural rearward *arc* [of a person’s body during a particular exercise].” Appx208, Col. 9:47-48; *see also* Appx209, Col.11:63-65; Appx210, Col. 13:58-59; Appx211, Col. 15:40-42; Appx212, Col. 17:8-10 (emphasis added). The ‘880 explains a four-bar linkage system can move a user support “vertically” *and* along “an arcuate exercise path.” Appx205, Col. 3:10-14 (emphasis added). Importantly, the ‘880 patent is incorporated by reference to each of the ‘938, 440, 251, and 949 patents. The panel overlooked that each of the patents (at least by incorporating the ‘880 patent) characterizes a four-bar linkage as including linear component causing movement in an non-circular arcuate path, and that at least the ‘880 and ‘938 patents *lack* language of a four-bar linkage “mimicking” a single pivot. Even if the construction was properly affirmed as to some patents, these facts merit rehearing to determine at least whether all the “pivotally

mout[ed]/[ing]” terms should be construed identically throughout all asserted patents.

II. The Panel Misapprehended that the Construction Creates Ambiguity and Yields Incongruous Results.

A user support “pivotally mount[ed]/[ing] relative to” says nothing about an overall movement pattern, much less one that is “more synonymous with circular.” Nor is the Construction coextensive with the claim terms’ plain meaning as understood by a PHOSITA, which is the “purpose” of claim construction. *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1358 (Fed.Cir.2017).

Instead, the Construction leads to potentially absurd results: if using a pivot to mount an object satisfies the “pivotally mounted” claim language, the Construction may nonetheless render such devices non-infringing if they do not additionally move in the fashion construed. For example, Hoist demonstrated through precise engineering that the movement pattern of each accused user support may be achieved using four-bar linkage mechanisms exactly like those found in numerous embodiments of the patents. Appx9338-9382.

Accused Devices (Sliding Pivot Assembly)	Duplicate Path (Four Bar Linkage)
	
Appx9358, Appx9359 (video)	Appx9358, Appx9359 (video)

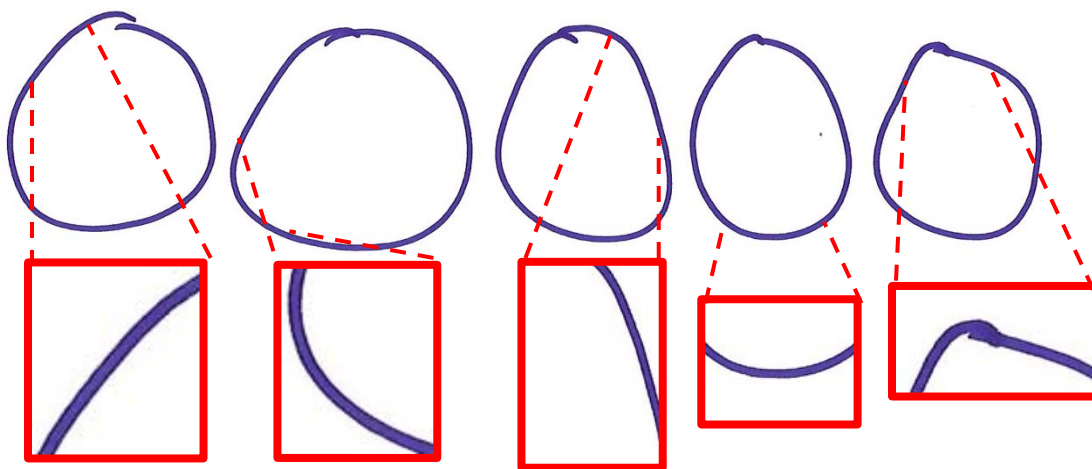
However, this evidence was excluded because according to the district court, it was not “more synonymous with circular.” Appx9440. This Court cautions against the incongruous result of excluding disclosed embodiments, which reflects the deficiencies of the Construction. *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1324 (Fed.Cir.2011).

In addition to erroneously narrowing scope, the Construction provides substantially *less* clarity. Although “a sound claim construction need not always purge every shred of ambiguity...” (*Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 806 (Fed.Cir.2007)) it should not deliver a result less clear than the original.

Fenner Investments, Ltd. v. Cellco P'ship, 778 F.3d 1320, 1323

(Fed.Cir.2015)(Explaining that construction “aims to state the boundaries” of “terse” patent claims with “clarity” despite the inherent limitation of language.).

Instead, the Construction leads to controversy of what is *circle-ish*. Hoist would contend that imperfect circles and each of their constituent arc segments—such as those drawn freehand below—fall within the claim since “generally concentric” is only “more synonymous with circular” but “need not be perfectly circular.” TuffStuff would presumably disagree, criticizing some arc segments as too flat, too acute, or asymmetrical.



Thus, the Construction leads to less clarity rather than more. Worse, the Construction improperly narrowed the scope to exclude at least some movement patterns produced by a four-bar linkage, a result the district court had repeatedly rejected. Remedying this incongruous result merits rehearing. *Aero Prods. Int'l, Inc. v. Intex Rec. Corp.*, 466 F.3d 1000, 1008 (Fed.Cir.2006)(Declining to entertain an “absurd” construction rendering a term illusory.).

ARGUMENT FOR REHEARING EN BANC

Although this Court has repeatedly recognized “the difficulty in drawing the fine line between construing the claims in light of the specification and improperly importing a limitation from the specification into the claims,” *Cont'l Circuits LLC v. Intel Corp.*, 915 F.3d 788, 797 (Fed. Cir.), *cert. denied*, 140 S. Ct. 648, 205 L. Ed. 2d 390 (2019); quoting *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed.Cir.2011) that fine line has grown to a chasm.

In an amicus brief last year, retired Judge Paul R. Michel highlighted Federal Circuit jurisprudence permitting panels to select from contradictory and mutually-exclusive authority in order to buttress their reasoning. *Intel Corp. v. Continental Circuits LLC*, 2019 WL 6726860 (U.S.), 2 (“[T]he Federal Circuit's claim-construction precedents have proven wholly inconsistent and its constructions unpredictable.”). Judge Michel reasoned that on one hand, certain authority supports the “heavy presumption” that claim terms maintain their plain and ordinary meaning and that the specification may “only” be permitted to narrow scope if lexicography or a clear disavowal of scope is found (the “strict approach”). *Id.* at *3 (emphasis in original). Alternatively, other authority provides a “holistic” approach, permitting the “specification to limit a claim term’s scope even when it does not evince clear lexicography or a disclaimer.” *Id.* at *4.

Accordingly, the “precedential divide has created confusion as to what the claim-construction principles even are, let alone how they apply.” *Id.* at 5.

Judge Michel is right and the inconsistency remains. In *Trs. of Columbia Univ. v. Symantec Corp.*, 811 F.3d 1359, 1363-64 (Fed.Cir.2016), this Court held that its “case law does not require explicit redefinition or disavowal[,]” and that its “*en banc* Phillips opinion rejected this very approach.” Yet, just the following year, *Cloud Farm Assocs. LP v. Volkswagen Grp. of Am., Inc.*, 674 F. App'x 1000, 1007 (Fed.Cir.2017) maintained that the Federal Circuit “depart[s] from the plain and ordinary meaning in only two instances. [] The first is when a patentee acts as his own lexicographer. The second is when the patentee disavows the full scope of the claim term in the specification or during prosecution.” *Citing Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed.Cir.2014); *see also Poly-Am., L.P. v. API Indus., Inc.*, 839 F.3d 1131, 1136 (Fed.Cir.2016).

Applied here, the panel’s decision is contrary to the “strict approach” mandated by *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed.Cir.2014); *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed.Cir.2012) and their progeny.

Neither the district court nor the panel reasoned that lexicography or disavowal mandated the narrowed Construction here. Undoubtedly, the Construction was generated using a “holistic” approach which ignored the “heavy

presumption” to stay true to the plain meaning of the original claim language. *See Nystrom v. TREX Co.*, 424 F.3d 1136, 1143 (Fed.Cir.2005). Judge Michel’s recitation of *Nystrom* “effectively appl[ying] an opposite test” is analogous. There, a broad construction according to a term’s ordinary meaning was rejected unless intrinsic support demanded it. 2019 WL 6726860 (U.S.), 14-15. Similarly here, the panel opined that because the ‘949 patent specification states that “a four-bar pivot linkage... ‘*can*’³ be arranged to produce movement equivalent to a single pivot[,]’ it could not support a broader construction.” Op. at 15.

The “holistic” approach to narrow claim terms also conflicts with other bedrock patent principles authorizing patentees to claim their inventions by *inclusion* rather than exclusion. *See Stiftung v. Renishaw PLC*, 945 F.2d 1173, 1178 (Fed.Cir.1991)(A claim “which uses the term ‘comprising,’ is an ‘open’ claim which will read on devices which add additional elements[.]”). It also conflicts with the requirement to “avoid importing limitations from the specification into the claims.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed.Cir.2005). The Construction rendered in this case is impermissible under the Federal Circuit’s well-established body of law that imposes a “heavy presumption”

³ Like other “open ended” patent language, “can” reflects permissive, rather than restrictive, capability. The American Heritage dictionary defines “can” as “used to indicate physical or mental ability” and Hoist’s use of “can” does not diverge from its ordinary meaning. *See* <https://ahdictionary.com/word/search.html?q=can> .

against departure from the ordinary meaning of the disputed claim term. This merits rehearing *en banc*.

CONCLUSION

The Court has an opportunity to secure uniformity in the canons of claim construction by resolving an intra-Circuit split and grant Hoist relief from the unjustified narrowing of its claims; amounting to an erosion of property rights. 35 U.S.C.A. § 261 (“... patents shall have the attributes of personal property.”). Neither justice in this dispute nor consistency in the patent system is served by permitting the contradictory and multi-layered claim construction to stand, which is contrary to this Court’s precedent.

Panel rehearing or rehearing *en banc* should be granted.

Dated: November 2, 2020

Gordon Rees Scully Mansukhani, LLP

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ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

HOIST FITNESS SYSTEMS, INC.,
Plaintiff-Appellant

v.

TUFFSTUFF FITNESS INTERNATIONAL, INC.,
Defendant-Appellee

2020-1047

Appeal from the United States District Court for the
Central District of California in No. 5:17-cv-01388-AB-KK,
Judge Andre Birotte, Jr.

Decided: October 2, 2020

LARA SUE GARNER, Gordon & Rees, San Diego, CA, argued for plaintiff-appellant. Also represented by SEAN DONOVAN FLAHERTY, MATTHEW G. KLEINER, SUSAN B. MEYER.

RUDOLPH A. TELSCHER, JR., Husch Blackwell LLP, St. Louis, MO, argued for defendant-appellee. Also represented by KARA RENEE FUSSNER, DAISY MANNING.

Before LOURIE, SCHALL, and DYK, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Plaintiff-Appellant Hoist Fitness Systems, Inc. (“Hoist”) appeals from the September 10, 2019 final judgment of noninfringement entered in the United States District Court for the Central District of California in Hoist’s patent infringement suit against Defendant-Appellee TuffStuff Fitness International, Inc. (“TuffStuff”). *Hoist Fitness Sys., Inc., v. TuffStuff Fitness Int’l, Inc.*, Final Judgment, No. 5:17-cv-01388-AB-KK, Dkt. No. 300 (C.D. Cal. Sept. 10, 2019), J.A. 24–25 (“Final Judgment”). Hoist sued TuffStuff for infringement of the following six patents: U.S. Patent No. 7,594,880 (“the 880 patent”); U.S. Patent No. 7,563,209 (“the ’209 patent”); U.S. Patent No. 7,549,949 (“the ’949 patent”); U.S. Patent No. 7,654,938 (“the ’938 patent”); U.S. Patent No. 7,976,440 (“the ’440 patent”); and U.S. Patent No. 7,993,251 (“the ’251 patent”). Judgment was entered pursuant to the parties’ stipulation following the district court’s final pronouncement on claim construction at a pretrial status conference held on September 9, 2019. Joint Stipulation for Entry of Judgment, No. 5:17-cv-01388-AB-KK, Dkt. No. 298 (C.D. Cal. Sept. 10, 2019), J.A. 26–29 (“Joint Stipulation”). Because we discern no error in the district court’s claim construction, we affirm.

BACKGROUND

I.

Hoist’s patents are directed to “exercise machine[s] with a pivoting user support.” ’938 patent col. 1 ll. 15–17. The patents state that the “user support frame moves in conjunction with the exercise arm” so the user experiences a “more natural feeling exercise movement that more closely replicates the movement found in the corresponding free weight exercise.” *Id.* at col. 4 ll. 11–16. The patents describe and illustrate two general kinds of mechanisms that may be used to pivotally mount a user support frame

onto an exercise machine's main frame to achieve this objective: (1) a single pivot;¹ or (2) a "four-bar linkage," which is a multiple part pivot assembly having multiple pivots.² Such four-bar linkage mechanisms have a "theoretical" pivot axis that is a point reflecting a composite center of rotation for the user support frame. *See* '938 patent col. 6 ll. 6–17; '209 patent col. 6 ll. 42–50. As explained in the '938 patent:

The multiple part pivot assembly defines a theoretical pivot axis of the user support pivotal motion. As illustrated in FIGS. 3 and 4, the theoretical pivot axis 84 is located below the user support, and a theoretical gravitational center line 74 of the pivotal motion extending through pivot axis 84 also extends through the user support frame 15. The location of the theoretical pivot axis 84 can be determined from the start and end positions of the two pivot links 60 and 62, and is the point of intersection of the centerline A of the pivotal movement of the forward link 62 and the centerline B of the pivotal movement of the rear link 60, as indicated in FIGS. 3 and 4.

'938 patent col. 6 ll. 6–17. For purposes of addressing the claim construction issues presented in this appeal, we consider claim 22 of the '880 patent and claim 1 of the '938 patent representative of the relevant claims of the six Hoist patents at issue. Claim 22 of the '880 patent recites:

¹ *See, e.g.*, '880 patent col. 10 l. 51–col. 22 l. 63 & Figs. 5–32; '949 patent col. 3 l. 13–col. 7 l. 11 & Figs. 1–6.

² *See, e.g.*, '938 patent col. 5 l. 63–col. 6 l. 17 & Figs. 1–4; '949 patent col. 7 l. 12–col. 8 l. 26 & Figs. 7A–8.

22. An exercise machine, comprising:

a main frame;

a user support frame pivotally mounted relative to the main frame for rotation about a user support pivot axis, the user support pivot axis defining a vertical, gravitational center line, the user support frame comprising one moving part of the machine;

the user support frame having at least a primary support and a secondary support for supporting spaced positions on a user's body throughout an exercise movement, the primary support comprising a seat pad and the secondary support comprises a leg support which travels in the same direction as the primary support throughout an exercise movement;

a user engagement device movably mounted on one of the frames for engagement by the user in performing exercises, the user engagement device comprising a second moving part of the machine;

a connecting link linking movement of the user engagement device to movement of the user support frame, the connecting link comprising a third moving part of the machine; and

a load for resisting movement of at least one of the moving parts of the machine; whereby movement of the user engagement device in an exercise movement simultaneously moves the user support frame between a start position and an end position, the user support pivot axis being positioned such that portions of the combined weight of the user and user support frame are distributed on each side of the gravitational center line of the user support pivot axis in both the start and end position and only a portion of the combined weight passes

through the gravitational center line during the exercise movement.

'880 patent col. 28 l. 44–col. 29 l. 14. Claim 1 of the '938 patent recites:

1. An exercise machine, comprising:

a stationary main frame having an upper end, a lower end, a first end, and a second end;

a user support frame which is adapted to support a user in an exercise ready position on the main frame;

a multiple part pivot assembly pivotally mounting the user support frame relative to the main frame and having multiple pivots which together control pivotal movement of the user support frame in an arcuate exercise movement path about a central pivot axis;

the user support frame having at least a primary support and a secondary support which support spaced positions on a user's body throughout an exercise movement, the secondary support being secured at a fixed and unchanging angular orientation relative to the primary support at least throughout an exercise movement, the primary support supporting the majority of a user's weight in the start position of the support frame;

a user engagement device movably mounted relative to the frames for engagement by the user in performing exercises;

a connecting linkage which translates movement of the user engagement device during an exercise to movement of the user support frame;

a load for resisting movement of at least one of the user support, user engagement device, and connecting linkage; and

the central pivot axis of the pivotal movement of the user support frame being positioned such that a gravitational center line which extends vertically through the central pivot axis also extends through the user support frame during at least part of the arcuate exercise movement path of the user support frame and only a portion of the combined weight of the user and user support frame passes through the gravitational center line during an exercise.

'938 patent col. 9 l. 56–col. 10 l. 25.

II.

On April 3, 2017, Hoist sued TuffStuff in the Southern District of California, alleging infringement of claim 22 of the '880 patent; claims 6 and 21 of the '209 patent; claims 2, 8, and 23 of the '949 patent; claims 1, 12, and 13 of the '938 patent; claims 5, 12, 13, and 20 of the '440 patent; and claims 54 and 71 of the '251 patent. Compl., No. 3:17-cv-00670, Dkt. No. 1 (S.D. Cal. Apr. 3, 2017) at 6–11, J.A. 330–35. The case was subsequently transferred to the Central District of California.

The exercise devices which Hoist accused of infringement are part of TuffStuff's "Bio-Arc" line of products. The TuffStuff devices have a user support that is mounted on a pivot that is, in turn, mounted on a sliding carriage that translates back and forth along a linear shaft during the exercise movement. Def.'s Not. of Mot. and Mot. for Summ. J, Ex. 17, Decl. of D. Penado, No. 5:17-cv-01388-AB-KK, Dkt. No. 144-17 (C. D. Cal. Dec. 26, 2018) at 2–16, J.A. 3773–87. The accused TuffStuff devices have structure that both pivots and slides, resulting in a "combined elliptical movement." Pl.'s Notice of Mot. and Mot. for Prelim.

Inj. to Enjoin Infringement of the '880 Patent, No. 5:17-cv-01388-AB-KK, Dkt. No. 33 (C.D. Cal. Sept. 5, 2017) at 16–17, J.A. 481–82.

III.

In the course of the proceedings below, the district court construed a number of claim terms. The joint stipulation for entry of judgment of noninfringement, however, was based upon the court's construction of just three terms: "pivotally mounted relative to the main frame," "pivotally mounting the user support frame relative to the main frame," and "pivotally mounted on the main frame." Joint Stipulation at 2, J.A. 27. Accordingly, it is to these related terms that we direct our attention. The term "pivotally mounted relative to the main frame" appears in independent claim 22 of the '880 patent in the limitation "a user support frame pivotally mounted relative to the main frame for rotation about a user support pivot axis, the user support pivot axis defining a vertical, gravitational center line." '880 patent col. 28 ll. 47–50.³ The term "pivotally mounting the user support frame relative to the main frame" appears in independent claim 1 and, through their dependency on claim 1, claims 12 and 13 of the '938 patent, in the limitation "a multiple part pivot assembly pivotally mounting the user support frame relative to the main frame and having multiple pivots which together control pivotal movement of the user support frame in an arcuate exercise movement path about a central pivot axis." '938 patent col. 9 ll. 61–

³ The term "pivotally mounted relative to the main frame" also appears in independent claims 6 and 21 of the '209 patent, independent claims 2, 8, and 23 of the '949 patent, and independent claims 5 and 20 of the '440 patent. See '209 patent col. 15 ll. 31, 54–57 & col. 16 l. 66; '949 patent col. 12 ll. 14 & 63, col. 13 ll. 29 & 42–43, col. 15 l. 19; '440 patent col. 11 ll. 47–48 & col. 14 ll. 51–52.

65 & col. 11 ll. 7–12.⁴ The term “pivotally mounted on the main frame” appears in independent claims 54 and 71 of the ’251 patent in the limitation “a user support frame pivotally mounted on the main frame which supports a user in an exercise position.” ’251 patent col. 21 ll. 28–29, col. 22 ll. 62–63. Where appropriate, we refer to these as the “pivotally mounted/mounting terms.”

In a claim construction order issued on October 24, 2018, the district court determined that no construction was necessary for the pivotally mounted/mounting terms. Claim Construction Order, No. 5:17-cv-01388-AB-KK, Dkt. No. 111 (C.D. Cal. Oct. 24, 2018) at 15, J.A. 44. The court observed, though, that construing “pivot” and “rotation” to include “more than generally ‘concentric’ movement would effectively destroy the meaning of those terms as they were understood by the patent applicant.” *Id.* at 14, J.A. 43.

On August 27, 2019, two weeks before the date scheduled for trial, the district court addressed claim construction again, when it ruled on the parties’ respective motions *in limine*. See Order Regarding Parties’ Mots. *in Lim.* and Construing Additional Disputed Claim Terms, No. 5:17-cv-01388-AB-KK, Dkt. No. 279 (C.D. Cal. Aug. 27, 2019) (“August 27, 2019 Order”), J.A. 95. The court (1) construed “pivotally mount[ed]/[ing] relative to the main frame” as “mount[ed]/[ing] such that the overall movement relative to the main frame is generally concentric; provided, however, that movement need not be perfectly circular;” (2) construed “pivotally mounted on the main frame” as “mounted, either directly or indirectly, to the main frame such that the overall movement relative to the main frame is generally concentric; provided, however, that movement

⁴ The term “pivotally mounting the user support frame relative to the main frame” also appears in independent claims 12 and 13 of the ’440 patent. ’440 patent col. 13, ll. 13–14 & 54–55.

need not be perfectly circular;” and (3) construed “arcuate exercise movement path about a central pivot” as an “overall movement path that is generally concentric about a single central pivot point; provided, however, that movement need not be perfectly circular around the central pivot point.” *Id.* at 7, J.A. 101. In its order, the court stated that it would permit Hoist’s expert, Steven M. Lenz, to serve a supplemental report responding to its claim construction. *Id.* at 8, J.A. 102. Hoist served its expert’s supplemental report on September 6, 2019. J.A. 9340.

On September 9, 2019, the day before trial was scheduled to begin, the court held a status conference. At the conference, the court provided further guidance regarding construction of the pivotally mounted/mounting terms, in light of its view that “concentric is more synonymous with circular” as opposed to “hav[ing] a common center or to be aligned.” J.A. 9439–40. The court stated:

All right. I have considered the argument of both counsel in the case. Look, the Court—I guess I take the view that the supplemental expert report has just interpreted the term “concentric” too broadly. The plaintiffs—I guess, if I understand Lenz’s report correctly, concentric means to have a common center or to be aligned, just looking at the report again. Defense believes concentric is more synonymous with circular. Quite frankly, the Court agrees with the defense on this one based on the Court’s orders and the patents themselves.

When you look at the claim language, it requires pivotal movement, and the claim term we have been construing here is “pivotally mounted.” I think the ordinary meaning of a pivot is a fixed point with movement around that point. And so, by construing the term to include generally concentric movement, we were trying to clarify that the patents that described this four-bar linkage

assembly embodiment would not require a perfectly circular motion. But I think the plaintiff's interpretation as concentric is something much broader than circular goes beyond these examples and I think beyond the meaning of pivot.

Id.

The effect of this pronouncement was to leave the parties with a claim construction that combined what the court had said in its claim construction order of October 24, 2018, and at the September 9 status conference. Accordingly, the pivotally mounted/mounting terms were effectively construed to mean:

mount[ed]/[ing] such that the overall movement relative to the main frame is generally concentric ["concentric" is "more synonymous with circular" rather than meaning "having a common center"]; provided, however, that movement need not be perfectly circular.⁵

In view of its claim construction, the district court struck the supplemental report of Hoist's expert.⁶

⁵ Similarly, the term "pivotally mounted on the main frame" was effectively construed to mean:

mounted, either directly or indirectly, to the main frame such that the overall movement relative to the main frame is generally concentric ["concentric" is "more synonymous with circular" rather than meaning "having a common center"]; provided, however, that movement need not be perfectly circular.

⁶ In his supplemental report, Hoist's expert Mr. Lenz stated that a person of ordinary skill in the art "would understand "concentric" as "having a common center,"

On September 10, based upon the claim construction advanced by the district court at the September 9 status conference, the parties stipulated to entry of judgment of noninfringement in favor of TuffStuff. That same day, the court entered final judgment in accordance with the stipulation. Thereafter, Hoist timely appealed. We have jurisdiction pursuant to 28 U.S.C § 1295(a)(1).

DISCUSSION

I.

Claim construction is ultimately an issue of law that we review *de novo*. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325–26 (2015). “[W]hen the district court reviews only evidence intrinsic to the patent (the patent claims and specifications, along with the patent’s prosecution history), the judge’s determination will amount solely to a determination of law, and the Court of Appeals will review that construction *de novo*.” *Id.* at 331. We review

“regardless of the object or shape to which the common center regards.” J.A. 9344. Mr. Lenz stated:

In other words, two bodies of dissimilar or non-symmetrical shapes or sizes may nonetheless be aligned in a concentric manner.

For example, a square and a triangle are concentrically aligned if they have a common center. Similarly, the overall rotational motion of a body is “concentric” arounds its center of rotation, or pole of planar displacement, despite the fact that not all points on said body need rotate precisely around the same center of rotation. Rather, when considering the rotation of the body as a whole, the center of rotation [is] an average point around which the body moves.

J.A. 9344.

the district court's underlying factual findings for clear error. *Id.* at 325–33.

Claim terms are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (*en banc*). The person of ordinary skill in the art is “deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Id.* at 1313.

II.

Hoist argues that the district court erred when it construed the pivotally mounted/mounting terms to require “overall movement” that is “generally concentric” and in concluding that “concentric” is “more synonymous with circular” rather than meaning “having a common center.” Appellant’s Br. 38.⁷ In so doing, Hoist contends, the district

⁷ We have considered and find no merit to TuffStuff’s argument that Hoist withdrew from the litigation its allegations of infringement with respect to certain patents and claims prior to, and unrelated to, the stipulation. Hoist did not officially “withdraw” its patents or claims, but merely selected “representative” claims to present to the jury upon the court’s request that it do so. J.A. 9273–74. Indeed, all of the patents and claims at issue were included in the parties’ joint proposed pre-trial conference order. Proposed Final Pre-Trial Conf. Order, No. 5:17-cv-01388-AB-KK, Dkt. No. 239, at 5 (C.D. Cal. Sept. 2, 2019). Further, the parties’ stipulation for entry of final judgment specifically identified each of the six Hoist patents at issue as having been asserted. Joint Stipulation at 2, J.A. 27. Hoist thus did not cease to litigate the patents or claims at issue, and they are all properly before us on appeal. *See Alcon Rsch. Ltd. v. Barr Labs., Inc.*, 745 F.3d 1180, 1193 (Fed. Cir. 2014)

court “improperly imported additional movement path restrictions” into its constructions of the pivotally mounted/mounting terms. *Id.* at 42. Hoist asserts that, while claims that recite a pivot axis do require “generally concentric” movement about the pivot axis,⁸ claims directed to pivotally mounted/mounting have no requirement of concentricity. *Id.* at 44–45. Finally, Hoist argues that the court’s claim construction improperly limits movement of the user support to the movement disclosed in the case of the single pivot embodiment. Hoist states that “[i]f an embodiment’s user support were mounted using one physical pivot *and if* that single pivot were fixed in place, the movement of the user support would be only circular.” *Id.* at 46. Hoist continues, however, that “[t]he Asserted Claims are not so limited.” *Id.* Hoist concludes its argument by summarizing that:

The “pivotally mounted[/ing]” terms have no special meaning beyond their plain meaning. The specification and claim language make[] clear that the claims merely require a pivotal mounting relative to or on the main frame, which is the plain meaning. The term makes no further reference to, and places no further limitation on, the shape or nature of the resulting movement path.

Id. at 48.

TuffStuff responds that the district court correctly construed the pivotally mounted/mounting terms. It states that the district court properly construed “pivotally mounted/mounting relative to the main frame” as

(citing *SanDisk Corp. v. Kingston Tech. Co.*, 695 F.3d 1348, 1353 (Fed. Cir. 2012)).

⁸ *E.g.*, claim 22 of the ’880 patent, claim 6 of the ’209 patent, claims 2, 8, and 23 of the ’949 patent, and claim 1 and its dependent claims 12 and 13 of the ’938 patent.

requiring “pivotal motion” (i.e., generally concentric/circular motion) in relationship to the main frame. Appellee’s Br. 47. TuffStuff argues that the patent specifications, the “single best guide” to claim construction under *Phillips*, 415 F.3d at 1315, “overwhelmingly” support the proposition that a mounting structure that produces “pivotal” motion is one that produces a circular motion around a fixed point. Appellee’s Br. 47, 50–51. In advancing that argument, TuffStuff points to several places in the ’209 and ’949 patent specifications where it is stated that the four-bar pivot linkage “duplicates” the movement of a single pivot. *Id.* at 8–10 & 48–50.

III.

We find no error in the district court’s claim construction. As noted above, claim terms are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art, who is “deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Phillips*, 415 F.3d at 1313. Here, the specifications compel a construction of “pivotally moun[ed]/[ing]” that requires generally concentric motion, where concentric is “more synonymous with circular” than “having a common center.”

Hoist does not dispute that a single, fixed, physical pivot accomplishes “generally circular” movement. *See* Appellant’s Br. 46. Indeed, Hoist’s expert, Mr. Lenz, confirmed that a single pivot mounted on a stationary base would move in “essentially” a “circular motion” around its pivot axis. J.A. 2618. Instead, however, Hoist points to the four-bar linkage as an embodiment that it claims illustrates movement that is *not* generally circular and instead “always includes a lateral component in addition to a pivotal component.” Oral Arg. at 4:19–5:05 (July 6, 2020), available at <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2020-1047.mp3>.

We do not read the specifications to encompass lateral movement in the manner Hoist argues. Rather, the specifications for the Hoist patents repeatedly state that the four-bar linkage system “duplicates” the movement pattern of a single point pivot, while providing additional location options for the theoretical pivot axis of the four-bar linkage that are not possible with a single point pivot. Specifically, the specification of the ’209 patent states:

The advantage of the four-bar pivot system with the theoretical pivot is that it *duplicates the movement pattern of a single point pivot* that might normally be located in an area impossible to access due to either structural or user interference, so that a desired movement pattern may be achieved while keeping the moving parts of the pivot mount beneath the user support.

’209 patent col. 6 ll. 42–48 (emphasis added); *see also id.* at col. 7 ll. 7–11 (“[T]he four-bar pivoting linkage system . . . *duplicates the movement pattern of a single point pivot* that would otherwise be located underground, beneath the machine.”) (emphasis added); col. 13 ll. 56–62 (explaining that a four-bar pivoting linkage system “can allow a desired pivoting movement to be achieved when a single pivot point for producing the *same motion* may be located in an area impossible to access due to either structural or user interference.”) (emphasis added).

The ’949 patent similarly states that a four-bar linkage recreates the movement of a single pivot when a pivot cannot be placed at the desirable location:

A four bar pivot linkage beneath the user support can be arranged to produce *movement equivalent to a single pivot* at an inaccessible location

’949 patent col. 2 ll. 10–15 (emphasis added).

The theoretical pivot . . . is the position the user support would pivot about *if a single pivot were used in order to obtain the same movement pattern.*

Id. at col. 8 ll. 6–9 (emphasis added). The '251 patent incorporates by reference the patent application that ultimately issued as the '949 patent and, in addition, uses the terms “concentric” and “circular” synonymously. '251 patent col. 1 ll. 53–55 (“Since the exercise arms had only one pivot, they could only move in a concentric or circular pattern.”).

Further, like the '209 patent and the '949 patent, the '880 patent, the '938 patent, and the '440 patent each describe a theoretical pivot axis for the four-bar linkage that is stationary, thereby resulting in generally concentric motion. *E.g.*, '880 patent col 9 l. 62–col. 10 l.1 & Figs. 1–4, '938 patent col. 6 ll. 6–17, col. 7 ll. 55–57 & Figs. 1–4, '440 patent col. 9 ll. 52–55.

We note that, to the extent the movement of a four-bar linkage is not identical to a single pivot, the district court addressed this through its construction that the movement need be “generally” concentric but need not be “perfectly circular.” *See* J.A. 9439–40; August 27, 2019 Order at 7, J.A. 101. At the same time, though, the Hoist specifications do not support a construction that goes beyond generally concentric, or generally circular, motion.

Based upon the foregoing, we hold that the district court did not err in its claim construction.⁹

⁹ Additionally, we find no error in the district court’s decision to strike Mr. Lenz’s supplemental report. The court struck the supplemental report in part because it determined that Mr. Lenz interpreted the term “concentric” too broadly. As we have affirmed the district court’s claim

CONCLUSION

Because we agree with the district court's construction of the pivotally mounted/mounting claim terms, we affirm the judgment of noninfringement of the Hoist patents in favor of TuffStuff.

AFFIRMED

construction, for the reasons discussed above, we also agree that the report was properly stricken.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on November 2, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

Dated: November 2, 2020

Gordon Rees Scully Mansukhani, LLP

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1. This brief complies with the type-volume limitation of Federal Circuit Rule 35(d) and Fed. R. App. P. 35(b)(2) because:

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Dated: November 2, 2020

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