UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of CERTAIN CASES FOR PORTABLE ELECTRONIC DEVICES	Inv. No. 337-TA-861 Inv. No. 337-TA-867 (Consolidated)

ORDER NO. 13: CONSTRUING TERMS OF THE ASSERTED PATENT

(July 8, 2013)

The claim terms construed in this Order are done so for the purposes of this Investigation. Hereafter, discovery and briefing in this Investigation shall be governed by the construction of the claim terms in this Order. Those terms not in dispute need not be construed. *See Vanderlande Indus. Nederland BV v. Int'l Trade Comm'n*, 366 F.3d 1311, 1323 (Fed. Cir. 2004) (noting that the administrative law judge need only construe disputed claim terms).

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Table of Abbreviations

Speck_IB	Speck's Initial Markman Brief
Speck_RB	Speck's Reply Markman Brief
FBG_IB	Fellowes' and Body Glove's Initial Markman Brief
FBG_RB	Fellowes' and Body Glove's Reply Markman Brief
Superior_IB	Superior's Initial Markman Brief
Superior_RB	Superior's Reply Markman Brief
Staff_IB	Staff's Initial Markman Brief
Staff_RB	Staff's Reply Markman Brief
Tr.	Markman Transcript

I. Introduction

By publication of notice in the Federal Register, Investigation No. 337-TA-867 was instituted by the Commission on January 31, 2013, to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain cases for portable electronic devices by reason of infringement of one or more of claims 1-16 of U.S. Patent No. 8,204,561 ("the '561 Patent"), and whether an industry in the United States exists as required by subsection (a)(2) of section 337. 78 Fed. Reg. 6834 (Jan. 31, 2013). The Commission consolidated Investigation No. 337-TA-867 with Investigation No. 337-TA-861. (*Id.*)

The complainant is Speculative Product Design, LLC ("Speck"). The respondents are Anbess Electronices Co. Ltd.;[1] BodyGlove International, LLC ("BodyGlove"); Fellowes, Inc. ("Fellowes"); ROCON Digital Technology Corp.;[2] SW-Box.com; Trait Technology (Shenzhen) Co., Ltd.;[3] Hongkong Wexun Ltd.;[4] En Jinn Industrial Co. Ltd.; Shengda Huanqiu Shijie; Global Digital Star Industry, Ltd.; JWIN Electronics Corp., dba iLuv;[5] Project Horizon, Inc., dba InMotion Entertainment;[6] Superior Communications, Inc., dba PureGear ("Superior"); and Jie

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[1] Terminated from the Investigation pursuant to 19 C.F.R. § 210.16 for failure to respond to the Complaint and Notice of Investigation. (Comm'n Notice (May 1, 2013).)
[2] Terminated from the Investigation pursuant to 19 C.F.R. § 210.16 for failure to respond to the Complaint and Notice of Investigation. (Comm'n Notice (May 1, 2013).)
[3] Terminated from the Investigation pursuant to 19 C.F.R. § 210.16 for failure to respond to the Complaint and Notice of Investigation. (Comm'n Notice (May 1, 2013).)
[4] Terminated from the Investigation pursuant to 19 C.F.R. § 210.16 for failure to respond to the Complaint and Notice of Investigation. (Comm'n Notice (May 1, 2013).)
[5] Terminated from the Investigation based upon a settlement agreement. (Comm'n Notice (May 28, 2013).)
[6] Terminated from the Investigation based upon the entry of a consent order. (Comm'n Notice (Mar, 22, 2013).)

Sheng Technology.[7] The Commission Investigative Staff ("Staff") is participating in this Investigation.

On May 13, 2013, a Markman hearing was held in this Investigation. Complainant Speck; respondents Fellowes, BodyGlove,[8] and Superior (collectively, "Respondents"); and the Commission Investigative Staff ("Staff") participated in the hearing and submitted briefing on the claim terms discussed below.

II. Relevant Law

"An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc) (internal citations omitted), *aff'd*, 517 U.S. 370 (1996). Claim construction is a "matter of law exclusively for the court." *Id.* at 970-71. "The construction of claims is simply a way of elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims." *Embrex, Inc. v. Serv. Eng'g Corp.*, 216 F.3d 1343, 1347 (Fed. Cir. 2000).

Claim construction focuses on the intrinsic evidence, which consists of the claims themselves, the specification, and the prosecution history. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc); see also *Markman*, 52 F.3d at 979. As the Federal Circuit in Phillips explained, courts must analyze each of these components to determine the "ordinary and customary meaning of a claim term" as understood by a person of ordinary skill in art at the time of the invention. 415 F.3d at 1313. "Such intrinsic evidence is the most significant source

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[7] Terminated from Investigation per Speck's motion for leave to amend the complaint and notice of investigation to remove Jie Sheng Technology from the investigation. (Comm'n Notice (May 24, 2013).)

[8] Fellowes and Body Glove submitted joint Markman briefing.

of the legally operative meaning of disputed claim language." *Bell Atl. Network Servs.*, Inc. v. *Covad Commc'ns Grp., Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001).

"It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Phillips*, 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). "Quite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claims terms." *Id.* at 1314; see also *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001) ("In construing claims, the analytical focus must begin and remain centered on the language of the claims themselves, for it is that language that the patentee chose to use to 'particularly point [ ] out and distinctly claim [ ] the subject matter which the patentee regards as his invention."). The context in which a term is used in an asserted claim can be ""highly instructive." *Phillips*, 415 F.3d at 1314. Additionally, other claims in the same patent, asserted or unasserted, may also provide guidance as to the meaning of a claim term. Id.

The specification "is always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term." *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). "[T]he specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Id.* at 1316. "In other cases, the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor." *Id.* As a general rule, however, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Id.* at 1323. In the end, "[t]he construction that stays true to the claim language and most naturally

aligns with the patent's description of the invention will be ... the correct construction." *Id.* at 1316 (quoting *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998)).

In addition to the claims and the specification, the prosecution history should be examined, if in evidence. *Id.* at 1317; see also *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004). The prosecution history can "often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Phillips*, 415 F.3d at 1317; see also *Chimie v. PPG Indus. Inc.*, 402 F.3d 1371, 1384 (Fed. Cir. 2005) ("The purpose of consulting the prosecution history in construing a claim is to exclude any interpretation that was disclaimed during prosecution.").

When the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence (*i.e.*, all evidence external to the patent and the prosecution history, including dictionaries, inventor testimony, expert testimony, and learned treatises) may be considered. *Phillips*, 415 F.3d at 1317. Extrinsic evidence is generally viewed as less reliable than the patent itself and its prosecution history in determining how to define claim terms. *Id.* at 1317. "The court may receive extrinsic evidence to educate itself about the invention and the relevant technology, but the court may not use extrinsic evidence to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence." *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 977 (Fed. Cir. 1999).

If, after a review of the intrinsic and extrinsic evidence, a claim term remains ambiguous, the claim should be construed so as to maintain its validity. *Phillips*, 415 F.3d at 1327. Claims, however, cannot be judicially rewritten in order to fulfill the axiom of preserving their validity.

See *Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999). Thus, "if the only claim construction that is consistent with the claim's language and the written description renders the claim invalid, then the axiom does not apply and the claim is simply invalid." *Id.*

III. U.S. Patent No. 8,204,561

A. Overview

U.S. Patent No. 8,204,561 ("the '561 Patent"), titled "One Piece Co-Formed Exterior Hard Shell Case with an Elastomeric Liner for Mobile Electronic Devices" was filed on October 26, 2011, and issued on June 19, 2012. The named inventors of the '561 Patent are Ryan Hill Mongan, David John Law, Jarret Weis, Bryan Lee Hynecek, and Stephen Reiger Myers.

The '561 Patent is a continuation of U.S. Patent Application No. 12/366,769, filed on February 6, 2009.

The '561 Patent has 16 claims, all of which are at issue in this Investigation. These claims read as follows (with the disputed terms highlighted in bold):

1. A **one-piece case** for enclosing a personal electronic device comprising:

> a **flexible inner layer co-molded** with an **exterior hard layer** and **permanently affixed together** to form a **co-molded one-piece assembly**;
>
> wherein the **co-molded one-piece assembly** is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device, wherein:
>
> the **flexible inner layer** includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and a **fitted cavity** configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device;
>
> the **exterior hard layer** includes a bottom surface and side surfaces sized and shaped to substantially cover an exterior of the

bottom and side surfaces of the **flexible inner layer** and a cut away portion that is **permanently filled** with a portion of the **co-molded flexible inner layer**.

2. The **one-piece case** of claim 1, wherein the cut-away portion forms an expansion portion in the **co-molded one-piece assembly** that contributes to the overall flexibility of the **co-molded one-piece assembly**.

3. The **one-piece case** of claim 1, wherein the **flexible inner layer** of the **co-molded one-piece assembly** provides shock protection for the enclosed personal electronic device.

4. The **one-piece case** of claim 1, wherein the side surfaces of the exterior hard layer form a corner joint and the **co-molded flexible inner layer fills in** the cut-away portion located at the corner joint contributing to the overall flexibility of the **one-piece case**.

5. The **one-piece case** of claim 1, wherein the **flexible inner layer** that **fills in** the cut-away portion creates a stretch-zone that is sufficiently flexible to enable the co-molded one-piece assembly to deform and thereby accept insertion of the personal electronic device.

6. The **one-piece case** of claim 1, wherein the **exterior hard layer** includes at least four side surfaces that intersect to form at least four corner joints and two of the corner joints comprise cut-away portions that expose the **co-molded flexible inner layer**.

7. The **one-piece case** of claim 1, wherein the **co-molded one-piece assembly** includes an overhang extending from a top portion of one or more of the side surfaces in parallel to the bottom surface of the **one-piece case**.

8. The **one-piece case** of claim 1, further comprising:

an opening parallel to the bottom surface of the **flexible inner layer** positioned such that a portion of the inserted personal electronic device is not enclosed by **the co-molded one-piece assembly**.

9. The case of claim 8, wherein an overhang extending from a top portion of one or more of the side surfaces and extends completely around the perimeter of the opening.

10. The **one-piece case** of claim 1, further comprising:

an aperture sized and positioned to align with a feature of the inserted personal electronic device and thereby enable access to the feature.

11. The **one-piece case** of claim 1, wherein the side surfaces of at least one of the **flexible inner layer** and the **exterior hard layer** extend above a top surface of the inserted personal electronic device.

12. The **one-piece case** of claim 1, wherein the **flexible inner layer** is manufactured from at least one of rubber, silicon, plastic, or fabric.

13. The **one-piece case** of claim 1, wherein the **exterior hard layer** is manufactured from at least one of plastic, metal, a polycarbonate material, or a para-aramid material.

14. The case of claim 1 wherein the **co-molded one-piece assembly** comprises a plurality of radiused corners and a plurality of cut-away portions and wherein each of the plurality of radiused corners contains one of the plurality of cut-away portions.

15. The **one-piece case** of claim 1, wherein the **exterior hard layer** includes at least two side surfaces that form a radiused corner and the cut-away portion is located at substantially the bisector of the radiused corner.

16. The case of claim 1 wherein the cut-away portion that is **permanently filled** with a portion of the **flexible inner layer**, extends through at least the side surface and a portion of the bottom surface of the **exterior hard layer**.

B. Level of Ordinary Skill in the Art

The '561 Patent is directed to "[a] one-piece co-formed exterior hard shell case with an elastomeric liner formed on the interior of the exterior hard shell for mobile electronic devices." ('561 Patent at [57].) Speck asserts that a person having ordinary skill in the art at the time of the '561 Patent "would include someone with an undergraduate degree (such as a Bachelor of Science) in industrial design, mechanical engineering or the equivalent with either course work in plastics or molding or 1-2 years of experience in the manufacturing or design of molded plastic products, preferably consumer products such as accessories for portable electronic devices, or a person of similar education and experience." (Speck OSITA Filing (May 29, 2013).) Alternatively, Speck asserts that "a hypothetical person of ordinary skill in the art without such an undergraduate degree would include someone with 2-4 year of experience in the manufacture or design of molded plastic products, preferably consumer products such as

accessories for portable electronic devices or a person of similar education and experience." (*Id.*)

Respondents assert that:

> [o]ne of ordinary skill would be a degreed mechanical or plastics engineer with at least three years of experience directly related to plastics product and mold design. Alternatively, one of ordinary skill may be a non-degreed practitioner with at least five years of experience directly related to plastics product and injection mold design.

(Respondents' OSITA Filing (May 29, 2013).) The Staff asserts that one of ordinary skill in the art of the '561 Patent would have "an undergraduate degree in mechanical or chemical engineering, including coursework related to plastics, and in addition would have approximately 1-2 years of practical experience with plastic molding techniques." (Staff OSITA Filing (May 29, 2013).) Alternatively, the Staff asserts that "a non-degreed practitioner would have approximately 2-4 years of experience directly related to plastics product and injection mold design and/or manufacture." (*Id.*) There is no discussion in the '561 Patent suggesting that the invention therein would require the level of education or experience suggested by Respondents or the Staff.

Accordingly, I find that a person of ordinary skill in the art is a person who has the education and/or qualifications identified by Speck. The level of skill articulated by Respondents and the Staff goes beyond the level of ordinary skill in the art. Respondents and the Staff have not offered sufficient justification regarding why a person of ordinary skill in the art would need the education and/or qualifications proposed. *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 454 (Fed. Cir. 1985) ("A person of ordinary skill in the art is . . . presumed to be one who thinks along the line of conventional wisdom in the art and is not one

who undertakes to innovate, whether by patient, and often expensive, systematic research or by extraordinary insights, it makes no difference which.").

C. Disputed Claim Terms

1. Co-molded (Claims 1-8, 14)

Term	Speck's Construction	Fellowes' and BodyGlove's Construction	Superior's Construction	Staff's Construction
co-molded	Plain and ordinary meaning[9]	Multi-shot injection molded or otherwise formed by molding all layers together in a single mold	Molded where all layers are formed together in a single mold	Formed by injecting polymer over [and]

The term "co-molded" is a limitation of all of the claims of the '561 Patent. Claim 1, the only independent claim of the '561 Patent, recites "a flexible inner layer ***co-molded*** with an exterior hard layer and permanently affixed together to form a ***co-molded*** one piece assembly." ('561 Patent at 5:17-19 (emphasis added).) There is no dispute that the common meaning of the term "co-molded" is "molded together." (Speck_RB at 15; FBG_IB at 6; Superior_IB at 34; Tr. at 209:9-13 (Staff's position).) The word "mold" commonly means "to give shape to;" "to form in a mold;" and "to fit the contours of." (Merriam-Webster's Collegiate Dictionary at 799 (11th ed. 2003).) A person of ordinary skill in the art reading the claims, specification, and prosecution history of the '561 Patent would conclude the term co-molded is used consistent with its commonly understood meaning.

The Respondents argue that the "co" in "co-molded" requires all of the layers to be molded together in a single mold. (FBG_IB at 6; Superior_IB at 34.) However, Respondents'

[9] Speck originally proposed an alternative construction of "injection molded" but withdrew the alternative construction at the Markman Hearing. (Tr. at 138:2-25.)

proposed construction is overly limiting and is contradicted by the intrinsic evidence. Further, Respondents' improperly limit their analysis of the term "co-molded" to ***plastic*** molding and product design. For example, Fellowes' and Body Glove's expert, Mr. Curtis Peterson, asserts that "[t]he term 'co-molded,' as it is used in the ***plastic molding and product design art***, is used synonymously with the terms 'two-shot injection molding' or 'multi-shot injection molding'" and requires "molding a product in a single mold."[10] (FBG_IB Ex. 3 at ¶ 14 (emphasis added.)

In sharp contrast to Mr. Peterson's opinion but still limited improperly limited to plastics, Superior's expert, Dr. David Kazmer, asserts "that 'co-molded' is not a term of art and does not have any particular generally understood meaning in the field of ***plastic products design***." (Superior_IB Ex. 8 at ¶¶ 26-27 (emphasis added).) However, Dr. Kazmer concludes that the term "co-molded" as used in the '561 Patent means "molded where all layers are formed together in a single mold." (Superior_IB Ex. 8 at ¶¶ 26-27 (emphasis added).)

The plain language of the claims of the '561 Patent militates against limiting "co-molded" to plastics. Dependent claims 12 and 13 recite exemplary non-plastic materials for the flexible inner layer and exterior hard layer, respectively. Specifically, claim 12, which is dependent on claim 1, recites "wherein the flexible inner layer is manufactured from at least one of rubber, silicon, plastic, or fabric" and claim 13, also dependent on claim 1 recites "wherein the exterior hard layer is manufactured from at least one of plastic, metal, a polycarbonate material, or a para-aramid material." ('561 Patent at 6:29-34.) Similarly, the claims of the '561 Patent are not limited to polymers, as required by the Staff's construction.

The only method of manufacturing identified by Respondents to mold all layers together in a single mold is multi-shot injection molding. Fellowes and Body Glove describe multi-shot

[10] All of the references cited by Mr. Peterson are directed to plastics.

injection molding as a process in which two or more materials are injected (*i.e.*, "shot") into a mold to form layers. (FBG_IB at 8.) Fellowes and Body Glove assert "[f]or example, when an object is molded using multi-shot, or co-, molding, the first layer may be injected into the mold, then the mold is shifted or rotated, and then the second layer is injected into the same mold." (*Id.*) However, this process requires the materials to be liquefied. Neither Fellowes and Body Glove nor Superior explain how an exterior hard layer manufactured of metal, a polycarbonate material, or a para-aramid material could readily and practicably be liquefied for injection molding. Indeed, Kevlar, a para-aramid material, does not have a melting point.

However, the specification discloses a method of co-molding for "metal or hard material" with an "over molded interior elastomeric layer." Specifically, the specification of the '561 patent states:

> Depending on manufacturing methods other materials made [sic] be used to replace the hard plastic used by the external hard shell layer **12** in a preferred embodiment of the present invention. For example, if it was desired to make a metal/elastomeric combo for the protective case **10** without overhangs in the hard material, in this example metal, a simple bending process could be considered for the metal manufacturing. An ***over molded*** interior elastomeric layer **13** would provide the undercuts to secure a device. The metal or hard **10** material would then simply provide a framework for the softer material interior layer and also provide the elastic stiffness to allow the device to be held in the opening. The undercut would be formed in the elastomeric material but the flexing to allow a device to be inserted into the protective case would come from the harder material, and again, cutting away the comers of the case allows the sides to easily flex.

('561 Patent at 3:56-4:4 (emphasis added).)

The Respondents argue that this disclosure of "over molded" refers to a separate process than "co-molded." (FBG_IB at 7.) For example, Dr. Kazmer, Superior's expert, asserts:

> The '561 Patent distinguishes overmolding as a process in which the metal hard layer is formed via a <u>separate</u> process and then inserted into a mold where the adjoining flexible layer is molded.

> Overmolding is similar to insert molding, in that with both an external component is placed in the cavity of the mold and then additional liquid material is applied; the difference between the two is that while with insert molding the component is entirely encapsulated within the mold, with overmolding the component is not entirely encapsulated. The fact that the patentee here uses a different term (over molded) to describe a process in which the hard layer is formed first and then the flexible layer is formed over it suggests that such a process is different from co-molded as used in the claims.

(Superior_IB Ex. 8 at ¶ 29 (emphasis in original).) Likewise, Mr. Peterson, Fellowes' and Body Glove's expert, asserts that, "[a] product that is co-molded, or produced by two-shot- or multi-shot injection molding, is made of at least two different materials, usually plastics." (FBG_IB Ex. 3 at ¶ 15.) Mr. Peterson continues:

> An alternative to co-molding is "insert molding," which is a form of overmolding. Like a co-molded product, an insert molded product contains two different materials. But the process for creating an insert molded product is different. The first step for insert molding a product is to create the base molded piece, or insert. The insert could be plastic, metal, wood, or other materials. Having already molded or otherwise manufactured the insert, the insert is placed into the mold tool. At that point, a plastic is injection molded into the portion of the mold cavity not occupied by the insert. In some cases, to ensure good adhesion between the insert and the subsequently-molded plastic, a mechanical bond may be used.

(*Id.* at ¶ 16.)

I find Respondents' conclusion that the discussion of "over molded" in the '561 Patent is for a *different* molding process than co-molded is contrary to the intrinsic evidence. Specifically, as discussed above, the Respondents' arguments with respect to multi-shot molding are directed to plastics. The inclusion of metal in claim 13 informs that co-molded includes the over molded embodiment disclosed in the specification. Adopting Respondents' construction requires the untenable conclusion that a person of ordinary skill in the art would understand co-molding with respect to the materials disclosed in claim 13 of the '561 Patent to be limited multi-shot molding,

for example, to liquefying metal for multi-shot molding, rather than including "a simple bending process … for the metal manufacturing" as suggested by the specification. Respondents' position is not supported by the intrinsic evidence.

While the specification uses the terms "co-molded" and "over molded," the specification does not discuss specific processes for manufacturing—indicating that the patentees did not intend to limit "co-molding" to a specific process of manufacturing. Indeed, the only time the specification of the '561 Patent refers to co-molding is in the "Background of the Invention:"

> Hard plastic shells normally are manufactured as more than one piece to allow the device to slide into the case before being closed in with a secondary piece. Additionally they will often have a liner of elastomeric material, which helps to cushion the device. This can be ***co-molded***, permanently attached or floating with the assembly.

('561 Patent at 1:38-43 (emphasis added).)

There is no dispute that at the time the application resulting in the '561 Patent was filed, both multi-shot molding and overmolding were known in the art as methods of manufacturing cases comprised of a hard plastic shell with an elastomeric liner. The specification characterizes the prior art as co-molded regardless of whether those cases were formed in a single mold or otherwise. ('561 Patent at 1:38-43.) This is further evidence that "co-molded" is used to generally describe the techniques known in the art at the time to mold together various materials and is not limited to molding in the same mold as proposed by Respondents.

Claim 1's requirement that the flexible inner layer is both "*co-molded* with exterior hard layer ***and*** *permanently affixed together* to form a co-molded one-piece assembly" is further evidence that the over molded embodiment disclosed in the specification of the '561 Patent is within the scope of claim 1. In support of their argument that overmolding is excluded from the term co-molded, Fellowes and Body Glove argue that "Speck amended its claims to recite the

specific type of process used to 'permanently affix' the layers together, requiring that the layers be co-molded." (FBG_RB at 6.) However, this argument renders superfluous claim 1's requirement that the layers are permanently affixed together in addition to being co-molded. The specification teaches numerous ways to permanently attach (or affix) the layers:

> The external hard shell layer **12** and the interior elastomeric layer **13** may be attached in several ways, such as glue, chemical bonding, heating, heat treated chemicals or any other means know in the art which permanently attach the external hard shell layer **12** to the interior elastomeric layer **13**.

('561 Patent at 3:44-49.) Notably, co-molding, as construed by Respondents, is not identified as one such method.

As Mr. Peterson explained, multi-shot injection molding "likely will not require any additional mechanical bond or adhesive between the layers due at least in part to the fact that the first plastic is still warm when the second plastic is injected." (Peterson Rebuttal Decl. at ¶ 7(b).) However, with respect to insert molding, Mr. Peterson explains, "a mechanical bond or adhesive may be required to attach the layers because insert molding typically results in weaker bonds." (*Id.* at ¶ 7(a).) The specification of the '561 Patent specifically teaches such mechanical bonds and adhesives. As multi-shot injection molding will likely not require such mechanical bonds and adhesives, this disclosure is persuasive evidence that overmolding is within the scope of co-molding.

As the Staff noted during the Markman hearing, the specification supports the conclusion that "co-molded" was not intended to be a technical term. (Tr. at 210:9.) The specification uses the word "molded" two other times:

> The first external hard shell layer **12** and a second interior elastomeric layer **13** are combined to independently attach to a handheld device **19** and incorporate at least one viewing window **14**, input/output access ports **15**,**16**, and **17**, and ***molded***

> elastomeric covers over device buttons, accessible though holes in the hard shell **18** and **26**.

('561 Patent at 1:26-32 (emphasis added).)

> These features could be detents **20** as described along the side or top and bottom of the external hard shell layer **12** or it could be a large area like illustrated in FIGS. **2***b* and **4** where an additional large elastomeric overhang **21** for securing a device **19** may be included in the protective case **10** so that a device would be slipped under and secured thereby with some form of undercut on the opposite end whether ***molded*** into the external hard shell layer **12** or the inner elastomeric layer **13**.

('561 Patent at 4:18-25 (emphasis added).) These passages do not connote a method of manufacture. Rather, the specification uses the word "molded" in its ordinary use as "formed" which is entirely consistent with a broad construction of "co-molded." Indeed, "mold" and "form" are synonyms. (Roget's II, The New Thesaurus at 650 (The Expanded Edition 1988).)

Further, the title of the patent is "One Piece *Co-Formed* Exterior Hard Shell Case with an Elastomeric Liner for Mobile Electronic Devices." ('561 Patent at [54] (emphasis added).) Likewise, the Abstract reiterates the phrase "co-formed," stating: "a one-piece co-formed exterior hard shell case with an elastomeric liner formed on the interior of the exterior hard shell for mobile electronic devices." (*Id.* at [57].) During the technology tutorial, the private parties discussed several terms relating to molding processes, such as mold, cavity, and tool, but the specification does not discuss the technology at that level of detail because the patentees were discussing an inner layer and exterior layer that are simply co-formed or co-molded together. (Tr. at 210:20-211:8.)

I am not persuaded by Respondents' argument that the prosecution history supports their respective constructions. First, Superior argues that the usage of "co-molded" in the Bodkin reference that was cited during prosecution of the parent application to the '561 Patent is highly relevant to the meaning of the term with respect to the '561 Patent. As an initial matter, Bodkin

was not cited during the prosecution of the '561 Patent. Additionally, there is no evidence that the patentees used the term "co-molded" in the same manner as used by Bodkin. Instead, the applicants "respectfully disagree[d] with Examiner's assertion that Bau in combination with Bodkin, teaches, discloses, or suggests all of the limitations of the pending claims." (Superior_IB Ex. 9 at SCI00031633.). Superior cites nothing in support of its assertion that Bodkin's use of "co-molded" is relevant here. Finally, as Superior admits, in "Bodkin, the term 'co-molded' is used to refer to a method of constructing a case that includes at least two plastics that are formed together in a single mold." (Superior_IB at 37.) As discussed above, the term "co-molded" in the '561 Patent is not limited to plastics.

Second, Superior argues that an inventor declaration filed during prosecution of the parent application of the '561 Patent mandates that the term be construed as "molded where all layers are formed in a single mold." (Superior_IB at 40.) However, the inventor's declaration merely explains that a manufacturer made "a prototype in May-June 2008, but claimed that the final product could not be made in a single mold the way SPECK had designed it." (*Id.* at 40.) Simply because Speck's preferred embodiment was a single mold design does not mean the term "co-molded" is limited to a single mold. Further, the declaration characterizes the efforts of the manufacturer as a "prototype" rather than saying they failed in reducing their invention to practice. Here, this is strong evidence that the inventors were in possession of an embodiment that was not made in a single mold, and, in fact, had reduced said embodiment to practice.

For the foregoing reasons, the term "co-molded" shall be accorded its plain and ordinary meaning.

2. One-Piece Case (Preamble, Claims 4, 7) / One-Piece Assembly (Claims 1, 2, 3, 7, 8)

Term	Speck's Construction	Respondents' Construction	Staff's Construction
one-piece case	No construction necessary Alternatively, if the Court determines that a construction is necessary: "a case in the form of a single part"	A case composed entirely of a single inseparable piece	No construction necessary Alternatively, if the Court determines that a construction is necessary: "a multiple-component case in the form of a single structure"
one-piece assembly	Plain and ordinary meaning In the alternative: assembly of the inner and exterior layers to form a single part	A structure composed entirely of multiple components that are inseparable	Plain and ordinary meaning In the alternative: assembly of the inner and exterior layers to form a structure

Speck and the Staff argue that the term "one-piece case" appears only in the preamble and does not require construction because it is not limiting. (Staff_IB at 7; Speck_RB at 2.) However, the term "one-piece case" appears in the body of claims 4 and 7. ('561 Patent at 5:48, 6:12.) Accordingly, I shall address the parties' arguments regarding the construction of "one-piece case."

The claim terms "one-piece case" and "one-piece assembly" share the clause "one-piece." The parties do not appear to dispute the terms "case" or "assembly;" rather, the dispute is centered on the construction of the term "one-piece." In claim construction, there is a "presumption that the same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms

have different meanings at different portions of the claims." *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 at 1366 (Fed. Cir. 2007) (quoting *Fin Control Sys. Pty., Ltd. v. OAM, Inc.*, 265 F.3d 1311, 1318 (Fed. Cir. 2001)). Indeed, Superior acknowledges that "one-piece" should be given the same meaning throughout the claims. (Superior_IB at 45.) There is no evidence that the term one-piece should be given a different meaning when modifying case than when modifying assembly. Yet Respondents inexplicably propose inconsistent definitions of "one-piece" and fail to offer an explanation as to why a "one-piece case" should be construed as a "single inseparable piece" whereas a "one-piece assembly" should be construed as "multiple components that are inseparable."[11] As Respondents provide ***no*** support for these differing constructions of "one-piece," the term "one-piece" shall be given the same meaning throughout the claims.

Fellowes and Body Glove state that they agree with Speck and the Staff that these terms should be amenable to construction merely based on their plain and ordinary meaning. (FBG_RB at 10.) Likewise, Superior acknowledges that "one-piece" is not a term of art and has a commonly understood meaning. (Superior_IB at 15.) I find Respondents' proposed constructions are improperly driven by litigation. Fellowes and Body Glove admit that their proposed construction is litigation driven and only provide a construction "[i]n light of Speck's apparent contention that the plain and ordinary meaning of "one-piece" can include multiple pieces" with respect to ***Superior's*** accused products. (FBG_IB at 16.) The plain and ordinary meaning of "one-piece" is ***not*** dependent on Speck's contentions. Rather, as the finder of fact, I will determine if the accused products meet the "one-piece" limitations of the claims of the '561 Patent. Additionally, as Fellowes and Body Glove acknowledge that their concern is founded in

[11] Moreover, Respondents' inconsistent constructions produce an illogical result. Claim 1 recites the "one-piece" case comprised of the "one-piece assembly." However, it is unclear how something "composed ***entirely*** of a *single inseparable piece*" could be comprised of something "composed ***entirely*** of *multiple components that are inseparable*."

speculation regarding ***Superior's*** accused products (*id.*), Fellowes and Body Glove have no real interest in the construction of "one-piece."

Further, Fellowes and Body Glove do not provide sufficient support for their proposed constructions by merely stating that their constructions "draw their basis from the intrinsic record, and specifically Figures 1-7b of the '561 Patent (all depicting a case with no removable pieces) and the written description (describing a 'single piece assembly')." (*Id.*) The claims of the '561 Patent use the signal "comprising." ('561 Patent at 5:16.) In the context of patent claims, the term "comprising" is well understood to mean "including but not limited to." *See Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 811 (Fed. Cir. 1999) (use the signal "comprising" "is generally understood to signify that the claims do not exclude the presence in the accused device or method of factors in addition to those explicitly recited.") Accordingly, I am not persuaded by Fellowes' and Body Glove's argument that none of the figures of the '561 Patent include removable pieces. Moreover, Fellowes and Body Glove fail to explain the relevance of the specification's discussion of a "single piece assembly" to the construction of "one-piece case" or "one-piece assembly."

I find the inclusion of "inseparable" in each of Respondents' proposed constructions redundant with the plain language of claim 1, which recites a "flexible inner layer-co-molded with an exterior hard layer and *permanently affixed together* to form a co-molded one-piece assembly." The plain language of the claim informs the reader that the two layers are *permanently affixed together*. Adopting Respondents' proposed construction improperly renders the limitation "permanently affixed together" superfluous. *See Merck & Co., Inc. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005).

Superior relies on three separate dictionary definitions for "one-piece" (Superior_IB at 16), none of which reliably supports its proposed construction. Neither the first dictionary reference ("consisting of or fashioned in a single whole piece"), nor the second ("that consists of or is made in a single undivided piece"), nor the third ("consisting of or made in a single undivided piece") even mention the words "entirely" or "inseparable" and thus provide no meaningful support for Respondents' proposed constructions.

Superior devotes over seven pages of briefing to its argument that the specification supports its construction of "one-piece." (Superior_IB at 17-24.) However, nothing cited by Superior supports the inclusion of "entirely" or "inseparable" in the construction of "one-piece." At most, Superior's arguments support a requirement that the flexible inner layer and exterior hard layer are permanently affixed together, which is already an explicit limitation of claim 1. Moreover, Superior improperly conflates its non-infringement arguments with claim construction, arguing a case with multiple separate pieces does not read on the claims of the '561 Patent.[12] (Superior_IB at 18.) Superior's arguments do not go to the construction of "one-piece" and I decline to address them prematurely on an incomplete record.

Superior devotes another eight pages of its briefing to its argument that the prosecution history supports its construction of "one-piece." (Superior_IB at 24-29, 46-47.) However, the most that can be said of Superior's arguments is that the applicants distinguished two cases comprised of multiple pieces, one of which was completely separable (Bau) and one of which was partially separable via a hinge (Richardson), from the claimed "one-piece case." (*Id.*) Nothing cited by Superior supports a conclusion that applicants limited the scope of their claims to "entirely" or "inseparable," rather Superior's arguments support that the claims of the '561

[12] Indeed, a pencil that includes an eraser may well infringe a "comprising" claim directed to a pencil.

Patent are directed to layers that are permanently affixed together as recited in the plain language of the claims.

The phrase "one-piece" is sufficiently clear in light of the specification and prosecution history. Respondents have failed to support reading the additional limitations of "entirely" and "inseparable" into the claims. Accordingly, I find the claim terms "one-piece case" and "one-piece assembly" shall be afforded their plain and ordinary meaning.

3. Flexible Inner Layer (Claims 1, 3-6, 8, 11-12, 16) / Exterior Hard Layer (Claims 1, 4, 6, 11, 13, 15-16)

Term	Speck's Construction	Fellowes' and BodyGlove's Construction	Superior's Construction	Staff's Construction
Flexible Inner Layer	Plain and ordinary meaning	Inner layer that is more flexible and less hard than the "exterior hard layer"	Superior declines to take a position	Plain and ordinary meaning
Exterior Hard Layer	Plain and ordinary meaning	Exterior layer that is less flexible and harder than the "flexible inner layer"	Superior declines to take a position	Plain and ordinary meaning

Fellowes and Body Glove argue that the terms "flexible inner layer" and "exterior hard layer" should be construed for two reasons. (FBG_IB at 13-15.) First, Fellowes and Body Glove argue that the inventors used the terms "flexible" and "hard" in a way that is inconsistent with the plain and ordinary meaning of those terms in the art and acted as their own lexicographer. (*Id.* at 13.) Second, Fellowes and Body Glove argue if the terms are not construed, they are indefinite. (*Id.*) Speck and the Staff argue that these terms do not require construction and that one of ordinary skill in the art would have readily understood what was

meant by these terms. (Speck_IB at 15-17; Staff_IB at 11-13, 17-18; Speck_RB at 8-13; Staff_RB at 5-7, 14.)

Fellowes and Body Glove argue that the '561 Patent uses the terms "hard" and "flexible" essentially as opposites rather than as ordinarily used by those in the art. Specifically, Fellowes and Body Glove argue that the '561 Patent only defines the flexibility of the "flexible inner layer" with reference to the "exterior hard layer"—*i.e.*, that the "flexible inner layer" has "much greater inherent flexibility" than the "exterior hard layer," "allow[ing] the hard shell to flex for mounting." (FBG_IB at 14 (citing '561 Patent at 2:25-31, 4:18-67).) Fellowes and Body Glove further argue that the '561 Patent defines the hardness of the "exterior hard layer" in relation to the "flexible inner layer." (*Id.* at 14 (citing '561 Patent at 3:67-4:4.) Fellowes and Body Glove argue that their constructions of "flexible inner layer" as an "inner layer that is more flexible and less hard than the 'exterior hard layer'" and "exterior hard layer" as an "exterior layer that is less flexible and harder than the 'flexible inner layer'" reflect the patentee's written intent to teach and define the flexibility of the "flexible inner layer" and the hardness of the "exterior hard layer" each in relation to the other. (*Id.* at 14.)

Contrary to Fellowes' and Body Glove's assertion, I find the specification of the '561 Patent uses the terms "flexible inner layer" and "exterior hard layer" in a manner consistent with their plain and ordinary meanings. (*See, e.g.,* '561 Patent at 1:64-65, 3:33-35, 4:43-49.) I am not persuaded by Fellowes' and Body Glove's argument that the patentees acted as their own lexicographer by using the terms "hard" and "flexible" essentially as opposites. To act as its own lexicographer, "a patentee must 'clearly set forth a definition of the disputed claim term' other than its plain and ordinary meaning… [and] 'clearly express an intent' to redefine the term." *Thorner v. Sony Comp. Ent. Amer. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (internal

citations omitted). The specification of the '561 Patent does not set forth any definitions for these terms, much less the clear expression required under the law. The portions of the specification cited by Fellowes and Body Glove do not provide a basis to limit the claims. Indeed, to do so would improperly limit the claim to a single embodiment disclosed in the specification.

Fellowes and Body Glove argue that without a construction, the terms are indefinite because the '561 Patent provides no standard for determining how flexible a material must be to be considered a "*flexible* inner layer" or how hard a material must be to be considered an "exterior *hard* layer." (FBG_RB at 9.) A claim is indefinite only if it is "insolubly ambiguous" and no narrowing construction can be adopted. *See, e.g., Exxon Research and Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). When the meaning of the term is discernible, even when reasonable people may disagree, the term cannot be found indefinite. *Id.* Moreover, a claim cannot be found indefinite when a person experienced in the field of the invention would understand the scope of the subject matter that is patented when read in conjunction with the rest of the specification. *S3 Inc. v. nVIDIA Corp.*, 259 F.3d 1364, 1367 (Fed. Cir. 2001). The plain language of claim 1 informs the scope of the claim terms. Indeed, claim 1 does not isolate the flexibility of the inner layer or the hardness of the exterior layer. Rather the two layers form a co-molded one-piece assembly that "is sufficiently flexible to accept insertion of the personal electronic device and sufficiently rigid to securely retain the inserted personal electronic device." ('561 Patent at 5:20-23.) As such, these claim terms are not indefinite.

The terms "flexible inner layer" and "exterior hard layer" shall be accorded their plain and ordinary meaning.

4. Fitted Cavity (Claim 1)

Term	Speck's Construction	Respondents' Construction	Staff's Construction
a fitted cavity	Plain and ordinary meaning	A cavity formed to fit the device closely	A cavity formed to fit the device closely

Claim 1 recites:

> the flexible inner layer includes a bottom surface, side surfaces joined to the bottom surface and extending upward therefrom, and a **fitted cavity** configured to accept and retain the inserted personal electronic device such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device.

('561 Patent at 5:24-31 (emphasis added).) Speck asserts that there is no real dispute that the term "a fitted cavity" is not a term of art and should not be assigned a special definition. (Speck_IB at 31.) Indeed, the Staff admits in its brief: "[i]n the specification of the '561 Patent, the term 'a fitted cavity' is used in its plain and ordinary meaning." (Staff_IB at 21.) Similarly, Superior states that "'[f]itted' is not a technical term of art, so common usage controls." (Superior_IB at 47.) Likewise, Fellowes and Body Glove do not argue that the term is unclear, ambiguous, or a term of art. (RBG_IB at 17.) In its reply brief, Superior argues that the term "fitted" requires clarification. (Superior_RB at 30.) However, Superior fails to explain why it believes the term "fitted" is, in any way, unclear. Tellingly, Superior tacitly admits that its construction is litigation based, asserting that "the Court will narrow the scope of the argument on summary judgment if it provides a construction now." (Superior_RB at 30.)

Despite the apparent agreement among the parties that "fitted cavity" is not a term of art, Respondents and the Staff propose that the term "a fitted cavity" should be construed as "a cavity formed to fit the device closely." In support of their proposed construction, Respondents and the

Staff rely on the disclosure in the '561 Patent's specification that "[w]hat makes this case different is the geometry and manufacturing of the case. The exterior hard shell part is formed to fit the device closely with a small offset from the devices [sic] surface." ('561 Patent at 2:15-18, 4:34-37.) Respondents' and the Staff's argument is not persuasive and provides no clear reason to import this limitation from the specification into the claims.

Here, what is formed to fit the device closely is the exterior hard shell part, not the flexible inner layer. Further, it is unclear how the proposed construction offers clarity to the term "fitted cavity" if both the exterior hard layer and fitted cavity are "formed to fit the device closely." Superior argues that "fitted cavity" should be limited to its described design intent that the "interior elastomeric layer 13 also ensures the device 19 and the protective case 10 fit together with no gaps . . . ." (Superior_IB at 47-48 (citing '561 Patent at 3:51-52).) However, the specification does not use "formed to fit the device closely" to indicate that there are no gaps. Instead, when discussed with the exterior hard shell part, the specification provides there is "a small offset from the devices [sic] surface." ('561 Patent at 4:36-37.) Accordingly, the specification does not support Superior's conclusion that "formed to fit the device closely" implies that there are no gaps. Further, adopting the proposed construction would improperly shift the focus of the argument from whether the accused products has a "fitted cavity" and instead focus on what is meant by "a cavity formed to fit the device closely."

In its reply brief, the Staff states, "[its] construction clarifies that the 'fitted' aspect of the cavity is specifically formed to fit the external 'device' closely, instead of being fitted in relation to any physical part of the 'one-piece case.'" (Staff_RB at 17.) While it is unclear what is meant by "any physical part of the 'one-piece case,'" Speck does not propose that the plain and ordinary meaning of "fitted cavity" pertains to any physical part of the "one-piece case."

Moreover, claim 1 requires "such that the bottom surface covers at least a portion of a bottom surface of the inserted personal electronic device and the side surfaces cover at least a portion of a side surface of the inserted personal electronic device" which is contrary to the proposed construction. There is no requirement that the fitted cavity relate to the entire device. Instead, only a portion of the bottom and side surfaces are discussed in relation to the inserted device. Yet the proposed construction is directed toward "the device" rather than "at least a portion of the device."

The Staff argues that the specification describes the purpose of "a fitted cavity" as:

> As shown in FIGS. 3 and 5, the external hard shell layer **12** defines a ***fitted cavity* 22 *fitted to clasp onto a device*** **19** and incorporates a detent **20** to ensure a snug and secure fit.

('561 Patent at 4:26-34 (emphases added).) Notably this is the only usage in the specification of the term "fitted cavity." Here, the term fitted cavity is used in relation to the external hard shell, not the flexible inner layer. Further, the Staff fails to explain how this language supports its proposed definition. Fitted to clasp onto a device and fit the device closely are not synonymous. Moreover, the plain language of claim 1 clearly defines the purpose of the "fitted cavity," that is "a **fitted cavity** configured to accept and retain the inserted personal electronic device." I decline to import additional limitations from the specification when the claim clearly defines the purpose of the "fitted cavity."

Fellowes and Body Glove assert that "Figures 1-7b of the '561 patent all depict a case that is formed to [sic] around the device to fit the device closely." (FBG_IB at 17.) I am not persuaded because, however, without a statement to the contrary, figures in patents are deemed not drawn to scale. *See Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000).

I find the Respondents' and Staff's proposed construction will only add ambiguity as the parties will argue over whether the accused products "fit the device closely" rather than focusing on the actual claim term and whether the accused products have a fitted cavity. Further, there does not appear to be any material dispute because all parties agree that the term "fitted cavity" is used in accordance with its plain and ordinary meaning. Accordingly, I find no construction is necessary.

5. Permanently Filled (Claim 1) / Fills In (Claims 4 and 5)

Term	Speck's Construction	Respondents' Construction	Staff's Construction
permanently filled	Plain and ordinary meaning	Formed such that the material that fully occupies the cut away portion is not removable	Plain and ordinary meaning
fills in	Plain and ordinary meaning	Fully occupies	Plain and ordinary meaning

Claim 1 recites "a cut away portion that is ***permanently filled*** with a portion of the co-molded flexible inner layer." ('561 Patent at 5:35-36 (emphasis added).) Claim 4 recites "the co-molded flexible inner layer ***fills in*** the cut-away portion located at the corner joint contributing to the overall flexibility of the one-piece case." (*Id.* at 5:45-48 (emphasis added).) The parties generally agree that the terms "permanently filled" and "fills in" are used consistently with their plain and ordinary meaning. Nevertheless, Respondents propose constructions that are admittedly driven by infringement. (FBG_IB at 18.)

Fellowes and Body Glove acknowledge that Respondents' proposed constructions are litigation driven. (FBG_IB at 18; FBG _RB at 15.) Fellowes and Body Glove admit that these terms should be construed according to their plain and ordinary meaning (FBG _RB at 15) but

state that they believe these terms must be construed because Speck is asserting that cases made by Superior that contain multiple pieces that can be removed from the "cut away portion" nevertheless constitute the "cut away portion" being "permanently filled" or "fill[ed] in" (FBG_IB at 18). The plain and ordinary meanings of "permanently filled" and "fills in" are ***not*** dependent on Speck's contentions. Rather, as the finder of fact, I will determine if the accused products meet these limitations of the claims of the '561 Patent. Additionally, as Fellowes and Body Glove acknowledge that their concern is founded in speculation regarding ***Superior's*** accused products (*id.*), Fellowes and Body Glove have no real interest in the construction of these terms.

Superior asserts that "[a]ny lay person understands that 'fills in' means 'fully occupies;' it does not suggest some partial or incomplete occupation of the filled space." (Superior_IB at 48.) Superior then asserts that "in every instance in the specification, the context of 'fills in' is synonymous with 'fully occupies' or fills such that no gaps remain." (*Id.* at 48-49.) However, none of the examples identified by Superior provide a basis for construing "fills in" as Superior acknowledges that "fills in" is used consistent with its plain and ordinary meaning. The Abstract of the '561 Patent's specification recitation that the "elastomeric material fills in the gaps created at the corners of the exterior hard shell to allow flex for mounting ('561 Patent at 2:25-27) does not suggest that the term "fills in" must be limited to "fully occupies" as proposed by Respondents. Superior further argues that Figures 1, 3, 7a, and 7b support Respondents' construction. (Superior_IB at 48-53.) However, without a statement to the contrary, figures in patents are deemed not drawn to scale. *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000).

Then, contrary to its argument that "fills in" is not a term of art, Superior argues that one of ordinary skill in the art would understand that the term means "fully occupies" for two additional reasons. (Superior_IB at 52.) First, Superior argues that "one of the primary purposes of the '561 Patent is to protect the enclosed electronic device from damage due to impact" and "one of ordinary skill in the art would understand that a corner which is fully occupied with an elastomeric or similar flexible material would provide maximal shock protection." (Superior_IB at 52.) Superior cites no support for limiting the claims to a one-piece case that "would provide maximal shock protection." Superior then attempts to limit this term based on "common practices in mold design and molding." (*Id.*) However, Superior cites no support whatsoever for limiting a claim to common practices in mold design or molding.

Superior argues that the plain and ordinary meaning should control, acknowledging that the patentees did not disavow the ordinary scope of the claim term in the specification or during prosecution. (Superior_IB at 54.) Then, in contradiction, Superior argues that because the two layers are permanently attached, the elastomeric layer that fills the cut away portions is formed such that it is not removable. However, this does nothing to inform as to the construction of "permanently filled" beyond its plain and ordinary meaning.

Contrary to Superior's acknowledgement that the patentees did not disavow ordinary claim scope, Superior next argues that during prosecution, the applicant disclaimed material that is removable from the scope of the term "permanently filled." (Superior_IB at 55.) However, Superior merely quotes a passage that uses the term "permanently filled" and inexplicably concludes that Speck disclaimed a case where the material that fills the cut away portion is removable. Such a conclusion is not supported by Superior's argument.

As noted by Staff, Respondents' proposed constructions add ambiguity. For example, instead of addressing whether the accused products meet the "fills in" limitation, the parties will instead focus on whether the accused products "fully occupies." Further, Respondents have failed to offer persuasive arguments in support of their proposed constructions. Accordingly, "permanently filled" and "fills in" should be accorded their plain and ordinary meaning.

6. Permanently Affixed Together (Claim 1)

Term	Speck's Construction	Respondents' Construction	Staff's Construction
Permanently affixed together	Plain and ordinary meaning. Alternatively: Inseparable during normal use.	Plain and ordinary meaning.	Inseparable during normal use

With respect to the term "permanently affixed together," the Staff has withdrawn its proposed construction and agrees with the private parties that it should be construed in a plain and ordinary meaning. There being no dispute, I decline to address this term. *See Vanderlande Indus. Nederland BV v. Int'l Trade Comm'n*, 366 F.3d 1311, 1323 (Fed. Cir. 2004) (noting that the administrative law judge need only construe disputed claim terms).

SO ORDERED.

Thomas B. Pender
Administrative Law Judge

IN THE MATTER OF CERTAIN CASES FOR PORTABLE ELECTRONIC DEVICES

337-TA-861
337-TA-867
(Consolidated)

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 13** has been served upon, **John Shin, Esq.**, Commission Investigative Attorney, and the following parties on

13. JUL - 8 2013

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IN THE MATTER OF CERTAIN CASES FOR PORTABLE ELECTRONIC DEVICES

337-TA-861
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