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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Clerisy Corporation, et al.,) CV 12-2110-PHX-PGR

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Plaintiffs,)

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v.) **ORDER**

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Airware Holdings, Inc., et al.,)

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Defendants.)

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After holding a *Markman* hearing on June 10, 2013, the Court enters the following claim construction Order.

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I. Background

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Plaintiff Reed Transition Technologies, LLC, is the owner by assignment of United States Patent No. 6,295,982 (“the Patent”), issued by the United States Patent and Trademark Office (“PTO”) on October 2, 2001. (Doc. 59, Ex A.) The Patent is for an “Apparatus for and Methods of Administering Volatile Substances into an Inhalation Flow Path.” (*Id.*) Plaintiff Clerisy Corp. manufactures, markets, and distributes Aromahaler® Nasal SoftStrips™ using the patented apparatus. Defendants market, sell, and distribute “AIR” branded nasal products, which, like the Nasal SoftStrips, are infused with aromatherapeutic essential oils.

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Plaintiffs allege that Defendants are infringing the Patent. On July 26, 2012, they filed

1 a complaint in the Western District of New York. The case was transferred to the District
2 of Arizona in October 2012. Plaintiffs filed an amended complaint on November 11, 2012.
3 (Doc. 59.) Defendants filed an answer and counterclaims on December 6, 2012. (Doc. 62.)

4 The parties have asked the Court to construe eight of the Patent’s claim terms.
5 Pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996), the Court
6 must construe the claims as a matter of law. The parties have filed briefs supporting their
7 proposed constructions of the terms. Having considered the arguments and evidence
8 presented in the parties’ briefs, exhibits, and at the *Markman* hearing, the Court construes the
9 disputed terms as set forth below.

10 **II. Legal standards**

11 Section 112 of the Patent Act provides that a patent specification “shall contain a
12 written description of the invention, and of the manner and process of making and using it
13 in such full, clear, concise, and exact terms as to enable any person skilled in the art to which
14 it pertains . . . to make and use the same.” 35 U.S.C. § 112. The section further provides that
15 a specification “shall conclude with one or more claims particularly pointing out and
16 distinctly claiming the subject matter which the applicant regards as his invention.” *Id.* “It
17 is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to
18 which the patentee is entitled the right to exclude.’” *Phillips v. AWH Corp.*, 415 F.3d 1303,
19 1312 (Fed.Cir. 2005) (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*,
20 381 F.3d 1111, 1115 (Fed.Cir. 2004)).

21 Claim construction, which is the determination of the meaning of the terms in a patent,
22 is a question of law exclusively within the province of the Court. *Markman*, 517 U.S. at 372.
23 To interpret claims, the court first considers the claims themselves. *Vitronics Corp. v.*
24 *Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir. 1996). The court should “look to the words
25 of the claims themselves,” giving them “their ordinary and customary meaning,” unless
26 clearly stated otherwise. *Id.* The “ordinary and customary” meaning of a claim term is “the
27 meaning that the term would have to a person of ordinary skill in the art in question at the
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1 time of the invention.” *Phillips*, 415 F.3d at 1313 (9th Cir. 2005); *see also Texas Digital Sys.,*
2 *Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202 (Fed.Cir. 2002) (“The terms used in the claims
3 bear a ‘heavy presumption’ that they mean what they say and have the ordinary meaning that
4 would be attributed to those words by persons skilled in the relevant art.”).

5 After the claims themselves, the court looks to the patent specification. *Vitronics*, 90
6 F.3d at 1582. The specification is highly relevant to the claim construction analysis and
7 usually is dispositive. *Phillips*, 415 F.3d at 1315. The specification is the single best guide
8 to the meaning of a disputed term. *Id.* Courts therefore relies heavily on the written
9 description of the claims in the specification for guidance when conducting claim
10 construction. *Id.* at 1317.

11 The specification may give a special definition to a claim term that differs from the
12 meaning it otherwise would have. *Id.* at 1316. In such cases, the inventor’s special definition,
13 or lexicography, governs. *Id.* In other cases, the specification intentionally may disclaim or
14 limit the scope of the claim. *Id.*

15 When reviewing the specification, however, courts must avoid reading limitations
16 from the specification into the claims. *Id.* at 1323. To avoid importing limitations, the court
17 must consider the purposes of the specification, which are to teach and enable those of skill
18 in the art to make and use the invention and to provide the best way for doing so. *Id.*

19 In addition to the claims themselves and the specification, courts should consider the
20 patent’s prosecution history. *Phillips*, 415 F.3d at 1317. The prosecution history consists of
21 the record of the proceedings before the PTO and includes the prior art cited during the
22 examination of the patent. *Id.* The prosecution history, which is part of the “intrinsic
23 evidence,” provides evidence of how the PTO and the inventor understood the patent. *Id.* The
24 prosecution history often informs the meaning of the claim language by demonstrating how
25 the inventor understood the invention and whether the inventor limited the invention in the
26 course of the prosecution, thereby making the claim scope narrower than it otherwise would
27 be. *Id.*

1 providing the carrier with at least one volatile substance;
 2 providing a barrier coupled to a surface of the carrier, the barrier being
 3 substantially impermeable to the one or more volatile substances carried by
 4 the carrier; and
 5 engaging the carrier to the surface of the skin proximate an inhalation flow
 6 path of a respiratory organ with the barrier adapted to be interposed between
 7 the carrier and the skin to prevent the one or more volatile substances from
 8 contacting the skin.

9 (*Id.*)

10 All of the disputed terms are in Claims 1 and 11. The parties' proposed constructions
 11 of the terms are set forth in their opening claim construction briefs. (Docs. 85, 88.)

12 The chart below summarizes the Court's construction of the contested claim terms.
 13 It is followed by the Court's supporting analysis.

Disputed Claim Term	Construction
Volatile substance	"A substance that readily vaporizes or evaporates."
Carrier	"The portion of the vehicle or device that carries or provides at least one volatile substance."
Barrier	"The portion of the vehicle or device that prevents contact between the skin and the volatile substance."
Coupled to	"Connected to."
Substantially impermeable to one or more volatile substances	"Preventing passage of most or all of the one or more volatile substances."
Proximate an inhalation flow path	"Close to or within the entrance to the mouth and/or the nasal passages and not on the bridge of the nose."
Engaging the carrier to a surface of the skin	"Attaching the vehicle to the skin."
Means for engaging the carrier to the surface of the skin	Function: "Attaching the vehicle to the skin proximate an inhalation flow path." Structure: "Adhesive, clamp, deformable element, or deformable member."

14 A. "Volatile substance"

15 Claims 1 and 11 refer to a method and vehicle "providing the carrier with at least one

1 volatile substance.” Plaintiffs define “volatile substance” as “a substance that is readily
2 vaporizable, including, for example, essential oils.” Defendant propose the following
3 construction: “a liquid or solid material that readily evaporates at ambient pressure and
4 temperature.”

5 The parties agree that “the technical meaning of a volatile substance is a substance
6 that readily transitions to a gas or vapor (i.e. vaporizes)” (Doc. 89 at 3) or “a substance that
7 readily vaporizes or evaporates” (Doc. 91 at 7). Defendants argue, however, that Plaintiffs’
8 construction is incomplete and potentially misleading. They contend that it is accurate to
9 qualify “volatile substance” with the phrase “liquid or solid” because a substance that
10 vaporizes is by definition not a gas. (*Id.*) They also argue that adding the phrase is
11 appropriate because “volatile substance” is a “technical chemistry term that a lay jury may
12 not know.” (*Id.* at 4.) Defendants likewise assert that the phrase “at ambient pressure and
13 temperature” is technically accurate and proper. (*Id.* at 5.)

14 Plaintiffs argue that it is inappropriate to read these additional limitations into the
15 specification. The Court agrees. “Where a specification does not *require* a limitation, that
16 limitation should not be read from the specification into the claims.” *Intel Corp. v. U.S. Int’l*
17 *Trade Comm’n*, 946 F.2d 821, 836 (Fed.Cir. 1991). Neither of the limitations proposed by
18 Defendants is required, nor would a jury would not fail to understand what is meant by
19 “substance” or “readily”

20 Accordingly, the Court will construe “volatile substance” as “a substance that readily
21 vaporizes or evaporates.”

22 **B. “Carrier,” “Barrier,” “Substantially impermeable to one or more volatile**
23 **substances,” and “Coupled to.”**

24 Claims 1 and 11 specify a vehicle and method “providing a barrier coupled to a
25 surface of the carrier, the barrier being substantially impermeable to the one or more volatile
26 substances carried by the carrier.”

27 Plaintiffs define “carrier” as “a portion of the vehicle or device that carries or provides
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1 at least one volatile substance.” Defendants propose the following construction: “a distinct
2 layer comprised of a substantially absorbent material that can take up and hold the volatile
3 substance, while allowing the release of the vapor of the volatile substance.” Plaintiffs define
4 “barrier” as “a portion of the vehicle or device that prevents contact between the skin and the
5 volatile substance.” Defendants propose “a distinct layer comprised of a different material
6 than the carrier that prevents the volatile substance from contacting the skin.”

7 In support of their proposed constructions, Defendants assert that “carrier” and
8 “barrier” must be defined as separate and distinct layers, composed of different materials,
9 because the two layers perform opposing functions. Defendants note that the vehicles
10 disclosed in the specification are composed of distinct barrier and carrier layers, and that “in
11 describing four of the five embodiments, the patentee explicitly states that the vehicle is
12 ‘comprised of a series of layers.’” (Doc. 85 at 3.) Defendants also argue that the “carrier”
13 must consist of a “substantially absorbent material” and that the term “portion,” as used by
14 Plaintiffs, is too broad.

15 Plaintiffs counter that the claims of the Patent require only the presence of a “carrier”
16 and “barrier” in the vehicle or device. There is no requirement of “distinct layers,” and the
17 phrase does not occur in the claims. Plaintiffs argue that a single material can be used as a
18 “carrier” and a “barrier.” They further assert that the manner in which the vehicle carries a
19 volatile substance while preventing contact with the skin is a design choice. Therefore,
20 although a “carrier” *may* consist of a substantially absorbent material, as it is in one of the
21 design choices described in the Patent, such a definition is not required.

22 The Court finds Plaintiffs’ position more convincing, and will adopt their proposed
23 constructions of “barrier” and “carrier.” Plaintiffs correctly note that “Defendants’ proposed
24 constructions rely on limitations imported from the specification into the claims.” (Doc. 91
25 at 2.) As the court explained in *Phillips*, “although the specification often describes very
26 specific embodiments of the invention, we have repeatedly warned against confining the
27 claims to those embodiments. . . . In particular, we have expressly rejected the contention that
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1 if a patent describes only a single embodiment, the claims of the patent must be construed
2 as being limited to that embodiment.” 415 F.3d at 1323; *see Liebel-Flarsheim Co. v. Medrad,*
3 *Inc.*, 358 F.3d 898, 906 (Fed.Cir. 2004) (reiterating that “this court has expressly rejected the
4 contention that if a patent describes only a single embodiment, the claims of the patent must
5 be construed as being limited to that embodiment”).

6 Furthermore, “[t]hat claims are interpreted in light of the specification does not mean
7 that everything expressed in the specification must be read into all the claims.” *Teleflex, Inc.*
8 *v. Ficosa North America Corp.*, 299 F.3d 1313, 1326 (Fed.Cir. 2002) (quoting *Raytheon Co.*
9 *v. Roper Corp.*, 724 F.2d 951, 957 (Fed.Cir. 1983)). In *Teleflex*, the court ruled that the term
10 “clip” was not confined to the embodiment described in specification, which would limit
11 “clip” to a structure having a single pair of legs. 299 F.3d 1313, 1326–28. The court
12 explained that there were no clear statements in the specification or prosecution history
13 indicating that the scope of claim should be so limited, noting, for example, that “[t]he
14 language of asserted claim 1 does not support limiting the claim to a ‘single pair of legs.’
15 Neither ‘single’ nor ‘pair of legs’ appears in claim 1.” *Id.* at 1327. The court concluded that
16 the district court “erred by importing the ‘single pair of legs’ limitation from the specification
17 into the claim.” *Id.* at 1328.

18 A similar analysis applies to Defendants’ attempt to import into claims 1 and 11 the
19 limit of “distinct layers.” The phrase “distinct layer” does not appear in the claims or the
20 specifications. Defendants note that the embodiments describe vehicles containing carrier and
21 barrier layers. Similarly, Defendants assert that because all of the embodiments disclosed in
22 the specification include a carrier made of a substantially absorbent material, the term carrier
23 must be so defined. Again, however, it is improper to confine a claim to the embodiments set
24 forth in the specification. Moreover, “the specification need not describe every embodiment
25 of the claimed invention.” *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1352 (Fed.Cir.
26 2001); *see Epistar Corp. v. International Trade Com’n*, 566 F.3d 1321, 1337 (Fed.Cir. 2009)
27 (rejecting accused infringer’s argument that the term “substrate” had to have a certain
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1 thickness, provide structural support, and be limited to a single layer since the disclosure in
2 the specification was only for an “exemplary” embodiment).

3 Plaintiffs also argue that the “distinct layer” limitation would improperly exclude “an
4 embodiment disclosed in the specification in which the carrier is comprised of several layers
5 sandwiched together.” (Doc. 91 at 3.) This embodiment includes a carrier that consists of two
6 other members “sandwiched together with a suitable adhesive and each consisting of a
7 natural or synthetic sponge-like or substantially absorbent,” with a “macrocapsule containing
8 one or more volatile substances” captured between the members. (Doc. 86-1, col. 6, ll. 8-12,
9 and FIG. 16.) As Plaintiffs note, in this embodiment the carrier, being comprised of two
10 members and a macrocapsule, cannot accurately be defined as a “distinct layer.” Courts
11 “normally do not interpret claim terms in a way that excludes embodiments disclosed in the
12 specification.” *Oatey Co. v. IPS Corp.*, 514 F. 3d 1271, 1276 (Fed.Cir. 2008). For this reason
13 too, the “distinct layer” limitation is not properly imported into the claim.

14 In addition, Defendants’ proposed construction of carrier is inappropriate under the
15 doctrine of claim differentiation, which holds that “the presence of a dependent claim that
16 adds a particular limitation raises a presumption that the limitation in question is not found
17 in the independent claim.” *Liebel–Flarsheim*, 358 F.3d at 910; *see Curtiss–Wright Flow*
18 *Control Corp. v. Velan, Inc.*, 438 F.3d 1374, 1381 (Fed.Cir. 2006) (explaining that “claim
19 differentiation takes on relevance in the context of a claim construction that would render
20 additional, or different, language in another independent claim superfluous”); *Phillips*, 415
21 F.3d at 1315 (“The presence of a dependent claim that adds a particular limitation gives rise
22 to a presumption that the limitation in question is not present in the independent claim.”).
23 Furthermore, independent claims are generally given broader scope so as to avoid rendering
24 corresponding dependent claims redundant. *Id.* at 1324 (citing *Dow Chem. Co. v. United*
25 *States*, 226 F.3d 1334, 1341 (Fed.Cir.2000)).

26 Dependent claim 12 describes a “vehicle of claim 11, wherein the carrier includes a
27 substantially absorbent member.” Therefore, there is a presumption that the “substantially
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1 absorbent member limitation,” contrary to Defendants’ construction, is not found in
2 independent claim 11. Defendants are correct that the written description can overcome the
3 claim differentiation presumption in certain circumstances, but those circumstances are not
4 present here. The effect of ignoring the doctrine in this case “would render the dependent
5 claims superfluous or even invalid.” *Abbott Laboratories v. Sandoz, Inc.*, 529 F.Supp.2d 893,
6 907 (N.D.Ill. 2007).

7 Next, Plaintiffs define “substantially impermeable to one or more volatile substances”
8 as “preventing passage of most or all of the one or more volatile substances.” Defendants
9 argue that the phrase does not need to be construed beyond its plain meaning. The Court will
10 adopt Plaintiffs’ construction, which is consistent with the ordinary and customary meaning
11 of the words, and accurately describes the function of the barrier as set forth in the
12 specification.

13 Finally, Plaintiffs define “coupled to” as “connected or adjacent to.” Defendants
14 propose the following definition: “the distinct carrier layer is affixed to the distinct barrier
15 layer.” The parties agree that “connected” is a fair construction of “coupled to.” (Doc. 85 at
16 12.)

17 Plaintiffs argue that their definition is consistent with the construction of the term
18 adopted by the court Federal Circuit in *Johnson Worldwide Associates, Inc. v. Zebco Corp.*,
19 175 F.3d 985, 992 (Fed.Cir. 1999), which held that the “clear meaning” of coupled “is not
20 limited to a mechanical or physical coupling.” Defendants counter that this definition is
21 inappropriate because a physical or mechanical coupling is required to connect the barrier
22 to the carrier; mere adjacency would not hold the carrier and barrier together. They also cite
23 the American Heritage Dictionary, which defines “adjacent” as “Close to; lying near” and
24 “Next to; adjoining.”

25 The Court finds neither party’s definition of “couple to” satisfactory. While the Court
26 has rejected Defendants’ “distinct layers” limitation on the terms barrier and carrier, it
27 concludes that Plaintiffs’ proposed construction is overly expansive. “Adjacent,” which can
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1 be defined as merely close to or near, is not consistent with Plaintiffs’ characterization of
2 their claims, which describe the carrier and barrier as being connected rather than merely
3 near each other. Accordingly, the Court will construe the term “coupled to” as “connected
4 to.”

5 **C. “Proximate an inhalation flow path,” “Engaging the carrier to a surface of the**
6 **skin,” and “Means for engaging the carrier to the surface of the skin.”**

7 Claims 1 and 11 specify a vehicle and method “engaging the carrier to the surface
8 of the skin proximate an inhalation flow path of a respiratory organ with the barrier adapted
9 to be interposed between the carrier and the skin to prevent the one or more volatile
10 substances from contacting the skin.” The parties’ proposed constructions of these terms
11 address the placement of the device and the mechanism by which it is held in place.

12 Plaintiffs define “proximate an inhalation flow path” as “close to or within the
13 entrance to the mouth and/or the nasal passages.” Defendants’ proposed construction is
14 “substantially immediately adjacent to the nasal or oral cavity openings, and not on the
15 bridge of the nose or inserted into the nasal cavity openings.”

16 The parties agree that “‘proximate an inhalation flow path’ means ‘close to’ or
17 ‘substantially immediately adjacent to’ the openings of the mouth (oral cavity) or nasal
18 passages.” (Doc. 89 at 14.) Defendants contend, however, that “the plain meaning of ‘close
19 to’ or immediately adjacent to’ does not include inside of.” (*Id.*)

20 Plaintiffs argue that their construction of the term is supported by the specification,
21 which includes embodiments where the device is inserted into the nose. They note that the
22 specification for vehicle 20 states that “the entrance of mouth 22 and entrances of nose 23
23 as defined by the external openings into each of the nasal passages define inhalation flow
24 paths” and that “vehicle 20 is preferably worn against the skin adjacent or otherwise in one
25 or more of inhalation paths 24 and 25.” (Doc. 86-1, Col. 3, lines 14–19, 58–64). Figure 4 also
26 shows the vehicle inserted into the nose.

27 Defendants assert, however, that the prosecution history shows that Plaintiffs
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1 disclaimed any embodiments in which the devise is inserted into the nose. (Doc. 85 at
2 13–15.) According to Defendants, this disclaimer supercedes the embodiments in the
3 specification.

4 During prosecution of claims, the Examiner cited U.S. Pat. Nos. 5,706,800 to Cronk
5 (“Cronk”) and 888,869 to Clark (“Clark”). (Doc. 86, Ex. G.) The Cronk reference discloses
6 a nasal dilator strip attached to the bridge of the nose. (*See id.*, Ex. F). Defendants argue that
7 the “patentee unambiguously gave away embodiments of a device that is attached to the
8 bridge of the nose.” (Doc. 85 at 14.) Plaintiffs acknowledge that the patentee distinguished
9 his invention from Cronk by stating that “Cronk does not teach the use of a vehicle proximate
10 the inhalation flow path. The bridge of the nose is a substantially [sic] distance form [sic] the
11 flow path.” (*Id.*, Ex. H at 9.) Plaintiffs note, however, that “the accused products in this case
12 are not placed on the bridge of the nose,” and argue there is no issue for the Court to resolve.
13 (Doc. 88 at 15.) The Court agrees with Defendants that Plaintiffs clearly and unmistakably
14 disavowed embodiments of vehicles positioned on the bridge of the nose. *See Omega*
15 *Engineering, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1325–26 (Fed.Cir. 2003)

16 The Clark reference discloses an inhaler that is inserted into the nose. (*Id.*) The
17 patentee argued that Clark did not disclose a carrier that is “positioned proximate the flow
18 path” but instead “actually blocks the flow path.” (*Id.*) The examiner removed the Clark
19 reference. According to Defendants, however, by “blocks the flow path,” the patentee
20 necessarily meant “inserted into the nostrils.” (*See Docs.* 85 at 15, 89 at 12.) Therefore,
21 Defendants argue, because the patentee’s characterization of the invention as being placed
22 “proximate” the flow path did not include being inserted into the nose, “Plaintiffs have
23 forever given up those embodiments and cannot now as a matter of law attempt to recapture
24 those same embodiments in litigation.” (Doc. 85 at 15.)

25 As additional evidence that Plaintiffs disclaimed embodiments inserted into the nose,
26 Defendants cite the patentee’s cancellation of proposed claim 22. (Doc. 89 at 12–13.) Claim
27 22 included the requirement that the vehicle be “within, at or below the openings of the
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1 respiratory organ.” (Doc. 91, Ex. J at 34.) The patentee believed the claim was allowable
2 because “within, at or below the openings of the respiratory openings while leaving said
3 openings unrestricted is believed to define over the cited references.” (*Id.* at 38.) The
4 patentee later cancelled claim 22. The record shows that “the Examiner indicated to [the
5 patentee’s counsel] that prior art cited in prior office actions, specifically U.S. Patent No.
6 5,706,800 to Cronk et al and U.S. Patent No. 888,869 to Clark, read on the newly submitted
7 claim 22. Applicant agreed to cancel claim 22 because claims 1–16 and claim 21 are
8 allowable over the prior art of record.” (*Id.* at 41.)

9 Plaintiffs argue that the patentee simply agreed to cancel proposed claim 22 in order
10 to facilitate issuance of the patent, because the Examiner had already allowed claims 1–16
11 and claim 21. They note that notwithstanding the applicant’s statements regarding Clark, the
12 Examiner allowed claims inserting the device into the nose: dependent claim 15, which states
13 that, “The vehicle of claim 11, wherein the means includes a deformable element deformably
14 engagable against the respiratory organ,” and dependent claim 16, “The vehicle of claim 11,
15 wherein the means includes a clip clippingly engagable against the respiratory organ.”

16 Plaintiffs also note that there were several differences between proposed claim 22 and
17 the issued claims; for example, in contrast to the claims that were issued, claim 22 did not
18 include the limitation of a “barrier.” Therefore, Plaintiffs argue, because the requirement in
19 proposed claim 22 that the vehicle be “within, at or below the openings of the respiratory
20 organ” was not the only distinction between the proposed and issued claims, the cancellation
21 of claim 22 did not constitute a disclaimer.

22 The Court agrees with Plaintiffs that these details of the applicant’s cancellation of
23 proposed claim 22 do not support a finding of disclaimer. “[F]or prosecution disclaimer to
24 attach, our precedent requires that the alleged disavowing actions or statements made during
25 prosecution be both clear and unmistakable.” *Omega*, 334 F.3d at 1325–26; *see Computer*
26 *Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374 (Fed.Cir. 2008) (“prosecution
27 disclaimer does not apply to an ambiguous disavowal.”) There is no “clear and
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1 unmistakable” disavowal if the statements are subject to “more than one reasonable
2 interpretation.” *Seirus Innovative Accessories, Inc. v. Bula America, Inc.*, No. 08-CV-2234
3 H(WMC), 2010 WL 5585509, at *2 (S.D.Cal. October 14, 2010) (quoting *SanDisk Corp. v.*
4 *Memorex Prods., Inc.*, 415 F.3d 1278, 1287 (Fed.Cir. 2005)). Here, the statements made
5 concerning the Clark reference and withdrawn claim 22 are subject to more than one
6 reasonable interpretation.

7 Based on the foregoing, the court will construe “proximate an inhalation flow path”
8 as “close to or within the entrance to the mouth and/or the nasal passages and not on the
9 bridge of the nose.”

10 Plaintiffs define “engaging the carrier to a surface of the skin” as “bringing the vehicle
11 into contact with the skin.” Defendants’ proposed definition is “adhering to the surface of the
12 skin.”

13 Defendants contend that their construction is consistent with the ordinary meaning of
14 “engaging.” (Doc. 85 at 15.) They also argue that the patentee surrendered all non-adhesive
15 claims during prosecution of the Patent—specifically, “embodiments using deformable
16 members or clips to position the device in the nasal cavities.” (Doc. 89 at 15.)

17 As described above, the Court finds there was no disclaimer related to embodiments
18 of the vehicle inserted into the nose. The Court also finds, as discussed in more detail below,
19 that there was no disclaimer of embodiments using deformable members or clips. The
20 specification disclosed a clamp and a deformable element that could be used to keep the
21 vehicle in contact with the skin. The Court concludes, therefore, that Defendants’ proposed
22 construction of “adhering to the surface of the skin” is too narrow and improperly limits the
23 scope of the claim. *See Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1301
24 (Fed.Cir. 2003) (“Absent a clear disclaimer of particular subject matter, the fact that the
25 inventor anticipated that the invention may be used in a particular manner does not limit the
26 scope to that narrow context.”).

27 However, the Court agrees with Defendants that Plaintiffs’ construction—“bringing
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1 the vehicle into contact with the skin”—is imprecise. In every embodiment described, the
2 vehicle is attached to, not merely brought into contact with, the skin, whether by an adhesive,
3 a clamp, or a deformable element. Therefore, the Court will construe “engaging the carrier
4 to a surface of the skin” as “attaching the vehicle to the skin.”¹

5 The parties agree that “means for engaging the carrier to the surface of the skin” is a
6 “means-plus-function” term governed by 35 U.S.C. § 112(f). Construction of a means-plus-
7 function limitation involves two steps. *Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*,
8 296 F.3d 1106, 1113 (Fed.Cir. 2002). First, the court must identify the claimed function. *Id.*
9 The court must construe the function to include the limitations contained in the claim
10 language, and only those limitations. *Id.* It is improper to narrow the scope of the function
11 beyond the claim language, or to broaden the scope of the claimed function by ignoring clear
12 limitations in the claim language. *Id.*

13 After identifying the claimed function, the court must determine what structure, if any,
14 disclosed in the specification corresponds to the claimed function. *Id.* In order to qualify as
15 corresponding, the structure must not only perform the claimed function, but the specification
16 must clearly associate the structure with performance of the function. *Id.* To determine the
17 structures, the court must “consider the specification as a whole, and to read all portions of
18 the written description, if possible, in a manner that renders the patent internally consistent.”
19 *Budde v. Harley–Davidson, Inc.*, 250 F.3d 1369, 1379–80 (Fed.Cir. 2001). “[P]roper
20 construction should account for ‘all structures in the specification corresponding to the
21 claimed function’ and it would be error to limit the structure to be just the preferred
22 embodiment.” *Seirus*, 2010 WL 5585509, at *2 (quoting *Callicrate v. Wadsworth Mfg., Inc.*,
23 427 F.3d 1361, 1369 (Fed.Cir. 2005)).

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26 ¹ This construction is supported by dictionary definitions of the words engage, adhere,
27 and attached. Engage is defined as “to come together and interlock.” Adhere: “to hold fast
28 or stick by or as if by gluing, suction, grasping, or fusing.” Attach: “to make fast (as by tying
or gluing).” Merriam-Webster’s Collegiate Dictionary (11th ed. 2008).

1 The means-plus-function limitation covers both distinct and alternative structures.
2 *Creo Prods., Inc. v. Presstek, Inc.*, 305 F.3d 1337, 1345 (Fed.Cir. 2002). Additionally,
3 “[w]hen multiple embodiments in the specification correspond to the claimed function,
4 proper application of § 112[] generally reads the claim element to embrace each of those
5 embodiments.” *Micro Chemical, Inc. v. Great Plains Chemical Co., Inc.*, 194 F.3d 1250,
6 1258–59 (Fed.Cir. 1999).

7 Plaintiffs’ proposed construction of function is “bringing the vehicle into contact with
8 the skin.” Defendants propose “attaching the carrier to the surface of the skin proximate an
9 inhalation flow path.” Neither construction is satisfactory. As Plaintiffs note, Defendants’
10 proposed construction, which describes the function as attaching the carrier to the surface of
11 the skin, is inconsistent with the claim language: “means for engaging the carrier to a surface
12 of skin proximate an inhalation flow path of the respiratory organ with the barrier adapted
13 to be interposed between the carrier and the surface of skin.” (Doc. 59, Ex. A, col. 8, ll.
14 37–42). Thus, while the vehicle comes into contact with the skin, the barrier is designed to
15 be interposed between the carrier and the skin. Contrary to Defendants’ proposed
16 construction, therefore, there is no requirement that the carrier itself must come into contact
17 with the skin. Next, for the reasons discussed above, Plaintiff’s description of function as
18 bringing the vehicle “into contact with” the skin is imprecise. Accordingly, the Court will
19 construe the function as “attaching the vehicle to the skin proximate an inhalation flow path.”

20 For the corresponding structure, Plaintiffs propose “adhesive, clamp, deformable
21 element, deformable member, and equivalents thereof,” while Defendants propose “adhesive
22 and equivalents thereof that were not disclaimed in prosecution.” Plaintiffs argue that their
23 construction is supported by the claims and specification. The Court agrees. Dependent
24 claims of the Patent provide that the means include an “adhesive” (claim 13), “a deformable
25 element” (claim 15), and “a clip” (claim 16). Similarly, the specification provides that:

26 user 21 may then engage adhesive backing 33 to his or her body proximate one
27 or more of inhalation flow paths 24 and 25 such as, as shown in FIG. 1,
28 adjacent the external openings of the nasal passages of nose 23.

1 Deformable member 55 thus permits the clamping of vehicle 50 against not
2 only septum 56, but also to the external sidewalls 57 and 58 of nose bounding
the external openings into the nasal passages if so desired.

3 Clamp 61 permits the clipping engagement of vehicle 50 against, for instance,
4 one of at least the septum and external sidewalls bounding the external
openings of the nasal passages of the nose of a user.

5 (Doc. 59, Ex. A, col. 3, ll. 41–44; col. 4, ll. 20–25, 49–52.)

6 Defendants again seek to limit the corresponding structure to “adhesive.” The Court
7 has rejected Defendants’ argument that the applicant surrendered the all non-adhesive
8 structures encompassed by the disputed “means for” claim language.

9 Defendants argue that the patentee failed to “clearly link” certain structures with the
10 claimed function. (Doc. 85 at 17.) Specifically, they argue that the patentee does not clearly
11 state that the clip and deformable element are for “engaging the vehicle to the skin proximate
12 an inhalation flow path.” Defendants cite, for example, the patentee’s statement that the
13 structures are for clamping or clipping “of vehicle 50 against not only septum 56, but also
14 to the external sidewalls 57 and 58 of nose bounding the external openings into the nasal
15 passages if so desired.” (Doc. 59, Ex. A, col. 4, ll. 20–25, 49–52; *see* FIG. 4 & 5.). According
16 to Defendants, therefore, the structures do not engage the vehicle to the skin *proximate* an
17 inhalation flow path, and this failure “to clearly associate the structures with the function
18 results in those structures not being covered by means-plus-function claiming.” (Doc. 89 at
19 17.)

20 The Court disagrees. Having rejected Defendants’ contention that Plaintiffs
21 disclaimed embodiments inserted into the nose, and having construed “proximate an
22 inhalation flow path” as “close to or within the entrance to the . . . nasal passages . . . ,” the
23 Court finds that the clip and deformable element do engage the vehicle to the skin proximate
24 an inhalation flow path.

25 Accordingly, “[a]fter considering the specification as a whole and reading the written
26 description in a manner that renders the patent internally consistent,” *Budde*, 250 F.3d at
27 1379–80, the Court concludes that the specification and claim history clearly link or associate
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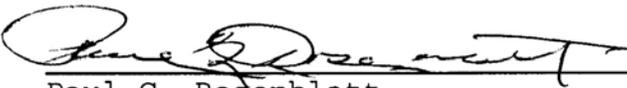
1 the deformable element and clip to the function attaching the vehicle to the skin. *See Omega*,
2 334 F.3d at 1322; *see also Seirus*, 2010 WL 5585509, at *2.² The Court will construe
3 structure to include the embodiments disclosed in the specification: adhesive, clamp,
4 deformable element, or deformable member.

5 **IV. Conclusion**

6 For the foregoing reasons, the Court construes the disputed claim terms as set forth
7 above.

8 **IT IS SO ORDERED.**

9 DATED this 23rd day of July, 2013.

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11 Paul G. Rosenblatt
12 United States District Judge

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25 ² In *Seirus*, the court construed terms for a patented ski mask and scarf, including the
26 term “securing means.” 2010 WL 5585509, at *7. The court noted that, “The specification
27 discloses that ‘a variety of snaps, strings, or other fastening devices’ may be used as a
28 securing means. The specification further discloses that co-acting fasteners, such as
VELCRO, can be used as a securing means in a preferred embodiment.” *Id.* The court
therefore defined securing means” to be these identified structures—namely, snaps, strings,
co-acting fasteners, and other fastening devices. *Id.*, at *7