

APPLICABLE PATENT LAW

1
2 There is patent infringement if any one of a patent's claims covers the alleged infringer's
3 product or process. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 889 (Fed.
4 Cir. 1988). Before determining whether a patent covers an alleged infringing device, it is
5 necessary to conduct a claim construction hearing to determine what the terms of the claim
6 mean. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995)(*en banc*), *aff'd*,
7 517 U.S. 370 (1996); *see also*, *Novartis Pharms. Corp. v. Abbott Labs.*, 375 F.3d 1328, 1332
8 (Fed. Cir. 2004); *SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 874 (Fed. Cir. 2004).
9 "A claim in a patent provides the metes and bounds of the right which the patent confers on the
10 patentee to exclude others from making, using, or selling the protected invention." *Corning*
11 *Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989). "The
12 construction of claims is simply a way of elaborating the normally terse claim language in order
13 to understand and explain, but not to change, the scope of the claims." *Terlep v. Brinkmann*
14 *Corp.*, 418 F.3d 1379, 1381 (Fed. Cir. 2005) (quoting *Embrex, Inc. v. Serv. Eng'g Corp.*, 216
15 F.3d 1343, 1347 (Fed. Cir. 2000)).

16 Under *Markman*, the court as a matter of law must construe the claims of the patent at
17 issue. *Markman*, 52 F.3d at 979; *Terlep*, 418 F.3d at 1381-82. "Words of a claim are generally
18 given their ordinary and customary meaning, which is the meaning a term would have to a
19 person of ordinary skill in the art after reviewing the intrinsic record at the time of the
20 invention." *O2 Micro Intern. Ltd. v. Beyond Innovation Technology Co., Ltd.*, 521 F.3d 1351,
21 1359 (Fed. Cir. 2008) (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005)
22 (*en banc*)). "In some cases, the ordinary meaning of claim language . . . may be readily apparent
23 even to lay judges, and claim construction in such cases involves little more than the application
24 of the widely accepted meaning of commonly understood words." *Phillips*, 415 F.3d at 1314.
25 The plain and ordinary meaning defines the scope of the claim unless the patentee has explicitly
26 disclaimed or clearly disavowed this meaning in the specification or prosecution history.
27 *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004) (requiring "words or
28 expressions of manifest exclusion or restriction" before broad terms in a claim will be read

1 narrowly in light of a narrow specification).

2 DISCUSSION

3 I. Claims at Issue

4 The parties dispute several terms used in Claim 1, the only independent claim, and
5 dependent Claim 4. The claims read as follows:

6 1. An elongated tubular casing structure for encasing meat products, said
7 elongated structure having a longitudinal direction and a transverse lateral
8 direction, said casing structure comprising:

9 a stockinette member comprising a closely knit tubular member formed of closely
10 knit threads and having a first stretch capacity;

11 a knitted netting arrangement having a second stretch capacity and comprising a
12 first plurality of spaced strands extending in said longitudinal direction and a
13 second plurality of spaced strands extending in said lateral direction;

14 the longitudinal and lateral strands of said netting arrangement each intersecting in
15 locking engagement with one another to form a grid-like pattern comprising a
16 plurality of four-sided shapes;

17 said strands of said netting arrangement being knit into the threads of said
18 stockinette member, whereby said netting arrangement and said stockinette
19 member are integrally formed so that said casing structure comprises an integrally
20 formed structure;

21 said first stretch capacity being greater than said second stretch capacity;

22 WHEREBY when a meat product is stuffed into said casing structure
23 under pressure, said meat product forms a bulge within each of said four-
24 sided shapes to thereby define a checker-board pattern on the surface
25 thereof, said stockinette member forming a shield to prevent the adherence
26 of adjacent meat product bulges over said strands of said netting
27 arrangement.

28 4. A casing structure as defined in claim 3 wherein each loop is interlaced
with an adjacent preceding loop and an adjacent following loop;

whereby to form a plurality of aligned interlaced loops;

each longitudinal strand comprising one of said aligned interlaced loops.

(Patent)

The parties dispute the construction of the following terms: “integrally formed”,
“stockinette member”, “netting arrangement”, “strand”, “thread”, “longitudinal strand”,

1 “latitudinal strand”, “locking engagement” and “checkerboard pattern”.¹

2 **1. Integrally Formed**

3 Plaintiffs provide an ordinary and customary construction of the term “integrally
4 formed”: “formed as a unit.” As plaintiffs pointed out during the Markman hearing, “that is the
5 plain meaning of this language.” (Markman Tr. at 45.)

6 Defendants assert that plaintiffs’ plain meaning of the term is too simplistic and not
7 reflective of the “claim language, specification and drawings, the prosecution history and the
8 plaintiffs’ own brief.” *Id.* at 62. In contrast to the plain meaning definition, defendants’
9 proposed construction of “integrally formed” is “the strands of the netting arrangement are knit
10 into the physically divisible stockinette member to form a unit.” Defendants first point to Figure
11 1 of the patent which shows a netting arrangement standing alone. With their proposed
12 construction, defendants further contend they are relying on the claim itself which indicates that
13 the strands of the netting arrangement are to be knit into the threads of the stockinette member to
14 create an integrally formed structure. *Id.* at 62-63. But defendants’ proposed construction does
15 not take into account the patent’s second preferred embodiment which demonstrates that two
16 separate structures are unnecessary.

17 Here, plaintiffs have not demonstrated an intent to deviate from the ordinary and
18 customary meaning of “integrally formed” by redefining the term. Based on claim language, the
19 Court construes “integrally formed” as “formed as a unit.”

20 **2. Stockinette Member**

21 Plaintiffs’ proposed construction of “stockinette member” is “a closely knit tubular
22 member formed of closely knit threads.” Defendants would modify plaintiffs’ construction to
23 include: “closely knit threads forming rows of regular loops and having a closer knit and smaller
24 opening than the netting arrangement.”

25
26
27 ¹ In the initial joint claim construction statement, certain terms were included that
28 subsequently have been withdrawn from construction consideration, *viz.* “for encasing meat
products”, tubular”, “closely knit”, “stretch capacity”, “knitted”, “intersecting”, “whereby”, and
“interlaced”. (Joint Claim Construction Statement at 3. [doc. #44])

1 Plaintiffs contend that defendants “agree that the proposed definition offered by the
2 plaintiffs is found in the claims” (Plaintiff’s response to defendants’ opening brief at 7) but by
3 inserting additional language in their construction, defendants are attempting to impermissibly
4 narrow the construction and interject language used exclusively in a prior art, the ‘057 Lombardi
5 patent. The dispute surrounding the construction is the “terminology of forming rows of regular
6 loops, having a closer knit and smaller openings than the netting arrangement.” (Markman Tr.
7 at 66. (emphasis added)) Plaintiffs argue that the only limitations contained within the claim are
8 that the stockinette member be (1) knit, (2) closely knit, and (3) have a first-stretch, *i.e.*, greater
9 stretch capacity, than the netting arrangement. (Markman Tr. at 30.) The Court agrees. The
10 unambiguous language of the claim does not require “regular loops” or any particular stitch be
11 used in the stockinette member.

12 But defendants contend that the term “rows of regular knit” is necessary for the proper
13 construction of the term “stockinette member” based on the prosecution history wherein
14 plaintiffs distinguished their invention over the prior art of Lombardi. Plaintiffs’ Office Action
15 Response, dated August 9, 1994, states with reference to Figure 4 that “the top of the long loop
16 of yarn 42 in wale 3, row 25, being separated from the special yarn [the netting arrangement] in
17 row 27 by one row 26 of regular loops (*i.e.*, loops of the regular yarn).” (Defendants’ Exh. B
18 151.) Based on this language, defendants contend that the stockinette member must be made of
19 regular loops of regular yarn in order to differentiate the stockinette member from the netting
20 arrangement.

21 Defendants are attempting to impermissibly narrow the plain and ordinary meaning of the
22 claim term. Plaintiffs have not explicitly disclaimed the plain meaning of “stockinette member”
23 in the specification or prosecution history. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d
24 898, 906 (Fed. Cir. 2004) (requiring “words or expressions of manifest exclusion or restriction”
25 before broad terms in a claim will be read narrowly in light of a narrow specification (quoting
26 *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002)).

27 With respect to the phrase “closer knit and smaller openings than the netting
28 arrangement,” defendants note that in order for the stockinette member to have a greater stretch

1 capacity and to form a shield as set forth in the “whereby” portion of Claim 1, the stockinette
2 must have a closer knit and smaller openings than the netting arrangement. The claim language
3 requires that the stockinette member be “closely knit” – a term that is not ambiguous. Further,
4 there is nothing in the claim language or specifications to suggest that smaller openings are
5 necessary for the stockinette member to function as intended.

6 The Court construes “stockinette member” as “a closely knit tube.”

7 **3. Netting Arrangement**

8 Plaintiffs proposed construction of the term “netting arrangement” is “lateral and
9 longitudinal strands that intersect in locking engagement to form a grid-like pattern.” Although
10 quite similar, defendants seek construction of the term as “longitudinal and lateral strands that
11 intersect in locking engagement with one another to form a grid-like pattern and *having not as*
12 *close a knit and larger opening than the stockinette member.*” Defendants’ construction is the
13 flip side of their construction for “stockinette member.” In other words, if the construction of
14 “stockinette member” includes “having a closer knit and smaller opening than the netting
15 arrangement,” the netting arrangement must have a less close knit and a larger opening than the
16 stockinette. As discussed above, this is an impermissibly narrow construction.

17 The term “netting arrangement” has a discernable plain and ordinary meaning.
18 Accordingly, the Court construes “netting arrangement” as “longitudinal and lateral strands that
19 intersect in locking engagement to form a grid-like pattern with less stretch capacity than the
20 threads of the stockinette member.”

21 **4. Strand**

22 Plaintiffs’ proposed construction of “strand” is “a yarn or yarns used in forming the
23 lateral and longitudinal structures of the netting arrangement.” Defendants’ construction of
24 “strand” is “elasticized or non-elasticized materials including yarn that is heavier than the yarn
25 used to form the stockinette member and having a longitudinal member and a lateral member.”

26 Plaintiff asserts that there is nothing in the claim language or specifications that suggests
27 that the yarn used to form the netting arrangement must be heavier than the thread found in the
28 stockinette member. According to plaintiffs the term “strand” refers to the location of the yarn

1 only, *i.e.*, “strand” relates solely to the netting arrangement rather than the stockinette member.

2 By adding defendants’ proposed language of “heavier than the yarn used to form the
3 stockinette member,” plaintiffs properly contend defendants are limiting the claim to a preferred
4 embodiment while ignoring the second preferred embodiment that actually demonstrates the
5 composition of the yarn used to form the netting arrangement and the stockinette can be the
6 same material, *i.e.*, yarn of the same weight instead of heavier for the netting arrangement and
7 lighter for the stockinette member.

8 The Court adopts plaintiffs’ construction of the term “strand”: “a yarn or yarns used in
9 forming the lateral and longitudinal structures of the netting arrangement.”

10 **5. Thread**

11 “Thread” was not one of the terms sought to be construed by either party in the opening
12 claim construction brief; however, defendants now contend it must be construed. Plaintiffs
13 responded to defendants’ proposed construction in its responsive brief and at the Markman
14 Hearing.

15 Plaintiffs construe “thread” as “a yarn or yarns used in forming the stockinette member.”
16 It is undisputed that throughout the patent, “thread” is associated with the yarn used for forming
17 the stockinette member. Defendants suggest that “thread” be construed as “yarn comprising
18 cotton, polyester, nylon or other suitable materials, that is finer than the yarn used to form the
19 netting arrangement,” contending this construction falls within the “ordinary and customary
20 meaning” of the term within the context of the specification, and is supported by plaintiffs’
21 expert.

22 As noted in the above discussion of the term “strand,” plaintiffs contend that the terms
23 “strands” and “threads” are intended to do nothing more than describe the location of the yarns.
24 “Strand” or “strands” refer to the netting arrangement; “thread” or “threads” refer to the
25 stockinette member. Plaintiffs state they acted as their own lexicographers, which is
26 permissible. But when acting as its own lexicographer, the patentee must set forth an explicit
27 definition of the term different from its ordinary and customary meaning. *Phillips*, 415 F.3d at
28 1316. Plaintiffs have not done so here.

1 Under the ordinary and customary meaning to a person of ordinary skill in the art in
2 question at the time of the invention, “thread” would likely be considered a finer gauge yarn than
3 a strand. This is borne out by plaintiffs’ expert’s testimony that the threads of the stockinette are
4 finer than the strands of the netting arrangement:

5 Q. So, I believe you’re indicating that a thread and a strand are both yarns, is that
6 correct?

6 A. Yes, sir.

7 Q. So how are they different?

7 A. To me, a thread is finer, a light yarn, a thin yarn.

8 (Defendants’ Exh. F, Mademann Depo. at 66).

9 Only if plaintiffs made clear they were defining “thread” differently than its ordinary and
10 customary meaning would “thread” not connote a finer gauge yard. Nevertheless, there is no
11 requirement in the claim language or the specifications that require the yarns used to make the
12 netting arrangement be heavier than those used to make the stockinette member which is clear in
13 reference to the second preferred embodiment: “the strands of the netting arrangement are knit
14 into the stockinette of the same threads which form the stockinette.”

15 The Court construes “thread” as “a yarn or yarns used in forming the stockinette
16 member.”

17 **6. Longitudinal Strand**

18 Plaintiffs seek to have the Court construe the term “longitudinal strand” as “strand or
19 strands which run in the length-wise direction of the netting structure.” Defendants propose the
20 term be defined as “strands forming the netting arrangement extending in the longitudinal
21 direction which do not include any stitch loops and are not immediately next to another parallel
22 longitudinal loop.”²

23 Plaintiffs base their definition on the plain and ordinary meaning because “the term has
24 no special meaning.” (Plaintiffs’ Opening Claim Construction at 16.) Defendants contend that
25

26 ² Defendants’ latest construction of the terms “longitudinal strand” and “lateral
27 strand” differ from that found in the joint claim construction statement, their responsive claim
28 construction brief and their opening claim construction brief. As a result, their arguments
concerning the these terms are found in the Markman hearing transcript.

1 plaintiffs provide no support for their construction, either intrinsic or extrinsic. (Defendants’
2 Responsive Claim Construction at 15.) But according to plaintiffs, defendants’ construction is
3 premised on a preferred embodiment. A particular embodiment appearing in the written
4 description may not be read into a claim when the claim language is broader than the
5 embodiment. *Electro Med. Sys. S.A. v. Cooper Life Sci., Inc.*, 34 F.3d 1048, 1054 (Fed. Cir.
6 1994).

7 In explaining why the definition of “longitudinal strand” should not include any stitch
8 loops, defendants state that stitch loops are “the little loops in the lateral strands that connect to
9 the regular loops of the stockinette.” (Markman Tr. at 73.) “When the meat product is stuffed
10 into the netting, the heavy yarn will be pulled tight, causing these little loops to disappear so that
11 the heavy yarn will be firmly pressed against the product. So if these lateral strands disappear
12 when the meat goes in there, we don’t think they should be construed as a longitudinal strand.”
13 *Id.* Defendants do not “feel that a stitch loop can contribute to a four-sided shape when it
14 disappears – when its longitudinal component disappears when it is stretched.” *Id.* at 74.
15 Defendants provide no intrinsic or extrinsic evidence to support their belief and the Court finds
16 none in the claim language, specifications or prosecution history. As a result, the construction of
17 “longitudinal strand” does not require the inclusion of “which do not include any stitch loops”
18 language.

19 Defendants also seek to include language that the netting arrangement strands are “not
20 immediately next to another parallel longitudinal loop” based upon the claim language which
21 provides that the netting arrangement is comprised of a “first plurality of *spaced strands*” in the
22 longitudinal direction. The dispute becomes whether a strand is a single yarn or whether a
23 strand can be composed of several yarns. Plaintiffs argue that “[a] strand is a very broad concept
24 and doesn’t refer to one individual filament or 2 or 3 or 20, or however many you wanted to use.
25 The strand is the structure itself; it’s not the components of the structure.” (Markman Tr. at 88.)
26 Plaintiffs’ interpretation is based on how the term “strand” is used in Claim 1 and how it is used
27 throughout the patent. The Court agrees. Although the claim language requires that the
28 longitudinal strands be spaced in order to create the checkerboard pattern, defendants seek to

1 limit longitudinal strands to a single component, *i.e.*, an individual strand, by including language
2 that strands are “not immediately next to another parallel longitudinal loop.” Defendants point
3 to Figure 12 which “basically shows no spacing between the longitudinal strands and basically
4 cannot create a checkerboard pattern.” (Markman Tr. at 74.) It appears defendants are using the
5 term “strand” as a component rather than as a structure. When “longitudinal strands” are
6 considered as a structure, the claim language requiring that those strands be spaced needs no
7 further definition of the kind defendants suggest. Defendants have not offered any intrinsic or
8 extrinsic evidence to support this construction.

9 The Court construes “longitudinal strand” as “strand or strands which run in the length-
10 wise direction of the tubular casing.”

11 **7. Lateral Strand**

12 The proper construction of “lateral strand” according to plaintiffs is “strand or strands
13 which run perpendicularly to longitudinal strand(s) around the circumference of the tube of the
14 netting structure.” In contrast, defendants construe the term as “strands forming the netting
15 arrangement extending in the lateral direction which does not form rows of regular loops and are
16 not immediately next to another parallel lateral strand.”

17 Like their definition of “longitudinal strand,” plaintiffs rely on a plain and ordinary
18 meaning for the term “lateral strand”, which defendants assert is unsupported. (Defendants’
19 Responsive Claim Construction at 15-16.) But as previously noted, “claim terms take on their
20 ordinary and accustomed meanings unless the patentee demonstrated an intent to deviate from
21 the ordinary and accustomed meaning of a claim term by redefining the term or by
22 characterizing the invention in the intrinsic record using words or expressions of manifest
23 exclusion or restriction, representing a clear disavowal of claim scope.” *Teleflex*, 299 F.3d at
24 1327.

25 Defendants point to the prosecution history where plaintiffs distinguished their invention
26 from the Lombardi prior art to support their definition of “lateral strand” as not formed with
27 rows of regular loops. (Markman Tr. at 71-72.) As defendants explain, because the stockinette
28 member is formed of rows of regular loops, the lateral strand, being a component of the netting

1 structure, cannot form rows of regular loops. *Id.* “If the lateral strands did form rows of regular
2 loops, we don’t see how a checkerboard pattern could result in a meat product.” *Id.* at 71-72.
3 The Court disagrees. When “strand” is construed without regard to the weight of the yarn, and
4 the stockinette member is not required to be comprised of rows of regular loops, a lateral strand
5 would function in a manner that would create the netting arrangement’s intended pattern and
6 would not become part of the stockinette member shield.

7 Defendants’ proposed inclusion of language that the netting arrangement strands are “not
8 immediately next to another parallel lateral strand” is based upon the claim language which
9 provides that the netting arrangement is comprised of a “second plurality of *spaced strands*” in
10 the lateral direction. But as with defendants’ argument concerning their proposed construction
11 of longitudinal strands, *i.e.*, they are “not immediately next to another parallel longitudinal
12 loop,” defendants are using the term “strand” as a component rather than as a structure. As set
13 forth in the claim language, the structure of lateral strands is spaced. Defendants have not
14 offered any intrinsic or extrinsic evidence that shows plaintiffs intended to deviate from the plain
15 and ordinary meaning of the term. Accordingly, no additional defining terms are needed.

16 The Court construes “lateral strand” as “strand or strands which run perpendicularly to
17 longitudinal strand(s) around the circumference of the tubular casing.”

18 **8. Locking Engagement**

19 Plaintiffs propose the proper construction of “locking engagement” as “the intersection of
20 the longitudinal and lateral structures to form a netting arrangement.” Defendants’ proposed
21 construction is: “each longitudinal strand of the netting arrangement is interlaced with an
22 adjacent preceding longitudinal strand of the netting arrangement and an adjacent following
23 longitudinal strand of the netting arrangement wherein the longitudinal strands of the netting
24 arrangement are not separated from one another by a row of regular loops.”

25 “Intersection” or “intersecting” is not a term that is subject to construction here: “Both
26 Plaintiffs and Defendants have agreed that the term ‘intersecting’ should be defined as having, as
27 two geometrical loci, one or more points in common: intersecting strands.” (Defendants’
28 Opening Claim Construction at 21.) As noted above, plaintiffs’ proposed construction of

1 “locking engagement” is the mere intersection of the lateral and longitudinal strands – the
2 strands of the netting arrangement having one or more points in common. This definition does
3 not suggest that the intersection of strands is fixed in making the netting arrangement. Claim 1
4 speaks of the longitudinal and lateral strands of the netting arrangement “each intersecting in
5 locking engagement”; therefore, “locking engagement” is the “how” the strands are meant to
6 intersect, and not the intersection itself. As plaintiffs assert: “All we say is locking engagement
7 means the intersection of longitudinal and lateral structures to form a netting arrangement. *They*
8 *have to be locked at the corners in order to be a net by definition.*” (Markman Trans. at 43.
9 (emphasis added)) Plaintiffs’ proposed construction does not define or even reference that the
10 intersection of the netting arrangement strands is fixed or locked in any manner. Consequently,
11 plaintiffs’ construction is rejected.

12 Nevertheless, “locking engagement” has a plain and ordinary meaning within this patent,
13 *i.e.*, at the intersection of the lateral and longitudinal strands, the strands are fixed so as to
14 prevent the strands from shifting. Relying on a “plain and ordinary meaning” may be inadequate
15 when a term has more than one “ordinary” meaning but in the present case the term is not
16 ambiguous nor have plaintiffs restricted the term in the specifications. *See Teleflex, Inc. v.*
17 *Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002) (requiring “words or expressions of
18 manifest exclusion or restriction” before broad terms in a claim will be read narrowly in light of
19 a narrow specification”).

20 The term “locking engagement” was defined for the first time in the prosecution history
21 and according to defendants, “[i]n order to more clearly distinguish Applicant’s claimed
22 invention over Henricus and Lombardi.” (Defendants’ Exh. B 148.) Plaintiffs amended what
23 was then claim 15 “to specify that the longitudinal and lateral strands of the netting arrangement
24 each intersect in locking engagement with one another to form a grid-like pattern comprising a
25 plurality of four-sided shapes.” *Id.*

26 Plaintiff further stated in the prosecution history:

27 As it is apparent from Figs. 1 and 2 of the present application, the longitudinal
28 strands of 5 and the lateral strands of 7 each intersect with one another to form a
grid-like pattern comprising a plurality of four-sided shapes. **Each loop 9 of the**

1 lateral strands 7 is interlaced with an adjacent preceding loop and an
2 adjacent following loop to thereby provide a locking engagement between the
3 longitudinal and lateral strands at their point of intersection, the longitudinal
stands 5 being formed by the interlaced aligned loops 9 . . .

4 (Defendants' Exh. B 148-149. (emphasis added))

5 Citing this amendment, defendants contend that their proposed construction of the term
6 "locking engagement" is what plaintiffs explicitly defined in their amendment to claim 15,
7 which became independent Claim 1: an interlacing of an adjacent preceding loop and an adjacent
8 following loop of the longitudinal and lateral strands at their intersection. But the term
9 "interlacing" is a means of creating a locking engagement but not necessarily the only means of
10 creating a locking engagement and the first and second preferred embodiments do not
11 demonstrate an interlacing of an adjacent preceding loop and an adjacent following loop

12 Defendants also contend that plaintiffs affirmatively stated what the term "locking
13 engagement" did *not* include – rows of regular loops separating the "locking engagements" of
14 the longitudinal strands. Defendants point to the prosecution history where plaintiffs
15 distinguished their invention over Lombardi.

16 In Lombardi, each loop of special yarn [the netting arrangement] extending in the
17 longitudinal direction does not intersect in locking engagement with each special
18 yarn extending in the lateral direction to form a grid-like pattern. This is also
19 apparent from Fig. 6 of Lombardi, where the aligned long loops of special yarn are
20 each separated from one another by a row of regular loops [the stockinett
21 member]. Accordingly, there is no teaching or suggestion whatsoever in
Lombardi in respect of providing a knitted netting arrangement comprising a first
plurality of spaced strands extending in the longitudinal direction and a second
plurality of spaced strands extending in the lateral direction, wherein the
longitudinal and lateral strands each intersect in locking engagement with one
another to form a grid-like pattern, *as in Applicant's claimed invention*.

22 (Defendants' Exh. at B 151. (underlining in original; italic added))

23 Once again, defendants are attempting to read a feature of the third preferred embodiment
24 into the claim as a limitation while ignoring the first and second preferred embodiments.

25 Based on the unambiguous meaning of the term, the Court construes "locking
26 engagement" as "fixed at each intersection."

27 **9. Checkerboard Pattern**


28 The parties are in substantial agreement concerning the phrase "checkerboard pattern":

1 “parallel vertical and horizontal impressions and crossing at right angles which results in a four
2 sided impression.” But defendants contend the phrase “*approximately equidistant*” should be
3 added to the definition. This argument is based on the plain and ordinary meaning of
4 “checkerboard pattern” and on defendants’ expert’s testimony that such a shape is square.
5 Plaintiffs argue that adding “approximately equidistant” improperly narrows the construction in
6 that a checkerboard pattern is not limited to perfect squares. Because of the second-stretch
7 capacity of the netting arrangement, the indentations may not appear on the meat products as
8 perfect squares but the basic shape of the netting arrangement is an approximate square. The
9 plain and ordinary meaning of the term “checkerboard pattern” includes “approximately
10 equidistant”.

11 The Court construes “checkerboard pattern” as: “parallel vertical and horizontal
12 impressions approximately equidistant and crossing at right angles which result in a four-sided
13 impression.”

14 **IT IS SO ORDERED.**

15 DATED: February 13, 2009

16 
17 M. James Lorenz
18 United States District Court Judge

19 COPY TO:

20 HON. CATHY ANN BENCIVENGO
21 UNITED STATES MAGISTRATE JUDGE

22 ALL PARTIES/COUNSEL
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