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EXAMINER
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ERIC C. LEUTHARDT, ROYCE A. LEVIEN,  
MARK A. MALAMUD, and LOWELL L. WOOD JR.

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Appeal 2015-002754  
Application 12/462,129<sup>1</sup>  
Technology Center 1600

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Before MICHAEL J. STRAUSS, JOHN F. HORVATH, and  
KIMBERLY McGRAW, *Administrative Patent Judges*.

McGRAW, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1, 3, 7, 8, 12–14, 33, 65, 66, 70–72, 74 and 75. Br. 4. Claims 2, 4–6, 9–11, 15–18, and 22–32 are withdrawn and claims 19–21, 34–64, 67–69, and 73 are cancelled.<sup>2</sup> Br. 4. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> According to the Appellants, the real party in interest is Searete LLC, which is wholly owned by Intellectual Ventures Management, LLC. Br. 4.

<sup>2</sup> Although the Answer and the Final Action state claims 19–21 are withdrawn and that claims 67–69 are pending and stand rejected, Appellants cancelled these claims in an Amendment dated June 20, 2014. As such, these claims are not before us on appeal.

## BACKGROUND

Appellants' Specification is titled "Computation System and Method for Memory Modification." Claims 1, 33, 65, 66, and 70 are independent. Claim 1 is reproduced below:

1. A system, comprising:
  - means for monitoring at least one physiological response, including at least one indication of breathing difficulty, of an individual during an artificial sensory experience, including at least a simulated flying experience for overcoming a fear of heights;
  - means for associating a stress level of the artificial sensory experience with the at least one indication of breathing difficulty of the individual; and
  - means for modifying at least one of a memory-dampening agent or the simulated flying experience at least partially based on associating a stress level of the artificial sensory experience with the at least one indication of breathing difficulty of the individual.

Br. 61 (Claims App.).

## THE REJECTIONS ON APPEAL

Claims 1, 3, 7, 8, and 12–14 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Ans. 2; Final Act. 3.

Claims 14 and 74 stand rejected under 35 U.S.C. § 112, first paragraph, for failing to comply with the written description requirement. Ans. 2; Final Act. 5.

Claims 1, 3, 7, 8, 12, 13, 33, 65, 66, and 70–72 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Wiederhold, et al (BK

Wiederhold, R. Gevirtz, and MD Wiederhold, *Fear of Flying: A Case Report Using Virtual Reality Therapy with Physiological Monitoring*, 1:2 *CyberPsychology & Behavior* 97 (1998)(hereinafter “Wiederhold”) and Snellman (WO 2007/141373) (hereinafter Snellman). Ans. 2; Final Act. 7.

Claim 75 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Weiderhold, Snellman, and Banos et al. (IEEE Transactions on Information Technology in Biomedicine 2002). Ans. 2; Final Act. 9.

#### ANALYSIS

We have thoroughly reviewed each of Appellants’ arguments for patentability. However, we are not persuaded by Appellants’ arguments and sustain the Examiner’s rejections for essentially those reasons expressed in the Final Action and the Examiner’s Answer. We add the following primarily for emphasis.

#### *35 U.S.C. § 112, ¶ 2 – Indefiniteness*

Independent claim 1 and dependent claims 3, 7, 8, and 12–14 stand rejected under 35 U.S.C. § 112, ¶ 2 as being indefinite. Ans. 2; Final Act. 3–4.

Appellants do not appeal this rejection. We therefore summarily affirm the rejection of claims 1, 3, 7, 8, and 12–14 as indefinite under 35 U.S.C. § 112, ¶ 2. *See* 37 C.F.R. § 41.37(c)(iv); *see also Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (“When the appellant fails to contest a ground of rejection to the Board, . . . the Board may treat any argument with respect to that ground of rejection as waived. In the event of such a waiver, the PTO may affirm the rejection of the group of claims that the examiner rejected on that ground without considering the merits of those rejections.”).

*35 U.S.C. § 112, ¶ 1 – Written Description*

The Examiner rejected claims 14 and 74 under 35 U.S.C. § 112, ¶ 1 for lack of written description, finding the original disclosure does not provide support for the full scope of the claims.

Appellants argue that the USPTO has only made a general allegation that the claims do not have written description support and has not provided reasons why a person skilled in the art would not have recognized that the inventor was in possession of the invention. Br. 8–9, 13–18.

This argument is not persuasive. With respect to claim 14, the Examiner specifically found the originally filed disclosure does not support the claim language requiring “each successive presentation [of a jet landing portion of the simulated flying experience] presents the jet closer to a runway than a preceding presentation in response to an improvement in stress level of the at least one individual” because the details of “successive presentation[s]” and “the jet closer to the runway” are not described in the specification. Final Act. 5–6. With respect to claim 74, the Examiner specifically found the originally filed disclosure does not support “accessing a [reference database] to correlate breathing difficulty with a stress level of the individual.” Final Act. 6. The Examiner explained the originally filed disclosure does not correlate breathing difficulty with stress level or accessing a database to perform such a correlation. *Id.*

Appellants also argue that support for claim 14 can be found in the specification as originally filed at page 166, lines 13–38 and page 179, lines 13–17. Br. 10. Appellants assert that the disclosure of a “simulation presenting *gradually increasing* contact” suggests at least “successive presentations” of the simulation as claimed, and that “gradually increasing

contact with the object of the fear” would suggest “the jet closer to the runway” during “each successive presentation.” Br. 10.

We disagree. As found by the Examiner, and unrebutted by Appellants, the claimed elements of “successive presentations” implies discontinuity in the contact, such as having the airplane make several separate passes over the runway, each at a lower altitude. Indeed, claim 14 explicitly requires “iteratively presenting a jet landing portion,” and the Specification’s disclosure of providing “gradually increasing contact with the object of fear” does not support successive or iterative presentations as recited in the claim. Ans. 3. As the Examiner found, and with which we agree, the Specification’s disclosure of “gradually increasing contact” implies that contact is increased continually during the artificial sensory experience (e.g., having the airplane approach the runway in a single landing event),” rather than having the contact iteratively or successively presented. *Id.*

Appellants argue that support for the limitation of claim 74 requiring “accessing at least one of a medical reference database, psychiatric reference database, or psychology reference database to correlate breathing difficulty with a stress level of an individual” can be found at page 19, lines 11–15, page 28, lines 9–11, page 37, lines 3–6, page 166, lines 2–3, page 166, lines 16–18, and page 177, line 29 through page 178, line 5. Br. 11–12.<sup>3</sup> Appellants assert that the Specification’s disclosure of “physician’s desk reference database,” such as the WebMD database, would “easily and

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<sup>3</sup> On pages 15–16 of their Brief, Appellants cite to paragraphs 120, 158, 416, and 433 of Appellant’s Specification. We note that the originally filed Specification did not contain paragraph numbers.

inherently suggest” at least “accessing at least one of medical reference database, psychiatric reference database, or psychology reference database to correlate *breathing difficulty* with a *stress* level of the individual.” Br. 12–13, 15–16.

We disagree. As found by the Examiner, and unrebutted by Appellants, although the originally-filed disclosure does mention medical reference databases, the disclosure does not describe a database that correlates a breathing difficulty with a stress level, or a database that contains information enabling one of ordinary skill in the art to perform such a correlation. Ans. 3–4. The Examiner further found that, although the WebMD database contains information that stress can cause hyperventilation, the database does not disclose a “correlation” between breathing difficulty and a stress level. Ans. 4. Accordingly, Appellants’ argument is unpersuasive of Examiner error.

*35 U.S.C. § 103(a)*

The Examiner rejected claims 1, 3, 7, 8, 12, 13, 33, and 65–72 under 35 U.S.C. § 103(a) as being unpatentable over Wiederhold and Snellman and claim 75 over Wiederhold, Snellman, and Baños. Final Act. 7–10.

*Claims 1, 7, 13, 33, 65, 66, 70, and 75*

Appellants contend the Examiner erred in rejecting claims 1, 7, 13, 33, 65, 66, 70, and 75 because there are “one or more significant differences between the pinpoint-cited portions of the technical material and the express claim language.” Br. 19–48. For each rejection, Appellants argue that “the pinpoint-cited portions of the technical material” do not disclose a particular limitation of each claim. *See, e.g., id at 23.*

Appellants’ arguments are not persuasive. Rather than pointing out the Examiner’s supposed errors, Appellants’ arguments amount to little more than a recitation of the claim language, a quotation of the Examiner’s statement of the rejection, a quotation of each of the cited portions of the prior art references, a conclusory statement that the “pinpoint-cited . . . technical material cited by the PTO does not disclose, nor fairly suggest[]” quoted claim language, and Appellants’ summary conclusion that “Appellant has shown by direct quotations” that the claims and the cited portions of the asserted art “are very different on their faces.” *See, e.g., id* at 19–24. Other than alleging that “at first sight,” “on the first appearance,” “on the face of it,” “so far as can be judged from the first disclosure,” the specific USPTO-cited “technical material is different from the claims,” Appellants have not identified, with any particularity, any error in the Examiner’s interpretations of Wiederhold or Snellman as applied in the rejections or construction of the claim language.

The test of whether a reference teaches or suggests a claim limitation is not whether the exact language of the limitation is present in the reference. Rather, the relevant inquiry is whether the limitation is taught or suggested by the prior art when the claim is given its broadest reasonable interpretation in light of the specification. *See, e.g., In re Bond*, 910 F.2d 831, 832–33 (Fed. Cir. 1990) (interpretation of references “is not an ‘ipsissimis verbis’ test”); *Akzo N.V. v. U.S. Int’l Trade Comm’n*, 808 F.2d 1471, 1479 & n.11 (Fed. Cir. 1986).

Appellants may well disagree with how the Examiner interpreted and applied the references or the rationale for combining the references. However, Appellants offer no evidence or substantive reasoned arguments to

rebut the specific underlying factual findings or conclusions made by the Examiner in support of the § 103 rejections. We decline to examine the claims *sua sponte*, looking for distinctions over the prior art. *See In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) (“It is not the function of this court to examine the claims in greater detail than argued by an [A]ppellant, looking for [patentable] distinctions over the prior art.”).

In the absence of a more detailed explanation, we are not persuaded of error on the part of the Examiner. *See In re Jung*, 637 F.3d. 1356, 1365 (Fed. Cir. 2001) (“[I]t has long been the Board’s practice to require an [Appellant] to identify the alleged error in the [E]xaminer’s rejections,” *citing Ex Parte Frye*, 94 USPQ2d 1072 (BPAI 2010) (precedential) (“The panel then reviews the obviousness rejection for error based upon the issues identified by appellant, and in light of the arguments and evidence produced thereon.”)).

Therefore, we sustain the Examiner’s rejections of claims 1, 7, 13, 33, 65, 66, 70, and 75.

*Claims 3, 7, 8, 12–14, 71, 72, 74 and 75*

Appellants argue that dependent claims 3, 7, 8, 12–14, 71, 72, 74 and 75 are patentable for at least the same reason as the independent claims from which they respectively depend. *See e.g.*, Br. 29, 40, 58. As we sustained the rejection of the independent claims, this argument is not persuasive. Accordingly, we sustain the rejection of claims 3, 7, 8, 12–14, 71, 72, 74 and 75.

#### DECISION

The rejection of claims 1, 3, 7, 8, and 12–14 under 35 U.S.C. § 112, ¶ 2 is summarily affirmed.

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The rejection of claims 14 and 74 under 35 U.S.C. § 112, ¶ 1 is affirmed.

The rejections of claims 1, 3, 7, 8, 12, 13, 66, 65, 66, 70–72, and 75 under 35 U.S.C. § 103(a) are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED