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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* TULGA SIMSEK<sup>1</sup>

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Appeal 2015-005430  
Application 12/742,646  
Technology Center 1700

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Before CHRISTOPHER L. OGDEN, CHRISTOPHER C. KENNEDY, and  
AVELYN M. ROSS, *Administrative Patent Judges*.

KENNEDY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's decision to reject claims 1, 49–55, 58, and 66. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

BACKGROUND

The subject matter on appeal relates to a washing machine. *E.g.*, Spec. 1, ¶ 1; Claim 1. Claim 1 is reproduced below from page 21 (Claims Appendix) of the Appeal Brief:

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<sup>1</sup>According to the Appellant, the real party in interest is the named inventor, Tulga Simsek. App. Br. 2.

1. A washer and extractor machine (1) comprising
  - a liquid tub (10) positioned either horizontally or inclined with the horizontal;
  - a perforated drum (5) having an interior cylindrical surface and including a shaft bearing (11) and wherein the perforated drum (5) rotates inside the liquid tub;
  - a circulation pump (16) for sucking a liquid from the liquid tub (10) and pumping the liquid back to the drum and
  - wherein the interior cylindrical surface is perforated and the perforated part of interior cylindrical surface of the perforated drum (5) includes at least eight protrusions (45) having a size between 1% and 6% of the perforated drum diameter which create hollows (46) in between protrusions (45) wherein the size of the protrusions of the washer and extractor machine (1) prevents harm to the textiles.

#### REJECTIONS ON APPEAL<sup>2</sup>

1. Claims 1, 49–55, 58, and 66 stand rejected under 35 U.S.C. § 112, ¶ 2, as indefinite.
2. Claims 1 and 50–54 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Sights et al. (US 5,782,111, issued July 21, 1998).
3. Claims 1, 55, 58, and 66 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Uzkureit et al. (US 6,463,767 B2, issued Oct. 15, 2002).

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<sup>2</sup> In the Answer, the Examiner withdraws a rejection of claim 49 under 35 U.S.C. § 112, ¶ 4. Ans. 2.

## ANALYSIS

### *I. Rejection 1*

Claims 1, 49–55, 58, and 66 stand rejected under 35 U.S.C. § 112, ¶ 2, as indefinite.

The legal standard for definiteness in prosecution is whether a claim reasonably apprises those of skill in the art of its scope. *In re Warmerdam*, 33 F.3d 1354, 1361 (Fed. Cir. 1994). “[D]efiniteness of the language employed must be analyzed—not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.” *In re Moore*, 439 F.2d 1232, 1235 (CCPA 1971). In a litigation context, the Supreme Court has held that 35 U.S.C. § 112, ¶ 2 “require[s] that a patent’s claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014). During prosecution, the inquiry made by the Examiner is focused upon whether the claims set out and circumscribe a particular subject matter with a reasonable degree of clarity and particularity. *See, e.g.*, MPEP 2173.02.

#### A. Claims 1 and 50

The Examiner determines that the limitation “prevents harm” renders claim 1 indefinite. Final Act. 4–5. Although the Appellant amended claim 1 in claim amendments following the Final Action, the amendment appears to address a typographical/grammatical mistake, *see* Claims dated Aug. 20, 2014; it does not appear to address the Examiner’s concern regarding the

term “prevents harm,” *see* Final Act. 4–5. In the Appeal Brief and the Reply Brief, the Appellant does not acknowledge or address the § 112, ¶ 2 rejection of claim 1, *see* App. Br. 10–11; Reply Br. 2–3, notwithstanding the fact that Examiner maintains the rejection in the Answer, Ans. 2; *see also* 37 C.F.R. § 41.39(a)(1) (“An examiner’s answer is deemed to incorporate all of the grounds of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory action and pre-appeal brief conference decision), unless the examiner’s answer expressly indicates that a ground of rejection has been withdrawn.”). Because the Appellant identifies no reversible error in the Examiner’s § 112 rejection of claim 1, we summarily affirm the rejection. *See Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (“If an appellant fails to present arguments on a particular issue—or more broadly, on a particular rejection—the Board will not, as a general matter, unilaterally review those uncontested aspects of the rejection.”); *cf. In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (even if the examiner failed to make a prima facie case, the Board would not have erred in framing the issue as one of reversible error because “it has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections”). Because claims 50–55, 58, and 66 depend, directly or indirectly, from claim 1, we likewise summarily affirm the Examiner’s § 112 rejection of those claims.

The Examiner determines that claim 50, which depends from claim 1, is further indefinite due to the language “by sucking the liquid from a volume (39) between the perforated drum (5) and the liquid tub (10) draining from the drum (5) into the volume (39) and pumping the liquid back to the perforated drum (5).” *See* Final Act. 5. The Examiner states that

“[t]he metes and bounds of this limitation are not understood,” and, for examination purposes, the Examiner interprets the claim to mean “the circulation pump sucks the liquid drained from the perforated drum into the tub and pumps the liquid back into the perforated drum.” *Id.*

In response to the rejection, the Appellant amended claim 50, consistent with the Examiner’s interpretation of the disputed limitation, to recite “by sucking the liquid from a volume (39) between the perforated drum (5) and the liquid tub (10) and pumping the liquid back to the perforated drum (5).” *See* Claims dated Aug. 20, 2014. The Examiner entered the amendment. *See* Amendment initialed by Examiner dated Sept. 12, 2014. Because that amendment appears to be consistent with the Examiner’s interpretation of the claim, it would appear to resolve the Examiner’s § 112, ¶ 2 concern with claim 50.

In the Examiner’s Answer, the Examiner does not expressly withdraw the rejection, but fails to provide any explanation as to why amended claim 50 remains indefinite. *See* Ans. 2–3. Because the Examiner provides no rationale as to why the amended claim remains indefinite, we reverse the § 112, ¶ 2 rejection of claim 50 with respect to the language “by sucking the liquid from a volume (39) between the perforated drum (5) and the liquid tub (10) draining from the drum (5) into the volume (39) and pumping the liquid back to the perforated drum (5),” which no longer exists in that form. However, as noted above, we affirm the § 112, ¶ 2 rejection of claim 50 with respect to the term “prevents harm,” which is included in claim 50 by its dependence from claim 1.

B. Claim 49

The Examiner determines that the limitation “adequate height and density” renders claim 49 indefinite. Final Act. 5. In particular, the Examiner determines that “[t]he term ‘adequate’ is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.” *Id.* The Examiner assumes that the height and number of protrusions “as expressed in claim 1 will result in the ‘adequate height and density’ of claim 49.” *Id.* In the Answer, the Examiner further explains:

Examiner finds the distinction between claims 1 & 49 to be recital of “adequate” by claim 49. Examiner considers that either the claimed invention of claim 49 is 1) distinct from claim 1 as imparted by “adequate height and density,” said distinction not being understood, or 2) a duplicate of claim 1 per what is positively recited of the protrusions. Since Appellant had not clarified/confirmed examination interpretation of ‘adequate’ on the record . . . the [§ 112, ¶ 2] rejection remains applied.

Ans. 2–3.

The Appellant argues that claim 49 itself provides sufficient context to render the disputed limitation definite. App. Br. 11. In particular, the Appellant points to the following language of claim 49 (emphasized): “adequate height and density *to keep laundry away from perforations (21) to prevent the perforations (21) being blocked by the laundry and to let water reach the perforations (21) and drain out from the perforated drum (5).*” *Id.* The Appellant also argues that, because the Examiner “understands the language to make a rejection,” the claim cannot be indefinite. *Id.*

We are not persuaded by those arguments because they do not address the Examiner's rationale. The fact that the Examiner previously rejected claim 49 under § 112, ¶ 4 (a rejection that is withdrawn in the Examiner's Answer, *see* Ans. 2) does not of itself establish, or even suggest, that the scope of the disputed term is reasonably clear to a person of ordinary skill in the art. Consistent with the previous § 112, ¶ 4 rejection, the Examiner finds that claim 49 is indefinite because it is unclear to what extent, if any, the scope of claim 49 differs from the scope of claim 1. *See* Final Act. 5; Ans. 2–3. In other words, it is unclear whether claim 1's limitation of "at least eight protrusions (45) having a size between 1% and 6% of the perforated drum diameter" (which is also repeated in claim 49) meets the "adequate height and density" limitation of claim 49, or if something more is required. Even considering the additional language of claim 49 emphasized by the Appellant, the Appellant's argument does not explain whether, and to what extent, claim 49 differs in scope from claim 1. Because the Appellant has not persuasively addressed the Examiner's concern with respect to claim 49, we are not persuaded of reversible error in the rejection. *Cf. Jung*, 637 F.3d at 1365; *see also In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989) ("[D]uring patent prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed."). We therefore affirm the rejection.

## *II. Rejection 2*

Claims 1 and 50–54 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Sights. After review of the cited evidence in the appeal record and the opposing positions of the Appellant and the Examiner, we determine that the Appellant has not identified reversible error in the

Examiner's rejection. Accordingly, we affirm the rejections for reasons set forth below, in the Final Action, and in the Examiner's Answer. *See generally* Final Act. 2–3, 6–10; Ans. 3–5.

The Appellant's arguments focus on limitations appearing in claim 1. We select claim 1 as representative of the rejected claims, and we limit our discussion to claim 1.

The Examiner finds that Sights teaches a washer and extractor machine comprising the elements of claim 1, except that Sights "does not explicitly teach" (1) a tub, (2) a shaft bearing, (3) a circulation pump, and (4) the specific number and size of protrusions. Final Act. 6–7. Concerning the tub, shaft bearing, and circulation pump, the Examiner takes official notice that those features are commonly included in washing machines. *Id.*

Concerning the number and size of protrusions, the Examiner notes that the Appellant's Specification states that conventional protrusion height is 6% to 12% of the drum diameter, and that it is conventional to include 6 to 8 protrusions. *Id.* at 8; Spec. 2–3. Given that (1) the admitted conventional height of 6% of drum diameter overlaps the claimed range of "between 1% and 6%," and (2) the admitted conventional number of eight protrusions overlaps the claimed range of "at least eight protrusions," the Examiner concludes that a washer and extractor machine having the claimed number and size of protrusions would have been obvious. Final Act. 8; *see also In re Wertheim*, 541 F.2d 257, 267 (CCPA 1976).

The Appellant principally argues that a person of ordinary skill in the art would not have considered the claimed invention obvious over Sights because Sights contemplates abrasion of garments, while the claimed

invention is concerned with “preventing harm to textiles.” *See* App. Br. 15–16.

We are not persuaded by that argument. Claim 1 is directed to an apparatus. “[A]pparatus claims cover what a device *is*, not what a device *does*.” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1468 (Fed. Cir. 1990) (emphasis in original). The Appellant’s argument fails to identify a structural difference between the apparatus of Sights (as modified according to the Examiner’s analysis) and the claimed apparatus.

The Appellant’s Specification contemplates as a goal “increase[d] rubbing effect during a washing” and “augmenting friction . . . between said fabrics with drum protrusions.” Spec. 10; Ans. 3. As the Examiner explains, “[i]t is evident that Appellant’s protrusions are also applying an abrasive/frictional effect from these passages.” Ans. 3. The Examiner further explains that the harm sought to be prevented by the Appellant’s invention is that caused by perforations in the drum. *See* Spec. 1 (“The machine according to this invention prevents the harm of the textile caused by the drum perforations and also during the high speed spinning stage.”), 9 (“to prevent drum perforations damaging delicate textile . . .”). While the Specification also references “damage caused to textile by normal size ribs,” Spec. 3, Sights expressly teaches that “[t]he degree of abrasion can be controlled by the size and diameter of the protrusions as well as their geometric shape,” *see* Sights at 4:7–8. The Appellant does not persuasively explain how or why the abrasion contemplated by Sights is incompatible with, or otherwise teaches away from, “prevent[ing] harm to the textiles” as recited by claim 1, particularly given that the Appellant’s own Specification appears to contemplate some level of abrasion (friction) caused by the

protrusions. On this record, the Appellant fails to identify a patentable distinction between the apparatus of claim 1 and the apparatus of Sights as modified according to the Examiner's analysis. The Appellant's arguments concerning abrasion do not persuade us of reversible error in the Examiner's rejection.

With no elaboration or explanation, the Appellant also "disagrees with the official notice taken for the liquid tub, the shaft bearing and the circulation pump." *See* App. Br. 15; Reply Br. 6. However, as the Examiner explains, a bald statement of disagreement with no identification of specific errors in the Examiner's rationale is not persuasive. *See, e.g., In re Chevenard*, 139 F.2d 711, 713 (CCPA 1943); *see also* MPEP § 2144.03. The Examiner's undisputed finding that Uzkureit teaches a washing machine comprising a liquid tub, shaft bearing, and circulation pump provides support for the Examiner's finding that tubs, shaft bearings, and circulation pumps are conventional aspects of washing machines. *See, e.g.,* Final Act. 11. On this record, we are not persuaded that the Examiner committed reversible error in taking official notice of certain facts. We affirm the rejection.

### *III. Rejection 3*

Claims 1, 55, 58, and 66 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Uzkureit. After review of the cited evidence in the appeal record and the opposing positions of the Appellant and the Examiner, we determine that the Appellant has not identified reversible error in the Examiner's rejection. Accordingly, we affirm the rejections for reasons set forth below, in the Final Action, and in the Examiner's Answer. *See generally* Final Act. 10–13; Ans. 5–6.

The Appellant's arguments focus on limitations appearing in claim 1. We select claim 1 as representative of the rejected claims, and we limit our discussion to claim 1.

The Examiner finds that Uzkureit teaches a washing machine comprising each element of claim 1 except "Uzkureit only teaches 3 paddles [protrusions] rather than 8, and is silent regarding the proportion in size of the protrusions being between 1 and 6%." Final Act. 11. Similar to Rejection 2, the Examiner relies on the Appellant's admission that a number and size of protrusions overlapping the number and size recited by claim 1 is conventional, and the Examiner concludes that claim 1 would have been obvious in view of Uzkureit. *Id.* at 11–12.

The Appellant argues that Uzkureit's protrusions are greater than 12% of the diameter of the drum and "teach away from the present invention." *See* App. Br. 19. The Appellant also argues that "Uzkereit [sic] would cause abrasion with paddle greater tha[n] 12% of the diameter," and that, "even when combined with the so-called 'conventional perforated drum' it would not produce the present invention as it appears both would cause abrasion." *Id.* at 20.

Those arguments are not persuasive. Regardless of the height of the protrusions disclosed by Uzkureit, the Examiner finds that it would have been obvious to use a known conventional protrusion height—e.g., 6% of the diameter of the drum—with Uzkureit's protrusions. Final Act. 12. The Appellant identifies nothing in Uzkureit that criticizes, discourages, or otherwise teaches away from the use of such a protrusion height. The Appellant provides no persuasive argument that Uzkureit as modified by the Examiner's analysis would not meet the structural limitations of claim 1, or

Appeal 2015-005430  
Application 12/742,646

that it would result in more abrasion than the washing machine of claim 1 in a way that would somehow remove it from the scope of claim 1. The Appellant's arguments do not persuade us of reversible error in the Examiner's rejection. We affirm the rejection.

#### CONCLUSION

We AFFIRM the Examiner's rejections of claims 1, 49–55, 58, and 66.

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

AFFIRMED