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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/597,756	02/23/2010	Petra Schachtner	12007-0142	2383
22902	7590	01/31/2020	EXAMINER	
CLARK & BRODY 1700 Diagonal Road Suite 310 Alexandria, VA 22314			WAGGENSPACK, ADAM J	
			ART UNIT	PAPER NUMBER
			3734	
			MAIL DATE	DELIVERY MODE
			01/31/2020	PAPER

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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* PETRA SCHACHTNER

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Appeal 2018-005603  
Application 12/597,756  
Technology Center 3700

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Before MURRIEL E. CRAWFORD, TARA L. HUTCHINGS, and  
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

HUTCHINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 43, 45–50, 52, 54–60, and 62. We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Our decision references Appellant's Specification (“Spec.,” filed Oct. 27, 2009), Published Application (“Pub. Appl.,” 2010-014790, pub. June 17, 2010), Appeal Brief (“Appeal Br.,” filed Feb. 23, 2018) and Reply Brief (“Reply Br.,” filed May 10, 2018), and the Examiner's Answer (“Ans.,” mailed Mar. 13, 2018) and Final Office Action (“Final Act.,” mailed July 27, 2017). Appellant identifies Schachtner Vermoegensverwaltungs GmbH & Co. KG as the real party in interest. Appeal Br. 3.

We AFFIRM IN PART.

CLAIMED INVENTION

Appellant's claimed invention relates to a carrying device. Spec. 1, ll. 3-4.

Claim 43, reproduced below, is the sole independent claim on appeal and is representative of the claimed subject matter:

43. A carrying device (10) for receiving a baby or small child in such a manner that at least a region of the baby's or small child's back can be received and/or can be supported therein, the carrying device comprising:

a holding harness system (40, 60) for fastening a receiving body (12) to a person, comprising a hip strap (40) and a pair of shoulder straps (60), each shoulder strap having a free end, the receiving body having a longitudinal length and positioned with respect to the holding harness system to contact and support at least a region of a back of the baby or small child;

wherein the receiving body (12) further comprises:  
a main body portion having a lower edge;  
an end portion, the end portion having an upper end, the upper end including opposing edges, which are angled with respect to a longitudinal axis of the receiving body;  
an extension element positionable between the main body portion and the end portion, wherein the extension element, the main body portion, and the end portion are of a unitary one piece construction or a multiple piece construction with the multiple pieces stitched together, and

means for changing the longitudinal length of the receiving body using the extension element to be able to accommodate both the baby and the small child, the extension element is positioned between the main body portion and the end portion so as to contact the region of the baby's or small child's back, and further wherein

the hip strap (40) is fastened along a central portion thereof to a lower edge of the main body and each shoulder

strap (60) is fastened to each respective opposing edge of the upper end of the end portion.

### REJECTIONS<sup>2</sup>

Claims 43, 45–50, 52, 54–60, and 62 are rejected under 35 U.S.C. § 112, second paragraph, as indefinite.

Claims 43, 45–50, 55, 56, 60, and 62 are rejected under 35 U.S.C. § 103(a) as obvious over Linday (US 4,986,458, iss. Jan. 22, 1991), Bricout (FR 2,546,389, iss. Nov. 30, 1984) or Bricout (FR 2,481,093, iss. Oct. 30, 1981) (“Bricout2”), and Elf (US 4,428,514, iss. Jan. 31, 1984).<sup>3</sup>

Claims 55–60 are rejected under 35 U.S.C. § 103(a) as obvious over Linday, Bricout or Bricout2, Elf, and Donine (US 2001/0030210 A1, pub. Oct. 18, 2001).

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<sup>2</sup> The Examiner has withdrawn the rejections of the claims under 35 U.S.C. § 103 involving Gray (US 2008/0190972 A1, pub. Aug. 14, 2008) and Grant (US 2009/0206116 A1, pub. Aug. 20, 2009). Ans. 18.

<sup>3</sup> It is unclear what combination of references the Examiner is applying in various rejections. For example, the heading for this rejection recites “Linday . . . in view of . . . Bricout . . . and . . . Elf . . . , either alone or also in view of . . . Bricout2[,],” suggesting that the claims are rejected under Linday, Bricout, and Elf, and also Linday, Bricout, Elf, and Bricout2. Final Act. 6. In the body of this rejection, the Examiner appears to apply a combination of Linday, Bricout, and Elf, and appears to rely on Bricout2 regarding attaching shoulder straps as disclosure of a shape of an end portion. *Id.* at 8–9. Yet, the rejection of claims 55–60 rejects the claims over “Linday in view of either Bricout or Bricout[2] and . . . Elf . . . as applied to claim 43 above, and further in view of . . . Donine,” suggesting that the rejections of claim 43 was over Linday, Bricout, and Elf; and Linday, Bricout2; and Elf. *Id.* at 11; *see also id.* at 14, 16 (indicating the same combinations for the rejection of claim 43). We treat the rejection as applying the Bricout references in the alternative.

Claims 55–58, and 60 are rejected under 35 U.S.C. § 103(a) as obvious over Linday, Bricout or Bricout2, Elf, and Dotseth (US 5,246,152, iss. Sept. 21, 1993).

Claims 52 and 54 are rejected under 35 U.S.C. § 103(a) as obvious over Linday,<sup>4</sup> Bricout or Bricout2, Elf, and Hiniduma-Lokuge (US 2012/0234877 A1, pub. Sept. 20, 2012).

## ANALYSIS

### *Indefiniteness*

Claim 43 recites a “means for changing the longitudinal length of the receiving body using the extension element to be able to accommodate both the baby and the small child.” The Examiner determines (Final Act. 2), and Appellant does not dispute (*see* Appeal Br. 17–18; *see also* Reply Br. 1), that this limitation qualifies as a means-plus-function pursuant to 35 U.S.C. § 112, sixth paragraph. When employing means-plus-function claim language, the Specification must adequately disclose what is meant by that language to satisfy the requirement under 35 U.S.C. § 112, second paragraph, to particularly point out and distinctly claim the invention. *In re Donaldson Co., Inc.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994) (en banc); *see also Atmel Corp. v. Information Storage Devices, Inc.*, 198 F.3d 1374, 1382 (Fed.Cir.1999) (“In order for a claim to meet the particularity requirement of ¶ 2, the corresponding structure(s) of a means-plus-function limitation must be disclosed in the written description in such a manner that one skilled in

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<sup>4</sup> We treat the Examiner’s identification in the rejection heading of “Parness,” instead of “Linday,” as inadvertent error. *See* Final Act. 16.

the art will know and understand what structure corresponds to the means limitation.”).

The Examiner finds that the Specification discloses the following three structures as the corresponding structure for the claimed means for changing the longitudinal length of the receiving body: (1) a pair of zipper tracks with excess material between them (Final Act. 5 (citing Pub. Appl. ¶ 11<sup>5</sup>, Figs. 1–3)); (2) a removable portion that can be added to increase size (*id.* at 5 (citing Pub. Appl. ¶ 10<sup>6</sup>); and (3) a part that can be rolled or folded up (*id.* at 5 (citing Pub. Appl. ¶ 11)). However, the Examiner finds that the Specification only describes a part that can be rolled up (i.e., item (3)) as relating to head part 110. *Id.* at 2, 5 (citing Pub. Appl. ¶ 69<sup>7</sup>). Therefore, the Examiner finds that it is unclear whether head part 110 is the means for changing the longitudinal length of the receiving body, or whether the means for changing the longitudinal length is some other structure. *Id.* at 2–3.

Appellant argues that the head part is described as a separate structure from the extension part, and that one of ordinary skill in the art would not confuse the head part for the extension element. Appeal Br. 17 (citing Spec. 7, 1. 7; 16, 1. 30–18, 1. 17); *see also* Reply Br. 1–2. Appellant also argues that rolling the extension section is described in the Specification as an alternative to folding, and that one of ordinary skill in the art would not be confused because the Specification describes that the head part can be rolled

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<sup>5</sup> Paragraph 11 of Appellant’s Published Application corresponds to page 3, line 33 to page 4, line 7 of the Specification, as filed.

<sup>6</sup> Paragraph 10 of Appellant’s Published Application corresponds to page 3, lines 23–31 of the Specification, as filed.

<sup>7</sup> Paragraph 69 of Appellant’s Published Application corresponds to page 18, lines 11–13 of the Specification, as filed.

for storage. Appeal Br. 16–17 (citing Spec. 3, l. 33–4, l. 7; 9, l. 30–10, l. 30, 18, ll. 11–13; claim 9).

As an initial matter, structures (2) and (3) identified by the Examiner correspond to the claimed extension element, not the claimed means for changing the longitudinal length of the receiving body using the extension element. Also, as acknowledged by the Examiner in the remarks section of the Final Office Action, aspects regarding folding or rolling the extension section pertain to actions/activities, not any particular structure that could constitute the claimed means. *See* Final Act. 18; *see also* Ans. 3.

Appellant asserts that the Specification discloses the following structures for the claimed means for changing the longitudinal length of the receiving body: (1) zippers, (2) snap fasteners, and (3) touch and close fasteners, which include hook or barb and loop surfaces, alone or in combination. *See* Appeal Br. 9 (citing Spec. 4, ll. 9–20); *see also id.* at 17 (“[t]he specification clearly describes the embodiment wherein zipper segments or fasteners may be used to change the length”).

We agree. *See* Spec. 4, ll. 9–20 (describing using “a zipper and/or snap fasteners and/or touch and close fasteners,” which include a barb and loop surfaces, to fix the extension element in a first position); *see also id.* at 9, ll. 13–25 (describing that zipper strips are spaced apart to increase the overall receiving body length when unzipped, and shortened when the two strips are fastened together with a zipper slide); 13, l. 35–14, l. 10 (describing that touch and close fasteners are brought together to secure folded extension section when the zipper strips are engaged with each other by the zipper slide), Figs. 1, 2, 4.

We also agree with Appellant that the Specification makes clear that the head part is a separate structure from the receiving body. *See* Appeal Br. 16–17; *see also* Reply Br. 1–2. The Specification describes, for example, the head portion as connected to the receiving body and as supporting the head and/or back of the neck of a child. *See, e.g.*, Spec. 7, ll. 7–19. In contrast, the Specification describes the extension element as positioned on the receiving body between a main body portion and an end portion. *See id.* at 3, ll. 12–21. The portion of the Specification cited by the Examiner describes that the head part can be rolled or folded, and then stowed in a pocket formed in the end section of the receiving body. Spec. 18, ll. 11–13. But such disclosure of stowing the head part would not suggest to one of ordinary skill in the art that the head part is part of the extension element.

In the Answer, the Examiner additionally finds that the claimed means is an overly expansive Markush group limitation that renders the metes and bounds of the limitation impossible to determine. *See* Ans. 3. Appellant replies that there is no Markush group language in claim 43, and that interpreting claim 43 as using an overly expansive Markush group is in error. Reply Br. 2. We agree. The claimed means for changing is not recited as part of a Markush group. Moreover, as set forth above, we find that one of ordinary skill would understand a zipper, snap fasteners, and touch and close fasteners as structures corresponding to the claimed means limitation, as recited in independent claim 43.

Therefore, we do not sustain the rejection under 35 U.S.C. § 112, second paragraph, of claim 43 as indefinite, or its dependent claims 45–48, 52, 54–60, and 62.

However, the Examiner correctly points out in the Answer that some dependent claims further recite fastening devices, which appear to constitute the claimed means for changing the longitudinal length. *See* Ans. 3 (citing claims 47–50).<sup>8</sup> In particular, dependent claim 49 further recites that the carrying device includes a fastening device to fix the extension element in a first position. Dependent claim 50 depends from claim 49 and further recites that the fastening device is a zipper, snap fastener, and/or hook-and-loop fastener.

We agree with the Examiner that the fastening device of claims 49 and 50 appears to correspond to the claimed means for changing the longitudinal length, as recited in claim independent 43. Indeed, Appellant points to the description for a fastening device as describing structures corresponding with the claimed means for changing. *See* Appeal Br. 9 (citing Spec. 4, ll. 9–20); *see also* Spec. 4, ll. 9–11 (“[a] fastening device is advantageously provided in order to fix the extension element in the first position”). Because it is unclear in view of the Specification how the fastening device recited in claims 49 and 50 distinguishes from the claimed means for changing longitudinal length, we sustain the rejection of claims 49 and 50 under 35 U.S.C. § 112, second paragraph, as indefinite.

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<sup>8</sup> Claims 47 and 48 further recite that the extension element can be folded or rolled, respectively, but this rolling and folding constitute actions, not structures corresponding to the claimed means for changing. We do not find that these additional limitations render the scope of the claimed means unclear to one of ordinary skill.

*Obviousness*

We are persuaded by Appellant's argument that the Examiner erred in rejecting claim 43 under 35 U.S.C. § 103(a), because Elf and Bricout do not disclose or suggest

an extension element positionable between the main body portion and the end portion, wherein the extension element, the main body portion, and the end portion are of a unitary one piece construction or a multiple piece construction with the multiple pieces stitched together, and

means for changing the longitudinal length of the receiving body using the extension element to be able to accommodate both the baby and the small child, the extension element is positioned between the main body portion and the end portion so as to contact the region of the baby's or small child's back,

as recited in claim 43. Appeal Br. 18–29; Reply Br. 3–5. In rejecting claim 43, the Examiner acknowledges that Linday does not disclosed the claimed extension element or the claimed means for changing, and relies on Elf and Bricout to cure the deficiency.

Elf describes an infant carrier made of flexible material, having a back end 2 and a bib end 3. *See* Elf col. 2, ll. 50–54. Between back end 2 and bib end 3 is a generally rectangular back end portion 4, having a width equal to or somewhat wider than the infant or toddler to be carried. *Id.* at col. 2, ll. 54–58. A longitudinal height of back end portion 4 can be adjusted by sliding and ruffling. *Id.* at col. 3, ll. 1–7, Fig. 2. For example, “[f]or more developed infants or toddlers, the back end portion can be ruffled downward to a desired height, as indicated in FIG. 8, such that it engages only the back or the back and the neck of the carried infant or toddler. *Id.* at col. 4, ll. 4–8 (emphasis omitted). For young infants with less developed neck muscles,

the back end portion is left fully extended so that the back end engages the back of the infants head. *Id.* at col. 3, l. 67–col. 4, l. 4, Figs. 6–7.

As pointed out by Appellant, Elf does not teach an extension element positionable between the main body portion and the end portion, as recited by claim 43, but rather teaches a back end that can be ruffled to adjust length. Appeal Br. 19. Elf also does not teach a means for changing the longitudinal length of the receiving body, as recited in claim 43.

Bricout discloses a fabric baby carrier for receiving a child. As shown in Figures 1 and 2 of Bricout, a back 1 of the carrier is divided longitudinally, and secured by longitudinal zippers 7 and 8. A carrier side panel of the receiving body and the infant side portion of the receiving panel are connected by side panels 3. A slide 12 allows the width of seat portion 4 to be adapted. Thus, Bricout teaches adjusting the width of the seat portion of the receiving body, but not the longitudinal length. As pointed out by Appellant (Reply Br. 3), Bricout’s side panels 3 prevent changing the longitudinal length of the receiving body.

The Examiner interprets the claimed means for changing the longitudinal length, for examination of the merits, as encompassing “any length adjustment device.” Final Act. 3; *see also* Ans. 4. This interpretation, applied to the Examiner’s analysis, is erroneous. As set forth above, the structures corresponding to the means for changing include a zipper, snap fasteners, and touch and close fasteners. The Examiner finds that Elf teaches that the longitudinal length of a receiving body can be adjustable, and that Bricout teaches a means for changing a “size” of a receiving body. Final Act. 8. Based on these disclosures, the Examiner determines that it would have been obvious to modify Linday in view of Elf

and Bricout to include the claimed extension element and the claimed means for changing the longitudinal length, as required by claim 43. *Id.* In particular, the Examiner reasons that the proposed modification results in merely making Linday's carrier adjustable, which does not distinguish over the prior art. *Id.* The Examiner further reasons that it would have been obvious "to locate the extension element between [Linday's] drawstrings (e.g. approximately at the midpoint between them or higher) . . . to avoid interfering with the drawstring (18)," and/or that the modification is "a mere rearrangement of parts." *Id.*

In our view, the Examiner does not adequately explain, and it is not readily apparent, why a person of ordinary skill in the art would have an apparent reason to modify Linday's receiving body to have the claimed extension element and the claimed means for changing the longitudinal length of the receiving body, where the extension element is positioned between the main body portion and end portion so as to contact the region of the baby's or small child's back based on the teachings of Elf and Bricout. Significantly, neither Elf nor Bricout teach a means for changing the longitudinal length of a receiving body, much less that the means changes the longitudinal length using an extension element positioned between the main body portion and the end portion so as to contact the region of a baby's or small child's back. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (holding that a prima facie case of obviousness requires showing that one of ordinary skill in the art would have had both an apparent reason to modify the prior art and predictability or a reasonable expectation of success in doing so).

In view of the foregoing, we do not sustain the Examiner's rejection of claim 43 or dependent claims 45–50, 55, 56, 60, and 62 under 35 U.S.C. § 103(a) as unpatentable over Linday, Bricout, and Elf.

The only additional finding the Examiner makes in rejecting claim 43 under 35 U.S.C. § 103(a) as unpatentable over Linday, Bricout2, and Elf relates to a different claim limitation (i.e., “an end portion, the end portion having an upper end . . . including opposing edges, which are angled with respect to a longitudinal axis of the receiving body”). *See* Final Act 8–9; *see also* Ans. 6–7. Therefore, the Examiner's rejection of claim 43 under 35 U.S.C. § 103(a) as unpatentable over Linday, Bricout2, and Elf suffers at least from the same deficiencies described above with respect to the Examiner's rejection of claim 43 over Linday, Bricout2, and Elf under 35 U.S.C. § 103(a).

The additional rejections of the dependent claims under 35 U.S.C. § 103(a) do not cure the deficiencies in the rejections of independent claim 43 under 35 U.S.C. § 103(a). Accordingly, we do not sustain any of the rejections of the dependent claims under 35 U.S.C. § 103(a) for the same reasons set forth above with respect to the rejections of the independent claim.

DECISION

In summary:

<b>Claim(s) Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
43, 45– 50, 52, 54–60, 62	112, ¶ 2	Indefiniteness	49, 50	43, 45– 48, 52, 54–60, 62
43, 45– 50, 55, 56, 60, 62	103(a)	Linday, Bricout, Elf		43, 45– 50, 55, 56, 60, 62
55–60	103(a)	Linday, Bricout, Elf, Donine		55–60
55–58, 60	103(a)	Linday, Bricout, Elf, Dotseth		55–58, 60
52, 54	103(a)	Linday, Bricout, Elf, Hiniduma- Lokuge		52, 54
43, 45– 50, 55, 56, 60, 62	103(a)	Linday, Bricout2, Elf		43, 45– 50, 55, 56, 60, 62
55–60	103(a)	Linday, Bricout2, Elf, Donine		55–60
55–58, 60	103(a)	Linday, Bricout2, Elf, Dotseth		55–58, 60
52, 54	103(a)	Linday, Bricout2, Elf, Hiniduma- Lokuge		52, 54
<b>Overall Outcome</b>			49, 50	43, 45– 48, 52, 54–60, 62

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Application 12/597,756

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

AFFIRMED IN PART