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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* TRACEY L. PICKETT

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Appeal 2019-006333  
Application 14/461,262  
Technology Center 3700

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Before BENJAMIN D. M. WOOD, MICHAEL J. FITZPATRICK, and  
LISA M. GUIJT, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant, Tracey L. Pickett,<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1, 20, and 21. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> "Appellant" refers to the applicant as defined in 37 C.F.R. § 1.42. Appellant identifies herself as the sole real party in interest. Appeal Br. 2.

## STATEMENT OF THE CASE

### *The Specification*

The Specification “relates generally to the field of head coverings designed for different weather conditions,” and discloses “a hat that is aesthetically pleasing and that can also be used during inclement weather.” Spec. 1:10–12.

### *The Claims*

Claims 1, 20, and 21 are rejected. Non-Final Act. 1. No other claims are pending. *Id.* Claim 1, the sole independent claim, is reproduced below.

1. A rain hat device comprising:
  - a combination structure;
  - a lining;
  - the combination structure and the lining jointly forming a hat shape by the combination structure being positioned atop the lining and the lining being positioned within the combination structure;
  - the lining being made of a satin material;
  - a device opening;
  - the device opening being formed in response to the combination structure and the lining jointly forming the hat shape;
  - a storage bag;
  - the storage bag being laterally connected to the lining;
  - a visor;
  - the visor being integrated onto the combination structure;
  - an adjustable band;
  - the adjustable band being configured to adjust the device opening;
  - the adjustable band and the visor being located opposite to each other;

the adjustable band being made of an elastic material;

a nonslip band;

the nonslip band being located in between the adjustable band and the visor;

the adjustable band and the nonslip band being connected with each other;

the adjustable band and the nonslip band jointly delineating the device opening;

the nonslip band being made of a nonslip material;

the combination structure comprising an interlacing layer and a waterproof layer;

a portion of the interlacing layer being made of a cotton material, a nylon material, a mesh material or a polyester material;

the interlacing layer being superimposed onto the waterproof layer;

the waterproof layer being superimposed onto the lining;

the waterproof layer being located in between the interlacing layer and the lining;

the storage bag comprising a bag opening;

the combination structure, the lining and the visor being configured to be accommodated within the storage bag by rendering the storage bag foldover, stuffing the combination structure, the lining and the visor into the storage bag through the bag opening, and fully closing the bag opening without utilizing any opening collapsing mechanism;

in response to the storage bag being laterally connected to the lining, the storage bag being formed in between the combination structure and the lining, the bag opening being formed adjacent to the device opening, and the bag opening and the visor being located opposite to each other;

a back covering section;

the back covering section being formed in response to the combination structure and the lining jointly forming the hat shape; and

the back covering section and the visor being located opposite to each other.

Appeal Br. 20–21.

### *The Examiner's Rejections*

The rejections before us are:

1. claims 1, 20, and 21 under 35 U.S.C. § 112(a) for lacking adequate written description (Final Act. 4);
2. claims 1, 20, and 21 under 35 U.S.C. § 112(b) for being indefinite (*id.* at 5);
3. claim 1 under 35 U.S.C. § 103 as unpatentable over Garza<sup>2</sup> and Steffy<sup>3</sup> (*id.* at 6); and
4. claims 20 and 21 under 35 U.S.C. § 103 as unpatentable over Garza, Steffy, and Epling<sup>4</sup> (*id.* at 10).

## DISCUSSION

### *Rejection 1—Written Description*

The Examiner originally found that the Specification lacks an adequate written description for the following limitations of claim 1: “combination structure,” “interlacing layer,” “back covering section,” and “polyester material.” Final Act. 4. In the Answer, the Examiner narrowed his findings, maintaining the rejection only with respect to “interlacing

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<sup>2</sup> US 2009/0055995 A1, published Mar. 5, 2009 (“Garza”)

<sup>3</sup> US 6,012,172, issued Jan. 11, 2000 (“Steffy”).

<sup>4</sup> US 2005/0268382 A1, published Dec. 8, 2005 (“Epling”).

layer” and “polyester material.” *See* Ans. 3 (“Examiner is persuaded by Appellant’s arguments that ‘combination structure’ and ‘back covering section’ are not new matter; however, ‘interlacing layer’ and ‘polyester material’ are new matter.”).

The Specification as filed lacks *in haec verba* support for either an “interlacing layer” or “polyester material.” *See generally* Spec. Although the law does not require *in haec verba* support, “the disclosure must . . . convey with reasonable clarity to those skilled in the art that . . . [the inventor] was in possession of the invention.” *Purdue Pharma L.P. v. Faulding Inc.*, 230 F.3d 1320, 1323 (Fed. Cir. 2000). “Put another way, one skilled in the art, reading the original disclosure, must immediately discern the limitation at issue in the claims.” *Id.*

As support for an “interlacing layer,” Appellant argues that it “refers to the exterior layer and the knitted interior layer onto which the exterior layer is superimposed.” Appeal Br. 13. Appellant further argues, “as shown in FIG. 4, the combination structure, comprises the interlacing layer and the waterproof layer 6. Further, the interlacing layer comprises the interior knitted layer 3 and the exterior layer 2.” *Id.* at 16. The Specification, however, does not describe the knitted layer 3 and exterior layer 2 being grouped, let alone by interlacing, to form an interlacing layer. Indeed, as the Examiner explained in the Answer, “[b]ecause ‘interlacing’ is a specific structure it appears Appellant is not merely grouping two previously disclosed layers, but introducing a new ‘interlacing layer’ with a specific structure.” Ans. 4. Appellant did not file a reply brief, and ultimately has not shown error in the Examiner’s finding that “interlacing layer” constitutes

new matter and that the Specification as filed lacks an adequate written description of the claimed invention.

Although the lack of written description support for “interlacing layer” is a sufficient basis to affirm Rejection 1, we also address the Examiner’s finding that “polyester material” likewise constitutes new matter. As support for “polyester material,” Appellant argues that nylon, which is disclosed in the Specification, “is a specific type of . . . polyester material.” Appeal Br. 13. Appellant does not provide a citation to any evidence in support of its argument. The Examiner responds unequivocally that “[n]ylon and polyester are two different materials and nylon is not a type of polyester.” Ans. 4. On the record presented, Appellant does not show error in the Examiner’s finding that “polyester material” constitutes new matter and that the Specification as filed lacks an adequate written description of the claimed invention.

Appellant does not apprise us of error in the rejection of claim 1 and, thus also claims 20 and 21, under 35 U.S.C. § 112(a) for lacking adequate written description. Rejection 1 is affirmed.

*Rejection 2—Indefiniteness*

The Examiner determined that claim 1 was indefinite based on multiple limitations. Final Act. 5–6. In the Answer, the Examiner narrowed the rejection, maintaining it only with respect to claim 1’s recitation of “the lining and the visor being configured to be accommodated within the storage bag by rendering the storage bag foldover.” See Ans. 4–5 (“Examiner is persuaded by some of Appellant’s arguments and the rejections set forth in the first, second, fifth, and sixth paragraphs are withdrawn by Examiner; however the ‘the lining and the visor being configured to be accommodated

within the storage bag by rendering the storage bag foldover’ (third paragraph) and ‘the storage bag foldover’ (fourth paragraph) remain indefinite.”).

With respect to this recitation, the Examiner determined that “the storage bag foldover” lacks antecedent basis and, further, it is unclear “how and by what means . . . the storage bag foldover [is] rendered.” Final Act. 5.

The Specification discloses that, in one embodiment, “the opening collapsing mechanism 10 can be, but is not limited to, a zipper or a fold-over pocket.” Spec. 6:10–11. This is the only reference in the Specification to “fold-over” or “foldover.” *See generally id.* In that singular disclosure, the hyphenated version of the claim term “foldover” is used to modify a “pocket.” Appellant argues that this disclosure evidences that “when a storage bag 8 is foldover, the lining 7 and a visor 100 can be accommodated within the storage bag 8.” Appeal Br. 14.

The Examiner responds that, notwithstanding Appellant’s argument, “[i]t is not clear how the combination structure, lining, and visor are accommodated within the storage bag by rendering . . . the storage bag foldover.” Ans. 5. The Examiner further responds that it is not even clear whether “foldover” is a structural component of the claimed bag or merely a capability of the bag. *See id.* (“Is a ‘foldover’ a portion of the bag? If so, how is the portion ‘rendered?’ Is a ‘foldover’ a capability of the storage bag, which is to say, it is capable of folding over? If so, what does it mean to ‘render’ an ability to fold over?”).

Finally, the Examiner correctly notes that Appellant does not contest the lack of antecedent basis. *Id.*

As stated above, Appellant did not file a reply brief. Based on the record before us, we agree with the Examiner that the phrase “rendering the storage bag foldover” is unclear and that Appellant’s reliance on page 6, line 11 of the Specification along with associated figures (*see* Ans. 14) does not adequately elucidate its meaning. Additionally, the lack of antecedent basis for “the storage bag foldover” effectively is conceded by Appellant.

Appellant has not shown error in the Examiner’s determination that “the lining and the visor being configured to be accommodated within the storage bag by rendering the storage bag foldover” is indefinite. Accordingly, we affirm the rejection of claim 1 and, thus also claims 20 and 21, under 35 U.S.C. § 112(b). Rejection 2 is affirmed.

*Rejection 3—Obviousness in view of Garza and Steffy*

Appellant argues for reversal of Rejection 3 mainly by contrasting the Specification’s disclosure with the asserted prior art. *See, e.g.*, Appeal Br. 7 (“In the present application, based on page 3 lines 23–25 and page 5 lines 20–21 of the specification and FIGs. 9 and 12, a rain hat device comprises: . . .”). All such arguments are inapposite. Section 103 of Title 35, under which the Examiner has rejected claim 1, states:

A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if *the differences between the claimed invention and the prior art* are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.

35 U.S.C. § 103 (emphasis added); *see also Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) (“Under § 103, the scope and content of the prior art are to

be determined; *differences between the prior art and the claims at issue are to be ascertained*; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.” (emphasis added)); *Sjolund v. Musland*, 847 F.2d 1573, 1582 (Fed. Cir. 1988) (“[T]he claims define the invention. . . . [L]imitations from the specification are not to be read into the claims.”).

Appellant’s sole argument based on the scope of claim 1 (as opposed to the disclosure of the Specification) is that the asserted prior art does not teach “a back covering portion; the back covering section being formed in response to the combination structure and the lining jointly forming the hat shape; and the back covering section and the visor being located opposite to each other,” as recited in claim 1. Appeal Br. 6. The Examiner found that Garza teaches these limitations via its closed end 14. Final Act. 8 (citing Garza Fig. 5).

Appellant argues that the asserted “closed end 14” of Garza’s hat “is on a top of a user’s head when worn by the user” and “is essentially different from the back covering section of the present application.” Appeal Br. 9. It is true that the closed end 14 appears centered about the top of a user’s head in Figure 1 of Garza. But this argument does not respond to the Examiner’s specific finding that the Garza’s closed end “has a substantial diameter that will cover the top of the wearer’s head as well as portions of the front, sides, and back.” Final Act. 5. It is enough, per the Examiner’s claim interpretation, that it “covers at least portions of the back of the wearer’s head.” *Id.* at 6. Appellant also does not rebut the Examiner’s further finding that “Garza’s hat is capable of being tilted back on the wearer’s head to cover an even greater amount including the entirety of the back of the

wearer’s head.” *Id.* Nor does Appellant persuade us that Garza’s closed end 14, despite covering a portion of the back of the user’s head in Figure 1 of Garza and despite being capable of being tilted back to cover a greater portion of the back of the user’s head, is not “a back covering portion” as recited in claim 1.

Because Appellant does not apprise us of error in the obviousness rejection of claim 1, Rejection 3 is affirmed.

*Rejection 4—Obviousness in view of Garza, Steffy, and Epling*

Claims 20 and 21 depend from claim 1. Appellant does not present any arguments with respect to the obviousness rejection of claims 20 and 21 beyond those already considered above with respect to the obviousness rejection of claim 1. Accordingly, we affirm Rejection 4 for reasons similar to those for which we affirm Rejection 3.

SUMMARY

| <b>Claims Rejected</b> | <b>35 U.S.C. §</b> | <b>References/Basis</b> | <b>Affirmed</b> | <b>Reversed</b> |
|------------------------|--------------------|-------------------------|-----------------|-----------------|
| 1, 20, 21              | 112(a)             | Written description     | 1, 20, 21       |                 |
| 1, 20, 21              | 112(b)             | Indefiniteness          | 1, 20, 21       |                 |
| 1                      | 103                | Garza, Steffy           | 1               |                 |
| 20, 21                 | 103                | Garza, Steffy, Epling   | 20, 21          |                 |
| <b>Overall Outcome</b> |                    |                         | 1, 20, 21       |                 |

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**