

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. DeeJayzoo, LLC

#

Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Cheryl Wynn

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: CLAIM CONSTRUCTION RULING

I. Introduction

Kitsch LLC (“Plaintiff” or “Kitsch”) brought this action for declaratory judgment of noninfringement and invalidity of certain intellectual property owned by DeeJayzoo, LLC (“DeeJayzoo”), including noninfringement and invalidity of U.S. Patent No. 10,021,930 (“the ’930 Patent”) and D775,792 (“the D792 Patent”). Complaint, Dkt. 1; *see also* Dkt. 15 (First Amended Complaint).¹ DeeJayzoo filed a counterclaim for infringement. Dkt. 17. The parties filed their Joint Claim Construction and Prehearing Statement on October 18, 2019. Dkt. 41; *see also* Dkt. 42 (First Amended Joint Claim Construction and Prehearing Statement). The parties filed their opening claim construction briefs on October 25, 2019, and responsive briefs on November 8, 2019. Dkts. 43, 44, 45, 47. The parties also lodged certain documents and materials in support of their respective claim construction positions. Dkts. 45-2, 47-2.

A hearing on claim construction was held on December 9, 2019. At the hearing, a tentative ruling was provided to the parties, arguments were presented, and the matter was taken under submission. Dkt. 48 (Minutes of Markman Hearing). The disputed claim terms are construed in this Order.

II. Factual Background

A. The ’930 Patent

The ’930 Patent, which is titled “Noise Reducing Water Resistant Headpiece,” was issued on July 17, 2018. It discloses a type of shower cap. The ’930 Patent states, “[t]he invention and its embodiments relate to a shower cap with improved properties. In particular, a shower cap that provides a more relaxing shower experience by reducing the volume experienced by a user of said shower cap.” ’930 Patent at 1:13-16. Figures 2 and 3 are front and rear views of one embodiment that is “shaped similarly to a turban, in that it provides complete coverage of the hair-producing areas of a user’s scalp.” *See id.* at 3:67-4:1, 4:43-46, 5:23-25.

¹ The Complaint also alleges noninfringement and invalidity of DeeJayzoo’s U.S. Trademark, Registration No. 5,208,472. Complaint, Dkt. 1.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

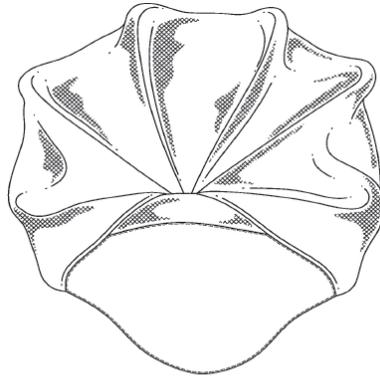


FIG. 2

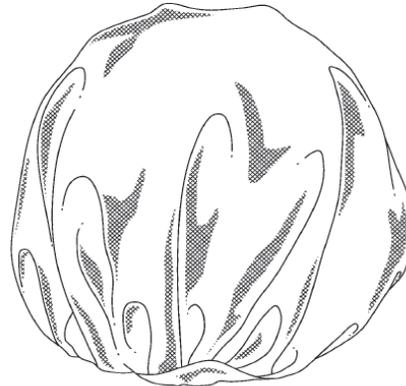


FIG. 3

'930 Patent, Figs. 2, 3.

Deejayzoo alleges that Kitsch infringes at least Claims 1, 3, and 5-7 of the '930 Patent. Dkt. 17 ¶ 77. In its opening claim construction brief Kitsch also asserts infringement of Claim 2 of the '930 Patent. Dkt. 43 at 1. The '930 Patent includes seven claims; Claim 1 is its only independent claim. Claim 1 recites:

1. A covering apparatus comprising:
 - a unitary material;
 - a grip;
 - an elastic member;
 - a gathered band; and
 - an elongated band;
 - wherein the gathered band and the elongated band are of a unitary construction;
 - wherein the gather band and the elongated band are attached to a periphery of the covering apparatus;
 - wherein the elastic member is enclosed within the gathered band;
 - wherein the unitary material comprises an outer layer and an inner layer;
 - wherein the outer layer comprises a fabric;
 - wherein the outer layer is water repellent;
 - wherein the inner layer is polyurethane;
 - wherein the covering apparatus comprises a plurality of folds;
 - wherein the plurality of folds culminate in a point at a front of the covering apparatus above the elongated band;
 - wherein the elastic member is located at the rear of the covering apparatus;
 - and wherein the covering apparatus is a shower cap.

'930 Patent at Claim 1.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. DeeJayzoo, LLC

#

B. The D792 Patent

The D792 Patent, which is a design patent, issued on January 10, 2017, and is titled “Noise Reducing Water Resistant Headwear Cap.” The D792 Patent claims “the ornamental design for a noise reducing water resistant headcap.” DeeJayzoo alleges infringement of the D792 Patent by Kitsch’s accused products. Dkt. 17 at ¶ 67.

Figure 8 of the D792 Patent is “a perspective view of the noise reducing water resistant headwear cap . . . as worn by an individual in accordance with the present invention.”²



FIG.8

D792 Patent, Fig. 8.

III. Analysis

A. Legal Standards

1. General Utility Patent Claim Construction Principles

Claim construction is the process of determining the meaning and scope of the patent claims. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). It is a matter for the court. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831, 840-41 (2015).

“[T]he words of a claim are generally given their ordinary and customary meaning,” which is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (internal citations and quotations omitted). “In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges,

² The D792 Patent notes that “[t]he partial human figure depicted by broken lines represents the environmental structure that forms no part of the claimed design.” See D792 Patent at Description, Figure 8.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Id.* at 1314. “In such circumstances, general purpose dictionaries may be helpful. In many cases that give rise to litigation, however, determining the ordinary and customary meaning of the claim requires examination of terms that have a particular meaning in a field of art.” *Id.*

“Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to ‘those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.’” *Id.* (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)). “Those sources include ‘the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.’” *Id.*

Claim construction “begins and ends” with the words of the claims. *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998). “Quite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claim terms.” *Phillips*, 415 F.3d at 1314. “[T]he context in which a term is used in the asserted claim can be highly instructive.” *Id.* In addition to the words of the claim(s) being construed, “[o]ther claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term. Because claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in other claims.” *Id.* (citations omitted). “Differences among claims can also be a useful guide in understanding the meaning of particular claim terms.” *Id.* “For example, the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.” *Id.* at 1314–15. However, “[c]laim differentiation is a guide, not a rigid rule. If a claim will bear only one interpretation, similarity will have to be tolerated.” *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed. Cir. 1991) (quoting *Autogiro Co. of Am. v. United States*, 384 F.2d 391, 404 (Ct. Cl. 1967)).

“[C]laims must be construed so as to be consistent with the specification, of which they are a part.” *Merck & Co. v. Teva Pharms. USA, Inc.*, 347 F.3d 1367, 1371 (Fed. Cir. 2003). “[T]he person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Phillips*, 415 F.3d at 1313. “[T]he specification ‘is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.’” *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)).

“[T]he specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor’s lexicography governs.” *Phillips*, 415 F.3d at 1316. To be a lexicographer, the inventor must “clearly express and intent to redefine the term.” *Thorner v. Sony Computer Entertainment America, LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). “In other cases, the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor. In that instance as well, the inventor has dictated the correct claim scope, and the inventor’s intention, as expressed in the specification, is regarded as dispositive.” *Phillips*, 415 F.3d at 1316. The inventor must demonstrate intent by “representing a clear disavowal of claim scope” in the specification.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. DeeJayzoo, LLC

#

Thorner, 669 F.3d at 1366.

Despite the importance of a specification, limitations of the described embodiments of the invention must not be read into the claims. The Federal Circuit “expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment.” *Phillips* at 1323. Conversely, “an interpretation [which excludes a preferred embodiment] is rarely, if ever, correct and would require highly persuasive evidentiary support.” *Vitronics*, 90 F.3d at 1583. Overall, limitations from the specification should not be read into claims. *Thorner*, 669 F.3d at 1366-67.

The prosecution history is also relevant intrinsic evidence. Although “the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation” and for this reason “often lacks the clarity of the specification,” it can nonetheless “often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.” *Phillips*, 415 F.3d at 1317.

“Although [the Federal Circuit has] emphasized the importance of intrinsic evidence in claim construction, [it has] also authorized district courts to rely on extrinsic evidence, which ‘consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises.’” *Id.* (quoting *Markman*, 52 F.3d at 980). The use of “technical words or phrases not commonly understood” may give rise to a factual dispute, the determination of which will precede the ultimate construction. *Teva*, 135 S.Ct. at 838, 849.

2. General Design Patent Claim Construction Principles

Unlike utility patents, design patents “typically are claimed as shown in drawings.” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (quoting *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1319 (Fed. Cir. 2007)). For that reason, the Federal Circuit “has not required that the trial court attempt to provide a detailed verbal description of the claimed design, as is typically done in the case of utility patents.” *Id.* “Given the recognized difficulties entailed in trying to describe a design in words, the preferable course ordinarily will be for a district court not to attempt to ‘construe’ a design patent claim by providing a detailed verbal description of the claimed design.” *Id.* A detailed description of a design patent includes risks, such as “placing undue emphasis on particular features of the design and the risk that a finder of fact will focus on each individual described feature in the verbal description rather than on the design as a whole.” *Id.* at 679-80. However, a district court has discretion about the level of detail used to describe a claimed design and, absent a showing of prejudice, issuing a detailed claim construction to describe a design patent “will not be reversible error.” *Id.* at 679.

Rather than attempting to provide a verbal description of the patented design, *Egyptian Goddess* observed:

a trial court can usefully guide the finder of fact by addressing a number of other issues that bear on the scope of the claim. Those include such matters as describing the role of particular conventions in design patent drafting, such as the role of broken lines, see 37

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

C.F.R. § 1.152; assessing and describing the effect of any representations that may have been made in the course of the prosecution history, *see Goodyear Tire & Rubber Co.*, 162 F.3d at 1116; and distinguishing between those features of the claimed design that are ornamental and those that are purely functional, *see OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1405 (Fed.Cir.1997).

Id. at 680.

Egyptian Goddess also explained that, as another alternative to construing a design patent by providing a detailed verbal description of the patented design, “a court may find it helpful to point out, either for a jury or in the case of a bench trial by way of describing the court's own analysis, various features of the claimed design as they relate to the accused design and the prior art.” *Id.*

3. Patent Invalidity Due to Indefiniteness Under 35 U.S.C. § 112(b)

A patent must conclude “with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.” 35 U.S.C. § 112(b).³ “[A] patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). The party seeking to show indefiniteness “must establish it by clear and convincing evidence.” *Dow Chem. Co. v. Nova Chems. Corp.*, 809 F.3d 1223, 1227 (Fed. Cir. 2015). Indefiniteness is a question of law. *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1260 (Fed. Cir. 2014) (citing *Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1365-66 (Fed. Cir. 2011)).

B. Agreed Claim Terms

In their Amended Joint Claim Construction and Prehearing Statement, the parties state, “[t]he parties originally had a dispute concerning the construction of the terms ‘breathable,’ ‘antimicrobial,’ and ‘polyurethane.’ After meeting and conferring, . . . the parties have agreed that the terms . . . do not need to be construed beyond their respective plain and ordinary meanings.” Dkt. 42 (internal citation omitted).

C. Disputed Claim Terms

1. “water repellant” (’930 Patent, Claim 1)

| Kitsch’s Construction | Deejayzoo’s Construction |
|-----------------------|----------------------------|
| Indefinite | Plain and ordinary meaning |

³ The America Invents Act did not change the operative language of 35 U.S.C. § 112, but modified the labeling convention for this section of the statute from numbers to letters. Thus, for patent applications filed after September 16, 2012, 35 U.S.C. § 112(b) applies rather than 35 U.S.C. § 112 ¶ 2. The utility patent at issue in this case was originally filed after September 16, 2012. Therefore, the post-AIA lettering convention is used in this Order.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

Claim 1 states, *inter alia*,

1. A covering apparatus comprising:
a unitary material;

...

wherein the unitary material comprises an outer layer and an inner layer;

wherein the outer layer comprises a fabric;

wherein the outer layer is **water repellent**;

wherein the inner layer is polyurethane[.]

...

and wherein the covering apparatus is a shower cap.

'930 Patent at Claim 1 (emphasis added).

The parties dispute whether the term “water repellent” is definite. Kitsch presents extrinsic evidence in the form of certain results from tests by the American Association of Textile Chemists and Colorists (“AATCC”). It is an organization that conducts standardized spray tests related to water repellency. See Dkt. 44 at 7 (citing excerpts of the “AATCC Test Method” for “Water Repellency: Spray Test,” Dkt. 44-5). Kitsch argues that “[b]ecause every fabric has a water repellency rating, the term ‘water repellent’ is a relative term that would only provide a [Person of Skill in the Art] with reasonable certainty regarding the scope of the claim term if it is [in] some way quantified in the patent itself.” *Id.* at 8.

Kitsch’s cited AATCC excerpts do not provide a sufficient basis to conclude that a person of skill in the art *in the relevant field* would be unable to understand the meaning of the term “water repellent” as that term is used in the context of the '930 Patent with reasonable certainty. The '930 Patent itself includes a figure where the “water-repellant nature of shower cap **100** is shown” ('930 Patent at 6:6-7):

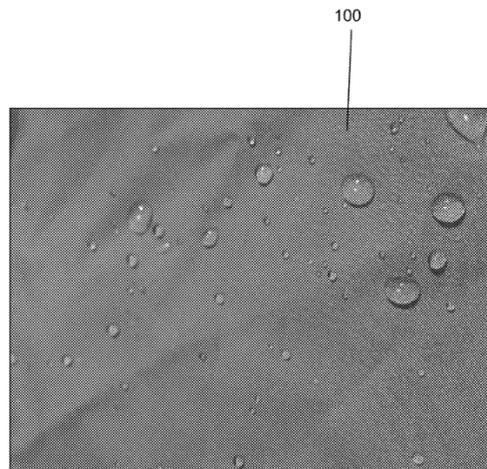


FIG. 13

Id. at Fig. 13. This image shows water droplets on top of a fabric that are not being absorbed into the

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

fabric layer.⁴ The '930 Patent also includes a description of the types of fabrics it anticipates as water repellant, including “[n]atural and synthetic latex [as] particularly suitable materials” for being both water repellant and antimicrobial. *Id.* at 4:54-64. Finally, the '930 Patent lists vendors who sell “proprietary suitable durable water repellants,” including “Grangers, Nikwas, McNett, Trek7.” *Id.* at 5:3-5. Kitsch dismisses this disclosure as one that does not provide sufficient specificity to facilitate an understanding of the term “water repellant” in the context of the '930 Patent. However, Kitsch does not present the testimony of an expert or a person of skill in the art to support its position that such a person would not understand the boundaries of the term based on this disclosure. For example, Kitsch argues that the disclosure of manufacturers of water repellant materials is insufficient because a specific material from each such manufacturer is not identified. However, Kitsch does not provide any support for the assertion that a person of skill in the art of shower caps, when provided with the names of these manufacturers of water repellant materials, would not be able to understand the boundaries of the term “water repellant” in the context of the claimed invention. Of note, “[t]he definiteness requirement . . . mandates clarity, while recognizing that absolute precision is unattainable.” *Nautilus*, 572 U.S. at 910. Given the disclosure in the specification itself, and particularly when considered *in combination* with the evidence presented by Kitsch, it has not shown that the term “water repellant” is indefinite by clear and convincing evidence.

At the hearing, Kitsch also emphasized, consistent with its proffer of the AATCC study, that “water repellant” is a term of degree. Terms of degree are not automatically indefinite. Instead, the inquiry still focuses on the disclosure in the intrinsic record and whether the challenging party has met its burden of proving indefiniteness by clear and convincing evidence. No evidence has been presented showing that persons of skill in the art in the relevant field of technology would have different opinions about the degree of water repellency a water repellant fabric must have to satisfy the requirements of the claim. The suggestion appears to be that “water repellant” is a term of degree in that it could refer to a material with a water repellency range from 0% to 100% (including very non-water repellent materials like paper bags). However, it is also noted that in common parlance, “water repellant” does not have such a broad definition or meaning. Instead it is used to refer to materials that effectively repel water. This is supported by how the specification refers to water repellent, including with the reference to Figure 13 and the importance of actually having water repellant properties in a fabric used to practice the disclosed invention.

For these reasons, Kitsch has not met its burden of showing indefiniteness by clear and convincing evidence.

The term “water repellant” is not found indefinite and is not construed.

2. “unitary” terms

| Term | Kitsch’s Construction | Deejayzoo’s Construction |
|---|---|----------------------------|
| “a unitary material” ('930 Patent, Claims 1, 2) | “a single material” | Plain and ordinary meaning |
| “unitary construction” ('930 Patent, Claim 1) | “constructed of a single piece of material” | Plain and ordinary meaning |

⁴ For this reason, whether Figure 13 shows a one-layer or two-layer embodiment of the disclosed shower cap does not matter for purposes of the issues addressed in this Order.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

Claim 1 states, *inter alia*,

1. A covering apparatus comprising:
 - a **unitary material**;
 - a grip;
 - an elastic member;
 - a gathered band; and
 - an elongated band;wherein the gathered band and the elongated band are of a **unitary construction**;
wherein the gather band and the elongated band are attached to a periphery of the covering apparatus;
wherein the elastic member is enclosed within the gathered band;
wherein the **unitary material** comprises an outer layer and an inner layer;
 - wherein the outer layer comprises a fabric;
 - wherein the outer layer is water repellent;
 - wherein the inner layer is polyurethane[.]

'930 Patent at Claim 1 (emphasis added).

The parties dispute whether the term “unitary” means “single.” Deejayzoo argues that interpreting “unitary” as “single” would be inconsistent with the claim language itself, particularly with reference to the “unitary material” term, because it is claimed as comprising an “outer layer” and an “inner layer.” See, e.g. Dkt. 45 at 3. Kitsch argues that this position is “based on a misreading of the claims and prior art.” Dkt. 47 at 1. Kitsch then states that, “both the claims and the specification clearly give the terms ‘layer’ and ‘material’ different meanings, and clarify that a single material may be made up of multiple layers.” *Id.*

Consistent with the claim language, the specification describes shower cap embodiments of a “two-layer” or “dual-layer” “variant.” '930 Patent at 4:65-5:3, 5:56-57. For example, the specification states, “FIGS. 11 and 12 show two embodiments of attachments of the two-layer variants. FIG. 11 shows an embodiment where the two layers are adhered together. FIG. 12 shows an embodiment where the two layers are folded over one another and subsequently joined.” *Id.* at 6:1-5.

In another section, the '930 Patent separately describes the “inner layer” and “outer layer.” It states, for example, “[i]n yet another preferred embodiment, the present invention is a dual-layer variant wherein said inner layer is constructed out of polyurethane, and the outer layer is constructed out of a material that is coated with durable water repellent coating. The resulting fabric appears to be one layer to the consumer.” *Id.* at 4:65-5:3.

The disclosure in the specification supports the view that each layer can be considered an independent material, and the two layers are joined together by various means so that they “appear[] to be one layer to the consumer.” *Id.* This disclosure does not support the position that “layer” and “material” have

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

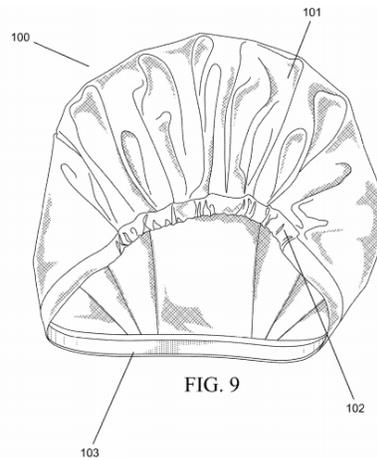
#

different meanings in the specification.⁵ Instead, with respect to the term “unitary material,” the specification supports that it refers to a material or collection of materials that are joined together so that there appears to be one layer.

Regarding “unitary construction,” the parties dispute whether the claimed “gathered band” and “elongated band” “can be made of two separate pieces of material and sewn together” (Dkt. 44 at 10), or whether they must be constructed of a single piece of material. The specification uses the term “unitary construction” only once. It states,

[r]eferring to FIG. 9, a front view of an embodiment of the present invention is shown. Here, shower cap **100** features outer layer **101**, gathered band **102**, and elongated band **103**. In one embodiment, gathered band **102** and elongated band **103** are of a **unitary construction**. Preferably, gathered band **102** and elongated band **103** are constructed out of an elastic material.

'930 Patent at 5:25-32 (emphasis added). Kitsch argues that the corresponding depiction of Figure 9 does not include seams and thus shows the elongated band and gathered band as constructed out of a single piece of material:



'930 Patent, Fig. 9; see also Dkt. 44 at 10-11. Deejayzoo’s responsive claim construction brief does not address Kitsch’s assertion,⁶ except to state that the terms “unitary material” and “unitary construction” “must be construed consistently with each other.” Dkt. 45 at 3. In its opening brief, Deejayzoo presented arguments based on the prosecution history and a claim construction decision from another court regarding a different patent to support its proposed construction. Dkt. 43 at 5-8.

Kitsch has not shown that the meaning of “unitary construction” is so narrow that it excludes embodiments where the gathered band and elongated band are sewn together. That a seam is not visible in Figure 9

⁵ Although Kitsch argues that “layer” and “material” have different meanings in the context of the '930 Patent specification, its proposed construction of each of the terms “inner layer” and “outer layer” is “a material having a discrete thickness.”

⁶ At the hearing, Deejayzoo stated that Figure 9 includes seams at the places where the bunched portions of the gathered band **102** terminate.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. DeeJayzoo, LLC

#

does not necessarily mean that the claims must be limited solely to a seamless embodiment. However, the intrinsic record supports that the gathered band and elongated band must be constructed together as the same *type* of material. For example, the patent specification states, “[p]referably, gathered band **102** and elongated band **103** are **constructed out of an elastic material.**” ’930 Patent at 5:30-32 (emphasis added). DeeJayzoo’s interpretation, as stated in its briefing, that the gathered band and elongated band need only form a “functional unit” (see Dkt. 43 at 4) would extend the scope of the claim language beyond what is contemplated by the ’930 Patent. This extension would include circumstances where the gathered band and elongated band are made out of different materials. This is not consistent with either the plain meaning of the phrase “unitary construction,” or the record.

At the hearing, Kitsch argued that interpreting “unitary construction” as not requiring construction out of a single piece of material would make the term meaningless because the claims already require that the entire shower cap be made out of the same “unitary material.” DeeJayzoo responded by stating that neither the claims nor specification necessarily require that the gathered band and elongated band be made out of the same material. DeeJayzoo added that, because the claims do not limit the term “unitary material” to a single material, the term “unitary” does not itself require matching materials.

DeeJayzoo’s arguments at the hearing rebut Kitsch’s position that the claim term “unitary construction” is rendered meaningless where the claim already requires that the covering apparatus comprises a unitary material. Kitsch’s position is also not a persuasive basis to narrow the meaning of the claims without further evidence. As to DeeJayzoo’s arguments at the hearing, the meaning of the term “unitary material” is specifically controlled by the surrounding claim language. Further, the claim language and specification still require that “unitary” in this context refer, at a minimum, to a collection of materials that appear to be a single layer. The same context is not provided for the term “unitary construction,” except that an embodiment in the specification states that materials of a “unitary construction” “are constructed out of **an elastic material.**” See ’930 Patent at 5:25-32 (emphasis added). There is no other basis for interpreting “unitary construction” or broadening its meaning to encompass multiple types of materials.

For these reasons, the term “unitary material” is construed as “a material or collection of materials that are joined together so that it appears to be one layer.” The term “unitary construction” is construed as “constructed together out of the same type of material.”

3. “layer” terms

| Term | Kitsch’s Construction | DeeJayzoo’s Construction |
|--------------------------------------|--|----------------------------|
| “inner layer” (’930 Patent, Claim 1) | “a material having a discrete thickness” | Plain and ordinary meaning |
| “outer layer” (’930 Patent, Claim 1) | “a material having a discrete thickness” | Plain and ordinary meaning |

Claim 1 states, *inter alia*,

1. A covering apparatus comprising:
a unitary material;

...

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

wherein the unitary material comprises an **outer layer** and an **inner layer**;
wherein the **outer layer** comprises a fabric;
wherein the **outer layer** is water repellent;
wherein the **inner layer** is polyurethane[.]

'930 Patent at Claim 1 (emphasis added).

The parties' dispute regarding the meaning of the term "layer" arises from Kitsch's proposal to include the language "having a discrete thickness." Kitsch argues that the specification "describes the layers as being separate and discrete." Dkt. 44 at 15. Kitsch states, "[b]ecause these two layers must be constructed of distinct materials, it is appropriate to construe the term 'layer' to mean 'a material having a discrete thickness.'" *Id.*

Kitsch emphasizes that the "inner layer" and "outer layer" must be separate, discrete layers. However, Kitsch's claim construction proposal, which requires a material of a "discrete thickness," does not focus on the separability of the layers. Kitsch does not otherwise explain why the thickness of a layer must be "discrete," or whether that means that a layer cannot vary in thickness.⁷ Further, Kitsch's proposal would remove the adjectives "outer" and "inner." Thus, if adopted, the two terms would be given the same meaning and would have no variation depending on whether a particular material is associated with the outer or inner layer.

As Kitsch recognizes, the claim language itself already designates that the unitary material includes two layers. The outer layer is a water repellent fabric and the inner layer is a polyurethane. Consequently, the claim language already supports that the two layers are designated as being made of different types of materials that are joined together. Kitsch has not otherwise shown that its construction is necessary or appropriate in light of the claim language. Indeed, Kitsch acknowledges that the term "unitary material" contemplates different materials being joined together in some fashion so that, to a consumer, they appear to be one layer. See, e.g. Dkt. 47 at 1-2 (Kitsch asserting that "the specification describes a single material having two layers—not two materials that are combined into a 'functional unit.'"). Kitsch's position as to the separateness of the layers is not entirely consistent with this position.

At the hearing, Kitsch explained that some of the reasoning for its position was based on a concern that the claims could be interpreted to cover an inner layer of material that is sprayed with a water repellent coating, such that the outer layer is not necessarily its own fabric or material. However, the claim language itself requires "wherein the outer layer comprises a fabric; [and] wherein the outer layer is water repellent." Thus, spraying a water repellent coating on an inner layer of fabric would not meet these limitations; they require that the outer layer is itself a fabric. As to whether the combination of a fabric and a water repellent spray could together constitute an "outer layer," there has been no evidence presented by either party that would warrant limiting the claims to exclude such an embodiment. Further, the "outer layer **comprises** a fabric" in the claims. This is also consistent with an embodiment disclosed in the specification. See '930 Patent at 4:65-5:2 ("[i]n yet another preferred embodiment, the present invention is a dual-layer variant wherein said inner layer is constructed out of polyurethane, and the outer layer is

⁷ In a footnote, Deejayzoo states it "respectfully maintains that Kitsch's proposed construction, even if adopted, is unhelpful as any material must have a thickness." Dkt. 45 at 4 n.1.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

constructed out of a material that is coated with durable water repellent coating. The resulting fabric appears to be one layer to the consumer.”).

For these reasons and based on the remarks provided herein, the terms “inner layer” and “outer layer” are not construed.

4. “the plurality of folds culminate in a point” (’930 Patent, Claim 1)

| Kitsch’s Construction | Deejayzoo’s Construction |
|--|----------------------------|
| “all the folds meet in a single point” | Plain and ordinary meaning |

Claim 1 states, *inter alia*,

wherein the covering apparatus comprises **a plurality of folds**;
wherein **the plurality of folds culminate in a point** at a front of the covering apparatus above the elongated band[.]

’930 Patent at Claim 1 (emphasis added).

The parties dispute whether the word “all” should be substituted for the claim phrase “the plurality.” See, e.g. Dkt. 43 at 9-10. Kitsch’s position appears to be that the claims, which use the open-ended phrase “comprising,” should nonetheless be limited to require that the claim language not cover circumstances where any other folds exist on a shower cap if those other folds do not also result in the claimed plurality of folds in the single point. As Deejayzoo argues, “under Kitsch’s proposed construction, would an otherwise-infringing shower cap avoid infringement by adding a fold, anywhere on the cap, that does not meet at the same point as every other fold?” Dkt. 43 at 10.

Kitsch argues that the substitution of “the plurality” to “all” is mandated by the prosecution history. During prosecution, the patent applicant and examiner conducted a telephonic conference and interview. See Applicant-Initiated Interview Summary, December 26, 2017, Dkt. 44-4 at ECF9. In a summary of the interview, the examiner stated that the examiner and applicant “[d]iscussed amending the claims to overcome the prior art references” and that, among other things, the applicant would need to amend an independent claim to include “detail that **all** the folds culminate at a single point at the front of the covering member above the elongated band.” *Id.* (emphasis added). The applicant subsequently amended independent Claim 1 to add many limitations, including the limitation “wherein the plurality of folds culminate in a point at a front of the covering apparatus above the elongated band.” Reply in Response to November 17, 2017 Non-Final Office Action and December 26, 2017 Interview Summary, February 20, 2018, Dkt. 44-4 at ECF3. The applicant also stated in associated remarks that, in response to the claim limitations proposed in the examiner’s interview summary, “the proposed claim limitations have been included in independent claim 1.” *Id.* at ECF6.

Kitsch’s position distills to an argument that the patent applicant disclaimed broader claim scope with respect to the “plurality of folds culminate in a point” limitation based on the statements it made during prosecution. However, prosecution history disclaimer requires clear and unequivocal disclaimer. The

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

Federal Circuit has “declined to apply the doctrine of prosecution disclaimer where the alleged disavowal of claim scope is ambiguous.” *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003). In this case, at the time of the examiner interview, other proposed dependent claims included the phrase “wherein the covering apparatus comprises a plurality of folds” and “each of the plurality of folds culminate in a point at a front of the covering apparatus.” See, e.g. Reply in Response to June 30, 2017 Final Office Action, October 30, 2017, Dkt. 44-4 at ECF33-34. It is not clear that the examiner, in stating that the patent applicant should add a limitation in an independent claim to “detail that all the folds culminate at a single point,” was referring simply to the claimed “plurality of folds” themselves, or was requesting that the applicant amend the claims to limit them as Kitsch proposes. Because the examiner’s statement and the applicant’s subsequent amendment to the independent claim are equivocal, narrowing the claims as Kitsch proposes is unwarranted.

As Deejayzoo also argues, other figures in the specification show the back of the shower cap described in the ’930 Patent as one that has additional folds that do not culminate in the same, single point at the front of the shower cap. Dkt. 43 at 10; see also, e.g. ’930 Patent at FIG. 3, 4:1 (describing Fig. 3 as “a rear view of the present invention.”). Kitsch’s interpretation would improperly exclude these figures and are rejected as inconsistent with the disclosure in the patent specification and not otherwise supported by the prosecution history.

Without additional information regarding the relevance of this dispute to dispositive issues of infringement and invalidity in this case, no construction of the term “the plurality of folds culminate in a point” is warranted at this time.

5. D792 Patent Claim

| Kitsch’s Construction | Deejayzoo’s Construction |
|-----------------------|---|
| Functional | “the ornamental design for a noise reducing water resistant headwear cap, as shown and described” |

Kitsch does not seek construction of the D792 Patent claim, but instead brings an invalidity challenge. Kitsch argues that the D792 Patent is invalid because its design is driven by function in such a way that it is purely functional. Kitsch emphasizes that many of the elements shown in the D792 Patent claims are also described in the ’930 Patent. See Dkt. 44 at 18-19. In the alternative, Kitsch argues that a construction of the D792 Patent should include certain statements about what the patent does and does not cover. *Id.* at 20.

Deejayzoo argues that the design of the D792 Patent is not dictated by function, and that “the record is replete with shower cap designs . . . that are markedly different from the aesthetic characteristics of the design of the D’792 Patent.” Dkt. 43 at 15. Deejayzoo adds that the ’930 Patent claim does not claim ornamental features in the way they are depicted in the D792 Patent. For example, Deejayzoo states that the ’930 Patent claim “does not recite the number, height, or spread of the folds, which collectively contribute to the ornamental appearance of the front of the cap” or “the height of the elongated band, which height also contributes to the ornamental appearance of the cap.” Dkt. 45 at 7.

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

Kitsch has not shown that making a determination regarding whether a design patent is invalid as functional is appropriate through claim construction. Indeed, “[w]hether a patented design is functional or ornamental is a question of fact” that must be established by clear and convincing evidence. *PHG Techs., LLC v. St. John Companies, Inc.*, 469 F.3d 1361, 1365 (Fed. Cir. 2006) (considering design patent validity in the context of a review of a preliminary injunction); *Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1328 (Fed. Cir. 2015). The evidence presented by Deejayzoo, including its own explanation of the scope of the D792 Patent compared to prior art designs and the '930 Patent, also support that factual disputes preclude a determination as a matter of law that the D792 Patent is invalid as functional. See, e.g. Dkt. 43 at 15-18, Dkt. 45 at 7. Kitsch’s invalidity challenge is rejected.

Regarding the proper construction of the D792 Patent, Kitsch asks that the patent be construed to include the following language:

The D’792 [P]atent is limited to the specific ornamental design for a noise reducing water resistant headwear cap shown in the patent.

The D’792 Patent does not prevent use of folds in the front of the cap as that is a functional feature that cannot be protected by a design patent.

The D’792 Patent does not prevent use of the additional material or pocket in the back of the cap as that is a functional feature that cannot be protected by a design patent.

The D’792 Patent does not prevent use of an elongated band or a gathered band of unitary construction as that is a functional feature that cannot be protected by a design patent.

Dkt. 47 at 10.

As Deejayzoo observes, the overall ornamental design of the shower cap -- including the design of Kitsch’s identified features and not simply the existence of those features divorced from their design -- dictates the scope of the design patent. For example, the elongated band and gathered band and their relationship to one another as well as their overall height and shape control for purposes of contributing to the scope of the D792 Patent. Kitsch’s second through fourth proposals could cause a jury to believe, incorrectly, that the shape and appearance of various elements should not be considered as part of the overall appearance of the article simply because they also serve some functional purpose. But “[u]nlike the functionality inherent in the underlying articles themselves, there is no evidence in the record, that any of the ornamental designs adorning those underlying articles are essential to the use of the article.” *Ethicon*, 796 F.3d at 1334.

Kitsch has not shown through expert testimony or other evidence, that the design of the folds, material or pocket in the back of the cap, elongated band, or gathered band are dictated by function, as opposed to elements that could be executed through other ornamental designs. That the '930 Patent refers to these elements is not sufficient to show that their particular design in the embodiment claimed by the D792 Patent is primarily dictated by function. “Moreover, design patents protect the overall ornamentation of a design, not an aggregation of separable elements.” *Sport Dimension, Inc. v. Coleman Co.*, 820 F.3d 1316, 1322 (Fed. Cir. 2016); see also *id.* (“By eliminating structural elements from the claim, the district

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. DeeJayzoo, LLC

#

court improperly converted the claim scope of the design patent from one that covers the overall ornamentation to one that covers individual elements. Here, the district court erred by completely removing the armbands and side torso tapering from its construction.”). Kitsch’s proposal, which identifies various elements in a generalized way, untethered to ornamentation, but omits others, would conflict with this design patent principle.

As to Kitsch’s first proposal, citing *Curver Luxembourg, SARL v. Home Expressions Inc.*, 938 F.3d 1334 (Fed. Cir. 2019), it argues that the D792 Patent must be limited solely to “noise reducing water resistant headwear caps.” Dkt. 44 at 20-21. In *Curver*, it was unclear from the design patent figures themselves to what particular article of manufacture the patent applied. The design patent, however, stated on its face that it covered a “pattern for a chair.” *Curver*, 938 F.3d at 1339. The Federal Circuit stated:

Given that the figures fail to illustrate any particular article of manufacture, Curver’s argument effectively collapses to a request for a patent on a surface ornamentation design *per se*. As Curver itself acknowledges, our law has never sanctioned granting a design patent for a surface ornamentation in the abstract such that the patent’s scope encompasses every possible article of manufacture to which the surface ornamentation is applied. We decline to construe the scope of a design patent so broadly here merely because the referenced article of manufacture appears in the claim language, rather than the figures.

Id. (footnote and internal citation omitted).

The Federal Circuit then clarified that it “traditionally focused on the figures illustrated in a patent” to determine their scope. *Id.* It reached its determination on narrow grounds and specifically reiterated that “design patents are granted only for a design applied to an article of manufacture, and not a design *per se*.” *Id.* at 1340.

Kitsch’s proposal would limit the D792 Patent to only covering “noise reducing” shower caps as opposed to any type of shower cap. However, the focus of a design patent is on an ornamental design. It is not clear that this functional language stated in the patent should limit the scope of the patent for purposes of an infringement inquiry, particularly at this stage of the case. Doing so would result in a comparison of functional similarity, *i.e.* whether an alleged infringing product or prior art design is also “noise-reducing,” not just a comparison of the ornamental design itself, would be required. This would be inconsistent with many design patent law principles, including the general requirements for the infringement analysis. *Curver*, 938 F.3d at 1338 (“Under the ‘ordinary observer’ test, an accused product infringes a design patent if in the eye of an ordinary observer two designs are substantially the same, such that the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other” (internal quotations omitted)). Kitsch has not shown that such an outcome is appropriate.

At the hearing, Kitsch argued that, if it is determined that the D792 Patent is not limited to a *noise-reducing* shower cap, then it would be improper to limit the D792 Patent to a shower cap at all. This argument was not raised in either of Kitsch’s claim construction briefs. DeeJayzoo did not respond by arguing expressly that it believes the D792 Patent is limited to shower caps. Instead, it noted that the argument was new and that the Federal Circuit “is clear that the figures rule in a design patent case.” Because Kitsch’s

#

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-02556 JAK (RAOx)

Date March 26, 2020

Title Kitsch LLC v. Deejayzoo, LLC

#

argument was not timely and it is unclear whether it is actually disputed by Deejayzoo, it is not addressed at this time. To the extent the parties disagree on this issue, it is one that can be raised through an appropriate motion as to potential amendments to invalidity contentions.

For these reasons, the D792 Patent is not found invalid and is not given a verbal construction; provided, however, that appropriate jury instructions regarding the proper analysis and consideration of a design patent may be proposed in connection with the Final Pretrial Conference. See *Egyptian Goddess*, 543 F.3d at 680.

IV. Conclusion

For the reasons stated in this Order, the following rulings on construction are adopted:

| Term | Court's Construction |
|--|---|
| "a unitary material" ('930 Patent, Claims 1, 2) | "a material or collection of materials that are joined together so that it appears to be one layer" |
| "unitary construction" ('930 Patent, Claim 1) | "constructed together out of the same type of material" |
| "inner layer" ('930 Patent, Claim 1) | No construction |
| "outer layer" ('930 Patent, Claim 1) | No construction |
| "water repellant" ('930 Patent, Claim 1) | Not indefinite; no construction |
| "the plurality of folds culminate in a point" ('930 Patent, Claim 1) | No construction |
| D792 Patent Claim | Invalidity not proven; no verbal construction |

IT IS SO ORDERED.

Initials of Preparer cw

#