Trials@uspto.gov
Tel: 571-272-7822

Paper 6
Entered: April 12, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PANTIES PLUS, INC.,
Petitioner,

v.

BRAGEL INTERNATIONAL, INC.,
Patent Owner.

Case IPR2017-00044
Patent 7,144,296 B2

Before MITCHELL G. WEATHERLY, KEVIN W. CHERRY, and JAMES A. WORTH, *Administrative Patent Judges.*

WEATHERLY, *Administrative Patent Judge*.

DECISION
Instituting *Inter Partes* Review
35 U.S.C. § 314, 37 C.F.R. §§ 42.4, 42.108

I. INTRODUCTION

A. BACKGROUND

Panties Plus, Inc. ("PPI") filed a petition (Paper 1, "Pet.") to institute an *inter partes* review of claims 1, 2, and 5 (the "challenged claims") of U.S. Patent No. 7,144,296 B2 (Ex. 1001, "the '296 patent"). 35 U.S.C. § 311. Bragel International, Inc. ("Bragel") timely filed a Preliminary

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Response. Paper 5 (“Prelim. Resp.”). Institution of an *inter partes* review is authorized by statute when “the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a); 37 C.F.R. § 42.108. Based on our review of the record, we conclude that PPI is reasonably likely to prevail with respect to at least one of the challenged claims.

PPI contends that the challenged claims are unpatentable under 35 U.S.C. § 103 based on the following grounds (Pet. 5–61):

References	Basis	Claims challenged
Canadian Patent App. No. 2,101,509 A1 (Ex. 1010, “Luckman”) and U.S. Patent No. 6,645,042 B2 (Ex. 1011, “Davis”)	§ 103	1, 2, and 5
U.S. Patent No. 6,231,424 B1 (Ex. 1012, “Valentin”) and U.S. Patent No. 6,857,932 B2 (Ex. 1014, “Chen”)	§ 103	1, 2, and 5
U.S. Patent No. 5,755,611 (Ex. 1013, “Noble”), U.S. Patent No. 5,922,023 (Ex. 1015, “Mulligan”), and U.S. Patent No. 3,196,878 (Ex. 1016, “Hedu”)	§ 103	1, 2, and 5

Generally, Bragel contends that the Petition should be denied in its entirety. For the reasons described below, we institute an *inter partes* review of claims 1, 2, and 5 on all three grounds asserted above.

B. RELATED PROCEEDINGS

PPI identified as related matters the following district court proceedings in the U.S. District Court for the Central District of California:

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Bragel International, Inc. v. Charlotte Russe, Inc. et al., 2:15-cv-08364 (the "CR Litigation"); *Bragel International, Inc. v. Styles For Less, Inc. et al.*, 2:15-cv-01756 (the "SFL Litigation" and collectively with the CR Litigation, the "Related Litigation"); *Bragel International, Inc. v. AGaci LLC*, 2:15-cv-08439; *Bragel International, Inc. v. E-Retail Society d/b/a Bra Society et al.*, 2:15-cv-07148; *Bragel International, Inc. v. Charlotte Russe, Inc.,* 2:14-cv-07691; *Bragel International, Inc. v. Remi Collections, LLC,* 2:14-cv-02946; *Bragel International, Inc. v. Love Culture, Inc*., 2:11-cv-04336. Pet. 1.

C. THE '296 PATENT

The '296 patent generally relates to backless, strapless breast form systems that are designed to be worn in lieu of a traditional bra. Ex. 1001, Abstract. The '296 patent explains that "externally worn articles are designed to replace a female human breast that has been surgically removed." Ex. 1001, 1:45–47. More generally "[e]xternally worn articles that can be worn for the purpose of either enhancing or replacing human breasts are referred to a breast forms." *Id*. at 1:47–49. The '296 patent states that "[i]n addition to the demand for devices and methods for enhancing breast size and shape, there is also a demand for being able to use those devices and methods while wearing a full-range of clothing." *Id*. at 1:60–63. The subject matter of the '296 patent addresses these problems. *See id*. at 1:60–2:72. By way of example, Figure 1 of the '296 patent, reproduced below, depicts one embodiment of the breast form system in a front elevational view, including two breast forms 12 adjoined by a connector 14.

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Fig. 1

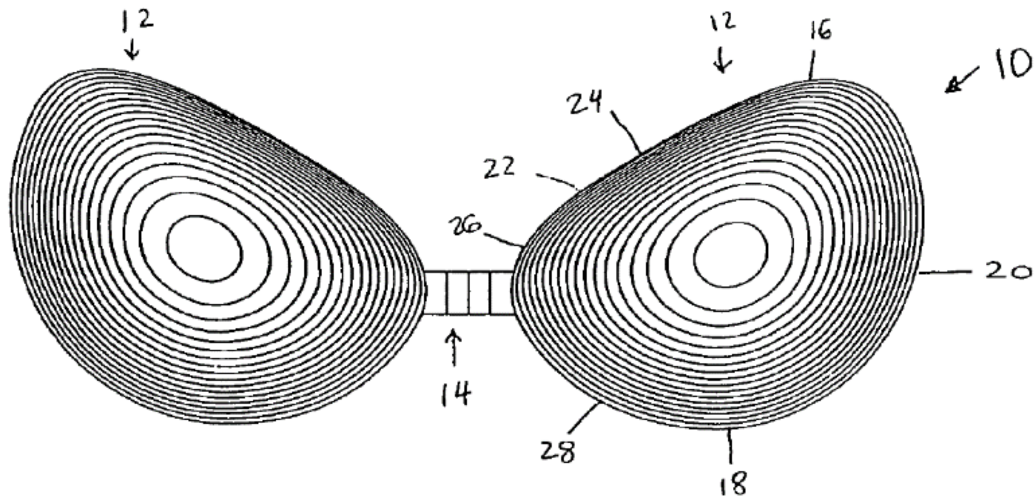

Figure 1 of the ’296 patent is a front view of a breast form system having a pair of breast forms adjoined by a connector.

Each breast form 12 comprises a volume of silicone gel encased in a thermoplastic film, helping to provide a natural look and feel. *Id.* at 4:66–5:7. Each breast form also has a concave interior surface with a pressure sensitive adhesive layer so that breast forms 12 can be secured to the user’s breasts. *Id.* at 4:13–33. Connector 14 allows two breast forms 12 to be adjoined, allowing the user to create varying degrees of breast cleavage depending on where breast forms 12 are positioned on the user’s breasts. *Id.* at 3:42–53.

Claim 1 is the only independent claim among the challenged claims and recites:

> 1. An improved backless, strapless breast form system to be worn in place of a traditional bra, comprising:
>
> a pair of breast forms, wherein each breast form comprises:
>
> a volume of silicone gel encased between thermoplastic film material;

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> a concave interior surface facing towards a user's breast having a pressure sensitive adhesive layer for securing the breast form to the user's breast; and
>
> a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms.

Id. at 8:48–59.

II. ANALYSIS

PPI seeks *inter partes* review on the grounds that claims 1, 2, and 5 are unpatentable as obvious over three different combinations of prior art. Pet. 37–61. Bragel counters that *inter partes* review should be denied for three high-level reasons, including: PPI fails to identify all real parties in interest, Prelim. Resp. 4–9, the Board should deny the Petition in its discretion under 35 U.S.C. § 325(d), *id.* at 15–28, and the combinations of prior art asserted by PPI fail to render any claims invalid, *id.* at 28–54. For the reasons expressed below, we determine that Bragel's first two arguments are unpersuasive. We also determine that PPI has persuasively demonstrated a reasonable likelihood of establishing that all three asserted grounds of unpatentability render claims 1, 2, and 5 obvious. Accordingly, we institute an *inter partes* review of all challenged claims on all asserted grounds.

A. Real Parties In Interest

PPI identifies itself as a real party in interest in these proceedings and represents that "[n]o other entities or persons other than the Petitioner has authority to direct or control Petitioner's actions or decisions relating to this petition. Petitioner is funding all of the fees and costs of this petition." Pet. 1. Bragel argues that PPI has failed to name all real parties in interest as required by 35 U.S.C. § 312(a)(2). Prelim. Resp. 3–9. According to Bragel,

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