

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No.	CV 14-00438 BRO (MRWx)	Date	February 9, 2015
Title	SPORT DIMENSION, INC. V. THE COLEMAN COMPANY, INC.		

Present: The Honorable **BEVERLY REID O’CONNELL, United States District Judge**

Renee A. Fisher

Not Present

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS)

SUPPLEMENTAL CLAIM CONSTRUCTION ORDER

I. INTRODUCTION

Pending before the Court are the parties’ proposed supplemental *Markman* constructions for the claim of U.S. Patent No. D623’714 (the “D’714 patent”). (*See* Dkt. Nos. 62, 64.) After considering the parties’ moving and opposing papers, as well as oral argument from the Court’s February 3, 2015 hearing, the Court construes the contested patent claim as follows.

II. BACKGROUND

Plaintiff Sport Dimension, Inc. (“Sport Dimension”) is a sports equipment and apparel company that has been operating in Southern California for sixteen years. (Compl. ¶ 6.) Sport Dimension develops, manufactures, sells, and distributes water-sports-related equipment, including wet suits, personal floatation devices (“PFDs”), body boards, sea scooters, masks, and fins. (Compl. ¶ 7.) Sport Dimension sells many of its products under the Body Glove brand. (Compl. ¶ 7.)

Defendant The Coleman Company, Inc. (“Coleman”) is a Delaware corporation that sells and distributes outdoor sporting equipment, including camping equipment and PFDs. (Answer ¶¶ 2, 8.) Coleman is the owner of all rights, title, and interest in the D’714 patent, which is titled “Personal Flotation Device.” (Answer ¶ 9; Compl. Ex. A.) Among other products, Coleman sells a child PFD called the “Puddle Jumper®,” which it asserts is covered by the D’714 patent. (Answer ¶¶ 10, 12.)

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On August 9, 2013, Coleman sent Sport Dimension a letter accusing one of Sport Dimension’s PFDs designed for children (the “Body Glove PFD”) of infringing Coleman’s D’714 patent and demanding that Sport Dimension cease and desist all “manufacturing, importing, distributing, selling and/or offering for sale in the United States” of the Body Glove PFD. (Compl. ¶¶ 13, 14.) Sport Dimension and Coleman then exchanged correspondence regarding Sport Dimension’s alleged infringement between August 2013 and December 2013. (Compl. ¶ 16.)

On January 21, 2014, Sport Dimension filed this lawsuit against Coleman seeking declaratory relief. (Compl.) Specifically, Sport Dimension requests declaratory judgment establishing (1) that Sport Dimension is not infringing the D’714 patent, and (2) that the D’714 patent is invalid. (Compl. ¶¶ 19–28.)

On October 10, 2015, the parties jointly requested a claim construction hearing pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). (Dkt. No. 35.) The sole subject of this hearing was how to construe the D’714 patent. The parties briefed this issue and submitted the following proposed constructions:

Sport Dimension’s Proposed Construction	Coleman’s Proposed Construction
<p style="text-align: center;">1. Arm Band Attachment</p> <p>The arm bands are attached vertically with a triangular shaped material attached to the body of the personal flotation device (“PFD”).</p> <p style="text-align: center;">2. Arm Band Edges</p> <p>The arm bands are curved at the ends and do not include hard edges.</p> <p style="text-align: center;">3. Arm Bands Tapering</p> <p>The arm bands gradually taper thinner and symmetrically on both sides on the bottom portion of the arm bands.</p> <p>The tapering of the arm bands is functional because it is necessary for ease of movement,</p>	<p>The ornamental design for a personal flotation device as shown in Figs. 1-8. The broken line showing is for illustrative purposes only and forms no part of the claimed design.</p>

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manufacturing, comfort, secure fit, and it naturally forms that design.

4. Arm Bands

The arm bands are functional and not ornamental because they are designed to meet the required buoyancy standards, for safety, secure fit, comfort and to serve as a swim aid.

The arm band attachments are functional and not ornamental because they prevent arm bands from slipping off. The arm band placement is functional and not ornamental because it is required for performance, comfort, and fit.

5. No Vertical Edges

There is no gathering of vertical edges at the point where the PFD torso and arm bands attach.

6. Top Front Torso

The top of the upper torso of the PFD is straight across, without a sloped edge or a curve until the point just before where the top of the torso meets the triangular-shaped material connected to the arm bands.

7. Side Torso

The side torso slopes down from the top to the bottom where it meets the strap, declining in height from the highest point. The downward slope of the sides is functional and not ornamental in that it is necessary to fit the PFD underneath the user's arms and to promote movement.

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8. Back View

The PFD provides for an open back design, consisting of a buckle connected to the strap, and a strap connected to the ends of the PFD body and not overlapping the torso material.

The open back is functional and not ornamental because it keeps the wearer cool and provides for ventilation.

9. Arm Band Placement

The arm bands rest in an elevated fashion above the side torso, with the arm band holes fully visible from the side view.

10. Arm Band Placement

When the PFD is buckled, the arm bands are elevated so that about 50% of the arm band itself rests above the side torso.

11. Connection between the Front and Side Torso

The top of the front torso angles down sharply at the point it meets the side of the torso.

In addition, Sport Dimension's Complaint provides the following eight figures that accompany the D'714 patent and which are referenced in Coleman's proposed construction, (*see* Compl. Ex. A; Dkt. No. 35 at 2):

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FIG. 8

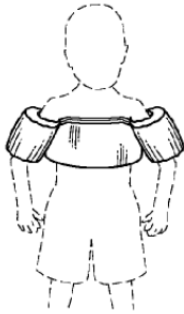


FIG. 1

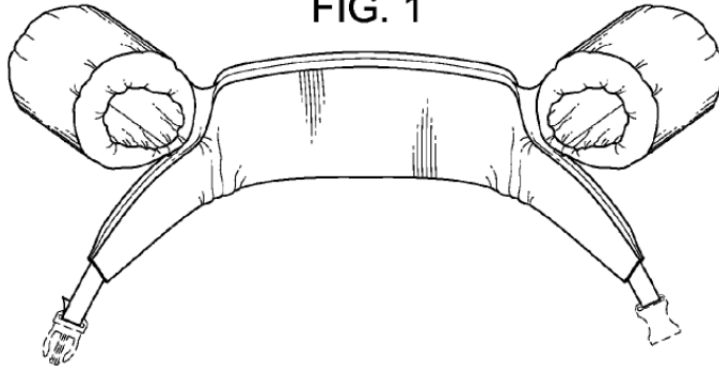


FIG. 2

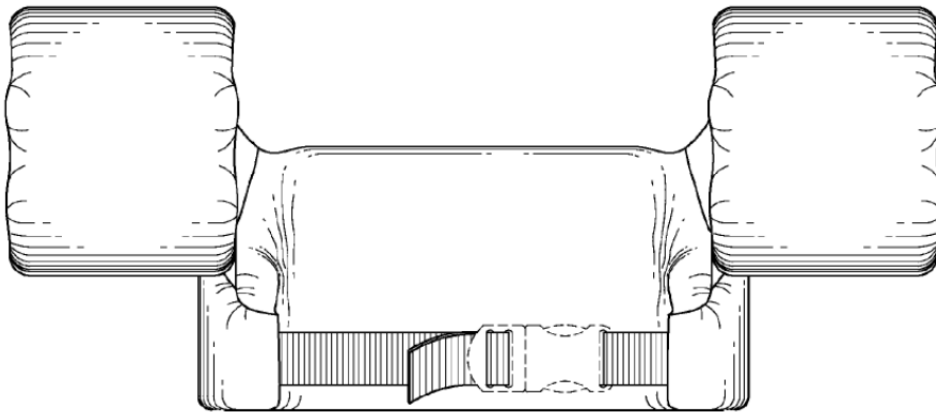
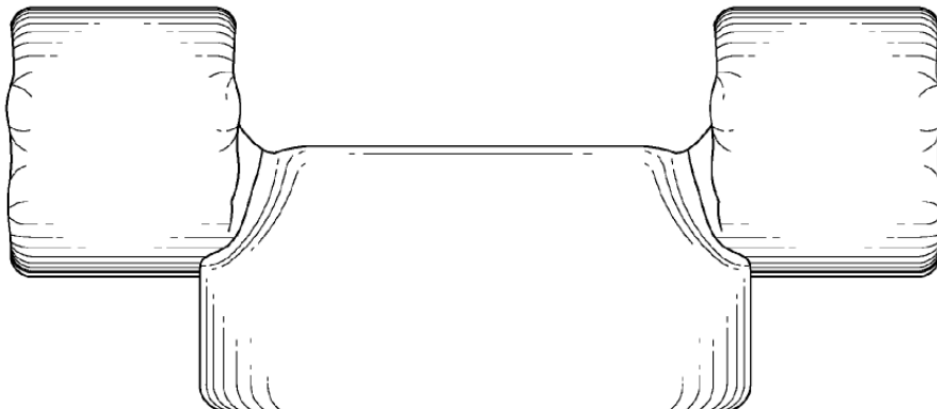


FIG. 3



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FIG. 4

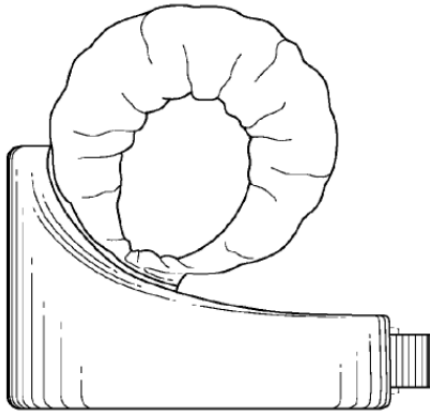


FIG. 5

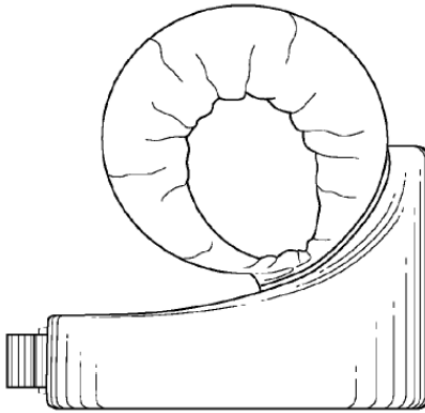


FIG. 6

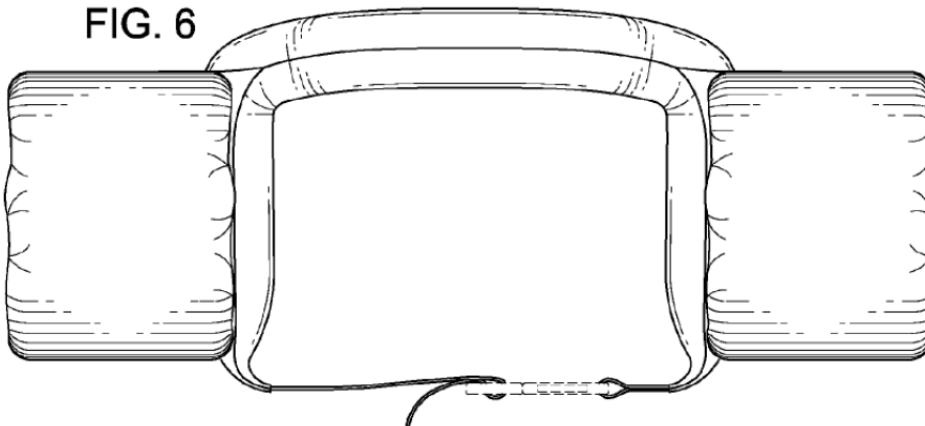
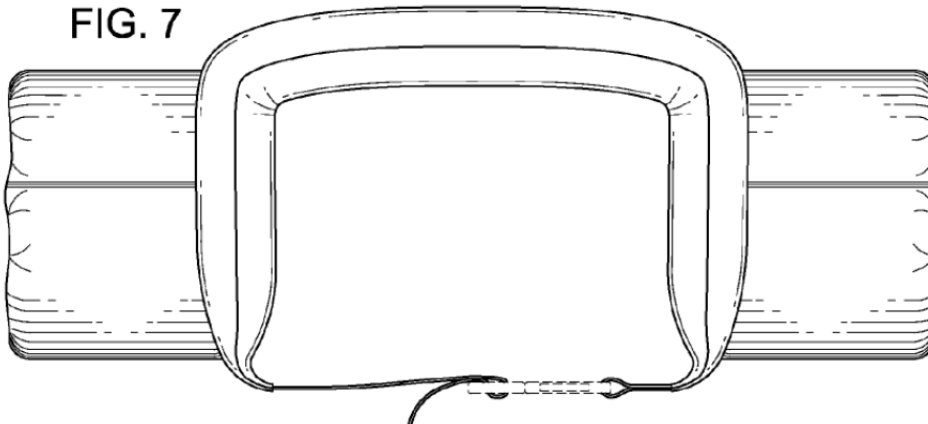


FIG. 7



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In support of its more-detailed proposed construction, Sport Dimension argued both that the Court should filter out any functional elements of the D’714 patent and that Coleman had made certain prosecution disclaimers that limited the scope of the D’714 patent. (*See* Dkt. No. 39.) Coleman opposed both arguments and asserted that it was premature to consider the issue of functionality because Coleman had not yet conducted adequate discovery on the issue. (Dkt. No. 36.) After consideration of the briefs and the parties’ oral argument on the matter, the Court determined that Coleman had not made any prosecution disclaimers. (Dkt. No. 59 at 17.) With regard to functionality, however, the Court deemed it premature to consider the issue because discovery had not yet been completed. (Dkt. No. 59 at 13–14.) Consequently, the Court deferred ruling on the functionality of aspects of the D’714 patent until after the parties had had the opportunity to conduct sufficient discovery. (Dkt. No. 59 at 14.)

On January 12, both parties submitted their supplemental claim construction briefs. (Dkt. Nos. 62, 64.) Sport Dimension also filed a motion to strike and exclude the testimony of Coleman’s expert, Peter Bressler, whom Coleman retained to testify about the functionality of certain aspects of the D’714 patent. (Dkt. No. 66.) The basis of Sport Dimension’s motion was that Mr. Bressler, an individual who wielded undeniable expertise in the field of industrial design, nevertheless was unqualified to render an opinion with regard to the patent at issue because he had no experience whatsoever in the field of PFDs. (Dkt. No. 66.) On January 29, 2015, the Court granted this motion on the ground that Mr. Bressler’s general expertise in industrial design was insufficient to qualify him to testify regarding PFD design under the Federal Circuit’s ruling in *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008). (Dkt. No. 80.) The Court then held oral argument on this matter on February 3, 2015.

III. LEGAL STANDARD

Claim construction is a pure question of law, reserved for the courts, *Markman*, 517 U.S. at 372, although it may also require resolution of “subsidiary factual disputes,” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015). The purpose of claim construction is to determine the meaning and scope of the patent claims asserted to be infringed. *O2 Micro Int’l, Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). “Ultimately, the interpretation to be given a term can only be determined and confirmed with a full understanding of what the inventors actually

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invented and intended to envelop with the claim.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005). Accordingly, a claim should be construed in a manner that “stays true to the claim language and most naturally aligns with the patent’s description of the invention.” *Id.* Yet while the specification may describe a preferred embodiment, the claims are not necessarily limited only to that embodiment. *Id.* at 1323; *see also Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 318 F.3d 1143, 1151 (Fed. Cir. 2003) (“The general rule, of course, is that claims of a patent are not limited to the preferred embodiment, unless by their own language.”).

In construing disputed terms, a court looks first to the claims themselves, for “[i]t is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to which the patentee is entitled the right to exclude.’” *Phillips*, 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). Generally, the words of a claim should be given their “ordinary and customary meaning,” which is “the meaning that the term[s] would have to a person of ordinary skill in the art in question at the time of the invention.” *Id.* at 1312–13. In some instances, the ordinary meaning to a person of skill in the art is clear, and claim construction may involve “little more than the application of the widely accepted meaning of commonly understood words.” *Id.* at 1314.

In many cases, however, the meaning of a term to a person skilled in the art will not be readily apparent, and a court must look to other sources to determine the term’s meaning. *See id.* Under these circumstances, a court should consider the context in which the term is used in an asserted claim or in related claims, bearing in mind that “the 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.” *Id.* at 1313. Indeed, the specification “‘is always highly relevant’” and “[u]sually . . . dispositive; it is the single best guide to the meaning of a disputed term.” *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptronc, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Where the specification reveals that the patentee has given a special definition to a claim term that differs from the meaning it would ordinarily possess, “the inventor’s lexicography governs.” *Id.* at 1316. Likewise, where the specification reveals an intentional disclaimer or disavowal of claim scope by the inventor, the invention as revealed through the specification is dispositive. *Id.*

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A court may also consider the patent’s prosecution history, which consists of the complete record of proceedings before the United States Patent and Trademark Office and includes the cited prior art references. *Id.* at 1317. A court may consider prosecution history where it is in evidence, for the prosecution history “can 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 otherwise would be.” *Id.*

“In some cases, . . . the district court will need to look beyond the patent’s intrinsic evidence and to consult extrinsic evidence in order to understand, for example, the background science or the meaning of a term in the relevant art during the relevant time period.” *Teva Pharm. USA*, 135 S. Ct. at 841. Expert testimony may be particularly useful in “[providing] background on technology at issue, . . . explain[ing] how an invention works, . . . [and] establish[ing] that a particular term in the patent or the prior art has a particular meaning in the pertinent field.” *Phillips*, 415 F.3d at 1318. Although a court may consider evidence that is extrinsic to the patent and its prosecution history, such evidence is considered “less significant than the intrinsic record” and “less reliable than the patent and its prosecution history in determining how to read claim terms.” *Id.* at 1317, 1318 (internal quotation marks and citations omitted). Thus, while extrinsic evidence may be useful in claim construction, ultimately “it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence.” *Id.* at 1319. Any expert testimony “that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history” will be significantly discounted. *Id.* at 1318 (internal quotation marks and citation omitted).

A design patent in particular protects only “the novel, ornamental features of the patented design,” not the functional elements. *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1405 (Fed. Cir. 1997) (citation omitted). “Where a design contains both functional and nonfunctional elements, the scope of the claim must be construed in order to identify the nonfunctional aspects of the design as shown in the patent.” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 680 (Fed. Cir. 2008) (en banc) (quotation omitted). If a certain design “configuration is made imperative by the elements which it combines and by the utilitarian purpose of the device,” then it is functional and does not fall within the scope of a design patent. *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186,

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1188 (Fed. Cir. 1988); *Cheng v. AIM Sports, Inc.*, No. CV 10-3814 PSG (PLAx), 2011 WL 1429647, at *3 (C.D. Cal. Apr. 14, 2011). “If, on the other hand, ‘there are several ways to achieve the function of an article of manufacture, the design of the article is more likely to serve a primarily ornamental purpose,’” and it may thus be protected by an applicable design patent. *Richardson v. Stanley Works, Inc.*, 610 F. Supp. 2d 1046, 1049 (D. Ariz. 2009) (quoting *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993)), *aff’d* 597 F.3d 1288 (Fed. Cir. 2010).

“In construing a design patent claim, the scope of the claimed design encompasses its visual appearance as a whole, and in particular the visual impression it creates.” *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1376 (Fed. Cir. 2002) (internal quotation marks and citation omitted). Generally, courts construing design patents should not “attempt to ‘construe’ a design patent claim by providing a detailed verbal description of the claimed design.” *Egyptian Goddess*, 543 F.3d at 677; *accord Crocs, Inc. v. Int’l Trade Comm’n*, 598 F.3d 1294, 1302 (Fed. Cir. 2010) (“This court has cautioned, and continues to caution, trial courts about excessive reliance on a detailed verbal description in a design infringement case.”). Rather, design patent construction must be governed by drawings or other illustrations “adapted to a pictorial setting.” *Crocs*, 598 F.3d at 1302.

IV. DISCUSSION

The only issue presented in the parties’ briefing is whether the Court should filter out any functional elements of the D’714 patent in its claim construction. Specifically, Sport Dimension argues that the design’s armbands, the armbands’ attachment and configuration, and the tapered configuration of the side torso are all functional elements that cannot receive design patent protection. As discussed above, “[w]here a design contains both functional and non-functional elements, the scope of the claim must be construed in order to identify the non-functional aspects of the design as shown in the patent,” *OddzOn Prods.*, 122 F.3d at 1405; *accord Z Produx, Inc. v. Make-Up Art Cosmetics, Inc.*, No. CV 13-00734 DDP RZX, 2013 WL 5941049, at *4 (C.D. Cal. Nov. 5, 2013) (“‘A design patent protects only the novel, ornamental features of the patented design,’ not its functional elements.” (quoting *OddzOn Prods.*, 122 F.3d at 1405)), *aff’d*,

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568 F. App'x 897 (Fed. Cir. 2014).¹ Thus, as part of its claim construction, the Court *must* “factor[] out the functional aspects” of the D’714 patent design. *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1294 (Fed. Cir. 2010).²

A design is deemed to be functional “when the appearance of the claimed design is dictated by the use or purpose of the article.” *L.A. Gear*, 988 F.2d at 1117 (citation and quotation marks omitted).³ Moreover, this determination “of whether the patented design is dictated by the function of the article of manufacture must ultimately rest on an analysis of its overall appearance.” *Berry Sterling Corp. v. Pescor Plastics, Inc.*, 122 F.3d 1452, 1455 (Fed. Cir. 1997). Nevertheless, in factoring out the functional aspects of a design patent during claim construction, the Court must consider the “functionality of the *elements at issue*.” *Z Produx*, 2013 WL 5941049, at *4 (emphasis added).

¹ See also *Egyptian Goddess*, 543 F.3d at 680 (“Apart from attempting to provide a verbal description of the design, 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 . . . [including] distinguishing between those features of the claimed design that are ornamental and those that are purely functional”); *L.A. Gear*, 988 F.2d at 1123 (“The elements of the design may indeed serve a utilitarian purpose, but it is the ornamental aspect that is the basis of the design patent.”); *Lee v. Dayton–Hudson Corp.*, 838 F.2d 1186, 1188–91 (Fed. Cir. 1988) (“[I]t is the non-functional, design aspects that are pertinent to determinations of infringements A device that copies the utilitarian or functional features of a patented design is not an infringement [While] infringement can be found for designs that are not identical to the patented design, such designs must be equivalent in their ornamental, not functional, aspects.”).

² Coleman argued at oral argument that Sport Dimension must prove functionality by clear and convincing evidence. (See, e.g., Dkt. No. 83-1 at 3.) While it is true that “invalidity of a design patent must be established by clear and convincing evidence,” that standard applies only because an issued patent is given a statutory presumption of validity. *L.A. Gear*, 988 F.2d at 1123 (citing 35 U.S.C. § 282). There is no presumption that a claim has any particular scope, nor could there be. Rather, as discussed above, the scope of the claim is a matter of law for the Court to decide. See *Markman*, 517 U.S. at 372.

³ Although Coleman repeatedly quotes *Egyptian Goddess* for the proposition that elements are excluded under this analysis only if they are deemed to be “purely functional,” *Egyptian Goddess*, 543 F.3d at 680, the proper standard remains whether “the claimed design is ‘dictated by’ the utilitarian purpose of the article,” *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1315 (Fed. Cir. 2013) (quoting *L.A. Gear*, 988 F.2d at 1123).

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The Federal Circuit has identified a “list of considerations” for determining whether a design is functional. *PHG Techs., LLC v. St. John Cos.*, 469 F.3d 1361, 1366 (Fed. Cir. 2006) (internal modification omitted). These considerations include: (1) “whether the protected design represents the best design”; (2) “whether alternative designs would adversely affect the utility of the specified article”; (3) “whether there are any concomitant utility patents”; (4) “whether the advertising touts particular features of the design as having specific utility”; and (5) “whether there are any elements in the design or an overall appearance clearly not dictated by function.” *Id.* (emphasis omitted). The court in *PHG* noted in particular that “[c]onsideration of alternative designs, if present, is a useful tool that may allow a court to conclude that a challenged design is not invalid for functionality.” “When there are several ways to achieve the function of an article of manufacture, the design of the article is more likely to serve a primarily ornamental purpose.” *Id.* at 1367 (internal modifications and citations omitted) (quoting *Berry Sterling*, 122 F.3d at 1455; *Rosco, Inc. v. Mirror Lite Co.*, 304 F.3d 1373, 1378 (Fed. Cir. 2002)). With these precepts in mind, the parties each submitted various arguments supported by expert witness testimony⁴ regarding the functionality of the contested elements of the D’714 patent.

A. The Particular Meaning of the Term “Personal Flotation Device”

A principal dispute between the parties concerns an additional factor that Sport Dimension attempts to shoehorn into this analysis. In its legal standard section for determining functionality, Sport Dimension claims that “where federal regulations govern the performance of the article of manufacture, the functionality of the design elements must be considered in light of those standards.” (Pl.’s Br. at 3.) In support of this statement, Sport Dimension cites an order by the District of Colorado adopting in part and rejecting in part a recommendation by a magistrate judge. *Shop*TV, Inc. v. Bed Bath & Beyond, Inc.*, No. CIV. 09CV00057REBCBS, 2010 WL 489539, at *1 (D. Colo. Feb. 3, 2010). Indeed, Sport Dimension discusses *Shop*TV* at length later in its brief for the purpose of arguing that when a design’s utility includes compliance with federal

⁴ The Court does not consider the testimony or report of Coleman’s expert, Peter Bressler. (See Dkt. No. 80.) Nor does the Court consider argument by Coleman that is based on Mr. Bressler’s conclusions. Nevertheless, the Court still considers Coleman’s many arguments regarding functionality, irrespective of whether Coleman also discussed these matters with Mr. Bressler.

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regulations, “proposed alternative designs that do not accomplish that function should not be considered.” (Pl.’s Br. at 8–9.) This order from *Shop*TV*, however, was later withdrawn by the same court that issued it. *See Shop*TV, Inc. v. Bed Bath & Beyond, Inc.*, No. 09-CV-00057-REB-CBS, 2010 WL 582165, at *1 (D. Colo. Feb. 17, 2010). Accordingly, *Shop*TV* does not provide sound authority on which Sport Dimension may rely, and Sport Dimension does not cite any other authority in support of this additional requirement for determining functionality.

Moreover, Coleman relies on established caselaw dictating that, in determining functionality, courts “should address the article in the claimed design, which means, realistically, the article and its configuration as shown in the drawings,” and “cannot use the limitations of the commercial embodiment of the underlying article of manufacture to impose limitations on the scope of the design patent.” *Berry Sterling*, 122 F.3d at 1455.⁵ Thus, Coleman is correct to note that external standards applicable to the commercial embodiment of a patent may not impose limitations on the scope of that patent.

Nevertheless, Sport Dimension argues that compliance with federal regulations—here, the regulations promulgated by the United States Coast Guard (“USCG”)—is an integral part of the *function* of the patent at issue and therefore must be considered in determining the functionality of certain aspects of the patent. In support of this argument, Sport Dimension first notes that the functionality analysis requires determination of whether “there are several ways to achieve the *function of an article of manufacture.*” *Cheng*, 2011 WL 1429647, at *3 (emphasis added). Sport Dimension then asserts that

⁵ *Accord Unique Functional Prods., Inc. v. Mastercraft Boat Co., Inc.*, 82 F. App’x 683, 689 (Fed. Cir. 2003) (“It is of no consequence that those extraneous features are present in [Plaintiff’s] commercial embodiment.”); *ACS Hosp. Sys. Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1578 (Fed. Cir. 1984) (finding error by the district court in comparing the accused device with the commercial embodiment of the patent, rather than to the claims of the patent); *Hutzler Mfg. Co. v. Bradshaw Int’l, Inc.*, No. 11 CIV. 7211 PGG, 2012 WL 3031150, at *10 (S.D.N.Y. July 25, 2012) (“A long line of cases counsels that, in performing a side-by-side comparison, courts generally should compare the design set forth in the patent—that is, the drawings—with the accused product, rather than comparing the embodiment of the patented design and the accused product.”); *Dekalb Genetics Corp. v. Syngenta Seeds, Inc.*, No. 4:06CV01191ERW, 2007 WL 4564196, at *26 (E.D. Mo. Dec. 21, 2007) (“[T]he Federal Circuit cautions against trial judges making claim construction determinations on the basis of the commercial embodiment of the invention.”).

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the “function of the article of manufacture” in this case is a PFD, noting that the patent is titled “Personal Flotation Device” and the claim describes it as such. While Coleman disputes this argument on the basis that a patent’s scope is not limited by its title or claim, Coleman offers no possible characterization of the patent other than “personal flotation device.” Sport Dimension then further argues that the term “personal flotation device” has a “particular meaning” in the industry that incorporates within its definition a requirement that it comply with USCG regulations. (Pl.’s Br. at 6.) Specifically, Sport Dimension cites the report of its expert witness, Ms. Susan Balistreri, who states:

17. **PFDs.** PFD is a regulatory term used to identify devices designed and approved for use by recreational boaters, sailors, canoeists, kayakers, water skiers, wake boarders, personal watercraft operators and riders, and participants in other tow-behind activities. The primary function of a PFD of the type depicted in the D’714 patent is to (1) provide adequate buoyancy to keep the user afloat, and (2) provide for secure and comfortable fit.

18. **PFD Requirements.** There are federal and state carriage and wear requirements for PFDs.

(Mikulka Decl. Ex. FF ¶¶ 17–18.) Expert testimony such as this is often useful in “establish[ing] that a particular term in the patent or the prior art has a particular meaning in the pertinent field.” *Phillips*, 415 F.3d at 1318. Ms. Balistreri’s testimony thus provides persuasive evidence that the term “personal flotation device” has a particular meaning in the PFD industry that necessarily requires that the device have been “approved for use” under the appropriate regulations.

This is a distinct argument from that which Coleman primarily rebuts—i.e., that any alternative design must comply with USCG regulations because the *commercial embodiment* of the D’714 patent complies with those regulations.⁶ Yet Coleman also takes issue with Ms. Balistreri’s characterization of the term. For example, Coleman notes that Ms. Balistreri conceded during her deposition that **the D’714 patent does not**

⁶ (See Def.’s Br. at 4 (“By requiring alternative design elements to be independently certifiable by UL, Ms. Balistreri has effectively limited the scope of the D’714 Patent on the Puddle Jumper® commercial device and the UL requirements for its manufacture in violation of this well-established precedent.”).)

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specify the device size or the material to be used. (Annis Decl. Ex. C at 107:2–108:24.) And a review of the D’714 patent reveals that it does not refer to any external standards such as USCG regulations. (See Compl. Ex. A.) As discussed above, however, if the term “personal flotation device” has a particular meaning in the industry that mandates compliance with these regulations in order to qualify for that term, then those standards are incorporated into the term. Coleman also argues that Ms. Balistreri bases some of her opinions on her analysis of the “UL file,” which is a reference to Coleman’s “MQ 29-114 file,” encompassing the certification history of Coleman’s Puddle Jumper® device. (See Annis Decl. Ex. C at 126:20–23; Dkt. No. 46 at 6.) In fact, Sport Dimension admits that Ms. Balistreri’s analysis was based on the Puddle Jumper® as the “commercial embodiment” of the D’714 patent. (Pl.’s Br. at 7.) As previously explained, Sport Dimension “cannot use the limitations of the commercial embodiment of the underlying article of manufacture to impose limitations on the scope of the design patent.” *Berry Sterling*, 122 F.3d at 1455. That is, the scope of the patent will not be limited to the specific utility features in the Puddle Jumper® device.

Nevertheless, Ms. Balistreri’s testimony is sufficient, for purposes of this claim construction and in the absence of any rebuttal evidence, to demonstrate that the term “personal flotation device” incorporates certain requirements imposed by federal regulations. The USCG defines the term “[p]ersonal flotation device” as “a device that is approved by the Commandant under 46 CFR part 160.” 33 C.F.R. § 175.13. And 46 CFR part 160 imposes certain requirements on the types, models, sizes, and dimensions of personal flotation devices, 46 C.F.R. § 160.064-2; their designs, constructions, material, buoyancy, and workmanship, *id.* § 160.064-3; their marking labels and durability, *id.* § 160.064-4; and the examination, testing, and inspections that they must undergo, *id.* § 160.064-6. The USCG regulations further state that USCG approval must be secured by applying to the Underwriters Laboratory (“UL”) for certification, *id.* § 160.064-7, which is presumably why Ms. Balistreri analyzed the UL file for the Puddle Jumper®. So while the scope of the D’714 patent is not limited to the commercial embodiment of the Puddle Jumper®, it nevertheless must be certifiable by the UL in order to comply with the applicable federal regulations and constitute a “personal flotation device.” Accordingly, the Court finds that any alternative design to the D’714 patent must comply with the requirements specified in 46 C.F.R. part 160.

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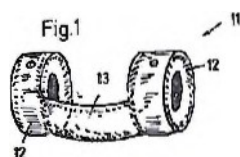
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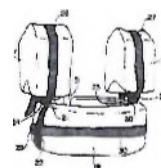
B. Alternative Designs

To demonstrate that the features of the D’714 patent are ornamental rather than functional, Coleman has submitted several alternative designs that it contends would provide the same utility. As discussed above, “[w]hen there are several ways to achieve the function of an article of manufacture, the design of the article is more likely to serve a primarily ornamental purpose.” *PHG*, 469 F.3d at 1367 (quoting *Rosco*, 304 F.3d at 1378). But the Court will not consider alternatives that “would adversely affect the utility” of the design. *Id.* Moreover, these alternatives must have existed at the time of the patent, as they must have presented alternative designs *to the inventor* of the patent. See *Smith v. M & B Sales & Mfg.*, No. C 89 0293 MHP (WDB), 1990 WL 11112, at *2 (N.D. Cal. Jan. 31, 1990) (“If the evidence is clear that *the inventors* could have accomplished the purpose that a given feature accomplishes only in one way, so that they had no alternatives, the court must conclude that that feature is functional (utilitarian) and cannot help support the validity of the design patent.” (emphasis added)); 1-23 Chisum on Patents § 23.03 n.4 (quoting *Smith*, 1990 WL 11112, at *2). With these principles in mind, the Court will consider the alternatives presented by Coleman.

Coleman presents a number of alternative designs that it contends could achieve the same utility as the D’714 patent. For example, in its supplemental claim construction brief, Coleman identifies the following seven alternative designs:



Kierner



Wessman



The Aqua Tot

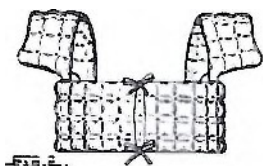


The Tadpool

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Kelso D'028 Patent



DiForte, Jr.



“Water Ski Belt”

(See Def.’s Br. at 9, 10, 14.) Coleman cites these designs as alternatives to the D’714 patent to argue several points regarding the contested elements at issue.⁷

1. The Armbands

First, Coleman argues that the armbands in the D’714 patent are not functional because a PFD does not need to have armbands to provide the same buoyancy and stability. Coleman also cites the testimony of Sport Dimension’s expert, Ms. Balistreri, to support its contention that **the shape of an element used in a PFD does not contribute to the PFD’s buoyant effect**. (Def.’s Br. at 7 (citing Annis Decl. Ex. C at 116:16–25).) To constitute a viable alternative, however, an alternative design must be able to produce the same effect as the *individual element* that is contested. See *Z Produx*, 2013 WL 5941049, at *4. In *Z Produx*, for example, the court addressed the functionality of a cosmetics holder. *Id.* In rejecting the defendant’s argument that there were plenty of alternative designs for a cosmetic holder that did not include a clear top and empty compartment, the court reasoned that the defendant had “mistakenly assume[d] that it [wa]s the

⁷ Coleman argues that any alternatives to the design need not have been in existence at the time of the invention, noting that the caselaw cited by Sport Dimension on this point involves an invalidity analysis, which is not at issue here. Yet caselaw is not necessary to make clear that the alternatives must have existed at the time of the invention to provide evidence that alternatives were available to a particular design. With constant advancements in technology, it defies logic to import an alternative design existing today back to the time at which a patent was invented as evidence that the inventor could have used today’s design. That the design here may not be as complex, or that the time differential between its invention and the introduction of later alternative designs may not be substantial, is immaterial. The principle is the same and founded in logic: to demonstrate that the inventor could have used alternative designs, those designs must have existed at the time the inventor was selecting the design for the patent in question.

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functionality of the device as a whole, rather than the functionality of the *elements at issue*, that matters for the construction of a design patent.” *Id.*

Similarly, in *OddzOn Products, Inc. v. Just Toys, Inc.*, the Federal Circuit rejected the notion that the arrow-like tail on a football was ornamental and not functional because it was “not required for a tossing ball.” In doing so, the court reasoned:

While OddzOn correctly states that there are many ways of designing “tossing balls,” it is undisputed that the ball in question is specifically designed to be thrown like a football, yet travel farther than a traditional foam football. It is the football shape combined with fins on a tail that give the design these functional qualities. The tail and fins on OddzOn’s design add stability in the same manner as do the tail and fins found on darts or rockets. They are no less functional simply because “tossing balls” can be designed without them.

122 F.3d at 1406. Here, as in *OddzOn*, the armbands in the D’714 patent are no less functional simply because PFDs can be designed without them. And in determining the functionality of the armbands, the Court must consider what effect the armbands have. That is, the fact that other PFDs may not have armbands yet still maintain buoyancy does not render the armbands ornamental; the armbands may have an additional function akin to making the ball travel farther in *OddzOn* or a clear top allowing a user to see through the cosmetics compartment in *Z Produx*.

In this case, Sport Dimension’s expert, Ms. Balistreri, asserts that **the presence of the armbands gives the PFD an “outrigger effect” that would not be present if the armbands were not there.** (Annis Decl. Ex. C at 152:2–21.) Because Coleman has not presented any evidence that the alternatives lacking armbands provide the same kind of effect, the Court concludes that any design without armbands “would adversely affect the utility” of the design. *PHG*, 469 F.3d at 1367 (quoting *Rosco*, 304 F.3d at 1378). Accordingly, the Court finds that the armbands are functional aspects of the D’714 patent and must be factored out of the Court’s claim construction.

2. The Armband Attachments

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Second, Coleman points to the Kierner, Wessman, Aqua Tot, and Tadpool designs shown above to argue that there are multiple alternative designs available to create armband attachments. (Def.’s Br. at 8–11.) As Coleman notes, each of these devices incorporates armbands but with different attachments than those depicted in the D’714 patent. For example, the Kierner design features armbands that are integral with the design; the armbands on the Wessman device are attached by strapping; the Aqua Tot attaches its armbands with releasable buckles; and the Tadpool’s armbands are attached to the device’s torso pad with t-shirt sleeves. All of these designs differ from the D’714 patent in the way their armbands are attached.

Nevertheless, Sport Dimension argues that none of these alternatives advances the same utility as the armbands in the D’714 patent—to provide armbands that do not slip off and are not prone to damage—while also complying with USCG regulations. In support of this argument, Sport Dimension presents Ms. Balistreri’s expert report, in which she opines that the alternatives submitted by Coleman are “not sufficient on their own to meet the intended function of the D’714 Patent design.” (Mikulka Decl. Ex. FF ¶ 48.) As Ms. Balistreri explains:

First, the Kierner patent German Patent No. DE3539528 A1 (the “Kierner Patent”) discloses a device with tapered armbands like the D’714 Patent and one without tapered armbands. Both are insufficient alternatives, however, because as explained in the file history of the Steger utility patent application, inflated armbands are problematic because they are prone to damage and can slip off. Moreover, inflated armbands cannot meet USCG approval for a device of this type. Therefore, Kierner discloses inflated armbands and/or inflated armbands fails [sic] to meet the intended function of a USCG approved device with armbands that fit securely and comfortably under the arms. As for the Wessman Patent, U.S. Patent No. 4,692,125 (the “Wessman Patent”), it discloses armbands that do not circle the arms and instead lay on top of the shoulders, and is therefore inadequate on its own to meet the intended purpose of the D’714 Patent, which is to provide, among other things, a USCG-approved device with armbands that fit securely around the arms.

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(Mikulka Decl. Ex. FF ¶ 48.)⁸ Coleman’s only rebuttal to Ms. Balistreri’s report is that her conclusion conflicts with Sport Dimension’s expert witness on the issue of “obviousness,” Mr. Wayne Walters, who concluded that the ordinary designer would look to these patents and their constituent elements to design a flotation device. (Def.’s Br. at 9 (citing Annis Decl. Ex. H ¶¶ 12, 18).) But the impact that Ms. Balistreri’s opinion may have on any obviousness inquiry is not relevant at this stage, where the Court is considering only the issue of functionality. Coleman may raise this issue again should the Court consider the issue of obviousness. At this stage, however, Ms. Balistreri’s report provides persuasive evidence that the Kierner and Wessman devices are not suitable alternatives for the armband attachments. (*See, e.g.*, Mikulka Decl. Ex. FF ¶ 46 (“I am unaware of any viable alternative designs to the armbands . . . for a PFD of this type.”); Ex. GG ¶¶ 17–26.)

As for the other two alternatives—the Aqua Tot and the Tadpool—Sport Dimension argues that these designs were not in existence at the time that the D’714 patent was invented and thus cannot provide alternative designs for purposes of the functionality analysis. *See Smith*, 1990 WL 11112, at *2; *Chisum, supra*. The Court agrees. The Aqua Tot is claimed by Design Patent No. D679,355, which was not issued until April 2013, (*see* Mikulka Decl. Ex. MM at SD003135), almost three years after the patent was issued for the D’714 patent, (Compl. Ex. A). Similarly, Ms. Balistreri, who designed the Tadpool, testified that **it was first offered for sale in 2013, which is also several years after the D’714 patent was issued in September 2010**. (*See* Mikulka Decl. Ex. HH at 41:19–42:1.) Accordingly, none of the designs offered by Coleman appears to present a viable alternative to the armband attachments depicted in the D’714 patent. In light of Ms. Balistreri’s expert testimony that she is “unaware of any viable alternative designs to the armbands . . . for a PFD of this type,” (Mikulka Decl. Ex. FF ¶ 46), and in the absence of any alternative before the Court that “would [not] adversely affect the utility” of the design, *PHG*, 469 F.3d at 1367, the Court finds that the armband attachments are functional and must be factored out of the claim construction.

⁸ Moreover, the applicant of the D’714 patent indicated that a device such as the Kierner that “utilizes an air-filled bladder” “is not a teaching that is the same as the present claimed invention.” (Mikulka Decl. Ex. TT at COLEMAN0000137.)

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3. The Shape and Tapering of the Armbands

Next, Coleman argues that there were numerous alternative shapes and configurations in which the armbands could have been crafted, making the shape and tapering of the armbands in the D’714 patent ornamental rather than functional. In support of this argument, Coleman cites the testimony of Ms. Balistreri, who conceded during her deposition that **the “shape of buoyant material does not increase or decrease its buoyancy.”** (Annis Decl. Ex. C at 120:17–20.) As discussed above, however, that other PFDs may have differently shaped armbands and still maintain the same buoyancy does not render the shape ornamental. *See Z Produx*, 2013 WL 5941049, at *4. Moreover, Coleman does not rebut Sport Dimension’s argument—supported by the testimony of the inventor, Mr. Steger—that other shapes may not have been manufacturable at the time, (Mikulka Decl. Ex. VV at 102:15–25 (**inventor of patent Mr. Steger testifying that different armband shapes may not have been manufacturable**)), and that the only material he could use was polyethylene foam, which “naturally forms a tapered design when folded,” (Pl.’s Br. at 13; *accord* Mikulka Decl. Ex. HH at 227:21–228:6 (**Ms. Balistreri opining that polyethylene foam must be used to meet intended use of patent**)).

Consequently, the evidence suggests that the choices of the shape and tapering of the armbands were driven by either what was manufacturable at the time or the choice of material—polyethylene foam—which was the best (and perhaps only) available material for the device. (*See* Mikulka Decl. Ex. VV at 63:10–64:25 (**Mr. Steger explaining that he chose to use polyethylene because it was the best material for his design**); *PHG*, 469 F.3d at 1366 (stating that a design is likely functional when it “represents the best design”); *Lee*, 838 F.2d at 1188 (noting that a design is functional if the design “configuration is made imperative by the elements which it combines and by the utilitarian purpose of the device”).) Accordingly, the Court finds that the shape and tapering of the armbands in the D’714 patent are similarly functional rather than ornamental elements.

4. The Tapered Side Torso

Finally, Coleman argues that there were multiple alternative designs for the side torso that do not include the tapering incorporated in the D’714 patent. As examples, Coleman provides the Kelso D’028 Patent, the DiForte, Jr., and the “water ski belt,” which are depicted above. (Def.’s Br. at 14.) Because neither the DiForte, Jr. nor the

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water ski belt has armbands, however, they do not provide suitable alternatives. *See supra* Subsection IV.B.1. Similarly, Ms. Balistreri notes several reasons in her report why the Kelso D’028 Patent is an inadequate alternative for the D’714 patent, including because it requires coverage on the chest, shoulders, and upper arms. (Mikulka Decl. Ex. GG ¶ 20.) The lack of viable alternatives to the tapered side torso thus counsels in favor of finding that it is a functional element of the D’714 patent.

C. Other Factors of Functionality

In addition to the lack of viable alternatives presented, the Court finds that other factors also weigh in favor of finding these elements functional rather than ornamental. As explained by the Federal Circuit in *PHG*, other factors to consider include whether the protected design represents the best design, whether there are any concomitant utility patents, and whether the advertising touts particular features of the design as having specific utility. 469 F.3d at 1366.

First, the alternative designs discussed herein and presented to the Court suggest that the D’714 patent’s features represent the best design. For example, the Kierner, Puddle Jumper®, Aqua Tot, and Tadpool designs each feature tapered armbands, which Ms. Balistreri indicated **was a result of using the preferred material— polyethylene foam**. (Mikulka Decl. Ex. HH at 234:11–21; *see also* Mikulka Decl. Ex. CC (providing illustrations of each design offered by Coleman); Ex. HH at 227:21–228:6 **(Ms. Balistreri opining that polyethylene foam must be used to meet intended use of patent)**.) Similarly, the majority of the designs provided by Coleman also have tapered sides, which indicates that this feature is also the best representation of the design.

Second, Coleman’s application for a utility patent claiming several of the features in question suggests that these features are functional. *See Z Produx*, 2013 WL 5941049, at *5 (“The existence of these prior utility patents covering the elements at issue further indicate that the clear top and empty base elements are functional.”). In this case, Coleman’s utility patent application claimed a PFD comprising “right and left armband flotation pads each having a plurality of stacked, detached, planar flotation pads, that, when folded to proximate a circle, form an armband flotation pad of tapering thickness.” (Mikulka Decl. Ex. LL at COLEMAN0000065–68 (¶¶ 1(d), 10(d), 20(f), 20(g), 25).) It also described the tapering and configuration as “allow[ing] for enhanced freedom of

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movement of the child’s arms as the thinner section is located under each arm.” (Dkt. No. 39-6 at 6.) These statements in the application history of the utility patent also suggest that the elements discussed are functional, and not ornamental.

Finally, Coleman’s advertising of the Puddle Jumper® touts particular features of the underlying design as having specific utility. For example, one of Coleman’s advertisements for the Puddle Jumper® states that it is the “only U.S. Coast Guard-approved life jacket of its kind,” and that users will “be amazed at how much stability and freedom to move they’ll instantly gain” by using it. (Mikulka Decl. Ex. OO at COLEMAN0000633.) Another features a picture of the Puddle Jumper® with the caption: “Allows Freedom of Movement for Ultra Comfortable Fit.” (Mikulka Decl. Ex. PP at COLEMAN0000610; *accord* Mikulka Decl. Ex. QQ.) That Coleman chose to emphasize these features of the product suggests that the elements of the product that contribute to these features—such as the armbands—are functional. Accordingly, these additional factors also weigh in favor of finding that the contested elements of the D’714 patent are functional rather than ornamental.

V. CONCLUSION

For the reasons discussed above, the Court agrees with Sport Dimension that the armbands, the armband attachments, the shape of the armbands, the tapering of the armbands, and the tapering of the side torso are all elements that serve a functional rather than ornamental role in the D’714 patent. Accordingly, the Court adopts the following claim construction that was proffered by Sport Dimension:

The ornamental design for a personal flotation device, as shown and described in Figures 1–8, except the left and right armband, and the side torso tapering, which are functional and not ornamental.

IT IS SO ORDERED.

Initials of Preparer

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rf