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FAEGRE BAKER DANIELS LLP 111 E. WAYNE STREET SUITE 800 FORT WAYNE, IN 46802			FIORELLO, BENJAMIN F	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOHN W. JINNINGS and MARK GUSTIN

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Appeal 2011-002228  
Application 12/041,133  
Technology Center 3600

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Before: PHILLIP J. KAUFFMAN, BRETT C. MARTIN, and  
HYUN J. JUNG, *Administrative Patent Judges*.

JUNG, *Administrative Patent Judge*.

DECISION ON APPEAL

### STATEMENT OF THE CASE

John W. Jinnings and Mark Gustin (Appellants) appeal under 35 U.S.C. § 134 a rejection of claims 1-14 under 35 U.S.C. § 103(a) as unpatentable over Raunisto (US 5,568,997; iss. Oct. 29, 1996) and White (US 6,447,036; iss. Sep. 10, 2002). We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

### THE CLAIMED SUBJECT MATTER

The claimed subject matter relates to pile driving equipment. Spec., para. [0002]. Claims 1, 9, and 12 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A modular side grip vibratory pile driver system, comprising:
  - a housing, said housing including a mounting base comprising two first jaw halves;
  - a vibratory gear case mounted to said housing;
  - an arm assembly forming two second jaw halves pivotally connected to said housing, respective said first and second jaw halves forming a pair of spaced-apart jaws adapted for gripping a pile at two longitudinally spaced apart locations;
  - an attachment assembly adapted to connect said housing to a construction machine, said housing being rotatably connected to said attachment assembly and being rotatable between a first position wherein the jaws are oriented vertically and spaced apart horizontally and a second position wherein the jaws are oriented horizontally and spaced apart vertically;
  - a plurality of sets of gripping assemblies having different gripping profiles adapted for

gripping a variety of different pile profiles, said sets of gripping assemblies adapted to be interchangeably connected to and forming pile gripping elements of said jaws;

said jaws including a single set of said interchangeably connected gripping assemblies detachably and interchangeably connected thereto;

said jaws forming a gap and being open and unobstructed so that a pile can enter the jaws laterally.

### ANALYSIS

Appellants argue claims 1-14 as a group. Br. 5-6. We select claim 1 as the representative claim, and claims 2-14 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2011).

The Examiner finds that Raunisto discloses the limitations of claim 1 with the exceptions of a vibratory gear case and a plurality of gripping assemblies that are of different profiles and that are interchangeable. Ans. 3-4. The Examiner finds that White discloses the vibratory gear case and the plurality of gripping assemblies, and thus concludes that Raunisto modified by White renders obvious the subject matter of claim 1. *Id.* at 4.

Appellants argue that the configuration of White is such that the pile can enter the jaws only in an axial direction. Br. 6. Appellants contend that the jaws of White are surrounded by substantial structure that obstructs the pile from moving laterally into the jaws. *Id.*

However, Appellants' argument is unpersuasive because the Examiner finds that Figures 1 and 2 of Raunisto disclose jaws forming a gap and being open and unobstructed so that a pile can enter the jaws laterally. Ans. 4. The Examiner does not rely on White for disclosing jaws that can receive a pile laterally. Instead, the Examiner relies on White for teaching the

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vibratory gear case and the plurality of gripping assemblies of claim 1. *Id.* at 4; *see also id.* at 10.

Appellants also argue that, because the configuration of the jaws and driving mechanism for the jaws are so different from the claimed structure, one skilled in the art would not be incentivized or be led to combining the structures of White and Raunisto. Br. 6. We are not persuaded. The Examiner finds that one skilled in the art would modify Raunisto to include the vibratory device of White in order to assist in the installation of a pile. Ans. 4. The Examiner also finds that White provides a reason for modifying the gripping assemblies of Raunisto to include interchangeable gripping assemblies of different profiles. *Id.* (citing White, col. 6, ll. 62-65, which states that “[i]t should be noted that the gripping surface **156** and the gripping ribs **154** will be designed to accommodate a pile of a given cross-sectional area and material.”). Appellants fail to cogently explain how the differences in the configuration of the jaws and the driving mechanisms for the jaws would not incentivize or lead one skilled in the art to combine Raunisto and White in the manner described by the Examiner.

Appellants further argue that White teaches away from a lateral entry structure. Br. 6. Appellants’ argument is unpersuasive as we cannot find, nor do the Appellants point to, any portion of White that, upon reading, a person of ordinary skill would be led in a direction divergent from the path taken by Appellants or that criticizes, discredits, or otherwise discourages the solution claimed. *See In re Haruna*, 249 F.3d 1327, 1335 (Fed. Cir. 2001) and *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

Having considered Appellants’ arguments against the rejection based on Raunisto and White, we now turn to Appellants’ evidence of secondary considerations. We recognize that evidence of secondary considerations,

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such as that presented by Appellants, must be considered en route to a determination of obviousness or nonobviousness under 35 U.S.C. § 103. Accordingly, we consider anew the issue of obviousness under 35 U.S.C. § 103, carefully evaluating and weighing both the evidence relied upon by the Examiner and the objective evidence of nonobviousness provided by Appellants.

Appellants state that the pile driver has been very successful commercially and that an important feature that contributes to the commercial success of the pile driver is the ability to have the pile or sheet enter the jaws in a lateral direction rather than in an axial direction. Br. 5.

We do not find that Appellants' statement persuasively establishes commercial success of the claimed invention, as it provides no data concerning sales and whether such sales data represent a substantial share in the market for pile drivers. *See In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996) (evidence related solely to the number of units sold without providing any indication of whether this represents a substantial quantity in the relevant market provides a very weak showing of commercial success, if any). Therefore, Appellants' evidence of commercial success is weak, at best.

Further, while Appellants state that an important feature that contributes to the commercial success of the pile driver is the ability to enter the jaws in a lateral direction rather than an axial direction, sufficient details are not provided to establish that this was in fact the case, or that they did not also possess features not claimed which made them attractive to purchasers. Appellants have not established a sufficient nexus between sales and features of the presently claimed subject matter. *See Joy Techs. Inc. v. Manbeck*, 751 F. Supp. 225, 229 (D.D.C. 1990) (Features responsible for

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commercial success were recited only in allowed dependent claims, and thus evidence of commercial success was not commensurate in scope with the broad claims at issue.).

As explained, *supra*, Appellants' arguments regarding the configuration of White, the differences in configurations, and White teaching away from a lateral entry structure are unpersuasive. Appellants' evidence regarding commercial success lacks sales data with market share data and does not sufficiently establish a connection between sales and features of claim 1. Having considered all the evidence presented by Appellants against obviousness and weighing all the evidence anew, it is our conclusion that the evidence for obviousness outweighs the weak evidence against it.

Accordingly, we sustain the Examiner's rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Raunisto and White. Thus, claims 2-14 fall with claim 1.

#### DECISION

For the above reasons, the Examiner's rejection of claims 1-14 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2011).

AFFIRMED

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