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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte YONAS GEBREWOLD and THOMAS J. XUE

Appeal 2011-003739
Application 11/553,082
Technology Center 3700

Before DONALD E. ADAMS, FRANCISCO C. PRATS, and
ULRIKE W. JENKS, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-15 (App. Br. 2; Ans. 2). We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

The claims are directed to a respirator (claims 1-14) and a method of making a respirator (claim 15). Claims 1 and 6 are representative and are reproduced in the Claims Appendix of Appellants' Brief.

Claims 1-5, 7-10, and 13-15 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Sustello¹ and Melville.²

Claims 6, 11, and 12 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Sustello, Melville, and Tate.³

We affirm.

ISSUE

Does the preponderance of evidence on this record support a conclusion of obviousness?

FACTUAL FINDINGS (FF)

FF 1. We adopt the Examiner's findings concerning the scope and content of the prior art (Ans. 3-7), and repeat the following for emphasis.

FF 2. Examiner relies on Melville "solely for the teaching of a skewed nose-contacting surface for a better fit which is more comfortable to the user and provides better ergonomics" (Ans. 8; *id.* at 9 (Melville suggests "a nose foam [that conforms] to the typical human user by providing the teaching of a skewed angle α The Melville reference solves the problem of providing a nose foam which closely fits the typical user's contours, especially around the nose region"))).

ANALYSIS

The claims were not separately argued and therefore stand or fall together. Claims 1 and 6 are representative.

Melville suggests a "protective eyeshade device ... used by golfers while on a golf course fairway to protect the wearer from golf balls in flight" (App. Br. 6). While Appellants recognize that Melville's "device ... has a

¹ Sustello, US 2007/0039620 A1, published February 22, 2007.

² Melville, US 3,952,331, issued April 27, 1976.

³ Tate, Jr., US 4,037,593, issued July 26, 1977.

nose piece that overlies the boned portion of the wearer’s nose,” Appellants contend that the “cushioning elements [of Melville’s device] ... are positioned on the eyewear in the area of the brow and temples” and are, therefore, “off-set 90° relative to how a nose foam would be positioned on a respirator mask,” as taught by Sustello (*id.* at 6-7). Therefore, Appellants contend that “any configuration of the impact-absorbing materials of Melville could not be properly applied to a nose foam on a respiratory mask because the impact element is oriented at an entirely different position (and for an entirely different purpose)” (*id.* at 7). We are not persuaded.

As Appellants recognize, “Sustello describes a face mask [e.g., a respirator] that has a visco-elastic member that is positioned to be alignable with the bridge of a user’s nose and is shaped so as to extend over the junction between the user’s nose and the user’s cheeks” (*id.* at 5-6; FF 1). While Melville is not directed to a respirator, Melville suggests a device that comprises “a skewed nose-contacting surface for a better fit which is more comfortable to the user and provides better ergonomics” about the nose region of a user’s face (FF 1-2; *Cf.* Reply Br. 3⁴). Therefore, the combination of Sustello and Melville suggests a respirator with a skewed nose-contacting surface that provides a better and more comfortable fit for the user.

For the foregoing reasons we are not persuaded by Appellants’ contention that Melville “is not in the same field of endeavor as applicants’ invention” or is non-analogous to Sustello (App. Br. 7-8). Appellants’

⁴ Appellants’ Reply Brief is not numbered. Therefore, we refer to page numbers in the Reply Brief as if the Reply Brief was numbered sequentially starting with the first page.

device and the device of Sustello relate to devices, respirators, that are worn on the face of users. While Melville's device relates to a protective eyeshade, Melville suggests a structure for the nose-contacting surface of a device, which is worn on the face and provides a comfortable fit for the user about the nose region of the user's face. Therefore, notwithstanding Appellants' contentions to the contrary, a person of ordinary skill in this art would have considered a device, such as Melville's, which is worn on the face, when considering the structure of devices that are worn on the face of a user to provide the device with a comfortable fit about the nose region of the user's face (*Cf.* App. Br. 7-8).

Having found no deficiency in the combination of Sustello and Melville, we are not persuaded by Appellants' contention that Tate fails to make up for the deficiency in the combination of Sustello and Melville (App. Br. 8).

CONCLUSION OF LAW

The preponderance of evidence on this record supports a conclusion of obviousness. The rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sustello and Melville is affirmed. Claims 2-5, 7-10, and 13-15 are not separately argued and fall together with claim 1. The rejection of claim 6 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sustello, Melville, and Tate is affirmed. Claims 11 and 12 are not separately argued and fall together with claim 6.

Appeal 2011-003739
Application 11/553,082

TIME PERIOD FOR RESPONSE

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

AFFIRMED

cdc