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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/276,456	10/19/2011	Martin R. Hoke	RHIN 200002US03	3982

27885 7590 11/03/2016
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PATEL, SHEFALI DILIP

ART UNIT	PAPER NUMBER
3763	

MAIL DATE	DELIVERY MODE
11/03/2016	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARTIN R. HOKE
and PAUL R. METCALFE[1]

Appeal 2015-000344[2]
Application 13/276,456
Technology Center 3700

Before DONALD E. ADAMS, JEFFREY N. FREDMAN,
and TIMOTHY G. MAJORS, *Administrative Patent Judges*.

PER CURIAM

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a method for irrigating a nasal cavity which have been rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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[1] Appellants identify the Real Party in Interest as RhinoSystems, Inc. (App. Br. 1.)

[2] This Appeal is related to Appeal No. 2014-008678, Application No. 13/276,448.

STATEMENT OF THE CASE

Appellants' invention "generally relate[s] to methods and devices for irrigating and rinsing the nasal cavity and anatomical openings thereto." (Spec. ¶ 2.) The method includes "sealing the nares of a user to a hand-held device including an associated fluid passageway in communication with a saline solution source and a saline effluent receptacle." (*Id.* at ¶ 23.)

Claims 1–5 and 7–13 are on appeal. Claim 1 is illustrative:

> 1. A method for irrigating a nasal cavity including:
>
> sealing nares of a user to a hand-held device via first and second nozzles to form an associated closed fluid passageway in communication with a saline solution source and an effluent receptacle, wherein the passageway, source and receptacle are integrally assembled in the hand-held device, the source being disposed above the nasal cavity and the receptacle being disposed below the nasal cavity for defining a gravitationally induced flowpath through the fluid passageway;
>
> applying a relative vacuum to the effluent receptacle with a powered suction source also included in the hand-held device; and,
>
> releasing saline solution from the source into the passageway and the nasal cavity whereby a continuous flow of the saline solution through the nares and around a posterior margin of a nasal septum irrigates the nasal cavity, the flow being induced by a combination of gravity and the relative vacuum.

(App. Br. 14 (Claims App'x).)

Claims 1–5 and 7–13 are rejected under 35 U.S.C. § 103(a) over Drinan,[3] Kronenberg,[4] and Djupesland.[5]

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[3] Drinan et al., US 6,907,879 B2, issued June 21, 2005.
[4] Kronenberg, US 2,078,180, issued Apr. 20, 1937.
[5] Djupesland, US 6,715,485 B1, issued Apr. 6, 2004.

DISCUSSION

The Examiner finds that

> Drinan [] teaches a method for irrigating a nasal cavity (column 6, lines 19–28) including:
>
> sealing nares (orifice openings of nasal cavity/structures sealed with nozzles [34]) of a user to a hand-held device (Figures 1–6, device [5])[](column 10, lines 57–61) via first and second nozzles [34] to form an associated closed fluid passageway (Figures 5 and 6) in communication with a saline solution source (first reservoir [85] with saline solution)[](column 13, lines 56–61) and an effluent receptacle (collection reservoir [82]).

(Final Act. 5.) The Examiner finds that Drinan also discloses "the source being disposed above the nasal cavity and the receptacle being disposed below the nasal cavity (Figure 5)." (*Id.*)

The Examiner finds that "Drinan [] does not appear to teach defining a gravitationally induced flowpath through the fluid passageway." (*Id.*) The Examiner, however, turns to Kronenberg and concludes that it would have been obvious to

> modify the method, of Drinan[], to define a gravitationally induced flowpath through the fluid passageway, as taught by Kronenberg, as such will minimize the vacuum and pressure necessary for inducement of the saline solution to the nasal cavity and to the effluent receptacle as inducement will occur by gravity (page 2, column 2, lines 29–39), thus providing a power-saving feature to the method as less power will be supplied to the suction source.

(*Id.* at 6.) According to the Examiner, "Kronenberg is only used to further support the concept of gravitational inducement." (Ans. 7.)

The Examiner finds that "Drinan [] is silent about whether the saline solution flows through the nares and around a posterior margin of a nasal

septum to irrigate the nasal cavity." (Final Act. 6.) The Examiner, however, turns to Djupesland and concludes that it would have been obvious to

> modify the flow of the saline solution, in the modified method of Drinan [] and Kronenberg, to be through the nares and around a posterior margin of a nasal septum, as taught by Djupesland, as such results in a redirection of the saline solution for better and bi-directional deposition of the saline solution to the posterior regions of the nasal turbinates and the nasal mucosa for a better reach of all the sinus ostia, which can improve sinus ventilation and drainage which is essential to treat sinusitis and inflammation of the nasal mucosa (column 7, lines 35–49).

(*Id.*)

We are not persuaded that the Examiner has established by a preponderance of the evidence that claims 1 and 7 would have been obvious.

Each of Appellants' independent claims 1 and 7, requires, among other things, "[a] method for irrigating a nasal cavity including: sealing nares of a user to a hand-held device via first and second nozzles to form an associated closed fluid passageway in communication with a saline solution source and an effluent receptacle." (App. Br. 14–15 (Claims App'x).) The method thus requires *the step of sealing* the nares (i.e., both nostrils) of the user via first and second nozzles to form an associated closed fluid passageway. (*See* App. Br. 14–15 (Claims App'x).)

The Examiner relies on Drinan to teach the claimed limitation: "sealing nares of a user to a hand-held device via first and second nozzles to form an associated closed fluid passageway in communication with a saline solution source and an effluent receptacle." (App. Br. 14–15 (Claims App'x); *see* Final Act. 5.)

The Examiner asserts that

> "[a]s Drinan [] teaches nozzles [34] (column 7, line 33), saline solution is delivered to both first and second nares. The secondary reference of Djupesland renders obvious the flow of the saline solution through the nares and around a posterior margin of a nasal septum (column 7, lines 35–49).

(Ans. 2–3.)

Appellants, however, contend that

> Drinan clearly expresses that his device is an "aspiration device" (see Title) wherein the aspiration device will "operate to first deliver an agent contained within the device to an orifice cavity and after an optional time delay, subsequently aspirate the delivered agent and orifice contents from the orifice cavity and related areas." (see Abstract). It is clearly a two-step and sequential process of first delivering the agent, and then removing the agent from the very same orifice cavity. This is simply a classic and conventional aspiration device. There is no teaching or suggestion anywhere in Drinan of a continuous flow in one nare and out the other.

(Reply Br. 2; *see also* App. Br. 7–8.) Appellants further explain that "[e]ven more objectionable is how the Examiner construes Drinan for the claimed requirement of first and second nozzles sealed against the nares" and that Drinan's element 34 in Fig. 2 is "intended to contact, and capable of only contacting, a single orifice." (Reply Br. 3–4.)[6] These arguments are persuasive. Contrary to the Examiner's finding, Drinan does not teach the step of "sealing nares of a user to a hand-held device via first and second nozzles to form an associated closed fluid passageway in communication

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[6] As Appellants contend, "[t]he multiple radiating lines shown in Fig. 2 from element **34** [of Drinan] are only intended to indicate that the nozzle may dispense a mist or spray from a plurality of ports in the nozzle. It is not a teaching of first and second nozzles contacting distinct nares of a user." (Reply Br. 4.) On the present record, Appellants' interpretation of Figure 2 is the more reasonable one.

with a saline solution source and an effluent receptacle" in a method for irrigating a nasal cavity. The Examiner has not provided findings or other persuasive reasoning on the present record to show that Kronenberg or Djupesland — alone or in combination — make up for the deficiencies noted above concerning Drinan. Nor has the Examiner sufficiently explained the modifications that would be required and predictably made by the skilled artisan, in view of the combination of the cited art, to produce the method claimed.

For the reasons above, the rejection of independent claims 1 and 7 are reversed. We also reverse the rejection of claims 2–5 and 8–13 because of their dependencies from claims 1 and 7.

CONCLUSION OF LAW

We reverse the rejection of claims 1–5 and 7–13 under 35 U.S.C. § 103(a) over Drinan, Kronenberg, and Djupesland.

REVERSED