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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/938,906	07/10/2013	Jennifer V. Hearst	Hearst	6962
94264	7590	08/26/2020	EXAMINER	
THE LAW FIRM OF ANDREA HENCE EVANS, LLC 14625 BALTIMORE AVE #853 LAUREL, MD 20707			LEE, MICHELLE J	
			ART UNIT	PAPER NUMBER
			3786	
			NOTIFICATION DATE	DELIVERY MODE
			08/26/2020	ELECTRONIC

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ANDREA.EVANS@EVANSIPLAW.COM  
docketing@evansiplaw.net

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JENNIFER V. HEARST

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Appeal 2019-005456  
Application 13/938,906  
Technology Center 3700

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Before EDWARD A. BROWN, CHARLES N. GREENHUT, and  
LEE L. STEPINA, *Administrative Patent Judges*.

BROWN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> seeks review under 35 U.S.C. § 134(a) of the Examiner's decision rejecting claims 1–4, 6–10, and 12–18.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Jennifer V. Hearst. Appeal Br. 2.

<sup>2</sup> Claims 5 and 11 are cancelled. Appeal Br. (Claims App.).

## CLAIMED SUBJECT MATTER

Appellant's disclosure "relates, in general, to a scented mask system having a disposable mask fitted on the nose, wherein the mask is nestled inside of a pod having a fragrance component which transfers the scent to the mask." Spec. 1.

Claims 1, 9, and 13 are independent claims. Claim 1, reproduced below, illustrates the claimed subject matter.

1. A scented mask system comprising: a sheet of stretchable material having a top edge, bottom edge and a left end region and a right end region, wherein the bottom edge is below the top edge, left end region, and right end region, and the bottom edge is adapted to be positioned above a user's upper lip, wherein the bottom edge is characterized by an upward slope from the left end region contiguous with a straight portion in tum contiguous with a downward slope towards the right end region;

a first and second elliptical-shaped cutout in the left end region and right end region, wherein the first and second elliptical-shaped cutouts are configured to receive the user's left and right ear, respectively; a round shaped pod comprising a top half and a bottom half; each of the top and bottom halves comprising a circumferential opening and a base; wherein the bottom half or the top half features a fragrance compartment having a compartment opening and walls extending upwards in the direction of the circumferential opening of each of the top or bottom halves, wherein the walls of the fragrance compartment and an inside of the base of the pod are a unitary one piece structure;

a peak, located at a middle area between the left and right end regions, wherein the peak is formed by upward sloping of the top edge from the left and right regions towards the middle area; and

a fragrance compartment cap having at least one aperture, wherein the fragrance compartment cap is sized to cover the compartment opening;

wherein the sheet of stretchable material is supported by the pod.

Appeal Br. 24 (Claims App.).

### REJECTIONS ON APPEAL<sup>3</sup>

Claims 1–4, 6–10, and 12–15 are rejected under 35 U.S.C. § 103 as unpatentable over Davis (US 2007/0181448 A1, published Aug. 9, 2007), Miura (US 5,727,544, issued Mar. 17, 1998), Tsuei (US 2012/0325843 A1, published Dec. 27, 2012), and Beliveau (US 8,387,163 B2, issued Mar. 5, 2013).

Claims 16–18 are rejected under 35 U.S.C. § 103 as unpatentable over Davis, Miura, Tsuei, Beliveau, and Hahn (US 5,165,603, issued Nov. 24, 1992).

### ANALYSIS

*Claims 1–4, 6–10, and 12–15 over Davis, Miura, Tsuei, and Beliveau*

Appellant argues claims 1–4, 6–10, and 12–15 together. Appeal Br. 10–22. We select claim 1 to decide the appeal as to this rejection, and claims 2–4, 6–10, and 12–15 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

As to claim 1, the Examiner finds that Davis discloses a scented personal care article system (container 100) comprising a round shaped pod and a personal care article supported on the pod. Non-Final Act. 3–4. The Examiner finds that Davis’s container can be for any personal care article,

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<sup>3</sup> The objection to claim 13 has been withdrawn. Ans. 3; Non-Final Act. 3.

but concedes Davis does not explicitly describe that the personal care article is a mask, as claimed. *Id.* at 4.

The Examiner further finds, however, Davis discloses that the container is for sanitizing personal care articles that are wet or damp and have undesirable contaminants, such as bacteria, mold, or viral organisms. Non-Final Act. 5 (citing Davis ¶ 23). The Examiner determines that a mask is a personal care article that may be damp, moist, and contaminated with unwanted organisms from the user's breath. *Id.*

Appellant contests the Examiner's findings for Davis. First, Appellant disagrees that a mask can be considered a "personal care article," as disclosed by Davis. Appeal Br. 13. Appellant contends that masks are typically disposable and not stored after use in a wet or damp condition or environment in which proliferation of undesirable contaminants is encouraged. *Id.* at 14. In response, the Examiner maintains that a mask is a personal care article because it receives and contains a user's breath. Ans. 3.

Appellant's first contention is unpersuasive. Davis teaches, "[g]enerally, the article may include *any item or implement* which is typically stored, after use, in a wet or damp condition or environment wherein proliferation of undesirable contaminants such as bacteria, mold or viral organisms is encouraged or supported." Davis ¶ 23 (emphasis added). Thus, Davis discloses that the articles are not even limited to personal care articles. As to personal care articles that may be sanitized, Davis lists, for example, mouth guards. Mouth guards are exposed to moisture from a wearer's mouth. Similar to this exposure, the Examiner's position is that masks can be damp and/or become contaminated from the user's breath as well as by exposure to the environment, which would include where the

mask is stored when not being used. The Examiner’s position is supported by Miura, for example, which describes, “the central portion of the mask becomes obstructed by moisture from breathing and mucous while the mask is being worn.” *See* Miura, col. 1, ll. 40–42. Additionally, Tsuei discloses that “antiviral, antibacterial, or antifungal agents” can be provided on the masks, and that these agents “may be useful for killing airborne pathogens and for pathogens in bodily fluids or other liquids that may come into contact with the mask.” *See* Tsuei ¶ 65. A person of ordinary skill in the art would reasonably believe that it would be beneficial to sanitize a face mask after use to prevent the proliferation of undesirable microbial species on the face mask, as taught by Davis, to allow the face mask to be reused safely. Additionally, paragraph 35 of Davis discloses that the antiseptic media may include a fragrance, and consequently, such fragrance would be imparted to the mask. Additionally, Tsuei discloses that the face masks can be “provided with a fragrance (e.g., for masking the unpleasant odors).” *See id.* ¶ 64.

Second, Appellant contends that Davis is non-analogous art. Appeal Br. 14. However, Appellant fails to explain why Davis is neither from the same field of endeavor nor reasonably pertinent to the particular problem with which the present inventor is involved. *See In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992). Rather, Appellant merely concludes that Davis is non-analogous art, states the two-part test set forth in *Clay*, and provides no further discussion of this issue. *See* Appeal Br. 14. Accordingly, this contention is unpersuasive.

Third, Appellant contends that Davis’s container is not round. Appeal Br. 14. And, according to Appellant, changing the “entire shape” of the

container would destroy the purpose of the “clam style” and the container’s structure. *Id.*

These contentions are also unpersuasive. The Examiner responds that the claim does not require the container to be a sphere. Ans. 4. We note that the claimed phrase “round shaped” is not described in Appellant’s Specification. Consistent with the Examiner’s interpretation, Appellant’s Figure 10, for example, shows that all points on the surface of the pod 200 are not equidistant from the center. The Examiner also determines that Davis’s container “has a curved edge.” Non-Final Act. 3; *see also* Davis Fig. 6; Ans. 4 (“Davis’[s] container can be seen in [F]ig. 6 as having a round forward portion.”). Davis describes that “the case portions desirably have a majority of smooth, *rounded*, and uninterrupted interior surfaces to minimize nooks and crannies where bacteria may hide.” Davis ¶ 26 (emphasis added). Accordingly, Davis teaches that rounded surfaces are desirable to minimize such bacteria hiding places.

The Examiner further finds that Miura discloses a mask, which is a sheet, and teaches that the mask includes first and second head-mounting means (straps) to receive the user’s ears and a nose peak (nasal area warmth-maintenance portion 3). Non-Final Act. 4–5 (citing Miura, Fig. 16A). The Examiner concludes that it would have been obvious for the personal care article of Davis to be a mask, as taught by Miura, to enable sanitizing the mask. *Id.* at 5.

Appellant disagrees that Miura teaches a “peak,” as claimed. Appeal Br. 15. Appellant contends that Miura’s nasal area warmth-maintenance portion 3 is formed separately from the main body, and thus, is not formed as part of the sheet of stretchable material, as claimed.

Appellant’s contention is unpersuasive. The Examiner responds that “the claim does not require the peak to be formed as integral and one-piece with the sheet of stretchable material.” Ans. 5. But even assuming claim 1 requires this limitation, Miura refutes Appellant’s contention, stating “the nasal area warmth-maintenance portion may be formed as a part of the main body, *or* formed separately from the main body and attached to the main body at at least one point.” Miura, col. 3, l. 65–col. 4, l. 1 (emphasis added).

The Examiner acknowledges that Miura does not disclose that the sheet is a stretchable material, and that the first and second head-mounting means are elliptical-shaped cutouts configured to receive the user’s left and right ear, respectively. Non-Final Act. 5. However, the Examiner finds that Tsuei teaches a sheet (elastic sheet 22) for covering the mouth of a user and face masks for covering the nose and mouth, and elliptical-shaped cutouts (apertures 27, 29) configured to receive the user’s left and right ear, respectively. *Id.* (citing ¶¶ 6, 38, 41). The Examiner concludes that it would have been obvious to modify the mask of Davis in view of Miura to comprise a sheet of stretchable material and to have the first and second head-mounting means be elliptical-shaped cutouts, as taught by Tsuei, because the elasticity “typically allow[s] for fuller coverage of the wearer’s face and provide for more flexibility in accommodating variously sized faces of users,” and “because of the lack of separately attached tie straps, the face mask is less likely to be damaged upon removing it from a dispenser.” *Id.* at 5–6 (citing Tsuei ¶¶ 9, 55).

Appellant contends that replacing the rubber bands of Miura with cutouts on the stretchable material, as taught by Tsuei, would destroy Miura’s mask because holes would need to be cut on the sheet, and “the



rubber bands could not be replaced with cutouts because no material on the sheet is cutout for the rubber bands to be attached, so the invention would be destroyed.” Appeal Br. 16. Appellant also contends that because Miura’s bands 6 are stretchable, there would be no reason to make the mask stretchable. *Id.*

The Examiner responds that the modification would not destroy the mask, but would simply change the mode of attachment to a user’s face. Ans. 5. The Examiner also clarifies that the rejection does not combine, but replaces, Miura’s rubber bands with Tsuei’s cutouts. *Id.* The Examiner also submits that making the mask more stretchable would not destroy the function of Miura’s mask as it would not prevent the mask from functioning properly. *Id.*

Appellant’s contentions are unpersuasive. The Examiner’s combination proposes to replace one known element (i.e., Miura’s elastic bands 6) with another element (i.e., Tsuei’s cutouts formed in an elastic sheet), relying on a simple substitution rationale. According to this rationale, “when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) (citation omitted). Appellant does not contend that one of ordinary skill in the art would have lacked the requisite skill to achieve this substitution, or that the results of the substitution would have been unpredictable. Appellant does not apprise us of error in the Examiner’s simple substitution rationale.

The Examiner concedes that the mask of Davis in view of Miura and Tsuei would not meet the claim limitation that the bottom edge is

characterized by an upward slope from the left end region contiguous with a straight portion in turn contiguous with a downward slope towards the right end region, as claimed. Non-Final Act. 6. The Examiner finds, however, that Beliveau teaches a mask including a bottom edge having the recited shape. *Id.* (citing Beliveau Figs. 4A, 4B). According to the Examiner, Figures 4A and 4B show that the left and right regions are curved to cover the cheekbones, such that these regions slope upwards to the straight portion of the nose. *Id.* The Examiner concludes that it would have been obvious to modify the mask of Davis in view of Miura and Tsuei so that the bottom edge has the claimed shape, as taught by Beliveau, to cover the cheekbones to increase warmth. *Id.*

Appellant contends that, by this modification, the Examiner is destroying Miura's mask by altering its structure, shape and purpose. Appeal Br. 16. According to Appellant, the primary purpose of Miura is to maintain warmth in the nasal area, and altering Miura's mask to "cover cheekbones" destroys the invention and alters Miura's intended purpose. *Id.*

These contentions are unpersuasive. The Examiner explains that modifying Miura's mask to cover the cheekbones would not detract from its ability to maintain warmth in the nasal area, because the mask would simply cover *more* area and would not somehow expose the nasal area. Ans. 5.

We have also considered each of Appellant's additional arguments, including that the rejection is a "syntactical swamp" (Appeal Br. 17); the rejection improperly changes the identity of the primary reference multiple times (*id.* at 18–20); and the rejection relies on improper hindsight bias (*id.* at 21) and is not supported by articulated reasoning with some rational

underpinning (*id.*). However, we agree with the Examiner’s response that these general arguments fail to identify any specific error in either the Examiner’s findings or reasoning in support of the proposed combination of reference teachings, and thus, are unpersuasive. *See* Ans. 6–7.

Accordingly, we sustain the rejection of claim 1, and claims 2–4, 6–10, and 12–15, which fall with claim 1, as unpatentable over Davis, Miura, Tsuei, and Beliveau.

*Claims 16–18 over Davis, Miura, Tsuei, Beliveau, and Hahn*

Claims 16–18 depend from parent claim 1, 9, or 13. Appeal Br. (Claims App.). Appellant’s argument does not apprise us of any specific error in either the Examiner’s findings or reasoning in support of the proposed combination, and thus, is unpersuasive. Appeal Br. 18–20; Non-Final Act. 15–16. Accordingly, we sustain the rejection of claims 16–18 as unpatentable over Davis, Miura, Tsuei, Beliveau, and Hahn for the same reasons as for claims 1, 9, and 13.

DECISION SUMMARY

In summary:

<b>Claim(s) Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1–4, 6–10, 12–15	103	Davis, Miura, Tsuei, Beliveau	1–4, 6–10, 12–15	
16–18	103	Davis, Miura, Tsuei, Beliveau, Hahn	16–18	
<b>Overall Outcome</b>			1–4, 6–10, 12–18	

Appeal 2019-005456  
Application 13/938,906

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

AFFIRMED