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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/001,540	02/08/2011	D622996	SMCY-172-602	8383
23342	7590	07/01/2020	EXAMINER	
KILPATRICK TOWNSEND & STOCKTON LLP			HYDER, PHILIP S	
Mailstop: 22 - IP Docketing			ART UNIT	
1100 Peachtree Street			PAPER NUMBER	
Suite 2800			2917	
Atlanta, GA 30309			MAIL DATE	
			DELIVERY MODE	
			07/01/2020	
			PAPER	

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SIMMONS BEDDING COMPANY

Requester

v.

SEALY TECHNOLOGY LLC

Patent Owner

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Appeal 2020-002736  
Reexamination Control 95/001,540  
Patent US D622,996 S<sup>1</sup>  
Technology Center 2900

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Before JOHN C. KERINS, DANIEL S. SONG, and BRETT C. MARTIN,  
*Administrative Patent Judges.*

MARTIN, *Administrative Patent Judge.*

DECISION ON APPEAL

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<sup>1</sup> Issued on September 7, 2010 to Sealy Technology LLC.

## STATEMENT OF CASE

Patent Owner appeals under 35 U.S.C. § 134 from the Examiner's rejection of the claim. Requester cross-appeals under 35 U.S.C. § 134 from the Examiner's decision not to adopt certain rejections of the claim. We have jurisdiction under 35 U.S.C. § 6(b).

Oral arguments were heard in this case on May 6, 2020, a record of which will be entered into the record in due course.

We AFFIRM.

## THE INVENTION

Appellant's claim is directed generally to "ornamental designs for a pillow-top mattress design." Claim. The figures illustrate the claimed subject matter.

## REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Tenuta, US 5,428,852, issued July 4, 1995.

Antares Model of Pirelli, *Pirelli Commercial Catalog*, 1982.

Somma Nouveau 500, *Specialty Bedroom*, summer 1996.

King Koil, 1999.

Lemoyne, *Ultimate Pillowtop*, 2001

Restonic Mattress, *Bedding Yearbook*, 2004.

## REJECTIONS

The Examiner made the following rejections:

The claim stands rejected under 35 U.S.C. § 103(a) as being unpatentable over King Koil, Antares, Tenuta, and Somma Nouveau. RAN 2.

The claim stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Somma Nouveau, Antares, Tenuta, and King Koil. RAN 6.

The claim stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Restonic Mattress, King Koil, Antares, and Tenuta. RAN 7.

The claim stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Lemoyne Ultimate Pillowtop, King Koil, Antares, and Tenuta. RAN 8.

#### ANALYSIS

In order for the Examiner's rejections to stand, we must first address whether the references can be properly considered as prior art publications. While we agree with Requester that Pirelli, which depicts the Antares model mattress, has all indications of being a commercial catalog that could have been distributed to mattress retailers for use in selling Pirelli mattresses, such indications are insufficient to actually qualify Pirelli as prior art. We first note that, although Pirelli has a date on its face of 1982, this is essentially hearsay as the document cannot be relied upon for such factual matters. While we would stop short of Patent Owner's assertion that actual distribution to the public need be shown, we still require some kind of evidence that this document was actually available to the public. Requester's Declaration of Fabio Formenti submitted for the purpose of establishing that this condition is met, fails on its own for numerous reasons.

First, Mr. Formenti's Declaration evidences that he was not even involved in the mattress industry until 1986, four years after Pirelli's alleged status as prior art. Formenti Decl. ¶ 2. Next, all Mr. Formenti can say regarding the document is that it is "the kind of catalog distributed widely at the time by Pirelli and other mattress manufacturers, who used and still use this kind of catalog." *Id.* ¶ 4. Neither of these facts is sufficient to show that Pirelli is actually a catalog that was distributed to the public in 1982. At best, we are left with evidence of it looking like something that may have been distributed, but no evidence that it is the actual Pirelli catalog from 1982.

The Declaration of Mr. Cantaluppi, however, along with the Formenti Declaration, is sufficient to establish Pirelli as prior art. Mr. Cantaluppi states that he was a Pirelli employee via Sapsa Bedding, which is a part of Pirelli & C. SpA. Cantaluppi Decl. ¶ 2. Although he did not start working for Sapsa until 1988, as a Pirelli employee, he was capable of determining past practices at Sapsa/Pirelli. Mr. Cantaluppi states that he received a copy of Pirelli around 1988. Cantaluppi Decl. 4. He also states that "Pirelli generally distributed many copies of its mattress catalogs, such as the 1982 Pirelli Catalog, to retailers" and that he understands "that on the order of thousands of copies of this 1982 Pirelli Catalog were distributed to retailers of mattress in or about 1982." Cantaluppi Decl. 5.

Patent Owner's only argument against Cantaluppi's statements is that he was not involved with Pirelli until 1988, which was six years after the Pirelli Catalog would have been distributed. As noted above, as a Pirelli employee, Mr. Cantaluppi was capable of familiarizing himself with Pirelli's business practices, which he apparently did in stating that it was his

understanding that thousands of copies were distributed. Patent Owner's arguments essentially amount to asserting that Mr. Cantaluppi's statements fail to support the document as prior art because he did not have first-hand knowledge of its distribution. Mr. Cantaluppi states, however, that thousands of copies of the Pirelli Catalog were distributed. He does not, as Mr. Formenti states, simply state that this is the type of document that would have been distributed. We are left with an uncontroverted statement by Mr. Cantaluppi that the Pirelli Catalog was indeed distributed to retailers. Although the Formenti Declaration does not add much to the substantiation of Pirelli as prior art, it is at least corroborative of and not inconsistent with the Cantaluppi Declaration. As such, the Declarations of Cantaluppi and Formenti establish that Pirelli was proper prior art.

As to the Lemoyne document, Patent Owner asserts that the only valid date of Lemoyne is January 26, 2011, which is the date Requester first printed the document from the Wayback Machine. PO App. Br. 7. As the Examiner points out, however, "Lemoyne is clearly marked with a copyright date of 2001." RAN 17. Furthermore, the Wayback Machine dates Lemoyne at least as far back as April 24, 2003. We do not agree that the Wayback Machine/Internet Archive is insufficient as it is a well-known, and generally reliable, database of known publication dates of material found on the Internet. As such, we accept Lemoyne as proper prior art as well.

As to the rejection itself, we first must start with claim construction, the main issue relating to the claim being the necessary type and/or level of contrast between the handle material and the mattress edges/handle edges. Having already construed the contrast necessary for Patent Owner's claim in our prior related Decision in Appeal 2014-007985, issued March 31, 2015

(“Dec.”), we maintain that the proper construction of contrast remains “one of differing appearance from the rest of the mattress...[such as] by: contrasting fabric, contrasting color, contrasting pattern, and contrasting texture...[that] can be seen as being different and thus visually distinguished from the rest of the mattress.” Dec. 6–7. The Examiner used this construction in making the rejections and, as such, the Examiner used the proper construction of the claim.

Further, as to claim construction, we also note, as stated above, that the contrast necessary is only between the handle material and mattress/pillowtop edges and handle edges. Patent Owner has disclaimed the body of the mattress and so the only parts of the mattress that are actually part of the claim are the mattress edges and handle edges, as well as the handle material. This is clear from Patent Owner’s figures where, for example, Figure 1 shows the corners of the mattress in dashed lines and there is no shading, except on the handles. Figure 4 depicts the buttons in dashed lines with no shading on any other portion of the mattress top. The remaining figures also contain similar drawing conventions showing that the design itself involves substantially the contrast between the edging and the central handle material with the mattress material being disclaimed.

We note that Patent Owner admits that neither Pirelli nor Tenuta is needed in the Examiner’s rejections because the claim is not limited to twin mattresses, for which the Examiner uses Pirelli, nor is it limited to mattresses having no stitching on the pillow top, for which the Examiner uses Tenuta. PO App. Br. 22. As such, we limit our discussion to the primary references.

Patent Owner next asserts that none of the cited references are “basically the same” as the claimed design. PO App. Br. 15. Regarding King Koil, Patent Owner asserts that “the light metallic color throughout all of the features of the mattress is a generally monochromatic mattress.” PO App. Br. 16. This argument ignores our construction that contrast can be differing fabric, texture, etc. Patent Owner’s argument essentially limits contrast only to color. We agree with Requester that King Koil “plainly includes horizontal and vertical edging of a light color and different texture that stands out from, and is clearly visible against, the border and other portions of the mattress.” Req. Resp. Br. 10. As such, King Koil exhibits the contrast necessary to meet the claim.

We also note that, even if we were to accept Patent Owner’s argument with regard to color contrast, Pirelli, via both the Antares mattress, used by the Examiner, and the Composit mattress, which is not asserted by the Examiner, show mattress and handle edges with stark contrast in color between the main mattress fabric and the edging. Our affirmance of the rejections does not rely on this type of contrast, but it is clear that such contrast already existed in the prior art well before Patent Owner’s design.

As to Somma Nouveau, Patent Owner asserts similar arguments as those regarding King Koil. PO App. Br. 17. As with King Koil, Patent Owner asserts that “Somma Nouveau shows a white-colored mattress that includes both mattress fabric as well as any edging or seams” such that it “is a generally monochromatic mattress.” *Id.* For the same reasons as stated above, we do not agree that contrast is limited to color. Patent Owner makes similar arguments regarding contrast for both Restonic and Lemoyne as well. PO App. Br. 18–20. We reject these arguments for the same reasons.



Regarding Lemoyne and Restonic, Patent Owner further argues that Lemoyne and Restonic fail as *Rosen* references because they do not show handles on the ends of the mattress. As stated in our prior related Decision,

it would have been obvious at the time to a designer of ordinary skill to include handles on the end in a manner matching the handles that are present. The prior art is replete with mattresses showing handles on both the ends and the sides and, given that this is the only element missing from these two references and that these two references already include handles on the sides, this is also merely a trivial difference that would have been obvious to include.

Dec. 6. As such, we do not find this argument persuasive.

Patent Owner also argues that one of skill in the art would not have combined the references as suggested by the Examiner. First, we note that Patent Owner appears to acknowledge that the secondary references are not even required for the rejection, as Patent Owner has disavowed claim coverage to mattress-size and to specific pillowtop design. Likewise, Patent Owner does not challenge that the sizing of the handles is an issue in any of the combinations. As such, the rejections essentially boil down to the main references in each rejection.

Lastly, with regard to Patent Owner's secondary considerations, we agree with the Examiner for the reasons articulated that no nexus has been properly established between the evidence presented and the design at issue. *See* RAN 16. Furthermore, we note that Patent Owner's evidence is generally directed to the overall appearance of the mattress rather than the actual claimed design, which as noted above, pertains only to the edging and the handles. Accordingly, we are not persuaded by Patent Owner's evidence of secondary considerations.

As to Requester's cross-appeal, although we generally agree with Requester that additional rejections may have been proper based on the submitted prior art, having affirmed the Examiner's rejections, any such rejections would appear to be, essentially, cumulative rejections. Furthermore, were we to introduce new grounds of rejection, the reexamination proceeding would return to the Examiner for another round of examination and, likely, another appeal. Rather than further delay the conclusion of this case, we decline to reach Requester's cross-appeal and consider the Examiner's rejections sufficient to resolve the case.

#### DECISION

For the above reasons, we AFFIRM the Examiner's decision to reject the claim as unpatentable. We also do not reach the merits of Requester's cross-appeal.

Requests for extensions of time in this *inter partes* reexamination proceeding are governed by 37 C.F.R. §§ 1.956 and 41.77(g).

In accordance with 37 C.F.R. § 41.79(a)(1), the "[p]arties to the appeal may file a request for rehearing of the decision within one month of the date of: . . . [t]he original decision of the Board under § 41.77(a)." A request for rehearing must be in compliance with 37 C.F.R. § 41.79(b). Comments in opposition to the request and additional requests for rehearing must be in accordance with 37 C.F.R. § 41.79(c) & (d), respectively. Under 37 C.F.R. § 41.79(e), the times for requesting rehearing under paragraph (a) of this section, for requesting further rehearing under paragraph (d) of this section, and for submitting comments under paragraph (c) of this section may not be extended.

Appeal 2020-002736  
Application 95/001,540

An appeal to the United States Court of Appeals for the Federal Circuit under 35 U.S.C. §§ 141–144 and 315 and 37 C.F.R. § 1.983 for an *inter partes* reexamination proceeding “commenced” on or after November 2, 2002 may not be taken “until all parties’ rights to request rehearing have been exhausted, at which time the decision of the Board is final and appealable by any party to the appeal to the Board.” 37 C.F.R. § 41.81. *See also* MPEP § 2682 (8th ed., Rev. 7, July 2008).

AFFIRMED

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