UPC_CFI_376/2023
DECISION ON THE
MERITS
From the Court of First Instance of the Unified Patent Court (UPC) Local Division
Brussels
Referred to 17 January 2025

Headnotes/Cup

1. Rejection of literal infringement claim as well as infringement claim by equivalence.
2. In application of Article 69 EPC and the , the assessment of an infringement claim (the scope of protection of a patent) proceeds in two stages. In a first stage, literal infringement is to be assessed by reference to the features of the patent in the light of the interpretation of the claims. In a second step, if it has been held that no literal infringement can be assumed and provided it is relied upon, infringement is assessed by equivalence.
3. In the absence of functional equivalence, there can be no infringement in equivalence (whatever equivalence test is applied).
4. If the Statement of Claim needs to be translated (and served) (Rule 271 (8) of the Procedural Rules of the Unified Patent Court), the temporal application condition for instituting proceedings on the merits after seizure of evidence (Rule 198 (1) of the Procedural Rules of the Unified Patent Court) is nevertheless satisfied if the (original) Statement of Claim was uploaded into the within the stipulated period.

Keywords/key words

Literal infringement - Infringement by equivalence. Soil proceedings following attachment of evidence (R.198(1) RoP. Consequences for seizure of evidence after dismissal of infringement claim (R.198(2) RoP)

CLAIMANT:

Mr [redacted] residing at [redacted]

Represented by: Mter. C. Ronse and Mter. K. Claeyé, lawyers at Havenlaan 86C, B414, 1000 Brussels (Belgium), and Mter. M.W. Rijsdijk and Mter D.E. Colenbrander, lawyers at Amstelplein 1 (Rembrandt Tower, 28th floor), 1096 HA Amsterdam (The Netherlands);

DEFENDANT(S):

(1) **OrthoApnea S.L.**, a company incorporated under Spanish law, with its registered office at Flauta Mágica 22, 29006 Malaga, Spain,

(2) **VIVISOL B BV**, a company incorporated under Belgian law with registered office at Zoning Ouest 14, 7860 Lessines, Belgium, and registered in the Crossroads Bank for Enterprises with enterprise number 0454.915.053;

Represented by: Mter. Van den Horst and Mter. Niemeijer, lawyers at Prinses Beatrixlaan 582, 2595 BM The Hague (The Netherlands)

OCROOI(S) SUBJECT TO THE DISPUTE

Patent no.	*Patent holder(s)*
[redacted]	[redacted]

LANGUAGE OF PROCEDURE: DUTCH

PANEL/DIVISION:

Present Department (Brussels) with the panel consisting

of: Chairman / Judge-Rapporteur	**Samuel Granata**
Legal Qualified Judge	**Margot Kokke**
Legally qualified judge	**András Kupecz**

ORAL TREATMENT:

The case was heard orally at the hearing on 6 December 2024.

AT THE : ABBREVIATIONS USED

For the sake of readability of this decision, and also in view of the official languages of the Procedural Regulations of the Unified Patent Court (French, German and English), the following abbreviations and references will be used below (in alphabetical order):

Duplicate	Conclusion of rejoinder following the reply following the statement of defence (*Rejoinder to the Reply to the Statement of Defence* Rule 12(d) Procedural Rules of the Unified Patent Court)
(Order seeking to obtain a) Seizure of evidence	(Order) an evidence preservation measure ("*Order to preserve evidence")* (R. 192 - R.198 of the Procedural Rules of the Unified Patent Court)
Claimant	Mr [redacted]

EPO	European Patent Office
EOV	European Patent Convention
EP 430	European patent 3 216 430 [redacted] by OrthoApnea S.L. granted on 13 November 2019.
[redacted] 761 [redacted]	European patent 1094761B1 granted on 29 October 2008 on the basis of the International patent application [redacted] (W W [redacted]
Court	Unified Patent Court ("*Unified Patent Court*")
Registry	Registry
LD Brussels	Local Division Brussels of the court of first instance of the Unified Patent Court
MAD	"*mandibular advancement devices*"
NOA	Allegedly infringing device of OrthoApnea S.L.
Occlusal plane (or) Bite area	The plane where the molars meet
The patent	European patent 2 [redacted] by Mr. [redacted] granted on 6 November 2019 and in force in Belgium, Germany, France, Luxembourg and the Netherlands
ORTHOAPNEA	OrthoApnea S.L. (defendant sub1)
OSA	Obstructive sleep apnoea *("obstructive sleep apnoea")*
Par (Nos). patent	Paragraph reproduced in the description of European patent 2 [redacted]
Pitch Report	Report prepared following the implementation of the decision of 21 September 2023 (attachment of evidence)(ACT_574133/2023)
Protocol	Protocol on the Interpretation of Article 69 EPC of 5 October 1973 as revised by the EPC Revision Act of 29 November 2000
Rejoinder	*Reply the Statement of* Defence Rule 12(c) Procedural Rules of the Unified Patent Court)
RoP (or) R. (preceding line displayed)	Rules of Procedure of the Unified Patent Court ("*Rules of Procedure*")
Statement of Requirement or CoE	Statement of Requirement (Rule 12(a) Procedural Rules of the Unified Patent Court)
Defence	Defence conclusion following *Statement Defence*(Rule 12(b) Procedural Rules of the Unified Patent Court)
Defendants	OrthoApnea S.L. and Vivisol B BV
Vestibular side (or) Vestibulum Oris	Side of the teeth at the cheek
VIVISOL	Vivisol B BV (defendant sub 2)
UPCA	Convention of the Unified Patent Court ("*Unified Patent Court Agreement*")
US 527	US patent application Mr. [redacted]
WO 317	International patent application fro[redacted] (WO [redacted]

I. PROCEEDINGS

1. Following an application seeking to obtain an attachment of evidence against ORTHOAPNEA, originating from the Claimant, an order leave to do so was made on 21 September 2023 (comprising an effective attachment and the appointment of an expert with instructions to proceed with the description) (ACT_574133/2023). The attachment was executed on 22 September . The appointed expert submitted the Pitch Report to the Tribunal on 28 September 2023.

2. A (Dutch-language) Statement of Claim is filed with the Tribunal (LD Brussels) on 23 October 2023. This is served on both Defendants.

3. A procedural order is issued on 23 December 2023 (in application of R. 9)(APP_2198/2024) setting the date of (formal) service of the Statement of Claim at 5 December 2023 for both Defendants.

4. By letter dated 4 January 2024, the Claimant is informed that ORTHOAPNEA refuses service of the Statement of Claim in Dutch within the meaning of R. 271 (8). Thereafter, pursuant to R. 271 (8), the Claimant is requested by the Tribunal to submit a translation of the Statement of Claim to the Registry (no later than 12 January 2024). Upon receipt of this translation (served as *Exhibit* to App_2198/2024 containing a Spanish translation of the Statement of Claim), a procedural order is issued on 18 January 2023 directing the Registry (of the LD Brussels) to proceed to serve it on ORTHOAPNEA.

5. On 19 January 2023, a procedural order is issued (in application of R. 9) (ORD_3129/2024) setting the date of service of the Statement of Claim on ORTHOAPNEA as 18 January 2024. The earlier procedural decision regarding the date of service on ORTHOAPNEA is reversed.

6. The defendants request on 5 January 2024 (in application of R. 323) a language change of the procedure to English (as the language of the patent). The Judge-Rapporteur transmits this request to the President of the Court of First Instance in application of R. 323 (1). On 5 March 2024, the aforementioned President issues a decision (ACT_660/2024 - 7027/2024) rejecting the request for a change of language. The (Dutch) procedural language was maintained.

7. On 18 April 2024, the Defendants submitted their Defence, followed by the Plaintiff's Rejoinder on 18 June 2024. In this Rejoinder, Plaintiff, in addition to additional assertions following Defendants' Defence (relating to literal infringement), also submitted arguments to the effect that there would be infringement at least in the event of equivalence. In its Rejoinder, Claimant adjusts its claims in this sense as well as streamlines some claims in light of the Defence.

8. On 24 June 2024, Defendants bring a procedural application ("*Objection against Equivalence*"). Defendants *primarily* request the Judge Advocate to refuse: i) the extension of the

basis of claim relying on equivalence ii) the newly alleged facts, and iii) the new (amended) claims. *In the alternative,* the Defendants request that the time limit for filing their Duplies be extended to 18 August 2024. The Judge-Rapporteur, after hearing the parties, issued a final procedural order on 8 July 2024 (ORD_37783/2024) dismissing the primary application. However, the Judge-Reporter does allow an additional period for the filing of the Duplicate and this until no later than 1 August 2024.

9. Against said procedural decision (ORD_37783/2024), the Defendants filed a Request for Reassessment (in application of R. 333 (1) and R. 334) on 16 July 2024. In this application, Defendants no longer maintain parts (ii) and (iii) of their primary application. After hearing the Defendants, the Tribunal (LD Brussels sitting as chambers), by order dated 19 July 2024 (ORD_42503/2024), dismissed the application for reassessment and upheld the earlier order of the Judge-Rapporteur. The General Court (LD Brussels sitting as chambers) allowed an appeal against the reassessment order.

10. The defendants appeal the above-mentioned order of both the Judge-Reporter (ORD_37783/2024) and the Chamber (ORD_42503/2024) which gives rise to a decision of the Court of Appeal of the Tribunal on 26 July 2024 (App_42818/2024) (UPC_COA_430/2024) in which the court, in the first instance, dismissed the application for stay of proceedings.

11. On August 1, 2024, Defendants their Duplicity.

12. By order of the Court of Appeal of Tribunal (APL_44633/2024) dated 21 November 2024, the Court of Appeal held that the appeal against the Judge Reporter's order (ORD_37783/2024) was inadmissible. The appeal against the Board's reassessment order (ORD_42503/2024) is held admissible but dismissed as unfounded.

13. Following the interim conference, the Chief Judge issued an (ORD_598476/2023) on 17 September 2024, of which only those parts are cited below of relevance to the further assessment of the dispute:

    1. *The value of case is set at€ 250,000.*
    2. *(...)*
    3. *It is considered appropriate for Mr VAZQUES-DELGADO to be available under a hybrid form of the oral hearing so that he can, (only) if necessary, answer any questions from the panel.*
    4. *The parties are invited to further oral submissions on the consequences of the alleged late filing of proceedings on the merits in the light of the descriptive attachment measures and its consequences.*
    5. *The use of pleading notes and visual (pleading) aids will be allowed under the following conditions:*
        - *These may only be used to support the argument already formulated*
        - *These should be notified to the Registry (LD Brussels) no later than 48h before the hearing*

- *These should also be communicated to the opposing party no later than the same date they are communicated to the Registry (LD Brussels).*

6. *The use of a jaw model during oral arguments is allowed under the following conditions:*
   - *The model should only be used to support the argument already formulated*
   - *The model should be lodged at the Registry (LD Brussels) no later than 14 days before the plea hearing*
   - *The model should be communicated to the counterparty no later than the same date on which they are filed at the Registry (LD Brussels).*
7. *(...)*

14. The parties explained their written submissions and claims/requests at the Tribunal's oral hearing on 6 December 2024, also using models of the NOA provided by the parties, a model of which the Tribunal requested the Defendants to deposit a model to include in the deliberations, which was done. The Claimant did not oppose the deposit thereof. Furthermore, also in application of the Order (ORD_598476/2023), Mr VAZQUES-DELGADO was given a virtual hearing (limited to questions asked by the Tribunal) and the Claimant (in person and present at the hearing) was given the opportunity to defend the contentions (answers) of Mr VAZQUES-DELGADO.

15. After pleadings, the case was taken under advisement and the parties were informed that judgment would follow within six weeks.

II. FACTUAL BACKGROUND

II.A. Parties

II.A.1. *Claimant*

16. The claimant, as a Belgian orthodontist, has been in private practice in [redacted] [redacted]

17. The plaintiff holds the patent granted on 6 November 2019. The patent application to that effect was filed on 6 July 2009. The patent invokes the priority of the Belgian patent BE [redacted] (filed 7 July 2008).

18. The patent relates to a device to be placed in the mouth for counteracting night time breathing problems ("*device for treating night time breathing problems*"), also known as snoring or sleep brace (or MAD).

II.A.2. *Defendants: ORTHOAPNEA and VIVISOL*

19. ORTHOAPNEA is a Spanish company. ORTHOAPNEA focuses on the development, production and distribution of a brace for the treatment of OSA. In that , ORTHOAPNEA claims to have developed the NOA.

20. VIVISOL, as a SOL Group company, is active in the medical home care services sector and the management of medical-curative home therapies. In doing so, VIVISOL provides services and products in the fields of oxygen therapy, sleep apnoea, ventilation, diagnostic devices and aerosol. The NOA is one of the products in its range.

II.B. The patent

II.B.1. *The (relevant) description of the patent*

21. The paragraphs of the description of the patent that are relevant to the assessment of this dispute are reproduced below in the language of the patent (i.e. English):

> *[02] Night-time breathing problems, which can for instance result in snoring, sleep apnoea syndrome or other sleep disorders are a generally known problem. When a person sleeps, the rear part of the tongue may tend to slide backwards, whereby the pharyngeal airway is wholly or partially closed off. It is known to solve such breathing problems with a device that can be placed further forward in relation to the upper jaw. The neck muscles are hereby forced into a tensioned position, whereby the tongue moves forward and the airway is left clear.*
>
> *[03] Said devices placeable in the mouth are generally known and can be found in a number of different embodiments, including embodiments as described in the preamble which have been known since the 1990's. The known embodiments have the drawback that they allow too much freedom of movement during opening/closing of the mouth.*
>
> *[04] US[redacted] and WO[redacted] both describe oral appliances in which coupling means are provided between the lower and upper arches. Such appliances prevent the tongue being in a position of rest and offer only limited possibilities of control.*
>
> *[05] The invention has for its object to provide a device according to the preamble of claim 1, which is user-friendly and agreeable to wear, and allows a precise adjustment with a limited freedom of movement of the lower jaw in relation to the upper jaw.*
>
> *[06] The invention is distinguished for this purpose by the features of the characterising portion of claim 1. The upper coupling element is provided with a stop for co-action with a contact surface of the lower coupling element, such that when the lower and upper jaw are moved towards each other a further closing of the mouth is prevented when the contact surface comes up against the stop. The left and right, upper and lower coupling elements are further connected to respectively the upper and lower part such that they are situated in the oral vestibule (...) in the position of the device placed in the mouth, i.e. the coupling elements are situated between the teeth and respectively the left and right cheek.*

[07] In this way the freedom of movement of the lower jaw in relation to the upper jaw is also limited in vertical direction, i.e. in a direction substantially perpendicular to the plane of the lower jaw or upper jaw.

[013] Each upper coupling element is provided with a substantially vertical portion with a concave or convex surface directed towards the front teeth, and each lower coupling element is provided with a substantially complementary shaped surface, this sich that the upper coupling element can engage in the lower coupling element and that the rearward movement of the lower jaw is avoided. In this way the vertical movement of the upper coupling element in relation to the lower coupling element is further guided and limited, while a lateral movement of upper jaw in relation to the lower jaw is possible, as while be further elucidated.

[018] The apparatus further comprises left and right coupling means 4 (for the sake of simplicity only the left coupling means are shown in figure 1) for coupling lower part 2 and upper part 3 close to the back teeth. Each of the left and right coupling means 4 comprises an upper coupling element 6 connected to upper part 3 and a lower coupling element 5 connected to lower part 2. In the position of lower and upper part placed in the mouth these coupling means 4 are situated on the vestibular side of the tooth arch, i.e. between the cheek and the tooth arches. As will become apparent, the left and right coupling means 4 are adapted to move the lower jaw forward in relation to the upper jaw, while the up/down- ward movement of the lower jar in relation upper jaw is also controlled.

[20] Central part 8 is further horizontally displaceable in relation to fixed part 9 via adjusting means (11), wherein the horizontally is understood to mean substantially parallel to lower part 2. Parts 7 and 8 this form a block which is horizontally displaceable in relation to fixed part 9. Parts 7, 8 and 9 with associated adjustment means this allow adjustment of both the vertical and horizontal position in contact with surface 12 in order to obtain an adjustable minimum vertical and horizontal distance between lower jaw and upper jaw.

[21] Upper coupling element 6 is provided with a substantially vertical position 14 with a concave surface 15 directed towards the front teeth, and contact portion 7 of lower coupling element 5 is provided with a substantially complementary shaped surface 16. In this way the upper coupling element can engage in the lower coupling element and the vertical movement of lower jaw in relation to upper jaw is further guided and limited.

II.B.2. *The (relevant) claims of the patent*

22. The claims of the patent relevant to the assessment of the present dispute are as follows:

23. In the original English language as well as in the (undisputed) Dutch translation of the , claim 1 (broken down into its (undisputed) features) reads as follows:

1.0	Device for treating breathing problems, comprising	Furnishing for the treatment of respiratory problems, comprising
1.1	a lower part (2) mountable on the lower jaw and an upper part (3) mountable on the upper jaw, which lower and upper parts are adapted to be situated at at least in the vicinity of the back teeth; and	a lower part (2) which attaches to the lower jaw and an upper part (3) which attaches to the upper jaw, which lower and upper parts are arranged to engage

		at least near the back teeth to are located; and
1.2.0	left and right coupling means (4) for coupling the lower part to the upper part close to the back teeth; wherein each of the left and right coupling means comprises an upper coupling element (6) connected to the upper part and a lower coupling element connected to the lower part (5); which left and right coupling means are adapted to move the lower jaw forward in relation to the upper jaw;	left and right coupling means (4) for coupling lower part with upper part near the rear teeth; each of the left and right coupling means having a top coupling member (6) connected to the upper part and a bottom coupling member connected [to] the lower part (5) includes; which left and right coupling means are arranged to move the lower jaw forward move relative to the upper jaw;
1.2.1	wherein the upper coupling element is provided with a stop (13) for co-action with a contact surface (12) of the lower coupling element; and	wherein the upper coupling element is provided with a stop (13) for cooperation with a contact surface (12) of the lower coupling element, and
1.2.2.	wherein each upper coupling element (5, 6) is provided with a portion with a concave or convex surface (15) directed towards the front teeth, and that each lower coupling element is provided with a complementarily shaped surface (16), this such that the upper coupling element can engage in the lower coupling element and that rearward movement of the lower jaw is avoided;	wherein each upper coupling element (5, 6) is provided a portion having a concave or convex surface directed towards the front teeth [15], and wherein each lower coupling element is provided with a complementary shaped surface (16), the foregoing in such a way that the upper coupling element can engage with the lower coupling element and that backward movement of the lower jaw is avoided;
1.2.3	characterised in that the upper and lower coupling elements (5, 6) are connected to respectively the upper and lower part such that these upper and lower coupling elements are situated in the oral vestibule in the position of the device placed in the mouth,	with the feature, that the upper and lower coupling elements (5, 6) are connected to the upper and lower part respectively in such a way that these upper and lower coupling elements are located in the vestibulum oris in the mouth placed state of the facility;
1.2.4	and in that said stop (13) and said contact surface (12) are located in the oral vestibule, on the vestibular side of the tooth arch, in the position of the device placed in the mouth, such that when lower jaw and upper jaw are moved toward each other a further closing of the mouth is prevented when the contact surface comes up against the stop.	and that the stop (13) and the contact surface (12) are located in the vestibulum oris, on the vestibular side of the dental arch, in the position of the device placed in the mouth, such that when the lower jaw and upper jaw move towards each other, a further closing of the mouth is avoided when the contact surface against the stop comes.

24. In the original English language of the patent and the (uncontested) Dutch translation, claim 9 (dependent claim) of the patent reads as follows:

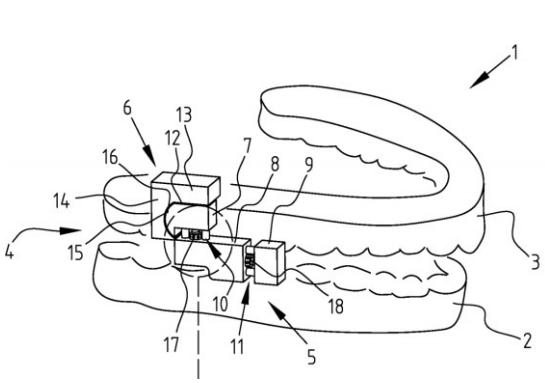
9	Device as claimed in any of the foregoing claims, characterised in that each lower coupling element has in lateral direction a width differing from the associated upper coupling element such that a lateral clearance is obtained which allows a lateral movement of the lower jaw in relation to the upper jaw, wherein a limited lateral or sideways movement of the lower part arranged on the lower jaw in relation to the upper part arranged on the upper jaw, i.e. amovement in the plane of the teeth and substantially perpendicularly of the back teeth,	Arrangement according to one of the preceding conclusions, having the characteristic, that each lower coupling element has in lateral a from that of the corresponding upper coupling element, such that a lateral clearance is , allows a lateral movement of the lower jaw in relation to the upper jaw, whereby a limited lateral or lateral movement of the lower part applied to the lower jaw in relation to the upper part applied to the upper jaw, i.e. a movement in the plane of the teeth and essentially perpendicular to the rear teeth, possible

	is possible.	

25. In the original English language of the patent and the (uncontested) Dutch translation, claim 10 (dependent claim) of the patent reads as follows:

10	Device as claimed in any of the foregoing claims, characterised in that both for the left and the right coupling means, one coupling element of the upper and lower coupling element is situated in lateral direction at a distance from the opposite lower or upper part in the position of the device placed in the mouth.	Arrangement according to one of the preceding conclusions, with the feature, that for both the left and right coupling means, one coupling element of the upper and lower coupling element is located in a lateral direction at a distance from the opposite lower or upper part in the in mouth placed state of the facility.

26. The patent specification includes, inter alia, the following relevant drawings:



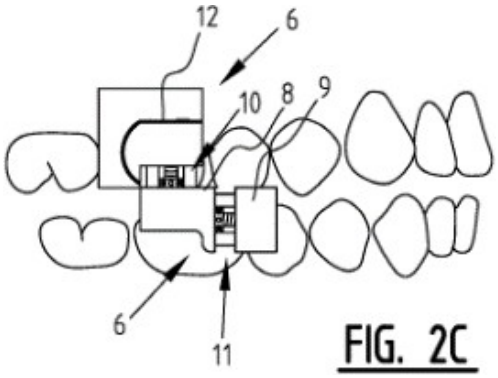


FIG. 2C

Drawing 1 (top half)

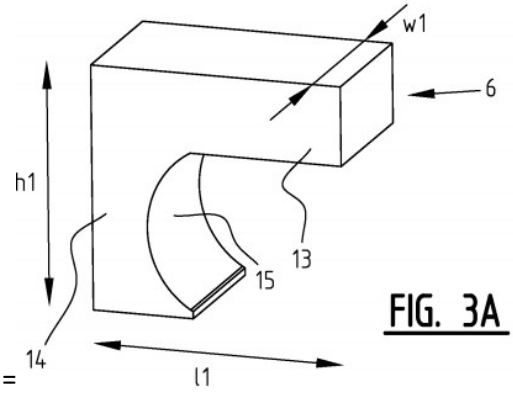


FIG. 3A

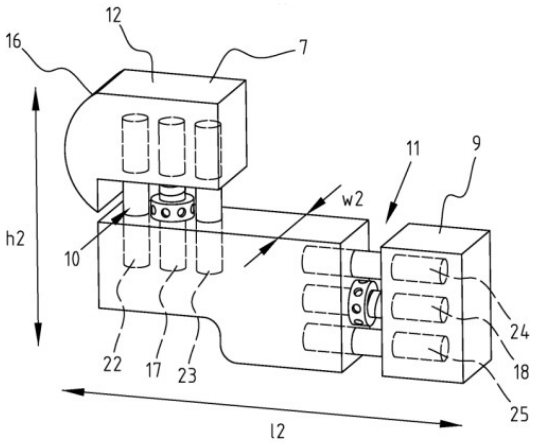
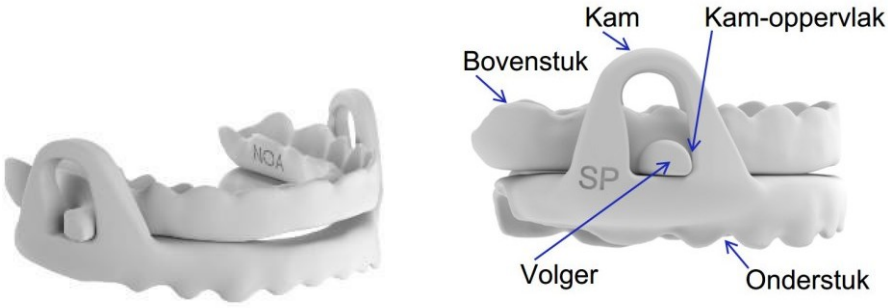


FIG. 3B

II.C. The allegedly infringing product: the NOA

27. By its own admission, the NOA developed by ORTHOAPNEA is a unique product that was digitally developed and adapted to the individual biomechanics of each patient's mandible.

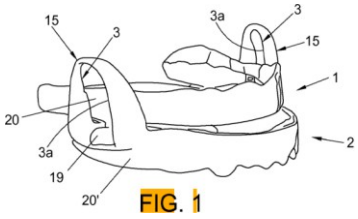
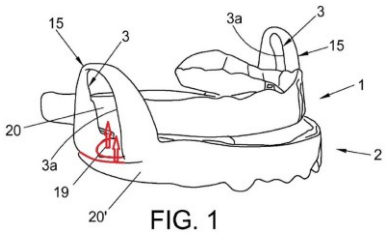
28. The (commercialised) NOA is presented by the Claimant as follows:



29. In their arguments, the defendants stress that the NOA can be fully customised to the clinical needs of the , with the lower part (and more specifically, the so-called comb surface) being personalised by following the patient's (user's) anatomy.

30. EP 430 was granted to ORTHOAPNEA. The establishment for which protection was obtained is shown in Drawing 1 of EP 430 (see drawing reproduced under marginal 31).

31. ORTHOAPNEA states that the marked NOA and the design object of EP 430 are largely the same but differ in that in the marked NOA the follower and comb were moved compared to EP 430. This adjustment is shown below using drawing 1 of EP 430 (with the displacement of the follower and comb indicated in red).

EP 430 (original)	Adaptation to EP 430	Marketed NSA
 FIG. 1	 FIG. 1	

III. RECEIVABLES

III.A. Claims brought by Claimant

32. In its Rejoinder, the Plaintiff (slightly modified from the Statement of Claim) seeks a *general* injunction prohibiting infringement of claims 1, 9 and 10 with ancillary claims (notice, recall, annulment, publication, information) on pain of periodic penalty payments as well as an advance payment of damages, and an order that the Defendants pay the costs. *Specifically,* these claims are formulated as follows:

(1) (Defendants) to refrain, with immediate effect following the Tribunal's decision, from any direct or indirect infringement of

European patent with number [redacted] 2 [redacted] in and [redacted]

more specifically by manufacturing, offering, placing on the market or using, or importing or stocking for that purpose, any:

(a) Facility for treating respiratory problems, including:

1.1 a lower part (2) attachable to the lower jaw and an upper part attachable to the upper jaw, which lower and upper parts are arranged to be located at least near the posterior teeth; and

1.2.0 left and right coupling means (4) for coupling lower part with upper part near the posterior teeth; where each of the left and right coupling means includes an upper coupling element (6) connected to the bo- ven part and a lower coupling element connected the lower part (5); which left and right coupling means are arranged to move the lower jaw forward relative to the upper jaw;

1.2.1 wherein the upper coupling member is provided with a stop (13) for sa- menation with a contact surface (12) of the lower coupling member; and

1.2.2 wherein each upper coupling element (5, 6) is provided with a portion having a concave or convex surface facing the front teeth, and wherein each lower coupling element is provided with a complementary shaped surface (16), all such that the upper coupling element can engage with the lower coupling element and that backward movement of the lower jaw is avoided;

1.2.3 with the feature, that the upper and lower coupling elements (5, 6) are connected to the upper and lower part respectively in such a way that these bo- ven and lower coupling elements are located in the vestibulum oris in the mouth position of the device;

1.2.4 and that the stop (13) and the contact surface (12) are located in the vestibulum oris, on the vestibular side of the dental arch, in the in-mouth position of the device, such that when the lower jaw and upper jaw move towards each other, a further closing of the mouth is avoided when the contact surface comes up against the stop;

(direct infringement of claim 1 of the European patent with num- mer [redacted]

(b) Arrangement according to one of the preceding conclusions, having the characteristic, that each lower coupling element has a width in lateral direction different from that of the corresponding upper coupling element, such that a lateral clearance is obtained, which allows a lateral movement of the lower jaw in relation to the upper jaw, whereby a limited lateral or lateral movement of the lower part applied to the lower jaw in relation to the upper part applied to the upper jaw, i.e. allows a movement in the plane of the teeth and essentially perpendicular to the posterior teeth.

(direct infringement of claim 9 of the European patent with nummer [redacted]

(c) Device according to one of the preceding claims, having the characteristic, that for both left and right coupling means, one coupling element of the upper and lower coupling element is located in a lateral direction at a distance from the opposite lower or upper part in the in mouth position of the device.

(direct infringement of claim 10 of the European patent with num- [redacted]

(d) Including at least the p[redacted]NOA;

(2) (Defendants) be ordered, within seven (7) days from the date of the Tribunals decision and for at least six (6) months, post and maintain on the home page of their respective websites orthoapnea.com and vivisol.be the text below, in the language and in a manner appropriate and in no way inferior to the rest of the , and at least in respect of visitors accessing the websites from [redacted]and [redacted]

(a) In Dutch:

'Dear visitor,

By decision of [IN : date to be rendered], the Belgian local division of the Unified Patent Court held that the mandibular advancement device pictured below with product name OrthoApnea NOA infringes the European patent number [redacted] *of (Claimant) as in force in* [redacted] *and* [redacted]

: photo from the NOA]

[IN ADDITION: OrthoApnea or Vivisol B] does not have the required permission from (Plaintiff) to commercialise this mandibular advancement device in these countries, and will therefore cease infringement in these countries.

Sincerely,'

(b) In : (...)
(c) In : (...)
(d) In German (...)

(3) (Order (Defendants) to provide a complete, accurate and verifiable statement of all sales of the aforementioned infringing products and all profits made by (Defendants) as a result, in particular concerning:

(a) the numbers and prices of infringing products produced and/or sold and/or supplied intended for [redacted] burg and[redacted] on presentation of proof of production and/or sales invoices;

(b) the numbers of infringing products in stock intended for [redacted] and [redacted] as well as the location where the in- break products are located;

(c) the name and contact details of purchasers of infringing products in [redacted] and [redacted] if they are not natural persons are;

(d) the numbers of infringing products sold or otherwise exploited in [redacted] and [redacted] under consultation-
copies of the related sales (operation) fac- tures, with the exception of views of personal data if the infringing products were supplied to natural persons;

(e) the amount of profit obtained from the production and exploitation of the infringing products in [redacted] and [redacted] with submission of an account for the calculation of profit;

(f) at least with such particulars as the Tribunal, notwithstanding what was previously requested, shall deem appropriate;

(4) Order (Defendants), within twenty-one (21) days of the Tribunal's interlocutory order, at their own expense, to require the purchasers (other than end-users) of infringing products specified above to return such by sending notices by letter and e-mail as provided below and whether , and send copies of such notices to counsel for (Plaintiff):

'Dear addressee,

By decision of [IN : date to be rendered], the Belgian local division of the Unified Patent Court held that the snoring braces with product name Or- thoApnea NOA that we supplied to you infringe the European patent with number [redacted] of (Plaintiff).
[IN ADDITION: OrthoApnea or Vivisol B] does not have the required permission from (Plaintiff) to market the snoring braces in [redacted] and [redacted], and will therefore cease infringement in these countries.
Therefore, by order of the Belgian local division of the Unified Patent Court, [PLEASE RETURN: OrthoApnea or Vivisol B] requests you to return by return all snoring braces with pro- duct name OrthoApnea NOA in your possession to [PLEASE RETURN: OrthoApnea or Vivisol B] to [PLEASE : return address or storage address OrthoApnea or Vivisol B].
In addition to refunding the purchase price, [: OrthoApnea or Vivisol B] will also bear the cost of returning the products. You can contact [INCLUDED: name] of [INCLUDED: OrthoApnea or Vivisol B] for this purpose at [INCLUDED: contact details].

Sincerely,'

(5) Order (Defendants) to destroy all infringing products in their possession at their own expense within twenty-eight (28) days of the Tribunal's decision, at least within a period to be determined by the Tribunal, and provide evidence thereof to counsel for (Plaintiff);

(6) To impose the above orders on (Defendants) on pain of a penalty of EUR 50,000 for each day that the respective Defendant breaches any of the Tribunal's orders sought above;

(7) order (Defendants)to compensate (Claimant) for the damages it has suffered, and will unexpectedly further, as a result of the infringement of the European patent number[redacted] 2 [redacted] in [redacted] and [redacted] provisionally assessed at a provisional compensation of EUR 50,000;

To order that the budget for such compensation, including any interest, will be the subject of follow-up proceedings;

(8) Order (Defendants) to reimburse the legal costs and other expenses incurred by (Plaintiff) in these proceedings and the proceedings with case number UPC-CFI- 329/2023, as provided for in Article 69 UPCA;

To order that the budgeting of these costs and expenses, including any interest, will be the subject of a follow-up procedure;

, dismiss the claims of (Defendants) as inadmissible, if not unfounded.

III.B. Applications on behalf of Defendants III.B.1.

33. The defendants request as follows:

(1) Dismiss the Claimant's claims;

(2) Order the Claimant to pay ORTHOAPNEA and VIVISOL B the costs of these proceedings and the related proceedings, together with interest from 14 days after the judgment to be given in these proceedings, or at least from a date to be determined by the Tribunal, if and to the extent that the Claimant has not paid these costs before;

(3) The amount of litigation costs to be determined in follow-up proceedings;

III.B.2.Requests due to ORTHOAPNEA

34. ORTHOAPNEA further requests as follows:

(4) Lift the seizure of evidence pursuant to the Order dated 21 September 2023 (case number UPC- CFI_329/2023) to the extent necessary, or at least order the return of what was seized and order the Plaintiff to pay ORTHOAPNEA the damages suffered and to be suffered by ORTHOAPNEA as a result of this seizure of evidence;

(5) Have the amount of damages resulting from the attachment determined in a follow-up procedure.

IV. POSITION PARTIES

35. The parties do not dispute that the NOA covers features 1.0 and 1.1. of the patent.

IV.A. Thesis and argument Plaintiff

36. The claimant argues generally that the NOA infringes the patent, and more concretely it argues as follows (these arguments are presented in more detail in the assessment below):
    - Since the NOA with/in the form of the follower and ridge includes an upper coupling element with a "*stop*" for cooperation with a "*contact surface*" of the lower coupling element, the NOA falls under features 1.2.1 and 1.2.4 which constitutes a literal infringement thereof. Subordinately, the plaintiff argues that "*in the perfectly symmetrical condition*" an infringement also exists in equivalence.
    - Since the NOA includes a conclave and convex surface and a complementary shaped surface, the NOA falls under characteristic 1.2.2.
    - Since the NOA includes and left and right coupling element, the NOA falls under attribute 1.2.0.

IV.B. Defence Defendants

37. The defendants dispute that the NOA falls within the scope of protection of the and therefore there can be no literal infringement or infringement by equivalence. Specifically, they argue as follows:

IV.B.1. Literal infringement

38. Claimant allegedly misinterprets claim 1 of the patent where words of this claim are "*isolated and disconnected (from) both the whole context of the claim and what the skilled person would derive from the description and figures in the patent* (and) *case law of the UPC in light of Article 69 EPC*". In support of this contention, the Defendants develop the following arguments:
        - The NOA would not include the *"stop"* and *"contact surface*" that "*avoids further closing of the mouth*" as defined in features 1.2.1. and 1.2.4. not include because - if the ridge and follower could be structurally classified as "*stop*" (13) and "*contact surface*" (12) at all - in the case of the NOA, the lower surface of the upper coupling element, when in its most closed position, is at some distance (0,16 mm) from the upper surface of the lower head element and, as such, do not restrict the movement of the upper and lower jaw so that a completely closed mouth is possible (which would not be possible in application of the patent, even more so in application of the invention with regard to *"avoiding further closing of the mouth"*).
        - Further, the NOA would also not include "*the concave or convex surface and the complementary formed surface*" as defined in feature 1.2.2. Specifically, state

Defendants that the concave and convex surfaces in the NOA do not exactly match and as such would not a complementary shaped plane.

- Finally, Defendants argue that the NAO would not include the "*left and right coupling element as defined in feature 1.2.0.*" would not include, arguing that location of the clutch in the NOA would be closer to the anterior teeth and therefore not "*near the posterior teeth*".

IV.B.2. Breach of equivalence

39. As already indicated, the (subordinate) argumentation concerning and claiming infringement in the event of equivalence is only offered and asserted by the Plaintiff in its Rejoinder (which, in the light of the circumstances of the case, was considered regular also by the Court of Appeal (see APL_44633/2024, UPC_CoA_456/2024).

40. In this Rejoinder, Plaintiff, in support of her contention that the NOA infringes on equivalence, firstly applies the "*function-way-result*" test and generally states that the NOA also makes equivalent application of a "*touch*" and "*contact surface*" even in perfectly symmetrical closed mouth to avoid further closing of the mouth. Specifically, in application of this test, she states that the contact surfaces of the NOA perform substantially the same function (in particular, providing a "*touch*" for cooperation with a "*contact surface*", or in other words, facilitating contact), that they do so in substantially the same way (in particular, by providing contact surfaces near the coupling elements in the *vestibulum oris*) and with substantially the same result (in particular, avoiding further closing of the mouth) as the invention under feature 1.2.4.

41. Additionally (alternatively), in application of the equivalence doctrine, she applies the "*insubstantial differences*" ("*insubstantial differences*") test where she argues that only insubstantial differences exist between the contact area at the NOA and under EP [redacted]

42. Defendants argue that Plaintiff fails to correctly apply the test in application of the breach at equivalence. Defendants argue that because there is no equivalence after application of the "*function-way-result*" test, because the function, way and result of the lower and upper parts of the NOA are substantially different from the "*stop*" and "*contact area*" of features 1.2.1. and 1.2.4, no infringement at equivalence can be assumed.

43. Further, Defendants also argue that Plaintiff also does not prove a breach at equivalence in application of the "*insubstantial differences*" ("*insubstantial differences*") test. Where the application of this test involves answering the question of whether the average subject matter expert could see the difference between features 1.2.1 and 1.2.4 and the allegedly equivalent construction of the NOA would be considered non-substantial (insignificant), they specifically state that since the NOA can be placed in a completely closed position, (with the contact surfaces of the lower and upper part making contact in the occlusal plane), the average person skilled in the art will assess this as a construction that is substantially different from and functions in comparison to the device subject to claim 1 of the patent.

IV.B.3. Additional: The Gillette *defence*

44 As a subsidiary and supplementary defence, Defendants what is known as a Gillette *defence* whereby they argue that "*(i)f the interpretation(s) claimed by (Plaintiff) of the features of Conclusion 1 are , (ORTHOAPNEA) is effectively applying the state of the art to those parts of the NOA*".

45. As part of this defence, the defendants rely on WO 317, a prior art patent application.

V. ASSESSMENT

V.A. Structure of assessment

46. The first section will assess the jurisdiction of the Tribunal (V.B.)

47. Next, the Defendants' contention that the proceedings on the merits were brought late before the Tribunal (after service of the order granting the attachment of evidence) will be assessed (V.C.).

48. As indicated, the subject matter of the proceedings concerns the alleged infringement of the patent (and specifically claims 1, 9 and 10), argued in main order as literal infringement and in subsidiary order on the basis of the so-called equivalence doctrine. The assessment of infringement depends on the interpretation of the claims ("*claim construction*") by the average person skilled in the art using his professional knowledge. This part of the decision is dealt with under V.D.

49. Under V.E., the infringement claims will then be assessed where, after determining the subject matter of these under V.E.1., in application of Article 69 EPC and the Protocol, literal infringement of the features of (claims 1, 9 and 10 of) the patent will be assessed in a first step (V.E.2.) and infringement by equivalence in a second step (V.E.3.). The implications of these assessments for the *Gillette defence* will be outlined in V.E.4.

50. Section V.F. discusses the impact of the infringement assessment on the mutually asserted claims. Section V.F.1 assesses the claims brought by Plaintiff and Section V.F.2 assesses the claims brought by Defendants.

V.B. Jurisdiction of the General Court and the Brussels LD

51. Despite the fact that the parties do not dispute the jurisdiction of the Tribunal, the Tribunal should examine of its own motion its international jurisdiction. The Tribunal finds that it has jurisdiction to assess the claims brought on the basis of the following considerations:

- The patent is a European patent which has not been removed from the jurisdiction of the General Court.
- The Statement of Claim includes claims for actual infringement of the above-mentioned patent which are within the jurisdiction of the Tribunal pursuant to Article 32(1)(a) UPCA.
- The Tribunal can derive its international jurisdiction from Article 4(1) Brussels Ibis Regulation in respect of the Respondent under 2 and Article 8(1) of this Regulation in respect of the Respondent under 1 or from Article 7(2) *in conjunction with* Article 71b(1) of this because the alleged infringement was established in Belgium[1].

52. Whereas international jurisdiction should be examined ex officio, this is not the case for the (internal) territorial jurisdiction of the Brussels LD. For the sake of completeness, the Tribunal (and concretely the Brussels LD) indicates that it has jurisdiction under Article 33 (1) (a) UPCA because the alleged infringement was established in Belgium.

V.C. (Temporal) regularity of instituting proceedings on the merits after evidence seizure

53. The defendants ground their application for "*lifting*" the attachment of evidence and restitution of what was seized on two distinct grounds (and this in application of R. 198 (1)). In addition to their argument concerning the temporal irregularity (implying the failure to institute the proceedings on the merits in due time after the seizure of evidence), the lifting of the seizure of evidence (and restitution of the seized goods) is equally requested as the NSA would not infringe the patent. This latter line of argument will be dealt with following the assessment regarding the alleged patent infringement (see margin number 110).

54. However, it is appropriate to deal with the first ground (temporal regularity) for the waiver prior to the assessment of the infringement claims as they may have impact on the evidence submitted in the present case by both parties and in the context of the seizure of evidence.

55. Before assessing the claimed lifting of the attachment of evidence, the Court notes that ORTOAPNEA's argumentation apparently does not concern the consequences of the *execution* of the attachment of evidence since ORTHOAPNEA also bases its defence (in part) on the Pitch Report. As a result, a legal inconsistency arises where ORTHOAPNEA *on the one hand* claims the lifting (understood in the sense of *ceasing to have effect* (as a translation of "*cease to have effect*") of the evidence seizure because of a temporal irregularity but *on the other hand* seems to the (evidentiary) consequences of its *execution*. For this reason alone, the claimed lifting of the attachment of evidence on the basis of a temporal irregularity should be rejected as unfounded. Indeed, the Court cannot hold that*, on the one hand,* the proceedings on the substance were instituted late and lift the attachment of evidence (which constitutes an irregularity that affects the regularity of the attachment of evidence *ex tunc* (of

[1] Cf. UPC Court of , 3 September 2024, UPC_CoA_188/2024 (*Aylo/Dish*)

affecting obtaining) and*, on the other hand,* allow a defence based on the evidence obtained after the execution of an evidence seizure (and concretely the Pitch Report).

56. Abstracting from the foregoing, the Court finds that there is no question of a late institution of proceedings on the merits so that this in itself cannot be regarded as valid reason for lifting (understood in the sense of "*ceases to have effect"* (as a translation of "*cease to have effect*")) the evidence order.

57. R.198 (1)[2] states as a basic rule that within a period not exceeding 31 calendar days or 20 working days (whichever is longer, taking into account the circumstances of the case) and commencing from the date laid down in the order authorising the attachment of evidence (taking into account the date on which the report (as reproduced in R.196.4.) is filed), the applicant (i.e. the Claimant) must commence proceedings on the merits ("*start*") before the . In the absence of the timely initiation ("*start*") of proceedings on the merits, the Tribunal must ensure that the order is revoked or "*in other cases*" (as translation of "*otherwise*") ceases to have effect "*cease to have effect*"). This "*ensuring*" does not apply *ex officio* but should be requested by Defendants ("*upon request of the defendant*").

58. R. 198 (1) does not specify to which court such an application should addressed, so it is assumed that such an application instituted in the present proceedings is regular (admissible).

59. The order of 21 September 2023 (ACT_574133/2024) ruled as follows on the time limit for the Claimant to proceed with proceedings on the merits (emphasis added by the Tribunal):

> *5.8 sets the time within which proceedings on the merits must be instituted, as referred to in rule 198.1 RoP, at 31 calendar days after service of the judgment on the defendant, failing which the court may, at the defendant's request, order that such judgment be revoked or otherwise cease to have effect*

60. The plaintiff obtained the evidence order on 21 September 2023 and proceeded to and execute the order on 22 September . The Pitch Report was filed on 28 September 2023. The plaintiff then proceeded to serve her Statement of Claim on 23 October 2023.

61. Generally , in application of R. 300(a), the calculation of the time limit begins on the day following service (i.e. 23 September 2023). The period of 31 calendar days (as the longest period) after service ends on 23 October 2023.

[2] R. 198 (1) provides as follows "*The Court shall ensure that an order to preserve evidence is revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if, within a time period not exceeding 31 calendar days or 20 working days, whichever is the longer, from the date specified in the Court's order with due regard to the date where the Report referred to in Rule 196.4 shall be presented, the applicant does not commence proceedings on the merits of the case before the Court."*

62. ORTHOAPNEA bases its defence on the contention that service on it of the (Spanish-language) Statement of Claim (after request to do so pursuant to R. 271 (8)) was made on 19 January 2024 (which is outside the 31-calendar-day period).

63. However, the Tribunal finds that the date of the "*initiation of proceedings on the merits*" ("*start*") is 23 October 2023, i.e. the date of the uploading of the (Dutch-language) Statement of Claim in CMS. This also follows from the wording of R.17 (4)[3]. The '*activities log*' in workflow 581538/2023 in CMS states '*Acknowledgement of Lodge*' on 23 October 2023 (15:54) and shortly thereafter '*Acknowledge Upload*'. This marks the start of the procedure. The date of service of the Dutch-language Verklaring van Eis is not the date on which the proceedings on the merits are initiated ('*start*'). Similarly, the service of the Spanish translation of the Statement of Claim is not considered a relevant date for the initiation ("*start*") of proceedings on the merits before the Tribunal within the meaning of R. 198 (1) (after request for translation of the Statement of Claim (in application of R. Rule 271 (8)).

64. Indeed, ruling otherwise here would have the effect of allowing the Defendants to influence the timing of the initiation ("*start*") of the proceedings by refusing service (Service) by requesting a translation.

65. For completeness, the Tribunal indicates that the Defendants also develop a (limited) argument regarding the *necessity* of the attachment of evidence in light of 4 trial purchases made by the Claimant of four different NOA prior to the application for the attachment of evidence. These trial purchases, according to the Defendants, would have been sufficient to (i) require the appointment an expert and/or (ii) (immediately) proceedings on the merits. The Tribunal finds that the Defendants did not seek review of the above order in application of R. 197(4).

V.D. The patent and explanation of claims ("*claim construction*")

V.D.1. Legal framework

66. Under Art 69 EPC and the Protocol, sources of law for the Tribunal in application of Art 24(1) UPCA, a patent claim is not only the starting point but also the decisive basis for determining the scope of protection of a European patent. The interpretation of a patent claim depends not only on the strict, literal meaning of the wording used. The description and drawings should be used as tools for explaining a patent claim and not just to any ambiguities in a patent claim. However, this does not mean that the patent claim would only serve as a guide and its subject matter includes what, after examining the

[3] R. 17 (4) provides as follows "*The action shall be regarded as having commenced before the Court as from the date of receipt attributed to the statement of claim".*

description and drawings, appears to be the subject matter for which the patentee seeks protection[4].

67. A patent claim must be interpreted from the point of view of the average person skilled in the art[5]. When interpreting a patent claim, the average person skilled in the art does not take a purely philological approach, but determines the technical meaning of the terms used from the description and drawings and through the lens of his general professional knowledge. A feature in a patent claim should always be interpreted in the light of the claim as a whole[6]. The description and drawings may show that the patent specification independently defines terms and, in this respect, may constitute a patent's own lexicon (dictionary). Thus, even if the terms used in the patent deviate from common , it may be that the ultimate meaning of a term from the claim, is that which appears from the patent specification.

68. In applying these principles, the aim should be to combine a reasonable degree of protection for the patent holder with sufficient legal certainty for third parties.

V.D.2. The patent

69. The patent relates to a device for treating breathing problems. Nocturnal breathing problems, which can lead, for example, to snoring, sleep apnoea syndrome or other sleep disorders, are a common problem.

70. The patent indicated that when a person sleeps, the posterior part of the tongue may tend to slide backwards, partially or completely closing the airway of the pharynx (par. 0002 patent). According to the patent (par. 0002 patent), it was known that such respiratory problems could be solved by a device placed in the mouth that moves the lower jaw further forward relative to the upper jaw. The neck muscles are thereby forced into a tensed position, moving the tongue forward and keeping the airway clear. Such devices were widely known at the priority date and include devices according to the opening words of the conclusion, but would have the disadvantage of allowing too much freedom of movement during the opening/closing of the mouth (para 0003 patent).

71. The prior art documents cited in the patent description (US and WO[redacted] describe oral [redacted] prostheses (devices) wherein coupling devices are fitted between the lower and upper dental arch. Such devices, according to the description, have the disadvantage that they prevent the tongue from moving to a resting position and provide limited control options (par. 0004 patent).

[4] Order of the CoA of 11 March 2024 in case CoA 335/2023, Nanostring/10 x Genomics, page 24
[5] UPC_CoA_335/2023, NanoString/10x Genomics, pp. 26-27 of the original German-language , CoA UPC 13 May 2024, VusionGroup/Hanshow, also UPC_CFI_1/2023 and UPC_CFI_14/2023 (paras. 6.3-6.8).
[6] CoA UPC 13 May 2024, VusionGroup/Hanshow, para 29

72. The invention seeks to provide a device that is user-friendly and comfortable to wear, and allows a precise adjustment with limited freedom of movement of the lower jaw relative to the upper jaw (par. 0005 patent). The solution put forward by the patent for that purpose and claimed in claim 1 is a device in which (i) the connectors of the lower and upper parts of the oral prosthesis are not located *between* the lower and upper dental arch but in the *vestibulum oris* and (ii) such that they avoid further closing of the mouth when the "*contact surface*" of the lower connector ("*contact surface*"
(12)) against the "*stop*" of the upper coupling ("*stop*" (13) or "*stop*" in the original English language) comes (paras 0006 and 0008 patent).

V.D.3. The average professional person and their expertise

73. According to Claimant, the average professional is a "*team consisting of a physician experienced in the treatment of sleep-related breathing problems, including sleep apnoea, assisted by an orthodontist*". Since the Defendants do not dispute this description and the Claimant's definition does not appear to the Tribunal to be incorrect, the Tribunal assumes this.

74. With regard to the professional knowledge of the average professional, the following should be :

- Plaintiff (supported by exhibits and not disputed by Defendants) indicates that the most commonly used sleeping position (70% of the) is the side position (lateral sleep position or side position). This sleeping position has several benefits, including promoting spinal position, reducing snoring, and helping to relieve symptoms of gastro-oesophageal reflux and sleep apnoea. Sleep experts recommend sleeping laterally to rest more comfortably and reduce the risk of interrupted sleep. Lateral sleeping is all the more important for patients with sleep apnoea, making it part of positional sleep therapy to treat sleep apnoea. After all, when sleeping laterally, the airway generally remains open because the tongue and soft palate do not sag backwards, which does happen when sleeping supine. The treatment of sleep apnoea therefore largely consists of so-called "*body positioning treatment*", also positional therapy. Stu- dies would show that in about 56% to 75% of patients with OSA, the frequency and duration of apnoeas are improved by body positioning.
- Besides this positional therapy, studies (not disputed by Defendants) would also show MADs to have a positive effect for:
  - patients with positional OSA who usually sleep supine. In these patients, the apnoea therefore follows from habitually lying supine and will therefore also be co-treated via positional sleep therapy to pursue a lateral sleep position,
  - patients with non-positional OSA who habitually sleep on the side. In these patients, the apnoea does not follow from habitually sleeping on the side and therefore the position does not need to be adjusted, so again the patient maintains a lateral sleep position
- The parties do not dispute that the average professional has knowledge of the fact that jaw joints are mobile, flexible and strong and can exert large forces on each other. The pressure created when the lower jaw and upper jaw move towards each other is exerted on the teeth (and in particular in the biting or occlusal). This

forces along with the lateral play of the lower and upper jaws are specifically manifested when a person grinds their teeth when sleeping.

V.D.4. Explanation of claim 1 ("*claim construction*")

75. Taking into account the professional knowledge of the average professional, the Tribunal rules as follows
regarding the explanation of the only independent (furnishing) claim 1 of the :

76. Characteristic 1.0 (no dispute)

1.0. facility for treating respiratory problems, including
The claim claims a device suitable for treating breathing problems. According to the description (par. 0002 patent), nocturnal breathing problems, which can lead, for example, to snoring, sleep apnoea syndrome or other sleep disorders, are a commonly known problem.

77. Characteristic 1.1 (no dispute)

1.1. a lower part (2) attachable to the lower jaw and an upper part attachable to the upper jaw, which lower and upper parts are arranged to be located at least near the posterior teeth, and
The device includes an upper and a lower part that is attachable to the upper and lower jaw, respectively. Neither the conclusion nor the description further defines these elements. Drawing 1 shows that the upper and lower pieces involve a "*bite shape*" that closes around the teeth (making the device attachable, indirectly through the teeth, to the jaw), but the claim is not limited to such an arrangement. The conclusion also requires that the lower and upper pieces are arranged to be located at least near the posterior teeth.

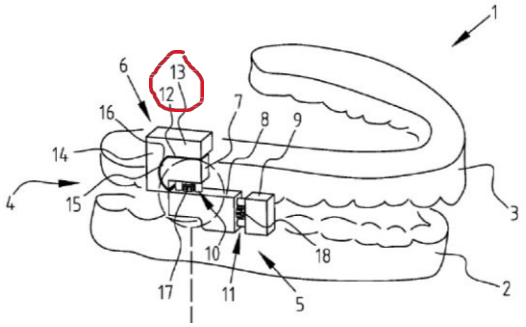
78. Feature 1.2.0.

1.2.0 left and right coupling means (4) for coupling lower part with upper part near the posterior teeth; wherein each of the left and right coupling means comprises an upper coupling element (6) connected to the upper part and a lower coupling element connected [to] the lower part (5); which left and right coupling means are arranged to move the lower jaw forward relative to the upper jaw;

Coupling should take place "*near the rear teeth*". The description does not further explain what is to be understood by or the function of the coupling "*near the rear teeth*". Drawings 1, 2 and 4 do offer an indication as to what is meant by this phrase. The average practitioner will further realise that what constitutes "*near posterior teeth*" partly depends on the patient's anatomy (where, for example, teeth may have been removed). Accordingly, the average practitioner will give a broad interpretation to this characteristic in which the coupling means will at least not be near the front teeth/at the front of the jaw. Furthermore, characteristic 1.2.0. cannot be separated from characteristic 1.1. from which it follows that lower and upper parts (which act as carriers of the coupling elements) are arranged to be located at least near the rear teeth. This is confirmed by drawing 1.

79. Feature 1.2.1. read together with feature 1.2.4.

1.2.1 where the upper coupling element is provided is from a stop (13) for cooperation with a contact surface (12) of the lower coupling element, and
(1.2.3. with the feature that (...)) 1.2.4 and that the stop (13) and the contact surface (12) are located in the vestibulum oris, on the vestibular side of the dental arch, in the position of the device placed in the mouth, such that when the lower jaw and upper jaw move towards each other, a further closing of the mouth is avoided when the contact surface is against the attack comes."
Feature 1.2.4. follows feature 1.2.3. Feature 1.2.3. starts with the notion "*with the feature, that (...)*" where in feature 1.2.4. is supplemented by the term "*and that*" to then indicate "*the stop (13) and the contact surface (12) are located in the vestibulum oris, on the vestibular side of the dental arch, in the position of the device placed in the mouth, in such a way that when the lower jaw and upper jaw move towards each other, a further closing of the mouth is avoided when the contact surface comes against the stop.*" Feature 1.2.1. indicates that the coupling elements are provided with, respectively, a "*stop*" 13 (on upper coupling element) and a "*contact surface*" 12 (on lower coupling element), as shown in drawings 1 and 3 (A and B). • Drawing 1 (relevant part)



- Drawing 3 (A and B)

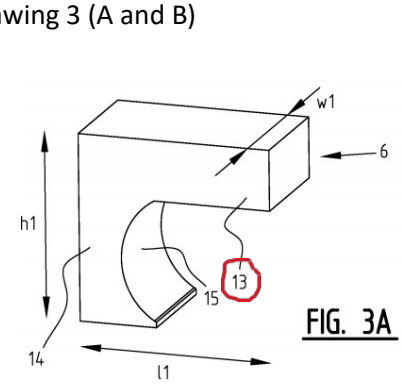


FIG. 3A

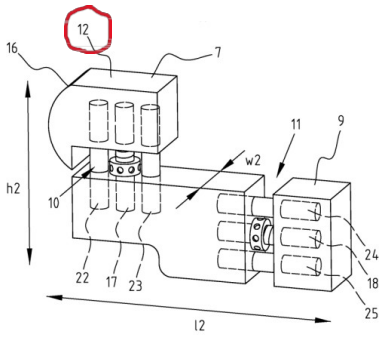


FIG. 3B

Feature 1.2.4 then firstly specifies that the "*stop*" and "*contact surface*" are in the *vestibilum oris*, particularly on the vestibular side of the dental arch (defined as between the cheek and dental arches, see above and par. 0006 and par. 0018 of the patent).

Furthermore, feature 1.2.4 makes clear that the technical function of "*stop*" and "*contact surface*" is to work together in such a way that they avoid further closing of the mouth when the device is placed in the mouth (see also par. 0006 patent).

For clarification purposes, the distinct structural elements of feature 1.2.1 are shown referring to the drawings of the patent (repeating for readability the numerical indication shown in claim 1):

2. lower part that can be attached to the lower jaw 3. upper part attachable to the upper jaw 4. left and right couplers 5. lower coupling element	6. upper coupling element 12. contact surface 13. stop 15 and 16. Complementary shaped surfaces

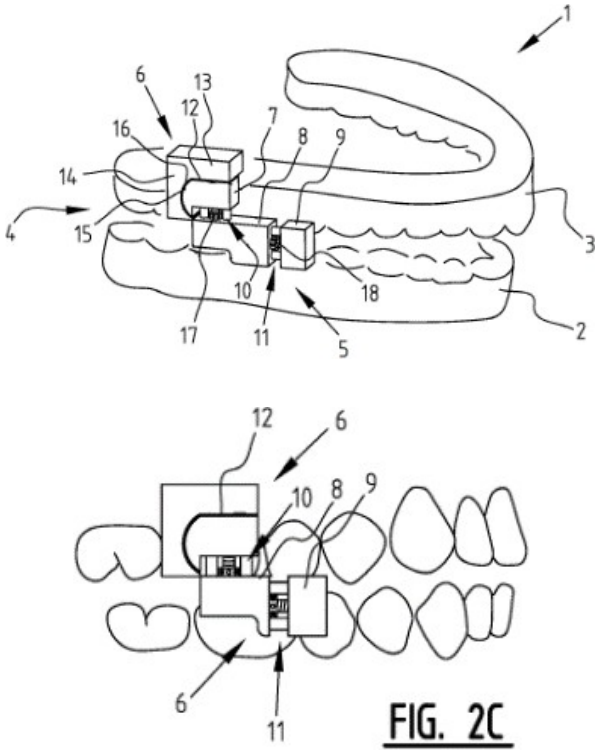


FIG. 2C

"Stop" and "*contact surface*" are thus recognisable as such structural components of the coupling elements that have the function, in cooperation, of restricting the downward vertical movement of the lower jaw relative to the upper jaw (i.e. in a direction perpendicular to the lower or upper jaw surface downwards) (see par. 0007 patent). The stop "*stops*" ("*stop"* is a translation of the term "*stop"* in the original English text of the claim) on the "*contact surface"* preventing further closing (par. 0006 patent).

Thus, the (technical) function of feature 1.2.4 is to prevent the lower and upper part from making contact in the occlusal plane (biting surface of the bracket) when closing the mouth. This is discussed further in the assessment of the infringement in equivalence.

For completeness, this explanation also indicates that where Claimant argues that the technical effect of the features of claim 1 is (partly) to prevent the mouth from falling open, the average practitioner cannot infer such technical effect either from claim 1, the description and drawings.

The average subject person will further understand (in explaining feature 1.2.1. in conjunction with feature 1.2.4:)

- That "*further closing of the mouth*" refers to further closing of the jaws (ie. bringing both jaws further together). This is confirmed because the conclusion also clarifies that it refers to avoiding closing "*when moving lower jaw and upper jaw together*".

- that, as also shown in the drawings, to work together "*stop*" and "*contact surface*" are positioned parallel to each other in the horizontal plane of the upper and lower jaws, respectively.

80. Characteristic 1.2.2.

1.2.2 wherein each upper coupling element (5, 6) is provided with a portion having a concave or convex surface directed towards the front teeth [15], and wherein each lower coupling element is provided with a complementary shaped surface (16), the foregoing in such a way that the upper coupling element can engage with the lower coupling element and that movement of the lower jaw is avoided;
To avoid backward movement of the lower jaw, each upper coupling element has a concave or convex surface facing the front teeth and the lower coupling elements have a complementary shaped surface. By allowing the upper coupling element to engage with the lower coupling element in this way, backward movement (i.e. in the "*horizontal plane*") of the lower jaw can be avoided. To fulfil this function, it is not necessary for the surfaces to be "*perfectly complementary*" in the sense that they are exactly mirror images in terms of their shape and dimensions. The average practitioner understands that it is not required that the surfaces are exactly matched or have the same length, as long as there is "*engagement*" and avoidance of the jaw sliding backwards (cf. also drawing 2, in which not all complementary surfaces are exactly mirror images). At the hearing, with reference to par. 0013 of the patent, the claimant further referred to the "*engagement*" in combination with the "*further guid[ing] and limit[ing]*" of the vertical movement of the coupling elements, indicating an upward vertical movement. Whatever of this, it does not follow that it would be necessary for the convex (or concave) surface and the complementary surface to be exactly mirror images. Indeed, as long as the surfaces are complementary to each other to a sufficient degree that they can "*slide*" past each other, this (claimed by Claimant, "*vertical*") function will also be able to be fulfilled.

81. Characteristic 1.2.3.

1.2.3 having the feature, that the upper and lower coupling elements (5, 6) are connected to the upper and lower part respectively in such a way that these upper and lower coupling elements are located in the vestibulum oris in the mouth position of the device;
The average person skilled in the art is familiar with the term *vestibulum oris* (in accordance with par. 0006 of the patent (last sentence) indicating that this refers to the space on the "*outside*" of the teeth between the teeth and the cheek). Feature 1.2.3 requires that

the coupling means are in this space when the device is placed in the mouth. From the description, the patent/claim delineates devices where the coupling means are located between the teeth (i.e. between the dental arches, see e.g. US2007/0283967 -par 0004 patent).

IV.E. Assessment of infringement claims

82. The burden of assertion and proof of patent infringement rests on the Claimant (Art. 54 UPCA).

83. The Court assesses infringement in two stages, in application of Article 69 EPC and the . In a first stage, the '*literal*' infringement of the features of (claims 1, 9 and 10 of) the patent is assessed in the light of the scope of protection that follows from the interpretation of claim 1 ("*claim construction*") (see above under marginal numbers 75-81). Given that the Tribunal will hold below that the NOA does not literally infringe the patent (and specifically claims 1, 9 and 10) and the Claimant argues in the alternative that the NOA infringes by equivalence, equivalence is assessed in a second step.

IV.E.1. The establishment (NOA) subject of infringement claims

84. The Tribunal starts from the marketed NOA. The device (NOA) as the basis of the assessment refers to the one that was the subject of the test purchases by the Claimant as well as the one seized in execution of the evidence seizure. Since the NOA and the device described in EP 430 differ (undisputedly) in that the follower and comb are positioned upwards (see supra note **31**), and since it has neither been stated nor shown that the precise device according to EP 430 is on the market or in danger of being on the market, the Tribunal does not take the device described in EP 430 as the basis for answering the infringement question.

85. For completeness, it is stated that it is not disputed that the NOAs submitted by the Claimant at the oral hearing and considered by the Tribunal are the subject matter of the infringement claims.

IV.E.2. "Literal" infringement

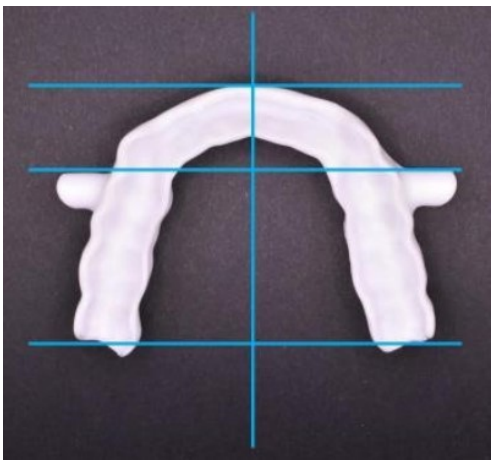
IV.E.2.1. Features 1.0. and 1.1.

86. As indicated, the Defendants do not dispute that the NOA meets features 1.0. and 1.1.

IV.E.2.2. Feature 1.2.0.

87. In light of the above explanation (see marginal 73 et seq.)**,** the Tribunal finds that the NOA complies with characteristic 1.2.0. The NOA includes left and right coupling elements (for coupling the lower part to the upper part) near the rear teeth.

88. The defendants attempt to refute this by referring to a photographic representation of the NOA stating that "*the location of the clutch is closer to the front teeth, therefore not near the back teeth*".



89. The Tribunal does not follow this defence and points to the following convincing elements put forward by the Claimant:

- According to the Pitch Report, "*(t)he NOA product sample further [includes] left and right coupling elements that connect the lower part and the upper part detachably and with a number of degrees of freedom. These coupling elements are located near the posterior teeth and on the outer side of the dental arch, i.e. on the vestibular side or in use between the cheek and dental arches*" (p. 29 Pitch Report).
- The above photographic representation (the origin of which is unclear to the Tribunal) is inconsistent with the other photographic representations, the establishments object of the trial purchases and the physical model put forward by Defendants at the hearing. Expressly, the Court refers to the photographic representation of the four lower parts (each with a different degree of forward displacement of the lower jaw in relation to the mandible classified as -1, standard, +1 and +2):

In each of these views, it can be seen that the coupling element (of which only the lower part is shown above in 3 of the views), the coupling element (fully shown in the 2e view), is located "*near the rear teeth*". Against the background of the above explanation of the relevant feature (see margin number 78), the Tribunal finds that the NOA thereby complies with feature 1.2.0.

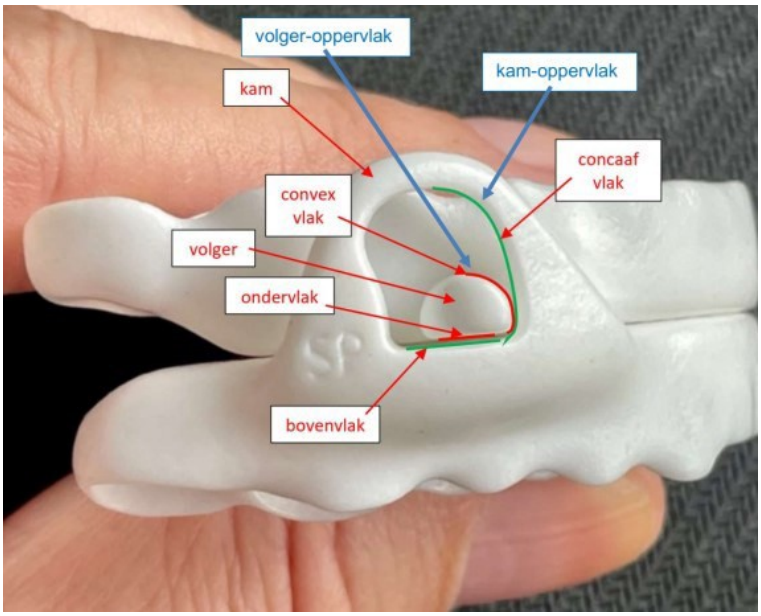
- Finally, it is recalled that the position of the coupling means cannot be separated from the requirement claimed in characteristic 1.1 that the upper and lower parts are arranged to be at least in the vicinity of the rear teeth (see explanation of this characteristic under marginal 77). It is not disputed by the Defendants that feature 1.1 is satisfied. In other words, if these carriers are arranged to at least in the vicinity of the rear teeth, this obviously also applies to the coupling means to which the coupling elements are attached.

IV.E.2.3. Characteristics 1.2.1. and 1.2.4.

90. The Tribunal finds that NOA does not meet the characteristics as shown under characteristic 1.2.1. and this in conjunction with feature 1.2.4.

91. In light of the earlier interpretation of Concluding Observations 1.2.1. and 1.2.4 of (Claim 1 of) the Patent (see marginal 79), the Tribunal finds that, in the case of the NOA, the closure of the mouth is not further avoided (or limited) by a "*stop*" and "*contact surface*" within the meaning of Claim 1, irrespective of whatever interpretation the Claimant may have of the constructive design of the NOA. According to the Claimant, the "*stop*" and "*contact surface*" could be considered (with the Tribunal providing a photographic representation for clarification):

- Follower surface and comb surface
- The lower face of the follower and the upper face of the bottom of the comb
- The contact surfaces of the lower and upper parts (not explicitly indicated in below; these are located "between" the upper and lower parts).



92. In none of the submitted reflections does the NOA satisfy characteristic 1.2.1 in conjunction with 1.2.4 justifying as follows:

- *Follower surface and comb surface*: The defendants have sufficiently refuted that the comb and follower surfaces referred to in the drawing above are decisive for avoiding further closing of the mouth. In the NOA, the parts that prevent further closing of the mouth are the lower and upper parts of the device. In the "*open*" state of the mouth, where the vertical movement of the jaws is not yet restricted, the follower and ridge of the NOA further closing of the mouth. In this casethere is then no question of these surfaces avoiding further closing of the mouth. In the "*closed*" state, the said follower surface and comb surface actually have no function in restricting vertical direction of movement from the lower jaw to the upper jaw (rather horizontal movement).
- *The lower surface of the follower and the upper surface of the underside of the ridge:* the Tribunal is also unable to find that these parts of the NOA qualify as "*stop*" and "*contact surface*" within the meaning of (features 1.2.1 and 1.2.4 of) Claim 1. In regard, the defendants first rely on the Pitch Report. The expert shows that after coupling the upper and lower parts of the NOA and moving the upper and lower parts horizontally and laterally (laterally) back and forth in the closed position, there is no, or at least no discernible, contact between the follower surface referred to here and the comb surface where graphite from a pencil is deposited on the respective surfaces (Photo 25 to 31 Pitch Report). Furthermore, the Defendants have convincingly demonstrated with reference to the (CAD) software used for the production and a "*Surface Contact Map*", that the manufacturing process of NOA is aimed at ensuring that the upper surface of the bottom of the comb in the closed position does not touch the lower surface of the follower. The Tribunal itself further found at the hearing that in the closed position, there is still space (albeit very limited) between these surfaces of the NOA. Thus, according to the Defendants, these planes do not work together to achieve the result of avoiding further closure of the mouth. According to Defendants, it is (the contact surfaces of) the upper and lower parts of the NOA that prevent the further closure of the mouth. This has not been sufficiently stated by the Claimant, on whom the burden of proof rests in this regard. The mere criticism that the expert in the Pitch Report did not carry out an *in vivo* experiment and the experiment with blue dye (Exhibit II.6) carried out by the Claimant together with its patent attorney in two patients, the representative value of which has been disputed by the Defendants, do not convince the Tribunal, also in light of the aforementioned facts. Moreover, the Court finds that even if there were a (more or less accidental) contact between the lower and upper surface in certain *in vivo* situations, i.e. in particular when sleeping on the side, this does not prove that this also prevents further closing of the mouth as required by characteristic 1.2.4. Rather, it is plausible that, as the Defendants argue, this is the result of the contact between the lower piece and upper piece *in itself*. The bottom piece and top piece are then already fully on top of each other and it is this fact that avoids further closing of the mouth.
- *The contact surfaces of the lower and upper part.* The contact surfaces are (uncontested) in the occlusal plane and do not meet the requirement of feature 1.2.4, first sub-characteristic, as the occlusal plane is (correctly) not part of the *vestibulum oris*.

93. Furthermore, the Claimant's contention, to the effect that infringement occurs as soon as there is any contact between the "*stop*" and the "*contact surface*" of the left or right clutches in a lateral sleep position (in a slightly tilted state), is not followed as it assumes an incorrect interpretation of feature 1.2.4. After all, in such a condition - which is neither mentioned in the conclusions nor in the description - the mouth can be closed further, namely by the vertical movement on the other side of the jaw joint. Even if it were assumed with Plaintiff that the average professional would know that in the side sleeping position, in which sleep apnoea patients regularly sleep, the jaw would "*sag*" on one side (which is disputed by Defendant), this does not thwart the above assessment. After all, the functional characteristic (technical effect) of "*stop*" ("*stop*") and "*contact surface*" is to prevent further closing of the mouth, and even if one side of the jaw were to make contact earlier in the side-sleeping position, there is no closure of the mouth until both jaws move towards each other. Indeed, preventing further closure only occurs when this "*bilateral*" jaw movement is avoided.

94. Where the above would not answer the Claimant's contentions, they are assessed specifically below (for the sake of completeness), in the light of the foregoing:

- *"The alleged very limited distance of 0.16 or 0.17 mm* [between *the upper surface of the bottom of the* comb and the lower surface of the follower] *when closed in perfectly symmetrical position just confirms the infringement."* First, it is noted that Claimant elaborates this contention (in main order) in application of the device claimed in EP 430. As explained above at margin 31, Defendants sufficiently convince the Tribunal that EP 430 differs from the subject matter of the infringement claims. Further, Claimant argues that such limited distance will cause contact to occur between the upper coupling element and the lower coupling element in the event of a "*minimal tilt*". Even if it were to be assumed with Plaintiff that with such a tilt there would be a contact between the upper head element and the lower head element (a proposition which Defendants argue is not proven in an *in vivo* test), the Court finds that this does not prove that this avoids further closing of the mouth (on the other side) by the comb/follower so that attribute is not satisfied
  1.2.4 (see above).
- *"The intended use leads all the more to contact between the lower surface of the follower and the upper surface of the comb"*: here, the Claimant is referring to the habitual lateral position. As the Court has indicated above (see margin 79), against the background of the function of the stop and the contact surface, which is to restrict the (vertical) freedom of movement of the jaws, an average professional will realise that by "*further closing the mouth*" is the further closing of the jaws (i.e. bringing both jaws together both left and right). This is confirmed by the fact that the conclusion also clarifies that it refers avoiding closing "*when moving the lower jaw and upper jaw together*".
- *"Because of the contact [between upper and lower], when the lower jaw and upper jaw move towards each other, a further closing of the mouth is avoided when the contact surface comes up against the stop"*: Where Claimant argues in support of this argument that the conclusions are "*in no way limited to the extent that there should be a certain distance between*

the upper part and lower part" this statement cannot help her. Whatever the , feature 1.2.4. also requires that this contact must be located in the *vestibilum oris*, whereas in the case of the NOA, the contact between upper and lower part takes place in the occlusal plane so that, for that reason alone, the conclusion is not satisfied.

- The reference to paragraph 20 of the description of the patent refers to the operation of the "*adjustment means*" by which the vertical and horizontal position of the contact surface can be adjusted to obtain an adjustable minimum vertical and horizontal distance between the lower jaw and upper jaw. These "*adjustment means*" are part of (dependent) claims 2 to 8 and not claim 1.

IV.E.2.4. Characteristic 1.2.2.

95. Since the Court of First Instance found above that no infringement could be established in relation to the implementation of characteristic 1.2.1. in with characteristic 1.2.4.

IV.E.2.5. Infringement of claims 9 and 10 of the patent

96. Given that all the features of independent claim 1 are not met, no infringement of dependent claims 9 and 10 of the patent is assumed either.

IV.E.3 Breach of equivalence

IV.E.3.1. Theoretical framework

97. As regards the principles for assessing infringement in the event of equivalence, the refers to its decision of 22 November 2024[7]. Since this decision was issued after the parties had uploaded their final written arguments in the CMS, they were allowed at the oral hearing to express oral views on its terms of application.

98. In assessing an alleged infringement of equivalence, whether the test used by the Court in the aforementioned judgment is the '*function-way-result*' or the '*insubstantial differences*' test, technical functional equivalence must first be . In the absence of such functional equivalence, a claim of infringement for equivalence already runs aground on that regardless of which test is .

IV.E.3.2. Application

99. As indicated, the technical function of (the functional part of) feature 1.2.4 (with which feature 1.2.1 is to be read together) is to prevent the contact surface of the

[7] UPC_CFI_239/2023, Plant-e vs Arkyne, No 86-88.

lower part and the stop of the upper part make contact in the occlusal plane (biting surface of the bracket)(see marginal 79). This has a direct effect on the forces of the jaws (and concretely the force redirection) when using the device as described in claim 1 of the patent. The forces of the lower jaw and upper jaw manifest, when closing the mouth (without use of the device as claimed in/from the patent, using known devices as described in paragraph 0004 of the patent), between the lower and upper dental arches, i.e. in the occlusal plane. By using the device as shown in the patent, these forces are redirected to the coupling elements, in particular stop and contact surface of the coupling elements, located in the vestibular space on the side of the dental arch. This interpretation is in line with the problem the patent aims to solve, as shown par. 0005 patent, and in particular with limiting the vertical freedom of movement of the jaws as described in par. 0007, while making the device user-friendly and comfortable to wear. This purpose is achieved by (i) the position of the "*stop*" and "*contact surface*" (in the *vestibulum oris* as shown in the constructive feature of 1.2.4. (first sub-characteristic) and (ii) the function ("*avoid further closing of the mouth*" as shown in the functional characteristic (second sub-characteristic).As considered above, the passage "avoid further closing of the mouth" should be understood to mean that the contact between the stop and the contact surface in the vestibulum *oris* not only prevents the mouth from closing further but also prevents the lower and upper parts from making contact in the occlusal plane in the process. This can also be seen in the drawings of the patent.

100. In NOA, (the corresponding parts of) the coupling elements do not have this function of avoiding further closing of the mouth. In NOA, complete closure of the mouth is prevented by the lower and upper parts of the device coming together. It is then not the coupling elements that have the function of avoiding further closing of the mouth, but the upper and lower parts, and this in the occlusal plane.

101. The forces at the NOA in its most closed state (where upper and lower parts meet) are not transferred to and diverted to the coupling elements in the *vestibulum oris*, but are absorbed by the lower and upper parts in the occlusal plane**.** Thus, while the contact surfaces between the upper and lower parts of the NOA indicated by Claimant perform the function of preventing the mouth from closing further, they do so in a substantially different way from the coupling elements located in the vestibulum *oris* according to the invention. A factor here is that, as is apparent from the description (par. 0004 patent), and as also expressly acknowledged by Claimant (marg. 36 Rejoinder), the feature that the stop and contact surface are located on the vestibular side of the dental arch was added to claim 1 to distinguish it from the prior art, in particular US
where the "*bite pads*", between the dental arches, prevent further closing of the [redacted] NOA, the contact between the upper and lower part also takes place between dental arches. Against this background, the plaintiff cannot successfully claim infringement by way of equivalence in the present case.

102. For the sake of completeness (and following the Claimant's argument structure), the finds that application of the so-called "*insubstantial differences*" ("*insubstantial differences*") test does not to a different result. After all, given that the NOA can be put in a 'closed state' where the contact surfaces of the lower and upper parts make contact in the occlusal plane and there is no stop/contact surface in the coupling elements that prevents this from happening the average person skilled in the art will judge that this device is significantly different and functions substantially differently from the device of claim 1, which is just aimed at avoiding the complete closure the mouth by providing a coupling element with stop and contact surface in the *vestibulum oris*, where the distance between the "*contact portion*" and "*base portion adjustable*" to adjust the downward vertical restriction (see 0009 patent and drawings 1-3). By extension, the skilled person understands that a different balance of forces occurs with the NOA compared to the device claimed in claim 1. In the NOA, the vertical forces are centralised in the occlusal plane and in the device claimed in claim 1 in the coupling elements located in the *vestibulum oris*. The constructive difference (which causes a different balance of forces) will be considered significant (substantial) by the average practitioner.

IV.E.4. Gillette *defence*

103. Given the above non-infringement assessment, we should not proceed to assess the (subordinate) *Gillette defence*.

IV.F. The implications of the above assessment for the mutually instituted claims

IV.F.1. Claims brought by Claimant

104. In of the above assessment, the claims brought by Claimant are dismissed as unfounded.

IV.F.2. Applications brought by Defendants

IV.F.2.1. Applications brought by both Defendants

(i) *Order to pay proceedings and related proceedings*

105. Given that the Claimant is unsuccessful, he should be ordered to pay the costs of these proceedings (in application of Art. 69(2) in conjunction with R. 118 (5)).

106. In application of R. 152 (2), it is already held that, in light of the valuation of the case at €250,000, the (reimbursement of) representation expenses should be determined at a ceiling of €38,000 (and this in itself in application of the "*Schedule of Costs adopted by the Administrative Committee on 24 April 2023*").

107. As no elements are provided that allow the Tribunal to assess whether this ceiling was reached and the parties expressly state at the hearing to assess the costs and damages in follow-up proceedings (R. 125), the Tribunal limits itself to a decision of principle on the reimbursement of the representation expenses.

108. The Defendants also claim payment of costs for "*related proceedings*". It is not clear to the Tribunal which proceedings are referred to and this all the more so as the Defendants are bringing a separate claim for damages pursuant to the attachment of evidence (see margin 109).

(ii) *Damages as a result of attachment of evidence*

109. In view of the Defendant's requests to have them determined in follow-up proceedings (R. 125), the Court does not proceed to consider them today.

IV.F.2.2. Requests submitted by ORTHOAPNEA

(i) *Lifting of evidence seizure and return of seized property*

110. The above assessment, in dismissing the infringement claim brought by the Claimant, has the effect that the attachment of evidence should be lifted in the sense that the Claimant should be ordered to return all the objects seized (in application of R. 198 (2)).

111. For practical reasons, a period of 10 working days from service of this decision is granted to the Claimant to give effect to this well-founded request.

(ii) *Order for damages suffered as a result of the seizure of evidence*

112. The assessment for payment of damages as a result of the seizure of evidence first of all requires an assessment as to the nature of liability on the part of the claimant (objective fault liability (whereby the damage must be proved) or subjective fault liability (whereby the fault, the causal link between the fault and the damage and the damage itself must be proved).

113. Given that ORTHOAPNEA wishes to hear the "*amount of damages*" resulting from the attachment determined in a follow-up proceeding (in application of R. 125) and given that the parties do not take a position on the nature of the fault, the Court considers it appropriate to assess the assessment regarding this claim for damages in its entirety in such follow-up proceedings.

V. BEMIDELING

114. The above decision dismisses the infringement claim and moves to order the Plaintiff in principle to pay the representation expenses. As indicated, a

Final assessment of these costs and any damages will be assessed in a follow-up procedure (R. 125).

115. The Court reminds the parties of the possibilities offered by the *Patent Mediation and Arbitration Centre*, and in general of the possibilities of mediation, to reach a mediated solution regarding the representation expenses to be reimbursed and compensation (if any) where, in addition to this decision, the risk (and costs) of an appeal may also be included in this process.

VI. DECISION

For the above reasons, and after the parties, the Court finds as follows:

1. as unfounded the infringement claims and all follow-up claims hereon brought by Claimant.

2. Judges that Plaintiff temporally regularly instituted proceedings on the merits after the attachment of evidence by order dated 21 September 2023 (ACT_574133/2023).

3. the attachment of evidence granted by order dated 21 September 2023 (ACT_574133/2023).

4. Orders Plaintiff to return the property seized in execution of the evidence seizure authorised by order dated 21 September 2023 (ACT_574133/2023).

5. Order the Claimant as the unsuccessful party to pay the Defendants' reasonable and proportionate costs of representation and other costs of the proceedings.

6. Dismisses the remaining claims and applications, with the exception of the finding that the determinations as to the specific costs of the proceedings and damages (if any) are to be assessed in subsequent proceedings in application of R. 150 and R. 125 of the Rules of Procedure of the Court of First Instance, respectively.

7. This decision is immediately enforceable with the exception of the lifting of the attachment of evidence (under 2) and the restitution order (under 3) whereby a period of 10 working days is given to the Claimant from service of the decision to give effect to it.

Decision issued on 17 January 2025 by:

Samuel **GRANATA** President and Judge-Rapporteur Legally qualified judge	Samuel Rocco M Granata Digitally signed by Samuel Rocco M Granata Date: 2025.01.17 08:52:55 +01'00'
Margot **KOKKE** Legally qualified judge	Margot Elsa KOKKE Digitally signed by Margot Elsa KOKKE Date: 2025.01.16 12:52:52 +01'00'
András **KUPECZ** Legally qualified judge	András Ferenc Kupecz Digital unterschrieben von András Ferenc Kupecz Date: 2025.01.16 14:13:27 +01'00'
Déborah **PLETINCKX** Grifier	DÉBORAH PATRICIA A PLETINCKX Signature numérique the DÉBORAH PATRICIA A PLETINCKX Date : 2025.01.16 14:20:55 +01'00'

INFORMATION REGARDING APPEALS

A party who is unsuccessful in whole or in part may appeal to the Court of Appeal within two months from the date of notification (section 73 (1)UPCA, R 220 (1)(a) RoP, 22 (1)(a) RoP).

IMPLEMENTATION INFORMATION

(Art. 82 UPCA, Art. Art. 37(2) UPCS, R. 118 (8), 158 (2), 354, 355 (4) RoP)

An authentic copy of the enforcement of the decision shall be issued by the Deputy Registrar at the request of the enforcing party in application of R. 69 RegR (Rules on the Registry of the Unified Patent Court).

DECISION DETAILS

Decision number	ORD_598478/2023
Case number	ACT_581538/2023
UPC Number	UPC_CFI_376/2023
Type-Action	Infringement claim