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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BARBARA Z. STAWSKI, THOMAS M. MINDAK,
PHILIP M. SOUKUP, GORDON N. McGREW,
JAMES C. CLARK, MICHAEL S. HASS,
and MIGUEL PEREZ

Appeal 2011-013363
Application 11/550,940
Technology Center 1700

Before RICHARD TORCZON, MICHAEL P. COLAIANNI, and GRACE KARAFFA OBERMANN, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

DECISION ON APPEAL

The named inventors ("Appellant") appeal under 35 U.S.C. § 134 from the final rejection of claims 1-7, 10, 20, 21, 28, 46-69, 56, 57, 61-63, 68, 71, 73, 74, 76-86, and 101 directed to a hard confectionary product and a method of removing bacteria from the top surface of a human tongue. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

STATEMENT OF THE CASE

Claim 1 is illustrative of the subject matter on appeal:

1. A hard confectionery product comprising:

a) a first side and a second side generally opposite relative to said first side;

b) the first side comprising a domed, non-abrasive surface; and

c) the second side comprising an abrasive surface that is suitable for scrubbing the top surface of a tongue within an oral cavity;

d) wherein the product does not include a handle.

THE REJECTIONS

Appellant seeks review of the following rejections entered under 35 U.S.C. § 103(a), which we refer to by number in our analysis:

1. Claims 1, 2, 4-7, 10, 20, 21, 28, 46-49, 56, 57, 61-63, 68, 71, 73, 74, 77-86, and 101 over Lawlor (US 2003/0007997 A1, published Jan. 9, 2003) in view of Della Posta (EPO 267160 B1, published May 11, 1988), Heisinger (US 2003/0163149 A1, published Aug. 28, 2003), and Pearce (US 2003/0224090 A1, published Dec. 4, 2003);[1]

2. Claims 3 and 76 over Lawlor in view of Della Posta, Heisinger, and Pearce, and further in view of Lees (Sugar Confectionary and Chocolate Manufacturer, published 1973, pages 165, 183, and 184);

3. Claims 7, 10, and 20 over Gwen (US 7,090,687 B1, published Aug. 15, 2006) in view of Della Posta and Heisinger; and

4. Claim 21 over Gwen in view of Heisinger.

[1] On page 14 of the Final Office Action mailed October 8, 2010, the Examiner cites two references (Mythen, US 6,004,334, issued Dec. 21, 1999, and Barkalow, US 2004/0156794, published Aug. 12, 2004) that are not identified as evidence used in making the rejections. Appellant addresses these references on page 17 of the Appeal Brief.

ISSUE

A dispositive issue arises:

Does the Examiner err in determining that the applied art would have led a skilled artisan to a hard confectionary product having a "second side comprising an abrasive surface that is suitable for scrubbing the top surface of a tongue . . . wherein the product does not include a handle"?

We answer this question in the positive and REVERSE.

ANALYSIS
(with Findings of Fact and Conclusions of Law)

Appellant claims a hard confectionary product having a "second side comprising an abrasive surface that is suitable for scrubbing the top surface of a tongue . . . wherein the product does not include a handle." Claims 1, 7, 20, 21, 28 (independent claims); *see* claim 101 (independent claim, specifying a method of removing bacteria from the top surface of a human tongue that includes "causing [an] abrasive surface of [a] hard confectionary product to be scraped across the top surface of the tongue" in a product that "does not include a handle").

An advantage of the inventive product is that it enables tongue scrubbing that "can be done very discretely" by excluding a "handle [that] has to be manipulated and protrudes out of the mouth." Spec. ¶ [0012]. Appellant achieves this advantage by, for example, employing "a domed, non-abrasive surface" on the first side of the product that fits into the roof of the mouth and holds the product in place while a tongue is rubbed against an abrasive surface on the second side. Claim 1; Spec. ¶ [0028] (explaining anchoring function of the "domed shape" in preferred embodiment); Spec. ¶ [00102] (in another embodiment, domed surface may be oval shaped).

Rejection One

The Examiner cites Lawlor for a confectionary product "suitable for scrubbing the top surface of the tongue within the oral cavity as instantly claimed." Ans. 21 (citing Lawlor ¶ [0066]). Lawlor discloses a confectionary product that has a "slightly gritty" texture that "can be used to reinforce the oral care benefits to [a] consumer," but does not disclose that the "gritty texture" is suitable for scrubbing the surface of a tongue. Lawlor ¶¶ [0033], [0066]. Heisinger explains that the volatile sulfur compounds that cause bad breath become firmly lodged in the folds and grooves of a human tongue and are not easily removed. Heisinger ¶¶ [0002]-[0016]. Lawlor chemically treats oral malodor with a polyphosphate and metal cation. Lawlor, abstract, ¶¶ [0002]-[0003], [0017]. Lawlor includes no means for holding the product in place during a tongue-scrubbing operation. *See id*. On this record, the Examiner fails to prima facie show that Lawlor suggests a product having "an abrasive surface that is suitable for scrubbing the top surface of a tongue." Claim 1.

The Examiner cites Heisinger for a confectionary product having a smooth surface opposite an abrasive surface, where the abrasive surface includes scraper elements that engage the dorsal of the tongue during scrubbing. Ans. 7 (citing Heisinger ¶¶ [0055], [0068], [0072], and Figs. 1, 2, 4, 6, and 7). Appellant argues, and we agree, that Heisinger's confectionary product requires a handle in order to scrub the abrasive surface against the tongue. App. Br. 18-19 (citing Heisinger ¶¶ [0004], [0046], [0050], [0058]-[0059]). Where Heisinger discloses that a handle is necessary in providing an abrasive surface suitable for tongue scrubbing, the evidence supports Appellant's view that a skilled artisan would not have

been led to modify Lawlor's confectionary product to include Heisinger's smooth and abrasive surfaces without also including Heisinger's handle. *Id.*

Some of the claims require "a domed, non-abrasive surface" on the first side of the product that fits into the roof of the mouth and holds the product in place while the tongue is scrubbed across an abrasive surface on the second side. Claims 1, 2, 4-6, 28, 46-49, 56, 57, 61-63, 68, 71, 73, 74, 77-86, and 101; *see* Spec. ¶ [0028]. The Examiner cites Della Posta's disclosure "that the form of the confections is generally circular but other lozenge shapes are considered as well." Ans. at 7 (citing Della Posta 8:55-58). From this the Examiner finds that a skilled artisan would have expected "that a confection with a generally circular shape would be considered to encompass a generally [domed] shaped product." *Id.* Appellant counters that "[j]ust because domed shapes may have a circular aspect to them does not mean that circular shapes have any sort of dome shape to them." Reply Br. 3 n. 2. We agree with Appellant that "nothing in the circular product of Della Posta [] suggests it would have any dome shape to it." *Id*; *see* Della Posta 8:55-58 (describing "generally circular planar profile body shape") and Figures (depicting same). On this record, the Examiner fails to prima facie show that Della Posta discloses a confectionary product having a domed surface.

The Examiner cites Pearce for a product that "is rubbed between the tongue and the roof of the mouth to release flavors." Ans. 7 (citing Pearce, abstract and ¶ [0239]). Pearce discloses an orally-soluble edible snack film that disintegrates quickly when placed in a human mouth. Pearce, abstract. The Examiner reasons that Pearce suggests that a snug-fitting, bowl-shaped product "would not move around" when held in the roof of the mouth during

a tongue-scrubbing operation. Ans. 12, 23-24. We agree with Appellant that Pearce's snack film appears to adhere to the tongue in a manner not relevant to the tongue-scrubbing operation at issue here. App. Br. 16 (citing Pearce ¶ [0239]).

For the above reasons, we reverse the rejection of 1, 2, 4-7, 10, 20, 21, 28, 46-49, 56, 57, 61-63, 68, 71, 73, 74, 77-86, and 101 over Lawlor in view of Della Posta, Heisinger, and Pearce.

Rejection Two

Our reasoning above regarding Rejection One applies with equal force to Rejection Two. For the reasons stated above, we reverse the rejection of claims 3 and 76 over Lawlor in view of Della Posta, Heisinger, and Pearce, and further in view of Lees.

Rejection Three

Claims 7 and 20 stand rejected over Gwen in view of Della Posta and Heisinger. We agree with Appellant that both Gwen and Heisinger disclose a handle as a necessary component of the tongue-scrubbing product. App. Br. 26; Gwen, abstract and Fig. 1; Heisinger ¶¶ [0004], [0046], [0050], [0058]-[0059]. In Gwen, the handle and the confectionary tablet are detachable, leading the Examiner to reason that, "although the confectionary product of Gwen is utilized with a handle, the confectionary product itself does not include a handle." Ans. 13. Gwen accomplishes tongue scrubbing by affixing the confectionary tablet to "a tablet receiving area of the elongate body" of "a tongue cleaner apparatus," in other words, a handle. *See, e.g.*, Gwen 2:41-63. Gwen further discloses that the "circular tablet holder edge" of the handle provides the mechanical tongue cleaning action and the flavored confectionary tablet provides chemical tongue cleaning. Gwen

4:19-35. On this record, we agree with Appellant that the applied art contains no suggestion of a product "suitable for scrubbing the top surface of a tongue" without "a handle." Claim 7, 20; *see* App. Br. 26.

For these reasons, we reverse Rejection Three.

Rejection Four

Our reasoning above regarding Rejection Three applies with equal force to Rejection Four. For the reasons stated above, we reverse the rejection of claim 21 over Gwen in view of Heisinger.

CONCLUSION

For the above reasons, we reverse the rejections of claims 1-7, 10, 20, 21, 28, 46-69, 56, 57, 61-63, 68, 71, 73, 74, 76-86, and 101.

REVERSED

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