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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JAMES NIAL HYNES and DMITRI BORIS PAPKOVSKY

Appeal 2019-000485
Application 14/233,602
Technology Center 1600

Before DONALD E. ADAMS, FRANCISCO C. PRATS, and
ULRIKE W. JENKS, *Administrative Patent Judges*.

JENKS, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant requests rehearing of the decision entered May 28, 2020 (“Decision”), which affirmed Examiner’s rejection under 35 U.S.C. ¶ 103.

We deny the requested relief.

DISCUSSION

Appellant contends that we misapprehended the art and erroneously accepted Examiner’s articulated rationale in arriving at the conclusion that the claims are obvious. *See generally* Req. Reh’g.

Specifically, Appellant contends that none of the art relied upon “teach or suggest detecting the presence of thermoduric microorganisms and *only thermoduric microorganisms* in a product.” Req. Reh’g 2. In the

Decision, we explained that “[t]hermoduric bacteria does not pertain to a particular strain of bacteria but is generally understood as any bacteria that survives the pasteurization process.” Dec. 10. Because thermoduric bacteria can survive pasteurization, any assay that detects live bacteria in a sample after pasteurization would be detecting thermoduric microorganisms. Accordingly, we are not persuaded that we misapprehended or overlooked any limitation.

Appellant contends that we accepted Examiner’s articulated motivation in error. Req. Reh’g 3. Specifically, Appellant contends that neither Pettifer nor Belhumeur motivate the addition of an oxygen probe before sterilizing the sample. *Id.*

We are unpersuaded by Appellant’s contention. Papkovsky teaches that oxygen probes can detect sample sterility but does not discuss the timing for adding the probe. Dec. 10; FF3. There are two opportunities for adding a sterilization probe to a sample, either before or after the sterilization process. *See* Dec. 10 (citing *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007)). Examiner relies on Belhumeur for teaching the addition of a probe before applying the sterilization process. Dec. 10 (citing Ans. 7 (Examiner explains that “Bellhumeur was cited to teach that sterilization (autoclaving) of probes to monitor contamination was known in the art.”)). Examiner relies on Pettipher for teaching detection of bacteria with a fluorescent probe after pasteurization. Dec. 10; FF1. Belhumeur and Pettifer, therefore, support the position that a sterilization probe can be added prior to or after sterilization. Based on the totality of the combined teachings of Papkovsky, Pettifer, and Belhumeur, we find no error with Examiner’s articulated rationale that adding the probe before the sterilization

process prevents the possibility for contamination when testing the product for viable microorganisms after pasteurization. *See* Ans. 7 (“The artisan would be motivated to add the oxygen probe [of Papkovsky] in the sample wells with the sample before pasteurizing and seal[ing] the samples during the testing so as to not contaminate the samples after pasteurizing.”);

Dec. 11.

In sum, Appellant’s arguments do not persuade us that our Decision affirming Examiner’s obviousness rejection of claims 1–4, 6–9, 11, 14, 15, 19 has misapprehended or overlooked any point of fact or law. We therefore decline to modify our original decision entered May 28, 2020.

Outcome of decision on rehearing:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Granted	Denied
1–4, 6–9, 11, 14, 15, 19	103(a)	Papkovsky, Pettipher, Belhumeur, Milk Facts, Kleinerman		1–4, 6–9, 11, 14, 15, 19

Final outcome of appeal after rehearing:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–4, 6–9, 11, 14, 15, 19	103(a)	Papkovsky, Pettipher, Belhumeur, Milk Facts, Kleinerman	1–4, 6–9, 11, 14, 15, 19	

TIME PERIOD FOR RESPONSE

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

REHEARING DENIED