

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN DELIO, JR

Appeal 2006-2782
Application 10/241,570
Technology Center 1700

Decided: September 20, 2006

Before KRATZ, FRANKLIN, and GAUDETTE, *Administrative Patent Judges*.

KRATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims 4 and 6-19, the only claims pending in this application. We have jurisdiction pursuant to 35 U.S.C. § 134.

Appellant's invention involves a feeding device comprising a housing for holding or receiving a feeding package wherein a feeding utensil is combined with the housing in a manner such that the feeding utensil communicates with the interior of the housing so as to allow for the contents

of the feeding package to be transferred to the utensil. Further details of the claimed invention are evident by a review of the appealed claims. Claims 15 and 16 are illustrative and are reproduced below:

15. A feeding package comprising:

a hollow housing adapted to receive a food packet,

said housing having ends and sides,

said housing having a feeding utensil secured to one of said ends,

means communicating between said feeding utensil and an inside of said hollow housing,

said housing having means for acting on a food packet placed in said hollow housing for transferring contents in said food packet through said means communicating between said feeding utensil and an inside of said hollow housing and onto said feeding utensil, and

wherein said means communicating between said feeding utensil and an inside of said hollow housing is a channel, and

wherein said channel has a piercing means at one end for piercing said food packet, and

wherein said piercing means is directly adjacent said one of said ends of said housing and is a part of said feeding utensil.

16. A feeding package comprising:

a hollow housing adapted to receive a food packet,

said housing having ends and sides,

said housing having a feeding utensil secured to one of said ends,

means communicating between said feeding utensil and an inside of said hollow housing,

said housing having means for acting on a food packet placed in said hollow housing for transferring contents in said food packet through said means communicating between said feeding utensil and an inside of said hollow housing and onto said feeding utensil, and

wherein said means for acting on a food packet is an extruder, and

wherein said extruder has an operating member and an extruding member, and

said housing has a slot extending though one side, and

said extruding member is inside said hollow housing, and is connected, through side slot, with said operating member.

The Examiner relies on the following prior art references as evidence in rejecting the appealed claims:

Sharpe	US 1,514,018	Nov. 4, 1924
O'Rourke	US 4,124,316	Nov. 7, 1978
Stussi	US 4,318,935	Mar. 9, 1982
Brogli	US 4,717,046	Jan. 5, 1988
Diaz	US 6,347,727	Feb. 19, 2002

Claims 4, 6-10, 14-16, 18, and 19 are rejected under 35 U.S.C § 103(a) as unpatentable over Diaz in view of Sharp, and O'Rourke. Claim 17 rejected under 35 U.S.C. § 103(a) as unpatentable over Diaz in view of Sharp, O'Rourke, and Strussi. Claims 11-13 are rejected under 35 U.S.C. § 103(a) as unpatentable over Diaz in view of Sharp, O'Rourke, and Brogli.

OPINION

The Examiner bears the initial burden of establishing some reasoning, motivation, or suggestion to combine the references as proposed to achieve

the claimed invention. *See In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). Upon review of the evidence of obviousness relied upon by the Examiner in light of the arguments submitted by Appellant in the Briefs, we determine that the Examiner has not discharged this initial burden. Rather, the Examiner appears to have resorted to speculation or impermissible hindsight instead of establishing a persuasive basis in the references or knowledge in this art that would have led one of ordinary skill in the art to the here claimed subject matter based on the teachings of the applied references. *See Dembiczak, supra*.

Diaz is directed to a specific structure that is disclosed as being useful in feeding infants wherein a small food packet (12, Fig. 1) includes holes (28a and b, Fig. 2) for securing the packet via spikes (44, Fig. 1) to a handle assembly between a spoon connecting end of the handle assembly (14, Fig. 1) and an attachment structure (60, Fig. 1) of a spoon bowl assembly (16, Fig. 1). The spoon bowl assembly of Diaz includes a receiving cavity (62, Fig. 4) that is mated with an opened end of the food packet (see Fig.'s 3 through 5) for allowing food that is inside the packet to be communicated with the receiving cavity. The receiving cavity (62) is located on the opposite side of a spoon bowl assembly from a spoon bowl (66, Fig. 1), which spoon bowl is communicated with the receiving cavity via a passageway (68, Fig. 1). The sides of the food packet near a food packet tear off end opening (38, Fig. 3) are firmly gripped by the spoon bowl assembly. *See* column 5, lines 50-63 of Diaz and the corresponding drawing figures.

In this regard, Diaz is directed to a food dispensing system that allows for a user to feed infants with one hand and without the need for dipping a

spoon into a container for obtaining the food. *See*, e.g., column 1, line 60 through column 2, line 61 of Diaz.

In rejecting claims 4, 6-10, 14-16, 18, and 19 as obvious within the meaning of § 103(a), the Examiner acknowledges that the claimed feeding package differs from Diaz. The Examiner notes, for example, that Diaz does not disclose a food dispenser including a hollow housing, as required by independent claims 15 and 16. The Examiner also notes that Diaz does not disclose a piercing means located at the end of a channel, as required by claim 15 or an operating member of an extruder that is arranged as required by claim 16.

According to the Examiner (Answer, 4 and 5):

It would have been obvious to one of ordinary skill in the art at the time of the invention to have put sides and a top on the bottom of the structure of Diaz in order to create a hollow housing as taught by Sharpe in order to prevent a mess when extruding the contents from the packet in case a seam in the packet breaks during extrusion, the hollow housing would prevent the contents from splattering on the user.

It follows then that it would have been obvious to one of ordinary skill in the art at the time of the invention to have used the operating member/extruder structure as taught by Sharpe with the extruder of Diaz in order to allow easy operation of the extruding member through the hollow housing and to make the operation of the extruder easier by only having to push the extruder, rather than having to roll the extruder. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used the slot in the housing as taught by Sharpe for the structure as disclosed by Diaz in order to be able to view the amount of contents left.

Diaz in view of Sharpe does not disclose a piercing means on the end of the utensil. O'Rourke teaches a dispensing system that has a hollow housing surrounding a content containing packet (see Abstract and Figure 1 and Column 4, lines 15-68 and Column 5, lines 1-11). O'Rourke teaches that a

brush is attached to the packet, the brush having a hollow needle on the end that pierces the packet within the housing, causing the contents to flow to the brush (see Abstract and Figure 1 and Column 4, lines 15-68 and Column 5, lines 1-11). It would have been obvious to one of ordinary skill in the art at the time of the invention to have used the hollow piercing structure of O'Rourke on the utensil end of Diaz in view of Sharpe, in order to more efficiently open the packet without requiring the use of a manual tearing motion which could be hard for people with arthritis. Additionally, the hollow piercing structure of O'Rourke would prevent a mess or spill from occurring when the packet was open, since the packet will only be opened by the diameter of the needle.

Here, the Examiner has not fairly articulated how the proposed modifications of Diaz would have been suggested to, much less effected by, one of ordinary skill in the art based on the combined teachings of Diaz, Sharpe, and O'Rourke. In this regard, Sharpe and O'Rourke are directed to disparate types of dispensing system arrangements. Sharpe discloses a combined dentifrice dispensing device and toothbrush holder. In Sharpe, a tube of dentifrice is placed within a frame. The frame includes sidewalls having slots (21). The ends of a roller carrying shaft/pintle (22) rotate inside the slots. Pawls (26) that are pivoted upon a yoke (27) can be actuated via a handle (28) to engage gears (24) to rotate the roller (23) along rack bars (25) to compress the tube and dispense the dentifrice as shown in the drawing Figures 1 and 2 of Sharpe.

The Examiner has not persuasively explained how the proposed modification of Diaz could or would be carried out by one of ordinary skill in the art so as to result in an operable feeding device that can be used with one hand, as Diaz is concerned with. In this regard, the Examiner's obviousness position regarding this modification appears to be based on

conjecture in that it is not clear how such a modified feeder using the more cumbersome and seemingly heavier and additional extruder arrangement of Sharpe would have been easier to operate with the hand of a person that is holding the feeder. The Examiner asserts that a problem with a mess being created by the device of Diaz serves as a reason why one of ordinary skill in the art would look to Sharpe to modify Diaz by providing a housing. Yet, the Examiner has not fairly explained where the prior art identifies or suggests such a problem is associated with the device of Diaz.

Moreover, the Examiner does not explain in detail how the proposed modification of Diaz would result in subject matter corresponding to the claimed subject matter by separately addressing at least the separate independent claims on appeal. For example, rejected independent claim 16 requires a hollow housing including a slot extending through a side thereof wherein an extrusion member located inside the housing is connected to an operating member by extending through the slot. Yet, the Examiner has not explained how the proposed modification would result in this feature in that the handle (28) of Sharpe is not disclosed as extending through a housing sidewall slot.

In so far as the additionally applied O'Rourke reference is concerned, the Examiner appears to apply this reference primarily in asserting the obviousness of the claimed piercing means as set forth in independent claim 15. In addition to the reasons provided at page 5 of the Answer, the Examiner maintains that "the hollow piercing structure of O'Rourke would provide an alternative opening method [that] would prevent a mess or spill from occurring when the packet was open, since the packet will be opened only by the diameter of the needle" (Answer, 7).

The difficulty we have with the Examiner's obviousness position in regard to this proposed modification is that the Examiner has not reasonably explained how the package assembly structure of Diaz would be modified so as to accommodate the hollow piercing structure of O'Rourke based on the combined teachings of the applied references. In this regard, O'Rourke is directed to a toothbrush with a dentifrice feeding attachment wherein a cartridge unit (11) has a needle/piercing element (25) secured in a central hole of a head thereof. The Examiner simply has not explained how the disparately arranged piercing structure of O'Rourke could have been modified and suggested for use in combination with the sealed plastic film food packet assembly arrangement of Diaz. In Diaz, a thin food packet is grippingly held between a spoon bowl assembly and handle assembly via spikes in a manner that would not appear to accommodate use of a piercing structure, as disclosed by O'Rourke.

For the foregoing reasons, we determine that the Examiner has not established a prima facie case of obviousness based on the reference evidence. Consequently, the Examiner's rejection of claims 4, 6-10, 14-16, 18, and 19 is not sustainable on this record.

The Examiner has not explained how Stussi, in the Examiner's separate rejection of claim 17, or Brogli, in the Examiner's separate rejection of claims 11-13, make up for the above-noted deficiencies in the Examiner's application of Diaz, Sharpe, and O'Rourke. It follows that we will also reverse the Examiner's separate rejections of claim 17 and claims 11-13.

CONCLUSION

We reverse the Examiner's rejection of claims 4, 6-10, 14-16, 18, and 19 under 35 U.S.C. § 103(a) as unpatentable over Diaz in view of Sharp and

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O'Rourke; the rejection of claim 17 under 35 U.S.C. § 103(a) as unpatentable over Diaz in view of Sharp, O'Rourke, and Strussi; and the rejection of claims 11-13 under 35 U.S.C. § 103(a) as unpatentable over Diaz in view of Sharp, O'Rourke, and Brogli.

REVERSED

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