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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/294,414	10/14/2016	Doug Gonterman	271280-502253	8048
186642	7590	05/26/2022	EXAMINER	
Honigman LLP/HYDY			PRONE, JASON D	
650 Trade Centre Way			ART UNIT	
Suite 200			PAPER NUMBER	
Kalamazoo, MI 49002-0402			3724	
			NOTIFICATION DATE	
			DELIVERY MODE	
			05/26/2022	
			ELECTRONIC	

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DOUG GONTERMAN and JESSICA LINEBERRY

Appeal 2022-001343
Application 15/294,414
Technology Center 3700

Before DANIEL S. SONG, MICHELLE R. OSINSKI, and LISA M. GUIJT,
Administrative Patent Judges.

GUIJT, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner’s decision to reject claims 1–5, 7–11, 21–23, and 25–28. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ We refer to Appellant as “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as NumNum, LLC. Appeal Br. 2. Appellant chose not to file a Reply Brief.

CLAIMED SUBJECT MATTER

Appellant's invention relates to "a personal food delivery apparatus." Spec. ¶ 2. Claims 1, 7, and 28 are the independent claims on appeal and are illustrative of the subject matter on appeal. Claims 1, 7, and 28 are reproduced below with the differences in claim scope between claim 1 and claims 7 and 28 emphasized by: (i) underlining language in claims 7 and 28 that does not appear in claim 1; and (ii) striking out language appearing in claim 1 but not in claims 7 and 28.

1. A utensil comprising:
a rounded handle end; and
a food end consisting of an exterior edge and a non-concave surface having interior extending arms,
wherein the utensil is approximately four inches long,
wherein the food end is to enter into a person's mouth, and
wherein the arms in combination with portions of the non-concave surface together define a food retaining edge, wherein the food retaining edge defines a hole.

7. A utensil comprising:
a rounded handle end to be held; and
a food end consisting of an exterior edge and a non-concave surface having interior extending arms,
~~wherein the utensil is approximately four inches long~~,
wherein the food end is to enter into a person's mouth, and
wherein the arms in combination with portions of the non-concave surface together define a food retaining edge, wherein the food retaining edge defines a hole.

28. A utensil comprising:
a rounded handle end; and
a food end consisting of an exterior edge and a non-concave surface comprising six interior extending arms,
wherein the utensil is approximately four inches long and has a longitudinal axis,
wherein the food end is to enter into a person's mouth,

wherein the arms in combination with portions of the [non-]²concave surface together define a food retaining edge, wherein the food retaining edge defines a hole comprising six exterior extending arms, and.

wherein the food end has a maximum width in a direction perpendicular to the longitudinal axis, and wherein a width of the hole is most of the maximum width of the food end.

Appeal Br. 20–22 (Claims App.).

THE REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Donaldson	US Des. 163,028	April 24, 1951
Adolfson	US 4,159,182	June 26, 1979
Morin	US Des. 268, 077	Mar. 1, 1983
Wagner	US 2009/0126204 A1	May 21, 2009

THE REJECTIONS³

The following rejections are before us on appeal:

- I. Claims 1–3, 5, 7–9, 11, 21, 23, and 25–28 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Morin, Wagner, and Donaldson.
- II. Claims 4, 10, and 22 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Morin, Wagner, Donaldson, and Adolfson.

² We understand the recitation of “the concave surface” as a typographical error, and read this limitation as “the non-concave surface,” with antecedent basis provided by the earlier recited “a non-concave surface.”

³ The Examiner’s rejection of claims 26–28 under 35 U.S.C. § 112, second paragraph, as being indefinite, has been withdrawn. Non-Final Act. 2; Ans. 12.

OPINION

Claim Construction

Each of independent claim 1, 7, and 28 recite, in relevant part, a utensil comprising (i) a rounded handle end; and (ii) a food end consisting of an exterior edge and a non-concave⁴ surface having interior extending arms, wherein the arms in combination with portions of the non-concave surface together define a food retaining edge, wherein the food retaining edge defines a hole. Figure 2 from the Specification is reproduced below.

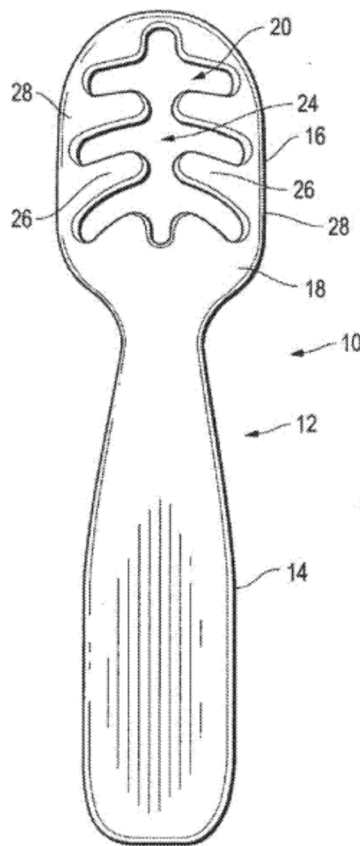


FIG. 2

⁴ Cf. Appeal Br. 19 (Claims App.) (claim 11, which depends from independent claim 7: “wherein the non-concave surface is a flat surface”).

Figure 2 of the Specification, reproduced above, depicts “a front view” of an embodiment of a utensil. Spec. ¶ 17, Fig. 2.

In particular, Figure 2 of the Specification depicts, wherein “the same numbers used in Figure 1 identify the same elements [in Figure 2],” a “flat surface 18,” which “does not include a concave receptacle for holding food as with a common spoon” but, instead, “food end 16 includes a food retaining device” (*id.* ¶¶ 21–22) and, specifically, a “food retaining device 20 . . . in the form of a hole 24” that “passes completely th[r]ough flat surface 18 of the food end 16” and “creates arms 26 that extend from the interior^[5] edge 28 of food end 16” (*id.* ¶ 22).

It is well settled that the transitional phrase “consisting of” excludes any element, step, or ingredient not specified in the claim. *In re Gray*, 53 F.2d 520 (CCPA 1931). In other words, the use of the transitional phrase “consisting of” limits the claim only to the elements recited. Here, the transitional phrase “consisting of” limits the structure of the claimed “food end” by excluding any structure other than a non-concave surface having interior extending arms that in combination with portions of the non-concave surface together define a food retaining edge, wherein the food retaining edge defines a hole. Thus, we construe the claimed non-concave surface as defining the entirety of the outside part of the utensil’s food end, which surface must also have an exterior edge (i.e., an outer limit of the

⁵ As depicted in Figure 2 of the Specification, the lead line for reference numeral 28 appears to incorrectly identify an *exterior* edge of utensil 12, which would correspond to the claimed “exterior edge”; notably, the claim term “exterior edge” is not used in the Specification, except as recited in the claims as originally filed (i.e., claim 1, as originally filed: “wherein the food end comprises an exterior edge”).

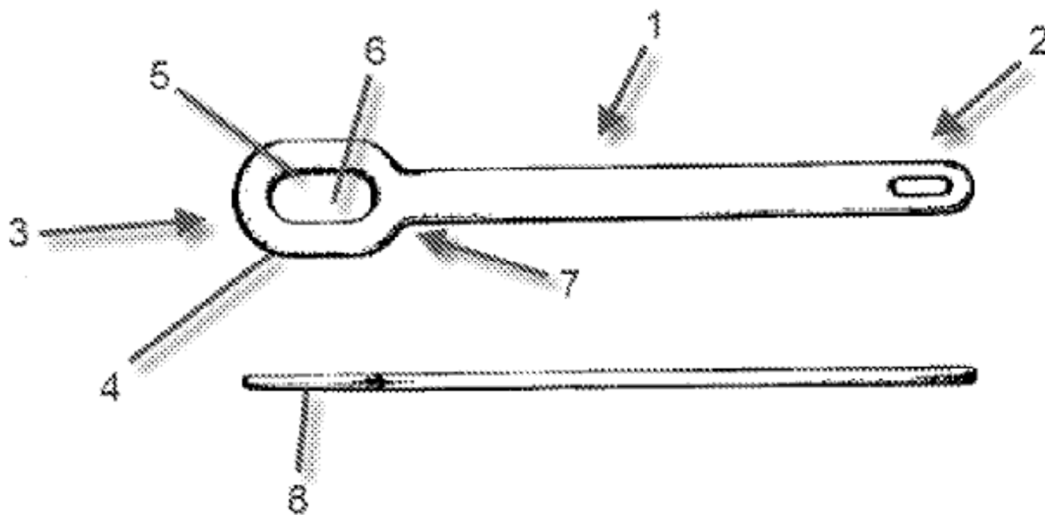
surface). We also construe the claimed “interior extending arms,” in view of the Specification, to be slender, cantilevered elements protruding into the interior (or away from the exterior edge) of the food end to define a food retaining edge that defines a hole, which, being defined by the arms, passes completely through the food end from one portion of the non-concave surface to an opposite portion, such that the sides of the hole form the food retaining edge. This claim interpretation is consistent with the Specification: “in another aspect, . . . at least one depression that creates a hole extending th[r]ough the food end non-curved, flat surface from side to side,” wherein “the hole is conformed to create arms in the food end, where the arms extend into the hole.” Spec. ¶ 12; *see also id.* ¶¶ 14, 21, 22.

Notably, the Specification explains that “the food retaining device” (i.e., the food retaining *edge* with respect to the instant claims) “holds the food in place as it is transferred to the user’s mouth” and “eliminates the need to maintain the utensil in a proper plane so as to avoid the food slipping off or spilling out of the utensil.” Spec. ¶ 5; *see also id.* ¶ 7 (explaining that the term “food retaining device” “describes a device to which food [(including solid and semi-solid foods such as pureed foods, spaghetti, mashed potatoes, and the like, for example only)] attaches” and wherein “[t]he attachment is accomplished by the provision of a retaining device onto or into which the food connects”); *id.* ¶ 22 (“arms 26 which create a shaped hole 24, or vice versa, provide[] a surprisingly effective food entrapment system for a wide variety of foods” and that “[e]ven such foods as peas, rice and beans are easily transported by infants as they are trapped in the hole 24 by the arms 26”); *id.* ¶ 25 (“[f]ood retaining device 20 enables utensil 12 to

pick up the food . . . without [the infant] having to hold utensil 12 in any particular attitude”).

The Examiner’s Initial Obviousness Determination

Regarding independent claim 1, the Examiner finds structures corresponding to the claimed utensil as indicated in the Examiner’s annotated Figures of Morin reproduced below. Non-Final Act. 4.



The above figures show the Examiner’s annotated Figures of Morin using reference numerals to identify: a rounded handle end (2), a food end (3) with an exterior edge (4), a non-concave surface (8), and a food retaining edge (5) that defines a hole (6). *Id.* (citing Morin, Fig. 2).

The Examiner finds that the rounded handled end (2), as identified and depicted above, is “capable of being held or gripped while the [food end (3)] is to be introduced into food to stir” and that “[the] removal of the stirrer from the food would result in a situation where food is capable of being retained on the edge . . . while [the] head . . . is placed into the user’s mouth to clean off the food.” Ans. 13.

The Examiner also finds that Morin (as modified by Wagner to be 4 inches long) fails to disclose that the non-concave surface has interior

extending arms that, in combination with portions of the non-concave surface, define the food retaining edge that defines the hole. Non-Final Act. 5–6. The Examiner relies on Donaldson for teaching:

it is old and well known in the art of stirring utensils to incorporate a surface with interior extending arms (a1, a2, a3, a4), the arms in combination with portions of the surface together define the food retaining edge (re), the edge defines the hole (h), and the retaining edge defines a hole having six exterior extending arms (e1, e2, e3, e4, e5, e6).

Id. at 5. The Examiner’s annotated Figure 1 of Donaldson is reproduced below.

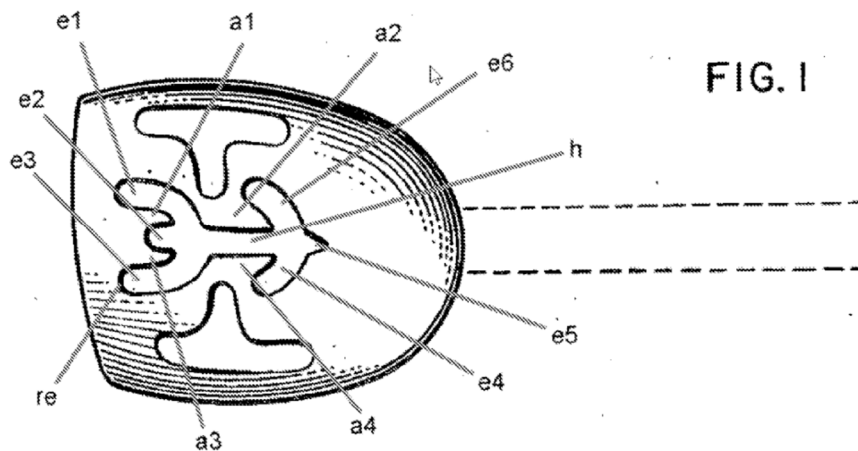


Figure 1 of Donaldson, reproduced above, depicts a concave end of utensil with arms that in combination with the concave surface define an edge defining a hole, which are identified by the Examiner’s annotations “e1”–“e6”, “a1”–“a-4”, and “re”. Non-Final Act. 6.

The Examiner further finds that the adjective “food” and the limitation “wherein the food end is to enter into a person’s mouth,” as recited in claim 1, indicate an intended use for the utensil and do not import any structural limitation into the claims. Ans. 12–13. The Examiner also finds that the

structure resulting from the Examiner's proposed modification of Morin, in view of Donaldson, is the same as the structure that is claimed and is also "capable of holding food." *Id.*

The Examiner reasons that it would have been obvious

to have provided Morin with the hole shape, as taught by Donaldson, because the substitution of one known element for another would have yielded predictable results and all claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective function and the combination would have yielded predictable results.

Non-Final Act. 5. The Examiner explains that because Morin and Donaldson disclose "ornamental designs" (as design patents) "it would have been obvious to have replaced one aspect (hole shape) with another aspect (alternate hole shape)." Ans. 14.

First, Appellant argues that "the skilled artisan, faced with the dilemma of making a new and improved infant's utensil, would not have looked to the disclosures and teachings of Morin and Donaldson in the first place." Appeal Br. 6. In support, Appellant submits that

Morin is directed to "a stirrer," which would be understood by one of ordinary skill to be meant for mixing a liquid. Morin at Title. Eating with a stirrer, which has nothing to grip, balance, or otherwise maintain food, would be completely nonsensical, particularly for a child who is learning to self-feed. Donaldson is directed to "a stirring and beating spoon." Donaldson at Title. Such spoons are readily known to be useful in preparing food, rather than for eating. Neither of these references are directed to eating utensils. Further, neither of these references is directed to children's eating utensils, which is the primary concern of the instant invention.

Id.

To the extent Appellant is arguing that Morin and Donaldson are not analogous to the claimed invention, we disagree. A reference qualifies as prior art for an obviousness determination when it is analogous to the claimed invention. *Innovation Toys, LLC. v. MGA Ent., Inc.*, 637 F.3d 1314, 1321 (Fed. Cir. 2011). “Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

Here, we decline to adopt Appellant’s narrow definition of the field of endeavor for Appellant’s claimed invention: “children’s eating utensils” or even “eating utensils.” Rather, we find that the field of endeavor of Appellant’s invention is more broadly a utensil, or a useful tool or implement, for handling food. *See, e.g.*, Spec. ¶ 7 (“‘utensil’ describes a device for use in the consumption of foods, such as a spoon, knife and fork or a combination thereof or any other utensil device now known or hereafter developed.”); *id.* ¶ 20 (“utensil 12 may be in the form of a fork, a knife or any other common form as deemed useful so long as they include the required elements of the invention”). We also find that Morin, titled, “Stirrer or Similar Article” is in the same field of endeavor (i.e., a utensil for handling food), in that Morin discloses a stirrer, or even more broadly, a similar article to a stirrer, which is known for handling (or stirring) food. We further find that Donaldson, titled, “Stirring and Beating Spoon” is in the same field of endeavor (i.e., a utensil for handling food), in that Donaldson

discloses a spoon, which is a conventional utensil for handling food. Thus, Morin and Donaldson are properly relied on by the Examiner as analogous art.

Second, Appellant argues that the Examiner's motivation to modify Morin, in view of Donaldson, "must take into account self-feeding," which is the purpose of Appellant's claimed invention, and further, that neither Morin nor Donaldson suggest modifying Morin to have the hole shape disclosed in Donaldson. Appeal Br. 6.

We are not persuaded by Appellant's argument, however, because "neither the particular motivation nor the avowed purpose of [Appellant] controls" in an obviousness analysis. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007). In other words, the Examiner does not need to rely on the problem addressed by Appellant to articulate a reason for modifying Morin, in view of Donaldson, as long as the Examiner's reasoning is supported by rational underpinning. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (requiring an obviousness conclusion to be based on explicit articulated reasoning with rational underpinning) cited with approval in *KSR*, 550 U.S. at 418. Nor do the references have to suggest the Examiner's proposed modification, as a teaching, suggestion, or motivation from the references in support of the motivation is not required. *See KSR*, 550 U.S. at 415. Here, the Examiner relies on the reasoning that where "a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result." *See id.* at 416. Appellant's argument fails to apprise us of error in the reasoning relied on by the Examiner.

Third, Appellant argues that the Examiner's proposed modification of Morin, in view of Donaldson, does not result in the claimed *eating* utensil. Appeal Br. 7. We agree, however, with the Examiner's claim construction, wherein the claim limitation "the food end is to enter into a person's mouth" is a statement of intended use that is not entitled to patentable weight. A statement of intended use in an apparatus claim cannot distinguish over a prior art apparatus that discloses all the recited structural limitations and is capable of performing the recited function. *See In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). In other words, all that is required by the Examiner's proposed modification is that the resulting utensil meets the structural limitations of claim 1. The utensil resulting from the Examiner's modification of Morin, in view of Donaldson, need not be used to enter into a person's mouth, but may be used to stir, mix, move, or otherwise handle food.

Fourth, Appellant submits that there are many configurations of holes in the "food end" of a utensil, including

slotted spoons . . . designed to decrease the "drag," allowing liquid to flow through while also helping to stir and move larger, more solid pieces. Some utensils have multiple, smaller holes in the "food end" that can be useful for lifting things out of a pot of liquid without requiring the liquid be drained out first. Alternatively, some utensils have a single, large hole to allow you to stir or scrape with the edges of the utensil, while leaving the contents of the bowl less disturbed (*i.e.*, because they can simply pass through the hole).

Appeal Br. 7. Appellant concludes that "[b]ecause the size, shape, and overall configuration of the utensil is directly related to its intended use, it would not have been obvious to replace the single round hole of Morin with

just any shaped hole, let alone a shaped hole defined by an edge having interior extending arms,” as claimed. *Id.*

Appellant’s argument, however, does not apprise us of error in the Examiner’s reasoning, which relies on the substitution of one known hole shape, as disclosed in Morin, for another, as disclosed in Donaldson, regardless of the use for the hole, as the hole shapes are both known. Further, Appellant’s argument does not address the Examiner’s substitution of one known hole shape for another known ornamental or decorative shaped hole, as disclosed in Donaldson, in that a person of ordinary skill in the art would have found it obvious to substitute an oval shaped of the hole with an ornamentally shaped hole, such as the hole with arms, as disclosed in Donaldson’s design patent.

Fifth, Appellant argues that “the skilled artisan would not have been motivated to replace the round hole of Morin with a shaped hole, particularly one that would increase the perimeter of the hole[’]s edge, because doing so would render the utensil unsatisfactory for its intended purpose.” Appeal Br. 7. In support, Appellant submits that “[d]ecreasing the size of the hole would limit the ability of the contents to flow thru” and “increase the drag, making the utensil less useful for stirring broths and more so for stirring liquids that contain larger solids” and “would also inhibit contents from flowing through the hole and add to the drag.” *Id.*

We are not persuaded by this argument, which is speculative and depends upon the foods (including semi-solid foods) that are stirred or handled by Morin’s stirrer, as modified by Donaldson. *Invitrogen Corp. v. Clontech Labs, Inc.*, 429 F.3d 1052, 1068 (Fed. Cir. 2005) (unsubstantiated attorney argument is no substitute for competent evidence). Moreover, other

than the four inch length of Morin's stirrer, as modified by Wagner, the teaching of Donaldson does not limit the size of the hole and a person of ordinary skill in the art may size the hole as desired. *See KSR*, 550 U.S. at 421 (2007) ("A person of ordinary skill is also a person of ordinary creativity, not an automaton").

Sixth, Appellant argues that the Examiner improperly relies on hindsight. Appeal Br. 9–10. However, Appellant's argument does not address the Examiner's reliance on Donaldson for disclosing arms as claimed, which the Examiner uses as evidence to show that the claimed hole shape is known in the art of utensils, and which forms the basis of the Examiner's rationale for substituting Morin's hole shape for Donaldson's. In other words, Appellant does not demonstrate how the Examiner's reasoning is merely gleaned from Appellant's Specification.

Seventh, Appellant argues that "one of ordinary skill would not have had a reasonable expectation of success in replacing the round hole of Morin with a shaped hole defined by an edge having interior extending arms, as instantly claimed, based upon the cited references." Appeal Br. 10. However, Appellant limits this expectation to a success related "to facilitat[ing] self-feeding," which is not the motivation relied on by the Examiner. *Id.* In other words, the Examiner relies on a simple substitution of one known hole shape for another, to result, with a reasonable expectation of success, in a utensil for stirring a food (or liquid), or further, to result, with a reasonable expectation of success, in a stirrer having a decorative shaped hole. Thus, Appellant's argument is not persuasive.

Appellant chose not to present arguments for the patentability of claims 2–5, 7–11, 21–23, and 25–28 apart from the arguments presented for

the patentability of claim 1 above. Appeal Br. 4–11. Thus, we are not persuaded of error in the Examiner’s initial obviousness determination, in view of the prior art.

Appellant’s Evidence of Nonobviousness: Commercial Success

Appellant presents evidence of commercial success by submitting a declaration⁶ by inventor, Douglas Gonterman (referred to herein as “the Declarant”), dated May 22, 2020, (referred to herein as “the Declaration” or “Dec.”). The Declarant states that Douglas Gonterman is “the President, Chief Executive Office, and co-owner of NumNum LLC.” Dec. ¶ 1.

The ultimate determination of whether a claimed invention would have been obvious or non-obvious is a legal conclusion, which is made based on considering and weighing all of the facts and evidence of record. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). Any initial obviousness determination is reconsidered anew in view of the proffered evidence of nonobviousness. *See In re Eli Lilly & Co.*, 902 F.2d 943, 945 (Fed. Cir. 1990); *In re Rinehart*, 531 F.2d 1048, 1052 (CCPA 1976); *Ex Parte Quist*, 95 USPQ2d 1140, 1145 (BPAI 2010). Evidence of commercial success, or other secondary considerations, is only significant if there is a nexus between the claimed invention and the commercial success. *See In re GPAC, Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995); *see also Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019) (“to accord substantial weight to secondary considerations in an obviousness analysis, the evidence of secondary considerations must have a nexus to the claims, *i.e.*, there must

⁶ A second, earlier declaration by Mr. Gonterman, which is dated July 26, 2016, is in the record before us, however, we refer solely to the evidence provided in the declaration dated May 22, 2020.

be a legally and factually sufficient connection between the evidence and the patented invention.” (internal quotation marks omitted)). The proponent bears the burden of showing that a nexus exists. *GPAC*, 57 F.3d at 1580. One way to prove nexus is by showing that the presented evidence of secondary considerations is “a direct result of the unique characteristics of the claimed invention.” *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996).

The Examiner determines that Appellant has failed to establish the required nexus between the claimed invention and Appellant’s evidence of commercial success. Non-Final Act. 8; Ans. 16. In particular, the Examiner finds that the customer comments submitted by Appellant fail to establish the requisite nexus, for example, because “the [claimed] arms are never specifically mentioned in any of the provided comments” and also that Appellant’s sales numbers and growth in sales over time “do not show . . . evidence as to market share.” Ans. 16–17 (emphasis omitted).

First, we consider whether Appellant has established a legally and factually sufficient connection (or nexus) between the claimed invention, as recited in independent claims 1, 7, and 28, and Appellant’s evidence of commercial success.

As discussed above, the claims require a rounded handle end, which the Specification discloses functions to allow an infant to grasp the utensil without regard to whether a non-concave surface portion of the utensil is upwardly or downwardly facing, and without regard to balancing the food within a concave surface, and also a food end consisting of a non-concave surface, which is depicted in Figure 2 as similar to a flat spatula instead of a conventional concave spoon. As also discussed, the food end functions to hold or retain food (i.e., solid or semi-solid food) without slipping or spilling

off of the utensil, because of interior extending arms that, in combination with portions of the non-concave surface, together define a food retaining edge that further defines a hole.

The Declarant demonstrates how the NumNum products embody the claim limitations by providing a comparison between a NumNum product and Figure 2 of the Specification, as reproduced below.

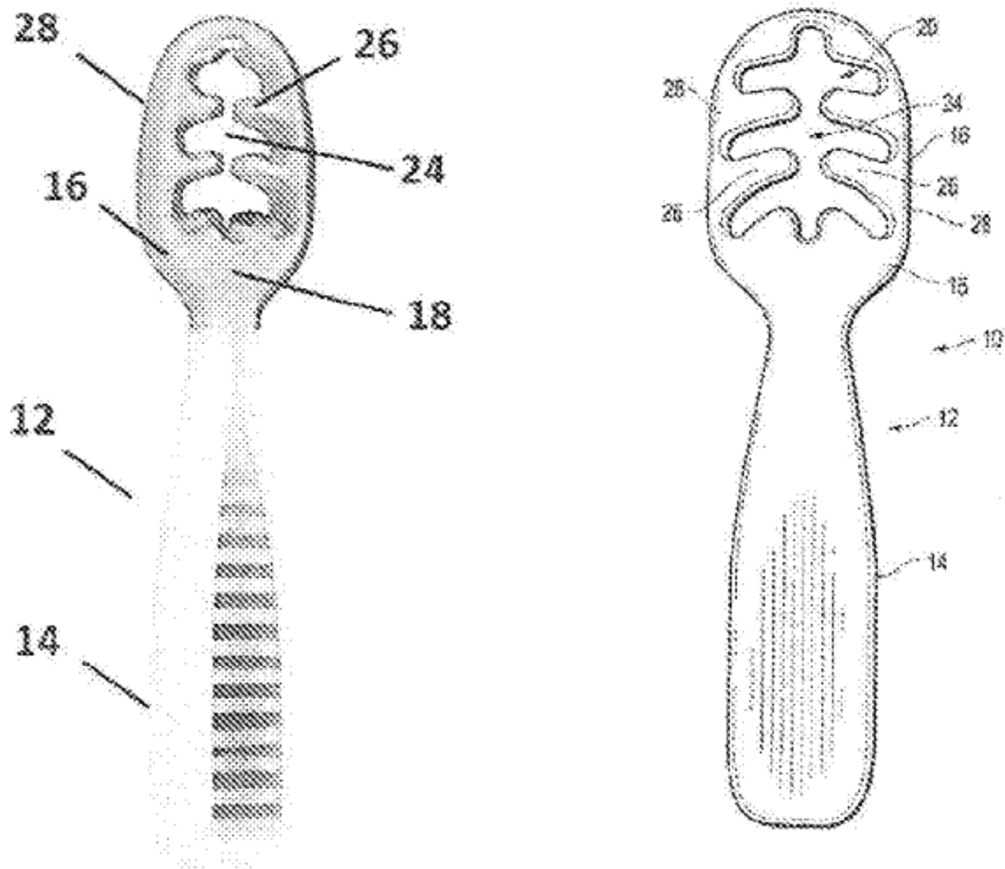


FIG. 2

The above reproduced figures show the NumNum product next to Figure 2 of the Specification. Dec. ¶ 4.

In the above regard, the Declarant opines that “[b]ased upon my understanding of the pending claims . . . and my familiarity with the

NumNum products, it is my opinion that these products are essentially the claimed invention”. Dec. ¶ 5. Notably, the Declarant submits that NumNum LLC “sells primarily one product,” which we understand to be the product illustrated above. Dec. ¶ 7. Thus, we accept, as represented by the Declarant, that the NumNum products referred to in the Declaration have a rounded handle and a food end consisting of an exterior edge and a non-concave surface having interior extending arms that in combination with portions of the non-concave surface together define a food retaining edge that defines a hole, as required by independent claims 1, 7, and 28. In view of this evidence, we agree with the Declarant that the NumNum product depicted above generally corresponds to Figure 2 of the Specification, but for apparent gripping elements on the rounded handle end. In other words, we agree with Appellant that the NumNum product represented above embodies the claimed invention.

Further, we find particularly persuasive the Declarant’s statement that “the products contain no additional unclaimed elements that contribute to the commercial success of the products” and find that such a statement is supported by Appellant’s comparison above. *Id.* ¶ 5. As such, the sales evidence discussed below are attributable to the claimed elements, and we find proper the Declarant’s statement that “[b]ased on my understanding of the pending claims . . . and my familiarity with the NumNum Products, it is my opinion that [the] commercial success is due to the recited features of the claimed invention.” *Id.* ¶ 10.

We also credit the Declarant’s statements that (i) these NumNum products are priced “at nearly double the price of most typical early utensils” (Dec. ¶ 16); (ii) “advertising spending is not a factor influencing the

customer preference” (*id.* ¶ 17); and (iii) “[the] size and cost of marketing staff and sales force is not a factor influencing the customer preference for NumNum products,” as “the company . . . is still only a three-person operation” and “do[es] not have a sales team on staff nor . . . contract[s] any sales associates” (*id.* ¶ 18), as additional evidence that the claimed features are driving the commercial success. Further, the Declarant submits anecdotal evidence from customers purchasing NumNum products and praising the utensil for functioning according to the claimed structures (i.e., the ability of semi-liquid food (i.e., yogurt) to be retained on the utensil). *See* Dec. ¶¶ 11–13.

Accordingly, we agree with Appellant that the Examiner erred in determining that Appellant failed to establish the required nexus between the claimed invention and Appellant’s evidence of commercial success (i.e., sales of the NumNum product represented above); rather, in our assessment and based on the evidence above, we find that Appellant has provided sufficient factual and legal support that Appellant’s evidence of commercial success relative to the NumNum products is attributable to the claimed features.

Second, we consider whether Appellant’s evidence of commercial success demonstrates that the NumNum products (i.e., the NumNum product depicted above) have indeed been commercially successful by showing significant sales in a relevant market. The Declarant states that “sales growth, year-ove[r]-year” demonstrates commercial success of the NumNum products,” which “were first sold in 2013 and have produced lifetime sales of over \$2 million.” Dec. ¶ 6. The Declarant provides the following sales summary:

Year	Sales per Individual Year
2013	\$37,000.00
2014	\$79,000.00

Year	Sales per Individual Year
2015	\$210,000.00
2016	\$310,000.00
2017	\$315,000.00
2018	\$385,000.00
2019	\$405,000.00
2020 (To Date)	\$485,000.00
2020 (Projected)	\$1,200,000.00

The tables depicted above show dollar sales figures for 2013 to 2019, for 2020 (to date), and 2020 (projected). Declaration ¶ 6.

The Declarant also submits a bar graph, reproduced below, as evidencing “unprecedented growth in sales.” Declaration ¶ 7.



The above reproduced bar graph illustrates the dollar sales figures for 2013 to 2019, for 2020 (to date), and 2020 (projected), showing the sales growth. Declaration ¶ 7.

The Declarant further explains that “the sales detailed above were restricted by [NumNum LLC’s] inventory,” wherein “[h]ad inventory been unlimited, it is expected that the sales would have been even higher” (*id.* ¶ 8) and also notes that “the sales detailed above were achieved *in spite of* decreasing birth rates (i.e., a shrinking market)” (*id.* ¶ 9).

We find the above discussed sales evidence persuasive in demonstrating significant sales, as well as sales growth. We are persuaded by Appellant’s argument that the Examiner erred by discounting Appellant’s evidence of commercial success because of a lack of discussion regarding market share. *See Tec Air, Inc. v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 1360–61 (Fed. Cir. 1999) (“Although sales figures coupled with market data provide stronger evidence of commercial success, sales figures alone are also evidence of commercial success.”). Here, we find that the evidence of actual sales numbers and sales growth over time (i.e., showing growth in Appellant’s share of the infant feeding utensil market) sufficiently

demonstrates that the NumNum products embodying the invention have been commercially successful.

In sum, on the record before us, we are persuaded by Appellant's argument that the evidence as a whole, taking into account the evidence of secondary considerations, outweighs the Examiner's evidence of obviousness. Accordingly, we reverse the Examiner's decision to reject claims 1–3, 5, 7–9, 11, 21, 23, and 25–28 under 35 U.S.C. § 103(a) as unpatentable over Morin, Wagner, and Donaldson, and further, in view of Adolfson for claims 4, 10, and 22.

CONCLUSION

The Examiner's rejections of claims 1–5, 7–11, 21–23, and 25–28 are not sustained.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–3, 5, 7–9, 11, 21, 23, 25–28	103(a)	Morin, Wagner, Donaldson		1–3, 5, 7–9, 11, 21, 23, 25–28
4, 10, 22	103(a)	Morin, Wagner, Donaldson, Adolfson		4, 10, 22
Overall Outcome				1–5, 7–11, 21–23, 25–28

REVERSED