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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte VINCENT RINALDI, JIA KHIUN WEE,
MARINA BRASLAVSKAYA, ZEINAB ALI, and
VICTOIRE AUBRY

Appeal 2018-005487
Application 13/152,835
Technology Center 1700

Before MONTÉ T. SQUIRE, MERRELL C. CASHION, JR., and
JANE E. INGLESE, *Administrative Patent Judges*.

SQUIRE, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Appellant² appeals under 35 U.S.C. § 134(a) from the Examiner’s final decision rejecting claims 3, 14, 15, 18–20, and 24–33.³ We have jurisdiction under 35 U.S.C. § 6(b).

¹ In this Decision, we refer to the Specification filed June 3, 2011 (“Spec.”); Final Office Action dated June 26, 2017 (“Final Act.”); Advisory Action dated Sept. 13, 2017 (“Advisory Act.”); Appeal Brief filed Nov. 27, 2017 (“Appeal Br.”); Examiner’s Answer dated Feb. 21, 2018 (“Ans.”); and Reply Brief filed Apr. 20, 2018 (“Reply Br.”).

² We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Stokely-Van Camp, Inc. as the real party in interest. Appeal Br. 2.

³ Claims 1, 2, 4–13, 16, 17, and 21–23 are cancelled. Appeal Br. 2.

We AFFIRM.

CLAIMED SUBJECT MATTER

The claimed subject matter relates to electrolyte blends and beverage compositions comprising the electrolyte blends, and, in particular, to rehydration products such as powders and beverages, for example, sports drinks. Spec. ¶ 2; Abstract. According to Appellant's Specification, the rehydration products are said to have improved taste due to reduced saltiness as compared to typical rehydration products. Spec. ¶ 2.

Claim 14 illustrates the claimed subject matter on appeal and is reproduced below from the Claims Appendix to the Appeal Brief:

14. A rehydration beverage comprising:

water;

at least one sweetener present in an amount between 0 wt. % and 10 wt. %;

at least one acid present in an amount between 0.1 wt. % and 1.0 wt. %; and

electrolytes;

wherein, excepting the at least one sweetener and the at least one acid, *the rehydration beverage contains only the electrolytes consisting of sodium chloride, sodium lactate, and monopotassium phosphate;*

wherein the electrolyte blend provides 50 to 250 mg sodium per serving, 20 to 350 mg potassium per serving, and 10 to 250 mg chloride per serving, wherein one serving is 240 mL of the rehydration beverage; and

wherein the rehydration beverage exhibits a salty taste that is lower than a salty taste of a reference beverage, wherein the reference beverage is the same as the rehydration beverage except that an electrolyte blend of the reference beverage consists of sodium chloride, sodium citrate, and potassium

phosphate in amounts that provide the same milligrams per serving of sodium, potassium and chloride as the rehydration beverage.

Appeal Br. 33 (key disputed claim language italicized and bolded).

REFERENCES

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

Name	Reference	Date
Gillota	US 2003/0143311 A1	July 31, 2003
Takaichi et al. (“Takaichi”)	EP 0470259 A1	Feb. 12, 1992
Murray et al. (“Murray”)	WO 2005/046360 A2	May 26, 2005
Rod et al. (“Rod”)	RU2375930 (C2)	Dec. 20, 2009

REJECTIONS

On appeal, the Examiner maintains (Ans. 2) the following rejections:

1. Claims 14, 15, 18, and 24–33 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Takaichi (“Rejection 1”).

Ans. 2.

2. Claim 26 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Takaichi, further as evidenced by Rod⁴ (“Rejection 2”).

Id. at 7.

3. Claim 3 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Takaichi in view of Gillota (“Rejection 3”). *Id.* at 9.

⁴ The Examiner refers and cites to the machine translation of the Rod reference dated December 19, 2013 provided in the record.

4. Claims 19 and 20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Takaichi, further in view of Gillota (“Rejection 4”). *Id.* at 11.

5. Claims 18–20, 24, and 28 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Murray (“Rejection 5”). *Id.* at 14.

OPINION

Having considered the respective positions advanced by the Examiner and Appellant in light of this appeal record, we affirm the Examiner’s rejections based on the fact-finding and reasoning set forth in the Answer, Advisory Action, and Final Office Action, which we adopt as our own. We add the following primarily for emphasis.

Rejection 1

The Examiner rejects claims 14, 15, 18, and 24–33 under § 103(a) as obvious over Takaichi (Ans. 2–7), which we refer to as Rejection 1. In response to the Examiner’s rejection, Appellant presents separate arguments for the patentability of the claims based on different claim groupings (Appeal Br. 7), which we address in turn below.

Claims 14, 15, and 18

Appellant presents argument for the patentability of claims 14 and 18 as a group but does not present separate argument for the patentability of claim 15. Appeal Br. 12, 19. We select claim 14 as representative of this group and claims 15 and 18 stand or fall with claim 14. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner determines that the subject matter of claim 14 would have been obvious to one skilled in the art from Takaichi’s teachings.

Ans. 2–7. On the record before us, we find a preponderance of the evidence and sound technical reasoning support the Examiner’s analysis and determination that Takaichi suggests a beverage satisfying all of the limitations of claim 14, and conclusion the reference would have rendered the claim obvious. Takaichi, Abstract, 2:1–10, 2:8–19, 2:30–38, 2:51–3:8, 3:9–13, 3:21–22, 3:29–30, 3:43–47, 3:43–53, 3:53–54, 4:1–6, 5 (Table 1).

Appellant argues the Examiner’s rejection of claim 14 should be reversed because Takaichi does not teach “a single embodiment,” which includes all of the limitations of the claim. Appeal Br. 13. In particular, Appellant contends

no specific embodiment is described [in Takaichi] that teaches or suggests the claimed, limited combination of electrolytes

Id. at 13.

Appellant also contends the passages of Takaichi relied upon in the Examiner’s rejection “only provide lists of components without any indication that a specific combination of electrolytes can be used” and no example teaches a rehydration beverage containing “only the electrolytes consisting of: sodium chloride, sodium lactate, and monopotassium phosphate,” as claimed. *Id.* at 15. *See also id.* at 15 (arguing “no example appears to teach monopotassium phosphate”).

Appellant’s arguments in this regard are misplaced and not persuasive of reversible error in the Examiner’s rejection because Takaichi’s teachings are not limited to the disclosures in its examples or preferred embodiments. *See In re Mills*, 470 F.2d 649, 651 (CCPA 1972) (“[A] reference is not limited to the disclosure of specific working examples.”); *see also In re Susi*, 440 F.2d 442, 445-46 (CCPA 1971) (explaining that disclosure of particular

preferred embodiments does not teach away from a prior art reference's broader disclosure).

As the Examiner finds (Ans. 2–4, 15–17), Takaichi teaches a beverage composition comprising each of the components recited in the claim, including sodium chloride, sodium lactate, and monopotassium phosphate, and combinations thereof. Takaichi, Abstract, 2:51–3:8, 3:21–22, 3:29–30, 3:43–53. Although Takaichi describes specific examples that may not include all of the claimed components in a single embodiment, such disclosure is exemplary or merely preferred embodiments and, without more, does not negate or take away from Takaichi's broad disclosure regarding the use of the claimed components in combination for beverage compositions, and that such use was known in the prior art. *See In re Preda*, 401 F.2d 825, 826 (CCPA 1968) (explaining that a prior art reference's disclosure must be considered for all that it teaches, including “the inferences which one skilled in the art would reasonably be expected to draw therefrom”). Likewise, the fact that Takaichi discloses each of the claimed components in a list and combinations thereof, without more, does not render any particular formulation less obvious. *Merck & Co., Inc. v. Biocraft Labs, Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989).

Appellant next argues the Examiner's rejection should be reversed because Takaichi fails to teach or suggest the claimed limited saltiness. Appeal Br. 15–16. In particular, Appellant contends Takaichi does not teach the “wherein the rehydration beverage exhibits a salty taste that is lower than a salty taste of a reference beverage” recitation of the claim. *Id.* at 15–16.

We do not find Appellant's argument persuasive based on the Examiner's fact-finding and reasoning provided at pages 3–4 and 17–18 of

the Answer. As the Examiner finds (Ans. Ans. 2–4, 15–17) and as previously discussed above, Takaichi suggests a beverage comprising all of the same components recited in the claim, including each of the claimed electrolytes and combinations thereof. Takaichi, Abstract, 2:51–3:8, 3:21–22, 3:29–30, 3:43–53; *see also* Spec. ¶ 16 (attributing the “low salty taste” of the claimed beverage to composition the electrolytes). As the Examiner further finds (Ans. 18), Takaichi teaches that, like the claimed beverage, the beverage it discloses has a good flavor and leaves no bad taste. Takaichi 2:30–38 (describing the composition as “leaving no bad taste due to the inorganic electrolyte when taken and having a good flavor” and “being capable of retaining the good taste over a prolonged period of time without deteriorating the taste stability”).

As the Examiner also finds and explains (Ans. 17), because Takaichi suggests a beverage comprising the same components recited in the claim, including the claimed electrolytes, it follows that one of ordinary skill in the art would have reasonably expected the prior art beverage of Takaichi to have exhibited the same lower salty taste as the claimed product. Thus, the burden shifted to Appellant to show that the beverage compositions of Takaichi do not inherently possess the recited “salty taste” of the claimed beverage. *See In re Spada*, 911 F.2d 705, 708-09 (Fed. Cir. 1990) (“[W]hen the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.”); *see also In re Best*, 562 F.2d 1252, 1255 (CCPA 1977) (“Where, as here, the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes, the PTO can require an applicant to prove that the prior art

products do not necessarily or inherently possess the characteristics of his claimed product.”).

Appellant, however, has not carried that burden. Appellant’s assertions that “the cited reference fails to teach or suggest the claimed limited saltiness” (Appeal Br. 15) and that there is no “evidence that the cited reference has any interest in reducing a salty flavor” (*id.* at 16) are conclusory and, without more, insufficient to rebut or otherwise establish reversible error in the Examiner’s rejection. Attorney argument is not evidence. *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984).

Lastly, Appellant argues that the claimed invention yields unexpected results. Appeal Br. 16–19; Reply Br. 3–5. In particular, relying principally on the experimental results provided at Tables 6 and 8 and Example 16 of the originally-filed Specification (Spec. 25, 27), Appellant contends that

when the combination of components is used, the saltiness of the product is lower than expected relative to other potential combinations of electrolytes achieving the same amount of Na⁺, K⁺, and Cl⁻.

Appeal Br. 16.

This argument is not persuasive. In attempting to overcome a *prima facie* case of obviousness by showing unexpected results, the burden rests with Appellant to establish (1) that the alleged unexpected results presented as associated with the claimed invention are, in fact, unexpected, (2) that the comparisons are to the disclosure of the closest prior art, and (3) that the supplied evidentiary showing is commensurate in scope with the claimed subject matter. *See In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972).

Based on the fact-finding and for the well-stated reasons provided by the Examiner at pages 18–23 of the Answer, we concur with the Examiner that Appellant has failed to satisfy the requisite burden.

As the Examiner finds (Ans. 20), Appellant has failed to establish that the relied upon results are, in fact, unexpected. In particular, Appellant does not direct us to persuasive evidence or explain adequately why the alleged reduced saltiness Appellant contends is shown in the experimental results (Appeal Br. 16–17) is considered an unexpected result, and not just a typical result, which would have been reasonably expected by one of ordinary skill. *Klosak*, 455 F.2d at 1080 (“[T]he burden of showing unexpected results rests on [the party] who asserts them.”). Rather, as the Examiner explains (Ans. 20), because it was known in the art that certain electrolytes, for example, sodium lactate, exhibit a milder salty taste relative to others, and that low molecular weight electrolytic anions, for example, produce saltier tasting compositions, it would not have been unexpected to one of ordinary skill in the art that different electrolyte combinations provide for a reduced salty taste when compared to others.

As the Examiner explains (Ans. 19–20), Appellant has not provided persuasive evidence sufficient to show that there is actually a difference between the saltiness of the claimed beverage and those of the closest prior art (Takaichi). Although Appellant contends “the combination of electrolytes in claim 14 would be expected to result in a less salty product when used to provide the same amounts of sodium, potassium and chloride per serving” (Appeal Br. 18), as compared to the examples provided in Table 1 of Takaichi, Appellant does not provide an adequate explanation or direct us to reliable data or experimental results sufficient to support that contention. *De Blauwe*, 736 F.2d at 705 (“It is well settled that unexpected results must be established by factual evidence. Mere argument or conclusory statements in the specification does not suffice.”).

Further, Appellant's alleged showing of unexpected results is not commensurate in scope with the claims. As the Examiner finds (Ans. 18–19), Appellant's claims are broader in scope than the examples tested and Appellant does not explain why the examples tested are representative of the overall scope of the claims. In particular, as the Examiner points out (Ans. 18) claim 14 recites “at least one sweetener present in an amount between 0 wt. % and 10 wt. %” and “at least one acid present in an amount between 0.1 wt. % and 1.0 wt. %,” but none of the examples relied upon by Appellant for showing unexpected results include any amount of sweetener or acid.

As the Examiner further notes (Ans. 18–19), claim 14 recites ranges for the electrolyte composition “wherein the electrolyte blend provides 50 to 250 mg sodium per serving, 20 to 350 mg potassium per serving, and 10 to 250 mg chloride per serving,” but the example relied upon by Appellant for these limitations is limited to 110 mg sodium, 20 mg potassium, and 90 mg chloride, which fails to evince the criticality over the entire breadth of the electrolyte blend composition recited in the claims. Thus, we are not persuaded Appellant has provided data sufficient to show that the alleged unexpected results occur over the entire claimed ranges. *See In re Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011) (“Evidence of secondary considerations must be reasonably commensurate with the scope of the claims.”).

We, therefore, sustain the Examiner's rejection of claims 14, 15, and 18.

Claims 24, 25, 27, 29, 30, and 32

Although Appellant presents nominally arguments for the patentability of claims 24, 25, 27, 29, 30, and 32 enumerated under separate

headings at pages 19, 20, and 23 of the Appeal Brief, Appellant does not present any new or additional substantive argument, but instead relies on essentially the same arguments previously presented above in response to the Examiner's rejection of claim 14.

Thus, based on the fact-finding and reasoning provided by the Examiner, and for principally the same reasons discussed above for sustaining the Examiner's rejection of claim 14, we sustain the Examiner's rejection of claims 24, 25, 27, 29, 30, and 32.

Claims 26 and 31

Appellant presents separate argument for the patentability of claims 26 and 31 as a group. Appeal Br. 20. We select claim 31 as representative of this group and claim 26 stands or falls with claim 31. 37 C.F.R. § 41.37(c)(1)(iv).

Claim 31 depends from claim 14 and further recites “wherein the electrolyte blend provides about 110 mg sodium per serving, ***about 20 mg potassium per serving***, and about 90 mg chloride per serving.” Appeal Br. 36 (Claims Appendix) (key disputed claim language italicized and bolded).

Appellant argues the Examiner's rejection of claim 31 should be reversed for the same reasons previously presented above in response to the Examiner's rejection of claim 14. Appeal Br. 20 (“Claim 31 depends from claim 14 and is nonobvious over the cited reference for at least the reasons that claim 14 is nonobvious over the cited reference.”); *see also id.* at 20–21 (arguing unexpected results). We do not find this argument persuasive for principally the same reasons discussed above for affirming the Examiner's rejection of claim 14.

Appellant further argues that the Examiner's rejection of claim 31 should be reversed because Takaichi does not teach or suggest the claimed amount of potassium. Appeal Br. 21. In particular, Appellant contends Takaichi does not teach an electrolyte blend that provides "about 20 mg potassium per serving," as recited in the claim. *Id.* at 22.

We do not find Appellant's argument persuasive of reversible error in the Examiner's rejection based on the Examiner's fact-finding and reasoning provided at pages 4–5 of the Answer, which is supported by a preponderance of the evidence. As the Examiner finds (Ans. 4–5), and Appellant does not refute, Takaichi teaches electrolyte compositions having, for example, 37.5–46.8 mg potassium per serving. Takaichi 5 (Table 1). As the Examiner further finds (Ans. 5), Takaichi teaches that the electrolyte components are used in an amount sufficient to make up for the electrolytes lost by sweating and that the amount of such component used may be variable over a wide range. Takaichi 3:9–13 (disclosing the "electrolyte component is used in an amount sufficient to make up for inorganic electrolyte cations and anions lost by sweating" and "[t]he amount of such component to be used is variable over a wide range which corresponds to the conventional range for this kind of beverage"). That is, the amount of potassium is a result-effective variable. *See In re Applied Materials, Inc.*, 692 F.3d 1289, 1297 (Fed. Cir. 2012) ("A recognition in the prior art that a property is affected by the variable is sufficient to find the variable result-effective.").

Thus, as the Examiner determines (Ans. 5), it would have been obvious to one of ordinary skill in the art to have arrived at the claimed range of "about 20 mg potassium per serving" by varying the amount of potassium to make up for the depleted amount lost by sweat as a matter of

routine experimentation. *In re Aller*, 220 F.2d 454, 456 (CCPA 1955) (“[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.”).

Appellant’s arguments do not reveal reversible error in the Examiner’s factual findings and analysis in this regard.

We, therefore, sustain the Examiner’s rejection of claims 26 and 31.

Claims 28 and 33

Appellant presents separate arguments for the patentability of claims 28 and 33 as a group. Appeal Br. 23. We select claim 33 as representative of this group and claim 28 stands or falls with claim 33. 37 C.F.R. § 41.37(c)(1)(iv).

Claim 33 depends from claim 14 and recites

wherein the rehydration beverage exhibits a salty taste of less than 1.5 on a scale of 0 to 15 as determined by a trained sensory panel, wherein a salty taste of a 0.70 wt. % solution of sodium chloride equals 15 on the scale, a salty taste of water subjected to reverse osmosis equals 0 on the scale.

Appeal Br. 36 (Claims Appendix) (key disputed claim language italicized and bolded).

Appellant argues the Examiner’s rejection of claim 33 should be reversed for principally the same reasons previously presented above in response to the Examiner’s rejection of claim 14. *Id.* at 23.

We do not find Appellant’s argument persuasive for principally the same reasons discussed above for affirming the Examiner’s rejection of claim 14. In particular, Appellant’s contentions that Takaichi does not teach or suggest “wherein the rehydration beverage exhibits a salty taste of less

than 1.5 on a scale of 0 to 15” (Appeal Br. 23) nor the “claimed saltiness” (*id.* at 24) are not well-taken because, as previously discussed above regarding claim 14, Takaichi suggests a beverage comprising the same components recited in the claim, it follows that Takaichi’s beverage would have exhibited the same salty taste as the claimed product.

We, therefore, sustain the Examiner’s rejection of claims 28 and 33.

Accordingly, we affirm the Examiner’s rejection of claims 14, 15, 18, and 24–33 under 35 U.S.C. § 103(a) as obvious over Takaichi.

Rejection 2

In response to the Examiner’s rejection of claim 26 under § 103(a) as obvious over Takaichi, as evidenced by Rod (Ans. 7–9), which we refer to as Rejection 2, Appellant repeats and relies on principally the same arguments previously presented above in response to the Examiner’s rejection of claim 31.

Accordingly, for principally the same reasons discussed above for affirming the Examiner’s rejection of claim 31, we affirm the Examiner’s rejection of claim 26 under 35 U.S.C. § 103(a) as obvious over Takaichi, as evidenced by Rod.

Rejection 3

The Examiner rejects claim 3 under § 103(a) as obvious over the combination of Takaichi and Gillota (Ans. 9–11), which we refer to as Rejection 3.

Claim 3 is reproduced below from the Claims Appendix to the Appeal Brief:

3. A rehydration beverage comprising:
 - electrolytes;
 - at least one of maltodextrin, isomaltulose, and dextrose;
 - and
 - water;
 - wherein the rehydration beverage contains only electrolytes consisting of sodium lactate and potassium chloride;
 - wherein the rehydration beverage comprises 50 to 220 mg sodium per serving, 20 to 110 mg chloride per serving, and ***80 to 100 mg potassium per serving*** and low calories; and
 - wherein one serving is 240 mL of the rehydration beverage.

Appeal Br. 32 (key disputed claim language italicized and bolded).

Appellant argues the Examiner's rejection of claim 3 should be reversed for principally the same reasons or reasons analogous to those previously presented above in response to the Examiner's rejection of claim 14. Appeal Br. 25 (arguing Takaichi "provide[s] a laundry list of electrolytes and salts of organic acids" and does not teach or suggest the claimed "reduced saltiness"); *see also id.* at 20–21 (arguing "unexpected and/or unpredictable results"). We, therefore, do not find these arguments persuasive for principally the same reasons discussed above for affirming the Examiner's rejection of claim 14.

Appellant further argues the Examiner's rejection of claim 3 should be reversed because "the cited references do not teach the claimed potassium range." Appeal Br. 26. We do not find this argument persuasive based on

the Examiner's fact-finding and reasoning provided at pages 9–11 and 25 of the Answer.

Contrary to what Appellant argues, a preponderance of the evidence supports the Examiner's finding that the cited art suggests that element of the claim. As the Examiner finds (Ans. 10–11), Takaichi teaches a beverage composition comprising electrolytes, including examples ranging from 37.5–46.8 mg potassium per serving, and further teaches that the electrolyte component is used in an amount sufficient to make up for inorganic electrolyte cations and anions lost by sweating, and the amount used is variable over a wide range. Takaichi 3:9–13, 5 (Table 1).

As the Examiner further finds (Ans. 11), Gillotta teaches a recovery drink that includes 38–114 mg potassium per serving and that the potassium functions to maintain fluid balance, nerve transmission, muscle contraction and glycogen formation. Gillotta, Abstract, ¶¶ 13, 79, 94.

The Examiner also provides a reasonable basis, which is supported by a preponderance of the evidence in the record, to evince why one of ordinary skill would have combined the teachings of Takaichi and Gillotta to arrive at the claimed invention. As the Examiner concludes (Ans. 11), it would have been obvious to one of ordinary skill in the art to have arrived at the claimed range by adjusting the amount of potassium within the known range in order to maintain fluid balance, nerve transmission, muscle contraction and glycogen formation, as taught by Gillotta. *Aller*, 220 F.2d at 456; *see also KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420 (2007) (explaining that any need or problem known in the art can provide a reason for combining the elements in the manner claimed).

Appellant's assertions that "Gillotta actually teaches away" and "a skilled person would not be led to combine Gillotta with Takaichi to obtain the claim invention" (Appeal Br. 26) are conclusory and, without more, insufficient to establish reversible error in the Examiner's factual findings and analysis in this regard. *De Blauwe*, 736 F.2d at 705; *see also In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (explaining that mere lawyer's arguments or conclusory statements, which are unsupported by concrete factual evidence, are entitled to little probative value).

Accordingly, we affirm the Examiner's rejection of claim 3 under 35 U.S.C. § 103(a) as obvious over the combination of Takaichi and Gillota.

Rejection 4

In response to the Examiner's rejection of claims 19 and 20 under § 103(a) as obvious over the combination of Takaichi and Gillota (Ans. 11–14), which we refer to as Rejection 4, Appellant does not present any new or additional substantive arguments in the Appeal Brief.

Rather, Appellant apparently intends to rely on the same arguments previously discussed and presented above in response to the Examiner's rejection of claim 3 as obvious over the combination of Takaichi and Gillota (Rejection 3, stated above).

Thus, based on the fact-finding and reasoning provided by the Examiner, and for principally the same reasons discussed above for affirming the Examiner's Rejection 3, we affirm the Examiner's rejection of claims 19 and 20 under 35 U.S.C. § 103(a) as obvious over the combination of Takaichi and Gillota.

Rejection 5

The Examiner rejects claims 18–20, 24, and 28 under § 103(a) as obvious over Murray (Ans. 14–15), which we refer to as Rejection 5. Murray is directed to an improved rehydration beverage, which includes a combination of electrolytes, and discloses beverage compositions similar to those of Takaichi. *Compare* Murray 1–2, 9–11 *with*, Takaichi 2–3.

In response to the Examiner’s rejection, Appellant presents arguments for the patentability of claims 18–20 as a group and separate arguments for the patentability of claims 24 and 28, respectively, which we address in turn below.

Claims 18–20

Appellant presents argument for the patentability of claims 18–20 as a group. Appeal Br. 27. We select claim 18 as representative of this group and the claims 19 and 20 stand or fall with claim 18. 37 C.F.R. § 41.37(c)(1)(iv).

Claim 18 includes language similar to claim 14 and is reproduced below from the Claims Appendix to the Appeal Brief:

18. A rehydration beverage comprising:
 - water;
 - at least one sweetener present in an amount between 0 wt. % and 10 wt. %;
 - at least one acid present in an amount between 0.1 wt. % and 1.0 wt. %; and
 - electrolytes,wherein, excepting the at least one sweetener and the at least one acid, the rehydration beverage contains only the electrolytes consisting of:
 - sodium chloride;

sodium lactate;
monopotassium phosphate;
magnesium-containing electrolytes; and
calcium-containing electrolytes;

wherein the electrolyte blend provides 50 to 250 mg sodium per serving, 20 to 350 mg potassium per serving, and 10 to 250 mg chloride per serving; wherein one serving is 240 mL of the rehydration beverage; and

wherein the rehydration beverage exhibits a salty taste that is lower than a salty taste of a reference beverage, wherein the reference beverage is the same as the rehydration beverage except that an electrolyte blend of the reference beverage consists of sodium chloride, sodium citrate, and potassium phosphate in amounts that provide the same milligrams per serving of sodium, potassium and chloride as the rehydration beverage.

Appeal Br. 34.

The Examiner determines that Murray suggests a beverage satisfying all of the limitations of claim 18 and concludes the reference would have rendered the claim obvious. Ans. 14–15. On the record before us, we find a preponderance of the evidence and sound technical reasoning support the Examiner’s analysis and determination that Murray suggests a beverage satisfying all of the limitations of claim 18, and conclusion the reference would have rendered the claim obvious. Murray, Abstract, 4:23–32, 9:19–11:14, 12:15–16.

In response to the Examiner’s rejection of claim 18, Appellant repeats and relies on principally the same arguments or arguments analogous to those previously presented above in response to the Examiner’s rejection of claim 14. Appeal Br. 27–29.

We do not find Appellant's arguments persuasive of reversible error in the Examiner's rejection based on the Examiner's fact-finding and reasoning provided at pages 14–15 and 25–27 of the Answer, and for principally the same reasons or reasons analogous to those previously discussed above in affirming the Examiner's rejection of claim 14.

We, therefore, sustain the Examiner's rejection of claims 18–20.

Claim 24

Although Appellant presents nominally arguments for the patentability of claim 24 enumerated under a separate heading at page 30 of the Appeal Brief, Appellant does not present any new or additional substantive argument. Instead, Appellant relies on the same or similar arguments discussed and previously presented above in response to the Examiner's rejections of claims 18 and 29, respectively.

Thus, based on the fact-finding and reasoning provided by the Examiner, and for principally the same reasons discussed above for sustaining the Examiner's rejections of claims 18 and 29, we sustain the Examiner's rejection of claim 24 as obvious over Murray.

Claim 28

Claim 28 depends from claim 18 and further recites

wherein the rehydration beverage exhibits a salty taste of less than 1.5 on a scale of 0 to 15 as determined by a trained sensory panel, wherein a salty taste of a 0.70 wt. % solution of sodium chloride equals 15 on the scale, a salty taste of water subjected to reverse osmosis equals 0 on the scale.

Appeal Br. 35 (Claims Appendix) (key disputed claim language italicized and bolded).

Appellant argues the Examiner's rejection should be reversed for principally the same reasons as claim 18 and reasons similar to the reasons presented in response to the Examiner's rejection of claim 33 as obvious over Takaichi. Appeal Br. 30. We do not find these argument persuasive for principally the same reasons or reasons analogous to those previously discussed above in affirming the Examiner's rejections of claims 18 and 33, respectively.

Appellant further argues the Examiner's rejection of claim 28 should be reversed because Murray does not teach or suggest the "wherein the rehydration beverage exhibits a salty taste of less than 1.5 on a scale of 0 to 15" recitation of the claim.

We do not find this argument persuasive of reversible error based on the Examiner's fact-finding and reasoning provided at pages 26–27 of the Answer, which is supported by a preponderance of the evidence. In particular, as the Examiner finds and explains (Ans. 26), because Murray teaches or suggests a beverage comprising the same components recited in the claim, it follows that Murray's beverage would have exhibited the same salty taste as the claimed product.

We, therefore, sustain the Examiner's rejection of claim 28.

Accordingly, we affirm the Examiner's rejection of claims 18–20, 24, and 28 under 35 U.S.C. § 103(a) as obvious over Murray.

CONCLUSION

In summary:

Claim(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
14, 15, 18, 24–33	103(a)	Takaichi	14, 15, 18, 24–33	
26	103(a)	Takaichi, Rod	26	
3	103(a)	Takaichi, Gillota	3	
19, 20	103(a)	Takaichi, Gillota	19, 20	
18–20, 24, 28	103(a)	Murray	18–20, 24, 28	
Overall Outcome			3, 14, 15, 18–20, 24–33	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (1)(iv).

AFFIRMED