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EXAMINER

GEORGE, PATRICIA ANN

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PAULINE MARCQ,
GERD KOBAL, and MARIA GOGOVA

Appeal 2019-002829
Application 14/207,104
Technology Center 1700

Before ADRIENE LEPIANE HANLON, LINDA M. GAUDETTE, and
JAMES C. HOUSEL, *Administrative Patent Judges*.

HANLON, *Administrative Patent Judge*.

DECISION ON APPEAL

A. STATEMENT OF THE CASE

The Appellant¹ filed an appeal under 35 U.S.C. § 134(a) from an Examiner’s decision finally rejecting claims 1, 3–20, and 22. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Altria Client Services LLC. Appeal Brief dated August 30, 2018 (“App. Br.”), at 2.

The claims on appeal are directed to a composition for human consumption, such as a food or beverage, which does not include carboxamide cooling agents.

The Appellant discloses sensory technologies that are said to mask undesirable flavors, such as the bitter taste of caffeine, and create superior flavor profiles in beverages and food products. Spec. ¶ 7–8. More specifically, the Appellant discloses “sensory technologies that reduce, modify, or eliminate the bitter flavor or off-note flavors associated with functional ingredients through the presence of trigeminal sensation eliciting compounds/ingredients, referred to . . . as sensates.” Spec. ¶ 8. “The best-characterized examples of chemically-induced trigeminal sensation . . . are the pungency, warming, or burning sensations produced by chili pepper or ethanol; the cooling produced by menthol; and the tingling and prickling sensations produced by carbonation.” Spec. ¶ 9.

Representative claim 1 is reproduced below from the Claims Appendix to the Appeal Brief. The limitation at issue is italicized.

1. A composition for human consumption comprising:
 - a predetermined quantity of a base composition;
 - caffeine in an amount of about 20mg to about 200 mg;and
 - one or more sensates,
 - wherein the one or more sensates comprise about 0.1 to about 5% by weight based on the weight of the composition, and are effective in reducing the bitterness of the caffeine,
 - wherein the one or more sensates is selected from the list consisting of menthol and its stereoisomers, menthone glycerol ketal, (-)-menthyl lactate, 3-(1-menthoxy)propane-1,2-diol, and peppermint, and
 - wherein said composition *does not include carboxamide cooling agents.*

App. Br. 12.

The Examiner maintains the following grounds of rejection on appeal:

- (1) claims 1, 3–14, 16, 18–20, and 22 under 35 U.S.C. § 103(a) as unpatentable over Luo et al.² in view of CSPI;³
- (2) claim 15 under 35 U.S.C. § 103(a) as unpatentable over Luo in view of CSPI, further in view of Gudas et al.;⁴ and
- (3) claim 17 under 35 U.S.C. § 103(a) as unpatentable over Luo in view of CSPI, further in view of TFG.⁵

B. DISCUSSION

The Examiner finds Luo teaches a food composition as claimed wherein carboxamide cooling agents are optional.⁶ Final Act. 4 (citing Luo ¶ 20); *id.*⁷ (finding that paragraph 20 of Luo discloses non-carboxamide cooling agents). For support, the Examiner relies on Luo’s Abstract which is said to state that “[e]dible compositions, including chewing gums, confectioneries, and beverages, include particular cooling agents that may be used alone, in combination with each other, or in combination with other cooling agents.” Pre-Appeal Brief Review 2;⁸ Ans. 13.⁹ The Examiner finds that “[t]his is an explicit teaching that the cooling agents

² US 2011/0159141 A1, published June 30, 2011 (“Luo”).

³ Caffeine Content of Foods and Drugs, <http://web.archive.org/web/19980124040618/http://www.cspinet.org/new/cafchart.htm> (last visited May 27, 2015) (“CPSI”).

⁴ US 6,165,516, issued December 26, 2000 (“Gudas”).

⁵ Energy Shots: Are they healthy?, <http://foodguru802.blogspot.com/2012/02/energy-shots-are-they-healthy.html> (“TFG”).

⁶ The Examiner relies on CSPI to show that the claimed amount of caffeine would have been obvious to one of ordinary skill in the art. Final Act. 3.

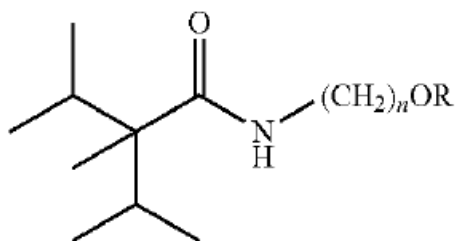
⁷ Final Office Action dated March 15, 2018.

⁸ Notice of Panel Decision from Pre-Appeal Brief Review dated July 30, 2018.

⁹ Examiner’s Answer dated December 21, 2018.

in this reference may be used alone, which means that when the non-carboxamide cooling agents taught [are] selected for use, alone, the composition does not include carboxamide cooling agents.” Pre-Appeal Brief Review 2; Ans. 14.

The Appellant, on the other hand, argues that the use of carboxamide cooling agents in Luo is not optional. App. Br. 8. More specifically, the Appellant argues that each confectionery or beverage disclosed in Luo requires a carboxamide compound represented by the following chemical structure. App. Br. 7 (citing Luo ¶ 5); *see also* App. Br. 8 (citing Luo ¶¶ 7, 21, 69, 112, 114).

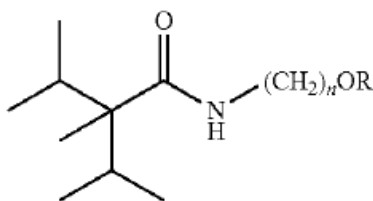


The depicted chemical structure is
a carboxamide compound.

The Appellant’s argument is supported by the record. Luo discloses that many confectionery products, especially breath freshening confectionery products, are mint-flavored and contain moderate to high levels of menthol. Luo ¶ 1. According to Luo, “there are disadvantages associated with using menthol, including its strong minty odor and the harsh notes it imparts to some compositions.” Luo ¶ 1. Luo discloses that a need exists for non-menthol cooling compositions that can be used in confectionery and beverage compositions, *either with a reduced menthol amount or no menthol at all*. Luo ¶ 4.

Luo discloses that “[t]he present inventor has found that *particular cooling agents* are effective to *partially or fully replace menthol* in confectioneries and beverages.” Luo ¶ 14 (emphasis added). Luo discloses that the chemical structure

of those *particular* cooling agents is identified below (Luo ¶¶ 14, 17; *see also* Luo ¶¶ 69, 112).



The depicted chemical structure is a carboxamide compound.

Luo discloses that *in some embodiments, a second cooling agent* may be used. Luo ¶ 20. In contrast to the first, carboxamide cooling agent, the second cooling agent includes *both* carboxamide cooling agents *and* non-carboxamide cooling agents, such as menthol.¹⁰ Luo ¶¶ 20, 71, 115; *see also* App. Br. 9 (contending that paragraph 20 of Luo “is directed to the use of an *optional* second cooling agent, which include[s] both carboxamide cooling agents and non-carboxamide cooling agents” (original emphasis omitted)).

Based on the Luo disclosure as a whole, we find that the “particular cooling agents that may be used alone” (Abstract; *see also* Luo ¶ 14) are the carboxamide cooling agents represented by the chemical structure reproduced above and the “other cooling agents” that may be used in combination with the “particular cooling agents” (Abstract) are the optional, second cooling agents which include non-carboxamide cooling agents. *See* Reply Br. 6–7.¹¹

¹⁰ Describing menthol as an optional, second cooling agent is consistent with Luo’s objective of eliminating or reducing the amount of menthol in confectionery and beverage compositions. *See* Luo ¶¶ 4, 14.

¹¹ Reply Brief dated February 21, 2019.

The Examiner states that Chemist Changqing Li from the Scientific and Technical Information Center (STIC) research department at the United States Patent and Trademark Office provided a second opinion regarding the interpretation of Luo. Final Act. 12. According to the Examiner, “Chemist Li stated that the Luo reference clearly provides that the *optional* cooling agents to be used include several non-carboxamides [0020].” Final Act. 12 (emphasis added).

Chemist Li’s statement is not inconsistent with our findings identified above. “Even assuming the comments by Chemist Li are accurate,” the Appellant correctly explains that “they do not address the matter at hand, which is whether the compositions of Luo require a carboxamide cooling agent.” App. Br. 9. In that regard, Chemist Li’s statement only relates to Luo’s optional, second cooling agent, not Luo’s first, carboxamide cooling agent. Luo ¶¶ 14, 20.

Based on the foregoing, a preponderance of the evidence of record does not support the Examiner’s finding that carboxamide cooling agents are optional in the confectionery and beverage compositions described in Luo.¹² Therefore, the obviousness rejections on appeal are not sustained.

C. CONCLUSION

The Examiner’s decision is reversed.

In summary:

¹² The Examiner relies on Gudas to show that the encapsulated caffeine complex recited in claim 15 would have been obvious to one of ordinary skill in the art. Final Act. 8. The Examiner relies on TFG to show that the volume of the energy shot recited in claim 17 would have been obvious to one of ordinary skill in the art. Final Act. 9.

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3–14, 16, 18–20, 22	103(a)	Luo, CSPI		1, 3–14, 16, 18–20, 22
15	103(a)	Luo, CSPI, Gudas		15
17	103(a)	Luo, CSPI, TFG		17
Overall Outcome				1, 3–20, 22

REVERSED