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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/662,638	03/19/2015	Indra Prakash	12600.105054 US CON	4646
121055	7590	06/02/2020	EXAMINER	
King & Spalding 1180 Peachtree Street Atlanta, GA 30309			WONG, LESLIE A	
			ART UNIT	PAPER NUMBER
			1793	
			NOTIFICATION DATE	DELIVERY MODE
			06/02/2020	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* INDRA PRAKASH, GRANT E. DUBOIS, PRASHANTHI JELLA, GEORGE A. KING, RAFAEL I. SAN MIGUEL, KELLY H. SEPCIC, DEEPTHI K. WEERASINGHE, and NEWTON R. WHITE

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Appeal 2019–004591  
Application 14/662,638  
Technology Center 1700

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Before BEVERLY A. FRANKLIN, MICHAEL P. COLAIANNI, JULIA HEANEY, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner’s decision to reject claims 166–169, 172, and 173. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Coca-Cola Co. Appeal Br. i.

### CLAIMED SUBJECT MATTER

Claim 166 is illustrative of Appellant’s subject matter on appeal and is set forth below:

166. A beverage comprising at least one amino acid and about 400 to about 500 ppm rebaudioside A, wherein:

the at least one amino acid is present in an amount from about 100 ppm to about 25,000 ppm and the amino acid is selected from the group consisting of aspartic acid, arginine, glycine, glutamic acid, praline, threonine, theanine, cysteine, cystine, alanine, valine, tyrosine, leucine, isoleucine, asparagine, serine, lysine, histidine, omithine, methionine, camitine, aminobutyric acid, glutamine, hydroxyproline, taurine, norvaline, sarcosine, salts thereof and combinations thereof.

### REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Payzant	US 5,962,678	Oct. 5, 1999
Harada	US 6,083,549	July 4, 2000
Catani	US 2006/0073254 A1	Apr. 6, 2006
Jan M.C. Geuns, <i>REVIEW: The safety of stevioside used as a sweetener</i> , Proc. of the first symposium, The safety of Stevioside, (2004)		

### THE REJECTION

Claims 166–169, 172, and 173 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Geuns, Payzant, Catani, and Harada.

OPINION

Appellant does not present any substantively distinct arguments for the Examiner’s rejection or for any dependent claims. *See* Appeal Br. *passim*. Therefore, consistent with the provisions of 37 C.F.R. § 41.37(c)(1)(iv) (2013), we limit our discussion to claim 166, and all other claims on appeal stand or fall together with claim 166.

Upon consideration of the evidence and each of the respective positions set forth in the record, we find that the preponderance of evidence supports the Examiner’s findings and conclusion that the subject matter of Appellant’s claims is unpatentable over the applied art. Accordingly, we sustain the Examiner’s rejection on appeal essentially for the reasons set forth in the Non-Final Office Action (mailed February 6, 2018), and in the Answer, and add the following for emphasis.

We refer to the Examiner’s statement of the rejection as set forth on pages 3–4 of the Answer, which we adopt as our own.

Appellant’s arguments are set forth in section “D. Appellant’s Traversal” of the Appeal Brief.<sup>2</sup> Therein, Appellant argues that the Examiner has not established a *prima facie* case of obviousness because a) the Examiner has failed to resolve the Graham factors, b) the Examiner has not made any finding that in combination, each element performs the same function as it did separately, and c) the Examiner has not made any finding that an ordinary artisan would have considered the results of the combination

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<sup>2</sup> The Appeal Brief does not have page numbers, so we refer to section headings as appropriate. Where page numbers are used, we numbered the Appeal Brief whereby the first page is page 1.

predictable. Appellant additionally argues that the claimed invention would not have been obvious to one of ordinary skill in the art in view of the cited references at the time of the invention because a) a person of skill in the art would not have been motivated to combine the cited references and b) a person of skill in the art would have lacked a reasonable expectation of success. Appellant also submits that the Examiner has not properly considered Appellant’s rebuttal arguments because a) the Examiner has not specifically set forth the facts and reasoning that justify the conclusion that the Appellant’s rebuttal arguments are insufficient and b) the Examiner has not established that the Appellant’s unexpected results are not commensurate with the scope of the claims. Appellant also argues (citing certain case law) that there is no obviousness where there would have been no reason to modify the initial formulation, even though the modification was possible, and when there is no evidence that the secondary reference provided an advantage that the primary reference needed. Appellant presents related arguments in the Reply Brief.

We are unpersuaded by the aforementioned line of arguments for the following reasons.

As stated by the Examiner beginning on page 5 of the Answer, the Examiner finds that Geuns discloses the steviol glycosides extracted from *Stevia rebaudiana* to include rebaudioside A, rebaudioside B, rebaudioside C, rebaudioside E, rebaudioside F, dulcoside A, dulcoside B, stevioside, and steviolbioside. The Examiner relies upon Payzant for teaching the extraction and purification of the *Stevia rebaudiana* plant, wherein a purity of rebaudioside A is at least 95%. The Examiner relies upon Catani for

teaching the addition of amino acids as claimed to high intensity sweeteners (“HIS” sweeteners) such as stevioside. Ans. 5. The Examiner relies upon Harada for teaching sweetening compositions wherein the use of amino acids serves to reduce astringency and bitterness of intense sweetener such as rebaudioside. Thus, the Examiner’s statement that the combination of a rebaudioside type sweetener with a sweetness-improving agent is known in the art is well-founded. Ans. 5. The Examiner then states that once the art has recognized the use of the claimed components for a specific purpose, then the use and manipulation of amounts would be obvious, expected, and well-within the skill of the art, including the manipulation of sweetener amounts. Ans. 5.

In response to Appellant’s argument that there is no teaching, suggestion, or motivation to combine the references, the Examiner replies that in this case, all of the references are directed to the use of sweeteners including steviol glycosides. Ans. 5. The Examiner also states that sweeteners are numerous and structurally diverse; however, the ultimate goal in the sweetener art is to duplicate or closely match the characteristics of sucrose. The Examiner states that it is well-known that different sweeteners have different sucrose equivalencies, and consequently, the manipulation of amounts is expected. Ans. 6.

We agree with the Examiner’s aforementioned stated position, and thus agree that a *prima facie* case has been made for the reasons provided by the Examiner in the record as highlighted hereinabove. We note that “[f]or obviousness under § 103, all that is required is a reasonable expectation of success.” *In re O’Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988)(citations

omitted); *see also*, *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1364 (Fed. Cir. 2007) (*quoting Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1367–69 (Fed. Cir. 2007) (“[T]he expectation of success need only be reasonable, not absolute.”)). Also, “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l v. Teleflex Inc.*, 550 U.S. 398, 415–16 (2007). The question to be asked is “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR*, 550 U.S. at 417. In the instant case, the applied art indicates (as stated by the Examiner in the record) that the combination of a rebaudioside type sweetener with a sweetness-improving agent is known in the art, as well as the associated characteristics. The Examiner thus appropriately determines that the combination of teachings of the applied references would be merely a predictable use of a prior art element for its established function. *KSR*, 550 U.S. at 417.

Having determined that the Examiner has properly presented a *prima facie* case, we turn now to Appellant’s rebuttal evidence of non-obviousness. Appellant relies on Example Set B and Example Set F set forth in the Specification. Appellant also refers to an article by Indra Prakash in an effort to show that the sweetener art is unpredictable because of differing flavoring and temporal profiles. Appeal Br. 19. Appellant argues that the Examiner has not considered the rebuttal evidence.

However, the Examiner discusses the rebuttal evidence on page 6 of the Answer. Therein, the Examiner identifies three reasons why the rebuttal evidence is not adequate, and we agree with those reasons. In so doing, we

note that Appellant can rebut a *prima facie* case of obviousness by showing “unexpected results,” *i.e.*, showing that the claimed invention possesses a superior property or advantage that a person of ordinary skill in the art would have found surprising or unexpected. *See In re Geisler*, 116 F.3d 1465, 1469 (Fed. Cir.1997) (quoting *In re Soni*, 54 F.3d 746, 750 (Fed. Cir. 1995)). Appellant does not adequately present an analysis of the data sufficient to establish unexpected results. Manifestly, it is not within the province of the Board to independently review Appellant’s data and ferret out possible evidence of unexpected results. On the contrary, the burden of establishing unexpected results rests squarely upon the party asserting them. *In re Klosak*, 455 F.2d 1077, 1088 (CCPA 1972).

We also note that “where the prior art gives reason or motivation to make the claimed [invention] . . . the burden (and opportunity) then falls on an applicant to rebut that *prima facie* case. Such rebuttal or argument can consist of . . . any other argument or presentation of evidence that is pertinent.” *In re Dillon*, 919 F.2d 688, 692-93 (Fed. Cir. 1990) (internal citations omitted) (*en banc*). The burden rests with Appellants to establish, *inter alia*, (1) that the comparisons are to the disclosure of the closest prior art, and (2) 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).

On this record, we concur with the Examiner that the showing (rebuttal evidence) is insufficient.

#### CONCLUSION

We affirm the Examiner’s decision.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
166–169, 172, 173	103(a)	Geuns, Payzant, Catani, Harada	166–169, 172, 173	

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED