

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CAMPBELL SOUP COMPANY,  
CAMPBELL SALES COMPANY, and  
TRINITY MANUFACTURING, L.L.C.,  
Petitioner,

v.

GAMON PLUS, INC.,  
Patent Owner.

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IPR2017-00094  
Patent D612,646 S

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Before GRACE KARAFFA OBERMANN, BART A. GERSTENBLITH,  
and ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

JUDGMENT

Final Written Decision on Remand  
Determining No Challenged Claim Unpatentable  
*35 U.S.C. §§ 144, 318*

## I. INTRODUCTION

We address this case on remand after a decision by the U.S. Court of Appeals for the Federal Circuit in *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335 (Fed. Cir. 2019).

### A. Procedural Background

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, L.L.C. (collectively, “Campbell” or “Petitioner”) filed a Petition to institute an *inter partes* review of the claim for a “Gravity Feed Dispenser Display” in U.S. Patent No. D612,646 S (Ex. 1001, “the ’646 patent”). Paper 2 (“Pet.”). Gamon Plus, Inc. (“Gamon” or “Patent Owner”) filed a Preliminary Response to the Petition. Paper 10. Applying the standard set forth in 35 U.S.C. § 314(a), we instituted an *inter partes* review of the challenged claim. Paper 13 (“Dec.”). Specifically we instituted review of the design claim as to three grounds pursuant to 35 U.S.C. § 103:

35 U.S.C. §	Reference(s)/Basis
§ 103(a)	Linz <sup>1</sup> , Samways <sup>2</sup>
§ 103(a)	Samways
§ 103(a)	Samways, Linz

Dec. 35. In our institution decision, we declined to institute review on nine of twelve grounds. *Id.* at 6, 35.

During the original trial, Gamon filed a Patent Owner Response (Paper 24, “PO Resp.”), and Campbell filed a Reply (Paper 33, “Pet. Reply”)

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<sup>1</sup> U.S. Patent No. D405,622, Arthur W. Linz, issued Feb. 16, 1999 (“Linz,” Ex. 1008).

<sup>2</sup> G.B. Patent Application No. 2,303,624, published Feb. 26, 1997 (“Samways,” Ex. 1009).

to the Patent Owner Response. We authorized Gamon to file a paper identifying allegedly improper new argument and citations in Petitioner's Reply (Paper 40), to which Campbell filed a response (Paper 48). We also authorized Gamon to file a sur-reply addressing evidence that Campbell produced late in the proceeding. Paper 68 ("PO Sur-reply").

An oral hearing was held on January 23, 2018, and a copy of the transcript is part of the record. Paper 80 ("Tr."). On March 29, 2018, we issued a Final Written Decision. Paper 81 ("Final Dec.") (Paper 84, redacted version). In our Final Written Decision, we concluded that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the '646 patent is unpatentable under 35 U.S.C. § 103. In the decision, we weighed the evidence of obviousness and nonobviousness as a whole, and we determined that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the '646 patent is unpatentable as obvious based on Linz and Samways. We likewise determined that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the '646 patent is unpatentable as obvious based on Samways alone or Samways and Linz. Petitioner filed a Notice of Appeal to the Federal Circuit on May 31, 2018. Paper 85.

On September 26, 2019, the Federal Circuit issued a decision affirming-in-part, vacating-in-part, and remanding for further consideration. *Campbell Soup Co.*, 939 F.3d at 1335.

The Federal Circuit determined that there was "no error in the Board's claim construction," with respect to the claim. *Id.* at 1340 n.1. The Federal Circuit affirmed our decision related to the Samways ground, determining "substantial evidence supports the Board's finding that Samways is not a

proper primary reference,” and “substantial evidence supports the Board’s finding that Samways does not create basically the same visual impression as the claimed designs.” *Id.* at 1341–42.

As to the ground under Section 103 based on Linz, the Federal Circuit determined “substantial evidence does not support the Board’s finding that Linz is not a proper primary reference.” *Id.* at 1342. The Federal Circuit then vacated “the Board’s conclusion that the claimed designs would not have been obvious over Linz in view of Samways” and remanded for further proceedings. *Id.* The Federal Circuit did not address any other findings related to obviousness based on Linz.

The Federal Circuit also remanded and ordered that “the Board should also consider the non-instituted grounds for unpatentability consistent with the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018).” *Id.* We discuss the Federal Circuit’s decision in more detail below.

On December 20, 2019, we issued an Order Modifying Decision Instituting *Inter Partes* Review and Setting the Schedule for Further Proceedings on Remand. Paper 92. In light of the remand from the Federal Circuit and the Supreme Court’s decision in *SAS*, we modified our Decision on Institution to include each of the nine non-instituted grounds challenging the design claim of the ’646 patent. *Id.* at 4–5; Dec. 6. Also, pursuant to the parties’ agreement, we instituted a briefing schedule and set parameters requested by the parties for the remand proceeding. *Id.* at 3. Further, we requested the parties confer to determine if there were any grounds that Petitioner no longer intended to pursue. *Id.* at 6. If any agreement was reached, we authorized the parties to jointly request that the Board limit the proceeding through a joint motion. *Id.*

Such a motion was filed on January 10, 2020. Paper 93. In that motion filed by Campbell, the parties agreed to limit the proceeding to the following grounds on remand<sup>3</sup>:

<b>Claim Challenged</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>
1	§ 103(a)	Linz
1	§ 103(a)	Linz, Samways
1	§ 103(a)	Linz, Knott <sup>4</sup>
1	§ 103(a)	Abbate <sup>5</sup> , Samways
1	§ 103(a)	Abbate, Samways, Linz
1	§ 103(a)	Abbate, Linz
1	§ 103(a)	Primiano <sup>6</sup> , Samways
1	§ 103(a)	Primiano, Knott

*Id.* at 1.

On January 27, 2020, we granted the parties' request to limit the remand proceeding to the grounds and statutory basis requested by the parties. Paper 94. Accordingly, this Final Written Decision on Remand addresses each of the grounds set forth above.

Pursuant to the briefing schedule on remand, Gamon filed a Patent Owner Response on Remand (Paper 95) and Campbell filed a Reply (Paper 97) to the Patent Owner Response on Remand. We authorized Gamon to file a Sur-reply (Paper 99), to which Campbell filed a response or

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<sup>3</sup> In the chart above, we have separated the grounds remaining in the proceeding into the different combinations presented, for ease of reference.

<sup>4</sup> U.S. Patent No. D178,248, issued July 10, 1956 ("Knott," Ex. 1010).

<sup>5</sup> U.S. Patent No. 4,909,578, issued Mar. 20, 1990 ("Abbate," Ex. 1011).

<sup>6</sup> U.S. Patent No. 6,068,142, issued May 30, 2000 ("Primiano," Ex. 1012).

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