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Michelle Fisher 2930 Domingo Ave Suite 123 Berkeley, CA 94705			GOYEA, OLUSEGUN	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHELLE FISHER

Appeal 2019-001705
Application 14/253,607
Technology Center 3600

Before CARL W. WHITEHEAD JR., JOHN F. HORVATH and
SCOTT RAEVSKY, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* WHITEHEAD
JR.

Opinion Concurring filed by *Administrative Patent Judge* HORVATH.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant¹ has filed a Request for Rehearing under 37 C.F.R. § 41.52 on July 2, 2020 (“Request”), from our Decision on Appeal mailed May 4, 2020 (“Decision”), wherein we affirmed the 35 U.S.C. § 112(a), (b) rejections as well as the 35 U.S.C. § 103 rejection of claims 1, 6, 11, 16, 20–

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Michelle Fisher as the real party in interest. Appeal Brief 2.

33, 35, 36, 40, 41, 44, 45, 49, 50 and 52–63². *See* Decision 14. Claims 2–5, 7–10, 12–15, 17–19, 34, 37–39, 42, 43, 46–48 and 51 are cancelled. Final Action 3.

We have reviewed Appellant’s Request but find no arguments or evidence identifying an issue that we either misapprehended or overlooked.

Appellant “requests consideration of the Board Decision dated 3/5/20 for Patent Application No. 15/076,578 in which the Board reversed the Examiner’s rejection.” Request 2. Appellant further contends, “[I]n related patent application 14/253,648 which was also under Appeal, it is respectively requested that consideration of the Board decision under 37 CFR 41.52 in which the Board reversed the Examiner’s rejection for the same reasons as patent application no. 15/076,578.” Request 3.

Respectfully, neither decision cited by Appellant has been designated precedential by the PTAB, therefore neither decision is binding upon this panel. *See* PTAB Standard Operating Procedure (SOP) 2 (Rev.10), available at <http://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/resources>.

Appellant further contends:

The Board may have overlooked Applicant’s statement regarding this on page 11 of the Appeal Brief dated May 17, 2018 which stated the following: “The Board for Patent Appeals and Interferences (BPAI) has specifically stated that KSR tell us that *‘[R]jections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some*

² Claims Appendix lists 63 claims. *See* Claims Appendix 8. The Examiner and Appellant acknowledge only 62 claims. *See* Appeal Brief 8; Answer 4. Claim 63 is dependent upon independent claim 11. We address claim 63 with claim 11.

articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”

Request 4–5.

Respectfully, the statement was not overlooked by the panel. The statement was under the heading “Legal Standard for an Obviousness Rejection” along with other citations to the MPEP and various other court decisions. Appeal Brief 11–12. We did not find Appellant’s citation to the MPEP and various court decisions to be demonstrative of Examiner error. *See generally* Appeal Brief; Reply Brief. Respectfully, we do not find Appellant’s citation to the MPEP, various court decisions, as well as, PTAB decisions to be demonstrative of Examiner error. *See generally* Request.

Moreover, Appellant did not argue in the Appeal that the claims were patentable because the Examiner failed to articulate sufficient reasoning to combine the cited prior art. *See* Appeal Brief 8–30. As stated in our Decision, any arguments not made in the Appeal Brief were waived. *See* Decision 5–6 (citing *Ex parte Frye*, 94 USPQ2d at 1072, 1075 (BPAI 2010) (precedential); *Hyatt* 551 F.3d 1307, 1313-14 (Fed. Cir. 2008)); *see also* 37 C.F.R. § 41.37(c)(1)(iv). We cannot have erred by failing to consider an argument Appellant has waived.

DECISION

Accordingly, for the reasons stated above, Appellant’s Request for Rehearing is denied.

CONCLUSION

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
41, 50, 54, 60	112	Written Description	41, 50, 54, 60	
1, 6, 11, 16, 20–33, 35, 36, 40, 41, 44, 45, 49, 50, 52–62	112	Indefiniteness	1, 6, 11, 16, 20–33, 35, 36, 40, 41, 44, 45, 49, 50, 52–63	
1, 6, 11, 16, 20–22, 25–28, 30, 31, 35, 36, 40, 41, 44, 45, 49, 50, 52, 55–58, 61–63	103	Rackley, Clisham	1, 6, 11, 16, 20–22, 25–28, 30, 31, 35, 36, 40, 41, 44, 45, 49, 50, 52, 55–58, 61–63	
23	103	Rackley, Hayashi	23	
24, 29	103	Rackley, Clisham, Bommel	24, 29	
32, 33	103	Rackley, Clisham, Ruano	32, 33	
53, 59	103	Rackley, Clisham, Gobburu	53, 59	
54, 60	103	Rackley, Clisham, Gautier	54, 60	
Overall Outcome			1, 6, 11, 16, 20–33, 35, 36, 40, 41, 44, 45, 49, 50, 52–63	

DENIED

Appeal 2019-001705
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Opinion of the Board filed by Administrative Patent Judge WHITEHEAD
JR..

Opinion Concurring filed by *Administrative Patent Judge* HORVATH.

DECISION ON REQUEST FOR REHEARING

HORVATH, *Administrative Patent Judge, concurring.*

I agree with the majority's decision to deny Appellant's request for rehearing, and write separately to express additional reasons the request should be denied. As stated above, Appellant requests "consideration of a new argument based upon recent relevant decision[s] by the Board for related patent applications." Request 2 (citing MPEP § 1214.03(a)(2)). Specifically, Appellant asks us to consider the Board's decisions on appeal in Application Nos. 15/076,578 ("the '578 Application") and 14/253,648 ("the '648 Application").

Appellant failed to identify this appeal as a related appeal in the two appeals later-filed in the '578 and '648 Applications, which our rules require. *See* 37 C.F.R. § 41.37(c)(1)(ii) (requiring the identification by application of "all other prior and pending appeals" that "may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal"). Had Appellant done so, the panel could have considered whether, and to what extent, the three appeals raised overlapping issues such that a decision in one would affect decisions in the others. By failing to do so, Appellant has denied this panel that opportunity, and cannot now ask this panel to consider whether and how the issues decided by another panel in the other appeals affect this appeal. *Id.* ("If an appeal brief does not contain a statement of related cases, the Office may assume there are no such related cases.").

Moreover, in this appeal, Appellant did not raise the argument that the claims were patentable because they recited a non-browser based application and the prior art failed to disclose a non-browser based application, i.e., the argument that led to the reversal of the Examiner's rejections in the '578 and

'658 Applications. *See* App. Br. 8–30; *see also* Request 2–3. Any arguments Appellant did not raise in its Appeal Brief were waived. *See* Decision 5–6; *see also Ex parte Frye*, 94 USPQ2d at 1075; *Hyatt v. Dudas*, 551 F.3d at 1313-14; 37 C.F.R. § 41.37(c)(1)(iv). Therefore, the panel cannot have erred by failing to consider an argument Appellant had waived.

Finally, Appellant's previously waived argument is unpersuasive in view of the references cited by the Examiner. Specifically, the Examiner cited Rackley for teaching a non-browser based application. *See* Final Act. 9 (citing Rackley ¶¶ 176, 194). Rackley teaches accessing billing information on a remote server using *either* "a computer online with web access *or via a mobile device 15 with mobile views.*" Rackley ¶ 176 (emphasis added). Rackley teaches the "mobile views" of mobile device 15 are obtained via a downloaded "*mobile client* (also called a mobile application or a 'Mobile Wallet')." *Id.* ¶ 194 (emphasis added). The Specification similarly identifies Appellant's non-browser based application as a "Mobile Wallet application." Spec. ¶ 15.

Moreover, on page 30 of the appeal brief filed in the '578 Application, Appellant argued the plain meaning of a "non-browser based application" was an application "operable without a network connection or offline." Rackley teaches its mobile client or application "runs independently on the mobile device and does not require an active communication connection to the [server]" and, therefore, can "operate in an offline mode." Rackley ¶ 176. That is, Rackley teaches its mobile client is a non-browser based application per Appellant's definition of that term.

Finally, Rackley teaches its mobile and web-based clients access the remote server using different interfaces. *Id.* ¶ 164 (disclosing the remote

server has “three major interfaces” including a “mobile device (mobile client) interface” and a “world wide web (WWW) or Internet user interface (UI). Rackley further teaches that users “may prefer to conduct certain types of functions . . . via an Internet web interface *instead of* via a mobile interface.” *Id.* ¶ 208 (emphasis added). That is, Rackley teaches the mobile device uses a mobile interface rather than a web interface because its mobile client is not a browser. Instead, as discussed above, it is a Mobile Wallet or non-browser based application.

For all of the reasons expressed above, I agree with the majority’s decision to deny Appellant’s request for rehearing.