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13/877,847	04/04/2013	Urvashi Bhagat		4620

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Asha Nutrition Sciences, Inc.  
P.O. Box 1000  
Palo Alto, CA 94302

EXAMINER
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BHAT, NINA NMN

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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* URVASHI BHAGAT

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Appeal 2019-005232  
Application 13/877,847  
Technology Center 3600

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Before ROMULO H. DELMENDO, JEFFREY T. SMITH, and  
JAMES T. MOORE, *Administrative Patent Judges*.

DELMENDO, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

The Appellant's<sup>1</sup> Request for Rehearing filed June 29, 2020 ("Request" or "Req. Reh'g") is now before us following the Decisions on Petitions entered August 17, 2020 and April 14, 2020, which were responsive to the Appellant's Petitions Under 37 C.F.R. §§ 41.3 and 1.181 filed April 28, 2020, March 10, 2020, and March 5, 2020. The Appellant requests rehearing of our Decision on Appeal entered February 20, 2020 ("original Decision" or "Dec."), in which we affirmed the Primary Examiner's final decision to reject claims 82–89, 91–104, 107–110, and

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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. The Appellant identifies "Asha Nutrition Sciences, Inc." as the real party in interest (Appeal Brief filed February 11, 2019, as revised March 6, 2019 ("Appeal Br.") at 3).

113–120 (Req. Reh’g 1–24).<sup>2</sup> Specifically, in our original Decision, we reversed Rejection A,<sup>3</sup> which the Appellant does not contest in this Request, summarily affirmed Rejections B<sup>4</sup> and C,<sup>5</sup> and affirmed Rejection D<sup>6</sup> on the merits (Dec. 3–16).

Because the Appellant’s arguments in the Request fail to establish that we misapprehended or overlooked any point in our original Decision, as discussed further below, we decline to modify our original Decision in any substantive respect for the reasons given in our original Decision and below. 37 C.F.R. § 41.52(a) (2018).

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<sup>2</sup> The caption for the Appellant’s Request refers to both 37 C.F.R. §§ 41.52 and 42.71. The provisions of 37 C.F.R. § 42.71, however, are inapplicable to *ex parte* appeals as § 42.71 is from Part 42, which relates generally to the Board’s trial practice and specifically to decisions on petitions and motions in trials. Therefore, we decline to address any argument based on Part 42 or 37 C.F.R. § 42.71.

<sup>3</sup> Rejection A: Claims 82 and 89 were rejected under pre-AIA 35 U.S.C. § 112, ¶ 1, as failing to comply with the written description requirement (Ans. 3–5; Final Act. 3–4).

<sup>4</sup> Rejection B: Claims 82, 87, 91–93, 96, 97, 99–102, 109, 110, and 113–120 were rejected under 35 U.S.C. § 112, ¶ 2, as indefinite (Ans. 5; Final Act. 4–10). In our original Decision (Dec. 3), we inadvertently omitted claims 115–120, which the Examiner listed separately as rejected (Final Act. 4).

<sup>5</sup> Rejection C: Claims 88, 89, 95, 103, and 107–110 were rejected under 35 U.S.C. § 112, ¶ 4, as being in improper dependent form for failing to further limit the subject matter of the claims from which they depend or failing to include all the limitations of the claims upon which they depend (Ans. 5–6; Final Act. 10–11).

<sup>6</sup> Rejection D: Claims 82–89, 91–104, 107–110, and 113–120 under 35 U.S.C. § 103(a) as unpatentable over Morris (US 2008/0213239 A1, published September 4, 2008) in view of Anthony et al. (US 2007/0166411 A1, published July 19, 2007; “Anthony”).

As a preliminary matter, the Appellant contends that “there were procedural violations in affirming Rejections B, C, and D” (Req. Reh’g 1). To the extent that the arguments in support of this contention relate to petitionable matters, we refer to the Decisions on Petitions entered August 17, 2020 and April 14, 2020, which are binding on this panel.

Turning to the substantive merits of this appeal, the Appellant asserts that “almost *all of the arguments* and *100% of the evidence* submitted with respect to Rejection D were overlooked” (Req. Reh’g 1). According to the Appellant, “the Decision is based on an erroneous interpretation of law and clear errors, and the decision represents an unreasonable judgment in weighing relevant facts and factors” (*id.*). The Appellant’s assertions are incorrect. As required, we reviewed each of the rejections, including Rejection D, for reversible error based upon the issues identified in the Appeal Brief and “in light of the arguments and [any] evidence produced thereon” (*see* Dec. 3–15). *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011).

Citing 37 C.F.R. § 42.71 and two *inter partes* review decisions, the Appellant argues that an abuse of discretion standard applies in this appeal (Req. Reh’g 2). As we indicated above, the matter before us is an *ex parte* appeal—not an *inter partes* review or trial. Neither 37 C.F.R. § 42.71 nor the two *inter partes* review decisions have any binding bearing on our decision, either in the first instance or on rehearing.

With respect to Rejections B and C, which were summarily upheld (Dec. 6–7), the Appellant argues that we erred because: (1) the Appellant listed the rejections in the “**GROUND OF APPEAL**” section and stated that “the rejection[s] should be reversed” (Appeal Br. 8); (2) in the “**ARGUMENT**” section, the Appellant stated that it was “not conceding to

the merits of the rejection[s]” (*id.* at 10–11); and (3) in the Reply Brief, the Appellant asserted that “[we] should reverse the rejections based upon arguments (such as submitted on June 15, 2018) and evidence of record (such as Examiner’s admissions) . . .” as determination of patentability is based upon the entire record (Req. Reh’g 3–4 (citing *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992)). According to the Appellant, we overlooked good cause or special circumstances showing the Appellant’s “diligence,” resulting in “a grave procedural violation,” and that we misapprehended case law (Req. Reh’g 4–7).

We refer to the two Decisions on Petitions, which fully address the Appellant’s arguments in connection with our summary affirmance of Rejections C and D (Decision on Petition entered August 17, 2020 at 8–14; Decision on Petition entered April 14, 2020 at 8–10). As explained in the August 17, 2020 Petition Decision at pages 13–14, the mere filing of an appeal does not, by itself, entitle an appellant to a *de novo* review of *all* aspects of the rejection, and the Appellant’s contrary reading of legal precedents, such as *Oetiker*, constitutes a misunderstanding of the law as applicable to the Board’s review on appeal of an examiner’s rejection. *Ex parte Frye*, 94 USPQ2d 1072, 1075–76 (BPAI 2010) (precedential) (cited with approval in *Jung*, 637 F.3d at 1365–66 (explaining that although the examiner retains the burden to show unpatentability and the Board’s review is made *de novo*, the Board’s review is based upon the applicant’s identification of what the examiner did wrong—i.e., “the issues identified by [the] appellant, and in light of the arguments and evidence produced thereon”)).

Additionally with respect to Rejection D, the Appellant contends that the Reply Brief referred to arguments made in the Appeal Brief and in the Appellant's Replies filed January 11, 2018, and June 15, 2018 (Req. Reh'g 7). This position is without persuasive merit. First, we considered all arguments raised in the Appeal Brief (Dec. 7–15). Second, to the extent that the Appellant's Replies filed January 11, 2018, and June 15, 2018 in response to the Examiner's Actions contain additional arguments, the belated attempt in the Reply Brief to “backdoor” these arguments into the previously-filed Appeal Brief is improper. *Jung*, 637 F.3d at 1365–66; *Frye*, 94 USPQ2d at 1075–76. *See also* 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.41(b)(2).

As in Rejections B and C, the Appellant appears to be arguing that cases such as *Oetiker* stand for the proposition that the patentability determination for Rejection D must be based on the entire record, and that, therefore, all arguments and evidence made throughout prosecution—even if not included in the Appeal Brief—must be considered in a Board's decision (Req. Reh'g 7). Again, the Appellant's position lacks persuasive merit. If the Appellant's logic is followed, an appeal brief outlining the issues for review would not be required at all. But that is not the case, as an appeal brief serves the important function of defining the Board's *de novo* review (e.g., without deference to the Examiner's factual findings) and identifying what the Examiner did wrong. *See* 37 C.F.R. § 41.37(a) (“Appellant *must* file a brief under this section . . .”) (emphasis added); 37 C.F.R. § 41.37(c)(1)(iv) (“The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant. Except as provided for in §§ 41.41, 41.47 and 41.52, any arguments or authorities not included in the

appeal brief will be refused consideration by the Board for purposes of the present appeal.”). *See also Jung*, 637 F.3d at 1365–66; *Frye*, 94 USPQ2d at 1075–76.

The Appellant argues that we overlooked certain issues because they were not listed in “*The Appellant’s Contentions*” section of our Decision (Dec. 9). For example, the Appellant contends that the “[p]rior art as a whole leads away from the claimed inventions” because, e.g., Lands 2005 restricts omega-6 dosages to less than 1 g/day (Req. Reh’g 8 (referring to Appeal Br. 13)). We focused, however, on the *dispositive* issues based on the Appellant’s arguments. The relevant question is not whether the claimed subject matter would have been obvious to a person having ordinary skill in the art in view of Lands 2005 (or some other document not applied in the rejection) as teaching away from the claimed invention, but whether the claimed subject matter would have been obvious over the combined teachings of Morris and Anthony.

For example, we discussed dosages extensively in our Decision (Dec. 11–12). Although non-applied prior art references such as Lands 2005 are pertinent in that they fall within the general field of endeavor, they are far less relevant for purposes of assessing obviousness than Morris, which is the closest prior art and directly contradicts the Appellant’s position based on the non-applied prior art references. *Yorkey v. Diab*, 601 F.3d 1279, 1284 (Fed. Cir. 2010) (The Board has discretion to give more weight to one item of evidence over another “unless no reasonable trier of fact could have done so.”); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1368 (Fed. Cir. 2004) (“The Board has broad discretion as to the weight to give to [evidence] offered in the course of prosecution.”).

Similarly, the Appellant contends that we did not address the argument that Morris teaches omega-6 and omega-3 fatty acids are interchangeable (Req. Reh’g 8). We pointed out, however, that claim 82 does not require omega-3 fatty acids and discussed Morris’s teachings relative to claim 82’s subject matter (Dec. 10–13).

Additionally, the Appellant contends that we did not address the argument that the problem to be solved by Morris or Anthony is different from that disclosed for the claimed subject matter (Req. Reh’g 8). *But see* Dec. 13–14. *KSR Int’l Co. Teleflex Inc.*, 550 U.S. 398, 420 (2007) (“The first error of the Court of Appeals in this case was to foreclose [an obviousness] reasoning by holding that . . . patent examiners should look only to the problem the patentee was trying to solve.”). “Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the [prior art] can provide a reason for combining the elements in the manner claimed.” *Id.* *See also In re Kemps*, 97 F.3d 1427, 1430 (Fed. Cir. 1996) (the motivation or reason in the prior art need not be the same as that of the inventor).

The remaining issues listed in the Request (Req. Reh’g 8–10) are also inapt as they are not germane to the Examiner’s rejection and our Decision sustaining it. For example, the Appellant points out what certain dependent claims recite (Req. Reh’g 10). *But see* Dec. 7.

The Appellant argues that “Morris identifies close to 500 antioxidants over 24 paragraphs . . . and yet leaves the list **open-ended**” and, therefore, we overlooked that Morris recites a “long **incomplete** and **infinite** list of antioxidants” (Req. Reh’g 13–14; *see also id.* at 14–15). We did not overlook Morris’s teachings. Morris provides a finite list of *identified*

antioxidants—one of which is a polyphenol antioxidant (Morris ¶ 128), as we discussed in our Decision at pages 10–11. *See also In re Corkill*, 771 F.2d 1496, 1500 (Fed. Cir. 1985) (finding an argument based on the notion that the prior art taught “an infinite number of zeolites are possible” to be unpersuasive because the prior art suggested that “hydrated zeolites will work” in detergent formulations).

The Appellant argues that the dosages recited in claim 82 are the same as the relative amounts for each component recited in the claim (Req. Reh’g 15–16; *see also id.* 17–18). That argument is unpersuasive for the reasons given in our Decision (Dec. 11–12). Claim 82 does not specify the relative amounts for each of the formulations (or ingredients) that make up the packaged product but rather a label (presumably a piece of paper with printed matter) that indicates “suitability for consumption that collectively provide a dosage” for various ingredients (Appeal Br. 20).

The Appellant argues that we misapprehended *In re Ngai*, 367 F.3d 1336, 1337–38 (Fed. Cir. 2004), arguing that the *Ngai* issue was raised in the Appeal Brief at pages 11–12 (Req. Reh’g 16–17). The Appeal Brief at pages 11–12 does not address *Ngai*, which was cited in the Final Action (Final Act. 20), let alone address why a functional relationship between the printed matter and the substrate exists. In any event, we did not misapprehend *Ngai* for the reasons discussed in our Decision (Dec. 8, 11–12).

The Appellant expresses a disagreement with our Decision, arguing that it is inconsistent with binding precedent such as *KSR*, 550 U.S. 416 (Req. Reh’g 18–20). Mere disagreement with our Decision that the Appellant failed to identify reversible error in the obviousness conclusion

*based on Morris and Anthony* is insufficient to establish that we overlooked or misapprehended any point.

The Appellant argues that objective evidence in the form of peer-reviewed papers and nutritional policy (e.g., Land 2005 restricting dosages of omega-6 fatty acids) provides validation from persons skilled in the art establishing nonobviousness (based on long-felt need) and that we overlooked such evidence (Req. Reh’g 21–22). We did not overlook such evidence, as it does not outweigh the strong evidence in support of obviousness *based on Morris and Anthony*. *Yorkey*, 601 F.3d at 1284; *Am. Acad. of Sci. Tech Ctr.*, 367 F.3d at 1368.

Moreover, as we discussed in our original Decision (Dec. 14), nonobviousness based on long-felt need requires a showing that both a demand existed and that others tried but failed to satisfy that demand.<sup>7</sup> Merely referring to other less pertinent documents, while ignoring the breadth of the claims and the scope and content of the *applied* prior art teachings, fails to satisfy a showing of a demand and that others tried but failed to satisfy that demand.

The Appellant argues that in pointing out that claim 82 does not require the presence of omega-3 fatty acids, we overlooked claims 92, 107, and 113, which do require such acids (Req. Reh’g 22). The Appellant, however, overlooks our finding (Dec. 8) as well as the Examiner’s determinations (Ans. 7–8; Final Act. 14 (citing Anthony ¶ 27)) that Morris would have suggested the combination of ingredients and that Anthony

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<sup>7</sup> See *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1082–83 (Fed. Cir. 2012).

teaches a ratio of omega-6 fatty acids to DHA omega-3 fatty acid ratio of about 6:1 or less (Req. Reh’g 22).

Notwithstanding the Appellant’s argument (Req. Reh’g 22–23) that it is the Examiner’s burden to establish a prima facie case of obviousness, the allocation of the procedural burdens *during the examination process* (35 U.S.C. § 132) does not excuse the Appellant from identifying reversible error in the Examiner’s rejection *in the appeal process*. *Jung*, 637 F.3d at 1365–66; *Frye*, 94 USPQ2d at 1075–76. 37 C.F.R. §§ 41.37(c)(1)(iv) and 41.41(b)(2).

To the extent that the Examiner’s rejections were “so uninformative that they prevent[ed] the Appellant from recognizing and seeking to counter the grounds [of] rejection” (Req. Reh’g 23), which does not appear to be the case, the Appellant should have filed a timely petition pursuant to 37 C.F.R. § 1.181 requesting supervisory intervention to compel the Examiner’s compliance with 37 C.F.R. § 1.104.<sup>8</sup> *See Jung*, 637 F.3d at 1364 (“[C]oncerns only arise where the examiner has failed to meet the notice requirement of § 132. Here, as discussed above, *Jung* was on notice of the full basis for the examiner’s rejection.”).

Finally, we note the Appellant’s reference to Exhibits A–C, which are said to be “pleadings in the Applicant’s prior-filed application US 12/426,034 to the United States Supreme Court” (Req. Reh’g 24). But the relevance of such pleadings to the current appeal is not readily apparent. Therefore, we do not address them. *Cf. In re Borkowski*, 505 F.2d 713, 718 (CCPA 1974).

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<sup>8</sup> *See* Petition Decision entered August 17, 2020 at 11.

For these reasons, we do not modify our original Decision in any substantive respect.

OUTCOME OF DECISION ON REHEARING

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Denied</b>	<b>Granted</b>
82, 87, 91–93, 96, 97, 99–102, 109, 110, 113–120	112, second paragraph	Indefiniteness	82, 87, 91–93, 96, 97, 99–102, 109, 110, 113–120	
88, 89, 95, 103, 107–110	112, fourth paragraph	Improper Dependency	88, 89, 95, 103, 107–110	
82–89, 91–104, 107–110, 113–120	103(a)	Morris, Anthony	82–89, 91–104, 107–110, 113–120	
<b>Overall Outcome</b>			82–89, 91–104, 107–110, 113–120	

FINAL OUTCOME OF APPEAL AFTER REHEARING

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
82, 89	112, first paragraph	Written Description		82, 89
82, 87, 91–93, 96, 97, 99–102, 109, 110, 113–120	112, second paragraph	Indefiniteness	82, 87, 91–93, 96, 97, 99–102, 109, 110, 113–120	
88, 89, 95, 103, 107–110	112, fourth paragraph	Improper Dependency	88, 89, 95, 103, 107–110	
82–89, 91–104, 107–110, 113–120	103(a)	Morris, Anthony	82–89, 91–104, 107–110, 113–120	

Appeal 2019-005232  
Application 13/877,847

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
<b>Overall Outcome</b>			82-89, 91-104, 107-110, 113-120	

DENIED