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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LENNY LEBOVICH

Appeal 2019-005567
Application 15/191,107
Technology Center 1700

Before JEFFREY T. SMITH, GEORGE C. BEST, and
JEFFREY R. SNAY, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* BEST.

Opinion Dissenting filed by *Administrative Patent Judge* SMITH.

BEST, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–4, 8–15, 21, and 24–30 of Application 15/191,107. Final Act. (May 10, 2018). We have jurisdiction under 35 U.S.C. § 6.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies PRE Brands as the real party in interest. Appeal Br. 1.

A telephonic hearing was held in this appeal on June 24, 2020.²
For the reasons set forth below, we *reverse*.

I. BACKGROUND

The '107 Application describes food packaging that allows the consumer to see the package contents from all angles while still permitting robust labeling of the package. Spec. ¶ 2. Figure 6 of the '107 Application is illustrative and is reproduced below:

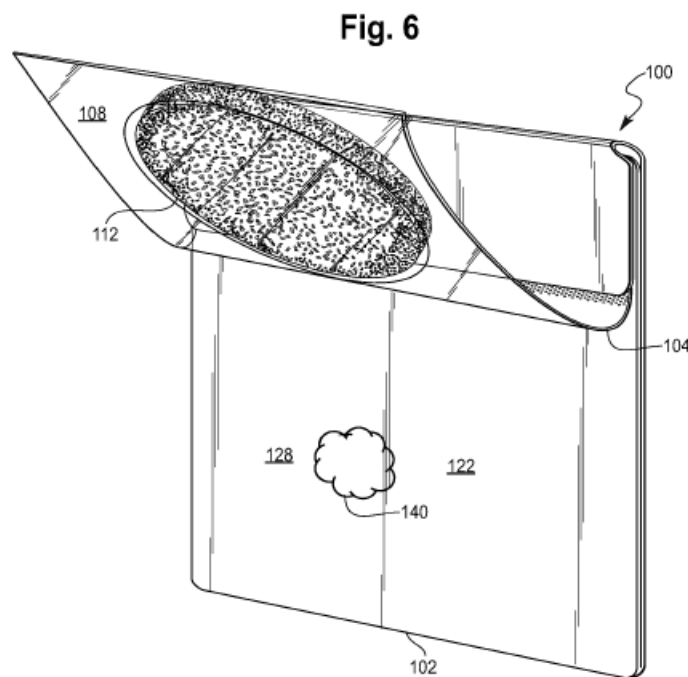


Figure 6 illustrates a food product within the transparent film that is secured to the backer card. Spec. ¶ 19.

As shown in Figure 6, backer card 102 provides a surface for securing transparent film 104 and for carrying printed information regarding the

² This hearing was conducted under the provisions of the Board's LEAP program, which gave Appellant's counsel 15 extra minutes of argument time.

product. *Id.* ¶ 24. Transparent film 104 includes a cavity that contains food item 112. *Id.* ¶ 29. The entire outside 122 of backer card 102 may be printed with information without obscuring visibility of food item 112. *Id.* Due to the manner of attachment of transparent film 104 to backer card 102, a consumer can inspect all sides of food item 112. *Id.*

Claim 1 is representative of the '107 Application's claims and is reproduced below from the Claims Appendix of the Appeal Brief.

1. A packaged food assembly, comprising:

a backer card having information printed thereon;

a transparent film disposed with at least a portion adjacent the backer card, the transparent film having a front side, a back side that faces the backer card opposite the front side, and a cavity disposed between the front and back sides; and

a meat item disposed in the cavity that is unobscured by the transparent film;

a perforation located between the cavity and the upper portion of the transparent film;

wherein the transparent film is attached to the backer card at an attachment location disposed above the cavity, enabling a portion of transparent film below the attachment location to move away from the backer card;

wherein the back side of the transparent film is flat and the front side of the transparent film complements the shape of the meat item, and the cavity is evacuated so that it is sized and shaped to house the meat item and does not extend laterally beyond the backer card; and

wherein the packaged food assembly permits a consumer to examine the meat item from all sides while also allowing for display of written information in a frontward facing direction

on an area that is greater in size than the front side of the transparent film.

Appeal Br. 39.

II. REJECTIONS

On appeal, the Examiner maintains the following rejections:

1. Claims 1–4, 8–10, 21, and 25–27 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Cook,³ Weinberg,⁴ Grinstead,⁵ Runner,⁶ Grottrup,⁷ Gerber,⁸ Levy,⁹ and Salfisberg.¹⁰ Final Act. 2.
2. Claims 11 and 28–30 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, Salfisberg, and Becker.¹¹ Final Act. 9.
3. Claims 12–14 and 24 are rejected under 35 U.S.C. § 103 over the combination of Cook, Gerber, Grottrup, Salfisberg, Levy, Weinberg, Runner, and Becker. Final Act. 10.

³ US 3,730,738, issued May 1, 1973.

⁴ US 3,102,034, issued Aug. 27, 1963.

⁵ US 2,623,826, issued Dec. 30, 1952.

⁶ US 2,272,623, issued Feb. 10, 1942.

⁷ US 3,946,869, issued Mar. 30, 1976.

⁸ US 3,112,827, issued Dec. 3, 1963.

⁹ US 7,789,233 B2, issued Sept. 7, 2010.

¹⁰ US 2,139,040, issued Dec. 6, 1938.

¹¹ US 3,223,233, issued Dec. 14, 1965.

4. Claim 15 is rejected under 35 U.S.C. § 103 as unpatentable over the combination of Cook, Gerber, Grottrup, Salfisberg, Levy, Weinberg, Runner, Becker, and Grinstead. Final Act. 15.
5. Claims 1–4, 9, 10, and 25–27 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Gerber, Cook, Grottrup, Weinberg, Grinstead, and Runner. Final Act. 15.
6. Claims 4 and 8 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner, and Levy. Final Act. 20.
7. Claims 11 and 28–30 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner, and Becker. Final Act. 21.
8. Claim 21 is rejected under 35 U.S.C. § 103 as unpatentable over the combination of Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner, and Salfisberg. Final Act. 22.
9. Claims 12–14 and 24 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Gerber, Cook, Grinstead, Levy, Grottrup, Weinberg, Runner, and Becker. Final Act. 23.
10. Claim 15 is rejected under 35 U.S.C. § 103 as unpatentable over the combination of Gerber, Cook, Grinstead, Levy, Grottrup, Weinberg, Runner, Becker, and Grinstead. Final Act. 28.

III. DISCUSSION

Appellant argues for reversal of all of the rejections with respect to all claims as an undifferentiated group. *See generally* Appeal Br. 14–38. We,

therefore, select claim 1 as representative of the claims on appeal. 37 C.F.R. § 41.37(c)(1)(iv) (2018).

Appellant's arguments for reversal of the pending rejections fall along two lines of attack. Appeal Br. 14–38. *First*, Appellant argues that the Examiner failed to establish a prima facie case of obviousness. *Id.* at 14–22. *Second*, Appellant argues that any prima facie case of obviousness is outweighed by the objective evidence of nonobviousness provided to the Examiner during prosecution. *Id.* at 22–38. We address these arguments separately.

A. The Examiner has established a prima facie case of obviousness

The Examiner rejected claims 1–4, 8–10, 21, and 24–30 of the '107 Application as obvious based upon various combinations of Cook and Gerber with a variety of additional references. *See* Final Act. 2–28. In particular, the Examiner has entered two sets of rejections of the claims at issue. The first set of rejections—identified as Rejections 1–4 above—rely upon Cook as the base reference and Gerber as a secondary reference. The second set of rejections—identified as Rejections 5–10 above—rely upon Gerber as the base reference and Cook as a secondary reference.

We address each set of rejections below.

1. Rejections relying upon Cook as the base reference

Appellant argues that each of the rejections is improper because the Examiner erred by finding that a person of ordinary skill in the art at the time of the invention would have combined Cook and Gerber in the manner set forth in the rejection. Appeal Br. 14–22. Appellant states that “[a]ll of the examiner’s reasons for why the combination of Cook and Gerber is allegedly

obvious are unpersuasive.” *Id.* at 14. Appellant specifically presents three arguments for reversal of these rejections. *Id.* at 15–22.

Because Gerber is a cumulative reference, we need not consider the merits of these arguments.

Even if the combination of Cook as a base reference with Gerber as a secondary reference is improper, Gerber is a cumulative reference. Gerber, therefore, is not needed for the Examiner to have demonstrated a prima facie case of obviousness for any of the claims rejected using Cook as a base reference.

When using Cook as a base reference, the Examiner found that Cook neither described nor suggested several limitations of claim 1 and relied upon Gerber—in part—to supply the missing description or suggestion. For example, in rejection 1:

a) The Examiner found that Cook arguably suggested the limitation regarding the size of the cavity in the packaging not “extend[ing] laterally beyond the backer card.” Final Act. 5. The Examiner further relied upon both Grottrup and Gerber to teach this limitation. *Id.* (citing Grottrup Fig. 9; Gerber Figs. 1, 3).

b) The Examiner found that Cook does not describe or suggest the limitation “a backer card having information printed thereon.” *Id.* at 6. The Examiner further found that Gerber and Levy each describe a backer card having product information printed thereon. *Id.*

c) The Examiner found that the backer card as taught by Cook also allows for display of written information in a frontward facing direction, but found that Cook did not necessarily describe the limitation “an area that is greater in size than the front side of the transparent film.” *Id.* at 7. The Examiner, however, also found that “Grottrup and Gerber both teach a

backer card having an area that is greater in size than the front side of the transparent film.” *Id.*

Thus, in rejecting claim 1 while using Cook as a base reference, the Examiner used Gerber in a cumulative manner. Therefore, even if the Examiner erred in finding that Cook and Gerber could be combined in the manner relied upon in the rejection, this error was harmless. We, therefore, cannot reverse Rejections 1–4 on this basis.

2. *Rejections relying upon Gerber as the base reference*

The Examiner rejected claims 1–4, 8–15, 21, and 24–30 in a series of six rejections using Gerber as the base reference. Final Act. 15–28. Because we have selected claim 1 as representative of the appealed claims, we focus on the rejection of claim 1 as unpatentable over the combination of Gerber, Cook, Grottrup, Weinberg, Grinstead, and Runner. *Id.* at 15.

Appellant argues that this rejection of claim 1 should be reversed because Gerber teaches away from combination with Cook. Appeal Br. 20–22. In particular, Appellant argues that Gerber teaches away from combination with Cook because a person of ordinary skill in the art would not have been motivated to modify Gerber to include “a perforation [located] between the cavity and the upper portion of the transparent film” because Gerber teaches away from such a modification. *Id.* at 21 (alteration in original). Appellant concludes that “[s]ince Gerber teaches away from providing a perforation as claimed, a [person of ordinary skill in the art] would not use Gerber’s display card packaging along with Cook’s packaging to create a packaged food assembly or method for packaging a perishable food product as claimed.” *Id.* at 22.

Appellant's argument regarding the combination of Gerber and Cook is not persuasive because the Examiner did not rely upon Cook as teaching anything about a perforation in the transparent film packaging.

In rejecting claim 1, the Examiner found, *inter alia*, that “[c]laim 1 differs from Gerber in specifically reciting that the package comprises a meat item and wherein the back side of the transparent film is flat and the front side of the transparent film complements the shape of the meat item.” Final Act. 16. The Examiner further found that Cook describes a header and backing board which comprises a transparent film package containing a food item such as meat. *Id.* (citing Cook 1:57–58, 3:19–24, Fig. 8).^{12, 13}

Thus, Appellant's argument in its Appeal Brief is misdirected. Gerber's alleged purpose of reducing the likelihood that the article-containing bag could be easily removed from the panels and fastener does not teach away from the proposed modifications to Gerber made in view of Cook.

In view of the foregoing, we determine that the Examiner did not err by finding that a person of ordinary skill in the art at the time of the invention would have combined Gerber with Cook to arrive at a packaged meat product that would allow a consumer to inspect the contents of the

¹² The Examiner also found that Cook describes the limitation “back side of the transparent film is flat and the front side of the transparent film complements the shape of the meat item.” Final Act. 17. This finding, however, is cumulative because the Examiner found that Weinberg also describes this limitation. *Id.*

¹³ Rather than rely on Cook for a description of a perforation, the Examiner relies upon Runner and Grottrup as describing this limitation. *Id.* at 18 (citing Runner Fig. 1; page 1, left col., ll. 1–6; page 1, right col., ll. 23–33; Grottrup, Fig. 9, 4:1–10).

package while also benefiting from the extra printable space described by Gerber. *See* Final Act. 16.

In its Reply Brief, however, Appellant broadens this teaching away argument so that it is no longer limited to the combination of Gerber with Cook. Reply Br. 5–6.

Normally, we would not consider an argument presented for the first time in the Reply Brief, *see* 37 CFR § 41.41(b)(2) (2018), but Appellant’s new, broader argument is responsive to assertions made for the first time in the Examiner’s Answer, *see* Answer 11. In particular, the Examiner argues:

Regarding the alternative rejection that relies on Gerber as the primary reference, it is noted that while Gerber teaches the use of a staple, Gerber does not explicitly state that other techniques of securement could not have been used. As such, it is noted that Gerber does not specifically discuss the use of an adhesive to secure the bag together with the folding of the backer card. Furthermore, it would still have been within the routine capabilities of one having ordinary skill in the art to provide perforations between the cavity and an upper portion of the transparent film in such a way that it would not have further increased one’s ability to tear the package out from the backer card, such as based on the number, size and depth of the perforations. See the following references for further evidence of perforations which can still maintain package integrity (see US 2115122, page 1, column 1, lines 1-22 and lines 41-47; U.S. 4672684 - Column 4, lines 54-63; US 4618992 - column 2, line 64 to column 3, line 4; US 4567987 - the abstract; US 3348760 - column 2, lines 8-12; US 3791573 - column 4, lines 40-46).

Id.

Rather than object to this new argument and additional evidence¹⁴ as setting forth a new ground of rejection,¹⁵ Appellant replies that “even if a perforation could be added that would not increase the ability to tear the package, the examiner failed to explain the purpose of such a perforation” in the proposed combination. Reply Br. 6. According to Appellant, this means that the Examiner’s explanation as to why a person of ordinary skill in the art would modify Gerber to include a perforation of any sort is insufficient. *Id.*

We agree with Appellant on this point. Moreover, we note that the newly-cited references describe the use of perforations that are tear-resistant for purposes that differ from the use of the perforations in Appellant’s packaging. For example, Prudden¹⁶ uses the perforations to provide a way for liquid to access material on the inside of the packaging and suggests tea bags as a representative use. Prudden 2:33–45.

Thus, we reverse the rejections of claims 1–4, 8–15, 21, and 24–30 over combinations of the prior art that rely upon Gerber as the base reference.

B. Appellant’s objective evidence of nonobviousness is sufficient to rebut the Examiner’s prima facie case of obviousness

Appellant argues that it has presented sufficient objective evidence of nonobviousness to overcome the Examiner’s prima facie case. Because we

¹⁴ Appellant does not challenge the accuracy of the Examiner’s findings regarding the content of the six newly-cited references.

¹⁵ A petition to the Director is the proper way to raise any such objection. *See In re Berger*, 279 F.3d 975, 984–85 (Fed. Cir. 2002).

¹⁶ US 2,115,122, issued Apr. 26, 1938.

have reversed the rejections that use Gerber as a base reference (identified as Rejections 5–10 above), we need only consider this question with respect to rejections that rely upon Cook as a base reference (identified as Rejections 1–4 above).

In this case, Appellant argues that it has presented the following types of objective evidence of nonobviousness: (1) commercial success, (2) industry praise and recognition, (3) solving a long-felt, unmet need for consumer-friendly packaging, and (4) unexpected results. Appeal Br. 22–36. In support of its argument, Appellant relies upon three declarations and each declaration’s accompanying exhibits: the June 13, 2017 Declaration of Lenny Lebovich (entered into record on June 14, 2017) (“Lebovich I”), the January 17, 2018 Declaration of Lenny Lebovich (entered January 19, 2018) (“Lebovich II”), and the January 16, 2018 Declaration of Jim Warner (entered January 19, 2018) (“Warner Decl.”).¹⁷

We address each of these categories of objective evidence separately to determine whether Appellant has, in fact, presented evidence of the sort claimed.

1. Appellant has presented evidence of commercial success

“[T]o accord substantial weight to secondary considerations in an obviousness analysis, the evidence of secondary considerations must have a nexus to the claims, *i.e.*, there must be a legally and factually sufficient connection between the evidence and the patented invention.” *Fox Factory*,

¹⁷ At the hearing, Appellant used demonstrative exhibits that improperly included evidence not present in any of its declarations, including recent sales data. We have not considered such information because it is not part of the record. *See* Tr. 3–4.

Inc. v. SRAM, LLC, 944 F.3d 1366, 1373 (Fed. Cir. 2019) (internal quotation marks omitted). The patentee bears the burden of showing that a nexus exists. *WMS Gaming, Inc. v. Int’l Game Tech.*, 184 F.3d 1339, 1359 (Fed. Cir. 1999). A patentee meets this burden by showing correspondence between the objective evidence and the claim’s scope. *Henny Penny Corp. v. Frymaster LLC*, 938 F.3d 1324, 1332 (Fed. Cir. 2019).

Appellant argues that it has presented evidence of commercial success in each of the declarations—Lebovich I, Lebovich II, Warner Decl.—submitted during prosecution. In particular, Appellant argues that since entering the market using packaging encompassed by the ’107 Application’s claims in 2015, its sales have grown every year and have grown by a much greater percentage than its competitors in the grass-fed beef market.¹⁸

¹⁸ The dissent takes issue with Appellant’s characterization of the relevant market as grass-fed beef and contends that the correct market is all beef products. Market definition is not an issue unique to patent law. We believe that antitrust law provides a useful definition of the relevant product market:

In the most general terms, a product market . . . consists of all goods or services that buyers view as close substitutes. That means if the price of one product goes up, and in response consumers switch to buying a different product so that the price increase is not profitable, those two products may be in the same product market because consumers will substitute those products based on changes in relative prices.

Markets | *Federal Trade Commission*, Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets> (last viewed September 4, 2020).

Our intuition is that consumers who buy organic, grass-fed beef are relatively reluctant to substitute non-organic, corn- or grain-fed or finished beef for grass-fed beef. This is demonstrated by the fact that such consumers

Appeal Br. 24 (citing *Lebovich I* ¶ 9, *Lebovich II* ¶ 21). Appellant especially emphasizes that it experienced more than a 475% year-on-year growth in 2016 while four of its competitors experienced less growth, and, in some cases, a slight decline in that time period. *Id.* (citing *Lebovich II* ¶ 21). We note that the record is devoid of evidence concerning the change in the size of the grass-fed beef market in the relevant time frame.¹⁹

In view of the foregoing, we find that Appellant has provided sufficient evidence of the commercial success of its products.

In this appeal, however, the question of how much weight to give this evidence of commercial success turns upon whether or not Appellant has established a nexus between the commercial success and the claimed invention. *See Fox Factory*, 944 F.3d at 1373. Appellant argues that it is entitled to a presumption of nexus because its products correspond to the claims at issue. Appeal Br. 29–31.

are willing to pay a premium price for organic, grass-fed beef. This suggests that grass-fed beef is in a different market from beef in general.

More importantly, however, the only evidence in the record concerning market definition comes from Appellant, who provided declaration testimony that grass-fed beef is a well-defined product market that is different from the market for beef in general. *See, e.g., Lebovich II* ¶¶ 6–7, Exs. 1–2.

¹⁹ The dissent argues that Appellant has not shown that its commercial success is due to the claimed invention rather than the redesign of the graphics on the packaging. The redesigned packaging, however, launched in the fall of 2016. *Lebovich II*, Ex. B2. The vast majority of Appellant’s sales growth occurred prior to launch of the redesigned packaging. *See id.* at Ex. 3. If anything, the rate of growth of Appellant’s sales slowed after introduction of the redesigned packaging. *Id.*

A patentee is entitled to a rebuttable presumption of nexus between the asserted evidence of secondary considerations and a patent claim if the patentee shows that the asserted evidence is tied to a specific product and that the product “*is the invention disclosed and claimed.*” *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988) (emphasis added); *see also SightSound Techs., LLC v. Apple Inc.*, 809 F.3d 1307, 1319 (Fed. Cir. 2015) (“If a product both embodies the claimed features and is coextensive with the claims at issue, a nexus is presumed. In other words, a nexus exists if the commercial success of a product is limited to the features of the claimed invention.” (citation and internal quotation marks omitted)); *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563 (Fed. Cir. 1997). “That is, presuming nexus is appropriate when the patentee shows that the asserted objective evidence is tied to a specific product and that product embodies the claimed features, and is coextensive with them.” *Fox Factory*, 944 F.3d at 1373 (internal quotation marks omitted).

Appellant presented declaration evidence that its products are reasonably commensurate with the claims’ scope. *See* Lebovich I ¶ 4, Warner Decl. ¶¶ 14–16.

The Examiner found that Appellant’s products were not commensurate in scope with the claims. Answer 11–12. In particular, the Examiner argues that Appellant’s products are not commensurate in scope with the claims because Appellant only sells grass-fed beef in the claimed packaging. *Id.* The Examiner points out that independent claim 1 recites that the packaged item is meat, which is a much broader category than grass-fed beef.

We cannot sustain the Examiner’s finding because it is not consistent with Federal Circuit precedent. As the Federal Circuit has pointed out,

[i]t seems unlikely that a company would sell a product containing multiple, redundant embodiments of a patented invention. . . . Rather, [the Federal Circuit has] consistently held that *a patent applicant need not sell every conceivable embodiment of the claims . . . to rely upon evidence of commercial success. Commercial success evidence should be considered so long as what was sold was within the scope of the claims.*

In re Glatt Air Techniques, Inc., 630 F.3d 1026, 1030 (Fed. Cir. 2011) (internal quotation marks and citations omitted, emphasis added); *see also ClassCo, Inc. v. Apple, Inc.*, 838 F.3d 1214, 1221 (Fed. Cir. 2016).

Although a patentee need not prove that the commercial success of the patented invention is not due to factors other than the patented invention, *Demaco Corp.*, 851 F.2d at 1394 (“A requirement for proof of the negative of all imaginable contributing factors would be unfairly burdensome, and contrary to the ordinary rules of evidence.”), Appellant does present evidence that tends to rule out possible alternative explanations for its commercial success.

First, Appellant points to evidence that consumers praise its packaging for features corresponding aspects of the packaging recited in the claims. Appeal Br. 25–28 (citing *Lebovich I* ¶¶ 23–27, *Lebovich II* ¶ 17). *Lebovich I* describes the customer praise it reports as unsolicited. Paragraphs 16 and 17 of *Lebovich II* identify additional consumer feedback, but it is unknown whether this feedback was unsolicited, solicited, or compensated. Tr. 25–26. In particular, Appellant presented evidence of consumer praise for the transparent film that permitted view of the entirety of the packaged meat product, the perforation between the cavity and the upper portion of the

film that allows a consumer to detach the backer card, and the information displayed on the backer card. Appeal Br. 25–28.

Second, Appellant points to opinion evidence that consumers regard grass-fed beef as a staple product. *See, e.g.*, Lebovich I ¶ 5. We note that Appellant defines the term “staple product” in a specific manner that differs from the commonly used definition.²⁰ According to Mr. Lebovich, Appellant’s founder and then-CEO, *id.* ¶ 3, staple goods are those where “there is little differentiation between product offerings from one supplier and another, and staple goods usually compete on the basis of price,” *id.* ¶ 5. We note that Mr. Lebovich has extensive experience in the marketing of beef, especially organic beef. *See id.* ¶ 3; Lebovich II ¶¶ 2–6. For the purposes of this opinion, we use the definition provided by and used in Appellant’s declarations. Doing otherwise hinders proper understanding of Appellant’s evidence and arguments.²¹

Mr. Lebovich opined that Appellant’s success is due to its product packaging. Lebovich I ¶ 6. In support of this opinion, Mr. Lebovich pointed to evidence that product positioning within stores and price were not the source of Appellant’s commercial success. *Id.* ¶¶ 7–8.

²⁰ *See, e.g.*, *Staple | Definition of Staple at Dictionary.com*, Dictionary.com, <https://www.dictionary.com/browse/staple> (last viewed August 25, 2020) (defining staple as a noun: “a basic or necessary item of food”; as an adjective: “chiefly or largely dealt in or consumed,” “basic, chief, or principal”).

²¹ The dissent appears not to recognize the special definition of the term “staple” used in the declarations submitted by Appellant as evidence during prosecution of the ’107 Application.

At the hearing, we questioned Appellant regarding the existence of evidence that the commercial success was due to the packaging rather than the quality of the grass-fed beef contained in the packaging. *See, e.g.*, Tr. 20–23. Here, the presence of the grass-fed beef as the packaged material is an unclaimed feature of the product being sold. Thus, if the commercial success is attributable to the quality of the grass-fed beef, presumption of a nexus is inappropriate. *Cf. Fox Factory*, 944 F.3d at 1374–75 (explaining that the presence of an unclaimed feature that amounts to a significant addition to the claimed invention may make presumption of a nexus inappropriate).

In response, Appellant argued that its beef is a staple product that is differentiated by its unique packaging. Tr. 20–21. This argument is somewhat undercut by one of the pieces of evidence submitted by Appellant. In a “Package Case Study” published on the Packaging World website on July 15, 2017, Anne Marie Mohan, *Literal transparency helps sell grass-fed beef*, Packaging World (July 15, 2007), <https://bit.ly/320Y6WY> (Lebovich II, Ex. B2), the quality of Appellant’s beef products is extolled:

[Appellant’s] beef products are sourced from Australia and New Zealand, where conditions and practices allow them to grow the best grass year-round. The company’s suppliers are also held to some of the highest quality standards including 100% grass-fed, 100% pasture-raised, and no added hormones or antibiotics. All [Appellant’s] steaks are hand-trimmed for consistent thickness and weight, and products must meet the company’s specified marbling scale, fat color, pH level, and meat color to be considered [Appellant’s].

Id. at 1. Thus, the Packaging World article suggests that Appellant’s products may be differentiated from its competitors by quality. Of course,

these statements also might be marketing puffery provided to a reporter interested in Appellant's packaging.

At the end of the day, we suspect that the quality of the grass-fed beef may drive Appellant's commercial success and repeat sales, but we are not able to take consumer surveys to obtain evidence one way or the other. *Cf. In re Best*, 562 F.2d 1252, 1255 (CCPA 1977) (explaining that the office has no ability to obtain samples of the prior art or conduct experiments). We, therefore, credit Mr. Lebovich's testimony that the packaging is the source of Appellant's commercial success.

Thus, we find that Appellant is entitled to a presumption that a nexus exists between the claimed invention and its commercial success.

2. *Appellant has presented evidence of its industry praise of an embodiment of the claimed invention*

Appellant identified articles demonstrating that its invention had been recognized as innovative in the packaging industry. *See* Lebovich I ¶¶ 23–24; Lebovich II ¶ 18 (discussing Lebovich II, Exs. B1, B2). Finally, Appellant reported that it had received an offer to license intellectual property related to its inventive packaging. Lebovich I ¶ 21.

The Federal Circuit has held that industry praise is objective evidence of nonobviousness. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1053 (Fed. Cir. 2016); *Institut Pasteur v. Focarino*, 738 F.3d 1337, 1347 (Fed. Cir. 2013) (“[I]ndustry praise . . . provides probative and cogent evidence that one of ordinary skill in the art would not have reasonably expected [the claimed invention.]”); *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1352 (Fed. Cir. 2010) (noting that industry praise tends to indicate that the invention would not have been obvious). Similarly, licenses showing industry respect for the invention constitute objective evidence of

nonobviousness. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1368 (Fed. Cir. 2013).

3. *The claimed invention satisfies a long-felt but unmet need*

Evidence that the invention satisfies a long-felt, unmet need weighs in favor of nonobviousness because it is reasonable to infer that the need would not have persisted if the solution actually were obvious. *Apple*, 839 F.3d at 1056 (Fed. Cir. 2016).

However, Appellant's argument to that effect is only marginally persuasive. Appellant's argument consists of a recitation of the differences between Appellant's packaging and the packaging used by its competitors. *See* Appeal Br. 32–33. In support of its argument, Appellant points to Lebovich II and the Warner Declaration. Appeal Br. 32–33.

The only evidence that directly addresses the question of whether or not the claimed invention satisfies a long-felt but unmet need is Mr. Lebovich's *ipse dixit*:

The packages described and depicted in Paragraph 7 illustrate consumers' long-felt, unmet need for transparent packaging of fresh, perishable food such as meat that still includes necessary nutritional information, a need addressed by the invention. Consumers have long demanded packaging for fresh foods such as meat that permits them to examine the

product from all angles so that they can select their preferred piece.

Lebovich II ¶ 8. Mr. Lebovich does not provide any basis for his assertion that consumers have ever perceived a need for transparent packaging of meat products.^{22, 23}

Mr. Warner’s declaration does not provide any evidence that he has experience, let alone expertise, in the meat industry. *See generally* Warner Decl. Mr. Warner’s declaration establishes that he relies upon Lebovich II at the source of his knowledge regarding the industry. His declaration compares Appellant’s packaging to its competitors’ packaging and finds that Appellant’s packaging has several “consumer-friendly” features that are not present in the competitors’ packaging. *Id.* ¶¶ 12–14. Appellant’s argument based upon the Warner Declaration assumes that any feature that may be described as “consumer-friendly” is something that consumers would have felt they needed and therefore constitutes a long-felt, unmet need. This argument assumes that consumers would have identified the problems with the existing packaging and been dissatisfied with it. Appellant provides no basis for this assumption.

Significantly, Appellant does not point us to any third-party evidence discussing problems with existing packaging or acknowledging that Appellant’s packaging solves long-felt problems with food packaging.

²² Speculation that Mr. Lebovich developed this knowledge during his 2010–2012 consumer interviews, *see* Lebovich II ¶ 5, is inappropriate. Direct testimony to this effect is needed.

²³ Appellant does not argue that the consumer praise discussed above provides evidence of a long-felt, unmet need. *See* Appeal Br. 31–33.

In view of the foregoing, we find that Appellant has established, barely, that its invention satisfies a long-felt, unmet need. However, the evidentiary basis for the showing is so weak that this factor is entitled to little weight in the ultimate obviousness determination.

4. *Appellant has established the existence of unexpected results*

A demonstration that a claimed invention achieves unexpected results relative to the prior art is objective evidence of nonobviousness. *Galderma Labs., L.P. v. Tolmar, Inc.*, 737 F.3d 731, 736 (Fed. Cir. 2013).

Appellant, relying upon the Warner Declaration, argues that it presented evidence of unexpected results. *See* Appeal Br. 34–36. In particular, Appellant argues that the claimed package design achieves unexpected results in three ways.

First, Appellant argues that the novel product design “surprisingly ‘allows for the development of brand loyalty beyond what is typical for a staple food like a perishable food item, and particularly [for] meat.’” *Id.* at 34 (quoting Warner Decl. ¶ 16). According to Mr. Warner, the claimed design maximizes the space available for printing product information on meat packaging. Warner Decl. ¶ 16. “After a customer uses the product, the individual may safely retain the backer card that remains uncontaminated. . . . The additional information and the ability to save the backer card ‘improves the connection consumers feel with the brand.’” Appeal Br. 34. (quoting Warner Decl. ¶ 16).

Appellant has presented evidence that it has achieved some degree of consumer loyalty and brand awareness. In particular, Appellant has demonstrated that it has achieved a repeat purchase rate that is greater than the repeat purchase rates of its closest competitors and of the average

branded grass-fed beef product. Lebovich I ¶ 14. Appellant has also presented other evidence demonstrating that it has achieved a degree of consumer loyalty greater than experienced for other products in its market segment. *See* Lebovich I ¶¶ 12–16.

In sum, we find that Appellant has demonstrated the surprising result that it achieved some degree of brand loyalty in a market segment filled with staple²⁴ goods.

Second, Appellant argues that the claimed design “surprisingly allows for an increased amount of visual graphic area without compromising product visibility.” Appeal Br. 34–35 (citing Warner Decl. ¶¶ 17–20). According to Appellant, prior to Appellant’s invention, a person of ordinary skill in the art would have considered increasing the graphic area capacity on meat packages to be inversely correlated with product visibility. *Id.* at 35. Appellant claims that the innovative packaging unexpectedly provides both 100% visibility of the product and a large area for display of visual graphics. *Id.* (citing Warner Decl. ¶ 17).

We do not consider this result surprising or unexpected relative to the closest prior art. While it is true that appellant’s claimed package design has the advantage of increased graphic display area and 100% visibility of the meat product to the consumer, this is the predictable result of design choices made by Appellant. Not every advantage of the claimed invention relative to the prior art is correctly characterized as surprising or unexpected.

Third, Appellant argues that products embodying and reasonably commensurate with the scope of the claims “surprisingly allow for improved

²⁴ As the term “staple” is defined by Appellant’s declarants.

display options in grocery stores over prior packaging.” Appeal Br. 35 (citing Warner Decl. ¶ 15). Specifically, Appellant argues that the ability to display the meat standing vertically as well as laying horizontally is a surprising and improved result because vertical display improves visibility on store shelves. *Id.* at 36 (citing Lebovich II, Ex. B2).

As we have discussed in connection with the increased area for printing graphics, not every advantage achieved by an invention relative to the prior art is correctly described as surprising or unexpected. In this case, the use of a rigid backer card would be expected to allow for vertical display of meat products, while the use of a vacuum sealed package avoids the problems encountered when Styrofoam tray packages are displayed vertically. In sum, this is not an unexpected result.

In view of the foregoing, we find that Appellant has established the existence of unexpected results with respect to the establishment of brand awareness and loyalty in a market segment comprised of staple goods, but not with regard to the increased area for display of graphic information or vertical display of the products on store shelves.

5. *Conclusion regarding obviousness*

When, as here, an applicant presents objective evidence of nonobviousness, the presumption of unpatentability created by the Examiner’s identification of a prima facie case of obviousness dissolves, and all of the evidence must be weighed together to reach a final conclusion regarding the obviousness of the claim in question. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). “[P]atentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument.” *Id.*

As discussed above, we have determined that the Examiner did not err in concluding that claim 1 is prima facie obvious over the combination of Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, and Salfisberg. *See* § III.A.1. However, when presented with Appellant's arguments regarding secondary considerations, the Examiner erred by finding that Appellant's evidence of commercial success was not commensurate in scope with the claims. The Examiner also erred in concluding that Appellant's presentation of objective evidence of nonobviousness was insufficient to overcome the prior art rejection.

For the reasons discussed above, we have found that Appellant demonstrated the existence of objective evidence of nonobviousness in the form of commercial success, industry praise, satisfaction of a long-felt, unmet need, and unexpected results. While Appellant's evidence of satisfaction of a long-felt, unmet need is exceedingly weak, the evidence of commercial success and industry praise are particularly strong.

In contrast, the prima facie case of obviousness for claim 1 over the combination of Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, and Salfisberg as set forth by the Examiner is—in our view—only average.

When we consider Appellant's evidence of objective evidence of nonobviousness together with the prima facie case of obviousness of claim 1, we think that, on balance, a preponderance of the evidence supports a conclusion that claim 1 is patentable over the cited prior art.

In view of the foregoing, we reverse the rejections of claims 1–4, 8–15, 21, and 24–30 as unpatentable over the combinations of prior art relying upon Cook as the base reference.

IV. CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-4, 8-10, 21, 25-27	103	Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, Salfisberg		1-4, 8-10, 21, 25-27
11, 28-30	103	Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, Salfisberg, Becker		11, 28-30
12-14, 24	103	Cook, Gerber, Grottrup, Salfisberg, Levy, Weinberg, Runner, Becker		12-14, 24
15	103	Cook, Gerber, Grottrup, Salfisberg, Levy, Weinberg, Runner, Becker, Grinstead		15
1-4, 9, 10, 25-27	103	Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner		1-4, 9, 10, 25-27
4, 8	103	Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner, Levy		4, 8
11, 28-30	103	Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner, Becker		11, 28-30
21	103	Gerber, Cook, Grottrup, Weinberg, Grinstead, Runner, Salfisberg		21
12-14, 24	103	Gerber, Cook, Grinstead, Levy, Grottrup, Weinberg, Runner, Becker		12-14, 24
15	103	Gerber, Cook, Grinstead, Levy, Grottrup, Weinberg, Runner, Becker, Grinstead		15
Overall Outcome				1-4, 8-15, 21, 24-30

REVERSED

SMITH, *Administrative Patent Judge*, dissenting.

I respectfully dissent from the reversal of the rejections of claims 1–4, 8–15, 21, and 24–30 under 35 U.S.C. § 103 as specified in Rejections 1–4.¹ Upon consideration of the evidence of record, I agree with the majority’s decision to affirm the Examiner’s § 103 rejections (Rejections 1–4) for essentially the reasons set out in the majority opinion and those presented by the Examiner in the Answer. However, after carefully evaluating and weighing both the evidence relied upon by the Examiner and the objective evidence of non-obviousness Appellant provided, I respectfully dissent from my colleagues’ final determinations regarding the obviousness rejections. I add the following:

Secondary Considerations

Evidence of secondary considerations, such as that presented by Appellant, must be considered in route to a determination of obviousness/nonobviousness under 35 U.S.C. § 103. Accordingly, the issue of obviousness under 35 U.S.C. § 103 is considered anew, carefully

¹ 1. Claims 1–4, 8–10, 21, and 25–27 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, and Salfisberg. Final Act. 2.

2. Claims 11 and 28–30 are rejected under 35 U.S.C. § 103 as unpatentable over the combination of Cook, Weinberg, Grinstead, Runner, Grottrup, Gerber, Levy, Salfisberg, and Becker. Final Act. 9.

3. Claims 12–14 and 24 are rejected under 35 U.S.C. § 103 over the combination of Cook, Gerber, Grottrup, Salfisberg, Levy, Weinberg, Runner, and Becker. Final Act. 10.

4. Claim 15 is rejected under 35 U.S.C. § 103 as unpatentable over the combination of Cook, Gerber, Grottrup, Salfisberg, Levy, Weinberg, Runner, Becker, and Grinstead. Final Act. 15.

evaluating and weighing both the evidence the Examiner relied upon and the objective evidence of nonobviousness Appellant provided. (*See, e.g., In re Eli Lilly & Co.*, 902 F.2d 943, 945 (Fed. Cir. 1990)). We also are mindful that objective evidence of non-obviousness in any given case may be entitled to more or less weight depending on its nature and its relationship to the merits of the invention (*see Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538–39 (Fed. Cir. 1983)).

“For objective evidence of secondary considerations to be accorded substantial weight, its proponent must establish a nexus between the evidence and the merits of the claimed invention.” *In re Huai-Hung Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011) (emphasis omitted) (quoting *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)). “Evidence of secondary considerations must be reasonably commensurate with the scope of the claims.” *Id.*

According to the Specification, the technical field of the invention is packaging, particularly “food packaging that enables complete visibility of packaging contents while allowing for robust labeling of the package.” Spec. ¶ 2. The invention described by claim 1 specifies, *inter alia*, a packaged food assembly, comprising a backer card having information printed thereon; a transparent film disposed with at least a portion adjacent the backer card; the transparent film having a front side, a back side that faces the backer card opposite the front side, and a cavity disposed between the front and back sides; a meat item disposed in the cavity that is unobscured by the transparent film; and a perforation located between the cavity and the upper portion of the transparent film.

Commercial Success

Appellant argues that they have presented evidence of commercial success in each of the declarations (Lebovich I, Lebovich II, Warner Decl.) and Nielsen Perishables Group data for the “Fresh Beef Category” from between the third quarter of 2014 and 2017 (Lebovich II, Ex. B3), submitted during prosecution. Appeal Br. 24. Appellant argues there is a nexus between the claims and the proffered evidence which is reasonably commensurate in scope with the claims. Appeal Br. 29. Appellant specifically states:

Evidence of the applicant’s commercial success in the area of steaks and roasts is reasonably commensurate with the scope of the claims, which are directed to packaging or methods for packaging perishable food items, and meat specifically, for claims 1-4, 8-11, 24-27, and is thus probative of commercial success. The examiner alleges that “the sales data shown in Exhibit B3 appears to be directed to the ‘fresh beef category’ (and ‘grass fed beef’) however, the claims are directed to ‘a meat item’; ‘a perishable food’ and ‘a fresh meat product’ and thus the data is not commensurate in scope with the claims.” (Final Office Action ¶ 124.) “PRE Brands offers several meat products [presented] in packaging covered by the claims.” (Ex. A, 1st Lebovich Decl. ¶ 4.) As explained by the Federal Circuit, the applicant does not need to produce objective evidence of nonobviousness for every potential embodiment of the claim since secondary considerations need only be reasonably commensurate with the scope of the claims. Also, as discussed above, customer testimonials and industry praise specifically mentions benefits of the claimed packaging features in combination. For example, see particular testimonials and praise directed to claimed features in Section VII.C.1.b and VII.C.1.c.

Appeal Br. 30 (alteration in original) (emphasis omitted).

To demonstrate nonobviousness based on commercial success, Appellant must provide evidence that establishes the existence of

commercial success, and a nexus between that success and the merits of the claimed invention. *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1324 (Fed. Cir. 2004). The evidence is required to show that “the successful product is the invention disclosed and claimed.” *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997). To establish a proper nexus between the claimed invention and the commercial success of a product, Appellant must offer proof that the sales of the product were a direct result of the unique characteristics of the claimed packaged food assembly as opposed to other factors, such as the high quality of the grass-fed beef contained within the packaging. *See In re DBC*, 545 F.3d 1373, 1384 (Fed. Cir. 2008) (finding no nexus, absent evidence that “the driving force behind [the allegedly successful product’s sales] . . . was the claimed combination”); *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1311–12 (Fed. Cir. 2006) (requiring a “nexus between the claimed invention and the commercial success”); *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996) (“proof that the sales [of the product] were a direct result of the unique characteristics of the claimed invention—as opposed to other economic and commercial factors unrelated to the quality of the patented subject matter”).

Here, Appellant has done little more than submit evidence of grass-fed beef sales. Lebovich II ¶ 20, Ex. B2. However substantial those sales, that evidence does not reveal in any way that the driving force behind those sales was the claimed packaged food assembly. There is also no evidence that increased sales of PRE Brands meat products occurring after October 2016 were not attributable to better marketing of the product, resulting from redesigning the graphics on the packaging with the aid of the brand design firm Ciulla. Lebovich II, Ex. B2. Nor is there evidence that sales of PRE

Brands meat products were not merely attributable to the source of the meat product and the high quality standards. Specifically:

PRE's beef products are sourced from Australia and New Zealand, where conditions and practices allow them to grow the best grass year-round. The company's suppliers are also held to some of the highest quality standards, including 100% grass-fed, 100% pasture-raised, and no added hormones or antibiotics. All PRE's steaks are hand-trimmed for consistent thickness and weight, and products must meet the company's specified marbling scale, fat color, pH level, and meat color to be considered PRE.

Lebovich II, Ex. B2.

Appellant has not directed us to evidence that establishes the quality standards of the other manufactures of grass-fed beef that are included in Exhibit B2.

As the Examiner observes, the objective evidence of nonobviousness is directed to the sale of grass-fed beef, but the Specification is silent as to the type of meat product used in claimed packaged food assembly, and the apparently critical characteristic, grass-fed beef, is not recited in claim 1. *See* Answer 11–12.

It is recognized that commercial success can be established by showing significant sales of the product in a relevant market. *J.T. Eaton*, 106 F.3d at 1571. Nonetheless, Appellant contends the reliance on grass-fed beef sales is appropriate because high-end, grass-fed beef is a staple good.

Appellant specifically states:

A POSA [person of ordinary skill in the art] would have recognized both prior to 2013 and today that even high-end, grass-fed beef is “generally viewed as a staple good in which products compete on price.” (Ex. B, 2nd Lebovich Decl. ¶¶ 10–11; Ex. C, Warner Del. ¶ 14.) This view would have been even

more prevalent with other meats and perishable food products generally. (Ex. B, 2nd Lebovich Decl. ¶ 10.)

Appeal Br. 16–17.

Appellant’s assertion that sales of high-end, grass-fed beef is not by itself convincing because the number of sales without relevant market share data does not establish commercial success.² *See, e.g., Huang*, 100 F.3d at 140. Furthermore, Appellant has not identified evidence that establishes “high-end, grass-fed beef” is a separate and distinct market sector from the staple good meat and/or beef.³ Having considered all the submitted affidavit testimony, I find Appellant’s objective evidence of nonobviousness is insufficient to demonstrate that the alleged sales of PRE Brands high-end, grass-fed beef were a direct result of the unique characteristics of the claimed invention, and not a result of factors, such as improved marketing and the source of the meat product that are unrelated to the subject matter of claim 1. Consequently, Appellant has not produced sufficient evidence, including persuasive fact, data, or analysis that links the asserted commercial success to the limitations recited in claim 1.

² Appellant has not identified the market share relative to the entire category of beef products.

³ “Staple product: any product the consumption of which does not vary much with changes in INCOME, for example, basic foodstuffs like potatoes and bread. Staple products have an INCOME ELASTICITY OF DEMAND of less than 1. This means that as incomes rise, proportionally less income is spent on such products. Contrast LUXURY PRODUCTS.” *The Free Dictionary* [Internet]. “staple product” *Collins Dictionary of Economics*, 4th ed., C. Pass, B. Lowes, L. Davies, 2005 (27 Aug. 2020), <https://financial-dictionary.thefreedictionary.com/staple+product>.

Accordingly, Appellant has not established a sufficient nexus between the merits of the claimed invention and the alleged commercial success.

Industry praise

Appellant contends the package design has received industry recognition and praise. Appellant specifically states that

[t]he applicant provided evidence of industry praise demonstrating recognition of the unique packaging. In April 2017, TrendHunter.com recognized the packaging for using transparent components to a greater extent than prior products, commenting that “[w]hat makes the package design particularly noteworthy is that the plastic piece can be flipped up so that all sides of the product may be viewed.” (Ex. B, 2nd Lebovich Decl. ¶18.a; Ex. B1, TrendHunter.) TrendHunter.com further noted that “[a]s well as being able to inspect a cut of meat from all angles with this package, consumers will also find it useful for freezing, as the paperboard backing can be removed via a perforated tear line and recycled for additional space-saving in the freezer.” (*Id.*) The novel package design also drew the attention of Packaging World, which published an article on the packaging in July 2017. (Ex. B, 2nd Lebovich Decl. ¶ 18.b; Ex. B2, Packaging World.) Packaging World commented on the customer appreciation of “100% transparency” and the recyclable “backing card” removable “by a perforation in the film at the edge of the header.” (Ex. B2, Packaging World.) Furthermore, competitors recognize the novel packaging benefits. “A major packaging company” contacted the applicant about licensing, explaining “their interest is motivated by [the] innovative packaging design.” (Ex. A, 1st Lebovich Decl. ¶ 21.)

Appeal Br. 28–29 (alterations in original).

Industry praise for an invention may provide evidence of nonobviousness where the industry praise is linked to the claimed invention. *See Geo. M. Martin Co. v. Alliance Mach. Sys. Int’l LLC*, 618 F.3d 1294, 1305 (Fed. Cir. 2010); *Asyst Techs., Inc. v. Emtrak, Inc.*, 544 F.3d 1310,

1316 (Fed. Cir. 2008). Appellant has not provided sufficient analysis explaining how the article published in the TrendHunter Lifestyle section (Lebovich II, Ex. B1) is representative of industry praise for the invention recited in the claims. The article states “[s]ince transparency is of utmost importan[ce] to today’s informed consumers, this package design makes it possible for them to come to their own conclusions on the quality of the premium product.” Lebovich II, Ex. B1 p. 2. Thus, the article appears to be focused on influencing consumer purchasing and is not representative of the packing industry. The article published in Packaging World (Lebovich II, Ex. B2) represents an interview with the Chief Marketing Officer of PRE Brands. This article is directed to extolling the high quality standards for PRE Brands beef products and the new design of the flip packaging. In the fall of 2016, the flip packaging was redesigned with the aid of the design firm Ciulla. The article states:

Since being introduced in fall 2016, the product and package have received praise from consumers and retailers alike, says Sinclair: “Consumers love our new packaging because it helps PRE stand out at shelf and also clearly communicates how great it tastes, with the cutting board and ingredients surrounding the beef. Retailers love it as well, as it helps call attention to the category and boosts PRE sales.”

Lebovich II, Ex. B2 p.2.

Appellant has not provided sufficient analysis explaining how the articles published in TrendHunter Lifestyle (Lebovich II, Ex. B1) and Packaging World (Lebovich II, Ex. B2) are representative of packaging industry praise for the invention recited in the claims which is commensurate in scope with, and covered by, the claimed invention. *See Bayer Healthcare Pharm., Inc. v. Watson Pharm., Inc.*, 713 F.3d 1369, 1377 (Fed. Cir. 2013) (finding that brief discussions of Patent Owner’s product in journal articles

“fall well short of demonstrating true industry praise” and reasoning that “industry praise of what was clearly rendered obvious by published references is not a persuasive secondary consideration”).

Accordingly, Appellant has not established a sufficient nexus between the merits of the claimed invention and the alleged industry praise.

Long-Felt Need and Failure of Others

Appellant submits that there has been a long felt need for the current product. Appeal Br. 31–33. Appellant states:

The applicant presented evidence of a recognized problem that has existed for a long period of time without solution. The problem has existed since the development of the modern field of packaged perishable items. For example, grass-fed beef sellers that compete with the applicant have been selling beef prior to the date of invention and, in some case, for decades prior. (Ex. B, 2nd Lebovich Decl. ¶ 9.) Mr. Warner, a food and beverage packaging designer with over 30 years of experience in the field of industrial design explained that disregard in the field for consumer-friendly features is common. (Ex. C, Warner Decl. ¶¶ 12-13.) As further explained in Mr. Lebovich’s second declaration, even today, other competitors in the meat industry continue to use either polystyrene trays or simple vacuum-sealed packages combined with stickers. (Ex. B, 2nd Lebovich Decl. ¶ 7.) . . .

The claimed invention satisfies the identified long-felt, unmet need. Such fulfillment is shown, for example, by sales, growth in the market, customer testimonials, and industry praise. (*See, e.g.*, Section VII.C.1.) Mr. Warner explained that the products embodying and reasonably commensurate with the scope of the claims represent “a complete change in the focus for packaging.” (Ex. C, Warner Decl. ¶ 14.) Competitors failed to fulfill such a need, providing only “minimal effort to develop unique brands or consumer-friendly features because low price and cost of goods is expected to drive sales.” (Ex. C, Warner Decl. ¶ 13.) The applicant’s packaging puts consumers’ interest

ahead of cost, using a large backer card to provide more product information combined with a perforated, transparent, and vacuum-sealed portion that permits 360° viewing. (Ex. C, Warner Decl. ¶¶ 14-16.)

Appeal Br. 32–33.

Establishing a long-felt need requires objective evidence showing existence of a persistent problem recognized by those of ordinary skill in the art for which a solution was not known. *In re Gershon*, 372 F.2d 535, 538–39 (CCPA 1967); *see also Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH*, 139 F.3d 877, 884 (Fed. Cir. 1998) (“The relevant secondary consideration is ‘long-felt but unsolved need,’ not long-felt need in isolation.” (emphasis omitted)). This can be shown, e.g., by evidence showing unsuccessful efforts to solve the problem. *See Orthopedic Equip. Co. v. All Orthopedic Appliances, Inc.*, 707 F.2d 1376, 1382 (Fed. Cir. 1983) (Although the claimed invention achieved the desirable result, there was no evidence of any prior unsuccessful attempts to do so.). The failure to solve a long-felt need may be due to factors such as lack of interest or lack of appreciation of an invention’s potential or marketability rather than want of technical know-how. *Scully Signal Co. v. Elecs. Corp. of Am.*, 570 F.2d 355, 361 (Fed. Cir. 1977).

Appellant’s contentions of a long felt need are not substantiated by persuasive and objective evidence. Appellant has failed to direct us to evidence that those of ordinary skill in the art recognized a problem and were searching for a solution. The identification of the 3 types of packaging that were typically used for grass-fed beef does not indicate that there was a persistent problem that needed to be resolved. Warner Decl. ¶ 12, Ex. C1. Appellant does not direct us to other evidence discussing problems with

existing packaging or acknowledging that Appellant's packaging solves long-felt problems with food packaging.

Accordingly, Appellant has not established a sufficient nexus between the merits of the claimed invention and the alleged long-felt need and failure of others.

Unexpected Results

Appellant alleges the Warner Declaration establishes evidence of unexpected results. *See* Appeal Br. 34–36. In particular, Appellant argues that the novel product design “surprisingly ‘allows for the development of brand loyalty beyond what is typical for a staple food like a perishable food item, and particularly [for] meat.’” *Id.* at 34 (quoting Warner Decl. ¶ 16). Appellant argues that the claimed design “surprisingly allows for an increased amount of visual graphic area without compromising product visibility.” *Id.* (citing Warner Decl. ¶¶ 17–20). Appellant further argues that products embodying and reasonably commensurate with the scope of the claims “surprisingly allow for improved display options in grocery stores over prior packaging.” Appeal Br. 35 (citing Warner Decl. ¶ 15).

Appellant's evidence that they have achieved some degree of consumer loyalty and brand awareness is mere opinion testimony that fails to establish unexpected results. Although, Appellant has not produced test data to support Mr. Warner's opinions, this does not mean that his opinions have no probative value. However, absent objective experimental data substantiating the purported unexpected results, the Warner Declaration does not constitute probative evidence of nonobviousness in the form of unexpected results. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) (“an applicant relying on comparative tests to rebut a prima facie case of

obviousness must compare his claimed invention to the closest prior art;” where appellant failed to present any experimental data, appellant’s assertions of unexpected results constituted mere argument, which cannot establish patentability). Moreover, the opinions and testimony of customers cited in the declaration do not adequately establish the elements of the claimed invention that are the basis of their opinion relative to the cited prior art.

Accordingly, Appellant has not established a sufficient nexus between the merits of the claimed invention and the alleged unexpected results.

Conclusion regarding obviousness

When, as here, an Appellant presents objective evidence of nonobviousness, the presumption of unpatentability created by the Examiner’s identification of a prima facie case of obviousness dissolves, and all of the evidence must be weighed together to reach a final conclusion regarding the obviousness of the claim in question. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). “[P]atentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument.” *Id.*

As discussed above, the Examiner did not err in rejecting claims 1–4, 8–15, 21, and 24–30 under 35 U.S.C. § 103 as specified in Rejections 1–4.

Having reconsidered the issue of obviousness anew, carefully evaluating and weighing both the evidence the Examiner relied upon together with the objective evidence of non-obviousness in the form of commercial success, industry praise, satisfaction of a long-felt, unmet need, and unexpected results Appellant provided, on balance, a preponderance of

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the evidence supports the Examiner's obviousness determination. I therefore dissent.