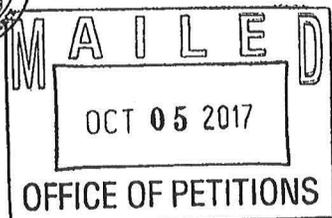




UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov



Ostrolenk Faber LLP
1180 Avenue of the Americas
New York NY 10036

In re Application of :
Luc Montagnier :
Application No. 13/731,481 : DECISION ON PETITION
Filed: December 31, 2012 :
For: HIGHLY SENSITIVE METHOD FOR :
DETECTION OF VIRAL HIV DNA :
REMAINING AFTER ANTIRETROVIRAL :
THERAPY OF AIDS PATIENTS :

This is a decision on the petition under 37 CFR 1.181 filed on August 29, 2017, requesting that the Director exercise supervisory authority and review the decision of June 29, 2017, by the Director of Technology Center 1600 (Technology Center Director), which decision refused to designate the examiner’s answer of April 4, 2017 as containing a new ground of rejection and to reopen prosecution in the above-identified application.

The petition to designate a new ground of rejection in the examiner’s answer of April 4, 2017 and to reopen prosecution in the above-identified application is **DENIED**.

RELEVANT BACKGROUND

The above-identified application was filed on December 31, 2012.

A non-final Office action was mailed on January 29, 2015. The Office action of January 29, 2015 included, *inter alia*: (1) a rejection of claims 1 through 10 under 35 U.S.C. § 112 ¶ 2¹ for

¹ Section 4 of the Leahy-Smith America Invents Act (AIA) designated 35 U.S.C. § 112, ¶¶ 1 through 6, as 35 U.S.C. §§ 112(a) through (f), effective as to applications filed on or after September 16, 2012. *See* Pub. L. No. 112-29, § 4, 125 Stat. 284, 293-97 (2011). Since the above-identified application has an effective filing date prior to September 16, 2012, this

failure to comply with its definiteness requirement; (2) a rejection of claims 1 through 10 under 35 U.S.C. § 101 for failure to comply with its utility requirement; and (3) a rejection of claims 1 through 10 under 35 U.S.C. § 112 ¶1 for failure to comply with its enablement requirement. The Office action of January 29, 2015 held claims 11 through 18 and 21 through 23 withdrawn from consideration as drawn to a non-elected invention (37 CFR 1.142).

A reply under 37 CFR 1.111 (a reply to a non-final Office action) to the non-final Office action of January 29, 2015, including an amendment to the claims, was filed on April 29, 2015.

A final Office action was mailed on June 2, 2015. The Office action of June 2, 2015 included, *inter alia*: (1) a rejection of claims 1 through 10 under 35 U.S.C. § 112 ¶2 for failure to comply with its definiteness requirement; (2) a rejection of claims 1 through 10 under 35 U.S.C. § 101 for failure to comply with its utility requirement; and (3) a rejection of claims 1 through 10 under 35 U.S.C. § 112 ¶1 for failure to comply with its enablement requirement. The Office action of June 2, 2015 held claims 11 through 16, 18, and 23 through 26 withdrawn from consideration as drawn to a non-elected invention (37 CFR 1.142).

A reply to the final Office action of June 2, 2015 was filed on September 2, 2015 including an amendment to the claims and a request for reconsideration. Petitioner was advised in an advisory action mailed on September 23, 2015 that: (1) the reply of September 2, 2015 is being treated as a reply under 37 CFR 1.116 (an after final reply); (2) the reply of September 2, 2015 did not place the above-identified application in condition for allowance; and (3) the amendment filed on September 2, 2015 would be entered for purposes of appeal.

A request for continued examination under 37 CFR 1.114, an amendment to the claims, and a declaration under 37 CFR 1.132 was filed on December 2, 2015. The declaration under 37 CFR 1.132 of December 2, 2015 is executed by petitioner's representative and discusses a video interview with French and English transcripts of the interview (the reliability of which petitioner questions) attached as exhibits to the declaration.

A non-final Office action was mailed on March 14, 2016. The Office action of March 14, 2016 included: (1) a rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 101 for failure to comply with its utility requirement; (2) a rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 112 ¶1, for failure to comply with its utility and enablement requirements; (3) a rejection of claims 1 through 11, 13, 16, and 24 through 26 under 35 U.S.C. § 102(b) as being anticipated by Montagnier (WO 2007/068831).

A reply to the non-final Office action of March 14, 2016 was filed on June 14, 2016, including an amendment to the claims.

decision refers to the pre-AIA version of 35 U.S.C. § 112. Similarly, this decision refers to the pre-AIA version of 35 U.S.C. § 102.

A final Office action was mailed on June 22, 2016. The final Office action of June 22, 2016 included: (1) a rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 101 for failure to comply with its utility requirement; (2) a rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 112 ¶1, for failure to comply with its utility and enablement requirements; (3) a rejection of claims 1 through 11, 13, 16, and 24 through 26 under 35 U.S.C. § 102(b) as being anticipated by Montagnier (WO 2007/068831); (4) a rejection of claims 1 through 11, 13, 16, and 24 through 26 under 35 U.S.C. § 102(e) as being anticipated by Montagnier (U.S. Patent No. 8,736,250); (5) a rejection of claims 1 through 11, 13, 16, and 24 through 26 under 35 U.S.C. § 102(e) as being anticipated by Montagnier (U.S. Patent No. 9,029,165); (6) a rejection of claims 1 through 11, 13, 16, and 24 through 26 under 35 U.S.C. § 102(e) as being anticipated by Montagnier (U.S. Patent No. 9,316,610); (7) a rejection of claims 1 through 11, 13, 16, and 24 through 26 on the ground of judicially created obviousness-type double patenting as being unpatentable over claims 1 through 20 of U.S. Patent No. 8,736,250 to Montagnier; (8) a rejection of claims 1 through 11, 13, 16, and 24 through 26 on the ground of judicially created obviousness-type double patenting as being unpatentable over claims 1 through 19 of U.S. Patent No. 9,029,165 to Montagnier; and (9) a rejection of claims 1 through 11, 13, 16, and 24 through 26 on the ground of judicially created obviousness-type double patenting as being unpatentable over claims 1 through 20 of U.S. Patent No. 9,316,610 to Montagnier.

A reply to the final Office action of June 22, 2016 (a request for reconsideration) was filed on August 23, 2016. Petitioner was notified in an advisory action mailed on August 29, 2016 that the request for reconsideration filed on August 23, 2016 did not place the application in condition for allowance.

A second reply to the final Office action of June 22, 2016 (including a declaration) was filed on September 1, 2016. Petitioner was notified in an advisory action mailed on September 6, 2016 that the reply of September 1, 2016 did not place the application in condition for allowance, and that the declaration filed on September 1, 2016 would not be entered.

A third reply to the final Office action of June 22, 2016 was filed on September 7, 2016. Petitioner was notified in an advisory action mailed on September 15, 2016 that the reply of September 7, 2016 did not place the application in condition for allowance.

A petition under 37 CFR 1.181 was filed on August 22, 2016. The petition of August 22, 2016 was denied by the Technology Center Director in a decision mailed on September 16, 2016. A renewed petition under 37 CFR 1.181 was filed on November 15, 2016. The petition of November 15, 2016 was denied by the Technology Center Director in a decision mailed on November 23, 2016.

A notice of appeal and pre-appeal brief request for review were filed on November 22, 2016. A notice of panel decision from pre-appeal brief review stating that the application would proceed to the Board of Patent Appeals and Interferences (now Patent Trial and Appeal Board (PTAB)) was mailed on December 14, 2016. An appeal brief was filed on January 23, 2017.

A notification of non-compliant appeal brief was mailed on February 17, 2017. An appeal brief was filed on February 22, 2017.

An examiner's answer was mailed on April 4, 2017. The examiner's answer of April 4, 2017 maintained the following rejections: (1) the rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 101 for failure to comply with its utility requirement, and (2) the rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 112 ¶1 for failure to comply with its utility and enablement requirements.

A petition under 37 CFR 1.181 was filed on April 10, 2017, requesting that the Director exercise supervisory authority over the primary examiner and *inter alia* withdraw and strike the examiner's answer mailed on April 4, 2017 and reopen prosecution in the above-identified application. The petition of April 10, 2017 was denied by the Deputy Commissioner for Patent Examination Policy in a decision mailed on May 8, 2017.

A petition under 37 CFR 1.181 was filed on June 5, 2017, requesting that the examiner's answer mailed on April 4, 2017 be designated as including a new ground of rejection and that prosecution in the above-identified application be reopened. The petition of June 5, 2017 was denied by the Technology Center Director in a decision mailed on June 29, 2017.

The instant petition under 37 CFR 1.181 was filed on August 29, 2017. The instant petition requests supervisory review of the Technology Center Director decision of June 29, 2017, and again requests that the examiner's answer mailed on April 4, 2017 be designated as including a new ground of rejection and that prosecution in the above-identified application be reopened.

STATUTES AND REGULATIONS

35 U.S.C. § 132(a) states:

Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Director shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the

application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.

35 U.S.C. § 134 provides that:

(a) PATENT APPLICANT — An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Patent Trial and Appeal Board, having once paid the fee for such appeal.

(b) PATENT OWNER — A patent owner in a reexamination may appeal from the final rejection of any claim by the primary examiner to the Patent Trial and Appeal Board, having once paid the fee for such appeal.

37 CFR 1.181(a) provides that:

Petition may be taken to the Director:

(1) From any action or requirement of any examiner in the *ex parte* prosecution of an application, or in *ex parte* or *inter partes* prosecution of a reexamination proceeding which is not subject to appeal to the Patent Trial and Appeal Board or to the court;

(2) In cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Director; and

(3) To invoke the supervisory authority of the Director in appropriate circumstances. For petitions involving action of the Patent Trial and Appeal Board, see § 41.3 of this title.

37 CFR 41.31 provides that:

(a) Who may appeal and how to file an appeal. An appeal is taken to the Board by filing a notice of appeal.

(1) Every applicant, any of whose claims has been twice rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.02(b)(1) within the time period provided under § 1.134 of this title for reply.

(2) Every owner of a patent under *ex parte* reexamination filed under § 1.510 of this title before November 29, 1999, any of whose claims has been twice rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(3) Every owner of a patent under *ex parte* reexamination filed under § 1.510 of this title on or after November 29, 1999, any of whose claims has been finally (§ 1.113 of this title) rejected, may appeal from the decision of the

examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(b) The signature requirements of §§ 1.33 and 1.18(a) of this title do not apply to a notice of appeal filed under this section.

(c) An appeal, when taken, is presumed to be taken from the rejection of all claims under rejection unless cancelled by an amendment filed by the applicant and entered by the Office. Questions relating to matters not affecting the merits of the invention may be required to be settled before an appeal can be considered.

(d) The time periods set forth in paragraphs (a)(1) through (a)(3) of this section are extendable under the provisions of § 1.136 of this title for patent applications and § 1.550(c) of this title for ex parte reexamination proceedings.

37 CFR 41.39 provides that:

(a) *Content of examiner's answer.* The primary examiner may, within such time as may be directed by the Director, furnish a written answer to the appeal brief.

(1) An examiner's answer is deemed to incorporate all of the grounds of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory action and pre-appeal brief conference decision), unless the examiner's answer expressly indicates that a ground of rejection has been withdrawn.

(2) An examiner's answer may include a new ground of rejection. For purposes of the examiner's answer, any rejection that relies upon any Evidence not relied upon in the Office action from which the appeal is taken (as modified by any advisory action) shall be designated by the primary examiner as a new ground of rejection. The examiner must obtain the approval of the Director to furnish an answer that includes a new ground of rejection.

(b) *Appellant's response to new ground of rejection.* If an examiner's answer contains a rejection designated as a new ground of rejection, appellant must within two months from the date of the examiner's answer exercise one of the following two options to avoid sua sponte dismissal of the appeal as to the claims subject to the new ground of rejection:

(1) *Reopen prosecution.* Request that prosecution be reopened before the primary examiner by filing a reply under § 1.111 of this title with or without amendment or submission of affidavits (§§ 1.130, 1.131 or 1.132 of this title) or other Evidence. Any amendment or submission of affidavits or other Evidence must be relevant to the new ground of rejection. A request that complies with this paragraph will be entered and the application or the patent under ex parte reexamination will be reconsidered by the examiner under the provisions of

§ 1.112 of this title. Any request that prosecution be reopened under this paragraph will be treated as a request to withdraw the appeal.

(2) *Maintain appeal.* Request that the appeal be maintained by filing a reply brief as set forth in § 41.41. Such a reply brief must address as set forth in § 41.37(c)(1)(iv) each new ground of rejection and should follow the other requirements of a brief as set forth in § 41.37(c). A reply brief may not be accompanied by any amendment, affidavit (§ § 1.130, 1.131 or 1.132 of this title) or other Evidence. If a reply brief filed pursuant to this section is accompanied by any amendment, affidavit or other Evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under paragraph (b)(1) of this section.

(c) *Extensions of time.* Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

37 CFR 41.40 provides that:

(a) *Timing.* Any request to seek review of the primary examiner's failure to designate a rejection as a new ground of rejection in an examiner's answer must be by way of a petition to the Director under § 1.181 of this title filed within two months from the entry of the examiner's answer and before the filing of any reply brief. Failure of appellant to timely file such a petition will constitute a waiver of any arguments that a rejection must be designated as a new ground of rejection.

(b) *Petition granted and prosecution reopened.* A decision granting a petition under § 1.181 to designate a new ground of rejection in an examiner's answer will provide a two-month time period in which appellant must file a reply under § 1.111 of this title to reopen the prosecution before the primary examiner. On failure to timely file a reply under § 1.111, the appeal will stand dismissed.

(c) *Petition not granted and appeal maintained.* A decision refusing to grant a petition under § 1.181 of this title to designate a new ground of rejection in an examiner's answer will provide a two-month time period in which appellant may file only a single reply brief under § 41.41.

(d) *Withdrawal of petition and appeal maintained.* If a reply brief under § 41.41 is filed within two months from the date of the examiner's answer and on or after the filing of a petition under § 1.181 to designate a new ground of rejection in an examiner's answer, but before a decision on the petition, the reply brief will be treated as a request to withdraw the petition and to maintain the appeal.

(e) *Extensions of time.* Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section.

See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for *ex parte* reexamination proceedings.

OPINION

Petitioner asserts that the examiner's answer of April 4, 2017 contains a new ground of rejection, and thus, argues that prosecution should be reopened. Petitioner specifically asserts that the examiner is now applying and using the declaration under 37 CFR 1.132 filed by petitioner on December 2, 2015 as support for the rejection in the examiner's answer mailed on April 4, 2017, and therefore, the evidence used to support the rejection has changed.

Whether there is a new ground of rejection depends upon whether the basic thrust of a rejection has remained the same. *See In re Kronig*, 539 F.2d 1300, 1303 (CCPA 1976). A new ground of rejection may be present when a rejection relies upon new facts or a new rationale not previously raised to the applicant. *See In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (quoting *Leithem*, 661 F.3d at 1319). The prior rejection, however, need not be repeated *in haec verba* to avoid being considered a new ground of rejection. *See id.* In addition, further explaining and elaboration upon a rejection, and thoroughness in responding to an applicant's arguments, are not considered a new ground of rejection. *See In re Jung*, 637 F.3d 1356, 1364-65 (Fed. Cir. 2011).

Section 1207.03(III) of the Manual of Patent Examining Procedure (MPEP) specifically provides that:

A position or rationale that changes the "basic thrust of the rejection" will also give rise to a new ground of rejection. *In re Kronig*, 539 F.2d 1300, 1303 (CCPA 1976). However, the examiner need not use identical language in both the examiner's answer and the Office action from which the appeal is taken to avoid triggering a new ground of rejection. It is not a new ground of rejection, for example, if the examiner's answer responds to appellant's arguments using different language, or restates the reasoning of the rejection in a different way, so long as the "basic thrust of the rejection" is the same. *In re Kronig*, 539 F.2d at 1303; see also *In re Jung*, 637 F.3d 1356, 1364-65 (Fed. Cir. 2001) (additional explanation responding to arguments offered for the first time "did not change the rejection" and appellant had fair opportunity to respond); *In re Noznick*, 391 F.2d 946, 949 (CCPA 1968) (no new ground of rejection made when "explaining to appellants why their arguments were ineffective to overcome the rejection made by the examiner"); *In re Krammes*, 314 F.2d 813, 817 (CCPA 1963) ("It is well established that mere difference in form of expression of the reasons for finding claims unpatentable or unobvious over the references does not amount to reliance on a different ground of rejection." (citations omitted)); *In re Cowles*, 156

F.2d 551, 1241(CCPA1946) (holding that the use of “different language” does not necessarily trigger a new ground of rejection).

See MPEP § 1207.03(III).

The final Office action of June 22, 2016 included, *inter alia*, a rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 101 for failure to comply with its utility requirement and (2) a rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 112 ¶1, for failure to comply with its utility and enablement requirements. In the appeal brief of February 22, 2017, petitioner argued, *inter alia*, that the examiner failed to provide a properly documented written analysis of the declaration under 37 CFR 1.132 filed by petitioner on December 2, 2015. The examiner’s answer of April 4, 2017 responds to petitioner’s arguments by providing a more thorough explanation of why the declaration of December 2, 2015 does not overcome the rejection of claims 1 through 11, 13 through 16, and 23 through 26.

The basic thrust of the examiner’s position in rejecting claims 1 through 11, 13 through 16, and 23 through 26 has remained the same from the final Office action of June 22, 2016 to the examiner’s answer of April 4, 2017. The claims remain rejected under 35 U.S.C. § 101 for failure to comply with its utility requirement and under 35 U.S.C. § 112 ¶1, for failure to comply with its utility and enablement requirements. The examiner continues to maintain the position, in both the final Office action of June 22, 2016 and the examiner’s answer of April 4, 2017, that the claimed invention lacks credible utility and enablement. While the examiner may have provided additional explanation regarding the declaration of December 2, 2015 in response to arguments presented by petitioner in the appeal brief of February 22, 2017, this additional explanation does not change the basic thrust of the rejection of claims 1 through 11, 13 through 16, and 23 through 26 under 35 U.S.C. § 101 for failure to comply with its utility requirement and under 35 U.S.C. § 112 ¶1, for failure to comply with its utility and enablement requirements. The additional discussion in the examiner’s answer of April 4, 2017 of the declaration submitted on December 2, 2015 merely amounts to an elaboration of the rationale set forth in the final Office action of June 22, 2016. The declaration of December 2, 2015 has not been relied upon in support of or applied to the rejections, and the evidence in support of the rejections remains unchanged.

Petitioner is reminded that it is not considered a new ground of rejection in the situation in which an applicant submits a document in support of his or her argument and the examiner’s answer points to portions of that document that counters the applicant’s argument. *See In re Hedges*, 783 F.2d 1038 (Fed. Cir. 1986).² Analogously, in the above-identified application, the

² The circumstances of the above-identified application are not comparable to other circumstances in which a new ground of rejection was found. While both *In re Stepan Co.* and the above-identified application involve the treatment of a declaration submitted by an applicant,

examiner's answer of April 4, 2017 merely responds to petitioner's arguments regarding the declaration under 37 CFR 1.132 of December 2, 2015 by pointing to portions of the same declaration to counter the arguments set forth by the petitioner in the appeal brief of February 22, 2017. In any event, petitioner was well aware that the exhibits submitted with declaration under 37 CFR 1.132 of December 2, 2015 contained statements that counter petitioner's arguments (declaration of December 2, 2015 at ¶ 7), and thus petitioner cannot now claim that he has been deprived of an opportunity to respond to the statements with which he does not agree. See *In re Alder*, 723 F.3d 1322, 1328 (Fed. Cir. 2013).

In conclusion, the examiner's answer of April 4, 2017 did not change the basic thrust of the rejections, and the petitioner has been given a fair opportunity to respond to the rejection of the claims. Accordingly, the examiner's answer of April 4, 2017 does not contain a new ground of rejection warranting the reopening of prosecution in the above-identified application.

in *Stepan* the examiner took the position that the prior art was effective under pre-AIA 35 U.S.C. § 102(b) and thus treated any attempt to overcome the rejection with a declaration under 37 CFR 1.131 as misguided, where the Board took the position that the prior art was effective only under pre-AIA 35 U.S.C. § 102(a), but found insufficiencies in the declaration under 37 CFR 1.131 filed to overcome the rejection. See 660 F.3d 1341, 1343-44 (Fed. Cir. 2011). In the above-identified application, the basis for the examiner's rejections remains 35 U.S.C. § 101 (failure to comply with its utility requirement) and 35 U.S.C. § 112 ¶1 (failure to comply with its utility and enablement requirements), and the examiner's position remains that the declaration under 37 CFR 1.132 submitted by petitioner on December 2, 2015 is insufficient to overcome these rejections. The circumstances of the above-identified application also are not comparable to other circumstances in which a new ground of rejection was found. See, e.g., *In re Imes*, 778 F.3d 1250 (Fed. Cir. 2015) (changing the rationale as to how the prior art reference meets a claim element); *Biedermann* (changing factual basis for combining references); *Rambus Inc. v. Rea*, 731 F.3d 1248 (Fed. Cir. 2013) (changing factual basis for combining references); *In re Leithem*, 661 F.3d 1316 (Fed. Cir. 2011) (changing the rationale as to how the prior art reference meets a claim element); *In re Kumar*, 418 F.3d 1361 (Fed. Cir. 2005) (providing new calculations to demonstrate that the prior art reference falls within or overlaps with the claimed range); *In re De Blauwe*, 736 F.2d 699 (Fed. Cir. 1984) (changing the treatment of applicant's contentions of unexpected results); *In re Waymouth*, 486 F.2d 1058 (CCPA 1973) (changing aspect of a claim element relied upon for position that application did not provide written description support under 35 U.S.C. § 112, ¶ 1); *In re Eynde*, 480 F.2d 1364 (CCPA 1973) (changing factual basis for the position that application did not provide enablement under former 35 U.S.C. § 112, ¶ 1); *In re Echerd*, 471 F.2d 632 (CCPA 1973) (changing portion of a reference relied upon to meet claim limitations); *In re Wiechert*, 370 F.2d 927 (CCPA 1967) (changing portion of a reference relied upon to meet claim limitations); and *In re Hughes*, 345 F.2d 184 (CCPA 1965) (changing the statutory basis of the rejection).

DECISION

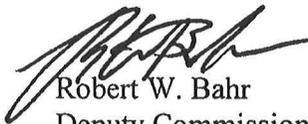
For the previously stated reasons, the petition is granted to the extent that the Technology Center decision of June 29, 2017 has been reviewed, but the petition is **DENIED** with respect to designating the examiner's answer of April 4, 2017 as containing a new ground of rejection or reopening prosecution.

This constitutes a final decision on the petition. No further requests for reconsideration will be entertained. Judicial review of this decision may be available upon entry of a final agency action adverse to the petitioner in the instant application (e.g., a final decision by the Patent Trial and Appeal Board). *See* MPEP 1002.02.

Petitioner is reminded that the appeal forwarding fee (37 CFR 41.20(b)(4)) must be paid no later than within **two (2) months** from the mailing date of this decision in order to avoid dismissal of the appeal. *See* 37 CFR 41.45. Extensions of time under 37 CFR 1.136(a) are not applicable to this time period. *See* 37 CFR 41.45(c).

Petitioner is also reminded that a reply brief may be filed no later than within **two (2) months** from the mailing date of this decision. *See* 37 CFR 41.41(a). Extensions of time under 37 CFR 1.136(a) are not applicable to this time period. *See* 37 CFR 41.41(c).

Telephone inquiries concerning this decision should be directed to Vanitha Elgart at 571.272.7395.



Robert W. Bahr
Deputy Commissioner for
Patent Examination Policy