

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MARA RENEWABLES CORPORATION,  
Petitioner,

v.

DSM IP ASSETS, B.V.,  
Patent Owner.

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IPR2024-00070  
Patent 8,207,363 B2

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Before SUSAN L. C. MITCHELL, ZHENYU YANG, and  
JON B. TORNQUIST, *Administrative Patent Judges*.

YANG, *Administrative Patent Judge*.

DECISION  
Denying Institution of *Inter Partes* Review  
35 U.S.C. § 314

## I. INTRODUCTION

Mara Renewables Corporation (“Petitioner”) filed a Petition (Paper 2, “Pet.”) seeking *inter partes* review of claims 1–15 of U.S. Patent No. 8,207,363 B2 (Ex. 1001, “the ’363 patent”). DSM IP Assets, B. V. (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

We have authority under 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted “unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a).

For the reasons provided below, we determine Petitioner has not demonstrated a reasonable likelihood that it would prevail with respect to at least one claim challenged in the Petition. Accordingly, we deny institution of an *inter partes* review.

### A. Related Matters

Petitioner previously filed IPR2023-01167 and IPR2023-01342, challenging two other patents assigned to Patent Owner. Pet. 70; Paper 4, 1. We denied institution in those cases. IPR2023-01167, Paper 7; IPR2023-01342, Paper 8. On April 9, 2024, Petitioner’s Request for Rehearing by Director in IPR2023-01342 was denied. IPR2023-01342, Paper 10.

The parties represent that there is no other matter related to this proceeding. Pet. 70; Paper 4, 1.

### B. The ’363 Patent and Related Technology

The ’363 patent is directed to isolated thraustochytrid microorganisms, as well as thraustochytrid biomasses and microbial oils. Ex. 1001, 1:16–19.

The '363 patent explains that fatty acids are classified based on the length (short, medium, or long) and saturation characteristics (saturated or unsaturated) of the carbon chain. *Id.* at 1:23–30. Fatty acids are unsaturated when double bonds are present, and unsaturated fatty acids are polyunsaturated when more than one double bond is present. *Id.* at 1:30–33. Polyunsaturated fatty acids (“PUFAs”) are classified based on the position of the first double bond from the methyl end of the fatty acid: omega-3 (n-3) fatty acids contain a first double bond at the third carbon, while omega-6 (n-6) fatty acids contain a first double bond at the sixth carbon. *Id.* at 1:34–38.

One example of an omega-3 long chain PUFA (“LC-PUFA”) is docosahexaenoic acid (“DHA”), which has 22 carbons and 6 double bonds, often designated as “22:6 n-3.” *Id.* at 1:38–42. Other omega-3 LC-PUFAs include eicosapentaenoic acid (“EPA”), designated as “20:5 n-3,” and omega-3 docosapentaenoic acid (“DPA n-3”), designated as “22:5 n-3.” *Id.* at 1:42–44. Examples of omega-6 LC-PUFAs include arachidonic acid (“ARA”), designated as “C20:4 n-6,” and docosapentaenoic acid (“DPA n-6”), designated as “C22:5 n-6.” *Id.* at 1:45–48.

According to the '363 patent, omega-3 fatty acids are biologically important molecules that affect cellular physiology, regulate production and gene expression of biologically active compounds, and serve as biosynthetic substrates. *Id.* at 1:49–53. “Because omega-3 fatty acids are not synthesized de novo in the human body, these fatty acids must be derived from nutritional sources.” *Id.* at 2:1–3.

The '363 patent states that although flaxseed oil and fish oils are good dietary sources of omega-3 fatty acids, both were known to have drawbacks.

*Id.* at 2:4–17. It notes that thraustochytrids have been recognized as an alternative source of omega-3 fatty acids, including DHA. *Id.* at 2:18–21. According to the '363 patent, oils produced from thraustochytrids “often have simpler polyunsaturated fatty acid profiles than corresponding fish or microalgal oils.” *Id.* at 2:22–25. In addition, strains of thraustochytrid species produce omega-3 fatty acids as a high percentage of the total fatty acids produced by the organisms. *Id.* at 2:25–28. The '363 patent, however, notes that “isolated thraustochytrids vary in the identity and amounts of LC-PUFAs produced, such that some previously described strains can have undesirable levels of omega-6 fatty acids and/or can demonstrate low productivity in culture.”

The '363 patent aims to address the need for “the isolation of thraustochytrids demonstrating high productivity and desirable LC-PUFA profiles.” *Id.* at 2:35–37. It discloses thraustochytrids that “are highly productive as compared to prior isolates and produce unique fatty acid profiles, characterized in part by high levels of omega-3 fatty acids, in particular high levels of DHA.” *Id.* at 5:16–20.

### *C. Illustrative Claims*

Among the challenged claims, claims 1, 3, and 4 are independent. They are illustrative of the claimed subject matter and are reproduced below.

1. A microbial oil comprising a triglyceride fraction of at least 70% by weight, wherein the docosahexaenoic acid content of the triglyceride fraction is at least 50% by weight, wherein the docosapentaenoic acid n-6 content of the triglyceride fraction is from 0.5% by weight to 6% by weight, and wherein the oil comprises 5% by weight or less of heptadecanoic acid.
3. A microbial oil comprising a triglyceride fraction of at least 70% by weight, wherein the docosahexaenoic acid content of the triglyceride fraction is at least 40% by weight, wherein the

docosapentaenoic acid n-6 content of the triglyceride fraction is from at least 0.5% by weight to 6% by weight, wherein the ratio of docosahexaenoic acid to docosapentaenoic acid n-6 is greater than 6:1, and wherein the oil comprises 5% by weight or less of heptadecanoic acid.

4. A microbial oil comprising a triglyceride fraction of at least 70% by weight, wherein the docosahexaenoic acid content of the triglyceride fraction is at least 60% by weight, and wherein the oil comprises 5% by weight or less of heptadecanoic acid.

Ex. 1001, 61:32–38, 61:42–53.

*D. Asserted Challenges to Patentability*

Petitioner asserts the following challenges to patentability:

| <b>Claim(s) Challenged</b> | <b>35 U.S.C. §<sup>1</sup></b> | <b>Reference(s)/Basis</b>               |
|----------------------------|--------------------------------|-----------------------------------------|
| 1–3                        | 102                            | Radianingtyas <sup>2</sup>              |
| 1–15                       | 103                            | Radianingtyas, Kralovec <sup>3</sup>    |
| 1–15                       | 103                            | Bijl, <sup>4</sup> Barclay <sup>5</sup> |

To support its Petition, Petitioner also relies on the Declaration of Jonathan Curtis, Ph.D. Ex. 1003.

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<sup>1</sup> The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284, 287–88 (2011), amended 35 U.S.C. § 103, effective March 16, 2013. Because the ’363 patent has an effective filing date before March 16, 2013, the pre-AIA version of § 103 applies. *See* Ex. 1001, code (22).

<sup>2</sup> PCT Pub. No. WO 2008/129358 A2, published Oct. 30, 2008 (Ex. 1007, “Radianingtyas”).

<sup>3</sup> PCT Pub. No. WO 2009/040676 A2, published Apr. 2, 2009 (Ex. 1030, “Kralovec”).

<sup>4</sup> PCT Pub. No. WO 97/37032, published Oct. 9, 1997 (Ex. 1008, “Bijl”).

<sup>5</sup> U.S. Patent No. 5,130,242, issued July 14, 1992 (Ex. 1019, “Barclay”).

## II. ANALYSIS

### A. *Claim Construction*

In an *inter partes* review, we construe a claim term “using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. [§] 282(b).” 37 C.F.R. § 42.100(b). Under this standard, we construe the claim term “in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” *Id.*; *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc) (holding that the words of a claim “are generally given their ordinary and customary meaning,” which is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application”).

Claim terms need only be construed to the extent necessary to resolve the controversy. *Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011). On this record and for purposes of this Decision, we see no need to construe any claim term.

### B. *Level of Ordinary Skill in the Art*

Petitioner contends that, when the application that issued as the '363 patent was filed, an ordinarily skilled artisan “would have had a Master of Science degree in an academic discipline emphasizing chemistry, chemical engineering, or biochemistry, in combination with training or at least two to three years of related work experience with lipid chemistry technologies, including but not limited to lipid extraction technologies.” Pet. 5 (citing Ex. 1003 ¶¶ 63–64). Alternatively, Petitioner proposes that an ordinarily skilled artisan “could have also had a Doctorate degree in a

relevant academic discipline with one to two years of related work experience in the same discipline.” *Id.* at 5–6. Petitioner argues that an ordinarily skilled artisan “would have been familiar with microbial oils” and “would have understood the benefits of polyunsaturated fats (PUFAs), microbial sources for obtaining them, and methods for culturing and extracting oils from those microbial sources.” *Id.* at 6 (citing Ex. 1003 ¶¶ 35–47, 64).

Patent Owner does not provide a definition of the level of ordinary skill in the art. *See* Prelim. Resp. 19. Patent Owner also states that any differences between the parties’ proposed definition of the skill level would not impact its arguments. *Id.*

For purposes of this Decision, we adopt Petitioner’s definition of the skill level because it is consistent with the prior art’s demonstration of the level of ordinary skill at the relevant time. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (holding that the prior art itself can reflect the appropriate level of ordinary skill in the art).

*C. Alleged Anticipation by Radianingtyas*

Petitioner asserts Radianingtyas anticipates claims 1–3. Pet. 6–16. Based on this record, and for at least the following reasons, we determine Petitioner has not established a reasonable likelihood that it would prevail in this assertion.

1. Radianingtyas

Radianingtyas discloses “compositions and methods related to oil producing microbes that can produce unsaturated fatty acids.” Ex. 1007, code (57). In particular, Radianingtyas discloses methods of culturing eukaryotes of the order Thraustochytriales and family Thraustochytriaceae,

which “when cultured produce quantities of unsaturated fatty acids, such as omega 3 (n-3) and/or omega 6 (n-6) oils, such as DHA, EPA, and DPA.” *Id.* at 1:22–31.<sup>6</sup> Radianingtyas states that “[o]f particular interest is ONC-T18[,] which produces up to 90% of its C20 to C22 content as DHA which is approximately 35% of the total intracellular fatty acids.” *Id.* at 99:22–24.

Radianingtyas discloses that a collection and screening process was used to identify 68 pure strains from collection sites throughout Atlantic Canada. *Id.* at 99:5–9. “All isolates which grew in liquid medium (54 out of 68), produced major amounts of omega-3 polyunsaturated fatty acid, particularly DHA which comprised between 22 and 80% of the total C20 to C22 content of these cells.” *Id.* at 99:16–18. “In addition to the omega-3 oils produced, approximately 80% of all isolates synthesized the omega-6 PUFAs, arachidonic acid (AA) or docosapentaenoic acids (DPA), at concentrations varying between 1 and 18% and 3 and 7% w/w, respectively.” *Id.* at 99:29–32.

Radianingtyas discloses manipulating the lipid composition to produce a better yield of DHA, EPA, or DPA by changing various parameters based on the growing conditions of the microbe. *Id.* at 27:4–8. Specifically, according to Radianingtyas, “the ratio of omega n-3 and/or n-6 oils to omega n-9 oils can be increased by su[p]plementing the medium of an oil producing microbe with a fatty acid production antagonist.” *Id.* at 27:26–28.

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<sup>6</sup> The parties cite the page numbers of the original documents, and not the exhibits. For consistency, we do the same.

## 2. The Parties' Arguments

Petitioner argues that Radianingtyas anticipates claims 1–3 because it discloses each limitation of claims 1–3. Pet. 6–16. Relevant to our analysis, Petitioner contends that Radianingtyas discloses microbial oils with triglycerides from “96 to about 100%” of the neutral lipids, which “can be at least 95% by weight of total lipids.” *Id.* at 9 (citing Ex. 1003 ¶ 78; Ex. 1007, 32:17–33:5, 89:24–26). In addition, Petitioner refers to Radianingtyas for stating that “[a]nalysis of results shows that the fatty acid component which ONC-T18 produces under heterotrophic fermentation **is almost entirely triglyceride (at least 95%)** in nature.” *Id.* at 9–10 (citing Ex. 1003 ¶ 79; Ex. 1007, 89:24–26) (emphasis added by Petitioner). Thus, Petitioner concludes that Radianingtyas discloses a microbial oil comprising a triglyceride fraction of at least 70% by weight. *Id.* at 9.

Petitioner contends that “ONC-T18 produces a lipid composition comprising ‘an omega-3 fatty acid, such as n-3 DHA, (for example, at least . . . **60% by weight**.’” *Id.* at 10 (quoting Ex. 1007, 26:29–34) (emphasis added by Petitioner). Because “at least 95%” of Radianingtyas’s lipid composition is triglycerides, Petitioner argues that Radianingtyas discloses the required DHA content at “50% by weight” (claim 1) or “40% by weight” (claim 3). *Id.* (citing Ex. 1003 ¶¶ 82–84; Ex. 1007, 32:17–33:5, 89:24–26).

Petitioner also argues that various other thraustochytrid strains in Radianingtyas produce oils with more than 50% DHA by weight. *Id.* at 11 (citing Ex. 1003 ¶ 85; Ex. 1007, 32:2–3, 3:25–28, Tables 3, 7, 8, Fig. 10/16). In addition, according to Petitioner, Radianingtyas discloses further purifying the extracted oils to increase DHA content. *Id.* at 11 (citing Ex. 1003 ¶ 86; Ex. 1007, 8:2–4). Thus, Petitioner concludes that

Radianingtyas discloses a microbial oil with at least 50% by weight DHA in the triglyceride fraction. *Id.* at 10.

Petitioner asserts that Radianingtyas discloses exemplary oils with low (from 0.17% to 2.69%) or undetectable amounts of heptadecanoic acid. *Id.* at 13 (citing Ex. 1003 ¶¶ 96–98; Ex. 1007, 32:20–25, 34:4–37:14, Fig. 11/16). Thus, Petitioner concludes that Radianingtyas discloses a microbial oil comprising 5% by weight or less of heptadecanoic acid. *Id.*

Patent Owner counters that Petitioner applies an incorrect legal standard by “mix[ing] and match[ing] disclosures from multiple, distinct embodiments in Radianingtyas and then cobbl[ing] them together to purportedly support anticipation.” Prelim. Resp. 20–23. According to Patent Owner, applying the correct legal standard, Radianingtyas does not disclose any microbial oil containing the claimed triglyceride, DHA and heptadecanoic acid concentrations. *Id.* at 22–41. In addition, Patent Owner asserts that Petitioner does not show an ordinarily skilled artisan would at once envisage the claimed subject matter from the distinct embodiments of Radianingtyas. *Id.* at 42. Thus, Patent Owner concludes that Petitioner does not establish a reasonable likelihood to prevail in this anticipate ground. *Id.*

For the reasons explained below, we find Patent Owner’s arguments persuasive.

### 3. Analysis

We focus our analysis on independent claims 1 and 3, and on the triglyceride, DHA, and heptadecanoic acid content recited therein. In order to anticipate a claim, a prior art reference “must not only disclose all elements of the claim within the four corners of the document, but must also disclose those elements arranged as in the claim.” *NetMoneyIN, Inc. v.*

*VeriSign, Inc.*, 545 F.3d 1359, 1370 (Fed. Cir. 2008) (quotation marks omitted). A reference, however, can anticipate a claim “even if it does not expressly spell out all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would at once envisage the claimed arrangement or combination.” *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1068 (Fed. Cir. 2017) (quotation marks and brackets omitted).

As explained below, here, Petitioner has not shown Radianingtyas discloses a microbial oil comprising the required triglyceride, DHA and heptadecanoic acid content. Specifically, although the exemplified strain ONC-T18 produces oil that meets the claimed triglyceride fraction and heptadecanoic acid level, Petitioner has not shown the same oil contains the recited DHA level.

Indeed, Radianingtyas discloses that “the typical composition of fatty acids” produced by the exemplified strain ONC-T18 includes 25% DHA. Ex. 1007, 32:21–25; *see also id.* at 91 (Table 5 showing ONC-T18 produced DHA at 24–34.2%), 99:22–24 (“Of particular interest is ONC-T18 which produces up to 90% of its C20 to C22 content as DHA which is approximately 35% of the total intracellular fatty acids.”). Despite touting that “the percent content of DHA . . . within ONC-T18 is extremely high” (*id.* at 91:13–14), Radianingtyas does not disclose ONC-T18 producing DHA at levels meeting the recited at least 40% (claim 3) or 50% (claim 1).

In accounting for the “5% by weight or less of heptadecanoic acid,” Petitioner relies on Example 14 of Radianingtyas, which presents oil production data from culturing ONC-T18 in media supplemented with fatty acid production antagonists. *See* Pet. 13 (citing Ex. 1007, 34:4–37:14).

According to Radianingtyas, four out of the six antagonists supplementation resulted in an increase in the content and proportion of DHA accumulated in OCN-T18. Ex. 1007, 34:4–37:14. None of the added antagonists, however, increased the DHA level to the recited at least 40% or 50%. *Id.*; *see also id.* at Fig. 9/16 (showing DHA level no higher than 35% in “Oleic acid fed flask”), Fig. 12/16 (showing the highest DHA (C22:6w3) level at 33.15%).

Petitioner also points to Radianingtyas for disclosing ““typical composition of fatty acids for ONC-T18, in the neutral lipids’ summing to 100% without disclosing [heptadecanoic acid].” Pet. 13 (quoting Ex. 1007, 32:20–25). That same “typical composition of fatty acids for ONC-T18,” again, contains only 25% DHA, not the required at least 40% or 50%. Ex. 1007, 32:20–25.

Petitioner asserts that ONC-T18 produces a lipid composition comprising DHA at least 60% by weight. Pet. 10 (citing Ex. 1007, 26:29–34). The paragraph containing the disclosure that Petitioner relies on here, in its entirety, reads as follows:

The eukaryotic microorganism, for example, such as ONC-T18, can produce at least about 30 wt.%, 40 wt.%, 50 wt.%, 60 wt.%, 70% wt.% or 80 wt.% (e.g., about 80 wt.%) of a lipid composition per dried cellular biomass. For example, the oil producing microbe can produce a lipid composition comprising ***from about 25% to about 40%*** of an omega-3 fatty acid, such as n-3 DHA, (for example, at least ***15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 55% or 60%*** by weight), and from about 0% to about 3% of the omega-3 fatty acid, EPA, (for example, at least 1% or 2% by weight) and from about 4% to about 12% of an omega-6 fatty acid, such as n-6 DPA, (for example, at least 4%, 5%, 6%, 7%, 8%, 9%, or 10% by weight).

*Id.* at 26:29–27:3 (emphases added).

It is undisputed that 15%, 20%, 45%, 50%, 55%, and 60% listed in the parentheses are outside the disclosed range “from about 25% to about 40%” they supposedly exemplify. Dr. Curtis opines that this disclosure should be read as “from about 15% to about 60% of an omega-3 fatty acid, such as n-3 DHA.” Ex. 1003, 39 n.4.

Patent Owner contends that “[t]he only mention of strain ONC-T18 in this particular paragraph is in the first sentence, which is directed to the amount of lipid composition produced per dried weight of cellular biomass.” Prelim. Resp. 33. “The sentence that purportedly discloses a range of about 15–60% by weight of DHA,” Patent Owner points out, “does not mention strain ONC-T18 at all.” *Id.*

We find Patent Owner’s argument persuasive. Indeed, Dr. Curtis does not point to any disclosure in Radianingtyas to show that ONC-T18 produces more than 40% DHA. Instead, as Petitioner observes, Radianingtyas discloses other, non-ONC-T18 thraustochytrid strains, that produce higher levels of DHA. Pet. 11 (citing Ex. 1007, 82, Table 3). Petitioner argues that “high DHA content in thraustochytrid oils was contemplated and described by Radianingtyas, in which various thraustochytrid strains contained more than 50% DHA by weight.” *Id.* As support, Petitioner relies on eleven non-ONC-T18 strains that according to Petitioner, have “more than 50% DHA when taking DHA amount (in mg/g) and dividing by total lipid amount (in mg/g).” *Id.*

The problem here is that the challenged claims require that the DHA content “of the triglyceride fraction” is at least 40% or 50%, yet Petitioner does not point to any teaching in Radianingtyas that discloses the triglyceride fraction produced by these other thraustochytrid strains. Indeed,

the disclosures Petitioner relies on for the triglyceride fraction only discuss the microbial oil produced by ONC-T18. *See* Pet. 9 (citing Ex. 1007, 32:17–33:5, 89:24–26). Petitioner does not argue, and we do not find, that the eleven other thraustochytrid strains produce oil with “almost entirely triglyceride (at least 95%)” or “96 to 100%” triglyceride, as ONC-T18 does (Ex. 1007, 32:17–33:5, 89:24–26), or with “a triglyceride fraction of at least 70% by weight,” as the challenged claims require.

In fact, other evidence produced by Petitioner demonstrates that although the major lipid class in thraustochytrids is neutral lipids, which include triglyceride among others, some strains produce triglyceride at levels much lower than the recited 70%. Ex. 1040, 301 (explaining neutral lipids make up “from 44.7–95.0% of total lipids”), 302 (Figure 4 showing at least two of the five strains reported do not contain at least 70% triglyceride fraction). Moreover, “[i]n general, the proportion of PUFAs in polar lipid is higher than that in neutral lipid.” *Id.* at 302 (teaching that PUFAs, such as DHA, “make up a large proportion of polar lipids, ranging from 36.5% to 72.0%”); *see also* Ex. 2001, 1431 (“Neutral lipids were composed of 35% DHA” whereas “polar lipids were composed of 63.5% DHA” in oil produced by a thraustochytrid strain). Thus, without knowing the triglyceride fraction, the mere fact that some non-ONC-T18 thraustochytrid strains produce oils with high levels of DHA has limited probative value.

We also are not persuaded by Petitioner’s argument that Radianingtyas’s general disclosure of purifying microbial oils used to increase DHA content satisfies the recited DHA level. Pet. 11 (citing Ex. 1007, 8:2–4). In defining the terms “purify” and “purifying,” Radianingtyas notes that when these terms are used, it means that a

composition could be, for example, 90% pure. Ex. 1007, 7:26–8:2. As an example of how the term “purified” may be used, Radianingtyas states “[f]or example, if a disclosed eukaryotic microorganism, for example, produces 35% DHA, this could be further ‘purified’ such that the final lipid composition was greater than 90% DHA.” *Id.* at 8:2–4. We do not interpret such prophetic language in Radianingtyas as actually disclosing purifying a microbial oil to have 90% DHA in the triglyceride fraction.

In sum, Petitioner has not shown sufficiently that Radianingtyas discloses a microbial oil comprising the required triglyceride, DHA, and heptadecanoic acid content, as arranged in claims 1 and 3. In addition, Petitioner neither argues nor points to evidence to show that an ordinarily skilled artisan would at once envisage such a microbial oil.

As a result, on this record, Petitioner has not established a reasonable likelihood that Radianingtyas anticipates claims 1 and 3. Because claim 2 depends from claim 1, we similarly find Petitioner has not established a reasonable likelihood that Radianingtyas anticipates claim 2 either.<sup>7</sup>

*D. Alleged Obviousness Over Radianingtyas and Kralovec*

Petitioner asserts claims 1–15 would have been obvious over the combination of Radianingtyas and Kralovec. Pet. 16–41. Based on this record, and for at least the following reasons, we determine Petitioner has not established a reasonable likelihood that it would prevail in this assertion.

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<sup>7</sup> Patent Owner presents additional arguments to counter Petitioner’s anticipation challenge of claim 2. Prelim. Resp. 39–41. We do not need to address those arguments because Petitioner has not shown sufficiently that Radianingtyas discloses each limitation of claim 1, from which claim 2 depends.

1. Kralovec

Kralovec teaches a process for increasing the concentration of PUFA in an oil composition. Ex. 1030, 1:9–11. According to Kralovec, “purifying and concentrating PUFA’s in a triglyceride form is generally desired.” *Id.* at 2:7–8.

Kralovec’s method includes a hydrolysis step that “removes one or more saturated and/or short chain fatty acids, or esters thereof, from a starting glyceride, thus leaving a glyceride fraction (hydrolyzed glyceride) where glyceride molecules with unsubstituted alcohol groups and/or polyunsaturated fatty acid esters remain.” *Id.* at 8:20–23, 9:8–10. Kralovec explains that “the hydrolysis step removes all or substantially all of any saturated and/or short chain fatty acids from the starting glyceride,” but “does not remove a substantial amount of polyunsaturated fatty acids, if present, from the glyceride.” *Id.* at 8:30–32.

After hydrolysis, the hydrolyzed glyceride can be separated from some or all of the free saturated fatty acids. *Id.* at 12:13–21. “After hydrolysis and separation, desirable polyunsaturated fatty acid components, for example, EPA and/or DHA, can be attached to the hydrolyzed and distilled glyceride using a lipase,” which is referred to as an “esterification step.” *Id.* at 13:26–29, 14:16–17.

Kralovec asserts that its process “can provide an oil having higher levels of a PUFA, such as, for example, EPA, DHA, or a combination thereof, than the starting oil composition.” *Id.* at 5:27–28. Kralovec teaches that “the specific composition of a treated oil (*e.g.*, glyceride) can be adjusted and/or tailored to have a target ratio of various polyunsaturated fatty acids. Such tailored compositions can be useful, for example, in

providing glycerides that comprise high concentrations of DHA that exhibit greater oxidation resistance.” *Id.* at 6:10–13.

## 2. The Parties’ Arguments

Petitioner argues that the combination of Radianingtyas and Kralovec teaches or suggests each limitation of claims 1–15. Pet. 26–41. Relevant to our analysis, Petitioner relies on the same arguments advanced in the anticipation ground to show Radianingtyas teaches a microbial oil comprising a triglyceride fraction of at least 70% by weight. *Id.* at 27, 34. Petitioner also asserts that Kralovec teaches oils with a high triglyceride content, for example, “greater than or equal to about 60%, 65%, 70%, 75%, or 80%” by weight of the total composition. *Id.* at 27 (citing Ex. 1030, 37:22–24, Tables 5, 8.1, 9.2, 10.2). According to Petitioner, triglyceride-rich oils were well known in the art. *Id.* (citing Ex. 1003 ¶¶ 142, 143).

For the claimed DHA content, Petitioner argues that Radianingtyas teaches ONC-T18 as producing a lipid composition comprising an omega-3 fatty acid, such as DHA, in an amount of “at least . . . 40%, 45%, 50%, 55% or 60% by weight.” *Id.* at 28 (citing Ex. 1007, 26:29–34), 34. Petitioner also contends that Radianingtyas teaches “at least eleven [thraustochytrids] strains having more than 50% DHA and three strains having at least 60% DHA.” *Id.* at 28 (citing Ex. 1007, 82, Table 3), 34. Because the majority of Radianingtyas’s lipid composition is triglycerides, Petitioner argues that “the majority of the PUFAs in Radianingtyas must be present in triglyceride form, including the DHA, and that such an oil would satisfy” the required DHA content at “50% by weight” (claim 1), “40% by weight” (claim 3), or “60% by weight” (claim 4). *Id.* at 34.

Petitioner asserts that “compositions having a DHA content of the triglyceride fraction that is at least 60% by weight were also well known” in the art. *Id.* at 35 (citing Ex. 1003 ¶ 171). Petitioner further argues that it was known “how to increase the yield of desired fatty acids, including DHA.” *Id.* (citing Ex. 1003 ¶ 171). In addition, according to Petitioner, Radianingtyas teaches purifying the extracted oils to increase DHA content. *Id.* (citing Ex. 1003 ¶ 172; Ex. 1007, 8:2–4).

For the n-6 DPA content, Petitioner asserts that Radianingtyas teaches ONC-T18 for producing a lipid composition comprising an omega-6 fatty acid, such as n-6 DPA, in an amount of “at least 4%, 5%, 6%, 7%, 8%, 9%, or 10% by weight.” *Id.* at 29 (citing Ex. 1007, 26:29–27:3). According to Petitioner, an ordinarily skilled artisan “would have understood that at least one of these lower DPA oils would contain 0.5% to 6% DPA in triglyceride form,” as claims 1 and 3 require. *Id.* (citing Ex. 1003 ¶ 147).

In addition, Petitioner argues that an ordinarily skilled artisan would have had a reason to apply Kralovec’s oil modification techniques to Radianingtyas’s extracted microbial oil to increase the DHA content, and would have had a reasonable expectation of success in doing so. *Id.* at 18–26. According to Petitioner, it would have been obvious to produce a DHA-enriched microbial oil containing “at least 50 wt.% DHA, or higher, such as at least 60 wt.% DHA in triglyceride form” and “a desired amount of DPA in triglyceride form.” *Id.* at 28 (citing Ex. 1003 ¶¶ 145–147), 35–36 (citing Ex. 1003 ¶¶ 173; Ex. 1030, 35:20–30, 36:12–15, 37:22).

Patent Owner disagrees. Prelim. Resp. 43–59. For claims 1–3, Patent Owner contends that Kralovec’s enrichment methods significantly increase the concentration of PUFAs in microbial oils, not just DHA. *Id.* at 43–47.

According to Patent Owner, Kralovec shows that after applying its methods, the DHA content is still below the levels required in claims 1–3, yet the DPA n-6 content is above the levels recited in the claims. *Id.* at 45–46 (citing Ex. 1030, Tables 8.2, 9.1, 9.2).

Patent Owner argues that the Petition fails to show an ordinarily skilled artisan would have had a reason to apply Kralovec’s enrichment methods to Radianingtyas’s microbial oils to increase the DHA concentration while, at the same time, maintaining DPA n-6 concentration within the claimed range. *Id.* at 49. Patent Owner further contends that the Petition fails to show a reasonable expectation of success—after applying Kralovec’s enrichment methods to Radianingtyas’s microbial oils—in arriving at a microbial oil with DPA n-6 concentration in the claimed range. *Id.* at 54–55.

For claim 4, Patent Owner asserts that “the combination of Radianingtyas and Kralovec does not disclose any oils that contain at least 70% by weight of a triglyceride fraction and at least 60% by weight DHA in the triglyceride fraction.” *Id.* at 56. Patent Owner argues that Radianingtyas’s ONC-T18 does not produce microbial oils containing at least 40%, much less at least 60%, DHA. *Id.* at 57. According to Patent Owner, an ordinarily skilled artisan “would not reasonably expect any oil produced by ONC-T18 to achieve an amount of at least 60% by weight of DHA *even after* being subjected to the enrichment techniques disclosed in Kralovec.” *Id.* at 57–58 (citing Ex. 1030, Tables 6, 8.2, 9.1).

In addition, Patent Owner argues that for the three non-ONC-T18 strains Petitioner relies on for teaching at least 60% DHA, Radianingtyas does not teach the triglyceride concentration of any oil produced by these

strains. *Id.* at 56. Patent Owner contends that other prior art Petitioner relies on similarly does not teach what portion of the microbial oils are made up of the triglyceride fraction. *Id.* at 58.

For the reasons explained below, we find Patent Owner's arguments persuasive.

### 3. Analysis

#### a. *Claims 1, 3, and Their Dependent Claims*

Claim 1 requires that, among others, the DHA content of the triglyceride fraction is at least 50% by weight, the DPA n-6 content of the triglyceride fraction is from 0.5% by weight to 6% by weight. Claim 3 is similar, except it requires at least 40% DHA. We focus on these two limitations.

As explained above, Petitioner has not shown Radianingtyas's ONC-T18 produces oil meets the claimed DHA level. *See supra* Section C.3. Also as explained above, Petitioner has not shown high-DHA oils produced by non-ONC-T18 thraustochytrid strains meet the claimed triglyceride level. *Id.* Thus, for the same reason explained above, we are not persuaded that Radianingtyas alone teaches the recited DHA content of the triglyceride fraction. *Id.*

Petitioner argues that an ordinarily skilled artisan would have had a reason to apply Kralovec's oil modification techniques to Radianingtyas's microbial oil to increase the DHA content. Pet. 22–26, 28. Kralovec's enrichment methods, however, are not selective for increasing only the concentration of DHA in an oil. Instead, Kralovec specifically identifies DPA n-6 as another suitable PUFA for its methods. Ex. 1030, 15:18–19, 19:28–20:2. And Kralovec's methods indeed increase the concentration of

DPA, and to levels above the recited 0.5–6%. *Id.* at Table 9.1 (disclosing 4.6% DPA in starting oil, 8.1% in glyceride fraction, and 7.3% in re-esterified oil).

Relying on Radianingtyas’s teaching that ONC-T18 produces a lipid composition comprising certain amount of an omega-6 fatty acid, such as n-6 DPA, Petitioner contends that an ordinarily skilled artisan “would have understood that at least one of these lower DPA oils would contain 0.5% to 6% DPA in triglyceride form,” as claims 1 and 3 require. Pet. 29 (citing Ex. 1007, 26:29–27:3). As shown above, applying Kralovec’s enrichment methods to Radianingtyas’s oil in order to increase DHA content, however, also increases the DPA level in the resulting product, and to above the recited range. Citing Dr. Curtis’s testimony verbatim, Petitioner contends that an ordinarily skilled artisan would have combined the teachings of Radianingtyas and Kralovec “to produce an enriched microbial oil containing a *desired amount* of DPA in triglyceride form.” *Id.* (citing Ex. 1003 ¶ 147) (emphasis added). Dr. Curtis provides no evidence to support his opinion. *See* Ex. 1003 ¶ 147. We, thus, accord limited weight to this conclusory statement.

In sum, we find Petitioner has not shown sufficiently that the combination of Radianingtyas and Kralovec would result in a microbial oil with a DHA content in the triglyceride fraction that is at least 40% (claim 3) or 50% (claim 1) by weight, *and* a DPA n-6 content in the triglyceride fraction that is from 0.5% to 6% by weight. As a result, on this record, Petitioner has not established a reasonable likelihood that claims 1 and 3, as well as their dependent claims would have been obvious over Radianingtyas and Kralovec.

*b. Claim 4 and Its Dependent Claims*

Claim 4 requires that, among others, the triglyceride fraction is at least 70% by weight of the microbial oil, the DHA content of the triglyceride fraction is at least 60% by weight.

Petitioner relies on three of Radianingtyas's non-ONC-T18 thraustochytrid strains for teaching the DHA content. Pet. 34 (citing Ex. 1007, 82, Table 3). As explained above, Petitioner has not shown high-DHA oils produced by non-ONC-T18 thraustochytrid strains meet the claimed triglyceride level. *See supra* Section C.3.

Petitioner also argues that ONC-T18 can produce oil that meets the claimed DHA level. Pet. 34 (citing Ex. 1007, 26:29–34). Again, as explained above, we are not persuaded by this argument. *See supra* Section C.3. In fact, Radianingtyas teaches oils produced by ONC-T18 includes at most 35% DHA. *Id.* (citing Ex. 1007, 32:21–25, 34:4–37:14, 91 (Table 5), 99:22–24, Figs. 9/16, 12/16).

Petitioner contends that an ordinarily skilled artisan “would also readily know how to increase the DHA content in triglyceride form using, e.g., methods disclosed by Kralovec.” Pet. 35. According to Petitioner, Kralovec's methods can produce “oils that comprise greater than or equal to about . . . 80% DHA by weight of the total composition.” *Id.* at 36 (citing Ex. 1030, 36:12–15).

As Patent Owner observes, however, “Kralovec's actual data demonstrate[] that its techniques do not achieve oils containing the claimed DHA concentration in the triglyceride fraction.” Prelim. Resp. 57. Indeed, even after Kralovec's enrichment methods, the DHA content remains below the recited 60%. *Id.* at 40 (Table 7 showing 43.8% DHA in the starting oil

increased to 51.1%, 52.2%, 53.2%, 55.2% after hydrolysis), 42 (Table 8.2 showing 52.2% DHA (22:6) in the glyceride fraction, and 51.7%, 44.9%, and 54.2% DHA after re-esterification); *see also id.* at 43 (Table 9.2 showing 22.0% DHA (22:6) in the starting oil increased to 38.8% in the glyceride fraction, and 34.5% after re-esterification). In other words, Kralovec's enrichment methods do not actually increase DHA content to the recited 60%, even when the starting oil contains 43.8% DHA, higher than Radianingtyas's 35% in ONC-T18.

Petitioner asserts that "compositions having a DHA content of the triglyceride fraction that is at least 60% by weight were also well known." Pet. 35 (citing Ex. 1009, 27; Ex. 1015 ¶ 116, Fig. 3; Ex. 1019, 27; Ex. 1020, 384, Table 2; Ex. 1032, 27–31, Table 2.5). None of these references, however, provides information on what portion of the oil is triglyceride. As explained above, some thraustochytrids strains produce triglyceride at levels much lower than the recited 70%, and in general, DHA content in polar lipids is higher than that in triglycerides. *See supra* Section II.C.2 (citing Ex. 1040, 301, 302; Ex. 2001, 1431). Thus, without knowing the triglyceride fraction, the mere fact that some thraustochytrid strains produce oils with high levels of DHA has limited probative value.

In sum, we find Petitioner has not shown sufficiently that the combination of Radianingtyas and Kralovec, in view of the knowledge in the art, would result in a microbial oil with a triglyceride fraction that is at least 70% by weight *and* a DHA content in the triglyceride fraction that is at least 60% by weight. As a result, on this record, Petitioner has not established a reasonable likelihood that claim 4 and its dependent claims would have been obvious over Radianingtyas and Kralovec.

*E. Alleged Obviousness Over Bijl and Barclay*

Petitioner asserts claims 1–15 would have been obvious over Bijl and Barclay. Pet. 42–64. Based on this record, and for at least the following reasons, we determine Petitioner has not established a reasonable likelihood that it would prevail in this assertion.

1. Relevant Prior Art Disclosures

*a. Bijl*

Bijl teaches a pure and stable microbial oil that contains at least one PUFA. Ex. 1008, 1:8–12. The microbial oil of Bijl is produced by one or more microorganisms, “suitably in a fermentation process,” and “has a triglyceride content of greater than 90%.” *Id.* at 2:30–36.

Bijl teaches its method is “for the recovery of such oil from a microbial biomass derived from a pasteurised fermentation broth, wherein the microbial biomass is subjected to extrusion to form granular particles, dried and the oil then extracted from the dried granules using an appropriate solvent.” *Id.*, Abstract. Bijl states that “pasteurisation may inactivate various lipases, and these may cleave fatty acids off a triglyceride backbone. This is disadvantageous for PUFAs where a high triglyceride content is preferred.” *Id.* at 7:34–37. According to Bijl, this process “can enable a cost effective and efficient extraction of the PUFA oil, and provide an oil of a particularly high quality.” *Id.* at 9:5–7.

Bijl explains that the microbial oil may be obtained from fungi, including *Thraustochytrium*. *Id.* at 6:3–7. Bijl also explains that typically the oils obtained from these organisms predominantly contain one particular PUFA, but may contain other PUFAs in lesser amounts. *Id.* at 5:24–26, 6:11–14. Bijl teaches DHA as a preferred PUFA. *Id.* at 5:30–35, 6:3–5,

13:19–31. In Example 19, Bijl describes a DHA oil recovered after its method includes 67% triglycerides and 32.6% DHA. *Id.* at 42:33–35.

*b. Barclay*

Barclay teaches a process for culturing single-celled fungi microorganisms of the order Thraustochytriales “for the production of lipids with high concentrations of omega-3 highly unsaturated fatty acids (HUFA).” Ex. 1019, Abstract, 1:23–28, 4:52–61.

Barclay teaches a method of producing omega-3 HUFAs comprising culturing Thraustochytriales, including Thraustochytrium “under nutrient-limited or nitrogen-limited conditions for an effective amount of time. . . and harvesting the Thraustochytriales during the period of nitrogen limitation in order to increase the concentration of omega-3 HUFAs in the microorganisms.” *Id.* at 5:21–34; *see also id.* at 10:17–23 (“A microbial product high in protein and high in omega-3 highly unsaturated fatty acids can be produced by harvesting the cells in the exponential phase of growth. If a product significantly higher in lipids and omega-3 highly unsaturated fatty acids is desired, the culture can be manipulated to become nutrient limited, preferably, nitrogen limited for a suitable time.”).

Barclay teaches that its process enables isolation of strains of microorganisms with “desirable characteristics for the production of omega-3 highly unsaturated fatty acids,” including “high content of omega-3 highly unsaturated fatty acids” and “preferably low content of saturated and omega-6 highly unsaturated fatty acids.” *Id.* at 6:42–50.

Specifically, “151 newly isolated strains . . . were sampled in late exponential phase growth and quantitatively analyzed for highly unsaturated fatty acid content.” 21:54–58. According to Barclay, “many strains . . .

produce a high proportion of total omega-3 fatty acids as C22:6w3 [DHA].” *Id.* at 22:47–49. “Fifteen strains had at least 94% by weight of total omega-3 fatty acids as C22:6w3 [DHA], more than any previously known strain.” *Id.* at 22:53–55.

## 2. The Parties’ Arguments

Petitioner argues that the combination of Bijl and Barclay teaches or suggests each limitation of claims 1–15. Pet. 50–64. Relevant to our analysis, Petitioner relies on Bijl for teaching the recited at least 70% triglyceride fraction. *Id.* at 51 (citing Ex. 1008, 2:30–33, 4:24–28). Although Barclay does not teach the triglyceride fraction in its microbial oils, Petitioner contends that an ordinarily skilled artisan would have understood “Barclay’s oils included triglycerides,” and “likely included high triglyceride content” based on other prior art teachings. *Id.* at 52 (citing Ex. 1003 ¶¶ 252–253; Ex. 1007, 32:17–33:5, 89:24–26; Ex. 1019, 6:6–11, 13:52–58; Ex. 1034 ¶¶ 37, 38). Petitioner further argues that “since the majority of Bijl’s microbial oil is made up of triglycerides (e.g., > 90% in the oil), the majority of the DHA in Bijl-Barclay must be present in the triglyceride form.” *Id.* (citing Ex. 1003 ¶ 252).

For the DHA content, Petitioner argues that an ordinarily skilled artisan would have had a reason to use Barclay’s strains that produce high DHA oils in Bijl’s processes to yield an improved oil composition having higher amounts of DHA. *Id.* (citing Ex. 1019, 22:47–54, Tables 3, 4) (arguing at least twenty strains in Barclay have more than 50% DHA, “of which three (3) strains have more than 70% DHA”); *see also id.* at 45–49 (arguing various reasons to combine the teachings of Bijl and Barclay). Petitioner also asserts there is a reasonable expectation of success in

applying Barclay's strains and culture modifications to increase the DHA concentration. *Id.* at 49–50.

Patent Owner contends that there are substantial differences between the combination of Bijl and Barclay and the claimed invention. Prelim. Resp. 60–64. Patent Owner also argues that the Petition does not demonstrate a reasonable expectation of success in achieving the claimed invention. *Id.* at 65–68.

For the reasons explained below, we find Patent Owner's arguments persuasive.

### 3. Analysis

When asserting unpatentability under obviousness, the patent challenger must show a reasonable expectation of success, that is, “the likelihood of success in combining references to arrive at the claimed invention.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016). Thus, “[t]he reasonable-expectation-of-success analysis must be tied to the scope of the claimed invention.” *Teva Pharms. USA, Inc. v. Corcept Therapeutics, Inc.*, 18 F.4th 1377, 1381 (Fed. Cir. 2021); *Allergan, Inc. v. Apotex Inc.*, 754 F.3d 952, 966 (Fed. Cir. 2014) (holding the trial court's failure to consider the appropriate scope of the claimed invention in evaluating the reasonable expectation of success constitutes a legal error).

Under this standard, we find Petitioner has not shown sufficiently a reasonable expectation of success in combining the teachings of Bijl and Barclay to arrive at the claimed invention. Relevant to our analysis, all challenged claims require its microbial oil to have, among others, a triglyceride fraction of at least 70% by weight and a DHA content of the

triglyceride fraction of at least 40% (claim 3), 50% (claim 1), or 60% (claim 4) by weight.

Petitioner contends that an ordinarily skilled artisan would have expected success in applying Barclay's strains and culture modifications to increase the concentration of DHA in the microbial oil because (1) Bijl contemplates that its invention can comprise DHA obtained from *Thraustochytrium* (Pet. 49 (citing Ex. 1008, 6:3–6)); and (2) both Bijl and Barclay teach that their oils are microbial in origin (*id.* at 50 (citing Ex. 1008, 13:19–22, 12:22–37; Ex. 1019, 4:59–61)), contain DHA (*id.* (citing Ex. 1008, 6:3–5, 7:18–19; Ex. 1019, 10:40–60, 6:31–41)), and both references acknowledge similar uses for their oils (*id.* (citing Ex. 1008, 9:30–36, 14:23–27; Ex. 1019, 13:35–40, 14:12–14, 14:48–68)). None of these arguments addresses the claimed invention as a whole, that is, a microbial oil with the requisite levels of triglyceride fraction and DHA content of the triglyceride fraction.

Evidence of record casts further doubt on Petitioner's argument on the reasonable expectation of success. First, Barclay does not teach the triglyceride fraction in its microbial oils. As explained above, some *thraustochytrids* strains produce triglyceride at levels much lower than the recited 70%, and in general, DHA content in polar lipids is higher than that in triglycerides. *See supra* Section II.C.2 (citing Ex. 1040, 301, 302; Ex. 2001, 1431). Thus, without knowing the triglyceride fraction, the mere fact that some of Barclay's strains produce oils with high levels of DHA has limited probative value.

Second, in Bijl's Example 19, the only working example where it teaches "[r]ecovery of DHA oil," the oil contained 32.6% DHA and 67%

triglyceride, below the claimed threshold for either, and far below the “greater than 90%” triglyceride content touted in the general disclosure. Ex. 1008, 3:31–33, 42:4–36. Thus, we agree with Patent Owner that “strains cultured and processed according to the methods of Bijl do not necessarily produce microbial oils with the claimed concentrations of triglycerides and DHA in the triglyceride fraction.” Prelim. Resp. 65.

Third, neither Petitioner nor Dr. Curtis provides sufficient support for, or otherwise explains, the conclusory statement that “since the majority of Bijl’s microbial oil is made up of triglycerides (e.g., > 90% in the oil), the majority of the DHA in Bijl-Barclay must be present in the triglyceride form.” Pet. 52 (citing Ex. 1003 ¶ 252<sup>8</sup>). We also are not persuaded that teachings from other prior art adequately support Petitioner’s assertion that Barclay’s oils “likely included high triglyceride content.” *Id.* (citing Ex. 1007, 32:17–33:5, 89:24–26; Ex. 1019, 6:6–11, 13:52–58; Ex. 1034 ¶¶ 37, 38). Indeed, those references do not discuss the strains used in Barclay or Bijl, and different thraustochytrids strains produce oils with different triglyceride content. Ex. 1040, 301 (explaining neutral lipids make up “from 44.7–95.0% of total lipids”), 302 (Figure 4 showing at least two of the five strains reported do not contain at least 70% triglyceride fraction).

In sum, we find Petitioner has not shown sufficiently that an ordinarily skilled artisan, based on the teachings of the asserted prior art, would have had a reasonable expectation of success in arriving at the claimed invention (that is, a microbial lipid having a triglyceride fraction of at least 70% by weight and a DHA content of the triglyceride fraction of at

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<sup>8</sup> Dr. Curtis’s testimony is substantively identical to the argument in the Petition. *Compare* Ex. 1003 ¶ 252, *with* Pet. 52.

least 40% (claim 3), 50% (claim 1), or 60% (claim 4) by weight). As a result, on this record, Petitioner has not established a reasonable likelihood that claims 1, 3, and 4, as well as their dependent claims, would have been obvious over Bijl and Barclay.<sup>9</sup>

### III. CONCLUSION

Based on the current record, and for the reasons explained above, we find Petitioner has not demonstrated a reasonable likelihood that it would prevail with respect to at least one claim challenged in the Petition. Thus, decline to institute *inter partes* review.

### IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is denied, and no trial is instituted.

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<sup>9</sup> Patent Owner also asks us to defer to the Examiner's previous evaluation because both Bijl and Barclay were previously presented to the Office and Petitioner has not shown examiner error. Prelim. Resp. 59–60, 68–70. We do not need to address this argument because we find Petitioner has not established a reasonable likelihood that it would prevail in its obviousness challenge based on Bijl and Barclay.

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