

No. _____

In the
Supreme Court
of the United States

IN RE URVASHI BHAGAT
Petitioner

*On Petition for Writ of Mandamus to the United
States District Court for the Eastern District of
Virginia, Alexandria Division.*

Emergency Petition for Writ of Mandamus

Vol. II.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:20-cv-1515

URVASHI BHAGAT,
Plaintiff

UNITED STATES PATENT AND
TRADEMARK OFFICE, et al.,

Defendants

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants' partial Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Federal Rules of Procedure 12(b)(1) and 12(b)(6). The Court also considers Defendants' Motion to Strike Plaintiff's Jury Demand pursuant to Rule 39(a)(2).

In 2013, Plaintiff filed a patent application with the U.S. Patent and Trademark Office ("USPTO"). This application contained claims for nutritional formulations comprising omega-6 fatty acids and antioxidants. The USPTO examiner who reviewed Plaintiff's application withdrew claim 112 for lack of "unity of invention." The USPTO rejected Plaintiff's other pending claims for lack of written

description, indefiniteness, improper dependency, and/or obviousness. Plaintiff appealed the USPTO's rejections to the Patent Trial and Appeal Board, which affirmed all rejections except for the lack of written description. Plaintiff then filed the present case in this Court appealing the Board's decision. She amended the Complaint on April 19, 2021.

Defendants filed the present Motion to Dismiss on May 3, 2021. The Motion seeks dismissal of all Plaintiff's causes of action unrelated to the patentability of Plaintiff's application claims. Defendants identify several causes of action unrelated to Plaintiff's patent claims, including a takings claim under the Fifth Amendment, a general claim for damages due to the USPTO's allegedly bad faith delay of Plaintiff's patent issuance, a claim of tortious harassment, and a mandamus compelling the USPTO to issue Plaintiff's requested patent claims. Plaintiff demands a jury trial on all issues triable by a jury. Defendants filed a Motion to Strike such demand on May 3, 2021.

A district court must dismiss an action if the court has no subject matter jurisdiction over the claim. See Fed. R. Civ. P. 12(b)(1). The Court finds it lacks jurisdiction over the Amended Complaint's Fifth Amendment takings claim, general claim for money damages, and harassment claim.

Generally, agencies of the United States are shielded from liability under the doctrine of sovereign immunity unless Congress expressly waives such immunity. Congress has not waived its sovereign immunity for money damages in actions brought pursuant to 35 U. S.C. S 145. Any claims

for money damages brought under this statute are dismissed for lack of subject matter jurisdiction.

The Tucker Act waives sovereign immunity with respect to non-tort monetary damage claims, such as violations of the Takings Clause of the Fifth Amendment, against the United States. But "a claim for just compensation under the takings clause must be brought to the Court of Federal Claims in the first instance." E .Enters. v. Apfel, 524 U.S. 498, 520 (1998). The U.S. Court of Federal Claims has exclusive jurisdiction over any such claims alleging damages greater than \$10,000. See id.

In the present action, Plaintiff claims \$500,000,000 in damages against the United States. Thus, the Court of Federal Claims has exclusive jurisdiction over this claim. Plaintiff's Fifth Amendment takings claim is dismissed for lack of subject matter jurisdiction.

Like the Tucker Act, the Federal Tort Claims Act ("FTCA") waives the Government's sovereign immunity for any "injury or loss caused by the negligent or wrongful act of a Government employee acting within the scope of his or her employment." Medina v. United States, 259 F.3d 220, 223 (4th Cir. 2001). This waiver includes actions for tortious harassment, so long as they are otherwise proper before the Court. But for an FTCA claim to be properly before the Court, a plaintiff must first present an administrative claim to the agency allegedly responsible for the plaintiff's injury. See 28 U.S. C. S 2675(a).

In this case, the relevant agency would be the USPTO because the Amended Complaint alleges

the USPTO is responsible for harassing Plaintiff. But the Amended Complaint does not indicate that Plaintiff first filed a claim with the USPTO regarding said harassment. Without first filing this claim with the USPTO, this Court has no authority to review the harassment claim. It is dismissed for lack of subject matter jurisdiction.

A complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) "if after accepting all well-pleaded allegations in the plaintiff's complaint as true... it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). A plaintiff must allege "a plausible claim for relief," instead of merely stating facts that leave open "the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." McCleary-Evans v. Md. Dep't of Transp., State Highway Admin., 780 F.3d 582, 587 (4th Cir. 2015) (emphases in original).

Although a court considering a motion to dismiss must accept all well-pleaded factual allegations as true, this deference does not extend to legal conclusions. Neither "naked assertions devoid of further factual enhancement," nor "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" suffice. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Courts are instructed to construe pro se pleadings liberally. "[W]hen reviewing a pro se complaint, a court must carefully examine the plaintiff's allegations, no matter how inartfully pleaded to determine whether they could provide a

basis for relief." Johnson v. Lyddane, 368 F. Supp. 2d 529, 531 (E.D. Va. 2005) (citing Gordon v. Leeke, 574 F. 2d 1147, 1151 (4th Cir. 1977)).

The Amended Complaint includes no facts supporting the conclusion that the USPTO violated Plaintiff's constitutional rights, that the USPTO made false statements, and that Plaintiff is plausibly entitled to mandamus relief.

To establish she is eligible for mandamus relief, a plaintiff must plead (1) she has a clear right to the relief requested and (2) no other relief is available. See Heckler v. Ringer, 466 U.S. 603, 616 (1984). The Amended Complaint does not plausibly allege either. Plaintiff has not established that the USPTO owes her a clear duty to issue her a patent. And there is at least one other form of relief, i.e., 35 U. S.C. § 145, which Plaintiff has also asserted in her Amended Complaint. Plaintiff's petition for mandamus is thus dismissed for failure to state a claim.

The Amended Complaint also fails to allege plausible misconduct or false statements by the USPTO. Though Plaintiff alleges the USPTO erred in the adjudication in her patent application, she provides no factual support for the allegation that the USPTO made false statements or acted with misconduct. The conclusion that the USPTO acted with "misconduct" is insufficient without providing any factual support of alleged misconduct. And the conclusion that "the Chief Judge also made false statements" is insufficient without any plausible explanation as to what statements were objectively false. These claims must be dismissed for failure to state a claim.

The Amended Complaint similarly alleges the USPTO violated Plaintiff's constitutional rights, but Plaintiff fails to set forth what action the USPTO took that violated her rights, or even which constitutional right was violated. This cause of action also must be dismissed for failure to state a claim.

Finally, Defendants ask the Court to strike Plaintiff's request for a jury trial. "It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). When Congress waives its sovereign immunity—as it has done with respect to patent appeals pursuant to 35 U.S.C. § 145—a plaintiff has a right to a jury trial only when Congress "unequivocally expresse[s]" such right in the authorizing statute. *Id.* Here, 35 U.S.C. S 145 provides no such unequivocal waiver. Thus, Plaintiff has no right to a jury trial on her sole remaining claim.

For the foregoing reasons, all causes of action in the Amended Complaint—except that which was brought pursuant to 35 U.S.C. § 145—must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). Plaintiff's request for a jury trial is struck. An appropriate order shall issue.

CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 22, 2021

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:20-cv-1515

URVASHI BHAGAT,
Plaintiff

UNITED STATES PATENT AND
TRADEMARK OFFICE, et al.,

Defendants

ORDER

For the reasons stated in the accompanying
Memorandum Opinion, it is hereby

ORDERED that Defendants' Partial Motion
to Dismiss Plaintiff's First Amended Complaint is
GRANTED. It is further

ORDERED that Defendants' Motion to Strike
Plaintiff's Jury Demand is GRANTED. A scheduling
order shall issue.

CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE
Alexandria, Virginia
July 22, 2021

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:20-cv-1515

URVASHI BHAGAT,
Plaintiff

UNITED STATES PATENT AND
TRADEMARK OFFICE, et al.,
Defendants

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S PARTIAL MOTION TO DISMISS
AND MOTION TO STRIKE PLAINTIFF'S JURY
DEMAND

The Plaintiff, Urvashi Bhagat, respectfully submits this brief in opposition to Defendants', the United States Patent and Trademark Office, Andrew Hirshfeld, and the United States of America (collectively "the USPTO"), motion to dismiss Plaintiff's First Amended Complaint (Dkt. 13 ("Am. Compl.")¹) for alleged lack of subject matter

¹A docketing error has ascribed the Appendices of the First Amended Complaint to Plaintiff's previous Opposition to Defendant's Motion to Dismiss (see Dkt. 15-1 (Appendix A) and

jurisdiction under Fed. R. Civ. P. 12(b)(1) and for alleged failure to state a claim on which relief can be granted under Fed. R. Civ. P. 12(b)(6); and in opposition to the USPTO's motion to strike Plaintiff's demand for a jury trial under Fed. R. Civ. P. 39(a)(2). The Plaintiff further submits an affirmation in support of this brief. The submissions are timely made under Local. Civil Rule 7(K) within 21 days of the filing of the motions.

INTRODUCTION

The Plaintiff's First Amended Complaint asserted the claims of U.S. Patent Application No. 13/877,847 (the '847 application) are perfectly patentable (¶¶ 1, 13, 52, 65, 75), the USPTO has acted in bad faith applying numerous improper repeated rejections on every claim over *eight years*² disregarding almost all of the arguments and evidence even in appeal review (¶¶ 2, 3, 10-11, 35-63, 66-74, 77) draining the Plaintiff's time and resources and obstructing her access to capital irreparably damaging the Plaintiff's business and life (¶¶ 4, 9, 67, 78, 81-84), and that due to bad faith actions of the USPTO in addition to declaratory and injunctive relief for the patent grant, monetary relief should be provided to the Plaintiff (¶¶ 13, 20, Prayer for Relief (a)-(f)).

The First Amended Complaint asserted two causes of action (1) "Ms. Bhagat has been entitled to issuance of the patent for several years," and (2) "Ms.

15-2 (Appendices B-D).) A letter to the Clerk of the Court is submitted herewith for correction of the docketing error.

² Patent average total pendency is 23.7 months, i.e., approximately two years.
(<https://www.uspto.gov/sites/default/files/documents/USPTOFY20PAR.pdf>)

Bhagat is entitled to damages due to bad faith actions of the USPTO.” Am. Compl. ¶¶ 64-84. The Complaint also asserted that the innovations are exceptionally important for public health and the piecemeal patents and obstruction of innovation in nutrition and prevention by the USPTO is causing great harm to the public (¶¶ 9, 11-12, 67-68, 77), therefore, a jury, representatives of public, should decide the case for positive impact on the law (page 22). The Complaint asserted that this Court has jurisdiction and venue pursuant to 28 U.S.C. §§ 1331, 1338(a), 1361, and 1391(b)(1)-(2), 1391(e), and 35 U.S.C. § 145 (¶¶ 18-23).

In their motions (Dkt. 19 generally), the Defendants marginalize grave interrelated claims and momentous issues brought pursuant to apt pairing of statutes, heeding only to 35 U.S.C. § 145 claims. Further, Defendants press this Court to dismiss the Plaintiff’s claims for taking property, bad faith actions irreparably harming the Plaintiff’s business and life, monetary damages, violation of constitutional rights, harassment, false statements and misconduct by the PTAB, mandamus relief, and for trial by jury. The Defendants have relied on inapposite case law and alleged sovereign immunity for Fed. R. Civ. P. 12(b)(1) dismissal, and affirmative defense questioning property interest for Fed. R. Civ. P. 12(b)(6) dismissal. This Court should deny the Defendants’ motions because as discussed in the “Argument” section the apposite case law holds that this Court has jurisdiction and there is a waiver of sovereign immunity, and all the facts necessary to the affirmative defense do not appear on the face of the Complaint because of which affirmative defense

cannot be reached by a Rule 12(b)(6) motion.

Further, USPTO's actions are in extreme bad faith. The USPTO proverbially kept its knee on the Plaintiff's neck for eight years suffocating the Plaintiff's life and business. The improper and protracted prosecution created a bias against the Plaintiff and her business, several jurisdictions copied USPTO actions, multiplying the Plaintiff's legal costs and burden, and making raising capital and licensing difficult, in addition to lost market timing. Now the USPTO wants to inflict more suffering upon the Plaintiff by asking this Court to dismiss several of the Plaintiff's claims in this action and bury the Plaintiff under multiple legal actions at different venues to seek justice, further delaying justice. As this Court appreciates—justice delayed is justice denied. Rather, the facts in each legal action will be the same, which are better discovered and tried at this Court to avoid duplication of efforts and wasting of the judiciary's time and resources.

The USPTO wants to hide behind sovereign immunity to evade responsibility for taking property and for causing damage to the Plaintiff's life and business, but as discussed below, 1) the Takings Clause is a self-executing waiver of sovereign immunity, 2) sovereign immunity cannot be used to shield bad faith actions violating constitutional rights, and 3) the Defendants are liable under additional legal provisions. To serve justice, to inculcate more responsible examinations at USPTO, to defend the Constitution of the United States, and to protect the integrity of the patents system and prevent it from becoming a hazard to public, the Defendants should be held accountable for the harm

they have caused. Otherwise, the patent system is not only a burden on the public in the near term but bears momentous long term detrimental consequences for humanity because it is obstructing advancement in nutrition and public health and is steering it on a dangerous path, which makes outcomes from catastrophes like COVID-19 worse than they otherwise would be.

This Court should deny the USPTO's motion for partial dismissal and the motion to strike jury trial, for this Court has subject matter jurisdiction and venue pursuant to 28 U.S.C. §§ 1331, 1338(a), 1361, and 1391(b)(1)-(2), 1391(e), and 35 U.S.C. § 145 (Am. Compl. ¶¶18-23), the Plaintiff's claims meet the requirements of Rule 8(a)(2) (Am. Compl. ¶¶ 64-84), Rule 12(b)(6) dismissal cannot reach the merits of an affirmative defense because all the facts necessary to the affirmative defense do not appear on the face of the Complaint, and the Plaintiff has presented compelling basis for jury trial in the public interest including that sovereign immunity is lost due to bad faith actions of the USPTO violating the Plaintiff's constitutional rights (Am. Compl. at 22). Finally, the Plaintiff's Amended Complaint is well pleaded, nevertheless this Court has a duty to liberally construe pleadings by pro se litigants however inartfully pleaded.

Detailed reasons for these assertions follow.

STATEMENT OF FACTS

First Amended Complaint lists the facts throughout with dates.

ARGUMENT

A. Plaintiff's Takings Clause Challenge is Proper

**for Jurisdiction and Statement of Claim
(Defendants' Count I)**

The Plaintiff appropriately asserted that jurisdiction over her claim for monetary relief lies with the Fifth Amendment's Taking Clause of the U.S. Constitution, which prohibits taking private property for public use without just compensation. See Am. Compl., ¶¶ 20, 79, Prayer for Relief (d)-(e). This Court has jurisdiction pursuant to 28 U.S.C. 1331 and the claims are well-stated pursuant to Fed. R. Civ. P. 8(a)(2). See Am. Compl., ¶¶ 18-23, 64-84.

1. This Court Has Jurisdiction over the Plaintiff's Fifth Amendment Claim

The Defendants want to divert the Plaintiff to the Court of Federal Claims for alleged exclusive jurisdiction for money damages against the United States under the Tucker Act, 28 U.S.C. § 1491³. Dkt. 19 at 6-7. However, § 1491 does not expressly mention takings or the Fifth Amendment, the Plaintiff did not invoke § 1491, additionally the cases relied upon by Defendants are inapposite. Contrary to the case law relied upon by the Defendants' the Supreme Court has cleared the confusion in the law more recently, in June 2019. Overruling a prior holding that the process provided by the Tucker Act is a prerequisite to takings claim against the Federal Government, the Court held, "But the Court was simply confused. A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it is a Fifth Amendment takings claim. A party who loses a

³ Little Tucker Act, 28 U.S.C. § 1346(a)(2) is not applicable because the claim exceeds \$10,000. Am. Compl., ¶ 84.

Tucker Act suit has nowhere else to go to seek compensation for an alleged taking," and opined that parties could pursue takings claims in federal courts. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2174 (2019). The Solicitor General also argued in the litigation as amicus curiae advising the Court that "inverse condemnation claims "aris[e] under" federal law and can be brought in federal court under 28 U.S.C. § 1331 through the *Grable* doctrine. Brief for United States as *Amicus Curiae* 22–24; see *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005)." *Id.* at 2174 n.5.

The Supreme Court ruling in *Knick v. Township of Scott* supersedes all the case law cited by the Defendants (Dkt. 19 at 6-7) and upholds that a claim for just compensation brought under Fifth Amendment takings claim is independent of the Tucker Act. Further, the Court held in *Grable* that the federal district courts have original federal question jurisdiction under 28 U.S.C. § 1331 when a claim arises out of a federal statute (federal tax laws in *Grable*) that has not specifically granted a private right to a cause of action. Section 1331 recites, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Accordingly, this claim is "arising under" the federal patent laws, Title 35 U.S.C. and the Takings Clause of the Fifth Amendment of the Constitution. Analogous to *Grable*, in the present action the constitutional takings claim arises out of inverse condemnation of the Plaintiff's patent rights by the federal government by abuse of federal patent laws. For all the foregoing reasons, this Court has original federal

question jurisdiction under § 1331, and contrary to the Defendants' postulation (Dkt 19 at 7), the Fifth Amendment claim can be and is related to 35 U.S.C. § 145 cause of action.

Further, contrary to the Defendants' reading (Dkt. 19 at 7), the Little Tucker Act and § 1331 can be read harmoniously. The former waives sovereign immunity for a wide range claims against the federal government for up to \$10,000, and Tucker Act waives sovereign immunity for wide range of claims exceeding \$10,000, besides takings claims. The Tucker Act is not needed to waive sovereign immunity for takings claim; that waiver is self-executed by the Fifth Amendment itself. For example, 42 U.S.C. § 1983 also does not expressly waive sovereign immunity for claims of money damages against the United States, however, the Supreme Court held that a Takings Clause violation could be pursued in federal courts under § 1983 in *Knick v. Township of Scott, supra*. In fact, the Supreme Court has repeatedly emphasized the principle that the Just Compensation Clause is self-executing. E.g., *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Jacobs v. United States*, 290 U.S. 13, 15 (1933).

Furthermore, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 US 59 (1978), the Supreme Court stated, a takings claim can be brought under Section 1331 federal question jurisdiction "where federally protected rights have

been invaded...courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell v. Hood*, supra, at 684, we conclude that appellees' allegations are sufficient to sustain jurisdiction under § 1331 (a)." *Id.* at 71.

Thus, federal district courts have jurisdiction over takings claims under 28 U.S.C. § 1331; and a waiver of sovereign immunity for taking claims is not only unnecessary, but duplicitous. The Court of Federal Claims simply created a convenient and specialized forum to litigate takings cases, but § 1331 provides the requisite jurisdiction for takings claims.

In the present action, convenience and judicial economy and efficiency is in adjudicating both the claims at this Court as the claims are interrelated—First Claim for Relief "Ms. Bhagat has been entitled to issuance of the patent for several years" (Am. Compl. ¶¶ 64-75) is tied to the Second Claim for Relief "Ms. Bhagat is entitled to damages due to bad faith actions of the USPTO" (Am. Compl. ¶¶ 76-84) and this Court holds exclusive jurisdiction over the First Claim for Relief under 35 U.S.C. § 145. In other words, proceedings at this Court to establishing USPTO's takings of substantial property rights from the Plaintiff through abuse of process and bad faith actions in examination of the '847 application are the first step, one outcome of which will be the finding that the patent should have been issued and when (further discussed below). Thereafter, the Second Claim for Relief "damages due to bad faith actions" will be ripe for adjudication. Accordingly, it is logical for takings claim also to be adjudicated at this Court, and § 1331 provides the requisite jurisdiction for takings claims to this Court.

Thus, this Court has jurisdiction and venue over takings claims pursuant to 28 U.S.C. §§ 1331, 1338(a), 1361, and 1391(b)(1)-(2), and §1391(e) and 35 U.S.C. § 145, as asserted in First Amended Complaint ¶¶ 18-23. This Court should deny the USPTO's motion to dismiss this claim under Rule 12(b)(1) because the jurisdiction and venue is proper for the reasons discussed above.

2. The Complaint's Fifth Amendment Challenge Sufficiently States the Claim

The Defendants move to dismiss the Fifth Amendment claim for failure to state a claim under Rule 12(b)(6) as the Complaint allegedly fails to identify a legal property interest that has been taken by the USPTO. However, affirmative defenses based on legality must be raised by the defendant under Fed. R. of Civ. P. 8(c), and the burden of establishing the affirmative defense rests on the defendant.

Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007); *See Newell v. Richards*, 323 Md. 717, 594 A.2d 1152, 1156 (1991); accord *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 427 F.2d 862, 870 (4th Cir.1970). A motion to dismiss filed under Federal Rule of Procedure 12(b)(6) testing the sufficiency of the complaint, “generally cannot reach the merits of an affirmative defense,” unless “all facts necessary to the affirmative defense ‘clearly appear on the face of the complaint.’” *Goodman*, 494 F.3d at 464.

Here, the First Amended Complaint states the claim in the Second Claim for Relief, ¶¶ 76-84 incorporating previous paragraphs by reference, where ¶ 79 asserts, “Ms. Bhagat is entitled for just compensation for taking of her property, including but not limited to her patent, which should have

been rightfully issued many years ago,” ¶¶ 2-3, 36, 45, 48-49, 55, 57, 59-63, 77 demonstrate bad faith actions of USPTO kept the patent from issuing, and ¶ 84 asserts, “The plaintiff has been damaged in an amount to be determined at trial, but which is no less than \$500,000,000 exclusive of costs and fees.” Also see Prayer for Relief (d)-(f), wherein (f) asserts “compensatory” damages, *inter alia*, “in an amount to be proven at trial, but in no event less than \$500,000,000.”

Thus, the cause of action meets the requirements of “a short and plain statement of the claim showing that the pleader is entitled to relief” of Fed. R. Civ. P. 8(a)(2), with assertions that further fact finding in discovery and trial is necessary, which will in part determine the patent should have been issued and when.

The Defendants inappropriately move this Court to reach the merits of an affirmative defense and render a judgement prematurely, when the discovery has not yet commenced. In fact, the case law cited by the Defendants (Dkt. 19 at 8), *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001), *Air Pegasus of D.C. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005), and *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004) in support of their motion are post trial rulings, where the courts deliberated and analyzed whether or not property rights existed.

The Plaintiff respectfully submits that all of the facts necessary to establish Defendants’ affirmative defense are to be ascertained. Therefore, it is premature to reach merits of the Defendants’ affirmative defense, and the Rule 12(b)(6) dismissal

cannot be granted. This Court dismissed a similar motion in *Touchcom, Inc. v. Berreskin Parr H. Samuel Frost*, 1:07cv0114 (JCC) (E.D. Va. Feb. 12, 2010) (DEX 1 at 2-16).

When faced with a standard Rule 12(b)(6) motion, the court should grant the motion only if it appears “beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 143 L.Ed.2d 839, 119 S.Ct. 1661 (1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 46, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957)); *Consolidated Edison Co. v. O’Leary*, 117 F.3d 538, 542 (Fed.Cir.1997), cert. denied sub nom. *Consolidated Edison Co. v. Pena*, 522 U.S. 1108, 140 L.Ed.2d 103, 118 S.Ct. 1036 (1998). The facts must be viewed in a light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283, 92 L.Ed.2d 209, 106 S.Ct. 2932 (1986) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974)); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir.1991).

A claim has factual plausibility when “the plaintiff pleads factual content that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 US at 570).

Further, the pro se Plaintiff, Ms. Bhagat is not an attorney, and this Court has a duty to liberally construe pleadings by pro se litigants, see *Estelle v. Gamble*, 429 U. S. 97, 106 (1976), “a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,” *ibid.* (internal quotation marks

omitted), and Fed. Rule Civ. Proc. 8(e), "Pleadings must be construed so as to do justice."

Therefore, for the foregoing reasons and the reasons below the Defendants' attempt to seek a premature judgement from this Court under the pretext of motion to dismiss for failure to state a claim should be denied.

a. Property Interest is Established in the Patent Application Due to Unreasonable Delay from USPTO's Bad Faith Actions

The USPTO alleges that no property interest exists in the '847 patent application for purposes of the Takings Clause because it has not issued as a patent, therefore, this component of Plaintiff's Takings Clause claim must be dismissed. Dkt. 19 at 9.

However, that is a travesty and tyranny, because that means that the USPTO can abuse processing of an application via bad faith actions as was done in this case (Am. Compl. ¶¶ 2-3, 11, 36, 45, 48-51, 55, 57, 59-63, 66-73, 77), not allow the patent to issue and thereby Take the property, and escape accountability for Taking of the property because "it has not issued as a patent." That goes against Plaintiff's constitutionally protected property interest, Article 1 Section 8 Clause 8, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," and Title 35 U.S.C, section 101, "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof,

may obtain a patent therefor, subject to the conditions and requirements of this title."

In fact, case law supports the Plaintiff's position that bad faith actions find taking of the Plaintiff's property interest under the Fifth Amendment. See *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) and *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 799 (Fed. Cir. 1993) (finding that extraordinary delay from bad faith is taking). Here extraordinary delay is evident, the '847 application has been under examination for eight years due to bad faith examination, while average patent application total pendency is about two years⁴. Further, patent term adjustment is not an adequate remedy as discussed below. Also see Am. Compl. ¶¶ 4, 78, 80-84.

USPTO's bad faith actions are so grave that let alone the two successive examiners (including the pro se examiner) even the Patent Trial and Appeal Board disregarded 99% of the arguments and 100% of the evidence in the appeal review and again even after the overlooked points were called to attention in the Request for Rehearing (Am. Compl. ¶¶ 3, 55, 59, 62) (the Board had not answered the arguments and evidence on appeal that the prior art as a whole, including the cited art, teach the opposite of the claimed subject matter rendering the matter non-obvious. See DEX 1 at 17-33, excerpts from the rehearing request dated June 29, 2020); the Chief Patent Judge improperly denied multiple petitions for review including the imploration that further

⁴<https://www.uspto.gov/sites/default/files/documents/USPTOFY20PAR.pdf>

legal action will be expensive for both sides and the subject innovations are exceptionally important for public health, including mitigating the current pandemic (Am. Compl. ¶¶ 3, 56-58, 60-63) (see DEX 1 at 34-46, petition requesting expanded or altered panel due to abuse and exceptional circumstances, dated April 28, 2020, and the Decision dated August 17, 2020), and the USPTO had improperly refused to enter evidence into the record in order to limit the Plaintiff's success potential in appeal to Court of Appeals for the Federal Circuit under section 141 (Am. Compl. ¶¶ 2, 45, 69) (see DEX 1 at 47-51, Pre-appeal Brief.). It is also clear that the USPTO sought to significantly reduce the scope of the claims, such that the value of the patent and the innovation would be compromised (Am. Compl. ¶¶ 11, 46, 49, 66, 68). Rather during telephonic interviews, the examiners pressured the Plaintiff to drastically narrow the claims or expect that the application would be abused similar to Plaintiff's previous applications (DEX 1 at 52-54, Summary of the Interview with the Examiner dated February 14, 2018). This Court will find more instances of bad faith actions in discovery and deliberations. Thus, there was no route to receiving a reasonable patent with a reasonable patent term from the USPTO.

Defendants allege (Dkt. 19 at 9), "Ms. Bhagat does not allege that the government took any ownership interest in the '847 application or took her intellectual property for the government's benefit." However, the Takings Clause of the Fifth Amendment to the United States Constitution reads, "Nor shall private property be taken for public use, without just compensation," and the Plaintiff does

allege so. Amended Complaint paragraph 11 states, “USPTO prefers to issue extremely narrow patents (apparently to increase its revenue and protect big businesses), particularly in nutrition...” Narrow patent grants and forcing applicants to divide applications increases USPTO revenue but at the expense of innovation and solving problems, as explained in the paragraph 11. Further, “big businesses” are a subsection of public and they benefit when individual inventors’ and small companies’ intellectual property is published but restricted and compromised in grant by the USPTO, which is “taking” for “big businesses” i.e., public. Also see applied restrictions in Am. Compl., ¶¶ 1, 2, 36, 66. Therefore, the Government did take private property for public use including its own, without just compensation.

The Defendants cite Order, *Hyatt v. USPTO*, 1:18-cv-546, Dkt. 66 at 3 (E.D. Va. Mar. 26, 2019) (Ellis, J.) in support of dismissing Fifth Amendment claim for taking of a patent application. However, *Hyatt* Order is inapplicable in this case for a number of reasons: 1) It is moot in view of the Supreme Court ruling in *Knick v. Township of Scott* and rest of the discussion under section A.1 above; and 2) *Hyatt* action did not pair 35 U.S.C. § 145 proceedings with 28 U.S.C § 1331, instead *Hyatt* action asserted taking of expired, not pending, patent applications solely under § 1331. *Hyatt v. USPTO*, 1:18-cv-546, Dkt. 1 at 8-9; Dkt 41 at v, 31-32. In the present case *Grable* doctrine discussed above is applicable, according to which 35 U.S.C. § 145 has been appropriately paired with 28 U.S.C § 1331, whereby this Court can adjudicate that the patent was

rightfully due and when and adjudicate the just compensation for the taking.

It is undisputed that “A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions,” *Consolidated Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1877). Further, that a patent has not issued on an application does not deprive it of its status as property. The Supreme Court has found all manner of similar “intangible interests to be property for purposes of the Fifth Amendment’s Taking Clause.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (so finding with respect to trade secrets); see also *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman’s lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935) (real estate lien); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause).

The deprivation of patent term itself also constitutes a taking. “[G]overnment regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

The Defendants inappropriately cite *Giuliani v. United States*, 6 F. App’x 863, 864 (Fed. Cir. 2001), where the plaintiff contended that the government took his patent when it abandoned his application for failure to pay the issue fee, and the Federal Circuit affirmed dismissal of that claim on the basis

“Congress has plenary power to impose conditions on the vesting of patent rights.” Here, by contrast, the Plaintiff has complied with all of the conditions on the vesting of patent rights imposed by Congress, including the payment of all required fees.

Thus, the property interest in the '847 application is adequately stated in the Complaint's First and Second Claim for Relief (¶¶ 64-84) and will be confirmed during the proceedings at this Court. This Court will find that patent was due several years ago, were it not for the USPTO's bad faith actions, and that significant value of the patent is lost due to extraordinary delay (Am. Compl. ¶¶ 4, 80-84). Further, it is premature to reach merits of the Defendants' affirmative defense. Therefore, Rule 12(b)(6) motion to dismiss should be denied.

b. Property Interest is Established in Time and Money Lost Due to Unreasonable Delay from USPTO's Bad Faith Actions

To prop Rule 12(b)(6) motion to dismiss property interest in time and money lost, the Defendants allege that the Plaintiff's assertions of time and livelihood lost including legal expenses in prosecuting the application, losses from other patent offices copying USPTO actions, lost market timing, and stalled venture financing and licensing do not provide specific facts and do not specify when the taking occurred to rise to *legal property interests*, that time spent would be part of business expectations, and that patents only offer the right to exclude others and not commercial success. Dkt. 19 at 10-11. However, the Defendants' allegations are improper for the following reasons.

The facts specified in the Amended Complaint meet the requirements of Rule 8(a)(2), "a short and plain statement of the claim showing that the pleader is entitled to relief." Accordingly, the facts specified in the Complaint include damages due to bad faith actions of USPTO for compromising Plaintiff's business and life for eight years, losses from other patent offices copying USPTO actions, lost market timing, and stalled venture financing and licensing (¶¶ 4, 78, 80-83), culminating in "The plaintiff has been damaged in an amount to be determined at trial, but which is no less than \$500,000,000 exclusive of costs and fees" (¶ 84 and Prayer for Relief (d) and (f). Thus, the claim is adequately stated, and further fact finding in discovery and trial will in part determine when the taking occurred. Further, Rule 12(b)(6) dismissal cannot reach the merits of affirmative defense of lack of "legal property interest" because all the facts necessary to the affirmative defense do not appear on the face of the Complaint. See A.2. *supra*.

The USPTO's statement, "Ms. Bhagat bemoans the loss of eight total years she chose to invest in prosecuting the '847 application and 'livelihood lost'" (Dkt. 19 at 10) demonstrates callousness towards inventors who invest their material and intellectual resources and lives in innovation for betterment of lives of Americans based upon Constitutional property rights—Article 1 Section 8 Clause 8 of the US Constitution and 35 U.S.C. § 101—that the USPTO will fairly examine applications and the Government will genuinely support solutions to problems plaguing the society, which rights were breached in this case. It should be noted that eight

years⁵ is nearly one-fifth of an individual's professional life (40 years of professional life, assuming employment from ages 25-65). The indifference in USPTO's attitude denotes worse than bad faith and it is making the patent system burdensome on humanity, not only because of the adverse impact on small inventors' lives but also because it creates chaos in nutrition arts and skews the marketplace away from prevention towards treatment (Am. Compl. ¶¶ 11, 30-34).

The Defendants argue that patents only offer the right to exclude others and not assurance that the patentee will be able to make use or sell the invention. However, the plaintiff contends that timely right to exclude others attracts investment and makes way for commercial success. Seventh Circuit Judge Frank Easterbrook's has written, "Patents give a right to exclude, just as the law of trespass does with real property. Intellectual property is intangible, but the right to exclude is no different in principle from General Motors' right to exclude Ford from using its assembly line, or an apple grower's right to its own crop,"⁶ which advance commercial interests. Further, the exclusive rights are transferable, assignable, and saleable, which was held to be the dispositive criteria for determining takings in *Am. Pelagic Fishing Co., L.P. v. United*

⁵ In fact, the USPTO has taken 14 years of the Plaintiff's life and livelihood (1/3 of her professional life) at the prime of her career, because her related U.S. applications 12/426,034 and 13/332,251 having April 2008 priority date were similarly abused by the Defendants.

⁶ Frank H. Easterbrook, "Intellectual Property is Still Property," 13 Harv. J.L. & Pub. Pol'y 108, 109 (1990) (quoted in Mossoff, "What is Property?", 45 Ariz. L. Rev. at 414)

States at 1373, 1374. Businesses founded around the same time with less important innovations for public health received timely patent grants from USPTO⁷ reached market valuations of \$4-10 billion (Am. Compl. ¶4), while Plaintiff's more critical innovations (Am. Compl. ¶¶ 24-34) and business have been compromised by the USPTO.

The USPTO's allegation that loss of time and money do not rise to legal property interests because there is no property interest in the '847 application, has already been rebutted above. See section A.2.a. Further, the key element in *Commonwealth Edison Co. v. United States* cited in the USPTO's Memorandum (Dkt. 19 at 11) is reasonableness. The Plaintiff contends that the abuse of process in examination was not reasonably expected. See Plaintiff's Affirmation in Support of Opposition to Defendant's Partial Motion to Dismiss and Motion to Strike, ¶¶ 4-8. The abuse of process cost eight years of life and livelihood to the Plaintiff, which is taking because patent application average total pendency is ~two years⁸, i.e., one-fourth of the time the '847 application has been pending. The fact that it took eight years in prosecution speaks to the patentability of the '847 application, multiple improper rejections including final rejections were applied, but they could not be sustained. They had to be withdrawn, but after multiple petitions and loss of time, evidencing improper rejections and bad faith. In the end, the USPTO had to force rejections by refusing to answer arguments and evidence (noted above and in

⁷ <https://patents.justia.com/assignee/impossible-foods-inc>

⁸ <https://www.uspto.gov/sites/default/files/documents/USPTOFY20PAR.pdf>

Am. Compl., ¶¶ 2-3, 55, 59, 62).

Further, the time and money spent qualify as property for “taking” by the government of that property “for public use” because, (1) USPTO is paid fees at nearly every step of prosecution, long prosecution means more fees to USPTO, which is for public use; (2) an important contention in this action is several unreasonable restrictions were applied to induce the Plaintiff into dividing the application in multiple divisional applications (some of the restrictions were withdrawn after multiple petitions, one such restriction is still a cause of this action, which also means more filing and prosecution fees to USPTO, which is also for public use. Thus, the USPTO did appropriate the Plaintiff’s time and livelihood for their own use, and the Complaint alleges so in paragraph 11, stating “USPTO prefers to issue extremely narrow patents (apparently to increase its revenue and protect big businesses).” USPTO appropriated the Plaintiff’s property for public use including “big businesses” who benefit when individual inventors’ and small companies’ intellectual property is published but restricted and compromised in grant by the USPTO. Am. Compl., ¶¶ 1, 2, 11, 36, 66.

Finally, the USPTO states finding that time lost equates to a taking is untenable because it would allow any dissatisfied applicant to bring a takings action against the USPTO for the time spent prosecuting its patent application. However, taking eight years to examine an application is also untenable. It defeats the very purpose of patents and ruins the lives of inventors. It turns the patent

system into a burden on society rather than boon that it is meant to be. As noted above average total pendency is about two years, thus four-times or 400% delay in this case is extraordinary delay and with a showing of bad faith (¶¶ 2, 3, 10-11, 35-63, 66-74, 77), which amounts taking. See *Wyatt v. United States* at 1098 and *Tabb Lakes, Ltd. v. United States* at 799.

The USPTO states (Dkt. 19 at 11, footnote 4) that if the Plaintiff is eventually awarded a patent, she may seek the adjustment of an issued patent's term for any unreasonable delay by the USPTO. However, that is not an equitable remedy, because 1) the opportune market timing is lost, 2) the long delay has created a bias against the patent application and the business, and 3) the USPTO actions have been copied in several patent offices, increasing the Plaintiff's prosecution costs and causing further damages including refusal of some patent applications. Further, there is an enormous opportunity cost of lost eight years of life. Am. Compl., ¶¶ 4, 78.

This is partly why a jury is necessary to decide this case so that positive impact on patent law can be made with public participation (discussed in First Amended Complaint at 22 and below).

This Court should deny the USPTO's motion to dismiss this claim under Rule 12(b)(6) because the Complaint adequately states the claim and identifies property interest that has been taken by the federal government for subsections of public use (the USPTO and big businesses)—while the Plaintiff and the

public as a whole suffers.

B. This Court is the Proper Venue and Has Jurisdiction for General Money Damages (The USPTO's Count II)

1. This Court Has Jurisdiction for General Money Damages

The Defendants allege that money damages outside of the Fifth Amendment must also be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1) because Tucker Act and the Court of Federal Claims has exclusive jurisdiction over claims for money damages of this size, citing *Jan's Helicopter Serv.*, 525 F.3d at 1304. Dkt. 19 at 12.

However, the allegation is patently improper. As discussed under A.1 *supra*, that the Supreme Court recently clarified the law in *Knick v. Township of Scott* that this Court has clear jurisdiction even for the monetary relief under the Fifth Amendment's Taking Clause of the U.S. Constitution, and certainly for money damages outside of the Fifth Amendment pursuant to 28 U.S.C. §§ 1331, 1338(a), and 35 U.S.C. § 145 (discussed below). Further, the Defendants have improperly cited *Jan's Helicopter Serv.*, where "The complaints [] were based entirely on the Fifth Amendment of the U.S. Constitution," *Id.* at 1304, which is not the case here.

Here, *FHA v. Burr*, 309 U.S. 242 (1940) is apposite, where the Supreme Court stated, "when Congress establishes such an agency [as USPTO is], authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that

restrictions on that authority are to be implied. ...when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be. Clearly the words "sue and be sued," in their normal connotation, embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts." *Id.* at 245-246. Such agencies may be sued in any court of otherwise competent jurisdiction as if it were a private litigant. *Id.* at 250.

The Supreme Court also stated, "waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed." *Id.* at 245. It is clear from 35 U.S. Code § 145 that Congress has organized the USPTO as an agency that could be sued, and this Court is the only court of competent jurisdiction. It is also clear from the difference between § 145 and the Administrative Procedure Act (APA); the former does not bar money damages whereas the latter does, expressly stating, "relief other than money damages." 5 U.S.C. § 702. Thus, there is an express difference in Congress' intent in § 145 versus APA, leaving the possibility of money damages in section 145, unlike in the APA.

Further, in *United States v. Testan*, 424 U.S. 392 (1976) the Supreme Court held that statutes can be paired for payment of money. *Id.* at 398.

Accordingly, 28 U.S.C. §§ 1331, 1338(a), 1361, and 35 U.S.C. § 145 have been aptly paired in the Plaintiffs First Amended Complaint ¶¶ 18. Also see

Grable doctrine discussed under A.1 *supra*. As such is this Court has jurisdiction for money damages. Thus, the Defendants' motion to dismiss this count must be denied.

**2. USPTO is a “Sue and Be Sued Agency”,
Restriction on That Authority Cannot Be
Assumed and Sovereign Immunity Does Not
Shield Bad Faith Actions of The Government
from Claims for Money Damages**

Contrary to the Defendants allegation (Dkt. 19 at 12) the Amended Complaint does not ground its claim for jurisdiction in 35 U.S.C. § 145 rather, it appropriately pairs 28 U.S.C. §§ 1331, 1338(a), 1361, and 35 U.S.C. § 145. Statutes can be paired for money damages. *United States v. Testan* at 398.

Then the Defendants allege that claim for general money damages is barred by sovereign immunity, absent a waiver, and that 28 U.S.C. §§ 1331, 1338(a), and 35 U.S.C. § 145 do not waive sovereign immunity against money damages. Dkt. 12-13.

However, as discussed above, in *FHA v. Burr*, the Supreme Court stated, “when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to ‘sue and be sued,’ it cannot be lightly assumed that restrictions on that authority are to be implied,” “when Congress launched a governmental agency into the commercial world and endowed it with authority to “sue or be sued,” that agency is not less amenable to judicial process than a private enterprise under like circumstances would be,” and “Waivers by Congress of governmental immunity from suit in the case of such federal

instrumentalities should be construed liberally.” *Id.* at 245.

The defendants’ reliance upon *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (Dkt. 19 at 12-13) is also inapposite, because *Meyer* sought to impose on FSLIC a form of tort liability—tort liability arising under the Constitution—that generally does not apply to private entities. *Id.* at 482. Rather, in *Meyer* the Supreme Court upheld its ruling in *FHA v. Burr* stating, “Because the claimant in each of these cases was seeking to hold the agency liable just like “any other business,” [Federal Housing Administration, Franchise Tax Board, and United States Postal Service], it was only natural for the Court to look to the liability of private businesses for guidance. It stood to reason that the agency could not escape the liability a private enterprise would face in similar circumstances.” *Id.* at 482. Further, even in *Meyer* the Court ruled, “we hold that FSLIC’s sue-and-be-sued clause waives the agency’s sovereign immunity.” *Id.* at 483. The Court concluded, “Meyer had no Bivens cause of action for damages against FSLIC.” *Id.* at 486. Thus, *Meyer* cause of action was entirely different from the present case, yet contrary to the Defendants’ allegation *Meyer* supports the Plaintiff’s position that agency cannot escape the liability a private enterprise would face in similar circumstances, and “sue-and-be-sued” structure waives the agency’s sovereign immunity.

As asserted in B.1 *supra*, even if section 145 does not explicitly provide for money damages, it does not bar it, unlike the APA, which expressly bars it stating, “relief other than money damages.” 5 U.S.C. § 702. Thus, Congress’ intent in § 145 leaves the

possibility of money damages, unlike in the APA. Furthermore, § 145 can be paired with other statutes for money damages, such as 28 U.S.C. § 1338(a), which states, “The district courts shall have original jurisdiction of *any* civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.” (emphasis added), and § 1331 as in *Grable* doctrine, when a claim arises out of a federal statute (§ 145) that has not specifically granted a private right to a cause of action. See A.1 *supra*.

Furthermore, sovereign immunity does not shield bad faith actions of the Federal Government and its agencies and officials from claims for money damages. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that executive officials in general are usually entitled to only qualified or good faith immunity. The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court held that for qualified immunity: First, a court must look at whether the facts indicate that a constitutional right has been violated; Second, a court must then look at whether that right was clearly established at the time of the alleged conduct. Under the *Saucier* test, qualified immunity applies unless the official's conduct violated such a right.

In the present action constitutional rights have

been clearly violated, which right was clearly established at the time of the very filing of the '847 application, and the USPTO knew that constitutional rights are being violated⁹ from their bad faith conduct in examination and appeal review. Am. Compl. ¶¶ 2-3.

Contrary to the USPTO's Memorandum (Dkt. 19 at 13), the Plaintiff did not claim money relief under the APA as in *Hyatt*, and there was no § 145 action in *Hyatt*, therefore the *Hyatt* Order is inapplicable.

Finally, the Supreme Court rulings supersede the lower courts' rulings. This Court should base its findings on Supreme Court rulings not lower courts, e.g., *FHA v. Burr* at 245-246, 250 and *FDIC v. Meyer* at 482-483.

Accordingly, the USPTO's motion to dismiss this claim must be denied because this Court has jurisdiction, USPTO is a "sue and be sued agency", which waives the agency's sovereign immunity and sovereign immunity does not shield bad faith actions of the government from claims for money damages.

C. Jurisdiction Over the Plaintiff's Tort Claims (The USPTO's Count III)

The USPTO alleges that dismissal of this claim is required because this Court lacks jurisdiction over "harassment" tort claim because the Plaintiff failed to present an administrative tort claim to the USPTO prior to bringing the instant action under 28 U.S.C. §§ 1346, 2401, 2671-2680.

⁹ <https://www.uspto.gov/web/offices/pac/mpep/mpep-0020-introduction.html>

However, the Complaint claims, “USPTO has made every possible excuse to harass Ms. Bhagat and delay her patents, just because she disclosed exceptionally important innovations,” (¶ 77) to assert bad faith actions. The Defendants are misreading, the Plaintiff’s claims are not tort claims. For example, this action is not brought “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U. S. C. § 1346(b).

Accordingly, this claim is properly brought to this Court under federal laws and this Court has jurisdiction over this claim. The motion to dismiss this claim should be denied.

D. The Amended Complaint Adequately Establishes Jurisdiction and States Claim for Mandamus Relief (The USPTO’s Counts IV)

The Defendants allege “a single citation [in ¶ 18] to the jurisdiction statute [28 U.S.C. § 1361] for mandamus claims is insufficient to satisfy the requirement for stating a plausible claim for relief,” and that mandamus is a drastic remedy, to be invoked in extraordinary situations (Dkt. 19 at 14).

However, the Defendants are misreading, the Complaint adequately meets the requirement of Rule 8(a)(2) “a short and plain statement of the claim showing that the pleader is entitled to relief,” in asserting, “the Court should order the Director to issue one [patent] and grant additional declaratory, injunctive, and monetary relief because of the USPTO’s bad faith actions” in ¶ 13, and § 1361 jurisdiction in ¶ 18. Further, Federal Rule of Civil

Procedure 8 allows the court to consider plausible inferences arising from totality of the statements made in the complaint. The Defendants also appear to be relying on affirmative defense, “she has not proven an undisputed right to a patent.” However, a motion to dismiss filed under Federal Rule of Procedure 12(b)(6) testing the sufficiency of the complaint, “generally cannot reach the merits of an affirmative defense,” unless “all facts necessary to the affirmative defense ‘clearly appear on the face of the complaint.’” *Goodman*, 494 F.3d at 464.

In fact, it is quite standard to include § 1361 citation in actions of this nature and they are generally not met with motions to dismiss. See *Immunogen v. USPTO*, 1:20cv274, Dkt. 1 ¶ 10; *Thaler v. USPTO*, 1:20cv903, Dkt. 1 ¶ 6.

Further, the Defendants appear to be conflating 28 U.S.C. §§ 1361 and 1651. § 1361 recites, “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff,” whereas § 1651 recites, “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Thus, § 1361 speaks only of compelling an officer or employee. It is the mandamus under § 1651 which is a drastic remedy to be invoked in extraordinary situations. The case law relied upon by the Defendants relates to § 1651 cases mostly.

Furthermore, the Defendants are misapplying *Swartz v. Matal*, 2017 WL 3611715, at *8 n.11 (E.D.

Va. Aug. 22, 2017) statement, "As the present action demonstrates, 35 U.S.C. § 145 provides a cause of action to review the denial of a patent application; therefore, plaintiff cannot bring suit against the agency under the APA." The Plaintiff is aware and has not brought suit against the agency under the APA. Also see Am. Compl. ¶ 23.

Accordingly, this claim is adequately stated, and this Court has jurisdiction over this claim. The motion to dismiss should be denied.

E. Violation of Constitutional Rights and Misconduct by the PTO are Adequately Stated (The USPTO's Counts V and VI)

The USPTO's Memorandum (Dkt. 19 at 15-16) alleges that the Plaintiff's following claims do not meet the pleading standard and that the Plaintiff has not identified a cause of action to bring these claims, therefore, they should be dismissed pursuant to Rule 12(b)(6). The Plaintiff disagrees the claims meet the pleading standard Rule 8(a) for the reasons below and cause of action is clear that both claims (Counts V and VI) relate to bad faith actions and abuse of discretion by the USPTO leading to loss of sovereign immunity for relief of money damages and relief by jury trial (Am. Compl. ¶¶ 2-3, 13, 55, 58-59, 70, 77-84).

- Count V: Violation of Constitutional Rights While Being Fully Aware of the

The Defendants parrot that the Plaintiff has not mentioned what particular rights have been violated (Dkt. 19 at 16). The Defendants demonstrate a mind unwilling to understand because they have detached

“violated Ms. Bhagat’s constitutional rights while being fully aware of the constitutional rights” from rest of the statements on two full pages of the Complaint at pages 2-3 in paragraphs 2-3 and refused to read the immediate context, let alone the context of the whole Complaint. It is clear from paragraphs 2-3 that the Plaintiff asserts that right to patents is grounded in the US Constitution, which was violated by bad faith actions and disingenuousness of the USPTO.

Even if Article I, Section 8, Clause 8 granted the power to Congress to establish the patent system, Congress extended that constitutional right to inventors via 35 U.S.C. § 101. Further, the hyperlink to the USPTO’s Manual of Practice and Examining Procedure is attached to the words, “while being fully aware of the constitutional rights,” to demonstrate that the USPTO has been aware that patent rights are grounded in the Constitution. The Plaintiff’s assertion is far from bald, it is in the immediate context of two pages (pp. 2-3) of assertions and 23 pages of full Complaint. Federal Rule of Civil Procedure 8 allows the court to consider plausible inferences arising from totality of the statements made in the complaint. The Court should deny the motion to dismiss Count V for failure to state a claim, as the Defendants are being disingenuous even in reading the Complaint.

Count VI: Misconduct and false statements by members of the USPTO Board.

The USPTO Memorandum (Dkt. 19 at 16) alleges that the Complaint is not sufficiently specific and does not explain under what legal framework this Court should address the validity of misconduct and

false statements (Count VI). However, the Complaint is not just specific it is very specific and very well-pleaded. For example, ¶ 3 states, “The USPTO’s bad faith continued in appeal review at PTAB, such that 99% of arguments and 100% of the evidence (scientific papers evidencing poorly understood factors) was disregarded in the appeal review and a decision contrary to PTAB’s own precedential opinions was issued, which is misconduct.” Also see Am. Compl., ¶¶ 55, 62, 72.

The Defendants allege the Amended Complaint omits what precedent. However, it is improper for the Defendants to expect legal arguments in the Complaint, which precedent was disregarded is a matter to be addressed in legal arguments. The Defendants are expecting judgement under the pretext of motion to dismiss under Rule 12(b)(6).

Therefore, the motion to dismiss these claims should be denied.

F. Compelling Reasons to Grant Plaintiff’s Demand for a Jury Trial

The Complaint asserted compelling reasons (Am. Compl. at 22). The Defendants allege that Rule (39)(2) bars jury trial on account of sovereign immunity and 35 U.S.C. § 145 does not provide for jury trial. Memorandum, Dkt. 19 at 17. Plaintiff disagrees because there is nothing in Rule 39 that bars a jury trial on account of sovereign immunity, and the Plaintiff did not just invoke 35 U.S.C. § 145 as the basis for jury demand, nor is there any bar in section 145 upon jury trial, the Plaintiff invoked a combination of 28 U.S.C. §§ 1331, 1338(a) and 35 U.S.C. § 145 as basis for the jury demand.

Rule 39(a) provides that the Court *may* find “that on some or all of those issues there is no federal right to a jury trial.” Further, Rule 39(c) provides that the Court “may try any issue with an advisory jury” or “may, with the parties’ consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.” However, none of the statutes invoked in this action provide for a nonjury trial or bar a jury trial. Thus, Rule 39(a) provides discretion to this Court to institute a jury trial even against the United States.

This Court should hold USPTO to the same standards as a private corporation, as per the Supreme Court precedents. *FHA v. Burr* at 245-246, 250 and *FDIC v. Meyer* at 482-483. Further, courts have expressed openness to trial by jury against the United States, even in section 145 actions. For example, “Plaintiff offers no basis for departing from these precedents,” was the reason for denial of the jury demand in *Joy Techs., Inc. v. Quigg*, 1989 WL 150027, at *2 (D.D.C. July 28, 1989) (Dkt.19-1 at 3).

In contrast, in this case the Complaint has asserted exceptional importance of the innovations at issue for public health (Am. Compl., ¶¶ 6-10, 30, 32-34) and that the proclivity of the USPTO against innovation in nutrition has been causing harm to the public health (Am. Compl., ¶¶ 11, 46), and bad faith actions of the USPTO (Am. Compl., ¶¶ 2-3, 55, 59, 62, 70, 77) are making the patent system harmful to public rather than helpful (Am. Compl., ¶¶ 67-68,), necessitating a jury trial (by representatives of the public). The assertions are neither too broad nor

perceived. For example, Am. Compl., ¶ 46 asserts that the USPTO tried to restrict the Plaintiff's claims to where all the ingredients would have to be mixed in the same container potentially leading to hazardous interactions, greatly compromising the innovations and public health.

Further, the Supreme Court has held in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that executive officials in general are usually entitled to only qualified or good faith immunity, which is a more appropriate balance between the need of government officials to exercise their discretion and the importance of protecting individual rights. Furthermore, in *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court held that qualified immunity does not apply when constitutional right clearly established at the time of the alleged conduct is violated. In this case, the USPTO including the Examiners and the PTAB were fully aware that they were violating constitutional rights of the Plaintiff under Article 1 Section 8 Clause 8—the very basis for the USPTO's existence. Same principle applies for overcoming federal immunity from jury trial.

Therefore, this Court should find that jury trial is in the public interest to curb the USPTO abuse of discretion, which has been impeding advancement in critical art for public health (Am. Compl. at 22) and deny the USPTO's motion to strike jury trial demand. The Court is reminded that if these innovations are not supported with conviction, and USPTO's compromising of the efforts is not countered, it will be a permanent loss to humanity (Am. Compl. 12).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court should deny the USPTO's partial motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) and deny their motion to strike jury trial demand pursuant to Federal Rule of Civil Procedure 39(a)(2).

Date: May 22, 2021 Respectfully submitted,
Urvashi Bhagat
Pro Se Petitioner
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Palo Alto, CA 94302
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APPENDIX C (Contd.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:20-cv-1515

URVASHI BHAGAT,
Plaintiff

UNITED STATES PATENT AND
TRADEMARK OFFICE, et al.,
Defendants

AFFIRMATION IN SUPPORT OF OPPOSITION TO
DEFENDANT'S PARTIAL MOTION TO DISMISS
AND MOTION TO STRIKE

I, Urvashi Bhagat, affirm the following under
penalty of perjury:

1. I am the plaintiff in this action, and I respectfully submit this affirmation in opposition to the motion dated May 3, 2021, made by the Defendants.
2. I have personal knowledge of facts which bear on this motion, and if called as a witness, I could and would testify thereto.
3. The motion should be denied because the version of the facts stated by the Defendants is materially incorrect.

4. The USPTO applied numerous improper rejections over eight years. I never expected that the examination and appeal review would be so unreasonable and improper.

5. USPTO's improper actions were copied in several other patent offices, increasing my legal burden and costs. Some applications were lost in the process.

6. For the last 14 years (eight years in this case but the USPTO has abused my other applications also, USPA 12/426,034 and 13/332,251), I have been continually writing legal briefs, because funds were depleted to afford proper legal support. I am not a formally educated lawyer, I have had to read the law on my own but there may be gaps in my knowledge.

7. USPTO's actions were held against my company by investors. They concluded that patents would not be granted, and it would not be possible to overcome the noise in the art without significant patents.

8. The USPTO's improper actions also obstructed my company's access to funding via licensing. The potential licensors were afraid to get involved because USPTO had created a bias against the patent applications and the company.

9. It has caused enormous damage to the company, including loss of most opportune timing.

10. I am committed to these innovations because they are exceptionally important for public health and also to building a successful socially responsible business. If this opportunity is lost, it may be permanently lost because market forces cannot solve this problem without patent, and no one can patent the solutions after my disclosures, as now the innovations are genuinely anticipated or obvious.

In view of the foregoing, it is respectfully submitted that the USPTOs motions should be denied.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2021

Respectfully submitted,
Urvashi Bhagat
Pro Se Petitioner
P.O. Box 1000
Palo Alto, CA 94302
(650) 785-2516
bhagatu@asha-nutrition.com

APPENDIX D

THE UNITED STATES CONSTITUTION, STATUTES and TREATIES

U.S. Constitution, Amendment V:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

U.S. Constitution, Amendment VII:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

28 U.S. Code § 1331 - Federal question:

“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

28 U.S. Code § 1338(a) – Patents, etc.:

“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.”

28 U.S. Code § 1361 - Action to compel an officer of the United States to perform his duty:

“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

35 U.S. Code § 145 - Civil action to obtain patent:

“An applicant dissatisfied with the decision of the Patent Trial and Appeal Board in an appeal under section 134(a) may, unless appeal has been taken to the United States Court of Appeals for the Federal Circuit, have remedy by civil action against the Director in the United States District Court for the Eastern District of Virginia if commenced

within such time after such decision, not less than sixty days, as the Director appoints. The court may adjudge that such applicant is entitled to receive a patent for his invention, as specified in any of his claims involved in the decision of the Patent Trial and Appeal Board, as the facts in the case may appear and such adjudication shall authorize the Director to issue such patent on compliance with the requirements of law."

Patent Cooperation Treaty:

The Patent Cooperation Treaty (PCT) is a multilateral Federal treaty on international patent law that was concluded in Washington, D.C. in 1970 and entered in force in 1978. (Patent Cooperation Treaty, Jan. 24, 1978, TIAS 8733, 28 UST 7645.) It is administered by the International Bureau of the World Intellectual Property Organization ("WIPO").

The PCT provides a unified procedure for filing a single patent application (the "international application") to protect an invention, with effect in several countries, instead of filing separate national and/or regional patent applications.

The United States of America is one of the 150 Contracting States, which avow cooperation in the Treaty as follows:

"The Contracting States,

Desiring to make a contribution to the progress of science and technology,

Desiring to perfect the legal protection of inventions,

Desiring to simplify and render more economical the obtaining of protection for inventions where protection is sought in several countries,

Desiring to facilitate and accelerate access by the public to the technical information contained in documents describing new inventions,

Desiring to foster and accelerate the economic development of developing countries through the adoption of measures designed to increase the efficiency of their legal systems, whether national or regional, instituted for the protection of inventions by providing easily accessible information on the availability of technological solutions applicable to their special needs and by facilitating access to the ever expanding volume of modern technology,

Convinced that cooperation among nations will greatly facilitate the attainment of these aims,

Have concluded the present Treaty."¹

¹wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:20-cv-1515

URVASHI BHAGAT,
Plaintiff

UNITED STATES PATENT AND
TRADEMARK OFFICE, et al.,
Defendants

**FIRST AMENDED COMPLAINT AND JURY
DEMAND**

Plaintiff, Urvashi Bhagat, for her Amended Complaint against, the United States Patent and Trademark Office and Andrew Hirshfeld, in his official capacity as performing the functions and duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (collectively “the USPTO”), adds the United States of America to the Defendants, and alleges as follows:

NATURE OF THIS ACTION

1. This civil action is brought by the inventor of U.S. Patent Application No. 13/877,847 (“the ’847

application”), Ms. Urvashi Bhagat, against the Director of the USPTO seeking a judgment that Ms. Bhagat is entitled to a patent for the invention specified in claims 82-89, 91-104, 107-110, and 112-120 of the ’847 application. These claims are the subject of a decision by the Patent Trial and Appeal Board (“PTAB”) of the USPTO refusing to issue a patent to Bhagat based on allegations of indefiniteness, improper dependency, obviousness, and lack of unity of invention.

2. The USPTO has acted in bad faith and violated Ms. Bhagat’s constitutional rights while being fully aware of the constitutional rights, repeatedly applying numerous overlapping improper rejections and frivolous “objections” on every patent claim, such as lack of unity of invention, product of nature, abstract idea, double patenting, lack of written description supporting the claims, indefiniteness, improper dependency, lack of novelty, and obviousness while failing to even make a *prima facie* case of obviousness in several claims. The USPTO disregarded the repeated submissions of arguments and evidence fully rebutting the objections. Several improper final rejections were issued. Ms. Bhagat had to file numerous administrative petitions for supervisory review at the USPTO. Some of the objections/rejections were eventually reversed—confirming that they were frivolous—but after multiple repeat petitions were filed for higher and higher level of review at the USPTO at great cost and loss of time.

For example, the USPTO tried to force 35 U.S.C. § 101 rejection over multiple Office actions, even though the Plaintiff expressly disclaimed products

of nature in the claims reciting, “wherein the product produced is not a specific variety of a vegetable, a fruit, a grain, a legume, a nut, or a seed.” But the Examiner kept applying lack of literal basis in the specification under § 112 1st paragraph, refusing to read responses where the support was cited and its was asserted that law does not require literal support. The rejections were reversed after multiple petitions but after wasting *two years* in prosecution and a whole lot of expense. Same process was repeated with other rejections. Eventually, the ‘847 application was transferred to *pro se* exam unit, where the examiner forced other §§ 112 and 103 rejections refusing to respond to the arguments and evidence and even refusing to enter expert testimony into the record for an excuse to maintain § 103 rejections and so that the testimony is not available for appeal review.

3. The USPTO’s bad faith continued in appeal review at PTAB, such that 99% of arguments and 100% of the evidence (scientific papers evidencing poorly understood factors) was disregarded in the appeal review and a decision contrary to PTAB’s own precedential opinions was issued, which is misconduct. Ms. Bhagat submitted several petitions for review by the Chief Administrative Patent Judge due to misconduct by the panel in appeal review requesting a new or expanded panel, which were either dismissed without proper review or not answered, rather the Chief Judge also made false statements in his decision contradicting the record².

² Petition Decision from Chief Judge mailed on August 17, 2020, footnote 1, alleged that on October 25, 2018, Applicant filed a

This demonstrates bad faith and disingenuousness in examination and appeal review, despite being aware of Plaintiff's constitutional rights³.

4. As part of this action Ms. Bhagat seeks damages from the Defendants because the USPTO's improper actions have resulted in loss of eight years and damaged Ms. Bhagat's company, livelihood, and life for the following reasons:

- a. Enormous expense and mental anguish of eight years long prosecution at the USPTO.
- b. The USPTO's improper actions were copied by many patent offices, compromising and delaying several of Ms. Bhagat's critical patent cases and even loss of some of them and multiplying legal burden including costs⁴.
- c. The opportune market timing is lost.
- d. Long delay created a bias against the patent application and the business.
- e. Venture financings and licensing discussions were stalled depriving the emerging company of lifeblood. The

petition requesting supervisory review of the final Office action of August 13, 2018 and that the Technology Center Director considered and dismissed the petition in a decision mailed February 13, 2019. However, the statement is false. Neither did the Examiner meaningfully address the subject rejections, nor were the rejections the subject of the petitions. The petitions were in reality directed to improper restriction of Claim 112 and the Examiner's improper refusal to enter the Das and Erickson Declarations into the record. This falsity was called to attention in Applicant's August 31, 2020 petition to the Chief Judge, available in electronic file at USPTO.

³ <https://www.uspto.gov/web/offices/pac/mpep/mpep-0020-introduction.html>

⁴ <https://asha-nutrition.com/research/intellectual-property/>

company's growth has severely suffered as a consequence, while companies in similar space and founded around the same time were granted US patents have reached market capitalization of \$ 4-10 billion⁵.

- f. Now the current civil action threatens more damage to Ms. Bhagat's business and life.

5. Ms. Bhagat has committed herself to researching role of lipids in health and disease, in particular omega-6 fatty acids and antioxidants including minor lipids found in plants (e.g., polyphenols). She has made important discoveries on precise dosage requirements of and interactions among these substances with profound health effects, such that tailored dosages (specified delivery) have the potential of mitigating chronic diseases and acute health events (such as strokes and heart attacks) and susceptibility to infections. These discoveries are the foundation of her inventions directed to dosages of these substances and methods of tailoring the same by demographic factors. The inventions described and claimed in the '847 application are innovative compositions and methods of tailoring formulations comprising omega-6 fatty acids and antioxidants including polyphenols in the broadest embodiments with additional features in narrower embodiments. The broadest claims "provide a dosage from 1 to 40g of omega-6 fatty acids and from 25mg to 10g of antioxidants, and wherein the antioxidants comprise one or more polyphenols in the dosage of greater than 5mg" via "one or more nutritional formulations

⁵ <https://markets.businessinsider.com/news/stocks/impossible-foods-ipo-spac-stock-market-listing-10-billion-valuation-2021-4-1030288368>

for an individual" with instructions for suitable intake of the formulations.

6. The claimed features in the '847 application remain poorly understood in the art even today. Many publications have taught reduced intake of omega-6 fatty acids, such as less than 1g/day, and some skilled persons even label high omega-6 containing foods as "poison" at "any amount," and many publications have taught random or high intake of antioxidants and polyphenols, including the publications cited by the USPTO. Further, these substances are randomly sold across the nation (US) and around the world. In contrast, the subject patent application teaches that omega-6 fatty acids are critical for health and their deficiency potentiates mechanisms that result in adverse health and adverse acute events, and that antioxidants affect the metabolism and requirement for omega-6 fatty acids and that total antioxidant intake including polyphenols must also be restricted for health.

7. Dosage is distinct from concentrations, but dosage is relevant to composition as it determines how much of the active ingredient is present in how much of the formulation determined for administration; and dosage takes factors such as subject's age, gender, diet, medical conditions into account, which are expressly recited in several of the subject claims. Correct dosage of omega-6 also eliminates toxicity from excess omega-6, which prior art has erroneously taught to counter with excess omega-3 fatty acids.

8. Neither the Dietary Guidelines for Americans published by US Department of Health and Human Services nor any other major regulatory body has

considered dosing of total omega-6 fatty acids and total antioxidants including polyphenols as taught in the subject patent application.

9. The subject innovations are exceptionally important for public health including in preventing chronic diseases and infections, such as coronavirus. Had the patent been granted on time it would have helped Ms. Bhagat raise venture capital for her company and it would have helped to effectively implement the innovations for public benefit mitigating the adversity of the current pandemic.

10. In rejecting the claims of the '847 application, the examiner and the PTAB made incorrect assumptions about what a person of ordinary skill in the art would have found obvious, disregarding the evidence of opposite teachings submitted and what is in plain sight that these substances are routinely and randomly marketed across the nation and around the world without dosing regimens.

11. The USPTO has held the scope of the inventions against the inventor, at great cost to public health and the nation. USPTO prefers to issue extremely narrow patents (apparently to increase its revenue and protect big businesses) particularly in nutrition, which cause misinformation and disinformation in the art as each party seeks to hype its patent protected products and methods, leading to chaos in the nutrition art. For example, USPTO has issued about 135,000 patents directed to various narrow compositions and methods comprising fatty acids, i.e., roughly 2.7 million years of monopolies (@ 20 years/patent) instead of granting a proper 20-year patent as claimed to eradicate the problem. USPTO has tried to force Ms. Bhagat to

accept an extremely narrow patent which would have compromised the innovations. In other words, USPTO is making public ill to boost its revenues.

12. The defendant has failed to understand that the opportunity to properly nurture these innovations may be permanently lost if this patent is not granted, because without the patent grant market forces are unable to address this over a century old complex problem, because of economic disincentives, and future applicants will not be able to patent these inventions because now they are genuinely anticipated/obvious from the Bhagat disclosures. The loss of the nurturing of these inventions via patent grant will be insurmountable loss to humanity.

13. For the aforementioned reasons Ms. Bhagat has elected to have remedy by civil action against the USPTO and the Director of the USPTO in the United States District Court for the Eastern District of Virginia as authorized by statute. Ms. Bhagat is entitled to a patent for the invention claimed in the '847 application, and the Court should order the Director to issue one and grant additional declaratory, injunctive, and monetary relief because of the USPTO's bad faith actions.

PARTIES

14. Plaintiff Urvashi Bhagat is the inventor of several patent applications pending before the USPTO and one issued patent (granted 10 years after pendency wiping out significant patent term). The applications and the patent are assigned to Asha Nutrition Sciences, Inc. ("Applicant" or "Appellant"), a corporation organized and operating under the

laws of California. The '847 application as filed is attached herewith as Exhibit A. The claims at issue (pending claims) are attached herewith as Exhibit B.

15. Defendant United States Patent and Trademark Office is the federal agency responsible for examining patent applications and for issuing U.S. patents. The USPTO's headquarters is located in Alexandria, Virginia.

16. Defendant Andrew Hirshfeld is performing functions and duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, acting in his official capacity. The Director is the acting head of the USPTO and is responsible for superintending or performing all duties required by law with respect to the granting and issuing of patents.

17. Defendant United States of America is a governmental entity.

JURISDICTION AND VENUE

18. This Court has jurisdiction and venue pursuant to 28 U.S.C. §§ 1331, 1338(a), 1361, and 1391(b)(1)-(2), 1391(e), and 35 U.S.C. § 145 (as amended by the America Invents Act on September 16, 2011).

19. Federal treaty at issue is Patent Cooperation Treaty (PCT) the international patent law treaty, concluded in 1970, providing a unified procedure for filing and examining patent applications to protect inventions in each of its contracting states, of which United States is one. The '847 application is a PCT application that entered national patentability

examination at the USPTO under 35 USC 371.

20. This action seeks monetary relief under the Fifth Amendment's Takings Clause, U.S. Const. amend. V.

21. Venue is also proper in this district under 35 U.S.C. § 145, which provides that “[a]n applicant dissatisfied with the decision of the Patent Trial and Appeal Board in an appeal under section 134(a) may, unless appeal has been taken to the United States Court of Appeals for the Federal Circuit, have remedy by civil action against the Director in the United States District Court for the Eastern District of Virginia if commenced within such time after such decision, not less than sixty days, as the Director appoints.”

22. The PTAB's decision on Bhagat's appeal of rejections against the claims of the '847 application, pursuant to 35 U.S.C. § 134(a), issued on February 20, 2020 and decision on Request for Rehearing issued on October 7, 2020 are attached as Exhibits C and D.

23. The original Complaint was timely filed within sixty-three days of the PTAB's last decision. An appeal has not been taken to the United States Court of Appeals for the Federal Circuit.

BACKGROUND

A. THE STATE OF THE ART

24. “Dosage” is a universally understood term by all people working in the health care profession as well as all individuals who are involved in health or disease maintenance and treatment to mean “specified amount of a substance for ingestion at one

time or regularly.” Oxford Dictionary defines dosage as, “The size or frequency of a dose of a medicine or drug. ‘a dosage of 450 milligrams a day.’” Further, 10s of 1000s of multi-dose products are marketed around the nation where packaging instructions specify the amount of formulation to be ingested to achieve the recommended dosage (e.g., cough syrups) confirming that the term “dosage” is extremely well known in the art.

25. Requirements and dosage of omega-6 fatty acids for health is not well understood, routine, or purely conventional step in the prior art. Prior art at large teaches reduced intake of omega-6 fatty acids and teaches away from instant Claims 82 and 99. For example, Lands WE, Ann. N.Y. Acad. Sci. 1055: 179–192 (2005) teaches less than 0.5% of calories from omega-6, which equals less than 1g/day for 1800 calorie diet. Similarly, the formulations taught by the reference cited by USPTO, US 2008/0213239 (“Morris”) either comprise zero omega-6 (formulations 1-6) or its dosage is significantly less than 1g (e.g., 70mg γ -linolenic acid in formulations 7-27, i.e., 7% of “from 1g” in present claims); whereas reference cited by USPTO US 2007/0166411 (“Anthony”) states linoleic acid is omega-3 and α -linolenic acid is omega-6 (¶49, ¶51) (contrary to the conventional nomenclature) and its exemplary formulations in Tables 2 and 7 comprise 0.2-0.4g α -linolenic acid [omega-6]. In contrast, the present claims require at least 1g of omega-6 fatty acids, based upon the individual, or demographic factors in some claims.

26. Requirements and dosage of antioxidants for health is not well understood, routine, or purely

conventional step in the prior art. Antioxidants are randomly recommended in prior art without teaching dosages and context, as evidenced by Niki, "Lipid peroxidation: Physiological levels and dual biological effects" Free Radic Biol Med. 2009 Sep 1;47(5):469-84. True to form, USPTO's citation *Morris* identifies close to 500 antioxidants over 24 paragraphs (¶42, ¶47, ¶48, ¶49, ¶62-68, ¶70-71, ¶89-90, ¶106-107, ¶128, ¶142, ¶169-170, ¶173-174, ¶185), and yet leaves the list open-ended, stating in ¶128 "Also suitable is an anti-oxidant as described in U.S. Patent Publication No. 2007/0275932." Further, *Morris*' dosages of antioxidants add up to significantly more than 10g restriction in present claims, e.g., 31g/day (formulation #27 is about 15,000mg/day (three times daily ¶164) and claims 1+2+3+4+9+13+18+19 yields antioxidants over 24,000mg/day). Yet *Morris* has not taught or suggested restriction of dosage of total antioxidants. Whereas *Anthony* is silent with respect to dosage of any antioxidants.

27. Requirements and dosage of polyphenols is not well understood, routine, or purely conventional step in the prior art, as evidenced by Specification (¶41, ¶90-91, and rest of the disclosure) and Mennen, "Risks and safety of polyphenol consumption" Am J Clin Nutr 2005;81(suppl):326S-9S. Similarly, *Morris* never suggests any dosage of polyphenols whatsoever, or the need to restrict them, instead *Morris* identifies an infinite list of antioxidants, of which one is polyphenols, in ¶128, and none of *Morris*' examples include any polyphenols.

28. Thus, none of the prior art including the references cited by the USPTO during examination

would have led one of skill in the art to practices dosages of omega-6 and antioxidants including polyphenols as required by the present claims.

29. Many variables including antioxidants modulate the metabolism of various fatty acids and it is difficult for consumers to calibrate on a daily basis the demands of the body for the bioactive substances as evidenced by Bhagat et al., "Potential role of dietary lipids in the prophylaxis of some clinical conditions" Arch Med Sci 2015; 11, 4: 807–818. The discoveries and state of the art led to the inventions disclosed in the '847 PCT application.

B. THE '847 APPLICATION

30. This PCT application entered national patentability examination at the USPTO under 35 USC 371 and CFR 1.495 on April 4, 2013. The Specification and claims are directed to multi-part and multi-dosage kits of nutritional formulations facilitating the restriction of the dosages of omega-6 to 1-40g and antioxidants to 25mg-10g including the dosage of polyphenols for intake by subjects because these nutrients are poorly understood in the art and are randomly marketed and ingested with grave public health consequences leading to numerous chronic diseases and weakened immune system rendering public susceptible to infections. Additional features and methods of tailoring are recited in narrower claims.

31. Foods such as fruits, vegetables, nuts, seeds, and animal products are extremely variable in nutrient content, such that amount of omega-6, antioxidants, and phytochemicals in any given food or mixture thereof are not always the same,

predictable, or controlled to be considered a “dosage”, as evidenced by Knowles, “Variability in oleic and linoleic acid contents of safflower oil” Economic Botany, January–March 1965, Volume 19, Issue 1, pp 53.

32. Prior art has created excesses/imbalances of certain foods and nutrients in the nutrition supply and individual consumption as evidenced by Nutrition and You: Trends 2008; Survey by American Dietetic Association, with major public health consequences (Specification ¶3-8 and rest of the disclosure).

33. There are very significant gaps in public knowledge of basic fats and nutrients. For example, less than 1% of Americans can correctly name fats, as evidenced by 2011 Food & Health Survey, by International Food Information Council Foundation.

34. According to the US Centers for Disease Control and Prevention “six in ten adults in the US have a chronic disease and four in ten adults have two or more...Chronic diseases such as heart disease, cancer, and diabetes are the leading causes of death and disability in the United States. They are also leading drivers of the nation’s \$3.5 trillion in annual health care costs...Many chronic diseases are caused by a short list of risk behaviors [including] poor nutrition.”

C. THE USPTO’S EXAMINATION

35. Prosecution of the ’847 application before the USPTO examiner ended with a final rejection mailed on August 13, 2018.

36. In that final office action, claim 112 was withdrawn from examination under the allegation of lack of unity, which is a violation of the PCT rules and the federal treaty. This matter had been petitioned for administrative review repeatedly at the USPTO previously, however, unity is continually evaluated throughout examination. The objection was repeated without providing any reasoning despite amendments to claim 112.

37. In that final office action, claim 96 was improperly objected for depending on a higher numbered claim 97, that should have been addressed by renumbering of claims post-allowance (USPTO Manual of Patent Examining Procedure 608.01(j)).

38. In that final office action, claims 82 and 99 were rejected under 35 USC §112(a) 1st paragraph for allegedly violating the written description requirement.

39. In that final office action, claims 82, 87, 91- 93, 96, 97, 99, 100-102, 105, 109, 110, 113-114, and claims 115-120 were rejected for allegedly being indefinite under 35 USC §112(b) 2nd paragraph. The Examiner alleged that the features in independent claim 82, "wherein the one or more formulations are so packaged and labeled indicating suitability for consumption that collectively provide a dosage from 1 to 40g of omega-6 fatty acids and from 25mg to 10g of antioxidants, and wherein the antioxidants comprise one or more polyphenols in the dosage of greater than 5mg" are indefinite. Claim 99 was similarly objected to. The Examiner had ignored the evidence submitted that such dosages are routinely disclosed on packaging (e.g., on cough syrups), the Examiner

had also ignored testimony from scientists that the claimed dosages are clear.

40. In that final office action, in claim 89 the Examiner recognized that Claim 82 recites “comprising” opening the claim to additional ingredients, yet the Examiner objected to lack of antecedent for lipids or omega-9 fatty acids.

41. In that final office action, the Examiner stated regarding claim 113 “the rejection remains for reasons of record...” even though claim 113 was never objected to in previous office action.

42. In that final office action, claims 88-89, 95, 103, 107-110 were rejected under 35 USC §112(d) 4th paragraph for allegedly failing to further limit the subject matter of the claims upon which each claim depends or for failing to include all the limitations of the claim upon which each claim depends.

43. In that final action, claims 83-86, 94, 98, 104, 107-108 were objected to allegedly as being dependent upon a rejected base claim.

44. In that final office action, claims 82-89, 91-104, 107-110 and 113-120 were rejected under 35 USC § 103 for allegedly being obvious over *Morris*, US 2008/0213239 in view of *Anthony* et al., US 2007/0166411, despite the teachings opposite to present claims within *Morris* and *Anthony*.

45. In that final office action, the examiner refused to enter two affidavits from skilled persons testifying that the claims are clear and definite from a skilled person's perspective and to the poorly understood dosages requirements of omega-6 fatty acids and antioxidants including polyphenols. The

Examiner alleged that the affidavits are not in proper form. The Examiner also failed to give weight to oral testimony from a skilled person in an interview held two week earlier testifying to the foregoing.

46. In that final office action, the Examiner suggested two allowable claims, which could not accommodate multi-dose container (e.g., for a multi-day supply) and all the ingredients would have to be mixed in the same container potentially leading to hazardous interactions, greatly compromising the innovations and public health.

47. On October 15, 2018, without conceding to the merits of the rejections, solely to appease the Examiner and in the hope of advancing the prosecution further and to reduce the issues upon appeal, Applicant filed an After-Final Response amending only the form of the claims to overcome §112 rejections and renewing non-obviousness arguments, presenting the Examiner alternatives in a conciliatory tone.

48. On October 18, 2018, the Examiner declined to enter and consider the claims that had been amended in form only.

49. On October 24, 2018, a Petition for withdrawal of restriction of claim 112 was filed since unity is reviewed continually in prosecution and Examiner had failed to do so, and on October 25, 2018, a Petition for withdrawal of finality of the Office action of August 13, 2018, was filed since Examiner had failed to consider declarations of Dr. Undurti Das and Dr. Kent Erickson submitted on June 15, 2018, containing evidence of criticality, unexpected results,

long-felt but unsolved needs, failure of others, etc., for determining the issue of obviousness of claims for patentability under 35 U.S.C. 103. On February 14, 2019, both the Petitions filed on October 24th and 25th were dismissed by the Director of Technology Center.

50. On November 13, 2018, a Notice of Appeal and a Pre-Appeal Brief was filed for review, reasoning that the October 15, 2018 amendments to form of the claims were filed to reduce issues on appeal, which should have been entered, and reiterating non-obviousness arguments.

51. On January 10, 2019, the Pre-Appeal Brief Review Panel instructed the Applicant via a mere checked box on a form to proceed to Appeal.

52. On February 11, 2019, timely Appeal Brief to PTAB was filed. Grounds of Appeal asserted reversal of each of the following rejections:

- A. claims 82 and 99 under 35 USC §112(a) 1st paragraph for allegedly violating written description requirement;
- B. claims 82, 87, 91- 93, 96, 97, 99, 100-102, 109, 110, and 113-120 for allegedly being indefinite under 35 USC §112(b) 2nd paragraph, asserting that Appellant does not concede to the merits of the rejection;
- C. claims 88-89, 95, 103, 107-110 for alleged improper dependency under 35 USC §112(d) 4th paragraph, asserting that Appellant does not concede to the merits of the rejection; and
- D. claims 82-89, 91-104, 107-110 and 113-120 under 35 USC § 103 for allegedly being obvious over *Morris*, US 2008/0213239 in

view of *Anthony et al.*, US 2007/0166411 asserting that each of the independent and the dependent claims is separately patentable. Six scientific publications from the record were resubmitted as evidence of poorly understood factors in the art and therefore non-obviousness.

53. On May 1, 2019, Examiner's Answer to the Appeal Brief was filed maintaining all rejections. With respect to rejections B and C, Examiner alleged that Appellant had not provided any arguments as to why they should be withdrawn, therefore the rejections should be sustained.

54. On July 1, 2019, Appellant filed a Reply Brief maintaining and reiterating the positions and arguments set forth in the Appeal Brief filed on February 11, 2019 and the responses filed on January 11, 2018 and June 15, 2018 and asserting that determination of patentability as per law is based on the entire record, and that arguments rebutting rejections B and C as improper are already on record.

55. On February 20, 2020, PTAB mailed a Decision reversing rejection A, but maintaining rejections B, C, and D, refusing to consider the arguments of record specifically called to attention in the Reply Brief. The PTAB decision is highly improper entailing violations of procedure, numerous clear errors, and abuse of discretion, and misconduct on part of the PTAB panel. The PTAB panel had disregarded 99% of the arguments within the Appeal Brief, let alone in and with the Reply Brief, and 100% of the evidence of non-obviousness (including the six scientific publications) submitted to the

panel. Further the panel's ruling is in violation of the US Supreme Court precedent and PTAB's own precedential decisions.

56. On March 5, 2020 (corrected on March 10, 2020), Appellant filed a Petition invoking supervisory authority of the Chief Administrative Patent Judge (hereinafter "Chief Judge") requesting the Chief Judge to review the Board's actions.

57. On April 14, 2020, the Chief Judge issued a Petition Decision on petition dated March 10, 2020, dismissing the request for relief without proper response to arguments.

58. On April 28, 2020, a renewed (2nd) petition to the Chief Judge was filed calling to attention overlooked and misapprehended points from the previous petition with a request to alter/expand the panel composition for rehearing due to the exceptional nature of the case and abuse asserted in the Petition dated March 10, 2020, from PTAB panel, also in the interest of judicial economy.

59. On June 29, 2020, a Request for Rehearing was filed to PTAB calling to attention the procedural violations in affirming Rejections B, C, and D, and that several points of law and fact were misapprehended and overlooked by the panel in the Decision, such that almost all of the arguments and 100% of the evidence submitted with respect to Rejection D were overlooked, and that there has been an abuse of discretion since the Decision is based on an erroneous interpretation of law and clear errors, and the decision represents an unreasonable judgment in weighing relevant facts and factors.

60. On August 17, 2020 the Chief Judge issued a Petition Decision on renewed (2nd) petition dated April 28, 2020, dismissing the request for relief again without proper response to arguments, and surprisingly making false statements⁶ in the Decision.

61. On August 31, 2020, another renewed (3rd) petition to the Chief Judge was filed calling to attention overlooked and misapprehended points from the previous petition dated April 28, 2020.

62. On October 7, 2020, the PTAB panel issued a decision on the Request for Rehearing again disregarding 99% of the arguments and 100% of the evidence, maintaining rejections B, C, and D. The Panel even declined to address rejections B & C alleging that the Chief Judge had addressed them, which was incorrect because the petition dated August 31, 2020 was still pending before the Chief Judge. The Panel also declined to address all of the evidence with respect to rejection D alleging that they may choose to rely upon evidence as convenient, which is not true because obviousness is determined

⁶ Petition Decision from Chief Judge mailed on August 17, 2020, footnote 1, alleged that on October 25, 2018, Applicant filed a petition requesting supervisory review of the final Office action of August 13, 2018 and that the Technology Center Director considered and dismissed the petition in a decision mailed February 13, 2019. However, the statement is false. Neither did the Examiner meaningfully address the subject rejections, nor were the rejections the subject of the petitions. The petitions were in reality directed to improper restriction of Claim 112 and the Examiner's improper refusal to enter the Das and Erickson Declarations into the record. This falsity was called to attention in Applicant's August 31, 2020 petition to the Chief Judge, available in electronic file at USPTO.

based on prior art as a whole as per US supreme Court precedent.

63. On December 7, 2020, the Chief Judge issued a Petition Decision on renewed (3rd) petition dated August 31, 2020, dismissing the request for relief and for the third time without proper response to arguments.

COUNTS

FIRST CLAIM FOR RELIEF

(Ms. Bhagat has been entitled to issuance of the patent for several years)

64. Paragraphs 1-62 are incorporated herein by reference, as if fully set forth herein.

65. Applicant filed the '847 application, entitled "Optimized Nutritional Formulations, Methods for Selection of Tailored Diets Therefrom, And Methods of Use Thereof" on April 4, 2013. The '847 application claims priority back to October 14, 2010. As amended, the '847 application includes the following claims: 82-89, 91-104, 107-110, and 112-120 ("the pending '847 claims"). The pending '847 claims relate generally to formulations, methods of their tailoring including a computer system for the purpose, and methods of prophylaxis and/or treatment of a medical condition or disease in an individual providing a dosage from 1 to 40g of omega-6 fatty acids and from 25mg to 10g of antioxidants, and wherein the antioxidants comprise one or more polyphenols in the dosage of greater than 5mg. The pending '847 claims are patentable and satisfy all applicable statutory and regulatory requirements.

66. The USPTO's restriction of claim 112 from continual examination is an error and a violation of federal treaty, the Patent Cooperation Treaty.

67. The USPTO's applying numerous frivolous "objections" forcing the Applicant to file numerous petitions for administrative review wasting Applicant's time and resources while depriving public of important solutions is obliteration of justice and is making the patent system harmful to public rather than helpful.

68. The USPTO's forcing the Applicant to accept severely restricted claims that could compromise public health and create waste problems for the society is counter to the charge of the USPTO to support innovation for betterment of the society.

69. The USPTOs refusal to consider affidavits of Drs. Erickson and Das, and oral testimony of Dr. Das is an error.

70. The PTAB's affirmance of the examiner's rejections against the '847 claims is in error, contrary to law, arbitrary and capricious, and an abuse of discretion.

71. The PTAB's declination to review the Appeal on entirety of record, in particular the arguments and evidence of record even if called to attention in Reply Brief, is a procedural violation, depriving the Applicant of full and fair opportunity to be heard contrary to the law.

72. The PTAB's failure to review almost entirety of arguments and evidence specifically called to attention in the Appeal Brief is a grave violation of justice.

73. The examiner's rejections upheld by the PTAB fail to even make out a *prima facie* case of obviousness, fail to give proper weight to the objective indicia of non-obviousness, are unsupported, and legally erroneous.

74. The rejections also fail to properly consider what a person of ordinary skill in the art would have known and understood. Properly assessed, the '847 claims would not have been obvious at the time of invention, as confirmed by strong objective indicia of non-obviousness. The PTAB erred in affirming such grounds of rejection. Ms. Bhagat is dissatisfied with the PTAB's erroneous decision and elects to file this civil action under 35 U.S.C. § 145.

75. Ms. Bhagat is entitled to prompt issuance of a patent for claims 82-89, 91-104, 107-110, and 112-120. Ms. Bhagat expressly reserves the right to pursue issuance of the subject matter of any claims not adjudicated here through a continuation application or other appropriate procedure.

SECOND CLAIM FOR RELIEF

(Ms. Bhagat is entitled to damages due to bad faith actions of the USPTO)

76. Paragraphs 1-75 are incorporated herein by reference, as if fully set forth herein.

77. USPTO has made every possible excuse to harass Ms. Bhagat and delay her patents, just because she disclosed exceptionally important innovations.

78. Ms. Bhagat is entitled for damages from the Defendants for deliberately compromising her business and life for last eight years.

79. Ms. Bhagat is entitled for just compensation for taking of her property, including but not limited to her patent, which should have been rightfully issued many years ago.

80. Due to USPTO's improper actions opportune market timing is lost for Ms. Bhagat's business.

81. The long delay has created a bias against the patent application and the business obstructing access to capital.

82. The USPTO actions have been copied in several patent offices, increasing the Plaintiff's prosecution costs and causing further damages including refusal of some patent applications and additional loss of business.

83. As a direct and proximate result of USPTO's bad faith actions, the Plaintiff has sustained losses and damages including but not limited to the inability to license the patented technology and enforce the patent against those who would infringe its claims.

84. The plaintiff has been damaged in an amount to be determined at trial, but which is no less than \$500,000,000 exclusive of costs and fees.

PRAYER FOR RELIEF

Wherefore, Ms. Bhagat respectfully requests that this Court enter judgment against the Defendants as follows:

(a) On the First Claim of Relief: setting aside and reversing the PTAB's conclusion, and any actions and findings underlying the conclusion, that claims 82-89, 91-104, 107-110, and 112-120 of Ms. Bhagat's

U.S. Patent Application No. 13/877,847 are unpatentable;

(b) On the First Claim of Relief: declaring that Ms. Bhagat is entitled to issuance of a patent for the invention claimed in claims 82-89, 91-104, 107-110, and 112-120 of U.S. Patent Application No. 13/877,847;

(c) On the First Claim of Relief: authorizing the Director of the USPTO to issue such patent in compliance with the requirement of the law, including 35 U.S.C. § 145;

(d) On the Second Claim of Relief: a finding that the USPTO took Ms. Bhagat's property with respect to the time wasted and livelihood lost over last eight years without providing just compensation, in violation of the Fifth Amendment;

(e) On the Second Claim of Relief: an award of just compensation for this taking of Ms. Bhagat's property;

(f) On the Second Claim of Relief: for an order finding Defendants to be jointly and severally liable and awarding compensatory, consequential and incidental damages in an amount to be proven at trial, but in no event less than \$500,000,000;

(g) For pre- and post-judgment interest on any award;

(h) Costs and expenses; and

(f) all other relief to which the Plaintiff may show herself to be entitled and any other and further relief the Court deems necessary, just, or proper.

JURY TRIAL DEMAND

Plaintiff Bhagat respectfully demands a trial by jury of all issues (including those identified above) triable by a jury in his Complaint. The landmark nature of the case due to significant ramifications from the disclosed innovations on public health, and harm rather than help being caused to public health by piecemeal patents and obstruction of innovation in nutrition and prevention by the USPTO makes a compelling case for jury trial in this case. In particular see paragraphs ¶¶ 9, 11-12, 67-68, and 77 above.

CERTIFICATION AND CLOSING

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

I agree to provide the Clerk's Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case

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I also declare under penalty of perjury that no attorney has prepared, or assisted in the preparation of this document.

Date: April 17, 2021

Respectfully submitted,
Urvashi Bhagat
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