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Box Interference

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

WEN-HWA LEE and PHANG-LANG CHEN
Junior Party,¹

v.

BERT VOGELSTEIN, SUZANNE BAKER,
ERIC R. FEARON and JANICE M. NIGRO
Senior Party.²

Patent Interference No. 104,066

FINAL HEARING: August 1, 2003

¹ Patent No. 5,532,220, issued July 2, 1996, based on Application 08/337,851, filed November 14, 1994. Accorded the benefit of Application 07/947,359, filed September 18, 1992, now abandoned; and Application 07/573,405, filed August 24, 1990, now abandoned.

² Application 08/035,366, filed March 22, 1993. Accorded the benefit of Application 07/860,758, filed March 31, 1992; Patent No. 5,362,623, issued November 8, 1994; Application 07/715,182, filed June 14, 1991, now abandoned; Application 07/928,661, filed August 17, 1992, now abandoned; Application 07/446,584 filed December 6, 1989, now abandoned; and Application 07/330,566, filed March 29, 1989, now abandoned.

Interference 104,066

Before METZ, ELLIS and LORIN, Administrative Patent Judges.

ELLIS, Administrative Patent Judge.

FINAL DECISION PURSUANT TO 37 C.F.R. § 1.658(a)

This interference was originally declared on May 11, 1998, and it involves a patent of Lee et al. (Lee), U.S. Patent No. 5,532,220 (the '220 patent), assigned to the Regents of the University of California and licensed to Canji, Inc., a wholly-owned subsidiary of Schering-Plough Corporation; and an application of Vogelstein et al. (Vogelstein), Application No. 08/035,366 (the '366 Application) assigned to the Johns Hopkins University and licensed to Genzyme Corporation.

I. Background

Following a decision on the preliminary motions, the APJ ordered the parties to serve, their respective preliminary statements. Paper No. 87. Since junior party Lee did not allege a date of conception (or reduction to practice) prior to the filing date of senior party Vogelstein's priority application, the APJ issued an order under 37 C.F.R. § 1.640(d)(3) for Lee to show cause as to why judgment should not be entered against it. Paper No. 90. In response to the order to show cause, Lee requested this final hearing. Paper No. 92.

The subject matter at issue is directed to a method of introducing a wild-type p53 tumor suppressor gene into a mammalian cancer cell in a manner which results in the suppression of said cell's neoplastic phenotype.

When the p53 gene was originally isolated from rodent and human tumor cells, it was thought to have oncogenic activity. See the '220 patent, col. 5, lines 36-40; LX

Interference 104,066

2006, p. 1187, col. 2, lines 4-6.³ However, researchers later observed that p53 deletions and mutations were present in numerous human cancers and realized that the wild-type p53 gene is actually a tumor suppressor gene which acts to suppress oncogenesis. See the '220 patent, col. 4, line 66-col. 5, line 2; col. 5, lines 40-49; LX2006, p. 1187, col. 1, lines 1-8; col. 2, lines 10-13; LX2010, p. 705, col. 1, para. 1. Today, of the approximately 6.5 million cancer cases worldwide, researchers estimate that 2.4 million contain a p53 gene mutation. LX 2006, p. 1187, col. 1, lines 7-9. Thus, the goal of the present invention is to express a wild-type p53 tumor suppressor gene in a mammalian cancer cell which lacks said gene function and to inhibit cellular proliferation (i.e., suppress the neoplastic phenotype). LX 2003, p. 924, cols. 1-3; LX 2006, p. 1187, col. 1, lines 1-3.

II. The Count

The subject matter of the interference is defined by a single count, Count 1, which reads as follows:

A method of treating mammalian cancer cells lacking endogenous wild-type p53 protein, comprising introducing a wild-type p53 tumor suppressor gene encoding said endogenous wild-type p53 protein into said mammalian cancer cells, whereby said mammalian cancer cells' neoplastic phenotype is suppressed.

³ Lee's Principal Brief for final hearing (Paper No. 108) will be referred to as LB. The Lee record and exhibits will be referred to as LR and LX, respectively, followed by the appropriate page number.

Interference 104,066

The claims of the parties which correspond to the count are:

Lee: Claims 1-6

Vogelstein: Claims 1-3 and 8-23

Both parties filed briefs and were represented by counsel at final hearing.

III. Issues

The sole issue in this interference is whether there is an interference-in-fact between the parties. Lee Belated Motion No. 1 (Paper No. 56).

IV. Decision on Motion

As a preliminary matter, we point out that the merits panel's review at final hearing of a substantive decision by a single APJ granting or denying a preliminary motion is performed without giving deference to the decision of the single APJ on fact or legal issues. 37 C.F.R. § 1.655(a).⁴

We further point out that this panel will consider only those issues which were properly raised in timely-filed motions and oppositions. 37 C.F.R. § 1.655(b). Review of a decision on a preliminary motion at final hearing is not a tool which a party can employ to reopen prosecution and present new arguments. The interference rules state that if an issue could have been raised in a preliminary motion and was not-- a party is not entitled to raise the issue at final hearing. 37 C.F.R. § 1.655(b). The rules

⁴ In 1999, § 1.655(a) was amended to afford a full hearing of any properly-raised, dispositive issue by a three-judge panel and, thus, now provides "the public with more certainty as to how matters will be considered... [and] make[s] practice within the Board more uniform." Interim Rule, 37 C.F.R. § 1.655(a), 64 Federal Register 12900, 12901 (1999).

Interference 104,066

are designed to provide orderly procedure and the parties are entitled to rely on their being followed. Myers v. Fegelman, 455 F.2d 596, 601, 172 USPQ 580, 584 (CCPA 1972). Waiver of the rules, absent compelling circumstances, would defeat their purpose and substantially confuse interference practice. Id. Thus, it is not appropriate for a party to file a motion or opposition, wait until after an APJ has rendered an adverse decision, and then present a new theory to support its position at final hearing. Accordingly, for purposes of this decision, we have limited our consideration only to those issues that were raised in Lee's originally-filed belated motion.

As indicated above, the sole issue before us is Lee's belated motion 1 pursuant to 37 C.F.R. § 1.633(b) for judgment that there is no interference-in-fact between "its involved patent U.S. 5,532,220 and the involved application Serial No. 08/035,366 of Senior party Vogelstein." Paper No. 56, p. 1. The motion stands unopposed. Nevertheless, Lee's belated motion 1 is DENIED.

As set forth in the Decision on Motion (Paper No. 81), even though there are no material facts in dispute between the parties with respect to the referenced motion, the USPTO must nevertheless determine the sufficiency of those facts before granting relief. Cf. Hsing v. Myers, 2 USPQ2d 1861, 1863 (Bd. App. & Int. 1986). An agreement between the parties is not binding on the Board. Id. Since the primary examiner instituted the present interference, it is presumed that an interference-in-fact exists between those claims of the parties which have been designated as

Interference 104,066

corresponding to the count.⁵ Accordingly, as the moving party challenging the examiner's finding, the burden is on Lee to establish, by a preponderance of the evidence, that each of its claims designated as corresponding to the count (i.e., claims 1-6), and each of Vogelstein's claims designated as corresponding to the count (i.e., claims 1-3 and 8-23), define inventions which are separately patentable.⁶ 36 C.F.R. § 1.637(a) and §1.601(j). See also, Kubota v. Shebuya, 999 F.2d 517, 591 n.2, 27 USPQ2d 1418, 1420 n.2 (Fed. Cir. 1993); Heymes v. Takaya, 6 USPQ2d 1448, 1451

⁵ 37 C.F.R. §1.601(j) provides:

An interference-in-fact exists when at least one claim of a party that is designated to correspond to the count and at least one claim of an opponent that is designated to correspond to the count define the same patentable invention.

⁶ Contrary to Lee's statement of the issues (LB, p. 1) and "Precise Relief Requested" (Paper No. 56, p. 1), the relevant inquiry here concerns the subject matter of the parties claims designated as corresponding to the count, not what is disclosed their respective specifications. 37 C.F.R. § 1.601(j).

Interference 104,066

(Bd. App. & Int. 1988). We apply the test set forth in § 1.601(n)⁷ to determine what constitutes a separate patentable invention.

Turning to the case before us, we find that in neither its belated motion nor in its brief for final hearing does Lee compare of each of its claims designated as corresponding to the count with each of Vogelstein's claims designated as corresponding to the count and explain how each of said claims defines a separate patentable invention. 37 C.F.R. §§1.601(j) and (n). Rather, we find that Lee only provides sweeping generalizations such as “[n]one of the [Vogelstein] claims is specifically directed to treating existing cancer in vivo in a mammal [LB, p. 19]”; and “[n]one of the [Vogelstein] claims specifies the environment of the cell when p53 is supplied to it... Lee[’s] claims, in contrast, are directed to methods of treating existing cancers [LB, p. 19].” Accordingly, we find that Lee’s belated motion fails to satisfy the procedural requirements of 37 C.F.R. § 1.601(j) and this failure alone is sufficient ground for denying the motion.⁸

⁷ 37 C.F.R. § 1.601(n) states, in relevant part, that

Invention “A” is a separate patentable invention with respect to invention “B” when invention “A” is new (35 USC 102) and non-obvious (35 USC 103) in view of invention “B” assuming invention “B” is prior art with respect to invention “A.”

⁸ We note Lee’s arguments with respect to what was known in the art at the time the Lee application was filed. LB, pp. 19-21. That is, Lee contends that in 1990 it was unexpected to those of ordinary skill in the art that the insertion of a wild-type p53 gene into a cancer cell which lacked wild-type p53 function would result in the suppression of the neoplastic phenotype. Id. We find these arguments to be misdirected. The relevant issue here is whether one of ordinary skill in the art, would understand that each of Vogelstein’s claims designated as corresponding to the count do, or do not,

Interference 104,066

We recognize that Lee's position is premised on its contention that Vogelstein's claimed invention is generic with respect to that of Lee. Throughout its brief, Lee characterizes Vogelstein's claims as being directed to a generic method of supplying wild-type p53 gene function to a cell which has lost said gene function by virtue of a mutation in a p53 gene. LB, pp. 4-19. According to Lee, its claims are directed to a method of treating mammalian cancer cells in vivo; whereas, Vogelstein's claims are said to be directed to a method of supplying p53 gene function to any tumor cell, benign⁹ or malignant, for diagnostic, prophylactic or therapeutic purposes. Thus, Lee

anticipate or render obvious each of Lee's claims designated as corresponding to the count. Thus, whether Lee's invention was unobviousness (and novel) at the time the Lee application was filed, is immaterial to the issue presented by the belated motion.

⁹ We point out that Lee's arguments in its brief for final hearing that the tumor cells recited in Vogelstein's claims refer to both benign (non-cancerous) and malignant (cancerous) tumors (e.g., LB, para. bridging pp. 15-16), were not raised in Lee's belated motion 1. Accordingly, since these arguments could have been raised in the original motion, but were not, they have not been considered by the merits panel. 37 C.F.R. § 1.655(b). Moreover, assuming, arguendo, that these arguments were properly raised in the belated motion, we would find them unpersuasive for several reasons.

First, Lee has not presented any evidence that (i) those of ordinary skill in the art would have understood the tumor cells recited in Vogelstein's claims 11-23 to refer to benign tumors; or (ii) benign tumors lack p53 gene function. Thus, we find that Lee relies only on attorney argument to support its contentions. To that end, we point out that arguments of counsel are accorded little, or no, evidentiary weight. Meitzner v. Mindick, 549 F.2d 775, 782, 193 USPQ 17, 22 (CCPA 1977), cert. denied, 434 U.S. 854, 195 USPQ 465 (1977).

Second, Lee's arguments are inconsistent with the evidence of record. We direct attention to Lee's exhibits LX 2002, 2003, 2006, 2010, 2013 and 2016 which disclose the role of the p53 gene as a tumor suppressor gene and that mutations in said gene result in the development of a malignant phenotype. See, LX2006 which lists numerous common cancers in the U.S. which lack p53 gene function and, especially, Table II which highlights the advances in p53 gene research over a sixteen (16) year period. Consistent with the teachings of Lee's exhibits we note that the VACO 235 adenoma cell line disclosed in Vogelstein's specification which is said to be "a benign

Interference 104,066

contends that none of Vogelstein's claims designated as corresponding to the count anticipate or render obvious any of Lee's claims designated as corresponding to the count, assuming Vogelstein's claims are prior art to Lee. However, when we make side-by-side comparisons of each of the parties claims designated as corresponding to the count, we find that Lee's arguments lack a substantive basis.

It is well established that claim interpretation begins with the claim language itself. Reinshaw PLC v. Marposs Societa per Azioni, 158 F.3d 1243, 1248, 48 USPQ2d 1117, 1120 (Fed. Cir. 1998). To that end, the words in the claims are given their ordinary and accustomed meaning as understood by one of ordinary skill in the art unless it appears from the specification that the inventor used them differently. Teleflex, Inc., v. Ficosa N. Am. Corp., 299 F.3d 1313, 1324, 63 USPQ2d 1374, 1380 (Fed. Cir. 2002); Toro Co. v. White Consolidated Industries Inc., 199 F.3d 1295, 1298, 53 USPQ2d 1065, 1067 (Fed. Cir. 2000) ("It is the person of ordinary skill in the field of the invention through whose eyes the claims are construed"); Hechst Celanese Corp. v. BP Chems. Ltd., 78 F.3d 1575, 1578, 38 USPQ2d 1126, 1129 (Fed. Cir. 1996). The specification and prosecution history of an application are considered to determine whether the inventor has given a term an unconventional meaning, or if a term is

tumor of the colon," has wild-type p53 gene function. See the involved '366 application, para. 1, lines 8-10. Thus, from the evidence of record it appears that cells which have lost p53 gene function are malignant, i.e., are cancer cells having a neoplastic phenotype; whereas, benign tumors consist of cells which have not lost p53 gene function.

Since all of Vogelstein's claims designated as corresponding to the count are directed to cells which have lost p53 gene function due to a mutation in a p53 gene, it reasonably follows that said cells are cancer cells.

Interference 104,066

ambiguous to determine its meaning. Teleflex, Inc., v. Ficosa N. Am. Corp., 299 F.3d at 1324, 63 USPQ2d at 1380; Hockerson-Halberstadt, Inc. v. Avia Group International, Inc., 222 F.3d 951, 955, 55 USPQ2d 1487, 1490 (Fed. Cir. 2000). However,

In the absence of an express intent to impart a novel meaning to claim terms, an inventor's claim terms take on their ordinary meaning. We indulge a "heavy presumption" that a claim term carries its ordinary and customary meaning [citations omitted]. Teleflex, Inc., v. Ficosa N. Am. Corp., 299 F.3d at 1324, 63 USPQ2d at 1380.

Turning first to Lee's claimed method of treating cancer cells, we find that said method comprises a single step, i.e., Lee's claims only require the introduction of a wild-type p53 tumor suppressor gene into mammalian cancer cells lacking endogenous wild-type p53 protein in a manner whereby the neoplastic phenotype of said cancer cells is suppressed.¹⁰ Lee's dependent claim 4 contains the limitation that the mammalian cell have a mutated p53 tumor suppressor gene, and dependent claim 6 recites several mammalian cancer cells which contain a mutated p53 gene.¹¹

As to Lee's contention that its claims are directed solely to a therapeutic method

¹⁰ Lee's claim 1 is identical to Count 1. See page 4, above.

¹¹ Lee's claims 4 and 6 read as follows:

4. The method of claim 1 or 2, wherein the mammalian cancer cell having no endogenous wild-type p53 protein has a mutated p53 tumor suppressor gene.

6. The method of claim 1 or 2, wherein the mammalian cancer cell is an osteosarcoma cell, lung carcinoma cell, lymphoma cell, leukemia cell, soft-tissue sarcoma cell, breast carcinoma cell, bladder carcinoma cell or prostate carcinoma cell.

As discussed above, Lee's claim 1 is identical to Count 1.

Interference 104,066

of treating cancer cells in vivo, we point out that this issue was addressed by the APJ in the Decision on Motions (Paper 61, pp. 4-8). In its brief for final hearing, Lee has not pointed out any facts which were overlooked or misapprehended by the APJ in the referenced Decision. Rather, for the most part, Lee has merely repeated its original arguments.¹² This merits panel has considered Lee's belated motion 1 in its entirety (37 C.F.R. § 1.655(a)); however, we find no factual or legal error in the APJ's decision that Lee's claims 1-6 would be understood by one of ordinary skill in the art to encompass the introduction of a wild-type p53 suppressor gene to mammalian cancer cells both in vivo and in vitro.¹³ Briefly stated, we find that the language of Lee's claim 1-6 to be clear on its face and that there is no limitation as to the environment in which the mammalian cancer cells recited therein must exist. In addition the APJ found, and Lee acknowledges in its brief for final hearing, that the '220 patent teaches a method of introducing a wild-type p53 suppressor gene into mammalian cancer cells in vitro

¹² Lee's arguments on pages 11-12 of its brief with respect to the Office action mailed April 5, 1995 and the examiner's double patenting rejection of its claims over two applications that are not of record in the present interference, are newly presented and thus have not been considered by the merits panel. We point out that Lee's newly-presented argument relying on the statements in an examiner's response differs substantially from its original argument (Paper No. 56, p. 5) that statements on page 4, lines 2-3, of a preliminary amendment filed February 29, 1995 (which amendment the APJ pointed out was not entered), supported its position that claims 1-6 are directed to treating cancer in a mammal (in vivo).

Lee acknowledges that the preliminary amendment filed February 28, 1995, was not entered. LB, p. 11, n 2. Thus, its reliance on statements made therein to support its position (LB, p. 11), are misplaced.

¹³ Rather than burden the record with unnecessary verbiage, we direct attention to APJ's Decision on Motions, p. 4-8 and adopt that position as our own. See Appendix.

Interference 104,066

whereby the cells' neoplastic phenotype is suppressed. LB, p. 9. Thus, our finding with respect to the plain meaning of words in claims 1-6 is consistent with the teachings of Lee's specification. Accordingly, contrary to Lee's arguments, we find that claims 1-6 are not limited to a therapeutic method of treating cancer cells in vivo.

With respect to Vogelstein's claims designated as corresponding to the count, we find Lee's contention that the term "supplying" renders said claims generic because methods of "supplying" a cell with a wild-type p53 gene would have been understood "by one of [ordinary] skill in the art at the time of the invention" as referring to diagnostic, therapeutic, and prophylactic methods (LB, p. 14), to be unpersuasive.

As set forth above, the burden is on Lee as the moving party to demonstrate that each of Vogelstein's claims designated as corresponding to the count is directed to an invention which is separately patentable from the inventions described in each of Lee's claims designated as corresponding to the count. Therefore, if just one of Vogelstein's claims designated as corresponding to the count would have anticipated or rendered obvious one of Lee's claims designated as corresponding to the count, an interference-in-fact exists. 37 C.F.R. § 1.601(j). Having determined that one of ordinary skill in the art would have understood from the plain meaning of the terms therein, that Lee's claims 1-6 encompass methods of introducing a p53 suppressor gene into mammalian cancer cells in vivo and in vitro, we move directly to Vogelstein's claims, designated as corresponding to the count. Specifically, we direct attention to Vogelstein's claims 12-

Interference 104,066

22. Even if we were to assume, arguendo¹⁴ that Vogelstein's broad claims encompass methods of diagnosis and prophylaxis, we find that Lee does not explain how its arguments are applicable to claims 12-22.¹⁵ That is, Lee does not explain how the

¹⁴ We find Lee's arguments that all of Vogelstein's claims designated as corresponding to the count encompass non-therapeutic methods such as diagnosis and prophylaxis to be unconvincing.

First, Lee urges that Dr. Harris's declaration (paras. 36 and 38) supports its position (LB, p. 17), that Vogelstein's claims are directed to diagnostic and prophylactic methods. However, in the referenced sections of the declaration, we find that Dr. Harris discusses another application; i.e., the '661 Application, not the involved '366 Application. With respect to the involved application, Dr. Harris acknowledges that it contains numerous changes including a teaching of a therapeutic use for a wild-type p53 suppressor gene (paras. 39, 42 and 43). Moreover, for the most part, we find that Dr. Harris's declaration is directed to the '366 specification and not to the claims. We do not find, and Lee has not pointed out, any statement in Dr. Harris declaration as to what one of ordinary skill in the art would understand Vogelstein's claims to encompass.

Second, we have reviewed the involved '366 Application and find that all the diagnostic methods described therein are DNA hybridization assays. That is, p53 DNA is hybridized to the DNA obtained from a lysate of the cell line in question. We find no methods of diagnosis in the involved '366 Application which comprise the step of "supplying wild-type p53 gene function to a cell which has lost said gene function by virtue of a mutation in a p53 gene." Moreover, it is not clear to us, and Lee does not explain, how supplying wild-type p53 to a cell which is known not to have said function in a manner such that the p53 gene is expressed acts as a diagnostic assay.

Third, the involved '366 Application is devoid of any teachings with respect to the use of p53 for prophylactic purposes. Lee has not provided any evidence that those of ordinary skill in the art would understand that the methods described in Vogelstein's claims designated as corresponding to the count encompass prophylactic treatments. Accordingly, we find Lee's position with respect to Vogelstein's claims encompassing prophylactic methods to be argument of counsel. As discussed above, we accord arguments of counsel little, or no, evidentiary weight. Meitzner v. Mindick, 549 F.2d at 782, 193 USPQ at 22.

¹⁵ Vogelstein's claims 12-22 read as follows:

12. The method of claim 11 wherein the tumor cell is a colorectal tumor cell.

Interference 104,066

methods recited in the referenced claims encompass a method of diagnosis when said claims describe introducing a wild-type p53 gene into a specific cancer cell. We point out that the claims are directed to a method of introducing a wild-type p53 tumor

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13. The method of claim 11 wherein the tumor cell is a breast tumor cell.
 14. The method of claim 11 wherein the tumor cell is a lung tumor cell.
 15. The method of claim 11 wherein the tumor cell is a bladder tumor cell.
 16. The method of claim 11 wherein the tumor cell is a liver tumor cell
 17. The method of claim 11 wherein the tumor cell is a leukemia cell.
 18. The method of claim 11 wherein the tumor cell is an osteosarcoma cell.
 19. The method of claim 11 wherein the tumor cell is a prostate tumor cell.
 20. The method of claim 11 wherein the tumor cell is a stomach tumor cell.
 21. The method of claim 11 wherein the tumor cell is a brain tumor cell.
 22. The method of claim 11 wherein the tumor cell is a mesenchyme tumor cell.

Vogelstein's claims 1 and 11 from which claims 12-22 depend read as follows:

1. A method of supplying wild-type p53 gene function to a cell which has lost said gene function by virtue of a mutation in a p53 gene, comprising:
 - introducing a wild-type p53 gene into a cell which has lost said gene function such that said gene is expressed in the cell.
11. The method of claim 1 wherein the cell which has lost wild-type p53 gene function is a tumor cell.

Interference 104,066

suppressor gene to a specific mammalian cancer cell such as a leukemia cell (claim 17), a prostate tumor cell (claim 19), etc. Since the cancer cell type recited in claims 12-22 is already known, we find that one of ordinary skill in the art would understand that these claims do not encompass methods of diagnosis. Nor does Lee explain how the referenced claims encompass a method of prophylaxis. Contrary to Lee's arguments, we find that the methods recited in the referenced claims are directed to the introduction of a wild-type p53 tumor suppressor into a pre-existing mammalian cancer cell; e.g., a leukemia cell, prostate tumor cell, etc. Thus, in our view, one of ordinary skill in the art would understand that Vogelstein's claims 12-22 do not encompass methods of prevention.

Not only do we find that Lee's arguments with respect to Vogelstein's claims encompassing methods other than therapeutic methods fail with respect to claims 12-22, but we point out that Lee's contention that Vogelstein's claims are all generic is equally unconvincing when Vogelstein's claims 12-22 are compared with Lee's claims 1-6. For example, it is not clear to us, and Lee has not explained how Vogelstein's claims 13, 14, 15, 17, 18 and 19 are generic with respect to its [Lee's] claim 6. In view of the foregoing, we find that one of ordinary skill in the art would understand that Vogelstein's claims 12-22 are directed to the therapeutic treatment of mammalian cancer cells in vivo or in vitro. Thus, at a minimum, we find that Lee's claims 1-6 and Vogelstein's claims 12-22 are directed to the same patentable invention.¹⁶ 37 C.F.R.

¹⁶ We recognize that Lee does not rely on the declaration of Dr. Harris to establish that each of its claims designated as corresponding to the count defines a

Interference 104,066

§ 1.601(n).

Accordingly, Lee's belated motion 1 is denied.

V.Judgment

In view of the foregoing, we find that Lee has not sustained its burden of showing why judgment should not be entered against it.

Accordingly, judgment is hereby awarded to BERT VOGELSTEIN, SUZANNE BAKER, ERIC R. FEARON, and JANICE M. NIGRO.

Judgment is entered against WEN-HWA LEE and PHANG-LANG CHEN.

BERT VOGELSTEIN, SUZANNE BAKER, ERIC R. FEARON, and JANICE M. NIGRO are entitled to a patent containing claims 1-3 and 8-23, designated as corresponding to the count; whereas,

separate patentable invention from each of Vogelstein's claims designated as corresponding to the count. Nevertheless, we point out that in his comparison of Lee's and Vogelstein's claims, Dr. Harris states his belief only to the extent that "Lee's claims 1-6 are not the same as or obvious in view of Vogelstein claims 1-3 and 8-10, in which p53 is simply supplied to a cell." Lee declaration exhibit 1, para. 44. Dr. Harris does not extend his comments to Vogelstein's claims 11-23.

Interference 104,066

WEN-HWA LEE and PHANG-LANG CHEN are not entitled to their patent containing claims 1-6, designated as corresponding to the count.

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Administrative Patent Judge)	
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Interference 104,066

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