

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte GEORGE NORBERT COX III,
CASEY CHRISTOPHER CASE, STEPHEN P. EISENBERG,
ERIC EDWARD JARVIS, and SHARON KAYE SPRATT

Appeal 2008-4125
Application 10/984,304
Technology Center 1600

Decided: September 26, 2008

Before TONI R. SCHEINER, DONALD E. ADAMS, and
FRANCISCO C. PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a method for modulating expression of a viral gene in a virally infected cell. The Examiner has rejected the claims as being indefinite, obvious, and for obviousness-type double patenting. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm the obviousness and obviousness-type double patenting rejections, but remand the case to the Examiner to reconsider the indefiniteness rejection.

STATEMENT OF THE CASE

Claims 70-72 are pending and on appeal (App. Br. 2). Claim 70 is representative and reads as follows:

70. A method for modulating expression of a viral gene in a virally infected cell, wherein the method comprises:

(a) expressing a zinc finger protein in the cell, wherein the zinc finger protein has been engineered to bind to a target site in a viral gene; and

(b) maintaining the cell under conditions in which the engineered zinc finger protein binds to a target site in the viral gene.

The Examiner applies the following documents in rejecting the claims:

Saiga et al. US 6,090,783 Jul. 18, 2000

E. H. Nasser et al., *Antiviral Activity of Influenza Virus M1 Zinc Finger Peptides*, 70 JOURNAL OF VIROLOGY 8639-8644 (December 1996).

The following rejections¹ are before us for review:

Claims 70-72 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention (Ans. 4).

Claims 70-72 stand rejected under 35 U.S.C. § 103(a) as being obvious in view of Saiga and Nasser (Ans. 4-6).

Claims 70-72 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 5, 7, and 12 of copending Application No. 11/148,794 (Ans. 6).

OBVIOUSNESS

ISSUE

The Examiner cites Saiga as disclosing “a human zinc finger protein termed TRP-1 that comprises a KRAB transcriptional repression domain in columns 20-24. Saiga et al. shows that control of gene expression in human T-cell leukemia virus type 1 (HTLV-1) is controlled by the promoter in the LTR region of HTLV-1 in column 2” (Ans. 4-5). The Examiner cites Example 8 of Saiga as demonstrating that expressing the zinc finger protein

¹ Appellants filed an after-final amendment on January 8, 2008, which the Examiner declined to enter (App. Br. 3-4). Appellants urge that the Examiner’s basis for denying entry was improper, and that the Board should consider the merits of the Examiner’s basis for non-entry of the amendment (*see id.* at 4-7). However, because the amendment was not entered, the claim proposed by Appellants was not subject to any ground of rejection, and is therefore not eligible for appeal. *See* 35 U.S.C. § 134(a) (claims must be twice rejected before appeal). Moreover, refusal to enter an amendment is a petitionable matter not decided by the Board. *See* MPEP § 1002.02(c); 37 C.F.R. §§ 1.127, 1.181. We therefore will not discuss the merits of the non-entered amendment.

TRP-1 in HeLa cells via a transfected expression vector inhibits transcription of cotransfected HTLV-1 genes (*id.* at 5).

The Examiner concedes that Saiga “does not show use of a zinc finger protein to repress expression of a viral gene in an infected cell,” and cites Nasser to meet that limitation (*id.*). Specifically, the Examiner cites Nasser as disclosing “a zinc finger peptide termed peptide 6 that is derived from the influenza virus M1 protein. Nasser et al. shows on page 8639 that peptide 6 was chemically synthesized, and comprises amino acids 148-166 of the wild type M1 protein” (*id.*).

The Examiner finds that Nasser discloses that peptide 6 represses infection of cultured cells by influenza virus, is 1000-fold more effective than the wild-type M1 protein in inhibiting influenza transcriptase, and that “[p]eptide 6 may provide a new approach to the design of antiviral agents effective against influenza virus and possibly other viruses” (*id.* at 5-6 (quoting Nasser 8644)). Based on these teachings, the Examiner concludes that one of ordinary skill in the art would have considered it obvious to modify Saiga’s method “to repress transcription of HTLV-1 viral genomes in infected cells because Nasser et al. shows that zinc finger proteins are capable of blocking viral infections and both Saiga et al. and Nasser et al. provide guidance to use zinc finger proteins as antiviral agents” (*id.* at 6).

Appellants contend that “the term ‘engineered to bind to a target site’ . . . clearly refers to a non-naturally occurring zinc finger protein that has been altered (*e.g.*, designed or selected) to bind to a particular target site” (App. Br. 10). Therefore, Appellants urge, “the pending claims are directed to [a] method of modulating viral infection using a non-naturally occurring zinc

finger protein including zinc finger DNA recognition domains that have been engineered to bind to a target site in a viral gene” (*id.*).

In contrast, Appellants argue, Saiga and Nasser “are completely silent” regarding zinc finger proteins “that have been engineered to bind to a target site as recited in the pending claims and, indeed, teach away from such proteins, clearly teaching that their proteins comprise non-engineered (naturally-occurring) DNA-binding domains so as to ensure the desired function by binding to the cognate target sites” (*id.*). Moreover, Appellants argue, the Examiner’s conclusion of obviousness is erroneous because both Saiga and Nasser use naturally occurring proteins to inhibit viral activity; therefore, modifying either reference to obtain the claimed non-naturally-occurring engineered proteins would destroy the intended function of the prior art proteins (*id.* at 10-12).

Appellants do not argue any of the claims separately. We select claim 70 as representative of the rejected claims. 37 C.F.R. § 41.37(c)(1)(vii).

The issue with respect to this rejection, then, is whether the Examiner has established a prima facie case that one of ordinary skill in the art would have considered it obvious, in view of Saiga and Nasser, to modulate the expression of a viral gene in a virally infected cell by expressing in the cell a zinc finger protein that has been engineered to bind to a target site in a viral gene, as recited in claim 70.

FINDINGS OF FACT (“FF”)

1. Saiga discloses “[a] protein (TRP-1) which binds to a transcriptional repressive region existing in the U5 region of human T-cell leukemia virus type I gene LTR . . . [and] includes a domain common to Kruppel-type

transcriptional repressive factors and five Kruppel-type zinc finger domains” (Saiga, col. 4, ll. 43-48).

2. Saiga discloses that the TRP-1 protein “specifically binds to U5RE existing in the U5 region of human T-cell leukemia virus type I gene LTR” (Saiga, col. 4, ll. 31-32).

3. Saiga discloses that the TRP-1 protein and its gene were obtained by expressing a cDNA library of the human acute lymphocytic leukemia cell line Molt-4, determining which proteins bound U5RE sequences, and obtaining the appropriate clone from the library (Saiga, col. 20, l. 10 through col. 22, l. 64 (Example 5)).

4. In order to test whether expression of TRP-1 inhibited transcription of HTLV-1 genes, Saiga discloses, in Example 8, introducing nucleic acid constructs into HeLa cells as follows:

An expression vector pEF-HA-TRP-1 obtained by engineering an EF-BOS vector so that a HA-TRP-1 fusion protein having the influenza HA [(hemagglutinin)] tag at the N-terminus of TRP-1 would be expressed, and a reporter plasmid TK-CAT in which HSV TK (a minimum promoter region) was linked upstream of the CAT (chloramphenicol acetyl transferase) gene or TK-3xU5RE-CAT in which three U5REs were inserted between the TK and CAT genes, were simultaneously introduced into HeLa cells. . . .

(Saiga, col. 23, l. 67, through col. 24, l. 8.)

5. Saiga discloses that “[t]he TK-3xU5RE-CAT includes U5REs, which are binding sequences for TRP-1, whereas TK-CAT includes no binding sequences” (Saiga, col. 24, ll. 9-11). Thus, in the experiment described in Example 8, “a pair consisting of pEF-HA-TRP-1 and TK-3xU5RE-CAT *or* a pair consisting of pEF-HA-TRP-1 and TK-CAT was introduced into HeLa

cells so as to analyze whether or not TRP-1 functions via U5RE” (*id.* at col. 24, ll. 37-41 (emphasis added)).

6. Saiga discloses that upon culturing the cells it was found that “the CAT activity by TK-3xU5RE-CAT was reduced by 35% in a concentration-dependent manner based on the concentration of the pEF-HA-TRP-1 plasmid, whereas no effect was observed for TK-CAT. Thus, it was indicated that TRP-1 has transcription repression activity via U5RE” (Saiga, col. 24, ll. 41-46).

7. Saiga discloses that the TRP-1 protein disclosed therein can be modified in a number of ways and still function in accordance with the disclosure:

A “sequence similar to” an amino acid sequence or a DNA sequence is not limited to any particular sequence, but is defined as such a sequence modified with substitutions, insertions, deletions, and the like known to those skilled in the art so that the function or activity of its encoded protein is substantially at the same level. Or, as long as the function or activity of the protein is substantially at the same level, it may contain chemical or biochemical modifications, or non-natural or derivatized amino acids or bases. For example, the above-mentioned TRP-1 protein preferably has similarity of about 50% or more, or homology of about 35% or more with the natural type. More preferably, the TRP-1 protein has similarity of about 70% or more, or homology of about 50% or more with the natural type. Still more preferably, the TRP-1 protein has similarity of about 80% or more, or homology of about 65% or more. Herein, “similarity” is defined as the rate (%) of identical amino acids within a similar sequence with respect to a reference sequence, where the amino acids are divided into the following five groups A to E and amino acids within each group are considered as identical; group A: Ala, Ser, Thr, Pro, and Gly; group B: Asn, Asp, Glu, and Gin; group C: His, Arg, and Lys; group D: Met, Leu, Ile, and Val; and group E: Phe,

Tyr, and Trp. The “homology” of an amino acid sequence is defined as the rate (%) of identical amino acids within a similar sequence with respect to a reference sequence, where only completely identical amino acids are considered as identical. *Furthermore, the “homology” of a DNA sequence is not limited to any particular sequence, but is defined as such a sequence modified with substitutions, insertions, deletions, and the like, known to those skilled in the art, especially so that the function of the DNA sequence, e.g., gene expression repressing function for HTLV-I, is substantially at the same level.*

(Saiga, col. 7, ll. 19-52 (emphases added).)

8. Nasser discloses that the influenza virus protein M1 “has been shown to inhibit influenza virus transcriptase” (Nasser 8639).
9. Nasser discloses the chemical synthesis of a peptide, termed peptide 6, composed of amino acid residues 148 to 166 of the M1 protein (Nasser 8639).
10. Nasser discloses that peptide 6 “represents a Zn^{2+} finger which includes a 7-residue ‘loop’ and a 4-residue ‘tail’ in addition to the 4 residues on either side of the loop involved in coordination of Zn^{2+} ” (Nasser 8639).
11. Nasser discloses that “[w]hen the peptide was introduced into tissue culture 5 min after viral challenge with A/PR/8/34, antiviral activity was seen at levels as low as 0.1 nM; on a molar basis, the peptide was shown to be 1,000- to 2,500-fold more effective than ribavirin or amantadine,” and that “[a]ntiviral activity was seen with addition of the peptide up to 1 h after viral infection” (Nasser 8639).
12. Nasser discloses that peptide 6 “was 1,000-fold more effective on a molar basis in transcriptase inhibition than was M1” (Nasser 8639).
13. Nasser discloses that “[i]n vivo studies have been performed with peptide 6, using a mouse influenza model; when administered intranasally,

peptide 6 was found to be as active as ribavirin against A/PR/8/34 (H1N1) and more active than ribavirin against A/Victoria/3/75 (H3N2)” (Nasser 8643-44).

14. Nasser discloses that peptide 6 “may provide a new approach to the design of antiviral agents effective against influenza virus and possibly other viruses” (Nasser 8644).

PRINCIPLES OF LAW

Recently addressing the question of obviousness, the Supreme Court reaffirmed that under the controlling inquiry, “the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved.” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007) (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966)).

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. “[The Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.”

In re Fritch, 972 F.2d 1260, 1265 (Fed. Cir. 1992) (citations omitted, bracketed material in original). Thus, as the Supreme Court pointed out in *KSR*, “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR*, 127 S. Ct. at 1741.

While holding that some rationale must be supplied for a conclusion of obviousness, the Court nonetheless rejected a “rigid approach” to the

obviousness question, and instead emphasized that “[t]hroughout this Court's engagement with the question of obviousness, our cases have set forth an expansive and flexible approach” *Id.* at 1739. The Court also rejected the use of “rigid and mandatory formulas” as being “incompatible with our precedents.” *Id.* at 1741; *see also* 1742-43 (“Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.”).

The Court thus reasoned that the analysis under 35 U.S.C. § 103 “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 1741. The Court further advised that “[a] person of ordinary skill is . . . a person of ordinary creativity, not an automaton.” *Id.* at 1742.

Regarding hindsight reasoning, the Court stated that “[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning. Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.” *Id.* at 1742-1743 (citations omitted).

ANALYSIS

Appellants’ arguments do not persuade us that the Examiner has failed to establish a *prima facie* case of obviousness with respect to claim 70. Rather, we agree with the Examiner that a person of ordinary skill in the art viewing Saiga and Nasser would have considered it obvious to modulate the expression of a viral gene in a virally infected cell by expressing in the cell a

zinc finger protein that has been engineered to bind to a target site in a viral gene.

Specifically, Saiga would have advised one of ordinary skill in the art that the TRP-1 protein was capable of specifically binding to an HTLV-1 repressor region (FF 1-3), and that, when the gene encoding the TRP-1 was expressed in a cell, the TRP-1 protein's binding capacity rendered it capable of inhibiting expression of viral genes (*see* FF 4-6). While Saiga does not appear to disclose expressing the TRP-1 protein in a virally infected cell, Nasser would have advised one of ordinary skill in the art that zinc finger proteins were capable of exerting antiviral effects in virally infected cells at dosages comparable to other antiviral agents (FF 10-14). Given these teachings, we agree with the Examiner that one of ordinary skill in the art would have reasonably inferred that it would be desirable to express the TRP-1 protein in virally infected cells so as to repress the viral genes.

With respect to the disputed limitation, claim 70 recites that “the zinc finger protein has been engineered to bind to a target site in a viral gene.” Appellants argue that this limitation “clearly refers to a non-naturally occurring zinc finger protein that has been altered (*e.g.*, designed or selected) to bind to a particular target site” (App. Br. 10). Because both references use a naturally-occurring zinc finger protein, Appellants argue, neither reference teaches or suggests this limitation (*id.*)

The Examiner responds that the limitation “engineered to bind to a target site in the viral gene” is essentially a product-by-process limitation on the protein, and therefore encompasses even wild-type (*i.e.* naturally-occurring) proteins because “[a]ny wild type sequence of a zinc finger protein could be arrived at by a process of modification of a related, but

different, zinc finger protein” (Ans. 8). Thus, the Examiner argues, “[t]he zinc finger protein shown in Saiga et al. meets all the functional limitations of the claimed subject matter, and therefore Saiga et al. shows the zinc finger used in the claimed processes” (*id.*).

The Examiner further contends that, even if claim 70 is limited to the use of non-naturally-occurring zinc finger proteins, the cited references meet that limitation because the protein expressed by Saiga is a TRP-1/HA fusion protein, and because Nasser uses a chemically synthesized peptide that is obtained from, and therefore different than, the wild-type influenza virus M1 protein (Ans. 8-9 (citing Saiga, columns 23-24 (*see* FF 4) and Nasser 8639 (*see* FF 9-13)). Appellants respond:

[T]he evidence of record establishes that the engineering to bind to a target site is accomplished by modification (design or selection) of the amino acid sequence of the recognition helix, not fusion to a heterologous domain. Accordingly, the claimed zinc finger proteins are themselves non-naturally occurring. By contrast, a zinc finger protein with an unaltered (non-engineered) DNA-binding binding domain is still a naturally occurring zinc finger protein even when incorporated into a (non-naturally occurring) fusion protein.

(Reply Br. 8.)

Even accepting the narrow definition advanced by Appellants, we are not persuaded that the cited references fail to suggest expressing a “zinc finger protein . . . engineered to bind to a target site in the viral gene” to modulate viral gene expression in a virally infected cell. Specifically, Saiga explicitly discloses that the HTLV-1-repressing TRP-1 protein can be modified in a number of ways and still function in accordance with the disclosure (FF 7).

Thus, Saiga discloses that the TRP-1 protein is not limited to any particular naturally-occurring sequence, but instead can be “modified with substitutions, insertions, deletions, and the like known to those skilled in the art so that the function or activity of its encoded protein is substantially at the same level” (Saiga, col. 7, ll. 21-24 (FF 7)). Saiga further discloses that the DNA sequence encoding the TRP-1 protein is not “limited to any particular sequence, but is defined as such a sequence modified with substitutions, insertions, deletions, and the like, known to those skilled in the art, especially so that the function of the DNA sequence, e.g., gene expression repressing function for HTLV-I, is substantially at the same level” (Saiga, col. 7, ll. 47-52 (FF 7)).

Thus, even if one accepts claim 70’s recitation “zinc finger protein . . . engineered to bind to a target site in the viral gene” to mean “a non-naturally occurring zinc finger protein that has been altered (*e.g.*, designed or selected) to bind to a particular target site” (App. Br. 10), Saiga explicitly discloses that its zinc finger protein can be altered with non-naturally occurring substitutions and deletions in the amino acid sequence, and still have its DNA-binding, gene-repressing functionality. We therefore do not agree that the cited references fail to provide any teaching or suggestion of a zinc finger protein that meets the definition advanced by Appellants.

While it is noted that Saiga contemplates non-naturally occurring modifications that result in substantially the same level of activity as the wild-type protein, claim 70 does not contain any limitation requiring the “engineering” to result in a higher activity than that present in the natural protein. Moreover, because Saiga explicitly contemplates non-naturally occurring modifications to its zinc finger protein, we are not persuaded that

one of ordinary skill in the art would find that making such modifications would destroy the protein's intended function.

Thus, we agree with the Examiner that one of ordinary skill in the art would have considered claim 70 *prima facie* obvious in view of Saiga and Nasser, even when the recitation “zinc finger protein . . . engineered to bind to a target site in the viral gene” is interpreted to mean “a non-naturally occurring zinc finger protein that has been altered (*e.g.*, designed or selected) to bind to a particular target site” (App. Br. 10), as urged by Appellants. We therefore affirm the Examiner's obviousness rejection of claim 70. Claims 71 and 72 fall with claim 70 because they were not argued separately. 37 C.F.R. § 41.37(c)(1)(vii).

OBVIOUSNESS-TYPE DOUBLE PATENTING

Claims 70-72 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 5, 7, and 12 of copending Application No. 11/148,794 (Ans. 6).

The Examiner contends that while the appealed claims and conflicting claims in the copending application are not identical, “they are not patentably distinct from each other because the copending claims of Application No. 11/148,794 are drawn to species of the instant method of modulation of viral gene expression with regards to the number and randomization of the zinc finger domains in the protein” (*id.*). Appellants present no substantive argument regarding this rejection, and instead “request that the obviousness-type double patenting rejection be held in abeyance pending indication of allowable claims in either application” (App. Br. 12).

In the absence of any argument that the Examiner's rejection is erroneous, we affirm the Examiner's provisional obviousness-type double patenting rejection of claims 70-72 over claims 5, 7, and 12 of copending Application No. 11/148,794.

INDEFINITENESS

Claims 70-72 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention (Ans. 4).

The Examiner states that "the phrase 'wherein the zinc finger protein has been engineered to bind to a target site in a viral gene'" is indefinite because the term "'engineered' is not defined in the specification and it is not clear how it limits the structure of the recited zinc finger protein" (*id.*).

Appellants respond that reference to the Specification shows that "the recitation 'wherein the zinc finger protein has been engineered to bind to a target site in a viral gene' . . . clearly refers to zinc finger proteins which have been altered in the recognition region helix by design or selection to bind to a selected target site" (App. Br. 8 (citing Spec. 10:17-21; Spec. 21: 10-20; Spec. 24:23-33; Spec. 74:13-16)).

We find this rejection unripe for appeal, and therefore remand the case to the Examiner to reconsider the merits of the indefiniteness rejection in light of the following discussion.

At the outset, we understand that before any decision on the merits of an appeal can be undertaken, the interpretation of the claims must be set. *See In re Steele*, 305 F.2d 859, 862 (CCPA 1962) ("[S]peculation as to the meaning of the terms employed and assumptions as to the scope of such claims" is legal error.); *see also In re Geerdes*, 491 F.2d 1260, 1262 (CCPA

1974) (“Before considering the rejections under 35 U.S.C. §[] 103 . . . we must first decide [what] the claims include within their scope.”).

However, regarding the appealed rejection under § 103, as discussed above, the cited references would have rendered the claimed subject matter obvious to a person of ordinary skill in the art regardless of whether we adopt the Examiner’s broad definition of “engineered,” or Appellants more limited definition.

Turning to the substance of the Examiner’ indefiniteness rejection, we first note that this application is a continuation of U.S. Patent Application Serial No. 09/897,844, filed July 2, 2001, which issued as U.S. Patent No. 6,979,539 B2, which is in turn a continuation of U.S. Patent Application Serial No. 09/229,037, filed January 12, 1999, which issued as U.S. Patent No. 6,534,261 B1. The claims of each of those issued patents contain a number of recitations regarding “engineered” zinc finger proteins.

Thus, despite having Specifications identical to that of the instant case, the Examiner has, in the instant case, concluded that the recitation “engineered” is indefinite -- a conclusion that appears to be directly inconsistent with the Examiner’s allowance of claims containing that term in the two parent cases. It is therefore unclear whether the Examiner has interpreted the language at issue in a consistent manner throughout the prosecution of these cases.

We therefore remand the case to the Examiner to ensure that the claims at issue herein are being interpreted in a manner consistent with the interpretation applied in the parent cases.

When the Examiner takes the case up for action the Examiner should take a step back, and review the prosecution histories in the parent cases to

ensure that the interpretation applied to the instant claims is consistent with the interpretation applied to the patented parent cases. The Examiner should also ensure that the position taken is consistent with the position one of ordinary skill in the art would take.

For example, the Examiner appears to have determined that one of ordinary skill in the art would consider “the term ‘engineering’ to describe a wide range of processes, including expression of a naturally occurring protein by recombinant DNA methods, and modifications of any portion of a gene or its expressed protein” (Ans. 7). Thus, despite having provided a definition for the term “engineering,” the Examiner nonetheless concludes that the term is indefinite. The Examiner is reminded that “breadth is not to be equated with indefiniteness.” *In re Miller*, 441 F.2d 689, 693 (CCPA 1971).

Also, even if the Examiner concedes that the Specification somehow limits the scope of the claims in the manner advanced by Appellants, the Examiner should consider whether, and why, that interpretation is indefinite.

If after reconsidering the rejection in light of the above discussion the Examiner should conclude that the rejection must be maintained, the Examiner should include in the rejection an explicit statement explaining why the indefiniteness rejection is consistent with the position taken in the parent cases.

SUMMARY

We affirm the Examiner’s rejection of claims 70-72 under 35 U.S.C. § 103(a) as obvious in view of Saiga and Nasser.

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We affirm the Examiner's provisional obviousness-type double patenting rejection of claims 70-72 over 5, 7, and 12 of copending Application No. 11/148,794.

However, because it is not clear that the Examiner has interpreted the claims consistently with the prosecution in the parent cases, we remand the case to the Examiner to reconsider the indefiniteness rejection under 35 U.S.C. § 112, second paragraph, in accordance with the discussion set forth herein.

Because we find that the case must be remanded to the Examiner, we hold the finality of our affirmances of the obviousness and obviousness-type double patenting rejections in abeyance until the proceedings on remand before the Examiner are concluded. 37 C.F.R. § 41.50(e).

AFFIRMED, REMANDED

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