

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JUDITH BAUMEISTER, MARIE-
PAULE LUCIENNE ARMANDA BOUCHE, CARLO BOUTTON,
MARIE-ANGE BUYSE, VEERLE SNOECK, STEPHANIE STAELENS,
BRUNO DOMBRECHT, PETER SCHOTTE,
CEDRIC JOZEF NÉOTÈRE VERVERKEN, GERALD BESTE,
GUY HERMANS, SOREN STEFFENSEN, ALEXANDER SZYROKI, and
TINNEKE DENAYER

Appeal 2026-000193
Application 17/409,019
Technology Center 1600

Before JEFFREY N. FREDMAN, ZHENYU YANG, and
RUSSELL E. CASS, *Administrative Patent Judges*.

YANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the
Examiner’s decision to reject claims 51 and 54–56. We have jurisdiction
under 35 U.S.C. § 6(b).

We AFFIRM.

¹ “Appellant” refers to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Ablynx N.V. and Sanofi. Appeal Br. 3.

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STATEMENT OF THE CASE

The Specification states that “the present invention provides methods and assays that easily allow the skilled person to predict whether an immunoglobulin single variable domain will or will not have a tendency to undergo a[]specific protein interference in an ADA [anti-drug antibody] assay.” Spec. 4:28–30. It “also describes a number of modifications that can be made to variable domains in order to reduce or essentially avoid such protein interference.” *Id.* at 5:4–5.

CLAIMED SUBJECT MATTER

Claim 51, reproduced below, illustrates the claimed subject matter:

51. A fusion protein comprising at least two immunoglobulin single variable domains (ISV), wherein one of the at least two ISVs is at the C-terminal end of the fusion protein, wherein the ISV at the C-terminal end of the fusion protein is a VHH, a humanized VHH, a VH, or a camelized VH that: does not bind to serum albumin; and has a C-terminal end of the sequence VTVSS(X)_n (SEQ ID NO: 34), in which n is 1, 2, 3, 4, or 5, and in which each X is chosen from the group consisting of alanine (A), glycine (G), valine (V), leucine (L), and isoleucine (I), except with the proviso that when n is 3, each X is chosen from the group consisting of glycine (G), valine (V), leucine (L), and isoleucine (I), wherein the fusion protein does not comprise an ISV that binds IL-23 or other interleukins.

Appeal Br. 51 (Claims App.).

REFERENCES

The Examiner relies on the following references to reject the claims:

Name	Reference	Date
The '364 patent	US 11,319,364 B2	May 3, 2022
The '401 patent	US 11,603,401 B2	Mar. 14, 2023

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Name	Reference	Date
The '307 patent	US 11,813,307 B2	Nov. 14, 2023
The '702 patent	US 11,932,702 B2	Mar. 19, 2024
The '797 patent	US 11,999,797 B2	June 4, 2024
The '308 patent	US 12,129,308 B2	Oct. 29, 2024
Silence	WO 2006/122825 A2	Nov. 23, 2006

REJECTIONS

The Examiner maintains the following rejections:²

1. Claims 51 and 54–56 are rejected on the ground of non-statutory double patenting (“NSDP”) as being unpatentable over claims 1 and 5–13 of the '364 patent. Non-Final Act. 4.
2. Claims 51 and 54–56 are rejected on the ground of NSDP as being unpatentable over claims 1–2, 5, 11, and 12 of the '401 patent. *Id.* at 5.
3. Claims 51 and 54–56 are rejected on the ground of NSDP as being unpatentable over claims 1, 16, 24, and 25 of the '702 patent. *Id.* at 7.
4. Claims 51 and 54–56 are rejected on the ground of NSDP as being unpatentable over claims 1 and 6–8 of the '307 patent. *Id.*
5. Claims 51, 54, and 55 are rejected on the ground of NSDP as being unpatentable over claims 1, 9, 12, 14, and 15 of the '308 patent. *Id.*
6. Claim 56 is rejected on the ground of NSDP as being unpatentable over claims 1, 9–12, 14, and 15 of the '308 patent in view of Silence. *Id.* at 8.
7. Claims 51, 54, and 55 are rejected on the ground of NSDP as being unpatentable over claims 1 and 7 of the '797 patent. *Id.* at 9.

² The Examiner also provisionally rejected claims 51 and 54–56 on the ground of NSDP as being unpatentable over Application No. 14/128,681 and Application No. 18/145,989. Non-Final Act. 5, 6. Those rejections are withdrawn. Ans. 4.

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8. Claims 56 is rejected on the ground of NSDP as being unpatentable over claims 1 and 7 of the '797 patent in view of Silence. *Id.*

OPINION

There are some undisputed facts in this case.

First, the instant application was filed on August 23, 2021. *See* Appeal Br. 1; Ans. 11. It is “a continuation of U.S. Application Serial No. 14/128,681, filed March 4, 2014, which is a national stage filing under 35 U.S.C. § 371 of international application PCT/EP2012/062251 [“the '251 application”], filed June 25, 2012.” Spec. 1.

Second, the patent term filing date of the instant application is June 25, 2012, the filing date of the '251 application. Appeal Br. 10; Ans. 15.

Third, the '251 application was published as WO 2012/175741 on December 27, 2012. Appeal Br. 10.

Fourth, the publication date of the '251 application predates the patent term filing date of each reference patent (i.e, the '364 patent, the '401 patent, the '702 patent, the '307 patent, the '308 patent, and the '797 patent). Appeal Br. 10, 25, 34, 38, 42–43, 47; Ans. 15–16.

Fifth, “[t]he instant application does not share a common priority claim with any of the reference patents applied.” Ans. 11.

Sixth, “the claims of the later-filed, now issued reference patents applied . . . were non-obvious over the instant disclosure and could not have been presented in the instant application.” Appeal Br. 17; Ans. 11.

Seventh, “the instant application and each of the reference patents have a common assignee and/or a common inventor.” Ans. 11; *see also id.*

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at 14–15 (“[W]hile there are inventors in common between the instant application and the reference patents, the inventorship is not identical to any of the reference patents. While there is a common applicant between the instant application and the reference patents, the applicant is not identical” for the ’364 patent, the ’401 patent, the ’307 patent, the ’308 patent, and the ’797 patent), 15 (the ’702 patent “has an applicant identical to the instant application”).

Qualification as NSDP References

The Examiner rejected the pending claims on the ground of NSDP over the ’364 patent, the ’401 patent, the ’702 patent, the ’307 patent, the ’308 patent, and the ’797 patent. Non-Final Act. 4–9. Appellant argues that none of the reference patents qualifies as an NSDP reference because each reference patent has a later patent term filing date compared to the instant application and expires later than any patent issuing from the instant application. Appeal Br. 8–14, 24–26, 33–35, 37–39, 41–44, 46–48.

Appellant relies on several Federal Circuit cases. Appeal Br. 8–12 (citing, affirming; *Allergan USA, Inc. v. MSN Lab ’ys Priv. Ltd.*, 111 F.4th 1358 (Fed. Cir. 2024); *In re Collect, LLC*, 81 F.4th 1216 (Fed. Cir. 2023); *Novartis AG v. Ezra Ventures LLC*, 909 F.3d 1367 (Fed. Cir. 2018); *Novartis Pharms. Corp. v. Breckenridge Pharm. Inc.*, 909 F.3d 1355 (Fed. Cir. 2018); *Gilead Sciences, Inc. v. Natco Pharma Ltd.*, 753 F.3d 1208 (Fed. Cir. 2014); *Acadia Pharms. Inc. v. Aurobindo Pharma Ltd.*, 706 F. Supp.3d 477 (D. Del. 2023), *aff’d*, 2025 WL 1618201 (Fed. Cir. June 9, 2025)).

Specifically, Appellant emphasizes that “the *fundamental purpose* of the NSDP doctrine ‘is to prevent patentees from obtaining a *second* patent on a patentably indistinct invention to effectively extend the life of a *first*

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patent to that subject matter.” Appeal Br. 8 (quoting *Allergan*, 111 F.4th at 1369). Appellant also argues that “[i]f a later (actually) filed patent with the same patent term filing date is ineligible as an NSDP Reference – as decided by the district court (and affirmed by the Federal Circuit) in Acadia – a patent having a **later patent term** filing date . . . must surely be ineligible as an NSDP Reference.” *Id.* at 10. Appellant further contends that “[a]n NSDP Reference must not have a later expiration date compared to the expiration date of a target claim.” *Id.* at 11.

We acknowledge the case law relied on by Appellant but find they have limited application in this case. *Ezra Ventures* addresses the interaction between patent term extension (“PTE”) under 35 U.S.C. § 156 and obviousness-type double patenting. 909 F.3d at 1373–74 (“[O]bviousness-type double patenting does not invalidate a validly obtained PTE.”). *Collect* grapples with the issue of how patent term adjustment (“PTA”) affects an obviousness-type double patenting (“ODP”) analysis. 81 F.4th at 1226–29 (“ODP for a patent that has received PTA, regardless whether or not a terminal disclaimer is required or has been filed, must be based on the expiration date of the patent after PTA has been added.”). In *Breckenridge*, the court encountered a “particular situation” involving “an earlier-filed, earlier-issued, pre-URAA patent that expires after the later-filed, later-issued, post-URAA patent due to a change in statutory patent term law.” 909 F.3d at 1366. The court used the pre-URAA patent’s issuance date as the reference point for its obviousness-type double patenting analysis. *Id.* The *Gilead* court answered “a narrow question: Can a patent that issues after but expires before another patent qualify as a double patenting reference for that other patent?” and “h[e]ld that an earlier-expiring patent can qualify as

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an obviousness-type double patenting reference for a later-expiring patent under the circumstances here.” 753 F.3d at 1211–12, 1217. And the *Allergan* court answered a different but equally narrow question: “can a first-filed, first-issued, later-expiring claim be invalidated by a later-filed, later-issued, earlier-expiring reference claim having a common priority date?” and “h[e]ld that it cannot.” 111 F.4th at 1366. *Acadia* “is entirely controlled by” *Allergan* and “appl[ied] *Allergan*’s holding that ‘a first-filed, first-issued, later-expiring claim cannot be invalidated by a later-filed, later-issued, earlier-expiring reference claim having a common priority date.’” 2025 WL 1618201 at *1 (quoting *Allergan*, 111 F.4th at 1369).

Despite Appellant’s skillful case synthesis, the facts that underpinned the Federal Circuit’s holdings in those cases are different from the facts in this case. A case that has a similar fact pattern to the instant case, but one not mentioned by Appellant, is *In re Fallaux*, 564 F.3d 1313, 1316 (Fed. Cir. 2009).

In *Fallaux*, the examiner rejected the pending claims in the Fallaux application for obviousness-type double patenting over certain claims of two reference patents. 564 F.3d at 1314–15. The Fallaux family of applications originated in a PCT application filed in June 1995. *Id.* at 1315. The first U.S. application in the family was filed in March 1997. *Id.* The Fallaux application was the fifth continuation application, claiming priority to the 1997 application. *Id.* The reference patents were filed in June 1998 and July 1999, respectively, and issued in July 2002 and January 2002, respectively. *Id.* Our predecessor, The Board of Patent Appeals and Interferences, affirmed the examiner’s rejection. *Id.* at 1314–15. And the Federal Circuit affirmed the Board’s decision. *Id.* at 1319.

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Like this case, the reference patents in *Fallaux* have later patent term filing dates compared to the application under examination. Because they are post-URAA patents, they would expire twenty years from the patent term filing dates. *See Allergan*, 111 F.4th at 1367 (explaining that post-URAA, “a patent’s term is now measured from its effective filing, or priority, date”). The application under examination was also filed post-URAA, and thus, any patent issued from the application would expire before the reference patents expired. Yet, the Federal Circuit upheld the Board’s decision, affirming the NSDP rejection of the pending claims over the reference patents with later patent term filing dates and later expiration dates because “there is a second justification for obviousness-type double patenting—harassment by multiple assignees.” *Fallaux*, 564 F.3d at 1318. As explained below, that justification remains relevant to the instant facts.

Fallaux remains good law. Indeed, the Federal Circuit cited *Fallaux* as recent as in *Allergan*. *See Allergan*, 111 F.4th at 1367 (citing *Fallaux*, 564 F.3d at 1318). Thus, under *Fallaux*, which is binding on us, we are not persuaded by Appellant’s argument that the reference patents do not qualify as NSDP references because they each have a later patent term filing date compared to the instant application and expires later than any patent issuing from the instant application.

Patentable Distinctiveness

In each NSDP rejection, the Examiner found that the rejected claims, though not identical to, are not patentably distinct from, those asserted claims in the reference patents. Non-Final Act. 4, 5, 7–9. The Examiner provided reasoned explanation as to why the claims are not patentably

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distinct. For example, for the rejection over the '401 patent, the Examiner found

issued claim 5 as it depends from claim 1 is directed to a polypeptide that comprises at least two ISV s that specifically bind AggreCAN, wherein the at least two ISVs are the same. As recited in issued claim 2, the ISV can be SEQ ID NO: 117. SEQ ID NO: 117 ends in VTVSSA (i.e. where n =1 and X is alanine is in the instant claims). Issued claims 11-12 provide pharmaceutical compositions suggesting those of instant claim 56.

Id. at 5–6; *see also id.* at 4–5, 7–9 (explaining why the rejected claims are not patentably distinct from the asserted claims of the '364 patent, the '702 patent, the '307 patent, the '308 patent, and the '797 patent, respectively).

Appellant does not address the Examiner's analyses on patentable distinctiveness. *See generally* Appeal Br. Appellant, however, argues that “the two-way test, not the one-way test, should be used to assess patentable distinctiveness” (*id.* at 16, 27, 36, 40, 44, 49) “in any situation where the reference has a later patent term filing date, regardless of the issue date” (*id.* at 17).

Appellant acknowledges that “M.P.E.P. § 804 suggests that ‘[a] two-way test is to be applied only when the applicant could not have filed the claims in a single application **and** the Office is solely responsible for any delays.’” Appeal Br. 17. Appellant asserts that “the second prong of this test (i.e., demonstrating that ‘the Office is solely responsible for any delays’) is only relevant pre-URAA, and it is unfair and unreasonable post-URAA – especially in view of the statutes and regulations related to PTA, which were codified after enactment of the URAA.” *Id.* According to Appellant, “the first [*sic*] prong of the two-way test is necessarily met

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post-URAA as the Office is solely responsible for any delay that would result in a timewise extension (*i.e.*, PTA).” *Id.* Thus, Appellant contends that “only the first prong of the two-way test needs to be met for the two-way test to apply (*i.e.*, demonstrating that the applicant could not have filed the claims in a single application), since the second prong is necessarily met.” *Id.*

Appellant argues that it “could not have filed the instant claims and the reference claims in the instant application,” and thus, met the first prong of the two-way test. *Id.* Ultimately, Appellant asserts that we should reverse the NSDP rejections under the two-way test because the claims of the reference patents were allowed over the disclosure of the instant application. *Id.*

We are not persuaded by Appellant’s arguments. “In determining double patenting, a one-way test is normally applied, in which the examiner asks whether the application claims are obvious over the patent claims.” *Fallaux*, 564 F.3d at 1316 (quotation marks omitted). “The two-way test is a narrow exception to the general rule of the one-way test. When applying the two-way test, the examiner also asks whether the patent claims are obvious over the application claims.” *Id.* (internal citation and quotation marks omitted). “The two-way test is only appropriate in the unusual circumstance where, *inter alia*, the United States Patent and Trademark Office (PTO) is *solely* responsible for the delay in causing the second-filed application to issue prior to the first.” *Id.* (quotation marks omitted).

Again, *Fallaux* is directly on point. In *Fallaux*, the examiner applied the one-way test to reject the Fallaux claims for NSDP. 564 F.3d at 1315. Dr. Fallaux argued that he was entitled to the two-way test before both the

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Board and the Federal Circuit. *Id.* at 1315–16. Both the Board and the Federal Circuit rejected that argument. *Id.* at 1315–16, 1319. In *Fallaux*, the specification of the priority application would have supported the rejected claims. *Id.* at 1317. “Nonetheless, Dr. Fallaux elected to prosecute other applications and delay filing the Fallaux application until six years after the [priority] application was filed. During this six year period, the [reference] patents were filed for and issued.” *Id.* In view of those facts, the Federal Circuit held that the PTO was not responsible for the delay and concluded that “[t]he Board correctly held that Dr. Fallaux cannot rely on the two-way test to overcome the rejection of the Fallaux claims for obviousness-type double patenting.” *Id.* at 1319.

Similarly in this case, the priority application (the ’251 application) was filed on June 25, 2012. Spec. 1. It entered the national stage with a U.S. utility application filed on March 4, 2014. *Id.* As the Examiner points out and Appellant does not dispute, “Appellant was not precluded from presenting and prosecuting the instant claims in the original application.” Ans. 11.

Both 2012 and 2014 application dates precede the patent term filing dates of all reference patents, the earliest of which is May 13, 2015 for the ’364 patent. Ans. 15. The instant application, however, was not filed until August 23, 2021, as a continuation of the 2014 national stage application. Spec. 1; Appeal Br. 1. In other words, Appellant chose to delay the filing of the instant application until more than nine years after

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the '251 application was filed. During this nine-year period, the reference patents were filed and prosecuted.³

Thus, under *Fallaux*, a precedent binding on us, we agree with the Examiner that “the instant application is not one in which the Office was solely responsible for any delays,” and “[a]s such, only a one-way determination of distinct[ive]ness is required.” Ans. 11; *see Fallaux*, 564 F.3d at 1318; *In re Hubbell*, 709 F.3d 1140, 1150 (Fed. Cir. 2013) (holding the two-way test not applicable where “the PTO was not solely responsible for the delay” because the applicant could have presented the claims in one of its earlier applications in the family).

We find persuasive the Examiner’s analyses of patentable distinctiveness and agree with the Examiner that, under the one-way test, the rejected claims are not patentably distinct from the asserted claims of all reference patents. *See* Non-Final Act. 4–9.

Equitable Considerations

Appellant argues that we should apply principles of equity to reverse the NSDP rejections. Appeal Br. 18–20.

We acknowledge Appellant’s argument that “[b]ut for the fact that there are common inventors (though distinct overall inventive entities), a common applicant, and a common assignee, the Examiner could not have issued the NSDP rejection over [each reference] Patent [because each reference] Patent is not prior art due to its later effective filing date.” Appeal Br. 23. But the Federal Circuit previously affirmed the Board’s decision

³ The '702 patent issued from an application filed on December 17, 2021, claiming priority to a provisional application filed on December 18, 2020. The '702 patent, codes 22, 60.

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affirming NSDP rejections under similar circumstances. *See Hubbell*, 709 F.3d at 1143 n.2 (“[T]hough the [reference] patent issued first, it is not available as prior art under 35 U.S.C. §§ 102 or 103 against the claims in the . . . application [under examination.]”).

Appellant contends that “allowing a patent (*e.g.*, the ’364 Patent) to qualify as an NSDP Reference to a patent (or patent application) having an earlier patent term filing date (*e.g.*, the instant application) would open avenues for gamesmanship by others seeking to invalidate patent claims (or to block the issuance of a patent application).” Appeal Brief 19–20. We are not persuaded by this argument.

As discussed above, “[s]ome commonality of inventorship or (deemed) ownership must exist between two or more patents or applications before consideration can be given to the issue of double patenting.” MPEP § 804. With common ownership, we are hard pressed to understand Appellant’s alleged “gamesmanship by others.” Where the NSDP is solely based on common inventorship, case law binding on us outweighs any equitable consideration. *See Fallaux*, 564 F.3d at 1315 (affirming NSDP rejection even though “[t]he reference patents for the double patenting rejection on appeal . . . are related to the Fallaux application only by way of a single common inventor”).

Appellant also contends that “[a]llowing a patent having a later patent term filing date (*e.g.*, the ’364 Patent) to qualify as an NSDP Reference to a patent (or patent application) having an earlier patent term filing date (*e.g.*, the instant application) would disincentivize patent owners from developing follow-on technologies.” Appeal Br. 20. This is because, Appellant continues, “patenting these later technologies . . . would have the potential to

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damage patent rights covering the earlier-developed generic technologies.”
Id. We are not persuaded by this argument either.

When facing an NSDP rejection over a patent, an applicant may timely file a terminal disclaimer to overcome the rejection. *Collect*, 81 F.4th at 1226. As Appellant repeatedly emphasizes, a reference patent having a later patent term filing date generally would have a later expiration date. In our view, a terminal disclaimer over the later-expiring patent (covering the later technology) would not cut short the term of the patent covering the earlier-developed technology. Appellant has not clearly articulated any other damage to patent rights covering the earlier-developed technologies.

Appellant further asserts that “double patenting issues would potentially restrict the patent owners’ ability to alienate their patent rights covering the later technologies (*e.g.*, because of common ownership requirements for terminal disclaimers).” Appeal Br. 20. Appellant is reminded that although the patent covering the later technology has issued, the instant application is still under examination. To overcome the NSDP rejection, Appellant is free to amend the pending claims so that they are patentably distinct from the issued claims. That would obviate the need to file a terminal disclaimer. To the extent Appellant is unwilling to do so, a timely filed terminal disclaimer complying with 37 C.F.R. § 1.321(c), including satisfying the common ownership requirement, is the quid pro quo for obtaining claims patentably indistinct from claims that are already issued.

Indeed, the common ownership requirement in a terminal disclaimer serves the purpose to prevent the possibility of multiple suits against an accused infringer by different assignees of patents claiming patentably

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indistinct variations of the same invention. *In re Van Ornum*, 686 F.2d 937, 944–48 (CCPA 1982). Appellant argues that *Van Ornum* and its progeny “were wrongly decided to the extent they may have relied on or otherwise endorsed an anti-harassment rationale as the sole basis for upholding an NSDP rejection.” Appeal Br. 21. The Board is not the proper venue to address this argument. Because Appellant points to no legal authority showing that *Van Ornum* has been overruled, *Van Ornum* remains binding on us.

Moreover, Appellant emphasizes that “the ***fundamental purpose*** of the NSDP doctrine ‘is to prevent patentees from obtaining a *second* patent on a patentably indistinct invention to effectively extend the life of a *first* patent to that subject matter.’” Appeal Br. 8 (quoting *Allergan*, 111 F.4th at 1369). But, as the Federal Circuit recognized, “the unjustified patent term extension justification for obviousness-type double patenting has limited force in . . . many double patenting rejections today, in no small part because of the change in the Patent Act from a patent term of seventeen years from issuance to a term of twenty years from filing.” *Fallaux*, 564 F.3d at 1318. The court confirmed this understanding in *Allergan*. 111 F.4th at 1367 (“[P]ost-URAA, there is little risk of an unjustified extension of term subject to ODP because all patents to an invention that share a priority date are expected to expire on the same day.”). Although the court “recognized that the doctrine of obviousness-type double patenting is less significant in post-URAA patent disputes,” it “also recognized its continued importance.” *Abbvie Inc. v. Mathilda & Terence Kennedy Inst. of Rheumatology Tr.*, 764 F.3d 1366, 1373 (Fed. Cir. 2014).

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In *Fallaux*, the Federal Circuit relied on a different “justification for obviousness-type double patenting—harassment by multiple assignees” in upholding the Board’s decision affirming the NSDP rejection. 564 F.3d at 1319. The court later applied the multiple-assignee-harassment rationale again. *See Hubbell*, 709 F.3d 1147–48 (“Because it is undisputed that an infringer of the [reference] patent would also infringe the . . . application [under examination], the multiple assignee harassment justification adopted in *Van Ornum* and reaffirmed in *Fallaux* applies here.”); *see also Collect*, 81 F.4th at 1230 (concluding “the Board did not err in determining that a risk of separate ownership existed and, even in the absence of separate ownership, that a terminal disclaimer would have been required to ensure common ownership” and stating “[w]hile [the patent owner] has not engaged in actions that resulted in divided ownership in the past, and it has promised that it will not do so in the future, neither fact suffices to abrogate the potential future risk of multiple owners or assignees”).

Under the Federal Circuit precedent, the Examiner did not err in stating that under the guidance under MPEP § 804.02(VI), “it is appropriate for an examiner to require a terminal disclaimer that will address the risk of separate ownership even where it is possible that there would be no unjustified timewise extension of the right to exclude.” Ans. 18. In this case, Appellant’s argument protesting “double patenting issues would potentially restrict the patent owners’ ability to alienate their patent rights” highlights the risk of separate ownership. *See* Appeal Br. 20.

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Ex Parte Baurin

Appellant argues that

[t]he material facts of the instant case are the same as those at issue in Ex Parte Baurin et al., Appeal 2024-002920 (P.T.A.B. Nov. 6, 2024), in which the Board held that the asserted references **were not** proper NSDP References and overturned the asserted NSDP rejections in view of these references.

Appeal Br. 14, 26, 35, 39, 44, 48.

Ex Parte Baurin is not currently a precedential Board decision and is therefore not binding on us. Moreover, as the Examiner points out, in that case,

a request for rehearing was made by the examiner under MPEP 1214.04 on 3 January 2025. Appellant responded on 29 January 2025. These materials are publicly available through the USPTO Patent Center. To date, the request for rehearing has not been granted or denied. No decision has been made on the merits of the requested rehearing.

Ans. 3. Thus, we do not consider the Board's decision in Appeal 2024-002920.

CONCLUSION

The Examiner's rejections are AFFIRMED.

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DECISION SUMMARY

The following table summarizes our decision:

Claim(s) Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
51, 54–56		Non-statutory Double Patenting US 11,319,364	51, 54–56	
51, 54–56		Non-statutory Double Patenting US 11,603,401	51, 54–56	
51, 54–56		Non-statutory Double Patenting US 11,932,702	51, 54–56	
51, 54–56		Non-statutory Double Patenting US 11,813,307	51, 54–56	
51, 54, 55		Non-statutory Double Patenting US 12,129,308	51, 54, 55	
56		Non-statutory Double Patenting US 12,129,308, Silence	56	
51, 54, 55		Non-statutory Double Patenting US 11,999,797	51, 54, 55	
56		Non-statutory Double Patenting US 11,999,797, Silence	56	
Overall Outcome			51, 54–56	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED