Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.
Chang, Administrative Patent Judge.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) involving claims to methods, systems, and computer program products for determining allergy predisposition, which have been rejected as obvious as well as provisionally rejected on the ground of nonstatutory obviousness-type double patenting. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

1 Appellants have not identified the Real Party in Interest in the Appeal Brief.
STATEMENT OF THE CASE

An allergy is typically an immune-mediated hypersensitivity to things in the environment. (Spec. ¶ 35.) An allergen is any substance that is recognized by the immune system and causes an allergic reaction. (Id. at ¶ 39.) The Specification explains that

[c]urrent allergy diagnosis involves tests for immunoglobulin E (IgE), the antibody that is responsible for the allergic reaction. . . . Other allergy diagnostic tests involve skin tests using the allergen to elicit a skin reaction in allergic subjects. . . .

One common IgE test is the RAST test (short for radioallergosorbent test). The RAST test, using a person’s extracted blood, detects the amount of IgE that reacts specifically with suspected or known allergens.

(Spec. ¶¶ 41–44.) According to the Specification, a problem with IgE and skin tests for food allergies is their relatively poor clinical specificity, where results positive for an allergy are common in sensitized subjects who are asymptomatic. (Spec. ¶¶ 42, 44, 46.) Further according to the Specification, improved allergy diagnosis is needed as a result of the problems with current tests. (Id. at ¶ 47.)

Claims 1, 2, 4, 19, 22, 23, 25, 40, 42, and 44–48 are on appeal.
Claims 1, 19, 25, and 40 are representative and reproduced below:

1. A computer-implemented method for determining allergy predisposition comprising:

   accepting an input providing innate determinant data from at least one sample;

   accessing a dataset to identify, based on the innate determinant data, at least one innate allergy determinant in the at least one sample;
accessing an allergy test dataset to identify, based on the at least one innate allergy determinant, allergy predisposition information; and

presenting a signal related to ingestion-dependent allergy predisposition information in response to accessing the allergy test dataset to identify, based on the at least one innate allergy determinant, the allergy predisposition information,

where each step is performed using a suitable microprocessor.

19. The method of claim 1 wherein presenting a signal related to ingestion-dependent allergy predisposition information in response to accessing the allergy test dataset to identify, based on the at least one innate allergy determinant, the allergy predisposition information comprises:

presenting a signal related to ingestion-dependent allergy predisposition information to a user at a user interface in response to accessing the allergy test dataset to identify, based on the at least one innate allergy determinant, the allergy predisposition information.

25. The system of claim 22 wherein the circuitry for accessing a dataset to identify, based on the innate determinant data, at least one innate allergy determinant in the at least one sample comprises:

circuitry for accessing a clinical trial dataset or an informal allergy study dataset to identify, based on the innate determinant data, at least one innate allergy determinant in the at least one sample.

40. The system of claim 22 wherein the circuitry for presenting a signal related to ingestion-dependent allergy predisposition information in response to the allergy predisposition information comprises:
circuitry for presenting a signal related to ingestion-dependent allergy predisposition information to a user at a user interface in response to accessing the allergy test dataset to identify, based on the at least one innate allergy determinant, the allergy predisposition information.

The Examiner rejects claims 1, 2, 4, 19, 22, 23, 25, 40, 42, and 44–48 under 35 U.S.C. § 103(a) as being unpatentable over Qiao and Liew. (Final Act. 3.)

The Examiner provisionally rejects claims 1, 2, 4, 19, 22, 23, 25, 40, 42, and 44–48 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over (a) claims 33, 67, 86, 88, 95, 107, 109, and 116–123 of copending Application No. 11/881,802; (b) claims 34, 68, 86, 88, 93, 105, 112, and 114–120 of copending Application No. 11/881,803; (c) claims 20, 41, 49, 51, 64, 66, 68, 81, and 83–89 of copending Application No. 11/891,669; (d) claims 21, 42, 50, 52, 68, 70, 72, and 88–95 of copending Application No. 11/893,106; (e) claims 48, 55, 62, 64, 71, 78, and 80–86 of copending Application No. 11/893,370; and (f) claims 48, 56, 64, 66, 68, 76, 84, 86, and 88–94 of copending Application No. 11/893,612. (Id. at 8–13.)

I.

Issue

The Examiner has rejected claims 1, 2, 4, 19, 22, 23, 25, 40, 42 and 44–48 under 35 U.S.C. § 103(a) as being unpatentable over Qiao and Liew. The Examiner finds that Qiao teaches a method that includes all the

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limitations of claim 1 other than the limitations relating to computer implementation. (Final Act. 3.) With respect to the limitation of “ingestion-dependent allergy predisposition information,” the Examiner notes that ampicillin and amoxicillin are administered orally to patients. (Id.) The Examiner further finds with respect to the dependent claims that Qiao teaches

accepting an input of genetic data from the sample; accessing a clinical trial dataset or informal allergy study to identify, based on the innate determinant data, at least one innate allergy determinant in the at least one sample; and presenting a signal related to ingestion dependent allergy predisposition information to a user at a user interface in response to accessing the allergy test dataset to identify, based on the at least one innate allergy determinant, the allergy predisposition.[.]

(Id. at 3–4 (citations omitted).)

The Examiner finds that, although Qiao “discusses analyzing data and creating statistical data,” it does not “explicitly teach using a computer program product.” (Id. at 4.) The Examiner finds, however, that Liew “teach[es] a general method of identifying biomarkers as well as diagnosing disease” and “discloses using a Scanalyzer, which would require a computer, circuitry, user interface, software, computer readable medium, recordable medium, and communications medium.” (Id. (citations omitted).)

The Examiner concludes that

[it] would have been obvious for one ordinary skill in the art at the time of the invention to implement the processes of [Qiao] on a computer and with computer programming. First, implementing a known function on a computer has been deemed obvious to one of ordinary skill in the art. In addition, one of ordinary skill in the art would have combined the computer system of Liew with the process of [Qiao] to gain the benefit of creating a system to determine if a patient has an allergy. [Qiao]
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has identified genetic polymorphisms which contribute to allergies to penicillins (abstract). Liew teaches that their system may be used to diagnose conditions via biomarkers (paragraph 0008). Thus, one of ordinary skill in the art would have been motivated to use the genetic polymorphisms discovered by [Qiao] as biomarkers in the system of Liew to determine if an individual has a penicillin allergy.

(Id. at 4–5.)

Appellants contend that the Examiner failed to establish a prima facie case of obviousness because (a) the Examiner merely “cites locations in the references in parentheses” and did not explain how the prior art references mapped onto the claims (Appeal Br. 34, 38), (b) the prior art references do not recite the actual language of the claims and no “objectively verifiable evidence” supports the Examiner’s characterization of the references as teaching these limitations (id. at 40–45, 47–52), (c) the rejection is based on impermissible hindsight, personal knowledge, and/or “official notice” of one or more facts (id. at 46, 52–53), and (d) there is no teaching to modify or combine Qiao and/or Liew to meet the recitations of claim 1 (id. at 53–63.)

Appellants do not separately argue claims 2, 4, 22, 23, 42 and 44–48. (Appeal Br. 63, 67–68.) We thus limit our discussion to claims 1, 19, 25, and 40. The issue with respect to this rejection is whether the evidence of record supports the Examiner’s conclusion that the cited references would have made obvious the inventions of claims 1, 19, 25, and 40 to a person of ordinary skill in the art.

Findings of Fact

1. The Specification states that “[a] sample . . . may be, for example, any measurement of an individual’s attribute, such as blood
containing DNA for genetic analysis, or blood or other tissue for gene expression analysis.” (Spec. ¶ 49.)

2. The Specification states that “[a]n innate determinant . . . may be, for example, a genetic sequence, including, for example, a single nucleotide polymorphism.” (Id. at ¶ 50.)

3. The Specification states that “innate allergy determinant” may refer to, for example, “genetic or other personal characteristics data associated with allergy that are essentially independent of environmental exposure and sensitization to allergens. For example, innate allergy [determinants] may include [a] gene polymorphism that is found . . . at a high frequency in patients with asthma.” (Id. at ¶ 131.)

4. The Specification states that “[a]llergy test data . . . may be, for example, a measure of sensitization to an allergen,” including a measure of total or specific IgE associated with the allergy; information relating to “sensitization to dietary, nutraceutical, or medical regimen”; or “[a]llergy skin tests, food challenge tests, and/or patch tests.” (Id. at ¶ 52; see also id. at ¶ 132.)

5. The Specification states:

Allergy predisposition information, including ingestion-dependent allergy predisposition information, may be, for example, a combination of innate allergy determinant and test allergy data together with associated symptoms. Such allergy predisposition information may be reported in, for example, allergy studies and/or allergy databases. Allergy predisposition information provides an improved marker for individuals and/or groups of people that experience defined levels of allergy.

(Id. at ¶ 53; see also id. at ¶ 133.) The Specification further states that “[i]ngestion-dependent allergy predisposition information . . . is allergy
predisposition information that relates to the association of innate allergy determinant and allergy test data with allergy symptoms resulting from the ingestion of at least one allergen.” (Id. at ¶ 133.)

6. Qiao states that “[n]umerous studies have suggested that both genetic and environmental influences are involved in the pathogenesis of allergic disease.” (Qiao 1326, abstract.)

7. Qiao discloses that “[a]llergy to β-lactam drugs is commonly reported, . . . especially penicillins allergy.” (Id. at 1326, left col.)

8. Qiao studies the “relationships between penicillins allergy, specific IgE antibodies and FceRIβ genetic polymorphism.” (Id. at 1327, left column.)

9. Qiao’s study involved “448 patients with penicillins allergy . . . and 101 control subjects. . . . Patient selection was based on a positive skin test or clinical symptoms after penicillins therapy.” (Id.)

10. Qiao teaches drawing blood samples from each subject for use in an in vitro test at the time of the clinical manifestations of allergy after penicillins therapy and/or at the time of a positive skin test. (Id.)

11. Qiao discloses that an “amino acid substitution (glutamic acid → glycine) at position 237 in the FceRIβ gene has been associated with total and specific IgE levels and with atopic asthma.” (Id.)

12. Qiao genotyped the FceRIβ polymorphism in 158 patients and 87 healthy subjects using genomic DNA isolated from peripheral blood and polymerase chain reaction. (Id. at 1327, right col.)

13. Qiao discloses that the “radioallergosorbent test (RAST) . . . with major antigenic determinants has been described previously in the
diagnosis of IgE-mediated penicillin allergy.” *(Id. at 1326, right col., reference citations omitted.)*

14. Qiao discloses that major and minor antigenic determinants “include[] . . . phenoxomethyl-penicilloyl-polylysine (PVO-PLL), ampicilloyl-polylysine (APO-PLL), . . . [and] benzylpenicillanyl-polylysine (BPA-PLL).” *(Id. at 1327, left col.)*

15. Qiao “found significant differences in E237G genotype between positive and negative BPA-, PVO- as well as APO-IgE patients. . . . Therefore, there were associations between genotype and allergic reactions to BPA, PVO, and APO antigens.” *(Id. at 1329, right col.)*

16. In particular, Qiao teaches that FcεRIβ E237G genotype was associated with the increase of BPA-, PVO, and APO-IgE and suggests that the E237G variant of the FcεRIβ gene is involved in the development of penicillin allergy through the process for the production of specific IgE antibodies. *(Id. at 1329–1330, bridging paragraph; 1330, Table 4; 1331, left column.)*

17. Qiao teaches that “[t]he positive rate of specific IgE antibodies in 448 patients was 58.26% (261)” and presents, “[a]ccording to allergic symptoms, the positive rates of eight kinds of antigenic determinants.” *(Id. at 1328, left column, Table 1.)*

18. Qiao teaches that positive reaction degree of skin test was significantly correlated with specific IgE antibodies, which suggests that RAST is a safe, effective approach to identifying patients at risk or those not at risk for allergic reaction to penicillin. *(Id. at 1330, right column.)*

19. Liew relates generally to “the identification of biomarkers of conditions including disease and non[-]disease conditions as well as
identifying compositions of biomarkers,” and further provides “a method of diagnosing disease, monitoring disease progression, and differentially diagnosing disease.” (Liew Abstract, ¶ 2, 10, 41.)

20. Liew discloses allergies as a disease for purposes of its invention. (Id. at ¶ 55–56.)

21. Liew discloses identifying biomarkers from a blood sample by measuring and comparing the level of one or more species of RNA transcripts or a synthetic nucleic acid copy thereof from individual(s) who have conditions of interest, who do not have said conditions, and/or who are healthy and normal. (Id. at ¶ 8, 42–43, 133–136.)

22. For example, Liew discloses drawing blood according to the methods of standard phlebotomy (id. at ¶ 88), preparing labeled (e.g., with fluorescent dyes) target nucleic acid samples from the blood samples (id. at ¶¶ 90, 99–104, 107), incubating the target samples with a nucleic acid array for purposes of hybridizing to the array (id. at ¶ 105), and scanning and analyzing the array using a GMS Scanner 418/428 and Scanalyzer/Jaguar software, followed by GeneSpring™ software analysis (id. at ¶ 106.)

23. Liew teaches that the presence of fluorescent dyes on the microarray “indicates hybridization of [] target nucleic acid[s] and a specific nucleic acid member on the microarray” while fluorescence intensities indicates “the expression level[s] of the specific nucleic acid member sequence in the target sample[s].” (Id. at ¶¶ 109, 111.) Liew further teaches that “[t]he ratios of . . . fluorescence intensities, after normalization, are indicative of differences of expression levels of the associated nucleic acid member sequence in . . . two samples for comparison” and used to identify differentially expressed genes. (Id. at ¶¶ 111–112.)
24. Liew discloses identifying differentially expressed genes using databases. \( (Id. \text{ at } \text{iii! 114–121.}) \)

25. Liew discloses that, in order to facilitate ready access, e.g. for comparison, review, recovery and/or modification, the expression profiles of patients with a condition or without a condition can be recorded in a database, whether in a relational database accessible by a computational device or other format . . . .

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\ldots [C]\text{omparison as between . . . an expression profile of a test individual suspected of having a condition of interest, with that of individuals with the condition of interest . . . so as to diagnose or prognose said test individual can occur via expression profiles generated concurrently or non concurrently. It would be understood that a database would be useful to generate said comparison.}
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As additional test samples from test patients are obtained, through clinical trials, further investigation, or the like, additional data can be determined in accordance with the methods disclosed herein and can likewise be added to a database to provide better reference data . . . .
\( (Id. \text{ at } \text{iii! 137–139.}) \)

26. Liew discloses using the identified biomarkers to determine whether an individual has a condition of interest. \( (See, \text{ e.g., } id. \text{ at } \text{iii! 45, 142–143.}) \) In particular, Liew teaches using the biomarkers to characterize an unknown sample “in accordance with ‘class prediction’ methods.” \( (Id.) \)

27. Liew discloses using its invention to identify biomarkers in whole blood samples that are specific to allergies. \( (Id. \text{ at } \text{iii! 327, claims 2, 4, 9, 10.}) \) Liew further discloses classification or class prediction of a test sample as having allergies or not having allergies using differentially
expressed genes, including by using commercially available software programs. (*Id.* at ¶ 331.)

**Principles of Law**

[T]he PTO carries its procedural burden of establishing a prima facie case when its rejection satisfies 35 U.S.C. § 132, in “notify[ing] the applicant ... [by] stating the reasons for [its] rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.”


 “[A]ll that is required of the office to meet its prima facie burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner as to meet the notice requirement of § 132.” *Id.* at 1363.

 “If a person of ordinary skill can implement a predictable variation [of a known work], § 103 likely bars its patentability.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

 “[T]he analysis 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 418.

**Analysis**

**Claim 1**

We agree with the Examiner that the combined disclosures of Qiao and Liew would have made obvious the method of claim 1.
Qiao discloses providing an innate determinant data from a sample (DNA from peripheral blood, FF12), identifying an innate allergy determinant based on the innate determinant data (FcεRIβ polymorphism associated with penicillin allergy, FF15, FF16), identifying allergy predisposition information based on the innate allergy determinant (FcεRIβ polymorphism) and allergy test dataset (RAST and skin test, FF13, FF14, FF17, FF18), and presenting a signal relating to ingestion-dependent allergy predisposition information (patient is or is not at risk for penicillin allergy symptoms, FF15–FF18).

Liew discloses a computer-based method for identifying biomarkers that are useful in diagnosing a condition (FF19–FF27).

We agree with the Examiner that it would have been obvious to a skilled artisan to combine Qiao’s disclosure of the relationships between specific IgE antibodies, FcεRIβ genetic polymorphism, and penicillins allergy with Liew’s computer-based system for diagnosing a condition based on biomarkers. As the Examiner found, “implementing a known function on a computer has been deemed obvious to one of ordinary skill in the art.” (Final Act. 4.) Furthermore, a skilled artisan would have had reason to combine the disclosures of Qiao and Liew, in order to create a computer-based system for determining whether a patient has an E237G polymorphism in the FcεRIβ gene and therefore is at increased risk of having a penicillin allergy. (Id. at 4–5.) See KSR Int’l Co. v. Teleflex Inc., 550 U.S. 398, 416 (2007) (“The combination of familiar elements according

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4 The Examiner finds and Appellants have not disputed that penicillin allergy is an ingestion dependent allergy. (Final Act. 3 (“[Ampicillin] and Amoxicillin are administered orally to patients.”)).
to known methods is likely to be obvious when it does no more than yield predictable results.”); *id.* at 421 (“When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp.”).

Appellants argue that the Examiner has not established a prima facie case of obviousness because the Examiner merely “cites location in the reference in parentheses” without explaining how the reference maps on the claims under the broadest reasonable interpretation (Appeal Br. 34–35, 38, 48, 51–52), because the references “fail[] to recite” certain limitations of claim 1 (*id.* at 35, 38, 40, 44–45, 48–51), and because the Examiner has not provided any “objectively verifiable evidence” to show that the references teach what is recited in the claim. (Appeal Br. 43–44, 49–51.)

We are not persuaded. “[A]ll that is required of the [PTO] to meet its prima facie burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner as to meet the notice requirement of § 132.” *In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011). Section 132, in turn, requires notice to the applicant sufficient to inform him of the reasons for rejection, “together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application.” 35 U.S.C. § 132.

Here, the Examiner notified Appellants that the claims were being rejected as unpatentable under 35 U.S.C. § 103(a) (Final Act. 3) and cited specific passages in Qiao and Liew, by page number and section headings, that form the basis for the conclusion of obviousness. (*id.* at 3–5, 6–7.) The
Examiner’s rejection satisfies the notice requirement of § 132, and therefore meets the burden of establishing a prima facie case of unpatentability. Cf. *Jung*, 637 F.3d at 1363 (“[T]he examiner’s discussion of the theory of invalidity . . . , the prior art basis for the rejection . . . , and the identification of where each limitation of the rejected claims is shown in the prior art reference by specific column and line number was more than sufficient to meet this burden.”).5

Appellants also argue that the Examiner’s rejection is based on impermissible hindsight, personal knowledge, and/or “official notice” of one or more facts. (Appeal Br. 46, 52.) This argument is not persuasive. We recognize that it is inappropriate to use hindsight to support the combination or modification of prior art to arrive at a later-claimed invention. Here, however, the Examiner has pointed to specific disclosures in Qiao and Liew that describe each limitation of Appellants’ claimed method and provided a basis for combining the references that is grounded in the disclosures of the references themselves. Thus, the Examiner has not relied on hindsight, personal knowledge, or official notice in making the rejection.

5 In its Reply Brief, Appellants request that the “Board read the Appeal Brief as consistent with the notice theory announced in *In re Jung* or allow Appellant(s) an opportunity to file a revised brief.” (Reply Br. 3.) Appellants further argue that, in any event, “Appellants [have] carried the burden of demonstrating that the claims are patentable over the technical material pinpoint-cited by Examiner.” (Id.) We decline to permit Appellants to file a revised brief. *Ex parte Nakashima*, 93 USPQ2d 1834, 1837 (BPAI 2010) (informative) (absent good cause arguments not timely presented in the Principal Brief will not be considered in a Reply Brief). For the reasons set forth in the rest of the opinion, we find that the Examiner has established a prima facie case of obviousness and that Appellants have not provided evidence that, when weighed with the evidence of obviousness, suffices to support a conclusion of non-obviousness.
We likewise find unpersuasive Appellants’ argument that “the USPTO has attempted to support the present rejection based on a ‘mere conclusory statement’.” (Appeal Br. 55.) The Examiner provided articulated reasoning for the conclusion of obviousness—i.e., that a skilled artisan would have been motivated to use the genetic polymorphisms discovered by Qiao as biomarkers in Liew’s computerized system to determine if an individual has a penicillin allergy—that is supported by the evidence of record. (Final Act. 4–5; FF15, FF16, FF19, FF25–27.) The Examiner’s reasoning is consistent with *Leapfrog Enterprises Inc. v. Fisher-Price Inc.*, 485 F.3d 1157 (Fed. Cir. 2007), where the court found that one of ordinary skill in the art would have found it obvious “to update [an old device] using modern electronic components in order to gain the commonly understood benefits of such adaptation, such as decreased size, increased reliability, simplified operation, and reduced cost.” *Id.* at 1163. Similarly, applying Liew’s computerization to Qiao’s process is simply “the adaptation of an old idea or invention . . . using newer technology that is commonly available and understood in the art.” *Id.*

Appellants also argue that combining Qiao and Liew as proposed by the Examiner would change Qiao’s principle of operation (Appeal Br. 55–58) and would render the technologies of Qiao unsatisfactory for their intended purposes. (*Id.* at 59–63.) Appellants appear to argue that combining Qiao and Liew would preclude Qiao from using a radioallergosorbent test (RAST) because Liew teaches a “method for the detection of gene transcripts in blood.” (*Id.* at 62, 57.)

These arguments are likewise unpersuasive. Qiao, like Liew, teaches using genomic information (FccRIβ polymorphism) as a biomarker, and
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Appellants have provided no persuasive evidence that information from Qiao’s radioallergosorbent test may not be incorporated into Liew’s database (FF25) without changing Qiao’s principle of operation or rendering Qiao unsatisfactory for identifying individuals with a penicillin allergy.

Claims 19, 25, and 40

With regard to claims 19, 25, and 40, Appellants first argue that the cited reference(s) do not disclose the elements of claim 1.6 (Appeal Br. 64, 69, 72.) This argument is not persuasive for the reasons already discussed. Appellants further argue that the reference(s) do not disclose the additional language of the claims relating to “presenting a signal related to ingestion-dependent allergy predisposition information to a user at a user interface” (claim 19), “circuitry for accessing a clinical trial dataset or an informal allergy study dataset to identify, based on the innate determinant data, at least one innate allergy determinant in the at least one sample” (claim 25), and “circuitry for presenting a signal related to ingestion-dependent allergy predisposition information to a user at a user interface in response to accessing the allergy test dataset to identify, based on the at least one innate allergy determinant, the allergy predisposition information” (claim 40). (Id. at 64–65, 69, 72.) We disagree because we find the user interface and circuitry limitations rendered obvious by the combination of Qiao’s data with Liew’s computer-based system. (Ans. 5–7, FF25 (central database with local or remote access; obtaining information from clinical trials)).

6 We note that claims 25 and 40 depend from claim 22 rather than claim 1. However, although claim 22 is a system claim rather than a method claim, it contains similar limitations as claim 1. (Appeal Br. 67.)
Conclusion of Law

The evidence of record supports the Examiner’s conclusion that Qiao and Liew render claims 1, 19, 25, and 40 obvious.

Claims 2, 4, 22, 23, and 42 and 44–48 have not been argued separately and therefore fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

II.

The Examiner has provisionally rejected claims 1, 2, 4, 19, 22, 23, 25, 40, 42, and 44–48 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over certain claims of copending Application Nos. 11/881,802, 11/881,803, 11/891,669, 11/893,106, 11/893,370, and 11/893,612. (Id. at 8–13.)

Copending Application Nos. 11/881,803 and 11/893,106 have been abandoned. We vacate the provisional double patenting rejections over these two applications as moot and summarily affirm the remaining provisional obviousness-type double patenting rejections. See Manual of Patent Examining Procedure § 1205.02 (“If a ground of rejection stated by the examiner is not addressed in the appellant’s brief, that ground of rejection will be summarily sustained by the Board.”); see also In re Berger, 279 F.3d 975, 984 (Fed. Cir. 2002) (affirming Board’s affirmance of an uncontested rejection and finding that the appellant had waived his right to contest the rejection by not presenting arguments as to error in the rejection on appeal to the Board).

SUMMARY

For the reasons above, we affirm the Examiner’s decision rejecting claims 1, 2, 4, 19, 22, 23, 25, 40, 42 and 44–48.
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).

AFFIRMED