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**Datasheet for the decision
of 3 May 2007**

Case Number: T 1165/03 - 3.3.08

Application Number: 88306613.6

Publication Number: 0301749

IPC: C12N 15/82

Language of the proceedings: EN

Title of invention:

Particle-mediated transformation of soybean plants and lines

Patentee:

Monsanto Company

Opponents:

Stephan Geene
Action Group on Erosion, Technology and Concentration
SYNGENTA PARTICIPATIONS AG
Pioneer Hi-Bred International Inc.

Headword:

Soybean transformation/MONSANTO

Relevant legal provisions:

EPC Art. 54

Keyword:

"- admissibility of opposition by opponent 1 - no"
"- main request - novelty - no"
"- reimbursement of appeal fee - yes"

Decisions cited:

G 0003/97, G 0003/99, T 0315/03

Catchword:

-



Case Number: T 1165/03 - 3.3.08

D E C I S I O N
of the Technical Board of Appeal 3.3.08
of 3 May 2007

Appellant I: Action Group on Erosion, Technology and
(Opponent 2) Concentration
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
28 August 2003 concerning maintenance of
European patent No. 0301749 in amended form.

Composition of the Board:

Chairman: L. Galligani
Members: F. Davison-Brunel
C. Rennie-Smith

Summary of Facts and Submissions

- I. European patent No. 0 301 749 with the title "Particle-mediated transformation of soybean plants and lines" was granted with 25 claims for all designated Contracting States, based on European patent application No. 88 306 613.6.

Granted claims 17 and 19 read as follows:

"17. A soybean seed which will yield upon cultivation a soybean plant comprising in its genome a foreign gene effective to cause the expression of a foreign gene product in the cells of the soybean plant."

19. A seed as claimed in claim 17 or 18 comprising in its genome an exogenous gene construction conditioning expression in the cells of a soybean plant of a marker gene product which is detectable by assay."

Claim 1 related to a method of making a genetically transformed soybean plant. Dependent claims 2 to 16 related to further features of the method of claim 1. Dependent claims 18, 20 and 21 related to further features of the seed of claim 17. Claims 22 and 23 related to regenerable soybean tissues and claims 24 and 25 related to methods of making a genetically transformed line of plants.

- II. Seven oppositions were filed against the grant of the patent. In the course of opposition proceedings, opponents 4 and 5 withdrew their oppositions and opponents 3 and 6 merged to become the present opponent 3. The patent was opposed under Article 100(a)

EPC, exclusions or exceptions to patentability (Articles 52(2)(a) and 53(a)(b) EPC), lack of novelty and inventive step (Articles 54 and 56 EPC), as well as under Article 100(b) EPC, insufficiency of disclosure (Article 83 EPC). The opposition division maintained the patent in amended form on the basis of the first auxiliary request then on file. Claim 17 of this request was identical to granted claim 17.

- III. The admissibility of the oppositions of opponents 1 and 2 was challenged by the patent proprietor but upheld by the opposition division. Both those opponents, but no other, sought to rely on Article 53(b) EPC as a ground of opposition but, in the case of opponent 2, that ground was held inadmissible. Accordingly, opponent 1 was the only opponent to rely on that ground in the first instance proceedings.
- IV. Appellant I (opponent 2) filed a notice of appeal, paid the appeal fee and submitted a statement of grounds of appeal. Appellant II (opponent 3) also filed a notice of appeal and submitted a statement of grounds of appeal. Since it was the successor by merger of two previous opponents (opponents 3 and 6), it paid two appeal fees as a precautionary measure and requested "official clarification of the situation" and reimbursement of one appeal fee.
- V. The respondent (patentee) filed a reply dated 17 May 2004 containing submissions in answer to appellants I and II' grounds of appeal, together with seven auxiliary claim requests, its main request being that the appeals be dismissed. It was also requested that the board consider whether the oppositions filed on

behalf of opponents 1 and 2, and the appeal of appellant I, were admissible. Appellant I answered the respondent's submissions concerning the admissibility of its opposition and appeal in a letter dated 21 July 2005.

VI. The board sent a communication pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal requesting, in the case of opponent 1, evidence conclusively proving his existence and, in the case of Appellant I, evidence of its legal status, in both cases to be filed within two months. The board also indicated its preliminary, non-binding opinion on substantive matters.

VII. Appellants I and II and the respondent filed further submissions in answer to this communication. Appellant 1 filed inter alia a further copy extract from the records of the Canadian Corporations Office. The respondent's submissions were accompanied by five new auxiliary requests in replacement of the auxiliary requests on file.

VIII. Opponent 1 did not answer the board's communication. However, on 28 April 2007, five days prior to the oral proceedings, the board received a one-page fax containing a form of authorisation appointing appellant I's representative to appear on his behalf also and a barely legible copy of both sides of what appeared to be a German identity card. At the oral proceedings, the original form and a clearer photocopy of a German identity card, apparently relating to the opponent, were filed.

- IX. Opponent 7 did not participate in the written appeal proceedings at any time and it was not present at the oral proceedings although duly summoned.
- X. At the oral proceedings, the issues of the admissibility of the oppositions by opponent 1 and appellant I, and of the appeal by appellant I were discussed first. After the main request (claim 17) had been found to lack novelty, the respondent withdrew the first auxiliary request. Sufficiency of disclosure was thereafter extensively discussed in relation to claim 1 of auxiliary request II then on file. After the board indicated that sufficiency of disclosure would not be acknowledged, the respondent withdrew auxiliary requests II to V.
- XI. The following document is mentioned in the present decision:

(B6) :SOYBEANS: Improvement, Production and Uses, Second Edition, J.R.Wilcox, editor, Number 16 in the series AGRONOMY, American Society of Agronomy, Inc., Crop Science Society of America, Inc., Soil Science Society of America, Inc., Publishers, 1987, pages 256 to 259.

- XII. The parties' arguments in writing and during oral proceedings, insofar as relevant to the present decision, may be summarised as follows:

Admissibility of oppositions - Respondent's arguments

The respondent substantially repeated its objections to the admissibility of the oppositions of opponents 1 and

2 made before the opposition division, where the respondent had relied on G 3/99 (OJ EPO 2002, 347 - see the minutes of the oral proceedings before the opposition division, page 1, and the decision under appeal, page 5, paragraphs 1.2 and 1.3).

As regards appellant I (opponent 2), the opposition had apparently been filed on behalf of a large number of persons. It was unknown whether it was a legal entity or just a loose group of persons. If it was a legal entity it was unclear how it was "transformed" from "Rural Advancement Foundation International" (its name when filing opposition) into the "Action Group on Erosion, Technology and Concentration" (its current name). The words "action group" were enough to suggest it was not a legal entity but just a loose association of persons.

As regards opponent 1, he had filed an unsigned notice of opposition which made the opposition inadmissible. Further, as the opposition file showed there had been difficulties in identifying and contacting the opponent. The respondent referred in particular to the communication of 15 May 1997 recording a telephone conversation, following the return marked "Unbekannt verzogen" (moved - address unknown) of a communication sent to the opponent, between a formalities officer and a Mrs Tippe of "Kein Patent auf Leben", a body mentioned in the notice of opposition as supporting the opposition and which had previously filed copy documents on behalf of the opponent. In that conversation Mrs Tippe said that the opponent's surname "Geene" stood for "Gen Ethisches Netzwerk" and that his first name "Stephan" was "fictive". At the oral

proceedings before the opposition division a person had been present but it appeared that the real opponent was "Gen Ethisches Netzwerk". It was unclear whether this was a natural or legal person or just a group of unidentified persons. If it was such a group, it could not validly file an opposition or appeal according to G 3/99.

The respondent also relied on the opponent's failure to reply to the board's communication, either within the two month time limit or at all. The submission at the oral proceedings of a copy identity card was not sufficient and in any event too late to allow the respondent to make any further inquiries.

Admissibility - Appellant I's arguments

The appellant referred to the fact that it had in its notice of opposition described itself as a body organised under the Canadian Corporations Act. As regards its change of name this had been the subject of a letter dated 12 March 2003 filed during the opposition proceedings informing the EPO of the change of name together with a copy of an extract from the records of the Canada Corporations Office to evidence that change. That letter had been further referred to in the appellant's letter of 21 July 2005 in the appeal proceedings. A further and more recent such copy extract was filed on 27 October 2006 in response to the board's communication.

Admissibility - Opponent 1's arguments

At the oral proceedings before the board, the representative of appellant I, who would have also represented opponent 1 if the board found his opposition admissible, submitted that, although filed regrettably late, an identity card was the best evidence of identity. In reply to questions from the board, the representative could not say he had met opponent 1, only that he had met the person supposed to be that opponent at the oral proceedings before the opposition division; he had not now been instructed in person by the opponent; and he did not in terms confirm that appellant I would not seek to rely on grounds of opposition only available to opponent 1 in the opposition proceedings.

Article 54 EPC; novelty - Main request, claim 17 - Appellants' arguments

Claim 17 related to soybean seeds regardless of the method by which they were obtained. It, thus, comprised all fertile genetically modified soybean seeds including those carrying full intact non-chimeric genes acquired from other soybean lines. Indeed, this possibility was mentioned on page 9, lines 36 to 38 of the patent in suit.

Document (B6) specifically referred on page 258 to a soybean cultivar identified as Bedford which had become resistant to cyst nematodes by acquiring the corresponding DNA from another line of soybean. This cultivar/seeds fell within the scope of claim 17 which thus lacked novelty.

The respondent had argued that the characterisation of the claimed soybean seed as comprising a **foreign** gene de facto excluded from the claim any seed comprising in its genome a gene from another soybean line because such a gene would not be regarded as foreign but as exogenous. This argument was not convincing. There was no evidence on file that, in the art, the term "foreign gene" would be coined uniquely for genes from different species. As for the patent per se, it was not correct that it defined "exogenous DNA" as comprising genes from other soybean lines or from other species, and "foreign DNA" as genes exclusively from other species. In fact, the two terms "exogenous" and "foreign" were used interchangeably irrespective of the origin of the genes to be introduced in the soybean plant as could be seen for example, on page 4, lines 39 to 43 and also in claim 19.

*Article 54 EPC; novelty - Main request, claim 17 -
Respondent's arguments*

Claim 17 was directed to a seed which comprised in its genome a "foreign" gene. The term "foreign gene" as used in the patent literature required that the gene stemmed from a different source than the plant species transformed with that gene. As a consequence, the soybean seed claimed as comprising a foreign gene would be understood as comprising a gene **not** derived from soybean.

Furthermore, the patent itself contained many passages which disclosed exogenous or foreign DNA as well as full intact or native DNA. It was clear from this

disclosure that an "exogenous DNA" may contain a native or a foreign sequence but it was never stated that a "foreign DNA" could be a native gene. In the passage on page 9, lines 34 to 36 the terms "exogenous" and "foreign" were presented as alternatives. It was readily apparent from the next sentence that the term "exogenous" was used to qualify the genes from **soybean lines** to be introduced into the claimed soybean seeds.

For these reasons, the disclosure in document (B6) of a soybean cultivar which had acquired the genetic determinant of being resistant to cyst nematodes from **another** soybean cell line (exogenous DNA) was not novelty-destroying for the subject-matter (seeds comprising foreign DNA) of claim 17.

The appellants' argument that the terms "foreign" and "exogenous" had been used interchangeably through the patent specification was not correct. The passage on page 4, lines 39 to 43 and claim 19 only taught that an exogenous DNA could be a foreign gene and not that a foreign gene could be a gene of the soybean species.

XIII. The appellants requested that the decision under appeal be set aside and that the patent be revoked. Appellant II further requested reimbursement of one appeal fee.

The respondent requested that the oppositions by opponents 1 and 2 be rejected as inadmissible and that the appeals be dismissed.

Reasons for the decision

Admissibility

1. Since both appeals fulfil all the requirements for admissibility, and since, for the reasons in 2-3 below, the board considers the opposition of opponent 2 (appellant I) to have been admissible and the respondent made no challenge to the admissibility of appellant II's appeal other than the admissibility of its opposition, the appeals are both admissible.

2. As regards the admissibility of the opposition of appellant I (opponent 2), the respondent's case can at best be called speculative but is in plain fact wrong. It is wrong to say the opposition was apparently filed on behalf of a large number of persons. The notice of opposition stated unambiguously (in its second paragraph):

"Opposition to the grant of this patent is hereby filed by Rural Advancement Foundation International (Canada) ("the Opponent"), a body organised under the Canada Corporations Act and situated at 71 Bank Street, Suite 504, Ottawa, Ontario, Canada K1P 5N2."

That statement provides the information that the opponent is a legal person, the jurisdiction of its incorporation and its address - perfectly adequate information for the patentee (now respondent) to verify and, if any doubts should be found, to contradict by evidence. However, the respondent has not produced the merest shred of evidence that this statement is incorrect. The respondent's allegation that it is

unknown whether the opponent is a legal entity or not is, in the absence of any evidence, valueless and incapable of gainsaying the opponent's clear statement that it is a legal entity (namely, a Canadian corporation). Further, on no less than three occasions the opponent (now appellant I) has filed letters about its change of company name, on two such occasions with copy extracts from publicly-available records in Canada and, in its reply to the board's communication, it also provided the internet address of the Canadian Corporations Office which the respondent could have used to verify appellant I's legal status. In the face of the appellant's evidence and in the absence of any evidence of its own to the contrary, it was futile for the respondent to maintain that the opponent might not be a legal entity.

3. It appears the respondent may have misguidedly allowed itself to be enticed into its untenable position by two matters. First, it can only have based the allegation that the opponent was in fact a large number of persons on the statement in the notice of opposition (immediately after that cited above) that a number of named organisations associate themselves with and support the opposition. However, support of an opponent by non-opponents, whether tacit or trumpeted, is of no relevance *per se* to admissibility (see T 315/03, OJ EPO 2006, 15, Reasons, paragraph 2.6 - that paragraph not published in OJ EPO). Second, if an opponent (whether an individual natural or legal person or a group of persons forming an acceptable "multiple opponent" - see G 3/99 OJ EPO 2002, 347) otherwise satisfies the requirements for admissibility, the name of the opponent, even if itself suggestive of a different or

even questionable status, has no relevance. While those with an active imagination might, in other contexts, think that the words "action group" suggest a more disparate organisation than a Canadian corporation, there is nothing in the choice of a name including those words to warrant the respondent's sweeping allegation that appellant I might thereby not be a legal entity.

4. In the case of opponent 1, the board cannot agree with the respondent that the absence of a signature on the notice of opposition as filed was fatal - the deficiency was remedied when the opposition division invited the opponent to do so under Rule 36(3) EPC and a signature was supplied. Whether that or any other signature of the opponent on file is genuine might, in the light of subsequent developments, be another matter but the file shows that a signed notice of opposition was ultimately filed within the required time.

5. In other respects however, the respondent had ample reasons to question the admissibility of the opposition of opponent 1, such reasons being very largely provided by the opponent himself or on his behalf. The board can characterise the evidence as falling into four broad categories. First, there is a cluster of "background" facts including the difficulties experienced by the opposition division in postal contact with the opponent, the several addresses used by him in the course of the proceedings (the fourth and latest such address being that on the copy identity card filed at the oral proceedings before the board), the occasional filings on his behalf by the organisations "Kein Patent auf Leben" and "Greenpeace", and the representation of him

at the first instance oral proceedings by Mrs Tippe and Dr Then of those organisations respectively. All those facts suggest that the opponent was nothing more than a nominal opponent acting as a façade for others, such as perhaps the five persons and bodies listed in the notice of opposition or the much larger number of member organisations of "Kein Patent auf Leben" on the list forming Annex 6 to that notice. But none of those facts, either alone or together, would in the board's view be bound to make the opposition inadmissible. Indeed, nominal opponents, or "men of straw" as they are often called, are *per se* permissible opponents in EPO opposition proceedings (see G 3/97 OJ EPO 1999, 245).

6. Second, there is the information given by Mrs Tippe to a formalities officer that the opponent's surname "Geene" stands for "Gen Ethisches Netzwerk" (an organisation appearing in the list of member organisations of "Kein Patent auf Leben", Annex 6 to opponent 1's notice of opposition) and that his first name is fictitious. That information raised a sufficiently large question over the role, indeed over the existence, of the person suggested to be opponent 1 that the board, in its communication of 29 August 2006, directed him to file conclusive evidence of his existence. His failure to comply with that direction, indeed his failure to reply to that communication at all, served only to fuel the suspicion about his existence.
7. Third, there is the identity card evidence. As regards the photocopy identity card which was very belatedly produced, at the oral proceedings before the board,

appellant I's representative (who would have represented opponent 1 also if the board found the opposition admissible) observed that an identity card or passport is the best evidence of identity - the board agrees but with the same proviso as applies to all evidence, namely that its value may be offset or even negated by other evidence. In the present case this was the second photocopy identity card to be filed: the previous one was sent to the opposition division with a letter of 27 August 2002 and, while it was even less legible than the copy faxed to the board on 28 April 2007, it was clearly not a copy of the same document as that shown in that fax or subsequently filed at the oral proceedings. The letter, which was signed in the name of opponent 1, said his name was only used accidentally in relation to the proceedings and that he was more often at his work address than at his home address shown on the identity card. However, on that earlier photocopy card on file, no address is legible. The work address in the letter is not that shown on the second photocopy identity card filed with the board, the address on which is, as mentioned in 5 above, a new and the latest of four addresses to be given for the opponent. The board concludes that the identity card evidence is inherently unreliable and inconclusive.

8. Fourth and last, both the respondent and appellant I referred to the presence at the first instance oral proceedings of a person who may, or may not, have been opponent 1. The minutes of those oral proceedings are of no assistance: under a heading "Present as or for the party or parties", they name each party followed by the persons present for that party. The name of

opponent 1 appears but that is no evidence that he was there let alone of his actual identity - the names of the parties are simply used to identify who the other persons named represent. The only information of any significance in relation to the opposition division oral proceedings is that one of the representatives of opponent 1 named as present was Mrs Tippe and there is no record of her having withdrawn or changed her previous information about opponent 1. That said, there may have been little or no opportunity for her to do so since it appears from the minutes (see page 1) that the opposition division dismissed the patent proprietor's submissions on admissibility without asking the opponents to speak on the issue.

9. It is clear from that assessment of the available evidence that the crucial item of evidence is Mrs Tippe's information. Without that information there would be little more than a history of postal difficulties; and without that there would have been no attempts to clarify the position which in turn led to the inconclusive identity card evidence. Mrs Tippe's information clearly suggests that the opponent does not in fact exist but that "Stephan Geene" is a fictitious name which has been used as a cipher to indicate an organisation referred to in the notice of opposition. It is a remarkable statement made by a person who is, even if only informally, a representative of the party in question and who would only be likely to have such information by virtue of being that representative. Accordingly it has to be given some considerable weight as evidence. The board also notes that Mrs Tippe attended the oral proceedings before the board as a person accompanying the representative of opponent 1,

that in the discussion of this issue the parties were well aware of the significance of Mrs Tippe's information, and that none the less nothing was said which affected it. Thus on the available evidence, the board can only conclude that in relation to opponent 1 the available information is not adequate enough to find his existence **as the named opponent** more likely than not. For the avoidance of doubt, the board adds that it is **not** deciding that there is or is not in existence a person called Stephan Geene. For these reasons the board decides that the opposition by opponent 1 is not admissible.

Article 54 EPC; novelty of claim 17

10. Claim 17 is directed to a soybean seed which will yield a soybean plant comprising in its genome a foreign gene effective to cause expression of a foreign gene product in the cells of the soybean plant. The patent in suit provides a definition of the DNA to be acquired by the claimed soybean seeds. On page 9, lines 36 to 38, it is, thus, mentioned:

*"The DNA sequence can be chimeric, in the sense of being constructed from DNA sequences from different organisms but **full intact non chimeric genes from other plant species or lines of the same species** may also be used."* (Emphasis added)

Accordingly, it is unambiguous that the claimed invention relates, in particular, to seeds having acquired DNA from a line of the soybean species other than the one used to generate the seeds.

11. Document (B6) discloses on page 258 a soybean plant identified as "Bedford" which is derived from the soybean line "Forrest" and which has become resistant to cyst nematodes by having acquired the corresponding genetic determinant from another soybean line, PI 88788. Taking into consideration the above mentioned definition, it is concluded that the Bedford cultivar/seeds fall within the scope of claim 1 and that, consequently, document (B6) is novelty-destroying to the subject-matter of claim 17. Admittedly, the Bedford line was obtained by traditional cross-breeding. Yet, this has no bearing on novelty insofar as what is claimed is the product *per se* and not the process for isolating it.

12. The respondent argued that in the patent literature, the term "foreign gene" as used in claim 17 was exclusively meant to define genes from other species than the one to be transformed, thus implying that the teachings of document (B6) were not relevant to novelty. Yet, no evidence was provided in this respect. The board is not convinced that this is necessarily how the skilled person would understand the term "foreign gene"; for example, it could very well be taken as meaning "a DNA which was not previously present in the genome of the soybean plant".

13. The lack of relevance of document (B6) to the novelty issue was also argued on the basis of the informational content of the patent in suit *per se*. According to the respondent, a clear difference was made therein between "exogenous" and "foreign" DNA, the first term covering DNA from soybean lines **and** from other species, whereas the second one was to be understood as solely referring

to DNA from other species. The passage on page 4, lines 39 to 44:

"The present invention also provides ... a regenerable soybean tissue including soybean cells which comprise in the genome an exogenous gene characterised in that at least some of the soybean cells carry small particles of biologically inert material which were used to carry the foreign gene into the cells."

and claim 19 (section I, *supra*) which, in the light of the examples, relates, in particular to exogenous genes which do not belong to the soybean species - were, in particular, cited in this respect. The board can agree that, on this basis, the term "exogenous DNA" can be seen to have the meaning that it comprises foreign genes or genes from other species than soybean. It does not, however, give any indication as to the exact meaning of the term "foreign" *per se*.

14. The sentence on page 9 which immediately precedes the sentence cited in paragraph 10 *supra* reads as follows:

"The DNA for use within the present invention will normally be constructed in a vector appropriate for expresison [sic] of the exogenous or foreign gene product in the cells of soybean..."

By comparing both sentences, the respondent came to the conclusion that they established a compulsory relationship between "exogenous" and "lines of the same species" on the one hand, and "foreign" and "full ... genes of other plant species", on the other hand. In the board's judgment, these two sentences establish no

- other relationship than that the DNA for use within the invention should be cloned in a vector suitable for its expression. In particular, there are no reasons to infer from comparing the first sentence ("... a vector appropriate for expresison [sic] of the exogenous **or** foreign gene product") and the second one ("full... genes from other plant species **or** lines of the same species") that "exogenous" is to be understood as comprising "lines of the same species" and "foreign" is to be equated with "genes of different plant species". If anything, and as a matter of symmetry of language, it is the reverse conclusion which would be reached.
15. In the course of the written procedure, further passages in the description were cited where the terms "exogenous DNA or genes, foreign DNA or genes, native DNA or genes" appeared. These passages need not be reviewed in detail insofar as the terms are used in another context (e.g. page 3, line 13, describing the background art, page 4, lines 46 to 48 describing steps of a transformation method) which is not useful in ascertaining the definitions of respectively "foreign" and "exogenous" DNA.
16. In the board's judgement, the patent in suit does not provide a clear distinction between the terms "exogenous" and "foreign", if only because they are not defined. A fortiori, if they were intended to have different meanings, it is not at all clear what the difference would be. Comparing them is, thus, not conducive to concluding that the term "foreign DNA" would not comprise all of the DNAs which are cited on page 9, lines 36 to 38 as being DNAs for use in the invention (point 1, supra).

17. For these reasons, the board thus concludes that the skilled person would not interpret the term "foreign gene" as used in claim 17 as exclusively depicting genes from other species than soybean. Therefore, as already mentioned in point 2, supra, the soybean Bedford cultivar/seeds which are disclosed in document (B6) as being resistant to cyst nematodes by having acquired the corresponding genetic determinant from another line of soybean is novelty-destroying to the subject-matter of claim 17.
18. The main (and only) request is, thus, rejected for failing to fulfil the requirements of Article 54 EPC.

Reimbursement of appeal fee

19. Appellant II's status as a company which succeeded to the interests of both the original Opponents 3 and 6 was already recognised by the EPO during the opposition proceedings. The Board can see no reason why, once only one party exists in place of two and is recognised as such by the EPO, more than one fee need subsequently be paid by that party. In its communication the board expressed a provisional opinion to this effect and invited submissions by the parties on this issue but none were filed, nor were any views against reimbursement of one fee expressed at the oral proceedings.
20. Since two or more legal or natural persons may together form one "multiple opponent" and pay only one opposition fee or, if entitled to appeal, one appeal fee (see G 3/99 OJ EPO 2002, 347), it would be wholly

illogical to require a single natural or legal person to pay more than one fee simply because that person is the successor to two (or more) original opponents. Accordingly, the Board sees no reason not to order the reimbursement of one of the two appeal fees paid by appellant II.

Order:

For these reasons, it is decided that:

1. The opposition by opponent 1 is inadmissible.
2. The opposition by opponent 2 is admissible.
3. The decision under appeal is set aside.
4. The patent is revoked.
5. One appeal fee paid by appellant II is to be reimbursed.

The Registrar:

The Chairman:

A. Wolinski

L. Galligani