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**Datasheet for the decision
of 14 January 2010**

Case Number: T 2197/08 - 3.3.02

Application Number: 02771857.6

Publication Number: 1320355

IPC: A61K 9/00

Language of the proceedings: EN

Title of invention:

System for delivering a tobramycin formulation

Patentee:

Novartis Vaccines and Diagnostics, Inc.

Opponent:

PARI Pharma GmbH

Headword:

Delivery of tobramycin/NOVARTIS VACCINES

Relevant legal provisions:

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Relevant legal provisions (EPC 1973):

EPC Art. 113(2)

Keyword:

"Basis of decision - patent proprietor (no longer approves of the text of the patent)"

Decisions cited:

T 0073/84

Catchword:

-



Case Number: T 2197/08 - 3.3.02

DECISION
of the Technical Board of Appeal 3.3.02
of 14 January 2010

Appellant: PARI Pharma GmbH
(Opponent) Moosstraße 3
D-82319 Starnberg (DE)

Representative: Beckmann, Claus
Kraus & Weisert
Patent- und Rechtsanwälte
Thomas-Wimmer-Ring 15
D-80539 München (DE)

Respondent: Novartis Vaccines and Diagnostics, Inc.
(Patent Proprietor) 4560 Horton Street
Emeryville, CA 94608 (US)

Representative: Hallybone, Huw George
Carpmaels & Ransford
43-45 Bloomsbury Square
London WC1A 2RA (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 19 September 2008
rejecting the opposition filed against European
patent No. 1320355 pursuant to Article 101(2)
EPC.

Composition of the Board:

Chairman: U. Oswald
Members: H. Kellner
T. Karamanli

Summary of Facts and Submissions

- I. By the decision announced orally at the end of the oral proceedings on 22 August 2008, and issued in writing on 19 September 2008, the opposition division rejected the opposition filed against the European patent No. 1 320 355.
- II. The appellant (opponent) lodged an appeal against this decision on 18 November 2008, with simultaneous payment of the prescribed fee, and requested the revocation of the patent as well as reimbursement of the appeal fee. Oral proceedings were also requested. With a letter of 28 January 2009 the appellant filed written statements setting out the grounds of appeal.
- III. In its letter dated 21 December 2009, the respondent (patentee) withdrew its requests and approval of the text of the patent as granted and declared that it was believed that, in these circumstances, the patent was to be revoked on formal grounds.
- IV. In its communication dated 11 January 2010 and faxed to the parties on the same day, the board informed the parties that it intended to set aside the decision under appeal and to revoke the patent in view of the respondent's letter of 21 December 2009. The board further indicated that, with regard to the request for reimbursement of the appeal fee, it appeared that there was no procedural violation in the first instance proceedings justifying the reimbursement and that therefore the issue of the reimbursement of the appeal fee had to be discussed and the date for oral proceedings had to be maintained.

V. With a letter dated 11 January 2010 the respondent informed the board that it would not be attending the oral proceedings.

VI. On 14 January 2010, oral proceedings took place before the board in the absence of the respondent.

During the oral proceedings, the appellant withdrew its request for reimbursement of the appeal fee.

VII. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.

VIII. The respondent (patentee) withdrew in writing its requests and approval of the text of the European patent as granted.

Reasons for the Decision

1. The appeal is admissible.
2. Article 113(2) EPC 1973 states that the European Patent Office confines its considerations in proceedings to the text of the European patent application or the European patent "submitted to it, or agreed, by the applicant for or proprietor of the patent".
3. In the present case, as indicated in section III above, the appellant (patent proprietor) made it clear that it withdrew its requests and that it no longer approved the text of the patent as granted.

4. It thus follows that there is no longer a text on the basis of which the board of appeal could consider compliance with the requirements of the EPC. Therefore, the patent must be revoked without any further substantive examination (see e.g. T 73/84, OJ EPO 1985, 241).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

N. Maslin

U. Oswald