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**Datasheet for the decision
of 23 January 2013**

Case Number: T 1614/09 - 3.2.02

Application Number: 96919392.9

Publication Number: 830158

IPC: A61M 1/36

Language of the proceedings: EN

Title of invention:

Extracorporeal blood processing apparatus and method for operating such an apparatus

Patent Proprietor:

Terumo BCT, Inc.

Opponent:

Fresenius Medical Care Deutschland GmbH

Headword:

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Relevant legal provisions:

EPC Art. 113(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"Withdrawal of all requests for amendment and of the approval of the text of the patent as granted - revocation"

Decisions cited:

T 0073/84

Catchword:

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Case Number: T 1614/09 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 23 January 2013

Appellant I:
(Patent Proprietor)

Terumo BCT, Inc.
10811 West Collins Avenue
Lakewood, CO 80215 (US)

Representative:

Roberts, Mark Peter
J A Kemp
14 South Square
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London WC1R 5JJ (GB)

Appellant II:
(Opponent)

Fresenius Medical Care Deutschland GmbH
Else-Kröner-Strasse 1
D-61352 Bad Homburg (DE)

Representative:

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Lorenz - Seidler - Gossel
Widenmayerstrasse 23
D-80538 München (DE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted
5 June 2009 concerning maintenance of European
patent No. 830158 in amended form.**

Composition of the Board:

Chairman: E. Dufrasne
Members: M. Stern
P. L. P. Weber

Summary of Facts and Submissions

- I. Appeals were lodged by the opponent and by the patent proprietor against the interlocutory decision of the Opposition Division, posted 5 June 2009, concerning the maintenance of European patent No. 0 830 158 in amended form.
- II. The patent proprietor (appellant I) filed a notice of appeal on 4 August 2009, paying the appeal fee the same day. A statement setting out the grounds of appeal was filed on 14 October 2009 together with amended sets of claims in the form of twenty-seven auxiliary requests.
- III. The opponent (appellant II) filed a notice of appeal on 15 July 2009, paying the appeal fee the same day. A statement setting out the grounds of appeal was filed on 12 October 2009.

The opponent requested that the decision under appeal be set aside and that the patent be revoked.

- IV. In a letter dated 21 December 2012, the patent proprietor withdrew all requests for amendment and withdrew its approval of the text of the patent as granted. The patent proprietor confirmed that it would not be submitting an amended text and stated its understanding that the patent would therefore now be revoked in accordance with the provisions referenced in the EPO Guidelines for Examination at D-VIII-1.2.5. It was also confirmed that the patent proprietor would not be attending oral proceedings.

Reasons for the Decision

1. Whilst the admissibility of the appeal by the patent proprietor has been questioned during the appeal proceedings (and remains undecided), the appeal by the opponent is undisputedly admissible.

2. The Board cannot decide whether the appeal is wholly or partially justified. The patent proprietor withdrew all requests for amendment and withdrew its approval of the text of the patent as granted during the appeal proceedings, confirming that it would not be submitting an amended text. There is therefore no text of the patent on the basis of which the Board can consider the appeal: under Article 113(2) EPC the European Patent Office must consider the European patent only in the text submitted to it, or agreed by, the proprietor of the patent.

Since the text of the patent is at the disposition of the patent proprietor, a patent cannot be maintained against the proprietor's will. If the patent proprietor withdraws its approval of the text of the patent as granted and declares that it will not be submitting an amended text, it may be inferred that it wishes to prevent any text whatever of the patent from being maintained.

Under these circumstances, and according to established jurisprudence (in particular T 73/84, OJ 1985, 241; cf "Case Law of the Boards of Appeal", 6th Edition 2010, VII.C.6.1.2), the patent is to be revoked.

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:

D. Hampe

E. Dufrasne