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# Datasheet for the decision of 12 January 2016

**Case Number:** T 0290/12 - 3.3.10

**Application Number:** 03023272.2

**Publication Number:** 1384452

**IPC:** A61F2/30, A61F2/28

**Language of the proceedings:** EN

**Title of invention:**
Method for providing a kit for autologous transplantation

**Patent Proprietor:**
Verigen AG

**Opponent:**
Aesculap AG

**Headword:**
Method for providing a kit/VERIGEN

**Relevant legal provisions:**
EPC Art. 123(3)

**Keyword:**
Amendments - broadening of claim (yes)

**Decisions cited:**

**Catchword:**

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**Beschwerdekammern**
**Boards of Appeal**
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**Case Number: T 0290/12 - 3.3.10**

# D E C I S I O N
# of Technical Board of Appeal 3.3.10
# of 12 January 2016

| | |
|---|---|
| **Appellant II:** (Patent Proprietor) | Verigen AG<br>Siemensstrasse 5b<br>63263 Neu-Isenburg (DE) |
| **Representative:** | Cooley (UK) LLP<br>Dashwood<br>69 Old Broad Street<br>London EC2M 1QS (GB) |
| **Appellant I:** (Opponent) | Aesculap AG<br>Am Aesculap-Platz<br>78532 Tuttlingen/Donau (DE) |
| **Representative:** | Gerspacher, Christoph<br>Ruff, Wilhelm, Beier, Dauster & Partner<br>Kronenstraße 30<br>70174 Stuttgart (DE) |
| **Decision under appeal:** | **Interlocutory decision of the Opposition Division of the European Patent Office posted on 1 December 2011 concerning maintenance of the European Patent No. 1384452 in amended form.** |

**Composition of the Board:**

| | |
|---|---|
| **Chairman** | P. Gryczka |
| **Members:** | J.-C. Schmid |
| | T. Bokor |

## Summary of Facts and Submissions

I. Appellant I (Opponent) and Appellant II (Proprietor of the patent) both lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent No. 1 384 452 in an amended form according to the then pending auxiliary request 2. Claim 1 of the patent as granted reads as follows.

"1. An *in vitro* method for adhering chondrocytes to a cell-free component, comprising the steps of: providing a cell-free component and a cell culture medium comprising chondrocytes; and incubating said cell-free component with the cell culture medium dispersed over a porous surface of the cell-free component,

characterized in that
said cell-free component comprises a bilayer membrane having a porous surface and a dense surface, and

the chondrocytes adheres to said porous surface"

II. The Appellant I requested in its notice of opposition the revocation of the patent in suit in its entirety on the grounds of lack of novelty and inventive step (Article 100(a) EPC), insufficient disclosure of the invention (Article 100(b) EPC) and extension of the subject-matter of the patent in suit beyond both the content of the application as filed and the parent application as filed (Article 100(c) EPC).

III. The Opposition Division held that the amendments made to the patent according to the then pending main and auxiliary request 1 extended the subject-matter of the patent-in-suit beyond the content of the parent

application (Article 76(1) EPC), while the claims according to the then pending auxiliary request 2 met the requirement of the EPC.

IV. With a letter dated 11 April 2012, Appellant II filed a new main request and auxiliary requests 1 to 3, auxiliary request 3 being identical to the auxiliary request 2 maintained by the Opposition Division.

Claim 1 of the main request reads as follows:

"1. An *in* vitro method for adhering chondrocytes to a cell-free component, comprising the steps of: providing a cell-free component and a cell culture medium comprising chondrocytes; and incubating said cell-free component with the cell culture medium dispersed over a porous surface of the cell-free component,

characterized in that
said cell-free component is a pure and resorbable bilayer membrane made of type I and type II collagen having a porous surface and a dense surface, and

the chondrocytes adhere to the edge of said bilayer membrane"

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the bilayer membrane is obtained by sterilizing by $\gamma$-irradiation.

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the bilayer membrane is obtained by extracting the collagen from pigs, purifying to avoid antigenic reactions, without

performing further cross linking, by sterilizing by ϒ-irradiation.

Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that the bilayer membrane is obtained by extracting the collagen from pigs, purifying to avoid antigenic reactions, without performing further cross linking or chemical treatment, by sterilizing by ϒ-irradiation.

V. With a communication dated 8 July 2015 accompanying the summons for oral proceedings to be held on 12 January 2016, the appellants' attention was drawn to the fact that claim 1 of each request on file was directed to a method for adhering chondrocytes to the edge of a bilayer membrane, whereas the claims of the patent as granted were directed to a method for adhering chondrocytes to the porous surface of a bilayer membrane and, therefore, the scope of protection of claim 1 of each request appeared to have shifted vis-à-vis that of the claims as granted, contrary to the requirements of Article 123(3) EPC.

VI. In reply to the summons for oral proceedings, Appellant II announced with a letter dated 16 December 2015 that it would not be represented at the oral proceedings. It did not take position on the issue of Article 123(3) EPC.

VII. In the oral proceedings, the Appellant I argued that the edges of a bilayer membrane were not necessary porous. Thus, claim 1 of the main request comprised methods where chondrocytes only adhered to non-porous surfaces of a bilayer membrane, thus covering methods not covered by the claims as granted. That applied also for the methods of claim 1 of auxiliary requests 1 to

3. Amending "the chondrocytes adheres to said porous surface" into "the chondrocytes adheres to the edge of said bilayer membrane" in claim 1 of each request resulted therefore in an extension of the scope of protection of the patent as granted, contrary to the provision of Article 123(3) EPC.

VIII. Appellant I requested that the decision under appeal be set aside and that the patent be revoked.

The Appellant II (Proprietor of the patent) requested that the decision under appeal be set aside and a patent be granted on the basis of the claims of the main request, or subsidiarily, of the basis of auxiliary requests 1 to 3, all requests filed with the letter dated 11 April 2012.

IX. At the end of the oral proceedings held on 12 January 2016 in the absence of Appellant II, the decision of the Board was announced.

## Reasons for the Decision

1. The appeals are admissible.

*Main request and auxiliary requests 1 to 3*

*2. Amendments (Article 123(3) EPC)*

Article 123(3) EPC provides that during opposition proceedings the claims of a patent as granted may not be amended in such a way as to extend the protection conferred upon grant.

Claim 1 as granted is directed to a method for adhering chondrocytes to a cell-free component comprising a bilayer membrane having a porous surface and a dense surface. The claimed method requires *inter alia* that the chondrocytes adhere to said porous surface.

Claim 1 of the main and auxiliary request 1 to 3 requires that the chondrocytes adhere to the edge of the bilayer membrane and no longer requires that the chondrocytes adhere to the porous surface of the bilayer membrane.

Accordingly, the amendments carried out in claim 1 of the main and auxiliary requests 1 to 3 result in including methods where the chondrocytes do not adhere to the porous surface of the bilayer membrane, thus, claims 1 of these requests cover methods not covered by the claims as granted.

3. The Board comes therefore to the conclusion that claim 1 of the main request and auxiliary requests 1 to 3 has been amended in such a way as to extend the protection conferred (Article 123(3) EPC). Hence, none of these requests is allowable.

**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:

C. Rodríguez Rodríguez P. Gryczka

Decision electronically authenticated