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Datasheet for the decision of 15 May 2017

Case Number: T 0293/12 - 3.3.01

Application Number: 04766068.3

Publication Number: 1638582

IPC: A61K31/715, A61P17/02

Language of the proceedings: EN

Title of invention:
USE OF HYALURONIC ACID FOR PREPARING COMPOSITIONS FOR TREATING RECURRENT ORAL CAVITY APHTHAS

Patent Proprietor:
Bioplax Limited

Opponents:
FADIM S.r.l.
Strehlke, Ingo K.

Headword:
Hyaluronic acid in the treatment of recurrent aphthae/BIOPLAX

Relevant legal provisions:
EPC Art. 123(2), 83, 100(b), 111(1)
RPBA Art. 12, 13

Keyword:
Amendments - allowable (yes)
Sufficiency of disclosure - (yes)
Remittal to the department of first instance

Decisions cited:
T 0144/83, T 0081/84, T 0024/91, T 0912/08, T 1652/06

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

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Case Number: T 0293/12 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 15 May 2017

Appellant: (Patent Proprietor)	Bioplax Limited 6th Floor 32 Ludgate Hill London EC4M 7DR (GB)
Representative:	Gervasi, Gemma Notarbartolo & Gervasi S.p.A. Corso di Porta Vittoria 9 20122 Milano (IT)
Respondent 1: (Opponent 1)	FADIM S.r.l. Via Fiume 25 20033 Desio (MI) (IT)
Representative:	Modiano, Micaela Nadia Modiano & Partners Via Meravigli, 16 20123 Milano (IT)
Respondent 2: (Opponent 2)	Strehlke, Ingo K. Dipl.-Chem.Dr.rer.nat. c/o Patentanwälte Gesthuysen,von Rohr&Eggert Huyssenallee 100 45128 Essen (DE)
Representative:	Von Rohr Patentanwälte Partnerschaft mbB Rüttenscheider Straße 62 45130 Essen (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 30 January 2012 revoking European patent No. 1638582 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	A. Lindner
Members:	M. Pregetter
	M. Blasi

Summary of Facts and Submissions

I. European patent No. 1 638 582 is based on European patent application No. 04766068.3, filed as an international application published as WO2005/000321.

II. Independent claim 1 of the patent as granted reads as follows:

"1. Use of hyaluronic acid for preparing compositions for the treatment of recurrent oral aphtous ulcers, wherein hyaluronic acid is the sole active ingredient and the average molecular weight of hyaluronic acid is comprised between 800,000 and 4,000,000."

III. The following documents, cited during the opposition and appeal proceedings, are referred to below:

(1) Moseley et al.: "Hyaluronan and its potential role in periodontal healing", Dental Update - Periodontology, vol. 29, No. 3, April 2002

(6) Nolan: "The efficacy of topical hyaluronic acid in the management of recurrent aphthous ulceration", J Oral Pathol Med, vol. 35: 461-5, 2006

(33) Wikipedia article, *http://en.wikipedia.org/wiki/2,4-Dichlorobenzyl_alcohol*, catchword: "2,4-Dichlorobenzyl alcohol"

(51) Opinion by Professor Robin Seymour

IV. The present appeal lies from the decision of the opposition division to revoke the patent under Article 101(2) EPC.

The opposition division held that the ground for

opposition under Article 100(b) EPC did not prejudice the maintenance of the patent as granted. An *obiter dictum* concerning the grounds for opposition under Article 100(a) and Article 100(c) EPC was included in the opposition decision. Article 123(2) EPC was found to be complied with, whereas the subject-matter of claim 1 was considered to be neither novel nor inventive. The grounds for opposition addressed in the *obiter dictum* had not been dealt with during the oral proceedings that had taken place before the opposition division.

V. The proprietor (appellant) lodged an appeal against the decision of the opposition division. In a letter dated 15 February 2012, respondent 2 requested dismissal of the appeal and, on an auxiliary basis, the appointment of oral proceedings, stated that it would await the statement of grounds of appeal and announced its intention to submit a reply in due course. However, respondent 2 filed no reply within four months of notification of the grounds of appeal.

VI. In the communication accompanying the summons to oral proceedings dated 16 February 2017 the parties were informed that, in addition to the issue of sufficiency of disclosure, the board intended to come to a decision on compliance with Article 123(2) EPC. It indicated that, in respect of the other grounds for opposition, it intended to remit the case to the opposition division, as requested by the appellant, if the decision were to be set aside.

VII. By letter of 13 April 2017, respondent 2, for the first time in appeal proceedings, filed submissions on the substance of the case. Said letter contained, *inter alia*, various lines of argument concerning sufficiency

of disclosure.

VIII. Oral proceedings were held before the board on 15 May 2017 in the absence of respondent 1. At the end of the oral proceedings, the chairman announced the present decision.

IX. The appellant's arguments, insofar as they are relevant to the present decision, may be summarised as follows:

Matters concerning admission

The appellant requested that the contents of respondent 2's letter dated 13 April 2007 should not be taken into consideration. This letter was late-filed and set out lines of argument raised by respondent 2 for the first time. Respondent 2 had not filed a reply to the grounds of appeal and consequently had also not set out any line of argument. Therefore the letter could not even be seen as providing any amendment to a party's case. The arguments contained in the letter should be disregarded.

Document (51) had been filed with the letter setting out the grounds for appeal. It provided help in interpreting the data of document (6), which had been misconstrued in the impugned decision. Document (51) contained no new data.

Amendments

Claim 1 of the patent as granted was a combination of claims 1 and 6 of the application as filed in combination with page 1, line 4, of the description as filed. In this passage the application acted as its own dictionary. Furthermore, the description as filed

described, on page 4, a clinical study that clearly related to recurrent oral aphthous ulceration. The terms "ulcers" and "ulceration" were interchangeable.

Sufficiency of disclosure

The appellant stressed that the invention could be reproduced. The clinical study starting on page 4 related to recurrent oral aphthous ulceration (ROAU), clearly established the group of patients to be treated and used hyaluronic acid as the sole active ingredient. It was clear that dichlorobenzyl alcohol acted as a preservative for the composition and not in the treatment of ROAU, since it was present both in the hyaluronic acid gel and the placebo composition. The results showed an influence on one specific episode. Episodes could not be predicted and, as ROAU was an idiopathic disease, no metabolic link could be made. Alleviating the severity of one specific episode represented a treatment of the pathology. The results of section D on page 8 of the application as filed were thus sufficient proof of the suitability of hyaluronic acid for treating ROAU. The data of document (6) and the explanation provided in document (51) also clearly showed the treatment of the specific pathology of ROAU.

X. Respondent 1's arguments, insofar as they are relevant to the present decision, may be summarised as follows:

Amendments

Respondent 1 did not raise any objections in connection with the ground for opposition under Article 100(c) EPC.

Sufficiency of disclosure

Respondent 1 endorsed the argumentation of the impugned decision. It argued that the treatment of ROAU necessarily involved the treatment of the recurrent nature of episodes of aphthae. Such a treatment had not been shown. Document (6) merely confirmed the known effect of hyaluronic acid on mouth ulcers manifested during one single episode of ROAU.

XI. Respondent 2's arguments, insofar as they are relevant to the present decision, may be summarised as follows:

Matters concerning admission

Concerning the letter dated 13 April 2017, respondent 2 pointed to the fact that this letter was not a new document, but merely provided new arguments. The ground for opposition under Article 100(b) EPC, including the line of argument relating to the parameter of the molecular weight of the hyaluronic acid, had been in the proceedings from the beginning of the opposition proceedings. The issue concerning the parameter of the molecular weight was of *prima facie* relevance and was prejudicial to the maintenance of the patent.

Document (51) was to be considered late-filed, as it was filed only at the appeal stage. As sufficiency of disclosure had to be proven at the effective date, the content of document (51) could not be relevant.

Amendments

Claim 1 of the patent as granted contained several amendments, the introduction of the molecular weight range of the hyaluronic acid, a change in the definition of the disease and the omission of the term

"oral cavity". Throughout the description of the application as filed the term "oral cavity" was used to define the aphthae to be treated. The application contained no general disclosure of the term "recurrent aphthous ulcers". The term "recurrent oral aphthous ulcerations" was referred to only in the section relating to the state of the art and in the study described on page 4. Said study, representing a single example, could not be generalised since it had a very specific treatment regimen and did not disclose the molecular weight of the hyaluronic acid. The section relating to the state of the art could not be used as a basis for amendments of the subject-matter of the invention. Furthermore, the terms "ulcers", i.e. the existing sore, and "ulceration", i.e. the process by which ulcers were formed, could not be freely interchanged.

Sufficiency of disclosure

The patent in suit did not disclose the claimed subject-matter sufficiently. Respondent 2 stated that there was no proof in the application as filed that a treatment of recurrent aphthae took place. Such a treatment necessarily concerned recurrency, and not only the treatment of a single episode. The results of page 8 of the application as filed could therefore not be taken into account. They concerned only one single episode and provided no information relating to several episodes. Also, these results were obtained by a composition not defining the molecular weight of the hyaluronic acid used and further comprising dichlorobenzyl alcohol. As could be seen from document (33), dichlorobenzyl alcohol was an antiseptic able to kill bacteria and viruses associated with mouth and throat infections. It was thus an active

ingredient. The tests described in the application were thus not based on hyaluronic acid as the sole active ingredient. The data of document (6) could not be taken into account. Document (6) was post-published. Furthermore, it related to a single episode and was not of statistical relevance. Again, the molecular weight of the hyaluronic acid was not disclosed.

XII. The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted. It further requested that respondent 2's letter dated 13 April 2017 not be admitted into the proceedings.

Respondent 2 requested that the appeal be dismissed. Furthermore, it requested that document D51 filed by the appellant with the statement of grounds of appeal not be admitted into the proceedings.

Respondent 1 had requested in writing that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. The oral proceedings before the board took place in the absence of respondent 1, who had been duly summoned but did not appear on the date of the oral proceedings. According to Article 15(3) RPBA, the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case. Hence, the board was in a position to announce a decision at the

conclusion of the oral proceedings, as provided for in Article 15(6) RPBA.

3. Admission of submissions

3.1 Letter dated 13 April 2017

Appeal proceedings are based on the notice of appeal and the statement of grounds of appeal and any written reply of the other party or parties (to be filed within four months of notification of the grounds of appeal), any communication sent by the board and any answer thereto filed pursuant to directions of the board (Article 12(1) RPBA).

Article 12(2) RPBA provides that the statement of grounds of appeal and the reply must contain a party's complete case. Under Article 13(1) RPBA any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the board's discretion. A non-exhaustive list of criteria to be included in the board's exercise of discretion is given in Article 13(1) RPBA.

The appellant argued that, because respondent 2 had not made a case under Article 12 RPBA, respondent 2's letter dated 13 April 2017 had to be disregarded.

However, the board does not derive from the provisions of Articles 12 and 13 RPBA that a party that did not file any submissions within the four months of notification of the grounds of appeal would, as from the outset, be excluded from presenting submissions at a subsequent stage. No such exclusion is explicitly provided for in Articles 12 or 13 RPBA. Nor can any such exclusion be implicitly derived therefrom. Rather,

Article 12 RPBA is concerned with defining the basis for the appeal proceedings and introducing a cut-off point at which a party's case is considered to be complete, such that the board is able to assess the appeal case and, subject to oral proceedings, take a decision. Hence, it is the risk of a non-appealing party that a decision is taken without that party having made its case if it does not file its submissions in due time, combined with the further risk that any submissions filed after the cut-off point are not admitted under Article 13 RPBA.

In view of the above considerations, the board does not agree with the approach suggested by the appellant that respondent 2's letter dated 13 April 2017 was to be excluded for the sole reason that no submissions under Article 12(1)(b) RPBA had been filed.

In the context of a non-appealing party that did not make any submissions within the four-month time limit under Article 12(1)(b) RPBA, the board notes that such a party cannot be in a better position than a party that did make its submissions in due time. Accordingly, the board considers that the requirements set out in Article 12(2) RPBA concerning the quality of the submissions apply, i.e. all the facts, arguments and evidence relied on have to be expressly specified. Likewise, aspects which according to the case law of the boards of appeal are considered by a board when exercising its discretion under Article 12(4) RPBA may additionally be taken into account in the context of the board's exercise of its discretion under Article 13(1) RPBA.

Therefore, the board also does not agree with respondent 2's view that, because the letter of

13 April 2017 merely comprised arguments, it should be admitted, as opposed to the submission of new documents. From Article 12(2) RPBA it is clearly derivable that the concept of a party's "case" refers to the presentation of requests, facts, arguments and evidence. Article 13(1) RPBA takes up this concept by referring explicitly to "a party's case". Accordingly, the submission of lines of argument which had not been presented up until the cut-off point laid down in Article 12(1) RPBA constitutes an amendment to a party's case within the meaning of Article 13(1) RPBA, and its admission and consideration are subject to the board's discretion.

As can be seen from the minutes of the oral proceedings before the board, respondent 2's submissions dealing with sufficiency of disclosure were the only submissions on which the board had to take a decision as to their admission into the proceedings.

Of the various lines of argument concerning sufficiency of disclosure presented in the letter, the board did not admit the line concerning the determination of the molecular weight, i.e. the parameter "molecular weight", its clarity and the absence of a method for its measurement addressed on pages 5 to 7 and under point III.1.of said letter.

This line of argument was raised for the first time in appeal proceedings in the letter dated 13 April 2017, received about a month in advance of the oral proceedings before the board. In this context it is not relevant either that the ground for opposition under Article 100(b) EPC as such was already discussed in opposition or that this line of argument had been addressed in the impugned decision, because the appeal

proceedings are not a continuation of the opposition proceedings. As neither the appellant nor respondent 1 had presented said matter in their submissions according to Article 12(1) and (2) RPBA, it was not within the scope of the present appeal. Nor had this issue been addressed in the board's communication and thereby brought into the appeal proceedings of the board's own motion. Accordingly, this was indeed a new line of argument and subject to admission by the board under Article 13(1) RPBA.

In addition to the fact that this line was presented at a very late stage of the appeal proceedings, the board considers the examination of sufficiency of disclosure in relation to a parameter to be a complex matter which can give rise to further issues. It involves the analysis of the parameter as such and its measurement, the evaluation of the knowledge of the skilled person with regard to the specific polymer under consideration and possibly also the assessment of whether Article 83 EPC or Article 84 EPC is to be applied. In these circumstances, the board considers that the aspect of whether or not the line of argument is of *prima facie* relevance, an aspect which may also be taken into account in the context of Article 13(1) EPC, is outweighed by the aspects of complexity and the procedural stage at which the argument had been brought forward.

Accordingly, the board, exercising its discretion, decided not to admit said line of argument (Article 13(1) RPBA).

3.2 *Document (51)*

Document (51) was submitted by the appellant with its statement of grounds of appeal. The appellant relied on document (51) in presenting its case as to why the opposition division had been wrong when analysing the data of document (6). The board therefore considers that document (51) has been submitted to directly address this essential point of the decision under appeal. Its filing constitutes a normal and justified development in appeal proceedings. Consequently the board decided to take document (51) into account (Article 12(4) RPBA).

4. Amendments

Claim 1 of the patent as granted is a combination of claims 1 and 6 of the application as filed and the disease to be treated stemming from page 1, line 4, of the description as filed.

Recurrent oral aphthous ulcers are by definition ulcers situated in the oral cavity. The omission of the terms "oral cavity" does not extend the subject-matter beyond the content of the application as filed.

Starting on page 1, line 3, the description as filed contains a section entitled "State of the art". The first sentence of this section reads as follows: "Aphthas, better known as recurrent oral aphthous ulcerations (ROAU), are ulcerous pathologies of the oral mucosa which affect more than 20% of the population" (page 1, lines 4 to 6). A more detailed picture of the symptoms of recurrent oral aphthous ulcerations is then provided. From line 15 onwards information on various known ways of relieving symptoms associated with ROAU are described. In the last two paragraphs of the "State of the art" section, two

specific publications dealing with inflammatory diseases of the oral mucosa are discussed. The sentence on page 1, lines 4 to 6, is thus clearly intended to provide the skilled person with a definition of the disease to be treated. This definition of the disease, although situated under the heading "State of the art", cannot be seen as relating merely to the discussion of diseases in the state of the art, but must be read as a clarification of the disease to be treated by the patent under consideration and therefore relates to the teaching of the present invention. It can thus serve as a basis for amendments. Decisions T 912/08 and T 1652/06, which were cited by respondent 2 in this context, are not pertinent for the present case, since a case-by-case analysis of the structure and content of the description is necessary in order to come to a conclusion for a particular case.

The molecular weight of the hyaluronic acid is defined in claim 6 of the application as filed, which has been integrated into claim 1 of the patent as granted. It is thus not necessary for the board to consider an intermediate generalisation of the "clinical study" of pages 4 to 8 of the application as filed.

Respondent 2 has objected to the term "ulcers" as being different to the term "ulcerations" used on page 1, line 4, of the application as filed. In view of the complete sentence on page 1, lines 4 to 6, which includes the terms "aphthas" and "ulcerous pathologies", which both clearly indicate the presence of ulcers, the board comes to the conclusion that a claim directed to the treatment of recurrent oral aphthous ulcers is based on the content of the application as filed.

The board has thus come to the conclusion that the ground for opposition under Article 100(c) EPC does not prejudice the maintenance of the patent as granted.

5. Sufficiency of disclosure

5.1 Treatment/therapy

In the present case, the term "treatment", albeit used in isolation, clearly means "therapeutic treatment" or "treatment by therapy".

The case law of the boards of appeal provides guidance as to the significance of the terms treatment by "therapy" and "therapeutic treatment".

A first definition of the term "therapy" was given in T 144/83 (OJ EPO 1986, 301). According to this decision, therapy relates to the treatment of a disease in general or to a curative treatment in the narrow sense as well as the alleviation of the symptoms of pain and suffering.

In T 81/84 (OJ EPO 1988, 207) the question arose whether or not the character of menstrual discomfort manifesting itself for instance in intense headaches and other painful symptoms was such that its treatment should fall under the category of therapeutic treatment. The board found that the concept of therapy should not be construed narrowly. It would be impossible and undesirable to distinguish between basic and symptomatic therapy, i.e. healing or cure and mere relief. The board concluded that irrespective of the origin of pain, discomfort or incapacity, its relief, by the administration of an appropriate agent, was to

be construed as therapy or therapeutic use within the meaning of Article 52(4) EPC 1973.

In T 24/91 (OJ EPO 1995, 512) the board observed that the term "therapy" was not restricted to curing a disease and removing its causes. Rather, this term covered any treatment which was designed to cure, alleviate, remove or lessen the symptoms of, or prevent or reduce the possibility of contracting, any disorder or malfunction of the human or animal body. The board found that the claimed process removed, by treatment of the patient's eye, the symptoms of myopia, hyperopia and astigmatism and was therefore a therapeutic treatment.

In line with these considerations, which represent established case law, the present board considers that the term "treatment", which in the present case means "therapeutic treatment", may relate to symptomatic treatment, including alleviation of any symptoms, as well as to curative treatment.

5.2 Treatment of recurrent oral aphthous ulcers

Claim 1 of the patent as granted defines the "treatment of recurrent oral aphtous [sic] ulcers". From the parties' submissions, the board infers that there is agreement between the parties that the disease thus defined is idiopathic and is characterised by frequent recurrences of episodes of appearances of ulcers in the oral cavity.

Various aspects of the disease under consideration have been discussed in the course of the proceedings. Among these aspects are the symptoms of pain and soreness associated with each single ulcer. Further, the

appearance, disappearance and reappearance of ulcers during one single episode, related to the number of ulcers present on the various days within an episode, has been addressed. Also, the duration of an episode and the recurrent nature of the episodes have been under discussion.

In view of the analysis of the term "treatment" under point 5.1 above, whereby "treatment" also relates to symptomatic treatment including alleviation of any symptoms, the board considers that the minimum requirement for a treatment of recurrent oral aphthous ulcers is a positive impact on any of the aspects mentioned in the previous paragraph.

5.3 "Clinical study"

The application as filed describes a clinical study, starting on page 4. On page 4, last paragraph, under the heading "Study design", it is disclosed that the study intends "to determine the efficacy of a gel formulation in relieving the symptoms in subjects with recurrent oral aphthous ulceration".

The participants in the study are selected to include patients having a history of recurrent oral aphthous ulcerations of greater than two times per year and having current aphthous ulcer/ulcers present for less than 3 days (page 5, point B2). The board considers that the patients thus selected are clearly suffering from the disease defined in claim 1 of the patent as granted.

The description of the patent in suit then goes on to disclose further aspects of the clinical study (page 5, point B3, to page 7, point C3). Respondent 2 had

objections concerning the use of hyaluronic acid as "the sole active ingredient" and concerning the molecular weight of the hyaluronic acid employed in the clinical study. These objections are addressed in points 5.4 and 5.5 below.

The various details of the efficacy assessment and the assessed parameters are then described (page 7, point C4, to page 8, point C6). No data concerning the detailed results of said parameters is disclosed. In the results part on page 8 (point D), it is stated that the gel composition containing hyaluronic acid, compared to the placebo composition, "proved able to reduce significantly the number of ulcers already in the fifth day", followed by a statement that "an overall beneficial effect in every investigated ROAU symptomatology" was observed. From this passage the board draws the conclusion that the tested treatment, i.e. the application of hyaluronic acid, leads to a reduction of ulcers at a specific point in time of an episode in the disease under consideration. Said treatment has thus been shown to positively influence one aspect of the claimed disease.

5.4 "Sole active agent"

Claim 1 of the patent as granted defines hyaluronic acid as the sole active ingredient in the treatment of the disease under consideration. Respondent 2 has argued that the "clinical study" as disclosed in the application as filed could not provide any proof that hyaluronic acid on its own would treat the recurrent oral aphthous ulcers, since the composition used in said clinical study comprised a further active ingredient in the form of dichlorobenzyl alcohol.

According to document (33), dichlorobenzyl alcohol is a mild antiseptic, able to kill bacteria and viruses associated with mouth and throat infections. These properties were not contested amongst the parties.

The "clinical study" as described in the application as filed on pages 4 to 8 is based on a double blind, single centre, parallel group design to determine the efficacy of a gel formulation comprising hyaluronic acid in relieving the symptoms in subjects with recurrent oral aphthous ulceration (page 4, point A). As stated above, in the results part on page 8 (point D), the gel composition containing hyaluronic acid, compared to the placebo composition, "proved able to reduce significantly the number of ulcers already in the fifth day". The hyaluronic acid gel and the placebo composition are disclosed in the lower part of page 6. Both compositions comprise the same ingredients, including dichlorobenzyl alcohol, with the exception of the hyaluronic acid, which is absent in the placebo composition. Consequently, the board considers the positive influence on the symptoms related to recurrent oral aphthous ulcers in the clinical study to be due to the presence of hyaluronic acid. It is concluded that each of the ingredients acts according to its known functions. The board does not doubt that dichlorobenzyl alcohol acts according to its known function as an antiseptic. However, the board sees no reason why it should assume that the activity of the hyaluronic acid is decisively influenced by the dichlorobenzyl alcohol or that said activity arises only in the presence of the dichlorobenzyl alcohol. In the absence of any indication that the absence of dichlorobenzyl alcohol would negatively influence the activity of the hyaluronic acid on the recurrent oral aphthous ulcers, the board considers that hyaluronic acid on its own

exhibits the shown activity (reduction of number of ulcers on the fifth day).

5.5 Molecular weight of the hyaluronic acid used in "clinical study"

Respondent 2 pointed to the fact that the "clinical study" of pages 4 to 8 of the application as filed did not disclose the molecular weight of the hyaluronic acid used therein. It considered that it had not been proven that hyaluronic acid of the molecular weight claimed in claim 1 of the patent as granted was effective in the treatment of recurrent oral aphthous ulcers.

The board concurs with respondent 2 that there is no disclosure of the molecular weight of the hyaluronic acid that had been used in the clinical study. On the other hand, the molecular weight range defined in claim 1 of the patent as granted, 800,000 to 4,000,000, is the broadest molecular weight range disclosed in the whole application as filed. As a consequence, the board has no reason to doubt that the molecular weight of the hyaluronic acid used in the clinical study was within said range.

5.6 Conclusion

The board has thus come to the conclusion that the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted. The decision under appeal is therefore to be set aside.

5.7 In view of the conclusion arrived at under point 5.6 it is not necessary to discuss documents (6) and (51).

6. *Remittal*

Concerning the grounds for opposition of lack of novelty and lack of inventive step, Article 100(a) and Articles 54 and 56 EPC, respectively, the parties had not been given an opportunity to comment during the oral proceedings before the opposition division.

In the board's opinion, it therefore appears appropriate to give the parties, here in particular the appellant as the party facing the negative finding on novelty and inventive step, the opportunity to present their cases, including at oral proceedings, before two instances. The respondents have also not presented arguments against a possible remittal after the board had expressed its intention in this regard in its provisional opinion accompanying the summons to oral proceedings.

Therefore, the board, exercising its discretion under Article 111(1), second sentence, EPC, decided to remit the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

M. Schalow A. Lindner

Decision electronically authenticated