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**Datasheet for the decision
of 24 February 2015**

Case Number: T 0958/12 - 3.3.07
Application Number: 99907491.7
Publication Number: 1052974
IPC: A61K9/08, A61K9/19, A61K47/10,
A61K47/18, A61K31/335,
A61K31/365
Language of the proceedings: EN

Title of invention:

PHARMACEUTICAL FORMULATION CONTAINING EPOTHILONE

Patent Proprietors:

Novartis AG
Novartis Pharma GmbH

Opponents:

Bristol-Myers Squibb Company
Bayer Pharma Aktiengesellschaft

Relevant legal provisions:

EPC Art. 101, 113(2)

Keyword:

Basis of decision -
text or agreement to text withdrawn by patent proprietor -
patent revoked

Decisions cited:

T 0073/84



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Case Number: T 0958/12 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 24 February 2015

Appellant: Bristol-Myers Squibb Company
(Opponent 1) P.O. Box 4000
Princeton NJ 08543-4000 (US)

Representative: Wolter, Thomas
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Patentanwälte
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Respondents: Novartis AG
(Patent Proprietors) Lichtstrasse 35
4056 Basel (CH)

Novartis Pharma GmbH
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1230 Wien (AT)

Representative: Henkel, Breuer & Partner
Patentanwälte
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Party as of right: Bayer Pharma Aktiengesellschaft
(Opponent 2) Müllerstrasse 178
13353 Berlin (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 February 2012 concerning maintenance of the
European Patent No. 1052974 in amended form.**

Composition of the Board:

Chairman J. Riolo
Members: D. Semino
 D. T. Keeling

Summary of Facts and Submissions

- I. An appeal was lodged by opponent 1 (appellant) against the decision of the opposition division announced at the oral proceedings on 24 November 2011 concerning maintenance of European Patent No. 1 052 974 in amended form.
- II. The appellant requested that the decision under appeal be set aside and the European patent be revoked.
- III. With letter of 12 February 2015 the patent proprietors (respondents) filed the following declaration:
- "The Proprietor hereby withdraws its approval of the text of the patent as granted and as upheld by the Opposition Division including the Auxiliary Requests submitted. As there is no approved text, the Proprietor understands that this withdrawal will have the consequence that the patent will be revoked (see e.g. T 1526/06).
- The Proprietor understands that oral proceedings will no longer be necessary".
- IV. The oral proceedings which had been arranged for 7 May 2015 were thereafter cancelled.

Reasons for the Decision

1. Under Article 113(2) EPC the European Patent Office must consider and decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent. This principle is part of the common provisions governing procedure and is therefore to be

strictly observed also in opposition and opposition appeal proceedings.

2. In the present case the respondents withdrew during the appeal proceedings their approval of the text of the patent as granted and as upheld by the opposition division, including all the auxiliary requests submitted, with the consequence that there is no text of the patent on the basis of which the Board can consider the case. With the same letter the respondents themselves envisaged revocation of the patent as the consequence of this withdrawal.
3. While the procedure for revocation pursuant to Articles 105a to 105c EPC is not available during opposition and opposition appeal proceedings, it is the consistent approach of the case law that, if the patent proprietor states that he no longer approves the text in which the patent was granted and does not submit or withdraws any amended text, the patent as a consequence of Article 113(2) EPC is to be revoked without substantive examination as to patentability, which becomes impossible in the absence of a valid text (see Case Law of the Boards of Appeal of the EPO, 7th edition 2013, IV.C.5.2, in particular T 73/84, OJ EPO 1985, 241 and the numerous decisions following the same approach).
4. The Board has no reason in the present case to deviate from the consistent approach of the case law, with the consequence that 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:



S. Fabiani

J. Riolo

Decision electronically authenticated