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**Datasheet for the decision
of 21 May 2015**

Case Number: T 2544/12 - 3.3.10

Application Number: 06021455.8

Publication Number: 1749543

IPC: A61L27/36

Language of the proceedings: EN

Title of invention:

Tissue regenerative composition

Patent Proprietor:

Acell, Inc.

Opponent:

Atkinson, Peter Birch

Headword:

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - added subject-matter (yes)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 2544/12 - 3.3.10

**D E C I S I O N
of Technical Board of Appeal 3.3.10
of 21 May 2015**

Appellant 1:
(Patent Proprietor)

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(Opponent)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 October 2012 concerning maintenance of the
European Patent No. 1749543 in amended form.**

Composition of the Board:

Chairman P. Gryczka
Members: R. Pérez Carlón
C. Schmidt

Summary of Facts and Submissions

- I. The patent proprietor (appellant 1) and the opponent (appellant 2) lodged an appeal against the interlocutory decision of the opposition division to maintain European patent No. 1 749 543 in the form of the then pending third auxiliary request.
- II. Notice of opposition had been filed on the grounds of added subject-matter (Article 100(c) EPC), insufficiency of disclosure (Article 100(b) EPC) and lack of novelty and inventive step (Article 100(a) EPC).
- III. During the oral proceedings before the board, which took place on 21 May 2015, appellant 1 filed a main request replacing every previously filed request, whose sole claim reads as follows:
- "A devitalized matrix for tissue repair and regeneration consisting of epithelial basement membrane and tunica propria, wherein the devitalized matrix is provided as either:*
- a powdered form;*
 - a gel-form;*
 - a lyophilized form;*
 - a fluidized form; or*
 - a tubular form."*
- IV. Appellant 1 argued that claim 1 found a basis on page 2, lines 25-27, on page 3, lines 8-10, and on page 4, lines 10-12 and 25-27, of the application as originally filed, and for that reason claim 1 did not contain subject-matter going beyond the disclosure of the application as originally filed, as required by Article

123(2) EPC.

V. Appellant 2 argued that the application as originally filed only disclosed a matrix which consisted of epithelial basement membrane and a portion of the tunica propria, namely the portion immediately subjacent to the basement membrane, since the abluminal portion of said tunica propria was delaminated (page 3, lines 10-12). For this reason, the feature "consisting of basement membrane and tunica propria" represented technical information going beyond that of the application as originally filed, contrary to the requirements of Article 123(2) EPC.

VI. The final requests of the parties were the following:

- Appellant 1 requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request, filed during the oral proceedings before the board.
- Appellant 2 requested that the decision under appeal be set aside and that the European patent No. 1 749 543 be revoked.

VII. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. The appeals are admissible.

Amendments:

2. Claim 1 is directed to a devitalized matrix for tissue repair and regeneration consisting of epithelial

basement membrane and tunica propria.

3. In order to determine whether or not claim 1 contains added subject-matter, it has to be examined whether it discloses technical information which a skilled person would not have objectively and unambiguously derived, either explicitly or implicitly, from the application as originally filed.

In the present case, it needs to be examined whether the application as originally filed discloses a matrix consisting of epithelial basement membrane and tunica propria.

4. Appellant 1 argued that the passages on page 2, lines 25-27; page 3, lines 8-10, and page 4, lines 10-12 and 25-27, provided the required basis.

Page 2, lines 27-28, reads "*and the tunica propria that is immediately subjacent to the basement membrane*". Page 3, lines 9-10, discloses "*and tunica propria immediately subjacent to the basement membrane*". Page 4, line 12, reads "*and at least the subjacent portion of the tunica propria*". Lastly, lines 25-27 of page 4 also refer to "*the biotropic connective tissue known as the tunica propria C that is immediately subjacent to and positioned on the abluminal side of the epithelial basement membrane B*".

The term "tunica propria" has thus always been disclosed in combination with the features "immediately subjacent" or "subjacent portion".

5. Appellant 1 argued that the terms "immediately subjacent" or "subjacent portion" merely described the position of the tunica propria within the tissue, since

the tunica propria is located at the abluminal side of the basement membrane and directly in contact with it (see figures 1A and 1B of the application as originally filed). For this reason, these terms did not imply any further limitation on the tunica propria not required by claim 1.

However, this term indicates that a part of the tunica propria, namely its abluminal portion, has been delaminated from the matrix:

The passage following that on page 3, lines 8-10, mentioned by appellant 1 reads: "the epithelial basement membrane and tunica propria immediately subjacent to the basement membrane are delaminated from cells of a mammalian epithelium and *abluminal portions* of the tunica propria".

Similarly, page 7, lines 1 to 21, discloses the preparation of a scaffold or matrix consisting of "epithelial basement membrane and subjacent tunica propria" (page 7, lines 15-16), which requires delaminating "the abluminal portion of the tunica propria" (page 7, line 10).

Lastly, the passage on page 4, lines 25-27, mentioned by appellant 1 refers to figures 1A (cross-sectional view of the wall of the intestine) and 1B (urinary bladder) and mentions that a preferred embodiment of the invention comprises the epithelial membrane B and the biotropic connective tissue known as the tunica propria C that is immediately subjacent to (refers to which part of the tunica propria is present in the matrix) and positioned on the abluminal side of the epithelial basement membrane B (refers to the situation of the tunica propria within the tissue).

Thus, the application as originally filed discloses only a matrix consisting of epithelial basement membrane and a *part* of the tunica propria (the luminal part, or the part immediately subjacent to the basement membrane) which does not include the abluminal part thereof, whereas claim 1 is not restricted to a matrix containing only a part of the tunica propria but is also directed to a matrix including the totality of this tissue layer.

For this reason alone, claim 1 contains technical information not derivable from the application as originally filed and goes beyond its disclosure, contrary to the requirements of Article 123(2) EPC, with the consequence that the sole request on file is not 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:



T. Buschek

P. Gryczka

Decision electronically authenticated