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**Datasheet for the decision
of 7 July 2016**

Case Number: T 0660/13 - 3.3.02

Application Number: 05858107.5

Publication Number: 1807698

IPC: C12N9/52, C12Q1/37, G01N33/542

Language of the proceedings: EN

Title of invention:
ASSAY FOR DETERMINING CLOSTRIDIAL TOXIN ACTIVITY COMBINING FRET
AND FLUORESCENCE POLARIZATION

Patent Proprietor:
ALLERGAN, INC.

Opponent:
Merz Pharma GmbH & Co. KGaA

Headword:
Lapse of the patent

Relevant legal provisions:
EPC R. 84(1), 100(1)

Keyword:
Lapse of patent in all designated states - termination of
appeal proceedings

Decisions cited:

T 0289/06, T 0436/02, T 0749/01, T 0708/01, T 0165/95,
T 0329/88

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0660/13 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 7 July 2016

Appellant: ALLERGAN, INC.
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Representative: Hoffmann Eitle
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Appellant: Merz Pharma GmbH & Co. KGaA
(Opponent) Eckenheimer Landstrasse 100
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Representative: Herzog, Fiesser & Partner Patentanwälte PartG
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
4 January 2013 concerning maintenance of the
European Patent No. 1807698 in amended form.**

Composition of the Board:

Chairman U. Oswald
Members: K. Giebeler
L. Bühler

Summary of Facts and Submissions

- I. Both the patent proprietor (hereinafter appellant I) and the opponent (hereinafter appellant II) lodged an appeal against the interlocutory decision of the opposition division posted on 4 January 2013 maintaining European patent no. 1 807 698 in amended form.

- II. By a communication dated 4 March 2016, the board informed the appellants that the patent in suit had lapsed with effect for all the designated Contracting States and invited the appellants to inform the board, within two months from notification of the communication, whether they requested a continuation of the appeal proceedings (Rules 84(1) and 100(1) EPC).

- III. No reply was received within the set time period.

Reasons for the Decision

1. Rule 84(1) EPC provides that if "the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States, the opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing him of the surrender or lapse". According to Rule 100(1) EPC, Rule 84(1) EPC applies also in appeal proceedings following opposition proceedings.

2. If - as in the present case - both, the opponent and the patent proprietor have lodged an appeal, it would be inappropriate to allow the appellant-opponent only to decide whether the appeal proceedings shall be continued. For this reason, Rule 84(1) EPC has to be

applied *mutatis mutandis* in such opposition appeal proceedings so that it is also the appellant-patent proprietor who can request that the appeal proceedings be continued (see decision T 708/01 of 17 March 2005, point 1).

3. According to an interpretation *argumentum e contrario*, if no request for continuation of the proceedings is filed within the set time period and the state of the file gives no grounds for the proceedings to be continued by the board of its own motion, the appeal proceedings are terminated (see decisions T 329/88 of 22 June 1993; T 165/95 of 7 July 1997; T 749/01 of 23 August 2002; T 436/02 of 25 June 2004; T 289/06 of 17 December 2007).

4. In the present case, the notification of the lapse within the meaning of Rule 84(1) EPC was sent to the appellants on 4 March 2016. Thus, the period of two months for requesting the continuation of the appeal proceedings ended on 14 May 2016 (cf. Rule 126(2) EPC). No request for continuation of the appeal proceedings was received within the set time period. Hence, the appeal proceedings have to be terminated (cf. point 3 *supra*).

Order

For these reasons it is decided that:

The appeal proceedings are terminated.

The Registrar:

The Chairman:



N. Maslin

U. Oswald

Decision electronically authenticated