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**Datasheet for the decision
of 25 October 2018**

Case Number: T 1398/13 - 3.3.01

Application Number: 06849520.9

Publication Number: 1952154

IPC: G01N33/543

Language of the proceedings: EN

Title of invention:

TURBIDIMETRIC IMMUNOASSAY FOR ASSESSING HUMAN CYSTATIN C

Patent Proprietor:

Gentian AS

Opponent:

Dako Denmark A/S

Headword:

Turbidimetric immunoassay for cystatin C/GENTIAN AS

Relevant legal provisions:

EPC Art. 113(2)

Keyword:

Basis of decision - text or agreement to text withdrawn by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

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1398/13 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 25 October 2018

Appellant: Dako Denmark A/S
(Opponent) Produktionsvej 42
2600 Glostrup (DK)

Representative: Grünecker Patent- und Rechtsanwälte
PartG mbB
Leopoldstraße 4
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Respondent: Gentian AS
(Patent Proprietor) Kolsrodveien 120
1599 Moss (NO)

Representative: Reitstötter Kinzebach
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81679 München (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 April 2013 concerning maintenance of the
European Patent No. 1952154 in amended form**

Composition of the Board:

Chairman A. Lindner
Members: T. Sommerfeld
M. Blasi

Summary of Facts and Submissions

- I. Appeal was lodged by the opponent (appellant) against the decision of the opposition division concerning maintenance of European patent No. 1952154 in amended form. With the statement of grounds of appeal, the appellant requested that the decision be set aside and the patent revoked in its entirety.
- II. The patent proprietor (respondent) submitted a reply to the statement of the grounds of appeal, requesting that the appeal be dismissed, or alternatively that the patent be maintained in amended form according to auxiliary requests 1 to 8, all filed with the letter of reply.
- III. Summons for oral proceedings before the board were issued, followed by a communication providing the provisional opinion of the board on some issues.
- IV. During oral proceedings, the respondent stated that it no longer approved the text of the patent as granted or amended and that it also no longer approved the text of any of the auxiliary requests on file. At the end of the oral proceedings the chairman announced the decision of the board.

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 patent proprietor. This principle is part of the common

provisions governing the procedure and is therefore to be observed also in opposition appeal proceedings.

2. In the present case the patent proprietor withdrew its approval of the text of the patent as granted and of the auxiliary requests, with the consequence that there is no text of the patent on the basis of which the Board can consider compliance with the requirements of the EPC.
3. While the procedure for revocation pursuant to Article 105a and 105b EPC is not available during opposition proceedings (Article 105a(2) EPC), it is the consistent jurisprudence of the boards of appeal that, if the patent proprietor states that he no longer approves the text in which the patent was granted, withdraws all pending requests and does not submit 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.
4. The Board has no reason in the present case to deviate from the consistent approach of the boards of appeal, 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:



M. Schalow

A. Lindner

Decision electronically authenticated