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Datasheet for the decision of 7 November 2017

Case Number: T 1401/13 - 3.3.08

Application Number: 07844409.8

Publication Number: 2076600

IPC: C12N15/11, A61K31/7105

Language of the proceedings: EN

Title of invention:
NICKED OR GAPPED NUCLEIC ACID MOLECULES AND USES THEREOF

Applicant:
Marina Biotech, Inc.

Headword:
Gapped nucleic acid molecules/MARINA BIOTECH

Relevant legal provisions:
EPC Art. 113(1), 114(2)
RPBA Art. 12(4)

Keyword:
Right to be heard - non-attendance at oral proceedings
Admissibility of all appellant's requests filed with the statement setting out the grounds of appeal - (no)

Decisions cited:
T 0936/09, T 1400/11

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1401/13 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 7 November 2017

Appellant: (Applicant)	Marina Biotech, Inc. 3830 Monte Villa Parkway Bothell WA 98021-7266 (US)
Representative:	Srinivasan, Ravi J A Kemp 14 South Square Gray's Inn London WC1R 5JJ (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 4 December 2012 refusing European patent application No. 07844409.8 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	P. Julià
Members:	B. Stolz
	D. Rogers

Summary of Facts and Submissions

I. The applicant (appellant) filed an appeal against the decision of an examining division refusing European patent application No. 07 844 409.8. The examining division decided that claims 4 to 10 of the sole request before it contravened Article 123(2) EPC.

II. The appellant did not attend the scheduled oral proceedings before the examining division. In a letter dated 9 August 2012, addressed to the examining division, it stated that:

"Applicant does not have current financial resource to attend the scheduled Oral Proceedings.

Applicant therefore requests a detailed written Decision, which may form the basis for Appeal in the event that Applicant is able to secure financial support over the next few months."

III. With its statement of grounds of appeal, the appellant submitted a new main request and auxiliary requests 1 and 2.

IV. The appellant was summoned to oral proceedings before the board. A communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) annexed to the summons, informed it of the provisional, non-binding opinion of the board on some of the issues of the appeal proceedings. In points 4 to 6 of this communication, the board informed the appellant that it considered it necessary to discuss the issue of admissibility of the new requests.

V. By letter dated 12 September 2017, the appellant informed the board that it would not attend the oral proceedings. The appellant did not file any substantive arguments in response to the board's opinion.

VI. Oral proceedings were held on 7 November 2017, in the absence of the appellant.

Reasons for the Decision

Article 113(1) EPC - right to be heard

1. As announced in writing, the appellant did not attend the scheduled oral proceedings, nor did the appellant file substantive arguments in reply to the board's communication. By neither replying to the board's communication in substance nor attending the oral proceedings, the appellant effectively chose not to avail itself of the opportunity to comment or present its observations on the board's opinion (Article 113(1) EPC). As a consequence there are no submissions on file as regards the admissibility of the main request and auxiliary requests 1 and 2 filed with the statement of the grounds of appeal.

Admission of the new sets of claims into the proceedings

2. The set of claims of the main request differs from the set of claims of the sole request underlying the decision under appeal by amendments to claims 1, 2, 4, 12 (previous claim 26) and 18 (previous claim 34), insertion of new claims 7 and 8, deletion of previous claims 6, 8, 9, 12-16, 18-25, 32, 33 and 35.

3. The set of claims of auxiliary request 1 differs from those of the request underlying the decision under

appeal by amendments to claims 1, 2, 8 (previous claim 26) and 14 (previous claim 34), the insertion of new claims 4 and 5, and the deletion of previous claims 4 to 10, 12 to 16, 18 to 25, 32, 33 and 35.

4. The set of claims of auxiliary request 2 differs from those of the request underlying the decision under appeal by the deletion of previous claims 4 to 10 and 35.

5. Thus, all three sets of claims were submitted for the first time upon appeal.

6. Pursuant to Article 12(4) RPBA, the board has the discretionary power to hold inadmissible facts, evidence or requests which could have been presented, or were not admitted, in the first instance proceedings.

7. The board notes that in the "Summons to attend oral proceedings", issued on 2 May 2012, the examining division already raised an objection under Article 123(2) EPC against the subject matter of claims 4 to 10 of the sole request underlying the decision under appeal. The appellant-applicant did not however file any further claim request in preparation for these oral proceedings, nor did it attend these proceedings. The applicant-appellant thus waived an opportunity to discuss its case and to file new or further claims during examination.

8. The appellant has not brought forward any reasons to justify the submission of the amended claims only at the stage of appeal proceedings, neither with its statement of grounds of appeal, nor in reply to the board's indication that it considered it necessary to

discuss this issue at the up-coming oral proceedings (cf. point 6 of the board's communication).

9. Before the examining division the appellant-applicant explained its non-attendance at the oral proceedings, and implicitly its failure to file any claim requests, by a shortage of money.

10. The above argument has not been repeated before the board, nevertheless, for the sake of completeness, the board will address it; a financially difficult situation is not a circumstance recognised in the EPC, the RPBA, or the case-law of the boards as permitting a party to shift their case from the department of first instance to the boards. Indeed such a shifting of its case would compel the board either to give a first ruling on the appellant's case or remit the matter to the examining division.

11. The board does not accept that an appellant-applicant is free to present or complete his case at any time that he wishes during the examination or examination appeal proceedings, depending for example, on his procedural strategy or his financial situation. This view is in line with the provisions of Article 114(2) EPC and of Articles 12(4) and 13 RPBA, which give discretion to the deciding body not to admit a party's submissions filed at a late stage of the proceedings. This applies to *ex parte* as to *inter partes* proceedings (see T 0936/09 of 1 March 2012, point 9 of the reasons, and T 1400/11 of 3 July 2014, point 3.2 of the reasons).

12. For the above reasons, the board, exercising its power under Article 114(2) EPC, in accordance with Article 12(4) RPBA, decided to hold inadmissible the

appellant's new main and first and second auxiliary requests.

13. Since there is no admissible request of the appellant on which the appeal proceedings could be based, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Malécot-Grob P. Julià

Decision electronically authenticated