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**Datasheet for the interlocutory decision  
of 14 April 2014**

**Case Number:** T 2317/13 - 3.3.04  
**Application Number:** 07867601.2  
**Publication Number:** 2097105  
**IPC:** A61K 39/395, C07K 16/28  
**Language of the proceedings:** EN

**Title of invention:**

Anti-p-selectin antibodies and methods of using the same to  
treat inflammatory diseases

**Applicant:**

Selexys Pharmaceuticals Corporation

**Headword:**

Anti-p-selectin antibodies/SELEXYS

**Relevant legal provisions:**

RPBA Art. 13(1)

**Keyword:**

"Re-establishment of rights (no)"  
"Minimally late filed statement of grounds of appeal -  
admissible"  
"Reimbursement of fee for re-establishment of rights (yes)"

**Decisions cited:**

T 0152/82, T 1198/03

**Catchword:**

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Case Number: T 2317/13 - 3.3.04

**I N T E R L O C U T O R Y    D E C I S I O N**  
of the Technical Board of Appeal 3.3.04  
of 14 April 2014

**Appellant:**  
(Applicant)

Selexys Pharmaceuticals Corporation  
800 Research Parkway Suite 338  
Oklahoma City OK 73104 (US)

**Representative:**

Armstrong, Iain Cheshire  
Harrison Goddard Foote LLP  
4th Floor, Merchant Exchange  
17-19 Whitworth Street West  
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**Decision under appeal:**

**Decision of the Examining Division of the  
European Patent Office posted on 2 July 2013  
refusing European patent application  
No. 07867601.2 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman:** C. Rennie-Smith  
**Members:** B. Claes  
M. Montrone

## **Summary of Facts and Submissions**

- I. This interlocutory decision is concerned only with the request of the appellant for re-establishment of rights.
- II. The appellant has appealed against the refusal of its European patent application No. 7867601 by the decision of the examining division of 2 July 2013. It filed its notice of appeal by online filing on 30 August 2013 and paid the appeal fee on the same date. The time for filing the statement of grounds of appeal expired on 12 November 2013. The appellant filed the statement by fax. The fax transmission began at 23.58 on 12 November 2013 and concluded at 00.16 on 13 November 2013.
- III. The board's registrar issued a communication dated 25 November 2013 stating that it appeared from the file that the statement of grounds of appeal had been filed out of time on 13 November 2013 and that it was therefore to be expected that the appeal would be rejected as inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC.
- IV. In response to that communication the appellant filed its request for re-establishment of rights by online filing on 13 January 2014 and paid the fee for such a request on the same date. The appellant's arguments supporting the request can be summarised as follows.

It was always the appellant's intention that the appeal be completed by filing the grounds of appeal on time. The 12 November 2013 time limit was properly noted on the representative's record system and communicated to the appellant itself. Documents required to meet the time

limit, including drafts of the grounds and a proposed accompanying witness statement, were prepared in advance of the deadline. Final versions of the necessary documents were completed late on 12 November 2013. The representative was not able to file the documents electronically due to an error in his EPO smart card. Technical errors meant that attempts to file the documents by fax in time to meet the deadline were unsuccessful. Although transmission of the faxed documents began on 12 November 2013, they were only received in their entirety after expiry of the deadline on 13 November 2013.

The request was accompanied by a witness statement of the representative detailing and verifying the facts summarised above. The appellant submitted that all due care required in the circumstances had been taken.

- V. The appellant requests re-establishment of its rights into the time for filing its statement of grounds of appeal and, if the board should not be prepared to allow re-establishment on the basis of the written request, oral proceedings.

### **Reasons for the Decision**

1. The discretion given to the board by Article 13(1) RPBA to admit and consider late filed submissions which amend a party's previously filed written case extends to the late admission and consideration of the written case itself (see T 1198/03 of 23 January 2007, reasons, point 4). While that discretion has to be exercised in the light of the particular facts of each case, the board notes that in T 1198/03 the then competent board observed that a delay

of one day by the respondent in that case in filing its written case was *de minimis*.

2. In the present case the delay in filing the statement of grounds of appeal was only of minutes. According to the copy of the statement and its accompanying documents showing the fax transmission times, the last page of the statement itself was received five minutes and fourteen seconds after expiry of the due time at midnight on 12 November 2013 and the entire fax transmission including the accompanying documents was complete by thirteen minutes and thirty-nine seconds after midnight. Thus the lateness of the filing was truly minimal.
3. Further, the first four pages of the statement of grounds were in fact received before the time limit expired and those pages are on any view admissible. It follows that the late filed remainder should be admitted in order to make sense of the pages filed in time. Not to admit and consider the grounds of appeal purely because of that minimal delay would, in the circumstances of the case, have been an incorrect exercise of discretion. The re-establishment request is therefore redundant and need not be considered on its merits.
4. The board which decided T 1198/03 did not accede to the respondent's request for reimbursement of the fee paid for the re-establishment request. The distinction that board made between the case before it and other previous cases in which reimbursement was allowed was that, in the case before it, the respondent, which had filed its request on a precautionary basis, would not have lost its rights but only found itself in a less favorable situation.

5. In the present case however, re-establishment was a remedy which the appellant had no choice but to pursue after receipt of the registrar's letter of 25 November 2013 which threatened inadmissibility of the appeal which would have led to a total loss of rights. In the event however, the board has admitted the statement of grounds of appeal as (partly) late filed in its discretion under Article 13(1) RPBA and the re-establishment request is therefore redundant and of no effect. Thus, as regards the fee, this case is closer to T 152/82 (OJ 1984, 301) in which the fee was reimbursed after it became apparent that the re-establishment request would not have become effective.

**Order**

**For these reasons it is decided that:**

1. The statement of grounds of appeal is admissible.
2. The request for re-establishment of rights is dismissed.
3. The fee for the re-establishment request is to be reimbursed.

The Registrar:

The Chairman:

P. Cremona

C. Rennie-Smith