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**Datasheet for the decision
of 27 October 2015**

Case Number: T 0615/14 - 3.3.09

Application Number: 04721828.4

Publication Number: 1605772

IPC: A23J1/20, A23J1/08, B01D15/08

Language of the proceedings: EN

Title of invention:
METHOD FOR HIGH THROUGHPUT VOLUMES IN THE FRACTIONATION OF
BIO-MOLECULES BY CHROMATOGRAPHIC SYSTEMS

Patent Proprietor:
UPFRONT CHROMATOGRAPHY A/S

Opponent:
Campina Nederland Holding B.V.

Headword:

Relevant legal provisions:
EPC R. 77(2), 101(2), 139 sentence 1

Keyword:
Correction of error in the opponent's name

Decisions cited:
G 0002/04, G 0001/12, J 0008/80, T 0025/85, T 0590/94,
T 0445/08

Catchword:

A request to correct the designation of the opponent in the notice of opposition is allowable under Rule 139, first sentence, EPC provided that it complies with the principles endorsed in G 1/12, in particular that it reflects what was originally intended when filing the notice of opposition, that it does not give effect to a change of mind or development of plans and that it represents the opponent's actual rather than ostensible intention (reasons 1.2 to 1.5).

The original intention at the time of filing the opposition can also be established on the basis of evidence submitted after the expiry of the opposition period (reasons 1.7).



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Case Number: T 0615/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 October 2015

Respondent: UPFRONT CHROMATOGRAPHY A/S
(Patent Proprietor) Lersø Parkallé 42
2100 Copenhagen Ø (DK)

Representative: Larsen & Birkeholm A/S
Banegaardspladsen 1
1570 Copenhagen V (DK)

Appellant: Campina Nederland Holding B.V.
(Opponent) 9, Hogeweg
5301 LB ZALTBOMMEL (NL)

Representative: Nederlandsch Octrooibureau
P.O. Box 29720
2502 LS The Hague (NL)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 13 January 2014
rejecting the opposition against European patent
No. 1605772 as inadmissible.**

Composition of the Board:

Chairman W. Sieber
Members: M. O. Müller
F. Blumer

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent against the decision of the opposition division to reject the opposition against European patent No. 1 605 772 as inadmissible.
- II. On 26 March 2008, professional representative Mr ... for Andries van Westerbrugge et al. / N.V. Nederlands Octrooibureau had filed a notice of opposition against the above-identified patent. Form 2300.1 mentioned N.V. Nutricia as opponent (section III), with the box in section VII ("Facts and arguments ... are submitted herewith on a separate sheet") being ticked. Attached was a document "Facts and Arguments" signed by the same attorney. In the first paragraph of page 1 of this document, it was stated: "On behalf of Campina Nederland Holding BV, the Netherlands, I hereby file opposition to European Patent No. 1 605 772 B1 ...". This document contained a reference to "the enclosed EPO form 2300" (second paragraph of page 1).
- III. By letter of 12 June 2008, another representative from the same law firm informed the EPO that the name N.V. Nutricia given in form 2300.1 was erroneous and should actually read Campina Nederland Holding B.V. The representative requested that the name of the opponent be accordingly corrected to Campina Nederland Holding B.V under Rule 139 EPC.
- IV. By letter of 24 February 2009, a response to the opposition was filed by the proprietor. The proprietor argued that the correction of the opponent's name was inadmissible and that the fact that two names were given for the opponent in the notice of opposition

created uncertainty as to whether the opponent had been designated before the expiry of the opposition period.

V. By letter of 17 April 2009, the opponent provided counter-arguments and stated that evidence could be provided that the wrong name in Form 2300.1 was an unintended and genuine mistake. This evidence was then provided by letters of 19 January 2012 and 25 October 2013:

Annex 1A: E-mail correspondence between Mr ... and Mr J. H. Roskam;

Annex 1B: English translation of part of annex 1A;

Annex 2: Case management database log file;

Annex 3: Visit report of Mr A. Verver, dated 15 July 2004; and

Annex 4: E-mail correspondence between Mr M. A. Olander and Mr A. Verver.

VI. In its decision to reject the opposition as inadmissible, the opposition division essentially reasoned as follows:

As confirmed by T 25/85, it was a fundamental principle underlying the opposition procedure before the EPO that the identity of the opponent had to be established at the expiry of the opposition period, since only then could it be a party to the opposition proceedings as laid down in Article 99(3) EPC.

In this respect, a distinction had to be made between deficiencies and omissions in information concerning

the opponent (see Rule 76(2)(a) in conjunction with Rule 41(2)(c) EPC), which could be remedied on invitation in accordance with Rule 77(2) EPC, and the requirement that the identity of the opponent be known and verifiable from the outset of the proceedings.

The remediable deficiencies involved details relating to the correct designation of the natural or legal person or to postal requirements in respect of the address. However, as set out in T 25/85, once the opposition period had expired it was not possible to supply information which would identify the opponent to the EPO for the first time. Rule 139 EPC could not be used in order subsequently to provide, in the form of a correction, information needed to identify an opponent.

In the present case, the notice of opposition did not allow the European Patent Office or the patentee to identify the opponent. The notice comprised the completed form 2300.1 naming "Nutricia" and a separate document, "Facts and Arguments", naming "Campina Nederland Holding BV".

The opponent's argument that the document "Facts and Arguments" was a complete and independent document and had more weight than form 2300 was not convincing. The document "Facts and Arguments" was not complete, as it did not contain the address of the opponent. Further, there was no provision in the EPC which allowed for part of a notice of opposition to be disregarded. Thus, there was one filing with two contradictory statements, with no clear indication as to which statement would be overriding and, consequently, which entity was meant to be the opponent. The intended opponent was hence neither clearly identified nor - in the absence of any indication as to who should it be - even identifiable

on the basis of the documents submitted at the end of the opposition period. Where the state of the file on the last day of the opposition period did not allow the identification of the opponent, a correction was not possible.

The opponent's argument and evidence that it was the opponent's original intention to file the opposition in the name of Campina Nederland Holding B.V. were not convincing in this respect. The requirement that the opponent had to be clearly identifiable was an objective criterion. The intention of the representative filing the notice of opposition was irrelevant, if this intention had not found its way in a clear manner into the documents constituting the notice of opposition. It was therefore also not to be considered whether or not the apparent mistake was unintended or an isolated one.

- VII. This decision was appealed by the opponent (hereinafter: the appellant) with the notice of appeal filed on 10 March 2014 and the statement setting out the grounds of appeal of 13 May 2014. The appellant in particular argued that in view of G 1/12, the request for correction should be allowed.
- VIII. A response was filed by the proprietor (hereinafter: the respondent) with its letter of 29 September 2014, together with a published decision from an opposition division relating to the admissibility of an opposition (pages 56-60 of OJ EPO 2/1986). The respondent argued *inter alia* that the request for correction was not allowable and relied in this respect on T 25/85 and G 2/04.

- IX. On 27 January 2015, the board issued its preliminary opinion in preparation for the oral proceedings. The board observed that it appeared not to be possible, on the basis of the notice of opposition or any other document on file by the expiry of the opposition period, to tell whether the opposition was filed in the name of N.V. Nutricia or Campina Nederland Holding B.V. It had therefore to be discussed whether a correction was possible under Rule 139, first sentence, EPC in view of the evidence filed after the expiry of the opposition period.
- X. By its letter dated 31 August 2015, the respondent declared that it would not be represented at the oral proceedings and provided further arguments.
- XI. On 27 October 2015, oral proceedings were held before the board in the respondent's absence.
- XII. The appellant requested that the opponent's name and address on form 2300.1 filed on 26 March 2008 be corrected under Rule 139 EPC to Campina Nederland Holding B.V., Hogeweg 9, 5301 LB Zaltbommel (NL).
- The appellant further requested that the decision under appeal be set aside and that the opposition be considered admissible, and that the patent be revoked in its entirety, or auxiliarily that the case be remitted to the opposition division for further prosecution.
- XIII. The respondent requested in writing that the appeal be rejected as inadmissible or that the decision of the opposition division be upheld and the opposition rejected as inadmissible.

In the event that the board intended to allow the correction of the opponent's name, the respondent furthermore requested that certain questions be referred to the Enlarged Board of Appeal (see point 3 of the Reasons).

In the event that (i) the appeal and the correction of the notice of opposition were allowed, and (ii) that the request for referral to the Enlarged Board was refused, the respondent requested that the case be remitted to the opposition division for further prosecution.

The respondent finally requested that annexes 1A, 1B, 2 and 3 not be admitted into the proceedings.

Reasons for the Decision

1. The request for correction
 - 1.1 The notice of opposition filed on 26 March 2008 contained the completed form 2300 and, annexed thereto, a separate document entitled "Facts and Arguments", each document referring to the other. In part 2300.1 (box III), the form named "N.V. Nutricia" as the opponent while the separate document referred to "Campina Nederland Holding B.V." as the opponent ("On behalf of Campina Nederland Holding BV, the Netherlands, I hereby file opposition...").

By letter of 12 June 2008, the then opponent requested that the designation of the opponent in form 2300.1 be corrected under Rule 139 EPC to "Campina Nederland Holding B.V., Hogeweg 9, 5301 LB Zaltbommel, The Netherlands". This request was refused by the opposition division.

1.2 The relevant part of Rule 139 EPC underlying the opponent's request is Rule 139, first sentence, EPC, which reads as follows:

"Linguistic errors, errors of transcription and mistakes in any document filed with the European Patent Office may be corrected on request."

1.3 In G 1/12 (points 34 to 40) issued after the opposition division's decision, the Enlarged Board held *inter alia* that for a request for correction (in that case a request to correct the appellant's name), the general procedure for correcting errors under Rule 139, first sentence, EPC was available and the well-established case law of the boards of appeal on the application of this rule provided the necessary guidance on its application. The Enlarged Board in particular stated that the correction had to introduce what was originally intended, that it should not be used to enable a person to give effect to a change of mind or development of plans and that it was the parties' actual rather than ostensible intention which had to be considered (point 37).

1.4 The respondent argued that G 1/12 could not be applied to the present case since that decision referred to the correction of the appellant's name rather than the opponent's. According to the respondent, the situation in appeal proceedings was different from that in opposition proceedings because the identity of an appellant was limited to one or only a few options, namely the party or parties involved in first-instance proceedings, while in the present case the identity of the opponent was completely unknown and in fact could be any party whatsoever.

The board acknowledges that G 1/12 does indeed deal with a correction of the appellant's name rather than the opponent's. However, the rationale applied in that decision as regards the correction under Rule 139, first sentence, EPC can nevertheless be applied by way of analogy to the present case.

Firstly, in the present case, there is a choice between only two opponents, namely N.V. Nutricia mentioned in form 2300.1 and Campina Nederland Holding B.V. mentioned in the annexed "Facts and Arguments". Hence, contrary to the respondent's assertion, there is no difference from the situation in appeal.

Secondly, even if there was such a difference, what was held in G 1/12 as regards Rule 139, first sentence, EPC could still be applied to opposition proceedings. This rule allows the correction of "mistakes in any document filed with the European Patent Office". The reference to "any document" makes it clear that Rule 139, first sentence, EPC is not restricted to mistakes in documents filed in appeal but rather extends to any other document, including the notice of opposition. In fact the Enlarged Board of Appeal in G 1/12 (points 35 and 36 and 39) emphasised that Rule 139, first sentence, EPC was generally applicable:

"The first sentence of Rule 88 EPC 1973, or now (with the same wording) of Rule 139 EPC, applies generally (see J 4/85, OJ EPO 1986, 205, and subsequent case law). This follows clearly from the EPC structure as intended by the legislator, Rule 139 EPC having been left in the part relating to "Common provisions", where it had already been in the EPC 1973." (point 36)

1.5 Hence, G 1/12, in as far as Rule 139 EPC is concerned, can be applied to opposition proceedings. Thus, a request for correcting the name of an opponent in the notice of opposition is allowable under Rule 139, first sentence, EPC provided that it complies with the principles established by the case law in this context, in particular that it reflects what was originally intended when filing the notice of opposition, that it does not give effect to a change of mind or development of plans and that it represents the opponent's actual rather than ostensible intention.

1.6 The board agrees with the respondent and the opposition division that in the present case neither the notice of opposition nor any other document on file before the expiry of the opposition period reveals whether it was N.V. Nutricia or Campina Nederland Holding B.V. in whose name Mr ... originally intended to file the opposition.

Hence, on the basis of the documents on file upon expiry of the opposition period, the requested correction would not have been allowable.

1.7 The appellant had filed evidence later on in the opposition proceedings, i.e. after the expiry of the opposition period, to establish Mr ...'s original intention when filing the notice of opposition (see point 1.8 below). It was a matter of dispute between the parties whether the original intention at the time of filing the opposition could also be established on the basis of evidence submitted after the expiry of the opposition period. Relying on T 25/85 and T 590/94, the respondent argued that this was not possible.

1.7.1 The board does not agree.

In T 25/85 (and T 590/94 relying thereon) it was held that Rules 55(a) and 56(2) EPC 1973 (equivalent to present Rules 76(2)(a) and 77(2) EPC) had to be considered as "*lex specialis*" of Rule 88 EPC 1973 (present Rule 139 EPC), first sentence, and that therefore the designation of the opponent was no longer possible after the expiry of the nine-month opposition period (point 12 of T 25/85: "... macht es notwendig, die Regeln 55 a) und 56(2) EPÜ gegenüber Regel 88 Satz 1 EPÜ als "*lex spezialis*" anzusehen. Diese besonderen Regeln über die Berichtigung der Einspruchsschrift nach Ablauf der Einspruchsfrist erlauben zwar Berichtigungen in der Bezeichnung des Einsprechenden, aber nicht seine nachträgliche Nennung.").

This ruling has however been superseded by G 1/12, where it is held that the applicability of Rule 139 EPC is general, not restricted by any *lex specialis*:

"The Enlarged Board of Appeal cannot subscribe to the argumentation put forward by the respondent (opponent) according to which, applying the general principle of *lex specialis derogat legi generali*, only Rule 101 EPC is applicable, since this is "*lex specialis*" in relation to Rule 139 EPC, which has to be considered "*lex generalis*". Leaving aside the explanations set out above, the Enlarged Board of Appeal cannot find in the wording of Rule 139 EPC any indication that this generally applicable provision refers to exceptional provisions. The EPC drafters did not in the wording of Rule 139 EPC make use of any introductory or final formula which, by definition, would have referred to a

specific provision excluding the general provision. ... The Enlarged Board of Appeal concludes that Rule 139 EPC is generally applicable as indicated above." (point 39)

1.7.2 In fact, it can be derived directly from G 1/12 that evidence proving the requester's original intention at the time of filing the opposition can also be submitted later in the proceedings. More specifically, the Enlarged Board held in point 37(b) that "Where the original intention is not immediately apparent, the requester bears the burden of proof ...". The Enlarged Board then referred to J 8/80, which allowed a correction of the designation of a contracting state on the basis of later-filed evidence concerning the attorney's original intention.

1.7.3 Also in T 445/08 (the case that led to referral G 1/12), issued after the Enlarged Board in G 1/12 had issued its decision, later-filed evidence was taken into account to establish the representative's original intention. In that case, notice of appeal against the decision of the opposition division to revoke the patent had been filed making reference at the same time to both "Zenon Technology Partnership" (the actual name of the proprietor of the revoked patent) and, erroneously, "ZENON ENVIRONMENTAL INC" (the name of the applicant rather than the proprietor of the revoked patent). The board allowed the appellant's request for correction of "ZENON ENVIRONMENTAL INC" to "Zenon Technology Partnership" under Rule 139 EPC on the grounds that the most plausible scenario was that the representative in charge of preparing the appeal simply copied erroneously the identity of the applicant mentioned in the first page of the PCT application and that in view of *inter alia* a later-filed affidavit

filed by the counsel who instructed the representative, it was established beyond reasonable doubt that the requested correction did not result in enabling the appellant to change its mind (see in particular points 13.1 and 13.4 of T 445/08).

- 1.7.4 The respondent argued that the consideration of subsequently filed evidence was excluded in view of the statement in G 2/04 that at any given time, throughout the proceedings - hence also directly after the expiry of the nine-month opposition period - there had to be no doubt as to who could validly exercise procedural rights.

However, this statement in G 2/04 dealt with a situation completely different from the present one, namely a case where one opponent was replaced by another party (see in particular point 2.2.2(a) of G 2/04). In contrast, in the present case, the correction of the opponent's name on the basis of later-filed evidence would not imply that a new party was joining the proceedings but only that the identity of the party intended to be the opponent from the start of the proceedings was being established.

- 1.7.5 Hence, the original intention at the time of filing the opposition can also be established on the basis of evidence submitted after the expiry of the opposition period.

- 1.8 It needs to be examined what the original intention was in the present case.

- 1.8.1 As regards this issue, the appellant had filed annexes 1A, 1B and 2 during the opposition proceedings. The opposition division had not taken these annexes

into account and in the present appeal proceedings the respondent requested that they not be admitted into the proceedings.

The respondent argued in this respect that the evidence filed by the appellant in support of its arguments that Campina Nederland Holding B.V. was the true opponent was not relevant since according to T 25/85 it was not possible to supply information which would identify the opponent for the first time after the opposition period had expired. A similar line of reasoning was taken by the opposition division. However, as set out above, T 25/85 has been superseded by G 1/12, and the original intention can also be established on the basis of evidence filed after the expiry of the opposition period.

Furthermore, as will be set out below, annex 1A (and the translation thereof, which is annex 1B) and annex 2 are *prima facie* relevant as to the representative's original intention when filing the notice of opposition.

The board therefore decided to admit annexes 1A, 1B and 2 into the proceedings.

- 1.8.2 The notice of opposition offers a choice between N.V. Nutricia and Campina Nederland Holding B.V. as the opponent.

Annex 1A (and the partial translation thereof, i.e. annex 1B) is e-mail correspondence between Mr Roskam, the IP manager of DMV-International, and Mr ..., the representative who signed the notice of opposition. From this e-mail correspondence it is apparent that

Mr Roskam asked Mr ... on 19 February 2008 to oppose European patent No. 1 605 772.

The appellant stated that DMV-International was a subdivision of Campina Nederland Holding B.V. at the time of filing the opposition. An indication to this effect is present in Mr Roskam's e-mail itself, which contains on the second page a legal disclaimer referring to Campina ("CAMPINA LEGAL DISCLAIMER"). A further indication in this direction is present in annex 2, which according to the appellant is a screenshot of the case management database log file summarising all events relating to the present opposition case. This annex contains in the third data block on the right-hand side the entry "DMV International" linked to the date entry "20 February 2008", which is one day after Mr Roskam wrote his e-mail to Mr The same company name is repeated together with the date entry "20 March 2008", and just above this entry another entry with the same date is present, this time referring to Campina Nederland Holding B.V.

Hence, of the two possible companies, N.V. Nutricia and Campina Nederland Holding B.V., it can only be the latter in whose name Mr Roskam instructed Mr ... to file the opposition. Mr ...'s original intention must accordingly have been to file the opposition in the name of this company, and only by mistake, namely, as explained by the appellant, by the sheer force of habit, was N.V. Nutricia named in form 2300.1.

Therefore, the request that the opponent's designation in form 2300.1 be corrected under Rule 139 EPC to Campina Nederland Holding B.V., Hogeweg 9, 5301 LB Zaltbommel, The Netherlands is allowable.

2. Admissibility of the opposition and appeal (Rules 77(2) and 101(2) EPC)

Since the request for correction is allowable, the opposition and appeal, which was filed in the name of Campina Nederland Holding B.V., are admissible.

3. Request for referral to the Enlarged Board of Appeal

- 3.1 The respondent requested that the following questions be referred to the Enlarged Board of Appeal.

"1. When a notice of opposition contains a deficiency which means that the identity of the opponent ("any person" as required by Article 99(1) EPC) cannot be reliably determined at the expiry of the 9-month opposition period, is a request for correction of the identity of the opponent filed after the expiry of the 9-month opposition period admissible as a remedy to such a deficiency?

2. If the answer to the first question is "yes", and the deficiency in the notice of opposition can be remedied, what level of proof is required for doing so?

3. If the answer to the first question is no, may the opponent's intention play a role and justify the application of Rule 139 EPC?"

- 3.2 As set out above (points 1.2 to 1.5), the present board is able to give an answer to the first question, namely that a correction under Rule 139, first sentence, EPC is allowable, provided the principles endorsed in G 1/12 are complied with. Contrary to the respondent's assertion, this answer does not diverge from the case

law exemplified in T 25/85 and T 590/94, as these two decisions have been superseded by G 1/12 (see points 1.7.1 and 1.7.2 above).

The second question is a question of fact, the answer to which depends on the factual situation in each individual case. A referral based on this question would therefore not meet the criteria of Article 112(1) EPC, which requires the referral question to be a question of law.

Finally, in view of the fact that the first question must be answered in the positive, the third question is rendered moot.

Thus the request that certain questions be referred to the Enlarged Board of Appeal must be refused.

4. Remittal

Since the opposition and appeal are admissible, and the substantive issues of the opposition have not yet been discussed before the opposition division, the case should be remitted to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The appellant's/opponent's request that the opponent's name and address on form 2300.1 filed on 26 March 2008 be corrected under Rule 139 EPC to Campina Nederland Holding B.V., Hogeweg 9, 5301 LB Zaltbommel (NL), is allowed.
3. The opposition and the appeal are admissible.
4. The respondent's request that certain questions be referred to the Enlarged Board of Appeal is refused.
5. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated