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**Datasheet for the decision
of 1 December 2020**

Case Number: T 1638/14 - 3.3.01

Application Number: 06720163.2

Publication Number: 1848414

IPC: A61K31/4706, A61K38/17,
A61P35/00

Language of the proceedings: EN

Title of invention:
METHOD FOR TREATING GEFITINIB RESISTANT CANCER

Patent Proprietor:
THE GENERAL HOSPITAL CORPORATION
Wyeth LLC

Opponent:
BOEHRINGER INGELHEIM INTERNATIONAL GMBH

Headword:
Gefitinib resistant cancer/WYETH

Relevant legal provisions:
EPC Art. 99(1)
EPC R. 76(2)(a), 77(1), 139

Keyword:

Admissibility of opposition (no) - identification of the
opponent

Correction of error (no) - late request and no evidence of true
intention

Decisions cited:

G 0001/12, G 0003/99, T 0025/85



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Case Number: T 1638/14 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 1 December 2020

Appellant: THE GENERAL HOSPITAL CORPORATION
(Patent Proprietor 1) 55 Fruit Street
Boston, MA 02114 (US)

Appellant: Wyeth LLC
(Patent Proprietor 2) 235 East 42nd Street
New York, NY 10017 (US)

Representative: Jones Day
Rechtsanwälte, Attorneys-at-Law, Patentanwälte
Prinzregentenstrasse 11
80538 München (DE)

Respondent: BOEHRINGER INGELHEIM INTERNATIONAL GMBH
(Opponent) Binger Strasse 173
55216 Ingelheim/Rhein (DE)

Representative: Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
Arabellastraße 30
81925 München (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
26 May 2014 concerning maintenance of the
European Patent No. 1848414 in amended form.**

Composition of the Board:

Chairman A. Lindner
Members: J. Molina de Alba
 P. de Heij

Summary of Facts and Submissions

I. The decision under appeal is the interlocutory decision of the opposition division finding that European patent No. 1 848 414 as amended in the form of auxiliary request 5, and the invention to which it relates, met the requirements of the EPC.

II. In the decision, the opposition division considered that the opposition met the requirements of Rule 76 EPC and therefore it was admissible. In this context, it cited, *inter alia*, the following documents:

E13: Excerpt from the "Handelsregister A des Amtsgerichts Mainz" concerning Boehringer Ingelheim Pharma GmbH & Co. KG

E14: Excerpt from the "Handelsregister B des Amtsgerichts Mainz" concerning Boehringer Ingelheim International GmbH

E15: Excerpt from the Boehringer Ingelheim Annual Report 2012, Corporate structure of the Boehringer Group

As to the substance, the opposition division held that the subject-matter of the main request (patent as granted) and auxiliary requests 1 and 2 was not novel. Furthermore, the claims of auxiliary requests 3 and 4 extended the protection conferred by the patent as granted.

III. Each of the patent proprietors and the opponent filed an appeal against the decision. As both parties are appellants (and thus also respectively respondents),

they will be referred to in the following as "patent proprietors" and "opponent".

- IV. With their statement of grounds of appeal, the patent proprietors maintained the main request (patent as granted) and auxiliary requests 1 to 5 underlying the appealed decision. They also filed three new documents to support their case.
- V. With its statement of grounds of appeal, the opponent filed 20 new documents and requested that Dr Thomas Harding be heard by the board in his capacity as an expert in the technical field of the patent.
- VI. With their replies to the other party's statement of grounds of appeal, the patent proprietors and the opponent filed additional documents.
- VII. The board scheduled oral proceedings in line with the parties' requests. In a communication dated 25 February 2020, it gave its preliminary opinion on the case.
- VIII. In response to the board's preliminary opinion, the patent proprietors filed a new set of claims as auxiliary request 6.
- IX. By letter dated 15 October 2020, the opponent informed the board that it would not attend the scheduled oral proceedings.
- X. Third-party observations were filed on 21 September 2020 and 9 October 2020. They focused on issues concerning the priority right.

- XI. The patent proprietors reacted to the third-party observations with a letter dated 3 November 2020.
- XII. Oral proceedings were held in the opponent's absence on 1 December 2020.
- XIII. The patent proprietors' arguments, where relevant to the present decision, may be summarised as follows.

The opponent's identity was not clear by the end of the opposition period, as required by Article 99(1) and Rule 76(2)(a) EPC. Therefore, the opposition should have been rejected as inadmissible pursuant to Rule 77(1) EPC (see also G 1/12, Reasons 20 and 22; G 3/97, Reasons 2.1; and G 3/99, Reasons 12).

The information required by Rule 76 EPC could only be provided in the notice of opposition because form 2300 had not been filed. The notice of opposition presented two different entities as the opponent. Each of the entities was mentioned only once in the whole document, one in the header and the other in the body text. They had the same weight. Thus, there were legitimate doubts regarding the identity of the opponent. This situation was analogous to that of the cases underlying decisions T 579/16 and T 615/14.

The formalities officer sent forms 2317A and 2316 whereby they considered the opponent as the entity mentioned in the body text of the notice of opposition. However, this was not legally binding, as it was not a decision by the opposition division (T 222/85, Headnote). Moreover, no case law supported that an opponent cited in the body text of the notice of opposition has prevalence over another one cited in the header. The opposition division erred in arbitrarily

picking one of two equally valid indications and admitting the opposition.

This deficiency could not be remedied under Rule 139 EPC (see e.g. T 579/16, Reasons 2, 5, 9), because the rule required that: i) the request for correction be made without delay once the error has been identified, and ii) the opponent prove that the correction was its true intention at the time of filing the opposition. Neither of these two conditions had been fulfilled: i) the first time that the opponent requested correction was as an auxiliary request in its statement of grounds of appeal (i.e. more than two years after identifying the error), and ii) the opponent did not provide any evidence concerning its true intention.

XIV. The opponent's arguments, where relevant to the present decision, may be summarised as follows.

The opposition is admissible. The notice of opposition stated on page 1 that the opposition was filed in the name of Boehringer Ingelheim International GmbH. The header mentioning Boehringer Ingelheim Pharma GmbH & CO. KG was only for informative purposes. There was no doubt that the opponent was the entity cited in the body text. This was also the EPO's finding in form 2316, sent during the opposition period, and form 2317A, sent following the examination as to formal requirements at the end of the opposition period. In the forms, the EPO correctly identified the opponent as being Boehringer Ingelheim International GmbH. The opposition division endorsed this finding and, therefore, never issued a communication under Rule 77 EPC. This conclusion should not be reviewed by the board.

In any case, the mention of Boehringer Ingelheim Pharma GmbH & Co. KG in the header of the notice of opposition was a mistake that can be corrected retroactively at any time under Rule 139 EPC (G 1/12, Reasons 34, 35 and 40; T 219/86, Reasons 5 and Headnote, item 2; and T 828/98).

XV. The parties' final requests, as far as relevant to the present decision, were as follows.

The patent proprietors requested that the decision under appeal be set aside and the opposition be rejected, implying that the patent be maintained as granted (main request).

The opponent had requested in its written submissions:

- that the appealed decision be set aside and the patent be revoked;
- alternatively, that the patent proprietors' appeal be dismissed;
- that the mention of Boehringer Ingelheim Pharma GmbH & Co. KG in the notice of opposition be corrected under Rule 139 EPC to read "Boehringer Ingelheim International GmbH"; and
- that Dr Thomas Harding be heard as an expert at the oral proceedings before the board.

XVI. At the end of the oral proceedings, the board's decision was announced.

Reasons for the Decision

1. The appeal is admissible. It complies with the requirements pursuant to Articles 106 to 108 and Rule 99 EPC.

2. *Opponent's identity*

2.1 According to Article 99(1), first sentence, EPC, "*[W]ithin nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin, any person may give notice to the European Patent Office of opposition to that patent, in accordance with the Implementing Regulations.*"

In this connection, Rule 76(2)(a) EPC requires that the notice of opposition contain "*particulars of the opponent as provided in Rule 41, paragraph 2(c)*". Such particulars include name and address.

If the notice of opposition does not comply with Article 99(1) EPC, Rule 77(1) EPC states that the opposition division "*shall reject the opposition as inadmissible, unless these deficiencies have been remedied before expiry of the opposition period*".

Thus, for an opposition to be admissible, the opponent's identity must be established before expiry of the opposition period (see T 25/85 and the reference to this decision in G 3/99, Reasons 12).

2.2 Contrary to the opponent's view, the admissibility of an opposition must be examined *ex officio* at any stage of the opposition and its subsequent appeal proceedings (see decisions cited in Case Law of the Boards of Appeal, 9th edition 2019, IV.C.2.3.2). Thus, the board is not only entitled but also obliged to check the admissibility of the opposition at any stage of the proceedings.

2.3 In the case in hand, an opposition was filed by means of a notice of opposition which was not accompanied by form 2300. Thus, all the information required by the Implementing Regulations had to be inferred from a single document.

The notice of opposition contained the following header identifying the essentials of the opposition, where the opponent was identified as being "Boehringer Ingelheim Pharma GmbH & Co. KG".

Our Ref.: 138 502 m6/bk
Opposition against EP 1 848 414
(EP Application No. 06 720 163.2)
Patentee: The General Hospital Corporation and Wyeth
Opponent: Boehringer Ingelheim Pharma GmbH & Co. KG

After this header, the body text of the notice of opposition started with the sentence below, which designated the opponent as "Boehringer Ingelheim International GmbH".

In the name of

**Boehringer Ingelheim International GmbH
Binger Strasse 173
55216 Ingelheim am Rhein**

we herewith lodge

o p p o s i t i o n

pursuant to Art. 99 EPC against European patent EP 1 848 414
(application no. 06 720 163.2) of

**The General Hospital Corporation
55 Fruit Street, Boston, MA 02114 (USA)**

and

Wyeth, LLS, 5 Giralda Farms, Madison, New Jersey, 07940 (USA)

It appears that, at the time of filing the opposition, "Boehringer Ingelheim Pharma GmbH&Co. KG" and "Boehringer Ingelheim International GmbH" were separate legal entities which shared the same address (see document E13, entries 1 and 9; document E14, entries 1 and 6; and document E15). This was not disputed by the opponent.

Thus, the information regarding the opponent's identity in the header and the body text was contradictory. The notice of opposition contained no additional information that could establish which of the two companies was the intended opponent.

- 2.4 In the opponent's view, it was clear that the intended opponent was the company designated in the body text.

The header was merely for informative purposes and its content had less value. For that reason, the formalities officer had correctly established in forms 2316 and 2317A that the opponent was Boehringer Ingelheim International GmbH. This finding was confirmed by the opposition division which held the opposition admissible and never sent a communication under Rule 77 EPC.

The board considers this argument unconvincing. There is no factual basis for assuming that more attention was given to the designation in the body text and that therefore the error was inevitably in the header.

The fact that the formalities officer had selected the company mentioned in the body text as the opponent and that this selection was endorsed by the opposition division does not change the board's assessment. The opposition division's decision relied on the assumption that the identification of the opponent had proved to be possible in view of the formalities officer's communications of 7 December 2011 and 13 February 2012, where the opponent was identified as Boehringer Ingelheim International GmbH. However, this assumption did not take into account that the identification must have been arbitrary, as there was no sufficient reason to hold the identified legal entity as the correct one.

Consequently, the board considers that, by the end of the opposition period, the opponent had not been unambiguously identified and that, therefore, the opposition should have been rejected as inadmissible under Rule 77(1) EPC.

3. *Request for correction under Rule 139 EPC*

3.1 It is established case law (see G 1/12, Reasons 40, and decisions cited in Case Law of the Boards of Appeal, 9th edition 2019, IV.C.2.2.4, paragraph 1) that the opponent's name may be corrected after the opposition period under Rule 139, first sentence, EPC. Such a correction has retrospective effect (G 1/12, Reasons 37, last paragraph). Nevertheless, for allowing the request for correction, the principles endorsed in G 1/12 (Reasons 37) must be fulfilled, namely that:

- (a) the correction introduces what was originally intended;
- (b) where the original intention is not immediately apparent, the requester bears the burden of proof, which must be a heavy one;
- (c) the error to be remedied may be an incorrect statement or an omission; and
- (d) the request for correction must be filed without delay.

3.2 It is clear that in the case in hand the request for correction was not filed without delay (condition (d)). The request was filed for the first time on 11 February 2015 as an auxiliary request in the reply to the patent proprietors' statement of grounds of appeal (page 7, last paragraph). This was more than two years after the identification of the error by the patent proprietors in their reply to the notice of opposition, dated 13 August 2012.

More importantly, however, the opponent, which had the burden of proof, has not provided any evidence that the

proposed correction was its true intention at the time of filing the opposition (condition (b)).

Hence, the conditions established in G 1/12 are not fulfilled and the opponent's request for correction under Rule 139 EPC must be rejected.

4. In view of the above, there is no need to decide on the opponent's request that Dr Harding be heard.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The opposition is rejected as inadmissible.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated