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**Datasheet for the decision  
of 10 January 2019**

**Case Number:** T 0605/15 - 3.3.01

**Application Number:** 08745614.1

**Publication Number:** 2139485

**IPC:** A61K31/519, A61K45/06,  
A61P3/02, A61P3/00, A61P25/16

**Language of the proceedings:** EN

**Title of invention:**

METHODS OF ADMINISTERING TETRAHYDROBIOPTERIN, ASSOCIATED  
COMPOSITIONS, AND METHODS OF MEASURING

**Patent Proprietor:**

BioMarin Pharmaceutical Inc.

**Opponent:**

Generics [UK] Limited

**Headword:**

Tetrahydrobiopterin/BIOMARIN

**Relevant legal provisions:**

EPC Art. 113(2)

**Keyword:**

Basis of decision - text or agreement to text withdrawn by  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

**Decisions cited:**

T 0073/84



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0605/15 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 10 January 2019**

**Appellant:** BioMarin Pharmaceutical Inc.  
(Patent Proprietor) 105 Digital Drive  
Novato, CA 94949 (US)

**Representative:** Weber, Martin  
Jones Day  
Rechtsanwälte Attorneys-at-Law Patentanwälte  
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**Appellant:** Generics [UK] Limited  
(Opponent) (trading as Mylan)  
Albany Gate  
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**Representative:** Elend, Almut Susanne  
Venner Shipley LLP  
Byron House  
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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**20 January 2015 concerning maintenance of the**  
**European Patent No. 2139485 in amended form.**

**Composition of the Board:**

**Chairman**           A. Lindner  
**Members:**           M. Pregetter  
                          P. de Heij

## **Summary of Facts and Submissions**

- I. Appeals were lodged both by the patent proprietor (appellant 1) and by the opponent (appellant 2) against the interlocutory decision of the opposition division concerning maintenance of European patent No. 2 139 485 in amended form.
- II. With the statement of grounds of appeal appellant 1 requested that the decision under appeal be set aside and that the patent be maintained based on the claims as granted. Alternatively, it requested maintenance of the patent based on any of auxiliary requests 1 to 9, filed with the statement of grounds of appeal. With letter dated 18 December 2015 two additional auxiliary requests were submitted, all other requests were re-submitted, some were renumbered. With letter dated 15 June 2017 two additional request were submitted, previous auxiliary request 11 was re-numbered and re-submitted as auxiliary request 12.
- III. With the statement of ground of appeal appellant 2 requested that the decision under appeal be set aside and the patent be revoked in its entirety.
- IV. The board issued a summons to oral proceedings to take place on 26 and 27 November 2018.
- V. With letter dated 9 November 2018 appellant 1 withdrew its appeal. Furthermore it withdrew its approval of the text to the patent as granted. It also withdrew all claim requests on file and confirmed that it would not be filing any further requests. It requested that the patent be revoked and reimbursement of the appeal fee.

## Reasons for the Decision

1. Pursuant to Article 113(2) EPC the European Patent Office shall examine, and decide upon the European patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent.
  - 1.1 Appellant 1 no longer approves the text in which the patent was granted and has withdrawn all pending claim requests.
  - 1.2 Therefore, there is no longer any text of the patent in the proceedings on the basis of which the board can consider the appeal. It is established case law that in these circumstances the patent must be revoked without further substantive examination as to patentability (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the EPO, 8th edition 2016, section IV.C.5.2).
2. *Reimbursement of the appeal fee*

Partial refund of the appeal fee was requested under R. 103(2) (a) EPC. R. 103(2) (a) EPC specifies that "The appeal fee shall be reimbursed at 50% if the appeal is withdrawn after expiry of the period under paragraph 1(b), provided withdrawal occurs (a) if a date for oral proceedings has been set, at least four weeks before that date".

By submissions of 9 November 2018, the Board was informed of the appellant's withdrawal of its appeal. The withdrawal of the appeal thus took place less than four weeks before the date set for oral proceedings,

which were to take place on 26 and 27 November 2018.

The period of time between the withdrawal of the appeal and the date for oral proceedings is thus less than four weeks. For this reason, the appellant's request for partial refund of the appeal fee is devoid of any legal basis.

## 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