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**Datasheet for the decision  
of 12 February 2019**

**Case Number:** T 0808/15 - 3.3.04

**Application Number:** 09702831.0

**Publication Number:** 2245062

**IPC:** C07K16/24, A61K39/395,  
A61P19/10

**Language of the proceedings:** EN

**Title of invention:**

Methods of treating bone-loss disorders using a GM-CSF antagonist

**Patent Proprietor:**

Kalobios Pharmaceuticals, Inc.

**Opponents:**

MorphoSys AG  
Huenges Martin c/o Maiwald Patentanwalts GmbH

**Headword:**

GM-CSF antagonist/KALOBIOS

**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Basis of decision - text or agreement to text withdrawn by  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

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 0808/15 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 12 February 2019**

**Appellant:** MorphoSys AG  
(Opponent 1) Lena-Christ-Str. 48  
82152 Planegg/Martinsried (DE)

**Representative:** Hutter, Bernd  
MorphoSys AG  
Sammelweisstrasse 7  
82152 Planegg (DE)

**Appellant:** Huenges Martin c/o Maiwald Patentanwalts GmbH  
(Opponent 2) Elisenhof Elisenstr. 3  
80335 Munich (DE)

**Representative:** Huenges, Martin  
Maiwald Patentanwalts- und  
Rechtsanwaltsgesellschaft mbH  
Elisenhof  
Elisenstraße 3  
80335 München (DE)

**Respondent:** Kalobios Pharmaceuticals, Inc.  
(Patent Proprietor) 260 East Grand Avenue  
South San Francisco, CA 94080 (US)

**Representative:** Pearl Cohen Zedek Latzer Baratz UK LLP  
16 Upper Woburn Place  
London WC1H 0BS (GB)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
26 February 2015 concerning maintenance of the  
European Patent No. 2245062 in amended form.

**Composition of the Board:**

<b>Chair</b>	G. Alt
<b>Members:</b>	R. Morawetz
	L. Bühler

## **Summary of Facts and Submissions**

- I. Appeals were lodged by the two opponents (appellants) against the interlocutory decision of the opposition division concerning the maintenance of the European Patent No. 2 245 062 in amended form.
- II. Both appellants requested that the decision under appeal be set aside and that the patent be revoked. Oral proceedings were requested on an auxiliary basis.
- III. The patent proprietor (respondent) requested that the appeals be dismissed. Oral proceedings were requested on an auxiliary basis.
- IV. As all parties had requested oral proceedings, the board issued a summons to oral proceedings to be held on 6 June 2019, accompanied by a communication of the board.
- V. By letter dated 10 January 2019 the respondent submitted that:

*"The patent proprietor (respondent) hereby surrenders European Patent No. 2245062. The proprietor no longer approves the text in which the European patent was maintained by the Opposition Division, withdraws all pending claim requests, and will not be submitting an amended text.*

*The revocation of the above European patent by the Board of Appeal is awaited in due course.*

*Evidently, the oral proceedings scheduled for 6 June 2019 are no longer required and can be cancelled."*

VI. The parties were informed by a communication dated 11 February 2019 that the oral proceedings had been cancelled.

### **Reasons for the Decision**

1. The appeals comply with Articles 106 to 108 and Rule 99 EPC and are therefore admissible.

#### *Disapproval of the text of the patent by the patent proprietor*

2. Pursuant to Article 113(2) EPC, the European Patent Office shall decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.

3. Such an agreement cannot be deemed to exist if the patent proprietor - as in the present case - expressly states that it no longer approves the text in which the European patent was maintained by the opposition division, withdraws all pending claim requests, and will not be submitting an amended text (see section V).

4. There is therefore no text of the patent on the basis of which the board can consider the appeal. In these circumstances, the proceedings are to be terminated by a decision ordering revocation of the patent, without 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, IV.C.5.2, page 979).

#### *Cancellation of the oral proceedings*

5. The statement contained in the letter of the respondent that "*the oral proceedings scheduled for 6 June 2019*

*are no longer required and can be cancelled"* (see section V) can only be interpreted as a withdrawal of its earlier request for oral proceedings. The summons to oral proceedings could be cancelled and the present decision could be taken without holding oral proceedings because the decision is in line with both appellants main requests (see section II).

## **Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



S. Lichtenvort

G. Alt

Decision electronically authenticated