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Datasheet for the decision of 23 August 2021

Case Number: T 1805/15 - 3.3.04

Application Number: 02710551.9

Publication Number: 1351981

IPC: C07K14/135

Language of the proceedings: EN

Title of invention:
A virus causing respiratory tract illness in susceptible mammals

Patent Proprietor:
Erasmus University Medical Center Rotterdam

Opponent:
Behrens, Lüder

Headword:
A virus causing respiratory tract illness/ERASMUS

Relevant legal provisions:
EPC Art. 123(2)
RPBA Art. 12(4)

Keyword:
Amendments - added subject-matter (yes)

This datasheet is not part of the Decision
It can be changed at any time and without notice

Decisions cited:
G 0009/91, G 0010/91, G 0001/93, G 0002/10

Catchword:

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Case Number: T 1805/15 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 23 August 2021

Appellant: (Patent Proprietor)	Erasmus University Medical Center Rotterdam Dr. Molewaterplein 50 3015 GE Rotterdam (NL)
Representative:	Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Respondent: (Opponent)	Behrens, Lüder Boehmert & Boehmert Anwaltspartnerschaft mbB Pettenkoferstrasse 20-22 80336 München (DE)
Representative:	Kuttenkeuler, David Boehmert & Boehmert Anwaltspartnerschaft mbB Pettenkoferstrasse 22 80336 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 13 July 2015 concerning maintenance of the European Patent No. 1 351 981 in amended form**

Composition of the Board:

Chairman	B. Claes
Members:	A. Chakravarty
	M. Blasi

Summary of Facts and Submissions

I. An appeal was filed by the patent proprietor (appellant) against the interlocutory decision of the opposition division that European patent No. 1 351 981 as amended in the form of auxiliary request 7, met the requirements of the EPC. The opponent is respondent to this appeal.

II. The opposition division considered sets of claims of a main and seven auxiliary requests. It held, *inter alia*, that claims 3, 11 and 13 of the main request did not meet the requirements of Article 123(2) EPC. Since claims of auxiliary requests 1 to 5 all contained the same contested phrase, "high stringency conditions", as claim 3 of the main request, these requests did not meet the requirements of Article 123(2) EPC either. Auxiliary request 6, which did not contain the above mentioned phrase, was considered not to meet the requirements of Article 123(2) EPC because the subject-matter of claim 3 did not have a basis in the application as filed either. The claims of auxiliary request 7 were held to meet the requirements of the EPC.

III. Claim 3 of the main request in appeal is identical to claim 3 of the main request considered by the opposition division (see above). It reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid wherein the isolated nucleic acid hybridizes specifically under high stringency conditions with the nucleic acid of claim 2."

IV. With the statement of grounds of appeal, the appellant submitted sets of claims of a new main and new auxiliary requests 1 to 9, all filed for the first time on appeal. Auxiliary request 10 was auxiliary request 7 held allowable by the opposition division. The appellant also submitted documents E17 to E21.

In the following claims, underline and ~~strike through~~ are by the board and serve to highlight the differences to claim 3 of the main request.

Claim 3 of auxiliary request 1 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1, wherein the isolated nucleic acid hybridizes specifically under high stringency conditions with the nucleic acid of claim 2."

Claim 3 of auxiliary request 2 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid wherein the isolated nucleic acid hybridizes specifically under ~~high~~ stringen~~cy~~t conditions with the nucleic acid of claim 2."

Claim 3 of auxiliary request 3 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid wherein the isolated nucleic acid

hybridizes specifically ~~under high stringency conditions~~ with the nucleic acid of claim 2."

Claim 3 of auxiliary request 4 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1 ~~wherein the isolated nucleic acid hybridizes specifically under high stringency conditions with the nucleic acid of claim 2~~."

Claim 3 of auxiliary request 5 reads:

3. A method of specifically detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1 ~~wherein the isolated nucleic acid hybridizes specifically under high stringency conditions with the nucleic acid of claim 2~~."

Claim 3 of auxiliary request 6 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1, wherein the isolated nucleic acid hybridizes specifically ~~under high stringency conditions~~ with the nucleic acid of claim 2."

Claim 3 of auxiliary request 7 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1, which isolated nucleic acid is a primer and/or probe."

Claim 3 of auxiliary request 8 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1, which isolated nucleic acid is a specific primer and/or probe ~~wherein the isolated nucleic acid hybridises specifically under high stringency conditions with the nucleic acid of claim 2~~."

Claim 3 of auxiliary request 9 reads:

"3. A method of detecting a human metapneumovirus in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid obtainable from a virus according to claim 1, which isolated nucleic acid is a specific primer and/or probe ~~wherein the isolated nucleic acid hybridises specifically under high stringency conditions with the nucleic acid of claim 2~~."

V. The following documents are referred to in this decision.

E17: Alberts *et al.*, Molecular Biology of the Cell, 3rd edition, Garland, 1994, pp. 305-306.

E18: Cleland *et al.*, in "*Protein Engineering, Principles and Practice*", Cleland and Craik (eds.), Wiley-Liss, 1996, pp. 14-15.

E19: Miyada and Wallace, Methods in Enzymology, Vol. 14, Academic Press, 1987, pp. 94-107.

E20: Anderson and Young, in "*Nucleic Acid Hybridisation: A Practical Approach*", Hames and Higgins (eds.), IRL Press Ld., Oxford, 1985, Chapter 4.

E21: Current Protocols In Molecular Biology, Vol. 1, Asubel *et al.* (ed.), Wiley, 1995, p. 6.3.1.

VI. The board appointed oral proceedings in view of corresponding requests of the parties and subsequently issued a communication pursuant to Article 15(1) RPBA. In this communication, the board informed the parties that it was in preliminary agreement with the opposition division that claim 3 had been amended to include subject-matter which extended beyond the content of the application as filed with respect to the phrase "high stringency" in claim 3 of the main request.

VII. Both the respondent and the appellant informed the board in writing that they would not attend the oral proceedings. Subsequently, the board cancelled the oral proceedings.

VIII. The arguments of the appellant, relevant to the decision are summarised as follows:

Consideration of documents

Documents E17 to E21, filed together with the statement of grounds of appeal, should be held admissible pursuant to Article 12(4) RPBA 2007. Their filing was occasioned by specific objections of the respondent, formulated for the first time during the oral proceedings before the opposition division.

Main Request - Article 123(2) EPC
Claim 3

The expression "high stringency conditions" was not limiting and did not constitute new technical information as compared to "stringent conditions". Alternatively, even if the term "high" within the expression were held to be truly limiting, it did not provide a technical contribution to the subject-matter of the claimed invention. According to decision G 1/93 of the Enlarged Board of Appeal (see OJ EPO 1994, 541, point 2 of the Order) such subject-matter did not extend beyond the content of the application as filed in the sense of Article 123(2) EPC.

The claimed invention lay in the recognition of the existence of the human metapneumovirus (MPV) of claim 1 and thus of the corresponding coding nucleic acid of claim 2. The opposition division had confirmed that the subject-matter of claims 1 and 2 met the requirements of the EPC and the respondent has not disputed this. The clinical and diagnostic applications which became available once the existence and significance of the virus sequences became known were therefore part of the invention and claim 3 was directed to such a method. The skilled person at the relevant date of the patent would realise that the isolated nucleic acid according

to claim 3 had to hybridise with a human metapneumovirus (MPV) nucleic acid in a sample under conditions that were sufficiently (highly) stringent for its interaction to be specific and thus to allow detection of the human MPV.

In this context, it belonged to the common general knowledge that there where generally two types of hybridisation conditions which could be applied depending on the objective of the hybridisation. Either (1) the specific identification of particular sequences such that only specific hybridisation is allowed, or (2) the non-specific capture of other, more distantly related sequences, such that the prime criterion of the interaction was not the specificity of hybridisation but rather intentional allowance for relatively significant deviation from the specific Watson-Crick base pairing rules, e.g. in order to obtain a hybridisation signal from unknown sequences which could significantly deviate from the known reference sequence. The skilled person would have had no doubt, that given the purpose of the hybridisation, only highly stringent conditions could have been meant.

From the common general knowledge in the art, the skilled person knew that various pairs of terms were used to refer to hybridisation conditions for specific and non-specific detection. The expressions "stringent" and "high stringency" were equivalent. Moreover, the description of the application as filed on page 3, lines 25 to 29 related to virological diagnosis of a "specific" viral infection and disclosed that the reagents employed should be the "most specific" for the target virus in question, in line with the commonly-known principle that the hybridisation should of course

be "as stringent as possible" in view of the overall objective of the method.

Furthermore, on page 4, lines 20 to 27, the application referred to nucleic acid-based detection, "diagnostic tests" and "stringent conditions of hybridisation" which the skilled person would understand as referring to any method having the objective of detecting particular sequences, fulfilling a particular sequence-based definition requires specific nucleic acid interactions, as was defined in claim 3 and accordingly also involving "stringent conditions of hybridisation". The presence of the term "high" in the claim, therefore, contributed no information going beyond the content of the application as filed.

Consideration of auxiliary requests 1 to 9

The claim requests should be considered in the appeal proceedings. They were not late filed. The amendments they contained were occasioned by the specific objections which the respondent formulated for the first time at the oral proceedings before the opposition division and due to which the then main and lower-ranking auxiliary claim requests were rejected. Their submission did also not contravene the purpose of the appeal proceedings.

IX. The arguments of the respondent, relevant to the decision, are summarised as follows:

Consideration of documents

Documents E17 to E21, filed together with the statement of grounds of appeal were late filed and should be held inadmissible pursuant to Article 12(4) RPBA 2007. The

issues that the documents sought to address had already been debated during the opposition proceedings, i.e. the question of whether or not the amendment to the claims concerning the expression "highly stringent conditions" added new information within the meaning of Article 123(2) EPC. These documents could therefore have been filed during opposition proceedings.

Consideration of the main request and of auxiliary requests 1 to 9 (Article 12(4) RPBA 2007)

The main purpose of *inter partes* appeal proceedings was to conduct a review of the decision given by the opposition division and thereby to provide the losing party with an opportunity to challenge the decision against it and obtain a judicial ruling on whether it is correct. Thus, the appeal proceedings were not a continuation of the opposition proceedings. Sets of claims that had not been subject to the decision under appeal should not be considered by the board, especially if they could have been filed before the opposition division. The new main request however had been filed to address issues that had already been raised in the notice of opposition and it therefore should be held inadmissible.

The appellant's allegation that the amendments in the set of claims of the main request were occasioned by specific objections which the respondent had formulated for the first time at the oral proceedings before the opposition division was incorrect because these amendments actually addressed objections that had been raised in the notice of opposition. Specifically, the language presently contested derived from claims 9 and 10 as granted.

Although the respondent had raised an objection under Article 123(2) EPC against claims 9 and 10 as granted arguing that the application as filed did not disclose isolated nucleic acids hybridising under the conditions referred to in claim 9, the appellant had not amended the claim in response to this objection.

A claim directed to a method of detecting a human metapneumovirus in a sample obtained from a human including a definition of a probe nucleic acid via hybridisation behaviour was filed with the reply to the summons to oral proceedings submitted at the final date for making written submissions, which had left the respondent with no time to file a further written response. It could not come as a surprise to the appellant at the oral proceedings that the respondent raised objections to these new claims. While the appellant had had more than four months to address issues raised in the annex to the summons to oral proceedings and to submit new claim requests, the respondent had had only about one month to analyse six completely new and extensively amended sets of claims before oral proceedings took place before the opposition division.

In addition, during oral proceedings before the opposition division sets of claims of two further auxiliary requests (6 and 7) were filed and respective arguments relating to the respondent's comments on the newly filed main request and auxiliary requests 1 to 5 were submitted.

The question of the admission of the newly filed claim requests into the appeal proceedings had to be considered in the context of the course of preceding opposition proceedings. In these proceedings, technical

objections against the subject-matter of claim 3 of the main request, which was a heavily revised version of granted claims 9 and 10, had repeatedly been submitted. Particularly, the question whether the expression "high stringency conditions" complied with Article 123(2) EPC was recurrently discussed by the parties.

The arguments presented for the main request applied equally to auxiliary requests 1 to 9. Thus, neither the main request or auxiliary requests 1 to 9 should be admitted into the proceedings.

Main Request - Article 123(2) EPC
Claim 3

The opposition division correctly held that the set of claims of the main request, contravened Article 123(2) EPC because the introduction of the phrase "high stringency conditions" in claim 3 represented new technical information. The application as filed referred on page 4, lines 20 to 27, to diagnostic tests using "stringent conditions" of hybridisation which allegedly guaranteed sufficient cross-reactivity of nucleic acid sequences with molecular percentages of 90% or higher. This was correctly considered by the opposition division to be distinct from "high stringency conditions" and thus could not serve as an implicit disclosure of these.

Both claim 3 and the application as filed did not relate only to methods of diagnosis but to methods of detecting nucleic acids in general. The skilled person reading the application as filed would therefore not consider that it only disclosed methods of detecting viral nucleic acids under "high stringency", conditions. In fact, the application as filed referred

explicitly to situations where high stringency was not desired. Taken as a whole, the application as filed disclosed methods of detecting a human metapneumovirus in a sample, to be carried out using hybridisation conditions that were clearly not highly stringent, but those which were less stringent, e.g. as disclosed on page 3, lines 29 to 34. Therefore, the amendment to require highly stringent hybridisation conditions was neither explicitly disclosed nor implied in the application as filed and the subject-matter of claim 3 contravened the requirements of Article 123(2) EPC.

Applying the ruling in decision G 1/93 could not remedy this situation because the type of hybridisation conditions used provided an important contribution to the claimed subject-matter in the sense of said decision. In particular, the desired degree of specificity influenced the hybridisation conditions i.e. the stringency needed.

X. The parties' requests (see points 6 and 7 of the board's communication referred to in section VII) which are relevant to the decision are as follows:

The appellant requests that the decision under appeal is set aside and that the patent is maintained in amended form on the basis of the set of claims of the main request or, alternatively, of one of auxiliary requests 1 to 9, all submitted with the statement of grounds of appeal, or further alternatively, on the basis of auxiliary request 10 being the version as considered allowable by the opposition division.
The appellant further requests that documents E17 to E21 be admitted into the proceedings.

The respondent requests that the appeal is dismissed and that the main request and auxiliary requests 1 to 9 and documents E17 to E21, all submitted with the statement of grounds of appeal, are held inadmissible by the board pursuant to Article 12(4) RPBA 2007.

Reasons for the Decision

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

Consideration of documents E17 to E21 (Article 12(4) RPBA 2007)

2. The board decides to admit these documents into the appeal proceedings. However, in view of the board's decision regarding the main and auxiliary requests 1 to 9, it is not necessary to provide reasons for this.

Consideration of the main request (Article 12(4) RPBA 2007)

3. Article 12(4) RPBA 2007 is applicable to the present case pursuant to Article 25(2) RPBA 2020 in view of the statement of grounds of appeal and the reply having been filed prior to 1 January 2020. The respondent objected to the admission of this request, arguing that it could have been filed earlier.

4. However, claim 3 is identical with the claim 3 of the main request considered by the opposition division (see section V). Thus admission of this request into the proceedings allows the review the opposition division's decision in relation to this claim.

5. Thus, in accordance with Article 12(4) RPBA 2007, the board decides to take this claim request into consideration.

Main request - claim 3

Claim construction

6. The claim is for a method of detecting a human metapneumovirus (hMPV) in a sample obtained from a human, wherein the method comprises contacting the sample with an isolated nucleic acid. This isolated nucleic acid (the probe) is obtainable from a virus according to claim 1 and is defined as being able to hybridise specifically under high stringency conditions with the nucleic acid which encodes a virus of claim 1 (the target), i.e. a negative-sense single stranded RNA human MPV, having an N protein which is at least 91 % identical to the amino acid sequence of the N protein of isolate hMPV 00-1 shown in figure 3, wherein sequence identity is determined over the entire length of the N protein. The claim is not limited to detecting only human MPV. Instead, any method in which human metapneumovirus is detected falls within its scope. Moreover, the target nucleic acid is not limited to that encoding the N protein but may be any human metapneumovirus nucleic acid.

Amendments (Article 123(2) EPC)

7. According to Article 123(2) EPC, a European patent may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed. This means that an amendment may only be made within the limits of what a skilled person would derive directly and unambiguously, using common

general knowledge, and seen objectively and relative to the date of filing, from the whole of the application as filed. Furthermore, the subject-matter of the amendment may be explicitly or at least implicitly disclosed in the application as filed (see decision G 2/10, OJ EPO 2012, 376, point 4.5.2 of the Reasons, and Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, II.E.1.3.3.).

8. In the decision under appeal, the opposition division held that claim 3 of the then main request had been amended to include subject-matter extending beyond the content of the application as filed. In particular, the expression "high stringency conditions" was considered to confer new technical information.

9. The appellant has not disputed that the application as filed does not contain a *verbatim* or explicit disclosure of a method of detecting a human metapneumovirus comprising hybridisation under high stringency conditions.

10. The board holds that the application as filed does not disclose, directly and unambiguously, the claimed subject-matter implicitly either.

11. The sole disclosure in the application as filed of a method detecting a human metapneumovirus in the sample obtained from a human comprising contacting the sample with an isolated nucleic acid and also mentioning the "*stringency*" of hybridisation conditions is in a passage on page 4, lines 20 to 27, in particular, the following sentence "*In general, for nucleic acid sequences, homology percentages of 90% or higher guarantee sufficient cross-reactivity to be relied upon in diagnostic tests utilizing stingent* [sic] *conditions*

of hybridisation". This passage cannot however constitute a disclosure of the claimed subject-matter *inter alia* because i) "*high*" stringency conditions are not disclosed and ii) the claimed subject-matter is not limited to diagnostic tests for detecting nucleic acid sequences with homology percentages of 90% or higher as referred to in this passage.

12. In a first line of argument, the appellant submitted that the stringent conditions of hybridisation mentioned on page 4, lines 20 to 27 (see point 11, above) of the application as filed would be understood by the skilled person to mean the same as "*high*" stringency conditions.

13. This argument does not advance the appellant's case firstly because, as set out in point 6., the claimed method and that mentioned on page 4 are not the same. Secondly, the board, in agreement with the opposition division, considers that although the expression "high stringency conditions" had no exact definition in the art for the skilled person at the relevant date of the patent, the expressions "stringent conditions" and "high stringency conditions" had clearly different technical meanings. Giving the term "high" in the expression "high stringency" its ordinary meaning, conveyed to the skilled person at the relevant date, that the hybridisation is carried out so as to allow detection of sequences having a high degree of identity. However, from both a linguistic and technical point of view, the skilled person would also have understood that the expression "stringent conditions" encompasses less stringent hybridisation conditions than the expression "high stringency conditions". Thus, the skilled person would have understood that methods of detecting hMPV metapneumovirus by using the "high

stringency conditions" had different, more limited results than those using another type of stringent conditions.

14. In a second line of argument, the appellant submitted that the skilled person would have understood that there were two essentially different types of experimental objective: (1) the specific identification of particular sequences such that only specific hybridisation is allowed, or (2) the non-specific capture of other, more distantly related sequences. Since the claimed method was for "detecting a human metapneumovirus", only the first type of objective and hence only "*high*" stringency conditions could have been intended by the above mentioned disclosure of stringent conditions on page 4 of the application. To support this view, documents E17 to E20, cited as reflecting the skilled person's common general knowledge of how the usage of the expressions "stringent", "high stringency" or "as stringent as possible" was equivalent and contrasted to the also equivalent usage of the expressions "reduced stringency", "low stringency", "nonspecific", "permissive" or "relaxed", in the context of detecting a virus.

15. However, the claim is not limited to detecting human metapneumovirus alone but includes methods detecting at least hMPV (see point 6), it is apparent that both stringent conditions, capable of detecting at least hMPV and highly stringent conditions, capable of detecting hMPV alone could be intended. Thus, this line of argument fails.

16. In a further line of argument, the appellant submitted that the term "high" within the expression "high stringency" did not constitute added subject-matter

because it did not provide a technical contribution to the claimed subject-matter. Such subject-matter could, according decision G 1/93 of the Enlarged Board of Appeal (see OJ EPO 1994, 541, point 2 of the Order) not extend beyond the content of the application as filed within the meaning of Article 123(2) EPC.

17. In the board's view, this argument can only succeed if it were accepted that the meanings of "stringent conditions" and "high stringency" are essentially identical. However, the board has already established that this is not the case and that the two expressions convey different technical teachings to the skilled person (see point 13. above). In such a case, the considerations in decision G 1/93 (*supra*) cannot be considered to apply.

18. In conclusion, the claim does not meet the requirements of Article 123(2) EPC.

Consideration of auxiliary requests 1 to 9
(Article 12(4) RPBA 2007)

19. Auxiliary requests 1 to 9 were filed with the statement of grounds of appeal to provide fall back-positions in case the subject-matter of the main request was held to extend beyond the content of the application as filed, contrary to Article 123(2) EPC. These amendments (see section VI) are variously in the form of additional features (auxiliary request 1), deletions (auxiliary requests 2 and 3) or combinations thereof (auxiliary requests 4 to 9).

20. The respondent objected to the admission of these auxiliary requests arguing that they should have been filed in the opposition proceedings. The appellant on

the other hand argued that the claim requests should be considered in the appeal proceedings because they were not late filed and had not been filed in the proceedings before the opposition division because the amendments they contained were occasioned by the specific objections which the respondent formulated for the first time at the oral proceedings before the opposition division.

21. The board notes that in the notice of opposition (see section 5 ff) the respondent objected to each of granted claims 1 to 24 and 26 under Article 123(2) EPC. Specifically, an objection that the application as filed "*does not disclose isolated nucleic acids hybridizing under the conditions referred to in claim 9*" was made in section 5.9 and was extended to claim 10 which was directed to a method of detecting a mammalian metapneumovirus in a sample comprising contacting that sample with a nucleic acid as defined in claim 9.

Claims 9 and 10 of the patent read:

"*9. An isolated nucleic acid, wherein the isolated nucleic acid hybridizes specifically under high stringency conditions with the nucleic acid of claim 8, preferably wherein said high stringency conditions comprise hybridization in a buffer consisting of 6X SSC, 50 mM Tris-HCI (pH=7.5), 1 mM EDTA, 0.02% PVP, 0.02% Ficoll, 0.02% BSA and 100 µg/ml denatured salmon sperm DNA, for 48 hours at 65°C, washing in a buffer consisting of 2X SSC, 0.01% PVP, 0.01% Ficoll, and 0.01% BSA, for 45 minutes at 37°C and washing in a buffer consisting of O.JX SSC, for 45 minutes at 50°C.*

10. A method of detecting a mammalian metapneumovirus in a sample, wherein the method comprises contacting

the sample with the nucleic acid of claim 8 or 9, preferably wherein the mammalian MPV is a human MPV".

22. Although brief, the objection to "*isolated nucleic acid hybridizing under the conditions referred to in claim 9*" was directed to the subject-matter now present in claim 3 of the main request.

23. Claim 3, in the form that is now part of the main request, was filed with the appellant's reply to the summons to oral proceedings before the opposition division on the final date for making written submissions fixed under Rule 116 EPC. The claim language was in part present in claim 10 as granted when read in combination with claim 9 as granted. In view of the timing of its filing, the respondent did not have a possibility to respond in writing to the amendments made. Accordingly, the respondent objected to this claim under Article 123(2) EPC only during the oral proceedings before the opposition division.

24. The board considers that the appellant should not have been surprised that objections, including those under Article 123(2) EPC, were made by the respondent to these extensively amended claims, in particular since an objection under Article 123(2) EPC to a claim comprising the expression "high stringency conditions", which was present in claim 9 as granted, had already been raised in the notice of opposition. In view of this, the board concludes that auxiliary requests 1 to 9 could and should have been filed in the proceedings before the opposition division.

25. It is also to be born in mind that *inter partes* appeal proceedings should primarily serve the parties' right to a review of the opposition division's decision

(decisions G 9/91 and G 10/91, point 19 of the reasons and Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, V.A.4.2.1). The consideration of auxiliary requests 1 to 9 would also not be in keeping with the primary purpose of the appeal proceedings.

26. In view of the above considerations, the board decides not to take auxiliary claim requests 1 to 9 into consideration (Article 12(4) RPBA 2007).

Conclusion

27. Since the main request is not allowable and the auxiliary requests are held inadmissible by the board, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

A. Chavinier-Tomsic B. Claes

Decision electronically authenticated