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**Datasheet for the decision
of 23 September 2019**

Case Number: T 1362/16 - 3.3.01

Application Number: 00926368.2

Publication Number: 1200090

IPC: A61K31/4985, A61K9/20,
A61K9/48, A61P15/10

Language of the proceedings: EN

Title of invention:

Pharmaceutical formulation comprising a beta-carboline and its use for treating sexual dysfunction

Patent Proprietor:

ICOS Corporation

Opponents:

Maiwald Patent- und Rechtsanwalts-gesellschaft mbH
Lek d.d.

Headword:

Micronised tadalafil comprising formulations/ICOS

Relevant legal provisions:

EPC Art. 113(2)

Keyword:

Basis of decision - text or agreement to text withdrawn by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

Decisions cited:

T 0073/84

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1362/16 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 23 September 2019

Appellant: Maiwald Patent- und Rechtsanwalts-gesellschaft
(Opponent 1) mbH
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Representative: Hamm&Wittkopp Patentanwälte PartmbB
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20354 Hamburg (DE)

Respondent: ICOS Corporation
(Patent Proprietor) Eli Lilly and Company
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Representative: Smith, Andrew George
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Party as of right: Lek d.d.
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Representative: Dörries, Hans Ulrich
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Patentanwälte Rechtsanwälte PartG mbB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 April 2016
rejecting the opposition filed against European
patent No. 1200090 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Lindner
Members: G. Seufert
 R. Romandini

Summary of Facts and Submissions

- I. Opponent 1 (appellant) lodged an appeal against the decision of the opposition division rejecting the opposition against the European patent No. 1 200 090.
- II. With the statement of grounds of appeal, the appellant opponent requested that the decision of the opposition division be set aside and the patent be revoked in its entirety.
- III. In its reply to the statement of grounds of appeal, the patent proprietor (respondent) requested that the appeal be dismissed (rejection of the opposition), or, alternatively, that the patent be maintained with an amended description according to auxiliary request 1 or on the basis of one of the sets of claims according to auxiliary requests 2 to 4, all filed with letter of 9 October 2015, and re-submitted with the statement of grounds of appeal.
- IV. Opponent 2 (party as of right) did not file any submissions or requests.
- V. Summons to oral proceedings were issued by the board followed by a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of appeal.
- VI. With letter of 19 July 2019, the respondent patent proprietor's representative stated that the patent proprietor no longer approved the text in which the patent was granted, will not be submitting an amended text and understood that the consequences set out in Article 68 EPC will follow from this action.
- VII. Oral proceedings were cancelled.

- VIII. In a communication dated 30 July 2019, the board drew the respondent patent proprietor's attention to the fact that it had already filed auxiliary requests with the statement of grounds of appeal, which had not been explicitly withdrawn. The respondent was requested to confirm that he withdrew or did no longer approve the text of any of the auxiliary requests on file. In accordance with established jurisprudence of the boards of appeal, revocation of the patent was to be expected.
- IX. In reply to the board's communication, the respondent withdrew the auxiliary requests filed with the statement of grounds of appeal.

Reasons for the Decision

1. The appeal is admissible.
2. Pursuant to Article 113(2) EPC, the EPO shall examine, and decide upon, the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.

In the present case, the respondent patent proprietor, indicating that no amended text will be submitted, expressly stated that he no longer approved the text of the patent as granted and withdrew all auxiliary requests (see points V and IX above).

There is therefore no longer any text of the patent in the proceedings on the basis of which the board can consider the appeal. It is established jurisprudence that, under these circumstances, the patent is to be revoked without further substantive examination (see

T 73/84 OJ EPO 1985, 241 and Case Law of the Boards of Appeal, 8th edition, section IV.C.5.2).

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