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**Datasheet for the decision
of 8 November 2019**

Case Number: T 2023/16 - 3.3.04

Application Number: 04735774.4

Publication Number: 1633389

IPC: A61K38/24, A61P15/08

Language of the proceedings: EN

Title of invention:
Unitary combination of FSH and hCG

Patent Proprietor:
Ferring B.V.

Opponent:
Merck Serono S.A.

Headword:
Combinations of FSH and hCG/FERRING

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Basis of decision - text or agreement to text withdrawn by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 2023/16 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 8 November 2019

Appellant: Merck Serono S.A.
(Opponent) Centre Industriel
1267 Coinsins (CH)

Representative: Weiss, Wolfgang
Weickmann & Weickmann
Patent- und Rechtsanwälte PartmbB
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81679 München (DE)

Respondent: Ferring B.V.
(Patent Proprietor) P.O. Box 3129 2130 KC
Polaris Avenue 144
2132 JX Hoofddorp (NL)

Representative: Bates, Philip Ian
Reddie & Grose LLP
The White Chapel Building
10 Whitechapel High Street
London E1 8QS (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 July 2016
rejecting the opposition filed against European
patent No. 1633389 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairwoman G. Alt
Members: D. Luis Alves
 L. Bühler

Summary of Facts and Submissions

- I. European patent No. 1 633 389, entitled "*Unitary combination of FSH and hCG*" was opposed under Articles 100(a) to (c) EPC. The opposition division held that the patent as granted met the requirements of the European Patent Convention and rejected the opposition.
- II. The opponent (appellant) filed an appeal against this decision requesting that the decision under appeal be set aside and the patent be revoked. Oral proceedings were requested on an auxiliary basis.
- III. The patent proprietor (respondent) requested as a main request that the appeal be dismissed, i.e. that the patent be maintained as granted, or alternatively that the patent be maintained on the basis of either auxiliary request 1, filed with the reply to the statement of grounds of appeal, or on the basis of one of auxiliary requests 2 to 10, all filed in the course of the appeal proceedings. Oral proceedings were requested on an auxiliary basis.
- IV. The board appointed oral proceedings and, in a subsequent communication pursuant to Article 15(1) RPBA, provided its preliminary appreciation of substantive and legal matters concerning the appeal.
- V. Oral proceedings before the board were held on 8 November 2019 as scheduled. At these proceedings the respondent disapproved of the text of the granted patent and withdrew all claim requests on file.

VI. At the end of the oral proceedings, the chair announced the decision of the board.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.
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 agreement is not deemed to exist if the patent proprietor - as in the present case - expressly states that it disapproves of the text of the granted patent and withdraws all pending claim requests (see section V above).
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, 9th edition, 2019, IV.D.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 Chair:



S. Lichtenvort

G. Alt

Decision electronically authenticated