

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 25 June 2021**

Case Number: T 1844/17 - 3.3.01

Application Number: 11730112.7

Publication Number: 2544680

IPC: A61P35/00, A61K31/337,
A61K31/517, A61K39/00,
A61K39/395, A61K45/06,
C07K16/28, C07K16/30, C07K16/32

Language of the proceedings: EN

Title of invention:
USE OF ERBB3 INHIBITORS IN THE TREATMENT OF TRIPLE NEGATIVE
BREAST CANCER

Patent Proprietor:
Merrimack Pharmaceuticals, Inc.

Opponent:
Daiichi Sankyo Co Ltd

Headword:

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Basis of decision - text or agreement to text withdrawn by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

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1844/17 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 25 June 2021

Appellant: Daiichi Sankyo Co Ltd
(Opponent) 3-5-1, Nihonbashi Honcho
Chuo-ku
Tokyo 103-8426 (JP)

Representative: Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
Arabellastraße 30
81925 München (DE)

Respondent: Merrimack Pharmaceuticals, Inc.
(Patent Proprietor) One Kendall Square
Suite B7201
Cambridge, MA 02139 (US)

Representative: J A Kemp LLP
14 South Square
Gray's Inn
London WC1R 5JJ (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
13 July 2017 concerning maintenance of the
European Patent No. 2544680 in amended form.**

Composition of the Board:

Chairwoman M. Pregetter
Members: T. Sommerfeld
L. Bühler

Summary of Facts and Submissions

- I. An appeal was lodged by the opponent against the interlocutory decision of the opposition division that European patent no. 2 544 680 in amended form and the invention to which it related met the requirements of the EPC.
- II. The board issued a summons to oral proceedings to be held on 15 September 2021.
- III. By letter dated 7 May 2021, the patent proprietor withdrew its approval of the text in which the patent had been granted and stated that it would not file an amended text and requested that the patent be revoked.

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.
2. Since the patent proprietor withdrew the approval of the text in which the patent was granted and confirmed that it would not be submitting an amended text, there is no text of the patent on the basis of which the board can consider compliance with the requirements of the EPC.
3. It is established case law of the boards of appeal that, under these circumstances, the patent is to be revoked without further substantive examination as to

patentability (see also T 73/84, OJ EPO 1985, 241).
There are also no ancillary issues that would have to
be dealt with by the board in the present appeal case.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairwoman:



M. Schalow

M. Pregetter

Decision electronically authenticated