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**Datasheet for the decision
of 7 February 2022**

Case Number: T 1226/18 - 3.3.08

Application Number: 10011225.9

Publication Number: 2298863

IPC: C12N5/00, A61P7/04

Language of the proceedings: EN

Title of invention:

Mesenchymal stem cells and uses therefor

Patent Proprietor:

Mesoblast International Srl

Opponent:

Chiesi Farmaceutici S.p.A.

Headword:

Mesenchymal stem cells/MESOBLAST INTERNATIONAL

Relevant legal provisions:

EPC Art. 113(2)

Keyword:

Text or agreement to text withdrawn by patent proprietor
(appellant)

Appealed decision becomes final - patent revoked

Decisions cited:

T 0347/90, T 0018/92, T 0481/96, T 1003/01, T 0053/03,
T 1244/08

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1226/18 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 7 February 2022

Appellant: Mesoblast International Sàrl
(Patent Proprietor) Route de Pre-Bois 20
1217 Meyrin (CH)

Representative: Schnappauf, Georg
ZSP Patentanwälte PartG mbB
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80686 München (DE)

Respondent: Chiesi Farmaceutici S.p.A.
(Opponent) Via Palermo, 26/A
43122 Parma (IT)

Representative: Trillat, Anne-Cecile
Chiesi Farmaceutici S.p.A.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 March 2018
revoking European patent No. 2298863 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chair B. Stolz
Members: P. Julià
R. Winkelhofer

Summary of Facts and Submissions

- I. European patent no. 2 298 864 is based on European patent application no. 10 011 225.9, a divisional application of the European patent application no. 05 725 577.0 (EP 1 727 892), originally filed under the PCT and published as WO 2005/093044. The patent was granted with 12 claims.
- II. An opposition was filed on the grounds set forth in Articles 100(a) and 100(b) EPC. The opposition division held that the main request (claims as granted) lacked novelty (Article 54 EPC), and auxiliary requests 3 and 5 did not fulfil the requirements of Articles 56 and 83 EPC, respectively. Auxiliary requests 1, 2 and 4 were not admitted and considered in the opposition proceedings. The patent was thus revoked (Article 101(3) (b) EPC).
- III. The patent proprietor (appellant) lodged an appeal, requesting that the decision under appeal be set aside and the opposition be rejected, or that the patent be maintained on the basis of any of auxiliary requests 1 to 3.
- IV. The opponent (respondent), *inter alia*, requested to dismiss the appeal.
- V. The parties were summoned to oral proceedings and were informed of the board's provisional opinion on the issues of the case.
- VI. With submission dated 3 February 2022, the appellant declared the following:

"The Proprietor hereby withdraws its approval of the text which the ... European patent was granted.

The Proprietor also withdraws any and all auxiliary requests and will not be filing a replacement text or any further request ... Consequently, the proceedings are to be terminated by a decision ordering the revocation of the patent without any reference to any of the substantive issues ..."

VII. In view of this declaration, the oral proceedings were cancelled.

Reasons for the Decision

1. Article 113(2) EPC requires that the European Patent Office decides upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
2. The patent proprietor (appellant) explicitly disapproved the text of the patent, they withdrew all auxiliary requests without filing any other amended text on which further prosecution could be based, and they requested the revocation of the patent and the termination of the appeal proceedings without going into the merits of the appeal.

Thus, the appellant unequivocally expresses that they are no longer interested in the continuation of the appeal proceedings and a decision on the appeal under Article 111 EPC.

3. In accordance with established, more recent jurisprudence (cf. T 1244/08 of 7 July 2011; T 53/03 of 10 November 2003; T 1003/01 of 8 December 2003;

T 481/96 of 16 September 1996; T 18/92 of 30 April 1993) the appellant's declaration is to be taken as the withdrawal of the appeal (for an older line of jurisprudence dismissing an appeal in such situation see T 347/90 of 19 February 1993).

4. This implies that the request for oral proceedings is also to be taken as withdrawn (i.e. there is no text to be discussed).
5. Thus, the appeal proceedings are terminated. The opposition division's decision to revoke the patent becomes final.

Order

For these reasons it is decided that:

The appeal proceedings are terminated. The decision of the Opposition Division of 15 March 2018 to revoke European patent no. 2 298 864 becomes final.

The Registrar:

The Chair:



L. Malécot-Grob

B. Stolz

Decision electronically authenticated