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**Datasheet for the decision
of 11 March 2021**

Case Number: T 0128/19 - 3.3.04

Application Number: 09701993.9

Publication Number: 2242512

IPC: C07K16/28, A61K39/395,
C07K16/46, A61K39/00, C07K16/18

Language of the proceedings: EN

Title of invention:

Methods for manipulating phagocytosis mediated by CD47

Patent Proprietor:

The Board of Trustees of the Leland Stanford
Junior University

Opponents:

01: Tioma Therapeutics, Inc
02: Blink Biomedical
03: Bristol-Myers Squibb Company
04: Avidity IP Limited
05: Wilding, James Roger
06: Surface Oncology, Inc.
07: Strawman Limited

Headword:

Phagocytosis/LELAND STANFORD JUNIOR UNIVERSITY

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Basis of decision - text or agreement to text withdrawn by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:

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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 0128/19 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 11 March 2021

Appellant:
(Patent Proprietor)
The Board of Trustees of the Leland Stanford
Junior University
Office of the General Counsel
Building 170, Third Floor, Main Quad
P.O. Box 20386
Stanford, CA 94305-2038 (US)

Representative:
Marshall, Cameron John
Carpmaels & Ransford LLP
One Southampton Row
London WC1B 5HA (GB)

Appellant:
(Opponent 1)
Tioma Therapeutics, Inc
4320 Forest Park Avenue, Suite 304
St Louis, MO 63108 (US)

Representative:
Boult Wade Tennant LLP
Salisbury Square House
8 Salisbury Square
London EC4Y 8AP (GB)

Appellant:
(Opponent 4)
Avidity IP Limited
Hauser Forum
21 J J Thomson Ave
Cambridge
Cambridgeshire CB3 0FA (GB)

Representative:
Avidity IP
Broers Building
Hauser Forum
21 JJ Thomson Avenue
Cambridge CB3 0FA (GB)

Appellant:
Wilding, James Roger
c/o Mathys & Squire LLP
The Shard

(Opponent 5) 32 London Bridge Street
London SE1 9SG (GB)

Representative: Wilding, James Roger
Mathys & Squire LLP
The Shard
32 London Bridge Street
London SE1 9SG (GB)

Appellant: Surface Oncology, Inc.
(Opponent 6) 50 Hampshire Street, 8th floor
Cambridge, MA 02139 (US)

Representative: D Young & Co LLP
120 Holborn
London EC1N 2DY (GB)

Party as of right: Blink Biomedical
(Opponent 2) 70 Rue Saint-Jean-de-Dieu
69007 Lyon (FR)

Representative: Maschio & Soames IP Ltd
30 Carlton Crescent
Southampton SO15 2EW (GB)

Party as of right: Bristol-Myers Squibb Company
(Opponent 3) Route 206 and Province Line Road
Princeton, NJ 08543-4000 (US)

Representative: Mewburn Ellis LLP
Aurora Building
Counterslip
Bristol BS1 6BX (GB)

Party as of right: Strawman Limited
(Opponent 7) Orchard Lea
Horns Lane
Combe, Witney
Oxfordshire OX29 8NH (GB)

Representative: Maschio & Soames IP Ltd
30 Carlton Crescent
Southampton SO15 2EW (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 November 2018 concerning maintenance of the
European Patent No. 2242512 in amended form**

Composition of the Board:

Chairwoman G. Alt
Members: B. Claes
 M. Blasi

Summary of Facts and Submissions

- I. The patent proprietor and opponents 1, 4, 5 and 6 lodged an appeal against the interlocutory decision of the opposition division, posted on 15 November 2018 and finding that European patent No. 2 242 512 as amended according to auxiliary request 4 met the requirements of the EPC. While the patent proprietor, opponents 1 to 5 and opponent 7 had received the decision within ten days following its dispatch, opponent 6 had acknowledged receipt with a date of 3 January 2019.
- II. With their statement setting out the grounds of appeal, the patent proprietor requested that the decision under appeal be set aside and that the patent be maintained on the basis of the set of claims of the main request or, alternatively, on the basis of the set of claims of one of the auxiliary requests 1 to 5, all filed with their statement setting out the grounds of appeal.
- III. The appealing opponents (see section I) all requested that the decision under appeal be set aside and the patent be revoked in its entirety.
- IV. In a communication of the Registry dated 21 February 2019, the board noted that the notice of appeal on behalf of opponent 6 had been received on 14 January 2019 and raised concern as to whether the appeal fee was duly paid.
- V. On 25 February 2019, opponent 6 paid the appeal fee.
- VI. In their reply to the appeals of the opponents, the patent proprietor requested that the appeal of

opponent 6 be held inadmissible, for failure to pay the appeal fee in due time.

VII. With a letter dated 6 January 2021, the patent proprietor informed the board as follows:

"The Proprietor hereby withdraws its approval under Rule 71 EPC of the text in which European Patent No. 2242512 was granted. The Proprietor will not be filing a replacement text. For the avoidance of doubt, the Proprietor also withdraws all requests pending in the appeal proceedings.

In the absence of a text agreed by the Proprietor, the opposition proceedings relating to this patent are terminated following Article 113(2) EPC, and the patent must be revoked...."

Reasons for the Decision

1. The appeals of all parties comply with the requirements of Articles 106 to 108 EPC and the further provisions referred to in Rule 101 EPC and are admissible.
2. In relation to opponent 6's appeal, the only issue at stake was whether the appeal fee was duly paid. Whether or not the appeal fee had already been validly paid on 14 January 2019 is irrelevant in the circumstances of the present case. At least for the reason that opponent 6's appeal fee was duly paid on 25 February 2019, which is within two months of notification of the decision under appeal to opponent 6, i.e. calculated from 3 January 2019 in accordance with Rule 126(2), Rule 131(1) and (4) EPC,

the board concludes that also opponent 6's appeal is admissible.

3. 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.
4. Since the text of the patent is at the disposition of the patent proprietor, their patent cannot be maintained against their will. In the present case the patent proprietor withdrew its approval of the text of the patent as granted. By withdrawing their auxiliary requests, they also unequivocally withdrew their approval of the text of the patent as amended according to any of these requests. There is therefore no longer any text of the patent in the proceedings which the board can consider for compliance with the requirements of the EPC.
5. It is established case law that in the present circumstances the patent must be revoked without further substantive examination as to patentability (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, section IV.D.2).
6. The board has no reason to deviate from this consistent approach of the boards of appeal, with the consequence that the patent is to be revoked. Revocation of the patent complies with the requests of all appealing parties.
7. The present decision can therefore be taken without holding oral proceedings.

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:



I. Aperribay

G. Alt

Decision electronically authenticated