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**Datasheet for the decision
of 25 January 2022**

Case Number: T 3043/19 - 3.3.01

Application Number: 09843771.8

Publication Number: 2421563

IPC: A61K48/00, C07H21/02,
A61K39/395

Language of the proceedings: EN

Title of invention:

INNATE IMMUNE SUPPRESSION ENABLES REPEATED DELIVERY OF LONG
RNA MOLECULES

Patent Proprietor:

Massachusetts Institute of Technology

Opponent:

Müller, Christian Stefan Gerd

Headword:

Conditional withdrawal

Relevant legal provisions:

EPC R. 84(1), 100(1), 103(2), 103(3), 103(4)

Keyword:

Conditional withdrawal - ineffective
Lapse of patent in all designated states - termination of
appeal proceedings
Reimbursement of appeal fee - (no)

Decisions cited:

J 0011/94, J 0027/94

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 3043/19 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 25 January 2022

Appellant: Müller, Christian Stefan Gerd
(Opponent) ZSP Patentanwälte PartG mbB
Hansastraße 32
80686 München (DE)

Respondent: Massachusetts Institute of Technology
(Patent Proprietor) 77 Massachusetts Avenue
Cambridge, MA 02139 (US)

Representative: Pearl Cohen Zedek Latzer Baratz UK LLP
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
30 August 2019 concerning maintenance of the
European Patent No. 2421563 in amended form.**

Composition of the Board:

Chairman A. Lindner
Members: T. Sommerfeld
L. Bühler

Summary of Facts and Submissions

- I. The present appeal was lodged by the opponent against the interlocutory decision of the opposition division, according to which European patent No. 2421563 could be maintained in amended form on the basis of the first auxiliary request (Articles 101(3)(a) and 106(2) EPC).
- II. A communication of the board dated 23 June 2021 was issued, drawing the parties' attention to the fact that according to the entries in the European Patent Register, the patent had been surrendered or lapsed with effect for all designated Contracting States. Pursuant to Rules 84(1) and 100(1) EPC, the appellant (opponent) was invited to inform the board, within two months from notification of the communication, whether they requested a continuation of the appeal proceedings. The parties were informed that if no request for continuation of proceedings was received in due time, the appeal proceedings might be discontinued.
- III. By letter dated 20 August 2021, the appellant withdrew its appeal and requested a partial refund of the appeal fee in accordance with Rule 103(2) EPC. However, the appellant also stated that the *"appeal is withdrawn only on the condition that the patent has been abandoned in all designated contracting states and that the patentee does not undertake any efforts to revive the patent."*
- IV. A communication of the board dated 9 September 2021 was issued, informing the appellant that the conditional withdrawal of the appeal filed with by letter dated 20 August 2021 had no effect in the present appeal proceedings. Since no request to continue the

opposition appeal proceedings had been filed in reply to the board's communication dated 23 June 2021, the board intended to terminate these proceedings.

- V. No reply was received within the time period set in the board's communication.

Reasons for the Decision

1. Pursuant to Rule 84(1) EPC, if the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States, the opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing him of the surrender or lapse. According to Rule 100(1) EPC, Rule 84(1) EPC also applies in opposition-appeal proceedings.
2. If no request for continuation of the proceedings is filed within the set time period and the state of the file gives no grounds for the proceedings to be continued by the board of its own motion, the appeal proceedings are terminated.
3. In reply to the board's communication dated 23 June 2021, the appellant did not request that the appeal proceedings be continued under Rules 84(1) and 100(1) EPC. Instead, the appellant withdrew their appeal subject to two conditions (see point III above).
4. In the interest of legal certainty, procedural declarations have to be unambiguous (see J 11/94, OJ EPO 1995, 596; J 27/94, OJ EPO 1995, 831). This

implies that such a declaration must not be subject to any condition, leaving it unclear in which way or whether at all the declaration has to be taken into account. In the present case, the second condition left it open whether the withdrawal should take effect upon expiry of any remedy available under national law to "revive the patent" or whether the withdrawal should be considered retracted in case of any action of the patent proprietor to "revive the patent" being taken at national level. It was thus unclear whether or not the board could proceed further on the basis of the withdrawal. Apart from that, the facts that needed to be ascertained were clearly outside of the framework of the appeal and the power of the board under Article 111 EPC. In the board's judgement, the conditional withdrawal of the appeal filed with the letter of 20 August 2021 had no legal effect in the present appeal proceedings for the above reasons.

5. As the appellant did not request continuation of the appeal proceedings and the state of the file gives no reasons for the proceedings to be continued by the board on its own motion, the board decides to terminate the appeal proceedings.
6. The appellant's request for a partial reimbursement of the appeal fee cannot be allowed because none of the conditions pursuant to Rule 103(2), (3) and (4) EPC are met and the appellant has not given any reasons in support of their request for reimbursement.

Order

For these reasons it is decided that:

1. The appeal proceedings are terminated.
2. The request for partial reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated