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**Datasheet for the decision
of 5 December 2023**

Case Number: T 1026/20 - 3.4.01

Application Number: 12884208.5

Publication Number: 2893540

IPC: G21G1/00, A61K51/00, A61M36/00,
A61K51/12

Language of the proceedings: EN

Title of invention:
RUBIDIUM ELUTION SYSTEM CONTROL

Patent Proprietor:
Jubilant Draximage, Inc.
Ottawa Heart Institute Research Corporation

Opponent:
Uexküll & Stolberg
Partnerschaft von Patent- und Rechtsanwälten

Headword:
Withdrawal of agreement to text of the patent

Relevant legal provisions:
EPC Art. 113(2)
EPC R. 103(4)(c)

Keyword:

Basis of decision - text or agreement to text withdrawn by
patent proprietor - patent revoked
Decision in written procedure - (yes) - withdrawal of request
for oral proceedings
Reimbursement of appeal fee at 25% - (yes)

Decisions cited:

T 0517/17, T 0488/18



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Case Number: T 1026/20 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 5 December 2023

Appellant: Uexküll & Stolberg
(Opponent) Partnerschaft von Patent- und Rechtsanwälten mbB
Beselerstrasse 4
22607 Hamburg (DE)

Representative: Uexküll & Stolberg
Partnerschaft von
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Beselerstraße 4
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Respondent: Jubilant Draximage, Inc.
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Respondent: Ottawa Heart Institute Research Corporation
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Ottawa,
Ontario K1Y 4W7 (CA)

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

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 February 2020 concerning maintenance of the
European Patent No. 2893540 in amended form.**

Composition of the Board:

Chairman P. Scriven
Members: A. Medeiros Gaspar
 D. Rogers

Summary of Facts and Submissions

- I. The opponent appealed the Opposition Division's decision, that the patent amended on the basis of the auxiliary request 1 met the requirements of the EPC, and requested that the patent be revoked.

- II. The proprietor (respondent) requested that the appeal be dismissed, or that the patent be maintained in amended form on the basis of one of six auxiliary requests, filed in reply to the appeal.

- III. Both parties also conditionally requested oral proceedings.

- IV. Summonses to oral proceedings before the Board were issued. They were accompanied by a communication expressing the Board's preliminary, non-binding view (Articles 15(1) and 17(2) RPBA 2020).

- V. Within one month of notification of the summons, the proprietor withdrew their approval to the text in which the Patent was granted and withdrew all outstanding requests. They furthermore indicated they would not be filing a replacement text or any further requests.

- VI. The oral proceedings were cancelled.

Reasons for the Decision

1. Under Article 113(2) EPC, the European Patent Office shall consider and decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
2. Since the text of the patent is at the disposition of the proprietor, a patent cannot be maintained against the proprietor's will. This principle has to be strictly observed and applies, in particular, in opposition proceedings and opposition appeal proceedings.
3. As the patent proprietor withdrew their approval of the text of the patent and indicated that they would not be filling any replacement text, there is no text on the basis of which the Board can consider the opponent's appeal.
4. These proceedings must, then, be terminated with a decision ordering revocation of the patent without substantive examination as to patentability (cf. Case Law of the Boards of Appeal 10th edition, IV.D.2., third paragraph).
5. By withdrawing all outstanding requests, the proprietor also withdrew their request for oral proceedings.
6. Additionally, in view of the conclusion under point 4, above, the condition for the opponent's request for oral proceedings does not apply.

7. Consequently, the oral proceedings were cancelled and this decision is issued on the basis of the written proceedings.

8. Since the proprietor's withdrawal of the request for oral proceedings was made within one month of notification of the communication issued by the Board in preparation for the oral proceedings, both conditions of Rule 103(4)(c) EPC, that *any request for oral proceedings is withdrawn ... and no oral proceedings take place*, are met. It makes no difference that the withdrawing party and the appealing party are not the same (cf. T517/17, reason 6; T488/18, reason 8). Hence, 25% of the appeal fee is to be reimbursed.

Order

For these reasons it is decided that:

1. The decision is set aside.
2. The patent is revoked.
3. The appeal fee is reimbursed at 25%.

The Registrar:

The Chairman:



D. Meyfarth

P. Scriven

Decision electronically authenticated