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**Datasheet for the decision
of 13 December 2023**

Case Number: T 1780/21 - 3.3.08

Application Number: 09807153.3

Publication Number: 2324360

IPC: G01N33/68

Language of the proceedings: EN

Title of invention:

Biomarker detection process and assay of neurological condition

Patent Proprietor:

Banyan Biomarkers, Inc.

Opponent:

Taylor, David

Headword:

Biomarker detection/BANYAN BIOMARKERS

Relevant legal provisions:

EPC Art. 113(1), 116(2)

RPBA 2020 Art. 12(8)

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Basis of decision - text or agreement to text withdrawn by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

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Case Number: T 1780/21 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 13 December 2023

Appellant: Taylor, David
(Opponent) Ablett & Stebbing
7-8 Market Place
London Greater London W1W 8AG (GB)

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

Respondent: Banyan Biomarkers, Inc.
(Patent Proprietor) 13400 Progress Blvd.
Alachua, FL 32615 (US)

Representative: Cabinet Beau de Loménie
51 avenue Jean Jaurès
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69301 Lyon Cedex 07 (FR)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 July 2021 concerning maintenance of the
European Patent No. 2324360 in amended form.**

Composition of the Board:

Chair T. Sommerfeld
Members: B. Claes
A. Bacchin

Summary of Facts and Submissions

I. The appeal lodged by the opponent (appellant) lies from the interlocutory decision of the opposition division that European patent No. 2 324 360 (the patent) as amended in accordance with the main request and the invention to which it relates meet the requirements of the EPC.

II. The appellant requested *inter alia* that the decision under appeal be set aside and the patent be revoked.

The respondent (patent proprietor) requested *inter alia* that the appeal be dismissed (main request) or, alternatively, that the decision under appeal be set aside and the patent be maintained on the basis of the set of claims of one of auxiliary requests 1 to 7, all requests filed with the reply to the appeal.

III. The board summoned the parties to oral proceedings in accordance with their requests and subsequently issued a communication pursuant to Article 15(1) RPBA.

IV. With a submission dated 27 July 2023 the respondent declared the following:

"Par la présente, le breveté retire toutes ses requêtes : le breveté retire ainsi sa requête principale, et donc son accord sur le texte tel que maintenu par la Division d'opposition dans sa décision provisoire du 15 juillet 2021 correspondant à sa requête principale et retire ses requêtes auxiliaires 1 à 7. Le breveté retire également son accord sur le texte du brevet délivré. Le breveté ne déposera pas d'autres texte, ni d'autres requêtes.

Nous nous attendons donc à ce que la procédure orale soit annulée et que la procédure de recours soit clause, avec émission d'une décision conformément aux décisions T 186/84, T 0301/18 et T 2518/19 notamment, sans examen substantif."

English translation by the board:

"The patentee hereby withdraws all its requests: the patentee thus withdraws its main request, and therefore its agreement to the text as maintained by the opposition division in its interlocutory decision of July 15, 2021, corresponding to the main request and withdraws its auxiliary requests 1 to 7. The patentee also withdraws its agreement with the text of the granted patent. The patentee will not file any further texts or requests.

We therefore expect the oral proceedings to be cancelled and the appeal procedure to be closed with the issue of a decision in accordance with decisions T 186/84, T 0301/18 and T 2518/19 in particular, without any substantive examination."

- V. In view of this declaration the oral proceedings were cancelled.

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 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 their approval of the text of the patent as granted. By withdrawing their main request and auxiliary requests, they also unequivocally withdrew their approval of the text of the patent as amended according to any of these requests. Consequently, 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.
3. 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, 10th edition 2022, section IV.D.2). 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.
4. Revocation of the patent complies with the request of the appealing opponent. The present decision can therefore be taken without holding oral proceedings (Article 116(1) EPC and Article 12(8) RPBA 2020).

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:



L. Malécot-Grob

T. Sommerfeld

Decision electronically authenticated