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D E C I S I O N
of 24 September 1998

Case Number: T 1211/97 - 3.3.4

Application Number: 84902150.6

Publication Number: 0151128

IPC: A61K 39/40

Language of the proceedings: EN

Title of invention:
Monoclonal antibodies reactive with endotoxin core

Patentee:
VELOS GROUP

Opponent:
Novartis AG
Sumitomo Chemical Company, Ltd.

Headword:
Monoclonal antibodies/VELOS GROUP

Relevant legal provisions:
EPC Art. 102(3), 106(3), 108, 109(1)
EPC R. 67

Keyword:
"Appeal deemed to have been filed - withdrawal of the appeal - reimbursement of the appeal fee refused"

Decisions cited:
T 0041/82

Catchword:
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Boards of Appeal

Chambres de recours

Case Number: T 1211/97 - 3.3.4

D E C I S I O N
of the Technical Board of Appeal 3.3.4
of 24 September 1998

Appellant:
(Proprietor of the patent)

VELOS GROUP
4824 Montgomery Lane
Bethesda, Maryland (US)

Representative:

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Leamington Spa
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Respondent I:
(Opponent 01)

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4058 Basel (CH)

Representative:

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Lichtstrasse 35
4002 Basel (CH)

Respondent III:
(Opponent 03)

Sumitomo Chemical Company, Ltd.
No. 15, Kitahama 5-chome, Higashiku
Osaka-shi, Osaka-fu
Osaka (JP)

Representative:

Brauns, Hans-Adolf, Dr.rer.nat.
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Decision under appeal:

Interlocutory decision of the Opposition Division
of the European Patent Office posted 7 October
1997 concerning maintenance of the European
patent No. 0 151 128 in amended form.

Composition of the Board:

Chairman: U. M. Kinkeldey
Members: W. Moser
R. E. Gramaglia

Summary of Facts and Submissions

- I. By an interlocutory decision (Article 106(3) EPC) delivered orally on 6 March 1997 with the written reasons posted on 7 October 1997, the patent in suit was maintained in amended form (Article 102(3) EPC).
- II. The Appellant (Patent Proprietor) lodged an appeal against that decision on 15 December 1997 and paid the appropriate fee at the same time. However, no written statement setting out the grounds of appeal (Article 108, 3rd sentence EPC) was filed.
- III. By a letter dated 6 March 1998, received by the EPO on 9 March 1998, the Appellant informed the Board of his intention to withdraw the appeal and to request reimbursement of the appeal fee.
- IV. By a communication dated 29 April 1998, the Board informed the Appellant of its provisional opinion that the request for reimbursement of the appeal fee would probably have to be refused.

Although invited to file observations on the communication, neither the Appellant nor the Respondents I and III (Opponents 01 and 03) made any comments.

Reasons for the Decision

1. The Board, in the exercise of its inherent original jurisdiction (cf. decision T 41/82 [OJ EPO 1982, 256]), is competent to decide on the request for reimbursement of the appeal fee.

2. Reimbursement of an appeal fee is possible:
- (i) in a case in which no notice of appeal is filed at all or in which no notice of appeal is deemed to have been filed because of a failure to pay the appeal fee within the time limit under Article 108, first sentence EPC, so that no appeal has ever existed; or
 - (ii) if such reimbursement is equitable by reason of a substantial procedural violation, in a case in which the department whose decision is contested considers the appeal to be well founded and rectifies its decision in accordance with Article 109(1), first sentence EPC (cf. Rule 67 EPC); or
 - (iii) where a Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation (cf. Rule 67 EPC).

3. In the present case, a notice of appeal was filed and the appeal fee was paid within the time limit under Article 108, first sentence EPC. Consequently, the appeal is deemed to have been filed so that a reimbursement of the appeal fee by virtue of the possibility indicated under point 2(i) above is to be excluded.

Finally, a reimbursement of the appeal fee by virtue of the possibility indicated under point 2(iii) above is also to be excluded because the present appeal has been withdrawn before a decision on its allowability could be taken.

Furthermore, the present case happens to be an *inter partes* case. By virtue of Article 109(1), second sentence EPC, an interlocutory revision was thus not allowable. Consequently, the possibility indicated under point 2(ii) above did not exist at all in the present case.

4. The Appellant's request for reimbursement of the appeal fee has thus to be refused.

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairperson:

D. Spigarelli

U. Kinkeldey