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**Datasheet for the decision  
of 20 September 2023**

**Case Number:** T 1310/19 - 3.3.08

**Application Number:** 09807366.1

**Publication Number:** 2318519

**IPC:** C12N5/0775, A61K35/28,  
A61K35/12

**Language of the proceedings:** EN

**Title of invention:**

Purified mesenchymal stem cell compositions

**Patent Proprietor:**

Mesoblast International Sàrl

**Opponents:**

Brantsandpatents bvba

Vossius & Partner Patentanwälte Rechtsanwälte mbB

**Headword:**

Mesenchymal stem cell compositions/MESOBLAST INTERNATIONAL

**Relevant legal provisions:**

EPC Art. 104(1), 111(1), 113(2)

RPBA 2020 Art. 16(1)

**Keyword:**

Text or agreement to text withdrawn by patent proprietor  
(appellant)  
Appealed decision becomes final - patent revoked  
Apportionment of costs - (no)

**Decisions cited:**

T 0347/90, T 0053/03, T 0490/05, T 1244/08, T 0301/12,  
T 0369/13, T 1663/13, T 1714/14, T 2350/15, T 0040/17,  
T 1226/18, T 1484/19

**Catchword:**

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Case Number: T 1310/19 - 3.3.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 20 September 2023**

**Appellant:** Mesoblast International Sàrl  
(Patent Proprietor) Route de Pre-Bois 20  
1217 Meyrin (CH)

**Representative:** Schnappauf, Georg  
ZSP Patentanwälte PartG mbB  
Hansastraße 32  
80686 München (DE)

**Respondent I:** Brantsandpatents bvba  
(Opponent 1) Pauline Van Pottelsberghelaan 24  
9051 Ghent (BE)

**Respondent II:** Vossius & Partner  
(Opponent 2) Patentanwälte Rechtsanwälte mbB  
Siebertstrasse 3  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 1 March 2019  
revoking European patent No. 2318519 pursuant to  
Article 101(3) (b) EPC**

**Composition of the Board:**

**Chair** T. Sommerfeld  
**Members:** B. Claes  
R. Winkelhofer

## Summary of Facts and Submissions

- I. European patent no. 2 318 519 (the patent) had been granted for European patent application No. 09 807 366.1 and is entitled "*Purified mesenchymal stem cell compositions*".
- II. The appeal lodged by the patent proprietor (appellant) lies from the decision of the opposition division revoking the patent.
- III. The appellant requested *inter alia* that the decision under appeal be set aside and amended such that the patent be maintained with the set of claims of a main request, or alternatively, with the set of claims of one of auxiliary requests 1 to 9.

The opponents 1 and 2 (respondents I and II) requested *inter alia* that the appeal be dismissed.

- IV. The parties were summoned to oral proceedings and were informed of the board's provisional opinion on the issues of the case.
- V. With submission dated 11 September 2023, the appellant declared the following:

*"The Proprietor hereby withdraws its approval of the text with which the above-mentioned European Patent was granted.*

*The Proprietor also withdraws any and all auxiliary requests and will not be filing a replacement text or any further request.*

*Consequently, the proceedings are to be terminated by a decision ordering the revocation of the patent without reference to any of the substantive issues (see, for example, T 1182/17 and T 969/10). We look forward to receiving confirmation that the opposition and appeal proceedings are terminated."*

- VI. In view of this declaration, the oral proceedings were cancelled.
- VII. On 14 September 2023, respondent I submitted that the appellant's conduct amounted to an abuse of procedure, as they had requested oral proceedings in their appeal, and had submitted the above declaration only almost one year after the board's provisional opinion, and about two weeks before the date of the oral proceedings. This had placed an undue burden on the respondents who had been required to make "*extensive preparations, including travel arrangements*" to ensure their presence at the oral proceedings.

They request apportionment of their costs, and the appellant be ordered to bear these costs.

### **Reasons for the Decision**

1. Article 113(2) EPC requires that the European Patent Office decides upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
2. The patent proprietor (appellant) explicitly disapproved the text of the patent, they withdrew all auxiliary requests without filing any other amended text on which further prosecution could be based, and they requested the revocation of the patent and the

termination of the appeal proceedings without going into the merits of the appeal. Thus, the appellant unequivocally expresses that they are no longer interested in the continuation of the appeal proceedings and a decision on the appeal under Article 111 EPC.

3. The board agrees with established jurisprudence (e.g. decisions T 53/03, T 1244/08, T 1226/18) that the appellant's declaration is to be taken as the withdrawal of the appeal (for an older line of jurisprudence dismissing an appeal in such situation see T 347/90).
4. The above implies that the request for oral proceedings is also to be taken as withdrawn (i.e. there is no text to be discussed).
5. As a consequence of the withdrawal of the appeal, the appeal proceedings are terminated, with the opposition division's decision to revoke the patent becoming thus final.
6. Ancillary questions like - as in the current case - apportionment of costs on request by a party are nevertheless to be decided by the board (see Case Law of the Boards of Appeal 10th Edition (2022) V.A.7.3.2; decision T 1484/19 of 4 July 2023 with further references).
7. Articles 104(1), 111(1) EPC and Article 16(1) RPBA 2020 provide that in appeal proceedings a party may be ordered to pay some or all of another party's costs (expenses) for reasons of equity, in case such costs arise from culpable actions of another party or even

their abusive behaviour (e.g. decisions T 301/12, T 1714/14, T 1484/19).

8. Generally, as derived from the principle of party disposition, an appellant may withdraw their appeal at any time, without this right being restricted by considerations as to apportionment of costs (see decisions T 490/05, T 1663/13, T 40/17 and T 1484/19).
9. The withdrawal of an appeal even shortly before the date of oral proceedings is, *per se*, no reason to impose costs on another party, in the absence of additional circumstances that amount to an abuse of procedure, by a party not acting in good faith (see decisions T 1663/13, T 1714/14, T 40/17, T 1484/19).
10. No circumstances have been brought forward by respondent I which could, not even *in abstracto*, amount to an abuse of procedure on the appellant's side. That the withdrawal of the appeal roughly two weeks before the date of the oral proceedings had placed "*an undue burden*" on the respondent, as they claim, is clearly not sufficient.
11. Nothing else can be gained from decisions T 369/13 and T 2350/15 as drawn upon by respondent I:

In the case underlying decision T 2350/15, the appellant had made a contradictory statement that they would not attend oral proceedings as scheduled upon their request, but had underlined that this declaration did not mean a withdrawal of the request for oral proceedings, or the appeal. Under these circumstances, the board held oral proceedings as scheduled and imposed the respondent's costs for participating in the

oral proceedings on the appellant. This case is thus fairly different from the current.

Decision T 369/13 is not concerned with apportionment of costs.

12. No apportionment of costs can thus be justified in the case in hand. Respondent I's request is thus to be refused.

## **Order**

### **For these reasons it is decided that:**

The request for apportionment of costs is refused.

The Registrar:

The Chair:



L. Malécot-Grob

T. Sommerfeld

Decision electronically authenticated