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**Datasheet for the decision
of 9 November 2022**

Case Number: T 2428/19 - 3.3.04

Application Number: 12765137.0

Publication Number: 2692359

IPC: A61K39/395, A61P35/00,
A61P37/04

Language of the proceedings: EN

Title of invention:

CANCER IMMUNOPOTENTIATING AGENT CONTAINING RANKL ANTAGONIST

Patent Proprietor:

Oriental Yeast Co., Ltd.

Opponent:

Dehmel & Bettenhausen

Headword:

RANKL Antagonist/ORIENTAL YEAST

Relevant legal provisions:

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

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Basis of decision - text or agreement to text withdrawn by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 2428/19 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 9 November 2022

Appellant: Dehmel & Bettenhausen
(Opponent) Herzogspitalstr. 11
80331 Munich (DE)

Representative: Ruckerl, Florian
Dehmel & Bettenhausen
Patentanwälte PartmbB
Herzogspitalstraße 11
80331 München (DE)

Respondent: Oriental Yeast Co., Ltd.
(Patent Proprietor) 3-6-10, Azusawa
Itabashi-ku
Tokyo 174-8505 (JP)

Representative: Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
Arabellastraße 30
81925 München (DE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 27 June 2019 rejecting the opposition filed against European patent No. 2692359 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chair M. Pregetter
Members: B. Claes
R. Romandini

Summary of Facts and Submissions

- I. The appeal lodged by the opponent (appellant) lies from the decision of the opposition division rejecting the opposition.
- II. The patent proprietor (respondent) replied to the appeal.
- III. The appellant requested that the decision under appeal be set aside and the patent be revoked. The respondent requested that the appeal be dismissed.
- IV. The board summoned the parties to oral proceedings in accordance with their requests and subsequently issued a communication pursuant to Article 15(1) RPBA 2020 setting out the board's preliminary appreciation of substantive and legal matters concerning the appeal.
- V. With a letter dated 8 November 2022 the respondent informed the board as follows:

"With regard to the above-mentioned patent, we hereby notify the EPO that the patentee no longer approves of the text of the patent as granted.

The patentee is not pursuing any of our pending requests on file, including the auxiliary claim requests, and will not propose any amended text.

We also withdraw our request for oral proceedings."

Reasons for the Decision

1. The appeal of the opponent complies with the requirements of Articles 106 to 108 EPC and the further provisions referred to in Rule 101 EPC and is admissible.
2. 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.
3. 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 its approval of the text of the patent as granted. Furthermore, they withdrew all the auxiliary requests pending in the appeal proceedings. Consequently, there is no longer any text of the patent in the proceedings approved by the patent proprietor which the board can consider for compliance with the requirements of the EPC.
4. 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 case law in the present case.
5. Revocation of the patent complies with the request of the appealing opponent. Therefore, the present decision

can 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:



I. Aperribay

M. Pregetter

Decision electronically authenticated