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

Case Number: T 1395/21 - 3.3.04

Application Number: 12702153.3

Publication Number: 2667892

IPC: A61K39/155, A61P31/14

Language of the proceedings: EN

Title of invention:
RSV immunization regimen

Patent Proprietor:
GlaxoSmithKline Biologicals SA

Opponent:
Pfizer Inc.

Headword:
RSV/GSK

Relevant legal provisions:
EPC Art. 113(2)

Keyword:
Basis of decision - text or agreement to text withdrawn by
patent proprietor - patent revoked



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Case Number: T 1395/21 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 20 July 2023

Appellant: GlaxoSmithKline Biologicals SA
(Patent Proprietor) Rue de l'Institut 89
1330 Rixensart (BE)

Representative: J A Kemp LLP
80 Turnmill Street
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Respondent: Pfizer Inc.
(Opponent) 66 Hudson Boulevard East
New York, NY 10001-2192 (US)

Representative: Dörries, Hans Ulrich
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 June 2021
revoking European patent No. 2667892 pursuant to
Article 101(2) and Article 101(3) (b) EPC**

Composition of the Board:

Chairwoman M. Pregetter
Members: D. Luis Alves
M. Blasi

Summary of Facts and Submissions

- I. The patent proprietor (appellant) filed an appeal against the decision of the opposition division to revoke European patent No. 2 667 892, entitled "*RSV immunization regimen*".
- II. With the statement of grounds of appeal the appellant requested that the decision of the opposition division be set aside and the patent be maintained as granted, implying that the opposition be rejected. On an auxiliary basis, the appellant requested that the patent be maintained in amended form on the basis of one of the sets of claims of auxiliary requests 1, 2, 2A, 2B, 3 and 4, all filed with the statement of grounds of appeal. Oral proceedings were requested on an auxiliary basis.
- III. With the reply to the appeal the opponent (respondent) requested that the appeal be dismissed and the patent be revoked in its entirety. Oral proceedings were requested on an auxiliary basis.
- IV. The board appointed oral proceedings to take place on 24 November 2023.
- V. In a letter dated 4 July 2023 the appellant stated that it withdrew the approval of the text in which the patent was granted. It further stated that it withdrew all requests submitted in the appeal proceedings and that it was understood that this would result in the patent being revoked.
- VI. The oral proceedings were subsequently cancelled.

Reasons for the Decision

1. Pursuant to Article 113(2) EPC the EPO 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. Such an agreement cannot be deemed to exist if the proprietor - as in the present case - expressly states that it no longer approves the text of the patent as granted and no alternative text is offered.
3. There is therefore no text of the patent on the basis of which the board can consider compliance thereof with the requirements of the EPC. It is established case law of the boards of appeal of the EPO that in these circumstances the patent must be revoked without further substantive examination (see Case Law of the Boards of Appeal of the EPO, 10th Edition, 2022, IV.D.2).
4. There are no remaining issues that have to be dealt with by the board in the present appeal case.
5. In the current case, however, the patent had already been revoked by the opposition division. Thus, it cannot be revoked again. The board's order therefore is that the appeal is to be dismissed. This has the consequence that the opposition division's decision to revoke the patent becomes final.

6. As this outcome complies with the respondent's request, the decision can be taken without holding oral proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



I. Aperribay

M. Pregetter

Decision electronically authenticated