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PATENTS

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Contents

Proceedings under the Patents Act 1990

Applications Lapsed, Refused Or Withdrawn Patents Ceased or Expired

Reference to the application numbers must include the year of the application of the patent, which is shown preceding the numbers.

The codes next to each number have the following meanings:

Code	Meaning
1	Application Lapsed Section 142(2)(a) \S 47(C)\
2	Application Lapsed Section 142(2)(b)
3	Application Lapsed Section 142(2)(c) \S 52B(3)\
4	Application Lapsed Section 142(2)(d) \S 47D(1)\
5	Application Lapsed Section 142(2)(e) \S 53\
6	Application Lapsed Section 142(2)(f)/Reg 8.3(3)
7	Application Lapsed Reg. 3.2(5)(a) \R 7B(3)\
8	Application Lapsed Reg. 3.4(6)
9	Application Lapsed Section 142(3)
10	Application Lapsed Section 142(4)(b)
11	Application Lapsed Section 148(1)(c)
12	Application Withdrawn Section 141(1)/Reg 8.3(2) \S 37\
13	Application Withdrawn Section 141(2)/Reg 8.3(2)
14	Patent Ceased Section 143(a), or Expired
15	Patent Ceased Section 143(b)
16	Application refused
17	Application Lapsed Regulation 22.2
A	Applications on which examination has not been requested or directed
B	Applications on which a direction to request examination has been given
C	Applications on which examination has been requested or on which an examination report has been issued
D	Applications which have been accepted or advertised accepted, (including applications which have also been advertised 'Not Sealed')
N	Applications Not Open to Public Inspection

517357 (14)
572356 (14)
575210 (14)
576633 (14)
579677 (14)
581262 (14)
582913 (14)
585270 (14)
588142 (14)
589875 (14)
592599 (14)
594651 (14)
599309 (14)
603612 (14)
606005 (14)
612526 (14)
613882 (14)
619785 (14)
627701 (14)
632071 (14)
637067 (14)
639949 (14)
641972 (14)
567624 (14)
574529 (14)
575448 (14)
577728 (14)
580898 (14)
581263 (14)
583314 (14)
586655 (14)
588259 (14)
590230 (14)
593148 (14)
596232 (14)
600655 (14)
604774 (14)
608083 (14)
612553 (14)
619283 (14)
622051 (14)
631381 (14)
632279 (14)
639031 (14)
640279 (14)
643569 (14)
570136 (14)
574854 (14)
576397 (14)
578753 (14)
581261 (14)
582394 (14)
584933 (14)
587161 (14)
588928 (14)
591718 (14)
593402 (14)
598960 (14)
600685 (14)
605927 (14)
610290 (14)
613304 (14)
619451 (14)
624029 (14)
631780 (14)
636858 (14)
639874 (14)
641947 (14)
646302 (14)

Appls Lapsed:W/drawn, Pat. Ceased:Exp/d cont'd

646303 (14)
648834 (14)
654054 (14)
658683 (14)
660157 (14)
661255 (14)
666878 (14)
668795 (14)
669397 (14)
671262 (14)
673304 (14)
675589 (14)
678059 (14)
679360 (14)
684222 (14)
685412 (14)
686915 (14)
688587 (14)
690334 (14)
690756 (14)
694684 (14)
696554 (14)
700009 (14)
700407 (14)
703318 (14)
704893 (14)
705703 (14)
709025 (14)
710749 (14)
713281 (14)
714636 (14)
717213 (14)
724034 (14)
725168 (14)
728262 (14)
729431 (14)
731249 (14)
731830 (14)
734510 (14)
735337 (14)
736470 (14)
737572 (14)
739559 (14)
744358 (14)
745097 (14)
746540 (14)
748497 (14)
748693 (14)
751044 (14)
751456 (14)
752290 (14)
647194 (14)
649992 (14)
656630 (14)
659696 (14)
660377 (14)
662939 (14)
666886 (14)
669219 (14)
670521 (14)
671603 (14)
673305 (14)
677714 (14)
678191 (14)
680049 (14)
684852 (14)
685519 (14)
687318 (14)
688604 (14)
690343 (14)
690767 (14)
695911 (14)
697501 (14)
700257 (14)
701113 (14)
704318 (14)
705111 (14)
706488 (14)
709033 (14)
711532 (14)
713597 (14)
716730 (14)
717309 (14)
724673 (14)
726344 (14)
728544 (14)
729589 (14)
731309 (14)
732218 (14)
735010 (14)
736284 (14)
736680 (14)
737582 (14)
740480 (14)
744532 (14)
745789 (14)
746554 (14)
748596 (14)
749861 (14)
751068 (14)
751524 (14)
752492 (14)
648733 (14)
652005 (14)
658233 (14)
660001 (14)
660594 (14)
663626 (14)
667969 (14)
669395 (14)
670532 (14)
672063 (14)
673382 (14)
677800 (14)
679359 (14)
680064 (14)
685010 (14)
686898 (14)
688291 (14)
689158 (14)
690394 (14)
691995 (14)
696021 (14)
699689 (14)
700392 (14)
702316 (14)
704763 (14)
705481 (14)
707790 (14)
710634 (14)
711910 (14)
714468 (14)
716751 (14)
717886 (14)
724839 (14)
727237 (14)
728648 (14)
730324 (14)
731551 (14)
733942 (14)
735171 (14)
736400 (14)
736800 (14)
739425 (14)
743819 (14)
744918 (14)
745917 (14)
748448 (14)
748605 (14)
750912 (14)
751133 (14)
751615 (14)
752943 (14)

Appls Lapsed:W/drawn, Pat. Ceased:Exp/d cont'd

753366 (14) 753471 (14) 753644 (14)
754481 (14) 755228 (14) 755310 (14)
756175 (14) 756772 (14) 756980 (14)
757797 (14) 757828 (14) 758566 (14)
759091 (14) 759825 (14) 760372 (14)
760529 (14) 761581 (14) 761682 (14)
762225 (14) 762935 (14) 762949 (14)
763068 (14) 763530 (14) 764163 (14)
764685 (14) 764865 (14) 764944 (14)
765226 (14) 766193 (14) 766338 (14)
766939 (14) 766972 (14) 767094 (14)
768170 (14) 768566 (14) 768900 (14)
769640 (14) 769644 (14) 770254 (14)
770354 (14) 770396 (14) 770905 (14)
771166 (14) 771724 (14) 771735 (14)
772742 (14) 772864 (14) 773762 (14)
773987 (14) 774115 (14) 774572 (14)
774709 (14) 775377 (14) 776920 (14)
777356 (14) 777374 (14) 777548 (14)
778266 (14) 779059 (14) 779480 (14)
780128 (14) 780217 (14) 781112 (14)
781151 (14) 48990 (5C) 69594 (4C)
69610 (4C) 69615 (4C) 69620 (4C)
69623 (4C) 70130 (5C) 77536 (4C)
80184 (5C)

2001

11042 (4C) 11052 (4C) 11185 (4C)
11233 (4C) 11234 (4C) 11445 (4C)
11536 (4C) 12344 (4C) 12350 (4C)
12364 (4C) 13134 (4C) 13439 (4C)
13474 (4C) 13499 (4C) 13919 (4C)
14435 (4C) 14456 (4C) 15634 (4C)
15756 (4C) 15772 (4C) 19565 (5C)
31307 (5C) 35095 (5C) 50532 (5C)
53934 (5C) 54301 (5C) 65626 (5C)
76067 (5C) 77308 (5C) 79432 (5C)
85529 (5C) 89333 (5C) 91383 (5C)
93429 (5C)

2002

15435 (5C)

Change of Name(s) of Applicant(s), Section 104

784193 Aventis Pasteur Limited The name of the applicant(s) has been changed to **Sanofi Pasteur Limited**

784206 NeuroMed Technologies, Inc. The name of the applicant(s) has been changed to **Neuromed Pharmaceuticals, Ltd.**

784510 Dana-Farber Cancer Institute The name of the applicant(s) has been changed to **Dana-Farber Cancer Institute, Inc.**

784635 Geneart GmbH Gessellschaft Fur Angewandte Biotechnologie; Yiming Shao The name of the applicant(s) has been changed to **Geneart AG; Yiming Shao**

2001

54465 BHP Steel (JLA) Pty Ltd The name of the applicant(s) has been changed to **Bluescope Steel Limited**

Assignments before Grant, Section 113

2001

12356 The Picower Institute for Medical Research The application has been assigned to **Cytokine PharmaSciences, Inc.**

Extensions of Time, Section 223

Applications Received

Notice of opposition under Section 223(6) to the undermentioned application(s) for an extension of time may be lodged at the Patent Office within the prescribed time.

667730 **Danisco A/S** An application to extend the time from 9 Feb 2005 to 9 Apr 2006 in which to pay a renewal fee has been lodged . Address for service in Australia - WRAY & ASSOCIATES Level 4 The Quadrant 1 William Street PERTH WA 6000

739436 **Schiavello, O.** An application to extend the time from 24 Sep 2004 to 24 May 2006 in which to pay a renewal fee has been lodged . Address for service in Australia - Callinan Lawrie Private Bag 7 KEW VIC 3101

741015 **QX Corp. Pty Ltd** An application to extend the time from 8 Nov 2005 to 8 Jun 2006 in which to pay a renewal fee has been lodged . Address for service in Australia - David Small QX Corporation Pty Ltd 401 Clunies Ross Street Acton A.C.T. 2601

746275 **Wells, P.** An application to extend the time from 19 May 2006 to 19 Jun 2006 in which to pay a renewal fee has been lodged . Address for service in Australia - Mills Oakley Patent Attorneys PO Box 453 Collins Street West VIC 8007

751050 **Zoltans Pool Products Pty Ltd** An application to extend the time from 23 Feb 2006 to 23 May 2006 in which to pay a renewal fee has been lodged . Address for service in Australia - Mills Oakley Patent Attorneys PO Box 453 Collins Street West VIC 8007

773721 **NEC Corp.** An application to extend the time from 16 Mar 2005 to 16 Apr 2006 in which to pay a renewal fee has been lodged . Address for service in Australia - SPRUSON & FERGUSON GPO Box 3898 SYDNEY NSW 2001

Extensions of Time, Section 223 -cont'd

782815 **Plasticos Vandux De Colombia, S.A.** An application to extend the time from 14 Oct 2005 to 1 Mar 2006 in which to provide search results under S45(3) has been filed . Address for service in Australia - Davies Collison Cave Level 15 1 Nicholson Street MELBOURNE VIC 3000

Amendments, Section 104

Applications for Amendment

A person interested in opposing the allowance of the amendment may, at any time within three months from the date of this journal, give notice at the Patent Office using the approved form accompanied by the prescribed fee.

688759 Production of human papillomavirus capsid protein and virus-like particles **University of Rochester** The nature of the proposed amendment is as shown in the statement(s) filed 3 Apr 2006. . Address for service in Australia - PHILLIPS ORMONDE & FITZPATRICK 367 Collins Street MELBOURNE VIC 3000

746362 Novel methods and materials for pest management **Dow AgroSciences LLC and University of Florida Research Foundation, Inc.** The nature of the proposed amendment is as shown in the statement(s) filed 18 Apr 2006. . Address for service in Australia - SPRUSON & FERGUSON GPO Box 3898 SYDNEY NSW 2001

Applications for Amendment -cont'd

748678 Concrete comprising organic fibres dispersed in a cement matrix, concrete cement matrix and premixes **Bouygues; LaFarge and Rhodia Chimie** The nature of the proposed amendment is as shown in the statement(s) filed 27 Apr 2006. . Address for service in Australia - WATERMARK PATENT & TRADEMARK ATTORNEYS Locked Bag 5 HAWTHORN VIC 3122

780612 Mediators of hedgehog signaling pathways, compositions and uses related thereto **Curis, Inc.** The nature of the proposed amendment is as shown in the statement(s) filed 4 May 2006. . Address for service in Australia - Shelston IP Level 21 60 Margaret Street SYDNEY NSW 2000

782917 Cell division inhibitors and process for producing the same **Nereus Pharmaceuticals, Inc.** The nature of the proposed amendment is as shown in the statement(s) filed 31 Mar 2006. . Address for service in Australia - Fisher Adams Kelly GPO Box 1413 BRISBANE QLD 4001

Amendments Made

704930 **ATF Mining Electrics Pty Ltd** The nature of the amendment is as was notified in the Official Journal dated 3 Jun 2004

Applications Accepted

Name Index

. The Nominated Person(s) (INID 70) are listed only if they differ from the Applicant(s) (INID 71). Otherwise only the Applicant(s) are listed.

(71) Amgen Inc.
(11) AU-B-37956/00 **(10) 784768**
(21) 37956/00 **(22)** 06.06.00
(54) METHODS FOR TREATING CYTOKINE MEDIATED DISEASES
(51) Int. Cl.
A61K 38/16 (2006.01)
(43) 13.12.01
(44) 15.06.06
(62) 42288/96
(72) Carmichael, D.F.; Smith, C.G.; Thompson, R.C.; Russell, D.; Kohno, T.
(74) WRAY & ASSOCIATES

(71) Aristocrat Technologies Australia Pty Ltd
(11) AU-B-31315/01 **(10) 784767**
(21) 31315/01 **(22)** 26.03.01
(54) GAMING MACHINE WITH PRIZE METER
(51) Int. Cl.
A63F 13/00 (2006.01)
A63F 5/04 (2006.01)
A63F 13/10 (2006.01)
(31) PQ6758 **(32)** 07.04.00 **(33)** AU
(43) 03.10.02
(44) 15.06.06
(72) Bennett, N.L.; Olive, S.; Bryant, N.
(74) Freehills Patent & Trade Mark Attorneys

(71) Biotec Pharmacon ASA
(11) AU-B-25596/01 **(10) 784783**
(21) 25596/01 **(22)** 10.01.01
(54) COD URACIL-DNA GLYCOSYLASE, GENE CODING THEREFORE, RECOMBINANT DNA CONTAINING SAID GENE OR OPERATIVE PARTS THEREOF, A METHOD FOR PREPARING SAID PROTEIN AND THE USE OF SAID PROTEIN OR SAID OPERATIVE PARTS THEREOF IN MONITORING OR CONTROLLING PCR
(51) Int. Cl.
C12N 9/24 (2006.01)
(87) WO01/51623
(31) 20000163 **(32)** 12.01.00 **(33)** NO
20005428 27.10.00 NO
(43) 24.07.01
(44) 15.06.06
(72) Lanes, O.; Willasen, N.P.; Guddal, P.H.; Gjellesvik, D.R.
(74) PHILLIPS ORMONDE & FITZPATRICK

(71) Callaway Golf Co.
(11) AU-B-10202/02 **(10) 784763**
(21) 10202/02 **(22)** 16.01.02
(54) SYSTEM AND METHOD FOR MEASURING A GOLFER'S BALL STRIKING PARAMETERS
(51) Int. Cl.
G06F 17/00 (2006.01)
A63B 69/00 (2006.01)
A63B 69/36 (2006.01)
(31) 09/765691 **(32)** 19.01.01 **(33)** US
(43) 25.07.02
(44) 15.06.06
(72) Manwaring, S.R.
(74) SPRUSON & FERGUSON

(71) Capral Aluminium Ltd.
(11) AU-B-18830/02 **(10) 784774**
(21) 18830/02 **(22)** 28.02.02
(54) SLIDING SCREEN ASSEMBLY
(51) Int. Cl.
E06B 3/46 (2006.01)
E05C 17/00 (2006.01)
E05C 21/00 (2006.01)
(31) PR3412 **(32)** 28.02.01 **(33)** AU
(43) 29.08.02
(44) 15.06.06
(72) Edlin, A.C.

(71) Capral Aluminium Ltd.
(11) AU-B-18829/02 **(10) 784775**
(21) 18829/02 **(22)** 28.02.02
(54) SLIDING SCREEN CLOSURE ASSEMBLY
(51) Int. Cl.
E05C 3/14 (2006.01)
E05C 7/02 (2006.01)
E06B 3/46 (2006.01)
(31) PR3413 **(32)** 28.02.01 **(33)** AU
(43) 29.08.02
(44) 15.06.06
(72) Edlin, A.C.
(74) Allens Arthur Robinson

(71) Carlson, B.A.
(11) AU-B-69124/00 **(10) 784778**
(21) 69124/00 **(22)** 17.08.00
(54) BALL VALVE WITH ADJUSTABLE FLOW COEFFICIENT

Applications Accepted - Name Index cont'd

(51) Int. Cl.
F16K 5/10 (2006.01)
F16K 5/06 (2006.01)
(87) WO01/13019
(31) 60/149398 **(32)** 17.08.99 **(33)** US
(43) 13.03.01
(44) 15.06.06
(72) Carlson, B.A.
(74) F.B. Rice & Co.

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(71) Cook Biotech, Inc.; Cook Inc.
(11) AU-B-33166/01 **(10)** **784782**
(21) 33166/01 **(22)** 31.01.01
(54) STENT VALVES AND USES OF SAME
(51) Int. Cl.
A61F 2/24 (2006.01)
A61F 2/06 (2006.01)
(87) WO01/54625
(31) 60/179195 **(32)** 31.01.00 **(33)** US
(43) 07.08.01
(44) 15.06.06
(72) Obermiller, J.F.; Osse, F.J.; Thorpe, P.E.
(74) Davies Collison Cave

Cook Inc. see Cook Biotech, Inc.
(11) AU-B-33166/01

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(71) Dragonfly Pictures, Inc.
(11) AU-B-22464/00 **(10)** **784766**
(21) 22464/00 **(22)** 22.03.00
(54) UNIVERSAL VTOL POWER AND ROTOR SYSTEM MODULE
(51) Int. Cl.
B64C 27/12 (2006.01)
B64C 37/00 (2006.01)
(31) 09/515050 **(32)** 25.02.00 **(33)** US
(43) 27.09.01
(44) 15.06.06
(72) Piasecki, M.W.
(74) Freehills Patent & Trade Mark Attorneys

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(71) Franz Plasser Bahnbaumaschinen-Industriegesellschaft m.b.H.
(11) AU-B-29327/02 **(10)** **784772**
(21) 29327/02 **(22)** 28.03.02
(54) A CLEARING CHAIN FOR A TRACK MAINTENANCE MACHINE
(51) Int. Cl.
E01B 27/04 (2006.01)
(31) 243/01 **(32)** 02.04.01 **(33)** AT
(43) 03.10.02
(44) 15.06.06
(72) Theurer, J.; Worgotter, H.
(74) PHILLIPS ORMONDE & FITZPATRICK

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(71) Geox S.P.A.
(11) AU-B-54799/01 **(10)** **784770**
(21) 54799/01 **(22)** 09.04.01
(54) BREATHABLE SHOE
(51) Int. Cl.
A43B 7/08 (2006.01)
A43B 7/12 (2006.01)
A43B 9/12 (2006.01)
(87) WO01/78542
(31) PD200A000091 **(32)** 13.04.00 **(33)** IT
(43) 30.10.01
(44) 15.06.06
(72) Polegato Moretti, M.
(74) Griffith Hack

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(71) Gouws, P.C.
(11) AU-B-44440/01 **(10)** **784769**
(21) 44440/01 **(22)** 28.03.01
(54) A WRENCH FOR USE WITH DRILLING APPARATUS
(51) Int. Cl.
B25B 13/50 (2006.01)
E21B 19/16 (2006.01)
(87) WO01/72476
(31) 2000/1647 **(32)** 31.03.00 **(33)** ZA
(43) 08.10.01
(44) 15.06.06
(72) Gouws, P.C.
(74) PIZZEYS

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(71) Hisamitsu Pharmaceutical Co., Inc.
(11) AU-B-41121/01 **(10)** **784779**
(21) 41121/01 **(22)** 13.03.01
(54) ULTRAVIOLET-SHIELDING ADHESIVE PREPARATION
(51) Int. Cl.
A61K 9/70 (2006.01)
A61L 15/42 (2006.01)
A61L 15/58 (2006.01)
(87) WO01/68061
(31) 2000-75554 **(32)** 17.03.00 **(33)** JP
(43) 24.09.01
(44) 15.06.06
(72) Tsuruda, K.; Ikeura, Y.
(74) Collison & Co

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(71) Lorraine Josey & Associates Pty Ltd
(11) AU-B-67103/01 **(10)** **784764**
(21) 67103/01 **(22)** 06.09.01
(54) POSTURE TRAINING DEVICE
(51) Int. Cl.
A63B 23/02 (2006.01)
(31) PQ9961 **(32)** 08.09.00 **(33)** AU
(43) 14.03.02
(44) 15.06.06
(72) Mulready, L.

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(71) Powderject Vaccines, Inc.
(11) AU-B-14814/01 **(10)** **784781**
(21) 14814/01 **(22)** 09.11.00
(54) INDUCTION OF MUCOSAL IMMUNITY BY VACCINATION VIA THE SKIN ROUTE
(51) Int. Cl.
A61K 39/145 (2006.01)
A61K 39/39 (2006.01)
(87) WO01/34185
(31) 09/437691 **(32)** 10.11.99 **(33)** US
(43) 06.06.01
(44) 15.06.06
(72) Chen, D.; Bhargava, S.; Fuller, D.
(74) F B Rice & Co

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(71) Schlumberger Technology B.V.
(11) AU-B-10199/02 **(10)** **784777**
(21) 10199/02 **(22)** 16.01.02
(54) EXPANDABLE DEVICES
(51) Int. Cl.
A61F 2/06 (2006.01)
E21B 33/12 (2006.01)
E21B 41/02 (2006.01)
E21B 43/08 (2006.01)
E21B 43/10 (2006.01)
E21B 43/16 (2006.01)
E21B 33/124 (2006.01)
E21B 33/127 (2006.01)
(31) 60/261749 **(32)** 16.01.01 **(33)** US
60/296875 08.06.01 US
10/050468 16.01.02 US
(43) 29.08.02
(44) 15.06.06
(72) Hart, B.; Johnson, C.D.; Schetky, L.M.
(74) Griffith Hack

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(71) Sigma-Tau Healthscience S.p.A.
(11) AU-B-70999/01 **(10)** **784780**
(21) 70999/01 **(22)** 26.06.01
(54) HEALTH FOOD USEFUL FOR PREVENTING LIVER AND BILIARY DYSFUNCTIONS CONTAINING AN ALKANOYL L-CARNITINE AND SILYBUM MARIANUM EXTRACT
(51) Int. Cl.
A61K 36/28 (2006.01)
A23L 1/30 (2006.01)
A23L 1/302 (2006.01)
A23L 1/305 (2006.01)
(87) WO02/05831
(31) RM200A000387 **(32)** 14.07.00 **(33)** IT
(43) 30.01.02
(44) 15.06.06
(72) Pola, P.
(74) Davies Collison Cave

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(71) Sony Corp.
(11) AU-B-38817/01 **(10)** **784773**
(21) 38817/01 **(22)** 24.04.01
(54) INFORMATION PROCESSING SYSTEM AND INFORMATION PROCESSING APPARATUS
(51) Int. Cl.
G11B 19/04 (2006.01)
(31) 2000-134282 **(32)** 28.04.00 **(33)** JP
(43) 01.11.01
(44) 15.06.06
(72) Nakai, H.
(74) Griffith Hack

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(71) Transgene S.A.
(11) AU-B-35190/01 **(10)** **784776**
(21) 35190/01 **(22)** 12.04.01
(54) POXVIRUS WITH TARGETED INFECTION SPECIFICITY
(51) Int. Cl.
C12N 15/39 (2006.01)
A61K 35/76 (2006.01)
A61K 38/00 (2006.01)
A61K 47/48 (2006.01)
A61K 48/00 (2006.01)
A61P 3/10 (2006.01)
A61P 31/00 (2006.01)
A61P 35/00 (2006.01)
A61P 37/00 (2006.01)
A61P 43/00 (2006.01)
C07K 19/00 (2006.01)
C12N 7/00 (2006.01)
C12N 7/02 (2006.01)
C12N 7/04 (2006.01)
C12N 15/09 (2006.01)
C12N 15/62 (2006.01)
C12N 15/63 (2006.01)
C12N 15/86 (2006.01)
C12Q 1/70 (2006.01)
A61K 39/275 (2006.01)
C07K 14/065 (2006.01)
C07K 14/705 (2006.01)
(31) 00440109 **(32)** 14.04.00 **(33)** EP
60/246080 07.11.00 EP
01440009 22.01.01 EP
(43) 18.10.01

Applications Accepted - Name Index cont'd

(44) 15.06.06
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(74) Freehills Patent & Trade Mark Attorneys

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(11) AU-B-29278/02 **(10)** **784771**
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(43) 03.10.02
(44) 15.06.06
(72) Foh, C.H.; Zukerman, M.
(74) Davies Collison Cave

(71) Vercell Biotechnology BV
(11) AU-B-51795/01 **(10)** **784765**
(21) 51795/01 **(22)** 07.06.01
(54) USE OF POLYACRYLAMIDE GEL FOR FORMING A CAPSULE IN THE TISSUE OF THE ORGANISM OF A MAMMAL, A METHOD OF CULTIVATING CELLS, AND A METHOD OF TREATING ONCOLOGICAL DISEASES AND DIABETES MELLITUS
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A61K 35/48 (2006.01)
A61K 47/16 (2006.01)
A61P 3/10 (2006.01)
A61P 5/50 (2006.01)
A61P 35/00 (2006.01)
(31) 2000116208 **(32)** 23.06.00 **(33)** RU
(43) 10.01.02
(44) 15.06.06
(72) Zybin, D.V.; Kotelevits, A.G.; Severin, S.E.; Sologub, V.K.; Mironova, L.L.
(74) Davies Collison Cave

Numerical Index

IPC Index

Opposition Proceedings

(The name in the parentheses is that of the opponent)

Opposition Lodged

784218 **Stasiuk, J.W.** (Rexam Beverage Can Europe Limited0)

Opposition Withdrawn

716581 **Wisconsin Alumni Research Foundation** (The Walter & Eliza Hall Institute of Medical Research)

770538 **Wisconsin Alumni Research Foundation** (The Walter & Eliza Hall Institute of Medical Research)

709909 **Pechiney Rhenalu, A societe Anonyme** (Corus Aluminium Walzprodukte GmbH)

758954 **EWT Trade and Business Consultants NZ Limited** (John Fairfax Holdings Limited)

742381 **Termguard Pty. Ltd.** (Altis Pty Ltd)

Opposition Dismissed - Proceeding to Sealing

723452 **Syngenta Participations AG** (Monsanto Company)

Opposition under Section 104(4) - Withdrawn

716581 **Wisconsin Alumni Research Foundation** (The Walter & Eliza Hall Institute of Medical Research)

709909 **Pechiney Rhenalu, A societe Anonyme** (Corus Aluminium Walzprodukte GmbH)

Letters Patent Sealed

Standard Patents

747650	770253	770538	771847	781182	783827
784131	784141	784157	784158	784159	784160
784161	784162	784164	784166	784167	784168
784170	784171	784172	784175	784176	784177
784181	784182	784183	784184	784185	784187
784190	784192	784193	784194	784195	

Assignments Registered

671189 The Boots Company PLC The patent has been assigned to **Reckitt & Colman (Overseas) Limited**

682023 The Boots Company PLC The patent has been assigned to **Reckitt & Colman (Overseas) Limited**

683999 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

686477 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

692159 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

699404 Pharmacia & Upjohn AB The patent has been assigned to **Advanced Medical Optics Uppsala AB**

700511 Ingenjorsfirman Formex AB The patent has been assigned to **Tyco Electronics Corporation**

713022 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

715844 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

718445 Ingenjorsfirman Formex AB The patent has been assigned to **Tyco Electronics Corporation**

720940 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

723880 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

725939 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

727292 Ingenjorsfirman Formex AB The patent has been assigned to **Tyco Electronics Corporation**

729705 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

734697 Ingenjorsfirman Formex AB The patent has been assigned to **Tyco Electronics Corporation**

738015 The Boots Company PLC The patent has been assigned to **Reckitt & Colman (Overseas) Limited**

740112 Cuno Inc. The patent has been assigned to **3M Innovative Properties Company**

740478 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

741240 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

745521 Cuno, Incorporated The patent has been assigned to **3M Innovative Properties Company**

746089 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

Assignments Registered - cont'd

746850 BASF Aktiengesellschaft; Abbott GmbH & Co KG The patent has been assigned to **Abbott GmbH & Co. KG**

747589 Cuno Inc. The patent has been assigned to **3M Innovative Properties Company**

747608 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

748325 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

748650 Pharmacia AB The patent has been assigned to **Advanced Medical Optics Uppsala AB**

749058 Cuno Inc. The patent has been assigned to **3M Innovative Properties Company**

749522 Pharmacia AB The patent has been assigned to **Advanced Medical Optics Uppsala AB**

756764 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

758388 Metalogenia, S.A. The patent has been assigned to **Metalogenia Patentes, S.L.**

758464 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

758902 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

758994 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

759210 The Picower Institute for Medical Research The patent has been assigned to **Cytokine PharmaSciences, Inc.**

759630 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

759632 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

760872 Cuno Incorporated The patent has been assigned to **3M Innovative Properties Company**

761393 Metalogenia, S.A. The patent has been assigned to **Metalogenia Patentes, S.L.**

763908 Cuno Inc. The patent has been assigned to **3M Innovative Properties Company**

765826 Cuno, Incorporated The patent has been assigned to **3M Innovative Properties Company**

771121 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

777150 Pharmacia AB The patent has been assigned to **Advanced Medical Optics Uppsala AB**

Assignments Registered - cont'd

777771 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

780441 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

782147 Goodman Fielder Pty Limited The patent has been assigned to **The Uncle Tobys Company Pty Limited**

782351 Cuno, Inc. The patent has been assigned to **3M Innovative Properties Company**

Alteration Of Name In Register

647383 Protein Design Labs, Inc. The name of the patentee(s) has been changed to **PDL BioPharma, Inc.**

675575 Bakelite Aktiengesellschaft The name of the patentee(s) has been changed to **Hexion Speciality Chemicals GmbH**

700511 Formex AB The name of the patentee(s) has been changed to **Ingenjorsfirman Formex AB**

718445 Formex AB The name of the patentee(s) has been changed to **Ingenjorsfirman Formex AB**

727292 Formex AB The name of the patentee(s) has been changed to **Ingenjorsfirman Formex AB**

734553 Bakelite AG The name of the patentee(s) has been changed to **Hexion Speciality Chemicals GmbH**

734697 Formex AB The name of the patentee(s) has been changed to **Ingenjorsfirman Formex AB**

769507 Kvaerner Process Systems AS The name of the patentee(s) has been changed to **Aker Kvaerner Process Systems AS**

770053 Ask Jeeves, Inc. The name of the patentee(s) has been changed to **IAC Search & Media, Inc.**

773008 Bakelite AG The name of the patentee(s) has been changed to **Hexion Speciality Chemicals GmbH**

774482 NeuroMed Technologies, Inc. The name of the patentee(s) has been changed to **Neuromed Pharmaceuticals, Ltd.**

Extensions of Term of Standard Patents, Section 70

Grant

The following application(s) for Extension of Term have been granted under Section 74.

676198 **Novartis AG**

CERTICAN everolimus

Date extended term due to expire on 24/09/2018

Corrigenda

In Vol 20, No 16, Page(s) 898 under the heading **Applications Accepted - Name Index** in the name DePuy Orthopaedics, Inc., Serial No. 784560, INID (33) amend the second priority application's country to read US

Official Notice

Revocation of secrecy

Details of the following applications filed under the provisions of Section 173 of the *Patents Act*, wherein the provisions of this Section have subsequently been revoked:

Provisional Specification – 2006900525

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ABSTRACTS OF DECISIONS

DECISION OF A DELEGATE OF THE COMMISSIONER OF PATENTS

Application	:	No. **710696** in the name of **Genentech, Inc.**
Title	:	**VEGF-Related Protein**
Action	:	Opposition under section 59 of the *Patents Act 1990* by the **Ludwig Institute for Cancer Research** and **Human Genome Sciences, Inc.**
Decision	:	Issued 5 June 2006 .

Abstract

The invention relates to a human VEGF-related protein, antibodies that react with this protein and methods and therapeutic applications involving use of this protein.

The opposition was partially successful on the ground that claims 1-7, 15, 16, 19 to 26, 28 to 33, 39 and 40 lack novelty, but was unsuccessful on all other grounds.

Costs were awarded against the applicant.

PATENTS ACT 1990

DECISION OF A DELEGATE OF THE COMMISSIONER OF PATENTS

Re: Patent Application No. **710696** by **Genentech, Inc** and opposition under section 59 of the *Patents Act 1990* by the **Ludwig Institute for Cancer Research** and **Human Genome Sciences, Inc.**

BACKGROUND

1. Patent Application 710696 (70128/96) in the name of Genentech, Inc (hereafter referred to as Genentech) was filed as PCT application WO 1997/009427 on 30 August 1996 claiming priority from US 60/003,491, which was filed on 8 September 1995. The application was advertised as accepted on 30 September 1999. The Ludwig Institute for Cancer Research (hereafter referred to as Ludwig) and Human Genome Sciences, Inc (hereafter referred to as HGS) filed notices of opposition on 30 December 1999 and 7 January 2000 respectively. Both opponents served their statements of grounds and particulars on 29 March 2000, with Ludwig subsequently amending their statement on 16 November 2004 to add s18(1)(c) as a further ground of opposition. Service of evidence in support was completed by Ludwig on 30 October 2000 and by HGS on 27 April 2001.
2. Amendments to the claims and specification were filed on 10 January 2002. The amendments were incorporated into the specification on 16 September 2002.
3. Evidence in answer to Ludwig's and HGS's evidence in support was completed on the 17 December 2002 and 18 December 2002 respectively. Evidence in reply was completed by Ludwig on 17 March 2004 and by HGS on 14 May 2004.
4. The specification that was the subject of the hearing was the specification as accepted and including the amendments of 10 January 2002.
5. The matter was heard in Canberra on 14 and 15 March 2004. Genetech was represented by Mr Ben Fitzpatrick of Counsel, assisted by Dr Ian Rourke of FB Rice. Ludwig was represented by Mr David Yates of Counsel, assisted by Dr Martin O'Brien and Dr John McCann of Spruson and Ferguson. HGS was represented by Mr David Catterns of Counsel, assisted by Mr Gary Cox of Wray and Associates and Ms Melissa Pytel.

THE EVIDENCE

6. Ludwig's evidence in support consists of:
   - Statutory Declaration of John Francis McCann, together with exhibits JFM 1-16;
   - Statutory Declaration of Peter Adrian Walton Rogers, together with exhibit 1;
   - Statutory Declaration of Francis John Ballard, together with exhibit 1.
7. HGS's evidence in support consists of:
   - Statutory Declaration of Piroska Elizabeth Rakoczy, together with exhibits PER 1-4;
   - Statutory Declaration of Brandon John Wainwright, together with exhibits BJW 1-2;
   - Statutory Declaration of Gary Baxter Cox, together with exhibits GBC 1-4.

8. The evidence in Answer consists of:
   - Statutory Declaration of Peter Philip Gray in response to Ludwig, together with exhibits PPG 1-8;
   - Statutory Declaration of Peter Philip Gray in response to HGS, together with exhibits PPG 1-4;
   - Statutory Declaration of Peter Robert Schofield in response to Ludwig, together with exhibits PRS 1-8;
   - Statutory Declaration of Peter Robert Schofield in response to HGS, together with exhibits PRS 1-5.

9. Ludwig's evidence in reply consists of:
   - Statutory Declaration of Kari Alitalo, together with exhibits KA 1-6;
   - Statutory Declaration of Peter Adrian Watson Rogers, PR 1-9;
   - Statutory Declaration of Francis John Ballard.

10. HGS's evidence in reply consists of:
   - Statutory Declaration of Piroska Elizabeth Rakoczy.

THE SPECIFICATION

11. The specification relates to isolation and characterisation of a VEGF-related protein (VRP). VRP is expressed in endothelial cells where it binds to, and phosphorylates the Flt4 tyrosine kinase receptor. The VRP/Flt4 interaction is involved in angiogenesis, embryogenesis, tumour formation and wound healing. The specification exemplifies the isolation and characterisation of cDNA clones encoding human VRP and recombinant expression of one of these clones to produce recombinant VRP. Figure 1 of the specification provides the sequence of the nucleic acid encoding VRP and the 419 amino acid sequence deduced from the nucleic acid sequence.

12. Human VRP is explicitly defined at page 5 of the specification as a polypeptide sequence containing the amino acid sequence disclosed in figure 1 of the specification, as well as biologically active deletional, insertional, or substitutional variants of this sequence having at least 265 amino acids and/or residues 1 to 29, inclusive, of figure 1. This section of the specification also states that the term VRP excludes all forms of VEGF and PIGF, two related peptides that are ligands for other members of the Flt tyrosine kinase receptor family.

13. The description of preferred embodiments in the specification includes a description of covalent modification of VRP and therapeutic formulations and uses for VRP, particularly uses associated with disorders of vasculogenesis and angiogenesis and with wound healing. The description also discusses the generation of anti-VRP antibodies and their use as antagonists of VRP function.

14. The specification ends with 7 examples, which relate to the isolation and recombinant expression of VRP. Recombinant VRP is shown to bind to, and phosphorylate the Flt4 receptor and to have a mitogenic effect on endothelial cells *in vitro*.

THE CLAIMS

15. The specification ends with 40 claims, all of which relate to the VRP peptide. The 13 independent claims can be divided into two groups, with the first group defining the claimed protein by explicit reference to the amino acid sequence disclosed in figure 1. Although the second group of claims does not explicitly refer to figure 1, use of the term VEGF-related protein (VRP) in the claims provides a reference to figure 1 through the definition of VRP at page 5 of the specification. Page 5, lines 12 to 17 defines VRP as:

> "a polypeptide sequence containing at least residues -20 to 399, inclusive, or residues +1 to 399, inclusive, of the amino acid sequence shown in Figure 1, including residues -5 to 399, inclusive, and residues -4 to 399, inclusive, of the amino acid sequence shown in Figure 1, as well as biologically active deletional, insertional, or substitutional variants of the above sequences having at least 265 amino acids and/or having at least residues +1 through 29, inclusive, of Figure 1."

Group 1 – claims that include an explicit reference to figure 1.

16. This group contains independent claims 1-3, 19, 26 and 35.

17. Claim 1 recites

An isolated protein comprising residues 1 through 399 of Figure 1 having the ability to bind and stimulate phosphorylation of a Flt4 receptor.

18. Claim 2 recites

An isolated VEGF-related protein (VRP) comprising residues -20 through 399 of Figure 1 having the ability to bind and stimulate phosphorylation of a Flt4 receptor.

19. Claim 3 recites

An isolated VEGF-related protein (VRP) comprising at least 351 amino acids in which the amino acid residue corresponding to amino acid residue 394 of the amino acid sequences shown in Figure 1 is a lysine, the protein having the ability to bind and stimulate phosphorylation of a Flt4 receptor.

20. Claims 4 to 8 define specific lengths for the proteins recited in claim 3 and pharmaceutical compositions for the proteins of any one of claims 1 to 3.

21. Claim 19 recites

A monoclonal antibody which binds to the N-terminal portion from residues -20 through 137, inclusive, or from residues 1 through 137, of the amino acid sequence shown in Figure 1..

22. Claims 20 to 22 define compositions comprising the monoclonal antibody of claim 19. Claim 23 defines use of the antibody for the manufacture of a medicament for treating vascular diseases or dysfunctional states characterised by lack of activation or lack of inhibition of a VRP receptor.

23. Claim 24 defines a method of using the peptide of claims 1-5 for stimulating phosphorylation of the Flt4 receptor. Claim 25 defines a chimaeric protein comprising the peptide of claims 1 to 5 fused to a tag sequence.

24. Claims 28 to 33 recite isolated nucleic acids coding for the peptide of claims 1-5 and vectors and expression systems for the production of this peptide.

25. Claim 26 defines the native signal peptide for human VRF. It recites

A peptide consisting of an amino acid sequence shown in residues -20 through -1, inclusive of Figure 1

26. Claims 35 recites

A sustained-release preparation comprising (i) a monoclonal antibody that binds specifically to a protein comprising the amino acids provided as -20 to 399 in Figure 1, and a semipermeable matrix of solid hydrophobic polymer.

Group 2 – claims that do not explicitly refer to figure 1

27. The second group of claims consists of independent claims 9, 18, 27, 34, 36, 38 and 39.

28. Claim 9 recites

A pharmaceutical composition useful for promotion of vascular endothelial cell growth comprising (i) a therapeutically effective amount of a human VEGF-related protein (VRP) comprising at least 265 amino acids having the ability to bind and stimulate phosphorylation of a Flt4 receptor,(ii) a further cell growth factor, and (iii) a pharmaceutically acceptable carrier.

29. Claims 10-14 define specific lengths for the proteins defined in claim 9 and claim 15 recites use of the VRP protein defined in any of the previous claims for the manufacture of a medicament for treating trauma affecting the vascular endothelium.

30. Claims 15 to 17 define use of the VRP protein defined in any of the preceding claims for the manufacture of a medicament for treating a dysfunctional state characterised by lack of activation or lack of inhibition of a receptor for VRP.

31. Claim 18 recites

Use of (i) a human VEGF-related protein (VRP) comprising at least 265 amino acids having the ability to bind and stimulate phosphorylation of a Flt4 receptor, and (ii) a further cell growth factor other than (i) for the manufacture of a medicament for treating a dysfunctional state characterised by lack of activation or lack of inhibition of a receptor for VRP in a mammal .

32. Claim 27 recites

A method of treating Kaposi's sarcoma in a mammal comprising administering to the mammal an effective amount of a VRP antagonist.

33. Claim 34 recites

A sustained-release preparation comprising (i) a human VEGF-related protein (VRP) comprising at least 265 amino acids having the ability to bind and stimulate phosphorylation of a Flt4 receptor, and (ii) a semipermeable matrix of solid hydrophobic polymer.

34. Claim 36 recites

A microcapsule containing a human VEGF-related protein (VRP) comprising at least 265 amino acids having the ability to bind and stimulate phosphorylation of a Flt4 receptor.

35. Claim 37 defines the microcapsule of claim 36 as a liposome.

36. Claim 38 recites

A gel formulation comprising (i) a human VEGF-related protein (VRP) comprising at least 265 amino acids having the ability to bind and stimulate phosphorylation of a Flt4 receptor, and (ii) a water soluble polysaccharide or polyethylene glycol.

37. Claim 39 recites

A human VEGF-related protein (VRF) comprising at least 265 amino acids having the ability to bind and stimulate phosphorylation of a Flt4 receptor, wherein the protein is covalently modified.

38. Claim 40 defines a number of specific forms of covalent modification for the protein of claim 39.

OTHER MATTERS

39. Immediately prior to the hearing the applicant provided a set of amended claims. The amendments seek to:
    - delete claim 26, which recites the VRP signal peptide consisting of residues -20 through to -1;
    - amalgamate claims 39 and 40 to result in a single claim directed to a covalently modified human VRP with a discrete range of covalent modifications, which range excludes covalent modification via glycosylation; and
    - amend claims 16 to 18 and 23 to restrict the claims to treatment of dysfunctional states associated with lack activation of a VRP receptor.

40. At the hearing the applicant explained that they only wished to pursue the subject matter in the claims as proposed to be amended and confirmed that they would file a request to make the proposed amendments either after the hearing or after the decision was issued. On the basis of this the opponent restricted their submissions to the claims as proposed to be amended. As a consequence I too have focused my discussion on the subject matter in the claims including the amendments proposed at the hearing, and have only briefly mentioned the subject matter that the applicant proposes excising.

41. At the hearing Ludwig also provided an amended statement of grounds and particulars that was consistent with the claims as amended by the amendments incorporated in the specification on 16 September 2002. The amendments bring the statement into line with the current claims and do not raise any new matters or seek to introduce any new documents.

CONSTRUCTION

42. Before considering the substantive issues in this opposition it is important to understand the scope of the term VEGF-related protein and its abbreviation VRP as used in independent claims 9, 18, 27, 34, 36, 38 and 39.

43. Ludwig submitted that there was little in the specification to define the boundaries of the term VRP. In particular Ludwig submitted that it was not clear whether the term extended to include proteins other than those derived from the human VRP sequence presented in figure 1 of the specification.

44. However, page 5 of the specification provides an explicit definition of VRP. The definition requires that VRP and VRP variants retain at least 265 residues of the amino acid sequence shown in figure 1, or residues +1 to 29 of the figure 1 amino acid sequence, as well as the ability to bind to, and stimulate the phosphorylation of, the Flt4 receptor. The same page also discloses a range of conventional assays that can be used to characterise binding and phosphorlyation of the Flt4 receptor.

45. It is also worth noting that the requirement for binding and stimulation of Flt4 also inherently necessitates an association between VRP and the sequence in figure 1. The primary amino acid sequence of a protein is key to the protein's secondary, tertiary and quaternary structure, which in turn determines the protein's biological properties. Therefore, Flt4 binding and stimulation necessarily require that the subject protein contains at least some of the residues depicted in figure 1.

46. The definition at page 5 is also consistent with further information provided in the body of the specification and with the peptides that are the subject of the examples. Based on this, I am satisfied that the boundaries of the invention are clearly stated in the specification and that VRP in its broadest context should be construed as relating to a protein that necessarily contains some of the residues depicted in figure 1 and that also retains the ability to bind to, and stimulate Flt4 phosphorylation.

47. Ludwig also submitted that it was not clear whether the invention is restricted to peptide variants derived from human VRP. In his first declaration Ludwig's expert Associate Professor Rogers stated that it was not clear whether the term was used to describe only variants derived from human VRP, or whether it encompassed non-human VRP orthologs, for example naturally occurring mouse and quail VRP orthologs as described in one of the citations put forward by Ludwig.

48. The specification is silent with respect to anything other than human derived VRP and it provides no discussion of other species variants or experiments conducted to identify VRP equivalents in species other than humans. As submitted by Mr Fitzpatrick, any suggestion that the invention was intended to extend beyond human derived variants to include non-human VRP orthologues would ignore the focus of the specification. This construction is also consistent with reference to VRP in all but one of the claims where there is either explicit definition of "human" VRP or definition of the peptide in terms of a protein that contains a substantial portion of the exact human sequence depicted in figure 1.

49. With respect to claim 3, the one claim that does not recite "human VRP", although it could be argued that the claim might include VRP derived from peptides other than the human peptide this would ignore the consistent use of the term VRP in the specification to describe only proteins that are referable to the human sequence disclosed in figure 1 and that are defined at page 5. I believe the problems with claim 3 stem more from a clumsy attempt by the applicant to amend the claims as originally accepted to better avoid the prior art, rather than any real intention to define a substantially different protein to that recited in the other claims. Given this, although claim 3 could be better drafted, I am satisfied that it is reasonable to also construe this claim as relating to a human VRP as defined at page 5 of the specification

50. Associate Professor Rogers also submitted that it was not clear whether the term "human VRP" restricted the invention to naturally occurring human VRP and naturally occurring variants derived from humans. Again reference to the specification can resolve this issue. Page 11 and example 6 clearly disclose production of variant VRP proteins in non-human prokaryotic and eukaryotic expression systems. This reflects standard practice in the art where a known peptide sequence is modified and the resultant variant protein is either expressed in standard non-human expression systems or produced by synthetic peptide synthesis. This is also supported by Professor Grey in his first declaration where he states that the skilled person would readily appreciate that the term human VRP would include both naturally occurring variants and man-made variants such as recombinant and synthetic proteins.

51. Given this I believe that the specification provides a clear definition for the term VEGF-related protein and its abbreviation VRP and that there is nothing to suggest that this definition extends to VRP orthologues derived from non-human species. I am also satisfied that the specification does not intend for the invention to be restricted to only naturally occurring VRP and VRP variants and that it is appropriate to regard the invention as extending to include recombinant and synthetic VRP variants derived from the sequence in figure 1.

DECISION

S40 ISSUES

CLARITY

52. All but one of the initial clarity matters raised by both Ludwig and HGS have fallen away either as a consequence of the amendments of 10 January 2005 and those proposed at the hearing or because they relate more to issues of fair basis and full description. In addition, one of the principle clarity issues pursued by both parties and relating to the scope of the term human VRP has been resolved by the construction exercise in the previous section. Given this I have confined my discussion to the one clarity issue remaining.

VRP antagonist

53. The first clarity issue relates to the term "VRP antagonist" as used in claim 27. Ludwig submitted that there was no definition of this term in the specification and that it was not clear whether the "VRP antagonist" is an antagonist of the protein of claims 1 to 5.

54. Firstly, I am satisfied that the skilled person would readily understand the meaning of the term VRP antagonist and appreciate the types of molecules that might function as a VRP antagonist. The term antagonist is a standard term in the art used to describe a second compound that interferes with, or prevents the action of a first compound. Ludwig's expert Associate Professor Rogers and HGS's expert Dr Rakocyz both describe antagonists that are consistent with this description and that are also consistent with the anti-VRP antibody and Flt4 receptor derived antagonists disclosed at page 8 of the specification. As such I am satisfied that the skilled person would be familiar with this term and that usage of the term in the specification and the claims is consistent with usage of the term in the art.

55. Given this, I am satisfied that the claims are clear with respect to the term VRP antagonist.

FAIR BASIS

56. HGS did not pursue fair basis at the hearing. As a consequence I have restricted my discussion to the fair basis matter raised by Ludwig.

57. Ludwig's submissions of fair basis focus on the argument that:

> "When the specification as a whole is read, it is clear beyond reasonable argument that the alleged invention around which the claims are drawn is the alleged novel protein of claims 1 to 5, characterised by; (a) a length of at least 351 amino acids, (b) a sequence of residues referable to amended Fig 1 of the specification, and (c) the ability to bind and stimulate phosphorylation of a Flt4 receptor."

58. I agree with Ludwig that parts (b) and (c) are features of the invention. These features are defined at page 5 of the specification and are present in each of the claims. However, I do not believe that the specification teaches that VRP must be at least 351 amino acids. As discussed in the construction section, the specification simply teaches that the invention must comprise either residues 1 to 29 of figure 1, or at least 265 residues of figure 1, and also include sufficient residues to bind and phosphorylate Flt4. There is nothing further in the specification to suggest that these properties are only present in a peptide of at least 351 amino acids, nor has Ludwig provided any evidence to suggest that 351 amino acids are essential for Flt4 binding and phosphorylation. As such I am satisfied that VRP as claimed and as defined at page 5 is consistent with VRP as described in the specification as a whole.

59. Given this, I am satisfied that the claims are fairly based on the invention as disclosed in the specification.

FULL DESCRIPTION

60. HGS included lack of full description among their grounds of opposition. However, they did not provide any submissions on full description at the hearing. Ludwig provided written submissions on claims 16, 18, 23 and 27 and their dependent claims, but chose not to address claims 16, 18 and 23 in the oral proceedings based on the applicant's commitment to amend these claims. Claims 16, 18 and 23 are Swiss-type claims that currently recite the preparation of a medicament for the treatment of a dysfunctional state associated with lack of activation or lack of inhibition of a VRP receptor. The foreshadowed amendments remove the reference to lack of inhibition of a VRP receptor and restrict the claims to dysfunctional states characterised by lack of activation of the VRP receptor.

61. At the hearing Mr Yates confirmed that the proposed amendment would resolve the issue discussed in Ludwig's submissions and it was agreed that these claims need not be considered in relation to full description based on the applicant's undertaking to file the proposed amendments following issue of the decision.

62. Ludwig also made submissions with respect to claim 27. Claim 27 defines a VRP antagonist to treat Kaposi's sarcoma. Ludwig submitted that the specification does not describe what genus of molecules work as antagonists, or what to do with them. However at page 8 the specification describes Flt4 or its extracellular domain, or an antibody to VRP as VRP antagonists. The specification also devotes pages 24 to 28 to a discussion of various standard methods for preparing and administering VRP and VRP antagonists for the treatment of various dysfunctional states and at page explicitly refers to Kaposi's sarcoma when describing diseases amenable to treatment with VRP or VRP antagonists. As such, I am satisfied that the specification meets the requirements for full description as set out in *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd.*

PRIORITY

63. The pivotal issues in this decision reflect the closely run race between Genentech, Ludwig and HGS to isolate VRP. The closeness of this race is demonstrated in the following table, which provides the earliest priority (EPD), complete filing and publication (OPI) dates for the opposed application and for the two most relevant citations, which are patent applications filed by Ludwig and HGS respectively.

Application	EPD	Complete Filing	OPI	Applicant
714484	6 June 1995	6 June 1996	24 December 1996	HGS
711578	1 August 1995	1 August 1996	26 February 1997	Ludwig
710696	8 September 1995	30 August 1996	27 March 1997	Genentech

64. Both Ludwig and HGS submitted that 710696 was not entitled to rely on its earliest priority date of 30 August 1996 as a consequence of the amendments filed on 10 January 2002. These amendments altered the VRP peptide sequence by replacing the threonine residue at position 94 in figure 1 and SEQ ID NO 3 with a tyrosine. Both opponents submitted that the altered VRP comprising the tyrosine residue was not disclosed in the priority document or the specification as filed.

65. However, the VRP DNA sequences in figure 1, and in SEQ ID NO 2, in both the priority document and the specification as filed, have a TAT codon at position 94. TAT codes for tyrosine rather than threonine, with AC(TCA or G) being the standard codons for threonine. As such, although both documents misidentify the amino acid at position 94 as a threonine, both documents disclose a nucleic acid sequence that would necessarily encode a peptide with a tyrosine at position 94. There is also good reason to consider the nucleic acid sequence, rather than the amino acid sequence as the correct sequence. As explained by Mr Fitzpatrick at the hearing, both the priority document and the complete specification clearly state that the amino acid sequence is deduced from the nucleic acid sequence. Where there are inconsistencies between a nucleic acid sequence and its deduced amino acid sequence the skilled person would understand that the errors will have arisen from incorrect translation and can remedied by reference to nucleic acid sequence.

66. The question of errors in specifications and priority dates was considered in *Merck and Co., Inc. v Sankyo Co., Ltd.* (1992) 23 IPR 415 where the Judge considered whether an amendment to correct an error in the chemical formula of a compound amounted to disclosure of a new substance. Although this case relates to the allowability of an amendment to the complete specification, as confirmed by the Judge in *Merck and Co., Inc. v Sankyo Co., Ltd* the Courts have applied basically the same test when considering whether amendments introduce new matter into a complete specification and whether a complete specification is fairly based on the disclosure in a provisional specification.

67. In the case of Merck and Co.'s application the Judge held that a corrected formula did not amount to new matter because the reaction described in the specification as filed had always produced the compound represented by the corrected formula, irrespective of the compound originally having been misidentified. The Judge stated:

> "The iso-propyl substituent had always been present in the starting materials and was always produced irrespective of it originally having been misidentified. I accept the evidence that in the circumstances, correcting the name of the substituent at the 25-position in the "b" compounds from n-propyl to iso-propyl did not mean that a new substance had been disclosed; it merely meant that the true structure had been determined. It follows, in my opinion, that the amendment made in the application as accepted did not result in the disclosure of any new matter."

68. Similarly, in the current situation, the correct peptide had always been present in both the priority document and the specification as filed by reference to the nucleic acid sequences in figure 1 and SEQ ID NO 2 and as such correction of the error does not result in disclosure of a new peptide.

69. At the hearing Mr Yates referred to *Case T0923/92-3.3.4, Boards of Appeal of the European Patent Office, Genentech, Inc.* Decision 8 November 1995. In this case the board considered an application where DNA sequencing errors had led to differences between peptide sequences in two priority documents and in the complete specification as filed. The board held that claims to the peptide sequence were not entitled to the earlier priority dates because

> "*the skilled reader, while realizing that possibly some error were made in reporting the sequences, is not in a position to establish which one of the two reported sequences of human t-PA is the correct one*".

70. However, not withstanding that this is a European Patent Office decision the reasoning of which may not necessarily apply to Australian law, the decision relates to an application where sequencing errors led to an incorrect DNA sequence. This differs from the current case where there is no evidence of DNA sequencing errors and where the specification clearly discloses that the reference sequence was the nucleic acid sequence and that the peptide sequence was subsequently deduced from a translation of the nucleic acid sequence. As such I do not believe that this case has any bearing on the priority date of the opposed application.

71. Given this, I am satisfied that not only was the correct VRP peptide present in both the priority document and the specification as filed but also that the correct VRP peptide sequence could have been readily determined from the nucleic acid in both the priority document and the specification as filed. Given this, I am satisfied that the invention as claimed is entitled to the priority date of 13 March 1997.

NOVELTY

72. The basic test for novelty is the "reverse infringement" test as stated in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, (1972) RPC 457 at pages 485, 486.:

> "If carrying out the directions contained in the prior inventor's publication will inevitably result in something being made or done which, if the patentee's patent were valid, would constitute an infringement of the patentee's claim".

73. However, in applying this test regard must be given to whether the prior art publication has provided clear and unmistakable directions to do what patentee has claimed, as also stated in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* at page 486.

> "To anticipate the patentees claim, the prior publication must contain clear and unmistakable directions to do what the patentee claims to have invented ...A signpost, however clear, upon the road to the patentee's invention will not suffice. The prior inventor must be clearly shown to have planted his flag at the precise destination before the patentee."

74. Although both Ludwig and HGS detailed extensive lists of documents in their respective statements of grounds and particulars, only three citations were pursued at the hearing. Ludwig confined their submissions to AU 711578 and AU 694524 and HGS confined their submissions to AU 714484. As a consequence I have only provided a detailed discussion of these three citations. Of the remaining citations listed in the opponents' grounds and particulars, one would only have been relevant if the opposed application were not entitled to its earliest priority date and the others do not disclose peptides with any significant similarity to VRP as defined in the specification.

75. All three of the citations pursued by the opponents are 'whole of contents' citations and can only be considered with respect to novelty. The prior art base with respect to "whole of contents" novelty is defined in Schedule 1 of the *Patents Act* 1990 in the following way.

> ii. information contained in a published specification filed in respect of a complete application where:
>
> A. if the information is, or were to be, the subject of a claim of the specification, the claim has, or would have, a priority date earlier than that of the claim under consideration; and
>
> B. the specification was published after the priority date of the claim under consideration; and
>
> C. the information was contained in the specification on its filing date and when it was published.

AU 711578

76. Ludwig submitted that all of the claims of the opposed application lacked novelty in light of the disclosure in 711578. 711578 was published in Australia on 26 February 1997, 17 months after the priority date of 710696. 711578 relies on 4 US priority documents 08/510133, 08/585895, 08/901132 and 08/671573, which were filed on 1 August 1995, 12 January 1996, 14 February 1996 and 28 June 1996 respectively. Only the first of these priority documents, 08/510133 was filed before the earliest priority date of the opposed application.

77. The complete specification of 711578 discloses VEGF-C, a protein whose peptide and corresponding nucleic acid sequences are identical to the VRP sequences disclosed in figure 1 of the opposed application. VEGF-C is characterised as a ligand for Flt4 and a mitogenic factor that is useful for treatment of vascular trauma and dysfunctional states relating to inappropriate VRP receptor activity. As such VEGF-C is highly relevant to the novelty of the claims.

78. However, 711578 can only be regarded as part of the prior art base for the purpose of 'whole of contents' novelty if it is entitled to its priority date. Entitlement to priority date requires that VEGF-C as disclosed in 711578 is fairly based on the VEGF-C peptide disclosed in the priority document. In the case of 711578, 711578 describes a VEGF-C peptide sequence containing the full 419 amino acids found in VRP, however the priority document 08/510133 describes a truncated VEGF-C sequence that is missing the N-terminal 69 amino acids of full length VEGF-C.

79. The issue that must be resolved here is whether the full length peptide was disclosed in the priority document.

80. In his declaration of 15 September 2003 Professor Alitalo, one of the inventors of 711578 confirms that a 1.2 kb cDNA clone disclosed in example 10 of 08/510133 contains the full length VEGF-C coding sequence. Example 11 in the priority document describes recombinant expression of this clone (pFLT4-L) and its ability to bind and stimulate Flt4 phosphorylation. This same peptide is further analysed in the complete specification of 711578, where figure 21 shows an expression product of a similar size to the recombinant VRP peptide described in the opposed application. Given this I am satisfied that the priority document discloses the full length VEGF-C nucleic acid and its corresponding peptide in the forms of the 1.2 kb cDNA and its recombinant expression product. As such, although the priority document incorrectly describes the sequence of the VEGF-C peptide, the peptide expressed from the 1.2 kb clone and disclosed in example 11 of the priority document represents full-length VEGF-C, and if sequenced would yield the full length sequence depicted in the complete specification of 711578. Given this, I am satisfied that 711578 is entitled to its priority date.

81. At the hearing Genentech also submitted that description of the clone in the priority document in terms of an internal designation as pFLT4-L and an unidentified Budapest Treaty deposit was insufficient disclosure for the purposes of supporting a whole of contents novelty. However this misapprehends the level of detail required in a priority document.

82. While UK law requires an enabling disclosure to establish a priority date (see *Asahi Kasei Kogyo KK's application* [1991] RPC 485) Australian law appears to have no such requirement. The role of a priority document is to provide fair basis for a more detailed description of the same subject matter in the complete specification. As noted in *Anaesthetic Supplies v Rescare Ltd* 28 IPR 383 (at 401):

> "All that the provisional specification needs to do is describe generally and fairly the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out. It is a mode of protecting the inventor until the time of filing the final specification. It is not intended to be a complete description of the invention, but simply to disclose the invention fairly, though in a rough state. The interval of time between the provisional and the final is intended to provide an opportunity of development and precise expression of the invention foreshadowed in the provisional."

83. All that is required under Australian law is that the priority document provide fair basis for a more detailed description of the same subject matter in the complete specification. As stated in the recent High Court decision of *Lockwood v Doric* [2004] HCA 58, fair basis merely requires that the invention disclosed in the priority document is the same as that claimed in the complete specification. In the current circumstances the priority document meets this requirement in examples 10 and 11, where there is a description of the preparation of pFTLT4-L followed by recombinant expression of the full length VEGF-C peptide.

84. As such, I am satisfied that 711578 is entitled to its earliest priority date and that it represents part of the prior art base with respect to whole of contents novelty considerations for the opposed application.

85. Given this I am also satisfied that 711578 deprives claims 1-7, 15, 16, 19-26, 28-32, 39 and 40 of novelty.

86. 711578 discloses not only a peptide that is identical to VRP but also recombinant expression of this peptide and its use to treat vascular trauma and endothelial disorders where there is aberrant Flt4 receptor activity, thereby disclosing subject matter that falls within the scope of claims 1-7, 15, 16, 24, 26 and 28-32.

87. 711578 also discloses monoclonal antibodies that are reactive with the N-terminal region of VRP. Page 14 describes the process of generating monoclonal antibodies and page 51 and examples 19 and 21 teach use of a peptide corresponding to residues 84-100 of VRP to raise antibodies. Although the examples relate to the generation of polyclonal antibodies rather than monoclonal antibodies I am satisfied that the skilled person would readily apply the directions of page 14 to also prepare both monoclonal and polyclonal antibodies to the N-terminal region of VEGF-C, thereby disclosing subject matter that falls within the scope of claims 19-23..

88. Page 51 also discloses generating GST-VEGF-C fusions to be used for characterisation of VEGF-C. As explained by Ludwig's expert Associate Professor Rogers, GST is routinely used as a tag to aid isolation of proteins of interest. As such 711578 discloses tag fusions that fall within the scope of claim 25.

89. Pages 10 and 14 of also 711578 disclose covalent modification of VEGF-C in the form of linking VEGF-C fragments by way of disulfide bonding (see page 10, lines 10-12) and covalent linkage to magnetic particles, radioactive agents, biotin and avidin (see page 14, lines 31-35). As such 711578 discloses subject matter that falls within the scope of claims 39 and 40.

90. Therefore, I am satisfied that 711578 provide clear an unmistakeable directions to subject matter that deprives claims 1-7, 15, 16, 19-26, 28-32, 39 and 40 of novelty.

91. Ludwig also submitted that 711578 deprived claims 8-14, 17 and 18 of novelty. These claims define pharmaceutical compositions comprising VRP and a further growth factor and methods of using such composition for the treatment of disorders associated with inappropriate VRP receptor function. However, there is no clear teaching in 711578 to combine VEGF-C with any other growth factor. Furthermore, there was nothing in the experts' submissions to suggest that there was anything in the specification that would direct the skilled person to prepare such a composition. As such, I am not satisfied that 711578 discloses or teaches toward any compositions that fall within the scope of claims 8-14, 17 or 18.

92. At the hearing Ludwig also submitted that the claims did not exclude a further growth factor comprising an altered form of VRP, for example truncated forms and short peptides such as those disclosed at page 13 of 711578. Mr Yates explained that although claims 8, 9, 17 and 18 specified that the further cell growth factor must be "other than" the VRP of the claims, this did not necessarily preclude a VRP that was other than the specific VRP defined in the claims to which claims 8, 9, 17 and 18 were appended. However, even if this were to be the case I cannot find any clear teaching in 711578 to combine different forms of VEGF-C in a single pharmaceutical formulation.

93. Ludwig also submitted that claim 27 lacked novelty in light of 711578. Claim 27 defines a method of using a VRP antagonist to treat Kaposi's sarcoma. Although 711578 discloses the use of VRP antagonists such as antibodies and truncated forms of VRP to treat a range of endothelial and vascular disorders there is no mention of Kaposi's sarcoma or of any similar disorders, where tumour formation is associated with viral infections. As such, I can find no clear and unmistakeable directions to use a VRP antagonist to treat Kaposi's sarcoma and I am not satisfied that 711578 discloses any method that falls within the scope of claim 27.

94. Ludwig submitted that the specific sustained-release preparations, microcapsules and gel formulations of claims 34 to 38 are also anticipated by the description in 711578 of pharmaceutical preparation comprising VEGF-C in association with any pharmaceutically-acceptable diluent, adjuvant, excipient or carrier. In support of this, Associate Professor Rogers, in his second declaration stated that the disclosure in 711578 "embraces and conveys (to a reader with average skill in the field) the specific vehicles recited in Genentech's application". However, it is not sufficient that a citation disclose a general class that would include the claimed subject matter, it must also be established that the skilled person would necessarily produce the claimed subject matter on reading the citation.

95. In the current circumstances, Ludwig has not provided any evidence to suggest that the skilled person would regard the citation as specifically teaching toward VEGF-C in a sustained release formulation, microcapsule or gel formulation as claimed. Given this, I have no evidence to suggest that the citation provides clear and unmistakeable directions to produce any formulations that fall within the scope of claims 34 to 38.

96. Therefore, I have no clear evidence that 711578 provides clear and unmistakeable directions to subject matter that falls within the scope of claims 8-14, 17, 18, 27 and 34.

97. In summary, I am satisfied that 711578 deprives claims 1-7, 15, 16, 19-26, 28-33, 39 and 40 of novelty. However I am not satisfied claims 8-14, 17, 18, 27 and 34 lack novelty in light of this citation.

AU 694524

98. Ludwig also submitted that claim 27 lacks novelty in light of the whole of contents disclosure in AU 694524 (694524). 694524 was published in Australia on 4 January 1996, 4 months after the priority date of 710696. 711578 relies on a single US priority document 247754, which was filed on 9 June 1994.

99. 694524 discloses the Flt4 receptor and use of Flt4-binding compounds to treat conditions such as metastatic cancers, lymphomas, inflammation, infections and immunological disease. Ludwig submitted that as such the citation discloses compounds representing the VRP antagonists recited in claim 27. Although I accept that this is the case, as with 711578, Mr Yates could not direct me to any clear disclosure of Kaposi's sarcoma in the citation or any information that would directly lead the skilled person to use Flt4-binding compounds to specifically treat Kaposi's sarcoma. As such, I have no clear evidence that 694524 deprives claim 27 of novelty.

AU 714484

100. HGS focused much of their evidence and their submissions at the hearing on 714484. 714484 is also a whole of contents citation. It relies on a single US priority document 08/465968, which was filed on 6 June 1995, and it has an Australian publication date of 24 December 1996, 15 months after the priority date of 710696. However, in contrast to 711578 there was no dispute about 714484's entitlement to rely on its earliest priority date, instead the dispute centred on HGS' submission that the peptide disclosed in 714484 was the same as the VRP peptide in the opposed application.

101. The compete specification of 714484 discloses a peptide, VEGF2, whose sequence is identical to the VRP sequence disclosed in 710696 with the exception of the two amino acids at positions -18 and 394 in figure 1. In 714484 there is a serine at -18, in comparison to the leucine at this position in figure 1 of the opposed application, and a glutamine at position 394, rather than the lysine found in figure 1. HGS' submissions were based on the assertion that these differences are immaterial and that as such VEGF2 and VRP should be regarded as essentially the same peptide.

102. It is worth noting that HGS was not suggesting that the differences in sequence between the two peptides were the consequence of a translation or sequencing error, rather their submissions centred on the assertion that the differences between the two peptides were "trivial and inconsequential" and had no material affect on properties of the peptide and that as such the two peptides should be regarded as essentially the same compound.

103. In support of their submissions that VEGF2 and VRP should be regarded as the same protein HGS directed me to Dr Rakoczy's statement in her second declaration. Dr Rakoczy stated that there was "nothing in the HGS application (714484) or the Genentech application that leads me to believe that the differences that I note make any difference to the biological activity of the two identified proteins". However, these comments focus on a biological activity associated with binding and stimulation of Flt4 phosphorylation and do not consider other functional properties, such as immunological properties, charge and stability.

104. HGS' submissions also ignore the nature of the lysine/ glutamine substitution where a large positively charged amino acid is replaced with a smaller negatively charged amino acid, as well as the generally accepted view in the art that even minor substitutions may have a substantial impact on the chemical and physical properties of a peptide. As explained by the applicant's expert Professor Grey even minor amino acid substitutions may have a significant and unpredictable effect on peptide structure and function.

105. This is also reflected in the European Board of appeal case, *Case T0923/92-3.3.4, Boards of Appeal of the European Patent Office, Genentech, Inc.* , which was discussed by Mr Yates in relation to the priority date of the opposed application. Where it was acknowledged that even a small structural modification (e.g. the substitution or deletion of one amino acid) can produce changes in structural and physico-chemical properties, which in turn will lead to changed functional characteristics.

106. As such, I do not believe that VEGF2 and VRP can be regarded as the same peptide, or even as two peptides with essentially the same functional characteristics. Although both peptides may share the ability to bind and stimulate phosphorylation of Flt4, this single activity is only one of the many functional characteristics that will define and distinguish each peptide. The presence of two amino acid differences between the proteins, particularly one difference that is a non-conservative, not only produces proteins with a different chemical structure, it is also likely to produce proteins with different structural and functional characteristics.

107. HGS also submitted that 714484 teaches proteins such as VRP through its disclosure of allelic variants and analogues of VEGF2 that retain the activity characteristic of VEGF2. However, a general disclosure of unspecified variants or derivatives will only anticipate a specific variant if it can be established that the prior art provides clear and unmistakeable directions to that specific variant or derivative. There are no such directions in 714484. Although 714484 discloses that VEGF2 includes fragments, derivatives and analogues of VEGF-C, including variants with at least 70% identity to the specific VEGF2 sequence disclosed in the citation, there is no disclosure of any specific variants and no teaching that would lead the skilled person directly to VRP.

108. HGS also submitted that the opposed application relates to a selection where 714484 has disclosed a class of compounds and Genentech has attempted to claim a new member of that class. HGS argued that if this were the case, the opposed application did not meet the requirements of a selection patent because it failed to disclose any unexpected advantage or unsuspected property associated with VRP. However, a requirement of the earlier disclosure is that it is enabling for the later member of the class. This is supported by the statement "all that is required is that the earlier publication is enabling for the described subject matter", taken from *Beecham Group Ltd (New Zealand/Amoxycillin) Application* (1982) FSR 187, and to which HGS referred in their submissions on selection patents. As explained above, 714484 may provide the wherewithal to produce further variants and analogues of VEGF2 and to search for other members of what may be a larger class of compounds, however it does not enable the isolation or preparation of any specific VEGF2 variant or analogue. As such I do not believe that 714484 can be regarded as providing a generic disclosure. In agreement with Mr Fitzpatrick, I am of the opinion that 714484 simply discloses a new peptide, which is at best a new member of the previously disclosed larger class of VEGF proteins.

109. Given this, I do not believe that 714484 is relevant to the novelty of any of the claims that explicitly recite a peptide or nucleic acid comprising amino acids that span either the -18 or the 394 region disclosed in figure 1. This equates to claims 1-3 and 26, which recite peptides comprising residues 1 to 399, residues -20 to 399, a 351 amino acid peptide including residue 394 respectively and residues -20 to -1 respectively. This also includes claims 4, 5, 24-26, 28-33 and 35, which are dependent from claims 1-3.

110. This leaves independent claims 9, 18, 19, 27, 34, 36, 38 and 39, and dependent claims 10-14, 17, 20-23 and 37-40, which are not restricted to residues that span either -18 or 394. These claims simply recite VEGF-related protein or VRP and thus relates to VRP and VRP variants that although including at least some of the residues from figure 1 do not necessarily span the -18 or 394 regions.

111. Claims 9 and 18 define pharmaceutical compositions comprising VRP and a further growth factor and methods of using such composition for the treatment of disorders associated with inappropriate VRP receptor function. 714484 does not provide any clear directions to prepare pharmaceutical compositions comprising both VRP and a further growth factor. Although on page 26, 714484 discloses use of VEGF2 "in conjunction with other therapeutic compounds", this does not provide a clear teaching to compounds with the specific properties of growth factors.

112. At the hearing Mr Catterns submitted that the requirement for an additional growth factor was nothing more than a "mere trivial addition or trimming". However, this argument presupposes that the growth factor has no effect on the composition. HGS has not provided any evidence to support this argument. Furthermore, as explained by Professor Grey in his declaration in response to Ludwig's submission, this argument is contrary to the disclosure at page 28 of the opposed specification, where the specification lists a range of growth factors that may be used in conjunction with VRP for "enhancing the activity of any of the growth factors, including VRP, in promoting cell proliferation and repair."

113. Given this, HGS has failed to convince me that the growth factor is a trivial addition or trimming, or that 714484 provide clear and unmistakeable directions to a VRP formulation comprising a further growth factor. As a consequence I do not believe that 714484 deprives claims 9-18 if novelty.

114. Claims 19 to 23 define a monoclonal antibody which binds to residues -20 to 137 of VRP and use of this antibody to treat disorders associated with inappropriate activity of the VRP receptor. 714484 only provides a general disclosure of antibodies, both monoclonal and polyclonal at page 34 and does not direct the reader to generate antibodies to any specific portion of VEGF2. Given this there is nothing to direct the skilled person to generate antibodies toward any specific part of the VRP peptide, or to expect that antibodies raised against the entire peptide would be more likely to bind to the N terminal epitopes than to epitopes present at other parts of the peptide.

115. Thus, I am not satisfied that 714484 deprives claims 19-23 of novelty.

116. Claim 27 defines a method of using a VRP antagonist to treat Kaposi's sarcoma. Although 714484 discloses the use of VRP antagonists such as antibodies and truncated forms of VEGF2 to treat a range of endothelial and vascular disorders including solid tumour metastasis, gliomas, retinopathy and chronic inflammation, this is an extremely broad range of conditions.

117. In their submissions at the hearing HGS argued that at the priority date of the application Kaposi's sarcoma was classified as a solid tumour metastasis and that as such the skilled person would have understood Kaposi's sarcoma to be included within this family of disorders. However, solid tumour metastases include a wide range of disorders arising from diverse causes and responding to widely differing preventative and therapeutic treatments and HGS did not provide evidence to show why the skilled person would be directed to select Kaposi's sarcoma from this diverse group of solid tumours.

118. As such, I am not satisfied that 714484 deprives claim 27 of novelty.

119. Claims 34 to 37 disclose specific sustained-release preparations and microcapsules comprising VRP. HGS submitted that semi-permeable polymers and microcapsules were well know as the priority date of the application and that as such the skilled person would have readily perceived their suitability for use with VEGF2. However, as stated in relation to Ludwig's submission on these claims, it is not sufficient that a citation disclose a general class that would include the claimed subject matter, it must also be established that the skilled person would necessarily produce the claimed subject matter on reading the citation. HGS has not provided any evidence to suggest that the skilled person would regard the citation as specifically teaching toward VRP in a sustained release formulation or microcapsule. Given this, I have no evidence to suggest that the citation provides clear and unmistakeable directions to produce the formulations of claims 34 to 37.

120. Claim 38 discloses a gel formulation comprising VRP and a water soluble polysaccharide or polyethylene glycol. In their submissions HGS referred to page 12 of 714484, where the citation describes fusing VEGF2 with polyethylene glycol. Although this is an explicit disclosure of administration of polyethylene glycol with VEGF2, the disclosure does not necessarily relate to a gel formulation. The disclosure relates to fusion of polyethylene glycol and VEGF2 for the purpose of extending the half life of the peptide but does not specify that the fusion is then administered as gel or suggest that the polyethylene glycol is fused in a manner that necessarily results in a gel product. HGS did not provide any submissions to suggest that the disclosure in 714484 inevitably extended, or taught to gel preparation and as such I am left with no clear evidence that the claim lacks novelty in light of 714484.

121. Claims 39 and 40 define covalently modified VRP. In particular claim 40 recites specific covalent modifications including glycosylation, derivatisation of lysine residues and addition of radioactive tags. 714484 at page 12 discloses fusion of VEGF2 with polyethylene glycol. This process normally involves addition of polyethylene glycol to activated amino acid residues such as activated lysine. Page 24 also discloses radioactive labelling of VEGF2 and page 20 glycosylation. As such 714484 clearly discloses the covalently modified peptides of claims 39 and 40, thereby depriving these claims of novelty.

122. In summary, HGS has not established that VRP and VEGF-C are the same protein, or provided me with clear evidence that 714484 discloses the subject matter of any of claim 1-38. However, I am satisfied that 714484 does disclose subject matter that falls within the scope of claim 39 and 40 and that these claims lack novelty in light of 714484.

MANNER OF MANUFACTURE

123. Both opponents submitted that at least claims 8-14, 17 and 18 did not define a manner of manufacture because they represented nothing more than a mere collocation of known ingredients. Claims 8 to 14, 17 and 18 relate to formulations comprising VRP in association with a further growth factor that is other than VRP. At the hearing Mr Yates directed me to page 28 of the specification where it is stated that "It is within the scope hereof to combine VRP therapy with other novel or conventional therapies (…….) for enhancing the activity of any of the growth factors, including the VRP, in promoting cell proliferation and repair". Both Mr Yates and Mr Catterns submitted that this statement did not suggest any synergistic effect when VRP is used in combination with another growth factor, and as such there was no evidence of any interaction between the two growth factors to produce a result that is greater than the sum of the two parts.

124. The specification does not provide any further evidence of synergy or any examples or explanation to support synergy between VRP and a further growth factor. In addition none of Genentech's experts have provided any further information concerning synergy that is specific to VRP or even to other VEGF growth factors. As such I have no evidence or information before me that suggests that there is anything other than an additive effect when VRP and another growth factor are used in combination. However, there is a further issue that needs to considered when assessing manner of manufacture. This is whether or not the various components of the claimed formulation were "known" at the priority date of the opposed application.

125. At the hearing Mr Fitzpatrick submitted that VRP was not known at the priority date because neither 711578 nor 714484 had been published at the priority date of the opposed application. As such VRP, VEGF2 or VEGF-C was not publicly available or known at this date. I agree with Mr Fitzpatrick in this respect, although a whole of contents disclosure may deprive a claim of novelty, the information in the disclosure cannot be regarded as 'known' in terms of a public disclosure if the information has not been published until after the priority date of the claim. Given this, neither opponent has established that claims 8-14, 17 and 18 simply define a collocation of know ingredients or integers or fail to define a manner of manufacture.

INVENTIVE STEP

126. Neither party provided any submissions on inventive step at the hearing or in their later rounds of evidence. Given this I have no evidence to show a lack of inventive step for the claims.

UTILITY

127. Although HGS amended their statement of grounds and particulars on 14 November 2004 to include this ground they did not pursue this matter at the hearing. As a consequence I have no evidence before me to suggest that the claims do not meet the requirements of s18(1)(c).

CONCLUSION

128. The opposition was partially successful on the ground of novelty, but was unsuccessful on all other grounds.

129. Claims 1-7, 15, 16, 19 to 26, 28 to 33, 39 and 40 lack novelty in light of 711578. The citation discloses peptides, nucleic acid constructs, expression systems and antibodies with the features defined in the claims

130. Claims 39 and 40 also lack novelty in light of 714484, which discloses a covalently modified peptide VEGF-related peptide with the features defined in this claim.

131. However, based on the evidence I have before me claims 8 to 14, 17, 18 and 27 to 38 are novel.

132. Neither party provided any submissions on inventive step at the hearing or in their later rounds of evidence. Given this I have no evidence to show a lack of inventive step for the claims.

133. In addition, neither opponent has provided me with clear evidence that the claims or specification fail to meet the requirements for fair basis, full description, manner of manufacture or utility.

134. Given that there is clearly patentable subject matter remaining in the application I give the applicant 60 days to provide amendments to resolve the lack of novelty for claims 1-7, 15, 16, 19 to 26, 28 to 33, 39 and 40.

COSTS

135. Given the amendments made to the application during the opposition proceedings, the further amendments foreshadowed by the applicant at the hearing and the partial success of the opposition I believe that it is appropriate to award costs against the applicant.

TERRY MOORE

Delegate of the Commissioner of Patents

Patent attorneys for the applicant : FB Rice & Co., Melbourne
Patent attorneys for the opponents : Spruson and Ferguson, Sydney and Wray and Associates, Perth

ABSTRACTS OF DECISIONS

DECISION OF A DELEGATE OF THE COMMISSIONER OF PATENTS

Application	:	No. **2001272201** in the name of **ERG R&D Pty Ltd**
Title	:	A Card System
Action	:	**Section 32 and section 36** requests by **Octopus Cards Limited** and an extension of time to file evidence in response by **ERG R&D Pty Ltd.**
Decision	:	Issued 5 June 2006.

Abstract

Extension granted - The evidence proposed to be adduced is likely to be highly relevant to the determination of the section 32 and 36 requests and likely to lead to a more just and correct determination of the entitlement dispute which is in the applicant's and public interest. While the applicant has been slow in preparing their evidence, they were always intending to defend their entitlement and the delays to date have been the result of poor case management rather than a lack of diligence. The evidence is close to finalisation and the applicant is also taking appropriate steps to complete their evidence within a reasonable time frame.

PATENTS ACT 1990

DECISION OF A DELEGATE OF THE COMMISSIONER OF PATENTS

Re: Patent Application No. **2001272201** by **ERG R&D Pty Ltd,** Section 32 and section 36 requests by **Octopus Cards Limited** and a request for an extension of time to file evidence in response by **ERG R&D Pty Ltd.**

BACKGROUND

1. Patent application 20012722201 was filed on 13 July 2001 in the name of ERG R& D Pty Ltd ("ERG") under the provisions of the PCT claiming priority from an Australian provisional application PQ8776 filed on 13 July 2000. The PCT application entered the National Phase in Australia on 11 December 2002 and requested examination on 5 December 2003. On 29 March 2005, section 32 and 26 requests were filed by Octopus Cards Limited ("OCL"). Their evidence in support was served on 19 September 2005.

2. As per the Commissioner's letter of 22 September 2005, the applicant initially had until 22 November 2005 to complete their evidence in response. This time period was extended after two extension requests (on 22 November 2005 and 31 January 2006) were allowed (the second after considering adverse comments from the section 32/36 requestor). Evidence from one of the inventors (Glyn Gregory Horne Denison) was filed on 31 January 2006. The applicant filed a third extension request on 6 April 2006 for 3 months. The section 32/36 requestor objected to this extension and the matter was set for hearing in Canberra on 24 May 2006. The patent applicant was represented by Richard McCormack of counsel instructed by David Webber, patent attorney of Davies Collison Cave, Melbourne (only the former appearing at the hearing) and the section 32/36 requestor was represented by Stephen Burley of counsel instructed by Robert Miller, patent attorney of Spruson & Ferguson, Sydney (who both appeared at the hearing).

SECTION 32 REQUEST

3. The facts outlined by OCL supporting their section 32 request are as follows:

   - In and before February 1993, MTR Corporation Limited of Hong Kong ("MTRC") developed a document known as "M&P/TS/CSC/1 Contactless Smart Card Specification, Draft Issue 1: 6th February 1993" (the "initial specification") describing a proposed contactless smart card system ("CSC system") for the Hong Kong mass transit railway. The subject matter contained within the Initial Specification was conceived and contributed principally by Mr Brian Chambers, an employee of MTRC and technical Manager of the CSC system Project (a copy of the Initial Specification was annexed to the request).

   - In or about February 1993, MTRC issued the Initial Specification (or a document substantially in the form of the Initial Specification) to smart card industry participants, including ERG Australia Limited (now known as ERG Limited), for industry comment as a preliminary step before the issue of a Request for Tender for the proposed CSC System (the "Tender"). ERG R&D Pty Limited, the applicant of the Application is part of the ERG Limited group of companies.

- In or about May 1993, MTRC issued the Tender. The Tender documents included a version of the Initial Specification.

- ERG Australia responded to the Tender, and was subsequently contracted in June 1994 as "Contractor" for implementation of the CSC system under Contract 901-93(E) between ERG Australia Limited and Creative Star Limited (the "Contract"). At the time the Contract was entered into, MTRC had transferred to Creative Star Limited all rights in the Contract as "Employer". In 2 January 2002, Creative Star Limited changed its name to Octopus Cards Limited.

- The Contract included as Parts VII to X a "Particular Specification" which included substantially all material in the Initial Specification together with certain other material developed by MTRC and its employees.

- In or about February 1994 Brian Chambers prepared and wrote the technical paper which also described the CSC System and delivered and published that paper at a UITP Conference in Bologna, Italy on 9-10 February 1994 (the "Paper" which was also annexed to the section 32 request).

- OCL is the owner of all versions of the Initial Specification, including the particular Specification and the Paper and all intellectual and other propriety rights arising out of or in connection with any inventions or subject matter embodied or described in those documents.

- The earliest priority date of the patent application is 13 July 2000.

- The named inventors of the patent application (ie Ian Anderson, Michael Edward Abbiss and Glyn Gregory Horne Denison) each were involved in various capacities with implementation of the CSC system and earlier versions of the Particular Specification.

- The paper and relevant parts of the Initial Specification and subsequent Particular Specification disclose some or all of the features of one or more of the claims of the ERG application, and potentially other subject matter described in the ERG application but not yet claimed.

REQUESTS FOR EXTENSION OF TIME

4. The reason provided for the applicant's first extension of time request was that the evidence filed by OCL was extensive and requires detailed consideration by at least one of the three listed inventors to assist with evidence in answer. However, unfortunately none of the inventors now work for the applicant or any members of the ERG group and it was difficult obtaining evidence from them.

5. The applicant advised that they had managed to obtain the services of one of the inventors (Mike Abbiss) but they then learned that he is not able to finalise his work on the matter until the end of January 2006 due to work commitments. Another inventor (Glyn Denison) was then engaged and the applicant's understanding was that he should be able to complete his work on the matter more expeditiously. The applicant (at that time) has been unable to contact the third inventor (Ian Anderson) who was believed to be working in the United Kingdom.

6. The applicant was able to file some evidence (from Glyn Denison) within the first extended period but requested another extension to complete their evidence. The reason provided in this second extension request was that the applicant wanted to obtain further evidence from the other 2 inventors. They had been able to establish contact with Ian Anderson and he was considering providing evidence in this matter which they expected to complete by the end of March 2006. The remaining inventor (Mike Abiss) had advised that he was unwilling to assist with evidence but the applicant was hopeful that he would change his mind.

7. No further evidence was filed at the end of March but the applicant requested a further extension. The reasons provided for this current extension are that in March 2006, ERG retained independent counsel to assist with their case. As a result of that advice, the applicant now appreciates the need to further investigate particular aspects of the development of the invention in defending entitlement. In particular, the applicant intends to establish that:

    - the Hong Kong Work is not an embodiment of the invention, but that the inventors built an embodiment that is a separate and different system to the Hong Kong work. That system is called the Multi Application Smart Card, abbreviated to "MASS".

    - the Hong Kong Contract does not detail an inventive step or, if it does (which is not admitted), that it is materially different to and separate from the inventive step represented by the Invention as described in claims 1-44 of the ERG specification.

8. According to the applicant, this will require the inventors to address "complex issues" over a period in excess of 7 years (May 1993 – July 2001) including their knowledge (if any) of the Initial Specification and the Particular Specification, their understanding of the prior art and the time and the invention they developed and how this differed from the contribution of OCL. The applicant alleges that this will require a detailed search through "an enormous volume" of documents produced in the course of inventing the invention and building its embodiment.

9. To give some idea of the volume of material that might be involved, the applicant pointed out that at its peak the R&D team had 130 staff working under the inventors' direction and are likely to have generated extensive material that are likely to be relevant to the OCL requests including specifications, design documents, test plans, test results and reports, review meeting agenda and minutes, programmer's notes and source code. Such documentation is not readily accessible through a central database or register and it would be necessary to search through the records of particular employees many of whom are no longer employed by ERG.

10. The applicant is also concerned that their evidence not include commercial in confidence material and advised they will need additional time to assess the evidence for confidentiality before filing. They suggest that this may take some time because of the complication of "various contractual obligations involving the named inventors".

SPECIFICATION

11. The specification relates to a card system and in particular to a system for managing and processing transactions using cards such as smart cards. According to the specification, previous card transaction systems have been produced for specific applications by developing a system architecture specific to that application with discrete components for all of the different entities or actors of the system. Such system architecture is not readily configurable to different applications.

12. In contrast, the current invention provides a multiple application smart card system (referred to as MASS). In this system, the core components of the card system are readily adapted to different transactions apparently because of the hierarchical structure of the smart card infrastructure.

13. The specification ends with 44 claims only two of which are independent (claims 1 and 26). These are as follows:

    1. A card system including a plurality of component infrastructures, said component infrastructures each having core components of said system, the infrastructures having a hierarchical relationship such that one infrastructure is dependent on components of a lower infrastructure, and the core components being configurable for different card transaction applications.

26. Software for a multiple application card system, stored on computer readable storage media, including a plurality of component infrastructures, said component infrastructures each having core components, said infrastructures having a hierarchical relationship such that one infrastructure is dependent on components of a lower infrastructure, and the core components being configurable for different card transaction applications.

RELEVANT LAW

14. The Commissioner's power to determine the practice and procedure under sections 32 and 36 derives from regulation 22.24 which states:

22.24 Practice and procedure other than for opposition proceedings

(1) Subject to these Regulations:

(a) if the Act or these Regulations authorise the Commissioner to hear and decide an application or matter that is not an opposition; or

(b) in a matter being decided on the motion of the Commissioner;

the practice and procedure to be followed for the purposes of enabling the application or matter to be decided is to be determined by him or her.

15. Where the law confers such a broad discretion, paras. 5 (1) (e) and (2)(b) and (f) of the Administrative Decisions Judicial Review Act 1977 (ADJR Act) set the expectation that the decision maker must not fail to take a relevant consideration into account or follow a rule or policy without regard to the merits of the particular case.

16. The broad discretion provided under regulation 22.24 is similar to that provided under regulation 5.10 which has judicially considered by the Federal Court in *Ferocem Pty Limited v. Commissioner of Patents* (1994) 28 IPR 243, *A Goninan and Co Ltd v Commissioner of Patents and Another* (1997) 38 IPR 213, and *National Starch & Chemical Company v Commissioner of Patents* (2001) 50 IPR 398. It is clear from these judgments that where there is a broad discretion to allow an extension of time, this cannot be reduced to an imperative compliance with particular requirements. On the contrary, it is necessary to give proper, genuine and realistic consideration to all relevant aspects of the case. Relevant aspects include the relevance of the evidence sought to be adduced, explanation for the delay, the public interest and the interests of the parties. I will address each of these factors in my decision.

DISCUSSION

(a) Relevance of the evidence sought to be adduced

17. At the hearing, the section 32/36 requestor (OCL) confirmed that their claim for entitlement is based on the inventive contribution made by Brian Chambers, who was employed by OCL's predecessor in title (MTRC). Chambers prepared the initial and particular specifications as part of the tendering process for the development of a multi-service provider smart card system for the Hong Kong transport system (the "Hong Kong project"). The patent applicant (ERG) won the tender for this system and proceeded to develop a smart card which could be used for all the transport providers in Hong Kong.

18. OCL's primary claim to entitlement was that the invention disclosed and claimed in the current patent application was derived from Chambers' work in generating the initial specification for the Hong Kong project tender. OCL's secondary claim to entitlement was that Chambers had inventive input during the development phase of the Hong Kong project with ERG and derived additional entitlement through this work. I note that while OCL's secondary claim is not particularly pressed in the evidence in support, it may become critical to OCL's case at the substantive hearing. Chamber's preliminary work may have been published prior to the priority date of the current claims (in a paper delivered by Chambers at the UITP Conference in Bologna, Italy in 1994). If this is correct, then Chamber's alleged contribution (or at least part of it) could have already been in the public domain at the relevant priority date. In that case, the real problem with the specification may well be novelty rather than entitlement if (as alleged by OCL) Chamber's preliminary work is within the scope of the current claims.

19. The applicant's counter-argument to OCL's claim is that the invention was created after the work on the Hong Kong project had been completed. According to one of the named inventors of the current application (Glyn Denison) in his evidence in response (paragraphs 13-15), ERG was involved in a number of international tenders for a multi-service provider contactless smart card system after the Hong Kong project (including Berlin, San Francisco, Rome and Singapore). As the requirements of the various tenders were considerably varied and complicated, the system delivered for Hong Kong could not be applied to deliver the systems for the other cities.

20. According to Denison, he and one of the other named inventors (Mike Abiss) decided that ERG needed to develop a smart card transaction system that was configurable and sufficiently flexible that it could be deployed in any environment or city. Abiss and Ian Anderson (the third named inventor) redeveloped what had been done by ERG up till then to make a "generic suite of software" that could be utilised in varying cities. The final design of the MASS system involved a comprehensive suite of software "Use cases" across 4 infrastructure layers of the architecture which allowed changes to be readily made to one part of the system without requiring the whole system to be changed. According to Denison, this results in far less development and cost and means a speedier implementation time for a smart card system in a new location.

21. Unfortunately, Denison has concentrated on the preferred embodiment of the invention (MASS) in his declaration rather than the considering the invention as broadly disclosed and claimed in the current application. As a consequence, while he has outlined the applicant's basic argument in response, he does not appear to have fully addressed the case mounted by the section 32/36 requestor. In particular, he did not compare the invention as claimed or as broadly disclosed with that described in the initial and particular specifications prepared by Chambers.

22. In addition, Denison refers to a "generic suite of software" which had been prepared by ERG in previous projects (including (presumably) the Hong Kong project). He appears to acknowledge that this software was incorporated into their MASS system. However, it is not clear whether this earlier software (or approach) is critical to the development of the later MASS invention and hence whether the earlier contribution by Chambers could from the basis of a claim to entitlement.

23. The applicant intends to file evidence from two of the other named inventors (Ian Anderson and Mike Abiss) to further support their case. Ian Anderson is the inventor most involved in the development of the MASS architecture and is best placed to comment on the genesis of the invention and any potential overlap it has with the Hong Kong project particularly with regard to whether any software prepared for the Hong Kong project was used in preparation of MASS as part of the "generic suite of software". Anderson would also be in a position to explain what role Chambers had in the development of the Hong Kong project and why they consider this to be unrelated to the current (claimed) invention. His evidence would also be particularly useful if it could discuss the differences between the *claims* and the initial Hong Kong specification rather than the preferred embodiment.

24. All this material is likely to be highly relevant to the determination of inventorship and my view is that Anderson's evidence is likely to be critical to the current dispute before the Commissioner. However, it is not clear what insight Mike Abiss could add over and above Anderson's evidence regarding the "genesis of the invention". Counsel for the applicant suggested that Abiss's evidence would corroborate Anderson's evidence. However it is difficult to see that such corroborating material would have substantial weight given that neither Abiss nor Anderson is an independent witness.

25. Counsel for the applicant also suggested that Abiss could have been involved in a different aspect in the invention on which he may be better placed than Anderson to provide evidence. However, the applicant was unable back this claim with specific details presumably because they had not completed their discussions with Anderson. My view is that until more specific information is provided, it is not clear that Abiss's evidence will add any insight over and above Anderson's evidence and hence at this stage I am not convinced that Abiss's evidence is highly relevant.

(b) Explanation of the delay

26. OCL argued that the applicant had not taken reasonable steps to prepare their case prior to the current extension and that because of their lack of diligence, the current extension should not be granted. I agree that progress in this matter has been slow. The issues in an ownership dispute are much narrower than in a normal section 59 opposition and the evidence required to support a case should be readily obtainable. Therefore the Commissioner's expectation is that evidence in a section 32/36 matter would generally be finalised within the 2 month period initially allowed to file evidence.

27. In the current case, the applicant has had almost 8 months to prepare their case. The reasons justifying the previous request have been because of difficulties obtaining evidence from the inventors given that all three inventors no longer work with the patent applicant and Ian Anderson now lives in the United Kingdom and was uncontactable. While these practical problems appear now to be resolved, the evidence is still some time from completion. In fact, the reasons provided in the current request appear to suggest that the applicant has made no real progress over the intervening period and has only just started preparing their case. OCL argued that this delay strongly infers that the applicant was not seriously attempting to defend their entitlement before the current extension request (particularly as they only sought the involvement of independent counsel in March 2006).

28. I agree that the applicant should have sought independent counsel's advice well before March 2006. However I am not convinced that this was because of a lack of diligence on the applicant's part. Prior to the current extension, the applicant was solely focused on contacting and engaging the inventors. It seems likely that this "one track" approach was because the applicant believed the inventor's input critical before they consulted independent counsel. Unfortunately this meant that the evidence was effectively stalled because of the on-going problems with obtaining the inventor's co-operation. The current delays therefore seem to me poor case management rather than a deliberate strategy not to seriously defend their claim of entitlement.

29. From the submissions by the applicant at the hearing, I am satisfied that the applicant is now taking all appropriate steps to prepare their case as expeditiously as possible. They do not appear as far from completing their evidence as appeared to be inferred in their extension of time request. Both Anderson and Abiss are now co-operating with the applicant and Anderson is in Australia preparing a draft declaration. While the applicant would not commit to a firm deadline (or a guillotine order), they expect that Anderson's evidence was likely to be substantially complete by the end of the current extension period.

30. The applicant also advised that they were not intending to conduct a major review of all the (extensive) material likely to be relevant to the OCL requests as they implied in their extension of time request (see paragraph 9 above). I note that such an approach would be very time consuming and potentially fruitless. As OCL observed, all the key documents should have been produced in response to an earlier notice of production from the section 32/36 requestor (for all documents related to the conception of the invention). All the key documents should have been located and produced at that time. It is not apparent why a second review is now necessary and what it is likely to find.

(c) Private and Public interests

31. OCL argued that the interests in a section 32/36 matter (in contrast to a section 59 matter) are mostly private rather than public interests. They conceded that there was no actual prejudice to them caused by the current delays. However, they argued that there is still a general principle that a litigant has the right to have their dispute heard at the earliest opportunity. According to OCL, the delays caused by the applicant should weigh against them being granted an extension. At some stage the Commissioner has to call a halt to proceedings where a party has had a reasonable opportunity to prepare their evidence but have failed to complete it.

32. OCL also suggested that the public has less interest in determining the ownership of a patent compared with determining the validity of the patent. The main public interest is therefore in the maintaining the efficiency of proceedings before the Patent Office. According to OCL, given that the applicant has caused serious delays, the public interest is weighed in favour of the Commissioner refusing the current extension.

33. In my view, the Commissioner has a public interest role in ensuring a "correct and just determination" in matters before her regardless of the dispute. The evidence that the applicant is currently preparing is likely to be highly relevant to the determination of the matter and appears reasonably close to finalisation. As noted above, while the applicant has been slow in preparing their evidence to date, this appears to be more poor case management rather than a deliberate strategy. I am satisfied that the applicant is now taking appropriate steps to complete their evidence within a reasonable time frame.

DECISION

34. The evidence proposed to be adduced is likely to be highly relevant to the determination of the section 32 and 36 requests and likely to lead to a more just and correct determination of the entitlement dispute which is in the applicant's and public interest. While the applicant has been slow in preparing their evidence, I am satisfied that the applicant was always intending to defend their entitlement and the delays to date have been the result of poor case management rather than a lack of diligence. I am also satisfied that the evidence is close to finalisation and that applicant is taking appropriate steps to complete their evidence within a reasonable time frame.

35. Given this, the applicant's interest in having the extension granted outweighs the interests of the section 32/36 requestor in the short delay caused by granting the current extension. My view is therefore that an extension is appropriate in all the circumstances and I grant the applicant an extension until 30 June 2006 to file evidence in response. I note that the extension has been granted on the assumption that evidence will be complete or substantially complete within the extended period. If the applicant requires extensions beyond this deadline, then they will need to justify this fully by providing a detailed explanation of the relevance of the material they intend to file, any problems they have encountered in preparing this material and an estimated time for completion of the evidence. In this regard, I note that the Commissioner is unlikely to be sympathetic to further extension requests where the applicant is still searching their holdings for possible relevant documentation. In addition, the Commissioner is unlikely to agree to a deferral because of possible settlement negotiations unless both parties agree.

COSTS

36. In matters before the Commissioner, costs generally follow the event. In this case, I have allowed the extension requested by the applicant. However, the extension has been granted based on the extra explanation provided by the applicant at the hearing regarding the progress of their evidence. The applicant argued that the hearing was useful to both parties to provide some direction for the evidence required in the substantive matter. As a consequence, the applicant suggested there was clear benefit to both parties in holding a hearing and that there should be no award of costs.

37. In my view, any benefit to the parties was simply an unintended bonus of the hearing. The applicant's extension request implied that they were re-starting the process of collecting relevant material for the hearing, that they had made no real progress with their evidence to date, and that they were still a long way from completing their evidence. In such circumstances, it is not surprising that the section 32/36 requestor objected to the extension request and perhaps if the applicant had provided better reasons in their original request, there would have been no need for the section 32/36 requestor to object. For this reason, I award costs against the applicant.

Karen Ayers
Delegate of the Commissioner of Patents

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