

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HUMAN GENOME SCIENCES, INC.,)
)
) Plaintiff,
)
) v.
) Civil Action No. _____
GENENTECH, INC.,)
)
) Defendant.
)

COMPLAINT

For its complaint against defendant (“Genentech”), plaintiff (“HGS”) alleges as follows:

NATURE OF ACTION

1. This is an action under 35 U.S.C. § 146 to review the Decision on Motions entered on November 28, 2007 and the Judgment entered February 20, 2008 by the Board of Patent Appeals and Interferences (the “Board”) of the United States Patent and Trademark Office (“PTO”) in Interference No. 105,361 (“the ’361 Interference”).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 35 U.S.C. § 146 and 28 U.S.C. §§1331 and 1338.
3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(c).

PARTIES

4. HGS is a corporation organized and existing under the laws of the State of Delaware and has a place of business in Rockville, Maryland.

5. Upon information and belief, Genentech is a corporation organized and existing under the laws of the State of Delaware and has a place of business at One DNA Way, South San Francisco, California.

THE PATENT INTERFERENCE

6. This action arises from, *inter alia*, the November 28, 2007 Decision on Motions and the February 20, 2008 Judgment of the Board of Patent Appeals and Interferences in the '361 Interference. A true and correct copy of the Judgment is attached as Exhibit A.

7. HGS is the owner by assignment of the entire right, title and interest in and to the invention disclosed in U.S. Patent No. 6,872,568, issued March 29, 2005 ("the '568 patent"), entitled "Death Domain Containing Receptor 5 Antibodies," in the names of Jian Ni, Reiner L. Gentz, Guo-Liang Yu, and Craig A. Rosen (collectively "Ni"). A copy of the '568 patent is attached as Exhibit B.

8. Upon information and belief, Genentech is the owner of the entire right, title and interest in and to U.S. Application 10/423,448, filed April 25, 2003 ("the '448 application"), entitled "Apo-2 Receptor," in the names of Camellia W. Adams, Avi J. Ashkenazi, Anan Chuntharapai, and Kyung Jin Kim (collectively "Adams"). Genentech is the recorded assignee of the '448 application. Upon information and belief, Genentech actively participated in the prosecution of the '448 application and the '361 Interference.

9. The Board declared and instituted the '361 Interference between the HGS '568 patent and the Genentech '448 application.

10. Claims 1–6, 8–19, 21–32, 34–45, and 47–52 of the HGS '568 patent were designated as corresponding to Count 1 of the '361 Interference.

11. Claims 114–119, 121–132, 134–145, 147–158, and 160–165 of the Genentech '448 application were designated as corresponding to Count 1 of the '361 Interference.

12. Claims 7, 20, 33, and 46 of the HGS '568 patent were designated as corresponding to Count 2 of the '361 Interference.

13. Claims 120, 133, 146, and 159 of the Genentech '448 application were designated as corresponding to Count 2 of the '361 Interference.

14. On November 28, 2007, the Board entered its Decision on Motions (Paper 107) which, along with its other decisions in the interference, including the decisions of October 25, 2005 (Paper 26), January 12, 2006 (Paper 51), May 2, 2006 (Paper 77), August 22, 2006 (Paper 96), and February 20, 2008 (Papers 113 and 114) (“the Board’s Decisions”), were adverse to HGS, and favorable to Genentech, and wherein the Board erroneously ruled, contrary to fact and law, that:

- a. HGS was not entitled to the benefit of the filing dates of applications 60/040,846, 60/054,021, 09/042,583, 60/132,498, 60/133,238, and 60/148,939 (Paper 107 denying Ni’s Substantive Motion 3);
- b. HGS could not obtain discovery from Dr. Vishva Dixit, Dr. Guohua (James) Pan and the University of Michigan (Papers 51 and 107 denying and dismissing Ni Miscellaneous Motion 2);
- c. HGS could not substitute Counts 3 and 4 for Counts 1 and 2, respectively (Paper 107 denying Ni Substantive Motion 4);

- d. Exhibit AX 1103, and portions of NX 2161, and NX 2162 would not be excluded (Paper 107 dismissing Ni's Miscellaneous Motion 7);
- e. HGS was not entitled to move that each claim of Genentech's '448 application is unpatentable in light of the HGS '568 patent under 35 U.S.C. § 102(e) and/or § 103 (Papers 26 and 113);
- f. HGS was not entitled to a judgment of priority against the Genentech '448 application claims (Papers 26 and 114);
- g. Genentech was entitled to a judgment of priority against claims 1–52 of the HGS '568 patent based on accorded benefits (Paper 114);
- h. HGS was not entitled to file a supplemental opposition to Genentech's Substantive Motion 2 for benefit (Paper 77); and
- i. HGS was not entitled to sanctions against Genentech related to Genentech's activities interfering with the *ex parte* examination of HGS's application which matured into the '568 patent (Paper 96).

15. On January 4, 2008 and on February 5, 2008, HGS requested permission to file a motion of unpatentability against Genentech's claims under 35 U.S.C. § 102(e) and § 103, and informed the Board that it would not file a priority brief in the interference. In the same paper, HGS indicated to the Board that it would nonetheless seek review of the Board's Decisions under 35 U.S.C. § 146.

16. On February 20, 2008, the Board denied HGS's request for permission to file a motion of unpatentability against Genentech's claims under 35 U.S.C. § 102(e) and § 103 (Paper 113).

17. On February 20, 2008, the Board entered Judgment against HGS (Paper 114).

18. HGS and Ni are dissatisfied with the Board's Decisions that resulted in the entry of Judgment.

19. Pursuant to 35 U.S.C. § 146, HGS has elected to file suit in this Court for dissatisfaction with the Board's Decisions and Judgment. HGS has not sought review by the United States Court of Appeals for the Federal Circuit of the Board's Decisions and Judgment.

20. The Board's Decisions in the '361 Interference were erroneous and, based on the record before the Board and any additional evidence that HGS may introduce in this action, HGS is entitled to judgment correcting the erroneous decisions and judgment of the Board.

21. HGS has priority as to the subject matter at issue in the '361 Interference and Genentech's claims are unpatentable under, *inter alia*, 35 U.S.C. § 102(g).

22. HGS's involved claims are patentable.

23. Genentech's involved claims are unpatentable.

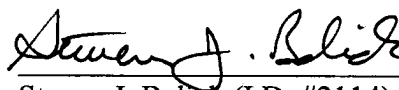
WHEREFORE, HGS respectfully requests judgment that:

- a. the Board's February 20, 2008 judgment in the '361 Interference is reversed, or in the alternative, vacated and remanded;
- b. the Board's judgment of priority against Ni's claims 1–52 based on accorded benefits is reversed;
- c. the Board's order canceling claims 1–52 of the '568 patent is reversed;

- d. the Board's decision denying Ni benefit of priority to the filing dates of applications 60/040,846, 60/054,021, 09/042,583, 60/132,498, 60/133,238, and 60/148,939 is reversed;
- e. Ni is granted benefit of priority of the filing dates of applications 60/040,846, 60/054,021, 09/042,583, 60/132,498, 60/133,238, and 60/148,939;
- f. the Board's decision denying HGS's request for a decision holding Adams' claims unpatentable is reversed;
- g. the Board's decision not to substitute count 3 for count 1 is reversed;
- h. Count 3 is substituted for Count 1;
- i. the Board's decision not to substitute count 4 for count 2 is reversed;
- j. Count 4 is substituted for Count 2;
- k. the Board's decision not to exclude Genentech's evidence (Exhibit AX 1103, and portions of NX 2161, and NX 2162) is reversed;
- l. Exhibit AX 1103, and portions of NX 2161 and NX 2162 are excluded from evidence upon any remand;
- m. the Board's decision denying HGS's request for sanctions against Genentech is reversed;
- n. Genentech is sanctioned for interfering with the *ex parte* examination of HGS's application which matured into the '568 patent;

- o. HGS is awarded priority against Genentech;
- p. Genentech's involved claims are unpatentable under 35 U.S.C. § 102(g);
- q. Genentech's involved claims are unpatentable as anticipated under 35 U.S.C. § 102(e), and/or obvious under 35 U.S.C. § 103, in view of U.S. Patent No. 6,872,568 and secondary references;
- r. HGS is entitled to the discovery sought against Dr. Dixit, Dr. Pan, and the University of Michigan in this action as well as upon any remand of the case to the Board;
- s. the Board's November 28, 2007 decisions ruling adversely to HGS in the '361 Interference are reversed;
- t. every decision in the interference in which the Board ruled against HGS is reversed;
- u. every decision in the interference in which the Board denied or dismissed the relief sought by HGS is reversed;
- v. every decision in the interference in which the Board granted the relief sought by Adams is reversed;
- w. costs and attorneys fees be awarded in favor of HGS against Genentech; and
- x. HGS be awarded such other and further relief as may be appropriate.

ASHBY & GEDDES



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