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10/315,445	12/10/2002	Tony Marcel	239682US0 CONT	4601
22850	7590	05/26/2010	EXAMINER	
OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, L.L.P. 1940 DUKE STREET ALEXANDRIA, VA 22314			BUNNER, BRIDGET E	
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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* TONY MARCEL,  
FRANCOIS ROUGEON, and CATHERINE ROUGEOT

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Appeal 2009-010632<sup>1</sup>  
Application 10/315,445  
Technology Center 1600

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Decided:<sup>2</sup> May 24, 2010

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Before LORA M. GREEN, FRANCISCO C. PRATS, and  
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims to peptide-containing pharmaceutical compositions. The Examiner rejected the claims for lack of enablement and lack of written description.

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<sup>1</sup> Institute Pasteur is the real party in interest (App. Br. 1).

<sup>2</sup> Oral argument was presented in this case on May 13, 2010.

We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

Claims 45-55 are pending (App. Br. 1). Claims 52-55 have been withdrawn from consideration by the Examiner (*id.*). Claims 45-51 stand rejected and are on appeal (*id.*).

Claim 45, the sole independent claim on appeal, reads as follows:

45. A composition, comprising:

a peptide comprising at least one amino acid sequence selected from the group consisting of SEQ ID NO: 1, SEQ ID NO: 2, SEQ ID NO: 3, and SEQ ID NO: 4, and

a pharmaceutical agent capable of treating impaired sexual behavior in a mammal having impaired sexual behavior,

wherein the amount of the pharmaceutical agent in the composition alone is not sufficient to treat impaired sexual behavior in a mammal having impaired sexual behavior and wherein the amount of the peptide and the pharmaceutical agent together is sufficient to treat impaired sexual behavior in a mammal having impaired sexual behavior.

The Examiner cites the following documents as evidence of unpatentability:

Vishnu M. Dhople and Ramakrishnan Nagaraj, *Conformation and activity of  $\delta$ -Lysin and its analogs*, 26 PEPTIDES 217-225 (2005).

Thomas Frei et al., *Different Extracellular Domains of the Neural Cell Adhesion Molecule (N-CAM) Are Involved in Different Functions*, 118 J. CELL BIOL. 177-194 (1992).

GOODMAN AND GILMAN'S, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS, 8<sup>th</sup> ed., pages 33-48 (1993).

Johanne Louise Neiiendam et al., *An NCAM-derived FGF-receptor agonist, the FGL-peptide, induces neurite outgrowth and neuronal survival in primary rat neurons*, 91 J. NEUROCHEM. 920-935 (2004).

The following rejections are before us for review:

(1) Claims 45-51, rejected under 35 U.S.C. § 112, first paragraph, as lacking enablement for the full scope of the claimed subject matter (Ans. 3-8); and

(2) Claims 45-51, rejected under 35 U.S.C. § 112, first paragraph, as lacking written description (*id.* at 8-10).

During prosecution, the Examiner made a species election requirement between the sequences recited in claim 45, and in response to Appellants' election, examination of the claims was limited to SEQ ID NO: 2 (*see* Final Rejection 3 (entered January 24, 2008)).

We limit our consideration of the merits of the appealed rejections to the elected species. *See Ex parte Ohsaka*, 2 USPQ2d 1460, 1461 (BPAI 1987).

## ENABLEMENT

### ISSUE

The Examiner concedes that the Specification enables (a) a composition “comprising a peptide consisting of the amino acid sequence of SEQ ID NO: 2,” and (b) a composition comprising a peptide “consisting of the amino acid sequence of SEQ ID NO: 2 in an amount sufficient to increase the number and duration of sexually-related behaviors in male rats (increased non-sexual contact, increased latency of the first mount; increased number of ejaculations per sexual episode, and increased number of mounts with intromissions)” (Ans. 3-4).

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