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EXAMINER
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TONY MARCEL,
FRANCOIS ROUGEON, and CATHERINE ROUGEOT

Appeal 2009-010632[1]
Application 10/315,445
Technology Center 1600

Decided:[2] May 24, 2010

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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[1] Institute Pasteur is the real party in interest (App. Br. 1).
[2] 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 Claims 52-55 have been withdrawn from consideration by the Examiner (*id.*).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 δ-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, 8th 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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