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Hoiberg A/S
St Kongensgade 59A
1264 COPENHAGEN K
DÄNEMARK

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European Patent Office
80298 Munich
Germany

Dir. 524
Legal Division
Patent Administration

Kristina J. Almer
Lawyer

Tel. +49 (0)89 2399 - 5248

Date: 12.08.2009

Legal File No.: **R14-90/2009**
Application No.: **05 820 913.1**
Applicant: **Antibodyshop S/A**
Your Ref.: **P1151EP00**

BRIEF COMMUNICATION FROM THE LEGAL DIVISION

For your information, please find enclosed the communication of the Legal Division of the European Patent Office (EPO) dated 12 August 2009 responding to the third party's observations made by letter dated 16 July 2009 concerning the stay and resumption of proceedings pursuant to Rule 14 EPC with regards to the above-mentioned application. Please also find attached a copy of the mentioned letter dated 16 July 2009.

K. Almer

Kristina Almer
Legal Division

Annex

European Patent Office
Landsberger Str. 30
80339 Munich
Germany

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Herrn Dr. Andreas v. Falck
Lovells LLP
Postfach 32 07 35
40422 Düsseldorf

European Patent Office
80298 Munich
Germany

Dir. 524
Legal Division
Patent Administration

Kristina J. Almer
Lawyer

Tel. +49 (0)89 2399 - 5248

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Copy to: **Hoiberg A/S**

COMMUNICATION CONCERNING RESUMPTION OF PROCEEDINGS PURSUANT TO RULE 14(3) EPC

Further to your letter dated 16 July 2009 the Legal Division of the European Patent Office (EPO) informs you as follows:

1. Pursuant to Rule 14(3) EPC the EPO may decide upon the resumption of proceedings at its own discretion regardless of the stage reached in the national entitlement proceedings. To determine whether proceedings should be continued, a balance of interests of the involved parties must be found taking into account all relevant aspects. Rather than deciding on the outcome of the entitlement proceedings, therefore, the Legal Division in the context of Rule 14(3) EPC only has the function and the competence to evaluate the impact of the resumption or further staying of the grant proceedings on each of the parties.

2.1. By said letter, it is mainly argued in the third party's favour that the stay of proceedings is necessary as an immediate action to safeguard the third party's interests as the grant of the patent was about to be published. It is stated that further evidence to show the misappropriation of the third party's invention would follow in the course of the national proceedings and that this would then shift the burden of proof for demonstrating that the invention was made by the applicant to the latter.

2.2. Against the applicant's interests it is in principle argued that it is a profit-making company not focused on research but on commercially exploiting routine diagnostics. It is claimed that the applicant is thus not a "vulnerable small listed company" but a company "not afraid of enhancing its profit by all means including seizing and exploiting a non profit organisation's invention". It is furthermore questioned that a "potentially

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80339 Munich
Germany

jeopardizing competitor" has actually entered the market. Share prices were not an indicator of economic drawbacks.

3. Taking into account these objections raised by the third party, the Legal Division does not consider it as appropriate to reverse its evaluation regarding the balance of interests taken in its communication dated 06 May 2009 and thus the date of resumption as amended by communication dated 19 May 2009.

3.1. In J 03/33 (not published), the Legal Board of Appeal when conducting the balance of interests in the sense of Rule 14(3) EPC mainly took account of the stage at which the proceedings were stayed and the consequences arising from this on both sides.

3.2. In the present case, it follows that, concerning the third party's interest in safeguarding its rights, the third party can still revert to other effective means of safeguarding its rights than the stay of proceedings, one being national legal means of provisional protection, another being the filing of an opposition against the granted patent as explained by communication dated 06 May 2009.
With regards to the statements concerning the alleged misappropriation of the invention, the EPO is not competent nor in the position to evaluate the outcome of the national entitlement proceedings in the context of Rule 14(3) EPC. Moreover, the argumentation made by letter dated 16 July 2009 diverges from the argumentation upheld in the original writ of summons dated 04 March 2009, where the ownership of the invention was questioned on the grounds of an alleged similarity of the invention with two existing patents in the name of the third party.

3.3. Concerning the interests of the applicant, the fact that it is aiming at enhancing profit by means inter alia of licensing patents, even from a non-profit organisation, cannot be held against the applicant. The right to license is one of the intrinsic functions of the patent system.

There is furthermore no need to scrutinize in detail whether or not the applicant has in fact already suffered from economic drawbacks. In J 03/33, the Board of Appeal held that even if the patent was stayed shortly before the delivery of the patent and thus a successful end of the grant procedure, the applicant had nothing to show for it (J 03/33, point 4.3. of the reasons). In this case, the Board considered it as sufficient that the applicant was deprived from the sole possibility of granting licences for royalties and claiming damages for possible infringements. It was furthermore taken into account that the applicant ran the risk that the patent could be obstructed for an incalculable period of time if the third party began further entitlement proceedings in other Member States.

4. Against this background, the balance of interests found in the communication dated 06 May 2009 remains valid.

5. Right to be heard (Article 113 EPC)

If you disagree with the above legal opinion, you may apply for the issue of an appealable decision within a period of two months as from the notification of the present communication.

6. Competence

The Legal Division is solely responsible for the procedure where the applicant or proprietor is not entitled (Special Edition No. 3, OJ EPO 2007, G.1.). **Please therefore address all relevant correspondence directly to the Legal Division citing the abovementioned legal file number.**

K. Almer

Kristina Almer
Legal Division