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**Datasheet for the interlocutory decision  
of 14 September 2018**

**Case Number:** T 1627/09 - 3.3.08

**Application Number:** 99965105.2

**Publication Number:** 1147174

**IPC:** C12N1/10

**Language of the proceedings:** EN

**Title of invention:**

DESATURASES AND METHODS OF USING THEM FOR SYNTHESIS OF  
POLYUNSATURATED FATTY ACIDS

**Patent Proprietor:**

Washington State University

**Opponent:**

E.I. DU PONT DE NEMOURS AND COMPANY

**Headword:**

Desaturases II/WASHINGTON

**Relevant legal provisions:**

EPC Art. 24(2), 24(4)

**Keyword:**

"Notice of self-recusation by two board members"  
"Replacement of the members by their alternates - (yes)"

**Decisions cited:**

D 0011/91, G 0001/05, G 0002/08, J 0015/04, T 0584/09,  
T 1627/09, R 0019/12, R 0008/13, R 0002/14, R 0002/15  
ECHR, Rudni-chenko v. Ukraine, no. 2775/07  
ECHR, Micallef v. Malta, no. 17056/06  
OGH (Austrian Supreme Court) 4 Ob 186/11y EFSlg 131.987

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1627/09 - 3.3.08

**I N T E R L O C U T O R Y   D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 14 September 2018**

**Appellant:** Washington State University  
(Patent Proprietor) P.O. Box 641802  
Pullman, WA (US)

**Representative:** Dick, Alexander  
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**Respondent:** E.I. DU PONT DE NEMOURS AND COMPANY  
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**Representative:** Dzieglewska, Hanna Eva  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 12 June 2009  
revoking European patent No. 1147174 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairwoman** M. R. Vega Laso  
**Members:** M. Montrone  
R. Winkelhofer

## **Summary of Facts and Submissions**

- I. This interlocutory decision concerns the procedure under Article 24(4) in connection with Article 24(2) EPC initiated by the notices of self-recusation of the chair and the legal member of the Board of Appeal 3.3.08.
- II. By decision T 1627/09 of 10 October 2013, the Board of Appeal 3.3.08 in the composition B. Stolz (chair), T. Mennessier (technical member) and D. Rogers (legal member) dismissed the appeal of the patent proprietor (appellant) against a decision of an opposition division of the European Patent Office revoking patent No. 1 147 174.
- III. Upon the appellant's petition for review pursuant to Article 112a EPC, the Enlarged Board of Appeal set aside decision T 1627/09 and ordered the proceedings before the Board 3.3.08 to be re-opened (decision R 2/14 of 22 April 2016).
- IV. Since the technical member of the board who participated in the decision T 1627/09 of 10 October 2013 had meanwhile retired, he was replaced according to the business distribution scheme of the Technical Boards of Appeal.
- V. Both the chair and the legal member of the board gave notices of self-recusation according to Article 24(2) EPC. Therein, they held that, if they remained as members of the board, they would have to decide for a second time on the same issues. In order to avoid a potential perception of bias, they requested

to step out of the board and to be replaced by their alternates.

VI. The appellant submitted comments in favour of a change in the board's composition.

VII. The respondent made no comments.

### **Reasons for the Decision**

1. Members of a board of appeal may not take part in a case in which they have any personal interest, or if they have previously been involved as representatives of one of the parties, or if they participated in the decision under appeal (Article 24(1) EPC). If, for one of these reasons, or for any other reason, a member of a Board of Appeal considers that he/she should not take part in an appeal, he/she shall inform the Board accordingly (Article 24(2) EPC).
2. In view of the notices of self-recusation of the chair and the legal member who formed part of the board in decision T 1627/09 of 10 October 2013, the present board, in which the members concerned have been replaced by their alternates, has to decide on the action to be taken (Article 24(4) EPC).
3. According to the jurisprudence of the Boards of Appeal, notices of self-recusation by board members do not automatically effectuate their exclusion from the proceedings, but only initiate the procedure under Article 24(4) EPC, without pre-empting the outcome of the decision to be taken. In a decision on the members' replacement, the grounds given in the notices of self-recusation, which may by their nature constitute possible grounds for an objection of partiality, should

normally be respected, as only a very strict observance of the requirement of impartiality can be considered in line with the Boards' judicial function as last instance within the European patent system. There should be no remaining real possibility of a party or the public suspecting bias after a decision by a board (cf. decisions G 1/05, OJ EPO 2007, 362, points 2 and 7; J 15/04 of 30 May 2006, points 12 and 13; T 584/09 of 1 March 2013, point 7; and R 2/15 of 21 October 2015, points 3 and 4).

4. The Boards' jurisprudence in this respect is in accordance with Article 6(1) of the European Convention on Human Rights (ECHR) and Article 47(2) of the Charter of Fundamental Rights of the European Union (CFR), both recognised as binding standards for proceedings before the boards, as they are expressing principles of procedural law generally recognised in the Contracting States of the European Patent Organisation (EPO) (see Article 125 EPC and decisions D 11/91, OJ EPO 1995, 721, point 3.3; G 1/05, *supra*; G 2/08, OJ EPO 2010, 456, point 3; R 19/12 of 25 April 2014, points 8 to 10; R 8/13 of 20 March 2015, point 2; R 2/14, *supra*, point 5). For that reason, the case law of national courts in the EPO Contracting States, as well as the case law of the European Court of Human Rights, may serve as supplementary sources of interpretation of the EPC (cf., *inter alia*, R 19/12, *supra*, point 9).
5. According to the case law of the European Court of Human Rights on Article 6(1) ECHR, only under very exceptional circumstances a notice of self-recusation shall not lead to a replacement (cf., *inter alia*, European Court of Human Rights, *Rudnichenko v. Ukraine*, no. 2775/07, paragraph 113 to 119; along the same lines cf., as an example for national case law in the EPO

Contracting States, Austrian Supreme Court 4 Ob 186/11y EFSlg 131.987).

6. For a notice of self-recusation under Article 24(2) EPC to be accepted, it is therefore not necessary - as is the case for objections raised under Article 24(3) EPC, first sentence - to establish an actual partiality. It is sufficient that an appearance of partiality is at least arguable in the circumstances of the case (see G 1/05, *supra*, point 19; R 2/15, *supra*, point 5 with reference to European Court of Human Rights, *Micallef v. Malta*, no. 17056/06, paragraph 98).
7. In the present case, no particular concerns as to the impartiality of the board members have arisen or had been voiced by the parties before. At the same time, it is at least arguable that an independent observer might objectively conclude that such bias could exist (e.g. see decision T 584/09, *supra*, where - as in the present case - appeal proceedings had been re-opened upon a petition for review and board members were then replaced upon self-recusation, with the board there arguing that such replacement had been justified to avoid any perception of bias on the members' side).
8. As there are no exceptional circumstances that could lead to a different conclusion, the notices of self-recusation are to be accepted.

## Order

### For these reasons it is decided that:

The chair and the legal member of board 3.3.08 are to be replaced by their alternates.

The Registrar:

The Chairwoman:



K. Boelicke

M. R. Vega Laso

Decision electronically authenticated