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**Datasheet for the decision  
of 16 October 2013**

**Case Number:** T 0703/11 - 3.3.09

**Application Number:** 04748674.1

**Publication Number:** 1672987

**IPC:** A23L 1/29, A23L 1/30

**Language of the proceedings:** EN

**Title of invention:**

Improvement of intestinal barrier integrity

**Patent Proprietor:**

N.V. Nutricia

**Opponent:**

Friesland Brands B.V.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 113(2)

**Keyword:**

"Revocation of the patent at request of the patent proprietor"  
"Agreement to text withdrawn by patent proprietor"

**Decisions cited:**

T 1655/07

**Catchword:**

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Case Number: T 0703/11 - 3.3.09

**DECISION**  
of the Technical Board of Appeal 3.3.09  
of 16 October 2013

**Appellant:** Friesland Brands B.V.  
(Opponent) Blankenstein 142  
NL-7943 PE Meppel (NL)

**Representative:** Hatzmann, Martin  
V.O.  
Johan de Wittlaan 7  
NL-2517 JR Den Haag (NL)

**Respondent:** N.V. Nutricia  
(Patent Proprietor) Eerste Stationsstraat 186  
NL-2712 HM Zoetermeer (NL)

**Representative:** Nederlandsch Octrooibureau  
P.O. Box 29720  
NL-2502 LS The Hague (NL)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
20 January 2011 concerning maintenance of  
European patent No. 1672987 in amended form.

**Composition of the Board:**

**Chairman:** W. Sieber  
**Members:** N. Perakis  
K. Garnett

## Summary of Facts and Submissions

- I. By its interlocutory decision announced orally on 21 October 2010 and issued in writing on 20 January 2011 the opposition division held that European patent No 1 672 987 as amended during the oral proceedings met the requirements of the EPC.
- II. On 18 March 2011 the opponent filed a notice of appeal against the decision of the opposition division and paid the prescribed fee on the same day. The statement setting out the grounds of appeal was filed on 20 May 2011. The opponent requested that the decision under appeal be set aside and that the patent be revoked in its entirety.
- III. By letter dated 1 December 2011, the patent proprietor filed observations to the appeal and requested oral proceedings in the event that the board considered the appeal to be well-founded and intended to overturn the impugned decision.
- IV. By communication dated 17 April 2013, the board summoned the parties to oral proceeding to be held on 10 December 2013.
- V. By letter of 1 October 2013, the patent proprietor stated that:

*"Please be informed that the Proprietor no longer approves the text and that the Proprietor requests the revocation of above referenced-patent EP 1672987. To be clear, Proprietors disapproval concerns the text of the patent as granted as well as of the amended*

*patent documents filed during oral proceedings on 21.10.2010".*

VI. On 15 October 2013 the oral proceedings scheduled to take place on 10 December 2013 were cancelled.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Article 113(2) EPC requires that the EPO may decide upon the European patent only in the text submitted to it, or agreed by the proprietor of the patent.

Agreement cannot be deemed to be given if the proprietor, without submitting an amended text, expressly states that he no longer approves the text of the patent as granted or previously amended. In such a situation a substantive requirement for maintaining the patent is lacking and the proceedings are to be terminated by a decision ordering revocation, without going into the substantive issues (see e.g. T 1655/07 not published in OJ EPO).

3. The patent proprietor has not explicitly withdrawn its request for oral proceeding. However, in view of its later request for revocation of the patent the earlier request for oral proceedings became obsolete. Consequently, the oral proceedings were cancelled.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

M. Canueto Carbajo

W. Sieber