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**Datasheet for the decision
of 17 January 2022**

Case Number: T 0301/18 - 3.3.09

Application Number: 10720370.5

Publication Number: 2563159

IPC: A23K1/00, A23K1/10, A23K1/14,
A23K1/16, A23L1/00, A23L1/0522,
A23L1/164

Language of the proceedings: EN

Title of invention:
A DUAL COMPONENT FOOD PRODUCT AND METHOD FOR THE PRODUCTION
THEREOF

Patent Proprietor:
Mark & Chappell (Ireland) Limited

Opponents:
Herbert Ospelt Anstalt
Mars, Incorporated

Headword:
Dual component food product/MARK & CHAPPELL

Relevant legal provisions:
EPC Art. 113(2)

Keyword:

Basis of decision - text or agreement to text withdrawn by
patent proprietor - patent revoked

Decisions cited:

T 0073/84, T 0186/84, T 0655/01, T 1526/06, T 2405/12



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
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Case Number: T 0301/18 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 17 January 2022

Appellant: Herbert Ospelt Anstalt
(Opponent 1) Schaanerstr. 79
9487 Bendern (LI)

Representative: Bogensberger, Burkhard
Bogensberger Patent- und Markenbüro
Fallsgasse 7
9492 Eschen (LI)

Appellant: Mars, Incorporated
(Opponent 2) 6885 Elm Street
McLean, Virginia 22101-3883 (US)

Representative: Haseltine Lake Kempner LLP
Redcliff Quay
120 Redcliff Street
Bristol BS1 6HU (GB)

Respondent: Mark & Chappell (Ireland) Limited
(Patent Proprietor) Unit 1 B, Kilcoole Industrial Estate
Kilcoole, Co. Wicklow (IE)

Representative: Murgitroyd & Company
Murgitroyd House
165-169 Scotland Street
Glasgow G5 8PL (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 24 November
2017 rejecting the opposition filed against
European patent No. 2563159 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
 F. Blumer

Summary of Facts and Submissions

- I. This decision concerns the appeals filed by opponents 1 and 2 (appellant 1 and 2) against the decision of the opposition division to reject the oppositions against European patent No. 2 563 159.
- II. The appellants requested that the decision under appeal be set aside and that the patent be revoked. The patent proprietor (respondent) replied to the statements setting out the grounds of appeal and filed auxiliary requests 1 and 2. It requested, among other things, that the appeals be dismissed.
- III. The board summoned the parties to oral proceedings and issued a communication in which it set out its preliminary opinion on all requests on file.
- IV. By letter dated 6 January 2022, the respondent declared the following:

"The Patentee hereby withdraws their request for Oral Proceedings.
The Patentee no longer approves the text in which the patent was granted."
- V. The board canceled the oral proceedings.

Reasons for the Decision

1. Article 113(2) EPC stipulates that the European Patent Office shall consider and decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
2. Agreement cannot be deemed to be given if the patent proprietor explicitly states that it no longer approves the text of the patent as granted. For the board, the patent proprietor unambiguously expressed that it neither approves the claims nor the description of the patent as granted. Although auxiliary claim requests are on file (auxiliary requests 1 and 2), it is manifest that the patent proprietor neither approves the description of the patent as granted nor has it provided a description to which it agrees.
3. Since the text of the patent is at the disposition of the patent proprietor, a patent cannot be maintained against its will.
4. In the case of T 73/84 (OJ EPO 1985, 241, Headnote and Reasons), the board decided that, if the proprietor of a European patent stated in opposition or appeal proceedings that it no longer approved the text in which the patent was granted, and did not submit any amended text, the patent was to be revoked. This approach was confirmed, *inter alia*, by decisions T 186/84 (OJ EPO 1986, 79), T 655/01, T 1526/06 and T 2405/12.
5. In the circumstances of the present case, the board sees no reasons to deviate from the principles set out

in the above-mentioned decisions. The patent must therefore be revoked without going into any substantive issue.

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:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated