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**Datasheet for the decision
of 14 January 2022**

Case Number: T 1132/18 - 3.3.09

Application Number: 10727511.7

Publication Number: 2437623

IPC: A61K38/17, A61K9/00, A61K9/107,
A61K33/06, A61K35/20,
A23L33/00, A23L33/16,
A23L33/17, A23L33/19

Language of the proceedings: EN

Title of invention:
LIQUID ENTERAL NUTRITIONAL COMPOSITION WITH A LOW MONOVALENT
METAL ION CONTENT

Patent Proprietor:
N.V. Nutricia

Opponents:
Société des Produits Nestlé S.A.
Fresenius Kabi Deutschland GmbH
FrieslandCampina Nederland B.V.

Headword:
Enteral nutritional compositions/NUTRICIA

Relevant legal provisions:

EPC Art. 113(2)
EPC R. 103(4) (a)

Keyword:

Basis of decision - text or agreement to text withdrawn by
patent proprietor - patent revoked
Reimbursement of appeal fee at 25% - (yes)

Decisions cited:

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

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1132/18 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 14 January 2022

Appellant:
(Patent Proprietor)

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Appellant:
(Opponent 1)

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Representative:

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Sevenoaks, Kent TN13 1XR (GB)

Appellant:
(Opponent 2)

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61352 Bad Homburg (DE)

Appellant:
(Opponent 3)

FrieslandCampina Nederland B.V.
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Representative:

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 March 2018 concerning maintenance of the
European Patent No. 2437623 in amended form.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. Appeals were filed by the patent proprietor and the three opponents against the decision of the opposition division which held that European patent No. EP 2 437 623 B1 as amended according to auxiliary request 1 meets the requirements of the EPC. In the course of the appeal proceedings, opponent 1 withdrew its appeal.
- II. During the oral proceedings held before the board, the patent proprietor appellant also withdrew its appeal and stated that it no longer approved of the text of the patent in any form.
- III. The opponent appellants requested that the decision under appeal be set aside and that the patent be revoked.

Reasons for the Decision

1. Under Article 113(2) EPC, 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. This principle has to be strictly observed also in opposition and opposition appeal proceedings.
 - 1.1 By disapproving the granted text of the patent in any form, the patent proprietor appellant has withdrawn its approval of any text for maintenance of the patent. Since the text of the patent is at the disposition of the patent proprietor, a patent cannot be maintained against the patent proprietor's will. There is

therefore no text of the patent on the basis of which the board can consider the appeals of the opponent appellants.

2. 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.
3. Furthermore, as clarified in decision T 186/84, the examination as to whether the grounds for opposition laid down in Article 100 EPC prejudice the maintenance of the patent becomes not merely superfluous but impossible since the absence of a valid text of the patent precludes any substantive examination of the alleged impediments to patentability.
4. In the circumstances of the present case, the board sees no reasons for deviating from the principles set out in the above-mentioned decisions. The patent must therefore be revoked, without a substantive examination first being carried out.
5. Since the patent proprietor withdrew its appeal after the expiry of the time limit set under Rule 103(3) (a) EPC but before the decision was announced at oral proceedings, its appeal fee is to be reimbursed at 25% (Rule 103(4) (a) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appeal fee of the patent proprietor is reimbursed at 25%.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated