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**Datasheet for the decision
of 21 November 2022**

Case Number: T 1827/19 - 3.3.09

Application Number: 13707169.2

Publication Number: 2819526

IPC: A23L29/30, A23L33/125

Language of the proceedings: EN

Title of invention:

NUTRITIONAL PRODUCTS HAVING A MODULATED OFF-TASTE INTENSITY
AND METHODS FOR MAKING SAME

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponents:

Omega Phytonutrition UG (haftungsbeschr.)
Fresenius Kabi Deutschland GmbH

Headword:

Off-taste modulation/Nestlé

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Basis of decision - text or agreement to text withdrawn by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 - withdrawal of appeal

Decisions cited:

T 0073/84, T 0186/84

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1827/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 21 November 2022

Appellant: Société des Produits Nestlé S.A.
(Patent Proprietor) Entre-deux-Villes
1800 Vevey (CH)

Representative: Elkington and Fife LLP
Prospect House
8 Pembroke Road
Sevenoaks, Kent TN13 1XR (GB)

Appellant: Fresenius Kabi Deutschland GmbH
(Opponent 2) Else-Kröner-Str. 1
61352 Bad Homburg (DE)

Representative: Fresenius Kabi Deutschland GmbH
Patent Department
Pharmaceuticals Division
Borkenberg 14
61440 Oberursel (DE)

Party as of right: Omega Phytonutrition UG (haftungsbeschr.)
(Opponent 1) Mühlenstr. 8a
14167 Berlin (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
3 April 2019 concerning maintenance of the
European Patent No. 2819526 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: A. Veronese
 N. Obrovski

Summary of Facts and Submissions

- I. Appeals were filed by opponent 2 and the patent proprietor against the opposition division's decision which found that the European patent as amended according to the auxiliary request 3 meets the requirements of the EPC.
- II. During the oral proceedings held before the board, the patent proprietor withdrew its appeal and its agreement to the text of the patent in any form.
- III. Opponent 2 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 examine, and decide upon, the European patent only in the text submitted to it, or agreed, by the proprietor of the patent. This principle, according to which the text of the patent is at the disposition of the patent proprietor, has to be strictly observed also in opposition and opposition appeal proceedings.
2. As the patent proprietor withdrew its agreement to the text of the patent in any form, there is no text of the patent on which the board can base its consideration of the opponent's appeal.
3. In 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 has been confirmed in numerous decisions (see Case Law of the Boards of Appeal, 10th edition 2022, IV.D.2, third paragraph and III.B.3.3, first paragraph).

4. The board also follows the above-mentioned approach. The patent must therefore be revoked, without any preceding substantive examination.
5. Furthermore, as clarified in decision T 186/84, Reasons 5, 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.
6. 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. Therefore, the appeal fee paid by the patent proprietor 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 paid by the patent proprietor is reimbursed at 25%.

The Registrar:

The Chairman:



M. Schalow

A. Haderlein

Decision electronically authenticated