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**Datasheet for the decision  
of 15 April 2025**

**Case Number:** T 0580/23 - 3.3.08

**Application Number:** 15750646.0

**Publication Number:** 3172315

**IPC:** C12N1/20, C12N1/36, A23C19/032,  
A23C9/123

**Language of the proceedings:** EN

**Title of invention:**  
Phage resistant lactic acid bacteria

**Patent Proprietor:**  
DSM IP Assets B.V.

**Opponent:**  
International N&H Denmark ApS

**Headword:**  
Phage resistant lactic acid bacteria/DSM

**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Basis of decision - text or agreement to text withdrawn by  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 0646/08, T 2434/18



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
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**Case Number: T 0580/23 - 3.3.08**

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 15 April 2025**

**Appellant I:** DSM IP Assets B.V.  
(Patent Proprietor) Wilhelminasingel 39  
6221 BE Maastricht (NL)

**Representative:** dsm-firmenich IP  
DSM-Firmenich AG  
Wurmisweg 576  
4303 Kaiseraugst (CH)

**Appellant II:** International N&H Denmark ApS  
(Opponent) Paralleelvej 16  
2800 Kongens Lyngby (DK)

**Representative:** D Young & Co LLP  
3 Noble Street  
London EC2V 7BQ (GB)

**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**19 January 2023 concerning maintenance of the**  
**European Patent No. 3172315 in amended form**

**Composition of the Board:**

**Chairwoman** T. Sommerfeld  
**Members:** R. Morawetz  
D. Rogers

## Summary of Facts and Submissions

- I. The appeals lodged by the patent proprietor (appellant I) and the opponent (appellant II) lie from the opposition division's interlocutory decision that the set of claims of the main request (claims as granted) contravened Article 54 EPC but that European patent No. 3 172 315 B1 ("the patent") with the set of claims of auxiliary request 1, submitted during oral proceedings on 31 October 2022, and the invention to which it relates met the requirements of the EPC.
- II. Appellant I initially requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, that the patent be maintained in amended form on the basis of auxiliary request 1, which was found allowable in the decision under appeal, or one of its further auxiliary requests.
- III. Appellant II requested as its main request that the decision under appeal be set aside and the patent be revoked in its entirety.
- IV. The board scheduled oral proceedings in accordance with the parties' requests and subsequently issued a communication under Article 15(1) RPBA.
- V. By letter dated 7 April 2025, appellant I stated that *"[p]atentee hereby withdraws its approval of the text on the bases of which the European patent EP3172315 was granted and withdraw therein consent to the Communication pursuant to Rule 71(3) EPC dated 14 April 2020. The patentee will not be filing a replacement text and withdraws all outstanding requests previously*

*pending in the appeal proceedings."*

VI. The board cancelled oral proceedings.

### **Reasons for the Decision**

1. Pursuant to the principle of party's disposition, as codified in Article 113(2) EPC, the European Patent Office shall examine, and decide upon the European patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent.
2. Since the text of a patent is at the disposition of the patent proprietor(s), their patent cannot be maintained against their will. In the case at hand the patent proprietor withdrew all pending claim requests and its approval of the text of the patent as granted and as maintained by the opposition division (see section V. above). Consequently, there is no longer any text of the patent in the proceedings which the board can consider for compliance with the requirements of the EPC, so that it is no longer possible to take a decision as to substance (see e.g. decisions T 186/84, OJ EPO 1986, 79, Reasons 5; T 646/08, Reasons 4 and T 2434/18, Reasons 4).
3. It is established case law that in the present circumstances the decision under appeal must be set aside and the patent be revoked without further substantive examination as to patentability (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022, sections III.B.3.3 and IV.D.2). The board has no reason to deviate from this consistent approach of the Boards of Appeal, with the consequence

that the patent is to be revoked.

4. Revocation of the patent complies with the main request of appellant II. There are no remaining issues that need to be dealt with by the board in this appeal case, either.

## **Order**

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

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

The Registrar:

The Chairwoman:



C. Rodríguez Rodríguez

T. Sommerfeld

Decision electronically authenticated